

OP. NO. 03-109

COUNTIES, CITIES AND TOWNS: PLANNING, SUBDIVISION OF LAND AND ZONING.

General Assembly must enact express statutory authorization for local governing body to deny rezoning request solely on basis of lack of adequate public facilities and services to meet needs generated by development of rezoned property.

The Honorable John C. Watkins
Member, Senate of Virginia
December 15, 2003

Issue Presented

You ask whether statutory authority is required for a local governing body to deny a rezoning request solely on the basis of the lack of adequate public facilities and services to meet the needs generated by development of rezoned property.

Response

It is my opinion that the General Assembly must enact express statutory authorization to permit a local governing body to deny a rezoning request *solely* on the basis of inadequate public facilities.

Background

You advise that the General Assembly has considered legislation dealing with the ability of local governing bodies to adopt adequate public facilities ordinances. You note that a 2002 opinion of the Attorney General appears to empower localities to require adequate public facilities prior to rezoning or development of property as part of the local comprehensive plan. You relate that § 15.2-2286, which describes the permitted provisions that may be included in zoning ordinances, does not appear to authorize localities to require that adequate public facilities be in place prior to the rezoning or development of property. You believe that § 15.2-2286 enables a local governing body to consider the manner in which facilities and services will be provided as one consideration among many; however, § 15.2-2286 does not create a basis for a locality to require that developers provide adequate public facilities or defer development until such services are provided.

Applicable Law and Discussion

A 2002 opinion of the Attorney General concludes that a locality may adopt, as part of its comprehensive plan, a voluntary proffer policy that considers certain criteria in an adequate public facilities requirement before applications for rezoning may be approved.¹ The 2002 opinion is based on the specific fact that a city proffer policy anticipates, but does not require, that three specific proffers be considered in evaluating the merits of each specific rezoning request.² Furthermore, the underlying facts upon which the 2002 opinion is based require

the governing body to also consider all other factors relevant to land use decisions and act upon the rezoning request in the best interest of the public.³ The 2002 opinion is necessarily limited to a general discussion of the authority of a Virginia locality to adopt, as part of a comprehensive plan, a voluntary proffer policy that considers several criteria in an adequate public facilities requirement before applications for rezoning may be approved.⁴ The criteria include the following:

1. The impact of a proposed new development on public facilities;
2. The protection against undue density of population with respect to the public facilities in existence to service the proposed new development;
3. The planning by the locality for the provision of public facilities consonant with the efficient and economical use of public funds to service the proposed new development; and
4. The locality's interpretation and application of its comprehensive plan concerning the timing of the development as determined by reasonably object criteria.⁵

Finally, the 2002 opinion is premised on the express assumption that any standard for determining whether public facilities serving a particular proposed development are adequate is extensive and comprehensive.⁶ Such standard is not articulated in the 2002 opinion.⁷

In *Board of Supervisors of Powhatan County v. Reed's Landing Corporation*, the Supreme Court of Virginia held that, under § 15.1-491.2:1, the predecessor statute to § 15.2-2298, a local governing body is "not empowered to require a specified proffer as a condition precedent to a rezoning."⁸ The Court determined that the evidence supported the trial court's conclusion that the sole reason the governing body denied the developer's rezoning request was the developer's refusal to make a cash proffer fixed by the county board of supervisors.⁹ Accordingly, the Court determined that the trial court correctly ruled that the subject proffer was not voluntary within the meaning of the statute, and that the governing body imposed an unlawful condition precedent on the developer.¹⁰

In the enabling zoning legislation, "the General Assembly ... has undertaken to achieve ... a delicate balance between the individual property rights of its citizens and the health, safety and general welfare of the public as promoted by reasonable restrictions on those property rights."¹¹ To this end, all zoning and planning authority of local government is derived from the enabling legislation contained in Chapter 22 of Title 15.2, §§ 15.2-2200 through 15.2-2327. Section 15.2-2286 enumerates various permissible provisions that may be included in local zoning ordinances. Sections 15.2-2296 through 15.2-2302 clearly authorize a conditional zoning process in certain specified localities that includes a provision in the zoning ordinances for the *voluntary* written proffering "of reasonable conditions" as part of a rezoning or an amendment to a zoning map.¹² There is, however, no express statutory authorization that expressly grants to localities an ability to specifically require developers to provide adequate public facilities or to defer development until such services are provided.

Virginia adheres to the Dillon Rule of strict construction, which provides that local governing bodies "have only those powers that are expressly granted, those

necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable."¹³ "[T]he Dillon Rule is applicable to determine in the first instance, from express words or by implication, whether a power exists at all. If the power cannot be found, the inquiry is at an end."¹⁴

Statutory authorization is clearly required to permit a local governing body to deny a rezoning request based *solely* on the lack of adequate public facilities to serve any development of rezoned property. While the nature of the public services to be provided to new development is certainly one of many considerations of local governing bodies in reviewing rezoning requests, I am of the opinion that neither the manner nor the timing in which public services will be provided may serve as the sole basis for a locality to require that developers provide adequate public facilities or defer development until such facilities and services are provided.

Conclusion

Accordingly, I must conclude that the General Assembly must enact express statutory authorization for a local governing body to deny a rezoning request *solely* on the basis of the lack of adequate public facilities and services to meet the needs generated by the development of rezoned property.

¹2002 Op. Va. Att'y Gen. 85.

²The city proffer policy encourages the property owner to voluntarily agree (1) to coordinate the commencement of plan review and construction with the availability of adequate public facilities and services, as measured by the city's level-of-service standards; (2) to reconsideration of a rezoning application that is submitted at a time when public facilities and services no longer adequately serve the needs of the proposed development; and (3) to revocation of the rezoning, unless assurances are proffered that the developer will correct such deficiencies in public facilities and services to the satisfaction of the city. 2002 Op. Va. Att'y Gen., *supra* note 1, at 86.

³*Id.*

⁴*Id.* at 86-87.

⁵*Id.* at 89.

⁶*Id.* at 90 n.1.

⁷The 2002 opinion does not stand for the proposition that a locality may adopt an adequate public facilities requirement that constitutes the sole reason to deny a rezoning application. The 2002 opinion merely articulates what is already contemplated by the law, namely, that the provision of public services to be provided to a new development is one of many factors to be considered by a local governing body in its deliberations concerning a rezoning application.

⁸250 Va. 397, 400, 463 S.E.2d 668, 670 (1995) (noting that former § 15.1-491.2:1 clearly states that proffers of conditions by zoning applicant must be made voluntarily).

⁹*Id.* at 398-99, 463 S.E.2d at 669

¹⁰*Id.* at 400, 463 S.E.2d at 670

¹¹*Bd. of Supvrs. v. Horne*, 216 Va. 113, 120, 215 S.E.2d 453, 458 (1975).

¹²Sections 15.2-2297(A), 15.2-2298(A) (LexisNexis Repl. Vol. 2003).

¹³*City of Chesapeake v. Gardner Enters., Inc.*, 253 Va. 243, 246, 482 S.E.2d 812, 814 (1997).

¹⁴*Commonwealth v. County Bd.*, 217 Va. 558, 575, 232 S.E.2d 30, 41 (1977).

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