

01-052

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

CONSERVATION: HISTORIC RESOURCES – DEPARTMENT OF HISTORIC RESOURCES.

CONSTITUTION OF VIRGINIA: BILL OF RIGHTS.

Attorney General declines to render opinion: (1) whether ordinance delegating authority to architectural review board to determine historical significance of vacant parochial school building for purposes of demolition by church is invalid on its face; such function is properly left to local authority responsible for adoption and enforcement of ordinance; (2) whether decision of architectural review board places substantial burden on religious exercise of church; such decision requires analysis of facts and circumstances rather than interpretation of law; (3) whether review board's denial of church's permit application constitutes unconstitutional 'taking.' Department of Historic Resources is appropriate agency to determine whether building located in historic district and labeled 'ruin' may be removed.

The Honorable Johnny S. Joannou
Member, House of Delegates
June 29, 2001

You ask several questions regarding the scope of authority of an architectural review board pursuant to § 15.2-2306 of the *Code of Virginia*.¹ You first ask whether the absence of published objective standards for use by an architectural review board in determining historical significance constitutes an invalid delegation of authority by the Portsmouth City Council.

You relate that a church in Portsmouth has purchased for demolition a parochial school building that has been vacant since 1991, for the purpose of constructing a prayer garden plaza and expanding the church parking lot. You understand that the Portsmouth church was founded in 1772, and is the third oldest church of its denomination in the United States. The architectural review board has determined that the school building contained an 1891 structure regarded as historic. In the 1950s, the school building was built over with a brick wraparound structure, leaving one of the four original walls visible. You advise that the Department of Historic Resources regards the building as a "ruin," because the original integrity of the building had been greatly altered. The church desires to increase its presence and visibility on the street corridor now occupied by the former parochial school building.

The Portsmouth city code enclosed with your correspondence requires the church to apply for a certificate of appropriateness to demolish any building in the locality's historic district.² Application is made to the secretary of the architectural review board.³ The board either issues or denies a certificate of appropriateness based on the general purposes for creating historic districts, including "[t]he preservation and protection of historic buildings, structures, places and areas of historic interest."⁴ For purposes of demolition, the architectural review board must consider "[t]he historical or architectural value and significance of the building or structure and its relationship to or congruity with the historic value of the land, place and area in the historic district upon which it is [erected],"⁵ and with other buildings or structures in the vicinity.⁶ Any person aggrieved by a decision of the board may appeal such decision to the local governing body for

review.⁷ The basis for such appeal must be "limited to an alleged error by the [board] in finding that the proposed erection, alteration, reconstruction or restoration ... would not be architecturally compatible with the historic landmarks, buildings or structures within the historic district."⁸ Decisions of the governing body may be reviewed and revised in circuit court.⁹

This Office historically has followed a policy of responding to official opinion requests only when such requests concern an interpretation of federal or state law, rule or regulation.¹⁰ In instances when a request requires an interpretation of a local ordinance, the Attorney General has declined to respond in order to avoid becoming involved in matters solely of local concern and over which the local governing body has control.¹¹ Any ambiguity that exists in a local ordinance is a problem to be rectified by the local governing body rather than by an interpretation by this Office.¹² In addition, a 1987 opinion of the Attorney General concludes that the Attorney General has declined to render official opinions when the request involves, among others, a matter of purely local concern or procedure.¹³ Accordingly, I have limited my comments to the scope of authority of an architectural review board created by a locality pursuant to § 15.2-2306.

