



COMMONWEALTH of VIRGINIA

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The Honorable G. Glenn Oder
Member, House of Delegates
P.O. Box 6161
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Dear Delegate Oder:

As you know, the Supreme Court of Virginia recognizes that construction of the Constitution and statutes of the Commonwealth by the Attorney General under § 2.2-505 of the *Code of Virginia* "is of the most persuasive character and is entitled to due consideration."¹ The same status and weight, however, is not afforded informal opinions and advice rendered by deputy and assistant attorneys general. The views expressed herein do not constitute an opinion of the Attorney General under the provisions of § 2.2-505. Consequently, this response to your inquiry represents only the individual views of one of the counsel to the Attorney General.²

Issue Presented

You ask whether a water authority, created pursuant to the Virginia Water and Waste Authorities Act, has authority to require developers to pay, per lot or residential unit, a fee which is to be deposited in a dedicated account for the purpose of funding the operation and maintenance of a water system constructed by the developer.

Response

It is my view that the General Assembly authorizes a water authority, created pursuant to the Virginia Water and Waste Authorities Act, to require a developer to pay, per lot or residential unit, a fee which is to be deposited in a dedicated account for use in funding the authority's costs for operating and maintaining a water system constructed by the developer to supply water to each lot/unit.

Background

You advise that it has become apparent over the past several years that the James City Service Authority runs a substantial deficit on the operation and maintenance of independent water systems. The Authority is required to assume the operation and maintenance of independent water systems pursuant to § 19-57(a) of the James City County Code, which provides:

¹Barber v. City of Danville, 149 Va. 418, 424, 141 S.E. 126, 127 (1928); see also City of Va. Beach v. Va. Rest. Ass'n, 231 Va. 130, 135, 341 S.E.2d 198, 201 (1986); Bd. of Supvrs. v. Marshall, 215 Va. 756, 762, 214 S.E.2d 146, 150 (1975).

²See VA. CODE ANN. § 2.2-501 (LexisNexis Repl. Vol. 2001) (permitting Attorney General to appoint such deputy and assistant attorneys general as may be necessary).

If public water is not available, the subdivider of any major subdivision shall construct a central water system including distribution lines, storage, and supply facilities within the subdivision. Central water service shall be extended to all lots within a subdivision, including recreation lots. Upon completion and acceptance of the improvements, the water system, together with all necessary easements and rights-of-way, including the well lot, shall be dedicated to the service authority by deed and an accompanying plat.³

This provision requires a developer of any major development containing six lots or more to install a water system to serve the development and, upon completion of the facility, to turn the water system over to the Authority. The requirement was incorporated into the County Code to promote the health, safety and welfare of the community by

1. ensuring that an adequate water supply with a qualified dependable operator is available for the homes served by the water system, and that an adequate and dependable flow of water is available to provide fire protection;
2. providing a level of protection to the aquifer supporting the James City Service Authority and county efforts to safeguard the groundwater system; and
3. precluding the James City Service Authority and the county from having to incur the expense of retrofitting a neighborhood with a public water system should a private water system or private well fail to serve the development.⁴

You also advise that the James City Service Authority commissioned Municipal Finance and Services Corporation in the fall of 2003 to study the reason behind the substantial deficit being incurred by the Authority for the operation and maintenance of the independent water systems. Municipal Finance confirmed that the operating costs of the six existing independent water systems operated and maintained by the Authority exceed the revenues generated, and that customers served by the central water system subsidize the deficit. In order to address the issue of the deficits, Municipal Finance recommends charging a \$4,000 fee per lot or residential unit for any lots created in the future. The James City Service Authority is to collect such fee prior to accepting by dedication the facilities of the independent system. The fee would be held in an interest-bearing dedicated account and used by the Authority to provide service to independent water systems. You state that the Authority actually begins incurring costs and expenses related to operating such independent systems at the point of accepting by dedication the facilities of the independent systems. Furthermore, developers usually connect residential units to the independent water systems during construction of the units.

