

00-087

CONSERVATION: CHESAPEAKE BAY PRESERVATION ACT.

Chesapeake Bay Local Assistance Board has authority to intervene in, institute or take legal and administrative actions on its own or on behalf of person who believes Tidewater Virginia jurisdiction is disregarding its zoning ordinances or misinterpreting Board criteria designed to protect quality of state waters within designated preservation areas, and to ensure compliance with Act and Board regulations. Act does not authorize Executive Director of Chesapeake Bay Local Assistance Department or Board to issue cease and desist order to locality that is violating Act and request Attorney General to seek injunction against locality that violates order.

Mr. Michael D. Clower
Executive Director, Chesapeake Bay Local Assistance Department
November 26, 2001

You inquire regarding the authority of the Chesapeake Bay Local Assistance Board to institute legal action to enforce the Chesapeake Bay Preservation Act¹ and regulations promulgated by the Board in a jurisdiction located in Tidewater Virginia.

The following statements paraphrase the facts described in your request. In 1991, the Chesapeake Bay Local Assistance Board approved the ordinance of a locality in Tidewater Virginia. The Chesapeake Bay Local Assistance Department questions the locality's interpretation of a portion of the ordinance that is contrary to the 50-foot buffer allowance in the Chesapeake Bay Preservation Area Designation and Management Regulations² ("Board Regulation(s)"). As a result, the locality implements its program under the Chesapeake Bay Preservation Act in a manner that is inconsistent with the directions of the Department. To justify its position, the locality relies on the Department's Code and Model Ordinance, the Department's prior approval of the ordinance, and the nine-year duration of the local program. The locality has ignored the Department's interpretation of the ordinance pertaining to the 50-foot buffer area permitted by the Board Regulations.³ In 1992, the Board published an advisory stating that 50-foot buffers permitted by the applicable Board Regulation were exceptions to the Department's requirements, and were allowable only when necessary on lots that existed prior to enactment of the Act.⁴

You state that the Chesapeake Bay Local Assistance Department has verified a complaint that the Tidewater locality is not correctly implementing the Chesapeake Bay Preservation Act by allowing automatic 50-foot buffers, removing all vegetation within the buffer and replanting with grass, and not requiring water quality impact assessments. The locality subsequently has assured the Department that it will complete water quality impact assessments and retain or plant properly vegetated buffers, but will continue to allow 50-foot buffers in accord with its interpretation of the ordinance.

You ask several questions regarding the authority of the Chesapeake Bay Local Assistance Board to intervene in local zoning cases to ensure a locality's compliance with the Chesapeake Bay Preservation Act and Board Regulations. Specifically, you ask whether the Board may (1) bring legal action to discontinue a development based solely on an approved site plan that clearly shows a violation of the Act and Board Regulations; (2) file an injunction against site developers where they are violating the Act and Board Regulations; and (3) seek a court order prohibiting the issuance of permits by a locality until it is compliant with the Act and Board Regulations. Based on the clear and unambiguous language of the Chesapeake Bay Preservation Act and the reasoning provided below, I answer the above questions in the affirmative.

Section 10.1-2103 of the *Code of Virginia*, a portion of the Chesapeake Bay Preservation Act, empowers the Board to "[p]romulgate regulations,"⁵ "[d]evelop, promulgate and keep current the criteria required by § 10.1-2107,"⁶ and ensure that local comprehensive plans and zoning and subdivision ordinances comply with the Act.⁷ Section 10.1-2105 of the Act creates the Chesapeake Bay Local Assistance Department to provide staff assistance to the Board and to perform all duties necessary to carry out the purposes of the Act.

A 1991 opinion of the Attorney General provides:

Local governments in Tidewater Virginia are required to designate the Chesapeake Bay Preservation Areas^[8] within their respective jurisdictions and must apply the [Board] Regulations to protect the quality of state waters within these designated preservation areas, through their comprehensive plans,

zoning ordinances and subdivision ordinances.^[9]

The opinion observes that "[l]ocal governments outside Tidewater Virginia also may employ the criteria in the [Board] Regulations and 'may incorporate protection of the quality of state waters into their comprehensive plans, zoning ordinances and subdivision ordinances.'"¹⁰ Finally, the opinion concludes:

Section 10.1-2110 specifically authorizes localities not subject to the mandatory provisions of the Bay Act and [Board] Regulations nevertheless to incorporate those criteria into their comprehensive plans and subdivision and zoning ordinances for "protection of the quality of state waters." Section 10.1-2108 recognizes such provisions to be a valid exercise of local police powers.^[11]

