

PRESENT: All the Justices

KENT SINCLAIR

v. Record No. 101831

NEW CINGULAR WIRELESS PCS,
LLC, ET AL.

OPINION BY
JUSTICE WILLIAM C. MIMS
January 13, 2012

FROM THE CIRCUIT COURT OF ALBEMARLE COUNTY
H. Thomas Padrick, Jr., Judge Designate

In this appeal, we consider whether an Albemarle County zoning ordinance governing construction on slopes within the county conflicts with statutory law or exceeds the powers delegated to the county by the General Assembly, in violation of the Dillon Rule.

I. BACKGROUND AND MATERIAL PROCEEDINGS BELOW

Kent Sinclair and Joan C. Elledge own adjacent residential parcels in Albemarle County. New Cingular Wireless PCS, LLC ("New Cingular") contracted with Elledge to install a 103-foot cellular transmission tower on her parcel. The steep topography of the parcel brings it within the scope of Albemarle County Code § 18-4.2 ("the Ordinance"), which restricts construction on land with slopes of 25 percent or more ("a Critical Slope").

Under Albemarle County Code § 18-4.2.5(a) ("the Waiver Provision"), the planning commission is authorized to grant a waiver from the restrictions otherwise imposed by the Ordinance after making certain findings or imposing conditions it deems necessary to protect the public health, safety, or welfare and to

ensure compliance with the intent and purpose of the Ordinance.¹ An appeal from the decision of the planning commission lies to the board of supervisors only if the waiver is granted subject to conditions objectionable to the applicant or is denied. Albemarle County Code § 18-4.2.5(a)(5). The Ordinance makes no provision for appeals by third parties, such as owners of adjoining parcels who believe themselves to be aggrieved by a decision of the planning commission to grant a waiver.

Elledge and New Cingular filed an application for a waiver as provided by the Waiver Provision. Sinclair opposed the application throughout the administrative staff review process and two public hearings. Nevertheless, the planning commission approved the application in February 2010.

Sinclair then filed a complaint in the circuit court seeking a declaratory judgment that (1) the Waiver Provision is invalid because it conflicts with the statutory scheme governing planning and zoning set forth in Title 15.2 of the Code of Virginia and (2) the county exceeded the power delegated to it by the General Assembly in violation of the Dillon Rule because its procedure for

¹ The Albemarle County Code § 18-4.2.5 also provides for an "administrative waiver" when the Critical Slope triggering application of the Ordinance was created during development of the property in accordance with a site plan approved by the county or to replace an existing structure located on a Critical Slope when the footprint of the new structure does not exceed the footprint of the structure it replaces. Albemarle County Code § 18-4.2.5(b). The "administrative waiver" provision is not relevant in this case and is not before us in this appeal.

considering waiver applications is not authorized by state law.² In particular, he asserted that the only departures from a zoning ordinance permitted by state law are variances, defined by Code § 15.2-2201, and zoning modifications, provided for in Code § 15.2-2286(A)(4). Under Code § 15.2-2312, a variance may only be approved by the board of zoning appeals and only upon a finding that criteria set forth in Code § 15.2-2309(2) have been met.³ Under Code § 15.2-2286(A)(4), zoning modifications may only be granted by the zoning administrator and only upon a finding that identical criteria have been met. Thus, whether the waiver is a variance or a zoning modification, the Waiver Provision irreconcilably conflicts with state law because it permits waivers to be granted by the planning commission, rather than the board of zoning appeals or zoning administrator, and without a finding that the criteria in Code § 15.2-2309(2) have been met.

Sinclair also asserted that the Waiver Provision unlawfully circumvented his right to judicial review. Under Code § 15.2-

² The Complaint named as defendants Elledge and New Cingular, Albemarle County and its board of supervisors and planning commission, and the director of the Albemarle County Department of Community Development in his official capacity. We refer to these parties collectively as "the Defendants."

³ Code § 15.2-2309(2) permits a board of zoning appeals to grant a variance only if it finds that "the strict application of the ordinance would produce undue hardship relating to the property," "the hardship is not shared generally by other properties in the same zoning district and the same vicinity," and "the authorization of the variance will not be of substantial detriment to adjacent property and that the character of the district will not be changed by the granting of the variance."

