

## Dillon's Rule

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### Overview

The vast majority of citizens are affected most directly by their local government. State and federal laws have broad impacts on the day to day lives of citizens, but it is local government that decides whether a new subdivision will be built, the local school zones, how much citizens will pay for trash collection, and whether a road should be widened from two lanes to four lanes this year or next year. In this context, understanding the powers of and limitations on local governments in Virginia as a result of Dillon's Rule is fundamental to understand how the government that effects people the most and most directly actually works.

### Why I Taught These Sources

Any student who pays any attention to state or local political issues in Virginia will eventually hear someone complain about Dillon's Rule because complaining about Dillon's Rule is ubiquitous in local government circles in Virginia. I once spoke to a high school government class about Dillon's Rule and before I got a few sentences into my talk a student raised her hand and said "My Dad says Dillon's Rule is the biggest obstacle to progress we have ever faced." I seldom hear a positive word spoken about Dillon's Rule. It conjures up bad images in the mind's eye: bad constitutional law and unwarranted limits on local government's ability to make public policy. However, I think while Dillon's Rule certainly does restrain local government in some significant ways, it is often unfairly blamed as the cause of many problems for which it has played no role at all. I use these sources to make this point and my hope is that students come away with a better understanding of just what role Dillon's Rule plays in local governance in Virginia.

### How I Introduce These Sources

I introduce these three sources to the students by first talking about the concept of home rule. I think the most important thing for students to understand when trying to get their heads around Dillon's Rule is to think about power on a continuum from absolute power to make decisions on one end to absolutely no power to make decisions on the other end. I use my students as an example, asking them to think back to their time in high school. I draw a line across the board and on the left I write "Absolute Power" and on the right I write "Absolutely No Power." I ask the students to tell me where they think they would have placed their own decision making authority viz-a-viz their parents when they were in high school. There are always a few outliers, but most students place themselves near the middle right, meaning their power was restricted but they felt like they did have power and authority to make some decisions. We have a brief class discussion about this, and I try to focus the discussion on what kind of decisions they had the authority to make for themselves. They probably couldn't decide to stay out all Friday night without talking to their parents about it, but they probably could decide which movie they were going to see without talking to their parents about it.

I use this analogy and apply it to local government in Virginia, noting that like their position in high school, local governments also have limitations on their power and authority. With this idea of power on a continuum in mind, I then shift the discussion to the three sources: an overview of Dillon's Rule from the League of Women Voters of Fairfax County, a chapter on the Dillon Rule from The Albemarle County Land Use Handbook, and a Virginia Supreme Court Ruling.

## Reading the Sources

It is very easy to get mired in the minutia of local ordinances, court cases, and laws, so reading the sources takes some care. I have found the best way to read the sources is to give students a list of questions first, and then ask them to read the first source Handout #1: *Dillon's Rule: Good or Bad for Local Governments?* with those questions in mind. The list I usually give includes: 1.) In what way does Dillon's Rule limit local governmental power and authority? 2.) In what way does Dillon's Rule empower local governmental power and authority? 3.) What is the default position when there is disagreement or uncertainty, and why does this default position frustrate people? In a class discussion I cover the concepts of "expressed power," "implied power," and "inherent power." I then go back to the concept of power on a continuum and ask students to generically place local governments somewhere on the continuum between "Absolute Power" and "Absolutely No Power." The goal of this discussion is to come out of the other end with the students understanding that local governmental power in Virginia exists on the continuum at about the same place on that continuum that many students their own power and authority in high school, slightly to the right of center.

I next turn to a case study, since many conflicts involving Dillon's Rule in recent years have been around land use and planning, I ask students to read Handout #2: *Albemarle County Land Use Law Handbook, Chapter 5* and Handout #3: *Jacquelyn C. Logan v. City Council of the City of Roanoke*. We have a class discussion about the advice provided in the handbook and the decision made by the Virginia Supreme Court. These two readings serve as a case study of Dillon's Rule in action and how local governments make policy in the context of their very real limitations and their very real powers.

## Reflections

Studying Dillon's Rule is very valuable for several reasons. Virginia is a Dillon's Rule state and as such there are very real limitations placed upon local government's power and authority. Students should understand what this means and by understanding this they will have gained a much better idea of the potential difficulties local officials might have solving problems. However, it is equally important that students understand that Dillon's Rule does not mean that local governments have no powers. There are powers expressly granted and powers necessarily implied, and it is through these power that local governments are able to solve many (if not most) of the problems that arise. Finally, understanding Dillon's Rule and the grants and limitations of power it provides to local governments gives students an avenue to understanding how to become engaged in their communities.

## Materials

Handout #1: *Dillon's Rule: Good or Bad for Local Governments?*

Handout #2: *Albemarle County Land Use Law Handbook, Chapter 5*

Handout #3: *Jacquelyn C. Logan v. City Council of the City of Roanoke*

# Dillon's Rule: Good or Bad for Local Governments?

Committee Members: Chair, Sally Ormsby; Members: Edith Appel, Pat Brady, Jere Gibber, Fran Kieffer, Rita Koman, Mary Nightlinger, Jean Packard, and Mary Valder

## Introduction

There have been numerous studies of the pros and cons of state and local governance under Dillon's Rule versus home rule over the past few decades—and longer. Our unit meetings in October and November 2002 focused on Virginia's government structure and the General Assembly, which provoked numerous questions and comments. This is an update and expansion of 1990 LWVVA and LWVFA studies on Dillon's Rule and looks at the arguments for and against each type of local governmental powers, including specific instances here in Fairfax County.

## Dillon's Rule

In an Iowa State Court decision in 1868, and subsequently upheld by the U.S. Supreme Court in *City of Clinton v. Cedar Rapids and Missouri River Railroad Company*, 24 Iowa 455 (1868), state supremacy was codified. Judge John F. Dillon adjudicated this case in 1872 in a major treatise, stating:

*It is a general and undisputed proposition of law that a municipal corporation possesses, and can exercise, the following powers, and no other: First, those granted in express words; second, those necessarily or fairly implied in, or incident to, the powers expressly granted; third, those essential to the declared objects and purposes of the corporation not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.<sup>1</sup>*

Dillon's Rule arose in response to local corruption and fiscal irresponsibility. The pendulum of political power and abuse had swung freely toward municipal governments. According to former Virginia Senator Robert Calhoun (R-Alex.), in a speech at a LWVVA workshop, it was not an uncommon practice for local governments to issue bonds to enable various projects, notably to finance railroads, and when the project failed to refuse to honor its obligations, arguing that the locality lacked the authority of state law to have issued the bonds in the first place.

It has not been, and still is, difficult to set out clearly what specific functions should or can be best handled by any level of government. People can differ philosophically and ardently about what functions should be shared among our national, state, regional, and local units. Diversity of populations, traditions, resources, geography, and economic fluctuations often preclude generalizations about proper functions and powers.

Dillon's Rule, by asserting that there are no such things as *inherent rights of local self-government*, exacerbated an ongoing power struggle between state and local governments. Local communities must derive their powers from the state rather than the local electorate. The state can expand or contract these same powers at any given time. Senator Calhoun explained that, in formal terms, Dillon's Rule has been part of the law of Virginia since 1896 and is a fundamental rule for construing the scope of governmental powers. Attempts to repeal or modify its rigors by a constitutional amendment, as was attempted in 1971, or by legislative enactment are routinely allowed to slumber in the committees of the General Assembly.

## Limiting State Legislative Excesses

Nationally, with population growth in cities and towns, local demands grew for public services such as better education, sanitation, and recreation that the state could not, or would not, provide. This, coupled with the growing complexities of industrialization, communications, and expansion, fueled the tendency to extend more *home rule*. Before the end of the 19<sup>th</sup> century the abuses committed by corrupt state politicians became so flagrant that there arose a groundswell of citizen action to restrain legislatures and to enlarge the powers of local jurisdictions.

