

COMMONWEALTH of VIRGINIA

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January 26, 2023

The Honorable James A. Leftwich, Jr.
Member, House of Delegates
Pocahontas Building, Room W232
900 East Main Street
Richmond, Virginia 23219

Dear Delegate Leftwich:

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 regarding the scope of a locality's authority to regulate the takeoff and landing of privately-owned unmanned aircraft systems ("drones") on private property. You more specifically ask whether a locality may prohibit completely such drone takeoffs and landings within its jurisdiction or subject such takeoffs and landings to conditional or special use permits or other approval requirements.

Response

It is my opinion that Virginia law currently limits local authority to regulate the use of privately-owned drones; a locality may regulate the takeoffs and landings of such aircraft only on property owned by political subdivisions. It further is my opinion that a locality therefore may not adopt zoning regulations that prohibit such takeoffs and landings on private property nor subject the activity to conditional or special use permit requirements.

Applicable Law and Discussion

The powers of political subdivisions of the Commonwealth are governed by the Dillon Rule, whereby local governing bodies have only those powers that are expressly granted by the General Assembly, those that are necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable.¹ The General Assembly has delegated to localities the authority to control land use within their boundaries through zoning.² "This delegation of authority . . . is a delegation of the

¹ *Tabler v. Bd. of Supvrs. of Fairfax Cnty.*, 221 Va. 200, 202 (1980). This principle is strictly construed, meaning that any doubt regarding a power must be resolved against the local governing body. *Sinclair v. New Cingular Wireless*, 283 Va. 198, 204 (2012).

² VA. CODE ANN. § 15.2-2280 (2018).

Commonwealth’s police power to legislate” in the area of land use.³

Local zoning authority generally includes the power to allow certain uses only upon a landowner meeting certain conditions, whereby a landowner first must obtain a conditional use or special use permit for that use.⁴ Although localities have broad discretion in the enactment of zoning ordinances, their zoning powers are not absolute.⁵ Adopted “ordinances must be consistent with the laws of the Commonwealth[,]”⁶ and “[w]hen a statute enacted by the General Assembly conflicts with an ordinance enacted by a local governing body, the statute must prevail.”⁷

Although the General Assembly generally has empowered localities to apply zoning ordinances to the superjacent airspace of any private land area,⁸ Virginia Code § 15.2-926.3 expressly provides that “[n]o political subdivision may regulate the use of a privately owned, unmanned aircraft system . . . within its boundaries.”⁹ A political subdivision nevertheless may “regulate the take-off and landing of [a drone] on property owned by the political subdivision[,]”¹⁰ provided such regulation otherwise comports with state and federal law.¹¹

³ 2013 Op. Va. Att’y Gen. 222, 225; *see also* 2022 Op. Va. Att’y Gen. No. 22-027, *available at* <https://www.oag.state.va.us/citizen-resources/opinions/official-opinions/30-resource/opinions/2247-2022-official-opinions#august>. “Zoning” or “to zone” is “the process of classifying land within a locality into areas and districts . . . by legislative action and the prescribing and application in each area and district of regulations concerning building and structure designs, building and structure placement and uses to which land, buildings and structures within such designated areas and districts may be put.” Section 15.2-2201 (Supp. 2022).

⁴ Section 15.2-2286(A) (Supp. 2022) (providing that zoning ordinances “may include . . . regulations . . . [f]or . . . special exceptions”). “Special use” is used interchangeably with “special exception,” which “means a special use that is a use not permitted in a particular district except by a special use permit granted” pursuant to law. Section 15.2-2201. “Both terms refer to the delegated power . . . to set aside certain categories of uses which are to be permitted only after being submitted to governmental scrutiny in each case, in order to insure compliance with standards designed to protect neighboring properties and the public.” *Bd. of Supvrs. of Fairfax Cnty. v. Southland Corp.*, 224 Va. 514, 521 (1982). Conditional use permitting is “equivalent to the special exception [process.]” 1976-77 Va. Op. Att’y Gen. 332, 333. This is distinct from “conditional zoning,” *see* §§ 15.2-2296 to -2303.4 (2018 and Supp. 2022), which is defined as “the allowing of reasonable conditions governing the use of such property, such conditions being in addition to, or modification of the regulations provided for a particular zoning district or zone by the overall zoning ordinance.” Section 15.2-2201. Such conditions are the result of “voluntary proffering” by a landowner seeking a zoning change, § 15.2-2297; conditional or special use permits pertain to involuntary conditions imposed as part of existing zoning regulations. *See Southland Corp.*, 224 Va. at 522.

⁵ 2022 Op. Va. Att’y Gen. No. 22-027.

⁶ *W. Lewinsville Heights Citizens Ass’n v. Bd. of Supvrs. of Fairfax Cnty.*, 270 Va. 259, 265 (2005).

⁷ *Rowland v. Town Council of Warrenton*, 298 Va. 703, 713 (2020) (quoting *Sinclair v. New Cingular Wireless*, 283 Va. 567, 576 (2012)). *See also* VA. CODE ANN. § 1-248 (2017) (“The Constitution and laws of the United States and of the Commonwealth shall be supreme. Any ordinance, resolution, bylaw, rule, regulation, or order of any governing body . . . shall not be inconsistent with the Constitution and laws of the United States or of the Commonwealth.”).

