



COMMONWEALTH of VIRGINIA

Office of the Attorney General

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January 11, 2013

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The Honorable Terry G. Kilgore
Member, House of Delegates
Post Office Box 669
Gate City, Virginia 24251

Dear Delegate Kilgore:

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 a local governing body has the authority to adopt a blanket prohibition of the exploration for, and drilling of, oil and natural gas within the locality's boundaries through the use of its zoning laws.

Response

It is my opinion that, although a local governing body may adopt a zoning ordinance that places restrictions on the location and siting of oil and gas wells that are reasonable in scope and consistent with the Virginia Gas and Oil Act¹ and the Commonwealth Energy Policy,² a local governing body cannot ban altogether the exploration for, and the drilling of, oil and natural gas within the locality's boundaries.

Background

Since April 20, 2010, the Virginia Gas and Oil Board ("Board") has approved the creation of four different 160-acre units for the drilling of gas wells in Washington County.³ Additionally, on August 16, 2010, the Board approved an application to pool⁴ the interests in the first of those four units.⁵ The uncontradicted testimony at the pertinent Board hearings established that drilling for gas in Washington

¹ The Virginia Gas and Oil Act, Chapter 22.1 of Title 45.1, VA. CODE ANN. §§ 45.1-361.1 through 45.1-361.44 (2002 & Supp. 2012).

² The Commonwealth Energy Policy, Chapter 1 of Title 67, VA. CODE ANN. §§ 67-100 through 67-103 (2012).

³ See Va. Gas and Oil Board transcripts for docket item VGOB-10-0420-2700, heard on April 20, 2010, docket item VGOB-11-0315-2918 heard on March 15, 2011, and docket items VGOB-11-0315-2920 through -2956, heard on June 14, 2011.

⁴ Section 45.1-361.21(Supp. 2012) gives the Board a nondiscretionary mandate to pool, or unitize, all interests in a drilling unit when the criteria of that statute are met.

⁵ See Va. Gas and Oil Board transcript for docket item VGOB 10-0615-2713, heard on August 16, 2010.

County dates back to the early 1930s, at the latest.⁶ Additionally, the Virginia Oil and Gas Conservation Commission and the Virginia Oil and Gas Board, the predecessors to the current Board, issued orders providing for the establishment of drilling units in the Early Grove Gas and Oil Field of Washington and Scott counties on at least two occasions, beginning September 1, 1983.⁷

You report that a gas operator who has received approval from the Board for several gas drilling units within Washington County filed a request with the Washington County Zoning Administrator, seeking a determination that a gas well was an approved accessory use or structure under § 66-297 of the Washington County Code.⁸ You indicate that the agricultural limited (A-1) and agricultural general (A-2) zoning classifications for the parcels encompassing these drilling units are the two least restrictive zoning classifications in the county. That request and a subsequent appeal filed with the County Board of Zoning Appeals have resulted in denials by the county of the operator's application to locate a gas well site in Washington County. It is not clear from the information you provide whether the applicant additionally has sought and been denied a special use permit.⁹

You relate that the application of the gas operator asserted that at least twelve gas wells are currently in existence in Washington County. It is not known when the county approved the siting of those wells or if any of those wells were evaluated with the same level of scrutiny under the county's current zoning ordinance in allowing them as permissible uses. The assertion of their existence remained unchallenged before the County Board of Zoning Appeals, so it is accepted as factually correct for purposes of this opinion.

The County Attorney for Washington County sent a letter dated March 19, 2012, to the Department of Mines, Minerals and Energy ("DMME") to inform the agency of action taken by the Washington County Board of Supervisors on this subject. At its February 28, 2012, meeting, the Board of Supervisors by a 4-3 vote "acted to delay action to amend the County Zoning Ordinance to allow for natural gas extraction until after the [U.S. Environmental Protection Agency ("EPA")] publishes its report on the public safety issues associated with hydro-fracturing."¹⁰ It appears from this decision that the

⁶ Va. Gas and Oil Board transcripts for docket item VGOB-10-0420-2700 heard on April 20, 2010, and docket item VGOB-11-0315-2918 heard on March 15, 2011.

