

Virginia Code § 15.2-1200 as Authority for Water Quality Ordinances

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I. INTRODUCTION

This memo addresses the question whether Virginia Code § 15.2-1200 may be used as authority for appropriate local ordinances to address local water quality issues. My research indicates that this statute has in fact has been used for this purpose.

The question is important because of Virginia's "Dillon Rule," so called because of its articulation by Judge John Dillon in his 1872 treatise, *The Law of Municipal Corporations*. Under this rule, a locality has no powers except as expressly granted by the state legislature. Its use in Virginia may be dated from 1896 when, in *City of Winchester v. Redmond*, the Virginia Supreme Court described it as a principle which lies "at the foundation of the law of municipal corporations."¹ Quoting from the treatise, Justice Reily said:

It is a general and undisputed proposition of law... that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; Second, those necessarily or fairly implied in or incident to the powers expressly granted; Third, those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.²

According to this principle, a Virginia locality wishing to enact new water pollution control rules may do so only if a section of the Virginia Code or Virginia Constitution specifically authorizes the action.

II. VA. CODE § 15.2-1200 AND SELECTED ORDINANCES

Section 15.2-1200 of the Virginia Code grants local governments the authority to enact laws deemed necessary to protect the "health, safety and general welfare" of their residents, including "regulations for the prevention of the pollution of water which is dangerous to the health or lives of persons residing in the county."³ Some localities in eastern Virginia have cited to this section as authority for provisions intended to address local water pollution. In most discovered instances, localities have done so in conjunction with other Code provisions, such as

** This document summarizes research; it is not intended to be, and should not be used as, legal advice regarding any specific situation.

¹ *City of Winchester v. Redmond*, 93 Va. 711, 713-714 (Va. 1896).

² *Id.* (quoting 1 John Forrest Dillon, *The law of Mun. Corps.* §89 (3d ed.)).

³ Va. Code § 15.2-1200

statutes relating to biosolids, local utilities, and Chesapeake Bay Preservation Act measures. In only a few cases have localities in this part of the Commonwealth cited this provision alone in addressing pollution problems. Examples of local ordinances relying on Va. Code §15.2-1200 follow.⁴

A. Henrico County

Henrico County has cited §15.2-1200 as authority for several ordinances to improve local water quality. The first, §14-39 (“Pollution of Waters”),⁵ relies on §15.2-1200 alone, and the second, §24-106.2 (“Landscaping, tree cover, screen and buffer requirements, transitional buffering and design standards”),⁶ relies as well on the Chesapeake Bay Preservation Act, §10.1-2108, and other statutes.

Section 14-39 states:

No person shall bathe or wash any dog, other animal, vehicle or clothing in any stream, lake or other water of any park, or throw, cast, lay, drop, discharge, direct, deposit or abandon into any stream, lake or other water of any park, or in any storm sewer or drain flowing into such water, any substance, matter or thing, in whatever form, which may directly or indirectly result in the pollution of such waters.

This ordinance appears to have two important benefits. First, it is simple in its approach. Second, implementation of this ordinance is completely free because it involves prohibitions of non-economic activities.

Henrico Code §24-106.2 addresses landscaping measures and provides a detailed, comprehensive plan to protect natural resources, including water quality. The ordinance’s purposes are described as follows:

The purpose and objective of this section is to facilitate the creation of a convenient, attractive and harmonious community; to conserve and protect natural resources, including air and water quality; to enhance property values; to preserve the unique character of an area; and to encourage the appropriate use of land. . . . More specifically, this section is intended to ameliorate the impact of more intense or incompatible uses by requiring a screen or buffer between such uses where they border less intense uses. Additionally, this section is intended to require the landscaping of certain parking lots in order to reduce the harmful effects of wind and air turbulence, heat, the glare of motor vehicle lights, to diminish stormwater drainage problems, to prevent soil erosion, to

⁴ A list of ordinances from Eastern Virginia Bay watershed that regulate matters related to water quality (*e.g.*, septic, biosolids, and others) under §15.2-1200 is attached as Appendix B.

⁵ HENRICO COUNTY, VA. CODE §14-39 (2010).

⁶ HENRICO COUNTY, VA. CODE §24-106.2 (2010).

provide shade and to enhance the appearance of parking lots. Additionally, this section requires the preservation and planting of trees on sites to provide a specified percentage of tree cover at ten years' maturity.

