STUDY ON GRANTS OF AUTHORITY TO THE GOVERNOR AND THE GENERAL ASSEMBLY OF VIRGINIA

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COMMONWEALTH OF VIRGINIA
Department of Purchases and Supply
Richmond
1978

STUDY ON
GRANTS OF AUTHORITY
TO AGENCIES AND BOARDS OF EXECUTIVE DEPARTMENT

A Report Pursuant to Senate Joint Resolution 96

Adopted by the 1977 General Assembly

Prepared by SJR 96 Task Force

Pat Perkinson, Secretary of the Commonwealth, Chairman

William E. Breen, MIS Director, Office of the Secretary of Commerce and Resources

Charles A. Brooks, Human Resources Developer, Office of the Secretary of Human Resources

Jack Heishman, Special Assistant, Office of the Secretary of Public Safety

Dr. Everett B. Howerton, Assistant Superintendent for Administrative Field Services, Department of Education

Frank W. Sencindiver, Assistant Commissioner, Citizen Services Program, Division of Motor Vehicles

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COMMONWEALTH *of* VIRGINIA

MRS. PAT PERKINSON

Secretary of the Commonwealth

RICHMOND, VIRGINIA 23219

December 20, 1977

The Honorable Mills E. Godwin, Jr.
Governor of Virginia
State Capitol
Richmond, Virginia

Dear Governor Godwin:

As chairman of the Task Force appointed to carry out the study mandated by Senate Joint Resolution 96, I am pleased to submit the attached report. It has been prepared with the help of the Attorney General, the Director of Legislative Services, the Governor's Secretaries, agency heads, board chairmen and others.

The study has identified a number of problem areas and has prompted corrective action in many of these. It has served also to increase awareness of the limitations in statutory grants of authority and the risks involved in exceeding these limitations.

Due to time and staff constraints, this study must be considered an interim one. The report should be reviewed and followed up by a staff appropriately versed in Administrative, Antitrust and First Amendment law. Meanwhile there are certain actions that could be set into motion by the Governor's Secretaries after further evaluation of this study's findings.

I speak for the Task Force members in expressing appre-caition for the opportunity to carry out this assignment.

Sincerely,

Pat Perkinson

Mrs. Pat Perkinson
Secretary of the Commonwealth

mlf

Attachment

SENATE JOINT RESOLUTION NO. 96

Requesting the Governor to review the statutory grants of power to the various boards, councils, commissions, departments and agencies of the executive branch of State government, as well as the rules, regulations, standards, orders or other actions of such bodies, to determine whether the statutes granting such powers are in any instances lacking in adequate guidelines and limitations on the exercise of such powers, and to insure that any rules, regulations, standards, orders or other actions adopted pursuant to such statutory grants of power are consistent therewith and do not exceed such grants; and to present his findings and recommendations to the General Assembly at its nineteen hundred seventy-eight Session.

Agreed to by the Senate, March 4, 1977

Agreed to by the House of Delegates, March 4, 1977

WHEREAS, the General Assembly has granted power to various boards, councils, commissions, departments and agencies within the executive branch of State government, including the power to make rules and regulations, promulgate standards, issue orders, and take other actions of a quasi-legislative nature; and

WHEREAS, these grants of power should be accompanied by guidelines and limitations which adequately circumscribe the exercise of such powers by the various executive bodies; and

WHEREAS, adequate guidelines and limitations on the exercise of these powers are essential to insure accountability and to protect against the usurpation of legislative prerogatives; and

WHEREAS, there should be a systematic and periodic review of the actions taken by the various executive bodies to insure that such actions are consistent with statutory grants of power and do not exceed such grants and any guidelines or limitations accompanying them; and

WHEREAS, the Governor is responsible under the Constitution of Virginia to see that the laws are faithfully executed, and responsible by statute for a review of the programs and activities of all executive bodies each biennium in connection with the formulation and submission of a comprehensive budget to the General Assembly; and

WHEREAS, the Governor is ideally situated to undertake a review of such statutory grants and any actions taken pursuant thereto in connection with the exercise of his other responsibilities; now, therefore, be it

RESOLVED by the Senate of Virginia, the House of Delegates concurring, That the Governor is requested to review the statutory grants of power to the various boards, councils, commissions, departments and agencies within the executive branch of State government, to determine whether the statutes granting such powers are in any instances lacking in adequate guidelines or limitations on the exercise of such powers, and to insure that any rules, regulations, standards, orders or other actions adopted pursuant thereto are consistent therewith and do not exceed such grants or any guidelines and limitations accompanying them and to present his findings and recommendations to the General Assembly on or before January eleven, nineteen hundred seventy-eight.

INTRODUCTION

Senate Joint Resolution 96, enacted by the 1977 General Assembly, directed the Governor to review statutory grants of authority to executive department boards, councils, commissions, departments and agencies, and the rules, regulations, standards, orders and other actions of such bodies, to determine whether or not statutes are lacking in adequate guidelines and limitations, and to ensure that rules, regulations, standards, orders or other actions are consistent with and do not exceed statutory grants of power. The Resolution obligated the Governor to present findings and recommendations to the General Assembly by January 11, 1978.

To conduct the study, Secretary of Administration and Finance Maurice B. Rowe, on behalf of the Governor, established a Task Force representing the six secretarial areas in the Executive Department. Mrs. Pat Perkinson, the Secretary of the Commonwealth, served as Chairman of the Task Force and representative of Secretary Rowe and the agencies in his Office of Administration and Finance. Others named by their respective Secretaries were William E. Breen, MIS Director, representing Secretary Earl J. Shiflet and the agencies in the Office of Commerce and Resources; Charles A. Brooks, Human Resources Developer, representing Secretary Woodrow W. Wilkerson and the Office of Human Resources; Jack Heishman, Special Assistant, representing Secretary H. Selwyn Smith and the Office of Public Safety; Dr. Everett B. Howerton, Assistant Superintendent for Administrative Field Services, Department of Education, representing Secretary Robert R. Ramsey and the Office of Education; and Frank W. Sencindiver, Assistant Commissioner, Citizen Services Program, Division of Motor Vehicles, representing Secretary Wayne Whitham and the Office of Transportation.

Several technical advisors assisted the Task Force. Among them were Robert Perrow, Assistant Attorney General; Edward C. Tosh, Staff Attorney, Virginia Code Commission; Dr. Joseph P. Roberts, Research Supervisor, Division of Education Research and Statistics, Department of Education; William B. Rowland, Jr., Chief Analyst, Department of Planning and Budget; and Mrs. Trudy, who served as liaison for the Governor's Counsel, Robert D. McIlwaine, III. Mrs. Myra Federspiel, Research Assistant, Office of the Secretary of the Commonwealth, served as secretary to the Task Force.

DELEGATION OF AUTHORITY

The general premise that underlies concerns expressed in Senate Joint Resolution 96 is well stated in the September 1976

summary of the priority recommendations of the Commission on State Governmental Management, Improving State Government Management:

> "It is an ancient legal doctrine that the legislature may not delegate its legislative power to others in a wholesale manner. When it does delegate substantial decision-making (e.g. making rules or regulations, setting standards, or determining allocations), it must accompany such grant of power with adequate policy guidelines. Existing statutes should be amended to set forth with greater precision the General Assembly's policies, priorities and objectives, which serve as premises upon which boards and commissions make their decisions."

Just how much delegated authority is enough and how much is too much are questions answered in various ways by different authorities. Indeed, when the Task Force attempted to follow up on an advisor's suggestion that it obtain a statement from the Attorney General as to what, at a minimum, should be contained in a statute granting authority to an agency, Attorney General Anthony F. Troy replied that there is "no definitive response available to your request in view of the current status of case law in the fields of Administrative, First Amendment, and Antitrust law, not to mention the law applicable to each particular area of regulation." The Director of the Division of Legislative Services, John A. Banks, Jr., agreed that such a request is unreasonable in view of the varying kinds of responsibilities for which authority must be delegated. A cursory survey indicated no other state has developed a model or even a checklist to be followed in establishing or evaluating an agency's statutory grant of authority and limitations thereon, although publications from some States do relate a concern about the lack of adequately specific guidelines. As one says, "Most agencies' problems result not from outright subversions but from honest mistakes made in trying to interpret vague statutes. Although agency perceptions of the common good may differ from legislative perceptions, most agencies would prefer to follow the legislative intent if it can be defined...It would be economical and helpful to the agency to have a clear sense of intent in the enabling legislation."*

Some authorities whose help was sought in connection with this study suggested that not only the intent, but very carefully spelled out limitations as well, must be built into statutory grants of power. Few are inclined to go as far as one attorney

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* Administrative Rules...What Is the Legislature's Role? Senate Research Service, Task Force on Critical Problems, New York State Senate. Albany, N. Y. June, 1976

whose practice brings him into close contact with regulatory agencies. He is critical of the trend towards streamlining the statutes granting authority to such boards and believes the General Assembly must deal with specifics rather than delegate authority for developing them to the boards themselves. He warns that an increasing number of suits will result from board actions which are not specifically authorized by statutes. He believes a statute setting up an occupational or professional board should define the profession, say who can practice it, how to get a license and what kind and amount of education and other qualifications are necessary to apply, and list "do's and don'ts" such as prohibitions against falsifying an application, having a communicable disease, etc. This approach was followed earlier but was abandoned in the mid-70's to rid the General Assembly of what were seen to be unnecessary details.

