



# COMMONWEALTH of VIRGINIA

Office of the Attorney General

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Attorney General

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The Honorable Richard P. Bell  
Member, House of Delegates  
Post Office Box 239  
Staunton, Virginia 24402

Dear Delegate Bell:

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, as follows, concerning local ordinances adopted to establish stormwater control programs pursuant to § 15.2-2114 of the Virginia Code: 1) whether the authorized service charges constitute a tax; 2) whether the enforcement provisions are enforceable; 3) whether recent legislation delays that enforcement; 4) whether certain properties may be grandfathered or exempted; and finally, 5) whether landowners are liable for run-off from their property that is created by drainage originating elsewhere.

## Response

It is my opinion that the utility or service charge authorized by § 15.2-2114 is a fee, not a tax, that is enforceable by localities pursuant to § 15.2-2114(D) and that Senate Bill 395 does not affect localities' ability to enforce existing stormwater control programs. It further is my opinion that § 15.2-2114 neither provides for the grandfathering of properties, nor does it provide an exemption for landowners who own property with characteristics that make runoff mitigation infeasible. Finally, a landowner cannot be held responsible for reducing or paying a charge for runoff from his property caused by drainage from other properties.

## Background

You report that the City of Staunton has adopted an ordinance establishing a stormwater control program pursuant to § 15.2-2114.<sup>1</sup> You also note that, during its 2010 session, the General Assembly adopted Senate Bill 395, which delays the effective date of the regulation that will establish the

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<sup>1</sup> See City of Staunton, Va., Code § 13.05 (Code Publishing Co. 2010), available at <http://www.codepublishing.com/VA/staunton.html>.

procedures by which the Department of Conservation and Recreation delegates authority for stormwater management programs to localities and the water quality and quantity criteria to be enforced by such programs, as well as the criteria by which such programs will be evaluated.<sup>2</sup>

### Applicable Law and Discussion

You first inquire whether the utility or service charge authorized by § 15.2-2114 is a tax. The language of the statute indicates that it is a fee, not a tax.<sup>3</sup> Not only is it called a “service charge” rather than a tax, but § 15.2-2114(B) requires that the charges must be based on properties’ contributions to stormwater runoff, and that the income derived from service charges may not exceed the actual costs incurred by a locality in operating a stormwater control program. As expressed in a recent Opinion of this office, because these charges are structured to produce only sufficient revenue to cover the costs of operating a stormwater control program, such a stormwater control charge assessed by the City of Chesapeake pursuant to § 15.2-2114 is a service fee, not a tax.<sup>4</sup>

You next ask whether the enforcement provisions of § 15.2-2114(D), which are consistent with tax lien enforcement, can be applied to a utility charge. The Code permits localities to assert a lien against real property for nonpayment of charges or fees in numerous instances.<sup>5</sup> In this case, § 15.2-2114 explicitly grants localities authority to impose stormwater control program charges, to file suit to recover unpaid charges and interest, and to assert a lien against real property for the unpaid charges and interest.<sup>6</sup> Because the General Assembly has expressly authorized localities to use this approach, the provisions set forth in § 15.2-2114 are enforceable.

You further inquire whether the passage of Senate Bill 395 delays these enforcement measures until the new stormwater management regulations take effect. Localities adopt stormwater control programs pursuant to § 15.2-2114 to meet the requirements of the Virginia stormwater management regulations.<sup>7</sup> These regulations currently are in effect. Senate Bill 395 simply delayed the effective date of *new* regulations that will replace portions of the existing regulations.<sup>8</sup> As such, those localities that have adopted stormwater control programs pursuant to § 15.2-2114 may continue to administer and enforce those programs, but will need to satisfy the new regulations when they take effect.

You also ask whether a property with conditions predating the adoption of an ordinance establishing a stormwater control program is “grandfathered”<sup>9</sup> and thus exempt from payment of the

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<sup>2</sup> The bill extends the effective date of the regulations to “within 280 days after the establishment by the United States Environmental Protection Agency of a Chesapeake Bay-wide Total Maximum Daily Load (TMDL) but in any event no later than December 1, 2011.” 2010 Va. Acts ch. 370.

<sup>3</sup> VA. CODE ANN. § 15.2-2114 (2008 and Supp. 2010).

<sup>4</sup> See 2010 Op. Va. Att’y Gen. No. 09-098, at <http://www.vaag.com/OPINIONS/2010opns/09-098-Hallman.pdf>.

<sup>5</sup> See, e.g., VA. CODE ANN. § 15.2-901 (locality may assert lien for unpaid charges for removal of trash, garbage, refuse, litter and other substances which might endanger the health or safety of residents); § 15.2-2119 (locality may assert lien for unpaid fees and charges for sewer services); § 15.2-1115 (locality may assert lien for charges for abatement or removal of nuisances).

<sup>6</sup> Section 15.2-2114(D).

