COMMONWEALTH of VIRGINIA

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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*.

Issue Presented

You ask whether, pursuant to § 15.2-2157, a locality may adopt requirements and standards other than maintenance requirements for alternative onsite sewage systems that are in addition to or more stringent than those set forth by the Board of Health in the Sewage Handling and Disposal Regulations and the Emergency Regulations for Alternative Onsite Sewage Systems.

Response

It is my opinion that a Virginia locality can adopt standards and requirements for alternative onsite sewage systems that are in addition to or more stringent than those promulgated in regulations by the Board of Health, provided such standards or regulations do not relate to maintenance issues.

Applicable Law and Discussion

Alternative onsite sewage systems, as well as conventional systems, are regulated by the Virginia Department of Health. Section 32.1-163 defines a conventional onsite sewage system as, "a treatment works consisting of one or more septic tanks with gravity, pumped, or siphoned conveyance to a gravity distributed subsurface drainfield."[1] An alternative onsite sewage system is defined as, "a treatment works that is not a conventional onsite sewage system and does not result in a point source discharge."[2] Alternative systems are often utilized in circumstances where soils are unsuitable for conventional septic systems, there are too many conventional septic systems in one area, or the systems are too close to groundwater or surface waters.[3]

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[1] VA. CODE ANN. § 32.1-163 (2011).

[2] *Id.* "'Treatment works' means any device or system used in the storage, treatment, disposal or reclamation of sewage or combinations of sewage and industrial wastes, including but not limited to pumping, power and other equipment and appurtenances, septic tanks, and any works, including land, that are or will be (i) an integral part of the treatment process or (ii) used for ultimate disposal of residues or effluents resulting from such treatment." Section 32.1-163.

[3] For further discussion of the mechanics of an alternative onsite sewage system, *see* 2010 Op. Va. Att'y Gen. 53 and technical documents cited therein.

Pursuant to § 15.2-2157(A), a locality "may require the installation, maintenance and operation of, regulate and inspect onsite sewage systems" in order to protect public health.[4] Further, while a county or town also has the general authority to deny applications for onsite sewage systems when the locality has adopted a master plan for sewers,[5] § 15.2-2157(C) specifically prohibits any locality from otherwise banning, "[w]hen sewers or sewerage disposal facilities are not available, . . . the use of alternative onsite sewage systems that have been approved by the Virginia Department of Health . . . ."[6] Additionally, subsection (D) provides that localities "shall not require maintenance standards and requirements for alternative onsite sewage systems that exceed those allowed under or established by the State Board of Health pursuant to § 32.1-164."[7]

In your opinion request, you specifically refer to a county ordinance that requires a bond, letter of credit or cash escrow to be paid by the owner prior to the issuance of an operation permit for an alternative onsite sewage system, in order to provide for the maintenance, repair or replacement of the system. The Department of Health's regulations applicable to maintenance of onsite sewage systems do not include a provision for a requirement of posting such a bond. You therefore ask whether a locality can adopt such an ordinance, in light of the restriction set forth in § 15.2-2157(D). The example you provide clearly involves a maintenance requirement, so based on the express prohibition against a locality's adoption of maintenance standards and requirements exceeding those established by the Board of Health, I conclude that the locality is precluded from enforcing such a bond requirement.

Your inquiry, nonetheless, is broader in scope. You ask whether the restriction on local regulation applies solely to maintenance standards or whether it also limits a locality's ability to impose additional requirements of any nature. You seek the proper construction of the phrase "maintenance standards and requirements" as used in § 15.2-2157(D).

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[4] *See also, e.g.,* § 15.2-2126 (2008) (requiring notice and public hearing for the establishment or extension of sewer systems to serve three or more connections); § 15.2-2127 (2008) (authorizing localities to disapprove sewage systems if the locality finds for certain reasons that the sewage system is not capable of serving the proposed number of connections); and § 15.2-2128, *infra.*

[5] *See* § 15.2-2128 (2008) ("Notwithstanding any other provision of general law relating to the approval of sewage systems, the governing body of any county or town which has adopted a master plan for a sewage system is authorized to deny an application for a sewage system if such denial appears to it to be in the best interest of the inhabitants of the county or town").

[6] Section 15.2-2157(C).

