

# Dillon's Rule

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## *The Development of Local Governments in Virginia*

Government in Virginia has not been static but has evolved to meet the changing needs of changing times. It is no surprise that units of local government as we think of them today were not present in the early years of the Virginia Colony. The colony was settled primarily as a business and economic adventure, and in the early years, England administered everything out of London through its own appointed governor and council.

But it is also not surprising that grumbling among the colonist about this centralized approach of government started fairly soon, and within 13 years the first General Assembly that included representation by the colonists had met. By 1634, the colony's population and the state's needs had grown beyond the management capabilities of a centralized government and the General Assembly created eight "shires" or counties to help keep the peace and take care of administrative details. The county court became the local governing body and the justice of the peace and then the sheriff became the dominant local figures. In addition to the collection of taxes, the administration of justice and law enforcement were major functions of the government.

Eighty-eight years after the formation of the first counties, the first cities in Virginia emerged. The British Crown granted a city charter to Williams-burg in 1722 and just a few years later Norfolk received its royal charter. The charter would serve as a mini-constitution establishing the organization of "independent" cities and authorizing their various powers. In time, the cities of Williams-burg and Norfolk were carved out of their counties, each having separate and distinct boundaries, starting a tradition that holds today.

In the 1930s a new form of government came into vogue to ease the handling of special needs such as the development of water and sewer Systems. This was the special district. These districts generally have significant powers but cannot raise taxes, and their operations frequently cross local government boundaries.

As a way of helping localities address growth needs, the Virginia State constitution as revised in 1971 allowed the formation of regional governments. Although, regional governments have not caught on, intergovernmental agreements between localities to jointly perform various governmental services have served a similar purpose.

Further peeks into Virginia's local government past reveal some approaches that would seem most out of step in today's modern Virginia but which made considerable sense in their time. In the early days, most local officials were appointed by the state, and in later years many governing bodies appointed their own members, as vacancies became open. Also, in the 1800s bicameral councils governed Virginia's cities with two houses just like today's General Assembly. This likely was required by the state constitution before 1902 as a way of providing checks and balances for local government's powers.

Again, the point to be made is that local governments in Virginia have not been static but have evolved to meet current needs.

### ***Development of the Dillon Rule and Municipal Home Rule***

John Forest Dillon, for whom the Dillon Rule is named, was the chief justice of the Iowa Supreme Court approximately 100 years ago. He was also one of the greatest authorities of his time on municipal law and a prolific writer on local governments.

Judge Dillon was a man who greatly distrusted local governments and local government officials. He is quoted as saying that "those best fitted by their intelligence, business experience, capacity and moral character' usually did not hold local office and that the conduct of municipal affairs was generally "unwise and extravagant."

Perhaps largely because of such strong beliefs. Judge Dillon expounded his famous rule, which was quickly adopted by state supreme courts around the nation and was adopted by the Virginia Supreme Court before the turn of the century. The rule is still in effect here in Virginia.

#### ***What is the Dillon Rule?***

The Dillon Rule is used in interpreting state law when there is a question of whether or not a local government has a certain power. Lawyers call it a rule of statutory construction.

Dillon's Rule construes grants of power to localities very narrowly. The bottom line is that if there is a question about a local government's power or authority, then the local government does not receive the benefit of the doubt. Under Dillon's rule, one must assume that the local government does not have the power in question.

In legal language, the first part of Dillon's Rule reads like this: Local governments have only three types of powers, those granted in express words, those necessarily or fairly implied in or incident to the powers expressly granted and those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable.

It is the second part of the Dillon Rule, however, that puts the vice on local government's powers. This part states that if there is any reasonable doubt whether a power has been conferred on a local government, then the power has not been conferred. This is known as a rule strict construction of local government powers.

## ***Judge Dillon's Era***

Judge Dillon had a basis for being so harsh on local officials. He lived during what was probably the lowest point in the history of America's cities. Many of our cities' governments were sodden with corruption and inefficiency, and political machines and bosses controlled the day, particularly in the big cities. Graft was shamelessly accepted in the many new public work projects and public utility franchises brought about by changing technology and rapidly expanding growth.

Lord Bryce of England. Perhaps the most noted foreign scholar of American politics at the time most succinctly summed up the era in his writings in 1888. He wrote. "There is no denying that the government of cities is the one conspicuous failure of the United States." (Fortunately, local government corruption was not a major problem in Virginia during this time.)

Judge Dillon undoubtedly was reacting also to a second factor. During this time period a small but vocal group was proclaiming that local governments certain inherent constitutional powers even though such powers were not spelled out in the various state constitutions. They argued that state general assemblies had no authority to interfere with these local powers.

Naturally, with his lack of respect for local government officials, this argument was anathema to Judge Dillon. Dillon held emphatically that local governments had no inherent constitutional powers and that since local governments were creatures of state government, they had only those powers the state delegated by state law or state constitution.

With the Dillon Rule firmly intact and corruption in local government still a major problem, state governments in the latter part of the 1800s rolled into action and passed hundreds of special laws controlling even the smallest of details in the lives of local governments. Unfortunately, a number of state legislators themselves got caught up in the corruption because of the extraordinary power they wielded over local governments.