Proposals ranged from minor limitations on state legislatures to broad *home rule* efforts. Specifically, four kinds of checks and balances have been devised to effect this reform:

- The first check *forbids special legislation* and allows the legislature to pass only general laws. The Virginia General Assembly attempts to operate under this provision. Bills for a specific locality are drafted in general terms with locality-specific application, such as population parameters, form of government, and/or geographic location.
- The second check grew out of the first. It *forbade special legislation except when approved by the locality concerned*.
- A third variation is known as the *optional charter*. This change did not satisfy the most ardent proponents of home rule but, like Virginia's statutory law, allowed a wider choice of governmental forms. A charter is an organized way of presenting the basic laws and usually permits more experimentation than allowed under general law.

■ The fourth, and probably most popular, option for controlling state legislative excesses is known as *home rule*. This device was first adopted in 1875. The 1915 Maryland constitutional *home rule* amendment for Baltimore City and County is closest to the *grant of power* approach discussed below and was further defined by statutory law in an Express Powers Act. In 1970, the Maryland legislature extended the *charter county* concept to the remaining counties with the exception of Frederick County, which remains a code county. The Maryland counties in the Washington metropolitan area have charters.<sup>2,3</sup>

State preeminence, based on Dillon's Rule, is now accepted legal theory in all fifty states. All courts continue to resolve controversies over state and local rights in favor of the state by assigning the benefit of the doubt to that entity. As an established legal principle Dillon's Rule will remain the deciding factor whenever state and local powers come into conflict. The degree to which the rule remains operative depends upon the degree of *home rule* granted localities. Virginia applies Dillon's Rule in a strict way. Actions of a county board of supervisors must be in accordance with the *exact* language of enabling state legislation. This fact of life is little understood by most residents.

### Types of Home Rule

Pure *home rule* assumes that a local government may exercise all authority *not specifically prohibited* it by a state's constitution or statutory law. The Virginia General Assembly has been opposed to extending *home rule* to its localities. Three types of *home rule* are generally recognized based on the scope of power granted to localities and upon the extent of local freedom from reliance upon the state's legislature for such powers:

■ **Self-executing constitutional home rule or mandatory constitutional home rule** is deemed the strongest form. Under it, localities are granted self-government in purely local affairs. The principle is incorporated in the state constitution. The state legislature acts in local matters through *special laws requested by the locality* concerned or through *general laws applicable to all communities*.

The constitution may spell out chartermaking procedures in detail or may require the legislature to pass general laws granting *home rule* to localities on the basis of specified broad constitutional principles. *Self-executing home rule* provisions vary greatly from state to state. Most follow one of two divergent approaches, namely:

■ The more common **grant of powers** approach reflects the older classical concept of the home rule charter as a grant of power that must spell out the desired, expressed powers on the basis of a constitutional separation or powers between the local and state governments.

■ The **instrument of limitation or residual powers** approach broadly grants to localities all powers of local self-government *except* those powers which are specifically denied or restricted by the state's constitution itself, the home rule charter of the community, or general state laws.

■ **Permissive constitutional home rule.** State constitutions with permissive home rule provisions merely *authorize* the state legislature to enact home rule laws delegating powers of self-government to localities but do not impose an obligation upon the legislature to so act. Thus, home rule becomes a *matter of legislative grace*.

■ **Legislative home rule.** This weakest form of home rule is extended piecemeal to localities by statute rather than by constitutional authorization.

### State Constitutions

State constitutions authorize state actions in conformance with the Tenth Amendment to the constitution of the United States that says, in effect, the powers not specifically given to Congress or prohibited altogether reside in the states or in the people. State constitutions may define the powers of local governments and special districts. *Virginia's constitution contains no provision analogous to the Tenth Amendment in prescribing power relationships between the state and its localities.*

The Virginia Constitution expressly gives the General Assembly power to pass general and special laws to set forth the organization and powers of local governments. In 1969, the Commission on the Constitutional Revision proposed reversal of Dillon's Rule, recommending "A charter county or a city may exercise any power or perform any function which is not denied to it by this constitution, by its charter or by laws enacted by the General Assembly." Both the Virginia Municipal League (VML) and the Virginia Association of Counties (VACO) opposed these changes because local officials serving on VML felt the General Assembly had been fairly responsive to the needs and desires of local governments both through general laws and through charters. They also had a fear of the unknown in moving from Dillon's Rule to home rule. The VML and VACO executive directors also talked with their counterparts in various home rule states and found it was not unusual for general assemblies in those states to pass laws denying local governments powers in a wide variety of areas. Thus, their opposition resulted in deletion of this proposed home rule constitutional provision by the General Assembly.<sup>4</sup>

### Virginia's Government Structure

On August 12, 2001, former Governor Gerald L. Baliles presented the keynote address at the 50<sup>th</sup> anniversary meeting of the Virginia Local Government Officials' Conference on

this subject. “All of us live in either a city or a county. The structure and power of that local government depends upon whether it is a city or county. We live with the terms ‘city and county.’ Yet I submit that we do so without comprehending that time and events have blurred the distinctions that city and county once had. We tinker almost annually . . . adjust for core city problems. . . alter for suburban areas. . . change for rural needs. . . [We need] to effect the changes desired by both urban and rural interests in the various state funding formulas for local governments. We owe it to ourselves and to the future of the Commonwealth.”

Governor Baliles reported that “for years, local governments’ financial problems have been studied, reports and recommendations have been made. . . The decade of the 1990s offered us a wonderful opportunity. But we didn’t take it. . . Instead, we watched state revenues increase significantly, strengthened by rises in sales and income taxes. . . Meanwhile, localities were largely confined to stagnant property tax revenues. . . Local government provides vital and essential services: fire, police, garbage collection, schools, parks, etc. . . Yet, Virginia has failed to give local government the support needed to do its best work.” He offered three proposals for changing the fortunes of local governments, improve their abilities or address their challenges. They were:

- **Powers and Duties of Local Governments.** In many areas of the Commonwealth cities and counties are generally indistinguishable and provide essentially the same levels of service yet are governed by different laws and their funding often depends upon their status as a city or county. First the question of what we want local governments to accomplish must be answered, . . . then we should determine whether counties and cities should be different. The next step would be to define the powers and duties of governments, draft a charter and then “allow local governments to operate within the framework of that clearly defined charter without having to trot to the General Assembly, hat in hand, on an annual basis.” He finished this recommendation by saying, “The idea that somehow state government—and, specifically, the General Assembly—is the font of all wisdom on local matters is a concept that many observers find increasingly unacceptable.” “The General Assembly would periodically review the legislatively approved local charter framework and revisions to it” (and) “would bear the obligation and the duty to identify sources of revenue for financing the specified functions of local government.”

- **Consolidation of Government Functions.** To achieve the benefits of efficiency and lower costs through cooperative programs, and to increase the potential of the Regional Competitiveness Act, the General Assembly could appropriate a one-time hefty increase in local government funding to meet long unfunded state mandates and to make up for program

budget cuts” (following which increases would be limited to cost-of-living adjustments). The General Assembly could also provide that where two or more adjoining jurisdictions (counties or cities) combined or consolidated major functions of government, the total appropriations to those localities would be increased by a significant percentage, perhaps 25 to 35 percent.

- **Reorganization of Redistricting and Reducing the Size of Government.** Redistricting often sacrifices “communities of interest,” sometimes with legislators representing only a few precincts in a community. Baliles’ proposal was to reconfigure the size of the House and Senate so that one senator and two delegates represent the same area, thereby reducing the size of the House of Delegates to 80. Districts could be more compactly drawn, respecting communities of interest, and creating more coherent results.

