

**OP. NO. 04-095**

**TAXATION: PAYMENTS IN LIEU OF REAL PROPERTY TAXATION —  
TAXATION OF PUBLIC SERVICE CORPORATIONS.**

**COUNTIES, CITIES AND TOWNS: ELECTRIC AUTHORITIES ACT.**

**No authority for county to receive payment of service fee in lieu of property and other taxes unless entity is tax-exempt. County may only negotiate arrangement pursuant to Electric Authorities Act for defined 'authority.' No authority for county to arrange continuous stream of payments in lieu of local taxes from commercial entity; no arrangement for General Assembly to modify or abrogate.**

Ms. Melissa Ann Dowd  
Highland County Attorney  
April 4, 2005

**Issues Presented**

You ask whether an entity must be tax-exempt in order for a Virginia county to be able to negotiate an arrangement with that entity to pay the county a "service charge" in lieu of payment of local property and other taxes. You also inquire whether §§ 15.2-5423 and 58.1-3400 are the only statutes that would permit a locality to negotiate an arrangement with an entity to insure a fixed and continuing stream of revenue in lieu of taxes. Finally, you inquire whether a county may negotiate with a private for-profit entity to receive payments in lieu of local property and other taxes, and whether the General Assembly may, by subsequent legislation, modify or abrogate such an arrangement.

**Response**

It is my opinion that a county does not have the authority to negotiate an arrangement for payment of a service fee in lieu of property and other taxes unless the entity is tax-exempt. It is further my opinion that a county may only negotiate an arrangement pursuant to the Electric Authorities Act<sup>1</sup> for entities defined therein as an "authority." Finally, it is my opinion that there is no authority for a county to enter into an arrangement that would guarantee the county a continuous stream of payments in lieu of local taxes from a commercial entity. Therefore, there can be no potential arrangement subject for the General Assembly to modify or abrogate.

**Background**

You relate that Highland New Wind Development, LLC (the "company") leases certain private property on Allegheny Mountain, on the western border of Highland County for the first known "wind farm" project in Virginia. The company intends to locate, build and operate a minimum of twenty-two commercial wind turbines and a substation for the transmission of electricity generated by the turbines. The company expects to produce no more than thirty-nine megawatts of

electricity to be transmitted on an existing 69kv line in the County and the electricity will be added to the existing power grid.

You also advise that Highland County's taxing officials have determined that the company is not tax-exempt and will not be classified as an "authority"<sup>2</sup> under the Electric Authorities Act. Instead, you state that the Board of Supervisors of Highland County has received a letter from the Virginia State Corporation Commission advising the County that the Commission has tentatively determined that the property of the company will be valued by the Commission for purposes of local property taxation pursuant to § 58.1-2604.<sup>3</sup> As such, the County anticipates receiving real and personal property, as well as utility taxes from the company.

Because this will be the first such project in Virginia,<sup>4</sup> you note that Highland County believes that it is in the best interests of all parties to negotiate a constant amount, character, and continuation of local levies on the company by accepting a stream of "service fees" in lieu of local taxes.

### **Applicable Law and Discussion**

Article X, § 1 of the Virginia Constitution establishes that in Virginia "[a]ll property, *except as hereinafter provided*, shall be taxed. All taxes shall be levied and collected under general laws and shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax."<sup>5</sup> (Emphasis added.) Article X, § 6(a) of the Constitution sets forth a list of properties of certain entities that "shall be exempt from taxation, State and local, including inheritance taxes." Article X, § 6(b), (d)-(e) provides that certain property may be exempt or partially exempt from taxation, including certain real or personal property "used primarily for the purpose of abating or preventing pollution of the atmosphere or waters of the Commonwealth or for the purpose of transferring or storing solar energy."<sup>6</sup> Article X, § 6(f) requires that the exemptions of property from taxation be "strictly construed,"<sup>7</sup> unless the property was tax-exempt prior to the adoption of the present Constitution.<sup>8</sup> Therefore, only the properties specifically listed in § 6 may be relieved of the obligation to pay local property taxes.<sup>9</sup> Commercial wind turbines are not a solar energy source.<sup>10</sup>

The Virginia Constitution recognizes that localities may need to provide certain governmental services to tax-exempt properties. Thus, Article X, § 6(g) provides that "[t]he General Assembly *may by general law* authorize any county, city, town, or regional government to impose a service charge upon the owners of a class or classes of exempt property for services provided by such governments." (Emphasis added.)