Finally, you advise that, should the independent water system be connected to the Authority's central water system, funds held in the dedicated account will be used to pay the construction costs to connect to the system. All funds deposited in the dedicated account will be separate from other Authority funds and used, as needed, to offset maintenance and operating expenses of the independent system.

³JAMES CITY COUNTY, VA., CODE (2001), available at http://www.jccgov.com/resources/county_code/chp19.pdf.

⁴You advise further that, in the late 1970s, James City County incurred significant expense for the construction of water lines to serve the Sandhill neighborhood after the failure of several private wells serving individual homes.

Applicable Law and Discussion

The Virginia Water and Waste Authorities Act, §§ 15.2-5100 through 15.2-5158, concerns the public provision of water and sewer services in the Commonwealth. Section 15.2-5102(A) provides that the governing body of one or more localities may create a water authority, a sewer authority, a sewage disposal authority, a stormwater control authority, a refuse collection and disposal authority, or any combination of these authorities. Section 15.2-5114 details the powers of such authorities and provides:

Each authority is an instrumentality exercising public and essential governmental functions to provide for the public health and welfare, and each such authority may:

....

10. Fix, charge and collect rates, fees and charges for the use of or for the services furnished by or for the benefit from any system operated by the authority. Such rates, fees, rents and charges shall be charged to and collected from any person contracting for the services or the lessee or tenant who uses or occupies any real estate which is served by or benefits from any such system. Water and sewer connection fees established by any authority shall be fair and reasonable. Such fees shall be reviewed by the authority periodically and shall be adjusted, if necessary, to assure that they continue to be fair and reasonable. Nothing herein shall affect existing contracts with bondholders that are in conflict with any of the foregoing provisions[.]

The above language is broad and comprehensive, indicating a clear legislative intent to encompass all uses, services and benefits from all systems operated by an authority. A 1989 opinion of the Attorney General concludes that this specific provision clearly *requires* an authority to charge and collect fees for *all* real estate that is served or benefited by a system of an authority.⁵ The opinion also concludes that this specific statutory provision requires an authority to charge and collect the fees from either the person contracting for the service, or the lessee or tenant of the property, or any combination of these persons.⁶ The General Assembly does not, however, define the term "person" as used in § 15.2-5114(10). The term must, therefore, be given its common, ordinary meaning. The term "person" generally means "[a] human being"; "[a]n entity (such as a corporation) that is recognized by law as having the rights and duties of a human being."⁷ Accordingly, an authority is also required under § 15.2-5114(10) to "charge and collect rates, fees and charges" from any contractor "for the services furnished by or for the benefit from any system operated by the authority," as if such contractor were a "human being."

Section 15.2-5136 also authorizes an authority to fix rates and charges for its services. Section 15.2-5136(A) specifically authorizes a water authority to "fix and revise rates, fees and other charges ... for the use of and for the services furnished or to be furnished by any ... water ... system." Section

⁵1989 Op. Va. Att'y Gen. 135, 136 (interpreting § 15.1-1250(i), predecessor to § 15.2-5114).

⁶*Id.*

⁷*See Anderson v. Commonwealth*, 182 Va. 560, 565-66, 29 S.E.2d 838, 840 (1944) (noting well-recognized meaning of words "listed or assessed" in tax statutes); *Op. Va. Att'y Gen.*: 1997 at 202, 202, *id.* at 72, 73; 1993 at 210, 213.

⁸BLACK'S LAW DICTIONARY 1162 (7th ed. 1999).

15.2-5137(A) provides that, "with concurrence of the locality," connection to an authority's water system shall be mandatory. Additionally, § 15.2-5137(A) provides that "such connections shall be made in accordance with rules and regulations adopted by the authority, which may provide for a reasonable charge for making such a connection." Consistent with the conclusion of the 1989 opinion, it appears from the nature, context, and purpose of these provisions that the General Assembly intends the term "shall," as used in §§ 15.2-5136(A) and 15.2-5137(A), to be treated as mandatory.⁹

Section 15.2-5137(B) provides an exception to the mandatory water connection in § 15.2-5137(A):

[T]hose persons having a domestic supply or source of potable water shall not be required to discontinue the use of such water. However, persons not served by a water supply system, as defined in § 15.2-2149, producing potable water meeting the standards established by the Virginia Department of Health may be required to pay a connection fee, a front footage fee, and a monthly nonuser service charge, ... or any combination of such fees and charges.

