



COMMONWEALTH of VIRGINIA

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April 12, 2013

The Honorable S. Chris Jones
Member, House of Delegates
Post Office Box 5059
Suffolk, Virginia 23435

Dear Delegate Jones:

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

Issues Presented

You inquire whether the Mayor, Vice Mayor or any other Hampton City Council member may be appointed by the Hampton City Council to serve as a member of the Fort Monroe Authority ("FMA" or "Authority") Board of Trustees ("Board"). You further ask whether members of the Board of the Authority, a political subdivision and public body corporate and politic of the Commonwealth of Virginia, are subject to the common law duties of loyalty, care, obedience, and disclosure that are generally applicable to the directors of boards of corporations in Virginia. Also, you inquire about the remedies available to address a Board member's failure to fulfill his lawful duties.

Response

It is my opinion that, because there is no available exemption to the prohibitions of Article VII, § 6 of the Constitution of Virginia and § 15.2-1535 of the *Code of Virginia*, neither the Mayor, Vice Mayor, or any other Hampton City Council member may be appointed by the Hampton City Council to serve as a member of the FMA Board. It is further my opinion that members of the FMA Board, as individuals holding public office, stand in a fiduciary relationship with the FMA and thus are subject to the common law duties of loyalty, care, obedience, and disclosure that are generally applicable to those in such a fiduciary relationship. Finally, it is my opinion that an FMA Board member who fails to fulfill his lawful duties may be removed from office in accordance with the Board's by-laws and applicable law.

Background

In 2005, the City of Hampton created a Federal Area Development Authority (FADA) to deal with issues related to Fort Monroe.¹ The FADA was transformed into the Fort Monroe Federal Area Development Authority (FMFADA) in 2007 to continue the planning required by the Defense Base

¹ See 2005 Va. Acts chs. 869 & 887 (authorizing the City to take such action).

Closure and Realignment Act.² In 2010, pursuant to the Fort Monroe Authority Act (FMA Act),³ the Virginia General Assembly created the FMA

to serve as the Commonwealth's management agent exercising all the Commonwealth's powers over public and private land in the Area of Operation, including regulation of land use, zoning, and permitting and implementation of actions and fulfillment of obligations under the Programmatic Agreement, Design Standards, Reuse Plan, State Memorandum of Understanding, and any other agreements regarding Fort Monroe to which the Commonwealth is a party.^{4]}

The FMA is empowered to enter into contracts, to foster and stimulate economic development, to sue and be sued and to exercise other powers necessary to the fulfillment of its mission.⁵ The FMA Act contains provisions specifying the relationship of the Authority to the City of Hampton, including provisions concerning the collection of taxes from private parties when owed⁶ and the payment of a fee in lieu of taxes on property owned by the Commonwealth based on the assessed value of the properties.⁷ This provision gives the FMA the right to contest the assessments made by the City.⁸

The FMA Act further specifies a governing Board of Trustees consisting of twelve (12) voting members, including "two members appointed by the Hampton City Council," to perform these duties.⁹ Members of the Board take an oath of office that requires, in part, that each Board member "...will faithfully and impartially discharge all the duties incumbent upon me as..." a member of the Fort Monroe Authority Board of Trustees.¹⁰ The City appointees to the Hampton FADA and the FMFADA contained no members of the City Council. Since the creation of the FMA, the City has appointed only City Council members to serve on the Board. The present City of Hampton representatives are the Mayor, Molly Joseph Ward, and the Vice Mayor, George E. Wallace.

You ask whether these individuals, and more generally, whether any Hampton City Council member, can serve on the FMA Board in light of specific prohibitions contained in the Constitution of Virginia and the Code of Virginia. You express concern that, even if the appointment of the City Council members to the FMA Board is allowed under the Constitution and the Code of Virginia, such appointments may present those members with potential conflicts because of the differing interests of the FMA and the City of Hampton. You describe two situations that may raise conflicts for the Hampton City Council members. The first involves the work of the FMA Board to develop its positions and plans to deal with disagreements that arise between the FMA and the City of Hampton regarding the real property assessments used to calculate the fees in lieu of taxes paid by the FMA to the City. The second

² See 2007 Va. Acts chs. 707 & 740 (specifying conditions related to FADA).

