



# COMMONWEALTH of VIRGINIA

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The Honorable Todd E. Pillion  
Member, Senate of Virginia  
851 French Moore Jr. Boulevard, Suite 178  
Abingdon, Virginia 24210

Dear Senator Pillion:

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 inquire regarding the potential deployment of license plate recognition (LPR) cameras on Virginia Department of Transportation (VDOT) rights-of-way by third parties.<sup>1</sup> You specifically ask whether the Commonwealth Transportation Board (CTB) has the authority to amend its Land Use Permit Regulations (Regulations) to enable a permit to be issued for the installment of such cameras when requested by a law enforcement agency or local government. In particular, you seek guidance on whether the CTB can amend Part VII, Miscellaneous Provisions, of the Regulations to add the following language:

### **24 VAC 30-151-661. Stationary License Plate Readers.**

Upon request of a locality or the chief law enforcement officer serving a locality, permits may be issued to a third-party provider to install a [LPR] within highway rights-of-way. Maintenance of these facilities is the responsibility of the permittee. Such permits may only be issued upon approval of the proposed operating agreement between the locality/law enforcement and the third-party provider which shall provide any pictures or data captured by such LPRs must be completely deleted within 30 days of capture.

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<sup>1</sup> LPR technology is not specifically defined in your inquiry; for purposes of this opinion, an LPR camera is one that takes snapshots of passing vehicles, thereby obtaining and electronically caching information such as the vehicle make, type, and color, and the license plate number and state. This Office has described prior iterations of LPR technology as “a combination of cameras and optical character recognition technology to read license plates. The camera captures an image of a license plate and the optical character recognition technology converts the image into data that can be searched against an existing database or the data may be stored for future use, along with the time, date, and location of the observation.” 2013 Op. Va. Att’y Gen. 7, 8-9. Although LPR technology may continue to evolve, salient here is that the LPR cameras collect snapshots of passing vehicles and store the images and related data for some period of time.

### Applicable Law and Discussion

The Constitution of Virginia expressly provides that “administrative agencies may be created by the General Assembly with such authority and duties as the General Assembly may prescribe.”<sup>2</sup> The General Assembly’s delegation of its legislative power to administrative agencies “is essential to carry out the legitimate functions of government[; i]f nothing could be left to the judgment and discretion of administrative officers, government could not be efficient and the legislation itself would become ‘either oppressive or inefficient.’”<sup>3</sup> Accordingly, administrative agencies may be empowered to make regulations, and validly adopted regulations carry the force of law.<sup>4</sup>

Unlike the General Assembly, which exercises plenary power limited only by the Virginia or United States Constitutions,<sup>5</sup> the agencies established by the General Assembly are creatures of statute and “derive[] [their] power only from [their] authorizing legislation.”<sup>6</sup> An agency’s authority to promulgate regulations therefore is not boundless; rather, the agency’s power is limited to that which has been delegated by the General Assembly.<sup>7</sup> Absent such a delegation, an agency is precluded from acting in a legislative role.<sup>8</sup>

Central to your inquiry, therefore, is whether the General Assembly has delegated to the CTB the authority to promulgate regulations related to installing, for law enforcement purposes, LPR technologies operated by private parties at the request of a locality or law enforcement.

By statute, the General Assembly has empowered the CTB to “make regulations that are not in conflict with the laws of the Commonwealth for the protection of and covering traffic on and for the use of systems of state highways . . . .”<sup>9</sup> VDOT rights-of-way are part of the state highway system,<sup>10</sup> and pursuant to its statutory authority, the CTB has established a permitting system whereby parties may request certain

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<sup>2</sup> VA. CONST. art. III, § 1.

<sup>3</sup> *Bell v. Dorey Elec. Co.*, 248 Va. 378, 379-80 (1994) (quoting *Thompson v. Smith*, 155 Va. 367, 379 (1930)).

