

**ANNUAL REPORT
OF THE
ATTORNEY GENERAL
TO THE
GOVERNOR OF VIRGINIA
2015**



**COMMONWEALTH OF VIRGINIA
OFFICE OF THE ATTORNEY GENERAL
RICHMOND**

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LETTER OF TRANSMITTAL

May 1, 2016

The Honorable Terence R. McAuliffe
Governor of Virginia

Dear Governor McAuliffe:

I am pleased to present to you the *Annual Report of the Attorney General* for 2015. The citizens of the Commonwealth of Virginia can be proud of the dedicated public servants who work for the Office of the Attorney General. I have enjoyed working with them and you over the past year and look forward to continuing to ensure that the Commonwealth has the finest lawyers and staff at the Department of Law to represent the interests of all Virginians. 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 Solicitor General of Virginia represents the Commonwealth in litigation before the Supreme Court of the United States and in all lower court appeals, except capital cases, calling into question the constitutionality of a Virginia statute or touching on sensitive policies of the Commonwealth. The Solicitor General also assists all Divisions of the Office with constitutional and appellate issues.

In 2015, the Solicitor General's Office filed amicus briefs supporting the prevailing position in two of the most high-profile cases in the U.S. Supreme Court's 2014-15 Term: *King v. Burwell* and *Obergefell v. Hodges*. *King* was an appeal from the Fourth Circuit concerning the availability of tax credits to Virginians under the Patient Protection and Affordable Care Act (the ACA). As it did in the Fourth Circuit, the Solicitor General's Office filed an amicus brief in support of the government's position that the ACA makes tax credits available to eligible citizens in all States, regardless of whether the State opted to rely on a federally-facilitated healthcare insurance exchange, as Virginia did, or chose to create its own Exchange. The brief argued that if plaintiffs' construction of the ACA were valid, then Congress violated the Spending Clause of the U.S. Constitution by failing to provide the Commonwealth with "clear notice" of the conditions on the grant of federal monies, as required under the *Pennhurst* doctrine. Virginia's brief was joined by 21 other States and the District of Columbia. And in *Obergefell*—a landmark decision striking down same-sex-marriage bans as unconstitutional—Virginia filed an amicus brief

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highlighting Virginia's unique history in civil-rights cases such as *Loving v. Virginia* and supporting the challengers' argument that same-sex-marriage bans violate the Fourteenth Amendment. Virginia's brief in *Obergefell* was recognized by the National Association of Attorneys General with one of its annual "Best Brief" Awards.

During the year, the Solicitor General's Office also was involved in ongoing redistricting litigation. In October 2014, in a suit brought against members of the State Board of Elections, a three-judge panel of the U.S. District Court for the Eastern District of Virginia ruled that Virginia's Third Congressional District ("CD3") is a racial gerrymander in violation of the Fourteenth Amendment to the United States Constitution. In *Cantor v. Personhuballah*, certain members of Virginia's congressional delegation—intervenor-defendants in the action—appealed that decision to the U.S. Supreme Court, which remained pending at the end of 2014. On March 30, 2015, the Supreme Court vacated and remanded *Cantor* for further consideration in light of its decision in *Alabama Legislative Black Caucus v. Alabama*. Following further briefing, the three-judge panel issued an opinion on June 5, again holding CD3 unconstitutional and ordering the General Assembly to enact a remedial redistricting plan by September 1. When the General Assembly failed to adopt a remedial plan, the three-judge panel appointed a special master to recommend or formulate a plan. The Solicitor General's Office represented the State Board of Elections during that remedial phase. The intervenor-defendants also appealed the underlying merits decision to the Supreme Court. Both the remedial decision and the appeal of the underlying merits decision remained pending at the end of 2015. The Solicitor General's Office also represented the State Board of Elections before the U.S. Supreme Court in *Bethune-Hill v. Virginia State Board of Elections*, in which a different three-judge panel rejected a similar challenge to the constitutionality of Virginia's House of Delegates districts. That appeal also remained pending at the end of 2015.

The year also saw the Solicitor General's Office involved in numerous matters in the U.S. Court of Appeals for the Fourth Circuit. In March, it received a favorable decision from the Fourth Circuit in *Prieto v. Clarke*, in which a Virginia death-row inmate challenged his placement on death row under the Due Process Clause. Several other appeals were in cases the Solicitor General's Office successfully defended in federal district court in 2015, such as *Sarvis v. Judd* (E.D. Va.), challenging the constitutionality of Virginia's method of structuring election ballots; *Klemic v. Dominion Transmission, Inc.* (W.D. Va.), in which Virginia intervened to defend the constitutionality of Virginia Code § 56-49.01, which permits an interstate natural gas company to enter private property for surveying purposes; and *Colon Health Centers of America v. Hazel* (E.D. Va.), a dormant-commerce-clause challenge to Virginia's certificate-of-public-need program for certain medical equipment and services. These

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cases remained pending at the end of 2015. The Solicitor General's Office also briefed and argued multiple cases in the Fourth Circuit filed by prisoners, primarily alleging violations of the Eighth Amendment and the Religious Land Use and Institutionalized Persons Act of 2000.

In the Supreme Court of Virginia, in *Toghill v. Commonwealth*, *McClary v. Commonwealth*, and *Saunders v. Commonwealth*, the Solicitor General's Office successfully defended the convictions of three offenders charged, respectively, with computer solicitation of a minor to perform sodomy, sodomy with a minor, and engaging in a public sex act. The Supreme Court of Virginia rejected the offenders' claim that the statute under which they were convicted was facially unconstitutional or unconstitutional as applied to them. Other matters of note remained pending before the Supreme Court of Virginia at the end of 2015. *Blount v. Clarke* involves certified questions from the U.S. District Court for the Eastern District of Virginia concerning the scope of the Governor's authority to commute a life sentence to a term-of-years sentence. Two other cases, *Valentin v. Commonwealth* and *Vasquez v. Commonwealth*, concern whether the prohibition of life-without-parole sentences for juvenile non-homicide offenders, recognized by the U.S. Supreme Court in *Graham v. Florida*, 560 U.S. 48 (2010), applies to aggregate sentences that exceed a person's life expectancy.

CIVIL LITIGATION DIVISION

The Civil Litigation Division of the Attorney General's Office represents the Commonwealth and its agencies, institutions, and officials in civil matters. The Division handles civil enforcement actions pursuant to Virginia's consumer protection and antitrust laws, serves as consumer counsel in regulatory matters before the State Corporation Commission, pursues debts owed to Commonwealth agencies, prosecutes licensed medical professionals who have acted contrary to law, and investigates civil rights and fair housing claims.

The Division consists of six sections, some of which contain units. The Trial Section consists of the General Civil Unit, the Employment Law Unit, and the Workers' Compensation Unit. The Consumer Protection Section consists of the Counseling, Intake and Referral Unit (CIRU), the Dispute Resolution and Investigations Unit (DRIU), and the Antitrust and Consumer Enforcement Unit (ACEU). The remaining four sections are the Insurance and Utilities Regulatory Section, the Division of Debt Collection, the Health Professions Unit, and the Division of Human Rights and Fair Housing.

2015 REPORT OF THE ATTORNEY GENERAL**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/Underinsured Motorists and the Birth-Related Neurological Injury Compensation Program. In addition, the Section provides support to the Solicitor General's Office. The Trial Section consists of three units: the General Civil Unit, the Employment Law Unit, and the Workers' Compensation Unit.

General Civil Unit

The General Civil Unit provides legal advice to the Virginia State Bar, the Virginia Board of Bar Examiners, the Birth Injury Fund Board, and the Commonwealth Health Research Board. It also advises state courts and judges, which includes participation in the annual training of newly-appointed district and circuit court judges. In 2015, the Unit represented the Virginia State Bar in twelve new matters, including four attorney disciplinary appeals before the Supreme Court of Virginia, and the prosecution of six persons for the unauthorized practice of law. In addition to the matters continued from prior years, in 2015 the Unit received 182 new lawsuits.

Significant cases that the Unit handled in 2015 are as follows:

In the companion wrongful death actions of *Dionne Williams, Administrator of the Estate of Jauwan Holmes v. Commonwealth*, and *Kim Edmonson, Administrator of the Estate of Marvell T. Edmonson v. Commonwealth*, plaintiffs collectively demanded \$50,000,000 in damages arising from the drowning deaths of two Virginia State University students during an alleged hazing event. Both actions were filed in Chesterfield Circuit Court. The Unit moved to dismiss the actions and, following briefing, the plaintiffs agreed to dismiss both actions and not refile them. The time for re-filing ran, and the actions are now concluded.

In the companion tort actions of *Donovan v. Commonwealth* and *Short v. Commonwealth* (Prince William County Circuit Court), the Unit successfully argued a demurrer, plea of statute of limitations, and plea of sovereign immunity. Despite leave of Court, the plaintiff failed to amend his deficient complaint. The actions arose out of the allegedly unconstitutional affixing of a GPS device by agents of the

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Department of Game and Inland Fisheries to the plaintiffs' vehicles when they were suspected of violating gaming and hunting laws. The actions collectively demanded over \$10,000,000 in damages. Both actions raised issues of first impression relating to the affixing of GPS devices and whether these devices constitute a search under the Fourth Amendment.

After extensive briefing, in the action of *Virginia Division of Risk Management v. VACORP*, the Supreme Court of Virginia granted the Division of Risk Management (DRM) an appeal of certain decisions adversely affecting DRM's Risk Management Plan. Oral argument will soon follow.

In *Kuchinsky v. Virginia State Bar*, the Supreme Court of Virginia heard oral argument and affirmed the decision of a three-judge panel to impose sanctions on an attorney who had violated the Rules of Professional Conduct, holding that the three-judge panel had exercised rightful jurisdiction.

In *Turner v. Virginia State Bar*, the Supreme Court of Virginia granted the Unit's motion to dismiss a bar appeal of right on procedural grounds when an attorney challenged the one-year suspension of her bar license for violating various rules of professional conduct, but did not prepare an appellate brief in compliance with the Rules of the Supreme Court of Virginia.

In re Jesse Wiese and *In re Taso Saunders* involved two appeals from the Virginia Board of Bar Examiners (VBBE), respectively declining to issue a Virginia bar license to a convicted felon and to an applicant who presented character and fitness issues. Following briefing, the Supreme Court of Virginia denied the petitions without argument. These appeals were matters of first impression and represent a changing tide in administrative litigation against the VBBE.

In representing the Birth-Related Neurological Injury Compensation Program (the "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 Commission through the Virginia Court of Appeals. Five eligibility petitions and three appeals before the Virginia Court of Appeals were pending at the end of 2014. During 2015, the Unit resolved three post-admission family care reimbursement claims, thirteen fees and costs petitions, and two housing renovation matters. The Unit also resolved a complex real estate matter concerning the sale of a cash-grant home and eighty-three pre-petition benefit claims. Additionally, the Unit provided advice to the Board concerning thirteen claimants' benefit issues.

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During 2015, the Unit litigated eight eligibility cases to conclusion and saved the Program \$2,900 through negotiations regarding attorneys' fees petitions and over \$122,000 through negotiations regarding pre-petition compensation requests. One of the eligibility cases was dismissed upon a finding of ineligibility. This is estimated to have saved the Program up to \$2 million.

At the end of 2015, four eligibility cases were pending. Three consolidated cases concerning whether claims are subject to remand as non-derivative claims were awaiting decision from the Supreme Court of Virginia.

In representing the Commonwealth Health Research Board (CHRB), the Unit provides legal advice to the CHRB and its Administrator. During 2015, the Unit resolved a dispute concerning a grant award which resulted in the University of Virginia's repayment of \$30,000 to the CHRB.

Employment Law Unit

In 2015, the Unit provided employment law advice to, or represented in litigation, many state entities, including the Central Virginia Training Center, Department of Alcoholic Beverage Control, Department of Behavioral Health and Developmental Services, Department of Conservation and Recreation, Department of Corrections, Department of Health, Department of Human Resource Management, Department of Juvenile Justice, Department of Labor and Industry, Department of Medical Assistance Services, Department of Motor Vehicles, Department of Social Services, Department of Transportation, Department of Veterans' Services, Indigent Defense Commission, George Mason University, Jamestown/Yorktown Foundation, Longwood University, Norfolk State University, Northern Virginia Training Center, Office of the Executive Secretary of the Supreme Court of Virginia, Old Dominion University, Radford University, State Corporation Commission, Virginia Commonwealth University, Virginia Community College System, Virginia Port Authority, Virginia State Bar, Virginia State Police, Virginia State University, Virginia Workers' Compensation Commission, Western State Hospital, and the Office of the Attorney General's (OAG) Division of Human Rights. The Unit also represented several individual defendants in employment-related litigation. In addition, attorneys in the Unit provided training to management and human resources personnel from various state agencies. For example, Fair Labor Standards Act training was provided to several public institutions of higher education throughout the Commonwealth. In addition to the matters continued from prior years, in 2015 the Unit received twenty-three new lawsuits.

The Unit prevailed in employment lawsuits and grievance appeals brought throughout the Commonwealth. In *Bala v. Virginia Department of Conservation and*

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Recreation, the plaintiff's claims of discrimination (based on national origin and age), and the claim for retaliation, were dismissed by the federal district court (E.D. Va.). The dismissal was then affirmed by the Fourth Circuit by unpublished opinion.

In *Harris v. Virginia Department of Alcoholic Beverage Control*, the plaintiff's claims of disability discrimination pursuant to the Americans with Disabilities Act (ADA) were dismissed by the federal district court (E.D. Va.). In doing so, the court rejected the plaintiff's attempt to add individual defendants to the lawsuit pursuant to 42 U.S.C. § 1983 because it found that the ADA is a comprehensive remedial scheme that prohibits such claims from being brought against individuals. This decision is significant because it will protect employees of the Commonwealth from personal liability for alleged violations of the ADA.

Another case of note was *Milner v. Virginia Department of Juvenile Justice*, which was a grievance appeal wherein the Virginia Court of Appeals reversed the decision of the Henrico County Circuit Court finding that the appellant's reassignment was disciplinary. The appellant's subsequent petition for review was denied by the Supreme of Court of Virginia.

The Unit also continued to successfully defend lawsuits involving public institutions of higher education. In *Lau v. Longwood University*, the plaintiff's claims of negligence and breach of contract were dismissed by the Prince Edward County Circuit Court. The plaintiff then filed a petition for review with the Supreme Court of Virginia, which was denied.

Workers' Compensation Unit

The Workers' Compensation Unit defends workers' compensation cases filed by employees of state agencies. Because hearings are held throughout the Commonwealth, cases are assigned to attorneys in Richmond and also to attorneys working in Abingdon. The Unit handles claims brought by injured workers and by employers' applications. Claims include initial compensability and change-in-condition claims, and may be handled for the life of the matter (including the initial hearing before a Deputy Commissioner, to review by the Full Commission, and appeals to the Virginia Court of Appeals and the Supreme Court of Virginia). In 2015, the Unit handled 347 new cases.

The Unit also pursues subrogation claims in order to recover funds for the Department of Human Resource Management's Workers' Compensation Services. Subrogation issues arise when a state employee is injured by a third party. The Unit assists Workers' Compensation Services in recovering from negligent parties, through restitution, what it has paid to, or on behalf of, the employee in workers'

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compensation benefits. In 2015, the Unit assisted Workers' Compensation Services and its third-party administrator with subrogation recoveries exceeding \$722,000.

Two cases went to the Supreme Court of Virginia in 2015. In *Blakey v. University of Virginia Health System*, the Supreme Court of Virginia refused a petition for appeal of a decision of the Virginia Court of Appeals holding that the permanency rating given by the treating doctor was entitled to more weight than the opinion of a records review doctor. In *Kaminsky v. Virginia Polytechnic Institute and State University*, the Court refused a petition for rehearing of a procedural dismissal.

The Unit also was active before the Virginia Court of Appeals in 2015. In *Rush v. University of Virginia Health System*, the Unit successfully defended a claim brought under and interpreting a relatively new statutory presumption for non-fatal injuries in Virginia Code § 65.2-105. In a published opinion, the Court affirmed the Workers' Compensation Commission's decision holding that the injured worker must be physically or mentally unable to testify in order for the presumption to apply. The Court rejected the injured worker's invitation to add language to the statute. This was a case of first impression.

In *Boukhira v. George Mason University*, the Unit successfully argued that res judicata barred a subsequent claim for permanency benefits after an initial permanency claim was denied on the merits. The Unit prevailed again before the Virginia Court of Appeals in *McGuire v. Virginia Department of Transportation*, which upheld the process for filing employers' applications and found that the Commonwealth had not abandoned its position.

In *Blakey v. University of Virginia Health System*, the Virginia Court of Appeals reversed the Workers' Compensation Commission and held that the permanency rating given by the treating doctor was entitled to more weight than the opinion of a records review doctor. The Supreme Court of Virginia refused the Unit's subsequent petition for appeal.

In *Harvey v. Old Dominion University*, the Unit prevailed before the Virginia Court of Appeals in a case concerning a contested request for a second opinion.

The Unit also continued to develop important case law before the Full Commission in 2015. In *Pultz v. University of Virginia*, the Commission upheld the statute of limitations defense to a claim. The Commission also upheld the denial of a claim in *Barris v. Radford University*, involving a severe head injury on exterior stairs because the injury was not an actual risk of employment.

Consumer Protection Section

The Consumer Protection Section's Counseling, Intake and Referral Unit (CIRU) serves as the central clearinghouse in Virginia for the receipt, evaluation, and referral of consumer complaints. All complaints are handled within the CIRU, referred to the Section's Dispute Resolution and Investigations Unit (DRIU), or referred to another local, state, or federal agency having specific jurisdiction. The DRIU offers dispute resolution services for complaints that do not demonstrate on their face a violation of consumer protection law. Where a complaint alleges or demonstrates on its face a violation of law, the DRIU will investigate and either attempt to resolve the complaint, or, where a pattern or practice of violations is found, work with Section attorneys to prepare a law enforcement action.

For the period from January 1, 2015 through December 31, 2015, the CIRU received and handled 31,900 telephone calls through its Consumer Hotline, and received 4,366 written consumer complaints. During the same period, the DRIU, together with the CIRU, resolved or closed 3,992 complaints. Consumer recoveries from closed complaints totaled \$1,725,876.44.

The Section's Antitrust and Consumer Enforcement Unit (ACEU) filed several new actions, resolved various Virginia-specific and multistate investigations, and obtained beneficial results for consumers in 2015. In the antitrust area, it conducted reviews of proposed mergers, acquisitions, and other transactions for anticompetitive effects. The reviews resulted in litigation as well as settlements to address the anticompetitive concerns.

During 2015, the Office's nonprofit review panel, which includes representatives from the Consumer Protection, Financial Law and Government Support, and Health Services Sections, completed review of an Integration and Joint Operating Agreement entered into by The Rector and Visitors of the University of Virginia (on behalf of its Medical Center) and Novant Health to create a regional health alliance to be known as Novant Health UVA Health System. The alliance will include UVA/Culpeper Hospital and all of Novant's Virginia facilities, including the Prince William Health System, Novant Prince William Medical Center, Novant Haymarket Medical Center, and Novant Health Cancer Center.

ACEU also completed a review of Chesapeake-based Dollar Tree's acquisition of discount retailer Family Dollar. It worked with the Federal Trade Commission (FTC) and other states in assessing the anticompetitive effects of the merger, and reached an agreement with the parties that required divestiture of 330 Family Dollar stores, including nine Virginia stores. The FTC accepted a Consent Order that included the divestiture package. The Commonwealth, along with seventeen other

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states, reached an agreement with the merging parties in a second Consent Judgment, which contained additional terms limiting rebranding, closing, or opening additional stores within a five-year period after the deal is complete and which provided for attorneys' fees. Virginia received a fee distribution from the parties of \$4,019. *Florida v. Dollar Tree, Inc.* (D.D.C.).

In February 2015, ACEU, along with the FTC, ten other states, and the District of Columbia, sought a preliminary injunction to stay the proposed merger of Sysco Corporation and US Foods, respectively the largest and second-largest national food distributors in the country. In this case, *Federal Trade Commission v. Sysco Corp.* (D.D.C.), the federal district court granted the preliminary injunction, agreeing that there was a reasonable probability that the proposed merger would substantially impair competition in national and local broad line food distribution markets, including in southwest Virginia. Following the court's decision, the companies abandoned the deal.

In November 2015, ACEU joined the U.S. Department of Justice and six other states in filing a Complaint and a proposed Consent Judgment relating to the proposed merger of two consumer finance lenders – Springleaf Holdings, Inc. and OneMain Financial Holdings, LLC. *United States of America v. Springleaf Holdings, Inc.* (D.D.C.). Under the proposed Consent Judgment, Springleaf agreed to divest 127 branches (with loan balances of \$611.95 million), including 15 branches (with loan balances of \$58.58 million) located in Virginia.

ACEU also continued to litigate a case that it, along with thirty-three other states and territories, and the U.S. Department of Justice, filed in 2012 against five of the six major ebook publishers and Apple, Inc., for alleged price-fixing to raise the prices of ebooks at the time of Apple's iPad launch. The five publishers settled prior to trial. In the case, *Texas v. Penguin Group (USA) Inc.* (S.D.N.Y.), the Court found Apple liable under both federal and state antitrust law and entered an injunction against it. Before the damages phase of the trial, Apple reached a settlement with the plaintiffs providing that the amount of damages Apple would pay will depend on the outcome of its appeal of rulings in the liability phase. In August 2015, the Second Circuit upheld the liability finding and the injunction. Apple has petitioned the U.S. Supreme Court for a writ of certiorari to appeal the Second Circuit's decision.

In the consumer protection area, ACEU resolved four new Virginia-specific enforcement actions, initiated two other Virginia-specific enforcement actions, filed an amicus brief with the Supreme Court of Virginia on an important consumer protection issue, participated in six multistate settlements, and continued to litigate other pending suits.

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In June 2015, ACEU entered into an Assurance of Voluntary Compliance (AVC) with Trio Alarm, LLC, a Wisconsin-based provider of home security systems and monitoring agreements for alleged violations of the Virginia Consumer Protection Act and Virginia’s “bait-and-switch” statute. In *Commonwealth v. Trio Alarm, LLC* (Newport News Circuit Court), ACEU’s Complaint alleged that the company solicited consumers via door-to-door sales calls and made various misrepresentations regarding—among other things—its affiliation with the consumer’s current alarm provider and “free” upgrades to the consumer’s current security systems. When the consumer agreed, Trio installed their own alarm equipment and induced consumers into long-term monitoring contracts, often causing the consumers to be locked into multiple long-term agreements at the same time. The AVC included injunctive relief, restitution totaling more than \$8,000 to consumers, and civil penalties and attorneys’ fees totaling \$12,500.

In December 2015, ACEU entered into an AVC with MoneyKey – VA, Inc., a Delaware-based Internet lender for alleged violations of Virginia’s consumer finance statutes and the Virginia Consumer Protection Act. In this suit, *Commonwealth v. MoneyKey – VA, Inc.* (Richmond Circuit Court), the company made open-end credit loans to Virginians via the Internet, attempting to comply with Virginia’s open-end credit statute, which permits lenders to charge interest at agreed-upon rates, provided that they give borrowers a minimum 25-day, interest-free grace period during which to repay their advances. However, as ACEU averred, MoneyKey instead assessed its borrowers an immediate 15% cash-advance fee without providing the grace period. MoneyKey’s failure to comply with the statute made it subject to the consumer finance statutes, which it violated by charging interest in excess of 12% annually. The AVC included injunctive relief, over \$18,000 in restitution to consumers, over \$5 million in forbearances of interest and other fees owed, and \$30,000 in attorneys’ fees and costs to the Commonwealth.

In May 2015, ACEU entered into an AVC with Wire Into Cash, an Illinois-based Internet lender for alleged violations of Virginia’s payday loan statutes and the Virginia Consumer Protection Act. In its suit, *Commonwealth v. MD Financial d/b/a Wire Into Cash* (Roanoke County Circuit Court), ACEU alleged that the company made payday loans to Virginians without first having obtained a payday loan license from the State Corporation Commission. The AVC included injunctive relief and \$420 in restitution to two affected borrowers.

In September 2015, ACEU entered into a Consent Judgment with Annual Business Services, LLC (ABS), a Florida limited liability company, for alleged violations of the false advertising statute, Virginia Code § 18.2-216. In its suit, *Commonwealth v. Annual Business Services, LLC* (Richmond Circuit Court), ACEU alleged that ABS failed to clearly disclose that its form was not an official

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government mailing and implied that Virginia limited liability companies are subject to provisions of the Virginia Stock Corporation Act requiring the holding of an annual meeting and preparation of meeting minutes. The Consent Judgment included injunctive relief and provided for refunds to customers upon their request. ACEU notified 156 Virginia customers of their ability to request a refund. As of December 2015, twenty-seven Virginia customers had requested and received refunds totaling \$2,862.

In March 2015, ACEU obtained a Supplemental Restitution Judgment and Order in *Commonwealth v. KLMN Readers Services, Inc.* (Chesapeake Circuit Court), a previously pending matter that alleged violations of the Virginia Consumer Protection Act and the Virginia Home Solicitation Sales Act (VHSSA). In 2014, the court entered a Permanent Injunction and Final Judgment enjoining KLMN from violating the Virginia Consumer Protection Act and the VHSSA, and awarded the Commonwealth \$8,647.40 for restitution to more than 100 individuals, \$15,000 for civil penalties, and \$15,000 for attorneys' fees. The Supplemental Restitution Judgment obtained in 2015 provided a judgment of \$4,391 for restitution to fifty-five additional individuals.

In July 2015, ACEU filed suit against B&B Pawnbrokers, Inc., a Spotsylvania-based pawnbroker, for alleged violations of Virginia's pawnbroker statutes, motor vehicle title loan statutes, consumer finance statutes, and the Virginia Consumer Protection Act. In this suit, *Commonwealth v. B&B Pawnbrokers, Inc.* (Richmond Circuit Court), ACEU alleged that B&B charged illegal and excessive pawnbroker fees, made unlicensed motor vehicle title loans, and unlawfully charged in excess of 12% annually on consumer loans. In December 2015, the court denied B&B's motion to transfer venue to Spotsylvania, and granted in part, but denied in part, the defendant's Plea in Bar regarding the consumer finance statutes claim. The defendant filed its Answer to the consumer finance statutes count in January 2016, and the matter remains in active litigation.

In October 2015, ACEU brought an enforcement action against Lynchburg-based Virginia Silversmiths, Inc. and its president, Lindsay Martin, for violations of the Virginia Consumer Protection Act. In this action, *Commonwealth v. Virginia Silversmiths, Inc.* (Lynchburg Circuit Court), ACEU's Complaint alleged that the company engaged in a pattern and practice of accepting silver goods for repair, charging down payments or partial payments from customers, and thereafter failing to start or complete the contracted-for work, provide refunds, or return the silver goods to customers. The defendants filed their Grounds of Defense in January 2016, and the matter continues in active litigation.

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In January 2015, ACEU filed an amicus brief in an appeal before the Supreme Court of Virginia considering the standard of proof a plaintiff must satisfy to prevail upon claims alleging violations of the Virginia Consumer Protection Act. On appeal, the private plaintiff asserted that the trial court had erred by instructing the jury that the burden of proof on a Virginia Consumer Protection Act claim was by clear and convincing evidence, and by refusing to instruct the jury that the burden of proof was by a preponderance of the evidence. ACEU's brief supported the appellant and argued that the appropriate standard of proof in an action under the Act is the preponderance of the evidence. On June 4, 2015, the court issued its opinion accepting ACEU's position, and ruling that the lower preponderance-of-evidence standard applies to such actions. *Ballagh v. Fauber Enterprises, Inc.* (Va. 2015).

In July 2015, ACEU, along with forty-six other states, the District of Columbia, and the federal Consumer Financial Protection Bureau, entered into a settlement with Chase Bank, USA N.A. and Chase BankCard Services related to the alleged robo-signing practices of Chase and related entities in using false, inaccurate, and deceptive affidavits in filing lawsuits and obtaining judgments against their credit card customers. The agreement provided for reforms to Chase's credit card debt collection procedures, required an estimated \$50 million in consumer restitution, prohibited active collection on approximately 500,000 consumer accounts, and required Chase to pay \$95 million to the settling states and the District of Columbia, including \$1,986,054.07 that has been paid to Virginia.

In May 2015, ACEU, along with forty-nine other states and the District of Columbia, entered into settlements with Verizon Wireless and Sprint Corporation over those companies' alleged mobile cramming practices, which involved the unauthorized pass-through of third-party expenses to consumers via their cellular telephone bills for services such as horoscopes, trivia, and sports scores. These settlements arose out of suits filed in *Commonwealth v. Cellco Partnership d/b/a Verizon Wireless*, and *Commonwealth v. Sprint Corp.* (both in the Richmond Circuit Court). The settlements included injunctions prohibiting mobile cramming practices and nationwide restitution payments totaling \$120 million from Sprint and Verizon. Virginia also received nearly \$500,000 to reimburse the Commonwealth for its attorneys' fees and costs.

In August 2015, ACEU and forty-eight other states entered into a settlement with Amgen, Inc. to resolve allegations that it unlawfully promoted the biologic medications Aranesp and Enbrel. In *Commonwealth v. Amgen, Inc.* (Richmond Circuit Court), ACEU alleged that Amgen violated the Virginia Consumer Protection Act by 1) promoting Aranesp for dosing frequencies longer than the FDA-approved label without competent and reliable scientific evidence to substantiate the extended dosing frequencies; 2) promoting Aranesp for anemia caused by cancer without

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having FDA approval or competent and reliable scientific evidence in support; 3) promoting Enbrel for mild plaque psoriasis even though Enbrel is only approved by the FDA to treat chronic moderate to severe plaque psoriasis; and 4) overstating the length of Enbrel's efficacy in treating plaque psoriasis. The Consent Judgment included injunctive relief related to how Amgen branded and promoted these products and resulted in a settlement payment to Virginia of approximately \$1.5 million.

In November 2015, ACEU, along with thirty-nine other states and the District of Columbia, entered into a multi-state Consent Judgment with Education Management Corporation (EDMC), a Pennsylvania corporation, for alleged violations of the Virginia Consumer Protection Act, and for committing deceptive and misleading recruitment and enrollment practices. The Consent Judgment in the case, *Commonwealth v. Education Management Corporation* (Henrico County Circuit Court), provided for reforms to EDMC's practices of recruiting students for its online and on-ground campuses, and addressed key aspects of the enrollment process. EDMC also agreed to forgive \$102.8 million in outstanding institutional loan debt held by over 73,000 students nationwide, including over \$2.28 million in debt held by over 1,900 Virginians.

In May 2015, ACEU, along with the FTC, the forty-nine other states, and the District of Columbia, filed suit against four allegedly sham charities and the individuals who controlled them - Cancer Fund of America, Inc. (CFA); Cancer Support Services, Inc. (CSS); Children's Cancer Fund of America, Inc. (CCFA); The Breast Cancer Society, Inc. (BCS); James Reynolds, Sr.; James Reynolds, II; Rose Perkins; and Kyle Effler. In this case, *FTC v. Cancer Fund of America, Inc.* (D. Ariz.), ACEU alleged that the defendants raised more than \$187 million from donors across the country while misrepresenting the purposes for which the contributions would be used. The suit alleged that the defendants told donors their money would help cancer patients, including children and women suffering from breast cancer, but the overwhelming majority of donations benefited the defendants, their families and friends, and fundraisers. Settlements were reached with CCFA, BCS, and three of the individuals, with the two organizations placed into receiverships, and the individuals permanently banned from charitable fundraising, charity management, and controlling charitable assets. Judgments were entered against CCFA and Perkins for \$30,079,821; against BCS and Reynolds (II) for \$65,564,360; and against Effler for \$41,152,231. As part of the settlements, \$914,000 was paid to the states to be used along with other recovered funds for distribution to legitimate charities benefiting cancer patients and for partial reimbursement of the states' attorneys' fees and costs. Litigation continues against the non-settling defendants, CFA, CSS, and James Reynolds, Sr.

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During 2015, significant restitution was provided to Virginia consumers from a previously resolved matter. In June 2014, ACEU, along with forty-eight other states, the District of Columbia, and several federal agencies filed a Complaint and Consent Judgment regarding SunTrust's mortgage origination, servicing, and foreclosure practices. (*United States v. SunTrust Mortgage, Inc.* (D.D.C.)). Under the settlement, SunTrust agreed to make payments totaling \$40 million to borrowers who had lost their homes due to foreclosure during the period from January 1, 2008, through December 31, 2013. In December 2015, the Settlement Administrator mailed foreclosure relief payments to the 29,023 eligible borrowers nationwide who filed approved claims. This figure included 1,982 Virginians. The aggregate amount of the checks issued to Virginians was \$2,648,348.40.

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). In this capacity, the Section represents the interests of Virginia's citizens as consumers in the regulation 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 SCC conducted its biennial review of Dominion Virginia Power's rates in 2015. Consumer Counsel submitted expert testimony and legal pleadings addressing the case's major issue of whether Dominion had earned excessive profits during 2013 and 2014, which would trigger rate credits for customers. Dominion contended that it had not earned above its allowed return of 10.00%, plus the 70 basis points (0.70%) statutory earnings collar. Consumer Counsel's testimony showed that customers were due rate credits because Dominion had earned above 10.70%. The SCC's final order agreed that Dominion had earned excessive profits after reflecting reasonable regulatory accounting adjustments, finding that the company earned a return on equity of approximately 10.89% for the period. This amounted to approximately \$103.9 million in excess earnings above 10%. Virginia law allows Dominion to keep all earnings above 10.0% up to 10.70%, and 30% of the excess earnings above 10.7%. This left \$19.7 million to be credited to customers' bills in the form of a monthly refund. Because of legislation passed by the 2015 General Assembly, Dominion's base rates are now frozen, and its earnings will not be subject to review by the SCC until 2022. The company will continue to be able to seek rate increases for new projects through separate rate adjustment clauses. The OAG had unsuccessfully opposed this legislation at the General Assembly.

Consumer Counsel participated in several electric utility rate adjustment clause (RAC) proceedings. The freeze to base rates noted above does not prevent utilities from continuing to seek rate increases for new projects through separate RACs. Dominion sought approval of a certificate of public convenience and necessity (CPCN) to construct and operate a 20 megawatt (MW) solar facility in Fauquier County. Dominion estimated the costs of the project to be approximately \$47 million, and sought approval of a RAC to recover all costs of the facility. Virginia law now requires an electric utility seeking to construct new generation facilities to demonstrate that it has considered and weighed alternative options, including third-party market alternatives, in its selection process as a prerequisite to a CPCN. Consumer Counsel argued that the CPCN should not be approved unless SCC was satisfied that Dominion had meaningfully considered alternatives, and that the proposed project represented the best option for customers. The SCC found that Dominion failed to adequately consider actual third-party alternatives and denied the application without prejudice. The SCC further found that Dominion failed to establish that the costs for the project to be paid by consumers would be reasonable or prudent as required by statute.

In another Dominion RAC case, Consumer Counsel presented expert testimony that a company proposal to spend \$263 million, and ultimately \$2 billion over ten years, to underground a portion of its overhead distribution lines would be unreasonable and imprudent. The SCC agreed, finding that Dominion had failed to establish that its proposed spending would be cost effective and that it did not establish that the project would result in specific reliability improvements justifying the expense of the program. The Commission found that a more targeted, lower-cost program could potentially be approved in the future. Consumer Counsel was active in several other Dominion RAC cases, including a proposal to enable voluntary customer purchases of blocks of solar generation, and the company's annual filing for demand side management and energy efficiency programs. Consumer Counsel generally supported both of these proposals, but advocated for certain measures that protected consumers' interests.

In the SCC proceeding on Dominion's Integrated Resource Plan filing, Consumer Counsel raised concerns over the company's rapidly increasing expenditures related to a potential third unit at the company's North Anna nuclear facility. The company considers such costs ultimately recoverable from its customers. Dominion has incurred approximately \$580 million thus far in development costs, and it is projected to incur approximately \$2 billion before it would seek approval of the project, which is now forecasted to cost more than \$19 billion. Consumer Counsel did not ask that development on the project be stopped, but rather that the SCC undertake a review of the reasonableness and prudence of the

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costs being incurred. The Commission found that Consumer Counsel “raised a serious concern,” and directed the company to respond to a number of detailed questions concerning the issue in its next IRP in 2016.

Consumer Counsel also participated in Appalachian Power rate adjustment clause cases. It successfully advocated for cost caps on a suite of proposed energy efficiency programs, and in another case helped to ensure that residential and small commercial customers would receive their fair share of rate credits associated with the company’s renewable portfolio standard program. Credits were required because of net proceeds associated with sales of renewable energy credits, and an over-recovery from customers in prior years. A major issue concerned the proper calculation for certain avoided costs associated with the company’s wind power purchase agreements; \$7.6 million in rate credits were approved by the SCC.

In addition to electric utility cases at the SCC, Consumer Counsel was active in matters at the federal level. At FERC, Potomac-Appalachian Transmission Highline, LLC, or “PATH,” a joint venture of FirstEnergy and American Electric Power, sought to recover approximately \$160 million, including a 10.4% return, on abandoned plant costs for a now-cancelled transmission project that never received siting approval from any state commission. FERC had allowed PATH to begin recovering costs through the PJM Interconnection tariff, which is assigned across the PJM footprint, and is reflected in Virginia consumers’ retail electric rates. Consumer Counsel joined utility consumer advocate offices in other mid-Atlantic states in protesting PATH’s application. Following a hearing at FERC in early 2015, an administrative law judge issued an initial decision that partially disallowed aspects of the cost recovery sought by PATH, and reduced the requested return from 10.4% to 6.27%. A final order from FERC is expected in 2016. In PJM stakeholder matters, Consumer Counsel worked with other states’ utility consumer advocate offices to secure PJM’s endorsement of a permanent funding mechanism for the Consumer Advocates of PJM States (CAPS) organization. The CAPS entity enables the individual state offices to maintain a more effective level of participation in PJM member stakeholder activities on behalf of retail ratepayers’ interests.

Consumer Counsel was also active in utility cases involving natural gas local distribution companies and water and sewer companies. In a Columbia Gas of Virginia rate case, the SCC adopted recommendations of Consumer Counsel’s expert witness that limited the amount of costs recovered through minimum fixed monthly customer charges rates, as opposed to the volumetric rates based on usage. In another gas case, Consumer Counsel successfully argued against a novel proposal of Washington Gas Light to invest \$122 million in natural gas wells, an activity outside of its traditional distribution business. The SCC agreed with Consumer Counsel that the specific proposal was not in the public interest because the forecasted benefits of

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the company's plan were too speculative and the project would shift undue risk onto customers.

A group of Virginia water and wastewater utility companies petitioned the SCC for approval of regulations authorizing new rate surcharges for infrastructure projects. A number of local governments and homeowners' associations strongly opposed the petition on legal and policy grounds. Consumer Counsel contended the Commission possessed the legal authority to promulgate such regulations, but did not support their adoption. The SCC agreed, finding that the proposed regulations were not necessary for water and wastewater companies to have a reasonable opportunity to recover necessary infrastructure investment. Consumer Counsel also participated in a rate case of Aqua Virginia, which operates a large number of systems throughout the Commonwealth. Counsel successfully advocated for a reduction in the requested authorized return from 10.3% to 9.25%. The SCC did not accept Consumer Counsel's recommendation not to increase the fixed monthly customer charges, but it did limit the overall increase in rates to \$1.1 million, on an annual basis, compared to the requested \$1.7 million.

Finally, in the area of insurance regulation, OAG continued its annual participation in the workers' compensation rate proceeding of the National Council on Compensation Insurance to establish the advisory "loss cost" component of rates for the Voluntary Market and the "assigned risk" rates for the Assigned Risk Market. This work includes retaining an actuarial consultant to participate in a working group among the insurance industry, the SCC's Bureau of Insurance, and other interested stakeholders to identify and address actuarial issues before the rate cases each year. For the industrial classifications, the 2015 proceeding resulted in an overall average increase of 3.4% to the loss cost component of rates in the voluntary market, and an increase of 2.3% to assigned risk rates.

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 state agencies. The Division has eight 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, bankruptcy, and legislative issues to client agencies and to other divisions within OAG, and one attorney serves as general counsel to the Unclaimed Property Division of the Department of Treasury.

In 2013, the Division assumed oversight and coordination responsibilities for non-Medicaid related recoveries under the Virginia Fraud Against Taxpayers Act. This oversight and coordination included intervening in the case *Integra v. Barclays*

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(Richmond Circuit Court). In this case, the Commonwealth alleged that eleven financial institutions misrepresented their underwriting standards, and submitted fraudulent prospectus statements on which the Virginia Retirement System relied to purchase residential mortgage backed securities. A portion of the matter was removed to the U.S. District Court for the Eastern District of Virginia. All parties in both state and federal court agreed to a settlement conference before a U.S. Magistrate Judge. After extensive negotiation, the Division obtained a total settlement from the defendants of \$63 million. The *Integra* settlement is the largest non-health-care related fraud recovery ever obtained under the Virginia Fraud Against Taxpayers Act. While the majority of work involved in the *Integra* action occurred in 2014 and 2015, the settlement was finalized in 2016.

The Division of Debt Collection continues to pursue Virginia Fraud Against Taxpayers Act matters on behalf of the Commonwealth, and also oversaw two other noteworthy settlements in 2015. First, the Division resolved *United States ex rel. Fulk v. UPS* (E.D. Va.), for an award to the Commonwealth of \$241,056.34. This fraud recovery resolved allegations of delivery overcharges to the Commonwealth and its political subdivisions. The Commonwealth also resolved through settlement, *U.S. ex rel. Perez v. Stericycle* (N. Dist. Ill.), for an award of \$2,015,450.14 to resolve allegations of contractual overcharges for the disposal of medical waste.

In 2015, the Division continued to partner with the Construction Litigation Section of the Office to leverage the expertise of both sections through joint representations on debt collection matters that involved construction litigation. This partnership has resulted in substantial economic benefit to the Commonwealth.

In furtherance of its mission, the Division periodically hosts an agency summit to inform client agencies on relevant collection laws and trends. Past summits have been evaluated highly, particularly on content and materials, and on the opportunity for agency representatives to interact with Division attorneys and staff.

The Division is self-funded by contingency fees earned from its recoveries on behalf of state agencies. During the twelve months from July 1, 2014 through June 30, 2015, gross recoveries for thirty-seven agencies totaled more than \$23.2 million, up by \$11.2 million from the previous fiscal year. During fiscal year 2015, the Division recognized collection service fees of almost \$3.9 million, up \$1.3 million from the previous year. Fiscal year 2015 fees were nearly \$1.6 million in excess of Division expenditures. Out of these fees, \$1,035,000 was returned to the agencies, resulting in a 30% reduction of the base contingency rate paid by agencies. The balance of the fees was turned over to the General Fund at fiscal year-end. Virginia Fraud Against Taxpayers Act fees earned during fiscal 2015 totaled \$125,000.

Health Professions Unit

The Health Professions Unit (HPU) provides focused and effective administrative prosecution of cases involving health care professionals before the health care regulatory boards under the Virginia Department of Health Professions (DHP). The Unit renders 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. Many of the cases that HPU prosecutes involve standard of care violations, substance abuse, mental illness, incompetence, inappropriate sexual conduct, and patient abuse. Following formal hearings before the Boards, disciplinary sanctions, including suspension and revocation of licenses, often are imposed.

HPU handled several significant cases before the health regulatory boards in 2015. One matter against “Medical Doctor A” involved the respondent’s improper treatment of patients who were participating medical students in his emergency medical training course. At a formal administrative hearing held in June 2015, the Board of Medicine ordered the revocation of the respondent’s medical license.

During a formal hearing in February 2015, the Board of Medicine considered allegations that “Rheumatologist A” violated the standard of care with respect to one patient. The Unit alleged that the respondent misdiagnosed the patient and inappropriately prescribed certain medications. At the conclusion of the hearing, the formal panel of the Board issued a reprimand and placed the respondent on probation with terms and conditions.

In October 2015, the Board of Medicine convened a formal administrative hearing to consider allegations regarding “Medical Doctor B.” The Unit presented evidence that the respondent unlawfully or improperly prescribed medications and failed to monitor some medications prescribed. The Board panel voted to continue the respondent’s license on indefinite suspension for a period of not less than twelve months.

In another case, several allegations were brought against “Medical Doctor C.” The allegations included standard of care and competency issues. Prior to the hearing, the respondent agreed to enter into a Consent Order whereby his license would be indefinitely suspended for a minimum of two years before he could petition the Board for reinstatement.

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HPU also prosecuted two significant cases before the Board of Pharmacy, brought against a permitted pharmacy and a licensed pharmacist. The cases were brought following an inspection which showed that “Pharmacy A” and its pharmacist-in-charge, among other violations, failed to take the necessary measures to prevent the diversion of certain controlled substances.

The prosecution before the Board of Pharmacy resulted in the revocation of the pharmacy’s permit and the imposition of a monetary penalty and costs against it. The prosecution also resulted in a revocation of the pharmacist’s license to practice; the imposition of a monetary penalty; and a term which prohibits the pharmacist from having access to the prescription department of any pharmacy in the Commonwealth during the three-year minimum revocation period.

Finally, in August 2015, the Unit handled a case before the Board of Physical Therapy. The Board convened a formal administrative hearing to consider allegations that “Physical Therapist A” engaged in inappropriate behavior and initiated treatment of a patient’s medical condition without a physician’s order. The Board voted to indefinitely suspend the respondent’s license to practice for a period of not less than eighteen months.

Division of Human Rights and Fair Housing

The Division of Human Rights (DHR) performs two primary missions with regard to Virginia’s civil rights laws. First, the DHR investigates complaints alleging discrimination in employment, in places of public accommodation, and in educational institutions in violation of the Virginia Human Rights Act or corresponding federal laws. At the conclusion of an investigation, the DHR reviews the evidence to determine whether there is reasonable cause to believe that discrimination occurred. As part of its investigative process, the DHR also facilitates conciliation efforts among the parties to resolve their cases either before or after an investigation.

The DHR participates in a work-share agreement with the federal Equal Employment Opportunity Commission (EEOC) to investigate and make determinations with regard to alleged violations of Title VII of the Civil Rights Act of 1964, and related civil rights laws. The DHR met its goal of investigating 46 cases for violations of Title VII (a 4.5% increase from 2014) under the EEOC work-share agreement covering federal fiscal year 2015. Overall, the DHR processed 222 complaints of discrimination in 2015 (a 6% increase from 2014). The DHR successfully resolved five cases through conciliation/mediation, recovering \$21,960 in settlement funds to the five complainants.

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In its second primary function, DHR's attorney serves as counsel to the Real Estate Board and Fair Housing Board for allegations of housing discrimination filed by complainants. If an investigation of housing discrimination results in a "reasonable cause" finding and resulting "Charges of Discrimination" issued by either or both of the Boards, then DHR prosecutes the alleged violations of the Virginia Fair Housing Law through civil actions filed in the appropriate local circuit court. In 2015, the DHR filed six civil actions alleging discrimination by housing providers. In particular, four of these cases involve alleged discrimination against families with children, and two concern alleged discrimination against persons with a disability.

Additionally, DHR reached settlements in three cases in which the Boards had found that "reasonable cause" existed to believe housing discrimination occurred, resulting in over \$21,000 in recoveries for the complainants in those cases. In one of the cases, the defendants agreed to pay \$12,000 to a complainant who was denied housing because she had two assistance animals that alleviated the effects of her mental disabilities. In another matter, resolved before litigation began, a newspaper publisher agreed to provide monetary relief, and to publish fair housing advertisements in one of its housing sections after its classified ads editorial staff neglected to prevent a housing advertisement stating "No Children" from being published.

COMMERCE, ENVIRONMENT AND TECHNOLOGY DIVISION

The Commerce, Environment and Technology (CET) Division provides comprehensive legal services to secretariats, executive agencies, state boards, and commissions for much of the Commonwealth's government. Composed of three Sections—Technology and Procurement, Financial Law and Government Support, and Environment—the Division provides legal advice across a wide range of substantive areas, including as guidance on matters of employment, contracts, technology, purchasing, environment, 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 legal counsel to the Virginia Information Technologies Agency, the Department of General Services, the Information Technology Advisory Council, the Secretary of Technology, the Secretary of the Commonwealth, the Cyber-Security Commission, the Wireless E-911 Services Board, the Virginia Geographic Information Network Advisory Board, the

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Innovation and Entrepreneurship Investment Authority, the Secretary of Administration (for intellectual property, procurement, and supplier diversity issues), the State Corporation Commission (for procurement matters), the Department of Small Business and Supplier Diversity (for procurement and supplier diversity issues), the Unmanned Systems Commission, and the Identity Management Standards Advisory Council, as well as dozens of other agencies and institutions in areas involving contracts, technology issues, intellectual property, procurement, and ethics rules.

In 2015, the Section provided legal assistance needed for Commonwealth initiatives such as public procurement law reform; advancing equity for small, women and minority-owned businesses in public procurement; prevention of “patent trolling”; and other areas. This included launching of the Attorney General’s Patent Troll Unit to enforce Virginia legislation prohibiting bad faith assertions of patent infringement; service on the Joint Commission on Technology and Science’s workgroup studying the impact of proposed changes to required state contractual provisions; and provision of advice to support the Joint Legislative Audit and Review Commission’s study of state contract development and management, and the Division of Legislative Services’ reorganization and clarification of statutes pertaining to the Virginia Information Technologies Agency.

The Section provided all necessary legal support for the Commonwealth’s central procurement agencies, the Department of General Services (DGS) and Virginia Information Technologies Agency (VITA), including legal review of revisions to procurement regulations and policies, and legal assistance regarding procurements, contracts, and associated disputes, and participation in joint procurements with other states.

The Section continued providing legal assistance needed by VITA in its management of the Commonwealth’s Comprehensive Infrastructure Agreement with Northrop Grumman Systems Corporation to address deficiencies in services, negotiation and drafting of changes to terms of service, and negotiation of amendments to enhance security or address new products and advances in technology. As this critical agreement is approaching its expiration, the Section has continued providing all necessary legal support for disentanglement from the current service provider and procurement of replacement services. Necessary legal assistance was also provided in support of VITA’s procurement and negotiation of statewide data telecommunications contracts.

The Section helped the State Corporation Commission develop an administrative appeals process for procurement decisions in fulfillment of a legislative mandate to do so, provided continued assistance on a critical procurement

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effort for information technology services to replace the aging Clerk's Information System, and extensive assistance with contract proposal review. This Section also successfully defended the State Corporation Commission against a losing offeror's petition for mandamus in the Supreme Court of Virginia seeking to compel a stay of contract award.

The Section also represented and advised many other Commonwealth agencies, institutions, and boards in regard to procurement and contract problems, technology acquisitions, data breach, electronic transactions, ethics, and intellectual property matters. Among other assistance, the Section successfully represented and obtained voluntary dismissals of actions against Virginia Commonwealth University and the Department of Small Business and Supplier Diversity in procurement and certification matters; won a \$3.1 million Fraud Against Taxpayers Act judgment on behalf of DGS and the Commonwealth against a state contractor and its officer and owner for overbilling; filed an action for injunction on behalf of the Virginia Department of Health against a private contractor to preserve a contracted-for registry of citizen advance health care directives to enable continued access to this by citizens and their health care providers; assisted the Department for the Blind and Visually Impaired with protests and a procurement appeal related to its procurement of vending services at highway rest stops; represented the Department of Juvenile Justice against procurement claims in circuit court; assisted the Department of Forensic Science in a contract termination dispute; provided advice and a non-infringement opinion related to the Virginia Department of Transportation's use of a device created by an employee; and provided guidance to help agencies respond to allegations of copyright infringement and assisted with associated settlement agreements.

The Section assisted Opinions Counsel with analysis and drafting of many formal and informal advisory opinions requested by Commonwealth officers, employees, and legislators on ethics, conflict-of-interests, and agency governance issues. The Section provided necessary legal support to the Secretary of the Commonwealth's office in conflicts and notarial matters; provided conflict-of-interests and procurement ethics orientation presentations to numerous senior government officials; provided informal coordination assistance to the Virginia Conflict of Interest and Ethics Advisory Council; and provided advice to dozens of state and local agencies and boards in regard to conflict-of-interests matters affecting them and to help them implement extensive statutory amendments made to these laws in the 2015 legislative session.

Additionally, the Section provided educational services, such as continuing legal education (CLE) presentations to the Local Government Attorneys Association on the State and Local Government Conflict of Interests Act, and to Virginia intellectual

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property attorneys on state efforts to combat patent trolling. The section also provided procurement law training for public procurement professionals at the DGS's annual Public Procurement Forum.

Financial Law and Government Support Section

The Financial Law and Government Support Section (FLAGS) provides legal counsel to a wide variety of agencies, boards, and commissions, including those reporting to the Secretaries of Administration, Agriculture and Forestry, Commerce and Trade, Commonwealth, Finance, Public Safety and Homeland Security, and Veterans and Defense Affairs, as well as to the secretariats. FLAGS attorneys provide representation and advice on regulatory enforcement, administrative appeals, litigation, employment matters, Freedom of Information Act matters, and contract negotiations.

FLAGS continues to represent the Commonwealth on state and federal elections matters through its representation of the State Board of Elections (SBE) and the Department of Elections (ELECT). The year saw the continuation of challenges to redistricting in federal court, as well a federal challenge to the statutory authority of an incumbent elected official to select the nomination method for candidates of his or her political party. Additionally, FLAGS represents SBE and ELECT in state court litigation challenging the 2011 redistricting plan for the Senate of Virginia and House of Delegates. The Section continues to assist in litigation challenging the 2012 redistricting plan for Virginia's Third Congressional District and the 2011 redistricting plan for the House of Delegates at the appellate stage, as well as litigation initiated in 2015 challenging the Virginia voter photo identification requirement.

The Section also carries out the Attorney General's responsibility to oversee charitable funds. As part of this obligation, the Section works with institutions when they wish to modify or release restrictions on gifts and funds. In early 2015, the Board of Directors of Sweet Briar College (SBC) notified the Attorney General that it had voted to close after the 2015 academic year. SBC's remaining endowment funds were restricted-use trust funds, and this Office's approval would be necessary to modify or release the restrictions which limited the use of these funds. Instead of granting the Board's request to repurpose the funds to close SBC, or joining in any one of the three lawsuits that were filed against the Board, the Attorney General convened a mediation. This mediation brought all interested parties to the table—the Board, the plaintiff who filed lawsuits against the Board, the County of Amherst where SBC is located, and a grass-roots organization formed to save SBC. Following weeks of intense negotiations, the parties emerged with a solution that kept open the

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school and ended the acrimonious litigation. As of the writing of this report, SBC is finishing up its academic year and about to graduate its 107th graduating class.

The Section represents the Virginia Department of Agriculture and Consumer Services (VDACS) and the boards and commissions concerned with agriculture, commodities, and charitable gaming, to include the Milk Commission, the Wine Board, and the Charitable Gaming Board. In 2015, FLAGS attorneys were instrumental in advising VDACS as it entered into memoranda of understanding with the Virginia Department of Health related to wineries and breweries (discussed *infra* in the Environmental Law Section as well).

The Virginia Racing Commission (VRC) is also advised by the Section. The VRC made various licensing decisions in 2015 related to the newly-created significant infrastructure license and advanced account deposit wagering (ADW) licenses. FLAGS advised the VRC with regard to these licensing decisions to ensure legal defensibility if challenged. The CET Division also facilitated mediation between the Virginia Horseman Benevolent and Protective Association (HBPA) and TwinSpires.com, which resolved a long-term dispute involving ADW fees and will allow horse racing to move forward without acrimonious litigation as a backdrop for the first time in several years.

The FLAGS Section represents the Department of Professional and Occupational Regulation (DPOR) and the professional and occupational boards serviced by that agency. FLAGS defended one such DPOR board, the Real Estate Appraiser Board, against alleged federal antitrust violations in the matter of *Coester VMS.com, Inc. v. Real Estate Appraiser Board* in the federal district court (E.D. Va.). The matter was settled prior to any dispositive ruling by the court.

FLAGS has represented the Department of Veterans Services (DVS) and the board and councils served by that agency for a number of years. In addition to advising DVS, attorneys in FLAGS are heavily involved in training employers participating in the Virginia Values Veterans (“V3”) program. These training sessions focus on educating employers about compliance with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and other federal and state statutes that offer protection to employees who are veterans, in the military reserves, or in the National Guard. Additionally, the Section provides USERRA and Higher Education Opportunity Act training for state agencies and institutions of higher education.

In December 2015, this Office announced that it would offer a new pro bono legal service for Virginia veterans and their spouses. The Wills for Veterans Clinics were organized to provide basic estate planning services to veterans without ready

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access to legal representation for estate planning. The Clinics were planned to offer a simple will, a power of attorney, and an advance medical directive, and were scheduled to take place at four different locations across the Commonwealth: Tidewater, central Virginia, western Virginia, and northern Virginia. Members of FLAGS were responsible for the months of planning leading up to the announcement, and were to implement and run the Clinics in 2016. The Clinics were established through a partnership between the Attorney General, the DVS, and the Virginia State Bar.

FLAGS also represents the Department of Labor and Industry (DOLI) and the Virginia Employment Commission (VEC). The number of VEC unemployment benefit appeals to circuit courts handled by FLAGS continued to decrease from prior years. The number of appeals declined in 2015 to 75 petitions for judicial review, compared to 91 petitions in 2014, and 133 petitions in 2013.

A number of Section attorneys provide advice to the agencies and boards directly concerned with the finances of the Commonwealth, including the Departments of Planning and Budget, Taxation, Treasury, and Accounts; the Comptroller; and the Auditor of Public Accounts. For the Department of Taxation (TAX), the Section serves as litigation counsel in matters challenging the assessment and collection of state taxes, including retail sales and use taxes and corporate and individual income taxes.

The Section defended a number of significant litigation matters for TAX during 2015. One ongoing grouping of cases concerns the requirement that corporate taxpayers add back royalty expenses subject to Virginia Code § 58.1-402(B)(8) to their federal taxable income. Four Virginia corporate taxpayers—Lorillard Tobacco Company; Kohl's Department Stores, Inc.; United Parcel Service, Inc.; and Michael Baker Jr., Inc.—continued to prosecute their individual suits in circuit courts against TAX. Their complaints allege that the royalties paid to their related members were subject to an exception set forth in Code § 58.1-402(B)(8)(a)(1) and thus not required to be added back to their federal taxable income.

The Section successfully defended a claim by a corporate taxpayer alleging that the Commonwealth's corporate income tax statutes operate to attribute too large a portion of the taxpayer's nationwide income to Virginia, and that Virginia's "relief statute" required TAX to grant its request for an alternative method of apportionment. The circuit court granted summary judgment in favor of TAX, denying the taxpayer's request for a refund of \$8,980,282.00 plus interest. The taxpayer has noted an appeal to the Supreme Court of Virginia.

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Finally, the Section works closely with TAX in challenges to its determinations of the amount of tax credits allocated to taxpayers who donate conservation easements in accordance with the Virginia Land Conservation Incentives Act (the “Act”). The Section continued representing TAX in a number of litigated claims under the Act in 2015, including *James K. Woolford v. Virginia Department of Taxation* and *Cook v. Department of Taxation*. In each of these cases, the taxpayer claimed that the value of the property encumbered by the easement that was donated was far in excess of the value that was supported by the underlying documentation submitted to TAX by the taxpayer.

The FLAGS attorneys who work with the Commonwealth’s financial agencies also advise a number of authorities who issue bonds for revenue-producing capital projects such as the Virginia Resources Authority, the Virginia Public Building Authority, the Virginia College Building Authority, and the Virginia Small Business Financing Authority.

In addition to representation of agencies directly concerned with the finances of the Commonwealth, FLAGS attorneys advise a number of boards and agencies whose mission is to foster expansion of the state’s economy, including the Virginia Economic Development Partnership, the Virginia Tourism Authority, and the Virginia Film Office. The Section also represents the Tobacco Region Revitalization Commission (TRRC), which saw significant changes to its enabling statutes during the 2015 General Assembly Session. Section attorneys provided TRRC with legal guidance in implementing these changes, which will significantly increase the efficacy of TRRC and the stability of its funds for future years.

The Section represents the Department of Alcoholic Beverage Control (ABC). FLAGS attorneys litigated a number of appeals of administrative agency decisions at the circuit court and Court of Appeals levels for the agency. Favorable decisions were rendered in every case, including two unpublished opinions from the Court of Appeals. The Section continues to serve as general counsel to ABC, advising the agency on licensing, employment disputes, marketing efforts, regulatory action, law enforcement operations, and issues related to the agency’s transition to an authority in 2018.

The Section also provides legal advice to certain independent agencies including the Virginia Retirement System (VRS) and the Virginia Workers’ Compensation Commission. With respect to VRS, the Section coordinated with outside counsel in both domestic and foreign securities litigation matters. It was particularly involved in settlement of the class action lawsuit *In re MF Global Holdings Limited Securities Litigation* in which VRS serves as the co-lead plaintiff. This securities action arises out of material misrepresentations and omissions of certain MF Global former

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officers and directors, as well as the underwriters of public securities offerings, concerning MF Global's financial condition. There was a settlement reached early in the year with one defendant in the amount of \$65 million, and final settlement of \$75 million later in the year.

Environmental Section

The nine attorneys of the Environmental Section represent agencies reporting to the Secretary of Natural Resources, the Secretary of Agriculture and Forestry, the Secretary of Health and Human Resources, the Secretary of Finance, and the Secretary of Commerce and Trade. Its clients include the Department of Environmental Quality (DEQ); the Department of Conservation and Recreation; Soil and Water Conservation Districts; the Department of Taxation; the Department of Forestry; the Division of Consolidated Laboratory Services; the Department of Game and Inland Fisheries; the Marine Resources Commission; the Environmental Health Division of the Virginia Department of Health; the State Veterinarian's Office and Consumer Protection Division of the Department of Agriculture and Consumer Services; and the Department of Mines, Minerals, and Energy. The attorneys in this Section provide a wide range of legal services, including litigation, regulatory and legislative review, counseling, transactional work, representation in personnel issues, responding to subpoenas issued to agency personnel, real estate work, and related matters.

The Section represents the DEQ's Air; Renewables; Water; Land Protection and Revitalization (Waste); and Enforcement Divisions.

In the DEQ Renewables arena, the Section prevailed in *Karr v. DEQ*, which involved an APA challenge to DEQ's renewable energy permit for wind projects. The case is currently pending on appeal. The Section also prevailed in *Horner v. DEQ*, a writ of mandamus brought against the DEQ under the Virginia Freedom of Information Act (FOIA) for certain working papers relating to climate change.

The Section represented DEQ Air in the Fourth Circuit in the "good neighbor" Clean Air Act State Implementation Plan litigation: Virginia intervened in that case, which was dismissed without relief being ordered by the court against Virginia. Also in the Air area, the Section represented Virginia in Clean Air Act §§ 111(d) and 111(b) Clean Power Plan litigation before the D.C. Circuit. The Section continues to advise DEQ in its implementation of the Clean Power Plan in Virginia.

Also in 2015, the Section represented the DEQ's Water Division in the procurement of several judicial inspection warrants to facilitate the agency's investigation of environmental noncompliance. It also negotiated the settlement of

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two cost recovery claims under Article 10 of the State Water Control Law related to the unlawful release of oil into the environment. The settlement resulted in the payment of more than \$350,000 to the Virginia Petroleum Storage Tank Fund.

Additionally, the Section successfully represented the Water Division in *Chesapeake Bay Foundation v. State Water Control Board* (Richmond Circuit Court), an administrative appeal of certain regulations pertaining to animal feeding operations. In July 2015, the court entered a ruling in favor of the State Water Control Board on all counts, finding that the regulations, as promulgated, were in accord with law and supported by substantial evidence in the record. The Section continues to advise the Water Division on legal challenges to discharge permits issued to the Possum Point and Bremo power stations. Its representation of the agency continues in the pending cases of *Kelble v. State Water Control Board* (Richmond Circuit Court), an administrative appeal of State Water Control Board regulations and the General Virginia Pollutant Discharge Elimination System (VPDES) Permit for Discharges from Construction Activities; and *Kelble v. State Water Control Board* (Richmond Circuit Court), an administrative appeal of State Water Control Board regulations related to land application of biosolids.

The Section advised DEQ's Land Protection and Revitalization Division on a number of matters in 2015, including a significant claim for natural resource damages associated with the former DuPont fibers facility in Waynesboro, Virginia. It successfully reengaged DuPont on substantive settlement discussions concerning this liability, and it continues to lead discussions among DuPont, the United States, and the Commonwealth on this matter. The Section also continued to advise DEQ regarding a large Superfund site remediation contribution action related to the AWI property in Portsmouth, Virginia. The matter involves demanding of the U.S. Navy contribution for the Navy's share of contamination of a portion of the Elizabeth River and the subject site; and the Section finally was able, after a number of aborted attempts in the past, to engage the Navy in discussions concerning its liability at the site. In addition, during the year the Section successfully resolved a claim originally filed in 2009 to recover funds expended by DEQ in the cleanup of a used tire pile in Charles City County.

The Section represented the DEQ Land Protection and Revitalization Division in an APA appeal brought by Hampton Roads Sanitation District, or "HRSD." (*Hampton Roads Sanitation District v. DEQ*). HRSD argued that the Department erred in deciding that HRSD's use of biosolids ash as fill to raise the level of a farm near Back Bay was not exempt from the Virginia Solid Waste Management Regulations. The Court declined to rule on the merits and instead remanded to DEQ for further fact-finding. The Section is filing a motion to reconsider and will likely appeal.

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The Section advised the Department of Forestry on several FOIA-related matters, agreements involving access to public lands, and multiple real estate matters (easements, acquisition of additional property, and land swaps). In 2015, it assisted DOF with improvements in its easement program that helped enable a five-fold increase over 2014 in the number of completed conservation easement donations to the agency.

The Section represented the Virginia Department of Health (VDH) in multiple litigation and non-litigation matters in 2015. On the litigation side, it represented VDH in an action brought by the Chesterfield Health District against the owner of a campground who was operating without a permit. The Section ultimately agreed to drop the action after the campground successfully removed all inhabitants and passed multiple unannounced monthly inspections. The Section also aided VDH employees in dealing with a number of witness subpoenas during 2015 and in responding to subpoenas *duces tecum*. It assisted VDH in working with the Virginia Department of Agriculture and Consumer Services and its counsel to develop a Memorandum of Understanding (MOU) between the agencies regarding the inspection of wineries. The MOU helps clarify the respective inspection responsibilities of the two agencies to avoid duplication. Subsequently, the Section assisted the agency in developing a MOU between the two agencies regarding breweries. It continues to assist VDH in developing strategies regarding the regulation of hotels that house long-term residents. This work has been focused on the Town of Ashland, from which there have arisen particular complaints of negative externalities arising from the hotels, but the work will eventually be broadened out to other parts of Virginia. The Section is actively advising VDH regarding an ongoing dispute between two homeowners regarding a shared septic system and the system's performance. In addition, over the year the Section reviewed proposed amendments to the Food Regulations, examined issues raised by the Deputy Counsel to the Governor concerning revisions to crabmeat regulations, assisted the agency regarding its legislative proposals for the 2016 session, and provided guidance on issues regarding hearing officer disqualification raised by the implementation of Code § 2.2-4024.1. The Section also provided advice numerous times during 2015 on issues regarding FOIA, the Administrative Process Act, requests for variances from regulations enforced by VDH, and other matters concerning interpretation of the law as it relates to VDH's Office of Environmental Health Services and Office of Drinking Water.

