



COMMONWEALTH of VIRGINIA

Office of the Attorney General

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November 17, 2006

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The Honorable L. Scott Lingamfelter
Member, House of Delegates
5420 Lomax Way
Woodbridge, Virginia 22193

Dear Delegate Lingamfelter:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issues Presented

You inquire concerning Virginia's subdivision enabling statutes in Article 6, Chapter 22 of Title 15.2, §§ 15.2-2240 through 15.2-2279. Specifically, you ask whether § 15.2-2260(B) applies to final subdivision plats, site plans, or plans of development with regard to state agency comments. If so, you ask whether state agencies and other referral agencies have any role in the approval of final subdivision plats, site plans, or plans of development. If so, you ask what statutory provisions govern the comment period for such submittals. Further, you ask whether a locality may by subdivision ordinance delegate its obligation to comply with the plat requirements of § 15.2-2259 to a noncounty agency, such as a county water and sanitation authority. You also ask whether a water and sanitation authority is obligated to comply with the time constraints imposed by § 15.2-2259 when a locality requires a developer to secure the approval of the authority for plats, site plans, or plans of development. Finally, you ask whether a county may create a condition precedent to a plat officially submitted to require that a referral agency or agencies approve and sign a plat before it is submitted to the county and the statutory time period begins to run. If so, you ask whether there is a timeframe within which the referral agency or agencies must act, and what statutory provisions, if any, govern the manner of their response.

Response

It is my opinion that § 15.2-2260(B) applies to preliminary subdivision plats and not to final subdivision plats, site plans, or plans of development. Further, §§ 15.2-2258, 15.2-2259, 15.2-2260, and 15.2-2261 require any person desiring to subdivide a tract of land to submit a plat of the proposed subdivision to the local subdivision agent for approval. Section 15.2-2260(A) authorizes a local governing body to enact a subdivision ordinance that provides for submission of preliminary subdivision plats for tentative approval. Additionally, it is my opinion that §§ 15.2-2259 and 15.2-2260 place time constraints on local subdivision agents for the approval of such subdivision plats. The time requirements of § 15.2-2259 are applicable to the locality and may not be delegated to other agencies. A water and sanitation authority is not statutorily obligated to comply with the provisions of § 15.2-2259. It is my opinion that the General Assembly requires that a locality enact a subdivision ordinance that includes reasonable provisions for adequate drainage and flood control. Finally, it is my opinion that a locality may include a requirement that subdivision plats be submitted for approval to an authority created to provide sewage disposal and stormwater control prior to submission to the locality for its consideration under §§ 15.2-2258, 15.2-2259, 15.2-2260, and 15.2-2261.

Background

You relate that a constituent has experienced difficulty obtaining approval of its site plans, plans of development required for the issuance of building permits, and approval for final subdivision plats in a locality within your district. You advise that a county has established a review process for final plats, site plans, and plans of development that requires an applicant for any of these items to submit copies of the plats or plans to the local department of community development, which has final approval authority as agent for the local planning commission. Thereafter, you relate that the plats are referred to various public agencies or departments for review and comment. The majority of the public agencies or departments that receive the plats or plans are county agencies and state agencies. Of particular concern to your constituent, however, is a referral to a county water and sanitation authority ("County Authority").

You also note that all of the agencies, except the County Authority, return comments to the county and comply with the requirements in § 15.2-2259 regarding a thorough review of the plat and a good faith effort to identify deficiencies. Furthermore, such agencies comply with the time requirements contained in § 15.2-2259 requiring that action on the proposed plat be completed within sixty days after officially submitted for approval or within forty-five days after officially resubmitted from a prior disapproval. In addition, you relate that the county attempts to comply with the statutory time requirements contained in § 15.2-2259.

You state that the County Authority, however, advises that it is not required to comply with § 15.2-2259. As a result, the County Authority refuses to comply with the time requirements or to refer "to specific duly adopted ordinances, regulations or policies" when disapproving the initial plat. You believe that the County Authority is a state agency and should be required to comply with § 15.2-2259.

