



COMMONWEALTH of VIRGINIA

Office of the Attorney General

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November 3, 2014

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The Honorable Lionell Spruill, Sr.
Member, House of Delegates
Post Office Box 5403
Chesapeake, Virginia 23324-0403

Dear Delegate Spruill:

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 inquire whether, as a prerequisite to approving a site plan and issuing a building permit, a local governing body may require a landowner to dedicate land for a street widening and to construct certain drainage improvements.

Response

It is my opinion that a local governing body may require dedication of land for street widening and construction of drainage improvements only when the need for such conditions is generated by the proposed development. Whether that standard has been met in any particular situation is a question of fact that this Office does not determine.

Background

According to facts provided by you and the City of Chesapeake, a constituent is seeking a building permit to construct a 4,000 square-foot office warehouse on a parcel of land that is zoned M-1 Industrial. The anticipated use would be for storage and distribution of industrial steel beams, plates, and other steel products. The property has been zoned M-1 for approximately thirty years, and the proposed use is permitted under present zoning. Although the property will not be subdivided for the proposed use, Chesapeake requires approval of a site plan before a building permit will be issued.

A two-lane street ends at approximately the northern edge of the property, and the street in front of and to the south of the property is single-lane. It comes to a dead end a short distance to the south. The site plan for the proposed development has the proposed vehicular entrance to the property near the northern edge, close to or adjacent to the two-lane street, and the anticipated vehicular use generated by the property would be along the two-lane street, not in a southerly direction along the single-lane, dead-end street.

In addition, on the front of the property, directly adjacent to the single-lane street, there is a deep drainage ditch. Because the drainage ditch prevents driving on the shoulder, the single-lane street is wide

enough for only one car. Across the street, there is a residential subdivision, with houses constructed on several of the lots, and with the remaining lots to be developed in the future. The residential subdivider was not required to dedicate any property for street widening. The existing homes are situated toward the south end of the residential subdivision; accordingly, traffic generated by those houses uses the single-lane street until it reaches the two-lane street.

As conditions for approval of the site plan, Chesapeake is requiring the property owner to dedicate a fifteen-foot strip running the length of the property for street widening and a ten-foot strip as a drainage easement. Because the street dedication strip contains a deep drainage ditch, Chesapeake also is requiring the owner to relocate and to reconstruct the drainage ditch farther back on the property. Without the owner agreeing to the street dedication and relocation of the drainage ditch, Chesapeake will not approve the site plan and will not issue a building permit.

Applicable Law and Discussion

Generally, “[t]he legislative branch of a local government in the exercise of its police power has wide discretion in the enactment and amendment of zoning ordinances. Its action is presumed to be valid so long as it is not unreasonable and arbitrary.”¹ Also, “[a]s a general rule, the decision whether to . . . improve a particular street is a matter within the legislative discretion of the governing body of a municipality. In the absence of fraud, collusion, or a clear abuse of discretion, the municipality’s decision will not be disturbed by the courts.”²

Nevertheless, such local power is limited. First, in determining the legislative powers of local governing bodies, Virginia follows the Dillon Rule of strict construction,³ which states that local governing bodies “have only those powers that are expressly granted, those necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable.”⁴ Accordingly, if no delegation from the legislature can be found to authorize the enactment of a local ordinance or act, that ordinance or act is void.⁵ This Office consistently has opined that when the legislature has created an express grant of authority, that authority exists only to the extent specifically granted.⁶ Second, local authority is subject to constitutional constraints: the scenario you present implicates the constitutional protection that private property may not be taken for public use without just compensation.⁷

The Uniform Statewide Building Code requires compliance with all applicable local laws and ordinances to obtain a building permit.⁸ Correspondingly, as part of its zoning power, localities may

¹ *Cupp v. Bd. of Supvrs.*, 227 Va. 580, 596, 318 S.E.2d 407, 415 (1984) (quoting *Bd. of Supvrs. v. Carper*, 200 Va. 653, 660, 107 S.E.2d 390, 395 (1959)).