⁸ Section 15.2-2293 (2018). Zoning ordinances actually are required, to conform with federal law, to include regulations regarding the height of structures and growth to protect air navigation in those jurisdictions containing air facilities and airports. Section 15.2-2294 (2018); 2009 Op. Va. Att’y Gen. 12, 13.

⁹ VA. CODE ANN. § 15.2-926.3(A) (Supp. 2022).

¹⁰ Section 15.2-926.3(B). I note that the authority for a political subdivision to so regulate was added to the statute in 2020. 2020 Va. Acts ch. 345.

¹¹ Section 15.2-926.3(B).

The plain language of the statute makes clear that a locality generally is prohibited from regulating private drone use.¹² The statute affords only one, limited exception to the general prohibition: a locality may regulate such use only to the extent it involves takeoffs and landings on land the locality owns.¹³ By its terms, the exception does not extend to takeoffs and landings on private land. Accordingly, the General Assembly has empowered localities to adopt regulations regarding takeoffs and landings of drones on their own public property, but it has prohibited localities from otherwise regulating the use of privately-owned drones. Because the complete prohibition of and the imposition of permitting requirements on takeoffs and landings on private land are regulatory actions that fall outside this narrow exception,¹⁴ I conclude that any such actions by a locality are prohibited under § 15.2-926.3.¹⁵

This conclusion is supported by the fact that, in other circumstances, the General Assembly specifically has authorized greater local regulation of aircraft. In particular, a locality may adopt aircraft noise overlay zones¹⁶ and “local zoning ordinances may require a special exception, special use permit, or conditional use permit for repetitive helicopter landings and departures on the same parcel of land in some or all zoning districts.”¹⁷ Generally, when the legislature “has used specific language in one instance, but omits that language or uses different language when addressing a similar subject elsewhere in the Code, we must presume that the difference in the choice of language was intentional.”¹⁸ Had the General Assembly intended to authorize a locality to subject private drone use to such regulation, it could have done so.¹⁹

The language of § 15.2-926.3 evinces an overall intent of the General Assembly to permit the private use of drones, subject only to state and federal law.²⁰ I therefore conclude that current law precludes local governing bodies from taking any action regulating the use for the takeoff or landing of privately-owned drones on private property within their respective jurisdictions, to include adoption of ordinances that completely prohibit, impose conditions on, or require prior approval of drone takeoffs and landings on private property.

I note that drones are an evolving technology, with a multitude of recreational, commercial, law

¹² When “construing a statute, we must apply its plain meaning, and we are not free to add language, nor ignore language, contained in statutes.” *Dodge v. Trustees of Randolph-Macon Woman’s Coll.*, 276 Va. 10, 16 (2008) (quoting *BBF, Inc. v. Alstom Power, Inc.*, 274 Va. 326, 331 (2007)).

¹³ I note that such permitted regulation remains subject to the terms of § 15.2-926.3(D).

¹⁴ See 2013 Op. Va. Att’y Gen. at 229 n.21 (noting that regulatory action is that which “controls, directs, or establishes rules for activity”).

¹⁵ See *Commonwealth ex rel. Virginia Dep’t of Corr. v. Brown*, 259 Va. 697, 705 (2000) (applying principle that when “a legislative enactment limits the manner in which something may be done, the enactment also evinces the intent that it shall not be done another way” (quoting *Grigg v. Commonwealth*, 224 Va. 356, 364 (1982))).

¹⁶ Section 15.2-2295 (2018).

¹⁷ Section 15.2-2293.2 (2018). Localities thus do have the power to regulate takeoff and landing areas for certain aircraft as part of their land use regulation authority.

¹⁸ *Zinone v. Lee’s Crossing Homeowners Ass’n*, 282 Va. 330, 337 (2011).

¹⁹ See 2014 Op. Va. Att’y Gen. 95, 97 (noting that the General Assembly “knows how to express its intent”).

²⁰ An enactment clause associated with the statute’s 2020 amendment also reflects the legislature’s intent to regulate private drone use at the state rather than local level. It directed that the Virginia Department of Aviation, “in consultation with representatives of the unmanned aircraft system industry, small and medium-sized businesses utilizing unmanned aircraft systems, localities, and other stakeholders, [to] develop rules and regulations specific to take-offs and landings[.]” including rules governing a locality’s process for adoption of any regulation pertaining to such activity on its property. 2020 Va. Acts ch. 345, Enactment cl. 3.

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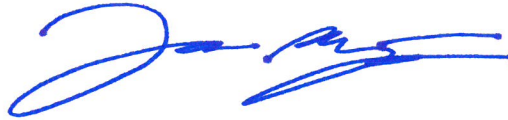
enforcement, and public safety applications. The rapid growth and expansion of the technology has prompted legislation on the federal, state, and local levels to adapt to the still-developing technology, attempting to enable the many valuable uses of drones while prohibiting inappropriate or dangerous uses. I expect that new legislation and regulation on all levels will continue to change the regulatory landscape as the technology continues to evolve.

Conclusion

Accordingly, it my opinion that, because Virginia law currently limits local authority to regulate the use of privately-owned drones to the regulation of takeoffs and landings of such aircraft on property owned by political subdivisions, a locality may not adopt zoning regulations that prohibit the takeoff and landing of privately-owned drones on private property, nor subject the activity to conditional or special use permit requirements.

With kindest regards, I am,

Very truly yours,

A handwritten signature in blue ink, appearing to read "Jason S. Miyares". The signature is stylized with a large initial "J" and a long horizontal stroke.

Jason S. Miyares
Attorney General