### **Arguments for and Against Dillon’s Rule and Home Rule**

In a presentation to the Virginia Chapter of the American Planning Association annual meeting on April 25, 2004, Robert Puentes, senior research manager at the Center on Urban and Metropolitan Policy of The Brookings Institution, spoke on “Clarifying the Influence of Dillon’s Rule on Growth Management.”<sup>6</sup> Before addressing growth management, Mr. Puentes presented the arguments for and against Dillon’s Rule and home rule, as follows:

#### **For Dillon’s Rule**

- State legislators often prefer to give new powers to a few local governments at first, to “test” the new powers. If proven successful, then the legislature may grant the power to all local governments.
- Control from the state level ensures more uniformity (taxes, etc.).
- State legislators often feel that Dillon’s Rule results in efficient and fair governance.
- Benefits local government officials by allowing them to use the rule as an excuse to not do things.
- State oversight may prevent exclusionary and provincial actions by local governments.
- Provides certainty to local governments.

#### **Against Dillon’s Rule**

- Shackles local officials and prevents them from quickly reacting to unique local problems with specially tailored local responses.
- Prevents progressive local governments from going beyond the status quo to deliver services in an efficient and high quality manner and forces uniform mediocrity.
- Forces local government officials or their hired lobbyists to periodically trek to state capitals to beseech state legislators to grant more authority.
- Creates problems of unfunded state mandates.

- State “one size fits all” solutions may not serve local governments well.
- Many commentators assail the lack of certainty involved in Dillon’s Rule.

### **For Home Rule**

- Local citizens can select the form of government they prefer.
- Local communities are diverse, and home rule allows local citizens to solve their problems in their own fashion.
- Reduces the time that a state legislature devotes to “local affairs.”
- Places the responsibility for taxation where it belongs—on the local elected, not on state, officials.
- State officials do not “second guess” local officials.
- “Liberal construction” of home rule provisions reduces court interference in local policymaking and administration.

### **Against Home Rule**

- Allows local officials to act in an arbitrary and capricious fashion.
- Results in a lack of uniformity among units of government.
- Local citizens whose preferences are not met cause the state legislature to spend more time on local affairs.
- Local units with control over their finances will undercut the revenue base of the state government.
- Local units with authority to make and administer their own public policies would make it very difficult for the state government to address problems that cut across jurisdictional boundaries or require the action of multiple jurisdictions.

The Virginia Chamber of Commerce “is strongly opposed to an alteration of the Dillon Rule that would allow local autonomy on matters of taxation, business and environmental regulation, collective bargaining for public employees, land use and other major policy decisions best left to the state legislative process.” The Chamber justifies its position by saying that local autonomy would result in a third level of government regulation of business; local environmental regulatory ordinances create a costly duplication of reporting without providing greater public protection; there must be stability and predictability in land use, development, and construction activities with ultimate authority being retained by the legislature.<sup>7</sup>

Jesse Richardson, co-author of The Brookings Institution report, an attorney and assistant professor in the Department of Urban Affairs and Planning at Virginia Tech, has written several articles on Dillon’s Rule. In a “Mother, May I?” article in late 1998,<sup>8</sup> Professor Richardson talked about enabling statutes which municipalities must obtain in order to take desired local actions. He reported that one Virginia statute in particular purports to grant broad powers to municipalities, allowing them to exercise “all powers” to “secure and promote the general welfare” and promote “safety, health, peace, good order, comfort, convenience, morals, trade, commerce and

industry” (*Virginia Code Ann. §15.2-1102*), but Virginia and other courts use Dillon’s Rule to narrowly construe even this seemingly generous grant of power. As recently as July 1998, the Virginia Court of Appeals reaffirmed Dillon’s Rule in Virginia.

Richardson writes about the pros and cons of Dillon’s Rule (see text above), noting that “Municipalities generally disapprove of Dillon’s Rule. They feel that the rule prevents them from adopting creative solutions to local problems. Municipalities are often more aware of local problems and, given free reign, may be able to fashion unique solutions to fit the unique circumstances. . . . The General Assembly sets out which taxes municipalities may impose, how they may impose them and, in some cases, the tax rate.”<sup>9</sup>

### **A Scan of the States**

The Brookings Institution study<sup>6</sup> shows that 31 states operate under Dillon’s Rule while 10 states do not abide by it. In addition, 8 states practice Dillon’s Rule for certain types of municipalities and the one remaining state (Florida) has conflicting authority. Brookings also ranked the 50 states by the degree of local discretionary authority, and, surprisingly, Virginia ranked 8<sup>th</sup> in the composite (for all types of local units), 9<sup>th</sup> for cities only, and 13<sup>th</sup> for counties only.

A Research Brief for the National Association of Counties in January 2004<sup>10</sup> reports that one survey found 40 states currently considered “Dillon’s Rule” states. It notes that “regardless of type, home rule gives local government the capability to shape the way it serves the needs of its constituency. . . . Home rule is not all encompassing, or absolute, since it too has its limitations. Counties are a unit of the state government, deriving their powers from the state constitution and legislative statutes—they will always be subject to, and affected by, state law.”

*Those best fitted by their intelligence, business experience, capacity and moral character do not hold local office.*

Justice John Forest Dillon, Iowa, about 1865

### **Local Government Powers in Virginia**

The local levels of government in Virginia are counties, cities, and towns. Cities are not part of counties but stand alone as the only level of government below that of the state. Cities, and some counties, have charters that set out their specific governmental powers. Cities are responsible for building and maintaining roads for which they receive an allocation from the state. Towns are a part of the counties within which they are located, with the counties being responsible for providing some of the town’s services, such as K-12 education. Towns levy their own real property taxes in addition to those of the counties to cover the cost of their local government and certain services, such as police and fire.

The uniform charter powers provision in *The Code of Virginia* (§15.2-204) states that:

- Cities and towns shall have all powers set forth in this section and such powers need not be specified or incorporated by reference in a city or town's charter.
- Counties shall have all powers set forth in this section only when specifically granted to the county.

### **Powers of Counties and Cities**

County and city governments have certain powers, per §15.2, Chapter 9, General Powers of Local Governments, but must seek approval of the General Assembly to assume any additional powers. Some of the 75 items in this chapter grant the following powers:

- Abatement or removal of nuisances
- Removal or disposal of trash; cutting of grass or weeds
- Control of certain noxious weeds
- Taxing and regulating "automobile graveyards" and "junkyards"
- Removal of inoperative motor vehicles on residential and commercial properties, but certain counties have expanded powers for this purpose
- Require removal, repair, etc., of buildings and other structures (local "blight abatement" ordinance), including those harboring illegal drug use, harboring a bawdy place, etc.
- Remove or repair the defacement of buildings, walls, fences, and other structures

### **Powers of Cities and Towns**

*The Code of Virginia*, §15.2-1100, specifies the powers held by municipal corporations (cities and towns), whether or not included in their charter, including the following:

- A municipal corporation shall have and may exercise all powers which it now has or which may hereafter be conferred upon or delegated to it under the Constitution and laws of the Commonwealth and all other powers pertinent to the conduct of the affairs and functions of the municipal government, the exercise of which is not expressly prohibited by the Constitution and the general laws of the Commonwealth, and which are necessary or desirable to secure and promote the general welfare of the inhabitants of the municipality and the safety, health, peace, good order, comfort, convenience, morals, trade, commerce and industry of the municipality and the inhabitants thereof, and the enumeration of specific powers shall not be construed or held to be exclusive or as a limitation upon any general grant of power, but shall be construed and held to be in addition to any general grant of power. The exercise of the powers conferred under this section is specifically limited to the area within the corporate limits of the municipality, unless otherwise conferred in the applicable sections of the Constitution and general laws, as amended, of the Commonwealth.
- Generate revenue annually through taxes and assessment on property, persons, and other subjects not prohibited by law

- Impose an admissions tax and exempt such tax for charitable events
- Borrow money and issue evidence of indebtedness therefor
- Inspect milk, milk products, beverages, and food products from production through distribution

### **General Powers of Counties**

§§15.2-1200 through -1249 set forth the general powers of counties, some of which can be considered rather mundane. Among those enumerated are:

