



# COMMONWEALTH of VIRGINIA

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Attorney General

June 20, 2007

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The Honorable Clarence E. "Bud" Phillips  
Member, House of Delegates  
P.O. Box 36  
Oakwood, Virginia 24224

Dear Delegate Phillips:

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 ask whether the Virginia Public Procurement Act<sup>1</sup> ("Procurement Act") and the State and Local Government Conflict of Interests Act<sup>2</sup> ("Conflict Act") apply to the Breaks Interstate Park Commission and its members. If so, you ask whether the Acts would prohibit a member of the Commission from submitting a bid or being awarded a contract. If such actions are not prohibited, you ask what steps must be taken to comply with the law.

## Response

It is my opinion that the Procurement and Conflict Acts do not apply to the Breaks Interstate Park Commission or its members. However, it is my opinion that the Commission, in the exercise of its public mission, should adopt appropriate rules or other measures to preserve and promote public confidence in its operations and to guard against circumstances that may create an appearance or actual occurrence of impropriety.

## Background

The Breaks Interstate Park Commission ("Commission") is a joint corporate instrumentality of the Commonwealths of Virginia and Kentucky that performs governmental functions for the two states. Additionally, you state that the Commission has, among other things, the power to enter into contracts. You indicate that the Commission receives funding from the Commonwealth of Virginia and may receive funding from the Virginia Coalfield Economic Development Authority to perform construction within the Park. Finally, you relate that a member of the Commission, who is a resident of Kentucky, wishes to place a bid for construction work that may be funded by that Authority.

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<sup>1</sup>VA. CODE ANN. §§ 2.2-4300 to 2.2-4377 (2005 & Supp. 2006).

<sup>2</sup>Sections 2.2-3100 to 2.2-3131 (2005 & Supp. 2006).

### Applicable Law and Discussion

The Commission was created by interstate compact among the governments of Virginia and Kentucky<sup>3</sup> and approved by Congress<sup>4</sup> for the purpose of creating, developing, and operating an interstate park<sup>5</sup> ("Compact"). As a creation of the Compact, the Commission's rights and responsibilities are governed by the Compact.<sup>6</sup> Except as found in the Compact, the Commission is not required to comply with a particular signatory's laws, and one of the signatories may not unilaterally subject the Commission to an obligation not found in the Compact.<sup>7</sup>

Thus, I must look to the Compact concerning application of laws regulating the Commission and the conduct of the governmental bodies. The Compact provides that:

Pursuant to authority granted by an Act of the 83rd Congress of the United States, being Public Law 275, approved August 14, 1953, the Commonwealth of Kentucky and the Commonwealth of Virginia do hereby covenant and agree as follows:

....

There is hereby created the Breaks Interstate Park Commission....

....

The Commission ... shall be deemed to be performing governmental functions of the two states in the performance of its duties hereunder. The Commission shall have power to sue and be sued, to contract and be contracted with, to use a common seal and to make and adopt suitable by-laws, rules and regulations....

...They [members of the Commission] shall take the oath of office required of officers and their respective states.

...The Commission shall submit annually and at other times as required such reports as may be required by the laws of each Commonwealth....

...The Commission is authorized to issue revenue bonds ... pursuant to procedures which shall be in substantial compliance with the provisions of laws of either or both states[.]<sup>[8]</sup>

The Compact provides that the Commission shall be subject to the signatories' laws regarding the oath of office, submission of reports, and bond issuance procedures, but nothing subjects the Commission to the

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<sup>3</sup> See 1954 Va. Acts ch. 37, at 36, 36-38 (creating Breaks Interstate Park Commission and authorizing Governor to execute compact); see also 1994 Va. Acts ch. 622, at 893, 893-95 (amending and reenacting compact to revise membership of Commission); 1964 Va. Acts ch. 292, at 506, 506-08 (amending and reenacting compact to authorize Commission to exercise right of eminent domain).

<sup>4</sup> See Pub. L. No. 543, 68 Stat. 571 (1954) (consenting to Breaks Interstate Park Compact); see also Pub. L. No. 88-602, 78 Stat. 957 (1964) (consenting to amendment to The Breaks Interstate Park Compact).