2311(A), any person aggrieved by an adverse decision of the zoning administrator concerning the grant or denial of a zoning modification may appeal to the board of zoning appeals. Under Code § 15.2-2314, any person aggrieved by the decision of the board of zoning appeals, whether on an appeal from a decision of the zoning administrator concerning a zoning modification or from the board's grant or denial of a variance, may petition the circuit court for a writ of certiorari to review the board's decision. Because the Waiver Provision provided no right of appeal to aggrieved parties and particularly no judicial review in the circuit court, it again conflicted with state law.⁴

Sinclair and the Defendants filed competing motions for summary judgment. After a hearing, the circuit court determined that the waivers allowed by the Waiver Provision are not variances within the meaning of Code § 15.2-2201. Therefore, Code § 15.2-2312 did not reserve consideration of waiver applications to the board of zoning appeals and the criteria to be considered in granting or denying variances imposed by Code § 15.2-2309(2) did not apply. The court also ruled that the Ordinance's delegation to the planning commission of the decision to grant or deny waiver

⁴ Sinclair also claimed that the planning commission erred in applying the Waiver Provision to Elledge and New Cingular's application because it provides for waivers only upon application by a "subdivider" or "developer," and neither Elledge nor New Cingular fell within the Ordinance's definition of either term. This claim was nonsuited and is not before us on appeal.

applications was within the broad grant of powers delegated to the county under Code §§ 15.2-2280 and 15.2-2286. Accordingly, it held the Waiver Provision did not conflict with state law and the county acted pursuant to power delegated to it by the General Assembly. The court therefore granted the Defendants' motion for summary judgment. We awarded Sinclair this appeal.

II. ANALYSIS

The circuit court's interpretation of the Ordinance and state law presents a legal question, which we review de novo. Jones v. Williams, 280 Va. 635, 638, 701 S.E.2d 405, 406 (2010). Localities have "no element of sovereignty" and are agencies created by the Commonwealth. Marble Techs., Inc. v. City of Hampton, 279 Va. 409, 417, 690 S.E.2d 84, 88 (2010) (quoting Whiting v. Town of West Point, 88 Va. 905, 906, 14 S.E. 698, 699 (1892)) (internal quotation marks omitted). Accordingly, when a statute enacted by the General Assembly conflicts with an ordinance enacted by a local governing body, the statute must prevail. Covel v. Town of Vienna, 280 Va. 151, 162, 694 S.E.2d 609, 616 (2010).

Moreover, local governing bodies "have only those powers that are expressly granted, those necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable." Marble Techs., Inc., 279 Va. at 417, 690 S.E.2d at 88 (quoting Board of Zoning Appeals v. Board of Supervisors, 276 Va. 550, 553-54, 666 S.E.2d 315, 317 (2008) (internal quotation

marks omitted)). This principle, known as the Dillon Rule, is a rule of strict construction: "[i]f there is a reasonable doubt whether legislative power exists, the doubt must be resolved against the local governing body." Board of Supervisors v. Reed's Landing Corp., 250 Va. 397, 400, 463 S.E.2d 668, 670 (1995). There is no presumption that an ordinance is valid; if no delegation from the legislature can be found to authorize the enactment of an ordinance, it is void. Marble Techs., Inc., 279 Va. at 416-17, 690 S.E.2d at 88. Only where a delegation is found and "the question is whether [the delegated power] has been exercised properly, [may] the 'reasonable selection of method' rule . . . be applicable, [whereupon] the inquiry is directed to whether there may be implied the authority to execute the power in the particular manner chosen." Id. at 417 n.10, 690 S.E.2d at 88 n.10 (internal alterations omitted).

Sinclair first asserts that the Waiver Provision is void because the Ordinance prohibits construction on Critical Slopes. Because a landowner may not lawfully erect a structure on a parcel with a Critical Slope without obtaining a waiver, he argues, a waiver is in reality a variance or zoning modification and the criteria set forth in Code §§ 15.2-2309(2) and 15.2-2286(A)(4) must be met. We disagree.

