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ADMINISTRATIVE INSPECTIONS AND THE VIRGINIA MAINTENANCE CODE

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The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail, its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force dares not cross the threshold of the ruined tenement.

– William Pitt (1763)

22-1 SCOPE OF CHAPTER

Administrative inspections by local government officials are becoming an increasingly important part of the enforcement of state and local codes and regulations. Because administrative inspections constitute searches of private property, local government officials must be aware of the limitations imposed by the U.S. and Virginia Constitutions when conducting inspections. The first part of this chapter discusses the federal and state requirements for conducting administrative inspections.

The chapter's primary focus is on the enforcement of the Uniform Statewide Building Code (USBC)² and in particular the Virginia Maintenance Code. In an effort to help deal with blighted buildings, more and more localities are electing to enforce the Maintenance Code. Section 22-3 discusses the history, purpose, administrative structure, scope, and enforcement procedures of the USBC and the Maintenance Code. The chapter also discusses the potential liability local governments and code officials can face from Code enforcement and available defenses to liability.

22-2 ADMINISTRATIVE INSPECTIONS

22-2.01 In General

Administrative inspections by local government officials are a necessary part of the enforcement process of state and local regulations. Because these inspections involve a search of private property, local government officials must be aware of the limitations imposed by the U.S. and

¹ The authors thank Walter C. Erwin III, previous author of this chapter and former Lynchburg City Attorney, for the excellent foundation he laid for us, and Greg Lukanuski, Richmond Deputy City Attorney, for reviewing our final draft.

² The Virginia Building and Code Officials Association [website](#) contains a copy of the Uniform Statewide Building Code and other information concerning code enforcement. This is a very helpful website for anyone involved in code enforcement.

Virginia Constitutions, as well as state and local laws regulating inspections, before entering private property to conduct an inspection.

Virginia Code § 19.2-59 provides, in relevant part:

No officer of the law or any other person shall search any place, thing or person, except by virtue of and under a warrant issued by a proper officer. Any officer or other person searching any place, thing or person otherwise than by virtue of and under a search warrant, shall be guilty of malfeasance in office. Any officer or person violating the provisions of this section shall be liable to any person aggrieved thereby in both compensatory and punitive damages.

Nevertheless, it does not appear that counties and municipalities in Virginia can be held liable for the negligent acts and omissions of their inspectors, and local government inspectors should generally be protected by sovereign immunity in the performance of their duties. See section [22-5.02\(a\)\(4\)](#). The Supreme Court of Virginia has concluded that sovereign immunity is a defense to a claim for unlawful search under Va. Code § 19.2-59 because “Code § 19.2-59 concerns a common law tort that has achieved constitutional dimensions, and the statute specifies the familiar tort law remedy of damages.” *Cromartie v. Billings*, 298 Va. 284, 837 S.E.2d 247 (2020). Such a defense, however, will only protect inspectors for acts of simple negligence. *Id.*

22-2.02 Fourth Amendment Limitations

Administrative inspections by officials for such purposes as health, safety, fire, and building inspections, while generally governed by Virginia law, must first meet the requirements of the Fourth Amendment of the U.S. Constitution to be valid. *Michigan v. Tyler*, 436 U.S. 499, 98 S. Ct. 1942 (1978); *See v. Seattle*, 387 U.S. 541, 87 S. Ct. 1737 (1967); *Camara v. Mun. Court of San Francisco*, 387 U.S. 523, 87 S. Ct. 1727 (1967). The Fourth Amendment states that:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Absent consent, exigent circumstances, or the like, the subject of a search must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker in order for an administrative search to be constitutional. *Los Angeles v. Patel*, 576 U.S. 409, 135 S. Ct. 2443 (2015) (statute allowing warrantless inspection of hotel records facially unconstitutional because no opportunity for precompliance review); *Donovan v. Lone Steer, Inc.*, 464 U.S. 408, 104 S. Ct. 769 (1984) (administrative search pursuant to a subpoena constitutional because of opportunity to raise objections in court prior to being subject to penalties); *See v. Seattle*, 387 U.S. 541, 87 S. Ct. 1737 (1967).

22-2.02(a) Property Owner’s and Occupant’s Consent to Inspection

Consent by a property owner or tenant to an inspection by a code official satisfies both the U.S. and state Constitutions. If a code official has obtained consent, it is not an unreasonable inspection unless conducted in an inappropriate manner (e.g., unwarranted destruction of property while searching).

