



COMMONWEALTH of VIRGINIA

Office of the Attorney General

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The Honorable R. Creigh Deeds
Member, Senate of Virginia
Post Office Box 5462
Charlottesville, Virginia 22905

Dear Senator Deeds:

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 inquire whether the Warm Springs Sanitation Commission is entitled to governmental immunity.

Response

It is my opinion that, in certain circumstances, the Warm Springs Sanitation Commission is entitled to governmental immunity under Virginia law.

Applicable Law and Discussion

The doctrine of sovereign immunity is 'alive and well' in Virginia.¹ "Thus, the Commonwealth is immune from tort liability for the acts or omissions of its agents and employees unless an express statutory or constitutional provision waives that immunity."² Counties, as integral parts of the State, also enjoy full immunity in such cases.³ Cities and municipal corporations, on the other hand, are entitled to immunity only in situations involving governmental, rather than proprietary functions.⁴

¹ Gray v. Sec'y of Transp., 276 Va. 93, 101, 662 S.E.2d 66, 70 (2008) (quoting Messina v. Burden, 228 Va. 301, 307, 321 S.E.2d 657, 660 (1984) (internal quotation marks omitted)). I do not address Eleventh Amendment sovereign immunity in this opinion; however, such immunity does not usually apply to such entities, because they are independently financed, have considerable autonomy, and are too localized to be considered an alter ego of the Commonwealth. See Ram Ditta v. Maryland Nat'l Capital Park & Planning Comm'n., 822 F.2d 456 (4th Cir. 1987).

² Ligon v. Cnty. of Goochland, 279 Va. 312, 316, 689 S.E.2d 666, 668 (2000).

³ *Id.* See also, e.g., Mann v. Cnty. Bd., 199 Va. 169, 173-74, 98 S.E.2d 515, 518 (1957).

⁴ See, e.g., Va. Electric & Power Co. v. Hampton Redev. & Hous. Auth., 217 Va. 30, 34, 225 S.E.2d 364, 368 (1976); Taylor v. City of Newport News, 214 Va. 9, 10, 197 S.E.2d 209, 210 (1973); 2006 Op. Va. Att'y Gen. 95, 96.

Based on a review of case law and prior opinions addressing other bodies,⁵ I conclude that the Warm Springs Sanitation Commission is a municipal corporation, and therefore afforded sovereign immunity for its governmental actions. As the Supreme Court of Virginia has explained,

in categorizing a particular entity, the first inquiry is “how many attributes of a municipal corporation does the entity in dispute possess?” We have identified six attributes pertinent to that inquiry:

- (1) Creation as a body corporate and politic and as a political subdivision of the Commonwealth;
- (2) Creation to serve a public purpose;
- (3) Power to have a common seal, to sue and be sued, to enter into contracts, to acquire, hold and dispose of its revenue, personal and real property;
- (4) Possession of the power of eminent domain;
- (5) Power to borrow money and issue bonds which are tax exempt, with interest on such bonds enjoying the same status under tax laws as the interest on bonds of other political subdivisions of the state;
- (6) Management of the corporation vested in a board of directors or a commission.^[6]

The Warm Springs Sanitation Commission overwhelmingly satisfies these criteria. The Commission administers the Warm Springs Sanitation District, which was created pursuant to the Sanitation Districts Law of Nineteen Hundred and Forty-Six.⁷ This law provides that “[i]n and for each district . . . created pursuant to this chapter or pursuant to a special act of the General Assembly, *a commission is hereby created as a body corporate*, invested with the rights, powers and authority and charged with the duties set forth in this chapter.”⁸ “Commission,” in turn, “means *the body corporate or*

⁵ See *Hampton Rds. Sanitation Dist. Comm’n v. Smith*, 193 Va. 371, 68 S.E.2d 497(1954) (finding the Hampton Roads Sanitation District Commission to be a municipal corporation for jurisdictional purposes); *Cnty. of York v. Peninsula Airport Comm’n*, 235 Va. 477 369 S.E.2d 665 (1988) (finding the Peninsula Airport Commission to be a municipal corporation for taxation purposes); *Va. Electric & Power Co.*, 217 Va. at 30, 225 S.E.2d at 364 (affording limited immunity to local housing authority upon determining the authority to be a municipal corporation); *Robertson v. W. Va. Water Auth.*, Case No. CL07-1316, City of Roanoke Cir. Ct. (Va. Cir. 2011) (deciding water authority is a municipal corporation and therefore entitled to limited immunity). See also *Hampton Rds. Sanitation Dist. v. McDonnell*, 234 Va. 235, 360 S.E.2d 841 (1987) (addressing whether particular activity of similarly created sanitation district was intentional so as to remove entity from protection of immunity when assertion of such entitlement otherwise was uncontested). Further, this Office previously has concluded that a fire company, 1985-86 Op. Va. Att’y Gen. 173; a county department of social services, 1986-87 Op. Va. Att’y Gen. 45; a county/county school board consolidated services administration, 1995 Op. Va. Att’y Gen. 72; the Lake Anna Advisory Commission, 1997 Op. Va. Att’y Gen. 123; and a water authority, 2006 Op. Va. Att’y Gen. 95, are protected by sovereign immunity.