<sup>4</sup> *See* VA. CODE ANN. § 2.2-4001 (2017); *see also* *Manassas Autocars, Inc. v. Couch*, 274 Va. 82, 87 (2007); 2014 Op. Va. Att’y Gen. 42, 45.

<sup>5</sup> *Terry v. Mazur*, 234 Va. 442, 449 (1987).

<sup>6</sup> *Carpenter v. Virginia Real Est. Bd.*, 20 Va. App. 100, 106 (1995); *accord* *Muse v. Virginia Alcohol Beverage Control Bd.*, 9 Va. App. 74, 78 (1989) (“The [Alcohol Beverage Control] Board, being a creature of statute, derives its powers from statute.”).

<sup>7</sup> *Sydnor Pump & Well Co. v. Taylor*, 201 Va. 311, 316 (1959) (“[A]dministrative agencies, in the exercise of their powers, may validly act only within the authority conferred upon them by statutes vesting power in them.”).

<sup>8</sup> The legislative power of the Commonwealth is vested in the General Assembly, VA. CONST. art. IV, § 1; apart from proper delegations of legislative authority to executive branch agencies, “[t]he legislative, executive, and judicial departments shall be separate and distinct, so that none exercise the powers properly belonging to the others, nor any person exercise the power of more than one of them at the same time . . . .” VA. CONST. art. III, § 1. *See generally* *Elizabeth River Crossings OpCo, LLC v. Meeks*, 286 Va. 287, 310-11 (2013); *Cochran v. Fairfax Cnty. Bd. of Zoning Appeals*, 267 Va. 756, 765 (2004) (“Under fundamental constitutional principles, . . . agencies are empowered to act only in accordance with standards prescribed by the legislative branch of government.”).

<sup>9</sup> VA. CODE ANN. § 33.2-210(A) (2019).

<sup>10</sup> 24 VA. ADMIN. CODE § 30-21-10 (defining “right-of-way” generally to mean the “property within the system of state highways that is open or may be opened for public travel or use”); *accord* 24 VA. ADMIN. CODE § 30-151-10.

uses of the rights-of-way.<sup>11</sup> The current permitting Regulations “apply to all *authorized* use or occupancy of the right-of-way.”<sup>12</sup> There is no statute expressly authorizing the general use of the equipment you present on VDOT rights-of-way. Nor is there explicit statutory authority permitting CTB to adopt regulations regarding the installation of data-gathering or surveillance equipment operated by private parties.<sup>13</sup>

Although the language authorizing the CTB to “make regulations . . . for the use of systems of state highways” may appear broad, such language must be considered in relation to the CTB’s overall basic law.<sup>14</sup> The scope of an agency’s regulatory authority is determined by taking into “account the text as well as the context of the underlying statute,” whereby it is viewed it as a “symmetrical and coherent regulatory scheme.”<sup>15</sup> The purposes underlying the basic law also are to be considered when examining the validity of agency action.<sup>16</sup>

As the Supreme Court of Virginia has noted, “[t]he General Assembly has delegated to the [CTB] . . . authority over the supervision, management, construction, improvement, and maintenance of public highways and roads.”<sup>17</sup> A review of the statutes pertaining to the duties and powers of the CTB reveals that the CTB’s basic law generally is limited to issues concerning the passage or conveyance on public roadways in the Commonwealth and enforcing traffic and safety requirements regarding the same.<sup>18</sup> The current Regulations related to rights-of-way generally reflect this understanding of the scope of CTB’s

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<sup>11</sup> See 24 VA. ADMIN. CODE § 30-21-30(A) (“No person, firm, or corporation shall use or occupy the right of way of any highway for any purpose except travel, except as may be authorized by VDOT, either pursuant to regulation or as provided by law.”); see also 24 VA. ADMIN. CODE § 30-21-20 (stating that “[n]o work of any nature shall be performed on any real property under the ownership, control, or jurisdiction of the [CTB] or VDOT, including . . . the right of way . . . in the system of state highways until written permission is first obtained from VDOT”); accord 24 VA. ADMIN. CODE § 30-151-20.