In *Abateco Services Inc. v. Bell*, 23 Va. App. 504, 477 S.E.2d 795 (1996), the Virginia Court of Appeals held that a company cannot unilaterally revoke its contractual waiver of Fourth Amendment rights regarding its records; thus, the government was still entitled to review the records without a warrant. In *Wildauer v. Frederick County*, 993 F.2d 369 (4th Cir. 1993), the Fourth Circuit held that once a property owner consented to the entry of a social worker, he could not deny access to the local sheriff for a non-criminal investigatory search.

In *Commonwealth v. Saunders*, 87 Va. Cir. 414 (City of Norfolk 2014), the circuit court held that a mother could give consent to police officers to search her adult son's bedroom located in her home and for which he paid rent. The court noted that the son's bedroom door did not have a lock, adult children can pitch in for rent, and mothers frequently have control over the premises where their children reside.

In *Georgia v. Randolph*, 547 U.S. 103, 126 S. Ct. 1515 (2006), a husband and wife were living in a single-family residence. Both were physically present at the home. The wife gave law enforcement officers permission to search the residence for drugs. The husband objected to the search and refused to give permission. Law enforcement officers searched the residence based on the wife's permission and found evidence of drug use by the husband. The husband was charged with possession of drugs and moved to suppress the evidence on the grounds that the search was illegal. The United States Supreme Court ruled that because both property owners had common authority over the property and were physically present, the consent given by the wife was not valid in the face of the husband's refusal to consent to the search. In the previous case of *United States v. Matlock*, 415 U.S. 164, 94 S. Ct. 988 (1974), the Supreme Court held that a search that was conducted with the consent of one co-occupant in the other's absence was valid.

In *Fernandez v. California*, 571 U.S. 292, 134 S. Ct. 1126 (2014), the Supreme Court ruled that police officers may enter and search a house without a warrant in non-emergency situations as long as one occupant of the home consents, even if another occupant has previously objected to the search. In this case a man and his girlfriend were living together in an apartment. The man was arrested for robbery and taken to the police station; at the time of his arrest, he refused to allow police officers to search the apartment. After the arrest, police officers returned to the apartment and searched it with the consent of the girlfriend and found a shotgun and gang-related material that belonged to the man. In upholding the search, the Court seemed to limit its decision in *Georgia v. Randolph* that consent to search a dwelling is invalid in the presence of an objecting resident, holding that under the "co-occupant consent rule," when the objecting co-occupant is legitimately removed from the home (such as by a lawful arrest), any remaining occupant can consent to a search of the home, even though the absent occupant previously objected to the search.

In *Florida v. Jardines*, 569 U.S. 1, 133 S. Ct. 1409 (2013), the Supreme Court noted that the curtilage (the area immediately surrounding a home) is just as protected by the Fourth Amendment as the home itself, so a government official may not enter that area without a warrant except to "knock and talk" as any private citizen would do. Construing *Jardines*, the Fourth Circuit found that a tax assessor who ignored "no trespassing" signs, opened a door to leave a pamphlet, and searched the curtilage had potentially violated the homeowner's Fourth Amendment rights. *Covey v. Assessor of Ohio Cnty.*, 777 F.3d 186 (4th Cir. 2015).

In *Widgren v. Maple Grove Township*, 429 F.3d 575 (6th Cir. 2005), a property owner who owned a twenty-acre lot in a remote rural setting began construction of a house in the middle of his property without obtaining a building permit. The area immediately surrounding the house was cleared and routinely mowed, and a clear line marked the perimeter of the mowed area. "No Trespassing" signs were posted at the entrance to the driveway. Without the consent of the owners, the local zoning administrator and tax assessor entered the property a total of three times to confirm the zoning violation, to post a civil infraction warning on the front door of the house, and to conduct a tax assessment through observation of the exterior of the house. When the owners learned of the three visits, they filed suit alleging various violations of federal and state laws, including a claim that the local officials had conducted an illegal search. The court dismissed the lawsuit, finding that the intrusions did not rise to the level of a Fourth Amendment illegal search. The court noted that during the first visit, no illegal search occurred because the local officials did not go into the curtilage or the area immediately surrounding the house, but limited their access and observations to the

open fields. During the second visit, the officials simply posted a civil infraction notice on the front door; this was not a search because the officials were not seeking to discover incriminating information. They were simply posting a notice of a violation that had been observed from the open fields during the first visit. During the third visit, the tax assessor did not go into or look into the house, but did go onto the curtilage and observed and photographed the exterior of the house for the purpose of making a tax assessment. The court concluded that the assessor's actions did not constitute an illegal search because the purpose of the intrusion was not a criminal investigation but a tax assessment, and nothing was seized.