- Any county may adopt such measures as it deems expedient to secure and promote the health, safety, and general welfare of its inhabitants which are not inconsistent with the general laws of the Commonwealth. Such power shall include, but shall not be limited to, the adoption of quarantine regulations affecting both persons and animals, the adoption of necessary regulations to prevent the spread of contagious diseases among persons or animals, and the adoption of regulations for the prevention of the pollution of water which is dangerous to the health or lives of persons residing in the county. (§15.2-1200)
- County boards of supervisors are vested with powers and authority of councils of cities and towns, except for certain actions regarding motorized vehicles, signs, road lighting, etc., controlled by the Commonwealth Transportation Board.
- May appropriate funds to towns within its boundaries.
- May give, lend, or advance funds or property to any authority created by the governing body pursuant to law.
- May impose a license tax of not more than \$25 to a person in the business of selling pistols or revolvers to the public.
- May regulate carrying of loaded firearms on public highways.
- Establish boundaries of election and magisterial districts.
- May equip and maintain television transmission and relay facilities.
- May regulate the sale of property at auction; may regulate the conduct of and prescribe the number of pawnshops and dealers in secondhand goods, wares, and merchandise; may regulate or prohibit peddling; may prevent fraud or deceit in the sale of property.
- The governing body of every county shall cause to be recorded, in well-bound books or by a microphotographic process which complies with standards adopted pursuant to regulations issued under §42.1-82 for microfilm, microfiche, or such other similar microphotographic process, complete minutes of all their respective meetings and proceedings.

### **Forms of County Government**

Virginia has the following forms of county government:

- **County Board.** One member elected at-large and others from districts; "board shall elect chairman from its membership," although a 1990 amendment allows counties to gain voter approval through referendum to elect the board

chairman at large. The board is the policy-determining body “and shall be vested with all rights and powers conferred on boards of supervisors by general law, consistent with the form of county organization and government herein provided;” has county administrator. “Whenever it is not designated herein what officer or employee of the county shall exercise any power or perform any duty conferred upon or required of the county, or any officer thereof, by general law, then any such power shall be exercised or duly performed by that officer or employee of the county so designated by ordinance or *resolution of the board.*” (Example: Loudoun County, with the chairman elected at large)

- **County Executive.** Board of three to nine members elected at large or by district; any district may hold referendum on chairman elected at large; if adjacent to a county with an Urban County Executive (UCE) form of government may elect to establish different, but fixed, terms of office for appointed boards, authorities, and commissions; board is policy-determining body; county executive appointed by board for no specific term, serving at pleasure of the board; county executive may also serve as head of a department(s); county manager appointed by board as administrative head, does not have to reside in county, cannot be an elected official, and serves at pleasure of the board. (Example: Prince William County)

- **County Manager.** Board of three to nine members elected at large or by district, plus one member elected at large; board is policy-determining body.

- **County Manager Plan.** County must have population of at least 500 persons per square mile; five-member board; chairman elected by board annually, is the official head of the county, and has same powers and duties as other board members but no veto; annual salary \$25,000 but can be increased for inflation (chairman and vice chairman can receive more); board cannot interfere with county manager’s appointments; county manager is appointed by board each year and has administrative *and* executive powers, appointing some non-elected officers and employees; board appoints department heads; board has general power of management and “all the powers conferred by general law on city councils;” no part of county can be annexed by city, only entire county following referendum. (Example: Arlington County)

- **Urban County Executive.** County must have population of at least 90,000; board composed of one member from each district and an at-large chairman; chairman may call regular and special meetings, set agendas, appoint county representatives to regional boards, authorities, and commissions, create and appoint committees of the board; board is policymaking body; appoints county executive (cannot be board member or elected official) who is the

administrative head of the county, can act as director of a department, and serves at pleasure of the board; no unincorporated area within county may become an incorporated city or town, but a city within or adjacent to the county may petition, following referendum, to become a district within the county; board may establish a committee to audit and review county agencies and county-funded functions; board establishes salaries and allowances for board members following public hearing. (Virginia’s UCE form of local government is so specifically tailored by statutory law for Fairfax County that it has many of the earmarks of a charter. Only Fairfax County uses this form of government.)

### Around Virginia

As an example of local jurisdictions seeking authority to carry out important local functions, the Fauquier County Board of Supervisors submitted a list of legislative priorities for consideration by the 2004 General Assembly, which included the following issues: Adequate Public Facilities, impact fees, full funding of K-12 Standards of Quality, retention of local revenue authority, retention of local government zoning and land use authority, sharing of state income tax revenues with localities, relaxation of Dillon’s Rule for planning, zoning, and revenue matters, and a local option real estate transfer tax.<sup>11</sup> This is indicative of the numerous requests from localities for state legislative permission to take specific actions at the local level.

An interesting opinion was written by Jim Oliver, former city manager of Norfolk and administrator of James City County, in September 1999.<sup>12</sup> Of note are his statements, “Our local governments are established in isolation and often produce policies and programs that don’t consider realities beyond their boundaries. But consider how many issues today cross boundary lines: crime, traffic, education, poverty, etc. . . . I often thought the state was insensitive to local government, or worse. Whether through action or inaction, words or silence, it felt like local government was facing complicated problems alone, unless, of course, it was time for a new rule or mandate. The result was not a sense that we were partners, or even ‘agents of the state.’ It was instead a sense of aloneness, worry about ‘incoming scuds’ from the State Capitol. At the same time, I often found myself just trying to focus on helping my city survive as opposed to thinking out better choices.”

In a speech on January 8, 2004, at the Virginia Natural Resources Leadership Institute,<sup>13</sup> former Prince William County Attorney Sharon Pandak noted the following tools lacking in Virginia’s statutory system: a full transfer of development rights program, full Adequate Public Facilities authority, full Tree Preservation authority, full Blight Abatement authority, equality of powers between cities and counties, tax flexibility at the local level, and incentives for



*Prince William can't ban dangerous dogs or install photo-red cameras. Fairfax County can't require cars to stop for pedestrians at marked crosswalks or mold zoning ordinances to its particular needs. Arlington can't declare English Ivy a "noxious weed."*

Michael Neibauer, Journal Newspapers, June 27, 2004

regional cooperation. Without enabling state legislation, localities cannot act on any of these issues but must continue to plead with the General Assembly for action.

### Fairfax County

When the candidates for Chairman of the Fairfax County Board of Supervisors were asked their opinion of Dillon's Rule in a campaign debate in October 2003, candidate Mychele Brickner responded, "I wouldn't go as far as saying that we need to abolish the Dillon Rule. I think there should be a balance there," adding that the state ought to give more taxing powers to the county, including the ability to tax cigarettes (for which cities and some counties already had the authority). Candidate Gerry Connolly said he was in favor of repealing the rule, calling it a "terrible impediment" to the county.<sup>14</sup>

The 1989 General Assembly granted permission to Fairfax County to form a special tax district to improve the Route 28 road corridor. The enabling legislation specifically protected the county's right to change future zoning. However, when the Board of Supervisors amended the zoning ordinance in late 1989 to place more restrictions on uses permitted in the district, the 1990 General Assembly revoked this authority for a thirteen-year period.

In a letter appearing in the Outlook section of *The Washington Post* on March 4, 1990, Delegate Kenneth Plum, Va. 36th Dist., wrote "Never before has the Virginia legislature interceded in a matter that is so clearly before the court. More than 71 lawsuits concerning the downzoning along Route 28 are now moot as a result of the actions of the legislature. Never before in Virginia or in any state legislature has there been such a direct intrusion of state government in a local land-use controversy. Substituting the judgment of the state lawmaking body for that of the local governing authority is unprecedented."

This action and several other land use *vesting* bills were passed despite the fact that landowners' suits were before the court to resolve whether the county's action was unfair to property owners within the tax district. The legislative action also countervailed explicitly delegated powers of planning and zoning by and within a local jurisdiction.