<sup>7</sup> 4 VA. ADMIN. CODE § 50-60.

<sup>8</sup> See note 2, *supra*.

<sup>9</sup> “The term ‘grandfathering’ simply is a matter of legislative grace where the governing body, by ordinance or other legitimate formal policy, carves out a legislative exception to the general application of regulations for a

charge and whether a landowner who has property with unique characteristics is exempt from the ordinance requirements when the runoff from the property cannot be mitigated.<sup>10</sup> The Dillon Rule dictates that, “municipal corporations have only those powers expressly granted, those necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable.”<sup>11</sup> Section 15.2-2114 does not provide for “grandfathering” of properties. Therefore, the General Assembly has not shown an intention to exempt properties with conditions predating local stormwater control ordinances from the requirements of such ordinances, including the service charge. I am not aware of any basis, absent express legislation, upon which such properties may be “grandfathered.”<sup>12</sup> Similarly, the Code does not authorize local governments to exempt from the charge a landowner who is unable to mitigate runoff and pollutants and thereby obtain a waiver. The General Assembly has expressly authorized localities to waive fees when certain conditions are met, but it has not provided similar authorization for a locality to exempt owners of properties for which stormwater flow and pollutants cannot be reduced.

Your final inquiry is whether a landowner can be held responsible for reducing or paying a charge for runoff from his property caused by drainage coming onto his property from other properties or public streets. Section 15.2-2114(B) requires that stormwater charges assessed to property owners “be based upon their contributions to stormwater runoff.”<sup>13</sup> Runoff draining onto a property from other sources, therefore, does not constitute that property’s “contribution” to stormwater runoff, and as such, the landowner is not liable. The ordinance adopted by the City of Staunton serves as an illustration: it provides that the stormwater control program fee is to be based on a property’s square footage of impervious area.<sup>14</sup> Such a fee makes the property owner responsible only for runoff attributed to his property’s impervious areas while meeting the requirement of § 15.2-2114(B) that the charge be based on a property’s contribution to stormwater runoff.

### Conclusion

Accordingly, it is my opinion that the utility or service charge authorized by § 15.2-2114 is a fee, not a tax, that is enforceable by localities pursuant to § 15.2-2114(D). It is further my opinion that Senate Bill 395 does not affect localities’ ability to enforce existing stormwater control programs adopted pursuant to § 15.2-2114. Additionally, it is my opinion that § 15.2-2114 does not provide for the grandfathering of properties with conditions that predated the passage of local ordinances, nor does it provide an exemption for landowners whose properties have unique characteristics that prevent the

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particular provision.” 2009 Op. Va. Att’y Gen. 30, 31, citing *County of Fairfax v. Fleet Indus. Park Ltd. P’ship*, 242 Va. 426, 431, 410 S.E.2d 669, 672 (1991).

<sup>10</sup> When you refer to mitigation, I believe you are referring to the provision in § 15.2-2114(B) that allows localities to fully or partially waive charges for landowners who take certain steps to reduce runoff and pollutants from their properties; see Section 15.2-2114(B).

<sup>11</sup> *Bd. of Supvrs. v. Countryside Investment Co.*, 258 Va. 497, 503, 522 S.E.2d 610, 613 (1999) (quoting *Chesapeake v. Gardner Enters.*, 253 Va. 243, 246, 482 S.E.2d 812, 814 (1997)); accord *Commonwealth v. County Bd.*, 217 Va. 558, 574, 232 S.E.2d 30, 40 (1977); *Bd. of Supvrs. v. Horne*, 216 Va. 113, 117, 215 S.E.2d 453, 455 (1975); *City of Richmond v. Bd. of Supvrs.*, 199 Va. 679, 684, 101 S.E.2d 641, 645 (1958); 2008 Op. Va. Atty. Gen. 37, 38. Furthermore, any doubt as to the existence of such power must be resolved against the locality; see *City of Richmond v. Bd. of Supvrs.*, 199 Va. at 684, 101 S.E.2d at 645; 2009 Op. Va. Atty. Gen. 41.

<sup>12</sup> For a similar analysis of whether “grandfathering” is allowed absent express statutory authorization, see 2004 Op. Va. Att’y Gen. 146.

<sup>13</sup> Section 15.2-2114(B).

<sup>14</sup> See CITY OF STAUNTON, VA., Code § 13.05.055(2) (Code Publishing Co. 2010).

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reduction of stormwater runoff. Finally, I conclude that a landowner cannot be held responsible for reducing runoff or paying a charge for runoff from his property when that runoff is caused by drainage from other properties.

With kindest regards, I am

Very truly yours,

A handwritten signature in blue ink, reading "Ken C II". The signature is stylized, with the first name "Ken" and the second name "C" followed by the Roman numeral "II".

Kenneth T. Cuccinelli, II  
Attorney General