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OF COUNSEL  
ELIZABETH LACKEY JACOBS

August 5, 2015

Mr. Ed Kerwin, Executive Director  
Orange Water and Sewer Authority  
400 Jones Ferry Road  
Carrboro, NC 27510

Re: Observations on Restrictions Applicable to Charitable Activities by OWASA

Dear Mr. Kerwin:

The Board of Directors has requested information on the legal restrictions that prohibit OWASA's participation in charitable actions to make service costs more affordable to customers who may be less able to pay than others and to understand what, if anything, might be done to alter those restrictions.

In this regard, it would be useful to review the sources of OWASA's legal authority, as well as the restrictions on that authority, pertaining to these questions.

First, as an independent, single-purpose unit of local government, OWASA is empowered by the General Statutes to govern, operate, and determine how to finance the water and sewer system here. Those powers are set out in Chapter 162A of the General Statutes. As a corollary, it is important to understand that OWASA has no authority to do anything except what that statute specifically authorizes it to do. Stated another way, OWASA is a limited purpose unit of local government, not a general purpose unit such as a County or Town.

The General Statutes empower the Board to set the fees and charges it thinks necessary to operate and maintain the system, and require that rates be uniform within the various user classes. In short, this provision means that fees shall be charged for service provided, and that users in each particular user class will be charged equal amounts for equal usage. No authority is given to establish user classes based upon the income or economic situation of individual users.

We have often referred to this dictate as the "No Free Service" rule. Its corollary is that reduced rates for persons within the same user class, based upon their income level or economic means, are not permitted by the statute.

The No Free Service dictate is also found in the Sales and Purchase Agreements entered into by OWASA with the University, with the Town of Chapel Hill, and with the Town of Carrboro, for their

transfer of their water and sewer system facilities to OWASA in 1977. Those agreements specifically recite that, except for service provided to supply water to the various fire hydrants in the Towns and on campus, no free service will be provided.

The system facilities were purchased in 1977 with funds obtained by OWASA's borrowing the purchase price paid, by the issuance and sale of bonded certificates of indebtedness. Those Bonds were secured by a Bond Order, (the function of which is much like a homeowner's mortgage), that requires certain rate-making practices, and especially financial management practices. Since payment of the bonded indebtedness is promised from the rates and fees collected from system customers, the Bond Order requires measures that will assure prudence in the protection of those revenues to assure payment of the Bonds. One of the most important covenants of the bond orders prohibits free service, so as to prevent the erosion of the revenues that are essential to the financial vitality of the Bonds.

Thus we see that free service, as well as differential rates based upon income or economic level of various customers, are not authorized by the General Statutes, conflict with the Sale and Purchase Agreements, and are prohibited by the Bond Order.

I talked with OWASA's Bond Counsel recently about the Board's interest in learning more about how it might contribute to charitable needs in the community, including whether it might differentiate its rates to serve customers of varying means by charging various rates among similar user classes based upon economic need.

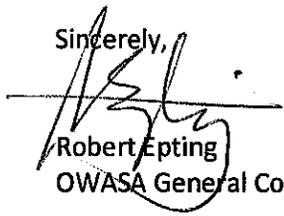
Bond Counsel agreed that OWASA is a "cost of service" utility, that it is bound to fix its rates and charges based on cost of service, and that neither the enabling legislation nor the Agreements of Sale and Purchase anticipate or empower OWASA to charge "sliding scale" rates based on income, or to give rebates or collect fees to provide funding for charitable causes, or to help the less fortunate. He also underscored that such charitable practices, though well motivated, would violate the Rate Covenants contained in Section 7.04 of the present Bond Order.

For the reasons set out above, to do otherwise would require a specific amendment to the General Statutes to give Water and Sewer Authorities the specific power to fund or operate charitable causes, or to charge rates and fees based on sliding scales related to income or means levels of various customers.

In addition, so long as the present Bond Order remains in effect, the provisions restricting OWASA to cost of service rates, equal within each user class, must be followed. I do note that the Bond Order would allow OWASA to spend a de minimus amount (from interest income only, subject to a limit of not more than one percent of its net expenses, as I recall) for charitable purposes. However, that provision does not empower OWASA to do anything the General Statutes does not empower it to do, and so without that power springing from legislative action, OWASA could not do so even though the de minimus fund might not violate the Bond Order.

Nor would the consent of the parties to the Sales and Purchase Agreements empower OWASA to begin to engage in charitable activities. Again, that power must be added to Chapter 162A's list of things that Water and Sewer Authorities may do, by the General Assembly. Failing that, in my opinion, OWASA is not authorized to charge differential rates based upon its customers' varying economic circumstances, nor has it any authority to expend its revenues for any purpose other than operation, maintenance, improvement and replacement of the community's water and sewer system facilities.

Our previous opinions on this subject from March and July of 1997, may be useful for the Board to consider, and are provided by attachment.

