



COMMONWEALTH of VIRGINIA

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September 26, 2008

The Honorable Ken T. Cuccinelli, II
Member, Senate of Virginia
10560 Main Street, Suite LL-17
Fairfax, Virginia 22030

Dear Senator Cuccinelli:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issue Presented

You request guidance related to the authority of the Department of Conservation and Recreation to regulate the open carrying of firearms in state parks.¹

Response

It is my opinion that the Department of Conservation and Recreation has only such authority to restrict the open carrying of firearms which is expressly provided by law.²

Applicable Law and Discussion

Article 1, Chapter 1 of Title 10.1, §§ 10.1-100 through 10.1-104.4 governs and establishes the Department of Conservation and Recreation (the "Department"). Section 10.1-104(A)(4) mandates that the Department "prescribe rules and regulations necessary or incidental to the performance of duties or execution of powers conferred by law." In accordance with such authority, the Department has adopted the following regulation regarding firearms:

No person except employees, police officers, or officers of the department shall carry or possess firearms of any description, or airguns, within the park. This regulation shall not apply in areas designated for hunting by the Department of Conservation and Recreation. This regulation also shall not apply to the carrying of concealed handguns

¹You do not inquire concerning the Department's authority to regulate firearms in the context of hunting on state property. Consequently, that issue is not addressed.

²The right of open carrying of firearms may be limited in certain situations. *See infra* notes 29-30 and accompanying text. Such right to openly carry a firearm is further subject to statutory provisions that limit the manner in which that right may be executed. *See, e.g.*, VA. CODE ANN. § 18.2-282(A) (Supp. 2008) (restricting conduct regarding pointing, holding, or brandishing any firearm).

within state parks by holders of a valid concealed handgun permit issued pursuant to § 18.2-308 of the Code of Virginia.^[3]

The Department is the state agency responsible for the management of all state parks.⁴ State parks are open to the general public and are located in areas of the Commonwealth suitable to the development of outdoor recreational activities, including, but not limited to, camping, concerts, festivals, boating, hunting, fishing, horseback riding, and swimming.⁵ The Department's general authority does not supersede statutory or case law, public policy, or explicit statements of the General Assembly regarding specific topics.⁶

A 2002 opinion of the Attorney General (the "2002 Opinion") concluded that the Department lacked authority to regulate or prohibit the general carrying of a concealed handgun by an individual with a valid permit.⁷ Further, the common law right to openly carry a firearm long has been recognized.⁸

The 2002 Opinion regarding the authority of the Department to regulate concealed handguns, concluded that § 10.1-104(A) "empowers the Department to employ personnel to carry out the duties of the Department; enter into contracts; accept funds and grants and gifts of real and personal property; and assess civil penalties for state park admittance and parking violations."⁹ In addition, the Director of the Department may request that the Governor commission designated conservation officers¹⁰ "to uphold and enforce the laws of the Commonwealth."¹¹

Section 10.1-200 sets out the duties of the Department related to parks and outdoor recreation and grants the Department the power to administer funds to accomplish the purposes of parks and recreation;

³ 4 VA. ADMIN. CODE § 5-30-200 (2005). The Department revised this regulation in 2003 to permit persons holding valid concealed handgun permits to possess a concealed handgun in state parks. *See* 2002 Op. Va. Att'y Gen. Va. 34 (concluding that Department may not issue regulation prohibiting permit holders from carrying concealed handguns in state parks); 19 Va. Reg. Regs. 1338 (Jan. 13, 2003) (amending 4 VAC 5-30-200 and noting in "Background" that reason for amendment was 2002 opinion of Attorney General).

⁴ *See generally* VA. CODE ANN. § 10.1-200 (2006).

⁵ *See id.*; *see also* Department of Conservation and Recreation, Virginia State Parks, http://www.dcr.virginia.gov/state_parks/index.shtml (noting state park activities) (last visited July 10, 2008).

⁶ *See generally* *Stallings v. Wall*, 235 Va. 313, 367 S.E.2d 496 (1988) (holding that general delegations of authority may be broad enough to permit localities to restrict sales of firearms); *see also* VA. CODE ANN. § 15.2-915 (2008) (clarifying authority of localities regarding control of firearms raised by plaintiff in *Stallings* and providing specific guidance). The General Assembly reacted to the issues present in the *Stallings* matter by making it clear that local regulation of firearms is limited. The General Assembly may wish to clarify the limits of agency regulation as well.

