



STATE OF WEST VIRGINIA  
OFFICE OF THE ATTORNEY GENERAL  
CHARLESTON 25305

October 6, 1987

CHARLIE BROWN  
ATTORNEY GENERAL

The Honorable Earl W. Weller  
Prosecuting Attorney of Berkeley County  
Berkeley County Courthouse  
Martinsburg, West Virginia 25401

Dear Mr. Weller:

This is in response to your letter of June 26, 1987, wherein you request an opinion from this office regarding implementation of a mandatory garbage fee. Specifically, you state:

"Chapter 7, Article 1, Section 3f of the West Virginia Code states that '...such commissions are hereby empowered to establish, operate and maintain, either directly or by contract, garbage and refuse collection and disposal services, and to pay for the establishment, operation and maintenance of such collection and disposal services, in whole or in part, either out of general funds in the county treasury, or out of special funds to be derived from fees charged to and paid by the users of such services...'

"The Berkeley County Commission would like to know if they can impose a mandatory user fee on the residents of the unincorporated areas of Berkeley County for garbage service. Secondly, are they empowered to enact this user fee by ordinance or by an order on their official minute book?" (Emphasis original.)

The first question you ask is whether they can impose a mandatory user fee on the residents of the unincorporated areas of Berkeley County for garbage service. From the statute, it initially appears that they may be able to so, as the language of the statute itself authorizes a fee to be charged to and paid by "users."

The term "users" is defined in W. Va. Code § 7-1-3f to include "any person to whom such services are made available \* \* \*." (Emphasis supplied.) Thus, one interpretation is that

in order to be assessed a fee, the person would not have to actually use the service, but, rather, simply have the service made available to him.

On the other hand, the language could be construed to mean only actual users may be assessed the fee. An almost identical definition for "users" is found in Code 7-15-17, which authorizes imposition and collection of special emergency ambulance service fees by county commissions. In the past, this office was asked whether it would be permissible to impose and collect an emergency ambulance fee from citizens of Randolph County having personal property within the county.

In 56 Ops. Att'y Gen. 308 (1976), we stated:

"The next question raised in your letter is whether or not the County Commission of Randolph County may impose the special emergency ambulance service fee solely on those citizens having personal property within the County. Again, it is necessary to look to the language of the statute itself wherein it provides, in part, that:

'A county commission may, by ordinance, impose upon and collect from the users of emergency ambulance service within the county a special service fee, which shall be known as the "special emergency ambulance service fee."' (Emphasis supplied.)

"The statute then goes on to define 'users' as follows:

'As used in this section, 'users' means any person to whom emergency ambulance service is made available under the provisions of this article.'

"There is nothing in this language to suggest that the Legislature intended such service fees to be imposed only on property owners. Certainly, ambulance service is just as essential to a person not owning property as it is to a property owner. However, the legislative intent with respect to the manner in which a county commission is to impose the fee is unclear. The statute defines 'users' as 'any person to whom emergency ambulance service is made available under the provisions of this article, 'which immediately conveys

the meaning that the fee is to be imposed only on those persons who actually effect use of the service. On the other hand, a close reading of the entire Act reflects a legislative purpose to make emergency ambulance service available to all citizens and residents of the State of West Virginia, and in order to accomplish this purpose, Section 17 of the Act further provides, in part, as follows:

'\* \* \* The proceeds from the imposition and collection of any such special service fee shall be deposited in a special fund and used only to pay reasonable and necessary expenses actually incurred and the cost of buildings and equipment used in providing emergency ambulance service to residents of the county. Such proceeds may be used to pay for, in whole or in part, the establishment, maintenance and operation of an authority, as provided for in this article.' (Emphasis supplied.)

"This language seems to indicate that the Legislature envisioned circumstances whereby the entire emergency ambulance service system could be funded by imposition and collection of the 'special emergency ambulance service fee.' This certainly could not be accomplished if the service fee was to be collected only from those persons who actually made use of the emergency ambulance service. In the case of State ex rel. Cabell County Court v. Arthur, 150 W.Va. 293, 145 S.E. 2d 34 (1965), Syllabus Point 1 reads as follows:

'"The county court is a corporation created by statute, and possessed only of such powers as are expressly conferred by the Constitution and legislature, together with such as are reasonably and necessarily implied in the full and proper exercise of the powers so expressly given. It can do only such things as are authorized by law, and in the mode prescribed."' (Emphasis supplied.)

"Therefore, it is the opinion of this office that while the Legislature, in Code 7-15-17, authorized county commissions to impose and collect a special

service fee from the users of emergency ambulance service within the county, it failed to prescribe the mode by which such fee is to be imposed."

