TO THE HONORABLE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT OF VIRGINIA:

The Local Government Attorneys of Virginia, Inc. (the "LGA") the Commissioners of the Revenue Association of Virginia ("Commissioners of the Revenue"), the Treasurers' Association of Virginia ("Treasurers' Association"), and the Virginia Municipal League ("VML"), by counsel, submit this brief *amicus curiae* in support of Appellant in this matter, the City of Lynchburg, Virginia ("Lynchburg").

I. Interests of the *Amici Curiae*

The LGA is a nonprofit professional corporation created to promote the continuing legal education of local government attorneys, furnish information to local government attorneys and their offices that will enable them to better perform their functions, offer a forum through which LGA members may meet and exchange ideas of import to Virginia local government attorneys, and initiate, support, or oppose legislation and litigation that, in the judgment of the LGA, is significant to Virginia local governments. The LGA was founded in 1975, and its members represent 71 counties, 39 cities, and 55 towns of the Commonwealth. The Virginia General Assembly and agencies of the Commonwealth regularly ask the LGA to offer legal advice on matters of state policy and to recommend

knowledgeable attorneys to serve on legislative study committees and commissions.

The Commissioners of the Revenue Association of Virginia is dedicated to the improvement of local tax assessments in Virginia. Its members serve their constituents in a tireless effort to fairly and accurately assess property and taxes. The Commissioners of the Revenue Association of Virginia was formed in 1937 out of the desire of Commissioners to associate themselves to promote a common understanding of the problems faced in the assessment of taxes and the administration of revenue laws. The Association encourages cooperation with various departments in state government that have a direct relationship to the Commissioner's office. Various committees within the Association work to promote the education of members and to study tax issues and make constructive recommendation for changes in tax law that will benefit taxpayers and localities.

The Treasurers' Association of Virginia was formed in 1930 as a voluntary association of Virginia's local government treasurers, who are charged by the Constitution and Code of Virginia with collecting taxes for Virginia's localities, to represent and support their interests and the interests of the localities they were elected or appointed to serve. The

Treasurers' Association presently consists of the local government treasurers and directors of finance from approximately 180 member cities, counties, and towns from throughout the Commonwealth.

The VML is an association of political subdivisions of the Commonwealth, currently consisting of 39 cities, 155 towns, and 12 urban counties, formed and maintained pursuant to § 15.2-1301 of the Code of Virginia for the purpose of promoting the interest and welfare of its members as may be necessary or beneficial. VML is an instrumentality of its member political subdivisions.

As an organization of attorneys who are charged with the responsibility of protecting the legal interests of Virginia's local governments, the LGA is well qualified to recognize matters of general importance impacting local government law that may be presented to this Court. Similarly, the VML is uniquely qualified to express the interests of municipalities throughout Virginia with respect to matters of common concern that come before this Court. The Commissioners of the Revenue and Treasurers' Association are uniquely qualified to express the interests of local taxing officials throughout Virginia with respect to matters of common concern that come before this Court. The LGA, the Commissioners of the Revenue, the Treasurers' Association and the VML

therefore are well situated to provide assistance to the Court with respect to local government issues that may impact not only the present litigants but all Virginia local governments and their citizens. The LGA, Commissioners of the Revenue, Treasurers' Association and VML have previously filed *amicus curiae* briefs or letters of support in cases before this Court that implicate issues of special importance to Virginia's local governments.

II. Preliminary Statement

According to a survey conducted by an expert witness for the City of Lynchburg, the overwhelming majority of localities surveyed (30 out of 33) levy on and collect business license taxes from contractors in the same manner as Lynchburg did in the case at bar.

The language of Virginia Code Section 58.1-3715 is plain and unambiguous. It provides that if a contractor has a principal office in a locality and does business in other localities, the locality where the principal office is located may collect business license taxes from the contractor on all gross receipts, with a deduction for the amount of business done in other counties, cities or towns where a license tax has been paid.

Likewise, Virginia Code Section 58.1-3703.1(A)(3)(a)(1) is clear. Unless a contractor is subject to section 58.1-3715, i.e. has a principal

office in a locality that levies license taxes, then a contractor should be taxed at the definite place of business at which his services are performed, or if none, at the definite place of business from which his services are directed or controlled.

