



COMMONWEALTH of VIRGINIA

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The Honorable Mark L. Cole
Member, House of Delegates
P.O. Box 6046
Fredericksburg, Virginia 22403

Dear Delegate Cole:

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 Virginia county is authorized to enact an ordinance creating a Community Development Authority (“Authority”) that permits the subsequent release or withdrawal of land from the Authority district.

Response

It is my opinion that a Virginia county may not enact an ordinance creating an Authority that permits the subsequent release or withdrawal of land from the Authority district.

Background

You advise that after publishing the notice and conducting a hearing as required by § 15.2-5156, a Virginia county adopted an ordinance creating an Authority pursuant to § 15.2-5155. You state that the ordinance was adopted on May 23, 2006 (the “Ordinance”).¹ The second paragraph of the ordinance establishes the boundaries of the Authority and provides that:

The Board of Supervisors, upon the request of the [Spotsylvania Harrison Road Connector Community Development Authority (the “CDA”)] or the Spotsylvania Mall Company (the “Developer”), may, by resolution, release or exclude from the CDA district (i) at any time before the issuance of the Bonds certain portions of land as long as at least 100 acres of land remain in the CDA district and (ii) after the issuance of the Bonds only *de minimis* portions of land not to exceed approximately two acres.²

¹ See Spotsylvania County, Va., Ordinance No. 2006-03 (May 23, 2006) (recorded with minutes of Board of Supervisors), available at <http://www.spotsylvania.va.us/downloadfiles/minutes/bos/05232006.pdf>.

² *Id.*, para. 2, at *8-9.

You note that a locality must create an Authority according to §§ 15.2-5152 through 15.2-5158. Further, you state that § 15.2-5152 appears to incorporate the requirement in § 15.2-5156 that an Authority be created only upon the petition of owners of fifty-one percent of the land area or assessed value of the tract at issue as set forth in § 15.2-5153. Finally, you observe that § 15.2-5156(B) provides that if all of the petitioning landowners waive the right to withdraw their signatures from the petition, the local governing body may adopt the Authority ordinance provided the body has complied with all other requirements and provisions of law.

You note that the Ordinance represents the fact that all petitioning landowners for the proposed Authority have waived the right to withdraw signatures from the petition in accordance with § 15.2-5156.³ You believe that such waiver implicitly assures compliance with the petition requirements to create an Authority.

You further state that an educational foundation is the largest landowner of the petitioning landowners within the proposed district. You represent that the foundation owns two tracts of land totaling 316.15 acres of the proposed district, which is comprised of 523.822 acres. Accordingly, it is your view that the educational foundation is a necessary landowner to meet the fifty-one percent land area requirement within the proposed district.⁴ You emphasize that the foundation, along with all other landowners, waived the right to withdraw their signatures from the petition. Thereby, you believe such waiver permitted the local governing body to pass the Ordinance without waiting the required thirty-day period from the public hearing.

You further advise that on January 31, 2008, the educational foundation signed an agreement (the "Agreement") with the Authority requesting that its parcels be withdrawn from the Authority boundaries. The Agreement, which you provide for review, is entitled "Agreement and Declaration of Restrictive Covenants." You observe that the first paragraph of the Agreement modifies the Authority district boundaries by excluding the foundation's property as requested by the Authority and the locality. Therefore, your view is that the educational foundation, which owns more than fifty-one percent of the land area in the Authority district, has withdrawn from the Authority although the foundation previously waived such right. Your concern is that absent the authority to enact such a withdrawal provision in the Ordinance creating the Authority, the Ordinance is void *ab initio*.

Applicable Law and Discussion

Article 6, Chapter 51 of Title 15.2, §§ 15.2-5152 through 15.2-5158, of the Virginia Water and Waste Authorities Act⁵ ("Article 6"), governs community development authorities. Such authorities typically are created to construct some particular improvement for a community. Section 15.2-5152(C) provides that "[a]ny county may by ordinance elect to assume the power to consider petitions for the creation of community development authorities in accordance with [Article 6]. A public hearing shall be held on such ordinance."

³"WHEREAS, each Landowner has waived in writing the right to withdraw its signature from the Petition in accordance with § 15.2-5156 of the [Virginia Water and Waste Authorities] Act." *Id.*, at *8.

⁴It is not clear from the information you provide whether the educational foundation's land also represents at least fifty-one percent of the assessed value of the tracts of land.

⁵See VA. CODE ANN. §§ 15.2-5100 to 15.2-5158 (2008).

