SPECIAL USE PERMITS

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THE DILLON RULE: *WHO WAS DILLON AND WHAT IS HIS "RULE"?*

In 1890, John Forrest Dillon wrote a book entitled *Commentaries on the Law of Municipal Corporations*[1], wherein he claimed that it was a "well settled" principle of law that localities have essentially three sources of very limited powers. (In fact, this was not a "well settled" principle of law and was not followed in many, if any, states at the time. He was likely only restating one of his own opinions written as an Iowa Supreme Court justice). Nevertheless, "Dillon's Rule" was officially recognized by the Virginia Supreme Court in 1896.[2]

Stated briefly, Dillon's Rule states that localities have only three sources of power:

(1) Power expressly granted by the General Assembly; and

(2) Power that is necessarily or fairly implied from the express grant of power; and

(3) Powers that are essential and indispensable.

Any doubt about the existence of authority is construed *against* the locality.[3] Virginia courts strictly apply the Dillon Rule and rarely upholds an exercise of power absent an express grant. For example, the Virginia Supreme Court decided that just because the General Assembly granted localities the right to require subdivision plat approval, localities did not also have the right to suspend applications for such approval (i.e., development moratoria).[4]

Implied powers are usually found to be valid only when their absence would render the expressly-granted power ineffective. For example, in 1997 the Virginia Code stated that a locality could prohibit the construction of new structures in support of a nonconforming use. Nothing, however, was stated about whether a locality could regulate the expansion of existing structures in support of a nonconforming use. The Virginia

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[1] 4th Edition, Boston: Little, Brown, and Company, 1890, p.145.
[2] *City of Winchester v. Redmond*, 93 Va. 711 (1896).
[3] *Commonwealth v. County Board of Arlington*, 217 Va. 558, 574 (1977).
[4] *Board of Supervisors of Fairfax County v. Horne*, 216 Va. 113 (1975).

Supreme Court found that there was an implied power to regulate the existing structure; otherwise, an owner of a nonconforming use could expand it without any control by the locality.[5]

SPECIAL USE PERMITS: AN EXPRESSLY GRANTED POWER

Who may grant a special use permit?

Under Virginia Code § 15.2-2286(A)(3), the Board of Supervisors is authorized to grant special use permits under suitable regulations and safeguards.[6] The Virginia Code permits the governing body to retain the power to grant special use permits or to delegate that power to the Board of Zoning Appeals.[7] The Board of Supervisors has retained the right to grant special use permits and has not delegated it to the BZA. The Planning Commission reviews each application for a special use permit and makes recommendations to the Board of Supervisors regarding whether they should be approved or not.

Why is a special use permit required for that particular use?

The district regulations in the Zoning Ordinance set forth a number of uses allowed "by right" (i.e., you don't need any special permit or rezoning to establish the proposed use), and a number of uses that are allowed by special use permit in each district. Uses that are allowed only upon issuance of a special use permit are those that the Board of Supervisors have determined to have a potentially greater impact upon neighboring properties or the public than those uses permitted in the district as a matter of right.[8] If a special use permit is granted to allow the use, the <u>potential impacts should be addressed through specific conditions imposed on the use</u>.

In James City County, a special use permit is also required for commercial uses that reach beyond certain size or trip generation thresholds.[9] In these cases, the general

[5] *City of Chesapeake v. Gardner Enterprises, Inc.*, 253 Va. 243 (1997).
[6] Special Use Permits are also known as Conditional Use Permits and Special Exceptions. The Virginia Code refers to Use Permits and Special Exceptions and the Virginia Supreme Court has determined that the two terms mean the same thing. *Fairfax County v. Southland Corp.*, 224 Va. 514, 521-22, (1982). In James City County, they are universally referred to as "Special Use Permits."
[7] Virginia Code § 15.2- 2309(6)
[8] *Board of Supervisors of Fairfax County v. Southland Corp.*, 224 Va. 514 (1982)
[9] James City County Code section 24-11.

use (commercial) has been deemed acceptable, but only in a small scale (i.e., below the thresholds set forth in County Code 24-11). Consideration of a use permit that is required pursuant to this section of the County Code should not be any different than any other use permit, except that consideration of the general use (commercial) is not at issue; rather, the concern is with the impacts associated with the size or trip generation of the proposed use. This is a very technical distinction that in practice is not likely to have a significant impact on your consideration of the use permit and the associated conditions.

Is this a public hearing? What is the advertising requirement for a special use permit?

A public hearing must be held prior to the issuance of a special use permit. The public notice must be published once a week for two successive weeks in a newspaper published or having general circulation in the County (currently, the County advertises in the *Virginia Gazette*, though the *Daily Press* qualifies as well). [10]

What is a "legislative" act and what is an "administrative" act?