The circuit court below read section 58.1-3703.1(A)(3)(a)(1) in such a way as to conflict with 58.1-3715 and render it nearly meaningless. This Court has held that statutes which address parts of the same subject should be harmonized where possible.

For this reason, the *amici curiae* herein join in requesting that the Supreme Court reverse the circuit court's holding.

III. Statement of the Case

The LGA, Commissioners of the Revenue Association, Treasurers' Association and Virginia Municipal League adopt the Statement of the Case submitted by the City of Lynchburg in its Brief of Appellant.

IV. Statement of Facts

The LGA, Commissioners of the Revenue Association, Treasurers' Association and Virginia Municipal League adopt the Statement of Facts submitted by the City of Lynchburg in its Brief of Appellant.

V. Standard of Review

The LGA, Commissioners of the Revenue Association, Treasurers' Association and Virginia Municipal League adopt the statement setting forth the appropriate Standard of Review submitted by the City of Lynchburg in its Brief of Appellant.

VI. Argument

The LGA, Commissioners of the Revenue Association, Treasurers' Association and Virginia Municipal League urge this Court to reverse the circuit court's decision in these cases for the following reasons:

A. A Substantial Number of Virginia Localities and Taxing Officials Levy the BPOL Tax on Contractors in the Same Manner and Method used by the City of Lynchburg

In connection with this litigation, the Commissioner of Revenue for the City of Lynchburg, Mitchell Nuckles (the "Commissioner"), surveyed other localities to determine whether their assessment practices in the factual circumstances presented here were consistent with the practice of the Lynchburg Commissioner's Office. The Commissioner conducted a survey of all cities with a population of more than 25,000 and counties that have a business license tax and a population of more than 50,000. The Commissioner limited the scope of the survey to larger localities to ensure the locality would have contractors with a principal office in the locality.

Before contacting other localities, the Commissioner prepared a standard form to ensure that he asked each locality the same questions. The Commissioner's Office then contacted each of the localities by telephone and asked the appropriate official the questions on the survey form. After conducting the telephone survey, the Commissioner sent each locality a copy of the completed survey form and asked the appropriate local official to sign the form verifying the accuracy of the information.

The survey showed that Lynchburg's assessment of license taxes on contractors is consistent with the practices of the overwhelming majority of localities surveyed. *See* explanation of the survey's methodology, a blank survey form, and a summary of the survey results attached to this Brief as Exhibit 1.

The construction of a statute by the public official charged with its administration is entitled to great weight. *County of Henrico v. Mgt. Rec., Inc.,* 221 Va. 1004, 1010, 277 S.E.2d 163, 166 (1981) (citing *Virginia Dept. of Taxation v. Progressive Comm. Club*, 215 Va. 732, 739, 213 S.E.2d 759, 763 (1975)). In this case, of the thirty-three larger localities in the Commonwealth imposing a business license tax on contractors, thirty of the local taxing officials charged with the administration of such tax levy and collect the tax in the manner as the City of Lynchburg. Moreover, the

Virginia Tax Commissioner concurs in the method used by those thirty local taxing officials. *See* P.D. 97-396 (J.A. 185) discussed in more detail below in Section B.

B. The language of Virginia Code Section 58.1-3715 is plain and unambiguous and supports the manner by which business license taxes on contractors are levied and collected by an overwhelming number of localities in the Commonwealth where a contractor's principal office is located.

Virginia Code Section 58.1-3715(A) provides in pertinent part:

> When a contractor has paid any local license tax required by the county, city or town in which his principal office and any branch office or offices may be located, no further license or license tax shall be required by any other county, city or town for conducting any such business within the confines of this Commonwealth. However, when the amount of business done by any such contractor in any other county, city or town exceeds the sum of $25,000 in any year, such other county, city or town may require of such contractor a local license, and the amount of business done in such other county, city or town in which a license tax is paid may be deducted by the contractor from the gross revenue reported to the county, city or town in which the principal office or any branch office of the contractor is located.