B. Chesterfield County

Section 12-26 of the Chesterfield County Code, titled "Disposition of sludge, etc." states that it is "[a]uthorized by Code of Virginia, § 15.2-1200."⁷ This ordinance governs disposal of "sludge and other material" from septic tanks, providing that "[t]he sludge or other material shall be carefully deposited and the surface of the ground, manholes and tanks into which the deposit is made shall be maintained in a sanitary condition. Any sludge or other material that is spilled shall be promptly and completely removed."⁸ The ordinance further requires both that "[a]ll persons who engage in the business of cleaning septic tanks shall provide the health department with the name, address and location of the site where the sludge and other material will be disposed" as well as requiring County Health Department approval of disposal sites.

C. Surry County

Surry County cites §15.2-1200 as the authority for the entirety of Chapter 30 of its Code, titled "Environment." The chapter includes ordinances for two local regulatory programs, on-site sewage and biosolids, each of which recites additional Code authorities.⁹ Article II of this chapter, titled "On-site Sewage Disposal," includes §§ 10-19, "Permit required to install or maintain septic tank or privy, conditions in permit"; 10-20, "Nonconforming houses and structures; compliance" and 10-21, "Septic tanks, etc., regulations; permit procedure."

Section 10-19 requires property owners to obtain a permit from the county health director before constructing or installing a septic system. Before this permit may be issued, §10-19(b) further requires the health director to inspect the property to determine the following:

- (1) Whether a public sanitary sewer is available;
- (2) Whether the land is suitable for a septic tank and, if so, the proper location for;
- (3) The proper location for a privy; and
- (4) Such other requirements, if any, which should be stated in the permit to secure and promote the public health.¹⁰

Section 10-20 offers a timeline for enforcement of Article II, stating that all property must be made to comply with Chapter 10 within one year from the effective date of the ordinance.¹¹ Section 10-21 prohibits any person from engaging "in the business of installing, constructing, repairing or cleaning septic tanks in the county without first having obtained from

⁷ Chesterfield has a more comprehensive set of ordinances that regulate septic systems pursuant to Va. Code § 15.2-2126. *See* §§12-11 through 12-25

⁸ CHESTERFIELD COUNTY, VA., CODE § 12-26 (1997).

⁹ The on-site sewage provisions recite Va. Code §§ 32.1-163 et seq., as authority, and the biosolids provisions recites Va. Code § 62.1-44.19:3.

¹⁰ SURRY COUNTY, VA., CODE § 10-19(b) (2009).

¹¹ SURRY COUNTY, VA., CODE § 10-20 (2009).

the health director a permit to engage in such business in the county.”¹² This section states that such permits are to be issued “on a calendar year basis.”¹³

D. New Kent County

Chapter 38 of the New Kent County Code, “Health and Sanitation,” cites for its authority to Virginia Code § 15.2-1200 and other Code sections.¹⁴ Of particular interest is Article III, “Septic Tanks; Septic Tank Contractors and Cleaners.”¹⁵ This lengthy article includes 12 subsections which regulate all aspects of septic system installation and maintenance. The New Kent ordinances notably differ from those of Chesterfield and Surry counties in both quantity and enforcement power, enacting a significantly greater number of septic system regulations under the authority of 15.2-1200.

New Kent County explicitly categorizes a violation of Article III of Chapter 38 as a class 2 misdemeanor.¹⁶ Section 38-181, “Order to correct violations or health hazards,” provides “the health director, his authorized agent, or other lawful authority”¹⁷ with the power to issue an order to any land owner upon a finding of a violation. Section 38-181 further declares a failure to comply with such an order to be “unlawful.”¹⁸

III. §15.2-1200 AND NUISANCE LAW

A question has been raised as to whether the decision in *Old Dominion Land Co. v. Warwick County*, 172 Va. 160 (Va. 1939), which affirms a right to dump sewage in tidal waters, currently requires a finding that an act amounts to a “nuisance” before a local government may regulate it. In considering this question, it is important to note that *Old Dominion Land Co* was decided in 1939, before the 1950 enactment date of 15.2-1200. In 1939, therefore, the powers granted to localities under 15.2-1200 were not yet available. Later cases have also questioned its holding, recognizing the drastic federal and state policy changes concerning water pollution that have occurred since that time.¹⁹ For example, in questioning the continuing validity of *Old Dominion Land Co.* 172 Va. 160, the United States Court of Appeals for the Fourth Circuit said, in *Moore v. Hampton Roads Sanitation Dist. Com.*, 557 F.2d 1030, 1033 (4th Cir. 1976):

