COUNTIES, CITIES AND TOWNS: PLANNING, SUBDIVISION OF LAND AND ZONING.

Governing body has no authority to refuse to consider rezoning petition previously withdrawn after planning commission has completed its review. Zoning ordinance may not impose time period not prescribed by statute after which property owner may not withdraw petition prior to public hearing before governing body.

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You ask several questions regarding the authority of a county, pursuant to § 15.1491(g) of the Code of Virginia, to include restrictions in its zoning ordinance on the withdrawal of rezoning petitions and on repeated submissions within a specified time period of substantially the same rezoning petition.

Virginia's land use and zoning enabling statutes are detailed in Chapter 11 of Title 15.1.1 Section 15.1427.1 requires "[t]he governing body of every county and municipality [to] create a local planning commission," and provides that "such planning commissions shall serve primarily in an advisory capacity to the governing bodies." Section 15.1493(B) requires that any amendment to a zoning ordinance be referred to the local planning commission for its recommendation to the governing body.

Section 15.1491 sets out the matters that a county or municipality may regulate in its zoning ordinance. Section 15.1491(g), which relates to amendments to the zoning ordinance, states that the ordinance "may provide for the consideration of proposed amendments only at specified intervals of time, and may further provide that substantially the same petition will not be reconsidered within a specific period, not exceeding one year." You ask whether a petition has been "considered" for the purposes of § 15.1491(g) once the planning commission has held its hearing on the petition and made its recommendation to the governing body, and whether "reconsideration" of the petition may be denied for a period of time not to exceed one year, despite the fact that a petitioner withdraws the petition before it is "considered" by the governing body.

The zoning ordinance amendment mechanism grants property owners the right to petition for removal of restrictions placed on their property through the local government's exercise of its legislative power to regulate the use of
land within the jurisdiction. When a locality relinquishes its power to amend a zoning ordinance, it limits the right of property owners to seek changes in the restrictions imposed on their property. In the case of Board of Supervisors v. Horne, the Supreme Court of Virginia considered the effect on property owners of a governing body's refusal to exercise a legislative function granted by the zoning and land use enabling statutes.

The ordinance challenged in Horne prohibited for a specified period of time the filing of applications for approval of site plans and preliminary subdivision plats. In ruling that such prohibitions are invalid, the Court noted that the General Assembly in the land use statutes had "undertaken to achieve a delicate balance between the individual property rights of its citizens and the health, safety and general welfare of the public as promoted by reasonable restrictions on those property rights." In light of this "delicate balance," the Court refused to expand the powers expressly granted local governments in § 15.1491 by interpreting the statute as constituting implied authorization for such restrictions on the submission of subdivision and site plan proposals. A prior opinion of the Attorney General applies the same reasoning to conclude that there is no statutory authority for a locality to declare a moratorium on considering zoning changes.

Although not far-reaching like a moratorium on zoning changes, a requirement that a petition for rezoning may not be reconsidered for a period of time not to exceed one year after the petitioner withdraws the petition is similar in effect. Both a moratorium and a restriction on reconsideration of a petition for a period of time limit the rights of the governing body to exercise a legislative function and the rights of property owners to use their property as they wish. Accordingly, your question implicates the same "delicate balance" concern and the need for express statutory authority to support enactment of the ordinance.

Section 15.1491(g) clearly permits a governing body to relinquish its legislative power to "consider" a petition for a zoning amendment under certain circumstances. To conclude, however, that § 15.1491(g) authorizes adoption of the ordinance you propose would require interpreting "consideration" as including also the planning commission's review of the petition and its recommendation to the governing body, despite the fact that the planning commission serves only in an advisory capacity to the governing body and has no authority to grant or deny the petition.

In my view, this expansive reading would conflict with the strict statutory construction of § 15.1491 adopted by the Court in Board of Supervisors v. Horne, and would threaten "the delicate balance" between public and private interests established in the enabling legislation. Moreover, it would be
contrary to the principles repeatedly stated in court decisions and Attorney General opinions that a planning commission has no authority beyond that granted by statute, that a governing body may not delegate its legislative power to a planning commission, and that a zoning ordinance may not add requirements to the zoning process.\(^9\)

Accordingly, it is my opinion that § 15.1491(g) does not authorize a governing body to refuse to consider a rezoning petition previously withdrawn after the planning commission had completed its review.

You ask also whether the zoning ordinance may require that an applicant withdraw his petition within a set number of days prior to the public hearing before the governing body. Section 15.1491(g) requires a governing body to act on a petition for amendment within a reasonable time, not to exceed twelve months, unless the applicant withdraws the petition. The section further provides that "upon such withdrawal, processing of the petition shall cease without further action as otherwise would be required by this subdivision." No language in § 15.1491(g) authorizes imposing a time limit after which a petitioner may not withdraw his petition, and, in fact, such a requirement would be contrary to the language mandating that the governing body cease its process upon withdrawal of the petition. For the reasons stated in response to your first question, it is my opinion that a governing body has no authority to impose this additional requirement on property owners' access to the zoning amendment process.

\(^1\)Sections 15.1427 to 15.1503.4.

\(^2\)See also § 15.1496 (governing body may provide by ordinance that substantially same application for special exceptions and variances will not be considered by board of zoning appeals within specified period, not to exceed one year).

\(^3\)See § 15.1486 (governing body may regulate, restrict and prohibit uses of land and erection of structures).


\(^5\)Id. at 120, 215 S.E.2d at 458.

\(^6\)Id.

The petition must be "substantially the same," and the period may not exceed "one year." Section 15.1491(g). This restrictive language indicates a legislative intent to provide a narrow exclusion from the amendment process.

See Laird v. City of Danville, 225 Va. 256, 261, 302 S.E.2d 21, 24 (1983) (because zoning and rezoning constitute legislative acts, such acts can be performed only by county's legislative body-board of supervisors-and then only by ordinance), construed in Krisnathevin v. Fairfax County, 243 Va. 251, 254, 414 S.E.2d 595, 596 (1992); see also Arkenberg v. City of Topeka, 197 Kan. 731, 735, 421 P.2d 213, 217 (1966) (until governing body makes final decision, petition for rezoning remains in process of consideration; no finality in any action taken by planning commission). A governing body has no authority to delegate any of its legislative function to a planning commission. See Op. Va. Att'y Gen.: 1989 at 113, 114 (planning commission has no authority beyond that expressly conferred by statute); 1981-1982 at 114, 115 (governing body cannot enact ordinance requiring two-thirds majority vote by governing body to overrule recommendation of planning commission; cannot enact self-imposed restrictions beyond those authorized by statute); 1978-1979 at 203 (planning commission's role in amendment process is advisory only); see also Op. Va. Att'y Gen.: 1977-1978 at 285 (governing body may not insert additional steps into rezoning process); 1974-1975 at 602, 60304 (ordinance restricting property owner's right to petition for zoning amendment is inconsistent with state law and invalid). Compare 1989 Op. Va. Att'y Gen. 115, 116 (governing body may enact reasonable provisions for administering zoning amendments; requirement that conditional zoning proffers be submitted in writing seven days before public hearing is reasonable means for allowing adequate review).