



COMMONWEALTH OF VIRGINIA

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September 1, 2009

James E. Barnett, Esq.
York County Attorney
P.O. Box 532
Yorktown, Virginia 23690-0532

Dear Mr. Barnett:

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 localities in Virginia may regulate or prohibit the use of fertilizers within their jurisdictional boundaries.

Response

It is my opinion that a Virginia locality is authorized by § 10.1-603.7(A) and § 15.2-924.1(A) to adopt an ordinance regulating or prohibiting the use or application of fertilizers within its jurisdictional boundaries provided the locality makes the factual findings required by § 10.1-603.7(A) and determines that the ordinance is necessary to prevent any further degradation to water resources or to address specific existing water pollution. The locality also must comply with the public hearing procedures required by § 10.1-603.7(A).

Background

You note that virtually all of York County drains either directly or indirectly into the Chesapeake Bay. You point out that the continued health of the Bay and its tributaries is important to the quality of residential life in the County and its tourism industry as well as the livelihoods of local watermen. Further, you note that fertilizer runoff has been identified as one of the major threats to the Bay's ecosystem. You also explain that various citizen groups in the County are concerned about the health of the Bay and have urged the York County Board of Supervisors to consider adopting a ban on, or stringent regulation of, the application of fertilizers and other lawn chemicals. Thus, you seek guidance concerning the authority of a locality to enact such a ban or regulation.

Applicable Law and Discussion

In determining the validity of a local government's exercise of legislative authority, Virginia follows the Dillon Rule of strict construction that provides "municipal corporations have only those powers expressly granted, those necessarily or fairly implied from expressly granted powers, and those

that are essential and indispensable”¹ and its corollary that “[t]he powers of county boards of supervisors are fixed by statute and are limited to those powers conferred expressly or by necessary implication.”² Therefore, to have the power to act in a certain area, local governments must have express enabling legislation or authority that is necessarily implied from enabling legislation.³

Section 3.2-3602 mandates that “[n]o locality shall regulate the registration, packaging, labeling, sale, or distribution of fertilizers.” However, § 3.2-3602 does not prohibit localities from regulating the use or application of fertilizers. Section 15.2-924.1(A) addresses this question directly, providing that:

No locality shall regulate the use, application, or storage of fertilizers, as defined in Chapter 36 (§ 3.2-3600 et seq.) of Title 3.2, except by ordinances consistent with the requirements of the Chesapeake Bay Preservation Act (§ 10.1-2100 et seq.), the Erosion and Sediment Control Law (§ 10.1-560 et seq.), the Stormwater Management Act (§ 10.1-603.1 et seq.) or other nonpoint source regulations promulgated by the Department of Conservation and Recreation or the Soil and Water Conservation Board.

I am not aware of any requirements in the Chesapeake Bay Preservation Act or its implementing regulations or in the Erosion and Sediment Control Law or its implementing regulations that specifically address the authority of a locality to control the use or application of fertilizers.

The Stormwater Management Act⁴ and its implementing regulations do not include any requirements concerning the regulation of fertilizer use and application by localities. However, § 10.1-603.7(A) of the Stormwater Act authorizes localities

to adopt more stringent stormwater management ordinances than those necessary to ensure compliance with the [Virginia Soil and Water Conservation] Board’s minimum requirements, provided that the more stringent ordinances are based upon factual findings of local or regional comprehensive watershed management studies or findings developed through the implementation of a MS4 permit or a locally adopted watershed management study and are determined by the locality to be necessary to prevent any further degradation to water resources or to address specific existing water pollution including nutrient and sediment loadings, stream channel erosion, depleted groundwater resources,

¹Bd. of Supvrs. v. Countryside Investment Co., 258 Va. 497, 503, 522 S.E.2d 610, 613 (1999) (quoting Chesapeake v. Gardner Enters., 253 Va. 243, 246, 482 S.E.2d 812, 814 (1997)); accord Commonwealth v. County Bd., 217 Va. 558, 574, 232 S.E.2d 30, 40 (1977); Bd. of Supvrs. v. Home, 216 Va. 113, 117, 215 S.E.2d 453, 455 (1975); City of Richmond v. Bd. of Supvrs., 199 Va. 679, 684, 101 S.E.2d 641, 645 (1958); 2008 Op. Va. Atty. Gen. 37, 38.

²County Bd. v. Brown, 229 Va. 341, 344, 329 S.E.2d 468, 470 (1985); accord Gordon v. Bd. of Supvrs., 207 Va. 827, 832, 153 S.E.2d 270, 274 (1967).

³Any doubt as to the existence of such power must be resolved against the locality. See *Board of Supervisors*, 199 Va. at 684, 101 S.E.2d at 645; 2009 Op. Va. Atty. Gen. No. 09-027, available at <http://www.vaag.com/OPINIONS/2009opns/09-027-Rowan.pdf>.

⁴See VA. CODE ANN. tit. 10.1, ch. 6, art. 1.1, § 10.1-603.1 (not set out), §§ 10.1-603.2 to 10.1-603.15 (2006 & Supp. 2009).

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or excessive localized flooding within the watershed and that prior to adopting more stringent ordinances a public hearing is held after giving due notice.

Furthermore, the Virginia Stormwater Management Program (VSMP) Permit Regulations,⁵ promulgated by the Virginia Soil and Water Conservation Board pursuant to §10.1-603.4, require applications for VSMP permits for large and medium municipal separate storm sewer systems (MS4s) to include a management program that contains a description of control measures that will be used to reduce pollutants from stormwater runoff from commercial and residential areas, including:

A description of a program to reduce to the maximum extent practicable, pollutants in discharges from municipal separate storm sewers associated with the application of pesticides, herbicides and fertilizer that will include, as appropriate, controls such as educational activities, permits, certifications and other measures for commercial applicators and distributors, and controls for application in public right-of-ways and at municipal facilities.^[6]

Thus, the VSMP Permit Regulations recognize that control of the application of fertilizers is an appropriate method to reduce pollutants in stormwater runoff.

A local ordinance that regulates the use and application of fertilizers would be a more stringent stormwater management ordinance than that necessary to comply with the Virginia Soil and Water Conservation Board's minimum requirements under the Stormwater Management Act as permitted by § 10.1-603.7(A). Such an ordinance is authorized by §§ 10.1-603.7(A) and 15.2-924.1(A) when the stated statutory requirements are met.

Conclusion

Accordingly, it is my opinion that a Virginia locality is authorized by § 10.1-603.7(A) and § 15.2-924.1(A) to adopt an ordinance regulating or prohibiting the use or application of fertilizers within its jurisdictional boundaries provided the locality makes the factual findings required by § 10.1-603.7(A) and determines that the ordinance is necessary to prevent any further degradation to water resources or to address specific existing water pollution. The locality also must comply with the public hearing procedures required by § 10.1-603.7(A).

Thank you for letting me be of service to you.

Sincerely,

A handwritten signature in black ink, appearing to read 'W C Mims', with a stylized flourish at the end.

William C. Mims

⁵ 4 VA. ADMIN. CODE §§ 50-60-10 to 50-60-1240 (Supp. 2008) (codified in scattered sections).

⁶ 4 VA. ADMIN. CODE § 50-60-380(C)(2)(d)(1)(f).