However, in *Jacob v. Township of West Bloomfield*, 531 F.3d 385 (6th Cir. 2008), the same court held that a land ordinance enforcement official violated a property owner's rights by conducting warrantless inspections of the yard adjacent to the property owner's home, the "curtilage." The land ordinance enforcement official was inspecting the property to determine if the owner was storing inoperable motor vehicles and junk in violation of a local land-use ordinance. The court held that such searches exposed the property owner to the possibility of criminal sanctions and were carried out without the owner's consent or an inspection warrant, and therefore violated the owner's Fourth Amendment rights against unreasonable searches.

In *Naperville Smart Meter Awareness v. City of Naperville*, 900 F.3d 521 (7th Cir. 2018), the court held that the city's use of a smart meter to record a property owner's electric usage at fifteen-minute intervals constituted a search, albeit a reasonable search. The message from the court appears to be that if a locality is going to implement a smart meter program, it needs to include an opt-out provision. If a property owner fails to opt out, the property owner has consented to the reading of their electric meter and cannot raise a Fourth Amendment claim that the reading of the meter was an unreasonable search.

Even if a code official conducts an inspection without the consent of the owner or occupant and without an inspection warrant, it is possible the owner or occupant may not have standing to object to the inspection. Matthew Brady was suspected of the deaths of an elderly couple. He was living with his estranged wife when, without a warrant, the police searched the wife's residence and found evidence linking Brady to the deaths. Brady moved to suppress the evidence, and the court ruled he did not have standing to challenge the search because he was under a court order not to have any contact with his wife. In view of the order, the court held that Brady had no reasonable expectation of privacy at his estranged wife's house. *Commonwealth v. Brady*, No. CR11000465-01 (City of Colonial Heights Cir. Ct. Oct. 3, 2012). Other courts have refused to hear objections to searches when defendants have been expressly barred from the location in question. This is the first time a Virginia court dealt with a protective order that did not include a specific address. The court reasoned that Brady had no right of privacy in a residence where he had no legal right to be. An Ohio federal court rendered a similar decision in the case of *United States v. Dye*, No. 1:10CR221 (N.D. Ohio Apr. 27, 2011), *aff'd on other grounds*, No. 11-3934 (6th Cir. Sept. 3, 2013).

22-2.02(b) Consent by Tenants

Make sure the person consenting to the search has the authority to give consent; for example, a tenant may be able to give permission for an inspection of the portions of a building the tenant is leasing. However, a guest in a residential unit or a child probably cannot give consent to a search.

Landlords will often argue that even if a tenant consents to an inspection, they have the right to prohibit a code official from conducting such an inspection. However, several landlord-tenant cases recognize the right of tenants to invite guests upon the premises over the objections of landlords. See, e.g., *L.D.L. v. State*, 569 So. 2d 1310 (Fla. Dist. Ct. App. 1990) (landlord generally does not have right to deny entry to persons a tenant invited to come onto his property, including the common areas of the premises); *In re Jason Allen D.*, 733 A.2d 351 (Md. Ct. Spec. App. 1999) (criminal trespass defendant had bona fide claim of

right to enter housing complex at the invitation of a resident, despite the housing authority's attempt to ban him from the premises; reversing trespass conviction); *City of Columbus v. Parks*, No. 10AP-574 (Ohio Ct. App. 10th Dist. May 5, 2011) ("Prior warnings by an owner of rental property, or the owner's agent, do not preclude a finding of privilege [in the context of a charge of criminal trespass, for] Ohio courts have held that an individual invited onto rental property by a tenant cannot be guilty of trespassing on the owner's premises even if the owner expressly instructed the individual not to come onto the property.") (citing *City of Kent v. Hermann*, No. 95-P-0042 (Ohio Ct. App. Mar. 8, 1996) (unpubl.)); *State v. Hites*, No. 1-2000-22 (Ohio Ct. App. Aug. 8, 2000); *State v. Herder*, 415 N.E.2d 1000 (Ohio Ct. App. 1979).

In *In re Jason Allen D.*, *supra*, the Court of Special Appeals of Maryland discussed and followed the reasoning of other courts that had addressed the subject:

In the absence of any restriction in the agreement between the landlord and his tenant, the tenant, when in possession of the demised premises, has the right to invite or permit such persons as his business interests or pleasure may suggest to come upon the premises so in his possession, for any lawful purpose, and the landlord has no right to prohibit such persons from coming on the demised premises. One who thus comes upon the premises upon the invitation of the tenant, although expressly forbidden to do so by the landlord, is not guilty of criminal trespass.

Id. (emphasis omitted) (quoting *L.D.L. v. State*, 569 So. 2d 1310 (Fla. Dist. Ct. App. 1990)).

