OP. NO. 03-029

COUNTIES, CITIES AND TOWNS: BUDGETS, AUDITS AND REPORTS — FRANCHISES, PUBLIC PROPERTY, UTILITIES.

Authority for town of Warrenton to transfer surplus water and sewer utility funds to town's general fund for construction of recreation center, provided utility is not independent entity.

Mr. James P. Fisher
Town Attorney for the town of Warrenton
June 3, 2003

Issue Presented

You ask whether the town of Warrenton has the authority to use surplus revenues from water and sewer utility fees to fund a portion of the construction costs for a recreation center at the St. Leonard's Farm property. You specifically inquire whether the town is prohibited or restricted in its use of such surplus or whether it may transfer the surplus to the town's general fund for general town expenditures.

Response

It is my opinion that the town of Warrenton has the authority to transfer surplus water and sewer utility funds to the town's general fund for use in constructing a recreation center, provided that such utility is not an independent entity.

Background

You relate that the town of Warrenton's water and sewer fund has accrued substantial surplus revenues that exceed the reserves needed for operating and capital expenses within the reasonably near future.

You explain that the town of Warrenton recently authorized the construction of a recreational center that will serve both the town residents and those in surrounding areas of Fauquier County. The town has acquired the land for the facility; however, the building and related improvements will cost approximately $8 million. The town council may operate the recreational center as a self-supporting operation through the imposition of fees for use of the facility. With respect to the capital costs, the town council desires to obtain approximately $2 million from the utility fund surplus to reduce the debt service.

Applicable Law and Discussion

"It is a frequently recited proposition that a municipality is authorized to perform both 'governmental' and 'proprietary' functions. Governmental functions … are powers and duties to be performed exclusively for the public welfare."[1] Stated another way, a governmental function involves "the exercise of an entity's political, discretionary, or legislative authority."[2] A function is governmental if it is "directly tied to the health, safety, and welfare of the citizens."[3] The regulation of

traffic, or a similar activity intended to protect the general public safety, is a governmental function of a municipality.[4] The routine maintenance of a municipality's streets, however, is a proprietary function.[5]

"[T]he operation of a water department for the purpose of supplying water for domestic and commercial purposes [generally] is a private or proprietary right."[6] "In the performance of a purely proprietary function, a municipality may consider factors of corporate benefit and pecuniary profit."[7] In addition, a municipality generally has no affirmative duty, except that which is undertaken by contract, to furnish water and sewer service to users outside its territorial limits.[8] When a municipal corporation provides utility services outside its territorial limits, it is also performing a proprietary, not a governmental, function.[9]

Section 15.2-2111 authorizes a locality to operate and regulate water and sewer systems. Section 15.2-2111 provides:

> Any locality may exercise its powers to regulate sewage collection, treatment or disposal service and water service notwithstanding any anticompetitive effect. Such regulation may include the establishment of an exclusive service area for any sewage or water system, including a system owned or operated by the locality, the fixing of rates or charges for any sewage or water service, and the prohibition, restriction or regulation of competition between entities providing sewage or water service.
>
> No power herein granted shall alter or amend the powers or the duties of any present or future authority created pursuant to the Virginia Water and Waste Authorities Act (§ 15.2-5100 et seq.) nor confer any right or responsibility upon the governing body of any locality which would supersede or be inconsistent with any of the duties or responsibilities of the State Water Control Board.[10]

Section 15.2-2111 clearly authorizes a locality to regulate sewer or water systems and expressly includes within the locality's power "the fixing of rates or charges for any sewage or water service." A 1997 opinion of the Attorney General concludes that a locality is authorized to establish, operate and maintain water and sewer systems and to fix fees and charges for use of the system.[11] The opinion also notes that, in the absence of a statutory standard for determining charges, the fees and charges fixed by the locality are subject only to the implicit requirement of reasonableness.[12] Furthermore, a 1998 opinion recognizes that a locality, pursuant to the authority extended by § 15.2-2111, may set water rates by regulating the rates of a small water public utility system, subject to the ultimate review of the State Corporation Commission.[13] It is, therefore, clear that the town of Warrenton may set fees and charges for use of a water and sewer utility, subject only to the implicit requirement of reasonableness.[14]

Budgeting is a planning process, required by the General Assembly, by which localities anticipate revenue needs and make decisions about the priority of

programs and level of services to be provided.[15] Budgets adopted by local governing bodies are, therefore, for planning and informative purposes[16] and are statutorily distinguished from appropriations.[17] The appropriations process is the mechanism by which the governing body makes funds available for spending on those programs and operations it plans to support.[18] The local governing body may disburse money only pursuant to an appropriation for a contemplated expenditure.[19] Thus, adoption of a budget that contemplates certain expenditures does not automatically result in the expenditure of money for that purpose.[20] In addition, when a locality develops a surplus in one fiscal year, it may appropriate and expend such surplus funds in the following fiscal year.[21]

In a 1982 opinion, the Attorney General responds to an inquiry regarding whether funds of other independent agencies within a town government, such as the fire department and airport commission, may be transferred to the town's general fund.[22] The opinion concludes that, if the organizations are, in fact, independent entities, such transfers and repayments of funds by agreement would constitute loans to the town, to be repaid from the collection of revenues in the current year.[23] You do not indicate whether the water and sewer utility in the town is an independent entity. Assuming that the water and sewer utility is not an independent entity, I find no prohibition against the transfer of surplus revenues to the town's general fund for use in constructing the recreation center.

