

**CRIMINAL PROCEDURE: BAIL AND RECOGNIZANCES - SENTENCE; JUDGMENT;
EXECUTION OF SENTENCE.**

PRISONS AND OTHER METHODS OF CORRECTION: PROBATION AND PAROLE.

CONSTITUTION OF VIRGINIA: JUDICIARY.

GENERAL PROVISIONS: COMMON LAW, STATUTES AND RULES OF CONSTRUCTION.

Judges and magistrates have broad discretionary authority to place geographic restrictions on drug/prostitution offenders as condition of pretrial release, probation or suspended sentence. Adoption of ordinance by City of Lynchburg prohibiting drug/prostitution offenders, and such offenders who have been released on bond, parole or probation, from entering restricted geographical zones and making violation of such ordinances Class 1 misdemeanor infringes on authority of courts and Parole Board to set conditions for release on probation or suspended sentence and for release of parolees and to provide penalties for violation of conditions.

The Honorable L. Preston Bryant Jr.

Member, House of Delegates

February 20, 1998

You ask whether the City of Lynchburg has the authority to implement an initiative to identify those areas of the city with concentrated drug and prostitution activities and to limit the ability of drug offenders and prostitutes to frequent those identified areas.

You provide detailed descriptions of two initiatives the city is considering. Under both initiatives, the city would identify areas where crime and violence can be associated with the presence and activity of known drug offenders and prostitutes.¹ These areas would be designated as drug-free zones and/or prostitution-free zones. The primary distinction between the two initiatives is that the first initiative would operate pursuant to orders issued by the city's judges and magistrates, while the second initiative would operate pursuant to ordinances adopted by the city council.

You ask first whether the city's judges and magistrates may order individuals charged with or convicted of drug or prostitution offenses to stay out of designated drug-free and prostitution-free zones as a condition of probation, sentence suspension or pretrial release, with individuals who violate such orders subject to incarceration for violation of probation or parole, or for violation of a bond restriction.

It is my opinion that judges and magistrates currently have the discretion to order individuals charged with or convicted of drug or prostitution offenses ("drug/prostitution offenders") to stay out of certain geographical areas, such as drug-free and prostitution-free zones, as a condition of pretrial release, probation or suspended sentence.² Section 19.2121 of the *Code of Virginia* allows a judicial

officer to set bail for one accused of a crime "to assure the appearance of the accused and to assure his good behavior pending trial." Section 19.2123(A)(2) allows a judicial officer to release the accused on his own recognizance and to "[p]lace restrictions on the travel, association or place of abode of the person during the period of release." Section 19.2303 provides that "[a]fter conviction, ¼ the court may suspend imposition of sentence or suspend the sentence in whole or part and in addition may place the accused on probation under such conditions as the court shall determine." Finally, § 19.2306 permits the court to revoke such probation "for any cause deemed by it sufficient which occurred at any time within the probation period."

These statutes place broad discretion in the court to impose reasonable conditions related to the nature of the offense and the goal of rehabilitation when releasing persons on bail or granting probation.³ While the reasonableness of the application of geographic restrictions in any case will depend on the facts and circumstances of the particular case,⁴ it is my opinion that geographic restrictions prohibiting drug/prostitution offenders from frequenting drug-free and prostitution-free zones generally satisfy the test of reasonableness.⁵

You next ask whether the city may adopt ordinances automatically prohibiting drug/prostitution offenders, or such offenders who have been released on bond, parole or probation, from going onto public streets or sidewalks in drug-free or prostitution-free zones and making the violation of such ordinances a Class 1 misdemeanor.⁶ It is my opinion that the city lacks authority to adopt ordinances prohibiting drug/prostitution offenders, and such offenders who have been released on bond, parole or probation, from going on public streets or sidewalks in drug-free or prostitution-free zones and making the violation of such ordinances a Class 1 misdemeanor.⁷ Virginia follows the Dillon rule of strict construction whereby local governing bodies have only those powers expressly granted, those necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable.⁸ While the Supreme Court of Virginia has broadly construed the general grant of police powers to localities when public safety and morals are involved,⁹ a locality's exercise of its police power must be consistent with state law.¹⁰ A local ordinance is inconsistent with state law if state law preempts local regulation in the field, either by expressly barring local regulation or by enacting state regulations so comprehensive that they may be deemed to occupy the entire area.¹¹

The General Assembly places with the judiciary, and not with local government officials, the authority to set reasonable conditions on a defendant's release on bail or on his own recognizance and to establish conditions for a defendant's release on probation or suspended sentence.¹² State law also provides that the Virginia Parole Board is to set conditions for the release of parolees.¹³ State law likewise provides procedures and penalties for violation of these conditions of release. For example, when a condition of release on bail is violated, the court has the discretion to remand the accused to jail.¹⁴ When a condition for probation

or suspended sentence is violated, the court has the discretion to revoke the suspension or probation.¹⁵ Moreover, when a parolee violates a condition of his parole, the Parole Board has the discretion to revoke parole and order the parolee's reincarceration.¹⁶

It is my opinion that the second proposal the city suggests infringes on such authority placed in the courts and the Parole Board and would be inconsistent with state law in an area where the law is so comprehensive that it may be deemed to occupy the entire field.¹⁷ For this same reason, if the first proposed initiative *requires* magistrates or judges to include a geographic restriction as a condition of release, it is my opinion that the first initiative likewise is in conflict with the Dillon rule and would potentially violate Article VI, § 1 of the Constitution of Virginia (1971), which vests the judicial power of the Commonwealth with the courts.