Section 10.1-2109 of the Act mandates that, "after adoption of criteria by the Board,"¹² local governments in Tidewater Virginia "shall" designate Chesapeake Bay Preservation Areas within their jurisdictions and incorporate measures to protect the quality of state waters into their comprehensive plans and zoning and subdivision ordinances.¹³ It is clear that the jurisdictions comprising Tidewater Virginia¹⁴ are required to designate Chesapeake Bay Preservation Areas within their jurisdictions.¹⁵

In the event a Tidewater Virginia jurisdiction does not designate the Chesapeake Bay Preservation Areas within its jurisdiction and/or does not incorporate the measures set forth in the Board Regulations to protect the quality of state waters within designated preservation areas in its local plan and ordinance, § 10.1-2104 of the Act provides "exclusive authority" for the Board to "institute or intervene in legal and administrative actions to ensure compliance by local governing bodies with [the Act] and with any criteria or regulations adopted hereunder."¹⁶

In addition, § 10.1-2103(10) authorizes the Board to "[t]ake administrative and legal actions to ensure compliance by counties, cities and towns with the provisions of [the Act]." As the Supreme Court of Virginia has stated, "[i]f the language of a statute is plain and unambiguous, and its meaning perfectly clear and definite, effect must be given to it."¹⁷ It is unnecessary to resort to any rules

of statutory construction when the language of a statute is unambiguous.¹⁸ In those situations, the statute's plain meaning and intent govern.

Sections 10.1-2103(10) and 10.1-2104 clearly and unambiguously authorize the Board to intervene in or institute both administrative and legal actions to ensure compliance by local governing bodies with the Act. Under well-accepted principles of statutory construction, when a statute creates a specific grant of authority, the authority exists only to the extent specifically granted in the statute.¹⁹ In addition, the mention of one thing in a statute implies the exclusion of another.²⁰ The Chesapeake Bay Preservation Act authorizes the Board to "intervene" on its own or on behalf of a person who views a local governing body to be disregarding its zoning ordinances or misinterpreting certain criteria designed to protect the quality of state waters. The Act also specifically authorizes the Board to "institute" or "take" administrative and legal actions against local governing bodies in Tidewater Virginia to ensure their compliance with the Act and Board Regulations.²¹

Sections 10.1-2109 and 10.1-2111 of the Act plainly and unambiguously require compliance by local governments in Tidewater Virginia. Section 10.1-2109 provides, in part:

A. Counties, cities and towns in Tidewater Virginia shall use the criteria developed by the Board to determine the extent of the Chesapeake Bay Preservation Area within their jurisdictions. Designation of Chesapeake Bay Preservation Areas shall be accomplished by every county, city and town in Tidewater Virginia not later than twelve months after adoption of criteria by the Board.

B. Counties, cities, and towns in Tidewater Virginia shall incorporate protection of the quality of state waters into each locality's comprehensive plan consistent with the provisions of [the Act].

C. All counties, cities and towns in Tidewater Virginia shall have zoning ordinances which incorporate measures

to protect the quality of state waters in the Chesapeake Bay Preservation Areas consistent with the provisions of [the Act]. Zoning in Chesapeake Bay Preservation Areas shall comply with all criteria set forth in or established pursuant to § 10.1-2107.^[22]

D. Counties, cities and towns in Tidewater Virginia shall incorporate protection of the quality of state waters in Chesapeake Bay Preservation Areas into their subdivision ordinances consistent with the provisions of [the Act]. Counties, cities and towns in Tidewater Virginia shall ensure that all subdivisions developed pursuant to their subdivision ordinances comply with all criteria developed by the Board.

Section 10.1-2111 provides that "[l]ocal governments shall employ the criteria promulgated by the Board to ensure that the use and development of land in Chesapeake Bay Preservation Areas shall be accomplished in a manner that protects the quality of state waters consistent with the provisions of [the Act]."

The use of the word "shall" in a statute ordinarily implies that its provisions are mandatory.²³ The Act contains no definition of the term "employ" as that term is used in § 10.1-2111. In the absence of any such definition, the term must be given its common, ordinary meaning.²⁴ "Employ," as used in § 10.1-2111, means "to make use of ...; use; apply."²⁵ Local governments in Tidewater Virginia, therefore, must comply with the Board Regulations to ensure that land use and development in the designated areas is accomplished in a manner that protects the quality of state waters, as required by the Act. Should a local government fail to do so, the Board is authorized to intervene in, institute, or take administrative and legal actions to ensure compliance with the Act.