Applicable Law and Discussion

Virginia's subdivision enabling statutes are detailed in Article 6, Chapter 22 of Title 15.2, §§ 15.2-2240 through 15.2-2279. Section 15.2-2240 requires that counties, cities and towns adopt a subdivision ordinance "to assure the orderly subdivision of land and its development." Sections 15.2-2258, 15.2-2259, 15.2-2260, and 15.2-2261 require that any person desiring to subdivide a tract of land must submit a plat of the proposed subdivision to the local subdivision agent for approval. Section 15.2-2260(A) also authorizes the local governing body to enact an ordinance providing for submission of preliminary subdivision plats for tentative approval as a part of the orderly subdivision of land within its jurisdiction.¹ Sections 15.2-2259 and 15.2-2260 also place time constraints on local subdivision agents for the approval of subdivision plats.

The power of a local governing body, unlike that of the General Assembly, must be exercised pursuant to an express grant² because the powers of a county "are limited to those conferred expressly or by necessary implication."³ This rule is corollary to the Dillon Rule that municipal corporations are similarly limited in their powers.⁴

¹See 2006 Op. Va. Att'y Gen. No. 05-082, available at <http://www.vaag.com/OPINIONS/2006opns/05-082.pdf>;

²Nat'l Realty Corp. v. Va. Beach, 209 Va. 172, 175, 163 S.E.2d 154, 156 (1968).

³See Bd. of Supvrs. v. Horne, 216 Va. 113, 117, 215 S.E.2d 453, 455 (1975).

⁴*Id.*

Section 15.2-2260(B) provides:

Any state agency making a review of a plat forwarded to it under this section, including, without limitation, the Virginia Department of Transportation, shall complete its review within forty-five days of receipt of the preliminary plat. The Virginia Department of Transportation shall allow use of its public rights-of-way for placement of utilities by permit when practical and shall not unreasonably deny plat approval. If a state agency does not approve the plat, it shall comply with the requirements, and be subject to the restrictions, set forth in § 15.2-2259 A with the exception of the time period therein specified. Upon receipt of the approvals from all state agencies, the local agent shall act upon a preliminary plat within thirty-five days.

Article 6 is replete with express grants of powers to local governing bodies and their authorized agents to administer and enforce their own subdivision regulations.⁵ Statutes relating to the same subject should be considered *in pari materia* where the words used in a particular statute are not sufficiently explicit.⁶ In addition, “[w]hile not part of the code section, in the strictest sense, the caption may be considered in construing the statute, as it is ‘valuable and indicative of legislative intent.’”⁷ “A title may be read in an attempt to ascertain an act’s purpose, though it is no part of the act itself.”⁸

Section 15.2-2260 is a part of the statutory provisions expressly granting powers to local governing bodies to adopt, administer, and enforce subdivision regulations. The title to § 15.2-2260 specifically indicates that localities may provide for the submission of preliminary subdivision plats in a subdivision ordinance. The first sentence of § 15.2-2260(A) provides that nothing in Article 6 is to be construed “to prohibit the local governing body from providing in its ordinance for the submission of preliminary subdivision plats for tentative approval.” Furthermore, § 15.2-2260(B) begins with the sentence “[a]ny state agency making a review of a plat forwarded to it under this section.” Therefore, it is my opinion that § 15.2-2260(B) applies to preliminary subdivision plats. When a preliminary subdivision plat is approved by the local planning commission, or its agent, the plat is valid for a period of five years, provided the subdivider meets the required conditions.⁹ First, the subdivider must submit a final plat for at least a portion of the property within one year of the approval or such longer period as prescribed by local ordinance.¹⁰ Thereafter, the subdivider must diligently pursue approval of the final subdivision

⁵See, e.g., VA. CODE ANN. § 15.2-2245(A) (2003) (granting power to act on performance bonds); § 15.2-2254(2) (2003) (granting power to approve plats for recordation); § 15.2-2258 (2003) (granting power of planning commission to act on plats); §§ 15.2-2259 (2003), 15.2-2260 (Supp. 2006), 15.2-2261(B)(1) (2003), 15.2-2271(1) (2003) (granting various powers of governing body regarding plats).

