



# COMMONWEALTH of VIRGINIA

Office of the Attorney General

Robert F. McDonnell  
Attorney General

July 10, 2007

900 East Main Street  
Richmond, Virginia 23219  
804-786-2071  
FAX 804-786-1991  
Virginia Relay Services  
800-828-1120  
7-1-1

The Honorable Kenneth T. Cuccinelli, II  
Member, Senate of Virginia  
10560 Main Street, Suite LL-17  
Fairfax, Virginia 22030

Dear Senator Cuccinelli:

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 City Council for the City of Manassas ("City Council") has the authority to regulate abortion clinics by adopting an ordinance similar to Senate Bill 146 as introduced, but not enacted into law, during the 2004 Session of the General Assembly ("Senate Bill 146"). You further ask what legal requirements the City Council must consider before adopting such an ordinance.

## Response

It is my opinion that the greater weight of the law suggests that the City Council has limited authority to enact an ordinance consistent with its charter, general statutory law, and constitutional jurisprudence, regulating abortion clinics, including one similar to the health and safety provisions of Senate Bill 146. Further, whether other localities possess similar authority to adopt such an ordinance depends on the powers granted to such localities by the General Assembly. Finally, it is my opinion that in order to survive a constitutional challenge, any ordinance regulating abortion clinics must be reasonable in scope, clearly define prohibited conduct, and not unduly burden a woman's decision-making process.

## Background

You relate that Senate Bill 146 was introduced during the 2004 Session of the General Assembly, but was not reported by the Senate Education and Health Committee.<sup>1</sup> Senate Bill 146 proposed an amendment to the definition of "hospital" in § 32.1-123 to include "any clinic or other facility performing 25 or more abortions per year. Any such clinic shall be subject to all of the requirements of this article for outpatient surgical hospitals and the regulations of the Board in the same manner as any other hospital."<sup>2</sup> Such a definition would require abortion clinics to be regulated as outpatient surgical centers.<sup>3</sup>

<sup>1</sup>See 2004 S.B. 146, available at <http://leg1.state.va.us/cgi-bin/legp504.exe?041+ful+SB146>.

<sup>2</sup>*Id.*

<sup>3</sup>See 12 VA. ADMIN. CODE §§ 5-410-1150 to 5-410-1290 (2005 & Supp. 2007).

### Applicable Law and Discussion

Virginia adheres to the Dillon Rule of strict construction regarding powers of local governing bodies.<sup>4</sup> Under the Dillon Rule, local governing bodies have only those powers that are expressly granted, those that are necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable.<sup>5</sup> Section 15.2-1102 confers general police powers on cities and towns which are not

expressly prohibited by the Constitution and the general laws of the Commonwealth, and which are necessary or desirable to secure and promote the general welfare of the inhabitants of the municipality and the safety, health, peace, good order, comfort, convenience, morals, trade, commerce and industry of the municipality and the inhabitants thereof[.]

A city is only permitted to act on this general grant of powers if the General Assembly has authorized it to do so.<sup>6</sup> The General Assembly specifically has conferred on the city of Manassas (“Manassas”) all of the powers set forth in § 15.2-1102.<sup>7</sup> Chapter 5, § 18(S) of the Charter of the City of Manassas authorizes the City Council to pass ordinances to promote the general welfare and

*[t]o do all things whatsoever necessary or expedient, and to pass all ordinances, resolutions and bylaws for promoting or maintaining the security, general welfare, comfort, education, morals, peace, government, health, trade, commerce and industries of the city, or its inhabitants, not in conflict with the Constitution and general laws of the Commonwealth, or the Constitution of the United States.*<sup>8</sup>

The Supreme Court of Virginia and prior opinions of the Attorney General have broadly construed the general grant of police powers to cities and towns in § 15.2-1102, and the analogous grant of authority to counties in § 15.2-1200, when dealing with local regulation of a wide range of activities and subjects.<sup>9</sup> A local government may, as an exercise of its general police power, regulate topless dancing;<sup>10</sup> regulate the operation of massage salons;<sup>11</sup> regulate the use of “common towels”;<sup>12</sup> prohibit the

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<sup>4</sup> Commonwealth v. County Bd., 217 Va. 558, 573, 232 S.E.2d 30, 40 (1977).

<sup>5</sup> 1987-1988 Op. Va. Atty Gen. 146, 146.

<sup>6</sup> See Bd. of Supvrs. v. Corbett, 206 Va. 167, 173, 142 S.E.2d 504, 508-09 (1965).

