

OP. NO. 05-081

**COUNTIES, CITIES AND TOWNS: VIRGINIA WATER AND WASTE
AUTHORITIES ACT.**

**CONSTITUTION OF VIRGINIA: TAXATION AND FINANCE (TAXES OR
ASSESSMENTS UPON ABUTTING PROPERTY OWNERS).**

**Interpretation of 'abutting property owners' in Virginia Water and Waste
Authorities Act requires some relationship constituting physical
connection between assessed property and financed improvement;
abutting property owners are not necessarily limited to owners of property
with fee simple frontage on improvement.**

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January 9, 2006

Issues Presented

You ask several questions pertaining to the circumstances under which a Virginia local government may levy a special tax or assessment on property within a community development authority district under § 15.2-5158(A)(3), (5). First, you ask whether a landowner who owns tax parcels that are adjacent at some point meets the abutment requirement for all parcels where at least one of the adjacent parcels abuts the financed improvement. Secondly, you ask whether a parcel abuts the financed improvement when it is proximate to the improvement, but physically separated by a public right-of-way, easement, or road. You next ask whether a parcel may be considered to abut such improvement where it is connected to the improvement by an easement.¹ Finally, you ask whether a parcel is considered to abut an infrastructure improvement where the parcel abuts only a portion of the system of infrastructure improvements to be financed.²

Response

It is my opinion that the broad authority granted in the Virginia Water and Waste Authorities Act,³ when read in conjunction with the requirements of Article X, Section 3 of the Constitution of Virginia, supports an interpretation of "abutting property owners" that requires some relationship constituting a physical connection between the assessed property and the financed improvement. It is further my opinion, however, that abutting property owners are not necessarily limited to owners of property with fee simple frontage on the improvement.

Background

You advise that the County of Spotsylvania ("County") has been asked to consider the creation of a community development authority ("authority") under Article 6, Chapter 51 of Title 15.2, §§ 15.2-5152 through 15.2-5158, of the Virginia Water and Waste Authorities Act. You conclude⁴ that Article X, § 3 of the Virginia Constitution provides authority for the General Assembly to authorize localities to impose taxes or assessments on abutting property owners for local

public improvements. You note that § 15.2-5158(A)(3) of the Act authorizes a locality to impose a special ad valorem tax on taxable real property within the authority's jurisdiction, without reference to any requirement of abutment. Further, you note that § 15.2-5158(A)(5) of the Act authorizes the levy of a special assessment on abutting property within an authority's district to finance the services and facilities it provides. You advise that the proposed authority would finance a number of infrastructure improvements consisting primarily of road construction and road and traffic flow improvements by means of a special ad valorem tax or special assessment or some combination of the two revenue sources.

Applicable Law and Discussion

In 1993, the General Assembly amended the Virginia Water and Waste Authorities Act to provide an additional method for localities to finance infrastructure associated with development and redevelopment in an authority district.⁵ In 1997, the General Assembly amended the Act to authorize the creation of community development authorities.⁶ Section 15.2-5158(A)(1) of the Act provides that, in addition to its powers with respect to water, sewer, and storm water facilities under Article 3⁷ of the Act, an authority may "finance, fund, plan, establish, acquire, construct or reconstruct, enlarge, extend, equip, operate, and maintain the infrastructure improvements enumerated in the ordinance or resolution establishing the district, as necessary to meet the increased demands placed upon the locality as a result of development within the district." Section 15.2-5158(A)(1) provides a nonexclusive list of such infrastructure improvements, including:

- a. Roads, bridges, parking facilities, curbs, gutters, sidewalks, traffic signals, storm water management and retention systems, gas and electric lines and street lights within or serving the district
- b. Parks and facilities for indoor and outdoor recreational, cultural and educational uses; entrance areas; security facilities; fencing and landscaping improvements throughout the district.
- c. Fire prevention and control systems, including fire stations, water mains and plugs, fire trucks, rescue vehicles and other vehicles and equipment.
- d. School buildings and related structures

Section 15.2-5158(A)(5) of the Act authorizes an authority to "[f]inance the services and facilities it provides to abutting property within the district by special assessment thereon imposed by the local governing body." Additionally, § 15.2-5158(A)(5) provides that an assessment "may be imposed on abutting land which is later subdivided" as long as the assessment does not "exceed the peculiar benefits of the improvements to the abutting land as subdivided."

Section 15.2-5100 of the Virginia Water and Waste Authorities Act requires that Act "shall be liberally construed to effect the purposes of the [Act]." Article X, § 3 of the Virginia Constitution provides that "[t]he General Assembly by general law may authorize any county, city, town, or regional government to impose taxes or

assessments upon abutting property owners for such local public improvements as may be designated by the General Assembly."

