



COMMONWEALTH of VIRGINIA

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February 25, 2009

The Honorable Robert B. Bell
Member, House of Delegates
P.O. Box 406
Richmond, Virginia 23218

Dear Delegate Bell:

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 ask whether the *Virginia Code* authorizes localities to require the review and approval of boundary survey plats and physical survey plats¹ by local planning officials as a prerequisite to recordation. You further ask whether clerks of the circuit court are authorized to refuse to record boundary survey plats and physical survey plats until after the review and approval of such plats by local planning officials.

Response

It is my opinion that localities are not authorized to require the review and approval of boundary survey plats and physical survey plats as a prerequisite for recordation. It further is my opinion that circuit court clerks may not refuse to record such plats based solely on the lack of such review and approval from the local planning official.

Background

You relate that land surveyors have advised you that several Virginia localities apply an informal policy requiring all boundary and physical survey plats to be reviewed and approved by local planning officials as a prerequisite to recordation. You believe that these localities base their actions upon the delegated authority to regulate land development and the subdivision of land. Further, you state that such

¹You advise that the boundary and physical surveys about which you inquire are surveys that do not change or alter property lines or create new parcels of land. Further, you explain that a boundary survey is a survey or a retracement of the metes and bounds of an existing parcel of land based on a prior survey or deed description of the property. A physical survey is a survey of a lot or parcel which also shows the location of all structures, physical and recorded encumbrances, and manmade physical features located within the property's existing boundaries. For purposes of this opinion, any reference to "boundary survey plats" and "physical survey plats" means the surveys you describe and about which you inquire unless otherwise noted.

policies are not included in those localities' published ordinances governing the development and subdivision of land. You note that these policies effectively prevent surveyors from recording such plats until after local planning officials have reviewed and approved them.

Furthermore, you advise that some circuit court clerks have refused to accept such boundary and physical survey plats for recordation until the plats were reviewed and approved by local planning officials. You state that the circuit court clerks of these localities have related they are without authority to accept such plats for recordation without the approval of the local planning officials.

You note that the standards for boundary and physical surveys, as developed by the Virginia Board of Architects, Professional Engineers, Land Surveyors, Certified Interior Designers and Landscape Architects, are set forth in 18 VAC §§ 10-20-370 and 10-20-380. Finally, it is your understanding that surveys that do require review and approval by local planning officials prior to recordation are: (1) subdivision surveys, where an existing parcel is being subdivided into two or more parcels; (2) boundary or property line adjustment surveys, where the boundary line between parcels is changed from the original survey or deed description, but no new parcels are created; and (3) any survey, by any other name, which changes a property line or creates new parcels or lots.

Applicable Law and Discussion

The overriding goal of statutory interpretation is to discern and give effect to legislative intent.² The Commonwealth follows the rule of strict construction of statutory provisions.³ The power of a county governing body "must be exercised pursuant to an express grant"⁴ because the powers of a county "are limited to those conferred expressly or by necessary implication."⁵ This rule is corollary to the Dillon Rule that municipal corporations similarly are limited in their powers.⁶ Thus, the powers of localities acting through either a local planning commission or a local governing body are fixed by statute and are limited to those powers granted expressly or by necessary implication and those that are essential and indispensable.⁷

Localities enact subdivision ordinances pursuant to delegation by the General Assembly of the police power of the Commonwealth.⁸ The rule of strict construction applies in interpreting the statutory authority of local governing bodies to adopt land use regulations.⁹ Consequently, authority for imposed requirements must be found in the subdivision enabling statutes and may not be implied from other more general grants of local powers.¹⁰

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).

³2003 Op. Va. Att'y Gen. 45, 46.

⁴*Nat'l Realty Corp. v. Va. Beach*, 209 Va. 172, 175, 163 S.E.2d 154, 156 (1968).

⁵*Bd. of Supvrs. v. Horne*, 216 Va. 113, 117, 215 S.E.2d 453, 455 (1975).

⁶*Id.*

⁷*Ticonderoga Farms, Inc. v. County of Loudoun*, 242 Va. 170, 174, 409 S.E.2d 446, 448 (1991).

⁸See 1989 Op. Va. Att'y Gen. 100, 101.

⁹See Op. Va. Att'y Gen.: 1992 at 59, 61; 1990 at 94, 96.

¹⁰See, e.g., *National Realty*, 209 Va. at 176-77, 163 S.E.2d at 157-58 (noting general authority to impose fees for licenses and permits did not authorize specific fee for review of subdivision plat).

