



# COMMONWEALTH of VIRGINIA

Office of the Attorney General

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Stephen W. Mullins, Esquire  
County Attorney, County of Dickenson  
Post Office Box 250  
Castlewood, Virginia 23219

Dear Mr. Mullins:

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 political subdivision of the Commonwealth may pay the legal defense costs of an employee when such costs are incurred because of the employee's actions in furtherance of his or her duties when serving the political subdivision.

## Response

It is my opinion that, pursuant to § 2.2-1520 of the *Code of Virginia*, a political subdivision of the Commonwealth is authorized to pay for the legal defense costs of an employee when such costs are incurred because of the employee's actions in furtherance of his or her duties when serving the political subdivision.

## Background

You note that the General Assembly has empowered localities such as Dickenson County to create, either by themselves or in conjunction with other localities, political subdivisions to accomplish certain designated tasks, such as economic development, industrial development, public services provision, and housing. Such entities are designated as political subdivisions of the Commonwealth of Virginia, rather than a political subdivision of the creating locality or localities. As examples, you cite to §§ 36-4 and 36-40 (redevelopment and housing authorities), § 15.2-4903(A) (industrial development authorities), § 15.2-5102(A) (public service authorities), and § 15.2-6000 (Virginia Coalfield Economic Development Authority, to which Dickenson County belongs). You further note that each of these political subdivisions has its own governing body and employees, separate from the governing body and employees of the creating locality or localities. You indicate that, from time to time, board members, officers, and employees of these political subdivisions may face legal action - whether civil or criminal - on account of their actions taken in furtherance of their duties for the political subdivision. Such circumstances raise the question of whether a political subdivision may pay the legal defense costs incurred by board members, officers, and employees as a result of these legal actions.

### Applicable Law and Discussion

Regarding payment of legal defense costs incurred by employees of political subdivisions, § 15.2-1520 provides, in relevant part, as follows:

Notwithstanding any provision of law to the contrary, general or special, a locality, *or political subdivision of such locality* may employ the county, city or town attorney, or the attorney for the Commonwealth, if there be no county, city or town attorney, *or other counsel approved by the governing body to defend it*, or any member thereof, or any officer of the locality, *or political subdivision or employee thereof*, or any trustee or member of any board or commission appointed by the governing body in any legal proceeding to which the governing body, or any member thereof, or any of the foregoing named persons may be a defendant, when such proceeding is instituted against it, or them by virtue of any actions in furtherance of their duties in serving the locality or political subdivision as its governing body or as members thereof or the duties or service of any officer or employee of the locality or political subdivision or any trustee or any member of any board or commission appointed by the governing body.<sup>[1]</sup>

This statute is a recodified version of former § 15.1-19.2, which, prior to its repeal in 1997, provided in relevant part as follows:

Notwithstanding any other provision of law, the governing body of any county, city, town, *or political subdivision* may employ the city attorney, the town attorney, or the attorney for the Commonwealth, if there be no city attorney or town attorney, *or other counsel approved by such governing body to defend it*, or any member thereof, or any officer of such county, city, town, *or political subdivision or employee thereof*, or any trustee or member of any board or commission appointed by the governing body in any legal proceeding to which such governing body, or any member thereof, or any of the foregoing named persons may be a defendant, when such proceeding is instituted against it, or by them by virtue of any actions in furtherance of their duties in serving such county, city, town or political subdivision as its governing body or as members thereof or the duties or service of any officer or employee of such county, city, town or political subdivision or any trustee or any member of any board or commission appointed by such governing body.<sup>[2]</sup>

For purposes of your inquiry, a comparison of these two statutes raises the question of whether the General Assembly intended a substantive change in the law when it substituted the phrase “a locality, *or political subdivision of such locality*” for the phrase “any county, city, town, *or political subdivision.*” In other words, the question is whether, by effecting this change, whether the General Assembly intended to limit the power to pay for legal defense costs of employees to only political subdivisions of a locality, as opposed to political subdivisions in general. For the reasons outlined below, it is my opinion that the General Assembly did not intend such a substantive change in the law.