⁷ See Va. Oil and Gas Conservation Commission Provisional Drilling Unit Order (Sept. 1, 1983) and Va. Oil and Gas Conservation Board Order (Aug. 10, 1988).

⁸ WASHINGTON COUNTY, VA., CODE OF ORDINANCES § 66-297, "Permitted uses and accessory uses and structures," available at <http://library.municode.com/index.aspx?clientId=11680>.

⁹ A special use is one not otherwise allowed in a particular zoning district except by a special use permit granted under the provisions of Chapter 22 of Title 15.2. See VA. CODE ANN. § 15.2-2201 (2012) and Fairfax County v. Southland Corp., 224 Va. 514, 521-22, 297 S.E.2d 718, 721-22 (1982). Special use permits are common features of local zoning ordinances and expressly provided for at § 15.2-2286 (2012).

¹⁰ Washington County Board of Supervisors, Regular Meeting Minutes 5 (Feb. 28, 2012), available at http://www.washcova.com/government/board-of-supervisors/meeting-agendas-a-minutes/cat_view/12-meeting-agendas-a-minutes/14-meeting-minutes/178-2012. At the request of Congress, the EPA is studying the impacts on drinking water and ground water of hydraulic fracturing, a process used in the extraction of natural gas that involves the injection of a specially engineered fluid (e.g., water, chemical additives and sand or other proppants) at high pressure down a well to fracture a coalbed, shale or tight sands formation and stimulate the flow of natural gas to the wellbore. The EPA released a progress report on December 21, 2012, which indicates that conclusions will be available in a draft report of results, expected to be released in 2014 for public comment and peer review. See U.S.

Board of Supervisors at the present time does not intend to allow gas drilling to proceed anywhere in the county.

Applicable Law and Discussion

The *Constitution of Virginia* provides in Article VII, § 3 that

[t]he General Assembly may provide by general law or special act that any county, city, town, or other unit of government may exercise any of its powers or perform any of its functions and may participate in the financing thereof jointly or in cooperation with the Commonwealth or any other unit of government within or without the Commonwealth.

Pursuant to this authority, the General Assembly has afforded localities general power to adopt land use regulations to further the welfare of their inhabitants.¹¹ Nonetheless, the *Code of Virginia* further provides that

[t]he 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.^[12]

In determining the power of a local governing body to adopt a particular ordinance or regulation, Virginia follows the Dillon Rule of strict construction, which provides that “municipal corporations have only those powers that are expressly granted, those necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable.”¹³ Its corollary states that “[t]he powers of county boards of supervisors are fixed by statute and are limited to those powers conferred expressly or by necessary implication.”¹⁴ The Dillon Rule is applicable to the initial determination, from express words or by implication, of whether a local power exists at all and “[i]f the power cannot be found, the inquiry is at an end.”¹⁵ Therefore, to have the power to act in a certain area, local governments must have express enabling legislation or authority that is necessarily implied from enabling legislation. Although state law grants localities zoning power, no statute expressly empowers a locality to adopt a ban on oil and gas exploration or drilling.¹⁶

ENVTL. PROT. AGENCY, STUDY OF THE POTENTIAL IMPACTS OF HYDRAULIC FRACTURING ON DRINKING WATER RESOURCES: PROGRESS REPORT (2012), available at <http://www.epa.gov/hfstudy/pdfs/hf-report20121214.pdf>.

¹¹ Zoning is a legislative power vested in the Commonwealth and delegated by it, in turn, to various local governments for the enactment of local zoning ordinances. *Byrum v. Bd. of Supvrs.*, 217 Va. 37, 39, 225 S.E.2d 369, 371 (1976) (decided under prior law). Virginia’s zoning enabling statutes, which authorize the adoption of local land-use ordinances, are generally set forth in Article 7, Chapter 22 of Title 15.2 of the *Code of Virginia*. See VA. CODE ANN. §§ 15.2-2280 through 15.2-2316 (2012).

¹² VA. CODE ANN. § 1-248 (2011).

¹³ *Bd. of Supvrs. v. Countryside Investment Co.*, 258 Va. 497, 503, 522 S.E.2d 610, 613 (1999) (quoting *Chesapeake v. Gardner Enters.*, 253 Va. 243, 246, 482 S.E.2d 812, 814 (1997)).