⁷ *See* 2002 Op. Va. Att'y Gen. Va., *supra* note 3, at 34.

⁸ "[I]t has always been widely understood that the Second Amendment ... codified a pre-existing right. The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it 'shall not be infringed.'" *Dist. of Columbia v. Heller*, 554 U.S. ___, 2008 U.S. LEXIS 5268, *37 (June 26, 2008).

⁹ *See* 2002 Op. Va. Att'y Gen., *supra* note 3, at 35 (footnotes omitted).

¹⁰ *See* § 10.1-115(A) (2006).

¹¹ *See* § 10.1-117(A) (2006).

study and develop a comprehensive plan for the Commonwealth's outdoor recreational needs and programs and establish standards for outdoor recreational facilities; apply for federal aid respecting outdoor recreation; act independently or jointly with another department to carry out the Department's powers and duties; and report annually to the Governor and General Assembly on the development of a standard by which the public may determine whether park and recreational needs are being met by the Commonwealth. In addition, the Department shall engage in state park master planning;¹² prescribe and impose penalties for littering;¹³ prohibit admission to a state park for which a charge has been assessed and regulate vehicle parking in such parks;¹⁴ acquire property by gift, purchase or eminent domain;¹⁵ pay gifts and funds for state parks to the State Park Conservation Resources Fund;¹⁶ establish a card authorizing persons receiving social security disability payments to enter state parks free of charge;¹⁷ protect and maintain the Appalachian Trail and the statewide system of trails;¹⁸ and manage False Cape State Park.¹⁹

Read as a whole, the duties imposed on the Department may be summarized into four categories: (1) acquisition of property; (2) development of recreational facilities; (3) handling of funds; and (4) cooperation with other agencies. Authority to govern the recreational activities of parks is implicit in these general duties. Specific authority to proscribe the conduct of individual citizens is limited to littering, parking, and the payment of charges. Otherwise, an individual's conduct must conform with the general laws of the Commonwealth, which are enforced by Department officers charged with that responsibility.

The construction of statutes by agencies charged with the administration of such statutes is entitled to great weight.²⁰ A decision of an agency charged by the General Assembly with statewide administration carries great weight and is entitled to deference, unless it clearly is wrong.²¹ The grant of regulatory authority extends only to duties or powers conferred by law.²² As such, "regulations, promulgated ... pursuant to definitive statutory authority, have the force and effect of law."²³ Regulations

¹² See § 10.1-200.1(A) (2006).

¹³ See § 10.1-104 (Supp. 2008); § 10.1-200.2 (2006).

¹⁴ See § 10.1-200.3 (2006).

¹⁵ See § 10.1-201 (2006).

¹⁶ See § 10.1-202 (A) (Supp. 2008).

¹⁷ See § 10.1-202.1 (2006).

¹⁸ See §§ 10.1-203, 10.1-204 (2006).

¹⁹ See § 10.1-205 (2006).

²⁰ See *Commonwealth v. Prog. Comty. Club*, 215 Va. 732, 739, 213 S.E.2d 759, 763 (1975); *Commonwealth v. Research Analysis Corp.*, 214 Va. 161, 163, 198 S.E.2d 622, 624 (1973); see also *Forst v. Rockingham Poultry Mktg. Coop.*, 222 Va. 270, 276, 279 S.E.2d 400, 403 (1981) (noting that Tax Commissioner's interpretation of tax statute is entitled to great weight).

²¹ See *Specialty Auto Body v. Cook*, 14 Va. App. 327, 330, 416 S.E.2d 233, 235 (1992); *Va. Real Estate Bd. v. Clay*, 9 Va. App. 152, 160-61, 384 S.E.2d 622, 627 (1989); 1999 Op. Va. Att'y Gen. 159, 163.

²² See 2002 Op. Va. Att'y Gen., *supra* note 3, at 36.

²³ *Carbaugh v. Solem*, 225 Va. 310, 314, 302 S.E.2d 33, 35 (1983).

that “clearly and explicitly mirror” statutory authority are the most likely to be sustained.²⁴ Therefore, any regulation the Department adopts must be reasonably grounded in an identifiable and definitive statutory foundation.