A variance "allows a property owner to do what is otherwise not allowed under the ordinance." Bell v. City Council, 224 Va.

490, 496, 297 S.E.2d 810, 813-14 (1982). But where "the property may be developed in a way consistent with the ordinance, but only with approval of the [locality] after specified conditions are met," a variance is not necessary. Id. at 496, 297 S.E.2d at 814. Here, the Ordinance allows construction, provided that the landowner applies for the county's prior approval. The application process allows the county to review the proposed construction to ensure it will not precipitate the adverse effects it enacted the Ordinance to avoid, or to impose any conditions it determines to be necessary to ameliorate such adverse effects.⁵ If the proposed construction does not precipitate such effects or if conditions may be imposed to ameliorate them, the construction will be allowed.

In Bell, we determined that when proposed construction is permitted by ordinance, subject to prior application to and approval by the local government, the approval was not a variance but a special exception. 224 Va. at 496, 297 S.E.2d at 814. The General Assembly has delegated to localities the authority to provide for "the granting of special exceptions under suitable regulations and safeguards" in a zoning ordinance. Code § 15.2-

⁵ The Ordinance identifies such adverse effects to include "rapid and/or large-scale movement of soil and rock; excessive stormwater run-off; siltation of natural and man-made bodies of water; loss of aesthetic resource; and . . . greater travel distance of septic effluent, all of which constitute potential dangers to the public health, safety and/or welfare." Albemarle County Code § 18-4.2.

2286(A)(3). Moreover, Code § 15.2-2288.1 expressly permits the use of the special exception procedure for steep slope development.

Unlike variances, special exceptions are not required to be reviewed for compliance with the criteria set forth in Code §§ 15.2-2309(2) and 15.2-2286(A)(4). Accordingly, we reject Sinclair's argument that the Waiver Provision conflicts with state law because it does not require consideration of those criteria before a waiver application is approved.⁶

Sinclair next asserts that the procedure for reviewing waiver applications created by the Waiver Provision is not authorized by state law and therefore conflicts with the Dillon Rule. We agree.

As previously noted, the Waiver Provision purports to confer upon the planning commission the authority to grant or deny a waiver application. Albemarle County Code § 18-4.2.5(a). However, delegation of such authority to the planning commission is

⁶ Our holding on this issue is limited to addressing Sinclair's argument that a waiver granted under the Waiver Provision may only be either a variance or a zoning modification and that the mandatory criteria set forth by the General Assembly in Code §§ 15.2-2309(2) and 15.2-2286(A)(4) therefore must be considered before such a waiver is granted. We hold today that such a waiver need not be either a variance or a zoning modification and that the Code §§ 15.2-2309(2) and 15.2-2286(A)(4) criteria therefore need not be included in the consideration of such a waiver. We do not decide today that such a waiver is not a departure from the zoning ordinance because variances and zoning modifications are not the only form of departures. See, e.g., Code § 15.2-2201 (providing for special exceptions). However, that does not end our inquiry because Sinclair further argues that the planning commission lacks the authority to grant such a waiver. It is to that question that we now turn.

inconsistent with the general role of planning commissions, as reflected by their enabling statutes. Also, the General Assembly has specifically empowered only zoning administrators and boards of zoning appeals to authorize departures from zoning ordinances. The General Assembly was fully capable of empowering planning commissions in this regard and elected not to do so.

The General Assembly requires every locality to "create a local planning commission in order to promote the orderly development of the locality and its environs." Code § 15.2-2210. While the General Assembly describes planning commissions as "primarily" advisory bodies, id., it has declined to grant them executive, legislative, or judicial powers.⁷

For example, planning commissions are charged with preparing comprehensive plans to recommend to the local governing body. Code § 15.2-2223. To accomplish this task, they are authorized to survey and study development and growth trends, id.; to request reasonable information from any state entity responsible for any public facility within the locality, Code § 15.2-2202(B); to request reasonable information from any electrical utility

⁷ Even their necessary incidental powers are specifically set forth in statute. See, e.g., Code § 15.2-2214 (power to fix the time for regular meetings); Code § 15.2-2214 (power to call special meetings); Code § 15.2-2217 (power to elect a chairman and vice-chairman, and appoint any other officers, employees, or staff authorized by the local governing body); Code § 15.2-2222 (power to spend funds allocated by the local governing body); Code § 15.2-2211 (power to adopt rules and appoint committees).

