



COMMONWEALTH of VIRGINIA

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February 2, 2009

The Honorable Emmett W. Hanger, Jr.
Member, Senate of Virginia
P.O. Box 2
Mt. Solon, Virginia 22843

Dear Senator Hanger:

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

Issue Presented

You ask whether a local police department may enact regulatory guidelines for towing and recovery service companies absent the local governing body creating an advisory board and enacting an ordinance pursuant to § 46.2-1217.

Response

It is my opinion that in the interest of highway safety, a local police department may adopt certain procedures for selecting private towing and recovery service companies to provide safe and efficient removal, storage, and safekeeping of vehicles involved in traffic accidents or other highway safety incidents. However, such procedures may not infringe upon the authority of the local governing body to regulate towing and only may address matters related to public safety. Further, it is my opinion that whether such procedures address public safety concerns is a question of fact.¹

Applicable Law and Discussion

Section 46.2-1217 provides, in pertinent part, that:

The governing body of any county, city, or town by ordinance may regulate services rendered pursuant to police towing requests by any business engaged in the towing or storage of unattended, abandoned, or immobile vehicles. The ordinance may include delineation of service areas for towing services, the limitation of the number of persons engaged in towing services in any area, including the creation of one or more exclusive service areas, and the specification of equipment to be used for providing towing service. The governing body of any county, city, or town may contract for services rendered pursuant to a police towing request with one or more businesses engaged in the towing or storage of unattended, abandoned, or immobile vehicles. The contract may specify the

¹ Attorneys General historically have declined to render official opinions when the request involves a question of fact rather than one of law. *See, e.g.*, Op. Va. Att’y Gen.: 1997 at 195, 196; 1996 at 207, 208.

fees or charges to be paid by the owner or operator of a towed vehicle to the person undertaking its towing or storage and may prescribe the geographical area to be served by each person providing towing services. The county, city, or town may establish criteria for eligibility of persons to enter into towing services contracts and, in its discretion, may itself provide exclusive towing and storage service for police-requested towing of unattended, abandoned, or immobile vehicles. Such criteria shall, for drivers of tow trucks and towing and recovery operators, be no less restrictive than those established pursuant to Chapter 28 (§ 46.2-2800 et seq.) of this title and regulations adopted pursuant thereto.

Prior to adopting an ordinance or entering into a contract pursuant to this section, the local governing body shall appoint an advisory board to advise the governing body with regard to the appropriate provisions of the ordinance or terms of the contract. The advisory board shall include representatives of local law-enforcement agencies, towing and recovery operators, and the general public.

Section 46.2-1217 refers to criteria established pursuant to Chapter 28 of Title 46.2, §§ 46.2-2800 through 46.2-2828, for tow truck drivers and towing and recovery operators and mandates the criteria established by the locality “shall ... be no less restrictive” than Chapter 28. Section 46.2-2826 provides that:

The Board [for Towing and Recovery Operators] shall establish regulations required of Class A and Class B operators to provide public safety towing and recovery services. For the purposes of this section, “public safety towing and recovery services” shall be those towing and recovery and related services requested by a state or local law-enforcement agency. Such regulations shall establish minimum requirements, including qualifications, standards, necessary equipment, and public safety concerns necessary and appropriate to permit a Class A or Class B operator to provide public safety towing and recovery services. No operator shall provide public safety towing and recovery services unless they meet such criteria established by Board regulation applicable to public safety towing and recovery services. Upon submitting evidence to the Board of meeting such criteria, the Board shall maintain, on a timely basis, a list to be readily available to state and local law-enforcement agencies of Class A and Class B operators who meet the Board’s criteria for providing public safety towing and recovery services.

The Board for Towing and Recovery Operators (the “Board”) has not yet established such regulations or criteria because § 46.2-2809 provides that “[n]o regulation of the Board pertaining to public safety towing and recovery services, as provided in § 46.2-2826, shall become effective prior to July 1, 2010.”²

Other statutory provisions apply to the authority of local and state law-enforcement officers to remove, store, and safeguard vehicles involved in accidents or other highway safety incidents. First, § 46.2-1212.1 provides:

²Prior to the adoption of regulations establishing the criteria mandated by § 46.2-2826, the 2008 Session of the General Assembly amended § 46.2-2809 by adding the quoted language, which defers the effective date of such regulations until July 1, 2010. See 2008 Va. Acts ch. 836, available at <http://leg1.state.va.us/cgi-bin/legp504.exe?081+ful+CHAP0836+pdf>.

A. As a result of a motor vehicle accident or incident, the Department of State Police and/or local law-enforcement agency in conjunction with other public safety agencies may, without the consent of the owner or carrier, remove:

1. A vehicle, cargo, or other personal property that has been (i) damaged or spilled within the right-of-way or any portion of a roadway in the state highway system and (ii) is blocking the roadway or may otherwise be endangering public safety; or

2. Cargo or personal property that the Department of Transportation, Department of Emergency Management, or the fire officer in charge has reason to believe is a hazardous material, hazardous waste or regulated substance as defined by the Virginia Waste Management Act (§ 10.1-1400 et seq.), the Hazardous Materials Transportation Act (49 U.S.C. § 1808 et seq.) or the State Water Control Law (§ 62.1-44.2 et seq.), if the Department of Transportation or applicable person complies with the applicable procedures and instructions defined either by the Department of Emergency Management or the fire officer in charge.