Section 15.2-2306 contains the only reference to architectural review boards found in the Virginia Code. Section 15.2-2306 declares that the governing body of a locality may provide for an architectural review board to administer any ordinance adopted by the locality setting forth the historic landmarks within the locality. Architectural review boards have only two specifically designated functions: (1) to review and certify that a proposed building or structure, including signs, is "architecturally compatible with the historic landmarks, buildings or structures" in the district subject to the board's control;¹⁴ and (2) to review and approve or disapprove the razing, demolition or moving of a historic landmark, building or structure within a historic district.¹⁵

Statutes that relate to the same subject "are not to be considered as isolated fragments of law, but as a whole, or as parts of a great connected, homogenous system, or a single and complete statutory arrangement."¹⁶ When construing statutes on the same subject, each section must be considered in conjunction with every other section to produce a harmonious result.¹⁷

Chapter 22 of Title 15.2, §§ 15.2-2200 through 15.2-2327, presents such a "connected system" for local government planning, subdivision of land and zoning. Various statutes within Chapter 22 detail the creation, powers and responsibilities of the several bodies and officers charged with carrying out the local land use regulation process, including the local governing body,¹⁸ the planning commission,¹⁹ the zoning administrator,²⁰ the board of zoning appeals²¹ and the architectural review board.²²

When a local governing body delegates a portion of its legislative power, it must establish standards for the exercise of the authority delegated. "There must be provided uniform rules of action, operating generally and impartially, for enforcement cannot be left to the will or unregulated discretion of subordinate officers or boards."²³ This statement "is subject to a qualification, 'where it is difficult or impracticable to lay down a definite rule,'"²⁴ and a delegation to an administrative board of the power to exercise a discretion based upon a finding of facts is not an invalid delegation.²⁵ This exception is premised on the understanding that legislation cannot address every variable that will arise in the application or administration of the delegated authority.²⁶ In addition, it is presumed that public officials will discharge their duties in accordance with law, and if an appeal may be had from the arbitrary acts of an official, due process requirements are met.²⁷

I note that, pursuant to the Portsmouth city code, any person aggrieved by a decision of the architectural review board may appeal the decision to the local governing body for review.²⁸ Furthermore, decisions of the governing body may be reviewed and revised in circuit court.²⁹ In addition, the review board is composed of members from civic coalitions, associations and leagues from the historic area, and "members ... chosen to provide professional expertise, such as architects, attorneys, real estate agents or historians."³⁰ Under the circumstances, I cannot conclude that the delegation of authority here is invalid on its face.

You next inquire whether a building that is located in a historic district and is labeled a "ruin" may be removed.

You relate that, according to guidelines issued by the Department of Historic Resources, a building is considered a "ruin" when the original integrity has been greatly altered. Section 10.1-2202 states that the powers and duties of the Director of the Department are designed

to encourage, stimulate, and support the identification, evaluation, protection, preservation, and rehabilitation of the Commonwealth's significant historic, architectural, archaeological, and cultural resources; in order to establish and maintain a permanent record of those resources; and in order to foster a greater appreciation of these resources among the citizens of the Commonwealth.

Among the powers and duties set forth in § 10.1-2202, the Director is required

[t]o aid and to encourage counties, cities and towns to establish historic zoning districts for designated landmarks and to adopt regulations for the preservation of historical, architectural, or archaeological values; [and]

[t]o provide technical advice and assistance to individuals, groups and governments conducting historic preservation programs and regularly to seek advice from the same on the effectiveness of Department programs[.]^[31]

For many years, Attorneys General have concluded that § 2.1-118, the authorizing statute for official opinions of the Attorney General, does not contemplate that such opinions be rendered on matters requiring factual determinations, rather than matters interpreting questions of law.³² In addition, two 1987 opinions of the Attorney General conclude that, in rendering official opinions pursuant to § 2.1-118, the Attorney General has declined to render such opinions when the request (1) does not involve a question of law, (2) requires the interpretation of a matter reserved to another entity, (3) involves a matter currently in litigation, or (4) involves a matter of purely local concern or procedure.³³ Prior opinions also conclude that a request for an official opinion made pursuant to § 2.1-118 concerning the propriety of the actions of another entity interpreting matters reserved solely to it is not subject to review by the Attorney General and must be treated as the binding determination with regard to the matter.³⁴ The General Assembly clearly has authorized the Department of Historic Resources, through its Director, to promulgate guidelines pertaining to structures contained in historic districts. Consequently, I must respectfully decline to render an opinion regarding whether a building located in a historic district and fitting the Department's definition of a "ruin" may be removed. I am of the view that the Department of Historic Resources is the appropriate agency to make such a determination.³⁵

You also ask whether the Religious Land Use and Institutionalized Persons Act of 2000³⁶ ("Religious Land Use Act") permits the removal of a building that is viewed as a substantial threat to the existence of another church building.

