

**OPINIONS
OF THE
ATTORNEY GENERAL
AND
REPORT
TO THE
GOVERNOR OF VIRGINIA
2013**



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

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LETTER OF TRANSMITTAL

May 1, 2014

The Honorable Terence G. McAuliffe
Governor of Virginia

Dear Governor McAuliffe:

I am pleased to present to you the *Annual Report of the Attorney General* for 2013. As you know, I did not assume office until January 2014, yet during the few months since then, I am constantly impressed with the volume of legal work that goes through the Office as well as the breadth and the scope of what we do. I have dedicated time to meeting many of the committed public servants who work for the Office of the Attorney General, and I can assure you that you and the citizens of this Commonwealth may be proud of their efforts.

I look forward to working with you over the next four years to continue the success and accomplishments of my predecessors. Further, I will ensure that the Commonwealth has the finest lawyers and staff at the helm of the Department of Law. It is with great pride that I present to you a small portion of the accomplishments of this Office from last year.

STATE SOLICITOR GENERAL

The State Solicitor General represents the Commonwealth before the Supreme Court of the United States and other appellate courts in litigation, other than capital cases, in high-profile matters involving the Commonwealth. The Solicitor General also assists all Divisions of the Office with constitutional and appellate issues.

In *McBurney v. Young*, the Solicitor General successfully defended a challenge to Virginia's Freedom of Information Act (FOIA) in the United States Supreme Court. The Court unanimously held that Virginia's FOIA, in granting access to all public records to citizens of Virginia but not citizens of other states, does not violate the Privileges and Immunities Clause of Article IV or the dormant Commerce Clause. The Court held that Virginia provides non-citizens with access to certain records through other state laws and does not abridge "fundamental" rights of non-citizens by not providing them with certain records. The Supreme Court declined to grant a writ of certiorari in three other matters handled by the Solicitor General's office: *Virginia v. EPA*, a challenge to the Environmental Protection Agency's endangerment finding for greenhouse gases; *Libertarian Party v. Judd*, in which plaintiffs successfully challenged the state residency requirement for petition circulators as unconstitutional; and *MacDonald v. Moose*, in which the U.S. Court of Appeals for the Fourth Circuit held Virginia's anti-sodomy statute facially unconstitutional.

The Solicitor General's office also had business before the Fourth Circuit in 2013. In *Colon Health Centers of America v. Hazel*, two medical services businesses filed suit seeking to have Virginia's certificate of public need statutes declared unconstitutional, as an infringement on their privileges or immunities, due process rights, rights to equal protection, and as a violation of the dormant Commerce Clause. The Fourth Circuit affirmed dismissal of all claims but the dormant Commerce Clause

claim, which it remanded for further proceedings and which remains pending. The Fourth Circuit also reversed the district court's dismissal of *De'Lonta v. Johnson*, in which an inmate asserted that the Department of Corrections' failure to evaluate the conditions of his gender identity disorder for the possibility of sex reassignment surgery violated the Eighth Amendment's prohibition on cruel and unusual punishment.

The Supreme Court of Virginia decided two appeals argued by the Solicitor General in 2013. In *Elizabeth River Crossings OpCo, LLC v. Meeks*, the Solicitor General served as co-counsel for the Department of Transportation (VDOT) in a suit involving VDOT's planned construction of, among other things, an additional tunnel crossing the Elizabeth River between Portsmouth and Norfolk. The Supreme Court rejected plaintiffs' claim that the General Assembly unconstitutionally had delegated its taxing power to VDOT. In *Virginia Broadcasting Corporation v. Commonwealth*, involving a circuit court's decision to prohibit video recording devices and cameras in the courtroom during a criminal sentencing hearing, the Court adopted the Office's interpretation of the relevant statute in affirming the circuit court's decision.

The Solicitor General's office also filed amicus briefs in matters before the Supreme Court of the United States, the U.S. Courts of Appeals for the Fourth Circuit and the D.C. Circuit, U.S. District Courts for the Eastern District of Virginia and the District of Columbia, the Supreme Court of Virginia, and the Court of Appeals of Virginia.

CIVIL LITIGATION DIVISION

The Civil Litigation Division (Division) advocates for the interests of the Commonwealth, its agencies, institutions, and officials in civil law suits. Such civil actions include tort, construction, employment, workers' compensation, Birth Injury Fund, debt collection, and civil rights, as well as constitutional challenges to statutes. The Division also handles cases involving the commitment or conditional release of sexually violent predators. The Division contains the Division of Debt Collection, which is responsible for providing legal services and advice related to the collection of funds owed to the Commonwealth. In addition, the Division pursues civil enforcement actions under Virginia's consumer protection statutes and antitrust laws, represents the interests of the citizens of the Commonwealth with regard to the conduct of charities, and serves as Consumer Counsel in matters involving regulated utilities, including cases pending before the State Corporation Commission. Finally, the Division provides legal advice to agencies and institutions of state government on risk management, employment, insurance, utilities, and construction issues, and serves as counsel to Virginia's judiciary and the Virginia State Bar.

Trial Section

The Trial Section of the Civil Litigation Division handles most of the civil litigation filed against the Commonwealth. The cases defended include tort claims, civil rights issues, contract issues, denial of due process claims, defamation claims, employment law matters, election law issues, Birth Injury Fund claims, Freedom of Information Act challenges, contested workers' compensation claims, and constitutional challenges to state statutes. The Section also represents the Commonwealth

in matters involving Uninsured Motorists/Under Insured Motorists and the Birth-Related Neurological Injury Compensation Program. The Section also provides support to the Solicitor General's office. The Trial Section consists of three Units: General Civil Unit, Employment Law Unit, and 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 2013, the Unit represented the Virginia State Bar in 5 new matters, including 1 attorney disciplinary appeal before the Supreme Court of Virginia, and prosecuted 3 persons for the unauthorized practice of law. The Unit represents the Commonwealth in matters involving Uninsured Motorists/Under-Insured Motorists matters. In addition to the matters continued from prior years, in 2013, the Unit received 155 new lawsuits.

In 2013, the Unit continued its handling of the wrongful death actions filed by two families seeking \$10 million each as a result of the April 16, 2007, shootings at Virginia Tech. Plaintiffs had alleged that the actions of the President of Virginia Tech on the morning of the shootings constituted both simple and gross negligence because of the University's failure to warn the daughters of the plaintiffs of the danger presented by the shooter. As the cases progressed, individual defendants were dismissed – including President Charles Steger on a plea of *res judicata* – leaving the Commonwealth as the sole defendant. In March 2012, a jury returned a \$4 million verdict for the plaintiffs in each case, which the court reduced to \$100,000 pursuant to the Virginia Tort Claims Act. We filed and briefed a motion to set aside the verdicts, which the court denied. Both sides filed petitions for appeal to the Virginia Supreme Court. The appeals were argued in September. The circuit court's judgment against the Commonwealth was reversed, and plaintiffs' appeal was denied. In a related matter, Unit attorneys continued their representation of Virginia Tech before the U.S. Department of Education in the appeal of two fines imposed upon Virginia Tech for Clery Act violations. The Department of Education alleged that Virginia Tech should have known that the perpetrator of an early morning homicide in a dormitory posed an ongoing threat to the campus and that Virginia Tech failed to properly disclose its timely warning policies. Virginia Tech elected not to appeal the Department's final decision to impose two fines totaling \$32,500.

In another notable case, *Page v. Virginia State Board of Elections*, plaintiffs claimed that racial gerrymandering rendered Virginia's 3rd Congressional District unconstitutional and sought a declaration that the district is unconstitutional and an injunction preventing any elections in the district until it could be redrawn. Virginia's Republican congressmen intervened as defendants. Defendants' motions for summary judgment were denied, and trial is set for May 2014.

In *Educational Media v. Swecker*, the University of Virginia and Virginia Tech student newspapers challenged the constitutionality of ABC regulations that restrict the advertisement of alcohol in college student publications. The district court found the regulations to be facially unconstitutional and issued a permanent injunction. On appeal, the Fourth Circuit reversed and remanded the matter for further proceedings

on those issues not decided by the district court. On remand, the district court granted defendants' motion for summary judgment and dismissed the case with prejudice. The student newspapers appealed to the Fourth Circuit, which reversed the dismissal, opining that the regulation is not sufficiently tailored and unconstitutional as applied to the plaintiffs. Specifically, the court concluded that the regulation fails the fourth prong under *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, "because it prohibits large numbers of adults who are 21 years of age or older from receiving truthful information about a product that they are legally allowed to consume." The Commonwealth did not appeal to the U.S. Supreme Court.

Another significant case handled by the Unit, *Henley ex rel. Strickland v. Woodford*, arose from the drowning of a 12-year-old boy at Smith Mountain Lake State Park. The boy's mother filed a \$15 million wrongful death and negligence action against three Commonwealth of Virginia lifeguards and the decedent's private chaperones. The circuit court granted the lifeguards' Pleas of the Good Samaritan Statute, § 8.01-225, dismissing the action and all claims against the lifeguards in their entirety. The case remains pending against the non-state chaperones.

Other notable cases handled by the Unit include a medical malpractice complaint, *Baird ex rel. Barnes v. Stokes*, filed against several doctors and the Eastern Virginia Medical School (EVMS). The lawsuit was amended to add the Commonwealth as a defendant. The Unit's attorneys filed a demurrer stating that EVMS is not an agency of the Commonwealth. The trial court agreed and issued an order dismissing the Commonwealth. The Supreme Court of Virginia affirmed the dismissal.

Plaintiffs in *Brown v. Commonwealth*, *Crist v. Commonwealth*, and *Macleay v. Commonwealth* claimed breach of an express and implied-in-fact oral contract against the Commonwealth. Plaintiffs alleged that a Dean at John Tyler Community College (JTCC) promised them that the one-year surgical technology program, which was offered for the first time, would be accredited by the date of students' expected graduation. The circuit court issued a letter opinion and granted our Plea of Sovereign Immunity with respect to the breach of oral contract claim. The circuit court ruled that pursuant to the Virginia Community College System Policy Manual, contracts with the VCCS must be in writing. The circuit court further ruled that the President of JTCC did not delegate his contractual authority to the Dean. Accordingly, the alleged oral contract was ultra vires, void ab initio, and unenforceable against the Commonwealth; and the Commonwealth was dismissed with prejudice.

Rodriguez v. Doe is a lawsuit against numerous Virginia officials and employees concerning the revocation of the plaintiff's license to practice law in Virginia. The district court granted our Motion to Dismiss and Motion for Sanctions with respect to a nationwide pre-filing injunction but denied an award of attorneys' fees. On appeal, the Fourth Circuit in an unpublished opinion affirmed the district court's dismissal of the action and imposition of a nationwide pre-filing injunction. Another appeal, *Livingston v. Virginia State Bar*, concerns a disciplinary proceeding against a prosecutor who charged a defendant with possession with intent to distribute actual Oxycontin, even though he knew that the undercover police officer sold the defendant imitation Oxycontin pills. The Supreme Court affirmed in part and reversed in part the Disciplinary Board's Memorandum Order. The Court held that the prosecutor violated Rule 1.1, which relates to competence, because he failed to provide the thoroughness and preparation reasonably necessary for his client, but the Court also

found that the prosecutor did not violate Rule 3.1, which relates to meritorious claims, or Rule 3.8(a), which prohibits a prosecutor from maintaining a charge that he knows is not supported by probable cause.

In representing the Birth-Related Neurological Injury Compensation Program, the Unit provides legal advice to the Board and its Executive Director, defends appeals of Board decisions regarding specific claims for benefits to the Workers' Compensation Commission, and represents the Program in eligibility determination cases from the Workers' Compensation Commission through the Virginia Court of Appeals. The manner in which birth injury cases are litigated is changing. Formerly a primarily administrative process, litigating eligibility cases to completion required minimal discovery, minimal expense, and less time per claim. Following *Kavanaugh v. Virginia Birth-Related Neurological Injury Compensation Program*, and with an increased defensive use of the Act by healthcare providers pursuant to the transfer statute, the Unit has spent more time addressing pre-petition benefit issues and discovery matters.

Seven eligibility petitions and two benefit matters were pending at the end of 2012. During 2013, the Unit represented the Program regarding at least 25 benefit claims, excluding petitions for attorneys' fees and claims that were submitted to the Board for determination. The Unit resolved seven petitions for attorneys' fees and costs and prepared seven advice memos regarding benefit claims that were submitted to the Board. The Unit litigated nine eligibility cases to conclusion and saved the Program at least \$9,375 through negotiations regarding attorneys' fees petitions. At the end of 2013, six eligibility cases and two benefit cases were still pending. Of these cases, two of the eligibility cases and one of the benefit cases were pending before the Full Commission.

Employment Law Unit

In 2013, the Unit provided employment law advice to, or represented in litigation, many state entities, including the Department of Human Resource Management, Department of Juvenile Justice, Department of Transportation, Department of Corrections, Department of Criminal Justice Services, Indigent Defense Commission, Department of Health, Department of Behavioral Health and Developmental Services, Central Virginia Training Center, Virginia State University, Norfolk State University, Virginia Commonwealth University, Longwood University, Old Dominion University, Virginia Community College System, Rappahannock Community College, Southside Virginia Community College, Northern Virginia Community College, Department of Social Services, Department of Labor and Industry, Department for the Blind and Vision Impaired, Department of Veterans Services, Virginia State Police, Virginia Workers' Compensation Commission, State Corporation Commission, State Board of Elections, Department of Game and Inland Fisheries, Virginia Port Authority, Supreme Court of Virginia, Virginia Department of Alcoholic Beverage Control, and OAG's Division of Human Rights. In addition, attorneys in the Unit provided training to management and human resources personnel from various state agencies, including Fair Labor Standards Act training for law enforcement agencies.

In 2013, the Unit successfully defended many lawsuits involving public institutions of higher education throughout the Commonwealth. In *Hentosh v. Old*

Dominion University, *Mveng-Whitted v. Virginia State University*, *Hawthorne v. Larose* and *Davis v. Rao*, the Unit prevailed in challenges to these institutions' denial of tenure, promotion, or appointment of professors. In *Irby v. Caven*, the Unit successfully defended an institution that had eliminated faculty positions due to budget cuts or low enrollment. In another lawsuit, *Gordon v. James Madison University*, the Unit successfully defended the institution's decision to terminate the plaintiff's employment for disciplinary reasons.

The Unit also prevailed in *Smith v. Commonwealth*, a wrongful discharge claim challenging an order by the Acting Adjutant General of the Virginia Air National Guard dismissing an Assistant Adjutant General. In addition, the Unit successfully defended a First Amendment challenge to an employment decision made by this Office. In *Vanterpool v. Cuccinelli*, a former Assistant Attorney General was terminated after posting a public comment to a newspaper addressing a perceived feud involving the Attorney General. Plaintiff alleged a violation of her First Amendment rights, political affiliation, and constructive discharge. In granting the defendants' motion to dismiss, the court found that the plaintiff was not protected by the First Amendment based on the *Elrod-Branti* exception.

Workers' Compensation Unit

The Workers' Compensation Unit defends workers' compensation cases filed by employees of Virginia agencies. Because hearings are held throughout the Commonwealth, cases are assigned to attorneys in Richmond as well as field attorneys in Abingdon. The Unit handles claims brought by injured workers and employers' applications. Claims include initial compensability and change in condition claims. This Unit represents the agencies through all stages of a matter, from initial hearings before a Deputy Commissioner, to review by the Full Commission, and appeals to the Virginia Court of Appeals and Virginia Supreme Court. The Unit handled 326 new cases in 2013.

The Unit also pursues subrogation claims in order to recover funds for the Department of Human Resource Management's (DHRM) Workers' Compensation Services. Subrogation issues arise in instances where an injured worker is injured by a third-party. The Workers' Compensation Unit assists DHRM to recover when the injured worker receives monies in litigation involving the accident, and also files subrogation lawsuits on behalf of the Commonwealth. In 2013, the Unit assisted the Workers' Compensation Services and its third-party administrator with subrogation recoveries exceeding \$574,000.

Consumer Protection Section

The Section's Counseling, Intake and Referral Unit (CIRU) serves as the central clearinghouse in Virginia for the receipt, evaluation, and referral of consumer complaints. Complaints received 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 alternative dispute resolution services for complaints that do not allege or 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. During 2013, the CIRU received and handled 28,276 telephone calls through our Consumer Hotline and received 3,994 written consumer complaints. The CIRU, with the DRIU, resolved or closed 4,135 complaints. Consumer recoveries from closed complaints totaled \$695,829.

The Section's Antitrust and Consumer Enforcement Unit (ACEU) filed several new actions and obtained beneficial results for consumers in 2013. In the antitrust area, we filed one new action and continued to litigate a previously filed action through trial. In August, the Antitrust Division of the U.S. Department of Justice (DOJ), Virginia, five other states, and the District of Columbia sued to block the proposed merger of American Airlines and US Airways, the third and fourth largest domestic legacy air carriers. The plaintiffs alleged that the merger would lessen competition on national routes between certain city pairs, reduce domestic flight capacity, increase ticket prices and ancillary fees for items such as checked bags and changed tickets, and increase the concentration of takeoff/landing slot ownership at Reagan National airport (DCA).

In November, DOJ and the states reached a settlement that allowed the merger to proceed with certain conditions, including the divestiture of American Airlines' air carrier slots at DCA; the divestiture of gates and facilities at several other airports; continued operations by the merged airline at all current hubs, except Dallas-Fort Worth and DCA, consistent with historical operations for three years; and continued daily scheduled service through any current hub to all airports currently served in the plaintiff states for the next five years. DOJ and the states have final approval of all purchasers of the divested assets. In addition, each of the plaintiff states will receive reimbursement of its attorneys' fees and other costs involved in the investigation and litigation of the merger challenge.

Together with the Attorneys General of 33 states and territories, we sued five of the six major ebook publishers and Apple, Inc. for alleged price-fixing to raise the price of ebooks at the time of Apple's iPad launch. The Antitrust Division of DOJ also sued these companies. The five publishers settled with the States and DOJ before trial. The settlement with the DOJ provided only for injunctive relief, while the settlement with the states included damages and injunctive relief. Virginia's share of the consumer restitution portion of the five publisher settlements is projected to be approximately \$4.3 million. The liability claims against Apple, however, were litigated in a bench trial in June 2013 in U.S. District Court for the Southern District of New York. The resulting verdict in favor of the states and DOJ is currently on appeal in the Second Circuit Court of Appeals. The states, together with private class counsel, are scheduled to proceed with a jury trial on the damages portion of their cases against Apple in the district court in May 2014.

On the consumer protection front, the ACEU filed and resolved four new Virginia-specific enforcement actions. Two matters involved alleged violations of Virginia consumer lending statutes. In June, we entered into a Consent Judgment with Advance, LLC d/b/a Advance 'til Payday, an Illinois-based consumer lender operating out of one location in the Richmond area. The lender allegedly violated the state's consumer finance laws by charging in excess of the 12% annual interest rate cap (in the form of a 15% cash advance fee) on its small consumer loans and by failing to comply with the state's open-end credit statute, which operates as an exception to the

state's consumer finance statutes. The Consent Judgment provides for injunctive relief prohibiting future violations of the Virginia consumer finance statutes, restitution totaling \$46,274.61 to date, forbore interest collection totaling \$8,383.37, and attorneys' fees paid to the Commonwealth in the amount of \$10,000.

In July 2013, we filed suit, and later obtained a default judgment, against Jupiter Funding Group, LLC (Jupiter), a Kansas City-based Internet payday lender, for alleged violations of the Virginia payday loan statutes and the Virginia Consumer Protection Act (VCPA). Jupiter allegedly violated the Virginia payday loan statutes and the VCPA by making loans to Virginians via the Internet without first having obtained a payday loan license from the State Corporation Commission. The Permanent Injunction and Final Order includes judgments for consumer restitution in the amount of \$3,129.60, civil penalties of \$12,500, and attorneys' fees of \$12,000.

A third concluded enforcement matter related to a Richmond-area contractor. In February, we filed suit against Old Richmond Exteriors, LLC (ORE), and its Member/Manager, David W. Isom, alleging violations of the VCPA, and referral rebate statute. In September, the court entered a Permanent Injunction and Final Judgment enjoining ORE and Isom from violating the VCPA and the referral rebate statute, and enjoining Isom from violating Virginia Code § 54.1-1115(A)(4), which prohibits any applicant for a contractor's license from providing false information to the Board for Contractors. The Final Judgment also entered the following judgments in favor of the Commonwealth, and against ORE and Isom: (1) \$19,378.90 for restitution and as trustee for the use and benefit of nine named individuals; (2) \$12,000 for civil penalties (based on violations relating to 12 victims); and (3) \$25,000 for attorneys' fees.

The fourth concluded enforcement matter related to actions of two loan modification companies. In March, we entered into Assurances of Voluntary Compliance (AVCs) with Virginia Beach-based Rysnglo Financial Management, LLC (Rysnglo) and Los Angeles-based Mae Global Enterprises, LLC (MGE), for alleged violations of the VCPA, including the Foreclosure Rescue law. We alleged that these affiliated companies violated the VCPA by charging advance fees in connection with foreclosure avoidance services and failed to deliver the promised services. The AVCs provided for injunctive relief and judgments totaling \$248,200 for consumer restitution, \$85,000 in civil penalties, and \$25,000 in attorneys' fees and costs.

In May, we entered into a Consent Judgment with an individual, Tareq Salahi, and affiliated corporate entities, for their alleged violations of the VCPA in connection with a winery tour business operated in northern Virginia. In our Complaint, we alleged that Salahi and the two corporate entities violated the VCPA by failing to deliver promised wine tours, or failing to deliver tours as promised, and also by misrepresenting on the company website that several reputable businesses were "official partners." The Consent Judgment includes injunctive relief prohibiting future violations of the VCPA, a restitution payment in the amount of \$5,201.66, and judgments against the corporate entities totaling \$5,000 for civil penalties and attorneys' fees.

Finally, we filed two new Virginia-specific consumer actions that remain pending. In April, we filed suit against an individual, Joel Steinberg and two corporate entities, MidAtlantic Loan Solutions (MLS) and MidAtlantic Financial Solutions, LLC (MFS), which ran a foreclosure rescue operation in northern Virginia. We

alleged that MLS contracted with consumers to receive advance fee payments typically amounting to \$1,500 from consumers for services to avoid or prevent foreclosure, in violation of the Foreclosure Rescue law's advance fee ban. Monies received from consumers were deposited into a bank account in the name of MFS, or into Steinberg's personal bank account. Additionally, we have alleged that the Defendants did not deliver services, or did not deliver them as promised, also in violation of the VCPA. In September, the Court held the two corporate defendants in default, and our Office continues to litigate against the individual defendant.

In November, we filed a Complaint against KLMN Readers Services, Inc. (KLMN) alleging violations of the VCPA and the Virginia Home Solicitation Sales Act. KLMN is a Florida corporation that conducts door-to-door sales of magazine subscriptions around the country. When consumers purchase a subscription, their receipt provides a Chesapeake, Virginia contact address and a phone number with a 757 area code. The complaints we received prior to filing fell into two major categories: (1) consumers who waited the suggested 120 day processing period, but still never received the subscriptions they ordered; and (2) consumers who attempted to cancel their subscriptions within 3 days by providing a Notice of Cancellation, but either never received a refund, received a refund after the 10-day period required by statute, or received only a partial refund.

In addition to these Virginia-specific actions, the ACEU entered into five multistate consumer protection settlements that are providing significant benefits to Virginians. First, in January, along with the Attorneys General of 44 other states and the District of Columbia, we entered into a Consent Judgment relating to the alleged robo-signing practices of Lender Processing Services, Inc. (LPS), and two of its subsidiaries. LPS is a Florida-based company that provides technological support to banks and mortgage loan servicers. Under the settlement, LPS agreed to injunctive relief enjoining it from "surrogate signing" and other robo-signing mortgage servicing practices. LPS further agreed to make payments to participating jurisdictions in the aggregate amount of \$120.6 million. Virginia's share of the settlement was approximately \$3.5 million.

In February, along with the Attorneys General of 28 other states, we joined in a \$29 million settlement with Toyota Motor Corporation and its related North America entities over allegations that they had violated the VCPA by concealing safety issues relating to unintended acceleration. Specifically, the states alleged that Toyota violated state consumer protection statutes by failing to disclose known safety defects with accelerator pedals. The settlement includes injunctive relief requiring Toyota to improve its corporate culture and chain of command to enhance safety and responsiveness to regulatory agencies. The settlement also requires Toyota to reimburse the out-of-pocket costs consumers incurred as a result of certain recall campaigns, and to pay the states a total \$29 million in attorneys' fees and costs.

Third, in March, along with the Attorneys General of 37 other states and the District of Columbia, we announced a settlement with Google Inc. relating to alleged privacy violations committed in connection with mapping streets for Google's "Street View" application. While Google's vehicles traveled public streets taking photographs for its Street View service, the vehicles also collected WiFi network identification information purportedly for use in offering geolocation services. Google paid the settling states \$7 million, of which Virginia received \$142,606.88.

Fourth, in October, along with the Attorneys General of 45 other states and the District of Columbia, we joined a \$30 million multistate settlement with Connecticut-based Affinion, and its subsidiaries Trilegiant and Webloyalty.com (collectively, Affinion) to settle allegations that they had misled consumers into signing up and paying for discount clubs and memberships. In complaints filed with the states, consumers alleged that they were charged for services without their authorization, and, that once they learned of the improper charges, they had difficulties canceling or obtaining refunds. As a result of the settlement, Affinion was required to establish a fund of approximately \$19 million for consumer restitution, of which Virginia's approximate share was \$340,000, plus additional restitution to those consumers who filed complaints with their respective Attorney General offices. The Commonwealth also received \$25,000 for reimbursement of its attorneys' fees and costs.

Fifth, in November, along with 36 other states and the District of Columbia, we announced a separate settlement with Google Inc. relating to representations it made concerning the Safari browser and actions it took to circumvent Safari's default privacy settings. As part of the settlement, Google agreed not to deploy the type of code used to override a browser's cookie-blocking settings without the consumer's consent unless necessary to detect, prevent, or otherwise address fraud, security, or technical issues. In addition, Google is prohibited from misrepresenting or omitting material facts about how consumers can use any particular Google product, service, or tool to directly manage how company serves advertisements to its browsers. Google paid the settling states \$17 million. Virginia's share of the settlement was \$392,152.60.

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, including matters arising under the Virginia Electric Utility Regulation Act.

At the SCC, Consumer Counsel was active in a number of cases, including Dominion Virginia Power's biennial review and an APCo application to acquire interests in two coal-fired generation plants. The predominant issue in Dominion's biennial review was the adoption of a new authorized return-on-equity, which directly affects rates. The company had requested a return of 11.50%. Expert testimony sponsored by Consumer Counsel supported a return well below the requested amount, and the SCC ultimately approved an allowed return of 10.0%, more in line with Consumer Counsel's recommendation. The Commission also agreed with Consumer Counsel that Dominion's approved return did not warrant any additional performance adjustment.

In the APCo case, the company requested authority to acquire interests in two coal-fired generation plants, totaling 1,647 megawatts of capacity, from an affiliated

AEP utility. Consumer Counsel raised a number of objections to the proposal, including environmental risks of owning forty-year-old units and the diminished fuel diversity that would result from additional coal generation in APCo's fleet. Consistent with Consumer Counsel's recommendations, the SCC approved only the transfer of the interest in one of the units, at a reduced cost, and denied the transfer of the second. This should reduce the risk of higher costs to APCo's customers in the future.

Consumer Counsel was active in two other SCC cases concerning new power generation projects. In Dominion's application to construct its proposed \$1.3 billion 1,358 megawatt natural gas generation facility in Brunswick County, we argued that Dominion had failed to adequately consider third-party market alternatives to establish that its proposal was the most cost-effective way for the company to obtain the capacity and energy needed. The Commission granted the company's request to construct the facility. On a separate issue in the case, one commissioner adopted arguments first raised by SCC Staff, and supported by Consumer Counsel, that the applicable rate of return bonus for the generation facility should not extend to the capital cost for 23 miles of high-voltage transmission lines and related infrastructure that is separate from the generation plant. Consumer Counsel has appealed the SCC majority's decision on this issue to the Supreme Court of Virginia.

In the other case, we supported a Dominion request to conduct a 3-megawatt customer-owned solar tariff program, which allows customers who voluntarily choose to install solar generating systems on their property to receive a financial payment from the company. The SCC approved this pilot program, and Dominion will evaluate program results to determine if the company should expand its customer-owned solar purchase program.

In another proceeding involving generation facilities, Consumer Counsel supported APCo's \$64.8 million request to convert to natural gas two coal-fired units at its facility in Russell County. The company proposed to retire completely a third coal unit. Consumer Counsel recommended that the company also consider converting the third coal unit to natural gas. The SCC granted APCo's conversion request as filed.

Dominion and APCo also filed a number of applications to update existing rate adjustment clause cost recovery (RAC) mechanisms for various projects. Consumer Counsel participated in each of these proceedings. They included RAC cases for Dominion's Wise County coal plant and demand-side management programs and for APCo's RPS programs, environmental compliance costs, and the Dresden natural gas plant. In each of these proceedings, Consumer Counsel sought to ensure that only reasonable and prudent costs would be recovered from ratepayers.

Consumer Counsel's consumer advocacy at the SCC was not limited to electric utility cases. Virginia Natural Gas Company filed an application authorized by 2008 legislation for "rate decoupling" paired with utility-sponsored conservation and energy efficiency programs, the costs of which are charged to both participating and non-participating customers. Consumer Counsel intervened to ensure that the Commission was satisfied with assumptions used by the company to demonstrate that the programs would be cost-effective.

In insurance proceedings, Consumer Counsel again participated in an annual 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. Our work in this matter includes retaining an actuarial consultant to participate in a working group among the insurance industry, Bureau of Insurance, and other interested stakeholders to identify and address actuarial issues before the rate cases each year. The 2013 proceeding resulted in an overall average increase of 4.1% to the loss cost component of rates, and a decrease of 7.6% to assigned risk rates. We also continued to review and comment upon filings made by Anthem for waivers from conditions imposed by the SCC in connection with the Commission’s approval of Anthem’s acquisition of Trigon and Anthem’s subsequent merger with WellPoint. Anthem had been required to provide certain services from within Virginia. Anthem periodically seeks permission to provide services from outside of Virginia on a program specific basis or for specific groups of services.

In addition to cases at the SCC, Consumer Counsel was active in several matters before the Federal Energy Regulatory Commission (FERC) in 2013. Consumer Counsel intervened in three FERC dockets related to a corporate reorganization of American Electric Power Company (AEP), the corporate parent of APCo. The dockets involved, among other things, the termination of the AEP East power pool and the transfer of interests in certain coal generation units from AEP affiliates to APCo. Consumer Counsel worked to ensure that FERC would not preempt the SCC on decisions regarding APCo’s proposed acquisition of the coal units, and also negotiated changes to AEP’s proposed new Power Coordination Agreement among APCo and AEP affiliates that should benefit APCo and its customers. Consumer Counsel also intervened in an application at FERC of Potomac Electric Power Company and Delmarva Power & Light (PHI) requesting full recovery of alleged prudently-incurred abandonment costs associated with the Mid-Atlantic Power Pathway (MAPP) Project, a planned high-voltage transmission line extending from Virginia to New Jersey. MAPP was projected to cost over \$1.05 billion with an in-service date of 2013. PJM Interconnection LLC (PJM), a regional transmission organization, cancelled the Project in 2012, and PHI requested recovery of \$87 million in planning and development costs to be collected from ratepayers through FERC transmission rates. The total amount of recovery would increase to \$109 million based on carrying charges on capitalized expenses. Consumer Counsel and other state utility consumer advocate offices in the region were successful in persuading FERC to remove all previously approved incentive adders from PHI’s allowed return, and to approve a final settlement reducing total cost recovery to \$80.5 million.

Additionally, in coordination with the SCC, Consumer Counsel represented the Commonwealth in a proceeding at FERC regarding the distribution of settlement funds arising out of an investigation by FERC’s Office of Enforcement. FERC’s investigation determined that certain wholesale power market transactions by Constellation Energy Commodities Group violated FERC’s Anti-Manipulation Rule. As part of the settlement, Constellation agreed to disgorge unjust profits of \$110 million. The disgorgement included \$6 million to be allocated among states within PJM, including Virginia. Consumer Counsel participated in oral arguments at FERC in late 2012, and in 2013 secured approximately \$760,000 for Virginia’s share of the settlement funds, which are to be used to support consumer litigation for the benefit of electric utility consumers throughout the Commonwealth. Consumer Counsel also

worked with other state Attorneys General and consumer advocate offices to secure a portion of the settlement proceeds to fund a permanent position for an individual who will provide a consistent presence in PJM stakeholder proceedings on behalf of the individual state consumer advocate offices to ensure that residential customers' interests are adequately represented at PJM.

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 seven 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 the Office of the Attorney General, and one attorney serves as general counsel to the Unclaimed Property Division of the Department of Treasury. In late 2013, the Division assumed the oversight and coordination responsibilities for non-Medicaid related recoveries under the Fraud Against Taxpayers Act.

The Division is self-funded by contingency fees earned from its recoveries on behalf of state agencies. During the 12 months from July 1, 2012, through June 30, 2013, gross recoveries for 41 agencies totaled more than \$11.3 million, up by \$.8 million from the previous fiscal year. During fiscal year 2013, the Division recognized fees of almost \$2.5 million, up \$.1 million from the previous year. Fiscal year 2013 fees were nearly \$700,000 in excess of Division expenditures. Out of the excess fees, \$500,000 was returned to the agencies, resulting in a 21.1% reduction of the base contingency rate paid by agencies. The remainder of the excess fees were turned over to the General Fund at fiscal year end.

Sexually Violent Predators Civil Commitment Section

Since the Sexually Violent Predator Act became effective in 2003, the Commitment Review Committee and the courts have referred a total of 1147 cases to the SVP Section. As of the end of 2013, the Section has filed a total of 632 petitions for civil commitment or conditional release and reviewed another 499 cases where it was determined that offenders did not meet the statutory criteria, so no petition was filed. In 2013, the Section filed 79 petitions, made 386 court appearances, and travelled approximately 57,285 miles. Since 2003, approximately 361 persons have been determined to be a sexually violent predator and ordered 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 120 offenders determined to be sexually violent predators have been placed on conditional release.

COMMERCE, ENVIRONMENT, AND TECHNOLOGY DIVISION

The Commerce, Environment, and Technology Division was formed in 2013 as a result of a restructuring of Divisions in the Office. Composed of three Sections - Technology and Procurement, Financial Law and Government Support, and Environmental - the Division provides comprehensive legal services to secretariats,

executive agencies, state boards and commissions for much of the Commonwealth's government; such services cover a wide range of substantive areas, including 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 Wireless E-911 Services Board, the Virginia Geographic Information Network Advisory Board, the Innovation and Entrepreneurship Investment Authority, the Secretary of Administration (for intellectual property, procurement, and supplier diversity issues), the State Corporation Commission (for procurement matters), and the Department of Minority Business Enterprise (for procurement and supplier diversity issues), as well as dozens of other agencies and institutions in areas involving contracts, technology issues, intellectual property, and procurement.

In 2013, the Section provided legal assistance for Commonwealth programs, concerns, and initiatives such as public procurement law reform, the Commonwealth's small business enhancement program, and the Governor's response to a federal inquiry into state contracting practices. Long-standing issues relating to insurance coverage for state vehicles driven by contract employees were resolved. The Section further provided guidance related to the implementation of cooperative procurement and legislatively directed award of contracts to charitable institutions, as well as conflict-of-interest, ethics, and Freedom of Information Act matters, and contractual issues affecting the Unemployment Insurance Modernization project and acquisition of a financial management system for the Virginia Employment Commission. The Section also supplied necessary legal support for the procurement of services to replace the Clerk's Information System for the State Corporation Commission, the resolution and recovery of overpayments from the Wireless E-911 Fund, the transition to a new statewide provider of electronic government services, and the procurement of photogrammetric data for Virginia's Base-mapping Program.

The Section also provided necessary legal support to the Virginia Information Technologies Agency in its management of the Commonwealth's Comprehensive Infrastructure Agreement with Northrop Grumman Systems Corporation, including assistance to help the agency address performance problems, plan for long-term issues, and negotiate numerous contract amendments relating to licensing, security, protection of criminal justice and federal tax information, and other matters. The Section also provided assistance for the Commonwealth's certification program for employment services organizations, the Supreme Court's land records remote access initiative, the Commonwealth's Alternative Fuels initiative, the development of guidelines for collection of debts by Commonwealth's Attorneys, and implementation of the Electronic Health and Human Resources Program.

This Section provided legal assistance to other Commonwealth agencies, institutions and boards in regard to various contract performance and billing problems, technology acquisitions, trademark applications, licensing of data and

software to other parties, data security issues, intellectual property agreements, Internet issues, structuring of procurements, and resolution of procurement protests and litigation issues. Additionally, the Section provided workshop training for public procurement professionals at the annual Public Procurement Forum sponsored by the Department of General Services, continuing legal education sponsored by the Office of the Attorney General, and briefing for the General Assembly's Special Joint General Laws Subcommittee on issues of law relating to enforcement and oversight of the Virginia Public Procurement Act requirements.

Financial Law and Government Support Section

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

This Section's representation of the Department of Taxation covers litigation challenging the assessment and collection of state taxes, including retail sales and use taxes and corporate and individual income taxes, as well as complex litigation arising under the Commonwealth's land preservation tax credits program as a result of disputes between land owners and the Department of Taxation regarding the valuation of donated land or conservation easements. During 2013, likely due in part to improving economic conditions, the number of unemployment benefit appeals handled by VEC counsel at the Circuit Court level decreased steadily. In 2013, 133 petitions were handled, while there 168 petitions in 2012 and 174 in 2011. Nonetheless, the number of appeals from unemployment benefit decisions remains elevated as compared to an average of approximately 100 appeals per year in years prior to the economic downturn. For the ABC, the Section litigated six appeals of administrative actions at the circuit court level.

The Section also prosecutes violations of animal fighting and animal cruelty laws, all of which resulted in favorable outcomes for the agency. The Section responded to 60 requests for assistance from animal control, law enforcement and commonwealth's attorneys regarding animal neglect/cruelty, dangerous dog, and animal fighting cases throughout the Commonwealth. The Section prosecuted two

individuals for animal cruelty in 2013, and under special prosecution agreements with several localities, assisted in three animal fighting investigations throughout the year.

Environmental Section

The Environmental Section represents agencies reporting to the Secretary of Natural Resources, the Secretary of Agriculture and Forestry, the Secretary of Health, and the Secretary of Commerce and Trade, including the Department of Environmental Quality, the Department of Conservation and Recreation, the Department of Mines, Minerals and Energy, the Department of Forestry, and the Environmental Health Division of the Virginia Department of Health. 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, and related matters.

In 2012, the Section filed suit against the U.S. Environmental Protection Agency (EPA) on behalf of the Virginia Department of Transportation (VDOT), seeking judicial review of an EPA issued Total Maximum Daily Load (TMDL) controlling the quantity or flow of water to be discharged into Accotink Creek in Fairfax County. The Fairfax County Board of Supervisors joined VDOT in suing the EPA. The Accotink TMDL was one of the first four so-called “flow TMDLs” established by the EPA anywhere in the United States. In 2013, the U.S. district court granted plaintiffs’ Rule 12(c) motion for judgment on the pleadings and entered an order vacating the TMDL on the grounds that EPA could not regulate water flow as a proxy for pollution. The EPA did not appeal the Court’s decision.

In 2013, the Section represented the State Water Control Board (SWCB) in a long-running action brought by the Chesapeake Bay Foundation (CBF) and the Citizens of Stumpy Lake seeking judicial review of SWCB’s 2003 Virginia Water Protection (VWP) Permit and the Board’s Virginia Water Protection Permit. By final order entered in January 2012, the Circuit Court held that CBF and the Citizens of Stumpy Lake failed to meet their burden of establishing (i) that the SWCB had insufficient evidential support for its findings, or (ii) that the Board had violated § 62.1-44.15:5(D) or any other laws or regulations. CBF appealed that order in October 2012. Oral argument on the merits and the Commonwealth’s motion to dismiss for lack of appellate jurisdiction was heard by the Court of Appeals in December 2013. The court’s decision is pending. In addition, the Section represented the Department of Environmental Quality (DEQ) and the SWCB in two administrative appeals seeking judicial review of Virginia Pollutant Discharge Elimination System permits, both of which were dismissed, and in two appeals seeking review of regulations related to the land application of biosolids, and to stormwater discharges from construction activities, both of which were pending in the Richmond Circuit Court as of the end of 2013.

The Section represented the Marine Resources Commission (VMRC) in an administrative appeal pursued by the Chincoteague Inn. In response to an enforcement action brought by Commission staff, the Commission issued an administrative order requiring the Inn to remove a barge that had been moored to the restaurant for the sole purpose of expanding its seating capacity. The Inn appealed. The circuit court ruled in favor of the Inn, finding that the barge was a vessel and thus beyond the Commission’s jurisdiction. VMRC pursued an appeal to the Court of

Appeals where a panel found that federal maritime law did not preempt the Commission's jurisdiction and remanded the matter for further determination consistent with its opinion. The Inn petitioned the Court of Appeals for a rehearing *en banc*, which the Court granted. The *en banc* opinion found that the Commission lacked jurisdiction over the barge because it was a vessel. VMRC petitioned the Supreme Court of Virginia for review, and the Court granted the petition. The case has been briefed and argued; the Supreme Court's ruling is anticipated in April 2014. The Section further represented the VMRC in multiple Virginia Administrative Process Act appeals, after-the-fact permits for the use of state-owned bottomlands, and in a tax lien real estate sale.

The Section represented the Virginia Department of Health (VDH) in a Virginia Indoor Clean Air Act (VICAA) case that involved the application of VICAA's smoking restrictions. The Court of Appeals found that the facility, while a restaurant, was also a retail tobacco store and therefore exempt from the VICAA. In a pending petition to the Virginia Supreme Court, we argue that VICAA does not exempt those restaurants that are located on the premises of retail tobacco stores. In addition, since August 2013, the Section has been handling an administrative appeal involving whether a particular property is subject to sewage permit requirements. The property owners argue that the property is neither a home nor a "place where humans congregate" and therefore no permit is required.

The Section counseled the Department of Forestry in the Cobbs Creek Reservoir Wetland Mitigation transaction, which involved a sale of stream mitigation units by the Department of Forestry to Henrico County. The units were created by encumbering land in Cumberland State Forest with a recorded Declaration of Restrictions and Stewardship Plan. The transaction involved a purchase and sale agreement with Henrico County, who required the mitigation for its reservoir project. The project presented several novel issues, including sovereign immunity, in that it involved a recorded restriction on state property and possible enforcement by the U.S. Army Corps of Engineers against the Department. The Section successfully amended the transaction documents to protect the Department and the Commonwealth as well as insure the legal viability of the mitigation long term. The Corps of Engineers and Henrico agreed to changes, and the Department of Forestry received \$9.8 million for protecting land in the State Forest.

Finally, the Section provided legal counsel to the Department of Conservation and Recreation (DCR) during the ongoing development of the Resource Management Plan Regulations as well as other regulatory matters, including updating the Nutrient Training and Certification regulations. The Section also was an active participant in a legislative study to explore options to resolving the issues of ownership and public access to non-tidal bottomlands.

HEALTH, EDUCATION, AND SOCIAL SERVICES DIVISION

The legal support provided by the Health, Education, and Social Services Division has an impact on many programs that benefit, protect, and enhance the quality of life of the citizens of our Commonwealth. Client agencies of this Division face challenging issues that affect the interests of health care providers and their clients, mental health and social services providers and their clients, and Medicaid providers and recipients. This Division represents the boards that regulate health

professionals, including physicians, dentists, nurses, and pharmacists. The Division's attorneys provide advice to much of Virginia's public education structure, to include the Department of Education, the Virginia Community College System, and all of Virginia's public colleges and universities. Attorneys working on child support enforcement cases successfully secure many orders assuring that child support obligations are met.

Child Support Enforcement Section

In 2013, the Child Support Section continued to handle effectively and efficiently a vast number of child support cases on behalf of the Department of Social Services' Division of Child Support Enforcement (DCSE). The Section appeared at 139,442 child support hearings, the majority of which were heard on over 4,231 dockets in juvenile and domestic relations district courts dedicated to child support cases. The Section established new child support orders totaling in excess of \$1.3 million and enforced existing orders by obtaining lump sum payments of nearly \$13 million and sentences totaling 767,297 days in jail. The bankruptcy unit of the Section monitored and filed pleadings in 596 Chapter 7 and Chapter 13 cases involving child support arrears. The Section reviewed and handled seven cases in the Court of Appeals of Virginia. To enhance efficiency in court preparation and presentation, the Section also worked with DCSE on technology improvements. Section attorneys worked with DCSE to create a block of essential pleadings and information needed for court in the four main areas of paternity, order establishment, modification of orders, and show cause hearings.

In addition, the Section assisted the 15-member Child Support Guidelines Review Panel in its quadrennial review of the child support guidelines to determine their adequacy based on current economic data on the cost of raising children. The Panel submitted its Report to the Governor and General Assembly for consideration during the 2014 legislative session. The Panel recommended that the General Assembly make several changes to the guidelines, including the adoption of a new child support schedule of basic monthly child support obligations for parents with combined monthly gross incomes up to \$35,000. That and other recommendations were adopted, with minor amendments, in the 2014 Session. The Section also continued to monitor a comprehensive review of the portions of the *Virginia Administrative Code* pertaining to child support. Of 74 sections, the attorneys recommended repealing 55 sections (74%) and amending 18 others. The Board of Social Services approved the amended proposed regulation in December.

Education Section

The forty lawyers in the Education Section provide advice, counsel, and guidance to the Commonwealth's educational institutions, including the Commonwealth's public colleges and universities and museums. For the Department of Education and K-12, this guidance often directly influences local schools in implementing the Standards of Learning and Standards of Quality, providing access to technology for disadvantaged students, maintaining discipline and safety on school grounds, complying with federal education programs, and improving school facilities. Virginia's fourteen colleges and twenty-three community colleges are self-contained

communities with the full range of legal needs: campus safety and security, admission and educational quality issues, personnel issues, the proper relationship between colleges and the Commonwealth, contracts, procurement, and financing.

In 2013, Education Section attorneys continued their work on matters arising from the 2007 shootings on the Virginia Tech campus. The Section provided advice on issues related to Family Education Rights Privacy Act, mental health, disaster planning, and campus safety generally. Section attorneys also collaborated with lawyers from the Trial Section in the Office's efforts to conclude successfully the litigation and administrative proceedings related to the event, as described above.

Health Services Section

The attorneys in the Health Services Section represented the Commonwealth and the Department of Behavioral Health and Developmental Services (DBH) in the implementation of the settlement agreement approved by the United States District Court for the Eastern District of Virginia between the United States and the Commonwealth regarding the state's system of services for individuals with developmental disabilities. The Section also assisted DBH with legal issues arising from the closing the first of four state training centers. Further, the Section's attorneys defended (DBH) in a federal district court lawsuit filed by a former resident of the Virginia Center for Behavioral Rehabilitation claiming violations of his constitutional rights. The Section also successfully defended a petition for a writ of habeas corpus filed in the Supreme Court of Virginia by an insanity acquittee in the custody of DBH. The Section also successfully defended an appeal to the Virginia Court of Appeals regarding judicial authorization for treatment.

The Section continued its efforts assisting the Department of Health Professions and its fourteen health regulatory boards in numerous disciplinary proceedings under the Administrative Process Act. Many of these cases were appealed by the disciplined professionals to state courts, including the Virginia Court of Appeals, and the Section's attorneys successfully represented the boards. Section attorneys also represented the Department of Health in multiple cases challenging the Commissioner's decisions regarding issuance of certificates of public need. The attorneys also advised the Department of Health on a variety of issues, including the reporting of child abuse and neglect, vital records, the exchange of health information, emergency medical services, employee grievances, and emergency preparedness. Finally, the Section successfully defended the Department for Aging and Rehabilitative Services in the Fourth Circuit Court of Appeals in a lawsuit filed by an applicant for disability benefits who had alleged that his constitutional rights had been violated.

Medicaid & Social Services Section

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 in 2013, thereby continuing to assist these clients in protecting the safety of children and other vulnerable citizens of the Commonwealth. The Section also was responsible for the recovery of millions of public dollars that had been improperly disbursed.

The Section assisted DMAS in implementing the first phase of significant reforms to the Medicaid program, as required by the 2013 directive of the General Assembly. Phase One of included the Commonwealth Coordinated Care program, or the Medicare-Medicaid Financial Alignment Demonstration, which now allows Virginia to integrate covered Medicare and Medicaid benefits under one system for those dually eligible. The Section reviewed the Request for Proposal and subsequent Memorandum of Understanding with the Centers for Medicare and Medicaid Services.

By successfully defending a number of appeals related to provider reimbursement for overpayment claims, the Section protected the Commonwealth's treasury. The Section obtained favorable decisions by the Court of Appeals of Virginia in *Family Redirection Institute, Inc. v. DMAS* and *Professional Therapies v. DMAS*. The *Professional Therapies* case concerned the interpretation of a complex DMAS emergency regulation that changed the reimbursement methodology for outpatient rehabilitation providers from a cost-based methodology to reimbursement based on a fee schedule. The Section also successfully defended many eligibility determinations made by DMAS in administering the Medicaid program. The Section also collaborated with the Office's Medicaid Fraud Control Unit in *Commonwealth v. McKesson Corporation*, which resulted in a settlement that will return more than \$37 million to the Commonwealth.

The Section also counseled DMAS in an investigation by the United States Department of Health and Human Services, Office for Civil Rights (OCR) regarding a breach of patient records confidentiality. In March 2013, OCR opened an investigation of the breach incident. Because of the Section's thorough response to OCR and corrective action subsequent to the incident, this investigation has now been closed. Finally, because the Medicaid program is a federal-state partnership, DMAS promulgates regulations to provide guidance to both recipients and providers. The Section reviewed numerous regulatory packages in 2013, including emergency proposed regulations for Mental Health Support Services (MHSS). The goal of the regulations is to strengthen the eligibility requirements for MHSS, which will ensure that those recipients who truly need the services receive them.

In its representation of DSS, the Section successfully litigated numerous cases in 2013. In *Dixon v. DSS*, a Founded-Level One physical abuse case involving the poisoning of a newborn, the Section successfully upheld the founded disposition of child abuse. Section attorneys also defended a number of licensing decisions made by DSS, including revocations or denials of licenses on substandard assisted living facilities, such as *In Re: Ashwood Assisted Living, LLC*. In *Oakwood Assisted Living, LLC v. VDSS*, the court agreed that VDSS could relocate the residents of Oakwood following VDSS' refusal to renew Oakwood's license to operate. The court denied Oakwood's motion for a preliminary injunction and made clear that, even without the jurisdictional bars, the requested relief would not have been granted as there was no merit to Oakwood's argument. In *Guertler v. VDSS*, upon determining that there was no evidence the agency had failed to comply with the Virginia Freedom of Information Act, the court dismissed with prejudice a writ of mandamus. The Section also handled a number of welfare benefits cases, including *Dotson v. Brown, Commissioner, Virginia Department of Social Services*, a case involving the

Supplemental Nutrition Assistance Program that was dismissed because the applicant had a Maryland felony drug conviction.

The Section participated in several import projects in 2013. As part of the Secretary of Health and Human Resources' technology initiatives, the Secretary has been working with the Secretaries of Technology and Transportation to develop the Enhanced Memorandum of Understanding (E-MOU), a data sharing agreement intended to enhance the security of the data maintained and exchanged by the various agencies in the three Secretariats for various programs administered or supervised by those agencies. The Section, along with the Health Services Section, spent many hours reviewing and revising the E-MOU and provided guidance to ensure that the E-MOU maintains its flexibility and usefulness as new agencies join the agreement. In 2013, the adult services unit from DSS joined the Department for Aging and Rehabilitative Services (DARS) as its Adult Protective Services Division. The Section worked closely with DSS and DARS to ensure a successful transition, which included the review and certification of regulatory action. The Section also worked with DSS' Human Resources Department to revise the Board of Social Services Human Resource Manual to Local Departments regarding employee possession of weapons in the workplace. Upon review of the two policies concerning weapons and Virginia law, advice was given that parts of the current policies should be amended due to conflict with Virginia law, and the Office drafted revised policies. Finally, based on the results of a 2012 federal audit finding that several areas, including appeals for recipients of Title IV-E benefits, where Virginia was not in compliance with federal law or regulation, this Section assisted in drafting both legislation passed in 2013 that granted certain foster care appeal rights and an emergency regulation that the Board of Social Services adopted in October.

The Office of Comprehensive Services, along with its supervisory body, the State Executive Council, administers 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. The Section advised OCS and SEC regarding a policy that requires localities to use Medicaid eligibility criteria for the procurement of certain community-based mental health services for at-risk youth and families using CSA state pool funds.

PUBLIC SAFETY AND ENFORCEMENT DIVISION

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

Computer Crimes Section

In 1998, the General Assembly authorized and funded the creation of a Computer Crime 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. 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 2013, the Computer Crime Section continued to travel extensively throughout the Commonwealth to investigate and prosecute such crimes. The Section handled cases in the counties of Chesterfield, Dinwiddie, Fairfax, Floyd, Frederick, Henrico, King William, Prince William, Spotsylvania, Surry, and Westmoreland, and the cities of Charlottesville, Danville, Richmond, and Roanoke, 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.

The Computer Crime Section's three attorneys obtained 43 convictions during 2013 for crimes of production of child pornography, distribution of child pornography, receipt of child pornography, Internet solicitation of children, and computer fraud. One notable case is *Commonwealth v. Rice*, in which the defendant was identified through an investigation into the trading of child pornography over peer-to-peer networks. An undercover officer downloaded four child pornography files from Rice's computer and agents subsequently executed a search warrant at his residence. A resulting forensic examination of the defendant's computers revealed that the defendant had sexually abused his juvenile cousin and had produced pornographic images depicting the abuse. Rice entered guilty pleas to three counts of production of child pornography and one count of aggravated sexual battery and was sentenced to 25 years of active imprisonment with an additional 25 years of suspended time.

The defendant in *United States v. Stanley* was arrested during execution of a search warrant at his residence after a video was recovered from his computer showing him sexually molesting a 12-year-old girl. Stanley was initially detected trading child pornography on a peer-to-peer network and a subsequent computer forensic examination revealed that he had collected over 2,000 videos and images of child pornography. Further evidence indicated that he had purchased small video cameras in order to hide them and film the 12 year-old in the shower while he babysat her. Stanley pled guilty to production of child pornography and was sentenced to 17 years and six months imprisonment and ordered to pay restitution to the victim.

The defendant in *United States v. King* was identified through an investigation into a ring of individuals involved in the production and distribution of child pornography. An FBI agent in Colorado identified an individual who had created multiple Internet boards and chat rooms in which users would discuss sexual contact with minors and trade child pornography. Investigation revealed that King had uploaded approximately 1800 images and 38 videos of child pornography to a photo-sharing board that was part of the group. Based on this information, agents executed a search warrant at the defendant's residence where he admitted being part of a trading ring of child pornography; including witnessing one member of the ring molest his niece on ten to 20 occasions via webcam. The court sentenced the defendant to 12 years of active imprisonment. In *United States v. Sleezer*, undercover FBI agents

detected Sleezer sharing several child pornography videos over a peer-to-peer network. Following execution of a search warrant at the defendant's residence, a forensic examination of his computer equipment revealed that he had downloaded and saved 493 videos and 397 images of child pornography involving prepubescent children. Sleezer was actively sharing 51 child pornography files as agents entered his residence to execute the warrant. Evidence also revealed that he had utilized his neighbor's wireless Internet connection to distribute the pornography. The defendant pled guilty to distribution of child pornography and was sentenced to nine years of active imprisonment.

Another significant case, *Commonwealth v. Alston*, involved a priest and former Prince George County junior high school teacher who recently had moved to Greensboro, North Carolina. He was discovered using social networking sites and text messages to engage in sexually explicit conversations with a former student. The minor victim showed the messages to her father, who then reported the activity to the Virginia State Police. Special agents with state police pursued the lead, during which time Alston continued to solicit the victim for sexual activity, requested nude photographs, and sent an explicit image of himself. He also made plans to travel to Virginia to meet the victim for sex. The defendant pled guilty to using a computer to solicit a minor, and the court imposed a sentence of three years and six months of active imprisonment.

In 2013, the Office's Computer Forensic Unit within the Computer Crime Section assisted in alleviating Virginia law enforcement's computer forensic backlog. The Unit handled 50 total cases for 20 separate jurisdictions across the Commonwealth. As part of those cases, the Unit forensically examined 221 pieces of evidence, including computer hard drives, cell phones, and various storage devices. The Unit also completed a state-of-the-art computer forensics lab located in the OAG, which has allowed for increased work capacity. There are currently three computer forensic examiners/investigators assigned to the Unit and the Office hopes to expand this number in the coming years.

In addition to investigating and prosecuting computer crimes, the Section continues to serve as a clearinghouse for information concerning criminal and civil misuses of computers and the Internet. In 2013, the Section's investigators handled over 200 investigatory leads and citizen complaints funneled through the Section's email inbox and the Internet Crime Complaint Center, which serves as the primary resource nationwide for computer crime complaints. The Section also reviewed 271 notifications from companies experiencing database breaches for compliance with Virginia's database breach notification law. Given these responsibilities, members of the Section often are called upon to give presentations or to make media appearances to inform the public about issues such as the increasing scourge of identity theft, computer fraud, computer security, and the use of the computers and the Internet by sexual predators to make contact with children.

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 three 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.

The Section's team of prosecutors and investigators also continue to educate and train prosecutors and law enforcement statewide. Throughout 2013, Section's members trained law enforcement, including school resource officers, and prosecutors at various conferences and police training academies in Fredericksburg, Hampton, Richmond, Roanoke, and Weyers Cave. 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, Section members continued to travel throughout Virginia to speak to students and parents and deliver the office's "Safety Net" presentation. "Safety Net" is an interactive presentation that addresses issues of "cyber-bullying" and "sexting," and utilizes 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. In 2013, the high-demand presentation was delivered over 50 times to schools in Chesterfield, Craig, Fairfax, Falls Church, Henrico, King William, Norfolk, Orange, Prince William, Richmond, and many other locations throughout the Commonwealth.

Correctional Litigation Section

The Correctional Litigation Section represents the Departments of Corrections, Juvenile Justice, and their policy-making Boards, as well as the Parole Board. Further, the Section represents the Secretary of Public Safety and the Governor on extradition matters, Commonwealth's Attorneys on detainer matters, and Correctional Enterprises. During 2013, the Section was responsible for handling 87 Section 1983 cases, 1 employee grievance, 123 habeas corpus cases, 184 mandamus petitions, 44 inmate tort claims, 10 warrants in debts, and 423 advice matters. In 2013, the Section handled several significant matters in the federal district courts, the Fourth Circuit Court of Appeals and the circuit courts of the Commonwealth, including 6 trials, 11 jury trials, 27 hearings, 13 motions hearings, and 27 videoconferences.

Two of the significant matters the Section handled in 2013 involved claims by inmates regarding medical care. *Scott v. Clarke* was filed as a proposed class action lawsuit in which the plaintiffs allege that they are being denied adequate medical care in violation of the Eighth Amendment to the United States Constitution. They seek declaratory judgment and injunctive relief requiring the defendants to provide adequate medical treatment. The proposed trial date is in December of 2014. In *De'lonta v. Clarke*, a civil action filed by a pre-operative transgender female, the plaintiff alleges that defendants have denied her adequate medical care, including sex reassignment surgery, to treat her Gender Identity Disorder. The plaintiff seeks \$50,000 in damages from each of two defendants and an injunction ordering defendants to provide her with adequate medical care, including sex reassignment surgery, but the plaintiff since has been released on discretionary parole.

Many of the cases litigated in 2013 involve claims of assault. *Grantham v. Commonwealth* was filed in state court pursuant to the Virginia Tort Claims Act. The Section successfully defended plaintiff's claims of negligence and gross negligence against various Department of Corrections defendants. The plaintiff alleged that his

cellmate sexually assaulted him and that the assaults had occurred because of the defendants' failure to conduct proper cells searches and shakedowns and their assignment of the assailant to the plaintiff's cell when they knew or should have known that he was a threat to the plaintiff. In *Carter v. Honaker*, the plaintiff sought damages in excess of \$1 million and alleged deliberate indifference by the defendants when he was assaulted at the Keen Mountain Correctional Center. The plaintiff claimed that he had informed the defendants that he was in fear for his safety due to a prior perceived threat from his assailant, and that the defendants did nothing to separate him or protect him from the other inmate. He also claimed that one of the defendants did not act to stop the assault and, in fact, left the scene while the assault was occurring. After two days of deliberations, a jury reached a verdict in favor of the defendants. In another matter, *Reid v. Carico*, the plaintiff alleged that he had been assaulted by the defendant corrections officers and had suffered various injuries, but the jury returned a verdict in favor of all defendants. *Chapman v. Commonwealth* alleges numerous constitutional violations by various prison officials involving an alleged sexual harassment and battery by a female counselor. The court has denied our Motion for Summary Judgment as to the plaintiff's Eighth Amendment claims against one defendant. A jury trial is set for May 2014.

Finally, in the consolidated case of *Bass, Administratrix v. Commonwealth*, the plaintiff alleged that the defendants were liable to her for the wrongful death of her son, an inmate in the Department of Corrections, and sought total damages of \$3,500.00. In June, after a hearing on our Motion for a Demurrer, the court dismissed the case. The plaintiff has appealed that decision to the Virginia Court of Appeals.

Criminal Litigation Section

The Criminal Litigation Section handles an array of post-conviction litigation filed by state prisoners challenging their convictions, including criminal appeals, state and federal habeas corpus proceedings, petitions for writs of actual innocence, and other extraordinary writs. The Section's Capital Unit defends against appellate and collateral challenges to all cases in which a death sentence was imposed. The Section represents the Capitol Police, state magistrates, and the Commonwealth's Attorneys' Services Council; and several attorneys in the Section also review applications for electronic surveillance. In 2013, the Section defended 1035 petitions for writs of habeas corpus and represented the Commonwealth in 343 appeals in state and federal courts. The Section received 32 petitions for writs of actual innocence and 26 petitions for writs of mandamus or prohibition. In addition, Section attorneys provided informal advice and assistance to prosecutors statewide in over 100 instances in 2013.

The Section litigated several significant in the Supreme Court of Virginia in 2013. In *Commonwealth v. Tuma*, the Court reversed the decision of the Court of Appeals and held that in a prosecution for taking indecent liberties with a child, aggravated sexual battery, and animate object penetration, the Commonwealth committed no Due Process violation by delaying production of an audio-tape recording of an investigative interview with the young victim that could have been used in impeachment of four witnesses, because the recording was made available to the defendant during trial in sufficient time to allow for its effective use. In *Henderson v. Commonwealth*, the Court established the procedure for determining the

admissibility of hearsay evidence at a probation revocation hearing, when a Confrontation Clause objection is raised, adopting both the reliability and balancing tests. In *Boone v. Commonwealth*, the Court addressed the use of prior violent felony convictions in a prosecution for possession of a firearm by a convicted felon, holding that the applicable statute does not preclude the Commonwealth from presenting evidence of more than one prior violent felony.

The Section also litigated numerous cases in the Court of Appeals of Virginia. For example, in *Leftwich v. Commonwealth*, the Court affirmed Leftwich's eight convictions for embezzlement. The Court rejected the defendant's argument that to be convicted of embezzlement, she had to be "entrusted" with the converted funds. The Court held that because the applicable statutory provision contains three separate scenarios in which a person may be convicted of embezzlement, the evidence that Leftwich wrongfully and fraudulently converted checks she received for her law firm was sufficient, in itself, to sustain the conviction. In *Watkins v. Commonwealth*, the Court affirmed the defendant's conviction for attempted possession of a firearm by a felon, holding that the evidence was sufficient to prove the defendant had committed the overt act necessary to accomplish the purpose of acquiring a firearm when he submitted incorrect information on the required state police criminal background form and that his later cancellation of the purchase did not negate his criminal culpability. In *Dillsworth v. Commonwealth*, the Court affirmed a conviction for possession of a firearm by a violent felon, holding that Dillsworth's prior conviction in Maryland for an offense substantially similar to Virginia's offense of malicious wounding constituted a proper predicate for the possession of a firearm charge. In another matter, *Huguely v. Commonwealth*, the Commonwealth argued that Huguely's conviction for second degree murder for beating to death fellow UVA student and former girlfriend, Yeardeley Love, should be affirmed and the Court should reject Huguely's claim that his Sixth Amendment right to counsel was violated when trial proceeded without one of his attorneys, who was ill.

The Court of Appeals also issued opinions that will clarify trial procedures in criminal cases. In *Bailey v. Commonwealth*, the Court affirmed Bailey's conviction and held, as a matter of first impression in Virginia, that a defendant who exercises his Fifth Amendment privilege to remain silent is not an unavailable declarant for purposes of the declarations-against-interest-exception to the hearsay rule. Also, the Court, sitting en banc, held in *Robertson v. Commonwealth* that no Confrontation Clause violation occurred when a supervisor of a department store testified about a list of stolen items that she and another employee jointly prepared. The Court held that such a process was acceptable even in light of *Melendez Diaz v. Massachusetts*, because not everyone involved in preparing a document is required to testify under the Confrontation Clause. In *Farmer v. Commonwealth*, the Court affirmed the defendant's convictions for murder, rape, statutory burglary, and robbery, holding that the use of inconsistent theories in the separate trials of co-defendants is not a violation of the Due Process Clause.

The Section's Capital Unit defended on appeal and collateral attack the convictions of persons sentenced to death under Virginia law. One death-row inmate was executed in 2013. In *Wolfe v. Clarke*, the Fourth Circuit reversed the district court's order barring retrial. In *Gray v. Pearson*, and *Juniper v. Pearson*, the Fourth Circuit granted partial

remands in both cases for petitioners to identify defaulted claims that nevertheless may be reviewed under the rule announced in *Martinez v. Ryan*.

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 and elder abuse and neglect in health care facilities. MFCU comprises investigators, auditors, analysts, computer specialists, attorneys, outreach workers and support staff. Over the past 31 years, MFCU successfully has prosecuted more than 150 providers in cases involving patient abuse and neglect or fraudulent acts committed against the Virginia Medicaid program, and has recovered over \$1.8 billion in court-ordered criminal restitution, asset forfeiture, fines, penalties, civil judgments, and settlements.

MFCU has seen an increase in referrals as it continues to work with local jurisdictions and agencies throughout the Commonwealth. Due to the increase in referrals of fraud against the Virginia Medicaid program, the Virginia Attorney General's Office received permission from the United States Department of Health and Human Services' Office of Inspector General (HHS-OIG) to increase MFCU's staff by 20 positions, thereby bringing the total MFCU positions to 106.

In 2013, MFCU handled 106 active criminal investigations, and its Civil Investigations Squad opened 123 new civil cases. MFCU obtained 24 convictions, and the recoveries from criminal and civil investigations totaled more than \$66,073,616. Restitution checks in excess of \$50,566,237 were delivered to the Department of Medical Assistance Services (DMAS) for deposit into the Commonwealth's General Fund Health Care Account.

Several significant settlements were reached in 2013, each reflecting numerous years of investigation and active litigation. For example, the Commonwealth recovered approximately \$21 million in two health care fraud settlements with Johnson & Johnson and its subsidiary Janssen Pharmaceuticals, Inc. These settlements resulted from *qui tam* cases filed in the United States District Court for the Eastern District of Pennsylvania and the United States District Court for the District of Massachusetts. In 2010, Virginia, together with the United States and four other states, intervened in two *qui tam* actions against Johnson & Johnson and alleged Johnson & Johnson paid kickbacks to Omnicare, a long-term care pharmacy provider, to induce Omnicare to switch nursing home patients to Johnson & Johnson drugs and that such kickbacks resulted in false claims for reimbursement submitted to government healthcare programs, including Medicaid. The total settlement amount agreed upon was \$149 million; Virginia received approximately \$3,574,970.55 as part of a larger settlement negotiated with Johnson & Johnson over allegations that the company also had violated the Virginia Fraud Against Taxpayers Act. The state Medicaid share of this totaled \$1,775,497.55.

A global settlement also was reached with Johnson & Johnson and Janssen Pharmaceuticals, Inc., to resolve additional civil and criminal claims that alleged unlawful marketing practices, including the promotion of "off-label" use, to promote the sales of their atypical antipsychotic drugs, Risperdal and Invega. Under the terms of the civil settlement, the companies paid over \$1.2 billion to the states and the federal government. The settlement resolved four federal *qui tam* actions seeking relief under the federal False Claims Act and similar state False Claims statutes. In

addition, Janssen Pharmaceuticals, Inc. pled guilty in federal court to a criminal misdemeanor charge of misbranding Risperdal in violation of the Food, Drug, and Cosmetic Act. As part of its criminal plea, Janssen agreed to pay an additional \$400 million in criminal fines and forfeitures. The manufacturers' unlawful conduct caused false and/or fraudulent claims to be submitted to or caused purchases by government funded health care programs, including the state Medicaid programs. As part of the global resolution, the companies entered into a Corporate Integrity Agreement with HHS-OIG, which will require close monitoring of the company's future marketing practices. Virginia received approximately \$17,445,682 as part of this settlement, of which approximately \$8,105,539 was returned as the state's Medicaid share to Virginia's General Fund Health Care Account.

MFCU also reached a settlement in *Commonwealth v. McKesson Corporation*, a civil action filed with assistance from outside counsel in June 2011 in the Northern District of California. The matter involved allegations that McKesson violated Virginia's Fraud Against Taxpayers Act and caused false or fraudulent claims for payment to be submitted to Virginia's Medicaid Program by conspiring with First Data Bank (FDB) to inflate fraudulently for more than 400 brand-named prescription drugs the Average Wholesale Price, the pricing benchmark used by DMAS for brand-name drug reimbursement transactions. The case was filed in California in order to litigate before a court that had previously dealt with similar claims related to the fraudulent scheme and expeditiously litigate the matter to a successful conclusion. As a result of the October 2013 settlement, the Commonwealth recovered \$37 million and \$30 million was returned to Virginia's General Fund Health Care Account.

In addition to its investigative and enforcement responsibilities, MFCU seeks opportunities to provide outreach services to seniors, law enforcement, and senior citizen service providers. The Unit helps to inform communities on the latest methods to effectively prevent and/or report elder abuse and provide an additional resource for investigative referrals. The Unit's Community Outreach Coordinators in Richmond and Roanoke are establishing and strengthening programmatic partnerships between MFCU and community organizations, government agencies, academic institutions, and law enforcement personnel working with Virginia's senior population. The MFCU is developing a working group comprised of MFCU staff, prosecutors, ombudsmen, social services, police, adult protective services, and other organizations that will work together on issues of elder abuse and neglect. The goal is to share information and work cooperatively among different types of agencies and to create a group that will serve as a best practices model for replication in different jurisdictions throughout the Commonwealth. Other outreach initiatives include a law enforcement training video, quarterly newsletters, a Twitter account, and an active Facebook page.

Special Prosecution and Organized Crime Section

The Special Prosecutions/Organized Crime Section (SPOCS) is the primary prosecutorial section of the Office of the Attorney General. The Section holds the responsibility of prosecuting various crimes – either pursuant to the Office's statutory jurisdiction or by request of local Commonwealth's Attorneys - throughout the Commonwealth, representing criminal justice and public safety agencies, and implementing public safety initiatives set forth by the Attorney General. In 2013, the Section set out to continue its' agenda of helping to keep the citizens of the

Commonwealth safe. The Section accomplished this through multiple initiatives including engaging in the prevention, intervention, and suppression of criminal street gang activity; educating law enforcement partners and the public about the dangers of human trafficking, prescription drug abuse, and domestic and sexual violence; the prosecution and prevention of identity theft offenses; administrative prosecutions against medical professionals who violated Virginia's Health Professions regulations; enforcement of Virginia's fair housing laws through mediation and civil actions; and targeting and bringing down violators of the Virginia RICO and tobacco statutes.

Criminal Prosecutions and Enforcement Unit

The Criminal Prosecutions and Enforcement Unit (CPEU or Unit) is headed by a Director who reports directly to the Chief of the Special Prosecutions and Organized Crime Section in the Public Safety and Enforcement Division. CPEU comprises of seven Assistant Attorneys General, five of whom are sworn as Special Assistant United States Attorneys who routinely handle criminal prosecutions in federal court. One Assistant Attorney General serves as special counsel to the Shenandoah Valley Multi Jurisdiction Grand Jury and to the Multi Jurisdiction Grand Jury in the Tidewater area. Another attorney serves as special counsel to a newly formed Northern Virginia Multi Jurisdiction Grand Jury.

The Unit serves as agency counsel to the Department of State Police (VSP), the Department of Criminal Justice Services (DCJS), the Department of Forensic Science (DFS), and the Office of the Inspector General (OSIG). This legal representation includes, but is not limited to, reviewing legislation and regulations proposed by the agency, representing the agency in federal and state courts, and providing advice on a multitude of subjects, such as Freedom of Information Act requests, contracts, and personnel issues.

Of the agencies assigned to the Unit, VSP consistently requires the most resources. CPEU Attorneys have represented VSP in various courts around the Commonwealth in cases involving motions to vacate improperly granted expungements and motions to quash subpoenas *duces tecum* where civil attorneys have attempted to subpoena the Department's criminal investigative files in civil cases. Attorneys from the Unit also represented VSP in several cases filed by registered sex offenders petitioning the court to be relieved of their registration requirements. The Unit representation of DCJS includes handling administrative hearings involving individuals licensed by the agency such as bail bondsmen, bail enforcement agents, and private security guards. The OSIG, created by the General Assembly in 2011, began operation in July 2012, and, as a new agency expectedly has sought formal and informal advice on issues such as interpretation of applicable code sections, establishing policies, and the scope of their investigative power.

Assisting Virginia's Commonwealth's Attorneys in prosecutions across the state continued to be a priority for the Unit in 2013. Attorneys from CPEU investigated and prosecuted cases in Fairfax, Mecklenburg, Isle of Wight, Newport News, Richmond, and all throughout the Shenandoah Valley, and their efforts resulted in resulting in significant periods of incarceration for a variety of crimes, including 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.

Notable cases of 2013 include *Commonwealth v. Ross*, which involved the prosecution of a Bounty Hunter Blood gang member from Maryland for first-degree murder, aggravated malicious wounding, and use of a firearm in the commission of a felony in the murder of a 49 year-old man. An Augusta County jury found the gang member guilty after a two-day trial and recommended a sentence of 30 years for murder, 25 years for aggravated malicious wounding, and 3 years for the use of a firearm in the commission of a felony. In *Commonwealth vs. Moore*, the defendant pled guilty to feloniously obtaining money by false pretenses. Moore admitted to submitting time sheets for work she did not perform over the course of two years during her employment as a meat inspector for the Virginia Department of Consumer and Agriculture Affairs. *Commonwealth v. Lin* involved the purchase of what the defendant believed to be stolen, un-taxed cigarettes from an undercover law enforcement officer. Finally, in *Commonwealth v. Tesfatsion and Gebremariam*, the Unit prosecuted defendants who had forged and sold to an undercover officer checks stolen from Gebremariam's former employer.

The working relationship between the Unit and the United States Attorney's office is a valuable collaboration. Until 2013, the Unit assigned three assistants to the United States Attorney's offices in Alexandria, Richmond and Norfolk as Special Assistant United States Attorneys (SAUSA). In the summer of 2013, the federal grant funding for two attorney salaries was exhausted and the assistants in Alexandria and Richmond transferred back to the Attorney General's office to work primarily on state cases, but the assistants maintain their designation as special federal prosecutors and prosecute federal crimes when their caseload permits.

In one notable case of 2013, *United States v. Tellez*, the defendant, an illegal alien from Mexico, received a 46-months prison sentence for conspiring to transport more than 100 women to engage in commercial sex acts in Virginia, Maryland, and Delaware. This defendant was responsible for collecting prostitution proceeds, advertising the prostitution scheme, and obtaining lodging for the victims he prostituted. *United States v. Barcus and Dumas* involved two leaders of a multi-state sex trafficking enterprise that prostituted at least 7 minor girls and more than 23 adults in at least seven states on the East coast. The operation frequently relocated to ensure a steady supply of customers and to avoid detection by the police. The defendants were sentenced to 239 and 300 months in prison.

As a result of another prosecution, *United States v. Sovereignty*, six members of the Virginia-Maryland-District of Columbia "line-up" of the Nine Trey Gangsters, the largest East Coast Bloods set, and three members of the Richmond-area "line-up" pleaded guilty to multiple drug trafficking and weapons offenses. In another matter, *United States v. Coles*, the defendant was charged in December 2013, after an extensive investigation, with conspiracy to prepare and file false tax returns and bank fraud. Coles, a former Virginia Department of Social Services (DSS) employee, engaged in a private business to prepare tax returns for individuals. She prepared returns for hundreds of individuals, often filing them from her former job at DSS. On the returns, she falsified business losses, dependents, tax credits and other items to obtain large refunds; the tax loss amount was over \$1 million. She also committed bank fraud by falsifying her income to receive several bank loans. She currently is awaiting sentencing.

State law prohibits the Department of State Police from initiating, undertaking, or continuing an investigation of a state or local elected official for a criminal violation except upon the request of the Governor, Attorney General, or a grand jury. Because sheriffs and chiefs of police are invariably conflicted out of investigating criminal activity of local elected officials within their jurisdictions, the vast majority of elected official investigations are conducted by the state police. When the state police requests permission to conduct an investigation of an elected official, it is the CPEU's responsibility to review the allegations to determine what, if any, criminal violations may have occurred if the allegations are proven. Attorneys from CPEU work closely with state police to judiciously give these very important cases the attention they merit. In 2013, attorneys from CPEU processed twenty of these requests and recommended authorization for eleven investigations.

Health Professions Unit

The Health Professions Unit (HPU) provides legal advice and representation of a prosecutorial nature to the Boards within the Virginia Department of Health Professions (DHP), including the Boards of 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. HPU provides focused and effective administrative prosecution of cases against health care professionals accused of violating health care-related laws and regulations, including standard of care violations, substance abuse, mental illness/incompetence, sexual touching, and patient abuse. In addition to handling administrative actions against the licensees, HPU provides training to investigators, Board staff, and Board members.

HPU handled several significant cases before the health regulatory boards in 2013. *Board of Medicine v. Nibedita Mohanty, M.D., D.O.*, involved extremely poor pain management, as directed by Dr. Mohanty in her private practice, prescribing very large quantities of narcotics without a valid medical justification over an extended time period to young people suspected of trafficking in narcotics. The most serious allegation involved the death of a chronic pain management patient who was given narcotics after recovering from an apparent medication overdose. Two weeks after her release from the hospital, Dr. Mohanty refilled her medications as usual at their next office visit. The next day the patient died from an overdose of oxycodone and an antidepressant. Dr. Mohanty also prescribed opiates including oxycodone to her domestic partner on a monthly basis for 3 years while only recording progress notes on four occasions. She regularly prescribed to him even when he did not present to her office for an examination. She also prescribed chronic pain medication to another patient without examination. There were 18 patients who received more than 140,000 dosage units of oxycodone in addition to multiple other opiates and benzodiazepines. The Board of Medicine summarily suspended her license. The case settled with the voluntary surrender of her license for 36 months, the maximum permitted by statute.

In January, the Board of Medicine summarily suspended the license of Anandababu Chellappan, M.D., because Dr. Chellappan engaged in boundary violations of a nonconsensual sexual nature with two patients concurrent with the practitioner-patient relationship. In addition, he failed to take appropriate actions when there was evidence that one of the patients may have been exhibiting drug-

seeking or doctor-shopping behavior. Dr. Chellappan ultimately agreed to sign a Consent Order revoking his license.

In August, the Board of Pharmacy summarily suspended the license of Dale A. Moore, a pharmacist in Hampton, for dispensing several hundred prescriptions for Oxycodone, a Schedule II controlled substance, that he knew or should have known were fraudulent without verifying the prescriptions with the prescriber. In addition, he altered the pharmacy's prescription records of at least 268 prescriptions that were written from out-of-state prescribers to make them appear as if they had been written by a Virginia prescriber to avoid detection by the Virginia Prescription Monitoring Program. Mr. Moore then dispensed the drugs where no medicinal or therapeutic purpose or practitioner-patient relationship existed. In October the Grand Jury returned a true bill indictment against Mr. Moore charging him with eight (8) felony counts of distributing Oxycodone and one (1) felony count of embezzlement of goods with a value of \$200 or more. A trial is set for May 23, 2014.

In September, a panel of the Board of Dentistry revoked Robert Johnson, D.M.D.'s license to practice dentistry in the Commonwealth after conducting a formal hearing to consider numerous allegations against him related to practicing outside the scope of dentistry, using treatment modalities which were not supported by scientific evidence (including a number of alternative or homeopathic treatments), not obtaining informed consent from patients to use unsupported or experimental treatments, using false, deceptive, or misleading advertising, and maintaining poor or incomplete documentation. Finally, in November, a panel of the Board of Nursing convened a formal hearing to consider evidence that Martin M. Martin, C.N.A. sexually assaulted an 84-year-old resident of a nursing home, who was non-verbal and suffered from dementia. The panel revoked Mr. Martin's certificate to practice as a nurse aide and made a finding of abuse for entry into the Virginia Nurse Aide Registry.

Division of Human Rights

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, places of public accommodation, and education institutions in violation of the Virginia Human Rights Act or corresponding federal laws, and then determines whether there is reasonable cause to believe 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) regarding alleged violations of Title VII of the Civil Rights Act of 1964 and other civil rights laws. The DHR met its goal of investigating 42 cases for violations of Title VII under the EEOC work-share agreement covering federal fiscal year 2013. Overall, the unit processed 249 complaints of discrimination in 2013. The DHR successfully resolved six cases through conciliation/mediation, recovering \$16,644.00 in settlement funds to the six complainants.

In its other primary role, DHR's attorney, in collaboration with HPU's unit director, serves as counsel to the Real Estate Board and Fair Housing Board for allegations of housing discrimination filed by complainants. If an investigation results in a "reasonable cause" finding and resulting "Charges of Discrimination" issued by

either or both of the Boards, the unit prosecutes the alleged violations of the Virginia Fair Housing Law through civil actions filed in the appropriate local circuit court. In 2013, the OAG reached settlements in three cases where “reasonable cause” was found to believe housing discrimination occurred, resulting in just over \$54,000 in recoveries for the complainants in those cases. In one of these cases, the defendants, a real estate company and property owner, agreed to pay \$35,000 to a complainant who claimed she had been approved to rent a home in a community only to be told at the last minute that the community was age-restricted. Investigation revealed the age restrictions were improperly established and applied. In another matter, a man with a severe disability received \$15,000 in settlement of a claim that a housing program provider discriminated against him by refusing to make an accommodation to their housing program’s rules to allow the defendant to rent his caregiver/mother’s house that had been specially modified to allow the complainant to live there.

The Financial Crime Intelligence Center

The mission of the Financial Crime Intelligence Center (FCIC) is to identify, target, and disrupt the financial aspects of crime in the Commonwealth. The FCIC accomplishes this by identifying, targeting, and disrupting the flow of criminal proceeds and by enabling Commonwealth’s Attorneys and other law-enforcement officials to better address and attack the financial aspects of crime in their area by identifying targets for investigations, providing “on-site” financial investigative support, sharing timely intelligence on money laundering, providing financial investigative training, and assisting in asset identification and forfeiture actions.

In 2013, FCIC’s “Operation Tobacco Road,” a program designed to identify individuals, corporations, and businesses engaged in organized contraband cigarette trafficking who use their criminal proceeds to exert unfair advantage over local area business competition, resulted in 46 arrests (40 Felony, 6 Misdemeanor), thus leading to 38 state convictions and 4 federal felony convictions on charges of conspiracy to violate the Contraband Cigarette Trafficking Act. Intelligence derived from this program resulted in the disruption of over 30 organized tobacco trafficking networks operating in Virginia, North Carolina, Tennessee, Illinois, Pennsylvania, Maryland, New York, and Connecticut. FCIC efforts also resulted in the identification of over \$23 million in tax loss to the states of New York, New Jersey, Pennsylvania, Maryland, and Virginia.

The FCIC also assisted state prosecutors in Maryland and Virginia in charging and convicting individuals for violations of Felony Conspiracy, Possession and Transportation of Untaxed Cigarettes, Unlawful Purchase of Tax Stamps, as well as violations of the Virginia Comprehensive Money Laundering Statute and the Virginia Racketeer Influence and Corrupt Organization (RICO) Statute. FCIC’s federal partners in this effort include the Bureau of Alcohol, Tobacco, Firearms and Explosives, Homeland Security Investigations, the Internal Revenue Service, the U.S. Secret Service, the FBI and the United States Attorney’s Office for the Western District of Virginia. State and local agency partners include agents of the Virginia Alcoholic Beverage Control Board, the Virginia National Guard, the Virginia State Police and the Virginia Department of Taxation, the Northern Virginia Cigarette Tax Board and police and prosecutors from the cities of Emporia and Fredericksburg and the counties of Greenville, Fairfax, Orange, Shenandoah, and Spotsylvania.

Gang Reduction and Intervention Program (“GRIP”)

The Gang Reduction and Intervention Program (GRIP) began in the City of Richmond in 2003 with a federal grant from the Office of Juvenile Justice and Delinquency Prevention. The Office partnered with federal, state, and local law enforcement, along with local service agencies and organizations, to implement a community-based anti-gang strategy. The goal of GRIP is to reduce the number of gang-involved youth by providing them with services and healthy alternatives to gang life. The initiative employs a five-pronged approach: primary prevention, secondary prevention, gang intervention, gang suppression, and reentry services/programs for those being released from jail or prison. The model includes a broad spectrum of programs designed to deal with the full range of personal, family, and community factors that contribute to juvenile delinquency and gang activity. GRIP partners with community centers to bring in additional agencies and organizations that provide services on site.

GRIP works closely with the Virginia Department of Criminal Justice Services (DCJS) to consult with other localities and assist them in developing their own comprehensive anti-gang approaches based on the GRIP model. To that end, throughout the year, GRIP hosts visitors from other parts of the Commonwealth and GRIP staff visits other cities interested in learning more about the initiative and how to implement it in their respective localities. 2013 highlights include helping organize a Hopewell Gang Awareness & Prevention Community Forum in May and a Galax Community Day in August. In addition, the GRIP Director provides gang awareness training in a variety of settings and keeps her skills and knowledge up-to-date by attending a variety of training conferences and workshops throughout the year.

An important factor in the success of the GRIP initiative has been the inclusion of public-private partnerships. For example, GRIP collaborates with service providers, faith organizations, and other community partners to host Community Day events throughout the city to bring residents, service providers, organizations, and community volunteers together to celebrate and beautify their community. A strong step in a broader-based initiative to keep communities clean and crime free, these positive events help reinforce the presence of GRIP and the Office in the community and raise awareness of the coordinated effort to combat gangs and gang activity, in order to improve Virginia “One Community at a Time.” Since 2006, the Office has been working in communities across the Commonwealth in partnership with the Cal Ripken, Sr. Foundation (CRSF) utilizing the *Badges for Baseball* program to prevent juvenile delinquency and improve the relationship between law enforcement and young people. The program uses team sports to inspire youth to make positive decisions pointing their lives on a path toward success. In April, we partnered with the CRSF to host a Community Day in one of Richmond’s public housing communities, which was attended by 400 community members.

Since February 2013, the GRIP Director has served as a member of the “Tri-Cities Regional Strike Force,” an initiative launched by the Virginia Secretary of Public Safety to target crime in the Tri-Cities area, and is heading up the student outreach component of this initiative. The Strike Force comprises representatives of local, state, and federal law enforcement, as well as Commonwealth’s Attorneys, representing each of the five jurisdictions. In addition to a series of gang awareness assemblies to reach students in these jurisdictions before gangs do, the Strike Force

has organized law enforcement actions, such as a two-day fugitive roundup, and a community walk to engage faith leaders, service providers, and others in the fight against crime.

Every summer, GRIP joins forces with the Richmond Police Department (RPD) to host Virginia Rules Camp, a free camp dedicated to teaching urban youth Virginia's laws and the consequences of violating those laws. In addition to the Virginia Rules curriculum, the Camp offers canoeing, fishing, swimming, archery, and a high ropes course with volunteer police officers and Office employees. In 2013, 50 youth participated in the program. As part of another tradition, for the sixth consecutive year, GRIP partnered with RPD on the Holiday Project for the Needy. In 2013, hundreds of gifts were collected, including new bikes, winter coats, clothes, dolls, trucks, and a variety of other toys, and Office staff donated the gifts to 21 families in GRIP-targeted neighborhoods.

The Office provides gang awareness training, develops, and distributes written materials, and coordinates the provision and expansion of GRIP services in the three Richmond target areas and beyond. The Office has made hundreds of presentations on GRIP across the nation and will continue to do so as localities request assistance with gang reduction. We also staff tables, distribute printed materials and GRIP-branded giveaways, and provide other support for GRIP partner events throughout the year. The GRIP Director attends myriad community meetings and presentations and collaborates with a variety of organizations and task forces to address the challenges facing the Richmond metropolitan area. The GRIP team looks forward to continuing to work with all of its partners in supporting the initiative in Richmond and in expanding it to other jurisdictions.

Human Trafficking

As the crime of human trafficking began to grow across the Commonwealth, this Office responded by focusing additional resources to combat the crime on a variety of fronts: training, legislation, prosecutions, task force leadership, and outreach and awareness. In 2012, an Assistant Attorney General transitioned into the position of Anti-Trafficking Coordinator, dedicated to strengthening the Commonwealth's response to trafficking. In addition, in 2011, the Office embarked on a robust training initiative, conducting more than 50 trainings across the Commonwealth in little more than two years. These efforts increased awareness of trafficking for nearly 2,500 patrol officers, service providers, prosecutors, investigators, corrections officers, probation officers, health care professionals, and other community partners likely to encounter a trafficking victim. In 2013, four of these trainings were held as regional, multidisciplinary trainings for law enforcement, prosecutors, and victim-witness coordinators. Approximately 220 people attended these intensive two-day trainings.

Seen as a leader in combating trafficking in the United States, the Office has been invited to work on national initiatives. The Office is part of the human trafficking committee for the National Association of Attorneys General, a coalition of Attorneys General who are working to ensure that all Attorneys General give the issue of human trafficking the focused attention it deserves. Also, beginning in 2011, the Anti-Trafficking Coordinator became part of a group of experts drawn from across the country to advise the Uniform Law Commission on drafting a uniform state law to combat trafficking. The Anti-Trafficking Coordinator was one of only four advisors

asked by the ULC to present the draft law to the full body of more than 300 commissioners. That law was approved by the full commission and is projected to be introduced into legislation in states across the country.

The Office works directly with federal, state, and local law enforcement to investigate and prosecute human trafficking offenses in the Commonwealth. The Office has a reputation for partnering with stakeholders across the Commonwealth, and helping to coordinate collaborative efforts to combat trafficking and restore its victims. The Office serves on the coordinating committee convened by Governor McDonnell in 2013 to ensure state agencies work collaboratively against the problem of human trafficking in the Commonwealth. The other represented agencies are those tasked by the General Assembly with responding in some way to trafficking, and include the Department of Criminal Justice Services, the Department of Social Services, the Department of Education, and the Department of Labor & Industry. From this partnership came recommendations for the Governor's Executive Directive on trafficking, which establishes an Anti-Human Trafficking Coordinating Committee comprised of key state agencies working together to strengthen the Commonwealth's response to trafficking.

This Office co-leads task forces and working groups across the Commonwealth, partnering with the U.S. Attorney's offices, federal, state and local law enforcement, service providers, and community partners to combat trafficking in each region. The Anti-Trafficking Coordinator works in partnership with the U.S. Attorney's Office for the Eastern District of Virginia, the Fairfax County Police Department, and the Polaris Project to co-lead one of the few federally funded Human Trafficking Task Forces in the nation. The Anti-Trafficking Coordinator serves on the Northern Virginia Human Trafficking Task Force Executive Committee, directing task force administration and leading several sub-committees, and with other attorneys leads prosecutions and investigations on its behalf.

Virginia Rules

Virginia Rules is Virginia's state-specific, law-related education program for middle and high school students. The purpose of Virginia Rules is to educate young Virginians about Virginia laws and help them develop skills needed to make sound decisions, avoid breaking laws, and become active citizens within their schools and communities.

Virginia Rules is endorsed by the Secretaries of Education and Public Safety, and the Superintendent of Schools. It features 22 lessons designed for middle and high school students and a web site for use by students, parents, and Virginia Rules instructors. Instructors are able to access and download lessons with student worksheets, student topical handouts, and supplemental materials. The Virginia Rules website is also a repository for all law related educational and prevention materials for youth or Virginia Agencies. Additionally, it houses the Virginia Juvenile Law Handbook for School Administrators, which is intended to serve as a resource for school administrators and other school personnel who are responsible for not only the education of youth, but also for their safety and welfare.

In 2013, we distributed 720 Virginia Rules Instructor Guides and trained over 400 school resource and school security officers. The year ended with 988 registered users on the Virginia Rules website and 79,914 students reported as being taught Virginia

Rules. Fairfax alone taught over 10,000 lessons through their criminal justice academies on their Blackboard system in 2013. Similar systems and methods of delivery are used in Virginia Beach, Norfolk, and 120 other cities and localities across the Commonwealth. There have been 23,051 downloads of the curriculum off of the website and over 161,000 visitors to the website in 2013, with 85% of those being new visitors and 15% returning visitors.

Domestic Violence Initiatives

V-STOP. The V-STOP program is responsible for providing training to law enforcement, prosecutors, magistrates, victim advocates, and allied professionals on various topics addressing Violence Against Women. In 2013, the V-STOP program participated in and hosted multiple trainings, including the February joint VSTOP and CDS/GEAP program in conjunction with Chesterfield Domestic and Sexual Violence Resource Center “Serving the Underserved: Working with Underserved Populations,” with approximately 90 participants. In April and May, the V-STOP program and the Anti-Human Trafficking program hosted two “Human Trafficking for the Service Provider” trainings, one in Fredericksburg and one in Weyers Cave, with approximately 85 total attendees. In collaboration with DCJS and The James House, “Investigating and Prosecuting Stalking Cases” was held in November in Colonial Heights, with approximately 77 participants. In December, the V-STOP and CDS/GEAP programs jointly presented with the Virginia Poverty Law Center at a training sponsored by the Young Lawyers Division of the Virginia Bar Association in Martinsville, on the topics of protective orders, working with the Latino community, cultural competence, and remedies for immigrants. In addition, V-STOP provided support to the Anti-Human Trafficking program by assisting with the planning and implementation of trainings throughout the state and the organizing of the Western District Human Trafficking Task Force.

Community Defined Solutions (CDS)/Grant to Encourage Arrest Policies and the Enforcement of Protective Orders (GEAP). The CDS/GEAP program participates in a partnership with five government and non-profit agencies to improve practices and policies related to criminal justice and advocacy response to domestic violence. The CDS/GEAP program coordinator is responsible for providing training to law enforcement and prosecutors on domestic and sexual violence topics. In March 2013, the program hosted the final of three trainings, “Got Evidence?: Evidence Based Prosecution in Domestic Violence Cases” in Roanoke, which was attended by approximately 45 prosecutors and law enforcement personnel. The CDS/GEAP program also co-hosted and provided additional trainings with the VSTOP program.

Address Confidentiality Program (ACP). The OAG maintains the post office box that serves as the “substitute” mailing address for participants in the Address Confidentiality Program (ACP), a voluntary, confidential mail-forwarding service for victims of domestic violence who have moved recently to a location unknown to their abusers. ACP permits a participant to use the address in lieu of a home address in an effort to keep the victim’s physical location confidential. The program continues to see increased participation throughout the Commonwealth. In 2013, ACP provided training to the Tri-Cities Domestic Violence Task Force, the Mecklenburg Domestic Violence Coalition, and the YWCA of South Hampton Roads.

Tobacco Enforcement Unit

The Tobacco Enforcement Unit administers and enforces the Tobacco Master Settlement Agreement (MSA), a 1998 agreement between 46 states and leading cigarette manufacturers. The Unit works with the Tobacco Project of the National Association of Attorneys General as well as other MSA states. During 2013, the Commonwealth received more than \$177 million in payments from the participating manufacturers. MSA 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 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. In 2013, the Unit conducted 373 retail inspections and seized 6,733 packs of contraband cigarettes, filed 311 civil cases involving the destruction of seized contraband, investigated approximately 30 potentially false businesses involved in cigarette trafficking, conducted 5 stamping agent inspections, conducted 9 stamping agent field audits, certified 30 cigarette manufacturers as compliant with Virginia law, and removed one cigarette manufacturer from the Virginia Tobacco Directory for non-compliance with Virginia law. Members of the unit also followed tobacco legislation in the General Assembly and provided information to the Virginia State Crime Commission for its study of cigarette trafficking in the Commonwealth. In addition, the Unit continued to work with outside counsel representing the Commonwealth in the settlement of a multi-million dollar MSA payment dispute.

TRANSPORTATION, REAL ESTATE, AND CONSTRUCTION LITIGATION DIVISION

The Transportation, Real Estate and Construction Litigation Division was formed in January 2013 as part of a divisional restructuring of the Office to promote productivity and increase efficiency across the Office. The current division is composed of three Sections - Transportation, Real Estate and Land Use, and Construction Litigation - and provides comprehensive legal services to executive agencies, state boards, and commissions within its areas of expertise. The Division provides legal advice across a wide range of substantive subject areas as well as guidance on matters of employment, contracts, purchasing, and the regulatory process. The Division's attorneys regularly assist state agencies with complex and sophisticated transactions and also represent those agencies in court, often in close association with other attorneys in the Office.

Transportation Section

The Transportation Section represents and advises the state agencies, offices, authorities, and boards that report or are assigned to the Secretary of Transportation, namely the Virginia Department of Transportation (VDOT), the Commonwealth Transportation Board (CTB), the Department of Motor Vehicles, the Commission on the Virginia Alcohol Safety Action Program (VASAP), the Department of Rail and Public Transportation, 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 serves as counsel to the Secretary of Transportation.

The Section attorneys serve the transportation client agencies and entities in numerous administrative, regulatory, transactional/contractual and litigation matters, including Public-Private Transportation Act (PPTA) transactions; bond issuance and bond refunding and refinancing; contract negotiation, drafting and disputes; eminent domain/condemnation issues and litigation; land use issues; outdoor advertising and highway sign issues relating to right of way; personnel issues; environmental issues; procurement disputes; titling and registration of automobiles; licensure and regulation of drivers; motor fuels tax collection and enforcement; licensure and regulation and discipline of motor vehicle dealers; administration of motor vehicle dealer franchise laws and regulation of disputes between franchise dealers and manufacturers; administration of the VASAP program; transportation legislative reviews; rail and other grant agreement drafting and negotiation; freedom of information requests; conflict of interest questions; and administrative hearings involving a wide array of issues and several different transportation agencies and entities.

In 2013, attorneys in the Section appeared in state and federal courts throughout Virginia, including the Supreme Court of Virginia, to represent and protect the Commonwealth's transportation interests in litigation. For example, in *Meeks v. Virginia Department of Transportation*, the Section participated in rapidly appealing the Circuit Court for the City of Portsmouth's finding that the tolls to be charged for the Midtown Tunnel/ Downtown Tunnel/ Martin Luther King Extension project constituted unconstitutional taxes. That expedited appeal to the Virginia Supreme Court drew great public and political interest and validated the state's position that the tolls for that project were user fees that legally could be imposed for the \$2.1 billion Public Private Transportation Act (PPTA) construction project. The Virginia Supreme Court also validated the constitutionality of the Virginia PPTA statute and the ability of VDOT to impose tolls under that statutory authority.

The Section also was instrumental in legal work associated with closing several other key large VDOT transportation project transactions. They included the negotiation of a \$108 million design-build contract for the 460 Connector Phase 2 Project in southwest Virginia near the Virginia-Kentucky border. The project is being developed using innovative coal synergy to help reduce project costs. The Section also advised VDOT on issues related to the issuance of a Virginia Transportation Infrastructure Bank loan for \$78 million to support the completion of Pacific Boulevard in Loudon County.

Further, considerable time and effort was invested in legal services to the VDOT team that developed a request for proposal and contract for transferring VDOT's transportation operations to the private sector. This six-year Traffic Operations Center service contract valued at \$425 million was a groundbreaking transportation project and garnered international attention from both transportation agencies and private sector service companies. The contract coalesces five VDOT operations centers, six operational services, and creates a new statewide information technology system to support them. This program is the locus of VDOT's use of technology to monitor traffic conditions, respond to roadway incidents, and mitigate traffic congestion. The goal of this service contract is to unify regional traffic operations and technologies into a statewide interoperable system, that will enable increased efficiencies and innovation and ultimately improve traffic mobility throughout the Commonwealth.

The Section also handled numerous matters related to eminent domain issues. The Section successfully defended the Commonwealth's interests in an inverse condemnation case seeking \$9 million in damages claimed by over 100 landowners in Fairfax County, after a severe rain event in 2006 caused flooding in Alexandria and other portions of Northern Virginia. The case initially was decided on a demurrer at the Fairfax County Circuit Court and was thereafter appealed by the plaintiffs to the Virginia Supreme Court, which later remanded the matter back to the Fairfax Circuit Court for trial. Other significant eminent domain matters included the allocation of density credits for the valuation of an office building in Tyson's Corner as a result of the Silver Line Metro Rail extension and the successful sale of Hunting Towers Apartments. The Apartments were acquired by VDOT in 2001 and operated as an apartment complex in lieu of displacing a large number of residents and condemning the residue property for the Woodrow Wilson Bridge project. The 2013 sale netted \$78,100,000 in profit, which VDOT and FHWA put towards reimbursement of costs for the completed Woodrow Wilson Bridge project.

In addition, based on favorable bond and market financing rates in 2013, the Section assisted VDOT and the CTB with the issuance of \$273,390,000.00 in Commonwealth of Virginia Federal Transportation Grant Anticipation Revenue Notes, designed to support several critical VDOT construction projects, including an extension of the I-495 Express Lanes in Northern Virginia.

The Section also was involved heavily in rail transportation issues. After many years of facilitating negotiations between VDOT, the Virginia Department of Rail and Public Transportation, the Metropolitan Washington Airport Authority, and the Washington Metropolitan Area Transit Authority, the parties in 2013 agreed on conveyance documents and maintenance agreements necessary for the operation of the Silver Line Metro Rail to Dulles Airport. We also assisted DRPT in analysis and response to the Federal Transit Administration (FTA) concerns about state safety oversight pursuant to new federal statutory requirements, and actively participated in discussions with the FTA, Maryland, and the District of Columbia to identify potential avenues to meet the new federal statutory requirements through the establishment of a successor entity to the Tri-State Oversight Committee (TOC), which oversees safety on the WMATA metro-rail system. Other legal tasks included negotiations for the purchase of land in the abandoned S-Line corridor from Petersburg to the Norlina, North Carolina for the Southeast High Speed Rail Corridor from CSX Transportation; assistance with agreements concerning environmental

studies for the development of SESHR; purchase of properties surrounding the Richmond Staples Mill Amtrak station for parking expansion; the negotiation and drafting of agreements with Amtrak for federally required state assumption of financial responsibility for all intercity passenger service; and the negotiation of agreements for the expansion of intercity passenger rail service to Roanoke, Virginia.

The Section was active in matters concerning the Virginia Port Authority (VPA), including the reorganization of the Port Authority's operating company, Virginia International Terminals, which for the first time became a single member Limited Liability Company under the direct supervision of the VPA Board of Commissioners. The VPA Board of Commissioners also hired a new executive director and we were actively engaged in new employment and conflict of interest issues on behalf of the Board of Commissioners in this endeavor. We also assisted the VPA Board of Commissioners in a multitude of business matters involving the container and rail logistics at the port as well as leasing portions of the Portsmouth Marine Terminal to bulk shippers and exporters.

Finally, the Section negotiated the successful settlement of a \$16 million claim by Orbital Sciences Corporation regarding transporter, erector, and launch equipment located at Virginia's Mid Atlantic Regional Spaceport (MARS) on Wallops Island. The settlement favorably resolved equipment expenditures for the MARS liquid fuel pad and re-established a professional working relationship for the Virginia Commercial Space Flight Authority with Orbital Sciences Corporation. Orbital provides commercial resupply missions to the International Space Station for NASA out of Virginia's MARS facility at Wallops Island.

Real Estate and Land Use Section

The Real Estate and Land Use Section (RELU) handles several specialized areas of legal practice. Real estate questions and transactions affect every state agency to some degree, and RELU handles the majority of these transactions directly, or provides support and assistance to agency counsel who wish to retain the role as primary contact for the transaction. The Section does not handle VDOT right of way acquisitions. RELU opened 360 new matters and closed 494 matters in 2013. At the end of the year, the Section was handling 195 active cases with an estimated value in excess of \$1 billion.

Transactional real estate matters handled for the Commonwealth include sales, purchases, leases, and easements on state lands. RELU provides daily advice on real estate issues to the Department of General Services (DGS) and other state agencies overseeing significant real estate activity. The Section also provides real estate support to the various institutions of higher education. Real estate litigation includes boundary line disputes, landlord/tenant litigation, title disputes, and miscellaneous real estate related matters. Additionally, the Section reviews real estate related legislation introduced in the General Assembly, and, if a bill raises legal or constitutional issues, notifies the patron. The Section also helps prepare and review legislation proposed by the Executive Branch.

In recent years the Section has done a significant amount of work related to the rights of the Commonwealth in and to subaqueous lands. RELU worked closely with the Environmental Section to advise state agencies and help resolve these issues. The Section also advises the Virginia Outdoors Foundation (VOF), the Department of

Conservation and Recreation (DCR), the Department of Forestry (DOF), the Department of Historic Resources (DHR), and local soil and water conservation districts on their open space easements. The Section also provides legal advice regarding general matters and on issues related to the renovation and restoration incentive programs administered by DHR.

The Section provides advice to agencies, and works with the Construction Litigation Section, on construction procurement, contract management, and dispute resolution issues involving all construction matters other than VDOT projects. The Section provides a wide range of professional services, from review of construction bid documents, advice regarding the appropriate public procurement measures to be followed, representation and advice during bid protests, advice on contract interpretation during construction, and participation in negotiations to resolve disputes during performance, up to the tender of a formal complaint and transfer of the case to the Construction Litigation Section. RELU also advises the DGS Division of Engineering and Buildings (DEB) regarding policies, procedures and other issues that arise in DEB's role as statewide construction manager and building official. The Section also reviews and approves all required bid, payment, and performance bonds for construction projects in which DGS is involved.

The Section supported the efforts of the Special Joint General Laws Subcommittee Studying the Virginia Public Procurement Act, particularly with respect to construction procurement. The work of the Subcommittee will continue in 2014 and the Section has been asked by the Division of Legislative Services to continue to support their efforts in this area in 2014.

RELU continues to serve as the General Counsel to the Fort Monroe Authority (FMA) and counsel to the Governor on all matters related to Fort Monroe. 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. Fort Monroe was listed on the 2005 Base Relocation and Closure list, and the Army ceased all active military operations there on September 15, 2011. 312 acres of the land area at Fort Monroe reverted to the Commonwealth in 2013. The Commonwealth and the Army are negotiating an Economic Development Conveyance under the Base Relocation and Closure law for another 80 acres. The remaining 173 acres of federal surplus property (much of it submerged) will be transferred to the National Park Service (NPS) to create the Fort Monroe National Monument. The Commonwealth has agreed that over 100 acres of its reversionary land also will be transferred to the NPS for the National Monument. Coordinating all of the activities and actions necessary to have a functioning and useful National Monument will be a significant focus during 2014.

In addition, as Virginia's colleges and universities see an increase in real estate related activity as the economy improves, the Section often is asked to assist with these transactions, either directly or as support for University Counsel. During 2013, we provided significant direct support to Virginia State, Norfolk State, and Longwood Universities for a variety of projects. We also assisted University Counsel at Mary Washington, William and Mary, and George Mason on their real estate and construction projects. Of particular note in 2013, all of the properties necessary for construction of the multi-purpose center at Virginia State University have been acquired and a ground breaking ceremony has been held for the construction of the

facility. The acquisition of these properties has been a multi-year endeavor, and continues for the few remaining parcels needed for the larger project surrounding the multi-use center.

Some particular projects of note from 2013 include the sale of just under 75 acres of surplus property in Chesapeake, Virginia that was previously used by Southeastern Virginia Training Center (SEVTC), to an affiliate of Armada Hoffer. The transaction closed in December for a sale price of \$7.5 million, and it encompassed (i) parcels that will be developed by the purchaser and used by a military employer; (ii) a parcel that is currently leased by the Economic Development Authority of the City of Chesapeake; and (iii) a parcel that is anticipated to be used by SEVTC as a training facility. Because environmental issues associated with one of the parcels had not been finalized, two of the parcels closed into escrow. In connection with the transaction, we reviewed and commented upon the purchase agreement, two escrow agreements, two post-closing leases, and a declaration covering the surplus land and the land that was retained, along with all the various closing documents.

The donation of approximately 51 acres from Wal-Mart to DHR also was completed in 2013. This property had been selected by Wal-Mart to be the site of a new store, but it was discovered that the property was part of the Wilderness Battlefield. Following significant local opposition, Wal-Mart decided to build elsewhere and to donate the property to DHR. After extensive negotiations with Orange County over the reservation of a right-of-way for a potential collector road and with Wal-Mart over potential environmental issues, all of the documents creating the road dedication and transferring the property were recorded in November.

RELU provided support to both DGS and the Education Section of the OAG to negotiate and create all of the documents needed for the Science Museum to lease property to the City of Richmond for the creation of the Redskins Training Camp. The various agreements addressed the lease of the property, the access rights needed by the parties through the various properties and facilities, shared uses of the properties when not in use by the Redskins, and a number of other obligations. All aspects of the project were completed in time for a successful opening of the facility in July.

The Section also served as counsel to the Virginia State Bar during the negotiation of its lease for new office space. The Bar was notified by its current landlord that its space would be reclaimed at the end of the current lease on May 31, 2014. The new lease is for approximately 33,000 square feet of exclusively controlled space, shared conference rooms, and a guarantee of 80 parking spaces plus a fixed amount of free visitor parking each year. This is significantly more parking than was available at the old location. The lease terminates on September 30, 2024 and includes two five-year extension options.

Construction Litigation Section

The Construction Litigation Section is responsible for all litigation related to the construction of roads, bridges, and buildings for the Commonwealth's agencies and institutions. The Section defends, makes claims, or files lawsuits against construction and design professionals or surety companies in the context of construction disputes. Further, the Section provides ongoing advice to the Department of Transportation and other state agencies, colleges, and universities during the administration of well over \$3 billion in building, road and bridge contracts. These efforts support effective

partnerships between the Commonwealth, general contractors, and the road builders and facilitate timely and efficient completion of construction projects across the Commonwealth.

In 2013, the Section opened 70 new claim and litigation files. Claims handled by the Section seeking nearly \$15 million were resolved for a collective total payment of approximately \$4.6 million. In addition, the work of this Section resulted in payments to the Commonwealth, its departments and universities of approximately \$850,000.

LEGISLATIVE ACCOMPLISHMENTS

During the 2013 Session of the General Assembly, the Office of the Attorney General worked to promote legislation that would enhance the quality of life for citizens throughout the Commonwealth. As the chief patron of a bill addressing financial exploitation of the elderly, which I introduced in my former capacity as a member of the Senate of Virginia, I am particularly proud to highlight this Office's efforts in promoting the passage of legislation to protect the elderly and infirm from those who would prey upon them. I joined this Office in a truly bipartisan effort, which also included collaboration with Virginia's prosecutors, the AARP, and other public and private advocacy groups.

In addition, as part of this Office's ongoing efforts to combat human trafficking and sexual exploitation of minors, the Office also worked with a bipartisan coalition to pass legislation making it a felony to offer money to engage in sexual acts with a minor. The Office also fought alongside advocates for child victims, domestic assault victims, and elder victims to garner bipartisan support for House Bill 2338, a bill to keep vulnerable victims from being needlessly re-victimized by the criminal justice system.

The Office also fought for initiatives to help Virginia consumers. Consumer Counsel was instrumental in the passage of House Bill 2261, which amended the Regulation Act to eliminate or reduce ratepayer-funded bonus returns, or profits, awarded to electric utilities for meeting Renewable Portfolio Standard (RPS) goals when they construct new generation facilities. This measure should save consumers hundreds of millions of dollars in future years without compromising utilities' RPS programs and plant construction. In addition, House Bill 2274 deferred the filing of Appalachian Power Company's next biennial review rate increase application from 2013 to 2014, thereby delaying the possibility of a base rate increase.

OPINIONS SECTION

The Opinions Section processes and manages requests made pursuant to § 2.2-505 for official opinions of the Attorney General as well as conflict of interests opinions for state government officers and employees and members of the General Assembly. The Section also handles confidential informal opinions that are issued by other Office attorneys. Opinions are assigned to attorneys within all Divisions of the Office based on the request's subject matter. In 2013, the Opinions Section received over 150 opinion requests, including requests not statutorily entitled to a response, that were withdrawn, or that were answered by previously issued opinions. The Office issued 150 official, informal and conflict of interests opinions in 2013, including the 97 official opinions published in this report and on the Office website. The Section is

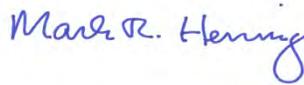
responsible for publishing the Annual Report of the Office of the Attorney General mandated by § 2.2-516 and presenting it to the Governor of Virginia on May 1st.

CONCLUSION

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

With kindest regards, I am

Very truly yours,



Mark R. Herring
Attorney General

PERSONNEL OF THE OFFICE¹

Kenneth T. Cuccinelli II.....	Attorney General
Patricia L. West.....	Chief Deputy Attorney General
Rita W. Beale.....	Deputy Attorney General
John F. Childrey.....	Deputy Attorney General
Richard F. Neel Jr.....	Deputy Attorney General
Wesley G. Russell Jr.....	Deputy Attorney General
E. Duncan Getchell Jr.....	Solicitor General of Virginia
Norman A. Thomas.....	Opinions & Senior Appellate Counsel
Jeffrey R. Allen.....	Senior Assistant Attorney General/Chief
Elizabeth A. Andrews.....	Senior Assistant Attorney General/Chief
C. Meade Browder Jr.....	Senior Assistant Attorney General/Chief
Craig M. Burshem.....	Senior Assistant Attorney General/Chief
Patrick W. Dorgan.....	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
David B. Irvin.....	Senior Assistant Attorney General/Chief
Jeremiah J. Jewett III.....	Senior Assistant Attorney General/Chief
Michael T. Judge.....	Senior Assistant Attorney General/Chief
Alan Katz.....	Senior Assistant Attorney General/Chief
Joshua N. Lief.....	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
Jill M. Ryan.....	Senior Assistant Attorney General/Chief
Allyson K. Tysinger.....	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
Rosemary V. Bourne.....	Senior Assistant Attorney General
Katheryn E. Surface Burks.....	Senior Assistant Attorney General
Howard M. Casway.....	Senior Assistant Attorney General
Ellen E. Coates.....	Senior Assistant Attorney General
Gary L. Conover.....	Senior Assistant Attorney General
Leah A. Darron.....	Senior Assistant Attorney General
Matthew P. Dullaghan.....	Senior Assistant Attorney General

¹ This list includes all persons employed and compensated by the Office of the Attorney General during calendar year 2013, as provided by the Office's Division of Administration. The most recent title is used for any employee whose position changed during the year.

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
Gregory W. Franklin	Senior Assistant Attorney General
John P. Griffin	Senior Assistant Attorney General
Wayne T. Halbleib	Senior Assistant Attorney General
Stephanie L. Hamlett.....	Senior Assistant Attorney General
Catherina F. Hutchins.....	Senior Assistant Attorney General
Donald E. Jeffrey III.....	Senior Assistant Attorney General
Frederick R. Kozak.....	Senior Assistant Attorney General
Donald A. Lahy	Senior Assistant Attorney General
Richard A. Mahevich II.....	Senior Assistant Attorney General
Kathleen B. Martin	Senior Assistant Attorney General
John H. McLees Jr.....	Senior Assistant Attorney General
Eugene P. Murphy	Senior Assistant Attorney General
Cynthia H. Norwood	Senior Assistant Attorney General
Ryan J. Pedraza	Senior Assistant Attorney General
Francis W. Pedrotty.....	Senior Assistant Attorney General
Sharon M.B. Pigeon	Senior Assistant Attorney General
Sydney E. Rab	Senior Assistant Attorney General
James E. Schliessmann.....	Senior Assistant Attorney General
Richard S. Schweiker Jr	Senior Assistant Attorney General
Virginia B. Theisen	Senior Assistant Attorney General
Richard C. Vorhis.....	Senior Assistant Attorney General
Jennifer C. Williamson.....	Senior Assistant Attorney General
Steven A. Witmer.....	Senior Assistant Attorney General
Alice T. Armstrong.....	Sr. Asst. Att’y Gen./Dir., Capital Litigation Unit
Katherine B. Burnett.....	Sr. Asst. Att’y Gen./Dir., Capital Litigation Unit
Scott J. Fitzgerald.....	Senior Assistant Attorney General/Unit Manager
Catherine Crooks Hill.....	Senior Assistant Attorney General/Unit Manager
Ronald N. Regnery	Senior Assistant Attorney General/Unit Manager
Pierce C. Acuff	Assistant Attorney General
Katherine Quinlan Adelfio	Assistant Attorney General
Sarah O. Allen	Assistant Attorney General
Karri B. Atwood.....	Assistant Attorney General
Catherine Christine Ayres	Assistant Attorney General
Susan F. Barr	Assistant Attorney General
Erin L. Barrett.....	Assistant Attorney General
Susan E. Baumgartner	Assistant Attorney General
Pamela Brown Beckner	Assistant Attorney General
Jacob L. Belue	Assistant Attorney General
Anthony R. Bessette	Assistant Attorney General
Anna Tillie Birkenheier.....	Assistant Attorney General

John W. Blanton	Assistant Attorney General
Michael H. Brady	Assistant Attorney General
Peter E. Broadbent III.....	Assistant Attorney General
Charles M. Burton Jr.	Assistant Attorney General
Aaron J. Campbell.....	Assistant Attorney General
Lauren C. Campbell	Assistant Attorney General
Carla R. Collins	Assistant Attorney General
Braden J. Curtis	Assistant Attorney General
Katherine M. DeCoster.....	Assistant Attorney General
Ryan D. Doherty.....	Assistant Attorney General
Kate E. Dwyre	Assistant Attorney General
James A. Fiorelli.....	Assistant Attorney General
Elizabeth L. Fitzgerald	Assistant Attorney General
James Michael Flaherty	Assistant Attorney General
Matthew J. Friedman.....	Assistant Attorney General
John D. Gilbody	Assistant Attorney General
Brett C. Glymph	Assistant Attorney General
Matthew L. Gooch.....	Assistant Attorney General
David C. Grandis.....	Assistant Attorney General
Margaret Elizabeth Griffin	Assistant Attorney General
Joseph Samuel Hall	Assistant Attorney General
Susan M. Harris	Assistant Attorney General
Mary Hendricks Hawkins.....	Assistant Attorney General
Jonathan B. Heath.....	Assistant Attorney General
Joshua D. Heslinga.....	Assistant Attorney General
Megan L. Holt	Assistant Attorney General
Laurel S. Huerkamp	Assistant Attorney General
Matthew R. Hull.....	Assistant Attorney General
James M. Isaacs	Assistant Attorney General
Steven P. Jack.....	Assistant Attorney General
Victoria L. Johnson	Assistant Attorney General
Adam L. Katz	Assistant Attorney General
Benjamin H. Katz.....	Assistant Attorney General
Elizabeth C. Kiernan	Assistant Attorney General
Usha Koduru.....	Assistant Attorney General
Mark S. Kubiak	Assistant Attorney General
Paul Kugelmann Jr	Assistant Attorney General
Michelle A. L’Hommedieu	Assistant Attorney General
Amanda L. Lavin.....	Assistant Attorney General
Joshua E. Laws	Assistant Attorney General
Stephanie Cothren Lloyd.....	Assistant Attorney General
Albert Pilavin Mayer	Assistant Attorney General
John D. McChesney	Assistant Attorney General
Patrick A. McDade.....	Assistant Attorney General
Robert B. McEntee Jr	Assistant Attorney General

Erin R. McNeill	Assistant Attorney General
Mikie F. Melis	Assistant Attorney General
Charis A. Mitchell	Assistant Attorney General
Christy W. Monolo.....	Assistant Attorney General
Ishneila G. Moore.....	Assistant Attorney General
Valerie L. Myers.....	Assistant Attorney General
Carrie S. Nee	Assistant Attorney General
Adele M. Neiburg.....	Assistant Attorney General
James W. Noel III.....	Assistant Attorney General
G. William Norris Jr.....	Assistant Attorney General
Kevin C. Nunnally.....	Assistant Attorney General
Andrew C. O’Brion.....	Assistant Attorney General
Patrick O. O’Leary	Assistant Attorney General
Joseph C. Obenshain	Assistant Attorney General
J. Michael Parsons.....	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
Ellen M. Porter	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
Sarah F. Robb.....	Assistant Attorney General
Wendell Charles Roberts.....	Assistant Attorney General
Tracey D.S. Sanders	Assistant Attorney General
Noëlle L. Shaw-Bell.....	Assistant Attorney General
Lisa Han Shin	Assistant Attorney General
Nicholas F. Simopoulos	Assistant Attorney General
Jessica Morgan Smith.....	Assistant Attorney General
Craig W. Stallard.....	Assistant Attorney General
Sarah J. Surber.....	Assistant Attorney General
Kenneth B. Swartz.....	Assistant Attorney General
C. Nicole Sydnor	Assistant Attorney General
J. David Taranto	Assistant Attorney General
Matthew A. Taylor	Assistant Attorney General
Farnaz Farkish Thompson	Assistant Attorney General
Lara K.J. Todd.....	Assistant Attorney General
David M. Uberman.....	Assistant Attorney General
Vincent J. Vaccarella.....	Assistant Attorney General
K. Michelle Welch	Assistant Attorney General
Janet L. Westbrook.....	Assistant Attorney General

Steven M. Westermann	Assistant Attorney General
Erin Dugan Whealton	Assistant Attorney General
Julie M. Whitlock	Assistant Attorney General
Collette M. Wilcox	Assistant Attorney General
Randall H. Wintory	Assistant Attorney General
Corie Tillman Wolf	Assistant Attorney General
Daniel S. Wolf	Assistant Attorney General
Erin M. Kulpa	Asst. Att’y Gen./Anti-Human Trafficking Coordinator
Susan B. Curwood	Asst. Att’y Gen./Dir., Tobacco Enforcement Unit
Shannon Dion Taylor	Assistant Attorney General/CPEU Director
Phillip O. Figura	Assistant Attorney General/Gang Prosecutor
Vaso Tahim Doubles	Assistant Attorney General/Prosecutor
Steven W. Grist	Assistant Attorney General/Prosecutor
Janine M. Myatt	Assistant Attorney General/Prosecutor
Amanda McGuire	Assistant Attorney General/Publications Coordinator
Marc J. Birnbaum	Assistant Attorney General/SAUSA
Cameron M. Rountree	Assistant Attorney General/SAUSA
Michael A. Jagels	Chief Prosecutor
David W. Tooker	Chief Prosecutor
Erica J. Bailey	Chief of Civil Investigations
Joseph E.H. Atkinson	Chief of Elder Abuse
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
Lelia P. Winget-Hernandez	Lead Attorney/Assistant Attorney General
Henry L. Chambers Jr	Special Assistant Attorney General
Frederick S. Fisher	Special Assistant Attorney General
Guy W. Horsley Jr	Special Assistant Attorney General
Elizabeth M. Latimer	Special Assistant Attorney General
Crystal V. Adams	Legal Secretary Senior
Matthew B. Addison	Claims Representative
Michelle Powell Ahearn	Paralegal
Lauren Ashworth Ainsley	Legal Secretary
Sameer Ali	IT Support Specialist II
J. Hunter Allen Jr	Investigator
S. Elizabeth Allen	Legal Secretary Senior Expert
Esther Welch Anderson	MFCU Administrative Manager
James W. Anderson	Investigator
Paul N. Anderson	Deputy Director, Investigations & Audits
Susan M. Antonelli	Claims Representative
Kristine E. Asgian	Chief Auditor & Grants Manager
Sheerie C. Ayres	Administrative Coordinator
Juanita Balenger	Community Outreach and TRIAD Director
David S. Barber	Investigator

Andrew P. Barone	Investigative Supervisor
James A. Barr	Clerk
Delilah Beaner	Administrative Legal Secretary Senior
Kiana M. Beekman	Investigator
Elizabeth K. Beverly	Investigator
Erin Blair Bishop	Dispute Resolution Specialist
Mary H. Blackburn	Senior Financial Investigator
Heather K. Blanchard	eDiscovery Technician
Kevin Marcelle Boone	Litigation Specialist
Daniel M. Booth	Financial Investigator
Donna M. Brown	Financial Manager
Linda F. Browning	Employee Relations and Training Manager
Tanya L. Buresh-Werby	Assistant Operations Coordinator
Howard K. Burkhalter	Investigator
Charles R. Calton	Claims Representative
Diana Tas Cardelino	EEO Investigator/Mediator
Laura Jean Carman	Investigator/Forensic Examiner
Lera L. Champagne-Andriani	Nurse Investigator
Jason E. Chandler	Investigator
Addison L. Cheeseman	MFCU Computer Forensic-IT Supervisor
Cory K. Chenard	Deputy Scheduler & Press Assistant
Gloria A. Clark	Legal Secretary Senior
Randall L. Clouse	Director & Chief, Medicaid Fraud Control Unit
Betty S. Coble	Legal Secretary Senior Expert
Christina I. Coen	Legal Secretary Senior Expert
Jeanne E. Cole-Amos	Director of Human Resources
Sharon T. ColeScott	Legal Secretary
Joseph J. Conahan	Investigator
Deborah P. Cook	Claims Specialist Senior Expert
John K. Cook Jr	Assistant Facilities Coordinator
Jill S. Costen	Chief Investigator for Provider Fraud
Katherine A. Courain	Scheduler
Billy Jack Cox Jr	Investigator
Donna D. Creekmore	Legal Secretary Senior
Charles E. Crute Jr	Senior Criminal Investigator
Thomasina Margaret Cunningham	Auditor
Beverly B. Darby	Investigator
Jennifer S. Dauzier	Criminal Analyst Senior
Demetrice A. Davis	Dispute Resolution Specialist
Diane W. Davis	Legal Secretary
Georgianna J. Davis	Investigator
J. Randall Davis	Community Outreach Coordinator
Tunisia M. Dean	Accountant Senior
Robert A. DeGroot	Investigative Supervisor
Linda A. Dickerson	Consumer Specialist Senior

Polly B. Dowdy	Paralegal Senior Expert
Edward J. Doyle	Director, FCIC
Christine R. Dreyer.....	Legal Secretary
Kelly Ford Ecimovic	Senior Expert Claims Representative
Melinda S.C. Edwards.....	Paralegal
Sonya L. Edwards.....	Paralegal Senior
Devin A. England.....	Financial 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
Hunter W. Fisher	Program Coordinator
Cheryl D. Fleming.....	Administrative Legal Secretary Senior
Caren Yeager Flick.....	Investigator
Gordon C. Franke.....	Computer Programmer
Judith B. Frazier	Legal Secretary Senior
Shannon Marie Gammel.....	Financial Investigator
William W. Gentry.....	Criminal Investigator
Caroline P.R. Gibson.....	Deputy Director of Communication
Sharon K. Goggin.....	Paralegal
Montrue H. Goldfarb.....	Paralegal Senior
Mary P. Goodman	Office Services Specialist
Brian J. Gottstein.....	Director of Communication
David C. Graham.....	Director, Computer Forensics Unit
LaToya S. Gray	Executive Assistant to the Attorney General
Karl E. Grotos.....	Business Manager
Steven F. Hadra	Investigative Supervisor
Lyn J. Hammack.....	Administrative Legal Secretary Senior
Mary Anne Harper.....	Claims Representative
Paul Gabriel Hastings Jr.	Investigator
Euticha B. Hawkins.....	Publications Assistant
Thomas E. Haynesworth	Office Technician
Jennifer Peterson Heatherington.....	Investigator
Regina M. Hedman.....	Investigator
Deborah J. Henderson	Legal Secretary Senior
Rebecca L. Hensby.....	Legal Secretary Senior Expert
Tiawanda L. Holt.....	Unit Manager, CIRU
Margaret C. Horn	Chief of Multi-State Investigations
Sandra W. Hott.....	Legal Secretary Senior
Charles A. Howell.....	Investigator
Elizabeth E. Hudnall.....	Nurse Investigator
Steven D. Irons	Investigative Supervisor
Jerome A. Jackson.....	Computer Programmer
Judith G. Jesse	Paralegal Senior Expert

Douglas A. Johnson.....	Deputy Director of Investigations & Audits
Genea C.P. Johnson.....	Paralegal
Kevin M. Johnson.....	Senior Investigator
Shawne Moore Johnson.....	Legal Secretary Senior
Tierra G. Johnson	Legal Secretary Senior
Jon M. Johnston.....	Senior Criminal Investigator
Scott D. Jones	Senior Investigator
Whitney W. Jones.....	Legal Secretary
Tammy P. Kagey.....	Paralegal Senior Expert
Hyo J. Kang.....	Senior Database Administrator/Developer
Michael G. Keen.....	Investigator
Amy Saucier Kelley	Analyst
Debra M. Kilpatrick	Administrative Coordinator
Chrystal L. Knighton.....	Programmer Supervisor
Jennifer Lynn Krajewski	Paralegal Senior
Nichole Sarah Krol.....	Financial/Senior Procurement Manager
Mary Anne Lange.....	Paralegal
Donna Lynn Lanno.....	Deputy Director of Finance
Wailing Lau.....	Fiscal Technician
Laura Ann LeBlanc	Administrative Assistant
Laureen S. Lester.....	Chief of Elder Abuse
Patricia M. Lewis	Unit Program Coordinator
Deborah L. Madison.....	Director of Information Systems
Deborrah W. Mahone	Paralegal Senior Expert/Legislative Specialist
Jason A. Martin	Computer Forensic Specialist
Madrika Lavona Martin.....	Buyer Specialist
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
Judy O. McGuire	Claims Representative
George T. McLaughlin	Investigator/Forensic Examiner
Melissa A. McMenemy	Statewide Facilitator
Katelyn E. Melo	MFCU Community Outreach Coordinator
Jacqlyn W. Melson.....	Investigator
Natalie A. Mihalek	Paralegal Senior
David J. Miller.....	Investigator
Lynice D. Mitchell	Office Services Specialist Senior
James B. Mixon Jr.....	Analyst/Community Outreach Coordinator
Karen G. Molzhon.....	Legal Secretary Senior
Eda M. Montgomery	Investigative Supervisor
Jonah F. Morrison.....	IT Support Specialist I
Patricia A. Morrison.....	Unit Manager, DRIU

Zachary H. Moyer	Criminal Investigator/Computer Forensic Examiner
Howard M. Mulholland	FCIC Financial Investigator
Eric W. Myer	Systems Development Manager
Janice M. Myer	Exec. Asst. to the Chief Dep. Att’y Gen.
Mary C. Nevetral	Receptionist
Connie J. Newcomb	Director of Office Operations
Trudy A. Oliver-Cuoghi	Paralegal
Christopher M. Olson	Investigator
Sheila B. Overton	Internet Services Administrator
Janice R. Pace	Financial Manager
Hailey Jeanine Paladino	Human Resources Assistant
Sharon P. Pannell	Legal Secretary Senior
Doris M. Parham	Intake Specialist
Rebecca A. Parks	Program Coordinator, GRIP
John W. Peirce	Investigative Supervisor
Coty D. Pelletier	Investigator
Duncan Allen Pence	Investigator
Jane A. Perkins	Paralegal Senior Expert
Bruce W. Popp	Deputy Director, Information Systems
Jacquelin T. Powell	Legal Secretary Senior Expert
Sandra L. Powell	Legal Secretary Senior
Sara Duvall Powers	Paralegal
Syed A. Rahman	Auditor
N. Jean Redford	Legal Secretary Senior Expert
Luvenia C. Richards	Legal Secretary
Ryan C. Rios	Financial Investigator
David A. Ridsen	Investigator
Alfreda J. Robinson	Human Resources Assistant
Hamilton J. Roye	Administrative Coordinator
Joseph M. Rusek	Investigative Supervisor
Frank Matthew Sasser III	Investigator
Kevin R. Satterfield	Network Engineer
Constance S. Saupé	Administrative Legal Secretary Senior
Tyler J. Saupé	IT Student Assistant
Lauri A. Schinzer	Claims Specialist
Matthew Z. Scott	Computer Programmer
Michelle S. Scott	Legal Secretary
Elizabeth G. Sherron	Senior Financial Investigator
Sara J. Skeens	eDiscovery Supervisor
Alexander Ross Smith	Paralegal
Debra L. Smith	Legal Secretary Senior
Faye H. Smith	Human Resource Manager
Jameen C. Smith	Claims Specialist Senior Expert
Marian B. Smith	Financial Manager
Tierra Monet Smith	Office Assistant

Gerald B. Snead II.....	EEO Manager
Michele A. Stanley.....	Investigator
Eva A. Stuart.....	Constituent Services Administrator
Nicolette K.D. Stumpf.....	MFCU Legal Secretary
Rhonda H. Suggs.....	Paralegal Senior
Kaci Cummings Sutherland.....	Consumer Specialist
Tara N. Talbott.....	Nurse Investigator
Gregory G. Taylor.....	Claims Representative
Jeannette T. Taylor.....	Legal Secretary
Kimberly Edward 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
Michelle L. Townsend.....	Unit Manager, DRIU
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
David M. Varcoe.....	Investigator
Corrine Vaughan.....	Program Director, Victim Notification Program
Laura C. Verser.....	Paralegal
Kathleen B. Walker.....	Program Assistant, Victim Notification Program
Meredith Kristen Wall.....	Senior Advisor to the Attorney General
Christie A. Wells.....	Director of Finance
Cortley D. West.....	EEO/Intake Manager
Nanora W. Westbrook.....	Program Asst. Sr., Victim Notification Program
Amy R. Wight.....	Special Projects Coordinator/GRIP Director
Kimberly Wilborn.....	Paralegal
Carlisle M. Williams.....	Auditor
M. Donette Williams.....	Administrative Coordinator
Tiffany D. Williams.....	Intake Specialist
Timothy L. Wilson.....	Administration/Operations Manager
Michael J. Wyatt.....	Investigator
Whitney B. Yarchin.....	Investigator
Abigail T. Yawn.....	Legal Secretary Senior
James A. Zamparello.....	Investigator
Apryl T. Ziegler.....	Paralegal

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. Bocock.....	1852–1857
John Randolph Tucker.....	1857–1865
Thomas Russell Bowden	1865–1869
Charles Whittlesey (military appointee).....	1869–1870
James C. Taylor	1870–1874
Raleigh T. Daniel	1874–1877
James G. Field	1877–1882
Frank S. Blair	1882–1886
Rufus A. Ayers	1886–1890
R. Taylor Scott	1890–1897
R. Carter Scott	1897–1898
A.J. Montague	1898–1902
William A. Anderson	1902–1910
Samuel W. Williams.....	1910–1914
John Garland Pollard.....	1914–1918
J.D. Hank Jr. 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.

