



COMMONWEALTH of VIRGINIA

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Mr. Stuart E. Katz
City Attorney for Newport News
2400 Washington Avenue
Newport News, Virginia 23607

Dear Mr. Katz:

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 creation and funding of a limited liability company for the purpose of owning and managing real property outside of Virginia as an investment for the Newport News Employees' Retirement Fund is a reasonable and appropriate exercise of local government powers under the Dillon Rule.¹

Response

It is my opinion that the creation and funding of a limited liability company to manage investments for a local government retirement system fund may be a reasonable and appropriate exercise of governmental powers under the Dillon Rule, provided such investments conform to the standards of § 51.1-803. Whether such a limited liability company may own and manage real property outside of Virginia as an acceptable investment pursuant to § 51.1-803 is a question of fact and not an appropriate issue on which to render an opinion.²

Background

You relate that the Charter of the City of Newport News authorizes the establishment of a local retirement fund known as the City of Newport News Employees' Retirement Fund. You also note that the charter authorizes the City "[t]o establish a system of pensions."³ Pursuant to that authority, you relate that the City has established the City of Newport News Employees' Retirement Fund,⁴ governed by a

¹See *infra* note 8.

²See Op. Va. Att'y Gen.: 2004 at 163, 164 n.2; 1999 at 132, 132; 1986-1987 at 1, 6 (noting that authority of Attorney General to issue official advisory opinions is limited to questions of law).

³See 1978 Va. Acts ch. 576, at 886, 888 (quoting § 2.02(H)).

⁴See NEWPORT NEWS, VA., CODE § 31-20 (2005), available at <http://www.municode.com/Resources/gateway.asp?pid=14013&sid=46>.

board of trustees⁵ (“board”). You state that the City has granted the board full power to invest all assets of the Retirement Fund.⁶ You relate that the board plans to invest a percentage of its assets in real estate. Such real estate investments may involve the purchase and sale of land on which timber groves will be harvested and sold. You further convey that the board will need to enter into an agreement with an individual or entity familiar with timber operations to manage the investment operations. To protect the Retirement Fund and the City from potential liability arising from the ownership of the real estate investment, the board wishes to form a limited liability company to own the real estate. You state that the board will maintain ultimate control over the limited liability company.

Applicable Law and Discussion

The overriding goal of statutory interpretation is to discern and give effect to legislative intent.⁷ The Commonwealth follows the Dillon Rule of strict construction “that municipal corporations possess and can exercise only those powers expressly granted by the General Assembly, those necessarily or fairly implied therefrom, and those that are essential and indispensable.”⁸ “[W]here a grant of power [by the General Assembly] is silent upon its mode of execution, a method of exercise clearly contrary to legislative intent, or inappropriate to the ends sought to be accomplished by the grant, ... would be unreasonable.”⁹ However, an established corollary to Dillon’s Rule provides that:

“Where the state legislature grants a local government the power to do something but does not specifically direct the method of implementing that power, the choice made by the local government as to how to implement the conferred power will be upheld as long as the method selected is reasonable.”¹⁰

The authority to establish a retirement system for local government employees is expressly contained in §§ 15.2-1510,¹¹ 51.1-800,¹² and 51.1-801.¹³ Those statutes do not specify the manner by which local governments may invest retirement fund assets. However, the intent of the investment

⁵NEWPORT NEWS, VA., CODE § 31-72 (2005)

⁶NEWPORT NEWS, VA., CODE § 31-80(a) (2005)

⁷See *Turner v. Commonwealth*, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983); *Vollin v. Arlington Co. Electoral Bd.*, 216 Va. 674, 678-79, 222 S.E.2d 793, 797 (1976).

⁸*City of Richmond v. Confere Club*, 239 Va. 77, 79, 387 S.E.2d 471, 473 (1990); see also *Commonwealth v. County Bd.*, 217 Va. 558, 574, 232 S.E.2d 30, 40 (1977); *Winchester v. Redmond*, 93 Va. 711, 714, 25 S.E. 1001, 1002 (1896).

⁹*County Board*, 217 Va. at 577, 232 S.E.2d at 42.

¹⁰*Arlington County v. White*, 259 Va. 708, 712, 528 S.E.2d 706, 708 (2000) (quoting *Virginia Beach v. Hay*, 258 Va. 217, 221, 518 S.E.2d 314, 316 (1999)).

¹¹“Any locality may establish a system for the retirement of injured or superannuated officers and employees[.]” VA. CODE ANN. § 15.2-1510 (2003).

¹²“Every county and city, and every town having a population of 5,000 or more, shall provide a retirement system for those officers and employees ... either (i) by establishing and maintaining a local retirement system ... or (ii) by participating directly in the Virginia Retirement System.” VA. CODE ANN. § 51.1-800(A) (Supp. 2007).

¹³“The governing body of any county, city, or town may, by ordinance adopted by a recorded vote of a majority of the members elected, establish a retirement system.” Section 51.1-801 (2005).

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powers granted by the General Assembly is unambiguous. Local governments must invest their retirement system fund assets “with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with the same aims.”¹⁴ Further, local government retirement systems are to diversify the investment of their assets “to minimize the risk of large losses unless under the circumstances it is clearly prudent not to do so.”¹⁵

Based upon the powers that the General Assembly has conferred to local governments to manage their retirement systems, it would be permissible to establish and fund a limited liability company as a means to implement investment powers provided such investments conform to the standards of care and diversification mandated by § 51.1-803(A). Further, the Supreme Court of Virginia has determined that when a grant of power is silent regarding a method for implementation, such as with § 51.1-803, “[a]ny doubt in the reasonableness of the method selected is resolved in favor of the locality.”¹⁶

Whether the particular real estate investment about which you inquire conforms to the standards of care and diversification mandated upon local government retirement systems by § 51.1-803 is a question of fact. Attorneys General traditionally have declined to render official opinions when the request involves a question of fact rather than one of law.¹⁷

Conclusion

Accordingly, it is my opinion that the creation and funding of a limited liability company to manage investments for a local government retirement system fund may be a reasonable and appropriate exercise of governmental powers under the Dillon Rule, provided such investments conform to the standards of § 51.1-803. Whether such a limited liability company may own and manage real property outside of Virginia as an acceptable investment pursuant to § 51.1-803 is a question of fact and not an appropriate issue on which to render an opinion.¹⁸

Thank you for letting me be of service to you.

Sincerely,



Robert F. McDonnell

1:1357; 1:941/07-038

¹⁴Section 51.1-803(A) (2005).

¹⁵*Id.*

¹⁶*White*, 259 Va. at 712, 528 S.E.2d at 708 (quoting *Hay*, 258 Va. at 221, 518 S.E.2d at 316).

¹⁷*See supra* note 2.

¹⁸*Id.*