Living side-by-side with Maryland's urban counties, which enjoy constitutional home rule, Northern Virginia's jurisdictions are acutely aware of the detriments of a strict Dillon Rule adherence by the courts and legislature upon local actions. Montgomery County, MD, adopted an **adequate public facilities** provision in its subdivision regulations in 1973. It also created a program for the **transfer of development rights** from the rural upper portion to the more urbanized lower section of Montgomery County. Fairfax County has been unsuccessful in many attempts over the years to persuade the Virginia General Assembly to enable it to provide such programs.

Planning and land use innovations to deal with development as well as other regulations are freely employed by Maryland's local governments. In addition to constitutional and statutory restraints imposed on the Maryland legislature, that body has evolved a state-local relationship that operates in a climate that is cooperative and not adversarial. Local ordinances may be superseded if the Maryland legislature enacts a bill that applies on a statewide basis.

An important constraint placed on Fairfax County because of Dillon's Rule is the lack of ability to diversify the county's tax base to relieve pressure on the real property tax, which currently represents about half of the revenue stream. Among the 2004 General Assembly's actions was authorization for counties to increase their sales tax on cigarettes if they so choose as well as a transient occupancy tax, 75 percent of which must be dedicated to tourism promotion and the remainder to a local nonprofit convention and visitors bureau. However, unlike cities and towns, counties still cannot enact a meals tax, transient occupancy, or admissions tax without going to referendum.

Unfunded state mandates, financial aid to localities, and a more flexible local revenue base have been the subject of many studies over the past few decades with no discernible results. A report by the Joint Legislative and Audit Review Commission of March 1992<sup>15</sup>, referring to a 1983 JLARC study of state mandates, noted 81 mandates placed on local governments since 1983. The report suggested two broad options: increase local taxing authority and increase state financial aid to localities. And JLARC made the bold suggestion that the legislature might wish to allow counties taxing authority equal to that of cities!

For several years the county sought enabling legislation aimed at preserving more trees during the construction process. In 2001 a minimal bill was passed, which helped a little. The county's request for more comprehensive legislation in 2002 was held over at the request of the development community; a watered-down version passed in 2003.

## Regionalism and Growth Management

The Code of Virginia requires localities to have comprehensive plans. Zoning is a local function that is subject to controls by the legislature and courts. State comprehensive and/or strategic planning has been studied over several years by legislatively appointed committees but has yet to be realized through legislative action.

Article VII of the *Constitution of Virginia* entitled “Local Government” includes provision for “regional government.” Its definition is “a unit of general government organized as provided by law within defined boundaries, as determined by the General Assembly.” Later, the Constitution states, “Every law for the organization of a regional government shall . . . require the approval of the organization of the regional government by a majority vote of the qualified voters voting thereon in each county and city which is to participate in the regional government. . . .”

The 1992 Final Report of the Commission Studying “Local and State Infrastructure Needs and Revenue Resources” (House Document No. 51) addressed, among other issues, the advisability of how regional approaches to infrastructure projects could benefit the Commonwealth considerably through cost savings. The report also noted that stormwater management utility fees “could enable localities to phase out general fund contributions and to rely on revenue bonds for the program’s infrastructure needs.”

According to The Brookings Institution’s study, growth management requires regional or statewide coordination and generally is not possible for localities to accomplish by themselves, noting that strong regional governance is scarce in the United States. In the argument that *home rule* would foster growth management, the study reports that Dillon’s Rule exerts little or no influence on the amount of government authority and presents no roadblock to intergovernmental cooperation; further, expanded local authority actually hinders growth management and regional collaboration. “In sum, localities—rather than blaming Dillon’s Rule for the shortcomings of growth management—need to reexamine their own regulations (which set the rules of the development game) and urge states to take a leadership role.”

## Conclusion

Unlike the federal government, states are wholly involved in dealing with internal issues, collecting and allocating resources for common use, and regulating the activities of their local jurisdictions and citizens. How they go about exercising these powers creates profound differences among and within states in the provision of programs and services. Virginia’s legislators, in the main, continue to view their role as one of micro-managers of local affairs. Almost without exception, and with about 3,000 bills to consider each legislative session, these lawmakers have little time to study the complexities of problems in a particular city or county,

yet are asked to vote on their solutions. Many legislators have never held local office.

Much of the general climate of distrust between local and state elected officials can be attributed to the General Assembly’s oversight of local authority. Fairfax County, with a population of more than one million people, must look to state legislators from throughout the Commonwealth, from Newport News to Norton to Westmoreland County, to determine what governmental authorities are needed in this increasingly urbanized county—for diversification of the local tax base, for educational programs, for land use and growth management, for the environment, and for many other aspects of our lives. It may be time for Virginia’s legislature to reconsider its role *vis-a-vis* local governments.

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### Interviews (telephone)

Stephen MacIsaac, Arlington County Attorney  
 Susan Milbourne, Loudoun County Attorney’s office  
 Prince William County Attorney’s office

## 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.

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 (4<sup>th</sup> Cir. 2001); *Arlington County Republican Committee v. Arlington County*, 983 F.2d 587 (4<sup>th</sup> 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.

PRESENT: All the Justices

JACQULYN C. LOGAN, ET AL.

v. Record No. 070371

OPINION BY  
JUSTICE BARBARA MILANO KEENAN  
April 18, 2008

CITY COUNCIL OF THE CITY  
OF ROANOKE, ET AL.

FROM THE CIRCUIT COURT OF THE CITY OF ROANOKE  
Charles N. Dorsey, Judge

The primary issue we decide in this appeal is whether Code § 15.2-2255 permits a local governing body to delegate to a planning commission or other agent the authority under a subdivision ordinance to grant exceptions involving public improvements. We also consider the issue whether certain provisions in the Roanoke City Subdivision Ordinance<sup>1</sup> (the Subdivision Ordinance) provided adequate standards, in compliance with Code § 15.2-2242(1), for rendering discretionary decisions granting exceptions under that Ordinance. Finally, we consider whether neighboring landowners may seek a declaratory judgment regarding a locality's application of a subdivision ordinance.

#### I. FACTS AND PROCEDURAL HISTORY

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<sup>1</sup> All references to the Roanoke City Subdivision Ordinance contained in this opinion relate to the Ordinance as it was written in 2004, because the parties and the circuit court relied exclusively on this version of the Ordinance when the case was decided by the circuit court. Since 2004, the Ordinance has been renumbered and portions have been amended.



In 2004, George Leonard Boone, president of Boone Homes, Inc., a land development company, began working with officials from the City of Roanoke (the City) to obtain approval of a subdivision plat providing for the construction of about 60 single-family homes in southern Roanoke. Boone planned to build this housing development, known as "Wilton," on about 50 acres of mountainous land.

Boone worked with R. Brian Townsend, the City's Director of Planning, Building, and Economic Development, to obtain approval of the Wilton subdivision plat. Townsend was the subdivision agent authorized by the City Council and the City Planning Commission, under former Subdivision Ordinance §§ 31-5(a)<sup>2</sup> and 31-65,<sup>3</sup> to make decisions regarding exceptions to the Subdivision Ordinance.

In December 2004, Townsend conditionally approved a portion of the subdivision plat for the Wilton development. The approved portion of the plat incorporated the following exceptions to the Subdivision Ordinance requirements: 1) an exception from the 10% maximum grade requirement for local streets, as set forth in former Subdivision Ordinance § 31-70, to allow for a maximum grade of 16% for one local street; 2) an

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<sup>2</sup> Under current Subdivision Ordinance § 31.1-600, the City Planning Commission is authorized to elect an agent to administer and enforce the Ordinance.

<sup>3</sup> Subdivision Ordinance § 31.1-210 is the current provision that permits an agent to grant exceptions to the Ordinance.

exception from the minimum requirement for local streets of a 30-foot-wide paved surface, as set forth in former Subdivision Ordinance § 31-90(b),<sup>4</sup> to permit several streets 22 feet in width; 3) an exception from the maximum length for cul-de-sac streets of 600 feet, as set forth in former Subdivision Ordinance § 31-70, to permit a cul-de-sac street of 1800 feet; and 4) permission to construct street blocks up to a maximum length of 1800 feet, a departure from former Subdivision Ordinance § 31-67,<sup>5</sup> which states that blocks longer than 1200 feet, or less than 360 feet, "may be cause for disapproval of the preliminary plat."