Both the Attorney General and the Director of Legislative Services expressed the view that the flexibility incorporated in more recently drafted statutes is not only desirable but necessary. It protects the framework for good administrative law, allowing agencies to adapt to changing needs and circumstances that may not have been foreseen at the time the legislation was passed. And it relieves the General Assembly of having to deal with minutiae at each session.

LIMITATIONS ON RULEMAKING AUTHORITY

The second major area of study by the Task Force was the validity of the rules, regulations, standards, orders and other actions of the various State agencies of a quasi-legislative or quasi-judicial nature. In this regard, Senate Joint Resolution 96 directed the Governor to ensure that such activities of the State agencies "are consistent with and do not exceed statutory grants of power."

From the inception of its study of the actions of the State agencies, the Task Force was confronted with applying legal principles which are complex and dynamic. For example, the Antitrust laws, the First Amendment and the Fourteenth Amendment have each formed the basis for successful legal attacks on the rules and regulations of professions and occupations which are regulated by the State.

The number of boards and commissions established by the State has proliferated over the years and expanded to affect many areas of the economy previously unregulated. Each State agency is created to protect the public or to promote the public welfare. Thus, professional and occupational boards have been established to ensure that only qualified practitioners may engage in the regulated profession or occupation;

State agencies have been created to protect the environment, to ensure the safety of buildings and structures constructed in the Commonwealth and to dispense public funds. Statutes and regulations enacted for such purposes have a significant impact on the State's economy through the attendant cost of compliance with such statutes and regulations, and the frequent increase in the cost of services rendered by the licensed practitioners of regulated professions or the price of products produced by a regulated business.

The focus of the legal attack on the self-regulated professions and occupations has been on regulations which have the effect on insulating an occupation from competition by establishing unreasonable entry levels (education and experience requirements) or by prohibiting competitive activity (advertising). In other words, self-protectionism in the name of "professionalism" has been found to be unacceptable under the Antitrust laws, the First Amendment and the Fourteenth Amendment. It was evident to the Task Force that a board's rulemaking authority has become increasingly suspect. As a result, rules and regulations of the various agencies should be continually studied and evaluated.

The Task Force is aware that positive steps have been taken to control the proliferation of boards and commissions and to guarantee that the procedures under which they operate afford individual citizens their constitutional right to due process. Accomplishments in this area include enactment of the Administrative Process Act which governs the administrative procedures followed by the State agencies in promulgating regulations or exercising their quasi-judicial authority. In 1974, the General Assembly created the Commission for Professional and Occupational Regulation to recommend the establishment of regulatory boards consonant with the statutory policy of the Commonwealth. The Commission is further charged with seeing that no regulation shall be imposed upon any profession or occupation except for the exclusive purpose of protecting the public interests when the public requires such protection, when the practice of the profession requires specialized skill or training, and where the public is not effectively protected by other means.

The Task Force was unable to uncover specific areas in which a particular agency has promulgated an invalid regulation. There are several apparent reasons for this finding: (1) the questionnaire was a self-study, (2) the individual State agencies are, in some instances, not fully cognizant of the evolving legal principles affecting their rulemaking authority and (3) the Attorney General does not have the resources to ensure that each attorney assigned to a particular agency has the requisite expert knowledge to evaluate an agency's regulations under the complex Antitrust laws and the First Amendment. In fact, the Attorney General has stated that in view of the current

status of the case law in the area of the First Amendment, regarding advertising restrictions, and in view of the current status of case law in the Antitrust area, regarding when an agency can implement anti-competitive restrictions, rules and regulations currently exist which are clearly invalid. As an outgrowth of the work of this Task Force, the Attorney General has been asked to prepare a memorandum for distribution to all State agencies to alert the agencies to these problems and to inform them when to consult with the Assistant Attorney General assigned to their agency.

METHOD

At the outset the Task Force sought to determine whether a similar study had been undertaken by any other State, hoping to save time by adapting approaches used elsewhere. Despite a diligent search by its central and regional staff members, the Council of State Governments was unable to identify a State that had attempted such a broad study of statutory grants of power as that mandated by Senate Joint Resolution 96. The Council did call attention to States that have adopted administrative procedures acts similar to Virginia's for legislative review of rules and regulations promulgated by State agencies. Contacts were made with several of these States including Florida, which has the most comprehensive program of this nature in the country. Mr. Carroll Webb, Executive Director of the Florida Legislature's Joint Administrative Procedures Committee, offered helpful suggestions.

Concurrently with the search for methods and tools with which to accomplish its assignment, the Task Force sought to gain some understanding of the circumstances and the thinking which prompted the adoption of Senate Joint Resolution 96 and to identify problem areas which should be included in the study. A number of individuals provided invaluable aid, among them Patrick McSweeney, former Director of the Commission on Governmental Management; Kenneth Golden, Director of the Commission on Governmental Management; John A. Banks, Jr., Director, Division of Legislative Services; and Ray D. Pethtel, Director of the Joint Legislative Audit and Review Commission. Letters requesting information bearing on the subject matter covered in Senate Joint Resolution 96 were sent to chairmen of the standing committees in the Senate and House of Delegates. In addition, agencies providing central governmental services were requested to inform the committee of any problems with which they were acquainted. Suggestions obtained from these sources were followed up by Task Force members and formed the basis for items included in the questionnaire distributed to agency heads.

As the planning phase of the study progressed, it became

clear that the assignment contained in Senate Joint Resolution 96 envisioned a much more comprehensive study than could be produced by the Task Force in the allotted time. Because there were no funds for carrying out the study and no provision for staff to assist with the effort, Task Force members assumed this assignment in addition to their regular responsibilities. Assistance from the Office of the Attorney General and other agencies was limited for the same reason.

Given these restrictions, the Task Force members concluded they would have to rely heavily upon agency heads to produce data for the study. They were aware that this approach could be criticized by those holding to the don't-leave-the-fox-to-guard-the-henhouse view of self-studies. In the absence, however, of a staff versed in administrative law and the time to review all the agencies' statutes, rules, regulations, policies and actions, the Task Force had no alternative to asking agency heads to conduct in-house studies.

A questionnaire survey was the method chosen for obtaining information from the various agencies, departments, boards, commissions and councils of the executive branch. This was deemed the best method for three reasons: (1) it allowed for careful construction of questions covering the problem areas the Task Force defined, (2) it provided information which could readily be summarized and followed up and (3) it could be administered in a relatively short time.

During the period in which the questionnaire was being devised, reviewed by the Task Force's advisors and pretested on selected agencies, a memorandum from Governor Mills E. Godwin, Jr. alerted agency heads to the study, and urged them to give the forthcoming questionnaire their personal attention. Agency heads were advised to look particularly for those areas in which adequate statutory authority is lacking, for those in which authority is not clear and precise, for those about which there may be ambiguity or confusion due to related responsibilities of other agencies. In the case of those agencies and departments which work in conjunction with boards and commissions, the Governor asked that agency heads determine the clarity of the statutes under which they operated with respect to whether power to issue rules, etc., lies with the agency head or with the board, and whether the statutes are being executed faithfully. They were advised to involve boards and commissions in the completion of the questionnaire.

The Governor made it clear that he expected the study to produce both immediate and longer range effects. "It should lead to the immediate correction of any actions for which there is not suitable statutory authority. It should identify areas in which statutory authority is deemed too narrow or too broad to carry out legislative intent."

The questionnaire developed for dissemination to agency heads contained two parts. The first called for submission of information under headings required in the program budget structure in order to elicit problems related to all of an agency's subfunctions, programs, subprograms and other activities. The second requested data on problems associated with the overall operation of the agency and its relationships with other governmental bodies. The questionnaire and instructions were submitted for review to each member of the advisory group, the Director of Legislative Services and the Governor's Counsel. Once the questionnaire had been completed by the agency head, his responses were to be reviewed by the Assistant Attorney General assigned to that agency. A copy was to be sent to the Chairman of the board, commission or council associated with the agency, if any, for his review and comments.

Questionnaires were distributed to heads of organizations in the executive branch on August 4, 1977 with a request that completed forms be returned to the appropriate Task Force member by September 1. Upon advice of the Office of the Attorney General, the Governor's Counsel and the former Director of the Commission on State Governmental Management, higher educational institutions and boards of visitors were omitted from the study.