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

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

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.

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.

CASES
IN THE
SUPREME COURTS
OF
VIRGINIA
AND THE
UNITED STATES

CASES DECIDED IN SUPREME COURT OF VIRGINIA¹

Baird ex rel. Barnes v. Stokes. Affirming the circuit court’s dismissal of a medical malpractice case involving several doctors and the Eastern Virginia Medical School.

Boone v. Commonwealth. Affirming the holding of the Court of Appeals that in a prosecution for possession of a firearm by a felon, the Commonwealth was not limited to presenting evidence of only one prior conviction.

Burkeen v. Commonwealth. Affirming Court of Appeals decision that the defendant’s unprovoked attack on the victim with his bare fists, causing serious injuries, supported conviction for malicious wounding.

Commonwealth v. Peterson. Reversing the trial court’s judgment holding that a duty arose to warn students of harm by a third party criminal, and directing the entry of final judgment in favor of the Commonwealth. The Court assumed, without deciding, that a “special relationship” existed between the Commonwealth and Virginia Tech students.

Commonwealth v. Tuma. Reversing the Court of Appeals ruling that a *Brady* violation occurred, as the evidence at issue was available for the defendant’s use at trial.

Daily Press v. Commonwealth. Holding appeal was not moot and that the circuit court erred in denying a motion to unseal records from a completed criminal trial.

Elligson v. Commissioner of the Dep’t of Behavioral Health & Developmental Services. Dismissing petition for a writ of habeas corpus challenging confinement in the custody of the Department of Behavioral Health and Developmental Services.

Henderson v. Commonwealth. Affirming the Court of Appeals en banc decision that affirmed the circuit court’s revocation of probation.

In re: Garry Diamond. Granting a writ of actual innocence based on biological evidence.

Jordan v. Commonwealth. Affirming decision of the Court of Appeals that the victim’s description of the firearm used by the defendant was sufficient to sustain a conviction for possession of a firearm by a convicted felon, even though no weapon was recovered from the defendant.

Laster v. Russell. Holding that the circuit court did not err in denying a petition for a writ of habeas corpus alleging deficient trial counsel in connection with a plea offer.

Lawlor v. Commonwealth. Affirming circuit court convictions and capital murder sentence.

Livingston v. Virginia State Bar. Affirming in part and reversing in part the Disciplinary Board’s memorandum order; affirming the Board’s determination that the prosecutor violated Rule 1.1, which relates to competence; reversing the Board’s determination that the prosecutor violated Rule 3.1, which relates to meritorious claims, and Rule 3.8, which relates to filing a charge not supported by probable cause.

¹ A complete listing of all the cases handled by the Office of the Attorney General is not reprinted in this Report. Only selected cases pending in or decided by the Supreme Court of Virginia and the Supreme Court of the United States are included, as required by § 2.2-516 of the *Code of Virginia*. Further, several noteworthy Supreme Court cases are highlighted in the Letter to the Governor describing the accomplishments of each Division of the Office of the Attorney General.

Meeks v. Virginia Department of Transportation. Reversing the trial court's finding that tolls to be charged for the Midtown Tunnel/ Downtown Tunnel/ Martin Luther King Extension Public Private Transportation Act (PPTA) project constituted unconstitutional taxes, thereby validating the state's position that the tolls were user fees that could be legally imposed and upholding the constitutionality of the PPTA and the ability of VDOT to impose tolls under the PPTA statutory authority.

Morva v. Warden. Dismissing habeas corpus case challenging convictions for capital murder and sentence of death.

Neely v. Warden. Dismissing habeas corpus petition challenging conviction for assault and battery of a law enforcement officer.

Northam v. Virginia State Bar. Dismissing and vacating the Virginia State Bar Disciplinary Board's public reprimand arising from a violation of conflict of interest rules.

Peterson v. Commonwealth. Finding appeal moot regarding claims against Virginia Tech President based upon the Court's holding in *Commonwealth v. Peterson*.

Peterson v. Commonwealth & Pryde v. Commonwealth. Reversing the circuit court's judgment against the Commonwealth in a wrongful death trial arising from the 2007 shootings at Virginia Tech.

Prieto v. Warden. Dismissing habeas corpus case challenging convictions for capital murder and sentence of death.

Powell v. Commonwealth. Affirming Court of Appeals decision upholding validity of weapons frisk following a concededly valid *Terry* stop.

Rhoten v. Commonwealth. Affirming the trial court's decision that *res judicata* did not bar the Commonwealth's petition and finding that Rhoten met the statutory criteria for a sexually violent predator and was ordered civilly committed.

Sigmon v. Director. Holding that a petition for a writ of habeas corpus and a direct appeal of a criminal conviction can proceed simultaneously in the Virginia Supreme Court, and finding the petitioner's claim of ineffective assistance of counsel lacked merit.

Whitehead v. Commonwealth. Affirming conviction for possession of N-Benzylpiperazine (BZP), a Schedule I controlled drug.

Wright v. Commonwealth. Affirming the trial court's decision and finding that the trial court had considered the respondent's evidence which consisted of the written evaluation prepared by Wright's sexually violent predator expert.

CASES PENDING IN THE SUPREME COURT OF VIRGINIA²

Alexander v. Commonwealth. Appealing Court of Appeals treatment of defendant's conviction for harassment by telephone.

Allen v. Commonwealth. Appealing the Court of Appeals holding that there was sufficient corroboration of the defendant's confession to sustain his conviction in the Lynchburg Circuit Court for aggravated sexual battery.

² Although these cases were pending in the Supreme Court in 2012, some have reached decision in early 2013, prior to publication of this Report. Those case decisions will be included in the 2013 Annual Report's Cases Decided.

American Tradition Institute v. Rector & Visitors of the University of Virginia. Appealing circuit court decision that e-mail records of a former University faculty member are exempt from disclosure under the Virginia Freedom of Information Act and that the University is entitled to reimbursement for reviewing the e-mails to determine if they should be disclosed.

Bradley v. Commonwealth. Appealing the holding of the Court of Appeals that the defendant's argument was defaulted by Rule 5A:18 where at trial he challenged only the sufficiency as to whether he possessed the cocaine at trial, but argued on appeal the evidence did not prove he had intent to distribute.

Commonwealth v. Amos. Appealing the decision of the Court of Appeals that the trial court erred in finding Amos guilty of summary contempt.

D'Amico v. Commonwealth. Appealing conviction for refusal to take a breathalyzer, arguing strict compliance with Code § 18.2-268.3 is required for conviction.

Davis v. McDonnell. Petitioning for appeal from dismissal of case against state and city officials after petitioner received a citation from the City of Richmond for violating its property maintenance ordinances.

Department of Juvenile Justice v. Coffey. Petitioning for appeal seeking to reverse adverse ruling of Court of Appeals that restored a teacher to employment who had been fired for striking a juvenile in one of the Department of Juvenile Justice facilities.

Eggleston v. Commonwealth. Appealing the Court of Appeals denial of a petition for appeal on the ground that the assignment of error was insufficient under Rule 5A:12(c).

Findlay v. Commonwealth. Appealing the Court of Appeals dismissal of appeal on the ground that the assignment of error was insufficient under Rule 5A:12(c).

Gardner v. Commonwealth. Appealing the defendant's convictions for two counts of aggravated sexual battery and one count of object sexual penetration.

Herring v. Commonwealth. Appealing Court of Appeals decision and challenging the sufficiency of the evidence to prove the defendant's intent to commit premeditated murder and whether he performed a direct but ineffectual act toward the commission of that crime; also at issue in the Commonwealth's cross-appeal is whether the Court of Appeals erroneously reversed the defendant's abduction convictions.

In re Hunter. Petitioning for writs of mandamus and prohibition against a judge for cooperating with attempts to extradite petitioner and enforce a Florida judgment.

In re Rompalo. Petitioning for appeal by a pro se petitioner who sought an extraordinary writ in the circuit court to vacate a plea bargain entered in the general district court two years before the petition for the writ was filed.

Irby v. Cavan. Noting appeal by former faculty members of Southside Virginia Community College in a case alleging breach of contract and fraudulent concealment after their positions were eliminated due to budget cuts and low enrollment.

Kirtley v. Commonwealth. Appealing Court of Appeals finding the evidence sufficient to find a probation violation based on refusal to cooperate with sex offender treatment.

Kuchinsky v. Virginia State Bar ex rel. Third District Committee. Appealing a public reprimand issued by the Bar for violations of Rules 1.8(a), 3.4(d), and 8.4(a).

Lawlor v. Davis. Petitioning for habeas corpus in a capital case.

Linnon v. Commonwealth. Appealing the Court of Appeals upholding for taking indecent liberties with a minor in a custodial relationship.

Maxwell v. Commonwealth. Appealing the Court of Appeals finding that Rule 5A:18 barred consideration of the merits of the appeal.

McAllister v. Commonwealth. Petitioning for appeal an action involving injury after being struck in the arm by a snow blower on the campus of Wytheville Community College.

Rowe v. Commonwealth. Appealing the Court of Appeals ruling that the trial court properly denied the defense motion for mistrial, based on a comment by the prosecutor in closing argument to the jury, as no timely objection was made.

Smith v. Schiavone. Petitioning for appeal in action by *pro se* incarcerated plaintiff seeking return of farm equipment from state police officer.

Starrs v. Commonwealth. Appealing Court of Appeals holding that Starrs was not entitled to deferred disposition, looking to ultimately dismiss the charge following his guilty pleas.

Supinger v. Cuccinelli. Petitioning for appeal from judgment denying injunction and writ of mandamus to challenge the Attorney General's appointment of outside counsel to handle the petitioners' grievance hearings.

Swart v. Commonwealth. Petitioning for appeal after a *pro se* prisoner sought a writ of mandamus forcing the circuit court to vacate his plea bargain over two years after the plea bargain was entered, on the basis that the plea bargain did not expressly state that he would be serving his sentences consecutively, and therefore the court did not have the authority to impose consecutive sentences pursuant to the plea bargain.

Town & Country Veterinary Clinic v. Virginia-Maryland Regional College of Veterinary Medicine. Petitioning for appeal in a lawsuit alleging business torts against a state agency.

Willis v. Commonwealth. Petitioning for appeal from *inter alia* the circuit court's dismissal of the Commonwealth on the basis that the Commonwealth does not have *respondeat superior* liability for alleged civil rights abuses by City of Virginia Beach police officers, related to the police's temporary detention of the petitioner as a suspect in a nearby shooting, and discovered marijuana on his person when they searched him as an incident of his temporary detention.

Woodard v. Commonwealth. Appealing Court of Appeals' upholding sentences imposed for possession of MDMA (ecstasy) with intent to distribute and distribution of MDMA.

CASES REFUSED OR DISMISSED ON PROCEDURAL GROUNDS BY THE SUPREME COURT OF VIRGINIA

Bono v. George Mason University. Denying appeal of circuit court's upholding the University's denial of in-state tuition based on the University's conclusion that the student moved to Virginia for the purpose of attending school.

Butts v. Commonwealth. Refusing petition for writ of mandamus filed by a prisoner *pro se* alleging that the Clerk of the Juvenile and Domestic Relations District Court unlawfully declined to destroy an order of child support.

Cardwell v. Commonwealth, Department of Taxation. Dismissing petition for appeal of circuit court grant of summary judgment to the Commonwealth for failure to perfect the appeal pursuant to Rule 5:17(c)(1).

Castine v. Commonwealth. Refusing petition for appeal that the circuit court erroneously granted a plea of sovereign immunity on the ground that the notice of claim does not sufficiently describe the location of the accident.

Green v. Virginia Employment Commission. Dismissing petition for appeal of circuit court order upholding the Commission's reduction of unemployment benefits for failure to timely file the petition for appeal pursuant to Rule 5:17(a)(2) and for failure to assign an error pursuant to Rule 5:17(c)(1).

Gyimah v. Department of Motor Vehicles. Dismissing a petition for appeal because the petition was filed late and failed to assign error to the ruling of the circuit court.

Huff v. Commonwealth. Refusing to hear appeal from trial court's denial of request that the Department of Behavioral Health and Developmental Services be ordered to find a home for a sexually violent predator to effectuate his release from custody.

In re Dowling. Refusing petition for writ of prohibition against a judge in a divorce case.

In re Field. Dismissing a petition for writ of mandamus filed against a circuit court judge and a court-appointed commissioner.

In re Lazzaro. Dismissing a petition for appeal on procedural grounds in a case involving an attorney sanctioned by a judge in Roanoke Circuit Court.

In re Liverman. Dismissing a petition for writ of mandamus against the Virginia Parole Board by a *pro se* petitioner who challenged, on a continuing violations theory, his allegedly erroneous initial 1995 parole ineligibility finding and most recent parole denial.

Juma Brothers, Inc. v. Virginia Department of Taxation. Refusing to hear appeal from circuit court finding that bidis are cigarettes for purposes of the Virginia Tobacco Directory and upholding the Department's assessment of a penalty for possessing bid is not listed in the Directory.

Prince v. U.S. Bank National Association. Dismissing on procedural grounds a petition for appeal in a case involving a *pro se* petitioner who had filed Virginia Fraud Against Taxpayer's Act claims.

Stevenson v. Hamilton. Dismissing petition for writ of mandamus concerning the renewal of a concealed handgun permit because petition was moot.

Virginia Commonwealth University v. Hall. Denying a *pro se* litigant's petition for appeal following the trial court's grant of VCU's demurrer and motion to dismiss the *pro se* litigant's counterclaim against VCU, which alleged civil rights violations that were litigated and dismissed years earlier as defenses to the debt collection action initiated by VCU against the *pro se* litigant for not paying student fees for classes taken at VCU.

Walsh v. Virginia Commonwealth University. Denying a petition for appeal after the Court of Appeals denied motion for reconsideration in this challenge to litigant's termination from VCU for falsifying an employment application.

CASES IN THE SUPREME COURT OF THE UNITED STATES

Brooks v. Arthur. Denying a petition for writ of certiorari by corrections officers after Fourth Circuit dismissed lawsuit complaining of unconstitutional discharge in violation of their protected freedom of speech.

Hill v. Hawks. Denying a petition for a writ of certiorari where a *pro se* appellant had filed a federal civil action against the Supreme Court of Virginia and a circuit court judge after the Supreme Court of Virginia and the circuit court judge adjudicated her state tort case with a dismissal.

Keeler v. City of Newport News. Denying a petition for writ of certiorari challenging the district court's dismissal of the action for lack of subject matter jurisdiction.

In re Liverman. Denying the appeal and petition for writ of extraordinary mandamus of a *pro se* petitioner who challenged, on a continuing violations theory, his allegedly erroneous initial 1995 parole ineligibility finding and most recent parole denial. His petition for writ of mandamus against the Virginia Parole Board in the Virginia Supreme Court had been dismissed as untimely under Virginia Code § 8.01-644.1.

Nofsinger v. Virginia Commonwealth University. Denying a petition for writ of certiorari by a graduate student alleging denial of due process, violation of equal protection rights, and breach of contract after being dismissed from the physical therapy program for lack of professionalism.

Sanders v. Commonwealth. Denying a *pro se* plaintiff's petition for writ of certiorari from the dismissal of his action challenging DNA evidence in a rape/maiming conviction.

Scott v. U.S. National Bank. Denying a petition for writ of certiorari in a case alleging judges and others engaged in a conspiracy to deprive plaintiff of two parcels of property.

Stokes v. Virginia Department of Corrections. Denying a *pro se* petitioner's motion to file a petition for a writ of certiorari out of time in a case alleging discrimination, retaliation, and failure to rehire after termination for cause based on insubordination.

Vuyyuru v. Jadhav. Denying a petition for writ of certiorari in a case challenging the Board of Medicine's ruling suspending plaintiff's license to practice medicine in Virginia.

Wilson v. Flaherty. Denying petition for certiorari review of the decision of the Fourth Circuit Court of Appeals affirming the district court's ruling dismissing Wilson's habeas corpus petition.

Wolfe v. Clarke. Denying petition for a writ of certiorari seeking to challenge the Fourth Circuit's reversal of the district court's order prohibiting the retrial and new trial of the defendant for capital murder and related crimes, thereby removing any lingering concern over a federal bar to his retrial on capital murder for hire and additional related charges.

OFFICIAL OPINIONS
OF THE
ATTORNEY GENERAL



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

Each opinion in this report is preceded by an opinion number and a main headnote briefly describing the subject matter of the opinion. For purposes of citing an opinion, each opinion begins on the page on which the opinion number preceding the opinion first appears. Cite an opinion in this report as follows: 2013 Op. Va. Att'y Gen. ___.

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



OP. NO. 13-009**ADMINISTRATION OF GOVERNMENT: AUTHORITIES-FORT MONROE AUTHORITY ACT****COUNTIES, CITIES, AND TOWNS: LOCAL GOVERNMENT PERSONNEL, QUALIFICATION FOR OFFICE, BONDS, DUAL OFFICE HOLDING AND CERTAIN LOCAL GOVERNMENT OFFICERS****CONSTITUTION OF VIRGINIA**

Neither the Mayor, Vice Mayor, or any other Hampton City Council member may be appointed by the Hampton City Council to serve as a member of the Fort Monroe Authority Board.

Members of the FMA Board stand in a fiduciary relationship with the FMA and thus are subject to the common law duties of loyalty, care, obedience, and disclosure that are generally applicable to those in such a fiduciary relationship.

THE HONORABLE S. CHRIS JONES
MEMBER, HOUSE OF DELEGATES
APRIL 12, 2013

ISSUES PRESENTED

You inquire whether the Mayor, Vice Mayor or any other Hampton City Council member may be appointed by the Hampton City Council to serve as a member of the Fort Monroe Authority (“FMA” or “Authority”) Board of Trustees (“Board”). You further ask whether members of the Board of the Authority, a political subdivision and public body corporate and politic of the Commonwealth of Virginia, are subject to the common law duties of loyalty, care, obedience, and disclosure that are generally applicable to the directors of boards of corporations in Virginia. Also, you inquire about the remedies available to address a Board member’s failure to fulfill his lawful duties.

RESPONSE

It is my opinion that, because there is no available exemption to the prohibitions of Article VII, § 6 of the Constitution of Virginia and § 15.2-1535 of the *Code of Virginia*, neither the Mayor, Vice Mayor, or any other Hampton City Council member may be appointed by the Hampton City Council to serve as a member of the FMA Board. It is further my opinion that members of the FMA Board, as individuals holding public office, stand in a fiduciary relationship with the FMA and thus are subject to the common law duties of loyalty, care, obedience, and disclosure that are generally applicable to those in such a fiduciary relationship. Finally, it is my opinion that an FMA Board member who fails to fulfill his lawful duties may be removed from office in accordance with the Board’s by-laws and applicable law.

BACKGROUND

In 2005, the City of Hampton created a Federal Area Development Authority (FADA) to deal with issues related to Fort Monroe.¹ The FADA was transformed into the Fort Monroe Federal Area Development Authority (FMFADA) in 2007 to continue the planning required by the Defense Base Closure and Realignment Act.² In 2010,

pursuant to the Fort Monroe Authority Act (FMA Act),³ the Virginia General Assembly created the FMA

to serve as the Commonwealth's management agent exercising all the Commonwealth's powers over public and private land in the Area of Operation, including regulation of land use, zoning, and permitting and implementation of actions and fulfillment of obligations under the Programmatic Agreement, Design Standards, Reuse Plan, State Memorandum of Understanding, and any other agreements regarding Fort Monroe to which the Commonwealth is a party.^[4]

The FMA is empowered to enter into contracts, to foster and stimulate economic development, to sue and be sued and to exercise other powers necessary to the fulfillment of its mission.⁵ The FMA Act contains provisions specifying the relationship of the Authority to the City of Hampton, including provisions concerning the collection of taxes from private parties when owed⁶ and the payment of a fee in lieu of taxes on property owned by the Commonwealth based on the assessed value of the properties.⁷ This provision gives the FMA the right to contest the assessments made by the City.⁸

The FMA Act further specifies a governing Board of Trustees consisting of twelve (12) voting members, including "two members appointed by the Hampton City Council," to perform these duties.⁹ Members of the Board take an oath of office that requires, in part, that each Board member "...will faithfully and impartially discharge all the duties incumbent upon me as..." a member of the Fort Monroe Authority Board of Trustees.¹⁰ The City appointees to the Hampton FADA and the FMFADA contained no members of the City Council. Since the creation of the FMA, the City has appointed only City Council members to serve on the Board. The present City of Hampton representatives are the Mayor, Molly Joseph Ward, and the Vice Mayor, George E. Wallace.

You ask whether these individuals, and more generally, whether any Hampton City Council member, can serve on the FMA Board in light of specific prohibitions contained in the Constitution of Virginia and the Code of Virginia. You express concern that, even if the appointment of the City Council members to the FMA Board is allowed under the Constitution and the Code of Virginia, such appointments may present those members with potential conflicts because of the differing interests of the FMA and the City of Hampton. You describe two situations that may raise conflicts for the Hampton City Council members. The first involves the work of the FMA Board to develop its positions and plans to deal with disagreements that arise between the FMA and the City of Hampton regarding the real property assessments used to calculate the fees in lieu of taxes paid by the FMA to the City. The second involves the work of the Board to consider proposals from developers for possible projects at Fort Monroe when the City of Hampton takes an official position against the projects.

APPLICABLE LAW AND DISCUSSION

Article VII, § 6 of the Constitution of Virginia provides, in pertinent part, that

No member of a governing body shall be eligible, during the term of office for which he was elected or appointed, to hold any office filled by the governing body by election or appointed, except that a member of a governing body may be named a member of such other boards, commissions, and bodies as may be permitted by general law.^[11]

In accordance with this constitutional provision, § 15.2-1535(A) of the *Code of Virginia* also provides that, “[n]o member of a governing body of a locality shall be eligible, during the term of office for which he was elected or appointed, to hold any office filled by the governing body by election or appointment, except that a member of a governing body may be named a member of such other boards, commissions, and bodies as may be permitted by general law...”¹² Section 15.2-1535(B) then sets forth boards, commission and authorities that are exempted from this prohibition.¹³

Thus, whether the City Council members may serve on the FMA board depends on whether a board position constitutes an “office” as contemplated in the Constitution and Code and, if so, whether such service can avail itself of the statutory exemption to the prohibition.

A previous opinion of this Office addressed the criteria for determining whether a particular position constitutes a public office. It concludes:

To constitute a public office, the position must be created by the Constitution or statutes. It is a position filled by election or appointment, with a designation or title, and duties concerning the public, assigned by law. A frequent characteristic of such a post is a fixed term of office.^[14]

The FMA is the creation of the FMA Act,¹⁵ which establishes the Authority as a “public body politic and corporate... constituted as a public instrumentality exercising public functions.”¹⁶ The General Assembly has declared that the Authority “serves a public purpose”¹⁷ and that the exercise of its powers and duties constitutes “the performance of an essential governmental function[.]”¹⁸ The enabling legislation further provides that the FMA is to be governed by a Board of Trustees and sets forth the method of appointment and prescribes terms of office for Board members.¹⁹ Based on the above criteria, I therefore conclude that FMA Board positions are public offices for purposes of Article VII, § 6 and Virginia Code § 15.2-1535.

The FMA Act provides that two Board members are to be appointed by the Hampton City Council.²⁰ Thus, a position on the FMA Board is an office appointed by City Council, and, in accordance with Article VII, § 6, no member of an appointing city council is eligible to be appointed to the Authority unless such appointment is expressly authorized by law.²¹ I am unaware of any provision of general law which expressly authorizes such an appointment. In addition, § 15.2-1535(B) does not include among its specific exemptions any provisions applicable to the FMA Board. Consequently, I conclude that neither the Mayor, Vice Mayor, nor any other Hampton City Council member may be appointed by the Hampton City Council to serve as a member of the FMA Board.

With regard to your second question, as discussed above, FMA Board members hold public office. As this Office previously has stated “[a] public officer or official has a

fiduciary relationship with the body of which he is a member”²² A fiduciary is “a person who is required to act for the benefit of another person on all matters within the scope of their relationship; one who owes to another the duties of good faith, trust, confidence and candor.”²³ Additionally, public officials “are trustees for the people who have a right to require them to exercise their best judgment in everything that pertains to the people or their welfare, unaffected and unprejudiced by anything that might inure to the official’s own interest as individuals.”²⁴ As noted previously, FMA Board members must take an oath of office obligating them to “faithfully and impartially” serve as members of the Board. Consequently, FMA Board members owe a duty of “good faith, trust, confidence and candor” to the entity that they serve, the FMA, and by extension, to the Commonwealth of Virginia as the entity to whom the Board is responsible.²⁵ Those duties must be discharged in a faithful and impartial manner.

Members of Hampton City Council, of course, also serve in a public office and owe the same duties of good faith, trust, confidence, and candor to the constituents that they represent as members of the Council,²⁶ as well as the same obligation to serve those constituents faithfully and impartially pursuant to their oath of office as Council members. To the extent that any FMA Board member serves in another position that would divide his or her loyalties to the FMA, there would be a conflict of interests based on the duties enumerated above and the obligations flowing from their oath of office. Nonetheless, because I conclude that Hampton City Council members are prohibited from serving on the FMA Board, I offer no further comments regarding the specific examples provide in your letter.

You also request my opinion regarding remedies that might be available to the FMA in the event a Board member failed to fulfill his duties to the FMA.²⁷ Pursuant to the Authority’s ability to adopt bylaws, rules, and regulations,²⁸ the FMA has determined that “the removal of any Trustee will be in accordance with Section 24.2-230.”²⁹ Section 24.2-230 allows for the removal of an elected or appointed Commonwealth officer only by the person or authority who appointed him, unless the member is convicted of certain crimes or is determined to be mentally incompetent.³⁰

CONCLUSION

Accordingly, it is my opinion that, because there is no available exemption to the prohibitions of Article VII, § 6 of the Constitution of Virginia and § 15.2-1535 of the *Code of Virginia*, neither the Mayor, Vice Mayor, or any other Hampton City Council member may be appointed by the Hampton City Council to serve as a member of the FMA Board. It is further my opinion that members of the FMA Board, as individuals holding public office, stand in a fiduciary relationship with the FMA and thus are subject to the common law duties of loyalty, care, obedience, and disclosure that are generally applicable to those in such a fiduciary relationship. Finally, it is my opinion that an FMA Board member who fails to fulfill his lawful duties may be removed from office in accordance with the Board’s by-laws and applicable law.

¹ See 2005 Va. Acts chs. 869 & 887 (authorizing the City to take such action).

² See 2007 Va. Acts chs. 707 & 740 (specifying conditions related to FADA).

³ See 2010 Va. Acts chs. 338 & 460. The FMA Act originally was codified in Title 15.2, but was recodified as part of Title 2.2 in 2011. 2011 Va. Acts ch. 716; see VA. CODE ANN. §§ 2.2-2336 through 2.2-2346 (2011 & Supp. 2012).

⁴ VA. CODE ANN. § 2.2-2339(7) (Supp. 2012).

⁵ Section 2.2-2340 (Supp. 2012).

⁶ Section 2.2-2341 (2011).

⁷ Section 2.2-2342 (2011).

⁸ *Id.*

⁹ Section 2.2-2338 (2011).

¹⁰ FORT MONROE AUTHORITY, BY-LAWS, art. III, § 3.01; VA. CODE ANN. § 49-1 (2009).

¹¹ VA. CONST. art. VII, § 6. See also 2000 Op. Va. Att’y. Gen. 51.

¹² VA. CODE ANN. § 15.2-1535(A) (2012).

¹³ Section 15.2-1535(B).

¹⁴ 2000 Op. Va. Att’y Gen. 51, 52; 1983-84 Op. Va. Att’y Gen. 292, 293; 1981-82 Op. Va. Att’y Gen. 170, 170; 1977-78 Op. Va. Att’y Gen. 322, 323 and cases cited therein.

¹⁵ VA. CODE ANN. §§ 2.2-2336 through 2.2-2346 (2011 & Supp. 2012).

¹⁶ Section 2.2-2336(C) (2011).

¹⁷ Section 2.2-2336(B)(6).

¹⁸ Section 2.2-2336(C).

¹⁹ Section 2.2-2338.

²⁰ Section 2.2-2338.

²¹ *Compare* Bray v. Brown, 258 Va. 618, 621, 521 S. E. 2d 526, 528 (1999) (holding Deputy Sheriff shall not be prohibited from serving on the Town Council because he was neither elected nor appointed as a deputy sheriff by the Town Council).

²² 1984-85 Op. Va. Att’y Gen. 245, 245 and cases cited therein.

²³ BLACK’S LAW DICTIONARY 289 (3d pocket ed. 1996).

²⁴ Blankenship v. City of Richmond, 188 Va. 97, 98, 49 S.E.2d 321 (1948).

²⁵ 1984-85 Op. Va. Att’y Gen. at 245 and cases cited therein.

²⁶ *Id.*

²⁷ The propriety or impropriety of any action will be dependent on the particular facts and circumstances of each case, and any specific guidance is beyond the scope of this opinion.

²⁸ See 2.2-2340(B)(1).

²⁹ FORT MONROE AUTHORITY, BY-LAWS, art. III, § 3.05

³⁰ VA. CODE ANN. § 24.2-230 (Supp. 2012).

OP. NO. 12-073

ADMINISTRATION OF GOVERNMENT: GOVERNMENT DATA COLLECTION AND DISSEMINATION PRACTICES ACT

The Government Data Collection and Dissemination Practices Act does not preclude law enforcement agencies from maintaining, using and disseminating personal information

collected by an automated License Plate Reader, provided such data specifically pertains to investigations and intelligence gathering relating to criminal activity.

Data collected by an LPR that is not properly classified as “criminal intelligence information” and not otherwise relating directly to law enforcement investigations and intelligence gathering respecting criminal activity, is subject to the Data Act’s strictures and prohibitions.

POLICE (STATE): VIRGINIA FUSION INTELLIGENCE CENTER

Data collected by an LPR may be classified as “criminal intelligence information” and thereby exempted from the Data Act’s coverage only if the data is collected by or on behalf of the Virginia Fusion Intelligence Center, evaluated and determined to be relevant to criminal activity in accordance with, and maintained in conformance with the criteria specified in § 52-48 of the *Code of Virginia*.

COLONEL W.S. FLAHERTY
SUPERINTENDENT, VIRGINIA DEPARTMENT OF STATE POLICE
FEBRUARY 13, 2013

ISSUES PRESENTED

You inquire regarding the collection, maintenance, and dissemination of data collected from an automated license plate reader (“LPR”). Specifically, you ask whether the Government Data Collection and Dissemination Practices Act (the “Data Act”) permits law enforcement agencies to collect, maintain, and disseminate LPR data. You also ask whether such data can be classified as “criminal intelligence information” under applicable Virginia law and thereby exempted from the Data Act’s provisions.

RESPONSE

It is my opinion that the Data Act does not preclude law enforcement agencies from maintaining, using and disseminating personal information collected by an LPR, provided such data specifically pertains to investigations and intelligence gathering relating to criminal activity. It further is my opinion that data collected by an LPR may be classified as “criminal intelligence information” and thereby exempted from the Data Act’s coverage only if the data is collected by or on behalf of the Virginia Fusion Intelligence Center, evaluated and determined to be relevant to criminal activity in accordance with, and maintained in conformance with the criteria specified in § 52-48 of the *Code of Virginia*. Finally, it is my opinion that data collected by an LPR that is not properly classified as “criminal intelligence information” and not otherwise relating directly to law enforcement investigations and intelligence gathering respecting criminal activity, is subject to the Data Act’s strictures and prohibitions.

BACKGROUND

LPRs use a combination of cameras and optical character recognition technology to read license plates. The camera captures an image of a license plate and the optical character recognition technology converts the image into data that can be searched

against an existing database or the data may be stored for future use, along with the time, date, and location of the observation. You describe two methods to collect data utilizing an LPR: an “active” manner, whereby law enforcement collects, evaluates, and analyzes the LPR data in real time to determine the relevance to an ongoing case or emergency, and, alternatively, a “passive” manner, whereby law enforcement collects unanalyzed data for potential future use if a need for the collected data arises respecting criminal or terroristic activities.

In your letter, you specifically describe these collection methods as follows:

Uses of LPR technology include searching for a specific plate number in cases involving vehicle larceny, abductions, wanted persons and in Amber/Senior/Blue Alerts. In these situations, the system allows law enforcement to process many more plates more accurately and much faster than they could through normal observation techniques. These systems are a vital tool in combating crime and protecting our most vulnerable populations.

The reason of this inquiry is another growing use of this technology. LPR systems can also be used to collect raw data. Whether the LPR reader is mobile or fixed, the data collected includes the image of the place, the time, date and precise location the license plate in question was captured by the system. This is accomplished passively and continuously. If the LPR system is on, it will capture and store the data for every license in plain view to the public it encounters. On a routine patrol, this may include thousands of license plate numbers and locations This can, and has been an invaluable tool in developing leads in terrorism investigations and criminal cases.

APPLICABLE LAW AND DISCUSSION

The Government Data Collection and Dissemination Practices Act¹ governs the collection, maintenance, and dissemination of personal information by government agencies.² The General Assembly enacted the Data Act in response to concerns about potentially abusive information-gathering practices by the government, including enhanced availability of personal information through technology.³ The Data Act serves to guide state agencies and political subdivisions in the collection and maintenance of personal information.⁴

The Data Act seeks to protect individual privacy, by placing strictures upon the governmental collection, maintenance, use and dissemination of personal information.⁵ “Personal information” includes

all information that (i) describes, locates or indexes anything about an individual including, but not limited to, his social security number, driver’s license number, agency-issued identification number, student identification number, real or personal property holdings derived from tax returns, and his education, financial transactions, medical history, ancestry, religion, political ideology, criminal or employment record^[6]

Data collected utilizing LPR technology falls within this statutory definition, as, for example, it may assist in locating an individual data subject, documenting his movements, or determining his personal property holdings.⁷ The collection of such

information may adversely affect an individual who, at some point in time, may be suspected of and or charged with a criminal violation.⁸ Accordingly, data collected by an LPR generally meets the definition of “personal information” and thus falls within the scope of the Data Act.

Therefore, the analysis of the issues you present must explore any exemptions to the Data Act’s coverage that may be applied to data collected through LPR technology.

The Data Act’s provisions afford an exemption for certain personal information systems that are “[m]aintained by the Department of State Police; the police department of the Chesapeake Bay Bridge and Tunnel Commission; police departments of cities, counties, and towns; and the campus police departments of public institutions of higher education”⁹ This exemption applies exclusively to information “that deal[s] with investigations and intelligence gathering relating to criminal activity[.]”¹⁰

Clearly, data collected by an LPR in the active manner and maintained by such law enforcement entities relates directly to the immediate public safety threat of criminal activity. Thus, such data is exempted from the application of the Data Act by its specific terms.

With respect to LPR data collected to date in the passive manner, you note that it has proven “an invaluable tool in developing leads in terrorism investigations and criminal cases . . . , [including] in high profile cases like the Museum of the Marine Corps sniper case.” Nevertheless, because no specific exemption applies to it, I must conclude that data so collected is subject to the Data Act’s regulatory provisions.

At § 2.2-3800(C) of the *Code of Virginia*, and fundamental to the Data Act, the General Assembly enunciated several “principles of information practice to ensure safeguards for personal privacy.” Among those principles is one particularly relevant to LPR data collected in the passive manner, stating that, “[i]nformation shall not be collected unless the need for it has been clearly established in advance.”¹¹

You state that data collected by an LPR in the passive manner is considered “raw data,” and is continuously recorded. It captures the “image of the place, the time, date and precise location the license plate in question[.]” You also explain that, “[t]he system only translates letters and numbers. This data is then stored by the capturing agency and can be searched at a later date by an alphanumeric query to determine if, when and where a license plate matching the query was encountered.”

On these facts I conclude that the need for such data has not been “clearly established in advance,” so as to conform to the applicable principle of information practice.¹² Its future value to any investigation of criminal activity is wholly speculative. Therefore, with no exemption applicable to it, the collection of LPR data in the passive manner does not comport with the Data Act’s strictures and prohibitions, and may not lawfully be done.¹³

With regard to your second inquiry, information that can be classified as “criminal intelligence information” also is expressly exempt from the application of the Data Act.¹⁴ This exemption is found in another part of the Code, one that relates to the

Virginia Fusion Intelligence Center (“the fusion center”).¹⁵ “Criminal intelligence information” is defined as “data that has been evaluated and determined to be relevant to the identification and criminal activity of individuals or organizations that are reasonably suspected of involvement in criminal activity.”¹⁶ This definition, however, “shall not include criminal investigative files.”

You ask whether data obtained through LPRs meets this definition. When construing a statute, the primary objective is “to ascertain and give effect to legislative intent,” as expressed by the language used in the statute.¹⁷ Where the language of a statute is unambiguous, the courts are bound by the plain meaning of that language.¹⁸ Also, where a statute specifies certain things, the intention to exclude that which is not specified may be inferred,¹⁹ and “[courts] may not add to a statute language which the legislature has chosen not to include.”²⁰

In defining the term “criminal intelligence information,” the General Assembly specifically limited such information to “data that has been evaluated *and* determined to be relevant to the identification and criminal activity . . .”²¹ Thus, only information that has been both evaluated and determined to be relevant to the identification and criminal activity of individuals or organizations that are reasonably suspected of involvement in criminal activity constitutes “criminal intelligence information.” Information that has not been evaluated or determined to be so relevant does not meet the definition.

Accordingly, data collected by the fusion center through use of an LPR in the active manner, and specifically, the data that is evaluated and analyzed in real-time respecting suspected criminal activity, meets the definition of “criminal intelligence information.” It thus is exempted from the scope of the Data Act.

Conversely, any data that may be collected in the passive manner by the fusion center through use of an LPR that is of unknown relevance and not intended for prompt evaluation and potential use respecting suspected criminal activity, is not “criminal intelligence information.” It therefore is not exempted from the scope of the Data Act.

Therefore, in sum, I conclude that whether an LPR can be used to collect personal information depends on the manner in which the device is employed to obtain the data. If the data is collected in the active manner, including data that can be deemed “criminal intelligence information,” such data can be collected, maintained and disseminated in accordance with law. On the other hand, LPR technology may not lawfully be used to collect personal information in the passive manner, including “the image of the place, the time, date and precise location [of a] license plate[.]”

CONCLUSION

Accordingly, it is my opinion that the Data Act does not preclude law enforcement agencies from maintaining, using and disseminating personal information collected by an LPR, provided such data specifically pertains to investigations and intelligence gathering relating to criminal activity. LPR data so collected is exempted from the Data Act’s coverage. It further is my opinion that data collected by an LPR may be classified as “criminal intelligence information,” and thereby exempted from the Data

Act's coverage, if the data is collected by or on behalf of the Virginia Fusion Intelligence Center, is evaluated and determined to be relevant to criminal activity in accordance with, and is maintained in conformance with the criteria specified in § 52-48 of the Code of Virginia. Finally, it is my opinion that because the need for such data has not been "clearly established in advance", LPR data collected in the continuous, passive manner, that is not properly classified as "criminal intelligence information" and not otherwise relating directly to law enforcement investigations and intelligence gathering respecting criminal activity, is subject to the Data Act's strictures and prohibitions, and it may not lawfully be collected through use of LPR technology.

¹ VA. CODE ANN. §§ 2.2-3800 through 2.2-3809 (2011).

² Your inquiry does not implicate the Fourth Amendment prohibition against unlawful search and seizure. *See* U.S. CONST. amend IV. Fourth Amendment protections are triggered only when the state conducts a search or seizure in an area in which there is a "constitutionally protected reasonable expectation of privacy." *New York v. Class*, 475 U.S. 106 (1986). When there is no reasonable expectation of privacy, the Fourth Amendment is not implicated. *See, e.g., United States v. Dionisio*, 410 U.S. 1, 14 (1973) (no reasonable expectation of privacy in one's voice); *United States v. Mara*, 410 U.S. 19, 21 (1973) (no reasonable expectation of privacy in one's handwriting); *California v. Greenwood*, 486 U.S. 35, 37 (1988) (same as to trash left by the curb). Because there is no reasonable expectation of privacy to one's license plate in public places, the use of LPRs by law enforcement does not violate the Fourth Amendment; for "it is unreasonable to have an expectation of privacy in an object required by law to be located in a place ordinarily in plain view from the exterior of the automobile." *Class*, 475 U.S. at 114 (finding no reasonable expectation of privacy in a VIN).

³ *Hinderliter v. Humphries*, 224 Va. 439, 443-44, 297 S.E.2d 684, 686 (1982). *See* § 2.2-3800(B) (listing General Assembly's findings leading to the Data Act's enactment).

⁴ *See* 2002 Op. Va. Att'y Gen. 3, 4.

⁵ Section 2.2-3800(B) and (C).

⁶ Section 2.2-3801.

⁷ Readily attainable information may include the vehicle registrant's name, address, vehicle information, and potential lien status. The definition of "information system" also broadly encompasses records "containing personal information and the names, personal number, or other identifying particulars of a data subject." Section 2.2-3801. A "data subject" is "an individual about whom personal information is indexed or may be located under his name, personal number, or other identifiable particulars, in an information system." *Id.*

⁸ *See* § 2.2-3801.

⁹ Section 2.2-3802(7).

¹⁰ *Id.*

¹¹ Section 2.2-3800(C)(2).

¹² Section 2.2-3800(C)(2).

¹³ *See* §§ 2.2-3800(B) and (C), 2.2-3803(A), and 2.2-3809.

¹⁴ Section 52-48(A) (Supp. 2012).

¹⁵ *See* Chapter 11 of Title 52 of the *Code of Virginia*, VA. CODE ANN. §§ 52-47 through 52-49 (2009 & Supp. 2012). I note that the term "criminal intelligence information" is used only in this part of the Code, which deals exclusively with the Virginia Fusion Intelligence Center, and not with law enforcement practices more generally. The Virginia Fusion Intelligence Center is a multiagency center tasked specifically with gathering and reviewing terrorist-related information. *See* § 52-47 (2009). The Department of State Police operates the fusion center, and it "shall collect, analyze, disseminate, and

maintain such information to support local, state, and federal law-enforcement agencies, and other governmental agencies and private organizations in preventing, preparing for, responding to, and recovering from any possible or actual terrorist attack.” *Id.*

¹⁶ Section 52-48(E).

¹⁷ *Commonwealth v. Amerson*, 281 Va. 414, 418, 706 S.E.2d 879, 882 (2011) (quoting *Conger v. Barrett*, 280 Va. 627, 630, 702 S.E.2d 117, 118 (2010)) (internal quotation marks omitted).

¹⁸ *Kozmina v. Commonwealth*, 281 Va. 347, 349, 706 S.E.2d 860, 862 (2011) (quoting *Conyers v. Martial Arts World of Richmond, Inc.*, 273 Va. 96, 104, 639 S.E.2d 174, 178 (2007)).

¹⁹ See 2A NORMAN J. SINGER & J.D SHAMBIE SINGER, *SUTHERLAND STATUTORY CONSTRUCTION* § 47:23 (7th ed. 2007) (explaining maxim of statutory construction “*expressio unius est exclusio alterius*”). See also, e.g., 2008 Op. Va. Att’y Gen. 126, 127 and citations therein.

²⁰ *Cnty. of Amherst v. Brockman*, 224 Va. 391, 397 297 S.E.2d 805, 808 (1982).

²¹ Section 52-48(E) (emphasis added).

OP. NO. 12-076

ADMINISTRATION OF GOVERNMENT: OFFICE OF THE STATE INSPECTOR GENERAL

The Office of the State Inspector General is not required to assume all duties, powers, and resources from the predecessor entities.

The jurisdiction of OSIG is limited to executive branch agencies; non-governmental entities that are wholly or principally supported by state funds not otherwise excepted by the definition of “nonstate agency;” and certain public institutions of higher education.

THE HONORABLE MICHAEL F.A. MOREHART
STATE INSPECTOR GENERAL
JULY 19, 2013

ISSUES PRESENTED

You ask whether the Office of the State Inspector General (“OSIG”) must assume all related powers, duties, and resources from certain predecessor entities and whether OSIG has jurisdiction beyond agencies within the executive branch of state government.

RESPONSE

It is my opinion that OSIG is not required to assume all duties, powers, and resources from the predecessor entities. It is further my opinion that the jurisdiction of OSIG is limited to executive branch agencies; non-governmental entities that are wholly or principally supported by state funds not otherwise excepted by the definition of “nonstate agency;” and public institutions of higher education to the extent that there are allegations of fraud, waste, abuse, or corruption concerning either the president of the institution or such institution’s internal audit department.

APPLICABLE LAW AND DISCUSSION

The statutory provisions establishing and governing OSIG grant it broad authority to investigate many state agencies.¹ Sections 2.2-309.1 through 2.2-309.4 provide that

OSIG will take over certain audit functions of a smaller subset of state agencies that have traditionally had their own inspector general.² Specifically, you inquire whether these provisions require OSIG to assume *all* of the related powers, duties, and resources from the inspector general offices of these agencies.

The OSIG was established during the 2011 General Assembly Session.³ In 2013 changes were made to that enabling legislation to reorganize the OSIG and to clarify that OSIG investigators had law enforcement powers.⁴ It is important to look at the language of the 2011 legislation and 2013 legislation together and interpret them as if originally enacted together.⁵

We begin by looking at the fifth enactment clause of the 2011 legislation, which requires the Governor and other stakeholders to develop a plan to transfer the internal audit programs from affected agencies:

[t]he Governor, on or before December 31, 2011, shall, in consultation with impacted stakeholders, complete a plan for the coordination and oversight of the internal audit programs to the Office of the State Inspector General. This plan shall consider where transfer of the internal audit program to the Office is necessary *or when a dual reporting structure is most practicable*.^[6]

The option of either transferring the internal audit program or maintaining a dual reporting structure implicitly allows for certain functions to remain with pre-existing internal audit programs residing at the specified state agencies, provided that OSIG retains some authority over such programs.

Moreover, the third enactment clause provides for the transfer of the properties and rights from the consolidated inspector general offices to OSIG:

[t]he Office of the State Inspector General created by this act shall be deemed the successor in interest to the (i) Office of the Inspector General for Behavioral Health and Developmental Services, (ii) Inspector General for the Department of Corrections, (iii) Inspector General of the Department of Juvenile Justice, (iv) Inspector General of the Department of Transportation, and (v) Department of the State Internal Auditor, *to the extent that this act transfers powers and duties*. All rights, title, and interest in and to any real or tangible personal property vested in the Inspector General for Behavioral Health and Developmental Services, the Inspector General for the Department of Corrections, the Inspector General of the Department of Juvenile Justice, the Inspector General of the Department of Transportation, and the Department of the State Internal Auditor *to the extent that this act transfers powers and duties* as of July 1, 2012, shall be transferred to and taken as standing in the name of the Office of the State Inspector General created by this act.^[7]

By including the phrase “to the extent that this act transfers powers and duties,” the General Assembly indicated that it did not intend for OSIG necessarily to assume the entirety of the consolidated inspector general offices located within other agencies.⁸

There is nothing in the 2013 legislation to suggest that the General Assembly expressed some other intent than that set forth in these enactment clauses.⁹ I therefore

conclude that OSIG is not required to assume all duties, powers, and resources from the predecessor entities.¹⁰

Your next question refers to the scope of OSIG’s jurisdiction over “nonstate” agencies and other agencies outside of the executive branch of government. Section 2.2-307 of the *Code of Virginia* defines “state agency” as “any agency, institution, board, bureau, commission, council, or instrumentality of state government in the executive branch listed in the appropriation act.” A “nonstate agency” is defined as

[a]ny public or private foundation, authority, institute, museum, corporation, or similar organization that is (i) not a unit of state government or a political subdivision of the Commonwealth as established by general law or special act and (ii) wholly or principally supported by state funds. “Nonstate agency” shall not include any such entity that receives state funds (a) as a subgrantee of a state agency, (b) through a state grant-in-aid program authorized by law, (c) as a result of an award of a competitive grant or a public contract for the procurement of goods, services, or construction, or (d) pursuant to a lease of real property as described in subdivision 5 of § 2.2-1149.^[11]

Section 2.2-309 sets forth the powers and duties of the State Inspector General and includes the following:

A. The State Inspector General shall have power and duty to . . .

4. Investigate the management and operations of state agencies and nonstate agencies to determine whether acts of fraud, waste, abuse, or corruption have been committed . . . ;

9. Conduct performance reviews of state agencies . . . ;

10. Coordinate and require standards for those internal audit programs in existence as of July 1, 2012, and for other internal audit programs in state agencies and nonstate agencies . . . ;

12. Assist agency internal auditing programs . . . ;

B. If the State Inspector General receives a complaint from whatever source that alleges fraud, waste, abuse, or corruption by a public institution of higher education . . . [and] the complaint concerns the president of the institution or its internal audit department . . . the investigation shall be conducted by the State Inspector General^[12]

These provisions grant OSIG largely identical jurisdiction over state and nonstate agencies.¹³ OSIG’s powers and duties appear limited to (1) state government executive branch agencies; (2) non-governmental entities that are wholly or principally supported by state funds not otherwise excepted by the definition of nonstate agency; and (3) allegations of fraud, waste, abuse, or corruption where the complaint concerns the president of a public institution of higher education or its internal audit department. Notably, the jurisdiction of OSIG does not extend to those units of state government outside of the executive branch that, as defined, are neither state nor nonstate agencies.

CONCLUSION

Accordingly, it is my opinion that OSIG is not required to assume all duties, powers, and resources from the predecessor entities. It is further my opinion that the jurisdiction of OSIG is limited to executive branch agencies; non-governmental entities that are wholly or principally supported by state funds not otherwise excepted by the definition of “nonstate agency;” and public institutions of higher education to the extent that there are allegations of fraud, waste, abuse, or corruption concerning either the president of the institution or such institution’s internal audit department.

¹ See VA. CODE ANN. §§ 2.2-307 through 2.2-313 (2011 & Supp. 2013).

² Sections 2.2-309.1 through 2.2-309.4 (Supp. 2013) (§ 2.2-309.1 refers to Behavioral Health and Developmental Health Services, § 2.2-309.2 refers to the Tobacco Indemnification and Community Revitalization Commission, § 2.2-309.3 refers to Adult Corrections and § 2.2-309.4 refers to Juvenile Justice).

³ 2011 Va. Acts ch. 798 at 1366; 2011 Va. Acts ch. 871 at 1595.

⁴ <http://leg1.state.va.us/cgi-bin/legp504.exe?131+oth+HB2114FER122+PDF>.

⁵ *In re Allied Towing Corp.*, 478 F. Supp. 398, 402 (E.D.Va. 1979).

⁶ 2011 Va. Acts ch. 798 at 1366; 2011 Va. Acts ch. 871 at 1595 (emphasis added).

⁷ *Id.* (emphasis added).

⁸ See *Woolfolk v. Commonwealth*, 18 Va. App. 840, 847, 447 S.E. 2d 530, 534 (1994) (“Generally, the words and phrases used in a statute should be given their ordinary and usually accepted meaning unless a different intention is fairly manifest.”) The legislation creating the OSIG makes several references that indicate “dual reporting” in a permissible outcome. I cannot conclude that a different intention is “fairly manifest.”

⁹ See 2004 Op. Va. Att’y Gen. 125, 127 (noting that it is presumed that the legislature has knowledge of the existing law when making amendments). The 2013 legislation was more specific in its expectations of oversight by the OSIG for Behavioral Health and Development Services, the Department of Corrections and the Department of Juvenile Justice than as set forth in the 2011 legislation. See §§ 2.2-309.1 through 2.2-309.4.

¹⁰ I do note, however, that the fiscal year 2014 appropriation for the OSIG is \$6,176,536 and that would seem to indicate that the General Assembly intended a significant number of responsibilities being transferred to OSIG. See <http://lis.virginia.gov/cgi-bin/legp604.exe?131+bud+21-A147>. In 2011, the estimated budget for the inspector general offices of Behavioral Health and Developmental Services, Juvenile Justice, Corrections and Transportation was \$9,316,953. See <http://leg1.state.va.us/cgi-bin/legp504.exe?111+oth+HB2076FER122+PDF>.

¹¹ Section 2.2-307 (2011).

¹² Section 2.2-309 (Supp. 2013). See the 2013 Appropriations Act, available at <http://lis.virginia.gov/cgi-bin/legp604.exe?131+bud+21-64.05>.

¹³ I note that OSIG is not authorized to conduct performance reviews of nonstate agencies. *Id.*

OP. NO. 12-089

ADMINISTRATION OF GOVERNMENT: OFFICE OF THE STATE INSPECTOR GENERAL

The director of Office of the State Inspector General may designate himself and no more than 30 members of the investigation unit to have the same powers as a sheriff or law-enforcement officer in the investigation of allegations of criminal behavior affecting the operations of a state agency or a nonstate agency pursuant to OSIG duties.

THE HONORABLE R. STEVEN LANDES
MEMBER, HOUSE OF DELEGATES
JULY 19, 2013

ISSUE PRESENTED

You ask whether the investigators employed by the Office of the State Inspector General (“OSIG”) are “law-enforcement officers” with arrest powers and the authority to execute criminal process.

RESPONSE

It is my opinion the OSIG director may designate himself and no more than 30 members of the investigation unit to have the same powers as a sheriff or law-enforcement officer in the investigation of allegations of criminal behavior affecting the operations of a state agency or a nonstate agency pursuant to OSIG duties.

APPLICABLE LAW AND DISCUSSION

You also ask about the duties of investigators employed by OSIG and whether such investigators may be considered law enforcement officers. Section 2.2-311(A) provides:

The State Inspector General may designate himself and no more than 30 members of the investigations unit of the Office to have the same powers as a sheriff or law-enforcement officer in the allegations of criminal behavior affecting the operations of a state agency or nonstate agency pursuant to his duties as set forth in this chapter. Such employees shall be subject to any minimum training standard established by the Department of Criminal Justice Services under § 9.1-102 for law-enforcement officers prior to exercising any law enforcement power under this section.

This language permits the OSIG to have 31(including the director) investigators with law enforcement powers. Law enforcement powers would include the power to arrest and execute criminal process as necessary to carry out OSIG duties.¹

CONCLUSION

Accordingly, it is my opinion the OSIG director may designate himself and no more than 30 members of the investigation unit to have the same powers as a sheriff or law-enforcement officer in the investigation of allegations of criminal behavior affecting the operations of a state agency or a nonstate agency pursuant to OSIG duties.

¹ 2000 Op. Va. Att’y Gen. 69 (discussing powers of sheriffs and law-enforcement officers as well as jurisdictional limits).

OP. NO. 13-058

**ADMINISTRATION OF GOVERNMENT: SECRETARY OF THE COMMONWEALTH-
REGISTRATION OF LOBBYISTS**

Section 2.2-434 does not prohibit the Virginia Port Authority from employing a lobbyist for compensation to represent its interests at the federal level of government.

THE HONORABLE WILLIAM H. FRALIN, JR.
CHAIRMAN, BOARD OF COMMISSIONERS
VIRGINIA PORT AUTHORITY
JULY 19, 2013

ISSUE PRESENTED

You ask whether the prohibition contained in § 2.2-434 of the *Code of Virginia* prohibits the Virginia Port Authority's employment of a lobbyist for compensation to represent its interests at the federal level of government.

RESPONSE

It is my opinion that § 2.2-434 does not prohibit the Virginia Port Authority ("VPA") from employing a lobbyist for compensation to represent its interests at the federal level of government.

APPLICABLE LAW AND DISCUSSION

Section 2.2-434 expressly prohibits the "[e]mployment of a lobbyist for compensation by an officer, board, institution or agency of the Commonwealth" ¹ For purposes of § 2.2-434, a "lobbyist" is an individual who is engaged in specified activities "for the purpose of lobbying." ² "Lobbying" is defined as: "[i]nfluencing or attempting to influence executive or legislative action through oral or written communication with an executive or legislative official" ³ In turn, "executive official" and "legislative official" are further defined exclusively in terms of state officials such as the Governor, Lieutenant Governor, Attorney General, members of the General Assembly, and others within the Commonwealth's executive and legislative branches. ⁴ The enumerated definitions clearly limit the application of § 2.2-434 to lobbying at the state level of government. ⁵ Because these definitions do not include federal officials, § 2.2-434 does not prohibit the VPA from employing a lobbyist for compensation to lobby the federal level of government.

CONCLUSION

Accordingly, it is my opinion that the prohibition contained in § 2.2-434 does not prohibit the VPA's employment of a lobbyist for compensation to represent its interests at the federal level of government.

¹ VA. CODE ANN. § 2.2-434 (2011).

² Section 2.2-419 defines "[l]obbyist" as:

1. An individual who is employed and receives payments, or who contracts for economic consideration, including reimbursement for reasonable travel and living expenses, for the purpose of lobbying;
2. An individual who represents an organization, association, or other group for the purpose of lobbying; or
3. A local government employee who lobbies.

³ Section 2.2-419 (2011). “Lobbying” also includes the “[s]olicitation of others to influence an executive or legislative official.” *Id.*

⁴ *See* § 2.2-419 (defining “executive official” and “legislative official”).

⁵ *Id.*; *see also* the definitions of “Executive action” and “Legislative action,” as contained in that statute, which similarly limit their applicable scope to state government matters.

OP. NO. 12-015

ADMINISTRATION OF GOVERNMENT: STATE AND LOCAL GOVERNMENT CONFLICT OF INTERESTS ACT

Officers and employees of Virginia Housing Development Authority are prohibited by Conflict of Interests Act from participating as owners in the federal Housing Choice Voucher program administered by VHDA.

THE HONORABLE CHARLES MCCONNELL
CHAIRMAN, BOARD OF COMMISSIONERS
VIRGINIA HOUSING DEVELOPMENT AUTHORITY
MAY 3, 2013

ISSUE PRESENTED

You inquire whether the State and Local Government Conflict of Interests Act (“COIA”)¹ prohibits officers and employees of the Virginia Housing Development Authority (“VHDA”) from participating as owners in the federal Housing Choice Voucher program (“HCV”) administered by VHDA. You further inquire whether, if not prohibited from participating, those employees and officers must make any disclosures or abstain from participating in HCV transactions.

RESPONSE

It is my opinion that officers and employees of VHDA are prohibited by COIA from participating as owners in the federal HCV program administered by VHDA. Furthermore, I note that the current regulations governing the program expressly bar officers and certain employees of VHDA from participating in the program as owners.

BACKGROUND

You state that the HCV program provides rental subsidies for low and moderate income persons and families. VHDA receives federal funds for the HCV program from the United States Department of Housing and Urban Development (“HUD”) pursuant to annual contracts between VHDA and HUD. Both HUD and VHDA have adopted regulations governing the administration of the program.²

You further state that the monthly rental assistance payments are paid by VHDA to the owners of the rental properties on behalf of the low-income persons or families participating in the HCV program. The monthly payments to owners are determined by a formula that calculates the amount the participating family will pay for rent with VHDA paying the remainder to the owner pursuant to a contract between VHDA and the owner.

You request that it is assumed, for the purposes of this Opinion, that the amount of rental payments made to any participating VHDA officers and employees would exceed \$10,000 annually, and that the value of their ownership interest in the dwelling units leased under the HCV program would exceed \$10,000.

APPLICABLE LAW AND DISCUSSION

Your inquiry focuses on any prohibition that COIA may impose on officers and employees of VHDA, but I first note that the regulations governing the program prohibit officers and at least some employees of the authority from participating in the program as owners. Specifically, the relevant regulations provide that

[p]ersons holding the following offices and positions may not participate as owners in the program during their tenure and for one year thereafter because their relationship with the authority or the program would constitute a prohibited interest under the ACC and HAP contracts: (i) **present or former members or officers of the authority or the administrative agent**, (ii) **employees of the authority or the administrative agent who formulate policy or influence decisions with respect to the program**, and (iii) public officials or members of a governing body or state or local legislators who exercise functions or responsibilities with respect to the program. In addition, current members of or delegates to the Congress of the United States of America or resident commissioners are not eligible to participate in the programs as owners.^[3]

This language essentially tracks the language of 24 C.F.R. § 982.161, which provides that certain people are not eligible to participate as owners in the program due to a conflict of interests. Accordingly, by regulation, all officers and former officers within one year of their respective tenures at VHDA are barred from participating in the program as owners. Similarly, certain employees of VHDA who are involved in formulating policy or influencing decisions regarding the program may not participate in the program as owners.

Turning to your specific inquiry, COIA prohibits officers and employees of state government agencies from having personal interests in contracts, other than their employment contracts, with the government agency by which they are employed.⁴ The payments pursuant to the HCV program you describe would constitute “contracts” as defined in COIA.⁵

Nonetheless, grants or other payments under any program wherein uniform rates for, or the amounts paid to, all qualified applicants are established solely by the administering governmental agency are exempt from the prohibition in COIA.⁶ Thus, whether such payments are exempt from COIA turns on whether the payments to owners are made pursuant to a uniform schedule.

The payments you describe are partially set by a formula in accordance with VHDA guidelines and apply equally to all HCV program participants. A prior COIA opinion of this office concluded that the formula represented a “uniform rate,” and therefore, fell within the COIA exemption. However, the formula described in your letter does

not actually set the payments because one element of the formula, the rental price of the property at issue, is utilized in the formula but is not actually set by the formula.

Specifically, based on your letter, payments to owners under the program are determined by subtracting the lessee's share (which is determined by a formula tied to the lessee's income) from the lesser of a payment standard established by VHDA for the rental unit or the gross rent, which is defined as the rent payable to the owner plus utilities paid by the lessee. Thus, the amount paid to an owner depends on the gross rent paid by the lessee or the payment standard that VHDA sets for the particular dwelling unit.

The regulations governing the program indicate that there can be differences in the payment standards set by VHDA or the gross rent charged by an owner. For example, the rent for a property "must normally not exceed the fair market rent established by HUD for the area. . . ,"⁷ suggesting there are circumstances when the rent may exceed the HUD established rate. Furthermore, the regulations setting forth the duties of an administrative agent for the program specify that it is the administrative agent's responsibility to "[r]eview the leases proposed by owners; determine rent reasonableness; and inspect the rental housing units."⁸ Given the inherent subjectivity in determining whether rent is reasonable, it appears that there is some discretion as to what rents are acceptable.

The federal regulations governing the program also recognize that the rents charged may vary from the payment standard set by HUD. The relevant regulation provides that "the subsidy is based on a local 'payment standard' that reflects the cost to lease a unit in the local housing market. **If the rent is less than the payment standard**, the family generally pays 30 percent of adjusted monthly income for rent. **If the rent is more than the payment standard**, the family pays a larger share of the rent."⁹

Because the regulations allow an owner to charge less than the payment standard set by HUD, the amount that owners of similar properties will receive from the program can vary, and thus, cannot be considered "uniform." To the extent that this is the case, payments under the program do not fall within the exemption found in § 2.2-3110(A)(8).

Given the facts specified in your request, the only other COIA exemption that might be applicable is found in § 2.2-3110(A)(1), which provides an exemption for contracts related to

[t]he sale, lease or exchange of real property between an officer or employee and a governmental agency, provided the officer or employee does not participate in any way as such officer or employee in such sale, lease or exchange, and this fact is set forth as a matter of public record by the governing body of the governmental agency or by the administrative head thereof

To fall within this exemption, the contract between VHDA and the owner who is also an officer or employee of VHDA would have to constitute a "sale, lease or exchange of real property between an officer or employee and a governmental agency" Here, the contract between VHDA and the officer or employee would not constitute

the sale or exchange of real property because the officer or employee would continue to own the property.

Furthermore, while the program does require a lease between the tenant and the owner, the contract between the owner and VHDA is not a lease of real property, but rather is a separate agreement that does not create a leasehold. The federal regulations that govern the HVC program define a lease as a “written agreement between an owner and a tenant for the leasing of a dwelling unit to the tenant.”¹⁰ The definition continues, noting the purpose of a lease and distinguishing it from the contract between a property owner and an authorized housing agency. Specifically, the definition concludes by noting that a “lease establishes the conditions for occupancy of the dwelling unit by a family with housing assistance payments under a HAP contract between the owner and the [authorized housing agency].”¹¹

Because the contract between a property owner and VHDA under the HVC program is not the “sale, lease or exchange of real property between an officer or employee and a governmental agency . . .,” the exemption found in § 2.2-3110(A)(1) does not apply. Given that no COIA exemption applies, the general prohibition that “[n]o officer or employee of any governmental agency of state government . . . shall have a personal interest in a contract with the governmental agency of which he is an officer or employee, other than his own contract of employment . . .” applies.¹² Accordingly, I conclude that, even absent the prohibition found in the state and federal regulations governing the HVC program, COIA prevents officers and employees of VHDA from being an owner in the HVC program under the factual assumptions contained in your request.

CONCLUSION

Accordingly, it is my opinion that officers and employees of VHDA are prohibited by COIA from participating as owners in the federal HCV program administered by VHDA. Furthermore, I note that, even absent COIA’s restrictions, the current regulations governing the program expressly bar officers and at least certain employees of VHDA from participating in the program as owners.

¹ VA. CODE ANN. §§ 2.2-3100 through 2.2-3131 (2011 & Supp. 2012).

² See 24 C.F.R. § 982, *et seq.*; 13 VA. ADMIN. CODE §10-70-10, *et seq.*

³ 13 VA. ADMIN. CODE § 10-70-30 (emphasis added).

⁴ See VA. CODE ANN. § 2.2-3106(A) (2011).

⁵ See § 2.2-3101 (2011); *see also* 1999 Op. Va. Att’y Gen. 10.

⁶ See § 2.2-3110(A)(8) (2011).

⁷ 13 VA. ADMIN. CODE §10-70-10.

⁸ 13 VA. ADMIN. CODE §10-70-50(9) (emphasis added). There are two subsections numbered 9 in 13 VA. ADMIN. CODE § 10-70-50. The second, detailing the duties of the administrative agent, is quoted here. *See also* 24 C.F.R. § 982.305(a)(4).

⁹ 24 C.F.R. § 982.1(a)(4)(ii) (emphasis added). *See also* 24 C.F.R. § 982.4 (defining “reasonable rent” a “rent to owner that is **not more than** rent charged: (1) For comparable units in the private unassisted market; and (2) For comparable unassisted units in the premises . . .”) (emphasis added).

¹⁰ 24 C.F.R. § 982.4.

¹¹ *Id.*

¹² VA. CODE ANN. § 2.2-3106(A).

OP. NO. 13-072

ADMINISTRATION OF GOVERNMENT: VIRGINIA FREEDOM OF INFORMATION ACT

Determining whether the email distribution list of a Board of Supervisors member for a newsletter that the member sends out to constituents is a public record subject to the Freedom of Information Act requires determining whether the newsletter utilizing the email distribution list is a public record, which is a fact-specific determination.

JAMES E. BARNETT, ESQUIRE
COUNTY ATTORNEY, YORK COUNTY
SEPTEMBER 27, 2013

ISSUES PRESENTED

You inquire whether the email distribution list of a Board of Supervisors member for a newsletter that the member sends out to constituents, “informing them of matters of interest related to York County government, the actions of the supervisor, and soliciting input from” them, is subject to the Freedom of Information Act. Assuming the email distribution list is a public record, you also inquire whether the email addresses contained in the distribution list are exempt from disclosure pursuant to Section 2.2-3705.7(30).

RESPONSE

In order to determine whether the email distribution list is a public record subject to the Freedom of Information Act, it is necessary to determine whether the newsletter utilizing the email distribution list is a public record. This is a fact-specific determination that I cannot make based on the facts provided in your letter.

APPLICABLE LAW AND DISCUSSION

Enacted in 1968, Title 2.2, Subtitle II, Part B, Chapter 37 is titled the Virginia Freedom of Information Act (“FOIA”). Section 2.2-3700 “ensures the people of the Commonwealth ready access to public records in the custody of a public body or its officers and employees, and free entry to meetings of public bodies wherein the business of the people is being conducted.” Moreover, the Act “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.”¹ Any exemption is narrowly construed, but the Act should not be “construed to discourage free discussion by government officials or employees of public matters with the citizens of the Commonwealth.”²

The first determination that must be made is whether the records requested are public records. If they are not public records then they are not subject to FOIA. The

definition of “public record” is very broad. Section 2.2-3701 defines a “public record” as

All writings and recordings that consist of letters, words or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photography, magnetic impulse, optical or magneto-optical form, mechanical or electronic recording or other form of data compilation, however stored, and regardless of physical form of characteristics, prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business. Records that are not prepared for use in the transaction of public business are not public records.

As you note in your letter, the “transaction of public business” is not defined in FOIA. Not everything of public interest is public business.³ It is the content of the newsletter that determines whether it qualifies as the transaction of public business, and therefore, constitutes a public record.⁴ “There must be some nexus between the record produced and the public trust imposed upon the official or governmental body.”⁵ The determination of whether there is such a nexus is a fact-dependent determination.⁶ For instance, it is not clear from your letter whether the newsletter is sent out by the Board member in his official capacity as representative of his constituents or through his campaign, which would exist to ensure the reelection of the Board member, as opposed to the transaction of public business. In addition, although the information provided generally summarizes the newsletter’s representative content, once again, its specific content will bear upon any determination whether it is used in the transaction of public business.

Moreover, a determination respecting how the email distribution list is used bears upon whether it is a public record. The definition of “public record” in § 2.2-3701 includes all writings prepared or owned by the Board member in the transaction of public business and excludes “records not prepared or used for the transaction of public business.” While the email distribution list may not appear to transact public business in and of itself, once it is used to send a newsletter that is a public record, it becomes a record used in the transaction of public business and therefore is a public record subject to FOIA.⁷ Conversely, if the newsletter is not a public record, the email distribution list is not subject to FOIA.⁸

Thus, without more information, or a copy of one or more editions of the newsletter, so as to determine its specific origin and content, I cannot determine whether the newsletter would constitute a public record. “The Attorney General ‘refrain[s] from commenting on matters that would require additional facts[.]’”⁹

Assuming the email distribution list is a public record, you next ask whether § 2.2-3705.7(30) would exempt the email addresses from disclosure. Section 2.2-3705.7(30) exempts from disclosure “[n]ames, physical addresses, telephone numbers, and email addresses contained in correspondence between an individual and a member of the governing body, school board, or other public body of the locality in which the individual is a resident unless the correspondence relates to the transaction of public business.” This section was adopted in 2012 and there are no prior attorney general opinions interpreting its meaning.

“A principal rule of statutory interpretation is that courts will give statutory language its plain meaning.”¹⁰ Additionally, “statutes must be construed to give meaning to all of the words enacted by the General Assembly, and a court is “not free to add language, nor to ignore language, contained in statutes.”¹¹ Based on a plain reading of the exemption, it only applies to email addresses (and other personal identifiers) “contained in correspondence” between a resident and a member of his local governing body. Therefore, an email distribution list assembled in a record separately from any correspondence would not fall within this exemption.¹²

CONCLUSION

I cannot offer an opinion regarding whether the email distribution list is a public record without first resolving the issue of whether the newsletter utilizing the e-mail distribution list is a public record. I cannot make that determination at this time based upon the information provided to this Office.

¹ VA. CODE ANN. § 2.2-3700 (2011).

² *Id.*

³ *Burton v. Mann*, 74 Va. Cir. 471, 474, 2008 Va. Cir. LEXIS 57, *6 (Jan. 30, 2008).

⁴ *Id.*

⁵ *Id.*

⁶ 2004 Op. Va. Att’y Gen. 13, 17-18 (the determination whether certain circumstances constitute the transaction of public business is triggering the open meeting requirements of FOIA requirements is fact dependent).

⁷ See VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL, Advisory Op. No.: AO-04-12 (Oct. 17, 2012) (although a phone bill paid personally by a public official is not a public record, if the official sought reimbursement from a public body, the phone bill then would constitute a public record), available at http://foiacouncil.dls.virginia.gov/ops/12/AO_04_12.htm (last visited Sept. 23, 2013).

⁸ Significantly, it may be that some of the newsletters would constitute public records while others would not. Thus, for example, if only *one* newsletter sent utilizing a particular e-mail list constituted a public record, the e-mail list associated with its sending likewise would be a public record.

⁹ 2010 Op. Va. Att’y Gen. 56, 58.

¹⁰ *Davenport v. Little-Bowser*, 269 Va. 546, 555, 611 S.E.2d 366, 371 (2005) (citing *Jackson v. Fidelity & Deposit Co.*, 269 Va. 303, 313, 608 S.E.2d 901, 904 (2005)).

¹¹ *Signal Corp. v. Keane Fed. Sys.*, 265 Va. 38, 46, 574 S.E.2d 253, 257 (2003).

¹² It should be noted, however, that pursuant to § 2.2-3704(D) if a Board member has not created an email distribution list as a separate record then he would not be required to create a new record in response to a FOIA request.

OP. NO. 11-104

ADMINISTRATION OF GOVERNMENT: VIRGINIA PUBLIC PROCUREMENT ACT

The City of Hampton does not have the authority to grant a preference in the award of construction contracts procured by competitive sealed bidding to contractors who employ, or agree to grant hiring preference to, Hampton residents for work to be performed under the contract. The City may not impose a requirement in its construction

contracts that the contractors give a preference for hiring Hampton residents for such work.

CYNTHIA E. HUDSON, ESQUIRE
CITY ATTORNEY FOR THE CITY OF HAMPTON
APRIL 12, 2013

ISSUE PRESENTED

You ask whether the City of Hampton (the “City”), in the award of construction contracts procured by competitive sealed bidding, may grant preference to contractors who employ, or agree to grant hiring preference to, Hampton residents for work to be performed under the contract or, alternatively, whether the City may impose a requirement in its construction contracts that the contractors give a preference for hiring Hampton residents for such work.

RESPONSE

It is my opinion that the City of Hampton does not have the authority to grant a preference in the award of construction contracts procured by competitive sealed bidding to contractors who employ, or agree to grant hiring preference to, Hampton residents for work to be performed under the contract. It is my further opinion that the City may not impose a requirement in its construction contracts that the contractors give a preference for hiring Hampton residents for such work.

BACKGROUND

You report that, based on citizen concerns regarding the high levels of unemployment among skilled and unskilled laborers in the City, the Hampton City Council was asked to adopt a requirement in City construction contracting that successful bidders agree to grant preference in hiring to local residents to perform the work procured.

APPLICABLE LAW AND DISCUSSION

By enacting the Virginia Public Procurement Act¹ (the “Procurement Act”), the General Assembly has established explicit statutory provisions governing the public procurement of goods and services. The purpose of the Procurement Act is to ensure that solicitation by governmental units are presented and awarded in a fair and impartial manner to promote competition.² Although localities are given some flexibility in devising the details of their procurement through the adoption of alternative procedures, those alternative procedures must be “based on competitive principles.”³ Prior opinions of this Office have concluded that it is inconsistent with the principles of the Procurement Act to condition the award of a public contract on factors that are unrelated to the goods or services being procured.⁴

The General Assembly in certain limited circumstances has authorized conditional preferences in the award of public contracts based on specifically enumerated factors. For example, § 2.2-4328 authorizes the governing body of a county, city or town, in the case of a tie bid, to “give preference to goods, services and construction produced in such locality or provided by persons, firms or corporations having principal places of business in the locality.”⁵ No provision of the Procurement Act, however,

authorizes localities in the award of construction contracts to give preference to bidders who commit to employing local residents. Indeed, as recently as the 2010 and 2011 sessions, the General Assembly has declined to enact legislation that would have authorized localities to give a preference in the award of contracts to construction contractors who hire residents of the locality or the commonwealth.⁶

In Virginia, local governing bodies have only those powers that are expressly conferred upon them, those which may be necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable.⁷ Given that the Procurement Act sets forth no express authority for localities to give a preference to contractors who hire local residents, and that the General Assembly has rejected legislation that would have conferred such authority, Dillon Rule principles do not permit a finding that localities are vested with the power to conduct procurements in such a manner.

CONCLUSION

Accordingly, it is my opinion that the City of Hampton does not have the authority to grant a preference in the award of construction contracts procured by competitive sealed bidding to contractors who employ, or agree to grant hiring preference to, Hampton residents for work to be performed under the contract. It is my further opinion that the City may not impose a requirement in its construction contracts that the contractors give a preference for hiring Hampton residents for such work.

¹ See VA. CODE ANN. §§ 2.2-4300 through 2.2-4377 (2011 & Supp. 2012).

² Section 2.2-4300(C) (2011).

³ Section 2.2-4343(A)(10) (Supp. 2012). See 1983-84 Op. Va. Att’y Gen. 455, 456. You relate that pursuant to the authority granted localities under § 2.2-4343(A)(10), the City has adopted a procurement ordinance that you describe as being in all material respects a local codification of the Procurement Act. See HAMPTON, VA., City Code §§ 2-320 to 2.342.

⁴ See 2002 Op. Va. Att’y Gen. 13 (requirement that contractor provide a “living wage” to its employees is unrelated to goods or services to be procured and not authorized by the Procurement Act); 1992 Op. Va. Att’y Gen. 38 (affordable housing requirement proposed as a condition on the selection of depository institutions is an unrelated condition not permitted by the Procurement Act).

⁵ Section 2.2-4328 (2011). See also § 2.2-4324 (2011) (in the case of a tie bid, preference to be given to goods produced in Virginia, goods or services or construction provided by Virginia persons, firms or corporations).

⁶ See S.B. 703, 2010 Reg. Sess. (Va. 2010) and 2011 Reg. Sess. (Va. 2011) (legislation carried over to 2011 session and left in committee in 2011 that proposed amending § 2.2-4324 to permit a locality to implement a bidding system that provides a preference to construction contractors that hire residents of the locality or the commonwealth), respectively available at <http://leg1.state.va.us/cgi-bin/legp504.exe?101+sum+SB703> and <http://leg1.state.va.us/cgi-bin/legp504.exe?111+com+S12N06>.

⁷ See *Marble Tech., Inc. v. City of Hampton*, 279 Va. 409, 417-18, 690 S.E.2d 84, 88 (2010).

OP. NO. 12-009

AGRICULTURE, ANIMAL CARE, AND FOOD: COMPREHENSIVE ANIMAL CARE

Section 3.2-6528 authorizes a locality to charge a kennel establishment more than \$50.00 in local license taxes in circumstances where the establishment maintains multiple

blocks of kennels; however, the locality may not charge more than \$50.00 for any one individual kennel block.

THE HONORABLE STEPHEN H. MARTIN
MEMBER, SENATE OF VIRGINIA
AUGUST 23, 2013

ISSUE PRESENTED

You inquire whether the local license tax on kennels authorized by § 3.2-6528 is limited to \$50.00 as a total cap that may be charged by a locality for any kennel license, or whether the Code allows localities to charge more than \$50.00 for successive numbers of dogs.

RESPONSE

It is my opinion that § 3.2-6528 authorizes a locality to charge a kennel establishment more than \$50.00 in local license taxes in circumstances where the establishment maintains multiple blocks of kennels, however, the locality may not charge more than \$50.00 for any one individual kennel block.

APPLICABLE LAW AND DISCUSSION

Section 3.2-6528 provides, in relevant part:

The governing body of each county or city shall impose by ordinance a license tax on the ownership of dogs within its jurisdiction. The governing body of any locality that has adopted an ordinance pursuant to subsection B of § 3.2-6524 shall impose by ordinance a license tax on the ownership of cats within its jurisdiction The tax for each dog or cat shall not be less than \$1 and not more than \$10 for each year Any ordinance may provide for a license tax for kennels of 10, 20, 30, 40, or 50 dogs or cats not to exceed \$50 *for any one such block of kennels.*^[1]

“A primary rule of statutory construction is that courts must look first to the language of the statute. If a statute is clear and unambiguous, a court will give the statute its plain meaning.”² Furthermore, courts must assume that the “legislature chose, with care, the words it used when it enacted the relevant statute, and [courts] are bound by those words as [they] interpret the statute.”³ In addition, “[a] statute is not to be construed by singling out a particular phrase; every part is presumed to have some effect and is not to be disregarded unless absolutely necessary.”⁴

The language of § 3.2-6528 reads, “[a]ny ordinance may provide for a license tax for kennels of 10, 20, 30, 40, or 50 dogs or cats not to exceed \$50 for any one such block of kennels.” The qualifier “not to exceed \$50” seems to suggest the answer that \$50 is a cap for an individual kennel. The qualifying language “for any one such block of kennels” suggests, however, that there is not an absolute cap. Further, the language “kennels of 10, 20, 30, 40, or 50 dogs or cats” suggests that the statute seeks to qualify the word “kennels.”

For Chapter 65 of Title 3.2, “unless the context requires a different meaning,” § 3.2-6500 provides a statutory definition of kennel as “any establishment in which five or more canines, felines, or hybrids of either are kept for the purpose of breeding, hunting, training, renting, buying, boarding, selling, or showing.”⁵ It appears, however, that the word “kennel” in § 3.2-6528 is intended in its more limited sense, as “a house for a dog.”⁶ The statute’s qualifying word “block” generally is defined to mean “a continuous row of buildings ... any number of persons or things regarded as a unit.”⁷ Thus, in order to give effect to each word used in § 3.2-6528, the phrase a “block of kennels” more properly is interpreted to mean a continuous row of cat or dog houses or shelters containing 10, 20, 30, 40 or 50 dogs or cats. A kennel establishment might have one block of kennels or multiple blocks of kennels. Given this definition, the qualifying language “for any one such block of kennels” suggests that a locality can charge for each successive block of kennels.⁸ The statutory cap of \$50.00 thus applies to one individual kennel block and is not intended as a cap on the license taxes a locality may charge to a kennel establishment.

CONCLUSION

Accordingly, it is my opinion that § 3.2-6528 authorizes a locality to charge a kennel establishment more than \$50.00 in local license taxes in circumstances where the establishment maintains multiple blocks of kennels, however, the locality may not charge more than \$50.00 for any one individual kennel block.

¹ VA. CODE ANN. § 3.2-6528 (2008) (emphasis added).

² Loudoun Cnty. Dep’t of Soc. Servs. v. Etzold, 245 Va. 80, 85, 425 S.E.2d 800, 802 (1993). See *City of Va. Beach v. Bd. of Supvrs. of Mecklenburg Cnty.*, 246 Va. 233, 236, 435 S.E.2d 382, 384 (1993).

³ *City of Va. Beach v. ESG Enters., Inc.*, 243 Va. 149, 153, 413 S.E.2d 642, 644 (1992).

⁴ *Jeneary v. Commonwealth*, 262 Va. 418, 430, 551 S.E.2d 321, 327 (2001) (quoting *Commonwealth v. Zamani*, 256 Va. 391, 395, 507 S.E.2d 608, 609 (1998)).

⁵ Additionally, commercial dog breeders are governed by VA. CODE ANN. §§ 3.2-6500 (Supp. 2013) and 3.2-6507.2 (2008).

⁶ See WEBSTER’S NEW TWENTIETH CENTURY DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 998 (2d ed. 1961).

⁷ *Id.* at 196. In contrast, the plain meaning of the word “establishment” connotes something broader, e.g., “[t]he place where a person is settled for residence or for transacting business.” *Id.* at 625.

⁸ The prior opinions of the Attorney General dealing with kennel licenses are not controlling. See, e.g., 1979-80 Va. Op. Att’y Gen. 151 (determining whether a kennel license could be required in addition to individual dog licenses); 1969-70 Op. Va. Att’y Gen. 109 (construing earlier state law that mandated specific fees for kennels by size). Sections 3.2-6500 and 3.2-6528 were adopted in 1984 after these Opinions were issued and changed the law regarding the tax on kennels with the specific, controlling language discussed herein.

OP. NO. 12-100

AGRICULTURE, ANIMAL CARE, AND FOOD: COMPREHENSIVE ANIMAL CARE

A locality lawfully may operate a capture and sterilization program for the purpose of controlling a population of feral cats. The feral cats may be captured in a humane fashion, and such captured cats may be sterilized by a licensed veterinarian.

The feral cats captured in such a program may not be released by the locality back to the location from whence they came or some other location in the wild.

Persons who capture feral cats while acting as agents of or in conjunction with a locality as part of its trap and sterilize program are companion animal finders and do not become the *de facto* or *de jure* owners of such cats.

DOUGLAS W. NAPIER, ESQUIRE
TOWN ATTORNEY
TOWN OF FRONT ROYAL
JULY 12, 2013

ISSUES PRESENTED

You inquire generally whether a town and county legally may operate a Trap-Neuter-Release (“TNR”) program, and specifically as to:

1. Whether it is legal to trap feral cats in a humane fashion;
2. Whether such trapped cats may be neutered by a licensed veterinarian and released back to the location from which they were trapped; and
3. Whether persons who trap feral cats in accordance with a locality’s TNR program become the *de facto* or *de jure* owners of such cats.

RESPONSE

It is my opinion that a locality lawfully may operate a capture and sterilization program for the purpose of controlling a population of feral cats. The feral cats may be captured in a humane fashion, and such captured cats may be sterilized by a licensed veterinarian. The feral cats, however, may not be released by the locality back to the location from whence they came or some other location in the wild. Finally, it is my opinion that persons who capture feral cats while acting as agents of or in conjunction with a locality as part of its trap and sterilize program are companion animal finders and do not become the *de facto* or *de jure* owners of such cats.

BACKGROUND

You indicate that TNR programs seek to trap feral cats humanely, neuter or spay them, and return them to the place from which they were trapped or “some other more suitable place in the wild.” The proposed program would involve the participation of the Warren County Animal Control and the Humane Society of Warren County.

APPLICABLE LAW AND DISCUSSION

You first inquire whether a Virginia locality lawfully may implement a program to trap feral cats.

Both feral and domestic cats are “companion animals” as defined by statute.¹ The term “trap” is not used in Title 3.2 of the *Code of Virginia* in connection with feral cats or other companion animals.² Rather, it is used in connection with “trapping” of wildlife as regulated under other titles.³

Although the term “trapping” is not used for the companion animals included in Title 3.2, certain local officials may capture feral cats. In fact, § 3.2-6562 provides that it is the duty of animal control officers “to *capture and confine* any companion animal of unknown ownership found running at large on which the license fee has not been paid.”⁴ Similarly:

Any humane investigator, law-enforcement officer or animal control officer may lawfully *seize and impound* any animal that has been abandoned, has been cruelly treated, or is suffering from an apparent violation of this chapter that has rendered the animal in such a condition as to constitute a direct and immediate threat to its life, safety or health.^[5]

Section 3.2-6543 provides that a local governing body may adopt and “make more stringent” ordinances that parallel many sections of Title 3.2.⁶ Thus, it is my opinion that a locality could adopt ordinances that would allow for the capture and confinement of feral cats, because they would parallel § 3.2-6562.⁷

Turning to your inquiry regarding sterilization, a locality has the authority to adopt local ordinances for animal control programs so long as they will “conform to and not be in conflict with the public policy of the State as embodied in its statutes.”⁸ Section 3.2-6574(A) provides, in part, that “[e]very new owner of a . . . cat adopted from a releasing agency shall cause to be sterilized the . . . cat.” Section 3.2-6548(E) transfers the responsibility for documenting such sterilization from an animal shelter to any other “releasing agency.”⁹ Further, § 3.2-6534 requires that a locality’s proceeds from dog and cat license taxes be spent on six specified purposes, one of which is “[e]fforts to promote sterilization of dogs and cats.”¹⁰ Pursuant to § 3.2-6500, “sterilization” means a surgical or chemical procedure performed by a licensed veterinarian that renders a dog or cat permanently incapable of reproducing.” The General Assembly recognizes the existence of localities’ sterilization programs in two other provisions that discuss how funds and penalties collected may be spent. One requires that penalties paid by veterinarians for not providing localities with information on vaccination certificates “be placed in the locality’s general fund for the purpose of animal control activities *including spay or neuter programs*.”¹¹ The other authorizes that “[a]ny funds collected pursuant to the enforcement of ordinances adopted pursuant to the provisions of this section may be used for the purpose of defraying the costs of local animal control, *including efforts to promote sterilization of cats and dogs*.”¹² However, no statute specifies how localities should promote such sterilization.

Virginia follows the Dillon Rule of local government authority, whereby localities have only those powers expressly granted or necessarily implied by statute, as well as those powers that are essential and indispensable.¹³ Where a statute grants a power to a locality, but does not specifically direct the method of exercising that power, a local government’s choice regarding how to implement the power will be upheld “so long as the method selected is reasonable.”¹⁴ The Supreme Court of Virginia provided guidance for application of this “reasonableness” test in *City of Virginia Beach v. Hay*.¹⁵ The court stated that while the question of reasonableness is dependent on the circumstances of each case, a locality’s method is considered unreasonable only if it is “contrary to legislative intent or inappropriate for the ends sought to be accomplished

by the grant of power.”¹⁶ If there is any doubt in the reasonableness of the method selected, it is “resolved in favor of the locality.”¹⁷

While §§ 3.2-6529, 3.2-6534, and 3.2-6543 provide an express grant of power for a locality to expend funds to promote the sterilization of companion animals, they are silent regarding the mode or manner of execution.¹⁸ Therefore, the “reasonable method of selection” rule applies.¹⁹ Because the statutes, by their own terms, seek to promote sterilization of companion animals and indicate that in certain circumstances an animal shelter, pound, or other receiving agency is responsible for documenting that it is done, it is reasonable for a locality to adopt an ordinance authorizing monies to be spent directly to arrange for the sterilization procedure. Thus, it is my opinion that a locality, by ordinance, may establish a program for and provide funding to have feral cats sterilized by a licensed veterinarian.

Your inquiry regarding whether such captured and sterilized feral cats may be released back to the location from which they were captured turns on the construction of terms found in § 3.2-6546.²⁰ Once such animals are captured, § 3.2-6546 provides the framework for the confinement and disposition of animals.²¹ Section 3.2-6546(D) specifically provides five methods by which an animal may be released or adopted by the county or city pounds or their designees.²² Two of the five methods allow for release to any humane society, animal shelter or other releasing agency, either within the Commonwealth, or in another state; the other three provide for adoption by a resident of the county, a resident of an adjacent county or other person.²³

Moreover, § 3.2-6504 provides: “No person shall abandon or dump any animal.”²⁴ The statute criminalizes a violation of that prohibition as a Class 3 misdemeanor.²⁵ “Abandon” is defined as “desert, forsake, or absolutely give up an animal without having secured another owner or custodian for 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.”²⁶ “Dump” is defined as “knowingly desert, forsake, or absolutely give up without having secured another owner or custodian any dog, cat, or other companion animal in any public place including the right-of-way of any public highway, road or street or on the property of another.”²⁷ Even a person who “finds” an animal pursuant to § 3.2-6551 has certain duties, including attempting to notify an owner and complying with the provisions of § 3.2-6503 for adequate care.²⁸

Thus, given the current statutory requirements for the disposition of companion animals, including feral cats, and the statutory prohibition upon abandoning or dumping companion animals, it is my opinion that feral cats may not be released programmatically back to the location where they were captured or other location “in the wild.”²⁹

As to your final inquiry, it is my opinion that persons who capture feral cats while acting on behalf of a town-operated capture and sterilize program do not become the *de facto* or *de jure* owners of such cats. The *Code of Virginia* defines the term “owner” as “any person who: (i) has a right of property in an animal; (ii) keeps or harbors and animal; (iii) has an animal in his care; or (iv) acts as a custodian of an animal.”³⁰ Conversely, a person acting on behalf of a town-operated capture and sterilize program, who is not an animal control officer or other officer under § 3.2-

6562, would be acting as an individual who “finds” an animal pursuant to § 3.2-6551. That Section provides that any “individual who finds a companion animal and: (i) provides care or safekeeping; or (ii) retains a companion animal in such a manner as to control its activities” has certain responsibilities, including attempting to notify the owner and the pound within 48 hours, and complying with § 3.2-6503.³¹ The law therefore makes a distinction between an owner, who has a property interest in, cares for and/or shelters a companion animal, and someone who temporarily takes custody of and cares for and/or shelters such an animal while acting consistently with the above-noted statutory requirements respecting the animal. Thus, it is my opinion that a finder acting in conjunction with the locality-operated capture and sterilize program would not have a property right in a feral cat, nor would he become a *de facto* or *de jure* owner thereof through his actions of capturing and temporarily harboring, caring for, and otherwise taking temporary custody of the animal.³²

In reaching these conclusions, I make no judgment on the wisdom of the policy decisions underlying the statutory scheme regarding the disposition of companion animals, including feral cats. This opinion only addresses the law as it exists and makes no comment on what the law could or should be. As you note in your request, local jurisdictions are free to seek a legislative change if a different result is desired.

CONCLUSION

It is my opinion that a locality may lawfully operate a capture and sterilization program for the purpose of controlling the population of feral cats. The feral cats may be captured in a humane fashion, and such captured cats may be sterilized by a licensed veterinarian. The feral cats may not, however, be released by the locality back to the location from whence they came or some other location in the wild. Finally, it is my opinion that persons who capture feral cats while acting as agents of or in conjunction with a locality as part of its trap and sterilize program are companion animal finders and do not become the *de facto* or *de jure* owners of such cats.

¹ VA. CODE ANN. § 3.2-6500 (Supp. 2013).

² An implied authority to trap companion animals was recognized in a previous opinion of the Attorney General, which concluded that Virginia Code §§ 15.1-510 and 29-196 allowed for a county to order and arrange for the trapping of wild dogs. 1968-69 Op. Va. Att’y Gen. 10A. These sections have been repealed and replaced in part by Title 3.2.

³ See § 3.2-6570(D) (Supp. 2013) (“This section shall not prohibit authorized wildlife management activities or hunting, fishing or trapping as regulated under other titles of the Code of Virginia, including Title 29.1 . . .”); and § 3.2-6571 (2008).

⁴ Section 3.2-6562 (2008) (emphasis added).

⁵ Section 3.2-6569(A) (Supp. 2013) (emphasis added).

⁶ Section 3.2-6543 (Supp. 2013).

⁷ See also VA. CODE ANN. §§ 15.2-1102 (2012) (towns and cities) and 15.2-1200 (2012) (counties) (granting, among other powers, general powers relating to securing and promoting the health, safety and general welfare of such jurisdictions’ inhabitants).

⁸ King v. Arlington Cnty., 195 Va. 1084, 1090, 81 S.E.2d 587, 591 (1954).

⁹ Section 3.2-6500 defines “releasing agency” as, “a pound, animal shelter, humane society, animal welfare organization, society for the prevention of cruelty of animals, or other similar entity or home-based rescue, that releases companion animals for adoption.”

¹⁰ Section 3.2-6534 (2008) (sterilization of companion animals identified apart from “[t]he care and maintenance of a pound,” which is listed as a separate purpose). *See also* § 3.2-6535 (2008) (localities not limited to revenues derived solely from dog and cat license taxes to fund sterilization programs for dogs and cats under section which specifically authorizes localities to supplement dog and cat license funds “with other funds as they consider appropriate”).

¹¹ Section 3.2-6529 (2008) (emphasis added).

¹² Section 3.2-6543 (emphasis added).

¹³ *See, e.g.,* Commonwealth v. County Bd., 217 Va. 558, 573-74, 232 S.E.2d 30, 40 (1977); and Virginia Beach v. Hay, 258 Va. 217, 221, 518 S.E.2d 314, 316 (1999).

¹⁴ *Hay*, 258 Va. at 221, 518 S.E.2d at 316.

¹⁵ *Id.*, at 222, 528 S.E.2d at 316.

¹⁶ *Id.*

¹⁷ *Id.*, at 221, 528 S.E.2d at 316.

¹⁸ *County Bd.*, 217 Va. at 574-75, 232 S.E.2d at 40-41.

¹⁹ *Id.*

²⁰ Section 3.2-6546 (2008).

²¹ *Id.* Yet, § 3.2-6562 does provide that an animal control officer may deliver a companion animal to any person who will pay the required license fee for it as an alternative to the disposition methods found under § 3.2-6546.

²² Section 3.2-6546.

²³ *Id.* *See also* § 3.2-6548(A) (2008) (An animal shelter or releasing agency is also required to dispose of the animals it receives pursuant to § 3.2-6546).

²⁴ Section 3.2-6504 (2008).

²⁵ *Id.*

²⁶ Section 3.2-6500.

²⁷ *Id.*

²⁸ Section 3.2-6551 (2008). *See also* § 3.2-6503 (Supp. 2013) (care of a companion animal includes providing adequate food, water and shelter, among other items.)

²⁹ I express no opinion regarding the policy implications this conclusion may elicit. Localities will have to weigh for themselves whether maintaining a TNR program furthers their interests and what such a program’s potential effect on population numbers and adoption rates will be. In light of the *Code of Virginia*’s requirements regarding the disposition of companion animals, a locality could logically conclude that the neutering program served a beneficial purpose by increasing the likelihood that the animal would be adopted or could conclude that the additional expense of neutering should not be incurred given the manner of disposition that the law might eventually require.

³⁰ Section 3.2-6500.

³¹ Section 3.2-6503 lists an owner’s duties to care for a companion animal.

³² *See* VA. CODE ANN. § 1-200 (2011) (relating to the applicability of common law principles, “except as altered by the General Assembly.”). Here, the above-referenced statutory analysis dictates the outcome of your ownership-related inquiry.

OP. NO. 11-132**AGRICULTURE, ANIMAL CARE, AND FOOD: RIGHT TO FARM****COUNTIES, CITIES, AND TOWNS: PLANNING, SUBDIVISION OF LAND, AND ZONING**

Allowing agriculture “by right” in areas zoned “Rural Residential” does not constitute a zoning classification as used in § 3.2-301.

THE HONORABLE BRENDA L. POGGE
MEMBER, HOUSE OF DELEGATES
JUNE 21, 2013

ISSUES PRESENTED

You ask whether allowing agriculture as a “by right” use in areas zoned “Rural Residential” constitutes a zoning classification as used in § 3.2-301, part of the Virginia Right to Farm Act (the “Act”).¹ You are particularly concerned about language in the Act stating that “no county shall adopt any ordinance that requires that a special exception or special use permit be obtained for any production agriculture or silviculture activity in an area that is zoned as an agricultural district or classification.”²

RESPONSE

It is my opinion that allowing agriculture “by right” in areas zoned Rural Residential does not constitute a zoning classification as used in § 3.2-301.

APPLICABLE LAW AND DISCUSSION

Zoning is a local legislative action for “the process of classifying land within a locality into areas and districts, such areas and districts being generally referred to as ‘zones’.”³ It includes “the prescribing and application in each area and district of regulations concerning building and structure designs, building and structure placement and uses to which land, buildings and structures within such designated areas and districts may be put.”⁴ In other words, the exercise of zoning authority by a locality involves the application of two, distinct aspects of legislative authority.

The first is the creation of “zones.” This exercise of authority includes creating classifications and districts. A “class” is defined as “[a] group of...qualities or activities that have common characteristics or attributes.”⁵ A “district” is defined as “[a] territorial area into which a...political subdivision is divided for...administrative purposes.”⁶ Accordingly, for these purposes, a classification is a description of an activity or activities with common attributes, while a district denotes a specific geographic area within which such activities may be authorized. As discussed below, allowing agriculture “by right” in a “Rural Residential” zone is not a classification issue.

The second exercise of legislative authority is the creation of certain defined regulations regarding use, appearance and structure, among other things, that will apply within the districts. This second action includes prescribing what activities are authorized by right, i.e., by virtue of fitting within the classification or lying within

the boundaries of the district; as opposed to specifying what activities are allowed in the particular district or classification only if additional conditions beyond those routinely applicable to the district or classification are met, i.e., activities that require special or conditional use permits.⁷ This aspect of the exercise of legislative authority does not define the zone, but clarifies what may occur within that zone. Your inquiry relates to the legislative authority regarding the regulations that will apply within a district.

For purposes of this opinion I will assume that the zoning classifications to which you refer are those routinely found in local governments in Virginia. In that case, a Rural Residential zoning district would be considered a residential classification.⁸ Such a classification does not promote agricultural and silvicultural activities within its geographic boundaries; it promotes residential uses in rural areas. Certain types of agricultural activities might be allowed in such a district. Often, uses that are considered “less intensive” than those authorized by the zoning classification will be authorized as “by right” uses in a district. That does not change the nature of the district or the classification, however. These are merely legislative choices regarding what restrictions to place on or in any particular category. A legislative choice could be made to allow only incidental agricultural uses in residential zones, i.e., gardens for home consumption only. All agricultural uses could be allowed. All agricultural uses could be prohibited unless a special exception or conditional use permit is granted. But in a residential zoning district, § 3.2-301 would not be applicable because it is not “an agricultural district or classification” referred to by the Act.

A final point is that an owner’s existing property rights may be vested and therefore unaffected by future zoning changes provided he:

- (i) obtains or is the beneficiary of a significant affirmative governmental act which remains in effect allowing development of a specific project, (ii) relies in good faith on the significant affirmative governmental act, and (iii) incurs extensive obligations or substantial expenses in diligent pursuit of the specific project in reliance on the significant affirmative governmental act.^{9]}

Each of these conditions must be met before a right is vested. Merely authorizing an activity in a zoning ordinance does not, by itself, create a vested right.¹⁰ Consequently, authorizing agriculture as a “by right” use in Rural Residential zones does not, by itself, vest any rights in a property owner, but other conditions may exist that vest such rights in a property owner.

CONCLUSION

Accordingly, it is my opinion that authorizing agricultural uses in a Rural Residential zoning district does not create an agricultural district or classification as those terms are used in § 3.2-301.

¹ The Virginia Right to Farm Act, VA. CODE ANN. §§ 3.2-300 through 3.2-302 (2008).

² Section 3.2-301 (2008).

³ VA. CODE ANN. § 15.2-2201 (2012).

⁴ *Id.*

⁵ BLACK'S LAW DICTIONARY 105 (Bryan A. Garner ed., 3d Pocket ed. 2006) (alteration in original).

⁶ *Id.* at 218.

⁷ See generally JOHN R. NOLON & PATRICIA E. SALKIN, LAND USE IN A NUTSHELL 67-71 (2006).

⁸ Cf. *Cherrystone Inlet, L.L.C. v. Bd. of Zoning Appeals*, 271 Va. 670, 672, 628 S.E.2d 324, 325 (2006) (referring to a “Rural Village-Rural Residential” zoning classification as “a restrictive *residential* classification” (emphasis added)).

⁹ Section 15.2-2307 (2012).

¹⁰ *Bd. of Supvrs. v. Crucible, Inc.*, 278 Va. 152, 159, 677 S.E.2d 283, 286 (2009).

OP. NO. 13-015

CIVIL REMEDIES AND PROCEDURE: ACTIONS-VIRGINIA TORT CLAIMS ACT

Because the Virginia Tort Claims Act does not provide relief for torts committed by agents of the Commonwealth that occurred prior to July 1, 1982, it is unlikely that a claimant could successfully bring an action against the Commonwealth for having been sterilized by the Commonwealth between 1924 and 1979.

THE HONORABLE ROBERT G. MARSHALL
 THE HONORABLE PATRICK A. HOPE
 MEMBERS, HOUSE OF DELEGATES
 MARCH 15, 2013

ISSUE PRESENTED

You inquire whether someone who was sterilized by the Commonwealth between 1924 and 1979 could successfully bring a claim against the Commonwealth under the Virginia Tort Claims Act (“VTCA”).¹

RESPONSE

It is my opinion that, because the VTCA does not provide relief for torts committed by agents of the Commonwealth that occurred prior to July 1, 1982, it is unlikely that a claimant could successfully bring an action against the Commonwealth for having been sterilized.

APPLICABLE LAW AND DISCUSSION

At common law, the Commonwealth enjoyed absolute immunity from tort and other claims because “[i]t is an established principle of sovereignty, in all civilized nations, that a sovereign State cannot be sued in its own courts . . . without its consent and permission”² The Commonwealth retains its absolute immunity “[a]bsent an express statutory or constitutional provision waiving . . .” that immunity.³

In the 1981 session, the General Assembly enacted a statutory waiver of the Commonwealth immunity, the VTCA.⁴ The VTCA was and remains only a “limited waiver” of the Commonwealth’s immunity and is to “be strictly construed because the Act is a statute in derogation of the common law.”⁵

By its express terms, the VTCA waived the Commonwealth's immunity only prospectively. Specifically, since the VTCA's adoption, § 8.01-195.3 has provided that, subject to the law's other provisions, "the Commonwealth shall be liable for claims for money only accruing on or after July 1, 1982"⁶

Generally, and for the purposes of your inquiry, causes of action accrue in Virginia at the time the tort occurs.⁷ Thus, the latest a cause of action could have accrued given the dates in your letter is 1979, which is prior to the enactment and effective date of the VTCA. Accordingly, no such claim falls within the VTCA, and therefore, the Commonwealth retains its absolute immunity from any such claims.

In addition, any potential claim also may be barred by the notice provisions of the VTCA. Section 8.01-195.6 provides that

[e]very claim cognizable against the Commonwealth or a transportation district shall be forever barred unless the claimant or his agent, attorney or representative has filed a written statement of the nature of the claim, which includes the time and place at which the injury is alleged to have occurred and the agency or agencies alleged to be liable, within one year after such cause of action accrued.

Obviously, no notices of claim were filed within one year of 1979, because there was no VTCA in 1980.

The only exception to the notice provisions would be if the tort victim were under a legal disability, and thus, entitled to a tolling of the notice requirement.⁸ While some of those who were sterilized were almost certainly under a disability, the prospective nature of the VTCA nevertheless would bar any claim.

Finally, for at least some of the potential claimants, there also could be general statute of limitations problems.⁹

I therefore conclude that the VTCA does not waive immunity for any torts committed by agents of the Commonwealth that occurred prior to July 1, 1982.

CONCLUSION

Accordingly, it is my opinion that it is unlikely that a claimant could successfully bring an action against the Commonwealth for having been sterilized.

¹ VA. CODE ANN. §§ 8.01-195.1 through 8.01-195.9 (2007 & Supp. 2012).

² *Gray v. Va. Sec'y of Transp.*, 276 Va. 93, 101, 662 S.E.2d 66, 70 (2008) (quoting *Bd. of Public Works v. Gantt*, 76 Va. 455, 461 (1882)).

³ *Rector & Visitors of the Univ. of Va. v. Carter*, 267 Va. 242, 244, 591 S.E.2d 76, 78 (2004) (citing *Patten v. Commonwealth*, 262 Va. 654, 658, 553 S.E.2d 517, 519 (2001); *Baumgardner v. Sw. Va. Mental Health Inst.*, 247 Va. 486, 489, 442 S.E.2d 400, 401 (1994)).

⁴ 1981 Va. Acts ch. 449.

⁵ *Carter*, 267 Va. at 244-45, 591 S.E.2d at 78 (citations omitted).

⁶ The prospective nature of the VTCA is perhaps best demonstrated by the fact that, while it was first adopted in 1981, the General Assembly chose to make the waiver effective for the first time more than a year after the VTCA's adoption.

⁷ See § 8.01-230 (2007).

⁸ See § 8.01-229(2007).

⁹ See §§ 8.01-228 (2007) ; 8.01-243 (Supp. 2012); 8.01-248 (2007).

OP. NO. 13-101

CIVIL REMEDIES AND PROCEDURE: EXECUTIONS AND OTHER MEANS OF RECOVERY

Pursuant to § 8.01-499, a sheriff has discretion to collect or not collect a commission from a sheriff's sale. Section 15.2-1615 directs what the sheriff must do with the money should he receive a commission.

THE HONORABLE J. E. "CHIP" HARDING
SHERIFF, COUNTY OF ALBEMARLE
DECEMBER 20, 2013

ISSUES PRESENTED

You inquire whether § 8.01-499 of the *Code of Virginia* mandates the collection of a commission from a sheriff's sale or whether a sheriff has discretion not to collect a commission. You also ask whether that section mandates what the sheriff is to do with the commission if and when it is collected.

RESPONSE

It is my opinion that, pursuant to § 8.01-499, a sheriff has discretion to collect or not collect a commission from a sheriff's sale. It is further my opinion that § 15.2-1615 directs what the sheriff must do with the money should he receive a commission.

BACKGROUND

You relate that sheriff's sales are rare in the County of Albemarle and that you have elected in the past to not collect a commission in order to allow the full amount of the sale to go to the judgment creditor. You further relate that the Commonwealth of Virginia Auditor of Public Accounts, Shenandoah Valley Region Team, interprets § 8.01-499 as making collection of such commission mandatory.

APPLICABLE LAW AND DISCUSSION

Sheriffs are constitutional officers "whose duties and authority are controlled by statute."¹ Section 15.2-1609 of the *Code of Virginia* provides that "the sheriff shall exercise all the powers conferred and perform all the duties imposed upon sheriffs by general law." Except as limited by law, constitutional officers are "free to discharge [their] constitutional duties in a manner in which [they] deem most appropriate."²

As a means of enforcing monetary judgments, Virginia law permits sheriffs to sell tangible property of a debtor when such property has been properly levied.³ As part of this process, § 8.01-499 of the *Code of Virginia* provides the following:

An officer receiving money under this chapter shall make return thereof forthwith to the court or the clerk's office of the court in which the judgment is entered. For failing to do so, the officer shall be liable as if he had acted under an order of such court. After deducting from such money a commission of 10 percent and his necessary expenses and costs, including reasonable fees to sheriff's counsel, he shall pay the net proceeds, and he and his sureties and their representatives shall be liable therefor, in like manner as if the same had been made under a writ of fieri facias on the judgment.

The plain language of the statute authorizes an officer to collect a ten percent commission from the money realized from a sale.⁴ No express language in the statute mandates collection of said commission. Rather, it authorizes collection of the commission and then directs what the sheriff should do with the remainder: "he shall pay the net proceeds . . . in like manner as if..."⁵

The General Assembly knows how to express its intention.⁶ There is no explicit direction that the sheriff must charge the commission.⁷ Moreover, even if the statute were to provide that the sheriff "shall" charge the commission, that would not necessitate a finding that the commission must be charged. As the Virginia Supreme Court has noted,

the use of 'shall,' in a statute requiring action by a public official, is directory and not mandatory unless the statute manifests a contrary intent. As this Court explained in *Commonwealth v. Rafferty*, 241 Va. 319, 402 S.E.2d 17 (1991), '[a] statute directing the mode of proceeding by public officers is to be deemed directory, and a precise compliance is not to be deemed essential to the validity of the proceedings, unless so declared by statute.' *Id.* at 324, 402 S.E.2d at 20 (quoting *Nelms v. Vaughan*, 84 Va. 696, 699, 5 S.E. 704, 706 (1888) (citation omitted)).^[8]

Accordingly, I conclude that while § 8.01-499 authorizes a sheriff to collect a ten percent commission, it does not require him to do so.⁹

With respect to your second question, § 8.01-499 does not address what must be done with a commission when a sheriff elects to collect it. Thus, the ten percent commission authorized by § 8.01-499 would fall within the broad scope of § 15.2-1615, which provides that, "[a]ll money received by the sheriff shall be deposited intact and promptly with the county or city treasurer or Director of Finance."¹⁰ That section's mandate is clearly stated and by its terms applies to *all* money received by the sheriff.¹¹ Therefore, I conclude that a sheriff choosing to collect the commission deposit the funds with the county or city treasurer or Director of Finance.

CONCLUSION

Accordingly, it is my opinion that it is within a sheriff's discretion whether or not to collect a commission under § 8.01-499. It is further my opinion that if a commission is collected, the sheriff must comply with § 15.2-1615.

¹ *Keathley v. Vitale*, 866 F. Supp. 272, 276 (E.D. Va. 1994) (citing *Hilton v. Amburgey*, 198 Va. 727, 96 S.E.2d 151 (1957)); *see also* VA. CONST. art. VII, § 4 (“The duties and compensation of such officers shall be prescribed by general law or special act.”).

² 1984-85 Op. Va. Att’y Gen. 284, 284.

³ *See* VA. CODE ANN. §§ 8.01-466 through 8.01-505 (2012 & Supp. 2013) (establishing process for obtaining and enforcing a writ of execution).

⁴ 2003 Op. Va. Att’y Gen. 172, 173; 2001 Op. Att’y Gen. 20, 21.

⁵ Section 8.01-499 (2012). Procedures respecting the payment of proceeds following execution of a writ of fieri facias are set forth at VA. CODE ANN. §§8.01-483 through 8.01-486 (2007).

⁶ *See, e.g.*, 2007 Op. Va. Att’y Gen. 133, 136 n.4. “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, 590 S.E.2d 563, 556 (2004) (quoting *Barr v. Town & Country Props., Inc.*, 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990)).

⁷ *Compare* § 8.01-499 with VA. CODE ANN. § 15.2-1609.3(A) (2012) (the latter providing in pertinent part that “[e]very sheriff, and every sheriff’s deputy *shall* collect all fees and mileage allowances provided by law for the services of such officer.”) (emphasis added). A “commission” is not a “fee” under this section, for the statute later provides that, if a sheriff neither sells the property nor receives payment, he is not entitled to any *commission* but may still take a *fee*. Section 15.2-1609.3(C)-(D) (emphasis added); *and see* 1982-83 Op. Va. Att’y Gen. 260, 261. Rules of statutory construction dictate that “[w]hen the General Assembly uses two different terms in the same act, it is presumed to mean two different things.” *Forst v. Rockingham Poultry Mktg. Coop., Inc.*, 222 Va. 270, 278, 279 S.E.2d 400, 404 (1981), *quoted in* *Simon v. Forer*, 265 Va. 483, 490, 578 S.E.2d 792, 796 (2003). Furthermore, although not specifically discussed, the difference between a commission and a fee repeatedly has been recognized in prior opinions: *See* 2001 Op. Va. Att’y Gen. 20, 21; 1997 Op. Va. Att’y Gen. 18, 19; 1962-63 Op. Va. Att’y Gen. 101, 102.

⁸ *Jamborsky v. Baskins*, 247 Va. 506, 511, 442 S.E.2d 636, 638 (1994).

⁹ This is consistent with a prior opinion of this Office, which noted in passing that a sheriff “may deduct” the commission referenced in § 8.01-499. 2001 Op. Va. Att’y Gen. 20, 21; 1997 Op. Va. Att’y Gen. 18, 19.

¹⁰ VA. CODE ANN. § 15.2-1615(A) (2012).

¹¹ Section 15.2-1615(A) includes two exemptions to this requirement, however, they are inapplicable to your inquiry.

OP. NO. 12-074

CONSERVATION: FLOOD PROTECTION AND DAM SAFETY

Irrigation is not a necessary element for a farm pond to qualify for the agricultural exemption, provided the impounded waters are utilized in a manner found to be required for agricultural production.

THE HONORABLE THOMAS C. WRIGHT, JR.
MEMBER, HOUSE OF DELEGATES
JANUARY 4, 2013

ISSUES PRESENTED

You present several questions related to the Dam Safety Act and the application by the Department of Conservation and Recreation (“DCR”) of the agricultural exemption it contains.¹ You first ask whether a farm pond must be used for the irrigation of crops to qualify for the exemption. You also inquire whether the agricultural exemption applies in two situations: 1) for a farm pond available for fire suppression when located within forestland where conventional silviculture is practiced professionally, or 2) for a pond located in the middle of a pasture from which hay is cut, hay being a plant as well as an agricultural commodity. Finally, you ask what constitutes being a forester within the context of the Dam Safety Act and attendant regulations and guidance, and specifically, how a forester differs from an orchardist.

RESPONSE

It is my opinion that irrigation is not a necessary element for a farm pond to qualify for the agricultural exemption, provided the impounded waters are utilized in a manner found to be required for agricultural production. It is further my opinion that, because the determination of whether the agricultural exemption applies to any particular structure is primarily a factual question reserved to the Director of DCR on a case-by-case basis, I must decline to render an opinion on the issues raised in the second question presented. Finally, it is my opinion that, absent a specific definition in the Dam Safety Act, it is appropriate to look to the definition of the term “forester” provided in the statutes governing the Department of Forestry as an interpretative guide, and that a forester differs from an orchardist in that an orchardist harvests fruit, nuts or sap from trees, while a forester is concerned with the timber itself.

BACKGROUND

With respect specifically to your second question, you relate that you have constituents who own what you describe as farm ponds. You identify at least two categories of uses to which such farm ponds are dedicated. The first category you describe comprises ponds located within forested land subject to conventional silvicultural practices in accordance with the guidelines of the Virginia Department of Forestry. The owners of these ponds assert that they are entitled to the agricultural exemption because the ponds serve a valuable fire suppression purpose. The second category contains ponds surrounded by open fields on which the owners cut hay and/or run livestock. In this instance, the owners assert that the ponds are operated for agricultural purposes and therefore subject to the agricultural exemption.

APPLICABLE LAW AND DISCUSSION

The Dam Safety Act (“the Act”) provides for the regulation and permitting of impounding structures in the Commonwealth² in order to protect human life and property from the dangers of dam failure.³ The Act exempts from regulation structures that are “operated primarily for agricultural purposes” and do not exceed certain height and impoundment capacity limitations.⁴ This provision is generally referred to as the “25/100 exemption” or the “agricultural exemption.”

The General Assembly has directed the Soil and Water Conservation Board (“the Board”) to “adopt regulations to ensure that impounding structures in the Commonwealth are properly and safely constructed, maintained and operated.”⁵ Pursuant to this authority, the Board has adopted the Impounding Structure Regulations.⁶ These regulations define “agricultural purpose” as “the *production* of an agricultural commodity as defined in § 3.2-3900 of the Code of Virginia that *requires the use of impounded waters*.”⁷ Section 3.2-3900 defines “agricultural commodity” as “any plant or part thereof, animal, or animal product, produced by a person (including farmers, ranchers, vineyardists, plant propagators, Christmas tree growers, aquaculturists, floriculturists, orchardists, foresters, nurserymen, wood treaters not for hire, or other comparable persons) primarily for sale, consumption, propagation, or other use by man or animals.”⁸

The Impounding Structure Regulations provide that “[a]n owner covered by an agricultural exemption pursuant to § 10.1-604 of the Code of Virginia and [4 VA. ADMIN. CODE § 50-20-30] may validate such exemption by submitting an Agricultural Exemption Report (Agricultural Exemption Report for Impounding Structures).”⁹ This report requires, *inter alia*, “[a] list of the agricultural functions for which the impoundment supplies water” and “[t]he owner’s signature validating that the impoundment is operated primarily for agricultural purposes.”¹⁰

Pursuant to a delegation of authority from the Board, DCR administers the Dam Safety Program.¹¹ The Director of DCR has issued a guidance document regarding the agricultural exemption requirements.¹² Although guidance documents do not have the force and effect of law, they serve to advise the agency’s staff and the public of the agency’s interpretations of its regulations.¹³ Courts generally give such “interpretative” rules persuasive effect and will give “great deference to an administrative agency’s interpretation of the regulations it is responsible for enforcing.”¹⁴

In this document, the Director explains three scenarios that meet the agricultural exemption: (1) the dam owner demonstrates that the agricultural land consists of a minimum of five contiguous acres upon which the agricultural commodity is produced and the impounded water is used or held in reserve primarily to assist in this production; (2) the owner of the agricultural use certifies gross sales in excess of \$1,000 annually over the previous three years for the sale of agricultural commodities produced from the lands served by the impounding structure waters; or (3) the dam owner demonstrates that the land on which the agricultural commodity is produced is zoned for agricultural use and the impounded water is used or held in reserve primarily to assist in this production.¹⁵

Nothing in this guidance document, or in the applicable statutes or regulations, sets forth a requirement that a farm pond be used specifically for irrigation in order to qualify for the agricultural exemption. As the language of the document suggests, what is critical is that the impounded waters be used “to assist in [agricultural] production.” No provision of law limits such assistance to irrigation. Thus, in response to your first question, I conclude that, provided the impounded waters otherwise are shown to be primarily used for agricultural purposes as required by §

10.1-604, irrigation is not a necessary element for a farm pond to be eligible to receive the 25/100 exemption.

Your next inquiry relates to eligibility for the exemption in two scenarios, as described above. With regard to the first scenario, silviculture clearly falls within the scope of the above-referenced definition of “agricultural commodity” and “agricultural purpose.”¹⁶ Nonetheless, the authorities cited above, including DCR’s own guidance, do not address the question of whether possible fire suppression for traditional silviculture “requires the use of impounded waters,” as the regulations require to qualify for the exemption.¹⁷ In addition, it does not appear that the Department of Forestry¹⁸ has issued any guidelines or descriptions of best management practices that speak to the use of impounded waters for possible fire suppression as part of silvicultural activity. I also am not aware of any court decisions addressing this question. The question you ask involves matters of specific silvicultural practices that do not appear in law and are left for the relevant agencies to address. It is for the relevant agencies to determine whether traditional silviculture activity requires impounded waters for possible fire suppression. Any agency determination on the matter will be entitled to deference by the courts unless plainly wrong or contrary to the agency’s own rules.¹⁹ Moreover, the General Assembly is presumed to be aware of the agency’s construction of a particular statute and, when such a construction continues without legislative alteration, the legislature will be presumed to have acquiesced in it.²⁰

You similarly ask whether a farm pond located in the middle of a pasture from which hay is cut qualifies for the agricultural exemption. As with the first scenario, in the abstract, it is possible that growing hay will “require the use of the impounded waters,” and it is also possible that the impounded waters would not be required for such an agricultural production. The question of whether a particular pond is maintained “primarily for agricultural purposes” as discussed in § 10.1-604, is for the Director to determine based on the particularized facts of each case. I am therefore unable to render an opinion as to whether the exemption would be available in any particular circumstance in either scenario.

Lastly, you ask what constitutes being a forester within the context of the Act and attendant regulations and guidance and how a forester differs from an orchardist. As discussed above, the Act exempts from regulation certain structures that are “operated primarily for agricultural purposes,” where an “agricultural purpose” includes “the production of an agricultural commodity”²¹ Relative to your inquiry, “agricultural commodity” is “any plant or part thereof, animal, or animal product, produced by a person (including . . . orchardists [and] foresters . . .) primarily for sale, consumption, propagation, or other use by man or animals.”²² Neither the Act, the regulations, nor the guidance document provide a definition of “forester” or “orchardists.”

Nonetheless, as for “forester,” because the *Code of Virginia* constitutes a single body of law, other sections may be looked to where the same phraseology is used.²³ In the statutes governing the Department of Forestry, the General Assembly has defined “forester” as “any person who is engaged in the science, profession and practice of forestry and who possesses the qualifications required by this article.”²⁴ The statute

further defines “forestry” as “the science, art and practice of creating, managing, using and conserving forests and associated natural resources for human benefit and in a sustainable manner to meet desired goals, needs, and values.”²⁵ I conclude that, absent a specific definition in the Act, it is appropriate to look to the definition of “forester” in § 10.1-1181.8 as an interpretative guide for determining the meaning of the term as it is used in the dam safety context.²⁶

Unlike “forester,” the General Assembly has not provided a definition of “orchardist” in the *Code of Virginia*. In the absence of a statutory definition, a term is given its ordinary meaning, given the context in which it is used.²⁷ The common definition of “orchardist” is “an owner or supervisor of orchards,” and “orchard” is commonly defined as “a planting of fruit trees, nut trees, or sugar maples.”²⁸ I therefore conclude that a forester differs from an orchardist in that an orchardist harvests fruit, nuts and sap from trees, while a forester “creat[es], manag[es], us[es] and conserv[es] forests and associated natural resources for human benefit and in a sustainable manner to meet desired goals, needs, and values.”²⁹ Thus, an orchardist is concerned with the products of trees, while a forester is interested in the timber itself.

CONCLUSION

Accordingly, it is my opinion that irrigation is not a necessary element for a farm pond to qualify for the agricultural exemption, provided the impounded waters are utilized in a manner found to be required for agricultural production. It is further my opinion that, because the determination of whether the agricultural exemption applies to any particular structure is primarily a factual question reserved to the Director of DCR on a case-by-case basis, I must decline to render an opinion on the issues raised in the second question presented. Finally, it is my opinion that, absent a specific definition in the Dam Safety Act, it is appropriate to look to the definition of the term “forester” provided in the statutes governing the Department of Forestry as an interpretative guide, and that a forester differs from an orchardist in that an orchardist harvests fruit, nuts or sap from trees, while a forester is concerned with the timber itself.

¹ You indicate that some of these questions arise from reports to you regarding DCR enforcement of the applicable regulations. You state that you have been informed that DCR has taken the position that fire suppression in a forest is not a use that would qualify the pond for the agricultural exemption and that DCR approves the agricultural exemption for such a pond only if water is being pumped from the pond for irrigation purposes.

² See VA. CODE ANN. §§ 10.1-604 through 10.1-613.5 (2012).

³ See, e.g., § 10.1-608 (providing measures for “an unsafe dam constituting an imminent danger to life or property”).

⁴ See § 10.1-604 (defining “impounding structure” as not including, *inter alia*, “dams operated primarily for agricultural purposes which are less than twenty-five feet in height or which create a maximum impoundment capacity smaller than 100 acre-feet”).

⁵ Section 10.1-605(A).