Conclusion

Accordingly, it is my opinion that the town of Warrenton has the authority to transfer surplus water and sewer utility funds to the town's general fund for use in constructing a recreation center, provided that such utility is not an independent entity.

[1]City of Va. Beach v. Carmichael Dev. Co., 259 Va. 493, 499, 527 S.E.2d 778, 782 (2000).

[2]Carter v. Chesterfield County Health Comm'n, 259 Va. 588, 591, 527 S.E.2d 783, 785 (2000).

[3]Edwards v. City of Portsmouth, 237 Va. 167, 171, 375 S.E.2d 747, 750 (1989).

[4]*See, e.g.*, Transp., Inc. v. City of Falls Church, 219 Va. 1004, 1006, 254 S.E.2d 62, 64 (1979).

[5]*See, e.g.*, Bialk v. City of Hampton, 242 Va. 56, 58, 405 S.E.2d 619, 620 (1991).

[6]City of Richmond v. Va. Bonded Warehouse Corp., 148 Va. 60, 70, 138 S.E. 503, 506 (1927).

[7]Town of Rocky Mount v. Wenco of Danville, Inc., 256 Va. 316, 320, 506 S.E.2d 17, 20 (1998) (citing *Bialk*, 242 Va. at 59, 405 S.E.2d at 621; Fenon v. City of Norfolk, 203 Va. 551, 556, 125 S.E.2d 808, 812 (1962); Hoggard v. City of Richmond, 172 Va. 145, 150, 200 S.E. 610, 612 (1939)).

[8]*See* Light v. City of Danville, 168 Va. 181, 204-05, 190 S.E. 276, 285 (1937); Bd. of Supvrs. v. City of Richmond, 162 Va. 14, 24-26, 173 S.E. 356, 360 (1934);

Corp. of Mt. Jackson v. Nelson, 151 Va. 396, 145 S.E. 355 (1928); 11 Eugene McQuillin, The Law of Municipal Corporations § 31.10 (3d ed. 1991).

[9]*See Light*, 168 Va. at 209, 190 S.E. at 287 (citing *Mt. Jackson*, 151 Va. at 404, 145 S.E. at 357); 11 McQuillin § 31.10, *supra* note 8.

[10]*See* Va. Code Ann. tit. 62.1, ch. 3.1, art. 2, §§ 62.1-44.7 to 62.1-44.15:5:2 (Michie Repl. Vol. 2001 & LexisNexis Supp. 2002) (setting forth statutory scheme governing State Water Control Board).

[11]1997 Op. Va. Att'y Gen. 76, 77.

[12]*Id*. at 77.

[13]1998 Op. Va. Att'y Gen. 117, 119 (determining that, when locality fixes amount of increase for public utility under § 15.2-2111, such fee will not control if either affected customers, utility itself, or State Corporation Commission chooses to hold hearing on amount of rate change pursuant to § 56-265.13:6(A), which authorizes Commission to determine amount of fee increase).

[14]In your written opinion, you conclude that the town of Warrenton may set rates that result in net revenue or a profit. Given the implicit requirement of reasonableness in setting fees and charges for the use of a town water and sewer utility, however, it is difficult to discern how the surplus you describe has been accumulated. 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. § 2.2-505(B) (LexisNexis Repl. Vol. 2001).

[15]*See* Va. Code Ann. §§ 15.2-2500 to 15.2-2513 (Michie Repl. Vol. 1997 & LexisNexis Supp. 2002).

[16]*See* §§ 15.2-2503, 15.2-2506 (Michie Repl. Vol. 1997).

[17]*See* § 15.2-2506 (stipulating that, in no event shall budget process "be deemed to be an appropriation"); Op. Va. Att'y Gen.: 1986-1987 at 141, 144; 1982-1983 at 16, 16; 1980-1981 at 9, 10; 1976-1977 at 228, 229.

[18]2000 Op. Va. Att'y Gen. 194, 195.

[19]*See* § 15.2-2506.

[20]Op. Va. Att'y Gen.: 2000, *supra* note 18, at 195; 1999 at 53, 54.

[21]1968-1969 Op. Va. Att'y Gen. 51 (interpreting § 15.1-162, predecessor to § 15.2-2506).

[22]1982-1983 Op. Va. Att'y Gen. 66, 68.

[23]*Id*.

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