

**HEALTH: ENVIRONMENTAL HEALTH SERVICES - SEWAGE DISPOSAL.**

**CONSTITUTION OF VIRGINIA: BILL OF RIGHTS.**

**COUNTIES, CITIES AND TOWNS: GENERAL POWERS AND PROCEDURES OF COUNTIES  
— PLANNING, SUBDIVISION OF LAND AND ZONING — FRANCHISES, PUBLIC  
PROPERTY, UTILITIES**

**STATE WATERS, PORTS AND HARBORS: STATE WATER CONTROL LAW.**

**Department of Health must consider land use concerns expressed by county board of supervisors regarding Department's processing of application for reissuance of permit to allow storage of sludge at existing facility within county. Local ordinance regulating alternative on-site sewage systems may not subject such systems to restrictions more stringent than those prescribed by state law or regulation. Analysis of "taking" in relation to Department's denial of permit.**

The Honorable Walter A. Stosch  
Member, Senate of Virginia  
June 2, 1999

You inquire regarding the processing of a permit application by the State Department of Health ("Department") for a sludge storage facility located in Goochland County. You ask whether the Department is required to consider the land use concerns expressed by the county board of supervisors. If such permit application is denied by the Department, you also ask whether such denial constitutes a "taking" under either the Fifth Amendment to the Constitution of the United States or Article I, § 11 of the Constitution of Virginia (1971).

You relate that the Department is considering the reissuance of a permit to allow the storage of sludge at an existing facility in Goochland County. The storage facility has been operating for ten years under a permit that initially was issued by the Department on March 17, 1989. There has been significant residential growth in the immediate area of the sludge storage facility since that date. You also advise that the county's comprehensive plan and the growth management plan anticipate and encourage the continued residential development of the general area surrounding the storage facility. In June 1998, the county board of supervisors adopted an ordinance banning the deposit or land application of sludge within the county.

You also advise that the board of supervisors has adopted a formal resolution opposing the issuance of a new permit based on what you describe as traditional land use planning concepts. The resolution expresses the board's sentiment that the sludge storage facility is no longer compatible with the county comprehensive plan and county growth management plan. You relate that pursuant to § 32.1-164.2 of the *Code of Virginia*, the board of supervisors has forwarded a copy of its resolution to the Department to formally provide its comments against the continued operation of the sludge storage facility in an area that is considered to be a prime area for future residential development.<sup>1</sup>

The General Assembly has delegated the principal responsibility for regulating and managing sewage treatment and disposal in Virginia to the State Board of Health in conjunction with the State Water Control Board. Specifically, § 32.1-164 provides:

- A. The [State] Board [of Health] shall have supervision and control over the safe and sanitary collection, conveyance, transportation, treatment, and disposal of sewage, all sewerage systems, and treatment works as they affect the public health

and welfare. In discharging [this] responsibility ... the Board shall exercise due diligence to protect the quality of both surface water and ground water. The regulation of sewage, as it may affect the public health, shall be primarily the responsibility of the Board and, in cases to which the provisions of Chapter 3.1 (§ 62.1-44.2 et seq.) of Title 62.1<sup>[2]</sup> are applicable, the joint responsibility of the Board and the State Water Control Board in accordance with such chapter....

B. The regulations of the [State] Board [of Health] shall govern the collection, conveyance, transportation, treatment and disposal of sewage.<sup>[3]</sup> Such regulations shall be designed to protect the public health and promote the public welfare ....

