

OP. NO. 05-011

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

No authority for locality to pass site ordinance restricting or requiring undesirable industries or businesses before locating within locality. Adoption of zoning ordinance is only method for locality to generally control location of such industries or businesses. General police power of county does not solely authorize board of supervisors to pass site ordinance in conjunction with distance requirement from water source.

Mr. Scott S. Farthing
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March 31, 2005

Issue Presented

You ask whether the Wythe County Board of Supervisors is authorized to pass a site ordinance restricting or requiring specific requirements of potentially undesirable industries or businesses before locating within Wythe County which does not have a zoning ordinance.¹ You also ask whether there is any way other than application of the provisions of a zoning ordinance to control the location of undesirable industries or businesses within Wythe County. Finally, you ask whether the Board may pass a site ordinance pursuant to the County's general police power if it is passed in conjunction with a distance requirement from a water source.

Response

It is my opinion that Wythe County is not authorized to pass a site ordinance restricting or requiring specific requirements of potentially undesirable industries or businesses before locating within Wythe County. Adoption of a zoning ordinance is the only method permitted by the General Assembly authorizing a locality to generally control the location of undesirable industries or businesses within a locality. Finally, it is my opinion that the Wythe County Board of Supervisors is not authorized solely under the exercise of the County's general police power as you describe to pass a site ordinance in conjunction with a distance requirement from a water source.

Background

You relate that the Wythe County Planning Commission ("Planning Commission") was directed by the Wythe County Board of Supervisors (the "Board") to study and draft a proposed zoning ordinance for the County. The Planning Commission spent approximately two years working on the ordinance, using the comprehensive plan, various committees and public meetings to gain input on the needs of the County and translating such into a zoning ordinance. A public hearing was held, and the Planning Commission recommended a zoning ordinance for the consideration of the Board. The Board has conducted several work sessions discussing the ordinance and possible changes to it. You indicate that some of the County's citizens have expressed their concern that the zoning ordinance will intrude on their private property rights.

You advise that over the past couple of years, some businesses have located in the county that citizens have asked the Board to regulate. Such businesses include truck stops, asphalt plants and livestock markets. You relate that the Board has made inquiry of you, as County Attorney, regarding whether the County has some means of controlling potentially undesirable land uses by private owners, such as by a site ordinance for each undesirable use.

Applicable Authorities and Discussion

The overriding goal of statutory interpretation is to discern and give effect to legislative intent.² The Commonwealth follows the Dillon Rule³ of strict construction of statutory provisions and its corollary that “the powers of county boards of supervisors are fixed by statute and are limited to those powers conferred expressly or by necessary implication.”⁴ Additionally, the powers of boards of supervisors are fixed by statute and are limited to those conferred expressly or by necessary implication.⁵ “[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.”⁶

To determine whether the General Assembly has passed enabling legislation that permits localities to adopt a site ordinance with the provision that you describe, the land use provisions of Title 15.2 must be considered. “[A] fundamental rule of statutory construction requires that ... the entire body of legislation and the statutory scheme [be viewed] to determine ‘the true intention of each part.’”⁷ “[T]he fullest possible effect [must be given] to the legislative intent embodied in the entire statutory enactment.”⁸ In the land use statutes, 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.”⁹

Article 7, Chapter 22 of Title 15.2, §§ 15.2-2280 through 15.2-2316, contains Virginia's zoning enabling statutes. Section 15.2-2280 grants any locality the power to classify its territory into districts and to regulate the use of land and buildings within each district for the statutorily recognized purposes of promoting the health, safety and welfare of the general public.¹⁰ In addition to the uses permitted by right in each district, § 15.2-2286(A)(3) authorizes “the granting of special exceptions under suitable regulations and safeguards.” Sections 15.2-2286 and 15.2-2285 prescribe the specific procedures that must be followed when a locality proposes to enact a zoning ordinance or adopt an amendment to such an ordinance. First, the governing body must initiate the proposal by adopting a written resolution stating the underlying public purpose.¹¹ Second, the proposal must be referred to the local planning commission for review.¹² Third, the commission must give public notice pursuant to the provisions of § 15.2-2204, conduct a public hearing, and report its recommendations to the governing body.¹³ Fourth, upon receipt of the commission's report, the governing body must give public notice and conduct its own public hearing.¹⁴ “By complying with these procedures, the governing body acquires the same authority to act upon a zoning proposal as it has to act upon other legislative matters.”¹⁵ The only statutory provision permitting the adoption of a specific siting ordinance pertains to the location of a solid waste management facility within a locality.¹⁶ There are no other statutory provisions authorizing a board of supervisors to adopt a specific site ordinance as you describe. It is, therefore, my opinion that the General Assembly has not authorized the Board to pass the site ordinance that you describe absent the adoption of a zoning ordinance.