Therefore, based on the clear and unambiguous language of the Act, I must conclude that the Chesapeake Bay Local Assistance Board has authority to "intervene" on its own or on behalf of a person who believes a local governing body in Tidewater Virginia is disregarding its zoning ordinances or misinterpreting certain criteria designed to protect the quality of state waters. I am also of the

opinion that the Board is authorized to institute or take administrative and legal actions to ensure compliance with the Act.

Finally, you ask whether the Executive Director of the Chesapeake Bay Local Assistance Department and the Chesapeake Bay Local Assistance Board have the authority to impose a cease and desist order on a locality that is violating the Act, and to request the Attorney General to file an injunction against any locality that violates a cease and desist order.

The powers and duties of the Board are stated clearly and unambiguously in § 10.1-2103. In addition, § 10.1-2106(C) of the Act vests the Director "with all the authority of the Board, including the authority granted by § 10.1-2104, when it is not in session, subject to such regulations as may be prescribed by the Board." As noted above, § 10.1-2104 authorizes the Board to institute legal actions. I am unable, however, to find authorization in the Act for the Board or the Director to impose a cease and desist order on a locality that is violating the Act. When a statute creates a specific grant of authority, the authority exists only to the extent specifically granted in the statute.²⁶ As the Virginia Supreme Court has often stated, "[t]he manifest intention of the legislature, clearly disclosed by its language, must be applied."²⁷ Consequently, I am of the opinion that the Chesapeake Bay Preservation Act does not authorize the Executive Director of the Chesapeake Bay Local Assistance Department or the Chesapeake Bay Local Assistance Board to issue a cease and desist order to a locality that is violating the Act, and to request the Attorney General to seek an injunction against a locality that violates a cease and desist order.

¹Va. Code Ann. tit. 10.1, ch. 21, §§ 10.1-2100 to 10.1-2116 (Michie Repl. Vol. 1998).

²9 Va. Admin. Code 10, ch. 20, 10-20-10 to -280 (Law. Coop. 1996).

³"To minimize the adverse effects of human activities on the other components of the Resource Protection Area, state waters, and aquatic life, a 100-foot buffer area of vegetation that is effective in retarding run-off, preventing erosion, and filtering non-point source pollution from run-off shall be retained if present and established where it does not exist. The 100-foot buffer area shall be deemed to achieve a 75% reduction of sediments and a 40% reduction of nutrients. Except as noted in this subsection, a combination of a buffer area not less than 50 feet in width and appropriate best management practices located landward of the buffer area which collectively achieve water quality protection, pollutant removal, and water resource conservation at least the equivalent of the 100-foot buffer area may be employed in lieu of the 100-foot buffer." 9 Va. Admin. Code 10-20-130(B).

⁴The Chesapeake Bay Preservation Act became effective July 1, 1988. See 1988 Va. Acts ch. 608, at 784, 792-96 (adding sections in Title 10 relating to Act); see also *id.* ch. 891, at 1874 (repealing Title 10 and adding Title 10.1).

⁵Section 10.1-2103(4).

⁶Section 10.1-2103(5).

⁷Section 10.1-2103(8).

⁸"*Chesapeake Bay Preservation Area*" means an area delineated by a local government in accordance with criteria established pursuant to § 10.1-2107." Section 10.1-2101.

⁹1991 Op. Va. Att'y Gen. 31, 32.

¹⁰*Id.* at 32 (quoting § 10.1-2110).

¹¹*Id.* at 35.

¹²Section 10.1-2109(A).

¹³Section 10.1-2109(A)-(D) uses "shall" to require local governments to designate Chesapeake Bay Preservation Areas and incorporate protection measures into local plans and ordinances. *Accord* 1991 Op. Va. Att'y Gen. 36, 36.

¹⁴See § 10.1-2101 (defining jurisdictions comprising "Tidewater Virginia").

¹⁵The word "shall" is primarily mandatory in its effect and the word "may" is primarily permissive. See *Pettus v. Hendricks*, 113 Va. 326, 330, 74 S.E. 191, 193 (1912).

¹⁶The Board Regulations require *local governments* to develop *local programs* necessary to comply with the Act and Chapter 20 of the Regulations (see *supra* note 2). See 9 Va. Admin. Code 10-20-50. "*Local governments*" means counties, cities and towns [and] applies to local governments in Tidewater Virginia, as defined in § 10.1-2101 of the Act, but the provisions of [Chapter 20] may be used by other local governments." 9 Va. Admin. Code 10-20-40. "*Local program*" means the measures by which a local government complies with the Act and regulations." *Id.* The Board Regulations require that local programs contain the following elements:

"A. A map delineating Chesapeake Bay Preservation Areas.

