Chapter 5

The Dillon Rule and Its Limitations on a Locality's Land Use Powers

5-100 Introduction

The Dillon Rule (also referred to as "Dillon's Rule") provides that a locality's governing body has only those powers expressly granted by the General Assembly, powers necessarily or fairly implied from the express powers, and powers that are essential to the declared objects and purposes of the locality. *Bragg Hill Corporation v. City of Fredericksburg*, 297 Va. 566, 578, 831 S.E.2d 483, 489 (2019); *Jennings v. Board of Supervisors of Northumberland County*, 281 Va. 511, 516, 708 S.E.2d 841, 844 (2011) ("a locality's zoning powers are 'fixed by statute and are limited to those conferred expressly or by necessary implication'"); *Marble Technologies v. City of Hampton*, 279 Va. 409, 417, 690 S.E.2d 84, 88 (2010); *Logan v. City Council of the City of Roanoke*, 275 Va. 483, 659 S.E.2d 296 (2008); *Norton v. City of Danville*, 268 Va. 402, 602 S.E.2d 126 (2004); *Board of Supervisors of Augusta County v. Countryside Investment Co.*, 258 Va. 497, 522 S.E.2d 610 (1999) (invalidating subdivision regulation that was not based on the enabling authority in Virginia Code §§ 15.2-2241 or 15.2-2242); *City of Chesapeake v. Gardner Enterprises, Inc.*, 253 Va. 243, 482 S.E.2d 812 (1997) (upholding validity of a zoning regulation that prohibited the construction of additional buildings or structures to support a nonconforming use); *Curzio Construction, Inc. v. Zoning Appeals Board of Front Royal*, 63 Va. Cir. 416 (2003) (holding that town had implied authority to require in its zoning ordinance that the main or front building façade and entrance of a building be oriented toward the front yard of the property under its authority in Virginia Code § 15.2-2283 to "facilitate the creation of a convenient, attractive, and harmonious community").

The Dillon Rule is a rule of statutory construction that was first recognized in Virginia in *City of Winchester v. Redmond*, 93 Va. 711, 25 S.E. 1001 (1896), a decision in which the Virginia Supreme Court quoted with approval from 1 John F. Dillon, *Commentaries on the Law of Municipal Corporations*, § 89 (3d ed. 1881). The Dillon Rule is also a rule of strict construction – if there is a reasonable doubt whether the legislative power exists, the doubt must be resolved against the locality's governing body. *Sinclair v. New Cingular Wireless*, 283 Va. 198, 204, 720 S.E.2d 543, 546 (2012).

Virginia is one of approximately half the states that follow the Dillon Rule.

5-200 Who was John Forrest Dillon and where did his rule come from?

John Forrest Dillon was the chief justice of the Iowa Supreme Court in the mid-1800s. In their article *Why Does Dillon Rule? Or Judge John's Odd Legacy* appearing in *Nice & Curious Questions*, Edwin S. Clay III and Patricia Bangs explain that Dillon's perspective was the result of the rise of the city as a service provider that resulted from the shift from an agrarian to a more urbanized society in the post-Civil War era and the corruption that consumed many city governments. The rule itself is the result of Dillon's distrust of city government. Clay and Bangs write:

> By the 1860s, cities had become not only inefficient, but corrupt. Graft, in the form of kickbacks, was rampant for many public works and public utility projects, including the railroads. It was the era of "Boss Tweed" and the Tammany Hall gang who reportedly swindled between $75 and $200 million from New York City between 1861 and 1875.
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> Dillon understandably did not trust local government and wrote, "Those best fitted by their intelligence, business experience, capacity and moral character" did not go into local public service. He felt local government was "unwise and extravagant" ("Dillon's Rule," Clay L. Witt, *Virginia Town and City*, August 1989).

The rule has stirred debate over the years. Clay and Bangs note that those persons objecting to the Dillon Rule complain that the rule continues to bind the ability of Virginia's localities to respond to the priority needs of their localities and regions. The Dillon Rule limits a local governing body's ability to address local issues using local

strategies that could be exercised under its general police power. As a result, a locality's ability to address local issues is at the mercy of the General Assembly unless a means to address the issue has already been enabled. Stated differently, a locality's governing body does not have broad general authority to adopt whatever ordinance it deems appropriate or desirable. *Lawless v. County of Chesterfield*, 21 Va. App. 495, 465 S.E.2d 153 (1995). On the other hand, the Dillon Rule has the effect of assuring, at least to some extent, a certain amount of consistency for those who deal with Virginia's localities. The Virginia Chamber of Commerce has stated that the Dillon Rule "represents a positive tradition of legislative oversight" and encourages economic growth through a consistency in laws throughout the state."

