

OP. NO. 04-071

COUNTIES, CITIES AND TOWNS: GENERAL POWERS OF LOCAL GOVERNMENT – ADDITIONAL POWERS

No authority for locality to use public funds to repair or maintain roads of ingress or egress to private cemetery as part of cemetery's care and upkeep. Phrase, 'in which free burial space is provided' means free burial space that is provided to general public of locality.

The Honorable Phillip P. Puckett
Member, Senate of Virginia
October 19, 2004

Issue Presented

You ask several questions regarding the authority of the Buchanan County Board of Supervisors (the "board") to expend public funds pursuant to § 15.2-972. Specifically, you ask whether a locality is authorized to use public funds to repair or maintain roads providing ingress and egress to a private cemetery. Next, you ask whether the phrase in § 15.2-972, which states "in which free burial space is provided" means free burial space that is provided to the public. Finally, if § 15.2-972 requires that free burial space be provided to the public, you ask whether a cemetery authority, such as cemetery trustees, must enter into an agreement with the locality assuring non-discriminatory use of such burial space.

Response

It is my opinion that a locality does not have the authority to use public funds to repair or maintain roads providing ingress and egress to a private cemetery pursuant to § 15.2-972. It is further my opinion that the phrase "in which free burial space is provided" means free burial space that is provided to the general public of a locality. Consistent with the historical practice of prior Attorneys General, I am unable to opine on whether a cemetery authority, such as cemetery trustees, must enter into an agreement with the locality assuring non-discriminatory use of burial space to the public as it does not involve interpretation of a statutory scheme.

Applicable Law and Discussion

Section 15.2-972 provides:

Any locality may make appropriations in such sums and at such times as the governing body of the locality deems proper, for the care and upkeep of any cemetery in the locality in which free burial space is provided.

A 1972 opinion of the Attorney General considers whether a board of supervisors may expend public funds to build a road over its right of way from a state highway to a tract of land owned by the county and used as a public sanitary landfill.¹ Virginia adheres to the Dillon Rule of strict construction, which provides

that local governing bodies "have only those powers that are expressly granted, those necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable."² The powers of a county board of supervisors are limited to those "conferred expressly or by necessary implication."³ Any doubt as to the existence of power must be resolved against the locality.⁴ The 1972 opinion concludes that a board of supervisors is not authorized by the General Assembly to spend public funds for the construction of private roads.⁵

"The legislature is presumed to have had knowledge of the Attorney General's interpretation of the statutes, and its failure to make corrective amendments evinces legislative acquiescence in the Attorney General's view."⁶ The General Assembly has not taken any action to alter the 1972 opinion; therefore, counties do not have any authority to operate and maintain private roadways.⁷

The Dillon Rule requires a narrow interpretation of all powers conferred on local governments since they are delegated powers.⁸ In addition, the "credit clause" of Article X, § 10 of the Constitution of Virginia restricts the authority of the localities to lend their credit or appropriate funds to promote private interests. Expenditures which incidentally benefit private interests do not violate the credit clause, provided that the animating purpose of the transaction is to promote the locality's interests rather than private interests.⁹ Article X, § 10 prohibits any locality, or regional government from any financial commitment "in aid of any person, association, or corporation." In addition, § 15.2-953(A) clearly permits appropriations of public funds by local governing bodies, but only to charitable institutions or associations "located within their respective limits or outside their limits if such institution or association provides services to residents of the locality."¹⁰

"The ascertainment of legislative intention involves appraisal of the subject matter, purposes, objects and effects of the statute, in addition to its express terms."¹¹ Thus, consistent with Article X, § 10 and Article IV, § 16, a narrow reading of § 15.2-972 requires a conclusion that the phrase "in which free burial space is provided" means the provision of free burial space to the public at large. Only when a locality's citizens will benefit from free burial in a cemetery, may public funds be used for the care and upkeep of such cemetery.¹² Clearly, the provision of free burial space to only certain private interests does not promote the general interest of all of the residents of a locality. Thus, any appropriation benefiting only the private interests of owners of a private cemetery would violate the provisions of Article X, § 10.

I must, likewise, conclude that a narrow reading of § 15.2-972 does not authorize a locality to use public funds to repair or maintain roads providing ingress and egress to a private cemetery as part of the maintenance of such cemetery.