Section 15.2-5153 provides that:

The owners of at least 51 percent of the *land area or assessed value of land* in the following tracts may, by petitioning the locality or localities in which the tract is located, propose the creation of a community development authority:

....

3. Any tract of any size in any country which has elected to consider such petitions pursuant to subsection C of § 15.2-5152. [Emphasis added.]

Section 15.2-5156 provides that:

A. An ordinance or resolution creating a community development authority shall not be adopted or approved until a public hearing has been held by the governing body on the question of its adoption or approval. Notice of the public hearing shall be published once a week for three successive weeks in a newspaper of general circulation within the locality. The petitioning landowners shall bear the expense of publishing the notice. The hearing shall not be held sooner than ten days after completion of publication of the notice.

B. After the public hearing and before adoption of the ordinance or resolution, the local governing body shall mail a true copy of its proposed ordinance or resolution creating the development authority to the petitioning landowners or their attorney in fact. Unless waived in writing, any petitioning landowner shall have thirty days from mailing of the proposed ordinance or resolution in which to withdraw his signature from the petition in writing prior to the vote of the local governing body on such ordinance or resolution. If any signatures on the petition are so withdrawn, the local governing body may pass the proposed ordinance or resolution only upon certification by the petitioners that the petition continues to meet the requirements of § 15.2-5152. If all petitioning landowners waive the right to withdraw their signatures from the petition, the local governing body may adopt the ordinance or resolution upon compliance with the provisions of subsection A and any other applicable provisions of law.

The overriding goal of statutory interpretation is to discern and give effect to legislative intent.⁶ Virginia long has followed and still adheres to the Dillon Rule⁷ of strict construction of statutory provisions and its corollary 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.”⁸ Additionally, the powers of boards of supervisors are fixed by statute and are limited to those conferred expressly or by necessary implication.⁹ “[T]he Dillon Rule is applicable to determine in the first instance, from express words or by

⁶See *Turner v. Commonwealth*, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983); *Vollin v. Arlington Co. Electoral Bd.*, 216 Va. 674, 678-79, 222 S.E.2d 793, 797 (1976); 1990 Op. Va. Att’y Gen. 155, 155 and opinions cited therein.

⁷*City of Richmond v. Bd. of Supvrs.*, 199 Va. 679, 684-85, 101 S.E.2d 641, 644-45 (1958) (noting Dillon’s Rule that municipal corporations have only those powers expressly granted, those necessarily or fairly implied therefrom, and those that are essential and indispensable).

⁸*County Bd. v. Brown*, 229 Va. 341, 344, 329 S.E.2d 468, 470 (1985).

⁹*Gordon v. Bd. of Supvrs.*, 207 Va. 827, 832, 153 S.E.2d 270, 274 (1967); *Johnson v. County of Goochland*, 206 Va. 235, 237, 142 S.E.2d 501, 502 (1965).

implication, whether a power exists at all. If the power cannot be found, the inquiry is at an end.”¹⁰ The Dillon Rule requires a narrow interpretation of all powers conferred on local governments since they are delegated powers.¹¹ Therefore, any doubt as to the existence of power must be resolved against the locality.¹²

The applicable rule of statutory construction requires that words be given their ordinary meaning, given the context in which they are used in a statute.¹³ Section 15.2-5152(C) grants to counties the authority to consider petitions for the creation of community development authorities.¹⁴ Should a county elect to consider such a petition, § 15.2-5156(A) requires that a public hearing be held on the question of adoption or approval of such an ordinance or resolution creating an Authority. Following the public hearing, the county is required to: (1) mail the proposed ordinance or resolution to the petitioning landowners; or (2) obtain from the petitioning landowners a written waiver of the right to withdraw their signatures from the petition.¹⁵ When the petitioning landowners do not waive their right to withdraw, the county must give such landowners thirty days from the mailing of the proposed ordinance or resolution to withdraw their signatures before the proposed ordinance or resolution may be adopted.¹⁶ However, where all of the petitioning landowners have waived their right to withdraw, the county may adopt the ordinance creating an Authority upon compliance with § 15.2-5156(A).¹⁷

“The manifest intention of the legislature, clearly disclosed by its language, must be applied.”¹⁸ The General Assembly has not expressly granted to counties the statutory authority to permit petitioning landowners to withdraw their signatures from the petition after adoption of the ordinance or resolution creating the Authority. The Dillon Rule prevents a county from acting indirectly when it is not authorized to do so by express statutory language.¹⁹ I cannot conclude that, by necessary implication, a county may permit petitioning landowners to withdraw their signatures from a petition seeking formation of an Authority subsequent to the adoption of the Authority by ordinance or resolution. I am required to conclude that a county is not indirectly, by implication, authorized to permit such withdrawal.

