



COMMONWEALTH OF VIRGINIA

Office of the Attorney General

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March 4, 2010

Ronald S. Hallman, Esq.
Chesapeake City Attorney
306 Cedar Road
Chesapeake, Virginia 23322

Dear Mr. Hallman:

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 the stormwater fee set forth in § 26-401 of the Chesapeake City Code is permissible under § 15.2-2114 of the *Virginia Code* or constitutes an impermissible tax on the United States, which would exempt the United States Navy from paying the fee.

Response

Based on the facts you present, it is my opinion that the stormwater fee set forth in § 26-401 of the Chesapeake City Code is a service fee rather than a tax, and the United States Navy is not constitutionally exempt from paying the fee.

Background

To better regulate pollution conveyed by stormwater runoff, Congress enacted § 1342(p) of the Clean Water Act, which established the National Pollutant Discharge Elimination System (NPDES) Permit program. Section 1342(p) of the Act requires certain municipalities to obtain a NPDES permit to reduce the discharge of pollutants in stormwater runoff.¹ You advise that federal law mandates that localities control the water quality impact of stormwater discharges. In compliance with this mandate, you note that the city of Chesapeake (“City”) has obtained a NPDES permit for its municipal drainage system. To recoup costs associated with this program, the City has established a “utility” that charges a stormwater management fee pursuant to § 15.2-2114 of the *Virginia Code*.

You relate that the fee is structured to ensure that the amount charged to particular properties is proportional to the properties’ contribution to stormwater runoff. Undeveloped parcels are not charged a fee. The fee for developed parcels is based on Equivalent Residential Units (ERUs), which are the average impervious area of all residential dwelling units, approximately 2,112 square feet. Each owner is

¹*Id.*

charged based on the number of ERUs on each parcel. Residential parcels are charged one ERU, and nonresidential parcels are charged a fee based on the number of ERUs represented by their total impervious area. You explain that nonresidential parcels typically are charged a higher fee than residential parcels because the nonresidential parcels have a greater impact on the stormwater system.

You relate that the United States Navy (“Navy”) has refused to pay stormwater fees claiming that the City’s fee structure is a tax-like assessment. Prior to 2007, you advise that the Navy paid the City’s stormwater fee without question or complaint. You observe that typically only those federal facilities that have obtained the required NPDES permit from the Virginia Department of Conservation and Recreation and that discharge stormwater runoff directly into waters of the United States are exempt from municipal stormwater fees. You conclude that because the Navy properties located within the City discharge stormwater into the City’s stormwater system, and not directly into United States waters, the Navy is not exempt from this fee.² You advise that the fee is not a tax because it mirrors the exact requirements contained in § 15.2-2114. Further, you advise that the fee is nondiscriminatory, is reasonable, is proportionate to the benefit conferred, and produces revenues that do not exceed the cost of the program. Therefore, you conclude that the stormwater fee is a valid service charge under § 15.2-2114 and not an impermissible tax.³

Applicable Law and Discussion

The traditional role of this Office regarding requested opinions has been to interpret applicable statutes to the extent possible utilizing the pertinent rules of statutory construction and general application of statutory provisions. Attorneys General have a longstanding policy of responding to official opinion requests only when such requests concern an interpretation of federal or state law, rule, or regulation.⁴ In instances when a request: (1) involves application of facts to the law, and does not involve a question of law; (2) requires the interpretation of a matter reserved to another entity; (3) involves a matter currently in litigation; and (4) involves a matter of purely local concern or procedure, this Office traditionally has declined to render an opinion.⁵ Accordingly, I limit my comments to the interpretation of § 26-401 of the Chesapeake City Code (“City Code”) as authorized by § 15.2-2114. Further, the analysis in this opinion is based entirely upon the facts that you provide. I refrain from commenting on matters that would require additional facts or the application of facts to the appropriate provisions of law.

In § 15.2-2114(A), the General Assembly permits any locality to adopt a stormwater control program consistent with Article 1.1, Chapter 6 of Title 10.1 by establishing a utility or enacting a system

²Section 2.2-505(B) requires that an opinion request from a county attorney “shall itself be in the form of an opinion embodying a precise statement of all facts together with such attorney’s legal conclusions.”