States that do not follow the Dillon Rule are sometimes referred to as "home rule" states, in which localities are determined to have the inherent authority to exercise powers that promote the public health, safety, or welfare, even if they are not expressly enabled.

5-300 How the Dillon Rule should be applied

The Dillon Rule not only operates to determine whether a locality or its governing body (collectively, the "governing body") has a particular power, but also to determine how that power may be exercised if the power exists. The Dillon Rule should be applied in two steps. The first step determines whether the governing body is enabled to exercise a particular power. If so, the second step determines whether the enabled power has been properly exercised.

5-310 Step 1: Whether the governing body is enabled to exercise a power

The first step in a Dillon Rule analysis is whether the local governing body is enabled under any state law. *Marble Technologies v. City of Hampton*, 279 Va. 409, 418, 690 S.E.2d 84, 88 (2010) (city not enabled under Chesapeake Bay Preservation Act to rely on federal criterion when state law required localities to use state criterion).

The Dillon Rule applies "to determine in the first instance, from express words or by implication, whether a power exists at all. If the power cannot be found, the inquiry is at an end." *Commonwealth v. County Board of Arlington County*, 217 Va. 558, 575, 232 S.E.2d 30, 41 (1977). The analysis considers whether the power exists at all, under *any* statute. *Marble Technologies,* 279 Va. at 417, 690 S.E.2d at 88. The plain terms of the legislative enactment are first examined to determine whether the General Assembly expressly granted a particular power. *Marble Technologies,* 279 Va. at 418, 690 S.E.2d at 88. If the General Assembly has not authorized a particular act, it is void. *Sinclair v. New Cingular Wireless*, 283 Va. 198, 204, 720 S.E.2d 543, 546 (2012). In *Bragg Hill Corporation v. City of Fredericksburg*, 297 Va. 566, 578-579, 831 S.E.2d 483, 489-490 (2019), the Virginia Supreme Court summarized this first step as follows:

> In applying the Dillon Rule, we first examine the plain terms of the legislative enactment to determine whether the General Assembly expressly granted a particular power to the municipal corporation. [W]hen an enabling statute is clear and unambiguous, its intent is determined from the plain meaning of the words used, and, in that event, neither rules of construction nor extrinsic evidence may be employed. A municipal ordinance is invalid under Dillon's Rule if it exceeds the scope of authority granted by statute, or is inconsistent with a statute such that the ordinance and statute cannot coexist. The fact that a county or municipal ordinance enlarges on a statute's provisions does not create a conflict with the statute unless the statute limits the requirements for all cases to its own terms. If an enabling statute and an ordinance can both be given effect, we harmonize them and apply them together. (internal citations omitted)

There is always a question as to how deep one must go to find the appropriate enabling authority. For example, when examining the zoning power, an issue may arise in a dispute whether the search ends upon finding the general power to regulate land uses (Virginia Code § 15.2-2280), or whether one must search for the power to regulate the specific activity in question. In *Resource Conservation Management, Inc. v. Board of Supervisors of Prince William County*, 238 Va. 15, 380 S.E.2d 879 (1989), the issue was whether the board was enabled to prohibit private landfills under what is now Virginia Code § 15.2-2280. In upholding the validity of the Prince William County ordinance, the Virginia Supreme Court held that the board acted well within its delegated authority, stating that "[w]hile the language does

not specify a landfill as one of the uses that may be prohibited, such specificity is not necessary under even the Dillon Rule of strict construction." In *Advanced Towing Company, LLC v. Fairfax County Board of Supervisors*, 280 Va. 187, 694 S.E.2d 621 (2010), the Virginia Supreme Court upheld a county regulation prohibiting the removal of towed vehicles outside of the county, finding that the regulation was a reasonable exercise of the authority granted under Virginia Code § 46.2-1232 to "regulate" the towing of vehicles. *Advanced Towing*, 280 Va. at 193, 694 S.E.2d at 625.