⁶ See 4 VA. ADMIN. CODE §§ 50-20-10 through 50-20-400.

⁷ 4 VA. ADMIN. CODE § 50-20-30 (emphasis added). Section 10.1-605 of the Code authorizes the Board to adopt regulations “to ensure that impounding structures in the Commonwealth are properly and safely constructed, maintained and operated.”

⁸ VA. CODE ANN. § 3.2-3900 (Supp. 2012).

⁹ 4 VA. ADMIN. CODE § 50-20-165(B).

¹⁰ 4 VA. ADMIN. CODE § 50-20-165(B)(5),(7).

¹¹ See Minutes of the Virginia Soil and Water Conservation Board 9-10 (Dec. 11, 1991) (on file with DCR). See also § 10.1-605.1 (authorizing the Board to “delegate to the Director or his designee any of the powers and duties vested in the Board by [the Act], except the adoption and promulgation of regulations”).

¹² DEP’T OF CONSERVATION & RECREATION, GUIDANCE DOCUMENT ON AGRICULTURAL EXEMPTION REQUIREMENTS (Nov. 30, 2010), available at

http://www.dcr.virginia.gov/dam_safety_and_floodplains/documents/DCR-VSWCB-022.pdf.

¹³ NRV Real Estate, LLC v. Va. Dep’t of Health, 51 Va. App. 514, 526-27, 659 S.E.2d 527, 533-34 (2008).

¹⁴ *Id.* (citations omitted).

¹⁵ *Supra* note 12 at 4.

¹⁶ “Silvicultural activity” is defined as “any forest management activity, including but not limited to the harvesting of timber, the construction of roads and trails for forest management purposes, and the preparation of property for reforestation.” Section 10.1-1181.1 (2012).

¹⁷ 4 VA. ADMIN. CODE § 50-20-30.

¹⁸ In addressing forest fires and fire suppression, the General Assembly has authorized the State Forester “to employ temporary forest wardens to extinguish forest fires . . . [and to] take such action as is authorized by law to prevent and extinguish forest fires.” Section 10.1-1105 (2012). He is further authorized to “develop silvicultural best management practices, including reforestation, prevention of erosion and sedimentation, and maintenance of buffers for water quality.” *Id.* The General Assembly has provided a statutory scheme for forest wardens and the suppression of forest fires, as well as a certified prescribed burning manager program. See Article 6 (“Forest Wardens and Fires”) and Article 6.1 (“Certified Prescribed Burning Manager Program”) of Chapter 11 of Title 10.1 of the *Code of Virginia*. The Department of Forestry has adopted regulations regarding fire prevention, see, e.g., 4 VA. ADMIN. CODE § 10-30-180 (“Fires, lighted cigarettes, etc.”), but does not address impounding structures used for possible fire suppression and whether or not they are considered part of a silvicultural operation.

¹⁹ See *Level 3 Comm’ns of Va. v. State Corp. Comm’n*, 268 Va. 471, 478, 604 S.E.2d 71, 74 (2004) (agency’s “interpretation of its own rules is entitled to deference”); *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 171 (2007) (“[A]n agency’s interpretation of its own regulations is controlling unless plainly erroneous or inconsistent with the regulations being interpreted.”) (internal quotation marks omitted).

²⁰ See *Commonwealth v. Am. Radiator & Standard Sanitary Corp.*, 202 Va. 13, 19, 116 S.E.2d 44, 48 (1960) (“when [a public official’s construction of a statute] has long continued without change the legislature will be presumed to have acquiesced therein”); *Miller v. Commonwealth*, 180 Va. 36, 42, 21 S.E.2d 721, 723 (1942) (“The Legislature is presumed to be cognizant of [the construction given to a statute by public officials], and, when long continued, in the absence of legislation evincing a dissent, the courts will adopt that construction”). See also 2011 Op. Va. Att’y Gen. 143, 145; 1986-87 Op. Va. Att’y Gen. 194, 194.

²¹ See 4 VA. ADMIN. CODE § 50-20-30.

²² Section 3.2-3900.

²³ See *First Nat’l Bank of Richmond v. Holland*, 99 Va. 495, 504, 39 S.E. 126, 129-30 (1901). See also 2012 Op. Va. Att’y Gen. 117.

²⁴ Section 10.1-1181.8 (2012). *See also* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 457 (10th ed. 1994) (defining "forester" as "a person trained in forestry").

²⁵ Section 10.1-1181.8. *See also* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 457 (10th ed. 1994) (defining "forestry" as "the science of developing, caring for, or cultivating forests . . . the management of growing timber").

²⁶ *See First Nat'l Bank*, 99 Va. at 504, 39 S.E. at 129-30. *See also* 1975-76 Op. Va. Att'y Gen. 3, 4-5.

²⁷ *See Grant v. Commonwealth*, 223 Va. 680, 684, 292 S.E.2d 348, 350 (1982); *Loyola Fed. Savings v. Herndon*, 218 Va. 803, 805, 241 S.E.2d 752, 753 (1978).

²⁸ *See* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 818 (10th ed. 1994).

²⁹ Section 10.1-1181.8 (definition of "forestry").

OP. NO. 13-027

CONSTITUTION OF THE UNITED STATES: FIFTH AMENDMENT

CONSTITUTION OF VIRGINIA: BILL OF RIGHTS

CRIMINAL PROCEDURE: EXCEPTIONS AND WRITS OF ERROR

House Bill No. 2338, as codified in § 19.2-324.1, does not infringe upon any protection afforded by either the Fifth Amendment to the U.S. Constitution or Article I, § 8, of the Constitution of Virginia.

The Constitution of Virginia expressly permits the General Assembly to legislate on matters of procedural as well as substantive law; therefore, no amendment to the Constitution of Virginia was necessary for this enactment to take effect on July 1, 2013.

THE HONORABLE SCOTT A. SUROVELL
MEMBER, HOUSE OF DELEGATES
AUGUST 23, 2013

ISSUE PRESENTED

You ask whether House Bill No. 2338, now codified as § 19.2-324.1 of the *Code of Virginia*, violates the Fifth Amendment to the U.S. Constitution or Article I, § 8, of the Constitution of Virginia.

RESPONSE

It is my opinion that House Bill No. 2338, as codified in § 19.2-324.1, is constitutional; the enactment does not infringe upon any protection afforded by either the Fifth Amendment to the U.S. Constitution or Article I, § 8, of the Constitution of Virginia. It is further my opinion that the Constitution of Virginia expressly permits the General Assembly to legislate on matters of procedural as well as substantive law;¹ therefore, no amendment to the Constitution of Virginia was necessary for this enactment to take effect on July 1, 2013.

BACKGROUND

House Bill No. 2338 was duly enacted by the General Assembly during the 2013 Regular Session and subsequently was signed into law by the Governor in March of

2013.² The law, now codified as § 19.2-324.1, became effective on July 1, 2013.³ In your request, you posit that this piece of legislation may improperly place an accused person twice in jeopardy for the same offense. Specifically, you express concern that the legislation could be unconstitutional because you believe the Supreme Court of Virginia case to which it responds, *Rushing v. Commonwealth*,⁴ was based on the state Constitution. You further posit that, assuming those circumstances, an amendment to the Constitution of Virginia was necessary to give force to the enactment.

APPLICABLE LAW AND DISCUSSION

At the threshold, all legislative acts “are presumed to be constitutional.”⁵ “Indeed, ‘[t]here is no stronger presumption known to the law than that which is made by the courts with respect to the constitutionality of an act of Legislature.’”⁶ Under this presumption, courts must “resolve any reasonable doubt regarding the constitutionality of a statute in favor of its validity.”⁷ Moreover, “the Legislature has the power to legislate on any subject unless the Constitution says otherwise”⁸

Section 19.2-324.1, the new code provision created by the legislation you question, provides for the following:

In appeals to the Court of Appeals or the Supreme Court, when a challenge to a conviction rests on a claim that the evidence was insufficient because the trial court improperly admitted evidence, the reviewing court shall consider all evidence admitted at trial to determine whether there is sufficient evidence to sustain the conviction. If the reviewing court determines that evidence was erroneously admitted and that such error was not harmless, the case shall be remanded for a new trial if the Commonwealth elects to have a new trial.

This provision abrogates *Rushing*⁹ and codifies U.S. Supreme Court jurisprudence addressing the proper procedure for evaluating challenges to the sufficiency of the evidence when evidence is improperly admitted or rejected at trial.¹⁰ You express concern that remanding a case for a new trial under the circumstances presented in § 19.2-324.1 runs afoul of constitutional protections against double jeopardy.¹¹ Based on a review of the precedent that follows, I conclude that § 19.2-324.1 does not violate the protections against double jeopardy contained in the federal and state constitutions.

I first offer an explanation of how the U.S. Supreme Court views the Double Jeopardy Clause in cases involving evidentiary issues. Significantly, the Court repeatedly has held that the Double Jeopardy Clause “does not preclude the Government’s retrying a defendant whose conviction is set aside because of an *error in the proceedings* leading to conviction.”¹² In *Lockhart v. Nelson*, the Court articulated the policy reasoning behind this doctrine:

Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction.^[13]

In *United States v. Tateo*, the Court explained how this principle also serves to protect a defendant at the trial court level:

From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendants' rights as well as society's interest.^[14]

An exception exists to the general rule that the government may retry a defendant whose conviction has been reversed for error. This exception, recognized in *Burks v. United States*, is available "when a defendant's conviction is reversed by an appellate court on the *sole* ground that the evidence was insufficient to sustain the jury's verdict."¹⁵ In such instances, "the Double Jeopardy Clause bars a retrial on the same charge."¹⁶ Consequently, the government is precluded from retrying the defendant in an attempt "to supply evidence which it failed to muster in the first proceeding."¹⁷ Nonetheless, the U.S. Supreme Court has noted the fundamental distinction, "for double jeopardy purposes," between a reversal based solely on insufficient evidence and a reversal based on "ordinary trial errors" like the improper admission or rejection of evidence.¹⁸

While the former [recognizes] 'that the government has failed to prove its case' against the defendant, the latter 'implies nothing with respect to the guilt or innocence of the defendant,' but is simply 'a determination that he has been convicted through a judicial process which is defective in some fundamental respect.'^[19]

Given this fundamental distinction, "where the evidence offered by the State and admitted by the trial court – whether erroneously or not – would have been sufficient to sustain a guilty verdict, the Double Jeopardy Clause does not preclude retrial."²⁰ Rather, "[i]t has long been settled...that the Double Jeopardy Clause's general prohibition against successive prosecutions does not prevent the government from retrying a defendant who succeeds in getting his first conviction set aside, through direct appeal or collateral attack, because of some error in the proceedings leading to conviction."²¹ In sum, a reversal for trial error, rather than the sufficiency of the evidence, does not operate as an acquittal but recognizes that a breakdown in the judicial process occurred. In such instances, "the accused has a strong interest in obtaining a fair adjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished."²²

Accordingly, the U.S. Supreme Court has held that, in considering a defendant's challenge to his conviction based on the sufficiency of the evidence, a reviewing court must consider *all* the evidence examined at trial, whether or not such evidence was admitted erroneously.²³ The reason for this is that the reviewing court stands in no greater position with respect to the quantum of evidence than that of the trial court. When a defendant argues on appeal that his conviction should be reversed due to insufficient evidence, he essentially argues that the trial court should have acquitted him at the close of the evidence.²⁴ The reviewing court therefore must examine the

exact evidence that was considered by the trial court, without regard to whether such evidence was properly or improperly admitted. To do otherwise would place the reviewing court on a different analytical balance than the trial court, thus potentially skewing the reviewing court's determination as to whether the evidence was sufficient at the trial court level.²⁵

As a result, the reviewing court must treat any evidence improperly admitted at the trial court level as "ordinary trial error" rather than error affecting the sufficiency of the evidence.²⁶ If the overall quantum of evidence (both admissible and inadmissible)²⁷ supports conviction, the reviewing court will not reverse due to insufficiency of the evidence. If a reviewing court concludes that, absent the impermissible evidence, there was insufficient evidence to support a conviction, it should reverse the conviction for "ordinary error," i.e., error lying in the improper admission of evidence rather than the sufficiency thereof.²⁸ As the U.S. Supreme Court has stated, reversal of a conviction on the grounds of "ordinary error" does not preclude the Government from retrying the defendant.²⁹ No double jeopardy principles are offended by a retrial after reversal for ordinary trial error, as opposed to trial error based on the grounds of insufficient evidence.³⁰

Like the U.S. Supreme Court, the Virginia Supreme Court also has dealt with the issue of retrial after reversal for evidentiary error at the trial court level. In *Rushing*, the Virginia Supreme Court considered the case of a defendant who challenged his conviction for criminal gang participation on the grounds of insufficient evidence.³¹ While acknowledging the precedent for evaluating challenges to the sufficiency of the evidence set by the U.S. Supreme Court in *Lockhart*, the Virginia Supreme Court nevertheless found that Virginia had adopted a contrary standard of appellate review.³² Citing *Crawford v. Commonwealth*,³³ the Court stated that the applicable rule in Virginia is that "on appellate review of the sufficiency of the evidence, 'an appellate court may *not* consider evidence illegally admitted at trial.'"³⁴

Upon finding that some evidence had been erroneously admitted at trial, the *Rushing* Court held that:

[I]f the record is considered *without* the erroneously admitted evidence . . . the Commonwealth proved only one predicate crime committed by a gang member rather than the two required by the statute. Therefore, the Commonwealth failed to prove an essential element of the crime and the Court of Appeals erred in affirming Rushing's conviction for gang participation.^[35]

The Court then reversed Rushing's conviction for gang participation and entered final judgment based on insufficient evidence at trial,³⁶ thus barring a retrial.³⁷

The Virginia Supreme Court's holding in *Rushing* afforded the defendant in that case greater protection against double jeopardy than that delineated by the U.S. Supreme Court in *Lockhart*.³⁸ Although a state, as a matter of state law, may extend greater constitutional safeguards to its citizens than those afforded by the federal Constitution,³⁹ Virginia has not chosen to do so with respect to double jeopardy protections.⁴⁰ As a result, the holding of the U.S. Supreme Court in *Lockhart* is applicable to constitutional double jeopardy jurisprudence in Virginia. Consequently,

the Virginia Supreme Court's holding in *Rushing* represents a deviation from applicable federal precedent.⁴¹

As you note, the Virginia Supreme Court, in *Rushing*, referenced "Constitutional protections"⁴² in its opinion, but did not specify them. Rather, the Court disclaimed that it was reaching the constitutional issue, noting that "[t]he only issues before us in this appeal involve questions of the interpretation of Virginia statutes, Virginia appellate procedure, and Virginia's rules of evidence."⁴³ The Court then reiterated that it was not reaching the constitutional issue.⁴⁴

By its express terms, *Rushing*'s rule of decision did not implicate constitutional grounds. Accordingly, it was and remains within the purview of the General Assembly to change the underlying rules of evidence/appellate procedure in a way that would lead to a different result.⁴⁵ As you note, the General Assembly did exactly that when HB 2338 was adopted, with the House of Delegates doing so unanimously.⁴⁶

In closing, I make the following observations. It is well-established that the remedy for a violation of a criminal defendant's Sixth Amendment right to confrontation is a new trial.⁴⁷ The remedy for a violation of a criminal defendant's Sixth Amendment right to effective assistance of counsel is a new trial.⁴⁸ The remedy for a violation of a criminal defendant's Fifth Amendment right against self-incrimination is a new trial without the offending evidence.⁴⁹ None of these situations offends the Double Jeopardy Clause.⁵⁰ A violation of a mere state law rule of evidence, which is what was at issue in *Rushing*,⁵¹ entitles a criminal defendant to no greater remedy than he receives for a violation of a constitutional right.

Based on the foregoing, I conclude that § 19.2-324.1 requires nothing more than what the U.S. Supreme Court has said is required in precisely the circumstance *Rushing* presented. Therefore, the new statute fully comports with the Fifth Amendment of the U.S. Constitution and Article I, § 8, of the Constitution of Virginia. Furthermore, because the *Rushing* decision was not dictated by the constitutional principles you reference, the subsequent enactment of § 19.2-324.1 was and remains within the authority of the General Assembly and no constitutional amendment was necessary.

CONCLUSION

Accordingly, it is my opinion that House Bill No. 2338, as codified in § 19.2-324.1, is constitutional; the legislation does not infringe upon the protections against double jeopardy contained in the Fifth Amendment to the U.S. Constitution or Article I, § 8, of the Constitution of Virginia. It is further my opinion that no amendment to the Constitution of Virginia was necessary for this enactment to take effect.

¹ VA. CONST. art. IV, § 14.

² See 2013 Va. Acts ch. 675. See also VA. CONST. art. IV, § 11 (setting forth the procedure by which a bill may become duly-enacted law); VA. GENERAL ASSEMBLY LEGISLATIVE INFORMATION SYSTEM, HB 2338, 2013 Reg. Sess. (Va. 2013), *Criminal conviction; appeals to Court of Appeals, etc., based on erroneously admitted evidence, available at* <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=131&typ=bil&val=hb2338> (setting forth the complete legislative history of House Bill No. 2338).

³ VA. CONST. art. IV, § 13.

⁴ 284 Va. 270, 726 S.E.2d 333 (2012).

⁵ *In re Phillips*, 265 Va. 81, 85, 574 S.E.2d 270, 272 (2003); *see also Volkswagen of Am., Inc. v. Smit*, 279 Va. 327, 336, 689 S.E.2d 679, 684 (2010) (“[D]uly enacted laws are presumed to be constitutional.”); *Yamaha Motor Corp., U.S.A. v. Quillian*, 264 Va. 656, 665, 571 S.E.2d 122, 126 (2002) (“[A]ll acts of the General Assembly are presumed to be constitutional.”).

⁶ *FFW Enters. v. Fairfax Cnty.*, 280 Va. 583, 590, 701 S.E.2d 795, 799 (2010) (alteration in original) (citation omitted); *see also Harrison v. Day*, 200 Va. 764, 770, 107 S.E.2d 594, 598 (1959).

⁷ *In re Phillips*, 265 Va. at 85-86, 574 S.E.2d at 272.

⁸ *FFW Enters.*, 280 Va. at 592, 701 S.E.2d at 801 (citation omitted).

⁹ 284 Va. 270, 726 S.E.2d 333.

¹⁰ *See McDaniel v. Brown*, 558 U.S. 120, 131 (2010) (per curiam); *see also Lockhart v. Nelson*, 488 U.S. 33, 40-41 (1988).

¹¹ The federal Double Jeopardy Clause guarantees that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.” U.S. CONST. amend. V. This provides a defendant with protection against a second prosecution for the same offense after acquittal or conviction, as well as protection against multiple punishments for the same offense. *Brown v. Ohio*, 432 U.S. 161, 165 (1977); *Blythe v. Commonwealth*, 222 Va. 722, 725, 284 S.E.2d 796, 797 (1981). The Constitution of Virginia also guarantees that an individual subject to criminal prosecution “shall not . . . be put twice in jeopardy for the same offense.” VA. CONST. art. I, § 8. The protections of the Virginia Constitution with respect to double jeopardy are the same as those of the federal Constitution. *See Stephens v. Commonwealth*, 263 Va. 58, 62, 557 S.E.2d 227, 230 (2002); *Martin v. Commonwealth*, 221 Va. 720, 722, 273 S.E.2d 778, 780 (1981).

¹² *Burks v. United States*, 437 U.S. 1, 14 (1978) (quoting *United States v. Tateo*, 377 U.S. 463, 465 (1964)).

¹³ *Lockhart*, 488 U.S. at 38 (1988) (quoting *Tateo*, 377 U.S. at 466); *see also Garrett v. United States*, 471 U.S. 773, 796 (1985) (“[T]he finality guaranteed by the Double Jeopardy Clause is not absolute, but instead must accommodate the societal interest in prosecuting and convicting those who violate the law.”) (O’Connor, J., concurring).

¹⁴ *Tateo*, 377 U.S. at 466.

¹⁵ *Lockhart*, 488 U.S. at 39 (emphasis added) (citing *Burks*, 437 U.S. at 18).

¹⁶ *Id.*

¹⁷ *Burks*, 437 U.S. at 5, 11.

¹⁸ *Lockhart*, 488 U.S. at 40 (internal quotation marks omitted). *See United States v. Dionisio*, 503 F.3d 78, 83 (2d Cir. 2007) (“[I]n identifying whether jeopardy attache[s], it is necessary to distinguish . . . between determinations that relate to a defendant’s culpability and those that are merely procedural and do not bear on the defendant’s blameworthiness”) (internal quotation marks omitted); *Ex parte Grantham*, 613 So.2d 1260 (Ala. 1993) (discussing and explaining the “*Burks/Lockhart* rule”).

¹⁹ *Lockhart*, 488 U.S. at 40 (alteration in original) (emphasis omitted) (quoting *Burks*, 437 U.S. at 15).

²⁰ *Id.* at 34.

²¹ *Id.* at 38. *See also Tibbs v. Florida*, 457 U.S. 31, 40 (1982) (discussing the “narrow exception” *Burks* created to the general rule that retrial upon reversal of a conviction is permissible).

²² *Burks*, 437 U.S. at 15.

²³ *McDaniel*, 558 U.S. at 131; *Lockhart*, 488 U.S. at 41. *See also Langevin v. State*, 258 P.3d 866, 874 (Alaska Ct. App. 2011) (“[A] defendant who successfully contends on appeal that the trial judge should have excluded a portion of the government’s evidence can not [sic] then argue that the government’s remaining evidence was insufficient to withstand a motion for judgement of acquittal. Rather, the sufficiency of the evidence is assessed in light of *all* the evidence presented at the defendant’s trial — even the evidence that was wrongfully admitted.”); *People v. Story*, 204 P.3d 306, 316 (Cal. 2009) (“[W]hen reviewing the sufficiency of the evidence for purposes of deciding whether retrial is permissible, the

reviewing court must consider *all* of the evidence presented at trial, including evidence that should not have been admitted.”); *People v. Williams*, 183 P.3d 577, 581 (Colo. App. 2007) (“[I]n determining whether the evidence in this case is sufficient to support defendant’s conviction, it is permissible for us to consider the laboratory report despite the fact that we have concluded it was improperly admitted.”); *Carr v. State*, 934 N.E.2d 1096, 1109 (Ind. 2010) (“Here, although reversal is required because of trial error in the admission of evidence, clearly *with* that evidence, there was enough to support the jury’s verdict of guilty and the resulting conviction.”) (internal quotation marks omitted); *State v. Wright*, 690 So. 2d 850, 855 (La. Ct. App. 1997) (“[I]f the overall evidence, including the [erroneously admitted evidence], is sufficient to support the conviction, the state is entitled to retry the defendant.”); *Emory v. State*, 647 A.2d 1243, 1266 (Md. Ct. Spec. App. 1994) (“For double jeopardy purposes, one does not subtract the inadmissible evidence and then measure the legal sufficiency of the remainder. One measures, rather, the legal sufficiency of all of the evidence, the inadmissible as well as the admissible.”); *Commonwealth v. Hanson*, 945 N.E.2d 409, 412 (Mass. App. Ct. 2011) (“If evidence, when considered in totality, is sufficient, even where a conviction is reversed on appeal because of the erroneous introduction of a certain piece or pieces of evidence, a retrial is not barred by principles of double jeopardy.”); *State v. Cox*, 779 N.W.2d 844, 853 (Minn. 2010) (“[I]n view of all the evidence presented by the State, including erroneously-admitted evidence, we conclude that the evidence . . . was legally sufficient, and therefore the Double Jeopardy Clause does not preclude a retrial.”); *State v. McCulloch*, 742 N.W.2d 727, 733 (Neb. 2007) (“The Double Jeopardy Clause does not forbid a retrial so long as the sum of all the evidence admitted by a trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict.”); *Stephans v. State*, 262 P.3d 727, 734 (Nev. 2011) (“Assessing the record with the erroneously admitted price tag testimony, the evidence was sufficient to sustain Stephans’s grand larceny conviction. The remedy for the evidentiary error committed here thus is reversal and remand for a new trial, not acquittal.”) (citation omitted); *State v. Horak*, 986 A.2d 596, 601 (N.H. 2010) (“In determining whether the evidence was sufficient, however, we consider all the evidence, including the testimony of the complainant that we previously concluded was erroneously admitted; thus, we adopt for purposes of our state constitutional analysis the United States Supreme Court’s standard under the Federal Double Jeopardy Clause.”); *State v. Brewer*, 903 N.E.2d 284, 291 (Ohio 2009) (“As the United States Supreme Court held in *Lockhart*, we hold that when evidence admitted at trial is sufficient to support a conviction, but on appeal, some of that evidence is determined to have been improperly admitted, the Double Jeopardy Clauses of the United States and Ohio Constitutions will not bar retrial.”); *State v. Frazier*, 622 N.W.2d 246, 261 (S.D. 2001) (“[W]e review all the evidence admitted at trial, including . . . statements that were wrongfully admitted.”); *State v. Longstreet*, 619 S.W.2d 97 (Tenn. 1981) (permitting retrial where some of the evidence should have been suppressed because of an invalid search warrant).

²⁴ *McDaniel*, 558 U.S. at 131; *Lockhart*, 488 U.S. at 39.

²⁵ *See Lockhart*, 488 U.S. at 39.

²⁶ *Id.* at 40.

²⁷ The standard of examining all evidence upon review for sufficiency of the evidence is also set forth in *Jackson v. Virginia*: “Once a defendant has been found guilty of the crime charged, the factfinder’s role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution.” 443 U.S. 307, 318-19 (1979) (footnote omitted) (citation omitted). The Supreme Court of Virginia has cited the *Jackson* standard many times as controlling sufficiency of the evidence review on appeal in Virginia: *see, e.g.*, *Commonwealth v. McNeal*, 282 Va. 16, 20, 710 S.E.2d 733, 735 (2011); *Sullivan v. Commonwealth*, 280 Va. 672, 676, 701 S.E.2d 61, 63 (2010); *Williams v. Commonwealth*, 278 Va. 190, 193, 677 S.E.2d 280, 282 (2009); *Jones v. Commonwealth*, 277 Va. 171, 182, 670 S.E.2d 727, 734 (2009); *McMillan v. Commonwealth*, 277 Va. 11, 19, 671 S.E.2d 396, 399 (2009); *Young v. Commonwealth*, 275 Va. 587, 591, 659 S.E.2d 308, 310 (2008); *Maxwell v. Commonwealth*, 275 Va. 437, 442, 657 S.E.2d 499, 502 (2008). *See also Hubbard v. Commonwealth*, 276 Va. 292, 295, 661 S.E.2d 464, 466 (2008) (“[A]n essential of the due process guaranteed by the Fourteenth Amendment [is] that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof — defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense.”) (alteration in original) (quoting *Jackson*, 443 U.S. at 316); *Washington v. Commonwealth*, 273 Va. 619, 629, 643 S.E.2d 485, 490 (2007); *Powell v. Commonwealth*, 268 Va. 233, 237, 602 S.E.2d 119, 121 (2004) (Koontz, J., dissenting) (noting

constitutional import of the “beyond a reasonable doubt” standard of proof); *Smith v. Commonwealth*, 220 Va. 696, 703, 261 S.E.2d 550, 555 (1980) (Poff, J., dissenting) (finding insufficient proof of premeditation to sustain first degree murder conviction).

²⁸ See *Lockhart*, 488 U.S. at 40-42 (reversing defendant’s conviction and permitting retrial due to the erroneous admission of evidence, when – absent such erroneously admitted evidence – the evidence was insufficient to support defendant’s conviction).

²⁹ *Burks*, 437 U.S. at 14.

³⁰ *Id.* at 14.

³¹ See *Rushing v. Commonwealth*, 58 Va. App. 594, 608, 712 S.E.2d 41, 48 (2011) (“The evidence at trial amply supports the rationality of the jury verdict finding Rushing guilty of [gang participation]. Testifying as a gang expert, the detective described the bandannas, colors, hand signs, and other unique indicia of membership associated with the Gangsta Disciples gang. The evidence showed Rushing wore a bandanna in Gangsta Disciples colors during the home invasion. The picture of him flashing the pitchfork hand sign, a symbol unique to the gang, further confirms his status. The evidence also showed Rushing planned and executed the crime with Newton—who also wore a telltale bandanna during the crime, had evidence in his home of the pitchfork and other gang symbols, and used the secret Gangsta Disciples greeting.”).

³² *Rushing*, 284 Va. at 278, 726 S.E.2d at 339.

³³ 281 Va. 84, 704 S.E.2d 107 (2011).

³⁴ *Rushing*, 284 Va. at 278, 726 S.E.2d at 339 (emphasis added) (quoting *Crawford*, 281 Va. at 112, 704 S.E.2d at 123-24).

³⁵ *Rushing*, 284 Va. at 278, 726 S.E.2d at 339 (emphasis added).

³⁶ *Id.* at 279, 726 S.E.2d at 339.

³⁷ See *Burks*, 437 U.S. at 16-17.

³⁸ The underlying circumstances of *Rushing* are quite similar to those in *Lockhart*. In both cases, a conviction order used to prove a predicate offense ultimately was held inadmissible. *Lockhart*, 488 U.S. at 37; *Rushing*, 284 Va. at 277, 726 S.E.2d at 337-38.

³⁹ Cf. *Virginia v. Moore*, 553 U.S. 164, 174 (2008) (“A State is free to prefer one search-and-seizure policy among the range of constitutionally permissible options, but its choice of a more restrictive option does not render the less restrictive ones unreasonable, and hence unconstitutional.”).

⁴⁰ As stated in Note 11, *supra*, the double jeopardy protections afforded by the Constitution of Virginia are coextensive with Fifth Amendment protections against double jeopardy. See *Stephens*, 263 Va. at 62, 557 S.E.2d at 230 (“Virginia’s constitutional guarantee against double jeopardy affords a defendant the same guarantees as the federal Double Jeopardy Clause.”); see also *Martin*, 221 Va. at 722, 273 S.E.2d at 780. Cf. *DiGiacinto v. Rector & Visitors of George Mason Univ.*, 281 Va. 127, 134, 704 S.E.2d 365, 369 (2011) (Second Amendment) (“This Court has stated that provisions of the Constitution of Virginia that are substantively similar to those in the United States Constitution will be afforded the same meaning.”).

⁴¹ I note that “a state supreme court has no discretion to disregard” applicable constitutional holdings of the U.S. Supreme Court. See *Jaynes v. Commonwealth*, 276 Va. 443, 458, 666 S.E.2d 303, 311 (2008); see also *Chesapeake & Ohio Ry. Co. v. Martin*, 283 U.S. 209, 220-21 (1931) (holding that state courts may not lawfully adopt their own rules and procedures contrary to decisions of the U.S. Supreme Court on questions of federal law; rather, a determination by that Court on a matter of federal law “is binding upon the state courts and must be followed, any state law, decision, or rule to the contrary notwithstanding.”). Only the U.S. Supreme Court can overrule one of its precedents. *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983) (per curiam).

⁴² *Rushing*, 284 Va. at 278, 726 S.E.2d at 339. *Crawford*, the case cited in *Rushing*, also fails to specify the “Constitutional protections” at issue. See *Crawford*, 281 Va. at 112, 704 S.E.2d at 124.

⁴³ *Rushing*, 284 Va. at 278, n.4, 726 S.E.2d at 339, n.4.

⁴⁴ *Id.* at 278, n.5, 726 S.E.2d at 339 n.5 (“Here, as in Crawford, we are concerned with the rules of appellate review in Virginia. The Supreme Court of the United States, in Lockhart, in a federal habeas corpus appeal, considered whether the *Double Jeopardy Clause* barred a resentencing proceeding after evidence used to support an enhanced penalty was found to have been improperly admitted. If the Commonwealth should seek to retry Rushing, a double jeopardy question may arise, but that question is not before us in this appeal.”).

⁴⁵ The Virginia Supreme Court has the power to adopt evidentiary and other rules. *See* VA. CODE ANN. § 8.01-3 (Supp. 2013). Nevertheless, those rules are subject to revision by the General Assembly. Section 8.01-3(D) (“The General Assembly may, from time to time, by the enactment of a general law, modify or annul any rules adopted or amended pursuant to this section. *In the case of any variance between a rule and an enactment of the General Assembly such variance shall be construed so as to give effect to such enactment.*”) (emphasis added).

⁴⁶ *See* <http://leg1.state.va.us/cgi-bin/legp504.exe?131+vot+HV0608+HB2338>.

⁴⁷ *See, e.g.*, Melendez-Diaz v. Massachusetts, 557 U.S. 305, 327-29 (2009) (remanding the case for further proceedings in light of confrontation violation); Cypress v. Commonwealth, 280 Va. 305, 317-18, 320, 699 S.E.2d 206, 213-14 (2010) (remanding co-defendant’s case for a new trial after finding Confrontation Clause violation).

⁴⁸ *See, e.g.*, Jackson v. Warden, 270 Va. 269, 280, 619 S.E.2d 92, 97-98 (2005) (granting habeas corpus relief and remanding for a new trial).

⁴⁹ *See, e.g.*, Ferguson v. Commonwealth, 52 Va. App. 324, 348, 663 S.E.2d 505, 516 (2008) (en banc) (finding defendant’s statements were subject to suppression for a *Miranda* violation and remanding for new trial), *aff’d*, 278 Va. 118, 677 S.E.2d 45 (2009).

⁵⁰ The reason for this procedure is manifest: the price for adopting a contrary rule is too high to exact upon society and may ultimately infringe the rights of those subject to criminal prosecution. *Tateo*, 377 U.S. at 466.

⁵¹ 284 Va. at 278 n.4, 726 S.E.2d at 339 n.4.

OP. NO. 12-086

CONSTITUTION OF THE UNITED STATES: FIRST AMENDMENT

The First Amendment protection of free speech does not prohibit VDOT, when it is acting in a proprietary capacity, from negotiating commercially reasonable, profit-conscious contracts for advertising and distributing written materials at its Rest Areas.

THE HONORABLE BARRY D. KNIGHT
MEMBER, HOUSE OF DELEGATES
MARCH 1, 2013

ISSUE PRESENTED

You ask whether the First Amendment of the United States Constitution prohibits the Virginia Department of Transportation (“VDOT”) from charging a fee to a business wishing to distribute travel guide directories at Virginia highway Safety Rest Areas and Welcome Centers (collectively, “Rest Areas”).¹

RESPONSE

It is my opinion that the First Amendment protection of free speech does not prohibit VDOT, when it is acting in a proprietary capacity, from negotiating commercially

reasonable, profit-conscious contracts for advertising and distributing written materials at its Rest Areas.

BACKGROUND

Virginia's Rest Areas are part of the federal interstate highway system and serve more than 30 million people annually.² In an effort to offset the expense of maintaining and operating Rest Areas and thereby improve their long term financial sustainability, Virginia instituted the state Sponsorship, Advertising, and Vending Enhancement ("SAVE") program in 2011.³ The SAVE program implements three state revenue generating initiatives at Rest Areas: sponsorships that are acknowledged by roadway signs, the sale of advertising space, and enhanced vending machine sales. A private contractor manages the various marketing components of the SAVE program for VDOT. Federal laws regulate signs, use of space and vending at Rest Areas. Access, use, and commercial activity are limited by federal statute and federal regulation.⁴ Vending is permitted at federal interstate highway system rest areas in compliance with the Randolph-Sheppard Act.⁵ State highway departments are responsible for managing interstate rights-of-way in accordance with Federal Highway Administration ("FHWA") guidelines.⁶ VDOT has kept the FHWA informed on Virginia's SAVE program to ensure compliance with federal regulatory requirements.

You relate that one of your constituents operates a business, VistaGraphics, Inc., that publishes and distributes the Virginia Hospitality and Travel Guide in coordination with the Virginia Hospitality and Travel Association ("VHTA"). The guide is a directory containing information of interest to travelers, including advertisements of attractions, lodging and dining in Virginia. Prior to the implementation of the SAVE program, VistaGraphics distributed its guides at the Rest Areas without charge. After implementation of the SAVE program, VDOT, through a contractor, made available advertising and distribution space at Rest Areas to marketing firms, all of which were charged a fee for the advertising space. At that time, VistaGraphics and other marketing firms entered into contracts to distribute travel guides and other travel-related advertising at Rest Areas in exchange for a fee. You relate that VistaGraphics now questions whether the First Amendment permits the Commonwealth to charge a fee for the use of state property as a distribution point for advertisements such as the Virginia Hospitality and Travel Guide.

APPLICABLE LAW AND DISCUSSION

Freedom of speech is protected by the Virginia Constitution⁷ and the United States Constitution.⁸ VDOT regulations governing the use of highway rights-of-way acknowledge that vendors of written materials are protected by the First Amendment.⁹ The issue raised here is whether those First Amendment constitutional protections necessarily prohibit VDOT from assessing a commercially reasonable fee for the use of its Rest Area facilities as a distribution point for travel guides.¹⁰

Although the use of Rest Areas for advertising is a relatively recent practice, other government venues, such as airports, university stadiums, and bus stations have a long history of generating revenue from advertising space.¹¹ In a similar case, reviewing the regulation of newspaper distribution in an airport, the Federal Court of

Appeals for the Eleventh Circuit summarized the law applicable to this practice by stating: “We hold that when a government acts in a proprietary capacity, that is, in a role functionally indistinguishable from a private business, then commercially reasonable, profit-conscious contracts may be negotiated for distribution space in a non-public forum for *First Amendment* activities.”¹²

Following the constitutional analysis employed in this and other similar First Amendment cases, the threshold question is whether an interstate rest area is a non-public forum.¹³ A public forum is public property, such as a public street or park, which has by long tradition or designation “been devoted to assembly and debate.”¹⁴ A non-public forum is “[p]ublic property which is not by tradition or designation a forum for public communication [and] is governed by different [First Amendment] standards.”¹⁵ Numerous courts have determined that transportation facilities and their advertising spaces are non-public forums.¹⁶ One federal court has opined that an interstate rest area, specifically, is a non-public forum.¹⁷

I concur with this determination. Interstate highways are limited access road systems that are designed to connect “principal metropolitan areas, cities, and industrial centers ... to serve the national defense; and ... to connect ... routes of continental importance.”¹⁸ A safety rest area is a component of the interstate system, defined as a “roadside facility safely removed from the traveled way with parking and such facilities for the motorist deemed necessary for his rest, relaxation, comfort and information needs.”¹⁹ As limited access facilities on interstate highways designed to provide toilets, food, drink, picnic areas and other restorative opportunities for motorists, safety rest areas “have never existed independently of the Interstate System” and “are hardly the kind of public property that has by ‘long tradition or by government fiat ... been devoted to assembly and debate.’”²⁰

The United States Supreme Court has held that the state has “no constitutional obligation *per se* to let any organization use [a non-public forum].”²¹ “[T]he First Amendment does not guarantee access to property simply because it is owned or controlled by the government.”²² Governmental imposition upon expressive activity in a non-public forum is permissible if it is “reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.”²³ Courts will examine the imposition “for reasonableness given the surrounding circumstances. Restrictions must only be reasonable; [they] need not be the most reasonable or the only reasonable” method of governing the expressive activity.²⁴ Courts have applied the “reasonableness” standard of review in a variety of circumstances involving such issues as: the imposition of fees,²⁵ the sufficiency of written procedural safeguards,²⁶ and the nexus between the regulation and the purpose of the non-public forum.²⁷ As to the permissibility of profit-conscious fees, courts have ruled that when a governmental entity acts reasonably and in a proprietary capacity in a non-public forum, it is constitutionally permissible to charge “profit-conscious fees for access for expressive conduct, in a manner similar to fees that would be charged if the forum was owned by a private party.”²⁸

CONCLUSION

Accordingly, it is my opinion that the First Amendment protection of free speech does not prohibit VDOT, when it is acting reasonably and in a proprietary capacity, from negotiating commercially reasonable, profit-conscious contracts for advertising and distributing written materials at its Rest Areas.

¹ The documents accompanying your inquiry state that VDOT does not impose a fee on all distributors at Rest Areas. According to information provided to this office by VDOT, while some distributions of written material have been permitted in the past without a fee, all distributions at Rest Areas are now subject to the fee requirements of the revenue generating program.

² See 2008 & 2009 Visitation Data for the VDOT Statewide Safety Rest Area/Welcome Center Program, available at http://www.virginiadot.org/info/resources/2009_Traffic_Accounts_for_Welcome_Centers_and_Safety_Rest_Area/rest_areas_Avg_Visitors_031110.pdf. In addition to the 40 Rest Areas maintained by VDOT on interstate highways in the Commonwealth, VDOT also maintains one Rest Area on U.S. Route 13 in Accomack County.

³ By resolution on December 8, 2010, the Commonwealth Transportation Board endorsed the Enhanced Sponsorship, Advertising and Vending Program, acknowledging that “as part of his governmental reform initiatives, Governor Robert F. McDonnell directed VDOT to identify and implement long-term strategies to streamline the operating costs of Virginia rest areas and make them more efficient.” Resolution of the Commonwealth Transportation Board (Dec. 8, 2010), available at http://www.ctb.virginia.gov/resources/2010/dec/resol/Agenda_Item_10_CTB_ESAV_Vending_Resolution-final.pdf.

⁴ See 23 U.S.C. § 111; 23 C.F.R. § 1.23.

⁵ 20 U.S.C. § 107a.

⁶ 23 C.F.R. § 710.201.

⁷ VA. CONST. art. I, § 12 provides:

[t]hat the freedoms of speech and of the press are among the great bulwarks of liberty, and can never be restrained except by despotic governments; that any citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; that the General Assembly shall not pass any law abridging the freedom of speech or of the press, nor the right of the people peaceably to assemble, and to petition the government for the redress of grievances.

⁸ U.S. CONST. amend. I provides that “Congress shall make no law ... abridging the freedom of speech.”

⁹ 24 VA. ADMIN. CODE § 30-151-670 provides, in part, that “[v]endors of newspapers and written materials enjoy constitutional protection under the First Amendment to place or operate their services within rights-of-way, provided they neither impede traffic nor impact the safety of the traveling public.”

¹⁰ There is no issue raised here regarding any government restriction of the content of the advertisements.

¹¹ A line of cases in the Fourth Circuit employs a two-part test to analyze First Amendment cases involving commercial speech. First, the court determines whether the commercial speech concerns lawful activity and is not misleading. If the speech passes this test, it is entitled to First Amendment protection, and courts next determine whether the governmental regulation of the speech is justified by applying the forum analysis outlined by the U. S. Supreme Court. *Shopco Distrib. Co. v. Commanding General of Marine Corps Base, Camp Lejeune, North Carolina*, 885 F.2d 167, 171 (4th Cir. 1989); *Park Shuttle N Fly, Inc. v. Norfolk Airport Auth.*, 352 F. Supp. 2d 688, 703 (E.D. Va. 2004). For the purposes of this Opinion, it is assumed that the commercial speech in question is lawful and not misleading.

¹² *Atlanta Journal & Constitution v. City of Atlanta Dep’t of Aviation*, 322 F.3d 1298, 1312 (11th Cir. 2003) (emphasis in original). See also *Gannett Satellite Info. Network, Inc. v. Metro Transp. Auth.*, 745 F.2d 767, 772 (2d Cir. 1984) (“[B]ecause licensing fees serve the significant governmental interest of raising revenue for the efficient, self-sufficient operation of the rail lines, we hold that they can be valid ... restrictions on Gannett’s right to place its newsracks in those areas.”).

¹³ See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44-49 (1983); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302-04 (1974).

¹⁴ *Perry*, 460 U.S. at 45.

¹⁵ *Id.* at 46.

¹⁶ See, e.g., *Int'l Soc'y for Krishna Consciousness, Inc. (ISKON) v. Lee*, 505 U.S. 672, 680-83 (1992) (solicitation in an airport terminal); *Lehman*, 418 U.S. at 303-04 (advertising space in the transit vehicles of a city transit system); *ACLU v. Mineta*, 319 F. Supp. 2d 69, 81-83 (D. D.C. 2004) (advertising in buses, subway cars and subway stations); *James v. Washington Metro. Area Transit Auth.*, 649 F. Supp. 2d 424, 429 (D. Md. 2009) (campaign activities and advertising in subway stations); *Sanders v. City of Seattle*, 156 P.3d 874, 884-85 (Wash. 2007) (easement through shopping mall to city's monorail platform).

¹⁷ *Sentinel Commc'ns Co. v. Watts*, 936 F.2d 1189, 1203-04 (11th Cir. 1991).

¹⁸ 23 U.S.C. § 103(c)(1)(C).

¹⁹ 23 C.F.R. § 752.3(a).

²⁰ *Sentinel Commc'ns*, 936 F.2d at 1203 (quoting *Perry*, 460 U.S. at 45). See also *James*, 649 F. Supp. 2d at 429 (“[below-ground areas of subway stations] are not public fora because they are not expressly dedicated to free speech activities.”).

²¹ *Perry*, 460 U.S. at 48 (internal quotations omitted).

²² *U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129 (1981).

²³ *Perry*, 460 U.S. at 46.

²⁴ *Atlanta Journal*, 322 F.2d at 1307 (citing *ISKON*, 505 U.S. at 683) (internal quotations omitted).

²⁵ *Atlanta Journal*, 322 F.2d at 1309.

²⁶ *Id.* at 1310-11; *Sentinel Commc'ns*, 936 F.2d at 1196-1200 (the manner of regulating distribution must include clear written standards to limit officials' unbridled discretion).

²⁷ *Perry*, 460 U.S. at 49; *Shopco*, 885 F.2d at 174; *Park Shuttle N Fly*, 352 F. Supp. 2d at 706; *James*, 649 F. Supp. 2d at 429; *ISKON*, 505 U.S. at 683-85 (governmental policies must be reasonable in light of the purpose served by the non-public forum).

²⁸ *Atlanta Journal*, 322 F.3d at 1309. See also *Gannett*, 745 F.2d at 775 (“If Gannett were to place its newsracks on privately owned business property it undoubtedly would have to pay rent to the owner of the property. The fact that the business property in question is owned by the Metro Transportation Authority should confer no special benefit on Gannett.”).

OP. NO. 13-046

CONSTITUTION OF VIRGINIA: LEGISLATURE-APPROPRIATIONS TO RELIGIOUS OR CHARITABLE BODIES

Appropriations to a charitable institution for benevolent purposes are impermissible because they violate Article IV, § 16 of the Constitution of Virginia, except where the appropriation explicitly or implicitly authorizes a state agency to enter into a bona fide contract with the charitable entity or where the entity receiving funds is owned or controlled by the Commonwealth or the Commonwealth is passively distributing federal funds.

THE HONORABLE WILLIAM A. HAZEL, JR., M.D.
SECRETARY OF HEALTH AND HUMAN RESOURCES
JUNE 28, 2013

ISSUE PRESENTED

You ask whether certain line items in the 2013-2014 Appropriations Act¹ are permissible appropriations to charitable institutions under the Constitution of Virginia.²

RESPONSE

It is my opinion that some of the appropriations about which you inquire are impermissible and violate Article IV, § 16 of the Constitution of Virginia, while others are permissible because they do not violate the constitutional prohibition on appropriations to charities. It is further my opinion that the constitutionality of the remaining appropriations will depend upon the particular agencies establishing *bona fide* contracts, or the Commonwealth passively distributing non-general funds, or specific facts that have not been presented to me.

BACKGROUND

Your request pertains to certain appropriations the General Assembly made to the Department of Health (VDH), the Department of Behavioral Health and Developmental Services (DBHDS), the Department for Aging and Rehabilitative Services (DARS), and the Department of Social Services (DSS). You relate that the agencies responsible for administering these appropriations have indicated that they believe the intended recipients are charitable organizations. These appropriations are found in Items 297, 315, 330, 330.05, and 343 of the Appropriations Act.³

APPLICABLE LAW AND DISCUSSION

I. APPLICATION OF ARTICLE IV, § 16

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

The Virginia Constitution forbids the General Assembly from making “any appropriation of public funds, personal property, or real estate . . . to any charitable institution which is not owned or controlled by the Commonwealth.”⁴ A few exceptions to this rule exist. The General Assembly can make “appropriations to nonsectarian institutions for the reform of youthful criminals and may also authorize counties, cities, or towns to make appropriations to any charitable institution or association.”⁵ Furthermore, the General Assembly may assist non-state educational institutions of higher education with borrowing money for the construction of facilities, provided that the Commonwealth is not liable for the debt.⁶ The term “charitable institution” is not defined in the Constitution.

The Supreme Court of Virginia has not provided express guidance concerning what constitutes a “charity” for purposes of Article IV, § 16. Nevertheless, it appears that the Court would give the term “charitable institution” a broad meaning.⁷ The Court concluded that a fund created for the relief of firefighters and their families was charitable in nature.⁸ Similarly, it invalidated a fund established to provide relief to military veterans and their dependents.⁹ Plainly, the General Assembly’s appropriations to entities providing traditional charitable services -- for education, the relief of disease or suffering, or similar traditional charitable purposes -- are impermissible.

In 2011, this Office issued an opinion articulating this constitutional prohibition in concluding that two proposed budget amendments violated Article IV, § 16.¹⁰ One of those amendments read, “[o]ut of this appropriation, \$500,000 the second year from the general fund shall be provided to Operation Smile.”¹¹ The second amendment was to the Federation of Virginia Food Banks “for the purchase of food through food banks across the Commonwealth.”¹² With each of these amendments, the General Assembly directed a state agency to provide money to a charitable organization, neither owned nor controlled by the Commonwealth, without the Commonwealth receiving goods or services in return. The nature of the amendments was tantamount to a gift for benevolent purposes. Several appropriations in your request are fundamentally no different than the constitutionally impermissible budget amendments considered in the previous opinion.¹³

B. Contracts Arising from Appropriations to Charitable Institutions

Article IV, § 16 does not prohibit categorically all State payments to charities. The General Assembly can establish programs to provide services to its residents, and make appropriations to state agencies that, in turn, result in payments to charitable entities for goods purchased or services provided. In another 2011 opinion, this Office discussed the constitutional convention debate on the language contained in Article IV, § 16.¹⁴ That opinion concluded that the historical records support the view that Article IV, § 16 permits *bona fide* contracts with nonprofits.¹⁵

Language in the Appropriations Act may serve as the basis for a state agency to contract with a charitable institution. In the absence of language suspending or superseding the operation of other statutory requirements, the recipient agency must comply with all other applicable laws when contracting with the charitable institution.¹⁶ None of the appropriations mentioned in your request suspend or supersede the operation of other laws. Therefore, these appropriations must be read in harmony with other statutes, such as the Virginia Public Procurement Act (VPPA).¹⁷ Indeed, when language in the Appropriations Act evinces the General Assembly’s intention that an agency contract with a charitable institution, the agency is expected to comply with the VPPA, along with other state contracting requirements, to obtain fair and reasonable value, thereby ensuring that a *bona fide* contract results from the appropriation. Several of the appropriations identified in your request fit this paradigm.¹⁸

Several other appropriations also may fall into this category.¹⁹ However, the language of these appropriations does not identify with particularity the goods or services the Commonwealth is supposed to purchase. Absent additional information, I am unable to determine whether these appropriations are prohibited by Article IV, § 16. To be permissible, the several agencies involved must have valid contracts with the named charitable organizations. These must be *bona fide* contracts in accordance with the Virginia Public Procurement Act, meaning that goods or services are received for fair and reasonable value. Without such a contract, these appropriations are nothing more than direct appropriations to a charity for benevolent purposes, and thus would violate Article IV, § 16.

C. Exemptions from and Exceptions to Article IV, § 16

There are other appropriations in your request that clearly are not prohibited by Article IV, § 16, because the entity is owned or controlled by the Commonwealth.²⁰ In addition, one appropriation may not implicate Article IV, § 16, because the recipient, in fact, may not be a charitable organization.²¹ Further, certain appropriations do not appear to require payment to charitable institutions, and therefore, can be implemented in a manner that does not violate Article IV, § 16.²²

D. Non-general Fund Appropriations

I note that some of the appropriations mentioned in your request are from non-general funds.²³ The source of these non-general funds is not indicated for a few items, but other items come from federal funds.

Federal grant programs distribute money in various ways. The Commonwealth's role can vary from distributing funds as a "pass through" to being the entity that determines who receives the federal grant and how much they receive. Without knowing the specifics of each grant, I cannot opine with any certainty whether such appropriated expenditures would violate Article IV, § 16. However, where the Commonwealth passively distributes federal money, distributing funds to charitable organizations would be permissible. The doctrine of preemption dictates that federal law and regulation control the expenditure and use of federal funds. The appropriation of the federal funds is made under conditional spending established by Congress and the federal government, thereby making it an allocation of federal, not state, funds. To the extent that the General Assembly passively appropriates the federal funds in a manner consistent with federal law and regulation, those appropriations would not appear to violate Article IV, § 16.

II. APPLICATION OF ARTICLE IV, § 14

The appropriations you identify also may implicate another section of Article IV. In particular, Article IV, § 14 prohibits the General Assembly from enacting any local, special or private law in certain instances.²⁴ Specific to your request is the prohibition on special laws "[g]ranting to any private corporation, association, or individual any special or exclusive right, privilege, or immunity."²⁵

In analyzing the special laws prohibition, the Supreme Court of Virginia articulated a test for examining a challenged statute.²⁶ The challenged law must have "a reasonable and substantial relation to the object sought to be accomplished by the legislation."²⁷ A reasonable and substantial relation for many of the appropriations in your request can be found in the General Assembly's explanation of what is to be provided in exchange for the funds received.

Only those appropriations that I have identified as being prohibited by Article IV, § 16 lack an easily discernible relationship to the object of the appropriation. Even those appropriations might survive a special laws challenge if at the time each law was enacted "any state of facts [could have been] reasonably conceived, that would sustain it . . ."²⁸ Having determined these specific appropriations violate the provisions of Article IV, § 16, there is no need to conduct a special laws analysis.

III. ALTERNATIVE PROCUREMENT

The Appropriations Act contains the following clause:

ALTERNATIVE PROCUREMENT: If any payment is declared unconstitutional for any reason or if the Attorney General finds in a formal, written, legal opinion that a payment is unconstitutional, in circumstances where a good or service can constitutionally be the subject of a purchase, the administering agency of such payment is authorized to use the affected appropriation to procure, by means of the Commonwealth's Procurement Act, goods and services, which are similar to those sought by such payment in order to accomplish the original legislative intent.^[29]

For the appropriations violating Article IV, § 16, the subject agencies may rely upon this provision to procure goods or services similar to those covered in the unconstitutional appropriations, assuming a discernible legislative intent is apparent from the Appropriations Act's language.

CONCLUSION

Accordingly, it is my opinion that some of the appropriations about which you inquire are appropriations to a charitable institution for benevolent purposes, and thus, are impermissible because they violate Article IV, § 16 of the Constitution of Virginia. Some other appropriations you identify are permissible, because the language of the appropriation explicitly or implicitly authorizes a state agency to enter into a *bona fide* contract with the charitable entity. Other appropriations may be permissible, but because the appropriation's language does not articulate clearly the goods or services to be purchased, the agencies administering those appropriations must be able to enter into *bona fide* contracts in order to comply with Article IV, § 16. Other appropriations comport with Article IV, § 16 because the entity receiving funds is owned or controlled by the Commonwealth or the Commonwealth is passively distributing federal funds. Finally, I am unable to determine whether certain appropriations violate Article IV, § 16 without knowing the specific terms of the grant or other particularized facts related to those appropriations.

¹ 2013 Va. Acts ch. 806.

² One of the appropriations you present, Item 434(E), which provides funds to Volunteer Emergency Families for Children is not addressed here. According to the Department of Social Services, that entity no longer exists, and therefore, that appropriation cannot be made.

³ 2013 Va. Acts ch. 806. The specific appropriations pertinent to your inquiry are referenced by "Item" number in the footnotes that follow. Each appropriation is set forth in its entirety, with its Item number, in the addendum that accompanies this opinion.

⁴ VA. CONST. art. IV, § 16.

⁵ *Id.* The General Assembly has enacted enabling legislation that permits localities to make appropriations and donations to charities located within their jurisdiction. VA. CODE ANN. § 15.2-953 (2012).

⁶ VA. CONST. art. VIII, § 11.

⁷ See 2011 Op. Va. Att'y Gen. 55.

⁸ Commonwealth v. Nat'l Fire Ins. Co. of Hartford, 161 Va. 737, 172 S.E. 448 (1934).

⁹ Almond v. Day, 197 Va. 419, 89 S.E.2d 851 (1955).

¹⁰ See 2011 Op. Va. Att’y Gen. 52.

¹¹ SB 800, Item 288(W), 2011 Reg. Sess. (Va.).

¹² *Id.*, Item 333(G). This item included a limitation that “[n]o funding shall be used for administrative or overhead expenses.”

¹³ The particular constitutionally impermissible appropriations are those found in Item 297(B-D), (G), (K), (O), (Q), (S); Item 315(G); Item 330(I)(2); and Item 343(G-H) of 2013 Va. Acts ch. 806. These provisions are set out in full in paragraph 1 of the attached addendum.

¹⁴ See 2011 Op. Va. Att’y Gen. at 54.

¹⁵ *Id.*

¹⁶ “[A] later act does not by implication repeal an earlier act unless there is such a clear, manifest, controlling, necessary, positive, unavoidable, and irreconcilable inconsistency and repugnancy, that the two acts cannot, by a fair and reasonable construction, be reconciled...” *S. Norfolk v. Norfolk*, 190 Va. 591, 601, 58 S.E.2d 32, 36 (1950) (citation omitted).

¹⁷ See VA. CODE ANN. §§ 2.2-4300 through 2.2-4377 (2012).

¹⁸ See 2013 Va. Acts ch. 806, Item 297(L)(1-5); Item 343(K). These appropriations are set out in their entirety in paragraph 2 of the attached addendum.

¹⁹ *Id.* at Item 297(A)(1-6), (E)(1-3), (F)(1-3), (H), (P); Item 330.05(G); Item 343(A)(2), (C), (D)(1-2), (I-J). These provisions are set out in full in paragraph 3 of the attached addendum.

²⁰ *Id.* at Item 297(J), (M), (R)(1-3). These distributions of funds are set out in their entirety in paragraph 4 of the attached addendum.

²¹ *Id.* at Item 297(U). This provision is set out in full in paragraph 5 of the attached addendum. Based on information provided by the Department of Health, the Hampton Roads Proton Beam Therapy Institute at Hampton University, LLC is not a 501(c)(3) entity. However, I have not been provided with any information regarding the members of the LLC. If one or more of the members is a charitable institution, Article IV, § 16 likely is implicated. Given the constitutional prohibition, it is incumbent on the agency disbursing the funds to confirm that the recipient is not a charitable institution.

²² *Id.* at Item 297(I), (N); Item 330.05(F). These appropriations are set out in their entirety in paragraph 4 of the attached addendum.

²³ *Id.* at Item 297(A)(1); Item 343(A)(3), (C), (F), (L). These appropriations are set out in their entirety in paragraph 6 of the attached addendum.

²⁴ See VA. CONST. art. IV, § 14.

²⁵ VA. CONST. art. IV, § 14(18).

²⁶ See *Mandell v. Haddon*, 202 Va. 979, 121 S.E.2d 516 (1961).

²⁷ *Jefferson Green Unit Owners Ass’n v. Gwinn*, 262 Va. 449, 459, 551 S.E.2d 339, 344 (2001) (citations omitted).

²⁸ *Id.*

²⁹ 2013 Va. Acts ch. 806, § 4-5.04(I).

ADDENDUM TO OP. NO. 13-046

1. Appropriations Impermissible under Article IV, § 16 (footnote 13)

2013 Va. Acts ch. 806, Item 297:

B. Out of this appropriation \$69,496 the first year and \$34,748 the second year from the general fund shall be provided to the Alexandria Neighborhood Health Services, Inc. The organization shall pursue raising funds and in-kind contributions from the local community.

C. Out of this appropriation \$7,653 the first year and \$3,904 the second year from the general fund shall be provided to the Louisa County Resource Council. The council shall continue to pursue raising funds and in-kind contributions from the local community.

D. Out of this appropriation, \$10,230 the first year and \$5,115 the second year from the general fund shall be provided to the Olde Towne Medical Center.

...

G. Out of this appropriation, \$38,250 the first year and \$19,125 the second year from the general fund shall be provided to expand services at the Jeanie Schmidt Free Clinic.

...

K. Out of this appropriation, \$13,919 the first year and \$6,959 the second year from the general fund shall be provided to the Fan Free Clinic for AIDS related services.

...

O. Out of this appropriation, \$76,712 the first year and ~~\$38,356~~ \$76,712 the second year from the general fund shall be provided to the St. Mary's Health Wagon.

...

Q. Out of this appropriation, \$20,825 the first year and \$10,625 the second year from the general fund shall be provided to the Virginia Dental Health Foundation for the Mission of Mercy (M.O.M.) dental project.

...

S. Out of this appropriation, \$42,500 the first year and \$21,250 the second year from the general fund shall be provided to the Community Health Center of the Rappahannock Region.

2013 Va. Acts ch. 806, Item 315:

G. Out of this appropriation \$190,000 the first year and \$190,000 the second year from the general fund shall be provided to Grafton School for the continued operation and expansion of the Virginia Autism Resource Center.

2013 Va. Acts ch. 806, Item 330:

I. 2. Of this appropriation, \$200,000 the first year and \$200,000 the second year from the general fund shall be provided to Didlake for vocational services for people with disabilities.

2013 Va. Acts ch. 806, Item 343:

G. Out of this appropriation, \$70,000 the first year and \$70,000 the second year from the general fund shall be provided for dementia-specific training of long-term care workers dealing with Alzheimer's disease and related disorders through the Virginia Alzheimer's Association Chapters.

H. Out of this appropriation, \$200,000 the first year and \$200,000 the second year from the general fund shall be provided to Northern Virginia Family Services to provide comprehensive safety net services for children and families.

2. Permissible Appropriations under Article IV, § 16 Based on a Bona Fide Contract (footnote 18)

2013 Va. Acts ch. 806, Item 297

L.1. Out of this appropriation, \$4,080,571 the first year and \$4,080,571 the second year from the general fund shall be provided to the Virginia Health Care Foundation. These funds shall be matched with local public and private resources and shall be awarded to proposals which enhance access to primary health care for Virginia's uninsured and medically underserved residents, through innovative service delivery models. The foundation, in coordination with the Virginia Department of Health, the Area Health Education Centers program, the Joint Commission on Health Care, and other appropriate organizations, is encouraged to undertake initiatives to reduce health care workforce shortages. The foundation shall account for the expenditure of these funds by providing the Governor, the Secretary of Health and Human Resources, the Chairmen of the House Appropriations and Senate Finance Committees, the State Health Commissioner, and the Chairman of the Joint Commission on Health Care with a certified audit and full report on the foundation's initiatives and results, including evaluation findings, not later than October 1 of each year for the preceding fiscal year ending June 30.

2. On or before October 1 of each year, the foundation shall submit to the Governor and the Chairmen of the House Appropriations and Senate Finance Committees a report on the actual amount, by fiscal year, of private and local government funds received by the foundation since its inception. The report shall include certification that an amount equal to the state appropriation for the preceding fiscal year ending June 30 has been matched from private and local government sources during that fiscal year.

3. Of this appropriation, from the amounts in paragraph L.1., \$125,000 the first year and \$125,000 the second year from the general fund shall be provided to the Virginia Health Care Foundation to expand the Pharmacy Connection software program to unserved or underserved regions of the Commonwealth.

4. Of this appropriation, from the amounts in paragraph L.1., \$105,000 the first year and \$105,000 the second year from the general fund shall be provided to the Virginia Health Care Foundation for the Rx Partnership to improve access to free medications for low-income Virginians.

5. Of this appropriation, from the amounts in paragraph L.1., \$1,850,000 the first year and \$1,850,000 the second year from the general fund shall be provided to the Virginia Health Care Foundation to increase the capacity of the Commonwealth's health safety net providers to expand services to unserved or underserved Virginians. Of this amount, (i) \$850,000 the first year and \$850,000 the second year shall be used to underwrite service expansions and/or increase the number of patients served at existing sites or at new sites, (ii) \$850,000 the first year and \$850,000 the second year shall be used for Medication Assistance Coordinators who provide outreach assistance, and (iii) \$150,000 the first year and \$150,000 the second year shall be made available for locations with existing medication assistance programs. . . .

2013 Va. Acts ch. 806, Item 343:

K. Out of this appropriation, \$250,000 the second year from the general fund shall be provided to Elevate Early Education for the purpose of implementing a pilot program for a kindergarten readiness assessment. The contract with Elevate Early Education to administer this program shall require the submission of a final report from the organization detailing the assessment method(s) utilized, actual expenditures for the program, and outcome analysis and evaluation. This report shall be submitted to the Governor, Chairmen of the House Appropriations and Senate Finance Committees, and the Secretaries of Health and Human Resources and Education no later than November 1, 2013. Prior to the receipt of any state funding for this purpose, Elevate Early Education must provide evidence of private matching funds secured for this purpose.

3. Permissible Appropriations under Article IV, § 16 upon Establishment of a Bona Fide Contract (footnote 19)

2013 Va. Acts. ch. 806, Item 297

A.1. Out of this appropriation, \$1,910,574 the first year and ~~\$1,182,946~~ \$1,382,946 the second year from the general fund and \$400,000 the second year from the federal Temporary Assistance for Needy Families (TANF) block grant is provided to the Comprehensive Health Investment Project (CHIP) of Virginia.

2. In addition, the CHIP of Virginia shall receive \$100,000 the first year and \$100,000 the second year from other nongeneral funds subject to the availability of foster care prevention funding transferred from the Department of Social Services.

3. The purpose of the program is to develop, expand, and operate a network of local public-private partnerships providing comprehensive care coordination, family support and preventive medical and dental services to low-income, at-risk children.

4. The general fund appropriation in this Item for the CHIP of Virginia projects shall not be used for administrative costs.

5. CHIP of Virginia shall continue to pursue raising funds and in-kind contributions from local communities. It is the intent of the General Assembly that the CHIP program increases its efforts to raise funds from local communities and other private or public sources with the goal of reducing reliance on general fund appropriations in the future.

6. Of this appropriation, from the amounts in paragraph A.1., \$48,371 the first year and \$24,679 the second year from the general fund is provided to the CHIP of Roanoke and shall be used as matching funds to add three full-time equivalent public health nurse positions to expand services in the Roanoke Valley and Allegheny Highlands.

...

E.1. Out of this appropriation, \$433,750 the first year and \$433,750 the second year from the general fund shall be provided to the Virginia Community Healthcare Association for the purchase of pharmaceuticals and medically necessary pharmacy supplies, and to provide pharmacy services to low-income, uninsured patients of the Community and Migrant Health Centers throughout Virginia. The uninsured patients served with these funds shall have family incomes no greater than 200 percent of the federal poverty level. The amount allocated to each Community and Migrant Health Center shall be determined through an allocation methodology developed by the Virginia Community Healthcare Association. The allocation methodology shall ensure that funds are distributed such that the Community and Migrant Health Centers are able to serve the pharmacy needs of the greatest number of low-income, uninsured persons. The Virginia Community Healthcare Association shall establish accounting and reporting mechanisms to track the disbursement and expenditure of these funds.

2. Out of this appropriation, \$175,000 the first year and \$175,000 the second year from the general fund shall be provided to the Virginia Community Healthcare Association to expand access to care provided through community health centers.

3. Out of this appropriation, \$1,800,000 the first year and \$1,800,000 the second year from the general fund shall be provided to the Virginia Community Healthcare Association to support community health center operating costs for services provided to uninsured clients. The amount allocated to each Community and Migrant Health Center shall be determined through an allocation methodology developed by the Virginia Community Healthcare Association. The allocation methodology shall ensure that funds are distributed such that the Community and Migrant Health Centers are able to serve the needs of the greatest number of uninsured persons. The Virginia Community Healthcare Association shall establish accounting and reporting mechanisms to track the disbursement and expenditure of these funds.

F.1. Out of this appropriation, \$1,321,400 the first year and \$1,321,400 the second year from the general fund shall be provided to the Virginia Association of Free Clinics for the purchase of pharmaceuticals and medically necessary pharmacy supplies, and to provide pharmacy services to low-income, uninsured patients of the Free Clinics throughout Virginia. The amount allocated to each Free Clinic shall be determined through an allocation methodology developed by the Virginia Association of Free Clinics. The allocation methodology shall ensure that funds are distributed such that the Free Clinics are able to serve the pharmacy needs of the greatest number of low-income, uninsured adults. The Virginia Association of Free Clinics shall establish accounting and reporting mechanisms to track the disbursement and expenditure of these funds.

2. Out of this appropriation, \$175,000 the first year and \$175,000 the second year from the general fund shall be provided to the Virginia Association of Free Clinics to expand access to health care services.

3. Out of this appropriation, \$1,700,000 the first year and \$1,700,000 the second year from the general fund shall be provided to the Virginia Association of Free Clinics to support free clinic operating costs for services provided to uninsured clients. The amount allocated to each free clinic shall be determined through an allocation methodology developed by the Virginia Association of Free Clinics. The allocation methodology shall ensure that funds are distributed such that the free clinics are able to serve the needs of the greatest number of uninsured persons. The Virginia Association of Free Clinics shall establish accounting and reporting mechanisms to track the disbursement and expenditure of these funds.

...

H. Out of this appropriation, \$210,759 the first year and \$107,530 the second year from the general fund shall be provided to the Southwest Virginia Graduate Medical Education Consortium to create

and support medical residency preceptor sites in rural and underserved communities in Southwest Virginia.

...

P. Out of this appropriation, \$88,200 the first year and ~~\$90,000~~ \$105,000 the second year from the general fund shall be provided to the Statewide Sickle Cell Chapters of Virginia (SSCCV) for grants to community-based programs that provide patient assistance, education, and family-centered support for individuals suffering from sickle cell disease. The SSCCV shall develop criteria for distributing these funds including specific goals and outcome measures. A report shall be submitted to the Chairmen of the House Appropriations and Senate Finance Committees detailing program outcomes by October 1 of each year. . . .

2013 Va. Acts ch. 806, Item 330.05:

G. Out of this appropriation, \$215,500 the second year from the general fund shall be provided for the Pharmacy Connect Program in Southwest Virginia, administered by Mountain Empire Older Citizens, Inc. . . .

2013 Va. Acts ch. 806, Item 343:

A.2. Out of this appropriation, \$185,725 the first year and \$185,725 the second year from the general fund shall be provided to the Virginia Community Action Partnership to support the Virginia Earned Income Tax Coalition (EITC) and provide grants to local organizations to provide outreach, education and tax preparation services to citizens who may be eligible for the federal Earned Income Tax Credit. The Virginia Community Action Partnership shall report on its efforts to expand the number of Virginians who are able to claim the federal EITC, including the number of individuals identified who could benefit from the credit, the number of individuals counseled on the availability of the federal EITC, and the number of individuals assisted with tax preparation to claim the federal EITC. This report shall be provided to the Governor and the Chairmen of the House Appropriations and Senate Finance Committees and the Chairman of the Joint Legislative Audit and Review Commission by December 1 each year.

C. Out of this appropriation, \$760,000 the first year and ~~\$760,000~~ \$951,896 the second year from the general fund and \$2,475,501 the first year and ~~\$2,475,501~~ \$2,833,605 the second year from the Temporary Assistance for Needy Families (TANF) block grant shall be provided to Healthy Families Virginia. These funds shall be used at the discretion of local sites for obtaining matching Title IV-E nongeneral funds when available. The Department of Social Services shall continue to allocate funds from this item to the statewide office of Prevent Child Abuse Virginia for providing the coordination, technical support, quality assurance, training and evaluation of the Healthy Families Virginia program.

D.1. Out of ~~the~~ *this* appropriation, \$1,500,000 the first year and ~~\$750,000~~ \$1,250,000 the second year from the general fund shall be provided to the Virginia Early Childhood Foundation (*VECF*). These funds shall be matched with local public and private resources with a goal of leveraging a dollar for each state dollar provided. Funds shall be awarded to proposals that seed and foster community programs that enhance the health, safety and well-being of Virginia's youth. The Foundation shall account for the expenditure of these funds by providing the Governor, Secretary of Health and Human Resources, and the Chairmen of the House Appropriations and Senate Finance Committees with a certified audit and full report on Foundation initiatives and results not later than October 1 of each year for the preceding fiscal year ending June 30.

2. On or before October 1 of each year, the foundation shall submit to the Governor and the Chairmen of the House Appropriations and Senate Finance Committees a report on the actual amount, by fiscal year, of private and local government funds received by the foundation.

...

I. Out of this appropriation, \$931,000 the first year and \$931,000 the second year from the general fund shall be used to sustain statewide services provided through child advocacy centers. The department shall develop a request for proposal to (i) distribute 67 percent of the allocated funds for accredited child advocacy centers and 30 percent for associate/developing child advocacy centers, as recognized and in good standing with the National Children's Alliance, with input from Children's

Advocacy Centers of Virginia (CACVA); (ii) allocate three percent to Children's Advocacy Centers of Virginia, the recognized chapter of National Children's Alliance for Virginia's child advocacy centers, for the purpose of assisting and supporting the development, continuation and sustainability of community-coordinated, child-focused services delivered by children's advocacy centers; and (iii) distribute any non-allocated funding equally to accredited and associate/developing child advocacy centers awarded funding in section (i) of this paragraph.

J. Out of this appropriation, \$100,000 the first year and \$100,000 the second year from the general fund shall be provided to the County of Prince William to establish a pilot program that improves services and performance at facilities located within the county that are licensed residential treatment centers for children eligible for pool funding under the Comprehensive Services Act. The objectives of these grants shall be to assist facilities to improve practices with a goal of implementing a "system of care" model, resulting in placement of children in the least restrictive environment. Desired outcomes shall include, but not be limited to, improved patient scores on the Child and Adolescent Needs and Strengths instrument; and, appropriate lengths of stay based on identified reasons for referral to the facility. Of this amount, up to \$10,000 per year may be retained by Prince William County for grant administration. *Youth for Tomorrow (YFT) to provide comprehensive residential, education and counseling services to at-risk adolescents and youth. The department shall include in the contract with YFT specific goods and services that will be delivered to adolescents and youth of the Commonwealth as a result of this appropriation. The department shall report outcomes to the Chairmen of the Senate Finance and House Appropriations Committees on October 1, 2013 and each year thereafter.*

4. Appropriations Not Implicated by Article IV, § 16 (footnotes 20, 22)

2013 Va. Acts ch. 806, Item 297:

I. Out of this appropriation, \$454,828 the first year and \$232,055 the second year from the general fund shall be provided to the regional AIDS resource and consultation centers and one local early intervention and treatment center.

J. Out of this appropriation, \$75,660 the first year and \$37,830 the second year from the general fund shall be provided to the Arthur Ashe Health Center in Richmond. [Note: The Arthur Ashe Health Center is part of the Hayes E. Willis Health Center, a satellite clinic of the Virginia Commonwealth University Health System's Ambulatory Care Center.]

...

M. Out of this appropriation, \$17,371 the first year and \$8,685 the second year from the general fund shall be provided to the Chesapeake Adult General Medical Clinic.

N. Out of this appropriation, \$242,367 the first year and \$247,313 the second year from the general fund is provided to support the administration of the patient level data base, including the outpatient data reporting system.

...

R.1. Out of this appropriation, \$500,000 the first year and \$1,000,000 the second year from the general fund shall be provided to fund ~~two~~ three Poison Control Centers. *The appropriation of general fund amounts the second year shall be divided between the three poison control centers in proportion to the Virginia population served by the centers.*

2. The State Health Commissioner shall report to the Chairmen of the Senate Finance and House Appropriations Committees by November 1, 2012 on the level of funding needed to support the operations and services of Poison Control Centers. The commissioner shall assess the level of funding needed to provide statewide coverage of poison control services by two centers and the services that are required to be provided.

3. *The State Health Commissioner shall work with the poison control centers to ensure continued statewide coverage of poison control services through the existing centers.* [Note: The Board of Health is obligated by VA. CODE ANN. § 32.1-111.15 to establish poison control centers.]

2013 Va. Acts ch. 806, Item 330.05:

F. Out of this appropriation, \$201,875 the second year from the general fund shall be provided to support the distribution of comprehensive health and aging information to Virginia's senior population, their families and caregivers.

5. Appropriations that May Not Implicate Article IV, § 16 (footnote 21)

2013 Va. Acts ch. 806, Item 297

U. Out of this appropriation, \$2,010,000 the first year and \$500,000 ~~\$510,000~~ the second year from the general fund is designated to the Hampton Roads Proton Beam Therapy Institute at Hampton University, LLC to support efforts for proton therapy in the treatment of cancerous tumors with fewer side effects.

6. Appropriations Potentially Distributed Passively by the General Assembly (footnote 23)

2013 Va. Acts ch. 806, Item 297:

A.1. Out of this appropriation, \$1,910,574 the first year and ~~\$1,182,946~~ *\$1,382,946* the second year from the general fund *and \$400,000 the second year from the federal Temporary Assistance for Needy Families (TANF) block grant* is provided to the Comprehensive Health Investment Project (CHIP) of Virginia.

2013 Va. Acts ch. 806, Item 343:

A.3. Out of this appropriation, \$500,000 the first year *from the general fund* and \$500,000 the second year from ~~the general fund~~ *the Temporary Assistance for Needy Families (TANF) block grant* shall be provided to Community Action Agencies.

...

C. Out of this appropriation, \$760,000 the first year and ~~\$760,000~~ *\$951,896* the second year from the general fund and \$2,475,501 the first year and ~~\$2,475,501~~ *\$2,833,605* the second year from the Temporary Assistance for Needy Families (TANF) block grant shall be provided to Healthy Families Virginia. These funds shall be used at the discretion of local sites for obtaining matching Title IV-E nongeneral funds when available. The Department of Social Services shall continue to allocate funds from this item to the statewide office of Prevent Child Abuse Virginia for providing the coordination, technical support, quality assurance, training and evaluation of the Healthy Families Virginia program.

...

F. Out of this appropriation, \$100,000 the first year and \$100,000 the second year from nongeneral funds shall be provided for the Child Abuse Prevention Play administered by Theatre IV of Richmond.

...

L. Out of this appropriation, \$25,000 the second year from the federal Temporary Assistance to Needy Families block grant shall be provided to the Visions of Truth Community Development Corporation to support self-sufficiency programs for at-risk youth. The Department of Social Services shall require that an update on the use of these funds to promote self-sufficiency be provided to the department by January 1, 2014.

OP. NO. 13-064

CONSTITUTION OF VIRGINIA: LEGISLATURE-APPROPRIATIONS TO RELIGIOUS OR CHARITABLE BODIES

Article IV, § 16 of the Constitution of Virginia precludes the Virginia Department of Environmental Quality from distributing state funds pursuant to an appropriation to be paid to the Chesapeake Bay Foundation, Inc. to support Chesapeake Bay education field studies, because the language of the appropriation is in the nature of a gift.

THE HONORABLE DOUGLAS W. DOMENECH
SECRETARY OF NATURAL RESOURCES

SEPTEMBER 27, 2013

ISSUE PRESENTED

You inquire about an appropriation in an amendment to the 2013-14 Appropriation Act¹ to be paid to the Chesapeake Bay Foundation, Inc. (“CBF”) to support Chesapeake Bay education field studies. Specifically, you ask whether the Virginia Department of Environmental Quality (“DEQ”) can distribute these funds to CBF in light of the prohibition found in the Constitution of Virginia on appropriations to charitable institutions that are not owned or controlled by the Commonwealth.

RESPONSE

It is my opinion that the prohibition on appropriations to charities set forth in Article IV, § 16 of the Constitution of Virginia precludes DEQ from distributing state funds pursuant to the appropriation about which you inquire, because the language of the appropriation is in the nature of a gift.

BACKGROUND

In your inquiry, you note that CBF is a non-profit organization incorporated in the State of Maryland in 1966, that it maintains tax-exempt status pursuant to Section 501(c)(3) of the Internal Revenue Code, and that it registers annually with the Virginia Department of Agriculture and Consumer Services’ (“VDACS”) Office of Charitable and Regulatory Programs as a charitable organization soliciting in Virginia pursuant to the Virginia Solicitation of Contributions Law.² On its website, CBF states that its mission is to “Save the Bay™, and keep it saved, as defined by reaching a 70 on CBF’s Health Index” and that it is “Saving the Bay through education, advocacy, litigation, and restoration.”³ On the organization’s Internal Revenue Service Form 990, CBF states that it works throughout the Chesapeake Bay watershed to “educate - build an informed citizenry; advocate - advance pollution reduction; litigate - encourage enforcement of environmental law; and restore - rebuild the Bay system’s natural filters such as oysters, underwater grasses, and streamside forests.”⁴ Additionally, on Guidestar.org, which is offered as a link on the webpage for the VDACS Office of Charitable and Regulatory Programs as a service that maintains information about the operations and finances of nonprofit organizations, CBF lists “Environment Restoration” and “Education” as its programs.⁵

APPLICABLE LAW AND DISCUSSION

I. Scope of the Constitutional Prohibition on Appropriations to “Charitable Institutions”

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

A threshold question is whether nonprofit groups such as CBF constitute “charitable institutions” within the scope of Article IV, § 16. There are no decisions on point from

the Supreme Court of Virginia providing express guidance concerning what constitutes a “charity” for purposes of Article IV, § 16; but in a prior opinion issued to you, I concluded that, in light of the historical record and the spirit of this constitutional provision, the term “charitable institution” was intended to have a broad meaning that encompasses nonprofits dedicated to land conservation.⁸ For the same reasons, I reach the conclusion that a nonprofit organization such as CBF that is dedicated to conservation programs and environmental education and protection is encompassed within the term “charitable institution” used in Article IV, § 16.

II. *Gifts versus Contracts with Charitable Institutions*

In my prior opinion to you, I noted that I do not interpret the prohibition on charitable appropriations in Article IV, § 16 to extend to *bona fide* contracts between the state and charitable institutions.⁹ I further noted that Virginia and its agencies are free to enter into contractual arrangements with nonprofits, but Article IV, § 16 prohibits the state from making grants that are in the nature of gifts, with no bargained-for exchange of funds for services or the provision of rights and remedies.¹⁰ For example, an earlier opinion of this Office found an appropriation to the Federation of Virginia Food Banks “for the purchase of food through food banks across the Commonwealth”¹¹ to be a direct appropriation to a charitable institution for benevolent purposes and therefore in violation of Article IV, § 16.¹²

In this instance, the appropriation in question directs the payment of funds to CBF “to support Chesapeake Bay education field studies.”¹³ I do not see anything in this appropriation to distinguish it from the 2011 appropriation to the Federation of Virginia Food Banks that this Office concluded was in violation of Article IV, § 16. In both instances, the appropriation is to be given directly to a specific nonprofit organization to defray expenses it incurs as a part of fulfilling its mission. Although the General Assembly can appropriate funds to a state agency to procure enhanced services, there is nothing in the appropriation or in the information you provided to indicate an objective of that nature.¹⁴ I must conclude that the appropriation is in the nature of an impermissible grant to a charitable institution. DEQ therefore is precluded from making the payment to CBF as envisioned by the appropriation, since it would be in conflict with Article IV, § 16 of the Constitution of Virginia.¹⁵ “The Constitution of the State, if it be consistent with the Federal Constitution, is the fundamental law of the State, is part of its supreme law, and acts passed by the legislature inconsistent with it are invalid. Any attempt to do that which is prohibited is repugnant to that supreme and paramount law, and is invalid.”¹⁶

CONCLUSION

Accordingly, it is my opinion that the prohibition on appropriations to charities set forth in Article IV, § 16 of the Constitution of Virginia precludes DEQ from distributing state funds pursuant to the appropriation about which you inquire, because the language of the appropriation is in the nature of a gift.

¹ 2013 Va. Acts ch. 806, Item 364(D). The 2013-14 Appropriation Act, adopted in the 2012 Special Session (2012 Va. Acts ch. 3), originally called for an appropriation of \$80,000 to be paid to the Chesapeake Bay Foundation (CBF) during the first year of the biennium. Your inquiry concerns an amendment to that

provision, enacted during the 2013 Reconvened Session, which added an appropriation of \$80,000 to be paid to CBF during the second year of the biennium.

² VA. CODE ANN. §§ 57-48 through 57-69 (2012 & Supp. 2013).

³ See <http://www.cbf.org/about-cbf/our-mission>.

⁴ CBF IRS Form 990 (2011), Return of Organization Exempt from Income Tax, Schedule O (Public Disclosure Copy).

⁵ See <http://www.guidestar.org/organizations/52-6065757/chesapeake-bay-foundation.aspx#mission>.

⁶ VA. CONST. art. IV, § 16.

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

⁸ 2011 Op. Va. Att'y Gen. 55, 60-61.

⁹ *Id.*

¹⁰ *Id.*

¹¹ 2011 Va. Acts ch. 890, Item 333(G).

¹² 2011 Op. Va. Att'y Gen. 52.

¹³ 2013 Va. Acts ch. 806, Item 364(D).

¹⁴ The information you supplied provides no basis for viewing Chesapeake Bay education field studies as anything other than a part of the ongoing activities conducted by CBF in pursuit of its mission of educating citizens about the Bay. This is reinforced by the absence of any duty to conduct Chesapeake Bay education field studies in DEQ's enabling statutes set forth in Title 62.1 of the *Code of Virginia*.

¹⁵ Note that the 2013 Appropriation Act includes in § 4-5.04, Goods and Services, the following provision:

(l) Alternative Procurement: If any payment is declared unconstitutional for any reason or if the Attorney General finds in a formal, written, legal opinion that a payment is unconstitutional, in circumstances where a good or service can constitutionally be the subject of a purchase, the administering agency of such payment is authorized to use the affected appropriation to procure, by means of the Commonwealth's Procurement Act, goods and services, which are similar to those sought by such payment in order to accomplish the original legislative intent.

2013 Va. Acts ch. 806, § 4-5.04(l). Thus, as the General Assembly has provided, the \$80,000 still is available to DEQ to contract for these services in accordance with the Virginia Public Procurement Act, VA. CODE ANN. §§ 2.2-4300 through 2.2-4377 (2011 & Supp. 2013).

¹⁶ See *Nat'l Fire Ins. Co. of Hartford*, 161 Va. at 750, 172 S.E. at 453. See also *Carlisle v. Hassan*, 199 Va. 771, 776, 102 S.E.2d 273, 277 (1958) (quoting *Ellinger v. Commonwealth*, 102 Va. 100, 105, 45 S.E. 807, 808 (1903), explaining that "The Legislature, it is true, to a large extent represents the Commonwealth, but it does so in subordination to the Constitution of the State. It can do nothing which that instrument prohibits and, in what is confided to it, must conform in its mode of action to the requirements of the Constitution. If it transcends its power, or if it acts in contravention of the Constitution, its acts are void.").

OP. NO. 13-012

CONSTITUTION OF VIRGINIA: LEGISLATURE - ENACTMENT OF LAWS

The General Assembly may not delegate final legislative authority regarding budget or other matters to a committee composed of a subset of the members of the General Assembly.

THE HONORABLE BEN L. CLINE
MEMBER, HOUSE OF DELEGATES
FEBRUARY 22, 2013

ISSUE PRESENTED

You inquire whether the General Assembly, as part of enacting the budget, may delegate authority to make spending decisions regarding Medicaid to a smaller sub-group of elected officials, including members of the General Assembly.

RESPONSE

It is my opinion that the General Assembly may not delegate final legislative authority regarding budget or other matters to a committee composed of a subset of the members of the General Assembly.

APPLICABLE LAW AND DISCUSSION

In your inquiry, you hypothesize a proposal for the General Assembly to enact a statute that delegates final authority regarding budget decisions related to Medicaid to what amounts to a sub-committee composed of somewhere between 6 and 12 members from the two houses of the General Assembly. Specifically, the proposal is for the General Assembly to pass budgetary language related to Medicaid that will become effective only if, at some point after the General Assembly has passed the law and the Governor has signed it, a subset of members of the General Assembly (not constituting a majority of each house) votes that certain conditions have been met.

Any analysis of a proposed statute's constitutionality begins with the recognition that the General Assembly does not operate under a grant of authority, but rather, that it has all powers except those prohibited by either the Virginia or United States Constitutions.¹ Enactments of the General Assembly are presumed to be constitutional, and the Virginia Supreme Court "will not invalidate a statute unless that statute clearly violates a provision of the United States or Virginia Constitutions."² The Supreme Court will "give the Constitution [of Virginia] a liberal construction in order to sustain the enactment in question, if practicable. . . ."³ and "every reasonable doubt regarding the constitutionality of a legislative enactment must be resolved in favor of its validity."⁴

While the General Assembly's powers are broad, they are not absolute. "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."⁵ Furthermore, the General Assembly is prohibited from doing indirectly that which the Virginia Constitution prohibits it from doing directly.⁶

Article IV, § 11 specifies how a bill becomes a law. Specifically, it provides that:

No bill shall become a law unless, prior to its passage: (a) it has been referred to a committee of each house, considered by such committee in session, and reported; (b) it has been printed by the house in which it originated prior to its passage therein; (c) it has been read by its title, or its title has been printed in a daily calendar, on three different calendar days in each house; and (d) upon its final passage a vote has been taken thereon in each house, the name of each member voting for and against recorded in the journal, and a majority of those voting in each house, which majority shall include at least two-fifths of the members elected to that house, recorded in the affirmative.

Thus, for any enactment to become effective, it must be passed by a majority of the members of each house of the General Assembly. Furthermore, it must be then presented to the Governor for his signature or veto.⁷

While the general rule is that, assuming a quorum, a simple majority of those voting in each house is all that is necessary to effectuate an enactment, budgetary matters have more stringent requirements. Specifically,

[n]o bill which creates or establishes a new office, or which creates, continues, or revives a debt or charge, or which makes, continues, or revives any appropriation of public or trust money or property, or which releases, discharges, or commutes any claim or demand of the Commonwealth, or which imposes, continues, or revives a tax, shall be passed except by the affirmative vote of a majority of all the members elected to each house, the name of each member voting and how he voted to be recorded in the journal.^[8]

Accordingly, budget matters require the affirmative vote of at least 51 members of the House of Delegates and 21 members of the Senate, regardless of how many members actually vote on the matter.

These provisions limit the authority of the General Assembly. The General Assembly may not avoid them by simply passing a statute that provides that an act, or part of an act, will become effective in the future if a subset of the General Assembly determines that certain conditions are met or that prudence dictates that the act becomes effective.⁹

Thus, while the General Assembly has the authority and responsibility to pass legislation related to budgetary matters, it may only exercise that power consistent with the provisions of Article IV, § 11 and may not delegate the decision of whether a budgetary enactment becomes effective to a subset of its members.

CONCLUSION

Accordingly, it is my opinion that the Virginia Constitution prohibits the General Assembly from delegating final legislative authority regarding budget or other enactments to a committee composed of a subset of the members of the General Assembly.

¹ VA. CONST. art. IV, § 14 (“The authority of the General Assembly shall extend to all subjects of legislation not herein forbidden or restricted.”); *Harrison v. Day*, 201 Va. 386, 396, 111 S.E.2d 504, 511 (1959) (The Virginia Constitution “is not a grant of legislative powers to the General Assembly, but is a restraining instrument only, and, except as to matters ceded to the federal government, the legislative powers of the General Assembly are without limit.”).

² *Marshall v. N. Va. Transp. Auth.*, 275 Va. 419, 427, 657 S.E.2d 71, 75 (2008) (citing *In re Phillips*, 265 Va. 81, 85-86, 574 S.E.2d 270, 272 (2003); *City Council of Emporia v. Newsome*, 226 Va. 518, 523, 311 S.E.2d 761, 764 (1984)).

³ *Id.* at 428, 657 S.E.2d at 75 (citing *Heublein, Inc. v. Dep’t of Alcoholic Beverage Control*, 237 Va. 192, 195, 376 S.E.2d 77, 78 (1989)).

⁴ *Id.* (citing *Hess v. Snyder Hunt Corp.*, 240 Va. 49, 53, 392 S.E.2d 817, 820 (1990). *See Blue Cross of Va. v. Commonwealth*, 221 Va. 349, 358-59, 269 S.E.2d 827, 832-33 (1980); *In re Phillips*, 265 Va. at 85-86, 574 S.E.2d at 272.

⁵ *Id.* at 428, 657 S.E.2d at 75-76 (citing *Dean v. Paolicelli*, 194 Va. 219, 227, 72 S.E.2d 506, 511 (1952); *Kirkpatrick v. Bd. of Supvrs.*, 146 Va. 113, 126, 136 S.E. 186, 190 (1926); *Albemarle Oil & Gas Co. v. Morris*, 138 Va. 1, 7, 121 S.E. 60, 61 (1924); *Button v. State Corp. Comm'n*, 105 Va. 634, 636, 54 S.E. 769, 769 (1906); *Smith v. Commonwealth*, 75 Va. (1 Matt.) 904, 907 (1880); *see also Sch. Bd. v. Shockley*, 160 Va. 405, 413, 168 S.E. 419, 422 (1933)).

⁶ *Marshall*, 275 Va. at 435, 657 S.E.2d at 80.

⁷ VA. CONST. art. V, § 6.

⁸ VA. CONST. art. IV, § 11.

⁹ In your inquiry, you have not provided sufficient specifics to allow me to address other possible constitutional infirmities that may be present in such a proposal. For example, if members of the executive or judicial branches are involved in the process, the proposal may represent an unconstitutional violation of the Separation of Powers. *See* VA. CONST. art. I, § 5 & art. 3, § 1. However, I would need additional specifics to address this or other potential constitutional concerns.

OP. NO. 13-013

CONSTITUTION OF VIRGINIA: LEGISLATURE - ENACTMENT OF LAWS

The provisions of the 2013 budget act that purport to authorize Medicaid expansion only “[i]f the Medicaid Innovation and Reform Commission determines that” certain conditions set by the General Assembly have been met constitutes a delegation of the General Assembly’s legislative authority.

The General Assembly may not delegate final legislative authority regarding budgetary or other matters to a committee composed of a subset of the members of the General Assembly.

THE HONORABLE ROBERT G. MARSHALL
MEMBER, HOUSE OF DELEGATES
MARCH 22, 2013

ISSUE PRESENTED

You inquire whether the General Assembly, as part of enacting the budget, may delegate authority to make spending decisions regarding Medicaid to a smaller sub-group of elected officials, including members of the General Assembly. Specifically, you ask whether language in the 2013 budget act regarding the implementation of Medicaid expansion constitutes an unconstitutional delegation of the General Assembly’s authority.

RESPONSE

It is my opinion that the provisions of the 2013 budget act that purport to authorize Medicaid expansion only “[i]f the Medicaid Innovation and Reform Commission determines that” certain conditions set by the General Assembly have been met constitutes a delegation of the General Assembly’s legislative authority. It is further my opinion that the General Assembly may not delegate¹ final legislative authority

regarding budgetary or other matters to a committee composed of a subset of the members of the General Assembly.

APPLICABLE LAW AND DISCUSSION

In the 2013 amendments to the 2012 budget,² the General Assembly has provided for the creation of the Medicaid Innovation and Reform Commission (the “Commission”).³ The Commission shall be composed of 10 voting members, the chairman of the House Committee on Appropriations (or his designee), the chairman of the Senate Finance Committee (or his designee), 4 members of the House Committee on Appropriations appointed by the chairman of the House Committee on Appropriations and 4 members of the Senate Finance Committee appointed by the Chairman of the Senate Finance Committee.⁴ The Commission also includes two, non-voting members in the persons of the Secretary of Health and Human Resources and the Secretary of Finance.⁵

The Commission is directed

to review, recommend and approve innovation and reform proposals affecting the implementation of Title XIX and Title XXI of the Social Security Act, including eligibility and financing for proposals set out in Item 307 of this act. Specifically, the Commission shall review (i) the development of reform proposals; (ii) progress in obtaining federal approval for reforms such as benefit design, service delivery, payment reform, and quality and cost containment outcomes; and (iii) implementation of reform measures.^[6]

Perhaps most significantly, the Commission must make the final determination as to whether Virginia will expand Medicaid consistent with the terms of the Patient Protection and Affordable Care Act. Specifically, the budget provides that:

a. The Department [of Medical Assistance Services (“DMAS”)] shall seek the approval of the Medicaid Innovation and Reform Commission to amend the State Plan for Medicaid Assistance under Title XIX of the Social Security Act, and any waivers thereof, to implement coverage for newly eligible individuals pursuant to 42 U.S.C. § 1396d(y)(1)[2010] of the Patient Protection and Affordable Care Act. **If the Medicaid Innovation and Reform Commission determines that the conditions in paragraphs 2, 3, 4, and 5 have been met, then the Commission shall approve implementation of coverage for newly eligible individuals pursuant to 42 U.S.C. § 1396d(y)(1)[2010] of the Patient Protection and Affordable Care Act.**

b. Upon approval by the Medicaid Innovation and Reform Commission, the department shall implement the provisions in paragraph 6.a. of this item by July 1, 2014, or as soon as feasible thereafter.^[7]

Recognizing that there could be disagreement over whether the conditions permitting Medicaid expansion have been met, the General Assembly established particularized voting rules to govern Commission action. Specifically,

[a]n affirmative vote by three of the five members of the Commission from the House of Delegates and three of the five members of the Commission

from the Senate shall be required to endorse any reform proposal to amend the State Plan for Medical Assistance under Title XIX of the Social Security Act, and any waivers thereof, to implement coverage for newly eligible individuals pursuant to 42 U.S.C. § 1396d(y)(1)[2010] of the Patient Protection and Affordable Care Act.^[8]

In short, the General Assembly has not, as of yet, approved Medicaid expansion. Rather, it has authorized the members of the Commission to make a determination as to whether specified criteria have been met. Thus, the decision as to whether Medicaid expansion will occur will not be made by the General Assembly as a whole, but rather, will be made if as few as six but no more than 10 members of the General Assembly “determine[] that the conditions”⁹ have been met.

Determining whether the conditions are met requires the evaluation of several criteria. Some of the criteria are subjective. The criteria include deciding whether

(i) the services and benefits provided are similar . . . ; (ii) reasonable limitations on non-essential benefits such as non-emergency transportation are implemented; and (iii) patient responsibility is required including reasonable cost sharing and active engagement in health and wellness activities to improve health and control costs.^[10]

The Commission must also determine whether any future reforms

include administrative simplification of the Medicaid program . . . and outline agreed upon parameters and metrics to provide maximum flexibility and expedited ability to develop and implement pilot programs to test innovative models that (i) leverage innovations and variations in regional delivery systems; (ii) link payment and reimbursement to quality and cost containment outcomes; or (iii) encourage innovations that improve service quality and yield cost savings to the Commonwealth.^[11]

Further, the Commission must conclude whether DMAS has sought reforms “to include all remaining Medicaid populations and services in cost-effective, managed and coordinated delivery systems.”¹²

The subjective nature of these criteria require that the members of the Commission exercise their discretion and judgment in determining “that the conditions . . . have been met.”¹³ Thus, the ultimate decision as to whether Virginia will expand Medicaid, effectively promising to make the necessary appropriations related to the expansion is not committed to the General Assembly as a whole, but rather, is committed to the judgment, discretion and ultimate vote of the individual members of the Commission.¹⁴

Given that you question the constitutionality of this arrangement, I note that the analysis of a law’s constitutionality begins with the recognition that the General Assembly does not operate under a grant of authority, but rather, that it has all powers except those prohibited by either the Virginia or United States Constitutions.¹⁵ Enactments of the General Assembly are presumed to be constitutional, and the Virginia Supreme Court “will not invalidate a statute unless that statute clearly violates a provision of the United States or Virginia Constitutions.”¹⁶ The Supreme Court will

“give the Constitution [of Virginia] a liberal construction in order to sustain the enactment in question, if practicable[,]”¹⁷ and “every reasonable doubt regarding the constitutionality of a legislative enactment must be resolved in favor of its validity.”¹⁸

While the General Assembly’s powers are broad, they are not unlimited. “An act is unconstitutional if it is expressly prohibited or is prohibited by necessary implication based upon the provisions of Constitution of Virginia or the United States Constitution.”¹⁹ Furthermore, the General Assembly is prohibiting from doing indirectly that which the Virginia Constitution prohibits it from doing directly.²⁰

The legislative power of the Commonwealth is to be exercised by the General Assembly. Article IV, §1 of the Virginia Constitution provides that “[t]he legislative power of the Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and House of Delegates.” Other provisions of Article IV describe the procedures that must be employed for the General Assembly to utilize that power.

Article IV, § 11 specifies how a bill becomes a law. Specifically, it provides that:

No bill shall become a law unless, prior to its passage: (a) it has been referred to a committee of each house, considered by such committee in session, and reported; (b) it has been printed by the house in which it originated prior to its passage therein; (c) it has been read by its title, or its title has been printed in a daily calendar, on three different calendar days in each house; and (d) upon its final passage a vote has been taken thereon in each house, the name of each member voting for and against recorded in the journal, and a majority of those voting in each house, which majority shall include at least two-fifths of the members elected to that house, recorded in the affirmative.

Thus, for any enactment to become effective, it must be passed by a majority of the members of each house of the General Assembly. Furthermore, it must be then presented to the Governor for his signature or veto.²¹

While the general rule is that, assuming a quorum, a simple majority of those voting in each house is all that is necessary to effectuate an enactment, budgetary matters have more stringent requirements. Specifically,

[n]o bill which creates or establishes a new office, or which creates, continues, or revives a debt or charge, or which makes, continues, or revives any appropriation of public or trust money or property, or which releases, discharges, or commutes any claim or demand of the Commonwealth, or which imposes, continues, or revives a tax, shall be passed except by the affirmative vote of a majority of all the members elected to each house, the name of each member voting and how he voted to be recorded in the journal.^[22]

Accordingly, budget matters require the affirmative vote of at least 51 members of the House of Delegates and 21 members of the Senate, regardless of how many members actually vote on the matter.²³

These provisions limit the authority of the General Assembly. The General Assembly may not avoid them by simply passing a statute that provides that an act, or some part

of an act, will become effective in the future if a subset of the General Assembly determines that certain subjective conditions are met or that prudence dictates that the act becomes effective.²⁴

The purpose behind the requirements of Article IV, § 11 regarding budget matters is self-evident. They seek to promote transparency and accountability when the General Assembly utilizes its powers regarding taxing and spending. The provisions assure a citizen that a majority of the members elected to both houses actually support the enactment and ensure that citizens can know exactly how their representatives (and all of the other representatives) voted on the issue. Delegating final decision-making authority to a subset of the General Assembly removes these safeguards.

Thus, while the General Assembly has the authority and responsibility to pass legislation related to budgetary matters such as Medicaid expansion, it may exercise that power only consistent with the provisions of Article IV, § 11 and may not delegate the decision of whether a budgetary enactment, or some part of an enactment, becomes effective to a subset of its members.

In reaching this conclusion, I offer no judgment on the wisdom of the policy decisions underlying the decision whether or not to expand Medicaid. The legal opinion I offer here is limited solely to the method the General Assembly has chosen regarding Virginia's ultimate decision on the issue. For the above stated reasons, I conclude that this particular method violates the Virginia Constitution.

CONCLUSION

Accordingly, it is my opinion that the Virginia Constitution prohibits the General Assembly from delegating final legislative authority regarding budget or other enactments to a committee comprised of a subset of the members of the General Assembly.

¹ “The General Assembly has delegated its authority when it enacts a law authorizing another entity to determine whether the law will be imposed.” *Marshall v. N. Va. Transp. Auth.*, 275 Va. 419, 432, 657 S.E.2d 71, 78 (2008) (internal citations omitted).

² See <http://leg2.state.va.us/WebData/13amend.nsf/Conf+List/?OpenForm> to view the budget amendments. Although this legislation was agreed to by both Houses, it is not yet law for it remains subject to the Governor's veto.

³H.B. 1500, Item No. 4-14.00, 2013 Reg. Sess. (Va. 2013), available at <http://leg2.state.va.us/WebData/13amend.NSF/ebea1c0863d2f61b8525689e00349981/cd79c35337dc35bd85257b1b004cb317?OpenDocument>.

⁴ *Id.* § 4(B).

⁵ *Id.*

⁶ *Id.* § 4(A).

⁷ H.B. 1500, Item No. 307 § JJJ(6), 2013 Reg. Sess. (Va. 2013) (emphasis added), available at <http://leg2.state.va.us/WebData/13amend.nsf/ebea1c0863d2f61b8525689e00349981/1c6d29fff614c86e85257b1b00756af1?OpenDocument>. That the Commission's purpose is to make the final determination as to whether Virginia will expand its Medicaid program as allowed under the Patient Protection and Affordable Care Act is borne out by the explanatory language accompanying the budget amendment that created the Commission. The explanation states that “[t]his amendment establishes a Medicaid Innovation and Reform

Commission in the Virginia General Assembly to review, recommend and approve innovation and reform proposals affecting the Virginia Medicaid and Family Access to Medical Insurance Security (FAMIS) programs, including those set forth in item 307 in the Department of Medical Assistance Services. Language requires an affirmative vote by a majority of the members appointed from each body to approval (sic) Medicaid expansion for newly eligible individuals pursuant to the Patient Protection and Affordable Care Act.”

⁸ H.B. 1500, Item No. 4-14.00 § 4(D)(2).

⁹ See H.B. 1500, Item No. 307 § JJJJ(6)(a).

¹⁰ *Id.* § JJJJ(3).

¹¹ *Id.*

¹² *Id.* § JJJJ(4).

¹³ Not all of the stated conditions are subjective. For example, one of the conditions is that DMAS “provide a report to the Medicaid Innovation and Reform Commission on the specific waiver and/or State Plan changes that have been approved and status of implementing such changes, and associated cost savings or cost avoidance to Medicaid/FAMIS expenditures.” H.B. 1500, Item No. 307 § JJJJ(5). Such an objective condition, by itself, would not constitute an impermissible delegation of the General Assembly’s authority.

¹⁴ Including the direction that, if the members determine that the conditions have been met, they “shall approve implementation of coverage for newly eligible individuals pursuant to 42 U.S.C. § 1396d(y)(1)[2010] of the Patient Protection and Affordable Care Act . . . [.]” H.B. 1500, Item No. 307 § JJJJ(6)(a), does not make the members’ determination any less an exercise of judgment and discretion. The instruction to vote is only effective after the predicate of a member of the Commission, in the exercise of the delegated judgment and discretion, having made a determination that the conditions have been met. It is the ability to use the judgment and discretion necessary to make the underlying determination that constitutes the exercise of the General Assembly’s authority.

¹⁵ VA. CONST. art. IV, § 14 (“The authority of the General Assembly shall extend to all subjects of legislation not herein forbidden or restricted[.]”); *Harrison v. Day*, 201 Va. 386, 396, 111 S.E.2d 504, 511 (1959) (The Virginia Constitution “is not a grant of legislative powers to the General Assembly, but is a restraining instrument only, and, except as to matters ceded to the federal government, the legislative powers of the General Assembly are without limit.”).

¹⁶ *Marshall*, 275 Va. at 427, 657 S.E.2d at 75 (citing *In re Phillips*, 265 Va. 81, 85-86, 574 S.E.2d 270, 272 (2003); *City Council of Emporia v. Newsome*, 226 Va. 518, 523, 311 S.E.2d 761, 764 (1984)).

¹⁷ *Id.* at 428, 657 S.E.2d at 75 (citing *Heublein, Inc. v. Dep’t of Alcoholic Beverage Control*, 237 Va. 192, 195, 376 S.E.2d 77, 78 (1989)).

¹⁸ *Id.* (citing *Hess v. Snyder Hunt Corp.*, 240 Va. 49, 53, 392 S.E.2d 817, 820 (1990)). See *Blue Cross of Va. v. Commonwealth*, 221 Va. 349, 358-59, 269 S.E.2d 827, 832-33 (1980); *In re Phillips*, 265 Va. at 85-86, 574 S.E.2d at 272.

¹⁹ *Marshall*, 275 Va. at 428, 657 S.E.2d at 75-76 (citing *Dean v. Paolicelli*, 194 Va. 219, 227, 72 S.E.2d 506, 511 (1952); *Kirkpatrick v. Bd. of Supvrs.*, 146 Va. 113, 126, 136 S.E. 186, 190 (1926); *Albemarle Oil & Gas Co. v. Morris*, 138 Va. 1, 7, 121 S.E. 60, 61 (1924); *Button v. State Corp. Comm’n*, 105 Va. 634, 636, 54 S.E. 769, 769 (1906); *Smith v. Commonwealth*, 75 Va. (1 Matt.) 904, 907 (1880); *Sch. Bd. v. Shockley*, 160 Va. 405, 413, 168 S.E. 419, 422 (1933)).

²⁰ *Id.* at 435, 657 S.E.2d at 80.

²¹ VA. CONST. art. V, § 6.

²² VA. CONST. art. IV, § 11.

²³ Given the inclusion of the language in the budget and the fact that Medicaid expansion amounts to a significant financial commitment of the Commonwealth going forward, it is clear that this provision is subject to this requirement.

²⁴ As noted above, this does not mean that the General Assembly cannot condition certain budget matters on future events. For example, an enactment that provided that a particular program would be funded only if the Commonwealth's revenues reached a certain level would likely pass constitutional muster because whether or not the condition has been met can be objectively determined and requires no one to exercise judgment or discretion on a matter reserved for the General Assembly.

OP. NO. 13-014

CONSTITUTION OF VIRGINIA: TAXATION AND FINANCE

CONSTITUTION OF VIRGINIA: LEGISLATURE - POWERS OF GENERAL ASSEMBLY; LIMITATIONS

Although the imposition of different taxes on transactions in different localities does not violate the uniformity requirement of Article X, § 1 of the Virginia Constitution, imposition of taxes in specific localities constitutes a local law related to taxation prohibited by Article IV, § 14(5) of the Virginia Constitution.

The imposition of such taxes on specific localities does not fall within the ambit of Article VII, § 2 of the Virginia Constitution when the tax is imposed directly by the General Assembly.

THE HONORABLE ROBERT G. MARSHALL
MEMBER, HOUSE OF DELEGATES
MARCH 22, 2013

ISSUES PRESENTED

You inquire whether the General Assembly constitutionally may impose an additional 0.7 percent sales tax for certain localities in Northern Virginia and Hampton Roads as well as impose additional recordation and transient occupancy taxes for certain localities in Northern Virginia.¹ You specifically ask whether House Bill 2313's imposition of different tax rates on similar transactions in different areas of the Commonwealth violates Article X, § 1 of the Virginia Constitution. You further inquire whether the taxes imposed are prohibited special laws and/or are subject to the two-thirds voting requirement of Article VII, §§ 1 and 2.

RESPONSE

It is my opinion that, although the imposition of different taxes on transactions in different localities does not violate Article X, § 1, HB 2313's imposition of taxes in the specific localities constitutes a local law related to taxation prohibited by Article IV, § 14(5) of the Virginia Constitution. It further is my opinion that, because the taxes were imposed directly by the General Assembly, the taxes cannot be saved by the provisions of Article VII, § 2, even if they had obtained the affirmative vote of two-thirds of the members elected to each house.

APPLICABLE LAW AND DISCUSSION

In the 2013 session, the General Assembly passed House Bill 2313 ("HB 2313"). HB 2313 has many constituent pieces. Most relevant to your inquiry is that, in addition to

raising certain taxes for the Commonwealth as a whole, it raises those taxes by additional amounts in certain localities. Specifically, it imposes the following additional taxes in certain localities:

- (1) “in each county and city embraced by the Northern Virginia Transportation Authority^[2] . . . a retail sales tax at the rate of 0.70 percent . . .” (new § 58.1-603.1(A));
- (2) “in each county and city embraced in the Hampton Roads Region,^[3] as described in subsection B of § 33.1-23.5:3, a retail sales tax rate of 0.70 percent. . . .” (new § 58.1-603.1(B));
- (3) a “‘regional congestion relief fee’ . . . on each deed, instrument, or writing by which lands, tenements, or other realty located in any county or city embraced by the Northern Virginia Transportation Authority . . . is sold and is granted, assigned, transferred, or otherwise conveyed to or vested in the purchaser or any other person, by such purchaser’s direction” (new § 58.1-802.2)⁴; and
- (4) “an additional transient occupancy tax at the rate of three percent of the amount of the charge for the occupancy of any room or space occupied that is located in any county or city embraced by the Northern Virginia Transportation Authority . . .” (new § 58.1-1742).

You inquire whether the imposition of each of these taxes violate the Constitution. The inquiry takes three parts: first, whether the additional taxes in certain localities violate the uniformity requirement of Article X, § 1, second, whether the taxes violate the constitutional prohibition on the General Assembly enacting “any local, special, or private law . . . [f]or the assessment and collection of taxes, except as to animals which the General Assembly may deem dangerous to the farming interests”⁵ and third, assuming that the taxes do constitute a local law in violation of Article IV, § 14(5), whether the General Assembly has the authority to impose local taxes pursuant to Article VII, § 2 should two-thirds of the members elected to each house vote for the taxes.

I first note that any analysis regarding the constitutionality of an enactment begins with the recognition that the General Assembly does not operate under a grant of authority, but rather, that it has all powers except those prohibited by either the Virginia or United States Constitutions.⁶ Enactments of the General Assembly are presumed to be constitutional, and the Virginia Supreme Court “will not invalidate a statute unless that statute clearly violates a provision of the United States or Virginia Constitutions.”⁷ The Supreme Court will “give the Constitution [of Virginia] a liberal construction in order to sustain the enactment in question, if practicable[.]”⁸ and “every reasonable doubt regarding the constitutionality of a legislative enactment must be resolved in favor of its validity.”⁹

While the General Assembly’s powers are broad, they are not unlimited. “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.”¹⁰ I further note that the Virginia Constitution, taken as a whole, treats

the taxing power differently than other powers exercised by the General Assembly, imposing numerous restrictions on the taxing power and evincing a healthy concern about its potential abuse. As the Virginia Supreme Court has noted, the Virginia Constitution's "explicit language demonstrates the special status that the legislative taxing power occupies in the Constitution, and reflects the greater restrictions that the Constitution places on the General Assembly's exercise of the taxing power."¹¹ The Court further has expressed that "the people of Virginia approved a Constitution that places restrictions on the General Assembly's exercise of the taxing power. In fact, greater restrictions are placed on the taxing power than are placed on the exercise of most other types of legislative power."¹²

One such restriction is found in Article X, § 1, which provides, with its title, as follows:

Section 1. Taxable property; uniformity; classification and segregation.

All property, except as hereinafter provided, shall be taxed. All taxes shall be levied and collected under general laws and shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, except that the General Assembly may provide for differences in the rate of taxation to be imposed upon real estate by a city or town within all or parts of areas added to its territorial limits, or by a new unit of general government, within its area, created by or encompassing two or more, or parts of two or more, existing units of general government. Such differences in the rate of taxation shall bear a reasonable relationship to differences between nonrevenue-producing governmental services giving land urban character which are furnished in one or several areas in contrast to the services furnished in other areas of such unit of government.

The General Assembly may by general law and within such restrictions and upon such conditions as may be prescribed authorize the governing body of any county, city, town or regional government to provide for differences in the rate of taxation imposed upon tangible personal property owned by persons not less than sixty-five years of age or persons permanently and totally disabled as established by general law who are deemed by the General Assembly to be bearing an extraordinary tax burden on said tangible personal property in relation to their income and financial worth.

The General Assembly may define and classify taxable subjects. Except as to classes of property herein expressly segregated for either State or local taxation, the General Assembly may segregate the several classes of property so as to specify and determine upon what subjects State taxes, and upon what subjects local taxes, may be levied.

With respect to Article X, § 1 and its predecessors, the Supreme Court has held that "[t]he dominant purpose of [this constitutional provision] is to distribute the burden of taxation, so far as is practical, evenly and equitably."¹³ Nonetheless, before a particular tax can be invalidated under Article X, § 1, that tax must be subject to the constitutional provision. Thus, the inquiry turns on whether Article X, § 1 applies to the taxes about which you have inquired.

From the express terms of Article X, § 1, it is evident that it is focused on property taxes. From the title of the section (“Taxable property”) through the remainder of the section, there are numerous references to the taxation of property. Contextually, it appears that the Article X, § 1’s uniformity requirement applies only to taxes on property, whether real or personal. Moreover, the Supreme Court of Virginia consistently has held that the uniformity provision of Article X, § 1 and its predecessors apply only to direct taxes on property.¹⁴

None of the taxes about which you inquire are taxes on property, but rather, they are taxes on transactions (sales, stays at hotels, etc.). Even the “regional congestion fee” found in the new § 58.1-802.2 is not a tax on property, but rather, is a tax on transactions because it applies upon the recordation of “each deed, instrument, or writing by which lands, tenements, or other realty located in any county or city embraced by the Northern Virginia Transportation Authority . . . [that] is sold and is granted, assigned, transferred, or otherwise conveyed to or vested in the purchaser or any other person, by such purchaser’s direction. . . .” Accordingly, I conclude that none of the taxes about which you inquire offend Article X, § 1.

Irrespective of Article X, § 1, the Supreme Court of Virginia has made clear, based on the express terms of Article IV, § 14(5), that “[t]he General Assembly is directly prohibited from enacting ‘any local, special, or private law . . . [f]or the assessment and collection of taxes.’”¹⁵ Furthermore, having enumerated specific categories for which the General Assembly may not enact special or local laws, the Virginia Constitution, in the very next section, provides that “[i]n all cases enumerated in the preceding section, and in every other case which, in its judgment, may be provided for by general laws, the General Assembly shall enact general laws.”¹⁶

The prohibition on special or local laws and the directive that the General Assembly enact general laws has been part of the Virginia Constitution since 1902.¹⁷ Since that time, it generally has been understood that, “[t]aken together, the pervading philosophy of Article IV, sections 14 and 15 reflects an effort to avoid favoritism, discrimination, and inequalities in the application of the laws.”¹⁸ “Although all legislative enactments are entitled to a presumption of constitutionality, [the Virginia Supreme Court has] not hesitated to invalidate laws found, upon careful consideration, to violate the prohibitions against special laws.”¹⁹ Because the local taxes in HB 2313 discriminate against certain localities, they run contrary to Article IV, §§ 14 and 15.

Nonetheless, the special and local law prohibition of Article IV, § 14 does not prohibit the General Assembly from drawing distinctions or from creating classifications.²⁰ The reasonableness of and necessity for a classification are primarily issues for a legislature, and, “‘if any state of facts can be reasonably conceived that would sustain [the classification], that state of facts at the time the law was enacted must be assumed.’”²¹

Furthermore, when, as here, the General Assembly uses the boundaries of localities as the basis for its classification, the classification, while potentially permissible, must survive additional scrutiny. Specifically,

“ . . . the fact that a law applies only to certain territorial districts does not render it unconstitutional, provided it applies to all districts and all persons who are similarly situated, and to all parts of the State where like conditions exist. Laws may be said to apply to a class only, and that class may be in point of fact a small one, provided the classification itself be a reasonable and not an arbitrary one, and the law be made to apply to all of the persons belonging to the class without distinction.”^[22]

As noted above, the various levies at issue are clearly taxes,²³ and therefore, there can be no question that HB 2313 is a law regarding the “assessment and collection of taxes.”²⁴ Thus, the first portion of your inquiry turns on whether the General Assembly logically could conclude that all of the localities identified for additional taxation in the enactment have the same transportation issues and that none of the localities that are not identified for additional taxation have similar transportation issues. Thus, for the enactment to survive scrutiny, it must be reasonable to conclude that Isle of Wight County and the City of Poquoson have transportation issues that are the same as the City of Virginia Beach (and the others in the Hampton Roads Region), but unlike any other locality in the Commonwealth.²⁵ It also would have to be reasonable to conclude that Prince William County’s transportation issues are more similar to the problems of Arlington County and the City of Alexandria than they are to Stafford County. Finally, it would have to be reasonable to conclude that no locality located outside of the area embraced by the Northern Virginia Transportation Authority or the Hampton Roads Region has transportation issues substantially similar to at least one of the localities contained in those groupings.

Given the inherent differences in the localities that make up the two groupings and the similarities that some of the localities necessarily share with localities outside of the groupings, it is unlikely that the classification here passes constitutional muster.²⁶

A conclusion that the local taxes found in HB 2313 violate Article IV, § 14(5)’s prohibition on local laws does not end the inquiry. As the Supreme Court has stated,

[t]he General Assembly is directly prohibited from enacting “any local, special, or private law . . . [f]or the assessment and collection of taxes.” Va. Const. art. IV, § 14(5). There is, however, an exception to this specific prohibition. The General Assembly may by special act delegate the power of taxation to any county, city, town, or regional government. *See* Va. Const. art. VII, § 2. NVTVA is not a county, city, town, or regional government, and thus it is not a political subdivision to which the General Assembly may constitutionally delegate its legislative taxing authority pursuant to Article VII, Section 2.^[27]

Regarding the seeming conflict between Article IV, § 14(5) and Article VII, § 2, the Court has consistently held that “[w]hen an act of assembly involves ‘the organization, government, and powers of any county, city, town or regional government, including such powers of legislation, taxation, and assessment’ the authorization found in Art. VII, §§ 1 and 2 prevails over the restrictions found in Art. IV, § 14.”²⁸ Thus, if the local taxes imposed by HB 2313 were to fall within Article VII, § 2, they will survive despite the restrictions found in Article IV, § 14(5).

The local taxes contained in HB 2313 do not fall within the ambit of Article VII, § 2. Article VII, § 2 expressly deals with the General Assembly's ability to confer powers of taxation to local governments. It does not authorize the General Assembly to impose special local taxes on the citizens of specific localities.²⁹ Accordingly, the two-thirds requirement you inquire about is not applicable here.

Given the foregoing, it is my opinion that the additional local taxes imposed by HB 2313 violate the Virginia Constitution.³⁰ In reaching this conclusion, I make no judgment on the wisdom of the policy decisions underlying the local tax provisions of HB 2313. My opinion is limited to the means the General Assembly chose to achieve its objectives. These particular means violate the Virginia Constitution, and therefore, other means to address this aspect of Virginia's transportation challenges must be used.

I do not conclude that the General Assembly cannot address the problem, but rather, only that constitutional means must be employed. For example, the General Assembly could, pursuant to Article VII, § 2, grant governing bodies of localities the power to impose the local taxes that the General Assembly cannot. Alternatively, the General Assembly could adopt a classification scheme that encompassed only localities meeting certain objective criteria (and additional localities that might meet the criteria in the future), thereby guaranteeing that the affected localities were, in fact, substantially similar and that no localities similarly affected were excluded. Under existing precedent, such an approach would not violate Article IV, § 14(5), and therefore, could be enacted if it received majority support from the members elected to each house.

Whether these or other ideas are the correct policy prescriptions is ultimately for the General Assembly to decide. However, whatever means is chosen must comport with the Virginia Constitution.

CONCLUSION

Accordingly, it is my opinion that, although the imposition of different taxes on transactions in different localities does not violate Article X, § 1, HB 2313's imposition of taxes in the specific localities constitutes a local law related to taxation prohibited by Article IV, § 14(5) of the Virginia Constitution. It further is my opinion that, because the taxes were imposed directly by the General Assembly, the taxes cannot be saved by the provisions of Article VII, § 2, even if they had obtained the affirmative vote of two-thirds of the members elected to each house.

¹ You do not inquire about the additional use taxes imposed by the new § 58.1-604.1. Accordingly, they are not addressed in this opinion.

² The Northern Virginia Transportation Authority is made up of the counties of Arlington, Fairfax, Loudoun, and Prince William, and the cities of Alexandria, Fairfax, Falls Church, Manassas, and Manassas Park. VA. CODE ANN. § 15.2-4831 (2012).

³ Pursuant to the new § 33.1-23.5:3, which is part of HB 2313, the localities composing the Hampton Roads Region are the counties of Gloucester, Isle of Wight, James City, and York and the Cities of Chesapeake, Hampton, Newport News, Norfolk, Poquoson, Portsmouth, Suffolk, Virginia Beach, and Williamsburg.

⁴ There is no question that, despite the name given it by the General Assembly, the “regional congestion relief fee” is a tax for the purposes of the Virginia Constitution. The General Assembly enacted a similar levy, also dubbed a “regional congestion relief fee,” when it passed Chapter 896 of the Acts of Assembly in 2007. In striking the levy down as an unconstitutional delegation of the General Assembly’s taxing power, the Virginia Supreme Court held that the regional congestion fee and other levies in Chapter 896 “constitute[] a tax, because they all are designed to produce revenue to be used for the purpose of financing bonds and **supplying revenue for transportation purposes in the Northern Virginia localities.**” *Marshall v. N. Va. Transp. Auth.*, 275 Va. 419, 431-32, 657 S.E.2d 71, 78 (2008) (emphasis added).

⁵ VA. CONST. art. IV, § 14(5).

⁶ VA. CONST. art. IV, § 14 (“The authority of the General Assembly shall extend to all subjects of legislation not herein forbidden or restricted.”); *Harrison v. Day*, 201 Va. 386, 396, 111 S.E.2d 504, 511 (1959) (The Virginia Constitution “is not a grant of legislative powers to the General Assembly, but is a restraining instrument only, and, except as to matters ceded to the federal government, the legislative powers of the General Assembly are without limit.”).

⁷ *Marshall*, 275 Va. at 427, 657 S.E.2d at 75 (citing *In re Phillips*, 265 Va. 81, 85-86, 574 S.E.2d 270, 272 (2003); *City Council of Emporia v. Newsome*, 226 Va. 518, 523, 311 S.E.2d 761, 764 (1984)).

⁸ *Id.* at 428, 657 S.E.2d at 75 (citing *Heublein, Inc. v. Dep’t of Alcoholic Beverage Control*, 237 Va. 192, 195, 376 S.E.2d 77, 78 (1989)).

⁹ *Id.* (citing *Hess v. Snyder Hunt Corp.*, 240 Va. 49, 53, 392 S.E.2d 817, 820 (1990)). See *Blue Cross of Va. v. Commonwealth*, 221 Va. 349, 358-59, 269 S.E.2d 827, 832-33 (1980); *In re Phillips*, 265 Va. at 85-86, 574 S.E.2d at 272.

¹⁰ *Marshall*, 275 Va. at 428, 657 S.E.2d at 75-76 (citing *Dean v. Paolicelli*, 194 Va. 219, 227, 72 S.E.2d 506, 511 (1952); *Kirkpatrick v. Bd. of Supvrs.*, 146 Va. 113, 126, 136 S.E. 186, 190 (1926); *Albemarle Oil & Gas Co. v. Morris*, 138 Va. 1, 7, 121 S.E. 60, 61 (1924); *Button v. State Corp. Comm’n*, 105 Va. 634, 636, 54 S.E. 769, 769 (1906); *Smith v. Commonwealth*, 75 Va. (1 Matt.) 904, 907 (1880); *Sch. Bd. v. Shockley*, 160 Va. 405, 413, 168 S.E. 419, 422 (1933)).

¹¹ *Id.* at 432-33, 657 S.E.2d at 78.

¹² *Id.* at 434, 657 S.E.2d at 79. These constitutional restrictions include: Article I, § 6 (that Virginians “cannot be taxed . . . without their own consent, or that of their representatives duly elected, or bound by any law to which they have not, in like manner, assented for the public good.”); Article IV, § 11 (“No bill . . . which imposes, continues, or revives a tax, shall be passed except by the affirmative vote of a majority of all the members elected to each house, the name of each member voting and how he voted to be recorded in the journal.”); Article IV, § 14(5); and Article VII, § 2 (“The General Assembly may also provide by special act for the organization, government, and powers of any county, city, town, or regional government, including such powers of legislation, taxation, and assessment . . .” with “special act” being defined by Article VII, § 1 as requiring an affirmative vote of two-thirds of the members elected to each house of the General Assembly.”)

¹³ *Alderson v. Cnty. of Alleghany*, 266 Va. 333, 339, 585 S.E.2d 795, 798 (2003) (internal quotation marks and citations omitted).

¹⁴ See, e.g., *Tidewater Ass’n of Homebuilders, Inc. v. City of Virginia Beach*, 241 Va. 114, 121, 400 S.E.2d 523, 527 (1991) (“[T]he provisions of Article X, § 1 apply to taxation of property.”); *Cnty. Bd. v. Foglio*, 215 Va. 110, 112, 205 S.E.2d 390, 392 (1974); *Shepherd v. Moore*, 207 Va. 498, 502, 151 S.E.2d 419, 422 (1966); *Bradley & Co. v. City of Richmond*, 110 Va. 521, 525, 66 S.E. 872, 874 (1910) (citing *Helfrick’s Case*, 70 Va. 844, 29 Gratt. 844 1878)); see also II A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 1040 (1974).

¹⁵ *Marshall*, 275 Va. at 434, 657 S.E.2d at 79 (quoting VA. CONST. art IV, § 14(5)).

¹⁶ VA. CONST. art. IV, § 15.

¹⁷ *Benderson Dev. Co. v. Sciortino*, 236 Va. 136, 147, 372 S.E.2d 751, 757 (1988).

¹⁸ *Id.* (quoting I A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 549 (1974) (citing *Martin's Ex'rs v. Commonwealth*, 126 Va. 603, 611-12, 102 S.E. 77, 81 (1920); *Winfree v. Riverside Cotton Mills*, 113 Va. 717, 722, 75 S.E. 309, 311 (1912)).

¹⁹ *Benderson*, 236 Va. at 148, 372 S.E.2d at 757 (citing *Riddleberger v. Chesapeake Ry.*, 229 Va. 213, 327 S.E.2d 663 (1985); *Commonwealth v. Hines*, 221 Va. 626, 272 S.E.2d 210 (1980); *Green v. Cnty. Bd.*, 193 Va. 284, 68 S.E.2d 516 (1952); *Cnty. Bd. of Supvrs. v. Am. Trailer Co.*, 193 Va. 72, 68 S.E.2d 115 (1951); *Shulman Co. v. Sawyer*, 167 Va. 386, 189 S.E. 344 (1937); *Quesinberry v. Hull*, 159 Va. 270, 165 S.E. 382 (1932); *McClintock v. Richlands Corp.*, 152 Va. 1, 145 S.E. 425 (1928); *Shelton v. Sydnor*, 126 Va. 625, 102 S.E. 83 (1920)).

²⁰ *Am. Trailer Co.*, 193 Va. at 78-79, 68 S.E.2d at 120.