³*Id.*

⁴*See* Op. Va. Att’y Gen.: 1998 at 71, 72; 1997 at 105, 107; 1991 at 237, 238; 1989 at 288, 293 n.1; 1986-1987 at 347, 348; 1977-1978 at 31, 33; 1976-1977 at 17, 17.

⁵The authority of the Office of the Attorney General to issue advisory opinion is limited to questions that are legal in nature. *See, e.g.*, Op. Va. Att’y Gen.: 2008 at 141, 144 n.14; 2006 at 95, 97; 2002 at 144, 147; 1999 at 215, 217; 1997 at 195, 196; 1996 at 207, 208; 1991 at 122, 124; 1982-1983 at 100, 101 n.3; 1977-1978 at 31, 33; 1976-1977 at 17, 17.

of service charges. Pursuant to § 15.2-2114, the City adopted a stormwater management fee ordinance.⁶ The key question is whether this fee truly is a user fee or service charge or whether it is an impermissible tax disguised as a fee.

One of the oldest constitutional principles is that a state may not tax the United States.⁷ Consequently, the City, a political subdivision of the Commonwealth, may not tax the Navy. Although local governments may not tax the United States, they may charge the federal government user fees for services provided by the locality. Such a fee, however, must clearly be a fee, not a tax disguised as a fee. The United States Fourth Circuit Court of Appeals has explained that “[u]ser fees are payments made in return for a government-provided benefit. Taxes, on the other hand, are ‘enforced contribution[s] for the support of government.’”⁸

The fees imposed by the City are akin to fees for sewage. The City is processing stormwater runoff that emanates from the naval facility. The Supreme Court of the United States has held that if a fee (1) does not discriminate against the federal government, (2) is a fair approximation of use by the federal government, and (3) is structured to produce revenues that will not exceed the total costs of benefits

⁶Section 26-401 of the Chesapeake City Code, titled “[s]tormwater utility fees,” provides that:

“(a) The city council, by this article, shall set appropriate levels of utility fees so that sufficient revenues will be generated to provide for a balanced budget for the stormwater management system. Effective after approval of this article, utility fees shall be charged to owners of all developed property in the city.

“(b) For the purpose of determining the utility fee, all properties in the city shall be classified by the director into one of the following categories:

“(1) Residential;

“(2) Nonresidential; and

“(3) Undeveloped property.

“(c) The monthly utility fee for residential shall be the ERU [Equivalent Residential Unit] rate of \$4.45 per month for one ERU for the year of 2007, \$6.35 per month for one ERU for the year of 2008, and increased by an additional \$0.50 per month for one ERU for every year thereafter until further consideration by City Council.

“(d) The monthly utility fee for nonresidential shall be the ERU rate of \$4.45 per month for one ERU for the year of 2007, \$6.35 per month for one ERU for the year of 2008, and increased by an additional \$0.50 per month for one ERU for every year thereafter until further consideration by City Council, multiplied by the numerical factor obtained by dividing the total impervious area of a nonresidential property by one ERU (2,112 square feet). The director shall determine impervious area considering data supplied by the real estate assessor, other city staff and/or the property owner. The assessed utility fee shall be updated by the director based on any change in impervious area. The minimum utility fee for any nonresidential property shall be equal to one ERU rate.

“(e) The utility fee for vacant developed property, both residential and nonresidential, shall be the same as that for occupied property of the same class.

“(f) Undeveloped property shall be exempt from the utility fee.”

http://library1.municode.com/default-test/home.htm?infobase=10529&doc_action=whatsnew.

⁷See U.S. CONST. art. VI, cl. 2; see also *United States v. County of Allegheny*, 322 U.S. 174, 177 (1944) (noting that state or local governmental body may not tax federal entity in absence of congressional consent); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436-37 (1819) (declaring that Maryland could not tax Bank of the United States; such tax was unconstitutional and void).