The Section represented the Department of Game and Inland Fisheries in various litigation and non-litigation related matters in 2015. For instance, it defended two Department employees from unlawful search and seizure claims asserted by a group of landowners and their relatives. The Section also defended the Department from a challenge to its decision to suspend a zoo's permit to exhibit animals, and from

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a lawsuit filed by a landowner seeking indemnification from the Department for a death that occurred on land that the landowner had opened for recreational use. It represented the Department in a grievance filed by a former employee and continued to defend the Department and its employees from charges filed by two *pro se* plaintiffs related to the Department's transfer of a boat's title to a marina owner under Code § 29.1-733.25. It also assisted the Department with negotiating a new contract for information technology services.

The Section represented the Marine Resources Commission in multiple administrative appeals. In the Supreme Court of Virginia, it secured a ruling affirming the Commission's order requiring the Chincoteague Inn, a restaurant on Chincoteague Island, to remove a barge that had been moored to the restaurant to expand its seating capacity. It also secured a favorable ruling from the Virginia Court of Appeals in an appeal of the Commission's decision to revoke a commercial fisherman's fishing licenses and privileges in which the court recognized the Commission's wide discretion in such cases. It continues to represent the Commission in ongoing administrative appeals, including appeals of the Commission's decision to revoke other fishermen's licenses and privileges; its decision to issue a permit for a utility company's use of state-owned submerged land to erect a powerline across a river; and its decision to lease general oyster planting grounds to commercial oyster planters.

The Section represented the Department of Mines, Minerals and Energy (DMME) by successfully defending, in the Fall of 2015, the ban on uranium mining found in Code § 45.1-283. It successfully prosecuted a motion to dismiss before the U.S. District Court for the Western District in *Virginia Uranium, Inc. v. McAuliffe* (now on appeal to the Fourth Circuit).

The Section has been actively supporting the DMME throughout the serial Chapter 11 bankruptcy filings of major coal mining companies, including advising DMME on the issue of insufficient bonding to cover reclamation liabilities. It also represented DMME in several matters in coordination with other states and the federal government against coal companies that have been continual violators of state and federal environmental laws, resulting in agreed dispositions involving the payment of penalties, agreements on future penalties, and mechanisms for maintaining compliance with applicable environmental laws.

The Section also had an active year in its representation of Virginia's Soil and Water Conservation Districts. It represented the Culpeper Soil and Water Conservation District in three lawsuits filed by the owner of property where the District holds an easement to operate and maintain a dam. In the first lawsuit, it successfully defended against Plaintiff's Motion for a Temporary Injunction and the

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case was subsequently non-suited. The remaining lawsuits were dismissed on the Section's preliminary motions. In addition, the Section negotiated a settlement for the John Marshall Soil and Water Conservation District where a landowner had violated his cost-share contract by removing certain conservation practices. The settlement resolved the case and recovered more than half of what the landowner owed for the remaining life of the contract. The Section also resolved violations of two cost-share contracts for the Loudoun Soil and Water Conservation District. The first was settled after the Section filed a lawsuit in General District Court to recover for the remaining life of the contract. With respect to the second, the violations were corrected after the Section sent a letter threatening litigation. The Section recovered state money paid by the Holston River Soil and Water Conservation District for a landowner entering into the federal Conservation Reserve Program. The landowner exited from the program early but was unresponsive to the District's demands for repayment of the balance he received. That balance was paid after the Section sent a demand letter to the landowner. Finally, the Section advised numerous Soil and Water Conservation Districts on how to properly respond to FOIA requests, as well as providing advice on other matters.

During 2015, the Section assisted the Office of Pesticide Services in preparing proposed legislation to correct a redundancy in the appeal process for a notice of violation of the Pesticide Control Act.

For the Department of Conservation and Recreation (DCR), the Section continues to provide advice on the implementation of the RMP (resource management plan) program. It advised DCR through the process of its probable maximum participation (PMP) study and implementation of those values into its dam safety program (including, for instance, grandfathering issues). And it continues to advise DCR on the dam safety program as to the Department's issuance of state permits. With the expiration of 50-year contracts between soil and water conservation districts and NRCS for dam maintenance, the Section is advising on how to handle districts that may wish to release easements or convey them back to landowners, as well as the underlying property law questions involved in doing so. The Section advises DCR on a variety of FOIA and COIA issues as well.

The Environmental Section includes the newly-created Animal Law Unit. Following creation of the Unit in January 2015, it has handled more than 200 criminal, civil, regulatory, training, and other animal-related matters, including assisting multiple localities with animal cruelty, seizure, neglect, and animal fighting prosecutions. It continues to advise the Department of Agriculture and Consumer Services on multiple animal-related matters, including enforcement actions against private and public animal shelters.

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This Office, and the Animal Law Unit specifically, have been honored with two awards for work done by the Unit. In January 2015, the Humane Society of the United States presented the Office with the Humane Law Enforcement Award for the Unit's role on the "Big Blue" cockfighting case, which shut down and successfully prosecuted a multi-state cockfighting ring in Wise County, Virginia, and Kentucky. This matter involved work with the U.S. Attorney's Office (Western District of Virginia) to prosecute the operators of the ring, one of the largest cockfighting rings in the region. Five individuals were sentenced to jail terms ranging from six months to one and a half years, in addition to fines, for their roles in operating a cockfighting ring. The Virginia Federation of Humane Societies also honored the Unit's work on this precedent-setting case in March of 2015.

HEALTH, EDUCATION, AND SOCIAL SERVICES DIVISION

Attorneys in the Health, Education, and Social Services Division represent agencies and institutions of the Commonwealth in the Secretariats of Health and Human Resources and Education. These agencies provide social services, health and disability services, and vocational rehabilitation to vulnerable populations. They protect public health by monitoring and advising on contagious diseases, and they regulate medical professionals to assure a proper standard of care. Client institutions provide K-12 and higher education to Virginians and fulfill significant artistic, historic, and cultural missions.

Division attorneys provide a full range of legal services to client agencies including advice regarding statutory and regulatory interpretation, contracting and procurement, personnel, and compliance with laws governing the administration of government such as the Administrative Process Act and the Freedom of Information Act. By providing legal counsel to client agencies, Division attorneys help to assist them in fulfilling their mission of enhancing the lives of Virginia residents.

In addition, Division attorneys help to ensure the proper use of government resources by recouping Medicaid funds paid to health care providers as a result of improper billing. They also work to ensure that parents properly support their children financially.

Child Support Section

Over forty-five lawyers in the Child Support Section represent the Division of Child Support Enforcement (DCSE) of the Department of Social Services. These attorneys appear in Virginia juvenile and domestic relations courts to establish paternity through admission or DNA tests, to establish child support obligations or health care coverage, and to modify those orders. They also enforce child and spousal

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support orders through show cause rules, seeking lump sums, payment plans, income withholdings, or jail time with work release. In addition to frequently appearing in court, Section attorneys provide legal advice and counsel to DCSE and conduct training for DCSE local district offices.

The Section efficiently handled an enormous number of child support cases in 2015—appearing at 118,388 child support hearings. Each Section attorney in the field appeared in court more than twice each week to handle nearly 220 hearings per month. The majority of those cases were heard on approximately 4,000 court dockets dedicated to child support cases, with the average docket containing 30 cases. Through its work, the Section established new child support orders totaling almost \$1.4 million and enforced existing orders by obtaining lump sum payments of nearly \$11 million, as well as coercive sentences totaling over 400,000 days in jail. Throughout the state, nineteen outside counsel assisted the Section with its hearings caseload. Outside counsel appearances helped to fill gaps due to vacancies, overlapping dockets, conflicting schedules, and attorney leave. Altogether, outside counsel handled about 5 ½% of the total Section court hearings.

Section attorneys are divided into three regions: the Eastern, Central and Western regions. The Eastern Region consists of eleven attorneys representing seven DCSE offices and appearing in court in twenty-three jurisdictions within the Hampton Roads area. The Central Region consists of fifteen attorneys representing six DCSE offices and appearing in court in thirty-six jurisdictions in central Virginia, from Emporia to northern Virginia. The Western Region consists of fifteen attorneys representing seven DCSE offices and appearing in court in seventy jurisdictions—more than half the Commonwealth’s jurisdictions—throughout central, northern, and western Virginia. The Western Region encompasses the localities along the Commonwealth’s border with West Virginia, along the border with North Carolina to Mecklenburg County and north through Charlottesville to Frederick County.

Ongoing and special projects included:

Mandatory Continuing Legal Education (CLE) - Section attorneys and other speakers provided 13 hours of live CLE credit, including two hours of ethics, at the Section’s 2015 statewide conference, hosted this year by the City of Roanoke. The topics covered included: “Preserving Error and Avoiding Mistakes That Will Sink Your Appeal”; “Office of the Attorney General Family Violence Initiatives and Confidentiality”; “Protective Orders”; “Trauma Informed Care”; “Case Law Update”; “Legislative Process”; “Federal Regulations as Applied to Division’s Performance Measures”; “Recent Developments in Juvenile Court Practice and Procedure”; “Freedom of Information Act”; “Marriage Equality”; “Affordable Care Act”; “Unauthorized Practice of Law”; “Non-Lawyer Representation of Employers in

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General District and Juvenile Court”; “Communications with Represented and Unrepresented Persons”; and “The Aging Attorney.”

Bankruptcy - During each month in 2015, the Bankruptcy Unit processed nearly 100 new cases filed under Chapters 7 and 13 of the U.S. Bankruptcy Code. The Unit also averaged filing over forty pleadings per month including proofs of claims, objections to Chapter 13 plans, and motions to dismiss. The Section’s bankruptcy expert appeared at approximately 10-15 hearings in U.S. Bankruptcy Courts across Virginia each month. The Bankruptcy Unit also received and processed about 775 electronic and hard copy documents each month. These included emailed notices regarding bankruptcy filings and orders. As of December 2015, the Bankruptcy Unit was handling 940 active bankruptcies affecting 1,139 DCSE cases, including 193 cases filed under Chapter 7, and 747 cases filed under Chapter 13.

Program Guidance - Child support attorneys assisted DCSE’s Program Guidance Team to ensure that changes in policy were in accordance with Virginia and federal statutes, regulations, and case law. They reviewed and commented on all of Virginia’s standardized forms, as well as changes to the federal UIFSA forms for interstate and international cases. They also suggested changes to make DCSE’s administrative review and modification procedures more efficient.

Legislation - During the 2015 legislative session, Section attorneys reviewed all legislation that had the potential to impact DCSE by amending child support or other domestic relations laws. They provided legal advice and counsel on numerous bills, including those addressing the allocation of health care premiums and child support for disabled children over the age of 18.

In addition, Section attorneys helped DCSE shepherd through three bills supported by the OAG administration:

- Legislation adopting the 2008 amendments to the Uniform Interstate Family Support Act (UIFSA), as mandated by Congress. This law helps assure the uniform and efficient establishment, modification, and enforcement of child support orders—particularly in international cases. These changes comport with The Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance.
- Legislation clarifying how child support arrearage payments should be applied in multiple cases by addressing inconsistent Code sections in Titles 20 and 63.2 of the *Code of Virginia*.

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- Legislation authorizing DCSE to develop a program for forgiving arrears and interest owed to the Commonwealth as child support arrearages. It also expanded restricted driver's license provisions for participants in the administrative component of DCSE's intensive case monitoring program.

Education Section

The forty-five lawyers in the Education Section, some in residence at universities and community colleges and some in the main Richmond OAG Office, provide advice, counsel, and guidance to the Commonwealth's public educational institutions. Section attorneys also represent state museums including the Frontier Culture Museum, the Science Museum of Virginia, The Library of Virginia, and the Virginia Museum of Fine Arts.

For the Department of Education and K-12, guidance from Section attorneys often directly influences local schools in implementing the Standards of Learning and Standards of Quality, in providing access to technology for disadvantaged students, in maintaining discipline and safety on school grounds, in complying with federal education programs, and in improving school facilities.

With respect to higher education, the Section assists Virginia's public colleges and universities with a full range of legal needs: issues include campus safety and security, admission and educational quality, human resources, relationships with other Commonwealth agencies, as well as contracts, procurement, and financing.

In addition to a wealth of other issues, Education Section attorneys continued to work closely on issues relating to sexual violence on university and college campuses. Upon the conclusion of the Governor's Task Force on Combating Campus Sexual Violence, the attorneys worked with individual colleges and universities, the State Council of Higher Education in Virginia, and other entities to help carry out the recommendations of the Task Force.

In 2015, the General Assembly enacted several laws aimed at 1) preventing and responding to campus sexual violence, 2) delineating the proper relationship between campus personnel and law enforcement with respect to the response to sexual violence, and 3) providing assistance and support to victims of sexual violence on campus. Section attorneys advised client universities and colleges on the implementation of these new laws.

Education Section attorneys also continued to review and revise existing campus policies on sexual violence in response to the ongoing initiative of the U.S.

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Department of Education's Office for Civil Rights (OCR) under Title IX.¹ Additionally, Section attorneys are frequently called upon to advise individuals on campus—from athletic staff, to student affairs deans, to the institution's president—on legal issues encountered when a student or employee reports an allegation of sexual violence. Issues on which the attorneys advise include compliance with complex federal requirements; coordination with local law enforcement; facilitation of trauma-informed recovery for victims; and the provision of due process for accused individuals.

Section attorneys continue to work diligently to successfully resolve sexual violence complaints against colleges and universities, and to advise these institutions on the attendant public relations issues, and associated requests for information under the Freedom of Information Act. Section attorneys also continue to provide guidance to boards of visitors and all levels of the public institutions' leadership when sexual violence complaints arise. During 2015, Section attorneys represented Virginia universities in litigation brought by both alleged perpetrators and victims of sexual violence.

Health Services Section

The attorneys in the Health Services Section represent numerous agencies in the Health and Human Resources Secretariat, including the Department of Behavioral Health and Developmental Services and its hospitals, training centers, and sexually violent predator facility (the Virginia Center for Behavioral Rehabilitation); the Department of Health; the Department of Health Professions and its regulatory boards; the Department for the Blind and Vision Impaired; the Virginia Board for People with Disabilities; the Department for the Deaf and Hard of Hearing; and the Department for Aging and Rehabilitative Services and its Woodrow Wilson Rehabilitation Center.

During 2015, attorneys in the Health Services Section continued to represent the Commonwealth and the Department of Behavioral Health and Developmental Services in the implementation of the settlement agreement entered by the federal district court (E.D. Va.) between the United States and the Commonwealth regarding the state's system of services for individuals with developmental disabilities. Two status conferences were held before the Court. In addition, the United States filed a motion for a court-ordered schedule of compliance that was withdrawn as a result of negotiations handled by the Section's attorneys. The Section also assisted the

¹ Implications of the OCR's views under Title IX of the Civil Rights Act also affected Virginia K-12 schools particularly in the question of rights afforded to transgender students.

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Department of Behavioral Health and Developmental Services with legal issues that arose in the process of closing the second of four state training centers.

Further, the Section successfully defended the Department of Behavioral Health and Developmental Services in multiple habeas petitions filed in federal district court by an insanity acquittee claiming violations of his constitutional rights. Section attorneys also provided legal advice to the Department of Behavioral Health and Developmental Services on many issues, including civil commitment, confidentiality, human resources, and regulatory compliance. The Section also provided trainings to special justices and community services boards on civil commitment.

The Section continued to assist 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, including the Supreme Court of Virginia, and the Section's attorneys successfully represented the Boards. In addition, the attorneys assisted in defending the Board of Medicine in a federal lawsuit, filed by a chiropractic licensee alleging antitrust violations, that is currently pending before the U.S. Court of Appeals for the Fourth Circuit.

Health Services attorneys represented the Department of Health in multiple cases filed in state courts challenging the Commissioner's decisions regarding issuance of certificates of public need, and they have continued to provide advice to the Department of Health on a variety of issues including reporting of child abuse and neglect, vital records, exchange of health information, emergency medical services, employee grievances, and emergency preparedness. Section attorneys also advised the Department of Health on its response to the Ebola Disease Virus.

Additionally, the Section successfully represented the Department for the Blind and Vision Impaired in a federal arbitration proceeding brought by a blind vendor who alleged that the agency had violated his rights.

Medicaid and Social Services Section

The attorneys in the Medicaid and Social Services Section represented the Department of Medical Assistance Services (DMAS), the Department of Social Services (DSS), and the Office of Comprehensive Services (OCS) on several noteworthy matters this past year and assisted these clients in protecting the health and safety of children and other vulnerable residents of the Commonwealth. Section attorneys also recovered in excess of \$2 million in public funds that had been inappropriately disbursed.

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During 2015, Section attorneys successfully defended numerous Medicaid appeals related to Medicaid provider reimbursement appeals. The most significant case this year was *Culpeper Regional Hospital v. Jones*. Pursuant to this case, DMAS is able to retract overpayments when the retraction is based on an unambiguous contractual provision that does not require a substantial compliance analysis on the part of DMAS or the courts. Another important case this year was *Alice C. Tyler Village for Childhelp v. DMAS*, in which the Section successfully recovered and had upheld an overpayment of over \$1 million due to DMAS. Altogether, the Section's work resulted in the recovery of over \$2 million to the Medicaid program in 2015.

Section attorneys also continued to review and certify regulatory packages included in the Governor's "A Healthy Virginia" plan. This plan expands Medicaid coverage to uninsured Virginians with acute mental health needs and provides coverage to its most vulnerable and underserved populations. Section attorneys certified proposed regulations to replace existing emergency regulations which removed an exclusion to allow children of state employees, who otherwise are eligible for the Family Access to Medical Insurance Security (FAMIS) program, to be enrolled in the program. Section attorneys also certified a change to the income eligibility level for the Governor's Access Plan (GAP), which provides health care services for individuals with serious mental illness. Finally, Section attorneys reviewed a regulatory package to provide dental services to pregnant women under Medicaid and FAMIS.

In 2015, the Section also reviewed another important regulatory package regarding the "Exceptional Rate for ID Waiver." These proposed regulations replaced existing emergency regulations derived from a 2013 mandate by the General Assembly. They enable Medicaid providers of congregate residential support services to be reimbursed at a higher rate for rendering exceptional support services required by individuals enrolled in the ID Waiver who have complex medical or behavioral needs. According to DMAS, providers are not able, within the current Medicaid reimbursement structure, to render the exceptional level of support services these individuals require.

During the course of representing DSS, Section attorneys litigated a variety of cases, including defending local departments of social services' findings of child abuse and neglect, decisions involving various benefits programs, and decisions revoking or denying the licenses of substandard child day care and assisted living facilities. One noteworthy case this year involved the Section filing an amicus brief in the Culpeper Circuit Court. Parents filed suit against the local department of social services over the termination of certain adoption assistance payments. To preserve the administrative appeals process and to avoid any confusion moving forward, Section attorneys filed the brief to inform the parties and the court. Ultimately, the

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court dismissed the case on the basis that it lacked jurisdiction due to the parents' failure to adhere to the administrative appeals process.

In addition to reviewing and certifying several regulatory packages dealing with DSS programs, the Section began a comprehensive review of DSS's General Procedures Regulations addressing the agency's licensing duties. This is a substantial project, as the Section is examining the possibility of both substantive and organizational changes to enable DSS to efficiently operate its programs.

Section attorneys continued their work on a number of matters dealing with DSS's Child Care Subsidy Program, including drafting new vendor agreements to initiate compliance with changes in the recently reauthorized federal Child Care and Development Block Grant Act. Attorneys also assisted DSS in resolving a number of disputes with providers. Also significant this year was advice given to DSS regarding new federal laws dealing with child victims of sex trafficking affecting foster care and child protective services. Section members also presented information to local government attorneys regarding upcoming changes in the law and in child welfare practices.

During 2015, the Section continued to represent the Office of Comprehensive Services (OCS). The OCS, along with its supervisory body, the State Executive Council (SEC), administer the provisions of the Comprehensive Services Act for At-Risk Youth and Families (CSA), a law that establishes a single state pool of funds to purchase services for at-risk youth and their families. Section attorneys continued to advise the SEC on the statutory definition of "child in need of services" (CHINS), resulting in an expansion of the population of children and youth that localities are mandated to serve under the CSA program. Virginia Code § 16.2-228 states that a CHINS is "a child whose behavior, conduct or condition presents or results in a serious threat to the well-being and physical safety of the child." Historically, a child was determined to be a CHINS if his own behavior, his substance abuse, his mental health issues, or actions taken by him resulted in serious threat to his well-being and safety. The use of the word "condition" in the definition, however, allows for circumstances not only caused by the child himself, but also factors in the child's environment, such as the actions, substance abuse, or mental health issues of the child's parents, the occurrence of domestic violence in the home, or other circumstances that may result in a serious threat to the child's well-being or safety.

CRIMINAL JUSTICE AND PUBLIC SAFETY DIVISION

The Criminal Justice and Public Safety Division includes the following Sections: Computer Crimes, Correctional Litigation, Criminal Appeals, Major Crimes and Emerging Threats, Health Care Fraud and Elder Abuse, and the Sexually

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Violent Predators Section. The Division handles computer crimes and cyber-security issues, cases brought by inmates, criminal appeals, Medicaid fraud cases, as well as prosecutions relating to child pornography, gangs, money laundering, fraud, and patient abuse. It also represents various Commonwealth agencies, petitions for the civil commitment of sexually violent predators, and administers the 1998 Tobacco Master Settlement Agreement.

Computer Crimes Section

In 1998, the General Assembly authorized and funded the creation of a Computer Crimes Section within the Office. The long-term vision for the Section was to spearhead Virginia's computer-related criminal law enforcement in the 21st Century. In accordance with Virginia Code § 2.2-511, OAG has original and concurrent jurisdiction to investigate and prosecute crimes within Virginia's Computer Crimes Act, crimes that implicate the exploitation of children, and crimes involving identity theft. During 2015, the Computer Crimes Section continued to travel extensively throughout the Commonwealth to investigate and prosecute such crimes, which often involve large volumes of evidence and extensive analysis. Jurisdictions in which the Section has handled cases over the past year include the counties of Amelia, Arlington, Bedford, Chesterfield, Fairfax, Hanover, Henrico, Loudoun, Lunenburg, Madison, Prince William, and Spotsylvania, and the cities of Colonial Heights, Emporia, Hopewell, Newport News, Richmond, Virginia Beach, and Winchester, among others. The Section's attorneys are cross-designated as Special Assistant United States Attorneys and prosecute cases in federal as well as state courts.

On the prosecution front, the Computer Crime Section's four attorneys handled eighty cases this year, obtaining twenty-eight convictions (with the remainder of cases ongoing) for crimes of production of child pornography, distribution of child pornography, receipt of child pornography, internet solicitation of children, and computer fraud. Defendants in these cases were sentenced to an aggregate of 191 years and 4 months of active imprisonment. A few cases of note include the following:

United States v. Harper (E.D. Va.) – The federal district court sentenced Noland Harper to 24 years and 4 months of active imprisonment for his conviction on one count of engaging in a child exploitation enterprise. Harper was part of an interstate child pornography enterprise involving defendants in California, Arizona and Nevada. Harper and three other individuals sexually abused boys as young as 11-years-old in California and Nevada in rented houses and filmed the abuse using semi-professional equipment. Harper ran the business component of the enterprise from his residence in Henrico County, operating several websites where he uploaded the content and

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charged for access. Harper's three co-conspirators were arrested on federal and state charges in their respective states.

United States v. Johnson (E.D. Va.) – The federal district court sentenced Michael P. Johnson to 30 years of active imprisonment and a lifetime term of supervised release for his conviction on one count of production of child pornography. The defendant was identified when the FBI received a tip from a foreign law enforcement agency that Johnson had uploaded child pornography to a website located in its jurisdiction. Based on this information, the FBI obtained a search warrant for Johnson's residence in Stafford County. Evidence from the investigation revealed that Johnson had repeatedly sexually abused a female minor over the course of several years, beginning when she was four years old. In addition, Johnson had produced multiple videos and images of the incidents. He also downloaded from the Internet, and subsequently possessed, approximately five terabytes of child pornography on his computers.

Commonwealth v. Gray (City of Hopewell Circuit Court) – The City of Hopewell Circuit Court sentenced Mathew Gray to ten years of imprisonment following his conviction on five counts of online solicitation of a minor. Gray was identified after the victim contacted the staff at her school regarding sexually explicit text messages she received from Gray. Gray used text messages to solicit the 15-year-old female to perform sex acts and exchange nude photographs. The Hopewell Police Department's investigation revealed that Gray had met the victim at church and solicited her for sex and nude photographs several times via text message and social media. Evidence further revealed that Gray had traveled to the victim's home with the intention to engage in sexual acts but was unsuccessful in his attempt.

Commonwealth v. Wright (Colonial Heights Circuit Court) – Douglas M. Wright, a resident of Colonial Heights, was sentenced to thirty-seven years of active imprisonment after a jury found him guilty of four counts of distribution of child pornography and nine counts of possession of child pornography. Wright first came to the attention of law enforcement during an investigation of the distribution of child pornography over peer-to-peer file sharing networks. Detectives in Hanover County observed Wright sharing child pornography files on the network and subsequently downloaded several of the files directly from Wright. The OAG Computer Forensic Unit conducted a forensic examination of Wright's computer and recovered thousands of child pornography files Wright had saved on the computer's hard drive.

In 2015, the Computer Crime Section's Computer Forensic Unit continued to make extensive progress towards alleviating Virginia law enforcement's computer forensic backlog. The Unit handled 154 total cases (an increase of 25 percent from 2014) for 31 separate jurisdictions across the Commonwealth. As part of those cases,

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the Unit forensically examined 947 pieces of evidence, including computer hard drives, cell phones, and various storage devices. This large volume of evidence represents a 40 percent increase from 2014. The Unit also continued to bolster its state-of-the-art computer forensics lab on the ground floor of the OAG, thereby increasing its work capacity. There are currently three computer forensic examiners/investigators assigned to the Unit, and the office will look to expand this number in the coming years. The establishment of the Unit was made possible, in part, with grant funding from the Department of Criminal Justice Services (DCJS).

The Section continues to be an active member of the Southern Virginia and Northern Virginia Internet Crimes Against Children Task Forces, and the Richmond-based Virginia Cyber Crime Strike Force, dedicating its three computer forensic examiners and providing four prosecutors to pursue the resulting cases in both state and federal courts. The task forces handle crimes committed via computer and the Internet, including child exploitation and solicitation, internet fraud, computer intrusion, computer harassment, and identity theft. These partnerships between federal, state, and local law enforcement were created to coordinate the prosecution of the aforementioned computer crimes and provide Virginia with centralized locations to report such crimes.

Throughout 2015, the Section's team of prosecutors and investigators continued to educate and train prosecutors and law enforcement statewide. Section members trained law enforcement, including school resource officers, and prosecutors at various conferences and police training academies in Chesterfield, Fredericksburg, Lynchburg, Richmond, and Virginia Beach. These trainings focused on computer crime law, obtaining search warrants for digital evidence, and the use of procedural tools in the investigation of computer crimes and identity theft.

In addition, the Section continued to serve as a clearinghouse for information concerning criminal and civil misuses of computers and the Internet. In 2015, Section investigators handled over 100 investigatory leads and citizen complaints submitted through the Section's email inbox and the FBI's Internet Crime Complaint Center, which is the primary resource nationwide for computer crime complaints. Section attorneys also reviewed notifications from companies and organizations experiencing database breaches for compliance with Virginia's database breach notification law found in Code § 18.2-186.6. The Section received 316 such notices in 2015. Members of the Section are often called upon to give presentations or to make media appearances to inform the public about issues such as identity theft, computer fraud, computer security, and sexual predators' use of the internet to make contact with children. Moreover, in 2015, attorneys from the Section were asked to speak as experts on data breach incidents and data breach laws at national conferences in Chicago, Houston, Los Angeles, New York, and Washington, D.C.

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During 2015, as in past years, members of the Section traveled frequently throughout Virginia to speak to students and parents and deliver the Office's Virginia Rules "Safety Net" presentation. "Safety Net" is an interactive presentation that addresses issues of "cyber-bullying" and "sexting," and utilizes an actual case study to demonstrate how easy it is for a predator using very little personal information to track down a child victim over the Internet. The presentation continues to be in high demand among middle schools, high schools, and parent groups across the Commonwealth. During 2015, Section members delivered the presentation numerous times to schools in Chesterfield, Fairfax, Henrico, Powhatan, Richmond, Suffolk, as well as many other locations throughout the Commonwealth.

On the legislative front, the Computer Crimes Section was instrumental in the drafting and passage of two important pieces of public safety legislation. The first was an amendment to Virginia's administrative subpoena statute allowing for more secure and productive investigations of child abuse and exploitation offenses. The change prevents Internet service providers from notifying child abuse and child exploitation suspects that they are targets of criminal investigations once law enforcement has served the provider with an administrative subpoena. This needed improvement curtails the destruction of evidence and helps prevent suspects from fleeing. The second piece of legislation was an amendment to Virginia's search warrant statute allowing law enforcement to submit only one search warrant for both the seizure of, and resulting forensic examination of, a computer's contents in a criminal investigation. This measure saves law enforcement valuable time when dealing with a large volume of digital evidence and promotes expeditious handling of criminal investigations.

Finally, over the past two years, members of the Computer Crime Section have been active participants in the Virginia Cyber Security Commission. The Commission, established by the Governor's Office in early 2014, was comprised of tech industry leaders, public officials, and educators, and sought ways to improve Virginia's overall cyber security through advancements in economic development, education, and law enforcement. Members of Section drafted several pieces of cybercrime legislation adopted by the Commission and put forward in the General Assembly.

Correctional Litigation

The Correctional Litigation Section represents the Department of Corrections, the Parole Board, Department of Juvenile Justice, and the Board of Juvenile Justice. Additionally, the Section represents the Secretary of Public Safety and the Governor on extradition matters, and Commonwealth's Attorneys on detainer matters. During 2015, the Section was responsible for handling 155 Section (§) 1983 cases, 141

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habeas corpus cases, 111 mandamus petitions, 46 inmate tort claims, 5 warrants in debts, 7 injunctions, 3 declaratory judgments, and 195 advice matters.

Several of the significant matters handled by the Section are as follows:

Phelan v. Commonwealth (Va. S. Ct.) - In this case, an inmate filed a Virginia Tort Claim Action alleging that she had slipped and fell as she worked in a canning department of a prison facility. The trial court found that the required Notice of Claim was insufficient and dismissed the matter. On appeal, the Supreme Court of Virginia affirmed, holding that a Notice of Claim must specify the information required by statute, even where such information could be inferred from the rest of the notice.

Surovell v. Department of Corrections (Va. S. Ct.) - This case involves a request that was made under the Virginia Freedom of Information Act (FOIA) for various records pertaining to methods of executions. The Department of Corrections withheld certain records based on security considerations, and the requesting party filed suit to compel. The trial judge, although agreeing that the Department had properly withheld some of the records, ordered the release of other withheld records. On appeal, the Supreme Court of Virginia concluded that the trial court had erred in ordering the production of a redacted document and remanded the matter back to the trial court for further consideration of the security concerns of the prison officials.

Hoglan v. Robinson (E.D. Va.) - This case involved an inmate's challenge to a particular institutional policy as an infringement of his right to free speech. Specifically, the inmate claimed he was improperly denied certain commercial photographs. The policy, which was in effect for approximately one month, was found by the federal district court to be unconstitutional and the matter was tried before a jury to set damages and to adjudicate other claims. The jury awarded the inmate damages of one dollar and dismissed all other claims and defendants.

Peyton v. Clarke (E.D. Va.) - In this case, an inmate filed suit alleging various constitutional violations when he was bitten by a Department of Corrections control dog. At the conclusion of the jury trial, a verdict was entered for all three defendants.

Porter v. Clarke (E.D. Va.) - This case involves four death row inmates who allege that the conditions on death row violate the Eighth Amendment. After extensive discovery, cross motions for summary judgment were argued and the parties are awaiting a decision.

Prieto v. Clarke (E.D. Va.) - In this case, Alfredo Prieto, who had been scheduled for execution by lethal injection, mounted a last-minute challenge to the

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use of compounded pentobarbital by the Commonwealth. Following an evidentiary hearing, the federal district court denied his request for a preliminary injunction. The execution was carried out later that night in accord with proper procedure.

Rountree v. Clarke (E.D. Va.) - In this case, an inmate filed suit alleging numerous constitutional violations of religious freedom, freedom of speech, and retaliation. After all claims but one were dismissed, the parties agreed to settle the matter, permitting the inmate to stand on her prayer rug during court.

Scott v. Clarke (W.D. Va.) - During 2015, the Section successfully concluded this case, which involved four plaintiffs who alleged they and all other similarly-situated offenders at Fluvanna Correctional Center for Women had been receiving inadequate medical care. The case was certified as a class action, and the parties, through counsel, successfully mediated a settlement. The settlement included a thorough review of prison policies and practices with regard to the provision of medical care at Fluvanna and the creation of a Compliance Monitor. The Compliance Monitor will work with the parties to better ensure the administration of adequate medical care.

Smith v. Ely (E.D. Va.) - This case involved an inmate who filed suit alleging numerous constitutional violations pertaining to the force used to restrain and transport him between prisons. After a two day evidentiary hearing, the case was dismissed against all defendants.

The Correctional Litigation Section also handles a considerable volume of advice requests from its client agencies. During 2015, the Department of Corrections sought advice on how to resolve a water billing issue in which a locality had requested payment of approximately \$1.2 million in back fees, attributable to a billing error over the last ten years. Based on the Section's research and advice, the Department was able to settle the dispute for \$160,000.

Criminal Appeals

The Criminal Appeals Section handles an array of post-conviction litigation filed by state inmates challenging their convictions, including criminal appeals, state and federal habeas corpus proceedings, petitions for writs of actual innocence, and other extraordinary writs. The Section's Actual Innocence and Capital Litigation Unit reviews and coordinates petitions for writs of actual innocence, and defends against appellate and collateral challenges to all cases in which a death sentence is imposed. In addition, Section attorneys review wiretap applications and provide advice and assistance to prosecutors statewide. The Section responded to several hundred such requests for assistance in 2015. Finally, the Section represents the Capitol Police, state magistrates,

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and the Commonwealth's Attorneys' Services Council. Although the 25-30 matters involving magistrates are less time-consuming than other litigation, one § 1983 case is ongoing in federal district court. In 2015, the Section defended against 501 petitions for writs of habeas corpus and represented the Commonwealth in 213 appeals in state and federal courts. During the year, the Section also received 14 petitions for writs of actual innocence, an ever-increasing area of responsibility. Section attorneys are frequently assigned to assist on matters in other Sections and have provided advice and assistance in several elected official investigations over the last year.

The Section's Actual Innocence and Capital Litigation Unit handled litigation that preceded the execution of Alfredo Prieto on October 1, 2015. During the year, there were no significant actual innocence cases resolved by the Unit, but the Unit handled litigation in several of the remaining capital cases. In *Gray v. Zook*, and *Teleguz v. Zook*, the Fourth Circuit affirmed the district courts' denials of federal habeas corpus relief. In *Porter v. Zook*, the Fourth Circuit remanded the case to the district court, holding that the order purporting to deny relief was not a final order because a claim of juror misconduct had not been addressed. In *Morva v. Davis*, the federal district court (W.D. Va.) dismissed the inmate's habeas corpus petition. The cases of *Juniper v. Zook* and *Lawlor v. Zook* were both pending decision of the federal habeas corpus petitions in the federal district court (E.D. Va.).

In 2015, the Section handled the following significant cases before the Supreme Court of Virginia:

Bowman v. Commonwealth - Here, the Court held that Virginia Code § 18.2-200.1, the construction fraud statute, requires proof that the certified letter sent by the victim to the contractor make an unqualified demand for the return of the advance made to him, and because the evidence in the case failed to prove that element, the Court reversed the conviction from the City of Hampton.

Powell v. Commonwealth - In this action, the Supreme Court of Virginia clarified its jurisprudence concerning the application of the statutes criminalizing the distribution of imitation controlled substances. In defining an "imitation controlled substance," Virginia Code § 18.2-274(B) includes both "counterfeit controlled substances," and those pills, capsules, tablets, and substances which are not "controlled substance[s] subject to abuse." In resolving the specific circumstances presented in *Powell*, the Court determined that a Schedule VI controlled substance, as set forth in Virginia Code § 54.1-3400 *et seq.* is not a "controlled substance subject to abuse," as a matter of law.

Ricks v. Commonwealth - In this case, the Supreme Court of Virginia held that the recently enacted strangulation statute did not require any observable injury or

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break to the skin, but that the statute was satisfied by evidence of any bodily injury, including a bruise or momentary blackout.

Rivera v. Commonwealth - In this case with significant law enforcement implications, the Supreme Court of Virginia considered a Court of Appeals' decision addressing whether *Riley v. California*, 134 S. Ct. 2473 (2014), required retroactive application to Rivera's case, necessitating the suppression of evidence seized following a warrantless search of his cell phone. While the Court of Appeals concluded that retroactive application was appropriate, such that the search amounted to a violation of the Fourth Amendment's prohibition on unreasonable searches and seizures, the Court nevertheless found that applying the exclusionary rule would be inappropriate because law enforcement had an "objectively reasonable good-faith belief" that their conduct in searching the defendant's phone was lawful at the time.

Tolliver v. Commonwealth - In this case, the Supreme Court of Virginia resolved a conflict with the Fourth Circuit regarding the constitutionality of Virginia's anti-sodomy statute. The Supreme Court of Virginia held that the statute was constitutional as applied to the appellant, and that he lacked standing to mount a facial challenge to the statute. In addition, the Court held that the statute was not facially unconstitutional as it was subject to judicial reform to prohibit only non-protected conduct, such as sodomy involving minors, commercial transactions, or public acts. (In two related cases, *McClary v. Commonwealth* and *Saunders v. Commonwealth*, the Supreme Court of Virginia affirmed the Court of Appeals of Virginia by order, referencing its decision in *Tolliver*.)

Major Crimes and Emerging Threats

The Major Crimes & Emerging Threats Section (MC&ET) is the primary prosecutorial Section of the Office. The Section prosecutes various crimes—either pursuant to this Office's jurisdiction under the *Virginia Code* or upon request of local Commonwealth's Attorneys—represents criminal justice and public safety agencies in legal matters, and implements OAG public safety initiatives. In 2015, the Section continued its mission of keeping Virginia's residents safe by adding a prosecutor in Southwest Virginia and through expanded prosecutions throughout the Commonwealth. The Section engaged in multiple initiatives including the continuation of a major heroin and prescription drug abuse agenda; the prosecution of major homicide cases; the prevention, intervention, and suppression of criminal street gang activity; the prosecution and prevention of identity theft offenses; participation in major financial crime investigations; and the apprehension and prosecution of violators of the Virginia's RICO and tobacco statutes.

2015 REPORT OF THE ATTORNEY GENERALCriminal Prosecutions

The Major Crimes & Emerging Threats Section is headed by a Chief who reports directly to the Deputy of Criminal Justice and Public Safety. The Section has nine prosecutors, five of whom are sworn as Special Assistant United States Attorneys (SAUSA) who routinely handle criminal prosecutions in federal court. One of the nine prosecutors serves as special counsel to the Shenandoah Valley Multi-Jurisdiction Grand Jury investigating gang-related activity in that region, and also serves as special counsel to the Multi-Jurisdiction Grand Jury in Newport News. Another prosecutor serves as special counsel to the Northern Virginia Multi-Jurisdiction Grand Jury. Three prosecutors are now based in Norfolk, with one also assisting in violent crime prosecutions statewide as needed. Through a grant with the Baltimore-Washington High Intensity Drug Trafficking Area (HIDTA) Program, two additional prosecutors will be placed at the United States Attorney's Office in Alexandria. They will be responsible for prosecuting significant drug-trafficking related cases, with an emphasis on heroin trafficking.

Heroin/Opiate Agenda

In 2014, MC&ET attorneys and staff established a major multi-faceted program to combat the heroin/opiate epidemic in Virginia through education, prosecution, and appropriate legislation. Part of this program included drafting legislation aimed at punishing drug traffickers, equipping first responders with drug counteracting medication (naloxone), providing a defense for those who call 911 to report overdose, and providing for amendments to Virginia's Prescription Monitoring Program. Nearly all these initiatives were passed in the 2015 General Assembly.

MC&ET attorneys also drafted legislation to punish drug traffickers where the drugs they sell result in the death of an end user. While not enacted by the General Assembly in 2015, this legislation would have provided prosecutors with an additional tool to combat deaths related to drug trafficking, especially trafficking related to opioids such as heroin and fentanyl.

The Section worked with local and federal partners to prosecute more than twenty-eight cases against drug dealers and traffickers, involving more than 95 kilograms of heroin with an estimated street value of more than \$19 million. This amount equals approximately 238,500 daily doses of heroin.

The Section continues to combat heroin trafficking and other major crimes in areas of the state where they are needed most, primarily South Hampton Roads. Section attorneys continue to be active in Hampton Roads through initiatives such as Project Safe Neighborhoods (PSN) and the federal High Intensity Drug Trafficking

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Area program (HIDTA), both of which aim to combat crimes related to violent gangs, firearms, and drug-trafficking. Additionally, the Section was instrumental in forming the first Multi-Jurisdictional Grand Jury in South Hampton Roads.

Firearms/Violence Prosecution Agenda

MC&ET has made the prosecution of crimes involving firearms-violence a priority. This year, it obtained numerous convictions in cases involving firearms violence. In addition, one prosecutor from the Section prosecuted dozens of illegal possession of firearm cases, primarily in the Hampton Roads area.

MC&ET also coordinated the Joint Task Force to Reduce Gun Crimes in Virginia. This Task Force was established by Governor McAuliffe's Executive Order 50 to bring together federal and state law enforcement and prosecutors to develop strategies to combat illegal firearm sales, firearms-trafficking, and crimes involving firearms violence throughout Virginia. The Task Force held its first meeting in December 2015 at the Office of the Attorney General.

Prosecution Summary

Assisting Virginia's Commonwealth's Attorneys is a priority for the Section. In 2015, the Unit assisted Commonwealth's Attorneys in prosecutions throughout Virginia, resulting in convictions with significant periods of incarceration. Section attorneys investigated and prosecuted cases in state and federal courts in Alexandria, Fairfax, Prince William, Frederick, Buchanan, Norfolk, Newport News, Richmond, and all throughout the Shenandoah Valley and Southwest Virginia. Crimes included theft and embezzlement of state property, theft of state records, possession with the intent to distribute contraband cigarettes, gang participation, use of a firearm during the commission of a felony, and murder.

Examples of state cases prosecuted or being prosecuted by members of the Section include the following:

Commonwealth v. Severance (Alexandria City Circuit Court) - Capital Murder (two counts); First-Degree Murder; Malicious Wounding; Use of a Firearm (four counts); Possession of a Firearm by a Convicted Felon. The defendant killed three individuals in Alexandria over an approximately ten-year period. Following a five-week trial, the jury convicted Severance on all counts. The defendant received a sentence of three terms of life imprisonment, plus 48 years' imprisonment, and a fine of \$400,000.

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Commonwealth v. Tyrone Batten, Floyd Taybron, and Marcus Williams (Newport News Circuit Court) - Murder (two counts); Use of Firearm; Felony Gang Participation; Discharge of Firearm within 1,000 feet of a School. This case involved a double murder that occurred when the defendants suspected one of the victims of belonging to a rival gang. In January 2016, following the four-day jury trial, Batten was convicted of two counts of second degree murder, use of a firearm during the commission of a murder, shooting a firearm in a school zone, and felony gang participation. The jury recommended a sentence of ninety-six years in the penitentiary. (Previously, in 2014, the Section secured convictions against Marcus Williams and Floyd Taybron.)

Commonwealth v Lavelle Kareem Smith (Norfolk Circuit Court) - Breaking and Entering; Robbery; Use of a Firearm; Possession of a Firearm by Felon; and Wearing a Mask. Here, the defendant was charged with a home invasion robbery while wearing a mask to conceal his face. The defendant, along with another individual, ransacked the victim's apartment before Norfolk City Police arrived at the scene. He was convicted of all charges and sentenced to 7 years and 6 months in prison.

Some examples of significant federal cases prosecuted by MC&ET attorneys include the following:

Commonwealth v. Venable (E.D. Va.) - Conspiracy to Distribute More than One Kilogram of Heroin. The defendant and his co-conspirators regularly sold heroin in the Eastern District of Virginia, District of Maryland, and Washington, D.C., to customers who traveled from Culpeper County and Orange County. Some of these customers also carried the heroin back to the Western District of Virginia for further distribution. The defendant and his co-conspirators distributed at least one kilogram of heroin. The defendant was sentenced to 120 months imprisonment.

United States v. Woodson (E.D. Va.) - Conspiracy to Distribute More than 100 Grams of Heroin. The defendant, a Washington, D.C.-based drug dealer, regularly sold heroin to at least nine adults between the ages of 21 and 36, who had traveled from in and around Fairfax County to meet him. He was sentenced to 72 months imprisonment.

United States v. Alonzo Outten, et al. (E.D. Va.) - Conspiracy to Manufacture, Distribute, and Possess with Intent to Distribute Heroin. The FBI and detectives from the Chesapeake Police Department, with the assistance of the Virginia State Police, DEA, NCIS, and the Virginia Beach, Norfolk, Portsmouth, and Suffolk police departments conducted a simultaneous execution of 14 search warrants and 5 federal arrest warrants on July 14 in Portsmouth, Chesapeake, and Suffolk. Over 250 federal, state, and local law enforcement officers participated in the takedown. An indictment

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was returned in July 2015 alleging forty-four counts against several defendants involved in what is believed to be the largest heroin trafficking organization in Hampton Roads. It is believed to be responsible for the distribution of over 75 kilograms of heroin (with a street value of approximately \$3.75 million) over the past two years. In March 2015, five individuals were hospitalized after overdosing on heroin purchased from this organization. All of the defendants agreed to plead guilty within three weeks of their arrest. There were sentenced to a combined total of 140 years imprisonment.

United States v. Edgar Brito, et al. (E.D. Va.) - Conspiracy to Interfere with Commerce by Means of Robbery; Brandishing a Firearm During a Crime of Violence. Edgar Brito and two co-conspirators committed a string of armed robberies of stores that sold cellular phones. During these robberies, Brito and his co-conspirators entered the stores wearing masks and demanded employees at gunpoint to provide cash from the registers and cell phones. As Brito and his co-conspirators fled from a Virginia Beach robbery they dropped one of their duffle bags, which contained stolen cell phones and a Greyhound bus ticket bearing the name Edgar Brito. Detectives from the Virginia Beach Police Department arrested Brito and he confessed to the armed robberies. The three defendants were collectively sentenced to over 30 years imprisonment.

Elected Official Investigations

Pursuant to Code § 52-8.2, the Virginia State Police (VSP) is prohibited 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, the 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 VSP requests permission to conduct an investigation of an elected official, MC&ET reviews the allegations to determine what, if any, criminal violations may have occurred. Attorneys from MC&ET work closely with VSP to give these important cases the attention they merit. In 2015, attorneys from the Section processed thirty-five of these requests and recommended authorization for twenty-one investigations by the Virginia State Police.

Agency Representation

The MC&ET Section serves as agency counsel to VSP, the Department of Criminal Justice Services (DCJS), the Department of Forensic Science (DFS), the Office of the Inspector General (OSIG), the Department of Emergency Management (DEM); the Department of Fire Programs (DFP)/State Fire Marshal's Office

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(SFMO)/Virginia Fire Services Board; and the Department of Military Affairs (DMA)/Virginia National Guard (VANG)/Virginia Defense Force. The Section also advises the Secretary of Public Safety and Homeland Security upon request. In addition, an MC&ET member is the Attorney General's designee on the Secure Commonwealth Panel.

The scope of the Section's legal representation includes, but is not limited to, reviewing proposed legislation, reviewing proposed regulations and amendments to regulations, representing the agencies in federal and state courts, and providing advice on a wide range of subjects such as Freedom of Information Act requests, contracts, and personnel issues. The Section also is responsible for representing DCJS in administrative hearings involving bail bondsmen, bail enforcement agents, and private security guards. Of the client agencies assigned to MC&ET, VSP requires the most legal resources. MC&ET Attorneys represented VSP in cases throughout the Commonwealth involving motions to vacate improperly granted expungements and motions to quash subpoenas *duces tecum* where civil attorneys attempted to subpoena the Department's criminal investigative files in civil cases. Attorneys from the Section also represented VSP in several cases filed by registered sex offenders petitioning the court to be relieved of their registration requirements.

MC&ET also devotes substantial legal resources to the Department of Emergency Management. This includes advising DEM on its daily operations as well as emergency response actions. The Section coordinates with the Governor's Counsel and cabinet secretaries as needed during states of emergency. In 2015, DEM handled the usual weather events, along with other special planning events such as the Papal Visit, the UCI Road World Championships, and the Ebola Virus monitoring event. The Section also advised DEM on the establishment of an Access and Functional Needs Advisory Committee to ensure inclusive emergency planning. MC&ET worked closely with DEM for several months on a Federal Emergency Management Agency administrative appeal involving hazard mitigation grant funds. Additionally, MC&ET made several emergency management presentations to the emergency management community, including authoring an article in the Winter 2015 Journal of Local Government Law. One Section member served as an instructor at the newly-established DEM Emergency Management Basic Academy. Finally, the MC&ET Section works closely with emergency management personnel at the local, state, and federal levels by participating on regional and national workgroups such as the National Capital Region Attorneys Group and the National Emergency Management Association Legal Counsel Workgroup.

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Special Projects

During 2015, the Section was involved in several special projects. In particular, it was involved with the timely issue of Body Worn Cameras (BWC). During the 2015 Session of the Virginia General Assembly, legislators introduced several bills relating to Body Worn Cameras. The bills were passed by, and the legislation was sent to the Secure Commonwealth Panel (SCP) to be studied for the year. As a result, the SCP sent the bills to the Law Enforcement and Technology Subpanel (LE&T Subpanel) of the SCP.

The SCP asked the subpanel to investigate and report on the rapidly developing field of body worn cameras (BWC) and related issues such as record release, retention, and redaction. Additionally, the SCP asked DCJS to develop a model policy on the use of BWCs. Deputy Attorney General Linda Bryant engaged several prominent BWC proponents to address the LE&T subpanel during its meeting in June 2015 in Richmond. Speakers included Alexandria's Commonwealth's Attorney, Fredericksburg's Commonwealth's Attorney and Chief of Police, and two police lieutenants from Mesa, Arizona, all of whom have experience with BWCs. The LE&T Subpanel met in late summer 2015 in Richmond to again hear from stakeholders and to review a draft model policy developed by the DCJS.

The LE&T Subpanel commissioned a workgroup to study BWC record retention issues. MC&ET facilitated the workgroup, first by identifying stakeholders to participate on the workgroup, and next by conducting a meeting in July 2015 in Richmond. Members of the workgroup include Commonwealth's Attorneys, county attorneys, law enforcement officers, indigent counsel, and the NAACP. The retention workgroup did not recommend any changes to the current retention schedules maintained by the Library of Virginia; however, the workgroup plans future meetings to re-evaluate retention schedules following the conclusion of the 2016 General Assembly.

As the SCP and LE&T Subpanel were meeting, DCJS established a state-agency workgroup tasked by the SCP with developing a model policy on use of BWCs. The MC&ET Section participated on this model policy workgroup. The model policy was presented to the SCP at its November 2015 meeting in Richmond. The SCP reviewed the policy and encouraged its adoption by state and local law enforcement agencies. The policy is now available on DCJS's website for law enforcement departments to use as a guide when developing BWC policies.

Finally, the MC&ET Section remains involved in regional efforts related to BWCs. A Section member participates on the Metropolitan Washington Council of Governments (COG) Body Worn Camera Working Group. This group is comprised

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of law enforcement officers from COG jurisdictions in Maryland and Virginia as well as the District of Columbia. The working group convened in September 2015 and meets approximately quarterly to provide a forum for jurisdictions to discuss BWC implementation.

Additional Duties of the Section

In addition to the duties outlined above, members of the MC&ET Section also drafted opinions, reviewed and monitored legislation, and filed and argued appeals on a number of criminal and civil issues. Members of the Section also served as organizers or lecturers at various law enforcement training programs such as Gangbusters and the Virginia Gang Investigators' Association Conference.

MC&ET Financial Crime Investigators

The MC&ET Section has two investigators and one analyst whose mission is to identify, target, and disrupt the financial aspects of crime in the Commonwealth. This team assists Commonwealth's Attorneys and law enforcement in addressing the financial aspects of crime in their area by identifying targets for investigations, providing "on-site" financial investigative and analytical support, sharing timely intelligence on money laundering, providing financial investigative training, and assisting in asset identification and forfeiture actions. Over the course of the year, the team worked on a number of investigations pertaining to various types of criminal activity involving finances. Examples of 2015 investigations included:

Maria Rosalba Alvarado McTague – This case was a joint investigation with Homeland Security Investigations (HSI) in Harrisonburg, Virginia. It is being prosecuted by the U.S. Attorney's Office for the Western District of Virginia. McTague and her son Felix Chujoy have been indicted by a federal grand jury for human trafficking and associated offenses.

Jeanne Braithwaite – This was a joint investigation with Harrisonburg Police Department. The Defendant, an office manager and bookkeeper for a dentist in Harrisonburg, was charged with embezzling over \$100,000 from her employer. MC&ET financial investigators reconstructed the books of the dentist and were able to quantify the amount of the embezzled funds. The defendant pled guilty to fraud and money laundering. MC&ET financial investigators testified at the restitution hearing where she was found liable for repayment of the entire amount as determined by the MC&ET financial investigators.

Additionally, MC&ET and the Frederick County Sheriff's Office are conducting numerous investigations into the conspiracy to purchase and transport contraband

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cigarettes to New York from Frederick County, Virginia. MC&ET investigators participated in numerous search warrants and have analyzed hundreds of financial documents to assist in the investigation and prosecution of individuals engaged in the illegal trafficking of cigarettes, money laundering and other crimes.

Tobacco Enforcement Unit

The Tobacco Enforcement Unit administers and enforces the Tobacco Master Settlement Agreement (MSA), a 1998 agreement between forty-six states and the leading cigarette manufacturers. In that effort, the Unit works with the National Association of Attorneys General Center for Tobacco and Public Health as well as other MSA states. During 2015, the Commonwealth received more than \$115 million in payments from the participating manufacturers. MSA settlement funds are used to fund 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 and complimentary 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 federal, state, and local agencies to combat cigarette trafficking. Specifically in 2015, the Unit conducted 1,724 retail inspections and seized 4,735 packs of contraband cigarettes; filed 37 civil cases involving the destruction of seized contraband; investigated more than 140 potentially false businesses involved in cigarette trafficking; conducted 4 stamping agent facility inspections; performed 15 stamping agent field audits, and certified 31 cigarette manufacturers as compliant with Virginia law. Pursuant to legislation enacted in 2015, the Unit developed a list of persons who, because of certain criminal convictions involving cigarette trafficking, can no longer be authorized holders of cigarettes in Virginia. The list is maintained on the Attorney General's website. Members of the Unit also followed tobacco legislation in the General Assembly and provided information to the Virginia State Crime Commission for their study of cigarette trafficking in the Commonwealth. In addition, the Unit continued to represent the Commonwealth in the settlement of a multi-million dollar MSA payment dispute.

2015 REPORT OF THE ATTORNEY GENERALCigarette Trafficking Investigations

Steve Chen – OAG Tobacco Enforcement investigators assisted the High Intensity Drug Trafficking Area, Northern Virginia Financial Initiative Task Force, and the Virginia Alcoholic Beverage Control Board agents with their serving of five federal search warrants for money laundering, structuring, other illegal financial activity, and trafficking contraband cigarettes. The search warrants were served on the home and businesses of the defendant and his wife. Investigators were also present when interviews were conducted. The defendant was convicted in federal district court (E.D. Va.) in December 2015 and sentenced to five years in prison.

Medicaid Fraud Control Unit

The Health Care Fraud and Elder Abuse Section's Medicaid Fraud Control Unit (MFCU) investigates and prosecutes allegations of Medicaid fraud, as well as elder abuse and neglect in health care facilities. MFCU is comprised of investigators, auditors, analysts, computer specialists, attorneys, outreach workers, and administrative staff. Over the past 33 years, MFCU has successfully prosecuted more than 238 providers in cases involving patient abuse and neglect or fraudulent acts committed against the Virginia Medicaid program, and has had over \$1,918,000,000 in criminal and civil recoveries. This year, in addition to prosecuting those responsible for health care fraud or abuse, MFCU recovered \$18,700,954.88 in court-ordered criminal restitution, asset forfeiture, fines, penalties, civil judgments, and settlements.

MFCU continues to expand its outreach efforts to inform the community on the latest methods to effectively prevent and report elder abuse and provide an additional resource for investigative referrals. Through its designated Community Outreach Coordinators in Richmond, Tidewater, Roanoke, Abingdon, and Northern Virginia, MFCU continues to strengthen programmatic partnerships with community organizations, government agencies, academic institutions, and law enforcement working with Virginia's senior population. In addition, MFCU publishes an Annual Report and quarterly newsletter; it also has a Twitter account along with an active Facebook page.

MFCU continues to partner with the Social Security Administration in a joint task force to investigate allegations of disability fraud involving the Social Security and Medicaid programs. By preventing unqualified persons from receiving Social Security disability benefits, the task force prevents the expenditure of unwarranted Medicaid funds. The task force has been very successful in its ongoing mission. Over the past year, its work has resulted in savings to the Virginia Medicaid program of \$18,759,928, and savings to the Social Security program of \$15,523,593, for a

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combined total savings of \$34,283,521. The Social Security Administration and the U.S. Department of Health and Human Services, Office of the Inspector General are now allowing other state MFCUs to create similar joint task forces.

MFCU had a successful year in 2015. At the end of the year, MFCU had ninety active criminal investigations. It ended the year having obtained sixty-one convictions. The Civil Investigations Squad of MFCU opened ninety-four new civil cases.

A few notable cases the Unit prosecuted in 2015 include the following:

Commonwealth v. Porter, et al. (Roanoke County Circuit Court) - In June 2015, a settlement was reached in this matter to resolve allegations over claims that were submitted between 2007 and 2012. The primary defendant is a licensed professional counselor. MFCU alleged that he submitted false claims, or submitted claims prior to performing services. After extensive investigation, the defendant and his practice agreed to a total settlement amount of \$80,000. As part of the settlement agreement, the defendant and his practice voluntarily agreed to permanent exclusion from the Virginia Medicaid Program.

Commonwealth v. Tuan Vu, et al. (Richmond Circuit Court) - In June 2015, a settlement was reached in this matter to resolve allegations involving the submission of claims for services that were never provided to patients. The primary defendant was a dentist in Alexandria. Prior to the settlement, the federal government obtained a criminal conviction against the dentist. Part of the criminal remedy included restitution to Virginia's Medicaid Program in the amount of \$158,223.21 and the loss of the defendant's dental license.

Following the federal criminal conviction, this Office pursued civil remedies, including penalties, against the dentist and his practice. Pursuant to the settlement, the defendants have agreed to pay \$180,000 plus interest to the Commonwealth of Virginia.

Progressive Counseling Services - This case was referred to MFCU by the Department of Homeland Security, Homeland Security Investigations (HSI) and the IRS. HSI and the IRS initiated an inquiry into the defendant and requested assistance from the MFCU after learning he owned Progressive Counseling Services (Progressive), a Medicaid provider of mental health support services.

A joint investigation by MFCU and Norfolk FBI revealed an extensive health care fraud scheme carried out by the defendant and numerous employees. The scheme involved the creation of fraudulent assessments of Progressive clients and the

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subsequent submission of fraudulent Medicaid reimbursement claims. Most of the purported counselors at the firm were unqualified to serve as mental health professionals; moreover, the counseling sessions that were submitted-for never occurred, and progress notes used to document the sessions were fabricated. The total value of the fraud was adjudicated as \$2,483,752. Most of the defendants in this matter were convicted in federal court and received significant sentences of incarceration.

Brian Center Health and Rehab Facility - The investigation in this matter disclosed that the business model for the Brian Center was based on draining money from the facilities by charging an exorbitant management fee, minimizing staffing and supplies, avoiding payments to vendors, and failing to properly fund and administer employee benefit plans. Brian Center residents consequently suffered from a lack of basic care, and endured poor hygiene, nutrition, and wound care, resulting in the serious physical deterioration of several residents. As a result of the efforts of MFCU, the U.S. Attorney's Office, HHS-OIG, the U.S. Department of Labor, and IRS, multiple defendants were indicted and convicted. The primary defendant in this matter was sentenced to 5 years probation; 4 months home confinement; 400 hours community service; restitution, fines, and forfeiture in the amount of \$1,612,347; and a 50-year exclusion from participation in health care.

Sexual Violent Predators (SVP) Section

Since the SVP Act became effective in April 2003, the Commitment Review Committee and the courts have referred a total of 1,409 cases to the SVP Section. The Section has filed a total of approximately 773 petitions for civil commitment or conditional release, and has reviewed approximately 621 other cases where it was determined that offenders did not meet the statutory criteria, resulting in no petition being filed. Approximately 604 persons have been determined to be sexually violent predators, and approximately 382 have been civilly committed to the Department of Behavioral Health and Developmental Services. The majority of these offenders are at the Virginia Center for Behavioral Rehabilitation. Approximately 200 offenders determined to be sexually violent predators have been placed on conditional release.

In 2015, the Section filed approximately 74 petitions, made approximately 369 court appearances, and traveled approximately 66,759 miles.

The Supreme Court of Virginia rendered decisions in appeals of two sexually violent predator cases in 2015:

Willis v. Commonwealth – This case arose out of Willis' annual review hearing, wherein he assigned error to the Commonwealth's expert testifying to polygraph

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evidence and to the Commonwealth introducing the second opinion evaluation into evidence without the expert being present. However, after oral argument and after additional briefing ordered by the Court, the Court ordered the appeal dismissed as moot.

Tyson v. Commonwealth – This case arose out of a jury trial. Upon the jury finding Tyson to be a sexually violent predator, the trial court immediately ordered Tyson to be civilly committed. Tyson alleged error in the trial court finding that it was Tyson’s burden to prove by a preponderance of the evidence that he was appropriate for conditional release. In an unpublished opinion, the Court found that Tyson had failed to preserve the issue for appeal and declined to apply the ends of justice exception.

In 2015, the Section filed two Petitions for Appeal in the Supreme Court of Virginia:

Commonwealth v. William – This case arose out of a bench trial, wherein the Commonwealth alleged error in the trial court’s denial of a continuance after an out-of-state witness inexplicably failed to show at trial, and in the trial court’s refusal to allow the Commonwealth to introduce into evidence a deposition transcript of the witness’s testimony. After his release from incarceration, William was being investigated for sexual assault, murder, and abduction. Upon being found by authorities in Massachusetts, he killed himself. The Commonwealth has moved to withdraw the appeal as moot based on his death.

Commonwealth v. Proffitt – This case arose out of a jury trial, wherein the Commonwealth alleged error in the trial court’s refusal to allow the Commonwealth to call two of Proffitt’s victims to testify as irrelevant, prejudicial and cumulative. The case remained pending at the end of 2015.

TRANSPORTATION, REAL ESTATE, AND CONSTRUCTION LITIGATION DIVISION

The Transportation, Real Estate and Construction Litigation Division includes three Sections: Transportation, Real Estate and Land Use, and Construction Litigation. It provides comprehensive legal services to executive agencies, state boards, and commissions within its areas of expertise. The Division provides legal advice on a wide variety of subjects, including advice on matters of employment, contracts, purchasing, and the regulatory process. Division attorneys regularly assist state agencies with complex transactions and also represent those agencies in court, often in close association with other attorneys in the Office.

Transportation Section

The Transportation Section represents and advises the state agencies, offices, authorities, and boards that report to (or are assigned to) the Secretary of Transportation. These bodies include the Virginia Department of Transportation (VDOT), the Commonwealth Transportation Board (CTB), the Department of Motor Vehicles (DMV), the Commission on the Virginia Alcohol Safety Action Program (VASAP), the Department of Rail and Public Transportation (DRPT), the Virginia Port Authority (VPA), the Virginia Port Authority Board of Commissioners, the Virginia Department of Aviation, the Virginia Aviation Board, the Motor Vehicle Dealer Board, 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.

Section attorneys serve their transportation clients in numerous administrative, regulatory, transactional/contractual, and litigation matters, including Public-Private Transportation Act (PPTA) transactions; bond issuance and bond refunding and refinancing transactions; contract negotiation, drafting, and dispute issues; eminent domain/condemnation issues and litigation; land use issues; outdoor advertising and roadway sign issues relating to highway rights-of-way; personnel issues; environmental issues; procurement strategies and disputes; automobile titling and registration issues; driver licensure and regulation issues; motor vehicle fuels tax collection and enforcement issues; motor vehicle dealer licensure, regulation, and disciplinary issues; administration of motor vehicle dealer franchise laws and regulation of disputes between franchise dealers and manufacturers; administration of the VASAP program; review of transportation legislation; rail and other grant agreement drafting and negotiation; Freedom of Information (FOIA) requests; conflict of interests inquiries; and administrative hearings involving a wide variety of issues and transportation agencies or entities.

In 2015, Transportation Section attorneys appeared in state and federal courts throughout Virginia to protect the Commonwealth's transportation interests in litigation. The Section litigated a National Environmental Policy Act (NEPA) lawsuit brought by plaintiffs in federal court, claiming that VDOT and the Federal Highway Administration (FHWA) had not followed the procedural requirements of NEPA in approving three projects meant to reduce congestion on Route 29 in the Charlottesville area. Working with federal colleagues, the Section successfully opposed the plaintiffs' Motion for Preliminary Injunction. After the Court's denial of the motion for preliminary injunctive relief, the plaintiffs filed a stipulation of dismissal, in which VDOT and FHWA joined.

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The Section also was involved in certain significant First Amendment cases involving the Sons of the Confederate Veterans and the display of the confederate flag on state license plates. By way of background, in 1999 the Commonwealth enacted Code § 46.2-746.22, which required the DMV to issue special license plates to members of the Sons of Confederate Veterans (“SCV”). The second sentence of this statute prohibited DMV from issuing an SCV plate that displayed or incorporated any “logo or emblem of any description” in its design. Following passage of the state law and DMV’s rejection of the SCV’s request to place the SCV logo on specialty plates issued under the statute, the SCV filed suit in the U.S. District Court (W.D. Va.). In that case, *SCV v. Holcomb*, the district court ultimately found the second sentence of the statute to be an unconstitutional violation of the First Amendment, holding that license plates constitute private speech that may not be restricted by the government. The Court enjoined the Commonwealth from enforcing the ban on emblems or logos on the SCV plates and ordered DMV to issue plates bearing the logo. The Fourth Circuit affirmed this opinion in 2002, and DMV began to produce license plates bearing the SCV logo, which displayed the Confederate battle flag.

In June 2015, the U.S. Supreme Court held in *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, that Texas had the right to reject the SCV logo on a license plate because the plates in question were government speech. As government speech, rather than private speech, the state was entitled to restrict or ban use of the image on the plates. Because the ruling in *Walker* was directly contrary to the U.S. District Court’s decision in *SCV v. Holcomb*, DMV filed a motion to vacate the ruling as being contrary to the law. In August 2015, the district court vacated the judgment, dissolved the injunction, and dismissed the case against DMV and the Commonwealth. Subsequently, DMV issued a recall of all plates bearing the SCV logo.

The Section now is involved in a related state court proceeding filed in Brunswick County Circuit Court in November 2015. In this case, *Clary v. DMV*, the plaintiff has appealed DMV’s recall of the SCV plate. The Section has filed a motion to dismiss, and the case is still pending.

During 2015, the Section also was instrumental in legal work associated with several key (and very large) VDOT transportation project transactions. This included providing extensive legal advice and preliminary drafting of Public Private Transportation Act (PPTA) documents, including voluminous procurement documents. The Section also assisted with drafting an extensive Memorandum of Agreement with the Northern Virginia Transportation Authority (NVTA) to provide toll revenue funding of I-66 High Occupancy Toll (HOT) lanes for multimodal transportation improvements being developed by VDOT on I-66 inside the Beltway

corridor. NVTA has agreed to partner with VDOT and the CTB in selecting and developing those multimodal transportation improvements on I-66 inside the Beltway.

