

02-091

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

CONSTITUTION OF VIRGINIA: LOCAL GOVERNMENT (DEBT).

Amended ordinance establishing Elizabeth Lake Estates Service District does not specify Elizabeth Lake Estates Civic Association as entity to develop plan for services to be rendered in service district, receive funds, or provide services; provides for tax levy to be set annually as part of budget process with other tax rates. Amended ordinance does not create long-term unconditional debt obligation, in violation of Constitution, and does not delegate legislative authority of city council.

The Honorable Molly Joseph Ward
Treasurer for the City of Hampton

Mr. A. Paul Burton
City Attorney for the City of Hampton

October 28, 2002

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

Issue Presented

A prior opinion of this Office concludes that an ordinance adopted June 13, 2001, by the City of Hampton, establishing the Elizabeth Lake Estates Service District, creates an unconstitutional debt obligation and impermissibly delegates the legislative authority of the city to a private association.¹ You ask whether the amendments to the ordinance, adopted by the Hampton city council on June 26, 2002, cure the unconstitutional infirmities noted in the prior opinion.

Response

Because the Hampton city council now has imposed an annual tax and appropriations mechanism, it is my opinion that the amended ordinance does not create a long-term unconditional debt obligation, that in violation of the Constitution of Virginia, nor does it delegate to others the legislative function of the city council.

Background and Applicable Authorities

This Office historically has followed a policy of responding to official opinion requests only when such requests concern an interpretation of federal or state law, rule or regulation.² In 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.³ Any ambiguity that exists in a local ordinance is a problem to be rectified by the local governing body rather than by an interpretation by this Office.⁴ In addition, Virginia Attorneys General traditionally have declined to render such opinions when the request involves a matter of purely local concern or procedure.⁵ Accordingly, I have limited my comments to the authority of a Virginia locality to adopt the June 26, 2002, ordinance described.

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.⁶

Pursuant to the authority granted localities in Chapter 24 of Title 15.2,⁷ the City of Hampton created by ordinance the Elizabeth Lake Estates Service District.⁸ The ordinance sets forth a procedure by which interested entities may present an annual plan for services to be rendered in the service district.⁹ If the city council approves the proposed plan, it will appropriate funds annually to implement the plan and may enter into agreements with interested entities to effectuate the services within the service district.¹⁰ Unlike the ordinance reviewed in the prior opinion, the amended ordinance does not specify that the Elizabeth Lake Estates Civic Association shall be the entity to develop the plan, receive the funds, or provide the services. The amended ordinance provides for an annual tax levy that, after 2003, will be set annually as part of the budget process with other tax rates.¹¹ The ordinance reviewed in the prior opinion imposed a tax for five years.

Discussion

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.¹² A long-term contract for services is permissible only if payment is required as services are rendered.¹³

The amended ordinance imposes an annual tax.¹⁴ Under this ordinance, the revenue from the tax will be appropriated annually, following approval of annual plans to provide services, and paid pursuant to agreements with entities whose plans have been approved by council.¹⁵ In view of the annual tax and appropriation process, the ordinance does not establish an unconditional long-term obligation to make payments in future years that would constitute a "debt" under Article VII, § 10(b).¹⁶ Therefore, it is my opinion that the amended ordinance is consistent with the mandates of Article VII, § 10(b).

Any determination as to the provision of services and the appropriation of funds to pay for them is a legislative function.¹⁷ "[T]he power to exercise legislative authority may not be removed from the control of the local legislative representatives of the people."¹⁸ "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."¹⁹ 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.

Unlike the ordinance reviewed in the prior opinion, the amended ordinance provides that "interested entities" may present a plan to render services in the service district.²⁰ If the city council approves the plan, it will appropriate funds annually to implement the plan and may enter into agreements with the entities that presented plans to effectuate the delivery of services.²¹

While the Elizabeth Lake Estates Civic Association is obviously an interested entity that may present a plan to provide services in the district, the ordinance allows other entities to also present plans for consideration. The amended ordinance permits more than one entity to present a plan, more than one plan to be adopted for a year, and agreements to be entered into with more than one interested entity to deliver the services. In other words, the "interested entity" is the same as any vendor or contractor from which the city may obtain other goods and services.²²

Under the amended ordinance, the city council may approve the annual plan describing the services to be rendered and the cost, and appropriate annually the funds to implement the plan, if it sees fit. The council clearly retains, and will exercise annually, its legislative function to determine the services to be provided in the service district and the amount expended in a given budget or fiscal year to provide those services.²³ Therefore, it is my opinion that the amended ordinance does not delegate the city council's legislative authority.