First, the available legislative history pertaining to the recodification of former § 15.1-19.2 to current § 15.2-1520 does not support the existence of such a substantive change. As noted in a prior Attorney General opinion, “[i]n 1997, the Virginia Code Commission recommended recodification of Title 15.1, which had not been recodified since 1962, to resolve confusion caused by conflicting and

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<sup>1</sup> VA. CODE ANN. § 15.2-1520 (2012) (emphasis added).

<sup>2</sup> VA. CODE ANN. § 15.1-19.2 (1989) (repealed 1997) (emphasis added).

outdated provisions, and to reorganize and simplify existing statutes into a more user-friendly Title 15.2.”<sup>3</sup> Regarding former § 15.1-19.2, the Virginia Code Commission’s drafting note indicates that the recodification made “[n]o substantive change in the law.”<sup>4</sup> Moreover, “there is a presumption that a recodified statute does not make substantive changes in the former statute unless a contrary intent plainly appears in the recodified statute.”<sup>5</sup> Nothing in the recodified statute clearly suggests an intent to make a substantive change, particularly given the Virginia Code Commission’s Report.<sup>6</sup>

Because it appears that the General Assembly did not intend a substantive change to former § 15.1-19.2, previous interpretations of that statute may be utilized for guidance. In *Beckett v. Board of Supervisors of Accomack County*,<sup>7</sup> the Supreme Court held that, under former § 15.1-19.2, the Board of Supervisors was authorized to reimburse the County Administrator for legal expenses incurred when he defended himself against criminal charges arising from his official duties performed on the County’s behalf. In addition, a prior Attorney General opinion determined that former § 15.1-19.2 authorized a local redevelopment and housing authority to employ counsel to defend an employee, or to ratify an employee’s appointment of counsel under the principles of agency if the authority finds that the employee acted on behalf of the governing body when he appointed counsel.<sup>8</sup> Based on the foregoing legislative history reflecting no substantive change to former § 15.1-19.2, the analysis set forth in *Beckett* and in the prior Attorney General opinion applies equally to your question.

Second, under Virginia law, the term “political subdivision” is understood as referring to a political subdivision of the Commonwealth. Previous Attorney General opinions have described political subdivisions as follows:

A political subdivision is created by the legislature to exercise some portion of the state’s sovereignty in regard to one or more specific governmental functions. It is independent from other governmental bodies, in that it may act to exercise those powers conferred on it by law without seeking the approval of a superior authority. It employs its own consultants, attorneys, accountants and other employees whose salaries are fixed by the political subdivision, and it often incurs debts which are not debts of the Commonwealth but are debts of the political subdivision.<sup>9</sup>

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<sup>3</sup> 2003 Op. Va. Att’y Gen. 52, n.8 (citing 5 H. & S. Docs., Report of the Virginia Code Commission on the Recodification of Title 15.1 of the Code of Virginia, S. Doc. No. 5, at i (1997)).

<sup>4</sup> 5 H. & S. Docs., Report of the Virginia Code Commission on the Recodification of Title 15.1 of the Code of Virginia, S. Doc. No. 5, at 380-81 (1997).

<sup>5</sup> *Waldrop v. Commonwealth*, 255 Va. 210, 214, 495 S.E.2d 822, 825 (1998) (citations omitted).

<sup>6</sup> The Virginia Supreme Court recently cited to the drafting notes of the Virginia Code Commission’s Report as authority regarding the recodification of former Title 15.1, stating:

The Commission’s report on the recodification is the impetus of the underlying legislation at issue here. The General Assembly expressly instructed the Commission “to study Title 15.1” and report back a revision of the title. Senate J. Res. 2, 1994 Acts, at 2600. The General Assembly then enacted into law the proposals contained in the report with few amendments, and no amendments at all to the recommended language of the provision that is now codified as Code § 15.2-852(A). We therefore accept the report’s drafting note as persuasive authority that the General Assembly did not intend to effectuate a substantive change to the definition of “financial or business interest” with the 1997 recodification.