<sup>12</sup> 24 VA. ADMIN. CODE § 30-151-30(A) (emphasis added).

<sup>13</sup> Whether the installation of LPRs in the VDOT right-of-way by a third-party would be prohibited under the land use restrictions on vendors in the VDOT right-of-way is beyond the scope of this opinion. See 24 VA. ADMIN. CODE § 30-151-670(2).

<sup>14</sup> See generally VA. CODE ANN. § 2.2-4001 (defining “regulation” to mean “any statement of general application, having the force of law, . . . adopted by an agency in accordance with the authority conferred on it by applicable basic laws” and defining “basic law,” in turn, as the “provisions of the Constitution and statutes of the Commonwealth authorizing an agency to make regulations or decide cases . . .”).

<sup>15</sup> *Kavanaugh ex rel. Kavanaugh v. Virginia Birth-Related Neurological Inj. Comp. Program*, 60 Va. App. 440, 447 (2012) (quoting *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 86 (2002)).

<sup>16</sup> *Virginia Alcoholic Beverage Control Comm’n v. York St. Inn, Inc.*, 220 Va. 310, 313-14 (1979); *Virginia Imps. Ltd. v. Kirin Brewery of Am., LLC*, 41 Va. App. 806, 821 (2003); *Johnston-Willis, Ltd. v. Kenley*, 6 Va. App. 231, 244 (1988).

<sup>17</sup> *Maddox ex rel. Maddox v. Commonwealth*, 267 Va. 657, 662 (2004).

<sup>18</sup> See, e.g., VA. CODE ANN. §§ 33.2-208 to -221.1 (2019 & Supp. 2022) (setting forth certain duties and powers of the CTB, to include designation of highway locations; responsibilities regarding certain transportation construction contracts; naming of highways, bridges, and other transportation facilities; prioritization of projects involving the funding of the state transportation system; regulation of roadside memorials; and setting fees for informational signs for motorists); §§ 33.2-300 to -414 (2019 & Supp. 2022) (providing for powers associated with establishing and maintaining highway systems, including road paving; designation of limited access highways, byways, and scenic highways); §§ 33.2-500 to -505 (2019) (relating to the designation and use of high-occupancy vehicle lanes); §§ 33.2-600 to -615 (2019 & Supp. 2022) (relating to ferries and toll facilities); see also VA. CODE ANN. §§ 46.2-808 (2017), -809 (2017), -809.1 (2017) (relating to the regulation of traffic on certain roadways); 46.2-931 (permitting regulation related to sales, solicitations, and distribution of materials within roadways and medians).

authority.<sup>19</sup> Indeed, in administering its statutory functions, the CTB itself has determined that “[t]he Code of Virginia authorizes the [CTB] . . . to promulgate regulations, establish guidelines, administer programs, or take other actions *related to transportation*.”<sup>20</sup>

The camera installation you describe would not relate to the flow of traffic, the transportation network or assets, or uses of the state highways for travel. I find no nexus between the installation of LPR technology to aid law enforcement generally and the CTB’s specific authority to issue regulations either “for the protection of,” “covering traffic on,” or “for the use of systems of state highways.”<sup>21</sup> The proposed permitting of LPR cameras by the CTB for the benefit of third-party providers therefore falls outside the scope of authority currently delegated to the CTB.<sup>22</sup>

Not only does a review of the CTB’s basic law, standing alone, fail to evince a legislative intent to authorize the CTB to regulate in this area, but an examination of other legislative action by the General Assembly further reveals that the CTB’s authority to regulate is not so broad as to encompass the activity you present.<sup>23</sup> Other laws specifically address the use of cameras and similar equipment in connection with transportation assets in the Commonwealth. The General Assembly explicitly has authorized the use of “photo-monitoring systems,” which take “photographs, . . . videotape, or other recorded images of [a] vehicle,” to capture toll and traffic light violations.<sup>24</sup> The General Assembly also has authorized employing