² *City of Staunton v. Cash*, 220 Va. 742, 747, 263 S.E.2d 45, 48 (1980) (citing *Appalachia v. Mainous*, 121 Va. 666, 678, 93 S.E. 566, 570 (1917) and *City of Lynchburg v. Peters*, 145 Va. 1, 13, 133 S.E. 674, 678 (1926)).

³ *Richmond v. Confre Club of Richmond, Inc.* 239 Va. 77, 79, 387 S.E.2d 471, 473 (1990).

⁴ *Sinclair v. New Cingular Wireless PCS, LLC*, 283 Va. 567, 576, 727 S.E.2d 40, 44 (2012) (internal quotation marks omitted).

⁵ *Id.* (citing *Marble Techs., Inc. v. City of Hampton*, 279 Va. 409, 416-17, 690 S.E.2d 84, 88 (2010)).

⁶ *Cf. e.g.*, 2010 Op. Va. Att’y Gen. 87, 89 n.3; 2010 Op. Va. Att’y Gen. 10, 11; 2002 Op. Va. Att’y Gen. 109, 111; 1992 Op. Va. Att’y Gen. 145, 146.

⁷ U.S. CONST. amend. IV; VA. CONST. art. I, § 11.

⁸ *See* USBC § 110.1. While the General Assembly has charged the State Board of Housing and Community Development with promulgating a Uniform Statewide Building Code, VA. CODE ANN. § 36-98 (2011), the enforcement of the promulgated regulations is “the responsibility of the local building department.” Section 36-

require submission and approval of a site plan as a condition for issuing a building permit.⁹ A locality is statutorily authorized to impose requirements for site plan approval to the same extent as authorized for subdivision approval.¹⁰ A locality is authorized to condition approval of a site plan on compliance with local regulations that provide

2. For the coordination of streets within and contiguous to the subdivision with other existing or planned streets within the general area as to location, widths, grades and drainage . . .
3. For adequate provisions for drainage and flood control . . .
4. For the extent to which and the manner in which streets shall be graded, graveled or otherwise improved and water and storm and sanitary sewer and other public utilities or other community facilities are to be installed;
5. For the acceptance of dedication for public use of any right-of-way located within any subdivision or section thereof, which has constructed or proposed to be constructed within the subdivision or section thereof, any street, curb, gutter, sidewalk, bicycle trail, drainage or sewerage system, waterline as part of a public system or other improvement dedicated for public use, and maintained by the locality, the Commonwealth, or other public agency, and for the provision of other site-related improvements required by local ordinances for vehicular ingress and egress^[11]

In applying these provisions, this Office has determined that localities may impose reasonable construction and improvement requirements for streets and water and sewer systems.¹² This Office additionally has found that the enabling statutes authorize a locality to impose reasonable dedication requirements for streets and public facilities.¹³

While Chesapeake may withhold a building permit until a valid site plan is approved, it may deny approval only within statutory and constitutional limits. Decisions of the Supreme Court of Virginia establish that a locality's general legal authority to condition approval of a site plan on the landowner's provision of adequate drainage and/or dedication of property for right-of-way is limited by application of the Dillon Rule and the constitutional guarantees due process and just compensation. Thus, in order for a

105(A)(Supp. 2014). The Uniform Statewide Building Code supersedes local regulations, § 36-98, and no provision of the Building Code authorizes a locality to require a landowner to dedicate land or construct off-site street improvements under any circumstances.

⁹ VA. CODE ANN. § 15.2-2286 (Supp. 2014).

¹⁰ Section 15.2-2246 (2012) ("Site plans or plans of development which are required to be submitted and approved in accordance with subdivision A 8 of § 15.2-2286 shall be subject to the provisions [governing subdivision ordinances,] §§ 15.2-2241 through 15.2-2245, mutatis mutandis.").

¹¹ Section 15.2-2241(A) (2012)

¹² See 1987-88 Op. Va. Att'y Gen. 204, 206 (citing 1985-86 Op. Va. Att'y Gen. 83, 86 n.2; 1981-82 Op. Va. Att'y Gen. 106; 1973-74 Op. Va. Att'y Gen. 342).