Va. Code §58.1-3715 (2004 Repl. Vol.). Hence any contractor which has a principal office located in a Virginia county, city or town and which does business in other Virginia localities can by taxed be the locality where the principal office is located on the contractor's gross receipts from all localities, deducting the amount of business done in other localities where

the contractor pays a license tax. In this case, the appellee contractor had a principal office in Lynchburg and did business in other localities. As a result, Lynchburg taxed the contractor on his gross receipts from not only Lynchburg, but from other localities where the contractor did business, permitting the contractor a deduction for license taxes actually paid to other localities where his gross receipts exceeded $25,000.

The language of Section 58.1-3715(A) is plain and unambiguous. "Where the legislature has used words of a plain and definite import the courts cannot put upon them a construction which amounts to holding the legislature did not mean what it has actually expressed." *City of Winchester v. American Woodmark Corp.*, 250 Va. 451, 457, 464 S.E.2d 148, 152 (1995). In other cases of a plain and unambiguous statute, this Court has said it is not necessary to add language to the statute, as the circuit court did here, in order to ascertain its meaning and applicability. *Tazewell County School Board v. Brown,* 267 Va. 150, 161-162, 591 S.E.2d 671, 676 (2004).

In the instant case, Section 58.1-3715(A) is an exception to the general situs rule for business license taxation of contractors found in Virginia Code Section 58.1-3703.1(A)(3)(a)(1). "A statute applicable to a special or particular state of facts must be treated as an exception to a

general statute so comprehensive in its language as to cover all cases within the purview of the language used. In this way, and no other, can the two statutes be harmonized." *Southern Railway Co. v. Commonwealth,* 124 Va. 36, 56, 97 S.E. 343, 349 (1918). "[W]hen one statute speaks to a subject in a general way and another deals with <u>a part of the same subject</u> in a more specific manner, the two should be harmonized, if possible, and where they conflict, the latter prevails." *Frederick County School Bd. v. Hannah,* 267 Va. 231, 236, 590 S.E.2d 567, 569 (2004) (quoting *Virginia Nat'l Bank v. Harris*, 220 Va. 336, 340, 257 S.E.2d 867, 870 (1979)) (emphasis added).

Section 58.13701 authorizes the Commissioner of the Virginia Department of Taxation, (the " Tax Commissioner") to issue written advisory opinions to interpret the provisions of Virginia Code Title 58.1, Chapter 37 on business license taxes. The Tax Commissioner has applied this Court's position on general versus specific statutes in an advisory opinion on the specific issue at bar:

> The specific situs rule [*in 58.1-3715*] overrides the general situs rule [*in 58.1-3703.1(A)(3)(a)(1)*] when a contractor (1) has a principal office in a Virginia locality, (2) engages in the licensable activity in another locality, and (3) earns gross receipts of $25,000 or more from the local business activity, regardless of the length of time for the activity's completion.

See P.D. 97-396, Va. Dep't of Taxation, September 30, 1997 (emphasis added) (J.A. 185). The Tax Commissioner further stated, "If all of these criteria are <u>not</u> satisfied, <u>*then*</u> the general situs rule applies under Code §58.1-3703.1(A)(3)(a)(1) ." *Id*. (emphasis added).

As noted above, this same practice is implemented by a majority of Virginia localities in which a contractor's principal office is located. The great weight of the state and local public officials applying these statutes weighs in favor of the Lynchburg's method of taxation on contractors.

C. Virginia Code Sections 58.1-3703.1(A)(3)(a)(1) and 58.1-3715 can be read and construed together in order to give full meaning, force and effect to each.

It is an established rule of statutory construction that a court may not "add" words to a plain and unambiguous statute. *Coca-Cola Bottling Co. v. County of Botetourt,* 259 Va. 559, 565, 526 S.E.2d 746, 750 (2000) (citing *City of Winchester v. American Woodmark Corp.*, 250 Va. 451, 457, 464 S.E.2d 148, 152 (1995)).

The problem here is that while the language of Virginia Code Section 58.1-3715 in and of itself is plain and unambiguous, a reading of Section 58.1-3715 in conjunction with Section 58.1-3703.1(A)(3)(a)(1), seems to evoke confusion. Using the circuit court's interpretation, the two statutes are inconsistent, conflicting and/or overlapping with each other.

