



COMMONWEALTH of VIRGINIA

Office of the Attorney General

Kenneth T. Cuccinelli, II
Attorney General

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900 East Main Street
Richmond, Virginia 23219
804-786-2071
FAX 804-786-1991
Virginia Relay Services
800-828-1120
7-1-1

The Honorable Ralph S. Northam
Member, Senate of Virginia
Post Office Box 9363
Norfolk, Virginia 23505

Dear Senator Northam:

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 whether the General Assembly may delegate to the Virginia Marine Resources Commission the authority to make adjustments to boundaries of the Baylor grounds. You also ask, if this is permitted, under what conditions the delegation could be made.

Response

It is my opinion that the General Assembly may delegate Baylor grounds¹ boundary determinations and boundary adjustments to the Virginia Marine Resources Commission ("VMRC"), provided the law delegating the authority establishes specific policies and fixes definite standards to guide the VMRC in making its determinations.

Applicable Law and Discussion

The *Constitution of Virginia* provides that

The authority of the General Assembly shall extend to all subjects of legislation not herein forbidden or restricted; and a specific grant of authority in this Constitution upon a subject shall not work a restriction of its authority upon the same or any other subject. The omission

¹ The terms "Baylor grounds" and "Baylor survey" are not defined in the *Code of Virginia*. In the 1890s, James Bowen Baylor, a Virginia native, campaigned for and initiated a survey that was conducted throughout Virginia's tidal waters to locate and map the naturally productive oyster beds, rocks, and shoals. This has become known as the Baylor survey. See PROCEEDINGS AND DEBATES OF THE VIRGINIA HOUSE OF DELEGATES PERTAINING TO AMENDMENT OF THE CONSTITUTION 548-49 (Ex. Sess. 1969) (historical account by Delegate Walther B. Fidler of Warsaw, Virginia). Within Virginia case law, the terms "Baylor grounds," "Baylor survey," "oyster grounds" and "natural oyster rocks, beds and shoals" are synonymous. See, e.g., *Comm'n of Fisheries v. Hampton Rds. Oyster Packers & Planters Ass'n*, 109 Va. 565, 64 S.E. 1041 (1909) (using the terms "Baylor survey," "public oyster grounds" and "natural oyster rocks, beds and shoals" interchangeably).

in this Constitution of specific grants of authority heretofore conferred shall not be construed to deprive the General Assembly of such authority . . . unless such purpose plainly appear.^[2]

Accordingly, Virginia courts look to the Constitution of Virginia for limitations of legislative power, not for grants of power.³ As the Virginia Supreme Court has explained, the Constitution of Virginia is to be looked to, not to ascertain whether a power has been conferred to the General Assembly, but whether it has been taken away.⁴ Unless a provision of the Virginia Constitution compels the legislature to act or operates to prohibit it from acting, the General Assembly is free to legislate as its judgment dictates.⁵

The Constitution of Virginia vests the legislative power of the Commonwealth in the General Assembly.⁶ Article XI, § 3 recognizes the General Assembly's authority to define and determine Virginia's oyster grounds; it expressly provides, in pertinent part, that "the General Assembly may, from time to time, define and determine such natural beds, rocks, or shoals by surveys or otherwise."⁷ This language does not prohibit the General Assembly from delegating its authority here. In fact, when the General Assembly authorized the original Baylor survey in 1892, it delegated to the Board on the Chesapeake and its Tributaries responsibility for overseeing "a true and accurate survey of the natural oyster beds, rocks and shoals of the commonwealth."⁸ Furthermore, the General Assembly subsequently delegated its authority to re-determine the boundaries of the Baylor grounds to a predecessor of the VMRC.⁹

The Virginia Constitution does not prohibit the General Assembly from delegating the definition and determination of the oyster grounds to the VMRC. Rather, it states that the General Assembly may define and determine the oyster grounds by survey or otherwise. Additionally, the General Assembly has made this delegation in the past. Accordingly, it is my opinion that delegating this authority to the VMRC is permissible.

Nevertheless, for this delegation to remain within Constitutional limits, the laws delegating this authority must establish specific policies and fix definite standards to guide the VMRC in making its determinations.¹⁰ The Supreme Court of Virginia has recognized that delegating authority to administrative

² VA. CONST. art. IV, § 14.

³ *City of Richmond v. Va. Ry. & Power Co.*, 141 Va. 69, 91, 126 S.E. 353, 359 (1925).

⁴ *Pine v. Commonwealth*, 121 Va. 812, 822, 93 S.E. 652, 655 (1917).

⁵ *Id.* See also *Dean v. Paolicelli*, 194 Va. 219, 227, 72 S.E.2d 506, 511 (1952) ("The Constitution is not a grant of power, but only the restriction of powers otherwise practically unlimited, and except as far as restrained by the Constitution of this State and the Constitution of the United States, the legislature has plenary power").

⁶ VA. CONST. art. IV, § 1.