²¹ *Concerned Residents v. Bd. of Supvrs.*, 248 Va. 488, 498, 449 S.E.2d. 787, 793 (1994) (quoting *Martin's Ex'rs*, 126 Va. at 612-13, 102 S.E. at 80). Despite a similarity in language used by the courts, analysis of the special and local laws provision of the Virginia Constitution is not the same as the rational basis test employed when analyzing Equal Protection claims pursuant to the U.S. Constitution. As the Virginia Supreme Court has noted:

It is true that for a long period of our history, the Equal Protection clause was interpreted by both federal and state courts in language that bore marked similarities to the analysis we made of statutes under the special-laws prohibition contained in the Virginia Constitution. But the two are not the same.

Benderson, 236 Va. at 146, 372 S.E.2d at 756.

²² *Green*, 193 Va. at 287-88, 68 S.E.2d at 518 (quoting *Ex parte Settle*, 114 Va. 715, 718-9, 77 S.E. 496, 497 (1913)).

²³ *Marshall*, 275 Va. at 431-32, 657 S.E.2d at 78 (“[E]ach of the regional taxes and fees provided in Chapter 896 [of the Acts of Assembly of 2007] constitutes a tax, because they all are designed to produce revenue to be used for the purpose of financing bonds and supplying revenue for transportation purposes in the Northern Virginia localities.”).

²⁴ VA. CONST. art. IV, § 14(5).

²⁵ By its own terms, HB 2313 necessarily suggests that at least some of the localities embraced by the Northern Virginia Transportation Authority are dissimilar to the localities in the Hampton Roads Region because the regional congestion fee and additional transient occupancy tax are only applicable in the localities embraced by the Northern Virginia Transportation Authority.

²⁶ In *Marshall*, none of the parties challenging the enactment, which contained similar local taxes, raised the issue of the taxes violating the constitutional prohibition on special/local laws. Yet the Court raised the issue *sua sponte*, noting in the opinion that

[t]he Marshall Defendants and Loudoun County did not argue before the circuit court that Chapter 896 is a local or special law that violates the provisions of Article IV, Section 14(5), prohibiting the General Assembly from enacting any local, special, or private law for the assessment and collection of taxes. Thus, the question whether Chapter 896 is such a local or special law . . . is not before us in these appeals.

275 Va. at 435 n.3, 657 S.E.2d at 79 n.3. Although the Court did not address the question because the parties did not raise it, the fact that the Court noted the question at all is clearly significant.

²⁷ *Id.* at 434, 657 S.E.2d at 79.

²⁸ *Alderson*, 266 Va. at 341, 585 S.E.2d at 799.

²⁹ *See, e.g., Marshall*, 275 Va. at 434, 657 S.E. 2d at 79 (Pursuant to Article VII, § 2, “[t]he General Assembly may by special act **delegate the power of taxation** to any county, city, town, or regional government.” (emphasis added)); *Alderson*, 266 Va. at 342, 585 S.E.2d at 799 (Article VII, § 2 enactment in question did “not determine assessments nor [did] it establish tax rates.”).

³⁰ This does not mean that all of HB 2313 is necessarily unconstitutional. “The General Assembly expressly has provided that any unconstitutional provisions of an enactment will be severed from its remaining valid provisions, unless the enactment specifically states that its provisions may not be severed or that the provisions must operate in accord with one another.” *Marshall*, 275 Va. at 428, 657 S.E. 2d at 76 (citing VA. CODE ANN. § 1-243). See also H.B. 2313, Para. 16, 2013 Reg. Sess. (Va. 2013) (“That should any portion of this act be held unconstitutional by a court of competent jurisdiction, the remaining portions of this act shall remain in effect.”). Accordingly, given the limits of your inquiry, my opinion is confined only to those provisions of HB 2313 that impose/appropriate the local taxes. Any further analysis would be beyond the scope of this opinion.

OP. NO. 11-136

COUNTIES, CITIES, AND TOWNS: FRANCHISES; SALE AND LEASE OF CERTAIN MUNICIPAL PUBLIC PROPERTY; PUBLIC UTILITIES

Fairfax County lacks authority to impose a limit or subject to County review or approval the water service rates Vienna sets for those persons using the Town’s water service, including any customers residing outside the Town limits.

STEVEN D. BRIGLIA, ESQUIRE
TOWN ATTORNEY FOR THE TOWN OF VIENNA
JULY 19, 2013

ISSUES PRESENTED

You inquire regarding the validity of several provisions of a County of Fairfax (“County”) ordinance related to the regulation of rates set by the Town of Vienna (“Vienna”) for water services Vienna provides to residents of the County. Specifically, you ask whether the County 1) presumptively can invalidate any rate adopted by Vienna if such water rate exceeds the water rate charged by the Fairfax County Water Authority; 2) can require the Town to submit its water rates for review to the staff and legislative board of a locality that does not operate the water system or set the water rate by ordinance; and 3) can require the Town to obtain the consent of the County for setting water rates that exceed those set by Fairfax County Water Authority.

RESPONSE

It is my opinion that Fairfax County lacks authority to impose a limit or subject to County review or approval the water service rates Vienna sets for those persons using the Town’s water service, including any customers residing outside the Town limits.

BACKGROUND

You relate that Vienna currently operates a water system that supplies water to Vienna residents and to residents of neighborhoods immediately adjacent to Vienna. You state that this water system was in operation prior to July 1, 1976. For years, at the request of the County of Fairfax and the Fairfax County Water Authority, the independent water authority created by the County, Vienna also has provided water to customers located outside the Town’s corporate limits but within the bounds of the County. Each year, the Vienna mayor and town council hold a public hearing on water and sewer

rates and set those rates by ordinance; you state that such rates have never been determined to be unfair or unreasonable.

In 2011, the County adopted an ordinance related to the regulation of water rates.¹ The ordinance expressly provides that “no provider of retail public water service within [the County] shall set, establish, bill, charge, or collect from any user in Fairfax County any rate, fee, or charge for water service that is greater than the corresponding rate, fee, or charge imposed by the Fairfax County Water Authority.”² A higher rate is permissible only upon the review and approval of a written proposal submitted by the water provider to the County Director of Public Works and Environmental Services. Upon finding that the proposed rate is “fair and reasonable,” the County Board of Supervisors may approve the higher rate by ordinance.³

While rates set by a city or town for water service provided within its territorial limits are exempt from the foregoing provisions of the ordinance,⁴ approximately forty percent of Vienna’s water system users, as you relate, are outside the boundaries of Vienna. Vienna’s water rates with regard to these users therefore would fall under the purview of the ordinance. You question the authority of the County to adopt this ordinance.

APPLICABLE LAW AND DISCUSSION

In determining the powers of a local government, Virginia follows the Dillon Rule of strict construction. Accordingly,

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.^[5]

There is no statutory provision granting counties general oversight of water services provided to their residents by other localities. Rather, § 15.2-2143 provides, in pertinent part:

Every locality may provide and operate within or outside its boundaries water supplies and water production, preparation, distribution and transmission systems, facilities and appurtenances for the purpose of furnishing water for the use of its inhabitants; or may contract with others for such purposes and services. Fees and charges for the services of such systems shall be fair and reasonable and payable as directed by the locality

No locality, after July 1, 1976, shall construct, provide or operate outside its boundaries any water supply system prior to obtaining the consent of the locality in which the system is to be located. No consent shall be required for the operation of any such water supply system in existence on July 1, 1976, in the process of construction or for which the site has been purchased, or for its orderly expansion.

It is a general rule of statutory construction that the words of a statute are to be given their usual, commonly understood meaning.⁶ Moreover, when “the language of a

statute is clear and unambiguous,” application of the rules of statutory construction is not required.⁷ The plain language of the first paragraph of § 15.2-2143 is unequivocal. Any locality, including a town,⁸ is authorized to provide and operate, within or outside its boundaries, water supply services. Moreover, the locality providing the service may charge “fees and charges for the services of such systems” so long as they are “fair and reasonable” and are payable “as directed by the locality.”

The General Assembly clearly contemplated operations of water services by a locality both “within or outside” the boundaries of the supplying locality, and permitted the locality providing the service to set the fees and charges for the services, making them payable as directed by the operating locality. Thus, the locality providing the service is authorized to set rates for its customers, regardless of where those customers live. The *Code of Virginia* does not provide authority for a non-supplying locality to set rates for its residents who receive their water services from another locality.⁹ If the General Assembly had intended to provide such authority, it could have easily done so; however, no such authorization is included, and none now should be implied.¹⁰

Therefore, I conclude that Vienna can set the fees and charges for its customers, including those located outside Vienna but within the County, without restriction or consent from the County.¹¹ The only limitation on such rates and charges is that they be “fair and reasonable.”¹² Because Vienna is authorized to set rates for water services it provides to users residing within or outside of its boundaries, and because the County lacks such authority, I further conclude that the County has no authority to direct Vienna to submit its rates to the County for review and approval.

CONCLUSION

Accordingly, it is my opinion that Fairfax County lacks authority to impose a limit on or subject to review the water service rates Vienna sets for those persons using the town’s water service, including any customers residing outside the town limits.

¹ COUNTY OF FAIRFAX, VA., Code § 65-6-13.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Bd. of Supvrs. v. Horne*, 216 Va. 113, 117, 215 S.E.2d 453, 455 (1975) (citations omitted); *accord Bd. of Supvrs. v. Countryside Inv. Co.*, 258 Va. 497, 503, 522 S.E.2d 610, 613 (1999).

⁶ *See Wright v. Commonwealth*, 278 Va. 754, 759, 685 S.E.2d 655, 657 (2009).

⁷ *Ambrogi v. Koontz*, 224 Va. 381, 386, 297 S.E.2d 660, 662 (1982).

⁸ VA. CODE ANN. § 15.2-102 (2012) (defining a “locality” for purposes of Title 15.2 to include cities, counties, and towns, “as the context may require.”). Moreover, Section 6.1(a) of The Charter of the Town of Vienna grants the Town Council the “power and authority to acquire, or otherwise obtain control of or establish, maintain, operate, extend and enlarge waterworks . . . within or without the limits of the Town,” as well as to “promulgate and enforce reasonable rates, rules and regulations for use of the same, any or all of which rates, rules and regulations the Council may alter at any time without notice.”

⁹ Although § 15.2-2111 authorizes a county (or any other locality) to fix the rates of *any* sewage or water services provided within its boundaries, the general language of this statute must yield to the more specific language of § 15.2-2143, which authorizes a town (or any other locality) supplying water outside its

boundaries to set the rates of the water so supplied. “In construing conflicting statutes, if one section addresses a subject in a general way and the other section speaks to part of the same subject in a more specific manner, the latter prevails.” *Beard Plumbing & Heating v. Thompson Plastics*, 254 Va. 240, 245, 491 S.E.2d 731, 734 (1997) (citing *Dodson v. Potomac Mack Sales & Serv., Inc.*, 241 Va. 89, 94-95, 400 S.E.2d 178, 181 (1991)).

¹⁰ *See Bd. of Supvrs. v. Reed’s Landing Corp.*, 250 Va. 397, 400, 463 S.E.2d 688, 670 (1995) (“If there is a reasonable doubt whether legislative power exists, the doubt must be resolved against the local governing body.”)

¹¹ Moreover, § 15.2-2143 additionally provides that no locality “operating outside its boundaries any water supply system” that was in existence as of July 1, 1976 is required to obtain the consent of the locality in which the system is located in order continue operations outside its boundaries. This language further supports the proposition that a town may operate a preexisting water system serving users outside of town boundaries in a manner independent of County influence.

¹² Whether the rates at issue here are “fair and reasonable” is beyond the scope of this opinion, and a “determination of reasonableness will ultimately depend on the particular facts presented.” 1997 Op. Va. Att’y Gen. 77, 79, and *see* citations therein.

OP. NO. 13-073

COUNTIES, CITIES AND TOWNS: GENERAL POWERS OF LOCAL GOVERNMENTS

A county may not enter into an agreement with another state to perform building inspections of industrialized buildings manufactured in a Virginia facility to determine compliance with the building code of the other state.

C. ERIC YOUNG, ESQUIRE
COUNTY ATTORNEY FOR TAZEWELL COUNTY
OCTOBER 11, 2013

ISSUES PRESENTED

You inquire whether a county may enter into an agreement with another state to perform inspections of industrialized buildings manufactured in a Virginia facility, to determine compliance with the building code of the other state. You also inquire whether the county or its employees would be entitled to the protection of sovereign immunity with respect to the performance of such inspections.

RESPONSE

It is my opinion that a county may not enter into an agreement with another state to perform building inspections of industrialized buildings manufactured in a Virginia facility, to determine compliance with the building code of the other state. It is my further opinion that neither the county nor its employees would be entitled to the protection of sovereign immunity with respect to the performance of such inspections.

BACKGROUND

You relate that a business in Tazewell County has contracted to manufacture metal shell structures to be shipped to the state of Washington for use in the housing of utility equipment. You further relate that the business has requested that the county’s building officials inspect the metal shell structures and certify to Washington State

that the structures comply with Washington State's building code. You have been advised that Washington State's building code requires that such structures manufactured out of state be inspected for compliance with Washington State's building code by a "government official" in the state where the structure is manufactured. You indicate that Washington State does not accept certifications from licensed private inspectors performing inspections in other states. You have received a form agreement prepared by the Washington State Department of Labor and Industries by which that agency delegates specific inspection authority of factory-assembled structures to government officials in the state of manufacture, in return for certain contractual commitments by the governmental entity that is agreeing to undertake the inspections on behalf of Washington State.

APPLICABLE LAW AND DISCUSSION

The power to enter into agreements with other states is held by the General Assembly,¹ and those agreements may be negotiated by the Governor.²

Virginia generally follows the Dillon Rule of strict construction and its corollary for municipalities. "[M]unicipal corporations possess and can exercise only those powers expressly granted by the General Assembly, those necessarily or fairly implied therefrom, and those that are essential and indispensable."³

Enforcement of the provisions of the Virginia Uniform Statewide Building Code for new construction and rehabilitation of existing buildings erected on property in the Commonwealth has been designated as the responsibility of the local building department.⁴ Notwithstanding this statutory authority, the type of building to be manufactured at the facility in your locality is an industrialized building,⁵ to be shipped to Washington State, where it will be affixed to real property, and thus made subject to *that* state's building code.

I find no statutory authority enabling Virginia localities to enter into agreements with other states to inspect locally-manufactured industrialized buildings to determine such structure's compliance with that state's building code.⁶ "If there is any reasonable doubt whether legislative power exists, that doubt must be resolved against the local governing body."⁷ Therefore, it is my opinion that a county does not have the authority to enter into such an agreement.⁸

You also ask whether the county or its employees would be entitled to the protection of sovereign immunity for tort claims arising from the performance of such inspections. The applicability of such immunity to a given government activity constitutes a question of law, and is subject to a four-part analysis established by the Virginia Supreme Court.⁹ In the landmark case of *Messina v. Burden*,¹⁰ the Court articulated the legal test as follows:

In *James* we developed a test to determine entitlement to immunity. Among the factors to be considered are the following:

1. the nature of the function performed by the employee;
2. the extent of the state's interest and involvement in the function;

3. the degree of control and direction exercised by the state over the employee; and
4. whether the act complained of involved the use of judgment and discretion.^[11]

This test likewise applies to the actions of a local government, and its employees, respecting the performance of a given function.¹²

Under the factual scenario that you describe, and consistent with the lack of enabling authority for the county to enter into an agreement with another state for the stated purpose, it is apparent that the county would have no lawful interest in the function at issue. Therefore, it is my opinion that the county would not satisfy the legal test to establish an entitlement to the protection of sovereign immunity for it or its employees respecting the performance of the inspections.

CONCLUSION

Accordingly, it is my opinion that a county may not enter into an agreement with another state to perform building inspections of industrialized buildings manufactured in a Virginia facility, to determine compliance with the building code of the other state. It is my further opinion that neither the county nor its employees would be entitled to the protection of sovereign immunity with respect to the performance of such inspections.

¹ VA. CONST. art. IV, § 14 (“The authority of the General Assembly shall extend to all subjects of legislation not herein forbidden or restricted”). *See also* *Harrison v. Day*, 201 Va. 386, 396, 111 S.E.2d 504, 511 (1959) (“The Constitution of the State is not a grant of legislative powers to the General Assembly, but is a restraining instrument only, and, except as to matters ceded to the federal government, the legislative powers of the General Assembly are without limit.”).

² VA. CONST. art. V, § 7 (“The Governor shall conduct, either in person or in such manner as shall be prescribed by law, all intercourse with other and foreign states.”). *See also* 1974-75 Op. Va. Att’y Gen. 221, 221-22.

³ *Richmond v. Confre Club of Richmond, Inc.*, 239 Va. 77, 79, 387 S.E.2d 471, 473 (1990).

⁴ VA CODE ANN. § 36-105(A) (Supp. 2013).

⁵ *See* § 36-71.1 (2011) (“‘Industrialized building’ means a combination of one or more sections or modules, subject to state regulations and including the necessary electrical, plumbing, heating, ventilating and other service systems, manufactured off-site and transported to the point of use for installation or erection, with or without other specified components, to comprise a finished building.”).

⁶ In contrast, the General Assembly has granted authority to localities to enter into agreements in certain other specific contexts. *Cf.* VA CODE ANN. §§ 15.2-5100 through 15.2-5158 (2012 & Supp. 2013) (authorizing localities to create a water authority in conjunction with other localities); 2004 Op. Va. Att’y Gen 82 (concluding locality could enter into an agreement with neighboring jurisdiction in North Carolina to create joint water authority). *Cf. also* § 15.2-815 (2012) & § 15.2-932 (2012) (authorizing localities to enter contracts with other entities for garbage disposal services).

⁷ *Richmond v. Confre Club of Richmond, Inc.*, 239 Va. 77, 79, 387 S.E.2d 471, 473 (1990).

⁸ For a locality to exercise such power, the General Assembly would have to enact enabling legislation granting localities that authority.

⁹ *See Burns v. Gagnon*, 283 Va. 657, 666, 676, 727 S.E.2d 634, 646 (2012).

¹⁰ 228 Va. 301, 321 S.E.2d 657 (1984).

¹¹ *Id.* at 313, 321 S.E.2d at 663 (citing *James v. Jane*, 221 Va. 43-53, 282 S.E.2d 864, 869 (1980)).

¹² *See, e.g., Ligon v. Goochland County*, 270 Va. 312, 316, 689 S.E.2d 666, 668(2010) (wherein the Court stated, “The same immunity principles apply to counties, which are political subdivisions of the Commonwealth.”); *and see Colby v. Boyden*, 241 Va. 125, 128-30, 400 S.E.2d 184, 186-87 (1991).

OP. NO. 13-042

COUNTIES, CITIES AND TOWNS: GENERAL POWERS AND PROCEDURES OF COUNTIES- ADDITIONAL POWERS

The local board of supervisors may provide school resource officers for the county’s private schools as well as the county’s public schools.

THE HONORABLE MICHAEL W. TAYLOR
SHERIFF, PITTSYLVANIA COUNTY
JULY 19, 2013

ISSUE PRESENTED

You ask whether the local board of supervisors has the legal authority to provide school resource officers funded at county expense to the county’s private schools as well as to the county’s public schools.

RESPONSE

It is my opinion that the local board of supervisors may provide school resource officers for the county’s private schools as well as the county’s public schools.

BACKGROUND

You relate that your office has recommended to the Pittsylvania County Board of Supervisors the hiring of additional deputies to serve as school resource officers¹ to accomplish the goals of a safe school initiative in that county. You indicate that local leaders have asked whether the county has the legal authority to spend funds to hire, train, and equip deputies who would serve at the county’s private schools as well as the county’s public schools.

APPLICABLE LAW AND DISCUSSION

In determining the powers of a local government, Virginia follows the Dillon Rule of strict construction, whereby power of a local governing body is limited to “those powers which are expressly granted by the state legislature, those powers fairly or necessarily implied from expressly granted powers, and those powers which are essential and indispensable.”² The General Assembly has provided local governments general authority to “make appropriations for the purposes for which it is empowered to levy taxes and make assessments, for the support of the locality, for the performance of its functions, and the accomplishment of all other lawful purposes and objectives....”³

One of the most important functions of local government is public safety and the exercise of police powers to achieve that safety. Section 15.2-1200 provides that

“[a]ny county may adopt such measures as it deems expedient to secure and promote the health, safety and general welfare of its inhabitants which are not inconsistent with the general laws of the Commonwealth.”⁴ The Supreme Court of Virginia has construed broadly this general grant of police powers to localities when public safety and morals are involved.⁵ Accordingly, it is reasonable to anticipate that local governments may provide funding for law-enforcement positions to be assigned the duties of school resource officers in private as well as public schools located within their jurisdiction, so as to provide for the safety of all children attending school within their jurisdiction.

Although your inquiry does not distinguish between types of private schools, I note that many jurisdictions contain private schools with religious affiliations. Thus, it is appropriate to address whether a locality may provide for school resource officers to be present in private schools with religious affiliations, pursuant to the goal of ensuring the safety and security of the attending children. Providing such resource officers constitutes a predominantly secular act; it does not appear to advance or inhibit any religion or create an excessive entanglement with religion in violation of the Establishment Clause of the United States Constitution.⁶ For those reasons, it is my opinion that the resource officers could be made available to all private schools within the local government’s jurisdiction, notwithstanding that one or more of them may have a religious affiliation.

CONCLUSION

Accordingly, it is my opinion that a local board of supervisors may provide school resource officers for the county’s private schools as well as the county’s public schools.

¹ Although the *Code of Virginia* provides a definition of “school resource officer” that is limited to include only officers serving in public schools, VA. CODE ANN. § 9.1-101 (2012), such definition does not serve to preclude a local government from also installing officers to perform that function at private schools. The local government cannot, however, apply for grants pursuant to § 9.1-110 from the Criminal Justice Services Board for the additional law enforcement positions installed at private schools.

² *Arlington Cnty. v. White*, 259 Va. 708, 712, 528 S.E.2d 706, 708 (2000) (quoting *City of Va. Beach v. Hay*, 258 Va. 217, 221, 518 S.E.2d 314, 316 (1999)).

³ VA. CODE ANN. § 15.2-950 (2012).

⁴ There are instances where the General Assembly makes evident that they do not intend a locality to be able to pass a measure. *See* 2005 Op. Va. Att’y Gen. 84, 85. I find nothing, however, to so indicate with respect to the question you present.

⁵ *See, e.g.* *Stallings v. Wall*, 235 Va. 313, 318, 367 S.E.2d 496, 499 (1988) (holding that general delegation of authority was broad enough to permit localities to restrict sales of firearms); *King v. Cnty. of Arlington*, 195 Va. 1084, 1087, 81 S.E.2d 587, 590 (1954) (holding that county ordinance prohibiting keeping of vicious dogs was valid); *Assaid v. City of Roanoke*, 179 Va. 47, 50, 18 S.E.2d 287, 289 (1942) (concluding that city had power to regulate operation of pool rooms); *see also* 1994 Op. Va. Att’y Gen. 29, 31-32 (noting that state court decisions and prior opinions of the Attorney General have concluded that a locality’s general police powers are broad enough to sustain local regulation of a wide range of activities and subjects).

⁶ U.S. CONST. amend. I. *See* *Everson v. Bd. of Educ.*, 330 U.S. 1, 17-18 (noting that it is not a violation of the First Amendment for the state to provide ordinary police protection to religious schools). *See also* 2006

Op. Va. Att’y Gen. 164, 168 (“The mere fact that the programs being implemented have a religious component does not render them unconstitutional on their face.”).

OP. NO. 13-089

COUNTIES, CITIES, AND TOWNES: GENERAL POWERS OF LOCAL GOVERNMENTS-PUBLIC HEALTH AND SAFETY; NUISANCES

For specified zoning classifications, § 15.2-905(A) authorizes Albemarle County to ban the keeping of inoperable vehicles unless the inoperable vehicle is within a fully enclosed building or structure or otherwise shielded or screened from view.

THE HONORABLE R. STEVEN LANDES
MEMBER, HOUSE OF DELEGATES
SEPTEMBER 17, 2013

ISSUE PRESENTED

You inquire regarding the interpretation of § 15.2-905 of the *Code of Virginia*. Specifically, you ask whether § 15.2-905 authorizes Albemarle County to enact an ordinance that would ban, in a residential zoning district, the keeping of one or more inoperable vehicles outside of fully enclosed buildings.

RESPONSE

It is my opinion that, for specified zoning classifications, § 15.2-905(A) authorizes Albemarle County to ban the keeping of inoperable vehicles unless the inoperable vehicle is “within a fully enclosed building or structure or otherwise shielded or screened from view”¹

BACKGROUND

You indicate that Albemarle County is in the process of developing “an ordinance to limit the number of inoperable vehicles ‘outside of a fully enclosed building’ to zero on residential properties of less than five acres.” You further relate that a question has arisen as to whether Albemarle County can ban the keeping of all inoperable vehicles or whether § 15.2-905 requires that Albemarle County permit at least one inoperable vehicle to be kept outside of an enclosed building on such properties.

APPLICABLE LAW AND DISCUSSION

The question of whether a locality may enact a particular ordinance turns on whether the General Assembly has authorized the locality to do so. As the Virginia Supreme Court has noted,

[i]n Virginia the powers of boards of supervisors [i] 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.^[2]

In determining whether the statutes enacted by the General Assembly grant the locality authority to adopt a particular ordinance, normal rules of statutory construction apply. Thus, in making such determinations, “courts will give statutory language its plain meaning.”³ Nevertheless, “[i]f there is any reasonable doubt whether legislative power exists, that doubt must be resolved against the local governing body.”⁴

Section 15.2-905(A) is clearly a grant of authority to local governing bodies. In regards to your inquiry, it provides that the governing body of the County

of Albemarle . . . may by ordinance prohibit any person from keeping, except within a fully enclosed building or structure or otherwise shielded or screened from view,^[5] on any property zoned or used for residential purposes, or on any property zoned for commercial or agricultural purposes, any motor vehicle, trailer or semitrailer, as such are defined in § 46.2-100, which is inoperable.^[6]

Thus, § 15.2-905(A) expressly grants Albemarle County the power to enact an ordinance prohibiting inoperable vehicles from the listed zoning classifications unless the vehicles are kept “within a fully enclosed building or structure or otherwise shielded or screened from view.”

Giving the word “prohibit” its ordinary meaning,⁷ Albemarle County may ban inoperable vehicles, as defined by § 15.2-905, from a residential zoning district. Accordingly, Albemarle County is authorized to enact the ordinance you describe so long as this ban contains an exception for any inoperable vehicles that are “otherwise shielded or screened from view” or are stored in a “fully enclosed building or structure.”

The confusion that necessitated your request appears to stem from the second paragraph of § 15.2-905(A). After providing the specified localities with the power to prohibit inoperable vehicles, the second paragraph of § 15.2-905(A) provides that those localities “*in addition* may by ordinance limit the number of inoperable motor vehicles that any person may keep outside of a fully enclosed building or structure.”⁸

This portion of § 15.2-905(A) does not serve to limit the powers of the named localities. By using the phrase “in addition,” the General Assembly made clear that this provision of the statute was granting *more* powers to the localities than the powers described in the first paragraph of § 15.2-905(A).

Thus, § 15.2-905(A) grants the specified localities multiple options regarding the regulation of inoperable vehicles within their jurisdiction. First, a locality may enact a total ban on such vehicles in the relevant zoning classifications, provided that the ban does not apply to inoperable vehicles kept within a fully enclosed building or structure or otherwise shielded or screened from view. Alternatively, the locality, in its discretion, may choose instead to limit the number of inoperable vehicles that may be kept outside of a fully enclosed building or structure.⁹

CONCLUSION

Accordingly, it is my opinion that, for specified zoning classifications, § 15.2-905 authorizes Albemarle County to enact an ordinance that bans the keeping of inoperable vehicles unless the inoperable vehicle is “within a fully enclosed building or structure or otherwise shielded or screened from view”¹⁰

¹ VA. CODE ANN. § 15.2-905(A) (Supp. 2013).

² Bd. of Supvrs. v. Horne, 216 Va. 113, 117, 215 S.E.2d 453, 455 (1975) (citations omitted); accord Bd. of Supvrs. v. Countryside Inv. Co., 258 Va. 497, 503, 522 S.E.2d 610, 613 (1999).

³ Davenport v. Little-Bowser, 269 Va. 546, 555, 611 S.E.2d 366, 371 (2005) (citing Jackson v. Fidelity & Deposit Co., 269 Va. 303, 313, 608 S.E.2d 901, 904 (2005)).

⁴ Richmond v. Confre Club of Richmond, Inc., 239 Va. 77, 79, 387 S.E.2d 471, 473 (1990).

⁵ Section 15.2-905(A) defines “shielded or screened from view” as “not visible by someone standing at ground level from outside of the property on which the subject vehicle is located.”

⁶ Section 15.2-905(A), in relevant part, defines “inoperable motor vehicle” as “any motor vehicle, trailer or semitrailer which is not in operating condition; or does not display valid license plates; or does not display an inspection decal that is valid or does display an inspection decal that has been expired for more than 60 days.”

⁷ “Prohibit” generally is defined to mean “to forbid by authority” or “to prevent from doing something.” See e.g., MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 929 (10th ed. 2001).

⁸ Emphasis added.

⁹ Without the second provision of § 15.2-905(A), an argument could be made that the localities either had to ban the keeping of inoperable vehicles outright or allow them to be kept without any limitation as to their number. The provisions read together make clear that the localities may enact an outright ban or choose to enact a numeric limitation.

¹⁰ Section 15.2-905(A).

OP. NO. 12-035

COUNTIES, CITIES, AND TOWNS: GENERAL POWERS OF LOCAL GOVERNMENTS-PUBLIC HEALTH AND SAFETY; NUISANCES

When a locality, acting pursuant to § 15.2-922, adopts an ordinance to require installation of smoke detectors in “any building containing one or more dwelling units,” that enactment does not necessitate the retrofitting with smoke detectors of existing buildings containing dwelling units. To remain in compliance with the ordinance, once the smoke detectors are initially installed, the terms of the Uniform Statewide Building Code govern the maintenance or replacement of the smoke detectors.

MARK D. STILES, ESQUIRE
CITY ATTORNEY, CITY OF VIRGINIA BEACH
JULY 26, 2013

ISSUE PRESENTED

You inquire regarding certain legal consequences of a locality’s adoption of an ordinance as enabled by, and described in § 15.2-922 of the *Code of Virginia*, which authorizes a locality to require that smoke detectors be installed in “any building containing one or more dwelling units.” Specifically, you ask whether § 15.2-922

necessitates the retrofit of those buildings for compliance with the current provisions of the Uniform Statewide Building Code (“USBC”).

RESPONSE

It is my opinion that when a locality, acting pursuant to § 15.2-922, adopts an ordinance to require installation of smoke detectors in “any building containing one or more dwelling units,” that enactment does not necessitate the retrofitting with smoke detectors of existing buildings containing dwelling units. It is my further opinion that at such time as smoke detectors may be installed in any building containing dwelling units, the installation must comply with the then-current provisions of the Uniform Statewide Building Code. Finally, it is my opinion that, to remain in compliance with the ordinance, once the smoke detectors are initially installed, the terms of the Uniform Statewide Building Code govern the maintenance or replacement of the smoke detectors.

APPLICABLE LAW AND DISCUSSION

The General Assembly, “to provide comprehensive protection of the public health and safety,”¹ has “directed and empowered [the Board of Housing and Community Development] to adopt and promulgate a Uniform Statewide Building Code.”² Generally,

The Building Code shall prescribe building regulations to be complied with in the construction and rehabilitation of buildings and structures, and the equipment therein as defined in § 36-97, and shall prescribe regulations to ensure that such buildings and structures are properly maintained, and shall also prescribe procedures for the administration and enforcement of such regulations, including procedures to be used by the local building department in the evaluation and granting of modifications for any provision of the Building Code, provided the spirit and functional intent of the Building Code are observed and public health, welfare and safety are assured. The provisions of the Building Code and modifications thereof shall be such as to protect the health, safety and welfare of the residents of the Commonwealth[.]^[3]

Moreover, the General Assembly has provided that “[s]uch building code shall supersede the building codes and regulations of the counties, municipalities and other political subdivisions and state agencies.”⁴

Consistent with these overarching legislative policy considerations, § 15.2-922 provides that “[a]ny locality . . . may by ordinance require that smoke detectors be installed in . . . any building containing one or more dwelling units”⁵ The statute further provides that “[s]moke detectors installed pursuant to this section shall be installed in conformance with the provisions of the Uniform Statewide Building Code . . . , and any locality with an ordinance shall follow a uniform set of standards for maintenance of smoke detectors established in the [USBC].”⁶

“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.”⁷ “Under basic rules of statutory construction, we determine the General Assembly’s intent from the

words contained in the statute.”⁸ In addition, generally, “statutes may be considered as *in pari materia* when they relate to . . . the same subject or to closely connected subjects or objects. Statutes which have the same general or common purpose or are parts of the same general plan are also ordinarily considered as *in pari materia*.”⁹

The USBC, as adopted in Virginia, generally is divided into three parts. Part I, the Virginia Construction Code (“VCC”), governs the construction of new buildings and structures.¹⁰ Part II, the Virginia Rehabilitation Code (“VRC”), contains regulations specific to the rehabilitation of existing buildings.¹¹ Part III, the Virginia Maintenance Code (“VMC”), contains regulations specific to the maintenance of existing structures.¹²

By the express terms of § 15.2-922, upon a locality’s adoption of an ordinance requiring the installation of smoke detectors, subsequent installations of smoke detectors should comply with the provisions of the then-applicable edition and subdivision of the USBC for a particular building that is to contain one or more dwelling units.¹³ Once initially installed into a building containing such dwelling units, § 15.2-922 requires only that they be maintained in accordance with the USBC.¹⁴ Thus, the applicable provisions of that code, as they may be revised from time to time and applicable to smoke detectors, will govern all post-installation matters.

With respect to the maintenance of existing buildings and structures, the VMC currently provides that

[b]uildings and structures shall be maintained and kept in good repair in accordance with the requirements of this code and when applicable in accordance with the USBC under which such building or structure was constructed. No provision of this code shall require alterations to be made to an existing building or structure or to equipment unless conditions are present which meet the definition of an unsafe structure or a structure unfit for human occupancy.^[15]

Thus, the VMC generally does not require alteration of existing buildings, structures, or equipment to comply with periodic maintenance-related revisions in the USBC.¹⁶ Nevertheless, there is a notable exception to this rule with respect to smoke detectors, dependent upon a specific, inspection-based determination of a locality’s building official:

Smoke detectors in buildings containing dwelling units. AC-powered smoke detectors with battery backup or an equivalent device shall be required to be installed to replace a defective or inoperative battery-powered smoke detector located in buildings containing one or more dwelling units or rooming houses offering to rent overnight sleeping accommodations, when it is determined by the building official that the responsible party of such building or dwelling unit fails to maintain battery-powered smoke detectors in working condition.^[17]

You specifically ask whether the adoption of an ordinance pursuant to § 15.2-922 “requires the retrofit of . . . [existing] . . . buildings for compliance with the current

provisions of...” the USBC. In my examination of the USBC, I find only the above-quoted provision that is specifically directed to smoke detectors in buildings containing dwelling units; its language does not generally require the retrofitting of existing buildings with such detectors. This absence of language distinctly differs from USBC provisions relating to smoke detectors in several other types of existing structures where human habitation occurs, such as those specific to college and university dormitories,¹⁸ juvenile care facilities,¹⁹ assisted living facilities,²⁰ hotels and motels,²¹ and adult day care centers.²² For each of these facilities, the USBC requires installation of smoke detectors regardless of when the building was constructed. Based upon these differences in wording within the USBC regarding the requirement to retrofit existing buildings with smoke detectors, I conclude that local ordinances adopted pursuant to § 15.2-922 do not require the retrofit of existing buildings that contain one or more dwelling units so as to require the immediate installation of smoke detectors.²³

As noted above, following a locality’s adoption of an ordinance pursuant to §15.2-922, and according to that statute’s express language, any installation of smoke detectors in buildings containing dwelling units should be in accordance with the then-current provisions of the USBC.²⁴ Moreover, with respect to post-installation maintenance or replacement of smoke detectors in a such a building, one must refer to the applicable sections of the *Code of Virginia*, to smoke detector-specific provisions of the USBC, and to any responsible party-specific determinations of the local building official for appropriate guidance.

CONCLUSION

Accordingly, it is my opinion that when a locality, acting pursuant to § 15.2-922, adopts an ordinance to require installation of smoke detectors in “any building containing one or more dwelling units,” that enactment does not necessitate the retrofitting with smoke detectors of existing buildings containing dwelling units. It is my further opinion that at such time as smoke detectors may be installed in any building containing dwelling units, the installation must comply with the then-current provisions of the Uniform Statewide Building Code. Finally, it is my opinion that, to remain in compliance with the ordinance, once the smoke detectors are initially installed, the terms of the Uniform Statewide Building Code govern the maintenance or replacement of the smoke detectors.

¹ VEPCO v. Savoy Constr. Co., 224 Va. 36, 44, 294 S.E.2d 811, 817 (1982).

² VA. CODE ANN. § 36-98 (2011).

³ Section 36-99(A) (2011).

⁴ Section 36-98.

⁵ VA. CODE ANN. § 15.2-922 (2012).

⁶ *Id.* The Virginia Statewide Fire Prevention Code (“VSFPC”) contains similar local-option enabling provisions with respect to smoke alarms. 13 VA. ADMIN. CODE § 5-51-11(E) (2013). This opinion focuses only on your inquiries respecting § 15.2-922, and its enabling authority respecting smoke *detectors*.

⁷ *Cuccinelli v. Rector & Visitors of the Univ. of Va.*, 283 Va. 420, 425, 722 S.E.2d 626, 629 (2012) (quoting *Commonwealth v. Amerson*, 281 Va. 414, 418, 706 S.E.2d 879, 882 (2011)) (further citation and internal quotation marks omitted).

⁸ *Williams v. Commonwealth*, 265 Va. 268, 271, 576 S.E.2d 468, 470 (2003) (citing *Vaughn, Inc. v. Beck*, 262 Va. 673, 677, 554 S.E.2d 88, 90 (2001); *Thomas v. Commonwealth*, 256 Va. 38, 41, 501 S.E.2d 391, 393 (1998)).

⁹ *Prillaman v. Commonwealth*, 199 Va. 401, 405, 100 S.E.2d 4, 7 (1957).

¹⁰ *See* 13 VA. ADMIN. CODE §§ 5-63-10 through 5-63-390 (2013).

¹¹ *See* 13 VA. ADMIN. CODE §§ 5-63-400 through 5-63-440 (2013).

¹² *See* 13 VA. ADMIN. CODE §§ 5-63-450 through 5-63-540 (2013).

¹³ Identification of the specific kind or type of smoke detector required to be installed in a building containing one or more dwelling units, upon the enactment of such an ordinance, is beyond the scope of this Opinion.

¹⁴ This maintenance requirement would apply to smoke detectors existing in a building containing one or more dwelling units on the effective date of an ordinance adopted pursuant to § 15.2-922.

¹⁵ *See* 13 VA. ADMIN. CODE § 5-63-470(B) (2013).

¹⁶ *See Clayton v. State Bldg. Code Technical Review Bd.*, 2011 Va. App. LEXIS 36, *8, 2011 WL 382134 (2011) (unpublished).

¹⁷ 13 VA. ADMIN. CODE § 5-63-350(P) (which provision relates to existing structures, and adds a § 3413.6 to the USBC in Virginia, derivative of the section-numbering system found in the 2009 International Building Code). Identification of the specific regulatory provisions or local conditions that may lead a locality's building official to conduct an inspection of an existing building's smoke detectors is beyond the scope of this Opinion. *See* VA. CODE ANN. § 36-105 (2012) (setting forth general provisions regarding building inspections).; *and see* 13 VA. ADMIN. CODE § 5-51-135(H) (containing language for inclusion in the VSFPC pertaining to the frequency of inspection of smoke detectors). *See generally* VA. CODE ANN. §§ 36-99.3 through 36-99.5:1 (2011), *and* 13 VA. ADMIN. CODE § 5-63-650(K) through (O), and (Q) through (X) (for examples of statutory and USBC provisions relating to smoke detectors that are not germane to your specific inquiries).

¹⁸ *See* 13 VA. ADMIN. CODE § 5-63-350(L) (which provision relates to existing structures, and adds a § 3413.2 to the USBC in Virginia).

¹⁹ *See* 13 VA. ADMIN. CODE § 5-63-350(M) (which provision relates to existing structures, and adds a § 3413.3 to the USBC in Virginia).

²⁰ *See* 13 VA. ADMIN. CODE § 5-63-350(O) (which provision relates to existing structures, and adds a § 3413.5.2 to the USBC in Virginia).

²¹ *See* 13 VA. ADMIN. CODE § 5-63-350(T) (which provision relates to existing structures, and adds a § 3413.10 to the USBC in Virginia).

²² *See* 13 VA. ADMIN. CODE § 5-63-350(X) (which provision relates to existing structures, and adds a § 3416.14 to the USBC in Virginia).

²³ *See generally* *Halifax Corp. v. First Union Nat'l Bank*, 262 Va. 91, 100, 546 S.E.2d 696, 702 (2001) (wherein the court stated, "When analyzing a statute, we must assume that the General Assembly chose, with care, the words it used in enacting the statute, and we are bound by those words when we apply the statute Additionally, when the General Assembly includes specific language in one section of a statute, but omits that language from another section of the statute, we must presume that the exclusion of the language was intentional." (citations omitted)).

²⁴ This opinion focuses upon your inquiry regarding the issue of retrofitting of existing buildings with smoke detectors following a local governing body's adoption of an ordinance pursuant to the enabling authority of § 15.2-922. Thus, it does not address legal issues pertaining to installation of smoke detectors

in new, or newly rehabilitated buildings containing one or more dwelling units, or upon a change of use of a building from non-residential to residential.

OP. NO. 13-001

COUNTIES, CITIES, AND TOWNS: JOINT ACTIONS BY LOCALITIES

ADMINISTRATION OF GOVERNMENT: INVESTMENT OF PUBLIC FUNDS ACT

Two or more political subdivisions may exercise their investment powers by investing in a jointly administered investment pool and such pooled investment program may be organized in the form of a trust fund.

THE HONORABLE LAURA M. RUDY
TREASURER, STAFFORD COUNTY
FEBRUARY 8, 2013

ISSUES PRESENTED

You ask two questions regarding the development of a pooled investment program for the use of local governments and other political subdivisions.¹ Specifically, you ask whether two or more political subdivisions may invest in a jointly administered investment pool, and if so, whether any such pooled investment program can be established in the form of a trust fund.

RESPONSE

It is my opinion that two or more political subdivisions may exercise their investment powers by investing in a jointly administered investment pool and that such pooled investment program may be organized in the form of a trust fund.

BACKGROUND

You relate that a number of political subdivisions in the Commonwealth are interested in establishing a pooled investment program for the exclusive use of political subdivisions, to be named the “Virginia Investment Pool.” You project that this pool will provide greater liquidity and diversity in investment portfolios for individual participants, as well as allowing participating political subdivisions to share investment management and administrative expenses.

You indicate that the Virginia Investment Pool will be focused on investing assets that are available for investment for periods of six months or longer. The program will select investments with an estimated average duration of 1.5 years. Investments made with the pooled funds will be only in securities or instruments listed as authorized investments in the Investment of Public Funds Act of the *Code of Virginia*. Counties, cities, and towns wanting to join will be required to approve an ordinance authorizing execution of an agreement for participation in the Virginia Investment Pool. Other political subdivisions would be required to adopt a resolution for that purpose.

APPLICABLE LAW AND DISCUSSION

In determining whether localities possess a particular power, Virginia follows the Dillon Rule, which provides that “[m]unicipal corporations possess and can exercise only those powers expressly granted by the General Assembly, those necessarily or fairly implied therefrom, and those that are essential and indispensable.”²

The Constitution of Virginia states that,

The General Assembly may provide by general law or special act that any county, city, town or other unit of government may exercise any of its powers or perform any of its functions and may participate in the financing thereof jointly or in cooperation with the Commonwealth or any other unit of government within or without the Commonwealth.^[3]

Pursuant to that enabling authority, the Joint Powers Act⁴ provides that,

Any power, privilege or authority exercised or capable of exercise by any political subdivision of this Commonwealth may be exercised and enjoyed jointly with any other political subdivision of this Commonwealth having a similar power, privilege or authority except where an express statutory procedure is otherwise provided for the joint exercise.^[5]

The Investment of Public Funds Act expressly authorizes political subdivisions to invest funds belonging to them or within their control and enumerates the types of securities in which such funds may be invested.⁶ It is thus clear that political subdivisions are authorized to make and manage independently the investments you describe. Moreover, I am not aware of any statutory procedures specifically governing the potential joint exercise of the investment powers afforded localities separately.

The Joint Powers Act also prescribes how agreements to exercise powers jointly are to be entered into and particular elements that must be contained in the agreement.⁷ You indicate that the Virginia Investment Pool will adhere to these statutory requirements. I therefore conclude that the *Code of Virginia* authorizes two or more political subdivisions to exercise their investment powers by investing in a jointly administered investment pool.

Having answered your first question in the affirmative, I turn to your next question regarding whether such a pooled investment program can be organized as a trust fund. In authorizing local governments to enter into agreements to execute their authorized powers jointly, the Joint Powers Act provides that the agreement, in addition to the items enumerated as required, may contain “the manner of acquiring, holding (including how title to such property shall be held) and disposing of real and personal property used in the undertaking.”⁸ Political subdivisions are thus given substantial discretion in determining how to title and manage funds pooled in the joint execution of their powers. Nowhere does the Code prohibit a trust fund arrangement. I therefore conclude that political subdivisions lawfully may establish a trust fund as the form of organization for the pooled investment program.

CONCLUSION

Accordingly, it is my opinion that two or more political subdivisions may exercise their investment powers by investing in a jointly administered investment pool and that such pooled investment program may be organized in the form of a trust fund.

¹ For purposes of this opinion, I will refer to both municipal corporations (cities, towns, and service authorities) and counties as “political subdivisions.”

² *Richmond v. Confere Club of Richmond, Inc.*, 239 Va. 77, 79, 387 S.E.2d 471, 473 (1990) (citations omitted). A corollary of this rule applies to counties. *See Bd. of Supvrs. v. Countryside Inv. Co.*, 258 Va. 497, 503, 522, S.E.2d 610, 613 (1999) (“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.”)

³ VA. CONST. art. VII, §3.

⁴ VA. CODE ANN. §§ 15.2-1300 through 1310 (2012).

⁵ Section 15.2-1300(A). Previous opinions of the Attorney General have interpreted this provision, for example, to allow two or more counties to establish a joint department of real estate assessment. 2000 Op. Va. Att’y Gen. 68, and to authorize multiple localities and school boards to create a single voluntary, self-funded trust to insure health benefits for their employees and the families of their employees, 2012 Op. Va. Att’y Gen. 72.

⁶ The Investment of Public Funds Act, VA. CODE ANN. §§ 2.2-4500 through 2.2-4519 (2011). You indicate that any investments made by the Virginia Investment Pool will be made in accordance to and in compliance with this list of authorized securities or instruments. I therefore do not address what investments are authorized by this Act, and will assume for purposes of this opinion that all investments are to be made pursuant to this statutory authority and that no investment will be made in any category not specifically authorized therein.

⁷ Section 15.2-1300(B), (C).

⁸ Section 15.2-1300(D)(2). In addition, subsection (D)(1) enables the participating political subdivisions to provide by agreement for “an administrator or a joint board responsible for administering the undertaking. The precise organization, composition, term, powers and duties of any administrator or joint board shall be specified.”

OP. NO. 13-087

COUNTIES, CITIES, AND TOWNS: LOCAL GOVERNMENT PERSONNEL, QUALIFICATION FOR OFFICE, BONDS, DUAL OFFICE HOLDING AND CERTAIN LOCAL GOVERNMENT OFFICERS-INSURANCE AND LEGAL DEFENSE

A political subdivision of the Commonwealth is authorized to pay for the legal defense costs of an employee when such costs are incurred because of the employee’s actions in furtherance of his or her duties when serving the political subdivision.

STEPHEN W. MULLINS, ESQUIRE
 COUNTY ATTORNEY, COUNTY OF DICKENSON
 OCTOBER 11, 2013

ISSUE PRESENTED

You ask whether a political subdivision of the Commonwealth may pay the legal defense costs of an employee when such costs are incurred because of the employee’s actions in furtherance of his or her duties when serving the political subdivision.

RESPONSE

It is my opinion that, pursuant to § 15.2-1520 of the *Code of Virginia*, a political subdivision of the Commonwealth is authorized to pay for the legal defense costs of an employee when such costs are incurred because of the employee's actions in furtherance of his or her duties when serving the political subdivision.

BACKGROUND

You note that the General Assembly has empowered localities such as Dickenson County to create, either by themselves or in conjunction with other localities, political subdivisions to accomplish certain designated tasks, such as economic development, industrial development, public services provision, and housing. Such entities are designated as political subdivisions of the Commonwealth of Virginia, rather than a political subdivision of the creating locality or localities. As examples, you cite to §§ 36-4 and 36-40 (redevelopment and housing authorities), § 15.2-4903(A) (industrial development authorities), § 15.2-5102(A) (public service authorities), and § 15.2-6000 (Virginia Coalfield Economic Development Authority, to which Dickenson County belongs). You further note that each of these political subdivisions has its own governing body and employees, separate from the governing body and employees of the creating locality or localities. You indicate that, from time to time, board members, officers, and employees of these political subdivisions may face legal action - whether civil or criminal - on account of their actions taken in furtherance of their duties for the political subdivision. Such circumstances raise the question of whether a political subdivision may pay the legal defense costs incurred by board members, officers, and employees as a result of these legal actions.

APPLICABLE LAW AND DISCUSSION

Regarding payment of legal defense costs incurred by employees of political subdivisions, § 15.2-1520 provides, in relevant part, as follows:

Notwithstanding any provision of law to the contrary, general or special, a locality, *or political subdivision of such locality* may employ the county, city or town attorney, or the attorney for the Commonwealth, if there be no county, city or town attorney, *or other counsel approved by the governing body to defend it*, or any member thereof, or any officer of the locality, *or political subdivision or employee thereof*, or any trustee or member of any board or commission appointed by the governing body in any legal proceeding to which the governing body, or any member thereof, or any of the foregoing named persons may be a defendant, when such proceeding is instituted against it, or them by virtue of any actions in furtherance of their duties in serving the locality or political subdivision as its governing body or as members thereof or the duties or service of any officer or employee of the locality or political subdivision or any trustee or any member of any board or commission appointed by the governing body.^[1]

This statute is a recodified version of former § 15.1-19.2, which, prior to its repeal in 1997, provided in relevant part as follows:

Notwithstanding any other provision of law, the governing body of any county, city, town, or *political subdivision* may employ the city attorney, the town attorney, or the attorney for the Commonwealth, if there be no city attorney or town attorney, or *other counsel approved by such governing body to defend it*, or any member thereof, or any officer of such county, city, town, or *political subdivision or employee thereof*, or any trustee or member of any board or commission appointed by the governing body in any legal proceeding to which such governing body, or any member thereof, or any of the foregoing named persons may be a defendant, when such proceeding is instituted against it, or by them by virtue of any actions in furtherance of their duties in serving such county, city, town or political subdivision as its governing body or as members thereof or the duties or service of any officer or employee of such county, city, town or political subdivision or any trustee or any member of any board or commission appointed by such governing body.^[2]

For purposes of your inquiry, a comparison of these two statutes raises the question of whether the General Assembly intended a substantive change in the law when it substituted the phrase “a locality, or *political subdivision of such locality*” for the phrase “any county, city, town, or *political subdivision*.” In other words, the question is whether, by effecting this change, whether the General Assembly intended to limit the power to pay for legal defense costs of employees to only political subdivisions of a locality, as opposed to political subdivisions in general. For the reasons outlined below, it is my opinion that the General Assembly did not intend such a substantive change in the law.

First, the available legislative history pertaining to the recodification of former § 15.1-19.2 to current § 15.2-1520 does not support the existence of such a substantive change. As noted in a prior Attorney General opinion, “[i]n 1997, the Virginia Code Commission recommended recodification of Title 15.1, which had not been recodified since 1962, to resolve confusion caused by conflicting and outdated provisions, and to reorganize and simplify existing statutes into a more user-friendly Title 15.2.”³ Regarding former § 15.1-19.2, the Virginia Code Commission’s drafting note indicates that the recodification made “[n]o substantive change in the law.”⁴ Moreover, “there is a presumption that a recodified statute does not make substantive changes in the former statute unless a contrary intent plainly appears in the recodified statute.”⁵ Nothing in the recodified statute clearly suggests an intent to make a substantive change, particularly given the Virginia Code Commission’s Report.⁶

Because it appears that the General Assembly did not intend a substantive change to former § 15.1-19.2, previous interpretations of that statute may be utilized for guidance. In *Beckett v. Board of Supervisors of Accomack County*,⁷ the Supreme Court held that, under former § 15.1-19.2, the Board of Supervisors was authorized to reimburse the County Administrator for legal expenses incurred when he defended himself against criminal charges arising from his official duties performed on the County’s behalf. In addition, a prior Attorney General opinion determined that former § 15.1-19.2 authorized a local redevelopment and housing authority to employ counsel to defend an employee, or to ratify an employee’s appointment of counsel

under the principles of agency if the authority finds that the employee acted on behalf of the governing body when he appointed counsel.⁸ Based on the foregoing legislative history reflecting no substantive change to former § 15.1-19.2, the analysis set forth in *Beckett* and in the prior Attorney General opinion applies equally to your question.

Second, under Virginia law, the term “political subdivision” is understood as referring to a political subdivision of the Commonwealth. Previous Attorney General opinions have described political subdivisions as follows:

A political subdivision is created by the legislature to exercise some portion of the state’s sovereignty in regard to one or more specific governmental functions. It is independent from other governmental bodies, in that it may act to exercise those powers conferred on it by law without seeking the approval of a superior authority. It employs its own consultants, attorneys, accountants and other employees whose salaries are fixed by the political subdivision, and it often incurs debts which are not debts of the Commonwealth but are debts of the political subdivision.^[9]

While the *Code of Virginia* contains references to political subdivisions of a locality, including the reference in § 15.2-1520,¹⁰ I am unaware of any provision of Virginia law that allows a locality to create a political subdivision of itself where such an entity would not be considered a political subdivision of the Commonwealth.¹¹ Instead, political subdivisions are created either directly by statute,¹² or by the actions of one or more localities pursuant to authority granted by enabling statutes.¹³ In order for an entity established by a locality to be considered a political subdivision, that entity must first be designated as such by statute.¹⁴ Moreover, the term “political subdivision” in § 15.2-1520 is not specifically defined.¹⁵ Therefore, I conclude that the language of § 15.2-1520 allowing political subdivisions to pay certain legal defense costs of employees refers to political subdivisions of the Commonwealth such as those voluntarily established by a locality pursuant to authority granted by enabling statutes.

CONCLUSION

Accordingly, it is my view that, pursuant to § 15.2-1520 of the *Code of Virginia*, a political subdivision of the Commonwealth is authorized to pay for the legal defense costs of an employee when such costs are incurred because of the employee’s actions in furtherance of his or her duties when serving the political subdivision.

¹ VA. CODE ANN. § 15.2-1520 (2012) (emphasis added).

² VA. CODE ANN. § 15.1-19.2 (1989) (repealed 1997) (emphasis added).

³ 2003 Op. Va. Att’y Gen. 52, n.8 (citing 5 H. & S. Docs., Report of the Virginia Code Commission on the Recodification of Title 15.1 of the Code of Virginia, S. Doc. No. 5, at i (1997)).

⁴ 5 H. & S. Docs., Report of the Virginia Code Commission on the Recodification of Title 15.1 of the Code of Virginia, S. Doc. No. 5, at 380-81 (1997).

⁵ *Waldrop v. Commonwealth*, 255 Va. 210, 214, 495 S.E.2d 822, 825 (1998) (citations omitted).

⁶ The Virginia Supreme Court recently cited to the drafting notes of the Virginia Code Commission’s Report as authority regarding the recodification of former Title 15.1, stating:

The Commission's report on the recodification is the impetus of the underlying legislation at issue here. The General Assembly expressly instructed the Commission "to study Title 15.1" and report back a revision of the title. Senate J. Res. 2, 1994 Acts, at 2600. The General Assembly then enacted into law the proposals contained in the report with few amendments, and no amendments at all to the recommended language of the provision that is now codified as Code § 15.2-852(A). We therefore accept the report's drafting note as persuasive authority that the General Assembly did not intend to effectuate a substantive change to the definition of "financial or business interest" with the 1997 recodification.

Newberry Station Homeowners Ass'n. v. Bd. of Spvrs., 285 Va. 604, 617, 740 S.E.2d 548, 555 (2013).

⁷ 234 Va. 614, 363 S.E.2d 918 (1988).

⁸ 1993 Op. Va. Att'y Gen. 70, 73 (citations omitted).

⁹ 2011 Op. Va. Att'y Gen. 154, 155 (quoting 2002 Op. Va. Att'y Gen. 281, 283).

¹⁰ See, e.g., VA. CODE ANN. §§ 15.2-962 (2012) and 15.2-1518 (2012).

¹¹ Given both context and the drafting note, the reference to "political subdivision of such locality," would appear to limit the political subdivisions for which the locality may pay legal fees to those affiliated with the locality. Thus, for example, Dickenson County may pay legal costs incurred by an employee of the public service authority with which it is affiliated, but may not pay for the legal expenses incurred by employees of a similar public service authority that was created to serve the citizens of Northern Virginia or Tidewater.

¹² See, e.g., § 15.2-6000 (2012) (establishing the Virginia Coalfield Economic Development Authority).

¹³ See, e.g., VA. CODE ANN. §§ 36-4 (2011) (enabling activation of a redevelopment and housing authority in a locality when approved by referendum), 36-40 (2011) (enabling the creation of regional housing authorities).

¹⁴ See Short Pump Town Ctr. Cmty. Dev. Auth. v. Hahn, 262 Va. 733, 745-46, 554 S.E.2d 441, 447 (2001) ("[I]n the absence of any statutory designation of community development authorities as 'political subdivisions,' we conclude that the [Short Pump Community Development Authority] is not such an entity."); 2011 Op. Va. Att'y Gen. 154, 156 ("The fact that the General Assembly did not designate regional partnerships as political subdivisions provides a strong indication that they do not qualify as political subdivisions, particularly when the General Assembly ordinarily provides for such a designation.").

¹⁵ Compare VA. CODE ANN. Title 15.2, Chapter 15 with Title 15.2, Chapter 27, § 15.2-2701 (the latter providing, "For the purposes of [Chapter 27], "political subdivision" means any county, city or town, school board, Transportation District Commission, or any other local governmental authority or local agency or public service corporation owned, operated or controlled by a locality or local government authority, with power to enter into contractual undertakings.").

OP. NO. 13-024

COUNTIES, CITIES, AND TOWNS: PARK AUTHORITIES ACT

Law enforcement officers may enforce against trail users stop signs installed on the Washington and Old Dominion Regional Park Trail if such signs represent a rule or regulation of the Northern Virginia Regional Park Authority.

THE HONORABLE JOE T. MAY
MEMBER, HOUSE OF DELEGATES
JUNE 14, 2013

ISSUE PRESENTED

You inquire whether law enforcement officers may enforce stop signs posted by the Northern Virginia Regional Park Authority (“NVRPA”) on trails located within the Washington and Old Dominion Regional Park (“W&OD Trail”).

RESPONSE

It is my opinion that law enforcement officers may enforce against trail users stop signs installed on the W&OD Trail if such signs represent a rule or regulation of the NVRPA.

BACKGROUND

You relate that the NVRPA seeks to establish uniform guidelines for the control of cycling traffic through the eight jurisdictions along the W&OD Trail. The W&OD Trail consists of a 10 foot wide, 45 mile long paved trail for walking, running, cycling, and skating, and 30 miles of a parallel gravel trail for horseback riding. The W&OD Trail passes through four towns, three counties, and one city. Trail users encounter potential collision with automobiles or other vehicles at the 70 road grade crossings.

APPLICABLE LAW AND DISCUSSION

The Northern Virginia Regional Park Authority is established as an authority under the Virginia Park Authorities Act.¹ Each authority established under the Virginia Park Authorities Act is

authorized and empowered . . . [t]o adopt such rules and regulations from time to time, not in conflict with the laws of this Commonwealth, concerning the use of properties under its control as will tend to the protection of such property and the public thereon. No such rule or regulation shall be adopted until after descriptive notice of an intention to propose such rule or regulation for passage has been published in accordance with the procedures required for the adoption of general county ordinances and emergency county ordinances as set forth in § 15.2-1427, mutatis mutandis. The full text of any proposed rule or regulation shall be available for public inspection and copying during regular office hours of the authority at a place designated in the published notice.^[2]

Thus, the NVRPA clearly is authorized to adopt rules and regulations, including traffic provisions, in furtherance of protecting persons using any property within its control.

The violation of any such rule or regulation adopted by the NVRPA is deemed by law to be a Class 4 misdemeanor.³ Thus, “the General Assembly has declared the violation of a park authority’s rules and regulations to be a misdemeanor, which is a crime, an offense against the state.”⁴ It is the duty of sheriffs and local police officers to enforce state laws.⁵ Consequently, no further legal justification is required to allow local police, sheriffs, or sheriff’s deputies to enforce park rules or regulations requiring trail users to stop prior to entering a highway.⁶

CONCLUSION

Accordingly, it is my opinion that law enforcement officers may enforce against trailer users stop signs installed on the W&OD Trail if such signs represent a rule or regulation adopted by NVRPA under the Virginia Park Authorities Act.⁷

¹ VA. CODE ANN. §§ 15.2-5700 through 15.2-5714 (2012).

² Section 15.2-5704(17) (2012).

³ Section 15.2-5705 (2012).

⁴ 1985-86 Op. Va. Att’y Gen. 255, 255 (responding to the Loudoun County Sheriff that sheriffs indeed have a duty to enforce the rules and regulations adopted by regional park authorities located in Loudoun County while noting that the sheriff retains exclusive control over the assignment of personnel and the day-to-day operations of his office).

⁵ See §§ 15.2-1609 (2012), 15.2-1704(A) (2012).

⁶ The enforceability of stop signs along the trail was addressed in part with recently enacted legislation that enables localities to adopt ordinances requiring users of shared-use paths to stop before crossing highways at marked crosswalks subject to fine not to exceed \$100. 2013 Va. Acts chs. 507, 681. In its correspondence with you, the NVRPA argues the W&OD Trail might be considered a “highway” and, as such, signs governing traffic on the trail posted by NVRPA would be eligible for traffic enforcement from local sheriff and police departments. Because of the conclusion reached herein, it is unnecessary to address this alternative argument. In addition, this opinion declines to determine the sufficiency of current signage.

I further note that “highway” is generally defined as

the entire width between the boundary lines of every way or place open to the use of the public for purposes of vehicular travel in the Commonwealth, including the streets and alleys, and, for law-enforcement purposes, (i) the entire width between the boundary lines of all private roads or private streets that have been specifically designated “highways” by an ordinance adopted by the governing body of the county, city, or town in which such private roads or streets are located and (ii) the entire width between the boundary lines of every way or place used for purposes of vehicular travel on any property owned, leased, or controlled by the United States government and located in the Commonwealth.

VA. CODE ANN. § 46.2-100 (Supp. 2012).

⁷ This Opinion makes no assumption as to whether such a properly adopted rule or regulation already exists. Rather, this Opinion makes note that NVRPA is vested with the authority to enact such a rule or regulation. See § 15.2-5704(17).

OP. NO. 13-045

COUNTIES, CITIES, AND TOWNS: PLANNING, SUBDIVISION OF LAND AND ZONING-GENERAL PROVISIONS

Section 15.2-2204(B) requires a local planning commission to give written notice to the owner of each parcel of land involved in a downzoning when other rezoning proposals under consideration include increases in density allowances that, when considered in conjunction with the downzoning, result in no net loss of subdividable lots in the locality.

THE HONORABLE LACEY E. PUTNEY
MEMBER, HOUSE OF DELEGATES
AUGUST 23, 2013

ISSUE PRESENTED

In your request, you specifically ask, “Does a municipality have the right to aggregate differing and other rezoning proposals by alleging no net loss of subdividable lots under new rezoning in order to avoid sending written notice to directly affected landowners subject to proposed down zoning as require by [§ 15.2-2204(B) of the *Code of Virginia*]?” Thus, in other words, you inquire whether § 15.2-2204(B) requires a local planning commission to give written notice to the owner of each parcel of land involved in a downzoning when other rezoning proposals under consideration include increases in density allowances that, when considered in conjunction with the downzoning, result in no net loss of subdividable lots in the locality.

RESPONSE

It is my opinion that § 15.2-2204(B) of the *Code of Virginia* requires a local planning commission to give written notice to the owner of each parcel of land involved in a downzoning under the circumstances you present.

BACKGROUND

You indicate that Bedford County’s Board of Supervisors proposes eliminating a twenty-acre agricultural subdivision provision contained in the county’s current zoning ordinance. You further state that this change would constitute a downzoning of numerous properties in the county. The county is also considering other amendments to the zoning ordinance that would increase the number of subdividable lots in certain portions of the county. These increases would offset the loss of subdividable lots eliminated by the downzoning, thereby resulting in no net loss of subdividable lots in the county. In all, you indicate that more than 600 lots or parcels would be affected by the proposed rezonings. You also indicate that not all of the properties affected by the downzoning would receive an offsetting increase in subdividable lots from the other proposed rezoning actions.

APPLICABLE LAW AND DISCUSSION

Section 15.2-2204(B) provides, in pertinent part, that:

When a proposed amendment of the zoning ordinance involves . . . a change to the applicable zoning ordinance text regulations that decreases the allowed dwelling unit density of any parcel of land, then, in addition to the advertising as above required . . . written notice shall be given by the local planning commission, or its representative, at least five days before the hearing to the owner, owners, or their agent of each parcel of land involved . . .

“The primary objective in statutory construction is to ascertain and give effect to legislative intent[.]”¹ and “[i]n construing statutes, courts should give the fullest possible effect to the legislative intent embodied in the entire statutory enactment.”² Courts “must determine legislative intent by what the statute says and not by what [the court] think[s] it should have said.”³ Finally, “[w]hen the language of a statute is unambiguous, we are bound by the plain meaning of that language.”⁴

The plain language of § 15.2-2204(B) provides that notice must be mailed to affected landowners if the zoning ordinance text amendment “decreases the allowed dwelling unit density of *any parcel* of land.”⁵ When enacting § 15.2-2204, the focus was placed on the rights adhering to each parcel of land and the General Assembly included no provisions allowing a locality to modify the requirement to notify landowners by offsetting the proposed decrease in the allowed dwelling unit density on some properties with proposed increases in density allowances on other properties. Instead, the statute clearly specifies that the owners of each individual parcel affected by a proposed decrease in allowed development density are entitled to notice prior to reductions in those density allowances. Accordingly, the plain and unambiguous terms of the statute require that individual notice must be mailed to the owners of all parcels of land affected by any proposed downzoning at least five days prior to the hearing on the proposed downzoning.⁶

In enacting zoning enabling legislation, “the General Assembly of Virginia has undertaken to achieve . . . a delicate balance between the individual property rights of its citizens and the health, safety and general welfare of the public as promoted by reasonable restrictions on those property rights.”⁷ “Critical to this balance is ensuring that landowners have notice and opportunity to be heard when zoning ordinances will change the permitted use of land”⁸ This notice is an essential component of due process and a prerequisite to actions adversely affecting a citizen’s property rights.⁹ Thus, a locality must adhere to applicable statutory notice requirements.

CONCLUSION

Accordingly, it is my opinion that § 15.2-2204(B) of the *Code of Virginia* requires a local planning commission to give written notice to the owner of each parcel of land involved in a downzoning, notwithstanding the fact that other rezoning proposals under consideration include increases in density allowances which, considered in conjunction with the downzoning, result in no net loss of subdividable lots in the locality.

¹ Conger v. Barrett, 280 Va. 627, 630, 702 S.E.2d 117 (2010) (quoting Turner v. Commonwealth, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983)) (further citation omitted).

² Va. Real Estate Bd. v. Clay, 9 Va. App. 152, 157, 384 S.E.2d 622, 625 (1989).

³ Commonwealth v. Anderson, 281 Va. 414, 421, 706 S.E.2d 879, 884 (2011) (quoting Virginian-Pilot Media Cos., LLC v. Dow Jones & Co., 280 Va. 464, 469, 698 S.E.2d 900, 902 (2010)) (further citation omitted).

⁴ Cuccinelli v. Rector & Visitors of the Univ. of Va., 283 Va. 420, 425, 722 S.E.2d 626, 629 (2012) (quoting Kozmina v. Commonwealth, 281 Va. 347, 349, 706 S.E.2d 860, 862 (2011)) (further citation and internal quotation marks omitted).

⁵ VA. CODE ANN. § 15.2-2204(B) (Supp. 2013) (emphasis added). See 1981-82 Op. Va. Att’y Gen. 464, 464 (finding that notice requirements of predecessor statute to § 15.2-2204 are plain and must be satisfied).

⁶ *Id.*

⁷ Bd. of Supvrs. v. Horne, 216 Va. 113, 120, 215 S.E.2d 453, 458 (1975).

⁸ 2007 Op. Va. Att’y Gen. 50, 51.

⁹ *Id.*

OP. NO. 13-053**COUNTIES, CITIES, AND TOWNS: PLANNING, SUBDIVISION OF LAND AND ZONING-ZONING**

Spotsylvania County Board of Supervisors may not enact a zoning ordinance amendment that applies to parcels located in areas defined by the boundaries of electoral districts, without regard to the boundaries of the county's zoning districts.

JAMES R. BENKAHLA, ESQUIRE
INTERIM COUNTY ATTORNEY
COUNTY OF SPOTSYLVANIA
SEPTEMBER 20, 2013

ISSUE PRESENTED

You ask whether the Spotsylvania County Board of Supervisors (the “Board”) may enact a zoning ordinance amendment that applies to parcels located in areas defined by the boundaries of electoral districts, without regard to the boundaries of the county’s zoning districts.

RESPONSE

It is my opinion that the Board may not enact a zoning ordinance amendment that applies to parcels located in areas defined by the boundaries of electoral districts, without regard to the boundaries of the county’s zoning districts.

BACKGROUND

You relate that the Spotsylvania County zoning ordinance has twenty-eight zoning districts ranging from Agricultural to Mixed Use. You further relate that there are seven electoral districts used to elect the Board, and, that the boundaries of the zoning districts and the electoral districts are not the same. On February 12, 2013, the Board adopted an amendment to the County zoning ordinance (the “February Amendment”) that authorized the keeping of laying hens in eleven of the County’s zoning districts zoned for agricultural or residential uses, but only in the parts of those eleven zoning districts that also lie within the boundaries of four of the County’s electoral districts.¹ The February Amendment did not authorize the keeping of laying hens in the parts of those eleven agricultural and residential zoning districts that lie outside the boundaries of those four electoral districts. In effect, the February Amendment treats parcels with the same zoning classification differently based on the electoral district in which they are found.

APPLICABLE LAW AND DISCUSSION

“In determining the legislative powers of local governing bodies, Virginia follows the Dillon Rule of strict construction.”² This rule states that local governing bodies “have only those powers that are expressly granted, those necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable.”³ Accordingly, if no delegation from the legislature can be found to authorize the enactment of a local ordinance, then the local ordinance is void.⁴ Moreover, when the

legislature has created an express grant of authority, that authority exists only to the extent specifically granted,⁵ and when a local ordinance conflicts with a statute enacted by the General Assembly, the statute must prevail.⁶

I find nothing in the *Code of Virginia* that provides express authority to regulate fractional parts of a zoning district according to the boundaries of electoral districts. Nonetheless, Virginia law does enable a locality to enact zoning ordinances to regulate the use and development of the territory under its jurisdiction.⁷ Specifically, § 15.2-2280 permits a locality to adopt ordinances classifying the territory under its jurisdiction into districts “as it may deem best suited to carry out the purposes of [the zoning article],” and once such territory is classified,⁸ the provision further authorizes the locality to regulate or restrict land use within each district according to the applicable “agricultural, business, industrial, residential, flood plain and other specific uses.” Notwithstanding this broad grant of authority, § 15.2-2282 requires that all local zoning regulations “be uniform for each class or kind of buildings and uses throughout each district.”

In construing statutes, the plain meaning of the language used controls and determines legislative intent unless a literal construction would be manifestly absurd.⁹ Further, two statutes that are parts of the same statutory plan or deal with the same subject must be read and construed together.¹⁰ Sections 15.2-2280 and 15.2-2282 are parts of an overall statutory plan enabling, and governing, local authority to zone property.¹¹ When read together, the language of these statutes provides that a locality may classify its territory into zoning districts; however, in so doing, the locality must ensure that all zoning regulations are uniform throughout each zoning district. Accordingly, § 15.2-2282 serves to limit the authority granted under § 15.2-2280.

On its face, the February Amendment treats similarly situated persons within the same zoning district differently. It uses a jurisdictional division created for an unrelated purpose, the electoral district, to inconsistently regulate land use within several of its zoning districts.¹² Specifically, owners of property in one of the four electoral districts named in the February Amendment are authorized to use their property in a way that is disallowed to property owners in the county’s three other electoral districts. Because the February Amendment does not comply with the requirement that uses be uniform throughout each individual zoning district, it conflicts with a prescribed limitation placed by the General Assembly upon local governing bodies respecting land use regulation.¹³

CONCLUSION

Accordingly, it is my opinion that the Board of Supervisors may not enact a zoning ordinance amendment that applies to parcels located in areas defined by the boundaries of electoral districts, without regard to the boundaries of the county’s zoning districts.

¹ COUNTY OF SPOTSYLVANIA, VA., Ordinance No. 23-153 (2013), available at http://www.spotsylvania.va.us/filestorage/2614/4652/4656/4690/16690/Min_021213.pdf (limiting the keeping of domestic laying hens as an accessory use to the Livingston, Chancellor, Salem and Courtland

voting districts). *See also* COUNTY OF SPOTSYLVANIA, VA., Code §§ 23-6.2.2, -6.3.2, -6.4.2, -6.5.2, -6.6.2, -6.7.2, -6.8.2, -6.11.2, -6.12.3, -6.24.2, -6.26.2.

² *Richmond v. Confrere Club of Richmond, Inc.*, 239 Va. 77, 79, 387 S.E.2d 471, 473 (1990).

³ *Sinclair v. New Cingular Wireless PCS, LLC*, 283 Va. 567, 576, 727 S.E.2d 40, 44 (2012) (internal quotation marks omitted).

⁴ *Id.*

⁵ *Cf.*, e.g., 2010 Op. Va. Att’y Gen. 87, 89 n.3; 2010 Op. Va. Att’y Gen. 10, 11; 2002 Op Va. Att’y Gen. 109, 111; 1992 Op. Va. Att’y Gen. 145, 146.

⁶ *See* VA. CODE ANN. § 1-248 (2011); *Sinclair*, 283 Va. at 576, 727 S.E.2d at 44; *Covel v. Town of Vienna*, 280 Va. 151, 162, 694 S.E.2d 609, 616 (2010).

⁷ *See* VA. CODE ANN. § 15.2-2280 (2012).

⁸ Section 15.2-2284 sets forth the considerations that may be used by a locality in creating, and by extension, regulating, zoning districts. I note that conformity with electoral district boundaries is not listed.

⁹ *Halifax Corp. v. First Union Nat’l Bank*, 262 Va. 91, 99-100, 546 S.E.2d 696, 702 (2001).

¹⁰ *Prillaman v. Commonwealth*, 199 Va. 401, 405-406, 100 S.E.2d 4, 7-8 (1957).

¹¹ *See* VA. CODE ANN. Title 15.2, Chap. 22, art. 7, §§ 15.2-2280 through 2316 (2012 & Supp. 2013) (containing statutes governing local zoning laws and regulations).

¹² Statutory provisions relating to the creation and use of electoral districts are contained in another title of the Code. *See, e.g.*, VA. CODE ANN. § 24.2-304.1 (Supp. 2013).

¹³ Section 15.2-2282; *and see discussion* *Schefer v. City Council*, 279 Va. 588, 593, 691 S.E.2d 778, 780-81 (2010).

OP. NO. 12-063

COUNTIES, CITIES, AND TOWNS: PLANNING, SUBDIVISION OF LAND AND ZONING-ZONING

ALCOHOLIC BEVERAGE CONTROL ACT: DEFINITIONS AND GENERAL PROVISIONS

Fauquier County Zoning Ordinance for farm wineries, in part, exceeds the locality’s delegated zoning authority and is preempted by state law governing alcoholic beverages.

THE HONORABLE CHRISTOPHER K. PEACE
MEMBER, HOUSE OF DELEGATES
JULY 19, 2013

ISSUES PRESENTED

You inquire regarding the validity of a Fauquier County Zoning Ordinance related to farm wineries. You specifically ask whether the ordinance’s provisions exceed the locality’s zoning authority, are preempted by state alcoholic beverage control law, or violate the Constitution of Virginia.

RESPONSE

It is my opinion that the Fauquier County Zoning Ordinance for farm wineries, at least in part, is an invalid exercise of local authority because it exceeds the locality’s

delegated zoning authority¹ and is preempted by state law governing alcoholic beverages.

APPLICABLE LAW AND DISCUSSION

Virginia follows the Dillon Rule of strict statutory construction, which provides that “municipal corporations have only those powers expressly granted, those necessarily or fairly implied therefrom, and those that are essential and indispensable”² and its corollary that “[t]he powers of county boards of supervisors are fixed by statute and are limited to those powers conferred expressly or by necessary implication.”³ Therefore, to have the power to act in a certain area, local governments must have express enabling legislation or authority that is necessarily implied from enabling legislation.⁴

Notwithstanding Virginia’s reliance on the Dillon Rule, localities generally are conferred broad zoning powers.⁵ Nonetheless, the General Assembly has restricted localities’ authority to regulate certain activities and events at farm wineries. Section 15.2-2288.3 specifies several areas in which a locality is either limited in or precluded from exercising its zoning power over farm wineries licensed by the Virginia Alcoholic Beverage Control Board. For instance, “[n]o local ordinance regulating noise, other than outdoor amplified music, arising from activities and events at farm wineries shall be more restrictive than that in the general noise ordinance.”⁶ The pertinent County ordinance provides that

Sound generated by outdoor amplified music shall not be audible at or beyond the property line of the Farm Winery. Outdoor amplified music shall include music emanating from a structure, including open pavilions and temporary structures such as tents. In addition, no noise emanating from a Farm Winery shall exceed the noise limits set forth in Section 9-700 [of the county zoning code].^[7]

Because the local provision comports with §15.2-2288.3, I conclude it is a valid exercise of the County’s zoning authority.

More generally, § 15.2-2288.3 recognizes that there will be some local control over farm wineries: it states that

Local restriction upon such activities and events of farm wineries licensed in accordance with Title 4.1 to market and sell their products shall be reasonable and shall take into account the economic impact on the farm winery of such restriction, the agricultural nature of such activities and events, and whether such activities and events are usual and customary for farm wineries throughout the Commonwealth.

It further provides that “[u]sual and customary activities and events at farm wineries shall be permitted without local regulation unless there is a substantial impact on the health, safety, or welfare of the public.”

Also, § 15.2-2288.3 enumerates several specific areas in which local regulation of farm wineries is strictly prohibited. Subsection E expressly provides that

No locality shall regulate any of the following activities of a farm winery licensed in accordance with subdivision 5 of § 4.1-207:

1. The production and harvesting of fruit and other agricultural products and the manufacturing of wine;
2. The on-premises sale, tasting, or consumption of wine during regular business hours within the normal course of business of the licensed farm winery;
3. The direct sale and shipment of wine by common carrier to consumers in accordance with Title 4.1 and regulations of the Alcoholic Beverage Control Board;
4. The sale and shipment of wine to the Alcoholic Beverage Control Board, licensed wholesalers, and out-of-state purchasers in accordance with Title 4.1, regulations of the Alcoholic Beverage Control Board, and federal law;
5. The storage, warehousing, and wholesaling of wine in accordance with Title 4.1, regulations of the Alcoholic Beverage Control Board, and federal law; or
6. The sale of wine-related items that are incidental to the sale of wine.

Section 6-401, subsections (1) through (7), of the Fauquier County Zoning Ordinance designates as “by-right uses accessory to the production and harvesting of grapes,” which shall be allowed at a farm winery “upon approval of a Zoning Permit pursuant to section 13-500,” those activities that § 15.2-2288.3(D) and § 15.2-2288.3(E) prohibit localities from regulating.⁸ To the extent that the process of obtaining a Zoning Permit imposes obligations and burdens, including fees, upon the farm winery applicant and allows Fauquier County the ability to restrict through its review and potential denial of the zoning permit application those activities, the Fauquier County Zoning Ordinance exceeds the locality’s zoning authority.

Additionally, § 4.1-128(A) of the Virginia Code prohibits localities from adopting ordinances that regulate alcoholic beverages or certain activities relating to alcoholic beverages at farm wineries.⁹ Section 6-401, subsections (1) through (5), of the Fauquier County Zoning Ordinance regulates those activities at farm wineries that § 4.1-128(A) prohibits localities from regulating. Therefore, Section 6-401, subsections (1) through (5), of the Fauquier County Zoning Ordinance exceeds the locality’s authority under the provisions of § 4.1-128(A) as well as under the provisions of § 15.2-2288.3.

The remaining restrictions on the activities at farm wineries imposed by Section 6-401, subsections 8 and 9, Sections 6-402, 6-403, 5-1810.1 and 5-1810.2 of the Fauquier County Zoning Ordinance may be consistent with § 15.2-2288.3(A).¹⁰ Whether the restrictions are permitted are factual questions based on whether the locality properly considers the economic impact on the farm winery of such restriction, the agricultural nature of such activities and events, and whether such activities and events are usual and customary for farm wineries throughout the Commonwealth. As this Office consistently has declined to answer questions resolving factual matters, rather than pure questions of statutory or Constitutional interpretation, this Office does not offer a view on the validity of these remaining

sections of the Fauquier County Zoning Ordinance under the locality's zoning authority.¹¹

CONCLUSION

Accordingly, it is my opinion that the Fauquier County Zoning Ordinance for farm wineries, at least in part, is an invalid exercise of local authority because it exceeds the locality's delegated zoning authority and is preempted by state law governing alcoholic beverages.

¹ To the extent a local government ordinance exceeds the powers granted by the General Assembly, the ordinance would violate the Virginia Constitution. *See* VA. CONST. art. VII, § 2

² *Bd. of Supvrs. v. Countryside Inv. Co.*, 258 Va. 497, 503, 522 S.E.2d 610, 613 (1999) (quoting *Bd. of Supvrs. v. Horne*, 216 Va. 113, 117, 215 S.E.2d 453, 455 (1975)).

³ *Cnty. Bd. v. Brown*, 229 Va. 341, 344, 329 S.E.2d 468, 470 (1985); *accord Gordon v. Bd. of Supvrs.*, 207 Va. 827, 832, 153 S.E.2d 270, 274 (1967).

⁴ Any doubt as to the existence of such power must be resolved against the locality. *See City of Richmond v. Bd. of Supvrs.*, 199 Va. at 684, 101 S.E.2d at 645; 2009 Op. Va. Att'y Gen. 41, 42.

⁵ *See* VA. CODE ANN. § 15.2-2280 (2012).

⁶ Section 15.2-2288.3(A) (2012).

⁷ FAUQUIER COUNTY, VA., ZONING ORDINANCE § 6-402(1).

⁸ *See* § 15.2-2288.3(D) ("No locality may treat private personal gatherings held by the owner of a licensed farm winery who resides at the farm winery or on property adjacent thereto that is owned or controlled by such owner at which gatherings wine is not sold or marketed and for which no consideration is received by the farm winery or its agents differently from private personal gatherings by other citizens.").

⁹ *See* § 4.1-128(A) ("No county, city, or town shall, except as provided in § 4.1-205 or § 4.1-129, adopt any ordinance or resolution which regulates or prohibits the manufacture, bottling, possession, sale, wholesale distribution, handling, transportation, drinking, use, advertising or dispensing of alcoholic beverages in the Commonwealth. Nor shall any county, city, or town adopt an ordinance or resolution that prohibits or regulates the storage, warehousing, and wholesaling of wine in accordance with Title 4.1, regulations of the Alcoholic Beverage Control Board, and federal law at a licensed farm winery.").

¹⁰ *See* § 15.2-2288.3(A).

¹¹ *See* 1986-87 Op. Att'y Gen. Va. 252.

OP. NO. 13-035

COUNTIES, CITIES, AND TOWNS: PLANNING, SUBDIVISION OF LAND AND ZONING-ZONING

Section 15.2-2288 authorizes localities to require a special use permit for "the storage or disposal of nonagricultural excavation material, waste and debris if the excavation material, waste and debris are not generated on the farm," regardless of the end use to which the materials may be put.

ANGELA L. HORAN, ESQUIRE
COUNTY ATTORNEY, COUNTY OF PRINCE WILLIAM
OCTOBER 11, 2013

ISSUE PRESENTED

You inquire whether § 15.2-2288 of the *Code of Virginia* allows localities to require a special use permit for the storage or disposal of nonagricultural excavation material on a farm if the excavation material is not generated on the farm, even if the storage or disposal of the excavation material is for an agricultural purpose.

RESPONSE

It is my opinion that § 15.2-2288 authorizes localities to require a special use permit for “the storage or disposal of nonagricultural excavation material, waste and debris if the excavation material, waste and debris are not generated on the farm,” regardless of the end use to which the materials may be put.

BACKGROUND

You relate that the large scale disposal of excavation materials from construction sites on properties zoned for agricultural uses has created a truck traffic problem on the roads in your county. You further state that, in response to this problem, the General Assembly in 2012 amended § 15.2-2288 to exempt “the storage or disposal of nonagricultural excavation material, waste, and debris if the excavation material, waste and debris are not generated on the farm” from the general exemption allowing agricultural activities in agricultural zoning districts to occur without a special exception or special use permit.¹ Following the effective date of this amendment, Prince William County proposed the adoption of a change to its Zoning Ordinance that requires a special use permit for “the storage or disposal of nonagricultural excavation material, if the excavation material is not generated on the farm” in the event that the number of dump truck deliveries exceed certain specified thresholds. The proposed zoning amendment also would specify that the nonagricultural excavation material may include only soil and rock.

APPLICABLE LAW AND DISCUSSION

Virginia follows the Dillon Rule regarding the authority of local governments. That rule states that “. . . local governing bodies ‘have only those powers that are expressly granted [by the General Assembly], those necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable.’”² In that context, fundamental rules of statutory construction require giving the fullest possible effect to the legislative intent embodied in an entire statutory enactment.³ When a statute is expressed in plain and unambiguous terms, whether general or limited, it is assumed that the General Assembly means what it plainly has expressed, and no room is left for construction.⁴

The Virginia General Assembly has given localities the authority to include special exceptions and to permit special uses, i.e., those not ordinarily permitted by right within a zoning district, within zoning ordinances.⁵ The General Assembly has also provided that a zoning ordinance cannot require a special exception or special use permit for “production agriculture or silviculture activity” in an agricultural district.⁶ It then specifically amended the Code to provide that “the storage or disposal of nonagricultural excavation material, waste, and debris if the excavation material,

waste and debris are not generated on the farm” did not qualify as production agriculture or silviculture activity.⁷

When read together, these provisions provide express General Assembly authority to local governing bodies to regulate the storage or disposal of nonagricultural excavation materials not generated on the farm, by enabling localities to impose a special exception or special use permit requirement on that land use activity. The language of the statute is clear and unambiguous, and it is not necessary to look beyond the plain language of the statute to discern its meaning.⁸

You also inquire whether the phrase in the 2012 amendment to § 15.2-2288, “subject to the provisions of the Virginia Waste Management Act” (“WMA”), limits the types of non-agricultural excavation material, waste, and debris that a locality can regulate through the requirement of special use permits.⁹ I conclude that it does not do so. It has been held that “[w]hen the State, in the exercise of its police power, enacts certain regulations, a political subdivision may, if it acts within its delegated powers, legislate on the same subject unless the General Assembly has expressly pre-empted the field.”¹⁰ Moreover, statutes dealing with the same subject matter should be construed together to achieve a harmonious result, and conflicts between them should be resolved so as to give effect to legislative intent.¹¹ Thus, the proviso in § 15.2-2288 regarding the WMA does not serve to preclude the county from acting within its express grant of authority, however, it does necessitate that in any instance of conflict between a local zoning ordinance and the WMA, the provisions of the WMA must prevail.¹²

Significantly, as to the intended use of the non-agricultural excavation materials, waste or debris to be stored or disposed of on agriculturally zoned property, the plain language of § 15.2-2288 does not differentiate a locality’s regulatory authority on the basis of the intended end use of the materials. Thus, it is my opinion that whether such material is destined for agricultural, or non-agricultural, use on the property, does not affect the authority of the locality to require a special use permit to regulate its storage or disposal.¹³

Finally, you note that some members of the public have questioned the reasonableness of the quantitative criteria in the proposed ordinance that trigger the need for a special use permit, and the qualitative limitation specifying that “[n]on-agricultural excavation material shall include only soil and rock,” and not “dump heaps or the storage or disposal of waste or construction debris.” This Office cannot now know the context of any potential future challenge to the proposed ordinance, or whether it ultimately will be adopted, or the specific language that the Board of Supervisors may enact. Thus, it cannot opine on the probable outcome of any such litigation. Nevertheless, I note that if the ordinance ultimately is adopted and thereafter challenged, the burden is on the one challenging it to establish that it is clearly unreasonable, arbitrary or capricious, and that it bears no relation to the public health, safety, morals or general welfare; if the reasonableness of an ordinance is fairly debatable it must be sustained.¹⁴

CONCLUSION

Accordingly, it is my opinion that § 15.2-2288 authorizes localities to require a special use permit for “the storage or disposal of nonagricultural excavation material, waste and debris if the excavation material, waste and debris are not generated on the farm,” regardless of the end use to which the materials may be put.

¹ 2012 Va. Acts ch. 455.

² *Sinclair v. New Cingular Wireless PCS, LLC*, 283 Va. 567, 576 727 S.E. 2d 40, 44 (2012).

³ 2007 Op. Va. Att’y Gen. 50, 51 (citing *Va. Real Estate Bd. v. Clay*, 9 Va. App. 152, 157, 384 S.E.2d 622, 625 (1989)).

⁴ 2009 Op. Va. Att’y Gen. 80, 81.

⁵ VA. CODE ANN. § 15.2-2286.A.1 (2012) provides that “[a] zoning ordinance may include, among other things, reasonable regulations and provisions . . . [f]or variances or special exceptions” Section 15.2-2201 defines “[s]pecial exception” as “a special use, that is a use not permitted in a particular district except by a special use permit granted under the provisions of this chapter and any zoning ordinances adopted herewith.”

⁶ Section 15.2-2288 (2012).

⁷ 2012 Va. Acts ch. 455.

⁸ “[W]hen the language of an enactment is free from ambiguity, resort to legislative history and extrinsic facts is not permitted because we take the words as written to determine their meaning.” *Newberry Station Homeowners Ass’n v. Bd. of Supvrs.*, 285 Va. 604, 614, 740 S.E.2d 548, 553 (2013) (citing *Brown v. Lukhard*, 229 Va. 316, 321, 330 S.E.2d 84, 87 (1985)).

⁹ The Virginia Waste Management Act, VA. CODE ANN. §§ 10.1-1400 through 10.1-1457 (2012), establishes the Virginia Waste Management Board and provides for a regulatory system to supervise and control waste management activities in the Commonwealth. The WMA’s numerous provisions encompass regulation of such diverse waste-related matters as solid waste (§§ 10.1-1408.1 through 10.1-1413.1), landfill closures (§ 10.1-1413.2), litter control and recycling (§§ 10.1-1414 through 10.1-1425), lead acid batteries (§§ 10.1-1425.1 through 10.1-1425.5), recycling by State agencies and universities (§§ 10.1-1425.6 through 10.1-1425.9), pollution prevention (§§ 10.1-1425.10 through 10.1-1425.19), heavy metals in packaging (§§ 10.1-1425.20 through 10.1-1425.25), cathode ray tubes and mercury thermostats recycling (§ 10.1-1425.26), computer recovery and recycling (§§ 10.1-1425.27 through 10.1-1425.38), rechargeable battery recycling (§ 10.1-1425.39), hazardous waste management (§§ 10.1-1426 through 10.1-1429), radioactive waste (§§ 10.1-1430 through 10.1-1432), siting of hazardous waste facilities (§§ 10.1-1433 through 10.1-1449), transportation of hazardous materials (§§ 10.1-1450 through 10.1-1454), and transportation of solid and medical wastes on State waters (§ 10.1-1454.1), and provides for enforcement of the Act and judicial review (§§ 10.1-1455 through 10.1-1457). The WMA defines numerous terms for purposes of its regulatory provisions. *See* §§ 10.1-1400, 10.1-1414, 10.1-1425.10, 10.1-1425.21, 10.1-1425.27 and 10.1-1433.

¹⁰ *Ticonderoga Farms, Inc. v. County of Loudoun*, 242 Va. 170, 175, 409 S.E.2d 446, 448 (1991) (citing *King v. County of Arlington*, 195 Va. 1084, 1088, 81 S.E.2d 587, 590 (1954)).

¹¹ *See* 2009 Op. Va. Att’y Gen. 80, 81; 2009 Op. Va. Att’y Gen. 115, 118.

¹² I note that the legislation does not require localities to regulate “the storage and disposal of nonagricultural excavation material, waste and debris” through a special exception or special use permit requirement. Nevertheless, it is evident that the General Assembly, within the limitations set by the newly-enacted language of § 2.2-2288, intended to enable a locality to place reasonable limitations upon the scope of that land use activity. *See Jones v. Conwell*, 227 Va. 176, 181, 314 S.E.2d 61, 64 (1984) (wherein the Court stated, “it is well established that every act of the legislature should be read so as to give reasonable effect to every word and to promote the ability of the enactment to remedy the mischief at which it is directed.”).

¹³ “Rules of statutory construction prohibit adding language to or deleting language from a statute.” *Appalachian Power Co. v. State Corp. Comm’n*, 284 Va. 695, 706, 733 S.E.2d 250, 256 (2012) (citing *BBF, Inc. v. Alstom Power, Inc.*, 274 Va. 326, 331, 645 S.E.2d 467, 469 (2007)).

¹⁴ *Bd. of Supvrs v. Carper*, 200 Va. 653, 660, 107 S.E.2d 390, 395 (1959).

OP. NO. 13-076

COUNTIES, CITIES, AND TOWNS: PLANNING, SUBDIVISION OF LAND AND ZONING-ZONING

Section 15.2-2291 does not require all counselors and other staff persons to reside at a facility for individuals with mental illness, intellectual disability, or developmental disabilities to qualify as a residential occupancy by a single family for zoning purposes.

JAMES E. BARNETT, ESQUIRE
COUNTY ATTORNEY, YORK COUNTY
OCTOBER 11, 2013

ISSUE PRESENTED

You inquire whether a facility as defined in § 15.2-2291 of the *Code of Virginia* shall be deemed to constitute a single family residence for zoning purposes only if all counselors and other staff persons who provide services to the residents are “resident,” i.e., live at the facility. In other words, you ask whether § 15.2-2291 imposes a requirement that all counselors and other staff persons who might provide services to the residents reside at the facility in order for it to qualify as a residential occupancy by a single family for zoning purposes.

RESPONSE

It is my opinion that § 15.2-2291 does not require all counselors and other staff persons to reside at a facility for individuals with mental illness, intellectual disability, or developmental disabilities to qualify as a residential occupancy by a single family for zoning purposes.

BACKGROUND

You indicate that York County has adopted a zoning code definition of “family” that incorporates the provisions of § 15.2-2291.¹ You further state that the York County Zoning Administrator has interpreted the relevant Code provisions “such that a facility which employs nonresident staff persons is not a single family dwelling for zoning purposes, and as such may be subject to a special use requirement.” You indicate that, based on this interpretation, York County requires special use permits for facilities that intend to use non-resident staff. You relate that applicants for these permits have questioned the Zoning Administrator’s opinion, prompting you to request that this Office opine on this matter.

APPLICABLE LAW AND DISCUSSION

Section 15.2-2291(A) provides, in relevant part, that:

Zoning ordinances for all purposes shall consider a residential facility in which no more than eight individuals with mental illness, intellectual disability, or development disabilities reside, with one or more resident counselors or other staff persons, as residential occupancy by a single family. . . . No conditions more restrictive than those imposed on residences occupied by persons related by blood, marriage, or adoption shall be imposed on such facility.

“The primary objective in statutory construction is to ascertain and give effect to legislative intent,”² and “[i]n construing statutes, courts should give the fullest possible effect to the legislative intent embodied in the entire statutory enactment.”³ A court “must determine . . . legislative intent by what the statute says and not by what [the court] think[s] it should have said.”⁴ Finally, “[w]hen the language of a statute is unambiguous, we are bound by the plain meaning of that language.”⁵

Virginia’s zoning enabling legislation recognizes that localities may define what constitutes a single family residence.⁶ Section 15.2-2291(A) categorizes facilities meeting the criteria of the Code section as a single family residence for zoning purposes regardless of how a locality may otherwise define such a residence. When enacting § 15.2-2291, the plain language used indicates that the General Assembly intended to ensure that a locality’s definition of a family would not preclude the subject facilities in single family residential zoning districts, so long as at least one counselor or other staff person likewise resides at the facility.⁷ Thus, by definition, and by plain construction of the statute, up to eight individuals with listed disabilities and any resident counselors or staff constitute a family for zoning purposes.

The statute also clearly states that “[n]o conditions more restrictive than those imposed on residences occupied by persons related by blood, marriage, or adoption shall be imposed on such facility.”⁸ Although it could have done so, the General Assembly did not require that anyone who was to provide any form of services at the facility must also reside at the facility. Instead, the statute clearly and unambiguously requires that single family residences as defined by the statute be treated the same as all other single family residences. This mirrors the requirement of general zoning law that “zoning regulations shall be uniform for each class or kind of buildings and uses throughout each district.”⁹ Requirements not imposed on traditional single family residences cannot be imposed on those facilities included within the scope of § 15.2-2291(A).

CONCLUSION

Accordingly, it is my opinion that § 15.2-2291 of the *Code of Virginia* does not require all counselors and other staff persons to reside at a facility for individuals with mental illness, intellectual disability, or development disabilities in order for the facility to qualify as a residential occupancy by a single family for zoning purposes.

¹ See COUNTY OF YORK, VA., COUNTY CODE § 24.1-104, available at <http://www.yorkcounty.gov/Default.aspx?tabid=5951>. I note, however, that this local definition of “family” differs to some extent from the wording of § 15.2-2291(A). Nevertheless, because the terms of § 15.2-2291(A) are mandatory as to localities, these linguistic differences are inapposite to the herein stated legal

analysis and conclusions. *See* VA. CODE ANN. § 1-248 (2011); *and see* *Sinclair v. New Cingular Wireless PCS, LLC*, 283 Va. 567, 576, 727 S.E.2d 40, 46 (2012).

² *Conger v. Barrett*, 280 Va. 627, 630, 702 S.E.2d 117 (2010) (quoting *Turner v. Commonwealth*, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983)).

³ *Va. Real Estate Bd. v. Clay*, 9 Va. App. 152, 157, 384 S.E.2d 622, 625 (1989).

⁴ *Commonwealth v. Amerson*, 281 Va. 414, 421, 706 S.E.2d 879, 884 (2011) (quoting *Virginian-Pilot Media Cos. v. Dow Jones & Co.*, 280 Va. 464, 469, 698 S.E.2d 900, 902 (2010)).

⁵ *Cuccinelli v. Rector & Visitors of the Univ. of Va.*, 283 Va. 420, 425, 722 S.E.2d 626, 629 (2012) (quoting *Kozmina v. Commonwealth*, 281 Va. 347, 349, 706 S.E.2d 860, 862 (2011)).

⁶ *See* VA. CODE ANN. § 15.2-2286(A)(5) and (14) (2012).

⁷ I construe the phrase “with one or more resident counselors or other staff persons” as modifying both the term “counselors” and the term “staff persons” with the word “resident.” “Generally, phrases separated by a comma and the disjunctive 'or' are independent.” *Lampkins v. Commonwealth*, 44 Va. App. 709, 717, 607 S.E.2d 722, 726 (2005) (citing *Smoot v. Commonwealth*, 37 Va. App. 495, 501, 559 S.E.2d 409, 412 (2002)). Nevertheless, in the quoted phrase no comma separates the terms “counselors” and “staff persons,” so they may be construed together for matters of interpretation and the application of modifiers. *See, e.g., Washington-Virginia Ry. Co. v. Fisher*, 121 Va. 229, 234-35, 92 S.E. 809, 811 (1917) (holding that the word “county” within the phrase “every county road or highway” modifies both the terms “road” and “highway”).

⁸ Section 15.2-2291 (2012).

⁹ Section 15.2-2282 (2012).

OP. NO. 13-007

COUNTIES, CITIES, AND TOWNS: POWERS OF CITIES AND TOWNS

The City of Hampton may lawfully conduct churning operations to detect crimes involving the diversion of tobacco products.

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

Funds derived from a churning operation are not exempt from general laws governing the use of local government funds. The City of Hampton may not appropriate or expend such funds until it establishes a lawful ownership interest in them.

CYNTHIA E. HUDSON, ESQUIRE

CITY ATTORNEY FOR THE CITY OF HAMPTON

MAY 31, 2013

ISSUES PRESENTED

You pose four questions regarding the operation of “churning” activities in the City of Hampton. First, you ask whether the City of Hampton, through its police division, is authorized to conduct churning operations to detect crimes involving the diversion of tobacco products. You next ask whether funds derived from a churning operation are exempt from laws generally governing the use of local government funds. Third, you ask whether the operation’s funds and other assets become the property of the City of Hampton at the conclusion of the churning operation. Finally, you ask at what point in time the City of Hampton may appropriate, or otherwise lawfully commence a process for expenditure of such funds.

RESPONSE

It is my opinion that the City of Hampton may lawfully conduct churning operations to detect crimes involving the diversion of tobacco products. It is further my opinion that funds derived from a churning operation, of which the city ultimately may obtain an ownership interest, are not exempt from general laws governing the use of local government funds. In addition, this Office cannot definitively opine on the ownership of the completed operation's residual funds and other assets. Finally, it is my opinion that the City of Hampton may not appropriate or expend such funds until it establishes a lawful ownership interest in them.

BACKGROUND

You relate that, in June, 2010, the Hampton Police Department entered into an agreement with the Federal Bureau of Alcohol Tobacco, Firearms and Explosives (ATF) to combat illegal cigarette trafficking. Through this partnership, a Hampton-based undercover operation was formed to target individuals who purchased cigarettes in Virginia and then sold them in higher tax states in order to make a profit. Pursuant to § 15.2-1726 of the *Code of Virginia*, the Hampton Police Division executed a memorandum of understanding with ATF ("the MOU") detailing the methodology and respective responsibilities of the parties.¹ ATF assumed operational control.

You state that ATF used federal money to create a fictitious business entity that sold tobacco products to cigarette traffickers. Through the fictitious entity, ATF and Hampton Police purchased cigarette inventory, opened bank accounts, secured credit cards and leased property to conduct the business. ATF "churned" the proceeds from these commercial transactions to offset expenses incurred during the undercover operation. Any additional moneys generated by the operation were deposited into the operation's bank accounts to fund future transactions.

You report that ATF suspended its participation in the operation in October, 2010, after an assigned ATF agent was arrested on allegations that he personally had benefited from the churning activities. By that time, the cigarette sales through the undercover enterprise had resulted in accumulation of several hundred thousands of dollars. These funds were deposited into the fictitious entity's bank account. Hampton Police chose to continue the operation without the participation of ATF and used churning proceeds to purchase vehicles, computer equipment, and other property; however, in late January, 2012, the Hampton Police Chief decided to halt the operation based on alleged officer misconduct and requested the Virginia Department of State Police conduct an independent criminal investigation.

You indicate that approximately \$750,000 was generated through the churning operation and remains in the fictitious entity's account. The property purchased with churning operation funds (vehicles, electronic equipment, and other office equipment) is kept separate from other city properties and is not being used. You state that, other than budgeted salaries for Hampton police officers, no City funds were expended in support of the operation.

APPLICABLE LAW AND DISCUSSION

In determining the power of a local governing body, Virginia follows the Dillon Rule of strict construction, which provides that “municipal corporations possess and can exercise only those powers expressly granted by the General Assembly, those necessarily or fairly implied therefrom, and those that are essential and indispensable.”²

Section 15.2-1102 of the *Code of Virginia* confers general police powers on cities and towns that are not:

expressly prohibited by the Constitution and the general laws of the Commonwealth, and which are necessary or desirable to secure and promote the general welfare of the inhabitants of the municipality and the safety, health, peace, good order, comfort, convenience, morals, trade, commerce and industry of the municipality and the inhabitants thereof[.]

The Supreme Court of Virginia has construed broadly this general grant of police powers to localities when public safety and morals are involved.³

Moreover, Hampton’s participation in a churning operation through its police department is not expressly prohibited by the Constitution or the general laws of the Commonwealth. Thus, it is my view that employing a churning operation to combat tobacco trafficking in Hampton is fairly implied in and consistent with the legislative grant of police power set forth in § 15.2-1102. The Hampton City charter further utilizes similar language to confer powers to the city to promote the general welfare of the city and the safety, health, peace, good order, comfort, convenience, and morals of its inhabitants.⁴ The city, through its police force, may deem a churning operation proper to provide for the safety, health, peace, good order, comfort, convenience, and morals of its inhabitants and would be authorized to conduct such an operation to deter criminal activity, including the illegal trafficking of cigarette products.⁵ Thus, the city’s police powers under § 15.2-1102 and its charter are broad enough to encompass the described churning operations.

The Hampton City Charter provides that “[a]ll moneys received or collected for the use of the city from any source shall be paid over, held and disbursed as the council may order or resolve, and in such depository or depositories as may be prescribed by the council, either by ordinance or resolution.”⁶ In addition, § 15.2-2506 of the *Code of Virginia* prescribes that,

No money shall be paid out or become available to be paid out for any contemplated expenditure unless and until there has first been made an annual, semiannual, quarterly or monthly appropriation for such contemplated expenditure by the governing body[.]

I find no other law that otherwise would apply to govern how such proceeds from a churning operation are to be handled.⁷ Therefore, to the extent that the city ultimately may obtain a lawful ownership interest in such funds, and consistent with their accumulation through a public safety-related operation in Hampton, it is my view that the moneys collected from tobacco sales were “for the use of the city.”⁸ In that instance, and in conformity with the above-cited provisions of Virginia law and the city’s charter, the funds may be appropriated and expended as the council provides.

The MOU section entitled, “Duration,” establishes how to effect termination of the agreement and sets forth the federal guidelines to which the parties must refer to govern the distribution of residual funds from task force operations:

This MOU shall remain in effect until it is terminated in writing (to include electronic mail and facsimile). If any participating agency withdraws from the Task Force prior to its termination, the remaining participating agencies shall determine the distributive share of assets for the withdrawing agency, in accordance with Department of Justice guidelines and directives.

Thus, a distribution of residual funds and other assets depends upon a written termination notice from a withdrawing participant in the MOU, and, upon a withdrawal from the task force created by it, adherence to the governing terms of the Department of Justice standards for such a “distributive share of assets.” Based upon the information you provide, neither ATF nor the City of Hampton’s police division have provided written notice of termination of the MOU or intent to withdraw from the task force created by it.⁹

The issue whether “the proceeds of such a churning operation and goods purchased with churning funds become the property of the city” is beyond the scope of this opinion. You note that while ATF ceased its participation in and apparently abandoned the joint operation, and initiated no prosecutions based upon it, “there is no indication that the ATF terminated the MOU with Hampton in accordance with its terms which provide for termination by ATF in writing.” Pursuant to the above-referenced specific termination-related provisions of the MOU, it is not possible to now opine on how residual funds and the proceeds from other assets might be divided between the City of Hampton, the federal government, and, perhaps, other law enforcement organizations participating in the MOU.¹⁰ Moreover, unless you were to present a specific legal question relating to the termination of the MOU, this Office would decline to interpret the provisions of such an agreement between a locality and other entities.¹¹

Finally, it is axiomatic that the City of Hampton may not make an appropriation or expenditure of residual funds or the proceeds from other assets derived from the churning operation unless and until it acquires a lawful ownership interest in them.¹² It has not yet established such an ownership interest.

CONCLUSION

Accordingly, it is my opinion that the City of Hampton lawfully may conduct churning operations to detect crimes involving the diversion of tobacco products. It is further my opinion that funds derived from a churning operation, of which the city ultimately may obtain an ownership interest, are not exempt from general laws governing the use of local government funds. In addition, this Office cannot definitively opine on the ownership of the completed operation’s residual funds and other assets. Finally, it is my opinion that the City of Hampton may not appropriate or expend such funds until it establishes a lawful ownership interest in them.

¹ As part of your inquiry, you provide an executed copy of the MOU. The parties to it are the Hampton Police Department, ATF, the Virginia State Police, the Newport News Police Department, the Norfolk

Police Department, and the Portsmouth Police Department. In addition, for background information, you provide a copy of a related Memorandum of Understanding, dated February 23, 2011, between the Hampton Police Division and the Office of the Hampton Commonwealth's Attorney.

² *Richmond v. Confrere Club of Richmond, Inc.*, 239 Va. 77, 79, 387 S.E.2d 471, 473 (1990) (citations omitted).

³ *See Stallings v. Wall*, 235 Va. 313, 367 S.E.2d 496 (1988) (holding that general delegations of authority may be broad enough to permit localities to restrict sales of firearms); *King v. Cnty. of Arlington*, 195 Va. 1084, 81 S.E.2d 587 (1954) (holding that county ordinance prohibiting keeping of vicious dogs was valid); *Assaid v. Roanoke*, 179 Va. 47, 18 S.E.2d 287 (1942) (concluding that city had power to regulate operation of pool rooms); *see also* 1994 Op. Va. Att'y Gen. 29, 31-32 (noting that state court decisions and prior opinions of the Attorney General have concluded that a locality's general police powers are broad enough to sustain local regulation of a wide range of activities and subjects).

⁴ CHARTER FOR THE CITY OF HAMPTON, VA., § 2.01; *see* § 2.03.

⁵ The terms of the MOU set forth a number of stated purposes, including to, "Conduct undercover operations where appropriate and engage in other traditional methods of investigation in order that the Task Force's activities will result in effective prosecution before the courts of the United States and the Commonwealth of Virginia." Under the section entitled, "Measurement of Success", one such criterion is listed as, "The reduction of loss of tax revenues caused by contraband alcohol and tobacco trafficking." Thus, in general, the churning operation you describe appears to be within the scope of the MOU and consistent with the anticipated law enforcement task force activities pursuant to it.

⁶ *Id.*, § 6.07.

⁷ You state that on October 12, 2012, the Commonwealth's Attorney for the City of Hampton determined that, "these assets are not, in his opinion, subject to forfeiture and their disposition must be determined by the city." You also note that no seizures were made as a result of the churning operation. As such, the procedures contained in Chapter 22.1 (§ 19.2-386.1, *et seq.*) of Title 19.2 of the *Code of Virginia* would appear to be inapplicable to your opinion request.

⁸ CHARTER FOR THE CITY OF HAMPTON, VA., § 2.01.

⁹ No Department of Justice guidelines or directives were provided to this Office.

¹⁰ Hampton city officials may seek to negotiate with ATF or other appropriate federal officials and representatives of the other participating law enforcement organizations on those matters. If necessary, and subject to any governing federal "guidelines and directives," the city also may consider seeking a judicial determination of ownership through a declaratory judgment or an interpleader action. This Office offers no opinion on the legal availability or efficacy of such potential courses of action.

¹¹ *See generally* 2010 Op. Va. Att'y Gen. 56, 58 nn. 4,5.

¹² *See* VA. CODE ANN. § 15.2-2506 and § 6.07 of Hampton's City Charter. It is my view that neither the statute nor the charter provision can reasonably be interpreted to enable the locality to appropriate and expend funds in which it does not possess a lawful ownership interest.

Op. No. 13-055

COUNTIES, CITIES, AND TOWNS: REGIONAL COOPERATION ACT

Surry County will not be subject to the regional transportation taxes and fees included in 2013 Transportation Funding Bill because the County is physically located in Planning District 19.

WILLIAM H. HEFTY, ESQUIRE
COUNTY ATTORNEY FOR SURRY COUNTY
JUNE 14, 2013

ISSUE PRESENTED

Your inquiry concerns whether Surry County is subject, on July 1, 2013, to the regional transportation taxes and fees included in the 2013 Transportation Funding Bill, Chapter 766 of the Virginia Acts of Assembly, 2013 Reconvened Session (“the Act”).

RESPONSE

It is my opinion that on July 1, 2013, Surry County will not be subject to the regional transportation taxes and fees included in the Act.

BACKGROUND

You relate that Surry County is physically located in Planning District 19.¹ You further relate that Surry County, pursuant to § 15.2-4220 of the *Code of Virginia*, has elected to become a member of the Planning District Commission for Planning District 23.

APPLICABLE LAW AND DISCUSSION

The Act provides for the imposition of certain specific taxes and fees by localities “located in” a planning district that meets certain population, registered vehicle, and transit ridership criteria.² Currently, Planning District 23 and Planning District 8 are the only districts that meet these criteria.³

Surry County is located in Planning District 19. The fact that Surry County is also a member of the District 23 Planning District Commission does not change the fact that Surry County is located in Planning District 19. Section 15.2-4220 of the *Code of Virginia* does provide that a county or other locality can be a member of more than one planning district commission. Nevertheless, a locality can be physically “located in” only one planning district. Ordinarily when a particular word or phrase in a statute is not defined therein one must give it its ordinary meaning.⁴ Surry County is located in Planning District 19. The additional local taxes provided by the Act do not apply to localities located in Planning District 19.

CONCLUSION

Accordingly, it is my opinion that on July 1, 2013, Surry County will not be subject to the regional transportation taxes and fees included in the Act.

¹ Planning Districts are created pursuant to Chapter 42 of Title 15.2 in order to facilitate regional cooperation and to promote joint effort in regional planning in matters of a regional nature. *See* VA. CODE ANN. § 15.2-4201 (2012).

² 2013 Va. Acts. ch. 766.

³ Planning District 8 is located in Northern Virginia and is not germane to the discussion here.

⁴ *Moyer v. Commonwealth*, 33 Va. App. 8, 35, 513 S.E. 2d 580,593 (2000) (citing *McKeon v. Commonwealth*, 211 Va. 24, 27, 175 S.E. 2d 282, 284 (1970)).

OP. NO. 12-065**COURTHOUSE SECURITY**

Although the chief judge and, collectively, the judges of a judicial circuit, do possess legal authority to establish rules regarding courthouse security, such power may not be delegated to a circuit court administrator.

The chief judge and, collectively, the circuit judges, possess the legal authority to establish a general rule that cellular telephones are permitted in the courthouse.

The sheriff possesses the legal authority to take action in any specific instance in which a cellular telephone causes a disturbance, or otherwise endangers public safety within the courthouse.

THE HONORABLE WILLIAM O. WATSON
SHERIFF, CITY OF PORTSMOUTH
JULY 12, 2013

ISSUES PRESENTED

You present two questions regarding the legal authority to make rules relating to courthouse security. First, regarding the physical security of the courthouse, and specifically, the granting of physical access to certain areas of the courthouse, you inquire whether the chief judge, acting independently, or, the judges of a circuit court, acting collectively, possess the authority to mandate that a circuit court administrator make such decisions. Second, you inquire whether the chief judge or the judges of a circuit possess the authority to mandate that the sheriff allow all types of cellular phones into the courthouse.¹

RESPONSE

It is my opinion that, while the chief judge and, collectively, the judges of a judicial circuit, do possess legal authority to establish rules regarding courthouse security, such power may not be delegated to a circuit court administrator. In addition, it is my opinion that the chief judge and, collectively, the circuit judges, possess the legal authority to establish a general rule that cellular telephones are permitted in the courthouse. Nonetheless, it is further my opinion that the sheriff possesses the legal authority to take action in any specific instance in which a cellular telephone causes a disturbance, or otherwise endangers public safety within the courthouse.

APPLICABLE LAW AND DISCUSSION

Your questions involve both the construction of statutes and recognition of the inherent authority of courts to conduct the functions of the judicial branch.² Issues related to courthouse security and decorum are dealt with in multiple sections within the *Code of Virginia*. For example, § 53.1-120 provides that:

- (A) Each sheriff shall ensure that the courthouses and courtrooms within his jurisdiction are secure from violence and disruption and shall designate deputies for this purpose. . . .

(B) The chief circuit court judge, the chief general district court judge and the chief juvenile and domestic relations district court judge shall be responsible by agreement with the sheriff of the jurisdiction for the designation of courtroom security deputies for the respective courts. If the respective chief judges and sheriff are unable to agree on the number, type and working schedules of the courtroom security deputies for the court, the matter shall be referred to the Compensation Board for resolution

Thus sheriffs are afforded certain powers and responsibilities related to courthouse security.³

The legal authority of sheriffs is, nonetheless, not exclusive. As set forth in § 53.1-120 above, the *Code of Virginia* expressly contemplates that at least one issue of courthouse security will be resolved “by agreement” between the sheriff and the chief judges of the respective local courts.⁴ Additionally, § 8.01-4 provides that the district and circuit courts may prescribe rules “necessary to promote proper order and decorum and the efficient and safe use of courthouse facilities and clerks’ offices.” Finally, the courts of Virginia have found that they possess certain inherent powers related to courthouse security.⁵

Reading § 53.1-120 together with § 8.01-4 and the relevant case law dictates the conclusion that the chief judge of a circuit court, acting pursuant to § 17.1-501(B) of the *Code of Virginia*, or the judges of such circuit, acting collectively, possess supervisory rule-making authority over courthouse security.⁶ The sheriff, however, by law, retains the authority to act as the enforcer of such court-promulgated rules, or, programmatically, in the absence of such rules, and, situationally, as necessary to ensure courthouse security. Thus, both Virginia law and the practicalities of emergent situations require that circuit judges and the sheriff work collaboratively to establish and maintain courthouse security.⁷

If, as in your first inquiry, a question or dispute arises as to what persons will be given access to courthouse spaces, the chief judge, or, alternatively, the collective circuit judges, possess the legal authority to make the determination of “who is granted physical access to . . . areas of a courthouse.”⁸ Such authority, however, derived from both statute and the inherent authority of the court, belongs to the judges and thus may not be delegated.⁹ To the extent that a circuit court exercises its authority to establish rules regarding access to areas of a courthouse, it must do so itself, in accordance with § 8.01-4. While a circuit court may use an administrator to communicate and implement such rules, it may not delegate to such person an ability to, “make decisions in regards to the physical security of the courthouse by . . . deciding who is granted physical access to...areas of [it.]”

Similarly, and with respect to your second inquiry, if the chief judge or, alternatively, the collective circuit judges, determine by rule that “all cellular phones, including those with video and still cameras, must be allowed into the courthouse,” they possess the legal authority to do so. While such a rule may allow persons to enter into the courthouse with such devices, it would not thereby enable anyone to use camera features in a disruptive manner, or, more generally, in a way that would endanger

public safety inside that structure. As noted above, Virginia law charges the sheriff with the duty to intervene into any such courthouse situation.

CONCLUSION

Accordingly, it is my opinion that, while the chief judge and, collectively, the judges of a judicial circuit, do possess legal authority to establish rules regarding courthouse security, such power may not be delegated to a circuit court administrator. In addition, it is my opinion that the chief judge and, collectively, the circuit judges, possess the legal authority to establish a general rule that cellular telephones are permitted in the courthouse. Nonetheless, it is further my opinion that the sheriff possesses the legal authority to take action in any specific instance in which a cellular telephone causes a disturbance, or otherwise endangers public safety within the courthouse.

In closing, I reiterate that both sheriffs and circuit court judges share not only legal authority regarding courthouse security, but also share responsibility in that critical public safety arena. The public will be best served if issues of courthouse security are resolved with input from and the consensus agreement of both sheriffs and the judges of the court.

¹ With respect to your second inquiry, you note the existence of “dissenting opinions of Judges from other jurisdictional courts in the same courthouse.” This opinion necessarily must focus only on the legal authority of circuit judges in relation to that of the sheriff. *See* VA. CODE ANN. § 2.2-505(B) (2011) (providing that, with the exception of opinion requests from the Governor or a General Assembly member, “the Attorney General shall have no authority to render an official opinion unless the question dealt with is directly related to the discharge of the duties of the official requesting the opinion.”). Therefore, this opinion does not discuss the authority of circuit judges in relation to judges of courts not of record that share the same courthouse.

² There has been substantial public debate over the existence of, and the limits upon inherent authority of Virginia courts respecting various issues, including the disposition of cases. *See, e.g.,* *Hernandez v. Commonwealth*, 281 Va. 222, 226, 707 S.E.2d 273, 275 (2011). While General Assembly members have taken issue with the judiciary’s assertion of inherent authority in certain instances, one primary function of the opinion process under § 2.2-505 is to provide guidance as to what the courts of Virginia are likely to decide on a given issue. Accordingly, it is appropriate to herein address the judiciary’s historically recognized inherent legal authority respecting courthouse security.

³ *See also* 2004 Op. Va. Att’y Gen. 170, 171; 2002 Op. Va. Att’y Gen. 242, 243; 1998 Op. Va. Att’y Gen. 33, 34-35; 1987-88 Op. Va. Att’y Gen. 467, 468-69.

⁴ VA. CODE ANN. § 53.1-120(B) (2009).

⁵ *See Payne v. Commonwealth*, 233 Va. 460, 466, 357 S.E.2d 500, 504 (1987) (“The trial judge has overall supervision of courtroom security.”); *Epps v. Commonwealth*, 47 Va. App. 687, 701, 626 S.E.2d 912, 918 (2006) (“Courts have the inherent authority to ensure the security of their courtrooms.”) *Bond v. Commonwealth*, 32 Va. App. 610, 615, 529 S.E.2d 827, 829 (2000) (upholding the trial judge’s decision to exercise responsibility for courtroom security by disallowing accused’s twin brother, a prisoner, to sit among the audience in the courtroom) In *Epps*, the Court of Appeals, sitting *en banc* noted the interplay between a sheriff’s duties and a court’s authority, stating that “[a]lthough Code § 53.1-120 mandates the sheriff to provide courthouse security, the statute does not bar the court from ensuring the sheriff properly discharges that duty.” *Epps*, 47 Va. App. at 701, 626 S.E. 2d at 918.

⁶ In discussing the legal authority of circuit judges and sheriffs respecting courthouse security, this opinion does not purport to address the resolution of any situation wherein differences may arise between the chief judge and the other judges of the circuit on a particular aspect thereof. I note that the General Assembly

places upon chief judges the overarching responsibility to “ensure that the system of justice in his circuit operates smoothly and efficiently.” VA. CODE ANN. § 17.1-501(B) (2010).

⁷ As noted above, in at least one instance, regarding the allocation of courtroom deputies, a disagreement between the judges and the sheriff must be resolved under a procedure established by § 53.1-120(B). That provision states, “If the respective chief judges and sheriff are unable to agree on the number, type and working schedules of courtroom security deputies for the court, the matter shall be referred to the Compensation Board for resolution in accordance with existing budgeted funds and personnel.”

⁸ Consistent with the proviso of footnote 1, *supra*, this opinion does not address the resolution of any disagreements regarding access to courthouse areas that may arise between the circuit judges and the judges of courts not of record respecting those courthouse spaces occupied by the latter courts and their support personnel and facilities.

⁹ The authority to create courthouse security rules is limited to “district courts and circuit courts.” VA. CODE ANN. § 8.01-4 (2007). The statute makes no mention of court administrators. *Id.* “When a statute creates a specific grant of authority, the authority is deemed to exist only to the extent granted in the statute.” 2009 Op. Va. Att’y Gen. 5, 6 (further citation omitted) (applying the legal maxim “*Expressio unius est exclusio alterius.*”)

OP. NO. 13-096

COURTHOUSE SECURITY

Judges retain rule-making authority over courthouse security, and the sheriff is responsible for enforcing the rules and responding to any security threats or disturbances.

THE HONORABLE PAUL W. HIGGS
SHERIFF, CITY OF FREDERICKSBURG
DECEMBER 13, 2013

ISSUES PRESENTED

You present several questions regarding a sheriff’s legal authority for making decisions related to courthouse security. Specifically, you inquire whether the sheriff is empowered to make final determinations regarding the location of cameras in the courthouse, including areas within clerks’ offices, and the type of door locks to be used in the courthouse. You also ask whether a sheriff is permitted to enter all areas of the courthouse, including both locked and unlocked areas.

RESPONSE

It is my opinion that, while judges and sheriffs should work together to resolve any issues or concerns about courthouse security, judges retain rule-making authority over courthouse security, and the sheriff is responsible for enforcing the rules and responding to any security threats or disturbances.

APPLICABLE LAW AND DISCUSSION

Sheriffs have a statutory duty to maintain security within courthouses: § 53.1-120(A) specifically directs that “[e]ach sheriff shall ensure that the courthouses and courtrooms within his jurisdiction are secure from violence and disruption and shall designate deputies for this purpose” Thus, sheriffs have the responsibility to provide courthouse security.¹

This authority, however, is not exclusive and is shared by judges. For instance, § 53.1-120(B) provides further that

The chief circuit court judge, the chief general district court judge and the chief juvenile and domestic relations district court judge shall be responsible by agreement with the sheriff of the jurisdiction for the designation of courtroom security deputies for their respective courts. If the respective chief judges and sheriff are unable to agree on the number, type and working schedules of the courtroom security deputies for the court, the matter shall be referred to the Compensation Board for resolution

Moreover, § 8.01-4 more generally provides that “[t]he district courts and circuit courts may, from time to time, prescribe rules for their respective districts and circuits. Such rules shall be limited to those rules necessary to promote proper order and decorum and the efficient and safe use of courthouse facilities and clerks’ offices.” Section 17.1-501(B) further explains that “[t]he chief judge of the circuit shall ensure that the system of justice in his circuit operates smoothly and efficiently.”

Based on these statutes and on courts’ inherent powers, Virginia courts have found that “[t]he trial judge has overall supervision of courtroom security.”² As a prior Opinion of this Office explains, judges “possess supervisory rule-making authority over courthouse security,” while the sheriff enforces those rules and works together with the court to “establish and maintain courthouse security.”³ If a court issues an order concerning a security issue, a sheriff who disobeys or disregards that order is subject to being held in contempt.⁴ Accordingly, with respect to your first two inquiries, I conclude that the authority to make rules regarding courthouse security questions, including location of cameras and types of locks, lies with the judges and not with the sheriff.

Regarding your third question, a previous Opinion of this Office concluded, based on judges’ inherent powers, that judges are authorized to determine who is admitted to the courthouse and to what areas within the courthouse.⁵

CONCLUSION

Accordingly, it is my opinion that judges and sheriffs share responsibility for courthouse security, but judges have the authority to determine the rules of the courthouse with regards to security while sheriffs possess the legal authority to enforce the rules and to respond to security threats or disturbances.

It is crucial that sheriffs and judges work together to protect the security of the courthouse. Hence, input and agreement among sheriffs and judges is in the public’s best interest and should be pursued, if at all possible, on a collaborative basis.

¹ For related discussions regarding a sheriff’s role in ensuring court security, see 2004 Op. Va. Att’y Gen. 170, 171; 2002 Op. Va. Att’y Gen. 242, 243; 1998 Op. Va. Att’y Gen. 33, 34-35; 1987-88 Op. Va. Att’y Gen. 259, 259-60; 1987-88 Op. Va. Att’y Gen. 467, 468-69; and 2013 Op. Va. Att’y Gen. No. 12-065, available at

<http://www.ag.virginia.gov/Opinions%20and%20Legal%20Resources/Opinions/2013opns/12-065%20Watson.pdf>; 2004 Op. Va. Att’y Gen. 170, 171; 2002 Op. Va. Att’y Gen. 242, 243; 1998 Op. Va. Att’y Gen. 33, 34-35; 1987-88 Op. Va. Att’y Gen. 259, 259-60; 1987-88 Op. Va. Att’y Gen. 467, 468-69.

² *Payne v. Commonwealth*, 233 Va. 460, 466, 357 S.E.2d 500, 504 (1987). *See also* *Bd. of Spvrs. v. Bacon*, 215 Va. 722, 724, 214 S.E.2d 137, 138 (1975) (court has control over portion of building that comprises the courthouse); *Porter v. Commonwealth*, 276 Va. 203, 260-61, 661 S.E.2d 415, 445 (2008) (contrary to circuit court’s first belief, it has authority to direct sheriff’s deputies’ conduct within courtroom); *Epps v. Commonwealth*, 47 Va. App. 687, 701, 626 S.E.2d 912, 918 (2006) (“Courts have the inherent authority to ensure the security of their courtrooms.”), *aff’d* 273 Va. 410, 641 S.E.2d 77 (2007); *Bond v. Commonwealth*, 32 Va. App. 610, 615, 529 S.E.2d 827, 829 (2000) (trial court properly excluded defendant’s twin brother from courtroom, “exercising its responsibility for courtroom security”).

³ 2013 Op. Va. Att’y Gen. No. 12-065.

⁴ *Epps v. Commonwealth*, 47 Va. App. at 717-20, 626 S.E.2d at 926-27 (although the trial court’s finding of contempt was reversed on evidentiary grounds, the sheriff who disregarded court order regarding courthouse security was subject to contempt proceeding).

⁵ 2013 Op. Va. Att’y Gen. No. 12-065. Nevertheless, that opinion also concluded generally that, “both Virginia law and the practicalities of emergent situations require that . . . judges and the sheriff work collaboratively to establish and maintain courthouse security.”

OP. NO. 13-051

COURTS NOT OF RECORD: DISTRICT COURTS

A Commonwealth’s Attorney is authorized to request that a bill of particulars be ordered in a district court where a motion to suppress evidence has been filed but includes no factual basis for the motion.