## ***The Reformers and Municipal Home Rule***

In reaction, hundreds of reform groups cropped up around the country. Civic groups were at the center of these reform efforts, and they cast their lot in solving the problems with a philosophy known as municipal home rule.

Although most reformers knew there was no "legal" inherent right of local self-government, they strongly believed in the "moral" right of local self-government for which Americans had always exhibited at least a sentimental attachment. They openly avowed the theory that it was better for the city to weary at length of bad government than to enjoy somewhat better government under state control. They felt that as long as local governments were dependent on the state, they would never gain a capacity for leadership or develop a sense of responsibility for their own conditions.

## ***What is Municipal Home Rule?***

One modern-day reformer described home rule as follows: "We want some freedom of choice as to the major emphases to be given to our local governmental programs, the right to decide whether we will stress health, schools, traffic, crime control or other interests. We want some leeway for experimentation and enough financial freedom. We want the state to be restrained so that it will not exercise its privileged position to dabble in local decisions, finance and appointments for partisan political purposes.

Municipal home rule is harder to describe than Dillon's Rule since there was only one Judge Dillon but there are approximately 43 states that have granted some measure of home rule and the scope and style of home rule varies considerably from state to state.

Home rule is frequently granted by revising the state constitution to authorize local governments to enact home rule charters. Missouri was the pioneer state in 1875 to so amend its constitution, and its approach is similar to what we find in many states today. In Missouri, it is up to each city to decide whether to develop a home rule charter.

This local option approach has been used in most states but is not always exercised by all local governments.

In Missouri, a home rule charter sets forth the organization and powers of the city and is drafted by a local charter commission. The charter does not become effective unless approved by a majority of the citizens of the locality in a public referendum. Future amendments to the charter also must be approved by referendum.

The South is the only section of the United States where municipal home rule has not made substantial in-roads. North Carolina and Kentucky remain Dillon Rule states, as does Virginia.

## ***Dillon's Rule Survives in Home Rule States***

Studying home rule states carefully, one finds that Dillon Rule concepts are far from dead even in home rule states. For example, in most cases a specific power in a home rule charter can be overturned by the general assembly if the general assembly passes a uniform state statute dealing with the issue.

Another reason Dillon's Rule remains alive is that some home rule states have retained the second prong of the rule saying that when the courts interpret the powers of local governments, those powers should be narrowly construed. However, a 1935 textbook on municipal law states, "Home rule states have been by no means universally liberal in defining the scope of the city's powers, but the most illiberal have left cities a measure of independence considerably in excess of what they might have enjoyed under any form of legislative charter." Many home rule advocates would agree with this today.

## ***The Kansas Example***

In Kansas, home rule is given to cities through the state constitution and to counties through state statutes. It is a model that has gone far to reverse Dillon's Rule and gives more home rule power than found in many other states.

Kansas does not have home rule charters; rather cities and counties are authorized "to determine their local affairs including the levying of the full range of taxes and other fees." The legislature, however, can pre-empt any power by passing a uniform state law. If, however, the state passes a non-uniform law on a particular topic, any city or county can pass a charter ordinance and exempt itself from the law even though it applies to the locality.

The charter ordinance requires special safeguards such as a two-thirds vote of the governing body and a 60-day waiting period before its effective date. During this 60-day period, a petition signed by registered voters equal to 10 percent of the number voting in the last regular election of the locality can force a referendum on the issue.

Another provision of the Kansas Constitution worth noting states: "Powers and authority granted cities pursuant to this section shall be liberally construed for the purpose of giving to cities the largest measure of self-government.

## ***Virginia's Constitution and A Missed Opportunity***

The Virginia Constitution expressly gives the General Assembly power to pass general and special laws to set forth the organization and powers of local governments. Dillon's Rule remains in place in Virginia. But in 1969 a proposal surfaced to reverse the Dillon Rule and to give local governments power to have home rule charters.

This proposal, as well as all the other changes originally proposed to the state constitution, were recommended by the Commission on the Constitutional Revision chaired by former Gov. Albertis Harrison. The proposal stated, "A charter county or a city may exercise any power or perform any function which is not denied to it by this constitution, by its charter or by laws enacted by the General Assembly.

The intention was to reverse the Dillon Rule and give all cities and those counties with populations of more than 25,000 a large measure of home rule. Although no language was proposed that said local powers should be liberally construed such as in the Kansas Constitution, the commission's report and the Senate debate indicate that the intention was also to abolish the rule of strict construction of local government powers.

You may be surprised to learn that the Virginia Municipal League and the Virginia Association of Counties opposed these changes. Once VML and VACO said they did not favor reversal of the Dillon Rule and the granting of home rule charters, it didn't take the General Assembly long to unanimously strike these provisions from the proposed revisions to the constitution.

Reading and talking with those involved in the decision to oppose the proposed constitutional revisions reveals that the league's local officials felt at the time the General Assembly had been fairly responsive to the needs and desires of local governments both through general laws and through charters, and this was VML's testimony during the 1969 debates.