A recent federal district court case explains that the concept of a religious freedom restoration act began as the congressional response to the decision of the Supreme Court of the United States in *Employment Division, Department of Human Resources v. Smith*,³⁷ which construed the Free Exercise Clause of the First Amendment to the Constitution of the United States to hold that neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest.³⁸ With the enactment of the Religious Freedom Restoration Act of 1993,³⁹ Congress sought to rescind *Smith* and restore what is referred to as the pre-Smith standard: the "compelling interest/least restrictive means" test found in the cases of *Sherbert v. Verner* and *Wisconsin v. Yoder*.⁴⁰ Through the 1993 Act, Congress reinstated the compelling interest test eschewed by *Smith* by requiring that a generally applicable law placing a "substantial burden" on the free exercise of religion must be justified by a "compelling governmental interest" and must employ the "least restrictive means" of furthering that interest.⁴¹ In 1997, the Supreme Court struck down the Act in the case of *City of Boerne v. Flores*.⁴² "The Court held Congress lacked the power under the Enforcement Clause of the Fourteenth Amendment to change the meaning of the First Amendment."⁴³ In 2000, Congress responded with the Religious Land Use Act, a law similar to the Religious Freedom Restoration Act.⁴⁴

The Religious Land Use Act forbids the imposition or implementation of land use regulations "in a manner that imposes a substantial burden on the religious exercise of a person, ... unless the government demonstrates that imposition of the burden"⁴⁵ furthers a compelling governmental interest and is the least restrictive means available.⁴⁶ The Act applies whenever the substantial burden is imposed in the implementation of a land use regulation under which a government makes, or is permitted to make, "individualized assessments of the proposed uses for the property involved."⁴⁷

In analyzing a claim under the Religious Land Use Act, the government must determine (1) whether a substantial burden has been imposed on the exercise of sincerely held religious beliefs, and (2) whether the state can justify the imposition of that burden. Therefore, if the church in question is unable to show that the board's decision is a substantial burden on religious exercise, the board is not required to come forth with proof of its interest. Such a determination requires an in-depth analysis of the facts and circumstances of the particular case. For many years, Attorneys General have concluded that § 2.1-118 does not contemplate that such opinions be rendered on matters requiring factual determinations, rather than matters interpreting questions of law.⁴⁸ Consequently, I am unable to provide a determination whether the decision of the architectural review board places a substantial burden on the religious exercise of the members of the church.

Finally, you ask whether the architectural review board's denial of the church's application for a permit constitutes a "taking" under eminent domain.

The Supreme Court of Virginia has defined "eminent domain" as "the right on the part of the state to take or control the use of private property for the public benefit when public necessity demands it, is inherent in every sovereignty, and is inseparable from sovereignty, unless denied to it by its fundamental law."⁴⁹ The Court also has stated that "[t]he only constitutional limitations imposed upon the power of eminent domain are contained in the just compensation clause" of the Constitution of Virginia.⁵⁰ "[T]here is no constitutional right to a hearing on the issue of necessity [for such a taking]."⁵¹ The necessity or expediency of the condemnor's project is a legislative question and is not reviewable by the courts.⁵²

The Court has also commented that, "[a]s sovereign, the State has the right of jurisdiction and dominion for governmental purposes over all the lands ... within its territorial limits," which is "sometimes termed the *jus publicum*."⁵³ "The *jus publicum* and all rights of the people, which are by their nature inherent or inseparable incidents thereof, are incidents of the sovereignty of the State."⁵⁴ The Virginia Constitution "impliedly denies to the legislature the power to relinquish, surrender or destroy, or substantially impair the *jus publicum*."⁵⁵

The General Assembly may delegate its power of eminent domain to political subdivisions and governmental bodies.⁵⁶ The delegated right of eminent domain, however, "must be exercised upon such terms and in such manner and for such public uses as the legislature may direct."⁵⁷ You provide no facts supporting a delegation by the General Assembly or the local governing body of the right of eminent domain to the architectural review board.