¹⁴ *Cnty. Bd. v. Brown*, 229 Va. 341, 344, 329 S.E.2d 468, 470 (1985); accord *Bd. of Supvrs. v. Horne*, 216 Va. 113, 117, 215 S.E.2d 453, 455 (1975); *Gordon v. Bd. of Supvrs.*, 207 Va. 827, 832, 153 S.E.2d 270, 274 (1967).

¹⁵ *Commonwealth v. Cnty. Bd.*, 217 Va. 558, 575, 232 S.E.2d 30, 41 (1977). See also 2005 Op. Va. Att’y Gen. 54, 55.

¹⁶ To the contrary, I note that in permitting local zoning regulations, the General Assembly included, in addition to health and safety, “the need for mineral resources and the needs of agriculture, industry and business be

The Commonwealth and localities may have concurrent jurisdiction over the same subject matter, and the fact that the Commonwealth, in the exercise of its police power, has made regulations with respect to a subject does not necessarily prohibit a county from legislating on the same subject.¹⁷ Nonetheless, irrespective of any general authority to act in an area, a local government may not exercise its police power either by adopting a local law inconsistent with constitutional or general law¹⁸ or when the legislature has restricted such an exercise by preempting the area of regulation.¹⁹ A local ordinance is inconsistent with state law if state law preempts local regulation in the area, either by expressly prohibiting local regulation or by enacting state regulations so comprehensive that the Commonwealth may be considered to occupy the entire field.²⁰

Pertinent to your inquiry, the Virginia Gas and Oil Act (the “Act”) provides a comprehensive structure for the regulation of gas and oil development and production by DMME, its Division of Gas and Oil and the Virginia Gas and Oil Board (the “Board”). Section 45.1-361.29 requires any person, before beginning any ground disturbing activity for any oil or gas well, to obtain a permit from the Director of DMME. Additionally, pursuant to the Act, DMME has promulgated extensive regulatory provisions that control such activities with significant specificity.²¹

Despite this overarching statutory and regulatory scheme, the Act does not preempt entirely the regulation of these activities. Section 45.1-361.5 includes an express carve-out from preemption:

No county, city, town or other political subdivision of the Commonwealth shall impose any condition, or require any other local license, permit, fee or bond to perform any gas, oil, or geophysical operations which varies from or is in addition to the requirements of this chapter. However, no provision of this chapter shall be construed to limit or supersede the jurisdiction and requirements of other state agencies, local land-use

recognized in future growth” among the factors a locality is to consider in promoting the welfare of its citizens. Section 15.2-2200 (2012).

¹⁷ See 1983-84 Op. Va. Att’y Gen. 86, 87.

¹⁸ See § 1-248. See also *Allen v. City of Norfolk*, 195 Va. 844, 848-849, 80 S.E.2d 605, 607 (1954) (finding that a city ordinance added a material provision not found in the authorizing statute, and thus was invalid).

¹⁹ See *City of Lynchburg v. Dominion Theatres Inc.*, 175 Va. 35, 42, 7 S.E.2d 157, 160 (1940); *New York State Club Ass’n v. City of New York*, 69 N.Y.2d 211, 217, 505 N.E.2d 915, 917 (1987), *aff’d*, 487 U.S. 1 (1988). See also 2002 Op. Va. Att’y Gen. 67, 68-69 (finding that governance of biosolids activities in Virginia resides in the Department of Health, and a local ordinance regulating application and storage of biosolids is preempted by the comprehensive state program); 1983-84 Op. Va. Att’y Gen. 86, 87 (noting that the Commonwealth and a county “may have concurrent jurisdiction over the same subject matter, and the fact that the State, in the exercise of its police power, has made regulations with respect to a subject does not prohibit a county from legislating on the same subject, unless the State regulations are so comprehensive that the State may be considered to occupy the ‘entire field’ of such regulation”). The legislative intent to preempt need not be expressly stated: “It is enough that the legislature has impliedly evinced its desire to do so and that desire may be inferred from a declaration of State policy by the legislature or from the legislative enactment of a comprehensive and detailed regulatory scheme in a particular area.” *New York State Club Ass’n*, 69 N.Y.2d at 217, 505 N.E.2d at 917.

