

Variation on "Mother, May I?": Dillon's Rule

Jesse Richardson

Remember when you were a child and played the game "Mother, May I"? You could do nothing until you first obtained permission from the player designated as "mother." In many states today, municipalities must similarly ask permission from the state prior to taking any action.

Virginia municipalities include towns, cities, and counties. Current law regards municipalities as "creatures of the state" and dictates that municipalities must look to the state constitution, their charter, or state laws for authorization to exercise powers. Consequently, a municipality has no powers whatsoever unless the state decides to give the municipality power.

A municipality may sue and be sued, like any person. In addition, municipalities may enter into contracts, buy and sell land, and pass ordinances. Finally, and most obviously, a municipality may raise, borrow, and spend money. These powers are similar to those possessed by most adults. However, a municipality may not, for example, buy land for any purpose that it chooses. In engaging in any of the listed activities, a municipality must be pursuing a purpose allowed to it by the state. Most purposes allowed to a municipality fall within the broad definition of the "police power."

The term "police power" refers to the ability to legislate to further the public health, safety, and welfare of the jurisdiction. The *United States Constitution* delegated this power to the states in the Tenth Amendment which states: "[a]ll powers not delegated to the United States by the

Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Therefore, even powers within the broad scope of the police power must be delegated to the municipality prior to exercise of the power. To deal with this issue, states developed two major doctrines: Dillon's rule and Home Rule.

Dillon's Rule

The United States began with the proposition that, as creatures of the state, municipalities must look to the state for all power. This doctrine was later stated as Dillon's Rule. The name derives from its primary author, a judge in Iowa. The rule, in its entirety, states

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 the power is resolved by the courts against the corporation, and the power is denied (Dillon 1873, p. 173 and *Clark v. City of Des Moines* 1865).

This rule arose in response to alleged widespread corruption at the local level at the end of the nineteenth century. Courts felt that this state control of local government power was necessary to combat crime-boss rule of cities and other ills that were threatening democratic governance.

Jesse Richardson is an Attorney at Law and Assistant Professor, Department of Urban Affairs and Planning, Virginia Tech.

Home Rule

The home rule movement, beginning with Missouri in 1875, prompted several states to adopt state constitutional amendments expanding the scope of municipal independence. The home rule doctrine allows a municipality to exercise any function, so long as it is not prohibited by the state legislation or in conflict with the state constitution or any state statute (Platt 1996, 144). Although the doctrine appears promising to those desirous of expanding local autonomy, one commentator characterized it as "... an uncertain privilege, for it depends entirely upon the whim of the legislature and may at any time be repealed or modified" (Zink 1939, p. 121). In addition, the grants of home rule authority vary widely. Some grants are very broad, while others are restricted.

A 1978 study, the most recent found, showed that 41 states had granted home rule authority to cities, while only 27 states had granted home rule jurisdiction to counties (Hill 1978, p. 43).

A Case Study on Dillon's Rule

One case illustrates the uncertainty involved in a Dillon's Rule state. In *Early Estates v. Housing Board of Review of Providence*, 174 A.2d 117 (R. I. 1961), the Supreme Court of Rhode Island was asked to consider whether the city council of Providence had the authority to include two requirements in a minimum standards housing ordinance. The ordinance had been passed pursuant to a state statute authorizing the city to establish minimum standards for housing "essential to the protection of the public health, safety, morals and general welfare," and to enact minimum standards deemed necessary to make dwellings "safe, sanitary and fit for human habitation." One of the challenged provisions of the ordinance required multifamily dwellings to have lighting in public spaces; the other required the same dwellings to be connected to hot water lines. The court held that the quoted language in the statute "clearly intended to vest the council with power to require hallway lights." The court interpreted the same statute, however, to contain no authority for a municipality to enact hot water requirements. In each instance, the court reached its decision based on an application of Dillon's Rule.

To many, this case simply makes no sense. No one (with the possible of exception of the Rhode Island Supreme Court) understands the difference between hallway lights and connection to hot water in this context. This case shows how Dillon's Rule sometimes causes odd results, while

possibly hampering localities in attempting to further the public good.