Legislative Acts: A legislative act involves the "balancing of the consequences of private conduct against the interests of public welfare, health, and safety."[11] Legislative acts include the adoption of a comprehensive plan and amendments thereto, adoption of a zoning ordinance (both text and map) and all amendments thereto, and the issuance of special use permits.[12]

Virginia follows the rule that legislative decisions by localities are presumed to be valid.[13] If a legislative zoning decision made by the County were challenged, the person challenging the decision must show that the existing zoning is unreasonable and that the zoning requested is reasonable.[14] If the determination is "fairly debatable," the locality

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[10] Virginia Code § 15.2-2204.

[11] *Board of Supervisors of Fairfax County v. Southland Corp*., 224 VA. 514, 522 (1982).

[12] *Byrum v. Board of Supervisors*, 217 Va. 37 (1976); *County Board of Arlington County v. Bratic*, 237 Va. 221 (1989); *City of Richmond v. Randall*, 215 Va. 506, 511 (1975); *City Council of Virginia Beach v. Harrell*, 236 Va. 99, 102 (1988); *Board of Supervisors of Fairfax County v. Southland Corp*., 224 Va. 514, 522 (1982).

[13] *Board of Supervisors of Fairfax County v. Carper*, 200 Va. 653 (1959).

[14] *Board of Supervisors of Roanoke County v. International Funeral Services Inc.*, 221 Va. 840 (1981).

will prevail based upon the presumption of validity.[15] An issue may be said to be fairly debatable when, measured by both quantitative and qualitative tests, the evidence offered in support of the opposing views would lead objective and reasonable persons to reach different conclusions.[16]

Administrative Acts: Administrative decisions (sometimes referred to as "ministerial" decisions) are those that result from the application of a previously-adopted legislative policy upon a specific project. These types of decisions include subdivision plat approval, issuance of building permits, issuance of certificates of occupancy, and site plan approvals, among others. To gain approval in an administrative act, the applicant need only prove compliance with the County's adopted ordinances, regulations, and policies. The approving agency has little, if any, discretion in approving the use if the applicant has complied with the County's adopted requirements. Essentially, an administrative approval is one where the approving agency need only look to see if all of the boxes on the application are checked. If the application is denied, the County must provide the applicant with a list of the specific reasons for denial (i.e., which of the previously adopted policies were not met).

If an applicant feels that she was wrongly denied an administrative approval, she may bring an action for "mandamus" in circuit court. A "mandamus" action is one where the court examines the application and determines whether the County's adopted requirements have been met. If the requirements have been met, then the court will order the County to approve the application.

Denial of a special use permit

If a special use permit is denied, the fairly debatable test applies and the burden is on the landowner to prove both the unreasonableness of the current zoning classification and the reasonableness of the proposed use.[17] A special use permit may also be denied because the proposed use is inconsistent with the Comprehensive Plan.[18] Even if the

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[15] *Loudoun County v. Snell Corporation*, 214 Va. 655 (1974).
[16] *Id.*
[17] *Board of Supervisors of Roanoke County v. International Funeral Services*, 221 Va. 840 (1981).
[18] *National Memorial Park, Inc. v. Board of Zoning Appeals of Fairfax County*, 232 Va. 89 (1986).

landowner satisfies all of the technical requirements for the issuance of the special use permit, the governing body nonetheless retains discretion to approve or deny the permit.[19]

The denial of a permit is arbitrary if the decision is not related to any zoning interest, but is instead motivated principally by the heavy opposition of neighbors expressing concerns not related to any zoning interest.[20] If it is shown that the standards are being applied in an inconsistent and discriminatory manner, a court may find that the denial of a special use permit does not have a rational basis.[21]

CONDITIONS IMPOSED UPON A USE PERMIT

The unique characteristic of special use permits, which distinguishes them from conditional zoning, is the authority given to the County to issue them "under suitable regulations and safeguards."[22] This phrase means that the County may impose *reasonable* conditions on the issuance of a use permit, in contrast to proffers that must come voluntarily from the applicant.

Once issued, the locality may revoke a permit only for failure to comply with these conditions.[23] There are very few Virginia court cases that address the imposition of special use permit conditions. The few cases that have been decided have suggested that there are close boundaries on the authority to impose conditions on a special use permit. For example, the County can impose conditions that address on-site access to public roads.[24] The County can include a condition that prohibits the sale of alcohol on a property.[25] One Virginia Circuit Court has determined that there is no requirement that specific enabling authority be identified for particular conditions and there are no express restrictions on what conditions may be imposed.[26]