In *Azam v. City of Columbia Heights*, 865 F.3d 980 (8th Cir. 2017), a landlord who owned several multifamily buildings brought a § 1983 action against the city, alleging that the inspection of the common areas of his buildings by housing-code enforcement officials violated the Fourth Amendment. The district court held that Azam did not have a reasonable expectation of privacy in the rental properties' common areas, and the inspection of the common areas did not intrude on a constitutionally protected area. There was no reasonable expectation of privacy in the common areas of the rental properties because the common areas were accessible and available to the buildings' residents, the residents' guests, the owner's agents, and others legally passing through the common areas with express or implied consent such as mail carriers.

22-2.02(c) Judicial Warrant for Search or Inspection of Property

To be valid, a search warrant must be based on probable cause and must describe the place to be searched and the items to be seized. "Probable cause under the Fourth Amendment exists where the facts and circumstances within the [official's] knowledge, and of which he has reasonably trustworthy information, are sufficient unto themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed." *Berger v. New York*, 388 U.S. 41, 87 S. Ct. 1873 (1967). The case law has also indicated that the general purpose of the search and the appropriate limits of the search should be stated in the warrant. *Camara v. Mun. Court of San Francisco*, 387 U.S. 523, 87 S. Ct. 1727 (1967); *Gilluly v. Commonwealth*, 221 Va. 38, 267 S.E.2d 105 (1980).

Although an administrative inspection requires a warrant, just as a criminal search would, the courts have been more lenient in issuing administrative inspection warrants. Obtaining an administrative inspection warrant is less burdensome for the government because the standard of probable cause the government has to meet is lower than the standard used for criminal search warrants. For a criminal search warrant, there must be enough evidence to convince a judicial officer that an offense or violation is taking or has taken place. *Berger, supra*; *Saunders v. Commonwealth*, 218 Va. 294, 237 S.E.2d 150 (1977).

While administrative inspection warrants may use evidence of a specific violation to meet the standard of probable cause for a warrant, they may also be issued based on a showing that “reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular dwelling.” *Camara v. Mun. Court of San Francisco*, 387 U.S. 523, 87 S. Ct. 1727 (1967); see Va. Code § 19.2-394; *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 98 S. Ct. 1816 (1978). The Court in *Camara* gave examples of what factors administrative standards may be based on, and these included the passage of time, the nature of the building, or the condition of the entire area. Based on these factors, municipalities have been able to conduct routine housing inspections for health and safety violations, fire inspections of private and public buildings, OSHA inspections for industries, and other administrative inspections while still complying with the Fourth Amendment. The Supreme Court stressed in *Camara* that reasonableness is the ultimate controlling standard in the decision to search private property. *Id.* The warrant procedure is the guarantee that a search will be reasonable.

Note: It is not necessary to have permission or an administrative search warrant for conditions that are in “plain view,” i.e., a code official may be able to observe Building Code violations from public rights of way or from adjacent property, as long as the code official has permission from the adjacent property owner to be on the property.

22-2.02(d) Warrantless Inspection Because of Emergency Situation or Closely Regulated Industry

The courts have upheld warrantless searches when they involved either emergency situations or closely regulated industries. The Supreme Court recognizes that there are emergency situations where there is not time to obtain a warrant, such as the need to quarantine for health purposes or to seize unwholesome food, and these types of searches have been held not to violate the Fourth Amendment. *Camara v. Mun. Court of San Francisco*, 387 U.S. 523, 87 S. Ct. 1727 (1967); see *Michigan v. Tyler*, 436 U.S. 499, 98 S. Ct. 1942 (1978); *N. Am. Cold Storage Co. v. City of Chicago*, 211 U.S. 306, 29 S. Ct. 101 (1908); *Compagnie Francaise v. La. Bd. of Health*, 186 U.S. 380, 22 S. Ct. 811 (1902).

The Court has also not required search warrants for inspections in closely regulated industries³ because it deems the entrepreneur who has entered these businesses to have voluntarily subjected himself to regulations and to have given up any expectation of privacy. *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 98 S. Ct. 1816 (1978); see *New York v. Burger*, 482 U.S. 691, 107 S. Ct. 2636 (1987); *United States v. Biswell*, 406 U.S. 311, 92 S. Ct. 1593 (1972); *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 90 S. Ct. 774 (1970); see also *LeSueur-Richmond Slate Corp. v. Fehrer*, 666 F.3d 261 (4th Cir. 2012) (warrantless inspection of mining facilities constitutional despite little statutory limitation on the timing and scope; however, officials conducting warrantless inspections pursuant to the statute may still violate the Fourth Amendment if the inspections were a pretext for harassment or other improper conduct); *Solem v. Commonwealth*, No. 1618-01-02 (Va. Ct. App. Oct. 15, 2002) (unpubl.) (enterprises that supply dairy products for human consumption (including homemade goat cheese) constitute a “pervasively regulated industry” and are constitutionally subject to warrantless searches). In *Reeves Bros., Inc. v. EPA*, 956 F. Supp. 676 (W.D. Va. 1996), the district court held that a warrantless search by the Environmental Protection Agency of property for hazardous substances was a clear violation of the Fourth Amendment.