Therefore, unless the nonconnecting persons or entities are served by a water supply system as defined in § 15.2-2149,¹⁰ a water authority may impose a connection fee, a front footage fee, and a monthly nonuser service charge or a combination of those charges. Obviously, this exception does not apply to the factual situation you present.

Section 15.2-5136(A) authorizes an authority to "fix and revise rates ... and other charges ..., subject to the provisions of this section, for the use of ... any ... water ... system." Section 15.2-5137(E) provides that "[w]ater ... fees established by any authority shall be fair and reasonable." The General Assembly provides no definition of the term "fair and reasonable" as used in § 15.2-5137(E). A 1976 opinion of the Attorney General responds to a request regarding the standards governing the costs of water and sewer connections.¹¹ The opinion notes that the statute "provides that the connection charge shall be 'reasonable.'"¹² Further, the opinion notes that the predecessor statute to § 15.2-5136

⁹The word "shall" in a statute ordinarily, but not always, implies that its provisions are mandatory. Compare *Schmidt v. City of Richmond*, 206 Va. 211, 217-18, 142 S.E.2d 573, 578 (1965) (holding that statute using "shall" required court to summon nine disinterested freeholders in condemnation case), and *Ladd v. Lamb*, 195 Va. 1031, 1035-37, 81 S.E.2d 756, 759-60 (1954) (holding that statute providing that clerk of court "shall forward" copy of conviction to Department of Motor Vehicles Commissioner within fifteen days is not mandatory but merely directory).

¹⁰Section 15.2-2149 provides that "[a]ny person, including municipal corporations, that proposes to establish a water supply consisting of a well, springs, or other source and the necessary pipes, conduits, mains, pumping stations, and other facilities in connection therewith, to serve or to be capable of serving three or more connections shall notify the State Board of Health and shall notify in writing the governing body of the county in which such water system is to be located and shall appear at a regular meeting thereof and notify such governing body in person."

¹¹1975-1976 Op. Va. Att'y Gen. 423, 424.

¹²*Id.* at 424 (interpreting § 15.1-1261, predecessor to § 15.2-5137).

provides that the aggregate sum of all fees and charges for the use of and for services furnished by any water or sewer system shall provide funds sufficient to defray operating costs, pay the principal of, and the interest on, the revenue bonds as the same shall become due, and provide a margin of safety for making such payments. A reasonable inference, therefore, is that all charges assessed by a sewer and water authority are to be cost-based, although not necessarily limited precisely to actual costs because of the requirement that the funds collected provide a margin of safety for meeting the obligations of the authority.¹³

The General Assembly has taken no action to alter the conclusions of either the 1976 or 1989 opinion. The repeal of §§ 15.1-1250, 15.1-1260 and 15.1-1261 and enactment of §§ 15.2-5114, 15.2-5136 and 15.2-5137 by the 1997 Session of the General Assembly does not affect the pertinent language of these three statutory provisions.¹⁴ The Supreme Court of Virginia has stated that “[t]he legislature is presumed to have had knowledge of the Attorney General’s interpretation of the statutes, and its failure to make corrective amendments evinces legislative acquiescence in the Attorney General’s view.”¹⁵ Clearly, then, an authority is statutorily authorized and, indeed, an authority is required, to charge and collect fees for all real estate that is served by a system operated by the authority. In addition, such fees must be charged to and collected from the person or entity contracting for the service, or the person or entity occupying the real estate that is served by such a system. You indicate the proposed fee is \$4,000. Whether such a fee is “fair and reasonable” is a factual determination specific to each case. You do not ask, and I do not offer a view, on whether the proposed fee is “fair and reasonable.” In any event, Attorneys General have concluded that § 2.2-505, the authorizing statute for official opinions, does not contemplate opinions on matters requiring factual determinations.¹⁶

