



COMMONWEALTH of VIRGINIA

Office of the Attorney General

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October 11, 2013

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Angela L. Horan, Esquire
County Attorney
County of Prince William
1 County Complex Court
Prince William, Virginia 22192-9201

Dear Ms. Horan:

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

Issue Presented

You inquire whether § 15.2-2288 of the *Code of Virginia* allows localities to require a special use permit for the storage or disposal of nonagricultural excavation material on a farm if the excavation material is not generated on the farm, even if the storage or disposal of the excavation material is for an agricultural purpose.

Response

It is my opinion that § 15.2-2288 authorizes localities to require a special use permit for “the storage or disposal of nonagricultural excavation material, waste and debris if the excavation material, waste and debris are not generated on the farm,” regardless of the end use to which the materials may be put.

Background

You relate that the large scale disposal of excavation materials from construction sites on properties zoned for agricultural uses has created a truck traffic problem on the roads in your county. You further state that, in response to this problem, the General Assembly in 2012 amended § 15.2-2288 to exempt “the storage or disposal of nonagricultural excavation material, waste, and debris if the excavation material, waste and debris are not generated on the farm” from the general exemption allowing agricultural activities in agricultural zoning districts to occur without a special exception or special use permit.¹ Following the effective date of this amendment, Prince William County proposed the adoption of a change to its Zoning Ordinance that requires a special use permit for “the storage or disposal of nonagricultural excavation material, if the excavation material is not generated on the farm” in the event that the number of dump truck deliveries exceed certain specified thresholds. The proposed zoning

¹ 2012 Va. Acts ch. 455.

amendment also would specify that the nonagricultural excavation material may include only soil and rock.

Applicable Law and Discussion

Virginia follows the Dillon Rule regarding the authority of local governments. That rule states that “. . . local governing bodies ‘have only those powers that are expressly granted [by the General Assembly], those necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable.’”² In that context, fundamental rules of statutory construction require giving the fullest possible effect to the legislative intent embodied in an entire statutory enactment.³ When a statute is expressed in plain and unambiguous terms, whether general or limited, it is assumed that the General Assembly means what it plainly has expressed, and no room is left for construction.⁴

The Virginia General Assembly has given localities the authority to include special exceptions and to permit special uses, i.e., those not ordinarily permitted by right within a zoning district, within zoning ordinances.⁵ The General Assembly has also provided that a zoning ordinance cannot require a special exception or special use permit for “production agriculture or silviculture activity” in an agricultural district.⁶ It then specifically amended the Code to provide that “the storage or disposal of nonagricultural excavation material, waste, and debris if the excavation material, waste and debris are not generated on the farm” did not qualify as production agriculture or silviculture activity.⁷

When read together, these provisions provide express General Assembly authority to local governing bodies to regulate the storage or disposal of nonagricultural excavation materials not generated on the farm, by enabling localities to impose a special exception or special use permit requirement on that land use activity. The language of the statute is clear and unambiguous, and it is not necessary to look beyond the plain language of the statute to discern its meaning.⁸

You also inquire whether the phrase in the 2012 amendment to § 15.2-2288, “subject to the provisions of the Virginia Waste Management Act” (“WMA”), limits the types of non-agricultural excavation material, waste, and debris that a locality can regulate through the requirement of special use permits.⁹ I conclude that it does not do so. It has been held that “[w]hen the State, in the exercise of its

² *Sinclair v. New Cingular Wireless PCS, LLC*, 283 Va. 567, 576 727 S.E. 2d 40, 44 (2012).

³ 2007 Op. Va. Att’y Gen. 50, 51 (citing *Va. Real Estate Bd. v. Clay*, 9 Va. App. 152, 157, 384 S.E.2d 622, 625 (1989)).

⁴ 2009 Op. Va. Att’y Gen. 80, 81.

⁵ VA. CODE ANN. § 15.2-2286.A.1 (2012) provides that “[a] zoning ordinance may include, among other things, reasonable regulations and provisions . . . [f]or variances or special exceptions” Section 15.2-2201 defines “[s]pecial exception” as “a special use, that is a use not permitted in a particular district except by a special use permit granted under the provisions of this chapter and any zoning ordinances adopted herewith.”

⁶ Section 15.2-2288 (2012).

⁷ 2012 Va. Acts ch. 455.

⁸ “[W]hen the language of an enactment is free from ambiguity, resort to legislative history and extrinsic facts is not permitted because we take the words as written to determine their meaning.” *Newberry Station Homeowners Ass’n v. Bd. of Supvrs.*, 285 Va. 604, 614, 740 S.E.2d 548, 553 (2013) (citing *Brown v. Lukhard*, 229 Va. 316, 321, 330 S.E.2d 84, 87 (1985)).