A warrantless inspection in the context of a closely regulated business must satisfy three criteria: (1) a substantial government interest must inform the regulatory scheme

³ In *Los Angeles v. Patel*, 576 U.S. 409, 135 S. Ct. 2443 (2015), the United States Supreme Court noted that “only” four industries in forty-five years have been identified as closely regulated: liquor sales, firearms dealing, mining, and running an automobile junkyard. The Court found that the operation of hotels was not closely regulated as their operation did not pose a clear and significant risk to public welfare. The Court also stated that the closely regulated exception should be “narrow.”

pursuant to which the inspection is made; (2) the warrantless inspections must be necessary to further the regulatory scheme; and (3) the statute's inspection program, in terms of the certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant. *New York v. Burger*, 482 U.S. 691, 107 S. Ct. 2636 (1987).

Construing *Burger*, the Virginia Court of Appeals held in *Osburn v. Virginia Dep't of Alcoholic Bev. Control*, 67 Va. App. 1, 792 S.E.2d 276 (2016), that Virginia's ABC inspection statute, Va. Code § 4.1-402(F), which states that "free access" must be allowed to ABC agents, does not mean that ABC agents have the "right to raid with impunity the records and businesses of either applicants or licensees." Licensees and license applicants must consent to a warrantless search in order to meet the third prong of the *Burger* test. The Supreme Court vacated the court of appeals opinion, avoiding the constitutional issue by holding that Va. Code § 4.1-402(F) does not apply to license applicants. *Osburn v. Virginia Dep't of Alcoholic Bev. Control*, 295 Va. 10, 810 S.E.2d 262 (2018).

22-2.02(e) Plain View

Under the Fourth Amendment and the Virginia Constitution, a public official's observation of a condition that is in plain view does not constitute a search as long as the official has a lawful right to be at the location from which the condition is plainly viewed. For example, if a public official is standing on a public sidewalk, where he or she has a lawful right to be, and observes that the front porch of a house is structurally unsound and in danger of collapse, such observation does not constitute a search. A person has no expectation of privacy in a condition that is exposed to plain view.

In *L.R. Willson & Sons Inc. v. Occupational Safety & Health Review Commission*, 134 F.3d 1235 (4th Cir. 1998), an inspector for the Occupational Safety and Health Administration (OSHA) videotaped a construction site from the roof of a hotel across the street to prove that construction workers were not wearing "fall protective devices" as required by OSHA regulations. The court held that the inspector did not conduct an illegal search in violation of the Fourth Amendment. The OSHA inspector had permission from the hotel to be on the roof, the construction company's work activities were easily observable from the roof, and the inspector's observations and videotape recording were not an unreasonable intrusion into the company's "private space."

In *1064 Old River Road, Inc. v. City of Cleveland*, 137 F. App'x 760 (6th Cir. 2005), a federal court held that the inspection of dance clubs for building code violations, fire code violations, and under-age drinking were not Fourth Amendment "searches" when they took place while the clubs were open to the public for business and inspectors did not go beyond the areas where club customers could go.

22-2.03 Virginia Inspection Law

22-2.03(a) Constitutional Requirements

The Virginia Constitution deals with the issue of searches and warrants in its Bill of Rights, found in Article 1, § 10. It states:

That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.

The Virginia Constitution requires probable cause before a search warrant will be issued but does not make a distinction between reasonable and unreasonable searches. The U.S. Constitution proscribes unreasonable searches but leaves room for reasonable searches based on a lesser standard of probable cause. It is unclear whether general administrative inspections, which are not based on evidence of a specific violation, are valid under the Virginia Constitution.

The Constitution appears to permit searches only where a violation is suspected, and *Camara*-type searches based on “reasonable legislative or administrative standards” would not meet this requirement. While the issue of the validity of a general administrative inspection warrant under the Virginia Constitution was raised in pleadings before the Virginia Supreme Court in *Mosher Steel-Va. v. Teig*, 229 Va. 95, 327 S.E.2d 87 (1985), the parties did not brief or argue the issue, and the Court made its decision on other grounds.

In *Bennett v. Commonwealth*, 212 Va. 863, 188 S.E.2d 215 (1972), the Virginia Supreme Court hinted that warrantless searches may be legal in emergency situations. However, such inspections are risky and should be considered only as a last resort in a true emergency. Keep in mind that if a public official conducts an improper inspection, any evidence of code violations may be declared inadmissible in a subsequent court proceeding.

