



COMMONWEALTH of VIRGINIA

Office of the Attorney General

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October 31, 2006

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The Honorable Christopher K. Peace
Member, House of Delegates
P.O. Box 819
Mechanicsville, Virginia 23111

Dear Delegate Peace:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issues Presented

You ask several questions concerning a water authority created pursuant to § 15.2-5100. First, you ask whether a water authority is a public entity. Next, you inquire whether the rates a water authority charges and the money it collects for its services are considered public funds. Additionally, you ask whether a water authority may make payments on claims in the absence of any negligence, legal liability, or legal obligation. Further, you inquire whether a water authority has sovereign immunity. If so, you ask whether a water authority may waive immunity by voluntarily paying a claim, regardless of negligence, legal liability, or legal obligations.

Response

It is my opinion that a water authority created pursuant to the Virginia Water and Waste Authorities Act is a public body, specifically, a municipal corporation. It further is my opinion that the funds a water authority receives from rates and fees generally may be considered “public funds.” As a municipal corporation, sovereign immunity shields a water authority from liability for its governmental functions, but not its proprietary functions. It is my opinion that a water authority may make payments on claims related to its proprietary functions, but not claims related to its governmental functions. Finally, it is my opinion that a water authority may waive its immunity for actions related to its governmental functions only when expressly authorized by statute.

Applicable Law and Discussion

I. Public Body

Under the Virginia Water and Waste Authorities Act, §§ 15.2-5100 through 15.2-5158, a water service authority is “a public body politic and corporate”¹ that “exercis[es] public and essential

¹VA. CODE ANN. § 15.2-5102(A) (2003); *see also* 1982-1983 Op. Va. Att’y Gen. 741, 741 (concluding that sewer authority formed under predecessor statutes to Virginia Water and Sewer Authorities Act was “public body” subject to Virginia Public Procurement Act).

governmental functions.”² It is also a municipal corporation. The Supreme Court of Virginia has enunciated a six-part test for determining whether a particular entity is a municipal corporation.³ A water authority properly established under the Act satisfies this test because it: (1) is “a public body politic and corporate”;⁴ (2) was created to serve a public purpose;⁵ (3) can sue and be sued, enter into contracts, and acquire and dispose of personal and real property;⁶ (4) has the power of eminent domain;⁷ (5) can issue bonds to raise revenue;⁸ and (6) has its management vested in a board of directors.⁹

II. Public Funds

The Virginia Water and Waste Authorities Act does not provide a definition of “public funds.” The Virginia Supreme Court, however, generally defines “public funds” as “those moneys belonging to the State or to any city, county or political subdivision of the State,—or more specifically, taxes, customs and moneys raised by the operation of law for the support of the government or for the discharge of its obligations.”¹⁰ Section 15.2-5136(D) authorizes a water service authority to charge “fair and reasonable” fees for the service provided. A 1974 opinion of the Attorney General (“1974 Opinion”) concluded that a water authority appears to be a political subdivision whose funds are public funds.¹¹ Consistent with the 1974 Opinion, it is my opinion that the funds of a municipal water authority appear to fit within the general definition of “public funds.”¹²

III. Power to Make Payments

A water authority has limited power to make payments or disburse funds on claims because it is a creature of statute having only those powers expressly conferred or necessarily implied from the powers expressly conferred.¹³ Since Virginia law expressly confers a water authority with the power to sue and

²Section 15.2-5114 (Supp. 2006).

³*See City of Richmond v. Richmond Metro. Auth.*, 210 Va. 645, 647, 172 S.E.2d 831, 832 (1970). For legal purposes, the Supreme Court of Virginia has also recognized “municipal corporation” as synonymous with “municipality.” *Id.* at 646, 172 S.E.2d at 832.

⁴Section 15.2-5102(A).

⁵Section 15.2-5114.

⁶Sections 15.2-5114(5)–(6), (11)–(12), (14).

⁷Sections 15.2-5114(6).

⁸Sections 15.2-5114(7), (9).

⁹Section 15.2-5113 (2003).

¹⁰*Beckner v. Commonwealth*, 174 Va. 454, 459, 5 S.E.2d 525, 527 (1939); *see also* VA. CODE ANN. § 2.2-4501(A) (2005) (referring to public funds, for purposes of investment, as “any and all moneys belonging to [the Commonwealth, all public officers, municipal corporations, other political subdivisions and all other public bodies of the Commonwealth] or within their control”).

