



# COMMONWEALTH of VIRGINIA

Office of the Attorney General

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May 5, 2015

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The Honorable Richard H. Stuart  
Member, Senate of Virginia  
Post Office Box 1146  
Montross, Virginia 22520

Dear Senator Stuart:

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 a locality may use its zoning authority to prohibit “unconventional gas and oil drilling,” commonly known as “fracking” (short for hydraulic fracturing). You also ask whether a locality may use zoning to regulate certain aspects of fracking, such as the timing of drilling operations, traffic, or noise.<sup>1</sup> This Opinion addresses only fracking, and not any other type of activity involving the exploration for, mining of, or transportation of any natural resource.

## Applicable Law and Discussion

Fracking is a method of retrieving oil or natural gas by injecting fluid into underground shale beds at high pressure.<sup>2</sup> As noted in your Opinion request, fracking has the potential to greatly increase domestic production of oil and gas and to spur economic development in localities located on or near shale beds. Fracking can also be an intensive land use, and the recent expansion of this industry has raised significant environmental and safety concerns. The potential dangers arising from this still-evolving technology include the depletion of fresh water from aquifers, contamination of groundwater, earthquakes, and surface problems such as air pollution and industrial truck traffic.<sup>3</sup> Fundamental land use questions are thus presented about fracking’s compatibility with existing and planned uses of nearby lands.

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<sup>1</sup> I assume for the purpose of this Opinion that any zoning ordinance relating to fracking is adopted in full compliance with all procedural and substantive requirements imposed by applicable laws.

<sup>2</sup> See MERRIAM-WEBSTER, *Definition of “Fracking,”* <http://www.merriam-webster.com/dictionary/fracking> (last visited March 25, 2015).

<sup>3</sup> See, e.g., Robert B. Jackson et al., *The Environmental Costs and Benefits of Fracking*, 39 ANNUAL REV. OF ENV’T & RES. 327 (2014), available at <http://www.annualreviews.org/doi/abs/10.1146/annurev-environ-031113-144051>; Nicholas Schroeck & Stephanie Karisny, *Hydraulic Fracturing and Water Management in the Great Lakes*, 63 CASE W. RES. L. REV. 1167, 1169 (2013); U.S. GEOLOGICAL SURVEY’S EARTHQUAKE HAZARDS PROGRAM, *Induced Earthquakes*, <http://earthquake.usgs.gov/research/induced> (last visited April 20, 2015).

Two steps are involved in determining the extent of local zoning authority over fracking. First, it is necessary to determine whether localities in Virginia have general authority under law to prohibit or otherwise to regulate fracking within their boundaries. If that question is answered in the affirmative, it is then necessary to determine whether the power to prohibit or regulate fracking is nevertheless preempted in whole or part by other applicable state law.

### Dillon Rule Analysis

Virginia follows the Dillon Rule of strict construction, which provides that “municipal corporations have only those powers that are expressly granted, those necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable.”<sup>4</sup> A corollary to the Dillon Rule provides that the powers of local governing bodies are “fixed by statute and are limited to those conferred expressly or by necessary implication.”<sup>5</sup> Consistent with the Dillon Rule, a local governing body may prohibit fracking only if the legislature has expressly granted it the authority to do so, or if that power is necessarily implied from an express grant of power.

The General Assembly has delegated to localities the authority to control land use within their jurisdictions through zoning.<sup>6</sup> The extent of local zoning powers is broad.<sup>7</sup> Indeed, the Supreme Court of Virginia has stated that “[t]he legislative branch of a local government possesses wide discretion in the enactment and amendment of zoning ordinances,” and its actions in doing so are presumed valid absent express limitations to the contrary.<sup>8</sup> In addition, “[t]he mere fact that the state, in the exercise of the police power, has made certain regulations . . . does not prohibit a municipality from exacting additional requirements” through the use of its zoning powers.<sup>9</sup>

As part of the broad zoning authority granted to them by the General Assembly, localities in the Commonwealth are permitted to prohibit certain land uses within their boundaries. Pursuant to § 15.2-2280, a locality “may, by ordinance . . . regulate, restrict, permit, *prohibit*, and determine” a variety of land uses within its jurisdiction.<sup>10</sup> The Supreme Court of Virginia has confirmed that “by this language, the governing body of a locality is expressly authorized to prohibit a specific use of land.”<sup>11</sup>

While § 15.2-2280 contains an exemplary list of land uses that may be prohibited, the list is not exhaustive, and a specific mention of fracking would not be necessary for the use to fall within the

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<sup>4</sup> Bd. of Zoning Appeals v. Bd. of Supvrs., 276 Va. 550, 553-54 (2008).