Specifically, the circuit court's conclusion implicitly adds the words "where such contractor does not perform services at a definite place of business in another locality" to Virginia Code Section 58.1-3715. (J.A. 91, 2nd and 3rd paragraph). Those words simply do not appear in Section 58.1-3715. The language of Section 58.1-3715 contains no reference to the "definite place of business" which is the focal point of Section 58.1-3703.1. Rather, Section 58.1-3715 employs the term "principal office."

By doing this, the circuit court has violated a familiar rule of statutory construction that when a given controversy involves a number of related statutes, they should be read and construed together in order to give full meaning, force, and effect to each. *LZM, Inc. v. Virginia Dept. of Taxation,* 269 Va. 105, 111, 606 S.E.2d 797, 800 (2005) *(citing Ainslie v. Inman*, 265 Va. 347, 353, 577 S.E.2d 246, 249 (2003)).

By reading words into Section 58.1-3715, the circuit court has modified Section 58.1-3715 and has failed to give the statute its full meaning, force and effect as written. In fact, in its written opinion the circuit court made no effort to read and construe Section 58.1-3715 or to read and construe 58.1-3715 and 58.1-3703.1(A)(3)(a)(1) together so as to give meaning and effect to both of them under the statutory scheme. The circuit court based its decision solely on a reading of 58.1-3703.1(A)(3)(a)(1).

According to this Court, the proper interpretation would not allow a court to ignore or add words to either statute. Moreover, such an interpretation focuses on the words used by the General Assembly in enacting these two statutes and their plain meaning, specifically the terms "definite place of business" and "principal office."

When the General Assembly uses two different terms in the same act, it is presumed to mean two different things. *Forst v. Rockingham,* 222 Va. 270, 278, 279 S.E.2d 400, 404 (1981) (citing *Wine v. Commonwealth*, 301 Mass. 451, 457, 17 N.E.2d 545, 548 (1938)). Here the General Assembly used two different terms, "definite place of business" and "principal office," in the business license act. These two terms must be presumed to mean two different things. However, the circuit court and the appellees use them as if they mean the same thing – definite place of business.

The meaning of "definite place of business" is found in the "Definitions" section of the license tax provisions. It is "an office or a location at which occurs a regular and continuous course of dealing for thirty consecutive days or more." *See* Va. Code § 58.1-3700.1. That definition is broad and all-inclusive. "Definite place of business" could

include both a national corporate headquarters and a temporary office in a trailer at a construction site, and everything in between.

By contrast, “principal office” has a much narrower meaning. Although no definition is provided for that term in the “Definitions” section of the license tax provisions, the plain meaning of it is easily ascertainable. According to *Webster's Third New International Dictionary*, “principal” means “most important, consequential, or influential: relegating comparable matters, items or individuals to secondary rank" and "matter or thing of primary importance.” *Webster's Third New Int'l Dictionary* (3d ed. 1993 printing). The “principal office” of a contractor is more specific than the general term “definite place of business” and easily distinguishable from among the various types of offices and locations of a contractor which “definite place of business” might include.

Sections 58.1-3715 and 58.1-3703.1(A)(3)(a)(1) can be read and construed together in order to give full meaning, force, and effect to each if one question is answered. The question in this appeal is when is a contractor “subject to the provisions of § 58.1-3715.”

According to the words of section 58.1-3715, the answer is when the contractor has a principal office in a Virginia county, city or town that levies license taxes on contractors. If the contractor has his principal office in a

county, city or town that does not levy license taxes on contractors, then 58.1-3715 does not apply. If the contractor does not have a principal office in the Commonwealth, then 58.1-3715 would not apply. In those circumstances, the contractor should be taxed on the gross receipts from one or more of the contractor's definite places of business where he performs services, in accordance with Section 58.1-3703.1(A)(3)(a)(1).

Following the principles enunciated by this Court in *Southern Railway Co. v. Commonwealth* and *Frederick County School Bd. v. Hannah* (discussed above) regarding harmonization of statutes, this construction of the two statutes avoids the tortured interpretation applied by the circuit court and construes both statutes so that they do not overlap or conflict.

D. The circuit court's reading and analysis of Virginia Code Sections 58.1-3703.1(A)(3)(a)(1) and 58.1-3715 is incorrect because it creates a conflict between the statutes.