Sincerely,  
  
Robert Epting  
OWASA General Counsel

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July 16, 1997

Mr. Ed Kerwin  
Executive Director  
Orange Water and Sewer Authority  
Carrboro, NC 27510

Re: Customer Assistance Program Proposals

Dear Mr. Kerwin:

I wrote in March expressing our opinion that the Customer Assistance Program funded through "rounding up" of customer bills is a purpose authorized for authorities under Chapter 162A of the General Statutes. After disclosing my long time representation of the Interfaith Council, I also suggested that the proposal to have the fund administered by the IFC appeared to be legal and appropriate.

Since then, Water Partners International has applied to share in the fund, from which distributions would be made for its very worthy efforts to provide clean water to those without this resource in other parts of the world. If the Board decides to include WPI, perhaps it will also consider whether to open the application process to other similar organizations.

In light of my previous advice to you and the Board about the legality of a program administered by a local agency to provide local assistance of a well defined nature, i.e., to help people in straited financial circumstances to pay their water bills, I want to add a cautionary note, based both on my experience as a Town Council member, and on my hope that the Board will understand the peculiar difficulties presented when it must choose from among a number of worthy purposes to decide how to distribute its resources.

Again, let me emphasize that what I am about to say is not intended to disparage Water Partners International or to discourage the Board from determining to include WPI as its partner in the distribution of the rounded up funds. Indeed, if the Board determined at this time to establish a program in which that portion of the fund not expended by IFC to help with the payment of local water bills was turned over to WPI for its purposes, most of the concerns I am about to express would be satisfied.

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The difficulty is presented when application for the use of the rounded up "Fund" is opened across the board to any charitable group that wishes to apply. Mr. Rimer will recall, as I do, the phalanx of worthy organizations that showed up in every Town budget cycle to make application for the very limited funds the Town had begun to provide for local charitable purposes.

There is no way to make judgments about which should be approved, and which denied, that we are sure will withstand dispassionate judicial scrutiny in the unlikely event a disappointed agency sues claiming that its denial is in effect an unfair or unequal application of public funds. Truly, these decisions are political at their most fundamental level, and ought not be tested in the Courts, but I must say that if they were tested, neither I nor the Board would be able to establish a rational basis equally applied to support the denial decisions. (The approval decisions are easy.)

If the Board determined that the Fund would be subject to application for use by local agencies, and national or international organizations, it would find itself in the same situation as the Town Council, with additional duties of receiving and processing applications, receiving public and private comment from parties interested in individual applications, allocating funds upon the basis of majority vote, and, of course, monitoring or auditing the use of those funds, all over and above its usual work of overseeing the administration of the water and sewer authority. It may be more difficult for the Board to determine to its satisfaction whether potential beneficiary organizations are well managed if they are not locally based agencies such as the IFC, WPI, Habitat, or Orange Community Housing Corporation.

Finally, the Board may be subjecting itself to the claims of disappointed agencies, some one or few of which might call OWASA into Court where we would have the burden to explain or establish that there existed an objective, impartial basis for granting some requests and denying others.

Although claims of undue partiality might be avoided by the method suggested above, that is, by deciding now that individual disbursement decisions would be made by an agency like IFC, and/or WPI, the Board's fiduciary responsibilities would still include regular audits of the administration of Funds proceeds by these agencies.

I should also note that the forms evidencing customer consent to rounding up should clearly identify the purposes for and methods by which the funds would be allocated; such as, "administered by IFC to provide assistance for needy customers for payment of water

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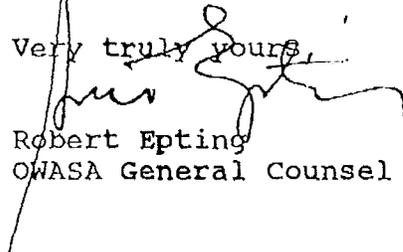
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and sewer charges," or similar language for the WPI component.

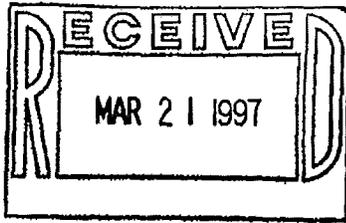
We would find it difficult to draft language covering the "potential" uses and purposes of "potential" fund applicants if the Board chose to open the Funds for application by a broad scale of public or charitable group. As I advised in my earlier letter, specific customer authorization for particular uses is a crucial component of OWASA's authority to accept gifts under the statute. (The Board might consider that customers will be executing these consent forms in advance of OWASA's collection and distribution of these Funds, and that they might be less interested in donating as the potential uses of these funds become broader or are subject to later determination or annual redetermination by the Board.)

In the Board's effort to assist needy persons in obtaining clean water and wastewater disposal, both locally and beyond our own community, for all the reasons stated above, I advise the Board to choose as specific a program or programs as possible for the application of these funds, both so that customers may know just what they are being asked to authorize, and so that we can defend the allocation and use of these funds as being clearly within the actual and reasonable discretion of the Board.