Here, as in Code 7-15-17, the Legislature has failed to prescribe the mode by which such fee is to be imposed. Thus, while the term user can be broadly construed, such broad construction may be tested. On the other hand, in accordance with a later opinion regarding the ambulance fee, we have stated with regard to fees charged for actual use:

"Thus, even though this office has previously concluded that the manner in which the emergency ambulance service fee, provided for in Code 7-15-7 [7-15-17], is to be imposed and collected needs legislative clarification, Code 7-15-10, which sets forth the general powers and duties of emergency ambulance authorities, does provide that the authority is given the power 'to provide emergency ambulance service, maintain and operate such service' and 'to do any and all things necessary or convenient to carry out the powers given in this article.' Therefore, the imposition of a charge upon the basis of a minimum fee per transport, mileage charge, etc., for services actually rendered, would appear to be in the conformity with the general powers of the authority set forth in Code 7-15-10." 59 Ops. Att'y Gen. 161, 165 (1982).

Here, as in the case of ambulance service fees, the imposition of a charge based on actual use would appear to be permissible.

Berkeley County may also face a challenge to the fee based on the argument that the fee is a property tax. If the charge is considered a tax, there would be a potential violation of Article X, Section 1, of the West Virginia Constitution, which provides in relevant part:

"[T]he aggregate of taxes assessed in any one year upon personal property employed exclusively in agriculture, including horticulture and grazing, products of agriculture as above defined, including livestock, while owned by the producer, and money, notes, bonds, bills and accounts receivable, stocks and other similar intangible personal property shall not exceed fifty cents on each one hundred dollars of value thereon and upon all property owned, used and occupied by the owner

thereof exclusively for residential purposes and upon farms occupied and cultivated by their owners or bona fide tenants one dollar; and upon all other property situated outside of municipalities, one dollar and fifty cents; and upon all other property situated within municipalities, two dollars; and the legislature shall further provide by general law, for increasing the maximum rates, authorized to be fixed, by the different levying bodies upon all classes of property, by submitting the question to the voters of the taxing units affected, but no increase shall be effective unless at least sixty percent of the qualified voters shall favor such increase \* \* \*."

While it appears from the face of the statute that this charge for services is a fee and not a tax, Berkeley County should avoid tying the fee into property ownership or values, to avoid the charge that such fee is in violation of the above-quoted Tax Limitation Amendment, and thus unconstitutional. This same type of challenge has been successfully brought against fire service fees when those fees were assessed based on property value. See City of Fairmont v. Pitrolo Pontiac-Cadillac Co., \_\_\_ W. Va. \_\_\_, 308 S.E.2d 527 (1983).

As earlier indicated, the Legislature was not clear as to how these fees are to be imposed. For example, should everyone pay; should the fee be per household; should this fee be paid only by actual users; or should some other criteria be used? While the county might be able to establish some equitable method of assessing the fees, as there are no legislative guidelines, a court may find that the county has no authority to do so. A court could determine that the power and method of assessment must be expressly stated in order to confer such power to county commissions.

On other occasions, such as in the case of the fire service fee, the Legislature has been very explicit regarding how the fee would be implemented, calling for a vote of the populace. The very fact that Code 7-1-3f contains no such detail again strongly suggests that legislative clarification is necessary.

However, assuming that the county should decide to implement the fee, risking a challenge to their actions, you next asked if the county commission is empowered to enact this user fee by ordinance or by an order on their official minutes book. Again, Code 7-1-3f does not set forth any specific procedure which must be followed in order to establish the fee, even though several of

the other sections enumerating the powers of county commissions do set out in detail how they are to be implemented. This silence is further indication of the need for legislative clarification.

Inasmuch as the Code is silent as to any special requirements, the county commission may arguably authorize the mandatory garbage fee in the same manner it conducts its regular business. That is, it appears that it may simply enter an order in its record books at any regular session.

Of course, if the order is passed at a special session, the public must be notified as to the business the county commission plans to conduct at such special session. Mayer v. Adams, 27 W. Va. 244 (1885). To validate an act of a county commission in special session, the record must show that the notice thereof has been published for two days previous to the meeting, and that the act is fairly within the purpose set forth in the notice. State ex rel. Withrow v. Surface, 110 W. Va. 237, 157 S.E. 402 (1931).

If the county commission chooses, it may pass an ordinance dealing with this subject matter, although the statute does not specifically require that there be an ordinance. However, the commission could develop a more detailed plan of implementation through means of an ordinance.

In conclusion, it is the opinion of this office that the garbage service fee, provided for in Code 7-1-3f, may be properly imposed on actual users of the service. However, it is the further opinion of this office that the manner in which the fee may be imposed on and collected from other than such actual users of the service needs legislative clarification.

Very truly yours,

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Attorney General

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