Since 1939. . . Virginia has imposed ever-stronger controls on the discharge of sewage into state waters. A Virginia statute now prohibits the discharge of raw sewage into such waters. Va. Ann. Code, 1973 Repl. Vol., § 62.1-44.5. We conclude that whether or not the discharges of raw sewage by the City can be characterized

¹² SURRY COUNTY, VA., CODE § 10-21 (2009).

¹³ *Id.*

¹⁴ Article 38 of the New Kent County Code refers generally to Va. Code §§ 15.2-1200, as well as to § 15.2-901 (trash removal); § 15.2-2109 (public utilities); Code of Virginia, tit. 32.1 (health); and, § 62.1-44.2 (State Water Control Law).

¹⁵ NEW KENT COUNTY, VA., CODE ch. 38, art. III (2002). *See also, id.* at art. IV (“Sanitary Privies”).

¹⁶ NEW KENT COUNTY, VA., CODE § 38-182 (“Penalties for violation of article”) (2002).

¹⁷ NEW KENT COUNTY, VA., CODE § 38-181 (2002).

¹⁸ *Id.*

¹⁹ *Moore v. Hampton Roads Sanitation Dist. Com.*, 557 F.2d 1030, 1033 (4th Cir. 1976).

as occasional, they are not now protected by the public policy of the State²⁰

Based on the reasoning of *Hampton Roads Sanitation Dist. Com.*, it seems clear that *Old Dominion Land Co.* should not be considered to limit the use of Va. Code §15.2-1200.

IV. SUMMARY AND CAUTIONARY NOTE

As this survey indicates, localities in Virginia have relied on Va. Code § 15.2-1200 to take certain actions to protect local water quality. These examples suggest that the provision should be considered by localities as they address local problems. While most localities have used §15.2-1200 in conjunction with other more specific statutes, that pattern has not universally been followed and does not seem to be a requirement.

However, as the statute itself makes clear, a locality would have to ensure that any new water quality ordinance promulgated under the authority of the statute is “not inconsistent with the general laws of the Commonwealth.” See Va. Code §15.2-1200. Notably, the Commonwealth retains control over water quality throughout the state, pursuant to the State Water Control Law, Va. Code §§ 62.1-44.2, *et seq.*, and other state laws. See, e.g., § 62.1-44.4 (“The right and control of the Commonwealth in and over all state waters is hereby expressly reserved and reaffirmed”). The federal government also has important regulatory authorities over water quality pursuant to the Clean Water Act. Ensuring consistency with all such other provisions is a requirement that may not be ignored.

²⁰ *Id.*

Appendix A: Text of Ordinances Discussed Above

Chesterfield County:

Sec. 12-26. - Disposition of sludge, etc.

No person shall dispose of the sludge and other material removed from septic tanks except by depositing it into a sewerage system or sewage treatment plant, at such designated locations and under such conditions as may be approved by the health department. All persons who engage in the business of cleaning septic tanks shall provide the health department with the name, address and location of the site where the sludge and other material will be disposed. The county health department shall approve the disposal site before any disposal takes place.

The sludge or other material shall be carefully deposited and the surface of the ground, manholes and tanks into which the deposit is made shall be maintained in a sanitary condition. Any sludge or other material that is spilled shall be promptly and completely removed.

State law reference—Authorized by Code of Virginia, § 15.2-1200.

Surry County:

Sec. 10-19. - Permit required to install or maintain septic tank or privy; conditions in permit.

(a) Persons required to construct or install a septic tank upon property owned by them within the county shall do so only pursuant to a permit issued by the health director.

(b) Before issuing any permit under subsection (a) of this section, the health director shall cause an investigation to be made to determine:

- (1) Whether a public sanitary sewer is available;
- (2) Whether the land is suitable for a septic tank and, if so, the proper location for;
- (3) The proper location for a privy; and
- (4) Such other requirements, if any, which should be stated in the permit to secure and promote the public health.