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." Section 15.2-2258 requires 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. Sections 15.2-2259, 15.2-2260, and 15.2-2261 govern the actions of the local planning commission and the locality regarding such plats and the approval and validity thereof. Section 15.2-2260(A) also authorizes a 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.¹¹ Finally, §§ 15.2-2259 and 15.2-2260 impose time constraints for the approval of subdivision plats.

Article 6 is replete with express grants of powers to local governing bodies and their authorized agents to administer and enforce subdivision regulations as they relate to survey plats.¹² I find no express statutory authority elsewhere in Title 15.2 for a Virginia locality to require a review and approval of boundary survey plats and physical survey plats by local planning officials as a prerequisite for recordation.

The Dillon Rule of strict construction also is applicable to constitutional officers.¹³ Article VII, § 4 of the Constitution of Virginia creates the office of circuit court clerk and provides that a clerk's duties "shall be prescribed by general law or special act."¹⁴ As a general rule, circuit court clerks have no inherent powers, and the scope of their powers must be determined by reference to applicable statutes.¹⁵ A 1987 opinion of the Attorney General (the "1987 Opinion") concludes that, "[a]s a general rule, a clerk is not responsible for determining if an instrument to be recorded is sufficient to meet the requirements of any particular provision of law."¹⁶ Further, the 1987 Opinion concludes

that a clerk may record a plat of division without the approval of the subdivision agent of the locality upon the oral assertion of the person presenting the plat for recordation on behalf of the owner that the subdivision ordinance does not apply to the plat of division offered for recordation. I would suggest, however, that the clerk make a notation on the plat of division concerning the oral assertion that the ordinance does not apply to the division of the parcel in question.^[17]

¹¹ See 2006 Op. Va. Att'y Gen. 71, 74.

¹² See, e.g., VA. CODE ANN. § 15.2-2245(A) (2008) (granting power to act on performance bonds); § 15.2-2254(2) (2008) (granting power to approve plats for recordation); § 15.2-2259 (2008) (granting power to planning commission to act on plats); §§ 15.2-2260, 15.2-2261(B)(1), 15.2-2271(1) (2008) (granting various powers to governing body regarding plats).

¹³ See, e.g., Op. Va. Att'y Gen.: 2006 at 200, 201; 1984-1985 at 284, 284.

¹⁴ See also § 15.2-1600(A) (2008) (parallel statute).

¹⁵ See *Mendez v. Commonwealth*, 220 Va. 97, 102, 255 S.E.2d 533, 535 (1979) (stating that "authority of a clerk of court to administer an oath or take an affidavit is purely a creature of statute"); *Harvey v. Chesapeake & Potomac Tel. Co.*, 198 Va. 213, 218, 93 S.E.2d 309, 313 (1956) (noting that duties of clerk related to filing and lodging of court papers are ministerial); 21 C.J.S. *Courts* § 136 (2006); Op. Va. Att'y Gen.: 2001 at 121, 122; 1987-1988 at 80, 81.

¹⁶ 1987-1988 Op. Va. Att'y Gen. 208, 210.

¹⁷ *Id.*

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I find no statutory provision authorizing a circuit court clerk to refuse to record boundary survey plats and physical survey plats until after the review and approval of such plats by local planning officials. Pursuant to the authority granted in Article 6, a circuit court clerk may refuse to record boundary survey plats and physical survey plats that are: (1) subdivision surveys, where an existing parcel is being subdivided into two or more parcels; (2) boundary or property line adjustment surveys, where the boundary line between parcels is changed from the original survey or deed description, but no new parcels are created; or (3) a survey, by any other name, which changes a property line or creates new parcels or lots.¹⁸ However, the boundary survey plats and physical survey plats about which you inquire do not meet these criteria.¹⁹

Conclusion

Accordingly, it is my opinion that localities are not authorized to require the review and approval of boundary survey plats and physical survey plats as a prerequisite for recordation. It further is my opinion that circuit court clerks may not refuse to record such plats based solely on the lack of such review and approval from the local planning official.

Thank you for letting me be of service to you.

Sincerely,

A handwritten signature in black ink, appearing to read 'W. C. Mims', with a stylized flourish at the end.

William C. Mims
Acting Attorney General

1:213; 1:941/08-105

¹⁸ See, e.g., §§ 15.2-2254, 15.2-2258, 15.2-2265, and 15.2-2275 (2008).

¹⁹ See *supra* note 1.