³ See 2010 Va. Acts chs. 338 & 460. The FMA Act originally was codified in Title 15.2, but was recodified as part of Title 2.2 in 2011. 2011 Va. Acts ch. 716; see VA. CODE ANN. §§ 2.2-2336 through 2.2-2346 (2011 & Supp. 2012).

⁴ VA. CODE ANN. § 2.2-2339(7) (Supp 2012).

⁵ Section 2.2-2340 (Supp. 2012).

⁶ Section 2.2-2341 (2011).

⁷ Section 2.2-2342 (2011).

⁸ *Id.*

⁹ Section 2.2-2338 (2011).

¹⁰ FORT MONROE AUTHORITY, BY-LAWS, art. III, § 3.01; VA. CODE ANN. § 49-1 (2009).

involves the work of the Board to consider proposals from developers for possible projects at Fort Monroe when the City of Hampton takes an official position against the projects.

Applicable Law and Discussion

Article VII, § 6 of the Constitution of Virginia provides, in pertinent part, that

No member of a governing body shall be eligible, during the term of office for which he was elected or appointed, to hold any office filled by the governing body by election or appointed, except that a member of a governing body may be named a member of such other boards, commissions, and bodies as may be permitted by general law.^[11]

In accordance with this constitutional provision, § 15.2-1535(A) of the *Code of Virginia* also provides that, “[n]o member of a governing body of a locality shall be eligible, during the term of office for which he was elected or appointed, to hold any office filled by the governing body by election or appointment, except that a member of a governing body may be named a member of such other boards, commissions, and bodies as may be permitted by general law...”¹² Section 15.2-1535(B) then sets forth boards, commission and authorities that are exempted from this prohibition.¹³

Thus, whether the City Council members may serve on the FMA board depends on whether a board position constitutes an “office” as contemplated in the Constitution and Code and, if so, whether such service can avail itself of the statutory exemption to the prohibition.

A previous opinion of this Office addressed the criteria for determining whether a particular position constitutes a public office. It concludes:

To constitute a public office, the position must be created by the Constitution or statutes. It is a position filled by election or appointment, with a designation or title, and duties concerning the public, assigned by law. A frequent characteristic of such a post is a fixed term of office.^[14]

The FMA is the creation of the FMA Act,¹⁵ which establishes the Authority as a “public body politic and corporate . . . constituted as a public instrumentality exercising public functions.”¹⁶ The General Assembly has declared that the Authority “serves a public purpose”¹⁷ and that the exercise of its powers and duties constitutes “the performance of an essential governmental function[.]”¹⁸ The enabling legislation further provides that the FMA is to be governed by a Board of Trustees and sets forth the method of appointment and prescribes terms of office for Board members.¹⁹ Based on the above criteria,

¹¹ VA. CONST. art. VII, § 6. *See also* 2000 Op. Va. Att’y. Gen. 51.

¹² VA. CODE ANN. § 15.2-1535(A) (2012).

¹³ Section 15.2-1535(B).

¹⁴ 2000 Op. Va. Att’y Gen. 51, 52; 1983-84 Op. Va. Att’y Gen. 292, 293; 1981-82 Op. Va. Att’y Gen. 170, 170; 1977-78 Op. Va. Att’y Gen. 322, 323 and cases cited therein.

¹⁵ VA. CODE ANN. §§ 2.2-2336 through 2.2-2346 (2011 & Supp. 2012).

¹⁶ Section 2.2-2336(C) (2011).

¹⁷ Section 2.2-2336(B)(6).

¹⁸ Section 2.2-2336(C).

¹⁹ Section 2.2-2338.

I therefore conclude that FMA Board positions are public offices for purposes of Article VII, § 6 and Virginia Code § 15.2-1535.

The FMA Act provides that two Board members are to be appointed by the Hampton City Council.²⁰ Thus, a position on the FMA Board is an office appointed by City Council, and, in accordance with Article VII, § 6, no member of an appointing city council is eligible to be appointed to the Authority unless such appointment is expressly authorized by law.²¹ I am unaware of any provision of general law which expressly authorizes such an appointment. In addition, § 15.2-1535(B) does not include among its specific exemptions any provisions applicable to the FMA Board. Consequently, I conclude that neither the Mayor, Vice Mayor, nor any other Hampton City Council member may be appointed by the Hampton City Council to serve as a member of the FMA Board.

