



COMMONWEALTH of VIRGINIA

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Michael McHale Collins, Esquire
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Post Office Box 59
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Dear Mr. Collins:

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

Issue Presented

You ask whether an ordinance passed by the Bath County Board of Supervisors pursuant to § 58.1-3833 is a legal enactment of a food and beverage tax ("meals tax") in the amount of 1% when the citizens of Bath County by referendum authorized the Board of Supervisors to impose a meals tax in the amount of 4%.

Response

It is my opinion that the enactment by the Board of Supervisors of a meals tax ordinance with a rate of 1% after voters of that county gave their approval to a meals tax by a referendum vote is a valid exercise of the statutory authority granted to the Board of Supervisors to levy a meals tax in an amount and on such terms as that governing body may by ordinance prescribe.

Background

You state that in the spring of 2009, the Board of Supervisors determined that the approval of the citizens of Bath County should be sought for the enactment of a meals tax in the county in order to provide another source of county revenue. The Board adopted a resolution to put the issue on the next general election ballot, and the Circuit Court entered an order directing that the ballot for the November 3, 2009, general election include a referendum on the following question:

Should Bath County enact an ordinance to levy a tax on food and beverages sold, for human consumption, by a restaurant, in the amount of 4% of the amount charged for such food and beverages not to include, however, sales through vending machines, by boarding houses, employee cafeterias, non-profit cafeterias, and other non-profit organizations?

You advise that the Board of Supervisors chose to present to the voters in the referendum question the maximum meals tax rate of 4% permitted by Virginia law so that the matter would be presented fairly to

the public. The referendum question, however, described the proposed tax to be “in the amount of 4%” rather than using the language found in the enabling statute that the proposed tax was “not to exceed four percent.” The voters answered in the affirmative the question put before them, approving the enactment of a meals tax for Bath County in the referendum vote on November 3, 2009.

Following the passage of the referendum, those responsible for the collection of the tax voiced concern over the levying of a 4% meals tax in difficult economic times. The Board of Supervisors determined that imposing a tax in the amount of 1% could generate the targeted amount of revenue sought. Following a properly noticed public hearing, the Board of Supervisors enacted an ordinance levying a tax in the amount of 1%. A citizen complaint followed, challenging the authority of the Board of Supervisors to levy a meals tax at a rate less than the 4% rate stated in the approved referendum.

Applicable Law and Discussion

Two important principles of the Constitution of Virginia apply to this matter of local taxation. First, “all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage, and cannot be taxed ... without their own consent, or that of their representatives duly elected.”¹ Second, “[n]o ordinance or resolution appropriating money ..., imposing taxes, or authorizing the borrowing of money shall be passed except by a recorded affirmative vote of a majority of all members elected to the governing body.”² The interplay between these two principles is displayed in § 58.1-3833, enacted by the General Assembly under its express constitutional authority to provide for the organization, government and powers of counties.³

Section 58.1-3833(A) authorizes any county “to levy a tax on food and beverages sold, for human consumption, by a restaurant.”⁴ This tax is “not to exceed four percent” and shall not be levied in certain circumstances enumerated in the statute, such as the sale of food and beverages from vending machines or by public and private schools, colleges and universities, hospitals and extended care facilities.⁵

A precondition to imposing the tax is that the voters approve the tax in a referendum held in accordance with § 24.2-684 and initiated either by a resolution of the county’s governing body or a petition signed by at least 10 percent of the registered voters of the county and presented to the circuit court.⁶ The role of the voters is not to determine the precise amount of the tax. Rather, the statute calls

¹ VA. CONST. art. I, § 6.

² VA. CONST. art. VII, § 7.

³ VA. CONST. art. VII, § 2.

⁴ VA. CODE ANN. § 58.1-3833(A) (2009).

⁵ *Id.*

⁶ *Id.* The language on the ballot here satisfies the requirement found in § 24.2-684 that the circuit court order calling the referendum “shall state the question to appear on the ballot in plain English.”⁶ VA. CODE ANN. § 24.2-684 (2006). For the applicable definition of “plain English,” see § 24.2-687(A) (2006) (“‘Plain English’ means written in nontechnical, readily understandable language using words of common everyday usage and avoiding legal terms and phrases or other terms and words of art whose usage or special meaning primarily is limited to a particular field or profession”).

upon voters to “approve” the tax “in a referendum.”⁷ Following approval of the voters, the tax is to become effective “in an amount and on such terms as the governing body may by ordinance prescribe.”⁸

This division of responsibility mandated by the General Assembly in the context of the meals tax honors both constitutional principles mentioned above. The consent of the county’s citizens first must be obtained before a meals tax may be imposed, and the local governing body then retains the authority to adopt an ordinance setting the meals tax rate. Once the citizens of Bath County authorized a tax, the Board of Supervisors, by law, retained the discretion to set the tax rate consistent with statutory requirements. The language on the ballot could not fix the precise amount of the tax – that responsibility rested with the governing body.

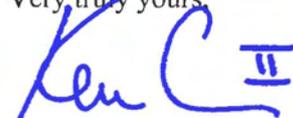
Two complementary constitutional considerations favor this interpretation. First, the Board could not delegate its authority to determine the tax rates for the locality to its citizens. It is a general principle of law that a legislative body may not delegate or divest itself or its legislative powers or its discretion in exercising those powers.⁹ Second, and more specifically, citizens cannot set a tax rate because the Virginia Constitution reserves that power to the governing body.¹⁰ The terms of the tax are thus within the discretion of the governing body.¹¹ Therefore, I conclude that the legislation authorizes the imposition of a tax up to 4% and requires the Board to set the rate following the affirmative vote of the referendum. Pursuant to this authority, the Board of Supervisors properly enacted an ordinance that implements a meals tax in the amount of 1%.¹² The safest practice, of course, and the one least likely to invite controversy, is to phrase the referendum language to state that the meal tax will be in an amount “up to 4%.”

Conclusion

Accordingly, it is my opinion that the enactment by the Board of Supervisors of a meals tax ordinance with a rate of 1% after voters of that county gave their approval to a meals tax by a referendum vote is a valid exercise of the statutory authority granted to the Board of Supervisors to levy a meals tax in an amount and on such terms as that governing body may by ordinance prescribe.

With warmest regards, I am

Very truly yours,



Kenneth T. Cuccinelli, II
Attorney General

⁷ Section 58.1-3833(A).

⁸ *Id.*

⁹ 1985-86 Op. Va. Att’y Gen. 96, 96-97 (citing *Mumpower v. Hous. Auth.*, 176 Va. 426, 11 S.E.2d 732 (1940), *Beal v. City of Roanoke*, 90 Va. 77, 17 S.E. 738 (1893)).

¹⁰ *Wright v. Norfolk Elect. Bd.*, 223 Va. 149, 286 S.E.2d 227 (1982) (VA. CONST. art. VII, § 2 precludes residents of a city from setting the real estate tax rate through the initiative process).

¹¹ *See* 1997 Op. Va. Att’y Gen. 186, 188.

¹² I also note that a referendum will not be vitiated “if the spirit and intention of the law is not violated.” *See* 1977-78 Op. Va. Att’y Gen. 334, 336.