Agency heads, through the questionnaire, were asked to assess agency and board rules, regulations, standards and actions and to provide information on the following:

*statutory authority for rules, regulations, etc.
*clarity and adequacy of statutory guidelines and restrictions relative to the agency's rules, regulations, etc.
*regularity of review of rules, regulations, etc. for legal sufficiency
*provisions for public hearings on rules, regulations, etc.
*ambiguity in statutes which has resulted in overlapping authority, duplication of efforts and other problems between agencies, or in uncertain division of authority for policy-making and administration between an agency and its board or commission
*conflicts between the agency's rules, regulations, standards and actions and those of Federal or local government agencies

Each Task Force member was responsible for reviewing and commenting upon the questionnaires returned by agencies under his Secretary. The questionnaires and comments were then reviewed by the Secretary. The Secretaries and Task Force members determined the content of the reports which follow.

RESULTS OF SELF-STUDY BY AGENCIES

The following information, arranged by Secretarial area, highlights the data supplied on the questionnaire survey form by heads of agencies and departments and chairmen of boards, commissions and councils in the executive branch.

Included also are problems identified by chairmen of standing committees of the General Assembly, the Governor's Secretaries, staff members of the Commission on Governmental Management, the Joint Legislative Audit and Review Commission, and others whose assistance was sought by the Task Force.

Statutory citations throughout the report refer to the Code of Virginia.

OFFICE OF ADMINISTRATION AND FINANCE

Most of the agencies and boards reporting through the Secretary of Administration and Finance indicated they were not aware of any problems of the nature covered by Senate Joint Resolution 96. They included:

Department of Accounts
Art Commission
Compensation Board
Department of Management Analysis and Systems Development
Department of Purchases and Supply and Board of Purchases and Supply
Department of Property Records and Insurance and State Insurance Board
Department of Taxation
Department of Treasury and Treasury Board
Board of Trustees of the Virginia Supplemental Retirement System
Department of Personnel and Training

STATE BOARD OF ELECTIONS

*Pursuant to SJR 85 as adopted by the 1977 General Assembly, the Joint Privileges and Elections Committees are conducting studies of certain procedures in Title 24.1 regarding the conduct of elections.

DEPARTMENT OF GENERAL SERVICES

Division of Engineering and Buildings

*The Public Buildings Commission statute, § 2.1-486, should be amended to indicate that there are nine members (rather than "eight" as incorrectly used in the drafting of amendments to the act creating the new department).

§ 11-17-23.4 requires bids on contracts exceeding $2,500. It is suggested the minimum be raised to $5,000 to reflect the current reality that all but a few minor contracts exceed this amount.

*Duplication of assignments to the Division of Engineering and Buildings in § 2.1-503 - 512 appear in statutes granting authority to other agencies. Among these are:

§ 37.1-16 - 18 giving the Department of Mental Health and Mental Retardation responsibility for disposing

of surplus property.

§ 29-11 giving the Department of Game and Inland Fisheries authority to acquire, sell or lease property without coordination of approval of the Division of Engineering and Buildings.

§ 23-4.1 giving institutions of higher education the right to lease or sell real property.

§ 23-9.1 empowering institutions of higher education to grant easements with the approval of the Governor. It is suggested that such proposals be submitted to the Director of the Division of Engineering and Buildings for review and recommendations to the Governor.

§ 23-18 giving institutions of higher education the authority to borrow funds, sell bonds, etc. which seems to circumvent the intent of the Appropriations Act.

*Substantial duplication of effort exists with respect to authority to promulgate standards to ensure access by handicapped persons: Division of Engineering and Buildings, for State buildings (§ 2.1-516), the State Board of Education, for public school facilities (§ 2.1-518), and the State Board of Housing for other places of public accommodation (§ 36-124). Only the last mentioned standards are set forth in the Statewide Building Code. In addition, local governing bodies must promulgate standards for their buildings (§ 2.1-517). The standards adopted by HEW pursuant to the Rehabilitation Act of 1973 will undoubtedly preempt any less stringent standard of any recipient of Federal financial assistance.

*The Division has encountered problems in reconciling State and Federal requirements associated with contract specifications for construction financed in part with Federal funds. An example is the Federal government's insistence on deductive alternates in contracts while the State uses the additive alternate method.

*Consideration should be given to establishing a statewide policy on parking fees for employees and students such as that set forth in § 2.1-531, authorizing the Division of Support Services to levy fees for parking at the seat of government.

Division of Consolidated Laboratory Services

*The implementing regulations accompanying such Federal legislation as the Clinical Laboratory Improvement Act and the Safe Drinking Water Act have the potential of dictating

personnel classification specifications and mandating additional expenditures on the part of State government.

Virginia Telecommunications Council

*The Virginia Telecommunication Council's inclusion in Title 2.1, Chapter 32, establishing the Department of General Services, was suspended by the Governor upon request of the Council to afford an opportunity to seek changes in the statute at the 1978 session.

VIRGINIA HOUSING DEVELOPMENT AUTHORITY

The Virginia Housing Study Commission is offering at the 1978 General Assembly amendments to:

*Amend § 36-55.40(4) to clarify the provisions of the Act relative to the pledge customarily given by VHDA to the purchasers of its notes and bonds and to facilitate the pledging of mortgage loan notes, without actual physical delivery thereof, in commercial borrowing transactions.

*Revise § 36-55.31:1 to provide that loans for energy saving devices may be secured by a mortgage or unsecured to persons or families eligible under VHDA's rules and regulations.

OFFICE OF HOUSING

*Duplication of authority, and in some cases direct conflict, exists with the Department of Labor in the area of construction of boiler and pressure vessels. Local building officials enforce the provisions of the Uniform Statewide Building Code with respect to construction; however these same officials have no authority to make periodic inspections to determine if the equipment is being used in a safe manner. The Office of Housing recommends that consideration be given to amending Chapter 3.1 of Title 40-1 and § 36-98 of the Code of Virginia, deleting the portion of the Boiler and Pressure Vessel Safety Act superseded by the Uniform Statewide Building Code and clarifying the authority of the Department of Labor and Industry to inspect such equipment.

*Duplication of authority exists with the Department of Health with respect to standards for the construction of hospitals, nursing homes, day care centers, etc. The basic question appears to be this: Which of the two agencies involved in this conflict

is most knowledgable about the construction of these types of facilities? The Health Department maintains it possesses the expertise, and specific exemptions to § 36-98 are being proposed through the recodification project of Title 32. The Office of Housing contends that construction of these facilities should be regulated by the agency authorized to enforce the Uniform Statewide Building Code. (The conflict is highlighted in litigation involving the construction of a nursing home under BOCA standards rather than nursing home construction standards.)

*Some local jurisdictions have failed to repeal local ordinances pertaining to construction of buildings which were in direct conflict with § 36-98 of the Code of Virginia. Through regional seminars, monthly meetings with local enforcement officials and dissemination of information, this problem is being resolved and local jurisdictions gradually are coming into compliance with State legislation.

*There exists a potential for conflict over what agency has the authority to promulgate rules and regulations regulating individuals who prepare construction drawings. Any such rules and regulations adopted by the State Board of Housing would appear to be in conflict with those of the State Board of Architects, Professional Engineers and Land Surveyors. This matter has been referred to the Attorney General's Office for resolution. Legislation to clarify which agency is responsible for regulation of this area may be deemed appropriate.

*§ 36-139N should be amended to conform with revisions made to § 36-124(6) relating to the definition of "places of public accommodation" for the purposes of accessibility by the physically handicapped.

DEPARTMENT OF INTERGOVERNMENTAL AFFAIRS

*The Office on Volunteerism, now operating under Governor Godwin's Executive Order #25, should be established under § 2.1.

*The Community Services Agency, which evolved from the old Office of Economic Opportunity in the Governor's Office under § 2.1, should be transferred to the new Department of Housing and Community Development, established under § 36-131 et seq.

DEPARTMENT OF PLANNING AND BUDGET

The Governor is required to plan and recommend a budget for all State programs. Under recent amendments to the Code which establishes management responsibilities for the Secretaries the Secretaries are responsible for directing the planning and

development of a comprehensive program budget for all agencies assigned to Secretarial areas. The Department of Planning and Budget is the central staff agency for providing assistance to the Secretaries and coordinating the budget preparation. It is recognized that the delegation of authority by the General Assembly to the Secretaries establishes clear responsibility. There are other provisions of the Code which tend to overlap and dilute the role of the Secretaries. While these provisions are considered secondary to the more recent legislation dealing with the role of the Secretaries, it would appear important to amend the Code to remove those references to budget planning and coordination where such appear in conflict with more recently adopted provisions of the statute. Some of these are as follows:

§ 10-184.1(4). The Council on the Environment is required to present a comprehensive budget for environmental programs; the Secretary of Commerce and Resources is required to prepare a comprehensive program budget for the functional area which includes the environmental programs. Both require the same information and both operate within the same time frame, using the same materials.

§ 2.1-552(D). The Division for Children, to be established July 1, 1978 in the "Office of the Governor," and the Secretary of Human Resources have similar review requirements in the area of children and youth programs.

