



# COMMONWEALTH of VIRGINIA

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November 21, 2014

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The Honorable Brenda L. Pogge  
Member, House of Delegates  
Post Office Box 196  
Norge, Virginia 23127

Dear Delegate Pogge:

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 § 15.2-2306 of the *Code of Virginia* grants localities the authority to require a property owner to procure an archaeological survey to determine the existence of historic or archaeological resources on his property.<sup>1</sup>

## Response

It is my opinion that § 15.2-2306 allows a locality to require - as a condition of developing property in an area of known historical or architectural significance - documentation, reasonable under the circumstances, that the development will preserve or accommodate historical or archaeological resources. Whether an archaeological survey is necessary to meet the reasonable documentation requirement is a question of fact about which this Office can express no opinion.

## Applicable Law and Discussion

Historic areas and sites have long been recognized in Virginia as important resources worthy of protection. Indeed, the Constitution of Virginia states, "it shall be the policy of the Commonwealth to conserve, develop, and utilize . . . its historical sites and buildings."<sup>2</sup> The ability of localities to create historic districts as provided by § 15.2-2306(A)(1) has been recognized repeatedly by the Supreme Court of Virginia.<sup>3</sup>

Consistent with this policy, the General Assembly has granted localities wide powers to ensure historic and archaeological preservation. For instance, § 15.2-2306 authorizes localities to create historic

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<sup>1</sup> From the question presented, this inquiry entails only the scope of a locality's authority involving land within a designated historic district. Consequently, no opinion is expressed or implied herein about a locality's authority to preserve and protect historic, architectural, or archaeological resources that are not located in a historic district.

<sup>2</sup> VA. CONST. art. XI, § 1.

<sup>3</sup> See, e.g., *Bd. of Spvrs. v. Rowe*, 216 Va. 128, 216 S.E.2d 199 (1975); *Bell v. City Council*, 224 Va. 490, 297 S.E.2d 810 (1982); *Covel v. Town of Vienna*, 280 Va. 151, 694 S.E.2d 609 (2010).

districts and to control development in such areas in order to preserve historical, architectural, archaeological, or cultural resources:

A. 1. Any locality may adopt an ordinance setting forth . . . buildings or structures within the locality having an important historical, architectural, archaeological, or cultural interest, any historic areas within the locality as defined by § 15.2-2201 and areas of unique architectural value located within designated conservation, rehabilitation or redevelopment districts, amending the existing zoning ordinance and delineating one or more historic districts . . . . A governing body may provide in the ordinance that the applicant must submit documentation that any development in an area of the locality of known historical or archaeological significance will preserve or accommodate the historical or archaeological resources.

The term “historic area” is defined as “an area containing one or more buildings or places in which historic events occurred or having special public value because of notable architectural, archaeological, or other features relating to the cultural or artistic heritage of the community, of such significance to warrant conservation and preservation.” Thus, it encompasses archaeological matters as well as architectural and historical matters.<sup>4</sup>

Section 15.2-2306(A)(1), quoted above, explicitly allows localities to require “documentation that any development in an area . . . of known historical or archaeological significance will preserve or accommodate the historical or archaeological resources.” The remaining questions, then, are whether an archaeological survey report is the type of documentation that reasonably may be required, and the circumstances under which it may be required.

Applying the standard of review set forth by statute,<sup>5</sup> the Supreme Court of Virginia has held that “our review of the decision of a local governing body relating to a historic district is limited by statute to ‘whether that decision is arbitrary and capricious and constitutes an abuse of discretion’ or is ‘contrary to law’ . . . . The decision of the governing body is presumed to be correct . . . . The party challenging the decision has the burden of proving ‘it is clearly unreasonable, arbitrary or capricious, and that it bears no reasonable or substantial relation to the public health, safety, morals, or general welfare.’<sup>6</sup> Nonetheless, the Court has overturned a local historic preservation restriction when the locality failed to meet its burden of showing the restriction to be reasonable.<sup>7</sup>

Thus, the validity of any particular requirement imposed by a locality in connection with historic preservation is a question of reasonableness, and therefore one of fact, to be measured by the legal standards articulated by statute and the cases cited here. While some documentation may be required to demonstrate that the development will preserve resources of historical or archaeological significance, the requirement may not be unreasonable or arbitrary or capricious, and it must bear a substantial relation to the historic, archaeological, or historical interest in question. A party who is aggrieved by a local decision related to historic preservation, be it the requirement of an archaeological survey or any other decision or requirement, has a right of appeal to Circuit Court.<sup>8</sup>

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<sup>4</sup> VA. CODE ANN. § 15.2-2201 (Supp. 2014).

<sup>5</sup> Section 15.2-2306(A)(3) (2012).

<sup>6</sup> *Covel*, 280 Va. at 157, 694 S.E.2d at 613.

<sup>7</sup> *Norton v. City of Danville*, 268 Va. 402, 602 S.E.2d 126 (2004).

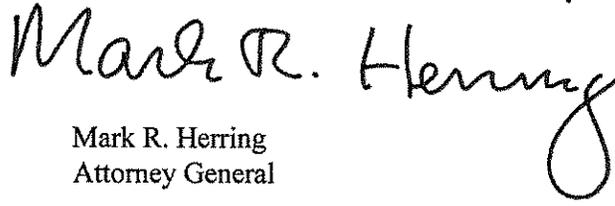
<sup>8</sup> Section 15.2-2306(A)(3).

**Conclusion**

Accordingly, it is my opinion that § 15.2-2306 allows a locality to require certain documentation as a condition of developing property that is in a designated area of known historical or archaeological significance. Any documentation that may be required is subject to a standard of reasonableness. Whether an archaeological survey is a reasonable requirement for this type of documentation is a question of fact depending on the particular circumstances at hand, on which I can express no general opinion.

With kindest regards, I am

Very truly yours,

A handwritten signature in black ink that reads "Mark R. Herring". The signature is written in a cursive style with a large, looping flourish at the end of the word "Herring".

Mark R. Herring  
Attorney General