



COMMONWEALTH OF VIRGINIA

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January 11, 2010

The Honorable Christopher K. Peace
Member, House of Delegates
P.O. Box 819
Mechanicsville, Virginia 23111

Dear Delegate Peace:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issues Presented

You inquire about § 15.2-2223.1 as it relates to the inclusion of urban development areas (“UDA”) in the comprehensive plan of Hanover County. Specifically, you ask whether UDAs must accommodate 10 to 20 years of anticipated growth in addition to or instead of growth planned and permitted in other areas. Further, you ask whether developers are required to zone and develop to specific densities within UDAs. You ask whether the Board of Supervisors must approve rezoning to specified densities even if public facilities are inadequate. Finally, you ask whether specified densities will be increased and how the County and developers are to finance the infrastructure necessary to serve UDA style development.

Response

It is my opinion that an urban development area must accommodate 10 to 20 years of anticipated growth within such an area. It further is my opinion that developers are required to zone and develop to specific densities within such areas. Finally, it is my opinion that local governing bodies may not deny a rezoning request solely on the basis of inadequate public facilities.

Limitation of Opinion

The traditional role of the Attorney General regarding opinion requests is to interpret statutes to the extent possible utilizing the pertinent rules of statutory construction and general application of the statutory provisions. Additionally, Attorneys General have a longstanding policy of responding to official opinion requests only when such requests concern an interpretation of federal or state law, rule, or regulation.¹ In instances when a request: (1) involves questions of fact and 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, Attorneys General traditionally

¹See 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.

have declined to render an opinion.² Accordingly, I must limit my comments to the interpretation of § 15.2-2223.1. Further, I must decline to opine on whether the General Assembly will increase the specified densities or how the County and developers may finance the necessary infrastructure.

Applicable Law and Discussion

Article 3, Chapter 22 of Title 15.2, §§ 15.2-2223 through 15.2-2232, governs the development and adoption of a comprehensive plan. 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.”³ “[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.”⁴ Generally, a comprehensive plan does not act as an instrument of land use control.⁵ Rather, the plan serves as a guideline for the development and implementation of zoning ordinances.⁶ As noted in a prior 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.”⁷

The Supreme Court of Virginia also has acknowledged that the provisions of a comprehensive plan can be an important factor in land use decisions.⁸ For example, in the context of the special exception process, the Court specifically has 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.⁹ Thus, a comprehensive plan serves as a general guideline for the development and implementation of a zoning ordinance.¹⁰

²The authority of the Attorney General to issue advisory opinion is limited to questions that are legal in nature. *See, e.g.*, Op. Va. Att’y Gen.: 2008 at 141, 144 n.14; 2006 at 95, 97; 2002 at 144, 147; 1999 at 215, 217; 1997 at 195, 196; 1991 at 122, 124; 1977-1978 at 31, 33.

³*Jonesville v. Powell Valley Village Ltd. P’ship*, 254 Va. 70, 76, 487 S.E. 2d 207, 211 (1997) (interpreting § 15.1-446.1, predecessor to § 15.2-2223).

⁴*Bd. of Supvrs. v. Snell Constr. Corp.*, 214 Va. 655, 658, 202 S.E. 2d 889, 892 (1974).

⁵*See* 1987-1988 Op. Va. Att’y Gen. 212, 213.

⁶*See* *Bd. of Supvrs. v. Safeco Ins. Co.*, 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* note 5, at 213.

⁷*See* 1987-1988 Op. Va. Att’y Gen., *supra* note 5, at 213.

⁸*See infra* note 9.

⁹*See, e.g.*, *Nat’l Mem’l Park v. Bd. of Zoning Appeals*, 232 Va. 89, 348 S.E.2d 248 (1986) (upholding decision of zoning board that applied standards set out in county zoning ordinance to deny memorial park’s application for special use permit to operate crematory); *Bell v. City Council*, 224 Va. 490, 496, 297 S.E.2d 810, 814 (1982) (finding that amendments to city zoning regulations, which allowed special permits to modify setback and density requirements of zoning ordinance, were valid); *Nat’l Maritime Union v. Norfolk*, 202 Va. 672, 119 S.E.2d 307 (1961) (holding that challenged provision of zoning ordinance, which required use permit for union hiring hall, provided adequate standards to assure uniform application and was constitutional).

