



COMMONWEALTH of VIRGINIA

Office of the Attorney General

Robert F. McDonnell
Attorney General

900 East Main Street
Richmond, Virginia 23219
804-786-2071
FAX 804-786-1991
Virginia Relay Services
800-828-1120
7-1-1

January 6, 2009

Elizabeth K. Dillon, Esq.
Botetourt County Attorney
415 S. College Avenue
Salem, Virginia 24153

Dear Ms. Dillon:

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 § 15.2-101(A) grandfathers the “suitability of land provisions” contained in §§ 21-64 and 21-122 of the Botetourt County Code.

Response

It is my opinion that § 15.2-101(A) does not grandfather the “suitability of land provisions” contained in §§ 21-64 and 21-122 of the Botetourt County Code.

Background

You advise that the § 21-64 of Botetourt County Code (“Ordinance § 21-64”) directs that the subdivision agent

shall not approve the subdivision of land if, from adequate investigation conducted by all public agencies concerned, it has been determined that in the best interest of the public the site is not suitable for platting and development purposes of the kind proposed.^[1]

You also advise that in 2002 Botetourt County added § 21-122 (“Ordinance § 21-122”) to the Subdivision Ordinances, which includes a similar suitability of land provision, but specifies the conditions that may be considered by the planning commission.² You relate that Botetourt County is considering amendments to eliminate the “suitability of land” provisions in §§ 21-64 and 21-122 because the provisions exceed the authority delegated by the General Assembly to localities in Article 6, Chapter 22 of Title 15.2, §§ 15.2-2240 through 15.2-2279. You also advise that it has been suggested that Ordinance § 21-64 was authorized by enabling legislation when it was adopted in 1958 and therefore is “grandfathered.”

¹See BOTETOURT COUNTY, VA., CODE § 21-64 (2002), available at <http://www.co.botetourt.va.us/government/documents/mc/ch021.pdf>.

²See *id.*, § 21-122 (2002).

You conclude that the “suitability of land” provisions in Ordinances § 21-64 and § 21-122 are not authorized under the current Virginia subdivision enabling statutes and are not grandfathered provisions.³

Applicable Law and Discussion

The term “grandfathering” simply is a matter of legislative grace where the governing body, by ordinance or other legitimate formal policy, carves out a legislative exception to the general application of regulations for a particular provision.⁴ The normal purpose of a “grandfather” provision is to delay the application of some new and stricter standard.⁵

The power of a local governing body, unlike that of the General Assembly, “must be exercised pursuant to an express grant”⁶ because the powers of a county “are limited to those conferred expressly or by necessary implication.”⁷ “If the power cannot be found, the inquiry is at an end.”⁸ The Dillon Rule requires a narrow interpretation of all powers conferred on local governments since they are delegated powers.⁹ Therefore, any doubt as to the existence of power must be resolved against the locality.¹⁰

Section 15.2-101(A) provides that:

The repeal of Title 15.1 effective as of December 1, 1997, shall not affect the powers of any locality with respect to any ordinance, resolution or by-law adopted and not repealed or rescinded prior to such date[.]

Although § 15.2-101(A) does not define the term “power,”¹¹ it generally means “[t]he ability to act or not act”; “[t]he legal right or authorization to act or not act.”¹² Words are to be given their ordinary meaning, given the context in which they are used in a statute.¹³ “The manifest intention of the legislature, clearly

³Section 2.2-505(B) requires that an opinion request from a county attorney “shall itself be in the form of an opinion embodying a precise statement of all facts together with such attorney’s legal conclusions.”

⁴County of Fairfax v. Fleet Indus. Park Ltd. P’ship, 242 Va. 426, 431, 410 S.E.2d 669, 672 (1991); *see also* Parker v. County of Madison, 244 Va. 39, 41-42, 418 S.E.2d 855, 856 (1992) (noting principle that new laws apply only to future cases unless it is clear that law was intended to have retrospective effect).

⁵Op. Va. Att’y Gen.: 2004 at 146, 150; 1980-1981 at 331, 331.

⁶Nat’l Realty Corp. v. Va. Beach, 209 Va. 172, 175, 163 S.E.2d 154, 156 (1968).

⁷Bd. of Supvrs. v. Horne, 216 Va. 113, 117, 215 S.E.2d 453, 455 (1975).

⁸Commonwealth v. County Bd., 217 Va. 558, 575, 232 S.E.2d 30, 41 (1977).

⁹*See* Bd. of Supvrs. v. Countryside Invest. Co., 258 Va. 497, 504-05, 522 S.E.2d 610, 613-14 (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.

¹⁰2A 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.

¹¹When a term is not defined, it must be given its ordinary meaning. *See* McKeon v. Commonwealth, 211 Va. 24, 27, 175 S.E.2d 282, 284 (1970).

¹²BLACK’S LAW DICTIONARY 1207 (8th ed. 2004).

¹³Va. Beach v. Bd. of Supvrs., 246 Va. 233, 236-37, 435 S.E.2d 382, 384 (1993).

Ms. Elizabeth G. Dillon
January 6, 2009
Page 3

disclosed by its language, must be applied.”¹⁴ Therefore, it is clear that the authorization or authority of a locality to act pursuant to a grant or delegation of power by the General Assembly is not affected by the repeal of Title 15.1 with respect to local acts taken pursuant to a grant of power resulting in enactment of a local ordinance, resolution, or by law in effect prior to December 1, 1997. Section 15.2-101(A) simply means that the recodification and repeal of a particular statute that formerly authorized an action does not invalidate the actions taken by localities under a former grant of power by the General Assembly. However, it does not operate to grandfather ordinances adopted under a former grant of statutory authority.

Conclusion

Accordingly, it is my opinion that § 15.2-101(A) does not grandfather the “suitability of land provisions” contained in §§ 21-64 and 21-122 of the Botetourt County Code.

Thank you for letting me be of service to you.

Sincerely,

A handwritten signature in black ink, reading "Robert F. McDonnell". The signature is written in a cursive, flowing style with a large, prominent "R" and "M".

Robert F. McDonnell

1:213; 1:941/08-070

¹⁴Barr 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)).