



COMMONWEALTH of VIRGINIA

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The Honorable Stephen H. Martin
Member, Senate of Virginia
P.O. Box 700
Richmond, Virginia 23832

Dear Senator Martin:

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 § 15.2-2157(C) prevents a Virginia locality from requiring a developer to obtain a special exception to the local zoning ordinance in order to construct a privately-owned alternative onsite sewage system under the circumstances contemplated by that subsection.

Response

It is my opinion that a Virginia locality cannot require an owner to obtain a special exception to a local zoning ordinance in order to install an alternative onsite sewage system if the conditions set forth in § 15.2-2157(C) exist, namely that (i) there is no sewer or sewerage disposal facility available and (ii) the alternative onsite sewage system has been approved by the Virginia Department of Health for use in the particular circumstances and conditions in which the proposed system is to be operating.

Background

Alternative onsite sewage systems, as well as conventional systems, are regulated by the Virginia Department of Health. Section 32.1-163 defines a conventional onsite sewage system as "a treatment works consisting of one or more septic tanks with gravity, pumped, or siphoned conveyance to a gravity distributed subsurface drainfield." Conversely, § 32.1-163 defines an alternative onsite sewage system as, "a treatment works that is not a conventional onsite sewage system and does not result in a point source discharge."¹ Alternative systems are often utilized due to soils being unsuitable for conventional septic systems, or if there are too many conventional septic systems in one area, or the systems are too close to groundwater or surface waters.²

Alternative systems use different treatment mediums such as sand, peat or plastic instead of soil to promote wastewater treatment. Some systems utilize wetlands, lagoons, aerators or disinfection devices

¹ VA. CODE ANN. § 32.1-163 (2009).

² See ENVIRONMENTAL PROTECTION AGENCY, A HOMEOWNER'S GUIDE TO SEPTIC SYSTEMS 3 (2002, rev. 2006), available at http://www.epa.gov/owm/septic/pubs/homeowner_guide_long.pdf.

for treatment. Float switches, pumps and other electrical or mechanical components are also used in alternative systems.³ According to the Virginia Department of Health, there is an increasing need for alternative septic systems as increasing residential growth pushes homeowners to find solutions for marginal soils and geology.⁴ The exponential growth in the value of buildable land is also prompting the increasing reliance on alternative systems.⁵

Your letter notes that a locality has adopted an ordinance that requires a developer of a subdivision to obtain a special exception to the local zoning ordinance in order to construct a privately-owned alternative sewage system under certain conditions. You question whether a locality may impose such a requirement.

Applicable Law and Discussion

Pursuant to § 15.2-2157, when sewers or sewerage disposal facilities are not available, a locality has the general authority to regulate, inspect, and require the installation and maintenance of onsite sewage systems in order to protect public health.⁶ A county or town also has the general authority to deny applications for onsite sewage systems when the locality has adopted a master plan for sewerage. Section 15.2-2128 provides:

Notwithstanding any other provision of *general law* relating to the approval of sewage systems, the governing body of any county or town which has adopted a master plan for a sewage system is authorized to deny an application for a sewage system if such denial appears to it to be in the best interest of the inhabitants of the county or town.^[7]

In 2009, the General Assembly amended § 15.2-2157 to add subsection (C) specifically to bar localities from prohibiting “the use of alternative onsite sewage systems that have been approved by the Virginia Department of Health” in areas where sewers or sewerage disposal facilities are not available.⁸ The amendments to § 15.2-2157 further provided in subsection (D) that localities “shall not require

³ *Id.* at 4.

⁴ See E.L. HAMM & ASSOCS., INC., VDH RE-ENGINEERING INITIATIVE, ONSITE SEWAGE SYSTEM PROGRAM 1 (2006), available at http://www.vdh.virginia.gov/EnvironmentalHealth/Onsite/newsofinterest/documents/VDH%20Reengineering%20Initiative_final_5.06.pdf

⁵ *Id.*

⁶ VA. CODE ANN. § 15.2-2157(A) (Supp. 2010) (“Any locality may require the installation, maintenance and operation of, regulate and inspect onsite sewage systems or other means of disposing of sewage when sewers or sewerage disposal facilities are not available; without liability to the owner thereof, may prevent the maintenance and operation of onsite sewage systems or such other means of disposing of sewage when they contribute or are likely to contribute to the pollution of public or private water supplies or the contraction or spread of infectious, contagious and dangerous diseases; and may regulate and inspect the disposal of human excreta”). See also § 15.2-2126 (2008) (requiring notice for the establishment or extension of sewer systems to serve three or more connections) and § 15.2-2127 (2008) (authorizing localities to disapprove sewage systems if the locality finds for certain reasons that the sewage system is not capable of serving the proposed number of connections).