⁷ VA. CONST. art. XI, § 3. In making this declaration, the Virginia Constitution simply recognizes existing law and does not confer any authority that the General Assembly did not already possess. *Pine*, 121 Va. at 825, 93 S.E. at 655-56. See also 1973-74 Op. Va. Att'y Gen. 85, 85 (noting that, notwithstanding the protections afforded to these oyster grounds under Article XI, § 3, i.e., the prohibition of leasing, renting and selling the oyster grounds and the requirement that these be held in trust for the benefit of the people of the Commonwealth, the Constitution of Virginia grants the General Assembly the authority to redefine the limits of these oyster grounds).

⁸ 1892 Va. Acts ch. 511.

⁹ *Blake v. Marshall*, 152 Va. 616, 624, 148 S.E. 789, 791 (1929) (citing § 3233 of the Code of Virginia of 1919, which delegated to the Commission of Fisheries the duty to resurvey the oyster grounds). See also *Hampton Rds. Oyster Packers & Planters Ass'n*, 109 Va. at 568, 64 S.E. at 1041 (explaining that the Board of Fisheries, after a hearing on a report and survey, entered an order relocating and re-establishing the lines of the Baylor survey).

¹⁰ See *Dickerson v. Commonwealth*, 181 Va. 313, 322-26, 24 S.E.2d 550, 555-56 (1943) (upholding General Assembly's delegation to the Alcoholic Beverage Control Board to regulate transportation of alcoholic beverages), *aff'd*, *Carter v. Virginia*, 321 U.S. 131 (1944); *Bd. of Spvrs. v. State Milk Comm'n*, 191 Va. 1, 4-7, 60 S.E.2d 35, 37-38 (1950) (upholding delegation of legislative power to the State Milk Commission to set minimum prices of milk), *aff'd*, 340 U.S. 881 (1950). In *Dickerson*, the Virginia Supreme Court observed, "[t]he delegation of power to make

agencies “is essential to carry out the legitimate functions of government[, for] [i]f nothing could be left to the judgment and discretion of administrative officers, government could not be efficient and the legislation itself would become ‘either oppressive or inefficient.’”¹¹ Nonetheless, the Virginia Supreme Court has held that the General Assembly cannot delegate its legislative power when the delegation is accompanied only by a broad statement of general policy.¹² While statutes enjoy the presumption of constitutionality, delegations of legislative power are valid only if they establish specific policies and fix definite standards to guide the official, agency, or board in the exercise of the power.¹³ Delegations of legislative power that lack such policies and standards are unconstitutional and void.¹⁴

Whether the legislative delegation is constitutional depends on the specific provisions of the statute.¹⁵ The Supreme Court has held that delegations of authority are adequately limited where the terms or phrases employed in the statute have a well understood meaning and prescribe sufficient standards to guide the administrator.¹⁶ As such, any statutory scheme delegating Baylor grounds determinations to the VMRC must be adequately limited in that the terms or phrases employed in the statutes have a well understood meaning and prescribe sufficient standards to guide the VMRC in making Baylor grounds determinations.

Conclusion

Accordingly, it is my opinion that the General Assembly may delegate Baylor grounds boundary determinations and boundary adjustments to the Virginia Marine Resources Commission, provided the law delegating the authority establishes specific policies and fixes definite standards to guide the VMRC in making its determinations.

With kindest regards, I am

Very truly yours,



Kenneth T. Cuccinelli, II
Attorney General

administrative rules and regulations for the purpose of carrying out the policy of the lawmaking body, within the standard set by it, is exemplified in the grants to ... commissions charged with the duty of carrying out statutes ... and many other boards and agencies charged with the duty of promoting the public welfare.” 181 Va. at 323, 24 S.E.2d at 555.

¹¹ *Bell v. Dorey Elec. Co.*, 248 Va. 378, 379-80, 448 S.E.2d 622, 623 (1994) (citing and quoting *Thompson v. Smith*, 155 Va. 367, 379, 154 S.E. 579, 584 (1930)).

¹² *See Chapel v. Commonwealth*, 197 Va. 406, 415, 89 S.E.2d 337, 343 (1955) (Dry Cleaners Act held invalid, in part, because General Assembly delegated unlimited discretion to an administrative agency to promulgate rules “without fixing any standard or test to guide and control the exercise of such discretion”). *See also Andrews v. Bd. of Spvsrs.*, 200 Va. 637, 640-41, 107 S.E.2d 445, 448 (1959) (county zoning ordinance section struck down for merely setting out a policy with “no uniform rule or set of standards to guide the Board of Zoning Appeals in the exercise of its duties”).

¹³ *Bell*, 248 Va. at 380, 448 S.E.2d at 623.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 382, 448 S.E.2d at 624. *See also Volkswagen of Am. v. Smit*, 279 Va. 327, 339-40, 689 S.E.2d 679, 686 (2010) (“A statute, ordinance, or regulation which delegates discretionary authority to an administrative officer to determine its application does not satisfy due process if it lacks standards which are sufficiently clear to guide the officer, and inform those subject to his jurisdiction, of how that discretion is to be exercised.”).