<sup>7</sup> See § 3-a of the Manassas City Charter, which provides that “[t]he powers set forth in §§ 15.1-837 through 15.1-907 of Chapter 18 of Title 15.1 of the Code of Virginia as in force on January one, nineteen hundred seventy-six, are hereby conferred on and vested in the city of Manassas, Virginia and all other powers which are now or may hereafter be conferred upon or delegated to cities under the Constitution and laws of the Commonwealth.” 1976 Va. Acts ch. 721, at 1121, 1121. The general police powers found in § 15.1-839 have been recodified as § 15.2-1102. 1997 Va. Acts ch. 587, at 977, 1048.

<sup>8</sup> See 1976 Va. Acts, *supra* note 7, at 1125.

<sup>9</sup> See *infra* notes 10-18 and accompanying text.

<sup>10</sup> Wayside Rest., Inc. v. Va. Beach, 215 Va. 231, 208 S.E.2d 51 (1974).

<sup>11</sup> Kisley v. Falls Church, 212 Va. 693, 187 S.E.2d 168 (1972).

<sup>12</sup> Nat'l Linen Serv. Corp. v. Norfolk, 196 Va. 277, 83 S.E.2d 401 (1954).

conduct of lotteries and numbers games;<sup>13</sup> restrict the keeping of vicious dogs;<sup>14</sup> regulate or prohibit the operation of poolrooms;<sup>15</sup> regulate burglar alarm installation access to police department;<sup>16</sup> regulate smoking;<sup>17</sup> and regulate homes for aged, infirm, and disabled adults.<sup>18</sup>

Section 15.2-1102 provides that ordinances adopted under this broad police power authority must not be inconsistent with state law. The state and the locality may, however, exercise concurrent jurisdiction unless the state statutes and regulations are so comprehensive that the state “occupie[s] the entire field” of such regulation.<sup>19</sup> City ordinances are not deemed inconsistent with state statutes and regulations unless they are so contradictory that the two cannot coexist.<sup>20</sup> Moreover, § 15.2-1102 specifically authorizes local ordinances to promote the health of inhabitants unless expressly prohibited by the Constitution of Virginia or general laws of the Commonwealth. In addition, § 32.1-34 clearly contemplates that local governments will adopt ordinances that are more stringent than state laws or regulations to protect public health.<sup>21</sup>

The General Assembly has enacted legislation providing for the regulation of medical care facilities, including hospitals.<sup>22</sup> The current definition of hospitals in the *Virginia Code* does not include abortion clinics.<sup>23</sup> Abortion clinics are exempt from the current state statutory and regulatory framework

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<sup>13</sup> Allen v. Norfolk, 195 Va. 844, 80 S.E.2d 605 (1954), *modified*, 196 Va. 177, 83 S.E.2d 397 (1954).

<sup>14</sup> King v. County of Arlington, 195 Va. 1084, 81 S.E.2d 587 (1942).

<sup>15</sup> Assaid v. Roanoke, 179 Va. 47, 18 S.E.2d 287 (1942).

<sup>16</sup> 1992 Op. Va. Att’y Gen. 59.

<sup>17</sup> 1987-1988 Op. Va. Att’y Gen. 143.

<sup>18</sup> 1987-1988 Op. Va. Att’y Gen. 146.

<sup>19</sup> See King, 195 Va. at 1087-89, 81 S.E.2d at 590; 1983-1984 Op. Va. Att’y Gen. 86, 87; see also 1989 Op. Va. Att’y Gen. 64, 64-65 (concluding that local governments lacked authority to require fees and permits for operation of hotels, restaurants, and campgrounds; § 35.1-9 specifically superceded all local ordinances regulating hotels, restaurants, and campgrounds; no similar provision exists superceding local government authority to regulate by ordinance health care facilities for protection of public health). The 2006 Session of the General Assembly considered House Bill 189, which proposed licensure for “abortion clinics.” See 2006 H.B. 189, available at <http://leg1.state.va.us/cgi-bin/legp504.exe?061+ful+HB189H1+pdf>. The Senate Committee on Education and Health failed to report the bill, and it was defeated. See *id.* (status). An argument can be made that the failure of the General Assembly to enact House Bill 189 is indicative of its intent not to regulate in this area. An alternative argument is that the legislature’s failure to regulate “the entire field” at the state level provides localities with the potential authority to regulate the clinics. See 1991 Op. Va. Att’y Gen. 307, 313 (concluding that failure of General Assembly to enact legislation granting authority for particular action raises inference that General Assembly did not intend entity to have such authority). Since the General Assembly has enacted charters granting localities significant authority to promote health and safety, it is my opinion that this is the more valid argument.