(c) Any permit issued under this section may contain such requirements as the health director may deem necessary to secure and promote the public health, and it is unlawful for any permit holder to violate, or to permit the violation, of any such requirement.

Sec. 10-20. - Nonconforming houses and structures; compliance.

Each house or other structure within the county which is intended for use or which is used as a place for human habitation, employment or congregation, including tourist and

other camps and tent shows, which fails to comply with the requirements of this chapter on the effective date of the ordinance from which this section is derived shall, by its owner, be made to comply with this chapter within one year from the effective date of said ordinance.

Sec. 10-21. - Septic tanks, etc., regulations; permit procedure.

(a) No person shall engage in the business of installing, constructing, repairing or cleaning septic tanks in the county without first having obtained from the health director a permit to engage in such business in the county; and such permits, when issued, shall be issued on a calendar-year basis and shall not be in lieu of individual permits required for each septic tank or privy installation.

(b) No permit shall be issued by the health director to any person engaged in cleaning of septic tanks unless the equipment used in connection with the work is capable of holding and transporting the contents of cesspools, septic tanks and privies without leakage or spillage. The place of disposal shall be such that no source of food and no water supply or stream will be contaminated by the presence of the contents from septic tanks or that the presence of such contents at such place will create a hazard to the health of any person. The manner of disposal shall be such that flies will not have access to such contents and that it will not create a hazard as far as the health of any person is concerned.

(c) The conviction of any person for violating any of the rules and regulations of the health director, the state department of health, or statutes regulating the constructing, installing and cleaning of septic tanks and disposal of human wastes, shall automatically revoke any permit issued under this section.

New Kent County:

Sec. 38-171. - Permit and approval required prior to installation, use and repair of septic tank system.

It shall be unlawful for any person, for himself or for another, to install, construct, use, maintain or repair, or to contract to install, construct, maintain or repair, a septic tank system in the county without first obtaining a septic tank permit. Each proposed septic tank system shall be approved by the county health department by a certificate of approval signed by the health director as a condition precedent to the granting of a county building permit.

Sec. 38-172. - Construction, inspection and approval of septic tank systems, house sewers and connections; state department of health rules and regulations.

(a) The entire septic tank system shall be built in accordance with the design of plans shown on the septic tank permit. Such design shall provide for a primary drainfield area and a secondary, or repair drainfield area with a capacity equal to that of the primary drainfield area. The secondary, or repair drainfield area shall be utilized only if the primary drainfield fails, and not for the purpose of expansion of the primary drainfield in order to accommodate additions to or enlargement of the structures served by such system. The size and type of the sewer lines shall be specified on the permit. A filter may

be installed on the septic tank prior to the discharge of effluent from the septic tank. The sewer line from the building to the septic tank, including all necessary connections and filters, shall be subject to inspection and approval by the health department. The installation of a filter and proper maintenance of the filter will exempt the homeowner from the five-year pump out requirement described in sections 38-176 and 94-39 of this Code.

(b) The septic tank system shall be constructed in accordance with specifications set forth in the state department of health rules and regulations, and the requirements set forth in this article. A copy of such regulations shall remain on file in the office of the county administrator.

Sec. 38-173. - Prohibited installations.

(a) *Endangering any well or source of water supply.* No septic tank permit shall be issued for any system where an existing well or domestic water supply system is present and the installation of such system violates the requirements and safety standards established by regulations of the state department of health.

(b) *In swampy areas subject to flooding; prohibited connections to septic tank system.* Septic tank installations in low swampy areas with a high water table or in areas which may be subjected to flooding are prohibited. It shall be unlawful to connect basement floor drains and roof, gutter and downspout drains or footing drains into any part of the septic tank system.

Sec. 38-174. - Restrictions on systems underlying buildings, hard-surfaced areas and other impervious structures or substances.

No part of any septic tank system shall be covered with a building or with relatively or completely impervious structures such as driveways, patios, blacktop or other hard-surfaced areas or stationary built-in place or outdoor cooking facilities or garages. Exceptions to the foregoing may be made by obtaining permission from the county health department to cover the septic tank, provided that it is designed to withstand specified loads and contains approved access manholes to each section of the septic tank.

Sec. 38-175. - Inspection and approval of installation prior to covering; method of covering and backfilling.

