



COMMONWEALTH of VIRGINIA

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The Honorable Riley E. Ingram
Member, House of Delegates
3302 Oaklawn Boulevard
Hopewell, Virginia 23860

Dear Delegate Ingram:

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

Issue Presented

You ask several questions regarding the authority of a Virginia locality to adopt and enforce a local ordinance affecting the rights of corporations within its boundaries. Specifically you inquire whether a locality may enact an ordinance¹ that preempts or nullifies state or federal law or that diminishes, alters, or eliminates legal rights.

Response

It is my opinion that a Virginia locality may not enact an ordinance that preempts or nullifies state or federal law and that such an ordinance would be unconstitutional. Further, it is my opinion that a Virginia locality may not enact an ordinance that diminishes, alters, or eliminates legal rights, particularly where the state or federal government may be said to “occupy the field,” unless given specific authority to do so by the General Assembly or the Congress of the United States.

Background

You provide an example of an ordinance promoted by a not-for-profit organization, which is headquartered outside of the Commonwealth. You note that the organization has developed a variety of ordinances (“model ordinances”) that it seeks to have adopted by local governments. You relate that the model ordinances include provisions that: (a) prohibit corporations from mining or owning certain mineral estates within a town; (b) create a new strict liability cause of action (“bodily trespass”); and (c) deprive corporations of standing and other rights. You inquire concerning the constitutionality of these model ordinances.

¹You provide a copy of an ordinance enacted by a locality in Virginia. Attorneys General consistently have declined to issue official opinions on local ordinances or matters purely of local concern. *See, e.g.*, Op. Va. Att’y Gen.: 2007 at 105, 107 n.2; *id.* at 84, 88 n.1; 2004 at 159, 160; 1976-1977 at 17, 17. However, I will provide guidance and address your questions in a general manner.

Applicable Law and Discussion

Virginia follows the Dillon rule of strict construction regarding powers of localities.² “Under the Dillon Rule, municipal corporations and counties possess and may exercise only those powers expressly granted ..., powers necessarily or fairly implied from such express powers, and those powers that are essential and indispensable.”³ The terms “locality” and “local government” include a “county, city, or town as the context may require.”⁴ Virginia courts consistently have held that “a local government may not ‘forbid what the legislature has expressly licensed, authorized or required.’”⁵

Furthermore, § 1-248 expressly provides:

The Constitution and laws of the United States and of the Commonwealth shall be supreme. Any ordinance, resolution, bylaw, rule, regulation, or order of any governing body or any corporation, board, or number of persons shall not be inconsistent with the Constitution and laws of the United States or of the Commonwealth.

Consequently, a Virginia locality may not, by ordinance or otherwise, deny corporations rights specifically afforded to them by the Constitutions and laws of the United States and the Commonwealth of Virginia.

You specifically inquire about a model ordinance that regulates activities regarding certain mining activities. For example, the General Assembly has enacted and codified statutes governing the permitting process and the conduct of certain mining activities,⁶ which would include exploratory mining of uranium deposits.⁷ Specifically, Chapter 21 of Title 45.1⁸ (“Exploration for Uranium Ore”) governs the mining of uranium in the Commonwealth. Section 45.1-274(A) prohibits “any person to commence any exploration activity ... without first obtaining a permit to do so from the Chief [of the Division of Mines of the Department of Mines, Minerals and Energy].”

In § 32.1-228.1(A), the General Assembly has designated the Department of Health as the state radiation control agency. Section 32.1-229, which governs the powers and duties of the State Board of Health (the “Health Board”), authorizes the Health Board, in part, to:

²See *Commonwealth v. County Bd.*, 217 Va. 558, 573, 232 S.E.2d 30, 40 (1977)

³*Logan v. City Council*, 275 Va. 483, 494, 659 S.E.2d 296, 302 (2008).

⁴See VA. CODE ANN. § 15.2-102 (2008) (applying definition to Title 15.2).

⁵*Blanton v. Amelia County*, 261 Va. 55, 64, 540 S.E.2d 869, 874 (2001) (quotation not identified); see also *Klingbeil Mgmt. Group Co. v. Vito*, 233 Va. 445, 449, 357 S.E.2d 200, 202 (1987); *King v. County of Arlington*, 195 Va. 1084, 1090, 81 S.E.2d 587, 591 (1954) (noting fundamental rule that local ordinances must conform to and not be inconsistent with state’s public policy and statutes).

⁶See VA. CODE ANN. tit. 45.1, ch. 16, §§ 45.1-180 to 45.1-197.18 (2002 & Supp. 2008) (codified in scattered sections).

⁷See § 45.1-181 (Supp. 2008) (providing that “[i]t shall be unlawful for any operator to engage in any mining operation in Virginia, without having first obtained from the Department [of Mines, Minerals and Energy] a permit to engage in such operation and paying a fee A permit shall be obtained prior to the start of any mining operation”).

⁸See § 45.1-272 (not set out), §§ 45.1-273 to 45.1-285, §§ 45.1-285.1 to 45.1-285.10 (not set out) (2002).

1. Establish a program of effective regulation of sources of radiation for the protection of the public health and safety, including a program of education and technical assistance relating to radon that is targeted to those areas of the Commonwealth known to have high radon levels.

2. Establish a program to promote the orderly regulation of radiation within the Commonwealth, among the states and between the federal government and the Commonwealth and to facilitate intergovernmental cooperation with respect to use and regulation of sources of radiation to the end that duplication of regulation may be minimized.

3. Establish a program to permit maximum utilization of sources of radiation consistent with the public health and safety.