In Hampton Roads, the Section assisted with legal issues associated with starting up the Hampton Roads Transportation Accountability Commission (HRTAC). It addressed legal issues associated with the Interstate 64 Capacity Improvements Project, which is expected to be constructed in three phases, widening that road to Williamsburg in both directions. This will be HRTAC's first highway project. The Section was also extensively involved with the cancellation of the Route 460 project in Hampton Roads. It assisted the Secretary of Transportation with legal issues associated with the termination of the project as a PPTA, helped draft termination and settlement documents, provided counsel to the Secretary and the Commonwealth Transportation Board, and provided legal advice regarding solutions and contract termination options for the project as well as the development of a new permissible route for the project.

Finally, considerable time and effort was invested in legal services to the VDOT team that initially developed a request for proposal and contract for transferring VDOT's transportation operations to the private sector. That team decided to terminate this mega-contract due to the contractor's inability to perform and meet many of the contract requirements. The contract—known as the six-year Traffic Operations Center service contract—was valued at \$425 million and represented a groundbreaking transportation project that garnered international attention from both transportation agencies and private sector service companies. The contract coalesced five VDOT operations centers, six operational services, and was to create a new statewide information technology system to support them. The program established by the contract was the locus of VDOT's use of technology to monitor traffic conditions, respond to roadway incidents, and mitigate traffic congestion.

The goal of the service contract was to unify regional traffic operations and technologies into a statewide interoperable system that would increase efficiency and innovation and ultimately improve traffic mobility throughout the Commonwealth. The first two years of this innovative contract were fraught with legal and operational challenges in transferring missions and responsibilities for equipment, personnel, and technology to provide operational oversight for VDOT's extensive road network and the management of traffic in all kinds of weather and traffic events. The Section and OAG were ultimately successful in negotiating a multimillion dollar settlement with the contractor enabling VDOT to transition its operations back to a more manageable and successful arrangement. That work continues and is an ongoing effort.

In 2015, the Section also provided extensive support to VDOT concerning fiber optic resource sharing agreements. These agreements allow fiber companies to utilize

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VDOT rights-of-way to install fiber optic carrier lines in return for providing VDOT with fiber optic resource lines for traffic management and communications functions. These agreements continue to save VDOT and the taxpayers significant sums of money.

During the year, the Section was heavily involved in rail transportation issues. It continued to assist the Virginia Department of Rail and Public Transportation in analysis and response to the Federal Transit Administration's (FTA) concerns about the Tri-State Oversight Committee (TOC), which oversees safety on the WMATA metro-rail system. These concerns have matured into the ongoing efforts of the Federal Transit Administration to create a new Safety Service Oversight entity, to be created by an interstate compact, to oversee WMATA and its safe operation of the metro-rail system. Other legal tasks included negotiations for the Southeast High Speed Rail (SEHSR) Corridor from CSX Transportation; assistance with agreements concerning environmental studies for the development of SESHR; negotiation with VDOT and AMTRACK concerning parking expansion for the Richmond Staples Mill Amtrak station; and the negotiation and drafting of agreements with Amtrak for federally-required state assumption of financial responsibility for all intercity passenger service.

The Section was actively involved with the Virginia Port Authority (VPA) during the year. It continued to handle extensive legal issues associated with the reorganization of the Port Authority's operating company, Virginia International Terminals (VIT), which became a single member Limited Liability Company under the direct supervision of the VPA Board of Commissioners. Administrative services of the VPA and VIT were consolidated under a shared services agreement and most services were moved to the VPA, allowing VIT to focus solely on operating the VPA maritime terminals. The Section also assisted the VPA's Board of Commissioners in a multitude of business matters involved with container and rail logistics at the port, including a new forty-year lease at the Port of Richmond. Additionally, the Section assisted the VPA with ongoing efforts to renegotiate and extend its lease at the Virginia International Gateway Terminal.

Finally, the Section assisted the Virginia Commercial Space Flight Authority and the Secretary of Transportation in settling and resolving the rebuilding of Virginia's Mid-Atlantic Regional Spaceport (MARS) on Wallops Island associated with Orbital Sciences Corporation's unsuccessful third Commercial Resupply Mission (CRM) to the International Space Station. The launch anomaly and explosion upon liftoff of the Orbital Antares Rocket was reduced to approximately \$15 million of damage to launch pad "0A" at the Virginia MARS facility. The Section gave extensive legal advice to the Virginia Commercial Space Flight Authority with regard to Orbital Sciences Corporation's legal obligations under

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various MARS agreements associated with launch operations. Orbital has had prior success providing International Space Station commercial resupply missions for NASA out the MARS facility at Wallops Island. The resolution of the damage at the MARS facility will enable Orbital Sciences Corporation's return to the facility for future CRM missions under both existing and future contracts between that company and NASA.

Real Estate and Land Use Section

The Commonwealth of Virginia, through its various agencies, departments, educational institutions, museums, and authorities, is the largest holder of real property interests in the Commonwealth, with the possible exception of the U.S. government. The Real Estate and Land Use Section (RELU) handles many of the attendant real estate matters, and may participate in litigation involving real property interests.² During 2015, RELU opened 308 new matters, and completed approximately 12 purchases, 6 sales, 49 ABC lease transactions, 23 conservation easements, and 20 utility, access, water or other such routine-type easements. The Section also approves payment and performance bonds for various construction projects, processing forty-seven of these in 2015.

Significant transactional real estate matters handled for the Commonwealth include sales, purchases, leases, and easements on lands of the Commonwealth. In this regard, RELU provides daily advice on real estate issues to the Division of Real Estate Services (DRES) of the Department of General Services (DGS) and to other state agencies with significant real estate activity, including interagency transfers of property by written agreement. The Section provides real estate support to the various institutions of higher education and museums that do not have the requisite authority to act independently under the Restructured Higher Education Financial and Administrative Operations Act. Additionally, the Section serves as special real estate counsel to independent authorities upon request, and it reviews legislation related to real estate.

In recent years the Section has done a significant amount of work regarding a range of issues related to the rights of the Commonwealth in and to subaqueous lands. RELU has worked closely with the Environmental Section of the CET Division to advise state agencies and help resolve these issues. This work continues and has intensified in some areas.

The Section also advises the Division of Engineering and Buildings (DEB) within DGS, regarding policies, procedures and other issues that arise in DEB's role as

² RELU does not handle Virginia Department of Transportation right-of-way acquisitions.

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statewide construction manager and building official, and it reviews and approves all required bid, payment, and performance bonds for construction projects managed by DGS, Norfolk State University, the Department of Military Affairs, the Department of Game and Inland Fisheries, and the Department of Conservation and Recreation. One RELU attorney is located in Northern Virginia and is shared with the Construction Litigation Section. This attorney has assisted VDOT with contract administration and claims resolution for significant VDOT projects in Northern Virginia in addition to carrying out real estate responsibilities.

Specific transactions of note include the following:

Alcoholic Beverage Control Board (ABC)

Sale Leaseback of Property in Alexandria, Virginia for \$12,500,000 – This complicated sale closed on August 10, 2015. The transaction was structured as a sale leaseback pursuant to a sale agreement from 2012 that had been amended eleven times over a three-year period and involved a holdback of \$1,000,000 to address environmental and archeological issues. The closing took place on an expedited basis over a period of one week.

Department of Agriculture and Consumer Services (VDACS)

Sale of Northern Neck Farmers Market – The Section handled the surplus property sale of this farmers market for \$1.2 million, which included an interim transfer of the property from the Virginia Public Building Authority (VPBA) to the agency.

Sale of the Southwest Virginia Farmers Market – The Section handled the surplus sale of this farmers market to the County of Carroll, Virginia for a sale price of \$222,000.

Department of Corrections (DOC)

Acquisition of Probation and Parole (P&P) Office in the City of Richmond for a purchase price of \$673,000 - The Section negotiated the contract and closed the acquisition of this P&P office in the City of Richmond. Complicating factors included the due diligence eviction of tenants without written leases, as well as an absentee seller who obtained title through an estate where the testator had acquired the property through a like-kind exchange.

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Department of Game Inland Fisheries (DGIF)

Purchase of Headquarters at Villa Park II in Henrico County for \$8,515,098.71 – The Section handled the closing of 9.036 acres of land containing an 89,302 square foot office building for use by DGIF as its headquarters facility. DGIF was occupying the building pursuant to a lease that contained an option to purchase the building with a formula to calculate the purchase price but without the usual provisions in a purchase agreement that detail closing deliveries and procedures. This complex closing was handled on an expedited basis over a three-day period.

Hazel River – This ongoing matter involves issues relating to the ownership of a certain portion of the subaqueous lands on bottomlands of the Hazel River in Culpeper County, and involves the removal of a 150-year-old dam to eliminate a dangerous obstruction in the river and promote aquatic life. Determining ownership of the river bottomlands required an examination of various chains of title extending back to King’s grants from the early 1700’s.

Acquisition of 164.14 acres in Buckingham County adjacent to Featherfin Wildlife Management Area for \$390,000 – This acquisition by DGIF closed in May 2015.

Loving Lease of Former Headquarters – The Loving Movie Company, LLC, the company that filmed “Loving,” a movie concerning the couple that was the subject of the U.S. Supreme Court case of *Loving v. Virginia*, leased a portion of the former DGIF headquarters on Broad Street when DGIF moved to its new headquarters in Henrico. The transaction was completed on an expedited basis by the Section.

Department of General Services (DGS)

Ninth Street Office Building – The Section handled the reacquisition from the VPBA of two tracts of land in the City of Richmond, bounded by 8th Street, 9th Street, and East Broad Street, containing the former Hotel Richmond building, which will become the new Office of the Attorney General. The transaction involved title examination work and several easement issues.

UCI Road World Championships – The Section worked with DGS on the use of a Commonwealth parking deck during the bike races.

Governor’s Street – The Section has been working closely with DGS with respect to the conveyance of various properties in the City of Richmond within the seat of government, which will involve the closing of Governor’s Street to the public.

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Executive Order 50 – The Section advised and assisted DGS in the implementation of the prohibition against firearms in state office buildings.

Virginia Indian Tribute in Capitol Square – The Section assisted outside counsel and DGS with the negotiation and drafting of an Agreement for Commission of Public Art Work between the Virginia Indian Commemorative Commission and Alan Michaelson. The design for the Virginia Indian Tribute features a spiral sidewalk with low walls and water crossing underneath the sidewalk, evoking a creek or river. The contract was approved at the Commission’s meeting on December 8, 2015.

Women’s Monument in Capitol Square – The Section is assisting the Virginia Women’s Commission with drafting an agreement with StudioEIS and “The 1717 Design Group” for construction and design of the Virginia Women’s Monument on Capitol Square. The first Phase was completed in March 2014 with the delivery of a Schematic Design Report. Negotiations are ongoing.

Virginia State Police Land Exchange with Staunton Economic Development Authority (EDA) – As part of the City of Staunton’s ongoing efforts to redevelop the former Western State Hospital site, the City proposed acquiring VSP’s existing Staunton headquarters. In exchange for the land, the City’s EDA would provide an alternate site for VSP to construct a new headquarters facility. The Section worked with DGS, BCOM, VSP and the EDA to refine the terms of this transaction and prepare the necessary documents.

Roanoke One Stop – This matter initially involved assisting DGS with the analysis of the occupant agencies’ allegations of ADA violations. The Section assisted DGS with the analysis of these allegations and advised on negotiations with the landlord over remedial actions. A subsequent fire in a room below the leased premises caused significant smoke damage. The Section advised DGS, the occupant-agencies, and the Secretary of Administration on the Commonwealth’s rights and obligations under the leases.

Department of Historic Resources (DHR)

Great Neck Archaeology Site – The Section assisted DHR with the donation of certain services and equipment in support of an archaeological study performed by DHR at an important Native American archaeological site in Virginia Beach. The site dates to the Woodland Period and contained the remains of a defensive wall and houses, as well as a number of human burials. The Section obtained the Governor’s approval for the non-monetary donations and drafted a letter of understanding between DHR and the property owner.

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New Ramp Construction at Executive Mansion – The Section advised DHR with respect to FOIA requests for certain records pertaining to the construction of a new ADA-compliant ramp at the south entrance of the Executive Mansion.

Promulgation of Regulations – The Section has been involved in the process of promulgation of (i) revisions to the Regulations Governing Permits for the Archaeological Removal of Human Remains; (ii) emergency revisions to regulations for Evaluation Criteria and Procedures for Designations By the Board of Historic Resources, (iii) emergency revisions to regulations for Evaluation Criteria and Procedures for Nominations of Property to the National Register for Designation as a National Historic Landmark, and (iv) revisions to regulations concerning Historic Rehabilitation Tax Credit.

Historic Preservation Easements – The Section reviewed and approved the following Conservation Easements, which were recorded in 2015:

- Mignogna Tract, The Breakthrough and Peebles Farm Battlefields, 2.52 acres (Dinwiddie County)
- Kronenwetter Tract, 27.488 acres (Spotsylvania County)
- Baird-Cole Tract, Reams Station I and II Battlefields, 10.525 acres (Dinwiddie County)
- Early Tract, Trevilian Station Battlefield, 1.422 acres (Louisa County)
- Bernstein Tract, Trevilian Station Battlefield, 253.21 acres (Louisa County)
- Lee-Jackson Building, New Market Battlefield, 0.26 acres (Shenandoah County)
- Historic Huntley, 2.85 acres (Fairfax County)
- Rector Tract, Rappahannock Station I and II Battlefields & Brandy Station Battlefield, 1.7605 acres (Fauquier County)
- Historic Long Bridge Road Tract, First and Second Deep Bottom Battlefields, 3.6 acres (Henrico County)
- Holway Open-Space Parcel, Waterford Historic District, 2.13 acres (Loudoun County)

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Department of the Lottery

The Section was asked to serve as special real estate counsel to the Virginia Lottery in its search for new headquarters space outside of downtown Richmond as a result of its relocation from the Pocahontas Building. The lottery ultimately will stay in state-owned property.

Department of Military Affairs (DMA)

Camp Pendleton State Military Reservation (SMR) – The Section assisted in advising, drafting documents, and ensuring the completion of numerous lease, license, and easement transactions with various federal agencies and the Department of the Navy.

Transatlantic Cable Landing at Camp Pendleton – The Section advised DMA in negotiating with private parties who proposed to use Camp Pendleton property as a cable landing site, which involved compliance issues with federal, state and local laws.

Education and Museums

Virginia's colleges and universities often ask RELU to assist with acquisition transactions, either directly or as support for university counsel. During 2015, the Section provided significant direct support to colleges, universities and museums, as follows:

Longwood University –

- *Sale of property to Longwood University Real Estate Foundation (LUREF) for the construction of a new residence facility* – This Section represented Longwood University in its sale to LUREF of land to construct a new residential facility. One complicating factor was that the improvements were to be constructed under the direction of DGS's Bureau of Capital Outlay Management (BCOM) in order for any conveyance back to Longwood University to be compliant with state requirements. The deed was placed into escrow pending completion of the improvements, which was to take place over a period of more than one year. The competing interests of Longwood University, LUREF, and the lender made this transaction challenging. Several advisory communications of this office were delivered in connection with the bond financing.
- *Purchase of several lots of property from LUREF* - The Section assisted in the purchase by Longwood University of 113 W. Third Street (\$1); and 603

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& 605 High Street (collectively, \$391,539), each owned by LUREF. Closing on these properties occurred on November 6, 2015.

Virginia Commonwealth University (VCU) – The Section was engaged in the possible acquisition, at different times, of two very significant parcels of land in the City of Richmond, neither of which came to fruition.

Virginia Military Institute (VMI) – The Section continues to assist VMI with various real estate issues involving easement and renovations on Post and other property owned by VMI. Of note were the following:

- *Corps Physical Training Center* – VMI began construction of an \$80 million physical training center on property that had been acquired in an assemblage over a twenty-year-plus time frame. On the advice of this Office, title work was obtained to confirm there were no problems with the assemblage. The title work revealed several problems that the Section continues to shepherd.
- *Secretary Marsh Burial Site at New Market Battlefield* – As the request of VMI, the Section assisted the Education Section in the preparation of an agreement for the benefit of Secretary Marsh in accord with his wishes that he be buried at New Market Battlefield.

Virginia State University (VSU) – The Section continued to assist VSU with the build-out of the multi-purpose center (MPC) and the Chesterfield Avenue Development project, both of which are envisioned to significantly enhance the reputation and success of VSU. Assistance included the acquisition of most of the remaining hard-to-close properties in the MPC footprint, along with the conveyance of numerous easements to various utility providers.

Frontier Culture Museum - Along with the Education Section, RELU assisted the Frontier Culture Museum in conveying a storm water retention and sewage connection easement to the museum foundation to further the development of retail space adjacent to the museum.

Virginia Museum of Fine Arts (VMFA) - Pelham Confederate Memorial Chapel: the Section assisted VMFA and the Governor's Office with the termination of a lease between the VMFA, as landlord, and the Lee-Jackson Camp No. 1, Sons of Confederate Veterans (SCV), as tenant. Concurrent with the Governor's termination of the lease, the Section developed a Use Agreement between the parties so that the SCV could continue to use the Chapel for certain purposes along with other organizations sharing a historic connection with the property. The SCV ultimately

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did not enter into the Use Agreement, but it was used as a template for the current Use Agreement between the VMFA and the United Daughters of the Confederacy.

Science Museum of Virginia (SMV) - Land leased to the Economic Development Authority (EDA) for the City of Richmond, Virginia for use by Bon Secours Hospital primarily as a training facility for the Washington Redskins – The Section continued its representation, with the Education Section, of the SMV with respect to its ground lease to the EDA for the Redskins training facility.

Fort Monroe Authority (FMA)

The Section continues to serve as the primary counsel to the FMA and counsel to the Governor on all matters related to Fort Monroe. The Fort, which traditionally has been a U.S. Army installation, contains approximately 565 acres of land with over 400 buildings and other facilities, many of which have historical significance. Three hundred and twelve acres of the land area at Fort Monroe reverted to the Commonwealth in 2013. In 2015, RELU was the key legal player in several major transactions of monumental import, including:

National Park Service (NPS) Transfer of Inner Fort and North Beach - One hundred twenty-one acres of federal surplus property was transferred to the National Park Service (NPS) to create the Fort Monroe National Monument on August 25, 2015. The Section also is in the process of granting a historic preservation easement over much of the property still owned by the Commonwealth.

Economic Development Conveyance (EDC) – The Section continues to assist the Governor’s office and FMA in negotiating an EDC under the Base Relocation and Closure law for eighty acres of property that did not revert to the Commonwealth when FMA was closed.

Economic Development Partnership (VEDP)

The Section was consulted as special real estate counsel by the VEDP in its lease of space in downtown Richmond for its new headquarters.

Virginia Outdoors Foundation (VOF)

House Mountain Management Dispute – The Section worked with VOF to develop legal and policy strategies for addressing its dispute with the Rockbridge Area Conservation Council (RACC) over the management of 876 acres in Rockbridge County owned by VOF, which includes the peaks of House Mountain. After more than a year of attempts to work with RACC, the VOF Board adopted a resolution

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setting forth how House Mountain would be managed. RACC then filed suit against VOF alleging breach of a 1989 agreement regarding management of the property. The Section is overseeing outside counsel in the litigation and continues serving as VOF's primary advisor in this matter.

Dispute Between Martha Boneta and Piedmont Environmental Council (PEC) – The Section advised VOF officials on a dispute regarding an easement co-held by PEC and VOF on property owned by Martha Boneta. The easement has provisions enforced by VOF and separate provisions enforced by PEC. Ms. Boneta alleges that PEC has engaged in intrusive actions related to enforcement of their provisions. The Section continues working with VOF staff, a mediator, counsel for PEC, and Ms. Boneta in an attempt to draft an amended easement to resolve the dispute.

Virginia Port Authority (VPA)

Port of Richmond – The Section was consulted on real estate matters concerning the long-term lease of the Port of Richmond. Section attorneys assisted in the redrafting of a prior long-term lease and advised on title insurance matters and closing.

Virginia State Police (VSP)

Acquisition of Area 14 Office in Edinburg Virginia for a purchase price of \$585,000 – The Section represented VSP in negotiating and executing the purchase, as well as drafting the conveyance documents and reviewing all due diligence documents.

Acquisition of Reg'l Office in Emporia Virginia for a purchase price of \$340,000 – The Section represented VSP in negotiating and executing the purchase, as well as drafting the conveyance documents and reviewing all due diligence documents.

Income and expense leases for various cell towers - The Section represented VSP with respect to various income and expense leases for cell towers throughout the Commonwealth.

Litigation

On behalf of the VOF, the Section prepared and submitted an amicus brief before the Virginia Supreme Court in the case of *Wetlands America Trust, Inc. v. White Cloud Nine Ventures, LLC*.

The Section defended the Commonwealth regarding the Petition for Appeal to the Supreme Court of Virginia in the case of *Asbury v. Commonwealth*, from the

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Fluvanna County Circuit Court. The *pro se* plaintiff had sought a considerable amount of monetary damages.

The Section provided litigation support to the Solicitor General's Office in the case of *Klemic, et al. v. Dominion Transmission, Inc.*, in which the Commonwealth intervened and assisted in the successful defense of Virginia statutes granting parties with eminent domain authority a right of entry to privately-owned real property for purposes of preliminary site inspections and survey work prior to any actual condemnation.

Construction Litigation Section

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

CLS gave legal advice to the Virginia Department of Transportation (VDOT) in every major transportation construction project that VDOT was involved in during the past year. This advice was given during the life of the construction projects; and, in many cases, it continued throughout the claims process and any ensuing litigation. Some of the more notable cases are mentioned below.

CLS defended VDOT in a \$22.4 million suit filed against VDOT stemming from the Chincoteague Bridge project on the eastern shore of Virginia. This project was the largest road and bridge transportation project on the eastern shore of Virginia in many years. The litigation was highly complex and involved many issues.

Also during the past year, the Section gave significant legal advice on the I-495 Virginia HOT Lanes Project which delivered the most significant enhancements to the Capital Beltway since its opening in 1964. This \$1.4 billion project added two new lanes in each direction from the Springfield Interchange to just north of the Dulles Toll Road and replaced a significant amount of aging infrastructure. This included replacing more than 50 bridges, overpasses, and major interchanges. The Section continues to provide ongoing support for this project. During the construction phase of the project, it advised senior project staff on change order

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language, claims management, issue documentation, FOIA requests, as well as surety, prompt payment, schedule, and emergency management issues. In 2015, the construction phase of the Project achieved substantial completion, and the Section began assisting senior project staff with the Concessionaire's transition to the operation of the HOT Lanes.

The Section also provided substantial assistance to VDOT regarding the I-95 Virginia Express Lanes Project, which will create approximately 29 miles of HOV/HOT lanes on I-95 from Garrisonville Road in Stafford County to the Edsall Road area on I-395. This \$925,000,000 project was procured under the PPTA. At the request of senior project staff, the Section provided project support, including advising on schedule issues, change order language, claims management, issue documentation, and drafting of correspondence. This support is ongoing.

Another significant VDOT project that the Section devoted substantial time and effort towards was the ongoing \$74 million design-build contract to construct a truck climbing lane on I-81. The contractor began having difficulties from the beginning of the project and filed an \$11.5 million claim. The claim was settled for \$5.5 million.

The Section worked with VDOT on the Route 29/Linton Hall Road Interchange Project during the past year. This \$267,000,000 project involves construction of a temporary detour for Route 29, construction of two railroad overpasses, widening of Route 29, and the creation of a limited-access facility on a portion of Route 29 and will greatly enhance the interchange with Route 66.

The Section also provided a great deal of assistance on the Route 50 at Courthouse Road project that involves the reconstruction of two major interchanges in Arlington. Due to the intense development and heavy congestion in this area, the project presents particularly challenging work sequencing and traffic management issues. Soon after commencing work, the contractor fell significantly behind schedule and sought additional compensation. The Section provided ongoing support for this project. After lengthy negotiations, its efforts resulted in a global settlement of all issues through a time certain. VDOT considered the global settlement a major success.

During 2015, a significant amount of time and effort was spent by the Section investigating and ultimately causing the Commonwealth to intervene in the case styled *Commonwealth of Virginia v. Trinity Industries, Inc.*, pending in the City of Richmond Circuit Court. The matter was previously filed under seal. Trinity manufactures and sells guard rail end treatments that are held out to act as crash cushions when motorists traveling Virginia's highways have an accident and crash into the end of a guard rail. Changes were made to the product in 2005 and neither the

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FHWA nor any of the states, including Virginia, were notified of the changes by Trinity. The changes appear to have made the product much less safe. This is a Fraud Against Taxpayers action.

In 2015, the Section worked on well over \$100,000,000 in claims and litigation involving the Commonwealth. Claims and litigation against the Commonwealth seeking nearly \$17.5 million were resolved for a collective total payment by the Commonwealth of approximately \$7 million. Payments to the Commonwealth, its departments, and universities totalled approximately \$3.625 million.

OPINIONS SECTION

Section 2.2-505 of the *Code of Virginia* authorizes the Attorney General to issue official opinions when requested by certain state or local officials. Official opinions are public documents and are published on the Office's website, and also in the Annual Report. The Attorney General's Office also has inherent authority to issue confidential informal opinions to those officials. In addition, § 2.2-3121 authorizes the Attorney General to issue advisory opinions to certain officials about the State and Local Government Conflict of Interests Act. The Opinions Section processes and manages all such requests.

When a request for an opinion is received, the Opinions Section first determines whether it qualifies for issuing an opinion. There are a number of factors which, by longstanding tradition, make issuance of an opinion inappropriate. By way of example, they include pending litigation, resolving issues of fact, and deciding matters reserved by law for decision to some other official or agency. If the request qualifies for an opinion, the Opinions Section does preliminary legal research and then assigns the opinion for drafting by an attorney with appropriate specialized knowledge of the subject. Most opinions are assigned to the different Divisions—Civil Litigation; Criminal Justice and Public Safety; Transportation, Real Estate, and Construction Litigation; Commerce, Environment, and Technology; Health, Education, and Social Services; or Solicitor General—but some are drafted by the Opinions Section.

Once drafted in one of the Divisions, an opinion is carefully reviewed and edited by the Opinions Section before being recommended for approval. This review process helps ensure that all opinions correctly apply and interpret all applicable legal authorities. It also ensures that opinions conform to the unique requirements for citation of legal authorities, as set forth in *The Bluebook*. Once the review process is complete and an opinion is authorized, it is issued. Official opinions and conflict of interests advisory opinions are signed by the Attorney General. Informal opinions are

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signed a Deputy Attorney General, Assistant Attorney General, or Opinions Counsel and do not necessarily reflect the official views of the Attorney General.

During 2015, sixty opinions were issued, consisting of thirty-one official opinions, twenty informal opinions, and nine conflict of interests advisory opinions. The requesters included the Governor of Virginia, numerous members of the Senate and House of Delegates of Virginia, judges, Commonwealth's Attorneys, Treasurers, Clerks of Circuit and General District Courts, Commissioners of the Revenue, heads of state agencies, and county, city and town attorneys. The requests came from counties, cities and towns in all parts of the Commonwealth, from Wise/Norton, Washington County, Coeburn and Lebanon in Southwest and Southside; to Fairfax, Loudoun, and Arlington in Northern Virginia; to Chesapeake, Norfolk, Virginia Beach, Urbanna and Gloucester in Tidewater; to Winchester, Albemarle, Lynchburg, Hanover, and Henrico in central Virginia and the Valley, to name a few.

The Opinions Section is also responsible for publishing the Annual Report of the Attorney General, pursuant to Virginia Code § 2.2-516.

PROGRAMS & COMMUNITY OUTREACH SECTION

In 2014, the Office created the Programs & Community Outreach Section to ensure that all of the resources of the Office are afforded to Virginia communities. The Section's programs include: Victim Assistance, Identity Theft Passport, Domestic Violence Services, Address Confidentiality, Virginia Rules, Gang Prevention, Human Trafficking Awareness, Triad, Lethality Assessment Protocol (LAP), Physical Evidence Recovery Kits (PERKS) Elimination, Project Safe Neighborhoods (PSN) and Re-Entry. During 2015, the Section secured over \$1,750,000 in new federal, state, and local grants to operate its programs and initiatives.

The Section is comprised of a centralized team of program coordinators and administrators who oversee and implement its programs, initiatives, trainings, collaborations, and public safety awareness campaigns for citizens, law enforcement, human service providers, and prosecutors. The Section also includes six community outreach coordinators assigned to different regions to promote the Office's services and resources to all residents of the Commonwealth. These regions include Northern Virginia, Central Virginia, Mountain Empire, Southwest Virginia, and Tidewater.

The Section's Victim Notification Program (VNP) notifies victims of any appeal or habeas corpus proceeding involving cases in which they are victim. During 2015,

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the Section provided assistance to 1,488³ victims of crime (479 criminal cases, 225 sexually violent predator civil commitment cases, and 784 identity theft cases) through VNP and the Identity Theft Passport Program. Also in 2015, the Section's Domestic Victim Services enrolled 36 new families and provided services to 200 active participants in the Address Confidentiality Program, a confidential mail-forwarding service for victims of domestic violence, sexual assault, and stalking.

To combat domestic violence homicides, the Section hosted a four-day training conference on the LAP which was attended by over 125 participants representing 21 law enforcement agencies and 23 victim service agencies. The LAP is an evidence-based screening tool for first responders to identify victims who are at high risk of suffering serious injury or death by their abusers and to connect them to local domestic violence services.

To address campus sexual violence, the Section hosted the Campus Sexual Violence Summit, which was attended by over 120 individuals representing every community college institution in the Commonwealth. In its continual effort to serve victims and survivors, the Section, on behalf of the Office and in partnership with the Department of the Forensic Science (DFS), was awarded a \$1.4 million grant to test 2,034 untested sexual assault evidence kits, also known as PERKs. The goal of PERKs is to identify predators—possibly linking evidence to cold cases—in order to assist prosecutors and law enforcement officers in providing justice for victims and survivors. Actual testing of PERKs is scheduled to begin in early 2016.

This year, the Section also conducted an advertising campaign for the national human trafficking hotline. It distributed brochures and posters in public areas such as truck stops, universities, high schools, courthouses, and state-owned rest areas. It also created and provided adhesive stickers with hotline numbers to VDOT, which had them placed on the mirrors in restrooms at 43 rest areas and welcome centers across Virginia. Additionally, the Section created billboards and bulletins that were placed along the busiest corridors of Interstates 81, 95, and 64 to promote awareness of human trafficking.

During 2015, the Section collaborated with DCJS to sponsor “Gang Busters III,” a week-long training session for Virginia law enforcement and prosecutors. This intensive team training included a workshop-style interactive course focused on the investigation and prosecution of gang-related cases, including components on human trafficking, narcotics, and witness protection.

³ A single victim may be counted more than once depending on the number of cases the individual is involved in.

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Since 1995, the Office has used the Triad Program to increase awareness of scams and frauds that target seniors, to strengthen communication between law enforcement and seniors, and to educate seniors on the local and state resources that are available to reduce the fear of crime and victimization. The Section's Community Outreach Members have coordinated with the Office's Medicaid Fraud Control Unit (MFCU) as well as other senior organizations and agencies to increase efforts in serving the senior population. In 2015, the Office signed charters for four new Triad Chapters in the Roanoke area, increasing the total number of Virginia Triad Chapters to 134, which includes more than 225 participating cities, counties, and towns. During 2015, the Office provided a total of \$29,865.73 in mini-grants to 16 Virginia Triad chapters. For the 20th Anniversary of the Program, the Section hosted a three-day Virginia Triad Conference in March that was attended by over 120 guests and vendors.

Through the Office's Re-Entry Program, the Section provides assistance to local jails and sheriffs' offices as they prepare inmates for release and connect them with community stakeholders. The goal of the Re-Entry Program is to provide resources for returning citizens to reduce recidivism and to strengthen communities. In 2015, the Program reached out to 17 local and regional jail facilities across Virginia and conducted 24 presentations on re-entry and recidivism to 10 jail facilities. The Section successfully established partnerships with the Department of Motor Vehicle Connect Program, Virginia Department of Corrections (VADOC), Virginia Commonwealth University, and the Department of Social Services to expand re-entry services and efforts.

The Section oversees Virginia Rules, a Virginia-specific law education curriculum for teens featuring 23 stand-alone modules, covering a wide variety of juvenile law issues. Drugs, bullying, alcohol and tobacco, internet safety, the criminal justice system, and labor law are just a few of the modules offered through the Program's website. In 2015, Virginia Rules provided resources and tools to 268 newly-enrolled instructors, increasing the total number of instructors to 1,449. Instructors reported giving presentations to over 29,000 students, representing an 82% increase in the number of students taught in comparison to 2014. In addition, the Section sponsored Virginia Rules Summer Camps in five localities across the state (Richmond, Chesapeake, Pittsylvania, Norfolk, and Charlottesville), providing over 500 middle and high school students with a week-long day camp experience. These students experienced traditional camp fun, learned about Virginia law, and built positive relationships with their school resource officers and other law enforcement officers who served as camp counselors, as well as with other community volunteers assisting with camp planning and programming.

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To address violence and gang crimes in the City of Norfolk, the Community Outreach Team actively reached out to the at-risk youth population through the Office's PSN initiative. PSN aims to reduce violent crime by educating youth about consequences of gang involvement and illegal use of guns. The Section joined forces with the Norfolk Police Department Crime Prevention Unit, the Virginia Gang Investigators Association, and other local state and community agencies to collaborate on four Anti-Bullying and Gangs Forums in 2015.

In response to Virginia's growing heroin and prescription drug epidemic, the Section assisted with the production and release of a documentary film *Heroin: The Hardest Hit* and debuted the film at screenings in several localities throughout the Commonwealth. Once the hardcopies are available, the Section will oversee distribution of the DVDs to the public. Additionally, the Section successfully managed thousands of requests for the distribution of *The Big Lie: Unmasking the Truth Behind Gangs* DVD to constituents, educators, probation officers, and other service providers and institutions across the Commonwealth.

On behalf of the Office, the Section collaborated with many state agencies, law enforcement organizations, nonprofit organizations, businesses, law firms, hospitals, clinics, universities, churches, and other partners to accomplish its mission. During 2015, the Section joined forces with DCJS, DFS, Office of Chief Medical Examiner, Maryland LAP, NCVRW, Virginia Sexual and Domestic Violence Action Alliance, Commonwealth's Attorney's Services Council, VADOC, VDOT, DMV, Virginia Poverty Law Center, Maryland Network Against Domestic Violence, Office of the Executive Secretary of the Supreme Court, Virginia Victim Assistance Network, Virginia Association of Chiefs of Police, Virginia Sheriffs' Association, Virginia Chapter of the International Association of Forensic Nurses, Virginia Gang Investigator's Association, Total Action for Progress, and many other entities to serve residents, communities, and providers throughout Virginia. In addition, the Section's team members delivered over 290 presentations, participated in at least 74 conferences and trainings, and served as members in at least 42 various professional organizations, committees, task forces, and forums. In 2015, the Section has reached out to over 687,000 Virginia citizens in its mission to promote safety, awareness, and the availability of resources.

LEGISLATIVE ACCOMPLISHMENTS

In 2015, this Office worked with a bipartisan set of legislators to introduce a number of bills aimed at promoting public safety within the Commonwealth.

The Office won a significant victory with the passage of comprehensive legislation aimed at combatting prescription drug and heroin abuse, a leading cause of

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deaths in the prior year. Through the efforts of a bipartisan coalition of legislators, interest groups, and executive branch agencies, fire fighters and law enforcement can now possess naloxone while on duty to save lives in the event potentially fatal drug overdoses occur. Additionally, pharmacists can enter into a standing order with a physician so that anyone in need of a naloxone device may purchase one at a pharmacy without having to see a doctor first. Naloxone, a lifesaving drug that often reverses the effects of an overdose, has been proven to save lives, is not addictive, and is easy to use with minimal training. Making the substance available in such critical circumstances will ensure that fewer people die from drug overdoses. Law enforcement and the medical community worked together to support this measure which led to its historic passage and implementation.

This Office also worked to approve probation and parole officers as authorized users of Virginia's Prescription Monitoring Program to enable them to monitor the drug use of individuals on probation or parole. This encourages personal abstinence from illegal drug use and helps to reduce recidivism in local jails and prisons. In addition, the Office worked to pass a groundbreaking new law that will help save lives when overdoses occur by providing certain criminal immunity if the person, or a bystander, calls "911" to report the overdose and cooperates with law enforcement. This new law will encourage people to seek medical assistance in the event of an overdose and will help law enforcement find and arrest persons responsible for supplying the illegal drugs. Finally, legislation was proposed that would hold drug dealers accountable when the drugs they supply lead to fatal overdoses. The Office worked with Delegates Lingamfelter and Miller in an endeavor to amend the felony homicide statute to make it easier to prosecute drug dealers for these deaths. Unfortunately, the bill did not come out of the conference committee, and prosecutors continue to struggle to find ways to utilize the felony homicide statute to hold drug dealers accountable.

Finally, other public safety bills introduced by the Office in 2015 include measures focused on 1) allowing localities or regions to establish adult fatality review teams to examine unnatural or suspicious deaths of older or incapacitated individuals; 2) protections for victims of child pornography, exploitation, and human trafficking; 3) protections for victims of domestic violence through the denial of bail for persons charged with strangulation; 4) banning potentially dangerous powdered or crystalline alcohol substances from Virginia's grocery stores; and 5) modernizing Virginia's law in accord with the U.S. Supreme Court's holding in *Hall v. Florida* regarding execution of the intellectually disabled. All of these bills were passed by the General Assembly in 2015.

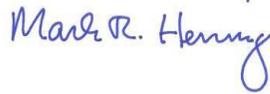
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CONCLUSION

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 their efforts.

With kindest regards, I am

Very truly yours,

A handwritten signature in blue ink that reads "Mark R. Henning". The signature is written in a cursive style with a large, looping final letter.

Attorney General

2015 REPORT OF THE ATTORNEY GENERAL
PERSONNEL OF THE OFFICE¹

Mark R. Herring	Attorney General
Cynthia E. Hudson	Chief Deputy Attorney General
Cynthia V. Bailey	Deputy Attorney General
Jeffrey M. Bourne.....	Deputy Attorney General
Linda Lee Bryant.....	Deputy Attorney General
John W. Daniel II	Deputy Attorney General
Rhodes B. Ritenour	Deputy Attorney General
Stuart A. Raphael	Solicitor General
Trevor S. Cox	Deputy Solicitor General & Exec. Division Counsel
H. Lane Kneedler III	Senior Counsel to Attorney General
G. Timothy Oksman	Opinions Counsel
Kristina P. Alexander	Senior Assistant Attorney General/Chief
Jeffrey R. Allen	Senior Assistant Attorney General/Chief
C. Meade Browder Jr.....	Senior Assistant Attorney General/Chief
Beth J. Edwards.....	Senior Assistant Attorney General/Chief
Samuel E. Fishel IV.....	Senior Assistant Attorney General/Chief
Ronald C. Forehand.....	Senior Assistant Attorney General/Chief
Christy E. Harris-Lipford	Senior Assistant Attorney General/Chief
Michael A. Jagels	Senior Assistant Attorney General/Chief
Michael T. Judge	Senior Assistant Attorney General/Chief
Heather H. Lockerman	Senior Assistant Attorney General/Chief
Richard T. McGrath	Senior Assistant Attorney General/Chief
Peter R. Messitt	Senior Assistant Attorney General/Chief
Steven O. Owens	Senior Assistant Attorney General/Chief
Kim F. Piner	Senior Assistant Attorney General/Chief
Ronald R. Regnery	Senior Assistant Attorney General/Chief
Lynne Catherine Rhode.....	Senior Assistant Attorney General/Chief
Jill M. Ryan.....	Senior Assistant Attorney General/Chief
Richard S. Schweiker Jr.	Senior Assistant Attorney General/Chief
Katherine E. Surface Burks	Senior Assistant Attorney General/Chief
Allyson K. Tysinger	Senior Assistant Attorney General/Chief
Richard C. Vorhis.....	Senior Assistant Attorney General/Chief
John S. Westrick.....	Senior 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

¹ This list includes all persons employed by the Office of the Attorney General during calendar year 2015, as provided by the Office's Division of Administration. The most recent title is used for any employee whose position changed during the year.

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Susan F. Barr	Senior Assistant Attorney General
Janet Westbrook Baugh	Senior Assistant Attorney General
Rosemary V. Bourne	Senior Assistant Attorney General
Mitchell D. Broudy	Senior Assistant Attorney General
Evelyn Bufton	Senior Assistant Attorney General
Randall E. Clark	Senior Assistant Attorney General
Ellen E. Coates	Senior Assistant Attorney General
Alexander E. Conlyn	Senior Assistant Attorney General
Geoffrey S. Darnell	Senior Assistant Attorney General
Leah A. Darron	Senior Assistant Attorney General
Amy K. Dilworth	Senior Assistant Attorney General
Matthew P. Dullaghan	Senior Assistant Attorney General
Elizabeth G. Dwyer	Senior Assistant Attorney General
Christopher D. Eib	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
Mary Ellen F. Forehand	Senior Assistant Attorney General
Gregory W. Franklin	Senior Assistant Attorney General
John P. Griffin	Senior Assistant Attorney General
Margaret Elizabeth Griffin	Senior Assistant Attorney General
Wayne T. Halbleib	Senior Assistant Attorney General
Catherina F. Hutchins	Senior Assistant Attorney General
David B. Irvin	Senior Assistant Attorney General
Joseph V. Jagdmann	Senior Assistant Attorney General
Donald E. Jeffrey III	Senior Assistant Attorney General
Brian R. Jones	Senior Assistant Attorney General
Frederick R. Kozak	Senior Assistant Attorney General
Paul Kugelman Jr.	Senior Assistant Attorney General
Robin Kurz	Senior Assistant Attorney General
Donald A. Lahy	Senior Assistant Attorney General
Marsha B. Lambert	Senior Assistant Attorney General
Richard A. Mahevich II	Senior Assistant Attorney General
Kathleen B. Martin	Senior Assistant Attorney General
Janice L. McDaniel	Senior Assistant Attorney General
John H. McLees Jr.	Senior Assistant Attorney General
Eugene P. Murphy	Senior Assistant Attorney General
Nicholas S. Murphy	Senior Assistant Attorney General
Carrie S. Nee	Senior Assistant Attorney General
Cynthia H. Norwood	Senior Assistant Attorney General
Francis W. Pedrotty	Senior Assistant Attorney General

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Sydney E. Rab	Senior Assistant Attorney General
Steven P. Roadcap	Senior Assistant Attorney General
Donnie W. Salyers	Senior Assistant Attorney General
James E. Schliessmann	Senior Assistant Attorney General
Paul S. Stahl	Senior Assistant Attorney General
Virginia B. Theisen	Senior Assistant Attorney General
Amelia Bland Waller	Senior Assistant Attorney General
Gary P. Webb	Senior Assistant Attorney General
Jennifer C. Williamson	Senior Assistant Attorney General
Steven A. Witmer	Senior Assistant Attorney General
Alice T. Armstrong	Sr. AAG/Dir., Actual Innocence & Cap. Lit. Unit
K. Michelle Welch	Sr. AAG/Dir., Animal Law Unit
Alice Burlinson	Sr. AAG/Dir., Legal Operations (Headquarters)
Nancy Crawford	Sr. AAG/Dir., Legal Operations (Central)
Victoria Dullaghan	Sr. AAG/Dir., Legal Operations (East)
Josh S. Ours	Sr. AAG/Dir., Legal Operations (West)
Sarah O. Allen	Senior Assistant Attorney General/Unit Manager
Scott J. Fitzgerald	Senior Assistant Attorney General/Unit Manager
Pierce C. Acuff	Assistant Attorney General
Airen Brittany Adamonis	Assistant Attorney General
Katherine Quinlan Adelfio	Assistant Attorney General
Catherine Christine Ayres	Assistant Attorney General
Abrar Azamuddin	Assistant Attorney General
Erica J. Bailey	Assistant Attorney General
Erin L. Barrett	Assistant Attorney General
Juliet M. Bates	Assistant Attorney General
Susan E. Baumgartner	Assistant Attorney General
Pamela Brown Beckner	Assistant Attorney General
Ava Greene Bedden	Assistant Attorney General
Justin Ian Bell	Assistant Attorney General
Anthony R. Bessette	Assistant Attorney General
Jessica Leigh James Berdichevsky	Assistant Attorney General
Anna Tillie Birkenheier	Assistant Attorney General
Marc J. Birnbaum	Assistant Attorney General
John W. Blanton	Assistant Attorney General
Kelci Aman Marie Block	Assistant Attorney General
Johanna E. Bragg-Midgett	Assistant Attorney General
Peter E. Broadbent III	Assistant Attorney General
Molly Burke	Assistant Attorney General
Charles M. Burton Jr.	Assistant Attorney General

2015 REPORT OF THE ATTORNEY GENERAL

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John Godfrey Butler III	Assistant Attorney General
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Lauren C. Campbell	Assistant Attorney General
Ann M. Chidester	Assistant Attorney General
Carla R. Collins	Assistant Attorney General
Braden J. Curtis	Assistant Attorney General
Nancy H. Davidson	Assistant Attorney General
Martin L. Davis	Assistant Attorney General
Katherine M. DeCoster	Assistant Attorney General
Keisha Marnae Dillard-Brady	Assistant Attorney General
Anna Athena Dimitri	Assistant Attorney General
Ryan D. Doherty	Assistant Attorney General
Michelle A. Duda	Assistant Attorney General
Kate E. Dwyre	Assistant Attorney General
Kathryn F. Fenske	Assistant Attorney General
James A. Fiorelli	Assistant Attorney General
William B. Fiske	Assistant Attorney General
Elizabeth L. Fitzgerald	Assistant Attorney General
James Michael Flaherty	Assistant Attorney General
Claire C. Foley	Assistant Attorney General
Matthew J. Friedman	Assistant Attorney General
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Jennifer L. Gobble	Assistant Attorney General
Matthew L. Gooch	Assistant Attorney General
Joelle E. Gotwals	Assistant Attorney General
David C. Grandis	Assistant Attorney General
Kristen L. Gray	Assistant Attorney General
Elizabeth M. Guggenheim	Assistant Attorney General
Elizabeth Leigh Gunn	Assistant Attorney General
Joseph Samuel Hall	Assistant Attorney General
Timothy P. Halpin	Assistant Attorney General
Ryan S. Hardy	Assistant Attorney General
Susan M. Harris	Assistant Attorney General
John F. Haugh	Assistant Attorney General
Mary Hendricks Hawkins	Assistant Attorney General
Jonathan B. Heath	Assistant Attorney General
Tyler T. Henry	Assistant Attorney General
Joshua D. Heslinga	Assistant Attorney General

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Angela Maree King	Assistant Attorney General
Usha Koduru.....	Assistant Attorney General
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Lindsay C. Leonard.....	Assistant Attorney General
Ellen Ruth Malenke.....	Assistant Attorney General
Tawnya Ann Manzlak	Assistant Attorney General
Albert Pilavin Mayer.....	Assistant Attorney General
Laura R. McCarthy.....	Assistant Attorney General
John D. McChesney	Assistant Attorney General
Patrick A. McDade.....	Assistant Attorney General
Robert B. McEntee Jr.....	Assistant Attorney General
Matthew Robert McGuire	Assistant Attorney General
Erin R. McNeill	Assistant Attorney General
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Charis A. Mitchell	Assistant Attorney General
Christy W. Monolo.....	Assistant Attorney General
Elaine S. Moore	Assistant Attorney General
Elizabeth L. Montagna	Assistant Attorney General
Sean J. Murphy.....	Assistant Attorney General
Valerie L. Myers.....	Assistant Attorney General
Adele M. Neiburg.....	Assistant Attorney General
James W. Noel III.....	Assistant Attorney General

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Joseph C. Obenshain.....	Assistant Attorney General
Alexander K. Page.....	Assistant Attorney General
J. Michael Parsons.....	Assistant Attorney General
Christian A. Parrish.....	Assistant Attorney General
Keven B. Patchett.....	Assistant Attorney General
Elizabeth B. Peay.....	Assistant Attorney General
Kiva Bland Pierce.....	Assistant Attorney General
Christopher J. Pitera.....	Assistant Attorney General
J. Duncan Pitchford.....	Assistant Attorney General
Corey L. Poindexter.....	Assistant Attorney General
Lori L. Pound.....	Assistant Attorney General
Charles A. Quagliato.....	Assistant Attorney General
Ann M. Reardon.....	Assistant Attorney General
William T. Reisinger.....	Assistant Attorney General
Rodolfo R. Remigio.....	Assistant Attorney General
Eric J. Reynolds.....	Assistant Attorney General
Gregory Lee Richards.....	Assistant Attorney General
Sarah F. Robb.....	Assistant Attorney General
Wendell Charles Roberts.....	Assistant Attorney General
Curtis M. Rogers.....	Assistant Attorney General
Stacey Elizabeth Rohrs.....	Assistant Attorney General
Nerissa Neal Rouzer.....	Assistant Attorney General
Carly Luisa Rush.....	Assistant Attorney General
James E. Rutkowski.....	Assistant Attorney General
Tracey D.S. Sanders.....	Assistant Attorney General
Christopher P. Schandavel.....	Assistant Attorney General
Emily Oye Sealy.....	Assistant Attorney General
Mark D. Seidelson.....	Assistant Attorney General
Mamoona Hafeez Siddiqui.....	Assistant Attorney General
Nicholas F. Simopoulos.....	Assistant Attorney General
Liza Shawn Simmons.....	Assistant Attorney General
Jessica Morgan Smith.....	Assistant Attorney General
Stephen M. Solomon.....	Assistant Attorney General
Stephen John Sovinsky.....	Assistant Attorney General
Craig W. Stallard.....	Assistant Attorney General
Karen A.D. Taylor.....	Assistant Attorney General
Mathew A. Taylor.....	Assistant Attorney General
Ramona Leigh Taylor.....	Assistant Attorney General

2015 REPORT OF THE ATTORNEY GENERAL

Nancy M. Thorne	Assistant Attorney General
David M. Uberman.....	Assistant Attorney General
Laurel Anne Uhlar.....	Assistant Attorney General
Scott F. Weber.....	Assistant Attorney General
Vincent J. Vaccarella.....	Assistant Attorney General
Steven M. Westermann	Assistant Attorney General
Erin Dugan Whealton.....	Assistant Attorney General
Alvin M. Whitley	Assistant Attorney General
Megan Alma Winfield.....	Assistant Attorney General
William E. Winters Jr.....	Assistant Attorney General
Randall H. Wintory	Assistant Attorney General
Corie Tillman Wolf.....	Assistant Attorney General
Daniel S. Wolf.....	Assistant Attorney General
Katherine Parrott Wright.....	Assistant Attorney General
Adam J. Yost.....	Assistant Attorney General
Rebecca A. Young.....	Assistant Attorney General
Susan B. Curwood.....	Asst. Att’y Gen./Dir., Tobacco Enforcement Unit
James F. Entas	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
Euticha B. Hawkins.....	Assistant Attorney General/Publications Coordinator
Amanda McGuire.....	Assistant Attorney General/Publications Coordinator
James W. Noel III.....	Assistant Attorney General/VPA Counsel
Nicholas F. Simopoulos	Assistant Attorney General/Unit Manager
Deborah Love.....	Sr. Ass’t Attorney General/College Counsel
Roscoe C. Roberts	Sr. Ass’t Attorney General/University Counsel
Madelyn F. Wessel.....	Sr. Ass’t Attorney General/University Counsel
Greer D. Saunders	Assistant Attorney General/System Counsel
Pamela F. Boston.....	Assistant Attorney General/University Counsel
Kay K. Heidbreder	Assistant Attorney General/University Counsel
Maureen R. Matsen	Assistant Attorney General/University Counsel
Thomas M. Moncure Jr.....	Assistant Attorney General/University Counsel
Richard E. Nance.....	Assistant Attorney General/University Counsel
Susan L. Wheeler	Assistant Attorney General/University Counsel
Thomas S. Cantone.....	Ass’t Attorney General/Assoc. System Counsel
Noelle L. Shaw-Bell.....	Ass’t Attorney General/Assoc. System Counsel
Jacob A. Belue.....	Ass’t Attorney General/Assoc. Univ. Counsel
Elizabeth Lim Brooks.....	Ass’t Attorney General/Assoc. Univ. Counsel
Stephen F. Capaldo.....	Ass’t Attorney General/Assoc. Univ. Counsel
David G. Drummey.....	Ass’t Attorney General/Assoc. Univ. Counsel

2015 REPORT OF THE ATTORNEY GENERAL

Lynne R. Fleming.....	Ass't Attorney General/Assoc. Univ. Counsel
K. Anne G. Gentry	Ass't Attorney General/Assoc. Univ. Counsel
Mark A. Gess.....	Ass't Attorney General/Assoc. Univ. Counsel
Beth C. Hodsdon	Ass't Attorney General/Assoc. Univ. Counsel
Sarah Dearing Johns.....	Ass't Attorney General/Assoc. Univ. Counsel
Sarah Dearing Johns.....	Ass't Attorney General/Assoc. Univ. Counsel
John F. Knight.....	Ass't Attorney General/Assoc. Univ. Counsel
Alison P. Landry.....	Ass't Attorney General/Assoc. Univ. Counsel
Marvin Hudson McClanahan	Ass't Attorney General/Assoc. Univ. Counsel
Barry T. Meek	Ass't Attorney General/Assoc. Univ. Counsel
Sarah E. Melchoir.....	Ass't Attorney General/Assoc. Univ. Counsel
Mikie F. Melis	Ass't Attorney General/Assoc. Univ. Counsel
Martha M. Parrish.....	Ass't Attorney General/Assoc. Univ. Counsel
Pamela H. Sellers	Ass't Attorney General/Assoc. Univ. Counsel
Farnaz Farkish Thompson.....	Ass't Attorney General/Assoc. Univ. Counsel
Robert Michael Tyler	Ass't Attorney General/Assoc. Univ. Counsel
Brian E. Walther.....	Ass't Attorney General/Assoc. Univ. Counsel
James D. Wright.....	Ass't Attorney General/Assoc. Univ. Counsel
Phillip O. Figura	Chief Prosecutor
David W. Tooker	Chief Prosecutor
Joseph E.H. Atkinson.....	Chief of Fraud & Corporate Neglect Investigations
Shawri Jenica King-Casey.....	Compliance & Transparency Counsel
R. Thomas Payne II.....	Dir., Civil Rights Unit/Asst. Att'y Gen., Fair Housing
Kimberly M. Bolton	Lead Attorney/Assistant Attorney General
Candice M. Deisher.....	Lead Attorney/Assistant Attorney General
W. Clay Garrett	Lead Attorney/Assistant Attorney General
Frederick S. Fisher	Special Assistant Attorney General
Alan Katz.....	Special Assistant Attorney General
Crystal V. Adams.....	Legal Secretary Senior
Michelle Powell Ahearn.....	Paralegal
Lauren Ashworth Ainsley	Legal Secretary
Sameer Ali.....	Network Engineer
J. Hunter Allen Jr.....	Investigator
S. Elizabeth Allen.....	Legal Secretary Senior Expert
Brittany A. Anderson	Dir., Legislative & Constituent Affairs
Esther Welch Anderson.....	MFCU Administrative Manager
James W. Anderson.....	Investigator
Matthew Patrick Anderson.....	eDiscovery Analyst
Susan M. Antonelli.....	Claims Representative
Leigh E. Archer	Director of Administration
Kristine E. Asgian	Grants Manager

2015 REPORT OF THE ATTORNEY GENERAL

Christine Renee Aubin	Investigator
Ira K. Ausby	Systems Administrator
Sheerie C. Ayres.....	Administrative Coordinator
Joshua Lawrence Ballew	Dispute Resolution Specialist
David S. Barber	Investigator
Joseph Gregory Barlow	Investigator
Andrew P. Barone	Chief of Fraud & Corporate Neglect Investigations
Nicolette Stumpf Bateson.....	MFCU Legal Secretary
Delilah Beaner.....	Legal Secretary Senior Expert
Kiana M. Beekman.....	Investigator
Deborah Hurley Bell	Community Outreach Coordinator
Rakeisha Pearson Benn	Community Outreach Coordinator
Elizabeth K. Beverly	Investigator
Yongsheng Bian	Data Analyst
Erin Blair Bishop.....	Dispute Resolution Specialist
Heather K. Blanchard.....	eDiscovery Project Manager
Althea Ann Boling.....	Intake Specialist Senior
Kevin Marcelle Boone.....	eDiscovery Supervisor
Daniel M. Booth.....	Senior Financial Investigator
Elizabeth Cullen Bray	Legal Secretary Senior
Donna M. Brown.....	Financial Manager
Linda F. Browning	Employee Relations and Training Manager
Amy B. Bullock.....	Legal Secretary Senior
Tanya L. Buresh-Werby.....	Deputy Director of Office Operations
Timothy Paul Burke	Investigative Supervisor
Howard K. Burkhalter	Investigator
Charles R. Calton	Claims Representative
Diana Tas Cardelino.....	EEO Investigator/Mediator
George Cary Cartin II.....	Application System Developer
Pamela Renee Charles	IT Support Specialist I
Addison L. Cheeseman.....	MFCU Computer Forensic-IT Supervisor
Randall L. Clouse.....	Director & Chief, Medicaid Fraud Control Unit
Betty S. Coble.....	Legal Secretary Senior Expert
Christina I. Coen.....	Legal Secretary Senior Expert
Sharon T. Colescott.....	Legal Secretary Senior
Joseph J. Conahan	Investigator
Deborah P. Cook	Claims Specialist Senior Expert
John K. Cook Jr.....	Facilities Supervisor
Jill S. Costen.....	Deputy Director, Investigations & Audits
Billy Jack Cox Jr.....	Investigator
Donna D. Creekmore.....	Legal Secretary Senior

2015 REPORT OF THE ATTORNEY GENERAL

Charles E. Crute Jr.....	Senior Criminal Investigator
Thomasina Margaret Cunningham.....	Auditor
Deborah Diane Daniels.....	Executive Assistant to Senior Counsel
Beverly B. Darby.....	Investigator
Jennifer S. Dauzier.....	Criminal Analyst Senior
Demetrice A. Davis.....	Dispute Resolution Specialist
Diane W. Davis.....	Legal Secretary
J. Randall Davis.....	Community Outreach Coordinator
Tunisia M. Dean.....	Accountant Senior
Robert A. DeGroot.....	Investigative Supervisor
Doyle W. DeGuzman.....	Deputy Dir., Information Systems
Linda A. Dickerson.....	Unit Manager, CIRU
Amy Rush Duncan.....	Community Outreach Coordinator
Kelly Ford Ecimovic.....	Senior Expert Claims Representative
Elizabeth A. Edmond.....	Paralegal Senior
Melinda S.C. Edwards.....	Paralegal
Sonya L. Edwards.....	Claims Representative
Devin A. England.....	Financial Investigator
Harold Ewers.....	Investigator
David Buck Farmer.....	Investigator
Tosha A. Feild.....	Investigator
Mark S. Fero.....	Public Safety Financial Manager
Vivian B. Ferry.....	Legal Secretary Senior Expert
Teresa J. Finch.....	Intake Specialist Senior
Cynthia Marie Finley.....	Financial Manager
Arian N. Fisher.....	Administrative Assistant
Cheryl D. Fleming.....	Administrative Legal Secretary Senior
Caren Yeager Flick.....	Investigator
Heather M. Ford.....	Legal Secretary
Judith B. Frazier.....	Legal Secretary Senior
April Shannon Freeman.....	Program Coordinator
Lisa Garren Furr.....	Program Coordinator
William W. Gentry.....	Criminal Investigator
Sharon K. Goggin.....	Paralegal
Montrue H. Goldfarb.....	Paralegal Senior
Michelle Renee Gopez.....	Records Manager
David C. Graham.....	Director, Computer Forensics Unit
Karl E. Grotos.....	Business Manager
Johnetta Hill Guishard.....	Community Outreach Coordinator
Steven F. Hadra.....	Investigative Supervisor
Tracy Lee Hall.....	Web Specialist

2015 REPORT OF THE ATTORNEY GENERAL

Lyn J. Hammack.....	Administrative Legal Secretary Senior
DeNay L. Harris.	Claims Specialist
Paul Gabriel Hastings Jr.	Investigator
Thomas E. Haynesworth	Facilities Assistant
Jennifer Peterson Heatherington.....	Investigator
Regina M. Hedman.....	Investigator
Deborah J. Henderson	Legal Secretary Senior
Howard J. Hicks III	Investigative Supervisor
Shaquita I. Hicks	Receptionist
Michael T. Hnatowski	eDiscovery Project Manager
Margaret C. Horn	Chief of Civil Investigations and Elder Abuse
Sandra W. Hott.....	Legal Secretary Senior
Shante S. Howell.....	Claims Representative
Elizabeth E. Hudnall.....	Nurse Investigator
Wendy Renee Hupp.....	Financial Manager
Steven D. Irons	Investigative Supervisor
Megan Kelly Jenks	Investigator
Judith G. Jesse	Paralegal Senior Expert
Abigail Lester Johnson.....	Legal Secretary
Genea C.P. Johnson.....	Paralegal
Kevin M. Johnson.....	Senior Investigator
Shawne Moore Johnson.....	Legal Secretary Senior
Jon M. Johnston.....	Senior Criminal Investigator
Whitney W. Jones.....	Legal Secretary
Tammy P. Kagey.....	Paralegal Senior Expert
Hyo J. Kang.....	Senior Database Administrator/Developer
Michael G. Keen.....	Investigator
Michael K. Kelly	Director of Communication
Debra M. Kilpatrick	Administrative Coordinator
Ryan T. Kolb.....	Financial Investigator
Antonio Darnell Kornegay	Procurement Officer
Jennifer Lynn Krajewski	Paralegal Senior
Mary Anne Lange.....	Paralegal Senior Expert
Donna Lynn Lanno.....	Deputy Director of Finance
Wailing Lau.....	Asset Forfeiture Coordinator
Rachel Anne Lawless	Director of Scheduling
Laura Ann LeBlanc	Paralegal
Patricia M. Lewis	Unit Program Coordinator
Michele Irene Leith	Community Outreach Coordinator
William T. Ludwig.....	Data Analyst
Deborrah W. Mahone	Paralegal Senior Expert/Legislative Specialist

2015 REPORT OF THE ATTORNEY GENERAL

Jason A. Martin	Computer Forensic Specialist
Madrika Lavona Martin.....	Procurement Manager
Sara I. Martin.....	Human Resources Analyst
Tomisha R. Martin	Claims Specialist Senior
Joshua A. Marwitz.....	Investigator
Stephanie B. Maye	Legal Secretary Senior
LaToya L. Mayo.....	Administrative Assistant
Angela M. McCoy.....	Administrative Legal Secretary Senior
Lauren Perry McDaniel.....	Claims Representative
Judy O. McGuire	Claims Representative
George T. McLaughlin.....	Investigator/Forensic Examiner
Melissa A. McMenemy	Statewide Facilitator
Jacqlyn W. Melson.....	Investigator
David J. Miller.....	Investigator
Lynice D. Mitchell	Office Services Specialist Senior
Karen G. Molzhon.....	Legal Secretary Senior
Nicole Danielle Monroe.....	Director of Information Systems
Eda M. Montgomery	Investigative Supervisor
Terrie Darnell Montour.....	Legal Secretary
Patricia A. Morrison.....	Unit Manager, DRIU
Zachary H. Moyer	Criminal Investigator/Computer Forensic Examiner
Howard M. Mulholland.....	FCIC Financial Investigator
Mary C. Nevetral.....	Office Support Specialist
Connie J. Newcomb	Director of Office Operations
Meaghan E. O'Brien.....	Outside Counsel Program Coordinator
Kevin C. O'Holleran.....	Chief of Staff
Trudy A. Oliver-Cuoghi.....	Paralegal
Laura Jean Olman.....	Investigator/Forensic Examiner
Christopher M. Olson.....	Investigator
Timothy J. Ortwein.....	Financial Investigator/Computer Forensic Examiner
Janice R. Pace.....	Financial Manager
Hailey Jeanine Paladino	Human Resources Assistant
Sharon P. Pannell	Legal Secretary Senior Expert
Doris M. Parham	Intake Specialist
John W. Peirce.....	Investigative Supervisor
Coty D. Pelletier.....	Senior Investigator
Duncan Allen Pence.....	Investigator
Jonathan W.T. Peters.....	Financial Investigator
Nicole Therese Phelps.....	Administrative Coordinator
Lynette R. Plummer	Exec. Ass't to Att'y Gen. & Chief Dep. Att'y General
Sandra L. Powell	Legal Secretary Senior

2015 REPORT OF THE ATTORNEY GENERAL

Sara Duvall Powers	Paralegal
Syed A. Rahman	Auditor
Christine Wendy Reed	Legal Secretary
Sharon Renee Rice	Legal Secretary Senior
David A. Risdén	Investigator
Frank Matthew Sasser III	Investigator
Constance S. Saupé	Paralegal
Tyler J. Saupé	IT Support Specialist
Theresa Renee Scales	Community Outreach Coordinator
Lauri A. Schinzer	Claims Specialist
Michelle S. Scott	Legal Secretary
William Alton Shackelford Jr.	Community Outreach Coordinator
Mary Kennedy Sharp	Victim Advocate
Elizabeth G. Sherron	Senior Financial Investigator
DeVon E. Simmons	Re-entry Coordinator
Sara J. Skeens	eDiscovery Supervisor
Alexander Ross Smith	Paralegal
Faye H. Smith	Human Resource Manager
Hasan Smith	Senior IT Support Specialist
Jameen C. Smith	Claims Specialist Senior Expert
Marian B. Smith	Financial Manager
Ruth Ann Smith	Paralegal Senior Expert
Tierra Monet Smith	Office Assistant
Gerald B. Snead II	EEO Manager
Carol Snodgrass	Data Analyst Supervisor
Rhonda H. Suggs	Investigator
Kaci Cummings Sutherlin	Paralegal
Tara N. Talbott	Nurse Investigator
Gregory G. Taylor	Claims Representative
Jeannette T. Taylor	Legal Secretary
Kimberly Edwards Taylor	Executive Assistant to the Solicitor General
Susan W. Terry	Paralegal Senior
Daniel W. Thaw	Investigator
Patricia S. Thomas	Nurse Investigator
Erin K. Thompson	Investigator
Kimberly D. Tinsley-Strauss	Claims Representative
Mary E. Trapp	Intake Specialist
Ashley C. Trowbridge	Investigator
Lynda Turrieta-McLeod	Administrative Legal Secretary Senior
Latarsha Y. Tyler	Paralegal
Patricia L. Tyler	Paralegal Senior Expert/Manager

2015 REPORT OF THE ATTORNEY GENERAL

David M. Varcoe Investigator
Corrine Vaughan Program Director, Victim Notification Program
Laura C. Verser Paralegal
Kathleen B. Walker Program Assistant, Victim Notification Program
Megan Lee Wallmeyer Rose Paralegal Senior
Jonathan Glenn Ward Confidential Assistant & Executive Aide
Mary Vail Ware Director, Programs & Community Outreach
Amy Elizabeth Weatherly Paralegal Senior
Christie A. Wells Director of Finance
Nanora W. Westbrook Program Asst. Sr., Victim Notification Program
Gerard Joseph White Director of Office Operations
Kimberly Wilborn Paralegal
Carlisle M. Williams Auditor
Tiffany D. Williams Intake Specialist
Timothy L. Wilson Administration/Operations Manager
Tonya Ellis Woodson Director of Human Resources
Brian E. Wray Investigator
Michael J. Wyatt Senior Investigator
Whitney B. Yarchin Investigator
Abigail T. Yawn Legal Secretary Senior
James A. Zamparello Investigator

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ATTORNEYS GENERAL OF VIRGINIA, 1776 – PRESENT

Edmund Randolph.....	1776–1786
James Innes	1786–1796
John J. Marshall ¹	1794–1795
Robert Brooke.....	1796–1799
Philip Norborne Nicholas.....	1799–1819
John Robertson.....	1819–1834
Sidney S. Baxter.....	1834–1852
Willis P. Bocoock	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. ²	1918–1918
John R. Saunders.....	1918–1934
Abram P. Staples ³	1934–1947
Harvey B. Apperson ⁴	1947–1948
J. Lindsay Almond Jr. ⁵	1948–1957
Kenneth C. Patty ⁶	1957–1958

¹ The Honorable John J. Marshall served as acting Attorney General in absence of James Innes from mid-October 1794 until late March 1795.