²⁰ Unless the provisions of a county ordinance and state statutes are contradictory in the sense that they cannot coexist, where, for example, the ordinance purports to authorize what the statutes prohibit, or prohibit what the statutes expressly authorize, *King v. County of Arlington*, 195 Va. 1084, 1090-91, 81 S.E.2d 587, 591 (1954) (superseded), they are not deemed inconsistent because of mere lack of uniformity in detail. *Id.* See generally 2005 Op. Va. Att’y Gen. 54; 1998 Op. Va. Att’y Gen. 12; 1998 Op. Va. Att’y Gen. 13; 1980-81 Op. Va. Att’y Gen. 418.

²¹ See 4 VA. ADMIN. CODE §§ 25-160-10 to 25-160-200; 4 VA. ADMIN. CODE §§ 25-150-10 to 25-150-750.

ordinances, regulations of general purpose, or §§ 58.1-3712, 58.1-3712.1, 58.1-3713, 58.1-3713.1, 58.1-3713.2 and 58.1-3713.3.

Although the first sentence of § 45.1-361.5 provides a general exemption for holders of state gas or oil well permits from local license, permit, fee and bond requirements, the second sentence sets forth several exceptions to that exemption. Because statutes must be read as a whole, with every provision given effect, if possible,²² the first sentence of § 45.1-361.5 must be read as modified by the second sentence of that section.²³ Among the limited exceptions, the General Assembly has included “local land-use ordinances.” Zoning laws are land-use ordinances.²⁴

Nevertheless, statutes are not to be read in isolation²⁵ and the *Code of Virginia* constitutes one body of law.²⁶ Pursuant to the Commonwealth Energy Policy,²⁷ the General Assembly has provided that “[a]ll agencies and political subdivisions of the Commonwealth, in taking discretionary action with regard to energy issues, shall recognize the elements of the Commonwealth Energy Policy and where appropriate, shall act in a manner consistent therewith.”²⁸ One of the goals set forth in the Commonwealth Energy Policy is “[to] [e]nsure the availability of affordable natural gas throughout the Commonwealth by expanding Virginia’s natural gas distribution and transmission pipeline infrastructure; developing coalbed methane gas resources and methane hydrate resources; encouraging the productive use of landfill gas; and siting one or more liquefied natural gas terminals.”²⁹ The development of Virginia’s natural resources is clearly a matter of priority under the Commonwealth Energy Policy, as well as under the Act.³⁰

²² *Gallagher v. Commonwealth*, 205 Va. 666, 669, 139 S.E.2d 37, 39 (1964); *City of Richmond v. Bd. of Supvrs.*, 199 Va. 679, 685, 101 S.E.2d, 641, 646 (1958).

²³ See 1993 Op. Va. Att’y Gen. 173, 174-75 (discussing interpretation of § 45.1-361.5).

²⁴ See § 15.2-2201 (defining “zoning” to include the regulation of “building and structure designs, building and structure placement and uses to which land, buildings and structures within such designated areas and districts may be put.”). See also 1993 Op. Va. Att’y Gen. 173. This 1993 opinion addresses the preemptive effect of the Act on local zoning laws, but deals specifically with local special use permit requirements. It does not opine expressly on a locality’s ability to prohibit altogether natural gas exploration and production and does not consider the Commonwealth Energy Policy, which was enacted in 2006.

²⁵ See, e.g., 2010 Op. Va. Att’y Gen. 173, 175-76 (citing *Prillaman v. Commonwealth*, 199 Va. 401, 405, 100 S.E.2d 4, 7 (1957) (“statutes are not to be considered as isolated fragments of law, but as a whole, or as parts of . . . a single and complete statutory arrangement”)).

²⁶ See *Branch v. Commonwealth*, 14 Va. App. 836, 839, 419 S.E.2d 422, 425 (1992).

²⁷ VA. CODE ANN. §§ 67-100 through 67-1305 (2012).

²⁸ See § 67-102(C). It should be noted, however, that Subsection D of § 67-102 states that the Policy is intended as guidance and shall not be construed to amend, repeal or override any contrary provision of applicable law. Moreover, § 67-102(D) provides that “[t]he failure or refusal of any person to recognize the elements of the Commonwealth Energy Policy, to act in a manner consistent with the Commonwealth Energy Policy, or to take any other action whatsoever, shall not create any right, action, or cause of action or provide standing for any person to challenge the action of the Commonwealth or any of its agencies or political subdivisions.”