The decisions of the Supreme Court of Virginia interpreting the police power of a locality clearly explain that § 15.2-1200 and analogous legislative acts constituting a general grant of the police power of the Commonwealth are not a complete grant of the police power of the Commonwealth to the localities.¹⁷ Rather, many decisions apply the Dillon Rule of strict construction to the authority of local governments, thereby requiring that certain activities undertaken, or regulations imposed, by local governments have express enabling legislation or are necessarily implied from enabling legislation.¹⁸ One commentator describes the general limitations on the exercise of the police power under a general grant as follows:

[T]he ordinance must have a clear, reasonable and substantial relation to the public health, safety, morals, or welfare, and must be reasonably appropriate for the police power objective sought to be obtained.^[19]

The Supreme Court of Virginia has held that a local government may, in the exercise of its general police power: (1) require a municipal permit for the purchase of handguns;²⁰ (2) regulate smoking in public areas;²¹ (3) regulate topless dancing;²² (4) regulate the operation of massage salons;²³ (5) regulate the use of “common towels”;²⁴ (6) prohibit the conduct of lotteries and numbers games;²⁵ (7) restrict the keeping of vicious dogs;²⁶ and, (8) regulate or prohibit the operation of pool rooms.²⁷ A 1984 opinion of this Office interpreting the scope of a county’s police power under § 15.1-510, predecessor to § 15.2-1200, concludes that this statute authorizes the regulation of a broad range of activities that may reasonably be found to be adverse to the public health, safety, or welfare in particular sets of circumstances.²⁸ The regulation of waste disposal activities and waste disposal sites has generally been approved as an appropriate exercise of a locality’s police power.²⁹

The General Assembly has, however, expressly granted to localities the authority to prohibit or regulate specific uses of land only in their exercise of the zoning power.³⁰ Zoning is a valid exercise of the police power of the Commonwealth.³¹ In an analogous context, the Supreme Court of Virginia has held that a county could not adopt an “Interim Development Ordinance” prohibiting the filing of subdivision plats and site plans under its general police power when the challenged provisions were not authorized under the applicable subdivision enabling statutes.³² The Court has also commented that the police powers granted by the General Assembly under the zoning enabling statutes balance an individual’s property rights against the health, safety, and welfare of the public by placing reasonable restrictions on such property rights.³³

There is a well-developed body of case law available to guide the proper exercise of regulation of land uses within the context of the zoning power in any given instance. In addition, the provisions of § 15.2-2283 authorize local zoning ordinances to include reasonable provisions, not inconsistent with applicable state water quality standards, to protect surface water and groundwater. Section 15.2-1200 authorizes the adoption of measures under a county’s general police power to prevent the outright pollution of county water “which is dangerous to the health or lives of persons residing in the county.”³⁴ Considering the scope of the police power in § 15.2-1200, and the interaction between the general police power in § 15.2-1200 and Virginia’s zoning enabling statutes, however, it is my opinion that the site ordinance you generally describe, used in conjunction with an unspecified distance requirement from a water source, would likely not be held to be a valid exercise of the general police power in generally regulating specific uses of land. I am of the opinion that the appropriate statutory provisions

to be used in regulating the private use of land in the County would be through the use of Virginia's zoning enabling statutes.

Conclusion

Accordingly, it is my opinion that Wythe County is not authorized to pass a site ordinance restricting or requiring specific requirements of potentially undesirable industries or businesses before locating within Wythe County. Adoption of a zoning ordinance is the only method permitted by the General Assembly authorizing a locality to generally control the location of undesirable industries or businesses within a locality. Finally, it is my opinion that the Wythe County Board of Supervisors is not authorized solely under the exercise of the County's general police power as you describe to pass a site ordinance in conjunction with a distance requirement from a water source.

¹You do not define the term "site ordinance" as it is used in your letter request. The only reference to a siting ordinance set forth in the *Code* is § 15.2-929. Section 15.2-929 authorizes localities to adopt solid waste management facility siting ordinances, generally describes the contents of such ordinances, and prescribes a procedure for siting approval. I am not aware of any other statutory provision that provides for a site ordinance such as the one you describe.

²See *Turner v. Commonwealth*, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983); *Vollin v. Arlington Co. Electoral Bd.*, 216 Va. 674, 678-79, 222 S.E.2d 793, 797 (1976); 1990 Op. Va. Att'y Gen. 155, 155, and opinions cited therein.

³*City of Richmond v. County Bd.*, 199 Va. 679, 684-85, 101 S.F.2d 641, 644-45 (1958) (noting Dillon's Rule that municipal corporations have only those powers expressly granted, those necessarily or fairly implied therefrom, and those that are essential and indispensable).

⁴*County Bd. v. Brown*, 229 Va. 341, 344, 329 S.E.2d 468, 470 (1985).