Local governments, for example, had what some thought was near home rule powers through the provisions of the Uniform Charters Act which authorizes any city or town to obtain from the General Assembly a charter provision that permits the locality to have all powers not denied to it by the constitution or by state statute.

Also, there was considerable fear of the unknown in moving from Dillon's Rule to home rule. A widely distributed statement put out by the governor's office just prior to the 1969 special session that dealt with revision of the constitution used this language to describe the changes involving local governments and particularly the reversal of the Dillon Rule:

*"Times have changed' and continue to change rapidly, and Virginia must learn to change too or be left behind because of its inability to adapt."*

"This article would loosen some of the legislative reins on local government and treat cities and counties more alike, principally by reversing the present constitutional philosophy. The General Assembly is directed to start from scratch and outline by statute the organization, government. Powers changes of boundaries, consolidation and dissolution of counties, cities, towns and regional governments."

The summary was clearly erroneous, but it was the type of language that struck fear in the hearts of local officials. Certainly it did not create support for abolishing the Dillon Rule.

Further, the executive directors of VML and VACO got on the telephone and started talking with their counter-parts in various home rule states. They found it was not unusual for general assemblies in those states to pass laws denying local governments powers in a wide variety of areas.

Even the report of the Commission on Constitutional Revision set forth 13 different areas where the General Assembly might want to prohibit local action. These included such areas as providing for the taxation of subjects reserved for taxation by the state, prescribing the manner for election of local officials and prescribing the duties or compensation of police officers, firefighters or other public officers whose duties or compensation are prescribed by the constitution or general laws of the General Assembly.

Local officials worried that the General Assembly would get into the mode of denying powers and end up denying more than they would grant through home rule. In addition, several provisions were included in the local government section of the proposed changes that VML did not like, such as requiring towns to have a population of 25,000 before they could become cities and requiring referendums to enact or amend charters. The attention of the organization was drawn to killing these provisions as opposed to going after something new.

On the other hand, local officials agreed with several provisions included in the proposed changes, and this gave them something to point to as benefiting local governments without supporting home rule. Of particular importance was a revision that gave the General Assembly authority to pass special laws relating to a single locality. Thus, a special law can be used to grant a locality a needed power or even to give a county power similar to a city through the granting of a charter. Also, local officials felt that with the General Assembly meeting every year rather than every two years, local governments could get their concerns met in a more timely fashion.

Finally, some local officials found comfort in placing the burden of decision-making on the General Assembly. In short, members of the General Assembly rather than local officials would catch the heat for controversial decisions.

With the lack of a compelling reason to adopt home rule, local officials seemed pleased with their new constitution that did not change the status quo of Dillon's Rule.

### *A Change of Heart*

By the early 1980s, after the Virginia Supreme Court had issued some narrow interpretations of local government powers, particularly in dealing with land use and zoning, VML had learned just how important Dillon's Rule is to local governments. Howard Dobbins general counsel for the league, wrote a column in **Virginia Town & City** calling the decision of the General Assembly not to overturn Dillon's Rule "unfortunate. Since that time, the abolition of Dillon's Rule, or at least the reversal of its strict interpretation to a liberal interpretation, has been a key legislative position of the league.

Since Judge Dillon articulated his rule in 1873, several developments have removed its philosophical underpinnings, not the least of which occurred right here in Virginia in 1908 when Staunton became the first American city to hire a city manager. Today, competent professional management has replaced "boss" politics and is the norm rather than the exception. In addition, Virginia's General Assembly has removed much of the danger of an "unwise and extravagant" local government by the passage of laws such as the Freedom of Information Act, the Conflict of Interest Act, the Public Procurement Act and the Public Finance Act. These laws as well as the auditor of public accounts and the operation of the grievance procedure ensure high levels of honesty and competency in local government.

Not only has the condition of local government that Judge Dillon saw disappeared, but other conditions of local government have changed as well. Today, local governments operate under pressure for services coming from all sides. With increasing taxes, citizens expect the most for their tax dollar and demand quality programs. Federal mandates require more of local governments while federal financial assistance is disappearing. The cost of providing services has escalated with inflation just like the cost of living. And rapid growth has put pressure on many of Virginia's local governments and often demands quick action. Today's times require innovative solutions of local governments, and the Dillon Rule restricts the power and flexibility which local governments must have to address their needs.

Times have changed and continue to change rapidly, and Virginia must learn to change too or be left behind because of its own inability to adapt. Virginia's local governments need the authority to cope with their own problems without the delay of the legislature, and the legislature needs the freedom to define and address the many issues of state-wide concern confronting the commonwealth. Many legislators have been heard to express concern about the volume of work that must be accomplished during the session. Our state legislators do not need to concern themselves with the numerous purely local matters local officials currently are forced to bring before the General Assembly.

The vision of local government that Judge Dillon depicted does not exist today, and there are numerous checks and balances on the "unwise and "extravagant" exercise of local power. The General Assembly can legislate on issues of statewide significance, the courts can review local government actions, today's active press serves as a watchdog for all government activity and the electorate certainly has the last say by exercising its power at the ballot box. The time has come to reverse the Dillon Rule and grant a liberal construction of local government powers in Virginia.

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