§ 2.1-64.24. The Council on Criminal Justice and the Secretary of Public Safety are the participants in a similar review situation regarding administration of justice programs.

§ 23-9.9. The State Council of Higher Education and the Secretary of Education are the participants in a similar review situation in the area of higher education programs. In this area, however, there is an additional complication which deserves attention: the Council reports to both the General Assembly and the Governor, placing it in the position of an executive agency which may be called upon to argue for its proposals in conflict with those of the Chief Executive.

*The following is an area of inconsistent scheduling:

§§ 2.1-392, 2.1-483. The Division of Engineering and Buildings capital outlay budgeting schedule for six-year projects is not congruent with the operating expense projection schedule or the revenue projections schedule.

*The Department is proposing legislation to amend Title 2.1, Chapter 27, Code of Virginia, to eliminate inconsistencies in timing for the filing of Six-Year Expenditure Plans and Six-Year

Revenue Plans and to simplify reporting requirements regarding program authority and levels of effort and clarify terminology.

SECRETARY OF THE COMMONWEALTH

*The Governor's proclamations are required by law to be published in the Annual Report of the Secretary of the Commonweal but the more significant Executive Orders are not published. To ensure ready access to Executive Orders, they should be available as a supplement to the report.

*§ 2.1-71 requires each county, city and town and each authority, commission, district or other political subdivision to which any State money is appropriated or which collects or expends public monies to file an annual report with the Secretary of the Commonwealth, who must publish it in the Secretary's Annual Report. To make the information available to disbursing agencies more expeditiously, two changes are suggested: (1) publish the form in the Code so it will be readily available for use by political subdivisions, upon whom the responsibility for filing rests, and (2) require that the information be available as a supplement to the Annual Report.

*The Administrative Process Act, § 9-6.14:1 through § 9-6.14:20, requires regulatory agencies to notify political subdivisions of proposed changes in regulations which would affect those entities in certain ways. While § 2.1-71 requires the Secretary of the Commonwealth to publish the reports, there is no assurance that such a compilation would encompass all of the authorities, commissions, districts, etc., set up under the law as political subdivisions. The Director of Legislative Services will recommend legislation to facilitate the collection of data required in § 2.1-71 and § 9-6.14:1 et seq.

*§ 30-28.5:1 says post-session lobbyists' and employers' reports must be filed with the Secretary of the Commonwealth within 60 days following adjournment sine die of the General Assembly. With the backing of the Attorney General's office, the Secretary has held that reports should be in the office by close of business on the 60th day, and has so informed lobbyists and employers at the time of registration and well before the deadline. In view of the recently enacted $50-a-day late-filing penalty, the law should be amended to state clearly that reports must be in the office by the deadline.

*The only statutory qualification for notaries public (§ 47-1 et seq.) is the requirement that the applicant be 18 years of age. The application form used by the Secretary of the Commonwealth requires the signatures of a character reference and an official (member of the General Assembly, judge, clerk of court or assistant clerk) who recommends that the Governor

commission the individual. It further asks whether the applicant has been convicted of a felony and, if so, whether his political disabilities have been removed. (The latter inquiry is a hold-over from the time the Constitution required that an applicant possess the same qualifications as a voter.) It may be advisable to write more restrictions into the law. The anachronistic reference to notaries public as "conservators of the peace" should be deleted.

*The General Assembly should designate the Code Commission or other appropriate agency within the legislative branch to review the statutes dealing with appointments by the Governor to make them consistent with §§ 2.1-41.2, 2.1-42.1 and 9-6.23. Many are outdated by the 1977 Commission on State Governmental Management legislation which requires that the Governor appoint nearly all department heads and board and commission members and that all such appointments by subject to confirmation by the General Assembly; establishes that appointees serve at the pleasure of the Governor and may be removed under certain circumstances; and prohibits service of General Assembly members on certain executive department boards to which they were formerly named by the House Speaker and Senate Privileges and Election Committee.

OFFICE OF COMMERCE AND RESOURCES

No difficulties associated with statutory authority were reported by the following agencies:

- Department of Agriculture and Commerce and Board of Agriculture and Commerce
- Virginia Athletic Commission
- State Registration Board for Contractors
- Virginia Energy Office
- Virginia Historic Landmarks Commission
- Division of Industrial Development and the Governor's Advisory Board on the Division of Industrial Development
- Milk Commission
- Commission of Outdoor Recreation
- Virginia Port Authority

STATE AIR POLLUTION CONTROL BOARD

Although a conflict seems to exist in regulations published by the State and those promulgated by the Environmental Protection Agency, differences are always resolved. In the end Federal regulations will take precedence over State regulations.

*The language in the Clean Air Act is much more specific than that of the present air pollution control law of Virginia. Action has been taken with the Attorney General's office to develop amendments necessary to effect needed changes in the Code of Virginia.

*Amendments to the Clean Air Act contain a new non-compliance penalty which will require a change by the General Assembly. Action is being taken with the Attorney General's office to determine what is required to effect a change.

DEPARTMENT OF CONSERVATION AND ECONOMIC DEVELOPMENT

*The law governing coal surface mining, Chapter 17 of Title 45.1, contains vague language such as "to the maximum extent practical" and "probable cause" which does not convey necessary statutory guidance to effectively draft regulations. This problem is currently being studied by the General Assembly in connection with the recent passage of the Federal Coal Surface Mining Act. The entire program and related laws will have to be restructured.

*PL95 - 493, Surface Mining Control and Reclamation Act of 1977 will require the Commonwealth to change its surface coal mining laws. A State task force in conjunction with the Department of Interior is drafting new regulations under the current law.

COUNCIL ON THE ENVIRONMENT

*The Council on the Environment is composed of a selective membership from various State boards but does not include all agency boards that are involved with or have an interest in the environment. It is recommended that all State boards having an environmental interest or involvement be a part of the Council or that the Council be composed of seven (7) interested citizens from the public sector. In either case, assuming the Council remains under the Secretary of Commerce and Resources, the Code should be changed to require that the Council's administrator act as the secretary to the Council. The chairman should be selected from the Council or appointed.

DEPARTMENT OF LABOR AND INDUSTRY

*United States Department of Interior coal mine safety laws and Virginia State laws overlap. This does not pose a serious problem to the Commonwealth and no change is suggested.

*There are two sections of Title 40.1 which are in conflict, §§ 40.1-51.4 and 40.1-6(9). Under the provisions of Title 40.1 both the Commissioner of Labor and Industry and the Safety and

Health Codes Commission have the same authority. Contact will be made with the Attorney General's office to develop changes to Title 40.1 to eliminate this conflict.

MARINE RESOURCES COMMISSION

*Law enforcement by Marine Resources inspectors searching boats for illegal fish, crabs, etc., is hampered by the necessity of first obtaining a search warrant; however this is the law and the Commission must comply.

*United States Army Corps of Engineers has taken positions on Federal dredge and fill permits that are inconsistent with Marine Resources Commission on same project. These differences are worked out on a case-by-case basis and no change is recommended.

*The Commission is having some difficulty in interpreting its regulatory authority in that it is subject to § 28.1-23 et seq., and § 9-6.14:6 et seq. The lengthier provisions of § 9-6.14:6 et seq., are inappropriate to the operations of an agency dealing with the seasonal and oftimes immediate dynamics of a natural resource such as fisheries. In particular the 30-day waiting period after adoption of regulations is very burdensome to the industry which often requests and deserves immediate action. An exemption from § 9-6.14:6 et seq., such as is granted the Commission of Game and Inland Fisheries for similar reasons, is recommended.

*It has been a general recommendation that the Code was too specific in some of the marine resource laws and that more general authorities, policies, guidelines, etc., should be in the Code with details and specifics left to the regulatory power of the Commission. No specific recommendation is made here, but the matter will be discussed with appropriate legislators.

VIRGINIA INSTITUTE OF MARINE SCIENCES

*Now under study is the question of whether VIMS' professional personnel should be considered faculty members or remain under the classified act.

VIRGINIA OUTDOORS FOUNDATION

*§ 10-159 et seq., establishes the Virginia Outdoors Foundation to facilitate the preservation of open-space lands. The Code gives the Foundation certain powers which include accepting, acquiring, holding and administering gifts and bequests of money, securities or other property, and appointing and prescribing duties of officers, agents and employees as may

be necessary to carry out its functions. The law makes no mention of a relationship with any other State agency. Apparently by tacit agreement with the General Assembly at the time the Foundation was funded, the Foundation was not to be set up as a separate entity but was to be lodged in the Commission of Outdoor Recreation. In effect, the Director of the Commission oversees the Foundation's operation, appoints and supervises the Foundation's staff and approves all monetary transactions involving State appropriations by the Foundation's director. Further complicating the picture is the fact that § 10-163(g), dealing with the Foundation's power to appoint officers to carry out the activities of the Foundation, is superseded by § 2.1-41.2, enacted by the 1977 General Assembly, giving the Governor the power to appoint all agency heads with a few specifically defined exceptions. The Attorney General at first ruled that the Governor should appoint the Director of the Foundation but rescinded that ruling upon learning of the General Assembly's apparent intention through the Appropriations Act to house the Foundation with the Commission of Outdoor Recreation. The Chairman of the Foundation feels that the Governor should appoint the Executive Director of the Foundation and that the Foundation should be autonomous. It is the opinion of the Director of the Commission of Outdoor Recreation that the problem can be resolved by a change in the appropriations bill to appropriate funds directly to the Virginia Outdoors Foundation.