Article 1, Chapter 6 of Title 32.1<sup>4</sup> provides comprehensive statutory regulation for sewage treatment and disposal. Section 32.1-164 grants the State Board of Health broad authority to regulate many areas, including without limitation, the development of standards governing disposal of sewage on or in soils, criteria for determining the demonstrated ability of alternative on-site systems, and standards and criteria for alternative discharging sewage systems.<sup>5</sup> Additionally, § 32.1-166.1 establishes a review board to hear "administrative appeals of denials of onsite sewage disposal system permits."<sup>6</sup>

"[T]he primary objective of statutory construction is to ascertain and give effect to legislative intent."<sup>7</sup> Section 32.1-164.2 expressly provides that the State Board of Health must notify local governing bodies where sewage disposal is to occur of "pertinent details of the proposal and establish a date for a public meeting to discuss technical issues relating to the proposal." Moreover, the Board's regulations provide that "[c]onformance to local land use zoning and planning should be resolved between the local government and the facility owner or permit holder."<sup>8</sup>

Consistent with the prior opinions of the Attorney General, therefore, it is my view that the Department must consider the land use concerns expressed by the county board of supervisors, such as the local ordinance and resolution you mention.

Local ordinances adopted under the broad police power authority of § 15.2-1200, however, must not be inconsistent with state law.<sup>9</sup> Thus, while the state and the county may share some jurisdiction in this area, the power of the State Water Control Board and the State Board of Health is paramount, and any local ordinance must not operate in a conflicting manner.<sup>10</sup> Therefore, regardless of whether there are statutes which may be interpreted to enable a locality to adopt an ordinance regulating alternative on-site sewage systems, systems falling within the purview of state regulation may not be prohibited or subjected to restrictions more stringent than those prescribed by regulation.<sup>11</sup>

You next ask whether the Department's denial of a permit would constitute a "taking" under either the Fifth Amendment to the United States Constitution or Article I, § 11 of the Virginia Constitution.

The Fifth Amendment to the Constitution of the United States prohibits the taking of private property for public use, "without just compensation." Article I, § 11 of the Constitution of Virginia contains a similar prohibition.<sup>12</sup> The Supreme Court of the United States long ago held that not every governmental regulation resulting in a diminution of property values constitutes a "taking" compensable under the Fifth Amendment.<sup>13</sup> The Supreme Court also has long acknowledged that some regulations go too far in restricting property uses, and thereby constitute a taking.<sup>14</sup> These

early cases establish the extremes. Analysis of specific taking claims, however, has proven difficult.

The Virginia law of takings, like the federal law, is imprecise in its borders and definitions ....

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The most important distinction in Virginia law, as in federal law, is that between eminent domain, in which private property is taken or damaged, and the exercise of the police power of the State, in which the use of the property is simply regulated for the public interest. The former is compensable; the latter is not.<sup>[15]</sup>

In recent cases, the Supreme Court of the United States has focused its takings analysis on the economic viability of the uses remaining to the property owner being regulated. The application of land use controls is a taking only if the ordinance or regulation "does not substantially advance legitimate state interests, or denies an owner economically viable use of his land."<sup>16</sup> The Supreme Court of Virginia has reached similar conclusions:

All citizens hold property subject to the proper exercise of the police power for the common good. Even where such an exercise results in substantial diminution of property values, an owner has no right to compensation therefor. In *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), the Supreme Court held that no taking occurs in these circumstances unless the regulation interferes with all reasonable beneficial uses of the property, taken as a whole.<sup>[17]</sup>

More recently, the Supreme Court of Virginia has held that a zoning ordinance does not constitute a taking unless the owner is "deprived of *all* economically viable uses of its property."<sup>18</sup>

In *Penn Central Transportation Co. v. New York City*, the Supreme Court of the United States held that "whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely 'upon the particular circumstances [in that] case.'"<sup>19</sup>

In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.<sup>[20]</sup>

Therefore, resolution of the inquiry regarding whether the denial of the permit application by the Department constitutes a "taking" under either the Fifth Amendment to the United States Constitution or Article I, § 11 of the Virginia Constitution depends largely upon the particular facts and circumstances of the matter. You have provided no such facts upon which to base such a conclusion. Accordingly, I must respectfully decline to render an opinion on whether the Department's denial of such a permit application would constitute a "taking."<sup>21</sup>

<sup>1</sup>Section 32.1-164.2 provides: "Whenever the [State] Board [of Health] receives an application for land disposal of treated sewage, stabilized sewage sludges or stabilized septage, the Board shall notify the local governing bodies where disposal is to take place of pertinent details of the proposal and establish a date for a public meeting to discuss technical issues relating to the proposal. The Board shall give notice of the date, time and place of the public meeting and a description of the proposal by publication in a newspaper of general circulation in the ... county where land disposal is to take place. Public notice of the scheduled meeting must occur no fewer than seven nor more than fourteen days prior to the meeting. The Board shall not consider the application for land disposal to be complete until the public meeting has been held and comment has been received from the local governing body, or until thirty days have lapsed from the date of the public meeting. This section shall not apply to applications for septic tank permits."