² 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.

³ 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.

⁴ 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.

⁵ 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.

⁶ 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.

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Albertis S. Harrison Jr.....	1958–1961
Frederick T. Gray ⁷	1961–1962
Robert Y. Button.....	1962–1970
Andrew P. Miller.....	1970–1977
Anthony F. Troy ⁸	1977–1978
John Marshall Coleman.....	1978–1982
Gerald L. Baliles.....	1982–1985
William G. Broaddus ⁹	1985–1986
Mary Sue Terry.....	1986–1993
Stephen D. Rosenthal ¹⁰	1993–1994
James S. Gilmore III.....	1994–1997
Richard Cullen ¹¹	1997–1998
Mark L. Earley.....	1998–2001
Randolph A. Beales ¹²	2001–2002
Jerry W. Kilgore.....	2002–2005
Judith Williams Jagdmann ¹³	2005–2006
Robert F. McDonnell.....	2006–2009
William C. Mims ¹⁴	2009–2010

⁷ The Honorable Frederick T. Gray was appointed Attorney General on May 1, 1961, to fill the unexpired term of the Honorable Albertis S. Harrison, Jr. upon his resignation on April 30, 1961, and served until January 13, 1962.

⁸ 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.

⁹ 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.

¹⁰ 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.

¹¹ 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.

¹² 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.

¹³ 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, and served until January 14, 2006.

¹⁴ 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, and served until January 16, 2010.

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Kenneth T. Cuccinelli II.....	2010–2014
Mark R. Herring.....	2014–

CASES
IN THE
SUPREME COURTS
OF
VIRGINIA
AND THE
UNITED STATES

2015 REPORT OF THE ATTORNEY GENERAL

SUPREME COURT OF THE UNITED STATES**DECIDED**

Cantor v. Personhuballah. In appeal brought by Virginia’s Republican congressional delegation—intervenor-defendants in suit against members of the State Board of Elections—vacating and remanding for further consideration the decision by a three-judge panel of the U.S. District Court for the Eastern District of Virginia that Virginia’s Third Congressional District is a racial gerrymander in violation of the Fourteenth Amendment to the United States Constitution.

King v. Burwell. Decision affirming the Fourth Circuit’s decision that the Patient Protection and Affordable Care Act makes tax credits available to eligible citizens in all States, regardless of whether the State opted to rely on a federally-facilitated health insurance Exchange or a State-created Exchange, a position advocated in merits-stage amicus brief filed by Virginia on behalf of twenty-one other States and the District of Columbia.

Obergefell v. Hodges. Decision striking down States’ same-sex-marriage bans as unconstitutional, an outcome advocated in merits-stage amicus brief filed by Virginia.

REFUSED

Corr v. Metropolitan Washington Airports Authority. Certiorari denied in case in which Virginia moved to intervene and filed a brief defending the constitutionality of the MWAA compact between Virginia and the District of Columbia.

Marron v. Miller. Certiorari denied in case regarding alleged violation of petitioner’s rights under the Religious Land Use and Institutionalized Persons Act in connection with prison’s confiscation of unauthorized items in petitioner’s possession.

Prieto v. Clarke. Certiorari denied as moot in case where petitioner, an inmate on Virginia’s death row, had challenged his placement on death row under the Due Process Clause, and where Virginia successfully opposed intervention in the case by other death-row inmates.

2015 REPORT OF THE ATTORNEY GENERAL

Tomikel v. Commonwealth of Virginia. Certiorari denied in case involving alleged Confrontation Clause violations in connection with petitioner’s conviction for sexual assault.

PENDING

Wittman v. Personhuballah. Pending appeal by Virginia’s Republican congressional delegation—intervenor-defendants in suit against members of the State Board of Elections—from decision by three-judge panel of the U.S. District Court for the Eastern District of Virginia, following remand of *Cantor v. Personhuballah*, that Virginia’s Third Congressional District is a racial gerrymander in violation of the Fourteenth Amendment to the United States Constitution.

SUPREME COURT OF VIRGINIA**DECIDED**

Bowman v. Commonwealth. Decision that Virginia Code § 18.2-200.1, the construction fraud statute, requires proof that the certified letter sent by the victim to the contractor makes an unqualified demand for the return of the advance made to him.

Chincoteague Inn v. Virginia Marine Resources Commission. Decision affirming the ruling of VMRC that the Chincoteague Inn must remove a barge that had been moored to the restaurant to expand its seating capacity.

Commissioner of Highways v. Osborn. Decision affirming the circuit court in a case where VDOT appealed an award of damages for purported fixtures in an eminent domain case.

In re Robert Floyd Brown. Reversing circuit court in a case considered alongside *In re Steven Roy Arnold*, which was rendered moot by appellant’s death, in which Virginia filed a merits-stage amicus brief and oral argument in support of a transgender inmate’s appeal of the denial of her name-change application filed under Virginia Code § 8.01-217.

2015 REPORT OF THE ATTORNEY GENERAL

Kuchinsky v. Virginia State Bar. Decision affirming the determination of a three-judge panel to impose sanctions on an attorney who had violated the Rules of Professional Conduct, holding that the three-judge panel had exercised rightful jurisdiction.

Leonard v. Virginia Board of Medicine. Affirming the Board of Veterinary Medicine's order reprimanding and fining a licensee for performing an incomplete spay on a dog.

McClary v. Commonwealth. Rejecting facial and as-applied challenge to the constitutionality of Virginia's sodomy law where appellant was convicted of committing sex acts with minors.

PCC Technology Group v. State Corporation Commission. Dismissing a petition for a writ of mandamus to compel the State Corporation Commission to stay the award of a contract and to compel certification of a record for appeal of its denial of the petitioner's procurement protest.

Phelan v. Commonwealth. Decision that a Notice of Claim in an inmate's Virginia Tort Claim Action must specify the information required by statute, even where such information could be inferred from the rest of the notice.

Powell v. Commonwealth. Decision clarifying the Court's jurisprudence concerning the application of the statutes criminalizing the distribution of imitation controlled substances.

Ramsey v. Commissioner of Highways. Decision that VDOT's initial appraisal on which an offer to purchase was made could be admitted by landowner at trial, regardless of the existence of a second appraisal correcting a number of errors in made in the original, which resulted in a lower appraisal of the property.

Ricks v. Commonwealth. Decision that the recently enacted strangulation statute does not require any observable injury or break to the skin, but that the statute is satisfied by evidence of any bodily injury, including a bruise or momentary blackout.

Rivera v. Commonwealth. Decision that the U.S. Supreme Court's holding in *Riley v. California*, 134 S. Ct. 2473 (2014), required

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retroactive application to appellant's case, but declining to apply the exclusionary rule because law enforcement had an "objectively reasonable good-faith belief" that their conduct in searching the defendant's phone was lawful at the time.

Saunders v. Commonwealth. Rejecting facial and as-applied challenge to the constitutionality of Virginia's sodomy law where appellant was convicted of engaging in a public sex act.

Surovell v. Department of Corrections. Decision as to whether certain records of the Department of Corrections pertaining to methods of executions were subject to disclosure under the Virginia Freedom of Information Act.

Toghill v. Commonwealth. Rejecting facial and as-applied challenge to the constitutionality of Virginia's sodomy law where appellant was convicted of computer solicitation of a minor.

Tolliver v. Commonwealth. Decision resolving a conflict with the Fourth Circuit regarding the constitutionality of Virginia's anti-sodomy statute, and holding that the statute was not facially unconstitutional as it was subject to judicial reform to prohibit only non-protected conduct.

Tyson v. Commonwealth. Decision finding that appellant had failed to preserve the issue for appeal, where he had alleged error in the trial court's finding that it was his burden to prove by a preponderance of the evidence that he was appropriate for conditional release as a sexually violent predator.

Turner v. Virginia State Bar. Dismissing an attorney's challenge to a one-year suspension of bar license, where the attorney did not prepare an appellate brief in compliance with the Rules of the Supreme Court of Virginia.

Willis v. Commonwealth. Dismissing as moot the appeal of a sexually violent predator who challenged certain testimony and evidence introduced by the Commonwealth in his annual review hearing.

2015 REPORT OF THE ATTORNEY GENERAL**REFUSED**

Beisel v. Virginia Department of Taxation. Refusing a petition for appeal of taxpayer's claim to an income tax exclusion for his federal employee pension.

Blakey v. University of Virginia Health System. Refusing a petition for appeal of a decision of the Virginia Court of Appeals holding that, in a workers' compensation case, the permanency rating given by the treating doctor was entitled to more weight than the opinion of a records review doctor.

Cosgrove v. GMU. Refusing a petition for appeal regarding denial of a student's petition challenging University's decision to classify the student as out of state.

Coulibaly v. Dep't of Social Services. Refusing a petition for appeal regarding the timeliness of a challenge to an administrative action.

Holmes v. Board for Contractors. Denying a motion for rehearing of the Court's refusal of appeal, where the appellant sought to challenge a decision that, under the APA, he did not have standing to participate in a Board for Contractors' informal fact finding conference.

In re Jesse Wiese. Refusing a petition for appeal from the decision of the Virginia Board of Bar Examiners declining to issue a Virginia bar license.

In re Taso Saunders. Refusing a petition for appeal from the decision of the Virginia Board of Bar Examiners declining to issue a Virginia bar license.

Kaminsky v. Virginia Polytechnic Institute & State University. Refusing a petition for rehearing of a procedural dismissal in a workers' compensation case.

Lau v. Commonwealth. Refusing a petition for appeal of a circuit court's dismissal of a breach of contract claim against Longwood University.

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Milner v. Virginia Department of Juvenile Justice. Refusing a petition for review of a Virginia Court of Appeals decision involving an employee grievance matter.

Stuart v. Virginia Commonwealth University. Refusing a petition for appeal of Richmond City's dismissal of in-state tuition.

PENDING

Ablix Corp. d/b/a Accessible Home Health Care of No. Virginia v. Dep't of Medical Assistance Service. Pending appeal of an affirmation of the DMAS Director's final agency decision concerning overpayment to Medicaid provider.

Blount v. Clarke. Certified questions from the U.S. District Court for the Eastern District of Virginia regarding whether Governor of Virginia's reduction of prisoner's life sentence to 40 years is a commutation or a pardon, and whether that action was valid under Article V, § 12 of the Constitution of Virginia.

Commonwealth v. Proffitt. Pending appeal by the Commonwealth of certain decisions by the trial court in a sexually violent predator case.

Commonwealth v. William. Pending appeal by the Commonwealth of certain trial court findings in a sexually violent predator case.

Phillip S. Pool, LLC t/a C&C Mini Market v. Virginia Alcoholic Beverage Control Board. Pending appeal of a business owner challenging the ABC Board's decision to revoke his license.

Stuart v. Virginia Commonwealth University. Pending appeal of a circuit court's dismissal of in-state tuition appeal.

Valentin v. Commonwealth. Pending appeal concerning whether prohibition of life-without-parole sentences for juvenile non-homicide offenders applies to aggregate sentences that exceed a person's life expectancy.

Vandover Associates, LLC v. Department of Environmental Quality. Pending appeal of a landowner involved in a foreclosure action initiated by DEQ for the collection of funds expended in the remediation of a tire pile in Charles City County.

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Vasquez v. Commonwealth. Pending appeal concerning whether prohibition of life-without-parole sentences for juvenile non-homicide offenders applies to aggregate sentences that exceed a person's life expectancy.

Virginia Division of Risk Management v. VACORP. Pending appeal of the Virginia Division of Risk Management (DRM) of certain decisions adversely affecting DRM's Risk Management Plan.

OFFICIAL OPINIONS
OF THE
ATTORNEY GENERAL

Each opinion in this report is preceded by an opinion number and main headnote(s) 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: 2015 Op. Va. Att’y Gen. ____.

Opinions of the Attorney General beginning with opinions issued in January 1996, and certain Annual Reports of the Attorney General may be accessed on the Internet at www.oag.state.va.us. Opinions of the Attorney General are also available on LEXISNEXIS, beginning with opinions issued in July 1958; on WESTLAW, beginning with opinions issued in July 1976; on HeinOnline, beginning with opinions issued in 1895; and on CaseFinder, beginning with opinions issued in July 1967.

OP. NO. 14-067**IMMIGRATION**

An “ICE” detainer is merely a request. It does not create for a law enforcement agency either an obligation or legal authority to maintain custody of a prisoner who is otherwise eligible for immediate release from local or state custody. For that reason, an adult inmate or a juvenile inmate with a fixed release date should be released from custody on that date notwithstanding the agency’s receipt of an ICE detainer.

If a juvenile is being held pursuant to an indeterminate commitment, the Department of Juvenile Justice (DJJ) may exercise its discretion to hold the juvenile until ICE officials assume custody, provided DJJ does not hold the juvenile longer than thirty-six continuous months or past his twenty-first birthday.

THE HONORABLE KEN STOLLE
SHERIFF, CITY OF VIRGINIA BEACH
JANUARY 5, 2015

ISSUES PRESENTED

You seek guidance regarding requests from the federal Department of Immigration and Customs Enforcement (“ICE”) that a local or regional law enforcement agency continue to detain otherwise releasable prisoners because of the person’s immigration status. These requests are commonly known as “ICE detainees.” Specifically, you ask whether the local agency is required to honor an ICE detainer, has discretion to honor it or not, or alternatively, whether the agency is legally obligated to release the prisoner despite receipt of the detainer. You make these inquiries with respect to both adult and juvenile detainees.

RESPONSE

It is my opinion that an ICE detainer is merely a request. It does not create for a law enforcement agency either an obligation or legal authority to maintain custody of a prisoner who is otherwise eligible for immediate release from local or state custody. For that reason, an adult inmate or a juvenile inmate with a fixed release date should be released from custody on that date notwithstanding the agency’s receipt of an ICE detainer. If a juvenile is being held pursuant to an indeterminate commitment, the Department of Juvenile Justice (“DJJ”) may exercise its discretion to hold the juvenile until ICE officials assume custody, provided DJJ

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does not hold the juvenile longer than thirty-six continuous months or past his twenty-first birthday.

APPLICABLE LAW AND DISCUSSION

As governed by federal regulation 8 C.F.R. § 287.7, an ICE detainer is a notice issued by an authorized immigration officer that “serves to advise another law enforcement agency that the Department [the Department of Homeland Security, hereinafter “DHS”] seeks custody of an alien presently in the custody of that agency, for the purpose of arresting and removing the alien.”¹ The detainer operates as “a request that such agency advise [DHS], prior to release of the alien, in order for [DHS] to arrange to assume custody, in situations when gaining immediate physical custody is either impracticable or impossible.”² “Upon determination by [DHS] to issue a detainer for an alien not otherwise detained by a criminal justice agency, such agency shall maintain custody of the alien for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays in order to permit assumption of custody by [DHS].”³

From the plain wording of 8 C.F.R. § 287.7, a detainer serves as only a notice or request. There is no language either imposing a legal obligation on the recipient agency to detain or creating authority to detain. Moreover, federal law provides no enforcement mechanism to ensure compliance by agencies that do not honor such detainer requests. Although § 287.7 contains the mandatory word “shall,” the use of that word in context “serves only to inform an agency that otherwise decides to comply with an ICE detainer that it should hold the person no longer than 48 hours.”⁴ Thus, the use of the word “shall” in this context does not change the nature of an ICE detainer from a request to a mandatory detention order. To the contrary, it limits the amount of time a prisoner not otherwise detained may be detained if an ICE detainer is honored.

Uniform authority from several federal courts indicates that ICE detainers constitute mere requests and neither obligate nor authorize law enforcement agencies to detain a person who is the subject of a detainer. Most notably, in a case decided in April, 2014, the United States Court of Appeals for the Third

¹ 8 C.F.R. § 287.7(a).

² *Id.*

³ 8 C.F.R. § 287.7(d).

⁴ *Galaraza v. Szalczyk*, 745 F.3d 634, 640 (3rd Cir. 2014).

Circuit explicitly ruled that “8 C.F.R § 287.7 does not compel state or local [law enforcement agencies] to detain suspected aliens subject to removal pending release to immigration officials. Section 287.7 merely authorizes the issuance of detainers as requests to local [law enforcement agencies].”⁵ Other federal courts of appeals similarly have treated ICE detainers as requests, referring to them almost exclusively as such.⁶ In addition, the United States Court of Appeals for the Fourth Circuit, which encompasses the Commonwealth of Virginia, has described ICE detainers as “a mechanism by which federal immigration authorities may request that another law enforcement agency temporarily detain an alien ‘in order to permit assumption of custody by [DHS;]’”⁷ and the First Circuit has explained further that a “detainer is not, standing alone, an order of custody . . . [but] serves as a request that another law enforcement agency notify the INS before releasing an alien from detention.”⁸

Moreover, as the Third Circuit found, ICE and its precursor—the Immigration and Naturalization Service (“INS”)—have “consistently construed detainers as requests rather than mandatory orders.”⁹ In 1994, INS wrote that, “a detainer is the mechanism by which the Service requests that the detaining agency notify the Service of the date, time, or place of release of an alien who has been arrested or convicted under federal, state, or local law.”¹⁰ More recently, during a congressional briefing in 2010, ICE representatives stated that “local [law enforcement agencies] are not mandated to honor a detainer, and in some jurisdictions they do not.”¹¹ On its website, ICE currently describes a detainer

⁵ *Id.* at 645.

⁶ *Ortega v. U.S. Immigration & Customs Enforcement*, 737 F.3d 435, 438 (6th Cir. 2013) (noting that federal immigration officials issue detainers to local LEAs “asking the institution to keep custody of the prisoner for the [federal immigration] agency or to let the agency know when the prisoner is about to be released”); *Liranzo v. United States*, 690 F.3d 78, 82 (2d Cir. 2012) (noting that “ICE issued an immigration detainer to [jail] officials requesting that they release Liranzo only into ICE’s custody so that he could be removed from the United States”); *Giddings v. Chandler*, 979 F.2d 1104, 1105 n.3 (5th Cir. 1992) (describing the procedure under § 287.7 as “an informal [one] in which the INS informs prison officials that a person is subject to deportation and requests that officials give the INS notice of the person’s death, impending release, or transfer to another institution”).

⁷ *United States v. Uribe-Rios*, 558 F.3d 347, 350 n.1 (4th Cir. 2009).

⁸ *United States v. A.F.S.*, 377 F.3d 27, 35 (1st Cir. 2004).

⁹ *Galaraza*, 745 F.3d at 641.

¹⁰ *Id.* (internal citation omitted).

¹¹ *Id.* at 642 (internal footnote omitted).

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simply as a notice informing a law enforcement agency that ICE intends to take custody of a person in that agency's custody¹² and further serves as a request to the agency for information about an impending release so that ICE may take custody before the release and for limited continued custody of a prisoner who otherwise would be released.¹³ As acknowledged by prior Opinions of this Office, interpretations of a law by an agency charged with administering the law, unless clearly wrong, are afforded great weight and deference.¹⁴

Based on the foregoing authorities, I conclude that an ICE detainer is merely a request and does not either impose a mandatory obligation or grant legal authority for a law enforcement agency to maintain custody of an individual who is otherwise subject to immediate release from local or state custody.

A person has a constitutional liberty interest in not being imprisoned longer than he was sentenced by the sentencing court.¹⁵ Accordingly, an adult prisoner who is eligible for release from custody must be released at his eligible date notwithstanding the agency's receipt of an ICE detainer.

With respect to a person charged as a juvenile and sentenced to confinement in a juvenile correctional facility, a court may impose, based on the attendant circumstances, one of four different types of sentences. The authority of the facility to hold the juvenile following receipt of an ICE detainer depends on which type of sentence is imposed.

¹² ICE, ICE Detainers: Frequently Asked Questions, <http://www.ice.gov/factsheets/detainer-faq.htm> (last visited Nov. 13, 2014).

¹³ *Id.*

¹⁴ *See, e.g.*, 2002 Op. Va. Att'y Gen. 293, 294 and opinions cited therein.

¹⁵ *McNeil v. Dir., Patuxent Inst.*, 407 U.S. 245, 249-52 (1972). Incarceration beyond the termination of one's sentence may state a claim under the Eighth Amendment. *Golson v. Dep't of Corr.*, 914 F.2d 1491 (4th Cir. 1990). *See also* *Miranda-Olivares v. Clackamas Cnty.*, No. 3:12-cv-02317-ST, 2014 U.S. Dist. LEXIS 50340, at *7 (D. Or. Apr. 11, 2014); *Jordan v. Shands*, 255 Va. 492, 497 (1998) (holding that the direct restraint by one person of the physical liberty of another without adequate legal justification is known in Virginia as false imprisonment, and it consists in imposing by force or threats an unlawful restraint upon a man's freedom of locomotion).

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Of the four types of sentences for juvenile offenders, three entail sentences for fixed periods of time.¹⁶ A juvenile serving a term of confinement at a secure local detention center for a fixed sentence will have a definite release date, whether based on a sentence as initially imposed or a subsequent court order directing his immediate release from custody. For the same reasons that prohibit the detention of an adult inmate past his release date, a juvenile serving a fixed sentence cannot be held past the date upon which he otherwise would be released from custody.

The fourth possible type of sentence for juveniles, however, does not entail a fixed term: a juvenile offender may be committed to the custody of DJJ to serve an indeterminate commitment,¹⁷ the duration of which is not specifically fixed by court order. Rather, “all commitments . . . shall be for an indeterminate period having regard to the welfare of the juvenile and the interests of the public”¹⁸ For an indeterminately committed juvenile, DJJ “shall have the authority to discharge any juvenile or person from its custody . . . in accordance with policies and procedures established by the State Board and with other provisions of law.”¹⁹

¹⁶ First, the juvenile offender may be sentenced to a specific term of confinement in a local secure detention center, up to, but not exceeding, thirty days. See VA. CODE ANN. §§ 16.1-278.8(16) (Supp. 2014) & 16.1-284.1 (Supp. 2014). Second, a juvenile offender may be sentenced to serve in a post-dispositional program at a local secure detention center whereby the court imposes a specific term of confinement, which shall “not exceed six months from the date the order is entered.” Section 16.1-284.1. These types of sentences are subject to monthly mandatory review hearings, which may result in the required release of the juvenile, with the remaining sentence obligation being eliminated. Section 16.1-284.1(C). Third, when the circumstances so dictate, a juvenile must be committed to DJJ’s custody as a serious offender. Sections 16.1-278.8(17) & 16.1-285.1 (2010). For this third type of sentence, the committing court “shall specify a period of commitment not to exceed seven years or the juvenile’s twenty-first birthday, whichever shall occur first.” Section 16.1-285.1(C). The juvenile “shall not be released at a time earlier than that specified by the court in its dispositional order,” unless otherwise ordered by the court following a release and review hearing. Section 16.1-285.1(F). Thus, under this third type of sentence, the release of a serious offender will occur only under one of three specific circumstances: (1) the juvenile has served the duration of the specific period of confinement; (2) the juvenile has reached his twenty-first birthday; or (3) the committing court has ordered DJJ to release the juvenile from custody. Because none of these three types of sentences involve discretionary determinations on the part of DJJ, DJJ has no authority to continue to hold the juvenile past the set release date. In like manner, DJJ cannot hold a juvenile in a post-dispositional program past the date that he would otherwise have been released from custody.

¹⁷ Section 16.1-278.8(14).

¹⁸ Section 16.1-285 (2010).

¹⁹ *Id.*

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The only constraints on this discretion are that “no juvenile committed ... shall be held or detained longer than thirty-six continuous months or after such juvenile has attained the age of twenty-one years;”²⁰ otherwise, the length of an indeterminate commitment is “a matter resting solely within the discretion of [DJJ].”²¹ Because a juvenile serving an indeterminate commitment is held pursuant to DJJ’s discretion, DJJ may exercise its discretion to hold the juvenile until ICE officials assume custody of him, provided doing so does not cause DJJ to hold the juvenile beyond thirty-six continuous months or past his twenty-first birthday.²²

CONCLUSION

It is my opinion that an ICE detainer is merely a request. It does not create for a law enforcement agency either an obligation or legal authority to maintain custody of a prisoner who is otherwise eligible for immediate release from local or state custody. For that reason, an adult inmate or a juvenile inmate with a fixed release date should be released from custody on that date notwithstanding the agency’s receipt of an ICE detainer. If a juvenile is being held pursuant to an indeterminate commitment, the DJJ may exercise its discretion to hold the juvenile until ICE officials assume custody, provided DJJ does not hold the juvenile longer than thirty-six continuous months or past his twenty-first birthday.

OP. NO. 14-070

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

The Louisa County Industrial Development Authority (IDA) is not authorized under Virginia law to operate an airport.

Where the IDA holds a license to operate an airport from the Department of Aviation, contracting out the performance of certain airport functions to independent contractors does not change the fact that it is “operator” of an airport.

²⁰ *Id.*

²¹ Harlow v. Clatterbuck, 230 Va. 490, 494 (1986).

²² Section 16.1-285.

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Certification by the IDA's counsel that it has the authority to carry out particular airport tasks is not enabling; it is merely Counsel's interpretation of the law. Whether the IDA has authority to operate an airport is a matter of law.

A Board of Supervisors, by ordinance, may constructively limit the ability of an Industrial Development Authority to incur debt by limiting the number and type of facilities that it may finance. It may not, however, require that the IDA secure the Board's approval of the amount financed for a particular project.

MICHAEL W. S. LOCKABY, ESQUIRE
COUNTY ATTORNEY FOR LOUISA COUNTY
JANUARY 30, 2015

ISSUES PRESENTED

Your inquiry regards the scope of authority of the Louisa County Industrial Development Authority (the "IDA") to operate a general aviation airport located in Louisa County (the "Airport"). You ask the following questions:

- 1) Is the IDA authorized by Virginia law to operate the Airport?
- 2) Does the performance of certain airport functions by independent contractors mean that the IDA is not operating the Airport?
- 3) What is the legal effect of certification by the IDA's counsel that the IDA has the authority to perform certain airport tasks?
- 4) May the Louisa County Board of Supervisors (the "Board") limit the authority of the IDA to incur debt and ensure that the IDA's actions serve the County's economic development goals?

BACKGROUND

In 1978, the Board created the IDA¹ pursuant to the Industrial Development and Revenue Bond Act (the "Act").² In the 1980s, the IDA developed the Airport, which is located in an industrial park on land owned by the IDA. The IDA obtained its first license to operate the Airport from the Virginia Department of

¹ COUNTY OF LOUISA, VA., CODE §§ 2-70-71. Section 2-71 reads "The industrial development authority of the county shall have all powers and perform all duties prescribed for industrial development authorities as set forth in the Industrial Development and Revenue Bond Act, Code of Virginia, § 15.2-4900 et seq., and other state laws relating to industrial development authorities."

² VA. CODE ANN. §§ 15.2-4900 through 15.2-4920 (2012 & Supp. 2014).

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Aviation (the “Department”) in June 1986, and it is still the license holder. Pursuant to its license, the IDA is the legally responsible operator of the Airport.

Over time, the IDA has hired independent contractors, including a mechanic who rented garage space and Fixed-Base Operators who provided fuel services and other services. The IDA now employs a manager to oversee all Airport operations and to be in charge of all the Airport’s real property, including hangars, terminal, and garages. The manager operates under general supervision of the IDA. Since 1986, the Airport manager, acting on behalf of the IDA, has sought and obtained grants from the Department and the Federal Aviation Administration. All such grants included a certification from the IDA’s attorney that the IDA was authorized to receive the grants. You also state that to the best of your knowledge no other IDA in Virginia operates an airport, and all other local airports are operated either by localities or airport authorities pursuant to express grants of authority from the General Assembly.

The facts you present describe a well-run airport that has been recognized for its achievements and its contributions to Louisa County.

APPLICABLE LAW AND DISCUSSION

1. Is the IDA authorized by Virginia law to operate the airport?

You first ask whether the IDA is authorized by Virginia law to operate an airport. As political subdivisions of the Commonwealth,³ IDAs are subject to Dillon’s Rule,⁴ which limits their powers to those expressly granted by the legislature, those that are fairly or necessarily implied from expressly granted powers, and those that are indispensable and essential.⁵

As articulated by the Act, the General Assembly authorized the creation of IDAs by localities “so that such authorities may acquire, own, lease, and dispose of properties and make loans to the end that such authorities may be able to promote industry and develop trade by inducing manufacturing, industrial, governmental,

³ See § 15.2-4903.

⁴ *Marble Technologies, Inc. v. City of Hampton*, 279 Va. 409, 417 (2010).

⁵ *Sinclair v. New Cingular Wireless PCS, LLC*, 283 Va. 567, 576 (2012).

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nonprofit and commercial enterprises and institutions of higher education to locate in or remain in the Commonwealth”⁶

The Act specifies numerous types of projects or activities (called “Authority facilities”) that are authorized for IDAs.⁷ Airports are not included.

In contrast, the General Assembly has explicitly authorized other political subdivisions to operate airports. For example, all Virginia localities are authorized by statute to:

[A]cquire, by purchase, lease, gift, condemnation or otherwise, within or without the limits of any such city, town or county, whatever land may be reasonably necessary for the purpose of establishing, constructing, owning, controlling, leasing, equipping, improving, maintaining and operating airports for the use of airplanes; may acquire, establish, construct, enlarge, improve, maintain, equip, operate and regulate the use of such airports or landing fields, structures, air navigation facilities and other property incident thereto; may make, prior to such acquisition, investigation, surveys and plans and enter upon any lands or waters for such purposes; may construct, install, maintain and operate facilities for the servicing of aircraft, and for the

⁶ Section 15.2-4901.

⁷ Section 15.2-4902 defines “Authority facilities” or “facilities” as

any or all (i) medical (including, but not limited to, office and treatment facilities), pollution control or industrial facilities; (ii) facilities for the residence or care of the aged; (iii) multi-state regional or national headquarters offices or operations centers; (iv) facilities for private, accredited and nonprofit institutions of collegiate, elementary, or secondary education in the Commonwealth whose primary purpose is to provide collegiate, elementary, secondary, or graduate education . . . (v) parking facilities, including parking structures; (vi) facilities for use as office space by nonprofit, nonreligious organizations; (vii) facilities for museums and historical education, demonstration and interpretation, together with buildings, structures or other facilities necessary or desirable in connection with the foregoing, for use by nonprofit organizations; (viii) facilities for use by an organization . . . which is described in § 501(c)(3) of the Internal Revenue Code of 1986, as amended . . . (ix) facilities for use by a locality, the Commonwealth and its agencies, or other governmental organizations . . . ; (x) facilities devoted to the staging of equine events and activities (other than racing events) . . . (xi) facilities for commercial enterprises that are not enterprise zone facilities . . . and (xiii) facilities used primarily for single or multi-family residences

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accommodation and comfort of air travelers; may purchase and sell equipment and supplies as an incident to the operation of its airport properties. . . .^[8]

There is further statutory authorization for localities to continue operating airports or to delegate their operation to some other “suitable” officer, board, or body, provided approval is obtained from the Virginia Aviation Board:

The governing body, or other proper authority, of a county, city, or town which has established an airport or landing field and acquired, leased, or set apart property for such purpose, may construct, improve, equip, maintain and operate the same, or may vest jurisdiction for the construction, improvement, equipment, maintenance and operation thereof in any suitable officer, board or body of such county, city, or town. A member of the governing body of any such county, city, or town may also serve as a member of any board or body established to manage an airport or landing field. No such city, town or county, however, shall operate an airport without first obtaining the permission of the Board as now or hereafter provided by law.^[9]

The General Assembly from time to time also has created local or regional airport authorities or commissions that are expressly authorized to operate airports. Examples include the Charlottesville-Albemarle Airport Authority,¹⁰ the Commercial Space Flight Authority,¹¹ the Winchester Regional Airport Authority,¹² the Roanoke Regional Airport Commission,¹³ the Blue Ridge Airport Authority,¹⁴ the Middle Peninsula Regional Airport Authority,¹⁵ the Dinwiddie Airport and Industrial Authority,¹⁶ the Virginia Tech/Montgomery Regional Airport Authority,¹⁷ the Luray-Page County Airport Authority,¹⁸ and the

⁸ VA. CODE ANN. § 5.1-31 (2010).

⁹ Section 5.1-41 (2010).

¹⁰ 1995 Acts ch. 286.

¹¹ 1995 Acts ch. 758.

¹² 1995 Acts ch. 338.

¹³ 1996 Acts ch. 385.

¹⁴ 1996 Acts ch. 465.

¹⁵ 1997 Acts ch. 871.

¹⁶ 2000 Acts ch. 261.

¹⁷ 2001 Acts ch. 202.

Clarksville-Boydton Airport Commission.¹⁹ Special acts granting authority to operate airports typically contain detailed provisions about the exact scope and limitations of authority for specific functions.²⁰

The absence of any language about IDAs operating airports in the Act is significant as a matter of statutory construction when compared with the explicit and detailed grants of powers to operate airports given by statute to localities, and given by special acts to individual local or regional airport authorities. When the legislature omits language from one statute that it has included in another, courts may not construe the former statute to include that language, as doing so would ignore “an unambiguous manifestation of a contrary intention” of the legislature.²¹ I therefore conclude that, absent special legislation for a particular IDA, IDAs generally do not have legal authority to operate airports.

There is also a restriction on the powers of IDAs that is relevant to this analysis: an IDA “shall not have power to operate any facility as a business other than as a lessor.”²² To the same effect, an IDA “shall not itself be authorized to operate any such manufacturing, industrial, nonprofit or commercial enterprise”²³ These statutes evince a legislative intent that where an IDA owns property, it may function only as a passive landlord, and it may not actively engage in business or commerce. The facts you present are that the IDA is not acting within the statutory limitation, *i.e.*, the IDA developed the airport; it holds the operator’s

¹⁸ 2004 Acts ch. 39.

¹⁹ 2005 Acts ch. 680.

²⁰ *See, e.g.*, 2009 Acts ch. 694, entitled “The Breaks Regional Airport Authority Act.” In relevant part, this Act creates the Breaks Regional Airport Authority, sets forth its rules of governance, and authorizes particular aircraft facilities and their permitted locations, the award of concessions, leases, and franchises, the setting of fees and rates, applications for and acceptance of gifts and grants, establishment of a foreign trade zone, employment of staff and professionals, personnel rules, a pension system, rules and regulations having the force and effect of law including imposition of misdemeanor penalties for violations, the power of eminent domain, and the issuance of bonds. The Act limits the use of these powers to operation of the airport. Certain officials who enforce the airport’s police powers are required to be certified by the Department of Criminal Justice Services. There are specific reporting and procurement requirements.

²¹ *See* Halifax Corp. v. Wachovia Bank, 268 Va. 641, 654 (2004).

²² Section 15.2-4905(13).

²³ Section 15.2-4901.

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license for the airport;²⁴ it is the legally responsible operator of the airport; it has applied for and received financial assistance for the airport; it employs a manager who operates under general oversight of the IDA; and at various times portions of airport operations have been carried out by independent contractors of the IDA.

Finally, the regulations of the Department provide that a license that has been issued to a particular license holder to operate an airport may not be transferred to another entity without approval of the Department.²⁵ This regulatory structure indicates that a license does not merely authorize operation of a particular airport, it authorizes a particular license holder to operate that airport. Here, the license holder is, and always has been, the IDA.

It is my opinion that these activities, when considered within the Department's regulatory structure, make the IDA the active "operator" of the Airport, which is the type of active operation of a business or a commercial enterprise IDAs are barred from engaging in by statute.

2. Does contracting out certain functions mean that the IDA is not operating the Airport?

In response to your second question, I conclude that IDA's delegation of certain operational tasks of the Airport to third parties does not alter the conclusion that the IDA is operating the Airport. To operate an airport in Virginia, one first must obtain a license from the Virginia Department of Aviation, and the license is particular to the holder, not just the airport in question.²⁶ Under the facts you present, the IDA is the only entity holding a such a license for the Airport, and the license makes it the legally responsible party. Contracting out the responsibility for performing tasks necessary to operate an airport does not remove the licensee's ultimate control and responsibility for operations. Accordingly, it is the

²⁴ Section 5.1-7 states that "every person, before *operating* an airport . . . shall first secure from the Department [of Aviation] a license." (emphasis added). Thus, by operation of law, the holder of the license is the operator. Here, the IDA has always held, and presently holds, the license for the Airport.

²⁵ See 24 VA. ADMIN. CODE § 5-20-150(A) (providing "No license issued by the department for the operation of an airport or landing area may be transferred by the licensee without first obtaining the approval of the department.").

²⁶ *Id.*

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IDA—the licensee—which operates the Airport, not any entity or individual with whom it contracts to perform day-to-day airport management functions.²⁷

3. Does certification by the IDA’s counsel give it authority to operate the airport?

Next, you ask whether the certification of the IDA’s counsel to federal agencies awarding grants that the IDA has authority to carry out particular airport tasks gives that authority to the IDA. In my opinion, it does not. A certification by legal counsel is not enabling; it is merely counsel’s interpretation of the law. Whether the IDA has the authority to operate the Airport is a matter of law as set forth in general or special legislation of the General Assembly, properly construed in accordance with Dillon’s Rule principles.

4. Control by Board of Supervisors of IDA Projects

You ask whether the Board may limit the IDA’s authority to incur debt and ensure that its activities and projects serve the County’s economic development goals by limiting the type and number of IDA facilities.

While the Act is to be “liberally construed,”²⁸ § 15.2-4903(A) provides that the Board may by ordinance “limit the type and number of facilities that the authority may otherwise finance . . . which ordinance of limitation may, from time to time, be amended.” As you recognize, at present there are no such limitations in Louisa’s local code,²⁹ thus the IDA has all powers granted to it by the Act.³⁰ However, because the Board may amend the local code to “limit the type and number of facilities”³¹ financed by the IDA, the Board may, by ordinance, constructively limit the IDA’s ability to incur debt by limiting the number and type of facilities that it may finance.

The Board may not, however, require that the IDA secure the Board’s approval of the amount financed for a particular project. As this office previously opined

²⁷ *The American Heritage Dictionary* defines the verb “operate” to mean, among other things, “to control the functioning of; run . . . conduct the affairs of; manage.” THE AMERICAN HERITAGE DICTIONARY 1233 (4th ed. 2000).

²⁸ Section 15.2-4901.

²⁹ COUNTY OF LOUISA, VA., CODE § 2-71.

³⁰ Sections 15.2-4900 through 15.2-4920.

³¹ Section 15.2-4903.

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when considering the question of whether a city council could require an IDA to obtain the council's prior approval of the purpose and amount of any proposed bond issue: "Council is authorized to limit the type and number of facilities, but it has no authority to dictate the terms of financial arrangements made by the Authority, which are, by statute within its province alone."³²

As to whether the County can ensure that the IDA's operations serve the County's economic development goals, the County's authority over the IDA is limited to limiting the type and number of facilities. Whether doing so will serve the County's economic development goals is a matter for the Board to determine. There is no statutory authority to specifically require compliance with economic development goals.

CONCLUSION

Accordingly, it is my opinion that the IDA presently lacks legal authority to operate the Airport. Contracting out certain airport operations does not change the fact that the IDA is the Airport operator. The certification of the IDA's attorney that the IDA has authority to conduct certain airport activities does not create that authority where it does not exist under applicable law. The Board may limit the number and type of projects undertaken by the IDA, but the Board may not limit the debt incurred by the IDA on a particular project.

OP. NO. 14-078

CIVIL REMEDIES AND PROCEDURE: CIVIL ACTIONS; COMMENCEMENT, PLEADINGS, AND ACTIONS

A demurrer can be filed in both general district courts and circuit courts to challenge the legal sufficiency of a cause of action.

THE HONORABLE SCOTT A. SUROVELL
MEMBER, HOUSE OF DELEGATES
FEBRUARY 4, 2015

³² 1977-78 Op. Va. Att'y Gen. 187, 189 (emphasis added).

ISSUE PRESENTED

You inquire whether § 8.01-273 of the *Code of Virginia* authorizes demurrers in general district courts or only in circuit courts.¹

APPLICABLE LAW AND DISCUSSION

Pursuant to § 8.01-273, “the contention that a pleading does not state a cause of action or that such pleading fails to state facts upon which the relief demanded can be granted may be made by demurrer.” Section 8.01-273 expressly provides that such contention can be made “[i]n any suit in equity or action at law,” but that “[a]ll demurrers shall be in writing” You ask whether this provision permits a written demurrer to be filed in general district courts as well as circuit courts.

“When construing a statute, our primary objective is ‘to ascertain and give effect to legislative intent,’ as expressed by the language used in the statute[.]”² and “[w]e ‘assume that the legislature chose, with care, the words it used when it enacted the relevant statute.’”³ Although § 8.01-273 makes no specific reference to district court proceedings, the terms “action” and “suit” generally include “all civil proceedings whether upon claims at law, in equity or statutory in nature and whether in circuit courts or district courts.”⁴ I find no provision that otherwise would limit the use of demurrers to circuit courts.⁵ Accordingly, I conclude that

¹ I note that a demurrer also may be filed in a criminal case. Because your inquiry is about demurrers in civil cases pursuant to § 8.01-273, this Opinion will presume your question is limited to only civil cases pending in general district courts.

² *Cuccinelli v. Rector & Visitors of the Univ. of Va.*, 283 Va. 420, 425 (2012) (quoting *Commonwealth v. Amerson*, 281 Va. 414, 418 (2011)) (further citation and internal quotation marks omitted).

³ *Alger v. Commonwealth*, 267 Va. 255, 261 (2004) (quoting *Barr v. Town & Country Props., Inc.*, 240 Va. 292, 295 (1990)).

⁴ VA. CODE ANN. § 8.01-2(1) (Supp. 2014). I note that “district court” is defined to include both general district courts and juvenile and domestic relations district courts. VA. CODE ANN. § 16.1-69.5(d) (2010).

⁵ This includes a survey of Title 16.1, particularly Chapter 4.1, which contains provisions specifically applicable to district court procedures, and the procedural standards set forth in Rules of the Supreme Court of Virginia. Nothing in Title 16.1 limits or restricts the pleadings permitted in general district courts, and neither of the Rules pertaining to district court pleadings addresses demurrers. *See* VA. SUP. CT. RS. 7B:2 (Permitting a court to award a party summary judgment if the opposing party does

§ 8.01-273 authorizes a written demurrer to be filed in any civil action, whether in a circuit court or a general district court.

I note that the attendant procedure for filing a demurrer in a district court case may differ slightly from that in a circuit court case. Unlike a circuit court case, which is initiated by filing a complaint that must “state the facts on which the plaintiff relies” and will be “sufficient” only if it “clearly informs the defendant or defendants of the true nature of the claim asserted,” a general district court case also may be initiated by a plaintiff’s filing a warrant,⁶ often based on forms provided by the Supreme Court of Virginia.⁷ In some instances, given the limited information they convey, these form warrants may not provide a valid basis upon which a defendant could demur. Nevertheless, either party may request that the judge “direct the filing of a written bill of particulars”⁸ in order “to amplify any pleading that does not provide notice of a claim or defense adequate to permit the adversary a fair opportunity to respond or prepare the case.”⁹ Once the claim supplies sufficient facts, the case may be in a posture in which a defendant could challenge the factual allegations against him as failing to state a claim upon which relief may be granted by filing a demurrer.¹⁰ Accordingly, it is clear that even in a general district court case, a demurrer is an available responsive pleading that allows the defendant to test the legal sufficiency of the claims asserted by the plaintiff.

not file a pleading as ordered by the judge presiding over the case) and 7B:3 (defining general provisions as to pleadings, but not discussing demurrers).

⁶ Section 16.1-79 (2010).

⁷ See *General District Court Civil Forms*, VIRGINIA’S JUDICIAL SYSTEM, available at <http://www.courts.state.va.us/forms/district/civil.html> (last visited Dec. 1, 2014).

⁸ Section 16.1-69.25:1 (2010).

⁹ VA. SUP. CT. R. 3:7(a). Although this definition is from the Rules that are specifically applicable only in circuit court cases, the use of bills of particulars in the general district courts serve the same function. There is no statute or Rule that defines a bill of particulars used in a general district court case differently than one used in the circuit courts.

¹⁰ I note that a demurrer is distinct from a motion to strike an insufficient bill of particulars. See VA. SUP. CT. R. 3:7(b). An insufficient bill of particulars “fails to inform the opposing party . . . of the true nature of the claim.” By contrast a demurrer tests the legal sufficiency of the claims stated in the pleadings, not the factual sufficiency. *Thompson v. Skate Am., Inc.*, 261 Va. 121, 128 (2001). The question raised in a demurrer is “whether the facts thus pleaded, implied, and fairly and justly inferred are legally sufficient to state a clause of action against the defendant.” *Id.*

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CONCLUSION

Accordingly, it is my opinion that a demurrer can be filed in both general district courts and circuit courts to challenge the legal sufficiency of a cause of action.

OP. NO. 14-053**PROFESSIONS AND OCCUPATIONS: PHARMACY**

The requirement for a bona fide practitioner-patient relationship to exist applies when a supervising physician prescribes medication after a patient's follow-up visit with a nurse practitioner or physician assistant.

When certain conditions are met, a supervising physician who initially saw a patient may prescribe and dispense medication to the same patient based on the recommendation of a nurse practitioner or physician assistant who saw the patient at a follow-up visit.

THE HONORABLE JENNIFER T. WEXTON
MEMBER, SENATE OF VIRGINIA
FEBRUARY 4, 2015

ISSUE PRESENTED

You ask whether a supervising physician who initially saw a patient may prescribe and dispense medication to the same patient based on the recommendation of a nurse practitioner or physician assistant who saw the patient at a follow-up visit.

APPLICABLE LAW AND DISCUSSION

You inquire as to the authority of a supervising physician to prescribe medication on the recommendation of a nurse practitioner or physician assistant who has seen his patient during a follow-up visit.¹ Under Virginia law, a physician licensed by the Commonwealth “shall only prescribe, dispense, or administer controlled substances in good faith for medicinal or therapeutic purposes within the course of his professional practice.”² In addition, a physician may issue a prescription only

¹ I note that Virginia law also authorizes nurse practitioners and physician assistants to prescribe certain controlled substances under specified conditions. *See* VA. CODE ANN. §§ 54.1-2952.1 (2013); 54.1-2957.01 (2013); 54.1-3408 (2013).

² Section 54.1-3408(A). Section 54.1-3401 defines the terms “dispense” and “administer.” “Dispense” means “to deliver a drug to an ultimate user or research subject by or pursuant to the lawful order of a

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to a person with whom he has a bona fide practitioner-patient relationship.³ To establish a bona fide practitioner-patient relationship, the physician must

- i) ensure that a medical or drug history is obtained;
- ii) provide information to the patient about the benefits and risks of the drug being prescribed;
- iii) perform or have performed an appropriate examination of the patient, either physically or by the use of instrumentation and diagnostic equipment through which images and medical records may be transmitted electronically; except for medical emergencies, the examination of the patient shall have been performed by the practitioner himself, within the group in which he practices, or by a consulting practitioner prior to issuing a prescription; and
- iv) initiate additional interventions and follow-up care, if necessary, especially if a prescribed drug may have serious side effects.^[4]

This requirement for a bona fide practitioner-patient relationship to exist applies when a supervising physician prescribes medication after a patient's follow-up visit with a nurse practitioner or physician assistant.

For a bona fide practitioner-patient relationship to exist, the patient must have been appropriately examined. That examination need not have been conducted by the prescribing physician if it was otherwise performed by a person "within the group in which he practices," or by a consulting practitioner prior to issuance of the prescription.⁵ The phrase "within the group he practices" does not have a statutory definition. Generally, when a particular term is not defined in a statute,

practitioner, including the prescribing and administering, packaging, labeling, or compounding necessary to prepare the substance for that delivery. . . . For practitioners of medicine or osteopathy, 'dispense' shall only include the provision of drugs by a practitioner to patients to take with them away from the practitioner's place of practice." "Administer" is defined as "the direct application of a controlled substance, whether by injection, inhalation, ingestion or any other means, to the body of a patient or research subject by (i) a practitioner or by his authorized agent and under his direction or (ii) the patient or research subject at the direction and in the presence of the practitioner."

³ Section 54.1-3303(A) (2013).

⁴ *Id.* These requirements also apply to nurse practitioners and physician assistants when they issue prescriptions as authorized pursuant to §§ 54.1-2957.01 and 54.1-2952.1.

⁵ Section 54.1-3303(A). I note the statute contains an exception for medical emergencies.

it must be given its plain and ordinary meaning.⁶ The rule that an undefined term must be given its plain and ordinary meaning also requires that courts be “guided by ‘the context in which [the word or phrase] is used.’”⁷ Thus, to determine whether a nurse practitioner or physician assistant is within the group a supervising physician practices, the role, as defined by statute, each fulfills as a practitioner of healing arts must be considered.

1. Nurse Practitioners

In Virginia, a nurse practitioner is required to practice as part of a patient care team,⁸ and must “maintain appropriate collaboration and consultation, as evidenced in a written or electronic practice agreement, with at least one patient care team physician.”⁹ A “patient care team” is “a multidisciplinary team of health care providers actively functioning as a unit . . . for the purpose of providing and delivering health care to a patient or group of patients.”¹⁰ Further, for purposes of these requirements, “collaboration” and “consultation” are defined as follows:

“Collaboration” means the communication and decision-making process among members of a patient care team related to the treatment and care of a patient and includes (i) communication of data and information about the treatment and care of a patient, including exchange of clinical observations and assessments; and (ii) development of an appropriate plan of care, including decisions regarding the health care provided, accessing and assessment of appropriate additional resources or expertise, and arrangement of appropriate referrals, testing, or studies.

“Consultation” means the communicating of data and information, exchanging of clinical observations and assessments, accessing and

⁶ See *Moyer v. Commonwealth*, 33 Va. App. 8, 35 (2000) (citing *McKeon v. Commonwealth*, 211 Va. 24, 27 (1970)).

⁷ *Protestant Episcopal Church v. Truro Church*, 280 Va. 6, 21 (2010) (citing *Sansom v. Bd. of Supvrs.*, 257 Va. 589, 595 (1999) (quoting *Dep’t of Taxation v. Orange-Madison Coop. Farm Serv.*, 220 Va. 655, 658 (1980))).

⁸ Section 54.1-2957(B) (2013).

⁹ *Id.*

¹⁰ Section 54.1-2900 (Supp. 2014).

assessing of additional resources and expertise, problem-solving, and arranging for referrals, testing, or studies.^[11]

Accordingly, the governing law, in requiring practice agreements between a supervising physician and a nurse practitioner, contemplates a relationship where the nurse practitioner will assess the patient and recommend treatments. A nurse practitioner working within the same patient care team with the physician thus reasonably should be considered to be working “within the group” of the supervising physician.

2. Physician Assistants

With respect to physician assistants, Virginia law requires that, prior to initiating practice, a physician assistant inform the Board of Medicine who his supervising physicians will be and how he will be utilized.¹² The medical tasks the physician assistant will be authorized to perform on behalf of a supervising physician must be set forth in a written practice supervision agreement.¹³ Further, although a supervising physician’s physical presence is not required when the assistant is performing his duties, the assistant remains subject to the continuous supervision of the physician,¹⁴ and anyone employing the assistant remains fully responsible for the medical acts of the assistant.¹⁵ Based on the resulting relationship, I conclude that, if the supervising physician and the physician assistant who sees the patient during the follow-up visit have entered into a written practice agreement, then the physician assistant and the physician are within the same practice group.

I therefore conclude that, if the supervising physician has entered into a written practice agreement with a physician assistant, or with a nurse practitioner who is part of the same patient care team, then the physician assistant or nurse practitioner is considered to be within the same group in which the physician

¹¹ Section 54.1-2957(F).

¹² Section 54.1-2951.1(B) (2013).

¹³ Section 54.1-2952(A) (2013). Delegable duties include “health care services which are educational, diagnostic, therapeutic, preventive, or include treatment, but shall not include the establishment of a final diagnosis or treatment plan for the patient unless set forth in the written practice supervision agreement.” *Id.*

¹⁴ *Id.*

¹⁵ Section 54.1-2952(B).

practices. The supervising physician can rely on the assessment of the patient by the physician assistant or nurse practitioner who examined the patient at a follow-up visit and thereby have a bona fide practitioner-patient relationship with the patient.¹⁶ The supervising physician may then prescribe medication to the patient based upon the recommendations of the nurse practitioner or the physician assistant.

With regard to the dispensing, rather than mere prescribing, of medication, a physician may not sell or dispense controlled substances unless licensed by the Board of Pharmacy.¹⁷ The Board of Pharmacy may grant to a physician licensed in Virginia, “to whom a pharmaceutical service is not reasonably available,” a license to dispense drugs.¹⁸ If the supervising physician has received a license to dispense medications from the Board of Pharmacy, then he may dispense medication that he has prescribed after his patient’s follow-up visit with a nurse practitioner or physician assistant within his practice group.

CONCLUSION

Accordingly, it is my opinion that if a nurse practitioner is part of the supervising physician’s patient care team, then the supervising physician may prescribe medication to the patient after the patient was seen by the nurse practitioner, based upon the nurse practitioner’s recommendation. Similarly, if a physician assistant has entered into a written practice agreement with the supervising physician that authorizes the physician assistant to assess and recommend treatment for the patient, then the supervising physician may prescribe medication to the patient based upon the physician assistant’s recommendation. In either case, the supervising physician must ensure that all the requirements of a bona fide

¹⁶ I note, however, that the other elements of a bona fide practitioner-patient relationship also must be satisfied: the supervising physician must ensure, for a follow-up visit with a nurse practitioner or physician assistant, that an updated medical or drug history is obtained from the patient and that the patient has been provided information regarding the benefits and risks of any drug being prescribed. Section 54.1-3303(A).

¹⁷ Section 54.1-2914(A) (2013) provides that “[a] practitioner of the healing arts shall not engage in selling controlled substances unless he is licensed to do so by the Board of Pharmacy.” Nevertheless, the prohibition does not apply to a physician “who administers controlled substances to his patients or provides controlled substances to his patient in a bona fide medical emergency or when pharmaceutical services are not available.” *Id.*

¹⁸ Section 54.1-3304 (2013).

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practitioner-patient relationship have been met. The supervising physician may not dispense medication to the patient unless he is licensed by the Board of Pharmacy to dispense drugs.

OP. NO. 14-063**ADMINISTRATION OF GOVERNMENT: VIRGINIA FREEDOM OF INFORMATION ACT (“FOIA”)**

Local law-enforcement agencies must disclose adult arrestee photographs (“mug shots”) pursuant to a valid FOIA request if they are contained in a database maintained by the local law-enforcement agency, regardless of whether the defendant is still incarcerated or has been released, unless disclosing them will jeopardize a felony investigation.

THE HONORABLE JIM O’SULLIVAN
SHERIFF, CITY OF CHESAPEAKE
FEBRUARY 5, 2016

ISSUE PRESENTED

You inquire whether adult arrestee photographs—commonly known as “mug shots”—are subject to disclosure under the Virginia Freedom of Information Act (“FOIA”)¹ once the prisoner has been released.

BACKGROUND

You advise that the Chesapeake Sheriff’s Office operates the Chesapeake City Jail. One element of jail operation is maintaining a database of information on inmates in an Offender Management System. The database includes mug shots, which are usually taken by your office. The mug shots are maintained indefinitely, and none have been deleted since the system was installed almost ten years ago. They are provided to the Chesapeake Police Department from time to time so that the Police Department may conduct photo lineups and respond to FOIA requests from news media.

¹ VA. CODE ANN. §§ 2.2-3700 through 2.2-3714 (2014).

APPLICABLE LAW AND DISCUSSIONThe Freedom of Information Act

FOIA “ensures the people of the Commonwealth ready access to public records in the custody of a public body or its officers and employees”² The primary purpose of the law “is to facilitate openness in the administration of government.”³ To that end, “[a]ll public records and meetings shall be presumed open, unless an exemption is properly invoked.”⁴ Moreover, “[a]ny exemption from public access to records or meetings shall be narrowly construed and no record shall be withheld . . . unless specifically made exempt pursuant to this chapter or other specific provision of law.”⁵

The requirements of FOIA apply to records maintained by law-enforcement agencies,⁶ and photographs fall within the types of records subject to disclosure.⁷ An amendment to FOIA adopted by the 2013 General Assembly requires release of “[i]nformation relative to the identity of any individual, other than a juvenile, who is arrested and charged, and the status of the charge or arrest[.]”⁸ and it specifically directs that

All public bodies engaged in criminal law-enforcement activities *shall provide . . . [a]dult arrestee photographs* taken during the initial intake following the arrest and as part of the routine booking procedure, except when necessary to avoid jeopardizing an investigation in felony cases until such time as the release of the photograph will no longer jeopardize the investigation^[9]

² VA. CODE ANN. § 2.2-3700(B).

³ Am. Tradition Inst. v. Rector & Visitors of the Univ. of Va., 287 Va. 330, 339 (2014).

⁴ Section 2.2-3700(B).

⁵ *Id.*

⁶ FOIA applies only to “public bodies.” As an “agency” of a “political subdivision of the Commonwealth,” the Sheriff’s Department of the City of Chesapeake is a public body subject the provisions of FOIA. *See* § 2.2-3701 (defining “public body”); *see also* 2005 Op. Va. Att’y Gen. 13, 16 (noting that a “sheriff’s office . . . is also a public body subject to the disclosure requirements of the Act”).

⁷ *See* § 2.2-3701 (defining “public record” to include recordings that are set down by photography).

⁸ Section 2.2-3706(A)(1)(c).

⁹ Section 2.2-3706(A)-(A)(1)(b) (emphasis added); 2013 Va. Acts ch. 695.

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Applying the plain language of these FOIA provisions,¹⁰ I conclude that the General Assembly clearly mandated in 2013 that adult mug shots be released upon proper request, subject to the restriction about jeopardizing an investigation. This 2013 amendment does not differentiate between mug shots of prisoners whose cases are pending and mug shots from ended cases.

Criminal History Record Information

In addition to FOIA, laws governing disclosure of criminal history record information must be considered to determine what restrictions, if any, they place on releasing mug shots. Criminal history record information is maintained pursuant to the Criminal Justice Information System (the “CJIS”) and the Central Criminal Records Exchange (the “CCRE”).¹¹

CJIS applies to “original or copied criminal history record information, maintained by a [state or local] criminal justice agency.”¹² The term “criminal history record information” is defined in relevant part as “records and data collected by criminal justice agencies on adult individuals consisting of identifiable descriptions. . . .”¹³ While mug shots are not specifically mentioned, this definition can reasonably be interpreted to encompass them, for they are “identifiable descriptions” of individuals. Laws concerning the CCRE, discussed below, restrict the release of criminal history record information so that it may be released only to certain authorized persons.¹⁴

Although the release of criminal history record information is restricted,¹⁵ “nothing contained in this article shall be construed as prohibiting a criminal justice agency from disclosing to the public factual information concerning . . . the apprehension, arrest, release, or prosecution of an individual . . . which is related to the offense for which the individual is currently within the criminal justice

¹⁰ When statutory language is clear and unambiguous, its plain meaning will be given effect. *See* *Brown v. Lukhard*, 229 Va. 316, 321 (1985) (citing *School Bd. of Chesterfield County v. School Bd. of the City of Richmond*, 219 Va. 244, 250 (1978)).

¹¹ *See* VA. CODE ANN. § 9.1-127 (2012).

¹² Section 9.1-126 (2012).

¹³ Section 9.1-101 (Supp. 2014).

¹⁴ *See* VA. CODE ANN. § 19.2-389 (Supp. 2014).

¹⁵ *Id.*

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system.”¹⁶ Mug shots, which fall within the meaning of criminal history record information (*i.e.*, restricted release) also fall within the meaning of the term “factual information concerning . . . arrest” (*i.e.*, unrestricted release).

Criminal history record information is maintained by local law enforcement agencies, and it is also entered into a central database, as set forth in Chapter 23 of Title 19.2. That database, the CCRE, is maintained by the State Police as “the sole criminal record-keeping agency of the Commonwealth.”¹⁷ Its duties are “to receive, classify and file criminal history record information as defined in § 9.1-101 and other records required to be reported to it”¹⁸ For numerous offenses, local law enforcement officers are required to submit to the CCRE arrest information required by the CCRE.¹⁹ As noted above, mug shots reasonably can be deemed to be within the statutory definition of “criminal history record information,” and there is also a separate statutory requirement that they be included in the CCRE database.²⁰ Thus, mug shots are included in the CCRE.

Chapter 23 of Title 19.2 restricts dissemination of criminal history record information. It may be disseminated only to forty-four named requesters. Persons seeking criminal history record information pursuant to FOIA are not authorized requesters or recipients.²¹ While mug shots are included in the CCRE database,²² Chapter 23 explicitly does not preclude a local law enforcement agency “from maintaining its own separate photographic database.”²³ I note that the restrictions on releasing CCRE information dates from 2001 or earlier, several years prior to the 2013 FOIA amendment requiring the release of mug shots,²⁴ which lends support to the conclusion that the FOIA amendment requires the release of mug shots that are in a “separate photographic database.”

¹⁶ Section 9.1-126(C).

¹⁷ Section 19.2-387 (2008).

¹⁸ Section 19.2-388 (2008).

¹⁹ Section 19.2-390 (Supp. 2014).

²⁰ Section 19.2-390(A).

²¹ Section 19.2-389.

²² Section 19.2-392 (2008).

²³ Section 19.2-390(A)(1)(d).

²⁴ See 2001 Va. Acts 844 (amending, upon recodification of Title 9, the predecessor statute to § 9.1-128 to insert current § 9.1-128(A), thereby explicitly applying the restrictions of § 19.2-389 to all “criminal history record information”).

Your inquiry thus involves the relationship between two competing sections of the *Code of Virginia*. FOIA, as amended in 2013, evinces a clear and unmistakable legislative intent that mug shots must be released to the public upon proper request, without differentiating between active and closed cases. In contrast, laws related to CJIS and CCRE that predate the FOIA amendment evince an equally clear legislative intent that CJIS records, which are maintained in, but not exclusively in, the CCRE, and which include mug shots, be confidential and *not* accessible by the general public. However, this strict mandate against release is tempered by one statutory provision that allows the release of factual information concerning arrests and another statutory provision that allows a local law enforcement agency to maintain its own database of mug shots.

Conflicting laws should be construed “in *pari materia* in such manner as to reconcile, if possible, any discordant feature which may exist, and make the body of the laws harmonious and just in their operation.”²⁵

Exemptions to FOIA must be narrowly construed,²⁶ and a later enactment is presumed to prevail over an earlier enactment if they are inconsistent.²⁷ The FOIA amendment explicitly requiring disclosure of mug shots is more recent than the CJIS and CCRE laws requiring the confidentiality of criminal history record information. Further, while CJIS law takes precedence if it conflicts with other laws,²⁸ CJIS law can be interpreted in such a way that it does not conflict with FOIA.

Therefore, reconciling discordant laws in such a way as to make them harmonious and to honor legislative intent, it is my opinion that adult mug shots should be deemed “factual information concerning . . . the apprehension, arrest, release, or prosecution of an individual” and thus subject to release by local law enforcement agencies under FOIA so long as they exist in a photographic database maintained by the local law enforcement agency, and so long as their release will not jeopardize a felony investigation. It is my further opinion that mug shots contained in the CCRE are fully subject to the restrictions against disseminating

²⁵ *Waller v. Commonwealth*, 278 Va. 731, 737 (2009) (internal quotation marks and citations omitted).

²⁶ Section 2.2-3700(B).

²⁷ *Standard Drug v. General Electric*, 202 Va. 367, 378 (1960).

²⁸ “In the event any provisions of this article conflict with other provisions of law, the provisions of this article shall control. . . .” Section 9.1-137(A) (2012).

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CCRE information, and those restrictions do not allow mug shots to be drawn from the CCRE pursuant to a FOIA request.

CONCLUSION

For the foregoing reasons, it is my opinion that local law enforcement agencies must disclose adult arrestee photographs pursuant to a valid FOIA request if they are contained in a database maintained by the local law enforcement agency, regardless of whether the defendant is still incarcerated or has been released, unless disclosing them will jeopardize a felony investigation. However, photographs may not be drawn from the Central Criminal Records Exchange for disclosure at any time to comply with a FOIA request.

OP. NO. 14-081**TAXATION: TAXES ADMINISTERED BY THE DEPARTMENT OF TAXATION -
RETAIL SALES & USE TAX**

A hotel separated by a public street from a qualifying public facility is “adjacent” to the facility within the definition of “public facility” under subsection (iv) of § 58.1-608.3(A).

A hotel which is separated from a public facility by a public street but is connected to the public facility by a bridge or walkway is “attached” to the public facility within the definition of “public facility” under subsection (iii) of § 58.1-608.3(A).

Section 58.1-608.3 of the *Code of Virginia* allows for a hotel not originally constructed as part of a qualifying public facility to meet the definition of “public facility” under subsection (iii) and/or (iv) of § 58.1-608.3(A).

ANTHONY C. WILLIAMS, ESQUIRE
CITY ATTORNEY FOR THE CITY OF WINCHESTER
FEBRUARY 5, 2015

ISSUES PRESENTED

You inquire regarding the application of the term “public facility” as used in § 58.1-608.3 of the *Code of Virginia*, which entitles the municipal owner of such a facility to recoup certain sales tax revenues. You specifically ask whether a hotel with any of the following descriptions may qualify as a “public facility” under subsections (iii) or (iv) of § 58.1-608.3(A):

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- (i) A hotel not originally constructed as part of a qualifying public facility;
- (ii) A hotel located across a public street from a qualifying public facility; and
- (iii) A hotel located across a public street from a qualifying public facility and connected to that facility via a bridge or walkover.¹

BACKGROUND

You relate that the City of Winchester has purchased certain property for the purpose of constructing a convention center satisfying the requirements of the definition of “public facility” under § 58.1-608.3 of the *Code of Virginia*. You further advise that a hotel is located directly across the street from the proposed convention center property and that the city’s consultant for the convention center has identified the hotel as an integral part of the convention center project. You state that there are no other hotels within a two-mile radius of the proposed convention center site and no other hotels capable of supporting a convention center within the entire city. In addition to the hotel’s current ninety guestrooms, the feasibility study for the convention center indicates that the project will require an additional fifty guestrooms, which may be constructed either as part of the existing hotel structure or upon the property purchased for the convention center. The question has arisen as to whether the existing hotel will qualify as part of the proposed convention center (“public facility”), entitling the City to all sales tax revenue generated by the hotel under § 58.1-608.3(C).

APPLICABLE LAW AND DISCUSSION

Section 58.1-608.3(C) of the *Code of Virginia* entitles selected municipalities, including the City of Winchester, to recoup all sales tax revenues generated by transactions at a public facility for which the municipality has issued bonds.²

¹ I note that your inquiry arises from a specific factual situation. Although I am unable to comment definitely on the particular circumstances about which you inquire, I offer the analysis herein as general guidance. Whether the specific hotel in question qualifies in fact as a “public facility” for purposes of § 58.1-608.3 is beyond the scope of this Opinion. See 2009 Op. Va. Att’y Gen. 80, 81 & n.17 (“Attorneys General consistently have declined to render official opinions on specific factual matters[.]”); 2010 Op. Va. Att’y Gen. 56, 58 (The Attorney General “refrain[s] from commenting on matters that would require additional facts[.]”).