Boone requested several of these exceptions in order to construct an access road, named Wilton Park Drive, leading into the Wilton development. Under Boone's plan, Wilton Park Drive would intersect with Peakwood Drive, an existing main road in a residential area of the City known as Prospect Hills. To construct Wilton Park Drive, Boone planned to demolish a house he owned on a one-acre lot that connects the Wilton property with Peakwood Drive and construct the entry to Wilton Park Drive on that lot. The proposed Wilton Park Drive would have a downward grade of 16% and, like all the proposed roads in the

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<sup>4</sup> Current Subdivision Ordinance § 31.1-400 provides requirements for the width of paved streets.

<sup>5</sup> Current Subdivision Ordinance § 31.1-301 addresses interconnected systems of streets and the "maximum street length between such connections."

Wilton subdivision, would end in a cul-de-sac.

In October 2005, Jacquelyn C. Logan and 15 additional landowners who own homes on Peakwood Drive near the proposed Wilton subdivision filed a bill of complaint for declaratory judgment against the Roanoke City Council, the City Planning Commission, Townsend, and Boone Homes, Inc. (collectively, the defendants). Logan and the additional complainants (collectively, Logan) alleged that Peakwood Drive, a curved road located on a mountainside, would be "unsafe and inappropriate" for the additional vehicle traffic that would result from construction of the Wilton subdivision.

Logan also alleged in the bill of complaint that the Subdivision Ordinance was both facially invalid and invalid as applied to the approval of the Wilton subdivision plat. Logan asserted the following particular claims relevant to this appeal: 1) former Subdivision Ordinance §§ 31-65 and -90(b) were unlawful because they stated less stringent standards for granting exceptions to the Subdivision Ordinance than the standards provided in Code § 15.2-2242(1); 2) in violation of Code § 15.2-2255, the City Council improperly delegated to its subdivision agent the authority to grant exceptions under the Subdivision Ordinance involving public improvements; 3) former Subdivision Ordinance §§ 65 and -90(b) failed to provide adequate standards to guide the subdivision agent's decisions

whether to grant exceptions under the Ordinance; 4) the subdivision agent lacked authority under Code §§ 15.2-2242 and -2255 to grant exceptions relating to public improvements; 5) the subdivision agent acted arbitrarily and capriciously when he granted the exceptions; and 6) the approval of plans for proposed Wilton Park Drive violated former Subdivision Ordinance § 31-8<sup>6</sup> because the plans would alter the boundaries of lots in Prospect Hills and would alter Peakwood Drive.

The defendants filed demurrers to the bill of complaint. The circuit court sustained the demurrers regarding Logan's claims one, two, and four, as listed above, and granted Logan leave to amend those claims.

After Logan filed an amended bill of complaint, the defendants again filed demurrers. Among other things, the defendants contended that Logan did not have a private right of action to challenge enforcement of the Subdivision Ordinance as applied to the Wilton subdivision plat. The circuit court held that the amended bill of complaint was not significantly different from Logan's original pleading, and again sustained the demurrers regarding claims one, two, and four.

The case proceeded to a five-day bench trial, in which the circuit court heard evidence relating to each of the granted

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<sup>6</sup> The current Subdivision Ordinance does not contain a provision that specifically addresses boundary line relocation.

exceptions. Following the trial, in a letter opinion, the circuit court dismissed Logan's remaining claims. The circuit court held that Logan could seek a declaratory judgment under Code § 8.01-184 to determine the adequacy of standards for granting exceptions under the Subdivision Ordinance, and the propriety of the particular decisions Townsend made concerning the Wilton subdivision plat. The circuit court concluded that former Subdivision Ordinance §§ 31-65 and -90 contained definite and sufficient standards under Code § 15.2-2242(1) to guide the subdivision agent in exercising his discretion under those provisions. The circuit court also held that Logan failed to prove by a preponderance of the evidence that the subdivision agent acted in an arbitrary and capricious manner in granting the challenged exceptions.

We awarded Logan this appeal. We also granted the defendants' assignments of cross-error, in which they assert that Logan did not have a right of action to challenge the subdivision agent's application of the Subdivision Ordinance in approving the Wilton subdivision plat.

## II. ANALYSIS

### A. Delegation of Authority to Subdivision Agent

Logan argues that the City Council was prohibited by Code § 15.2-2255 from adopting a provision in its Subdivision Ordinance that delegated to its subdivision agent the authority

to approve exceptions involving public improvements. The statute provides:

The administration and enforcement of subdivision regulations insofar as they pertain to public improvements as authorized in §§ 15.2-2241 through 15.2-2245 shall be vested in the governing body of the locality in which the improvements are or will be located.

Except as provided above, the governing body shall be responsible for administering and enforcing the provisions of the subdivision regulations through its local planning commission or otherwise.

Code § 15.2-2255.

Relying on the Dillon Rule of strict construction, Logan contends that the first paragraph of Code § 15.2-2255 removes the category of public improvements from the general authority of a local governing body to delegate matters concerning the application and enforcement of its subdivision ordinance. Thus, Logan contends that only a local governing body, not its designated agent, may grant exceptions pertaining to public improvements as part of the subdivision plat approval process.

In response, the defendants contend that the first paragraph of Code § 15.2-2255 addresses situations in which real property is subject to the subdivision ordinances of both a county and a municipality. According to the defendants, in such situations, the administration and enforcement of subdivision ordinance provisions pertaining to public improvements shall be vested in the governing body of the

locality in which the improvements are located. Thus, the defendants assert that because approval of the Wilton subdivision plat did not involve public improvements located in more than one jurisdiction, this statutory provision did not prevent the City from delegating to Townsend the authority to grant exceptions relating to public improvements proposed for the Wilton subdivision. We agree with the defendants' arguments.

We examine the language of Code § 15.2-2255 in the context of related statutes that also address the application and enforcement of subdivision ordinances. Our consideration of the various statutes involves a pure question of law, which we determine de novo on appeal. Miller v. Highland County, 274 Va. 355, 364, 650 S.E.2d 532, 535 (2007); Budd v. Punyanitya, 273 Va. 583, 591, 643 S.E.2d 180, 184 (2007); Boynton v. Kilgore, 271 Va. 220, 227, 623 S.E.2d 922, 925 (2006). The central focus of our analysis is to ascertain and give effect to the General Assembly's intent in enacting the provisions concerning subdivision ordinances adopted by localities. See Miller, 274 Va. at 364, 650 S.E.2d at 535; Boynton, 271 Va. at 227, 623 S.E.2d at 925; Chase v. DaimlerChrysler Corp., 266 Va. 544, 547, 587 S.E.2d 521, 522 (2003).

We determine the General Assembly's intent from the words employed in the statutes. Miller, 274 Va. at 364, 650 S.E.2d

at 535; Crawford v. Haddock, 270 Va. 524, 528, 621 S.E.2d 127, 129 (2005); Horner v. Dep't of Mental Health, 268 Va. 187, 192, 597 S.E.2d 202, 204 (2004). We may not add words to a statute or ignore any of the actual statutory language. Purce v. Patterson, 275 Va. 190, 194, 654 S.E.2d 885, 886 (2008); BBF, Inc. v. Alstom Power, Inc., 274 Va. 326, 331, 645 S.E.2d 467, 469 (2007). Thus, we presume that every part of a statute has some effect, and we will not consider any portion meaningless unless absolutely necessary. Jackson v. Commonwealth, 274 Va. 630, 634, 652 S.E.2d 111, 113 (2007); Level 3 Commcn's of Va., Inc. v. State Corp. Comm'n, 268 Va. 471, 477-78, 604 S.E.2d 71, 74 (2004); Department of Medical Assistance Servs. v. Beverly Healthcare of Fredericksburg, 268 Va. 278, 285, 601 S.E.2d 604, 608 (2004); Hubbard v. Henrico Ltd. P'ship, 255 Va. 335, 340-41, 497 S.E.2d 335, 338 (1998). Additionally, because the several statutes we consider impact the same subject, we harmonize their provisions whenever possible. Peerless Ins. Co. v. County of Fairfax, 274 Va. 236, 244, 645 S.E.2d 478, 483 (2007); Alliance to Save the Mattaponi v. Commonwealth, 270 Va. 423, 439-40, 621 S.E.2d 78, 87 (2005); Capelle v. Orange County, 269 Va. 60, 65, 607 S.E.2d 103, 105 (2005).