¹The designations would be based on crime statistics, investigations and complaints.

²My conclusion assumes that the designations of the zones are reasonable and that reasonable exceptions are available to permit individuals access to their residences, places of employment and other necessary facilities. The initiative you describe appears to meet this requirement of reasonableness.

³See *Grant v. Commonwealth*, 223 Va. 680, 685, 292 S.E.2d 348, 351 (1982) (legislature has afforded trial courts wide latitude in fashioning rehabilitative initiatives for defendants; inherent in court's power to suspend imposition or execution of sentence is power to place conditions on such suspension, with only limitation being that conditions be reasonable); see also 1981-1982 Op. Va. Att'y Gen. 238 (magistrate may impose conditions on release of accused if official determines restriction is necessary to assure good behavior of accused pending trial).

⁴See *Loving v. Commonwealth*, 206 Va. 924, 930, 147 S.E.2d 78, 83 (1966) (condition of suspension "must be reasonable, having due regard to the nature of the offense, the background of the offender and the surrounding circumstances"), *rev'd on other grounds*, 388 U.S. 1 (1967).

⁵While such restrictions serve the public purpose of reducing crime and violence in the designated areas, the restrictions must be narrowly tailored. Restrictions that are overly broad or unnecessarily harsh or severe violate the constitutionally protected rights of the individuals charged with or convicted of the crimes. See *Rutherford v. Blankenship*, 468 F. Supp. 1357, 136061 (W.D. Va. 1979) (probation condition barring defendant from state for ten years is unreasonable and constitutes banishment; such condition is prohibited by public policy and

amounts to cruel and unusual punishment and denial of due process); *State v. Stanford*, 900 P.2d 157 (Haw. 1995) (bail condition requiring defendant to stay out of defined area during hours associated with crime for which she was charged is not unconstitutional); *Jones v. State*, 727 P.2d 6 (Alaska Ct. App. 1986) (probation conditions involving area restrictions are valid if there is relationship between offense and prohibited activity of area; area restriction encompassing 45 blocks and denying access to residence and occupation is invalid); *Oyoghok v. Municipality of Anchorage*, 641 P.2d 1267 (Alaska Ct. App. 1982) (upholding probation condition prohibiting defendant from returning to area in city known for street prostitution); *State v. Morgan*, 389 So.2d 364 (La. 1980) (condition of probation that person convicted of prostitution remain out of French Quarter for length of probation is not unconstitutional and is reasonably related to goal of rehabilitation); *In re White*, 97 Cal. App. 3d 141, 158 Cal. Rptr. 562 (5th Dist. 1979) (geographic restriction imposed as condition of probation for person convicted of prostitution is overly broad and violates constitutional right of free movement).

⁶Both initiatives would provide limited exceptions for individuals who resided in a zone prior to their exclusion and for individuals employed in a business located in a zone and would permit individuals to conduct business at a government office or medical facility located in a zone, to attend a house of worship located in a zone, or to travel through a zone.

⁷The locality may, of course, adopt ordinances designating the areas that constitute drug-free and prostitution-free zones and containing other relevant provisions of the initiative.

⁸See *Commonwealth v. Arlington County Bd.*, 217 Va. 558, 57374, 232 S.E.2d 30, 40 (1977); *Fairfax Zoning Board v. Cedar Knoll*, 217 Va. 740, 743, 232 S.E.2d 767, 769 (1977).

⁹See *Stallings v. Wall*, 235 Va. 313, 367 S.E.2d 496 (1988) (city ordinance may require permit for ownership of handgun); *King v. County of Arlington*, 195 Va. 1084, 81 S.E.2d 587 (1954) (county ordinance prohibiting keeping of vicious dogs was valid); *Assaid v. Roanoke*, 179 Va. 47, 18 S.E.2d 287 (1942) (city had power to regulate operation of pool rooms); see also 1994 Op. Va. Att'y Gen. 29, 3132.

¹⁰Section 113.17 (ordinance may not be inconsistent with laws of Commonwealth); 1995 Op. Va. Att'y Gen. 85, 86.

¹¹19831984 Op. Va. Att'y Gen. 86, 87. See generally *King v. County of Arlington*, 195 Va. at 1084, 81 S.E.2d at 587 (discussing prohibiting of vicious dogs pursuant to state law and county ordinance).

¹²Sections 19.2121, 19.2123(A)(2), 19.2303.

¹³Section 53.1136(1)(2).

¹⁴Section 19.2135.

¹⁵Section 19.2306.

¹⁶Sections 53.1136(3), 53.1137.

¹⁷Another potential problem created by such ordinances is the creation of a second punishment for a single noncriminal act. See *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969) (Double Jeopardy Clause "protects against multiple punishments for the same offense").
