00-082

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

Planning commission of Franklin County may not review for compliance with comprehensive plan existing locations of telecommunications towers in areas of county not subject to zoning. Such review may be undertaken only when application for telecommunications is made with county.

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You ask whether the provisions of § 15.2-2232(A) and (F) of the *Code of Virginia* permit review by the Franklin County planning commission for compliance with the comprehensive plan the existing location of telecommunications towers in parts of the county that are not subject to zoning.

You advise that, since 1988, four magisterial districts in Franklin County have been zoned; however, the 1990 census changed the county's magisterial district boundaries so that zoning now exists outside those four districts. You relate that your question arises from the presence of telecommunications towers owned by private wireless providers and located in areas of the county not subject to zoning. You note that the telecommunications towers do not constitute a public utility facility or a public service corporation facility subject to review by the local planning commission for compliance with the comprehensive plan under § 15.2-2232(A). You state, however, that § 15.2-2232(F) requires review by the commission of a telecommunications facility, but that such review does not relate exclusively to the rezoning process. Therefore, you conclude that § 15.2-2232(F) permits review by the local planning commission for compliance with the comprehensive plan the location of telecommunications towers in parts of the county that are not subject to the zoning application process.[1]

Virginia's land use and zoning enabling statutes are detailed in Chapter 22 of Title 15.2, §§ 15.2-2200 through 15.2-2327. Chapter 22 presents a connected system for local government planning, subdivision of land, and zoning. Various provisions 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 local planning commissions. A local planning commission is required to prepare and recommend subdivision ordinances and amendments thereto to the governing body of the locality,[2] to prepare and recommend a comprehensive plan for development of the area, and to specify the procedures for putting the plan into effect.[3] In addition, the planning commission may recommend amendments to zoning ordinances;[4] may have made, for approval by the governing body, an official map showing existing and proposed public streets, waterways and public areas;[5] and may prepare a five-year capital outlay program for the locality based on the comprehensive plan.[6]

A local planning commission is, therefore, an administrative entity that has specific powers and duties concerning the local comprehensive plan and the administration of the local subdivision and zoning ordinances.[7] It has been stated

repeatedly in court decisions and opinions of the Attorney General that a planning commission has no authority beyond that granted by statute, and that a governing body may not delegate its legislative power to a planning commission.[8]

Sections 15.2-2223 through 15.2-2228 provide for the development and adoption of a comprehensive plan. Section 15.2-2232 provides for the legal status of a comprehensive plan. A comprehensive plan, by itself, generally does not act as an instrument of land use control.[9] Rather, the plan serves as a guideline for the development and implementation of a zoning ordinance.[10] Section 15.2-2232(A) provides that no public area, public building, public structure, public utility facility, or public service corporation facility, whether publicly or privately owned, shall be established unless the general location and character of such building or facility is shown on the comprehensive plan or has been approved as substantially in accord with the plan.[11] Unless such a feature is actually shown on an adopted comprehensive plan, it shall not be constructed without approval of the governing body of the locality.[12]

Section 15.2-2232(F) provides:

> *On any application for a telecommunications facility*, the commission's decision shall comply with the requirements of the Federal Telecommunications Act of 1996.[13] Failure of the commission to act on any such application for a telecommunications facility under subsection A [of § 15.2-2232] submitted on or after July 1, 1998, within ninety days of such submission shall be deemed approval of the application by the commission unless the governing body has authorized an extension of time for consideration or the applicant has agreed to an extension of time. The governing body may extend the time required for action by the local commission by no more than sixty additional days. If the commission has not acted on the application by the end of the extension, or by the end of such longer period as may be agreed to by the applicant, the application is deemed approved by the commission. [Emphasis added.]

Section 15.2-2232(F) applies exclusively to "telecommunications" facilities. Section 15.2-2232(F) begins with the phase "[o]n any application for a telecommunications facility." This phrase reflects a legislative intent that an application for construction of such a facility actually be filed with the locality and referred to the planning commission. Furthermore, such application is made "under subsection A [of § 15.2-2232] on or after July 1, 1998."[14] Pursuant to § 15.2-2232(A), a local planning commission must decide whether "the general location or approximate location, character, and extent" of the facility is "substantially in accord with the adopted comprehensive plan or part thereof." An additional requirement for decisions regarding applications to construct telecommunications facilities is that such decisions must be rendered in compliance with the Federal Telecommunications Act of 1996.[15] The Telecommunications Act places restrictions on the ability of a locality to limit the provision of telecommunications service through application of land use regulations.[16] When a statute creates a specific grant of authority, the authority exists only to the extent specifically granted in the statute.[17] The written decision of the planning commission must then be communicated to the governing body of the locality.

