

OP. NO. 03-053

**CONSTITUTION OF VIRGINIA: TAXATION AND FINANCE
(EXEMPT PROPERTY).**

TAXATION: TAX EXEMPT PROPERTY.

Whether nonprofit entity is 'benevolent' entity for property tax exemption purposes is factual determination to be made by local governing body, after consideration of attendant facts.

Mr. John H. Tate, Jr.
County Attorney for Smyth County
July 31, 2003

Issue Presented

You ask whether the Smyth County Board of Supervisors may grant tax-exempt status to the Thomas Bridge Water Corporation, a privately held nonprofit corporation providing water service to certain residents of the county, pursuant to Article X, § 6(a)(6) and § 58.1-3651.

Response

It is my opinion that whether a nonprofit entity is a "benevolent" entity for the purposes of Article X, § 6(a)(6) is a factual determination to be made by the local governing body, after a careful consideration of all the attendant facts consistent with the procedures in § 58.1-3651.

Background

You relate that the Thomas Bridge Water Corporation is a public service water system serving approximately 1,407 users in Smyth County. The corporation was chartered in 1965. You advise that although the officers and directors are authorized to receive payment for their services, they receive no compensation other than a fee of \$50 per board meeting. A shareholder's stock in the corporation reverts to the corporation in the event of a sale of the stockholder's property and the stockholder no longer is a personal customer of the corporation.

You relate that Smyth County provides water service to the towns of Marion, Chilhowie, and Saltville. Additionally, the Rye Valley Water Authority serves part of the county, and the local governing bodies control the other water systems in the county. The county does not tax these systems or the locality that operates them.

Applicable Law and Discussion

Pursuant to Article XII, § 1 of the Constitution of Virginia, the 2002 and 2001 Sessions of the General Assembly agreed to an amendment to Article X, § 6(a)(6), relating to property made exempt from taxation "by classification or designation by ... *an ordinance adopted by the local governing body*"¹ "on and after January 1, 2003."² The voters ratified the amendment to § 6(a)(6) at the general election held on November 5, 2002³ ("ratified amendment"). Prior to ratification,⁴ Article X, § 6(a)(6) required that property tax exemptions be granted by "a three-fourths vote ... of the General Assembly."⁵

The ratified amendment to Article X, § 6 provides:

(a) Except as otherwise provided in this Constitution, the following property and no other shall be exempt from taxation, State and local, including inheritance taxes:

....

(6) Property used by its owner for religious, charitable, patriotic, historical, benevolent, cultural, or public park and playground purposes, as may be provided by classification or designation by ~~a three-fourths vote of the members elected to each house of the General Assembly~~ *an ordinance adopted by the local governing body* and subject to such restrictions and conditions as ~~may be prescribed~~ *provided by general law.*^[6]

The 2003 Session of the General Assembly added Article 4.1 in Chapter 36 of Title 58.1, consisting of § 58.1-3651.⁷ Section 58.1-3651(A) limits property tax exemptions to "the real or personal property, or both, owned by a nonprofit organization that uses such property for religious, charitable, patriotic, historical, benevolent, cultural, or public park and playground purposes." Section 58.1-3651(B) establishes certain requirements for notifying the public of a hearing regarding the proposed adoption of an ordinance

exempting property pursuant to subsection A, and sets forth questions to be considered by the local governing body before adopting such an ordinance. Section 58.1-3651(C) provides that "[e]xemptions of property from taxation under this article shall be strictly construed in accordance with Article X, Section 6 (f) of the Constitution of Virginia."

A 1976 opinion of the Attorney General concludes that under § 6(a)(6), the General Assembly could exempt the Thomas Bridge property from local property taxes.⁸ The opinion recognizes the authority of the General Assembly to enact legislation to exempt property used for "charitable or benevolent" purposes.⁹ The power to make such determinations is now vested in the local governing body.¹⁰ Section 58.1-3651 governs the procedures for making such determinations. To the extent, the General Assembly could deem Thomas Bridge a "charitable or benevolent" entity for the purposes of § 6(a)(6), so may the Smyth County Board of Supervisors.

The 1976 opinion recognizes that the General Assembly could deem an organization "benevolent" for the purposes of tax exemption.¹¹ Similarly, local governing bodies are now authorized to make such determinations based on a reasonable definition of the term. Of course, a local governing body may not arbitrarily exercise such discretion and adopt a definition of "benevolent" so broad as to give the word no meaning.¹²

Whether the Thomas Bridge Water Corporation is a benevolent entity for the purposes of § 6(a)(6) is a determination to be made by the Smyth County Board of Supervisors consistent with the procedures in § 58.1-3651. Section 58.1-3651(B)(1)-(8) requires the governing body to consider a series of questions in determining whether to grant an exemption. Nothing in § 58.1-3651 requires a governing body to answer each of the considerations listed in subsection B in the affirmative. Presumably, these factors assist in making the determination whether "[p]roperty [is] used by its owner for religious, charitable, patriotic, historical, benevolent, cultural, or public park and playground purposes."¹³ Such a determination necessarily is fact dependent. After careful consideration of all the attendant facts, should the board of supervisors decide that such an entity meets the definition of "benevolent," it is authorized to grant the tax-exempt status.

