Chapter 5

The Dillon Rule and its Limitations on a Locality's Land Use Powers

5-100 Introduction

The Dillon Rule (also sometimes referred to as "Dillon's Rule") limits Virginia's governing bodies to exercising only those zoning and other powers expressly granted by the General Assembly, powers necessarily or fairly implied from the express powers, and powers that are essential and indispensable. *Logan v. City Council of the City of Roanoke*, 275 Va. 483 (2008); *Norton v. City of Danville*, 268 Va. 402 (2004).

The concept of "home rule," which holds that localities have the inherent power to exercise powers that promote the public health, safety or welfare even if they are not expressly enabled, is the antithesis of the Dillon Rule. Virginia is one of a very limited number of strict Dillon Rule states.

5-200 Who was Dillon and where did his rule come from?

John Forrest Dillon was the chief justice of the Iowa Supreme Court in the mid-1800's. In their article *Why Does Dillon Rule? Or Judge John's Odd Legacy* appearing in *Nice & Curious Questions*, Edwin S. Clay III and Patricia Bangs explain that Dillon's perspective was the result of the rise of the city as a service provider that resulted from the shift from an agrarian to a more urbanized society in the post-Civil War era and the corruption that consumed many city governments. The rule itself is the result of Dillon's distrust of city government. Clay and Bangs write:

> By the 1860s, cities had become not only inefficient, but corrupt. Graft, in the form of kickbacks, was rampant for many public works and public utility projects, including the railroads. It was the era of "Boss Tweed" and the Tammany Hall gang who reportedly swindled between $75 and $200 million from New York City between 1861 and 1875.
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> Dillon understandably did not trust local government and wrote, "Those best fitted by their intelligence, business experience, capacity and moral character" did not go into local public service. He felt local government was "unwise and extravagant" ("Dillon's Rule," Clay L. Witt, *Virginia Town and City*, August 1989).

The Dillon Rule continues to stir debate. Clay and Bangs note that some complain that the rule continues to bind the Commonwealth's ability to respond to the priority needs of its localities and regions, while the Virginia Chamber of Commerce believes that the rule "represents a positive tradition of legislative oversight" and encourages economic growth through a consistency in laws throughout the state."

5-300 The nature and purpose of the Dillon Rule

The Dillon Rule is a rule of statutory construction that was first recognized in Virginia in *City of Winchester v. Redmond*, 93 Va. 711 (1896), a decision in which the Virginia Supreme Court quoted with approval from 1 John F. Dillon, *Commentaries on the Law of Municipal Corporations*, § 89 (3d ed. 1881). As a result of the Dillon Rule, a governing body does not have broad general authority to adopt whatever ordinance it deems appropriate or desirable. *Lawless v. County of Chesterfield*, 21 Va. App. 495 (1995).

The Dillon Rule limits a locality's ability to address local issues using local strategies exercised under its police power. Consequently, a locality's ability to address local issues is at the mercy of the General Assembly unless a means to address the issue has already been enabled. On the other hand, the Dillon Rule has the effect of assuring, at least to some extent, a certain amount of consistency for those who deal with Virginia's localities.

5-310 Governing bodies have only those powers expressly granted and those necessarily implied

The Dillon Rule provides that governing bodies have only those powers that are expressly granted, those necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable. *Board of Supervisors of Augusta County v. Countryside Investment Co.*, 258 Va. 497 (1999); *City of Chesapeake v. Gardner Enterprises, Inc.*, 253 Va. 243 (1997); *Ticonderoga Farms v. County of Loudoun*, 242 Va. 170 (1991); *City of Richmond v. Confrere Club of Richmond*, 239 Va. 77 (1990); *Curzio Construction, Inc. v. Zoning Appeals Board of Front Royal*, 63 Va. Cir. 416 (2003) (town had implied authority to require in its zoning ordinance that the main or front building façade and entrance of a building be oriented toward the front yard of the property under its authority in Virginia Code § 15.2-2283 to "facilitate the creation of a convenient, attractive, and harmonious community").

