

02-032

**COUNTIES, CITIES AND TOWNS: TAXES & ASSESSMENTS
FOR LOCAL IMPROVEMENTS – SERVICE DISTRICTS.**

Ordinance directing City of Hampton to turn over to Elizabeth Lake Estates Civic Association tax revenue collected in service district is unconstitutional. City's delegation of its legislative authority to Association is unconstitutional. Tax imposed by ordinance is unenforceable.

The Honorable Molly Joseph Ward
Treasurer for the City of Hampton
May 13, 2002

Issue Presented

You ask whether a City of Hampton ordinance imposing a tax on real estate in the Elizabeth Lake Estates Service District is consistent with the Constitution and laws of Virginia.

Response

It is my opinion that the provisions of the ordinance relating to the expenditure of tax revenue by the Elizabeth Lake Estates Civic Association are not consistent with the debt limitations of the Virginia Constitution and are contrary to the state laws governing service districts. Therefore, the tax imposed by the ordinance is unenforceable.

Background and Authorities

Pursuant to the authority granted localities in § 15.2-2400 of the *Code of Virginia*, the City of Hampton has created by ordinance the Elizabeth Lake Estates Service District.¹ The ordinance provides for a tax levy,² and sets forth its plan for the city to enter into an agreement with Elizabeth Lake Estates Civic Association whereby the Association would receive the tax-generated funds.³ The agreement would require that the Association use the tax revenue to maintain the real estate owned in common by the Association and to provide other services within the district to enhance the area.⁴

Article 1, Chapter 24 of Title 15.2, §§ 15.2-2400 through 15.2-2403, contains the laws governing service districts in the Commonwealth. Section 15.2-2400 authorizes localities to create service districts by

ordinance "to provide additional, more complete or more timely services of government than are desired in the locality or localities as a whole." The authorized governmental services are enumerated in § 15.2-2403(1)-(2). A service district may acquire real and personal property, hire employees, contract with any person, and impose taxes on real estate in the service district, if necessary, to provide the statutorily authorized governmental services.⁵ It appears, however, that the ordinance creating the Elizabeth Lake Estates Service District is inconsistent with the state constitution and law.

Discussion

Ordinance Creates a Debt Obligation

The ordinance directs that all tax revenue received through June 30, 2006, be turned over to the Elizabeth Lake Estates Civic Association.⁶ Article VII, § 10(b) of the Constitution of Virginia prohibits localities from contracting debt unless the proposed debt is authorized by general law and approved by referendum. A "debt" is described as establishing an unconditional long-term obligation to make payments in future years.⁷ A long-term contract for services is permissible only if payment is required as services are rendered.⁸ For example, the city could contract with the Association to provide specified services for a fixed amount paid annually or semiannually, or on a "cost-plus" basis not to exceed revenue from the service district tax, or on some other basis. Under the ordinance, however, the payment of the tax revenue to the Association would be unrelated to the services performed by the Association. This is similar to a revenue-sharing agreement between localities, which this Office has opined creates a debt obligation under the Constitution.⁹ Therefore, I am of the opinion that the requirement in the ordinance that service district tax revenues be turned over to the Association creates a debt obligation that is inconsistent with the mandates of Article VII, § 10(b).

Ordinance Delegates Legislative Authority to a Private Entity

The ordinance states that, in addition to receiving tax revenue and providing services in the district, the Elizabeth Lake Estates Civic Association shall "set the goals and budget ... and evaluate the effectiveness of the district programs."¹⁰ After collecting tax revenue and turning it over to the Association, the city retains no control or oversight over the expenditure of the tax revenue.¹¹ Thus, the ordinance gives complete discretion to the Association to determine the services it will provide.

Any determination as to the provision of services and the appropriation of funds to pay for them is a legislative function.¹² "[T]he power to exercise legislative authority may not be removed from the control of the local legislative representatives of the people."¹³ "If allowed by statute, local governing bodies may delegate the exercise of these legislative functions to subordinate bodies, officers, or employees, but the subordinate body's exercise of these functions continues to be considered a legislative action."¹⁴

Section 15.2-2403(9) allows a local governing body to create a development board and to delegate to the board the authority to control and manage the funds appropriated to the service district. The ordinance describes the Elizabeth Lake Estates Civic Association as a nonprofit corporation.¹⁵ The Association does not appear to be an agency, board or other governmental entity to which legislative authority may be validly delegated. A delegation of authority must be accompanied by standards to guide the exercise of the delegated function.¹⁶ In the context of service districts, any delegation of the function to decide what services to offer must be accompanied by standards that, at a minimum, restrict the services to governmental services¹⁷ as required by statute.¹⁸ The ordinance contains language directing that the funds be used to maintain the real estate owned in common by the Association,¹⁹ which may be interpreted as such a standard.²⁰ Delegation of legislative authority to a private entity, however, may not be made constitutional by attaching standards.

