



# **COMMONWEALTH of VIRGINIA**

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February 2, 2009

The Honorable David S. Ekern, P.E.  
Commissioner, Virginia Department of Transportation  
1401 East Broad Street  
Richmond, Virginia 23219-2000

Dear Commissioner Ekern:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

### **Issue Presented**

You ask for clarification of an opinion issued July 28, 2008, to David Bobzien<sup>1</sup> (the "2008 Opinion"). Specifically, you ask whether the 2008 Opinion has general application throughout the Commonwealth or whether it applies only to agreements between the Commonwealth Transportation Commissioner and Fairfax County under § 33.1-375.1.

### **Response**

It is my opinion that only Fairfax County is authorized to enter into an agreement with the Commonwealth Transportation Commissioner to enforce the provisions of § 33.1-373 as addressed in the 2008 Opinion.<sup>2</sup>

### **Applicable Law and Discussion**

The General Assembly has enacted Article 1, Chapter 7 of Title 33.1, §§ 33.1-351 through 33.1-378 ("Article 1"), of the Outdoor Advertising in Sight of Public Highways Act (the "Act") to govern outdoor advertising in and adjacent to highway rights-of-way. Section 33.1-351 establishes the overall policy implemented by the Act and provides, in part, that:

In order to promote the safety, convenience, and enjoyment of travel on and protection of the public investment in highways within this Commonwealth, to attract tourists and promote the prosperity, economic well-being, and general welfare of the Commonwealth, and to preserve and enhance the natural scenic beauty or aesthetic features of the highways and adjacent areas, the General Assembly declares it to be the policy of the

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<sup>1</sup>See Op. Va. Att'y Gen. No. 08-013, available at <http://www.vaag.com/OPINIONS/2008opns/08-013-Bobzien.pdf>.

<sup>2</sup>The 2008 Opinion addressed a question that was specific to Fairfax County. To the extent that this opinion is inconsistent with the 2008 Opinion, that opinion is overruled. See *id.*

Commonwealth that the erection and maintenance of outdoor advertising *in areas adjacent to the rights-of-way* of the highways within the Commonwealth shall be regulated in accordance with the terms of [Article 1] and regulations promulgated by the Commonwealth Transportation Board pursuant thereto. [Emphasis added.]

Additionally, § 33.1-351 defines the following terms used in Article 1:

The following terms, wherever used or referred to in [Article 1], shall have the following meanings *unless a different meaning clearly appears from the context*:

“*Advertisement*” means any writing, printing, picture, painting, display, emblem, drawing, sign, or similar device which is posted or displayed outdoors on real property and is intended to invite or to draw the attention or to solicit the patronage or support of the public to any goods, merchandise, real or personal property, business, services, entertainment, or amusement manufactured, produced, bought, sold, conducted, furnished, or dealt in by any person; the term shall also include any part of an advertisement recognizable as such.

....

“*Sign*” means any outdoor sign, display, device, figure, painting, drawing, message, placard, poster, billboard, or other thing which is designed, intended, or used *to advertise or inform*, any part of the advertising or informative contents of which is visible from any highway. [Emphasis added.]

Section 33.1-12(3) empowers the Commonwealth Transportation Board (the “Board”) “[t]o make rules and regulations ..., *not in conflict with the laws of this Commonwealth*, for the protection of and concerning traffic on and the use of systems of state highways and to add to, amend or repeal the same.” (Emphasis added.) Section 33.1-19 stipulates that “[t]he rules and regulations ..., prescribed by the Board ..., shall have the force and effect of law and any person, firm or corporation violating any such rule or regulation ... shall be guilty of a misdemeanor.” Pursuant to its authority, the Board has adopted a regulation prohibiting the use or occupancy of rights-of-way within the system of state highways except for travel or as authorized by permit or as provided by law.<sup>3</sup> Section 33.1-369(13) provides that no advertisement or advertising structure shall be erected, maintained, or operated if it is inconsistent with regulations adopted by the Board.

Section 33.1-375 provides that:

Any *sign*, advertisement or advertising structure which is erected, used, maintained, operated, posted or displayed *in violation of §§ 33.1-369, 33.1-370, or § 33.1-372 or for which no permit has been obtained where such is required*, or after revocation or more than thirty days after expiration of a permit, or which, whether or not excepted under the provisions of § 33.1-355, is not kept in a good general condition and in a reasonably good state of repair and is not, after thirty days’ written notice to the person erecting, using, maintaining, posting or displaying the same, put into good general condition and in a reasonably good state of repair, *is hereby declared to be a public and private nuisance and may be forthwith removed, obliterated or abated by the Commissioner or his*

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<sup>3</sup> See 24 VA. ADMIN. CODE § 30-20-80 (1996).

*representatives*. The Commissioner may collect the cost of such removal, obliteration or abatement from the person erecting, using, maintaining, operating, posting or displaying such sign, advertisement or advertising structure. [Emphasis added.]