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 amended ordinance states that "[t]he city believes that any benefit that may possibly inure to the Elizabeth Lake Estates Civic Association, itself as a result of the creation of this service district is merely incidental to the public benefits that are derived from the beautification, maintenance, improvement, etc. of the area."²⁴ To the extent such services improve or maintain the real estate owned in common by the Association, a benefit is clearly conferred upon the Association, a private entity. Such a private benefit, however, is permissible if it is merely incidental to a public benefit.²⁵ 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.²⁶ This Office refrains from issuing opinions on questions of fact rather than questions of law.²⁷

Conclusion

Accordingly, because the Hampton city council now has imposed an annual tax and appropriations mechanism, it is my opinion that the amended ordinance does not create a long-term unconditional debt obligation, in violation of the Constitution of Virginia, nor does it delegate to others the legislative function of the city council.

¹Op. no. 02-032, to Hon. Molly Joseph Ward, Hampton City Treasurer (May 13, 2002), available at <http://www.vaag.com/media%20center/Opinions/may02ndx.htm>.

²See Op. Va. Att'y Gen.: 1998 at 71, 72; 1997 at 105, 107; 1991 at 237, 238; 1989 at 288, 293 n.1; 1986-1987 at 347, 348; 1977-1978 at 31, 33; 1976-1977 at 17, 17.

³See Op. Va. Att'y Gen.: 1995 at 260, 261; 1986-1987, *supra*, at 348; 1976-1977, *supra*, at 17.

⁴See Op. Va. Att'y Gen.: 1986-1987, *supra* note , at 348; 1976-1977, *supra* note , at 17; *see also* Op. Va. Att'y Gen.: 1993 at 151, 153 n.1; 1992 at 131, 132 n.1; 1981-1982 at 471, 472.

⁵Op. Va. Att'y Gen.: 1999 at 90, 93; 1997, *supra* note , at 107; 1987-1988 at 69, 72; 1985-1986 at 64, 65; 1977-1978, *supra* note , at 33; 1976-1977, *supra* note , at 17.

⁶Va. Code Ann. § 15.2-2403(3), (4), (6), (8) (LexisNexis Supp. 2002).

⁷Va. Code Ann. §§ 15.2-2400 to 15.2-2413 (Michie Repl. Vol. 1997 & LexisNexis Supp. 2002).

⁸See Hampton, Va., Code § 37-140 (2002), *amended by* Ord. No. 1333 (June 26, 2002), *available at* <http://livepublish.municode.com/19/lpext.dll?f=templates&fn=main-hit-j.htm&2.0>.

⁹*Id.* § 37-140(3).

¹⁰Section 37-140(3) of the Hampton, Va., Code, provides:

"The plan for providing such facilities and services shall be for interested entities to present a plan for the services to be rendered in the service district to city council for approval annually. Said plan shall specifically describe the services to be rendered, the cost thereof and the relationship between the service and the benefit to the service district and the public generally. Council shall approve or disapprove the plan and costs thereof and, if approved, appropriate the funds for the services from any available Elizabeth Lake Estates Service District revenues, on an annual basis. The city may enter into agreements with these entities to effectuate the delivery of services in the service district and the transfer of appropriated funds. Entities receiving service district funds shall annually submit a report to city council detailing the use of service district funds which council shall review and evaluate. In addition, entities receiving service district funds 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 ordinance as to use and purpose of revenues, expenditures, assets, liability and residual fund balance resulting from monies provided under this ordinance; 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 in accordance with the powers enumerated in Section 15.2-2403, of the Code of Virginia, 1950, as amended and as set forth in the plan approved by city council."

¹¹See Hampton, Va., Code § 37-140(5), *supra* note .

¹²1990 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).

¹³Fairfax County v. County Executive, 210 Va. 680, 683-84, 173 S.E.2d 869, 872 (1970); *see also* Herren, 230 Va. at 395, 337 S.E.2d at 744; (noting that continuing services contracts impose no obligation to pay for future services; only meet accounts payable for services rendered that year).

¹⁴See Hampton, Va., Code § 37-140(5), *supra* note .

¹⁵*Id.* § 37-140(3).

¹⁶See *supra* note .

¹⁷See Leonard v. Town of Waynesboro, 169 Va. 376, 385, 193 S.E. 503, 507 (1937) (reiterating holding in *Stansbury v. Richmond*, 116 Va. 205, 81 S.E. 26 (1914), that determination as to public improvements to be made by municipality is legislative function).

¹⁸Fairfax County v. Fleet Industrial Park, 242 Va. 426, 432, 410 S.E.2d 669, 672 (1991).

¹⁹Helmick v. Town of Warrenton, 254 Va. 225, 229, 492 S.E.2d 113, 115 (1997).

²⁰Hampton, Va., Code § 37-140(3), *supra* note .

²¹*Id.*

²²The city must comply with the Virginia Public Procurement Act, §§ 2.2-4300 to 2.2-4377, in connection with contracts to provide services within the district.

²³See cites *supra* note .

²⁴Hampton, Va., Code § 37-140(2), *supra* note .

²⁵Light v. City of Danville, 168 Va. 181, 206, 190 S.E. 276, 286 (1937) (noting that, when private benefit and public use 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.

²⁶See Op. Va. Att'y Gen.: 1987-1988 at 192, 195; 1983-1984 at 103, 104.

²⁷Op. 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.

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