responsible for transmission lines of 150 kilovolts or more, Code § 15.2-2202(E); to meet with the Department of Transportation about any state highway affected by the plan, Code § 15.2-2222.1; to study public facilities necessary to implement the plan, and any associated costs or revenues, Code § 15.2-2230.1; to post the proposed plan on a website and hold public hearings, Code § 15.2-2225; and to review the plan every five years to determine whether it should be amended by the local governing body, Code § 15.2-2230.

Similarly, planning commissions may also prepare an official map and make any surveys necessary for such purpose, Code § 15.2-2233, and recommend the ensuing map for approval by the local governing body, Code § 15.2-2234.

Planning commissions may consult with the local governing body about the creation of an agricultural and forestal district, Code § 15.2-4305; recommend termination, modification, or continuation of an existing district, Code § 15.2-4311; make recommendations about proposals to build on or acquire land within a district, Code § 15.2-4313, or to withdraw land from an agricultural and forestal district, Code § 15.2-4314.

Planning commissions may prepare and recommend a subdivision ordinance for approval by the local governing body, Code § 15.2-2251, and recommend amendments to the subdivision ordinance, Code § 15.2-2253. They also may prepare and recommend a zoning ordinance for adoption by the local governing body, Code § 15.2-

2285, or recommend that the local governing body amend the zoning ordinance, Code § 15.2-2286(7).

But after reviewing the seventy sections in which the term "planning commission" appears in Title 15.2 of the Code, we have not identified a single provision of state law authorizing planning commissions to consider and rule upon departures from a zoning ordinance. The Defendants nevertheless argue that Code §§ 15.2-2280 and 15.2-2286 provide broad authority to localities for the administration and enforcement of zoning ordinances. The county's delegation to the planning commission is consistent with this broad authority, the Defendants continue, particularly when the power delegated is not legislative but ministerial or administrative in nature, as is the power to grant waiver applications. We disagree.

When the General Assembly has allowed local governing bodies to delegate additional powers to planning commissions, it has done so in express terms. For example, it has permitted local governing bodies to authorize them to receive funds or approve bonds or letters of credit relative to the dedication of public rights of way, Code § 15.2-2241(A); to assess whether a transfer of development rights complies with the locality's transfer of development rights ordinance, Code §15.2-2316.2; and to serve as a road impact fee advisory committee, Code § 15.2-2319. Likewise, it has permitted local governing bodies to delegate to planning commissions the enforcement and administration of subdivision

regulations, Code § 15.2-2255, and to consider subdivision plats and preliminary subdivision plats submitted for approval, Code §§ 15.2-2259 and 15.2-2260. It has not, however, authorized local governing bodies to delegate to planning commissions approval of departures from zoning ordinances or any other powers to administer or enforce an existing zoning ordinance.⁸ Compare Code § 15.2-2255 (empowering local governing bodies to administer and enforce subdivision ordinances and expressly including planning commissions) with Code § 15.2-2286(A)(4) (empowering local governing bodies to administer and enforce zoning ordinances with no mention of planning commissions at all).

To the contrary, those to whom local governing bodies are authorized to delegate approval of departures from zoning ordinances are clearly set out in state law. Local governing bodies are expressly authorized to delegate approval of zoning modifications to a zoning administrator. Code § 15.2-2286(A)(4) ("Where provided by ordinance, the zoning administrator may be authorized to grant a modification from any provision contained in the zoning ordinance"). Likewise, they are expressly authorized to delegate approval of special exceptions to the board

⁸ "The public policy of the Commonwealth is determined by the General Assembly." Uniwest Constr., Inc. v. Amtech Elevator Servs., 280 Va. 428, 440, 699 S.E.2d 223, 229 (2010). In Virginia, the General Assembly has decided that unless it provides otherwise by statute, planning commissions are advisory, not decision-making, bodies.

of zoning appeals. Compare Code § 15.2-2310 (applications for special exceptions "shall be transmitted promptly to the secretary of the board who shall place the matter on the docket to be acted upon by the board") with Code § 15.2-2286(A)(3) ("the governing body of any locality may reserve unto itself the right to issue such special exceptions"). Variances are to be considered by the board of zoning appeals. Code §§ 15.2-2309(2) and 15.2-2310.