DEPARTMENT OF PROFESSIONAL AND OCCUPATIONAL REGULATION

Statutes and rules and regulations of this agency have undergone a thorough examination during the past three years and many inconsistencies have been remedied by administrative and board action following consultation with the Office of the Attorney General.

State Board of Accountancy

*§ 58-372.1 is subject to conflicting interpretations. The interpretation of the State Tax Commissioner and of the Attorney General's office is that a person licensed is a person in practice. The Board's opinion is that a licensed employee of a CPA firm is not practicing if he or she limits his or her accounting activities to those performed for the employing firm. Since all sole proprietors are required to register as such with the Board, and since any moonlighting employee is required to so register, it is suggested that § 58-372.1 be amended in part to read as follows: "Every certified public accountant ~~practicing~~ registered in this State as a sole proprietor, as a member of a CPA partnership or as a shareholder in a CPA professional corporation, in addition etc." This should result in the revenue license being mandatory for all CPAs who derive income other than salary from accounting activities.

which is, the Board maintains, the intent of the law.

*To preclude discriminating against foreign CPA professional corporations, the State Board of Accountancy should be empowered to permit practice in Virginia by such firms just as it permits practice by foreign firms which are unincorporated. This can be corrected only by amending Title 13.1, Chapter I, Code of Virginia, 1950, as amended.

State Board of Architects, Engineers and Land Surveyors

*As presently drafted, the Uniform Statewide Building Code allows local building inspectors to accept plans and specifications for any building from individuals who have not been licensed as architects or engineers as required in statute and regulation and who have not met requirements of minimum competency to engage in such work. Many other states require that plans bear the seal of a licensed architect or engineer. The Board of Architects, Professional Engineers and Land Surveyors recommends that the State Board of Housing require all building officials to accept plans and specifications only when they bear the seal of a licensed individual.

VIRGINIA SOIL AND WATER CONSERVATION COMMISSION

*State statutes provide for a voluntary soil and water conservation program. It is anticipated that Federal regulations will require mandatory control of non-point sources of water pollution from agriculture operations. At the propitious time legislation will be introduced to comply with Federal regulations.

STATE WATER CONTROL BOARD

*The State Water Control Board's monitoring and surveillance programs are oriented towards maintaining all beneficial uses of the groundwaters of the Commonwealth and therefore are of a much broader scope and of more detail than the State Department of Health's program, which is primarily concerned with assuring water quality standards are maintained solely for public health. To avoid duplication and conflict, § 62.1-44.86 of the Code should be amended to give the State Water Control Board the total responsibility for the administration and enforcement of the Ground Water Act.

*In the event that governmental units of local political subdivisions fail to adopt, enforce and administer flood plain management ordinances in such a manner that would enable citizens living in flood-prone areas to avail themselves of the opportunity to indemnify themselves from flood losses through the purchase

of flood insurance program of the National Flood Insurance Act of 1968, as amended, there probably should be a provision for a unit of State government to administer such program. The General Assembly mandated guidelines under the Flood Reduction Act. These guidelines must be carried out before a determination is made as to their acceptability in administering flood plain management ordinances.

*§ 62.1-44.34:2, which establishes liability for discharge of oil, states that the responsible parties shall be liable to the Commonwealth of Virginia; the Water Control Board has assumed this responsibility. It is recommended that this section be amended to place this responsibility for recovering on behalf of the Commonwealth with the Water Control Board.

*§ 62.1-44.15(11) includes a means for replacement cost of common freshwater species of fish but should be expanded to include endangered species and marine species as well, where replacement cost is unsatisfactory as a measure of value.

*§ 62.1-44.83-107 should be amended to permit sounder management of all groundwater uses over a specified amount to be determined by the regulating agency for applicability in each groundwater management area. At the same time, changes to Title 62.1, Chapter 3.4 of the 1950 Code of Virginia should be amended making the Code compatible with the above proposed legislation.

*Chapter 8 of Title 62.1, Dam Safety Provisions should be amended to give authority to the State Water Control Board to regulate the safety of all dams or other impounding structures as defined in § 45.1-222.

*§ 62.1-44.18 should be amended to eliminate duplication of effort between the State Water Control Board and State Health Department in review of plans and specifications for constructing sewage treatment facilities. All sewerage matters should be transferred to the State Water Control Board.

*There appears to be a conflict between § 21-293 and the Water Control Board's Wetland Policy. § 21-193 states: "Drainage considered essential - It is hereby declared that the drainage of the surface water from wet agricultural lands is essential for the successful cultivation of such lands and the prosperity of the community, and the reclamation of overflowed swamps and tidal marshes shall be considered a public benefit and conducive to the public health, convenience, utility and welfare." This section can be viewed as being in contradiction to the State Water Control Board's Wetland Policy which states in part: "It shall be the Board's policy to minimize alteration in the quantity or quality of the natural flow of water that nourishes wetlands and to protect wetlands from adverse dredging or filling practices, solid waste management

practices, siltation, or the addition of pesticides, salts, or toxic materials arising from non-point source wastes and through construction activities, and to prevent violation of applicable water quality standards from such environmental insults." If in fact it is determined that a contradiction does exist, corrective measures should be taken by either amending § 21-293 to conform with the Board's Wetland Policy or modifying the Board's Wetland Policy to remove the apparent contradiction.

*§ 15.1-292 should be reviewed because of possible conflicts with State Water Control Board's National Pollutant Discharge Elimination System (NPDES) permit program. § 15.1-292 states in part: "Such governing body may also prevent the pollution of water and injury to waterworks for which purpose their jurisdiction shall extend to five miles above the same." This section implies that the governing bodies - towns, cities, and counties - can prevent a discharger from locating its effluent within a five-mile stretch upstream of the governing body's raw water intake. The State Water Control Board's National Pollutant Discharge Elimination System Permit allows a discharger to locate its discharges for all practical purposes, on almost any stream so long as the discharger complies with the effluent limitations prescribed in the NPDES Permit. These effluent limitations are based on effluent guidelines and/or water quality standards. Thus, a discharger should be allowed to locate on any stream, even within five miles of a raw water intake, so long as it complies with the NPDES effluent limitations.

OFFICE OF EDUCATION

Half of the agencies and boards reporting through the Secretary of Education indicated that they were aware of no problems of the nature included in the questionnaire survey. These were as follows:

- Virginia College Building Authority
- Virginia State Library
- Virginia Museum of Fine Arts
- Virginia Public School Authority
- Science Museum of Virginia
- Virginia Truck and Ornamentals Research Station

VIRGINIA COMMISSION OF THE ARTS AND HUMANITIES

*The Virginia Commission of the Arts and Humanities is authorized to receive and disburse funds provided from Federal and other sources for the encouragement of interest and participation in the arts and humanities as provided in §§ 9-84.01-9-84.07. This agency receives and disburses funds received from

the National Endowment for the Arts. (Funds from the National Endowment for the Humanities are received and disbursed through the Virginia Foundation for the Humanities and Public Policy.) It is recommended that the word Humanities be deleted from Title 9, Chapter 9.1 to eliminate public confusion.

*Requested further is clarification of the reversion provisions regarding those endowment funds which at the end of a biennium revert to the general fund. It is recommended that the Office of the Attorney General review the prerogatives of retaining endowment funds similar to the manner in which such funds are retained in institutions of higher education.

VIRGINIA DEPARTMENT OF COMMUNITY COLLEGES

*The Virginia Department of Community Colleges administers in cooperation with the Virginia Council of Higher Education the activities of the 23 community colleges throughout the Commonwealth as provided in Title 23. The authority of the State Board for Community Colleges, although at variance to some degree, is similar to that held by the individual boards governing public four-year colleges and universities. Differences of opinion arise frequently with regard to a delineation of responsibilities between the Department of Community Colleges and the Council of Higher Education. Particular reference was given to budgetary matters and the determination of program course offerings. The heads of both agencies in concert with the Secretary of Education are aware of the possible overlapping responsibilities and are attempting to resolve them.

COUNCIL OF HIGHER EDUCATION FOR VIRGINIA

*The Council of Higher Education for Virginia is the coordinating agency for State-supported institutions of higher education, as well as for all post-secondary educational programs for health professions and occupations as provided in Title 23, Chapter 1.1. The Council suggests that consideration be given to amending § 23-9.6:1(c) whereby the Council studies and submits its recommendation to the Governor and the General Assembly regarding the proposed escalation of any public institution to a higher degree-granting level. Recommended was a procedure whereby the Council would make a determination with regard to any escalation, report to the Governor, and delay effectiveness until thirty (30) days after the adjournment of the session of the General Assembly next following the filing of such report.