Dillon's Rule in Virginia

Virginia remains a stalwart Dillon's Rule state. Virginia delegates powers to localities through the *Virginia Constitution*, charters and, most commonly, by statute. A charter can be viewed as the "birth certificate" or "articles of incorporation" of the municipality. And the General Assembly may amend municipal charters at any time. The General Assembly grants charters to recognize the existence of the municipality. The charter sets out the boundaries of the municipality and delineates powers and limitations of the particular municipality. Municipality charters govern over Virginia statutes and often provide a rich source of powers for municipalities. Government officials and citizens alike should familiarize themselves with their local charter to determine whether it grants the municipality unique powers.

Statutes (or laws), on the other hand, generally apply to all municipalities. Some statutes apply more narrowly. Municipalities mainly look to statutes to "enable" them to carry out their functions. These statutes are called "enabling statutes." One Virginia statute in particular purports to grant broad powers to municipalities. The statute allows municipalities to exercise "all powers" to "secure and promote the general welfare" and promote "safety, health, peace, good order, comfort, convenience, morals, trade, commerce and industry" (*Virginia Code Ann.* § 15.2-1102).

However, Virginia and other courts use Dillon's Rule to narrowly construe even this seemingly generous grant of power. For example, this apparently broad grant of power generally does not suffice to enable a locality to enact a zoning ordinance (8 *McQuillin on Municipal Corporations* §§ 25.35, 25.37 (3rd ed. 1983 rev. vol.)). A state where Dillon's Rule applies, therefore, must grant municipalities the power to zone. In Virginia, a detailed "enabling statute" allows municipalities to zone and sets out how they may zone. If a municipality strays from the procedure set out in the statute, Dillon's Rule may apply to prohibit the "creative" or "different" approach.

A recent Virginia Supreme Court case illustrates this latter point. In February of 1997, the Court considered the validity of a local zoning ordinance prohibiting the construction of additional buildings or structures to support a nonconforming use (*City of Chesapeake v. Gardner Enterprises, Inc.*, 253 Va. 243, 482 S.E.2d 812 (1997)). A

nonconforming use is a utilization of land in a fashion that was legal when started but, because of a change in laws, is now no longer lawful. Nonconforming uses are generally "grandfathered" and allowed to continue. Nonconforming uses may not be expanded, however, and cannot be renewed if stopped for a certain length of time.

The plain language of *Virginia Code Ann.* § 15.1-492 applies to (1) nonconforming land uses, including buildings and structures supporting those uses; and (2) nonconforming buildings and structures. However, the law does not expressly address the construction of additional facilities to support a nonconforming use. Under Dillon's Rule, therefore, the court had to determine whether the power to prohibit such construction is necessarily or fairly implied from the powers expressly granted by the statute. The court found that the statute was sufficient to grant the power. That the localities and the landowner called upon the Supreme Court of Virginia to decide this issue shows, again, the inherent uncertainty arising from application of Dillon's Rule.

As recently as July 1998, the Virginia Court of Appeals reaffirmed Dillon's Rule in Virginia. In June 1995, the management of Loudoun House, a federally-subsidized apartment complex, devised a strategy to curb criminal activity and trespassing. The property manager executed a power of attorney appointing as her agents all members of the Leesburg Police Department and basically granting them the power to issue and serve trespass notices and the like on the Loudoun House property. The power of attorney designated "each and every sworn officer of the Leesburg Police Department as my true and lawful attorneys-in-fact."

The court had to determine whether the police could accept broad power to issue trespass notices. The plain language of the applicable statute granted police officers the power to prevent and detect crime, to arrest criminals, and to protect life and property (*Virginia Code Ann.* § 15.1-138). Because the law did not explicitly address police authority to issue trespass notices, the court employed a Dillon's Rule analysis to determine whether this power was "necessarily or fairly implied in or incident to" the powers expressly granted by the statute. The court found that the limited authority to issue trespass notices was a necessary and expedient means of crime prevention and was "fairly implied in or incident to the powers expressly granted" to police by the law.

Pros and Cons of Dillon's Rule

These cases indicate both the specificity required in the law to grant powers to localities and the uncertainty involved in the Dillon's Rule. Many commissions and writers have

urged the repeal or modification of Dillon's Rule in Virginia. For example, in 1969, the Commission on Constitutional Revision urged the General Assembly to reverse the rule by allowing municipalities to exercise any powers not denied to them by the Constitution, their charters, or Virginia laws. The General Assembly rejected this request, as well as all prior and subsequent suggestions for changes in Dillon's Rule..

Municipalities generally disapprove of Dillon's Rule. They feel that the rule prevents them from adopting creative solutions to local problems. Municipalities are often more aware of local problems and, given free reign, may be able to fashion unique solutions to fit the unique circumstances.