22-2.03(b) Statutory Requirements

For a number of years, the Code of Virginia provided for search warrants in criminal investigations based on probable cause, but it did not contain a general statute outlining the procedures required for an administrative inspection. See Va. Code § 19.2-52. Because the Code did not address administrative inspections directly, officials were referred for guidance to Va. Code §§ 19.2-393 through 19.2-397, which provide for the issuance of inspection warrants in cases involving the manufacture or emission of toxic substances, and the principles discussed in *Mosher Steel-Virginia v. Teig*, 229 Va. 95, 327 S.E.2d 87 (1985). See section 22-2.03(c); 1999 Op. Va. Att’y Gen. 90. The Code of Virginia was eventually amended to include procedures for administrative inspections. See Va. Code § 36-105(C)(3) and USBC, Part III, §§ 104.1 (13 VAC 5-63-480(A)), 105.6 (13 VAC 5-63-485), for authority to obtain Building Code inspection warrants, and Va. Code § 15.2-2286(A)(15), for authority to obtain zoning inspection warrants.

Various Virginia statutes still directly reference the warrant procedures laid out in the toxic substances statute in Va. Code § 19.2-394. Primarily, these statutes address regulation of health issues and require inspections to ensure that any type of waste or condition present in a working or living environment does not endanger the public. See, e.g., Va. Code § 10.1-1456 (Virginia Waste Management Act, providing for inspections for solid, hazardous, or radioactive waste); Va. Code § 32.1-25 (providing for inspections of property by the Health Department); Va. Code § 35.1-5 (health inspections of hotels, restaurants, and camps).

In other areas of the Code of Virginia, administrative inspections are allowed by statute, but can be vague as to how these inspections are to be conducted or if an administrative warrant similar to those set out in § 19.2-394 is required. See, e.g., Va. Code § 40.1-51.10 (providing for boiler and pressure vessel inspections); Va. Code § 62.1-44.15:37.1 (inspection of land-disturbing activities associated with the construction of large natural gas pipelines); Va. Code § 62.1-44.15:60 (warrantless inspections allowed to enforce erosion and sediment control law “at reasonable times and under reasonable circumstances”).

22-2.03(c) Administrative Inspection Case Law

Virginia case law concerning the requirements for administrative search warrants is limited and tends to follow the guidelines set out for administrative inspections by the U.S. Supreme Court in *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 87 S. Ct. 1727 (1967). See, e.g., *Hogge v. Hedrick*, 391 F. Supp. 91 (E.D. Va. 1974) (holding that warrantless administrative inspections of massage parlors were intrusive and did not qualify as an emergency; thus, a warrant based on probable cause was required); *Gilluly v. Commonwealth*, 221 Va. 38, 267 S.E.2d 105 (1980) (warrant must describe the place to be searched and items to be seized, and recite the offense in relation to which the search is to be made). The most prominent Virginia case on this issue suggests that the Virginia Supreme Court may require stricter standards for the demonstration of probable cause by government officials seeking inspection warrants than the standards required by federal law. See *Mosher Steel-Va. v. Teig*, 229 Va. 95, 327 S.E.2d 87 (1985).

Mosher Steel-Virginia involved a steel fabrication plant (Mosher) that was subject to a safety inspection by the Virginia Department of Labor and Industry, which is charged with enforcing the state's occupational and health laws. Mosher refused to permit the inspection without a valid search warrant. After a warrant was obtained, Mosher again refused the inspection, asserting that the warrant was illegal because it was not based on reasonable legislative or administrative standards. Mosher challenged the underlying plan for general inspection of the industry, urging that it was not neutral and did not meet the requirement of having reasonable, objective, and fair standards. *Id.*; cf. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 98 S. Ct. 1816 (1978). Mosher requested a pre-inspection declaratory judgment to determine the constitutional validity of the inspection plan. The lower court held for the state commissioner, but on appeal the Virginia Supreme Court found for Mosher. The Court found that Mosher was entitled to a pre-inspection declaratory judgment to determine if the affidavits furnished probable cause for an inspection based on reasonable legislative or administrative standards. If the inspection was not based on specific evidence of an existing violation, the warrant application was required to provide factual allegations that the inspection program was based on reasonable standards and that the standards were being applied to the employer in a neutral and nondiscriminatory manner. The Court required that there be a description of the procedure by which the employer was selected for inspection, providing the specific facts underlying each step of the selection process. The Court also stated that the affidavit must recite the employer's own inspection history and the status of general scheduled inspections of all other employers subject to inspection in that region.