STATE DEPARTMENT OF EDUCATION

*The State Department of Education is under the direct supervision of the Superintendent of Public Instruction. The

Board of Education is a constitutional body vested with the general supervision of the public school system. The powers and duties of the Board of Education are numerous and occasionally conflict with those held by the local school boards established in each locality. Litigation arises frequently with regard to the exercise of these powers affecting both Federal and local authorities. The Department states that this trend is not unusual when examined in the context of events occurring in other states. Regulations promulgated by the Board of Education frequently have fiscal impact on each of the various political subdivisions of the Commonwealth; therefore the Administrative Process Act is followed. A number of clarifications were cited as requiring review, especially as they appear in Title 22. These discrepancies have been transmitted to the Code Commission which has been charged with the responsibility of reviewing and updating Title 22 consistent with required Federal and State mandates and making its recommendations to the 1979 session of the General Assembly.

STATE EDUCATION ASSISTANCE AUTHORITY

The State Education Assistance Authority is authorized to guarantee to participatory lenders a portion of loans made to students for attendance at approved institutions of higher education and vocational schools throughout the United States as provided in § 23-9.2:1 and Chapter 494. Cited as a difference of opinion was the understanding of the procedures for the collection of defaulted student loans by the Office of the Attorney General.

VIRGINIA EDUCATION LOAN AUTHORITY

*The Virginia Education Loan Authority is authorized to make loans to students at institutions of higher education and vocational schools, and to fix interest charges and fees as provided for in Title 23, Chapter 4.3. Cited as a legal conflict is the prohibition against the use of social security numbers as set forth in the Virginia Privacy Protection Act and the necessary usage for required identification. The use of the social security number appears essential to the effective management of student loans; therefore it is recommended that appropriate amendments to the Virginia Privacy Protection Act be submitted through the established procedure.

*There are conflicts between the regulations administered by the Virginia Education Loan Authority and those administered by the State Education Assistance Authority. It is recommended that a review of regulations, procedures, and practices be undertaken by the Secretary of Education.

OFFICE OF HUMAN RESOURCES

No problems covered by Senate Joint Resolution 96 were reported by the following agencies and boards under the Secretary of Human Resources:

Virginia Office on Aging
Virginia Commission for Children and Youth
Virginia Council for the Deaf
Virginig Developmental Disabilities Planning
and Advisory Council
Virginia State Board of Medicine
Virginia State Board of Nursing
Virginia Commission for the Visually Handicapped
Commission on the Status of Women

DEPARTMENT OF HEALTH

*Title 32 is undergoing a thorough examination by the Code Commission and the Department staff. Recodification is expected to remedy archaic language and lack of specificity in the Code. It should also reflect the changes of mission for the Board of Health from an advisory role to an increasingly regulatory role, particularly in environmental matters, in accordance with recent General Assembly sentiment. Among the changes anticipated are a clarification of the legal basis for the Department, now lacking in the statutes; a shift of authority for rules and regulations from the Commissioner to the Board of Health; resolution of a three-way problem over industrial waste disposal involving §§ 15.1-282, 32-9.1 and Board and Health regulations; and clear establishment of the Board's authority in construction standards for hospitals, nursing homes, migrant labor camps, wastewater treatment plants and drinking water works, deemed to be an inappropriate function of the Office of Housing. Consideration should also be given to amending the Uniform Statewide Building Code to make it consistent with Title 32.

*There is a conflict between the Federal Health Planning and Resources Act and the State Certificate of Need Law as regards Federal regulations that allow any person to have standing in appeal procedure in certificate of need decisions. No change in the State law is anticipated.

*The Federal Environmental Protection Agency has adopted regulations permitting use of "flow-through" marine sanitation devices on boats. The Federal Food and Drug Administration has said such devices will not adequately protect shellfish waters. Consequently all State shellfish waters around marinas would have to be closed unless a remedy is provided. The State Water Control Board's Regulation 5 would require holding tanks on boats in Virginia. The General Assembly is currently

considering a solution.

*The Federal government enacted in 1976 the Resource Conservation and Recovery Act to deal with solid and hazardous waste problems. The State must amend its current law, § 32-9.1, and adopt a parallel statute in order to participate in the EPA program.

*The attorneys for the Department are considering the legal nature of the Statewide Health Coordinating Council which now operates under an Executive Order pursuant to Public Law 93-641 and which plays an integral role in the Department's health planning functions. If it appears that the SHCC has insufficient authority, this matter will be brought to the attention of the General Assembly.

DEPARTMENT OF HEALTH REGULATORY BOARDS

This Department came into being on July 1, 1977, as a vehicle for the coordination of the administrative, enforcement, education, and legislative activities of the seven health regulatory boards which are now a part of it. The intent behind the creation of this department was to enable the boards to more effectively and efficiently discharge their responsibilities with respect to the delivery of health care in Virginia The new department is undergoing a transitional phase during which it is identifying the issues which it needs to address if it is to respond to its mandate. Central concerns and problems of the individual boards are being studied, and a comprehensive plan to deal with them is being developed. It is expected that by early 1978 the mechanisms that will resolve any existing difficulties will be in place and functioning.

Board of Dentistry

*Consideration should be given to rewording Regulation 7A concerning licensing certification to require that specific notice of offenses relating to unprofessional and unconscionable conduct be given to the licensee.

*Regulation 7A-4A should define more specifically the legal scope of practice of dental and auxiliary personnel.

*In Regulation 7A-4b, item 7b (requiring dentists to report faulty work to the board) should be deleted as grounds for licensure revocation.

Board of Funeral Directors and Embalmers

*The Board's grant of authority in § 54-260.69 is very broad and in effect unlimited. This broad grant of authority

may need to be made consistent with § 54-1.10 regarding powers and duties of boards. The Attorney General's office has advised the Board that under Title 54-1, Chapter 10.2, of the Code, the Board has the responsibility for crematories. To date the Board has not adopted regulations for crematories and therefore at this time crematories are unregulated in Virginia. It is understood, however, that the Board plans to offer legislation to the 1978 General Assembly designed to bring crematories under its jurisdiction.

Board of Pharmacy

*Board Regulation 12.2 (e) is of questionable validity. It states that any decision of a non-pharmacist owner or supervisor which overrides the decision of a pharmacist is deemed to be the practice of pharmacy. The Board does not have the authority to define the practice of pharmacy.

Board of Veterinary Examiners

*The following sections were repealed during the reorganization of the Department of Professional and Occupational Regulation in 1974. Now that the Board of Veterinary Examiners is no longer under the general statute of the Department of Professional and Occupational Regulation and in the Department of Health Regulatory Boards, these sections must be recodified to be legal:

§ 10.1 pertaining to fundamental grants of powers
§ 10.2 pertaining to rule-making authority of boards
§ 10.9 pertaining to the issuance of certificates to applicants who have passed the necessary examination
§ 10.10 pertaining to registration fees
§ 10.11 requiring that license be displayed in office
§ 10.12 pertaining to the authority to revoke or suspend licenses
§ 10.13 requiring that there be a hearing as a pre-requisite for suspension of license
§ 10.14 pertaining to the suspension or revocation of license
§ 10.15 pertaining to suspension or revocation of license
§ 10.16 pertaining to the appeal to the court for revocation action
§ 10.17 pertaining to the unlawful practice without a license
§ 10.18 pertaining to who may practice with a license
§ 10.19 stipulating the qualifications to sit for an examination for a license
§ 10.20 stipulating the requirements for veterinary license
§ 10.21 stipulating the requirements for training for veterinary license

§ 10.23 stipulating the qualifications to practice as an animal technician
§ 10.24 pertaining to the right to waive written examinations for animal technicians
§ 10.25 pertaining to the legal scope of practices for animal technicians
§ 10.29 pertaining to the authority for boards to regulate animal hospitals

DEPARTMENT OF MENTAL HEALTH AND MENTAL RETARDATION

*Presently, admissions and commitments of mentally ill minors are controlled by the same statutes and criteria that apply to adults. This may be appropriate for mature minors capable of making decisions about their mental health needs, but even in this situation questions arise concerning a hospital's duty to obtain a parent's consent to a voluntary admission by a minor and its duty to advise parents concerning treatment. Also, some minors in need of inpatient treatment may be too immature or otherwise incapable of giving consent, yet they may not be so mentally ill as to meet adult commitment standards; as a consequence, inpatient care, which may be the preferred treatment, is not possible. Therefore the Department suggests that the legislature review the possibility of using a certification process to admit minors to mental health facilities similar to that used in mental retardation cases. The Department in conjunction with the Office of the Attorney General is preparing a draft of such legislation.