The Taking Clause of the Fifth Amendment to the United States Constitution applies not only to a physical deprivation of property, but also to regulations of property.⁵⁸ The Taking Clause is violated when land use regulations do not "substantially advance legitimate state interests," or they "den[y] an owner economically viable use of his land."⁵⁹ A land use regulation which does not in its terms arbitrarily discriminate, however, will not be declared unconstitutional, except where its effect upon an individual parcel of land is so great as to amount to a taking of the property without just compensation.⁶⁰

Resolution of any inquiry regarding whether the denial of the permit application by the architectural review board constitutes a "taking" under either the Fifth Amendment to the United States Constitution or the Just Compensation Clause of the Virginia Constitution depends on the particular facts and circumstances of the matter. You provide no such facts upon which to base such a conclusion. Accordingly, I must respectfully decline to render an opinion on whether the board's denial of such a permit application would constitute a "taking."⁶¹

¹Section 15.2-2306(A.1) provides:

"Any locality may adopt an ordinance setting forth the historic landmarks within the locality as established by the Virginia Board of Historic Resources, and any other buildings or structures within the locality having an important historic, architectural, archaeological or cultural interest, any historic areas within the locality as defined by § 15.2-2201, and areas of unique architectural value located within designated conservation, rehabilitation or redevelopment districts, amending the existing zoning ordinance and delineating one or more historic districts, adjacent to such landmarks, buildings and structures, or encompassing such areas, or encompassing parcels of land contiguous to arterial streets or highways (as designated pursuant to Title 33.1, including § 33.1-41.1 of that title) found by the governing body to be significant routes of tourist access to the locality or to designated historic landmarks, buildings, structures or districts therein or in a contiguous locality. An amendment of the zoning ordinance and the establishment of a district or districts shall be in accordance with the provisions of Article 7 (§ 15.2-2280 et seq.) of [Chapter 22 of Title 15.2]. The governing body may provide for a review board to administer the ordinance and may provide compensation to the board. The ordinance may include a provision that no building or structure, including signs, shall be erected, reconstructed, altered or restored within any such district unless approved by the review board or, on appeal, by the governing body of the locality as being architecturally compatible with the historic landmarks, buildings or structures therein."

Section 15.2-2306(A)(2) authorizes the governing body to provide "that no historic landmark, building or structure within any [historic] district shall be razed, demolished or moved until the razing, demolition or moving thereof is approved by the review board, or, on appeal, by the governing body after consultation with the review board."

²*See* Portsmouth, Va., Code § 40-53 (1988).

³*Id.* The Portsmouth city code uses the phrase "commission of architectural review" for the phrase "architectural review board" as used in this opinion.

⁴*Id.* § 40-51(a).

⁵*Id.* § 40-54(a).

⁶*Id.* § 40-54(b).

⁷*Id.* § 40-53.6(a).

⁸*Id.*

⁹*Id.* § 40-53.6(c).

¹⁰*See* Op. Va. Att'y Gen.: 1998 at 71, 72; 1997 at 105, 107; 1991 at 237, 238; 1989 at 288, 293 n.1; 1986-1987 at 347, 348; 1977-1978 at 31, 33; 1976-1977 at 17, 17.

¹¹*See* Op. Va. Att'y Gen.: 1995 at 260, 261; 1986-1987, *supra*, at 348; 1976-1977, *supra*, at 17; *see also* Op. Va. Att'y Gen.: 1993 at 151, 153 n.1; 1992 at 131, 132 n.1 (stating that function of interpreting local ordinances is properly left to local authorities responsible for adoption and enforcement of ordinances).