If the power is not expressly granted, then the question is whether the power is necessarily or fairly implied from the powers expressly granted by the statute or is essential and indispensable. *Marble Technologies, supra.* This is the most difficult part of a Dillon Rule analysis and requires careful consideration. "To imply a particular power from a power expressly granted, it must be found that the legislature intended that the grant of the express also would confer the implied." *Arlington County,* 217 Va. at 577, 232 S.E.2d at 42. "Questions concerning implied legislative authority of a local governing body are resolved by analyzing the legislative intent of the General Assembly." *Tabler v. Board of Supervisors*, 221 Va. 200, 202, 269 S.E.2d 358, 360 (1980). "Legislative intent is determined from the plain meaning of the words used." *City of Richmond v. Confrere Club of Richmond,* 239 Va. 77, 80, 387 S.E.2d 471, 473 (1990). Thus, the "central focus of [a Dillon Rule analysis] is to ascertain and give effect to the General Assembly's intent in enacting provisions." *Logan v. City Council of the City of Roanoke*, 275 Va. 483, 492, 659 S.E.2d 296, 301 (2008). An example of a *necessarily or fairly implied* power is the power to enter into a contract that is necessary to exercise a power expressly granted. *See Concerned Residents of Gloucester County v. Board of Supervisors of Gloucester County*, 248 Va. 488, 449 S.E.2d 787 (1994). An example of an *essential and indispensable* power is the power of a school board, vested with authority to supervise the schools in their school division, to discipline school employees. *Payne v. Fairfax County School Board*, 288 Va. 432, 764 S.E.2d 40 (2014).

The existence of another means to achieve a particular legislative goal may mean that a power may not be necessarily implied. *Lawless v. County of Chesterfield*, 21 Va. App. 495, 502, 465 S.E.2d 153, 156 (1995) (county did not have the implied power to criminally punish each day's continuing violation of the zoning ordinance because the General Assembly had expressly provided other enforcement options to abate the violation). If there is a reasonable doubt as to whether a legislative power exists, the doubt must be resolved against the local governing body. *Schefer v. City Council of Falls Church*, 279 Va. 588, 593, 691 S.E.2d 778, 780 (2010); *Board of Supervisors v. Reed's Landing Corp.*, 250 Va. 397, 400, 463 S.E.2d 668, 670 (1995).

When considering whether a power exists under the state subdivision laws, the search for the enabling authority likely will need to find an express grant of the specific power being challenged because localities have not been granted broad powers in that area. *See Board of Supervisors of Augusta County v. Countryside Investment Co.*, 258 Va. 497, 522 S.E.2d 610 (1999), discussed in section 5-420.

5-320 Step 2: If the governing body is enabled to act as it did, whether it properly exercised the power

If it is determined that the governing body is enabled to act as it did, the second step in a Dillon Rule analysis considers whether it properly exercised the power. There are two alternative rules that determine whether the governing body properly exercised its power.

5-321 When the enabling authority specifies the method to exercise the power

Some state enabling authority grants a power and specifies the method in which the power is to be exercised. In those cases, the method specified in the statute is *the only way in which the power may be exercised. Marble Technologies v. City of Hampton*, 279 Va. 409, 421, 690 S.E.2d 84, 90 (2010) (city's zoning regulations that included lands in its resource protection areas on the basis of federal law were void where state law required that localities use the criteria developed by the Chesapeake Bay Local Assistance Board to determine the extent of the Chesapeake Bay Preservation Area within its jurisdiction); *Logie v. Town of Front Royal*, 58 Va. Cir. 527 (2002) (Virginia Code § 36-105 enables localities to enforce a property maintenance code and prescribes prosecution as a misdemeanor and fines as the method of enforcement; as a result, town regulation authorizing termination of electric service as a method of enforcement violated the Dillon Rule).

There are many statutes where the General Assembly has specified the method in which the governing body may exercise its zoning power. These include: (1) clustering single-family dwellings under Virginia Code § 15.2-2286.1; (2) conditional zoning (proffers) under Virginia Code § 15.2-2296 *et seq*.; (3) affordable housing programs under Virginia Code § 15.2-2305 (compare Virginia Code § 15.2-2305 to the enabling authority for affordable housing programs in certain localities under Virginia Code § 15.2-2304); and (4) transfer of development rights programs under Virginia Code § 15.2-2316 *et seq*. Under the state subdivision laws, the General Assembly has specified the required and optional provisions of a subdivision ordinance in Virginia Code §§ 15.2-2241 and 15.2-2242, often with great precision.