<sup>2</sup>Chapter 3.1 of Title 62.1, §§ 62.1-44.2 to 62.1-44.34:28, embodies the State Water Control Law.

<sup>3</sup>The State Board of Health has implemented its Biosolids Use Regulations. See 12 VAC ch. 585, 5-585-10 to 5-585-650 (West 1996 & Supp. 1999).

<sup>4</sup>Sections 32.1-163 to 32.1-166 (entitled "Sewage Disposal").

<sup>5</sup>Section 32.1-164(B)(4), (10)-(13).

<sup>6</sup>Section 32.1-166.6.

<sup>7</sup>Turner v. Commonwealth, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983).

<sup>8</sup>12 VAC 5-585-260, at 17-18 (West Supp. 1999).

<sup>9</sup>See §§ 1-13.17, 15.2-1200; 1983-1984 Op. Va. Att'y Gen. 86, 87.

<sup>10</sup>See 1995 Op. Va. Att'y Gen. 66, 67.

<sup>11</sup>Note that sewage disposal systems regulated by the Department and incorporated into the Uniform Statewide Building Code would preempt local regulation by operation of the express preemption provisions in § 36-98. See 1987-1988 Op. Va. Att'y Gen. 610, 611.

<sup>12</sup>Article I, § 11 actually requires just compensation for private property "taken or *damaged*" for public uses. (Emphasis added.) While this appears to be a stricter standard than the federal constitutional requirement, the Virginia provision has, in fact, been applied similarly to the federal one, preserving a distinction between compensable "takings" and valid noncompensable restrictions on the use of property imposed through the state's or locality's exercise of its police power. See 1 A.E. Dick Howard, Commentaries on the Constitution of Virginia 218-23 (1974).

<sup>13</sup>See *Mugler v. Kansas*, 123 U.S. 623 (1887) (state is not required to compensate brewery owner for damage to property value resulting from prohibition law). Local zoning regulations and similar restrictions on land use, even when they diminish land values, likewise have long been upheld. See *Euclid v. Ambler Co.*, 272 U.S. 365 (1926).

<sup>14</sup>Penna. Coal Co. v. Mahon, 260 U.S. 393 (1922) (state law barring subsurface coal mining to prevent subsidence under public buildings is invalid exercise of police power to accomplish what state could only achieve by exercise of eminent domain—compensating owner of mineral rights).

<sup>15</sup>1 A.E. Dick Howard, *supra* note 12, at 218, 219.

<sup>16</sup>Agins v. Tiburon, 447 U.S. 255, 260 (1980) (citations omitted); *see also* Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470, 495 (1987); Ciampitti v. United States, 22 Cl. Ct. 310 (1991); Florida Rock Industries, Inc. v. United States, 21 Cl. Ct. 161 (1990), *vacated and remanded*, 18 F.3d 1560 (Fed. Cir. 1994).

<sup>17</sup>Commonwealth v. County Utilities, 223 Va. 534, 542, 290 S.E.2d 867, 872 (1982) (citations omitted).

<sup>18</sup>Virginia Beach v. Virginia Land Invest. Ass'n, 239 Va. 412, 416-17, 389 S.E.2d 312, 314 (1990) (emphasis added).

<sup>19</sup>438 U.S. 104, 124 (1978) (citation omitted).

<sup>20</sup>*Id.* (citations omitted).

<sup>21</sup>See 1991 Op. Va. Att'y Gen. 122, 124 (Office of Attorney General declines to render official opinions when request involves question of fact rather than one of law).