⁷ Section 15.2-2128 (2008) (emphasis added).

⁸ 2009 Va. Acts chs. 786, 846. VA. CODE ANN. § 15.2-2157(C)-(D).

maintenance standards and requirements for alternative onsite sewage systems that exceed those allowed under or established by the State Board of Health pursuant to § 32.1-164.”⁹

Construing §§ 15.2-2157 and 15.2-2128 together, the use of alternative onsite sewage systems cannot be prohibited where sewers or sewerage disposal facilities are not available regardless of whether a master sewage plan has been adopted. “[W]hen one statute speaks to a subject in a *general* way and another deals with a part of the same subject in a more *specific* manner, the two should be harmonized, if possible, and where they conflict, the latter prevails.”¹⁰

In your opinion request, you specifically refer to an ordinance enacted by a locality requiring a “special exception”¹¹ in order to construct a privately owned alternative septic system. Because the granting of a special exception is discretionary,¹² you note that it is possible for the locality to deny a developer’s application for an alternative onsite sewage system despite the system fulfilling the requirements of § 15.2-2157(C). Pursuant to that section, the special exception requirement may be valid only if a public sewer is available and offered to the individual seeking to install the alternative onsite sewage system. The locality retains the general authority pursuant to § 15.2-2157(A) and § 15.2-2128 to regulate, inspect, and deny applications for onsite sewage systems where a public sewer or sewerage facility is available; but § 15.2-2157(C) clearly states that when “sewers or sewerage disposal systems are not available, a locality shall not prohibit the use of alternative onsite sewage systems....” To require a special exception application for an alternative onsite sewer system that meets the conditions set forth in § 15.2-2157(C) effectively would give the local governing body the option to prohibit the system, a result not permitted by that subsection.

⁹ *Id.* The State Board of Health enacted emergency regulations, effective April 7, 2010, for alternative onsite sewage systems pursuant to the enactment language of the 2009 amendments to § 32.1-163.6. 2009 Va. Acts ch. 220. See 2009 Op. Va. Att’y Gen. 3 (concluding that adoption by Board of Health of emergency regulations will trigger applicability of § 15.2-2157(C)-(D) upon the effective date of such regulations). The regulations prescribe certain requirements for alternative onsite sewage systems depending upon the designer of the system. See 12 VA. ADMIN. CODE §§ 5-613-40 through 5-613-110. Requirements imposed by localities that are more stringent than those listed in the regulations are prohibited by § 15.2-2157(D).

¹⁰ *Thomas v. Commonwealth*, 244 Va. 1, 22-23, 419 S.E.2d 606, 618 (1992) (quoting *Va. Nat’l Bank v. Harris*, 220 Va. 336, 340, 257 S.E.2d 867, 870 (1979)) (emphasis added). See also *Phipps v. Liddle*, 267 Va. 344, 346, 593 S.E.2d 193, 195 (2004) (“If possible, we must harmonize apparently conflicting statutes to give effect to both.”); *Kirkpatrick v. Bd. of Supvrs.*, 146 Va. 113, 125, 136 S.E. 186, 190 (1926) (“[W]here two statutes are in apparent conflict they should be construed, if reasonably possible, so as to allow both to stand and to give force and effect to each.”); *Ainslie v. Inman*, 265 Va. 347, 353, 577 S.E.2d. 246, 249 (2003) (“[W]hen a given controversy involves a number of related statutes, they should be read and construed together in order to give full meaning, force, and effect to each.”); *Ragan v. Woodcroft Village Apts.*, 255 Va. 322, 325, 497 S.E.2d 740, 742 (1998) (“We accord each statute, insofar as possible, a meaning that does not conflict with any other statute.”).