5-322 When the enabling authority is silent about the method to exercises the power

State enabling authority may be silent about the method by which the enabled power is to be exercised. In those cases, the method by which the governing body exercises the power is lawful if the method selected is reasonable. *Advanced Towing Company, LLC v. Fairfax County Board of Supervisors*, 280 Va. 187, 694 S.E.2d 621 (2010). This rule is known as the "reasonable selection of method rule." *Advanced Towing*, 280 Va. at 193, 694 S.E.2d at 624. The rule applies regardless of whether the power is express or is necessarily implied. *Commonwealth v. County Board of Arlington County*, 217 Va. 558, 574-575, 232 S.E.2d 30, 41 (1977).

In *Advanced Towing*, the issue was whether the county could require that towed vehicles be stored in Fairfax County instead of in an adjoining locality. The Virginia Supreme Court found that Virginia Code § 46.2-1232 authorized localities to "regulate" the towing of vehicles. The Court also concluded that, although Virginia Code § 46.2-1232 was silent on the authority of a locality to determine the territory within which vehicles were to be stored after being towed, "localities may exercise reasonable discretion in prescribing, by ordinance, the territory within which towed vehicles" could be stored. *Advanced Towing*, 280 Va. at 193, 694 S.E.2d at 625.

Whether the method chosen to implement an express or implied power is reasonable will depend upon the circumstances of each case. *City of Virginia Beach v. Hay*, 258 Va. 217, 222, 518 S.E.2d 314, 316 (1999). The selected method is reasonable if it is consistent with the legislative intent; it is unreasonable if it is contrary to the legislative intent or inappropriate for the ends sought to be accomplished by the grant of the power. *Arlington County v. White*, 259 Va. 708, 528 S.E.2d 706 (2000) (county was not enabled to extend coverage to the newly defined category of domestic partners under its self-funded health insurance benefits plan). For example, in *Logie v. Town of Front Royal*, 58 Va. Cir. 527 (2002), the circuit court considered Virginia Code § 36-105, which enables localities to enforce a property maintenance code but does not prescribe the method of enforcement. The court concluded that the town's program of periodic inspections, triggered by changes in tenancy after the passage of two years and not after every tenancy, was an inspection program on a periodic basis that was reasonable and did not violate the Dillon Rule. The selected method will be unreasonable if the implementation expands the power beyond rational limits necessary to promote the public interest. *Hay*, *supra*. Any doubt in the reasonableness of the method selected is resolved in favor of the locality. *White, supra.*

Virginia Code § 15.2-2280 is a good example of state enabling authority that is silent about the method in which a local governing body is to exercise the power granted. The statute enables localities to "regulate, restrict, permit, prohibit, and determine" the use of land and structures, the size, height, area, bulk, location, and other features of structures, and the areas and dimensions land, water, and air space to be occupied by structures and uses, and of yards and other open spaces to be left unoccupied by structures and uses. Virginia Code § 15.2-2280 stands in stark contrast to the enabling authority summarized in section 5-321 where the General Assembly has provided with great specificity the method in which the power must be exercised.

5-400 The Dillon Rule applied in land use cases

The following sections illustrate how the Dillon Rule has been applied in Virginia land use cases.

5-410 Under the zoning enabling authority

In *Bragg Hill Corporation v. City of Fredericksburg*, 297 Va. 566, 831 S.E.2d 483 (2019), the property in issue had