⁶ *Peninsula Airport Comm’n*, 235 Va. at 480-81, 369 S.E.2d at 666-67 (quoting *Smith*, 193 Va. at 376, 68 S.E.2d at 500 and citing *City of Richmond v. Richmond Metro. Auth.*, 210 Va. 645, 647, 172 S.E.2d 831, 832 (1970)).

⁷ See 1983-84 Op. Va. Att’y Gen. 301. The law is codified at VA. CODE ANN. §§ 21-224 through 21-290 (2008).

⁸ Section 21-237 (emphasis added).

politic comprising a [sanitation] district and its inhabitants”⁹ Thus, the Commission clearly possesses the first and last elements.¹⁰

The Commission’s enabling legislation sets forth its public purpose: “the relief of the waters of the district for public health and the consequent improvement of conditions affecting the public health.”¹¹ The law further grants the Commission the following powers:

1. To adopt and have a common seal and to alter the same at pleasure;
2. To sue and to be sued;
3. In the name of the commission and on its behalf, to acquire, hold and dispose of its fees, rents and charges and other revenues;
4. In the name of the commission . . . to acquire, hold, and dispose of other personal property for the purposes of the commission;
5. In the name of the commission . . . to acquire by purchase, gift, *condemnation* or otherwise, real property or rights or easements therein, necessary or convenient for the purposes of the commission, . . . provided that the *right of condemnation* granted herein shall be subject to the same provisions as are provided in § 25.1-102 concerning the condemnation of any property belonging to a corporation possessing the power of eminent domain by another public service corporation;
6. To borrow money for the purposes of the commission and to issue therefor its bonds ...
7. To accept gifts or grants or real or personal property, money, material, labor or supplies for the purposes of the commission and to make and perform such agreements and contracts as may be necessary or convenient in connection with the procuring or acceptance of such gifts or grants; . . .
9. To make and enforce rules and regulations for the management and regulation of its business and affairs and for the use, maintenance and operation of its facilities and properties, and to amend the same^[12]

Accordingly, because a preponderance of applicable factors are met¹³ and based on the application of immunity in similar instances,¹⁴ I conclude that the Warm Springs Sanitation Commission is a municipal corporation entitled to sovereign immunity.

⁹ Section 21-225(2) (emphasis added).

¹⁰ Although the statute does not expressly designate the Commission as a “political subdivision,” “municipal corporations are ‘political subdivisions of the State’” and such designation is not critical to an entity’s classification as a municipal corporation when the essential attributes of a municipal corporation are present. *Short Pump Town Ctr. Cmty. Dev. Auth. v. Hahn*, 262 Va. 733, 744-45, 554 S.E.2d 441 (2001) (explaining and affirming *Peninsula Airport Comm’n*, 235 Va. at 477, 369 S.E.2d at 665). *See also* *Richmond, Fredericksburg & Potomac R.R. Co. v. Richmond*, 145 Va. 225, 238, 138 S.E. 800, 803-04 (1926).

¹¹ Section 21-249.

¹² Section 21-248 (emphasis added).

¹³ It is unclear whether the bonds hold tax exempt status, and such inquiry is beyond the scope of this Opinion. Further, in my view, such inquiry is unnecessary, for the question posed by the Supreme Court, “how many attributes of a municipal corporation does the entity in dispute possess?” does not require that each attribute be present. *See Smith*, 193 Va. at 377, 68 S.E.2d at 501 (“the more attributes of a municipal corporation an agency has the more likely it is to be treated as a municipal corporation . . .”).

I reiterate however that the sovereign immunity afforded municipal corporations arises only for governmental and not proprietary activities.¹⁵ Because no bright line rule exists to distinguish between governmental and proprietary functions, whether the exercise of any particular power by the Warm Springs Sanitation Commission would be governmental or proprietary would turn on facts not presented. In addition, the Attorney General refrains from issuing opinions on matters of fact.¹⁶ It should also be kept in mind that individual commission members or employees can lose the protection of sovereign immunity through intentional misconduct or gross negligence, and depending on the facts and circumstances, may not enjoy such protection at all.¹⁷

Conclusion

Accordingly, it is my opinion that the Warm Springs Sanitation Commission would be found, in a proper case, to enjoy the protections of sovereign immunity.

With kindest regards, I am

Very truly yours,

A handwritten signature in blue ink that reads "Ken C II". The signature is stylized and written in a cursive-like font.

Kenneth T. Cuccinelli, II
Attorney General

¹⁴ See *supra*, note 5.

¹⁵ See *supra*, note 4. Further, this immunity is available only for actions sounding in tort, and not contract. See *Wiecking v. Allied Med. Supply Corp.*, 239 Va. 548, 551, 391 S.E.2d 258, 260 (“we have never extended th[e] defense [of sovereign immunity] to actions based upon valid contracts entered into by duly authorized agents of the government”).

¹⁶ 2004 Op. Va. Att’y Gen., 48 n.16; 2002 Op. Va. Att’y Gen. 96, 99 and opinions cited at 101 n.27.

¹⁷ *James v. Jane*, 221 Va. 43, 53, 282 S.E.2d 864, 869 (1980).