

00-060

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

**Virginia locality may adopt proffer policy that considers
adequate public facilities requirement before applications may
be approved for rezoning.**

The Honorable Ronald S. Hallman
City Attorney for the City of Chesapeake
April 29, 2002

Issue Presented

You ask whether the City of Chesapeake may adopt a proffer policy as part of the city's comprehensive plan to encourage rezoning applicants to proffer to develop rezoned property only when public facilities are deemed adequate to support the public needs that will be generated by the proposed development. You provide a draft of the "Chesapeake Comprehensive Plan Proffer Policy" ("city proffer policy") for review.

Response

It is my opinion that a Virginia locality may adopt, as part of its comprehensive plan, a proffer policy that considers an adequate public facilities requirement, with criteria as set forth below, before applications for rezoning may be approved.

Facts

You advise that the City of Chesapeake applies levels-of-service tests for roads, schools and sewer capacity to all rezoning applications to ensure that these public facilities are capable of serving the proposed development at the time of rezoning. You state that, in cases of delayed development of rezoned properties, the levels of service may have decreased below acceptable standards.

You advise that the intention of the proposed city proffer policy is to ensure the timely development of rezoned properties and orderly development of land, and to ensure that adequate public facilities and services are available to meet the needs generated by development of the rezoned property. The proffer states that city council will anticipate, but not mandate, that three proffers be

considered when evaluating the merits of a rezoning application. The city proffer policy encourages proffers where the property owner agrees (1) to coordinate the commencement of plan review and construction with the availability of adequate public facilities and services, as measured by the city's level-of-service standards;¹ (2) to reconsideration of a rezoning application that is submitted at a time when public facilities and services no longer adequately serve the needs of the proposed development; and (3) to revocation of the rezoning, unless assurances are proffered that the developer will correct such deficiencies in public facilities and services to the satisfaction of the city. Finally, the city proffer policy requires that the city council consider all other factors relevant to land use decisions and act in the best interest of the public on each zoning application.

Limitation of Opinion

This Office has long followed a policy of responding to official opinion requests only when such requests concern an interpretation of federal or state law, rule or regulation.² 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.³ 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.⁴ In addition, Virginia Attorneys General traditionally have declined to render such opinions when the request involves a matter of purely local concern or procedure.⁵ Accordingly, I have limited my comments to the authority of a Virginia locality to adopt such a policy, and have refrained from interpreting the specific city proffer policy that you forward with your request.

Applicable Law and Discussion

Virginia follows the Dillon Rule of strict construction in that "municipal corporations have only those powers expressly granted, those necessarily or fairly implied therefrom, and those that are essential and indispensable."⁶ The powers of county boards of supervisors in the Commonwealth are also limited to those "conferred expressly or by necessary implication."⁷ Any doubt as to the existence of a power must be resolved against the locality.⁸ Accordingly, because local governments are subordinate creatures of the Commonwealth, they possess only those powers conferred upon them by the General Assembly.⁹

Virginia's zoning enabling statutes are detailed in Article 7, Chapter 22 of Title 15.2, §§ 15.2-2280 through 15.2-2316 of the *Code of Virginia*. Among the purposes underlying zoning ordinances are the promotion of rational development of land, the availability of adequate public utilities, the economic development of communities, and protection against overcrowding of land and undue density of population in relation to community facilities.¹⁰ Section 15.2-2284 provides:

Zoning ordinances and districts shall be drawn and applied with reasonable consideration for the existing use and character of property, the comprehensive plan, the suitability of property for various uses, the trends of growth or change, the current and future requirements of the community as to land for various purposes as determined by population and economic studies and other studies, the transportation requirements of the community, the requirements for airports, housing, schools, parks, playgrounds, recreation areas and other public services, the conservation of natural resources, the preservation of flood plains, the preservation of agricultural and forestal land, the conservation of properties and their values and the encouragement of the most appropriate use of land throughout the locality.

Article 6, Chapter 22 of Title 15.2, §§ 15.2-2240 through 15.2-2279, details the requirements and procedures for the adoption of local subdivision ordinances regulating land subdivision and development. Section 15.2-2240 requires every locality to adopt such an ordinance, and § 15.2-2241 mandates the provisions to be included in all subdivision ordinances.

Section 15.2-2283 contains the purposes of a zoning ordinance. Among the purposes to be considered in a zoning ordinance are the provision of "adequate police and fire protection, ... transportation, water, sewerage, flood protection, schools, parks, forests, playgrounds, recreational facilities, ... and other public requirements."¹¹ As the Supreme Court of Virginia indicated in reviewing this section and provisions similar to it, the General Assembly has vested the legislative branch of local governments with wide discretion in the enactment and amendment of zoning ordinances.¹²