²⁹ See § 67-102(A)(5) (emphasis added).

³⁰ See, *inter alia*, § 45.1-361.3, “[t]he provisions of this chapter shall be liberally construed so as to effectuate the following purposes ... [t]o foster, encourage and promote the safe and efficient exploration for and development, production, utilization and conservation of the Commonwealth’s gas and oil resources ... [t]o recognize and protect the rights of persons owning interests in gas or oil resources contained within a pool....”

The overriding goal of statutory interpretation is to discern and give effect to legislative intent.³¹ The comprehensiveness of the Gas and Oil Act supports the conclusion that the carve-out to total preemption set out in § 45.1-361.5 does not extend to a locality's ability to ban completely the operation of the gas and oil industry within its borders. Rather, the carve-out is intended to allow local regulation of location and siting issues only. Reading § 45.1-361.5 so broadly so as to allow a locality to adopt a complete ban on the exploration and drilling of oil and natural gas would permit a few jurisdictions to thwart the stated policy goals of the Commonwealth, as expressed in the Commonwealth Energy Policy.³² Such a conclusion further would conflict with the Gas and Oil Act's statewide requirements for the spacing of gas and oil wells,³³ obviate the numerous statutory and regulatory provisions established for the uniform regulation of permitting and pooling of units,³⁴ and trigger significant constitutional questions involving property rights, equal protection, and due process.³⁵ It is fundamental that local ordinances must conform to, and not be in conflict with, the public policy of the Commonwealth as set out in its statutes.³⁶

It is well-settled that if any doubt remains as to the existence of such power in view of all the facts, that doubt must be resolved against the locality.³⁷ Moreover, "a local government may not 'forbid what the legislature has expressly licensed, authorized, or required.'"³⁸ The "fundamental rule is that

³¹ See *Turner v. Commonwealth*, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983) (citing *Tiller v. Commonwealth*, 193 Va. 418, 69 S.E.2d 441 (1952)); *Vollin v. Arlington Cnty. Electoral Bd.*, 216 Va. 674, 678-79, 222 S.E.2d 793, 797 (1976); 2002 Op. Va. Att'y Gen. 67, 68; 1990 Op. Va. Att'y Gen. 155, and opinions cited therein.

³² See §§ 67-100 through 67-103.

³³ See §§ 45.1-361.17, 45.1-361.20 (2002).

³⁴ See §§ 45.1-361.1 through 45.1-361.44. See also 4 VA. ADMIN. CODE §§ 25-160-10, *et seq.*, 4 VA. ADMIN. CODE §§ 25-150-10, *et seq.*

³⁵ Regardless of how legitimate the purpose is underlying the exercise of delegated police power, the power may not be used to regulate property interests unless the means employed are reasonably suited to achieve the stated goal. *City of Manassas v. Rosson*, 224 Va. 12, 19-20, 294 S.E.2d 799, 803 (1982), *appeal dismissed*, 459 U.S. 1166 (1983) (quoting *Alford v. City of Newport News*, 220 Va. 584, 586, 260 S.E.2d 241, 243 (1979)). See also *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365, 386-388 (1926). The mere power to enact an ordinance does not carry with it the right arbitrarily or capriciously to deprive a person of the legitimate use of his property. *Alford*, 220 Va. at 586, 260 S.E.2d at 243 (citing *Bd. of Supvrs. v. Carper*, 200 Va. 653, 662, 107 S.E.2d 390, 396-397 (1959)). See also *Euclid*, 272 U.S. at 395. Further, the classifications an ordinance contains, and the distinctions it draws, cannot be arbitrary or capricious, either as written or as applied. *Southland Corp.*, 224 Va. at 522, 297 S.E.2d at 722. See also *Kisley v. City of Falls Church*, 212 Va. 693, 697, 187 S.E.2d 168, 171-72 (1972); *Rosson*, 224 Va. at 17-18, 294 S.E.2d at 802. See also, *inter alia*, *Bd. of Supvrs. v. Rowe*, 216 Va. 128, 134-143, 216 S.E.2d 199, 205-211 (1975); *Horne*, 216 Va. at 120, 215 S.E.2d at 458 (decided under prior law); *Rosson*, 224 Va. at 18, 294 S.E.2d at 802 (citing *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974)); *Carper*, 200 Va. at 660, 107 S.E.2d at 395 ("The exercise of the police power is subject to the constitutional guarantee that no property shall be taken without due process of law and where the police power conflicts with the Constitution the latter is supreme, but courts will not restrain the exercise of such power except when the conflict is clear").