While we have held that local governing bodies may delegate administrative or ministerial acts without statutory authorization, see Ours Props., Inc. v. Ley, 198 Va. 848, 850-52, 96 S.E.2d 754, 756-58 (1957), the power the planning commission purports to exercise in granting a waiver application is not administrative or ministerial in nature. Zoning is a legislative power, Andrews v. Board of Supervisors, 200 Va. 637, 639, 107 S.E.2d 445, 447 (1959), and approval of departures from zoning ordinances is a legislative act. Cochran v. Fairfax County Board of Zoning Appeals, 267 Va. 756, 765, 594 S.E.2d 571, 576 (2004); National Mem. Park, Inc. v. Board of Zoning Appeals, 232 Va. 89, 92, 348 S.E.2d 248, 249 (1986); Board of Supervisors v. Southland Corp., 224 Va. 514, 522, 297 S.E.2d 718, 721 (1982); see also Helmick v. Town of Warrenton, 254 Va. 225, 229, 492 S.E.2d 113, 114 (1997) (A decision "that regulates or restricts conduct with respect to property is purely legislative." (internal quotation marks and alterations omitted)). "If allowed by statute, local governing bodies may delegate the

exercise of these legislative functions to subordinate bodies, officers, or employees” Helmick, 254 Va. at 229, 492 S.E.2d at 115 (emphasis added). Here, as discussed above, the delegation authorized by statute is limited to the zoning administrator (for zoning modifications) or the board of zoning appeals (for variances and special exceptions).⁹

We therefore hold that the Waiver Provision’s delegation of power to grant waiver applications to the planning commission is legislative in nature and is not authorized by state law. Accordingly, in enacting the Waiver Provision, the county exceeded its authority from the General Assembly in violation of the Dillon Rule and the Waiver Provision is void.

III. CONCLUSION

For the foregoing reasons, we will affirm the circuit court’s judgment that waivers are not variances within the meaning of Code § 15.2-2201, reverse its judgment that the decision to grant or

⁹ Decisions to grant or deny a departure from a zoning ordinance necessarily implicate important property rights, not solely for the landowner applying for such a departure but also for other parties who may be adversely affected by a ruling. Accordingly, the decision of the zoning administrator to grant or deny a zoning modification may be appealed to the board of zoning appeals by any aggrieved party. Code § 15.2-2311(A). Similarly, the decision of the board of zoning appeals – whether a decision to grant or deny a variance or special exception or an appeal from a zoning administrator’s decision to grant or deny a zoning modification – may be appealed to the circuit court by any aggrieved party. Code § 15.2-2314. The Waiver Provision affords no right of appeal to an aggrieved party, other than a landowner whose application is approved with objectionable conditions or denied outright.

deny waiver applications may be delegated to the planning commission, and remand for further proceedings consistent with this opinion.

Affirmed in part,
reversed in part,
and remanded.

JUSTICE McCLANAHAN, with whom JUSTICE POWELL joins, concurring in part and dissenting in part.

I would affirm the circuit court's judgment in its entirety.

In count I of his complaint, Sinclair asserted the Waiver Provision was void because it is in direct conflict with the Code provisions governing zoning variances and modifications. As the majority concludes, however, the Waiver Provision is not a mechanism for a zoning variance as defined by Code § 15.2-2201¹ nor a zoning modification as provided for in Code § 15.2-2286(A)(4)² since the

¹ Variance "in the application of a zoning ordinance" is defined as

a reasonable deviation from those provisions regulating the size or area of a lot or parcel of land, or the size, area, bulk or location of a building or structure when the strict application of the ordinance would result in unnecessary or unreasonable hardship to the property owner, and such need for a variance would not be shared generally by other properties, and provided such variance is not contrary to the intended spirit and purpose of the ordinance, and would result in substantial justice being done.

