



# COMMONWEALTH of VIRGINIA

Office of the Attorney General

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June 20, 2006

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The Honorable Phillip A. Hamilton  
Member, House of Delegates  
P.O. Box 1585  
Newport News, Virginia 23601

Dear Delegate Hamilton:

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 the city charter or the general laws of the Commonwealth require the city of Newport News to have an actuarially sound retirement system for its employees.

## Response

It is my opinion that the city charter and the general laws of the Commonwealth require the city of Newport News to have an actuarially sound retirement system for its employees.

## Applicable Law and Discussion

The charter for the city of Newport News (the "City") empowers the City

[t]o establish a system of pensions for ... retired ... city ... employees, ... and to establish a fund or funds for the payment of such pensions by making appropriations out of the treasury of the city, ... provided that the total annual payments into such fund or funds shall be sufficient on sound actuarial principles to provide for the pensions to be paid therefrom.<sup>[1]</sup>

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<sup>1</sup>See 2003 Va. Acts ch. 183, at 198, 198; 1958 Va. Acts ch. 141, at 147, 149 (quoting § 2.02(H) of Newport News charter).

Additionally, § 51.1-800(A) provides that:

Every ... city, ... shall provide a retirement system for those ... employees listed in subsection B<sup>[2]</sup> either (i) by establishing and maintaining a local retirement system which provides a service retirement allowance to each employee who retires at age sixty-five or older which equals or exceeds two-thirds of the service retirement allowance to which the employee would have been entitled had the allowance been computed under the provisions of the Virginia Retirement System or (ii) by participating directly in the Virginia Retirement System.

The word “shall” used in a statute ordinarily implies that its provisions are mandatory.<sup>3</sup> Furthermore, in § 51.1-803(A), the General Assembly requires that where the governing body of a city establishes a retirement system, all funds on hand that are “not necessary for immediate payment of pensions or benefits” be prudently and diligently invested and diversified “so as to minimize the risk of large losses.”

“[T]he primary rule of statutory construction is to ascertain and declare the intention of the legislature and to carry such intention into effect to fullest degree.”<sup>4</sup> Consequently, “the rules of interpretation are resorted to for the purpose of resolving ambiguity, not for the purpose of creating it.”<sup>5</sup> The Supreme Court of Virginia has stated that “[t]he manifest intention of the legislature, clearly disclosed by its language, must be applied.”<sup>6</sup>

The charter for the City and §§ 51.1-800(A) and 51.1-803(A) clearly and unambiguously require the City to have an actuarially sound retirement system for its employees.<sup>7</sup>

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<sup>2</sup>Section 51.1-800(B) includes:

“1. Officers and employees who are regularly employed full time on a salaried basis, whose tenure is not restricted to temporary or provisional employment.

“2. Officers and employees who are regularly employed full time on a salaried basis, whose tenure is not restricted to temporary or provisional employment by an organization other than a public school board that functions solely within the boundaries of a county, city, or town, unless the cost of the organization’s operation is borne by (i) users of services, (ii) more than one county, city, or town, or (iii) an entity other than a county, city, or town.

“3. clerks of the circuit court and deputies or employees of such officers.”

<sup>3</sup>See, e.g., *Schmidt v. City of Richmond*, 206 Va. 211, 217-18, 142 S.E.2d 573, 578 (1965) (noting that statute using “shall” required court to summon nine disinterested freeholders in condemnation case); cf. *Ladd v. Lamb*, 195 Va. 1031, 1035-36, 81 S.E.2d 756, 758-59 (1954) (noting that statute providing that clerk of court “shall forward” copy of conviction to Commissioner of Department of Motor Vehicles within fifteen days not mandatory but merely directory); see also 1986-1987 Op. Va. Att’y Gen. 210, 211; 17 MICHIE’S JUR. *Statutes* § 60, at 436-37 (1994).

<sup>4</sup>*United States v. Jerge*, 738 F. Supp. 181, 183 (E.D. Va. 1990).

<sup>5</sup>*In re Boggs-Rice Co*, 66 F.2d 855, 858 (4th Cir. 1933).

<sup>6</sup>*Barr v. Town & Country Props., Inc.*, 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990) (quoting *Anderson v. Commonwealth*, 182 Va. 560, 566, 29 S.E.2d 838, 841 (1944)); see also 2001 Op. Va. Att’y Gen. 179, 180.

<sup>7</sup>Section 51.1-800(A) provides the city of Newport News with the option of participating in the Virginia Retirement System as an alternative to maintaining its own retirement system.

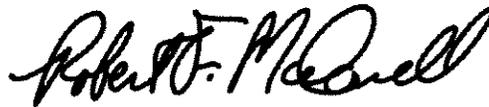
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### Conclusion

Accordingly, it is my opinion that both the city charter and the general laws of the Commonwealth require the city of Newport News to have an actuarially sound retirement system for its employees.

Thank you for letting me be of service to you.

Sincerely,

A handwritten signature in black ink, reading "Robert F. McDonnell". The signature is written in a cursive style with a large, prominent "R" and "M".

Robert F. McDonnell