been located in Spotsylvania County and zoned R-2 by the county before it was included as part of an annexation by the City of Fredericksburg on January 1, 1984. The city code at the time provided: "Any territory hereafter annexed to the City of Fredericksburg shall be in District R-1." In its complaint filed in 2017, the owner claimed that the city code provision's automatic rezoning of the property upon annexation in 1984 violated state law and was void *ab initio* because it rezoned the property without an ordinance, resolution, a public hearing, planning commission review, or a comprehensive plan. Virginia Code § 15.1-491(b) (which is now Virginia Code § 15.2-2286(A)(2)) provided in 1984 that a "zoning ordinance may include, among other things, reasonable regulations and provisions . . . [f]or the temporary application of the ordinance to any property coming into the territorial jurisdiction of the governing body by annexation or otherwise, subsequent to the adoption of the zoning ordinance, and pending the orderly amendment of the ordinance." The Court concluded that "Fredericksburg City Code § 18.1-17 was within the scope of the City's authority granted by Code § 15.1-491(b) (1984), it does not violate Dillon's Rule and validly authorized the City's zoning of the annexed Property as R-1 upon its annexation. The R-1 zoning classification imposed upon the Property upon its annexation by the City was therefore not void *ab initio* . . ." The Court further explained: (1) that the "enabling authority allowed a municipality to pass a zoning ordinance that applied to recently annexed land that came into the governing body's jurisdiction; Fredericksburg City Code § 18.1-17 executed that granted authority – it automatically classified recently annexed land as R-1"; (2) "the lack of the word 'temporary' in Fredericksburg City Code § 18.1-17 does not render it in conflict with, or beyond the authority provided by Code § 15.1-491(b) (1984) [; u]nder its plain terms, Code § 15.1-491(b) (1984) did not mandate any 'temporary' designation in the zoning ordinance"; and (3) even if Virginia Code § 15.1-491(b) mandated a temporary zoning classification for all recently annexed land, "there is no indication that Fredericksburg City Code § 18.1-17 does not comply with that requirement" [; a]ny zoning ordinance may be said to be temporary in the sense that it is always subject to amendment."

In *Sinclair v. New Cingular Wireless*, 283 Va. 198, 720 S.E.2d 543 (2012), the county's zoning ordinance authorized the planning commission to consider and act on what were commonly known as "critical slopes waivers." Under the county's regulations, critical slopes could not be disturbed unless the planning commission authorized their disturbance by applying specific criteria in the regulations and making certain findings. A neighbor challenged the planning commission's approval of a critical slopes waiver that permitted 408 square feet of critical slopes to be disturbed that would allow a tree-top personal wireless service facility to be constructed in the landowner's backyard. Although the Virginia Supreme Court rejected the neighbor's assertion that the critical slopes waiver was a variance that could be granted only by a BZA, the Court nonetheless concluded that there was no authority for the board of supervisors to delegate what the Court characterized as a "departure" from the zoning ordinance that was legislative in nature. The Court rejected the county's argument that the broad authority granted to localities in Virginia Code §§ 15.2-2280 and 15.2-2286(A)(4) allowed the board to delegate this task to the planning commission and rejected the argument that the board had delegated an administrative task under prescribed standards, as authorized in prior opinions of the Court.

In *Marble Technologies v. City of Hampton*, 279 Va. 409, 690 S.E.2d 84 (2010), the city's zoning ordinance used a federal criterion for designating lands to be included in a resource preservation area under the Chesapeake Bay Preservation Act. The issue was whether the city was authorized to use the federal criterion under the state enabling authority. The General Assembly had given localities broad authority in former Virginia Code § 10.1-2108 to "exercise their police and zoning powers to protect the quality of state waters consistent with the provisions" of the Act. However, that authority was limited because former Virginia Code §§ 10.1-2100(A)(ii) and 10.1-2109 required that localities use the criteria established by the state. Therefore, the Virginia Supreme Court concluded that the city's reliance on a federal criterion exceeded the authority granted by the Chesapeake Bay Preservation Act.

In *Kenyon Peck v. Kennedy*, 210 Va. 60, 168 S.E.2d 117 (1969), a zoning ordinance was upheld that had the effect of prohibiting advertising by means of outdoor moving signs or devices such as pennants, even though there is no specific mention of such a regulation in the Virginia Code. Thus, the failure of the zoning enabling authority to mention specifically a particular subject that a local governing body wants to regulate is not necessarily fatal to the governing body's exercise of its zoning power. *1984-85 Va. Op. Atty. Gen. 34*.

A locality has a substantial governmental interest in preserving its aesthetic character. *American Legion Post 7 v. City of Durham*, 239 F.3d 601 (4th Cir. 2001); *Arlington County Republican Committee v. Arlington County*, 983 F.2d 587 (4th