Section 15.2-2284 requires that "[z]oning ordinances and districts shall be drawn and applied with reasonable consideration for ... the

comprehensive plan." Sections 15.2-2223 through 15.2-2228 provide for the development and adoption of the comprehensive plan. By virtue of § 15.2-2223, every local governing body in the Commonwealth was required to adopt a comprehensive plan by July 1, 1980.¹³ Section 15.2-2232 generally provides for the legal status of a comprehensive plan, and § 15.2-2232(A) provides that a comprehensive plan shall control the general development of land within a locality. "A comprehensive plan provides a guideline for future development and systematic change, reached after consultation with experts and the public."¹⁴ "[T]he Virginia statutes assure [landowners] that such a change will not be made suddenly, arbitrarily, or capriciously but only after a period of investigation and community planning."¹⁵ A comprehensive plan, by itself, however, generally does not act as an instrument of land use control.¹⁶ Rather, the plan serves as a guideline for the development and implementation of zoning ordinances.¹⁷ As noted in a 1988 opinion of the Attorney General, "[a] comprehensive plan ... acts as an indirect instrument of land use control with respect to public areas, public buildings, [and] public structures, ... whether publicly or privately owned."¹⁸ Once the plan has been recommended by the local planning commission and adopted by the governing body, such proposed public facilities *must* be submitted and approved by the local commission as being substantially compliant with the adopted comprehensive plan.¹⁹ The Supreme Court of Virginia has recognized that a governing body may base its denial of a rezoning request, in part, on inconsistencies between the proposed development and the comprehensive plan.²⁰

The Supreme Court of Virginia also has acknowledged that the provisions of a comprehensive plan can be an important factor in land use decisions.²¹ For example, in the context of the special exception process, the Court has specifically approved zoning ordinance provisions governing the grant or denial of special exceptions that require the consideration of the comprehensive plan or the general purposes of the local zoning ordinance as part of the special exception process.²²

Section 15.2-2296 authorizes certain localities to use conditional zoning, whereby a use otherwise prohibited in a district may be permitted "subject to certain conditions proffered by the zoning applicant for the protection of the community that are not generally applicable to land similarly zoned." Therefore, § 15.2-2296 authorizes the zoning ordinance of the additional localities to provide for the voluntary proffer of reasonable conditions as part of a rezoning or an amendment to a zoning map. A county, city or town may qualify if its population has grown ten percent or more

from the 1980 to the 1990 census.²³ Additionally, a county may qualify if it is contiguous to at least three such high-growth counties, a city may qualify if it adjoins such a high-growth city or county, and a town may qualify if it is located within such a high-growth county.²⁴ Conditional zoning addresses the effects of changing land use patterns within these communities. Its purpose is to permit differing land uses within those communities while protecting the community as a whole.

In 1975, the Supreme Court of Virginia reversed a Fairfax zoning denial, noting that, "[a]s a practical matter, and because of the ever-existing problem of finance, the construction and installation of necessary public facilities usually follow property development and the demand by people for services."²⁵ The Court found that the board of supervisors had denied a zoning application "primarily because of its timing, rather than because of its impact on public facilities" that were or would become available in the reasonably foreseeable future.²⁶ Within the same year, the Court, again reversing a Fairfax zoning denial, noted that "[w]e have no quarrel with the Board concerning its contention ... that in its zoning actions it must protect against 'undue density of population in relation to the community facilities existing or available' and must make provision for public facilities 'consonant with the efficient and economical use of public funds.'"²⁷

In 1980, the Supreme Court considered the comprehensive development plan adopted in 1969 by the Loudoun County board of supervisors.²⁸ An applicant for rezoning owned a large parcel of land and requested rezoning from an existing planned industrial classification to a category that permitted construction of a large regional shopping center. The comprehensive development plan expressly anticipated that a shopping center would be feasible to the area when a certain population density was reached in the surrounding market area.²⁹ The supervisors' position was that the development of the shopping center was premature under the plan. The application for rezoning, therefore, was denied. The applicant contended that the minimum population required by the plan existed. The Court held that the supervisors' interpretation of the county's comprehensive plan was entitled to a presumption of reasonableness and that it was fairly debatable whether the county or the applicant was correct.³⁰

Conclusion

From these cases, I conclude that the Virginia Supreme Court approves the consideration of the following criteria by a locality reviewing zoning applications for new development:

1. the impact of the proposed new development on public facilities;
2. the protection against undue density of population with respect to the public facilities in existence to service the proposed new development;
3. the planning by the locality for the provision of public facilities consonant with the efficient and economical use of public funds to service the proposed new development; and
4. the locality's interpretation and application of its comprehensive plan concerning the timing of the development as determined by reasonably objective criteria.

Therefore, I must conclude that a Virginia locality may adopt, as part of its comprehensive plan, a proffer policy that considers these criteria in an adequate public facilities requirement before applications for rezoning may be approved.³¹

¹You do not provide for review with your request any "level-of-service" standards that are deemed to be acceptable with your request. Accordingly, for the purposes of this opinion, I shall assume that such standards are extensive and comprehensive.

²See 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.

³See Op. Va. Att'y Gen.: 1995 at 260, 261; 1986-1987, *supra*, at 348; 1976-1977, *supra*, at 17.