Section 33.1-373, regarding placement of advertisements within the limits of any state highway, provides that:

Any person who in any manner (i) paints, prints, places, puts or affixes any advertisement upon or to any rock, stone, tree, fence, stump, pole, ...or other object *lawfully within the limits of any highway* or (ii) erects, paints, prints, places, puts, or affixes any advertisement *within the limits of any highway* shall be assessed a civil penalty of \$100.... Advertisements placed *within the limits of the highway* are hereby declared a public and private nuisance and may be forthwith removed, obliterated, or abated by the Commonwealth Transportation Commissioner or his representatives without notice....

The provisions of this section shall not apply to signs or other outdoor advertising regulated under Chapter 7 (§ 33.1-351 et seq.) of [Title 33.1]. [Emphasis added.]

Section 33.1-378 provides that Article 1 “shall be liberally construed with a view to the effective accomplishment of its purposes.” Prior to the 1993 Session of the General Assembly, § 33.1-351 defined the term “advertisement” to mean

any writing, printing, picture, painting, display, emblem, drawing, sign, or similar device which is posted or displayed outdoors on real property and is intended to invite or to draw the attention or to solicit the patronage or support of the public to any goods, merchandise, property, real or personal, business, services, entertainment or amusement manufactured, produced, bought, sold, conducted, furnished or dealt in by any person *or for any political party or for the candidacy of any individual for any nomination or office*; the term shall also include any part of an advertisement recognizable as such[.] [Emphasis added.]<sup>[4]</sup>

A primary goal of statutory interpretation is to ascertain the intent of the General Assembly.<sup>5</sup> In addition, statutes pertaining to the same subject should be considered *in pari materia*.<sup>6</sup> While the 1993 Session of the General Assembly deleted political campaign signs from the definition of “advertisement” in § 33.1-351,<sup>7</sup> this is not necessarily dispositive of whether political campaign signs may be posted within state highway rights-of-way. Language preceding the definitions contained in § 33.1-351 notes that the defined terms are to have the meanings provided, unless a different meaning appears from the context. In addition, § 33.1-351, which describes the Act’s general policy, specifies that the Act is intended to address and regulate outdoor advertising in areas *adjacent* to highway rights-of-way. Unlike most of the provisions in the Act that govern outdoor advertising in areas visible from highways and

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<sup>4</sup> See VA. CODE ANN. § 33.1-351 (1990).

<sup>5</sup> See *Turner v. Commonwealth*, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983).

<sup>6</sup> See *Prillaman v. Commonwealth*, 199 Va. 401, 405-06, 100 S.E.2d 4, 7-8 (1957); 1996 Op. Va. Att’y Gen. 134, 135.

<sup>7</sup> See 1993 Va. Acts, ch. 538, at 668, 668.

*adjacent* to highway rights-of-way, § 33.1-373 and, in part, § 33.1-375 govern signs and advertisements *within* the limits of the highway, which would include highway rights-of-way.

Section 33.1-375.1(A) specifically authorizes the Commissioner to enter into such agreements with Fairfax County, but imposes limitations on the authority granted under such an agreement. One such limitation provides that signs and advertising supporting an individual's candidacy for elected public office or other ballot issues are not subject to an agreement between the Commissioner and Fairfax County unless they have been in place for more than three days after the election to which they apply.<sup>8</sup> Section 33.1-375.1(A) also provides that "[s]igns and advertising promoting and/or providing directions to a special event" that remain in place more than three days after the event concludes and other "signs and advertising erected for no more than three days" are not subject to an agreement between the Commissioner and Fairfax County. The foregoing limitation, explicitly noted by the statute, does not apply to an agreement between the Commissioner and any other locality under § 33.1-375.1(D). By prohibiting Fairfax County from enforcing § 33.1-373 for signs and advertising relating to political candidacy and other ballot issues and in characterizing the prohibition as a "limitation" in § 33.1-375.1, it is clear that § 33.1-375.1 contemplates that such signs and advertising and ballot issues are otherwise subject to and governed by § 33.1-373. Section 33.1-375.1(D) expressly limits enforcement of § 33.1-373 by Fairfax County, but does not apply to agreements between the Commissioner and other localities.

### Conclusion

Accordingly, it is my opinion that only Fairfax County is authorized to enter into an agreement with the Commonwealth Transportation Commissioner to enforce the provisions of § 33.1-373 as addressed in the 2008 Opinion.<sup>9</sup>

Thank you for letting me be of service to you.

Sincerely,

A handwritten signature in black ink, reading "Robert F. McDonnell". The signature is fluid and cursive, with the first name "Robert" and last name "McDonnell" clearly legible.

Robert F. McDonnell

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<sup>8</sup> See § 33.1-375.1(C)(1) (2005).

<sup>9</sup> See *supra* note 2.