Mosher created a greater burden on the government official conducting a general inspection program because it required the inspector to detail each step of the selection process. Thus, it appears that general inspection programs with legitimate purposes such as ensuring compliance with fire or health regulations must justify the necessity for each building inspection that takes place under a general plan. The affidavit must state the owner's inspection history as well as its relationship with similar buildings being inspected in the area. *Mosher* involved only the specific area of OSHA administrative inspections, and the Virginia courts may not extend this holding to inspections other than OSHA regulatory inspections. Due to the similarities in the nature of routine OSHA inspection programs and building maintenance and fire inspection programs, inspectors should be aware that affidavits for warrants may have to show not only that an owner is a member of a class of owners to be inspected, but also why that individual's inspection history justifies an inspection. 1986-87 Op. Va. Att'y Gen. 221.

In *Logie v. Town of Front Royal*, 58 Va. Cir. 527 (Warren Cnty. 2002), the circuit court held that property maintenance inspections conducted as part of a routine residential rental property inspection program were uniformly applied in an objective, neutral, and nondiscriminatory manner and were constitutional.

22-2.03(d) Specific Types of Inspections

The statutes that are a major concern for Virginia counties and municipalities are the statutes governing amusement park rides and building and fire inspections. Va. Code §§ 36-97 through 36-107 (providing for such inspections); see Va. Code §§ 27-34.4, 27-94 through 27-101 (providing for fire inspections of buildings under construction and occupied buildings open to the public for commercial or residential use). Building and fire inspections differ from health or environmental inspections covered by the Code of Virginia because the General Assembly has decided to regulate these areas under separate uniform statewide codes. In each instance, the technical provisions of the USBC were based on the International Building Code (IBC) and the International Property Maintenance Code (IPMC), and the fire code was based on the International Fire Code.

22-2.03(d)(1) Amusement Parks Inspections

The Board of Housing and Community Development (the Board) promulgates the regulations pertaining to the construction, maintenance, operation, and inspection of amusement devices.

See 13 VAC 5-31-10 et seq., [Virginia Amusement Device Regulations](#). Amusement device means (i) a device or structure open to the public by which persons are conveyed or moved in an unusual manner for diversion, and (ii) passenger tramways. In response to the decision in *Vuich v. Great Eastern Resort Corp.*, 281 Va. 240, 704 S.E.2d 377 (2011) (snow tube ride is an amusement device), the statute was amended to expressly exclude snow tubing parks and rides, ski terrain parks, ski slopes, and ski trails.

The regulations include the following inspection requirements:

1. the issuance of certificates of inspection prior to the operation of an amusement device;
2. maintenance inspections of existing amusement devices;
3. immediate investigative inspections following accidents involving an amusement device that result in serious injury or death; and
4. a timely reconsideration of the decision of the local building department when an amusement device owner or operator is aggrieved by such a decision.

Inspections required by Va. Code § 36-98.3 must be performed by persons certified by the Board pursuant to § 36-137(6) as competent to inspect amusement devices. The provisions of § 36-105 notwithstanding, the local governing body is responsible for enforcing the regulations promulgated by the Board for existing amusement devices. Nothing prohibits the local governing body from authorizing inspections to be performed by persons who are not employees of the local governing body, provided those inspectors are certified by the Board as provided herein. The Board is authorized to conduct or cause to be conducted any required inspection, provided that the person performing the inspection on behalf of the Board is certified.

To the extent that they are not superseded by the provisions of Va. Code § 36-98.3 and the regulations promulgated thereunder, the USBBC applies to amusement devices.

22-2.03(d)(2) Building Code Inspections⁴

22-2.03(d)(2)(i) New Construction

Code officials are required under the USBBC to conduct a series of inspections during the construction of a building. Upon application for a permit to construct, enlarge, alter, repair, remove, demolish, or change the use of a site, the code official may require a preliminary inspection. After the building permit is issued, there are several mandatory minimum inspections at various stages of the construction of a building and covering areas such as the structural framing, electrical and plumbing work, insulation materials, and other necessities. When an inspection is required, the permit holder notifies the building inspector, and the building inspector responds within a reasonable time. See 13 VAC 5-31-75.

22-2.03(d)(2)(ii) Property Maintenance

The main tool for enforcing the [Virginia Property Maintenance Code](#) is the inspection of buildings and structures covered by the code. If a locality chooses to enforce the code, the Virginia USBBC, Part III, § 104.5.3 (13 VAC 5-63-480(P)), gives the code official the right to enter and inspect structures and premises at reasonable times to ensure compliance with the code. See also 1986-87 Op. Va. Att’y Gen. 221. A town’s property maintenance inspection program for residential rental properties was upheld as constitutional in *Logie v. Town of Front Royal*, 58 Va. Cir. 527 (Warren Cnty. 2002).