Many civic and homeowners' associations provide services that would qualify as governmental services. For example, the maintenance of common areas that are open to the public may qualify as beautification and landscaping services, which are specifically authorized by § 15.2-2403(1). It would be permissible for the ordinance to direct the city to contract with the Association to provide beautification and landscaping services within the service district, as well as other governmental services for which the city would be contractually obligated to pay as the services are rendered. The ordinance, however, directs that the city delegate in an agreement with the Association the legislative authority and responsibility to decide what services to offer.

Therefore, I am of the opinion that the City of Hampton may not delegate its legislative authority to the Association.

Ordinance Directs Expenditures That May Benefit a Private Entity

Section 15.2-2403(1) expressly prohibits a service district from providing "services, events or activities ... undertaken for the sole or dominant benefit of any particular individual, business or other private entity." The ordinance contains similar language.²¹

The ordinance mandates that the revenue be used to maintain the real estate owned in common by the Association.²² This clearly confers a benefit on the Association, a private entity. Such a private benefit, however, is permissible when it is merely incidental to a public benefit.²³ The questions regarding whether a particular transaction is executed in performance of a proper governmental function, and whether the resulting benefits inure primarily to the public and only incidentally to private interests, are to be determined from the factual circumstances in each case.²⁴ This Office refrains from issuing opinions on questions of fact rather than questions of law.²⁵

Imposition of Tax Is Not Severable

The remaining question is whether you, as city treasurer, have a duty to collect the tax imposed by the ordinance. Whether the tax should be collected when other portions of the ordinance creating the tax are inconsistent with the Virginia Constitution and contrary to state law depends on whether the portion of the ordinance imposing the tax may be severed from the remainder of the ordinance. Absent a severability provision, "the ordinance is presumed to be non-severable."²⁶ That presumption may be overcome by a showing that the governing body "manifested an intention to deal with a part of the subject-matter covered, irrespective of the rest of the subject-matter."²⁷ My review of the ordinance reveals no such manifested intention. Accordingly, it is my opinion that the tax imposed by the ordinance is unenforceable.

Conclusion

As noted above, the provisions of the ordinance relating to the expenditure of tax revenue by the Elizabeth Lake Estates Civic Association are inconsistent with the debt limitations of the Constitution and are contrary to the state laws governing service districts. Therefore, I am of the opinion that the tax imposed by the ordinance is unenforceable.

¹ See Hampton, Va., Code § 37-140 (2001) (codifying Ord. No. 1306, adopted June 13, 2001).

² *Id.* § 37-140(2).

³Section 37-140(3) of the Hampton Code provides:

"The plan for providing such facilities and services shall be for the city to enter into an agreement with Elizabeth Lake Estates Civic Association, a non-profit corporation in good standing formed under the laws of the Commonwealth of Virginia which shall receive the funds for operating the district, set the goals and budget, hire any needed staff, oversee the operations, apply for appropriate grants, coordinate programs with participating property owners and all federal, state, and local governmental entities as may be appropriate, and evaluate the effectiveness of the district programs. The Elizabeth Lake Estates Civic Association shall submit to the City of Hampton Annual Financial Statements, audited by a licensed certified public accountant, (the auditor), including the auditor's report on compliance with this division as to use and purpose of revenues, expenditures, assets, liability and residual fund balance resulting from monies provided under this division; and, the auditor's report on internal controls over financial reporting and bookkeeping. The financial statements and related reports of the certified public accountants are to be provided to the city's director of finance annually on or before September 30th of each year.

"Funds collected by the city as a result of this tax shall be used for maintenance and upkeep of the real estate owned in common by the Elizabeth Lake Estates Civic Association within the service district as well as the maintenance, repair and replacement of real property, installed equipment and such other services, events or activities which will enhance the use and enjoyment of and the safety, convenience and well being within the service district, provided that any such service, events or activities shall not be undertaken for the sole or dominant benefit of a particular individual, business or other private entity."