[19] *County Board of Arlington County v. Bratic*, 237 Va. 221 (1989).
[20] *See, e.g., Marks v. City of Chesapeake,* 883 F.2d 308 (4th Cir. 1989) (if city denied permit to allow palmistry and fortune telling solely to placate neighborhood opposition, which was based on religious and moral grounds, rather than zoning grounds, decision was arbitrary)
[21] *Board of Supervisors of Fairfax County v. McDonald's Corporation*, 261 Va. 583 (2001).
[22] Va. Code § 15.2-2286(A)(3).
[23] *First Assembly of God v. City of Alexandria*, 739 F.2d 942 (4th Cir. 1984); *BZA v. Cedar Knoll, Inc*., 217 Va. 740, 232 S.E.2d 767 (1977).
[24] *Board of Supervisors of Fairfax County v. Southland Co*., 224 Va. 514 (1982)
[25] *County of Chesterfield v. Windy Hill, Ltd*., 263 Va. 197, 559 S.E.2d 627 (2002)
[26] *Merrick Land Trust I v. Louisa Cnty. Bd. of Supvrs.*, 54 Va. Cir. 378 (Louisa Cnty. 2001)

The authority to impose conditions upon a special use permit does not extend to any requirement for dedication or construction of on-or-off-site road improvements, if the need for these improvements is not *substantially generated by the development at issue*.[27] Remember also that any conditions imposed must be "suitable" (Virginia Code § 15.2-2286(A)(3)), which means that a court could question the reasonableness as well as the constitutional validity of any involuntarily imposed condition.

A locality cannot deny the permit indirectly by imposing unreasonable and impossible conditions on its use. Under Virginia law, the conditions imposed must bear a *reasonable relationship* to the legitimate land use concerns and problems generated by the use of the property.[28]

When can the County accept or require dedication of land or money?

The County may only take property in exchange for "just compensation." Because there is typically no exchange of money between the County and the applicant in relation to use permit conditions (or proffers associated with conditional zoning), a special test is needed to determine if the County's requirements are overreaching or could be considered a taking. The United States Supreme Court has stated that there must be a sufficient "nexus" between the requirement sought by the County and the impact of the proposed use. [29] Additionally, the requirements must be roughly proportional to the extent of the impact.[30]

Nollan v. California Coastal Commission: The "Nexus" Explained

In *Nollan*, the California Coastal Commission demanded that the owners allow public beach access across their property in return for a building permit to replace their bungalow with a larger house. The United States Supreme Court struck down this exaction as not being reasonably related to the burden imposed by the development. The

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[27] *Cupp v. Board of Supervisors*, 227 Va. 580, 318 S.E.2d 407 (1984).
[28] *Cupp v. Board of Supervisors of Fairfax County*, 227 Va. 580 (1984).
[29] *Nollan v. California Coastal Commission*, 482 U.S. 304 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).
[30] *Id*.

Court stated that it was "impossible to understand" how public beach access could help remedy the burden imposed by the proposed development.

Dolan v. City of Tigard: The "Rough Proportionality" Explained

In *Dolan*, the City of Tigard conditioned the owners' proposed reconstruction of their commercial building by requiring them to dedicate land for a bicycle path and for a greenway within the floodplain. Although the majority of the United States Supreme Court held that the city could require the owners to dedicate land in the floodplain in order to handle increased stormwater runoff from the development, the court invalidated the city's requirement that the floodplain corridor be opened to public access for the greenway and bike path, holding that the city had failed to show that either the floodplain or the transportation impact of the expanded business was reasonably related in "rough proportion" to the requirement of public access.

Nexus and Rough Proportionality in Virginia

The Virginia Supreme Court has addressed the exaction question at least three times, and in each case the issue was whether a locality could require owners to dedicate a portion of their property for a road abutting the property.[31] These cases, which each held that the proposed exaction violated the Dillon Rule, also state that unless the need for the dedication is substantially generated by the proposed development rather than by public traffic demands, they constitute a taking without just compensation.

Statutory Limitations on the Uses for which Special Use Permits May be Required

The authority of the County to require special use permits for certain uses has some limitations. The General Assembly has identified a range of uses that, under statutorily prescribed circumstances, are to be allowed as a matter of right. These uses include: (1) production agriculture or silviculture activities (Virginia Code § 15.2-2288);

[31] *Board of Supervisors of James City County v. Rowe*, 216 Va. 128 (1975) (zoning ordinance requirement); *Hylton Enterprises, Inc. v. Board of Supervisors of Prince William County*, 220 Va. 435 (1979) (subdivision ordinance requirement); *Cupp v. Board of Supervisors of Fairfax County*, 227 Va. 580 (1984) (special use permit condition).

(2) certain residential uses (Virginia Code § 15.2-2288.1; 15.2-2286.1); (3) manufactured housing (Virginia Code § 15.2-2290(A)); (4) group homes of eight or fewer persons (Virginia Code § 15.2-2291); (5) family day homes of five or fewer children (Virginia Code § 15.2-2292); temporary structures (Virginia Code § 15.2-2288.2); and licensed farm wineries (Virginia Code § 15.2-2288.3).