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<sup>19</sup> See, e.g., 24 VA. ADMIN. CODE § 30-151-470 (permits for bicycle and road races, parades and marches); 24 VA. ADMIN. CODE § 30-151-600 (permits for pedestrian and bicycle facilities); 24 VA. ADMIN. CODE § 30-151-630 (permits for school bus shelters, public transit shelters, or ride share stations); 24 VA. ADMIN. CODE § 30-151-610 (permits for the passage of oversized haulers and loaders); 24 VA. ADMIN. CODE § 30-151-460 (permits for moving buildings over 16 feet wide); 24 VA. ADMIN. CODE § 30-151-510 (permits for signals to facilitate the “safe and expeditious entry of emergency vehicles” onto the roadway); 24 VA. ADMIN. CODE § 30-151-530 (permits for flashing school speed limit signs). Other regulations concern land uses with direct or indirect impact to the roadways, including the physical integrity of roadways. See, e.g., 24 VA. ADMIN. CODE §§ 30-151-300 to -430 (permits for utilities, including the placement of utilities under or over the pavement); 24 VA. ADMIN. CODE § 30-151-540 (permits for right-of-way grading).

<sup>20</sup> 24 VA. ADMIN. CODE § 30 (emphasis added). As a regulation interpreting the agency’s governing statutes, this determination is entitled to great weight. *Manassas Autocars*, 274 Va. at 87.

<sup>21</sup> VA. CODE ANN. § 33.2-210(A).

<sup>22</sup> The maxim *noscitur a sociis*, which translates as “it is known from its associates,” also applies here. It provides that “the meaning of a word takes color and expression from the purport of the entire phrase of which it is a part, and it must be read in harmony with its context.” *Turner v. Commonwealth*, 226 Va. 456, 460 (1983). Accordingly, “[w]hen general words and specific words are grouped together, the general words are limited and qualified by the specific words and will be construed to embrace only objects similar in nature to those objects identified by the specific words.” *Cuccinelli v. Rector & Visitors of Univ. of Virginia*, 283 Va. 420, 432 (2012) (quoting *Andrews v. Ring*, 266 Va. 311, 319 (2003)). The language of § 33.2-210 authorizing regulations “for the use of systems of state highways” thus must be read in light of the more limited language of the statute permitting regulations “protect[ing] or covering traffic.” Such a reading conveys that activity that does not implicate travel and transportation uses is beyond CTB’s powers.

<sup>23</sup> As “one body of law,” the Virginia Code is to be viewed as a whole, and a statute should be interpreted so that it harmonizes with other statutes. 2004 Op. Va. Att’y Gen. 68, 70 (quoting *Branch v. Commonwealth*, 14 Va. App. 836, 839 (1992)).

<sup>24</sup> VA. CODE ANN. §§ 15.2-968.1(E) (2018); 46.2-819.1 (Supp. 2022); see also §§ 33.2-503(2)(a) (Supp. 2022) (providing for photo enforcement of HOT lanes) and 46.2-819.5 (Supp. 2022) (providing for use of a photo-monitoring system along the Dulles Access Highway).

“video-monitoring system[s]” to enforce traffic laws related to school bus safety<sup>25</sup> and “photo speed monitoring devices” to record speeding violations in highway work zones and school crossing zones.<sup>26</sup> By definition, these monitoring systems and devices are similar in function to LPR cameras. The statutes authorizing the use of this equipment are very detailed. That the General Assembly has set forth these uses with such particularity implies an intent that they not be done otherwise; *i.e.*, through an agency’s regulatory action.<sup>27</sup> Accordingly, this express legislation governing, in particularized circumstances, the use of LPR-similar technology within the state highway system supports a finding that general authority to permit their use has not been delegated to the CTB and such authority remains solely vested in the General Assembly.<sup>28</sup>