The Supreme Court has stated that "'[t]he manifest intention of the legislature, clearly disclosed by its language, must be applied.'"[18] I must, therefore, conclude that the provisions of § 15.2-2232(A) and (F) do not permit the planning commission of Franklin County to review for compliance with the comprehensive plan existing locations of telecommunications towers in parts of the county that are not subject to zoning. Any such review by the commission may be undertaken only when "application for a telecommunications facility"[19] is made with the county. Until July 1, 1998, telecommunications facilities have been unrestricted by the statute as to their location in Franklin County. After July 1, 1998, any application for a telecommunications facility to be located in Franklin County must comply with § 15.2-2232(F).[20]

[1]"Any opinion request to the Attorney General by an attorney for the … county … shall itself be in the form of an opinion embodying a precise statement of all facts together with such attorney's legal conclusions." Va. Code Ann. § 2.2-505(B) (LexisNexis Repl. Vol. 2001).

[2]Va. Code Ann. §§ 15.2-2251 to 15.2-2253 (Michie Repl. Vol. 1997)

[3]*Id*. § 15.2-2223 (Michie Repl. Vol. 1997).

[4]*Id*. § 15.2-2286 (Michie Supp. 2001).

[5]*Id*. § 15.2-2233 (Michie Repl. Vol. 1997).

[6]*Id*. § 15.2-2239 (Michie Repl. Vol. 1997).

[7]*See, e.g.,* Va. Code Ann. § 15.2-2204 (Michie Supp. 2001); §§ 15.2-2221, 15.2-2223, 15.2-2239, 15.2-2251, 15.2-2258 to 15.2-2261 (Michie Repl. Vol. 1997).

[8]*See* Laird v. City of Danville, 225 Va. 256, 261, 302 S.E.2d 21, 24 (1983) (because zoning and rezoning constitute legislative acts, such acts may be performed only by county's governing body—board of supervisors—and then only by ordinance), *construed in* Krisnathevin v. Fairfax County, 243 Va. 251, 254, 414 S.E.2d 595, 596 (1992); Op. Va. Att'y Gen.: 1989 at 113, 114 (noting that planning commission has no authority beyond that expressly conferred by statute); 1981-1982 at 114, 115 (noting that any delegation of legislative authority to advisory body, such as planning commission, must be authorized by statute); 1978-1979 at 203, 204 (noting that planning commission's role in amendment process is advisory only); *see also* Arkenberg v. City of Topeka, 197 Kan. 731, 735, 421 P.2d 213, 217 (1966) (until governing body makes final decision, application for rezoning remains in process of consideration; no finality in any action taken by planning commission).

[9]*See* 1987-1988 Op. Va. Att'y Gen. 212, 213.

[10]*See* Bd. of Sup. v. Safeco, 226 Va. 329, 335, 310 S.E.2d 445, 448 (1983); Bd. of Supervisors of Fairfax Co. v. Allman, 215 Va. 434, 441, 211 S.E.2d 48, 52 (1975); Op. Va. Att'y Gen.: 1987-1988, *supra*, at 213; 1978-1979 at 72, 72; 1975-1976 at 436, 437.

[11]*See* Op. Va. Att'y Gen.: 1983-1984 at 80, 82 (concluding that property owned by public body and devoted to governmental purpose of operating sanitary landfill for local citizens is considered to be public area within meaning of predecessor statute to § 15.2-2232(A)); 1976-1977 at 237 (concluding that school site is subject to conformity review process under predecessor statute to § 15.2-2232(A)). *But see* 1964-1965 at 258, 259 (noting that businesses, such as apartments, hotels, filling stations and stores, are not public areas subject to review under predecessor statute to § 15.2-2232(A)).

[12]Bd. of Supervisors v. City of Roanoke, 220 Va. 195, 199, 257 S.E.2d 781, 784 (1979).

[13]*See* Pub. L. No. 104-104, 110 Stat. 56 (1996).

[14]Section 15.2-2232(F).

[15]*Id*.

[16]*See* Pub. L. No. 104-104, § 704(a)(7)(B)(i)(II), 110 Stat. at 151 (codified at 47 U.S.C.A. § 332(c)(7)(B)(i)(II) (West Supp. 2000)) (providing that locality's regulation of placement, construction, and modification of personal wireless service facilities "shall not prohibit or have the effect of prohibiting the provision of personal wireless services").

[17]*See* Commonwealth v. Brown, 259 Va. 697, 704-05, 529 S.E.2d 96, 100 (2000) (applying maxim "*expressio unius est exclusio alterius*"); Turner v. Wexler, 244 Va. 124, 127, 418 S.E.2d 886, 887 (1992); 2A Norman J. Singer, Sutherland Statutory Construction § 47.23 (West 6th ed. 2000); Op. Va. Att'y Gen.: 1992 at 145, 146; 1989 at 252, 253; 1980-1981 at 209, 209-10.

[18]Barr v. Town & Country Properties, 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990) (quoting Anderson v. Commonwealth, 182 Va. 560, 566, 29 S.E.2d 838, 841 (1944)).

[19]Section 15.2-2232(F).

[20]"A statute … in general and comprehensive terms and prospective in operation applies not only to situations existing at the time of its enactment, but to situations and subjects which may come into existence thereafter." Great A. & P. T. Co. v. Richmond, 183 Va. 931, 950, 33 S.E.2d 795, 803 (1945).

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