Code § 15.2-2201.

² Like a variance, a modification may be granted by zoning administrators upon satisfaction of certain criteria when "strict

Albemarle County Code zoning ordinance expressly allows disturbance of critical slopes upon compliance with the conditions promulgated by the board of supervisors. Therefore, I agree the circuit court did not err in granting the defendants' motions for summary judgment as to count I of Sinclair's complaint.

In count II of his complaint, Sinclair asserted that under Virginia law only a board of zoning appeals and a zoning administrator are given the power to authorize a "deviation" from a zoning ordinance, whether denominated as a zoning "variance" or "modification." Therefore, according to Sinclair, since the Waiver Provision grants to the planning commission the power to approve a zoning variance or modification, the Waiver Provision is void as being in violation of the Dillon Rule. As the majority concludes, though, the Waiver Provision is not a mechanism for a zoning variance or modification. Therefore, count II, being premised on Sinclair's assertion that the Waiver Provision is a zoning variance or modification, must necessarily fail.³ My analysis would thus end here.

application of the ordinance would produce undue hardship." Code § 15.2-2286(A)(4).

³ I find it difficult to reconcile the majority's holding as to count II with its holding as to count I. Although the majority concludes the Waiver Provision is not a zoning variance mechanism since it does not allow a "deviation" from the zoning ordinance, it nevertheless concludes the Waiver Provision is void because it grants to the planning commission the power to allow a "departure" from the zoning ordinance. I see no meaningful distinction between the term "deviation," which is used by Sinclair, and the term

However, notwithstanding its conclusion that the Waiver Provision is not a mechanism for deviating from the zoning ordinance, the majority nevertheless holds the Waiver Provision is not authorized by state law because it grants legislative power to the planning commission.⁴ I disagree.

In considering challenges to zoning ordinances, we have "repeatedly" held that "an administrative officer or bureau may be invested with the power to ascertain and determine whether the qualifications, facts or conditions comprehended in and required by the general terms of a law, exist in the performance of their

"departure," which is used by the majority. Webster's Dictionary denotes no distinction either. It defines "departure" as "a deviation or divergence esp. from a rule, course of action, plan, or purpose." Webster's Third New International Dictionary 604 (3d ed. 1993).

Counts I and II of Sinclair's complaint are both premised on his position that the Waiver Provision is void because it is a mechanism allowing the County to avoid the application of the Code provisions governing zoning variances and modifications, which involve the power to permit a landowner to do something that is prohibited under legislatively enacted zoning provisions. As the majority concludes, the Waiver Provision does not grant power to the planning commission to permit a landowner to do what is not allowed under legislatively enacted zoning ordinance. Instead, the Waiver Provision is an integrated part of the legislatively enacted zoning ordinance and expressly allows the disturbance of critical slopes upon compliance with conditions set forth therein. As such, it does not grant the planning commission the power to "deviate" or "depart" from the zoning ordinance.

⁴ It cannot be disputed that the board of supervisors had the authority to enact a zoning ordinance. Ours Props., Inc. v. Ley, 198 Va. 848, 850, 96 S.E.2d 754, 756 (1957). Thus, the issue raised by the majority's analysis and holding becomes whether the board of supervisors unlawfully delegated legislative authority to the planning commission. See Logan v. City Council of the City of Roanoke, 275 Va. 483, 659 S.E.2d 296 (2008); County of Fairfax v. Southern Iron Works, Inc., 242 Va. 435, 410 S.E.2d 674 (1991).

duties, and especially when the performance of their duties is necessary for the safety and welfare of the public." Ours Props., Inc., 198 Va. at 851, 96 S.E.2d at 757 (citations omitted) (zoning ordinance not an unlawful delegation of legislative power to building inspector given discretion to grant or deny permits).

A legislative body, such as a city council, must work through some instrumentality or agency to perform its duties, since it does not sit continuously. Under the changing circumstances and conditions of life, it is frequently necessary that power be delegated to an agent to determine some fact or state of things upon which the legislative body may make laws operative. Otherwise, the wheels of government would cease to operate. Of course, the discretion and standards prescribed for guidance must be as reasonably precise as the subject matter requires or permits.