¹²*See* Op. Va. Att'y Gen.: op. no. 01-014 to Hon. Paul Clinton Harris Sr., H. Del. Mbr. (Feb. 16, 2001), at www.vaag.com; 1986-1987, *supra*; 1976-1977, *supra*.

¹³1987-1988 Op. Va. Att'y Gen. 69, 72; *see also* Op. Va. Att'y Gen.: 1999 at 90, 93; 1997 at 105, 107; 1977-1978, *supra*, at 33.

¹⁴Va. Code Ann. § 15.2-2306(A.1) (Michie Repl. Vol. 1997).

¹⁵Section 15.2-2306(A)(2).

¹⁶*Prillaman v. Commonwealth*, 199 Va. 401, 405, 100 S.E.2d 4, 7 (1957) (quoting earlier edition of 73 Am. Jur. 2d *Statutes* § 188, at 387 (1974)); *see also* 1990 Op. Va. Att'y Gen. 220, 223 n.4.

¹⁷*Commonwealth v. Jones*, 194 Va. 727, 731, 74 S.E.2d 817, 820 (1953); 1987-1988 Op. Va. Att'y Gen. 271, 273.

¹⁸*See, e.g.*, Va. Code Ann. § 15.2-2240 (Michie Repl. Vol. 1997) (governing body to adopt subdivision ordinance); § 15.2-2280 (Michie Repl. Vol. 1997) (governing body may adopt zoning ordinance).

¹⁹*See, e.g.*, Va. Code Ann. §§ 15.2-2251 to 15.2-2253 (Michie Repl. Vol. 1997) (planning commission to prepare and recommend subdivision ordinance and amendments thereto to governing body); § 15.2-2286(7) (Michie Supp. 2000) (planning commission to make recommendations on amendments to zoning ordinance).

²⁰Section 15.2-2286(4) (Michie Supp. 2000) (zoning administrator is vested with enforcement authority on behalf of local governing body).

²¹*See, e.g.*, Va. Code Ann. § 15.2-2308 (Michie Supp. 2000) (creation of board of zoning appeals); §§ 15.2-2309 to 15.2-2312 (Michie Repl. Vol. 1997 & Supp. 2000) (board of zoning appeals to hear appeals of decisions of zoning administrator and applications for variances).

²²Section 15.2-2306(A.1)-(2).

²³*Andrews v. Board of Supervisors*, 200 Va. 637, 639, 107 S.E.2d 445, 447 (1959).

²⁴*Maritime Union v. City of Norfolk*, 202 Va. 672, 681, 119 S.E.2d 307, 313 (1961) (quoting *Gorieb v. Fox*, 145 Va. 554, 563, 134 S.E. 914, 917 (1926), *aff'd*, 274 U.S. 603 (1927)).

²⁵*See Ours Properties, Inc. v. Ley*, 198 Va. 848, 852, 96 S.E.2d 754, 758 (1957).

²⁶*See Maritime Union*, 202 Va. at 681, 119 S.E.2d at 313; *Ours Properties*, 198 Va. at 852, 96 S.E.2d at 758.

²⁷*Ours Properties*, 198 Va. at 851, 853, 96 S.E.2d at 757, 758.

²⁸Portsmouth, Va., Code § 40-53.6(a), *supra* note 2.

²⁹*Id.* § 40-53.6(c).

³⁰*Id.* § 40-178(a).

³¹Va. Code Ann. § 10.1-2202(10), (11) (Michie Repl. Vol. 1998).

³²*See, e.g.*, Op. Va. Att'y Gen.: 1996 at 121, 122; 1991 at 122, 124; 1986-1987 at 1, 6; *id.* at 7, 9 n.3.

³³1987-1988 Op. Va. Att'y Gen. 69, 72; *id.* at 489, 490.

³⁴Op. Va. Att'y Gen.: 1997 at 10, 12; *id.* at 133, 134; 1987-1988 140, 141; *id.* at 352, 352.

