



# COMMONWEALTH OF VIRGINIA

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October 16, 2009

The Honorable M. Kirkland Cox  
Member, House of Delegates  
131 Old Brickhouse Lane  
Colonial Heights, Virginia 23834

Dear Delegate Cox:

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 may impose bonding requirements in excess of ten percent of the estimated construction costs for the administrative allowance required from a developer.

## Response

It is my opinion that localities may not impose bonding requirements that exceed ten percent of the estimated construction costs for the administrative allowance required from a developer pursuant to § 15.2-2241(5).

## Applicable Law and Discussion

Section 15.2-2241(5) provides, in pertinent part, that:

**5. (Effective until July 1, 2014)** For the acceptance of dedication for public use of any right-of-way located within any subdivision or section thereof, which has constructed or proposed to be constructed within the subdivision or section thereof, any street, curb, gutter, sidewalk, bicycle trail, drainage or sewerage system, waterline as part of a public system or other improvement dedicated for public use, and maintained by the locality, the Commonwealth, or other public agency, and for the provision of other site-related improvements required by local ordinances for vehicular ingress and egress, including traffic signalization and control, for public access streets, for structures necessary to ensure stability of critical slopes, and for storm water management facilities, financed or to be financed in whole or in part by private funds only if the owner or developer (i) certifies to the governing body that the construction costs have been paid to the person constructing such facilities; (ii) furnishes to the governing body a certified check or cash escrow in the amount of the estimated costs of construction or a personal, corporate or property bond, with surety satisfactory to the governing body or its designated administrative agency, in an amount sufficient for and conditioned upon the construction of such facilities, or a contract for the construction of such facilities and the contractor's bond, with like surety, in like amount and so conditioned; or (iii) furnishes to the

governing body a bank or savings institution's letter of credit on certain designated funds satisfactory to the governing body or its designated administrative agency as to the bank or savings institution, the amount and the form. The amount of such certified check, cash escrow, bond, or letter of credit shall not exceed the total of the estimated cost of construction based on unit prices for new public or private sector construction in the locality and a reasonable allowance for estimated administrative costs, inflation, and potential damage to existing roads or utilities, which *shall not exceed 10 percent* of the estimated construction costs. "Such facilities," as used in this section, means those facilities specifically provided for in this section. [Emphasis added.]

The power of a local governing body, unlike that of the General Assembly, "must be exercised pursuant to an express grant."<sup>1</sup> Section 15.2-2241(5) specifically provides that the amount for administrative allowance required from a developer "*shall not exceed 10 percent.*" (Emphasis added.) Prior to July 1, 2009, the amount permitted by § 15.2-2241(5) was "25 percent."<sup>2</sup> When the General Assembly amends a statutory provision, a presumption arises that the legislature intended to change existing law.<sup>3</sup> Clearly, such was the intent of the 2009 Session of the General Assembly in amending § 15.2-2241(5) as the only change was the reduction of the required bonding amount.<sup>4</sup>

### Conclusion

Accordingly, it is my opinion that localities may not impose bonding requirements that exceed ten percent of the estimated construction costs for the administrative allowance required from a developer pursuant to § 15.2-2241(5).

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

1:845; 1:941/09-074

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<sup>1</sup>Nat'l Realty Corp. v. Va. Beach, 209 Va. 172, 175, 163 S.E. 154, 156 (1968).

<sup>2</sup>See 2009 Va. Acts ch. 193, available at <http://leg1.state.va.us/cgi-bin/legp504.exe?091+ful+CHAP0193> (amending § 15.2-2241(5) and deleting "25" and replacing it with "10" percent). However, I note that on July 1, 2014, the amount will revert to "25 percent." See *id.*, cl. 2 (mandating that provisions of act will expire on July 1, 2014).

<sup>3</sup>See *Wisniewski v. Johnson*, 223 Va. 141, 144, 286 S.E.2d 223, 224-25 (1982); *City of Richmond v. Sutherland*, 114 Va. 688, 693, 77 S.E. 470, 472 (1913).

<sup>4</sup>See 2009 Va. Acts ch. 193, *supra* note 2. Further, there is a presumption that an amendment to a law is intended to have some meaning and is not intended to be unnecessary or vain. See *Cape Henry Towers, Inc. v. Nat'l Gypsum Co.*, 229 Va. 596, 600, 331 S.E.2d 476, 479 (1985); 2007 Op. Va. Att'y Gen. 69, 71. The amendment to § 15.2-2241(5) would be meaningless if not read to reduce the bonding requirement from twenty-five to ten percent during the effective period of the enactment. See 2009 Va. Acts ch. 193, *supra* note 2, cl. 2 (mandating that provisions of act will expire on July 1, 2014).