Id. Thus, "[c]onsiderable freedom to exercise discretion and judgment must, of necessity, be accorded to officials in charge of administering such ordinances." Id. at 851, 96 S.E.2d at 756-57.

The Albemarle County Code directs the planning commission to "[a]dminister the . . . zoning ordinance as set forth in such." Albemarle County Code § 2-406(G). This role is certainly consistent with the duty of planning commissions in Virginia to prepare the zoning ordinances for their respective localities. See Code § 15.2-2285(A). In fact, we have stated that "[t]he role of a planning commission is critical in the zoning process." City Council of the City of Alexandria v. Potomac Greens Assocs. P'ship, 245 Va. 371, 376, 429 S.E.2d 225, 227 (1993).

The Waiver Provision allows the disturbance of critical slopes upon a finding by the commission, in consultation with the county engineer, that the conditions promulgated by the board of supervisors and set forth in the provision have been satisfied.⁵ Thus, in the scope of its duty to "administer" the zoning ordinance, the commission is given the power to determine the facts and whether those facts comply with the law and policy set forth by the board of supervisors. It is not, however, given the power to deviate or depart from the conditions set forth therein. Nor is it given the power to change the law or policy as set forth in the zoning ordinance.

In the instant case, the ordinance merely conferred administrative functions upon the [commission] charged with the duty of carrying out the will and direction of the [board of supervisors]; the legislative purpose was disclosed by the enactment of the ordinance; and, as far as was reasonably

⁵ In particular, "the commission shall consider the determination by the county engineer" as to whether the developer will address "the rapid and/or large-scale movement of soil and rock, excessive stormwater run-off, siltation of natural and man-made bodies of water, loss of aesthetic resources, and, in the event of septic system failure, a greater travel distance of septic effluent that might otherwise result from the disturbance of critical slopes" to ensure that the disturbance "will not pose a threat to the public drinking water supplies and flood plain areas, and that soil erosion, sedimentation, water pollution and septic disposal issues will be mitigated to the satisfaction of the county engineer." Albemarle County Code § 18-4.2.5(a)(1)-(2)(emphasis added). Based on the determination of the county engineer, the commission must find, among other things, that the disturbance "would not be detrimental to the public health, safety or welfare, to the orderly development of the area, or to adjacent properties; [and] would not be contrary to sound engineering practices." Albemarle County Code § 18-4.2.5(a)(2)-(3).

practical, the ordinance left to the [commission] charged to act under it merely the discretion of determining whether a given status came within the provisions thereof.

Ours Props., Inc., 198 Va. at 853, 96 S.E.2d at 758. Cf. Laird v.

City of Danville, 225 Va. 256, 262, 302 S.E.2d 21, 25 (1983)

(authorizing planning commission to rezone property is unlawful delegation of legislative power).⁶

For these reasons, I would hold the circuit court also did not err in granting defendants' motions for summary judgment as to count II of Sinclair's complaint.

⁶ Delegation to planning commissions of the duty to administer zoning ordinances has been upheld by other states as well. See e.g., Wesley Inv. Co. v. County of Alameda, 151 Cal. App.3d 672, 679 (Cal. Ct. App. 1st Dist. 1984) (rejecting claim that county improperly delegated legislative power to planning commission and holding commission could properly administer existing policy set forth in zoning ordinance in denying site review applications); Bellemeade Co. v. Priddle, 503 S.W.2d 734, 739-40 (Ky. Ct. App. 1973) (city may delegate to planning commission authority to locate a "floating zone" since it is not a prohibited use nor is it authorizing the granting of a variance and ordinance contains standards for administration); Southland Corp. 7-Eleven Stores v. Mayor & City Council of Laurel, 541 A.2d 653, 656 (Md. Ct. App. 1988) (city may delegate to planning commission authority to determine under zoning ordinance when a proposed building would create a public hazard and reject site plan); Florka v. City of Detroit, 120 N.W.2d 797, 803 (Mich. 1963) (zoning ordinance lawfully conferred power upon planning commission to act on applications for business permits and, in doing so, determine whether business injurious to surrounding neighborhood and not contrary to spirit and purpose of ordinance).