With regard to your second question, as discussed above, FMA Board members hold public office. As this Office previously has stated “[a] public officer or official has a fiduciary relationship with the body of which he is a member”²² A fiduciary is “a person who is required to act for the benefit of another person on all matters within the scope of their relationship; one who owes to another the duties of good faith, trust, confidence and candor.”²³ Additionally, public officials “are trustees for the people who have a right to require them to exercise their best judgment in everything that pertains to the people or their welfare, unaffected and unprejudiced by anything that might inure to the official’s own interest as individuals.”²⁴ As noted previously, FMA Board members must take an oath of office obligating them to “faithfully and impartially” serve as members of the Board. Consequently, FMA Board members owe a duty of “good faith, trust, confidence and candor” to the entity that they serve, the FMA, and by extension, to the Commonwealth of Virginia as the entity to whom the Board is responsible.²⁵ Those duties must be discharged in a faithful and impartial manner.

Members of Hampton City Council, of course, also serve in a public office and owe the same duties of good faith, trust, confidence, and candor to the constituents that they represent as members of the Council,²⁶ as well as the same obligation to serve those constituents faithfully and impartially pursuant to their oath of office as Council members. To the extent that any FMA Board member serves in another position that would divide his or her loyalties to the FMA, there would be a conflict of interests based on the duties enumerated above and the obligations flowing from their oath of office. Nonetheless, because I conclude that Hampton City Council members are prohibited from serving on the FMA Board, I offer no further comments regarding the specific examples provide in your letter.

You also request my opinion regarding remedies that might be available to the FMA in the event a Board member failed to fulfill his duties to the FMA.²⁷ Pursuant to the Authority’s ability to adopt

²⁰ Section 2.2-2338.

²¹ *Compare* *Bray v. Brown*, 258 Va. 618, 621, 521 S. E. 2d 526, 528 (1999) (holding Deputy Sheriff shall not be prohibited from serving on the Town Council because he was neither elected nor appointed as a deputy sheriff by the Town Council).

²² 1984-85 Op. Va. Att’y Gen. 245, 245 and cases cited therein.

²³ BLACK’S LAW DICTIONARY 289 (3d pocket ed. 1996).

²⁴ *Blankenship v. City of Richmond*, 188 Va. 97, 98, 49 S.E.2d 321 (1948).

²⁵ 1984-85 Op. Va. Att’y Gen. at 245 and cases cited therein.

²⁶ *Id.*

²⁷ The propriety or impropriety of any action will be dependent on the particular facts and circumstances of each case, and any specific guidance is beyond the scope of this opinion.

bylaws, rules, and regulations,²⁸ the FMA has determined that “the removal of any Trustee will be in accordance with Section 24.2-230.”²⁹ Section 24.2-230 allows for the removal of an elected or appointed Commonwealth officer only by the person or authority who appointed him, unless the member is convicted of certain crimes or is determined to be mentally incompetent.³⁰

Conclusion

Accordingly, it is my opinion that, because there is no available exemption to the prohibitions of Article VII, § 6 of the Constitution of Virginia and § 15.2-1535 of the *Code of Virginia*, neither the Mayor, Vice Mayor, or any other Hampton City Council member may be appointed by the Hampton City Council to serve as a member of the FMA Board. It is further my opinion that members of the FMA Board, as individuals holding public office, stand in a fiduciary relationship with the FMA and thus are subject to the common law duties of loyalty, care, obedience, and disclosure that are generally applicable to those in such a fiduciary relationship. Finally, it is my opinion that an FMA Board member who fails to fulfill his lawful duties may be removed from office in accordance with the Board’s by-laws and applicable law.

With kindest regards, I am

Very truly yours,



Kenneth T. Cuccinelli, II
Attorney General

²⁸ See 2.2-2340(B)(1).

²⁹ FORT MONROE AUTHORITY, BY-LAWS, art. III, § 3.05

³⁰ VA. CODE ANN. § 24.2-230 (Supp. 2012).