³⁶ Section 1-248. See also 2002 Op. Va. Att'y Gen. 67, 68; *King*, 195 Va. at 1090, 81 S.E.2d at 591 (citing *MCQUILLIN ON MUNICIPAL CORPORATIONS*, 3d ed., vol. 6, § 23.07, at 392 *ff*; 37 AM. JUR. MUNICIPAL CORPORATIONS, § 165 at 787 *ff*).

³⁷ *City of Richmond*, 199 Va. at 684, 101 S.E.2d at 645 (citing *Donable's Administrator v. Harrisonburg*, 104 Va. 533, 535, 52 S.E. 174, 175 (1905)).

³⁸ *Blanton v. Amelia Cnty.*, 261 Va. 55, 64, 540 S.E.2d 869, 874 (2001) (quoting *King*, 195 Va. at 1090-91, 81 S.E.2d at 591).

local ordinances must conform to and ‘not be inconsistent with’ the public policy of the State as set forth in its statutes.”³⁹ Applying these principles, this Office previously has concluded that, if an activity is expressly authorized by and is operated in compliance with state law, a Virginia locality cannot impose a strict ban on that otherwise legal activity.⁴⁰ I note that the validity of an ordinance is to be tested not only by what has been done under it, but by what may, by its authority, be done.⁴¹ An outright ban, whether express or by operation of improper application of a facially valid zoning ordinance, exceeds a locality’s delegation of authority. I therefore conclude that, while an affected locality may regulate the location and siting of oil and gas drilling practices, such authority may not be used to prohibit completely such activity from occurring within its borders.

With regards to the specific situation you present, I first note zoning ordinances are generally either one of two kinds: those that enumerate allowed usage or those that list prohibited uses.⁴² You relate that ordinances establishing the zoning districts at issue in Washington County list specific approved activities for the areas zoned A-1 and A-2.⁴³ Among other permitted uses, the A-1 area is zoned to allow “[u]tilities and public services as follows ... [u]nderground pipes and lines, manholes, pumping and booster stations, meters and related appurtenances necessary for the transmission and distribution of potable water, wastewater collection, and *natural gas transmission and distribution*.”⁴⁴

You indicate, however, that the gas operator’s application has been denied in effect for *any location* within the county.⁴⁵ To the extent this is the case, the action amounts to an exercise of veto power by local regulation of gas well operation in its entirety, a power a locality does not have, as discussed above.⁴⁶ Rather, as anticipated by § 45.1-361.5, a locality’s delegated power is limited to the

³⁹ *Klingbeil Mgmt. Group Co. v. Vito*, 233 Va. 445, 449, 357 S.E.2d 200, 202 (1987) (citing *King*, 195 Va. at 1090, 81 S.E.2d at 591).

⁴⁰ *See, e.g.*, 1998 Op. Va. Att’y Gen. 12, 12-13 (localities lack express or implied authority to enact moratorium on intensive corporate and contract swine production); 1998 Op. Va. Att’y Gen. 13, 14 (county has no authority to adopt ordinance limiting circumstances in which agricultural operations may be deemed to constitute a nuisance or trespass). *See also* 2008 Op. Va. Att’y Gen. 90 and cases cited therein (a college, through its board of visitors, has express and implied power to act as necessary to effectuate its powers expressly granted, but that authority does not supersede statutes concerning specific topics).

⁴¹ *Assaid v. City of Roanoke*, 179 Va. 47, 51, 18 S.E.2d 287 (1942), 288; *Rowe*, 216 Va. at 132, 216 S.E.2d at 205.

⁴² *See* Article 7, Chapter 22 of Title 15.2, §§ 15.2-2280 through 15.2-2316 (2012).