"B. Performance criteria applying in Chesapeake Bay Preservation Areas that employ the requirements in Part IV [of Chapter 20 of the Board Regulations].

"C. A comprehensive plan or revision that incorporates the protection of Chesapeake Bay Preservation Areas and of the quality of state waters.

"D. A zoning ordinance or revision that (i) incorporates measures to protect the quality of state waters in Chesapeake Bay Preservation Areas, and (ii) requires compliance with all criteria set forth in Part IV.

"E. A subdivision ordinance or revision that (i) incorporates measures to protect the quality of state waters in Chesapeake Bay Preservation Areas, and (ii) assures that all subdivisions in Chesapeake Bay Preservation Areas comply with the criteria set forth in Part IV.

"F. An erosion and sediment control ordinance or revision that requires compliance with the criteria in Part IV.

"G. A plan of development process prior to the issuance of a building permit to assure that use and development of land in Chesapeake Bay Preservation Areas is accomplished in a manner that protects the quality of state waters."

9 Va. Admin. Code 10-20-60.

Part IV establishes the performance criteria for land use and development (see 9 Va. Admin. Code 10-20-110 to -160 (Law. Coop. 1996)). Part VI pertains to the statutory enforcement responsibilities of the Board (see 9 Va. Admin. Code 10-20-240 to -280 (Law. Coop. 1996)). "The Act requires that the [B]oard ensure that local governments comply with the Act and [Board R]egulations and that their comprehensive plans, zoning ordinances and subdivision ordinances are in accordance with the Act. To satisfy these requirements, the [B]oard has adopted [Chapter 20] and will monitor each local government's compliance with the Act and [Chapter 20]." 9 Va. Admin. Code 10-20-240. Pursuant to § 10.1-2103(8) and (10) of the Act, the Board shall take administrative and legal action to ensure compliance by local governments. See 9 Va. Admin. Code 10-20-250, -260.

¹⁷ Temple v. City of Petersburg, 182 Va. 418, 423, 29 S.E.2d 357, 358 (1944); see also 1993 Op. Va. Att'y Gen. 256, 257.

¹⁸ See Ambrogi v. Koontz, 224 Va. 381, 386, 297 S.E.2d 660, 662 (1982); 1993 Op. Va. Att'y Gen. 99, 100.

¹⁹ See 2A Norman J. Singer, Sutherland Statutory Construction § 47:23 (West 6th ed. 2000) ("*Expressio unius est exclusio alterius*").

²⁰ See Turner v. Wexler, 244 Va. 124, 127, 418 S.E.2d 886, 887 (1992); Christiansburg v. Montgomery County, 216 Va. 654, 658, 222 S.E.2d 513, 516 (1976); see also 1992 Op. Va. Att'y Gen. 145, 146.

²¹ See §§ 10.1-2103(10), 10.1-2104.

²² Section 10.1-2107(A) provides: "In order to implement the provisions of [the Act] and to assist counties, cities and towns in regulating the use and development of land and in protecting the quality of state waters, the Board shall promulgate regulations which establish criteria for use by local governments to determine the ecological and geographic extent of Chesapeake Bay Preservation Areas. The Board shall also promulgate regulations which establish criteria for use by local governments in granting, denying, or modifying requests to rezone, subdivide, or to use and develop land in these areas."

²³ See *Andrews v. Shepherd*, 201 Va. 412, 414, 111 S.E.2d 279, 281 (1959) (noting that "shall" is word of command, used in connection with mandate); see also *Schmidt v. City of Richmond*, 206 Va. 211, 218, 142 S.E.2d 573, 578 (1965) (noting that "shall" generally indicates procedures are intended to be mandatory, imperative or limited); Op. Va. Att'y Gen.: 1997 at 16, 17; 1996 at 20, 21; 1991 at 126, 126, and opinions cited therein; *id.* at 127, 129, and opinions cited therein.

²⁴ See *Anderson v. Commonwealth*, 182 Va. 560, 565-66, 29 S.E.2d 838, 840 (1944) (construing definition of commonly used words, "listed or assessed"); 1993 Op. Va. Att'y Gen. 210, 213.

²⁵ Webster's Encyclopedic Unabridged Dictionary of the English Language 468 (1989).

²⁶ See *Tate v. Ogg*, 170 Va. 95, 195 S.E. 496 (1938); 1999 Op. Va. Att'y Gen. 85, 86.

²⁷ *Barr v. Town & Country Properties*, 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990) (quoting *Anderson v. Commonwealth*, 182 Va. at 566, 29 S.E.2d at 841).

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