You describe the fee as being collected prior to the James City Service Authority accepting by dedication the facilities of an independent system. Furthermore, all such collected fees are placed in a separate and dedicated account. The James City Service Authority actually begins to incur costs and expenses related to the operation and maintenance of independent water systems at the point of accepting by dedication the facilities of such water systems. Finally, the developers connect residential units to such water systems almost immediately after the Authority accepts by dedication the facilities of such independent water systems for the purpose of servicing the units under construction by the contractor. It is, therefore, completely reasonable to infer that the developer is either using the services of the James City Service Authority, or obtaining the benefit from an independent system operated by the Authority when hooking the developed property onto the independent system. The General Assembly clearly requires persons owning and occupying residential property to be served by a water supply system producing potable water meeting the standards established by the Department of Health.¹⁷

¹³ *Id.* (interpreting § 15.1-1260, predecessor to § 15.2-5136).

¹⁴ 1997 Va. Acts ch. 587, at 976, 1320-21, 1328-30.

¹⁵ *Richard L. Deal & Assocs., Inc. v. Commonwealth*, 224 Va. 618, 622, 299 S.E.2d 346, 348 (1983).

¹⁶ 2003 Op. Va. Att’y Gen. 03-053, at 28-30 available at <http://www.vaag.com/media%20center/Opinions/2003opins/03-053.htm>.

¹⁷ See VA. CODE ANN. § 15.2-5137(B) (LexisNexis Repl. Vol. 2003).

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Under well-accepted principles of statutory construction, when a statute creates a specific grant of authority, the authority exists only to the extent specifically granted in the statute.¹⁸ The applicable statutes in this matter are §§ 15.2-5100 through 15.2-5158, and specifically §§ 15.2-5114(10), 15.2-5136 and 15.2-5137. "The manifest intention of the legislature, clearly disclosed by its language, must be applied."¹⁹ The water authority, therefore, is authorized to charge only the fees and costs permitted by the General Assembly by the express language used in the Virginia Water and Waste Authorities Act.²⁰ The fee you describe has the attributes of a rate, fee and charge "for the use of or for the services furnished by or for the benefit from any system operated by the authority"²¹ and, further, represents by its nature, context and purpose "other charges ... for the use of ... any ... water ... system"²² of the James City Service Authority.

Conclusion

Therefore, it is my view that the General Assembly does, in fact, authorize the James City Service Authority to charge, per lot or residential unit, a fee which is to be deposited into a dedicated account for use in operating and maintaining independent water systems constructed by developers to provide water service to new lot or residential units. Furthermore, it is my view that the General Assembly has authorized the Authority to dedicate such fee to offset the operating and maintenance costs associated with such water systems.

With kindest regards, I am

Very truly yours,



Stephanie L. Hamlett
Special Counsel to the Attorney General
and Chief of Opinions Section

2:213; 1:210/04-029i

¹⁸See 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47:23 (5th ed. 2000 & Supp. 2003) (explaining maxim, *expressio unius est exclusio alterius*, as applied to statutory interpretation); Op. Va. Att'y Gen.: 1992 at 145, 146; 1989 at 252, 253; 1980-1981 at 209, 209-10.

¹⁹*Barr v. Town & Country Props., Inc.*, 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990) (quoting *Anderson v. Commonwealth*, 182 Va. 560, 566, 29 S.E.2d 838, 841 (1944)), *quoted in* *Sykes v. Commonwealth*, 27 Va. App. 77, 80, 497 S.E.2d 511, 512 (1998).

²⁰"[W]here a [statute] is expressed in plain and unambiguous terms, whether those terms are general or limited, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction." *Town of S. Hill v. Allen*, 177 Va. 154, 165, 12 S.E.2d 770, 774 (1941).

²¹Section 15.2-5114(10) (LexisNexis Repl. Vol. 2003).

²²Section 15.2-5137(A) (LexisNexis Repl. Vol. 2003).