*The Department is often handicapped in its efforts to provide treatment and services to its patients and residents because of the lack of a guardian to give permission for the treatment or services. The problem arises most often with a mentally retarded adult who is not competent to make certain decisions on his own and has neither a guardian or committee appointed. The present system for the appointment of committees or guardians provided for in the Virginia Code is time consuming and expensive. When there is no responsible person willing to serve as guardian, the only alternative is to appoint the sheriff under § 37.1-130. It is virtually impossible for the sheriff to have personal knowledge of all the people for whom he serves as guardian or committee. As a result, the individual's rights are not adequately protected. The ideal statute would provide an easily accessible system for the appointment of someone to make major decisions that the person is incompetent to make but which would not limit the individual in areas in which he is competent.

*§ 37.1-65.1 should be amended to provide its own system of procedural due process. The section should also be amended to provide for emergency admissions to mental retardation

facilities and respite care. (The current judicial certification procedures for mental retardation facilities provided for in this section superimposes the procedures provided for involuntary commitment in §§ 37.1-67.1 through 37.1-67.4. The application of these procedures to mental retardation certification hearings is awkward and unrealistic. Currently the Department is providing for respite care and emergency admissions by regulation, but this should be spelled out in the statutes.)

*§ 37.1-105 should be amended to eliminate the 60-month restrictive liability of parents for their dependent children when such parents move their legal residence to another state leaving their dependent children in a Virginia State facility. Such parents often oppose transfer to the state into which they have moved because that state would require reimbursement, whereas their liability in Virginia has terminated. Isolated from their families, these children become more difficult to deinstitutionalize.

*§ 37.1-110 should be revised to insure that the State and the Department have access to all courts based upon jurisdictional amount as would any other creditor seeking to collect past due amounts. (Clarification of enforcement authority alone would result in at least $1 million a year in additional revenues resulting from a savings in attorneys' fees and increased ability by the Department to bring legally liable persons before a court. This is especially needed today when the average stay of a patient is now drastically reduced and the amounts owed are more properly collected at the district court level.)

*§ 37.1-118 should be repealed and reenacted to provide that the Commissioner may prescribe statement forms requiring a complete financial disclosure by all persons legally liable under the provisions of this article as a condition precedent to the Department's agreement to accept less than full payment of expenses incurred. (The present penalty provisions are virtually unenforceable. This approach would provide an administrative procedure which would be much more effective.

*§ 37.1-194(n) should be amended to read "Comprehensive drug abuse and alcoholism treatment programs as provided by Chapter 11."

*§ 37.1-194(p) should be amended to read "And other appropriate mental health, mental retardation and drug and alcohol programs necessary to provide a comprehensive system of services."

*§ 37.1-205(12) and § 37.1-220(A) should be amended to provide that the appropriate community services board established pursuant to Chapter 10 of Title 37.1 will be respon-

sible for the administration of substance abuse programs. (These three changes relating to substance abuse are desired so that Community Mental Health and Mental Retardation Services Boards will be uniformly responsible at the local level for these services, and possible duplication of services and responsibilities at this level will be avoided.)

DEPARTMENT OF VOCATIONAL REHABILITATION

*There are certain portions of the Federal Privacy Act that conflict with the State Privacy Protection Act regarding the availability of medical records to an individual or his representative.

DEPARTMENT OF WELFARE

*Some local Community Mental Health and Mental Retardation Boards have been acting as child-placing agencies within the definition of § 63.1-195 of the Code without submitting to licensure. It is recommended that the authority of such boards be clarified by amendments to §§ 37.1-194 and 37.1-197 of the Code.

*There is an unresolved dispute as to whether the Welfare Department or the Corrections Department is responsible for medical expenses when a child in foster care is placed in a facility operated by the Division of Youth Services.

*The Department of Welfare has been involved in the past 12 months in significant lawsuits relating to food stamps, finance assistance, personnel actions, foster care, work requirements, and general relief. With one exception, a foster care/special education case, all of these cases have been resolved favorably to the Department or are pending.

*§ 22-10.8 should be clarified to address the question of jurisdictional responsibility in the case of a child in need of special education services who resides in one jurisdiction while the parents or legal guardians reside in another. There is often a dispute as to which jurisdiction is responsible for administering the tuition grant system for the child. The problem is an operational one of which the Department of Education and the Department of Welfare are aware. It is under review by the Attorney General's office.

*It often occurs that several pieces of newly enacted legislation will all be required to be implemented on the same date, that is, the date on which the laws normally go into effect after the adjournment of the General Assembly session. This creates an enormous burden on the Department because of the short deadline and the simultaneous imple-

mentation of several new or revised programs. This situation could be averted if the General Assembly would set priorities for new programs or revisions by enacting such programs with staggered effective dates for each piece of enabling legislation. Alternatively, it may be appropriate for some legislation to authorize a waiver of implementation dates by the Secretary with responsibility for the Department, as was done with the Privacy Protection Act of 1976, where there is good cause to delay implementation.

OFFICE OF PUBLIC SAFETY

The agencies and boards listed below reporting to the Secretary of Public Safety indicated no problems of the nature covered by the questionnaire:

Criminal Justice Services Commission
Division of Justice and Crime Prevention
Virginia Parole Board
Rehabilitative School Authority

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL

*This agency did not indicate that the comments discussed under the State Police section were a problem. However, those comments are considered pertinent to the study of this agency.

DEPARTMENT OF CORRECTIONS

*There are conflicts and ambiguities within the enabling legislation establishing the powers and duties of the Board of Corrections vs. those of the Director of the Department of Corrections. The Director is given all the usual rule- and regulation-making powers necessary to administer the Department; for example §§ 53-19.8 through 53-19.14 outlines the broad powers of the Director in administering the agency. The Board of Corrections is designated to act in an advisory capacity to the Director and yet is given powers and duties that are more than advisory in nature in § 53-19.36. Furthermore, these powers and duties are, in many cases, identical to those of the Director as to establishing rules and regulations, setting up training for the Department's employees and establishing goals and direction for the Department administratively within its institutions and its main divisions. (A specific example exists in § 53-19.35, where the Board is given the power to establish entrance and performance standards for personnel employed by the Department. This seems to be a task which should be under the control of the Director as the adminis-

trative head of the agency, and the section, in fact, appears to be in direct conflict with § 53-19.14 under general powers and duties of the Director.) It is recommended that a comprehensive review of all laws of Virginia relating to Corrections be undertaken and code sections rewritten where necessary. Especially in need of recodification is Title 53 which dates back to the Department's status within the Department of Welfare and Institutions and does not reflect present-day correctional philosophy or practice. (For example, the Penitentiary, in Title 53, is given as the primary correctional facility, and the rules and regulations used in administering that institution are applicable to all other correctional facilities. This in practice is not the case, and philosophically it should not apply.) A comprehensive review of enabling legislation should result in laws relating to Virginia corrections that reflect present-day operating practices within the Virginia Department of Corrections.

DEPARTMENT OF STATE POLICE

*Although the State Police did not identify it as a problem, the Commission on State Governmental Management has identified some fragmentation, duplications and overlapping of efforts in the investigative functions of the State Police and the Alcoholic Beverage Control Department. Legislation was introduced during the 1977 General Assembly to consolidate the enforcement and investigative functions of the Department of Alcoholic Beverage Control with the Enforcement Division of the State Police. The bill did not pass, but the Commission has indicated that a somewhat similar bill will be introduced in 1978.

OFFICE OF TRANSPORTATION

The Governor's Council on Transportation indicated it has no problems related to statutory authority and limitations. Other agencies reported as follows:

VIRGINIA AIRPORTS AUTHORITY

*The concept of according all of the aviation functions of the Commonwealth to one agency has been the subject of several legislative proposals, none of which has borne fruit. The Authority has and continues to be supportive of actions that would result in a stronger aviation posture in Virginia. If studies and actions by the General Assembly result in the realignment of aviation activities it should be noted that the

Virginia Airports Authority is presently empowered and has all necessary authority under the provisions of Title 5.1, Chapter 6 to carry out aviation functions.

OFFICE OF EMERGENCY SERVICES

*This office reports an appalling lack of coordination among three Federal agencies--the Federal Preparedness Agency, the Civil Defense Preparedness Agency and the Federal Disaster Assistance Agency--and 23 others that have some responsibility for civil emergency work. Duplication, overlapping authority and inconsistencies in funding and implementation of programs make it extremely difficult for the State office to carry out its mandate under § 44-146.17, et seq. The National Governors' Conference, the National Association of State Directors for Disaster Preparedness and the United States Civil Defense Council have deplored the lack of a well-defined Federal program to counter the effects on the population of enemy attack, natural or man-made disasters, and have recommended that the President of the United States exercise his executive authority to reorganize the Federal Emergency Planning and Response Programs to create a single office under the direction of the President.