<sup>5</sup> Bd. of Supvrs. v. Horne, 216 Va. 113, 117 (1975) (citations omitted); *see also* Bd. of Supvrs. v. Countryside Inv. Co., 258 Va. 497, 503 (1999).

<sup>6</sup> *See* VA. CODE ANN. § 15.2-2280 (2012); *Byrum v. Bd. of Supvrs.*, 217 Va. 37, 39 (1976) (“The governing body of a county in Virginia is authorized by statute to enact local zoning ordinances.”). Zoning ordinances relate to the use of real property such as “existing use and character of property,” “the suitability of property for various uses,” and “the encouragement of the most appropriate use of land throughout the locality.” Section 15.2-2284 (2012).

<sup>7</sup> *See* VA. CODE ANN. §§ 15.2-2280 to 15.2-2316 (2012 & Supp. 2014) (establishing the extent of localities’ zoning powers).

<sup>8</sup> *Bd. of Cnty. Supvrs. v. Carper*, 200 Va. 653, 660 (1959).

<sup>9</sup> *See King v. Cnty. of Arlington*, 195 Va. 1084, 1090 (1954).

<sup>10</sup> Section 15.2-2280 (emphasis added); *see also Cnty. of Chesterfield v. Windy Hill, Ltd.*, 263 Va. 197, 206 (2002) (stating that, by granting localities zoning powers, the General Assembly vested them with the authority “to prevent the use of land in a manner the City has deemed detrimental to the general welfare of its inhabitants and deemed as having a deleterious effect on the community”).

<sup>11</sup> *See Resource Conservation Mgmt., Inc. v. Bd. of Supvrs.*, 238 Va. 15, 20 (1989).

purview of the statute.<sup>12</sup> In any case, however, fracking falls within the plain language of the fourth example listed in the statute – “[t]he excavation or mining of soil or other natural resources.”<sup>13</sup> Given the plain language of the statute, the Virginia Supreme Court’s acknowledgment of the broad zoning authority the statute grants to localities,<sup>14</sup> and the lack of any intervening change to the statute,<sup>15</sup> I conclude that the General Assembly has authorized localities to pass zoning ordinances prohibiting fracking. The plain language of the statute also authorizes localities to regulate fracking in instances where it is permitted.

What remains to be discussed is whether, and to what extent, the authority of localities to prohibit or otherwise to regulate fracking is preempted by state law.<sup>16</sup>

### Preemption Analysis

The question of preemption turns on whether a local ordinance regulating or prohibiting fracking is inconsistent with state law. “Any ordinance, resolution, bylaw, rule, regulation, or order of any governing body . . . shall not be inconsistent with the Constitution and laws of . . . the Commonwealth.”<sup>17</sup> Accordingly, any local zoning ordinance is preempted if it conflicts with state law.

Here, the potential source of state preemption is the Virginia Gas and Oil Act (the “Act”).<sup>18</sup> This Act creates a state permitting process for oil and gas operations.<sup>19</sup> Fracking is an oil and gas operation within the scope of the Act.<sup>20</sup> The purposes of the Act include “[protecting] the citizens and the environment of the Commonwealth from the public safety and environmental risks associated with the development and production of gas or oil.”<sup>21</sup> The Act creates the Virginia Gas and Oil Board (the

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<sup>12</sup> See *Resource Conservation*, 238 Va. at 20 (“While the language does not specify a landfill as one of the uses that may be prohibited, such specificity is not necessary even under the Dillon Rule of strict construction.”).

<sup>13</sup> Section 15.2-2280(4).

<sup>14</sup> *Resource Conservation*, 238 Va. at 20.

<sup>15</sup> See *Vasant & Gusler, Inc. v. Washington*, 245 Va. 356, 361 (1993) (following a previous decision of the Virginia Supreme Court interpreting a statutory provision, and noting that in light of the passage of “many sessions of the General Assembly,” “the construction given to the statute is presumed to be sanctioned by the legislature and therefore becomes obligatory upon the courts”).

<sup>16</sup> There may exist federal statutes or regulations that could, to one degree or another, preempt the local regulation of fracking, local eminent domain actions, or other local mechanisms – including those that might affect the siting or operation of fracking facilities. Those possible federal laws, if and to the extent that they exist, are outside the scope of this Opinion, which discusses only state law. Additionally, this Opinion does not address constitutional concerns that may arise from a ban on fracking, such as takings or due process claims. Those concerns, if they occur, will be dependent on the particular facts at issue.

<sup>17</sup> VA. CODE ANN. § 1-248 (2014).