<sup>20</sup> 1983-1984 Op. Va. Att’y Gen., *supra* note 19, at 87.

<sup>21</sup> VA. CODE ANN. § 32.1-34 (2004) (“No county, city or town ordinance or regulation shall be less stringent in the protection of the public health than any applicable state law or any applicable regulations of the [State] Board [of Health].”).

<sup>22</sup> See §§ 32.1-123 to 32.1-162.15 (2004 & Supp 2007).

<sup>23</sup> See § 32.1-123 (2004) (“‘Hospital’ means any facility licensed pursuant to [Article 1 of Chapter 5] in which the primary function is the provision of diagnosis, of treatment, and of medical and nursing services, surgical or nonsurgical, for two or more nonrelated individuals, including hospitals known by varying nomenclature or designation such as sanatoriums, sanitariums and general, acute, rehabilitation, chronic disease, short-term, long-term, outpatient surgical, and inpatient or outpatient maternity hospitals.”).

of hospitals because they are treated as “an office of one or more physicians or surgeons.”<sup>24</sup> Although Virginia has enacted legislation regulating medical care facilities, the state cannot be said to occupy the entire field. There is no policy or statute that prohibits local governments, when acting consistent with the Dillon Rule, from implementing regulations that go beyond those of the state government.<sup>25</sup>

Accordingly, it is my opinion that Manassas has authority under § 15.2-1102 and its charter to enact an ordinance regulating health and safety in abortion clinics. Whether other localities have similar authority would depend on the powers granted to them by charter by the General Assembly.

You next inquire concerning the legal requirements that the City Council must consider before imposing an ordinance regulating abortion clinics. Such an ordinance, if enacted by Manassas, would constitute an exercise of police power that is presumed to be valid.<sup>26</sup> The ordinance must, however, be reasonable and not arbitrary, uniform in operation, and must bear a real and substantial relation to public health, safety, morals, or welfare.<sup>27</sup>

While having the authority to legislate, Manassas must consider the federal constitutional jurisprudence limiting the scope of any statute or ordinance seeking to regulate abortion clinics.<sup>28</sup> The Fourth Circuit Court of Appeals has upheld South Carolina’s regulation of abortion clinics because it

did not place an undue burden on a women’s decision whether to seek an abortion in violation of the liberty interest protected by the Due Process Clause and ... did not distinguish unreasonably between clinics that performed a specific number of abortions and those that did not in violation of the Equal Protection Clause.<sup>[29]</sup>

The Fourth Circuit has identified several factors that enabled South Carolina’s abortion regulations to withstand constitutional challenge:

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<sup>24</sup>Section 32.1-124 (2004); *see also* Simopoulos v. Virginia, 462 U.S. 506, 611 n.3 (1983) (noting that physicians’ offices are excluded from hospital licensing statutes and regulations unless principally used for performing surgery).

<sup>25</sup>*See* King, 195 Va. at 1089, 81 S.E.2d at 590-91; 1983-1984 Op. Va. Att’y Gen., *supra* note 19, at 87-88.

<sup>26</sup>*Kisilej*, 212 Va. at 697, 187 S.E.2d at 171;  *Bd. of County Supvrs. v. Carper*, 200 Va. 653, 660, 107 S.E.2d 390, 395 (1959); *National Linen*, 196 Va. at 279, 83 S.E.2d at 403.

<sup>27</sup>*Id.* at 280-81, 83 S.E.2d at 403-04.

<sup>28</sup>In 1973, the Supreme Court of the United States found that the Fourteenth Amendment prohibited state laws against abortion. *See* *Roe v. Wade*, 410 U.S. 113 (1973). In 1992, the Court revisited its *Roe* holding. *See* *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). While affirming *Roe*, the Court disregarded the trimester framework and adopted the “undue burden” standard for challenges to abortion laws. *Id.* at 872-74. Subsequently, the Court applied the standard developed in *Roe* and *Casey* and struck down Nebraska’s ban on partial birth abortions because the lack of a health exception constituted an “undue burden.” *Stenberg v. Carhart*, 530 U.S. 914 (2000). Most recently, the Court concluded that the invalidation of New Hampshire’s parental notification law for lack of a health exception was improper. *Ayotte v. Planned Parenthood*, 126 S. Ct. 961 (2006). Rather, the Court held that federal courts should “enjoin only the unconstitutional applications of a statute while leaving other applications in force.” *Id.* at 967.