¹¹1974-1975 Op. Va. Att’y Gen. 538, 538.

¹²Other statutes addressing “public funds” indicate that whether moneys are “public funds” may depend on the context in which the phrase is used. For example, § 2.2-802 requires that “[a]ll transactions in public funds ... clear through the Comptroller’s office.”

¹³1985-1986 Op. Va. Att’y Gen. 47, 48.

be sued and to acquire and dispose of personal and real property,¹⁴ it is reasonable to imply that a water authority may also make payments to settle claims related to its proprietary functions. An express finding, whether by a court or otherwise, of negligence, legal liability, or legal obligation is not necessarily required. For example, a “de minimis” payment to resolve a seemingly meritless action may be justified. Since claims related to governmental functions are barred by sovereign immunity, a water authority cannot settle such claims.¹⁵

IV. Sovereign Immunity

The Commonwealth and its agents enjoy sovereign immunity from tort liability to the extent that the Commonwealth has not expressly waived such immunity.¹⁶ Courts historically have held that because of their dual character, municipal corporations enjoy immunity for governmental functions, but not for proprietary functions.¹⁷

While there is no bright line rule that distinguishes governmental from proprietary functions with certainty, guidance may be found in prior court decisions. “A function is governmental if it entails the exercise of an entity’s political, discretionary, or legislative authority.”¹⁸ With respect to a water authority, the Virginia Supreme Court recently held that designing and planning a water system are governmental functions to which sovereign immunity applies.¹⁹ In contrast, a proprietary function, to which sovereign immunity does not apply, is one that primarily is performed for the “private” benefit of the corporation.²⁰ Another factor courts examine is whether the function in question “could as well be performed by private enterprise.”²¹ Additionally, the Virginia Supreme Court has recognized “that acts of negligence in routine maintenance of municipal water supply facilities are nonimmune ministerial acts of a proprietary function.”²² “A characteristic example of a function undertaken by cities and towns in their private or proprietary capacity is the distribution of water to their inhabitants for domestic purposes.”²³

¹⁴Section 15.2-5114(5)-(6).

¹⁵See *infra* Parts IV-V (discussing proprietary and governmental functions as they relate to sovereign immunity).

¹⁶See *Mann v. County Bd.*, 199 Va. 169, 174, 98 S.E.2d 515, 518 (1957); see also *Messina v. Burden*, 228 Va. 301, 307, 321 S.E.2d 657, 660 (1984) (“[T]he doctrine of sovereign immunity is ‘alive and well’ in Virginia.”).

¹⁷See *Bialk v. City of Hampton*, 242 Va. 56, 58, 405 S.E.2d 619, 620 (1991); *Jones v. Williamsburg*, 97 Va. 722, 723-24, 34 S.E. 883, 883 (1900); see also *Taylor v. Newport News*, 214 Va. 9, 10, 197 S.E.2d 209, 210 (1973) (“[W]here governmental and proprietary functions coincide, the governmental function is the overriding factor” and sovereign immunity will apply); see generally 63 C.J.S. *Municipal Corporations* § 664 (1999 & Supp. 2006) (discussing governmental and proprietary powers and functions).

¹⁸*Chesapeake v. Cunningham*, 268 Va. 624, 634, 604 S.E.2d 420, 426 (2004); see also *Niese v. Alexandria*, 264 Va. 230, 239, 564 S.E.2d 127, 132 (2002) (quoting *Edwards v. City of Portsmouth*, 237 Va. 167, 171, 375 S.E.2d 747, 750 (1989)) (“A function is governmental if it is ‘directly tied to the health, safety, and welfare of the citizens’”), quoted in *Gedrich v. Fairfax County*, 282 F. Supp. 2d 439, 474 (2003).

¹⁹*Cunningham*, 268 Va. at 637-40, 604 S.E.2d at 428-30; see also *Stansbury v. City of Richmond*, 116 Va. 205, 207, 81 S.E. 26, 27 (1914).

²⁰*Hoggard v. City of Richmond*, 172 Va. 145, 148-50, 200 S.E. 610, 611-12 (1939).