B. The Department of Transportation, Department of State Police, Department of Emergency Management, local law-enforcement agency and other local public safety agencies and their officers, employees and agents, shall not be held responsible for any damages or claims that may result from the failure to exercise any authority granted under this section provided they are acting in good faith.

C. The owner and carrier, if any, of the vehicle, cargo or personal property removed or disposed of under the authority of this section shall reimburse the Department of Transportation, Department of State Police, Department of Emergency Management, local law-enforcement agency, and local public safety agencies for all costs incurred in the removal and subsequent disposition of such property.

Next, § 46.2-1209 provides, in part, that:

No person shall leave any motor vehicle, trailer, semitrailer, or part or combination thereof immobilized or unattended on or adjacent to any roadway if it constitutes a hazard in the use of the highway. No person shall leave any immobilized or unattended motor vehicle, trailer, semitrailer, or part or combination thereof longer than twenty-four hours on or adjacent to any roadway outside the corporate limits of any city or town, or on an interstate highway or limited access highway, expressway, or parkway inside the corporate limits of any city or town. Any law-enforcement officer may remove it or have it removed to a storage area for safekeeping and shall report the removal to the Department [of Motor Vehicles] and to the owner of the motor vehicle, trailer, semitrailer, or combination as promptly as possible.

Finally, there is a federal law that relates to this issue. Federal authority over intrastate transportation is set out in 49 U.S.C. § 14501, which provides in pertinent part:

(c) Motor carriers of property.—

(1) General rule.—Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air

carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

(2) Matters not covered.—Paragraph (1)—

(A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization;

....

(C) does not apply to the authority of a State or a political subdivision of a State to enact or enforce a law, regulation, or other provision relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle.

....

[(3)(C)](5) Limitation on statutory construction.—Nothing in this section shall be construed to prevent a State from requiring that, in the case of a motor vehicle to be towed from private property without the consent of the owner or operator of the vehicle, the person towing the vehicle have prior written authorization from the property owner or lessee (or an employee or agent thereof) or that such owner or lessee (or an employee or agent thereof) be present at the time the vehicle is towed from the property, or both.

Thus, regulation of the towing industry is addressed by both federal and state laws and, potentially, by local ordinances. Given that legal framework, the question becomes what authority is available to law-enforcement agencies regarding regulation of towing operations within their jurisdictions. This especially is true because the Board has not promulgated the regulations required by § 46.2-2826, and the local governing body has not enacted ordinances or entered into contracts with towing companies pursuant to § 46.2-1217.

You ask about specific procedures adopted by the Harrisonburg Police Department (the “Procedures”).³ The primary purpose of the Procedures appears to be a description of the process by which the Police Department will call towing companies to the scene of an accident or other incident requiring towing services. The Procedures describe a rotating list of qualified towing companies that will be called when such an incident occurs. Additionally, the Procedures require the call for a particular incident to go to the company at the top of the list. The remainder of the Procedures describe how a company is placed on or remains on the rotating list as a qualified company.

Most of the Procedures’ requirements for becoming a qualified towing company on the rotating list relate to general safety concerns about the proper equipment needed to tow vehicles, to clean up accident scenes, and to communicate with law-enforcement, and the need for twenty-four-hour availability to clear accident scenes safely and expeditiously. Law-enforcement agencies have a general

³ A copy of the Procedures, “Harrisonburg Police Department Operational Guidelines and Equipment Requirements for Wrecker Companies,” is on file with this Office. For purposes of this opinion, all references and information about the Procedures were derived from this document.

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duty to provide for public safety on the highways, including the specific statutory duties set out in §§ 46.2-1209 and 46.2-1212.1. The Procedures generally appear to fit within law-enforcement public safety duties by utilizing private companies that are capable of providing safe and expeditious service.

However, there are provisions in the Procedures that may go beyond establishing a process for utilizing private companies to enforce the Harrisonburg Police Department's public safety duties to clear the highways. Some provisions may be construed to be regulatory in nature. An example is the requirement that a towing company must have at least two wreckers, one a "rollback" and the other a "crane recovery wrecker," to be a qualified operator. It is possible that in some localities such a requirement for two wreckers of the specified types might be justifiable on public safety grounds. However, the procedures that are justifiable on public safety grounds will vary from jurisdiction to jurisdiction.⁴ Accordingly, there is a factual issue regarding whether such a requirement is essential solely based on public safety needs. Where a requirement regarding a "rollback" and "crane recovery wrecker" falls into the realm of regulation of towing companies, such regulation is permitted under federal and state law, but requires local adoption of ordinances or contractual arrangements following the appointment of an advisory board or by the Board pursuant to § 46.2-2826.

Conclusion

Accordingly, it is my opinion that in the interest of highway safety, a local police department may adopt certain procedures for selecting private towing and recovery service companies to provide safe and efficient removal, storage, and safekeeping of vehicles involved in traffic accidents or other highway safety incidents. However, such procedures may not infringe upon the authority of the local governing body to regulate towing and only may address matters related to public safety. Further, it is my opinion that whether such procedures address public safety concerns is a question of fact.⁵

Thank you for letting me be of service to you.

Sincerely,



Robert F. McDonnell

5:18; 1:941/08-084

⁴"Prior to proceeding further with drafting of any public safety towing regulations, the Board of Towing and Recovery Operators shall hold four public meetings to receive comments and recommendations regarding the appropriate equipment, standards, training, safety and other factors related to providing public safety towing and recovery services." 2008 Va. Acts, *supra* note 2 (quoting enactment clause 2).

⁵*See supra* note 1.