¹⁰Commonwealth v. County Bd., 217 Va. 558, 575, 232 S.E.2d 30, 41 (1977).

¹¹See Bd. of Supvrs. v. Countryside Invest. Co., 258 Va. 497, 522 S.E.2d 610 (1999) (holding that county board of supervisors does not have unfettered authority to decide what matters to include in subdivision ordinance; must include requirements mandated by Land Subdivision and Development Act, and may include optional provisions contained in Act); Op. Va. Att’y Gen: 2002 at 77, 78; 1974-1975 at 403, 405.

¹²2A EUGENE MCQUILLEN, THE LAW OF MUNICIPAL CORPORATIONS § 10.19, at 369 (3d ed. 1996); see also Op. Va. Att’y Gen.: 2002 at 83, 84; 2000 at 75, 76.

¹³Va. Beach v. Bd. of Supvrs., 246 Va. 233, 236, 435 S.E.2d 382, 384 (1993).

¹⁴The Supreme Court of Virginia has noted that while the effect of the word “shall” primarily is mandatory, and “may” primarily is permissive, “courts, in endeavoring to arrive at the meaning of written language, whether used in a will, a contract, or a statute, will construe ‘may’ and ‘shall’ as permissive or mandatory in accordance with the subject matter and context.” Pettus v. Hendricks, 113 Va. 326, 330, 74 S.E. 191, 193 (1912).

¹⁵Section 15.2-5156(B).

¹⁶*Id.*

¹⁷*Id.*

¹⁸Barr v. Town & Country Props., Inc., 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990) (quoting Anderson v. Commonwealth, 182 Va. 560, 566, 29 S.E.2d 838, 841 (1944)).

¹⁹See *supra* notes 7-12 and accompanying text.

Because local governments are subordinate creatures of the Commonwealth, they possess only those powers conferred upon them by the General Assembly.²⁰ An *ultra vires* act is one that is beyond the powers conferred upon a county by law.²¹ Such acts are void *ab initio*, from the beginning.²² Because I conclude that a county is not directly or “by necessary implication”²³ authorized to enact an ordinance permitting petitioning landowners to withdraw from an Authority once it has been created, I must also conclude that enacting an ordinance containing such unauthorized provision is an *ultra vires* act. Therefore, such an ordinance is void *ab initio*.

Conclusion

Accordingly, it is my opinion that a Virginia county may not enact an ordinance creating an Authority that permits the subsequent release or withdrawal of land from the Authority district.

Thank you for letting me be of service to you.

Sincerely,



Robert F. McDonnell

1:213; 1:941/08-067

²⁰ See *Gordon*, 207 Va. at 834-35, 153 S.E.2d at 275-76 (finding that county board of supervisors did not abuse its discretion in voting to lend money to airport authority; power exercised by board was expressly implied from legislative act allowing local governing body to lend real property to any authority it created).

²¹ The term “*ultra vires*” means “[u]nauthorized; beyond the scope of power allowed or granted ... by law.” BLACK’S LAW DICTIONARY 1559 (8th ed. 2004); see also *Jenkins v. City of Henderson*, 214 N.C. 244, 248-49, 199 S.E. 37, 40 (1938) (holding that *ultra vires* contract is void and municipality cannot be estopped to deny validity of contract; such contract has no legal effect and there is no right of action upon such contract); see also *Op. Va. Att’y Gen.*: 2000 at 204, 205 (concluding that absent specific legislation, local governing bodies have no authority to specify duties of constitutional officers); 1982-1983 at 66 (concluding that town’s contract for indebtedness beyond its charter limitations is void, at least to extent of excess).

²² BLACK’S LAW DICTIONARY, *supra* note 21, at 5 (defining “*ab initio*”); see also *Op. Va. Att’y Gen.*: 2005 at 157, 158 (concluding that *ultra vires* act is beyond powers of constitutional officer and such act is void *ab initio*); 1986-1987 at 315, 316 (concluding that city council’s reassessment of personal property taxes improperly refunded was void because it lacked authority); 1982-1983, *supra* note 21, at 67 (concluding that town’s contract for indebtedness beyond its charter limitations is void, at least to extent of excess).

²³ See *supra* note 9 and accompanying text.