¹³ *Id.* (citing 1985-86 Op. Va. Att'y Gen. at 85; 1982-83 Op. Va. Att'y Gen. 165; 1978-79 Op. Va. Att'y Gen. 165; 1973-74 Op. Va. Att'y Gen. at 343; 1966 Op. Va. Att'y Gen. 272. There have been no legislative changes evincing that this interpretation is incorrect; the General Assembly is presumed to have had knowledge of the Attorney General's interpretation of statutes, and its failure to make corrective amendments evinces legislative acquiescence in the Attorney General's view. See *Beck v. Shelton*, 267 Va. 482, 492, 593 S.E.2d 195, 200 (2004) and cases cited therein.

locality to impose the authorized conditions, the requested improvements must be necessitated by the proposed development.¹⁴

For example, in *James City County v. Rowe*,¹⁵ the locality rezoned numerous properties on approach streets to a large amusement park that was to be constructed. Under the new zoning, property owners were required to dedicate fifty-five feet of frontage for right-of-way widening. The purpose of the right-of-way dedication was to accommodate anticipated heavy traffic to the amusement park. The Supreme Court specifically addressed

whether a local governing body has the power to enact a zoning ordinance that requires individual landowners, as a condition to the right to develop their parcels, to dedicate a portion of their fee for the purpose of providing a street, the need for which is substantially generated by public traffic demands rather than by the proposed development.^{16]}

Finding no statutory authority for the actions of the locality,¹⁷ the Court further concluded that

[T]he Constitution of Virginia expressly and unequivocally provides “that the General Assembly shall not pass any law . . . whereby private property shall be taken or damaged for public uses, without just compensation.” The dedication requirement . . . offends that constitutional guarantee, and we hold that it is invalid.^{18]}

The Court took a similar approach in a subsequent case, *Cupp v. Board of Supervisors*.¹⁹ In this case, the Cupps operated a nursery on land they owned. Although the nursery initially was permitted as a use-by-right, this use later changed to a special exception use, whereby the nursery enjoyed grandfathered status until the owners sought to replace or enlarge any building. When the Cupps filed a special exception application to so build, the county required them to construct a deceleration/right turn lane and to dedicate 100 feet of right-of-way upon which they were required to build a service street. The Court, applying the Dillon Rule, held that even though the enabling statute²⁰ afforded localities wide latitude in

¹⁴ See 1985-86 Op. Va. Att’y Gen. 83, 85 (requirement for dedication for right-of-way or other public use must be related to the need generated, in whole or in part, by the proposed development, as opposed to traffic demands unrelated to the proposed development), accord 1984-85 Op. Va. Att’y Gen. 296; 1982-83 Op. Va. Att’y Gen. 165 (in the absence of a finding that a need for a right-of-way dedication was generated by a proposed development, an ordinance requiring such dedication was invalid); 1978-79 Op. Va. Att’y Gen. 255, 256 (“subdivider cannot be required, as a precondition to subdivision plat approval, to dedicate land for improvements, the need for which is not substantially generated by the development itself”). I note that certain other related statutes, while not directly applicable here, explicitly tie the power of localities to require certain improvements or expenditures only to improvements or expenditures necessitated by the proposed development. See, e.g., VA. CODE ANN. §§ 15.2-2242(A)(5) (2012) (“A subdivision ordinance may include . . . [in several identified localities, not including Chesapeake] provisions for payment by a subdivider or developer of land of a pro rata share of the cost of reasonable and necessary street improvements, located outside the property limits of the land owned or controlled by him but serving an area having *related traffic needs to which his subdivision or development will contribute . . .*”); 15.2-2319 (authorizing “impact fees” for street improvements, but only when the improvements “*benefit the new development.*”) (emphasis added).

¹⁵ 216 Va. 128, 216 S.E.2d 199 (1975).

¹⁶ *Id.* at 138, 216 S.E.2d at 208.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ 227 Va. 580, 318 S.E. 2d 407 (1984).

