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February 4, 2020

The Honorable F. Cody Pancake, III
Mineral County Prosecuting Attorney
P.O. Drawer 458
Keyser, WV 26726

Dear Prosecutor Pancake:

You have asked for an Opinion of the Attorney General addressing whether West Virginia Code § 7-1-3u requires county commissions to assume the responsibility or expense of removing debris from local waterways. This Opinion is being issued pursuant to West Virginia Code § 5-3-2, which provides that the Attorney General “may consult with and advise the several prosecuting attorneys in matters relating to the official duties of their office.” To the extent this Opinion relies on facts, it is based solely on the factual assertions in your correspondence with the Office of the Attorney General.

In your letter, you explain that a local public water association has asked the Mineral County Commission to remove debris from a local waterway. According to the association, West Virginia Code § 7-1-3u requires the Commission to assume responsibility for this role.

Your letter raises the following legal question:

To what extent does West Virginia Code § 7-1-3u impose a duty on county commissions to remove debris from local waterways and pay for that removal?

We conclude that the statute gives county commissions authority to clean local waterways, but does not require them to do so at an individual’s or entity’s request.

Discussion

West Virginia Code § 7-1-3u, titled “Authority of counties and municipalities to treat streams to prevent floods,” provides:

To protect people and property from floods, counties and municipalities are hereby empowered to rechannel and dredge streams; remove accumulated debris, snags, sandbars, rocks and any other kinds of obstructions from streams; straighten stream channels; and carry out erosion and sedimentation control measures and programs.

The section further empowers county commissions to finance these endeavors through several means. *Id.*

The statute does not define “authority” or “empowered,” which means that these terms “will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used.” *Nicole L. v. Steven W.*, 241 W. Va. 466, 471, 825 S.E.2d 794, 799 (2019) (citation omitted). The common and ordinary meanings of both words convey freedom to act—not a duty: “Authority” is defined as “official right or permission to act.” *Authority*, *Black’s Law Dictionary* 163 (11th ed. 2019); *see also Stauffer v. IRS*, 939 F.3d 1, 8 (1st Cir. 2019) (“[O]ne who acts with ‘authority’ has been bestowed with the power to perform an action on another’s behalf. By contrast, a duty imposes an obligation to perform a certain act.”). “Empower” similarly means “a grant of authority rather than a command of its exercise.” *Empower*, *Black’s Law Dictionary* 525 (6th ed. 1990 (last edition containing definition of “empower”)); *see also In re Whiteman’s Will*, 52 N.Y.S.2d 723, 725 (App. Div. 1944) (“As generally construed, the word ‘empower’ means a grant of authority rather than a command of its exercise.” (citation omitted)).

Being “empowered” or having “authority” to act, therefore, means an entity has legal ability to act. The plain meaning of Section 7-1-3u is thus that a county commission *may* remove debris from waterways, but is not under a *duty* to do so at an individual’s or entity’s request.

The “normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning” confirms this reading. *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (quotation omitted). Section 7-1-3qq, for example, “[a]uthoriz[es]” and “empower[s]” county commissions “to organize and hold motor vehicle racing events on roads and airports in this state.” W. Va. Code § 7-1-3qq(a). Yet if “empowered” in Section 7-1-3u connotes a duty to act, then the same would likely be true a few sections later, making county commissions *required* to conduct racing events. Similarly, county commissions’ “[a]uthority” to “lease, rent or to permit the use of county-owned buildings, lands and other properties or any portion thereof by nonprofit organizations” would be transformed into a mandatory duty. *Id.* § 7-1-3k. We are skeptical that the Legislature intended to create mandatory duties like these.

The plain-text reading is also supported by the Legislature’s treatment of improvement and maintenance of streets, sidewalks, alleys, and lay sewers not in the state road system. *See* W. Va. Code § 7-1-3a. For these improvements, the statute expressly authorizes requests from “persons, firms or corporations owning not less than sixty percent of the frontage of the lots abutting on both sides of any street or alley, between any two cross-streets, or between a cross-street and an alley in any unincorporated community.” *Id.* These requests are subject to statutory requirements and the county commission’s blessing. But if the commission acts on the request, such “persons, firms or corporations” bear the cost—not the commission. *Id.* In fact, these landowners are required to pay even if the county commission votes to add additional improvements to the requested project

to nearby streets, sidewalks, or sewers to satisfy problems such as drainage issues. *Id.* Viewed together with this provision, it is unlikely the Legislature would have imposed a special duty on county commissions to pay for the removal of debris from local waterways in response to an entity's unilateral request in Section 7-1-3u even though the statute is silent about cost allocation and the ability of an affected entity or individual to request the improvement in the first place.

Further, although the Supreme Court of Appeals has not spoken directly on this issue, the circuit court in *Cantley v. Lincoln County Commission* granted a motion to dismiss in a case brought by Lincoln County residents claiming failure of the Lincoln County Commission to abate future flooding of the Mud River. 221 W. Va. 468, 469, 655 S.E.2d 490, 491 (2007) (*per curiam*). The circuit court granted the Commission's motion to dismiss, in part, because it found that Section 7-1-3u did not impose an affirmative duty in this context. *Id.* at 470, 655 S.E.2d at 492. The Supreme Court of Appeals ultimately reversed that decision, but its analysis relied on a prior agreement in which the Commission consented to sponsor a U.S. Army Corps of Engineers' flood control project. *See id.* at 471, 655 S.E.2d at 493. The Court emphasized that its opinion should not be "construed to imply that [it] ruled upon the merits of any part of the complaint or issues in the case below." *Id.* at 471 n.6, 655 S.E.2d at 493 n.6. Thus, *Cantley* involved a contractual obligation that your letter does not indicate is present here, and it does not support interpreting Section 7-1-3u to include a mandatory duty to act.