⁶See *Prillaman v. Commonwealth*, 199 Va. 401, 405-06, 100 S.E.2d 4, 7-8 (1957); *City of Richmond v. Sutherland*, 114 Va. 688, 691, 77 S.E. 470, 471 (1913). “*In pari materia*” is the Latin phrase meaning “[o]n the same subject; relating to the same matter.” BLACK’S LAW DICTIONARY 807 (8th ed. 2004).

⁷*Bell v. Commonwealth*, 21 Va. App. 693, 701, 467 S.E.2d 289, 293 (1996) (quoting *Krummert v. Commonwealth*, 186 Va. 581, 584, 43 S.E.2d 831, 832 (1947)).

⁸*Hawkins v. Commonwealth*, 255 Va. 261, 269, 497 S.E.2d 839, 842 (1998).

⁹See § 15.2-2260(F).

¹⁰*Id.*

plat.¹¹ After the subdivider meets these conditions, a locality may revoke the approval of the preliminary plat after no less than three years and upon ninety days' written notice with a specific finding of fact that the subdivider did not diligently pursue approval of the final subdivision plat.¹²

Section 15.2-2259(A) clearly and unambiguously provides that:

The local planning commission or other agent shall act on any proposed plat within 60 days after it has been officially submitted for approval by either approving or disapproving the plat in writing, and giving with the latter specific reasons therefore.... The local planning commission or other agent shall act on any proposed plat that it has previously disapproved within 45 days after the plat has been modified, corrected and resubmitted for approval.

The word "shall" used in a statute ordinarily, but not always, implies that its provisions are mandatory.¹³ The use of the word "shall" in § 15.2-2259(A) clearly places time constraints on a local planning commission or subdivision agent for the approval of subdivision plats and leaves no doubt that the requirements are mandatory. It is also clear that the mandatory time constraints are applicable to the local planning commission or other agent and cannot be delegated to another entity. Consequently, it is my opinion that the time requirements of § 15.2-2259 are applicable to the locality and may not be delegated to other agencies.

Prior opinions of the Attorney General conclude that an authority created under the provisions of Article 2, Chapter 51 of Title 15.2, §§ 15.2-5102 through 15.2-5109, normally is vested with all powers contained in § 15.2-5114, and is an independent instrumentality exercising public and essential governmental functions, which include the exercise of independent discretion and judgment without control by any other entity.¹⁴ The County Authority to which you refer is an independent political subdivision created to further a specific governmental purpose.¹⁵ Therefore, the County Authority is a legal and political entity distinct from the county, the county governing board, and the state. While it is an independent political subdivision, the Authority also is a special purpose unit of government subordinate to the local governing body.¹⁶

¹¹*Id.*

¹²*Id.*

¹³*See, e.g.,* Schmidt v. City of Richmond, 206 Va. 211, 217-18, 142 S.E.2d 573, 578 (1965) (noting that statute using "shall" required court to summon nine disinterested freeholders in condemnation case). *Compare* Ladd v. Lamb, 195 Va. 1031, 1035-36, 81 S.E.2d 756, 758-59 (1954) (noting that statute providing that clerk of court "shall forward" copy of conviction to Commissioner of Department of Motor Vehicles within 15 days not mandatory but merely directory); *see also* 1986-1987 Op. Va. Att'y Gen. 210, 211; 17 MICHIE'S JUR. *Statutes* § 60, at 436-37 (1994).

¹⁴Op. Va. Att'y Gen.: 1991 at 77, 78-79; 1980-1981 at 401, 401 (interpreting § 15.1-1241, predecessor to § 15.2-5102; § 15.1-1250, predecessor to § 15.2-5114; Chapter 28 of Title 15.1, predecessor to Chapter 51 of Title 15.2).

¹⁵*See* § 15.2-5102 (2003); *see also* 1987-1988 Op. Va. Att'y Gen. 233, 234 (interpreting § 15.1-1250, predecessor to § 15.2-5114).