² VA. CODE ANN. § 58.1-608.3(C) (2013).

In order for a municipality to be entitled under § 58.1-608.3 to recoup sales tax revenue from a hotel, the hotel must qualify as part of the public facility under the statute. A hotel may qualify as part of a public facility under subsection (iii) of § 58.1-608.3 if it is “attached to and is an integral part” of a qualifying facility, or under subsection (iv) of § 58.1-608.3 if it is “adjacent to a convention center owned by a public entity and where the hotel owner enters into a public-private partnership whereby the locality contributes infrastructure, real property, or conference space.”³ The focus of your inquiry concerns the application of the terms “attached to” and “adjacent to.”

You first ask whether a hotel can meet the requirements of either subsection (iii) or subsection (iv) of the statute if it was not originally constructed as part of a qualifying facility. The relevant provisions make no reference to the time or purpose of the construction of a qualifying hotel.⁴ “Under basic rules of statutory construction, [courts] determine the General Assembly’s intent from the words contained in the statute.”⁵ Because the statute does not incorporate construction dates into its definition of “public facility,” I conclude that a hotel may meet the requirements under subsections (iii) and (iv) even if it originally was not constructed as part of the qualifying facility. Thus, assuming the other definitional requirements are met, the municipal owner of the public facility would be entitled to recoup sales tax revenues on both the public facility and the hotel.

Next, you inquire whether a hotel can meet the definition of “public facility” under subsection (iii) or (iv) of § 58.1-608.3(A) if it is separated from the qualifying public facility by a public street. Specifically, you ask whether the hotel can be considered “adjacent to” the qualifying public facility. Because the statute itself does not define “adjacent,” the term “adjacent” should be interpreted according to its ordinary meaning.⁶ *Black’s Law Dictionary* defines “adjacent” as “lying near or close to, but not necessarily touching,”⁷ and the Supreme Court of Virginia, in construing the term, has found that, to be “adjacent,” objects need not touch, but may be separated

³ Section 58.1-608.3(A).

⁴ *Id.*

⁵ *Williams v. Commonwealth*, 265 Va. 268, 271 (2003) (citing *Vaughn, Inc. v. Beck*, 262 Va. 673, 677 (2001); *Thomas v. Commonwealth*, 256 Va. 38, 41 (1998)).

⁶ *City of Va. Beach v. Bd. of Supvrs.*, 246 Va. 233, 236 (1993) (quoting *Grant v. Commonwealth*, 223 Va. 680, 684 (1982)) (“An important principle of statutory construction is that ‘words in a statute are to be construed according to their ordinary meaning, given the context in which they are used.’”).

⁷ BLACK’S LAW DICTIONARY 44 (8th ed. 2004).

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by the intervention of some other object.⁸ Specifically, the Court determined that although a billboard was separated from a highway by a road, it was, in fact, adjacent to the highway.⁹ Accordingly, a hotel may be considered adjacent to a convention center even if separated by a public road, and can satisfy the definition of a “public facility” under subsection (iv) of 58.1-608.3(A), so long as: (1) the convention center itself is owned by the city, and (2) the city enters into a public-private partnership with the hotel whereby the city contributes infrastructure, real property, or conference space. Provided these additional criteria are met, the municipal owner of the public facility would be entitled to recoup sales tax revenues on both the public facility and the hotel.

Finally, you ask whether a hotel could qualify as a “public facility” under subsection (iii) or (iv) of § 58.1-608.3(A) if the hotel were connected to a qualifying public facility via a bridge or walkover. Like “adjacent,” the word “attached” is not defined for purposes of the statute and must be given its plain meaning.¹⁰ To “attach” is “to fasten on or affix to; connect or join.”¹¹ Thus, I conclude that, should a bridge or walkway be constructed to connect a hotel with a qualifying convention center, the two structures would be “attached” for purposes of subsection (iii) of § 58.1-608.3(A). Thus, so long as the hotel also has been determined to be integral part of the public facility, the municipal owner of the public facility would be entitled to recoup sales tax revenues on both the public facility and the hotel.

CONCLUSION

Accordingly, it is my opinion that § 58.1-608.3 of the *Code of Virginia* allows for a hotel not originally constructed as part of a qualifying public facility to meet the definition of “public facility” under subsection (iii) and/or (iv) of § 58.1-608.3(A). It is also my opinion that a hotel separated by a public street from a qualifying public facility is “adjacent” to the facility within the definition of “public facility” under subsection (iv) of § 58.1-608.3(A). Finally, it is my opinion that a hotel which is separated from a public facility by a public street but is connected to the public facility by a bridge or walkway is “attached” to the public facility within the definition of “public facility” under subsection (iii) of § 58.1-608.3(A). If both or either of these definitions is satisfied, the municipal owner of the public

⁸ State Highway & Transp. Comm’r of Va. v. Creative Displays of Norfolk Ltd., 236 Va. 352, 354 (1988) (quoting Holston S. & P. Co. v. Campbell Trustee, 89 Va. 396, 398 (1892)).

⁹ *Id.*

¹⁰ See *Mattaponi v. Dep’t of Env’tl. Quality*, 270 Va. 423 (2005).

¹¹ THE AMERICAN HERITAGE DICTIONARY 139 (2d College ed. 1985).

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facility is entitled to recoup sales tax revenues on both the public facility and the hotel.

OP. NO. 14-052**U.S. CONSTITUTION – FOURTH AMENDMENT****MOTOR VEHICLES - MOTOR VEHICLE AND EQUIPMENT SAFETY**

Under *Riley v. California*, a law enforcement officer’s warrantless search of a driver’s cell phone or other handheld device in order to determine whether the driver had been operating a motor vehicle in violation of § 46.2-1078.1 generally would violate the Fourth Amendment.

THE HONORABLE DAVID L. BULOVA
MEMBER, HOUSE OF DELEGATES
FEBRUARY 6, 2015

ISSUE PRESENTED

You ask what effect, if any, the U.S. Supreme Court’s opinion in *Riley v. California*¹ has on the ability of a law enforcement officer to conduct a warrantless search of a driver’s cell phone during a traffic stop when the officer believes the driver was operating a motor vehicle in violation of § 46.2-1078.1 of the *Code of Virginia*, which prohibits texting or e-mailing messaging via handheld device while driving.

BACKGROUND

In 2013, the Virginia General Assembly enacted a statute prohibiting, as a primary offense, a driver from using a handheld device to communicate via text message or email while operating a moving motor vehicle on the highways of the Commonwealth.² Specifically, a driver is prohibited from “manually enter[ing] multiple letters or text in the device as a means of communicating with another person” or “read[ing] any email or text message transmitted to the device or stored within the device,” with the exception of a name or number stored on the device or caller identification information.³

¹ *Riley v. California*, 134 S. Ct. 2473 (2014).

² See 2013 Va. Acts cc. 752, 790.

³ VA. CODE ANN. § 46.2-1078.1(A)(1)–(2) (2014).

The case you reference, *Riley*, involved two separate cases where officers arrested defendants on firearms and drug distribution charges and searched their cell phones incident to their arrest in order to find further evidence of the crimes.⁴ The officers discovered evidence on the phones that subsequently was used in the defendants' trials, which resulted in convictions of the offenses.⁵ The U.S. Supreme Court specifically addressed whether a law enforcement officer "may, without a warrant, search digital information on a cell phone seized from an individual who has been arrested."⁶ In a unanimous decision, the Court held that "a warrant is generally required before such a search, even when a cell phone is seized incident to arrest"⁷ and thus reversed the conviction of one defendant and upheld the lower appellate court's reversal of the other.

APPLICABLE LAW AND DISCUSSION

The Fourth Amendment to the United States Constitution provides the following protections against unlawful search and seizure:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

For Fourth Amendment protections to attach, a person must have a reasonable expectation of privacy in the property that is to be searched.⁸ Because a person clearly has a reasonable expectation of privacy in the data contained on his cell phone,⁹ it is protected from unreasonable searches.

⁴ *Id.* at 2480–82.

⁵ *Id.*

⁶ *Riley*, 134 S. Ct. at 2480.

⁷ *Id.* at 2493.

⁸ See *United States v. Jones*, 132 S. Ct. 945, 950 (2012) (citing *Katz v. United States*, 389 U.S. 347, 351 (1967) (Fourth Amendment violation occurs when government official violates a person's reasonable expectation of privacy)).

⁹ See *Riley*, 134 S. Ct. at 2488-89 ("Modern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of cigarette pack, a wallet, or a purse.").

In evaluating the validity of particular searches, the Supreme Court of the United States has determined that “the ultimate touchstone of the Fourth Amendment is ‘reasonableness.’”¹⁰ As the Court articulated in *Riley*, its

cases have determined that “[w]here a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, . . . reasonableness generally requires the obtaining of a judicial warrant.” Such a warrant ensures that the inferences to support a search are “drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.” In the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement.¹¹

Although the Supreme Court long has recognized a search conducted incident to lawful arrest as an exception to the warrant requirement,¹² determining the scope of the exception requires “‘assessing on the one hand, the degree to which [a search] intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of governmental interests.’”¹³

In evaluating the warrantless cell phone searches before it, the *Riley* Court contrasted the search of data contained on an individual’s cell phone from the traditional searches of physical items the Court typically considers.¹⁴ With respect to privacy concerns, the Court noted that, in contrast to other physical objects, by virtue of the vast amounts of information modern cell phones can hold, a person’s entire life may be contained within his phone’s digital content¹⁵ and, therefore, a search of the latter constitutes an invasion of privacy that may exceed even “the most exhaustive search” of one’s house.¹⁶ With respect to governmental interests, the Court found that, while a law enforcement officer is free to conduct a physical search of a cell phone to ensure that it cannot be used as a weapon, a more extensive search of the data stored on the phone is unnecessary to ensure officer

¹⁰ *Id.* at 2482 (quoting *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006)) (internal quotation marks omitted).

¹¹ *Id.* (internal citations omitted).

¹² *Id.* at 2482-83.

¹³ *Id.* at 2484 (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)).

¹⁴ *See id.* at 2484-85, 2488-91.

¹⁵ *Id.* at 2489-91

¹⁶ *Id.* at 2491.

safety because “data on the phone can endanger no one.”¹⁷ Similarly, the Court found that the need to preserve evidence is insufficient to justify a data search when compared to the heightened privacy concerns, for “once law enforcement officers have secured a cell phone, there is no longer any risk that the arrestee himself will be able to delete incriminating data from the phone.”¹⁸

In sum, the Court held that the traditional concerns underlying the warrant exception for searching an arrestee and the area within his immediate control—officer safety and evidence preservation—do not exist in the context of cell phones so as to justify a blanket rule allowing for their warrantless search,¹⁹ and therefore, the Court instead established a rule prohibiting the warrantless search of a cell phone incident to arrest absent some other case-specific exception to the warrant requirement.²⁰

Your inquiry focuses on what effect, if any, this general prohibition against the warrantless searches of cell phones has on a law enforcement officer’s ability to search a handheld device of a driver the officer believes is operating a motor vehicle in violation of § 46.2-1078.1. Specifically, you ask whether *Riley* prohibits an officer who has stopped a driver under a suspicion of texting while driving from conducting a warrantless search of the driver’s cell phone for evidence of the driver’s text messaging activity. The scenario you present differs slightly from those considered in *Riley*: while *Riley* involved searches incident to arrest, your fact pattern concerns traffic stops made without a resulting arrest.

¹⁷ *Id.* at 2485.

¹⁸ *Id.* at 2486. With respect to other potential tampering issues, the Court suggested that officers could disconnect the phone from its cellular network by turning it off, removing the battery, or placing the phone in a device, typically known as a Faraday bag, that isolates it from radio waves, thus providing him with time to obtain a search warrant before searching the phone. *Id.* at 2487-88.

¹⁹ *Id.* at 2484-85. In weighing the competing interests, *Riley* also specifically rejects the contention that an officer may limit his search to only that area of the cell phone where he believes evidence of the crime may be located, such as, in the case presented, searching only the text messages of the individual. *Id.* at 2492. The Court reasoned that an officer cannot be sure of what evidence will be found where on a cell phone. *Id.*

²⁰ *Id.* at 2495 (“Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant.”).

Justification for a warrantless search incident to arrest is based, in part, on the reduced privacy interest of the defendant once he has been arrested.²¹ As a general rule, an officer may stop a car based simply on a reasonable and articulable suspicion that a crime has occurred,²² but an arrest requires probable cause. Thus, for traffic stops where the driver has not been arrested, his privacy interests remain fully intact, and the need for a warrant to search the contents of his phone is greater. The Supreme Court has “restricted broad searches resulting from minor crimes such as traffic violations,”²³ and, as the *Riley* Court notes, searches of vehicles and the person are not justified for mere citations issued during traffic stops.²⁴ It follows, then, that if the Fourth Amendment prohibits a warrantless search of a cell phone upon arrest when there is a lower expectation of privacy, it also must proscribe a warrantless search initiated from a traffic stop or otherwise based on the lower standard of reasonable suspicion.

Moreover, in refusing to extend a general warrant exception to cell phone data searches, the Court contemplated a situation similar to the one you propose—an officer conducting a warrantless search of a cell phone for evidence of an individual’s texting activity during an investigation of reckless driving.²⁵ Although the Court previously had recognized a separate, independent basis for permitting a warrantless search of a vehicle’s passenger compartment upon a reasonable belief that evidence of the crime of arrest was present,²⁶ the *Riley* Court clarified that this alternative exception is limited to the context of vehicle searches²⁷ and expressly declined to apply the precedent to officers looking for evidence on cell phones. The Court determined that such an extension would run afoul of the Fourth Amendment’s privacy protections, for warrantless searches of cell phones “would in effect give ‘police officers unbridled discretion to rummage

²¹ *Id.* at 2488.

²² *See Terry v. Ohio*, 392 U.S. 1, 30 (1968).

²³ *Riley*, 134 S. Ct. at 2492.

²⁴ *Id.* at 2485 (citing *Knowles v. Iowa*, 525 U.S. 113, 119 (1998)).

²⁵ *Id.* at 2492.

²⁶ *Id.* at 2485 (explaining part of the Court’s prior holding in *Arizona v. Gant*, 556 U.S. 332 (2009)).

²⁷ *Id.* at 2485, 2492.

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at will among a person's private effects" and provide access to a "virtually unlimited" amount of "potential pertinent information."²⁸

I therefore conclude, based on the rationale relied upon in *Riley*, that the Constitution of the United States prohibits a warrantless search of a cell phone, or any other handheld device capable of sending and receiving text and email communications, initiated from a traffic stop.

Nevertheless, I note that a law enforcement officer retains several options to further investigate whether a driver was in violation of § 46.2-1078.1. First, the officer may attempt to obtain the driver's consent to a search of the handheld device.²⁹ Second, the officer can seize the driver's handheld device to secure it in anticipation of obtaining a search warrant.³⁰ Finally, as noted in *Riley*, an officer may be able to rely on a case-specific exception to the warrant requirement based on exigent circumstances. Such an exception may apply in an "extreme" case that would allow officers encountering a true emergency to conduct a warrantless search of a cell phone.³¹ Although these exceptions are available outside the

²⁸ *Id.* at 2492 (quoting *Gant*, 556 U.S. at 345). The Court admonished: "It would be a particularly inexperienced or unimaginative law enforcement officer who could not come up with several reasons to suppose evidence of just about any crime could be found on a cell phone." *Id.*

²⁹ *See Katz*, 389 U.S. at 358 n.22 ("A search to which an individual consents meets Fourth Amendment requirements."). As long as the consent is freely and voluntarily given, the resulting search will be valid. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 228 (1973).

³⁰ *See Riley*, 134 S. Ct. at 2488. The warrantless seizure also must satisfy constitutional principles. A reviewing court will consider several factors to determine whether such a seizure comports with Fourth Amendment requirements. *See Illinois v. McArthur*, 531 U.S. 326, 332 (2001). These factors include whether the officer has probable cause to believe the driver's handheld device contains evidence of the crime being investigated; whether the officer has a reasonable fear that such evidence would be destroyed or tampered with but for the warrantless seizure; whether the officer balances the Commonwealth's interest in preserving evidence with the privacy rights of the driver by, for instance, merely seizing the handheld device without detaining the driver; and whether the officer employs the warrantless seizure for limited period of time. *Id.* Assuming the officer's investigation can satisfy these four requirements, his warrantless seizure of a driver's handheld device in anticipation of obtaining a search warrant would alleviate any Fourth Amendment concerns.

³¹ *Riley*, 134 S. Ct. at 2494. As examples, the *Riley* Court suggested scenarios involving an imminent need to prevent the destruction of evidence, to pursue a fleeing suspect, or to assist a person who is seriously injured or threatened by imminent injury. *Id.* The Court more specifically mentioned that the exception would apply in circumstances where a suspect is texting an accomplice who may be

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context of a search incident to arrest,³² the exigent circumstances exception applies only in situations in which ““there is a compelling need for official action and no time to secure a warrant.””³³

CONCLUSION

Accordingly, it is my opinion that, under *Riley*, a law enforcement officer’s warrantless search of a driver’s cell phone or other handheld device in order to determine whether the driver had been operating a motor vehicle in violation of § 46.2-1078.1 of the *Code of Virginia* would violate the Fourth Amendment of the U.S. Constitution.

OP. NO. 14-076**ADMINISTRATION OF GOVERNMENT - STATE & LOCAL GOVERNMENT
CONFLICT OF INTERESTS ACT (“COIA”)**

Answers to various inquiries regarding the effect of COIA’s “savings clause” upon the voting requirements of the Hampton Roads Transportation Accountability Commission.

THE HONORABLE FRANK W. WAGNER
MEMBER, SENATE OF VIRGINIA
FEBRUARY 6, 2015

ISSUES PRESENTED

You present the following inquiries relating to the application of the State and

preparing to detonate an explosive or where a child abductor may have information about the child’s whereabouts on his cellular telephone. *Id.*

³² See *Kentucky v. King*, 131 S. Ct. 1849 (2011) (warrantless search justified to protect person from injury); *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) (warrantless search justified to prevent imminent destruction of evidence and pursue fleeing suspect).

³³ *Missouri v. McNeely*, 133 S. Ct. 1552, 1559 (2013) (quoting *Michigan v. Tyler*, 436 U.S. 499, 509 (1978)). Whether exigent circumstances would exist in a particular case is a fact-specific determination beyond the scope of this Opinion.

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Local Government Conflict of Interests Act (“COIA”)¹ to the Hampton Roads Transportation Accountability Commission (the “Commission”):

- 1) You inquire whether the Commission is a state or local agency for purposes of COIA;
- 2) You inquire as to how COIA’s “savings clause”² applies to the specific voting requirements of the Commission;
- 3) You inquire whether the savings clause applies to the disqualifications described in § 2.2-3110(A)(4) and (6) (personal interest being only income and not ownership interest; contract between governmental agency and public service corporation, financial institution, or public utility);
- 4) You inquire whether the savings clause applies to disqualifications that occur under § 2.2-4369 of the Virginia Public Procurement Act;³ and
- 5) With respect to members of the Commission who also are legislators, you inquire whether the General Assembly Conflicts of Interests Act affects the ability of these members to participate in transactions of the Commission, and the Commission’s ability to meet its voting requirements.

BACKGROUND

The General Assembly created the Commission in its 2014 Regular Session.⁴ Pursuant to its enabling legislation, the Commission is responsible for selecting new regional highway construction projects to be financed primarily with monies from the Hampton Roads Transportation Fund.⁵ In addition, it is responsible for ensuring that all monies in the Fund are used for such construction purposes. One of the chief goals of the Commission is to reduce traffic congestion in the Hampton Roads region through its selection of highway construction projects.⁶ In

¹ VA. CODE ANN. §§ 2.2-3100 through 2.2-3131 (2014).

² See § 2.2-3112(C), discussed *infra*.

³ VA. CODE ANN. §§ 2.2-4300 through 2.2-4377 (2014).

⁴ See 2014 Va. Acts. cc. 545, 678.

⁵ VA. CODE ANN. § 33.2-2600 (2014).

⁶ *Id.*

order to facilitate its mission, the General Assembly has established detailed requirements governing the composition, authority, and voting procedures of the Commission.⁷

APPLICABLE LAW AND DISCUSSION

COIA sets minimum standards for ethical conduct for both state and local officers. It defines certain conduct that generally is prohibited, as well as other prohibited or restricted interests in contracts that are entered into and transactions that are considered by state and local governmental agencies in the course of public business. As a threshold matter, I note that appointees of the Commission are “officers” of a “governmental agency” as defined in COIA.⁸ I now will address your inquiries regarding the application of COIA to the Commission *seriatim*.

1. Whether the Commission is a State or Local Agency for Purposes of COIA

You first inquire whether the Commission is a state or local agency for purposes of COIA.⁹ COIA defines the term “governmental agency” as

each component part of the legislative, executive, or judicial branches of state and local government, including each office, department, authority, post, commission, committee, and each institution or board created by law to exercise some regulatory or sovereign power or duty as distinguished from purely advisory powers or duties.^[10]

⁷ See §§ 33.2-2600 through 33.2-2611 (2014).

⁸ See § 2.2-3101 (defining the terms “officer” and “governmental agency”).

⁹ The purpose of your inquiry is to determine whether members of the Commission may rely on advisory opinions of the Attorney General with regard to their obligations under COIA. Pursuant to § 2.2-3121(A) & (B), officers of state agencies may rely on advisory opinions of the Attorney General, whereas officers of local agencies may rely on advisory opinions issued by their local Commonwealth’s Attorney. (Both state and local officers, however, also may rely on advisory opinions issued by the Virginia Conflict of Interest and Ethics Advisory Council.)

In addition to these provisions creating separate avenues for state and local officers to obtain advisory opinions, other provisions of COIA apply differently to state and local officers. See Article 2 of COIA (§§ 2.2-3105 through 2.2-3110) (establishing separate requirements for state and local officers with personal interests in contracts); Article 5 of COIA (§§ 2.2-3113 through 2.2-3118.1) (establishing separate disclosure requirements for state and local officers); § 2.2-3127 (establishing separate venues for the enforcement of state and local level violations of COIA).

¹⁰ Section 2.2-3101.

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COIA provides no specific guidance for determining whether a governmental agency is “state” or “local” for its purposes. Generally, in determining whether an agency should be classified as “state” or “local” under state law, the following factors should be examined:

- 1) Whether the agency was created by an act of the General Assembly or a local governing body;
- 2) Whether the agency fulfills a state or local purpose;
- 3) Whether the General Assembly or a local governing body maintains control over the agency; and
- 4) Whether the agency is funded primarily with state or local funds.¹¹

Applying these factors to the Commission, I first note that it was created by an act of the General Assembly, rather than a local governing body.¹² Next, because the development of the state highway system is fundamentally a state purpose,¹³ the Commission fulfills a state purpose in selecting new highway construction projects for the Hampton Roads region. Although the Commission is a regionally-focused entity, and neither the General Assembly nor any local governing body maintains direct control over it, the General Assembly has closely circumscribed the reach of the Commission’s authority by statute. In particular, the General Assembly, through the Commission’s enabling legislation, has determined how Commission members shall be selected, what voting procedures the Commission shall follow, and the scope of the Commission’s control over

¹¹ *Cf. Prendergast v. N. Va. Reg’l Park Auth.*, 227 Va. 190, 194 (1984) (holding that park authority created and controlled by a locality was a “local” entity for purposes of determining tort liability); *Va. Elec. & Power Co. v. Hampton Redev. & Hous. Auth.*, 217 Va. 30, 32-33 (1976) (holding that a housing authority created and controlled by a locality was a “local” entity for purposes of determining tort liability); 1987-88 Op. Va. Att’y Gen. 84, 85-86 (establishing various factors for differentiating between state agencies, local agencies, and independent political subdivisions).

¹² *See supra* note 4.

¹³ *See generally* Chapter 2, Title 33.2 of the *Code of Virginia* (establishing governmental entities to manage the Commonwealth’s transportation system); Chapters 15 to 18, Title 33.2 of the *Code* (establishing avenues for the funding, development, and improvement of the Commonwealth’s transportation system).

regional transportation.¹⁴ Finally, the Commission is funded primarily with state revenues from the Hampton Roads Transportation Fund.¹⁵

Based on the foregoing, I conclude that the Commission is a “state agency” for purposes of COIA, and members of the Commission are to be deemed state officers.¹⁶

2. Application of the “Savings Clause” to Commission Voting Requirements

One section of COIA contains what is commonly known as the “savings clause.” Its purpose is to preserve the functioning of state and local agencies when disqualifications under COIA (i) render a required quorum impossible, or (ii) leave less than the number of members required by law to act.¹⁷ You ask how the savings clause applies to the specific voting requirements of the Commission. Section 33.2-2604 sets forth these voting requirements as follows:

A majority of the Commission, which majority shall include at least a majority of the chief elected officers of the counties and cities embraced by the Commission, shall constitute a quorum. Decisions of the Commission shall require a quorum and shall be in accordance with voting procedures established by the Commission. In all cases, decisions of the Commission shall require the affirmative vote of two-thirds of the members of the Commission present and voting, and two-thirds of the chief elected officers of the counties and cities embraced by Planning District 23 who are present and voting and whose counties and cities include at least two-thirds of the population embraced by the Commission

Thus, for Commission actions, the General Assembly has imposed two distinct voting requirements. In construing the mechanics of these voting provisions, it is

¹⁴ See §§ 33.2-2600 through 33.2-2611; *supra* note 7 and accompanying text.

¹⁵ See § 33.2-2600. The Hampton Roads Transportation Fund contains state revenues collected through the Motor Vehicle Fuels Sales Tax. See VA. CODE ANN. § 58.1-2299.20 (2013).

¹⁶ This conclusion is limited to classifying the Commission as a “state agency” for the narrow purposes of COIA and is not intended to affect the Commission’s classification for financial control or any other purposes.

¹⁷ See § 2.2-3112(C); *Jackabin v. Town of Front Royal*, 271 Va. 660, 668 (2006) (support for second prong of proposition).

helpful to note that the Commission comprises twenty-three members: fourteen chief elected officers of the governing bodies of the localities embraced by the Commission, three members of the House of Delegates, two members of the Senate of Virginia, and four nonvoting *ex officio* members.¹⁸ Therefore, in order to achieve a quorum, at least twelve members of the Commission must be present, at least eight of whom must be chief elected officers of the counties and cities embraced by the Commission. In order to pass a measure, two-thirds of the Commission members present and voting must affirm, including two-thirds of the chief elected officers present and voting whose counties and cities include at least two-thirds of the population embraced by the Commission.

The savings clause, as set forth in § 2.2-3112(C), provides that

notwithstanding any other provision of law, if disqualifications of officers or employees in accordance with this section leave less than the number required by law to act, the remaining member or members shall constitute a quorum for the conduct of business and have authority to act for the agency by majority vote, unless a unanimous vote of all members is required by law, in which case authority to act shall require a unanimous vote of remaining members.^[19]

Disqualifications under § 2.2-3112 could affect the Commission's ability to meet its voting requirements in two ways. First, disqualifications could leave fewer than the number required under § 33.2-2604 to constitute a quorum. Second, disqualifications could leave fewer than the number of chief elected officers sufficient to represent at least two-thirds of the population embraced by the Commission. In either case, the savings clause would apply to preserve the functioning of the Commission. I reach this conclusion because the savings clause applies "notwithstanding any other provision of law." It is not required that the savings clause be specifically mentioned in the enabling legislation creating the Commission.²⁰

¹⁸ Section 33.2-2602.

¹⁹ Emphasis added.

²⁰ See *Green v. Commonwealth*, 28 Va. App. 567, 570 (1998) (finding that inclusion of the phrase "notwithstanding any other provision of law" in a statute means that its provisions shall prevail over other incongruous law); see also *Alger v. Commonwealth*, 267 Va. 255, 261 (2004) (quoting *Barr v. Town & Country Props., Inc.*, 240 Va. 292, 295 (1990)) ("We 'assume that the legislature chose, with care, the words it used when it enacted the relevant statute.'").

The savings clause applies to each of these circumstances in the following manner: if disqualifications leave fewer than the number required to constitute a quorum under § 33.2-2604, the remaining voting members should be considered a quorum and shall have the authority to act by majority vote. If, on the other hand, a quorum under § 33.2-2604 has been achieved, but disqualifications leave fewer than the number of chief elected officers sufficient to represent two-thirds of the population, the remaining voting members of the Commission have the authority to act by majority vote (rather than overall two-thirds vote). Although this result effectively eliminates the population requirement in applicable scenarios, it preserves the ability of the Commission to function, in keeping with the purposes of the savings clause.

3. The Savings Clause and Disqualifications Described in § 2.2-3110(A)(4) and (6) (personal interest being only income and not ownership interest; contract between governmental agency and public service corporation, financial institution, or public utility)

You further inquire whether the savings clause applies when governmental officers or employees disqualify themselves in circumstances described in § 2.2-3110 (personal interest comprised of income but not ownership interest; contract with public service corporation, financial institution or public utility).

Disqualification applies to transactions, which are governed by Article 4 of COIA. Subject to certain exceptions, if a governmental officer or employee has a personal interest in a transaction, he must disqualify himself from participating in the transaction. The savings clause applies only when an officer or employee disqualifies himself from participating in a transaction. Section 2.2-3110, about which you inquire, is not in Article 4. It is in Article 3, which governs contracts, not transactions. It does not in any way modify the circumstances under which an officer or employee must disqualify himself under Article 4 from participating in a transaction. Instead, it provides that certain contracts which might otherwise be prohibited are permissible under certain circumstances. One of those circumstances is if an officer disqualifies himself from a transaction involving certain types of contracts. Section 2.2-3110 does not establish its own disqualification procedures.²¹ When an officer disqualifies himself for the

²¹ The negotiation and approval of a contract on behalf of an agency constitute “transactions” under COIA. See § 2.2-3101 (defining the term “transaction” as “[a]ny matter considered by any

purposes of § 2.2-3110, which is within Article 3, he is required to follow the disclosure and abstention procedures established in § 2.2-3112(A)(1), which is within Article 4.²² Therefore, there is no disqualification *per se* under § 2.2-3110, as suggested by your question. That section merely specifies the *consequences* of certain disqualifications made under § 2.2-3112. Therefore, the savings clause would apply to any such disqualification.

4. The Savings Clause and Nonparticipation Under the Procurement Act²³

Next, you ask whether the savings clause applies when the number of members prohibited from participating under § 2.2-4369 of the Virginia Public Procurement Act (the “Procurement Act”) leave less than the number required by law to act.²⁴ Similar to your preceding inquiry, the essence of this inquiry is whether nonparticipation pursuant to § 2.2-4369 should be considered a disqualification under § 2.2-3112 for purposes of applying the savings clause.

By its terms, the savings clause is not triggered by mandated nonparticipation under the Procurement Act: it applies only where there are “disqualifications of officers or employees *in accordance with this section*,” and the section in question—§ 2.2-3112—is a part of COIA and not a part of the Procurement Act. Further, the Procurement Act does not use any variation of the term “disqualification.”

governmental . . . agency, whether in a committee, subcommittee, or other entity of that agency or before the agency itself, on which official action is taken or contemplated”).

²² This is true regardless of whether the officer might otherwise be permitted to participate in the transaction pursuant to an applicable exception in § 2.2-3112(A). Subsections § 2.2-3110(4)-(6) require that an officer who avails himself of the relevant provisions in order to retain his personal interest in a contract must disqualify himself “as a matter of public record.” No exceptions to such disqualification apply. Section 2.2-3112(A)(1) establishes the relevant procedures for disqualification as a matter of public record that the officer must follow. Specifically, the officer is required to disclose his personal interest as required by § 2.2-3114(E) or § 2.2-3115(F); he is prohibited from attending any closed meeting in which the matter is discussed; and he also is prohibited from discussing the matter with any government officers or employees at any time.

²³ VA. CODE ANN. §§ 2.2-4300 through 2.2-4377 (2014). I note that the Procurement Act does not use the term “disqualification” or any variation of it, as COIA does. Instead, it discusses the circumstances under which public employees and officials may not “participate” in transactions.

²⁴ In addition to being subject to provisions of COIA, members of the Commission are subject to the ethics requirements of the Procurement Act. In particular, members of the Commission are considered “employees” of a “public body” as defined by the Procurement Act. *See* § 2.2-4301 (defining the term “public body”); § 2.2-4368 (defining the term “public employee”).

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Instead, it refers to mandated nonparticipation under certain circumstances. Section 2.2-4369 of the Procurement Act generally prohibits a public employee from participating in a procurement transaction when he is employed by, or has certain other types of interest in, a bidder, contractor, or offeror who is involved in the transaction.²⁵

As a practical matter, the facts that give rise to disqualification under COIA would in almost all cases require nonparticipation under the Procurement Act. However, it is possible that there could be a rare procurement transaction when an official is barred by the Procurement Act from participating, but he is not disqualified under COIA. If such a circumstance ever arises, the savings clause would not be invoked, and the government agency's quorum and voting requirements would remain in effect.

5. Potential Impact of the General Assembly Conflicts of Interests Act on Member Participation and the Ability of the Commission to Meet Voting Requirements

Your final inquiry concerns those members of the Commission who serve as members of the General Assembly. You ask whether the General Assembly Conflicts of Interests Act (the "General Assembly Conflicts Act")²⁶ applies to these members in a manner that may affect their ability to participate in the Commission or affect the Commission's ability to meet its voting requirements.

Members of the Commission who are legislators are subject to all applicable provisions of the General Assembly Conflicts Act in their service on the Commission.²⁷ Among other things, the General Assembly Conflicts Act governs the ethical conduct of legislators with respect to their financial interests in transactions of the General Assembly and contracts with state and local governmental agencies.²⁸ These requirements are separate from and independent of the requirements of COIA.

²⁵ See § 2.2-4369.

²⁶ VA. CODE ANN. §§ 30-100 through 30-129.3 (2011 & Supp. 2014).

²⁷ See § 30-100 (Supp. 2014) ("This chapter shall apply to members of the General Assembly.").

²⁸ See §§ 30-105 through 30-108 (2011 & Supp. 2014). In addition, the General Assembly Conflicts Act describes conduct which generally is prohibited. See § 30-103 (2011).

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Although the General Assembly Conflicts Act requires a legislator to disqualify himself from participating in transactions in which the legislator has a personal interest,²⁹ this requirement applies only to transactions before the General Assembly.³⁰ Accordingly, transactions before the Commission that a legislator considers in his role as a Commission member are not implicated under the General Assembly Conflicts Act. A legislator who serves as a Commission member is subject to COIA in his role as a Commission member, and COIA may require him to disqualify himself from certain transactions in which he has a personal interest. If that occurs, the savings clause would apply. However, disqualification and the savings clause would be applicable only because of COIA, not because of the General Assembly Conflicts Act.

CONCLUSION³¹

Accordingly, it is my opinion, based on the facts presented, that

- 1) The Commission is a state agency for purposes of COIA;
- 2) If disqualifications under § 2.2-3112 of COIA leave the Commission with fewer than the number required to constitute a quorum, the remaining voting members shall constitute a quorum and shall have authority to act by majority vote. If a quorum has been achieved, but disqualifications leave fewer than the number of chief elected officers sufficient to represent two-thirds of the population, the remaining voting members of the Commission have the authority to act by majority vote, rather than overall two-thirds vote;

²⁹ Section 30-109 (2011).

³⁰ See § 30-101 (Supp. 2014) (defining a “transaction” for purposes of the General Assembly Conflicts Act as “any matter considered by the General Assembly, whether in a committee, subcommittee, or other entity of the General Assembly or before the General Assembly itself, on which official action is taken or contemplated”).

³¹ Because the interaction of the different laws discussed in this opinion is so complex, it is conceivable that a particular set of facts could arise in which a different legal conclusion results. Thus, this Opinion should be viewed as providing only general guidance. If questions about future, specific factual situations arise, you are free to seek additional guidance from this Office.

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- 3) Section 2.2-3110 does not set forth a different type of disqualification from § 2.2-3112. It merely specifies certain consequences for certain contracts where there has been a disqualification under § 2.2-3112. The savings clause applies to all disqualifications under § 2.2-3112, regardless of whether or not they come into play under § 2.2- 3110.
- 4) The savings clause does not apply to mandated nonparticipation under § 2.2-4369 of the Procurement Act, but as a practical matter such mandated nonparticipation will probably also require disqualification under COIA, thus invoking the savings clause;
- 5) Members of the Commission who also are legislators are subject to all applicable provisions of the General Assembly Conflicts Act in their service on the Commission. However, the only transactions for which this Act requires disqualification are transactions with the General Assembly. Thus, the General Assembly Conflicts Act will not come into play for transactions of the Commission, and it will not require any legislator to disqualify himself from transactions of the Commission. A legislator does remain subject to COIA in his capacity as a member of the Commission, and if COIA requires him to disqualify himself from a transaction, the savings clause would apply.

OP. NO. 14-080**EDUCATION: GENERAL POWERS AND DUTIES OF SCHOOL BOARDS**

The Dillon Rule does not prevent school boards from amending their antidiscrimination policies to prohibit discrimination on the basis of sexual orientation and gender identity.

THE HONORABLE ADAM P. EBBIN
MEMBER, SENATE OF VIRGINIA
MARCH 4, 2015

ISSUE PRESENTED

You ask whether a 2002 Opinion of this Office,¹ concluding that a school board does not have the legal authority to amend its nondiscrimination policy to prohibit sexual-orientation and gender-identity discrimination, is valid in light of Article VIII, § 7 of the Constitution of Virginia, this Office’s 2006 Opinion concerning concealed weapons on college campuses,² and the Fourth Circuit’s recent decision in *Bostic v. Schaefer*.³ Your question implicates nondiscrimination policies with respect to both students and school employees.

APPLICABLE LAW AND DISCUSSION

School boards are “public quasi corporations that exercise limited powers and functions of a public nature granted to them expressly or by necessary implication.”⁴ Virginia follows the Dillon Rule of strict construction, which “provides that municipal corporations have only those powers that are expressly granted, those necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable.”⁵ A corollary to the Dillon Rule applies these constraints to local school boards.⁶ Because the General Assembly has never specifically authorized school boards to prohibit discrimination on the basis of sexual orientation or gender identity, school boards only have the authority to do so if that authority is fairly or necessarily implied from an express grant of power.

The Constitution of Virginia confers expansive power on local school boards. Article VIII, § 7 of the Constitution of Virginia provides that “the supervision of schools in each school division shall be vested in a school board.”⁷ The Supreme Court of Virginia has made clear that the express supervisory power contained in Article VIII, § 7 necessarily includes a broad range of implied powers. For

¹ 2002 Op. Va. Att’y Gen. 105.

² 2006 Op. Va. Att’y Gen. 116.

³ *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014), *cert denied*, Nos. 14-153, 14-225, 14-251, 2014 U.S. LEXIS 6053, 6316, 6504 (U.S. Oct. 6, 2014).

⁴ *Kellam v. Sch. Bd.*, 202 Va. 252, 254 (1961).

⁵ *Bd. of Zoning Appeals v. Bd. of Supvrs.*, 276 Va. 550, 553-54 (2008).

⁶ *Payne v. Fairfax Cnty. Sch. Bd.*, No. 140145 (Va. Oct. 31, 2014); *Bd. of Zoning Appeals*, 276 Va. at 553-54.

⁷ VA. CONST. art. VIII, § 7.

example, the Supreme Court has found that school boards' supervisory power necessarily includes derivative powers to regulate "the safety and welfare of students,"⁸ "to supervise personnel,"⁹ and to apply "local policies, rules, and regulations adopted for the day-to-day management of a teaching staff."¹⁰ No other local or state entity may encroach on the far-reaching scope of school boards' supervisory authority.¹¹

Regulating how a school system, students, and employees interact with and treat one another is a fundamental component of supervising a school system. A policy that allows some students or some employees to be treated differently from others necessarily implicates the welfare of students and supervision of personnel. These are areas that the Constitution of Virginia unquestionably empowers school boards to regulate.¹² Thus, the authority to prohibit discrimination, including discrimination based on sexual orientation or gender identity, is a power fairly or necessarily implied from the constitutional duty to supervise the schools.

A 2002 Opinion of this Office concluded that school boards do not have the authority to prohibit discrimination because the General Assembly has not enacted legislation that would make explicit school boards' authority to do so.¹³ That Opinion, however, did not examine the powers of local school boards under Article VIII, § 7 of the Constitution of Virginia, the corresponding broad grant of statutory authority in § 22.1-28 of the *Code of Virginia*, other enumerated powers set forth in Title 22.1, or those that may be fairly implied from them.¹⁴ The

⁸ *Commonwealth v. Doe*, 278 Va. 223, 230 (2009).

⁹ *Riddick v. Sch. Bd.*, 238 F.3d 518, 523 (4th Cir. 2000) (citing *Sch. Bd. v. Parham*, 218 Va. 950, 956 (1978)).

¹⁰ *Parham*, 218 Va. at 957.

¹¹ *Doe*, 278 Va. at 230; *Russell Cnty. Sch. Bd. v. Anderson*, 238 Va. 372, 383 (1989); *Howard v. Cnty. Sch. Bd.*, 203 Va. 55, 58-59 (1961); *Cnty. Sch. Bd. v. Farrar*, 199 Va. 427, 433 (1957); *Bd. of Suprvs. v. Chesterfield Cnty. Sch. Bd.*, 182 Va. 266, 270 (1944).

¹² *Doe*, 278 Va. at 230; *Parham*, 218 Va. at 957-58; *Bradley v. Sch. Bd.*, 462 F.2d 1058, 1067 (4th Cir. 1972), *aff'd*, 412 U.S. 92 (1973).

¹³ See 2002 Op. Va. Att'y Gen. 105.

¹⁴ No legislation is necessary to effectuate a school board's authority to do what the Constitution of Virginia already authorizes it to do. Cf. *Purdham v. Fairfax Cnty. Sch. Bd.*, Civ. Action No.1:09-CV-50, 2009 WL 4730713, at *4 (E.D. Va. Dec. 9, 2009) ("The power to operate, maintain and supervise public schools in Virginia is, and always has been, within the exclusive jurisdiction of the local school boards.") (quoting *Bradley*, 462 F.2d at 1067), *aff'd*, 637 F.3d 421 (4th Cir. 2011); *Russell Cnty. Sch.*

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Opinion also mistakenly analogized a school board's broad supervisory authority to a county's specific grant of authority under § 15.2-853 of the *Code of Virginia*.¹⁵

In addition to the authority granted by the Constitution, school boards enjoy broad statutory powers. There is a broad grant of authority corresponding to the constitutional grant.¹⁶ The General Assembly has further authorized school boards to “adopt bylaws and regulations . . . for the management of its official business and for the supervision of schools.”¹⁷ The General Assembly also has found that “quality of education is dependent upon the provision of . . . the appropriate working environment [and] the appropriate learning environment,”¹⁸ and school boards are tasked with promulgating standards of conduct to “provide that public education be conducted in an atmosphere free of disruption and threat to persons or property and *supportive of individual rights*.”¹⁹ It is well within the discretion of a school board to determine that prohibiting discrimination on various bases, including on the basis of sexual orientation or gender identity, is necessary to attain those goals.

The 2006 Opinion you reference in your opinion request supports this conclusion. In that Opinion, this Office concluded that the General Assembly's statutory grant of authority to the University of Virginia to regulate the conduct of students and employees gave the University the power to prohibit them from carrying concealed weapons on University grounds.²⁰ That authority stems not from a specific enabling act of the General Assembly allowing universities to regulate weapons, but rather is an implied power “reasonably necessary to effectuate the powers expressly granted” to the University to “establish rules and regulations for the conduct” of its students and employees.²¹ That the General Assembly omitted

Bd., 238 Va. at 383 (finding that a statutorily created panel cannot infringe on a school board's constitutional power to supervise its schools by discharging unsatisfactory employees).

¹⁵ 2002 Op. Va. Att'y Gen. 105.

¹⁶ VA. CODE ANN. § 22.1-28 (2011).

¹⁷ Section 22.1-78 (2011).

¹⁸ Section 22.1-253.13:1(a) (Supp. 2014).

¹⁹ Section 22.1-253.13:7(c)(3) (Supp. 2014) (emphasis added).

²⁰ 2006 Op. Va. Att'y Gen. 116.

²¹ *Id.* at 118 (citing VA. CODE ANN. § 23-9.2:3(A)(2), (A)(5) (Supp. 2005)); *see also* §§ 22.1-208.01(A) (Supp. 2014) (requiring school boards to establish character education programs that address the inappropriateness of bullying); 22.1-276.01 (Supp. 2014) (defining “bullying”);

university campuses from the list of places where a permitted-concealed weapon was barred did not prevent the University of Virginia from determining that the safety of its students and employees warranted prohibiting them from carrying such weapons.²² I similarly conclude that, like the authority of universities to regulate the conduct of their students and employees, the authority of school boards to protect students and employees from discrimination is a “reasonably necessary” derivative of the supervisory powers conferred upon school boards.²³

Finally, you ask about the impact of *Bostic v. Schaefer* on school boards’ authority to prohibit sexual-orientation and gender-identity discrimination.²⁴ Under the Fourth Circuit’s decision in *Bostic*, same-sex couples must be afforded all the “rights and privileges of marriage” granted to opposite-sex couples.²⁵ School boards therefore may not discriminate in the provision of benefits to employees who are married according to whether the employee’s spouse is of the same or opposite gender. For example, if a school board provides health-insurance benefits to the spouse of an employee, the school board may not treat same-sex spouses differently from opposite-sex spouses.

Given the broad scope of the supervisory power granted to school boards by the Constitution of Virginia and the explicit statutory grants of authority to school boards, I conclude that school boards have authority to expand their antidiscrimination policies to encompass sexual orientation and gender identity.

22.1-279.6(D) (Supp. 2014) (requiring school boards to include prohibitions against bullying in their codes of student conduct); 22.1-291.4 (Supp. 2014) (requiring school boards to educate their employees about the need to prevent bullying).

²² 2006 Op. Va. Att’y Gen. 116.

²³ This conclusion is in accord with decisions of the Supreme Court of Virginia and prior opinions of this Office that recognize occasions when a mechanical application of the Dillon Rule is inappropriate. *See, e.g.*, 1994 Op. Va. Att’y Gen. 40 (concluding, despite absence of specific legislation, that localities have power to allow charitable contributions by payroll deduction as part of its general authority as an employer) (citing *Scott v. Sylvester*, 220 Va. 182 (1979), *cert. denied*, 464 U.S. 961 (1983); *Nexsen v. Bd. of Spvrs.*, 142 Va. 313 (1925); 1982-83 Op. Va. Att’y Gen. 151).

²⁴ *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014), *cert. denied sub nom.*, *Rainey v. Bostic*, 135 S. Ct. 286 (2014), *Schaefer v. Bostic*, 135 S. Ct. 308 (2014), *McQuigg v. Bostic*, 135 S. Ct. 314 (2014).

²⁵ Judgment at 2, *Bostic v. Rainey*, Case No. 2:13-cv-00395-ALWA (E.D. Va. Feb. 24, 2014), ECF No. 139.

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To the extent that the 2002 opinion previously mentioned is inconsistent with this Opinion, it is overruled.²⁶

CONCLUSION

Accordingly, it is my opinion that, because the power to protect students and employees from discrimination in the public school system is a power fairly implied from the express grant of authority to school boards under Article VIII, § 7 of the Constitution of Virginia and from the specific authority granted to boards by the General Assembly in §§ 22.1-28, 22.1-78 and 22.1-253.13:7(c)(3) of the *Code of Virginia*, the Dillon Rule does not prevent school boards from amending their antidiscrimination policies to prohibit discrimination on the basis of sexual orientation and gender identity. To the extent that the 2002 Opinion of this Office discussed above is inconsistent with this Opinion, it is overruled.

OP. NO. 14-057**PROPERTY AND CONVEYANCES: PROPERTY OWNERS' ASS'N (POA) ACT****VIRGINIA ENERGY PLAN: COVENANTS RESTRICTING SOLAR ENERGY COLLECTION DEVICES**

A POA retains authority under § 67-701 to establish reasonable restrictions concerning the size, location, and manner of placement of solar panels on private property.

Section 67-701 does not violate the constitutional prohibition against legislation impairing the obligations of contract.

Under § 67-701, a POA may prohibit solar panels on private property only through a recorded declaration.

²⁶ I further note that, in determining that the Fairfax County School Board and Fairfax County have no authority to include sexual orientation in their nondiscrimination policies, the 2002 Opinion states that sexual orientation discrimination “cannot be either ‘fairly or necessarily implied’ from discrimination based on sex,” 2002 Op. Va. Att’y Gen. 105, 106, but this remains an open question under Title IX. See U.S. DEP’T OF ED., OFFICE FOR CIVIL RIGHTS, Questions & Answers on Title IX & Sexual Violence 5 (2014), available at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>; compare *Riccio v. New Haven Bd. of Educ.*, 467 F. Supp. 2d 219, 226 (D. Conn. 2006), with *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1090 (D. Minn. 2000).

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THE HONORABLE JOSEPH R. YOST
MEMBER, VIRGINIA HOUSE OF DELEGATES
APRIL 14, 2015

ISSUE PRESENTED

You inquire whether, in light of recent amendments to § 67-701 of the *Code of Virginia*, a property owners' association ("POA") is precluded from enforcing rules and regulations that prohibit homeowners from installing solar panels on their property, when such prohibitions are not contained in the recorded declaration of the POA.

APPLICABLE LAW AND DISCUSSION

The relationship between a POA and a homeowner is contractual in nature.¹ Generally, POAs possess broad latitude to contract with homeowners to devise and enforce rules and regulations governing the use of private property.² Nevertheless, the power of a POA to restrict the use of private property is not absolute and may be restrained by applicable law.³ Section 67-701, part of the Virginia Energy Plan,⁴ regulates the extent to which a POA may restrict the installation of solar panels on private property. As you note, this statute recently was amended by the General Assembly. Effective July 1, 2014, the statute provides, in relevant part, as follows:

No community association shall prohibit an owner from installing a solar energy collection device on that owner's property unless the recorded declaration for that community association establishes such a prohibition.

¹ *White v. Boundary Ass'n, Inc.*, 271 Va. 50, 55 (2006); *Sully Station II Cmty. Ass'n v. Dye*, 259 Va. 282, 284 (2000); 2011 Op. Va. Att'y Gen. 163, 163; *cf.* 2000 Op. Va. Att'y Gen. 177, 179-180 (stating that the rules and regulations of a condominium unit owners' association constitute a contract between the owners and the association).

² *See* VA. CODE ANN. § 55-513 (Supp. 2014); 2011 Op. Va. Att'y Gen. 163, 163.

³ *See* 2014 Op. Va. Att'y Gen. No. 13-106; 2011 Op. Va. Att'y Gen. 163, 163. The primary statutory scheme in place for regulating the operation and management of POAs is the Virginia Property Owners' Association Act. *See* VA. CODE ANN. §§ 55-508 through 55-516.2 (2012 & Supp. 2014).

⁴ VA. CODE ANN. §§ 67-100 through 67-1406 (2012 & Supp. 2014).

However a community association may establish reasonable restrictions concerning the size, place, and manner of placement of such solar energy collection devices on property designated and intended for individual ownership and use.^{5]}

What is noteworthy about the current language of this statute is that it permits only one procedure by which solar panels may be prohibited by community associations: by inclusion in the recorded declaration. The maxim ‘*expressio unius est exclusio alterius*’ “provides that mention of a specific item in a statute implies that omitted items were not intended to be included within the scope of the statute.”⁶ Applying this maxim, the current language of the statute must be viewed as meaning that any attempt by a POA to prohibit solar panels on private property by means other than a recorded declaration—such as rules, regulations, bylaws, policies, or other unrecorded instruments—is unenforceable.⁷

When read as a whole, the statute also means that, with the sole exception of recorded declarations, existing prohibitions against solar panels on private property are no longer enforceable. Had the General Assembly intended to create an exception for existing community associations’ prohibitions against solar panels, it could easily have done so through a “grandfather clause,” such as is contained in the predecessor version of this very statute.⁸ However, the General Assembly did not do so, thereby signaling its intent that the prohibition apply to existing unrecorded prohibitions. When the General Assembly clearly intends an enactment to have such retrospective effect, its intent will govern.⁹ Thus, I must conclude that § 67-701 was intended to preclude a POA from enforcing any existing prohibition on solar panels on private property, regardless of its date of adoption, unless the prohibition is contained in the POA’s recorded declaration.

⁵ See 2014 Va. Acts ch. 525.

⁶ *Geico v. Hall*, 260 Va. 349, 355 (2000) (quoting *Turner v. Wexler*, 244 Va. 124, 127 (1992)).

⁷ A POA may, however, prohibit the installation of solar panels in *common areas*, whether by recorded or unrecorded provision. See § 67-701 (Supp. 2014). The focus of your request, however, is the installation of solar panels by homeowners on private property.

⁸ In relevant part, the predecessor version of § 67-701 stated, “This section shall not apply with respect to any provision of a restrictive covenant that restricts the installation or use of any solar collection device *if such provision became effective prior to July 1, 2008.*” (Emphasis added.) See 2013 Va. Acts ch. 357.

⁹ See *McIntosh v. Commonwealth*, 213 Va. 330, 331-32 (1972); *Whitlock v. Hawkins*, 105 Va. 242, 249 (1906); *Rainey v. City of Norfolk*, 14 Va. App. 968, 972 (1992).

The only remaining question is whether the retrospective application of this statute is constitutionally barred. Statutes with retrospective effect implicate Article I, § 11 of the Constitution of Virginia, which provides that the General Assembly shall not enact laws “impairing the obligations of contract.” The constitutional prohibition against impairing the obligations of contracts (the “Contract Clause”) is not absolute, however. In certain circumstances, the state is permitted to use its regulatory power in a manner that affects existing contracts. As the Virginia Supreme Court has observed, the language of the Contract Clause “is [facially] unambiguous and appears absolute,”¹⁰ but it is not “the Draconian provision that its words might seem to imply.”¹¹ “[T]he Commonwealth is permitted to “[exercise the power] that is vested in it for the common good, even though contracts previously formed may be affected thereby.”¹² This power commonly is known as the police power.¹³

Courts examine three factors to determine whether a statute affecting contracts is lawful as an exercise of the state’s police power. First, as a preliminary matter, it must be shown that the statute does in fact impair existing contracts. Second, it must be determined whether the impairment is substantial. Third, if the impairment is substantial, it must next be determined whether the impairment is nevertheless “a legitimate exercise of the state’s sovereign powers.”¹⁴

Under the first part of this test, § 67-701 does in fact impair the operation of existing contracts by precluding the enforcement of unrecorded POA prohibitions that became effective prior to July 1, 2014.¹⁵ However, under the second part of the test, the impairment is not absolute: POAs may still prohibit solar panels, so long as they do so by recorded declarations. In addition, pursuant to the statute, community associations still retain unrestricted authority to impose reasonable restrictions on the size, location, and manner of placement of solar panels on

¹⁰ *The Working Waterman’s Ass’n of Va., Inc. v. Seafood Harvesters, Inc.*, 227 Va. 101, 109 (1984).

¹¹ *Id.* (quoting *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 240 (1978)).

¹² *Id.* at 109-110.

¹³ *Id.* at 110.

¹⁴ *Waste Mgmt. Holdings, Inc. v. Gilmore*, 64 F. Supp. 2d 537, 545 (E.D. Va. 1999); *cf. Working Waterman’s Ass’n*, 227 Va. 101.

¹⁵ *See Virginia & W. Va. Coal Co. v. Charles*, 251 F. 83, 128-29 (W.D. Va. 1917) (stating that, in order to impair the obligation of contract, a statute must “affect the validity, construction, discharge, or enforcement of the contract”), *aff’d*, 254 F. 379 (4th Cir. 1918).

private property. Given this overall context, I conclude that the impairment of existing contractual relationships is not substantial.¹⁶

In addition, it is particularly noteworthy that the statute in question is contained in Title 67, which is entitled the “Virginia Energy Plan.”¹⁷ The placement of this statute within the *Code of Virginia* evinces a legislative intent that solar panels are to be viewed as part of Virginia’s overall energy policy. Indeed, the uncodified enactment clause of the amended statute provides that the recent revisions were intended as “an exercise of the police power of the Commonwealth that is necessary for the general good of the public,” representing “a necessary and appropriate response to the valid public need to increase the use of solar power as a means of reducing reliance on energy sources that contribute to greenhouse gas emissions.”¹⁸ Accordingly, in amending § 67-701, the General Assembly expressly has exercised the power “that is vested in it for the common good, even though contracts previously formed may be affected thereby.”¹⁹ The exercise of police powers for environmental protection purposes generally has been held to be a substantial and legitimate purpose.²⁰ I therefore conclude that, under the third part of the test, the restriction on enforcing certain existing bans on solar panels should be considered a legitimate exercise of Virginia’s sovereign powers.

For the foregoing reasons, and bearing in mind the overriding principle that all statutes are presumed to be constitutional,²¹ I conclude that § 67-701 does not

¹⁶ See generally *City of Charleston v. Public Service Comm’n*, 57 F.3d 385 (4th Cir. 1995) (setting forth the various factors courts use in determining whether a contract has been substantially impaired, including whether the contract was “abolished or merely modified”).

¹⁷ See *supra* note 4 and accompanying text.

¹⁸ 2014 Va. Acts ch. 525, ¶ 2. The addition of this clause in the Acts of Assembly further supports the conclusion that the General Assembly intended its amendments to § 67-701 to have retroactive effect. By appealing to the police power, the legislature acknowledged that the effect of its amendments would be to impair existing contracts between POAs and homeowners. “We ‘assume that the legislature chose, with care, the words it used when it enacted the relevant statute.’” *Alger v. Commonwealth*, 267 Va. 255, 261 (2004) (quoting *Barr v. Town & Country Props., Inc.*, 240 Va. 292, 295 (1990)).

¹⁹ *Working Waterman’s Ass’n*, 227 Va. at 109-110.

²⁰ See, e.g., *United States Trust Co. v. New Jersey*, 431 U.S. 1, 28 (1977) (“Mass transportation, energy conservation, and environmental protection are goals that are important and of legitimate public concern.”).

²¹ See *Marshall v. N. Va. Transportation Authority*, 275 Va. 419, 427 (2008).

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violate the constitutional prohibition against legislation impairing the obligations of contract, and it is thus enforceable as duly enacted by the General Assembly.

CONCLUSION

Accordingly, it is my opinion that, under § 67-701 as amended, effective July 1, 2014, a POA may prohibit solar panels on private property only through a recorded declaration but not through any other means. Other than as may be contained in recorded declarations, such prohibitions are unenforceable, regardless of when or how they were imposed. It is further my opinion that a POA retains the authority under § 67-701 to establish reasonable restrictions concerning the size, location, and manner of placement of solar panels on private property, either through a recorded declaration or by any other legal means.

OP. NO. 15-028**HEALTH: REGULATION OF MEDICAL CARE FACILITIES AND SERVICES**

Board of Health lacks the authority to impose new design-and-construction standards on pre-existing abortion facilities by promulgating regulations under § 32.1-127 and § 32.1-127.001.

Board of Health generally has discretion to determine which sections of the Guidelines for Design and Construction of Hospitals and Outpatient Facilities should apply to regulated health care facilities that provide abortion services. Also, Board of Health generally has discretion to apply different standards to different types of facilities and to deviate from the exact language of the Guidelines, as long the deviation results in an equivalent level of performance, health and safety are not compromised, and the regulations are in substantial conformity with standards established by health care professionals.

Under § 32.1-127.001, the Guidelines for Design and Construction of Hospitals and Outpatient Facilities prevail over the Uniform Statewide Building Code in cases of conflict.

THE HONORABLE MARISSA J. LEVINE, MD, MPH, FAAFP
STATE HEALTH COMMISSIONER
MAY 4, 2015

ISSUES PRESENTED

You ask whether the Board of Health may require that facilities in existence before the enactment of the Regulations for Licensure of Abortion Facilities¹ satisfy the “design and construction standards”² in those regulations. You also ask if the Board of Health has the discretion under § 32.1-127.001 of the *Code of Virginia* to decide which prevails—the Uniform Statewide Building Code³ or the Guidelines for Design and Construction of Hospitals and Outpatient Facilities⁴—when the two standards contain conflicting requirements. Finally, you ask what § 32.1-127.001 means when it provides that the regulations must be “consistent with” the current edition of the Guidelines for Design and Construction of Hospital and Health Care Facilities.

BACKGROUND

Section 32.1-127 of the *Code of Virginia* requires the Board of Health (the “Board”) to adopt regulations governing hospitals, nursing homes, and certified nursing facilities.⁵ These regulations must include minimum standards for “the construction and maintenance of [facilities] to ensure the environmental protection and the life safety of its patients, employees, and the public.”⁶ In 2005, the General Assembly enacted § 32.1-127.001, which requires that these design-and-construction standards be “consistent with the current edition of the Guidelines for Design and Construction of Hospital and Health Care Facilities issued by the American Institute of Architects Academy of Architecture for Health” (the “Guidelines”).⁷ Pursuant to §§ 32.1-127 and 32.1-127.001, the Board adopted

¹ 12 VA. ADMIN. CODE § 5-412.

² *Id.* at § 5-412-370.

³ 13 VA. ADMIN. CODE § 5-63.

⁴ The Facility Guidelines Institute (the “FGI”) publishes minimum recommendations for the design and construction of health care facilities. The 2010 edition of the publication was called *Guidelines for Design and Construction of Health Care Facilities* [hereinafter 2010 Guidelines]. In 2014 the FGI issued an updated set of guidelines called *Guidelines for Design and Construction of Hospitals and Outpatient Facilities* (2014) [hereinafter 2014 Guidelines]. As required by § 32.1-127.001, the Board will use the 2014 Guidelines during its current review of the regulations. See VA. CODE ANN. § 32.1-127.001 (2011).

⁵ Section 32.1-127(B)(1) (Supp. 2014).

⁶ *Id.*

⁷ Section 32.1-127.001.

regulations in 2005 relating to the construction of new hospital,⁸ outpatient hospital,⁹ and nursing facility¹⁰ buildings. Those regulations generally require new facilities to follow relevant state and local laws, including both the Virginia Uniform Statewide Building Code (the “USBC”) and the Guidelines.¹¹ The Board did not require facilities constructed before the Board promulgated the new standards to comply with the design-and-construction sections of those regulations.¹²

In 2011, the General Assembly amended § 32.1-127(B)(1) so that, for the purposes of the minimum standards required in regulations promulgated by the Board under that paragraph, “facilities in which five or more first trimester abortions per month are performed shall be classified as a category of ‘hospital.’”¹³ The Board subsequently promulgated new emergency regulations, adopted as final regulations in 2013, addressing the clinical operation, staffing, and equipment of such facilities. Applying the provisions of § 32.1-127.001, the new regulations also imposed new design-and-construction standards on facilities that perform five or more first trimester abortions a month. The Board’s authority to adopt appropriate standards governing the clinical operation of those facilities is not in question. Consequently, this Opinion addresses only the scope of the Board’s authority to impose design-and-construction regulations under §§ 32.1-127(B)(1) and 32.1-127.001.

Like the design-and-construction regulations previously promulgated by the Board with respect to hospitals and nursing facilities, the Board required regulated health care facilities that provide abortion services to comply with state and local codes, zoning and building ordinances, the USBC, and the relevant sections of the Guidelines.¹⁴ Unlike its design-and-construction regulations for hospitals and

⁸ 22:8 VA. R. 1130 (Dec. 26, 2005).

⁹ 22:8 VA. R. 1152 (Dec. 26, 2005).

¹⁰ 22:7 VA. R. 1022 (Dec. 12, 2005).

¹¹ 22:8 VA. R. 1130 & 1152; 22:7 VA. R. 1022.

¹² I refer to regulations generally related to the design and construction of buildings as “design-and-construction” standards. They are found under the subheadings “General building and physical plant information” in 12 VA. ADMIN. CODE § 5-410-650 (standards for hospitals); “Codes; fire safety; zoning; construction standards” in § 5-410-1350 (standards for outpatient hospitals); and “Architectural drawings and specifications” in § 5-371-410 (standards for nursing facilities).

¹³ 2011 Va. Acts ch. 670 (amending § 32.1-127(B)(1)).

¹⁴ 12 VA. ADMIN. CODE § 5-412-370.

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nursing facilities, however, the Board applied the new design-and-construction standards to both new regulated facilities that provide abortion services as well as those built *before* the regulations were adopted.¹⁵ The Board established a two-year window during which existing facilities must bring themselves into compliance with the new construction standards.¹⁶

Notably, in its initial approval of the final regulations, the Board did *not* make the design-and-construction section applicable to existing facilities.¹⁷ Instead, like the regulations governing hospitals and nursing facilities, the design-and-construction section of the regulations would have applied only to “construction of *new* buildings and additions, renovations, alterations, and repairs.”¹⁸ The Office of the Attorney General, however, advised the Board¹⁹ that it “does not have the statutory authority to exempt existing facilities” from the new design-and-construction standards.²⁰ The Office of the Attorney General then refused to certify the version of the regulations that would have applied the design-and-construction standards only to new construction.²¹ In response, the Board reversed its decision and promulgated final regulations requiring existing facilities to come into compliance with the design-and-construction standards within two years.²²

¹⁵ Compare 12 VA. ADMIN. CODE § 5-412-370 (“abortion facilities shall comply”), with § 5-371-410 (applying nursing home regulations to “*new* buildings”) (emphasis added), § 5-410-1350 (applying outpatient hospital regulations to “construction of *new* buildings”) (emphasis added), and § 5-410-650 (applying hospital regulations to “*new* buildings”) (emphasis added).

¹⁶ 12 VA. ADMIN. CODE § 5-412-370. The Commissioner has the authority to grant a variance if adherence to the requirement poses an impractical hardship and if granting the temporary variance would not endanger the safety or well-being of patients. Section 5-412-80.

¹⁷ See *Minutes of the Board of Health* (June 15, 2012), at 6-8, available at <http://www.vdh.state.va.us/Administration/meetings/documents/2012/pdf/Minutes%20June%2015%202012.pdf>. The emergency regulations, however, had applied the design-and-construction standards to facilities constructed before the regulations were adopted.

¹⁸ *Id.* at 6-7 (emphasis added).

¹⁹ That advice was not provided in a formal Opinion requested under § 2.2-505.

²⁰ *Minutes of the Board of Health* (Apr. 12, 2013), at 6, available at http://www.vdh.state.va.us/Administration/Meetings/documents/2013/pdf/Minutes%20April%2012_2013.pdf.

²¹ See *id.* at 7 (“[T]his [non-retroactivity language] is the same language that the Board adopted during its meeting in June 2012 that the Office of the Attorney General did not certify.”).

²² *Id.* at 8.

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In 2014, Governor Terence R. McAuliffe directed the Board to conduct a periodic review of the regulations governing the licensure of abortion facilities.²³ That review resulted in the adoption and publication of a Notice of Intended Regulatory Action (“NOIRA”) to amend those regulations. According to the NOIRA, the Board intends to update a variety of aspects of the regulations, including the requirements for facility design and construction.²⁴

APPLICABLE LAW AND DISCUSSION

1. The Board’s authority to apply the design-and-construction section of the regulations to previously constructed facilities.

For the following reasons, it is my opinion that in 2011 and 2013 the Board did not have the authority to apply the design-and-construction section of the regulations to facilities built before the regulations took effect, nor does it have the authority to do so now.