[7] Section 32.1-164 provides that the regulations of the State Board of Health may include "[s]tandards for the design, construction, installation, modification and operation of sewerage systems" as well as "[p]erformance requirements for nitrogen discharged from alternative onsite sewage systems that protect public health and ground and surface water quality." The Board's Emergency Regulations, which supplement its Sewage Handling and Disposal Regulations, 12 VA. ADMIN. CODE §§ 5-610-20 through 5-610-1170._ provide a definition of maintenance and prescribe certain maintenance and performance standards and horizontal setback requirements which must be met by the owner and designer of the sewage system. *See* 12 VA. ADMIN. CODE § 5-613-10 (defining "maintenance" as "performing adjustments to equipment and controls and in-kind replacement of normal wear and tear parts such as light bulbs, fuses, filters, pumps, motors, or other like components. Maintenance includes pumping the tanks or cleaning the building sewer on a periodic basis. Maintenance shall not include replacement of tanks, drainfield piping, distribution boxes, or work requiring a construction permit and an installer"); *see also* 12 VA. ADMIN. CODE § 5-613-200 (providing specific horizontal setback requirements dependent upon system design and site and soil conditions). The Sewage Handling and Disposal Regulations also provide for minimum reserve area requirements for the design of a system. *See* 12 VA. ADMIN. CODE § 5-610-710.

The primary objective in statutory construction is to give effect to the legislature's intent,[8] as manifested through the plain language of the statute.[9] Rules of construction or extrinsic aids are resorted to only when the words of the statute are ambiguous.[10] Words and phrases should be construed according to the rules of grammar and common usage;[11] nonetheless, they must be read in context and not in isolation.[12] Further, statutes are to interpreted *in pari materia*,[13] and interpretations rendering part of an enactment superfluous are unreasonable.[14]

First I note that, generally, absent evidence of a contrary legislative intent, courts construe adjectives that precede more than one noun to modify each of the nouns that immediately follow the adjective.[15] Applying this rule, and because there are no intervening commas or other modifiers and no "or" to indicate that "requirements" is to be treated separately,[16] I conclude that "maintenance" modifies both "standards" and "requirements" so that a locality may impose additional requirements on alternative onsite sewage systems, provided those requirements do not concern the maintenance of such systems.

This construction is bolstered by reading §15.2-2157(D) in conjunction with other provisions relating to onsite systems. Section 15.2-2157(A) expressly authorizes localities to "regulate and inspect onsite sewage systems;" and § 32.1-163.6, in establishing a scheme for the Department of Health's review of permit applications by professional engineers, explicitly provides in subsection H that "[t]his section shall not be construed to prohibit any locality from adopting or enforcing any ordinance duly enacted pursuant to Chapter 21 [] of Title 15.2[,]" which includes § 15.2-2157. Clearly, the General Assembly intended the localities to be able to play a role in the regulation of alternative onsite systems. Reading § 15.2-2157(D) to restrict local governments from imposing *any* requirement in excess of the Department of Health's regulations thus not only controverts the language of the statute, but also strips these other provisions of most of their meaning.

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[8] Conger v. Barrett, 280 Va. 627, 630, 702 S.E.2d 117, 118(2010) (quoting Turner v. Commonwealth, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983)).

[9] Vaughn, Inc. v. Beck, 262 Va. 673, 677, 554 S.E.2d 88, 90 (2001).

[10] *See* Davis v. County of Fairfax, 282 Va. 23, 28, 710 S.E.2d 466, 468 (2011) ("When the language of a statute is unambiguous, we are bound by the plain meaning of that language") (internal citation omitted).

[11] *See* Hilfiger v. Transamerica Occidental Life Ins. Co., 256 Va. 265, 274, 505 S.E.2d 190, 195 (1998) ("As a general rule, 'proper grammatical effect will be given to the arrangement of words in a sentence of a statute'") (quoting Harris v. Commonwealth, 142 Va. 620, 624, 128 S.E. 578, 579 (1925)).

[12] *See* Herndon v. St. Mary's Hosp., Inc., 266 Va. 472, 476, 587 S.E.2d 567, 569 (2003) ("In ascertaining legislative intent, we will not single out a particular term or phrase in a statute. Instead, we will construe the words and terms at issue in the context of all the language contained in the statute.").