Pursuant to the authority in Article X, § 6(g), the General Assembly has enacted the two sections that authorize localities to impose service fees on governmental and other tax-exempt property. The first, § 58.1-3400, provides that localities may impose service fees calculated pursuant to a statutory formula upon the owners of tax-exempt properties with the exception of certain specific properties that are not relevant to your question.<sup>11</sup> You indicate that the company's property is not owned by such a tax-exempt or governmental entity. Thus, it does not fall within the scope of organizations eligible to pay service fees in lieu of taxes under § 58.1-3400.

The second statute, § 15.2-5423, is a variation of the service fees in lieu of local property taxes concept. Section 15.2-5423 is a part of the Electric Authorities Act. The stated intent of that Act is "to authorize the creation of electric authorities *by localities of this Commonwealth, either acting jointly or separately*, in order to provide facilities for the generation and transmission of electric power and energy."<sup>12</sup> These authorities are defined to be "political subdivisions,"<sup>13</sup> and do not include private, for-profit enterprises, such as the company. Although "projects" owned by authorities are exempt from local property taxation, an authority "shall, in lieu of property taxes, pay to any governmental body authorized to levy property taxes, the amount which would be assessed as taxes on real and personal property of a project if such project were otherwise subject to valuation and assessment by the State Corporation Commission, in the same manner as are public utility companies."<sup>14</sup> Indeed, the company is precisely the type of private entity for which the taxes serve as the benchmark for determination of the service fees to be paid by authorities under the Act. Thus, there is no indication that the General Assembly intended anything other than for such companies to be subject to real and personal property taxation by localities.

Accordingly, neither of the two statutes, §§ 58.1-3400 and 15.2-5423, are applicable to the company. While there are other statutes that permit Virginia localities to impose fees in lieu of property taxes, these are applicable only to tax-exempt and governmental entities.<sup>15</sup> I am not aware of a statutory mechanism that would permit Highland County to relieve a for-profit commercial entity, such as the company, from local property and other tax obligations in exchange for payment of a continuous stream of service fees or any other charges payable to the County.<sup>16</sup>

### **Conclusion**

Accordingly, it is my opinion that a county does not have the authority to negotiate an arrangement for payment of a service fee in lieu of property and other taxes unless the entity is tax-exempt. It is further my opinion that a county may only negotiate an arrangement pursuant to the Electric Authorities Act<sup>17</sup> for entities defined therein as an "authority." Finally, it is my opinion that there is no authority for a county to enter into an arrangement that would guarantee the county a continuous stream of payments in lieu of local taxes from a commercial entity. Therefore, there can be no potential arrangement subject for the General Assembly to modify or abrogate.

<sup>1</sup> See Va. Code Ann. § 15.2-5400 to 15.2-5431 (LexisNexis Repl. Vol. 2004).

<sup>2</sup> Section 15.2-5402 defines authority as "a political subdivision and a body politic and corporate created, organized and existing pursuant to the provisions of [Chapter 54], or if the authority is abolished, the board, body, commission, department or officer succeeding to the principal functions thereof or to whom the powers given by this chapter shall be given by law."

<sup>3</sup> The Commission's letter to Highland County references the valuation procedures under §§ 58.1-2604 and 58.1-2606 for local real and tangible personal property of public service corporations. See letter from Robert S. Tucker, Director, Division of Public Service Taxation, State Corporation Commission, to Jerry Rexrode, Chairman, Highland County Board of Supervisors (Jan. 12, 2005) (on file with this Office). Senate Bill 1011 introduced by the 2005 session of the General Assembly, which would amend § 58.1-2606, to provide that generating equipment of "electric suppliers" utilizing wind turbines shall be

taxed at a rate or rates, that when applied to "fair market value," would generate an amount of revenue equal to \$3,000 per megawatt of production capacity, effective on January 1, 2006. See 2005 S.B. 1011, available at <http://leg1.state.va.us/cgi-bin/legp504.exe?051+ful+SB1011>. Senate Bill 1011 was tabled in the Committee on Finance on February 21, 2005. See *id.* at <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=051&typ=bil&val=sb1011>. For purposes of this opinion, I have assumed that the company is a for-profit, commercial public service corporation, classified as an "electric supplier" under § 58.1-2600.