First, when it amended § 32.1-127(B)(1) in 2011, the General Assembly did not use language authorizing the Board to apply design-and-construction standards to facilities built before the new regulations took effect. In Virginia, there is a strong presumption against the retroactive application of a statute unless the statute makes that intention unmistakably clear.²⁵ The Supreme Court of Virginia has explained that “a statute is *always* to be construed as operating prospectively, unless a contrary intent is manifest.”²⁶ The General Assembly expresses that

²³ Governor Terence R. McAuliffe, Executive Directive 1 (2014), *available at* <https://governor.virginia.gov/media/3392/ed-1-directing-the-board-of-health-to-conduct-a-periodic-review-of-regulations-governing-licensure-of-abortion-facilities-12vac5-412.pdf>.

²⁴ Notice of Intended Regulatory Action, 12VAC5-412, 33:10 VA. R. 752 (Jan. 12, 2015), *available at* <http://register.dls.virginia.gov/details.aspx?id=4777>.

²⁵ *Adams v. Alliant Techsystems*, 261 Va. 594, 599 (2001) (explaining that “[r]etroactive laws are not favored”); *Rainey v. City of Norfolk*, 14 Va. App. 968, 972 (1992).

²⁶ *Adams*, 261 Va. at 599 (emphasis added) (citing *Duffy v. Hartsock*, 187 Va. 406, 419 (1948) (quoting *Whitlock v. Hawkins*, 105 Va. 242 (1906))); *see also* *Bailey v. Spangler*, No. 141702, 2015 Va. LEXIS 52, at *8 (Apr. 16, 2015) (“Absent an express manifestation of intent by the legislature, this Court will not infer the intent that a statute is to be applied retroactively.”); *Bd. of Supvrs. v. Windmill Meadows, L.L.C.*, 287 Va. 170, 180 (2014).

intent when it uses statutory language clearly calling for retroactive application.²⁷ For example, in § 36-99.3, the General Assembly expressly directed colleges and universities in Virginia to install and maintain USBC-compliant smoke detectors “*regardless of when the building was constructed.*”²⁸ That statute makes the retroactive intent clear. The 2011 amendment to § 32.1-127(B)(1) contained no similar language requiring that building standards be applied to already-constructed facilities.

The language of § 32.1-127.001, which predated the 2011 amendment to § 32.1-127(B)(1), also expresses no intent to impose new design-and-construction requirements on existing hospital or nursing facilities. Section 32.1-127 requires the Board to create standards for the “construction” and maintenance of facilities and § 32.1-127.001 requires the Board to create standards for the “design and construction” of facilities. Black’s Law Dictionary defines “construction” as “*the act of building*”²⁹ and “design” as “*a plan or scheme.*”³⁰ Consequently, the plain meaning of the statutes is that the regulations are to apply to *new* design and construction of facilities or renovations to existing facilities—not to facilities already built and completed. When interpreting statutes in Virginia, we “assume that the legislature chose, with care, the words it used when it enacted the relevant statute.”³¹ The terms in both § 32.1-127(B)(1) and § 32.1-127.001 express only prospective application. Under the clear-statement rule, therefore, they do not have retroactive application and apply only to new construction.

Second, the Board’s interpretation that the design-and-construction standards under §§ 32.1-127 and 32.1-127.001 apply retroactively to pre-existing facilities is contrary to longstanding administrative practice. It is well settled in Virginia that when the interpretation of a statute has been uniform for many years in

²⁷ See, e.g., 2011 Op. Va. Att’y Gen. 171, 176-77 (finding the requisite manifest intent because the General Assembly “expressly provide[d]” for retroactive application).

²⁸ VA. CODE ANN. § 36-99.3(A) (2014) (emphasis added); see also VA. CODE ANN. § 6.2-620 (1999) (applying the provisions of the article to multiple-party accounts *regardless of when* such multiple-party accounts were opened or created) (emphasis added); VA. CODE ANN. § 55-66.3 (2012) (allowing the procedure for the release of a deed of trust to be applied to deeds of trust after July 1, 2002 *regardless of when* the deed of trust was created) (emphasis added).

²⁹ BLACK’S LAW DICTIONARY 379 (10th ed. 2014) (emphasis added).

³⁰ *Id.* at 541.

³¹ *Alger v. Commonwealth*, 267 Va. 255, 261 (2004) (quoting *Barr v. Town & Country Props., Inc.*, 240 Va. 292, 295 (1990)) (internal quotation marks omitted).

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administrative practice, that interpretation is entitled to great weight.³² In such cases, the General Assembly is presumed to be aware of the agency's interpretation and to have acquiesced in it.³³ In this case, in the six years between 2005, when § 32.1-127.001 was first enacted, and 2011, when its scope was extended, all regulations promulgated by the Board pursuant to §§ 32.1-127 and 32.1-127.001 applied only to new buildings and renovations of existing buildings.³⁴ Accordingly, the General Assembly is presumed to have expected that the Board would continue to use its consistent, longstanding interpretation that §§ 32.1-127 and 32.1-127.001 have only prospective effect.³⁵

Third, applying the Guidelines to buildings already constructed contravenes both the plain language of the Guidelines themselves and their intended purpose. By their own terms, the Guidelines do not apply to facilities that have already been built. The 2014 Guidelines explicitly limit the scope of their application to “new construction and major renovation projects.”³⁶ New construction includes only “entirely new structures and systems,”³⁷ “additions to existing facilities that result

³² *Dan River Mills, Inc. v. Unemployment Comp. Comm'n*, 195 Va. 997, 1002 (1954).

³³ *See Commonwealth v. Am. Radiator & Standard Sanitary Corp.*, 202 Va. 13, 19 (1960) (“When [the 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 (1942) (“The Legislature is presumed to be cognizant of [the interpretation of a statute by public officials], and, when long continued, in the absence of legislation evincing a dissent, the courts will adopt that construction.”).

³⁴ *See* 12 VA. ADMIN. CODE § 5-371-410 (applying to “construction of new [nursing home] buildings and additions, renovations or alterations of existing buildings”); § 5-410-1350 (applying to “construction of new [outpatient hospital] buildings and additions[,] alterations or repairs to existing buildings”); § 5-410-650 (applying to “construction of new [hospital] buildings and additions, renovations, alterations or repairs of existing buildings”).

³⁵ *Cf. Beck v. Shelton*, 267 Va. 482, 492 (2004) (holding that an opinion of the Attorney General interpreting a statute was entitled to particular weight “when the General Assembly has known of the Attorney General’s Opinion, in this case for five years, and has done nothing to change it”).

³⁶ 2014 Guidelines § 1.1-1.2.1 (“Each chapter in this document contains information intended as minimum standards for [the] design and construction of *new*, and for major renovations of existing, health care facilities.”) (emphasis added). The sections of the Guidelines incorporated in the abortion facility regulations do contain an appendix that offers some non-binding *recommendations* that existing facilities follow. For example, the Guidelines recommend that “[o]wners of existing facilities should undertake an assessment of their facilities’ ability to withstand the effects of regional natural disasters.” *Id.* at § A1.2-5.5.1.

³⁷ *Id.* at § 1.1-2.1.

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in an increase of occupied floor area,”³⁸ and a “[c]hange in function in an existing space,”³⁹ while major renovations include “[a] series of planned changes and updates” or “modification of an entire building or entire area . . . to accommodate a new use or occupancy.”⁴⁰ The 2010 Guidelines also clearly explained that they applied only to new construction and renovation projects.⁴¹ The Guidelines are and have been clear—they are not meant to apply to existing facilities that are not undertaking a major renovation.

Fourth, when the USBC applies, retroactive enforcement violates the plain language and intent of the General Assembly. Under the USBC:

Any building or structure, for which a building permit has been issued or on which construction has commenced, or for which working drawings have been prepared in the year prior to the effective date of the Building Code, *shall remain subject to the building regulations in effect at the time of such issuance or commencement of construction.*^[42]

That language is unambiguous—facilities are to be regulated according to the version of the USBC in effect when they were constructed, not newer versions of the USBC enacted years or even decades later.⁴³

³⁸ *Id.* at § 1.1-2.2.

³⁹ *Id.* at § 1.1-2.3.

⁴⁰ *Id.* at § 1.1-3.1.1.2. The 2011 amendment to § 32.1-127(B)(1) changed the statutory scheme regulating abortion facilities—but it did not change the function or use of those facilities. Nothing in the statute changed the types of services offered to patients.

⁴¹ See 2010 Guidelines § 1.1-1.3.2 (explaining that “this document contains information intended as minimum standards for designing and constructing new health care facility projects”); § 1.1-3.2 (“In renovation projects and additions to existing facilities, only that portion of the total facility affected by the project shall be required to comply with applicable sections of these Guidelines.”).

⁴² Section 36-103 (2014) (emphasis added); see also § 36-119.1 (2014) (“This chapter shall not supersede provisions of the Fire Prevention Code . . . that prescribe standards to be complied with in existing buildings or structures, provided that such regulations shall not impose requirements that are more restrictive than those of the [USBC] *under which the buildings or structures were constructed.*”) (emphasis added).

⁴³ The USBC addresses the specific circumstances and exceptions where retroactive application is necessary to protect lives. For example, certain facilities are required to meet fire-suppression, fire-alarm, and fire-detection system standards and must install smoke detectors, regardless of when the

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Accordingly, the Board has no authority to apply the design-and-construction section of the regulations to pre-existing facilities. To the extent this Office previously provided advice that conflicts with this formal Opinion, that advice is revoked and overruled.

2. The Board's authority to determine whether, in cases of conflict, the USBC or the Guidelines prevail.

As explained in the Background section above, pursuant to §§ 32.1-127 and 32.1-127.001 the Board has issued regulations setting out the requisite design-and-construction standards for inpatient hospitals, outpatient hospitals, nursing facilities, and abortion facilities.⁴⁴ These regulations generally require that a health care institution follow local codes, zoning and building ordinances, the USBC, and the applicable sections of the Guidelines.⁴⁵ The 2013 regulations applicable to regulated health care facilities that provide abortion services explain that, when there is a conflict between the requirements contained in the Guidelines and the USBC, the Guidelines “shall take precedence.”⁴⁶ The 2005 regulations applicable to inpatient hospitals, outpatient hospitals, and nursing facilities state the opposite—that when there is a conflict between the USBC and the Guidelines, the USBC prevails.⁴⁷

You ask whether the Board has the discretion to choose whether the USBC or Guidelines control if the two conflict, and, if not, which standard takes precedence. It is my opinion that the Board was correct in its determination in 2013 that the Guidelines prevail over the USBC. The Board does not have the discretion to decide otherwise.

Section 32.1-127.001 provides:

structure was constructed or modified. 13 VA. ADMIN. CODE § 5-63-445(C)-(E) (smoke detectors); § 5-63-445(F) (fire-protective signaling systems and fire-detection systems); § 5-63-445(H), (I), (M) (fire-suppression, fire-alarm and fire-detection systems).

⁴⁴ See 12 VA. ADMIN. CODE § 5-410-650 (inpatient hospitals); § 5-410-1350 (outpatient hospitals); § 5-371-410 (nursing facilities); § 5-412-370 (abortion facilities).

⁴⁵ 12 VA. ADMIN. CODE § 5-410-650; § 5-410-1350; § 5-371-410; § 5-412-370.

⁴⁶ 12 VA. ADMIN. CODE § 5-412-370.

⁴⁷ 12 VA. ADMIN. CODE § 5-410-650; § 5-410-1350; § 5-371-410 (all noting that in case of a conflict between the Guidelines and another source of law “the requirements of the Uniform Statewide Building Code and local zoning and building ordinances shall take precedence”).

Notwithstanding any law or regulation to the contrary, the Board of Health shall promulgate regulations pursuant to § 32.1-127 for the licensure of hospitals and nursing homes that shall include minimum standards for the design and construction of hospitals, nursing homes, and certified nursing facilities *consistent with* the current edition of the [Guidelines].^[48]

The meaning of the statute is unambiguous. The plain language of “notwithstanding any law or regulation to the contrary” is that the General Assembly intended for § 32.1-127.001 to supersede any provision of the *Code* or any regulation that contradicts or conflicts with the requirements of § 32.1-127.001.⁴⁹ Moreover, § 32.1-127.001 instructs the Board to issue regulations that are “consistent with” the Guidelines; it would not be “consistent with” the Guidelines for the Board to determine in every instance that the USBC takes precedence over the Guidelines when the two conflict.

3. The Board’s discretion in the regulatory process

I turn now to your question about the meaning of the term “consistent with” in § 32.1-127.001 when it provides that the regulations must be “consistent with” the current edition of the Guidelines. Answering this question requires a broader discussion of the Board’s discretion in the regulatory process.

Section 32.1-127(B)(1) requires the Board to promulgate regulations treating health care facilities in which five or more first trimester abortions per month are performed as a “category of ‘hospital,’” and § 32.1-127.001 requires the regulations governing design-and-construction standards for “hospitals” to be “consistent with the current edition of the Guidelines.” The Guidelines, however, include standards for different categories of hospitals. Part 1 contains standards generally applicable to all categories of hospitals and health care facilities.⁵⁰ Part 2 includes additional standards for general hospitals, freestanding emergency

⁴⁸ Section 32.1-127.001 (emphasis added).

⁴⁹ See *Lamar Co. v. City of Richmond*, 287 Va. 348, 352 (2014) (interpreting the phrase “notwithstanding any local ordinance to the contrary”); *Green v. Commonwealth*, 28 Va. App. 567, 570 (defining “notwithstanding” as “without prevention or obstruction from or by,” and concluding that the inclusion of the phrase “notwithstanding any other provision of law” in a statute means that it prevails over other conflicting laws).

⁵⁰ 2014 Guidelines § 1.1-1.1.1.

facilities, critical-access hospitals, psychiatric hospitals, rehabilitation hospitals, and children’s hospitals.⁵¹ Part 3 includes additional standards for “outpatient facilities . . . used primarily by patients who are able to travel or be transported to the facility for treatment” and includes “outpatient units in a hospital, a freestanding facility, or an outpatient facility.”⁵² There are chapters within Part 3 that include standards for primary care facilities,⁵³ outpatient surgical facilities,⁵⁴ and facilities that include office-based procedure and operating rooms.⁵⁵

Under § 32.1-127 the Board is required to promulgate standards for “hospitals, nursing homes, and certified nursing facilities”⁵⁶ that:

shall be in *substantial conformity to the standards of health, hygiene, sanitation, construction and safety as established and recognized by medical and health care professionals and by specialists* in matters of public health and safety, including health and safety standards established under provisions of Title XVIII and Title XIX of the Social Security Act, and to the provisions of Article 2 (§ 32.1-138 et seq.).^[57]

Therefore, the Board’s task is to determine which parts of the Guidelines should apply to which facilities so that those regulations substantially conform to the standards established by professionals.

When issuing hospital regulations, the Board “may classify hospitals and nursing homes by type of specialty or service and may provide for licensing hospitals and nursing homes by bed capacity and by type of specialty or service.”⁵⁸ The Board has established definitions of categories of hospitals including “general hospital,” “special hospital,” and “outpatient hospital,” and has issued regulations that vary based upon those classifications.⁵⁹ For example, the Board has determined that to conform to the standards established by professionals, inpatient hospitals should

⁵¹ *Id.* at §§ 2.1-1.1.1 & 2.1-1.1.2.

⁵² *Id.* at § 3.1-1.

⁵³ *Id.* at § 3.2.

⁵⁴ *Id.* at § 3.7.

⁵⁵ *Id.* at § 3.8.

⁵⁶ Section 32.1-127(B).

⁵⁷ Section 32.1-127(A) (emphasis added).

⁵⁸ Section 32.1-127(B)(3).

⁵⁹ 12 VA. ADMIN. CODE § 5-410-10.

be consistent with Part 1 and §§ 2.1-1 through 2.2-8 of the Guidelines,⁶⁰ but outpatient hospitals should be consistent with Part 1, §§ 3.1-1 through 3.1-8, and § 3.7.⁶¹

Just as the Board has determined that inpatient and outpatient categories of hospitals should be consistent with different sections of the Guidelines, the Board has the discretion to determine which parts of the Guidelines are appropriately applied to regulated health care facilities that provide abortion services, in keeping with their treatment as a category of hospital for the purposes of § 32.1-127(B)(1).⁶² In accordance with § 32.1-127(A), however, the standard chosen must be in “substantial conformity to the standards of health, hygiene, sanitation, construction and safety as established and recognized by medical and health care professionals and by specialists in matters of public health and safety.”⁶³

The Board has also applied different design-and-construction regulations to facilities within the same general category of hospitals that offer different types of services. For example, the design and construction of general hospital nurseries are required to be consistent with §§ 2.2-2.12.1 through 2.2-2.12.6.6 of the Guidelines while “higher-level nurseries” are required to be consistent with §§ 2.2-2.10.1 through 2.2-10.9.3 of the Guidelines.⁶⁴ The Board may, in its discretion, make similar distinctions between types of facilities.⁶⁵ For example, the Board might decide that it is in substantial conformity with standards recognized by experts to distinguish between facilities that offer surgical procedures and those that do not. As long as the Board is acting in substantial conformity with the standards established by medical and health care professionals, the Board may apply different standards and Guidelines to different types of facilities.

⁶⁰ 12 VA. ADMIN. CODE § 5-410-650.

⁶¹ 12 VA. ADMIN. CODE § 5-410-1350.

⁶² The Board currently requires abortion facilities to comply with Part 1, §§ 3.1-1 through 3.1-8, and § 3.7 of the Guidelines.

⁶³ Section 32.1-127(A).

⁶⁴ 12 VA. ADMIN. CODE § 5-410-445.

⁶⁵ Section 32.1-127(B)(9) specifically allows the Board to differentiate standards for various levels or categories of neonatal services. There is nothing in the *Code* that would prevent the Board from using its discretion to similarly distinguish between categories of regulated health care facilities that provide abortion services.

Finally, the requirement in § 32.1-127.001 that the Board issue regulations “consistent with” the Guidelines does not mean the regulations must be identical to the Guidelines.⁶⁶ The Guidelines themselves are flexible standards rather than requirements to be followed exactly. The Introduction to the Guidelines recommends that “when used as a regulation, some latitude be granted in complying with the *Guidelines* requirements as long as the health and safety of the facility’s occupants are not compromised.”⁶⁷ To that end, § 1.1-6 of the Guidelines includes guidance about “equivalency concepts,” explaining that jurisdictions should allow “innovations that provide an equivalent level of performance with these standards in a manner other than that prescribed by this document, provided that no other safety element or system is compromised.”⁶⁸

It is consistent with the Guidelines, then, for the Board to adopt standards that differ from the exact text of the Guidelines if the deviation results in an equivalent level of performance and does not compromise health and safety. When considering any deviation from the Guidelines, the Board also must, under § 32.1-127, ensure that the regulations remain in substantial conformity to the standards established and recognized by medical and health care professionals.

CONCLUSION

Given the plain language of the statutes, the Board’s longstanding interpretation that design-and-construction standards have only prospective effect, and the intent of the Guidelines and USBC to apply only to new construction, it is my opinion that the Board of Health lacks the authority to impose new design-and-construction standards on pre-existing facilities by promulgating regulations under § 32.1-127 and § 32.1-127.001. Under the plain language of § 32.1-127.001, the Board was correct in 2013 that the Guidelines supersede the USBC when the two conflict. The Board does have discretion to determine which sections of the Guidelines should apply to regulated health care facilities that provide abortion services, as long as the regulations are, as required by § 32.1-127(A), in

⁶⁶ *Roanoke Memorial Hosps. v. Kenley*, 3 Va. App. 599 (1987) (interpreting “consistent with” to mean “‘in harmony with,’ ‘compatible with,’ ‘holding to the same principles,’ or ‘in general agreement with.’”); *see also Reston Hosp. Ctr., L.L.C. v. Remley*, 63 Va. App. 755, 772 n. 10 (2014); *Chippenham & Johnston-Willis Hosps., Inc. v. Peterson*, 36 Va. App. 469, 482 (2001).

⁶⁷ 2014 Guidelines at xxiv.

⁶⁸ *Id.* at § 1.1-6.2.

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substantial conformity with the standards of health, hygiene, sanitation, construction and safety as established and recognized by medical and health care professionals. The Board also has the discretion to apply different standards to different types of facilities and to deviate from the exact language of the Guidelines, as long the deviation results in an equivalent level of performance, health and safety are not compromised, and the regulations are in substantial conformity with standards established by health care professionals.

OP. NO. 14-085**COUNTIES, CITIES AND TOWNS: PLANNING, SUBDIVISION OF LAND AND ZONING****MINES & MINING: THE VIRGINIA GAS AND OIL ACT****A locality may use its zoning authority to prohibit “fracking.”****Localities may enact zoning restrictions on fracking only if and to the extent that the restrictions are reasonable in scope and are not inconsistent with the Virginia Gas and Oil Act, or regulations properly enacted pursuant to that Act.**

THE HONORABLE RICHARD H. STUART
MEMBER, SENATE OF VIRGINIA
MAY 5, 2015

ISSUES PRESENTED

You inquire whether a locality may use its zoning authority to prohibit “unconventional gas and oil drilling,” commonly known as “fracking” (short for hydraulic fracturing). You also ask whether a locality may use zoning to regulate certain aspects of fracking, such as the timing of drilling operations, traffic, or noise.¹ This Opinion addresses only fracking, and not any other type of activity involving the exploration for, mining of, or transportation of any natural resource.

¹ I assume for the purpose of this Opinion that any zoning ordinance relating to fracking is adopted in full compliance with all procedural and substantive requirements imposed by applicable laws.

APPLICABLE LAW AND DISCUSSION

Fracking is a method of retrieving oil or natural gas by injecting fluid into underground shale beds at high pressure.² As noted in your Opinion request, fracking has the potential to greatly increase domestic production of oil and gas and to spur economic development in localities located on or near shale beds. Fracking can also be an intensive land use, and the recent expansion of this industry has raised significant environmental and safety concerns. The potential dangers arising from this still-evolving technology include the depletion of fresh water from aquifers, contamination of groundwater, earthquakes, and surface problems such as air pollution and industrial truck traffic.³ Fundamental land use questions are thus presented about fracking's compatibility with existing and planned uses of nearby lands.

Two steps are involved in determining the extent of local zoning authority over fracking. First, it is necessary to determine whether localities in Virginia have general authority under law to prohibit or otherwise to regulate fracking within their boundaries. If that question is answered in the affirmative, it is then necessary to determine whether the power to prohibit or regulate fracking is nevertheless preempted in whole or part by other applicable state law.

1. Dillon Rule Analysis

Virginia follows the Dillon Rule of strict construction, which provides that “municipal corporations have only those powers that are expressly granted, those necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable.”⁴ A corollary to the Dillon Rule provides that the powers of local governing bodies are “fixed by statute and are limited to those conferred expressly or by necessary implication.”⁵ Consistent with the Dillon Rule, a local governing body may prohibit fracking only if the legislature has

² See MERRIAM-WEBSTER, *Definition of “Fracking,”* <http://www.merriam-webster.com/dictionary/fracking> (last visited March 25, 2015).

³ See, e.g., Robert B. Jackson et al., *The Environmental Costs and Benefits of Fracking*, 39 ANNUAL REV. OF ENV'T & RES. 327 (2014), available at <http://www.annualreviews.org/doi/abs/10.1146/annurev-environ-031113-144051>; Nicholas Schroeck & Stephanie Karisny, *Hydraulic Fracturing and Water Management in the Great Lakes*, 63 CASE W. RES. L. REV. 1167, 1169 (2013); U.S. GEOLOGICAL SURVEY'S EARTHQUAKE HAZARDS PROGRAM, *Induced Earthquakes*, <http://earthquake.usgs.gov/research/induced> (last visited April 20, 2015).

⁴ Bd. of Zoning Appeals v. Bd. of Supvrs., 276 Va. 550, 553-54 (2008).

⁵ Bd. of Supvrs. v. Horne, 216 Va. 113, 117 (1975) (citations omitted); see also Bd. of Supvrs. v. Countryside Inv. Co., 258 Va. 497, 503 (1999).

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expressly granted it the authority to do so, or if that power is necessarily implied from an express grant of power.

The General Assembly has delegated to localities the authority to control land use within their jurisdictions through zoning.⁶ The extent of local zoning powers is broad.⁷ Indeed, the Supreme Court of Virginia has stated that “[t]he legislative branch of a local government possesses wide discretion in the enactment and amendment of zoning ordinances,” and its actions in doing so are presumed valid absent express limitations to the contrary.⁸ In addition, “[t]he mere fact that the state, in the exercise of the police power, has made certain regulations . . . does not prohibit a municipality from exacting additional requirements” through the use of its zoning powers.⁹

As part of the broad zoning authority granted to them by the General Assembly, localities in the Commonwealth are permitted to prohibit certain land uses within their boundaries. Pursuant to § 15.2-2280, a locality “may, by ordinance . . . regulate, restrict, permit, *prohibit*, and determine” a variety of land uses within its jurisdiction.¹⁰ The Supreme Court of Virginia has confirmed that “by this language, the governing body of a locality is expressly authorized to prohibit a specific use of land.”¹¹

While § 15.2-2280 contains an exemplary list of land uses that may be prohibited, the list is not exhaustive, and a specific mention of fracking would not be necessary for the use to fall within the purview of the statute.¹² In any case,

⁶ See VA. CODE ANN. § 15.2-2280 (2012); *Byrum v. Bd. of Supvrs.*, 217 Va. 37, 39 (1976) (“The governing body of a county in Virginia is authorized by statute to enact local zoning ordinances.”). Zoning ordinances relate to the use of real property such as “existing use and character of property,” “the suitability of property for various uses,” and “the encouragement of the most appropriate use of land throughout the locality.” Section 15.2-2284 (2012).

⁷ See VA. CODE ANN. §§ 15.2-2280 to 15.2-2316 (2012 & Supp. 2014) (establishing the extent of localities’ zoning powers).

⁸ *Bd. of Cnty. Supvrs. v. Carper*, 200 Va. 653, 660 (1959).

⁹ See *King v. Cnty. of Arlington*, 195 Va. 1084, 1090 (1954).

¹⁰ Section 15.2-2280 (emphasis added); see also *Cnty. of Chesterfield v. Windy Hill, Ltd.*, 263 Va. 197, 206 (2002) (stating that, by granting localities zoning powers, the General Assembly vested them with the authority “to prevent the use of land in a manner the City has deemed detrimental to the general welfare of its inhabitants and deemed as having a deleterious effect on the community”).

¹¹ See *Resource Conservation Mgmt., Inc. v. Bd. of Supvrs.*, 238 Va. 15, 20 (1989).

¹² See *Resource Conservation*, 238 Va. at 20 (“While the language does not specify a landfill as one of the uses that may be prohibited, such specificity is not necessary even under the Dillon Rule of strict construction.”).

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however, fracking falls within the plain language of the fourth example listed in the statute—“[t]he excavation or mining of soil or other natural resources.”¹³ Given the plain language of the statute, the Virginia Supreme Court’s acknowledgment of the broad zoning authority the statute grants to localities,¹⁴ and the lack of any intervening change to the statute,¹⁵ I conclude that the General Assembly has authorized localities to pass zoning ordinances prohibiting fracking. The plain language of the statute also authorizes localities to regulate fracking in instances where it is permitted.

What remains to be discussed is whether, and to what extent, the authority of localities to prohibit or otherwise to regulate fracking is preempted by state law.¹⁶

2. Preemption Analysis

The question of preemption turns on whether a local ordinance regulating or prohibiting fracking is inconsistent with state law. “Any ordinance, resolution, bylaw, rule, regulation, or order of any governing body . . . shall not be inconsistent with the Constitution and laws of . . . the Commonwealth.”¹⁷ Accordingly, any local zoning ordinance is preempted if it conflicts with state law.

Here, the potential source of state preemption is the Virginia Gas and Oil Act (the “Act”).¹⁸ This Act creates a state permitting process for oil and gas operations.¹⁹ Fracking is an oil and gas operation within the scope of the Act.²⁰ The purposes

¹³ Section 15.2-2280(4).

¹⁴ *Resource Conservation*, 238 Va. at 20.

¹⁵ See *Vansant & Gusler, Inc. v. Washington*, 245 Va. 356, 361 (1993) (following a previous decision of the Virginia Supreme Court interpreting a statutory provision, and noting that in light of the passage of “many sessions of the General Assembly,” “the construction given to the statute is presumed to be sanctioned by the legislature and therefore becomes obligatory upon the courts”).

¹⁶ There may exist federal statutes or regulations that could, to one degree or another, preempt the local regulation of fracking, local eminent domain actions, or other local mechanisms—including those that might affect the siting or operation of fracking facilities. Those possible federal laws, if and to the extent that they exist, are outside the scope of this Opinion, which discusses only state law. Additionally, this Opinion does not address constitutional concerns that may arise from a ban on fracking, such as takings or due process claims. Those concerns, if they occur, will be dependent on the particular facts at issue.

¹⁷ VA. CODE ANN. § 1-248 (2014).

¹⁸ VA. CODE ANN. §§ 45.1-361.1 to 45.1-361.44 (2013 & Supp. 2014).

¹⁹ Sections 45.1-361.27 to 45.1-361.42 (2013).

²⁰ The Act, in relevant part, states that “[t]he Director [of the Department of Mines, Minerals and Energy (“DMME”)] shall have the power and duty to regulate gas, oil, or geophysical operations.”

of the Act include “[protecting] the citizens and the environment of the Commonwealth from the public safety and environmental risks associated with the development and production of gas or oil.”²¹ The Act creates the Virginia Gas and Oil Board (the “Board”),²² which has “the specific power to issue rules, regulations or orders” (collectively, “regulations”).²³ The permissible scope of these regulations is broad.²⁴ Current regulations of the Board address a wide range of subjects relating to oil and gas development within the Commonwealth. Some subjects within the purview of these regulations involve issues that could also be addressed by local zoning ordinances.²⁵

The issue of regulatory preemption was addressed by the Supreme Court of Virginia in *Blanton v. Amelia County*.²⁶ In that case, the Court held that localities could not prohibit the land application of biosolids in their communities through zoning because “a local government may not ‘forbid what the legislature has expressly licensed, authorized, or required.’”²⁷ The state law at issue in *Blanton* directed the State Board of Health to regulate the use of biosolids, leading the

Section 45.1-361.4(A). DMME regulations governing fracking are found in the Virginia Administrative Code. See 4 VA. ADMIN. CODE §§ 25-150-10 to 25-150-750. Also, the Act contains a definition of the term “injection well” as being “any well used to inject or otherwise place any substance associated with gas and oil operations into the earth or underground strata for disposal, storage or enhanced recovery.” Section § 45.1-361.1 (2013). This definition describes the principal process used in fracking.

²¹ Section 45.1-361.3(6) (2013).

²² Section 45.1-361.13 (2013).

²³ Section 45.1-361.15 (2013).

²⁴ In relevant part, the Board may issue regulations in order to “[p]revent waste through the design spacing, or unitization of wells, pools, or fields”; “[e]nter spacing and pooling orders,” “[e]stablish drilling units,” “[e]stablish maximum allowable production rates for the prevention of waste and for the protection of correlative rights,” and “[c]lassify pools and wells as gas, oil, gas and oil, or coalbed methane gas.” Section 45.1-361.15. In addition, it may “[t]ake such actions as are reasonably necessary to carry out the provisions of [the Act].” *Id.*

²⁵ See the Board’s regulations dealing with “the design, spacing, or utilization of wells, pools, or fields,” its “spacing and pooling orders,” and its authority to “carry out the provisions of [the Act]” with respect to the protection of citizens and the environment and *compare with* the legislative intent of zoning and land use regulation, which includes the intent “to improve public health, safety, and convenience of . . . citizens [and to ensure] that residential areas be provided with healthy surroundings.” VA. CODE ANN. §§ 15.2-2200; 45.1-361.15.

²⁶ *Blanton v. Amelia Cnty.*, 261 Va. 55, 64 (2001).

²⁷ *Id.* (quoting *King*, 195 Va. at 1090-91); see also *Dail v. York Cnty.*, 259 Va. 577, 585 (2000) (“A local ordinance may be invalid because it conflicts with a state regulation if the state regulation has ‘the force and effect of law.’”) (quoting *Loudoun Cnty. v. Pumphrey*, 221 Va. 205, 206-207 (1980)).

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Court to conclude that localities could not subsequently ban such land use activity.²⁸ In a 2013 Opinion addressed to Delegate Terry Kilgore (the “2013 Opinion”), this Office cited *Blanton* in concluding that localities may not pass zoning ordinances banning the exploration for, and drilling of, oil and natural gas.²⁹

However, there is a key difference between the statute that was at issue in *Blanton* and the Act. Section 45.1-361.5 of the Act expressly retains the authority of local land use ordinances, while the statute at issue in *Blanton* did not.³⁰ While § 45.1-361.5 of the Act states that no locality “shall impose any condition, or require any other local license, permit, fee or bond to perform any gas, oil, or geophysical operations which varies from or is in addition to the requirements of this chapter,” this same statute also includes a savings clause stating that the Act does not “limit or supersede the jurisdiction and requirements of . . . local land-use ordinances.” While these two components of § 45.1-361.5 may be to some degree inconsistent, they can be reconciled in part by concluding that the only authority localities retain over fracking is land use or zoning authority. All other possible local powers over fracking operations are totally preempted, but zoning authority is not. And, as explained above, local land use authority includes the authority to prohibit certain uses, including fracking.

When the General Assembly passed the current Act in 1990, it included the savings clause that appears in § 45.1-361.5.³¹ It must be presumed this was done intentionally and that the amendment was “purposeful and not in vain.”³²

²⁸ *Blanton*, 261 Va. at 62, 65-66.

²⁹ 2013 Op. Va. Att’y Gen. 231.

³⁰ See former VA. CODE ANN. § 32.1-164.5 (now repealed, which vested the Board of Health, with the assistance of the Departments of Environmental Quality and Conservation and Recreation, with authority to promulgate regulations concerning use of sewage sludge. No part of that statute could reasonably be interpreted to be a savings clause, and the statute granted no regulatory powers over placing sewage sludge to localities).

³¹ See 1993 Op. Va. Att’y Gen. 173 (discussing passage of the Act). The 1993 Opinion of this Office interpreted § 45.1-361.5 to allow a locality to require special use permits for gas drilling and made no distinction between special use permits and a locality’s power to prohibit gas wells. “The legislature is presumed to have had knowledge of the Attorney General’s interpretation of . . . statutes, and its failure to make corrective amendments evinces legislative acquiescence in the Attorney General’s view” of legislative language. *Richard L. Deal & Assocs., Inc. v. Commonwealth*, 224 Va. 618, 622 (1983) (citations omitted). Had the General Assembly disagreed with the view of this Office expressed in 1993, it has enjoyed many opportunities to amend the law. That it made no changes to the Act’s language for over 20 years may be seen as acquiescence with the 1993 Opinion.

³² See *Cape Henry Towers, Inc. v. Nat’l Gypsum Co.*, 229 Va. 596, 600 (1985) (citations omitted).

Furthermore, it must be presumed “the legislature acted with full knowledge of the law as it stood bearing on the subject” of the amendment.³³ The 1990 enactment of the Act occurred approximately a year after a key 1989 decision of the Supreme Court of Virginia. That case was *Resource Conservation Management, Inc. v. Board of Supervisors of Prince William County*.³⁴ There, the Court held that a locality could exercise its zoning authority to prohibit landfills from certain zoning districts, even though there was a statutory framework in place for regulating and permitting landfills. In essence, the Court in *Resource Conservation Management* held that local zoning authority was not necessarily preempted by a state regulatory program. With this fresh judicial reminder that any intent to preempt zoning powers must be made clear,³⁵ the General Assembly chose not to entirely preempt local land use powers in the Act. Instead, it did the opposite: it expressed in clear and unmistakable terms its intent that local land use powers were to be left generally undisturbed. This stands in marked contrast to the absence of a savings clause for zoning in other portions of the *Code of Virginia*,³⁶ including the statute relied on in *Blanton*.

Because the language of the savings clause in § 45.1-361.5 is clear, because it was enacted approximately a year after the Virginia Supreme Court’s decision in *Resource Conservation Management* holding that local zoning authority is not necessarily preempted by a statutorily-authorized framework of regulations, and because statutory authority exists for localities to prohibit certain land uses through zoning, I must conclude that the General Assembly intended for localities to retain their authority to prohibit fracking through duly enacted zoning ordinances.³⁷ Other types of local control over fracking that do not relate to zoning, such as license or fee requirements, are entirely preempted by the Act. To the extent that the 2013 Opinion conflicts with this conclusion, it is overruled.³⁸

³³ *Id.*

³⁴ 238 Va. 15 (1989).

³⁵ *Id.* at 23.

³⁶ *Id.* at 23 (“Furthermore, when the General Assembly intends to preempt a field, it knows how to express its intention.”) (citation omitted); *see also, e.g.*, VA. CODE ANN. § 3.2-301 (Supp. 2014) (limiting what zoning ordinances may be used to regulate agricultural operations); VA. CODE ANN. § 36-98 (2014) (providing that the Uniform Statewide Building Code will supersede local building codes and certain other local ordinances); VA. CODE ANN. § 55-79.43(A) (2012) (prohibiting zoning ordinances from barring condominium ownership).

³⁷ “When construing a statute, our primary objective is ‘to ascertain and give effect to legislative intent’ as expressed by the language used in the statute.” *Cuccinelli v. Rector & Visitors of the Univ. of Virginia*, 283 Va. 420, 425 (2012).

³⁸ The 2013 Opinion, which incorrectly relied on the *Blanton* opinion, for the reasons discussed, and which failed to note the statutory authority of localities to prohibit particular land uses, also relied in

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I now turn to your second inquiry as to whether a locality, in the absence of a total prohibition on fracking, has the authority to control aspects of fracking such as the timing of drilling operations, traffic, or noise. As noted above, § 15.2-2280 provides localities with broad powers over zoning, including the ability to “regulate” and to “restrict” a variety of uses, which the Act generally preserves through its savings clause. Nevertheless, the Act also provides that no locality “shall impose any condition, or require any other local license, permit, fee or bond to perform any gas, oil, or geophysical operations which varies from or is in addition to the requirements of this chapter.”³⁹ As noted previously, it is clear under § 1-248 of the *Code of Virginia* that local ordinances may not conflict with the provisions of state statute or regulation.

Based upon the statutory framework, it is my duty to harmonize, where reasonably possible, differing statutes and differing portions of a single statute.⁴⁰ As discussed above, there may be some degree of overlap between the regulations the Board is authorized to enact and local zoning ordinances. I conclude that a duly enacted local zoning restriction on fracking operations is valid only if, and to the extent that, it does not conflict with such a regulation, provided the regulation is within the scope of permissible regulations the Board may enact. Any local zoning ordinance must also be consistent with any statutory requirements for fracking operations set forth in the Act. Determining the extent to which particular zoning restrictions on fracking may possibly be preempted by state law will be governed by the particular facts, restrictions, and regulations at issue. Consequently, I can express no opinion on whether any particular zoning restriction has been preempted. I do note that the 2013 Opinion concludes in part that “a local governing body may adopt a zoning ordinance that places restrictions on the location and siting of oil and gas wells that are reasonable in scope and consistent with the Virginia Gas and Oil Act.”⁴¹ That portion of the 2013 Opinion, as it may apply to fracking, is generally reaffirmed.

part on the Commonwealth Energy Policy (the “Policy”), as set forth in § 67-102. See 2013 Op. Va. Att’y Gen. 231, 234. However, the Policy has a savings clause. It states that the Policy “is intended to provide guidance to the agencies and political subdivisions of the Commonwealth in taking discretionary action with regard to energy issues, and shall not be construed to amend, repeal, or override any contrary provision of applicable law.” VA. CODE ANN. § 67-102(D) (2012) (emphasis added). In short, the Policy is precatory and not mandatory where local zoning is concerned.

³⁹ Section 45.1-361.5.

⁴⁰ “Where two statutes are in apparent conflict, they should be construed, if reasonably possible, in such manner that both may stand together.” 1977-78 Op. Va. Att’y Gen. 351, 353, and citations therein.

⁴¹ 2013 Op. Va. Att’y Gen. 231, 236.

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CONCLUSION

It is my opinion that the General Assembly intended to permit localities to prohibit fracking operations through duly enacted land use or zoning ordinances, and the *Code of Virginia* so provides. With respect to your second inquiry, localities may enact zoning restrictions on fracking only if and to the extent that the restrictions are reasonable in scope and are not inconsistent with the Act or regulations properly enacted pursuant to the Act.

OP. NO. 15-005**CONSTITUTION OF VIRGINIA (ART. IX)**

Although the Constitution does not give the SCC jurisdiction over electric utilities operated by municipal corporations, the General Assembly retains the authority to enact a general law giving the SCC that jurisdiction.

THE HONORABLE FRANK W. WAGNER
MEMBER, SENATE OF VIRGINIA
JULY 2, 2015

ISSUE PRESENTED

You ask whether the General Assembly may enact a general law¹ requiring the State Corporation Commission (“SCC” or “Commission”) to regulate the rates, charges, and services of electric utilities operated by municipal corporations.

APPLICABLE LAW AND DISCUSSION

Article IX of the Constitution of Virginia establishes the SCC and sets forth its powers and duties.² Several provisions of Article IX are relevant to your inquiry.

Article IX, § 2 provides that “[s]ubject to such criteria and other requirements as may be prescribed by law, the Commission shall have the power and be charged with the duty of regulating the rates, charges, and services . . . of railroad,

¹ Because your inquiry specifically refers to general laws to expand the jurisdiction of the SCC, it is not necessary for this opinion to discuss the legality of possible special acts for that purpose.

² VA. CONST. art. IX.

telephone, gas, and electric companies.”³ Article IX, § 7 excludes “all municipal corporations, other political subdivisions, and public institutions owned or controlled by the Commonwealth” from the term “corporation” or “company” as it is used in Article IX.⁴ Thus, the Constitution does not grant to the SCC the authority to regulate the rates, charges, and services of electric utilities operated by municipal corporations.

It is critical to observe that while Article IX fails to grant the SCC express authority to regulate municipal utilities, it does not bar the SCC from regulating them. Article IX also authorizes the General Assembly to expand the jurisdiction of the SCC: Article IX, § 2 states that “[t]he Commission shall have such other powers and duties not inconsistent with this Constitution as may be prescribed by law.”⁵ This provision affirms the General Assembly’s power to add to the SCC’s authority.⁶ That is, the General Assembly has the power to enact laws that augment or supplement the SCC’s jurisdiction provided that such laws do not contravene the SCC’s fundamental power and duty to regulate the “rates, charges, and services . . . of railroad, telephone, gas, and electric companies.”⁷ Moreover, the Constitution of Virginia gives the General Assembly broad authority, stating, “[t]he authority of the General Assembly shall extend to all subjects of legislation not . . . forbidden or restricted [by the Constitution]; and a specific grant of authority in [the] Constitution upon a subject shall not work a restriction of [the

³ VA. CONST. art. IX, § 2.

⁴ VA. CONST. art. IX, § 7. In accord, § 56-1 of the *Code of Virginia* provides generally that a “‘public service corporation’ or a ‘public service company’ shall not include a municipal corporation, other political subdivision or public institution owned or controlled by the Commonwealth”

⁵ VA. CONST. art. IX, § 2.

⁶ Compare VA. CONST. art. IX, § 2 (providing the SCC with the express power and duty to regulate the rates, charges, services, and facilities of only railroad, telephone, gas, and electric companies) with VA. CODE ANN. § 56-232 (2012) (defining certain companies that provide water and sewerage services as public utilities to be regulated by the SCC).

⁷ See VA. CONST. art. IX, § 2; accord *Marshall v. N. Va. Transp. Auth.*, 275 Va. 419, 428 (2008) (“An act is unconstitutional if it is expressly prohibited or is prohibited by necessary implication based upon the provisions of the Constitution of Virginia or the United States Constitution.”). Although the General Assembly cannot remove the SCC’s Article IX, § 2 power and duty to regulate the rates of utility companies generally, it may limit the scope of the Commission’s jurisdiction. See *Commonwealth v. Va. Elec. & Power Co.*, 214 Va. 457 (1974) (exempting governmental customers from the SCC’s regulation of rates charged by electric companies does not violate Article IX, § 2 of the Virginia Constitution).

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General Assembly’s] authority upon the same or any other subject.”⁸ Thus, the General Assembly has all powers except those prohibited by either the Virginia or United States Constitutions.⁹

The General Assembly’s authority to confer powers to the SCC that are not explicitly provided by Article IX has been recognized by the Supreme Court of Virginia.¹⁰ To the same end, a previous Attorney General’s opinion addressed questions surrounding the constitutionality of placing a municipal water authority under the regulation of the SCC.¹¹ It opined that the General Assembly has “the authority to confer upon the Commission jurisdiction over any subject matter not clearly and expressly limited by the Constitution”¹² The opinion also finds that Article IX, § 7 represents an express limitation upon the constitutional grant of power of the *Commission* over municipal corporations, but is not a limitation on the power of the *General Assembly*.¹³ In other words, Article IX, § 7 “does not constitute a prohibition against action by the General Assembly to confer such jurisdiction upon the Commission.”¹⁴ I find that this rationale is equally applicable to the rates, charges, and services of electric utilities operated by municipal corporations.

In sum, the Constitution vests the SCC with the express, fundamental power and duty to regulate the “rates, charges, and services . . . of railroad, telephone, gas, and electric companies.”¹⁵ While that power does not extend to municipal electric utilities, the General Assembly may grant the SCC additional “powers and duties

⁸ VA. CONST. art. IV, §14.

⁹ See *Fairfax Cnty. Indus. Dev. Auth. v. Coyner*, 207 Va. 351, 355 (1966) (“It is an elementary principle of constitutional law that the General Assembly does not function under a grant of powers, and it may enact any law which is not prohibited by the Constitution of Virginia.”); *Harrison v. Day*, 201 Va. 386, 396 (1959) (“The Constitution of the State is not a grant of legislative powers to the General Assembly, but is a restraining instrument only”).

¹⁰ *Lewis Trucking Corp. v. Commonwealth*, 207 Va. 23, 29 (1966) (decided under former constitutional provision) (“[The Constitution] is not inclusive of all the powers and duties of the [SCC]; it does not prohibit or limit the power of the legislature to impose additional duties on the [SCC] in the performance of its duties.”).

¹¹ 1974-75 Op. Va. Att’y Gen. 421, 423.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ VA. CONST. art. IX, § 2.

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not inconsistent with [the] Constitution.”¹⁶ Although the Constitution does not give the SCC jurisdiction over electric utilities operated by municipal corporations, the General Assembly retains the authority to enact a general law giving the SCC that jurisdiction.

CONCLUSION

Accordingly, it is my opinion that the General Assembly may enact a general law requiring the SCC to regulate the rates, charges, and services of electric utilities operated by municipal corporations.

OP. NO. 14-082**PRISONS AND OTHER METHODS OF CORRECTION: LOCAL CORRECTIONAL FACILITIES****MOTOR VEHICLES: LICENSURE OF DRIVERS**

A sheriff has discretion to determine what types of prisoner information he will release to a collection attorney under § 53.1-127.5, but release must not be otherwise prohibited by state or federal law and must be reasonably related to the collection effort.

A collection attorney may appear in court on behalf of a sheriff to seek judgment against a former prisoner for nonpayment of jail keep fees, in addition to a court order suspending the former prisoner’s license. However, only a sheriff is authorized to transmit electronic communications to the DMV to effectuate license suspension or to release an existing suspension.

THE HONORABLE KEN STOLLE
SHERIFF, CITY OF VIRGINIA BEACH
JULY 8, 2015

ISSUES PRESENTED

You ask whether a sheriff is limited in the types of prisoner information he may release to a private attorney hired to collect costs associated with a prisoner’s keep (commonly known as “jail keep fees” or “daily jail keep fees”).

¹⁶ *Id.*

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You also ask whether such a private attorney may carry out the particular collection procedures described in § 53.1-127.4 (seeking judgment for unpaid jail keep fees) and § 46.2-320.2 (communications with Department of Motor Vehicles (“DMV”) concerning license suspension for unpaid jail keep fees).

APPLICABLE LAW AND DISCUSSION

The *Code of Virginia* provides that a sheriff may charge prisoners daily jail keep fees, so long as the amount is reasonable and does not exceed \$3 per day.¹ If a prisoner is unable to pay the fees upon release, the sheriff must provide him with a deferred or installment payment agreement to allow him more time to pay.² Should payment not be made under the terms of the agreement, § 53.1-127.5 authorizes the sheriff to pursue collection through an attorney or other collection agent.³

You first ask whether a sheriff is limited in the types of prisoner information he may release to a collection attorney under § 53.1-127.5.⁴ A prisoner’s file may contain various types of personal information, and the contents of the file are deemed confidential unless otherwise provided by law.⁵ Section 53.1-127.5 does not specify what types of personal information may be released for collection purposes, except that a sheriff “shall” release a prisoner’s social security number as part of any collections contract.⁶ This statutory provision clarifies that a prisoner’s social security number, which is protected information, must be

¹ VA. CODE ANN. § 53.1-131.3 (2013).

² See VA. CODE ANN. § 53.1-127.3 (2013). I note that any deferred or installment payment agreement entered into between a sheriff and a prisoner is subject to the approval of the general district court. *Id.*

³ See § 53.1-127.5 (2013). The sheriff also may opt to enter into a collection agreement with the local governing body or the county or city treasurer. *See id.*

⁴ Under the Dillon Rule, a sheriff may exercise 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.” 2012 Op. Va. Att’y Gen. 110, 111.

⁵ See 6 VA. ADMIN. CODE § 15-40-90 (stating that inmate records shall be “kept confidential” and shall contain, but not be limited to, an inmate data form, a commitment form or court order, classification records, disciplinary records, work records, program involvement records, inmate expenditure reports, and victim notification records).

⁶ Section 53.1-127.5 (stating that, as part of a collections contract, a private attorney or collection agency “shall be given access to the social security number of the person who owes the fees in order to assist in the collection effort”).

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released to facilitate the collection process.⁷ However, by authorizing the sheriff to enter into a collections contract, the statute also necessarily implies that he may release other types of information.⁸ To date, the Board of Corrections has issued no guidelines regarding what additional types of information a sheriff may release to a collection attorney.⁹

Given this context, it is my opinion that a sheriff has discretion to determine what types of information he will release to a collection attorney, but he must—in all cases—be guided by the following considerations.¹⁰ First, a sheriff may not release information if the release is prohibited by state or federal law. For example, the release of medical records, criminal history record information, victim/witness information under § 19.2-11.2, or confidential tax documents is generally prohibited under state law.¹¹ Second, a sheriff must ensure that any information released is reasonably related to the collection effort. Determining what is reasonably related to collection under § 53.1-127.5 is a fact-specific inquiry within the sound discretion of the sheriff.

⁷ See also generally Protection of Social Security Numbers Act, VA. CODE ANN. §§ 2.2-3815 through 2.2-3816 (2014) (establishing that the first five digits of an individual’s social security number contained in a public record shall be kept confidential and exempt from disclosure under the Freedom of Information Act, but providing an exception for a release that is necessary “to perform a service or function of the agency”).

⁸ See *Commonwealth v. Cnty. Bd.*, 217 Va. 558, 577 (1977) (“To imply a particular power from a power expressly granted, it must be found that the legislature intended that the grant of the express also would confer the implied.”). For example, collection efforts reasonably require a debtor’s address, and thus the ability of a sheriff to give a collection attorney the current address of a former prisoner may be reasonably implied from the statutory power to enter into a contract with a collection attorney, even though the statute does not explicitly authorize releasing addresses.

⁹ See § 53.1-127.5 (authorizing the Board of Corrections to promulgate “terms and conditions” governing contracts for the collection of unpaid keep fees).

¹⁰ “[A]lthough a sheriff’s powers and duties are limited to those prescribed by statute, he is free to discharge those powers and duties in a manner he deems appropriate.” 2002 Op. Va. Att’y Gen. 264, 265. Nevertheless, a sheriff’s exercise of powers and duties must be carried out in a reasonable manner. See 1987-88 Op. Va. Att’y Gen. 469, 472 (citing the “reasonable selection of method” rule discussed in *Commonwealth v. Cnty. Bd.*, 217 Va. 558, 575 (1977)).

¹¹ See VA. CODE ANN. § 19.2-11.2 (Supp. 2014) (certain victim/witness information); § 19.2-389 (Supp. 2014) (criminal history record information); § 53.1-133.03 (2013) (inmate medical records); VA. CODE ANN. § 58.1-3 (Supp. 2014) (confidential tax documents); 6 VA. ADMIN. CODE § 15-40-90 (inmate records generally); 6 VA. ADMIN. CODE § 15-40-410 (inmate medical records).

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You next ask whether an attorney may execute the collection procedures described in § 53.1-127.4 and § 46.2-320.2. Section 53.1-127.4 explicitly authorizes a sheriff to seek judgment against an individual for unpaid jail keep fees, as well as a court order suspending his driver's license for nonpayment. To effectuate court orders of suspension, a sheriff must enter into an agreement with the DMV Commissioner to transmit license suspension orders to DMV via electronic communication. In the event a former prisoner pays the delinquency in full, or enters into a satisfactory payment agreement, § 46.2-320.2 requires the sheriff to send subsequent electronic notification to DMV to release the suspension.¹²

Under Virginia law, it is clear that a private attorney who is under contract to collect may appear in court on behalf of a sheriff to seek judgment against a former prisoner for nonpayment, as well as a court order to suspend his license.¹³ However, a private attorney may not send electronic notices of license suspension, or releases of suspension, to DMV. The plain language of both § 53.1-127.4 and § 46.2-320.2 indicates that only a sheriff or jail superintendent may perform these functions.¹⁴ Had the General Assembly intended to permit private attorneys to do so, it could have so provided by statute. It did not do so. Accordingly, while a private attorney may obtain a judgment and a court order suspending the license of a former prisoner for nonpayment of inmate keep fees, he may not transmit the electronic communications to DMV that are described in § 46.2-320.2.

CONCLUSION

Accordingly, it is my opinion that a sheriff has discretion to determine what types of prisoner information he will release to a collection attorney under § 53.1-127.5, but in all cases the release must not be otherwise prohibited by state or federal law and must be reasonably related to the collection effort.

¹² This release must be sent the same work day the individual pays in full or enters into a payment agreement. VA. CODE ANN. § 46.2-320.2 (2014).

¹³ An attorney may represent clients in matters before courts in which he is qualified to practice, including collection proceedings. See VA. CODE ANN. § 54.1-3903 (2013); VA. SUP. CT. R., Part 6, § 1 ("Practice of Law in the Commonwealth of Virginia").

¹⁴ Cf. GEICO v. Hall, 260 Va. 349, 355 (2000) (quoting Turner v. Wexler, 244 Va. 124, 127 (1992)) (citing the maxim of statutory construction known as *expressio unius est exclusio alterius*, whereby "mention of a specific item in a statute implies that omitted items were not intended to be included within the scope of the statute").

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It is further my opinion that a collection attorney may appear in court on behalf of a sheriff to seek judgment against a former prisoner for nonpayment of jail keep fees, in addition to a court order suspending the former prisoner's license. However, only a sheriff is authorized to transmit electronic communications to the DMV to effectuate license suspension or to release an existing suspension.

OP. NO. 14-086**MOTOR VEHICLES: REGULATION OF TRAFFIC**

The operator of the toll facilities at the Midtown and Downtown Elizabeth River Tunnels may not impose processing and administrative fees on drivers for the purpose of general revenue recovery. The operator may, however, impose processing fees to recover the direct costs of use of a video-monitoring system and the cost of the invoice, and under the conditions set forth in § 46.2-819.3:1, may impose administrative fees to recover the expenses of collecting the unpaid toll.

HONORABLE KENNETH C. ALEXANDER
MEMBER, SENATE OF VIRGINIA
JULY 9, 2015

ISSUE PRESENTED

You ask whether the operator of the toll facilities at the Midtown and Downtown Tunnels crossing the Elizabeth River may impose processing and administrative fees on drivers to recover general revenue.

APPLICABLE LAW AND DISCUSSION

The toll facilities at the Midtown and Downtown Tunnels in Hampton Roads are operated by Elizabeth River Crossings, a private corporation that holds a concession to operate and maintain the tunnels for a period of 58 years. These facilities are "electronic-only," meaning they lack traditional toll booths where a driver can stop to make manual payment and instead provide a "drive-through" system that automatically debits a driver's account after detecting an EZ-Pass transponder mounted inside his vehicle. If a driver proceeds through one of the

facilities without a transponder, or without having made other payment arrangements,¹ the toll is unpaid.²

In order to collect the unpaid toll, the toll facility operator must identify and locate the vehicle's registered owner using license plate information captured by the facility's video monitoring system. The operator then mails an invoice to the individual. By law, the invoice must contain the following information: (i) the name and address of the registered owner; (ii) the registration number of the vehicle or information obtained from an automatic vehicle identification system; (iii) the location of the violation; (iv) the date and time of the violation; (v) the amount of the toll not paid; (vi) the amount of the administrative fee; (vii) the date by which the toll and administrative fee must be paid; (viii) available statutory defenses; (ix) a warning describing the penalties for nonpayment; and (x) a form for the driver to contest liability.³

Pursuant to legislation passed by the General Assembly in 2010 and codified at § 46.2-819.3:1, the operator of an electronic-only tolling facility equipped with a video-monitoring system may include processing fees in an invoice.⁴ Specifically, the statute provides that the operator “may levy charges for the direct cost of use of and processing for a video-monitoring system and to cover the cost of the invoice, which are in addition to the toll and may not exceed double the amount of the base toll”⁵ As the plain language of the statute indicates, the processing fee, which may not exceed double the base toll, is levied to cover the direct costs of using the video-monitoring system and preparing the invoice.⁶ Thus, the

¹ Specifically, an alternate payment system is available that allows drivers without an EZ-Pass to create a prepaid account that is electronically debited each time they proceed through one of the toll facilities. See ELIZABETH RIVER CROSSINGS, *Pay by Plate*, <https://www.driveert.com/pay-by-plate/> (last visited May 7, 2015) (describing the service).

² Virginia law establishes that “it shall be unlawful for the driver of a motor vehicle to use a toll facility without payment of the specified toll.” VA. CODE ANN. § 46.2-819 (2014).

³ Section 46.2-819.6 (2014).

⁴ 2010 Va. Acts ch. 839.

⁵ Section 46.2-819.3:1(B) (2014). The toll facility operator must post conspicuous signs informing drivers that the toll could be tripled for any vehicle that does not have an automatic toll collection device while the driver still has the opportunity to take an alternate route. *Id.*

⁶ “A principal rule of statutory interpretation is that courts will give statutory language its plain meaning.” *Davenport v. Little-Bowser*, 269 Va. 546, 555 (2005) (citing *Jackson v. Fidelity & Deposit Co.*, 269 Va. 303, 313 (2005)).

legislature has effectively excluded other purposes, including general revenue recovery, as permissible bases for the fee.⁷

If a driver does not pay the invoice within 30 days, he incurs a toll violation.⁸ At this point, § 46.2-819.3:1 authorizes the toll facility operator to charge the driver an administrative fee.⁹ If the driver pays the invoice within 30 days after incurring the toll violation, the amount of the administrative fee shall not exceed \$25 per violation.¹⁰ Otherwise, the amount of the fee shall not exceed \$100 per violation.¹¹ Any administrative fee charged is in addition to the amount of the base toll and processing fee. Thus, to summarize, a driver will owe (i) the amount of the base toll plus processing fee if paying within 30 days after receiving an invoice, (ii) the amount of the base toll, processing fee, and an administrative fee of up to \$25 if paying within 31 to 61 days after receiving an invoice; and (iii) the amount of the base toll, processing fee, and an administrative fee of up to \$100 if paying more than 61 days after receiving an invoice.¹²

The General Assembly has specifically stated that the purpose of the administrative fee is “to recover the expenses of collecting the unpaid toll” and that the amount of the fee must “be reasonably related to the actual cost of collecting the unpaid toll.”¹³ By providing that the administrative fee—like the processing fee—may be levied only for recovery of certain expenses incurred by

⁷ As previous Opinions of this Office have explained, “when a statute creates a specific grant of authority, the authority exists only to the extent specifically granted in the statute.” *See, e.g.*, 2010 Op. Va. Att’y Gen. 10, 11 (citing 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47:23 (7th ed. 2007); *see also* Turner v. Wexler, 244 Va. 124, 127 (1992) (“[M]ention of a specific item in a statute implies that omitted items were not intended to be included within the scope of the statute.”).

⁸ Section 46.2-819.3:1(B).

⁹ Alternative provisions apply if, for example, the toll facility is comprised of high-occupancy toll lanes (HOT lanes), *see* VA. CODE ANN. § 33.2-503 (2014), or uses a photo-monitoring system, *see* § 46.2-819.1 (2014). *See also* § 46.2-819.3 (2014).

¹⁰ *Id.*

¹¹ *Id.*

¹² The driver could be further subject to civil penalties and court costs if the matter is referred to court. *See* § 46.2-819.3:1.

¹³ Section 46.2-819.3:1(B).

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the toll facility operator, the legislature has effectively excluded other purposes for imposition of the fee, including general revenue recovery.¹⁴

CONCLUSION

Accordingly, it is my opinion that the operator of the toll facilities at the Midtown and Downtown Elizabeth River Tunnels may not impose processing and administrative fees on drivers for the purpose of general revenue recovery. The operator may, however, impose processing fees to recover the direct costs of use of a video-monitoring system and the cost of the invoice, and under the conditions set forth in § 46.2-819.3:1, may impose administrative fees to recover the expenses of collecting the unpaid toll.

This Opinion does not address the legitimacy of any particular fees billed to any individual, nor does it opine on whether the current amounts of processing and administrative fees charged by the operator are reasonably related to expenses incurred.¹⁵ Furthermore, I offer no comment as to the wisdom of the policy embodied in current law. It is within authority of the General Assembly to set the procedure governing the collection of processing and administrative fees as it has done in § 46.2-819.3:1.

Op. No. 15-025**COUNTIES, CITIES AND TOWNS: LOCAL GOVERNMENT PERSONNEL, QUALIFICATION FOR OFFICE, BONDS, DUAL OFFICE HOLDING AND CERTAIN LOCAL GOVERNMENT OFFICERS**

The Mayor of Quantico has complete management authority over the executive functions of the town, and the Town Council may not divest him of his authority to supervise employees by appointing a chief administrative officer to do so.

WILLIAM C. BOYCE, JR., ESQUIRE
ATTORNEY FOR THE TOWN OF QUANTICO
JULY 10, 2015

¹⁴ See *supra* note 7.

¹⁵ Attorneys General consistently have declined to render official opinions on specific factual matters. 2009 Op. Va. Att’y Gen. 80, 81, and n.17.

ISSUE PRESENTED

You ask whether the Mayor of Quantico has complete management authority over the executive functions of the town and whether the town council may appoint a chief administrative officer to restrict or divest him of his authority to supervise employees.

APPLICABLE LAW AND DISCUSSION

The Constitution of Virginia explicitly authorizes the General Assembly to prescribe local forms of government.¹ It provides that the General Assembly shall pass general laws establishing the “organization, government, and powers” of localities in the Commonwealth, and that the General Assembly may pass special laws establishing the “organization, government, and powers” of any city, town, or regional government.² A special law applies to only one local government and may provide forms of organization and powers that differ from those established for localities under general law.³

The Quantico Town Charter (the “Charter”) is a special law that establishes the organization and powers of the town’s government.⁴ It provides that the government shall be “vested in a town council, which shall be composed of a mayor and five councilmen.”⁵ The Charter also states that the Mayor shall be “chief executive officer of the town.”⁶ The term “chief executive officer” is not defined in the Charter and therefore must be given its plain meaning. Black’s Law Dictionary defines the term as “[a] corporation’s highest-ranking administrator or manager.”⁷ By definition, then, a chief executive officer is an organization’s highest-ranking administrator or manager. Therefore, because the

¹ 2 A.E. “DICK” HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 805 (1974) (noting that the Constitution provides that the General Assembly is “generally free to organize, empower, consolidate and dissolve local governments by general law or special act”).

² VA. CONST. art. IV, § 2.

³ See VA. CONST. art. IV, § 1; 2014 Op. Va. Att’y Gen. 53, 56 and citations therein (“The legislature may enact provisions in town charters that confer rights and privileges different from, and in addition to, those conferred by general statutes.”).

⁴ See generally CHARTER FOR THE TOWN OF QUANTICO, VA.; 2014 Va. Att’y Gen. 53, 56 (municipal charter is a special act).

⁵ *Id.* at § 4.

⁶ *Id.*; see generally *Hammer v. Commonwealth*, 169 Va. 355, 365 (“The functions, powers and duties of the mayor of a city, as well as other municipal officers, are derived from and are dependent upon constitutional, statutory, and charter provisions.”).

⁷ BLACK’S LAW DICTIONARY 289 (Bryan A. Garner et al. eds., 10th ed. 2014).

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Charter states that the Mayor of Quantico shall be “chief executive officer,” I conclude that he has ultimate *administrative* control over the supervision of town employees.

The Town Council is not authorized to divest the Mayor of this power. Although § 15.2-1540 provides that a local governing body may appoint a chief administrative officer to supervise and direct employees, § 15.2-1541 provides that a charter may function to limit the scope of his duties.⁸ That is exactly what has been done here: the Quantico Town Charter makes the Mayor the town’s chief executive officer, and it thus gives him administrative control over town employees, thereby limiting the powers of a chief administrative officer, if one is appointed. There is no statutory basis in this context for ascribing supervisory powers over employees to a chief administrative officer in lieu of the Mayor. Thus, if the Town Council were to create the position of chief administrative officer, that individual—if hired—would have to serve as a subordinate of the Mayor. The Mayor alone would remain ultimately responsible for administration, including the supervision of town employees.

I note that even if general law conflicted with the Charter’s designation of the Mayor as chief executive officer—and it does not—the Charter would control. The Charter is a special act with provisions that may differ from general law. Therefore, its provisions control where they conflict with general law.⁹ To the same effect, any ordinance that is inconsistent with the Mayor’s power under the Charter as chief executive officer would be unenforceable to the extent of the inconsistency.

CONCLUSION

Accordingly, it is my opinion that the Mayor of Quantico has complete management authority over the executive functions of the town, and the Town Council may not divest him of his authority to supervise employees by appointing a chief administrative officer to do so.

⁸ See VA. CODE ANN. § 15.2-1541 (2012) (establishing that a chief executive officer shall perform certain enumerated duties “unless it is otherwise prescribed by general law, charter, or by ordinance or resolution”); see also § 15.2-1501 (2012) (stating that a locality may designate officers or employees to exercise powers or carry out duties “[w]henever it is not designated by . . . special act” which individual shall be responsible for doing so) (emphasis added).

⁹ 2014 Va. Att’y Gen. 53, 56 (“[W]hen there is a conflict in the provisions of a special or local act and the general law on the subject[,] the special or local act is controlling.”) (quoting *Powers v. Cnty. Sch. Bd.*, 148 Va. 661, 669 (1927)).

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OP. NO. 15-009**COUNTIES, CITIES AND TOWNS: LOCAL CONSTITUTIONAL OFFICERS,
COURTHOUSES AND SUPPLIES**

A sheriff may not employ and dedicate deputies to provide full-time security services at a private hospital, and the local governing body may not accept funds from the hospital to cover the cost of doing so.

THE HONORABLE LUCY E. PHILLIPS
WASHINGTON COUNTY ATTORNEY
JULY 10, 2015

ISSUE PRESENTED

You ask whether a sheriff may dedicate several deputies to serve as full-time security at a privately owned hospital in exchange for the hospital's agreement to donate funding to the county sufficient to cover the cost of employing the deputies.

BACKGROUND

You relate that the private owner of a local, not-for-profit hospital has asked the sheriff to dedicate several deputies to serve as full-time security. The deputies would serve in newly created positions, not through a reassignment of existing positions. The new positions are not presently authorized by the State Compensation Board. The new deputies would remain under the supervision of the sheriff, with all the legal authority and employment benefits otherwise available to his employees, but the only service they would perform would be providing security for the hospital. The hospital would donate funds to the county sufficient to cover the cost of the deputies.