³⁵The Supreme Court of Virginia has noted that it is a basic rule of statutory interpretation that "the practical construction given to a statute by public officials charged with its enforcement is entitled to great weight ... and in doubtful cases will be regarded as decisive." *Bed Company v. Corporation Commission*, 205 Va. 272, 275, 136 S.E.2d 900, 902 (1964).

³⁶Pub. Law No. 106-274, 2000 U.S.C.C.A.N. (114 Stat.) 803 (to be codified at 42 U.S.C. §§ 2000cc to 2000cc-5).

³⁷See *C.L.U.B. v. City of Chicago*, No. 94CV6151, 2001 U.S. Dist. LEXIS 3791, at *41 (N.D. Ill. Mar. 30, 2001).

³⁸494 U.S. 872 (1990).

³⁹42 U.S.C. §§ 2000bb to 2000bb-4 (1994).

⁴⁰*C.L.U.B.*, 2001 U.S. Dist. LEXIS 3791, at *41; *see* 42 U.S.C. § 2000bb(b)(1).

⁴¹42 U.S.C. § 2000bb-1(b).

⁴²521 U.S. 507 (1997).

⁴³*C.L.U.B.*, 2001 U.S. Dist. LEXIS 3791, at *41.

⁴⁴*Id.* at *41-42.

⁴⁵Pub. Law No. 106-274, § 2(a)(1), 2000 U.S.C.C.A.N. (114 Stat.) 803 (to be codified at 42 U.S.C. § 2000cc(a)(1)).

⁴⁶*Id.* § 2(a)(1)(A)-(B) (to be codified at 42 U.S.C. § 2000cc(a)(1)(A)-(B)).

⁴⁷*Id.* § 2(a)(2)(C) (to be codified at 42 U.S.C. § 2000cc(a)(2)(C)).

⁴⁸*See* opinions cited *supra* note 32.

⁴⁹*Talbot v. Mass. Life Ins. Co.*, 177 Va. 443, 448-49, 14 S.E.2d 335, 336 (1941) (citation omitted).

⁵⁰*Hamer v. School Bd. of the City of Chesapeake*, 240 Va. 66, 70, 393 S.E.2d 623, 626 (1990). The Just Compensation Clause provides that "the General Assembly shall not pass any law ... whereby private property shall be taken or damaged for public uses, without just compensation." Va. Const. art. I, § 11.

⁵¹*Hamer*, 240 Va. at 70, 393 S.E.2d at 626; *see also* *Railway Company v. Llewellyn*, 156 Va. 258, 278-79, 157 S.E. 809, 815, *amended on other grounds*, 156 Va. 288, 162 S.E. 601 (1931).

⁵²*Hamer*, 240 Va. at 70, 393 S.E.2d at 626; *Stewart v. Highway Commissioner*, 212 Va. 689, 692, 187 S.E.2d 156, 159 (1972).

⁵³*Commonwealth v. Newport News*, 158 Va. 521, 546, 164 S.E. 689, 696 (1932).

⁵⁴*Id.* at 546, 164 S.E. at 696-97.

⁵⁵*Id.* at 546, 164 S.E. at 697.

⁵⁶*The A. & F. R. R. Co. v. A. & W. R. R. Co.*, 75 Va. 780, 784 (1881); *see also* *Light v. City of Danville*, 168 Va. 181, 190 S.E. 276 (1937).

⁵⁷*Blondell v. Guntner*, 118 Va. 11, 12, 86 S.E. 897, 897 (1915).

⁵⁸The Taking Clause provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V.

⁵⁹*Agins v. Tiburon*, 447 U.S. 255, 260 (1980); *see also Hodel v. Virginia Surface Mining & Recl. Assn.*, 452 U.S. 264, 295-96 (1981).

⁶⁰1983-1984 Op. Va. Att'y Gen. 475, 477 (citing *Maritime Union*, 202 Va. at 672, 119 S.E.2d at 307).

⁶¹*See* 1991 Op. Va. Att'y Gen. 122, 124, (noting that Attorney General declines to render official opinions when request involves question of fact rather than one of law).

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