Section 7-1-3u thus very likely does not require a county commission to pay for the removal of debris from local waterways at an entity's request. Neither are we aware of any other provisions that might impose a similar duty. Article 9, section 11 of the West Virginia Constitution gives county commissions the "superintendence and administration of the internal police and fiscal affairs of their counties, including the establishment and regulation of roads [and] ways." W. Va. Const. art. 9, § 11. This provision does not include, on its face, a mandatory duty to keep local waterways clean. We have also examined Section 7-1-3v, which authorizes county commissions to comply with the requirements of the National Flood Insurance Act of 1968 ("the Act"). *See also Weyer v. Wood Cty. Comm'n*, No. 14-1167, 2015 WL 6955137, at *4 (W. Va. Nov. 6, 2015) (memorandum decision). The residents in *Cantley* also proceeded under Section 7-1-3v in their complaint but, because the case was remanded on other grounds, the Court did not address the scope of this provision, either. *See* 221 W. Va. at 471, 655 S.E.2d at 493. Nevertheless, the requirements of the Act and text of the state statute make it unlikely that a court would impose an affirmative duty on county commissions on these grounds.

The goal of the Act is to make flood insurance available to individuals at reasonable prices and to encourage state and local governments to regulate and restrict land development in floodplains. 42 U.S.C. § 4001(a), (e). The Act further establishes the National Flood Insurance Program, which is administered by the Federal Emergency Management Agency. *Id.* § 4011. State and local governments may participate in this program provided that "an appropriate public body shall have adopted adequate land use and control measures (with effective enforcement provisions) which the Administrator finds are consistent with the comprehensive criteria for land management and use under Section 4102 of this title." *Id.* § 4022(a)(1). Required land use and control measures include "floodplain management regulations," such as adequate permitting and inspection systems for proposed construction in floodplains and mudslide- and erosion-prone areas. *See* 44 C.F.R. §§ 59.22, 60.3, 60.4, 60.5; *see also Carpenter v. Scherer-Mountain Ins. Agency*, 733 N.E.2d 1196,

1208 (Ohio Ct. App. 1999). Section 4022 also provides incentives “in the form of credits on premium rates for flood insurance” if a community has “adopted and enforced measure[s] that reduce the risk of flood and erosion damage” above and beyond the statutory floor. *Id.* § 4022(b)(2). Notably, participation in the federal program is voluntary, so the federal statute cannot be read to require a state or local body to take any of these measures. In any event, the program requirements pertain to building codes and zoning, not the kind of cleaning or routine improvement projects at issue here.

Unsurprisingly, when the Legislature gave counties and municipalities authority to comply with the Act’s requirements, it enumerated a set of powers that relates to building requirements and zoning. W. Va. Code § 7-1-3v(c) (“To the extent and only to the extent necessary to comply with the eligibility requirements” of the Act, county commissions may adopt, issue, and enforce “building codes” and “building permits,” may “conduct inspections of construction and other improvements,” and “otherwise take such action and impose such requirements regarding land use and control measures.”). This Code section also uses the same permissive verbs from Section 7-1-3u—“authorized” and “empowered.” *Id.* This means that, at most, Section 7-1-3v(c) could be interpreted as additional support for a county commission’s *authority* to clean waterways if deemed “necessary under [the Act].” *Id.* But nothing in its text requires a commission to do so at a separate entity’s or individual’s unilateral request. Thus, read together with the Act, this section does not impose a duty on county commissions to act as requested here.

Finally, this analysis stands even where the party requesting removal of debris is a public service district, as opposed to a private entity or landowner. Although public service districts are considered to be public corporations, *see* W. Va. Code § 16-13A-2, they are created by county commissions, *id.* §§ 16-3A-1b, 2, and at least one circuit court has found “that public service districts are under the virtual, if not micro, control of the county commissions that establish them.” *Larry v. Faircloth Realty, Inc. v. Berkeley Cty. Pub. Serv. Water Dist.*, No. 09-C-826, 2010 WL 8942477 (W. Va. Cir. Ct. Berkeley Cty. Jan. 29, 2010). It would be an odd result for an entity created by and under the control of a county commission to be able to dictate its fiscal decisions. Indeed, none of the statutes discussing county commissions’ duties to public service districts require commissions to fund their operations. County commissions *are* expressly authorized to devote county revenues to fund a public service district’s efforts to establish or improve water and sewer systems. W. Va. Code § 7-1-3t. Again, however, authorization is not equivalent to creating a duty to fund requested cleanup projects. And public service districts have their own stream of revenue through bonds and the provision of their services to the public, and they create their own budgets to cover operating costs. *See* W. Va. Code §§ 16-13A-3, 16-13A-10, 16-13A-13; *State ex rel. Allstate Ins. Co. v. Union Pub. Serv. Dist.*, 151 W. Va. 207, 220, 151 S.E.2d 102, 109-10 (1966) (compelling a public service district and members of the Public Service Board to establish, charge, and collect rates for services rendered by district sufficient to provide for all operational and maintenance expenses). The special relationship between county commissions and public service districts thus does not change the nature of a commission’s duties in this area.

* * *

In sum, neither West Virginia Code § 7-1-3u nor other provisions of state or federal law requires the Mineral County Commission to assume responsibility of or pay for the removal of debris from a local waterway at the request of a public water association. The Commission has power to do so consistent with its enumerated authority and responsibility to act in the public interest, but this power is discretionary. It is not obligated to act or pay for improvement projects at the request of an interested entity or individual.

Sincerely,



Patrick Morrissey
Attorney General

Lindsay See
Solicitor General