We disagree with Logan's argument that the first paragraph of Code § 15.2-2255 is intended to restrict a governing body's power to delegate the administration and enforcement of



subdivision regulations pertaining to public improvements. Such a construction would render meaningless the phrase "in which the improvements are or will be located."

Instead, we conclude that the first paragraph of the statute is intended to address situations in which existing or proposed public improvements may be subject to the subdivision ordinances of more than one locality. Such circumstances may arise under the provisions of Code §§ 15.2-2248 and -2249.

Under Code § 15.2-2248, in five specified counties, the subdivision regulations adopted by a municipality located within those counties shall apply in certain circumstances beyond the municipality's corporate limits into unincorporated regions of the county, if the municipal ordinance so provides. However, under Code § 15.2-2249, the subdivision regulations adopted by the local governing bodies of these five counties shall apply in all unincorporated areas of those counties, including those areas over which a municipality may extend the application of its subdivision ordinance, provided that any such municipality has been given the opportunity to approve or disapprove the county's proposed regulations.

The General Assembly specifically contemplated that disagreements could arise under these provisions regarding whether the regulations of a county or a municipality should be applicable to a given area. To address this problem, Code

§ 15.2-2250 permits a municipality or a county, or both these parties, to petition the circuit court for the county in which the major part of the disputed territory lies, and the circuit court "shall hear the matter and enter an appropriate order."

Id.

Viewed in the context of these statutes, the legislative intent of Code § 15.2-2255 is plain. We conclude that the General Assembly intended to make certain that control over the development of public improvements not be subject to uncertainty on the part of local officials or to an unresolved dispute between a county and a municipality. By enacting Code § 15.2-2255, the General Assembly specified that with regard to public improvements authorized by the subdivision ordinance enabling statutes, the administration and enforcement of subdivision regulations will be controlled by the governing body in which the improvements are or will be located. Accordingly, this provision removes any uncertainty regarding which jurisdiction shall exercise control over present and proposed public improvements physically located in a given jurisdiction.

In view of this statutory purpose, we hold that the first paragraph of Code § 15.2-2255 does not reflect a legislative intent to prevent a local governing body from delegating to an agent the responsibility to administer and enforce subdivision

regulations pertaining to public improvements within that locality. In fact, such delegation is expressly authorized by the second paragraph of Code § 15.2-2255, subject to the restrictions imposed by the first paragraph concerning public improvements that may be within the joint control of more than one locality.

Our conclusion is not altered by Logan's argument that the Dillon Rule of strict construction prohibits this result. Under the Dillon Rule, municipal corporations and counties possess and may exercise only those powers expressly granted by the General Assembly, powers necessarily or fairly implied from such express powers, and those powers that are essential and indispensable. Norton v. City of Danville, 268 Va. 402, 408 n.3, 602 S.E.2d 126, 129 n.3 (2004); Arlington Co. v. White, 259 Va. 708, 712, 528 S.E.2d 706, 708 (2000); Board of Supervisors v. Countryside Inv. Co., 258 Va. 497, 503, 522 S.E.2d 610, 613 (1999); County of Fairfax v. Southern Iron Works, Inc., 242 Va. 435, 448, 410 S.E.2d 674, 682 (1991). Here, the City Council's delegation of authority to its subdivision agent was expressly authorized by the second paragraph of Code § 15.2-2255. Therefore, the City did not violate the Dillon Rule by delegating authority to its subdivision agent to administer and enforce the provisions of the Subdivision Ordinance pertaining to public improvements.

## B. Adequacy of Subdivision Ordinance Standards

Logan argues that the former Subdivision Ordinance did not comply with the provisions of Code § 15.2-2242(1), which permit local governing bodies to adopt procedures for granting exceptions under their subdivision ordinances. Logan contends that the former Subdivision Ordinance failed to articulate standards required by Code § 15.2-2242(1) to guide decisions regarding the approval of exceptions. According to Logan, the evaluative factors listed in former Subdivision Ordinance §§ 31-65 and -90(b) provided little or no guidance for the granting of exceptions. Logan also contends that the language in former Subdivision Ordinance § 31-67 regarding block lengths lacked any substantive standard for permitting an exception under that section.

Initially, we do not consider Logan's argument that former Subdivision Ordinance § 31-67 was facially invalid because it lacked any standard to guide administrative review of its provisions. Logan did not make such an allegation in her amended bill of complaint and, therefore, the issue was not properly before the circuit court and is not before us in this appeal. See Board of Supervisors v. Robertson, 266 Va. 525, 538, 587 S.E.2d 570, 578-79 (2003); Jenkins v. Bay House Assocs., 266 Va. 39, 43, 581 S.E.2d 510, 512 (2003). Accordingly, we confine our review to Logan's remaining

allegations that former Subdivision Ordinance §§ 31-65 and - 90(b) were facially invalid.

In considering Logan's argument, we observe that the General Assembly has required that all local governing bodies adopt subdivision ordinances. Code § 15.2-2240. Those subdivision ordinances must include the provisions specified in Code § 15.2-2241, and may contain certain optional provisions set forth in Code § 15.2-2242.

The language of Code § 15.2-2242(1), which details one such optional provision, states that a subdivision ordinance may include provisions for "variations in or exceptions to the general regulations of the subdivision ordinance in cases of unusual situations or when strict adherence to the general regulations would result in substantial injustice or hardship." Under this authority, the City Council included several provisions in the former Subdivision Ordinance authorizing the subdivision agent to grant exceptions to the Ordinance's requirements.

When a legislative body delegates its authority to an administrative agent, that body must prescribe sufficient standards to guide the administrator in exercising the delegated authority. Bell v. Dorey Electric Co., 248 Va. 378, 382, 448 S.E.2d 622, 624 (1994); Ours Properties, Inc. v. Ley, 198 Va. 848, 851-53, 96 S.E.2d 754, 756-58 (1957). Therefore,

we consider whether former Subdivision Ordinance §§ 31-65 and - 90(b) prescribe sufficient standards to guide the subdivision agent's decision whether to grant exceptions under those sections.

Former Subdivision Ordinance § 31-65, entitled "General requirements; exceptions from article," provided:

The arrangement of lots, character of the subdivision, and extent, width, grade and location of all streets shall conform to the officially adopted master plan or parts, divisions or sections thereof and shall be considered in their relation to existing and planned streets, topographical conditions and public convenience and safety, and in their appropriate relation to the proposed uses of adjacent land; provided, however, that the agent may determine that the size or shape of the land, topography, proposed land use or other special conditions make compliance with all provisions of this article impractical and may make exceptions to provisions contained herein, provided such exceptions are not in conflict with provisions of other city ordinances.

Because former Subdivision Ordinance § 31-65 did not define the term "impractical," we employ the general definition of that word in considering the adequacy of the stated standards. See Adams Outdoor Adver., L.P. v. Board of Zoning Appeals, 274 Va. 189, 196, 645 S.E.2d 271, 275 (2007); Hoffman Family, L.L.C. v. City of Alexandria, 272 Va. 274, 284, 634 S.E.2d 722, 727 (2006). The word "impractical" is defined as "incapable of being put into use or effect or of being accomplished or done successfully or without extreme trouble,

hardship, or expense.” See Webster’s Third New International Dictionary 1136 (1993).