⁵*Gordon v. Bd. of Supvrs.*, 207 Va. 827, 832, 153 S.E.2d 270, 274 (1967); *Johnson v. County of Goochland*, 206 Va. 235, 237, 142 S.E.2d 501, 502 (1965).

⁶*Commonwealth v. County Bd.*, 217 Va. 558, 575, 232 S.E.2d 30, 41 (1977).

⁷*Va. Real Estate Bd. v. Clay*, 9 Va. App. 152, 157, 384 S.E.2d 622, 625 (1989) (quoting *McDaniel v. Commonwealth*, 199 Va. 287, 292, 99 S.E.2d 623, 627 (1957)).

⁸*Id.* at 157, 384 S.E.2d at 625.

⁹*Bd. of Supvrs. v. Horne*, 216 Va. 113, 120, 215 S.E.2d 453, 458 (1975) (interpreting local zoning ordinances; specifically, § 15.1-491, predecessor to § 15.2-2286).

¹⁰See VA. CODE ANN. § 15.2-2200 (LexisNexis Repl. Vol. 2003) (recognizing purpose of zoning is to improve public health, safety, and welfare).

¹¹Section 15.2-2286(A)(7) (LexisNexis Repl. Vol. 2003) (providing further that local planning commission may initiate amendment by motion that states public purpose or land owner may petition for amendment).

¹²Section 15.2-2285 (B) (LexisNexis Repl. Vol. 2003).

¹³Section 15.2-2285(A).

¹⁴Section 15.2-2285(C).

¹⁵*Town of Vinton v. Falcun Corp.*, 226 Va. 62, 66, 306 S.E.2d 867, 869 (1983) (construing §§ 15.1-491, 15.1-493, predecessors to §§ 15.2-2285, 15.2-2286).

¹⁶See *supra* note 1.

¹⁷ See cases cited *infra* notes 20-27.

¹⁸ See, e.g., *Tabler v. Bd. of Supvrs.*, 221 Va. 200, 202, 269 S.E.2d 358, 359-60 (1980) (holding that locality did not have express power to require deposit on beverage containers, because power was not implicitly authorized under former § 15.1-510).

¹⁹ CHARLES S. RHYNE, *THE LAW OF LOCAL GOVERNMENT OPERATIONS* § 19.8, at 452-53 (1980).

²⁰ *Stallings v. Wall*, 235 Va. 313, 367 S.E.2d 496 (1988).

²¹ See *Alford v. City of Newport News*, 220 Va. 584, 586, 260 S.E.2d 241, 243 (1979) (noting that regardless of how legitimate purpose underlying exercise of police power is, police power may not be used to regulate property interests unless means employed are reasonably suited to achieve stated goal).

²² *Wayside Rest., Inc. v. City of Va. Beach*, 215 Va. 231, 208 S.E.2d 51 (1974).

²³ *Kisley v. City of Falls Church*, 212 Va. 693, 187 S.E.2d 168 (1972).

²⁴ *Nat'l Linen Serv. Corp. v. City of Norfolk*, 196 Va. 277, 83 S.E.2d 401 (1954) (noting that ordinance enacted under general police power must bear real and substantial relationship to health, safety or general welfare of city's inhabitants).

²⁵ *Allen v. City of Norfolk*, 196 Va. 177, 83 S.E.2d 397, *modifying* 195 Va. 844, 80 S.E.2d 605 (1954).

²⁶ *King v. County of Arlington*, 195 Va. 1084, 81 S.E.2d 587 (1954).

²⁷ *Assaid v. City of Roanoke*, 179 Va. 47, 18 S.E.2d 287 (1942).

²⁸ See 1983-1984 Op. Va. Att'y Gen. 86, 87 (discussing regulation of sewage sludge disposal).

²⁹ See *generally* Op. Va. Att'y Gen.: 1984-1985 at 91; 1983-1984 at 89; 1981-1982 at 273; 1980-1981 at 123.

³⁰ See §§ 15.2-2280, 15.2-2281 (LexisNexis Repl. Vol. 2003).

³¹ *West Bros. Brick Co. v. City of Alexandria*, 169 Va. 271, 281, 192 S.E. 881, 885 (1937).

³² See *Horne*, 216 Va. at 113, 215 S.E.2d at 453.

³³ *Id.* at 120, 215 S.E.2d at 458.

³⁴ The general authority granted counties in § 15.2-1200 to regulate traditional aspects of public health and safety is broadly construed. See Op. Va. Att'y Gen.: 1992 at 59, 61; 1987-1988 at 147, 148 (construing § 15.1-510, predecessor to § 15.2-1200). A broad construction is particularly appropriate when the ordinance relates to a power expressly recognized in § 15.2-1200. See 1987-1988 Op. Va. Att'y Gen. 610, 614 (construing § 15.1-510).

[Back to March 2005 Opinion Index](#)