

OP. NO. 04-014

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

**Authority for county to include variance procedure in its
subdivision ordinance.**

The Honorable Phillip P. Puckett
Member, Senate of Virginia
May 6, 2004

Issue Presented

You ask whether a county that has not enacted a zoning ordinance may include a variance provision in its subdivision ordinance.

Response

It is my opinion that a county may include a variance provision in its subdivision ordinance, regardless of whether the county has enacted a zoning ordinance.

Applicable Law and Discussion

Opinions of the Attorney General rendered in 1976 and 1982 determine that a county may not include a variance procedure in its subdivision ordinance.¹ These determinations, however, were based on Articles 7 and 8, Chapter 11 of Title 15.1,² as they were enacted at the time of the opinions. At the time of these prior opinions, § 15.1-495 authorized a board of zoning appeals to grant variances;³ however, Article 7, which governed subdivision regulations, did not authorize a variance procedure.⁴ The opinions conclude that because a variance procedure was specifically authorized in the zoning context and no mention of such procedure was included in the subdivision enabling legislation, a variance procedure could not be included in a subdivision ordinance.⁵

In 1983, however, the General Assembly amended Article 7 by adding the following language to § 15.1-466:

B. A subdivision ordinance may include provisions for variations in or exceptions to the general regulations of the subdivision ordinance in cases of unusual

situations or when strict adherence to the general regulations would result in substantial injustice or hardship.^[6]

Section 15.2-2242, the successor statute to § 15.1-466, includes this identical language.⁷ It is my opinion, therefore, that, subsequent to the 1976 and 1982 opinions, the General Assembly specifically authorized localities to include variance provisions in their subdivision ordinances. This position is supported by the fact that subsequent to enactment of the relevant statutory language, both the Supreme Court of Virginia and a circuit court decided cases involving the standards for granting variances under subdivision ordinances.⁸

Nothing in § 15.2-2242 indicates that a locality's failure to enact a zoning ordinance impacts the locality's authority to include a variance procedure in its subdivision ordinance. "When the language of a statute is unambiguous, we are bound by the plain meaning of that language and may not assign the words a construction that amounts to holding that the General Assembly did not mean what it actually stated."⁹ Based on the plain language of § 15.2-2242, a locality may include a variance procedure in its subdivision ordinance.

Conclusion

Accordingly, it is my opinion that a county may include a variance procedure in its subdivision ordinance, regardless of whether the county has enacted a zoning ordinance.

¹ See Op. Va. Att'y Gen.: 1982-1983 at 374; 1976-1977 at 199.

² Articles 7 and 8, Chapter 11 of Title 15.1 governed land subdivision and development and zoning in counties, cities and towns, respectively.

³ See 1976-1977 Op. Va. Att'y Gen., *supra* note 1, at 200, *cited in* 1982-1983 Op. Va. Att'y Gen., *supra* note 1, at 375; *see also* 1975 Va. Acts chs. 521, 641, at 1110, 1110, 1313, 1329, respectively (citing § 15.1-495(b)).

⁴ Op. Va. Att'y Gen.: 1982-1983, *supra* note 1, at 375; 1976-1977, *supra* note 1, at 200; *compare* §§ 15.1-465 to 15.1-483 (Michie

Supp. 1976), and §§ 15.1-465 to 15.1-485 (Michie Repl. Vol. 1981 & Supp. 1982) (comprising Article 7, Chapter 11 of Title 15.1).

⁵Op. Va. Att'y Gen.: 1982-1983, *supra* note 1, at 375; 1976-1977, *supra* note 1, at 201 (applying principle *expressio unius est exclusio alterius*).

⁶1983 Va. Acts ch. 167, at 184, 185.

⁷See § 15.2-2242(1) (LexisNexis Repl. Vol. 2003).

⁸See *Baum v. Lunsford*, 235 Va. 5, 365 S.E.2d 739 (1988); *Gladstone v. Fairfax County Bd. of Supvrs.*, 38 Va. Cir. 309 (Fairfax 1996).

⁹*Commonwealth v. Diaz*, 266 Va. 260, 265, 585 S.E.2d 552, 554 (2003) (citing *Williams v. Commonwealth*, 265 Va. 268, 576 S.E.2d 468 (2003); *Mozley v. Prestwould Bd. of Dirs.*, 264 Va. 549, 570 S.E.2d 817 (2002)).

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