²¹*Va. Elec. & Power Co. v. Hampton Redev. & Hous. Auth.*, 217 Va. 30, 36, 225 S.E.2d 364, 369 (1976).

²²*Cunningham*, 268 Va. at 636, 604 S.E.2d at 428.

²³*City of Richmond v. Va. Bonded Warehouse Corp.*, 148 Va. 60, 71, 138 S.E. 503, 506 (1927) (quoting “19 R.C.L. 1130”).

Because no bright line rule exists to distinguish between governmental and proprietary functions, whether a specific function of a water authority constitutes a governmental function, to which immunity applies, is a factual determination. The Attorney General refrains from issuing opinions on questions of fact rather than questions of law.²⁴

V. Waiver of Sovereign Immunity

To the extent an entity is entitled to sovereign immunity, there must be clear legislative intent before such immunity may be waived.²⁵ Consent to suit must be explicitly and expressly announced by statute.²⁶ In reviewing the Virginia Water and Waste Authorities Act, I find no such explicit authority to waive immunity.

Although a water authority has the statutory power to “[s]ue and be sued,”²⁷ the Virginia Supreme Court and the Attorney General consistently have interpreted the power to “sue and be sued” or to “contract and be contracted with” insufficient to constitute a waiver of immunity or consent to suit.²⁸ The statutory authorization to “sue and be sued” affords a procedural right only and does not constitute an express statutory waiver of immunity or consent to suit.²⁹

Attorneys General consistently have concluded that a local government has no authority to waive its sovereign immunity in the absence of a statute authorizing such a waiver.³⁰ Further, since the waiver of sovereign immunity is solely within the province of the General Assembly, a state agency or institution is without authority to enter into a contract which purports to accept liability for tort claims.³¹ In examining whether a city could make a voluntary payment for alleged damages related to performance of a governmental function, this Office previously has concluded that such a payment is the same in principle and effect as a waiver of the city’s governmental immunity.³² It may not be done absent specific statutory authority to that effect.³³

Based on the foregoing, it is my opinion that a water authority may not waive immunity by voluntary payment of claims related to governmental functions, regardless of negligence, legal liability, or legal obligation.

²⁴ See, e.g., Op. Va. Att’y Gen.: 2004 at 44, 48 n.16; 2002 at 96, 99 and opinions cited at 101 n.27.

²⁵ 1986-1987 Op. Va. Att’y Gen. 139, 140.

²⁶ *Eriksen v. Anderson*, 195 Va. 655, 657, 79 S.E.2d 597, 598 (1954); 1980-1981 Op. Va. Att’y Gen. 317, 318.

²⁷ Section 15.2-5114(5).

²⁸ *Elizabeth River Tunnel Dist. v. Beecher*, 202 Va. 452, 457, 117 S.E.2d 685, 689 (1961); 1980-1981 Op. Va. Att’y Gen., *supra* note 26, at 318; *see also* 17 MICHIE’S JUR. *State* § 25 (1994 & Supp. 2005) (discussing suits against state).

²⁹ *Beecher*, 202 Va. at 457, 117 S.E.2d at 689.

³⁰ See, e.g., 1987-1988 Op. Va. Att’y Gen. 87, 91-92 and opinions cited therein.

³¹ 1976-1977 Op. Va. Att’y Gen. 51, 52.

³² 1984-1985 Op. Va. Att’y Gen. 108, 109.

³³ *Id.*

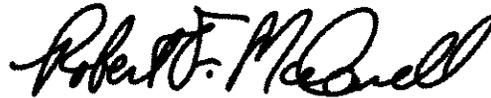
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Conclusion

Accordingly, it is my opinion that a water authority created pursuant to the Virginia Water and Waste Authorities Act is a public body, specifically, a municipal corporation. It further is my opinion that the funds a water authority receives from rates and fees generally may be considered "public funds." As a municipal corporation, sovereign immunity shields a water authority from liability for its governmental functions, but not its proprietary functions. It is my opinion that a water authority may make payments on claims related to its proprietary functions, but not claims related to its governmental functions. Finally, it is my opinion that a water authority may waive its immunity for actions related to its governmental functions only when expressly authorized by statute.

Thank you for letting me be of service to you.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert F. McDonnell". The signature is written in a cursive, flowing style with a large initial "R".

Robert F. McDonnell