⁸*United States v. City of Huntington*, 999 F.2d 71, 74 (4th Cir. 1993) (citation omitted) (second alteration in original).

supplied, then the federal government cannot assert its sovereign immunity from taxes.⁹ First, it is clear from the facts provided that the City's stormwater fee does not discriminate against the federal government. The Navy is assessed with a fee based on ERUs, the same as the fee assessed to other nonresidential properties. The fee per ERU is set, and the owner is charged with the fee based on the number of ERUs. Under the City's fee scheme, residential properties are charged a lesser fee because they are judged to have less impact on the stormwater system. Because the Navy is charged the same fee as other nonresidential properties, there is no discrimination against the federal government.

Second, the fee represents a "fair approximation" of the use by the particular lot. Of course, it is impossible to install a meter to measure the stormwater runoff for a particular parcel of land. You relate, however, that each lot is assessed based on the ERU, which is then multiplied by an impervious area calculation. This level of precision satisfies the "fair approximation" test. The United States Supreme Court has provided guidance concerning the meaning of "fair approximation."¹⁰ The Court analyzed a fee that was a flat registration tax for all civil aircraft, which was introduced to help finance federal aviation programs.¹¹ The amount of the fee was based on the size and type of aircraft,¹² but not the aircraft's actual use of the airways or the facilities and services supplied by the United States.¹³ Similarly here, even if the service charges do not correlate exactly with the stormwater flowing from the naval property at issue, that does not render the service charge an impermissible tax. As the United States Court of Appeals for the First Circuit has noted, "the law does not require a precise correlation between regulatory fees collected and regulatory services provided."¹⁴ The fee at issue represents a constitutionally permissible "fair approximation" of the use by the naval facility.¹⁵

The fees are structured to produce revenues that will not exceed the total costs of benefits supplied. You note that the fees, charges and other revenue collected for stormwater runoff are dedicated to special revenue and used only to finance the stormwater program. Therefore, "[t]he fees are not designed simply to raise money for general revenue purposes."¹⁶ Instead, they represent "a 'classic 'regulatory' fee ... imposed by an agency upon those subject to its regulation,' and used, for example, to 'raise money placed in a special fund to help defray the agency's regulation-related expenses.'"¹⁷

⁹Massachusetts v. United States, 435 U.S. 444 (1978).

¹⁰*Id.* at 467-70.

¹¹*Id.* at 446, 449-50.

¹²*Id.* at 450.

¹³*Id.* at 463. The Court also acknowledged that a fee based on actual use would measure the benefit to the user more accurately. The Court emphasized, however, that an actual use measurement method would be more costly to administer. *Id.* at 468-69.

¹⁴Maine v. Dep't of Navy, 973 F.2d 1007, 1014 (1st Cir. 1992) (upholding Hazardous Waste Fund as reasonable fee rather than impermissible tax).

¹⁵See N.Y. State Dep't of Envtl. Conserv. v. United States Dep't of Energy, 850 F. Supp. 132, 139-43 (N.D.N.Y. 1994) (upholding waste water facility fees imposed by New York on United States), *aff'd sub nom.*, Jorling v. United States Dep't of Energy, 218 F.3d 96 (2d Cir. 2000); *but see* Cincinnati v. United States, 39 Fed. Cl. 271 (1997) (invalidating storm water drainage fee as an impermissible tax), *aff'd on other grounds* 153 F.3d 1375 (Fed. Cir. 1998).

¹⁶*Maine*, 973 F.2d at 1012.

¹⁷*Id.* (citations omitted) (alteration in original).

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Finally, I note that in the Clean Water Act, Congress has waived any immunity of the federal government with respect to “reasonable service charges” that arise in connection with activities that result “in the discharge or runoff of pollutants.”¹⁸

Conclusion

Accordingly, based on the facts you present, it is my opinion that the stormwater fee set forth in § 26-401 of the Chesapeake City Code is a service fee rather than a tax, and the United States Navy is not constitutionally exempt from paying the fee.

With kindest regards, I am

Very truly yours,

A handwritten signature in black ink, appearing to read "Ken Cuccinelli II", with a horizontal line underneath the name.

Kenneth T. Cuccinelli, II
Attorney General

1:213; 1:941/09-098

¹⁸33 U.S.C.S. § 1323(a) (LexisNexis 2001).