<sup>5</sup> See 1954 Va. Acts, *supra* note 3, art. I, at 36.

<sup>6</sup> See *id.*, art. II, at 37.

<sup>7</sup> See *Potomac Elec. Power Co. v. State Corp. Comm'n*, 221 Va. 632, 635 n.1, 272 S.E.2d 214, 216 (1980); 1983-1984 Op. Va. Att'y Gen. 409, 410.

<sup>8</sup> 1994 Va. Acts, *supra* note 3, at 894-95.

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signatories' laws regarding public contracting and ethics. In my opinion, neither the signatories nor Congress intended to make the signatories' procurement and ethics laws applicable to the Commission or its members.<sup>9</sup>

While the Compact does not subject the Commission to the procurement and ethics laws of either Commonwealth, you mention that the Commission may accept funds from the Commonwealth of Virginia or from the Virginia Coalfield Economic Development Authority. It is possible that the Commission may expressly or implicitly agree to follow certain state procedures or ethical standards to the extent this is a condition of receiving particular appropriations or grants. Any such undertaking, however, would depend on the particular terms associated with the funding at issue.

The fact that the Compact does not prescribe procedures and ethical standards for the Commission to follow when exercising its contracting power<sup>10</sup> does not suggest that the Commission, which is a governmental entity created to serve the public interest, should allow procedures and ethical conflicts that create an appearance of impropriety or undermine public confidence in its operations. The Compact gives the Commission the power to "adopt suitable by-laws, rules and regulations."<sup>11</sup> Therefore, in my opinion, it would be appropriate for the Commission to adopt rules addressing such matters, which are important to the execution of its governmental functions.

Our system of government is dependent in large part on its citizens' maintaining the highest trust in their public officials. The conduct and character of public officials is of particular concern, because it is chiefly through that conduct and character that the government's reputation is derived. Where a governmental entity's legal structure falls outside the protection of generally applicable laws designed to define and prohibit inappropriate actions or conflicts, it becomes all the more important for the entity itself to determine whether its procedures will present an appearance or actual occurrence of impropriety that it finds unacceptable and that will affect the confidence of the public in its ability to perform its duties impartially.

### Conclusion

Accordingly, it is my opinion that the Procurement and Conflict Acts do not apply to the Breaks Interstate Park Commission or its members. However, it is my opinion that the Commission, in the

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<sup>9</sup>See *Smith Mtn. Lake Yacht Club, Inc. v. Ramaker*, 261 Va. 240, 246, 542 S.E.2d 392, 395 (2001) (noting maxim of *expressio unius est exclusio alterius*, which provides that mention of specific item in statute implies that other omitted items were not intended to be included within scope of statute); *C.T. Hellmuth & Assocs. v. Washington Metro. Area Transit Auth.*, 414 F. Supp. 408, 410 (D. Md. 1976) (holding that Maryland open records laws do not apply to authority created by compact).

<sup>10</sup>Although this opinion addresses the applicability of certain state laws to the Commission, it is apparent that the compact creating the Commission also reveals no intention to apply federal procurement or ethics rules to the Commission. *Cf. Seal & Co. v. Washington Metro. Area Transit Auth.*, 768 F. Supp. 1150, 1156-57 (E.D. Va. 1991) (examining compact in which court found unusual degree of federal involvement and use of terms of art drawn from federal procurement regulations; therefore, court allowed aggrieved bidder to challenge authority's procurement decision under federal procurement law).

<sup>11</sup>See 1994 Va. Acts, *supra* note 3, at 894.

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exercise of its public mission, should adopt appropriate rules or other measures to preserve and promote public confidence in its operations and to guard against circumstances that may create an appearance or actual occurrence of impropriety.

Thank you for letting me be of service to you.

Sincerely,

A handwritten signature in black ink, reading "Robert F. McDonnell". The signature is written in a cursive style with a large, stylized "R" and "M".

Robert F. McDonnell