

To: Members of the Buckingham County Board of Supervisors

From: Karl Cater, County Administrator
E. M. Wright, Jr., County Attorney

Re: Metal Mining Ordinance

Date: August 2, 2022

TASK:

The Board: asked that the County Administrator and the County Attorney bring to the Board a draft ordinance relating to gold mining for its review.

BACKGROUND:

The County Administrator met with a group of citizens, who are organized under the name of "Friends of Buckingham".

The group presented information relating to the mining of gold and metals in Buckingham County. They presented an ordinance for the County to consider. It was based on an ordinance taken by the Town of Halifax in 2008 to "ban" all corporate mining.

Here is a little detail to give you an idea of the content and rationale of that ordinance.

The authority set forth in the Town of Halifax ordinance might be categorized as a "claim of right" rather than authorized and permitted by the State of Virginia (Virginia is a Dillon State and localities can pass ordinances only in areas where the General Assembly has granted clear authority). Reference in the ordinance is made to:

- a. The Declaration of Independence:
the people are born with "certain unalienable rights"
and that governments are instituted among people to
secure those rights
- b. the 9th amendment of the U.S. Constitution:
to deny or disparage others retained by the people The
enumeration in the Constitution, of certain rights,
shall not be construed
- c. the 14th amendment of the U.S. Constitution:
No State shall make or enforce any law which shall
abridge the privileges or immunities of citizens of the
United States
- d. Article 1, Section 1 of the Virginia Constitution:
all people are by nature equally free and independent,

and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property. and pursuing and obtaining happiness and safety

- e. Article 1, Section 2 of the Virginia Constitution:
all power is vested in, and consequently derived from, the people
- f. Article 1, Section 3 of the Virginia Constitution:
government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community ... and whenever any government shall be found inadequate or contrary to these purposes a majority of the community hath an indubitable, inalienable, and indefeasible right to reform alter or abolish it
- g. Article 1, Section 4 of the Virginia Constitution:
no man, or set of men, is entitled to exclusive or separate emoluments or privileges from the community," and thus, corporations, as sets of men, shall not enjoy special legal privileges under the law
- h. Article 9, Section 1 of the Virginia Constitution:
it shall be the Commonwealth's policy to protect its atmosphere, lands, and waters from pollution, impairment, or destruction, for the benefit, enjoyment, and general welfare of the people of the Commonwealth
- I. Common law:
recognizes well-settled rules governing the tort of trespass, and which requires injunctive, compensatory, and punitive relief to be assessed for unauthorized intrusions
- j. Virginia Code, Section 15.2-1102.
A municipal corporation shall have and may exercise all powers which it now has or which may hereafter be conferred upon or delegated to it under the Constitution and laws of the Commonwealth and all other powers pertinent to the conduct of the affairs and functions of the municipal government, the exercise of which is not expressly prohibited by the Constitution and the general laws of the Commonwealth, and which are necessary or desirable

to secure and promote the general welfare of the inhabitants of the municipality and the safety, health, peace, good order, comfort, convenience, morals, trade, commerce and industry of the municipality and the inhabitants thereof, and the enumeration of specific powers shall not be construed or held to be exclusive or as a limitation upon any general grant of power, but shall be construed and held to be in addition to any general grant of power.

Of interest, the Town's ordinance also:

Within the Town of Halifax, corporations shall not be --persons" under the United States or Virginia Constitutions, or under the laws of the United States. Virginia, or the Town of Halifax, and so shall not have the rights of persons under those constitutions and laws. It shall be unlawful for any class of individuals upon whom the state has indirectly bestowed those rights - through the conferral of rights upon their corporations - to assert those rights against the Town of Halifax or its residents.

Within the Town of Halifax. no corporation shall be afforded the privileges, powers, and protections of the Contracts Clause or Commerce Clause of the United States Constitution. or of similar provisions within the Virginia Constitution.

Within the Town of Halifax. no corporation shall be afforded the privileges. powers. and protections of the First Amendment or the Fifth Amendment to the United States Constitution. or of similar provisions within the Virginia Constitution.

It should be noted that the State of Virginia "banned" uranium mining several years ago. That is the only "ban" on mining by the State of Virginia. "Ban" is the effect of what the State did, though not is not how it is labeled in the Code of Virginia.

The ordinance concerning "banning" the mining of metals in Buckingham County, presented by the Friends of Buckingham, is based on the same "claim of right" that was used by the Town of Halifax.

We can not recommend that Buckingham County adopt an ordinance based on this "claim of right". It would put the County in a difficult position if called upon to defend such an ordinance.

Having ruled out that path, we sought to find authority in the Code of Virginia to allow the County to adopt an ordinance to prohibit the mining of metals generally or specific metals, such as gold.

Virginia is only delegated a very limited role to local government in the mining area. It can be summarized as set out in the Code of Virginia at § 45.2-1227. Local standards and regulations; waiver of application of chapter; review for strict compliance with chapter.

A. Any locality may establish standards and adopt regulations dealing with the same subjects dealt with in this chapter so long as such standards and regulations are no less stringent than those adopted by the Director.

So if we adopt any ordinance, it will have to parallel the state's content and cannot be any more stringent than the state's regulations. The state does not have a prohibition against metal mining. Thus it seems of little benefit to adopt a parallel ordinance.

Please be aware that the General Assembly by HB2213 requires a study of gold mining. It requires that the work group include the Virginia Council on Environmental Justice and appropriate stakeholders, including experts in mining, hydrology, toxicology, and other fields; environmental organizations; representatives of potentially affected communities in localities with significant deposits of gold; and residents of Native American communities in such localities. The bill further provides that the work group shall evaluate the impacts of gold mining on public health, safety, and welfare; evaluate whether existing air and water quality regulations are sufficient to protect air and water quality from the mining and processing of gold, including evaluation of the impacts of different leaching and tailings management techniques on downstream communities; evaluate whether existing bonding, reclamation, closure, and long-term monitoring of sites for such mining or processing are sufficient. Finally it requires that it report its findings to the General Assembly by December 1, 2022.

Perhaps, the Board should wait until that report is made and the General Assembly considers it before it takes further action.

We seek your directions.

The work group will consist of two components:

A committee selected by the National Academies of Sciences, Engineering, and Medicine (NASEM) to evaluate the technical aspects of impacts of gold mining in Virginia and
A committee formed by the Department of Energy, the Department of Environmental Quality, and the Virginia Department of Health ("state agency committee") that will focus on local equity and environmental justice issues, and environmental and human health concerns of the local community. The NASEM committee's final product will be an independent, peer-reviewed consensus report. This report will be delivered to the state agency committee, who will write a companion document that responds to, expands upon, or discusses specific topics in the NASEM consensus report. The NASEM consensus report and the document written by the state agency committee will comprise the "report" to which the bill refers.