In Virginia, a court of record has not addressed the "abutting" requirement as it pertains to the Virginia Water and Waste Authorities Act.⁸ There are, however, interpretations of such a requirement in the context of other statutes permitting special assessments or taxes.⁹ I also note that the Virginia Constitution contains an additional requirement that a special assessment must not exceed the peculiar benefit to the assessed property of the financed improvements.¹⁰ Much of the existing case law involves a determination of whether the peculiar benefit requirement has been met or whether the imposition is a tax or user fee, which are questions not addressed by this opinion.¹¹

A circuit court case involved a challenge to community development authority financing of various infrastructure improvements to serve a regional retail town center, which consisted of water and sewer improvements, parking, roads, lighting, landscaping, sidewalks, traffic signals and turning lanes.¹² In upholding the financing of a turning lane, the court ruled that "[t]he fact that the left turn lane is across the street from the entrance and does not touch the district is of no consequence. It is necessitated by the creation of the district and is in direct proximity to the district."¹³

The Supreme Court of Virginia specifically has addressed the question of whether property subject to a special assessment abuts the improvement on only one occasion.¹⁴ A property owner successfully challenged the levy of a special assessment against his property to provide a portion of the funds necessary to pay the costs of construction of a state secondary highway pursuant to § 33.1-72.1(C), predecessor to § 33.1-72.1(F)(1).¹⁵ Although the improvements would provide improved access to his property, the landowner's property did not touch any portion of the road being improved.¹⁶ Section 33.1-72.1(F), however, includes specific procedures for levying the assessment and requires written acquiescence from seventy-five percent or more of the owners of platted parcels of land abutting the street and provides a mechanism for allocating the cost based on frontage. The statutory framework found in § 33.1-72.1(F) requires a strict construction of the concept of abutment and is distinguishable from the statutory framework of the Virginia Water and Waste Authorities Act.

A 1980 opinion of the Attorney General has interpreted provisions relating to the assessment of abutting property owners for local public improvements.¹⁷ The 1980 opinion does not discuss the nature of the improvements proposed to be financed, but does discuss the definition of "abutting property."¹⁸ The opinion concludes that the term "abutting property" means property touching, contacting, or bordering and requires an immediate physical connection between the improvement and the property assessed. As in the Virginia Supreme Court case,¹⁹ the statute being interpreted, by its very nature, requires a more restrictive interpretation of abutting property than the Virginia Water and Waste Authorities Act. The improvements authorized to be financed under § 15.2-2404, which governs taxes or assessments for local improvements, are limited to sidewalks, alleys, sanitary or storm water management facilities, retaining walls, curbs and gutters, waterlines, street lights, canopies, lighting, benches, and waste receptacles. The limited nature of these authorized improvements, which of necessity would be located on or adjacent to the assessed property in order for the property to receive any benefit at all, suggests a more restrictive interpretation of abutment. Interestingly, § 15.2-2404 also provides that in the case of street lighting, upon the petition of at least sixty percent of the property

owners in a subdivision, a locality may impose taxes or assessments upon all owners within the subdivision who benefit from such improvements. This appears to be the case regardless of whether they physically abut the improvements.

You first ask where a single landowner owns adjacent tax parcels, which adjoin at some point, whether the abutting requirement is satisfied for all such parcels where at least one of the parcels abuts the financed improvement. Article X, § 3 of the Virginia Constitution refers to abutting property owners, indicating that one must look to the owner and not necessarily at the tax parcels. The Virginia Water and Waste Authorities Act specifically provides for later subdivision of an assessed parcel.²⁰ Thus, it is clear that the intent of the General Assembly is that the assessment is valid with respect to subsequent tax parcels when at the time of assessment there is a single owner. Accordingly, multiple tax parcels owned by a single landowner may all be considered to abut an improvement when at the time the assessment is levied at least one such parcel abuts the improvement, each parcel adjoins another such parcel, and each parcel derives some benefit from the infrastructure improvements. The sale of one or more such adjoining parcels to a different owner after the levy of the assessment will not affect the validity of the assessment as such assessment may be apportioned subsequent to such sale.

Secondly, you ask whether a parcel abuts a financed improvement when it is proximate to the improvement, but physically separated by a public right-of-way, easement, or road. In the context of a road improvement, such as a turning lane or traffic signal, the property that abuts the roadway would be considered abutting the improvement for purposes of the Virginia Water and Waste Authorities Act.²¹ Similarly, one may reasonably conclude that a parcel which can be connected to a water or sewer line without crossing property owned by another property owner is abutting for purposes of the Act, even where the water or sewer line is separated from such parcel by a public road or other right-of-way.²²

You next ask whether a parcel may be considered to abut an improvement where it is connected to the improvement by an easement. You indicate that some of the tax parcels in the proposed authority have access to public roads via an easement across another owner's parcel. An integral part of the value of any such parcel is access to a public road.²³ Where such an easement is necessary for access to public roads, it is part of the property rights of the property owner.²⁴ It is, therefore, reasonable to conclude that the ownership of an easement connecting property to beneficial services such as roads or water service would render the owner of such easement an abutting owner with respect to improvements to which the easement extends. For example, where a road is improved and the easement extends to the road, then the parcel benefited with the right to use the easement for access to and from the road is considered to abut the improvements made to the road.