<sup>18</sup> VA. CODE ANN. §§ 45.1-361.1 to 45.1-361.44 (2013 & Supp. 2014).

<sup>19</sup> Sections 45.1-361.27 to 45.1-361.42 (2013).

<sup>20</sup> The Act, in relevant part, states that “[t]he Director [of the Department of Mines, Minerals and Energy (“DMME”)] shall have the power and duty to regulate gas, oil, or geophysical operations.” Section 45.1-361.4(A). DMME regulations governing fracking are found in the Virginia Administrative Code. See 4 VA. ADMIN. CODE §§ 25-150-10 to 25-150-750. Also, the Act contains a definition of the term “injection well” as being “any well used to inject or otherwise place any substance associated with gas and oil operations into the earth or underground strata for disposal, storage or enhanced recovery.” Section § 45.1-361.1 (2013). This definition describes the principal process used in fracking.

<sup>21</sup> Section 45.1-361.3(6) (2013).

“Board”),<sup>22</sup> which has “the specific power to issue rules, regulations or orders” (collectively, “regulations”).<sup>23</sup> The permissible scope of these regulations is broad.<sup>24</sup> Current regulations of the Board address a wide range of subjects relating to oil and gas development within the Commonwealth.<sup>25</sup> Some subjects within the purview of these regulations involve issues that could also be addressed by local zoning ordinances.<sup>26</sup>

The issue of regulatory preemption was addressed by the Supreme Court of Virginia in *Blanton v. Amelia County*.<sup>27</sup> In that case, the Court held that localities could not prohibit the land application of biosolids in their communities through zoning because “a local government may not ‘forbid what the legislature has expressly licensed, authorized, or required.’”<sup>28</sup> The state law at issue in *Blanton* directed the State Board of Health to regulate the use of biosolids, leading the Court to conclude that localities could not subsequently ban such land use activity.<sup>29</sup> In a 2013 Opinion addressed to Delegate Terry Kilgore (the “2013 Opinion”), this Office cited *Blanton* in concluding that localities may not pass zoning ordinances banning the exploration for, and drilling of, oil and natural gas.<sup>30</sup>

However, there is a key difference between the statute that was at issue in *Blanton* and the Act. Section 45.1-361.5 of the Act expressly retains the authority of local land use ordinances, while the statute at issue in *Blanton* did not.<sup>31</sup> While § 45.1-361.5 of the Act states that no locality “shall impose any condition, or require any other local license, permit, fee or bond to perform any gas, oil, or

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<sup>22</sup> Section 45.1-361.13 (2013).

<sup>23</sup> Section 45.1-361.15 (2013).

<sup>24</sup> In relevant part, the Board may issue regulations in order to “[p]revent waste through the design spacing, or unitization of wells, pools, or fields”; “[e]nter spacing and pooling orders,” “[e]stablish drilling units,” “[e]stablish maximum allowable production rates for the prevention of waste and for the protection of correlative rights,” and “[c]lassify pools and wells as gas, oil, gas and oil, or coalbed methane gas.” Section 45.1-361.15. In addition, it may “[t]ake such actions as are reasonably necessary to carry out the provisions of [the Act].” *Id.*

<sup>25</sup> The Act and its attendant regulations include a consideration of the potential impact that drilling in certain geographic locations may have on the Chesapeake Bay. *See* § 45.1-361.29(G) (2013) (prohibiting drilling in the waters, tributaries, Resource Protection Areas, and within 500 feet from the shorelines of the waters and tributaries of the Chesapeake Bay entirely, and prohibiting such drilling anywhere in the Tidewater region of Virginia unless the environmental assessment required by VA. CODE ANN. §§ 62.1-195.1 has been completed); *see also* 4 VA. ADMIN. CODE §§ 25-150-10 to 25-150-750; 4 VA. ADMIN. CODE §§ 25-160-10 to 25-160-200; §§ 25-165-10 to 25-165-130.

<sup>26</sup> *See* the Board’s regulations dealing with “the design, spacing, or utilization of wells, pools, or fields,” its “spacing and pooling orders,” and its authority to “carry out the provisions of [the Act]” with respect to the protection of citizens and the environment and *compare with* the legislative intent of zoning and land use regulation, which includes the intent “to improve public health, safety, and convenience of . . . citizens [and to ensure] that residential areas be provided with healthy surroundings.” VA. CODE ANN. §§ 15.2-2200; 45.1-361.15.

<sup>27</sup> *Blanton v. Amelia Cnty.*, 261 Va. 55, 64 (2001).

