COUNTIES, CITIES AND TOWNS: VIRGINIA WATER AND WASTE AUTHORITIES ACT — TAXES AND ASSESSMENTS FOR LOCAL IMPROVEMENTS.

Water authority may include fee for connecting to water system constructed by authority as proportionate part of its construction costs. Statutory use of "shall" appears to be advisory or directory in nature, and permits authority to review periodically and adjust amount of connection fees, as necessary.

The Honorable Kathy J. Byron
Member, House of Delegates
April 2, 2002

Issues Presented

You ask whether a fee for connecting to a water system constructed by a water authority may be assessed as a proportionate part of the costs of installing the pertinent water facilities ("construction costs"). If so, you ask whether such connection fee complies with the requirement in § 15.2-5137(E) of the Code of Virginia for periodic review by the authority.

Response

I answer your first question in the affirmative by stating that a water authority may assess, as a proportionate part of the construction costs, a fee for connecting to such water system. I answer your second question by stating that the facts are insufficient to determine whether the connection fee complies with the requirement in § 15.2-5137(E) for periodic review by the authority.

Facts

You advise that a county water authority functions as a local public service authority. You also advise that the authority’s neighborhood line extension policy allows the construction of waterlines where a majority of the neighboring residents agree to contribute, in escrow, their share of the construction costs. You relate that, upon completion of the waterline construction, the nonconnecting residents are assessed their proportionate share of the construction costs.

You advise further that the water authority relies on §§ 15.2-5136 and 15.2-5137 to compel the owners, tenants or occupants of each parcel of land abutting a public or private street containing a water main or water system ("resident(s)") to pay a proportionate part of the construction costs. Furthermore, you relate that the water authority relies on § 15.2-5139 to place a lien on the real estate of any resident whose construction costs are delinquent at the time the line construction is complete.

You believe that the water authority has authority to establish and charge a fair and reasonable connection fee, a nonuser fee to nonconnecting residents, and to
place liens on real estate to collect delinquent fees in accordance with the applicable statutory provisions. You do not believe, however, that the connection fees meet the "fair and reasonable" criteria established in § 15.2-5137(E), and state that the water authority’s attempt to recover the construction costs as a connection fee appears to be a special tax assessment under § 15.2-2404 that is beyond the statutory powers of the county water authority.

Applicable Law & Discussion

Section 15.2-2404 authorizes a locality to impose taxes or assessments upon abutting property owners "for the construction, replacement or enlargement of water lines" and other public improvements. Under § 15.2-2405, "such improvements may be ordered by the governing body" pursuant to (1) "an agreement between the governing body and the abutting landowners"; (2) "a petition from not less than three-fourths of the landowners" affected by the improvement; or (3) "a two-thirds vote of all the members elected to the governing body." Where a statute is unambiguous, the plain meaning is to be accepted without resort to the rules of statutory interpretation. It is clear from the facts that the county water authority is not a locality within the meaning of § 15.2-2404. Therefore, the water authority has no statutory authority to impose a special tax assessment.

Section 15.2-5136 authorizes an authority created pursuant to the Virginia Water and Waste Authorities Act to fix rates and charges for its services. Section 15.2-5136(A) specifically authorizes a water authority to "fix and revise rates, fees and other charges." Section 15.2-5137(A) provides that, "with concurrence of the locality," connection to the authority’s water system shall be mandatory. Additionally, § 15.2-5137(A) provides that "such connections shall be made in accordance with rules and regulations adopted by the authority, which may provide for a reasonable charge for making such a connection." It appears from the nature, context, and purpose of these provisions that the General Assembly intended the term "shall," as used in §§ 15.2-5136(A) and 15.2-5137(A), to be treated as mandatory.

Section 15.2-5137(B) provides an exception to the mandatory water connection in § 15.2-5137(A):

[T]hose persons having a domestic supply or source of potable water shall not be required to discontinue the use of such water. However, persons not served by a water supply system, as defined in § 15.2-2149, producing potable water meeting the standards established by the Virginia Department of Health may be required to pay a connection fee, a front footage fee, and a monthly nonuser service charge, … or any combination of such fees and charges.

Therefore, unless the nonconnecting residents are served by a water supply system as defined in § 15.2-2149, the water authority may impose a connection fee, a front footage fee, and a monthly nonuser service charge or a combination of those charges.

Section 15.2-5136(A) authorizes an authority to "fix and revise rates … and other charges ..., subject to the provisions of this section, for the use of … any … water … system." Section 15.2-5137(E) provides that "[w]ater … fees established
by any authority shall be fair and reasonable." The General Assembly provides no definition of the term "fair and reasonable" as used in § 15.2-5137(E). A 1976 opinion of the Attorney General responds to a request regarding the standards governing the costs of water and sewer connections. The opinion notes that § 15.1-1261 "provides that the connection charge shall be 'reasonable.'" Further, the opinion states:

Section 15.1-1260 provides that the aggregate sum of all fees and charges for the use of and for services furnished by any water or sewer system shall provide funds sufficient to defray operating costs, pay the principal of, and the interest on, the revenue bonds as the same shall become due, and provide a margin of safety for making such payments. A reasonable inference, therefore, is that all charges assessed by a sewer and water authority are to be cost-based, although not necessarily limited precisely to actual costs because of the requirement that the funds collected provide a margin of safety for meeting the obligations of the authority.

