



COMMONWEALTH of VIRGINIA

Office of the Attorney General

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The Honorable Douglas W. Domenech
Secretary of Natural Resources
Post Office Box 1163
Richmond, Virginia 23219

Dear Secretary Domenech:

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 about an appropriation in an amendment to the 2013-14 Appropriation Act¹ to be paid to the Chesapeake Bay Foundation, Inc. ("CBF") to support Chesapeake Bay education field studies. Specifically, you ask whether the Virginia Department of Environmental Quality ("DEQ") can distribute these funds to CBF in light of the prohibition found in the Constitution of Virginia on appropriations to charitable institutions that are not owned or controlled by the Commonwealth.

Response

It is my opinion that the prohibition on appropriations to charities set forth in Article IV, § 16 of the Constitution of Virginia precludes DEQ from distributing state funds pursuant to the appropriation about which you inquire, because the language of the appropriation is in the nature of a gift.

Background

In your inquiry, you note that CBF is a non-profit organization incorporated in the State of Maryland in 1966, that it maintains tax-exempt status pursuant to Section 501(c)(3) of the Internal Revenue Code, and that it registers annually with the Virginia Department of Agriculture and Consumer Services' ("VDACS") Office of Charitable and Regulatory Programs as a charitable organization soliciting in Virginia pursuant to the Virginia Solicitation of Contributions Law.² On its website, CBF states that its mission is to "Save the Bay™, and keep it saved, as defined by reaching a 70 on CBF's Health Index" and that it is "Saving the Bay through education, advocacy, litigation, and restoration."³

¹ 2013 Va. Acts ch. 806, Item 364(D). The 2013-14 Appropriation Act, adopted in the 2012 Special Session (2012 Va. Acts ch. 3), originally called for an appropriation of \$80,000 to be paid to the Chesapeake Bay Foundation (CBF) during the first year of the biennium. Your inquiry concerns an amendment to that provision, enacted during the 2013 Reconvened Session, which added an appropriation of \$80,000 to be paid to CBF during the second year of the biennium.

² VA. CODE ANN. §§ 57-48 through 57-69 (2012 & Supp. 2013).

³ See <http://www.cbf.org/about-cbf/our-mission>.

On the organization's Internal Revenue Service Form 990, CBF states that it works throughout the Chesapeake Bay watershed to "educate - build an informed citizenry; advocate - advance pollution reduction; litigate - encourage enforcement of environmental law; and restore - rebuild the Bay system's natural filters such as oysters, underwater grasses, and streamside forests."⁴ Additionally, on Guidestar.org, which is offered as a link on the webpage for the VDACS Office of Charitable and Regulatory Programs as a service that maintains information about the operations and finances of nonprofit organizations, CBF lists "Environment Restoration" and "Education" as its programs.⁵

Applicable Law and Discussion

I. *Scope of the Constitutional Prohibition on Appropriations to "Charitable Institutions"*

The Virginia Constitution forbids the General Assembly from making "any appropriation of public funds, personal property, or real estate . . . to any charitable institution which is not owned or controlled by the Commonwealth."⁶ The purpose of Article IV, § 16 is "to prohibit the appropriation of public funds . . . for charitable purposes."⁷

A threshold question is whether nonprofit groups such as CBF constitute "charitable institutions" within the scope of Article IV, § 16. There are no decisions on point from the Supreme Court of Virginia providing express guidance concerning what constitutes a "charity" for purposes of Article IV, § 16; but in a prior opinion issued to you, I concluded that, in light of the historical record and the spirit of this constitutional provision, the term "charitable institution" was intended to have a broad meaning that encompasses nonprofits dedicated to land conservation.⁸ For the same reasons, I reach the conclusion that a nonprofit organization such as CBF that is dedicated to conservation programs and environmental education and protection is encompassed within the term "charitable institution" used in Article IV, § 16.

II. *Gifts versus Contracts with Charitable Institutions*

In my prior opinion to you, I noted that I do not interpret the prohibition on charitable appropriations in Article IV, § 16 to extend to *bona fide* contracts between the state and charitable institutions.⁹ I further noted that Virginia and its agencies are free to enter into contractual arrangements with nonprofits, but Article IV, § 16 prohibits the state from making grants that are in the nature of gifts, with no bargained-for exchange of funds for services or the provision of rights and remedies.¹⁰ For example, an earlier opinion of this Office found an appropriation to the Federation of Virginia Food Banks "for the purchase of food through food banks across the Commonwealth"¹¹ to be a direct appropriation to a charitable institution for benevolent purposes and therefore in violation of Article IV, § 16.¹²

⁴ CBF IRS Form 990 (2011), Return of Organization Exempt from Income Tax, Schedule O (Public Disclosure Copy).