Before any part of a septic tank system, including the house sewer, shall be covered, it shall be inspected and approved by a representative of the county health department. The septic tank system shall be properly covered and backfilled immediately after approval, taking care not to disturb the pipe, grades, joints or alignment by the backfilling. If any septic tank system or part of such system is covered before being finally inspected and approved, as described in this section, it shall be uncovered by the installer at the direction of the health department.

Sec. 38-176. - Septic tank pump out.

All septic tank systems not requiring an NPDES permit and located within either a resource protection area or a resource management area, as defined in chapter 94, article II of this Code shall be pumped out at least once every five years, however, in lieu of requiring proof of septic tank pump-out every five years, owners of on-site sewage treatment systems may submit documentation every five years, certified by a sewage handler permitted by the Virginia Department of Health, that the septic system has been inspected, is functioning properly, and the tank does not need to have the effluent pumped out of it.

Sec. 38-177. - Septic tank contractor's permit required; application; duration; removal; revocation.

Any person contracting to install, repair or clean a septic tank in the county for another person shall first obtain a permit from the county health department to do such work. To obtain a permit as required by this section, such person shall apply to the county health department and, if the applicant is considered qualified to perform the duties of such a contractor, a permit shall be issued. Permits shall be renewed annually, and a permit may be revoked at any time by the county health department for failure to comply satisfactorily with the provisions of this article and other regulations of the county health department and the state department of health.

Sec. 38-178. - Equipment used by septic tank cleaning contractors; approval of site for disposal of sludge and other material.

No person shall engage in the business of cleaning septic tanks in the county unless the equipment used by such person in connection with the operation of such business complies with the following standards and has been inspected and approved in writing by the county health department:

- (1) The tank into which the septic tank sludge is pumped or delivered and carried is fully enclosed and watertight.
- (2) All inlets and outlets to such tank are fully enclosed and provided with watertight valves.
- (3) Suction and discharge houses are watertight, and provision is made for carrying them in such a manner to prevent leakage.
- (4) All exposed surfaces are painted and maintained in a sanitary condition by frequent washings.
- (5) The name and address of the person owning or operating such equipment is painted thereon in letters at least four inches high.
- (6) The person conducting the business has a site for disposal of the sludge or other material

Sec. 38-179. - Manner of disposal of sludge or other septic tank material.

It shall be unlawful to dispose of sludge and other material removed from septic tanks except in accordance with regulations of the state department of health. Any spillage of sludge or other material shall be promptly and completely removed.

Sec. 38-180. - Officers and officials issuing permits or licenses shall comply with article; permits issued contrary to article are null and void.

All departments, officials and employees of this county that are vested with the duty or authority to issue permits or licenses shall conform to the provisions of this article, and they shall issue permits for uses only when they are in harmony with the provisions of this article. Any such permit, if issued in conflict with the provisions of this article, shall be null and void.

Sec. 38-181. - Order to correct violations or health hazards.

If, upon investigation, the health director, his authorized agent, or other lawful authority shall find any violation of sections 38-1, 38-2, 38-211 through 38-213 and this article, or of the provisions of any septic tank permit issued under it, or if any septic tank system, privy, closet, toilet, drainage system or any part of such system is found detrimental to life or health, the health department or such other authority shall issue an order directly to the owner or occupant of the property upon which such violation or condition exists to abate, remove, suspend, alter, improve or otherwise correct the violation or condition as specified in the order. It shall be unlawful for any such property owner or occupant to fail to comply with the requirements of such order within the time therein specified for compliance.

Sec. 38-182. - Penalties for violation of article.

Any person violating any of the provisions of sections 38-1, 38-2, 38-211 through 38-213 and this article shall be guilty of a class 2 misdemeanor.

Appendix B: Some Ordinances Citing Va. Code § 15.2-1200 as Authority

1. Northumberland County - Chapter 39 (Biosolids).
2. King George County - Appendix A – Zoning Ordinance, Article 4, Section 4.6 (Biosolids)
3. Westmoreland County - Chapter 22, Article VII
4. Lancaster County - Chapter 9.5, Article IV
5. Isle of Wight - Chapter 14, Article XIV
6. Hanover County – Chapter 10, Article III
7. King William County
 - a. Chapter 30 – “Environment”
 - b. Chapter 58 – “Solid Waste”
8. Spotsylvania County – Chapter 22, Article VI