The Dillon rule applies "to determine in the first instance, from express words or by implication, whether a power exists at all. If the power cannot be found, the inquiry is at an end." *Commonwealth v. County Board of Arlington County*, 217 Va. 558 (1977). The existence of another means to achieve a particular legislative goal means that a power may not be necessarily implied. *Lawless, supra* (county did not have the implied power to criminally punish each day's continuing violation of zoning ordinance because the General Assembly had expressly provided other enforcement options to abate the violation). If there is a reasonable doubt as to whether a legislative power exists, the doubt must be resolved against the local governing body. *Board of Supervisors v. Reed's Landing Corp.*, 250 Va. 397 (1995); *Confrere Club of Richmond, supra*.

5-320 The power is granted; selecting the appropriate method to exercise the power

If a power is granted and the enabling authority specifies the manner in which the authority is to be exercised, a locality may not select any other method. *Commonwealth v. County Board of Arlington*, 217 Va. 558 (1977); *Kansas-Lincoln, L.C. v. Arlington County Board*, 66 Va. Cir. 274 (2004) (affordable housing guidelines that required cash contributions to the county's affordable housing fund or the contribution of affordable housing units as a condition of approval of the county's unique "special exception site plan process" was a mandatory affordable housing program not enabled under Virginia Code §§ 15.2-2286(A)(3), 15.2-2286(A)(10) or 15.2-2304 (enabling a voluntary affordable housing program); *Logie v. Town of Front Royal*, 58 Va. Cir. 527 (2002) (Virginia Code § 36-105 enables localities to enforce a property maintenance code and prescribes prosecution as a misdemeanor and fines as the method of enforcement; as a result, town regulation authorizing termination of electric service as a method of enforcement violated the Dillon Rule).

If the power is granted, but is silent about the method for implementing the power, the choice of implementation by the locality will be upheld as long as the method selected is reasonable; a method of exercise that is clearly contrary to the legislative intent or that is inappropriate to the ends sought to be accomplished by the grant, would be unreasonable. *Arlington County v. White*, 259 Va. 708 (2000); *Logie, supra* (Virginia Code § 36-105 enables localities to enforce a property maintenance code, but does not prescribe the method of enforcement; town's program of periodic inspections, triggered by changes in tenancy after the passage of two years and not after every tenancy, was an inspection program on a periodic basis that was reasonable and did not violate the Dillon Rule). In addition, if the method of implementation expands the power granted beyond rational limits necessary to promote the public interest, it will be found to be unreasonable. *Hay v. City of Virginia Beach*, 258 Va. 217 (1999). Any doubt in the reasonableness of the method selected is resolved in favor of the locality. *White, supra*.

5-400 The Dillon Rule applied in land use cases

The following cases illustrate how the rule has been applied in Virginia land use cases.

In *Kenyon Peck v. Kennedy*, 210 Va. 60 (1969), a zoning ordinance was upheld that had the effect of prohibiting advertising by means of outdoor moving signs or devices such as pennants, even though there is no specific mention of such a regulation in the Virginia Code. Thus, the failure of the zoning enabling legislation

to mention specifically a particular subject that a locality wants to regulate is not necessarily fatal to the locality's exercise of its zoning power. *1984-85 Va. Op. Atty. Gen. 34*.