Also, and more importantly, municipalities bitterly complain of "unfunded mandates." Namely, the General Assembly often requires municipalities to carry out certain functions. If the state legislators fail to give municipalities the ability to raise revenues to pay the cost of this new requirement, then municipalities must do more with the same resources. In some cases (like the real property tax), municipality officials could raise the local tax rate for more revenue. Dillon's Rule forecloses the possibility of raising some taxes or creating a new, more palatable tax.

In other words, the General Assembly sets out which taxes municipalities may impose, how they may impose them and, in some cases, the tax rate. Thus, real estate taxes and personal property taxes provide the greatest share of local revenue. However, the General Assembly recently voted to phase in elimination of the personal property tax. This loss of revenue was not offset by the power to impose a new tax. If municipalities wish to offset this loss of revenue, they must raise an existing tax (perhaps politically unpopular), get additional revenues from the state, or cut services.

Legislators in Virginia feel that the present system works satisfactorily. They do not wish to disrupt the system. If courts strictly interpret rules, the General Assembly may act to reverse the court by enacting legislation. The legislators also prefer to give new powers to a few municipalities at first, to "test" them (Howard 1970, pp. 811-812). If the grant of power is successful, then the legislature gives the power to all municipalities. In some states that have home rule, the legislature has passed large numbers of laws prohibiting municipalities from engaging a wide variety of practices (*Ibid.*). That approach hampers municipalities even more than Dillon's Rule. Finally, control from the state level ensures more uniformity, which encourages economic growth by assuring companies that requirements like business licenses and methods of taxation will be consistent throughout the state.

Conclusion

At bottom, issues surrounding Dillon's Rule appear to center on accountability and responsibility. In discharging its duties, the General Assembly must give consideration to government programs as well as government structures. In light of this reality and the long-term use of Dillon's Rule, the Commonwealth will, in all likelihood, continue to adhere to this form of government.

Changes, if any, will likely be incremental. Therefore, knowing the rule and how to work with it are not optional. If a municipality wishes to exercise a particular power but doubts whether a statute allows the exercise of that power, the prudent course of action is to ask the General Assembly to grant the power. Any other approach invites litigation.

References

- City of Chesapeake v. Gardner Enterprises, Inc.*, 253 Va. 243, 482 S.E.2d 812 (1997).
Clark v. City of Des Moines, 19 Iowa 199, 212, 87 Am. Dec. 423 (1865).
Dillon, John Forest. *Commentaries on the Law of Municipal Corporations*, Vol. I, 2d ed. (Boston: Little, Brown and Company, 1873).



Printed on recycled paper

VT/001/1298/3.8M/992344

- Early Estates v. Housing Board of Review of Providence*, 174 A.2d 117 (R. I. 1961)
8 *McQuillin on Municipal Corporations* §§ 25.35, 25.37 (3rd ed. 1983 rev. vol.)
Hill, Jr., Melvin B., *State Laws Governing Local Government Structure and Administration* (Athens, Ga.: Institute of Government, University of Georgia, 1978).
Howard, A. E. Dick, *Commentaries on the Constitution of Virginia* (Charlottesville, Va.: University Press of Virginia, 1970).
Platt, Rutherford H., *Land Use and Society* (Washington, D.C.: Island Press, 1996).
Virginia Code Ann. § 15.1-138, § 15.1-492, § 15.2-1102
Zink, H., *Government of Cities in the United States* (New York: Macmillan, 1939).

NOTICES

****New from REAP:** *Corn Pricing Guide, Wheat Pricing Guide, and Soybean Pricing Guide* by Dr. David Kenyon. These REAP Reports outline how to develop pricing strategies for the three commodities.

****HOW TO REACH US:** REAP, Department of Agricultural and Applied Economics 0401, Va. Tech, Blacksburg, VA 24061; telephone: (540) 231-9443; fax: (540) 231-7417; Email: reap01@vt.edu; web site: <http://www.reap.vt.edu/reap/reap/>

****Please** let us know if your address changes or if you know of anyone who would like to be added to our mailing list.

HORIZONS
Virginia Polytechnic Institute
and State University
Department of Agricultural and
Applied Economics 0401
Blacksburg, Virginia 24061
Return Service Requested

Non-Profit Org.
U.S. Postage
PAID
Blacksburg, VA 24060
Permit No. 28