THE HONORABLE SCOTT A. SUROVELL
MEMBER, HOUSE OF DELEGATES
AUGUST 16, 2013

ISSUE PRESENTED

You inquire whether a Commonwealth’s Attorney is authorized under § 16.1-69.25:1 to submit in a district court a motion for a bill of particulars seeking the factual basis of a defendant’s motion to suppress evidence.

RESPONSE

It is my opinion that a Commonwealth’s Attorney is authorized to request that a bill of particulars be ordered in a district court where a motion to suppress evidence has been filed but includes no factual basis for the motion.

APPLICABLE LAW AND DISCUSSION

A bill of particulars supplies the party seeking it with additional information concerning the matter at issue.¹ In criminal cases, defendants often seek a bill of particulars to acquire sufficient information to enable them to be fully informed of the offenses with which they are charged, and the decision whether to grant such a bill is within the court’s discretion.²

Section 16.1-69.25:1 provides district courts with the authority to direct the filing of a bill of particulars, and provides as follows:

Upon request of either party, a judge of a district court may direct the filing of a written bill of particulars at any time before trial and within a period of time specified in the order so requiring. Motions for bills of particulars in criminal cases before general district courts shall be made before a plea is entered and at least seven days before the day fixed for trial.^[3]

Section 16.1-69.25:1 makes no distinction between the parties with respect to requests for bills of particulars other than to provide a time limit for such requests in criminal cases before general district courts. Because the language in the statute is clear and unambiguous, there is no reason to look further to determine its meaning. “[T]he plain, obvious, and rational meaning of a statute is to be preferred over any curious, narrow, or strained construction....”⁴ Further, as the Virginia Supreme Court has noted,

If language is clear and unambiguous, there is no need for construction by the court; the plain meaning and intent of the enactment will be given it. When an enactment is clear and unequivocal, general rules for construction of statutes ...do not apply. Therefore, when the language of an enactment is free from ambiguity, resort to legislative history and extrinsic facts is not permitted^[5]

Accordingly, a Commonwealth’s Attorney may seek a bill of particulars in response to a motion to suppress.

You state that a defendant does not need to have a factual basis to support his motion to suppress evidence and, therefore, it would be inconsistent with Virginia law to interpret § 16.1-69.25:1 as authorizing a district court to direct a defendant to file a bill of particulars to provide the factual basis for his suppression motion. In support of the assertion that a defendant is not required to have a factual basis for filing a motion to suppress evidence, you cite Rule 3.1 of the Virginia Rules of Professional Conduct (hereinafter “Rule 3.1”); however, your interpretation of Rule 3.1 is incorrect.

Rule 3.1 provides that:

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

While Rule 3.1 does allow a criminal defense attorney to rely on the well-established principle that the Commonwealth must prove all of the elements of an offense, it does not authorize the defense to file motions for which the attorney has no basis in fact or law. Construing the second sentence to permit a criminal defendant to file a motion to suppress evidence in a factual vacuum is inconsistent with the first sentence of the Rule and with the case law applicable to the suppression of evidence in criminal cases.

Specifically, Rule 7A:8(a) of the Rules of the Supreme Court of Virginia establishes that counsel's "tendering a pleading gives assurance that it is filed in good faith and not for delay." Furthermore, Virginia's sanctions statute provides that "every pleading, written motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name" ⁶ The statute further provides that, by affixing his signature, an attorney is certifying

that (i) he has read the pleading, motion, or other paper, (ii) to the best of his knowledge, information and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and (iii) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. ⁷

Filing a motion without having a good faith belief, formed after reasonable inquiry, that the motion is well-grounded in fact subjects the attorney to a mandatory sanction. ⁸

In short, Virginia law does not authorize a criminal defense attorney to file motions for which he does not have a good faith basis, and therefore, one of the central premises of your inquiry is simply incorrect. ⁹ Although, as to warrantless searches, ¹⁰ it is true that the Commonwealth bears the ultimate burden of justifying the challenged invasion of privacy "by proving that it was reasonable under all the facts and circumstances. . . ." ¹¹ that does not transform the suppression issue into an element of the underlying offense. In mounting such a motion, the defendant bears a threshold "burden of proving he had a reasonable expectation of privacy in the place searched." ¹² Further, as the Virginia Court of Appeals has stated, "[the defendant's burden] is not a mere burden of production, requiring only a going forward with the evidence; it is a 'burden of persuasion,' requiring the defendant to prove to the satisfaction of the factfinder the existence of those facts upon which a legal conclusion can be drawn." ¹³

Finally, interpreting § 16.1-69.25:1 to authorize the Commonwealth to seek a bill of particulars in a district court is not inconsistent with § 19.2-266.2(C), which deals with the procedures for suppression motions and permits only the defendant to seek such a bill. Section § 19.2-266.2(C) provides:

To assist the defense in filing such motions or objections in a timely manner, the circuit court shall, upon motion of the defendant, direct the Commonwealth to file a bill of particulars pursuant to § 19.2-230. The circuit court shall fix the time within which such bill of particulars is to be filed. Upon further motion of the defendant, the circuit court may, upon a showing of good cause, direct the Commonwealth to supplement its bill of particulars. The attorney for the Commonwealth shall certify that the matters stated in the bill of particulars are true and accurate to the best of his knowledge and belief.

It is a well-established rule of statutory construction that "[w]hen 'two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed [legislative] intention to the contrary, to regard each as effective.'" ¹⁴ While the plain language of § 19.2-266.2(C) makes clear that it applies only to the authority of a

circuit court,¹⁵ the plain language of § 16.1-69.25:1 similarly makes clear that it applies only to the authority of a district court. Therefore, both § 19.2-266.2(C) and § 16.1-69.25:1 may be read together in harmony, each containing distinct provisions regarding motions for bills of particulars, respectively, in courts of record and courts not of record.

Thus, with regard to your specific inquiry, I necessarily must conclude that the Commonwealth lawfully may make a timely request of a district court to order a defendant to produce a bill of particulars providing a factual basis for his motion to suppress.

CONCLUSION

Accordingly, it is my opinion that a Commonwealth's Attorney is authorized to request that a bill of particulars be ordered where a motion to suppress evidence is filed in a district court.

¹ See *Tasker v. Commonwealth*, 202 Va. 1019, 1023, 121 S.E.2d 459, 462 (1961).

² See *Quesinberry v. Commonwealth*, 241 Va. 364, 372, 402 S.E.2d 218, 223 (1991).

³ VA. CODE ANN. § 16.1-69.25:1 (2010) (emphasis added).

⁴ *Meeks v. Commonwealth*, 274 Va. 798, 802, 651 S.E.2d 637, 639 (2007) (quoting *Commonwealth v. Zamani*, 256 Va. 391, 395, 507 S.E.2d 608, 609 (1998)) (internal quotation marks omitted).

⁵ *Brown v. Commonwealth*, 284 Va. 538, 543, 733 S.E.2d 638, 640 (2012) (quoting *Brown v. Lukhard*, 229 Va. 316, 321, 330 S.E.2d 84, 87 (1985)).

⁶ VA. CODE ANN. § 8.01-271.1 (Supp. 2013).

⁷ *Id.*

⁸ *Id.* (“If a pleading, motion, or other paper is signed or made in violation of this rule, the court, upon motion or upon its own initiative, *shall* impose upon the person who signed the paper or made the motion, a represented party, or both, an appropriate sanction.” (emphasis added)).

⁹ That the sanctions statute is found in the civil procedure section of the Code does not alter the analysis. In a recent case involving lawyer discipline, the Virginia Supreme Court cited to the obligations imposed by § 8.01-271.1 on a lawyer who filed a pleading in a criminal case. *Livingston v. Virginia State Bar*, 286 Va. 1, 15, ___ S.E.2d ___, __ (2013).

¹⁰ Regarding a motion to suppress evidence seized pursuant to a search warrant, the defendant “bears the burden of proving the search warrant invalid.” *Redmond v. Commonwealth*, 57 Va. App. 254, 260, 701 S.E.2d 81, 84 (2010) (citation and footnote omitted).

¹¹ See *United States v. Lilly*, 576 F.2d 1240, 1245 (5th Cir. 1978); *Commonwealth v. Ealy*, 12 Va. App. 744, 751, 407 S.E.2d 681, 685-86 (1991).

¹² *Sharpe v. Commonwealth*, 44 Va. App. 448, 455, 605 S.E.2d 346, 349 (2004).

¹³ *Logan v. Commonwealth*, 47 Va. App. 168, 171 n.2, 622 S.E.2d 771, 772 n.2 (2005) (en banc) (citation omitted) (quoting *United States v. Lewis*, 40 F.3d 1325, 1333 (1st Cir. 1994)). The imposition of this burden on a defendant does not violate the Due Process Clauses of the Federal or State Constitutions. See *United States v. Cruz Jimenez*, 894 F.2d 1, 5 (1st Cir. 1990) (citing *Rakas v. Illinois*, 439 U.S. 128, 130 n.1 (1978)). Moreover, “[b]ecause the due process protections afforded under the Constitution of Virginia are co-extensive with those of the federal constitution, the same analysis will apply to both.” *Shivae v. Commonwealth*, 270 Va. 112, 119, 613 S.E.2d 570, 574 (2005).

¹⁴ See *Seaton v. Commonwealth*, 42 Va. App. 739, 758-59, 595 S.E.2d 9, 18 (2004) (quoting *FCC v. NextWave Pers. Commc'ns Inc.*, 537 U.S. 293, 304 (2003)).

¹⁵ A prior opinion of this Office previously concluded that the requirements of § 19.2-266.2 apply only to proceedings in circuit courts. 2005 Op. Va. Att’y Gen. 86, 87-88. Moreover, as quoted above, the express terms of § 19.2-266(C) *require* a circuit court to direct the Commonwealth to file a bill of particulars on motion of the defense, in order to facilitate timely filing of defense motions or objections. It specifically references the more general grant of *discretionary* procedural authority in § 19.2-230 to circuit courts to direct the filing of bills of particulars in criminal cases, and in so doing, that statute’s language does not differentiate between the defense and the prosecution.

OP. NO. 13-047

COURTS OF RECORD: CLERKS, CLERKS' OFFICES AND RECORDS

A local governing body may not mandate that individuals not employed by the clerk be granted access to a case management system without the clerk’s authorization.

THE HONORABLE TERRY G. KILGORE
MEMBER, HOUSE OF DELEGATES
AUGUST 20, 2013

ISSUE PRESENTED

You inquire as to whether a governing body can mandate access to an automated case management system¹ for people who are not approved by the clerk and who are not employed by the clerk.

RESPONSE

It is my opinion that a local governing body may not mandate that individuals not employed by the clerk be granted access to a case management system without the clerk’s authorization.

APPLICABLE LAW AND DISCUSSION

Referencing a prior opinion of this Office,² you inquire whether a governing body may, without the consent of the clerk, grant access by persons not employed by the clerk to the clerk’s automated case management system and other integral parts of the system such as the Commonwealth online court order system. The prior opinion, which specifically addressed whether circuit court judges could order the clerk to grant access to the case management system by individuals not employed by the clerk, concluded that “automated case management systems maintained by the clerk of a circuit court, whether the storage media is on or off premises, are records of the clerk’s office under the custody of such clerk. Access to such a case management system lies within the sound discretion of the clerk.”³

In the years since that opinion, there have been statutory changes that have expanded who may authorize access to automated case management systems.⁴ Nothing in those changes, however, would authorize a local governing body to grant access to the automated case management system over the clerk’s objection. Accordingly, consistent with the prior opinion, I conclude that a local governing body cannot grant access to persons not employed by the clerk to the clerk’s automated case management system without the consent of the clerk.⁵

CONCLUSION

Accordingly, it is my opinion that a local governing body may not mandate that individuals not employed by the clerk be granted access to a case management system without the clerk's authorization.

¹ For the purposes of your inquiry, you state that the "clerk's automated case management system" is a system created by the clerk with funds appropriated to the clerk and that the system is stored on the servers of the private vendor with whom the clerk has contracted.

² 2002 Op. Va. Att'y Gen. 62.

³ *Id.* at 64.

⁴ In 2007, the General Assembly enacted 2007 Va. Acts chs. 548 and 626, which were codified at VA. CODE ANN. § 17.1-293 (Supp. 2013), and then amended that enactment in 2013. Section 17.1-293(F) provides that "[n]othing in this section shall prohibit the Supreme Court or any other court clerk from providing online access to a case management system that may include abstracts of case filings and proceedings in the courts of the Commonwealth."

⁵ Section 17.1-293(H) ("Nothing in this section shall be construed to permit any data accessed by secure remote access to be sold or posted on any other website or in any way redistributed to any third party, and the clerk, in his discretion, **may deny secure remote access to ensure compliance with these provisions.** However, the data accessed by secure remote access may be included in products or services provided to a third party of the subscriber provided that (i) such data is not made available to the general public and (ii) the subscriber maintains administrative, technical, and security safeguards to protect the confidentiality, integrity, and limited availability of the data.").

Op. No. 11-093

CRIMES AND OFFENSES GENERALLY: CRIMES AGAINST THE ADMINISTRATION OF JUSTICE

A General District Court is authorized to order postrelease supervision of a person convicted of violating § 18.2-472.1(A), but in the case of misdemeanor convictions that period is limited to six months for each such conviction. The General District Court can order the Virginia Department of Corrections to oversee such supervision.

THE HONORABLE LUCRETIA A. CARRICO
GENERAL DISTRICT COURT JUDGE, RETIRED
JULY 12, 2013

ISSUES PRESENTED

You ask whether a General District Court has the authority to impose a two-year added term of postrelease supervision on an individual convicted in that court of two misdemeanor first offenses, by virtue of a plea agreement, of failing to register as a sex offender in violation of § 18.2-472.1. You further inquire whether the General District Court can order the Virginia Department of Corrections ("VDOC") to supervise such postrelease supervision.

RESPONSE

It is my opinion that a General District Court is authorized to order postrelease supervision of a person convicted of violating § 18.2-472.1(A), but in the case of misdemeanor convictions that period is limited to six months for each such con-

viction. It is further my opinion that the court can order VDOC to oversee such supervision.

APPLICABLE LAW AND DISCUSSION

Section 18.2-472.1(A) provides:

Any person subject to Chapter 9 (§ 9.1-900 et seq.) of Title 9.1, other than a person convicted of a sexually violent offense or murder as defined in § 9.1-902, who knowingly fails to register or reregister, or who knowingly provides materially false information to the Sex Offender and Crimes Against Minors Registry is guilty of a Class 1 misdemeanor. A second or subsequent conviction for an offense under this subsection is a Class 6 felony.^[1]

Section 19.2-295.2:1 contains special postrelease supervision provisions for persons found guilty of violating § 18.2-472.1 after July 1, 2006. Specifically, it provides:

1. At the time the court imposes a sentence upon a conviction for a first violation of subsection A of § 18.2-472.1 the court shall impose an added term of postrelease supervision of six months.
2. For a second or subsequent violation of subsection A of § 18.2-472.1 when both violations occurred after July 1, 2006, or a first violation of subsection B of § 18.2-472.1, the court shall impose an added term of postrelease supervision by the Department of Corrections of two years.^[2]

This statute further provides that “[a]ny terms of postrelease supervision imposed pursuant to this section shall be in addition to any other punishment imposed, including any periods of active incarceration or suspended periods of incarceration, if any.”³ This language evinces a clear intent by the General Assembly that § 19.2-295.2:1 operates to enhance the punishment prescribed by § 18.2-472.1.

Your specific inquiry involves a sex offender who was charged with two counts of felony failure to register in violation of § 18.2-472.1, but who, pursuant to a plea agreement, entered guilty pleas to two misdemeanor *first* violations of § 18.2-472.1. Under the plain terms of § 18.2-472.1(A), misdemeanor offenses are not second or subsequent offenses. Thus, under the legal fiction created by the plea agreement, the defendant was pleading guilty to two first violations of § 18.2-472.1.

Section 19.2-295.2:1 requires an added term of postrelease supervision of six months for *first* violations of § 18.2-472.1. Section 18.2-472.1(A) makes clear that *only* a first violation is a misdemeanor while a “second or subsequent conviction” is a felony. At issue here is how to interpret the conflict created by the misdemeanor plea agreement that essentially creates two first violations.

Under accepted principles of statutory construction, in construing statutes so as to ascertain the will of the General Assembly, courts must read statutes addressing the same subject “*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.”⁴ When these sections of § 18.2-472.1(A) are read together, it appears the legislature intended for § 19.2-295.2:1(A)(1) to apply to misdemeanor

violations of § 18.2-472.1(A), and § 19.2-295.2:1(A)(2) to apply Class 6 felonies under § 18.2-472.1(A)(2).

Therefore, I conclude that proper postrelease supervision in the situation you describe is six months for each misdemeanor offense.⁵

In response to your question regarding which agency should supervise a defendant who receives postrelease supervision pursuant to § 19.2-295.2:1(A), I conclude that VDOC is the proper agency to serve such function, and § 19.2-295.2:1(B) grants a General District Court the express authority to order such supervision by VDOC.⁶

CONCLUSION

Accordingly, it is my opinion that a General District Court is authorized to order supervision of a person convicted of violating § 18.2-472.1(A), but in the case of misdemeanor convictions that period is limited to six months for each such conviction. It is further my opinion that the court can order VDOC to oversee such supervision.

¹ VA. CODE ANN. § 18.2-472.1(A) (Supp. 2013).

² VA. CODE ANN. § 19.2-295.2:1(A) (2008).

³ *Id.*

⁴ *Parker v. Commonwealth*, 42 Va. App. 358, 386, 592 S.E.2d 358, 372 (2004) (citing *Tyson v. Scott*, 116 Va. 243, 253, 81 S.E. 57, 61 (1914)).

⁵ This is not to say that a defendant could avoid, as part of a plea agreement, the mandatory requirement of postrelease supervision required by § 19.2-295.2:1. *See Wright v. Commonwealth*, 275 Va. 77, 81-82, 655 S.E.2d 7, 9-10 (2008) (holding that the defendant was not entitled to withdraw plea where plea agreement did not call for postrelease supervision under § 19.2-295.2(A) (2008), because the court was required to order postrelease supervision “as a matter of law,” and that requirement was thus a part of the plea agreement as though it had been “incorporated therein.”).

⁶ Section 19.2-25.2:1(B) clearly contemplates VDOC supervision and makes no distinction between misdemeanors and felonies for that supervision.

OP. NO. 13-083

CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING HEALTH AND SAFETY

A trust may not register a machine gun pursuant to the Uniform Machine Gun Act as enacted by the Virginia General Assembly.

COLONEL W.S. FLAHERTY
 SUPERINTENDENT
 DEPARTMENT OF STATE POLICE
 NOVEMBER 27, 2013

ISSUES PRESENTED

You inquire whether a trust may register a machine gun in Virginia under the Uniform Machine Gun Act (the “Act”).¹ Should the answer be in the affirmative, you further inquire who must be in possession of the machine gun to remain in compliance with the Act, and what action must be taken when a trustee of the trust is substituted.

RESPONSE

It is my opinion that a trust may not register a machine gun pursuant to the Uniform Machine Gun Act as enacted by the Virginia General Assembly.²

APPLICABLE LAW AND DISCUSSION

The Act requires the registration of every machine gun in the Commonwealth with the Department of State Police, and provides for no exceptions to this requirement.³ In relevant part, § 18.2-295 provides that

Every machine gun in this Commonwealth shall be registered with the Department of State Police within twenty-four hours after its acquisition or, in the case of semi-automatic weapons which are converted, modified or otherwise altered to become machine guns, within twenty-four hours of the conversion, modification or alteration [T]o comply with this section the application as filed shall be notarized and shall show the model and serial number of the gun, the name, address and occupation of the person in possession, and from whom and the purpose for which, the gun was acquired or altered. The Superintendent of State Police shall upon registration required in this section forthwith furnish the registrant with a certificate of registration, which shall be valid as long as the registrant remains the same.

The Act defines a “machine gun” as “any weapon which shoots or is designed to shoot automatically more than one shot, without manual reloading, by a single function of the trigger.”⁴ In addition, § 18.2-297 provides that “[t]his article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.”

The Act further provides that the term “person” applies to and includes any “firm, partnership, association or corporation.”⁵ A trust⁶ is not listed, and thus, I conclude that the General Assembly did not intend to include a trust among the non-natural person, *i.e.*, “legal,” entities that might be considered a “person” for purposes of the Act’s regulatory scope.^{7,8} Indeed, this omission is particularly noteworthy because the general definition of “person” found in § 1-230 includes “trust” among the other legal entities listed.⁹ 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.¹⁰ 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.”¹¹ Thus, I conclude that by omitting the word “trust” from the definition of “person” in § 18.2-288, the General Assembly intended that a trust may not register a machine gun under the Act.¹²

You additionally ask, in the event a trust may register a machine gun under the Act, who may be its “person in possession” for compliance with the requirements of § 18.2-295, and what registration-related actions must taken upon a substitution of trustee. In light of the above-noted conclusion, it is not necessary to address these matters.

CONCLUSION

Accordingly, it is my opinion that a trust may not register a machine gun pursuant to the Uniform Machine Gun Act as enacted by the Virginia General Assembly.

¹ VA. CODE ANN. §§ 18.2-288 through 18.2-298 (2009).

² Based upon the conclusion reached herein that a trust may not register a machine gun under the Act, it is not necessary to address your additional inquiries.

³ See § 18.2-295.

⁴ Section 18.2-288(1).

⁵ Section 18.2-288 (3).

⁶ A “trust” is defined generally as

The right, enforceable solely in equity, to the beneficial enjoyment of property to which another person holds the legal title; a property interest held by one person (the *trustee*) at the request of another (the *settlor*) for the benefit of a third party (the *beneficiary*).

BLACK’S LAW DICTIONARY 1513 (7th ed. 1999). For the purposes of your inquiry, I conclude that you intend to use the term “trust” in accordance with this general definition. In Virginia, most forms of trusts are governed by the terms of the Uniform Trust Code. See VA. CODE ANN. § 64.2-700 through 64.2-808 (2012 & Supp. 2013). See especially § 64.2-704 (2012) (providing that “The common law of trusts and principles of equity supplement this chapter, except to the extent modified by this chapter or another statute of the Commonwealth.”).

⁷ “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 Va.*, 230 Va. 420, 425, 722 S.E.2d 626, 629 (2012) (quoting *Commonwealth v. Amerson*, 281 Va. 414, 418, 706 S.E.2d 877, 882 (2011)) (further citation and internal question marks omitted). In addition, “[r]ules of statutory construction prohibit adding language to or deleting language from a statute.” *Appalachian Power Co. v. State Corp. Comm’n*, 284 Va. 695, 706, 733 S.E.2d 250, 256 (2012) (citing *BBF, Inc. v. Alstom Power, Inc.*, 274 Va. 326, 331, 645 S.E.2d 467, 469 (2007)).

⁸ VA. CODE ANN. § 1-230 (2011) provides that, “[w]henver the term ‘person’ is defined to include both ‘corporation’ and ‘partnership,’ such term shall also include ‘business trust and limited liability company.’” As noted above, this Opinion interprets the term “trust” in its broader, more general usage.

⁹ Section 1-230.

¹⁰ *Halifax Corp. v. Wachovia Bank*, 268 Va. 641, 654, 604 S.E.2d 403, 408 (2004).

¹¹ *GEICO v. Hall*, 260 Va. 349, 355, 533 S.E.2d 615, 617 (2000) (quoting *Turner v. Wexler*, 244 Va. 124, 127, 418 S.E.2d 886, 887 (1992)).

¹² The Act does not specifically define the term “registrant.” Nevertheless, based upon the public safety-related, regulatory purposes of the Act, it cannot reasonably be defined more broadly than the term “person.” “[I]t is well established that every act of the legislature should be read so as to give reasonable effect to every word and to promote the ability of the enactment to remedy the mischief at which it is directed.” *Jones v. Conwell*, 227 Va. 176, 181, 314 S.E.2d 61, 64 (1984).

OP. NO. 13-040

CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING HEALTH AND SAFETY

The term “state-certified” as used in § 18.2-308(G)(7) and (P1)(7) of the Code of Virginia refers to a firearms instructor that is certified by any state in the United States.

THE HONORABLE JOHN T. FREY
CLERK OF THE CIRCUIT COURT

FAIRFAX COUNTY CIRCUIT COURT
JUNE 14, 2013

ISSUE PRESENTED

You inquire whether the term “state-certified,” as used in § 18.2-308(G)(7) and (P1)(7) of the *Code of Virginia*, refers to an instructor certified by any state in the United States or only to an instructor certified by the Commonwealth of Virginia.

RESPONSE

It is my opinion that the term “state-certified” as used in § 18.2-308(G)(7) and (P1)(7) refers to a firearms instructor that is certified by any state in the United States.

APPLICABLE LAW AND DISCUSSION

To qualify for a Virginia concealed handgun permit, the law requires the permit applicant to demonstrate competence with a handgun.¹ The required types of proof to demonstrate competence are listed in § 18.2-308(G) and (P1). One form of acceptable proof is “[c]ompleting any firearms training . . . conducted by a state-certified or National Rifle Association-certified firearms instructor.”²

Finding no cases directly on point, I rely on the familiar rules of statutory construction to answer your inquiry. Foremost, in construing a statute, the plain meaning of the language determines the legislative intent unless a literal construction would lead to a manifest absurdity.³ Further, statutes must be construed to give meaning to all of the words enacted by the General Assembly, and a court is “not free to add language, nor to ignore language, contained in statutes.”⁴

Other statutes in the *Code of Virginia* specify a particular board or agency that must certify an individual for that person to be “state-certified.”⁵ The applicable provisions of § 18.2-308 do not indicate a requirement that a firearms instructor be certified by any board or agency of the Commonwealth, or contain any other reference to Virginia or the Commonwealth. Absent language qualifying or limiting the certification to a particular state, the certification requirement must extend to all “state-certified” firearms instructors.⁶ Additionally, it would appear unreasonable to limit the “state-certified” certification to only a Virginia certified firearms instructor when the handgun competency requirements apply equally to resident and non-resident concealed handgun permit applicants.

CONCLUSION

Accordingly, it is my opinion that the term “state-certified” as used in § 18.2-308(G)(7) and (P1)(7) refers to a firearms instructor that is certified by any state in the United States.

¹ VA. CODE ANN. § 18.2-308(G) (Supp. 2012) concerns the competency requirements for a Virginia resident concealed handgun permit. Section 18.2-308(P1) (Supp. 2012) concerns the competency requirements for a nonresident concealed handgun permit. These requirements are similar.

² Section 18.2-308(G)(7); § 18.2-308(P1)(7).

³ Halifax Corp. v. First Union Nat'l Bank, 262 Va. 91, 99-100, 546 S.E.2d 696, 702 (2001).

⁴ Signal Corp. v. Keane Fed. Sys., 265 Va. 38, 46, 574 S.E.2d 253, 257 (2003).

⁵ For example, "an individual who is not licensed by [the Virginia Real Estate Appraisal Board]" cannot represent himself as a "state certified real estate appraiser." VA. CODE ANN. § 54.1-2017 (2009).

⁶ For example, the General Assembly could have chosen to limit the training conducted by a Virginia-certified or Department of Criminal Justice-certified firearms instructor. Cf. 2012 Op. Va. Att'y Gen. 28, 29-30 (concluding that because § 8.01-341(5), which provides practicing attorneys an exemption from jury service, does not expressly limit the exemption to Virginia attorneys, "the exemption must extend to all licensed practicing attorneys.").

OP. NO. 13-005

CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING HEALTH AND SAFETY

An individual excepted from the concealed handgun prohibition found in § 18.2-308 may be restricted from carrying a weapon through voluntary membership in an organization that restricts the carrying of firearms by members while on the organization's property.

THE HONORABLE RICHARD H. BLACK
MEMBER, SENATE OF VIRGINIA
OCTOBER 11, 2013

ISSUE PRESENTED

You inquire regarding the authority of a volunteer fire department to enforce a restriction on the ability of its members to carry or possess a firearm on its property when the individual is excepted from the general prohibition on carrying a concealed handgun under the terms of § 18.2-308 of the *Code of Virginia*.

RESPONSE

It is my opinion that an individual excepted from the concealed handgun prohibition found in § 18.2-308 may be restricted from carrying a weapon through voluntary membership in an organization that restricts the carrying of firearms by members while on the organization's property.

APPLICABLE LAW AND DISCUSSION

Pursuant to § 18.2-308(B)(7), qualified retired law enforcement officers are excepted from the prohibition found in § 18.2-308(A) with respect to carrying a concealed handgun.¹ Carrying certain weapons while concealed is a misdemeanor and those excepted from the prohibition are merely exempt from prosecution for what would otherwise be an illegal act under § 18.2-308(A). "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.'"² Subsection 18.2-308(B)(7) does not operate to provide a retired law enforcement officer the right to carry a firearm in all circumstances; the plain reading of the statute merely operates as an exception to the general prohibition against concealed carry of a handgun contained in § 18.2-308(A).

Localities generally are restricted from adopting local ordinances, resolutions or motions that restrict the otherwise lawful possession of firearms.³ With that broad prohibition in mind, localities retain the authority to restrict carrying and possession of firearms as a term and condition of employment.⁴ Your inquiry, however, does not relate to the adoption of a restriction on a paid career firefighter as a term or condition of employment, but is limited to the enforcement of the restriction of volunteer firefighters in a volunteer association by the by-laws of the organization.⁵ It applies to members only while on the organization's property. In the instance you describe, the workplace rule was not adopted by the locality. It was adopted as a by-law by a volunteer firefighting corporation, and is consistent with lawful restrictions that may be imposed on career firefighters.^{6,7}

The restriction imposed under the by-law you have provided is limited in scope and does not implicate the ability to possess a concealed firearm pursuant to § 18.2-308(A) or the exceptions and exemptions thereto. The prescribed sanction is restricted to expulsion from the volunteer entity and does not criminalize otherwise lawful behavior.⁸ Thus, I necessarily conclude that it comports with Virginia law.

CONCLUSION

Accordingly, it is my opinion that an individual excepted from the concealed handgun prohibition found in § 18.2-308 may be restricted from carrying a weapon through voluntary membership in an organization that restricts the carrying of firearms by members while on the organization's property.

¹ Prior opinions of this Office have addressed various aspects of § 18.2-308 of the *Code of Virginia*, including the operation of subsection (B)(7), but they have not addressed the scope of authority for the retired law-enforcement officer to carry a concealed firearm pursuant to the exception from a permit. See generally 1998 Op. Va. Att'y Gen. 55 (discussing the requirements for the proof of consultation provision found in § 18.2-308(B)(8) (1998), subsequently renumbered as subsection (B)(7)). See also 2002 Op. Va. Att'y Gen. 140 (discussing the status of a sheriff as the chief law-enforcement officer for retired deputies).

² *City of Va. Beach v. Bd. of Supvrs.*, 246 Va. 233, 435 S.E.2d 382, 384 (1993) (quoting *Grant v. Commonwealth*, 223 Va. 680, 684, 292 S.E.2d 348, 350 (1982)).

³ See VA. CODE ANN. § 15.2-915(A) (2012)

⁴ *Id.* In certain instances, the *Code of Virginia* classifies volunteer firefighters as employees of a locality. See VA. CODE ANN. § 65.2-101 (2012) (addressing, in subpart (l) of the definition of "Employee," the classification of volunteer firefighters for purposes of worker' compensation). Classification of a volunteer firefighter as an employee would be dispositive of the concerns addressed in your inquiry, as the restriction of carrying a firearm as a term or condition of employment by an employee is clearly permissible by the locality or local government entity. See VA. CODE ANN. § 15.2-915(A) (2012). This opinion need not reach such a conclusion to address the inquiry fully and such a determination would require additional facts. The Attorney General "refrain[s] from commenting on matters that require additional facts[.]" 2010 Op. Va. Att'y Gen. 56, 58.

⁵ VA. CODE ANN. § 27-23.6(B) (2011) provides for a locality to use a combination of paid government-employed personnel and volunteer firefighters.

⁶ The Virginia State Corporation Commission reports that Fairfax Volunteer Fire Department was originally certified in 1928 and currently maintains an active registration as a Virginia corporation.

⁷ VA. CODE ANN. § 27-7 (2011) allows the locality to empower fire/EMS departments to enact by-laws.

⁸ This opinion does not address the wisdom of adoption of such a policy by a volunteer membership organization.

Op. No. 13-036

CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING HEALTH AND SAFETY

Beginning on July 1, 2013, the clerk of court must withhold from public disclosure the applicant's name and other information contained in all concealed handgun permit applications and orders, including those filed prior to July 1.

THE HONORABLE RAY S. CAMPBELL, JR.
CLERK OF THE CIRCUIT COURT FOR CAROLINE COUNTY
JULY 12, 2013

ISSUES PRESENTED

You inquire regarding the duties of the clerk of court pursuant to recent amendments to § 18.2-308(D) of the *Code of Virginia*, which prohibits the disclosure of certain information related to concealed handgun permits. You specifically inquire as to the effective date of the amendment. You also ask whether the amendment applies to applications and orders processed prior to the effective date of the enactment. You inquire similarly whether the prohibition encompasses references to orders granting applications that are recorded in "Order Books." Finally, you ask whether the clerk must take measures to comply with the new provisions despite the General Assembly's decision to not allocate funds to the clerk for this purpose.

RESPONSE

It is my opinion that the amendments to § 18.2-308(D) took effect on July 1, 2013. It is further my opinion that beginning on July 1, 2013, the clerk of court must withhold from public disclosure the applicant's name and other information contained in all concealed handgun permit applications and orders, including those filed prior to the effective date. It is further my opinion that the clerk must withhold from public disclosure court orders issuing such permits, whether they are maintained electronically or in "Order Books." Finally, it is my opinion that the clerk is required to comply with this statute irrespective of receiving any funding from the General Assembly.

APPLICABLE LAW AND DISCUSSION

During its 2013 session, the General Assembly amended § 18.2-308(D) of the *Code of Virginia* to require that "[t]he clerk of court shall withhold from public disclosure the applicant's name and any other information contained in a permit application or any order issuing a concealed handgun permit, except that such information shall not be withheld from any law-enforcement officer acting in the performance of his official duties."¹

You first inquire as to the effective date of this amendment. "All laws enacted at a regular session ... shall take effect on the first day of July following the adjournment

of the session of the General Assembly at which they were enacted, unless a subsequent date is specified.”² The amendment to § 18.2-308(D) was approved during the 2013 General Assembly regular session, and it contains no provision setting forth another effective date. I therefore conclude that the amendment became effective on July 1, 2013.

To respond to your next two inquiries, I rely on basic principles of statutory construction. Accordingly, “[i]n deciding the meaning of the statute, we must consider the plain language that the General Assembly employed in enacting the statute.”³ “[W]e determine the General Assembly’s intent from the words contained in the statute[.]”⁴ and “[w]e ‘assume that the legislature chose, with care, the words it used when it enacted the relevant statute.’”⁵

Beginning July 1, 2013, the amendment to § 18.2-308(D) imposes a duty on the clerk to withhold certain information pertaining to concealed weapon permits.⁶ Although this duty is prospective, the plain language of the statute does not place any limits on this duty based on filing or issuing dates. Rather, the statute evidences the General Assembly’s intent to prohibit public access to all applications and orders as of July 1, 2013, irrespective of the application date or the date of entry. If the General Assembly had intended to limit application of the amendment to only new orders and applications, it would have provided for such in the language of the statute.⁷ Accordingly, it is my opinion the clerk of court must withhold from public disclosure the applicant’s name and other information contained in all concealed handgun permit applications and orders issuing such permits, including those applications and orders filed prior to July 1, 2013.

You also inquire whether the clerk must withhold from disclosure references to orders issuing permits when such references are contained in the clerk’s “Order Books.” You relate the usual practice is to file the order in the clerk’s “Civil Book” or “Miscellaneous Book” (the “Order Books”), which may be maintained electronically or on paper, and are accessible to the public. The plain text of the statute expressly prohibits disclosure of “*information contained* in a permit application or any order issuing a concealed handgun permit.”⁸ The prohibition is not limited to the permits and orders themselves. Thus, the clerk must not permit disclosure of such information, regardless of where it is filed. It would defeat the purpose of the amendment if this information were to be publicly available in the clerk’s “Order Books.” I therefore conclude that to the extent information contained in an “Order Book” references the name or other information of an individual subject to such an order, such reference must be withheld from the public.⁹

Finally, you ask whether the clerk of court is required to comply with the statute even though the General Assembly has not allocated funds for that purpose. The duties of the office are prescribed by the General Assembly and include keeping records of the proceedings in circuit court, providing access to such records, and maintaining and purging records.¹⁰ Section 18.2-308(D), as amended, is a general law imposing a statutory duty on the clerk to maintain records in a certain manner. Requiring clerks of court to withhold this information without appropriating funds does not exceed the authority of the General Assembly because the authority of the General Assembly

extends to all subjects of legislation not otherwise forbidden or restricted.¹¹ The Clerk of Court, as a constitutional officer, must abide by the law and his oath of office, which requires him “faithfully and impartially discharge all the duties incumbent upon [him] as [Clerk of Court]”¹² Consequently, the clerk must comply with the statute notwithstanding the non-allocation of funds.

CONCLUSION

Accordingly, it is my opinion that the amendment to § 18.2-308(D) took effect on July 1, 2013. It is further my opinion that beginning on July 1, 2013, the clerk of court must withhold from public disclosure the applicant’s name and other information contained in all concealed handgun permits. It is further my opinion that the clerk must withhold from public disclosure court orders issuing such permits, whether they are maintained electronically or in “Order Books.” Finally, it is my opinion that the clerk is required to comply with this statute even though the General Assembly did not appropriate funds for this task.¹³

¹ 2013 Va. Acts ch. 659, to be recodified as the new VA. CODE ANN. § 18.2-308.02.

² VA. CONST. art. IV, § 13; *accord* VA. CODE ANN. § 1-214(A) (2011).

³ 2011 Op. Va. Att’y Gen. 18, 19 (quoting *Haslip v. S. Heritage Ins. Co.*, 254 Va. 265, 268, 492 S.E.2d 135, 137).

⁴ *Williams v. Commonwealth*, 265 Va. 268, 271, 576 S.E.2d 468, 470 (2003) (citing *Vaughn, Inc. v. Beck*, 262 Va. 673, 677, 554 S.E.2d 88, 90 (2001); *Thomas v. Commonwealth*, 256 Va. 38, 41, 501 S.E.2d 391, 393 (1998)).

⁵ *Alger v. Commonwealth*, 267 Va. 255, 261, 590 S.E.2d 563, 566 (2004) (quoting *Barr v. Town & Country Props., Inc.*, 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990)).

⁶ Section 1-238 (2011) (“‘Reenacted,’ . . . means that the changes enacted to a section of the Code of Virginia or an act of the General Assembly are in addition to the existing substantive provisions in that section or act, and are effective prospectively unless the bill expressly provides that such changes are effective retroactively on a specific date.”); *see also* 2002 Op. Va. Att’y Gen. 273, 276.

⁷ *Compare* 2013 Va. Acts ch. 659, *with* VA. CODE ANN. § 32.1-267(F) (2011) (“marriage licenses filed on and after July 1, 1997,” which disclose a social security number or control number, “shall not be available for general public inspection in the offices of clerks of the circuit courts”). *Cf.* 2012 Op. Va. Att’y Gen. 84, 86 (explaining that because the General Assembly provided for the charge of returned check fees only in criminal cases, a court could not charge such a fee in civil cases).

⁸ 2013 Va. Acts ch. 659 (emphasis added).

⁹ Redaction of certain information contained within an Order Book does not result in a retroactive application of the statute. Rather, it is consistent with the clerk’s prospective duty, beginning on July 1, 2013, to withhold this information from the public.

¹⁰ *See, e.g.*, VA. CODE ANN. §§ 17.1-200 through 17.1-295 (2010 & Supp. 2012).

¹¹ *See* VA. CONST. art. IV, § 14. “[T]he Virginia Constitution ‘is not a grant of legislative powers to the General Assembly, but is a restraining instrument only, and, except as to matters ceded to the federal government, the legislative powers of the General Assembly are without limit.’” 2009 Op. Va. Att’y Gen. 178, 180 (quoting *Harrison v. Day*, 201 Va. 386, 396, 111 S.E.2d 504, 511.) There is no constitutional provision prohibiting the General Assembly from requiring clerks to withhold information in this manner.

¹² VA. CONST. art. II, § 7.

¹³ The clerk, as a constitutional officer, may choose the means by which he fulfills his duties unless the General Assembly has limited his discretion. *See, e.g.*, 2010 Op. Va. Att’y Gen. 92, 92; 2010 Op. Va. Att’y Gen. 17, 18; 2003 Op. Va. Att’y Gen. 60, 60-61. As you suggest, the amendments to § 18.2-308(D) do not

specify the manner in which the clerk is to ensure the information is withheld from public disclosure. Accordingly, although you specifically inquire whether the legislation requires you to perform certain redactions, I do not address that explicit issue here; rather I conclude only that the information subject to the amendment, as discussed above, must be withheld.

OP. NO. 13-095

CRIMINAL PROCEDURE: DISABILITY OF JUDGE OR ATTORNEY FOR COMMONWEALTH; COURT- APPOINTED COUNSEL; INTERPRETERS; TRANSCRIPTS

COURTS OF RECORD: CLERKS, CLERKS' OFFICES AND RECORDS

An indigent criminal defendant convicted in a circuit court may be taxed for court-approved, reasonable expenses in addition to, and over and above the court-appointed counsel pre-waiver compensation limit set forth in § 19.2-163(2).

THE HONORABLE CATHY C. HOGAN
CLERK OF THE CIRCUIT COURT OF BEDFORD COUNTY
DECEMBER 27, 2013

ISSUES PRESENTED

You make three inquiries with respect to the assessment of expenses against an indigent criminal defendant convicted in a circuit court.¹ First, you ask whether there is a limit on the amount of court-approved expenses that may be assessed against such defendant, when the amount of such expenses exceeds the court-appointed counsel pre-waiver compensation limit set forth in § 19.2-163(2) of the *Code of Virginia*.² Second, you ask whether § 19.2-163(2) limits the amounts that may be assessed by a circuit court clerk under § 17.1-275.5 of the *Code of Virginia*.³ Third, you inquire whether the amount of expenses that may be assessed against such defendant who is represented by an attorney from a public defender or capital defender office is limited to the amount of the pre-waiver compensation limit set forth in § 19.2-163(2).

RESPONSE

It is my opinion that an indigent criminal defendant convicted in a circuit court may be taxed for court-approved, reasonable expenses in addition to, and over and above the court-appointed counsel pre-waiver compensation limit set forth in § 19.2-163(2). It is further my opinion that §§ 17.1-275.5 and 19.2-163 must be read together to determine the amount of combined court-appointed counsel compensation and approved expenses that may be assessed against such a defendant. Finally, it is my opinion that the amount of expenses that may be assessed against such a defendant who is represented by an attorney from a public defender or capital defender office is not limited by the court-appointed counsel pre-waiver compensation limit set forth in § 19.2-163(2).

APPLICABLE LAW AND DISCUSSION

You first inquire whether there is a limit on the amount of expenses that may be assessed against a convicted indigent defendant, when the amount of such expenses approved by the court under § 19.2-163 exceeds the amount of the court-appointed

counsel pre-waiver compensation limit. Section 19.2-163 provides that “[t]he circuit or district court shall direct the payment of such reasonable expenses incurred by . . . court-appointed counsel as it deems appropriate under the circumstances of the case.” Under the plain language of this statute, no monetary limit is set upon the amount the court may approve as reasonable expenses.⁴ Accordingly, upon court-appointed counsel’s request, the court may direct payment of reasonable expenses, without regard to the court-appointed counsel pre-waiver compensation limit of § 19.2-163(2).⁵ Moreover, with respect to the combined total amount of compensation awarded to counsel, up to the pre-waiver compensation limit, and reasonable expenses approved by the court, § 19.2-163 provides that “[i]f the defendant is convicted, the amount allowed by the court to the attorney appointed to defend him shall be taxed against the defendant as a part of the costs of prosecution[.]”⁶

Therefore, I conclude that the court may approve the payment of reasonable expenses to court-appointed counsel in addition to, and over and above the compensation approved for court appointed-counsel pursuant to § 19.2-163(2). I further conclude that the clerk may combine the amount of court-approved expenses and compensation approved for court-appointed counsel, and assess the total amount against the defendant as part of the costs of the prosecution. Nevertheless, in calculating this combined total, and with respect to the compensation approved by the court for court-appointed counsel, the clerk may assess against the defendant only an amount of compensation up to the pre-waiver compensation limit of § 19.2-163(2).

You next ask whether “§ 19.2-163(2) limits the fees that may be assessed by a circuit court clerk under § 17.1-275.5[.]”⁷ Both statutes generally relate to the same subject - namely, the amount of costs that lawfully are to be assessed against a convicted criminal defendant - and should be construed together.⁸ Should they conflict, the more specific statute will prevail over the more general.⁹ Nevertheless, in reading them together, I find no conflict between these two statutory provision.

Section 19.2-163(2), and those other parts of the statute relevant to your inquiries, pertain to those circuit court cases in which indigent defendants have been provided with court-appointed counsel. The statute therein provides for the determination of that attorney’s compensation, and for court approval of reasonable expenses that may be reimbursed to that attorney and taxed against such defendants who are convicted. Section 17.1-275.5, on the other hand, applies generally to all cases in which the Commonwealth has incurred costs in the prosecution of defendants convicted in courts of record.

Thus, with respect to the matters about which you inquire, § 19.2-163(2) is the more specific statute, and governs assessments in those circumstances to which it applies - namely, circumstances in which a convicted indigent defendant has been represented by court-appointed counsel, and the determination of compensation “for his services on an hourly basis[.]”¹⁰ It harmoniously corresponds with, and imposes a limitation on one matter within the broad scope of § 17-275.5(A)(1), mandating that a circuit court clerk assess against a convicted defendant “[a]ny amount paid by the Commonwealth for legal representation of the defendant.”¹¹ Section 19.2-163(2) provides the methodology for the determination of compensation of court-appointed

counsel for indigent criminal defendants, and other provisions within that statute mandate that the circuit court clerk assess a convicted defendant for the amount of such compensation, *not to exceed* the pre-waiver compensation limit. I conclude that this very specific limitation on the amount of court-appointed compensation that may be assessed against a defendant represented by court-appointed counsel correspondingly limits the amount that a clerk may assess a defendant under § 17.1-275.5(A)(1) for this particular *component* of amounts that may be “paid by the Commonwealth for legal representation of the defendant.”

You inquire further whether the amount of expenses assessed against an indigent defendant who is represented by an attorney from a public defender or capital defender office is limited to the amount of the pre-waiver compensation limit set forth in § 19.2-163(2). I conclude that the amount of expenses assessed under such circumstances is not so limited. Section 19.2-163.4:1 provides as follows:

In any case in which an attorney from a public defender or capital defender office represents an indigent person charged with an offense and such person is convicted, the sum that would have been allowed a court-appointed attorney as compensation *and as reasonable expenses* shall be taxed against the person defended as a part of the costs of the prosecution, and, if collected, shall be paid to the Commonwealth or, if payment was made to the Commonwealth by a locality for defense of a local ordinance provision, to the appropriate county, city or town.^[12]

The plain meaning of § 19.2-163.4:1 provides that all court-approved expenses incurred by an attorney from a public defender or capital defender office must be assessed against a convicted indigent defendant. “A principal rule of statutory interpretation is that courts will give statutory language its plain meaning.”¹³ Therefore, it is my opinion that the amount of expenses assessed against a convicted indigent defendant who is represented by an attorney from a public defender or capital defender office is not limited to the amount of pre-waiver compensation allowed a court-appointed attorney under § 19.2-163(2).¹⁴

CONCLUSION

Accordingly, it is my opinion that an indigent criminal defendant convicted in a circuit court may be taxed for court-approved, reasonable expenses in addition to, and over and above the court-appointed counsel pre-waiver compensation limit set forth in § 19.2-163(2). It is further my opinion that §§ 17.1-275.5 and 19.2-163 must be read together to determine the amount of combined court-appointed counsel compensation and approved expenses that may be assessed against such a defendant. Finally, it is my opinion that the amount of expenses that may be assessed against such a defendant who is represented by an attorney from a public defender or capital defender office is not limited by the court-appointed counsel pre-waiver compensation limit set forth in § 19.2-163(2).

¹ With respect to your specific inquiries, you seek clarification of a prior opinion of this Office, 2013 Op. Va. Att’y Gen. No. 13-060 (Sep. 20, 2013), which concluded that “because § 19.2-163(2) specifically sets the amount that a convicted indigent defendant can be taxed at the pre-waiver compensation limit, a

defendant cannot be taxed with approved expenses or fees that exceed the pre-waiver compensation limit.” *Id.* Your current inquiry focuses clearly upon the distinction between amounts that may be assessed for “compensation for [court-appointed counsel] services on an hourly basis,” and “reasonable expenses incurred by” such attorney in the representation of an indigent criminal defendant, as provided for in § 19.2-163, and whether those separate amounts may be *combined* upon a conviction and “taxed against the defendant as a part of the costs of prosecution.” While the former opinion generally addressed this subject matter under § 19.2-163(2), it did not purport to opine on the very specific legal issues that you now raise. To the extent that the former opinion’s conclusion is in conflict with the conclusions of this Opinion, that conclusion is superseded.

² VA. CODE ANN. § 19.2-163 (Supp. 2013).

³ VA. CODE ANN § 17.1-275.5 (Supp. 2013).

⁴ “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.’” *City of Va. Beach v. Bd. of Supvrs.*, 246 Va. 233, 236, 435 S.E.2d 382, 384 (1993) (quoting *Grant v. Commonwealth*, 233 Va. 680, 684, 292 S.E.2d 348, 350 (1982)).

⁵ Section 19.2-163. *See also* 1977-78 Op. Att’y. Gen. 199 (regarding a district court’s authority to award reasonable expenses to court-appointed counsel).

⁶ Section 19.2-163 further provides that “[i]n the event that counsel for the defendant requests a waiver *on the limits of compensation*, the court shall assess against the defendant an amount equal to the pre-waiver compensation limit specified in this section for each charge for which the defendant was convicted.” (Emphasis added.) Thus, in the event of a court-approved waiver respecting counsel compensation, and an award of additional compensation for services over and above the pre-waiver compensation limit of § 19.2-163(2), the maximum amount the clerk of court may assess the defendant is the pre-waiver compensation limit. The statute’s language makes clear that this calculation applies only to *compensation* to court-appointed counsel “for...services on an hourly basis,” and does not pertain to the separate assessment of court-approved, “reasonable expenses incurred by such court-appointed counsel.” Section 19.2-163; *see infra* note 5.

⁷ As quoted by you in your opinion request, § 17.1-275.5(A), in relevant part, pertains to certain costs in criminal cases, and it requires the clerk to “assess, in addition to the fees provided for by” several other statutory sections within Article 7 of Title 17.1 of the *Code of Virginia*, the following amounts:

1. Any amount paid by the Commonwealth for legal representation of the defendant;
2. Any amount paid for trial transcripts;
3. Extradition costs;
4. Costs of psychiatric evaluation;
5. Costs taxed against the defendant as appellant under Rule 5A:30 of the Rules of the Supreme Court of Virginia

With respect to such monetary amounts to be assessed against a convicted criminal defendant, § 17.1-275.5(A) does not make reference to § 19.2-163. Moreover, with one exception that might include them, these categories of cost items do not appear to relate to “reasonable expenses *incurred by* . . . court-appointed counsel,” as provided for by § 19.2-163. (Emphasis added). *See* § 17.1-275.5(A)(1) (potentially encompassing the reasonable expenses of court-appointed counsel). Instead, the items constitute costs of prosecution of the defendant, and his subsequent appeal, which most frequently would not be billed to, or paid in the first instance by, court-appointed counsel.

⁸ “The general rule is that statutes may be considered as *in pari materia* when they relate to the same person or thing, the same class of persons or things or to the same subject or to closely connected subjects or objects. Statutes that have the same general or common purpose or are parts of the same general plan are also ordinarily considered as *in pari materia*.” *Prillaman v. Commonwealth*, 199 Va. 401, 405, 100 S.E.2d 4, 7 (1957).

⁹ According to long-accepted principles of statutory construction, “[g]eneral language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment. Specific terms prevail over the general in the same or another statute which otherwise might be controlling.” *D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932) (internal citations omitted). *See also* *Commonwealth v. Jones & Robins, Inc.*, 186 Va. 30, 48, 41 S.E.2d 720, 730 (1947).

¹⁰ Section 19.2-163.

¹¹ *See also* §§ 19.2-163.4 and 19.2-163.4:1.

¹² Emphasis added.

¹³ *Davenport v. Little-Bowser*, 269 Va. 546, 555, 611 S.E.2d 366, 371 (2005) (citing *Jackson v. Fidelity & Deposit Co.*, 269 Va. 303, 313, 608 S.E.2d 901, 904 (2005)).

¹⁴ I note that, in your request, you posit four scenarios, each involving an indigent criminal defendant convicted of a Class 2 felony, and inquire as to the amount a circuit court clerk should assess against the convicted indigent defendant. I address each scenario in turn, noting that the amounts calculated are hypothetical only, in applying the legal conclusions reached herein. In the first scenario, the defendant’s court-appointed counsel submits documentation requesting statutory attorney’s fees in the amount of \$1,235 (such sum, in each of your hypothetical scenarios, represents the pre-waiver compensation limit under § 19.2-163(2)), plus expenses of \$400. The circuit court approves both amounts. In this instance, the defendant should be assessed in the amount of \$1,635. *See* § 19.2-163. In the second scenario, the defendant’s court-appointed counsel submits documentation requesting a waiver of the \$1,235 compensation limit, for a total attorney’s fee of \$2,000, plus expenses in the amount of \$400. The circuit court approves the waiver and the full amount of expenses sought. In this instance, the defendant should be assessed for compensation and expenses in the amount of \$1,635. *See* § 19.2-163. In the third scenario, the defendant is represented by a public defender, who in addition to seeking compensation in the amount of \$1,235, submits documentation of expenses totaling \$400, and the circuit court approves these amounts. In this instance, the defendant should be assessed for compensation and expenses in the amount of \$1,635, representing the pre-waiver compensation limit that would have been allowed a court-appointed attorney under § 19.2-163(2), that is, \$1,235, plus approved expenses in the amount of \$400. *See* § 19.2-163:4:1 (2008) (setting the sum that shall be assessed against the convicted indigent defendant at “the sum that would have been allowed a court-appointed attorney as compensation and as reasonable expenses”). In the fourth scenario, the defendant’s court-appointed counsel submits documentation for only ten hours of legal services, plus expenses in the amount of \$400. The circuit court approves \$900 in compensation for the attorney’s services, plus \$400 in expenses. *See* OFFICE OF THE EXEC. SEC’Y, DEP’T OF JUDICIAL SERVS., COURT-APPOINTED COUNSEL PROCEDURES & GUIDELINES MANUAL 5-1 (2013), *available at* <http://www.courts.state.va.us/courtadmin/aoc/djs/resources/manuals/ctapptatty/chapter05.pdf> (establishing \$90 an hour as the current compensation rate for court-appointed counsel). In this instance, the defendant should be assessed a total of \$1,300. *See* § 19.2-163(2).

OP. NO. 13-044

CRIMINAL PROCEDURE: RECOVERY OF FINES AND PENALTIES

TAXATION: ENFORCEMENT, COLLECTION, REFUNDS, REMEDIES AND REVIEW OF LOCAL TAXES

A city treasurer is authorized to enter into an agreement with the local Commonwealth’s Attorney for the collection of delinquent court debt.

The city treasurer is authorized to receive a contingent collection fee provided the percentage amount of this fee is no higher than 35 percent of any amounts recovered and may receive an administrative fee in addition to the contingent collection fee.

THE HONORABLE BARBARA O. CARRAWAY, CPA
CHESAPEAKE CITY TREASURER
AUGUST 30, 2013

ISSUES PRESENTED

You inquire whether a city treasurer can enter into an agreement with the local Commonwealth's Attorney for the collection of delinquent court debt and, if so, whether the city treasurer may claim a percentage of amounts collected in this manner as a contingent collection fee. You further ask whether there is a limit on the percentage that may be charged as a contingent collection fee and whether the treasurer also may claim an administrative fee under § 58.1-3958.

RESPONSE

It is my opinion that a city treasurer is authorized to enter into an agreement with the local Commonwealth's Attorney for the collection of delinquent court debt. It is my further opinion that the city treasurer is authorized to receive a contingent collection fee provided the percentage amount of this fee is no higher than 35 percent of any amounts recovered. Finally, it is my opinion that the city treasurer may receive an administrative fee under § 58.1-3958 in addition to the contingent collection fee.

APPLICABLE LAW AND DISCUSSION

Section 19.2-349 establishes procedures for the collection of delinquent court debt. Specifically, it provides that:

It shall be the duty of the attorney for the Commonwealth to cause proper proceedings to be instituted for the collection and satisfaction of all fines, costs, forfeitures, penalties and restitution. The attorney for the Commonwealth shall determine whether it would be impractical or uneconomical for such service to be rendered by the office of the attorney for the Commonwealth

If the attorney for the Commonwealth does not undertake collection, he shall contract with (i) private attorneys or private collection agencies, (ii) enter into an agreement with a local governing body, (iii) *enter into an agreement with the county or city treasurer*, or (iv) use the services of the Department of Taxation, *upon such terms and conditions as may be established by guidelines promulgated by the Office of the Attorney General, the Executive Secretary of the Supreme Court with the Department of Taxation and the Compensation Board*

The fees of any private attorneys or collection agencies shall be paid on a contingency fee basis out of the proceeds of the amounts collected. However, in no event shall such attorney or collection agency receive a fee for amounts collected by the Department of Taxation under the Setoff Debt Collection Act (§ 58.1-520 et seq.). *A local treasurer undertaking collection pursuant to an agreement with the attorney for the Commonwealth may collect the administrative fee authorized by § 58.1-3958.*^[1]

Section 58.1-3958, in turn, provides in relevant part that,

The governing body of any county, city or town may impose, upon each person chargeable with delinquent taxes or other delinquent charges, fees to cover the administrative costs and reasonable attorney's or collection agency's fees actually contracted for. The attorney's or collection agency's fees shall not exceed 20 percent of the taxes or other charges so collected. The administrative costs shall be in addition to all penalties and interest, and shall not exceed \$30 for taxes or other charges collected subsequent to 30 or more days after notice of delinquent taxes or charges pursuant to § 58.1-3919 but prior to the taking of any judgment with respect to such delinquent taxes or charges, and \$35 for taxes or other charges collected subsequent to judgment. If the collection activity is to collect on a nuisance abatement lien, the fee for administrative costs shall be \$150 or 25 percent of the cost, whichever is less; however, in no event shall the fee be less than \$25.^[2]

The plain language of § 19.2-349 makes clear that the city treasurer can enter into an agreement with the local Commonwealth's Attorney to collect delinquent court debt and that the treasurer also may receive the administrative fee authorized by § 58.1-3958. The availability of a contingent fee arrangement under the collection agreement is controlled by the guidelines referred to under § 19.2-349. The guidelines currently in place provide that the percentage charged as a contingent collection fee will be an amount, negotiated between the Commonwealth's Attorney and the collections contractor, which "shall not exceed 35 percent of all monies owed and actually collected through the contractor's efforts for unpaid fines, court costs, forfeitures, statutory interest, and penalties."³ The current guidelines do not distinguish between private and local government agents when setting forth the terms of the collection contract.⁴

CONCLUSION

Accordingly, it is my opinion that a city treasurer is authorized to enter into an agreement with the local Commonwealth's Attorney for the collection of delinquent court debt. It is my further opinion that the city treasurer is authorized to receive a contingent collection fee provided the percentage amount of this fee is no higher than 35 percent of any amounts recovered. Finally, it is my opinion that the city treasurer may receive an administrative fee under § 58.1-3958 in addition to the contingent collection fee.

¹ VA. CODE ANN. § 19.2-349(B) (Supp. 2013) (emphasis added).

² VA. CODE ANN. § 58.1-3958 (2009) (emphasis omitted).

³ MASTER GUIDELINES GOVERNING COLLECTION OF UNPAID DELINQUENT COURT-ORDERED FINES & COSTS PURSUANT TO VIRGINIA CODE §19.2-349 at 2-3 (July 9, 2013), available at <http://www.scb.virginia.gov/guidelinesfinesandfees.PDF>. Please note that the city treasurer may not deduct a contingent fee against any restitution it recovers. The amount of restitution recovered must be disbursed to the victim or court-ordered recipient in its entirety. *See id.* at 3.

⁴ *See id.* at 1 ("These Master Guidelines are mandatory and apply to all contracts for the collection of all fines, court costs, forfeitures, penalties, statutory interest, restitution, and restitution interest entered into by

the attorneys for the Commonwealth and contractors, local governing bodies, county or city treasurers, or the Department of Taxation.”).

OP. NO. 13-052

EDUCATION: GENERAL POWERS AND DUTIES OF SCHOOL BOARDS

Local school districts may prohibit an employee from storing a lawfully possessed firearm and ammunition in a locked private motor vehicle on school district property.

THE HONORABLE TONY O. WILT
MEMBER, HOUSE OF DELEGATES
AUGUST 2, 2013

ISSUES PRESENTED

You ask whether employees of local school boards are local government employees for purposes of § 15.2-915 of the *Code of Virginia* and whether local school boards may restrict an employee from storing a lawfully possessed firearm and ammunition in a locked private motor vehicle.

RESPONSE

It is my opinion that local public school boards have authority over the care, management, and control of the property of the school division and as such are separate and apart from the local government and that the employees of the school board are not local government employees for purposes of § 15.2-915. Therefore, local school districts may prohibit an employee from storing a lawfully possessed firearm and ammunition in a locked private motor vehicle on school district property.

APPLICABLE LAW AND DISCUSSION

Section 15.2-915 provides that “no locality shall adopt any workplace rule . . . that prevents an employee of that locality from storing at that locality’s workplace a lawfully possessed firearm and ammunition in a locked private motor vehicle.” At issue is the relationship between the local governments and local school boards and whether employees of the school boards are considered “local government employees.”

School boards constitute a corporate body with corporate powers that include holding, leasing, owning, and conveying property.¹ “A school board shall . . . [c]are for, manage and control the property of the school division. . . .”² The supervisory authority of local school boards has been confirmed by the judiciary in several cases. “[A] school board’s power to discharge employees [is] a power which is rooted in the Constitution of Virginia.”³ A prior opinion of this Office states that “[a] school board cannot forfeit its independence to another entity and must retain the ability to fulfill its responsibilities.”⁴

More specifically, prior opinions of this Office have concluded that school employees are not local government employees.⁵ The General Assembly is presumed to have knowledge of the Attorney General’s statutory interpretation.⁶ While the Attorney

General has not previously opined on this particular statute, it is clear that opinions of the Office of the Attorney General distinguish local governments from local school boards and local government employees from school board employees.

Additionally, § 15.2-915 references “locality” and “employee of that locality” with no reference to local school boards or school board employees. Section 15.2-102 defines locality “to mean a county, city, or town as the context requires.” The Supreme Court of Virginia has noted that “when the General Assembly ‘has spoken plainly’ on a subject, we must not ‘change or amend its enactments under the guise of construing them.’”⁷ In enacting § 15.2-915, the legislature dealt only with localities as defined in § 15.2-102 and not school boards or the employees of school boards. Thus, a local school board may adopt an employee policy that forbids storing of an otherwise lawfully-possessed firearm or ammunition in a locked vehicle.

CONCLUSION

Accordingly, it is my opinion that local public school boards have authority over the care, management, and control of the property of the school division and as such are separate and apart from the local government and that the employees of the school board are not local government employees for purposes of §15.2-915. Therefore, local school districts may prohibit an employee from storing a lawfully possessed firearm and ammunition in a locked motor vehicle on school district property.

¹ VA. CODE ANN. § 22.1-71(3) (2011).

² Section 22.1-79 (Supp. 2013).

³ Russell Cnty. Sch. Bd. v. Anderson, 238 Va. 372, 383, 384 S. E. 2d 598, 604 (1989). Cf. Howard v. Cnty. Sch. Bd., 203 Va. 55, 58-59, 122 S.E. 2d 891, 894 (1961) (finding it unconstitutional to divest school board of authority to decide when school property could be put up for sale); Harrison v. Day, 200 Va. 439, 452, 106 S.E. 2d 636, 646-47 (1959) (finding it unconstitutional to attempt, by statute, to divest local school authority to run schools).

⁴ 2011 Op. Va. Att’y Gen. 118, 118 (finding that a school board and local government could combine certain functions, but that school board could not abrogate or transfer its duty or responsibilities to the local government).

⁵ 2008 Op. Va. Att’y Gen. 43, 44 (finding that an individual employed as a school bus driver by a school board is not an employee of the county); 1985-86 Op. Va. Att’y Gen. 159 (finding that local school board employees are not local government employees because not under city supervision or control).

⁶ City of Winchester v. Am. Woodmark Corp., 250 Va. 451, 458, 464 S.E. 2d 148, 153 (1995).

⁷ *Id.* (quoting City of Martinsville v. Tultex Corp., 238 Va. 59, 63, 381 S.E. 2d 6, 8 (1989) (internal citations omitted)).

OP. NO. 13-028

EDUCATION: GENERAL POWERS AND DUTIES OF SCHOOL BOARDS

Loudoun County School Board does not currently have the legal authority to fund capital renovation costs for school property that it does not lease and which is fully owned and operated by the Fairfax County School Board.

THE HONORABLE JOE T. MAY
MEMBER, HOUSE OF DELEGATES
JUNE 28, 2013

ISSUE PRESENTED

You ask whether the Loudoun County School Board (LCSB) currently has the legal authority to pay a portion of the capital renovation costs for the Thomas Jefferson High School for Science and Technology (TJHS), an educational facility owned by the Fairfax County School Board (FCSB).

RESPONSE

It is my opinion that the Loudoun County School Board does not currently have the legal authority to fund capital renovation costs for school property that it does not lease and which is fully owned and operated by the Fairfax County School Board.

BACKGROUND

You state that TJHS is a facility that is neither owned in any part nor under lease to the LCSB, but rather, is a regional Academic-Year Governor's School that is wholly owned and operated exclusively by the FCSB. In addition, you note that TJHS has no joint governing board and, there is no joint ownership of the land upon which it is situated. The contract between the two school divisions regarding the establishment and operation of TJHS provides for the LCSB to pay to FCSB "the full costs for each student attending based on the per-pupil costs at Thomas Jefferson adjusted for transportation and state aid"¹

APPLICABLE LAW AND DISCUSSION

The powers and duties of a local school board are specifically enumerated, in part, within § 22.1-79 of the *Code of Virginia*. The statute provides that:

A school board *shall*:

. . .

3. Care for, manage and control the property of the school division and provide for the erecting, furnishing, equipping, and noninstructional operating of necessary school buildings and appurtenances and the maintenance thereof by purchase, lease, or other contracts; . . .

5. Insofar as not inconsistent with state statutes and regulations of the Board of Education, operate and maintain the public schools in the school division....^[2]

The statute vests the responsibility for maintenance and improvements of school property in the board that has authority in the locality in which a given facility is located. Moreover, § 22.1-129(B) limits a school board's authority to expend funds in regard to property it leases to repairs or improvements with a "useful life" that is equal to *or shorter than* the term of the lease, demonstrating the intent of the General Assembly to limit a school board's expenditures for leasehold improvements to ensure that its division will yield the full benefit of them.³ In addition, Virginia's school tuition statute, § 22.1-5(C), specifically excludes capital outlays and debt

service from inclusion in tuition between school divisions *unless* the school boards have fixed tuition by contract.⁴

In regard to TJHS, the two-year Cooperative Agreement, in effect until June 30, 2013, defines the relationship between LCSB and FCSB. This Agreement specifically states that the FCSB “established” TJHS “within the Fairfax County School Division” and that “Thomas Jefferson is an institution of Fairfax County Public Schools under the sole direction and control of FCSB.”⁵ In that agreement, LCSB commits only to pay for “actual costs” for special services and “full costs for each student attending based on per-pupil costs[.]”⁶ The agreement’s terms therefore make no mention of LCSB’s payment of capital expenditures through fixed tuition, but instead, appear to tie those payments to per-pupil educational costs. Indeed, the agreement does not contractually fix tuition amounts. Notably, your inquiry indicates that any requirement for LCSB to pay for a portion of FCSB’s capital expenditures represents a new development; heretofore, it has been foreign to the parties’ understanding and interpretation of the Cooperative Agreement’s terms.⁷

Thus, it is my opinion that no general statutory authority exists to enable the LCSB to pay for a portion of capital renovation costs to TJHS, an educational facility located outside of its division in which it neither owns any part nor possesses a leasehold interest.⁸ Moreover, based upon the information you provide, it further is my opinion that, under the terms of the existent Cooperative Agreement with FCSB, the terms of § 22.1-5(C) do not apply so as to allow LCSB to contribute to such improvements through contractually fixed tuition payments on behalf of the students from its division that attend TJHS.⁹

CONCLUSION

Accordingly, it is my opinion that the Loudoun County School Board does not currently have the legal authority to fund capital renovation costs for school property that it does not lease and which is fully owned and operated by the Fairfax County School Board.

¹ Cooperative Agreement Concerning the Establishment and Operation of Thomas Jefferson High School for Science and Technology, Fairfax County Public Schools, ¶ 9, dated 2011 (hereinafter “Cooperative Agreement”).

² VA. CODE ANN. § 22.1-79(3) & (5) (2011) (emphasis added).

³ Section 22-129(B) (Supp. 2012).

⁴ Section 22.1-5(C) (2011).

⁵ Cooperative Agreement, ¶ 1.

⁶ *Id.* at ¶¶ 8-9.

⁷ In relevant part, you state that the FCSB, “proposes to add a charge for a portion of the capital renovations costs for . . . [TJHS] . . . to the tuition bill paid by the . . . [LCSB] . . . and other participating school divisions.”

⁸ Prior Opinions of this Office have reached similar conclusions. *See* 1955-56 Op. Va. Att’y Gen. 175; 1960-61 Op. Va. Att’y Gen. 265-266; and 1996 Op. Va. Att’y Gen. 121.

⁹ *See* § 22.1-5(C) (which states in relevant part that, “No tuition charge authorized . . . in this section shall exceed the total per capita cost of education, exclusive of capital outlay and debt service, . . . except that if

the tuition charge is payable by the school board of the school division of the pupil's residence pursuant to a contract entered into between the two school boards, the tuition charge shall be that fixed by such contract.”).

Op. No. 12-084

EDUCATION: PUBLIC SCHOOL FUNDS

If a local governing body made a lump sum appropriation to the school board for fiscal year 2011-2012, and a surplus resulted from debt service savings, then the school board may reallocate and spend those savings for other school needs.

THE HONORABLE JUDITH C. WELLS
TREASURER, ISLE OF WIGHT COUNTY
JULY 12, 2013

ISSUES PRESENTED

You present two questions related to the appropriation of funds by a local governing body to the local school board. You first inquire whether funds “earmarked” for debt service may be reallocated and spent for other school needs when a refunding of the outstanding bonds results in a debt service savings thereby resulting in a surplus in the “earmarked” amount. You further ask for the interpretation of a local ordinance to determine whether the local governing body made a lump sum appropriation to the school board for fiscal year 2011-2012 or whether the local governing body intended that a portion of the local school board appropriation was designated specifically for debt service.

RESPONSE

It is my opinion that if the local governing body made a lump sum appropriation to the school board for fiscal year 2011-2012 and a surplus resulted from debt service savings, then the school board may reallocate and spend those savings for other school needs. It is further my opinion that the question of whether a lump sum appropriation was made to the local school board depends upon the interpretation of a local ordinance, a practice from which this Office has traditionally abstained.

BACKGROUND

You relate that on May 12, 2011, the local governing body “formally adopted the school board budget, in designated line item form and ... appropriated said budget in a lump sum amount of \$57,861,769.00 . . . of which . . . a specifically designated line item of \$4,388,545 [was] set aside for debt service . . . ” on outstanding school bonds. You further indicate that on May 12, 2011, the local governing body approved a resolution authorizing the refunding of outstanding bonds to achieve debt savings and that a portion of those savings were directly attributable to debt service in the local school board budget.

By June 2012, it was clear that the actual debt service savings associated with the bonds issued for school purposes was approximately \$1,358,887. You indicate that the

local school board's position was that the savings already had been "appropriated" to the local school board in a lump sum and that, therefore, the board could reallocate the funds and spend them for other school purposes.¹

APPLICABLE LAW AND DISCUSSION

A local governing body and local school board are separate and distinct governmental agencies of the Commonwealth.² The local school board, nonetheless, does depend on the local governing body for a significant amount of its funding.³ Indeed, "[t]he statutory scheme prescribed by the General Assembly envisions a symbiotic relationship between the school board and the [local governing body], whereby the school board manages and maintains the school system and the [local governing body] provides the requisite local funding."⁴

The local governing body has a budget and appropriations process by which funds are made available for the programs and operations the local governing body supports, including the local school board.⁵ The formal act of appropriation by the local governing body is how money is set aside for a specific use.⁶ Generally, "[o]nce the [governing body] has appropriated funds for educational purposes to the school board, the school board has the right to determine how such funds will be spent"⁷ Specifically, when the local governing body makes a lump sum appropriation to the school board, the school board has full discretion in determining how to spend the appropriated funds. Nevertheless, if a local governing body has divided its appropriation into classifications (e.g. debt service), the school board may not use funds designated for one classification for expenses belonging in another.⁸ Consequently, whether the school board in your scenario can allocate the debt savings surplus to another use depends on how the local governing body appropriated the school board's funds.

You present an ordinance by which the local governing body appropriated funds to the local school board, and you request an opinion regarding whether the language of the ordinance creates a lump sum appropriation or establishes classifications whereby the school board is more limited in its spending discretion.⁹ The Attorney General traditionally limits responses to "interpretation of federal or state law, rule or regulation."¹⁰ "In instances when a request requires interpretation of a local ordinance, the [Office] has declined to respond in order to avoid becoming involved in matters solely of local concern[.]"¹¹

CONCLUSION

Accordingly, it is my opinion that if the local governing body made a lump sum appropriation to the school board for fiscal year 2011-2012 and there was a surplus as a result of debt service savings then the school board could reallocate and spend those savings for other school needs. It is further my opinion the question of whether there was a lump sum appropriation was made to the local school board depends upon the interpretation of a local ordinance and this Office does not opine on local ordinances.

¹ According to press reports, the school board did reallocate and spend the savings. Alison T. Williams, *Isle of Wight Supervisor's Leader Says No To School Board Meeting*, DAILY PRESS (Newport News, Va.), Sept. 14, 2012, at A2.

² Bd. of Supvrs. v. Cnty. Sch. Bd., 182 Va. 266, 275, 28 S.E.2d 698, 702 (1944).

³ 2005 Op. Va. Att'y Gen. 44, 45.

⁴ Harold v. Bd. of Supvrs., 38 Va. Cir. 467, 472 (1996).

⁵ The general budget and appropriation process for localities is set out at VA. CODE ANN. §§ 15.2-2500 through 15.2-2513 (2012). The budget and appropriation process for school boards specifically is set out at §§ 22.1-92 through 22.1-94 (2011 & Supp. 2012).

⁶ 1982-83 Op. Va. Att'y Gen. 16, 16 (citing *Almond v. Day*, 197 Va. 419, 426, 89 S.E.2d 851, 85-86 (1955)). See § 22.1-94 (2011).

⁷ 1981-82 Op. Va. Att'y Gen. 323, 323.

⁸ 2010 Op. Va. Att'y Gen. 120, 121-22.

⁹ Specifically at issue is whether a budget attached to the ordinance is incorporated or if the lump sum language in the ordinance stands alone.

¹⁰ 2010 Op. Va. Att'y Gen. 80, 81 (further citation omitted).

¹¹ 2004 Op. Va. Att'y Gen. 72, 77.

OP. NO. 12-095

EDUCATION: PUPILS

A school superintendent possesses authority to rely upon Family Educational Rights and Privacy Act provisions to deny a request for access to a pupil's records by a law enforcement officer seeking information in the course of his duties.

THE HONORABLE KENNETH L. ALGER, II
COMMONWEALTH'S ATTORNEY FOR PAGE COUNTY
MAY 3, 2013

ISSUES PRESENTED

You inquire, with regard to law enforcement access to pupils' school records, whether § 22.1-287 of the *Code of Virginia* may be reconciled with the federal Family Educational Rights and Privacy Act ("FERPA"). You further ask, based upon a specific factual scenario, whether a school superintendent possessed authority to rely upon FERPA provisions to deny a request for access to a pupil's records by a law enforcement officer seeking information in the course of his duties.

RESPONSE

It is my opinion that the provisions of § 22.1-287 of the *Code of Virginia* may be reconciled with those of the Family Educational Rights and Privacy Act. It is my further opinion, based upon the factual scenario you describe, that the school superintendent possessed authority to rely upon FERPA provisions to deny access to a pupil's records to a law enforcement officer seeking information in the course of his duties.

BACKGROUND

You relate an incident in which several parents of high school students contacted law enforcement to advise that a local student had posted on Facebook a message that troubled them. According to the reports, the message read, “I hate all tenth graders. Remember Columbine.” Law enforcement officers identified the author of the post, referred to hereinafter as “Juvenile,” and met with him at his residence, where he admitted to making the post. The officers made a lawful search of the residence and found no weapons. They subsequently attempted to obtain “a juvenile petition for a threat and a CHINS petition”¹ and were denied both prior to Juvenile returning to school. When Juvenile arrived at school the next day, he was met by law enforcement personnel who searched him for weapons and found none. Juvenile was placed in in-school suspension.

Administrative staff at the school met with the police Captain that morning and related their concerns over safety at the school due to Juvenile’s prior disciplinary record, threats made towards other students and faculty, and violent outbursts he had made in the school setting. The Captain was informed that Juvenile had been involved in an altercation the previous Friday, where Juvenile reportedly had been the aggressor. On behalf of the victim, several students threatened Juvenile, to which Juvenile responded by stating, “That’s fine. I will bring my gun to school.” One of the other students replied, “Bring your gun to school. I dare you.” The confrontation continued into the weekend, leading to text message correspondence and the aforementioned Facebook post.

After receiving this new information, law enforcement personnel became increasingly concerned about students’ safety at the school. The Captain began receiving information from the Superintendent’s staff, school personnel, students and parents regarding their concern over the return of Juvenile to school. The captain was then informed that the Superintendent would not authorize the release of any information on Juvenile to law enforcement.

You indicate that the Captain advised the Superintendent that Juvenile’s records were essential to establish the level of threat Juvenile posed to the school system “in the past” and to determine whether Juvenile had access to weapons or had made similar threats to others. The Superintendent stated that she was not required to provide such information to law enforcement. She stated that FERPA included an emergency provision, but that she had determined that there was no emergency. The Captain maintained that this was a potential emergency. The records were obtained by a search warrant several days later.

APPLICABLE LAW AND DISCUSSION

FERPA, in relevant part, establishes as a condition of receiving federal funding, that the education records of students not be released without the prior written consent of a student’s parents.² FERPA nonetheless also provides several exceptions to the parental consent requirement. Relative to your inquiry, education records may be released to appropriate persons in connection with an emergency, in certain limited circum-

stances.³ The release of such information is made subject to the regulations of the Secretary of Education.⁴

The regulations promulgated by the Secretary of Education pursuant to FERPA reiterate this health and safety exception by stating, “[a]n educational agency or institution may disclose personally identifiable information from an education record to appropriate parties, including parents of an eligible student, in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals.”⁵ The regulation further provides that in making such a determination regarding health and safety,

an educational agency or institution may take into account the totality of circumstances pertaining to a threat to the health or safety of a student or other individuals. If the educational agency or institution determines that there is an articulable and significant threat to the health or safety of a student or other individuals, it may disclose information from education records to any person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals.^[6]

Section 22.1-287 of the *Code of Virginia* establishes the strictures for the release of pupil records in the Commonwealth. In relevant part, it expressly provides that

[n]o teacher, principal or employee of any public school nor any school board member shall permit access to any records concerning any particular pupil enrolled in the school in any class to any person except under judicial process unless the person is...[s]tate or local law-enforcement or correctional personnel...seeking information in the course of his duties....^[7]

Section 22.1-287 further provides, notwithstanding the restrictions it imposes, that

[t]he principal or his designee may disclose identifying information from a pupil’s scholastic record for the purpose of furthering the ability of the juvenile justice system to effectively serve the pupil prior to adjudication. In addition to those agencies or personnel identified in [specific sections of the statute], the principal or his designee may disclose identifying information from a pupil’s scholastic record to attorneys for the Commonwealth, court services units, juvenile detention centers or group homes, mental and medical health agencies, state and local children and family service agencies, and the Department of Juvenile Justice and to the staff of such agencies.^[8]

Statutes are to be interpreted according to their plain language.⁹ Both the federal and state provisions establish a default rule of non-disclosure. Federal law authorizes release “in connection with an emergency,” but critical to your inquiry, permits disclosure only “[i]f the educational agency or institution determines that there is an articulable and significant threat” to the safety of others.¹⁰ Indeed, absent a court order, the assessment of whether disclosure is warranted rests with the local educational agency, and not law enforcement. The decision to release records is further vested in the educational agency’s discretion, in that the law provides only that the agency “may disclose information from education records” to appropriate persons; it does not require such disclosure.¹¹

Similarly, although § 22.1-287 provides for law enforcement a limited exception to the prohibition against the release of records,¹² it nowhere imposes a clear, affirmative duty or requirement on school officials to release such records upon request. While the statute prohibits disclosure with several listed exceptions, it does not conversely mandate disclosure in the case of those listed exceptions. Rather, the statute permits disclosure in those instances, including when access to records is afforded “law enforcement . . . in the course of his duties,” or, for the “purpose of furthering the ability of the juvenile justice system to effectively serve the pupil prior to adjudication.”^{13,14}

In comparing these statutory provisions, I do not find an inherent conflict between FERPA and § 22.1-287. Critically, neither mandates disclosure where the other proscribes it; rather, where the release of student records is permitted, such release is discretionary on the part of the educational agency.¹⁵

Moreover, I conclude that the specific disclosure-related exception at issue in your inquiry is consistent with FERPA. The disclosure permitted under § 22.1-287(A)(5) falls within the scope of FERPA’s parallel emergency-related exception to nondisclosure.¹⁶ As noted, the exception at subsection (A)(5) permits disclosure to State or local law-enforcement or correctional personnel seeking information in the course of his duties. An educational agency could comply with both FERPA and this state law provision if it were to disclose information to law enforcement personnel in connection with an emergency, when the knowledge of such information is necessary to protect the health or safety of the student or other persons.¹⁷ If, however, upon taking into account the totality of existent circumstances, the educational agency does not conclude that the facts meet the criteria for the FERPA exception, information about the pupil may not be released.

In the specific factual scenario you describe, the superintendent concluded, under required FERPA analysis, “that there was no emergency.”¹⁸ Thus, the terms of § 22.1-287(A)(5) did not apply so as to enable the superintendent to provide a law enforcement officer access to the pupil’s records.

CONCLUSION

It is my opinion that the provisions of § 22.1-287 of the *Code of Virginia* may be reconciled with those of the Family Educational Rights and Privacy Act. It is my further opinion, based upon the factual scenario you describe, that the school superintendent possessed authority to rely upon FERPA provisions to deny access to a pupil’s records to a law enforcement officer seeking information in the course of his duties.

¹ See VA. CODE ANN. § 22.1-258 (2011); VA. CODE ANN. §§ 16.1-228 (Supp. 2012); 16.1-260 (Supp. 2012).

² 20 U.S.C.A. § 1232g(b)(1) (“No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records . . . of students without the written consent of their parents to any individual, agency, or organization” The “prohibition” is one only tied to the federal government’s spending power; and FERPA does not create an individual right of action. See *Gonzaga Univ. v. Doe*, 536 U.S. 273, 278 (U.S.

2002); *see also* Owasso Indep. Sch. Dist. No. I-011 v. Falvo, 534 U.S. 426, 428 (U.S. 2002) (explaining that “The Act states that federal funds are to be withheld from school districts that have ‘a policy or practice of permitting the release of education records . . . of students without the written consent of their parents.’ § 1232g(b)(1)”).

³ 20 U.S.C.A. § 1232g(b)(1)(I).

⁴ *Id.* *See* 34 C.F.R. § 99.36.

⁵ 34 C.F.R. § 99.36(a).

⁶ 34 C.F.R. § 99.36(c). Although not directly related to your inquiry, a somewhat similar exception within FERPA authorizes disclosure to “State and local officials or authorities to whom such information is specifically allowed to be reported or disclosed pursuant to State statute adopted

after November 19, 1974, if...the allowed reporting or disclosure concerns the juvenile justice system and such system’s ability to effectively serve, prior to adjudication, the student whose records are released; and...the officials and authorities to whom such information is disclosed certify in writing to the educational agency or institution that the information will not be disclosed to any other party except as provided under State law without the prior written consent of the parent of the student.

20 U.S.C.A. § 1232g(b)(1)(E)(ii).

⁷ VA. CODE. ANN. § 22.1-287(A)(5) (2011).

⁸ Section 22.1-287(D)(4).

⁹ *See* Davenport v. Little-Bowser, 269 Va. 546, 555, 611 S.E.2d 366, 371 (2005) (citing Jackson v. Fidelity & Deposit Co., 269 Va. 303, 313, 608 S.E.2d 901, 904 (2005)).

¹⁰ *See* 34 C.F.R. § 99.36(c).

¹¹ *Id.* Moreover, FERPA states that federal officials will not substitute their judgment for the judgment of local officials if there is a rational basis for the local officials’ determinations concerning the health and safety exception. *See* 34 C.F.R. 99.36(c). Weighing the risks and determining the proper actions fall within the purview of officials in the local educational agency absent a law or court order mandating disclosure. Nonetheless, any disclosure must meet the requirements set forth in FERPA’s implementing regulations. *See* 34 C.F.R. § 99.36(c).

¹² Section 22.1-287 generally prohibits disclosure of student records to law enforcement officers unless pursuant to judicial process or under one of the listed exceptions. 1978-79 Op. Va. Att’y Gen. 232.

¹³ According to the facts you relate, the superintendent was not asked to disclose the identifying information of Juvenile for the “purpose of furthering the ability of the juvenile justice system to effectively serve the pupil prior to adjudication,” pursuant to § 22.1-287(D)(4). You state that law enforcement officers had attempted to obtain a juvenile petition for a threat and a CHINS petition and were denied both. You also state that the records were “essential” to the investigation and “to establish the degree of a threat this individual had posed in the school system in the past and to develop other lead information to determine if Juvenile had other access to a weapon or made similar threats to others.” Thus, it appears the purpose underlying the request for disclosure was to evaluate a past and perhaps ongoing threat to ensure safety rather than to further the ability of the juvenile justice system to effectively serve the pupil.

¹⁴ “Unless it is manifest that the purpose of the legislature was to use the word ‘may’ in the sense of ‘shall’ or ‘must,’ then ‘may’ should be given its ordinary meaning - permission, importing discretion.” Masters v. Hart, 189 Va. 969, 979, 55 S.E.2d 205, 210 (1949).

¹⁵ For example, § 22.1-287(D)(4) tracks the language of the FERPA exception related to assisting the juvenile justice system, including the required condition that,

[p]rior to disclosure of any such scholastic records, the persons to whom the records are to be disclosed shall certify in writing to the principal or his designee that the information will not be disclosed to any other party, except as provided under state law, without the prior written consent of the parent of the pupil or by such pupil if the pupil is eighteen years of age or older[.]

20 U.S.C.A. § 1232g(b)(1)(E)(ii).

¹⁶ 20 U.S.C.A. § 1232g(b)(1)(I); *and see* 34 C.F.R. § 99.3(a) and (c).

¹⁷ *Id.*

¹⁸ Whether the superintendent correctly assessed the totality of circumstances in this instance is beyond the scope of this opinion.

OP. NO. 12-087

EDUCATIONAL INSTITUTIONS: GENERAL PROVISIONS

Dependents of service members whose ultimate duty orders or “follow-on duty” orders do not list Virginia, neither qualify for waiver of the one-year residency requirement, nor otherwise can be deemed domiciled in Virginia for purposes of in-state tuition based on the service member’s military status.

THE HONORABLE HARRY B. BLEVINS
MEMBER, SENATE OF VIRGINIA
FEBRUARY 11, 2013

ISSUE PRESENTED

You inquire regarding eligibility for in-state tuition of dependents of certain military personnel. Specifically, you ask whether the one-year residency requirement must be satisfied to establish domicile in the following situations: 1) when the service member has been ordered on an unaccompanied deployment with a “follow-on duty station” in Virginia, where Virginia is not listed on the orders; and 2) when the service member has been stationed in Virginia for 3 years but assigned to a one-year unaccompanied submarine tour and Virginia is not listed as the ultimate duty station on the orders.

RESPONSE

It is my opinion, based on the limited facts provided, that the dependents of the service members described in the scenarios you present neither qualify for waiver of the one-year residency requirement, nor otherwise can be deemed domiciled in Virginia for purposes of in-state tuition based on the service member’s military status.

BACKGROUND

You present two scenarios involving the domicile status of dependents of military service members. In the first scenario, the family of a military service member has moved to the City of Chesapeake while the service member is on an unaccompanied deployment.¹ You indicate that in these situations, the family is typically moved by the military to the follow-on duty station. You state that in this instance the next duty station is Virginia, but that Virginia is not listed in the orders. You relate that the service member is not a Virginia resident, but that the family members hold Virginia drivers’ licenses and are registered to vote in the Commonwealth.

In the second scenario you describe, the military service member has been on active duty and stationed in Virginia for the past three years, but in March 2012, he was

assigned to the Emory S. Land, a submarine tender, which has its home port in Diego Garcia. You relate his assignment is an unaccompanied tour for one year, during which time the service member's family will remain in Virginia. The service member's orders currently do not list Virginia as the ultimate duty station.

APPLICABLE LAW AND DISCUSSION

Eligibility for in-state tuition charges for students enrolled in Virginia's institutions of higher education is governed by § 23-7.4 of the *Code of Virginia*. The law generally provides that

To become eligible for in-state tuition, a dependent student or unemancipated minor shall establish by clear and convincing evidence that for a period of at least one year prior to the date of the alleged entitlement, the person through whom he claims eligibility was domiciled in Virginia and had abandoned any previous domicile, if such existed.^[2]

Further,

The domicile of a dependent student shall be rebuttably presumed to be the domicile of the parent or legal guardian claiming him as an exemption on federal or state income tax returns currently and for the tax year prior to the date of the alleged entitlement or providing him substantial financial support.^[3]

In determining domicile status, several factors are required to be considered; these factors, which include continuous residency in the Commonwealth, must exist for the one-year period prior to the date of alleged entitlement.⁴ Nonetheless, this one-year requirement is waived statutorily for active duty military personnel residing in the Commonwealth and their dependents who voluntarily elect to establish Virginia as their permanent residence for domiciliary purposes, provided all other conditions for establishing domicile are satisfied.⁵

In the first scenario you present, although the family, including the future student, have relocated to Virginia, the military service member does not appear to reside in the Commonwealth. Also, the facts you relate do not indicate that he has voluntarily elected to establish Virginia as his permanent residence for domiciliary purposes. Moreover, Virginia is not listed in the military member's orders. The service member in your second scenario similarly neither currently resides in the Commonwealth, nor has orders listing Virginia as a duty station. Furthermore, the facts you present do not suggest that he has voluntarily elected to establish Virginia as his permanent residence for domiciliary purposes, even though he resided in Virginia prior to his new assignment. Applying the plain language of § 23-7.4(B), which affords a waiver for military personnel "residing in the Commonwealth" and their dependents "who claim domicile through them," I conclude that the conditions for waiving the one-year residency requirement are not met in the scenarios you present as you describe them.

Nonetheless, § 23-7.4 further provides that,

all dependents, as defined by 37 U.S.C. § 401, of active duty military personnel, or activated or temporarily mobilized reservists or guard members,

assigned to a permanent duty station or workplace geographically located in Virginia, or in a state contiguous to Virginia or the District of Columbia, who reside in Virginia shall be deemed to be domiciled in Virginia for purposes of eligibility for in-state tuition and shall be eligible to receive in-state tuition in Virginia^[6]

In neither scenario does it appear that the military service member is assigned to a permanent duty station or workplace geographically located in Virginia, or in a state contiguous to Virginia or the District of Columbia. Although the guidelines developed by the State Council of Higher Education for Virginia further allow that such assignment may include temporary assignments to locations outside Virginia, a state contiguous to Virginia or the District of Columbia as long as the member remains assigned to a unit considered to have its home port or base located in Virginia, the District of Columbia, or a state contiguous to Virginia,⁷ it does not appear from the facts you present that either military member is on such a temporary assignment. Rather, the unaccompanied deployments are assignments of each service member to areas outside this geographic area. Therefore, the provision found in subsection 23-7.4(E) deeming certain military dependents to be domiciled in Virginia does not apply in the situations you relate.

CONCLUSION

Accordingly, it is my opinion, based on the limited facts provided, that the dependents of the service members described in the scenarios you present neither qualify for waiver of the one-year residency requirement, nor otherwise can be deemed domiciled in Virginia for purposes in-state tuition based on the service member's military status.⁸

¹ According to your letter, an "unaccompanied deployment" is a duty station with a home port where dependents are not permitted to reside.

² VA. CODE ANN. § 23-7.4(B) (2011). "'Date of the alleged entitlement' means the first official day of class within the term, semester or quarter of the student's program." Section 23-7.4(A). A "dependent student" is "one who is listed as a dependent on the federal or state income tax return of his parents or legal guardian or who receives substantial financial support from his spouse, parents or legal guardian." *Id.* Absent an exception, it is presumed that "a student under the age of 24 on the date of the alleged entitlement receives substantial financial support from his parents or legal guardian, and therefore is dependent on his parents or legal guardian[.]" *Id.* I assume for purposes of this Opinion that the children of the service members you present are "dependent students."

³ Section 23-7.4(C).

⁴ Section 23-7.4(B).

⁵ *Id.*

⁶ Section 23-7.4(E).

⁷ See STATE COUNCIL OF HIGHER EDUCATION FOR VIRGINIA, DOMICILE GUIDELINES, available at <http://www.schev.edu/Students/VAdomicileguidelines.asp>.

⁸ I limit this Opinion to the dependents' ability to qualify for in-state tuition through the service member's statutory domicile status. Nonetheless, I note that, depending on facts not before me, the students may be eligible to avail themselves of in-state tuition on their own accord or through a nonmilitary parent. Factors relevant to such a domicile determination are listed in Sections 23-7.4(A) and (B). I express no opinion on these separate issues. See 1987-88 Op. Va. Att'y Gen. 348, 349.

OP. NO. 12-014**ELECTIONS: CAMPAIGN FUNDRAISING; LEGISLATIVE SESSIONS**

A member of the General Assembly is not precluded from soliciting or accepting contributions during a regular session of the General Assembly on behalf of the following: (1) candidates for public office in states other than Virginia; (2) federal political action committees; (3) federal accounts maintained by state, congressional district, or county or city political party committees pursuant to federal campaign finance laws; and (4) independent expenditure only committees (commonly referred to as “Super PACs”) if they are considered “federal political action committees” under § 24.2-945.1(A).

THE HONORABLE SCOTT A. SUROVELL
MEMBER, HOUSE OF DELEGATES
JULY 12, 2013

ISSUES PRESENTED

You inquire whether a member of the Virginia General Assembly may solicit or accept contributions during a regular session of the General Assembly on behalf of any of the following: (1) statewide or legislative candidates for public office in states other than Virginia; (2) federal political action committees; (3) federal accounts maintained by state or local political party committees; and/or (4) what you refer to as “the new ‘Super-PAC’s’” or “independent expenditure organizations” that are tax exempt pursuant to Section 527 of the Internal Revenue Code (“IRC”).¹

RESPONSE

It is my opinion that a member of the General Assembly is not precluded from soliciting or accepting contributions during a regular session of the General Assembly on behalf of the following: (1) candidates for public office in states other than Virginia; (2) federal political action committees; (3) federal accounts maintained by state, congressional district, or county or city political party committees pursuant to federal campaign finance laws; and (4) independent expenditure only committees (commonly referred to as “Super PACs”) if they are considered “federal political action committees” under § 24.2-945.1(A).

APPLICABLE LAW AND DISCUSSION

Section 24.2-954 is the provision of the *Code of Virginia* that governs the fundraising activities of members of the General Assembly while the legislature is in session. It provides:

A. No member of the General Assembly or statewide official and no campaign committee of a member of the General Assembly or statewide official shall solicit or accept a contribution for the campaign committee of any member of the General Assembly or statewide official, or for any political committee, from any person or political committee on and after the first day of a regular session of the General Assembly through adjournment sine die of that session.

B. No person or political committee shall make or promise to make a contribution to a member of the General Assembly or statewide official or his campaign committee on and after the first day of a regular session of the General Assembly through adjournment sine die of that session.^[2]

As you note, a previous opinion of this Office, in addressing whether a member of the General Assembly may raise funds during the legislative session for a candidate for federal office, concluded that the restrictions imposed by § 24.2-954 are limited to campaigns for state office.³ Rules of statutory construction require that § 24.2-954 be read together with the Campaign Finance Act of 2006⁴ (“2006 Act”) and other related sections in Title 24.2, rather than in isolation.⁵ Section 24.2-945.1(A) of the 2006 Act defines a “campaign committee” as “the committee designated by a candidate to receive all contributions and make all expenditures for him or on his behalf in connection with his nomination or election.”⁶ Section 24.2-101 defines a “candidate” as “a person who seeks or campaigns for an office of the Commonwealth or one of its governmental units”⁷ Applying the plain language of the statute, the opinion reasoned that because a candidate seeking federal office, whether a member of the General Assembly or not, is not seeking “an office of the Commonwealth or one of its governmental units” a member of the General Assembly is not precluded from raising funds for such a candidate while the General Assembly is in session.⁸ Similarly, statewide or legislative candidates for public office in states other than Virginia are not seeking “an office of the Commonwealth or one of its governmental units.” Therefore, the prohibitions of § 24.2-954 do not apply to fundraising activities for a candidate seeking a statewide or legislative office in a state other than Virginia.

Section 24.2-954 forbids, under certain circumstances, the solicitation and acceptance of contributions for or from political committees. In defining “political committee,” the General Assembly expressly has provided that the term “shall not include: (i) a federal political action committee or out-of-state political committee....”⁹ Consequently, the prohibition on a member of the General Assembly soliciting or accepting contributions for political committees during a regular session does not apply to federal political action committees.¹⁰

Political party committees often are active participants in both state and federal elections and, consequently, are subject to both state and federal campaign finance laws. Political parties typically are organized with separate committees at the national, state, congressional district, state legislative district and county or city levels. The 2006 Act requires both state political party committees and congressional district political party committees to file a statement of organization and periodic campaign finance disclosure reports with the State Board of Elections (“SBE”).¹¹ Certain city and county political party committees also must file with the SBE (or the appropriate local electoral board if not filing electronically) if they are not otherwise exempted from doing so.¹² Under federal law, a state, district or local political party committee must register with, and send periodic campaign finance disclosure reports to, the Federal Election Commission (“FEC”) when it receives or spends funds in connection with a federal election in excess of a specific threshold.¹³

As I have noted previously, it is my opinion that the preemption doctrine, grounded in the Supremacy Clause¹⁴ of the Constitution of the United States, operates to preempt § 24.2-954 to the extent that this state law strays into the field of regulation of federal elections occupied by federal campaign finance laws.¹⁵ The Federal Election Campaign Act of 1971¹⁶ (“FECA”) includes a clear statement that its provisions supersede and preempt any provision of state law with respect to election to federal office.¹⁷ FEC regulations specifically provide that “[f]ederal law supersedes State law concerning the . . . [l]imitation on contributions and expenditures regarding Federal candidates and political committees.”¹⁸ While no court to date has ruled on whether § 24.2-954 has been preempted by FECA in the context of campaign finance limitations for federal candidates and federal political committees, a persuasive precedent from the Eleventh Circuit and an FEC advisory opinion regarding a similar statute in Georgia leave little doubt that it has been.¹⁹

FEC regulations require each state, district, and local party committee receiving or expending funds for federal election activity to establish one or more separate non-federal accounts and federal accounts.²⁰ Funds deposited into a non-federal account are governed by state law.²¹ Funds deposited into a federal account are governed by federal law, because only contributions that comply with the federal contribution limits, prohibitions and reporting requirements of FECA (“federal funds”) may be deposited into a federal account, regardless of whether the funds are for use in connection with federal or non-federal elections.²²

Federal preemption removes from the reach of § 24.2-954 the solicitation or acceptance of contributions of federal funds to be deposited into the federal account of a state, district, or county or city political party committee. Moreover, I find no restriction under federal law that would prevent a member of the General Assembly from soliciting or accepting contributions during a regular session of the General Assembly as outlined above. Thus, a member of the General Assembly is not precluded during a regular session from soliciting or accepting federal funds for a political party committee so long as those funds are deposited into the federal account of that committee. A note of caution is warranted, however, in light of the dual nature of campaign finance regulation of state and local political party committees. A state officeholder subject to the restrictions of § 24.2-954 would be in violation of that section if a contribution the officeholder solicited or accepted for a political party committee during a regular session exceeds the limits of the FECA, or comes from a source prohibited by the FECA, or is deposited into a non-federal account of the political party committee.²³

Whether or not the restrictions found in § 24.2-954 apply to fundraising activities for “Super PACs” requires more discussion. “Super PACs” were not created or authorized by federal or Virginia statutes, nor are they called Super PACs by the FEC. The term “Super PAC” is a common expression for what the FEC recognizes and regulates as “independent expenditure only committees” (“IEOC”).²⁴

IEOCs can make only independent expenditures.²⁵ An independent expenditure is an expenditure that expressly advocates the election or defeat of a clearly identified candidate and is not made in coordination with the candidate, the candidate’s

authorized political committee or its agents, or a political committee or its agents.²⁶ The FEC has ruled that an IEOC could solicit and accept unlimited contributions from individuals, political committees, corporations, and labor organizations to fund its independent expenditures.²⁷

Although § 24.2-954 prohibits a member of the General Assembly from soliciting on behalf of a “political committee” associated with a Virginia campaign during the legislative session, § 24.2-945.1(A) specifically excludes “federal political action committee” and “out-of-state political committee” from the definition of “political committee.”²⁸ An “out-of-state political committee,” however, must not “have as its primary purpose expressly advocating the election or defeat of a clearly identified candidate.”²⁹ Because IEOCs make expenditures that expressly advocate the election or defeat of a clearly identified candidate, they likely cannot qualify as “out-of-state political committees.” “Federal political action committee means any political action committee registered with the Federal Election Commission that makes contributions to candidates or political committees registered in Virginia.”³⁰ Whether or not a Super PAC qualifies as a “federal political action committee” under § 24.2-945.1(A) can only be determined on a case-by-case basis. If it does qualify, then the restrictions contained in § 24.2-954 would not apply to solicitations made on its behalf.

CONCLUSION

Accordingly, it is my opinion that a member of the General Assembly is not precluded from soliciting or accepting contributions during a regular session of the General Assembly on behalf of the following: (1) candidates for public office in states other than Virginia; (2) federal political action committees; (3) federal accounts maintained by state, congressional district, or county or city political party committees pursuant to federal campaign finance laws; and (4) independent expenditure only committees (commonly referred to as “Super PACs”) if they are considered “federal political action committees” under § 24.2-945.1(A).

¹ You also inquire regarding the solicitation of funds for “federal statewide coordinated campaign committees.” This term, however, does not identify a type of political committee subject to the Federal Election Campaign Act of 1971 (2 U.S.C. §§ 431 through 457) and the Federal Election Commission regulations (11 C.F.R. §§ 1.1 through 9039.3.) Rather, the “coordinated campaign” of the Democratic Party of Virginia and the “victory” program of the Republican Party of Virginia are candidate-support activities undertaken by those respective state political party committees for which one or more separate state political party bank accounts may be maintained but no separate political committee is created. Consequently, this inquiry is the same as your question regarding federal accounts maintained by political party committees pursuant to federal campaign finance laws.

² VA. CODE ANN. § 24.2-954 (2011) (emphasis added).

³ 2012 Op. Va. Att’y Gen. 100, 101.

⁴ See §§ 24.2-945 through 24.2-953.5 (2011 & Supp. 2012).

⁵ See *Alston v. Commonwealth*, 274 Va. 759, 769, 652 S.E.2d 456, 462 (2007) (applying statutory canon that a statute must be read *in pari materia* – that is, in conjunction with other statutes on the subject – to determine its meaning).

⁶ Section 24.2-945.1(A) (2011) (emphasis added).

⁷ Section 24.2-101 (2011) (emphasis added). See also § 24.2-945.1(A) (referring to § 24.2-101 for the definition of “candidate”).

⁸ 2012 Op. Va. Att’y Gen. at 100-01; *see also* 2010 Op. Va. Att’y Gen. 131, 131 (“It is my opinion that § 24.2-954 precludes members of the General Assembly from engaging in fundraising activity in connection with a campaign for *state office* during a regular session of the General Assembly.”) (emphasis in original).

⁹ Section 24.2-945.1(A).

¹⁰ Section 24.2-945.1(A) defines a “federal political action committee” as “any political action committee registered with the Federal Election Commission that makes contributions to candidates or political committees registered in Virginia.”

¹¹ *See* §§ 24.2-950 through 24.2-950.9 (2011).

¹² Sections 24.2-950.1 and 24.2-950.8.

¹³ *See* 2 U.S.C. §§ 431(4), 433, 434; 11 C.F.R. §§ 100.5, 102.1, 102.5, 104.1, 104.3 (2013).

¹⁴ U.S. CONST. art. VI, cl. 2.

¹⁵ *See* 2010 Op. Va. Att’y Gen. 131, 133 (further citation omitted). *See also* 2012 Op. Va. Att’y Gen. 100.

¹⁶ *See* Pub. L. No. 92-225, 86 Stat. 3 (codified in scattered sections, as amended, at 2 U.S.C. §§ 431 through 457).

¹⁷ 2 U.S.C. § 453(a) (“the provisions of this Act, and of rules prescribed under this Act, supersede and preempt any provision of State law with respect to election to Federal office”).

¹⁸ 11 C.F.R. § 108.7(b)(3). The FEC regulations also confirm that the FECA does not preempt certain enumerated state laws (*e.g.*, manner of qualifying as a candidate or political party and candidate’s personal financial disclosure) that are not the subject of this opinion. 11 C.F.R. § 108.7(c).

¹⁹ *See Teper v. Miller*, 82 F.3d 989, 994-999 (11th Cir. 1996) (finding a Georgia statute preempted to the extent it prohibited state legislator from soliciting contributions for his campaign for federal office while the state legislature was in session); Day for Senate, Adv. Op. Fed. Election Comm’n No. 1995-48 (1996), *available at* <http://saos.nictusa.com/saos/searchao> (search for 1995-48) (same).

²⁰ 11 C.F.R. § 300.30(b).

²¹ 11 C.F.R. § 300.30(b)(1).

²² 11 C.F.R. § 300.30(b)(3). Under the FECA, corporations, labor organizations, national banks, federal government contractors and foreign nationals are prohibited from making contributions in connection with a federal election. 2 U.S.C. §§ 441b, 441c, 441e. Thus, contributions from those sources are not eligible to be federal funds. *See* 11 C.F.R. § 300.2(g) (2013). When a political party committee establishes one or more separate accounts in a campaign depository to hold receipts and make disbursements for federal election activity, it is treated as a separate political committee for purposes of FEC registration and reporting requirements. 11 C.F.R. §§ 102.5(a)(1)(i), 300.30(c).

²³ Virginia law does not provide a safe harbor for a state officeholder in this circumstance. Nevertheless, a member of the General Assembly who desires during a regular session to solicit or accept contributions qualifying as federal funds for deposit into a federal account maintained by political party committee may wish to adopt the procedures followed by federal candidates and officeholders to protect against inadvertent receipt of prohibited funds. *See, e.g.*, 11 C.F.R. § 300.64(b) (2013) (where federal candidate or officeholder is soliciting funds at a nonfederal fundraising event, a clear and conspicuous written notice or oral statement must be given that the candidate or officeholder “does not seek funds in excess of \$[federally permissible amount], and does not seek funds from corporations, labor organizations, national banks, federal contractors, or foreign nationals.”).

²⁴ The FEC issued an advisory opinion in 2010 discussing the limits of an IEOP. *See Club for Growth, Inc.*, Adv. Op. Fed. Election Comm’n No. 2010-09 at 1, *available at* <http://saos.nictusa.com/saos/searchao> (search for 2010-09). The rise of IEOPs is the product of two recent cases. After *Citizens United v. FEC*, 558 U.S. 310, 372 (2010), held that restrictions on corporate independent expenditures are unlawful, and *SpeechNow.org v. FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010), held that contributions made to IEOPs could not be constitutionally limited, the Club for Growth approached the FEC concerning the organization’s plans to create and administer a “new independent expenditure-only political committee” that would be

regulated by the FEC. *Id.* In the advisory opinion issued in response, the FEC deemed lawful the Club for Growth's plan to establish, administer, and pay the solicitation costs of the political committee that sought to ask for unlimited contributions from individuals in the general public. *Id.*

²⁵ 2 U.S.C. § 431(17).

²⁶ *Id.*

²⁷ Commonsense Ten, Adv. Op. Fed. Election Comm'n No. 2010-11 at 2-3 (2010), available at <http://saos.nictusa.com/saos/searchao> (Search for 2010-11).

²⁸ Section 24.2-945.1; Section 24.2-954.

²⁹ Section 24.2-945.1(A).

³⁰ *Id.*

OP. NO. 13-065

ELECTIONS: GENERAL PROVISIONS AND ADMINISTRATION

ADMINISTRATION OF GOVERNMENT: DEPARTMENT OF LAW

There is no inherent conflict of interest presented, and, thus, no per se requirement that the Office of the Attorney General recuse from investigating and prosecuting alleged violations of election law, when the Attorney General is a candidate for public office in the same election that is under investigation.

THE HONORABLE JOHN S. EDWARDS
MEMBER, SENATE OF VIRGINIA
OCTOBER 18, 2013

ISSUE PRESENTED

You inquire whether the Attorney General and his office have a conflict of interest so as to require a recusal of the Office of the Attorney General from investigating and prosecuting alleged violations of election law, when the Attorney General is a candidate for public office in the same election that is under investigation.

RESPONSE

It is my opinion that there is no inherent conflict of interest presented, and, thus, no *per se* requirement that the Office of the Attorney General recuse from investigating and prosecuting alleged violations of election law, when the Attorney General is a candidate for public office in the same election that is under investigation. It is my further opinion that any potential recusal of that Office must be determined on a case-by-case basis.

APPLICABLE LAW AND DISCUSSION

The Constitution of Virginia sets forth the qualifications of the Attorney General.¹ The Attorney General's duties are as prescribed by law, and there are no limits on the terms of the Attorney General.² Section 2.2-507 provides that the Attorney General shall perform "[a]ll legal service in civil matters for the Commonwealth" except as otherwise provided by statute.³ If it is "impracticable" for such legal service to be rendered by the Attorney General or one of his assistants, he may employ special

counsel.⁴ Moreover, the Governor may employ special counsel when the “Attorney General’s office is unable to render such service,” upon issuing an exemption order “stating with particularity the facts and reasons leading to the conclusion that the Attorney General’s office is unable to render such service.”⁵

Section 2.2-511 sets forth the Attorney General’s authority in criminal cases.⁶ The Attorney General’s duties in that regard include those found in § 24.2-104, which, in relevant part, provides that

A. The Attorney General shall have full authority to do whatever is necessary or appropriate to enforce the election laws or prosecute violations thereof. The Attorney General shall exercise the authority granted by this section to conduct an investigation, prosecute a violation, assure the enforcement of the elections laws, and report the results of the investigation to the State Board [of Elections].^[7]

In 2013, the General Assembly amended the statute to provide independent authority to the Attorney General so that, without involvement of the State Board of Elections, he should have authority to enforce the election laws or prosecute violations thereof.⁸ Prior to this amendment, the Attorney General could exercise this authority only upon a request from the State Board of Elections.⁹ The effect of the 2013 amendments is to permit the Attorney General to take the actions specified in § 24.2-104(A) without need for a prerequisite request from the State Board of Elections.

When the General Assembly amended § 24.2-104, it did so knowing that under the Constitution of Virginia (“Constitution”) the Attorney General could run for reelection.¹⁰ An Attorney General running for reelection would present the exact same issue that is presented herein, that of an official having law enforcement authority related to an election wherein he also is running as a candidate.¹¹

Possessing authority to enforce the election laws while running for reelection is not a new development in the Commonwealth. The commonwealth’s attorney for each Virginia locality, who is subject to popular election,¹² has broad enforcement powers in election matters, including, but not limited to, defending a petition that challenges a voter registration denial;¹³ investigating and prosecuting violations of the Campaign Finance Disclosure Act of 2006;¹⁴ and handling “any complaint or allegation of unlawful conduct” under Title 24.2.¹⁵ The authority of the commonwealth’s attorney in election matters, even in years in which the commonwealth attorney is seeking reelection, has not been statutorily conditioned upon a request from the State Board of Elections or local electoral board.¹⁶

Notwithstanding these express provisions and grants of authority, you inquire whether Rule 1.7 of the Rules of Professional Conduct governing attorneys requires automatic recusal of the Office of the Attorney General if he is a candidate for election. The General Assembly has delegated to the Virginia Supreme Court the power to establish rules and regulations “[p]rescribing a code of ethics governing the professional conduct of attorneys.”¹⁷ The Code makes clear, however, that rules promulgated by the Supreme Court may not conflict with statutory law.¹⁸ The Rules of Professional Conduct, moreover, make clear at the outset that the ethical duties of government

lawyers may differ from those of lawyers in the private sector.¹⁹ While the Rules apply to all lawyers, “under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships.”²⁰

Rule 1.7(a) provides as follows:

Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.^[21]

The Comments to Rule 1.7 provide guidance with respect to application of this Rule and state that “[l]oyalty and independent judgment are essential elements to the lawyer’s relationship to a client.”²² The Comments further state that “[r]esolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation.”²³ The conflicts of interest referred to in Rule 1.7 include those that would affect the representation of a client in relation to the lawyer’s “business or personal interests.”²⁴ Where, as here, alleged conflicts may arise in a context other than litigation, they are difficult to assess, and the “question is often one of proximity and degree.”²⁵

In recognition of the unique role of government lawyers, the Attorney General is expressly permitted to

represent personally or through one or more of his assistants any number of state departments, institutions, divisions, commissions, boards, bureaus, agencies, entities, officials, courts, or judges that are parties to the same transaction or that are parties in the same civil or administrative proceeding and may represent multiple interests within the same department, institution, division, commission, board, bureau, agency, or entity.^[26]

Thus, the General Assembly has legislated that the Attorney General may represent more than one client in a transaction, notwithstanding the general terms of Rule 1.7.²⁷

There are other Rules of Professional Conduct that might apply to the Attorney General’s authority under § 24.2-104. Rule 1.11 provides certain special rules to prevent a government lawyer from engaging in “activities in which his personal or professional interests are or foreseeably may be in conflict with official duties or obligations to the public.”²⁸ Rule 3.8 further governs the conduct of the Attorney General when acting as a prosecutor, requiring that he not file charges not supported by probable cause and that he “has the responsibility of a minister of justice and not simply that of an advocate.”²⁹

Applying the above-referenced Rules of Professional Conduct to the question presented, it is clear that there is no inherent conflict of interest requiring recusal. The Constitution expressly provides that the Attorney General serve a four-year term and may run for reelection and does not prohibit him from running for Governor. The Code prescribes various duties to the Attorney General, including enforcement of election laws under § 24.2-104(A). The 2013 changes to the law do not provide for any form of blanket disqualification by the Attorney General if he is on the ballot. Thus, with respect to this statutory provision, it is the duty of the Attorney General to determine if the specific factual scenario at issue would affect his ability to ethically represent the Commonwealth. Clearly, this question of “proximity and degree” must be answered on a case-by-case basis.³⁰

I note that ample safeguards exist should an issue develop involving an Attorney General’s own campaign for reelection or for election to another office. The General Assembly was aware of such potentialities when it amended § 24.2-104. First, the commonwealth’s attorney in the relevant jurisdiction has concurrent jurisdiction to enforce the election laws.³¹ In addition, the State Board of Elections has authority to “request the Attorney General, or other attorney designated by the Governor for such purpose, to assist the attorney for the Commonwealth of any jurisdiction in which election laws have been violated,” and upon unanimous request, “[t]he Attorney General, or the other attorney designated by the Governor, shall have full authority to do whatever is necessary or appropriate to enforce the election laws or prosecute violations thereof.”³² Also, the Attorney General can appoint outside counsel or request that a commonwealth’s attorney review a matter.³³ Moreover, the Governor can appoint special counsel if a factual scenario develops in which he determines such action to be necessary.³⁴

Thus, with respect to the exercise of the authority granted by § 24.2-104(A), should ethical considerations warrant that the Attorney General recuse his Office from the investigation or prosecution of a specific alleged electoral law violation, the General Assembly has provided adequate alternatives for the Commonwealth’s legal representation.

In summary, there is no legal or ethical requirement that a sitting Attorney General who is on the ballot for an election disqualify himself or his Office from performing all of the Office’s statutory responsibilities pursuant to § 24.2-104. If, regarding an application of § 24.2-104 to a specific set of facts, the Attorney General determines that he cannot appropriately perform the statutory function, he may recuse himself, leaving the task to either the appropriate lawyers in the Office or outside counsel appointed by the Office. Necessarily, such a determination is fact specific and cannot be made in the abstract.³⁵

CONCLUSION

Accordingly, it is my opinion that there is no inherent conflict of interest presented, and, thus, no *per se* requirement that the Office of the Attorney General recuse from investigating and prosecuting alleged violations of election law, when the Attorney General is a candidate for public office in the same election that is under

investigation. It is my further opinion that any recusal of that Office must be determined on a case-by-case basis.

¹ “An Attorney General shall be elected by the qualified voters of the Commonwealth at the same time and for the same term as the Governor; and the fact of his election shall be ascertained in the same manner. No person shall be eligible for election or appointment to the office of Attorney General unless he is a citizen of the United States, has attained the age of thirty years, and has the qualifications required for a judge of a court of record. He shall perform such duties and receive such compensation as may be prescribed by law, which compensation shall neither be increased nor diminished during the period for which he shall have been elected. There shall be no limit on the terms of the Attorney General.” VA. CONST. art. V, § 15.

² *Id.* See also VA. CODE ANN. § 2.2-500 (2011).

³ Section 2.2-507(A) (Supp. 2013).

⁴ Section 2.2-507(C); see also VA. CODE ANN. § 2.2-510 (Supp. 2013).

⁵ Section 2.2-510(1).

⁶ Section 2.2-511 (2011).

⁷ VA. CODE ANN. § 24.2-104(A) (Supp. 2013).

⁸ See 2013 Va. Acts ch. 768.

⁹ See § 24.2-104(B) and (C). Section 24.2-104(C) also requires certain actions by the Attorney General when (“[t]he attorney for the Commonwealth or a member of the electoral board of any county or city” makes a request in writing that makes certain allegations made under oath. The Attorney General’s duties under this section predated the 2013 amendment to § 24.2-104.

¹⁰ When the legislature passes a new law, or amends an old one, it is presumed to act with full knowledge of the law as it stands. *Sch. Bd. of Stonewall Dist. v. Patterson*, 111 Va. 482, 487-88, 69 S.E. 337, 339 (1910).

¹¹ The fact that no Attorney General has run for reelection since the 1980s does not alter the legal analysis of this Opinion.

¹² VA. CONST. art VII, § 4; VA. CODE ANN. § 15.2-1626 (2012).

¹³ Section 24.2-422 (2011).

¹⁴ Section 24.2-946.3 (2011).

¹⁵ Section 24.2-1019 (2011).

¹⁶ See 1978-79 Op. Va. Att’y Gen. 95, 97.

¹⁷ VA. CODE ANN. § 54.1-3909 (2013).

¹⁸ Section 54.1-3915 (2013) (“Notwithstanding the foregoing provisions of this article, the Supreme Court shall not promulgate rules or regulations prescribing a code of ethics governing the professional conduct of attorneys which are inconsistent with any statute.”).

¹⁹ Va. Sup. Ct. R. Part 6, § II, Preamble.

²⁰ *Id.*

²¹ *Id.*, Rule 1.7; in addition, subparagraph (b) sets forth certain exceptions to the general rule applicable to attorneys in private client-lawyer relationships.

²² *Id.* at n.1.

²³ *Id.* at n.9.

²⁴ *Id.* at n.10.

²⁵ *Id.* at n.26.

²⁶ VA. CODE ANN. § 2.2-507(A).

²⁷ See also *Hladys v. Commonwealth*, 235 Va. 145, 148-49, 366 S.E.2d 98, 100 (1988).

²⁸ Va. Sup. Ct. R. Part 6, § II, Rule 1.11, n.1.

²⁹ *Id.*, Rule 3.8, n.1.

³⁰ The consideration of any given factual scenario would include reference to any applicable provisions of the State and Local Conflict of Interests Act. VA. CODE ANN. §§ 2.2-3101 through 2.2-3131 (2011 & Supp. 2013). *See especially* § 2.2-3103 (2011).

³¹ *See supra* notes 11-13, and accompanying text.

³² Section 24.2-104(B).

³³ Section 2.2-507(C).

³⁴ *See* § 2.2-510. *See also* Wilder v. Attorney Gen., 247 Va. 119, 439 S.E.2d 398 (1994) (upholding power of the Governor to appoint special counsel in situations where he determines that the Attorney General is unable to render services).

³⁵ For example, if there were an allegation of voter fraud regarding three votes in a House of Delegates race decided by one vote and all of the statewide races were decided by 100,000 vote margins, there would not even be a colorable claim that the Attorney General or his Office could be conflicted out of performing the functions outlined in § 24.2-104.

OP. NO. 12-111

EVIDENCE: ADMISSIBILITY OF EVIDENCE

The results of preliminary breath tests (Alco-Sensor or like device) may be admissible for the offenses of underage possession of alcohol, possession, or consumption of alcoholic beverages by an interdicted person and public intoxication at the discretion of the trial judge and subject to the proper foundation.

THE HONORABLE LA BRAVIA J. JENKINS
COMMONWEALTH'S ATTORNEY
CITY OF FREDERICKSBURG
JUNE 7, 2013

ISSUE PRESENTED

You have asked whether the results of preliminary breath tests (Alco-Sensor or like device) are admissible evidence for the offenses of underage possession of alcohol,¹ possession, or consumption of alcoholic beverages by an interdicted person,² and public intoxication.³

RESPONSE

It is my opinion that the results of the preliminary breath tests you describe may be admissible for the offenses of underage possession of alcohol, possession, or consumption of alcoholic beverages by an interdicted person and public intoxication at the discretion of the trial judge and subject to the proper foundation.

APPLICABLE LAW AND DISCUSSION

“The admissibility of evidence is within the broad discretion of the trial court.”⁴ There are obvious exceptions such as when the legislature has prohibited certain evidence. For example, the law expressly prohibits the admission into evidence of the results of

a preliminary breath test when a driver is suspected of certain driving offenses.⁵ No such prohibition exists for underage possession of alcohol, possession or consumption of alcoholic beverages by an interdicted person and public intoxication. When one statute makes a specific prohibition, the lack of such specific prohibition in another statute is evidence that the General Assembly intended that a prohibition not exist where it is not referenced.⁶

Nonetheless, it is also important to have a proper foundation in admitting preliminary breath test analysis into evidence. Even in civil cases the court has required evidence of proper calibration and reliability of the machine used in order to admit the test results.⁷ Therefore, an important element in the admissibility of the preliminary breath test is the foundation that the machine was working properly.

CONCLUSION

Accordingly, it is my opinion that results of the preliminary breath tests you describe may be admissible for the offenses of underage possession of alcohol, possession or consumption of alcoholic beverages by an interdicted person and public intoxication at the discretion of the trial judge and subject to the proper foundation.

¹ VA. CODE ANN. § 4.1-305 (Supp. 2012).

² Section 4.1-322 (2010).

³ VA. CODE ANN. § 18.2-388 (2009).

⁴ *Bell v. Commonwealth*, 49 Va. App. 570, 576, 643 S.E.2d 497, 500 (2007) (citing *Blain v. Commonwealth*, 7 Va. App. 10, 16, 371 S.E. 2d 838, 842 (1988)).

⁵ Section 18.2-267(E) (2009).

⁶ 2000 Op. Va. Att’y Gen. 136, 138 (stating that “the mention of one thing in a statute implies the exclusion of another.”).

⁷ *Santen v. Tuthill*, 265 Va. 492, 498, 578 S.E.2d 788, 791 (2003).

OP. NO. 12-072

FINANCIAL INSTITUTIONS AND SERVICES: MOTOR VEHICLE TITLE LOANS

A motor vehicle title lender may not disburse loan proceeds through a debit card transaction in which the borrower’s bank account is credited with the amount of the loan.

A motor vehicle title lender may not disburse loan proceeds through an electronic funds transfer to the borrower’s deposit account.

THE HONORABLE JOHN C. WATKINS
MEMBER, SENATE OF VIRGINIA
JANUARY 11, 2013

ISSUES PRESENTED

You ask two questions related to the permissible methods a motor vehicle title lender may use to disburse loan proceeds from a motor vehicle title loan under § 6.2-2215(7) of the *Code of Virginia*. You first ask whether the statute, by stating that a lender may disburse the proceeds “by debit card,” allows a licensee to disburse loan proceeds to a

borrower through a debit card transaction in which the borrower's bank account is credited with the amount of the loan. Secondly, you ask whether the statute, which allows a licensee to disburse loan proceeds "in cash," permits a licensee to disburse loan proceeds by electronic funds transfer to the borrower's deposit account.

RESPONSE

It is my opinion that a motor vehicle title lender may not disburse loan proceeds through a debit card transaction in which the borrower's bank account is credited with the amount of the loan. It is further my opinion that a motor vehicle title lender may not disburse loan proceeds through an electronic funds transfer to the borrower's deposit account.

APPLICABLE LAW AND DISCUSSION

Section 6.2-2215(7) of the *Code of Virginia* provides, in relevant part, that a motor vehicle title lender shall disburse loan proceeds "(i) in cash, (ii) by the licensee's business check,^[1] or (iii) by debit card provided that the borrower will not be directly charged a fee by the licensee in connection with the withdrawal of the funds." The term "debit card" is not defined in § 6.2-2200, the definition section applicable to § 6.2-2215. "An undefined term must be given its ordinary meaning, considered in the context in which the term is used."² "Debit card" is commonly defined as "[a] card used to pay for purchases by electronic transfer from the purchaser's bank account."³ Nevertheless, the context in which the term "debit card" is used in the statute compels me to conclude that the General Assembly intended the term to have a different meaning.

"Every part of a statute is presumed to have some effect and no part will be treated as meaningless unless absolutely necessary."⁴ Section 6.2-2215(7) authorizes the loan proceeds to be disbursed by debit card "provided that the borrower will not be directly charged a fee by the licensee in connection with the withdrawal of the funds." Obviously, upon disbursement of the loan proceeds, a motor vehicle title lender has no ability to charge a fee to a borrower for the withdrawal of specific funds from the borrower's own bank account by using a debit card issued by the borrower's deposit bank. Thus, interpreting the statute to permit the disbursement of the proceeds to a borrower's account through a debit card transaction would render meaningless the limitation on the charging of a fee for the withdrawal of funds. I therefore conclude that the General Assembly did not intend to allow a motor vehicle title lender to disburse loan proceeds through a debit card transaction in which the borrower's bank account is credited with the amount of the loan.

This conclusion is supported by the manner in which the State Corporation Commission implements the statute's provisions.⁵ In the regulations it issued that apply to motor vehicle title lenders, the State Corporation Commission requires such lenders to give the borrower an informational pamphlet.⁶ The text of this mandated pamphlet makes clear that the State Corporation Commission construes the authorization to disburse proceeds "by debit card" to mean giving the borrower a physical card with a prepaid value equal to the amount of the loan proceeds.⁷ This construction, which allows a lender to disburse the proceeds by giving the borrower a

physical, prepaid card, also gives full meaning to the limitation on lenders charging a fee for the withdrawal of funds, as the limitation will prevent the lender from imposing a fee when the card is used or the proceeds withdrawn.⁸ Because this construction gives meaning to the full statute, it is preferred. Thus, if a motor vehicle title lender wishes to disburse the loan proceeds by debit card, it must provide the borrower with a card prepaid with the amount of the loan proceeds, which later can be withdrawn when the card is used. As concluded above, the lender may not disburse the proceeds through a debit card transaction in which the borrower's bank account is credited.

You also ask whether a lender may disburse the proceeds through an electronic funds transfer to the borrower's bank account because the statute also allows a lender to disburse the loan proceeds "in cash."⁹ As the term "cash" is also undefined by the statute, it must be given its ordinary meaning considered in the context in which it is used.¹⁰ "Cash" is defined as "money or its equivalent" and as "currency or coins, negotiable checks, and balances in bank accounts."¹¹ The first definition of "cash," which is essentially restricted to paper currency and coins, is much more restrictive than the second, which includes checks and balances in bank accounts. It is necessary to determine whether the General Assembly intended the term "cash" to have the more restrictive or more expansive meaning. The context of the statute shows that it clearly intended the more restrictive definition to apply. Specifically, the General Assembly's inclusion of the option to disburse the proceeds "by the licensee's business check," a method that would be included within the more expansive definition of "cash," demonstrates that it intended the term to be restricted to currency and coins.¹²

CONCLUSION

Accordingly, it is my opinion that a motor vehicle title lender may not disburse loan proceeds to a borrower through a debit card transaction in which the borrower's bank account is credited with the proceeds. It is further my opinion that a motor vehicle title lender also may not disburse loan proceeds through an electronic funds transfer to a borrower's account.