⁴³ WASHINGTON COUNTY, VA., CODE OF ORDINANCES § 66-297.

⁴⁴ *Id.* at § 66-297(a)(11) (emphasis added).

⁴⁵ The letter you attached to your opinion request asserts that A-1 and A-2 are the least restrictive zoning categories in the county such that, if drilling of gas wells is to be permitted anywhere in the county, it would certainly be in areas with these zoning designations.

⁴⁶ This Office historically has declined to render opinions interpreting or applying local ordinances. *See, e.g.*, 1993 Op. Va. Att’y Gen 173, 176 and opinions cited in note 1 therein. I therefore decline to opine whether the application of the ordinance in this instance was reasonable. I nevertheless offer the following general guidance in determining reasonableness. One factor would be how the county treated others similarly situated, like the other gas wells the instant gas operator alleges operate in the county. If disparate treatment can be shown, then the county’s action may be deemed arbitrary and capricious and thus unreasonable. *See Nat’l Linen Service Corp. v. Norfolk*, 196 Va. 277, 281, 83 S.E.2d 401, 404 (1954) (noting that ordinances which in their operation necessarily restrain competition and tend to create monopolies or confer exclusive privileges are generally condemned). Another consideration is the fact that the operator has signed voluntary lease agreements with the owners of over ninety-

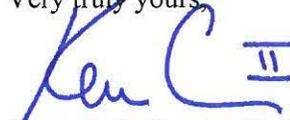
ability to adopt *reasonable siting* regulations.⁴⁷ The action by the Washington County Board of Supervisors on February 28, 2012, signaling that it would not amend its county zoning ordinance to allow for natural gas extraction until after the EPA publishes its study on hydraulic fracturing, makes clear the local governing body's present intention to maintain a countywide ban on this activity. A moratorium on an activity imposed by the local governing body pending further study is of the same legal effect as a ban and cannot be a valid exercise of delegated police power when the local governing body has neither express authority from a statute, nor implied authority therefrom, for such action.⁴⁸

Conclusion

Accordingly, it is my opinion that, although a local governing body may adopt a zoning ordinance that places restrictions on the location and siting of oil and gas wells that are reasonable in scope and consistent with the Virginia Gas and Oil Act and the Commonwealth Energy Policy, a local governing body cannot ban altogether the exploration for, and the drilling of, oil and natural gas within the locality's boundaries.

With kindest regards, I am,

Very truly yours,

A handwritten signature in blue ink, appearing to read "Ken C II".

Kenneth T. Cuccinelli, II
Attorney General

seven percent of the one hundred sixty acres included in their pooled unit. *See* Va. Gas and Oil Board transcript for docket item VGOB 11-0614-2956, heard on June 14, 2011. That fact would certainly lend support for the granting of any special use permit determined to be necessary for the establishment of this unit, in the event the ordinance itself were found not to allow the gas well as an appropriate accessory structure of an approved land use.

⁴⁷ The restriction of the local land use regulatory power to siting considerations is further supported by the discussion analogizing the power to enact zoning ordinances to the power to abate a nuisance in *Euclid*, 272 U.S. at 388: “[T]he question whether the power exists to forbid...a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the ...thing..., but by considering it in connection with the circumstances and the locality. A nuisance may be merely a right thing in the wrong place,--like a pig in the parlor instead of the barnyard.” (Internal citation omitted.)

⁴⁸ *See Horne*, 216 Va. at 122, 215 S.E.2d at 459 (county board's enactment of a moratorium on the filing of site plans and preliminary subdivision plats held invalid because “there was no express or implied authority for the enactment”); 1998 Op. Va. Att’y Gen. 12, 13 (county may not enact a moratorium on intensive corporate and contract swine production while the matter is studied because it lacks express and implied authority to do so). I further note, as the Virginia Supreme Court has observed, that

[T]he General Assembly of Virginia 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. We believe that it is peculiarly a function of the General Assembly to determine, subject to constitutional restraints, what revisions in the statutes may be required to maintain the appropriate balance between these important but frequently conflicting interests.

Horne, 216 Va. at 120, 215 S.E.2d at 458. Thus, as expressed in this opinion, a locality may make such determinations only as it is permitted to do so by the General Assembly.