Finally, you ask whether a parcel is considered to abut an improvement where the parcel abuts only a portion of the improvement. In addition to the powers contained in Article 3 of the Virginia Water and Waste Authorities Act to finance and implement water, sewer, and storm water facilities, § 15.2-5158(A)(1) of the Act contemplates the use of an authority to finance and implement "infrastructure improvements enumerated in the ordinance or resolution establishing the district, as necessary to meet the increased demands placed upon the locality as a result of development within the district." This language evidences an intent to permit the implementation through a community development authority of system-wide

improvements to assist the locality in providing utilities, roads, and other infrastructure to accommodate the development within an authority district. In order to meet the transportation needs of a district, it may be necessary to provide an improved road system consisting of new roadways, widened roads, improved signalization, interchange improvements, and new turning lanes. Similarly, in order to provide water or sewer infrastructure, it may be necessary to finance and construct new pump stations and treatment plants in addition to extended water mains and sewer lines. It would be an anomalous result to conclude that property benefiting from a system of integrated improvements may be assessed only for the portion of the improvement that physically touches the assessed property. Therefore, it is my opinion that property which abuts a portion of a system of improvements may be taxed or assessed under the Act to pay its allocable share of the cost of the entire system of improvements.

Conclusion

Accordingly, it is my opinion that the broad authority granted in the Virginia Water and Waste Authorities Act,²⁵ when read in conjunction with the requirements of Article X, § 3 of the Constitution of Virginia, supports an interpretation of "abutting property owners" that requires some relationship constituting a physical connection between the assessed property and the financed improvement. It is further my opinion, however, that abutting property owners are not necessarily limited to owners of property with fee simple frontage on the improvement.

¹You provide an example stating that the parcel does not front on the road to be improved. Instead, you relate that access to the road is provided via an easement.

²You provide the example of a parcel that abuts a road connecting to a new or improved interchange or a parcel connecting to a utility improvement such as a sewer pump station or water treatment plant. You state, however, that the parcel does not physically touch the pump station or plant.

³See Va. Code Ann. tit. 15.2, ch. 51, §§ 15.2-5100 to 15.2-5158 (2003 & Supp. 2005).

⁴A request by a county 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) (2005).

⁵See 1993 Va. Acts ch. 850, at 1234, 1235-36 (adding § 15.1-1250.03, predecessor to § 15.2-5158, to Virginia Water and Sewer Authorities Act). In 1997, the General Assembly amended and recodified the Virginia Water and Sewer Authorities Act as the Virginia Water and Waste Authorities Act. See 1997 Va. Acts ch. 587, at 976, 1316-35 (adding Chapter 51 of Title 15.2). Title 15.1 was repealed. See *id.*, cl. 13, at 1401.

⁶See 1997 Va. Acts ch. 587, *supra* note 5, at 1333-35 (adding Article 6, Chapter 51, of Title 15.2, §§ 15.2-5152 to 15.2-5158).

⁷See §§ 15.2-5110 to 15.2-5124 (2003 & Supp. 2005).

⁸I note, however, a brief reference in an unpublished decision of the Circuit Court of Henrico County. See *Taubman Regency Square Assocs. v. Bd. of Supvrs.*, No. CH00-1304 (Henrico Cty. Cir. Ct. May 10, 2002).

⁹See, e.g., *Taylor v. Bd. of Supvrs.*, 243 Va. 409, 412, 416 S.E.2d 433, 435 (1992) (interpreting special assessments for adjacent property under certain highway provisions).

¹⁰See Va. Const. art. X, § 3.

¹¹See, e.g., *City of Richmond v. Eubank*, 179 Va. 70, 75, 18 S.E.2d 397, 399-400 (1942) (explaining that purpose of assessment for abutting property owners is that party receiving benefit should bear burden of cost).

¹²See *Taubman Regency Square*, *supra* note 8.

¹³*Id.* at *9.

¹⁴See *Taylor*, 243 Va. at 409, 416 S.E.2d at 433.

¹⁵*Id.* The General Assembly subsequently amended § 33.1-72.1(C) and recodified the pertinent portion at § 33.1-72.1(F)(1). See 2004 Va. Acts ch. 677, at 982, 982-83 (amending and redesignating subsection C as subsections E and F).

¹⁶*Id.* at 411, 416 S.E.2d at 435.

¹⁷See 1980-1981 Op. Va. Att'y Gen. 91 (interpreting §§ 15.1-239 to 15.1-241, predecessor statutes to §§ 15.2-2404 to 15.2-2406 (relating to local government service districts)).

¹⁸See *id.* at 91 (quoting *Webster's New Collegiate Dictionary*).

¹⁹See *Taylor*, 243 Va. at 409, 416 S.E.2d at 433.

²⁰See § 15.2-5158(A)(5) (Supp. 2005).

²¹See *Taubman Regency Square*, *supra* note 8, at *9.

²²*Id.*

²³See *State Highway & Transp. Comm'r v. Linsly*, 223 Va. 437, 443-45, 290 S.E.2d 834, 838-39 (1982) (recognizing value of access to public roads).

²⁴*Id.* at 441, 290 S.E.2d at 837.

²⁵See *supra* note 3.

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