Regulatory authority also may be reasonably implied from statutes.²⁵ The General Assembly, by grant of regulatory authority to the Department, recognizes that the legislature cannot effectively or efficiently dictate the all the details of operating parks. Even where regulations by implication conflict with other statutes, they will be upheld,²⁶ unless there is “a manifest intent on the part of the legislature to preempt the field.”²⁷ There is no basis for an agency regulation where the legislature plainly, broadly, and comprehensively has addressed the same object.²⁸

I find no specific statutory authority granting the Department the authority to prohibit the open carrying of firearms in state parks. A person’s right to carry a firearm openly is considered universal within the Commonwealth, subject to definite and limited restrictions upon certain locations and classifications of individuals.²⁹ Section 18.2-287.4 is the only statute that specifically addresses carrying of firearms in public parks. In the context of parks and public spaces, the General Assembly merely limits certain classifications of firearms and not firearms generally.³⁰ Under accepted rules of statutory construction, the mention of one thing in a statute implies the exclusion of another.³¹ Further, the Department’s enabling legislation does not specifically authorize a prohibition against the open carry of firearms.³²

²⁴ See 1999 Op. Va. Att’y Gen., *supra* note 21, at 163.

²⁵ See 2002 Op. Va. Att’y Gen., *supra* note 3, at 36.

²⁶ *Va. Beach v. Va. Restaurant Assoc.*, 231 Va. 130, 132, 341 S.E.2d 198, 199 (1986).

²⁷ *Id.* at 133, 341 S.E.2d at 199 (1986); see also *Norfolk v. Tiny House, Inc.*, 222 Va. 414, 424, 281 S.E.2d 836, 842 (1981) (noting that courts are obligated to harmonize statute and ordinance where they can “stand together”); *Nat’l Maritime Union of Am. v. Norfolk*, 202 Va. 672, 674, 119 S.E.2d 307, 311 (1961) (noting that intention of Congress to exclude states from exerting power to legislate in particular areas must be manifest).

²⁸ *Cf.* 1981-1982 Op. Va. Att’y Gen. 112, 113 (concluding that counties have no authority to adopt ordinances regulating sale of handguns except as specifically permitted by statute).

²⁹ See generally § 18.2-283 (2004) (prohibiting carrying of weapons in places of religious worship); § 18.2-283.1 (Supp. 2008) (prohibiting carrying of weapons in courthouses); § 18.2-287.01 (Supp. 2008) (prohibiting carrying of weapons in air carrier airport terminals); § 18.2-308.1 (Supp. 2008) (prohibiting possession of weapons on school property); see also § 18.2-308.1:1 (Supp. 2008) (prohibiting possession of firearms by persons acquitted by reason of insanity); § 18.2-308.1:2 (2004) (restricting persons adjudicated incompetent from purchasing, possessing, and transporting firearms); § 18.2-308.1:3 (Supp. 2008) (prohibiting purchase, possession, and transportation of firearms by persons involuntarily committed); § 18.2-308.2 (Supp. 2008) (restricting convicted felons from purchasing, possessing, and transporting firearms).

³⁰ See § 18.2-287.4 (Supp. 2008) (restricting right to carry certain “loaded” high capacity center-fire weapons and shotguns in public parks and certain public areas).

³¹ See *Grigg v. Commonwealth*, 224 Va. 356, 364, 297 S.E.2d 799, 803 (1982) (explaining maxim “[e]xpressio unius est exclusio alterius”); *Op. Va. Att’y Gen.*: 1997 at 35, 35; 1994 at 9, 11.

³² This opinion is limited in scope and addresses only the open carrying of firearms in state parks. Other instrumentalities of the Commonwealth may have explicit or implicit authority to provide some measure of regulation regarding the open carrying of firearms.

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In light of the General Assembly's explicit statements regarding limitations on carrying and possessing firearms, the Department may not infer such authority from its enabling legislation and prohibit the carrying of firearms not otherwise prohibited within state parks. It is within the sole discretion of the General Assembly to limit the carrying of firearms in parks beyond that restricted by § 18.2-287.4. Additionally, the General Assembly could grant explicit statutory authority to the Department to accomplish such purpose. I find no authority, express or implied, for the Department to prohibit the carrying and possession of firearms within state parks beyond that currently prohibited by law.

Conclusion

Accordingly, it is my opinion that the Department of Conservation and Recreation has only such authority to restrict the open carrying of firearms which is expressly provided by law.³³

Thank you for letting me be of service to you.

Sincerely,

A handwritten signature in cursive script that reads "Robert F. McDonnell".

Robert F. McDonnell

3:1099; 1:941/08-043

³³ See *supra* note 2.