<sup>29</sup>*Greenville Women’s Clinic v. Comm’r, S.C. Dep’t of Health*, 317 F.3d 357, 359 (4th Cir. 2002).

(1) the Regulation serves a valid state interest and is little more than a codification of national medical- and abortion-association recommendations designed to ensure the health and appropriate care of women seeking abortions; (2) the Regulation does not “strike at the [abortion] right itself;” (3) the increased costs of abortions caused by implementation of the Regulation, while speculative, are even yet modest and have not been shown to burden the ability of a woman to make the decision to have an abortion; and (4) abortion clinics may rationally be regulated as a class while other clinics or medical practices are not.<sup>[30]</sup>

Specific concerns addressed and dismissed by the Fourth Circuit included the imposition of a threshold requirement of the performance of five abortions a month standard before a facility became subject to regulation.<sup>31</sup> “[D]rawing the line at [facilities] performing five abortions per month is rational. While anyone could say that it is just as rational to draw the line at ten abortions per month or three abortions per month, this type of line-drawing is typically a legislative function and is presumed valid.”<sup>32</sup> Therefore, the twenty-five abortions a year standard articulated in Senate Bill 146 would likely survive a court challenge. In considering the harm of increased costs stemming from regulation of abortion clinics, the Court concluded that although the increased cost “might make it ‘more difficult’ and would make it ‘more expensive to procure an abortion,’ there is no evidence that it would impose an undue burden on ‘a woman’s ability to make th[e] decision to have an abortion.’”<sup>33</sup>

Any ordinance regulating abortion clinics enacted by Manassas must be reasonable in scope and not unduly burden a woman’s decision-making process regarding abortion.<sup>34</sup> In addition, any law or regulation providing for monetary penalties or revocation of a permit or license to operate a clinic should be clearly defined to survive a constitutional challenge.<sup>35</sup>

When implementing any regulatory scheme,<sup>36</sup> there should be a reasonable delay in the effective date to permit existing providers an opportunity to comply with the new requirements or, in the alternative, provide for the grandfathering in of existing providers. Moreover, Manassas would be required to inspect abortion clinics and enforce its own regulations because no authority exists for the State Department of Health to perform these activities on its behalf.<sup>37</sup>

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<sup>30</sup> *Greenville Women’s Clinic v. Bryant*, 222 F.3d 157, 159 (4th Cir. 2000) (citation omitted).

<sup>31</sup> *Id.* at 174.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 170 (alterations in original) (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 874 (1992)).

<sup>34</sup> *Id.*

<sup>35</sup> For instance, the Fifth Circuit Court of Appeals has affirmed the constitutionality of regulating abortion clinics. *See Women’s Med. Ctr. v. Bell*, 248 F.3d 411 (5th Cir. 2001). The Texas regulations included fines and licensure revocation if the regulations were violated. *Id.* at 422. Thus, the regulations were quasi-criminal, thereby requiring that the terms be defined ““with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.”” *Id.* (quoting *United States v. Clinical Leasing Serv., Inc.*, 925 F.2d 120, 122 (5th Cir. 1991) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983))). The Fifth Circuit struck down three of the regulations for vagueness. *Id.* at 122-23.

<sup>36</sup> Of necessity, the City Council must comply with the authority granted to it under the Manassas Charter and any amendments thereto.

<sup>37</sup> *See* § 32.1-125.1 (2004) (governing inspection of hospitals by state agencies).

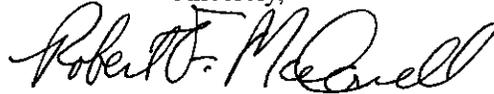
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### Conclusion

Accordingly, it is my opinion that the greater weight of the law suggests that the City Council has limited authority to enact an ordinance consistent with its charter, general statutory law, and constitutional jurisprudence, regulating abortion clinics, including one similar to the health and safety provisions of Senate Bill 146. Further, whether other localities possess similar authority to adopt such an ordinance depends on the powers granted to such localities by the General Assembly. Finally, it is my opinion that in order to survive a constitutional challenge, any ordinance regulating abortion clinics must be reasonable in scope, clearly define prohibited conduct, and not unduly burden a woman's decision-making process.

Thank you for letting me be of service to you.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert F. McDonnell". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Robert F. McDonnell