We also observe that former Subdivision Ordinance § 31-90(b) required that local streets have a minimum paved width of 30 feet. However, this section also provided for an exception to that requirement, stating that “[i]n cases where the cross slope will not permit a greater width,” the agent may modify the minimum paved width requirement “in a manner that will result in the best possible utilization of the land to be subdivided, giving consideration to the topography of the land and general character and density of the proposed subdivision.”

Upon our review, we hold that former Subdivision Ordinance §§ 31-65 and -90(b) prescribed adequate standards for the subdivision agent’s exercise of delegated authority consistent with the directive of Code § 15.2-2242(1). The subdivision agent was required to consider several factors under former Subdivision Ordinance § 31-65 before granting an exception to the stated ordinance requirements. That section also prohibited the agent from granting an exception to an ordinance requirement if the exception would be in conflict with any provision of any city ordinance.

Absent such a conflict, former Subdivision Ordinance § 31-65 permitted the subdivision agent to grant an exception based on such factors as the size or shape of the parcel, its

topography, the proposed land use, or other special conditions upon determining that compliance with the general subdivision ordinance requirements would be "impractical." Under former Subdivision Ordinance § 31-90(b), the agent could not permit an exception from the minimum width requirement of 30 feet for paved local streets unless a situation presented by a "cross slope" indicated that such an exception was needed. This section further required that the agent consider the topography and character of the subdivision to achieve the best utilization of the land. Thus, we hold that the circuit court did not err in concluding that these provisions contained adequate standards to guide the subdivision agent's decisions whether to grant the allowable exceptions.

#### C. Agent's Application of Subdivision Ordinance

The defendants argue as a matter of cross-error that Logan did not have a right to file a declaratory judgment action challenging Townsend's application of the Subdivision Ordinance in granting exceptions for the Wilton subdivision. According to the defendants, our holdings in Shilling v. Jimenez, 268 Va. 202, 597 S.E.2d 206 (2004), and Miller v. Highland County, 274 Va. 355, 650 S.E.2d 532 (2007), require that we dismiss this portion of Logan's appeal.

In response, Logan asserts that the Declaratory Judgment Act, Code §§ 8.01-184 through -191, permits her present



challenge to Townsend's application of the Subdivision Ordinance. Logan contends that her case may be distinguished from the proceedings in Shilling, which did not include the locality as a party defendant but involved a neighboring landowner's suit against an adjoining property owner. Logan further maintains that our decision in Shilling is not controlling because in that case, we did not address a subdivision agent's interpretation of an ordinance or an agent's allegedly arbitrary and capricious actions granting exceptions to that ordinance. We disagree with Logan's arguments.

In Shilling, we considered the issue whether the declaratory judgment statutes may be used to maintain a third-party challenge to a government action when such challenge is not authorized by statute. The complainants in Shilling filed a declaratory judgment action requesting that a circuit court declare void the creation of a certain "family subdivision" approved under an ordinance allowing conveyances to members of a landowner's immediate family. 268 Va. at 205-06, 597 S.E.2d at 208. The neighboring landowners alleged that local officials wrongfully approved the subdivision based on factual misrepresentations made by the applicant. Id.

The defendants filed demurrers alleging that the local governing body was the sole entity authorized to enforce the

ordinance, and that the complainants could not seek to enforce the ordinance provisions by employing the remedy of declaratory judgment. The circuit court sustained the demurrers and dismissed the bill of complaint with prejudice. Id. at 206, 597 S.E.2d at 208. We affirmed the circuit court's judgment, holding that the complainants, who were strangers to the subdivision approval process, did not have a third-party right of action to enforce the locality's application of its subdivision ordinance in a declaratory judgment suit, because no statute granted third parties this right. Id. at 208, 597 S.E.2d at 209-10.

Three years after our decision in Shilling, we were asked in Miller to consider the complainants' attempted use of the declaratory judgment statutes to challenge a planning commission's determination that that a conditional use permit was in "substantial accord" with the locality's comprehensive plan. 274 Va. at 368-69, 650 S.E.2d at 538; see also Code § 15.2-2232. We held that the complainants failed to assert a valid request for declaratory relief because no statute specifically authorized such a right of action. Miller, 274 Va. at 371-72, 650 S.E.2d at 540.

We explained that the purpose of the declaratory judgment statutes is to provide a mechanism for obtaining preventive relief to resolve controversies involving legal rights, without

requiring one party to invade the asserted rights of another in order to allow an ordinary civil action for damages. Miller, 274 Va. at 370, 650 S.E.2d at 539; Hoffman Family, L.L.C. v. Mill Two Assocs. P'ship, 259 Va. 685, 693, 529 S.E.2d 318, 323 (2000); Cupp v. Board of Supervisors, 227 Va. 580, 592, 318 S.E.2d 407, 413 (1984). We emphasized that our declaratory judgment statutes "do not create or alter any substantive rights, or bring any other additional rights into being." Miller, 274 Va. at 370, 650 S.E.2d at 539; accord Liberty Mutual Ins. Co. v. Bishop, 211 Va. 414, 419, 177 S.E.2d 519, 522 (1970).

We conclude that the holdings in Shilling and Miller require dismissal of the part of Logan's appeal challenging Townsend's application of the Subdivision Ordinance to the proposed Wilton subdivision. Like the complainants in those two cases, Logan has attempted to use the declaratory judgment statutes to create a right of appeal to the circuit courts that does not otherwise exist. Because the declaratory judgment statutes do not create such rights, and in the absence of statutory authority granting her a right of appeal to actions taken under the Subdivision Ordinance, Logan remained a stranger to the subdivision approval process and was not authorized to challenge Townsend's actions under that

Ordinance.<sup>7</sup> Therefore, we hold that the circuit court erred in concluding that Logan had a third-party right of action to challenge the City's approval of the Wilton subdivision plat, and that this part of Logan's appeal must be dismissed.

### III. CONCLUSION

Based on our holdings in this appeal, we will affirm the part of the circuit court's judgment concluding that the City lawfully delegated authority to its subdivision agent to administer and enforce the provisions of the Subdivision Ordinance pertaining to public improvements. We also will affirm the part of the circuit court's judgment holding that former Subdivision Ordinance §§ 31-65 and -90(b) provided adequate standards to guide the subdivision agent's exercise of discretion in granting exceptions allowed under those Ordinance provisions. We will enter final judgment in favor of the defendants on these parts of the circuit court's judgment.

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<sup>7</sup> We observe that, in one of her assignments of error, Logan challenged the circuit court's "ruling that [former] City Code § 31-8 permitted Townsend to approve a change to the boundaries of a lot, even though the purpose and effect of the change was to add a new intersection to, and thus physically alter, Peakwood Drive." Logan did not assign error, however, on the separate basis that approval of the changes to Peakwood Drive violated Code § 15.2-2275, which, among other things, prohibits a locality from allowing under its subdivision ordinance the alteration of a boundary line of a lot when that action "involve[s] the relocation or alteration of streets, alleys, easements for public passage, or other public areas." Therefore, we do not consider the impact of Code § 15.2-2275 on the actions relating to Peakwood Drive taken pursuant to the former Subdivision Ordinance.

We will reverse the part of the circuit court's judgment holding that Logan was entitled to seek a declaratory judgment regarding the subdivision agent's application of the former Subdivision Ordinance to the proposed Wilton subdivision, and we will enter final judgment in favor of the defendants on this part of the circuit court's judgment. Accordingly, we also will vacate the part of the circuit court's judgment regarding the subdivision agent's application of the former Subdivision Ordinance, and we will dismiss the portion of Logan's appeal addressing that part of the circuit court's judgment.

Affirmed in part, reversed in part,  
vacated in part, dismissed in part,  
and final judgment.