For many years, Attorneys General have concluded that § 2.2-505, the authorizing statute for official opinions of the Attorney General, does not contemplate that such opinions be rendered on matters requiring factual determinations, rather than matters interpreting

questions of law.¹⁴ Consequently, I am not authorized to opine on whether the Thomas Bridge Water Corporation is, in fact, a "benevolent" entity for the purposes of § 6(a)(6).

Conclusion

Accordingly, it is my opinion that whether a nonprofit entity is a "benevolent" entity for the purposes of Article X, § 6(a)(6) is a factual determination to be made by the local governing body, after a careful consideration of all the attendant facts consistent with the procedures in § 58.1-3651.

¹2002 Va. Acts chs. 825, 630, at 1999, 2000, 895, 896, respectively; 2001 Va. Acts ch. 786, at 1074, 1075.

²Va. Code Ann. § 58.1-3651(A) (LexisNexis Supp. 2003).

³A "general election" is held "on the Tuesday after the first Monday in November ... for the purpose of filling offices regularly scheduled by law to be filled at those times." Va. Code Ann. § 24.2-101 (LexisNexis Supp. 2003) (defining "general election," as that term is used in Title 24.2, which governs elections held in the Commonwealth).

⁴See 2002 Va. Acts ch. 630, § 1, *supra* note 1, at 896 (directing officers of election to "take the sense of the qualified voters upon the ratification or rejection of the proposed amendment to [Article X, § 6]" at the November 5, 2002 election).

⁵2002 Va. Acts, *supra* note 1, at 2000, 896; 2001 Va. Acts, *supra* note 1, at 1075 (providing for submission to voters of proposed amendment to Article X, § 6(a)(6), replacing language requiring that exemptions be granted by "a three-fourths vote of the members elected to each house of the General Assembly," with "*an ordinance adopted by the local governing body*," subject to restrictions and conditions as "*provided by general law*").

⁶2002 Va. Acts, *supra* note 1, at 1999-2000, 896; 2001 Va. Acts, *supra* note 1, at 1075.

⁷2003 Va. Acts ch. 1032, § 3, available at <http://leg1.state.va.us/cgi-bin/legp504.exe?031+ful+CHAP1032> (declaring that Chapter 1032 "is in force on and after January 1, 2003").

⁸See 1976-1977 Op. Va. Att'y Gen. 277.

⁹*Id.* (citing Va. Const. art. X, § 6(a)(6)).

¹⁰2002 Va. Acts, *supra* note 1, at 2000, 896; 2001 Va. Acts, *supra* note 1, at 1075. (amending Va. Const. art. X, § 6(a)(6)).

¹¹See 1976-1977 Op. Va. Att'y Gen., *supra* note 8, at 277.

¹²The ability of a taxpayer to test the legality of expenditures by a local government is premised on the "'peculiar relation of the corporate taxpayer to the [municipal] corporation' [that] makes the taxpayer's interest in the application of municipal revenues 'direct and immediate.'" *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 613 (1989) (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 486-87 (1923)). Thus, a local taxpayer may have standing to challenge the granting of a tax exemption where such exemption is improperly granted as a procedural or substantive matter. See *generally* *Burk v. Porter*, 222 Va. 795, 284 S.E.2d 602 (1981) (determining that taxpayers had standing to seek in equity accounting and reimbursement of expenditures from members of county board of supervisors for allegedly unauthorized travel); *Armstrong v. County of Henrico*, 212 Va. 66, 76-77, 182 S.E.2d 35, 43 (1971) (determining that taxpayers had standing to challenge legality of authority delegated by sanitary district to county to impose rates and connection charges for countywide water and sewerage systems); *Gordon v. Bd. of Supvrs.*, 207 Va. 827, 153 S.E.2d 270 (1967) (determining that taxpayer landowners' had right to test legality of authority of county board of supervisors to lend money to airport authority for costs preliminary to construction of airport); *Appalachian Elec. Power Co. v. Town of Galax*, 173 Va. 329, 4 S.E.2d 390 (1939) (determining that taxpayers had standing to resort to equity to prevent allegedly illegal issuance of local bonds to finance construction of electric generating plant). *Cf.* *Sauer v. Monroe*, 171 Va. 421, 199 S.E. 487 (1938) (determining that taxpayer, who has suffered no special damage, may not sue on behalf of municipality to recover money he contends has been illegally disbursed, without first requesting proper authorities to sue or showing that such request would have been unavailing).

¹³Va. Const. art. X, § 6(a)(6).

¹⁴See 2001 Op. Va. Att'y Gen. 73, 74; see also Op. Va. Att'y Gen.: 1999 at 132, 132; 1986-1987 at 1, 6 (interpreting former § 2.1-118, recodified at § 2.2-505); accord 1991 Op. Va. Att'y Gen. 122, 124.