¹⁶*See* 1996 Op. Va. Att'y Gen. 1, 2, and opinions cited therein.

The General Assembly grants powers to an authority, such as the County Authority, in §§ 15.2-5100 and 15.2-5114. It is a general principle of Virginia law that entities created by the General Assembly, in the exercise of the statutory powers granted by the General Assembly, may only act within the authority conferred upon the entity by the General Assembly.¹⁷ Therefore, I must conclude that the County Authority is not statutorily obligated to comply with the provisions of § 15.2-2259.

Pursuant to the strict construction required by the Dillon Rule,¹⁸ local governing bodies do not have unfettered discretion when deciding what matters may be included in subdivision ordinances. Rather, local governing bodies must include the requisites that are mandated in § 15.2-2241 and may, with discretion, include the optional provisions contained in § 15.2-2242. A governing body is entitled to exercise discretion only to the extent permitted by §§ 15.2-2241 and 15.2-2242.¹⁹ In § 15.2-2241, the General Assembly requires a local governing body to include in its subdivision ordinance reasonable regulations and requirements that provide for adequate drainage and flood control and other public purposes. An authority, as specified § 15.2-5102(A), may be created to provide water, sewer, sewage disposal, stormwater control, and refuse collection and disposal. Therefore, the General Assembly requires a locality to include in its subdivision ordinance reasonable provisions to address drainage and flood control. Such ordinance may include a requirement for the submission of subdivision plats to an authority that is created to provide sewage disposal and stormwater control for approval prior to submission to the locality for its consideration and approval pursuant to §§ 15.2-2258, 15.2-2259, 15.2-2260, and 15.2-2261.

Conclusion

Accordingly, it is my opinion that § 15.2-2260(B) applies to preliminary subdivision plats and not to final subdivision plats, site plans, or plans of development. Further, §§ 15.2-2258, 15.2-2259, 15.2-2260, and 15.2-2261 require any person desiring to subdivide a tract of land to submit a plat of the proposed subdivision to the local subdivision agent for approval. Section 15.2-2260(A) authorizes a local governing body to enact a subdivision ordinance that provides for submission of preliminary subdivision plats for tentative approval. Additionally, it is my opinion that §§ 15.2-2259 and 15.2-2260 place time constraints on local subdivision agents for the approval of such subdivision plats. The time requirements of § 15.2-2259 are applicable to the locality and may not be delegated to other agencies. A water and sanitation authority is not statutorily obligated to comply with the provisions of § 15.2-2259. It is my opinion that the General Assembly requires that a locality enact a subdivision ordinance that includes reasonable provisions for adequate drainage and flood control. Finally, it is my opinion that a locality may include a requirement that subdivision plats be submitted for approval to an authority created to provide sewage disposal and stormwater control prior to submission to the locality for its consideration under §§ 15.2-2258, 15.2-2259, 15.2-2260, and 15.2-2261.

¹⁷ “[A]dministrative agencies, in the exercise of their powers, may validly act only within the authority conferred upon them....” *Sydnor Pump & Well Co. v. Taylor*, 201 Va. 311, 316, 110 S.E.2d 525, 529 (1959). Courts ““must construe the law as it is written. An erroneous construction by those charged with its administration cannot be permitted to override the clear mandates of a statute.”” *City of Richmond v. County of Henrico*, 185 Va. 176, 189, 37 S.E.2d 873, 879 (1946) (quoting *Hancock Co. v. Stephens*, 177 Va. 349, 356, 14 S.E.2d 332, 334 (1941)).

¹⁸ See *supra* notes 2-4 and accompanying text.

¹⁹ See *Helmick v. Town of Warrenton*, 254 Va. 225, 232-33, 492 S.E.2d 113, 117 (1997) (construing, §§ 15.1-465 to 15.1-485, predecessors to §§ 15.2-2240 to 15.2-2276).

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Thank you for letting me be of service to you.

Sincerely,

A handwritten signature in black ink, reading "Robert F. McDonnell". The signature is written in a cursive style with a large, prominent "R" and "M".

Robert F. McDonnell

2:213; 1:941/06-055