APPLICABLE LAW AND DISCUSSION

The number of deputies of a sheriff is normally determined by the State Compensation Board.¹ The only exception is that the governing body of a county

¹ See VA. CODE ANN. § 15.2-1609.1 (2012) (“[T]he respective number of full-time deputies appointed by the sheriff of a county or city shall be fixed by the Compensation Board after receiving [the] recommendation of the board of supervisors of the county or the council of the city, as the case may be, as the board of supervisors or city council may desire to make.”).

or city may “employ a greater number of law-enforcement deputies than fixed by the Compensation Board, provided . . . the county or city shall pay the total compensation and all employer costs for such additional deputies.”² Accordingly, the new deputies could not be hired unless the county, in its sole discretion, agreed to pay their total compensation.³ However, even if the county were willing to pay this cost, it could not fund the new positions unless they would be providing services the sheriff is legally authorized to provide.⁴ Thus, the essential question is whether a sheriff is authorized to dedicate deputies to provide full-time security services at a private hospital.

A sheriff possesses “exclusive control over the day-to-day operations of his office” and is therefore authorized to assign specific duties and responsibilities to the deputies under his command.⁵ He is free “to discharge his prescribed powers and duties in a manner he deems appropriate.”⁶ However, his duties and powers are limited to those conferred expressly or by necessary implication by statute.⁷

² *Id.*

³ *Cf.* 1985-86 Op. Va. Att’y Gen. 56 (a sheriff cannot compel board of supervisors to fund certain expenses not approved by the Compensation Board).

⁴ *See* § 15.2-1609.1 (indicating that additional deputies employed by the county board of supervisors must provide “law-enforcement” services); *Bd. of Supvrs. v. Horne*, 216 Va. 113, 117 (1975) (“In Virginia the powers of boards of supervisors are fixed by statute and are limited to those conferred expressly or by necessary implication. This rule is a corollary to Dillon’s Rule that municipal corporations have only those powers expressly granted, those necessarily or fairly implied therefrom, and those that are essential and indispensable.”) (internal citations omitted); *see also* *State ex rel. City of Charleston v. Bosely*, 268 S.E.2d 590, 594 (W. Va. 1980) (citing the “fundamental rule that any power conferred upon a municipality must be exercised for a public use or purpose as distinguished from a private purpose”); *cf.* § 15.2-1609 (2012) (providing that a local governing body cannot request that a sheriff perform a duty that is “inconsistent with his office”).

⁵ 1997 Op. Va. Att’y Gen. 60, 61; 1987-88 Op. Va. Att’y Gen. 221, 222; 1995 Op. Va. Att’y Gen. 48, 48 (“[C]onstitutional officers are independent of their respective localities’ management and control.”).

⁶ 2002 Op. Va. Att’y Gen. 151, 153.

⁷ VA. CONST. art. VII, § 4; *Hilton v. Amburgey*, 198 Va. 727, 729 (1957) (citing *Narrows Grocery Co. v. Bailey*, 161 Va. 278 (1933)) (“[A] sheriff is a constitutional officer and his duties are regulated and defined by . . . statute.”); 2012 Op. Va. Att’y Gen. 110, 111 (stating that the Dillon Rule of strict construction applies to constitutional officers); 2002 Op. Va. Att’y Gen. 151, 153.

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Thus, despite a sheriff's discretion in assigning duties, he may not assign duties that do not fall within the scope of his authority.⁸

There is no statutory provision that would permit a sheriff to dedicate deputies to provide full-time security services at a private hospital in the manner you describe. A 1991 Opinion of this Office concludes that individuals appointed as full-time deputies cannot serve as correctional officers for a private corporation because such service "is beyond the scope of those duties imposed on a sheriff."⁹ The same reasoning applies to the scenario you present. Under existing statutes, a sheriff is generally charged with providing public law-enforcement services within his jurisdiction for the benefit of the population at large.¹⁰ Although conducting routine patrols of business premises at the request of a private owner is permissible in most circumstances,¹¹ guarding a private business on a full-time basis is a private—rather than public—function.¹² I therefore conclude that a sheriff is not authorized to dedicate deputies to provide ordinary, full-time security services for a private hospital.¹³

⁸ See, e.g., § 15.2-1603 (2012) (providing that sheriffs' deputies serve as agents to exercise the authority of their principal); 2001 Op. Va. Att'y Gen. 77, 77 and citations therein (indicating that the authority of a sheriff and his deputy is coextensive); 1997 Op. Va. Att'y Gen. 203, 205 and citation therein (stating that it has long been the public policy in Virginia that "a sheriff and his deputies are considered as one person").

⁹ 1991 Op. Va. Att'y Gen. 218, 220.

¹⁰ See generally § 15.2-1609 (providing that a sheriff "shall enforce the law or see that it is enforced in the locality from which he is elected"); 1987-88 Op. Va. Att'y Gen. 221 ("Among the general duties of sheriffs is the enforcement of all criminal laws in their jurisdiction and the preservation of peace and order."); cf. 1984-85 Op. Va. Att'y Gen. 73, 73 ("[A] sheriff does not . . . have the authority to allow the use of publicly owned property solely for private purposes.").

¹¹ See generally § 15.2-1609 (establishing the general law-enforcement powers of a sheriff); 2002 Op. Va. Att'y Gen. 151, 153 (providing that a constitutional officer "is free to discharge his prescribed powers and duties in a manner he deems appropriate").

¹² Compare 1991 Op. Va. Att'y Gen. 218, 220 (indicating that the proposed service of full-time deputies as correctional officers for a private corporation is a "private" purpose) with 1987-88 Op. Va. Att'y Gen. 221 (indicating that the service of deputies at certain large, privately-operated music festivals is a "public" function carried out to preserve peace and order).

¹³ This Opinion is not intended to address situations of public emergency that might require a sheriff to devote full-time personnel to the hospital on a temporary basis. I also note that even if the locality funds the additional positions, it cannot legally require the sheriff to assign them to the hospital. A locality may not dictate how a sheriff, who is a constitutional officer, uses the resources of his office. 1973-74 Op. Va. Att'y Gen. 39.

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I also note that because a sheriff may not legally provide the services in question, the county could not accept funds offered by the hospital to cover the cost of the services. Although local governing bodies are not, as a general rule, barred from accepting donations on behalf of the sheriff,¹⁴ the funds in the scenario you present would not constitute a true “donation.” Rather, they would in effect be compensation paid under a contract with the hospital to provide full-time security services, which I have concluded is not legally authorized.¹⁵ Because the underlying contract would not be legal, a local governing body cannot accept funds that would facilitate it.¹⁶

There are numerous occasional community services sheriffs may legally provide as part of their law enforcement responsibilities, such as crowd control, traffic control at accidents, funeral escorts, and services at other emergencies. These legal additional services could also include arrangements to provide limited “extra-duty” security to private businesses.¹⁷ The conclusion I reach in this opinion does not in any way affect or restrict the ability of sheriffs to provide those routine, occasional community services.

CONCLUSION

Accordingly, it is my opinion that a sheriff may not employ and dedicate deputies to provide full-time security services at a private hospital, and the local governing body may not accept funds from the hospital to cover the cost of doing so.

OP. NO. 14-075

AVIATION

Federal law preempts state or local regulation of the routes, rates, and services of commercial drones used to transport property across state lines. Furthermore, it preempts state and local regulation of drone safety, operational standards, and airspace designations, including particular issues relating to drone certification, training, and licensure.

States remain free to enact laws relating to drones if the laws fall outside the scope of the Aviation Act and FMRA and do not conflict with other federal laws or regulations. In

¹⁴ See § 15.2-1613 (2012); 2005 Op. Va. Att’y Gen. 13, 15; 1984-85 Op. Va. Att’y Gen. 284, 284-85.

¹⁵ See 2005 Op. Va. Att’y Gen. 13, 14; 1984-85 Op. Va. Att’y Gen. 284, 285.

¹⁶ See *supra* note 4.

¹⁷ See, e.g., 1974-75 Op. Va. Att’y Gen. 397.

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particular, states may regulate small drones that are exempted from federal regulation under the FMRA, and they may also enact laws for drones that address issues of privacy and property and also criminal offenses, so long as the laws do not conflict with the language or purpose of any existing federal aviation law.

THE HONORABLE SCOTT A. SUROVELL
MEMBER, HOUSE OF DELEGATES
JULY 13, 2015

ISSUE PRESENTED

You ask whether the Commonwealth or its localities may regulate the use of drones, or whether such actions are preempted by federal law.

BACKGROUND

Drones, otherwise known as unmanned aircraft systems, have in recent years become popular tools for scientific researchers, entrepreneurs, military personnel, and civilian hobbyists alike. Technology is rapidly expanding the numerous ways drones can be used. These developments have raised concerns about the possible misuse of drones, as well as questions regarding the extent of state and local authority to regulate their use.

APPLICABLE LAW AND DISCUSSION**1. The Supremacy Clause and Federal Preemption**

The Supremacy Clause of the Constitution of the United States declares that the “Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land,” notwithstanding the laws of any state to the contrary.¹ For purposes of the Supremacy Clause, “local ordinances [are] analyzed in the same way as . . . statewide laws.”² Thus, to the extent that state or local laws or ordinances conflict with federal law, they are preempted by federal law.³

¹ U.S. CONST. art. VI, cl. 2.

² *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985).

³ *See* *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824) (stating that in every case where state law conflicts with federal law, the federal law is supreme, and “the law of the state, though enacted in the exercise of powers not controverted, must yield to it”).

Courts have identified three types of federal preemption. “Express preemption” occurs when Congress has clearly stated or conveyed the intention that federal law shall preempt state law.⁴ “Conflict preemption” occurs when a state law is in direct conflict with federal law, such that “compliance with both federal and state [laws] is a physical impossibility,”⁵ or when state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”⁶ Finally, “field preemption” occurs when there is a “scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.”⁷ When a subject is field preempted, any state law falling within the scope of the field is preempted and is invalid.

The types of federal preemption that are relevant to your inquiry are express preemption and field preemption. I will discuss both in turn.

2. Express Preemption

The only federal law that expressly preempts state and local laws regarding aviation is found in the Airline Deregulation Act of 1978 (the “Deregulation Act”).⁸ Under the Deregulation Act, no state may “enact or enforce a law, regulation, or other provision . . . related to a price, route, or service of an air carrier that may provide air transportation.”⁹ The Deregulation Act defines an “air carrier” as “a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation.”¹⁰ It defines “air transportation,” in turn,¹¹ to include the interstate “transportation of passengers *or property* by

⁴ *Sprietsma v. Mercury Marine*, 537 U.S. 51, 62-63 (2002); *see also Dugan v. Childers*, 261 Va. 3, 8-11 (2001) (holding that a Virginia statute was expressly preempted by federal law).

⁵ *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963); *see also Marett v. Hillman*, 283 Va. 34, 40 (2012), *aff’d*, 133 S. Ct. 1943 (2013).

⁶ *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *see also Gustafson v. City of Lake Angelus*, 76 F.3d 778, 782-83 (6th Cir. 1996).

⁷ *Fidelity Fed. Sav. & Loan Ass’n v. De la Cuesta*, 458 U.S. 141, 153 (1982) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)) (internal quotation marks omitted); *see also Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1998); *Gustafson*, 76 F.3d at 782.

⁸ Pub. L. No. 95-504, 92 Stat. 1705 (codified as amended in scattered sections of 49 U.S.C.).

⁹ 49 U.S.C.S. § 41713(b)(1) (LexisNexis through P.L. 114-11).

¹⁰ 49 U.S.C.S. § 40102(a)(2) (LexisNexis through P.L. 114-11).

¹¹ 49 U.S.C.S. § 40102(a)(5).

aircraft as a common carrier for compensation.”¹² A drone qualifies as an “aircraft” under the Act’s broad definition of the term.¹³ Accordingly, to the extent a drone is used commercially to transport property for compensation across state lines, the Deregulation Act preempts any state regulation related to its price, routes, or services.

3. Field Preemption

The federal government has asserted exclusive sovereignty over the airspace of the United States.¹⁴ In 1958, Congress passed the Federal Aviation Act (the “Aviation Act”),¹⁵ which created the Federal Aviation Administration (“FAA”) and vested in it the power to “frame rules for the safe and efficient use of the nation’s airspace.”¹⁶ Among other things, the Aviation Act provides the FAA with broad authority to regulate air safety, the operation of aircraft, and the use of navigable airspace (i.e., airspace management).¹⁷ As the primary federal body responsible for the oversight of aviation, the FAA has issued extensive federal regulations on these topics pursuant to its authority under the Aviation Act.¹⁸

Courts have consistently found that the Aviation Act “preempts the entire field of aviation safety.”¹⁹ Congressional intent “to displace state law is implicit in the pervasiveness of the federal regulations, the dominance of the federal interest in this area, and the legislative goal of establishing a single, uniform system of

¹² 49 U.S.C.S. § 40102(a)(25) (emphasis added).

¹³ See 49 U.S.C. § 40102(a)(6) (defining the term “aircraft” as “any contrivance invented, used, or designed to navigate, or fly in, the air”).

¹⁴ 49 U.S.C.S. § 40103(a)(1) (LexisNexis through P.L. 114-11) (“The United States Government has exclusive sovereignty of airspace of the United States.”).

¹⁵ Pub. L. No. 85-726, 72 Stat. 731 (repealed and recodified in scattered sections of 49 U.S.C.).

¹⁶ *Air Line Pilots Ass’n Int’l v. Quesada*, 276 F.2d 892, 894 (2d Cir. 1960).

¹⁷ 49 U.S.C.S. §§ 44701; 40101(d)(4); 40103(b)(1) (LexisNexis through P.L. 114-11).

¹⁸ See generally Title 14 of the *Code of Federal Regulations*.

¹⁹ *Montalvo v. Spirit Airlines*, 508 F.3d 464, 468 (9th Cir. 2007); *Greene v. B.F. Goodrich Avionics Sys. Inc.*, 409 F.3d 784, 795 (6th Cir. 2005); *Abdullah v. Am. Airlines, Inc.*, 181 F.3d 363, 365 (3d Cir. 1999); *In re Air Crash Near Clarence Ctr., N. Y.*, 798 F. Supp. 2d 481, 486 (W.D.N.Y. 2011); *Med-Trans Corp. v. Benton*, 581 F. Supp. 2d 721, 740 (E.D.N.C. 2008); *Banner Adver., Inc. v. City of Boulder*, 868 P.2d 1077, 1083-84 (Colo. 1994).

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control over air safety.”²⁰ Courts have likewise found that the Aviation Act preempts the entire fields of aircraft operation²¹ and airspace management.²² Therefore, state and local governments may not enact laws purporting to regulate these areas. Examples of preempted regulations include, but are not limited to, regulations that govern aircraft altitude,²³ flight paths,²⁴ or noise.²⁵

The Aviation Act applies to all “aircraft,” which it broadly defines as “any contrivance invented, used, or designed to navigate, or fly in, the air.”²⁶ For the past nine years, the FAA has consistently treated drones as “aircraft” in guidance documents, policy statements, and internal memoranda.²⁷ And the National Transportation Safety Board recently affirmed the FAA’s interpretation that

²⁰ *Montalvo*, 508 F.3d at 473. Based on this rationale, courts have invalidated not only direct safety regulations, but also state laws that merely *implicate* aviation safety concerns. See, e.g., *Ventress v. Japan Airlines*, 747 F.3d 716, 722 (9th Cir. 2014) (employment regulations preempted); *U.S. Airways, Inc. v. O’Donnell*, 627 F.3d 1318, 1326 (10th Cir. 2010) (on-board alcohol regulations preempted); *French v. Pan Am Express, Inc.*, 869 F.2d 1, 6-7 (1st Cir. 1989) (state pilot qualifications preempted).

²¹ *City of Cleveland, Ohio v. City of Brook Park, Ohio*, 893 F. Supp. 742, 750 (N.D. Ohio 1995) (field of aircraft operation and navigation preempted).

²² *Big Stone Broad., Inc. v. Lindbloom*, 161 F. Supp. 2d 1009, 1016 (D.S.D. 2001) (field of airspace management preempted).

²³ *Allegheny Airlines, Inc. v. Village of Cedarhurst*, 238 F.2d 812, 815 (2d Cir. 1956) (local regulation of the altitude of aircraft take-offs and landings preempted); cf. *Gustafson*, 76 F.3d at 786 (a local ordinance pertaining to landing a seaplane on a lake was not preempted, because the “FAA does not believe Congress expressly or impliedly meant to preempt regulation of local land or water use”).

²⁴ *Skysign Int’l v. City & Cnty. of Honolulu*, 276 F.3d 1109, 1117 (9th Cir. 2002).

²⁵ *Am. Airlines, Inc. v. Hempstead*, 398 F.2d 369, 376 (2d Cir. 1968) (local noise ordinance preempted).

²⁶ 49 U.S.C.S. § 40102(a)(6) (LexisNexis through P.L. 114-11).

²⁷ *Unmanned Aircraft Operations in the Nat’l Airspace Systems*, 72 Fed. Reg. 6689, 6690 (Feb. 13, 2007), available at <http://www.gpo.gov/fdsys/pkg/FR-2007-02-13/html/E7-2402.htm> (last visited May 18, 2015); FED. AVIATION ADMINISTRATION, INTERIM OPERATIONAL APPROVAL GUIDANCE 08-01, UNMANNED AIRCRAFT SYSTEMS OPERATIONS IN THE U.S. NATIONAL AIRSPACE SYSTEM at 4 (March 13, 2008), available at http://www.faa.gov/about/office_org/headquarters_offices/ato/service_units/systemops/aaim/organizations/uas/coa/faq/media/uas_guidance08-01.pdf (last visited May 18, 2015); FED. AVIATION ADMINISTRATION, AFS-400 UAS POLICY MEMO 05-01, UNMANNED AIRCRAFT SYSTEMS OPERATIONS IN THE U.S. NATIONAL AIRSPACE SYSTEM – INTERIM OPERATIONAL APPROVAL GUIDANCE, at 2 & 3 (Sept. 16, 2005) (internal memorandum).

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drones fall under the definition of “aircraft” in the Aviation Act and are, therefore, subject to FAA regulation.²⁸

Furthermore, in 2012 Congress passed the FAA Modernization and Reform Act (“FMRA”), which deals directly with the federal regulation of drones.²⁹ The FMRA directs the FAA to issue a set of federal regulations to “safely accelerate the integration of [civilian drones] into the national airspace.”³⁰ Under that directive, the FAA must create standards for the “operation and certification” of drones,³¹ as well as the registration and licensing of drone pilots and operators.³² In 2013, the FAA issued a “roadmap,” which anticipates that forthcoming drone regulations will establish airworthiness certification standards for drones, standards for the acceptable operation of drones, and standards for training drone pilots and other members of the aviation community who will work with drones (such as mechanics, air traffic controllers, visual observers, and launch/recovery specialists).³³ Recently this year, the FAA issued a notice of proposed rulemaking³⁴ setting forth proposed regulations for small civilian drones.³⁵ These

²⁸ *Huerta v. Pirker*, N.T.S.B. Order EA-5730 (2014), available at http://c.ymcdn.com/sites/www.mapps.org/resource/resmgr/Docs/NTSB_Order_EA_5730.pdf (last visited May 18, 2015). In the *Pirker* case, the appellee flew a small drone through the streets of Charlottesville, Virginia, in order to record images for use in a promotional video. Based on the manner in which the drone had been operated, Mr. Pirker was fined \$10,000 by the FAA for flying an aircraft in a careless or reckless manner, which is prohibited by 14 C.F.R. § 91.13(a). Although an administrative law judge had determined that the drone at issue did not meet the definition of “aircraft” within the meaning of the Federal Aviation Act, the National Transportation Board disagreed, reversing the decision of the law judge and reinstating the fine against Mr. Pirker. *See id.*

²⁹ Pub. L. No. 112-95, 126 Stat. 72 (enacted Feb. 14, 2012) (to be codified in scattered sections of 49 U.S.C.).

³⁰ *Id.* at § 332(a)(1).

³¹ *Id.* at § 332(a)(2)(A)(i).

³² *Id.* at § 332(a)(2)(A)(iii).

³³ *See* FED. AVIATION ADMINISTRATION, INTEGRATION OF CIVIL UNMANNED AIRCRAFT SYSTEMS (UAS) IN THE NATIONAL AIRSPACE SYSTEM (NAS) ROADMAP (1st ed. 2013). To complement the FAA Roadmap, the federal Joint Planning and Development Office simultaneously issued a “Comprehensive Plan” regarding the integration of civilian drones into the national airspace. *See* JOINT PLANNING AND DEVELOPMENT OFFICE, UNMANNED AIRCRAFT SYSTEMS (UAS) COMPREHENSIVE PLAN: A REPORT OF THE NATION’S UAS PATH FORWARD (Sept. 2013).

³⁴ Operation and Certification of Small Unmanned Aircraft Systems, 80 Fed. Reg. 9544 (proposed Feb. 23, 2015) (to be codified at 14 CFR pts. 21, 43, 45, 47, 61, 91, 101, 107, and 183).

proposed regulations address many of the specifics pertaining to the operation of small drones, operational limitations and requirements, a prohibition on night-time operations, establishment of a maximum airspeed and altitude, and operator certification requirements and responsibilities.

It is therefore clear from both the FMRA and the Aviation Act that Congress intends to occupy the fields of drone safety, operation, and airspace management—including specific standards governing drone certification and the training and licensure of drone pilots. For this reason, I conclude that state and local governments are preempted from enacting regulation targeted to these areas, with certain exceptions.

One exemption from the field preemption created by the Aviation Act and FMRA is for regulations that pertain to certain “model aircraft.” That term encompasses some drones.³⁶ The FMRA prohibits the FAA from promulgating any regulations governing model aircraft that: (1) are used solely for recreational purposes; (2) are operated in accordance with a community-based set of safety guidelines, (3) weigh less than 55 pounds, (4) are operated in a manner so as not to interfere with manned aircraft, and (5) if flown within five miles of an airport, are operated by an individual who has given the aircraft operator and air traffic control tower prior notice of the operation.³⁷ The FAA retains the authority, however, to enact and enforce regulations to ensure that these model aircraft do not “endanger the safety of the national airspace system.”³⁸ Given the explicit “carve out” for model aircraft, it is my opinion that state and local regulations governing these types of small craft are not preempted, as long as those regulations do not conflict with either the language or purpose of existing federal law and regulations.³⁹

³⁵ Small drones are defined as those that weigh less than 55 pounds. Pub. L. No. 112-95, 126 Stat. 72, § 331(6).

³⁶ Pub. L. No. 112-95, 126 Stat. 72, § 336(a). The term “model aircraft” encompasses any “unmanned aircraft” that is: (1) capable of sustained flight in the atmosphere; (2) flown within the visual sight of the person operating the aircraft; and (3) flown for hobby or recreational—rather than commercial—purposes. *Id.* at § 336(c).

³⁷ *Id.* at § 336(a).

³⁸ *Id.* at § 336(b).

³⁹ *See* *Goodspeed Airport L.L.C. v. E. Haddam Inland Wetlands & Watercourses Comm’n*, 634 F.3d 206, 209 & 211 (2d Cir. 2011).

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Another exemption from the field preemption created by the Aviation Act and FMRA is for laws related to privacy and property regulation.⁴⁰ In addition, criminal statutes—even when the subject of the prohibited conduct is regulated under federal law—have generally been held not to be preempted under federal law.⁴¹ And although the standard of care for a tort action relating to a preempted subject is generally governed by federal law, the ability to bring the state cause of action survives.⁴² Finally, although the “United States Government has exclusive sovereignty of airspace of the United States,”⁴³ a private landowner has a vested

⁴⁰ The FAA has not enacted comprehensive regulations pertaining to the privacy considerations that might be associated with drone operations, noting, instead, that states and localities are free to enact regulations addressing these issues. *See, e.g.*, Unmanned Aircraft System Test Site Program, 78 Fed. Reg. 68360, 68362 (Nov. 14, 2013) (“[I]f [drone] operations at a Test Site raise privacy concerns that are not adequately addressed by the Test Site’s privacy policies, elected officials can weigh the benefits and costs of additional privacy laws or regulations.”); *see also* 80 Fed. Reg. 9544, 9552 (Feb. 23, 2015) (“[S]tate law and other legal protections for individual privacy may provide recourse for a person whose privacy may be affected through another person’s use of a [drone].”). President Obama has, however, issued a Presidential Memorandum imposing privacy-related requirements on federal agencies that use drones, and a recent request for public comment from the National Telecommunications and Information Administration indicates that additional privacy regulations regarding civilian drones may be forthcoming. *See* Presidential Memorandum: Promoting Economic Competitiveness While Safeguarding Privacy, Civil Rights, and Civil Liberties in Domestic Use of Unmanned Aircraft Systems (Feb. 15, 2015), 80 Fed. Reg. 9355 (Feb. 20, 2015); Privacy, Transparency, and Accountability Regarding Commercial and Private Use of Unmanned Aircraft Systems, 80 Fed. Reg. 11978 (Mar. 5, 2015) (requesting, in accordance with the presidential memorandum, public comment on a variety of privacy issues related to drone operations).

⁴¹ *See, e.g.*, *Crenshaw v. Commonwealth*, 219 Va. 38, 40–41 (1978) (holding that a conviction for unlawfully operating a car with a radar detector was not preempted by the Federal Communications Act); *Hall v. Commonwealth*, 129 Va. 738, 748 (1951) (upholding a speeding citation given to a federal employee delivering the mail); *Huver v. Commonwealth*, No. 0276-08-4, 2009 Va. App. LEXIS 97, at *10 (Mar. 10, 2009) (holding that the National Firearms Registration Act did not preempt a Virginia statute prohibiting the possession of unregistered weapons); *People v. Valenti*, 153 Cal. App. 3d Supp. 35, 40 (App. Dep’t Super. Ct. 1984) (holding that a California state criminal statute prohibiting the reckless operation of an airplane was not preempted by federal law).

⁴² *See, e.g.*, *Krantz v. Air Line Pilots Ass’n*, 245 Va. 202, 209 (1993) (holding that a state tort claim for intentional interference with a prospective employment contract was not preempted by the Railway Labor Act).

⁴³ 49 U.S.C. § 40103(a)(1).

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property interest in the “superadjacent airspace” just above the surface of the land.⁴⁴

I offer no opinion as to whether any *particular* state or local regulation is preempted by federal law, and I note further that the potential scope of federal preemption may change as Congress and the FAA continue to develop regulations pertaining to drones.⁴⁵

CONCLUSION

Accordingly, it is my opinion that the federal Deregulation Act expressly preempts state or local regulation of the routes, rates, and services of commercial drones used to transport property across state lines. Furthermore, the Aviation Act and FMRA preempt state and local regulation of drone safety, operational standards, and airspace designations, including particular issues relating to drone certification, training, and licensure. There are certain exceptions to federal preemption, as discussed above.

States remain free to enact laws relating to drones if the laws fall outside the scope of the Aviation Act and FMRA and do not conflict with other federal laws or regulations. In particular, states may regulate small drones that are exempted from federal regulation under the FMRA, and they may also enact laws for drones that address issues of privacy and property and also criminal offenses, so long as the laws do not conflict with the language or purpose of any existing federal aviation law.

OP. NO. 15-010

**COUNTIES, CITIES AND TOWNS: LOCAL CONSTITUTIONAL OFFICERS,
COURTHOUSES AND SUPPLIES**

**COUNTIES, CITIES AND TOWNS: LOCAL GOVERNMENT PERSONNEL,
QUALIFICATION FOR OFFICE, BONDS, DUAL OFFICE HOLDING AND CERTAIN
LOCAL GOVERNMENT OFFICERS**

⁴⁴ United States v. Causby, 328 U.S. 256, 265 (1946).

⁴⁵ See *supra* note 40.

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PRISONERS AND OTHER METHODS OF CORRECTION: LOCAL CORRECTIONAL FACILITIES

Under § 15.2-1517, a locality has discretion to determine whether to provide insurance programs for its employees; however, if a locality does so, it must provide coverage on the same basis to sheriffs and their employees unless a state program does so.

Under § 15.2-1605.1, a locality has discretion to determine whether to provide additional compensation to the sheriff or his deputies or employees.

Section 15.2-1615.1 provides that a locality shall pay certain expenses of the sheriff.

Section 53.1-1613 provides that a locality shall appropriate funds reasonably necessary by sheriffs for uniforms and other personal equipment.

Section 53.1-126 provides that a locality shall pay vendors of foodstuffs and other provisions purchased by the sheriff and used by jail prisoners.

No Virginia statute authorizes a locality to use funds dedicated under § 15.2-1613.1 (prisoner processing fees) or § 53.1-120 (courthouse security fees) to offset amounts it is required to pay a sheriff pursuant to other statutes.

THE HONORABLE KEN STOLLE
SHERIFF, CITY OF VIRGINIA BEACH
JULY 24, 2015

ISSUES PRESENTED

You ask two questions regarding local funding of sheriffs' offices: whether several statutes¹ require localities to pay certain expenses of sheriffs, and whether a locality may use funds collected pursuant to § 15.2-1613.1 (prisoner processing

¹ Specifically, VA. CODE ANN. §§ 15.2-1517 (2012) (localities may provide insurance for certain employees and retirees); 15.2-1605.1 (2012) (locality may supplement salaries of sheriffs and their deputies); 15.2-1615.1 (2012) (sheriff's purchase of office equipment and supplies within budgetary limits to be paid by locality, reimbursable by state); 15.2-1613 (2012) (localities may provide uniforms and other personal equipment to sheriffs' offices); 15.2-1613.1 (2012) (locality may enact processing fee for inmates, to be allocated to sheriff for processing costs); VA. CODE ANN. §§ 53.1-120 (2013) (locality may collect courthouse security fees in criminal and traffic cases, to be appropriated to sheriff's office); 53.1-126 (2013) (sheriff to purchase food, clothing, and medical supplies for prisoners at lowest reasonable cost, to be submitted to locality for payment). This Opinion responds only to your inquiries about these particular statutes, and no attempt has been made to identify and analyze all statutes dealing with local funding for sheriffs' offices.

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fees) or § 53.1-120 (courthouse security fees) to offset other amounts it is required to pay a sheriff pursuant to other statutes.

APPLICABLE LAW AND DISCUSSION

Each county and city in the Commonwealth elects a sheriff unless otherwise provided by law.² The sheriff is generally responsible for providing law enforcement services, overseeing the local jail, securing the courthouse, serving civil papers, and otherwise assisting in the judicial process.³ Consistent with the wide range of duties that sheriffs perform, funding for sheriffs' offices is derived from a variety of state and local sources of revenue.

Several statutes address local funding for particular expenses of sheriffs. Each statute must be analyzed separately to determine whether the funding it identifies is mandatory or discretionary on the part of a locality. When interpreting statutes, the Supreme Court of Virginia has held that "words in a statute are to be construed according to their ordinary meaning, given the context in which they are used."⁴ Unless necessary to accomplish the manifest purpose of the legislature, the ordinary meaning of "may" denotes permission, not compulsion.⁵ The word "shall" generally denotes an imperative or mandatory action.⁶ Given this understanding, I will discuss each of the statutes about which you inquire.

1. Local Insurance Programs

Section 15.2-1517 provides that:

Any locality *may* provide group life, accident, and health insurance programs for its officers and employees In the event a county or city elects to provide one or more of such programs for its officers and employees, it *shall* provide such programs to the constitutional officers and their employees on the same basis as provided to other officers and

² VA. CONST. art. VII, § 4; § 15.2-1609 (2012).

³ See, e.g., VA. CODE ANN. § 8.01-294 (2007); § 15.2-1609; § 53.1-120.

⁴ City of Va. Beach v. Bd. of Supvrs., 246 Va. 233, 236 (1993) (quoting Grant v. Commonwealth, 223 Va. 680, 684 (1982)) (internal quotation marks omitted).

⁵ Bd. of Supvrs. v. Weems, 194 Va. 10, 15 (1952) (citing Masters v. Hart, 189 Va. 969, 979 (1949)).

⁶ Schmidt v. City of Richmond, 206 Va. 211, 218 (1965); but see Caccioppo v. Commonwealth, 20 Va. App. 534, 537 (1995) (noting an exception whereby the word "shall" is deemed "directory and not mandatory" when used in certain statutes to describe procedural actions taken by public officials).

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employees, unless the constitutional officers and employees are covered under a state program, and the cost of such local program shall be borne entirely by the locality or shared with the employee.^[7]

The phrase “[a]ny locality *may* . . .” clearly gives localities the choice to provide insurance programs for its employees. If a locality does choose to provide insurance programs to its employees, it must also provide coverage on the same basis to sheriffs and their employees unless a state program does so.

2. Additional Compensation for Sheriff and/or Sheriff’s Deputies and Employees

Section 15.2-1605.1 states that any county or city “in its discretion, *may* supplement the compensation of the sheriff” or his deputies or employees “in such amounts as it may deem expedient.”⁸ “Such additional compensation *shall* be wholly payable from the funds of any such county or city.”⁹ This statute clearly provides a locality with discretion to determine whether to provide additional compensation to supplement the compensation fixed by the Compensation Board. Any additional compensation provided by the locality must come from the locality’s own funds.

3. Office Equipment and Supplies

In relevant part, § 15.2-1615.1 provides that:

Whenever a sheriff purchases office furniture, office equipment, stationery, office supplies, telephone or telegraph service, postage, or repairs to office furniture and equipment in conformity and within the limits of allowances duly made and contained in the then current budget of any such sheriff under the provisions of this chapter, the invoices therefor, after examination as to their correctness, *shall* be paid by the county or city directly to the vendors, and the Commonwealth shall monthly reimburse the county or city the cost of such items^[10]

⁷ Section 15.2-1517 (emphasis added).

⁸ Section 15.2-1605.1 (emphasis added).

⁹ *Id.* (emphasis added).

¹⁰ Section 15.2-1615.1 (emphasis added).

Under this statute, invoices for office equipment, supplies, telephone service, and certain repairs purchased by a sheriff within the limits of his budget are to be paid by the locality, with the locality then being reimbursed by the state. This statute is not discretionary. It requires that the locality pay those expenses, provided they are within budgetary limits.

4. Uniforms and Personal Equipment

Section 15.2-1613 provides that:

[C]ounties and cities *shall* provide at their expense . . . a reasonable number of uniforms and items of personal equipment required by the sheriff to carry out his official duties.^[11]

This statute requires localities to appropriate funds reasonably needed by sheriffs for uniforms and other personal equipment to perform official duties. It is not discretionary, so long as the funds are reasonably needed for the covered items for official duties.

5. Foodstuffs and Other Provisions for Prisoners

Section 53.1-126 provides that:

The sheriff . . . *shall* purchase at prices as low as reasonably possible all foodstuffs and other provisions used in the feeding of jail prisoners and such clothing and medicine as may be necessary. . . . Invoices or itemized statements of account from each vendor of such foodstuffs, provisions, clothing and medicines [for jail prisoners] shall be obtained by the sheriff . . . and presented for payment to the governing body of the city or county . . . , which *shall* be responsible for the payment thereof.^[12]

This statute requires the city or county to directly pay vendors of foodstuffs and other provisions purchased by the sheriff and used by jail prisoners. It is mandatory and not discretionary.

¹¹ Section 15.2-1613 (emphasis added).

¹² Section 53.1-126 (emphasis added).

6. Prisoner Processing Fee

Section 15.2-1613.1 provides, in relevant part, that:

Any county or city *may* by ordinance authorize 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.^[13]

This statute allows, but does not require, a county or city to assess a prisoner processing fee. If the locality assesses this fee, the proceeds must be used by the sheriff's office to support the costs of prisoner processing. The statute does not authorize a locality to take funds collected as prisoner processing fees and credit them against any amounts it is required to pay the sheriff for other purposes.

7. Courthouse Security Fees

Section 53.1-120(D) provides that:

Any county or city . . . *may* assess a sum not in excess of \$10 as part of the costs in each criminal or traffic case in its district or circuit court The assessment shall be collected by the clerk of the court in which the case is heard, remitted to the treasurer of the appropriate county or city and held by such treasurer to be appropriated by the governing body to the sheriff's office. The assessment *shall* be used solely for the funding of courthouse security personnel, and, if requested by the sheriff, equipment and other personal property used in connection with courthouse security.^[14]

Like the prisoner processing fee in § 15.2-1613.1, this statute allows, but does not require, a county or city to assess a fee for funding courthouse security. If a locality assesses this fee, the proceeds must be appropriated to the sheriff for use in supporting courthouse security. As with the processing fee statute, this statute does not authorize revenue from the fee to be used to "credit" or offset funds a locality is required to pay a sheriff for other purposes.

¹³ Section 15.2-1613 (emphasis added).

¹⁴ Section 53.1-120 (D) (emphasis added).

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Your second question, which is partially addressed above, is whether a locality may use funds collected as prisoner processing fees (§ 15.2-1613.1) or courthouse security fees (§ 53.1-120) to offset other amounts it is required to pay a sheriff. As noted above, neither statute authorizes an offset, and funds raised under each statute may be expended only for the purposes identified in that statute.

The Dillon rule of construction dictates 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.”¹⁵ I find no statutory authority under which a locality may make an offset against funds otherwise due to a sheriff’s office, such as funds related to food and provisions pursuant to § 53.1-126, or uniforms and personal equipment pursuant to § 15.2-1613. Thus, in conformance with the Dillon Rule, I must conclude that a city or county may not use funds collected as prisoner processing fees or courthouse security fees to offset amounts otherwise payable to a sheriff’s office under some other statute.

CONCLUSION

For the reasons stated above, it is my opinion that each statute regarding funding for a sheriff’s office must be individually examined in order to determine whether the statute establishes a mandatory financial obligation on the part of a locality. No Virginia statute authorizes a locality to use funds dedicated under § 15.2-1613.1 (prisoner processing fees) or § 53.1-120 (courthouse security fees) to offset amounts it is required to pay a sheriff under other statutes. Accordingly, a locality may not offset a sheriff’s funds in this manner.

OP. NO. 15-003

WELFARE (SOCIAL SERVICES): LICENSURE AND REGISTRATION PROCEDURES

The phrase “while employed in a child day center” in § 63.2-1720(C) refers to an offense committed during the period of time an individual is employed at a child day center, regardless of whether or not the offense was committed within the scope of employment there.

¹⁵ Arlington Cnty. v. White, 259 Va. 708, 712 (2000) (quoting City of Va. Beach v. Hay, 258 Va. 217, 221 (1999)).

THE HONORABLE T. SCOTT GARRETT, M.D.
MEMBER, HOUSE OF DELEGATES
JULY 31, 2015

ISSUE PRESENTED

By statute, § 63.2-1720(C) of the *Code of Virginia*, a person who has been convicted of certain offenses “while employed in a child day center” may not be employed there. The precise question presented is whether that phrase refers to (1) an offense committed *during the period of time* an individual is employed in a child day center, or (2) an offense committed *within the scope of employment* in a child day center.

APPLICABLE LAW AND DISCUSSION

Child day centers licensed by the Department of Social Services are required to conduct background checks on their prospective employees.¹ Section 63.2-1720 generally prohibits these facilities from hiring any person who has been convicted of a “barrier crime” as defined in § 63.2-1719.² However, § 63.2-1720 provides an exception that allows a child day center to hire a person who has been “convicted of not more than one misdemeanor offense under § 18.2-57 if 10 years have elapsed following the conviction, unless the person committed [the] offense *while employed in a child day center* or the object of the offense was a minor.”³

In this context, the phrase “while employed in a child day center” is ambiguous. It could mean an offense committed during the period of employment at a child day center, or it could mean an offense committed within the scope of employment in

¹ VA. CODE ANN. § 63.2-1720 (Supp. 2014). For purposes of § 63.2-1720, an “employee” of a child day center means an individual who is “involved in the day-to-day operations of [the] agency or who [is] alone with, in control of, or supervising one or more children.” *Id.*

² Certain offenses other than “barrier crimes” are also included in the prohibition. *See* §§ 63.2-1719 (2012), 63.2-1720.

³ Section 63.2-1720(C) (emphasis added).

a child day center. Because the statute is ambiguous, we must examine the language of related statutes to determine the intent of the General Assembly.⁴

Section 63.2-1726 is a related statute. It provides that children's residential facilities, like licensed child day centers, are prohibited from employing persons with certain criminal convictions.⁵ It lists the offenses that generally bar an individual from employment at a children's residential facility⁶ and provides an exception that allows a children's residential facility to hire "persons who have been convicted of not more than one misdemeanor offense under § 18.2-57 or 18.2-57.2, if 10 years have elapsed following the conviction, unless the person committed such offense *in the scope of his employment, volunteer, or contractual services.*"⁷

Although similar to the exception in § 63.2-1720(C) that applies to employees at child day centers, the exception in § 63.2-1726 for children's residential facilities has a key difference: it refers to "in the scope of his employment" rather than "while employed in." It must be assumed that the General Assembly chose its words with care in enacting the two statutes.⁸ Because the two statutes use different words in similar contexts, the General Assembly must have intended the different words to mean different things. The phrase "in the scope of his employment" means the offense must have occurred in connection with the individual's work at a covered facility. It must therefore be concluded that the

⁴ Cf. *Seaboard Fin. Corp. v. Commonwealth*, 185 Va. 280, 286 (1946) ("It is a cardinal rule of construction that statutes dealing with a specific subject must be construed together in order to arrive at the object sought to be accomplished.").

⁵ The hiring prohibition also applies to certain volunteers and contractors at children's residential facilities. See § 63.2-1726 (Supp. 2014).

⁶ *Id.* The list of crimes barring employment in a children's residential facility is slightly different than the list of "barrier crimes" barring employment at licensed child day centers. Compare § 63.2-1719 with § 63.2-1726.

⁷ Section § 63.2-1726(B) (emphasis added).

⁸ See *Williams v. Commonwealth*, 61 Va. App. 1, 7 (2012) (quoting *Coles v. Commonwealth*, 44 Va. App. 549, 557-58 (2004)).

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different phrase “while employed in” means the offense happened during the period of employment, but not necessarily in the scope of employment.⁹

CONCLUSION

Accordingly, it is my opinion that the phrase “while employed in a child day center” in § 63.2-1720(C) refers to an offense committed during the period of time an individual is employed at a child day center, regardless of whether or not the offense was committed within the scope of employment there.

OP. NO. 15-008**ADMINISTRATION OF GOVERNMENT: OFFICE OF THE GOVERNOR****PENSIONS, BENEFITS, AND RETIREMENT: VIRGINIA RETIREMENT SYSTEM**

The Governor is the “employer” of statewide elected officials for purposes of § 51.1-124.13.

The Governor may delegate his responsibility for implementing § 51.1-124.13.

An individual is “convicted” for purposes of § 51.1-124.13 when a trial judge enters a judgment of conviction.

Section 51.1-124.13 requires the forfeiture of all benefits awarded under Title 51, including spousal benefits and benefits accrued from service in multiple offices or positions.

THE HONORABLE TERENCE R. MCAULIFFE
GOVERNOR, COMMONWEALTH OF VIRGINIA
JULY 31, 2015

ISSUES PRESENTED

You ask four questions regarding the interpretation of § 51.1-124.13 of the *Code of Virginia*, which requires the forfeiture of pension and related benefits provided

⁹ I note that a 2008 Report of the Joint Commission on Health Care, entitled “Impact of Barrier Crime Laws on Social Service and Health Care Employers” (Senate Document No. 11) reaches the opposite conclusion, without considering the different wording between § 63.2-1726 (for children’s residential facilities, requiring that the barrier crime be committed “in the scope of . . . employment”) and § 63.2-1720(C) (for child day centers, requiring only that the barrier crime be committed “while employed” at the facility).

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under Title 51.1 to state employees convicted of certain felonies:

- 1) What state office, officer, or agency is considered the “employer” for purposes of applying the forfeiture statute to statewide elected officers, *i.e.*, Governor, Lieutenant Governor and Attorney General?
- 2) Whether and to whom the employer may assign responsibility for implementing the statute with respect to statewide elected officers?
- 3) At what point is an individual deemed “convicted of a felony” under the forfeiture statute?
- 4) Does the forfeiture of benefits under the statute affect other retirement benefits, such as spousal and dependent benefits entitlement and benefits accruing from service in multiple offices or positions of covered service?

APPLICABLE LAW AND DISCUSSION

Title 51.1 of the *Code of Virginia* provides pensions, retirement systems, and other benefits for various state employees, including retirement benefits through the Virginia Retirement System (“VRS”).¹ In 2011 the General Assembly enacted, and the Governor signed, § 51.1-124.13, which requires that any person otherwise entitled to benefits under Title 51.1 must forfeit those benefits if they are convicted of a felony arising from misconduct that occurred while that person was acting as an employee of the Commonwealth.² Specifically, the statute provides that:

No person shall be entitled to any of the benefits of this title as provided in this section if (i) he is convicted of a felony and (ii) the person’s employer determines that the felony arose from misconduct occurring on or after July 1, 2011, in any position in which the person was a member covered for retirement purposes under any retirement system administered by the Board.

Pursuant to the statute, the employer determines whether a felony conviction arose

¹ For example, Title 51.1 establishes the Virginia Retirement System (§§ 51.1-100 through 51.1-169), the Government Employees Deferred Compensation Plan (§§ 51.1-600 through 51.1-605), and the Cash Match Plan (§§ 51.1-607 through 51.1-613).

² VA. CODE ANN. § 51.1-124.13(A) (2013).

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from misconduct in a covered position on or after July 1, 2011. Before an employer makes that determination, however, the employer must give the employee “reasonable prior written notice and provide an opportunity to be heard.”³ The Board of Trustees of VRS (the “Board”) implements the forfeiture of benefits “as soon as practicable after the employer notifies the Board of its final determination that the member’s felony conviction arose from misconduct in any position in which the member was a member in service.”⁴

To date, no Virginia court has interpreted § 51.1-124.13, the statute about which you inquire. To answer your questions I must therefore rely primarily on general principles of statutory construction.

1. The “employer” of statewide elected officers.

You ask who is the “employer” of statewide elected officers for the purposes of § 51.1-124.13. Section 51.1-124.3 of the *Code of Virginia* provides various definitions meant to be applied throughout Chapter 1 of Title 51.1. Section 51.1-124.3 defines a “state employee” to include the “Governor, Lieutenant Governor, Attorney General, and members of the General Assembly.”⁵ In turn, the “employer” of a state employee is defined as the Commonwealth.⁶ Thus, the Commonwealth employs state employees, including the Governor, for the purposes of § 51.1-124.13.

It is well-settled that the Commonwealth can act only through its agents.⁷ The Constitution of the Commonwealth of Virginia vests the Governor with the authority to “take care that the laws [are] faithfully executed.”⁸ The General Assembly has also recognized that the Governor is the “Chief Personnel Officer of the Commonwealth” with broad powers of state personnel administration.⁹ These powers include the “authority and responsibility for the formulation and

³ *Id.*

⁴ Section 51.1-124.13(C).

⁵ Section 51.1-124.3 (Supp. 2014).

⁶ *Id.*

⁷ See *Richard L. Deal & Assocs., Inc. v. Commonwealth*, 224 Va. 618, 621 (1983) (explaining that “the sovereign can act only through its agents”).

⁸ VA. CONST. art. V, § 7.

⁹ VA. CODE ANN. § 2.2-103(B) (2014).

administration of the policies of the executive branch.”¹⁰ Accordingly, it is my opinion that the Governor of Virginia, acting as an agent of the Commonwealth, is the “employer” of state employees, to include statewide elected officials, for the purpose of implementing § 51.1-124.13.

2. Delegation of Governor’s authority

You next ask whether the Governor may assign responsibility for implementing § 51.1-124.13 to another member of the executive branch and, if so, to whom the Governor may delegate his authority. In § 2.2-104 of the *Code of Virginia*, the General Assembly granted the Governor the authority to:

designate and empower any secretary or other officer in the executive branch of state government who is required to be confirmed by the General Assembly or either house thereof, to perform without approval, ratification, or other action by the Governor any function that is vested in the Governor by law, or which such officer is required or authorized by law to perform only with or subject to the approval [or] ratification of the Governor; however nothing contained in this section shall relieve the Governor of his responsibility in office for the acts of any secretary or officer designated by him to perform such functions.^[11]

Consistent with this statute, the Governor may delegate the authority to enforce § 51.1-124.13 to any executive branch employee who is confirmed with the advice and consent of the General Assembly or one of its two branches.¹² The Governor must make any delegation of his authority under § 2.2-104 “(i) in the form of a written executive order, (ii) subject to the terms, conditions, and limitations the Governor deems advisable, and (iii) revocable in whole or in part at any time by the Governor.”¹³

¹⁰ Section 2.2-103(A).

¹¹ Section § 2.2-104 (2014).

¹² See, e.g., Exec. Order No. 46, VA. R. 29:22 1689 (July 2, 2012) (delegating the Governor’s authority regarding proposals involving Virginia Port Authority qualifying transportation facilities to the Secretary of Transportation).

¹³ Section § 2.2-104.

3. At what point is an individual deemed “convicted of a felony” under the statute?

You ask for clarification about when an employer should deem an individual to have been “convicted of a felony.”

VRS currently interprets § 51.1-124.13 to effect the forfeiture of benefits at the time of conviction at the trial level: it requires employers to file VRS Form No. 180 in order to forfeit state employee benefits under § 51.1-124.13. The form specifically provides that “[i]f at any time the employee’s felony conviction is overturned, you [the employer] must contact VRS to ensure the employee’s VRS benefits are reinstated.”¹⁴ In other words, VRS expects employers to file Form No. 180 forfeiting retirement benefits before all appeals are exhausted.

Courts have “construed the term ‘conviction’ in several different contexts.”¹⁵ In *Smith v. Commonwealth*, the Supreme Court of Virginia examined a statute removing elected or appointed public officials convicted of crimes of moral turpitude, finding that that the “word ‘convicted’ . . . means convicted by judgment, and requires a judgment of conviction.”¹⁶ The Court reiterated the *Smith* definition in the context of parole eligibility¹⁷ and guilty pleas.¹⁸ In each case, the Court found that “conviction” occurs when a judgment of conviction is entered by a trial court.

A different rule is applied, however, in the context of the “insurance proceeds forfeiture provision” that prohibits murderers from inheriting property from their victims (known as the “slayer statute”). The United States District Court for the Eastern District of Virginia, in *Prudential Insurance Company of America v. Tull*, held that in the context of that statute “a person does not stand finally ‘convicted’ until the Virginia Supreme Court has reviewed the trial court’s finding of guilt and has affirmed the conviction by appropriate action.”¹⁹ A conviction is interpreted in this context as final conviction after direct appeals are exhausted. The court in

¹⁴ VA. RETIREMENT SYSTEM, *Employer Request for Forfeiture of Member Benefits* (VRS Form No. 180), available at <http://www.varetire.org/pdf/forms/vrs-180.pdf>.

¹⁵ *Starrs v. Commonwealth*, 287 Va. 1, 12 n.4 (2014).

¹⁶ *Smith v. Commonwealth*, 134 Va. 589, 592 (1922).

¹⁷ *Ramdass v. Commonwealth*, 248 Va. 518, 520-21 (1994).

¹⁸ *Starrs v. Com.*, 287 Va. 1 (2014).

¹⁹ *Prudential Ins. Co. of Am. v. Tull*, 524 F. Supp. 166, 171 (E.D. Va. 1981).

Prudential Insurance Company relied in part on the fact that the slayer statute was passed prior to the Supreme Court’s holding in *Smith*, thus, the General Assembly cannot be assumed to have known of the definition the courts in Virginia would apply to the term “conviction” at the time the slayer statute was enacted.

Unlike the statute at issue in *Prudential Insurance Company*, the General Assembly enacted § 51.1-124.13 almost ninety years after the Virginia Supreme Court adopted the *Smith* definition of “conviction.” Moreover, since *Smith*, the General Assembly has been clear about when it expects something to occur only after all appeals of a conviction have been exhausted. For example, the General Assembly amended the statute at issue in *Smith*, § 24.2-233, to provide that certain elected and appointed officers are removed by the courts “upon conviction, *and after all rights of appeal have terminated.*”²⁰ No such language appears in § 51.1-124.13, the forfeiture of retirement benefits statute. “[W]hen the General Assembly has used specific language in one instance, but omits that language or uses different language when addressing a similar subject elsewhere in the Code, we must presume that the difference in the choice of language was intentional.”²¹ Accordingly, we must assume that the General Assembly purposefully omitted any reference to the appeals process in § 51.1-124.13, evidencing its intent that forfeiture of benefits be given effect upon final judgment of conviction in the trial court.

It is worth noting that interpreting “conviction” to be a judgment of conviction entered by a trial court is consistent with the practice of extinguishing a felon’s civil rights, including right to carry a weapon and right to vote upon judgment of conviction. In interpreting statutes, “we may look to the related statutes, reading them *in pari materia* with the statute under consideration, in order to give consistent meaning to the language used by the General Assembly.”²² Like § 51.1-124.13, § 18.2-308.2 prohibits anyone “*convicted of a felony*” from possessing and transporting firearms.²³ Section 24.2-427 instructs the State Board of Elections to cancel the voter registration of persons “*convicted of a felony.*”²⁴

²⁰ Va. Code Ann. § 24.2-233(2) (Supp. 2014) (emphasis added).

²¹ *Rives v. Commonwealth*, 284 Va. 1, 3 (2012) (citation omitted).

²² *Armstrong v. Commonwealth*, 263 Va. 573, 583 (2002) (citing *Lucy v. Cnty. of Albemarle*, 258 Va. 118, 129 (1999)).

²³ VA. CODE ANN. § 18.2-308.2 (2014) (emphasis added).

²⁴ Section 24.2-427 (Supp. 2014) (emphasis added).

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In each of these cases, the right to vote and carry a weapon is revoked upon the judgment of conviction in a court of record.

For those reasons, it is my opinion that an individual is convicted of a felony for the purposes of § 51.1-124.13 when a trial judge enters a judgment of conviction, notwithstanding any appellate review. If the conviction is later set aside on appeal, VRS has a procedure by which the retiree will have retirement benefits reinstated.

4. Does forfeiture of benefits under the statute affect other retirement benefits, such as spousal and dependent benefits entitlement and benefits accruing from service in multiple offices or positions of covered service?

It is a “principal rule of statutory interpretation . . . that courts will give statutory language its plain meaning.”²⁵ Section 51.1-124.13 is clear—an employee convicted of a felony arising from misconduct in a VRS-covered position is not “entitled to *any of the benefits* of [title 51.1].”²⁶ Moreover, “any service credit lost from relinquishment of benefits under subsection C shall be ineligible for subsequent purchase.”²⁷ The only exception to this forfeiture of benefits is that when an employee “is or becomes a member in service after relinquishment of benefits under subsection C, he shall be entitled to the benefits under this title based solely on his service occurring after the relinquishment.”²⁸

Thus, an employee covered under 51.1-124.13 loses all of the benefits earned at that point in time under Title 51, including all benefits administered by VRS and the benefits of the Optional Retirement Plans administered by certain colleges and universities. This includes even the residual VRS benefits that accrued prior to forfeiture and VRS benefits accruing from service in multiple offices or positions of covered service regardless of whether the felonious misconduct was related to that position or not. Had the General Assembly wished to limit the forfeiture only to VRS benefits accrued from the specific office or position underlying the employee’s felony conviction, it could have done so. It did not. In the absence of statutory language creating such exemptions, I must conclude from the plain

²⁵ Davenport v. Little-Bowser, 269 Va. 546, 555 (2005) (citing Jackson v. Fidelity & Deposit Co., 269 Va. 303, 313 (2005)).

²⁶ Section 51.1-124.13(A) (emphasis added).

²⁷ Section 51.1-124.13(E).

²⁸ Section 51.1-124.13(D).

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language of the forfeiture statute that an employee forfeits *all* benefits earned at that point in time. Statutory language is to be given its plain meaning.²⁹

This conclusion is consistent with current VRS interpretation of the forfeiture statute. VRS Form No. 180 includes a list of all VRS benefits subject to forfeiture under Code § 51.1-124.13. This form includes *all* Commonwealth-provided benefits under Title 51.1.³⁰

CONCLUSION

Accordingly, it is my conclusion that the Governor of Virginia is the “employer” of statewide elected officers for the purposes of § 51.1-124.13. Consistent with § 2.2-104, however, the Governor may delegate the responsibility for implementing the employer’s role in § 51.1-124.13 to any state officer in the executive branch. For the purposes of § 51.1-124.13, an individual is “convicted of a felony” when the trial court enters a final appealable judgment of conviction. Finally, § 51.1-124.13 requires the forfeiture of all benefits awarded under Title 51, including spousal benefits and benefits accrued from service in multiple offices or positions.

OP. NO. 15-050

COUNTIES, CITIES AND TOWNS: BUILDINGS, MONUMENTS AND LANDS GENERALLY

Section 15.2-1812 applies to monuments for any war or conflict, including an engagement in such war or conflict, or for war veterans, but not to memorials or markers erected to recognize the historical significance of buildings.

W. CLARKE WHITFIELD, JR., ESQUIRE
DANVILLE CITY ATTORNEY
AUGUST 6, 2015

²⁹ Davenport v. Little-Bowser, 269 Va. 546, 555 (2005).

³⁰ The VRS form does, however, allow a covered employee to obtain a refund of the contributions and interest credited to the employee’s member contribution account. This refund is merely the return of the employee’s own property; it is not a benefit provided by the Commonwealth.

ISSUE PRESENTED

You inquire whether a memorial or marker erected to recognize the historical significance of a building is subject to the protections of § 15.2-1812 of the *Code of Virginia*.

APPLICABLE LAW AND DISCUSSION

Beginning in 1904, the General Assembly has enacted laws authorizing local monuments and memorials (collectively, simply “monuments”) to wars and veterans.¹ Section 15.2-1812, as enacted in 1998, permits localities to erect monuments for “any war or conflict.” In relevant part, it states:

A locality may . . . authorize and permit the erection of monuments or memorials for any war or conflict, or for any engagement of such war or conflict If such are erected, it shall be unlawful for the authorities of the locality, or any other person or persons, to disturb or interfere with any monuments or memorials so erected, or to prevent its citizens from taking proper measures and exercising proper means for the protection, preservation and care of same. For purposes of this section, “disturb or interfere with” includes removal of, [or] damaging or defacing monuments or memorials^[2]

Simply put, the statute empowers a locality to authorize and permit a monument commemorating various wars or conflicts,³ including veterans of those wars,⁴ and

¹ See, e.g., 1904 Va. Acts ch. 29.

² VA. CODE ANN. § 15.2-1812 (2012). A “locality” means “a county, city, or town as the context may require.” VA. CODE ANN. § 1-221 (2014).

³ Virginia Code § 15.2-1822 identifies 15 wars or conflicts from the Algonquin (1622) to Operation Iraqi Freedom (2003-).

⁴ A related statute, § 15.2-1812.1, authorizes suits for civil damages for violating § 15.2-1812. In doing so, it characterizes § 15.2-1812 as applying to monuments for “war veterans.” A second related statute, § 18.2-137, also characterizes § 15.2-1812 as applying to monuments or memorials for “war veterans” by referring to “any monument or memorial *for war veterans* described in § 15.2-1812” (emphasis added). Thus, in short, while § 15.2-1812 refers only to monuments to wars or conflicts, two closely related statutes characterize it as referring to monuments for war *veterans*. It is well accepted that statutes may be considered *in pari materia* when they relate to the same person or things, the same class of persons or things, or to the same subject or to closely connected subjects or objects. *Prillaman v. Commonwealth*, 199 Va. 401, 405 (1957). For that reason, it is my view that § 15.2-1812

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thereafter to maintain it. It also bars “authorities of the locality” from disturbing or interfering with the monument, to include removing it. Further, it bars the locality’s “authorities” from preventing maintenance of the monument by citizens. Violation of the statute is a criminal offense that may range from a Class 3 misdemeanor to a Class 6 felony, depending on the nature of the conduct.⁵

The terms “war,” “conflict,” and “war veterans” are not statutorily defined. “When the legislature leaves a term undefined, courts must give [it] its ordinary meaning, taking into account the context in which it is used.”⁶

The importance of honoring all of our veterans, especially those who have given their lives and paid the ultimate sacrifice for us, our country and our freedoms, cannot be overstated. These brave men and women deserve our full support, and the General Assembly has chosen to extend certain protections to monuments honoring their service. The General Assembly has not chosen, however, to extend that same level of protection to memorials erected to recognize the historical significance of buildings. Here, the statutes do not address protecting monuments commemorating the historical significance of buildings. The plain language of §§ 18.2-137, 15.2-1812 and 15.2-1812.1 is limited to monuments for any war or conflict and for veterans of those wars and conflicts. Accordingly, it is my view that § 15.2-1812 applies to monuments commemorating certain wars and veterans of those wars, but not to monuments commemorating buildings.

applies to monuments to war veterans, even though the text of the statute refers only to wars/conflicts, but not to war veterans.

⁵ A violation involving unlawful damage, defacing, or removal of a monument without intent to steal, et cetera, is a Class 3 misdemeanor, punishable by a fine of not more than \$500. A violation with intent to cause injury where the damage is less than \$1,000 is a Class 1 misdemeanor, punishable by up to twelve months in jail and/or a fine of up to \$2,500. A violation with intent to cause injury where the damage is \$1,000 or more is a Class 6 felony, punishable by imprisonment of not less than one nor more than five years, or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than twelve months and a fine of not more than \$2,500, either or both. See VA. CODE ANN. §§ 18.2-137(a) (2014); 18.2-10(f) (2014); and 18.2-11(a), (c) (2014).

⁶ Am. Tradition Inst. v. Rector & Visitors of the Univ. of Va., 287 Va. 330, 341 (2014) (internal quotation marks and punctuation marks omitted).

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CONCLUSION

For the reasons stated, it is my view that § 15.2-1812 of the *Code of Virginia* applies to monuments for any war or conflict, including an engagement in such war or conflict, or for war veterans, but not to memorials or markers erected to recognize the historical significance of buildings.

OP. NO. 15-004**EDUCATION: PUBLIC SCHOOL FUNDS****EDUCATION: SCHOOL DIVISIONS, JOINT SCHOOLS AND CONTRACTS BETWEEN SCHOOL DIVISIONS**

There are at present no legal requirements concerning disposition of surplus funds by joint or regional schools. The governing board of each such school may adopt bylaws or rules of operation concerning such disposition, so long as the bylaws or rules are not inconsistent with applicable statutes or regulations. Having surplus funds revert pro rata to the participating local school divisions, and thence to the local governing bodies, would be consistent with law, but it is not legally required.

WALTER C. ERWIN, III, ESQUIRE
LYNCHBURG CITY ATTORNEY
SEPTEMBER 4, 2015

ISSUE PRESENTED

You ask whether unexpended local funds held by a joint or regional school at the end of a fiscal year must revert to the participating local school divisions, and thus ultimately to the local governing bodies that appropriated the funds.

BACKGROUND

The School Boards of the City of Lynchburg and the Counties of Amherst, Appomattox, Bedford, and Campbell have established several regional schools (the “regional schools”). Each regional school has its own joint board consisting of members from the participating local school boards. Each joint board manages and controls programs in its school. All these schools are located within the City

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of Lynchburg, and by agreement the Lynchburg City Treasurer serves as the fiscal agent for each school.

The governing body for each participating school division appropriates local funds to that school division, and the school division distributes a portion of the funding to the regional schools. Each regional school adopts and implements an annual budget. If there are unencumbered surplus funds remaining at the end of a budget year (herein, simply “surplus funds”), there is no uniform program for disposition of the funds. Some regional schools carry the funds over to the next school year, while other regional schools credit the funds on a pro rata basis to each participating school division’s tuition payment for the following year.

APPLICABLE LAW AND DISCUSSION

All regional schools, including those which are the subject of this Opinion, are organized in accordance with § 22.1-26 of the *Code of Virginia*. In relevant part, § 22.1-26 provides as follows:

A. Two or more school boards may, with the consent of the State Board [of Education], establish joint or regional schools . . . for the use of their respective school divisions and may jointly purchase, take, hold, lease, convey and condemn both real and personal property for such joint, regional, or regional public charter schools. . . . [T]he schools shall be managed and controlled by the school boards jointly, in accordance with such regulations as are promulgated by the State Board.

A regional school is a separate legal entity, and it has authority to hold property in the name of its joint board.¹

Section 22.1-100 specifically addresses the disposition of surplus funds for local school divisions, but not for regional schools:

All sums of money derived from the Commonwealth which are unexpended in any year in any school division shall revert to the fund

¹ VA. CODE ANN. § 22.1-26 (2011) states, in relevant part, “With the approval of the participating school boards and the respective local governing bodies, title to property acquired for a joint school shall be vested in the governing body of such school.”

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of the Commonwealth from which derived unless the Board of Education directs otherwise. All sums derived from local funds unexpended in any year shall remain a part of the funds of the governing body appropriating the funds for use the next year, but no local funds shall be subject to redivision outside of the locality in which they were raised.^[2]

There is no general statute making regional schools subject to all statutory requirements for local school divisions, nor is there a separate statute making § 22.1-100 applicable to regional schools. The absence of any reference to reversion of surplus funds held by regional schools in § 22.1-100 invokes the principle of statutory interpretation known as *expressio unius est exclusio alterius*, meaning “the express mention of one thing excludes all others.”³

The State Board of Education has adopted various regulations governing the operation of regional schools in Title 8 of the *Virginia Administrative Code*. One of these regulations allows the governing board of a regional school to adopt bylaws or rules of operation, which shall cover financial management and shall be consistent with state statutes and regulations:

The joint board shall adopt bylaws or rules of operation . . . [which] shall address the receipt, custody, and disbursement of funds . . . consistent with the state statutes and regulations of the Board of Education.^[4]

There is no regulation of the State Board addressing the disposition of surplus funds by regional schools.

In summary, § 22.1-100 sets forth the requirements for disposition of surplus funds for local school divisions, but not for joint or regional schools. There is a State Board of Education regulation authorizing the board of a joint or regional school to adopt bylaws or rules of operation for financial management that are consistent with statutes and regulations, but no regulation containing specific guidance on surplus funds held by a joint or regional school.

² Section 22.1-100 (2011).

³ See, e.g., *Fisher v. Tails, Inc.*, 289 Va. 69, 75 (2015).

⁴ 8 VA. ADMIN. CODE § 20-281-20(1).

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CONCLUSION

For the reasons stated, it is my opinion that there are at present no legal requirements concerning disposition of surplus funds by joint or regional schools. The governing board of each such school may adopt bylaws or rules of operation concerning such disposition, so long as the bylaws or rules are not inconsistent with applicable statutes or regulations. Having surplus funds revert pro rata to the participating local school divisions, and thence to the local governing bodies, would be consistent with law, but it is not legally required.

Op. No. 15-027**ADMINISTRATION OF GOVERNMENT: VIRGINIA FREEDOM OF INFORMATION ACT****FISHERIES AND HABITAT OF THE TIDAL WATERS: WETLANDS**

A Wetlands Board may hear public comment during meetings, even when such comment is not statutorily required.

THE HONORABLE S. CHRIS JONES
MEMBER, HOUSE OF DELEGATES
SEPTEMBER 4, 2015

ISSUE PRESENTED

You inquire about the authority of the Suffolk Wetlands Board (the “Board”) to permit public comment during meetings where public comment is not statutorily required.

BACKGROUND

According to the materials you provided, the Board held a meeting to hear a progress report on a project it had previously permitted. The report was required by the conditions of the permit previously issued by the Board and pertained to the permittee’s efforts at planting a vegetative buffer on the banks of the Nansemond River.

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Following the report, the Board's chairman noted that members of the Nansemond River Preservation Alliance were present. He stated that he would like to hear from the public about the report. The Board was advised that there was no authority for it to allow public comments on the matter currently before it. The Board was further advised that, under state law, a wetlands board may take public comments only during public hearings for the review of a permit application, and not on any other occasion.