¹¹ The term “special exception” refers to “the delegated power of the state to set aside certain categories of uses which are to be permitted only after being submitted to governmental scrutiny in each case, in order to insure compliance with standards designed to protect neighboring properties and the public.” *Bd. of Supvrs. v. Southland Corp.*, 224 Va. 514, 521, 297 S.E.2d 718, 721-22 (1982).

¹² “Whether a legislative body has reserved unto itself the power to grant or deny special exceptions or use permits, or has delegated the power to a Board of Zoning Appeals, [the Supreme Court of Virginia has] consistently held the exercise of that power to be a legislative, rather than administrative act.” *Id.*, 224 Va. at 522, 297 S.E.2d at 722. Such a legislative act “involves ... balancing ... the consequences of private conduct against the interests of public welfare, health and safety[.]” *Id.*

Further, § 15.2-2157(D) prohibits a locality from establishing maintenance standards and requirements for alternative onsite systems that exceed those established by the Virginia Department of Health.¹³ Therefore, if the “special exception” places standards or requirements on alternative systems that are more restrictive than those prescribed by the Virginia Department of Health, the ordinance would exceed the scope of the authority granted to localities pursuant to § 15.2-2157(D). The Commonwealth follows the Dillon Rule, which “provides that ‘municipal corporations have only those powers that are expressly granted, those necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable.’”¹⁴ Thus, “[w]hen a local ordinance exceeds the scope of this authority, the ordinance is invalid.”¹⁵

Conclusion

Accordingly, it is my opinion that a Virginia locality cannot require an owner to obtain a special exception to a local zoning ordinance in order to install an alternative onsite sewage system if the conditions set forth in § 15.2-2157(C) exist, namely that (i) there is no sewer or sewerage disposal facility available and (ii) the alternative onsite sewage system has been approved by the Virginia Department of Health for use in the particular circumstances and conditions in which the proposed system is to be operating.¹⁶

With kindest regards, I am

Very truly yours,



Kenneth T. Cuccinelli, II
Attorney General

¹³ Section 15.2-2157(D), unlike subsection (C), does not contain the language, “[w]hen sewers or sewerage disposal facilities are not available.” Therefore, it is presumed that the General Assembly intended for subsection (D) to apply whether or not a sewer or sewerage disposal system were available. *See Logan v. City Council*, 275 Va. 483, 492, 659 S.E.2d 296, 301 (2008) (“We determine the General Assembly’s intent from the words employed in the statutes.”); *see also City of Richmond v. Confrere Club of Richmond*, 239 Va. 77, 80, 387 S.E.2d 471, 473 (1990) (“Legislative intent is determined from the plain meaning of the words used.”).

¹⁴ *Marble Techs., Inc. v. City of Hampton*, 279 Va. 409, 417, 690 S.E.2d 84, 88 (2010) (quoting *Bd. of Zoning Appeals v. Bd. of Supvrs.*, 276 Va. 550, 553-54, 666 S.E.2d 315, 317 (2008)); *accord Bd. of Supvrs. v. Countryside Inv. Co.*, 258 Va. 497, 502-05, 522 S.E.2d 610, 612-14 (1999); *City of Chesapeake v. Gardner Enters., Inc.*, 253 Va. 243, 246, 482 S.E.2d 812, 814 (1997).

¹⁵ *City of Chesapeake*, 253 Va. at 246, 482 S.E.2d at 814; *see also Bd. of Supvrs. v. Reed’s Landing Corp.*, 250 Va. 397, 400, 463 S.E.2d 668, 670 (1995) (“If there is a reasonable doubt whether legislative power exists, the doubt must be resolved against the local governing body.”).

¹⁶ A Virginia locality still may require that plans for an alternative onsite sewage system be submitted as part of its site plan review process to ensure that the necessary technical requirements have been met. *See* § 15.2-2286(A)(8) (Supp. 2010). Any such review, however, must not impose requirements that exceed those established for such systems in regulations of the State Board of Health. *See* § 15.2-2157(D). Nor may the effect of any such review be to prohibit an alternative onsite sewage system when the conditions set forth in § 15.2-2157(C) exist.