Eligibility of individual to serve on town council depends on whether his position in town water department constitutes public office or whether he is employee of town. If individual's position constitutes office of town, individual is disqualified from serving on town council. If position is not office of town and individual is elected to town council, Act would not prohibit individual's continued employment in town water department, provided employment began before he became member of town council.

Mr. Jeffrey W. Parker
Town Attorney for the Town of Remington
May 9, 2000

You ask whether an individual who is employed by the water department in the Town of Remington may serve on the town council.

You advise that the subject individual in the town water department has filed a petition for election to the town council for the Town of Remington. You report that the town council makes all decisions regarding employment of town personnel, and directly employs all such individuals. The individual's position in the water department is full time and consists mainly of manual labor. Finally, you advise that there is no written contract or set term of employment.

It is your opinion that Article VII, § 6 of the Constitution of Virginia (1971) disqualifies the individual from continuing his employment with the water department of the Town of Remington if he is elected to town council. You believe that Article VII, § 6 must be literally construed, and that such literal construction results in the employee's disqualification.

Article VII, § 6 provides, in part:

No member of a governing body shall be eligible, during the term of office for which he was elected or appointed, to hold any office filled by the governing body by election or appointment, except that a member of a
governing body may be named a member of such other boards, commissions, and bodies as may be permitted by general law and except that a member of a governing body may be elected or appointed to fill a vacancy in the office of mayor or board chairman if permitted by general law or special act. [Emphasis added.]

Under the restriction in § 6, a member of an elected town council may not be appointed, during his tenure as councilman, to any office filled by a town council, unless such appointment is expressly authorized by law. The question for consideration, then, is whether the individual's position in the town water department constitutes an "office" of the Town of Remington.

A 1978 opinion of the Attorney General lists the criteria to be considered in determining whether a position constitutes an "office":

[T]o constitute a public office, the position must be created by the Constitution or statutes. It is a position filled by election or appointment, with a designation or title, and duties concerning the public, which are assigned by law. A frequent characteristic of such an office is a fixed term of office."

Your request does not indicate whether the individual's position in the town water department is a public office. The charter for the Town of Remington provides little additional information in this regard. Section 6-1 of the charter permits the town council to appoint such officers of the town as it deems necessary:

Such officers may include, but shall not be limited to Town Attorney, Town Treasurer, Town Assessor, Town Sheriff, Building Inspector and Zoning Administrator. The enumeration of officers in this section shall not be construed to require the appointment of any such officer herein named. Officers appointed by the Town Council shall perform such duties as may be specified in this Charter or by the Town Council."

Section 6-3 of the charter provides that officers appointed by the town council "shall be appointed for a term of two years, unless provided by this Charter or by ordinance of the Town Council.""

"[T]he plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, or strained construction." Statutes should not be construed to frustrate their purpose. In addition, the use of the word "shall" in a statute generally implies that its terms are intended to be mandatory, rather than permissive or directive. When a statute creates a specific grant of authority, the authority exists only to the extent specifically granted in the statute.

I am unable to conclude that the subject individual's position in the water department constitutes an "office," because your request provides no information from which to
make such a determination. Should it be determined that the individual's position in the water department is an "office" of the town, it is my opinion that Article VII, § 6 would disqualify the individual from serving on the town council.

I note from your opinion request, however, that the individual is "employed" by the town. Consequently, it is necessary to determine whether an employer/employee relationship exists between the town and the subject individual. Whether a particular individual is an "employee" of a governmental agency depends on several factors, including whether the individual has a contract of employment, express or implied; whether the individual receives a salary for services rendered; whether the services performed by the individual arise in the usual course of the trade, business or occupation of the governmental entity; and whether the entity exercises control over the manner in which the individual performs the services.\textsuperscript{11}

Title 15.2 of the Code of Virginia addresses aspects of the employer/employee relationship in local government. Specifically § 15.2-1500(A) provides that "[e]very locality shall provide for all the governmental functions of the locality, including, without limitation, … the employment of … employees needed to carry out the functions of government." Because the statute does not define the terms "employment" and "employee," these terms must be given their common, ordinary meanings.\textsuperscript{12} "Employment" generally is defined as "activity in which one engages or is employed"; "an instance of such activity"; "the act of employing: the state of being employed."\textsuperscript{13} "Employee" is "one employed by another usu[ally] for wages or salary and in a position below the executive level."\textsuperscript{14} Furthermore, the verb "employ" generally means "to use or engage the services of"; "to provide with a job that pays wages or a salary."\textsuperscript{15}

It is necessary to consider the State and Local Government Conflict of Interests Act\textsuperscript{16} (the "Act") in determining whether an individual is an employee or an officer of a local governmental agency. Section 2.1-639.7(A) of the Act provides that "[n]o person elected or appointed as a member of the governing body of a … town shall have a personal interest in (i) any contract with his governing body." Section 2.1-639.2 of the Act defines "personal interest" as "a financial benefit or liability accruing to an officer or employee or to a member of his immediate family." A "personal interest in a contract" is defined as "a personal interest which an officer or employee has in a contract with a governmental agency, whether due to his being a party to the contract or due to a personal interest in a business which is a party to the contract."\textsuperscript{17} Finally, § 2.1-639.2 defines "contract" as any agreement to which a governmental agency is a party, or any agreement on behalf of a governmental agency which involves the payment of money appropriated by the General Assembly or political subdivision, whether or not such agreement is executed in the name of the Commonwealth, or some political subdivision thereof. "Contract" includes a subcontract only when the contract of which it is a part is with the officer's or employee's own governmental agency.
Should the individual be elected as an officer of a local governing body subject to the Act's prohibitions and restrictions, the individual would have a "personal interest" in his contract of employment with the Town of Remington. For purposes of the Act, a "personal interest in a contract" with a governmental agency results from an officer being a party to the contract. Clearly, the individual is a party to his contract of employment and, therefore, would have a prohibited personal interest in the contract with the town unless one of the Act's exceptions applies.

Section 2.1-639.7(B)(1) exempts from the contract prohibition in § 2.1-639.7(A), "[a] member's personal interest in a contract of employment provided … (ii) the employment first began prior to the member becoming a member of the governing body." You advise that the individual is employed by the water department in the Town of Remington, and that he has filed a petition to seek election to town council. Therefore, this exception clearly applies to the subject individual's current employment.

In summary, therefore, if it is determined that the individual's position in the water department constitutes an office of the town, it is my opinion that Article VII, § 6 of the Constitution disqualifies the member from serving on the town council. If the individual's position in the water department is determined not to constitute an office of the town and he is elected to the town council, it is my opinion that § 2.1-639.7(B)(1)(ii) would allow the individual to continue his employment in the water department of the Town of Remington.

1 Any request by a town attorney for an opinion from the Attorney General "shall itself be in the form of an opinion embodying a precise statement of all facts together with such attorney's legal conclusions." Va. Code Ann. § 2.1-118.


14Id.

15Id.

16Tit. 2.1, ch. 40.1, §§ 2.1-639.1 to 2.1-639.24.

17Section 2.1-639.2.