Cir. 1993). Nevertheless, under Virginia law, absent enabling authority, a governing body cannot limit or restrict the use persons make of their property under the guise of its police power where the exercise of the power is justified *solely* on aesthetic considerations. *Board of Supervisors of James City County v. Rowe*, 216 Va. 128, 216 S.E.2d 199 (1975). The ordinance considered by the Virginia Supreme Court in *Rowe* required preliminary site plans within a particular zoning district to be subjected to an architectural design review of the elevations of each façade, materials, colors, texture, light reflecting characteristics, and other special features intended for each building. Each building was reviewed to determine whether it furthered the stated purposes for the review: to protect property values, to promote the general welfare by ensuring buildings in good taste, proper proportion, and reasonable harmony with the existing buildings in the surrounding area, and to encourage architecture that was distinct from the Colonial Williamsburg architecture. The landowners challenging the ordinance asserted that the state enabling authority did not delegate to localities the power to impose restrictions on architectural design. The Court found the ordinance to be invalid. *Rowe* is still the controlling law in Virginia on the question of whether a local governing body may consider solely aesthetic factors in rezoning matters or zoning restrictions. However, since *Rowe* the General Assembly has enabled localities to regulate aesthetics within historic districts established under Virginia Code § 15.2-2306.

In *Resource Conservation Management, Inc. v. Board of Supervisors of Prince William County*, 238 Va. 15, 380 S.E.2d 879 (1989), the Virginia Supreme Court held that the express authority given to localities to prohibit a use of land included, by implication, the authority to prohibit landfills as a use of land. The Court said that even under the Dillon Rule of strict construction, "such specificity [*i.e.*, identifying each type of use that may be prohibited] is not necessary." *Resource Conservation Management,* 238 Va. at 20, 380 S.E.2d at 882.

In *Cupp v. Board of Supervisors of Fairfax County*, 227 Va. 580, 318 S.E.2d 407 (1984), the Virginia Supreme Court found that the express authority given to localities to grant special use permits "under suitable regulations and safeguards" did not imply the power of a locality to require a citizen to turn land over to the county and build roads for the benefit of the public. Similarly, in *Hylton Enterprises, Inc. v. Board of Supervisors of Prince William County*, 220 Va. 435, 258 S.E.2d 577 (1979), the Virginia Supreme Court held that localities had neither express nor implied authority to require a subdivider to construct off-site roads as a condition of plat approval. In *National Realty Corp. v. City of Virginia Beach*, 209 Va. 172, 163 S.E.2d 154 (1968), the Virginia Supreme Court found that an ordinance that imposed a fee for the examination and approval of final subdivision plats and made payment of the fee a prerequisite to the recording of the plat was invalid because it was not enabled under Virginia law (localities have since been so enabled).

In *Staples v. Prince George County*, 81 Va. Cir. 308 (2010), the landowners challenged the validity of a zoning regulation and special exception condition that established a 14-day maximum stay in campgrounds. The landowners claimed that there was no express or implied authority for regulating the stay of guests at campgrounds. The circuit court rejected this argument, finding that the power to adopt such a regulation is granted in Virginia Code § 15.2-2280, and finding that the power to include such a condition was within the "suitable regulations and safeguards" authority in Virginia Code § 15.2-2296(A)(3).

In *Owens v. City Council of the City of Norfolk*, 78 Va. Cir. 436 (2009), the court upheld the city council's issuance of a certificate of appropriateness for a building in a historical district where the city council had granted a height variance under the city's certificate of appropriateness procedure enabled by Virginia Code § 15.2-2306. The court held that the variable height limitations within the historic district fell within the permissible scope of Virginia Code § 15.2-2306.

5-420 Under the subdivision enabling authority

In *Board of Supervisors of Augusta County v. Countryside Investment Co.*, 258 Va. 497, 522 S.E.2d 610 (1999), the Virginia Supreme Court found that two provisions of Augusta County's subdivision ordinance were not enabled under Virginia law and, therefore, violated the Dillon Rule and were void. The first provision provided in part that the "size and shape of all lots shall be subject to approval of the Board of Supervisors." The second provision prohibited land from being subdivided if, in the opinion of the board of supervisors, it was determined to be unsuitable for subdivision for various reasons, including the proposed subdivision not being conducive to the

preservation of a rural environment. The Court stated:

> The Board asserts that it has considerable discretion when deciding what to include in a subdivision ordinance. We disagree . . .[T]he Board does not have unfettered discretion when deciding what matters it may include in its subdivision ordinance. Rather, the Board must include those requisites which are mandated in Code § 15.2-2241 and may, at the Board's discretion, include the optional provisions of a subdivision ordinance contained in Code § 15.2-2242. . . . The Board is not, however, permitted to ignore the requisites contained in Code §§ 15.2-2241 and -2242 and, under the guise of a subdivision ordinance, enact standards which would effectively permit it to rezone property in a manner inconsistent with the uses permitted by the property's zoning classification.