⁴See Op. Va. Att'y Gen.: 1993 at 151, 153 n.1; 1992 at 131, 132 n.1; 1986-1987, *supra* note 1, at 348; 1981-1982 at 471, 472; 1976-1977, *supra* note 1, at 17.

⁵Op. Va. Att'y Gen.: 1999 at 90, 93; 1997 at 105, 107; 1987-1988 at 69, 72; 1985-1986 at 64, 65; 1977-1978, *supra* note 1, at 33; 1976-1977, *supra* note 1, at 17.

⁶*Commonwealth v. Arlington County Bd.*, 217 Va. 558, 574, 232 S.E.2d 30, 40 (1977) (quoting *Bd. of Supervisors v. Horne*, 216 Va. 113, 117, 215 S.E.2d 453, 455 (1975)).

⁷*Id.* at 572, 232 S.E.2d at 39.

⁸2A Eugene McQuillin, *The Law of Municipal Corporations* § 10.19 (3rd ed. rev. 1996 & Supp. 1999).

⁹See *Gordon v. Fairfax County*, 207 Va. 827, 153 S.E.2d 270 (1967) (county board of supervisors did not abuse its discretion in voting to lend money to airport authority; power was expressly implied from act of legislature allowing local governing body to lend money to any authority created by such governing body).

¹⁰See Va. Code Ann. §§ 15.2-2283, 15.2-2284 (Michie Repl. Vol. 1997); see also § 15.2-2200 (Michie Repl. Vol. 1997) (declaring legislative intent of Chapter 22).

¹¹VA. CODE ANN. § 15.2-2283(iv) (Michie Repl. Vol. 1997).

¹²See *City of Manassas v. Rosson*, 224 Va. 12, 17, 294 S.E.2d 799, 802 (1982).

¹³See 1977 Va. Acts ch. 228, at 271, 271-72 (reenacting § 15.1-446.1, repealed and codified as § 15.2-2223).

¹⁴*Town of Jonesville v. Powell Valley Village*, 254 Va. 70, 76, 487 S.E. 2d 207, 211 (1997).

¹⁵*Fairfax County v. Snell Corp.*, 214 Va. 655, 658, 202 S.E. 2d 889, 892 (1974).

¹⁶See 1987-1988 Op. Va. Att'y Gen. 212, 213.

¹⁷See *Bd. of Sup. v. Safeco*, 226 Va. 329, 335, 310 S.E.2d 445, 448 (1983) (noting that comprehensive plan "is not a zoning ordinance but only a guideline for zoning ordinances"); 1987-1988 Op. Va. Att'y Gen., *supra*, at 213.

¹⁸1987-1988 Op. Va. Att'y Gen., *supra* note 16, at 213.

¹⁹See Va. Code Ann. § 15.2-2232(A) (Michie Supp. 2001).

²⁰See, e.g., *Loudoun Co. v. Lerner*, 221 Va. 30, 267 S.E.2d 100 (1980).

²¹See *id.*

²²See, e.g., *National Memorial Park v. Board of Zoning*, 232 Va. 89, 348 S.E.2d 248 (1986) (applying standards set out in county zoning ordinance to deny memorial park's application for special use permit to operate crematory for humans and animals); *Bell v. City Council*, 224 Va. 490, 297 S.E.2d 810 (1982) (finding challenged amendments to city zoning regulations, which, among other things, allow special permits to modify setback and density requirements of zoning ordinance, valid); *Maritime Union v. City of Norfolk*, 202 Va. 672, 119 S.E.2d 307 (1961) (holding that challenged provision of zoning ordinance, requiring use permit for union hiring hall, provided adequate standards to assure uniform application and was constitutional).

²³VA. Code Ann. § 15.2-2298(A) (Michie Supp. 2001).

²⁴*Id.*

²⁵*Bd. of Supervisors of Fairfax Co. v. Allman*, 215 Va. 434, 439, 211 S.E.2d 48, 51 (1975).

²⁶*Id.* at 440, 211 S.E.2d at 52.

²⁷*Fairfax County v. Williams*, 216 Va. 49, 51, 216 S.E.2d 33, 36 (1975); *see also* *Gregory v. Board of Supervisors*, 257 Va. 530, 514 S.E.2d 350 (1999) (although county expected cash proffers, evidence supported decision of county board of supervisors to deny rezoning application based on health, safety and welfare concerns).

²⁸*See Lerner*, 221 Va. at 30, 267 S.E.2d at 100.

²⁹"The Comprehensive Plan established a number of standards 'as guidelines for new commercial development.' For a regional shopping center, the Plan provided a standard, among others, of a 'minimum population to support' of 100,000 to 200,000 within a radius of 5 to 15 miles for a [shopping] center containing 400,000 to 1,000,000 square feet." 221 Va. at 33, 267 S.E.2d at 102.

³⁰*Lerner* appears primarily to be a timed development case.

³¹My conclusion is premised on the express assumption that such a standard for determining whether public facilities serving a particular proposed development are adequate is extensive and comprehensive.

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