The circuit court's holding regarding the antecedent clause must be reversed in order to give full effect and meaning to section 58.1-3715, specifically the underlined part of the statute highlighted below:

> When a contractor has paid any local license tax required by the county, city or town in which his principal office and any branch office or offices may be located, **no further license or license tax shall be required by any other county, city or town for conducting any such business within the confines of this Commonwealth**. However, when the amount of business done by any such contractor in any other county, city or town exceeds the sum of $25,000 in any year, such other

> county, city or town may require of such contractor a local license, and the amount of business done in such other county, city or town in which a license tax is paid may be deducted by the contractor from the gross revenue reported to the county, city or town in which the principal office or any branch office of the contractor is located.

Va. Code §58.1-3715 (2004 Repl. Vol.)

Under Section 58.1-3715, when a contractor pays license taxes in the county, city or town where his principal office is located, no other county, city or town can impose a license tax on the contractor, except where the amount of business done by the contractor exceeds $25,000. However, the circuit court's reading of Section 58.1-3703.1(A)(3)(a)(1) renders that portion of 58.1-3715 inoperative.

The circuit court held that the phrase "unless the contractor is subject to the provisions of § 58.1-3715" qualifies only the antecedent clause [of 58.1-3703.1(A)(3)(a)(1)](shown below underlined) but does not qualify the first part of the statute (shown below italicized)

> The gross receipts of a contractor shall be attributed to *the definite place of business at which his services are performed*, or <u>if his services are not performed at any definite place of business, then the definite place of business from which his services are directed or controlled</u>, unless the contractor is subject to the provisions of § 58.1-3715.

Va. Code §58.1-3703.1(A)(3)(a)(1) (2004 Repl. Vol.) (J.A. 91, last paragraph). The circuit court's reading conflicts with the part of 58.1-3715

stating that if the contractor pays license taxes where his principal office in located, then the contractor does not pay license taxes in any other county, city or town, except where the amount of business he does exceeds $25,000. In other words, if a contractor is subject to 58.1-3715, then no other locality can require him to pay license taxes, even if he has a definite place of business in that locality, unless the contractor's business exceeds $25,000. But that would contradict the portion of 58.1-3703.1(A)(3)(a)(1) that states that a contractor is taxable in the localities wherever he has a "definite place of business at which his services are performed," without regard to the amount of business he does.

According to the rules of statutory construction as established by this Court, if a contractor is subject to 58.1-3715, then no part of 58.1-3703.1(A)(3)(a)(1) is operative. "[W]hen one statute speaks to a subject in a general way and another deals with <u>a part of the same subject</u> in a more specific manner, the two should be harmonized, if possible, and where they conflict, the latter prevails." *Frederick County School Bd. v. Hannah,* 267 Va. 231, 236, 590 S.E.2d 567, 569 (2004) (emphasis added). If the circuit court's reading were correct, then 58.1-3715 and 58.1-3703.1(A)(3)(a)(1) would conflict and the more specific statute (58.1-3715) would prevail. In the alternative, to harmonize the two statutes, the

phrase in 58.1-3703.1(A)(3)(a)(1) “unless the contractor is subject to the provisions of § 58.1-3715” must qualify and apply to all of 58.1-3703.1(A)(3)(a)(1) so that no part of section 58.1-3703.1(A)(3)(a)(1) conflicts with 58.1-3715. In other words, if 58.1-3715 is applicable to a contractor, then the "definite place of business" concept which is in 58.1-3703.1 A)(3)(a)(1), but not in 58.1-3715, has no applicability.

Further, the circuit court’s interpretation of 58.1-3703.1(A)(3)(a)(1) created a conflict or inconsistency in the application of the two statutes, but the court failed to properly resolve that conflict. Where from a plain reading of several related statutes there appears an inconsistency or conflict, this Court has provided the proper analysis. In approaching how to resolve a conflict between two statutes, the Court in *Moore v. Commonwealth,* 155 Va. 1, 155 S.E. 635 (1930) cited this language from *Golden Valley County v. Lundin*, 203 N.W. 317, 319 (N.D. 1925):

> The legislative intention must primarily be determined from the language of the statute. And if the language is plain, certain and unambiguous, so that no doubt arises from its own terms as to its meaning, then there is no room for interpretation, and the statute must be given effect according to its terms. But the legislative intention must be sought <u>from the whole act, and not merely from certain parts of it</u>; and where certain provisions of an act are inconsistent with other provisions of the same act, then it becomes incumbent upon the courts to determine which must prevail in order to carry out the legislative purpose and intention.