In sum, I conclude that, although the CTB regulates many uses on VDOT rights-of-way, at present it may not use its regulatory power to permit the installation of LPR systems therein without a clear delegation of authority from the General Assembly. Regulations are designed “to provide for specific applications of the broader policy concerns addressed in legislation passed by the General Assembly.”<sup>29</sup> To the extent that the CTB is to regulate such surveillance equipment, it must be with the express authority of the General Assembly.<sup>30</sup>

It is not lost on the Office of the Attorney General that the practical applications of LPR technology may be incredibly useful for law enforcement. It is clear that LPR technology has the potential to allow law enforcement agencies more rapidly to solve crimes; apprehend dangerous fugitives; recover stolen property; or locate missing persons, especially when used in conjunction with AMBER or Silver Alert. Nevertheless, equally evident is that approving and adopting a framework for using LPR technology remains squarely within the purview of the General Assembly, and neither this Office, nor an administrative agency may encroach upon the General Assembly’s authority in the present matter.<sup>31</sup>

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<sup>25</sup> VA. CODE ANN. § 46.2-844 (Supp. 2022).

<sup>26</sup> Section 46.2-882.1 (Supp. 2022). *See* 2022 Op. Va. Att’y Gen. 22-014 (Aug. 15, 2022) (relating to VDOT permitting of such devices in light of express statutory authority providing for their use in particular circumstances), *available at* <https://www.oag.state.va.us/files/Opinions/2022/22-014-Foster-issued.pdf>.

<sup>27</sup> 2014 Op. Va. Att’y Gen. 34, 37, n.20; 1993 Op. Va. Att’y Gen. 59, 67 (citing *Pine v. Commonwealth*, 121 Va. 812, 821 (1917); 1991 Op. Va. Att’y Gen. 91, 93). Furthermore, the legislature is presumed to have intended each enactment to have a meaning that is consistent with other provisions of the law and that is not superfluous, but part of a harmonious and symmetrical whole. 2001 Op. Va. Att’y Gen. 192, 193 (citing *Sch. Bd. v. Patterson*, 111 Va. 482, 487-88 (1910)).

<sup>28</sup> Notably, these enactments themselves are limited to enforcing laws relating to traffic concerns and do not pertain to law enforcement generally. I further note that the General Assembly on many occasions has considered legislation concerning the use of LPR technology. *See, e.g.*, S.B. 1198 (2021 Reg. Sess.); H.B. 1657 (2017 Reg. Sess.); S.B. 236 (2017 Reg. Sess.); H.B. 141 (2016 Reg. Sess.); S.B. 236 (2016 Reg. Sess.); H.B. 1528 (2015 Reg. Sess.); H.B. 1673 (2015 Reg. Sess.); S.B. 965 (2015 Reg. Sess.); S.B. 452 (2014 Reg. Sess.). That the General Assembly often has taken up the issue of LPRs suggests that it believes this is an issue left to the legislature, and outside the purview of an administrative agency.

<sup>29</sup> 2014 Op. Va. Att’y Gen. at 43.

<sup>30</sup> *See* *Portsmouth v. Va. Ry. & P. Co.*, 141 Va. 54, 68 (1925) (“It may be that in the evolution of transportation problems the time has come when the State should, for the public interest, empower the [State Corporation Commission] to relieve some of the street railway companies from some of their paving obligations, but for this relief the appeal must be made to the General Assembly. Neither the Commission nor the court has been vested with this sovereign legislative power, and cannot make but can only declare the law.”).

<sup>31</sup> *See* *Ours Props., Inc. v. Ley*, 198 Va. 848, 851-52 (1957); *Thompson v. Smith*, 155 Va. 367, 381 (1930).

**Conclusion**

For the foregoing reasons, it is my opinion that the Commonwealth Transportation Board lacks the authority to amend its land use permit regulations to authorize a land use permit to be issued for license plate readers within the Commonwealth.

With regards, I am,

Very truly yours,

A handwritten signature in blue ink, appearing to read "Jason S. Miyares", is written over a horizontal line.

Jason S. Miyares  
Attorney General