A locality has a substantial governmental interest in preserving its aesthetic character. *American Legion Post 7 v. City of Durham*, 239 F.3d 601 (4th Cir. 2001); *Arlington County Republican Committee v. Arlington County*, 983 F.2d 587 (4th Cir. 1993). Nevertheless, under Virginia law, absent enabling authority, a locality cannot limit or restrict the use a person makes of his property under the guise of its police power where the exercise of the power is justified *solely* on aesthetic considerations. *Board of Supervisors of James City County v. Rowe*, 216 Va. 128 (1975). The ordinance considered by the Virginia Supreme Court in *Rowe* required that preliminary site plans within a particular zoning district be subjected to an architectural design review of the elevations of each façade, materials, colors, texture, light reflecting characteristics and other special features intended for each building. Each building was reviewed to determine whether it furthered the stated purposes for the review: to protect property values, to promote the general welfare by insuring buildings in good taste, proper proportion, and reasonable harmony with the existing buildings in the surrounding area, and to encourage architecture which was distinct from the Colonial Williamsburg architecture. The landowners challenging the ordinance asserted that the enabling legislation did not delegate authority to local government to impose restrictions on architectural design. In finding the ordinance to be invalid, the *Rowe* court relied on its earlier decision in *Kenyon Peck, supra*. *Rowe* is still the controlling law in Virginia on the question of whether a locality may consider solely aesthetic factors in rezoning matters or zoning restrictions. However, since *Rowe* the General Assembly has enabled localities to regulate aesthetics within historic districts established under Virginia Code § 15.2-2306. *See chapter 21 for additional discussion regarding the regulation of aesthetics.*

In *Resource Conservation Management, Inc. v. Board of Supervisors of Prince William County*, 238 Va. 15 (1989), the Virginia Supreme Court held that the express authority given to localities to prohibit a use of land included, by implication, the authority to prohibit landfills as a use of land. The court said that even under the Dillon Rule of strict construction, "such specificity [*i.e.*, identifying each type of use that may be prohibited] is not necessary."

In *Cupp v. Board of Supervisors of Fairfax County*, 227 Va. 580 (1984), the Virginia Supreme Court found that the express authority given to localities to grant special use permits "under suitable regulations and safeguards" did not imply the power to require a citizen to turn land over to the county and build roads for the benefit of the public. Similarly, in *Hylton Enterprises, Inc. v. Board of Supervisors of Prince William County*, 220 Va. 435 (1979), the Virginia Supreme Court held that localities had neither express nor implied authority to require a subdivider to construct off-site roads as a condition of plat approval. In *National Realty Corp. v. City of Virginia Beach*, 209 Va. 172 (1968), the Virginia Supreme Court found that an ordinance that imposed a fee for the examination and approval of final subdivision plats and made payment of the fee a prerequisite to the recording of the plat was invalid because it was not enabled under Virginia law (localities have since been so enabled).

Finally, in *Board of Supervisors of Augusta County v. Countryside Investment Co.*, 258 Va. 497 (1999), the Virginia Supreme Court found that two provisions of Augusta County's subdivision ordinance were not enabled under Virginia law and, therefore, violated the Dillon Rule and were void. The first provision provided in part that the "size and shape of all lots shall be subject to approval of the Board of Supervisors." The second provision prohibited land from being subdivided if, in the opinion of the board of supervisors, it was determined to be unsuitable for subdivision for various reasons, including the proposed subdivision not being conducive to the preservation of a rural environment. The court stated:

> The Board asserts that it has considerable discretion when deciding what to include in a subdivision ordinance. We disagree . . .[T]he Board does not have unfettered discretion when deciding what matters it may include in its subdivision ordinance. Rather, the Board must include those requisites which are mandated in Code § 15.2-2241 and may, at the Board's discretion, include the optional provisions of a subdivision ordinance contained in Code § 15.2-2242. . . The Board is not, however, permitted to ignore the requisites contained in Code §§ 15.2-2241 and –2242 and, under the guise of a subdivision ordinance, enact standards which

would effectively permit it to rezone property in a manner inconsistent with the uses permitted by the property's zoning classification.

Countryside Investment, supra.