Countryside Investment, 258 Va. at 504-505, 522 S.E.2d at 613-614. Along similar lines, in *County of Chesterfield v. Tetra Associates, LLC*, 279 Va. 500, 689 S.E.2d 647 (2010), the Virginia Supreme Court considered various subdivision regulations by which the county prohibited the subdivision of land for a residential use within an agricultural zoning district, where the proposed residential use and minimum lot sizes complied with the applicable requirements of the agricultural zoning district under the zoning ordinance. Relying on its previous holding in *Countryside Investment*, the Court concluded that the county could not use its subdivision regulations to prohibit a use permitted by the applicable zoning regulations and directed that the county process the applicant's subdivision plat.

5-500 A rule that is stricter than the Dillon Rule applies to statutory bodies such as boards of zoning appeals and architectural review boards

The Dillon Rule applies to a locality and its governing body. Because boards of zoning appeals ("BZA") and architectural review boards ("ARB") are creatures of statute, they are subject to a rule that is stricter than the Dillon Rule. These bodies possess only those powers expressly conferred; they do not have the power to exercise powers that must be implied from expressly granted powers, or those that are perceived as essential and indispensable. *Board of Zoning Appeals of Fairfax County v. Board of Supervisors of Fairfax County*, 276 Va. 550, 666 S.E.2d 315 (2008) (holding that the BZA does not have the power to sue because that power is not expressly granted by statute); *Adams Outdoor Advertising, Inc. v. Board of Zoning Appeals of the City of Virginia Beach*, 261 Va. 407, 544 S.E.2d 315 (2001) (BZA was enabled to grant a variance only for the purposes and under the requirements provided by law; the subject of entitlement to compensation for the alleged taking of or damage to property as a result of zoning actions was not among the powers enumerated); *Board of Zoning Appeals of Fairfax County v. Cedar Knoll, Inc.*, 217 Va. 740, 232 S.E.2d 767 (1977) (zoning administrator, who is charged with the administration and enforcement of the zoning ordinance, and not the BZA, could revoke a special use permit; BZA could consider the matter only on appeal of the zoning administrator's decision).

5-600 Working with the Dillon Rule in its daily application

Following are the phrases that local officers and employees hates hearing from their attorney: "You can't do that," "That's not enabled," and "There's no enabling authority for us to do that." When a locality's attorneys say those things, they have researched the enabling authority to determine whether the locality is enabled to do something and have determined that there is no express or necessarily implied enabling authority. In other words, they have concluded that the proposed action is not enabled.

5-610 When the locality's attorney determines that the proposed action is not enabled

If one assumes that laws are intended to promote the public health, safety, and general welfare, the failure to find enabling authority means that the General Assembly has not (or has not yet) determined that the proposed action promotes these interests.

Once a determination is made that the necessary enabling authority is missing and the Dillon Rule applies, the locality's attorney is obligated to proceed in the best interests of the locality. *Rule 1.13(b) of the Virginia Rules of Professional Conduct*.

Among other things, Rule 1.13(b) means that once the attorney has determined that the locality has no authority to take the proposed action, they may decline to assist an officer or employee in violating the law by circumventing a prohibitory law or ignoring the absence of enabling authority.

5-620 When "other localities are doing" something

When word is received from the locality's attorney that the locality is not enabled to take a proposed action, an officer or employee may be aware that "other localities are doing" something. When such a claim is made, the attorney will inquire to find out which localities are doing it, and what if any authority there is for doing it. Following is a list of the typical findings from such an inquiry:

- The person claiming that other localities are doing something does not know or understand what the other localities are actually doing.

- Other localities are not doing "something," but are doing something similar that is enabled.

- The other localities that are doing something are either enabled through their charter or have special legislation applicable to a class of localities of which your locality is not a member.

- The other localities are not enabled either but have not been sued yet.

- The other localities are small rural localities, and the particular matter was never reviewed by their attorneys.

Of course, the locality's attorney will not conduct such an inquiry if they know that what the other localities are doing is obviously not enabled. The attorney knows that if five other localities are doing something, that means that over 100 Virginia localities are not doing it.

5-630 The search for alternative solutions

A locality's attorney's determination that a proposed action is not enabled does not end the inquiry. The attorney should advise the client of alternative solutions that will legally achieve, or achieve as closely as possible, the desired result. One of those alternatives may be to pursue a change in state law to obtain the enabling authority.