¹ "Licensee" in this provision refers to a business operating and licensed by the State Corporation Commission as a motor vehicle title lender under Chapter 22 of Title 6.2 of the *Code of Virginia*, "Motor Vehicle Title Loans." See VA. CODE ANN. § 6.2-2200 (2010) (defining "licensee") and § 6.2-2201 (Supp. 2012) (requiring licensure by the Commission).

²*Murphy v. Norfolk Cmty. Servs. Bd.*, 260 Va. 334, 339, 533 S.E.2d 922, 925 (2000) (citing *Sansom v. Bd. of Suprvs.*, 257 Va. 589, 594–95, 514 S.E.2d 345, 349 (1999); *Stevenson v. City of Falls Church*, 243 Va. 434, 437, 416 S.E.2d 435, 437 (1992); *Commonwealth v. Orange-Madison Coop. Farm Serv.*, 220 Va. 655, 658, 261 S.E.2d 532, 533–34 (1980)).

³BLACK'S LAW DICTIONARY 461 (9th ed. 2009); see MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 320 (11th ed. 2003) (defining the term as "a card like a credit card by which money may be withdrawn or the cost of purchases paid directly from the holder's bank account without the payment of interest").

⁴*Sims Wholesale Co. v. Brown-Forman Corp.*, 251 Va. 398, 405, 468 S.E.2d 905, 909 (1996) (citing *Raven Red Ash Coal Corp. v. Absher*, 153 Va. 332, 335, 149 S.E. 541, 542 (1929)).

⁵ Generally, deference should be given to the interpretation given to the statute by the agency tasked with its administration. The State Corporation Commission is the agency with the authority to license motor

vehicle title lenders and the authority to issue regulations applicable to motor vehicle title lenders. *See* VA. CODE ANN. §§ 6.2-2201, 6.2-2214 (2010 & Supp. 2012)

⁶10 VA. ADMIN. CODE § 5-210-30(A) (2012).

⁷*Id.* § 5-210-30(D) (“You will receive your loan proceeds in the form of . . . (iii) a debit card If you receive a debit card, the motor vehicle title lender is prohibited from charging you an additional fee when you withdraw or use the loan proceeds.”)

⁸*Id.*

⁹VA. CODE ANN. § 6.2-2215(7) (Supp. 2012).

¹⁰*Murphy*, 260 Va. at 339, 533 S.E.2d at 925.

¹¹BLACK’S LAW DICTIONARY 245 (9th ed. 2009); *see* MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 191 (11th ed. 2003) (defining “cash” as “ready money” or “money or its equivalent (as a check) paid for goods or services at the time of purchase or delivery”).

¹²“The meaning of a word . . . takes color and expression from the purport of the entire phrase of which it is a part, and it must be construed so as to harmonize with the context as a whole.” *Kohlberg v. Va. Real Estate Comm’n*, 212 Va. 237, 239, 183 S.E.2d 170, 172 (1971) (explaining doctrine of *noscitur a sociis*, a canon of construction based on Latin phrase meaning “it is known by its associates,” BLACK’S LAW DICTIONARY 1084 (7th ed. 1999)). *See also* *Va. Beach v. Bd. of Supvrs.*, 246 Va. 233, 236-37, 435 S.E.2d 382, 384 (1993) (noting that words in statute are construed according to context in which they are used and by considering language used in the statute and in other statutes dealing with closely related subjects).

OP. NO. 13-103

FINANCIAL INSTITUTIONS AND SERVICES: INTEREST AND USURY

An annual membership fee is not a “finance charge,” provided that such annual membership fee is assessed as a condition of access to the credit plan and regardless of whether a borrower actually receives an extension of credit from the lender.

A lender who extends open-end credit pursuant to § 6.2-312 may charge borrowers an annual membership fee in connection with the provision of open-end credit, regardless of whether the borrower repays the balance in full by the close of a minimum 25-day billing cycle.

THE HONORABLE TIMOTHY D. HUGO
MEMBER, HOUSE OF DELEGATES
DECEMBER 13, 2013

ISSUE PRESENTED

You ask whether it is permissible under Virginia law for a lender who extends open-end credit pursuant to § 6.2-312 of the *Code of Virginia* to charge an annual membership fee.

RESPONSE

It is my opinion that an annual membership fee is not a “finance charge,” provided that such annual membership fee is assessed as a condition of access to the credit plan and regardless of whether a borrower actually receives an extension of credit from the lender. Consequently, it is my further opinion that a lender who extends open-end credit pursuant to § 6.2-312 may charge borrowers an annual membership fee in connection with the

provision of open-end credit, regardless of whether the borrower repays the balance in full by the close of a minimum 25-day billing cycle.

APPLICABLE LAW AND DISCUSSION

Section 6.2-312 generally permits lenders to offer open-end credit plans to borrowers, and, in connection with such plans, to require payment of finance charges and other fees. Most relevantly, § 6.2-312(A) provides the following:

Notwithstanding any provision of this chapter other than § 6.2-327, and except as provided in subsection C, a seller or lender engaged in extending credit under an open-end credit plan may impose, on credit extended under the plan, *finance charges and other charges and fees* at such rates and in such amounts and manner as may be agreed upon by the creditor and the obligor, if under the plan a finance charge is imposed upon the obligor if payment in full of the unpaid balance is not received at the place designated by the creditor prior to the next billing date, which shall be at least 25 days later than the prior billing date.^[1]

Based on a plain reading of the statute, § 6.2-312(A) clearly distinguishes between “finance charges” and “other charges and fees.”² If a fee is a “finance charge,” the lender may assess it only if the borrower fails to fully repay the balance in full by the close of the (minimum 25 day) billing cycle. If a fee is an “other charge[] or fee[],” a lender may assess it regardless of whether the borrower repays the balance in full by the close of the (minimum 25 day) billing cycle. In this regard, I must examine whether the annual membership fee you describe is a “finance charge,” or another charge or fee contemplated by the statute.

For purposes of Title 6.2, the term “finance charge” is defined as having “the meaning assigned to it in Federal Reserve Board Regulation Z, 12 C.F.R. § 226.4, as amended.”³ Regulation Z to the federal Truth-in-Lending Act⁴ generally defines “finance charge” as “the cost of consumer credit as a dollar amount. It includes any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor *as an incident to or a condition of the extension of credit.*”⁵ Regulation Z further specifically excludes from the definition of “finance charge” “[f]ees charged for participation in a credit plan, whether assessed on an annual or other periodic^[6] basis.”⁷ Further instructive are the official Federal Reserve Board comments regarding participation fees:

The participation fees described in [12 C.F.R.] § 226.4(c)(4) do not necessarily have to be formal membership fees, nor are they limited to credit card plans. The provision applies to any credit plan in which payment of a fee is a condition of access to the plan itself, but it does not apply to fees imposed separately on individual closed-end transactions. The fee may be charged on a monthly, annual, or other periodic basis; a one-time, non-recurring fee imposed at the time an account is opened is not a fee that is charged on a periodic basis and may not be treated as a participation fee.^[8]

The foregoing definition of, and commentary on, the term “finance charge” are clear and unambiguous. To be considered a “finance charge,” a charge must be dependent on whether the borrower actually receives a loan or other extension of credit.⁹ Further helpful to my understanding of the meaning of “finance charge” is the clear exclusion of

periodic fees charged for the mere participation in a credit plan, as opposed to the actual receipt of one or more extensions of credit pursuant to such a credit plan.¹⁰ The Federal Reserve Board comments further clarify that a participation fee must be charged at regular intervals on a recurring basis.¹¹ Accordingly, I conclude that an annual membership fee is not a finance charge, provided that it is assessed for the privilege of participation in a credit plan, and not based on the actual extension of credit to the borrower. Because an annual membership fee is not a “finance charge” under Title 6.2, I also conclude that a lender offering credit under § 6.2-312 may assess an annual membership fee regardless of whether the balance is repaid in full by the borrower prior to the close of a minimum 25-day billing cycle.

CONCLUSION

Accordingly, it is my opinion that an annual membership fee is not a “finance charge,” provided that such annual membership fee is assessed as a condition of access to the credit plan and regardless of whether a borrower actually receives an extension of credit from the lender. Consequently, it is my further opinion that a lender who extends open-end credit pursuant to § 6.2-312 may charge borrowers an annual membership fee in connection with the provision of open-end credit, regardless of whether the borrower repays the balance in full by the close of a minimum 25-day billing cycle.

¹ Emphasis added.

² “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 Va.*, 230 Va. 420, 425, 722 S.E.2d 626, 629 (2012) (quoting *Commonwealth v. Amerson*, 281 Va. 414, 418, 706 S.E.2d 877, 882 (2011)) (further citation and internal question marks omitted). “We ‘assume the legislature chose, with care, the words it used when it enacted the relevant statute.’” *Alger v. Commonwealth*, 267 Va. 255, 261, 590 S.E.2d 563, 556 (2004) (quoting *Barr v. Town & Country Props., Inc.*, 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990)).

³ VA. CODE ANN. § 6.2-100 (2010).

⁴ The federal Truth in Lending Act is generally cited as 15 USCS §§ 1601 through 1693r (2013).

⁵ 12 C.F.R. § 226.4(a) (2013) (emphasis added).

⁶ The word “periodic” is not defined in Regulation Z or the Truth-in-Lending Act. Absent a statutory definition, words are given their ordinary meaning. 1987-88 Op. Va. Att’y Gen. 513, 514. *Merriam-Webster’s Dictionary* defines “periodic” as, most relevantly, “occurring or recurring at regular intervals.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 862 (10th ed. 2001).

⁷ 12 C.F.R. § 226.4(c)(4) (2013).

⁸ 12 C.F.R. pt. 226, supp. I, § 226.4, annot. (2013) (comment 4(c)(4)(1), “Official Staff Interpretations”).

⁹ 12 C.F.R. § 226.4(a) (defining “finance charge”).

¹⁰ See 12 C.F.R. § 226.4(c)(4).

¹¹ See *supra* notes 6 and 8 and accompanying text.

OP. NO. 12-052

FIRE PROTECTION: FIRE/EMS DEPARTMENTS AND FIRE/EMS COMPANIES

A Virginia locality may provide appropriations to certain organizations providing fire or emergency medical services regardless of their classification as IRS non-profit entities and regardless of whether they provide compensation to individual members.

LIBRARIES: VIRGINIA PUBLIC RECORDS ACT

A county treasurer's records must be located in the same building as that county treasurer's office, and that the county treasurer should maintain, store, and retain his records in accordance with the disposition schedule established for treasurers by the Library of Virginia.

ADMINISTRATION OF GOVERNMENT: VIRGINIA FREEDOM OF INFORMATION ACT

To the extent that other county offices are in possession of public records, such county offices may be required to produce information contained in these records pursuant to the Virginia Freedom of Information Act.

THE HONORABLE DANA T. BUNDICK
TREASURER, COUNTY OF ACCOMACK
JULY 26, 2013

ISSUES PRESENTED

You present several distinct questions concerning matters related to your duties as treasurer. First you ask whether Accomack County ("County") can appropriate funds to certain fire departments and rescue squads, specifically companies that allegedly have lost non-profit status for failure to file Form 990 with the Internal Revenue Service ("IRS") and companies that allegedly provide compensation to individual members. You then ask, in the event a particular company is ineligible to receive such funds, how you are to respond to your board of supervisors if it directs you to provide funds to the company in question. Next, you seek guidance regarding the proper storage of treasurers' records: you specifically inquire who is responsible for their storage, and where and for how long the records should be stored. Finally, you inquire whether other County offices have the authority to release delinquent tax information.

RESPONSE

It is my opinion that a Virginia locality may provide appropriations to certain organizations providing fire or emergency medical services regardless of their classification as IRS non-profit entities and regardless of whether they provide compensation to individual members.¹ It is further my opinion that a county treasurer's records must be located in the same building as that county treasurer's office, and that the county treasurer should maintain, store, and retain his records in accordance with the disposition schedule established for treasurers by the Library of Virginia ("LVA"). Finally, it is my opinion that, to the extent that other county offices are in possession of public records, such county offices may be required to produce information contained in these records pursuant to the Virginia Freedom of Information Act ("FOIA").²

BACKGROUND

Your first inquiries arise from matters brought to your attention by an association of concerned citizens. The association first questions the eligibility of certain fire departments and rescue squads to receive County monies obtained through property taxation. In a document you provide, the association expresses concern that a company that allegedly lost its non-profit tax status due to a failure to file Form 990 with the IRS and another company that allegedly provided compensation to individual members of the department may not be entitled to such funds. The concern focuses on the charitable status of such organizations. Your questions regarding the storage and retention of treasurers' records stem from another document you provide, in which the association outlines its concerns regarding records preservation. With respect to your final inquiry, you report that the County Attorney, in response to a FOIA request, released a taxpayer's personal delinquent tax information to that same taxpayer.³ You question whether the County Attorney, as well as other County offices, possess the authority to release such delinquent tax information.

APPLICABLE LAW AND DISCUSSION

I. Appropriations to Fire Departments and Rescue Squads

"In Virginia, the powers of [county] boards of supervisors are fixed by statute and are limited to those conferred expressly or by necessary implication."⁴ As one of the documents you provide notes, local governments expressly are authorized pursuant to § 15.2-953 to "make gifts and donations of property, real or personal, or money, to . . . any association or other organization furnishing voluntary fire-fighting services" as well as "any nonprofit lifesaving crew or lifesaving organization, or rescue squad, within or outside the boundaries of the locality...."⁵ Thus, to the extent an organization provides voluntary fire-fighting services or constitutes a non-profit rescue squad, it is eligible to receive funds from the local governing body.⁶

Nonetheless, and irrespective of the authority granted under § 15.2-953, the General Assembly has provided another method for appropriating money to organizations providing local fire or emergency medical services. Specifically, § 27-23.1 of the *Code of Virginia* authorizes local governments to designate geographical fire and emergency medical services ("EMS") zones or districts, within which fire and EMS departments may operate. The statute further allows a locality that has created such zones or districts to "contract with, or secure the services of, *any individual corporation, organization* or municipal corporation, or any volunteer fire fighters or emergency medical services personnel for such fire or emergency medical services protection as may be required."⁷ Although the locality may utilize the services of volunteer companies, the authority afforded under the plain language of this provision is not limited to their use. Moreover, the statute does not require that an organization providing fire or emergency medical services maintain a non-profit status for the purposes of the IRS or that its members serve without compensation. Accordingly, such an organization is eligible to receive appropriations from the County consistent with an agreement entered into under § 27-23.1.

II. Records Storage and Retention

“[T]o establish a single body of law applicable to all public officers . . . [for] public records management and preservation . . . [,]”⁸ the General Assembly enacted the Virginia Public Records Act (“Records Act”).⁹ The Records Act provides, with respect to where records used in the transaction of business should be located, that “[c]urrent public records should be kept in the buildings in which they are ordinarily used.”¹⁰ Thus, a treasurer’s records should be stored where his offices are located.¹¹

The Records Act further directs the Library of Virginia (“LVA”) to “establish procedures and techniques for the effective management of public records.”¹² All agencies, including constitutional officers,¹³ holding public records are required to comply with any applicable LVA records retention and disposition schedules.¹⁴ The LVA, in General Schedule No. GS-28, has issued a records retention and disposition schedule applicable to county treasurers.¹⁵ This schedule comprehensively lists the retention period and disposition method for various types of records.¹⁶ I therefore conclude that a treasurer should abide by this schedule in retaining and disposing of his records.

III. Disclosure of Delinquent Tax Information

FOIA provides that “[e]xcept as otherwise specifically provided by law, all public records shall be open to inspection and copying by any citizens of the Commonwealth during the regular office hours of the custodian of such records.”¹⁷ FOIA further requires that:

[t]he 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. Any exemption from public access to records or meetings shall be narrowly construed and no record shall be withheld . . . to the public unless specifically made exempt pursuant to this chapter or other specific provision of law.¹⁸

The Supreme Court of Virginia has acknowledged that the policy behind FOIA is to promote the disclosure of public records, and that there is a general presumption in favor of the release of such information.¹⁹

Nonetheless, FOIA expressly excludes from disclosure “[s]tate income, business, and estate tax returns, personal property tax returns . . . and confidential records held pursuant to § 58.1-3.”²⁰ Pursuant to § 58.1-3(A), it is a Class 2 misdemeanor²¹ for any “state or local tax or revenue officer or employee . . . [to] divulge any information acquired by him in the performance of his duties with respect to the transactions, property, including personal property, income or business of any person, firm or corporation.” This Office previously has clarified that although the identity of a delinquent taxpayer is releasable, the amount of the tax delinquency may not be disclosed.²²

Finally, “public records” are defined for purposes of FOIA as “all writings and recordings . . . prepared or owned by, or *in the possession of* a public body or its officers, employees or agents in the transaction of public business.”²³ FOIA defines a

“public body” in part as “any political subdivision of the Commonwealth, including cities, towns and counties, municipal councils, [and] governing bodies of counties” and specifies that constitutional officers also are considered “public bodies” for the purposes of FOIA.²⁴ Therefore, to the extent that a “public body,” or any of its officers, employees or agents, including a county attorney, is in possession of delinquent tax information not excluded from disclosure by law, the public body or person has a duty to produce such information. If, on the other hand, disclosure of particular information is prohibited by § 58.1-3, then it may not be released by the official or employee possessing it.²⁵

CONCLUSION

Accordingly, it is my opinion that: (1) localities may secure and provide funding for the services of an organization providing fire or emergency medical services irrespective of whether such an organization is an IRS non-profit entity or if its members serve without compensation; (2) the records of a county treasurer must be located in the same building as that county treasurer’s office, and such records must be retained according to the LVA’s records retention and disposition schedules applicable to county treasurers; and (3) a county attorney in possession of delinquent tax information that is not excluded from disclosure under FOIA is responsible for producing such information pursuant to a relevant FOIA request, except as provided for in § 58.1-3.

¹ By answering this question in the affirmative, this Opinion need not address your inquiry as it relates to any direction the board of supervisors might give you to provide these appropriations.

² VA. CODE ANN. §§ 2.2-3700 through 2.2-3714 (2011 & Supp. 2013).

³ You state that the FOIA request the taxpayer submitted to the County Attorney did not pertain to taxes. The actual FOIA request made, which need not be in writing, *see* 1998 Op. Va. Att’y Gen. 5, 6, is not before me; thus, I cannot comment on its scope.

⁴ *Bd. of Supvrs. v. Countryside Inv. Co.*, 258 Va. 497, 503, 522 S.E.2d 610, 613 (1999); *Bd. of Supvrs. v. Horne*, 216 Va. 113, 117, 215 S.E.2d 453, 455 (1975).

⁵ VA. CODE ANN. § 15.2-953(B) (2012).

⁶ This Opinion cannot address your request to the extent that it would require a finding on whether a particular fire department or rescue squad is indeed “volunteer” or “non-profit.” The Attorney General “refrain[s] from commenting on matters that require additional facts[.]” 2010 Op. Va. Att’y Gen. 56, 58.

⁷ *Id.* (emphasis added). The Accomack County Board of Supervisors has created fire and rescue districts pursuant to § 27-23.1. *See* COUNTY OF ACCOMACK, VA., Code §§ 42-101; 42-103; §§ 42-126 through 42-128; §§ 42-151 through 42-153; and §§ 42-176 through 42-178, *available at* <http://library.municode.com/index.aspx?clientId=13191>.

⁸ VA. CODE ANN. § 42.1-76 (2012).

⁹ VA. CODE ANN. §§ 42.1-76 through 42.1-91 (2002 & Supp. 2012).

¹⁰ Section 46.2-87(A) (Supp. 2012).

¹¹ Although the county may have provided the treasurer his office space, *see* § 15.2-1639 (2012), as a constitutional officer, the treasurer remains independent from the local governing body and, unless otherwise directed by statute, retains complete discretion in the day-to-day operations of his office, which would include the management of his files and records. *See, e.g.*, 1987-88 Op. Va. Att’y Gen. 161, 162 and opinions cited therein. Nonetheless, although the treasurer is deemed the custodian responsible for

maintaining his records, the Records Act clearly contemplates that certain records may be stored by another party by agreement. *See* § 42.1-87(A). Thus, although the treasurer is not required to turn over these records to the county for storage, he may choose to do so.

¹² Section 42.1-85(A) (Supp. 2012).

¹³ For purposes of the Records Act, “agency” is defined to include “the offices of constitutional officers,” § 42.1-77 (Supp. 2012), and therefore encompasses the office of county treasurer. *See* VA. CONST. art. VII, § 4.

¹⁴ Section 42.1-86.1(A) (Supp. 2012) (“No agency shall destroy or discard a public record unless . . . the record appears on a records retention and disposition schedule approved pursuant to § 42.1-82 and the record’s retention period has expired . . .”). *See* VA. CODE ANN. § 58.1-3129(C) (2009) (“The treasurer may cause records to be destroyed after audit . . . in accordance with retention regulations for records maintained by the treasurer established under the Virginia Public Records Act”).

¹⁵ LIBRARY OF VIRGINIA, *Records Retention and Disposition Schedule, General Schedule No. GS-28, County and Municipal Governments: Treasurer* (Apr. 16, 2013), available at http://www.lva.virginia.gov/agencies/records/sched_local/GS-28.pdf.

¹⁶ Because your request does not refer to any particular type of record, I can offer only general guidance here.

¹⁷ Section 2.2-3704(A) (2011).

¹⁸ Section 2.2-3700(B) (2011).

¹⁹ *See* *City of Danville v. Laird*, 223 Va. 271, 276, 288 S.E.2d 429, 431 (1982) (“[T]he Act shall be liberally construed to enable citizens to observe the operations of government and . . . the exemptions shall be narrowly construed ‘in order that no thing which should be public may be hidden from any person.’” (quoting § 2.1-340.1, the predecessor statute to § 2.2-3700)).

²⁰ Section 2.2-3705.7(1) (Supp. 2013).

²¹ *See* VA. CODE ANN. § 18.2-11(b) (2009) (“The authorized punishments for conviction of . . . Class 2 misdemeanors [are] confinement in jail for not more than six months and a fine of not more than \$1,000, either or both.”).

²² *See* 1993 Op. Va. Att’y Gen. 217, 220 (“[Section] 58.1-3 does not prohibit a local tax official from revealing the identity of a taxpayer who is currently delinquent in the payment of the locality’s business license tax as long as the amount of the delinquency is not disclosed.”). *See also* Ops. Va. Att’y Gen. 1999 at 211; 1992 at 157; 1989 at 304. You relate that the County Attorney disclosed the amount of the delinquency, but that such disclosure was to the delinquent taxpayer himself. Because the secrecy provisions of § 58.1-3 are intended to protect the taxpayer from disclosure of confidential tax information to third parties, releasing to a taxpayer his own information does not constitute a violation of § 58.1-3. *See* Ops. Va. Att’y Gen. 1975-76 at 394; 1984-85 at 297A, 298; 1985-86 at 312, 313; 1987-88 at 5, 8.

²³ Section 2.2-3701 (2011) (emphasis added).

²⁴ *Id.*

²⁵ “[FOIA’s] disclosure requirements generally are superseded by the secrecy provision of 58.1-3.” 2005 Op. Va. Att’y Gen. 147, 148.

OP. NO. 12-044

GAME, INLAND FISHERIES AND BOATING: LICENSES

An Indian who habitually resides on an Indian reservation or an Indian that is a member of a Virginia recognized tribe who resides in the Commonwealth is not required to obtain a license to fish in Virginia’s inland waters, or to hunt or trap in Virginia.

Virginia Indians are bound by the trapping, hunting and fishing laws and regulations of the Commonwealth regardless of whether they are on or off a reservation.

Members of the Virginia tribes that were parties to the Treaty of 1677 with England are not required to obtain a license to fish or oyster in Virginia's tidal waters provided the activity is limited to harvesting for sustenance.

ROBERT W. DUNCAN, EXECUTIVE DIRECTOR
VIRGINIA DEPARTMENT OF GAME & INLAND FISHERIES

JACK G. TRAVELSTEAD, COMMISSIONER
VIRGINIA MARINE RESOURCES COMMISSION
JULY 19, 2013

ISSUES PRESENTED

You ask whether members of Virginia Indian tribes are subject to Virginia's fish and wildlife laws and regulations with respect to seasons, moratoria, minimum size limits, possession limits, and method of take. If they are, you ask if there are any geographical limits to the application of those laws and whether there is any distinction among subsistence, recreational and commercial hunting, trapping and fishing. You also ask whether members of these tribes are required to obtain a fishing license from the Virginia Marine Resources Commission to fish in tidal waters.¹ Finally, you seek guidance as to which Virginia Indian tribes are formally recognized by the Commonwealth.

RESPONSE

It is my opinion that an Indian who habitually resides on an Indian reservation or an Indian that is a member of a Virginia recognized tribe² who resides in the Commonwealth is not required to obtain a license to fish in Virginia's inland waters, or to hunt or trap in Virginia. It is also my opinion that members of the Virginia tribes that were parties to the Treaty of 1677³ with England are not required to obtain a license to fish or oyster in Virginia's tidal waters provided the activity is limited to harvesting for sustenance. Finally, it is my opinion that Virginia Indians are bound by the trapping, hunting and fishing laws and regulations of the Commonwealth regardless of whether they are on or off a reservation.

APPLICABLE LAW AND DISCUSSION

Generally, it is unlawful to hunt, trap or fish in the Commonwealth without a license.⁴ Nonetheless, there is an exception to the license requirement that provides that "[n]o license to hunt, trap or fish shall be required of any Indian who habitually resides on an Indian reservation⁵ or of a member of the Virginia recognized tribes who resides in the Commonwealth."⁶ The fishing license exception is based on Indian heritage and is limited to fishing in Virginia's inland waters.⁷ Nonetheless, members of any Virginia tribe that was a party to the Treaty of 1677 are not required to have a license to fish or oyster in Virginia's tidal waters provided they are doing so for their sustenance. The Treaty of 1677 states in pertinent part that "the said Indians have and enjoy their wonted conveniences of Oystering, fishing, and gathering . . . anything else for their natural Support not usefull to the English."⁸ Because the Commonwealth stands as the

successor to the English Crown in the Treaty of 1677,⁹ it respects the spirit and intent of the treaty. Therefore, the Commonwealth still recognizes this exception.

Despite these exceptions, Virginia Indians must follow fish and wildlife laws and regulations with respect to seasons, moratoria, minimum size limits, possession limits, and method of take. The term “[l]icense’ has generally been defined as conferring a right to do something which otherwise one would not have the right to do”¹⁰ The statutory license exception, based on heritage and the exemption that comes from the Treaty of 1677, places Virginia Indians on equal footing with all others who are exempt from the licensing requirement, such as landowners hunting, fishing and trapping on their own property.¹¹ Virginia Indians, along with all other exempt hunters, anglers and trappers, must comply with applicable fish and wildlife laws and regulations with respect to seasons, moratoria, minimum size limits, possession limits, and method of take to the same extent as anyone required to obtain a license. Additionally, Virginia Indians are subject to regulations promulgated by the Department of Game and Inland Fisheries and the Virginia Marine Resources Commission provided that the regulations are not written or applied in a discriminatory manner against Indians.¹²

Additionally, the gaming and fishing laws and regulations are as applicable on a reservation as they are elsewhere in the Commonwealth. While Virginia Indians have the exclusive right of use and occupancy of reservation land, the Commonwealth owns the land.¹³ There is nothing in place that limits the Commonwealth’s jurisdiction. Therefore, the laws and regulations of the Commonwealth apply on a reservation.¹⁴

CONCLUSION

Accordingly, it is my opinion that an Indian who habitually resides on an Indian reservation or an Indian that is a member of a Virginia recognized tribe who resides in the Commonwealth is not required to obtain a license to fish in Virginia’s inland waters, or to hunt or trap in Virginia. It is also my opinion that members of the Virginia tribes that were parties to the Treaty of 1677 with England are not required to obtain a license to fish or oyster in Virginia’s tidal waters provided the activity is limited to harvesting for sustenance. Finally, it is my opinion that Virginia Indians are bound by the trapping, hunting and fishing laws and regulations of the Commonwealth regardless of whether they live on or off a reservation.

¹ There is a statutory exception for fishing and hunting license requirements that fall within the purview of the Department of Game and Inland Fisheries. VA. CODE ANN. § 29.1-301(I) (2011). There is no such exemption for those within the purview of the Virginia Marine Resources Commission. See VA. CODE ANN. § 28.2-226 (Supp. 2013).

² The Indian tribes that have been formally recognized by the Commonwealth are the Cheroenhaka (Nottoway) Indian Tribe of Southampton County, the Chickahominy, the Eastern Chickahominy, the Mattaponi, the Upper Mattaponi, the Monacan, the Nansemond, the Nottoway Indian Tribe of Virginia, the Pamunkey, the Patowomeck, and the Rappahannock. See S.J. Res. 127, 2010 Va. Acts 3104-08; S.J. Res. 12, 2010 Va. Acts 3020-21; H.J. Res. 171, 2010 Va. Acts 2797-2801; H.J. Res. 150, 2010 Va. Acts 2786-87; H.J. Res. 32, 2010 Va. Acts 2745-46; H.J. Res. 390, 1989 Va. Acts 2139-40; H.J. Res. 205, 1985 Va. Acts 1526; H.J. Res. 54, 1983 Va. Acts 1270.

³ The tribes that signed the Treaty of 1677, per the spellings within the treaty, are the Appomattux, the Manakins, the Maherains, the Nansaticoes, the Nanzem'd, the Nanzemunds, the Nottowayes, the Pamunkey, the Pomunkey, the Portabacchoes, the Sappones, and the Wayonoake. Treaty between Virginia and the Indians, King Charles II - Queen of the Pomunkey *et al.*, May 29, 1677, *reprinted in* 14 VA. MAGAZINE OF HISTORY AND BIOGRAPHY (1906-1907) at 289-96.

⁴ *See* § 28.2-225 (2011) (making it “unlawful to fish in the tidal waters of the Commonwealth or those waters under the joint jurisdiction of the Commonwealth without first obtaining the required license, subject to the exemptions set out in § 28.2-226.”) and § 29.1-300 (2011) (“[i]t [is] unlawful to hunt, trap or fish in or on the lands or inland waters of this Commonwealth without first obtaining a license, subject to the exceptions set out in § 29.1-301.”) “Inland waters...include all waters above tidewater and the brackish and freshwater streams, creeks, bays, including Back Bay, inlets, and ponds in the tidewater counties and cities.” Section 29.1-109 (Supp. 2013).

⁵ The phrase “any Indian who habitually resides on an Indian reservation” is not limited to members of state recognized tribes. Section 29.1-301(I). It falls to the person claiming this exemption to show that it applies. *See Commonwealth v. Bailey*, 124 Va. 800, 803, 97 S.E. 774, 775 (1919) (explaining that any exception to the licensing tax for hunting must be strictly construed against those seeking to employ it).

⁶ Section 29.1-301(I). In order to enjoy this exception, the person seeking to invoke it

[m]ust have on his person an identification card or paper signed by the chief of his tribe, a valid tribal identification card, written confirmation through a central tribal registry, or certification from a tribal office. Such card, paper, confirmation, or certification shall set forth that the person named is an actual resident upon such reservation or member of one of the recognized tribes in the Commonwealth....

Id.

⁷ The exception, set forth in § 29.1-301(I), must be read together with the statute invoking this exception, § 29.1-300, to give the exception its proper scope. *See Lillard v. Fairfax Cnty. Airport Auth.*, 208 Va. 8, 13, 155 S.E.2d 338, 342 (1967) (“[u]nder the rule of statutory construction of statutes *in pari materia*, statutes are not to be considered as isolated fragments of law, but as a whole, or as parts of a great, connected, homogeneous system, or a single and complete statutory arrangement.”) Because the statute invoking the exception only addresses fishing in Virginia’s inland waters, the exception for a fishing license is likewise limited to fishing in Virginia’s inland waters.

⁸ Treaty between Virginia and the Indians, *supra* note 3, at art. VII.

⁹ *See* 2001 Op. Va. Att’y Gen. 36, 37 (opining that, with respect to the Treaty of 1677, “[t]he Commonwealth now stands as the successor to the Crown[,]” the party with whom the Virginia Indians entered into the treaty).

¹⁰ 12A M.J. Licenses § 2.

¹¹ For example, one who hunts on his own land is not required to have a hunting license yet is still required to abide by other hunting laws and regulations. *Compare* § 29.1-301(A) (exempting landowners, among others, to hunt, trap and fish within the boundaries of their own lands from licensing requirements), *with Bailey*, 124 Va. at 803, 97 S.E. at 775 (explaining that any exception to the licensing tax for hunting must be strictly construed against those seeking to employ it).

¹² “No state shall...deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV § 1. *See also* VA. CONST. art. I, § 11 (stating that “the right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged . . .”) and *Puyallup Tribe v. Dep’t. of Game of Wash.*, 391 U.S. 392, 398, *holding limited by* 414 U.S. 44 (1973), *vacated sub nom. Bennett v. Dep’t. of Game of Wash.*, 414 U.S. 509 (1973) (explaining that, while commercial net fishing by the Indians was protected by the treaty at issue, guaranteeing the right to “fish at ‘all usual and accustomed places[.]’” nevertheless the treaty did not preclude the state from making reasonable, necessary, and nondiscriminatory regulations affecting the manner of the Indians’ fishing.).

¹³ 1976-77 Op. Va. Att’y Gen. 107, 109. *See also* *E. Band of Cherokee Indians v. United States*, 632 F.2d 373, 375 (4th Cir. 1980) (explaining that, after the Revolutionary War, the United States succeeded to

England's sovereignty and where Indian possessory rights to any particular land had been extinguished, the rights passed to the state in which such land was located); 2001 Op. Va. Att'y Gen. at 37-38 (explaining that Virginia Indians have a right of exclusive possession to their reservation lands with fee simple remaining in the Commonwealth).

¹⁴ See 2001 Op. Va. Att'y Gen. at 39 (explaining that the sheriffs have the same authority on a reservation as they do in the rest of the county in which they have jurisdiction).

OP. NO. 12-101

GAMELAND, INLAND FISHERIES, AND BOATING: WILDLIFE AND FISH LAWS

The Executive Director of Virginia Department of Game and Inland Fisheries or his designee, once he has issued a "kill permit" pursuant to § 29.1-529 for the taking of a bear, may not restrict that authorization so as to prohibit the use of dogs in hunting the bear.

THE HONORABLE ROBERT B. BEASLEY, JR.
COMMONWEALTH'S ATTORNEY, COUNTY OF POWHATAN
APRIL 12, 2013

ISSUE PRESENTED

You inquire whether the Executive Director of the Virginia Department of Game and Inland Fisheries ("DGIF") or his designee, once he has issued a "kill permit" pursuant to § 29.1-529 for the taking of a bear, may then restrict that authorization so as to prohibit the use of dogs in hunting the bear.

RESPONSE

It is my opinion that the Executive Director of DGIF or his designee, once he has issued a "kill permit" pursuant to § 29.1-529 for the taking of a bear, may not restrict that authorization so as to prohibit the use of dogs in hunting the bear.

BACKGROUND

You relate that one of your constituents keeps bees that he rents to commercial farmers for use in pollination of crops. You further note that moving the bee hives to a farm is a substantial and expensive undertaking, and that on three occasions this year a bear has destroyed a number of the beekeeper's hives that he was renting to a farmer in Cumberland County, Virginia, with resultant damage totaling approximately \$4,500. Each time the hives were destroyed, the DGIF Director issued a short-term authorization (also known as a "kill permit") to kill the bear pursuant to § 29.1-529, but each time the authorizations expired before the bear was located. You state that the beekeeper has requested permission from DGIF to use hunting dogs to locate the bear, but DGIF has denied his request. You further assert that DGIF has expressed some concern that, if dogs are used to hunt pursuant to a "kill permit," they could go onto adjacent property where the "kill permit" has no effect.

APPLICABLE LAW AND DISCUSSION

Unless otherwise specifically authorized by law, it is unlawful in Virginia “[t]o hunt, trap, take, capture, kill, attempt to take, capture or kill, ... by any means whatever, . . . at any time or in any manner, any wild bird or wild animal....”¹ More particularly, [a]ny person who kills or attempts to kill a bear in violation of any provision of [Virginia’s wildlife and gaming laws] or a regulation thereunder shall be guilty of a Class 1 misdemeanor.”² Nonetheless, Virginia law expressly allows, with an appropriate permit, the killing of a bear in certain situations, including whenever “...bear are damaging fruit trees, crops, livestock or personal property utilized for commercial agricultural production in the Commonwealth....”³ This provision would apply to the protection of bee keeping operations from bear damage.

Regulations issued by the Board of Game and Inland Fisheries (“BGIF”)⁴ restrict the use of dogs in hunting bear in certain jurisdictions.⁵ Cumberland county is not among the areas subject to such restrictions.

Although the Board has broad power regarding wildlife conservation,⁶ including broad authority to promulgate regulations related to hunting,⁷ and may confer upon the Director such power as it possesses,⁸ the authority of the Director or his designee to authorize the killing of a bear upon finding the bear responsible for any qualifying damage is governed by § 29.1-529.⁹ The statute is comprehensive; it enumerates the persons to whom the Director may issue a permit; grants the Director discretion to limit the permit by restricting the number of animals to be killed, the effective duration of the authorization, or the hours during which the authorization is limited or prohibited.¹⁰ The statute further provides that the Director may authorize nonlethal control measures rather than authorizing the killing of a bear, provided that such measures occur within a reasonable period of time.¹¹ Although the statute sets forth all of these specifics, it does not prohibit the use of dogs when hunting bears pursuant to such an authorization, nor does it provide express or implied authority to the Director to prohibit hunting with dogs.¹²

Moreover, “[i]t 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[.]”¹³ and “established principles of statutory construction require that ‘when one statute speaks to a subject in a general way and another deals with a part of the same subject in a more specific manner, the two should be harmonized, if possible, and where they conflict, the latter prevails.’”¹⁴ Thus, although bear hunting in general is subject to the Board’s regular permitting process, § 29.1-529 provides a specialized scheme to allow for protection of property damaged by bear. While the license is restricted to the particular property, a permit issued under § 29.1-529 provides limited authorization to hunt bear irrespective of season. Because this scheme does not provide for the Director’s discretion in conditioning any such permit on not using dogs, I conclude that the Director does not have the authority to prohibit their use when they are otherwise permitted for hunting in that jurisdiction.

CONCLUSION

Accordingly, it is my opinion that the Executive Director of DGIF or his designee, once he has issued a “kill permit” pursuant to § 29.1-529 for the taking of a bear, may not restrict that authorization so as to prohibit the use of dogs in hunting the bear.¹⁵

¹ VA. CODE ANN. § 29.1-521(A)(1) (2011).

² Section 29.1-530.2 (2011).

³ Section 29.1-529(A) (Supp. 2012).

⁴ Section 29.1-506 authorizes the Board of Game and Inland Fisheries (“BGIF”) to adopt regulations prescribing seasons and bag limits for hunting, fishing or otherwise taking wild birds, animals and fish. The regulations specifically concerning bear hunting are set forth in Chapter 50 of the BGIF regulations. See 4 VA. ADMIN. CODE §§ 15-50-11 to 15-50-120.

⁵ 4 VA. ADMIN. CODE § 15-50-110 provides:

A. It shall be unlawful to use dogs for the hunting of bear during the open season for hunting deer in the counties west of the Blue Ridge Mountains and in the counties of Amherst (west of U.S. Route 29), Bedford, and Nelson (west of Route 151); and within the boundaries of the national forests, except that tracking dogs as defined in § 29.1-516.1 of the Code of Virginia may be used.

B. It shall be unlawful to use dogs for the hunting of bear during the first 12 hunting days of the open season for hunting deer in the counties of Greene and Madison, except that tracking dogs as defined in § 29.1-516.1 of the Code of Virginia may be used.

C. It shall be unlawful to use dogs for the hunting of bear in the counties of Campbell (west of Norfolk Southern Railroad), Carroll (east of the New River), Fairfax, Floyd, Franklin, Grayson (east of the New River), Henry, Loudoun, Montgomery (south of Interstate 81), Patrick, Pittsylvania (west of Norfolk Southern Railroad), Pulaski (south of Interstate 81), Roanoke (south of Interstate 81), Wythe (southeast of the New River or that part bounded by Route 21 on the west, Interstate 81 on the north, the county line on the east, the New River on the southeast and Cripple Creek on the south); in the city of Lynchburg; and on Amelia, Chester F. Phelps, G. Richard Thompson, and Pettigrew wildlife management areas, except that tracking dogs as defined in § 29.1-516.1 of the Code of Virginia may be used.

Section 29.1-516.1 expressly provides that “[t]racking dogs maintained and controlled on a lead may be used to find a wounded or dead bear or deer statewide [within certain seasons], provided that those who are involved in the retrieval effort have permission to hunt on or to access the land being searched and do not have any weapons in their possession.”

⁶ Section 29.1-103(11) (2011).

⁷ Section 29.1-501(A) (2011).

⁸ Section 29.1-103(12).

⁹ More specifically, § 29.1-529 requires the DGIF Director or his designee to investigate whenever a landowner or lessee reports to him that deer, elk or bear are damaging fruit trees, crops, livestock or personal property used for commercial agricultural production in the Commonwealth; and if, after investigation, he finds that deer or bear are responsible for the damage, he “shall authorize in writing the owner, lessee or any other person designated by the Director or his designee to kill such deer or bear when they are found upon the land upon which the damages occurred.”

¹⁰ *Id.*

¹¹ *Id.*

¹² The maxim *expressio unius est exclusio alterius* applies here, which “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.” *GEICO v. Hall*, 260 Va. 349, 355, 533 S.E.2d 615, 617 (2000) (quoting *Turner v. Wexler*, 244 Va. 124, 127, 418 S.E.2d 886, 887 (1992)).

¹³ *Alston v. Commonwealth*, 274 Va. 759, 769, 652 S.E.2d 456, 462 (2007) (quoting *Prillaman v. Commonwealth*, 199 Va. 401, 406, 100 S.E.2d 4, 8 (1957)).

¹⁴ *Barr v. Town & Country Props., Inc.*, 240 Va. 292, 294-95, 396 S.E.2d 672, 674 (1990) (quoting *Va. Nat’l Bank v. Harris*, 220 Va. 336, 340, 257 S.E.2d 867, 870 (1979)).

¹⁵ I note that, in addition to the requirements of the Commonwealth’s wildlife laws, bear hunters are subject § 18.2-136, which provides that when their chase begins on other lands, they may go upon prohibited lands to retrieve their dogs but may not carry firearms or bows and arrows on their persons or hunt any game while there. That statute does not exclude persons hunting bear pursuant to a “kill permit” and, therefore, would apply to those hunters as much as to bear hunters hunting during the bear season pursuant to a hunting license. Thus, should the dogs used in hunting pursuant to a “kill permit” stray to adjacent properties, then § 18.2-136 would allow the hunter to retrieve the dogs as long as he is unarmed and does not hunt while he is on the adjacent properties.

OP. NO. 13-108

GENERAL ASSEMBLY: GENERAL ASSEMBLY CONFLICTS OF INTERESTS ACT

If a “lobbyist relationship” as defined by § 30-111 arises in the context of an election campaign, the separate disclosure requirement of § 30-111 for members and members-elect of the General Assembly applies irrespective of any disclosure the Campaign Finance Disclosure Act of 2006 may require of the campaign committee for the member or member-elect.

A “lobbyist relationship” is not established when a person who has registered as a lobbyist provides volunteer assistance to the election campaign of a member or member-elect if the nature of that assistance is not within the scope of the lobbyist’s usual occupation in legal, consulting or public relations services.

THE HONORABLE WILLIAM M. STANLEY
MEMBER, SENATE OF VIRGINIA
DECEMBER 27, 2013

ISSUES PRESENTED

You ask whether the requirement in § 30-111 of the *Code of Virginia* that a member or member-elect of the General Assembly disclose a “lobbyist relationship” applies in the context of an election campaign where a person who has registered as a lobbyist provides assistance in the election campaign of the member or member-elect. If § 30-111 is applicable in an election campaign setting, you further ask whether a “lobbyist relationship” may exist whenever a lobbyist assists a member in an election campaign or only in those circumstances where the lobbyist is rendering assistance by utilizing the skills from the lobbyist’s usual occupation in legal, consulting or public relations services.

RESPONSE

It is my opinion that, if a “lobbyist relationship” as defined by § 30-111 arises in the context of an election campaign, the separate disclosure requirement of § 30-111 for members and members-elect of the General Assembly applies irrespective of any

disclosure the Campaign Finance Disclosure Act of 2006 may require of the campaign committee for the member or member-elect. It is further my opinion that a “lobbyist relationship” is not established when a person who has registered as a lobbyist provides volunteer assistance to the election campaign of a member or member-elect if the nature of that assistance is not within the scope of the lobbyist’s usual occupation in legal, consulting or public relations services.

BACKGROUND

As a result of recent discussions you have had with legislative colleagues regarding ethics reform, you indicate that questions have arisen with respect to the statement of economic interests disclosure form that General Assembly members and members-elect are required, pursuant to the General Assembly Conflicts of Interests Act,¹ to file annually on or before January 8.² In particular, you point to question 7B on the disclosure form which asks whether the member or member-elect has a “lobbyist relationship” as defined in § 30-111.³ If the answer to that question is “yes,” the member or member-elect is required to complete schedule F-2 of the disclosure form detailing the lobbyist relationship.⁴

You relate that numerous members of the General Assembly receive assistance in their election or reelection campaigns from persons who are or have been registered as lobbyists with the Secretary of the Commonwealth.⁵ You indicate that the nature of this assistance can take a variety of forms. For example, you observe that a lobbyist might assist a legislator with raising campaign contributions from donors. Such assistance might involve the lobbyist serving on a host committee for a legislator’s fundraising event or being a member of a finance committee for the legislator’s campaign. You also relate that a lobbyist might participate in a legislator’s campaign as a volunteer in voter contact efforts such as door-to-door campaigning. You indicate that certain forms of this campaign assistance are disclosed and reported, *i.e.* as campaign contributions, in-kind donations of professional services, or payments for services rendered, on campaign finance reports filed by the campaign committee of the member or member-elect pursuant to the Campaign Finance Disclosure Act of 2006.⁶

APPLICABLE LAW AND DISCUSSION

The Commonwealth of Virginia substantially relies on disclosure requirements in its conflict of interests and campaign finance laws in its efforts to instill public confidence in state government.⁷ The General Assembly Conflicts of Interests Act requires members and members-elect to disclose annually certain economic interests.⁸ Specific to your inquiries, § 30-111 requires a member or member-elect to disclose a “lobbyist relationship.” The term “lobbyist relationship” is defined in § 30-111(A) to mean:

- (i) an engagement, agreement, or representation that relates to legal services, consulting services, or public relations services, whether gratuitous or for compensation, between a member or member-elect and any person who is, or has been within the prior calendar year, registered as a lobbyist with the Secretary of the Commonwealth, or (ii) a greater than three percent ownership interest by a member or member-elect in a business that employs, or engages

as an independent contractor, any person who is, or has been within the prior calendar year, registered as a lobbyist with the Secretary of the Commonwealth.

The General Assembly included in the Campaign Finance Disclosure Act of 2006 a preemption clause stating that the act “shall constitute the exclusive and entire campaign finance disclosure law of the Commonwealth, and elections to which the [act] applies shall not be subject to further regulation by local law.”⁹ You ask whether this provision preempts the disclosure requirement in § 30-111 when, for example, a “lobbyist relationship” as defined in § 30-111 arises in the context of an election campaign. When the language in a statute is free from ambiguity, its plain meaning will control.¹⁰ Repeal by implication is not favored.¹¹ The disclosures required by the General Assembly Conflicts of Interests Act in § 30-111 serve the purpose of assuring Virginians that “the judgment of the members of the General Assembly will not be compromised or affected by inappropriate conflicts.”¹² The disclosures required by the Campaign Finance Disclosure Act of 2006 serve a different purpose, to regulate the receipt and expenditure of money intended for expressly advocating the election or defeat of a clearly identified candidate. Its provisions, therefore, are not in conflict with the General Assembly Conflicts of Interests Act.

A prior opinion of this Office, issued in 1987, reached a consistent conclusion in analyzing the effect of the preemption clause in the Commonwealth’s predecessor campaign finance act on a disclosure requirement in land use proceedings for members of a local governing body in an urban county executive form of government.¹³ This disclosure requirement, now set forth in § 15.2-852,¹⁴ is substantially the same as the reporting requirements of both the State and Local Government Conflict of Interests Act¹⁵ and the General Assembly Conflicts of Interests Act. Each of these three statutes seeks to establish a record of economic interests which may affect the judgment of elected officials in the performance of their official duties.¹⁶ The 1987 opinion concluded:

[T]he reporting requirements of the Fair Elections Practices Act, in my opinion, serve a different and distinct purpose from the transactional disclosure requirement of [predecessor to § 15.2-852]. It is my opinion, therefore, that [predecessor to § 24.2-945] does not repeal by implication the transactional disclosure requirement of [predecessor to § 15.2-852]. In instances where a “business or financial relationship” exists between the supervisor and the applicant, etc., based on the receipt of political contributions, therefore, it is my opinion that [predecessor to § 15.2-852] requires that the relationship be disclosed.¹⁷

When the General Assembly wishes to limit disclosure to one or the other act, it does so expressly. I note that § 30-111 expressly provides in schedule E of the statement of economic interests disclosure form the following instruction regarding disclosure of gifts: “Do not list campaign contributions publicly reported as required by [the Campaign Finance Disclosure Act of 2006].”¹⁸ Clearly, then, the preemption clause of § 24.2-945 does not operate to preempt the entirety of disclosures required by § 30-111, because, if it did, the direction set forth in schedule E would be superfluous.¹⁹ Thus, if a “lobbyist relationship” as defined by § 30-111 arises in the context of an

election campaign, the separate disclosure requirement of § 30-111 must be met irrespective of any disclosure made under the Commonwealth's campaign finance disclosure laws.

You next ask whether a "lobbyist relationship" may exist whenever a lobbyist assists a member of the General Assembly in an election campaign, or only in those circumstances where the lobbyist is rendering assistance by utilizing the skills from the lobbyist's usual occupation in legal, consulting or public relations services. The 1987 opinion of this Office addressed a similar question. That opinion considered the requirement in the predecessor to § 15.2-852 that a supervisor disclose any "business or financial relationship" the supervisor has or has had within the past twelve months with the applicant in a zoning case, or with the agent, attorney or real estate broker for the applicant.²⁰ In considering the question whether the volunteer work by a zoning applicant for a political campaign of a supervisor is ever considered a "gift" that may establish a "business or financial relationship," the 1987 opinion concluded:

Volunteer work of the type you specify generally is rendered without compensation and generally is not subject to precise valuation. The rendering of volunteer services is not generally subject to the reporting requirements of the Fair Elections Practices Act applicable to election campaigns. It is my opinion, therefore, that volunteer work by the applicant, etc. for a political campaign or for constituent purposes does not establish a "business or financial relationship" within the meaning of [predecessor to § 15.2-852]. The receipt by a supervisor of other services from the applicant, etc., which are subject to precise valuation, however—e.g., professional or trade services—may, in certain circumstances, constitute a "business or professional [sic] relationship" when such services are donated to the supervisor.^[21]

A close examination of § 30-111 leads me to conclude that a "lobbyist relationship" is established only when there exists between member and lobbyist an interaction of a formal and substantive manner. Section 30-111 defines "lobbyist relationship" to be (i) "an engagement, agreement, or representation" entered into directly by a member or member-elect with a lobbyist "that relates to legal services, consulting services, or public relations services, whether gratuitous or for compensation," or (ii) "a greater than three percent ownership interest by a member or member-elect in a business that employs, or engages as an independent contractor" a lobbyist.²² The first prong of the definition does include "gratuitous" undertakings by a lobbyist, but is restricted to the provision of legal, consulting or public relations services. The second prong of the definition envisions a for-compensation relationship where the lobbyist is engaged by the member's business as an independent contractor to perform services not limited to the legal, consulting or public relations fields.

In your inquiry, you offer the hypothetical example of a lobbyist who is a member of the Virginia State Bar and who assists a member of the General Assembly in an election campaign, not by providing legal services, but rather by assisting with fund-raising activities or door-to-door voter contact activities. Such an arrangement is unlikely to meet the first prong of the "lobbyist relationship" definition. Volunteer campaign activity could be encompassed within the first prong, but only if that activity relates to the provision of legal, consulting or public relations services in "an

engagement, agreement, or representation.” Your hypothetical example posits that the attorney/lobbyist is not providing legal services. Unless the attorney/lobbyist is a professional fund-raising consultant by occupation, it is difficult to envision how that person’s volunteer service on a finance committee or host committee raising contributions for the election campaign of a member or member-elect meets the formal interaction required in § 30-111 (e.g., an engagement that relates to consulting services) to establish a “lobbyist relationship.” Likewise, unless the attorney/lobbyist is a professional campaign consultant, the act of the attorney/lobbyist volunteering to make door-to-door voter contacts, without more, would not create for the member or member-elect a “lobbyist relationship.”

Your hypothetical example also would not appear to meet the second prong of the “lobbyist relationship” definition. It is conceivable that a campaign committee for a member or member-elect might meet the definition of “business” set forth in § 30-111(A) under the broadest possible reading of that definition.²³ Your example, however, suggests a volunteer arrangement with no compensation made to the attorney/lobbyist, and the second prong of the definition envisions a circumstance where the lobbyist is employed or engaged as an independent contractor for a business owned by the member or member-elect. If the campaign committee of the member or member-elect has not employed or engaged the attorney/lobbyist as an independent contractor to perform services for the campaign, the volunteer activity of the attorney/lobbyist would not create for the member or member-elect a “lobbyist relationship.”

I caution that whether a “lobbyist relationship” exists in a particular circumstance will depend on the specific facts involved and, therefore, is a fact-specific determination beyond the scope of this opinion.²⁴

CONCLUSION

Accordingly, it is my opinion that, if a “lobbyist relationship” as defined by § 30-111 arises in the context of an election campaign, the separate disclosure requirement of § 30-111 for members and members-elect of the General Assembly applies irrespective of any disclosure the Campaign Finance Disclosure Act of 2006 may require of the campaign committee for the member or member-elect. It is further my opinion that a “lobbyist relationship” is not established when a person who has registered as a lobbyist provides volunteer assistance to the election campaign of a member or member-elect if the nature of that assistance is not within the scope of the lobbyist’s usual occupation in legal, consulting or public relations services.

¹ VA. CODE ANN. §§ 30-100 through 30-129 (2011 & Supp. 2013).

² See § 30-110 (2011).

³ See § 30-111(A) (2011) (setting forth the text of the statement of economic interests disclosure form).

⁴ *Id.*

⁵ See VA. CODE ANN. §§ 2.2-418 through 2.2-435 (2011) (relating to registration of lobbyists).

⁶ See VA. CODE ANN. §§ 24.2-945 through 24.2-953.5 (2011 & Supp. 2013).

⁷ See §§ 24.2-945 (2011), 24.2-945.2 (2011), 30-100 (2011) and 30-110. See also VA. CODE ANN. §§ 2.2-3100 (2011) and 2.2-3114 (2011).

⁸ Section 30-110.

⁹ Section 24.2-945(B).

¹⁰ See *City of Portsmouth v. City of Chesapeake*, 205 Va. 259, 269, 136 S.E.2d 817, 825 (1964). See also 2003 Op. Va. Att’y Gen. 108, 111.

¹¹ See *Standard Drug Co. v. Gen. Elec. Co.*, 202 Va. 367, 378-79, 117 S.E.2d 289, 297 (1960) (“Repeal by implication is not favored and the firmly established principle of law is, that where two statutes are in apparent conflict, it is the duty of the court, if it be reasonably possible, to give to them such a construction as will give force and effect to each.”) (quoting *Scott v. Lichford*, 164 Va. 419, 422, 180 S.E. 393, 394 (1935)).

¹² Section 30-100.

¹³ 1987-88 Op. Va. Att’y Gen. 153.

¹⁴ VA. CODE ANN. § 15.2-852 (2012).

¹⁵ See §§ 2.2-3100 through 2.2-3131 (2011 & Supp. 2013).

¹⁶ See 1999 Op. Va. Att’y Gen. 78, 79.

¹⁷ 1987-88 Op. Va. Att’y Gen. at 155.

¹⁸ Section 30-111 (Schedule E–Gifts). See also § 2.2-3117 (Schedule E–Gifts) (Supp. 2013) for the same instruction as provided to state and local government officers and employees required to file a statement of economic interests disclosure form pursuant to the State and Local Government Conflict of Interests Act.

¹⁹ See, e.g., *Cook v. Commonwealth*, 268 Va. 111, 114, 597 S.E.2d 84, 86 (2004) (“Words in a statute should be interpreted, if possible, to avoid rendering words superfluous.”).

²⁰ 1987-88 Op. Va. Att’y Gen. at 153.

²¹ *Id.* at 157 (citation omitted).

²² Section 30-111.

²³ Section 30-111(A) (“Business” is defined to mean “a corporation, partnership, sole proprietorship, firm, enterprise, franchise, association, trust or foundation, or any other individual or entity carrying on a business or profession, whether or not for profit.”).

²⁴ I refrain from commenting on matters that would require additional facts or factual determinations. See 2012 Op. Va. Att’y Gen. 117, 118; 2010 Op. Va. Att’y Gen. 56, 58.

OP. NO. 12-053

GENERAL PROVISIONS: JURISDICTION OVER LANDS ACQUIRED BY THE UNITED STATES

The United States does not hold concurrent legislative jurisdiction with the Commonwealth over the land on which the Langley Search Facility and the Langley West Gate are located.

CYNTHIA E. HUDSON, ESQUIRE
CITY ATTORNEY FOR THE CITY OF HAMPTON

JOHN F. HAUGH, ESQUIRE
ACTING COMMONWEALTH’S ATTORNEY
JANUARY 17, 2013

ISSUE PRESENTED

You ask whether there presently exists between the Commonwealth of Virginia (the “Commonwealth”) and the United States of America (the “United States”) concurrent jurisdiction over a portion of Joint Base Langley-Eustis, specifically the portion you designate as the Langley Search Facility¹ and the Langley West Gate (the “Designated Facilities”).

RESPONSE

It is my opinion that, given the absence of a notice of acceptance filed with the Governor whereby the United States has accepted concurrent jurisdiction over the land on which the Designated Facilities are located, the United States does not hold concurrent legislative jurisdiction over the land on which the Designated Facilities are located.

BACKGROUND

You state that the United States acquired the land on which the Designated Facilities are located through deed and lease sometime after 1940. In the mid-1970s, this Office, in conjunction with representatives of the United States, compiled an Inventory of Jurisdiction (the “Inventory”) that indicates the legislative jurisdiction held by the United States over lands acquired by the United States within the Commonwealth.² The Inventory indicates that the legislative jurisdiction held by the United States over Joint Base Langley-Eustis is exclusive jurisdiction in some areas and proprietary jurisdiction in other areas.

In addition, this Office is in possession of a map that illustrates the legislative jurisdiction of the United States at Langley Air Force Base (the “Map”). Like the Inventory, the Map indicates that the United States holds exclusive jurisdiction in some areas and proprietary jurisdiction in other areas. The Map shows the land on which the Designated Facilities are located (land that is just east of the intersection of North Armistead Avenue and Sweeney Boulevard in Hampton, Virginia) and the Map indicates that the United States holds proprietary jurisdiction³ over the land on which the Designated Facilities are located. I am not aware of any written notice whereby the United States has accepted concurrent legislative jurisdiction over the land on which the Designated Facilities are located.⁴

APPLICABLE LAW AND DISCUSSION

The federal government may exercise four types of jurisdiction over its property located in the state. Federal jurisdiction may be exclusive, concurrent, proprietary, or partial. As this Office previously has explained,

“Exclusive” means solely to the exclusion of others. “Concurrent” means that State and local law enforcement authorities enjoy jurisdiction equal to that of their counterparts with the United States. “Proprietary” means the State and local authorities enjoy full authority, with their federal counterparts having none. “Partial” means that the State and local authorities enjoy some authority with the federal officers.^[5]

Accordingly, all but proprietary jurisdiction afford the federal government some degree of legislative jurisdiction. As the Court of Appeals of Virginia has noted, “[t]he phrase ‘legislative jurisdiction’ refers to the ‘lawmaking power of a state’ and ‘the power of a state to apply its laws’ to a particular set of facts.”⁶

For interests in land acquired after 1940,⁷ federal law provides that the United States may accept or secure legislative jurisdiction not previously obtained “by filing a notice of acceptance with the Governor of the State or in another manner prescribed by the laws of the State where the land is situated.”⁸ If the United States does not so accept jurisdiction, then “[i]t is conclusively presumed that jurisdiction has not been accepted.”⁹ Although Virginia law provides that for “all lands hereafter acquired by the United States, the Commonwealth hereby cedes to the United States concurrent governmental, judicial, executive and legislative power and jurisdiction[,]”¹⁰ there is no provision that prescribes “another manner” for the United States to *accept* jurisdiction. This potential grant of jurisdiction serves only as an offer to the United States that the federal government may then accept. Because no other manner of acceptance is prescribed under Virginia law, the mere recording of a deed without the affirmative act of acceptance of jurisdiction by the federal government does not legally affect any jurisdictional change.¹¹ Rather, federal law requires that the United States file a notice of acceptance with the Governor in order to obtain concurrent legislative jurisdiction over land or an interest in land that was acquired in the Commonwealth after 1940.

As previously noted, the land on which the Designated Facilities are located was acquired after 1940. I am not aware of any notice of acceptance filed with the Governor of the Commonwealth of Virginia whereby the United States has accepted concurrent jurisdiction over the land on which the Designated Facilities are located. In the absence of such notice of acceptance, “[i]t is conclusively presumed that jurisdiction has not been accepted.”¹² Accordingly, I conclude that the United States does not hold concurrent legislative jurisdiction over such land.

CONCLUSION

Accordingly, it is my opinion that, given the absence of a notice of acceptance filed with the Governor whereby the United States has accepted concurrent jurisdiction over the land on which the Designated Facilities are located, the United States does not hold concurrent legislative jurisdiction over the land on which the Designated Facilities are located.¹³

¹ It is my understanding that the Langley Search Facility referenced in your letter is the large vehicle inspection station located near the West Gate of Langley Air Force Base.

² 1983-84 Op. Va. Att’y Gen. 205.

³ “This term applies to those instances where the Federal Government has acquired title to an area in a State but has not acquired any of the State’s legislative authority.” Philip D. Morrison, *Article: State Property Tax Implications For Military Privatized Family Housing Program*, 56 A.F.L. Rev. 261, 273 (2005).

⁴ I am also not aware of any written documentation whereby the United States has accepted exclusive jurisdiction over the land on which the Designated Facilities are located.

⁵ 1983-84 Op. Va. Att’y Gen. 205, 206, *accord* 1987-88 Op. Va. Att’y Gen. 476, 476-77.

⁶ *Campbell v. Commonwealth*, 39 Va. App. 180, 188, 571 S.E.2d 906, 910 (2002) (citing *Adventure Comm'ns v. Ky. Registry of Election Fin.*, 191 F.3d 429, 435 (4th Cir. 1999) and *Willis L.M. Reese, Legislative Jurisdiction*, 78 Colum. L. Rev. 1587, 1587-94 (1978)).

⁷ *Cf. Markham v. United States*, 215 F.2d 56, 58 (4th Cir. 1954), in which, over the defendant's argument that the United States did not have jurisdiction over land acquired in 1919 because the United States had not accepted jurisdiction pursuant to 40 U.S.C. § 255, held that "[t]he provision of that section creating the presumption against acceptance of jurisdiction was added ... by the amendment of February 1, 1940 to section 355 of the Revised Statutes and applies only to lands thereafter to be acquired." 40 U.S.C. § 255, the predecessor statute to 40 U.S.C. § 3112 enacted in 1940, provided: "Notwithstanding any other provision of law, the obtaining of exclusive jurisdiction in the United States over lands or interests therein which have been or shall hereafter be acquired by it shall not be required; but the head or other authorized officer of any department or independent establishment or agency of the Government may, in such cases and at such times as he may deem desirable, accept or secure from the State in which any lands or interests therein under his immediate jurisdiction, custody, or control are situated, consent to or cession of such jurisdiction, exclusive or partial, not theretofore obtained, over any such lands or interests as he may deem desirable and indicate acceptance of such jurisdiction on behalf of the United States by filing a notice of such acceptance with the Governor of such State or in such other manner as may be prescribed by the laws of the State where such lands are situated. Unless and until the United States has accepted jurisdiction over lands hereafter to be acquired as aforesaid, it shall be conclusively presumed that no such jurisdiction has been accepted."

⁸ 40 U.S.C. § 3112(b).

⁹ 40 U.S.C. § 3112(c). In *Adams v. United States*, 319 U.S. 312 (1943), the Supreme Court held, "Since the government had not given the notice required by the 1940 Act, it clearly did not have either 'exclusive or partial' jurisdiction over the camp area." *Id.* at 313. The Court further held that notice of acceptance is required to obtain concurrent jurisdiction. *Id.* at 314-15.

¹⁰ VA. CODE ANN. § 1-400 (2011).

¹¹ "If the United States acquires an interest in property, it does not automatically acquire jurisdiction over it; it must file a notice with the state stating the extent of jurisdiction it is accepting." *United States v. Grant*, 318 F. Supp. 2d 1042 (2004); *see also DeKalb County v. Henry C. Beck Co.*, 382 F.2d 992, 995 (1967) ("In this case the United States has taken no affirmative action to accept jurisdiction over the land. It has done no more than take title by deed."). Section 1-401 does prescribe a manner for the United States to accept additional jurisdiction beyond concurrent jurisdiction; it requires that the United States shall indicate its acceptance by executing and acknowledging the deed of cession, and by admitting it to record.

¹² 40 U.S.C. § 3112(c).

¹³ I note that federal jurisdiction can be obtained easily under Virginia law by giving written notice of acceptance of the jurisdiction to the Governor and meeting the requirements of §§ 1-400 and/or 1-401; my Office stands ready to assist with any such efforts.

OP. NO. 13-016

HEALTH: POSTMORTEM EXAMINATIONS AND SERVICES

Because the requirements set forth in § 32.1-288 apply only to human remains that have been the subject of a death investigation conducted by the Office of the Chief Medical Examiner pursuant to Article 1 of Chapter 8 of Title 32.1 of the Code of Virginia, such requirements do not oblige the sheriff to dispose of other unclaimed remains.

THE HONORABLE C. T. WOODY, JR.
SHERIFF, CITY OF RICHMOND
MAY 3, 2013

ISSUE PRESENTED

You ask whether § 32.1-288 of the *Code of Virginia* mandates Virginia's sheriffs to dispose of all unclaimed human remains in their jurisdictions or only those remains that have been the subject of a death investigation conducted by Virginia's Office of the Chief Medical Examiner (OCME) pursuant to Article 1 of Chapter 8 of Title 32.1 of the *Code of Virginia*.

RESPONSE

It is my opinion that, because the requirements set forth in § 32.1-288 apply only to human remains that have been the subject of a death investigation conducted by the OCME pursuant to Article 1 of Chapter 8 of Title 32.1 of the *Code of Virginia*, such requirements do not oblige the sheriff to dispose of other unclaimed remains.

APPLICABLE LAW AND DISCUSSION

Upon the death of any person as specified in § 32.1-283(A),¹ the medical examiner shall take charge of the dead body and conduct an investigation into the cause and manner of death.² Section 32.1-288 directs how the dead body is to be disposed of after the medical examiner completes the death investigation and specifically provides:

A. After any investigation authorized or required pursuant to this article has been completed, including an autopsy if one is performed, the sheriff or other person or institution having initial custody of the dead body shall make good faith efforts, pursuant to § 32.1-283, to identify the next of kin of the decedent, and the dead body may be claimed by the relatives or friends of the deceased person for disposition. The claimant shall bear the expenses of such disposition. However, if the claimant is financially unable to pay the reasonable costs of disposition of the body, the costs shall be borne (i) by the county or city in which the deceased person resided at the time of death if the deceased person was a resident of Virginia or (ii) by the county or city in which the death occurred if the deceased person was not a resident of Virginia or the location of the deceased person's residence cannot reasonably be determined.

B. If no person claims the body of a deceased person, the Commissioner may accept the body for scientific study as provided in Article 3 (§ 32.1-298 et seq.). If the Commissioner refuses to accept the body for scientific study, the dead body shall be accepted by the sheriff of the county or city where death occurred for proper disposition....^[3]

“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.’”⁴ The statute indicates that after the medical examiner completes the death investigation, the sheriff or other person or institution having initial custody of the dead body shall attempt to identify the decedent's next of kin.⁵ If no person claims the body of the deceased person, the Commissioner of the Department of Health may accept the body for scientific study.⁶ If the Commissioner does not accept the body for study, the sheriff of the city or county where the death occurred is required to accept the body for proper disposition.⁷

By its plain language, § 32.1-288 addresses only the disposition of a body that has been the subject of a death investigation by the medical examiner.⁸ Section 32.1-288 does not concern the disposal of unclaimed remains generally. Moreover, I find no other provision in the *Code of Virginia* that otherwise requires the sheriff to dispose of unclaimed human remains. Therefore, I conclude that the duty of the sheriff to dispose of unclaimed human remains is triggered only when such remains are unclaimed after an examination as provided for pursuant to Article 1 of Chapter 8 of Title 32.1 of the *Code of Virginia*.

CONCLUSION

Accordingly, it is my opinion that, because the requirements set forth in § 32.1-288 apply only to human remains that have been the subject of a death investigation conducted by the OCME pursuant to Article 1 of Chapter 8 of Title 32.1 of the *Code of Virginia*, such requirements do not oblige the sheriff to dispose of other unclaimed remains.

¹ VA. CODE ANN. § 32.1-283(A) (Supp. 2012) provides: “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 less than 18 months of age whose death is suspected to be attributable to Sudden Infant Death Syndrome (SIDS), the medical examiner of the county or city in which death occurs shall be notified....”

² Section 32.1-283(B).

³ Section 32.1-288 (A) and (B) (2011). I note that, although 2013 Va. Acts ch. 373, effective July 1, 2013, amends § 32.1-288(B) to give the next of kin thirty days from the date of notice to claim the dead body prior to disposition of the body in accordance with § 32.1-288(B), such amendment does not affect the analysis of your question.

⁴ *City of Va. Beach v. Bd. of Suprvs.*, 246 Va. 233, 236, 435 S.E.2d 382, 384 (1993) (quoting *Grant v. Commonwealth*, 223 Va. 680, 684, 292 S.E.2d 348, 350 (1982).

⁵ Section 32.1-288(A).

⁶ Section 32.1-288(B).

⁷ *Id.*

⁸ Section 32.1-288.

OP. NO. 12-114

HIGHWAYS, BRIDGES, AND FERRIES: COMMONWEALTH TRANSPORTATION BOARD AND HIGHWAYS GENERALLY

A County may abandon a bridge that is neither in the State Highway System nor the secondary highway system if the bridge is no longer necessary or if abandonment would serve the public interest.

Upon such abandonment, the bridge's ownership normally will revert to the owner of the underlying fee, if any such owner exists. If the County owns the fee, it lawfully may convey the bridge property to a private party in exchange for consideration by either a

public or private sale; such consideration may include the County's making of a monetary payment to the purchaser.

THE HONORABLE PHILLIP P. PUCKETT
MEMBER, SENATE OF VIRGINIA
AUGUST 2, 2013

ISSUES PRESENTED

You present several questions regarding abandonment and conveyance of county bridges. First, you ask whether Buchanan County (“the County”) lawfully may abandon bridges that are in need of repair or replacement, and, whether the County would retain liability after such abandonment. You further ask whether, under § 33.1-165 of the *Code of Virginia*, a sale of such a bridge to one or more private parties who intend to continue to use it would meet the statutory consideration requirement. In particular, you ask whether the County would fulfill the statutory consideration requirement if it made a monetary payment to the private purchasers of such a bridge at the time of conveyance. Finally, you ask whether § 33.1-165 contemplates a private or public sale of such a bridge.

RESPONSE

It is my opinion that the County may abandon a bridge that is neither in the State Highway System nor the secondary highway system if the bridge is no longer necessary or if abandonment would serve the public interest. It further is my opinion that upon such abandonment, the bridge’s ownership normally will revert to the owner of the underlying fee, if any such owner exists. In addition, it is my opinion that if the County owns the fee, it lawfully may convey the bridge property to a private party in exchange for consideration by either a public or private sale, and, that such consideration may include the County’s making of a monetary payment to the purchaser. Finally, I am unable to opine whether the County would retain liability following its abandonment of a bridge needing repair or replacement, as such determination of liability would depend on specific facts existing at the time of occurrence of injury or damage.

BACKGROUND

You relate that the Federal Highway Administration has required the County to inspect all bridges within the County’s road and bridge system pursuant to the National Bridge Inspection Standards.¹ To reduce costs to county residents, the Buchanan County Board of Supervisors (“Board”) is exploring the abandonment of bridges in need of repair or replacement to reduce costs. Once abandonment occurs, the County plans to consider conveyance of the bridges to private parties.

APPLICABLE LAW AND DISCUSSION

Article 12, Chapter 1, of Title 33.1 of the *Code of Virginia*² sets forth procedures for localities to pursue the abandonment of county roads, which by inference would include bridges thereof, that are not part of the State Highway System or the secondary system.³ The governing body of a county may abandon a section of road

that is not part of the State Highway System or the secondary system if such road is deemed no longer necessary for public use by the governing body.⁴ After a notification process that allows petitioners to request public hearing, the governing body may abandon the road if it finds either that no public necessity exists or that the public interest would be served best by abandonment.⁵ The determination may be appealed to the circuit court of the county by any petitioner or the governing body of the locality.⁶ The circuit court may order the road to remain open if any appealing party would be deprived of access to a public road.⁷ As a result of an abandonment, the road segment “shall cease to be a public road . . . subject to the rights of owners of any public utility installations which have been previously erected therein.”⁸

You report that the federal authorities have required compliance with mandates applicable to the inspection and evaluation of the structural integrity of bridges.⁹ As your request implies, a lawfully abandoned bridge no longer would be subject to such requirements, as it would neither be “essential to protect the safety of the traveling public,” nor needed to “allow for the efficient movement of people and goods on which the economy of the United States relies.”¹⁰

Should the Board abandon a section of road pursuant to §§ 33.1-157 or 33.1-166.1, it may convey the County’s ownership interest in it.¹¹ Note, however, that if the County’s interest is an easement originally acquired by condemnation or dedication of land for use as a public highway, then

the land used for that purpose immediately becomes discharged of the servitude and the absolute title and right of exclusive possession thereto reverts to the owner of the fee, without further action by the public or highway authorities. In the absence of evidence to the contrary, the fee is presumed to be in the abutting land owners. If the highway is the boundary line between different tracts, the presumption is that the reversion to each owner is to the center of the highway.^{12]}

In the event the County owns the underlying fee, it may sell the property without limitation as to the buyer, subject to the procedural due process limitations provided by law.¹³

As to the conditions for such conveyance, you inquire regarding the adequacy of consideration and, specifically, whether the County may “pay a relatively small monetary payment...to the grantee(s) in light that the bridge is in a defective condition at the time of conveyance.” You additionally note that “[f]ull disclosure would be made to the grantee(s) with the understanding that the conveyance would relieve the County of repair and/or replacement costs along with future inspection costs.”¹⁴ The statute requires only that the “sale or conveyance . . . [be] either for a consideration or in exchange for other lands that may be necessary for the uses of the county.”¹⁵ Virginia law broadly defines contractual consideration, and it generally may be termed “as ‘the . . . motive . . . or impelling influence which induces a contracting party to enter into a contract,’” or “as the ‘reason or material cause of a contract.’”¹⁶ Thus, while the County should determine and document the consideration for, and the perceived benefits to the parties to the conveyance, I find no *per se* legal impediment

to the County making a monetary payment to the purchaser of the fee in the abandoned road segment containing the bridge structure.

With respect to whether the conveyance may be a public or private sale, § 33.1-165 neither specifies nor places limitation upon the nature of the conveyance transaction. It does state that the action of the governing body “shall not be subject to § 15.2-1800.” The latter statute, at subsection B, generally sets forth a locality’s responsibility with respect to the sale of real property, and permits the disposal of such realty by public or private sale after public hearing.¹⁷ Because the terms of § 33.1-165 specifically address the sale of abandoned roadway segments, as opposed to the more general provisions of § 15.2-1800(B), I conclude that the County may use its discretion to determine whether a public or private sale would be most beneficial for the County, and that it need not conduct any public hearing beyond that required by the terms of § 33.1-165.¹⁸

Finally, based upon the specific facts at hand, I must decline to offer an opinion as to what, if any, liability may arise when a bridge in need of repair or replacement is abandoned.¹⁹ Any assessment of potential liability would be based on the particular facts presented in each proposed abandonment including, without limitation, such factors as the current condition of the bridge (including whether it may constitute a nuisance), the appropriate signage or barricading to be placed upon the bridge structure, the language and adequacy of disclosures to the persons to whom the bridge property is conveyed, the identification of foreseeable potential users of the abandoned bridge, how such persons’ access to public roads might be affected by the abandonment, the means and abilities of individual property owners to repair and maintain the bridge, and the location of the bridge relative to population centers. The assessment of such factors should be undertaken by the County and its attorney on a case-by-case basis.

CONCLUSION

Accordingly, it is my opinion that the County may abandon a bridge that is neither in the State Highway System nor the secondary highway system if the bridge no longer is necessary or if abandonment would serve the public interest. It further is my opinion that upon such abandonment, the bridge’s ownership normally will revert to the owner of the underlying fee, if any such owner exists. In addition, it is my opinion that if the County owns the fee, it lawfully may convey the bridge property to a private party in exchange for consideration by either a public or private sale, and, that such consideration may include the County’s making a monetary payment to the purchaser. Finally, I am unable to opine whether the County would retain liability following its abandonment of a bridge needing repair or replacement, as such determination of liability would depend on specific facts existing at the time of occurrence of injury or damage.

¹ Your inquiry cited former 23 U.S.C. § 151, which Congress repealed by Act July 6, 2012, P.L. 112-141, Div A, Title I, Subtitle E, § 1519(b)(1)(A), 126 Stat. 575, effective 10/1/2012. Nevertheless, 23 U.S.C. § 144, entitled, “National bridge and tunnel inventory and inspection standards,” sets forth requirements relating to the inventory and inspection of bridges throughout the country, and for the development by the

states of corrective action plans for the rehabilitation of structurally deficient bridges. *See also* 23 CFR 650.401, *et seq.*, (setting forth regulations pertaining to these federal statutory mandates).

² VA. CODE ANN. §§ 33.1-156 through 33.1-167 (2011).

³ The roadways comprising the “State Highway System, sometimes referred to as the primary system of state highways” and the “secondary system of state highways” are respectively defined at § 33.1-25 and § 33.1-67. The bridges to which you refer for purposes of your inquiry are located upon “county roads,” generally defined as those “maintained by a county and not part of the secondary system, and...not parts of the State Highway System[.]”

⁴ VA. CODE ANN. § 33.1-157 (2011).

⁵ Section 33.1-161 (2011).

⁶ Section 33.1-162 (2011).

⁷ *Id.*

⁸ Section 33.1-163 (2011).

⁹ *See* 23 U.S.C. § 144(b), (d) and (h). *See also* 23 CFR §650.401, *et seq.*

¹⁰ 23 U.S.C. § 144(a)(1)(A); *see* VA. CODE ANN. § 33.1-163 (2011).

¹¹ Section 33.1-165 (2011) provides in part that

When any road abandoned as above provided is deemed by the governing body no longer necessary for the public use, it shall so certify such facts upon its minutes and it may authorize the sale and conveyance in the name of the county a deed or deeds conveying such sections, either for a consideration or in exchange for other lands that may be necessary for the uses of the county[.]

This enabling authority is subject to a prescribed notice requirement to adjacent landowners, and the further requirement of a hearing before the governing body if such a landowner requests it. Should it therein “appear that such section of road should be kept open for the reasonable convenience of such landowner, or the public, then such section of road shall not be conveyed[.]” *Id.* *See also* § 33.1-157 *et seq.*

¹² *Bond v. Green*, 189 Va. 23, 32, 52 S.E.2d 169, 173 (1948). *See also* 1984 Op. Va. Att’y Gen 145, 147 (“[U]nless the county owns the underlying fee, the board of supervisors is ordinarily without power to sell and convey the land pursuant to § 33.1-165 . . . Only when the county owns the underlying fee would it have the power to sell and convey the land that was once part of the abandoned roadway.”).

¹³ Section 33.1-165 (2011).

¹⁴ I make no comment herein upon the wisdom of a local policy to abandon, then convey to private parties, county road bridges that are in need of structural repair or replacement. This opinion relates only to the specific legal issues about which you inquire.

¹⁵ *Id.*

¹⁶ *Hughes v. Cole*, 251 Va. 3, 13-14, 465 S.E.2d 820, 827 (1996) (favorably quoting *Black’s Law Dictionary* 306 (6th ed. 1990)). *See* *Smith v. Mountjoy*, 280 Va. 46, 53, 694 S.E.2d 598, 602 (2010) (“Consideration is, in effect, the price bargained for and paid for a promise. It may be in the form of a benefit to the party promising or a detriment to the party to whom the promise is made.”) (Virginia citations omitted); *Alexakis v. Mallios*, 261 Va. 425, 430, 544 S.E.2d 650, 654 (2001) (“A promise to forebear the exercise of a legal right is adequate consideration to support a contract.” (Virginia citation omitted)). *See also discussion* *Atlantic & Danville R’wy Co. v. Hooker*, 194 Va. 496, 510-11, 74 S.E.2d 270, 280 (1953).

¹⁷ Section 15.2-1800 provides that “. . . any locality may sell, at public or private sale, exchange, lease as lessor, mortgage, pledge, subordinate interest in or otherwise dispose of its real property . . . provided that no such real property, whether improved or unimproved, shall be disposed of until the governing body has held a public hearing concerning such disposal.”

¹⁸ “[E]stablished principles of statutory construction require that ‘when one statute speaks to a subject in a general way and another deals with a part of the same subject in a more specific manner, the two should be harmonized, if possible, and where they conflict, the latter prevails.’” *Barr v. Town & Country Props., Inc.*,

240 Va. 292, 295, 396 S.E.2d 672, 674 (1990) (quoting Va. Nat'l Bank v. Harris, 220 Va. 336, 340, 257 S.E.2d 867, 870 (1979)).

¹⁹ The Attorney General “refrain[s] from commenting on matters that would require additional facts[.]” 2010 Op. Va. Att’y Gen. 56, 58.

OP. NO. 12-115

HIGHWAYS, BRIDGES, AND FERRIES: COMMONWEALTH TRANSPORTATION BOARD AND HIGHWAYS GENERALLY

Section 33.1-72.1 provides the requirements and funding options to improve a road to be taken into the secondary system of highways.

THE HONORABLE PHILLIP P. PUCKETT
MEMBER, SENATE OF VIRGINIA
AUGUST 2, 2013

ISSUES PRESENTED

You present several questions regarding a private road within the Valley Heights subdivision of Russell County. Specifically, you ask whether and how Russell County may fund improvements for a private road in order for the road to be accepted into the secondary system of state highways. Additionally, you inquire as to the removal of a restrictive covenant prohibiting the use of public funds to improve the road.

RESPONSE

It is my opinion that § 33.1-72.1 of the *Code of Virginia* provides the requirements and funding options to improve a road to be taken into the secondary system of highways by the Virginia Department of Transportation (“VDOT”). It is further my opinion that whether the covenant described in your letter would be an impediment to acceptance into the secondary system of state highways requires a determination of fact that is beyond the scope of this opinion.¹

BACKGROUND

You relate that a privately-owned road in the Valley Heights subdivision of Russell County is in need of repair. The Russell County Board of Supervisors (“Board”) would like to add the road to the secondary system of state highways in order to shift the maintenance burden to VDOT. Roads must meet certain standards, however, prior to acceptance into the secondary system of state highways. You indicate that although the Board would like to consider using public funds to pay for repairs bringing the road up to such standards, a restrictive covenant on the property prohibits the use of public funds to improve the road.

APPLICABLE LAW AND DISCUSSION

Section 33.1-72.1 of the *Code of Virginia* provides for the addition of certain streets to the secondary system of highways. The statute specifically provides that

Whenever the governing body of a county recommends in writing to the Department of Transportation that any street in the county be taken into and become a part of the secondary system of the state highways in such county, the Department of Transportation . . . shall take such street into the secondary system of state highways^[2]

Such acceptance by VDOT is dependent upon the satisfaction of certain conditions. These conditions include that the street meet the following requirements:

(i) has a minimum dedicated width of 40 feet or (ii) in the event of extenuating circumstances as determined by the Commissioner of Highways, such street has a minimum dedicated width of 30 feet at the time of such recommendation. In either case such streets must easements appurtenant thereto which conform to the policy of the Commonwealth Transportation Board in respect to drainage However, no such street shall be taken into and become a part of the secondary system of state highways unless and until any and all required permits have been obtained and any outstanding fees, charges, or other financial obligations of whatsoever nature have been satisfied or provision has been made, whether by the posting of a bond or otherwise, for their satisfaction.^[3]

Section 33.1-72.1(F) sets forth the various funding options available to counties to make the improvements necessary for a road to be accepted into the secondary system of state highways.⁴ These options include general county funds, rural addition funds, and private funds.⁵ The statute authorizes the Board to make a determination as to the funds that should be used.⁶ Russell County, its attorney, and VDOT should review § 33.1-72.1 in light of the specific private property rights involved to determine whether and how it should improve this road.⁷

You also ask about landowner options to remove the restrictive covenant on the property. Based on the description provided, the restrictive covenant prohibits the use of public funds to maintain or repair the roadway. Many factors affect the ability of lot owners or Russell County to remove this covenant, including the existence of a homeowners' association, ownership of the road, and other covenants affecting the road or surrounding property. Because the particulars involved in such factors are not before me, I am unable to provide an opinion on the options specific to the Valley Heights subdivision as you present them.⁸ Nevertheless, I note that Russell County also might consider using its power of eminent domain to remove the covenant.⁹

CONCLUSION

Accordingly, it is my opinion Russell County may request that VDOT accept a road into the secondary system of state highways and expend funds to improve such a road in accordance with § 33.1-72.1. It is further my opinion that whether the covenant described in your letter would be an impediment to acceptance into the secondary system of state highways requires a determination of fact that is beyond the scope of this opinion.

¹ "Attorneys General consistently have declined to render official opinions on specific factual matters" 2009 Op. Va. Att'y Gen. 80, 81 (further citation omitted).

² VA. CODE ANN. 33.1-72.1(E) (2011).

³ *Id.*

⁴ Section 33.1-72.1(F).

⁵ *See id.*

⁶ *See id.*

⁷ “Attorneys General historically have declined to render official opinions when the request: (1) requires the interpretation of a matter reserved to another entity, (2) does not involve a question of law; (3) involves a matter currently in litigation; or (4) involves a matter of purely local concern or procedure.” 2009 Op. Va. Att’y Gen. 138, 141 (further citation omitted).

⁸ This Office traditionally has refrained from commenting on matters requiring additional facts to resolve. *See, e.g.*, 2010 Op. Va. Att’y Gen. 56, 58.

⁹ *See* VA. CODE ANN. § 15.1-1901 (Supp. 2013) (providing authority to localities to exercise eminent domain). The procedures for condemning land are set out at VA. CODE ANN. §§ 25.1-200 through 25.1-251 (2011 & Supp. 2013). *See* § 15.2-1902 (2012). *See also* § 15.2-1905 (2012) (establishing special condemnation procedures for counties). The courts have recognized that the right to eminent domain includes the right to condemn covenants. *See, e.g.*, *Minner v. City of Lynchburg*, 204 Va. 180, 191, 129 S.E.2d 673, 680-81 (1963) (enjoining the City of Lynchburg from building a road on property that was subject to a covenant prohibiting roads while specifically stating that “[t]his does not mean, however, that the city cannot construct the street It may acquire this right by eminent domain. . . .”). Nonetheless, the County would have to pay just compensation if it chose to condemn the covenant. *See* VA. CONST. art. I, § 11; VA. CODE ANN. § 25.1-230 (2011).

OP. NO. 13-025

HIGHWAYS, BRIDGES, AND FERRIES: FERRIES, BRIDGES, AND TURNPIKES

Absent a statutory rule to the contrary, a member of a state board or commission holds over after the conclusion of his term and may continue to serve in his office and execute the full range of duties of that office until the qualification of his successor.

THE HONORABLE BARRY D. KNIGHT
MEMBER, HOUSE OF DELEGATES
MAY 10, 2013

ISSUE PRESENTED

You ask whether a member of a state board or commission may, after the expiration of his term, continue to serve and vote on matters before such board or commission until his replacement has been duly appointed and qualified.

RESPONSE

It is my opinion that, absent a statutory rule to the contrary, a member of a state board or commission holds over after the conclusion of his term and may continue to serve in his office and execute the full range of duties of that office until the qualification of his successor.

BACKGROUND

You indicate that your question should be answered for state boards or commissions in general, but that you are concerned specifically with the Chesapeake Bay Bridge and Tunnel Commission (the “Commission”). You further state that the by-laws for the Commission do not address the issue presented.

The Commission consists of 11 members appointed by the Governor subject to confirmation by each house of the General Assembly.¹ The term of office for a member of the Commission is four years.² Members are

eligible for reappointment to a second four-year term, but, except for appointments to fill vacancies for portions of unexpired terms, shall be ineligible for appointment to any additional term. When a vacancy in the membership occurs, the Governor shall appoint a new member to complete the unexpired portion of the term, subject to confirmation by each house of the General Assembly....Each member of the Commission, immediately following his appointment, shall take an oath of office, prescribed by Article II, Section 7 of the Constitution^[3]

APPLICABLE LAW AND DISCUSSION

The statutes establishing the Commission do not expressly provide for a member’s holding over after the expiration of his term upon the failure of the Governor to appoint a successor. As a general rule, however, in the absence of a constitutional or statutory prohibition, a public officer holds over after the conclusion of his term until the qualification of his successor.⁴ Prior Opinions of this Office have applied this general rule.⁵ The purpose of the hold-over rule is to prevent a hiatus in government pending the election or qualification of a successor officer.⁶ A necessary implication of this rule is that such member may continue to exercise the powers and duties of his office, including the right to vote on matters before the Commission, until such successor has qualified.⁷

Furthermore, if the statute clearly sets a maximum term limit of four years (as it does for Commission members), the fixed term expires at the end of its four-year period, at which point the successor’s term begins. Although a Commission member is permitted to hold office until a successor is appointed and sworn in, the hold-over period is part of the successor’s term. Consequently, when the successor has assumed his office, he may serve only the time remaining in the term.⁸ In other words, the successor serves the full term, less any hold-over period of the predecessor. The analysis applied herein is of a general nature and may be applied to any state board or commission, provided no constitutional or statutory provision dictates otherwise.

CONCLUSION

Accordingly, it is my opinion that, absent a statutory rule to the contrary, a member of a state board or commission holds over after the conclusion of his term and may continue to serve in his office and execute the full range of duties of that office until the qualification of his successor.

¹ 1954 Va. Acts ch. 693, § 6, as amended and reenacted by 2000 Va. Acts chs. 238, 705. *See also* VA. CODE ANN. § 33.1-253 (2011) (incorporating by reference certain Acts of Assembly relating to the Chesapeake Bay Bridge and Tunnel District).

² *Id.*

³ *Id.*

⁴ *See* 63C AM. JUR. 2D *Public Officers and Employees* § 148 (LEXIS 2013).

⁵ *See* 1987-88 Op. Va. Att’y Gen. 223, 228-229; 1985-86 Op. Va. Att’y Gen. 64, 65; 1985-86 Op. Va. Att’y Gen. 250; and 1980-81 Op. Va. Att’y Gen. 4, 5.

⁶ *See* *Burnett v. Brown*, 194 Va. 103, 72 S.E.2d 394 (1952); *Fleming v. Anderson*, 187 Va. 788, 48 S.E.2d 269 (1948).

⁷ 1985-86 Op. Va. Att’y Gen. at 65.

⁸ *Owen v. Reynolds*, 172 Va. 304, 308, 1 S.E.2d 316, 317-18 (1939) (“The period between the expiration of an incumbent’s term and the qualification of his successor is a part of the term itself.”).

OP. NO. 12-077

MINES AND MINING: EXPLORATION FOR URANIUM ORE

A locality currently cannot regulate uranium mining in any fashion because uranium mining is not a permitted activity within the Commonwealth

CONSERVATION: AIR POLLUTION CONTROL BOARD

A locality lacks authority to implement more stringent air quality standards than provided for under federal and state law without the prior approval of the Board.

THE HONORABLE DONALD W. MERRICKS
MEMBER, HOUSE OF DELEGATES
OCTOBER 11, 2013

ISSUES PRESENTED

You ask whether a locality may: (i) limit or restrict uranium mining to certain zoning districts; (ii) implement more stringent air and water quality standards than those permitted by state and federal law; (iii) require additional bonding for uranium mine reclamation purposes in addition to or beyond those required by state and federal law; (iv) impose civil penalties or liability for depreciation in the value of real estate located within a defined geographic area of a uranium mining operation site; and (v) impose civil penalties or liability for loss of revenue by agriculturally based operations due to cancellation, rescission, or modification of agriculturally based contracts due to uranium mining.

RESPONSE

It is my opinion that a locality currently cannot regulate uranium mining in any fashion because uranium mining is not a permitted activity within the Commonwealth. It is further my opinion that, should the General Assembly act to permit and provide for the regulation of uranium mining, a locality’s authority related to uranium mining will depend upon federal and state law in effect at that time, including the

enabling legislation for uranium mining enacted by the General Assembly. It is further my opinion, as detailed below, that a locality does not have authority under existing federal and state law to take certain of the actions about which you inquire.

BACKGROUND

Section 45.1-283 of the *Code of Virginia* provides, “[n]otwithstanding any other provision of law, permit applications for uranium mining shall not be accepted by any agency of the Commonwealth prior to July 1, 1984, and until a program for permitting uranium mining is established by statute.” Currently, there is no program for the permitting of uranium mining within the Commonwealth. The Department of Mines, Minerals and Energy, in consultation with the Virginia Department of Health, permits exploration activity for uranium mining,¹ but no agency of the Commonwealth accepts applications for the actual mining of uranium.

On January 19, 2012, the Governor issued a directive to establish a Uranium Working Group to “provide a scientific policy analysis to help the General Assembly assess whether the moratorium on uranium mining in the Commonwealth should be lifted, and if so, how best to do so.”² The Governor’s directive enumerated eighteen tasks for the working group to complete, including the creation of a draft statutory and conceptual regulatory framework.³ The working group presented its report to the Governor on November 30, 2012.⁴

Legislation to permit and regulate uranium mining was introduced in the 2013 Session of the General Assembly, however, it did not pass.⁵

APPLICABLE LAW AND DISCUSSION

The Constitution of Virginia allows the General Assembly to confer broad authority on local governments relating to the welfare of its citizens, through the shared exercise of the Commonwealth’s general “police power.”⁶ Virginia, however, follows the Dillon Rule of strict construction with respect to the existence of local authority.⁷ The Dillon Rule 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 Its corollary states that “[t]he powers of county boards of supervisors are fixed by statute and are limited to those powers conferred expressly or by necessary implication.”⁹ The Dillon Rule is applicable to the initial determination of whether a local power exists at all and “[i]f the power cannot be found, the inquiry is at an end.”¹⁰ Therefore, to have the authority to act in a certain subject matter area, local governments must have express enabling legislation or authority that is necessarily implied from expressly granted powers.

State law also may block local authority in three ways: (1) preemption through explicit statutory language; (2) conflict preemption – a local government may not exercise its police power by adopting a local law inconsistent with constitutional or general state law;¹¹ and (3) field preemption – a locality may not exercise its police power when the legislature has preempted the area of regulation through a comprehensive state program.¹² The legislative intent to preempt may be stated

expressly, but need not be: “It is enough that the legislature has impliedly evinced its desire to do so and that desire may be inferred from a declaration of State policy by the legislature or from the legislative enactment of a comprehensive and detailed regulatory scheme in a particular area.”¹³ Federal law may preempt state and local action in legally analogous ways.¹⁴

Conflict preemption ensures that local enactments are consistent with the laws of the Commonwealth. The “fundamental rule is that local ordinances must conform to and ‘not be inconsistent with’ the public policy of the State as set forth in its statutes.”¹⁵ Thus, a locality may not “attempt to authorize . . . what the legislature has forbidden or forbid what the legislature has expressly licensed, authorized, or required.”¹⁶ Ordinances and the laws of the Commonwealth must be able to “coexist;” they “are not deemed inconsistent because of mere lack of uniformity in detail.”¹⁷

Field preemption is an exception to the general rule that it is possible to have concurrent state and local jurisdiction over the same subject matter. The mere fact that the State, in the exercise of its police power, has made regulations with respect to a subject does not prohibit a locality from legislating on the same subject.¹⁸ But state law preempts all local regulation on a subject if the state regulations “are so comprehensive that the state may be considered to occupy the ‘entire field.’”¹⁹

Local Authority with Respect to Uranium Mining Generally

Each of your questions asks about local authority to enact regulations related to uranium mining. If an activity is authorized by and conducted in compliance with state law, a Virginia locality cannot impose a ban on that otherwise legal activity.²⁰ The opposite is also true – a locality cannot authorize what the State currently prohibits.²¹ Because state law does not permit uranium mining at all,²² and ordinances must be consistent with state policy and general law,²³ localities currently do not have the authority to regulate uranium mining.

If the General Assembly chooses to establish a permitting program for uranium mining and milling operations within the Commonwealth and provides for related regulation, such legislation will affect local government authority to regulate such operations by ordinance. The General Assembly may choose to have the state preemptively occupy the field, and the locality could not regulate further. On the other hand, the General Assembly could enable concurrent regulatory authority to its appropriate agencies and localities, in which case the locality could exercise such authority so long as such exercises do not conflict with federal or state law.²⁴

Another important factor is the significant role played by the federal government in the regulation of uranium mining and milling activity. For example, the Nuclear Regulatory Commission (“NRC”) licenses and regulates uranium milling operations.²⁵ The Environmental Protection Agency (“EPA”) is authorized to set health and environmental standards to govern the stabilization, restoration, disposal and control of effluents and emissions at both active and inactive mill tailings sites.²⁶ The Federal Mine Safety and Health Administration enforces occupational health and safety laws for workers at a uranium mine and/or milling operations.²⁷ The Price-Anderson Act governs “any legal liability arising out of or resulting from a nuclear

incident.”²⁸ Any local action related to uranium mining would need to survive preemption analysis with respect to applicable federal law too.

Question 1: Limiting Uranium Mining to Certain Zoning Districts

Your first question is whether a locality may limit or restrict uranium mining to certain zoning districts.

“Zoning is a legislative power vested in the Commonwealth and delegated by it, in turn, to various local governments for the enactment of local zoning ordinances.”²⁹ Section 15.2-2280 of the *Code of Virginia* specifically provides localities with the authority to enact zoning ordinances regulating the use of land. This delegation of authority by the Commonwealth is a delegation of the Commonwealth’s police power to legislate in this area.³⁰ If any doubt remains as to the existence of such power in view of all the facts, that doubt must be resolved against the locality.³¹ Local zoning ordinances are presumed to be reasonable in the first instance, but the classifications an ordinance contains, and the distinctions that it draws, must not be arbitrary or capricious either in their terms as written or in their application.³²

Should the General Assembly authorize permitting of uranium mining and milling operations, and not otherwise fully preempt the regulation thereof, then whether localities could adopt zoning ordinances relating to district regulation of uranium mines will be dependent upon the general principle that the ordinances not be drafted in such a way as to be arbitrary or capricious either in their terms as written or in their application.³³ Further, such zoning ordinances could not be so restrictive as to impose a ban on that otherwise legal activity.³⁴

Question 2: More Stringent Air and Water Quality Standards

Your second question asks whether a locality may implement more stringent air and water quality standards than provided for in state or federal law.

Air quality is the subject of an extensive statutory and regulatory system that “represents decades of thought by legislative bodies and agencies and the vast array of interests seeking to press upon them a variety of air pollution policies. To say this regulatory and permitting regime is comprehensive would be an understatement.”³⁵

Pursuant to the Clean Air Act, EPA has “develop[ed] acceptable levels of airborne emissions, known as National Ambient Air Quality Standards (NAAQS).”³⁶ NAAQS “are meant to set a uniform level of air quality across the country,” but “decisions regarding how to meet NAAQS are left to individual states.”³⁷ States must create State Implementation Plans (“SIPs”), which then must be submitted to the EPA for approval and which become enforceable federal law once approved by the EPA.³⁸ Virginia’s SIPs was submitted in 1972 and has been amended numerous times since then.³⁹ Virginia’s air quality regime includes statutes, regulations adopted by the State Air Pollution Control Board (the “Board”), and permitting, enforcement, and other processes administered by the Virginia Department of Environmental Quality (“DEQ”).⁴⁰

It is unnecessary to reach herein any conclusion with respect to field preemption and air quality because the General Assembly has established explicit preemptive

limitations upon local authority. Since 1972, any local governing body that proposes to adopt or amend any ordinance relating to air pollution must obtain the approval of the Board as to the provisions of the ordinance, and the Board may not approve an ordinance regulating any emission source that is required to register with the Board or to obtain a permit pursuant to state law.⁴¹ Accordingly, it is my opinion that a locality lacks authority to implement more stringent air quality standards than provided for under federal and state law without the prior approval of the Board.

Water quality also is the subject of an extensive statutory and regulatory system, beginning with the Clean Water Act (“CWA”).⁴² The United States Supreme Court has stated that “Congress intended the [CWA] to ‘establish an all-encompassing program of water pollution regulation.’”⁴³ The CWA established the National Pollutant Discharge Elimination System (“NPDES”), a permit program to regulate the discharge of polluting effluents.⁴⁴ The EPA has delegated authority to Virginia to issue NPDES permits under the Virginia Pollutant Discharge Elimination System Permit program, and Virginia’s water quality regime involves statutes, regulations adopted by the State Water Control Board, and administrative authority exercised by DEQ.⁴⁵

Other federal and state laws address certain types or bodies of water. For example, the federal Safe Drinking Water Act (“SDWA”) regulates public water systems,⁴⁶ and the Virginia Groundwater Management Act of 1992 aims to ensure the public welfare, safety, and health by providing for management and control of ground water resources.⁴⁷

Although there exists no Virginia statute that establishes explicit limits on the enactment of ordinances relating to water quality, with respect to the particular action that is the subject of your question – local implementation of more stringent water quality standards than provided under federal and state law – it is my opinion that the federal and state regulatory scheme preempts this field so as to prohibit such an exercise of local authority.⁴⁸ As noted above, the degree of federal and state regulation of water quality standards is comprehensive.⁴⁹

Question 3: Additional Bonding

Your third question asks whether a locality can require additional bonding for uranium mine reclamation purposes in addition to or beyond any similar bonding requirements under state or federal law. The nature and extent of uranium mining bonding requirements, and the locus of authority for setting bonding requirements, will depend on such future legislation as may be passed by the General Assembly, as well as such agreed delegation of authority as may be entered into between the Commonwealth and the NRC. It is therefore impossible to opine conclusively upon this question at this time.

Question 4: Civil Penalties and/or Liability for Declines in Real Estate Value

Your next question is whether a locality has authority to subject a uranium mining operation to civil penalties or liability for depreciation in the value of real estate that is located within a defined proximity to the mining operation site.

“The Supreme Court [of the United States] has concluded that ‘the safety of nuclear technology [is] the exclusive business of the Federal Government....’”⁵⁰ The Court explained that state law “is not pre-empted only when it conflicts with federal law. Rather, the Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States.”⁵¹

Under the Price-Anderson Act, legal liability arising out of or relating to a “nuclear incident” is part of this broad preemption, in that the “public liability action” created by the Price-Anderson Act reflects Congressional intent to “supplant all possible state causes of action when the factual prerequisite[s] of the statute are met.”⁵² “In short, a plaintiff who asserts any claim arising out of a ‘nuclear incident’ ... ‘can sue under the [Price-Anderson Act] or not at all.’”⁵³

“The term ‘nuclear incident’ means any occurrence ... within the United States causing ... bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material.”⁵⁴ “Source” material includes uranium and uranium ore.⁵⁵ The term “nuclear incident” does not include depreciation in real estate value due to proximity to a uranium mining operation.

Federal courts have held that there cannot be any legal liability without a nuclear incident.⁵⁶ The United States Court of Appeals for the Tenth Circuit has held specifically that a mere decline in real estate value cannot establish a nuclear incident, explaining that diminution of real estate value might be a measure of damages but is insufficient to show the actual loss or damage that satisfies the nuclear incident requirement:

Diminution of value, however, cannot establish the fact of injury or damage. Otherwise, reduced value stemming from factors unrelated to any actual property injury, such as unfounded public fear regarding the effects of minor radiation exposure, could establish “damage to property” and “loss of use of property.” Public perception and the stigma it may attach to the property in question can drastically affect property values, regardless of the presence or absence of any actual injury or health risk. Instead, courts have traditionally utilized diminution of value as a measurement of damages rather than proof of the fact of damage.^[57]

Accordingly, it is my opinion that federal law precludes a locality from subjecting a uranium mining operation to civil penalties or liability for declines in the value of real estate located within a defined proximity of such an operation.

Even if federal law did not preempt local creation of such liability, operation of the Dillon Rule would appear to do so under current Virginia law. In Virginia, civil causes of action and liability arise from statutes or the common law, both of which are bodies of state law interpreted and adjudicated in state or federal courts. Localities have not been granted a general power to create civil penalties or liability, nor a specific power to do so with respect to uranium mining. A locality may not so act without a grant of power from the General Assembly.⁵⁸

Question 5: Civil Penalties or Liability for Loss of Revenue Related to Agricultural Contracts

Your final question asks whether a locality may subject a uranium mining operation to civil penalties or liability for loss of revenue by agricultural operations for cancellation, rescission, or modification of agricultural contracts due to uranium mining. For the reasons given in my response to your preceding question, it is my opinion that a locality may not do so.⁵⁹

CONCLUSION

Accordingly, it is my opinion that a locality currently cannot regulate uranium mining in any fashion because uranium mining is not a permitted activity within the Commonwealth. It is further my opinion that, should the General Assembly act to permit and provide for the regulation of uranium mining, a locality's authority related to uranium mining will depend upon federal and state law in effect at that time, including the enabling legislation for uranium mining enacted by the General Assembly. It is further my opinion, as detailed above, that a locality does not have authority under existing federal and state law to take certain of the actions about which you inquire.

¹ See VA. CODE ANN. § 45.1-278 (2002).

² Governor of Virginia, Directive Re: Establishment of Uranium Working Group (Jan. 19, 2012), available at <http://www.governor.virginia.gov/utility/media/Governor%27s%20Directive.pdf>.

³ *Id.*

⁴ See VA. DEP'T OF MINES, MINERALS & ENERGY, VA. DEP'T OF ENVTL. QUALITY, VA. DEP'T OF HEALTH, COMMONWEALTH OF VIRGINIA 2012 URANIUM WORKING GROUP REPORT (2012), available at <http://www.governor.virginia.gov/utility/docs/UWG%20Report%20-%20FINAL%2030Nov2012.pdf>.

⁵ See S.B. 1353, 2013 Reg. Sess. (Va.), available at <http://lis.virginia.gov/cgi-bin/legp604.exe?ses=131&typ=bil&val=SB1353>.

⁶ See VA. CONST. art. VII, § 3; *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926) (noting that local zoning ordinances "must find their justification in some aspect of the police power, asserted for the public welfare.").

⁷ *Commonwealth v. County Bd.*, 217 Va. 558, 573-575, 232 S.E.2d 30, 40-41 (1977); see also *City of Richmond v. Bd. of Supvrs.*, 199 Va. 679, 684-85, 101 S.E.2d 641, 644-45 (1958); 2005 Op. Va. Att'y Gen. 54, 55.

⁸ *Bd. of Supvrs. v. Countryside Investment Co.*, 258 Va. 497, 503, 522 S.E.2d 610, 613 (1999) (quoting *Chesapeake v. Gardner Enters.*, 253 Va. 243, 246, 482 S.E.2d 812, 814 (1997)).

⁹ *County Bd. v. Brown*, 229 Va. 341, 344, 329 S.E.2d 468, 470 (1985); accord *Advanced Towing Co., LLC v. Fairfax County Bd. of Supervisors*, 280 Va. 187, 193, 694 S.E.2d 621, 624, cert. denied, 131 S. Ct. 524 (2010).

¹⁰ *Commonwealth*, 217 Va. at 575, 232 S.E.2d at 41; accord *Marble Techs., Inc. v. City of Hampton*, 279 Va. 409, 416-17, 690 S.E.2d 84, 88 (2010); 2005 Op. Va. Att'y Gen. 54, 55.

¹¹ See VA. CODE ANN. § 1-248 (2011); *Sinclair v. New Cingular Wireless PCS, LLC*, 283 Va. 567, 576, 727 S.E.2d 40, 44 (2012) ("when a statute enacted by the General Assembly conflicts with an ordinance enacted by a local governing body, the statute must prevail"); *Allen v. City of Norfolk*, 195 Va. 844, 848-49, 80 S.E.2d 605, 607 (1954) (finding invalid a city ordinance that added a material provision not found in the authorizing statute). See also 2008 Op. Va. Att'y Gen. 90 and cases cited therein (opining that a college,

through its board of visitors, has express and implied power to act as necessary to effectuate its powers expressly granted, but that authority does not supersede statutes concerning specific topics).

¹² See *City of Lynchburg v. Dominion Theatres Inc.*, 175 Va. 35, 42-43, 7 S.E.2d 157, 160 (1940); *New York State Club Ass'n v. City of New York*, 505 N.E.2d 915, 917 (N.Y. 1987), *aff'd*, 487 U.S. 1 (1988). See also 2002 Op. Va. Att'y Gen. 67, 69 (opining that “the state occupies the field of sewage sludge disposal, treatment and management” and a local ordinance “is preempted by the comprehensive state program”); 1983-84 Op. Va. Att'y Gen. 86, 87 (opining that the Commonwealth and a county “may have concurrent jurisdiction over the same subject matter, and the fact that the State, in the exercise of its police power, has made regulations with respect to a subject does not prohibit a county from legislating on the same subject, unless the State regulations are so comprehensive that the State may be considered to occupy the ‘entire field’ of such regulation.”).

¹³ *New York State Club Ass'n*, 505 N.E.2d at 917.

¹⁴ See e.g., *English v. General Elec. Co.*, 496 U.S. 72, 78-79 (1990).

¹⁵ *Klingbeil Mgmt. Group Co. v. Vito*, 233 Va. 445, 449, 357 S.E.2d 200, 202 (1987) (citing *King v. County of Arlington*, 195 Va. 1084, 1090, 81 S.E.2d 587, 591 (1954)).

¹⁶ *King*, 195 Va. at 1090-91, 81 S.E.2d at 591; *accord Blanton v. Amelia County*, 261 Va. 55, 64, 540 S.E.2d 869, 874 (2001), *superseded by statute on other grounds*, VA. CODE ANN. § 62.1-44.19:3, *as stated in O'Brien v. Appomattox County*, 293 F. Supp. 2d 660, 663 (W.D. Va. 2003).

¹⁷ *King*, 195 Va. at 1090-91, 81 S.E.2d at 591; *accord West Lewinsville Hgts. Ass'n v. Bd. of Sup.*, 270 Va. 259, 265-66, 618 S.E.2d 311, 314 (2005). See generally 2005 Op. Va. Att'y Gen. 54; 1998 Op. Va. Att'y Gen. 12; 1998 Op. Va. Att'y Gen. 13; 1980-81 Op. Va. Att'y Gen. 418.

¹⁸ See *Vito*, 233 Va. at 449, 357 S.E.2d at 202; *King*, 195 Va. at 1088, 81 S.E.2d at 590; 1983-84 Op. Va. Att'y Gen. 86, 87.

¹⁹ *Id.* See also *supra* notes 12-14 and accompanying text.

²⁰ See *supra* note 16 and accompanying text; 2013 Op. Va. Att'y Gen. No. 12-102 (a local governing body cannot ban exploration for and drilling of oil and natural gas within the locality's boundaries), *available via link* at <http://www.ag.virginia.gov/Opinions%20and%20Legal%20Resources/Opinions/2013opns/Jan13opndx.html>; 1998 Op. Va. Att'y Gen. 12, 12-13 (localities lack express or implied authority to enact moratorium on intensive corporate and contract swine production); 1998 Op. Va. Att'y Gen. 13, 14 (county has no authority to adopt ordinance limiting circumstances in which agricultural operations may be deemed to constitute a nuisance or trespass).

²¹ See *supra* note 15 and accompanying text. Regulation controls, directs, or establishes rules for activity. See BLACK'S LAW DICTIONARY 1398 (9th ed. 2009) (defining “regulation”); DICTIONARY.COM UNABRIDGED (Random House 2013), at <http://dictionary.reference.com/browse/regulate> (last visited Sept. 3, 2013). There is at least implied authorization of activity that conforms to the regulation.

²² See VA. CODE ANN. § 45.1-283 (2002).

²³ See *supra* notes 15-16 and accompanying text.

²⁴ For example, Article 8 of Chapter 6 of Title 32.1 of the *Code of Virginia*, §§ 32.1-227 through 32.1-238, designates the Department of Health as the state radiation control agency, VA. CODE ANN. § 32.1-228.1(A) (Supp. 2013), and grants the State Board of Health regulatory powers with respect to sources of radiation, see VA. CODE ANN. § 32.1-229 (2011), but provides that local ordinances and regulations are not superseded, “provided that such ordinances or regulations are and continue to be consistent with” state law. VA. CODE ANN. § 32.1-237 (2011).

²⁵ See 10 C.F.R. Part 40 (2012). If the Commonwealth lifts its current moratorium on uranium mining and wants to regulate uranium milling operations, it first would need to ask the NRC to delegate that regulatory authority to the Commonwealth through an amendment to the Commonwealth's current agreement with the NRC. See 42 U.S.C. § 2021 (2011).

- ²⁶ See Uranium Mill Tailings Radiation Control Act of 1978, Pub. L. No. 95-604, 92 Stat. 3021 (codified as amended at 42 U.S.C. §§ 7901-7942 (2011)); 40 C.F.R. Part 192 (2012).
- ²⁷ See 30 C.F.R. Parts 56-58 & 62 (2012).
- ²⁸ See 42 U.S.C. § 2014(w) (2012). See also *El Paso Natural Gas Co. v. Neztosie*, 526 U.S. 473, 476-77 (1999) (setting forth the history of the Price-Anderson Act and the amendments to it).
- ²⁹ *Byrum v. Bd. of Supvrs.*, 217 Va. 37, 39, 225 S.E.2d 369, 371 (1976). Article 7 of Chapter 22 of Title 15.2 of the *Code of Virginia*, §§ 15.2-2280 through 15.2-2316 (2012 & Supp. 2013), contains Virginia's zoning enabling statutes, which authorize local land use ordinances.
- ³⁰ *Bd. of Supvrs. v. Rowe*, 216 Va. 128, 134, 216 S.E.2d 199, 206 (1975); accord *Cochran v. Fairfax County Bd. of Zoning Appeals*, 267 Va. 756, 764, 594 S.E.2d 571, 576 (2004).
- ³¹ *City of Richmond*, 199 Va. at 684, 101 S.E.2d at 645 (quoting *Donable v. Harrisonburg*, 104 Va. 533, 535, 52 S.E. 174, 175 (1905)); accord *Bd. of Supvrs. v. Town of Purcellville*, 276 Va. 419, 437, 666 S.E.2d 512, 521 (2008).
- ³² See *Bd. of Supvrs. v. Southland Corp.*, 224 Va. 514, 522, 297 S.E.2d 718, 722 (1982); *City of Manassas v. Rosson*, 224 Va. 12, 17-18, 294 S.E.2d 799, 802 (1982), *appeal dismissed*, 459 U.S. 1166 (1983).
- ³³ See *id.*
- ³⁴ See *supra* notes 16 and 20 and accompanying text.
- ³⁵ *North Carolina ex rel. Cooper v. TVA*, 615 F.3d 291, 298 (4th Cir. 2010).
- ³⁶ *Id.* The Clean Air Act may be found at 42 U.S.C. §§ 7401 to 767/g.
- ³⁷ *North Carolina ex rel. Cooper*, 615 F.3d at 299.
- ³⁸ *Id.*
- ³⁹ VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY (DEQ), THE STATE IMPLEMENTATION PLAN, available at <http://www.deq.virginia.gov/Programs/Air/AirQualityPlans/TheStateImplementationPlan.aspx> (last visited Sept. 3, 2013).
- ⁴⁰ See generally VA. CODE ANN. §§ 10.1-1300 through 10.1-1328 (2012); DEPARTMENT OF ENVIRONMENTAL QUALITY, AIR – LAWS, REGULATIONS, AND GUIDANCE, available at <http://www.deq.virginia.gov/Programs/Air/LawsRegulationsGuidance.aspx> (last visited Sept. 3, 2013).
- ⁴¹ VA. CODE ANN. § 10.1-1321 (2012).
- ⁴² The Clean Water Act is the name of the comprehensive 1972 amendments to the Federal Water Pollution Control Act and may be found at 33 U.S.C. §§1251to 1387.
- ⁴³ *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987) (quoting *Milwaukee v. Illinois*, 451 U.S. 304, 318 (1981)).
- ⁴⁴ *Id.* at 489 (citing 33 U.S.C. § 1342).
- ⁴⁵ See generally the State Water Control Law, VA. CODE ANN. §§ 62.1-44.2 through 62.1-44.34:28 (2006 & Supp. 2013); DEP'T OF ENVTL. QUALITY, WATER – LAWS, REGULATION, AND GUIDANCE, at <http://www.deq.virginia.gov/Programs/Water/LawsRegulationsGuidance.aspx> (last visited Sept. 3, 2013).
- ⁴⁶ The SDWA can be found at 42 U.S.C. §§ 300f to 300j-21.
- ⁴⁷ VA. CODE ANN. § 62.1-254 (2006). The Ground Water Management Act of 1992 is codified at VA. CODE ANN. §§ 62.1-254 through 62.1-270 (2006 & Supp. 2013).
- ⁴⁸ See *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 489 & n.7 (2008) (explaining that the CWA preempts claims that standards should be different from those provided by the CWA, unlike private claims for economic injury that do not threaten to interfere with federal regulatory goals). Cf. *Lockett v. EPA*, 319 F.3d 678, 683 (5th Cir. 2003) (noting that citizens may not bring suit under the CWA if federal or state administrative authorities are pursuing an action to require compliance); *Mattoon v. City of Pittsfield*, 980 F.2d 1, 4-6 (1st Cir. 1992) (“concluding that Congress occupied the field of public drinking water regulation with its enactment of the SDWA,” such that the plaintiffs’ other claims were barred).

⁴⁹ The General Assembly has granted localities only limited powers related to water. For example, as part of overseeing the development of territory within its jurisdiction, a locality may include in its comprehensive plan a “designation of areas for the implementation of reasonable ground water protection measures.” See § 15.2-2223(C)(4) (Supp. 2013). Localities also may create water authorities, which are granted certain powers by statute. See §§ 15.2-5102 and 15.2-5114 (2012).

⁵⁰ *Roberts v. Florida Power & Light Co.*, 146 F.3d 1305, 1308 (11th Cir. 1998) (quoting *Pacific Gas & Electric Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 208 (1983)) (second alteration in original); see also *Hanford Nuclear Reservation Litig. v. E.I. DuPont de Nemours & Co.* (In re *Hanford Nuclear Reservation Litig.*), 534 F.3d 986, 1003 (9th Cir. 2008).

⁵¹ *Pacific Gas & Electric*, 461 U.S. at 212.

⁵² *Cotroneo v. Shaw Env’t & Infrastructure, Inc.*, 639 F.3d 186, 192 (5th Cir. 2011) (quoting *In re TMI Litig. Cases Consol. II*, 940 F.2d 832, 857 (3d Cir. 1991)) (alteration in original); see also *El Paso Natural Gas Co. v. Neztosie*, 526 U.S. 473, 484 n.6 (1999) (the Price-Anderson Act’s preemption structure “resembles what we have spoken of as complete pre-emption doctrine”) (quotation marks omitted).

⁵³ *Cotroneo*, 639 F.3d at 192 (quoting *Nieman v. NLO, Inc.*, 108 F.3d 1546, 1553 (6th Cir. 1997)).

⁵⁴ 42 U.S.C. § 2014(q) (2011).

⁵⁵ 42 U.S.C. § 2014(z) (2011); accord VA. CODE ANN. § 32.1-227 (2011).

⁵⁶ See *Cotroneo*, 639 F.3d at 195-97 (explaining that a Texas “offensive contact battery” claim was preempted because “recovery on a state law cause of action without a showing that a nuclear incident has occurred would circumvent the entire scheme governing public liability actions” by allowing a plaintiff to recover without establishing public liability); *Cook v. Rockwell Int’l Corp.*, 618 F.3d 1127, 1139-41 (10th Cir. 2010) (holding that “the occurrence of a nuclear incident ... constitutes a threshold element of any [Price-Anderson Act] claim” and that merely claiming the presence of nuclear material creates increased risk, whether of radiation-related damage to property or injury, is insufficient to show a nuclear incident).

⁵⁷ *Cook*, 618 F.3d at 1141 n.12.

⁵⁸ See *supra* notes 7-10 and accompanying text for discussion of the Dillon Rule and related citations. It is true that localities have been granted authority to take action with respect to public nuisances. See VA. CODE ANN. § 15.2-900 (2012). The essence of a public nuisance, however, is that the condition in question is dangerous or hazardous to the public. See *id.*; *Breeding by Breeding v. Hensley*, 258 Va. 207, 213, 519 S.E.2d 369, 372 (1999). The determination of whether a dangerous or hazardous condition exists related to uranium mining is a safety determination committed to federal law and regulation, except as may be expressly delegated to states. See *supra* notes 50-53 and accompanying text.

⁵⁹ Virginia law provides for liability by a non-party for causing the end of a contract only in limited circumstances, through an action for “tortious interference.” See generally *Lewis-Gale Med. Ctr., LLC v. Alldredge*, 282 Va. 141, 149-50, 710 S.E.2d 716, 720 (2011) (discussing what a plaintiff must show for such a claim). It would require knowing and applying the relevant facts and circumstances of a particular, *in futuro* situation, to determine the viability (under Virginia law and with respect to federal preemption analysis) of a tortious interference claim against a uranium mining operation, and this Office refrains from commenting on matters that would require additional facts or the application of such facts to law. See 2010 Op. Va. Att’y Gen. 56, 58.

OP. NO. 12-102

MINES AND MINING: THE VIRGINIA GAS AND OIL ACT

Although 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 and the Commonwealth Energy Policy, a local governing body cannot ban altogether the exploration for, and the drilling of, oil and natural gas within the locality’s boundaries

THE HONORABLE TERRY G. KILGORE
MEMBER, HOUSE OF DELEGATES
JANUARY 11, 2013

ISSUE PRESENTED

You ask whether a local governing body has the authority to adopt a blanket prohibition of the exploration for, and drilling of, oil and natural gas within the locality's boundaries through the use of its zoning laws.

RESPONSE

It is my opinion that, although 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 Act¹ and the Commonwealth Energy Policy,² a local governing body cannot ban altogether the exploration for, and the drilling of, oil and natural gas within the locality's boundaries.

BACKGROUND

Since April 20, 2010, the Virginia Gas and Oil Board ("Board") has approved the creation of four different 160-acre units for the drilling of gas wells in Washington County.³ Additionally, on August 16, 2010, the Board approved an application to pool⁴ the interests in the first of those four units.⁵ The uncontradicted testimony at the pertinent Board hearings established that drilling for gas in Washington County dates back to the early 1930s, at the latest.⁶ Additionally, the Virginia Oil and Gas Conservation Commission and the Virginia Oil and Gas Board, the predecessors to the current Board, issued orders providing for the establishment of drilling units in the Early Grove Gas and Oil Field of Washington and Scott counties on at least two occasions, beginning September 1, 1983.⁷

You report that a gas operator who has received approval from the Board for several gas drilling units within Washington County filed a request with the Washington County Zoning Administrator, seeking a determination that a gas well was an approved accessory use or structure under § 66-297 of the Washington County Code.⁸ You indicate that the agricultural limited (A-1) and agricultural general (A-2) zoning classifications for the parcels encompassing these drilling units are the two least restrictive zoning classifications in the county. That request and a subsequent appeal filed with the County Board of Zoning Appeals have resulted in denials by the county of the operator's application to locate a gas well site in Washington County. It is not clear from the information you provide whether the applicant additionally has sought and been denied a special use permit.⁹

You relate that the application of the gas operator asserted that at least twelve gas wells are currently in existence in Washington County. It is not known when the county approved the siting of those wells or if any of those wells were evaluated with the same level of scrutiny under the county's current zoning ordinance in allowing them as permissible uses. The assertion of their existence remained unchallenged

before the County Board of Zoning Appeals, so it is accepted as factually correct for purposes of this opinion.

The County Attorney for Washington County sent a letter dated March 19, 2012, to the Department of Mines, Minerals and Energy (“DMME”) to inform the agency of action taken by the Washington County Board of Supervisors on this subject. At its February 28, 2012, meeting, the Board of Supervisors by a 4-3 vote “acted to delay action to amend the County Zoning Ordinance to allow for natural gas extraction until after the [U.S. Environmental Protection Agency (“EPA”)] publishes its report on the public safety issues associated with hydro-fracturing.”¹⁰ It appears from this decision that the Board of Supervisors at the present time does not intend to allow gas drilling to proceed anywhere in the county.

APPLICABLE LAW AND DISCUSSION

The *Constitution of Virginia* provides in Article VII, § 3 that

[t]he General Assembly may provide by general law or special act that any county, city, town, or other unit of government may exercise any of its powers or perform any of its functions and may participate in the financing thereof jointly or in cooperation with the Commonwealth or any other unit of government within or without the Commonwealth.

Pursuant to this authority, the General Assembly has afforded localities general power to adopt land use regulations to further the welfare of their inhabitants.¹¹ Nonetheless, the *Code of Virginia* further provides that

[t]he Constitution and laws of the United States and of the Commonwealth shall be supreme. Any ordinance, resolution, bylaw, rule, regulation, or order of any governing body or any corporation, board, or number of persons shall not be inconsistent with the Constitution and laws of the United States or of the Commonwealth.^[12]

In determining the power of a local governing body to adopt a particular ordinance or regulation, 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.”¹³ Its corollary states that “[t]he powers of county boards of supervisors are fixed by statute and are limited to those powers conferred expressly or by necessary implication.”¹⁴ The Dillon Rule is applicable to the initial determination, from express words or by implication, of whether a local power exists at all and “[i]f the power cannot be found, the inquiry is at an end.”¹⁵ Therefore, to have the power to act in a certain area, local governments must have express enabling legislation or authority that is necessarily implied from enabling legislation. Although state law grants localities zoning power, no statute expressly empowers a locality to adopt a ban on oil and gas exploration or drilling.¹⁶

The Commonwealth and localities may have concurrent jurisdiction over the same subject matter, and the fact that the Commonwealth, in the exercise of its police power, has made regulations with respect to a subject does not necessarily prohibit a county from legislating on the same subject.¹⁷ Nonetheless, irrespective of any

general authority to act in an area, a local government may not exercise its police power either by adopting a local law inconsistent with constitutional or general law¹⁸ or when the legislature has restricted such an exercise by preempting the area of regulation.¹⁹ A local ordinance is inconsistent with state law if state law preempts local regulation in the area, either by expressly prohibiting local regulation or by enacting state regulations so comprehensive that the Commonwealth may be considered to occupy the entire field.²⁰

Pertinent to your inquiry, the Virginia Gas and Oil Act (the “Act”) provides a comprehensive structure for the regulation of gas and oil development and production by DMME, its Division of Gas and Oil and the Virginia Gas and Oil Board (the “Board”). Section 45.1-361.29 requires any person, before beginning any ground disturbing activity for any oil or gas well, to obtain a permit from the Director of DMME. Additionally, pursuant to the Act, DMME has promulgated extensive regulatory provisions that control such activities with significant specificity.²¹

Despite this overarching statutory and regulatory scheme, the Act does not preempt entirely the regulation of these activities. Section 45.1-361.5 includes an express carve-out from preemption:

No county, city, town or other political subdivision of the Commonwealth 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. However, no provision of this chapter shall be construed to limit or supersede the jurisdiction and requirements of other state agencies, local land-use ordinances, regulations of general purpose, or §§ 58.1-3712, 58.1-3712.1, 58.1-3713, 58.1-3713.1, 58.1-3713.2 and 58.1-3713.3.