In *Owens v. City Council of the City of Norfolk*, Civil No. L07-5025, letter opinion dated March 7, 2008, the court granted a temporary injunction in favor of a neighbor opposing the city council's issuance of a certificate of appropriateness for a building in a historical district. The city council had granted a height variance under the city's certificate of appropriateness procedure enabled by Virginia Code § 15.2-2306. In finding that the plaintiff was likely to prevail on the merits, the court found that height limitations "constitute a fundamental and traditional element of zoning district land use regulation" as enabled under Virginia Code § 15.2-2280, that variances from district regulations are enabled either by the special use permit or variance procedures enabled by Virginia Code §§ 15.2-2286 and 15.2-2309, respectively, and that there was no similar enabling authority in Virginia Code § 15.2-2306.

5-500 A rule that is stricter than the Dillon Rule applies to the planning commission, the board of zoning appeals and the architectural review board

The Dillon Rule applies to a locality and its governing body. Because planning commissions, BZAs and ARBs are creatures of statute, they are subject to a rule that is stricter than the Dillon Rule. These bodies possess only those powers expressly conferred; they do not have the power to exercise powers that must be implied from expressly granted powers, or those that are perceived as essential and indispensable. *Board of Zoning Appeals of Fairfax County v. Board of Supervisors of Fairfax County*, 276 Va. 550 (2008) (holding that the BZA does not have the power to sue because that power is not expressly granted by statute); *Adams Outdoor Advertising, Inc. v. Board of Zoning Appeals of the City of Virginia Beach*, 261 Va. 407 (2001) (BZA was enabled to grant a variance only for the purposes and under the requirements provided by law; the subject of entitlement to compensation for the alleged taking of or damage to property as a result of zoning actions was not among the powers enumerated); *Board of Zoning Appeals of Fairfax County v. Cedar Knoll, Inc*., 217 Va. 740 (1977).

5-600 Working with the Dillon Rule in its daily application

Following are the phrases that every local officer or employee hates hearing from its attorney: "You can't do that," "That's not enabled," and "There's no enabling authority for us to do that." Why does the attorney say those things? Because he or she has researched the enabling authority to determine whether the locality is enabled to do something, has determined that there is no express enabling authority, and that there is no authority that may be necessarily implied. In other words, the Dillon Rule has been applied.

5-610 When the locality's attorney determines that the Dillon Rule applies

If one assumes that laws are intended to promote the public health, safety and general welfare, the failure to find enabling authority means that the General Assembly has not (or has not yet) determined that the proposed action promotes these interests.

Once a determination is made that the necessary enabling authority is missing and the Dillon Rule applies, the locality's attorney is obligated to proceed in the best interests of the locality. Rule 1.13(b) of the *Virginia Rules of Professional Conduct* states in part:

> If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. . . .

Among other things, this rule means that once the attorney has determined that the locality has no authority to take the proposed action, he or she is ethically precluded from assisting an officer or employee in violating the law by circumventing a prohibitory law or ignoring the absence of enabling authority.

5-620 When "other localities are doing it"

When word is received from the locality's attorney that the locality is not enabled to take a proposed action, an officer or employee may know that that "other localities are doing it." When such a claim is made, the attorney will investigate to find out which localities are doing it, and what if any authority there is for doing it. Following is a list of the typical findings from such an investigation:

- The person claiming that other localities are doing something doesn't know what the other localities are actually doing.
- Other localities are not doing it, but are doing something similar that is enabled.
- The other localities that are doing it are either enabled through their charter, or have special legislation applicable to a class of localities of which your locality is not a member.
- The other localities do not have the enabling authority, but haven't been sued yet.
- If five other localities are doing it, that means that over 100 Virginia localities are not doing it.
- The other localities are small rural localities, and the particular matter was never reviewed by their attorneys.

Of course, the locality's attorney will not conduct such an investigation if he or she knows that what the other localities are doing is obviously not enabled.

5-630 The search for alternative solutions

A locality's attorney's determination that a proposed action is not enabled does not end the inquiry. The attorney will endeavor to advise the client of alternative solutions that will legally achieve, or achieve as closely as possible, the desired result. One of those alternatives may be to pursue a change in State law.