*In the case of Boyd v. Commonwealth, it was charged that the recent gasoline shortage was not of sufficient seriousness to warrant implementing the disaster law to lower the speed limit to 55 miles per hour. The Commonwealth's position was upheld and subsequently the General Assembly changed the law to strengthen the Governor's powers in resource management.

HIGHWAY SAFETY DIVISION

*The Division will seek to have the 1978 session of the General Assembly amend § 18.2-271 to give the Division authority to establish standards for the State and local Alcohol Safety Action Programs, evaluate them, and set the fees.

DEPARTMENT OF HIGHWAYS AND TRANSPORTATION

*Regulations promulgated by the United States Department of Transportation require the Governor of each State to designate a metropolitan planning organization (MPO) in each urbanized area as a condition to the receipt of Federal-aid highway funds. Under the regulations, the planning organizations are to draft a transportation plan for their respective areas. Only those transportation projects (public transit, elderly and handicapped, air, highway, etc.) included in the plan will be eligible for Federal funds. By statute, the General Assembly has assigned to the Highway and Transportation Department the responsibility

for transportation planning, allocation of highway funds, and development of highway projects. The Federal regulations in effect give the MPOs the power to prepare transportation improvement programs in lieu of those State responsibilities. By approving a program of transportation improvements, the MPOs would become implementing, not planning, bodies, and would become for practical purposes a layer of regional government for which there is no provision in the Constitution of Virginia or in State law. The Commonwealth has joined as amicus curiae and filed a brief in the Circuit Court of Appeals in the District of Columbia in a California case challenging the propriety of the MPO regulations.

*In administering environmental legislation enacted by the Congress, Federal agencies have gone far beyond the Congressional intent and have established a confusing array of rules and regulations which themselves sometimes are in conflict. The Department of Highways and Transportation is required to prepare extensive environmental impact statements on every Federal-aid construction project, then must circulate the statements to approximately 30 Federal, State, regional and local agencies for review and comment. The review process generally works smoothly insofar as the State, regional, and local agencies are concerned. It is far different with the Federal agencies, all of which make their reviews and comments independently and without any central coordination at the Federal level. Federal agencies are free to challenge information and conclusions contained in the statements, but rarely assume responsibility for reconciliation of differences. Some recognize the need for highway improvements; others appear bent on obstructing such improvements with no regard to costs. The cost of preparing the Federally required environmental impact statements now amounts to approvimately $2.5 million annually. While there is no quarrel with the importance of protecting the environment, there is considerable room for quarrel with the Federal government's approach to providing that protection. One of the results of the process is that millions of dollars in highway improvements are delayed months and sometimes years while the Federal and State reviews slowly take their course. Even assuming approval of environmental impact statements by the Secretary of Transportation, some Federal agencies have virtual veto power over all projects at the permit stage by virtue of the Clean Water Act.

*The department also has witnessed in recent months an extraordinary interpretation of the Davis-Bacon Act under which wages are established for Federal or Federally-assisted construction projects. The case in point concerns the wage rates set by the United States Department of Labor for construction of Interstate 66 in Northern Virginia. The Department has ruled that normal highway rates are to be paid to workers involved on what the Labor Department regards as conventional highway work, while "heavy" construction rates -- twice as much in

most instances -- are to be paid those working on aspects of the project which may ultimately accommodate the Metrorail system. This ruling apparently ignores completely the fact that contractors' employees working side by side, having identical experience, using identical equipment, performing what for all practical purposes is identical work would be paid vastly differing wages. The Department of Highways and Transportation took the original ruling to the Labor Department's own Wage Appeals Boards. The board agreed with Virginia's position, and reversed the order for the "heavy" construction rates on the first I-66 project. The Labor Department through administrative action has again required the dual wages for the second I-66 project, and the Department will appeal again. As in the case of the environmental regulations and the MPOs the conflict experienced with the wage rates is not in Federal legislation but, instead, in the manner in which the legislation is administered.

DEPARTMENT OF MILITARY AFFAIRS

*In litigation is a suit filed on behalf of 18 prior Air Defense technicians who contend that the Adjutant General of Virginia exceeded his authority in conducting the 1974 reduction-in-force action. The reduction-in-force action resulted in the elimination of positions of 291 full-time Army National Guard Technicians. The plaintiffs are asking for damages of one million dollars, restoration of all personnel actions made subsequent to February 4, 1974, and retroactive implementation of the reduction procedures. The United States District Court denied the complaint and the plaintiffs appealed to the United States Fourth Circuit Court of Appeals. This court reversed the lower court decision and remanded the case to the District Court for entry of an appropriate order directing the defendants to prepare a schedule, subject to the court's approval, offering employment or reemployment to the plaintiffs at no less than the grade each would have had if competition for vacancies had been restricted to the displaced technicians. At the present time compliance with the order is pending. No other awards were ordered.

DIVISION OF MOTOR VEHICLES

*The Code provides that the Director of Personnel establish and administer a classification and compensation plan. § 46.1-30 provides for the Commissioner of Motor Vehicles to appoint and fix the compensation of branch office personnel. The Division is of the opinion that the Commissioner should be allowed to exercise this authority as an exception to the Personnel Act.

*Title 46.1 has not been recodified since 1958. A thorough review should be undertaken to eliminate duplicate or conflicting

sections.

*Dealer license plates (§ 46.1-101) and Dealer license certificates (§ 46.1-526) should expire on the same date. A bill will be drafted to effect this needed change.

*There is some duplication of effort with the State Corporation Commission. Duplication and overlap occur when a carrier is required to register at both DMV and SCC, and both agencies produce a registration card for the same vehicle.

CONCLUSIONS

*Heads of departments, agencies, boards, commissions, councils and other executive department bodies are aware of the statutory grants of power under which their entities operate and of the limitations and restrictions, expressed or inherent, which accompany those grants. Through the new budget-making process, they are now evaluating, on a biennial basis, their activities and programs to make certain they are within statutory grants of authority.

*Rules and regulations promulgated by most agencies, boards and other bodies are regularly reviewed within the organizations and, for legal sufficiency, by the Office of the Attorney General.

*Agencies would benefit by further directions concerning limitations on rule making under the Antitrust Laws and the First Amendment.

*Agencies are perhaps not as familiar with the Register Act or the Administrative Process Act as they need to be.

*The questionnaire proved valuable in that many problems cited have been resolved or are being resolved administratively within agencies or between agencies.

*Many problems cited evolve from Federal laws and/or regulations that conflict with Virginia's. Affected agencies appear to be attempting to resolve such matters, often through successful challenges to the Federal requirements.

*General Assembly studies are dealing with difficulties cited by several agencies. The Attorney General is aiding agencies in resolving a number of other problems.

*The most serious problems involve conflicts in, and fragmentation of, authority, notably in the budget-making area.

*In the future, instances of duplication and overlapping of authority in proposed legislation should be minimized by procedures being developed by the General Assembly to require filing of organizational impact statements by the executive branch.

*Time and staff limitations precluded follow-up efforts to this study that the Task Force feels are essential.

RECOMMENDATIONS

*An appropriately staffed and funded committee should be assigned to evaluate the problems cited in this study and to initiate appropriate action to resolve those problems deemed worthy of consideration.

*A memorandum drafted by the Attorney General should be distributed to all State agencies to inform them of their limitations on rulemaking under the Antitrust Laws and the First Amendment.

*The Governor's Secretaries should insure that agencies and boards review thoroughly at least annually all existing rules, regulations, etc., for timeliness, clarity, and legal sufficiency.

*In-service sessions should be held regularly for agency management personnel to inform them about such matters as the roles of the Governor and the Governor's Secretaries and requirements of the Register Act and the Administrative Process Act.

*There should be a process through which agencies would make systematic status reports to the Governor's Secretaries, and through them to the Governor, concerning significant developments and actions.

*In establishing new agencies or programs, legislative intent and policy should be spelled out and appropriate guidelines and limitations should be set forth in the Code in order to establish the proper legal framework within which the agencies or programs are to operate.

*Consideration should be given to providing for uniform terminology in describing operations and officials. Such words as department, division, commission, director, commissioner, etc., vary in meaning and some of the terminology is outmoded and obsolete.

*The General Assembly should consider reviewing the status and accountability of the approximately 500 authorities, commissions, public corporations and other bodies described in the Code as political subdivisions and operating on behalf or under the authority of the Commonwealth. Such a study seems advisable for the following reasons: (1) these entities have financial and programmatic impact on the State and its citizens; (2) very few of them comply with the Code requirement that they file annual reports with the State; (3) the stipulation that State funds be withheld from political subdivisions failing to file the report is not enforced; and (4) in the absence on an up-to-date list of political subdivisions, State agencies

cannot comply with requirements in the Administrative Process Act that political subdivisions be notified of proposed changes in rules and regulations.

*When Federal laws and regulations come into conflict with State laws and policies, agency heads should be encouraged to express their frustrations to the Governor or the appropriate Secretary. The decision should then be made as to whether an appeal for an exemption to the Federal regulation or an amendment to the Federal law should be sought.