<sup>28</sup> *Id.* (quoting *King*, 195 Va. at 1090-91); *see also* *Dail v. York Cnty.*, 259 Va. 577, 585 (2000) (“A local ordinance may be invalid because it conflicts with a state regulation if the state regulation has ‘the force and effect of law.’”) (quoting *Loudoun Cnty. v. Pumphrey*, 221 Va. 205, 206-207 (1980)).

<sup>29</sup> *Blanton*, 261 Va. at 62, 65-66.

<sup>30</sup> 2013 Op. Va. Att’y Gen. 231.

<sup>31</sup> *See* former VA. CODE ANN. § 32.1-164.5 (now repealed, which vested the Board of Health, with the assistance of the Departments of Environmental Quality and Conservation and Recreation, with authority to promulgate regulations concerning use of sewage sludge. No part of that statute could reasonably be interpreted to be a savings clause, and the statute granted no regulatory powers over placing sewage sludge to localities).

geophysical operations which varies from or is in addition to the requirements of this chapter,” this same statute also includes a savings clause stating that the Act does not “limit or supersede the jurisdiction and requirements of . . . local land-use ordinances.” While these two components of § 45.1-361.5 may be to some degree inconsistent, they can be reconciled in part by concluding that the only authority localities retain over fracking is land use or zoning authority. All other possible local powers over fracking operations are totally preempted, but zoning authority is not. And, as explained above, local land use authority includes the authority to prohibit certain uses, including fracking.

When the General Assembly passed the current Act in 1990, it included the savings clause that appears in § 45.1-361.5.<sup>32</sup> It must be presumed this was done intentionally and that the amendment was “purposeful and not in vain.”<sup>33</sup> Furthermore, it must be presumed “the legislature acted with full knowledge of the law as it stood bearing on the subject” of the amendment.<sup>34</sup> The 1990 enactment of the Act occurred approximately a year after a key 1989 decision of the Supreme Court of Virginia. That case was *Resource Conservation Management, Inc. v. Board of Supervisors of Prince William County*.<sup>35</sup> There, the Court held that a locality could exercise its zoning authority to prohibit landfills from certain zoning districts, even though there was a statutory framework in place for regulating and permitting landfills. In essence, the Court in *Resource Conservation Management* held that local zoning authority was not necessarily preempted by a state regulatory program. With this fresh judicial reminder that any intent to preempt zoning powers must be made clear,<sup>36</sup> the General Assembly chose not to entirely preempt local land use powers in the Act. Instead, it did the opposite: it expressed in clear and unmistakable terms its intent that local land use powers were to be left generally undisturbed. This stands in marked contrast to the absence of a savings clause for zoning in other portions of the *Code of Virginia*,<sup>37</sup> including the statute relied on in *Blanton*.

Because the language of the savings clause in § 45.1-361.5 is clear, because it was enacted approximately a year after the Virginia Supreme Court’s decision in *Resource Conservation Management* holding that local zoning authority is not necessarily preempted by a statutorily-authorized framework of regulations, and because statutory authority exists for localities to prohibit certain land uses through zoning, I must conclude that the General Assembly intended for localities to retain their authority to

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<sup>32</sup> See 1993 Op. Va. Att’y Gen. 173 (discussing passage of the Act). The 1993 Opinion of this Office interpreted § 45.1-361.5 to allow a locality to require special use permits for gas drilling and made no distinction between special use permits and a locality’s power to prohibit gas wells. “The legislature is presumed to have had knowledge of the Attorney General’s interpretation of . . . statutes, and its failure to make corrective amendments evinces legislative acquiescence in the Attorney General’s view” of legislative language. *Richard L. Deal & Assocs., Inc. v. Commonwealth*, 224 Va. 618, 622 (1983) (citations omitted). Had the General Assembly disagreed with the view of this Office expressed in 1993, it has enjoyed many opportunities to amend the law. That it made no changes to the Act’s language for over 20 years may be seen as acquiescence with the 1993 Opinion.

<sup>33</sup> See *Cape Henry Towers, Inc. v. Nat’l Gypsum Co.*, 229 Va. 596, 600 (1985) (citations omitted).

<sup>34</sup> *Id.*

<sup>35</sup> 238 Va. 15 (1989).

<sup>36</sup> *Id.* at 23.