Very truly yours,

  
Robert Epting  
OWASA General Counsel

cc: Board of Directors  
*FAXED TO BOARD ON 7/16/97*



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March 21, 1997

Mr. Ed Kerwin  
Executive Director  
Orange Water and Sewer Authority  
Carrboro, NC 27510

Re: Customer Assistance Program  
Legal Considerations

Dear Mr. Kerwin:

I have reviewed various materials supplied by Linda Vaughn with respect to the prospect of OWASA's establishing a Customer Assistance Program, which would provide financial assistance to customers temporarily unable to pay for OWASA's water and sewer service.

In recognition of its contractual obligations prohibiting the provision of free service, I understand that your committee has proposed to find a way to establish a fund which would not come from service revenues, and which could be administered by outside assistance from an agency experienced in such endeavors, such as the local Interfaith Council for Social Services.

(As you know, I have served for years as Counsel to the Interfaith Council. I point it out here, so that others who may later review this opinion letter will also have that information and not later learn it under circumstances that might then be made to appear inappropriate or awkward. I neither proposed, nor do I have any authority or ability to endorse, OWASA's cooperating with the IFC. If the IFC does agree to participate with OWASA in this matter, I will have nothing to do with its advice in that regard, and I will see that it obtains other counsel about that matter if it asks me to do so.)

I understand that you are considering a program which would invite and permit customers to contribute to a Customer Assistance Fund ("Fund") by way of "rounding up" their monthly bills to the next even dollar amount, with the net cents being directed by the customer to OWASA for contribution to the Fund, which would then be administered in such a way that a customer temporarily in financial distress could obtain assistance from the Fund to pay their OWASA water or sewer related charges.

I have reviewed the statutes, the Purchase and Sales Agreements, and the Bond Order, and I am of the opinion that OWASA is not prohibited from participating in such a program, for the following reasons.

First, the program would not make way for the provision of free service, but instead would be set up as a way for customers to provide assistance to other customers to pay for services actually received.

Second, the statutes make express provision allowing water and sewer authorities "to receive from any public or private agency, person, or entity ... donations ... and to agree to apply and use the same in accordance with the conditions under which the same are provided." (G.S. 162A-6(13)). Thus, at the written direction of a customer authorizing OWASA to receive the "rounded up" funds as a donation, and to use the same in the Customer Assistance Program to make provision for the payment of water and sewer charges due from other needy customers, OWASA is authorized by statute to do precisely what you are considering in this program.

Third, I do not believe that the net funds received from "rounding up" to the next dollar would in fact be subject to the bond order, because, so long as they were received and administered as I understand you are contemplating, I do not think they are in fact system revenues.

However, even if they were considered system revenues, the last revision of the Bond Order, at section 513, specifically refers to and would allow the expenditure of not more than "1% of current expenses, generated from interest earned upon the General Fund along with voluntary grants, contributions and subscriptions,..." to be used for any purpose allowed by the enabling act and the bond order.

In my opinion the creation of a fund from voluntary contributions given OWASA for the purpose of helping pay accounts which might otherwise remain delinquent and ultimately be lost, is a purpose allowed by the statutes and Bond Order, for the fund would help assure the maximization of collection of OWASA's service accounts, and thus the minimization of service that would otherwise have become a species of "free service," even though OWASA had not intended to provide it for free.

In the context of complaints about large development costs, such as availability and connection fees, where local agencies or legitimately concerned citizens have complained about the impact of water and sewer fees on development costs and the resulting dearth of affordable housing, OWASA has previously been counselled that statutory requirements that rates and fees be uniform within its various classes of service, and bond and contractual requirements

prohibiting free service, all prevent OWASA from varying its rates within a class according to the charitable nature of the user's endeavors. That is still my opinion and advice.

However, the program proposed is different in that it proposes to provide for full payment for OWASA's services, not some discount therein, by the use of funds authorized by statute and anticipated by the bond order. It is my opinion that a program established and administered as proposed would be within the legal authority of OWASA.

Finally, I add this note about tax deductibility. The bad news is that monies paid to OWASA for this purpose are not going to be tax deductible. The good news is that even for someone in Donald Trump's tax bracket, a tax deduction for \$11.88 (\$.99 x 12 months) would only be worth \$3.92 off their taxes. People or companies who want to make tax deductible contributions for this purpose should simply write their check to the Interfaith Council and mark it for use for the "Sharing Water Program" (my name for it). The IFC's use of the funds would be limited by that restrictive designation, and the same purpose would be served.

I will be glad to meet with you and your staff to discuss administrative questions as they arise. I think key components would include:

- assuring complete understanding of the details of the program by our customers;
- assuring that appropriate authorization and direction be given in writing by participating customers;
- assuring proper administration of the funds, whether within or without OWASA's direct administration or oversight.

I am thrilled to be able to be a part of OWASA's effort on this. It reminds me of why I am proud to be associated with you all.

Very truly yours,

  
Robert Epting  
OWASA General Counsel

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