Moore, 155 Va. at 11-12, 155 S.E. at 638; *accord Boynton v. Kilgore,* 271 Va. 220, 229-230, 623 S.E.2d 922, 927 (2006); *Ainslie*, 265 Va. at 353,577 S.E.2d at 249 (emphasis added).

The circuit court's interpretation failed to determine the legislative intent from the whole act governing license taxes on contractors. Rather the court focused only on 58.1-3703.1(A)(3)(a)(1) to render its decision. Further, the circuit court failed to analyze whether the provisions of the two statutes are inconsistent when read together (without adding words to either statute by implication). In fact, the circuit court's opinion did not in any way analyze the meaning of Section 58.1-3715. Consequently, the circuit court failed to ascertain and carry out the General Assembly's purpose and intent.

Moreover, the circuit court's analysis contradicts in part the General Assembly's purpose and intent in enacting 58.1-3715. In studying how to amend the business license statutes to create a more uniform business license taxing system throughout the Commonwealth, the General Assembly offered this Comment to Section 58.1-3703.1:

> The situs and apportionment rules in this section, together with the amendments to § 58.1-3708 and the repeal of § 58.1-3707, create uniform rules for all businesses and professions. Gross receipts must be attributed to a definite place of business. The draft repeals language in § 58.1-3708 allowing a locality to tax gross receipts of an out-of-state business if it has no definite

> place of business anywhere in Virginia. It has also been the practice in a few localities to tax gross receipts that may properly be attributable to another locality if that locality did not impose a BPOL tax; this "throwback" practice is eliminated *(except for contractors subject to § 58.1-3715)*.

Report of the Joint Subcommittee Studying the Business, Professional, and Occupation License Tax, House Document No. 59 (1995) (emphasis added) (J.A. 173).

The language in the italicized parenthetical indicates that the General Assembly *intended* for localities to tax a contractor's gross receipts that may be attributable to another locality if that locality did not impose a license tax. Contrary to the principle stated in the legislative history, the circuit court held that Lynchburg could not tax English's revenue from projects in other localities. (J.A. 91). Therefore, the circuit court's analysis was incomplete and incorrect in that it made no attempt to read and construe Section 58.1-3715, individually or together with Section 58.1-3703.1(A)(3)(a)(1), and it failed to attempt to ascertain the General Assembly's purpose and intent in enacting the statutes or to resolve the conflict created by its own interpretation of the two statutes.

CONCLUSION

By issuing an opinion at odds with the plain and unambiguous language of Virginia Code Section 58.1-3715, with this Court's rules for statutory construction and determining legislative purpose and intent; with

the legislature's stated intent in enacting Sections 58.1-3715 and 58.1-3703.1(A)(3)(a)(1); and with the administrative policies of the Tax Commissioner and taxing officials throughout the state, the circuit court has created an environment for innumerable assessment challenges across the Commonwealth. Accordingly, the Local Government Attorneys of Virginia, Inc., Commissioners of the Revenue Association of Virginia, the Treasurers' Association of Virginia and the Virginia Municipal League respectfully urge this Court to reverse the circuit court's holding and find that the City of Lynchburg correctly applied Sections 58.1-3715 and 58.1-3703.1(A)(3)(a)(1).

LOCAL GOVERNMENT ATTORNEYS OF VIRGINIA, INC.

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CERTIFICATE OF SERVICE

Pursuant to Rule 5:26(d) of the Rules of the Supreme Court of Virginia, I certify that this 15th day of December, 2008, twelve copies of the foregoing Brief *Amici Curiae* were filed with the Clerk of the Supreme Court of Virginia by hand and an electronic copy was e-mailed, and that three copies each were mailed by first class mail, postage prepaid, to counsel for the Appellant:

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