⁵ See <http://www.guidestar.org/organizations/52-6065757/chesapeake-bay-foundation.aspx#mission>.

⁶ VA. CONST. art. IV, § 16.

⁷ *Commonwealth v. Nat'l Fire Ins. Co. of Hartford*, 161 Va. 737, 743-44, 172 S.E. 448, 451 (1934).

⁸ 2011 Op. Va. Att'y Gen. 55, 60-61.

⁹ *Id.*

¹⁰ *Id.*

¹¹ 2011 Va. Acts ch. 890, Item 333(G).

¹² 2011 Op. Va. Att'y Gen. 52.

In this instance, the appropriation in question directs the payment of funds to CBF “to support Chesapeake Bay education field studies.”¹³ I do not see anything in this appropriation to distinguish it from the 2011 appropriation to the Federation of Virginia Food Banks that this Office concluded was in violation of Article IV, § 16. In both instances, the appropriation is to be given directly to a specific nonprofit organization to defray expenses it incurs as a part of fulfilling its mission. Although the General Assembly can appropriate funds to a state agency to procure enhanced services, there is nothing in the appropriation or in the information you provided to indicate an objective of that nature.¹⁴ I must conclude that the appropriation is in the nature of an impermissible grant to a charitable institution. DEQ therefore is precluded from making the payment to CBF as envisioned by the appropriation, since it would be in conflict with Article IV, § 16 of the Constitution of Virginia.¹⁵ “The Constitution of the State, if it be consistent with the Federal Constitution, is the fundamental law of the State, is part of its supreme law, and acts passed by the legislature inconsistent with it are invalid. Any attempt to do that which is prohibited is repugnant to that supreme and paramount law, and is invalid.”¹⁶

Conclusion

Accordingly, it is my opinion that the prohibition on appropriations to charities set forth in Article IV, § 16 of the Constitution of Virginia precludes DEQ from distributing state funds pursuant to the appropriation about which you inquire, because the language of the appropriation is in the nature of a gift.

With kindest regards, I am

Very truly yours,



Kenneth T. Cuccinelli, II
Attorney General

¹³ 2013 Va. Acts ch. 806, Item 364(D).

¹⁴ The information you supplied provides no basis for viewing Chesapeake Bay education field studies as anything other than a part of the ongoing activities conducted by CBF in pursuit of its mission of educating citizens about the Bay. This is reinforced by the absence of any duty to conduct Chesapeake Bay education field studies in DEQ’s enabling statutes set forth in Title 62.1 of the *Code of Virginia*.

¹⁵ Note that the 2013 Appropriation Act includes in § 4-5.04, Goods and Services, the following provision:

(I) Alternative Procurement: If any payment is declared unconstitutional for any reason or if the Attorney General finds in a formal, written, legal opinion that a payment is unconstitutional, in circumstances where a good or service can constitutionally be the subject of a purchase, the administering agency of such payment is authorized to use the affected appropriation to procure, by means of the Commonwealth’s Procurement Act, goods and services, which are similar to those sought by such payment in order to accomplish the original legislative intent.

2013 Va. Acts ch. 806, § 4-5.04(I). Thus, as the General Assembly has provided, the \$80,000 still is available to DEQ to contract for these services in accordance with the Virginia Public Procurement Act, VA. CODE ANN. §§ 2.2-4300 through 2.2-4377 (2011 & Supp. 2013).

¹⁶ See *Nat’l Fire Ins. Co. of Hartford*, 161 Va. at 750, 172 S.E. at 453. See also *Carlisle v. Hassan*, 199 Va. 771, 776, 102 S.E.2d 273, 277 (1958) (quoting *Ellinger v. Commonwealth*, 102 Va. 100, 105, 45 S.E. 807, 808 (1903), explaining that “The Legislature, it is true, to a large extent represents the Commonwealth, but it does so in subordination to the Constitution of the State. It can do nothing which that instrument prohibits and, in what is confided to it, must conform in its mode of action to the requirements of the Constitution. If it transcends its power, or if it acts in contravention of the Constitution, its acts are void.”).