The General Assembly has taken no action to alter the conclusion of the 1976 opinion. The repeal of §§ 15.1-1260 and 15.1-1261 and enactment of §§ 15.2-5136 and 15.2-5137 by the 1997 Session of the General Assembly did not affect the pertinent language of these two statutory provisions. The Supreme Court of Virginia has stated that "[t]he legislature is presumed to have had knowledge of the Attorney General’s interpretation of the statutes, and its failure to make corrective amendments evinces legislative acquiescence in the Attorney General’s view."

The connection fees you describe represent a proportionate part of the construction costs. Specifically, you advise that such construction costs may include, but are not limited to, engineering, survey, design and construction of mains and appurtenances, and the requisite meter boxes and service lines, including an appropriate allocation of administrative costs. All of these costs appear to be associated with the construction of the pertinent water facilities. Furthermore, the connection fee charges appear to be cost-based. Therefore, based on the conclusion of the 1976 opinion, I must conclude that the water authority may include a fee for connecting to a water system constructed by the authority as a proportionate part of its construction costs.

You next ask whether such connection fee complies with the requirement in § 15.2-5137(E) for periodic review by the authority.

Section 15.2-5137(E) provides that water fees established by an authority "shall be reviewed by the authority periodically and shall be adjusted, if necessary, to assure that they continue to be fair and reasonable."

In the case of Huffman v. Kite, the Supreme Court of Virginia considered the meaning of a state statute using the word "shall" in connection with circuit court appointments of school trustee electoral board members within thirty days after July 1. Ruling that the time limit imposed on circuit courts by statute was not mandatory, the Court stated:
If it appears from the nature, context, and purpose of the act that the legislature intended that "shall" be treated as advisory or directory, then it should be accorded that meaning.\[12\]

Therefore, "the use of 'shall,' in a statute requiring action by an official, is directory and not mandatory unless the statute manifests a contrary intent."\[13\] I am of the opinion that the use of the term "shall" in § 15.2-5137(E) is not intended as a mandatory requirement that an authority review connection fees periodically. Rather, the term "shall" appears to be advisory or directory in nature, and permits periodic review and adjustment of the connection fee amount, as may be necessary, by a water authority.

Although you provide a copy of the authority's neighborhood line extension policy,\[14\] you offer no facts regarding review of connection fees by the county water authority in this matter. Consequently, I am unable to conclude whether such connection fees have been reviewed periodically by the authority.

**Conclusion**

Accordingly, it is my opinion that a water authority may include as a proportionate part of the construction costs a fee for connecting to a water system constructed by the authority. Moreover, the use of the term "shall" in § 15.2-5137(E) appears to be advisory or directory in nature, and permits an authority to review periodically and adjust the amount of connection fees, as necessary.

\[1\]Section 15.2-2404 also provides that the taxes or assessments imposed on abutting property owners "shall not be in excess of the peculiar benefits resulting from the improvements to such property owners."


\[4\]The word "shall" in a statute ordinarily, but not always, implies that its provisions are mandatory. Compare Schmidt v. City of Richmond, 206 Va. 211, 217-18, 142 S.E.2d 573, 578 (1965) (holding that statute using "shall" required court to summon nine disinterested freeholders in condemnation case), and Ladd v. Lamb, 195 Va. 1031, 1035-37, 81 S.E.2d 756, 759-60 (1954) (holding that statute providing that court clerk court "shall forward" copy of conviction to Department of Motor Vehicles Commissioner within fifteen days is not mandatory but merely directory).

\[5\]Section 15.2-2149 provides that "[a]ny person, including municipal corporations, that proposes to establish a water supply consisting of a well, springs, or other source and the necessary pipes, conduits, mains, pumping stations, and other facilities in connection therewith, to serve or to be capable of serving three or more connections shall notify the State Board of Health and shall notify in writing the governing body of the county in which such water system is to be located and shall appear at a regular meeting thereof and notify such governing body in person."

Id. at 424.

Id.


198 Va. 196, 93 S.E.2d 328 (1956).

Id. at 202, 93 S.E.2d at 332.


You include with your request a copy of the Policy of Bedford County Public Service Authority as to Implementation of Its Mandatory Hookup and Payment of Connection and Non-User Fees Requirements Instituted December 17, 1984, which was approved September 21, 1999, and a copy of the revised draft Neighborhood Line Extension Policy which, according to the handwriting on the first page, was adopted September 18, 2001.