<sup>4</sup>You relate that other states have enacted specific exemptions from local taxation for commercial wind farm projects.

<sup>5</sup>See *DKM Richmond Assocs. v. City of Richmond*, 249 Va. 401, 407, 457 S.E.2d 76, 80 (1995) (noting Commonwealth's general policy of taxing all property); *Commonwealth v. Wellmore Coal Corp.*, 228 Va. 149, 153, 320 S.E.2d 509, 511 (1984) (noting Commonwealth's policy to distribute tax burden uniformly on all property).

<sup>6</sup>Va. Const. art. X, § 6(d).

<sup>7</sup>See *Wellmore Coal Corp.* 228 Va. at 153-54, 320 S.E.2d at 511 (holding that tax exemptions are strictly construed; where there is any doubt, doubt is resolved against exception), *cited in* 1972-1973 Op. Va. Att'y Gen. 444, 445.

<sup>8</sup>See *Manassas Lodge No. 1380 v. County of Prince William*, 218 Va. 220, 223, 237 S.E.2d 102, 105 (1977) (concluding that Article X, § 6(f) prescribes rule of strict construction to apply prospectively to exemptions established or authorized by 1971 Constitution); see also 2004 Op. Va. Att'y Gen. 44, 47 n.6 (forthcoming July 2005), available at <http://www.vaag.com/oagstuff/media%20center/opinions/2004opns/04-002w.htm>.

<sup>9</sup>See 1995 Op. Va. Att'y Gen. 265, 266.

<sup>10</sup>"Sunlight—solar energy—can be used to generate electricity, provide hot water, and to heat, cool, and light buildings." U.S. Dep't of Energy, *Solar Energy Basics*, at [http://www.eere.energy.gov/RE/solar\\_basics.html](http://www.eere.energy.gov/RE/solar_basics.html).

<sup>11</sup>See, e.g., 1971-1972 Op. Va. Att'y Gen. 389, 391 (noting that service charge permitted by § 58-16.2, predecessor to § 58.1-3400, essentially is tax measured by value of property rather than by value of service rendered). Compare 1981-1982 Op. Va. Att'y Gen. 68, 68 (concluding that charge imposed by § 27-2.1 should bear reasonable relationship to actual cost of service rendered; charge bearing absolutely no relationship to actual cost incurred would be absurd and such construction is to be avoided) and 1981-1982 Op. Va. Att'y Gen. 381, 382-83 (noting that liability for service charge is not tax; General Assembly authorized service charge not tax). Section 58.1-3401(C), however, provides that "[i]n no event shall the service charge exceed twenty percent of the real estate tax rate of the county, city or town imposing the service charge."

<sup>12</sup>Section 15.2-5401 (emphasis added).

<sup>13</sup>For purposes of the Electric Authorities Act, "[a]uthority" means a political subdivision and a body politic and corporate created, organized and existing

pursuant to the provisions of this chapter, or if the authority is abolished, the board, body, commission, department or officers succeeding to the principal functions thereof or to whom the powers given by [Chapter 54] shall be given by law." Section 15.2-5402.

<sup>14</sup> See § 15.2-5423.

<sup>15</sup> See, e.g., Va. Code Ann. § 3.1-55 (Michie Repl. Vol. 1994) (authorizing produce market to pay sums in lieu of taxes to city or county); Va. Code Ann. § 36-55.37(3) (LexisNexis Supp. 2004) (providing that Virginia Housing Development Authority may make payments in lieu of taxes consistent with cost of supplying municipal services to housing developments).

<sup>16</sup> See text accompanying note 15. Highland County and the company could, however, enter into an agreement whereby the company might agree to make voluntary payments to the County; however, the consideration cannot be the relief of the company's local property tax obligations. *Cf.* § 36-55.37(3) (providing that Virginia Housing Development Authority may agree to make payments in lieu of taxes consistent with cost of supplying municipal services to and maintaining economic feasibility of housing developments, residential housing, or non housing buildings). While a locality may not exempt a commercial entity from property taxes, there may be more flexibility for instead exempting or partially exempting an entity from certain business taxes so long as constitutional requirements are met. See Va. Const. art. X, § 6(j). I may not, however, offer an opinion in the absence of a definitive proposal. Such an opinion would merely be speculation.

<sup>17</sup> See *supra* note 1.

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