Although the first sentence of § 45.1-361.5 provides a general exemption for holders of state gas or oil well permits from local license, permit, fee and bond requirements, the second sentence sets forth several exceptions to that exemption. Because statutes must be read as a whole, with every provision given effect, if possible,²² the first sentence of § 45.1-361.5 must be read as modified by the second sentence of that section.²³ Among the limited exceptions, the General Assembly has included “local land-use ordinances.” Zoning laws are land-use ordinances.²⁴

Nevertheless, statutes are not to be read in isolation²⁵ and the *Code of Virginia* constitutes one body of law.²⁶ Pursuant to the Commonwealth Energy Policy,²⁷ the General Assembly has provided that “[a]ll agencies and political subdivisions of the Commonwealth, in taking discretionary action with regard to energy issues, shall recognize the elements of the Commonwealth Energy Policy and where appropriate, shall act in a manner consistent therewith.”²⁸ One of the goals set forth in the Commonwealth Energy Policy is “[to] [e]nsure the availability of affordable natural gas throughout the Commonwealth by expanding Virginia’s natural gas distribution and transmission pipeline infrastructure; developing coalbed methane gas resources and methane hydrate resources; encouraging the productive use of landfill gas; and siting one or more liquefied natural gas terminals.”²⁹ The development of Virginia’s

natural resources is clearly a matter of priority under the Commonwealth Energy Policy, as well as under the Act.³⁰

The overriding goal of statutory interpretation is to discern and give effect to legislative intent.³¹ The comprehensiveness of the Gas and Oil Act supports the conclusion that the carve-out to total preemption set out in § 45.1-361.5 does not extend to a locality's ability to ban completely the operation of the gas and oil industry within its borders. Rather, the carve-out is intended to allow local regulation of location and siting issues only. Reading § 45.1-361.5 so broadly so as to allow a locality to adopt a complete ban on the exploration and drilling of oil and natural gas would permit a few jurisdictions to thwart the stated policy goals of the Commonwealth, as expressed in the Commonwealth Energy Policy.³² Such a conclusion further would conflict with the Gas and Oil Act's statewide requirements for the spacing of gas and oil wells,³³ obviate the numerous statutory and regulatory provisions established for the uniform regulation of permitting and pooling of units,³⁴ and trigger significant constitutional questions involving property rights, equal protection, and due process.³⁵ It is fundamental that local ordinances must conform to, and not be in conflict with, the public policy of the Commonwealth as set out in its statutes.³⁶

It is well-settled that if any doubt remains as to the existence of such power in view of all the facts, that doubt must be resolved against the locality.³⁷ Moreover, "a local government may not 'forbid what the legislature has expressly licensed, authorized, or required.'"³⁸ The "fundamental rule is that local ordinances must conform to and 'not be inconsistent with' the public policy of the State as set forth in its statutes."³⁹ Applying these principles, this Office previously has concluded that, if an activity is expressly authorized by and is operated in compliance with state law, a Virginia locality cannot impose a strict ban on that otherwise legal activity.⁴⁰ I note that the validity of an ordinance is to be tested not only by what has been done under it, but by what may, by its authority, be done.⁴¹ An outright ban, whether express or by operation of improper application of a facially valid zoning ordinance, exceeds a locality's delegation of authority. I therefore conclude that, while an affected locality may regulate the location and siting of oil and gas drilling practices, such authority may not be used to prohibit completely such activity from occurring within its borders.

With regards to the specific situation you present, I first note zoning ordinances are generally either one of two kinds: those that enumerate allowed usage or those that list prohibited uses.⁴² You relate that ordinances establishing the zoning districts at issue in Washington County list specific approved activities for the areas zoned A-1 and A-2.⁴³ Among other permitted uses, the A-1 area is zoned to allow "[u]tilities and public services as follows ... [u]nderground pipes and lines, manholes, pumping and booster stations, meters and related appurtenances necessary for the transmission and distribution of potable water, wastewater collection, and *natural gas transmission and distribution*."⁴⁴

You indicate, however, that the gas operator's application has been denied in effect for *any location* within the county.⁴⁵ To the extent this is the case, the action amounts to an exercise of veto power by local regulation of gas well operation in its entirety, a

power a locality does not have, as discussed above.⁴⁶ Rather, as anticipated by § 45.1-361.5, a locality's delegated power is limited to the ability to adopt *reasonable siting* regulations.⁴⁷ The action by the Washington County Board of Supervisors on February 28, 2012, signaling that it would not amend its county zoning ordinance to allow for natural gas extraction until after the EPA publishes its study on hydraulic fracturing, makes clear the local governing body's present intention to maintain a countywide ban on this activity. A moratorium on an activity imposed by the local governing body pending further study is of the same legal effect as a ban and cannot be a valid exercise of delegated police power when the local governing body has neither express authority from a statute, nor implied authority therefrom, for such action.⁴⁸

CONCLUSION

Accordingly, it is my opinion that, although 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 and the Commonwealth Energy Policy, a local governing body cannot ban altogether the exploration for, and the drilling of, oil and natural gas within the locality's boundaries.

¹ The Virginia Gas and Oil Act, Chapter 22.1 of Title 45.1, VA. CODE ANN. §§ 45.1-361.1 through 45.1-361.44 (2002 & Supp. 2012).

² The Commonwealth Energy Policy, Chapter 1 of Title 67, VA. CODE ANN. §§ 67-100 through 67-103 (2012).

³ See Va. Gas and Oil Board transcripts for docket item VGOB-10-0420-2700, heard on April 20, 2010, docket item VGOB-11-0315-2918 heard on March 15, 2011, and docket items VGOB-11-0315-2920 through -2956, heard on June 14, 2011.

⁴ Section 45.1-361.21(Supp. 2012) gives the Board a nondiscretionary mandate to pool, or unitize, all interests in a drilling unit when the criteria of that statute are met.

⁵ See Va. Gas and Oil Board transcript for docket item VGOB 10-0615-2713, heard on August 16, 2010.

⁶ Va. Gas and Oil Board transcripts for docket item VGOB-10-0420-2700 heard on April 20, 2010, and docket item VGOB-11-0315-2918 heard on March 15, 2011.

⁷ See Va. Oil and Gas Conservation Commission Provisional Drilling Unit Order (Sept. 1, 1983) and Va. Oil and Gas Conservation Board Order (Aug. 10, 1988).

⁸ WASHINGTON COUNTY, VA., CODE OF ORDINANCES § 66-297, "Permitted uses and accessory uses and structures," available at <http://library.municode.com/index.aspx?clientId=11680>.

⁹ A special use is one not otherwise allowed in a particular zoning district except by a special use permit granted under the provisions of Chapter 22 of Title 15.2. See VA. CODE ANN. § 15.2-2201 (2012) and Fairfax County v. Southland Corp., 224 Va. 514, 521-22, 297 S.E.2d 718, 721-22 (1982). Special use permits are common features of local zoning ordinances and expressly provided for at § 15.2-2286 (2012).

¹⁰ Washington County Board of Supervisors, Regular Meeting Minutes 5 (Feb. 28, 2012), available at http://www.washcovva.com/government/board-of-supervisors/meeting-agendas-a-minutes/cat_view/12-meeting-agendas-a-minutes/14-meeting-minutes/178-2012. At the request of Congress, the EPA is studying the impacts on drinking water and ground water of hydraulic fracturing, a process used in the extraction of natural gas that involves the injection of a specially engineered fluid (e.g., water, chemical additives and sand or other proppants) at high pressure down a well to fracture a coalbed, shale or tight sands formation and stimulate the flow of natural gas to the wellbore. The EPA released a progress report on December 21,

2012, which indicates that conclusions will be available in a draft report of results, expected to be released in 2014 for public comment and peer review. *See* U.S. ENVTL. PROT. AGENCY, STUDY OF THE POTENTIAL IMPACTS OF HYDRAULIC FRACTURING ON DRINKING WATER RESOURCES: PROGRESS REPORT (2012), available at <http://www.epa.gov/hfstudy/pdfs/hf-report20121214.pdf>.

¹¹ Zoning is a legislative power vested in the Commonwealth and delegated by it, in turn, to various local governments for the enactment of local zoning ordinances. *Byrum v. Bd. of Supvrs.*, 217 Va. 37, 39, 225 S.E.2d 369, 371 (1976) (decided under prior law). Virginia's zoning enabling statutes, which authorize the adoption of local land-use ordinances, are generally set forth in Article 7, Chapter 22 of Title 15.2 of the *Code of Virginia*. *See* VA. CODE ANN. §§ 15.2-2280 through 15.2-2316 (2012).

¹² VA. CODE ANN. § 1-248 (2011).

¹³ *Bd. of Supvrs. v. Countryside Investment Co.*, 258 Va. 497, 503, 522 S.E.2d 610, 613 (1999) (quoting *Chesapeake v. Gardner Enters.*, 253 Va. 243, 246, 482 S.E.2d 812, 814 (1997)).

¹⁴ *Cnty. Bd. v. Brown*, 229 Va. 341, 344, 329 S.E.2d 468, 470 (1985); *accord Bd. of Supvrs. v. Horne*, 216 Va. 113, 117, 215 S.E.2d 453, 455 (1975); *Gordon v. Bd. of Supvrs.*, 207 Va. 827, 832, 153 S.E.2d 270, 274 (1967).

¹⁵ *Commonwealth v. Cnty. Bd.*, 217 Va. 558, 575, 232 S.E.2d 30, 41 (1977). *See also* 2005 Op. Va. Att'y Gen. 54, 55.

¹⁶ To the contrary, I note that in permitting local zoning regulations, the General Assembly included, in addition to health and safety, "the need for mineral resources and the needs of agriculture, industry and business be recognized in future growth" among the factors a locality is to consider in promoting the welfare of its citizens. Section 15.2-2200 (2012).

¹⁷ *See* 1983-84 Op. Va. Att'y Gen. 86, 87.

¹⁸ *See* § 1-248. *See also* *Allen v. City of Norfolk*, 195 Va. 844, 848-849, 80 S.E.2d 605, 607 (1954) (finding that a city ordinance added a material provision not found in the authorizing statute, and thus was invalid).

¹⁹ *See* *City of Lynchburg v. Dominion Theatres Inc.*, 175 Va. 35, 42, 7 S.E.2d 157, 160 (1940); *New York State Club Ass'n v. City of New York*, 69 N.Y.2d 211, 217, 505 N.E.2d 915, 917 (1987), *aff'd*, 487 U.S. 1 (1988). *See also* 2002 Op. Va. Att'y Gen. 67, 68-69 (finding that governance of biosolids activities in Virginia resides in the Department of Health, and a local ordinance regulating application and storage of biosolids is preempted by the comprehensive state program); 1983-84 Op. Va. Att'y Gen. 86, 87 (noting that the Commonwealth and a county "may have concurrent jurisdiction over the same subject matter, and the fact that the State, in the exercise of its police power, has made regulations with respect to a subject does not prohibit a county from legislating on the same subject, unless the State regulations are so comprehensive that the State may be considered to occupy the 'entire field' of such regulation"). The legislative intent to preempt need not be expressly stated: "It is enough that the legislature has impliedly evinced its desire to do so and that desire may be inferred from a declaration of State policy by the legislature or from the legislative enactment of a comprehensive and detailed regulatory scheme in a particular area." *New York State Club Ass'n*, 69 N.Y.2d at 217, 505 N.E.2d at 917.

²⁰ Unless the provisions of a county ordinance and state statutes are contradictory in the sense that they cannot coexist, where, for example, the ordinance purports to authorize what the statutes prohibit, or prohibit what the statutes expressly authorize, *King v. County of Arlington*, 195 Va. 1084, 1090-91, 81 S.E.2d 587, 591 (1954) (superseded), they are not deemed inconsistent because of mere lack of uniformity in detail. *Id.* *See generally* 2005 Op. Va. Att'y Gen. 54; 1998 Op. Va. Att'y Gen. 12; 1998 Op. Va. Att'y Gen. 13; 1980-81 Op. Va. Att'y Gen. 418.

²¹ *See* 4 VA. ADMIN. CODE §§ 25-160-10 to 25-160-200; 4 VA. ADMIN. CODE §§ 25-150-10 to 25-150-750.

²² *Gallagher v. Commonwealth*, 205 Va. 666, 669, 139 S.E.2d 37, 39 (1964); *City of Richmond v. Bd. of Supvrs.*, 199 Va. 679, 685, 101 S.E.2d, 641, 646 (1958).

²³ *See* 1993 Op. Va. Att'y Gen. 173, 174-75 (discussing interpretation of § 45.1-361.5).

²⁴ *See* § 15.2-2201 (defining "zoning" to include the regulation of "building and structure designs, building and structure placement and uses to which land, buildings and structures within such designated areas and

districts may be put.”). *See also* 1993 Op. Va. Att’y Gen 173. This 1993 opinion addresses the preemptive effect of the Act on local zoning laws, but deals specifically with local special use permit requirements. It does not opine expressly on a locality’s ability to prohibit altogether natural gas exploration and production and does not consider the Commonwealth Energy Policy, which was enacted in 2006.

²⁵ *See, e.g.*, 2010 Op. Va. Att’y Gen. 173, 175-76 (citing *Prillaman v. Commonwealth*, 199 Va. 401, 405, 100 S.E.2d 4, 7 (1957) (“statutes are not to be considered as isolated fragments of law, but as a whole, or as parts of . . . a single and complete statutory arrangement”)).

²⁶ *See Branch v. Commonwealth*, 14 Va. App. 836, 839, 419 S.E.2d 422, 425 (1992).

²⁷ VA. CODE ANN. §§ 67-100 through 67-1305 (2012).

²⁸ *See* § 67-102(C). It should be noted, however, that Subsection D of § 67-102 states that the Policy is intended as guidance and shall not be construed to amend, repeal or override any contrary provision of applicable law. Moreover, § 67-102(D) provides that “[t]he failure or refusal of any person to recognize the elements of the Commonwealth Energy Policy, to act in a manner consistent with the Commonwealth Energy Policy, or to take any other action whatsoever, shall not create any right, action, or cause of action or provide standing for any person to challenge the action of the Commonwealth or any of its agencies or political subdivisions.”

²⁹ *See* § 67-102(A)(5) (emphasis added).

³⁰ *See, inter alia*, § 45.1-361.3, “[t]he provisions of this chapter shall be liberally construed so as to effectuate the following purposes . . . [t]o foster, encourage and promote the safe and efficient exploration for and development, production, utilization and conservation of the Commonwealth’s gas and oil resources . . . [t]o recognize and protect the rights of persons owning interests in gas or oil resources contained within a pool. . . .”

³¹ *See Turner v. Commonwealth*, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983) (citing *Tiller v. Commonwealth*, 193 Va. 418, 69 S.E.2d 441 (1952)); *Vollin v. Arlington Cnty. Electoral Bd.*, 216 Va. 674, 678-79, 222 S.E.2d 793, 797 (1976); 2002 Op. Va. Att’y Gen. 67, 68; 1990 Op. Va. Att’y Gen. 155, and opinions cited therein.

³² *See* §§ 67-100 through 67-103.

³³ *See* §§ 45.1-361.17, 45.1-361.20 (2002).

³⁴ *See* §§ 45.1-361.1 through 45.1-361.44. *See also* 4 VA. ADMIN. CODE §§ 25-160-10, *et seq.*, 4 VA. ADMIN. CODE §§ 25-150-10, *et seq.*

³⁵ Regardless of how legitimate the purpose is underlying the exercise of delegated police power, the power may not be used to regulate property interests unless the means employed are reasonably suited to achieve the stated goal. *City of Manassas v. Rosson*, 224 Va. 12, 19-20, 294 S.E.2d 799, 803 (1982), *appeal dismissed*, 459 U.S. 1166 (1983) (quoting *Alford v. City of Newport News*, 220 Va. 584, 586, 260 S.E.2d 241, 243 (1979)). *See also Village of Euclid v. Amber Realty Co.*, 272 U.S. 365, 386-388 (1926). The mere power to enact an ordinance does not carry with it the right arbitrarily or capriciously to deprive a person of the legitimate use of his property. *Alford*, 220 Va. at 586, 260 S.E.2d at 243 (citing *Bd. of Supvrs. v. Carper*, 200 Va. 653, 662, 107 S.E.2d 390, 396-397 (1959)). *See also Euclid*, 272 U.S. at 395. Further, the classifications an ordinance contains, and the distinctions it draws, cannot be arbitrary or capricious, either as written or as applied. *Southland Corp.*, 224 Va. at 522, 297 S.E.2d at 722. *See also Kiskey v. City of Falls Church*, 212 Va. 693, 697, 187 S.E.2d 168, 171-72 (1972); *Rosson*, 224 Va. at 17-18, 294 S.E.2d at 802. *See also, inter alia*, *Bd. of Supvrs. v. Rowe*, 216 Va. 128, 134-143, 216 S.E.2d 199, 205-211 (1975); *Horne*, 216 Va. at 120, 215 S.E.2d at 458 (decided under prior law); *Rosson*, 224 Va. at 18, 294 S.E.2d at 802 (citing *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974)); *Carper*, 200 Va. at 660, 107 S.E.2d at 395 (“The exercise of the police power is subject to the constitutional guarantee that no property shall be taken without due process of law and where the police power conflicts with the Constitution the latter is supreme, but courts will not restrain the exercise of such power except when the conflict is clear”).

³⁶ Section 1-248. *See also* 2002 Op. Va. Att’y Gen. 67, 68; *King*, 195 Va. at 1090, 81 S.E.2d at 591 (citing *MCQUILLIN ON MUNICIPAL CORPORATIONS*, 3d ed., vol. 6, § 23.07, at 392 *ff*; 37 *AM. JUR. MUNICIPAL CORPORATIONS*, § 165 at 787 *ff*).

³⁷ *City of Richmond*, 199 Va. at 684, 101 S.E.2d at 645 (citing *Donable’s Administrator v. Harrisonburg*, 104 Va. 533, 535, 52 S.E. 174, 175 (1905)).

³⁸ *Blanton v. Amelia Cnty.*, 261 Va. 55, 64, 540 S.E.2d 869, 874 (2001) (quoting *King*, 195 Va. at 1090-91, 81 S.E.2d at 591).

³⁹ *Klingbeil Mgmt. Group Co. v. Vito*, 233 Va. 445, 449, 357 S.E.2d 200, 202 (1987) (citing *King*, 195 Va. at 1090, 81 S.E.2d at 591).

⁴⁰ See, e.g., 1998 Op. Va. Att’y Gen. 12, 12-13 (localities lack express or implied authority to enact moratorium on intensive corporate and contract swine production); 1998 Op. Va. Att’y Gen. 13, 14 (county has no authority to adopt ordinance limiting circumstances in which agricultural operations may be deemed to constitute a nuisance or trespass). See also 2008 Op. Va. Att’y Gen. 90 and cases cited therein (a college, through its board of visitors, has express and implied power to act as necessary to effectuate its powers expressly granted, but that authority does not supersede statutes concerning specific topics).

⁴¹ *Assaid v. City of Roanoke*, 179 Va. 47, 51, 18 S.E.2d 287 (1942), 288; *Rowe*, 216 Va. at 132, 216 S.E.2d at 205.

⁴² See Article 7, Chapter 22 of Title 15.2, §§ 15.2-2280 through 15.2-2316 (2012).

⁴³ WASHINGTON COUNTY, VA., CODE OF ORDINANCES § 66-297.

⁴⁴ *Id.* at § 66-297(a)(11) (emphasis added).

⁴⁵ The letter you attached to your opinion request asserts that A-1 and A-2 are the least restrictive zoning categories in the county such that, if drilling of gas wells is to be permitted anywhere in the county, it would certainly be in areas with these zoning designations.

⁴⁶ This Office historically has declined to render opinions interpreting or applying local ordinances. See, e.g., 1993 Op. Va. Att’y Gen 173, 176 and opinions cited in note 1 therein. I therefore decline to opine whether the application of the ordinance in this instance was reasonable. I nevertheless offer the following general guidance in determining reasonableness. One factor would be how the county treated others similarly situated, like the other gas wells the instant gas operator alleges operate in the county. If disparate treatment can be shown, then the county’s action may be deemed arbitrary and capricious and thus unreasonable. See *Nat’l Linen Service Corp. v. Norfolk*, 196 Va. 277, 281, 83 S.E.2d 401, 404 (1954) (noting that ordinances which in their operation necessarily restrain competition and tend to create monopolies or confer exclusive privileges are generally condemned). Another consideration is the fact that the operator has signed voluntary lease agreements with the owners of over ninety-seven percent of the one hundred sixty acres included in their pooled unit. See Va. Gas and Oil Board transcript for docket item VGOB 11-0614-2956, heard on June 14, 2011. That fact would certainly lend support for the granting of any special use permit determined to be necessary for the establishment of this unit, in the event the ordinance itself were found not to allow the gas well as an appropriate accessory structure of an approved land use.

⁴⁷ The restriction of the local land use regulatory power to siting considerations is further supported by the discussion analogizing the power to enact zoning ordinances to the power to abate a nuisance in *Euclid*, 272 U.S. at 388: “[T]he question whether the power exists to forbid...a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the ...thing..., but by considering it in connection with the circumstances and the locality. A nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard.” (Internal citation omitted.)

⁴⁸ See *Horne*, 216 Va. at 122, 215 S.E.2d at 459 (county board’s enactment of a moratorium on the filing of site plans and preliminary subdivision plats held invalid because “there was no express or implied authority for the enactment”); 1998 Op. Va. Att’y Gen. 12, 13 (county may not enact a moratorium on intensive corporate and contract swine production while the matter is studied because it lacks express and implied authority to do so). I further note, as the Virginia Supreme Court has observed, that

[T]he General Assembly of Virginia has undertaken to achieve . . . a delicate balance between the individual property rights of its citizens and the health, safety and general welfare of the public as promoted by reasonable restrictions on those property rights. We believe that it is peculiarly a function of the General

Assembly to determine, subject to constitutional restraints, what revisions in the statutes may be required to maintain the appropriate balance between these important but frequently conflicting interests.

Horne, 216 Va. at 120, 215 S.E.2d at 458. Thus, as expressed in this opinion, a locality may make such determinations only as it is permitted to do so by the General Assembly.

OP. NO. 12-004

MOTOR VEHICLES: ABANDONED, IMMOBILIZED, UNATTENDED AND TRESPASSING VEHICLES; PARKING

The City of Charlottesville may lawfully erect signs to regulate parking on city-owned property, including signs that state “Reserved Parking” for “Low Emitting/Fuel Efficient Vehicles Only.”

THE HONORABLE ROBERT B. BELL
MEMBER, HOUSE OF DELEGATES
JUNE 14, 2013

ISSUE PRESENTED

You ask whether the City of Charlottesville may lawfully erect signs on city-owned property stating “Reserved Parking” for “Low Emitting/Fuel Efficient Vehicles Only.”

RESPONSE

It is my opinion that the City of Charlottesville may lawfully erect signs to regulate parking on city-owned property, including signs that state “Reserved Parking” for “Low Emitting/Fuel Efficient Vehicles Only.”

BACKGROUND

You state that your question arises from signs posted in a city-owned parking lot for a municipal park, the Smith Aquatic & Fitness Center. Although the signs state “Reserved Parking” for “Low Emitting/Fuel Efficient Vehicles Only,” there is no indication that a violator would be subject to a fine or other enforcement. You also note that the constituent who brought this matter to your attention requested information from the City of Charlottesville. According to your report, the constituent learned that the signs were erected in part to achieve a Leadership in Energy and Environmental Design (also known as “LEED”) Platinum Certification, a designation provided to buildings employing sustainable and energy efficient measures. Your constituent further related that the City of Charlottesville informed him that the signs represented a “voluntary restriction.”

APPLICABLE LAW AND DISCUSSION

Localities in the Commonwealth have only those powers granted to them by the state, those powers that are necessarily implied from those granted to them, and those that are essential and indispensable.¹ The *Code of Virginia* provides that the “governing body of any county, city or town may by ordinance provide for the regulation of parking . . . within its limits.”² Moreover, through its charter, the General Assembly specifically granted the City of Charlottesville the authority

[t]o pass all by-laws, rules and ordinances, not repugnant to the Constitution and laws of the State, which they deem necessary for the good order and government of the city, the management of its property, the conduct of its affairs, the peace, comfort, convenience, order, morals, health, and protection of its citizens . . .^[3]

and “to make such other and additional ordinances as it may deem necessary for the general welfare of said city[.]”⁴ The City of Charlottesville, pursuant to those powers granted to it, adopted an ordinance prohibiting citizens from parking in contravention to the signs the city has posted.⁵ The City also enacted an ordinance deeming such a parking violation to be a traffic infraction and subject to a monetary penalty.⁶

Although I do not opine on the policy embodied by the signs themselves, I conclude that the erection of signs to ostensibly reserve parking spaces for a specific category of vehicles appears to be within the enabling authority granted by the General Assembly to the City of Charlottesville. The action has the dual result of regulating parking and managing city-owned property — each a legitimate exercise of municipal power. These conclusions are not affected by the manner or rate of enforcement or the suggested motivation of the City to earn a form of environmental certification.

CONCLUSION

Accordingly, it is my opinion that the City of Charlottesville may lawfully erect signs on city-owned property that state “Reserved Parking” for “Low Emitting/Fuel Efficient Vehicles Only.”

¹ See, e.g., *Schefer v. City Council*, 279 Va. 588, 593, 691 S.E.2d 778, 780 (2010) (and cases cited therein).

² VA. CODE ANN. § 46.2-1220 (Supp. 2012).

³ CHARTER FOR THE CITY OF CHARLOTTESVILLE, VA., § 14(20).

⁴ *Id.*, § 14(16).

⁵ CITY OF CHARLOTTESVILLE, VA., Code § 15-141 (2010).

⁶ *Id.*, § 15-148.

OP. NO. 12-067

MOTOR VEHICLES: GENERAL PROVISIONS

Under § 46.2-100, which controls the legal classification of all vehicles, the PS50 “ScootCoupe” would be classified as a “motor vehicle” and the PS150 “ScootCoupe” would be classified as a “motorcycle.”

COLONEL W. S. FLAHERTY, SUPERINTENDENT
DEPARTMENT OF STATE POLICE
MARCH 8, 2013

ISSUE PRESENTED

You inquire regarding the legal classification of a “ScootCoupe.” Specifically, you ask how two existing “ScootCoupe” models, the PS50 and the PS150, would be classified under the current *Code of Virginia*.

RESPONSE

It is my opinion that under § 46.2-100, which controls the legal classification of all vehicles, the PS50 would be classified as a “motor vehicle” and the PS150 would be classified as a “motorcycle.”

BACKGROUND

The “ScootCoupe” is a three-wheeled vehicle that is powered by a gasoline motor. There are two models of the ScootCoupe. The PS50, the smaller of the two, is powered by a 49.2cc engine and reaches a top speed of 30 miles per hour. The PS150 is powered by a 147.5cc engine and reaches a top speed of 55 miles per hour. Both vehicles sit close to the ground; they have a maximum height of 50 inches and the seat is less than 24 inches from the ground. Both models also have a Vehicle Identification Number (“VIN”) that has been issued and attached by the manufacturer. The manufacturer states on its website that “most states” classify the PS150 as a “motorcycle” and the PS50 as a “moped/scooter.”¹ In addition, the manufacturer claims that the ScootCoupe is “street legal in all 50 states.”²

APPLICABLE LAW AND DISCUSSION

Virginia law provides that a “vehicle” includes “every device in, on or by which any person or property is or may be transported or drawn on a highway, except devices moved by human power or used exclusively on stationary rails or tracks.”³ As their description demonstrates, both ScootCoupes are “vehicles” because they are capable of transporting a person on a highway and neither is moved by “human power” (they are gasoline powered) nor used exclusively on stationary rails or tracks. Additionally, a “motor vehicle” is defined as “every vehicle as defined in this section that is self-propelled or designed for self-propulsion except as otherwise provided in [Title 46.2].”⁴ The PS50 and the PS150 are self-propelled vehicles; thus, unless the ScootCoupes can satisfy the definitional requirements of any other category set forth in Title 46.2, they remain under the general category of “motor vehicle.”

Most relevant to your inquiry are the classifications for “motorized skateboard or scooter,” “moped,” “motorcycle,” “motor-driven cycle,” and “off-road motorcycle.”⁵ I will address each seriatim, applying the elements characterizing each category, as set forth in the plain language of the governing statute, to the design of the ScootCoupes.

Section 46.2-100 defines “motorized skateboard or scooter” as

every vehicle, regardless of the number of its wheels in contact with the ground, that (i) has no seat, but is designed to be stood upon by the operator, (ii) has no manufacturer-issued vehicle identification number, and (iii) is powered by an electric motor having an input of no more than 1,000 watts or a gasoline engine that displaces less than 36 cubic centimeters.

Because ScootCoupes are designed with seats, a VIN, and a gasoline engine of greater than 36 cubic centimeters displacement, they clearly fall outside this legal category.

A “moped” is defined as “every vehicle that travels on not more than three wheels in contact with the ground that has (i) a seat that is no less than 24 inches in height,

measured from the middle of the seat perpendicular to the ground and (ii) a gasoline, electric, or hybrid motor that displaces less than 50 cubic centimeters.”⁶ Both ScootCoupe models, however, sit close to the ground, having a seat height less than 24 inches. I therefore conclude that neither the PS50 nor the PS150 can be classified as a “moped.”

Section 46.2-100 defines a “motorcycle” as “every motor vehicle designed to travel on not more than three wheels in contact with the ground and is capable of traveling at speeds in excess of 35 miles per hour.” As noted above, both the PS50 and the PS150 constitute “motor vehicles,” and each has only three wheels. Because its maximum speed is 55 miles per hour, the PS150 qualifies as a “motorcycle” under this definition. The PS50, however, will not fall into this legal definition because its maximum speed is only 30 miles per hour.

Virginia law further classifies motorcycles under § 46.2-100. These subcategories include a “motor-driven cycle,” which is a “motorcycle that has a gasoline engine that (i) displaces less than 150 cubic centimeters; (ii) has a seat less than 24 inches in height, measured from the middle of the seat perpendicular to the ground; and (iii) has no manufacturer-issued vehicle identification number” and “off-road motorcycles,” which are defined as “every motorcycle designed exclusively for off-road use by an individual rider with not more than two wheels in contact with the ground.” As discussed above, the PS50 is not a motorcycle, so it does not qualify for either classification. Although the PS150 is a motorcycle, it has a VIN, rides on three wheels, and is designed for on-road use, so it also is excluded from these legal definitions.

In summary, from a legal or statutory standpoint both the PS50 and the PS150 are properly classified in the broader categories of “vehicle” and “motor vehicle.” The PS150 may be further classified as a “motorcycle.” The PS50 may not be further classified. As a result, the PS50 should be classified as a “motor vehicle” and the PS150 should be classified as a “motorcycle” for purposes of Virginia law,⁷ including any issues concerning criminal and/or traffic enforcement laws affecting motor vehicles and/or motorcycles.

CONCLUSION

Accordingly, it is my opinion that under § 46.2-100, which controls the legal classification of all vehicles, the PS50 would be classified as a “motor vehicle” and the PS150 would be classified as a “motorcycle.”

¹ See <http://www.scootcoupe.com/faqs.html> (last visited Feb. 11, 2013).

² *Id.*

³ VA. CODE ANN. § 46.2-100 (Supp. 2012).

⁴ *Id.*

⁵ Virginia law establishes further classifications of motor vehicles. Examples include “all-terrain vehicles,” which are “characterized by large, low-pressure tires, [and] a seat designed to be straddled by the operator . . . ;” “utility vehicles,” designed for off-road use, powered by an engine of no more than 25 horsepower, and used for general maintenance, security, agricultural, or horticultural purposes;” a “farm tractor” and a

“farm utility vehicle,” both of which are designated “for use exclusively on a farm, agricultural, or horticultural service.” Section 46.2-100.

The section also includes definitions for alternative forms of transportation: “golf cart,” “designed to transport persons playing golf and their equipment on a golf course; “low speed vehicle,” “any four-wheeled electrically-powered vehicle, . . . whose maximum speed is greater than 20 miles per hour but not greater than 25 miles per hour;” “specially constructed vehicle,” which is a device “not originally constructed under a distinctive name, make, model, or type;” “toy vehicle,” which is “any motorized or propellant-driven device that has no manufacturer-issued vehicle identification number. . .;” “electric personal assistive mobility device,” defined as “a self-balancing two-nontandem-wheeled device” or what is commonly known as a “Segway;” and “bicycle,” a device that is propelled “solely by human power.” *Id.* It is clear, though, that neither the PS50 nor the PS150 would fit into any of the aforementioned categories.

⁶ Section 46.2-100.

⁷ Therefore, both the PS50 and the PS150 would be subject to all laws regarding driver licensing, § 46.2-300 *et seq.*; motor vehicle titling and registration, § 46.2-600; insurance, § 46.2-706; and inspections, § 46.2-1157, to which motor vehicles and motorcycles are subject.

OP. NO. 13-059

MOTOR VEHICLES: MOTOR VEHICLE AND EQUIPMENT SAFETY

MOTOR VEHICLES: REGULATION OF TRAFFIC

On and after July 1, 2013, if a driver operates a vehicle on a highway recklessly or at a speed in a manner so as to endanger the life, limb, or property of any person, while using a hand held personal communication device, that driver can be charged and convicted of reckless driving regardless of whether there are grounds to support a violation of § 46.2-1078.1.

THE HONORABLE SCOTT A. SUROVELL
MEMBER, HOUSE OF DELEGATES
JUNE 28, 2013

ISSUE PRESENTED

With passage of HB 1907, effective July 1, 2013, texting, emailing or reading an email or text message while driving a moving vehicle will be a primary offense.¹ You seek to clarify whether someone who was driving while using a cell phone in a manner not made illegal under this provision could nevertheless be convicted of reckless driving pursuant to § 46.2-852 for driving “a vehicle on any highway recklessly or at a speed or in a manner so as to endanger the life, limb, or property of any person[.]”

RESPONSE

It is my opinion that, on and after July 1, 2013, if a driver operates a vehicle on a highway recklessly or at a speed in a manner so as to endanger the life, limb, or property of any person, while using a hand held personal communication device, that driver can be charged and convicted of reckless driving regardless of whether there are grounds to support a violation of § 46.2-1078.1. It is my further opinion, however, that Virginia case law makes clear that the mere happening of an accident or use of a

hand held personal communication device likely would be insufficient, standing alone, to support a conviction of reckless driving.

APPLICABLE LAW AND DISCUSSION

It is well established in Virginia that “[t]he essence of the offense of reckless driving lies not in the act of operating a vehicle, but in the manner and circumstances of its operation [and] [t]he mere happening of an accident does not give rise to an inference of reckless driving.”² To prove reckless driving under § 46.2-852, the Commonwealth must, “[i]rrespective of the maximum speeds permitted by law,” establish that the defendant drove “a vehicle on any highway recklessly or at a speed or in a manner so as to endanger the life, limb, or property of any person”³

For example, and by way of illustration, the Court of Appeals made clear in the context of driving while intoxicated that simply being intoxicated was not a sufficient fact, standing alone, to support a conviction for reckless driving:

Code § 46.2-852 provides, in pertinent part, that “any person who drives a vehicle on any highway recklessly or at a speed in a manner so as to endanger the life, limb, or property of any person shall be guilty of reckless driving.” “The word ‘recklessly’ as used in the statute imparts a disregard by the driver of a motor vehicle for the consequences of his act and an indifference to the safety of life, limb or property.” “The essence of the offense . . . lies not in the act of operating a vehicle, but in the manner and circumstances of its operation.” Thus, “the mere happening of an accident does not give rise to an inference of reckless driving.” To convict, the Commonwealth must “prove every essential element of the offense beyond a reasonable doubt, with evidence which excludes every reasonable hypothesis of innocence and . . . consistent only with . . . guilt”

In *Hall*, we considered the import of intoxication evidence in a prosecution for reckless driving. Hall was discovered by police “passed out” behind the wheel of an automobile stopped in a heavily traveled roadway, with “ignition switch and headlights . . . on and . . . indicator lights . . . illuminated.” Hall smelled of alcohol, was confused, unsteady, slurred in speech and admitted “driving” the vehicle. However, the record was silent with respect to the “manner and circumstances” of Hall’s driving. Guided by *Powers*, we concluded that “such circumstances . . . do not give rise to an inference that [defendant] drove . . . in a reckless manner.” In reversing the conviction, the panel noted ““that evidence of intoxication is a factor that might bear upon proof of dangerousness or reckless driving in a given case,”” but ““does not, of itself, prove reckless driving.” ““One may be both drunk and reckless . . . [or] reckless though not drunk . . . [, or] under the influence of intoxicants and yet drive carefully.””

Here, assuming, without deciding, that the evidence proved defendant had been driving the car while intoxicated at the time of the collision, it establishes little else. The record does not disclose the time of the accident, the manner in which defendant drove the car, his blood alcohol level, the road conditions, weather, traffic controls, or other circumstances probative of

a Code § 46.2-852 violation. Reckless driving is not a status offense, and defendant cannot be convicted upon “speculation and conjecture as to what caused [him] to lose control of the car.” Thus, under the instant facts, we find the evidence insufficient to support a conviction for reckless driving.^[4]

The Court noted that its conclusion was consistent with an earlier opinion in which the defendant had fallen asleep: “In *Kennedy*, the evidence clearly supported the inference that the accused ‘fell asleep at the wheel,’ resulting in a collision. Manifestly, driving a vehicle while sleeping evinces the disregard for the life, limb, and property contemplated by Code § 46.2-852.”⁵

The use of hypothetical scenarios also may illustrate how the particular facts and circumstances surrounding a driver’s cell phone use could influence which charges a driver may face upon apprehension by a law enforcement officer. Suppose that on July 1, 2013, a driver has his cell phone in the center console of his vehicle and he is staring at the cell phone’s screen which displays a GPS mapping program. The use of the cell phone in this manner would not violate § 46.2-1078.1 because § 46.2-1078.1(B)(3) exempts such conduct.⁶ Adding additional hypothetical acts, imagine the driver runs a stop sign and causes an accident because he is not paying sufficient attention to the roadway. In this instance the driver could be charged with reckless driving. If the hypothetical is changed further such that the driver is looking at his phone and reading an email displayed on its screen at the time of the accident, the driver then could be charged and convicted of a violation of § 46.2-1078.1 and § 46.2-852, provided the Commonwealth is able to meet its burden of proof as to the elements of each offense to the satisfaction of the fact finder.⁷ The reckless nature of the driving is exactly the same in each hypothetical scenario, however, only in the final situation would the driver additionally violate § 46.2-1078.1.

Thus, the facts and circumstances surrounding the manner in which a driver operates a vehicle while using a hand held personal communication device will determine whether the driver is in violation of § 46.2-1078.1 and/or reckless driving in violation of § 46.2-852. Consistent with the existing case law, however, the mere operation of such a device while driving, regardless of a violation of § 46.2-1078.1, would not necessarily result in a reckless driving conviction.

CONCLUSION

Accordingly, it is my opinion, that, on and after July 1, 2013, if a driver operates a vehicle on a highway recklessly or at a speed in a manner so as to endanger the life, limb, or property of any person, while using a hand held personal communication device, that driver can be charged and convicted of reckless driving regardless whether there are grounds to support a violation of § 46.2-1078.1. It is my further opinion, however, that Virginia case law makes clear that the mere happening of an accident or use of a hand held personal communication device likely would be insufficient, standing alone, to support a conviction of reckless driving.

¹ See 2013 Va. Acts ch. 752.

² Powers v. Commonwealth, 211 Va. 386, 388, 177 S.E.2d 628, 630 (1970) (citations omitted).

³ VA. CODE ANN. § 46.2-852 (2010).

⁴ *Thompson v. Commonwealth*, 27 Va. App. 720, 723-25, 501 S.E.2d 438, 439-40 (1998) (citing *Powers v. Commonwealth*, 211 Va. 386, 177 S.E.2d 628 (1970) and *Hall v. Commonwealth*, 25 Va. App. 352, 488 S.E.2d 651 (1997)) (internal citations omitted).

⁵ *Id.* at 725 n.2, 501 S.E.2d at 440 n.2 (citing *Kennedy v. Commonwealth*, 1 Va. App. 469, 339 S.E.2d 905 (1986) (citation omitted).

⁶ Section 46.2-1078.1(B) provides that the prohibition of using a handheld personal communication device does not apply to:

1. The operator of any emergency vehicle while he is engaged in the performance of his official duties;
2. An operator who is lawfully parked or stopped;
3. The use of factory-installed or aftermarket global positioning systems (GPS) or wireless communications devices used to transmit or receive data as part of a digital dispatch system; or
4. Any person using a handheld personal communications device to report an emergency.

⁷ Ultimately, whether any particular conduct or combination of factors constitutes a violation of § 46.2-852 is a question of fact that rests with the Commonwealth's Attorney and trier of fact. *See, e.g.*, 2010 Op. Va. Att'y Gen. 99, 103 (addressing elements of illegal gambling).

OP. NO. 13-003

MOTOR VEHICLES: POWERS OF LOCAL GOVERNMENT

CONSTITUTION OF VIRGINIA: EDUCATION-THE LITERARY FUND

Fines generated from local ordinances pursuant to § 46.2-1313 do not constitute “fines collected for offenses committed against the Commonwealth” within the meaning of Article VIII, Section 8 of the Virginia Constitution. Rather, such sums constitute revenue of the locality.

Per Article VIII, Section 8 of the Virginia Constitution, the General Assembly may appropriate such sums to the Literary Fund as “such other sums as the General Assembly may appropriate.”

Fines and fees arising from violations of town ordinances should not be considered part of total revenue from fines of the county in which the town is located.

THE HONORABLE MICHAEL F.A. MOREHART
STATE INSPECTOR GENERAL
APRIL 5, 2013

ISSUES PRESENTED

You inquire regarding the classification and treatment of fines generated from violations of local ordinances authorized by § 46.2-1313. Specifically, you ask whether such funds (a) constitute “fines collected for offenses committed against the Commonwealth” within the meaning of Article VIII, Section 8 of the Virginia Constitution; (b) constitute revenue of the locality; and (c) may be appropriated to the Literary Fund by the General Assembly per Article VIII, Section 8 as “such other sums as the General Assembly may appropriate.” You also ask whether fines arising

from violations of town ordinances should be considered part of total revenue from fines of the county in which the town is located.

RESPONSE

It is my opinion (a) that fines generated from local ordinances pursuant to § 46.2-1313 do not constitute “fines collected for offenses committed against the Commonwealth” within the meaning of Article VIII, Section 8 of the Virginia Constitution; (b) that such sums constitute revenue of the locality; and (c) that the General Assembly may enact legislation to appropriate such funds to the Literary Fund as “such other sums as the General Assembly may appropriate.” It is my further opinion that fines and fees arising from violations of town ordinances should not be considered part of total revenue from fines of the county in which the town is located.

BACKGROUND

You state that § 3-6.05(C) of the 2012 Special Sessions Acts of the General Assembly, Chapter 3 requires your Office to perform a special review of fines and fees collected by the General District courts. You also relate that Part A of § 3-6.05 mandates the Auditor of Public Accounts to determine those localities in which fine and fee collections exceeded 50 percent of the total collections, and then requires the State Comptroller to recover half of the amount in excess of 50 percent of those total collections.

You describe concerns that enforcement of local ordinances by local law enforcement officers is diverting revenue that would otherwise inure to the Literary Fund under corresponding state law. You relate further that in one case, combining of town revenues from fines and fees with similar revenues of the county in which the town is located caused the county to exceed the threshold set forth in § 3-6.05(A), where neither governmental entity separately would have been subject to withholding.

APPLICABLE LAW AND DISCUSSION

Article VIII, Section 8 of the Virginia Constitution requires that all “fines for offenses against the Commonwealth” are to be paid to the Literary Fund, along with, *inter alia*, “such other sums as the General Assembly may appropriate.”

Section 46.2-1300 of the *Code of Virginia* empowers local governing bodies to “adopt ordinances not in conflict with [state law] to regulate the operation of vehicles on the highways” within their jurisdiction. Section 46.2-1308 directs that “all fines imposed for violations of such ordinances shall be paid into the county, city or town treasury.” Pursuant to § 46.2-1313, such ordinances may incorporate by reference provisions of Title 46.2, of Article 9 of Chapter 11 of Title 16.1 (§ 16.1-278 et seq.), and of Article 2 of Chapter 7 of Title 18.2 (§ 18.2-266 et seq.).

In a previous opinion, I concluded that certain funds collected by localities pursuant to the authority granted in § 46.2-1308 do not constitute “fines for offenses against the Commonwealth.”¹ Whereas that Opinion addressed the nature of a particular local law, you inquire about an unspecified number of ordinances based upon multiple Titles of the Code; however, the same rationale applies. Because the fines are being imposed for violation of local ordinances and not for violation of a law of the

Commonwealth, they are outside the scope of Article VIII, Section 8.² I find no constitutional or other authority to prohibit the General Assembly from statutorily defining which criminal offenses are deemed to be committed against the Commonwealth, and those that rightfully may be deemed to be committed against a political subdivision of the Commonwealth.³

Accordingly, and in response to your next inquiry, I conclude that the money collected from violations of these ordinances, because they stem from a violation of local law rather than an “offense against the Commonwealth,” constitute revenue of the locality.

The question in part (c) of your inquiry concerns the ability of the General Assembly to appropriate to the Literary Fund revenue generated from fines for violation of ordinances enacted pursuant to § 46.2-1313. As noted above, the General Assembly presently has directed that fines for violation of local traffic ordinances be paid to the respective locality; however, there is no legal prohibition on the General Assembly changing that practice and providing that the funds be deposited into the Literary Fund. Accordingly, it is my opinion that the General Assembly may enact legislation directing that penalties and fines associated with the violation of local ordinances be paid to the Literary Fund per Article VIII, Section 8 as “such other sums as the General Assembly may appropriate.”⁴

Your final inquiry, concerning the possible combining of town and county revenue, raises traditional issues of statutory construction. “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.”⁵ Here, we examine the pertinent text of § 46.2-1308 to determine whether fines and fees arising from violations of town ordinances should be considered part of total revenue from the county in which the town is located. “Under basic rules of statutory construction, we determine the General Assembly’s intent from the words contained in the statute[,]”⁶ and “[w]e ‘assume that the legislature chose, with care, the words it used when it enacted the relevant statute.’”⁷

In discussing disposition of the revenue in question, § 46.2-1308 expressly provides that “all fines imposed for violations of such ordinances shall be paid into the county, city or town treasury.” The legislature explicitly included towns separately. Because “statutes must be construed to give meaning to all of the words enacted by the General Assembly, and thus, interpretations that render statutory language superfluous are to be avoided[,]”⁸ the specific mention of towns evinces its intent that towns retain funds resulting from violations of town ordinances. Had the General Assembly intended anything otherwise, it could have employed language evincing the same. For example, § 46.2-1308 could have required that fines be shared or credited between towns and the counties in which those towns are located.⁹ Because, however, the General Assembly did not modify its grant of independence to the various localities in this instance, I conclude that fines and fees arising from violations of town ordinances should not be considered part of total revenue from the county in which the town is located.

CONCLUSION

Accordingly, it is my opinion that (a) fines generated from local ordinances pursuant to § 46.2-1313 do not constitute “fines collected for offenses committed against the Commonwealth” within the meaning of Article VIII, Section 8 of the Virginia Constitution; (b) such sums constitute revenue of the locality; and (c) the General Assembly may enact legislation to appropriate such funds to the Literary Fund as “such other sums as the General Assembly may appropriate.” It is my further opinion that fines and fees arising from violations of town ordinances should not be considered part of total revenue from fines of the county in which the town is located.

¹ 2011 Op. Va. Att’y Gen. 150, *accord* 1977-78 Op. Att’y Gen. 162, 165. The opinion specifically addressed monetary penalties imposed for violating a traffic light ordinance that did not constitute criminal fines under the Virginia Supreme Court’s decision in *Southern Express Co. v. Commonwealth ex rel. Walker*, 92 Va. 59, 62, 22 S.E. 809 (1895), *aff’d* 168 U.S. 705 (1897).

² *Id.* It is clear from the opinion and the language of § 46.2-1308 that violations of local traffic ordinances are not “offenses against the Commonwealth.” Such an interpretation is supported by the fact that fines for violations of local traffic ordinances were authorized to be paid to the locality as opposed to the Literary Fund prior to the adoption of the current Constitution in 1971. Former § 46.1-182, Chapter 728 of the Acts of Assembly of 1958, directed that “fines imposed for a violation of such ordinances shall be paid into the county, city or town treasury....” Because this was the law when the Constitution of 1971 was adopted, the drafters of, and those ratifying, Article VIII, § 8 are deemed to have acquiesced in an interpretation that allows for same. *See* *Roanoke v. James W. Michael’s Bakery Corp.*, 180 Va. 132, 143, 21 S.E.2d 788,793 (1942) (“Framers of the Constitution are presumed to have been aware of prior decisions of their own courts and of legislative acts construing words or phrases, and to have used such words or phrases in the light of such construction.”). Indeed, the provisions of § 46.2-1313 (former § 46.1-188) have enabled localities to enact ordinances incorporating misdemeanor traffic offenses since at least 1968. *See* 1968 Va. Acts c. 243. For example, the offense of reckless driving has been contained in the same Title of the *Code of Virginia* as § 46.2-1313, and has been a misdemeanor criminal offense since the General Assembly’s codification of the Code in 1950. *See* 1950 Va. Acts ch. 385.

³ *See generally* VA. CONST. art. VIII, § 8; and *see* *Peacock v. Commonwealth*, 200 Va. 464, 468-69, 106 S.E.2d 659, 662-63 (1959) (wherein the Court implicitly recognized the General Assembly’s broad authority respecting criminal offenses, as it discussed the constitutionally-required specificity of language to be used by the General Assembly in any “act creating a statutory offense.”)

⁴ The practical effect this would have on localities deciding to have and enforce such local traffic ordinances is beyond the scope of this opinion.

⁵ *Cuccinelli v. Rector & Visitors of the Univ. of Va.*, 283 Va. 420, 425, 722 S.E.2d 626, 629 (2012) (quoting *Commonwealth v. Amerson*, 281 Va. 414, 418, 706 S.E.2d 879, 882 (2011)) (further citation and internal quotation marks omitted).

⁶ *Williams v. Commonwealth*, 265 Va. 268, 271, 576 S.E.2d 468, 470 (2003) (citing *Vaughn, Inc. v. Beck*, 262 Va. 673, 677, 554 S.E.2d 88, 90 (2001); *Thomas v. Commonwealth*, 256 Va. 38, 41, 501 S.E.2d 391, 393 (1998)).

⁷ *Alger v. Commonwealth*, 267 Va. 255, 261, 590 S.E.2d 563, 556 (2004) (quoting *Barr v. Town & Country Props., Inc.*, 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990)).

⁸ 2012 Op. Va. Att’y Gen. 14 (citing *Cook v. Commonwealth*, 268 Va. 111, 114, 597 S.E.2d 84, 86 (2004)).

⁹ *See, e.g.*, VA. CODE ANN. § 46.2-752(A) (2010) (setting forth a comprehensive plan for crediting vehicle taxes and license fees for residents of counties and the towns within those counties, with such crediting plan modifying a legislative grant in § 46.2-752(B), similar to that in § 46.2-1308, providing that involved revenue “shall be applied to general county, city or town purposes.”).

OP. NO. 13-092**MOTOR VEHICLES: REGULATION OF TRAFFIC**

In the unique situation wherein two “No Through Truck” routes are contiguous, a truck with either an origin or a destination on one of the routes may not lawfully travel through the entire length of the other, contiguous route, when the driver of the truck has notice of the two separate “No Through Truck” route designations, and one or more reasonable alternative routes exist.

THE HONORABLE C. LINWOOD GREGORY
COMMONWEALTH’S ATTORNEY
NEW KENT COUNTY
NOVEMBER 15, 2013

ISSUE PRESENTED

You inquire whether, in the unique situation wherein two “No Through Truck” routes are contiguous,¹ a truck with either an origin or a destination along one of the routes may travel lawfully through the entire length of the other, contiguous “No Through Truck” route, “regardless of available reasonable alternative routes.”

RESPONSE

It is my opinion, in the unique situation wherein two “No Through Truck” routes are contiguous, a truck with either an origin or a destination on one of the routes may not lawfully travel through the entire length of the other, contiguous route, when the driver of the truck has notice of the two separate “No Through Truck” route designations, and one or more reasonable alternative routes exist.²

BACKGROUND

In making your inquiry, you provide the following facts. In Hanover County, Routes 630 (Market Road) and 613 (Fox Hunter Lane) between Route 156 (Cold Harbor Road) and the Hanover/New Kent County line are designated a “No Through Truck” route (the “Hanover Route”). In New Kent County, Route 613 (Dispatch Road), between the Hanover/New Kent County Line and Route 249 (New Kent Highway), is designated a “No Through Truck” route (the “New Kent Route”). The two routes are contiguous and form a rural roadway measuring some 5.85 miles. Thus, through truck³ traffic is prohibited on this entire stretch of highway, albeit designated as two separate “No Through Truck” routes.

You indicate that the Hanover County Board of Supervisors, in 2003, and the New Kent County Board of Supervisors, in 2004, independently requested that the Virginia Department of Transportation (“VDOT”) designate the route located within its jurisdiction as a “No Through Truck” route, and, thereafter, each county satisfied all of the prerequisite requirements.⁴ On February 14, 2005, the Commissioner of VDOT, acting pursuant to his authority, issued a letter to the County Administrator of each county, approving the designation of each route as a “No Through Truck” route.⁵

You also provide the following additional facts relevant to your inquiry. A truck owner (“Doe”) resides on the west end of the Hanover Route. He can access the Hanover Route from roads that lie to the west of that route. From time to time, Doe drives a truck from his residence in Hanover County, east along the Hanover Route, crosses over the New Kent County line, and continues to drive the truck the full length of the New Kent Route, proceeding on to destinations beyond the terminus of that restricted route at the New Kent Highway. Doe contends he is allowed to drive the entire length of both “No Through Truck” routes, because his point of origin, (or, upon a return trip, his destination), is on the Hanover route. In making this contention, Doe cites an internal VDOT memorandum that refers to the two routes as “one continuous truck restriction.”⁶

APPLICABLE LAW AND DISCUSSION

Section 46.2-809 of the *Code of Virginia* provides, in pertinent part:

The Commonwealth Transportation Board, or its designee, in response to a formal request by a local governing body, after such body has held public hearings, may, after due notice and a proper hearing, prohibit or restrict the use by through traffic of any part of a primary or secondary highway if a reasonable alternate route is provided...Such restriction may apply to any truck or truck and trailer or semitrailer combination, except a pickup or panel truck.^[7]

The Commonwealth Transportation Board (“CTB”) has “delegate[d] the authority to restrict through truck traffic on secondary highways to the Commissioner of the Virginia Department of Transportation.”⁸ In its regulations, the CTB both explains its philosophy respecting restricted access to roadways and sets forth the essential public safety-related determinations requisite to the imposition of any such restriction:

It is the philosophy of the Commonwealth Transportation Board that all vehicles should have access to the roads on which they are legally entitled to travel. Travel by any class of vehicle on any class of highway should be restricted only upon demonstration that the restriction will promote the health, safety and welfare of the citizens of the Commonwealth without creating an undue hardship on any of the users of the transportation system. The board recognizes that there may be a limited number of instances when restricting through trucks from using a segment of a primary or secondary roadway will reduce potential conflicts, creating a safer environment and one that is in accord with the current use of the roadway. The board has adopted these guidelines to govern and regulate requests for through truck restrictions on primary and secondary highways.^[9]

Further,

Travel by any class of vehicle should be restricted only upon demonstration that the restriction will promote health, safety and welfare of the citizens of the Commonwealth without creating an undue hardship on any users of the transportation network[.]^[10]

In the factual scenario you describe, while the Hanover Route and the New Kent Route are contiguous, such that they appear to form a 5.85 mile stretch of nearly continuous road, as a matter of law they constitute two separately designated “No Through Truck” routes. Doe lives proximate to the western terminus of the Hanover Route, and may depart his residence as a point of origin, or access it as a destination, without driving upon the New Kent Route, by utilizing one or more alternative routes that VDOT has deemed reasonable. Moreover, the New Kent Route is located wholly in New Kent County, some distance east of Doe’s residence. When Doe drives his truck the length of it, so as to depart from or access his residence via the New Kent Highway, he does so as a through truck.¹¹ In so doing, he traverses the length of the New Kent Route in a way denied by operation of law to other truck drivers with no point of origin or destination along its length. Thus, he does so without any claim of necessity, but instead, for his mere convenience.

Upon these facts, I conclude that Doe’s use of the New Kent Route is inconsistent with, and violative of, VDOT’s designation of that roadway segment as a “No Through Truck” route. Therefore, and especially in light of the public safety-related rationale for such designation, I further conclude that such use is unlawful.

CONCLUSION

Accordingly, it is my opinion, in the unique situation wherein two “No Through Truck” routes are contiguous, a truck with either an origin or a destination on one of the routes may not lawfully travel through the entire length of the other, contiguous route, when the driver of the truck has notice of the two separate “No Through Truck” route designations, and one or more reasonable alternative routes exist.

¹ The term “contiguous” is defined to mean, “being in contact: touching along a boundary or at a point.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 270 (11th ed. 2009). In the context of your inquiry, the term signifies that the subject “No Through Truck” routes share an endpoint.

² As noted in detail below, your legal inquiry arises upon very specific factual circumstances. Thus, the legal conclusion of this Opinion directly pertains to those factual circumstances. Please note that other factual scenarios involving different configurations of contiguous or intersecting no-through-traffic routes may yield different conclusions upon an analysis of the applicable statutory and regulatory provisions.

³ The term “truck” is defined as “every motor vehicle designed to transport property on its own structure independent of any other vehicle and having a registered gross weight in excess of 7,500 pounds.” VA. CODE ANN. § 46.2-100 (Supp. 2013). While neither the *Code of Virginia* nor the *Virginia Administrative Code* defines “through truck,” VDOT uses the term “through truck” to mean a truck “that travels from one terminus [or endpoint] to the other with no origin or destination along the designated route.” See VA. DEP’T OF TRANSP., *Frequently Asked Questions – Through Truck Restriction Program*, http://www.virginiadot.org/programs/resources/web_faq's_TTR_program.pdf (last visited Oct. 24, 2013). This definition is generally consistent with the *Code of Virginia’s* definition of “residential cut-through traffic,” which is “vehicular traffic passing through a residential area without stopping or without at least an origin or destination within the area.” VA. CODE ANN. § 46.2-809.1 (2010).

⁴ When a locality seeks to have a portion of a primary or secondary road designated a “No Through Truck” route, the governing body must hold a public hearing and make a formal request of VDOT. 24 VA. ADMIN. CODE § 30-580-30. The process must adhere to a number of procedural requirements, as quoted below:

1. The public notices for the hearing must include a description of the proposed through truck restriction and the alternate route with the same termini. A copy of the notices must be provided.

2. A public hearing must be held by the local governing body and a transcript of the hearing must be provided with the resolution.
3. The resolution must describe the proposed through truck restriction and a description of the alternate, including termini.
4. The governing body must include in the resolution that it will use its good offices for enforcement of the proposed restriction by the appropriate local law-enforcement agency.

Id.

⁵ See VA. CODE ANN. § 46.2-809 (2010); see also 24 VA. ADMIN. CODE § 30-580-20.

⁶ See Memorandum from Curtis W. Myers, Jr., to Thomas A. Hawthorne, P.E. (Oct. 18, 2004) (“Memorandum”). In addition, you describe a related “Fact Sheet” that is referred to in the Memorandum. The Memorandum constituted an internal VDOT document, drafted by and for subordinate officials within that agency. It pertained primarily to the New Kent Route; however, it contained language referring to VDOT’s efforts to coordinate its processing of the separate applications of Hanover County and New Kent County to designate the subject roadway segments as “No Through Truck” routes within their respective jurisdictions. The Memorandum noted that the New Kent Route “meets the criteria for restricting through trucks in accordance with the guidelines adopted by the CTB.” Thereafter, the passage cited by Doe, in full context, reads as follows:

Route 613, functionally classified as a minor collector highway, is a two-lane undivided roadway with 16-20 foot pavement and 1-5 foot shoulders. The posted speed limit on this route is 35 and 45 miles per hour. The New Kent County Board of Supervisors have conducted a public hearing on this proposed restriction and determined that a reasonable alternate route exists to accommodate through trucks via Routes 249, I-64, I-295 and Route 156 to Route 630 in Hanover County. Hanover County has also requested that Route 630 and 613 be restricted to through trucks between Route 156 and the Hanover/New Kent County Line. We will try to have both of these restrictions processed and signed at the same time since they would constitute one continuous truck restriction.

As a document internal to VDOT, the Memorandum clearly did not represent a legally, or otherwise binding determination on New Kent County. Moreover, its contents reveal that VDOT, at the relevant time in October 2004, recognized that each county independently had sought a “No Through Truck” designation for specific highway segments within its territorial limit. Nevertheless, recognizing that the roadways shared a terminus at the Hanover/New Kent County line, agency officials sought to coordinate the consideration of them.

⁷ VA. CODE ANN. § 46.2-809 (2013).

⁸ 24 VA. ADMIN. CODE § 30-580-20.

⁹ 24 VA. ADMIN. CODE § 30-580-10.

¹⁰ 24 VA. ADMIN. CODE § 30-580-40. In setting forth four specific criteria for VDOT consideration, this guideline requires the locality to mandatorily establish the first two: “(1) Reasonable alternative routing is provided,” including that, “The termini of the proposed restriction must be identical to the alternate routing to allow a time and instance comparison to be conducted between the two routings. Also, the alternate routing must not create an undue hardship for trucks in reaching their destination,” and that, “(2) The character or frequency, or both, of the truck traffic on the route proposed for restriction is not compatible with the affected area.” In addition, it provides for consideration of the following factors, of which only one need be established: “(3) The roadway is residential in nature,” and/or, “(4) The roadway must be functionally classified as either a local or collector.” You note VDOT’s determinations that each county respectively met the specified criteria for the Hanover Route and the New Kent Route to receive approval for imposition of “No Through Truck” restrictions.

¹¹ Without question, according to the facts you provide, Doe has personal knowledge, that is, he possesses actual notice, of the separate “No Through Truck” designations of the Hanover Route and the New Kent Route. The fact of such notice is significant to the conclusion reached herein.

OP. NO. 12-083**MOTOR VEHICLES: TITLING AND REGISTRATION OF MOTOR VEHICLES**

The plain language of § 46.2-716(B) is broad enough to prohibit the placing of a clear plastic covering over a license plate if the covering in any way obscures information contained on the license plate.

THE HONORABLE GEORGE L. BARKER
MEMBER, SENATE OF VIRGINIA
JANUARY 17, 2013

ISSUE PRESENTED

You ask whether § 46.2-716(B) of the *Code of Virginia* can be read to prohibit clear license plate coverings, in addition to colored ones, that obstruct a police officer's ability to read a license plate or whether the prohibition is limited to only colored coverings.

RESPONSE

It is my opinion that the plain language of § 46.2-716(B) is broad enough to prohibit the placing of a clear plastic covering over a license plate, if the covering in any way obscures information contained on the license plate, but that whether any particular covering would bring rise to a violation of the provision is a determination of fact beyond the scope of this opinion.

BACKGROUND

You relate a situation in which a constituent of yours was ticketed for having a clear plastic cover over his license plate. You note that your discussions with law enforcement officers indicate that, "while the code only states that 'colored' coverings are considered illegal," any covering that obstructs an officer's ability to read the license plate due to reflection from their spotlight allows for a citation under § 46.2-716.

APPLICABLE LAW AND DISCUSSION

Section 46.2-716 sets forth the requirements for displaying license plates on automobiles operated in the Commonwealth. The statute also expressly provides that

No colored glass, colored plastic, bracket, holder, mounting, frame, or other type of covering shall be placed, mounted, or installed on, around, or over any license plate if such glass, plastic, bracket, holder, mounting, frame, or other type of covering *in any way* alters or obscures (i) the alpha-numeric information, (ii) the color of the license plate, (iii) the name or abbreviated name of the state wherein the vehicle is registered, or (iv) any character or characters, decal, stamp, or other device, indicating the month or year in which the vehicle's registration expires. No insignia, emblems, or trailer hitches or couplings shall be mounted in such a way as to hide or obscure any portion of the license plate or render any portion of the license plate illegible.^[1]

When the language of a statute is unambiguous, that language is binding and it is impermissible to assign a construction that amounts to concluding "that the General

Assembly did not mean what it actually has stated.”² Further, “[t]he purpose for which a statute is enacted is of primary importance in its interpretation or construction,”³ and unless it will lead to an absurd result, “a statute should be read to give reasonable effect to the words used and to promote the ability of the enactment to remedy the mischief at which it is directed.”⁴ Although penal statutes are strictly construed against the Commonwealth and in favor of the liberty of citizens,⁵ a criminal defendant is not entitled to benefit from an “unreasonably restrictive interpretation” of a statute.⁶ Courts will not “construe a penal statute in a manner that requires [them] to disregard the clear and obvious meaning of the statute.”⁷

The purpose of § 46.2-716(B) is to ensure that vehicles traveling in the Commonwealth bear license plates whose information is visible at all times. Under the plain language of the statute, any “type of covering” placed over a license plate – even a clear plastic one – is prohibited if it “*in any way*” obscures the view of the information on the license plate.⁸ Although the statute specifies certain types of coverings, including “colored plastic” ones, the provision also prohibits any “other type of covering” that “in any way” obscures the information on a license plate. This construction is consistent with the obvious purpose of the statute as expressed by its plain language. Thus, the critical inquiry is not the characteristic of the license plate cover itself, but whether it, in fact, obscured law enforcement’s view of the license plate at the time of the traffic stop. Such determination, however, must be made on a case-by-case basis.⁹ Thus, it is my opinion that even clear plastic license plate covers can violate the statute if credible evidence exists to establish that the cover “in any way alters or obscures” the license plate.

This conclusion is supported by a 2005 federal district court decision.¹⁰ In ruling on the validity of a traffic stop, the court concluded a violation of § 46.2-716 could be established by the police officer’s credible testimony that he could not see the information on the defendant’s license plate at the time of the traffic stop.¹¹ In this case, the police officer who stopped the vehicle in question testified that he had been unable to read the vehicle’s license plate because it was bent.¹² The court upheld the legitimacy of the stop under § 46.2-716 based on this evidence presented, namely that the officer could not read the license plate based on its condition.¹³

Thus, it is my opinion that § 46.2-716(B) prohibits any kind of covering over a license plate if it, in any way, obscures the license plate, even if the inability to read the license plate results from the covering in combination with other factors, such as light reflecting off of the covering. It is further my opinion that the question of whether an individual has violated § 46.2-716(B) is dependent upon the facts of each case as established by the evidence.

CONCLUSION

Accordingly, it is my opinion that the plain language of § 46.2-716(B) is broad enough to prohibit the placing of a clear plastic covering over a license plate, provided it in any way obscures information contained on the license plate, but that whether any particular covering would bring rise to a violation of the provision is a determination of fact beyond the scope of this opinion.

¹ VA. CODE ANN. § 46.2-716(B) (emphasis added).

² *Williams v. Commonwealth*, 265 Va. 268, 271, 576 S.E.2d 468, 470 (2003).

³ *Norfolk S. Ry. Co. v. Lassiter*, 193, Va. 360, 364, 68 S.E.2d 641, 643 (1952).

⁴ *Walston v. Cnty. of Arlington*, 37 Va. App. 457, 462, 559 S.E.2d 391, 393 (2002) (quoting *Jones v. Conwell*, 227 Va. 176, 181, 314 S.E.2d 61, 64 (1984)) (internal quotation marks omitted).

⁵ *Berry v. City of Chesapeake*, 209 Va. 525, 526, 165 S.E.2d 291, 292 (1969).

⁶ *Holloman v. Commonwealth*, 221 Va. 196, 198, 269 S.E.2d 356, 357 (1980).

⁷ *Walston*, 37 Va. App. at 464, 559 S.E.2d at 395 (quoting *Huddleston v. United States*, 415 U.S. 814, 831 (1974)) (internal quotation marks omitted).

⁸ Section 46.2-716(B)

⁹ The application of various elements of a criminal offense to a specific set of facts rests with the Commonwealth's attorney, the grand jury and the trier of fact. *See, e.g.*, 2010 Op. Va. Att'y Gen. 99, 103.

¹⁰ *United States v. Greenwood*, 405 F. Supp. 2d 673 (E.D.Va. 2005).

¹¹ *Id.* at 674-75, 677-78.

¹² *Id.* at 678.

¹³ *Id.* In *Greenwood*, the Court noted that the officer's testimony was corroborated by photographs showing the condition of the license plate.

OP. NO. 12-103

PENSIONS, BENEFIT, AND RETIREMENT: VIRGINIA RETIREMENT SYSTEM

Virginia Retirement System may recover the overpayments in benefits paid out to its retirees that were a result of an error in calculating the 2009 Cost of Living Adjustment.

THE HONORABLE RICHARD H. BLACK
MEMBER, SENATE OF VIRGINIA
OCTOBER 11, 2013

ISSUE PRESENTED

You ask whether the Virginia Retirement System (“VRS”) is permitted to recover from retirees the overpayments in benefits resulting from an error that occurred in calculating the 2009 Cost of Living Adjustment (“COLA”).

RESPONSE

It is my opinion that VRS may recover the overpayments in benefits paid out to its retirees that were a result of an error in calculating the 2009 COLA.

BACKGROUND

Annually, the actuary employed by VRS calculates and presents to the VRS Board of Trustees the Cost of Living Adjustments. The VRS COLA is applied to the service and disability retirement benefits for retirees, survivors and beneficiaries. For fiscal year beginning July 1, 2009, the VRS actuary prepared and presented the COLA as 3.84 percent. VRS adopted this percentage and applied it to benefits beginning July 1, 2009.

In 2012, it was determined that the 2009 COLA should have been measured at 3.42 percent. The miscalculation resulted in an overpayment amount of 0.42 percent. To correct the overpayments, VRS recalculated the 2009 benefit amount using the correct 2009 COLA and reapplied the subsequent COLAs to arrive at a corrected 2011 benefit amount. This corrected benefit served as the baseline to which the 2012 COLA of 3.08 percent was applied to arrive at the gross benefit amount for 2012. This adjustment corrected the 2009 error and provided the correct COLA going forward. The correction was done automatically and no action was required by the retirees. All retirees affected were provided notice of such correction and the reduction in benefits that resulted.

APPLICABLE LAW AND DISCUSSION

Section 51.1-124.9 of the *Code of Virginia* enables VRS to correct any benefit error and adjust payments accordingly. Specifically, § 51.1-124.9(A)(1) provides that,

If any change or error in records results in any member or beneficiary receiving more or less than he would have been entitled to receive from the Retirement System had the records been correct, the Board shall, subject to the provisions of subsection B, correct the error and as far as practicable adjust the payments so that the actuarial equivalent of the correct benefit shall be paid.^[1]

The Code further provides that the VRS Board of Trustees “may waive any repayment which it believes would cause hardship” if a member has been overpaid “through no fault of his own and could not reasonably have been expected to detect the error.”² The language of these provisions clearly evinces a legislative intent to enable VRS to recoup overpayments resulting from miscalculations,³ but does not dictate a specific methodology by which VRS is to “adjust the payments.”

The Code expressly allows VRS to recover overpayments by deducting the overpayment from the retirees’ group life insurance.⁴ You note concern, however, regarding employees who do not receive such insurance benefits; yet, such deductions from insurance benefits are not the only way by which VRS may lawfully recover overpayments of benefits. In correcting the 2009 COLA error, VRS chose to adhere closely to the statutory requirement that it “adjust the [benefits] payments so that the actuarial equivalent of the correct benefit shall be paid.”⁵ In lieu of a reduction in the monthly benefit going forward, VRS also offered the option that a beneficiary could elect to send VRS a specific lump sum payment by November 15, 2012, to repay VRS for the overpayment amount that had been made over the three-year period prior to VRS’ discovery of the error.

Thus, it is my opinion that VRS acted lawfully in accordance with the terms of § 51.1-124.9(A)(1) in the methods utilized to recoup benefit overpayments to retirees resulting from an error in calculating to 2009 COLA.

CONCLUSION

Accordingly, it is my opinion that VRS may recover the overpayments in benefits paid out to its retirees that were a result of an error in calculating the 2009 COLA.

¹ VA. CODE ANN. § 51.1-124.9(A)(1) (2013). Subsection (B) of § 51.1-124.9 provides authorization to VRS to recover overpayments subject to certain qualifications and limitations that are not germane to your specific inquiry.

² Section 51.1-124.9(A)(2). The use of the word “may” in a statute indicates that the provision is permissive and discretionary rather than mandatory. *See* *Masters v. Hart*, 189 Va. 969, 979, 55 S.E.2d 205, 210 (1949) (“Unless it is manifest that the purpose of the legislature was to use the word ‘may’ in the sense of ‘shall’ or ‘must,’ then ‘may’ should be given its ordinary meaning - permission, importing discretion”). A decision to waive repayment, however, is left to the discretion of the Board of Trustees when the statutorily prescribed circumstances exist.

³ “Under basic rules of statutory construction, we determine the General Assembly’s intent from the words contained in the statute.” *Williams v. Commonwealth*, 265 Va. 268, 271, 576 S.E.2d 468, 470 (2003) (citing *Vaughn, Inc. v. Beck*, 262 Va. 673, 677, 554 S.E.2d 88, 90 (2001); *Thomas v. Commonwealth*, 256 Va. 38, 41, 501 S.E.2d 391, 393 (1998)).

⁴ Section 51.1-124.22(A)(13) (2013) (“Overpayments from benefits received under the Virginia Retirement System ... may be deducted from life insurance benefits[.]”).

⁵ Section 51.1-124.9(A)(1).

OP. NO. 12-090

PRISONS AND OTHER METHODS OF CORRECTION: COMMENCEMENTS OF TERMS; CREDITS AND ALLOWANCES

A jail sentence is not tolled during the period when the inmate is temporarily transferred to another jurisdiction for a court appearance.

THE HONORABLE DANA LAWHORNE
SHERIFF, CITY OF ALEXANDRIA
JUNE 28, 2013

ISSUE PRESENTED

You ask whether a jail sentence being served by an inmate in the Alexandria Detention Center is tolled for a period when that inmate is temporarily transferred to another jurisdiction for a court appearance.

RESPONSE

It is my opinion that the jail sentence is not tolled during the period when the inmate is temporarily transferred to another jurisdiction for a court appearance. As a result, the outside jurisdiction may not prohibit the Alexandria Detention Center from giving the inmate credit for the period of his temporary transfer out of Alexandria.

BACKGROUND

You describe a situation in which a defendant is convicted of a misdemeanor and sentenced to serve twelve months in the Alexandria Detention Center. The individual begins his sentence on May 1, 2012. After computing his time, staff at the Alexandria Detention Center establish a projected release date of October 31, 2012. Between June 1, 2012, and June 2, 2012, the inmate is transferred out of Alexandria in order to make a court appearance in an outside jurisdiction. Your concern is whether this

period of transportation tolls the individual's sentence in Alexandria, thus requiring an upward adjustment to his projected release date.

APPLICABLE LAW AND DISCUSSION

A prior opinion of this Office concluded "that an inmate be given credit for *all* time spent in jail awaiting trial regardless of the jurisdiction so long as there is no duplication."¹ That opinion interprets and applies § 53.1-187, which provides:

Any person who is sentenced to a term of confinement in a correctional facility shall have deducted from any such term all time actually spent by the person in a state hospital for examination purposes or treatment prior to trial, in a state or local correctional facility awaiting trial or pending an appeal, or in a juvenile detention facility awaiting trial for an offense for which, upon conviction, such juvenile is sentenced to an adult correctional facility.

In light of the foregoing authority, it is the responsibility of the Alexandria Detention Center to ensure that the inmate receive all appropriate credit for time spent in confinement, including time spent temporarily confined in the facility of an outside jurisdiction while awaiting trial or court appearance. The Alexandria sentence does not toll during the period of transfer and temporary confinement. Should the inmate fail to receive all appropriate credit for such time, the Alexandria Detention Center, as custodian, risks the issuance of a writ of habeas corpus by the appropriate court.² For these reasons, the outside jurisdiction may not prohibit the Alexandria Detention Center from giving the inmate credit.

In the event the inmate is convicted and sentenced to serve time in the outside jurisdiction, that jurisdiction may only credit the inmate for his stay from June 1, 2012, to June 2, 2012, if the court of that jurisdiction orders this period of time to be treated as concurrent with that of Alexandria.³ All sentences in Virginia are presumed to run consecutively unless otherwise "expressly ordered" by the sentencing court.⁴

CONCLUSION

Accordingly, it is my opinion that the sentence served in Alexandria is not tolled during the period in which the inmate is temporarily transferred to another jurisdiction for court, and that the outside jurisdiction may not prohibit Alexandria from giving the inmate credit for the period of his transfer and temporary confinement.

¹ 1995 Op. Va. Att'y Gen. 219, 219 (quoting 1974-75 Op. Va. Att'y Gen. 129, 129).

² VA. CODE ANN. § 8.01-654 (2007).

³ See 1995 Op. Va. Att'y Gen. 219 (prohibiting duplication of sentences).

⁴ VA. CODE ANN. § 19.2-308 (2008).

OP. NO. 12-071

PROFESSIONS AND OCCUPATIONS: MEDICINE AND OTHER HEALING ARTS

Virginia law does not create a verbal Durable Do Not Resuscitate Order.

A physician who is physically present with a patient in cardiac or respiratory arrest and for whom a Durable Do Not Resuscitate Order has not been issued has the authority to issue any orders he deems in his professional judgment to be appropriate under the circumstances.

THE HONORABLE ROSALYN R. DANCE
MEMBER, HOUSE OF DELEGATES
JUNE 21, 2013

ISSUES PRESENTED

You ask a number of questions regarding the application of § 54.1-2987.1 (Durable Do Not Resuscitate Orders) and regulatory interpretations of that statute. Specifically, you ask if Virginia law permits a physician, in person or by telephone, to issue a verbal Do Not Resuscitate Order.

RESPONSE

It is my opinion that Virginia law does not create a verbal Durable Do Not Resuscitate Order. It is further my opinion that a physician, physically present with a patient in cardiac or respiratory arrest and for whom a Durable Do Not Resuscitate Order has not been issued, has the authority to issue any orders he deems in his professional judgment to be appropriate under the circumstances.

APPLICABLE LAW AND DISCUSSION

The *Code of Virginia* defines a Durable Do Not Resuscitate Order (“Durable DNR Order”) as “a *written* physician’s order issued pursuant to § 54.1-2987.1 to withhold cardio-pulmonary resuscitation from a particular patient in the event of cardiac or respiratory arrest.”¹ Pursuant to § 54.1-2987.1,

A Durable Do Not Resuscitate Order may be issued by a physician for his patient with whom he has a bona fide physician/patient relationship ... only with the consent of the patient or, if the patient is a minor or incapable of making an informed decision ... upon the request of and with the consent of the person authorized to consent on the patient’s behalf.^[2]

The *Code of Virginia* does not create nor authorize a verbal Durable DNR Order.

The *Regulations Governing Durable Do Not Resuscitate Orders*³ require that prior to issuing a Durable DNR Order, the physician shall explain to the patient or the person authorized to give consent on behalf of the patient, the alternatives available for response in the event of cardiac or respiratory arrest and if the option of a Durable DNR is agreed upon, the physician shall complete the Durable DNR Order form.⁴ A Durable DNR Order must be in writing.⁵

Your question is not limited to written Durable DNR Orders, but includes whether there can be a verbal order not to resuscitate a patient. This is a situation not encompassed by § 54.1-2987.1. If there is no written Durable DNR Order in place, this section is not applicable. The applicable regulation for this question provides, in relevant part, that “[n]othing in these regulations shall prohibit qualified health care personnel from following any direct verbal order issued by a licensed physician not to

resuscitate a patient in cardiac or respiratory arrest when such physician is physically present.”⁶ This regulation confirms a physician’s ability to give a verbal order not to resuscitate when the patient is in arrest and the physician is in attendance when there is no Durable DNR Order. Additionally, in response to another question in your letter, it is clear that a verbal order by telephone would not suffice, because the physician must be “physically present.”⁷ Moreover, a verbal order when the physician is present but before the patient goes into arrest would not comply with the terms of the regulation, which require the patient to be “in cardiac or respiratory arrest” when the verbal order is made.⁸

CONCLUSION

Accordingly, it is my opinion that Virginia law does not create a verbal Durable Do Not Resuscitate Order. It is further my opinion that a physician, physically present with a patient in cardiac or respiratory arrest and for whom a Durable Do Not Resuscitate Order has not been issued, has the authority to issue any orders he deems in his professional judgment to be appropriate under the circumstances.

¹ VA. CODE ANN. § 54.1-2982 (Supp. 2012) (emphasis added).

² Section 54.1-2987.1(A) (Supp. 2012).

³ 12 VA. ADMIN. CODE §§ 5-66-10 through 5-66-80.

⁴ 12 VA. ADMIN. CODE § 5-66-70(E).

⁵ VA. CODE ANN. § 54.1-2982; 12 VA. ADMIN. CODE § 5-66-10.

⁶ 12 VA. ADMIN. CODE § 5-66-60(A). Cf. VA. CODE ANN. § 54.1-2990(A) (2009) (providing, in relevant part, that “[n]othing in this article shall be construed to require a physician to prescribe or render health care to a patient that the physician determines to be medically or ethically inappropriate.”).

⁷ 12 VA. ADMIN. CODE § 5-66-60(C).

⁸ *Id.*

OP. NO. 12-112

PROFESSIONS AND OCCUPATIONS: PHARMACY

The Virginia Department of Health may utilize expedited partner therapy only to the extent that the requirements of § 54.1-3303(C) are met.

THE HONORABLE CHRISTOPHER P. STOLLE, M.D.
MEMBER, HOUSE OF DELEGATES
AUGUST 2, 2013

ISSUE PRESENTED

You ask whether the Virginia Department of Health (“Department”) has authority to utilize expedited partner therapy as a measure to treat curable communicable diseases that pose a threat to the public health.

RESPONSE

It is my opinion that the Department may utilize expedited partner therapy only to the extent that the requirements of § 54.1-3303(C) of the *Code of Virginia* are met.

BACKGROUND

You relate that the Centers for Disease Control and Prevention (“CDC”) has concluded that expedited partner therapy is a useful option to facilitate partner management among heterosexual men and women with chlamydial infection or gonorrhea.¹ The CDC defines “expedited partner therapy” as “the practice of treating the sex partners of persons with sexually transmitted diseases...without an intervening medical evaluation or professional prevention counseling.”² The usual method of expedited partner therapy is through patient-delivered partner therapy wherein a clinician provides his patient with medication intended for the patient’s partner or provides a prescription in the partner’s name for the patient to deliver.³

APPLICABLE LAW AND DISCUSSION

Under Virginia law, a practitioner⁴ generally may prescribe drugs only to persons with whom he has a bona fide practitioner-patient relationship.⁵ To enable the practitioner to lawfully prescribe a controlled substance, a bona fide practitioner-patient relationship requires the practitioner to:

(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.^{6]}

Thus, a practitioner normally is required to examine a patient prior to prescribing medicine that constitutes a controlled substance.

Upon meeting certain conditions, § 54.1-3303(C) permits a practitioner to prescribe certain substances to other persons in close contact with a diagnosed patient.⁷ This authority requires the practitioner to establish with the close contact all attributes of a bona fide practitioner-patient relationship, *except* that the practitioner need not conduct an examination of the close contact.⁸ In addition, the practitioner must satisfy three other criteria. First, the practitioner must have a full bona fide practitioner-patient relationship with a diagnosed patient who is in close contact with the person to be prescribed the medicine.⁹ Second, the practitioner, in his or her professional judgment, must believe that “there is urgency to begin treatment to prevent the transmission of a communicable disease[.]”¹⁰ Finally, the practitioner must believe that “emergency treatment is necessary to prevent imminent risk of death, life-threatening illness, or serious disability.”¹¹ Accordingly, I conclude that, provided these statutory requirements are fully met, a practitioner may lawfully practice such limited form of “expedited partner therapy.”¹²

Nevertheless, your inquiry focuses on the authority of the Department to use this treatment method. As you note, regulations of the Department provide that “[t]he

board [of health] and commissioner [of the Department] reserve the right to use any *legal* means to control any disease which is a threat to public health.”¹³ Section 54.1-3303(C) provides the legal means for practitioners to prescribe medicine without first examining the patient, subject to the limitations discussed above. “[W]hen a statute creates a specific grant of authority, the authority exists only to the extent specifically granted in the statute.”¹⁴ Neither the Board of Health nor the Commissioner of the Department of Health has any authority to expand or otherwise alter the parameters of expedited partner therapy outside of the constraints set by § 54.1-3303(C).

CONCLUSION

Accordingly, it is my opinion that the Virginia Department of Health may utilize expedited partner therapy if it does so in accordance with § 54.1-3303(C).

¹ CENTERS FOR DISEASE CONTROL AND PREVENTION, EXPEDITED PARTNER THERAPY IN THE MANAGEMENT OF SEXUALLY TRANSMITTED DISEASES: REVIEW AND GUIDANCE at 32 (2006), *available at* <http://www.cdc.gov/std/treatment/epfinalreport2006.pdf>.

² *Id.* at 4.

³ *See Id.* at 8.

⁴ A practitioner is “a physician, dentist, licensed nurse practitioner pursuant to § 54.1-2957.01, licensed physician assistant pursuant to § 54.1-2952.1, pharmacist pursuant to § 54.1-3300, TPA-certified optometrist pursuant to Article 5 (§ 54.1-3222 et seq.) of Chapter 32, veterinarian, scientific investigator, or other person licensed, registered, or otherwise permitted to distribute, dispense, prescribe and administer, or conduct research with respect to a controlled substance in the course of professional practice or research in the Commonwealth.” VA. CODE ANN. § 54.1-3401 (Supp. 2013).

⁵ Section 54.1-3303(A) (Supp. 2012).

⁶ *Id.* (emphasis added).

⁷ This statutory grant of authority is limited to the prescription of Schedule VI antibiotics and antiviral agents. *See* Section 54.1-3303(C), which states as follows:

Notwithstanding any provision of law to the contrary and consistent with recommendations of the Centers for Disease Control and Prevention or the Department of Health, a practitioner may prescribe Schedule VI antibiotics and antiviral agents to other persons in close contact with a diagnosed patient when (i) the practitioner meets all requirements of a bona fide practitioner-patient relationship, as defined in subsection A, with the diagnosed patient; (ii) in the practitioner's professional judgment, the practitioner deems there is urgency to begin treatment to prevent the transmission of a communicable disease; (iii) the practitioner has met all requirements of a bona fide practitioner-patient relationship, as defined in subsection A, for the close contact except for the physical examination required in clause (iii) of subsection A; and (iv) when such emergency treatment is necessary to prevent imminent risk of death, life-threatening illness, or serious disability.

⁸ *Id.* *See* § 54-3303(A).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² I must note that § 54.1-3408.01(A) requires that the name and address of the person receiving the medication be labeled on each prescription. Although the address can be added by the dispensing pharmacist, it is my opinion that the practitioner must obtain the name of the person to be prescribed the medicine.

¹³ 12 VA. ADMIN CODE 5-90-100 (emphasis added).

¹⁴ 2008 Op. Va. Att’y Gen. 69, 71.

OP. NO. 12-003**PROFESSIONS AND OCCUPATIONS: REAL ESTATE BROKERS, SALES PERSONS AND RENTAL LOCATION AGENTS**

A management company that manages short-term transient occupancy rentals of fewer than thirty days for a portion of the condominium units in a condominium must be licensed with the Virginia Real Estate Board and must employ a licensed real estate broker before renting or offering to rent those condominium units on behalf of the units' owners.

THE HONORABLE RANDY C. KRANTZ
COMMONWEALTH'S ATTORNEY, BEDFORD COUNTY
JANUARY 17, 2013

ISSUE PRESENTED

You inquire whether the owner of a company that manages short-term transient occupancy rentals of fewer than thirty days for a condominium complex is required to obtain a real estate broker's license before managing rentals of the condominium units.

RESPONSE

It is my opinion that a management company that manages short-term transient occupancy rentals of fewer than thirty days for a portion of the condominium units in a condominium must be licensed with the Virginia Real Estate Board and must employ a licensed real estate broker before renting or offering to rent those condominium units on behalf of the units' owners.

BACKGROUND

You describe a condominium where the units are individually owned, often by absentee owners for rental and investment purposes, and rented to guests on a short-term basis of fewer than thirty days per guest. You note that a management company has entered into a separate transient occupancy management agreement with each condominium unit owner desiring its services to solicit and book short-term occupancies, maintain a reservation system, and accept occupancy payments on behalf of the unit owner. The management company provides its services from the condominium's lobby, which itself is a unit within the condominium, and the management company leases the lobby from the owner of the lobby unit. The company does not otherwise lease any of the units from their owners. You relate that the management company has obtained a license from the Virginia Department of Health to operate a hotel on the premises. You indicate that Bedford County considers the condominium facility to resemble a hotel and requires the management company to collect transient occupancy taxes for each short-term rental.

APPLICABLE LAW AND DISCUSSION

Under Virginia law, a real estate broker is "any person or business entity . . . who, for compensation or valuable consideration (i) sells or offers for sale . . . or (ii) leases or

offers to lease, or rents or offers for rent, any real estate or the improvements thereon for others.”¹ Notably, the *Code of Virginia* does not create a distinction between “renting” generally and “short-term” or “transient” rentals for the purposes of real estate broker licenses. Further, “[o]ne act for compensation or valuable consideration of . . . renting, or offering to rent real estate, except as specifically excepted in § 54.1-2103, shall constitute the person . . . a real estate broker or real estate salesperson.”² “[T]o protect the public from the fraud, misrepresentation and imposition of dishonest and incompetent persons,”³ no individual or corporation may perform such services without being licensed as required by the Virginia Real Estate Board.⁴

There are several exemptions to the licensing requirement.⁵ Pertinent to your inquiry, a hotel may avail itself of the exemption provided for those “who as owner or lessor perform any [brokerage service] with reference to property owned or leased by them, where the acts are performed in the regular course of or incident to the management of the property and the investment therein[.]”⁶ Hotels in the Commonwealth are licensed separately by the State Board of Health,⁷ which defines as a “hotel” those establishments that offer transient lodging consisting of two or more lodging units.⁸ Critically, because a hotel license must be issued to the owner or lessee of the hotel, only the common owner or common lessee of multiple lodging units may be issued a license to operate a hotel.⁹ Thus, typically the owner of a hotel and its employees are exempt from having a real estate broker’s license before renting lodging units in the hotel.

In contrast, in the scenario you describe, the condominium units are individually owned and not owned or leased collectively by the management company. Because no combination of multiple units will have a common owner, there will be no ability to obtain a hotel license. Based on the facts presented, the management company and its employees would not qualify for any of the enumerated exemptions from licensure set forth in § 54.1-2103. The management company and its employees, if not employees of the individual unit owners,¹⁰ therefore will not be exempt from the Virginia Real Estate Board’s licensing requirements.¹¹

CONCLUSION

Accordingly, it is my opinion that a management company that manages short-term transient occupancy rentals of fewer than thirty days for a portion of the condominium units in a condominium must be licensed with the Virginia Real Estate Board and must employ a licensed real estate broker before renting or offering to rent those condominium units on behalf of the units’ owners.

¹ VA. CODE ANN. § 54.1-2100 (2009).

² Section 54.1-2107 (2009).

³ See *Massie v. Dudley*, 173 Va. 42, 55, 3 S.E.2d 176, 181 (1939) (disallowing a claim for a commission on the sale of real property because the claimant did not have a real estate broker’s license at the time he assisted a property owner with negotiating the sale of his farm to the United States government).

⁴ Section 54.1-2106.1 (Supp. 2012). To engage in these services willfully without a proper license constitutes a Class 1 misdemeanor. Section 54.1-111(A) (2009).

⁵ Section 54.1-2013.

⁶ See § 54.1-2103(A)(1) (2009).

⁷ See § 35.1-18 (2011) (“No person shall own, establish, conduct, maintain, manage, or operate any hotel . . . in this Commonwealth unless the hotel . . . is licensed as provided in this chapter. The license shall be in the name of the owner or lessee. No license issued hereunder shall be assignable or transferable.”)

⁸ See 12 VA. ADMIN. CODE § 5-431-10 (“‘Hotel’ means any establishment offering to the public for compensation transitory lodging or sleeping accommodations, overnight or otherwise, including but not limited to facilities known by varying nomenclatures or designations as hotels, motels, travel lodges, tourist homes, or hostels and similar facilities by whatever name called that consist of two or more lodging units.”)

⁹ See § 35.1-18.

¹⁰ I note that under certain circumstances, should the management company acquire the proper license, its employees may be able to be exempted under § 54.1-213(C), provided its requirements are satisfied.

¹¹ Prior opinions of this Office have concluded that the requirement to be licensed as a real estate broker or real estate salesperson applies in a variety of contexts. See 1989 Op. Va. Att’y Gen. 287, 288 (a home builder’s referral incentive program giving a home purchaser a monetary credit toward settlement or a dinner or ski weekend in return for the buyer referring another person to purchase from the home builder would constitute activity that would require the referring party to be licensed); 1973-74 Op. Va. Att’y Gen. 287, 288 (a “home-finding” business serving as a liaison between a prospective lessee or buyer and the lessor or seller of a home must be licensed even if the business operates through brokers or other sales agents).

OP. NO. 12-104

PROPERTY AND CONVEYANCES: PROPERTY OWNERS’ ASSOCIATION ACT

Because the Virginia Property Owners Act does not expressly provide or otherwise allow for a developer to maintain control of a homeowners’ association for a specific period of time or until a specific number of lots or units are sold, there is no Virginia Code provision to evaluate for facial violations of individual homeowners’ constitutional rights to the equal protection of law or to due process of law.

THE HONORABLE BRYCE E. REEVES
MEMBER, SENATE OF VIRGINIA
JANUARY 11, 2013

ISSUES PRESENTED

You inquire whether provisions of the Virginia Property Owners’ Act that provide or otherwise allow for a developer to maintain control of a homeowners’ association for a specific period of time, or until a specific number of lots or units are sold to private persons, facially violate the individual homeowners’ constitutional rights to the equal protection of law or to due process of law. You further ask whether an impermissible conflict of interests arises when a lawyer simultaneously serves as the attorney for both the developer and the homeowners’ association during the period of developer control.

RESPONSE

It is my opinion that because the Virginia Property Owners’ Act does not expressly provide or otherwise allow for a developer to maintain control of a homeowners’ association for a specific period of time or until a specific number of lots or units are

sold, there is no Virginia Code provision to evaluate for constitutionality. It is further my opinion that whether an impermissible conflict of interests exists when a lawyer is employed by the developer to serve simultaneously as the attorney for the developer and the association is not a matter of law upon which this Office can opine, but rather an ethical issue properly addressed by the Virginia State Bar.

BACKGROUND

You express concern regarding the legal rights, in relation to one another, of developers, homeowners' associations, and individual homeowners upon transfer of common areas from the developer to the homeowners' association. You describe a scenario in which roads and dams have been neglected during the period of developer control. During this time, per the declaration, the attorney for the developer also serves as the lawyer for the subdivision's homeowners' association.

APPLICABLE LAW AND DISCUSSION

The Virginia Property Owners' Association Act¹ (the "Act") governs many aspects of subdivision development control and governance. It includes provisions relating to the transfer of control from the developer,² disclosure requirements,³ and the conduct of meetings of associations' boards of directors.⁴ It also provides that "[e]very lot owner . . . shall comply with all lawful provisions of [the Act] and all provisions of the declaration."⁵

Notably, the Act includes but few provisions relating to the contents of the declaration or other documents governing the rights and duties of the parties subject to their terms.⁶ Most important to your inquiry, the Act does not expressly provide or otherwise allow for a developer to maintain control of a homeowners' association for a specific period of time or until a specific number of lots or units are sold to private persons (the "declarant control period").⁷ There is, therefore, no specific provision to evaluate for constitutionality pursuant to your request. Notwithstanding the absence of such specific provision, it is my opinion that the retention of control of a homeowners' association by the developer for a declarant control period can be done lawfully pursuant to the terms of the declaration.

The relationship between a homeowners' association and the homeowners is contractual in nature.⁸ In general, the contracting parties are allowed broad latitude in the terms of their agreement.⁹ "As with other contracts, effect must be given to the intention of the parties."¹⁰ Accordingly, a provision establishing a declarant control period is likely valid¹¹ if it does not violate applicable provisions of law.¹² The question of whether any particular such provision is valid is a fact-specific determination beyond the scope of this Opinion.¹³

Any recourse a homeowner may have against a developer regarding defective community property, in essence, is a private cause of action.¹⁴ If the developer's actions, by and through control of the association, contravene the declaration or the Act, such owner may bring a lawsuit for appropriate redress.¹⁵ Section 55-515(A) of the Act provides that any lack of compliance with the Act or the declaration

[S]hall be grounds for an action or suit to recover sums due, for damages or injunctive relief, or for any other remedy available at law or in equity, maintainable by the association, or by its board of directors or any managing agent on behalf of such association, *or in any proper case, by one or more aggrieved lot owners on their own behalf or as a class action.*^[16]

The above-quoted language of §55-515(A) would appear to anticipate a wide array of legal claims. Indeed, courts interpreting identical language¹⁷ under the Condominium Act¹⁸ have applied it broadly.

The Condominium Act language “contemplates that a violation of a right held in common by all unit owners shall be maintained by a unit owners’ association, unless the association fails or refuses to assert the common right.”¹⁹ Individual unit owners have standing to bring a claim on their own behalf if the association fails to assert a common claim.²⁰ Nonetheless, individual owners may maintain only “claims arising from lack of compliance with the [Condominium] Act or relevant condominium instruments. [S]tanding to institute claims or actions concerning common...is restricted to condominium unit owners’ associations.”²¹ Applying these holdings to the identical language in § 55-515(A) of the Act, it appears individual owners in a homeowners’ association may pursue claims arising from lack of compliance with the Act or the declaration.²²

Additionally, the Act requires every association to conduct a capital reserve study at least once every five years and to budget adequate cash reserves for the repair or replacement of capital components.²³ The provisions of the Act establishing these requirements do not distinguish between the declarant control period and other time periods.²⁴ During the declarant control period, therefore, the association must meet the Act’s capital study and reserve requirements. Failure of an association to satisfy these requirements may give individual homeowners the right to pursue an action under § 55-515(A).

Another course of redress potentially available to individual homeowners is a derivative suit to enforce any cause of action the association, as a corporate entity, may have against the developer. “A derivative claim enforces a corporate cause of action where the corporation has not sued to protect its own right.”²⁵ A party may “sue in a derivative capacity only upon a showing either that the managing agents are themselves the authors of the wrong, or that their refusal to bring suit in the name of the corporation is an act of bad-faith, or an abuse of the discretionary power vested in them.”²⁶ Thus, if the association is incorporated and homeowners can make these showings, they may have standing to assert a derivative claim against the developer on behalf of the association.

In regard to your second question, Virginia’s conflict of interests law, the State and Local Government Conflict of Interests Act,²⁷ provides minimum rules of ethical conduct for state and local government officers and employees. In general, the law relates to certain personal interests of such officers and details certain types of conduct that are improper.²⁸ This law applies only to state and local government officers and employees;²⁹ it does not govern private business actors.

Thus, there is no law for this Office to construe related to any potential conflict of interests a lawyer may have when serving as counsel to both to a developer and a homeowners' association. Rather, such questions concern ethical rules promulgated by the Virginia State Bar. I am therefore not in a position to render an opinion in response to your second inquiry.³⁰

CONCLUSION

Accordingly, it is my opinion that because the Virginia Property Owners Act does not expressly provide or otherwise allow for a developer to maintain control of a homeowners' association for a specific period of time or until a specific number of lots or units are sold, there is no Virginia Code provision to evaluate for constitutionality. It is further my opinion that whether an impermissible conflict of interests exists when a lawyer is employed by the developer to serve simultaneously as the attorney for the developer and the association is not a matter of law upon which this Office can opine, but rather an ethical issue better addressed by the Virginia State Bar.

¹ VA. CODE ANN. §§ 55-508 through 55-516.2 (2012).

² See, e.g., §§ 55-509.1 (payment of taxes); 55-509.2 (provision of documents).

³ See §§ 55-509.4 through 55-509.10.

⁴ See § 55-510.1.

⁵ Section 55-515.

⁶ See, e.g., §§ 55-509, 55-509.2, 55-512(A), 55-513, 55-515.2(F), and 55-516.1.

⁷ See §§ 55-508 through 55-516.2. It is worth noting that while the Act does not expressly authorize declarant control, it recognizes such control by references to such arrangements. See, e.g., §§55-509.1:1 (limits on certain contracts and leases formed during declarant control period); 55-509.2 (provision of documents to association upon termination of declarant control period); 55-510(B)(2) (association's employee salary information not available for examination during declarant control period). Compare the Act with § 55-79.74 of the Condominium Act, which expressly authorizes declarant control of a condominium owners' association. It is noteworthy, however, that unlike homeowners' associations governed by the Act, condominiums are entirely creations of statute. See *Unit Owners Assoc. v. Gillman*, 223 Va. 752, 762, 292 S.E.2d 378, 383 (1982); 1989 Op. Va. Att'y Gen. 288, 292.

⁸ 2011 Op. Va. Att'y Gen. 163, 163 (citing *Sully Station II Cmty. Ass'n v. Dye*, 259 Va. 282, 284, 525 S.E.2d 555, 556 (2000); *Farran v. Olde Belhaven Towne Owners Ass'n*, 80 Va. Cir. 508, 511 (Fairfax Cnty. Cir. Ct. 2010)).

⁹ See 2011 Op. Va. Att'y Gen. 163, 163.

¹⁰ See *Sully Station II Cmty. Ass'n Inc.*, 259 Va. at 284, 525 S.E.2d at 556 (2000); *Lake Holiday Country Club, Inc. v. Teets*, 56 Va. Cir. 113, 117 (Frederick Cnty. Cir. Ct. 2001).

¹¹ 2002 Op. Va. Att'y Gen. 266, 269 (noting that a developer owning a majority of the lots may retain control of association).

¹² For example, the Act sets certain limits on actions the developer may cause the association to take during the declarant control period. See § 55-509.1:1. The Act also specifies certain actions the developer must take at the end of such period. See § 55-509.2.

¹³ See 2012 Op. Va. Att'y Gen. 117. See also, e.g., 1991 Op. Va. Att'y Gen. 122, 124, and opinions cited therein for matters requiring factual determinations.

¹⁴ 2006 Op. Va. Att'y Gen. 191, 192.

¹⁵ *Farran v. Olde Belhaven Towne Owners Ass'n*, 83 Va. Cir. 286, 294 (2011).

¹⁶ Section 55-515(A) (emphasis added).

¹⁷ *See, e.g., Farran*, 83 Va. Cir. at 294.

¹⁸ Sections 55-79.39 through 55-79.103 (2012).

¹⁹ *Frantz v. CBI Fairmac Corp.*, 229 Va. 444, 451, 331 S.E.2d 390, 395 (1985).

²⁰ *Asterita v. Ghent Dev. Partners*, 2009 Va. Cir. LEXIS 23, 40-41 (Norfolk Cir. Ct. 2009).

²¹ *Kuznicki v. Mason*, 273 Va. 166, 176, 639 S.E.2d 308, 312 (2007); *313 Freemason v. Freemason Assocs., Inc.*, 59 Va. Cir. 407, 417 (Norfolk Cir. Ct. 2002). *But see* *Millisor v. Anchor Point Ventures, L.L.C.*, 77 Va. Cir. 246, 252 (Hopewell Cir. Ct. 2008)(wherein the court concluded that the plaintiff had standing to assert a claim respecting common elements because the Condominium Act authorized such actions during the declarant control period).

²² *See Farran*, 83 Va. Cir. at 294. I note declarations often place an obligation on the association to properly maintain common property. Failure to comply with such provisions of a declaration may permit individual homeowners to pursue an action under § 55-515(A) to compel compliance.

²³ Section 55-514.1.

²⁴ *See id.*

²⁵ *Efessiou v. Efessiou*, 41 Va. Cir. 142, 149 (Fairfax Cnty. Cir. Ct. 1996). *See also* *Richelieu v. Kirby*, 48 Va. Cir. 260, 261 (Fairfax Cir. Ct. 1999) (derivative actions may be brought on behalf of both stock and non-stock corporations).

²⁶ *Abella v. Universal Leaf Tobacco Co.*, 495 F. Supp. 713, 717 (E.D. Va. 1980) (citations omitted).

²⁷ VA. CODE ANN. §§ 2.2-3100 through 2.2-3131 (2011).

²⁸ *See* § 2.2-3103.

²⁹ “[F]or the purpose of establishing a single body of law applicable to all state and local government officers and employees on the subject of conflict of interests, the General Assembly enacts this State and Local Government Conflict of Interests Act so that the standards of conduct for such officers and employees may be uniform throughout the Commonwealth.” Section 2.2-3100.

³⁰ Section 2.2-505 articulates the authority of an Attorney General to render official legal opinions. Generally, it is recognized that such opinions must be confined to matters of law; thus the Attorney General historically has limited responses to requests for opinions to matters that require an interpretation of federal or state law or regulation. *See* 2002 Op. Va. Att’y Gen. 266, 267-68 (citing 2 A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 668 (1974)). Moreover, this Office declines to render an official opinion when the matter is better addressed by another agency. *See, e.g.*, 2000 Op. Va. Att’y Gen. 106, 107.

OP. NO. 13-026

PROPERTY AND CONVEYANCES: FORM AND EFFECT OF DEEDS AND COVENANTS

The deed by which the Commonwealth of Virginia conveyed Fort Boykin to Isle of Wight County obligated Isle of Wight County to maintain and preserve the dwelling in good condition, including to take reasonable measures to protect it from catastrophic loss. The county’s failure to maintain and preserve the dwelling does not give rise to a right of entry and reverter under the deed, so as to entitle the Commonwealth to reclaim title to the Fort Boykin property.

MARK C. POPOVICH, ESQUIRE
 COUNTY ATTORNEY, COUNTY OF ISLE OF WIGHT
 SEPTEMBER 20, 2013

ISSUES PRESENTED

You inquire as to whether the deed by which the Commonwealth of Virginia conveyed Fort Boykin to Isle of Wight County entitles the Commonwealth to reclaim title to the property if the County has failed to maintain and preserve a specific dwelling located thereon in accordance with the requirements of a covenant within the deed. In addition, you inquire whether the deed entitles the Commonwealth to reclaim title to the property as a result of that dwelling having been deemed a total loss as a result of a recent fire.

RESPONSE

It is my opinion that the deed obligated Isle of Wight County to maintain and preserve the dwelling in good condition, including to take reasonable measures to protect it from catastrophic loss. It is further my opinion that the county's failure to maintain and preserve the dwelling does not give rise to a right of entry and reverter under the deed, so as to entitle the Commonwealth to reclaim title to the Fort Boykin property.

BACKGROUND

On August 21, 1974, Sarah Elizabeth Jordan conveyed to the Commonwealth of Virginia, Department of Conservation and Economic Development, Division of Parks, (a predecessor agency to the current Department of Conservation and Recreation or "DCR") some 14.43 acres of real property generally referred to as "Fort Boykin." In accordance with authority granted by the General Assembly, DCR subsequently conveyed the Fort Boykin property by deed to the surrounding locality, Isle of Wight County (the "County").¹

In your opinion request and the accompanying materials, you relate that the residential dwelling on the property, formerly the home of Sarah Elizabeth Jordan, had fallen into substantial disrepair. As of April 24, 2012, the dwelling suffered from the effects of termite damage, foundation damage due to improperly sized floor joists, and water leakage around windows. Then, on March 20, 2013, an accidental fire severely damaged the dwelling. According to the Fire Scene Examination Report issued by the Virginia State Police, the dwelling suffered such damage that the cost to repair the structure will equal or exceed its value.²

APPLICABLE LAW AND DISCUSSION

DCR conveyed Fort Boykin to the County pursuant to a Deed of Conveyance, dated January 21, 1999. The deed sets forth the obligations of the County and enumerates four distinct covenants "which shall run with the land and be binding upon" the County.³ One of the four covenants requires that "the existing dwelling or farm house on said property, formerly the home of Sarah Elizabeth Jordan, shall be maintained and preserved in good condition."⁴

Courts will not look beyond the four corners of a deed when the language is clear, unambiguous, and explicit.⁵ Consistent with the plain definition of the term, the Supreme Court of Virginia has found the word "maintenance" to mean, "to preserve or to keep 'in a state of repair,' and 'repair' means to fix or 'restore what is torn or

broken.”⁶ Moreover, the concomitant obligation to “preserve” may extend to taking reasonable measures to protect an object; a former opinion of this office relied on that word’s plain definition to find the imposition of an obligation, “to keep safe from injury, harm, or destruction.”⁷

Based upon the facts that you provide, and for the purposes of this opinion, it appears that the County breached the covenant to maintain and preserve the dwelling in good condition when it failed to prevent or repair the damage related to termite infestation, improperly sized floor joists, and water leakage around windows, all of which disrepair was evident in 2012.⁸ Because the accidental fire appears to have arisen from an electrical malfunction of undetermined cause, upon the facts provided I cannot herein conclude whether or not the County breached its covenant obligation to take reasonable measures to protect the dwelling from catastrophic loss.

With respect to covenants within the deed, it further contains conditions subsequent, the breach of which trigger a right of DCR, on behalf of the Commonwealth, to take steps to reclaim title to the Fort Boykin property through a right of entry and reverter:

In the event that Fort Boykin, including its breastworks and other remaining physical features, are not properly maintained and preserved as an ancient fort, or in the event that all of said property is not used as a public park or for public park purposes or is not maintained and regularly open for public recreational and park use, then all right, title and interest in and to the said property shall revert to [DCR], which reverter interest shall entitle the Commonwealth to immediate right of entry and control in the event of a breach or violation of any of said conditions.⁹

At common law, as in this deed, a *covenant* may be coupled with a *condition subsequent*, and a breach of that condition may enable the grantor to enforce a forfeiture of the grantee’s fee simple title.¹⁰ Upon breach, the grantor may choose to enforce the covenant by seeking legal damages or specific performance thereof, or to enforce the condition by seeking forfeiture of the grantee’s title.¹¹ However, when such *possibility of reverter* exists, it is not self-executing upon breach of the condition subsequent; instead, title to the property remains with the grantee unless and until the grantor takes appropriate action to enforce it through exercising a *right of entry* in an action of *ejectment*.¹² Such forfeitures are not favored at common law, and the terms of conditions subsequent “are strictly construed, because they are calculated to defeat a vested estate and give rise to a situation by which the grantor can again obtain the granted property.”¹³ The intent of the condition subsequent respecting forfeiture must be clear,¹⁴ and “a party who insists upon a forfeiture of an estate for breach of a condition must bring himself clearly within the terms of the condition.”¹⁵

A careful reading of the deed reveals that none of its conditions subsequent relate specifically to the covenant to maintain and preserve in good condition the dwelling on the Fort Boykin property. Instead, by their unambiguous language, those conditions pertain only to the covenants requiring satisfactory maintenance and preservation of the ancient fort and its appurtenances, and the public recreational and park use of the Fort Boykin property as a whole. Therefore, I conclude that the

County's apparent breach of the covenant to maintain and preserve the dwelling did not trigger the deed's right of entry and reverter provisions.¹⁶

CONCLUSION

Accordingly, it is my opinion that the deed obligated Isle of Wight County to maintain and preserve the dwelling in good condition, including to take reasonable measures to protect it from catastrophic loss. It is further my opinion that the county's failure to maintain and preserve the dwelling does not give rise to a right of entry and reverter under the deed, so as to entitle the Commonwealth to reclaim title to the Fort Boykin property.

¹ See 1998 Va. Acts ch. 41.

² The report's narrative attachment concluded that

The area of origin for the fire occurred in the kitchen, around the area of the panel box. This is where the heaviest fire damage was found in the kitchen. A distinct fire pattern was noted on the wall around the panel box. A hole was seen on the wall where the panel box was originally mounted. The interior of the panel box showed signs of arcing to the wiring. The cause of the fire is found to be accidental. The damage surrounding the panel box and the signs of arcing in the panel box show the most probable cause to be an electrical malfunction.

³ Deed of Conveyance between the Commonwealth of Virginia, Department of Conservation and Recreation, and Isle of Wight County, Instrument #99-5244, recorded Sept. 29, 1999, in the Office of the Circuit Court Clerk, Isle of Wight County, at Page 41.

⁴ The covenants require that

(1) Fort Boykin, including its breastworks and other remaining physical features, shall be properly maintained and preserved as an ancient fort in keeping with prudent preservation practices for a historic fort of this type; (2) a bronze memorial plaque . . . shall be maintained on the grounds of Fort Boykin; (3) the existing dwelling or farm house in said property, formerly the home of Sarah Elizabeth Jordan, shall be maintained and preserved in good condition; and (4) the 14.43 acres of real property herein conveyed, including the Fort, shall be used, properly maintained and regularly kept open to the public at reasonable times and subject to such reasonable rules and regulations, as determined by the Grantee, for recreational and park use.

Id.

⁵ *Forster v. Hall*, 265 Va. 293, 301, 576 S.E.2d 746, 750 (2003).

⁶ *Id.*

⁷ See 1977-79 Op. Va. Att'y Gen. No. 61, 62 (citing *Webster's Seventh Collegiate Dictionary* (1972)); see also MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 920 (10th ed. 2001), wherein the verb "preserve" is defined as, "to keep safe from injury, harm or destruction: PROTECT . . . to keep . . . free from decay . . . MAINTAIN".

⁸ I note that an obligation to maintain a structure generally does not include an obligation to make improvements upon it. See, e.g. *Montgomery v. Columbia Knoll Condo. Council*, 231 Va. 437, 439, 344 S.E.2d 912, 913 (1986). Nevertheless, the breach of a deed covenant may give rise to an election to claim for legal damages or for specific performance. See *Neal v. State-Planters Bank & Trust Co.*, 166 Va. 158, 164-65, 184 S.E. 203, 205-206 (1936); and see *Adams v. Seymour*, 191 Va. 372, 61 S.E.2d 23 (1950).

⁹ Deed of Conveyance, *supra* note 4.

¹⁰ *Neal*, 191 Va. at 164-65, 184 S.E. at 205-206. See also 2 Thompson on Real Property §§ 20.01 through 20.05 (2004)

¹¹ *Id.*

¹² *Id.*, and see *Commonwealth Transp. Comm'r v. Windsor Indus., Inc.*, 272 Va. 64, 78-9, 630 S.E.2d 514, 520-21 (2006); and *Pence v. Tidewater Townsite Corp.*, 127 Va. 447, 452-55, 103 S.E. 694, 695-96 (1920). See also VA. CODE ANN. § 8.01-131 (2007), *et seq.* (ejection).

¹³ *Roadcap v. Rockingham Cnty. Sch. Bd.*, 194 Va. 201, 205-207, 72 S.E.2d 250, 253 (1952); and see *disc'n Copenhaver v Pendleton*, 155 Va. 463, 477-80, 155 S.E. 802, 806-807 (1930).

¹⁴ *Epperson v. Epperson*, 108 Va. 471, 475, 62 S.E. 344, 346 (1908).

¹⁵ *Peoples Pleasure Park Co. v. Rohleder*, 109 Va. 439, 445, 61 S.E. 794, 796 (1908), *reh'g denied*, 109 Va. 439, 63 S.E. 981 (1909) (citing “Dev. on Deeds, sec. 973 and note”).

¹⁶ As discussed above, a breach of the covenant pertaining to the dwelling’s proper maintenance and preservation entitled DCR to seek damages at law against the County, however, the structure’s total loss by fire of indeterminate cause obviated any putative right to seek specific performance of the covenant’s obligations.

OP. NO. 13-094

RULES OF THE SUPREME COURT OF VIRGINIA

The Commonwealth is under no general obligation to disclose the names, addresses, and telephone numbers of her witnesses as part of the discovery process in a criminal case.

CONSTITUTION OF THE UNITED STATES

When a confidential informant in a narcotics case possesses exculpatory information under the *Brady* standard, or is an “active participant” in the criminal activity at issue at trial, the prosecution must disclose the informant’s identity to the defense within a reasonable time in advance of trial.

THE HONORABLE HOLLY B. SMITH
COMMONWEALTH’S ATTORNEY
COUNTY OF GLOUCESTER
DECEMBER 13, 2013

ISSUE PRESENTED

You inquire whether the Commonwealth must reveal the names, addresses, and phone numbers of her trial witnesses, including confidential informants in narcotics cases, as part of the Commonwealth’s discovery obligation.

RESPONSE

It is my opinion that the Commonwealth is under no general obligation to disclose the names, addresses, and telephone numbers of her witnesses as part of the discovery process in a criminal case. Nevertheless, it is my further opinion that pursuant to *Brady v. Maryland*,¹ due process of law requires the Commonwealth to disclose the identity of those witnesses who have information that is favorable to the accused, when that evidence is material to the defendant’s guilt or punishment. Finally, it is my opinion that, when a confidential informant in a narcotics case possesses exculpatory information under the *Brady* standard, or is an “active participant” in the criminal

activity at issue at trial, the prosecution must disclose the informant's identity to the defense within a reasonable time in advance of trial.

BACKGROUND

You relate that your office, in "open file" discovery, provides detailed information regarding whether an informant has been paid for his information, may receive consideration for a pending charge, and the extent of his criminal history. You further state that you do not normally provide the name, address, or telephone number of the informant as part of discovery.

APPLICABLE LAW AND DISCUSSION

There is no general right to discovery in a criminal case.² Nonetheless, the Commonwealth is bound by the discovery rules established by the Supreme Court of Virginia and by any constitutional due process constraints that may require the prosecution to disclose certain information to the defendant.

The Rules of the Supreme Court generally prescribe the scope of discovery, and they provide only limited discovery rights to criminal defendants.³ Such Rules do not include a requirement for the Commonwealth to disclose witnesses' names, addresses, or phone numbers.⁴ Rather, Rule 3A:11 provides only that upon the timely motion of a defendant accused of a felony in Circuit Court or any misdemeanor brought on direct indictment, the court shall order the Commonwealth to permit the inspection and copying or photographing of certain enumerated items.⁵ The identities and other information of witnesses are not included among the list of discoverable material.⁶ Moreover, this Rule, by its express terms, "does not authorize the discovery or inspection of statements made by Commonwealth witnesses or prospective Commonwealth witnesses to agents of the Commonwealth," or otherwise command the disclosure of witness information.⁷

Correspondingly, Rule 7C:5, which applies to all criminal and traffic cases in the General District Court, provides that upon the timely motion of a defendant accused of a misdemeanor punishable by confinement or in advance of a preliminary hearing for a felony, the court shall order the Commonwealth to permit the inspection and copying or photographing of certain express items.⁸ This Rule does not require the disclosure of witness information. Accordingly, I conclude that the discovery rules do not require the Commonwealth to disclose witness information.

The Due Process Clause similarly does not place a general or express duty on the Commonwealth to disclose her witnesses' names or other information before trial.⁹ Nevertheless, as ruled by the United States Supreme Court in *Brady v. Maryland*,¹⁰ due process does require the Commonwealth to provide a defendant with evidence that is both favorable (either because it is exculpatory or impeaching) and material to the defendant's guilt or punishment.¹¹ The Court of Appeals of Virginia addressed the application of the Due Process Clause to the disclosure of the identities of confidential informants in a narcotics case in its foundational decision in *Commonwealth v. Keener*.¹² The Court specifically considered whether the def-

endant's conviction should be reversed based on the Commonwealth's failure to disclose the identity of a confidential informant, an alleged *Brady* violation.¹³

The *Keener* Court differentiated between two classes of informants: "active participants" (individuals who are present and witness material events) and "mere tipsters" (those who solely provide information to the police).¹⁴ Because the informant in *Keener* had arranged both a meeting and the drug transaction between the defendant and the undercover officer, she was an "active participant" in the drug distribution that gave rise to the defendant's criminal charges.¹⁵ The Court therefore found that the informant's testimony may have established a defense of entrapment or provided a mitigating factor for the jury to consider in sentencing the defendant.¹⁶ Even though the informant testified during trial, the Court ruled that late disclosure of her identity prejudiced the defendant.¹⁷ Thus, the Court determined that the Commonwealth had violated the defendant's due process rights by failing to disclose the identity of the police informant before trial.¹⁸ The Court stated that "disclosure of the informant's identity is required where the informer is an actual participant, particularly where he helps set up the criminal occurrence."¹⁹ Moreover, disclosure of exculpatory evidence must be made before trial to "afford [the defendant] a reasonable time to investigate and prepare [for] trial."²⁰

Therefore, based upon these constitutional due process principles, I conclude that the Commonwealth has an obligation to disclose the identity of those individuals with exculpatory information,²¹ including any witnesses who are "active participant" informants.²² This conclusion represents an exception to the general rule that "the identity of a person furnishing the prosecution with information concerning criminal activities is privileged,"²³ and thus not discoverable under the provisions of Rule 3A:11.

CONCLUSION

Accordingly, it is my opinion that the Commonwealth is under no general obligation to disclose the names, addresses, and telephone numbers of her witnesses as part of the discovery process in a criminal case. Nevertheless, it is my further opinion that pursuant to *Brady v. Maryland*, due process of law requires the Commonwealth to disclose the identity of those witnesses who have information that is favorable to the accused, when that evidence is material to the defendant's guilt or punishment. Finally, it is my opinion that, when a confidential informant in a narcotics case possesses exculpatory information under the *Brady* standard, or is an "active participant" in the criminal activity at issue at trial, the prosecution must disclose the informant's identity to the defense within a reasonable time in advance of trial.²⁴

¹ 373 U.S. 83 (1963).

² *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977); *Watkins v. Commonwealth*, 229 Va. 469, 479, 331 S.E.2d 422, 430 (1985) (citing *Weatherford*, 429 U.S. at 559); *Lowe v. Commonwealth*, 218 Va. 670, 679, 239 S.E.2d 112, 118 (1977) (citing *Weatherford*, 429 U.S. at 559); see also 1993 Op. Va. Att'y Gen. 128, 129 (citing *Lowe*, 218 Va. at 679, 239 S.E.2d at 118).

³ Part Four of the Rules of the Supreme Court governs pretrial procedures, depositions, and production at trial, Va. Sup. Ct. Rs. 4:0 through 4:15, but is expressly limited to civil actions. See Va. Sup. Ct. R. 4:0. Part Three A of the Rules, Va. Sup. Ct. Rs. 3A:1 through 3A:25, which contains provisions applicable to

criminal proceedings, includes only one rule that is related to discovery. *See* Va. Sup. Ct. R. 3A:11. That rule, by its terms, applies only to criminal proceedings “in circuit courts and juvenile and domestic relations district courts (except proceedings concerning a child in a juvenile and domestic relations district court).” *Id.* at Subpart (a).

⁴ *Lowe*, 218 Va. at 679, 239 S.E.2d at 118 (“Our rule providing for discovery in a criminal case contains no provision requiring the Commonwealth to furnish the names and addresses of the eyewitnesses to a crime.”); *Watkins*, 229 Va. at 479, 331 S.E.2d at 430-31 (citing *Weatherford*, 429 U.S. at 559; *Lowe*, 218 Va. at 679, 239 S.E.2d at 118) (finding that the trial court properly denied the defendant’s discovery motion seeking the names and addresses of all potential witnesses for the Commonwealth).

⁵ Va. Sup. Ct. R. 3A:11(a), (b). The Commonwealth generally is required to provide discovery pursuant to the Rules “only where the defendant requests such evidence, *and* the trial court orders the discovery of the requested evidence.” *Lawson v. Commonwealth*, 35 Va. App. 610, 622, 547 S.E.2d 513, 519 (2001) (emphasis in original).

⁶ Applicable here is the maxim of statutory construction “expressio unius est exclusio alterius,” which “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.” *GEICO v. Hall*, 260 Va. 349, 355, 533 S.E.2d 615, 617 (2000) (quoting *Turner v. Wexler*, 244 Va. 124, 127, 418 S.E.2d 886, 887 (1992)).

⁷ Va. Sup. Ct. R. 3A:11(b)(2).

⁸ Va. Sup. Ct. R. 7C:1, 7C:5(a), (c).

⁹ *Watkins*, 229 Va. at 479, 331 S.E.2d at 430-31 (citing *Weatherford*, 429 U.S. at 559; *Lowe*, 218 Va. at 679, 239 S.E.2d at 118).

¹⁰ 373 U.S. 83, 87 (1963).

¹¹ *Id.* at 87; *Lowe*, 218 Va. at 679, 239 S.E.2d at 118; *United States v. Bagley*, 473 U.S. 667, 676 (1985); *see also Berger v. United States*, 295 U.S. 78, 88 (1935) (“The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor — indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.”).

¹² 8 Va. App. 208, 380 S.E.2d 21 (1989). *See also Hatcher v. Commonwealth*, 17 Va. App. 614, 616-17, 440 S.E.2d 416, 418-19 (1994).

¹³ *Keener*, 8 Va. App. at 210, 380 S.E.2d at 22. The defendant in *Keener* did not specifically request disclosure of the informant’s identity, *see Roviario v. United States*, 353 U.S. 53, 60-61 (1957), but instead made a general request for discovery and exculpatory evidence pursuant to *Brady*, which the trial court granted. *Keener*, 8 Va. App. at 210, 215, 380 S.E.2d at 22, 25.

¹⁴ *Keener*, 8 Va. App. at 212-13, 380 S.E.2d at 24.

¹⁵ *Id.* at 213, 380 S.E.2d at 24.

¹⁶ *Id.* at 213, 216, 380 S.E.2d at 24 (citing *Roviario*, 353 U.S. at 64), 26.

¹⁷ *Id.*, at 216, 380 S.E.2d at 26.

¹⁸ *Id.* In your letter, you note that the confidential informants will testify at trial, and thus, the defendant will be aware of the informant’s identity and have the opportunity to cross-examine this witness.

¹⁹ *Id.* at 213, 380 S.E.2d at 24 (quoting *United States v. Price*, 783 F.2d 1132, 1138 (4th Cir. 1986), quoting *McLawnhorn v. North Carolina*, 484 F.2d 1, 5 (4th Cir. 1973)) (internal citations omitted).

²⁰ *Gilchrist v. Commonwealth*, 227 Va. 540, 546-47, 317 S.E.2d 784, 787 (1984).

²¹ *Keener*, 8 Va. App. at 216, 380 S.E.2d at 26. Conceivably, there could be a case in which knowledge of the witness’ phone number and address is material and beneficial to a defendant, such as to show contact

between parties (or the absence thereof) in phone records. In such a case, the Commonwealth also should provide this information to the defendant. The duty to determine in the first instance whether evidence is exculpatory rests with the individual prosecutor. *Cherricks v. Commonwealth*, 11 Va. App. 96, 101, 396 S.E.2d 397, 400 (1990); *see also* 1993 Op. Va. Att’y Gen. at 130.

²² Nonetheless, to what extent witness information must be disclosed in a particular case is beyond the scope of this Opinion.

²³ *Hatcher v. Commonwealth*, 17 Va. App. at 616, 440 S.E.2d at 418, (quoting *Daniel v. Commonwealth*, 15 Va. App. 736, 739, 427 S.E.2d 423, 425 (1993), and citing *Gray v. Commonwealth*, 233 Va. 313, 328, 356 S.E.2d 157, 165, *cert. denied*, 484 U.S. 873 (1987)).

²⁴ *See* 1993 Op. Va. Att’y Gen. at 130-31.

OP. NO. 12-109

TAXATION: ENFORCEMENT, COLLECTION, REFUNDS, REMEDIES, AND REVIEW OF LOCAL TAXES

When taxes on property in special tax districts and general real estate taxes are delinquent, a Treasurer should apply any payment first to the most delinquent assessed taxes, and such taxes become delinquent at the same time, a Treasurer should apply any payment ratably or pro-rata between such taxes.

THE HONORABLE H. ROGER ZURN, JR.
TREASURER, COUNTY OF LOUDOUN
MAY 17, 2013

ISSUES PRESENTED

You present two related questions regarding the application of payments of delinquent local real estate taxes when a locality has established special tax districts (“Special Districts”) and/or community development authorities (“CDAs”) and such taxes accrue at the same time as general real estate taxes, thus becoming delinquent at the same time. You first ask whether payments must be applied first to the general real estate taxes or, alternatively, whether the Treasurer should apply payments ratably or pro-rata between the general taxes and the taxes for the Special Districts and/or the CDAs. You then ask, assuming that general real estate taxes have been paid, and taxes for more than one Special District and/or CDA have accrued at the same time and remain delinquent, whether the Treasurer should allocate payments pro-rata or ratably between the taxes for the Special Districts and/or the CDAs or whether there is there any way, absent a local ordinance, to determine priority between such Special Districts and/or CDAs for the payment of taxes that are equally delinquent.

RESPONSE

It is my opinion that, because the Code does not distinguish between the source of taxing authority, with each of the presented taxes constituting an assessment against real estate, and because the Code does not otherwise provide for priority of liens based on delinquent payments of such assessed taxes, the Treasurer, in both of the scenarios you present, should apply any payment first to the most delinquent assessed

taxes, and, second, ratably or pro-rata between such taxes when they have accrued at the same time.

APPLICABLE LAW AND DISCUSSION

Section 58.1-3340 of the *Code of Virginia* provides that “[t]here shall be a lien on real estate for the payment of taxes and levies assessed thereon prior to any other lien or encumbrance.”¹ This provision makes clear that any tax or levy assessed on a piece of real estate constitutes a lien against such property which must be paid before other liens or judgments, but it does not establish a priority amongst local taxes and levies that become delinquent at the same time.

In the situation you present, the taxes at issue, although established for distinct purposes,² are all “taxes and levies assessed” on real estate within the meaning of § 58.1-3340. Clearly, the general real estate tax levied pursuant to Chapter 32 of Title 58.1 is categorically such an assessment. Furthermore, a tax assessed by a Special District is likewise a tax on the real estate within such district. Specifically, sanitary districts are authorized to “levy and collect an annual tax upon all the property in such sanitary district subject to local taxation...,”³ and service districts have the authority to “levy and collect an annual tax upon any property in such service district subject to local taxation...”⁴ Finally, CDAs are authorized to “[r]equest annually that the locality levy and collect a special tax on taxable real property within the development authority’s jurisdiction to finance the services and facilities provided by the authority.”⁵ Although the levies imposed by Special Districts and CDAs are in addition to, and not in lieu of, the general real estate tax, which is for the general support of the government,⁶ it is my opinion that they constitute taxes upon real estate.

Section 58.1-3913 instructs that any payment of local levies received by the Treasurer is to be credited first against the most delinquent local account;⁷ this foundational statutory directive remains in force. Nevertheless, this section does not provide further guidance for instances when there are numerous delinquent local accounts, all of which became delinquent at the same time. Because both the general real estate tax and taxes from Special Districts and CDAs are taxes on real estate that constitute first priority liens on such real estate, and without statutory guidance that one should take precedence over the other if they come due at the same time, I conclude that the Treasurer should apply the payment ratably or pro-rata between the general real estate tax and the taxes for the Special Districts and/or the CDAs.⁸

Similarly, in response to your second question, assuming general real estate taxes have been paid, and taxes for the Special Districts and/or the CDAs have accrued at the same time and remain delinquent, the Treasurer should allocate payments pro-rata or ratably between the taxes for the Special Districts and/or the CDAs.⁹

CONCLUSION

Accordingly, it is my opinion that, because the Code does not distinguish between the source of taxing authority with each of the presented taxes constituting an assessment against real estate, and because the Code does not otherwise provide for priority of liens based on delinquent payments of such assessed taxes, the Treasurer, in both of

the scenarios you present, should apply any payment first to the most delinquent assessed taxes, and, second, ratably or pro-rata between such taxes when they have accrued at the same time.