*Newberry Station Homeowners Ass’n. v. Bd. of Spvrs.*, 285 Va. 604, 617, 740 S.E.2d 548, 555 (2013).

<sup>7</sup> 234 Va. 614, 363 S.E.2d 918 (1988).

<sup>8</sup> 1993 Op. Va. Att’y Gen. 70, 73 (citations omitted).

<sup>9</sup> 2011 Op. Va. Att’y Gen. 154, 155 (quoting 2002 Op. Va. Att’y Gen. 281, 283).

While the *Code of Virginia* contains references to political subdivisions of a locality, including the reference in § 15.2-1520,<sup>10</sup> I am unaware of any provision of Virginia law that allows a locality to create a political subdivision of itself where such an entity would not be considered a political subdivision of the Commonwealth.<sup>11</sup> Instead, political subdivisions are created either directly by statute,<sup>12</sup> or by the actions of one or more localities pursuant to authority granted by enabling statutes.<sup>13</sup> In order for an entity established by a locality to be considered a political subdivision, that entity must first be designated as such by statute.<sup>14</sup> Moreover, the term “political subdivision” in § 15.2-1520 is not specifically defined.<sup>15</sup> Therefore, I conclude that the language of § 15.2-1520 allowing political subdivisions to pay certain legal defense costs of employees refers to political subdivisions of the Commonwealth such as those voluntarily established by a locality pursuant to authority granted by enabling statutes.

### Conclusion

Accordingly, it is my view that, pursuant to § 15.2-1520 of the *Code of Virginia*, a political subdivision of the Commonwealth is authorized to pay for the legal defense costs of an employee when such costs are incurred because of the employee’s actions in furtherance of his or her duties when serving the political subdivision.

With kindest regards, I am

Very truly yours,



Kenneth T. Cuccinelli, II  
Attorney General

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<sup>10</sup> See, e.g., VA. CODE ANN. §§ 15.2-962 (2012) and 15.2-1518 (2012).

<sup>11</sup> Given both context and the drafting note, the reference to “political subdivision of such locality,” would appear to limit the political subdivisions for which the locality may pay legal fees to those affiliated with the locality. Thus, for example, Dickenson County may pay legal costs incurred by an employee of the public service authority with which it is affiliated, but may not pay for the legal expenses incurred by employees of a similar public service authority that was created to serve the citizens of Northern Virginia or Tidewater.

<sup>12</sup> See, e.g., § 15.2-6000 (2012) (establishing the Virginia Coalfield Economic Development Authority).

<sup>13</sup> See, e.g., VA. CODE ANN. §§ 36-4 (2011) (enabling activation of a redevelopment and housing authority in a locality when approved by referendum), 36-40 (2011) (enabling the creation of regional housing authorities).

<sup>14</sup> See *Short Pump Town Ctr. Cmty. Dev. Auth. v. Hahn*, 262 Va. 733, 745-46, 554 S.E.2d 441, 447 (2001) (“[I]n the absence of any statutory designation of community development authorities as ‘political subdivisions,’ we conclude that the [Short Pump Community Development Authority] is not such an entity.”); 2011 Op. Va. Att’y Gen. 154, 156 (“The fact that the General Assembly did not designate regional partnerships as political subdivisions provides a strong indication that they do not qualify as political subdivisions, particularly when the General Assembly ordinarily provides for such a designation.”).

<sup>15</sup> Compare VA. CODE ANN. Title 15.2, Chapter 15 with Title 15.2, Chapter 27, § 15.2-2701 (the latter providing, “For the purposes of [Chapter 27], “political subdivision” means any county, city or town, school board, Transportation District Commission, or any other local governmental authority or local agency or public service corporation owned, operated or controlled by a locality or local government authority, with power to enter into contractual undertakings.”).