<sup>37</sup> *Id.* at 23 (“Furthermore, when the General Assembly intends to preempt a field, it knows how to express its intention.”) (citation omitted); see also, e.g., VA. CODE ANN. § 3.2-301 (Supp. 2014) (limiting what zoning ordinances may be used to regulate agricultural operations); VA. CODE ANN. § 36-98 (2014) (providing that the Uniform Statewide Building Code will supersede local building codes and certain other local ordinances); VA. CODE ANN. § 55-79.43(A) (2012) (prohibiting zoning ordinances from barring condominium ownership).

prohibit fracking through duly enacted zoning ordinances.<sup>38</sup> Other types of local control over fracking that do not relate to zoning, such as license or fee requirements, are entirely preempted by the Act. To the extent that the 2013 Opinion conflicts with this conclusion, it is overruled.<sup>39</sup>

I now turn to your second inquiry as to whether a locality, in the absence of a total prohibition on fracking, has the authority to control aspects of fracking such as the timing of drilling operations, traffic, or noise. As noted above, § 15.2-2280 provides localities with broad powers over zoning, including the ability to “regulate” and to “restrict” a variety of uses, which the Act generally preserves through its savings clause. Nevertheless, the Act also provides that no locality “shall impose any condition, or require any other local license, permit, fee or bond to perform any gas, oil, or geophysical operations which varies from or is in addition to the requirements of this chapter.”<sup>40</sup> As noted previously, it is clear under § 1-248 of the *Code of Virginia* that local ordinances may not conflict with the provisions of state statute or regulation.

Based upon the statutory framework, it is my duty to harmonize, where reasonably possible, differing statutes and differing portions of a single statute.<sup>41</sup> As discussed above, there may be some degree of overlap between the regulations the Board is authorized to enact and local zoning ordinances. I conclude that a duly enacted local zoning restriction on fracking operations is valid only if, and to the extent that, it does not conflict with such a regulation, provided the regulation is within the scope of permissible regulations the Board may enact. Any local zoning ordinance must also be consistent with any statutory requirements for fracking operations set forth in the Act. Determining the extent to which particular zoning restrictions on fracking may possibly be preempted by state law will be governed by the particular facts, restrictions, and regulations at issue. Consequently, I can express no opinion on whether any particular zoning restriction has been preempted. I do note that the 2013 Opinion concludes in part that “a local governing body may adopt a zoning ordinance that places restrictions on the location and siting of oil and gas wells that are reasonable in scope and consistent with the Virginia Gas and Oil Act.”<sup>42</sup> That portion of the 2013 Opinion, as it may apply to fracking, is generally reaffirmed.

### Conclusion

It is my opinion that the General Assembly intended to permit localities to prohibit fracking operations through duly enacted land use or zoning ordinances, and the *Code of Virginia* so provides. With respect to your second inquiry, localities may enact zoning restrictions on fracking only if and to the

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<sup>38</sup> “When construing a statute, our primary objective is ‘to ascertain and give effect to legislative intent’ as expressed by the language used in the statute.” *Cuccinelli v. Rector & Visitors of the Univ. of Virginia*, 283 Va. 420, 425 (2012).

<sup>39</sup> The 2013 Opinion, which incorrectly relied on the *Blanton* opinion, for the reasons discussed, and which failed to note the statutory authority of localities to prohibit particular land uses, also relied in part on the Commonwealth Energy Policy (the “Policy”), as set forth in § 67-102. *See* 2013 Op. Va. Att’y Gen. 231, 234. However, the Policy has a savings clause. It states that the Policy “is intended to provide guidance to the agencies and political subdivisions of the Commonwealth in taking discretionary action with regard to energy issues, *and shall not be construed to amend, repeal, or override any contrary provision of applicable law.*” VA. CODE ANN. § 67-102(D) (2012) (emphasis added). In short, the Policy is precatory and not mandatory where local zoning is concerned.

<sup>40</sup> Section 45.1-361.5.

<sup>41</sup> “Where two statutes are in apparent conflict, they should be construed, if reasonably possible, in such manner that both may stand together.” 1977-78 Op. Va. Att’y Gen. 351, 353, and citations therein.

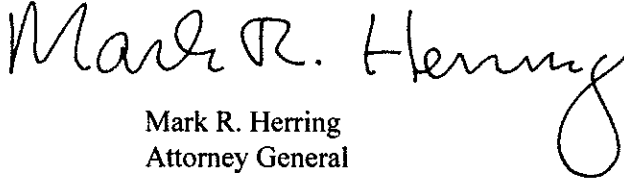
<sup>42</sup> 2013 Op. Va. Att’y Gen. 231, 236.

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extent that the restrictions are reasonable in scope and are not inconsistent with the Act or regulations properly enacted pursuant to the Act.

With kindest regards, I am

Very truly yours,

A handwritten signature in black ink that reads "Mark R. Herring". The signature is written in a cursive style with a large, looping "H" and a long, sweeping "g".

Mark R. Herring  
Attorney General