



# **COMMONWEALTH of VIRGINIA**

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May 28, 2009

The Honorable Charles J. Colgan  
Member, Senate of Virginia  
10677 Aviation Lane  
Manassas, Virginia 20110-2701

Dear Senator Colgan:

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 ask whether a municipal corporation is authorized to impose a flat fee on every residential unit and every business unit within the municipality for the purpose of providing funding to maintain parks and open space owned by the municipality.

### **Response**

It is my opinion that pursuant to the Open-Space Land Act, a municipal corporation may impose a flat fee on every residential unit and every business unit within the municipality to provide funding to maintain parks and open-space land owned by the municipality.

### **Background**

You advise that the governing body of the City of Manassas Park is considering the imposition of a flat fee to each residential and business unit within the City. The City states that the fee would be used to provide funding for parks ("green space"). The potential fee would not be assessed to each property, but rather to each "unit," *e.g.*, a single family house, apartments, business suites, and the like.

Specifically, the City questions whether the proposed fee is consistent with the uniformity requirements of Article X, § 1 of the Constitution of Virginia. Therefore, you seek clarification to determine whether the City is authorized to impose such fee.

### **Applicable Law and Discussion**

The power of a local governing body, unlike that of the General Assembly, "must be exercised pursuant to an express grant"<sup>1</sup> because its powers "are limited to those conferred expressly or by

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<sup>1</sup>Nat'l Realty Corp. v. Va. Beach, 209 Va. 172, 175, 163 S.E.2d 154, 156 (1968).

necessary implication.”<sup>2</sup> “If the power cannot be found, the inquiry is at an end.”<sup>3</sup> The Dillon Rule requires a narrow interpretation of all powers conferred on local governments since they are delegated powers.<sup>4</sup> Therefore, any doubt as to the existence of power must be resolved against the locality.<sup>5</sup>

The Open Space Land Act<sup>6</sup> authorizes public bodies to protect open space by acquiring easements in gross to preserve open-space land.<sup>7</sup> The Act defines “open-space land” as “any land which is provided or preserved for (i) park or recreational purposes, ... [or] (iii) historic or scenic purposes.”<sup>8</sup> It also defines a “public body” to include “any ... municipality.”<sup>9</sup> Section 10.1-1701 provides also that “[t]he use of the real property [purchased] for open-space land shall conform to the official comprehensive plan for the area in which the property is located.”

The Supreme Court of Virginia has said that “when the primary purpose of an enactment is to raise revenue, the enactment will be considered a tax, regardless of the name attached to the act.”<sup>10</sup> The Virginia Supreme Court has established that the appropriate inquiry into imposition of a municipal fee is whether the fee is a bona fide fee-for-service or an “invalid revenue-generating device.”<sup>11</sup> There must be a reasonable correlation between the benefit conferred and the cost exacted by any ordinance imposing a tax labeled as a fee.<sup>12</sup> The reasonable correlation test is determinative of whether a fee enacted by a municipality is a permissible exercise of its police power as opposed to an impermissible revenue-producing device in the form of a special assessment, impact fee or the like. Whether an act is a valid fee or an impermissible tax does not depend on the label the municipality applies to it.<sup>13</sup> In this matter, § 10.1-1702(B)(4) permits a city to “levy taxes and assessments” for purposes of the Open-Space Land Act.

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<sup>2</sup>Bd. of Supvrs. v. Horne, 216 Va. 113, 117, 215 S.E.2d 453, 455 (1975) (noting corollary to Dillon Rule).

<sup>3</sup>Commonwealth v. County Bd., 217 Va. 558, 575, 232 S.E.2d 30, 41 (1977).

<sup>4</sup>See Op. Va. Att’y Gen.: 2002 at 77, 78; 1974-1975 at 403, 405; see also Bd. of Supvrs. v. Countryside Invest. Co., 258 Va. 497, 504-05, 522 S.E.2d 610, 613-14 (1999) (holding that county board of supervisors does not have unfettered authority to decide what matters to include in subdivision ordinance; must include requirements mandated by Land Subdivision and Development Act and may include optional provisions contained in act).

<sup>5</sup>2A EUGENE MCQUILLEN, THE LAW OF MUNICIPAL CORPORATIONS § 10.19, at 369 (3d ed. 1996); Op. Va. Att’y Gen.: 2002 at 83, 84; 2000 at 75, 76.

<sup>6</sup>See VA. CODE ANN. tit. 10.1, ch. 17, §§ 10.1-1700 to 10.1-1705 (2006).

<sup>7</sup>See § 10.1-1703; 1993 Op. Va. Att’y Gen. 7, 8.

<sup>8</sup>Section 10.1-1700.

<sup>9</sup>*Id.*

<sup>10</sup>Marshall v. N. Va. Transp. Auth., 275 Va. 419, 431, 657 S.E.2d 71, 77 (2008). “[S]tatutes imposing taxes are to be construed most strongly against the government, and in favor of the citizen, and are not to be extended by implication beyond the clear import of language used. Whenever there is just doubt, ‘that doubt should absolve the taxpayer of his burden.’” City of Winchester v. Am. Woodmark Corp., 250 Va. 451, 456, 464 S.E.2d 148, 152 (1995) (alteration in original) (citation omitted), *quoted in* In re Tultex Corp., 250 B.R. 560, 564 (2000).

<sup>11</sup>See Mountain View Ltd. P’ship v. Clifton Forge, 256 Va. 304, 312, 504 S.E.2d 371, 376 (1998); see also Tidewater Ass’n of Homebuilders v. Va. Beach, 241 Va. 114, 400 S.E.2d 523 (1991); McMahon v. Va. Beach, 221 Va. 102, 267 S.E.2d 130 (1980).

<sup>12</sup>*Id.*

<sup>13</sup>See *supra* note 10 and accompanying text.

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Article X, § 1, of the Virginia Constitution establishes the general rule that, except as otherwise provided in the Constitution, “[a]ll property ... shall be taxed,” and “[a]ll taxes ... shall be uniform upon the same class of subjects.” However, courts have long recognized that the mandate of § 1 is “not self-executing, and legislation is necessary to carry it into effect. One must be able to put his finger upon the letter of authority.”<sup>14</sup> In this matter, § 10.1-1702(B)(4) provides the apparent statutory authority to impose such a flat fee which is uniform upon each residential and business unit.

Application of the Dillon Rule and the Open-Space Land Act to the facts you present support the conclusion that the City is authorized to impose the tax you describe.

### **Conclusion**

Accordingly, it is my opinion that pursuant to the Open-Space Land Act, a municipal corporation may impose a flat fee on every residential unit and every business unit within the municipality to provide funding to maintain parks and open-space land owned by the municipality.

Thank you for letting me be of service to you.

Sincerely,

A handwritten signature in black ink, appearing to read 'W C Mims', with a stylized flourish at the end.

William C. Mims

1:213; 1:941/09-026

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<sup>14</sup>Commonwealth v. Stringfellow, 173 Va. 284, 291, 4 S.E.2d 357, 360 (1939) (interpreting § 168 of 1902 Constitution of Virginia, predecessor to Article X, § 1).