

00-055

**COUNTIES, CITIES AND TOWNS: PLANNING, SUBDIVISION
OF LAND AND ZONING.**

Provision in subdivision ordinance prescribing minimum time period lot must be in existence prior to its subdivision is more expansive than is permitted by subdivision enabling statutes and is void and unenforceable.

The Honorable R. Creigh Deeds
Member, House of Delegates

October 13, 2000

You ask whether a locality may include in its subdivision ordinance a provision allowing the subdivision of a lot only if the lot was in existence on September 30, 1995, or has been in existence a minimum of five calendar years.

Section 15.2-2240 of the *Code of Virginia* authorizes "[t]he governing body of every locality [to] adopt an ordinance" regulating the subdivision and development of land "to assure the orderly subdivision of land and its development." Section 15.2-2241 contains mandatory provisions to be included in such subdivision ordinance, and § 15.2-2242 sets forth optional provisions which may be included in such subdivision ordinance.

The powers of local governing bodies in the Commonwealth are limited to those "conferred expressly or by necessary implication."¹ "This [principle] is a corollary to Dillon's Rule that municipal corporations have only those powers expressly granted, those necessarily or fairly implied therefrom, and those that are essential and indispensable."² Any doubt as to the existence of a power must be resolved against the locality.³ Accordingly, because local governments are creatures of the Commonwealth and thus subordinate, they possess only those powers that the General Assembly has conferred upon them.⁴

Subdivision ordinances are enacted pursuant to the delegation of the police power of the Commonwealth to the locality.⁵ As noted in § 15.2-2240, the purpose of a subdivision ordinance is to assure the orderly subdivision and development of land. "Provisions in a local subdivision ordinance, however, must derive power from an authorization from the General Assembly."⁶ Thus, a local governing body "does not have unfettered discretion when deciding what matters it may include in its subdivision

ordinance. Rather, [it] must include those requisites which are mandated in Code § 15.2-2241 and may, at [its] discretion, include the optional provisions of a subdivision ordinance contained in Code § 15.2-2242."⁷

It is my opinion that the General Assembly does not authorize the enactment of the requirement in issue. "Authority for requirements imposed on land subdividers and developers must be found in the subdivision enabling statutes and may not be implied from other more general grants of local powers."⁸ Neither § 15.2-2241 nor § 15.2-2242 authorizes a governing body to enact provisions in a subdivision ordinance prescribing a minimum time period for a lot to be in existence prior to being subdivided.⁹ Thus, such an ordinance is more expansive than is permitted pursuant to these statutes.¹⁰ Accordingly, a provision in a subdivision ordinance allowing the subdivision of a lot only if the lot has been in existence for a minimum period of time is, in my opinion, void and unenforceable.¹¹

¹Commonwealth v. Arlington County Bd., 217 Va. 558, 572, 232 S.E.2d 30, 39 (1977).

²*Id.* at 574, 232 S.E.2d at 40 (quoting Bd. of Supervisors v. Horne, 216 Va. 113, 117, 215 S.E.2d 453, 455 (1975)).

³2A Eugene McQuillin, *The Law of Municipal Corporations* § 10.19, at 369 (3rd ed. rev. 1996 & Supp. 2000).

⁴*See* Gordon v. Fairfax County, 207 Va. 827, 153 S.E.2d 270 (1967) (power exercised by county board of supervisors in voting to lend money to airport authority was expressly implied from act of legislature allowing local governing body to lend money to any authority created by such governing body).

⁵*See* Nat. Realty Corp. v. Virginia Beach, 209 Va. 172, 175, 163 S.E.2d 154, 156 (1968).

⁶Board of Supervisors v. Countryside Invest. Co., 258 Va. 497, 504, 522 S.E.2d 610, 613 (1999) (citing Nat. Realty Corp. v. Virginia Beach, 209 Va. at 177, 163 S.E.2d at 158 (neither statutes dealing with land subdivision nor charter empowered city council to impose fee for examination and approval of subdivision plats)).

⁷*Id.*

⁸1992 Op. Va. Att'y Gen. 53, 55-56.

⁹*Compare* Board of Supervisors v. Countryside Invest. Co., 258 Va. at 504, 522 S.E.2d at 613 (striking subdivision ordinance provisions which specify size and shapes of lots to be subdivided).

¹⁰*Id.* at 505, 522 S.E.2d at 614.

¹¹*Compare* 1989 Op. Va. Att’y Gen. 100, 103-04 (concluding that subdivision ordinance requiring family member to have held title to property for five years before creating family subdivision pursuant to § 15.1-466(A)(k) [recodified as § 15.2-2241(10)] unreasonably restricts availability of exception to property owner desiring to establish family subdivision consistent with purposes of statute).