⁹ The Virginia Waste Management Act, VA. CODE ANN. §§ 10.1-1400 through 10.1-1457 (2012), establishes the Virginia Waste Management Board and provides for a regulatory system to supervise and control waste management activities in the Commonwealth. The WMA’s numerous provisions encompass regulation of such

police power, enacts certain regulations, a political subdivision may, if it acts within its delegated powers, legislate on the same subject unless the General Assembly has expressly pre-empted the field.”¹⁰ Moreover, statutes dealing with the same subject matter should be construed together to achieve a harmonious result, and conflicts between them should be resolved so as to give effect to legislative intent.¹¹ Thus, the proviso in § 15.2-2288 regarding the WMA does not serve to preclude the county from acting within its express grant of authority, however, it does necessitate that in any instance of conflict between a local zoning ordinance and the WMA, the provisions of the WMA must prevail.¹²

Significantly, as to the intended use of the non-agricultural excavation materials, waste or debris to be stored or disposed of on agriculturally zoned property, the plain language of § 15.2-2288 does not differentiate a locality’s regulatory authority on the basis of the intended end use of the materials. Thus, it is my opinion that whether such material is destined for agricultural, or non-agricultural, use on the property, does not affect the authority of the locality to require a special use permit to regulate its storage or disposal.¹³

Finally, you note that some members of the public have questioned the reasonableness of the quantitative criteria in the proposed ordinance that trigger the need for a special use permit, and the qualitative limitation specifying that “[n]on-agricultural excavation material shall include only soil and rock,” and not “dump heaps or the storage or disposal of waste or construction debris.” This Office cannot now know the context of any potential future challenge to the proposed ordinance, or whether it ultimately will be adopted, or the specific language that the Board of Supervisors may enact. Thus, it cannot opine on the probable outcome of any such litigation. Nevertheless, I note that if the ordinance ultimately is adopted and thereafter challenged, the burden is on the one challenging it to establish that it

diverse waste-related matters as solid waste (§§ 10.1408.1 through 10.1-1413.1), landfill closures (§ 10.1-1413.2), litter control and recycling (§§ 10.1-1414 through 10.1-1425), lead acid batteries (§§ 10.1-1425.1 through 10.1-1425.5), recycling by State agencies and universities (§§ 10.1-1425.6 through 10.1-1425.9), pollution prevention (§§ 10.1-1425.10 through 10.1-1425.19), heavy metals in packaging (§§ 10.1-1425.20 through 10.1-1425.25), cathode ray tubes and mercury thermostats recycling (§ 10.1-1425.26), computer recovery and recycling (§§ 10.1-1425.27 through 10.1-1425.38), rechargeable battery recycling (§ 10.1-1425.39), hazardous waste management (§§ 10.1-1426 through 10.1-1429), radioactive waste (§§ 10.1-1430 through 10.1-1432), siting of hazardous waste facilities (§§ 10.1-1433 through 10.1-1449), transportation of hazardous materials (§§ 10.1-1450 through 10.1-1454), and transportation of solid and medical wastes on State waters (§ 10.1-1454.1), and provides for enforcement of the Act and judicial review (§§ 10.1-1455 through 10.1-1457). The WMA defines numerous terms for purposes of its regulatory provisions. See §§ 10.1-1400, 10.1-1414, 10.1-1425.10, 10.1-1425.21, 10.1-1425.27 and 10.1-1433.

¹⁰ *Ticonderoga Farms, Inc. v. County of Loudoun*, 242 Va. 170, 175, 409 S.E.2d 446, 448 (1991) (citing *King v. County of Arlington*, 195 Va. 1084, 1088, 81 S.E.2d 587, 590 (1954)).

¹¹ See 2009 Op. Va. Att’y Gen. 80, 81; 2009 Op. Va. Att’y Gen. 115, 118.

¹² I note that the legislation does not require localities to regulate “the storage and disposal of nonagricultural excavation material, waste and debris” through a special exception or special use permit requirement. Nevertheless, it is evident that the General Assembly, within the limitations set by the newly-enacted language of § 2.2-2288, intended to enable a locality to place reasonable limitations upon the scope of that land use activity. See *Jones v. Conwell*, 227 Va. 176, 181, 314 S.E.2d 61, 64 (1984) (wherein the Court stated, “it is well established that every act of the legislature should be read so as to give reasonable effect to every word and to promote the ability of the enactment to remedy the mischief at which it is directed.”).

¹³ “Rules of statutory construction prohibit adding language to or deleting language from a statute.” *Appalachian Power Co. v. State Corp. Comm’n*, 284 Va. 695,706, 733 S.E.2d 250, 256 (2012) (citing *BBF, Inc. v. Alstom Power, Inc.*, 274 Va. 326, 331, 645 S.E.2d 467, 469 (2007)).

is clearly unreasonable, arbitrary or capricious, and that it bears no relation to the public health, safety, morals or general welfare; if the reasonableness of an ordinance is fairly debatable it must be sustained.¹⁴

Conclusion

Accordingly, it is my opinion that § 15.2-2288 authorizes localities to require a special use permit for “the storage or disposal of nonagricultural excavation material, waste and debris if the excavation material, waste and debris are not generated on the farm,” regardless of the end use to which the materials may be put.

With kindest regards, I am,

Very truly yours,

A handwritten signature in black ink that reads "Ken C II". The signature is stylized, with the first name "Ken" written in a cursive script and the last name "C" followed by the Roman numeral "II".

Kenneth T. Cuccinelli, II
Attorney General

¹⁴ Bd. of Supvrs v. Carper, 200 Va. 653, 660, 107 S.E.2d 390, 395 (1959).