4. Promulgate regulations providing for (i) general or specific licenses to use, manufacture, produce, transfer, receive, acquire, own or possess quantities of, or devices or equipment utilizing, by-product, source, special nuclear materials, or other radioactive material occurring naturally or produced artificially, (ii) registration of the possession of a source of radiation and of information with respect thereto, and (iii) regulation of by-product, source and special nuclear material.

Pursuant to § 32.1-227(7), “source material” means “uranium or thorium, or any combination thereof, in any physical or chemical form; or ores that contain by weight one-twentieth of one percent (0.05 percent) or more of uranium, thorium, or any combination thereof.”

Article VI of the Constitution of Virginia establishes the rights and powers of the judiciary. Specifically, Article VI, § 1 grants to the General Assembly the “power to determine the original and appellate jurisdiction of the courts of the Commonwealth.” Standing may be established either by statute or by the courts in interpreting and applying those statutes.⁹

You ask whether a Virginia locality may impose criminal liability on an entity operating in compliance with federal and state laws or limit the authority of the state or the federal government employees to issue permits. Section 15.2-1102 confers general police powers on cities and towns which are not:

expressly prohibited by the Constitution and the general laws of the Commonwealth, and which are necessary or desirable to secure and promote the general welfare of the inhabitants of the municipality and the safety, health, peace, good order, comfort, convenience, morals, trade, commerce and industry of the municipality and the inhabitants thereof[.]

⁹See *Wilkins v. West*, 264 Va. 447, 458, 571 S.E.2d 100, 106 (2002) (“Merely advancing a public right or redressing a public injury cannot confer standing on a complainant.”); see also *Va. Beach Beautification Comm’n v. Bd. of Zoning Appeals*, 231 Va. 415, 419, 344 S.E.2d 899, 902 (1986) (holding that for party to be “aggrieved,” “it must affirmatively appear that such person had some direct interest in the subject matter of the proceeding that he seeks to attack”).

County and municipal ordinances must be consistent with the laws of the Commonwealth.¹⁰ Such ordinances are inconsistent with state law when they cannot coexist with a statute.¹¹ “[A] local government may ‘not forbid what the legislature has expressly licensed, authorized, or required.’”¹² While a local legislative body, in the exercise of its police powers, may have the authority to forbid an act where state law is silent on the subject, it cannot limit or forbid activities that expressly are sanctioned by the General Assembly.¹³ Thus, if an entity operates in compliance with state law, a Virginia locality cannot impose a criminal liability on that entity. Likewise, a locality may not prohibit or limit the authority of state or federal agencies to carry out their duties as prescribed by law.

Article 8, Chapter 6 of Title 32.1, §§ 32.1-227 through 32.1-238, governs radiation control and is administered by the Health Board.¹⁴ Due to the comprehensive nature of Article 8 and Chapter 21 of Title 45.1, the power of a Virginia locality to pass ordinances relating to corporate mining and chemical and radioactive activities is limited as the state may be said to “occupy the entire field.”¹⁵ Further, to survive a constitutional challenge, any ordinance regulating corporate mining must be reasonable in scope, clearly define prohibited conduct, and not unduly burden a corporation’s rights or violate the Commerce Clause of the United States Constitution.¹⁶

Conclusion

Accordingly, it is my opinion that a Virginia locality may not enact an ordinance that preempts or nullifies state or federal law and that such an ordinance would be unconstitutional. Further, it is my opinion that a Virginia locality may not enact an ordinance that diminishes, alters, or eliminates legal rights, particularly where the state or federal government may be said to “occupy the field,” unless given specific authority to do so by the General Assembly or the Congress of the United States.

Thank you for letting me be of service to you.

Sincerely,



Robert F. McDonnell

1:1426; 1:941/08-072

¹⁰ See *Blanton*, 261 Va. at 63, 540 S.E.2d at 873-74; *Klingbeil*, 233 Va. at 449, 357 S.E.2d at 202; *King*, 195 Va. at 1090, 81 S.E.2d at 591.

¹¹ See *Blanton*, 261 Va. at 64, 540 S.E.2d at 874; *King*, 195 Va. at 1091, 81 S.E.2d at 591; *West Lewinsville Hgts. Citizens Ass’n v. Bd. of Supvrs.*, 270 Va. 259, 265-66, 618 S.E.2d 311, 314 (2005).

¹² *Blanton*, 261 Va. at 64, 540 S.E.2d at 874 (quotation not identified).

¹³ See *Allen v. Norfolk*, 196 Va. 177, 180, 83 S.E.2d 397, 399-400 (1954).

¹⁴ See VA. CODE ANN. § 32.1-229 (Supp. 2008) (listing powers and duties of Health Board, including establishment of program to regulate sources of radiation).

¹⁵ See *Lynchburg v. Dominion Theatres, Inc.*, 175 Va. 35, 40, 7 S.E.2d 157, 159 (1940); Va. Op. Att’y Gen.: 2007 at 59, 60; 2001 at 141, 142; 1983-1984 at 86, 87; *c.f. King*, 195 Va. at 1087-88, 81 S.E.2d at 590 (noting that where state did not occupy entire field, locality could govern by ordinance); see also *Hanbury v. Commonwealth*, 203 Va. 182, 185, 122 S.E.2d 911, 913 (1961) (noting that ordinance conflicting with state law of general character and state-wide application is invalid).

¹⁶ See *Nat’l Linen Serv. Corp. v. Norfolk*, 196 Va. 277, 280, 83 S.E.2d 401, 403 (1954).