APPLICABLE LAW AND DISCUSSION

Every county, city, or town that enacts a wetlands zoning ordinance is required to create a wetlands board.¹ Section 28.2-1302 of the *Code of Virginia* sets forth the required terms of local wetlands zoning ordinances,² including public hearings for permit applications³ and for the suspension or revocation of a previously issued permit.⁴ Any person may testify at a public hearing.⁵ While the statute does not require public hearings for other actions of a local wetlands board, there are no circumstances or types of hearings where the statute bars or restricts a local board from receiving public comment.

Pursuant to this enabling legislation, Suffolk enacted a wetlands zoning ordinance, as part of its Unified Development Ordinance.⁶ The Suffolk ordinance adopts by reference the model ordinance set forth in the *Code of Virginia*, stating: "The wetlands Zoning Ordinance set forth in Code of Virginia § 28.2-1302, is hereby adopted as the Wetlands Zoning Ordinance of the City of Suffolk."⁷

Thus, local enactment of the state statute means public comment must be allowed where the Board is considering issuing, revoking, or suspending a permit. It does not mean the Board may not receive public comment in other circumstances. I

¹ VA. CODE ANN. § 28.2-1303(A) (2011).

² Section 28.2-1302 (Supp. 2015).

³ *Id.* at § 6 ("Wetlands Zoning Ordinance").

⁴ *Id.* at § 8.

⁵ *Id.* at §§ (7)(B) & 8.

⁶ CITY OF SUFFOLK, VA., UNIFIED DEVELOPMENT ORDINANCE, § 31-418; *see also id.* at § 31-206 (establishing a City wetlands board).

⁷ *Id.* at § 31-418.

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also note that it is common practice for the Chair of a deliberative body to permit comment by non-members.⁸

Finally, a wetlands board is a public body under the Virginia Freedom of Information Act (“FOIA”).⁹ The overall guiding principle of FOIA is open government, which includes free discussion with citizens:

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. . . . *This chapter shall not be construed to discourage the free discussion by government officials or employees of public matters with the citizens of the Commonwealth.*^[10]

CONCLUSION

Because there is neither a state law nor a local ordinance prohibiting the Board from receiving public comment where public comment is not required, because it is common practice for the Chair of a deliberative body to permit comment by non-members, and because of the overarching importance of open government and free discussion with citizens, as articulated by FOIA, it is my opinion that the Board may from time to time choose to permit public comment when public comment is not required.

OP. NO. 15-016

AGRICULTURE, ANIMAL CARE, AND FOOD: COMPREHENSIVE ANIMAL CARE

⁸ *Robert’s Rules of Order* notes the common practice of deliberative bodies allowing public comment from time to time, under the discretion of the presiding officer, even when it is not required: “Some bodies, especially public ones, may invite nonmembers to express their views, but this is done under the control of the presiding officer[,] subject to any relevant rules adopted by the body and subject to appeal by a member.” SARAH CORBIN ROBERT ET AL., *ROBERT’S RULES OF ORDER* 96-97 (11th ed. 2013).

⁹ See VA. CODE ANN. § 2.2-3701 (Supp. 2015) (defining the term “public body,” in part, as “any . . . board . . . of the Commonwealth or of any political subdivision of the Commonwealth, including cities, towns, and counties”).

¹⁰ Section 2.2-3700(B) (2014) (emphasis added).

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The Power of an animal Control Officer to remove an animal from private property in response to a complaint from the property owner depends on the precise circumstances involved. The Comprehensive Animal Care law includes one mandatory and two permissive provisions regarding the seizure of companion animals by animal control officers.

THE HONORABLE ROBERT D. ORROCK, SR.
MEMBER, VIRGINIA HOUSE OF DELEGATES
THE HONORABLE ADAM P. EBBIN
MEMBER, SENATE OF VIRGINIA

OCTOBER 2, 2015

ISSUE PRESENTED

You ask whether animal control officers in Virginia have statutory authority to remove an animal from private property in response to a complaint from the property owner.

APPLICABLE LAW AND DISCUSSION

The Comprehensive Animal Care Law (the “Animal Care Law”)¹ authorizes localities to employ animal control officers to enforce its provisions and any ordinance enacted pursuant to it.² It includes one mandatory and two permissive provisions regarding the seizure of companion animals by animal control officers. The power of an officer to seize animals depends on: (i) the type of animal; (ii) the circumstances in which the officer finds the animal; and (iii) local ordinances enacted pursuant to the Animal Care Law.

In a defined set of circumstances, an animal control officer is required to seize and hold companion animals under § 3.2-6562 of the *Code of Virginia*. For these companion animals,³ “it is the duty of animal control officers ‘to *capture and confine* any companion animal of unknown ownership found running at large on

¹ VA. CODE ANN. §§ 3.2-6500 to 6590 (2008 & Supp. 2014).

² See § 3.2-6555 (2008).

³ See § 3.2-6500 (Supp. 2014) (defining the term “companion animal” as “any domestic or feral dog, domestic or feral cat, nonhuman primate, guinea pig, hamster, rabbit not raised for human food or fiber, exotic or native animal, reptile, exotic or native bird, or any feral animal or any animal under the care, custody, or ownership of a person or any animal that is bought, sold, traded, or bartered by any person. Agricultural animals, game species, or any animals regulated under federal law as research animals shall not be considered companion animals . . .”).

which the license fee has not been paid.”⁴ Each provision must be met before the animal control officer is required to confine such a companion animal under this section: there must be a companion animal of unknown ownership for which licensure is required, the license fee must be unpaid, and the animal must be running at large.

The Animal Care Law provides for mandatory licensure of all dogs four months of age or older,⁵ but it requires licensure of cats only upon adoption of a local ordinance requiring the same.⁶ It does not authorize licensure of any other category of companion animal. Accordingly, animal control officers are not under a duty to exercise capture authority under § 3.2-6562 unless the animal is an unlicensed dog four months of age or older or a cat required to be licensed by applicable local ordinance.⁷ The animal control officer may presume to be unlicensed any dog of the requisite age, or any cat in a jurisdiction where cats must be licensed, so long as the animal is not wearing a collar bearing a valid license tag.⁸

“Running at large” is not a term for which the Animal Care Law provides a general definition in § 3.2-6500. However, in authorizing localities to adopt

⁴ 2013 Op. Va. Att’y Gen. 29, 31 (quoting VA. CODE ANN. § 3.2-6562 (2008) (emphasis added)). Section 3.2-6562 does not afford the animal control officer any discretion in capturing and confining such animals, as it “shall be the duty” of the officer to do so. *See Andrews v. Shepherd*, 201 Va. 412, 414 (1959) (“In its ordinary signification, ‘shall’ is a word of command, and is the language of command, and is the ordinary, usual, and natural word used in connection with a mandate.” (citation omitted)).

⁵ Section 3.2-6524(A) (2008).

⁶ Section 3.2-6524(B).

⁷ Although § 3.2-6543 allows a locality to “make more stringent” ordinances that parallel the Animal Care Law, there is no provision in the Animal Care Law permitting the adoption of an ordinance for licensure of any other category of companion animal other than dogs or cats. Under the Dillon Rule of strict construction, it does not appear a locality would have the ability to expand the categories of animals subject to licensure. *See Bd. of Supv’rs v. Countryside Inv. Co.*, 258 Va. 497, 503 (1999) (quoting *City of Chesapeake v. Gardner Enters.*, 253 Va. 243, 246 (1997)) (“[T]he Dillon Rule of strict construction . . . provides that municipal corporations have only those powers that are expressly granted, those necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable.”)

⁸ Section 3.2-6533 (2008) (“Any dog or cat not wearing a collar bearing a valid license tag shall prima facie be deemed to be unlicensed . . .”).

certain ordinances prohibiting dogs from running at large, it defines running at large to mean “roaming, running or self-hunting off the property of its owner or custodian and not under its owner’s or custodian’s immediate control.”⁹ It is reasonable to infer that this definition would guide a court’s evaluation of a seizure decision under § 3.2-6562, such that only a dog (or, in an appropriate local jurisdiction, a cat) which is found “roaming, running or self-hunting off the property of its owner or custodian” would be subject to seizure by the animal control officer.

Because the central element of “running at large” is being off the owner’s property, it is my opinion that, absent special circumstances, a companion animal on the property of some other person would be “running at large.”

Therefore, if an animal control officer receives a complaint from a property owner of a companion animal of unknown ownership for which licensure is required on the owner’s property, and if the officer determines the animal to be unlicensed, it is my opinion that he must seize and take control of the animal under § 3.2-6562.

Two other provisions of the Animal Care Law provide animal control officers with discretionary authority, but not a duty, to seize certain companion animals in certain situations. First, an animal control officer “may take” a dog or cat on the premises of a person other than its legal owner, notify the legal owner of the seizure and hold the animal pending its return to the owner.¹⁰ By its terms, this statute allows, but does not require, an animal control officer to seize a companion animal for which the proper licensure fee has been paid if that cat or dog is not on the premises of its legal owner.

Second, an animal control officer may “lawfully seize and impound any animal that has been abandoned, has been cruelly treated” or, because of an apparent violation of the Animal Care Law, is in “such a condition as to constitute a direct and immediate threat to its life, safety or health.”¹¹ Should an animal control

⁹ Section 3.2-6538 (2008).

¹⁰ Section 3.2-6585 (2008) (But “[t]he presence of a dog or cat on the premises of a person other than its legal owner shall raise no presumption of theft against the owner, and the animal control officer may take such animal and notify its legal owner.”)

¹¹ Section 3.2-6569(A) (Supp. 2015). “Abandon” is defined by the Animal Care Law to mean “to desert, forsake, or absolutely give up an animal without having secured another owner or custodian for

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officer receive a report of an abandoned, cruelly treated or immediately threatened animal and, after investigating the circumstances, determine the animal to be in such condition, the officer may seize the animal pursuant to § 3.2-6569 and commence the judicial process required thereunder.¹² Such seizure done in accordance with § 3.2-6569 is, by the terms of the statute, permissive and is not dependent upon the licensure status, type of animal, ownership, or location of the animal.

CONCLUSION

Accordingly, it is my opinion that an animal control officer is under a duty to remove an unlicensed companion animal from a property owner's property upon complaint from the property owner, where the animal is not owned by the property owner. Removal is to be by capture and confinement. In order to be deemed unlicensed, the animal must be a dog or a cat. If a dog, the animal must be four months of age or older, and, if a cat, only if the locality has adopted an ordinance requiring licensure of cats. If the companion animal is licensed, the officer has the discretion, but not the duty, to capture and confine it. If an officer captures and confines an animal, the officer must notify the owner. If any animal, whether a companion animal or not, and whether or not owned by the property owner, has been abandoned, cruelly treated, or immediately threatened because of an apparent violation of the Animal Care Law, the officer may seize it and commence the appropriate judicial process for abandoned animals.

OP. NO. 15-017

PROFESSIONS AND OCCUPATIONS: ATTORNEYS

Bar dues may be used only for expenses necessarily or reasonably incurred for the purpose of regulating the legal profession or improving the quality of the legal services available to the people of the State.

The mission of the Diversity Conference of the Virginia State Bar is germane to the purpose of regulating the legal profession or improving the quality of the legal services available to the people of the State.

the animal or by failing to provide the elements of basic care as set forth in § 3.2-6503 for a period of five consecutive days.” Section 3.2-6500 (Supp. 2015).

¹² Section 3.2-6569(C), (D).

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It would be constitutionally permissible for the Virginia State Bar to fund the Diversity Conference with mandatory state bar dues.

THE HONORABLE JENNIFER T. WEXTON
MEMBER, SENATE OF VIRGINIA
OCTOBER 2, 2015

ISSUE PRESENTED

You ask whether the activities of the Virginia State Bar’s Diversity Conference may legally be funded by bar members’ mandatory dues, as those dues are used to fund other Bar Conferences. A related question is whether the State Bar must create a procedure by which a member may challenge use of a portion of his or her dues for any expenditure to which the member objects.

BACKGROUND

The General Assembly created the Virginia State Bar (the “VSB”) in 1938 as an administrative agency of the Supreme Court of Virginia (the “Supreme Court”).¹ All attorneys licensed to practice law in the Commonwealth must be members of the VSB and are required by the Rules of the Supreme Court to pay annual membership dues.² Revenue from mandatory bar dues is used to fund a variety of VSB activities, including disciplining attorneys, making referrals, establishing professional standards, and providing continuing legal education.

In keeping with its founding, the VSB continues to be organized and governed by the Supreme Court.³ Its mission statement is “(1) to regulate the legal profession of Virginia; (2) to advance the availability and quality of legal services provided to the people of Virginia; and (3) to assist in improving the legal profession and the judicial system.”⁴

As part of its efforts to improve the legal profession and judicial system, VSB petitioned the Supreme Court for, and the Supreme Court established, four

¹ VA. CODE ANN. § 54.1-3910 (2013); *see also* Green v. Va. State Bar, 278 Va. 162, 175 (2009); Goldfarb v. Va. State Bar, 421 U.S. 773, 789 (1975).

² Section 54.1-3910; VA. SUP. CT. R., Pt. 6, § IV at para. 11.

³ *See* § 54.1-3910 (“The Supreme Court may promulgate rules and regulations organizing and governing the Virginia State Bar.”).

⁴ VSB, 2014-15 COMMITTEE, SECTION, AND CONFERENCE CHAIRS HANDBOOK 5 (updated Jan. 6, 2015), available at <http://www.vsb.org/docs/ch-operation.pdf>.

different “conferences,” or specialized subsets of the bar: the Senior Lawyers Conference, which focuses on “issues of interest to senior lawyers and promotion of the welfare of senior citizens”; the Young Lawyers Conference, which addresses “the special interests and concerns of young and new lawyers”; the Conference of Local Bar Associations, which maintains “a . . . beneficial relationship between the [State Bar] and local bar associations”; and the Diversity Conference, which focuses on “increasing diversity in the legal profession and . . . ensuring that Virginia meets the legal needs of an increasingly diverse population.”⁵

Revenue from mandatory bar dues is used to fund the Conference of Local Bar Associations, the Young Lawyers Conference, and the Senior Lawyers Conference. The Diversity Conference, however, receives no money from bar dues and must raise funds independently to support its activities.⁶ In order for the VSB to fund Diversity Conference activities from mandatory dues, it must petition for, and receive approval from, the Supreme Court.⁷ Thus, this Opinion addresses the question of whether a legal barrier exists to the approval of such a petition, should one be filed. It also addresses the question of whether the VSB must adopt a procedure by which members may challenge the expenditure of bar dues for activities to which they object.

APPLICABLE LAW AND DISCUSSION

1. The governing legal standard is *germaneness*: bar dues may be used only for expenses necessarily or reasonably incurred for the purpose of regulating the legal profession or improving the quality of the legal services available to the people of the State.

The VSB is funded by mandatory dues.⁸ An attorney may be required to join a mandatory bar association and pay reasonable dues, even if he objects to some of

⁵ VSB, *Conferences*, <https://www.vsb.org/site/members/conferences> (last visited July 14, 2015).

⁶ VSB, *About Diversity Conference*, <http://www.dcvsb.org/aboutconference.html> (last visited July 14, 2015).

⁷ See § 54.1-3910; VA. SUP. CT. R., Pt. 6, § IV at para. 9(j) (VSB Council has the authority to “recommend to the Supreme Court the adoption of, modifications to, amendments to or the repeal of any rule of the Supreme Court of Virginia”).

⁸ *Supra* note 2 and accompanying text.

its activities.⁹ Mandatory dues “to fund a lawful collective program may sometimes be used to pay for speech over the objection of some members of the group.”¹⁰ However, there are constitutional limits to the activities that may be lawfully funded with mandatory dues.

In *Abood v. Detroit Board of Education*,¹¹ the U.S. Supreme Court articulated the general constitutional principle that requiring a person to pay for political or ideological speech to which he objects violates his First Amendment right of free speech.¹² *Abood* involved teachers who were not members of a union being compelled to pay union service fees as a condition of public employment. Some of the fees were used to express the union’s political views and to contribute to particular political candidates.¹³ As the Court in *Abood* noted,

Our decisions establish with unmistakable clarity that the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments.^[14]

The Court concluded that while the “agency shop” fees could legally be imposed on non-union members, a non-member could not be required to pay the portion of fees used to fund political candidates whom the non-member did not wish to support. As the Court stated,

The fact that the appellants are compelled to make . . . contributions for political purposes works . . . an infringement of their constitutional

⁹ *Lathrop v. Donahue*, 367 U.S. 820, 843 (1961). The *Lathrop* Court explicitly abstained from ruling on whether certain bar activities could constitutionally be funded with mandatory dues. *Id.* at 847-48 (plurality opinion). As Justice Kennedy noted, speaking for the Supreme Court of the United States in *Board of Regents v. Southworth*, 529 U.S. 217, 231 (2000), “It is inevitable that government will adopt and pursue programs and policies within its constitutional powers but which nevertheless are contrary to the profound beliefs and sincere convictions of some of its citizens. The government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties.”

¹⁰ *Glickman v. Wileman Bros. & Elliot, Inc.*, 521 U.S. 457 at 472-73 (1997).

¹¹ 431 U.S. 209 (1977).

¹² *But see* *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 559 (2005) (holding that individuals may constitutionally be compelled to pay for government speech advocating official policies and programs).

¹³ *See Abood*, 431 U.S. at 234.

¹⁴ *Id.* (citing multiple cases).

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rights. . . . We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative. Rather, the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of . . . employment.^[15]

Abood was followed by *Keller v. State Bar of California*,¹⁶ which addressed the issue of First Amendment limits on the activities of a state bar association that may be funded by mandatory dues. *Keller* acknowledged that because it is legitimate state policy to “[elevate] the educational and ethical standards of the Bar to the end of improving the quality of . . . legal service available to the people of the State,”¹⁷ a state may require attorneys to join and pay reasonable dues to a mandatory bar association.¹⁸ However, the burden on speech imposed by compelled financial support for a professional organization such as a state bar is justified only by activities that promote a legitimate state interest in regulating the profession and improving the quality of legal services to the public.¹⁹ Accordingly, bar dues may be used to support only activities germane to those goals.²⁰ A mandatory bar “may not . . . fund activities of an ideological nature which fall outside . . . those areas of activity.”²¹ For that reason, the Court held that the California bar could not use mandatory dues revenue to fund ideological activities unrelated to regulating the practice of law or improving the quality of legal services. As the Court explained,

Precisely where the line falls [between permissible and impermissible dues-financed activities] will not always be easy to discern. But the

¹⁵ *Id.* at 234-236.

¹⁶ 496 U.S. 1 (1990).

¹⁷ *Id.* at 8 (quoting *Lathrop*, 367 U.S. at 843).

¹⁸ *Id.*

¹⁹ See *id.* at 13. Notably, the *Keller* Court characterized bar association activities as private speech, rather than government speech, thereby effectively distinguishing it from the type of speech discussed in *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550 (2005). See *Keller*, 496 U.S. at 10-13; see also *supra* note 12.

²⁰ *Keller*, 496 U.S. at 14.

²¹ *Id.*

extreme ends of the spectrum are clear: Compulsory dues may not be expended to endorse or advance a gun control or nuclear weapons freeze initiative; at the other end of the spectrum petitioners have no valid constitutional objection to their compulsory dues being spent for activities connected with disciplining members of the Bar or proposing ethical codes for the profession.^[22]

Ultimately, “the guiding standard must be whether the [activities] are necessarily or reasonably incurred for the purpose of regulating the legal profession or ‘improving the quality of the legal service available to the people of the State.’”²³

The activities funded by the State Bar of California that were at issue in *Keller* included a wide variety of controversial ideological issues not directly related to regulating the practice of law or improving the quality of legal services. They included, in part, lobbying efforts for or against laws to bar employer polygraph tests, to prohibit armor-piercing ammunition, to create an unlimited right of action to sue those causing air pollution, imposing criminal sanctions for exposing minors to drug paraphernalia, limiting the right of individualized education programs for students in need of special education, gift tax exclusion for gifts to pay education tuition or provide medical care, applying life imprisonment laws to certain minors, deleting voter approval for low-rent housing projects, and dealing with guest workers and importing workers from other countries.²⁴

Since *Keller*, there have been several lower court decisions addressing what activities may legally be funded with mandatory bar dues and what activities may not. Permissible activities have been held to include lobbying for laws to create new judicial positions or for increased salaries for government attorneys, or against statutory restrictions on attorney advertising or requirements for the

²² *Id.* at 15-16.

²³ *Id.* at 14 (quoting *Lathrop*, 367 U.S. at 843).

²⁴ Other bar-funded activities that were at issue in *Keller* included filing *amicus* briefs “in cases involving the constitutionality of a victim's bill of rights; the power of a workers' compensation board to discipline attorneys; a requirement that attorney-public officials disclose names of clients; the disqualification of a law firm” and “The adoption of resolutions by the Conference of Delegates endorsing a gun control initiative; disapproving the statements of a United States senatorial candidate regarding court review of a victim's bill of rights; endorsing a nuclear weapons freeze initiative; opposing federal legislation limiting federal-court jurisdiction over abortions, public school prayer, and busing.” *Id.* at 5, n.2.

certification of legal specialists;²⁵ or sponsoring a pamphlet on the Bill of Rights, a survey on the economics of law practice, gavel awards, a program to assist alcoholic lawyers, and mock trial competitions.²⁶ Impermissible activities have been held to include supporting restrictions on lawyer advertising in aid of, or against, family planning agencies or abortion clinics; promoting no-fault auto insurance; endorsing a pro-life constitutional amendment; generating support for the death penalty;²⁷ and lobbying and advocating for expansion of Medicaid coverage, full child immunization, family sex education, teen pregnancy prevention, and increased aid to families with dependent children.²⁸

2. Whether the purpose of the Diversity Conference meets the legal standard for being funded by mandatory bar dues.

Because the VSB may be funded by mandatory dues, which may constitutionally be used to fund any activities that are germane to regulating the practice of law or improving the quality of legal services to citizens, the ultimate question is whether the Diversity Conference exists and conducts activities for purposes that are germane to these legitimate state goals. If so, it may be funded by mandatory bar dues. If—and to the extent that—the Diversity Conference exists instead for a purpose of advocating political or ideological issues unrelated to regulating the practice of law and improving the quality of legal services to citizens, it may not be funded by mandatory bar dues.²⁹

Law is one of the least diverse professions in the United States.³⁰ According to recent national occupational figures of the U.S. Bureau of Labor Statistics, over

²⁵ *Schneider v. Colegio Abogados de Puerto Rico*, 917 F.2d 620, 632 (1st Cir. 1990).

²⁶ *Thiel v. State Bar of Wisconsin*, 94 F.3d 399, 406 (7th Cir. 1996).

²⁷ *Schneider*, 917 F.2d at 632-33.

²⁸ *Florida Bar In re David Frankel*, 581 So. 2d 1294, 1298 (Fla. 1991).

²⁹ As to the question of whether the mission of the Diversity Conference is specific enough to determine its constitutionality, I note that its mission statement is at least as specific as the mission statement of the other three Conferences. Thus, if the mission statements of the other three conferences are specific enough to determine whether they are germane to the practice of law, then the mission statement of the Diversity Conference is also. Moreover, unlike the other conferences, its mission has been implicitly approved by Justice Powell, within constitutional limits, in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

³⁰ Bourree Lam, *The Least Diverse Jobs in America*, THE ATLANTIC (June 29, 2015), <http://www.theatlantic.com/business/archive/2015/06/diversity-jobs-professions-america/396632/>.

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89.3% of lawyers are white, while 77.4% of the nation's total population is white. 4.2% of lawyers are African-American, as compared to 13.2% of total population. 5.1% of lawyers are Asian-American, as compared to 5.4% of total population. 5.1% of lawyers are Hispanic-American, as compared to 17.4% of total population.³¹

For Virginia, 89% of lawyers are white, as compared to 70.5% of the Commonwealth's total population. 4% of lawyers are African-American, as compared to 19.7% of population. 3% of lawyers are Asian-American, as compared to 6.3% of population. 1% of lawyers are Hispanic-American, as compared to 8.9% of population.³²

The American Bar Association ("ABA") reports that women, who make up 50.8% of the population, make up only 33% of the membership of the ABA, only 27% of federal and state judges, only 21% of law school deans, and only 17% of equity partners at private law firms.³³ According to a 2014 Membership Survey conducted by the VSB, only 36% of survey respondents were female, while Virginia's total population is 50.8% female.³⁴ Slightly over 1% of ABA attorneys self-identify as gay, lesbian, bisexual or transgender (LGBT),³⁵ compared to 3.4%

³¹ U.S. CENSUS BUREAU, *U.S.A. QuickFacts*, <http://quickfacts.census.gov/qfd/states/00000.html> (last updated June 8, 2015); U.S. BUREAU OF LABOR STATISTICS, REPORT 1050, LABOR FORCE CHARACTERISTICS BY RACE & ETHNICITY, 2013 at 26 (Aug. 2014), *available at* <http://www.bls.gov/cps/cpsrace2013.pdf>.

³² U.S. CENSUS BUREAU, *Virginia QuickFacts*, <http://quickfacts.census.gov/qfd/states/51000.html> (last updated May 28, 2015); VSB, 2014 Membership Survey (April, 2014) at 20, *available at* <http://www.vsb.org/docs/2014-member-survey.pdf>.

³³ U.S. CENSUS BUREAU, *U.S.A. QuickFacts*, <http://quickfacts.census.gov/qfd/states/00000.html> (last updated June 8, 2015); ABA, A CURRENT GLANCE AT WOMEN IN THE LAW at 2-7 (July 2014), http://www.americanbar.org/content/dam/aba/marketing/women/current_glance_statistics_july2014.authcheckdam.pdf.

³⁴ VSB, 2014 MEMBERSHIP SURVEY (April 2014), *available at* <http://www.vsb.org/docs/2014-member-survey.pdf>; U.S. CENSUS BUREAU, *Virginia QuickFacts*, <http://quickfacts.census.gov/qfd/states/51000.html> (last updated May 28, 2015).

³⁵ ABA, COMM'N ON SEXUAL ORIENTATION & GEND. IDENTITY, GOAL III REPORT FOR 2014-2015, SEVENTH ANNUAL REVIEW OF THE STATUS OF LGBT PARTICIPATION AT THE ABA at 16 (2015), http://www.americanbar.org/content/dam/aba/administrative/sexual_orientation/sogi_2015_goaliii.pdf.
authcheckdam.pdf.

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of the total population.³⁶ Moreover, in a 2010 ABA survey, only 7% of ABA members reported having a disability.³⁷ By contrast, 16.6% of the total U.S. working-age population reports having a disability.³⁸

It was against a similar demographic backdrop that the VSB petitioned the Supreme Court in 2009 to create the Diversity Conference to “centralize and make explicit the bar’s responsibilities to promote diversity in the legal profession and the judiciary.”³⁹ As the VSB explained in its petition to establish the Diversity Conference, “[f]or our legal profession and our judiciary to be properly responsive to the needs of society, we must be more reflective of the demographics of society.”⁴⁰ The VSB concluded that “an organized body of individuals . . . similar to that of the Young Lawyers Conference, the Senior Lawyers Conference and the Conference of Local Bars . . . would be best suited for carrying out” these goals.⁴¹ Pursuant to that petition, the Supreme Court amended its rules to add to the authority of the VSB Council the responsibility to “encourage and promote diversity in the profession and the judiciary.”⁴²

Today, the Diversity Conference’s mission is to foster and to encourage diversity in admission to the bar, as well as within the judiciary; to facilitate diversity in professional advancement and leadership opportunities; and to ensure that the changing legal needs of Virginia’s citizens are met.⁴³ Other responsibilities of the Diversity Conference are to “promote reforms in judicial procedure and the judicial system that are intended to improve the quality and fairness of the

³⁶ Gary J. Gates & Frank Newport, *Special Report: 3.4% of U.S. Adults Identify as LGBT* (Oct. 18, 2012), <http://www.gallup.com/poll/158066/special-report-adults-identify-lgbt.aspx>.

³⁷ ABA, ABA DISABILITY STATISTICS REPORT (2011), available at http://www.americanbar.org/content/dam/aba/uncategorized/2011/20110314_aba_disability_statistics_report.authcheckdam.pdf.

³⁸ See U.S. CENSUS BUREAU, AMERICANS WITH DISABILITIES: 2010, at 4 (July 25, 2012), available at <https://www.census.gov/newsroom/releases/archives/miscellaneous/cb12-134.html>.

³⁹ Petition of the Va. State Bar at 2, In re Rules of Va. Supreme Court Part 6, Section IV, Paragraphs 5 & 9(j) (Va. July 1, 2009), available at http://www.vsb.org/docs/para5_9j-petition-2009-07-01.pdf.

⁴⁰ *Id.* at 3 (quoting Manuel A. Capsalis via VA. LAWYER, Oct. 2008, at 13).

⁴¹ *Id.*

⁴² VA. SUP. CT. R., Pt. 6, § IV at para. 9(j).

⁴³ VSB, *About Diversity Conference*, <http://www.dcvsb.org/aboutconference.html> (last visited July 20, 2015).

system” and to “improve the quality of the legal services made available to the people of Virginia.”⁴⁴

A recent survey of bar members in the Commonwealth supports the proposition that creating a bar more responsive to the needs of society is directly related to the legitimate state goal of improving the quality of legal services available to Virginians.⁴⁵

It is clear that the promotion of diversity is intended to ensure equal and fair opportunities for all demographic groups to be admitted to the practice of law and to advance within the profession and the judiciary. The goal of diversity relates directly to two elements of the VSB’s mission statement, namely “to regulate the legal profession of Virginia” and “to assist in improving the legal profession and the judicial system.”⁴⁶ Likewise, reasonable efforts to promote diversity within the bar help the profession better understand and serve the interests of the diverse demographic groups in Virginia, in keeping with a third element of the VSB’s mission statement “to advance the availability and quality of legal services provided to the people of Virginia.”⁴⁷

Indeed, the actions of the VSB in seeking approval for the Diversity Conference to improve the practice of law, and the decision of the Supreme Court to approve it for that purpose, find implicit validation in a recent survey of bar members.⁴⁸ The purpose of the Diversity Conference, as well as the current needs of the legal profession, demonstrate that its purpose relates directly to legitimate regulation of the profession by helping to achieve fair and equal opportunities within the profession for all Virginia lawyers. Its purpose also relates directly to enhancing the availability and quality of legal services for all Virginia population groups.

In summary, the reasoning so ably set forth by the VSB in 2009 in petitioning to create the Diversity Conference demonstrates that the Conference meets the *Keller*

⁴⁴ See Petition of the Va. State Bar at 7-8, In re Rules of Va. Supreme Court Part 6, Section IV, Paragraphs 5 & 9(j) (Va. July 1, 2009), available at http://www.vsb.org/docs/para5_9j-petition-2009-07-01.pdf; VA. SUP. CT. R., Pt. 6, § IV at para. 9(j).

⁴⁵ See VSB, 2014 MEMBERSHIP SURVEY (April 2014), available at <http://www.vsb.org/docs/2014-member-survey.pdf>.

⁴⁶ *Supra* note 4 and accompanying text.

⁴⁷ *Id.*

⁴⁸ See *supra* note 45 and accompanying text.

standard of being germane to the legitimate state goals of improving legal services in Virginia and regulating the legal profession. Indeed, the Supreme Court's approval of the Diversity Conference, based on the VSB's petition, itself demonstrates that the Conference is reasonably related to regulating the practice of law. In addition, reasonable efforts to create diversity fall squarely within the three elements of the VSB Mission Statement.

For these reasons, it is my opinion that the stated mission of the Diversity Conference creates no constitutional barrier, as articulated by *Keller*, to being funded by revenue from mandatory dues.⁴⁹ Thus, should the VSB petition the Supreme Court to fund the Diversity Conference with revenue from mandatory dues, it is my opinion that such a petition may legally be approved. It is my further opinion that so long as the activities of the Diversity Conference are consistent with its stated goals, which reasonably relate to improving the delivery of legal services and improving the legal profession, rather than ideological or political goals, it may legally be funded by revenue from mandatory bar dues.

3. Whether the VSB must create a procedure by which members may challenge the legality under *Keller* of particular bar expenditures.

The final question to be addressed is whether funding the Diversity Conference with bar dues would require the VSB to create a procedure by which members who object to activities of the Diversity Conference could challenge the portion of their dues used to provide that funding.

The Bar Associations of some states engage in extensive "auxiliary" activities such as active legislative lobbying. The subjects of these lobbying efforts vary widely. As discussed above, some subjects have been held to be legitimately related to regulating the practice of law, such that they may be funded with mandatory bar dues, while others have been held to be unrelated to regulating the practice of law or improving the quality of legal services to citizens, and thus not fundable with mandatory bar dues under the *Keller* standard.⁵⁰

⁴⁹ In reaching this opinion, I consider only the stated purposes of the Diversity Conference, as articulated by the State Bar and the Supreme Court of Virginia. Those purposes do not include demographic quotas of the type disapproved by the Supreme Court of the United States in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

⁵⁰ See *supra* notes 25-28 and accompanying text.

The United States Supreme Court discussed procedures by which persons may challenge the use of mandatory fees or dues to support activities to which they object on First Amendment grounds in *Board of Regents v. Southworth*.⁵¹ *Southworth* held that it may be constitutional for a public university to use mandatory student activity fees to partially fund student organizations that engage in political or ideological speech objectionable to some students so long as there is viewpoint neutrality in the allocation of funding support.

The Court noted, “[t]he standard of germane speech as applied to student speech at a university is unworkable . . . and gives insufficient protection both to the objecting students and to the University program itself.”⁵² For that reason, the Court did not rule on the legality of funding any particular student activity with mandatory student fees, as it and other courts have done for various bar organizations. Instead, it noted that, in the particular context of a public university, a “viewpoint neutral” system should be created to allow students to seek refunds for portions of student fees used to support political speech to which they objected. Of particular importance, while *Southworth* held the *Keller* standard of germaneness to be inapplicable in the context of a public university, it reaffirmed that it remains fully applicable to mandatory bar and trade associations.⁵³

In short, *Southworth* stands for the proposition that there must be viewpoint neutral funding for extracurricular activities at a public university. It does not require viewpoint neutral funding for activities of professional associations such as the VSB. Professional associations remain subject to the “germaneness” standard. Justice Kennedy’s opinion for the Court clearly limited *Southworth* to the context of student extracurricular activities at a public university, to which the “germaneness” standard of *Keller* does not apply, and reaffirmed that the “germaneness” standard continues to apply to mandatory bar organizations.

There is nothing unique about the Diversity Conference by which it alone, among all the numerous and varied activities of the VSB, would require opt-out or challenge procedures if funded by bar dues. Like the other three conferences, its purpose is germane to the practice of law, and its purpose is also to improve the

⁵¹ 529 U.S. 217 (2000).

⁵² *Id.* at 231.

⁵³ “We must begin by recognizing that the complaining students are being required to pay fees which are subsidies for speech they find objectionable, even offensive. The *Abood* and *Keller* cases, then provide the beginning point for our analysis. . . . While those precedents identify the interests of the protesting students, the means of implementing First Amendment protections adopted in those decisions are neither applicable nor workable in the context of extracurricular student speech at a university.” *Id.* at 230.

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quality of legal services to citizens. It may be that not every attorney approves of every activity by the VSB, but the legal standard is not whether an individual attorney objects to a particular bar activity or expenditure, it is whether the activity or expenditure is reasonably related to the regulatory purpose of the organization.⁵⁴

This analysis and conclusion are no different for the Diversity Conference than they are for any of the other three conferences, or for any other VSB activities.

CONCLUSION

For the foregoing reasons, it is my opinion that the VSB's efforts to promote diversity in the legal profession represent a legitimate state interest, and that promoting diversity is reasonably related to regulating the legal profession and improving the quality of legal services to the public. Accordingly, it is my opinion that it would be constitutionally permissible for the Diversity Conference to be funded by mandatory state bar dues. It is my further opinion that the VSB is not required to create procedures through which members may challenge the use of dues for any bar activity to which they object, so long as its activities remain germane to the practice of law.

Op. No. 15-043

WATERS OF THE STATE, PORTS AND HARBORS: STATE WATER CONTROL LAW

Section 62.1-44.15:20(E) prohibits a locality from instituting a policy or plan mandating that mitigation for impacts to wetlands or streams occurring within that locality be performed within the boundaries of the locality. This prohibition includes acceptance of a voluntary proffer from an applicant relating to the location of compensatory mitigation.

THE HONORABLE THOMAS DAVIS RUST
MEMBER, HOUSE OF DELEGATES
OCTOBER 2, 2015

⁵⁴ *Keller*, 496 U.S. at 14.

ISSUES PRESENTED

You inquire whether a locality may institute a policy or plan mandating that compensatory mitigation for impacts to wetlands or streams occurring within the locality be performed within the boundaries of the locality. You also ask whether a locality may accept a voluntary proffer from an applicant requiring that compensatory mitigation occur within the boundaries of that locality and incorporate the proffer into the locality's zoning ordinance.

APPLICABLE LAW AND DISCUSSION

Environmental impacts to streams and wetlands within the Commonwealth are subject to regulation under the federal Clean Water Act¹ as well as Virginia's State Water Control Law.² Both laws generally prohibit the disturbance of a wetland or stream without first obtaining a permit from the U.S. Army Corps of Engineers and the State Water Control Board ("Board").³ All permits issued must contain "requirements for compensating impacts on wetlands."⁴ These requirements are intended to offset the adverse effects of human activity and development on streams and wetlands. Every permit holder is required to meet all applicable federal and state mitigation requirements.

Your inquiry involves state mitigation requirements. State law provides a number of different mechanisms for satisfying mitigation requirements.⁵ They include "(i) wetland creation or restoration, (ii) purchase or use of mitigation bank credits pursuant to § 62.1-44.15:23, (iii) contribution to the Wetland and Stream Replacement Fund established pursuant to § 62.1-44.15:23.1 . . . , or (iv) contribution to a Board-approved fund dedicated to achieving no net loss of wetland acreage and functions."⁶

¹ See 33 U.S.C. § 1344 (2012) (part of the Clean Water Act).

² See VA. CODE ANN. §§ 62.1-44.15:20 through 62.1-44.15:23.1 (2014).

³ Section 62.1-44.15:20(A) (providing it is unlawful to disturb a wetland except "in compliance with an individual or general Virginia Water Protection Permit" issued by the Board); see also 33 U.S.C. § 1311(a) (2012).

⁴ Section 62.1-44.15:21(B); 33 C.F.R. § 332.3.

⁵ Section 62.1-44.15:21(B).

⁶ *Id.*

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With respect to the location of mitigation efforts, the State Water Control Law places certain geographic requirements on the use of mitigation bank credits.⁷ Moreover, any mitigation effort performed under § 62.1-44.15:21(B)(i) must generally be sited within the same watershed as the impacted site.⁸ However, nothing in state law or regulation requires that mitigation be performed within the particular locality affected by the adverse impacts.

Indeed, the General Assembly has passed legislation prohibiting localities from intruding upon the Board's oversight of mitigation activities. As originally enacted, § 62.1-44.15:20(E) provided that "[n]o locality may impose wetlands permit requirements duplicating state or federal wetlands permit requirements."⁹ In 2010, the General Assembly clarified the scope of the restriction by stating that the prohibition extends to the location of mitigation efforts.¹⁰ In its current form, § 62.1-44.15:20(E) now provides that:

⁷ Section 62.1-44.15:23 (providing generally that mitigation bank credits may only apply when the "bank is in the same fourth order subbasin, as defined by the hydrologic unit boundaries of the National Watershed Boundary Dataset or by the hydrologic unit system or dataset utilized and depicted or described in the bank's approved mitigation banking instrument, as the impacted site, or in an adjacent subbasin within the same river watershed as the impacted site").

⁸ With respect to compensatory mitigation performed under § 62.1-44.15:21(B)(i), the Board's regulations require that the Board analyze whether off-site mitigation is appropriate. Such analysis must include a comparison of the impacted and preferred mitigation sites and must address certain criteria, including, but not limited to: water quality benefits; acreage of impacts; distance from impacts; hydrologic source and regime; watershed; functions and values; vegetation type; soils; constructability; timing of compensation versus impact; property acquisition; and cost. However, these criteria do not dictate that the compensatory mitigation site be located in a particular locality. *See* 9 VA. ADMIN. CODE § 25-210-116(B)(1)-(2); *see also* VA. DEP'T OF ENVRTL. QUALITY, GUIDANCE MEMO NO. 09-2004 – APPLYING COMPENSATORY MITIGATION PREFERENCES PROVIDED IN THE EPA MITIGATION RULE TO VA. WATER PROT. PERMITTING at 8 (March 19, 2004) (stating that Virginia Water Protection Permit Program staff should support a watershed approach which requires that compensatory mitigation generally be sited only within the same watershed as the impacted site). Similarly, federal regulations require only that compensatory mitigation be performed within the same watershed as the impacted site. *See* 33 C.F.R. 332.3(b)(1) and (c) (requiring that the U.S. Army Corps of Engineers utilize a watershed approach where the ultimate goal is to maintain and improve the quality and quantity of aquatic resources within watersheds through strategic selection of compensatory mitigation sites).

⁹ Section 62.1-44.15:20(E) (2009) (previous version of statute).

¹⁰ *See* 2010 Va. Acts ch. 233.

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[N]o locality shall impose or establish by ordinance, policy, plan or any other means provisions related to the location of wetlands or stream mitigation in satisfaction of aquatic resource impacts regulated under a Virginia Water Protection Permit or under a permit issued by the U.S. Army Corps of Engineers pursuant to § 404 of the Clean Water Act.^[11]

In analyzing this limitation, I note that Virginia follows the Dillon Rule, which “provides that municipal corporations have only those powers that are expressly granted, those necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable.”¹² In addition, a corollary to the Dillon Rule restricts the powers of local governing bodies to those that are “fixed by statute,” and limits their powers “to those conferred expressly or by necessary implication.”¹³ In keeping with the precepts of the Dillon Rule, where the General Assembly expressly limits the power of a locality, rather than enabling it, the express limitation must be given effect.¹⁴

Further, the language of the limitation in § 62.1-44.15:20(E) is plain. The statute clearly forbids a “locality,” by whatever means, from establishing the “location” of any required mitigation activities.¹⁵ Where a statute is unambiguous, courts will hold that the plain meaning of the statute controls. Stated differently, “[t]he manifest intention of the legislature, clearly disclosed by its language, must be applied. There can be no departure from the words used when the intention is clear.”¹⁶ Here, the restrictive language in the statute, coupled with the powers granted to the Board to oversee mitigation projects, makes clear the General Assembly’s intent that the comprehensive regulatory scheme established by the State Water Control Law cannot be intruded upon by localities. Accordingly, it is my opinion that localities are prohibited from requiring that mitigation efforts for impacts to wetlands or streams be performed within the boundaries of the locality.

This prohibition extends to voluntary proffers as well. Proffers, once accepted by a locality, “become conditions of the rezoning and, once entered into law, the

¹¹ Section 62.1-44.15:20(E) (2014).

¹² *See, e.g., Bd. of Zoning Appeals v. Bd. of Supvrs.*, 276 Va. 550, 553-54 (2008).

¹³ *Bd. of Supvrs. v. Horne*, 216 Va. 113, 117 (1975) (citations omitted).

¹⁴ *See The Lamar Co., LLC v. City of Richmond*, 287 Va. 348, 352 (2014) (“[R]estrictive legislation limits the power of local governments.”).

¹⁵ Section 62.1-44.15:20(E).

¹⁶ *Barr v. Town & Country Props., Inc.*, 240 Va. 292, 295 (1990) (citations omitted).

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conditions become zoning regulations.”¹⁷ In other words, by accepting the proffer, the locality effectively adopts an “amendment to the zoning ordinance” incorporating the proffer into the ordinance.¹⁸ Thus, the proffer adoption would constitute establishment “by ordinance” of provisions related to the location of wetlands or stream mitigation prohibited by the provisions of § 62.1-44.15:20(E).

CONCLUSION

Accordingly, it is my opinion that § 62.1-44.15:20(E) prohibits a locality from instituting a policy or plan mandating that mitigation for impacts to wetlands or streams occurring within that locality be performed within the boundaries of the locality. This prohibition includes acceptance of a voluntary proffer from an applicant relating to the location of compensatory mitigation.

OP. NO. 15-047

MOTOR VEHICLES: REGULATION OF TRAFFIC

A proceeding for violating § 46.2-844 may not be initiated by mailing a summons to the alleged violator. It may be initiated by a summons issued in compliance with all applicable legal requirements and then personally served on the alleged violator by a law enforcement officer.

LARRY W. DAVIS, ESQUIRE
COUNTY ATTORNEY FOR ALBEMARLE COUNTY
OCTOBER 2, 2015

ISSUES PRESENTED

Section 46.2-844 of the *Code of Virginia* imposes a civil penalty on a driver who illegally passes a stopped school bus, and it authorizes the use of video monitoring systems in such cases. You ask whether a locality may mail an alleged violator a notice of violation requesting payment of a civil penalty, where the evidence against him is video from a video monitoring system. You also ask whether a prosecution for violating this statute must be instituted by a law enforcement officer issuing a summons to the alleged violator.

¹⁷ *Town of Leesburg v. Long Lane Assocs. Ltd. P’ship*, 284 Va. 127, 137 (2012).

¹⁸ *Id.* at 136.

APPLICABLE LAW AND DISCUSSION

With certain exceptions, and under certain conditions, passing a stopped school bus comprises the traffic offense of reckless driving.¹ As an alternative to a reckless driving charge, a civil penalty may be imposed on an alleged violator under § 46.2-844. In relevant part, the civil penalty statute allows the charge to be based on video monitoring, pursuant to a local ordinance:²

A. The driver of a motor vehicle approaching from any direction a clearly marked school bus which is stopped on any highway, private road or school driveway for the purpose of taking on or discharging children, the elderly, or mentally or physically handicapped persons, who, in violation of § 46.2-859, fails to stop and remain stopped until all such persons are clear of the highway, private road or school driveway, is subject to a civil penalty of \$250 and any prosecution shall be instituted and conducted in the same manner as prosecutions for traffic infractions. . . .

B. A locality may, by ordinance, authorize the school division of the locality to install and operate a video-monitoring system in or on the school buses operated by the division . . . for the purpose of recording violations of subsection A.

The video monitoring portion of this statute was enacted in 2011.³ Prior to enactment, the initial bill authorized the mailing of a summons to an alleged violator,⁴ but this language was not in the bill that was ultimately enacted into law. You relate that on July 2, 2014, Albemarle County enacted a video monitoring ordinance authorized by this statute.⁵

¹ VA. CODE ANN. § 46.2-859 (2014).

² This Opinion does not address the proof that may be necessary at a trial brought pursuant to § 46.2-844.

³ 2011 Va. Acts chs. 787, 838.

⁴ H.B. 1911, 2011 Reg. Sess. (Va. 2011) (as prefiled by Miller, J., Patron).

⁵ That ordinance is now codified at §§ 9-800 to 9-802 of the *Code of the County of Albemarle*.

By a statute of general application, § 19.2-76, summonses executed by law enforcement officers must be executed in person.⁶

A related statute, § 15.2-968.1 of the *Code of Virginia*, addresses enforcing alleged traffic light violations, where the evidence is from video monitoring. These violations are commonly known as “photo red” violations. The statute provides an exception to the general rule requiring personal service of summonses by allowing this particular type of summons to be mailed:

A summons for a violation of this section may be executed pursuant to § 19.2-76.2 [authorizing mailing a summons for violation of a parking ordinance or a trash ordinance]. Notwithstanding the provisions of § 19.2-76, a summons for a violation of this section may be executed by mailing by first class mail a copy thereof to the owner, lessee, or renter of the vehicle.

It must be assumed that the General Assembly chose its words with care in enacting the two statutes.⁷ Because one statute authorizes mailing summonses while the other statute does not for a comparable offense, the General Assembly must have intended the absence of legal authority in the second statute to mean exactly that: § 46.2-844 does not authorize any official to mail a summons for passing a stopped school bus.

Various other statutes authorize localities to use summonses to give notice of various violations of law punishable by civil penalties: zoning administrators may issue notices of zoning code violations,⁸ and local health directors may issue notices of violations for onsite sewage violations.⁹ In addition, violations of a parking ordinance or a trash ordinance may be commenced by mailing a summons

⁶ Section 19.2-76 states, in relevant part, “A law-enforcement officer may execute within his jurisdiction a . . . summons issued anywhere in the Commonwealth. A jail officer as defined in § 53.1-1 employed at a regional jail or jail farm may execute upon a person being held in his jail a . . . summons issued anywhere in the Commonwealth. . . . [A] summons shall be executed by delivering a copy to the accused personally.” (Emphasis added).

⁷ See *Williams v. Commonwealth*, 61 Va. App. 1, 7 (2012) (quoting *Coles v. Commonwealth*, 44 Va. App. 549, 557-58 (2004)).

⁸ VA. CODE ANN. § 15.2-2209 (Supp. 2012).

⁹ Section 15.2-2157 (2012).

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to the alleged violator.¹⁰ However, there is no statute specifically authorizing mailed service of a summons for passing a stopped school bus.

A prior Opinion of this Office concluded that the use of mailed warnings to notify alleged violators of possible violations was prohibited unless the General Assembly had granted express authority to do so.¹¹ The Opinion discussed an earlier version of the “photo red” statute that did not contain the authorization for mailing summonses. In relevant part, it stated, “The General Assembly has not provided for the issuance of written warnings for violation[s] of this section. Therefore, I am of the opinion that any local ordinance enacted pursuant to [the section] may not provide that written warnings be mailed to violators . . . in lieu of issuing traffic summonses.”¹²

Virginia follows the Dillon Rule, 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.”¹³

Because of the absence of statutory authority in § 46.2-844 or any other statute to mail a summons for passing a stopped school bus, in contrast to the express statutory authority in § 15.2-968.1 for mailing summonses for “photo red” violations, and because of the Dillon Rule, it is my opinion that a prosecution for violating § 46.2-844 may not be commenced by mailing a summons to the alleged violator.

Section 46.2-844 provides that “any prosecution shall be instituted and conducted in the same manner as prosecutions for traffic infractions.” Law enforcement officers may enforce traffic infractions through the issuance and service of summonses.¹⁴ Issuance of a summons for a traffic offense is addressed by §§ 46.2-936 and 46.2-937.¹⁵

¹⁰ Section 19.2-76.2 (2008).

¹¹ 1995 Op. Va. Att’y Gen. 205, 206.

¹² *Id.*

¹³ *See, e.g.,* *Tabler v. Bd. of Supvrs. of Fairfax Cnty.*, 221 Va. 200, 202 (1980).

¹⁴ Section 46.2-102 (2014).

¹⁵ Section 46.2-936 provides that an officer shall issue a summons for a traffic offense punishable as a misdemeanor. Section 46.2-937 provides that for purposes of arrest traffic infractions shall be treated as misdemeanors. Section 46.2-844 provides that prosecution shall be instituted in the same manner as

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As previously noted, § 19.2-76 requires summonses to be personally served, unless there is statutory authority for a different form of service in particular circumstances. No such other form of service is authorized for a violation of § 46.2-844. Accordingly, it is my further opinion that the only present statutory authority for initiating a prosecution for violating § 46.2-844 is § 46.2-936,¹⁶ providing for personal service of a summons by a law enforcement officer.

CONCLUSION

For the reasons stated, it is my opinion that a proceeding for violating § 46.2-844 may not be initiated by mailing a summons to the alleged violator. It may be initiated by a summons issued in compliance with all applicable legal requirements and then personally served on the alleged violator by a law enforcement officer.¹⁷

OP. NO. 15-013**GENERAL ASSEMBLY: CHESAPEAKE BAY COMMISSION****MOTOR VEHICLES: TITLING AND REGISTRATION OF MOTOR VEHICLES**

The Chesapeake Bay Restoration Fund Advisory Committee may not disburse monies from the Fund in the form of grants for the development of a marketing strategy to promote the sale of the “Friend of the Chesapeake” specialty license plates.

THE HONORABLE JEFFREY L. MCWATERS
MEMBER, SENATE OF VIRGINIA
OCTOBER 9, 2015

prosecutions for traffic offenses. Therefore, § 46.2-936 governs instituting prosecution for a violation of § 46.2-844.

¹⁶ This statute provides that when a person is detained or in the custody of an officer, including for a traffic offense punishable as a misdemeanor, the officer shall, “issue a summons or otherwise notify him in writing to appear at a time and place to be specified in such summons or notice.” The context of the statute clearly contemplates the officer providing the notice while the person is detained or in his custody, not mailing it at a later time.

¹⁷ If the driver meets certain standards of non-cooperation, the officer may take him or her before a magistrate, in lieu of issuing a summons at the site of the offense. VA. CODE ANN. § 46.2-936, 937, and 940 (2014).

ISSUES PRESENTED

Your inquiry concerns the potential expenditure of funds from the Chesapeake Bay Restoration Fund (the “Fund”). You ask whether the Chesapeake Bay Restoration Fund Advisory Committee (the “Committee”) may disburse monies from the Fund in the form of grants for the development of a marketing strategy to promote the sale of “Friend of the Chesapeake” specialty license plates, and, if so, whether those grants may be awarded to a “for profit” entity or organization.

BACKGROUND

The Committee is authorized by law to exercise general oversight over the expenditure of monies in the Fund, which are derived from the sale of the “Friend of the Chesapeake” license plate. You relate that, in 1995, the Committee developed guidelines pursuant to § 30-256(D) for the use of monies in the Fund. Under these guidelines, the Committee established a grant program to award monies in the Fund to nonprofit organizations; to local, state and federal public agencies; and to educational institutions for the purposes of environmental education and restoration projects related to the Chesapeake Bay.

Currently, the Committee is interested in funding grants for the development of a marketing strategy to increase sales of the “Friend of the Chesapeake” license plate. Increased sales of the license plate would result in more revenue for the Fund, which would in turn allow the Committee to provide more grant funding to the entities engaged in educational and restoration efforts related to the Chesapeake Bay. You inquire whether the Committee has the statutory authority to fund the development of a marketing strategy for the license plate in this manner.

APPLICABLE LAW AND DISCUSSION

Section 46.2-749.2 provides that the Commissioner of the Department of Motor Vehicles shall issue a special license plate bearing the words “Friend of the Chesapeake,”¹ and that a portion of the proceeds from the sale of these plates “shall be paid into the state treasury and credited to the special nonreverting fund

¹ VA. CODE ANN. § 46.2-749.2(A) (2014) (stating that the Commissioner shall issue the plates upon receipt of an application and payment of fees prescribed by subsection B).

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known as the Chesapeake Bay Restoration Fund.”² The statute provides that monies in the Fund are “for use by the Commonwealth of Virginia for environmental education and restoration projects relating to the Chesapeake Bay and its tributaries.”³

The Chesapeake Bay Restoration Fund Advisory Committee was created to advise the General Assembly on the expenditure of monies received in the Chesapeake Bay Restoration Fund.⁴ Pursuant to § 30-256, the Committee is directed to develop goals and guidelines for the use of the Fund, which

may include but not be limited to cooperative programs with, or project grants to, state agencies, the federal government, or any not-for-profit agency, institution, organization, or entity, public or private, whose purpose is to provide environmental education and projects relating to the restoration and conservation of the Chesapeake Bay.^[5]

The only additional condition listed is that monies in the Fund may not be used to supplant existing general fund appropriations, except as provided in the *Code*.⁶

I must consider both statutes when making a determination as to how monies in the Fund may be disbursed. The application and meaning of a statute are controlled by “the plain language used by the legislature . . . unless that language is ambiguous or otherwise leads to an absurd result.”⁷ In addition, “statutes dealing with a specific subject must be construed together in order to arrive at the object sought to be accomplished.”⁸

Based on the plain language of the statutes, it is clear that the purpose of the Fund is for “environmental education and restoration projects” relating to the

² Section 46.2-749.2(B) (stating that the annual fee for the plate is \$25 in addition to the prescribed fee for state license plates; furthermore, for each \$25 collected in excess of 1,000 registrations, \$15 shall be paid into the state treasury and be credited to the Fund).

³ *Id.*

⁴ VA. CODE ANN. § 30-256(A) (2011).

⁵ Section 30-256(D).

⁶ *Id.*

⁷ *Reston Hosp. Ctr., L.L.C. v. Remley*, 59 Va. App. 96, 106 (2011).

⁸ *Prillaman v. Commonwealth*, 199 Va. 401, 406 (1957).

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Chesapeake Bay.⁹ Using these monies to pay an organization to develop a marketing strategy to increase sales of license plates, whatever the end goal may be, does not fall into either of those categories. Paying a marketing firm is, simply stated, advertising, and a part of commerce. It is not environmental education, nor is it a restoration project. Each of these statutes, read separately, and more importantly, read together, emphasizes this requirement, and this requirement cannot be ignored.

Given the above analysis, the Committee may not use the Fund to finance a grant to develop a marketing strategy to promote the sale of the license plates. Having answered this inquiry in the negative, it is unnecessary to address your second inquiry regarding the “for-profit” or “non-profit” status of the proposed recipient of the funding.

CONCLUSION

Accordingly, it is my opinion that the Chesapeake Bay Restoration Fund Advisory Committee may not disburse monies from the Fund in the form of grants for the development of a marketing strategy to promote the sale of the “Friend of the Chesapeake” specialty license plates.

Op. No. 15-037

HEALTH: POSTMORTEM EXAMINATIONS AND SERVICES

Section 32.1-283 places sole responsibility on OCME, once it is notified, to take charge of a dead body upon death from any of the circumstances specified in § 32.1- 283(A). No other agency is required to take charge of such a dead body or bear the cost of doing so once OCME has been notified, as that responsibility is placed exclusively on OCME by statute.

COLONEL W.S. FLAHERTY
SUPERINTENDENT, DEPARTMENT OF STATE POLICE
OCTOBER 9, 2015

⁹ See § 46.2-749.2(B); see also § 30-256(D) (stating that the purpose of the Fund is for “environmental education and projects relating to the restoration and conservation of the Chesapeake Bay”).

ISSUES PRESENTED

You ask whether it is the responsibility of the Office of the Chief Medical Examiner (“OCME”) to take charge of a dead body upon notification of death from trauma or accident. If it is not the responsibility of OCME, you ask what agency bears that responsibility. You further ask which agency should bear the cost of removing a body upon death from trauma or accident in the event that OCME does not assume charge of the body at the scene.

APPLICABLE LAW AND DISCUSSION

Section 32.1-283 of the *Code of Virginia* provides that:

A. Upon the death of any person from trauma, injury, violence, poisoning, accident, suicide or homicide, or suddenly when in apparent good health, or when unattended by a physician, or in jail, prison, other correctional institution or in police custody, or who is an individual receiving services in a state hospital or training center operated by the Department of Behavioral Health and Developmental Services, or suddenly as an apparent result of fire, or in any suspicious, unusual or unnatural manner, or the sudden death of any infant the Office of the Chief Medical Examiner shall be notified by the physician in attendance, hospital, law-enforcement officer, funeral director, or any other person having knowledge of such death. . . .

B. Upon being notified of a death as provided in subsection A, the Office of the Chief Medical Examiner *shall* take charge of the dead body and the Chief Medical Examiner shall cause an investigation into the cause and manner of death to be made and a full report, which shall include written findings, to be prepared.^[1]

“It is elementary that the primary object in the interpretation of a statute is to ascertain and give effect to the intention of the legislature.”² “In interpreting [a] statute, ‘courts apply the plain meaning . . . unless the terms are ambiguous or applying the plain language would lead to an absurd result.’”³

¹ VA. CODE ANN. § 32.1- 283 (Supp. 2015) (emphasis added).

² *Andrews v. Shepherd*, 201 Va. 412, 414 (1959); *see also Cuccinelli v. Rector & Visitors of the Univ. of Va.*, 283 Va. 420, 425 (2012).

³ *Baker v. Commonwealth*, 284 Va. 572, 576 (2012) (quoting *Boynton v. Kilgore*, 271 Va. 220, 227 (2006)).

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“[T]he word ‘shall’ is primarily mandatory in its effect and the word ‘may’ is primarily permissive.”⁴ This is especially true in cases involving the use of “shall” in statutory language.⁵ “When the word ‘shall’ appears in a statute, it is generally used in an imperative or mandatory sense.”⁶

When the death of a person has resulted from any of the circumstances listed in § 32.1-283(A) and OCME is notified, the plain language of § 32.1-283(B) clearly directs OCME to take charge of the dead body.⁷ No other agency bears the responsibility for or costs of doing so,⁸ and there is no statutory framework by which any other agency is required to do so or to bear the cost of doing so.

This opinion does not address the responsibility for dead bodies where death results from some cause other than trauma or accident,⁹ or when a state of emergency has been declared by the Governor.¹⁰

CONCLUSION

Accordingly, it is my opinion that § 32.1-283 places sole responsibility on OCME, once it is notified, to take charge of a dead body upon death from any of the circumstances specified in § 32.1- 283(A). No other agency is required to take

⁴ *Ross v. Craw*, 231 Va. 206, 212 (1986); *see also Pettus v. Hendricks*, 113 Va. 326, 330 (1912).

⁵ *Ross*, 231 Va. at 212; *see also, e.g., Price v. Commonwealth*, 209 Va. 383, 387 (1968) (discussing the term “may”); *Schmidt v. City of Richmond*, 206 Va. 211, 218 (1965) (discussing the term “shall”); *Creteau v. Phoenix Assurance Co.*, 202 Va. 641, 643-44 (1961) (“shall”); *Spindel v. Jamison*, 199 Va. 954, 957 (1958) (“may”); *Huffman v. Kite*, 198 Va. 196, 202 (1956) (“shall”); *Bd. of Supvrs. v. Weems*, 194 Va. 10, 15 (1952) (“may”); *Masters v. Hart*, 189 Va. 969, 979 (1949) (“may”); *Bryant v. Tunstall*, 177 Va. 1, 6 (1941) (“shall”); *Bd. of Supvrs. v. Cahoon*, 121 Va. 768, 773 (1917) (“may”); *Meade v. Meade*, 111 Va. 451, 453 (1910) (“shall”).

⁶ *Schmidt*, 206 Va. at 218; *accord City of Waynesboro Sheriff’s Dep’t v. Harter*, 222 Va. 564, 566 (1981).

⁷ Section 32.1-283(B).

⁸ Once OCME has completed its investigation, costs for the *disposition* of a dead body shall be borne in accordance with § 32.1-309.2 of the *Code of Virginia*. *See* § 32.1-309.2 (Supp. 2015). There is no comparable statute allocating the costs of taking charge and removal of a dead body.

⁹ *See, e.g., §§ 32.1-309.1* (Supp. 2015) (notification of next of kin; disposition of claimed dead body); 32.1-309.2 (dead bodies where death is from some cause other than trauma or accident); 32.1-309.3 (Supp. 2015) (cremations and burials at sea); 32.1-309.4 (Supp. 2015) (special procedure for hazardous human remains).

¹⁰ *See, e.g., VA. CODE ANN. § 44-146.17* (2013) (Governor may declare state of emergency, take actions related to the safety of the Commonwealth, and issue certain executive orders relating thereto).

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charge of such a dead body or bear the cost of doing so once OCME has been notified, as that responsibility is placed exclusively on OCME by statute.

OP. NO. 15-056**CONSTITUTION OF VIRGINIA (ART. X)****TAXATION: REAL PROPERTY TAX**

The real property tax exemption provided for in Article X, § 6-A(b) of the Virginia Constitution and § 58.1-3219.9 of the *Code of Virginia* is applicable to the surviving spouses of members of the armed forces who are killed in action at any time prior to, on, or after January 1, 2015, provided all other requirements for the exemption have been met. The exemption applies for tax years beginning on or after January 1, 2015.

THE HONORABLE PRISCILLA S. BELE
COMMISSIONER OF THE REVENUE
DECEMBER 18, 2015

ISSUE PRESENTED

You ask whether the real property tax exemption provided for in Article X, § 6-A(b) of the Virginia Constitution and § 58.1-3219.9 of the *Code of Virginia* applies to the surviving spouses of members of the armed forces killed in action prior to January 1, 2015.

APPLICABLE LAW AND DISCUSSION

In November 2014, citizens of the Commonwealth approved a constitutional amendment authorizing the General Assembly to provide by general law for a real property tax exemption for the surviving spouses of members of the armed forces who are killed in action.¹ In accord with this amendment, Article X, § 6-A(b) of the Virginia Constitution now provides as follows:

¹ See VA. DEP'T OF ELECTIONS, *Historical Elections Results – Proposed Amendment to Art. X, § 6-A of the Virginia Constitution*, http://historical.elections.virginia.gov/ballot_questions/view/2754/ (last visited Oct. 21, 2015). See generally VA. CONST. art. XII, § 1 (providing that proposed amendments to the Constitution shall be submitted by the General Assembly to the qualified voters of the Commonwealth).

Notwithstanding the provisions of Section 6, the General Assembly by general law, and within the restrictions and conditions prescribed therein, may exempt from taxation the real property of the surviving spouse of any member of the armed forces of the United States who was killed in action as determined by the United States Department of Defense, who occupies the real property as his or her principal place of residence. The exemption under this subdivision shall cease if the surviving spouse remarries and shall not be claimed thereafter. *This exemption applies regardless of whether the spouse was killed in action prior to the effective date of this subdivision, but the exemption shall not be applicable for any period of time prior to the effective date.* This exemption applies to the surviving spouse's principal place of residence without any restriction on the spouse's moving to a different principal place of residence and without any requirement that the spouse reside in the Commonwealth at the time of death of the member of the armed forces.^[2]

As written, this provision makes clear that the exemption applies regardless of when the member of the armed forces was killed in action. "If a constitutional provision is plain and unambiguous, [courts] do not construe it, but apply it as written."³ Moreover, "[i]f the intention is manifest from the language used and leads to no absurd conclusion, courts must give [the provision] the effect clearly intended."⁴

On January 1, 2015, legislation implementing the tax exemption became effective.⁵ This legislation, which is codified at § 58.1-3219.9, details the exemption and provides in relevant part that:

Pursuant to subdivision (b) of Section 6-A of Article X of the Constitution of Virginia, *and for tax years beginning on or after January 1, 2015*, the General Assembly hereby exempts from taxation the real property described in subsection B of the surviving spouse (i) of any member of the armed forces of the United States who was killed in action as determined by the United States Department of Defense

² Emphasis added.

³ *Town of Madison v. Ford*, 255 Va. 429, 432 (1998).

⁴ *Hollywood Cemetery Co. v. Commonwealth*, 123 Va. 106, 110-11 (1918).

⁵ *See* 2014 Va. Acts ch. 757.

and (ii) who occupies the real property as his principal place of residence. If such member of the armed forces of the United States is killed in action after January 1, 2015, and the surviving spouse has a qualified principal residence on the date that such member of the armed forces is killed in action, then the exemption for the surviving spouse shall begin on the date that such member . . . is killed in action.^[6]

The language of this legislation is consistent with that of the constitutional provision authorizing the exemption.⁷ The significance of “January 1, 2015,” involves only the tax years to which the exemption applies. Nothing in § 58.1-3219.9 serves to bar the exemption based on the date of death of the military member.

CONCLUSION

Accordingly, it is my opinion that the real property tax exemption provided for in Article X, § 6-A(b) of the Virginia Constitution and § 58.1-3219.9 of the *Code of Virginia* is applicable to the surviving spouses of members of the armed forces who are killed in action at any time prior to, on, or after January 1, 2015, provided all other requirements for the exemption have been met. The exemption applies for tax years beginning on or after January 1, 2015.

⁶ VA. CODE ANN. § 58.1-3219.9 (Supp. 2015) (emphasis added).

⁷ See generally *Terry v. Mazur*, 234 Va. 442, 449-50 (1987) (providing that statutes inconsistent with the Virginia Constitution are invalid).

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