¹ VA. CODE ANN. § 58.1-3340 (2009 & Supp. 2012).

² Special District taxes can be used only to pay the enumerated expenses set forth in the authorizing statutes for such levies. *See* VA. CODE ANN. § 21-118(6) (2008) (authorizing sanitary districts to impose taxes “to pay, either in whole or in part, the expenses and charges incident to constructing, maintaining and operating water supply, sewerage, garbage removal and disposal, heat, light, fire-fighting equipment and power and gas systems and sidewalks for the use and benefit of the public in such sanitary district.”); VA. CODE ANN. § 15.2-2403(6) (2012) (authorizing taxation by service districts “to pay, either in whole or in part, the expenses and charges for providing the governmental services authorized by [applicable law] and for constructing, maintaining, and operating such facilities and equipment as may be necessary and desirable in connection therewith; however, such annual tax shall not be levied for or used to pay for schools, police, or general government services not authorized by this section, and the proceeds from such annual tax shall be so segregated as to enable the same to be expended in the district in which raised.”). Likewise, taxes assessed by CDAs can be used only to finance the services provided by the authority. Section 15.2-5158(A)(3) (2012).

³ Section 21-118(6).

⁴ Section 15.2-2403(6). *See also* 1994 Op. Va. Att’y Gen. 117, 120 (“Indisputably, however, a service district levy under § 15.1-1-18.2(C)(6) [predecessor statute] is ‘an annual tax upon...property in such service district.’”)

⁵ Section 15.2-5158(A)(3).

⁶ 1981-82 Op. Va. Att’y Gen. 385, 386. In your request, you asked that I review this prior Opinion in light of the issues you now raise. I find no inconsistency between the conclusions of this Opinion on the nature or priority of these taxes, and the conclusions expressed in the prior one.

⁷ Section 58.1-3913 (2009); *See also* 1984-1985 Op. Va. Att’y Gen. 315, 316 (“As to priorities between tax liens of municipalities with concurrent taxing jurisdiction, i.e., town and county, ordinarily, where liens are given by statute the first in time takes precedence.”) (citing *Puryear v. Taylor*, 53 Va. (12 Gratt.) 401, 409 (1855)).

⁸ This is, of course, assuming that there is no local ordinance providing otherwise. *See* § 58.1-3913.

⁹ Again, this is absent a local ordinance establishing a different scheme of priority. *Id.*

OP. NO. 11-110

TAXATION: LICENSE TAXES

The local business license tax exemption afforded under § 58.1-3703(C)(1) does not apply to the subsidiary of a Class I railroad that operates a transloading facility unless it was certified by the Interstate Commerce Commission during that agency’s existence or is registered with the Surface Transportation Board for insurance purposes.

TAXATION: TAXATION OF PUBLIC SERVICE CORPORATIONS

The application of the real and tangible personal property tax rate provided by § 58.1-2607 depends on who owns the real and tangible property being taxed.

THE HONORABLE DEBORAH F. WILLIAMS
COMMISSIONER OF THE REVENUE
COUNTY OF SPOTSYLVANIA
JULY 19, 2013

ISSUES PRESENTED

You inquire whether a corporation claiming to be a subsidiary of a Class I railroad that operates a transloading facility qualifies for the local business license tax exemption provided by § 58.1-3703(C)(1). You further ask whether the corporation is eligible for the real and tangible personal property tax rate provided by § 58.1-2607.

RESPONSE

It is my opinion that the exemption afforded under § 58.1-3703(C)(1) does not apply to the subsidiary of a Class I railroad that operates a transloading facility unless it was certified by the Interstate Commerce Commission (ICC) during that agency's existence or is registered with the Surface Transportation Board (STB) for insurance purposes. It is further my opinion that the application of § 58.1-2607 depends on who owns the real and tangible property being taxed.¹

BACKGROUND

You relate that there is a corporation with a terminal in your county operating a rail-to-track transloading network that includes off-loading, storing and re-loading products for other commercial customers between railcars, containers and trucks. According to the corporation's website, the corporation is a subsidiary of a Class I railroad, but the subsidiary is a separate and distinct company. The same website offers the corporation's transloading services for businesses that do not have direct rail connections. The State Corporation Commission lists the subsidiary corporation as a separate entity in its records, which indicate that it is a Delaware corporation.

APPLICABLE LAW AND DISCUSSION

Section 58.1-3703(C)(1) expressly prohibits localities from imposing a license fee or levying any license tax

On any public service corporation or any motor carrier, common carrier, or other carrier of passengers or property formerly certified by the Interstate Commerce Commission or presently registered for insurance purposes with the Surface Transportation Board of the United States Department of Transportation, Federal Highway Administration, except as provided in § 58.1-3731^[2] or as permitted by other provisions of law.^[3]

Thus, whether the corporation is exempt from local license taxation depends on whether it falls within any of the enumerated categories in § 58.1-3703(C)(1).

The corporation qualifies for the exemption if it can be deemed a "public service corporation." "Public service corporation" is not defined within Title 58.1; however, reliance on the definition of "public service corporation" in § 56-1 is appropriate, because Title 56 establishes the regulatory powers and duties of the State Corporation Commission for public service companies and corporations.⁴ Section 56-1 provides that "[t]he words 'public service corporation' or 'public service company' shall include ... all persons authorized to transport passengers or property as a common carrier."⁵ "Person" includes individuals, partnerships, limited liability companies and corporations.⁶ Based upon the facts that you provide, it does not appear that a

corporation operating a rail-to-track transloading network that includes off-loading, storing and re-loading products for other commercial customers between railcars, containers and trucks would fall within the definition of public service corporation. However, § 58.1-3703(C)(1) also provides an exemption for the corporation if it was certified by the ICC or is presently registered for insurance purposes with the STB. That information is not before me and I offer no opinion on whether the exemption would apply based on an existing ICC Certificate or current registration with the STB for insurance purposes.

You also ask whether the real and business tangible property tax provisions of § 58.1-2607 of the *Code of Virginia* apply to the corporation. Section 58.1-2607 provides:

A. Notwithstanding the provisions of §§ 58.1-2604 and 58.1-2606, and beginning with assessments initially effective January 1, 1980, all assessments of real estate and tangible personal property of railroads shall be made by application of the local assessment ratio prevailing in such taxing district for other real estate as determined or published by the Department [of Taxation] except that land and noncarrier property shall be assessed as provided in § 58.1-2609.

B. The real estate and tangible personal property (other than the rolling stock) of every railway company, but not its franchise, shall be assessed on the valuation fixed by the Department and shall be taxed by a county, city, town, and magisterial district at the real estate tax rate applicable in such respective locality.

Whether a particular piece of real or tangible personal property is property of a railroad or railway company necessarily must be determined on a property-by-property basis. In order for real and tangible personal property to be assessed and taxed pursuant to § 58.1-2607, such property must be owned by a railroad or a railway company.⁷ The facts presented in your request do not discuss specific property or identify its ownership. I am therefore unable to opine on the application of § 58.1-2607 on any particular piece of real or tangible personal property.⁸

CONCLUSION

Accordingly, it is my opinion that the exemption afforded under § 58.1-3703(C)(1) does not apply to the subsidiary of a Class I railroad that operates a transloading facility unless it was certified by the ICC during that agency's existence or is registered with the STB for insurance purposes. It is further my opinion that the application of § 58.1-2607 depends on who owns the real and tangible property being taxed.

¹ My response provides an analysis of the law; however, whether an exemption applies in any specific circumstance is a factual determination to be made by the Commissioner of the Revenue. *See* 1984-85 Op. Va. Att'y Gen. 334.

² Section 58.1-3731 concerns certain public service companies, including telephone and telegraph companies, water companies, and heat, light and power companies, but does not relate to railroads or transloading companies.

³ I find no other applicable provisions of law that may be relevant to the response to your inquiries.

⁴ 2003 Op. Va. Att’y Gen. 164, 165.

⁵ A common carrier is one that “undertakes for hire to transport persons or commodities from place to place, offering his services to all . . . [who] choose to employ him and pay his charges.” *Bregel v. Busch Entertainment Corp.*, 248 Va. 175, 177, 444 S.E.2d 718, 719 (1994) (quoting *Carlton v. Boudar*, 118 Va. 521, 526, 88 S.E. 174, 176 (1916) (quoting *Black’s Law Dictionary*) and *Riggsby v. Tritton*, 143 Va. 903, 906, 129 S.E. 493 (1925)). Based upon the information you provide, and that gleaned from the corporation’s website, it does not appear that the corporation would meet this traditional definition of a common carrier.

⁶ VA. CODE ANN. § 56-1 (2012).

⁷ It cannot be assumed that the property on which the subsidiary operates its terminal is owned by the subsidiary. Additionally, your request is unclear as to what particular real and personal property is at issue.

⁸ The Attorney General “refrain[s] from commenting on matters that would require additional facts[.]” 2010 Op. Va. Att’y Gen. 56, 58.

OP. NO. 11-139

TAXATION: MISCELLANEOUS

Although “tourism” has not been defined for purposes of § 58.1-3819, it is generally considered to be a domestic and international travel market that is important to the economy of the Commonwealth. The requirement in § 58.1-3819 for those specified localities is that any transient occupancy tax imposed in excess of two percent must be spent to attract travelers to the locality, increase occupancy at lodging properties, and to generate tourism.

A determination on spending requires input from the local tourism industry. Localities have reasonable discretion in determining what are “local tourism industry organizations,” but the inclusion of representatives of lodging properties is required

SCOT S. FARTHING, ESQUIRE
WYTHE COUNTY ATTORNEY
JUNE 14, 2013

ISSUES PRESENTED

You ask whether the term tourism has been defined for purposes of § 58.1-3819 and you also seek clarification as to the meaning of a “local tourism industry organization” referenced in the same provision. You further inquire regarding the degree to which the local tourism industry must be consulted in spending transient occupancy taxes in excess of two percent.

RESPONSE

It is my opinion that while “tourism” has not been defined for purposes of § 58.1-3819, it is generally considered to be a domestic and international travel market that is important to the economy of the Commonwealth. It is further my opinion that the requirement in § 58.1-3819 for those specified localities¹ is that any transient occupancy tax imposed in excess of two percent must be spent to attract travelers to the locality, increase occupancy at lodging properties, and to generate tourism. Further, a determination on spending requires input from the local tourism industry.

Finally, it is my opinion that localities have reasonable discretion in determining what are “local tourism industry organizations,” but the inclusion of representatives of lodging properties is required.

APPLICABLE LAW AND DISCUSSION

Section 58.1-3819 authorizes counties to impose transient occupant taxes on certain lodging facilities not to exceed two percent.² The statute further expressly provides, for Wythe County and other specific localities³ to

levy a transient occupancy tax not to exceed five percent, and any excess over two percent shall be designated and spent solely for tourism and travel, marketing of tourism or initiatives that, as determined after consultation with the local tourism industry organizations, including representatives of lodging properties located in the county, attract travelers to the locality, increase occupancy at lodging properties, and generate tourism revenues in the locality.

You seek guidance regarding compliance with § 58.1-3819. The General Assembly has not defined tourism for purposes of § 58.1-3819 or elsewhere. The General Assembly has recognized the importance of tourism to the Commonwealth's economy as evidenced by its establishment of the Virginia Tourism Authority (the “VTA”).⁴ The VTA mission statement suggests that tourism is “the Commonwealth’s domestic and international travel market.”⁵ A look at the VTA website indicates that museums, historic sites, theme parks, the Commonwealth’s natural resources, festivals, and a host of other activities and destinations fall within a category that is considered tourism.⁶

Section 58.1-3819 reflects the General Assembly’s intent that the portion of the revenues derived from the transient occupancy tax in excess of two percent be spent to promote and generate tourism in the locality imposing that tax.⁷ The statute does not, however, suggest any methods regarding how the locality should do so⁸ except to require input from the local tourism industry. A prior opinion of this Office considered whether purchases of open spaces are consistent with the requirement that “such revenues be used to promote tourism in the locality,” and that Opinion concluded that such an assessment is “a factual determination to be made by the local governing body.”⁹

Although there is some deference to localities in determining what promotes tourism, the statute does require input from “the local tourism industry organizations, including representatives of lodging properties” where the localities have imposed transient occupancy taxes in excess of two percent and those revenues are being spent. Section 58.1-3819 also refers to “local tourism industry organizations” without defining them, but the statute is specific regarding consultation with “*representatives of lodging properties located in the county*” (emphasis added). This would indicate that localities should look to established local tourism associations¹⁰ where possible and must include representatives of lodging properties in spending (beyond the two percent amount) for tourism and travel and marketing of tourism.

CONCLUSION

Accordingly, it is my opinion that while “tourism” has not been defined for purposes of § 58.1-3819, it is generally considered to be a domestic and international travel market that is important to the economy of the Commonwealth. It is further my opinion that the requirement in § 58.1-3819 for those specified localities is that any transient occupancy tax imposed in excess of two percent must be spent to attract travelers to the locality, increase occupancy at lodging properties, and to generate tourism. Further, the determination on spending requires input from the local tourism industry. Finally, it is my opinion that localities have reasonable discretion in determining what are “local tourism industry organizations,” but the inclusion of representatives of lodging properties is required.

¹ The localities referred to in § 58.1-3819 are as follows:

Accomack County, Albemarle County, Alleghany County, Amherst County, Augusta County, Bedford County, Botetourt County, Brunswick County, Campbell County, Caroline County, Carroll County, Craig County, Cumberland County, Dinwiddie County, Floyd County, Franklin County, Giles County, Gloucester County, Greene County, Halifax County, James City County, King George County, Loudoun County, Madison County, Mecklenburg County, Montgomery County, Nelson County, Northampton County, Page County, Patrick County, Prince Edward County, Prince George County, Prince William County, Pulaski County, Rockbridge County, Smyth County, Spotsylvania County, Stafford County, Tazewell County, Washington County, Wise County, Wythe County, and York County.

² Specifically, § 58.1-3819(A) provides that

any county, by duly adopted ordinance, may levy a transient occupancy tax on hotels, motels, boarding houses, travel campgrounds, and other facilities offering guest rooms rented out for continuous occupancy for fewer than 30 consecutive days.... If any locality has enacted an additional transient occupancy tax pursuant to subsection C of § 58.1-3823, then the governing body of the locality shall be deemed to have complied with the requirement that it consult with local tourism industry organizations, including lodging properties. If there are no local tourism industry organizations in the locality, the governing body shall hold a public hearing prior to making any determination relating to how to attract travelers to the locality and generate tourism revenues in the locality.

³ See *supra* note 1.

⁴ VA. CODE ANN. § 2.2-2315. The Virginia Tourism Authority does business as the Virginia Tourism Corporation. See VIRGINIA TOURISM CORPORATION, *About Virginia Tourism Corporation*, available at <http://www.vatc.org/about/> (last visited June 4, 2013).

⁵ See VIRGINIA TOURISM CORPORATION, *Mission and Vision Statements*, available at <http://www.vatc.org/administration/mission/> (last visited June 4, 2013). The VTA includes motion picture production as part of its tourism mission as well. See *id.*

⁶ See VIRGINIA TOURISM CORPORATION, available at <http://www.vatc.org/home/> (home page) (last visited June 4, 2012).

⁷ See 1999 Op. Va. Att’y Gen. 200, 201.

⁸ *Id.*

⁹ *Id.* at 201-202.

¹⁰ For example, the Greater Williamsburg Chamber and Tourism Alliance is a Virginia tourism partner and could be considered a representative of the tourism industry in the Williamsburg area. See GREATER WILLIAMSBURG CHAMBER AND TOURISM ALLIANCE, available at <http://www.williamsburgcc.com/> (home page) (last visited June 4, 2013).

OP. NO. 13-070**TAXATION: REAL PROPERTY TAX****CONSTITUTION OF VIRGINIA: TAXATION AND FINANCE**

The exemption from, or deferral of, real property taxes authorized in Article X, § 6(b) for persons not less than 65 years of age or disabled does not extend to a person who has placed title to the real property in any form of trust, but does extend to a person who otherwise qualifies for the exemption and who holds a life estate in the real property.

The exemption for disabled veterans provided in Article X, § 6-A does extend to a qualifying veteran who holds a life estate in the real property.

THE HONORABLE PRISCILLA S. BELE
COMMISSIONER OF THE REVENUE, CITY OF NEWPORT NEWS

THE HONORABLE ROBERT S. WERTZ, JR.
COMMISSIONER OF THE REVENUE, LOUDOUN COUNTY

LARRY W. DAVIS, ESQUIRE
COUNTY ATTORNEY FOR ALBEMARLE COUNTY
DECEMBER 27, 2013

ISSUES PRESENTED

You ask several questions relating to the exemption from, or deferral of, local real property taxes when title to the property is held in trust or in a life estate. You first ask whether the property tax exemption or deferral for persons not less than 65 years of age or disabled authorized in Article X, § 6(b) of the Constitution of Virginia extends to a person who has chosen to place title to the real property in any form of trust or holds property in a life estate. You also ask whether the property tax exemption for disabled veterans provided in Article X, § 6-A of the Constitution of Virginia extends to a veteran who has chosen to place title to the real property in a life estate.

RESPONSE

It is my opinion that the exemption from, or deferral of, real property taxes authorized in Article X, § 6(b) for persons not less than 65 years of age or disabled does not extend to a person who has placed title to the real property in any form of trust, but does extend to a person who otherwise qualifies for the exemption and who holds a life estate in the real property. It is further my opinion that the exemption for disabled veterans provided in Article X, § 6-A does extend to a qualifying veteran who holds a life estate in the real property.

APPLICABLE LAW AND DISCUSSION

Article X, § 1 of the Constitution of Virginia provides that “[a]ll property, except as hereinafter provided, shall be taxed.” Article X, § 6 authorizes limited exemptions from taxation. Included within such exemptions, Article X, § 6(b) empowers the General Assembly to authorize specified age or disability based exemptions:

The General Assembly may by general law authorize the governing body of any county, city, town, ... to provide for the exemption from local property taxation, or a portion thereof, within such restrictions and upon such conditions as may be prescribed, of real estate and personal property designed for continuous habitation owned by, and occupied as the sole dwelling of, persons not less than sixty-five years of age or persons permanently and totally disabled as established by general law. A local governing body may be authorized to establish either income or financial worth limitations, or both, in order to qualify for such relief.

Additionally, effective for tax years beginning on or after January 1, 2011, Article X, § 6-A mandates a local real property tax exemption for totally disabled veterans. That section provides, in relevant part:

Notwithstanding the provisions of Section 6, the General Assembly by general law, and within the restrictions and conditions prescribed therein, shall exempt from taxation the real property, including the joint real property of husband and wife, of any veteran who has been determined by the United States Department of Veterans Affairs ... to have a one hundred percent service-connected, permanent, and total disability, and who occupies the real property as his or her principal place of residence.

Pursuant to Article X, § 6(f) these and any other “[e]xemptions of property from taxation as established or authorized hereby shall be strictly construed.”

The General Assembly enacted § 58.1-3210 to authorize local governing bodies to provide for the exemption set forth in Article X, § 6(b). Section 58.1-3210(A) provides in relevant part that

The governing body of any county, city or town may, by ordinance, provide for the exemption from, deferral of, or a combination program of exemptions from and deferrals of taxation of real estate and manufactured homes as defined in § 36-85.3, or any portion thereof, and upon such conditions and in such amount as the ordinance may prescribe. Such real estate shall be owned by, and be occupied as the sole dwelling of anyone at least 65 years of age or if provided in the ordinance, anyone found to be permanently and totally disabled as defined in § 58.1-3217.^[1]

The General Assembly implemented the exemption authorized in Article X, § 6-A through the enactment of § 58.1-3219.5, which provides in relevant part as follows:

Pursuant to Article X, Section 6-A of the Constitution of Virginia, and for tax years beginning on or after January 1, 2011, the General Assembly hereby exempts from taxation the real property, including joint real property of husband and wife, of any veteran who has been rated by the U.S. Department of Veterans Affairs ... to have a 100 percent service-connected, permanent, and total disability, and who occupies the real property as his principal place of residence.^[2]

Sections 58.1-3213 and 58.1-3219.6 contain the statutory requirements for the application process for claiming the respective exemptions.

During the 1969 debates in the General Assembly pertaining to the revision the Constitution of Virginia, some members expressed confusion regarding the meaning of the phrase “owned by” as used in the property tax exemption for certain persons not less than 65 years of age to be authorized in proposed Article X, § 6(b).³ In presenting the proposed § 6(b) to the House of Delegates on behalf of the Finance Committee, Delegate Theodore V. Morrison, Jr. indicated that the tax exemption would not be available for real property held in trust rather than owned directly by the person who in other respects qualifies for the exemption.⁴

Several prior opinions of this Office are relevant to the exemption qualification issues you raise.⁵ In particular, a 2007 Opinion notes that the phrase “owned by” contained in § 58.1-3210 is not subject to an exact definition.⁶ That Opinion explains that the facts of each exemption request must be carefully analyzed to determine whether the real estate involved actually is owned by a qualifying individual or individuals.⁷ Furthermore, a 2011 Opinion addresses a number of questions regarding Article X, § 6-A and concludes, in part, that the property tax exemption authorized by that constitutional provision is not available for a property held in trust for an otherwise qualifying disabled veteran.⁸ The rationale for that conclusion, which follows below, yields the same result when the question is whether property held in trust is eligible for the exemption authorized by Article X, § 6(b) and § 58.1-3210.

In Title 58.1 of the Code, “taxpayer” is defined as “every person, corporation, partnership, organization, *trust* or estate subject to taxation under the laws of this Commonwealth, or under the ordinances, resolutions or orders of any county, city, town or other political subdivision of this Commonwealth.”⁹ By statute, January 1 is the beginning of the tax year for the assessment of taxes on real estate, “and the owner of real estate on that day shall be assessed for the taxes for the year beginning on that day.”¹⁰ The Code provides that “[i]f property is owned by a person *sui juris*, it shall be taxed to him ... [i]f the property is held in trust for the benefit of another, it shall be listed by and taxed to the trustee, if there is any in this Commonwealth, and if there is no trustee in this Commonwealth, it shall be listed by and taxed to the beneficiary.”¹¹

The Supreme Court of Virginia has discussed the importance of adhering to the constitutionally mandated rule of strict construction in applying exemptions:

The Constitution of Virginia, as revised in 1971, provides that “[e]xemptions of property from taxation ... shall be strictly construed.” This rule of strict construction stems from the Commonwealth’s announced policy “to distribute the tax burden uniformly and upon all property.” Therefore, statutes granting tax exemptions are construed strictly against the taxpayer, and “[w]hen a tax statute is susceptible of two constructions, one granting an exemption and the other not granting it, courts adopt the construction which denies the exemption.” Indeed, “where there is any doubt, the doubt is resolved against the one claiming exemption,” and “to doubt an exemption is to deny it.”^[12]

Pursuant to the express terms of Article X, § 6(b) and § 58.1-3210, eligibility for the tax exemption or deferral authorized by those provisions requires the subject property to be “owned by” the person who occupies it as his or her sole dwelling and who otherwise qualifies for the exemption by reason of age or disability. When title to real

property is held by a trust, the incidents of ownership are with the trust and the trustee rather than the grantor or the beneficiary.¹³ Thus, if real property is held in trust, an otherwise qualifying individual not less than 65 years of age or disabled will not meet the ownership requirement of Article X, § 6(b) and § 58.1-3210.¹⁴

You also ask whether property that is held in a life estate can qualify for the exemption or deferral authorized in Article X, § 6(b). A prior opinion of this Office addressing this question concludes that a life tenant with a life estate in the subject property may qualify as the owner of the property for purposes of the tax exemption.¹⁵ At common law, a life estate in land is a freehold estate of indeterminate duration, not held at the will of another, which terminates upon the death of the life tenant or another living person.¹⁶ Although not possessed of the fee simple estate, a life tenant still has possession of the freehold with responsibilities of property ownership, including the duty to pay taxes.¹⁷ The Supreme Court of Virginia, for purposes of determining who is the “owner” of real property properly responsible for paying taxes levied on the property, asks “who has the usufruct, control or occupation of the land, whether his interest in it is an absolute fee, or an estate less than a fee.”¹⁸ In circumstances where the property is subject to a life estate, the court has consistently found that the life tenant, having sufficient present control over the property, is the “owner” of the property for tax purposes.¹⁹

Consistent with these precedents, a life tenant meets the ownership requirement for the exemption or deferral of taxes pursuant to Article X, § 6(b) and § 58.1-3210 and may be eligible for the grant of the same provided for in § 58.1-3215(A) to “the qualifying individual occupying such dwelling and *owning title or partial title* thereto.”²⁰ For the same reasons, I also conclude that a veteran who possesses a life estate in his or her principal place of residence meets the ownership requirement for the exemption authorized in Article X, § 6-A and § 58.1-3219.5.

CONCLUSION

Accordingly, it is my opinion that the exemption from, or deferral of, real property taxes for persons not less than 65 years of age or disabled authorized in Article X, § 6(b) of the Constitution of Virginia does not extend to a person who has placed title to the real property in any form of trust. It is further my opinion that the exemption or deferral authorized in Article X, § 6(b) does extend to a person who otherwise qualifies for the exemption and who holds a life estate in the real property. Finally, it is my opinion that the exemption for disabled veterans authorized in Article X, § 6-A of the Constitution of Virginia does extend to a qualifying veteran who holds a life estate in the real property.

¹ VA. CODE ANN. § 58.1-3210(A) (2013).

² Section 58.1-3219.5(A) (2013).

³ See PROCEEDINGS AND DEBATES OF THE SENATE OF VIRGINIA PERTAINING TO AMENDMENT OF THE CONSTITUTION 157 (Ex. Sess. 1969). See also 2 A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 1085 n.67 (1974). On November 2, 1976, the voters ratified an amendment to Article X, § 6(b), submitted to them by the General Assembly, to extend the authorized tax exemption to “persons permanently and totally disabled.” See 1976 Va. Acts chs. 751, 782.

⁴ The House of Delegates debates in 1969 included the following exchange between Delegate M. Caldwell Butler (R-Roanoke) and Delegate Theodore V. Morrison, Jr. (D-Newport News) regarding proposed Article X, § 6(b):

MR. BUTLER: With reference to the same problem, frequently elderly people will occupy residences that are held in trust for their benefit, together with a modest amount of income-producing security. Is it your understanding that they would be owners within the meaning of this provision and, therefore, be entitled to the exemption?

MR. MORRISON: If there is no deed of ownership held by the person occupying the property, I would say he would not qualify.

PROCEEDINGS AND DEBATES OF THE VIRGINIA HOUSE OF DELEGATES PERTAINING TO AMENDMENT OF THE CONSTITUTION 358 (Ex. Sess. 1969).

⁵ See 2011 Op. Va. Att’y Gen. 171, 182-84 (tax exemption authorized by Article X, § 6-A is not available for property held in trust, the beneficiary of which is an otherwise qualifying disabled veteran); 2007 Op. Va. Att’y Gen. 129, 132 (property owned jointly by qualifying and non-qualifying individuals is not exempt under § 58.1-3210); 2012 Op. Va. Att’y Gen. 134, 136 (exemption under Article X, § 6-A does not apply in favor of a veteran who is a proprietary lessee in a real estate cooperative); and 1999 Op. Va. Att’y Gen. 205, 206 (exemption under § 58.1-3210 is not available for proprietary lessee when real estate cooperative association owns property).

⁶ 2007 Op. Va. Att’y Gen. at 131.

⁷ *Id.* at 131-32.

⁸ 2011 Op. Va. Att’y Gen. at 183. In 2012, the General Assembly sought by statute to extend to properties held in trust the exemption authorized by Article X, § 6-A. 2012 Va. Acts chs. 75, 263. Upon any legal challenge, it remains to be seen whether the courts will agree that the legislature has the authority to make such a change to this tax exemption without seeking voter approval of an amendment to Article X, § 6-A of the Virginia Constitution. See, e.g., *Southern Ry. Co. v. City of Richmond*, 175 Va. 308, 318-19, 8 S.E.2d 271, 275 (1940) (General Assembly can neither authorize nor ratify a local tax assessment made in conflict with a limitation set forth in the Constitution of Virginia).

⁹ Section 58.1-1 (2013) (emphasis added).

¹⁰ Section 58.1-3281 (2013).

¹¹ Section 58.1-3015 (2013).

¹² *Commonwealth v. Wellmore Coal Corp.*, 228 Va. 149, 153-54, 320 S.E.2d 509, 511 (1984) (alteration in original) (internal citations omitted).

¹³ See, e.g., *Austin v. City of Alexandria*, 265 Va. 89, 95-97, 574 S.E.2d 289, 292-93 (2003) (when grantor conveyed title to property to a trust, grantor transferred the complete title in the property to himself as trustee and thereafter had no legal title in the property to convey in his individual capacity); *Air Power, Inc. v. Thompson*, 244 Va. 534, 537-38, 422 S.E.2d 768, 770 (1992) (beneficiary is not a necessary party in a suit to enforce a mechanic’s lien, because a beneficiary in a land trust retains no interest, legal or equitable, in the property itself).

¹⁴ This conclusion does not change in a circumstance where the otherwise qualifying individual also is (i) the trustee holding title to the subject property for a trust and (ii) a beneficiary of the trust. Exemptions of property from taxation must be strictly construed; “‘where there is any doubt, the doubt is resolved against the one claiming exemption.’” *Wellmore Coal Corp.*, 228 Va. at 154, 320 S.E.2d at 511 (quoting *Golden Skillet Corp. v. Commonwealth*, 214 Va. 276, 278, 199 S.E.2d 511, 513 (1973)). A person who holds title to real property as a trustee does not have legal title to the same in his individual capacity. *Austin*, 265 Va. at 95-97, 574 S.E.2d at 292-93. The text of Article X, § 6(b) makes no reference to trusts in setting forth the specific requirement that the property be “owned by” the otherwise qualifying individual. This is no mere oversight as the 1969 debates on the Constitution of Virginia specifically considered whether trust-owned property should be eligible for the exemption to be authorized by the proposed Article X, § 6(b). See *supra* note 4 and accompanying text.

¹⁵ See 1971-72 Op. Va. Att’y Gen. 427, 428.

¹⁶ See I RALEIGH COLSTON MINOR, THE LAW OF REAL PROPERTY § 135 (the freehold) (“The common law recognized no interest in land to be ‘*real property*’ unless it were a freehold, and no one as the actual owner of *land* unless he were a *tenant of the freehold*.” (emphasis in original)), and § 191 (general nature of life estates) (F.D.G. Ribble 2d ed. 1928).

¹⁷ *Id.* at §§ 136 (seisin), 143 (classification of estates of freehold and estates less than freehold), 157 (incidents of fee simple ownership), 215 (life tenant’s duty to pay taxes and local assessments).

¹⁸ See *Banks v. County of Norfolk*, 191 Va. 463, 467, 62 S.E.2d 46, 48 (1950), quoting *Powers v. City of Richmond*, 122 Va. 328, 335, 94 S.E. 803, 805 (1918).

¹⁹ See *City of Richmond v. McKenny*, 194 Va. 427, 430, 73 S.E.2d 414, 416 (1952); *Ceroli v. City of Clifton Forge*, 192 Va. 118, 125-26, 63 S.E.2d 781, 785 (1951); *Banks*, 191 Va. at 467, 62 S.E.2d at 47-48; *Stark v. City of Norfolk*, 183 Va. 282, 289, 32 S.E.2d 59, 61-62 (1944); *Commonwealth v. Wilson*, 141 Va. 116, 121, 126 S.E. 220, 222 (1925).

²⁰ Section 58.1-3215(A) (2013) (emphasis added). Because your inquiry does not ask about the eligibility of a remainderman, I do not herein address the issue. See 1976-77 Op. Va. Att’y Gen. 293, 294 (“As the holder of a life estate, the life tenant was the owner of ‘partial title,’ for purposes of the exemption Conversely, due to lack of control over the property, the remainderman, while also holding ‘partial title,’ would not be considered an ‘owner.’”).

OP. NO. 12-051

TAXATION: REAL PROPERTY TAX-SPECIAL ASSESSMENT FOR LAND PRESERVATION

When a commissioner of the revenue makes the factual determination that a parcel of land meets the criteria set forth in § 58.1-3230, but that the parcel fails to meet the acreage requirements of § 58.1-3233(2), such parcel may not qualify for use taxation and assessment.

THE HONORABLE PRISCILLA J. DAVENPORT
MIDDLESEX COUNTY COMMISSIONER OF THE REVENUE
MARCH 8, 2013

ISSUE PRESENTED

You ask whether a parcel of real property consisting of 8.6 acres of woodland and 3.2 acres of marsh/swamp land, in addition to one acre used for a home site, qualifies for your county’s Land Use Program, which implements the use taxation and assessment authorized by § 58.1-3230.

RESPONSE

It is my opinion that, should a commissioner of the revenue make the factual determination that a parcel of land meets the criteria set forth in § 58.1-3230, but fails to meet the acreage requirements of § 58.1-3233(2), such parcel may not qualify for use taxation and assessment.

BACKGROUND

You present a scenario in which a taxpayer owns 12.80 acres of real property in Middlesex County. You state that the land comprises one acre dedicated to a home site including a dwelling, 8.6 acres of woodland, and 3.2 acres of marsh/swamp land.

Nonetheless, you indicate the taxpayer claims the land is divided as follows: 3.1 acres is tidal marsh, 1.6 acres constitute vegetated riparian buffer, 1.15 acres is swamp, 0.82 acres of RPA, and the remaining 6.10 acres encompass woodland. You relate that the taxpayer has applied for your county's Land Use Program.

APPLICABLE LAW AND DISCUSSION

Pursuant to § 58.1-3231 of the *Code of Virginia*, any locality that has “adopted a land-use plan may adopt an ordinance to provide for the use value assessment and taxation . . . of real estate classified in § 58.1-3230.” Section 58.1-3230 establishes and defines the special classifications for which land use assessments are permitted: real estate that is devoted to either agricultural use, horticultural use, forest, or to open space use may be eligible for such assessment.¹

In addition to meeting the criteria set forth in the classifications provided in § 58.1-3230, the Code requires land devoted to a qualifying use to meet certain acreage requirements. Generally, land devoted to agricultural or horticultural use must consist of a minimum of five acres; forest property must consist of a minimum of twenty acres; and open-space property must consist “of a minimum of five acres or such greater minimum acreage as may be prescribed” by the locality.² As a previous Opinion of this Office has stated, “[t]o qualify for the special assessment, the land must be devoted to agricultural, horticultural, forest, or open-space uses, *and* must satisfy the minimum acreage requirement”³

Section 58.1-3233 directs and authorizes commissioners of the revenue to determine whether a particular parcel falls within the definition of a qualifying classification.⁴ To assist with this determination, the commissioner is authorized to request an opinion from the Director of the Department of Conservation and Recreation, the State Forester, or the Commissioner of Agriculture and Consumer Services, as necessary.⁵ Once the commissioner has classified the property, he further is directed to determine whether the applicable minimum acreage requirement is satisfied.⁶

Whether a particular parcel meets the requirements to qualify for a special assessment is a factual determination to be made by the local assessing official. Thus, should a commissioner of the revenue determine the land both is devoted to a qualifying use and satisfies the applicable acreage requirement, it is my opinion that such parcel may be eligible for special assessment, but that if the commissioner concludes that the land fails either criterion, such land may not be afforded a special assessment under § 58.1-3231.⁷

CONCLUSION

Accordingly, it is my opinion that, should a commissioner of the revenue make the factual determination that a parcel of land meets the criteria set forth in § 58.1-3230, but fails to meet the acreage requirements of § 58.1-3233(2), such parcel may not qualify for use taxation and assessment.

¹ VA. CODE ANN. § 58.1-3230 (Supp. 2012).

² Section 58.1-3233(2) (Supp. 2012). You do not indicate that Middlesex County has adopted an ordinance establishing an acreage minimum for open-space land greater than the 5-acre requirement provided in § 58.1-3233(2).

³ 2009 Op. Va. Att’y Gen. 168, 169 (emphasis added). This Opinion further concludes that for mixed-used properties, each qualifying use separately must meet the acreage requirement. *Id.*

⁴ Section 58.1-3233(1).

⁵ *Id.*

⁶ Section 58.1-3233(2).

⁷ I note your inquiry appears to involve the forest and open-space classifications. Under the facts you present, it is evident that, based on the 20-acre minimum requirement for forest land, the taxpayer is ineligible for special assessment on those grounds. In addition, although “real estate devoted to open-space” can include certain wetlands and riparian buffers, § 58.1-3230, whether the land in your scenario constitutes such real estate and whether it meets the applicable *acreage* minimum are factual determinations to be made by you and are beyond the scope of this Opinion. *See, e.g.*, 2009 Op. Va. Att’y Gen. 168, 169; 2008 Op. Va. Att’y Gen. 141, 143 and n.14.

OP. NO. 12-099

TAXATION: REAL PROPERTY TAX- SPECIAL ASSESSMENT FOR LAND PRESERVATION

CONSERVATION: VIRGINIA CONSERVATION EASEMENT ACT

Conservation easement land covered by § 10.1-1011 must meet the minimum acreage requirement of § 58.1-3233 at the time the easement is dedicated, unless the easement was placed on the property before the local land use assessment ordinance was adopted. Subsequent changes in acreage or use that are permitted under the conservation easement would not affect the continuing eligibility of the land for use assessment.

No back taxes, including the roll-back tax, may be imposed when conservation easement land, through apparent unpermitted use or development, no longer appears to qualify for use assessment under § 10.1-1011(C). Upon initiation of appropriate proceedings and factual findings respecting a land and easement, subsequent violations of the conservation easement could render the land ineligible for use assessment under § 10.1-1011(C).

LARRY W. DAVIS, ESQUIRE

COUNTY ATTORNEY FOR THE COUNTY OF ALBEMARLE

SEPTEMBER 20, 2013

ISSUES PRESENTED

You ask three questions regarding the land use assessment and taxation of land that is subject to a perpetual conservation easement. Specifically, you ask whether perpetual conservation easements must satisfy the minimum acreage requirements of § 58.1-3233 in order to qualify for land use assessment and taxation under §10.1-1011. You also ask whether land under a conservation easement must continue to meet the minimum acreage standards of § 58.1-3233 in order to annually qualify for land use assessment and taxation. Finally, you ask whether back taxes and roll-back taxes are

required to be imposed to correct any erroneous under-assessment of non-qualifying property.

RESPONSE

It is my opinion that, under § 10.1-1011, conservation easement land covered by the provisions of the statute must meet the minimum acreage requirement of § 58.1-3233 at the time the easement is dedicated, unless the easement was placed on the property before the local land use assessment ordinance was adopted. It is further my opinion that subsequent changes in acreage or use that are permitted under the conservation easement would not affect the continuing eligibility of the land for use assessment under § 10.1-1011(C). In addition, it is my opinion that no back taxes, including the roll-back tax, may be imposed when conservation easement land, through apparent unpermitted use or development, no longer appears to qualify for use assessment under § 10.1-1011(C). Finally, however, it is my opinion that upon the initiation of appropriate proceedings and the making of factual findings respecting the land and easement in question, such subsequent violations of the conservation easement could render the land ineligible for use assessment under § 10.1-1011(C).

BACKGROUND

You relate that, pursuant to § 58.1-3231, Albemarle County has adopted an ordinance to provide for the use assessment and taxation of “real estate devoted to open-space use,” as that phrase is defined in § 58.1-3230. Under that ordinance, Albemarle County has set the minimum acreage requirement for real estate devoted to open-space at twenty (20) acres.¹ You also relate that it is common for conservation easements to allow for limited subdivision of lots and that, once that right is exercised, the newly-created parcels often will not meet the minimum lot size for land use assessment and taxation under the Albemarle County ordinance.

Based on your reading of applicable law, it is your opinion that land under a perpetual conservation easement must meet the minimum acreage requirements of the Albemarle County ordinance at the time the easement is dedicated and in the years thereafter. It is also your opinion that the Finance Director of Albemarle County is required to correct any under-assessment of non-qualifying real estate pursuant to §§ 58.1-3980 and 58.1-3981.

APPLICABLE LAW AND DISCUSSION

Your inquiry involves the application of and interplay among several statutory provisions relating to the special taxation of land for conservation purposes. Several basic principles of statutory construction apply to interpretation of those statutes with respect to the questions you pose. First, the plain meaning of the language used in a statute determines legislative intent unless a literal construction would lead to a manifest absurdity.² Virginia courts “determine [legislative] intent from the words contained in the statute”³ and are not free to add or ignore language contained therein.⁴ Because statutes are “not to be construed by singling out a particular phrase,” but must be construed as a whole,⁵ they must be construed to give meaning to all of the words enacted by the legislature, and interpretations that render statutory

language superfluous are to be avoided.⁶ Additionally, when two statutes relate to the same or closely connected subjects they “must be considered together in construing their various material provisions,”⁷ and “in cases of apparent conflict, they should be construed, if reasonably possible, in such manner that both may stand together.”⁸ Accordingly, “when one statute speaks to a subject in a general way and another deals with a part of the same subject in a more specific manner, the two should be harmonized, if possible, and where they conflict, the latter prevails.”⁹

The statutory provisions implicated by your inquiry are those contained in Chapter 32, Article 4 and Chapter 32, Article 5 of Subtitle III of Title 58.1, which generally govern special assessments of real estate for land preservation, and § 10.1-1011 in Chapter 10.1, the “Virginia Conservation Easement Act,” of Title 10.1, which more specifically relates to taxation of land subject to a perpetual conservation easement.¹⁰ Pursuant to § 58.1-3231, any local government that has adopted a land use plan may adopt an ordinance to provide for a special land use assessment of land that has been designated as agricultural, horticultural, forest, or open-space.¹¹ Prior to assessing any parcel of real estate under a land use ordinance, the local taxing official is required to make several factual determinations. Specifically, § 58.1-3233 requires the tax assessor to

1. Determine that the real estate meets the criteria set forth in § 58.1-3230 [i.e., agricultural, horticultural, forest and open-space] and the standards prescribed thereunder to qualify for one of the classifications set forth therein . . .
2. Determine further that real estate devoted solely to . . . (iii) open-space use consists of a minimum of five acres or such greater minimum acreage as may be prescribed by local ordinance . . .
3. Determine further that real estate devoted to open-space use is . . . (ii) subject to a recorded perpetual easement that is held by a public body, and promotes the open-space use classification, as defined in § 58.1-3230 . . .^[12]

With respect to the taxation of land under perpetual easement for open-space preservation, § 10.1-1011(C) provides:

[L]and which is (i) subject to a perpetual conservation easement held pursuant to this chapter [the Virginia Conservation Easement Act] or the Open-Space Land Act (§ 10.1-1700 et seq.), (ii) devoted to open-space use as defined in § 58.1-3230, and (iii) in any county, city or town which has provided for land use assessment and taxation of any class of land within its jurisdiction pursuant to § 58.1-3231 or § 58.1-3232, shall be assessed and taxed at the use value for open space, if the land otherwise qualifies for such assessment at the time the easement is dedicated. If an easement is in existence at the time the locality enacts land use assessment, the easement shall qualify for such assessment. Once the land with the easement qualifies for land use assessment, it shall continue to qualify so long as the locality has land use assessment.

First, you specifically seek the proper construction of the phrase “if the land otherwise qualifies” as used in § 10.1-1011(C). You suggest that this language requires land under perpetual conservation easement¹³ to meet the minimum acreage requirements

of § 58.1-3233. In support of this conclusion, you cite § 58.1-3233(2), which sets out minimum acreage standards for the open-space use classification, and § 10.1-1011(C), which provides that land under perpetual conservation easement is eligible for land use assessment if it is “devoted to open-space use as defined in § 58.1-3230” and “if the land *otherwise* qualifies for such assessment at the time the easement is dedicated” (emphasis added). You conclude that the phrase “otherwise qualifies for such assessment” must be construed to refer to the minimum acreage requirements of § 58.1-3233, this being the only potential object of the phrase “otherwise qualifies.” I agree with such reasoning and that specific conclusion.

In order to give meaning to the phrase “otherwise qualifies” and thereby avoid rendering it superfluous, the phrase must refer to criteria outside of § 10.1-1011(C).¹⁴ Furthermore, because both § 10.1-1011(C) and § 58.1-3233 relate to a closely connected subject – qualification for use assessment of open-space land – it is appropriate to consider them together. Accordingly, the phrase “otherwise qualifies” in § 10.1-1011(C) must be understood as a reference to other provisions relating to the same or closely connected subjects but found elsewhere in the Code. In this case, those related provisions are found in § 58.1-3233; however, because the minimum acreage requirement of § 58.1-3233 stands alone as the only requirement supplemental to those already provided for and contained in § 10.1-1011(C), it is the only possible object of the referential phrase “otherwise qualifies.”

With respect to the issue of changes in use or acreage authorized by the easement, I understand the phrase “at the time the easement is dedicated” in § 10.1-1011(C) to be clear, unambiguous and susceptible of only one interpretation. It operates to fix the time of qualification for use assessment to the time at which the easement is dedicated. I note that in the case of a perpetual conservation easement meeting the requirements of § 10.1-1011(C), the purpose of such an easement includes the “retaining or protecting the natural or open-space values of real property, assuring its availability for agricultural, forestal, recreational, or open-space use.”¹⁵ As a general matter, to achieve such conservation purposes in perpetuity, the landowner is required permanently to give up the right to use or develop the land in a manner that would be inconsistent with the conservation purposes and values of the easement.

Consequently, it may fairly be concluded that any rights of the grantor reserved at dedication have been determined by the easement holder to be consistent with the conservation purposes and values of the easement. Later changes in use or development that are permitted under the easement already have been determined to be consistent with the conservation purposes of the easement and would not affect the land’s continuing eligibility for land use assessment under § 10.1-1011(C). It follows, therefore, that subsequent changes in acreage, if they result from a division permitted by the easement, would not affect the land’s continuing eligibility for land use assessment.

Furthermore, § 10.1-1011(C) provides that once the land with the easement is qualified, that qualification shall continue so long as the locality has land use assessment. This sentence in the statute is also clear, unambiguous and susceptible of only one interpretation. So long as a locality has a land use assessment program, property under an open space easement will qualify for that program. The plain

meaning of the statutory language controls. That meaning cannot be expanded to add a post-dedication requirement of continuing qualification.¹⁶

This conclusion finds support in an earlier Opinion of this Office that considered the relationship between temporary land use assessments and permanent open space easements:

By its plain language, § 10.1-1011 now requires lands permanently reserved as open space - under conservation or open-space easements meeting the requirements of § 58.1-3230 - to be assessed and taxed in the same way as lands that are being so used temporarily under a local use value assessment program Such a permanent easement affects the value of the ownership interest retained by the landowner, and the local tax assessing officer must take into account the effect of that change, as required by §10.1-1011.¹⁷

Turning to your final question, § 58.1-3237 provides that real estate qualifying for land use becomes subject to roll-back taxes when the use qualifying the subject real estate “changes to a nonqualifying use,” and liability for such taxes attaches “when [the] change in use occurs.” Nonetheless, as a previous Opinion of this Office noted,

Section 10.1-1011 does not subject such perpetual conservation or open-space easements to the same application, revalidation, roll-back and other administrative requirements that apply to other property under a local use value assessment program.¹⁸

In the case of a perpetual conservation easement, such land qualifies for land use assessment under § 10.1-1011 based on the easement being perpetual and in furtherance of open-space preservation. If unpermitted use or development were to occur and the land owner fails to cure the violation after a reasonable amount of time, this could constitute a violation of the easement. Both the Conservation Easement Act¹⁹ and the Open-Space Land Act²⁰ specify which parties have the right to enforce the easements entered into pursuant to those laws and how such easements may be terminated. Those parties have the authority to challenge whether the property under easement is being managed appropriately. That issue is not left open for ancillary challenges through other mechanisms, such as the land use assessment program. This provides clarity and certainty to those who participate in the easement programs and is consistent with the previously stated principle that specific statutes take priority over more general statutes.²¹ Until such time as the holder of the easement takes action to terminate the easement in accordance with the law or the express terms of the easement - or otherwise seeks a remedy pursuant to an enforcement action that would authorize a result to the contrary - the clear mandate of the law would not allow a change in the taxable status of the property.²²

A prior Opinion of the Attorney General stated that, “lack of enforcement of [an] easement ultimately would return the property to full fair market value assessment.”²³ That Opinion, however, did not address the mechanism by which such a return to fair market value would be effected. It is my opinion that such a transition ordinarily could not occur absent appropriate action by one authorized under the easement or the statutes to enforce the terms of the easement. What form such an action might take would depend on the specific law under which the easement was granted, the specific

terms of the easement and the particular facts in the case. Such determinations are questions of fact and would have to be made by the authorized taxing official or trier of fact, if contested or litigated, based on all the relevant facts.²⁴

CONCLUSION

Accordingly, it is my opinion that, under § 10.1-1011, conservation easement land covered by the provisions of the statute must meet the minimum acreage requirement of § 58.1-3233 at the time the easement is dedicated, unless the easement was placed on the property before the local land use assessment ordinance was adopted. It is further my opinion that subsequent changes in acreage or use that are permitted under the conservation easement would not affect the continuing eligibility of the land for use assessment under § 10.1-1011(C). In addition, it is my opinion that no back taxes, including the roll-back tax, may be imposed when conservation easement land, through apparent unpermitted use or development, no longer appears to qualify for use assessment under § 10.1-1011(C). Finally, however, it is my opinion that upon the initiation of appropriate proceedings and the making of factual findings respecting the land and easement in question, such subsequent violations of the conservation easement could render the land ineligible for use assessment under § 10.1-1011(C).

¹ COUNTY OF ALBEMARLE, VA., CODE § 15-804.

² Halifax Corp. v. First Union Nat'l Bank, 262 Va. 91, 99-100, 546 S.E.2d 696, 702 (2001).

³ Williams v. Commonwealth, 265 Va. 268, 271, 576 S.E.2d 468, 470 (2003) (citing Vaughn, Inc. v. Beck, 262 Va. 673, 677, 554 S.E.2d 88, 90 (2001)); Thomas v. Commonwealth, 256 Va. 38, 41, 501 S.E.2d 391, 393 (1998)).

⁴ BBF, Inc. v. Alstom Power, Inc., 274 Va. 326, 331, 645 S.E.2d 467, 469 (2007); *see also* Alger v. Commonwealth, 267 Va. 255, 261, 590 S.E.2d 563, 566 (2004) (“We ‘assume that the legislature chose, with care, the words it used when it enacted the relevant statute.’” (quoting Barr v. Town & Country Props., Inc., 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990))).

⁵ Va. Elec. & Power Co. v. Citizens for Safe Power, 222 Va. 866, 869, 284 S.E.2d 613, 615 (1981).

⁶ *See* Cook v. Commonwealth, 268 Va. 111, 114, 597 S.E.2d 84, 86 (2004).

⁷ *See, e.g.*, Colbert v. Commonwealth, 47 Va. App. 390, 395, 624 S.E.2d 108, 110 (2006).

⁸ 1977-78 Op. Va. Att’y Gen. 351, 353.

⁹ Va. Nat’l Bank v. Harris, 220 Va. 336, 340, 257 S.E.2d 867, 870 (1979).

¹⁰ This Opinion is limited to interpreting the interplay between the statutes within those particular Chapters in the context of your specific inquiries.

¹¹ Section 58.1-3230 designates four classifications of real estate that qualify for land use assessment based on the use value of such real estate: agricultural, horticultural, forest, and open-space use.

¹² VA. CODE ANN. § 58.1-3233 (2009).

¹³ Under § 10.1-1011(C), both “open-space easements” as defined in § 10.1-1700 and “conservation easements” as defined in § 10.1-1009 qualify for land use assessment if such easements meet the requirements of § 10.1-1011(C). Therefore, for purposes of this opinion, I make no distinction between conservation easements created under the Open-Space Land Act, VA. CODE ANN. §§ 10.1-1700 through 10.1-1705 (2012), or the Virginia Conservation Easement Act, VA. CODE ANN. §§ 10.1-1009 through 10.1-1016 (2012), unless specifically noted.

¹⁴ A prior Opinion of this Office concluded that the phrase “otherwise qualifies for such assessment,” as used in § 10.1-1011(C), “means that the land must be devoted to open space as defined in § 58.1-3230.” 1993 Op. Va. Att’y Gen. 7, 12. As you point out in your request, that Opinion does not specifically address

acreage requirements. The Opinion's reference to open space use was simply to make the point that "[n]ot all land that is subject to an easement is assessed at open-space values regardless of its use." *Id.* at 12. As such, this Opinion is hereby distinguished and clarified with respect to the meaning of the phrase "otherwise qualifies" as used in §10.1-1011(C).

¹⁵ Section 10.1-1009 (2012) (defining conservation easement); *see also* § 10.1-1700 (2012) (defining open-space easement).

¹⁶ I note the possibility that a parcel of land could qualify initially and upon a subsequent permitted division, one or both of the resulting parcels could fall below the minimum acreage requirements. I also note that a conservation easement property consisting of less than the minimum acreage could qualify if it were in existence at the time of the locality's adoption of a use assessment ordinance. Nonetheless, in both cases, the statute is clear and fixes the time of qualification to be the "time the easement is dedicated" for newly-created easements. Pre-existing easements are qualified when the locality enacts land use assessment without regard to any minimum acreage. Notwithstanding the somewhat incongruent results regarding acreage requirements that may occur in the implementation of this statute, it must be assumed that the General Assembly chose its words with care, and that the intent of the legislature must be ascertained by what the statute says and not by what might have been said to achieve a particular legislative end. *Commonwealth v. Amerson*, 281 Va. 414, 421, 706 S.E.2d 879, 884 (2011) (quoting *Virginian-Pilot Media Cos. v. Dow Jones & Co.*, 280 Va. 464, 469, 698 S.E.2d 900, 902 (2010)); *Alger v. Commonwealth*, 267 Va. 255, 261, 590 S.E.2d 563, 566 (2004).

¹⁷ 1993 Op. Va. Att'y Gen. 7, 11.

¹⁸ *Id.*

¹⁹ Sections 10.1-1009 through 10.1-1016.

²⁰ Sections 10.1-1700 through 10.1-1705.

²¹ *Va. Nat'l Bank*, 220 Va. at 340, 257 S.E.2d at 870.

²² *See* § 10.1-1011(C) (2012) ("[L]and which is (i) subject to a perpetual conservation easement . . . , (ii) devoted to open-space use as defined in § 58.1-3230, and (iii) in any county, city or town which has provided for land use assessment and taxation of any class of land within its jurisdiction . . . shall be assessed and taxed at the use value for open space Once the land with the easement qualifies for land use assessment, it shall continue to qualify so long as the locality has land use assessment.").

²³ 1993 Op. Va. Att'y Gen. 7, 12 n.3.

²⁴ 1997 Op. Va. Att'y Gen 195, 196; 1996 Op. Va. Att'y. Gen. 207, 208.

OP. NO. 13-010

TAXATION: STATE RECORDATION TAX

Federal Credit Unions are exempt from paying the recordation tax imposed on grantors by § 58.1-802.

THE HONORABLE TERRY H. WHITTLE
CLERK OF COURT, WINCHESTER CIRCUIT COURT
MARCH 29, 2013

ISSUE PRESENTED

You ask whether Federal Credit Unions are exempted from paying the recordation tax imposed on grantors by § 58.1-802 of the *Code of Virginia* pursuant to the exemption provided by 12 U.S.C. § 1768.

RESPONSE

It is my opinion that, pursuant to the exemption provided by 12 U.S.C. § 1768, Federal Credit Unions are exempted from paying the recordation tax imposed on grantors by § 58.1-802 of the *Code of Virginia*.

APPLICABLE LAW AND DISCUSSION

Virginia law applies a tax on “each deed, instrument, or writing by which lands, tenements or other realty sold is granted, assigned, transferred, or otherwise conveyed to, or vested in the purchaser, or any other person, by such purchaser’s direction.”¹ As previous Opinions of this Office have noted, however, “Congress may create exemptions from taxation for specific entities even if such exceptions are not memorialized in the states’ laws. Implicit in [this] opinion is the authority of the federal government to exempt specific real estate transactions from state taxation.”²

Applicable to your inquiry is the statutory exemption from taxation granted to Federal Credit Unions. The United States Code provides that

The Federal credit unions organized [under 12 U.S.C. Chapter 14], their property, their franchises, capital, reserves, surpluses, and other funds, and their income *shall be exempt from all taxation* now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority; except that any real property and any tangible personal property of such Federal credit unions shall be subject to Federal, State, Territorial, and local taxation to the same extent as other similar property is taxed.³

Thus, Congress has exempted Federal Credit Unions from “all taxation” by state and local governments, while explicitly allowing taxation of any real or tangible personal property of the Credit Unions as other similar property is taxed.

The recordation tax imposed on grantors by § 58.1-802 is “not a tax upon property...but a tax upon a civil privilege...of availing...of the benefits and advantages of the registration laws of the State.”⁴ Opinions of this Office consistently have held that a federal exemption of a federally created entity from “all taxation” exempts the entity from recordation taxes, even when such exemption explicitly allows for the taxation of the entity’s property.⁵ There is no substantive difference in the language of 12 U.S.C. § 1768 and the statutes interpreted in these prior Opinions. I therefore conclude that 12 U.S.C. § 1768 must be read to exempt Federal Credit Unions from state and local recordation taxes.

CONCLUSION

Accordingly, it is my opinion that, pursuant to the exemption provided by 12 U.S.C. § 1768, Federal Credit Unions are exempted from paying the recordation tax imposed on grantors by § 58.1-802 of the *Code of Virginia*.

¹ VA. CODE ANN. § 58.1-802(A) (2009).

² 2012 Op. Va. Att’y Gen. 137, 138 (quoting 2003 Op. Va. Att’y Gen. 177, 179). See also 2002 Op. Va. Att’y Gen. 328, 329.

³ 12 U.S.C. § 1768 (emphasis added).

⁴ *Pocahontas Consol. Collieries Co. Inc. v. Commonwealth*, 113 Va. 108, 112, 73 S.E. 446, 448 (1912).

⁵ See 1992 Op. Va. Att’y Gen. 183, 185; 1993 Op. Va. Att’y Gen. 260, 262; 2012 Op. Va. Att’y Gen. at 141. I note that this is not the case when the federal entity is not a principal to the transaction, but rather a guarantor or a beneficiary. See 2002 Op. Va. Att’y Gen. 328, 329.

OP. NO. 12-110

TAXATION: STATE RECORDATION TAX

A subordinate mortgage giving a security interest to the Secretary of Housing and Urban Development is subject to state and local recordation taxes.

THE HONORABLE JENNIFER R. SIMS
CLERK OF COURT
WARREN COUNTY CIRCUIT COURT
JUNE 28, 2013

ISSUE PRESENTED

You ask whether a subordinate mortgage giving a security interest to the Secretary of Housing and Urban Development, Department of Housing and Urban Development (HUD) is subject to state and local recordation taxes.

RESPONSE

It is my opinion that a subordinate mortgage giving a security interest to HUD is subject to state and local recordation taxes.

BACKGROUND

You advise that you have been presented with a document entitled “SUBORDINATE MORTGAGE” listing HUD as the lender/mortgager reciting a debt evidenced by the borrower’s note of \$13,434.74 (“the subordinate mortgage”). The cover sheet lists HUD as the grantee and references a prior deed of trust recorded in 2009 in the amount of \$249,829.00.¹ The cover sheet also claims an exemption from recording tax pursuant to § 58.1-809 of the *Code of Virginia* for the amount of the subordinate mortgage.

APPLICABLE LAW AND DISCUSSION

Recordation taxes are based on the privilege of having access to the benefits of state recording and registration laws.² Section 58.1-803 imposes a state recordation tax on deeds of trust or mortgages.³ Localities are authorized to impose a local recordation tax in an amount equal to one third of the state recordation tax collectable by the Commonwealth.⁴ Generally, the recording of any document is taxable absent a statutory exemption.⁵

Section 58.1-809 of the *Code of Virginia* provides that:

Sections 58.1-803, 58.1-807, and 58.1-808^[6] are not to be construed as requiring the payment of any tax for the recordation of any deed of trust, deed of subordination, mortgage, contract, agreement, modification, addendum, or other writing supplemental to any such deed, mortgage, contract, agreement, modification, addendum, or other writing theretofore admitted to record . . . upon which the tax herein imposed has been paid . . . when the sole purpose and effect of the supplemental instrument or writing is to convey property, in addition to or in substitution, in whole or in part, of the property conveyed in a prior instrument, to secure or to better secure the payment of the amount contracted for in a prior instrument, to alter the priority of the instrument, or to modify the terms, conditions, parties, or provisions of such prior instruments, other than to increase the amount of the principal obligation secured thereby.

The clear and unambiguous language of this statute evidences that the exemption applies only to a supplemental writing that modifies the terms of, or the parties to, a previously taxed writing.⁷ The Tax Commissioner has opined that in the context of the exemption, “supplemental” means “. . . add[ing] a thing to complete” a deed of trust or other security interest.⁸

A subordinate mortgage is not completing an existing deed of trust or other security interest. Instead, the subordinate mortgage evidences a separate, new agreement between a newly secured lender and the borrower and therefore is outside the exception provided by 58.1-809.⁹ A subordinate mortgage is a second mortgage, one that is inferior in priority to a primary mortgage.¹⁰

CONCLUSION

Accordingly, it is my opinion that a subordinate mortgage giving a security interest to HUD is subject to state and local recordation taxes.

¹ For purposes of this Opinion, I will assume that this prior deed was properly recorded and that all recordation taxes were collected.

² Ruling of the Tax Comm’r, No. 92-234 (Nov. 9, 1992).

³ VA. CODE ANN. § 58.1-803 (2009).

⁴ Sections 58.1-814 (2009); 58.1-3800 (2009).

⁵ Ruling of the Tax Comm’r, No. 92-234.

⁶ Sections 58.1-807 and 58.1-808 apply to contract leases and sales contracts for the sale of rolling stock or equipment and are not relevant to the question you present.

⁷ See 1987-88 Op. Va. Att’y Gen. 562 (opining that an assignment of a deed of trust merely modified the parties to a previously recorded instrument and, therefore, was exempt from taxes pursuant to § 58.1-809); 1990 Op. Va. Att’y Gen. 257 (finding that an instrument that evidences a separate, new agreement does not fall within the exemption provided by § 58.1-809); 1998 Op. Va. Att’y Gen 134 (concluding that a grantor’s assignment that merely modifies parties to a previously recorded lease qualifies for the exemption provided by § 58.1-809).

⁸ Ruling of the Tax Comm’r, No. 92-234.

⁹ 1990 Op. Va. Att’y Gen. 257, 258.

¹⁰ See, e.g., VA. CODE ANN. § 6.2-300 (defining “subordinate mortgage” as “a mortgage or deed of trust that is subject to a prior mortgage or deed of trust in existence at the time of the making of the loan secured

by such subordinate mortgage or deed of trust”); BLACK’S LAW DICTIONARY 433 (8th ed. 2004) (defining “subordinate debt” as “a debt that is junior or inferior to other classes of debt”).

OP. NO. 13-069

TAXATION: STATE RECORDATION TAX

Clerks of court should assess the regional congestion relief fee on real estate conveyance instruments based upon the date of recordation.

THE HONORABLE JOHN T. FREY
CLERK, CIRCUIT COURT OF FAIRFAX
SEPTEMBER 20, 2013

ISSUE PRESENTED

You ask whether clerks of court should assess the regional congestion relief fee on real estate conveyance instruments based upon (i) the date of the transaction or (ii) the date of recordation.

RESPONSE

It is my opinion that clerks of court should assess the regional congestion relief fee on real estate conveyance instruments based upon the date of recordation.

BACKGROUND

Your question pertains to the regional congestion relief fee adopted by the General Assembly in its most recent session.¹ You ask for clarification as to the assessment of such fee on the recordings of real estate conveyance instruments by the clerk of court.

You relate that an instruction distributed to clerks by the Office of the Executive Secretary, Supreme Court of Virginia, on June 21, 2013, stated that assessment of the fee should be based on the “date of the deed’ not the date of recordation.” Subsequently, on June 30, 2013, the Office of the Executive Secretary changed its position and directed clerks to assess the fee based on the date of the instrument’s recordation—not the date of deed. As a result of these conflicting instructions, you relate that some clerks “assessed the fee based upon the date of the deed and others followed the...directions to assess the fee based on the date of recordation.” You now seek clarification regarding whether the fee properly is to be assessed only on conveyance instruments dated on or after July 1, or, upon such instruments recorded on or after July 1, even if the underlying conveyance transaction occurred on an earlier date.

APPLICABLE LAW AND DISCUSSION

Chapter 766 of the 2013 Session of the General Assembly, codified at § 58.1-802.2 of the *Code of Virginia*, requires the imposition of a fee “on each deed, instrument, or writing by which lands, tenements, or other realty . . . is sold and is granted, assigned, transferred, or otherwise conveyed to or vested in the purchaser . . .”² The statute became law on July 1, 2013,³ and applies to real estate transactions only in certain

localities.⁴ As provided in § 58.1-802.2 of the *Code of Virginia*, the clerk of the court cannot record any deed, instrument, or writing without first certifying that the fee has been paid by the grantor.⁵

Although described in the text of the statute as a “regional congestion relief fee” and dedicated to fund transportation improvements, the fee is imposed and collected in the form of a recordation tax. For example, the statute establishing the fee is located within Chapter 8, Title 58.1 of the *Code of Virginia* (a chapter titled “State Recordation Tax”), and its language and form track that of the traditional state recordation tax.⁶ Furthermore, the regional congestion relief fee, like the state recordation tax, is payable by the grantor and collected by the clerk of court as a prerequisite to recordation.⁷

This Office has concluded and Virginia courts have held that recordation taxes are based upon the privilege of having access to the benefits of state recording and registration laws.⁸ In *Pocahontas Consol. Collieries Co., Inc. v. Commonwealth*, the Court stated that a recordation tax “is not a tax upon property, either within or out of the State, but a tax upon a civil privilege, that is, for the privilege of availing, upon the terms prescribed by statute, of the benefits and advantages of the registration laws of the State.”⁹

Thus, because the privilege of recordation is the manner by which the General Assembly chose to impose the fee and provide for its collection, it is my opinion that the fee should be assessed by clerks of court on real estate conveyance instruments based upon the date of their recordation. You will note that this conclusion is consistent with the correction notice sent to clerks of court from the Office of the Executive Secretary of the Supreme Court of Virginia.

CONCLUSION

Accordingly, it is my opinion that clerks of court should assess the regional congestion relief fee imposed by § 58.1-802.2 by the *Code of Virginia* on all real estate conveyance instruments recorded in the affected localities on or after July 1, 2013.

¹ 2013 Va. Acts ch. 766.

² VA. CODE ANN. § 58.1-802.2 (Supp. 2013).

³ VA. CODE ANN. § 1-214(A) (2011).

⁴ Section 58.1-802.2.

⁵ *Id.*

⁶ Compare § 58.1-802 (A) and (B) (Supp. 2012) with § 58.1-802.2.

⁷ Section 58.1-802.2

⁸ See 2013 Op. Va. Att’y Gen. No. 12-110 at 2, available at <http://www.ag.virginia.gov/Opinions%20and%20Legal%20Resources/OPINIONS/2013opns/12-110%20Sims.pdf>; see also 2012 Op. Va. Att’y Gen. 137, 141 (citing *Pocahontas Consol. Collieries Co., Inc. v. Commonwealth*, 113 Va. 108, 112, 73 S.E. 446, 448 (1912) and *White v. Schwartz*, 196 Va. 316, 321, 83 S.E.2d 376, 379 (1954)).

⁹ *Pocahontas Consol. Collieries*, 113 Va. 108 at 112, 73 S.E. 446 at 448.

OP. NO. 12-105**TAXATION: TANGIBLE PERSONAL PROPERTY, MACHINERY AND TOOLS AND MERCHANTS' CAPITAL**

Short-term rental property is to be classified as a distinct category of merchants' capital and may be taxed by a locality as merchants' capital or as short-term rental property, but may not be classified or taxed as personal tangible property.

A locality lawfully may decline to impose a tax on merchant's capital, including short-term rental property. The absence of a local ordinance imposing a tax on merchant's capital or short-term rental property represents a choice by the locality's governing body not to impose a tax on such property.

THE HONORABLE TERRY L. YOWELL
COMMISSIONER OF THE REVENUE
CULPEPER COUNTY
JULY 12, 2013

ISSUE PRESENTED

You ask for guidance regarding the taxation of short-term rental property in a locality that does not have a local ordinance establishing either a merchant's capital tax or a tax on short-term rental property.

RESPONSE

It is my opinion that short-term rental property is to be classified as a distinct category of merchants' capital and may be taxed by a locality as merchants' capital or as short-term rental property, but may not be classified or taxed as personal tangible property. It further is my opinion that a locality lawfully may decline to impose a tax on merchant's capital, including short-term rental property. Finally, it is my opinion that the absence of a local ordinance imposing a tax on merchant's capital or short-term rental property represents a choice by the locality's governing body not to impose a tax on such property.

BACKGROUND

As you relate, in 2010, the Virginia General Assembly amended § 58.1-3510.6(E) of the *Code of Virginia*, Short-Term Rental Property Tax, to exclude short-term rental property from being classified and taxed as tangible personal property.¹ The Code now provides that short-term rental property may be taxed as merchants' capital, or a locality may adopt a local ordinance authorizing a short-term rental property tax.² You state that the locality you serve has adopted neither a merchant's capital tax nor a short-term rental property tax.³

APPLICABLE LAW AND DISCUSSION

Article X, § 1 of the Constitution of Virginia prescribes that “[a]ll property, except hereinafter provided, shall be taxed[.]” and further provides that “[t]he General Assembly may define and classify taxable subjects.” The Constitution also establishes

that “[t]angible personal property is subject to local taxation only, to be assessed for local taxation in such manner and at such times as the General Assembly may prescribe by law.”⁴ Additionally, the General Assembly is authorized to allow a local governing body “the option to exempt or partially exempt from taxation any business, occupational or professional license or any merchant’s capital, or both.”⁵

The General Assembly, pursuant to this constitutional authority, has provided that tangible personal property shall consist of all personal property not otherwise classified as intangible personal property, as merchants’ capital, or as short-term rental property.⁶ The General Assembly further has declared that “[s]hort-term rental property shall constitute a classification of merchants’ capital”⁷ While the Code is clear that localities may tax such property as short-term rental property under § 58.1-3509, or may apply the merchants’ capital tax authorized under § 58.1-3510.6, but not both,⁸ the General Assembly also expressly has provided that “no county, city or town shall be required to impose a tax on [merchants’] capital.”⁹

Thus, although the General Assembly has enabled localities to tax short-term rental property, whether as merchant’s capital or, in its own name as a distinct classification thereof, Virginia law does not require localities to do so. Based upon these facts, I necessarily must conclude that the absence of a local ordinance imposing a tax on either merchant’s capital or short-term rental property represents a choice by the locality’s governing body to decline to tax such property.

CONCLUSION

Accordingly, it is my opinion that short-term rental property is to be classified as a distinct category of merchants’ capital and may be taxed by a locality as merchants’ capital or as short-term rental property, but may not be classified or taxed as personal tangible property. It further is my opinion that a locality lawfully may decline to impose a tax on merchant’s capital, including short-term rental property. Finally, it is my opinion that the absence of a local ordinance imposing a tax on merchant’s capital or short-term rental property represents a choice by the locality’s governing body not to impose a tax on such property.

¹ 2010 Va. Acts chs. 225, 295.

² VA. CODE ANN. § 58.1-3510.4 (Supp. 2012)

³ See § 58.1-3509 (2009) (providing, in relevant part, “The capital of merchants is segregated for local taxation only; however, no county, city or town shall be required to impose a tax on such capital[.]”) See also VA. CONST. art. X, § 6(j).

⁴ VA. CONST. art. X, § 4.

⁵ VA. CONST. art. X, § 6(j).

⁶ VA. CODE ANN. § 58.1-3500 (Supp. 2012).

⁷ Section 58.1-3510.4(A). “Merchants’ capital” is broadly defined as “[i]nventory of stock on hand; daily rental vehicles as defined in § 58.1-1735; and *all other taxable personal property of any kind whatsoever*, except money on hand and on deposit and except tangible personal property not offered for sale as merchandise” Section 58.1-3510 (Supp. 2012) (emphasis added).

⁸ Section 58.1-3510.4(A).

⁹ Section 58.1-3509.

OP. NO. 13-041**TAXATION: TAX EXEMPT PROPERTY**

Planned Parenthood of Southeastern Virginia, Inc. is exempt from local real and personal property taxes as a consequence of licensure as a category of hospital if the commissioner of the revenue determines that PPSV is operated not for profit, but to promote the charitable purposes of the organization, and that the property belongs to and is actually and exclusively occupied and used by PPSV.

THE HONORABLE PHILIP J. KELLAM
COMMISSIONER OF THE REVENUE
CITY OF VIRGINIA BEACH
AUGUST 2, 2013

ISSUE PRESENTED

You ask whether Planned Parenthood of Southeastern Virginia, Inc. (“PPSV”) is exempt from local real and personal property taxes by classification as a hospital conducted not for profit.

RESPONSE

It is my opinion that PPSV is exempt from local real and personal property taxes as a consequence of licensure as a category of hospital if the commissioner of the revenue determines that PPSV is operated not for profit, but to promote the charitable purposes of the organization, and that the property belongs to and is actually and exclusively occupied and used by PPSV.

BACKGROUND

You state that PPSV has state licensure as an “outpatient surgical hospital.” Documentation provided with your opinion request evidences that PPSV also is licensed as an abortion facility. You provide further documentation that indicates that income is derived from use of the property, and that part of the property is occupied or used by one or more other entities, although no further details on such occupancy and use are provided.¹

APPLICABLE LAW AND DISCUSSION

Article X, § 6(a)(6) of the Constitution of Virginia authorizes the General Assembly to provide tax exemptions for “[p]roperty used by its owner for religious, charitable, patriotic, historical, benevolent, cultural, or public park and playground purposes.”² Pursuant to this constitutional authority, the General Assembly has enacted several statutes granting tax exempt status to certain property. Such exemptions must be “strictly construed” as exceptions from general taxation.³

Specific to your inquiry, § 58.1-3606(A)(5) exempts from taxation

[p]roperty belonging to and actually and exclusively occupied and used by ... hospitals ... conducted not for profit but exclusively as charities (which shall

include hospitals operated by nonstock corporations not organized or conducted for profit but which may charge persons able to pay in whole or in part for their care and treatment).^[4]

Thus, based on the plain language of the statute, in order to qualify for an exemption PPSV must demonstrate that it meets three conditions: 1) that it is a “hospital,” 2) that the property in question belongs to and is “actually and exclusively occupied and used by” PPSV, and 3) that PPSV operates on a not for profit basis and exclusively as a charity.

Section 32.1-123 defines a “hospital” as

any facility licensed pursuant to this article in which the primary function is the provision of diagnosis, of treatment, and of medical and nursing services, surgical or nonsurgical, for two or more nonrelated individuals, including hospitals known by varying nomenclature or designation such as children’s hospitals, sanatoriums, sanitariums and general, acute, rehabilitation, chronic disease, short-term, long-term, outpatient surgical, and inpatient or outpatient maternity hospitals.^[5]

In addition, abortion facilities are classified as a category of hospital.⁶ PPSV holds dual licensure as an outpatient surgical hospital and an abortion facility, two categories of hospitals. Therefore, by virtue of such licensure, PPSV meets one of the qualifications for exemption set forth in § 58.1-3606(A)(5).

Satisfying the hospital requirement, however, does not end the inquiry whether PPSV is to be exempt from local real and personal property taxes. PPSV further bears the factual burden of showing that the property in question belongs to it, and that such property is “actually and exclusively occupied and used by” PPSV.⁷ Thus, PPSV’s ownership of the property, and the occupation by, and nature of the uses upon the property by another entity or entities must be factually determined by your office and evaluated in light of the exclusivity requirements of § 58.1-3606(A)(5).

In addition, § 58.1-3606(A)(5) requires PPSV to demonstrate that its occupation and use is conducted “not for profit” but exclusively as a charity. To establish that its operations are not for profit and charitable, PPSV must satisfy the “dominant purpose test.” This test determines whether or not the property in question promotes the purpose of the group seeking an exemption.⁸ The property is entitled to the tax exemption regardless of any revenue created on the land, so long as “the dominant purpose of the revenue generating property is not to obtain revenue or profit, but ‘to promote the purposes for which the [charity] was established and is incidental thereto.’”⁹

Whether the foregoing requirements for tax exemption are met requires factual determination by the commissioner of the revenue or other appropriate tax official.¹⁰ Virginia law requires that “[i]f there is any doubt concerning the exemption, [such] doubt must be resolved against the party claiming the exemption.”¹¹ The commissioner of the revenue therefore must determine whether PPSV qualifies for a tax exemption under § 58.1-3606(A)(5) by examining, and making determinations upon, all of the attendant facts.¹²

CONCLUSION

Accordingly, it is my opinion that PPSV is exempt from local real and personal property taxes as a consequence of licensure as a category of hospital if the commissioner of the revenue determines that PPSV is operated not for profit, but to promote the charitable purposes of the organization, and that the property belongs to and is actually and exclusively occupied and used by PPSV.

¹ PPSV's tax exemption application materials, as filed with your office, respond affirmatively to the questions, "Does any other individual, association or corporation occupy or use any part of the premises of any property for which exemption is sought? If so, give all details." and "Is any income derived from the use of any portion of the real property by other individuals or groups, whether considered as rent or reimbursement of necessary expenses for services incurred?" The identity of the other entity, or entities, is not provided, or the nature of its, or their, use or uses. A later question within the application inquires, "For what purpose is the real property currently being used? If there are several types of use for a single parcel, indicate such usages by areas of the buildings and floor locations." PPSV responds to that inquiry by stating, "The facility replaces our old Norfolk and Virginia (sic) leased facilities with an expanded clinical first floor of about 10,459 sq. ft. The second floor is about 2,941 sq. ft. dedicated to administrative and educational use." It is not clear whether these described second floor uses are related to PPSV's operations, or to the operations of a separate entity occupying that part of the property.

² VA. CONST. art. X, § 6(a)(6).

³ VA. CONST. art. X, § 6(f); *Smyth Cnty. Cmty. Hosp. v. Town of Marion*, 259 Va. 328, 333, 527 S.E.2d 401, 403 (2000).

⁴ VA. CODE ANN. § 58.1-3606(A)(5) (2009).

⁵ VA. CODE ANN. § 32.1-123 (2011).

⁶ See § 32.1-127(B)(1) (Supp. 2013); 12 VA. ADMIN. CODE § 5-412-30.

⁷ See *Smyth Cnty. Cmty. Hosp.*, 259 Va. at 333, 527 S.E.2d at 403 (quoting *Mem'l Hosp. Ass'n v. County of Wise*, 203 Va. 303, 307, 124 S.E.2d 216, 219 (1962)). See also 2002 Op. Va. Att'y Gen. 331, 335.

⁸ *Smyth Cnty. Cmty. Hosp.*, 259 Va. at 334, 527 S.E.2d at 404.

⁹ See *id.* (quoting *County of Wise*, 203 Va. at 309, 124 S.E.2d at 220). See also *Bd. of Supvrs. v. Med. Grp. Found., Inc.*, 204 Va. 807, 814, 134 S.E.2d 258, 263 (1964).

¹⁰ See 2002 Op. Va. Att'y Gen. 338, 340; 1989 Op. Va. Att'y Gen. 338, 339. The Attorney General "refrain[s] from commenting on matters that would require additional facts[.]" 2010 Op. Va. Att'y Gen. 56, 58.

¹¹ 2002 Op. Va. Att'y Gen. 331, 335 (citing *Westminster-Canterbury v. City of Virginia Beach*, 238 Va. 493, 501, 385 S.E.2d 561, 565 (1989)).

¹² See 2002 Op. Va. Att'y Gen. 338, 340; 1989 Op. Va. Att'y Gen. 338, 339.

OP. NO. 13-043

TAXATION: VIRGINIA MOTOR VEHICLE SALES AND USE TAX

The proper tax rate to impose on a vehicle sale transaction in Virginia is the tax rate in effect at the time of the sale, when ownership or possession of the vehicle is transferred, whichever of these events of sale occurs first. After the tax is imposed on the sales transaction, the tax is then owed and is paid and collected when the vehicle is titled by the DMV.

THE HONORABLE GREGORY D. HABEEB
THE HONORABLE JOHNNY S. JOANNOU
MEMBERS, HOUSE OF DELEGATES

THE HONORABLE RICHARD D. HOLCOMB
COMMISSIONER, DEPARTMENT OF MOTOR VEHICLES

MR. BRUCE GOULD
EXECUTIVE DIRECTOR, MOTOR VEHICLE DEALER BOARD
MAY 22, 2013

ISSUE PRESENTED

You inquire regarding the implementation of the increase, from 3% to 4%, in the motor vehicle sales and use tax rate that was enacted by the 2013 Session of the General Assembly and that is scheduled to become effective on July 1, 2013.¹ Specifically, you ask which tax rate, 3% or 4%, should be imposed when a motor vehicle is purchased prior to July 1, 2013 but titled by the Virginia Department of Motor Vehicles (“DMV”) subsequent to that date. Your inquiry states that a similar question previously was addressed by an official opinion of this Office,² and you have asked that the conclusion in that opinion be re-visited in light of changes in the motor vehicle industry and procedures at DMV since that time.

RESPONSE

It is my opinion that the proper tax rate to impose on a vehicle sale transaction in Virginia is the tax rate in effect at the time of the sale, when ownership or possession of the vehicle is transferred, whichever of these events of sale occurs first. After the tax is imposed on the sales transaction, the tax is then owed and is paid and collected when the vehicle is titled by the DMV.

BACKGROUND

In an official opinion to former State Senator Virgil Goode,³ former Attorney General Mary Sue Terry responded to an inquiry asking which motor vehicle sales and use tax, raised from 2% to 3% effective January 1, 1987, would apply to a vehicle purchased in North Carolina prior to January 1, 1987, but not titled in Virginia until after January 1, 1987. At the time, the opinion noted that North Carolina imposed its tax at the time the vehicle was sold and the North Carolina tax was collected by the motor vehicle dealer.⁴ In contrast to North Carolina and unlike the Virginia retail sales and use tax, §§ 58.1-600, *et seq.*, the Virginia motor vehicle sales and use tax is collected from the purchaser or user of the vehicle and not from the motor vehicle dealer. The opinion cited Virginia Code § 38.1-2404, which states that the sales and use tax “shall be paid by the purchaser or user...and collected by the [DMV] Commissioner at the time the owner applies...and obtains, a certificate of title....” Therefore, the opinion concluded that in the case inquired about, the use “tax should be imposed at the rate in effect at that time [of titling] and not at the rate in effect when the vehicle was actually purchased.”

I understand, based on information set forth in your inquiry, that the manner in which motor vehicles are sold and titled in Virginia has changed significantly in the last twenty-five to thirty years. The case where a purchaser pays the dealer for a vehicle and then the purchaser goes personally to DMV to title and register that vehicle is rare. Now, in a majority of sales, you state (1) that most vehicles are financed or leased and the dealer must collect the tax to complete the titling; (2) dealers are required by the Virginia Code to complete their titling and registration transactions with DMV electronically, so they must collect the sales tax from the customer to do so; and (3) the DMV Dealer Manual instructs dealers when they must collect the tax and notes that they have 30 days to remit the tax to DMV. You suggest that these changes in the industry and DMV procedures necessitate a change in the conclusion of the official opinion to Senator Goode, at least with respect to vehicles sold in Virginia. While it is undoubtedly true that many significant changes have occurred in the last twenty-five to thirty years, the answer to your question regarding a vehicle sale occurring in Virginia is found from the plain meaning of the relevant statute.

APPLICABLE LAW AND DISCUSSION

Section 58.1-2402 provides that “There is hereby levied, in addition to all other taxes and fees of every kind now imposed by law, a tax upon the sale . . . of motor vehicles in Virginia,” with exceptions not here relevant. Section 58.1-2401 defines “sale” to include “any transfer of ownership or possession.” “When . . . a statute contains no express definition of a term, the general rule of statutory construction is to infer the legislature’s intent from the plain meaning of the language used.”⁵ The corollary to this is that effect will be given to defined terms.

Based upon the plain meaning of the defined term “sale,” it is clear that the sales tax is imposed at the rate in effect at the time of the sale, when ownership or possession of the vehicle is transferred, whichever of these events of sale occurs first. After the sales transaction, pursuant to § 58.1-2404, the tax is “collected by the [DMV] Commissioner at the time the *owner* applies . . . and obtains, a certificate of title....” (emphasis added).

This conclusion flows from the recognition that the time a tax is collected does not equate to the time that a tax is determined or imposed. To the extent that the prior opinion may be read to equate these two distinct events, it would be in error. Nevertheless, I note that the prior opinion dealt with a factual scenario very different from the one you present. Specifically, you ask about taxation related to the purchase of a vehicle in Virginia, while the prior opinion addressed the imposition of a Virginia tax on a “motor vehicle purchased in North Carolina . . . but [subsequently] titled in Virginia”⁶ The purchase of a vehicle in North Carolina cannot, without more, give rise to Virginia’s imposing a tax because there is no nexus between Virginia and the North Carolina transaction.⁷ Thus, for transactions such as the North Carolina motor vehicle purchase referenced in the 1987 opinion, it is not until there is a Virginia nexus, such as the application for a Virginia title, that a Virginia tax may be imposed. Therefore, the prior opinion does not address the specific question you pose.

CONCLUSION

Accordingly, it is my opinion that the proper tax rate to impose on a vehicle sale transaction in Virginia is the tax rate in effect at the time of the sale, when ownership or possession of the vehicle is transferred, whichever of these events of sale occurs first. After the tax is imposed on the sales transaction, the tax is then owed and is paid and collected when the vehicle is titled by the DMV. Consequently, it is my opinion that a vehicle sales and use tax rate of 3% should be imposed when a vehicle is sold in Virginia prior to July 1, 2013, but titled by the DMV subsequent to that date.

¹ 2013 Va. Acts ch. 776.

² See 1986-87 Op. Va. Att’y Gen. 336.

³ *Id.*

⁴ N.C. Gen. Stat. § 105-164.4 (1985).

⁵ *Hubbard v. Henrico Ltd. P’ship*, 255 Va. 335, 497 S.E.2d 335, 338 (1998).

⁶ 1986-87 Op. Va. Att’y Gen. at 336.

⁷ See, e.g., *Ryder Truck Rental v. Cnty. of Chesterfield*, 248 Va. 575, 578, 449 S.E.2d 813, 815 (1994) (citations omitted) (“A prerequisite of a jurisdiction’s authority to tax . . . is the existence of a substantial nexus between the taxable instrumentality and the taxing jurisdiction.”).

OP. NO. 12-107

TRADE AND COMMERCE: PERSONAL INFORMATION PRIVACY ACT

Persuasive legal arguments exist to assert that the portion of the Virginia civil identity protection statute prohibiting the intentional communication of an individual's social security number, as contained in § 59.1-443.2(A)(1) of the Code of Virginia, is not preempted by the National Labor Relations Act.

THE HONORABLE RICHARD H. BLACK
MEMBER, SENATE OF VIRGINIA
APRIL 12, 2013

ISSUE PRESENTED

You inquire whether a portion of a Virginia civil identity protection statute, prohibiting the intentional communication of an individual’s social security number, is federally preempted by the National Labor Relations Act, in light of a recent court decision in a North Carolina case, *Fisher v. Communications Workers of America*.¹

RESPONSE

While I am unable to render a definitive opinion due to a lack of knowledge of all the pertinent and particular facts of a future case arising in Virginia, I conclude that persuasive legal arguments exist to assert that the portion of the Virginia civil identity protection statute prohibiting the intentional communication of an individual’s social security number, as contained in § 59.1-443.2(A)(1) of the *Code of Virginia*, is not preempted by the National Labor Relations Act. Under facts identical to those presented in *Fisher v. Communications Workers of America*, it is likely that Virginia’s courts would reach the same result. In the more likely event of labor relations

litigation arising on different facts, a much stronger prospect exists to successfully defeat a federal preemption claim.

BACKGROUND

In *Fisher*, the Court of Appeals of North Carolina held that the federal National Labor Relations Act (hereinafter “NLRA”) preempted an individual cause of action brought by civil suit pursuant to North Carolina’s Identity Theft Protection Act, and thus affirmed the lower court’s granting summary judgment on behalf of the defendants.² The North Carolina Supreme Court denied the plaintiffs’ petition for appeal, and the United States Supreme Court subsequently denied plaintiffs’ *writ of certiorari* in the case.³

The North Carolina Identity Theft Protection Act (hereinafter “the NC Act”) provides, in pertinent part, that a business may not, “[i]ntentionally communicate or otherwise make available to the general public an individual’s social security number.”⁴ The statute authorizes a civil cause of action for anyone aggrieved of such conduct and does not prescribe any criminal penalties.⁵ In *Fisher*, the plaintiffs sued their former labor union pursuant to the NC Act after the union posted the names and social security numbers of the plaintiffs on a bulletin board in order to publicize the recent renouncement of their membership from the organization.⁶ The plaintiffs filed a parallel complaint with the National Labor Relations Board (hereinafter “NLRB”) pursuant to the NLRA and claimed that the union’s actions exposed the plaintiffs to identity theft and amounted to a violation of Section 8(b)(1)(A) which prohibits attempted coercion by unions to prevent its members from leaving their groups.⁷ The NLRA provides for civil remedies in administrative proceedings before the NLRB, subject to federal judicial review, for aggrieved parties.⁸

The trial court in *Fisher* dismissed the plaintiffs’ claim after granting the defendants’ summary judgment motion; it held that the NLRA preempted the pertinent claim contained in the NC Act because the conduct at issue was subject to discipline under the NLRA.⁹ In its opinion affirming the ruling, the Court of Appeals analyzed the case in light of the U.S. Supreme Court case *San Diego Building Trades Council v. Garmon*.¹⁰ The *Garmon* doctrine focuses on the relationship between the NLRA and state law in the context of the Supremacy Clause of the U.S. Constitution.¹¹ It generally holds that the NLRA was designed to protect the collective bargaining process and to resolve labor disputes, and when federal and state law conflict, the conflict is resolved in favor of the federal statute.¹² *Garmon* also provides exceptions to such federal preemption, delineating when complainants may file claims under state law that might otherwise fall under NLRA jurisdiction.¹³ In its analysis, the North Carolina court examined the specific, violable conduct in the case and reasoned that if the claims under the NLRA and the NC Act involved substantially the same conduct, then the NC Act claim must be preempted.¹⁴ The court held that because both claims were based on the same instance of conduct, that plaintiffs presented an “arguable” case under the NLRA, that neither of the *Garmon* exceptions applied, and thus, the plaintiffs’ claims under the NC Act were preempted.¹⁵

APPLICABLE LAW AND DISCUSSION

Virginia's identity protection statutes include both civil and criminal provisions. Specifically, § 59.1-442, *et seq.*, of the *Code of Virginia* provide for civil protections and relief, and §§ 18.2-186.4 and 18.2-186.3 proscribe criminal conduct. The *Fisher* case is a North Carolina appellate decision that did not reach the North Carolina Supreme Court and represents, at best, persuasive authority with no binding precedent on Virginia courts.¹⁶ Furthermore, I located no other published state or federal opinions that address NLRA preemption over a state identity protection statute. Specifically, no Virginia court has addressed the *Fisher* scenario of competing claims under the NLRA and any provision within its identity protection statutes. While Virginia's courts may well follow the *Fisher* outcome on substantially similar facts, this opinion will explore the legal arguments available to potentially avoid such a result. Indeed, it is far more likely that such labor relations litigation would arise in Virginia's courts on facts different from those present in *Fisher*.

The Virginia Personal Information Privacy Act (hereinafter "VPIPA"),¹⁷ of the *Code of Virginia* provides civil remedies for misuse of social security numbers in a fashion similar to the NC Act under which the plaintiffs in *Fisher* filed their claim.¹⁸ The VPIPA expressly provides that a person shall not, "[i]ntentionally communicate another individual's social security number to the general public."¹⁹ The law characterizes such conduct as a "prohibited practice" under the Virginia Consumer Protection Act and thus subject to the remedies the latter provides.²⁰ Under the VPIPA, an aggrieved individual may file a civil cause of action for actual damages or \$500, whichever is greater, per incident.²¹ The Attorney General's Office also may investigate and file an action for injunctive relief or imposition of a civil penalty.²²

Section 8(b)(1)(A) of the NLRA provides that,

It shall be an unfair labor practice for a labor organization or its agents -- (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 [29 USCS § 157]: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein.^[23]

Section 7 of the NLRA "protects an individual's right to refrain from union organizing, union membership, and other union activities[.]"²⁴

The U.S. Supreme Court's decision in *Garmon* and its progeny control any potential analysis arising from parallel claims under the NLRA and Virginia's civil identity protection statutes. In *Garmon*, a union requested that a business hire only their members.²⁵ The business in turn refused, noting that none of its employees had expressed a desire to join a union and that the business would not negotiate until the employees designated the requesting union a collective bargaining agent.²⁶ The union responded by picketing in front of the business and pressuring customers and suppliers who patronized it.²⁷ The Court found that the purpose of the union pressure was to compel execution of a collective bargaining agreement.²⁸ The business ultimately filed a tortious interference suit in state court claiming unfair labor practices.²⁹

The suit was filed pursuant to a state law designed specifically to address labor disputes.³⁰ The state court ruled in favor of the business and granted damages.³¹ The U.S. Supreme Court vacated the state judgment and ruled that the NLRA preempted a claim under the state labor law. The Court held that preemption triggers, “[w]hen it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield.”³² The Court further stated that this is true regardless of whether the state law itself is one of “broad general application” or one specifically designed to address labor disputes.³³ The Court nonetheless outlined two exceptions to preemption: 1) “when the activity regulated was merely a peripheral concern of the NLRA,” or 2) “when the conduct regulated touches interest so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, one could not infer that Congress had deprived the States of the power to act.”³⁴ The Court expanded on the second exception, explaining that states can act to maintain domestic peace, including to provide tort remedies, prevent violence, and protect against imminent threats to the public order.³⁵

As a threshold issue to preemption, *Garmon* held that it must be clear that the activities the state purports to regulate are not covered by the NLRA.³⁶ In *Garmon*, the state attempted to adjudicate a labor dispute by specifically interpreting state labor law as part of a tortious interference claim.³⁷ Such an explicit state attempt to address labor/management issues is nonexistent in a claim under the VPIPA. The *Garmon* Court further held that conduct adjudicated under state laws of “broad general application” may also be preempted.³⁸ The VPIPA is relatively narrowly tailored to protect the personal privacy interests of Virginia citizens. A mere text comparison of § 8 of the NLRA and the VPIPA reveals that the NLRA seeks to regulate coercion by labor organizations upon its members, and the VPIPA seeks to regulate intentional publication of social security numbers, regardless of whether it occurs in the labor context.³⁹ Nowhere within the VPIPA does its language suggest that Virginia purports to regulate union coercion in the labor context or address a worker’s labor such as those set forth in Sections 7 and 8 of the NLRA.⁴⁰ Nor did the Court in *Fisher* find that the NLRA’s scope definitively extend to intentional public communication of another’s social security number.⁴¹ Even the title of the enactment, the “Virginia Personal Information Privacy Act,” suggests the statute is focused solely on protecting the personal privacy of citizens.⁴²

Notwithstanding *Fisher*’s contrary result on the facts and circumstance of that particular case, *Garmon* does not require preemption merely because the same instance of conduct could serve as a basis for both a state law claim and a claim under the NLRA.⁴³ The Supreme Court repeatedly has held that the same instance of conduct can indeed serve as a basis for both a state law claim and a claim under the NLRA as long as the issues or “controversies” are not identical. In *Linn v. United Plant Guard Workers of America*, a business owner filed a defamation lawsuit in state court against a union that repeatedly libeled the business.⁴⁴ The owner simultaneously filed a complaint with the NLRB under § 8 of the NLRA alleging coercive union tactics based on the exact same conduct.⁴⁵ The Court ruled that the state law claim was not preempted and stated,

Nor should the fact that defamation arises during a labor dispute give the Board exclusive jurisdiction to remedy its consequences. The malicious publication of libelous statement does not in and of itself constitute an unfair labor practice....[The Board] looks only to the *coercive or misleading nature* of the statements rather than the defamation quality.^[46]

It later noted, “When the Board and state law frown upon the publication of malicious libel, albeit for different reasons, it may be expected that the injured party will request both administrative and judicial relief.”⁴⁷

Similarly, in *Sears v. San Diego County District Council of Carpenters*, Sears filed a state trespass suit seeking injunctive relief against a union based upon the union’s picketing outside a local Sears store.⁴⁸ The union argued that any claim against the picketing was a matter of exclusive jurisdiction under the NLRA and thus the state action was preempted.⁴⁹ The Court ruled that the state law claim was not preempted and held that the “controversy” presented to the state court and potentially the NLRB was not the same, despite the claims arising from the same conduct.⁵⁰ It noted,

If Sears had filed a charge [with the NLRB], the federal issue would have been whether the picketing had a recognitional or work-reassignment objective; . . . Conversely, in the state action, Sears only challenged the location of the picketing, whether the picketing had an objective proscribed by federal law was irrelevant to the state claim.^[51]

As in *Linn* and *Sears*, claims based on the same conduct under both the VPIPA and § 8 of the NLRA would involve two separate and distinct controversies. A claim under the VPIPA would focus solely on whether the actor had intentionally published another person’s social security numbers. A parallel claim under § 8 of the NLRA would focus on whether these actions were attributable to union activity and indeed *coercive* in nature. In other words, and borrowing from *Sears*, whether the publication of a social security number had the objective of being coercive in nature is irrelevant to the state claim. Thus, a claim pursuant to VPIPA similar to the factual scenario presented in *Fisher* may not be federally preempted.⁵²

As a second prerequisite to preemption, the Supreme Court has held that, in addition to showing that a state is clearly regulating conduct, *i.e.* a “controversy,” within NLRA purview, the party arguing preemption maintains the burden of showing at least an “arguable” case under the NLRA.⁵³ In the scenario presented in *Fisher*, plaintiffs presented an arguable claim before the NLRB given the conduct occurred within the labor context and the apparent coercive manner by which the union published the members’ social security numbers. Indeed the plaintiffs in *Fisher* had filed a case before the NLRB prior to filing the state action.⁵⁴ The *Fisher* court discussed at some length the detailed factual circumstances of this issue in its opinion.⁵⁵ But while there appears to be a solid argument under the *Fisher* fact pattern to satisfy the “arguable case” requirement of preemption, as noted earlier, an argument that a claim under the VPIPA is clearly a regulated activity covered under the NLRA may prove unpersuasive.⁵⁶ Thus, preemption may not attach.

The inquiry, however, does not end there. Assuming, *arguendo*, that a court finds that Virginia clearly purports to regulate coercive labor tactics in a claim under the VPIPA, and that there exists an arguable case under the NLRA, it must then further address whether such conduct falls within one of two exceptions to preemption delineated in *Garmon*.

In the first exception, *Garmon* holds that a state law claim shall not be preempted where “the activity is merely a peripheral concern of the NLRA.”⁵⁷ The Court in *Linn* addressed this particular exception in the context of the business owner’s defamation suit against the union.⁵⁸ It held that

the exercise of state jurisdiction here would be merely a peripheral concern of the [NLRA] provided it is limited to redressing libel issues with knowledge of its falsity, or with reckless disregard of whether it was true or false. Moreover, we believe that an overriding state interest in protecting its residents from malicious libels should be recognized in these circumstances.^[59]

Again, in the instant factual scenario, a state claim under VPIPA would be limited simply to whether a person intentionally published another’s social security number, not whether the union was being coercive in doing so. And while the publishing of social security numbers was the method by which the union sought to coerce its members, a Virginia court may view such conduct as of peripheral concern to the NLRA’s objectives to quell coercive activities. Furthermore, by establishing a private cause of action in tort, and authorizing causes of action on behalf of the Commonwealth for injunctive relief and for civil penalties, Virginia enunciates a strong public interest in ensuring the security of its citizens by reducing their risk of identity theft through protection of their social security numbers.⁶⁰

As the second exception, *Garmon* establishes that a state law shall not be preempted “when the activity regulated touches an interest so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, one could not infer that Congress had deprived the States of the power to act.”⁶¹ This “local interest” exception has been expounded upon by the Court. In *Farmer v. United Brotherhood of Carpenters*, a union member filed a state claim against his union for intentional infliction of emotional distress, among other claims, based on conduct of abuse and harassment.⁶² The union argued that such a claim was preempted by the NLRA.⁶³ In ruling that preemption did not apply, the Court specifically addressed the “local interest” exception and held that there was a significant state interest in protecting citizens from harassment and stating that federal protection should not extend to such outrageous conduct in a civilized society.⁶⁴ The Court further found that, although the conduct occurred in the course of a labor dispute, the exercise of jurisdiction over the intentional infliction of emotional distress claim entailed little risk of interfering with a determination of the NLRB, namely whether the harassment was an unfair labor practice under § 8 of the NLRA.⁶⁵

Likewise, in *Belknap v. Hale*, former employees of a local hardware store filed a state breach of contract and misrepresentation claim against their former employer after the business promised them permanent employment upon hiring them as replacement workers during a strike of the business’ union workers.⁶⁶ Upon conclusion of the

strike, the business fired the replacement workers.⁶⁷ On appeal, the business argued that the breach of contract and misrepresentation suit were preempted by the unfair labor practice provisions of the NLRA.⁶⁸ The Court disagreed and, focusing on the local interest exception, ruled that the state “surely has a substantial interest in protecting its citizens from misrepresentations that have caused them grievous harm.”⁶⁹ The Court also noted that, although consisting of the same conduct, the state claim would not interfere with an NLRB adjudication because it focuses on whether the business made a misrepresentation, not on whether an unfair labor practice infringed workers’ rights pursuant to the NLRA.⁷⁰

As in an emotional distress case or misrepresentation case, Virginia certainly has a significant interest in protecting its citizens from identity theft and ensuring their personal privacy. This is clearly evident in recent years as the General Assembly has enacted, in addition to the VPIPA, legislation preventing disclosure of social security numbers on public documents, preventing disclosure of credit card numbers on restaurant receipts, requiring notice of database breaches containing personal information, and increasing penalties for criminal identity theft.⁷¹ Furthermore, the U.S. Federal Trade Commission reported for the 2011 calendar year 1,810,013 consumer complaints in the U.S. related to identity theft and fraud, an increase of close to 1.5 million per year from the number of complaints ten years prior, with Virginia ranking in the top half at number five out of fifty in fraud and related complaints, and number twenty-one out of fifty in identity theft complaints.⁷² Identity theft and related fraud clearly is a rapidly growing problem. Insulating organized labor from the penalties set forth in the VPIPA and thereby denying its citizens the privacy protections afforded in the Act would set a dangerous precedent.

Finally, as an alternative argument, the VPIPA can be characterized as an exercise of Virginia’s police powers and not subject to NLRA preemption. In the wake of *Garmon*, the Virginia Supreme Court has held that Congress “has not occupied and closed the file” on labor relations affecting interstate commerce to the exclusion of the states’ traditional authority to exercise their police power, provided the state action “does not contravene the provisions of the NLRA.”⁷³ In *National Maritime v. Norfolk*, appellants, the National Maritime Union, AFL-CIO, argued that § 8 of the NLRA preempted a city ordinance requiring a use permit for their hiring hall in Norfolk.⁷⁴ The court held that, “[i]t is well settled that the powers of a state to legislate in the exercise of its police power is coordinate with the power of the Federal government to legislate in matters affecting interstate commerce.”⁷⁵ In upholding the city ordinance, the court ruled that an intention of Congress to exclude the states from exerting their police power must be “clearly manifested.”⁷⁶ Unless a statute seeks to control the “fundamental right to self-organization and collective bargaining” it must be upheld.⁷⁷ The court further stated that, when seeking to preempt a state’s statutory exercise of police power, “the repugnance or conflict should be direct and positive so that the two acts could not be reconciled or consistently stand together.”⁷⁸

There is no evidence that Congress has “clearly manifested” an intent within the NLRA to preempt Virginia from exercising its police power to prohibit intentional public disclosure of social security numbers in furtherance of protecting its citizens.⁷⁹ As the court notes, the NLRA is designed to occupy the sphere of self-organization,

labor disputes and collective bargaining.⁸⁰ It was not written to prevent potential identity theft through protection of social security numbers, as is the goal of the VPIPA. Furthermore, there is nothing to suggest a direct conflict between these statutes or that they cannot consistently stand together. One can comply with both statutes without conflict. Accordingly, the VPIPA arguably does not conflict with the NLRA and a state claim may not be preempted, as established by the ruling in *National Maritime*.

CONCLUSION

Accordingly, while I am unable to render a definitive opinion due to a lack of knowledge of all the pertinent and particular facts of a future case arising in Virginia, I conclude that persuasive legal arguments exist to assert that the portion of the Virginia identity protection statute prohibiting the intentional communication of an individual's social security number, as contained in § 59.1-443.2(A)(1) of the *Code of Virginia*, is not preempted by the National Labor Relations Act. Under facts identical to those presented in *Fisher v. Communications Workers of America*, it is likely that Virginia's courts would reach the same result. In the more likely event of labor relations litigation arising on different facts, a much stronger prospect exists to successfully defeat a federal preemption claim.

¹ 721 S.E.2d 231 (N.C. App. 2012).

² *Fisher v. Comm'ns Workers of Am.*, 716 S.E.2d 396 (N.C. App. 2011).

³ *See Fisher*, 721 S.E.2d at 231, *cert denied* 184 L. Ed. 2d. 154 (2012).

⁴ N.C. Gen. Stat. § 75-62(a)(1).

⁵ N.C. Gen. Stat. § 75-62.

⁶ 716 S.E.2d at 399-400.

⁷ *Id.*

⁸ 29 U.S.C. §§ 151-69, 185. In *Fisher*, the proceedings before the NLRB had ended with a settlement between the plaintiffs and the union, without any finding by the board that the conduct at issue violated NLRA protections. *See Fisher* at 400, 402.

⁹ 716 S.E.2d at 400.

¹⁰ *Id.* at 400-09 (citing *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1955)).

¹¹ 359 U.S. 236.

¹² *Id.*

¹³ *Id.*

¹⁴ *See Fisher* at 405.

¹⁵ *Id.* at 404.

¹⁶ *Fisher* involved only preemption issues respecting the NC Act's civil protections against the union representatives' alleged unlawful posting of the plaintiffs' social security numbers. *See Fisher* at 399-400, 406. Therefore, this opinion is confined to an analysis, in light of *Fisher*, of potential preemption of that portion of the Virginia identity protection statute that prohibits the intentional communication of "another individual's social security number to the general public." *See* VA. CODE ANN. § 59.1-443.2(A)(1) (Supp. 2012).

¹⁷ VA. CODE ANN. §§ 59.1-442 through 59.1-444 (2006 & Supp. 2012).

¹⁸ *See* § 59.1-444 (2006). *See also* §§ 59.1-200 (Supp. 2012) & 59.1-204 (2006).

¹⁹ Section 59.1-443.2(A)(1) (Supp. 2012).

²⁰ Sections 59.1-444 (2006); 59.1-196 through 59.1-207 (2006 & Supp. 2012).

²¹ Section 59.1-204(A) (2006). A willful violation may garner enhanced civil consequences. *Id.*

²² Sections 59.1-203 (Supp. 2012); 59.1-206 (Supp. 2012).

²³ 29 U.S.C. § 158.

²⁴ *See Fisher* at 403 (quoting 29 U.S.C. § 157).

²⁵ *See Garmon* at 237.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 239.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 244.

³³ *Id.*

³⁴ *Id.* at 243-44.

³⁵ *Id.* at 247.

³⁶ *Id.* at 244.

³⁷ *Id.* at 239.

³⁸ *Id.* at 244.

³⁹ *See* 29 U.S.C. §158; VA. CODE ANN. § 59.1-443.2(A)(1).

⁴⁰ *See* VA. CODE ANN. § 59.1-443.2.

⁴¹ *See Fisher* at 400, 403-404.

⁴² *Id.*

⁴³ *Fisher* at 405.

⁴⁴ 383 U.S. 53, 56 (1966).

⁴⁵ *Id.* at 56-57.

⁴⁶ *Id.* at 63 (emphasis added).

⁴⁷ *Id.* at 66.

⁴⁸ 436 U.S. 180, 182-83 (1978).

⁴⁹ *Id.* at 182-84.

⁵⁰ *Id.* at 198.

⁵¹ *Id.*

⁵² The *Fisher* court adopts a narrow view in this regard and distinguishes *Linn* because the conduct at issue involved defamation and not identity protection. 716 S.E.2d at 406. Yet, the Supreme Court has employed a methodology that distinguishes between the same instance of conduct and whether it is the same “controversy” in NLRA preemption cases decided in the wake of *Garmon*. *See Farmer v. United Bd. of Carpenters & Joiners*, 430 U.S. 290 (1977) (parallel claims allowed in same instance of conduct in an emotional distress case); *Belknap v. Hale*, 463 U.S. 491 (1983) (parallel claims allowed in same instance of conduct in a misrepresentation case); *Sears*, 436 U.S. 180 (parallel claims allowed in same instance of conduct in a trespass case).

⁵³ See *Int'l Longshoremen's Ass'n v. Davis*, 476 US 380, 396 (1986).

⁵⁴ 716 S.E.2d at 399-400.

⁵⁵ *Id.* at 402-04.

⁵⁶ Under *Garmon*, prior NLRB action can also serve as a basis for preemption, which is a procedural, factual inquiry in every case as to when a claim was filed and the manner in which a board ruled. 359 U.S. at 245-46. As noted above, in *Fisher*, the court found that the board did not give a "definite decision" to trigger such preemption, thus the court relied solely on the "arguable case" argument in finding preemption. 716 S.E.2d at 404.

⁵⁷ 359 U.S. at 243.

⁵⁸ 383 U.S. at 61-62.

⁵⁹ *Id.* at 61 (citing *United Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656 (1947)).

⁶⁰ See VA. CODE ANN. §§ 59.1-200, 203 and 206 (Supp. 2012), and 59.1-204 (2006).

⁶¹ 359 U.S. at 244.

⁶² 430 U.S. at 293.

⁶³ *Id.* at 294-95.

⁶⁴ *Id.* at 302-05.

⁶⁵ *Id.* at 305.

⁶⁶ 463 U.S. at 493-97.

⁶⁷ *Id.* at 496.

⁶⁸ *Id.* at 497.

⁶⁹ *Id.* at 511.

⁷⁰ *Id.* at 510.

⁷¹ See VA. CODE ANN. §§ 2.2-3808 (2010); 2.2-3808.1 (2007); 6.2-429 (2010); 18.2-186.6 (2008); 18.2-186.3(D) (2009).

⁷² See FEDERAL TRADE COMMISSION, *Consumer Sentinel Network Data Book for January - December 2011* at 5, 15 (Feb. 2012).

⁷³ See *Nat'l Mar. v. Norfolk*, 202 Va. 672, 677, 119 S.E.2d 307, 310 (1961).

⁷⁴ *Id.* at 673-75, 119 S.E.2d 308-10.

⁷⁵ *Id.* at 676-77, 119 S.E.2d 311.

⁷⁶ *Id.* at 677-78, 119 S.E.2d 311 (quoting *Reid v. Colorado*, 187 U.S. 137, 148 (1902)).

⁷⁷ *Id.* at 678, 119 S.E.2d 311.

⁷⁸ *Id.* at 677, 119 S.E.2d 311 (quoting *Reid*, 187 U.S. at 148).

⁷⁹ Traditionally, police powers include anything that promotes the "health, safety, morals, comfort, prosperity or general welfare of the general public." *Id.* at 678, 119 S.E.2d 311. See also *Joyner v. Centre Motor Co.*, 192 Va. 627, 636, 66 S.E.2d 469, 474 (1951) (discussing state's police powers to promote public safety, health, morals or general welfare); *Sch. Bd. v. U.S. Gypsum Co.*, 234 Va. 32, 39, 360 S.E.2d 325, 329 (1987) (police powers designed to reduce a hazard to public health, safety, morals and general welfare). Prohibiting the public disclosure of a citizen's social security number promotes the safety, prosperity and general welfare of the public by protecting such a valuable piece of personal identifying information. Thus, § 59.1-443.2(A)(1) logically can be characterized as an exercise of the Commonwealth's police powers.

⁸⁰ 202 Va. at 678, 119 S.E.2d 311.

OP. NO. 11-101**WORKERS' COMPENSATION: VIRGINIA WORKERS' COMPENSATION COMMISSION****CRIMINAL PROCEDURE: COMPENSATING VICTIMS OF CRIME**

The Virginia Workers' Compensation Commission is not authorized under current law to use funds in the Criminal Injuries Compensation Fund to purchase a new office building in which to house the headquarters of the Commission and the Director of CICF and her staff.

Effective July 1, 2013, the Commission is permitted to locate its headquarters outside the City of Richmond, provided the facility remains within the Commonwealth.

MS. EVELYN MCGILL
EXECUTIVE DIRECTOR
VIRGINIA WORKERS' COMPENSATION COMMISSION
APRIL 12, 2013

ISSUES PRESENTED

You inquire whether, under current law, the Workers' Compensation Commission (the "Commission") may utilize funds in the Criminal Injuries Compensation Fund ("CICF" or "Fund") to purchase a new office building in which to house the headquarters of the Commission and the offices of Director of CICF and her staff. You further ask whether, if the Commission is not so empowered, there is any constitutional or other legal impediment to the introduction of legislation that would so empower the Commission. Finally, you ask whether the Commission is prohibited from housing its records and transacting its official business in an office building outside of the City of Richmond, Virginia.

RESPONSE

It is my opinion that the Commission is not authorized under current law to use funds in the Criminal Injuries Compensation Fund to purchase a new office building in which to house the headquarters of the Commission and the Director of CICF and her staff. It is my further opinion that there is no constitutional or other legal impediment to the introduction of future legislation that would enable the Commission to utilize the Fund for such purposes. Finally, it is my opinion that, effective July 1, 2013, the Commission is permitted to locate its headquarters outside the City of Richmond, provided the facility remains within the Commonwealth.

BACKGROUND

The General Assembly, pursuant to general statutes and budgetary enactments, has placed the administration of the CICF with the Commission. Daily operations are managed by the Director of CICF, under the supervision of the Executive Director of the Commission, and the Virginia Workers' Compensation Commissioners serve as the governing board of the Fund. You relate that the Commission's headquarters are currently located in a facility in one part of the City of Richmond, while the offices of the Director of CICF, her staff, and two additional Commission offices are currently

located at another address in the City of Richmond. You explain that the Commission is considering the relocation of its headquarters, four additional leased locations, and the offices of the Director of CICF and her staff into one office building suitable for their operations.

APPLICABLE LAW AND DISCUSSION

The administration of the Criminal Injuries Compensation Fund is governed by Chapter 21.1 of Title 19.2 of the *Code of Virginia*, entitled “Compensating Victims of Crime.”¹ Specifically, § 19.2-368.3 charges the Commission with the specific “powers and duties in the administration of the provisions of this chapter[.]” In addition, pursuant to § 19.2-368.3:1(A), the Commission must “employ a crime victims’ ombudsman and adequate staff to facilitate the prompt review and resolution of crime victim compensation claims and to assure that the crime victims’ rights are safeguarded and protected during the claims process.” The ombudsman “shall report directly to the Commission.”² Thus, I conclude that the General Assembly has placed with the Commission the responsibility to staff and administer the entirety of the Fund’s programming.

You note that the General Assembly has appropriated amounts for the Fund’s programming, and state that the Commission utilizes these appropriated funds for that purpose. In addition, § 19.2-368.18(B), in relevant part, designates that a portion of assessed court costs be deposited into the Fund, as follows:

Whenever the costs provided for in §§ 17.1-275.1, 17.1-275.2, 17.1-275.3, 17.1-275.4, 17.1-275.7, 17.1-275.8 or § 17.1-275.9 or subsections B or C of § 16.1-69.48.1 are assessed, a portion of the costs, as specified in those sections, shall be paid over to the Comptroller to be deposited into the Criminal Injuries Compensation Fund.

Section 19.2-368.18 specifies how Fund monies may be spent. It provides that:

D. Sums available in the Criminal Injuries Compensation Fund shall be used for the purpose of payment of the costs and expenses necessary for the administration of this chapter and for the payment of claims pursuant to this chapter.

E. All revenues deposited into the Criminal Injuries Compensation Fund, and appropriated for the purposes of this chapter, shall be immediately available for the payment of claims.

When a statute is unambiguous on its face, it will be interpreted according to its plain language.³ Under the plain language of the statute, the Fund is to be used for one of two explicit purposes, the costs and expenses necessary “for the administration of this chapter,” and the payment of criminal injury compensation claims. The payment of claims clearly takes precedence in priority, as funding placed into the fund must be made immediately available to pay such claims.

Although the Commission oversees the Fund and Fund deposits may be used for the administration of CICF programming, § 19.2-368.18(D) does not authorize the expenditure of Fund monies for the support of the Commission generally. Rather, the

use of such money is strictly limited to “the administration of this chapter.” This “chapter,” Chapter 21.1 of Title 19.2, involves only the Fund and no other Commission responsibilities. The administration-related sections therein focus on the program for receiving, investigating, evaluating and determining claims for relief from the Fund, and a mandate to provide the public with adequate notice of the Fund’s existence and availability. Thus, the “costs and expenses” that may be drawn from the Fund are limited to those relating to the operation of that specific programming.

Moreover, with respect to office facilities for the Commission, § 65.2-204(A) states that, “[t]he Commission shall be provided with adequate offices . . . in which the records shall be kept and its official business transacted during regular business hours.” Subsection (C) further provides that, “[a]ll salaries and expenses of the Commission shall be audited and paid out of the state treasury in the manner prescribed for similar expenses in other departments or branches of state government.” These specific statutory provisions are controlling with respect to the source of funding for Commission expenses, and cannot be construed to authorize use of the Fund for the procurement of Commission office facilities.

Accordingly, I conclude that the Commission may not utilize the Fund for the purchase of a new office building in which to house the headquarters of the Commission and the Director of CICF and her staff. Should the Commission deem it appropriate to seek future legislation explicitly allowing it to utilize the Fund for such a purchase, I find no constitutional or other legal impediment to it doing so.

Relevant to your final inquiry, § 65.2-204(A) currently provides, in pertinent part, that the Commission’s offices must be “in the Capitol or in some other suitable building in the City of Richmond[.]” During its 2013 Session, the General Assembly amended that statutory requirement. The amendment struck “City of Richmond” and inserted “Commonwealth” in its stead,⁴ and, thereby, will remove the restriction that the Commission maintain its operations within the City of Richmond. The amendment becomes effective July 1, 2013. I therefore conclude that, as of that date, the Commission lawfully may establish the location of its office facilities anywhere in the Commonwealth.

CONCLUSION

Accordingly, it is my opinion that the Commission is not authorized under current law to use funds in the Criminal Injuries Compensation Fund to purchase a new office building in which to house the headquarters of the Commission and the Director of CICF and her staff. It is my further opinion that there is no constitutional or other legal impediment to the introduction future legislation that would enable the Commission to utilize the Fund for such purposes. Finally, it is my opinion that, effective July 1, 2013, the Commission is permitted to locate its headquarters outside the City of Richmond, provided the facility remains within the Commonwealth.

¹ See VA. CODE ANN. §§ 19.368.1 through 19.2-368.18 (2008 & Supp. 2012).

² Section 19.2-368.3:1(A) (2009).

³ See, e.g., *Hubbard v. Henrico Ltd. P'ship*, 255 Va. 335, 339-40, 497 S.E.2d 335, 337-38 (1998).

⁴ See 2013 Va. Acts ch. 14.

OP. NO. 13-006

WORKERS' COMPENSATION: VIRGINIA WORKERS' COMPENSATION COMMISSION

The Circuit Court may appoint a guardian *ad litem* in proceedings pending before the Virginia Workers' Compensation Commission.

THE HONORABLE CHARLES N. DORSEY
JUDGE, TWENTY-THIRD JUDICIAL CIRCUIT
APRIL 19, 2013

ISSUE PRESENTED

You ask whether a circuit court may appoint a guardian *ad litem* to represent a minor beneficiary in a proceeding pending before the Virginia Workers' Compensation Commission ("VWCC" or "the Commission").

RESPONSE

It is my opinion that the Circuit Court may appoint a guardian *ad litem* in proceedings pending before the VWCC.

BACKGROUND

You relate a scenario in which the Estate of a deceased person filed a claim for compensation with the Commission pursuant to the Virginia Workers' Compensation Act (the "Act"). You state that the decedent, for purposes of the Act, was survived by three dependents, including two minor children. The Estate and the defendants reached a tentative settlement agreement subject to the approval of the minor children. The Estate then filed in your Court a Petition to Appoint Guardian *ad Litem* to represent the two minor children in proceedings before the Commission. You declined to appoint a guardian *ad litem* until the Attorney General rendered an advisory opinion regarding the subject. Subsequently, upon the Estate's request, you entered an order of non-suit dismissing the Petition to Appoint Guardian *ad Litem* without prejudice.

APPLICABLE LAW AND DISCUSSION

The petitioners have asked your Court to appoint a guardian *ad litem* to represent the minors' interests with regard to the settlement of a claim pending before the VWCC. A guardian *ad litem* is a special guardian appointed by the court to prosecute or defend, on behalf of an infant or incompetent, a lawsuit to which he is a party, and such guardian is considered an officer of the court to represent the interest of the infant or incompetent in the litigation.¹ The Act does not empower the Commission itself to appoint a guardian *ad litem*.² Case law from the VWCC regarding the appointment of guardians *ad litem*, while scant, reinforces the VWCC's inability to

appoint a guardian *ad litem*. The Commission's standing, and historical, practice is to direct the parties to apply to the appropriate circuit court for the appointment of a guardian *ad litem*.^{3,4}

A customary practice of the VWCC does not necessarily confer power upon a circuit court to appoint guardians *ad litem* for proceedings before the VWCC. In light of the fact that the VWCC may not appoint a guardian *ad litem* to represent the interests of a minor child in a workers' compensation claim, we must review the circuit court's power to appoint a guardian *ad litem* for proceedings before the VWCC.⁵

One source of authority of a circuit court to appoint a guardian *ad litem* is statutory. The general statutory provision for the appointment of guardians *ad litem* states:

A suit wherein a person under a disability is a party defendant shall not be stayed because of such disability, but the court in which the suit is pending, or the clerk thereof, shall appoint a discreet and competent attorney-at-law as guardian *ad litem* to such defendant....^[6]

This statute is inapplicable here for two reasons. First, the minor children are not party defendants in the VWCC proceedings or in your Court; rather, they are claimants seeking approval of a settlement of their deceased father's workers' compensation claim.⁷ Second, only the court "in which the suit is pending" may appoint guardians *ad litem* pursuant to the language of the statute.⁸ No underlying suit is pending in your Court. Therefore, the guardian *ad litem* appointment power contained in §8.01-9(A) does not grant a circuit court the power to appoint guardians *ad litem* in this scenario.

Nonetheless, a circuit court's ability to appoint guardians *ad litem* is not limited to the authority granted the court by statute.⁹ Rather, a circuit court has the inherent power to appoint guardians *ad litem*.¹⁰ This inherent equitable power and responsibility stems from the common law doctrine of *parens patriae*, which is "defined as that power of the Commonwealth to watch over the interests of those who are incapable of protecting themselves."¹¹ "In *all* suits or legal proceedings, of whatever nature, in which the . . . rights of a minor are involved, the protective powers of a court of chancery may be invoked whenever it becomes necessary to fully protect such rights."¹² I therefore conclude that the circuit court does have the power to appoint a guardian *ad litem* to represent the minor children in proceedings before the VWCC.

To effectuate its protective powers, the established practice is that a guardian *ad litem* may be appointed after a trial judge makes a preliminary finding that the best interests of the child require such appointment.¹³ In the instant case, your Court was presented with a petition to appoint a guardian *ad litem* to represent the minor children's interests in proceedings before the VWCC. The petition specifically stated that "[i]n order to protect the Hubbard Children's interest in [their deceased father's estates' settlement before the VWCC], a guardian *ad litem* should be appointed."¹⁴ Upon a determination that it is in the best interests of the child, the circuit court has the equitable power to appoint a guardian *ad litem*.

CONCLUSION

Accordingly, it is my opinion that a circuit court has jurisdiction to appoint guardians *ad litem* to protect the interests of minor children in proceedings before the VWCC.¹⁵

¹ BLACK'S LAW DICTIONARY 635 (5th ed. 1979).

² VA. CODE ANN. § 65.2-201(A) (2012), in relevant part, grants to the VWCC to power of a court, "to appoint guardians pursuant to Part C (§ 64.2-1700 et seq.) of Subtitle IV of Title 64.2." Section 64.2-1702 empowers a court to, "appoint a guardian for the estate of the minor and may appoint a guardian for the person of a minor unless a guardian has been appointed for the minor" by a parent in a valid testamentary instrument. These forms of guardianships over a minor's property estate, or over the general welfare of a minor's person, do not equate to the specialized duties of a court-appointed guardian *ad litem*, who is charged to represent the best interests of a minor, or other legal incompetent, in a litigation context.

³ See *Mowbray v. Appalachian Freight Carriers, Inc.*, 06 WC UNP 2231103 n.2 (2006) (explaining that "[w]hether or not we have the inherent authority, the Commission's practice has been to require the parties to seek the appointment of a guardian *ad litem* in the appropriate circuit court, and we see no reason to deviate from that practice here."); *Davis v. Kenton Transfer & Storage Co.*, 65 Va. WC 312, 313 (1986) (holding that "[b]ecause James P. Davis was found to be a person under disability[,] an Order appointing a guardian *ad litem* was entered in the Circuit Court of the City of Virginia Beach ... to represent, defend and protect the interest of James P. Davis in the instant proceeding."); *In re Townsend*, 11 WC UNP B0903 (2011) (deciding that Bedford County Circuit Court should be asked to appoint a guardian *ad litem* for the infant).

⁴ The General Assembly is presumed to be aware of an agency's construction of a particular statute, and, when such a construction continues without legislative alteration, the legislature will be presumed to have acquiesced in it. See 2011 Op. Va. Att'y Gen. 143, 145 cases/opinions cited therein. See also *Commonwealth v. Appalachian Electric Power Co.*, 193 Va. 37, 45-46, 68 S.E.2d 122, 127 (1951).

⁵ The VWCC's reliance on circuit courts to effectuate its determinations regarding compensation payments has statutory support. See VA. CODE ANN. § 65.2-523 (2012) (allowing the VWCC to direct lump sum payments to an entity appointed by an appropriate circuit court); § 65.2-525 (2012) (allowing the VWCC to direct lump sum payments for a minor or incapacitated person to an entity appointed by an appropriate circuit court). It may be argued that if the legislature had intended to confer upon the circuit courts the power to appoint guardians *ad litem* for proceedings before the VWCC, it could have done so explicitly. Nevertheless, in light of the doctrine of *parens patriae*, discussed hereinafter, the circuit court would not exceed its equitable power in appointing a guardian *ad litem* for proceedings before the VWCC.

⁶ VA. CODE ANN. § 8.01-9(A) (2012).

⁷ See *Cook v. Radford Cmty. Hosp.*, 260 Va. 443, 449, 536 S.E.2d 906, 909 (2000) (holding that "[Section 8.01-9] is not concerned with the capacity of a person under a disability to sue but with the protection of such person when named as a defendant in a lawsuit. One who institutes litigation is in a posture completely different than one against whom suit is filed. The filing of a lawsuit is an affirmative act on the part of a plaintiff and does not carry with it the need for the type of court-initiated protection which may exist when a person with a disability is required to defend himself . . .").

⁸ Section 8.01-9(A).

⁹ See *Verrocchio v. Verrocchio*, 16 Va. App. 314, 319-20, 429 S.E.2d 482, 485 (1993) ("We find the rules and statutes that presently express the court's authority to appoint guardians *ad litem* are not exclusive sources of that power. Rather they are non-exclusive codifications of an equitable power and responsibility dating back to chancery days." (quoting *Stewart v. Superior Court*, 787 P.2d 126, 129 (Ariz. 1989))).

¹⁰ See *Word v. Commonwealth*, 30 Va. (3 Leigh) 743, 748 (1827) (holding that it is a power incident to every court of justice to appoint a guardian *ad litem*); *Strayer v. Long*, 83 Va. 715, 719, 3 S.E. 372, 374 (1887) (noting that the power to appoint a guardian *ad litem* is incident to every court).

¹¹ *Verrocchio*, 16 Va. App. at 318, 429 S.E.2d at 485 (citation omitted).

¹² *Id.* at 319, 429 S.E.2d at 485 (emphasis added) (quoting *Stewart*, 787 P.2d at 129 (citation omitted)).

¹³ *Id.* at 317-18, 429 S.E.2d at 484. (“...[D]espite the great need for a circuit court to have the power to appoint a guardian *ad litem* ... , a ‘trial court must have a cognizable basis for granting equitable relief.’” (quoting *Tiller v. Owen*, 243 Va. 176, 179, 413 S.E.2d 51, 53 (1992))).

¹⁴ See Va. Sup. Ct. R. pt. 6, § II, 1.14(b) (2012) (“When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client’s own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian *ad litem*, conservator or guardian.”).

¹⁵ In specific instance you describe in your letter, it is not clear that the petitioners chose the correct circuit court to appoint the guardian *ad litem*. The mother and children were residents of Patrick County at the time the Petition was filed in Roanoke Circuit Court. As the appropriate situs of the petition was not questioned, I offer no opinion regarding venue or personal jurisdiction. Additionally, I offer no opinion regarding the requisite qualifications of any guardian *ad litem* that may be appointed.

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