Section 2.2-505 articulates the authority of the Attorney General of Virginia to render official legal opinions. It is acknowledged that official opinions of the Attorney General must be confined to matters of law.¹³ Historically, the Office has limited responses to requests for official opinions to matters that concern an interpretation of federal or state law, rule or regulation.¹⁴ The final question you pose regarding an agreement to assure non-discriminatory use of burial space does not involve a question of law. Whether a locality should or should not enter into an agreement assuring nondiscriminatory use of burial space would appear to fall into a category of "best management practice" and not one involving interpretation of an existing statutory scheme. Therefore, consistent with the

historical practice of prior Attorneys General, I am unable to comment on such an agreement.

Conclusion

Accordingly, it is my opinion that a locality does not have the authority to use public funds to repair or maintain roads providing ingress and egress to a private cemetery pursuant to § 15.2-972. It is further my opinion that the phrase "in which free burial space is provided" means free burial space that is provided to the general public of a locality. Consistent with the historical practice of prior Attorneys General, I am unable to opine on whether a cemetery authority, such as cemetery trustees, must enter into an agreement with the locality assuring non-discriminatory use of burial space to the public as it does not involve interpretation of a statutory scheme.

¹ See 1972-1973 Op. Va. Att'y Gen. 29.

² City of Chesapeake v. Gardner Enters., Inc., 253 Va. 243, 246, 482 S.E.2d, 812, 814 (1997); see also 2003 Op. Va. Att'y Gen. 42, 44.

³ See Bd. of Supvrs. v. Horne, 216 Va. 113, 117, 215 S.E.2d 453, 455 (1975). This rule is corollary to the Dillon Rule that municipal corporations are similarly limited in their powers. *Id.* at 117, 215 S.E.2d at 455.

⁴ 2A Eugene McQuillen, *The Law of Municipal Corporations* § 10.19, at 369 (3d ed. 1996); see Op. Va. Att'y Gen.: 2000 at 75, 76; 2002 at 83, 84.

⁵ See 1972-1973 Op. Va. Att'y Gen. *supra* note 1, at 30.

⁶ *Browning-Ferris, Inc. v. Commonwealth*, 225 Va. 157, 161, 300 S.E.2d 603, 605 (1983).

⁷ See 1982-1983 Op. Va. Att'y Gen. 142, 144 (concluding that counties generally do not have authority to operate and maintain roadways).

⁸ See Bd. of Supvrs. v. Countryside Invest. Co., 258 Va. 497, 522 S.E.2d 610 (1999) (holding that county board of supervisors does not have unfettered authority to decide what matters to include in subdivision ordinance; must include requirements mandated by Land Subdivision and Development Act, and may include optional provisions contained in Act); Op. Va. Att'y Gen.: 2002 at 77, 78; 1974-1975 at 403, 405.

⁹ See generally *City of Charlottesville v. DeHaan*, 228 Va. 578, 323 S.E.2d 131 (1984), *Almond v. Day*, 197 Va. 782, 791, 91 S.E.2d 660, 667 (1956); Op. Va. Att'y Gen.: 1987-1988 at 184, 186; 1983-1984 at 103.

¹⁰ *Accord* Va. Const. art. IV, § 16 (authorizing General Assembly to authorize counties, cities, or towns to appropriate public funds, personal property, or real estate to any charitable institution or association).

¹¹ *Vollin v. Arlington Co. Electoral Bd.*, 216 Va. 674, 679, 222 S.E.2d 793, 797 (1976).

¹² See generally 1968-1969 Op. Va. Att'y Gen. 23 (concluding that county may pay portion of burial expenses for indigent person dying within county pursuant to § 63.1-106, predecessor to § 63.2-802).

¹³ 2 A.E. Dick Howard, *Commentaries on the Constitution of Virginia* 668 (1974); see also Op. Va. Att'y Gen.: 2002 at 25, 28; 1986-1987 at 252, 252; 1977-1978 at 31, 33.

¹⁴ See, e.g., Op. Va. Att'y Gen.: 2002, *supra* note 13, at 28; 1999 at 90, 93; 1997 at 105, 107.

[Back to October 2004 Opinion Index](#)