¹⁰*See Safeco Insurance*, 226 Va. at 335, 310 S.E.2d at 448; 1987-1988 Op. Va. Att’y Gen., *supra* note 5 at 213.

Section 15.2-2223.1(A) requires that a locality have (1) a population of at least 20,000 and population growth of at least 5%; or (2) a population growth of at least 15% to amend its comprehensive plan to incorporate one or more UDAs. For purposes of § 15.2-2223.1, the General Assembly defines a UDA as

an area designated by a locality that is appropriate for higher density development due to proximity to transportation facilities, the availability of a public or community water and sewer system, or proximity to a city, town, or other developed area.

Further, § 15.2-2223.1(A) requires that within UDAs a comprehensive plan must “provide for commercial and residential densities ... that are appropriate for reasonably compact development at a density of at least four residential units per gross acre and a minimum floor area ratio of 0.4 per gross acre for commercial development.” Finally, the comprehensive plan is required to “designate one or more urban development areas sufficient to meet projected residential and commercial growth in the locality for an ensuing period of at least 10 but not more than 20 years, which may include phasing of development within the urban development areas.”¹¹

“A primary rule of statutory construction is that courts must look first to the language of the statute. If a statute is clear and unambiguous, a court will give the statute its plain meaning.”¹² In addition, it must be assumed that “the legislature chose, with care, the words it used when it enacted the relevant statute, and [courts] are bound by those words as [they] interpret the statute.”¹³ Courts may not rewrite statutes.¹⁴ Finally, I note that the “mention of a specific item in a statute implies that omitted items were not intended to be included within the scope of the statute.”¹⁵

Thus, the General Assembly specifically provides that when a locality is permitted to amend its comprehensive plan to designate one or more UDAs, the UDAs must be sufficient to meet the locality’s projected residential and commercial growth for a period of at least 10, but not more than 20 years.¹⁶ Furthermore, the General Assembly plainly requires that the UDAs must accommodate reasonably compact development at the statutorily designated levels of density and minimum floor area ratio for commercial development.¹⁷

¹¹VA. CODE ANN. §15.2-2223.1(A) (Supp. 2009).

¹²Loudoun County Dep’t of Soc. Servs. v. Etzold, 245 Va. 80, 85, 425 S.E.2d 800, 802 (1993).

¹³Va. Beach v. ESG Enters., Inc., 243 Va. 149, 153, 413 S.E.2d 642, 644 (1992) (quoting Barr v. Town & Country Props., Inc., 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990))

¹⁴*Id.* at 295, 396 S.E.2d at 674.

¹⁵Turner v. Wexler, 244 Va. 124, 127, 418 S.E.2d 886, 887 (1992); *see also* Christiansburg v. Montgomery County, 216 Va. 654, 658, 222 S.E.2d 513, 516 (1976); Tate v. Ogg, 170 Va. 95, 103, 195 S.E. 496, 499 (1938); 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47:23 (7th ed. 2007); Op. Va. Att’y Gen.: 1998 at 33, 34; 1992 at 145, 146 (applying or explaining maxim *expressio unius est exclusio alterius*).

¹⁶*See* § 15.2-2223.1(A).

¹⁷*See id.*

The Honorable Christopher K. Peace
January 11, 2010
Page 4

A prior opinion of the Attorney General (the “2003 Opinion”) concludes that “the General Assembly must enact express statutory authorization to permit a local governing body to deny a rezoning request *solely* on the basis of inadequate public facilities.”¹⁸ The General Assembly has not enacted any such statutory authorization. Therefore, the conclusion of the 2003 Opinion remains valid.

Conclusion

Accordingly, it is my opinion that an urban development area must accommodate 10 to 20 years of anticipated growth within such an area. It further is my opinion that developers are required to zone and develop to specific densities within such areas. Finally, it is my opinion that local governing bodies may not deny a rezoning request solely on the basis of inadequate public facilities.

Thank you for letting me be of service to you.

Sincerely,

A handwritten signature in black ink, appearing to read 'W. C. Mims', with a stylized flourish at the end.

William C. Mims

1:213; 1:941/09-091

¹⁸2003 Op. Va. Att’y Gen. 42, 43 (emphasis in original).