[13] *See* Prillaman v. Commonwealth 199 Va. 401, 405-06, 100 S.E.2d 4, 7-8 (1957).

[14] *See* Epps v. Commonwealth, 59 Va. App. 71, 80, 717 S.E.2d 151, 155 (2011); *see also* Cook v. Commonwealth, 268 Va. 11, 114, 597 S.E.2d 84, 86 (2004).

[15] *See, e.g.*, Washington-Virginia Ry. Co. v. Fisher, 121 Va. 229, 235, 92 S.E.2d 809, 811 (1917) ("In the sentence in which the words 'every county road or highway' are found, 'county' . . . modifies or limits both 'road' and 'highway;' and from their collocation those words are the equivalent of 'county road or county highway.'"); *S & P Consulting Engineers, PLLC v. Baker,* 334 S.W.3d 390, 402 (Tex. App. 2011) (acknowledging, generally, "authority preferring that a single adjective preceding a list of nouns modifies each of the nouns"); Long v. United States, 199 F.2d 717 (4th Cir. 1952) (holding "forcibly" in a statute modified each of the verbs following it); Milner v. Dep't of the Navy, 131 S. Ct. 1259 (2011) (applying, without discussion, "personnel" in the phrase "personnel rules and practices" to both "rules" and "practices").

[16] The use of the comma or the disjunctive "or" indicates items are to be considered alternatively, or as independent. *See, e.g.,* 1990 Op. Va. Att'y Gen. 209, 210; 1997 Op. Va. Att'y Gen. 16, 17; 2008 Op. Va. Att'y Gen. 41.

Furthermore, these provisions were amended in 2009. The restrictions on localities contained in subsections (C) and (D) were added to § 15.2-2157,[17] and § 32.1-163.6 was amended to require treatment works designs permitted under it to conform to certain Board of Health regulations.[18] While the legislature, with its enactment of the these amendments, clearly intended to establish certain statewide minimums and to limit the areas in which a locality could impose its own, different regulations, §§ 15.2-2157(A) and 32.1-163.6(H) remain.[19] Had the legislature wanted to establish a single, statewide set of standards or requirements it could have done so. Instead, the General Assembly chose to retain the provisions granting localities general authority to regulate onsite sewage systems, limiting this authority only in the field of maintenance.[20]

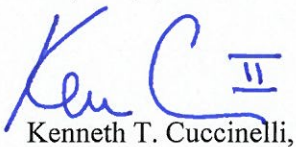
In your letter, you relate that a locality has adopted an ordinance that requires horizontal and vertical setback requirements as well as reserve area requirements that are in excess of those found in the Board of Health's regulations. Such requirements do not pertain to maintenance as defined by the Code. Therefore, provided they do not function so as to in effect ban use of an alternative system where the state regulations would allow for its operation,[21] the locality is free to impose them pursuant to § 15.2-2157(A).

Conclusion

Accordingly, it is my opinion that a Virginia locality can adopt standards and requirements for alternative onsite sewage systems that are in addition to or more stringent than those promulgated in regulations by the Board of Health, provided such standards or regulations do not relate to maintenance issues.

With kindest regards, I am

Very truly yours,



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[17] 2009 Va. Acts chs. 786, 846.

[18] 2009 Va. Acts chs. 220, 296.

[19] The General Assembly restricted that broad authority by its 2009 amendments by adding subsections C and D to § 15.2-2157.

[20] *Prillaman*, 199 Va. at 405-06, 100S.E.2d at 7 ("'as a general rule, where legislation dealing with a particular subject consists of a system of related general provisions indicative of a settled policy, new enactments of a fragmentary nature on that subject are to be taken as intended to fit into the existing system and to be carried into effect conformably to it, and they should be so construed as to harmonize the general tenor or purport of the system and make the scheme consistent in all its parts and uniform in its operation, unless a different purpose is shown plainly or with irresistible clearness. It will be assumed or presumed, in the absence of words specifically indicating the contrary, that the legislature did not intend to innovate on, unsettle, disregard, alter or violate a general statute or system of statutory provisions the entire subject matter of which is not directly or necessarily involved in the act.'") (quoting 50 Am. Jur., Statutes, § 349 at 345-47).

[21] *See* 2010 Op. Va. Att'y Gen. 53.