⁴*Id.*

⁵Va. Code Ann. § 15.2-2403(3), (4), (6), (8) (Michie Supp. 2001).

⁶The ordinance provides that "Elizabeth Lake Estates Civic Association ... shall receive the funds for operating the district." Hampton, Va., Code, *supra* § 37-140(3). "This tax ... shall continue through June 30, 2006." *Id.* § 37-140(5).

⁷1990 Op. Va. Att'y Gen. 48, 49; see, e.g., Fairfax-Falls Church v. Herren, 230 Va. 390, 394, 337 S.E.2d 741, 743-44 (1985) (holding that, to extent employment contracts between church community services board and employees extended beyond years in which they took effect, such contracts constituted long-term obligations binding Fairfax County).

⁸*Herren*, 230 Va. at 393, 337 S.E.2d at 743; *Fairfax County v. County Executive*, 210 Va. 680, 683-84, 173 S.E.2d 869, 872 (1970) (even though such contracts may extend over period of years, they are construed only as commitments to honor each year account payable incurred for services rendered that year); 1984-1984 Op. Va. Att'y Gen. 96, 98.

⁹1990 Op. Va. Att'y Gen., *supra*, at 50.

¹⁰Hampton, Va., Code, *supra* § 37-140(3).

¹¹I note that the ordinance requires the Association to provide audited financial statements annually to the city (see *id.*); however, financial reporting does not constitute program evaluation or control.

¹²*Leonard v. Town of Waynesboro*, 169 Va. 376, 385, 193 S.E. 503, 507 (1937); *Stansbury v. Richmond*, 116 Va. 205, 209, 81 S.E. 26, 27 (1914).

¹³*Fairfax County v. Fleet Industrial Park*, 242 Va. 426, 432, 410 S.E.2d 669, 672 (1991).

¹⁴*Helmick v. Town of Warrenton*, 254 Va. 225, 229, 492 S.E.2d 113, 115 (1997).

¹⁵*Hampton, Va.*, Code, *supra* § 37-140(3).

¹⁶*Chapel v. Commonwealth* 197 Va. 406, 89 S.E.2d 337 (1955); *Dickerson v. Commonwealth*, 181 Va. 313, 24 S.E.2d 550 (1943); 1981-1982 Op. Va. Att'y Gen. 385, 386.

¹⁷A prior opinion of this Office concludes that the phrase "additional governmental services" includes those services of a type usually provided by local governments on a jurisdiction-wide basis. In the service district context, however, such services are provided on an exclusive or enhanced basis within the service district, rather than on a uniform basis throughout the jurisdiction." 1986-1987 Op. Va. Att'y Gen. 113, 114.

¹⁸Va. Code Ann. §§ 15.2-2400, 15.2-2403 (Michie Supp. 2001).

¹⁹See *supra* note 3.

²⁰In instances when a request requires an interpretation of a local ordinance, the Attorney General has declined to respond in order to avoid becoming involved in matters solely of local concern and over which the local governing body has control. See Op. Va. Att'y Gen.: 1995 at 240, 241; *id.* at 260, 261; 1986-1987 at 347-348.

²¹*Hampton, Va.*, Code, *supra* § 37-140(3).

²²*Id.*

²³*Light v. City of Danville*, 168 Va. 181, 206, 190 S.E. 276, 286 (1937) (noting that when private and public benefit are blended, judicial practice in such cases is to approve undertaking if it is capable of furthering public use, and disregard private benefit as mere incident); 1993 Op. Va. Att'y Gen. 84, 87.

²⁴See Op. Va. Att'y Gen.: 1987-1988 at 192, 195; 1983-1984 at 103, 104.

²⁵Op. Va. Att'y Gen.: 1999 at 132, 133; 1997 at 1, 3; *id.* at 135, 137 n.15; *id.* at 195, 196; 1996 at 99, 100; *id.* at 102, 103; *id.* at 207, 208; 1991 at 122, 124.

²⁶*Robinson v. Commonwealth*, 217 Va. 684, 686, 232 S.E.2d 742, 744 (1977).

²⁷ *Id.* (quoting *Hannabass v. Maryland Cas. Co.*, 169 Va. 559, 569, 194 S.E. 808, 812, (1938)).

[Back to May 2002 Index](#)