²⁰ VA. CODE ANN. § 15.1-491 (predecessor statute to §§ 15.2-2280 through 15.2-2283 (2012)).

enacting zoning regulations and provisions regarding special exception and use permits, it did not grant “the power to require a citizen to turn land over to the county and build streets for the benefit of the public.”²¹ The Court further stated that even if a local governing body were authorized to impose such conditions, it could only do so where the dedication and construction requirements were related to a problem generated by the use of the subject property.²² The *Cupp* Court reasoned that requiring off-site expenditures not directly related to development may constitute an unconstitutional taking of property without just compensation.²³

In both cases, the Supreme Court also considered the scope of a locality’s general police power in determining whether the locality had the authority to impose the challenged conditions. The Court articulated its position as follows:

“The county contended that under its general police power, it could require construction of the street. We said the police power, while flexible, could not stretch that far because if it did, “no property right, indeed, no personal right, could co-exist with it.” We stated that as a general proposition, when the government takes property from a citizen it should pay for it. We held as follows: “The Board cites nothing in the constitution, enabling statutes, or case law of Virginia which empowers the sovereign to require private landowners, as a condition precedent to development, to construct or maintain public facilities on land owned by the sovereign, when the need for such facilities is not substantially generated by the proposed development. The private money necessary to fund the performance of such requirements is ‘property’, and we hold that such requirements violate the constitutional guarantee that ‘no person shall be deprived of his life, liberty, or property without due process of law.’ Constitution of Virginia, Art. I, § 11.”^[24]

In summary, while Chesapeake has authority to require adequate drainage and/or dedication of right-of-way as conditions of approving a site plan, and while its decisions in such matters are presumed to be valid, its power to withhold a building permit until a site plan is approved is subject to the Dillon Rule and the constitutional limits discussed above. To the point, such conditions may be imposed only if they are reasonably necessitated by the proposed development. If they are not, they exceed statutory authority and may constitute an unconstitutional taking of private property without just compensation. Whether these limits have been exceeded in any particular case is a question of fact to be determined by the appropriate authorities and is therefore beyond the scope of an official Opinion of this Office.²⁵

²¹ *Cupp*, 227 Va. at 594, 318 S.E.2d at 414 (quoting *Hylton Enters., Inc. v. Bd. of Supvrs*, 220 Va. 435, 440, 258 S.E.2d 577, 581 (1979)).

²² *Id.* at 594, 318 S.E.2d at 414.

²³ *Id.* at 595, 318 S.E.2d at 414-15 (quoting *Bd. of Supvrs. v. Rowe*, 216 Va. 128, 138-139; 216 S.E.2d 199 (1975) (emphasis added in *Cupp*)). See also *Cash*, 220 Va. at 746, 263 S.E.2d at 48 (1980) (upholding a city’s denial of a building permit under its zoning power because the improvements to the public street under consideration were necessary to “safely and conveniently accommodate the vehicular and pedestrian traffic generated in the area” where the lot was located).

²⁴ *Id.* at 595-96, 318 S.E.2d at 415 (quoting *Rowe*, 216 Va. at 139-40, 216 S.E.2d at 209).

²⁵ “The authority of the Attorney General to issue advisory opinions is limited to questions that are legal in nature.” 2010 Op. Va. Att’y Gen. 56, 59 n.5. “Attorneys General consistently have declined to render official opinions on specific factual matters . . .” 2009 Op. Va. Att’y Gen. 80, 81, and n.17.

Honorable Lionel Spruill, Sr.

November 3, 2014

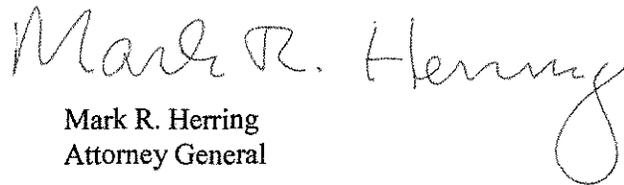
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Conclusion

Accordingly, it is my opinion that a local governing body, when approving a building permit, may require drainage improvements and dedication of land for street widening, but only when the need for the improvements is generated by the proposed development. Whether that standard has been met in any particular situation is a question of fact this Office cannot determine.

With kindest regards, I am

Very truly yours,

A handwritten signature in cursive script that reads "Mark R. Herring". The signature is written in dark ink and is positioned to the right of the typed name.

Mark R. Herring
Attorney General