When conducting inspections: (i) the code official is authorized to engage such expert opinion as deemed necessary to report upon unusual, detailed, or complex technical issues,

⁴ For a discussion of Building Code enforcement issues other than inspections, see section [22-3](#).

USBC, Part III, § 104.5.3 (13 VAC 5-63-480(P)); (ii) during an inspection if the code official observes an apparent or actual violation of another law, ordinance, or code not within the code official's authority to enforce, the code official shall report the findings to the official having jurisdiction over the violation, USBC, Part III, § 104.5.3.1 (13 VAC 5-63-480(Q)); (iii) the code official may adopt a written policy establishing minimum acceptable qualifications for third party inspections, and, after adopting such a policy, the code official may accept reports of inspections or tests from individuals or inspection agencies approved in accordance with the code official's written policy, USBC, Part III, §§ 104.5.3.2 (13 VAC 5-63-480(R)), 104.5.3.3 (13 VAC 5-63-480(S)); and (iv) in determining third party qualifications to conduct inspections and tests, the code official may consider such items as DHCD inspector certification, other state or national certifications, state professional registrations, related experience, education, and any other factors that demonstrate competency and reliability, USBC, Part III, § 104.5.3.4 (13 VAC 5-63-480(T)). Code officials have the option of conducting maintenance inspections for all buildings to ensure continued compliance with the USBC, except for those structures that are exempt from the provisions of the USBC under Parts I and III, § 102.3 (13 VAC 5-63-460(C)) of the USBC. In addition, code officials are obligated to inspect all residential rental dwellings reported by a tenant as unsafe. Va. Code § 36-105(C)(2). Localities must also enforce the provisions of the Maintenance Code dealing with the inspection of elevators, except for those in single and two-family homes and townhouses. Va. Code §§ 36-105(D), 36-105.01.

Administrative inspection warrants may be issued for the inspection of any unsafe building or structure. Virginia Code § 36-105(C)(3) provides that if a code official

receives a complaint that a violation of the Building Code exists that is an immediate and imminent threat to the health or safety of the owner, tenant, or occupants of any building or structure, or the owner, occupant, or tenant of any nearby building or structure, and the owner, occupant, or tenant of the building or structure that is the subject of the complaint has refused to allow the local building official or his agent to have access to the subject building or structure, the local building official or his agent may make an affidavit under oath before a magistrate or a court of competent jurisdiction and request that the magistrate or court grant the local building official or his agent an inspection warrant to enable the building official or his agent to enter the subject building or structure for the purpose of determining whether violations of the Building Code exist. After issuing a warrant under this section, the magistrate or judge shall file the affidavit in the manner prescribed by § 19.2-54. After executing the warrant, the local building official or his agents shall return the warrant to the clerk of the circuit court of the city or county wherein the inspection was made. The local building official or his agent shall make a reasonable effort to obtain consent from the owner, occupant, or tenant of the subject building or structure prior to seeking the issuance of an inspection warrant under this section.

See also USBC, Part III, §§ 104.1 (13 VAC 5-63-480(G)), 105.6 (13 VAC 5-63-485) for additional authority to obtain inspection warrants.

The Virginia Supreme Court has developed forms for an "Affidavit For Building Inspection Warrant" and a "Building Inspection Warrant." You should be able to find copies of these forms on your local general district court's website in the "Court Forms" file or by requesting them from your local general district court clerk's office.

To obtain an inspection warrant, the code official appears before a circuit court judge or magistrate and fills out an affidavit for an administrative inspection warrant. The application for the warrant can be based upon either of the following conditions:

1. Suspected Violations. A code official can obtain an administrative inspection warrant if the official can present some evidence of an existing violation of the Maintenance Code. This is not the same standard of probable cause required to obtain a criminal search warrant, but a reasonable belief (i.e., could be based on a statement from an occupant, personal observations of the code official, etc.) that a violation exists. Moreover, in addition to the factual basis justifying the warrant, the application for the administrative inspection warrant should contain a statement that the code official has been denied access for a consensual inspection.
2. Routine Inspections. An administrative inspection warrant can also be obtained if the code official has been denied access to the property as part of a general inspection program. In such a situation, the application for the warrant should state the existence of a general inspection program; that the search is based on reasonable standards that are being applied in a neutral and nondiscriminatory manner; how the building was selected for inspection; and that the code official was denied consensual access to the property. Once the search has been completed, the inspection warrant must be returned to the magistrate or court showing that the warrant was executed.

The Attorney General opined that a computer model designed to use specific risk factors to identify buildings having the highest degree of risk of deterioration might provide a sufficient basis for an administrative inspection warrant. However, it is up to the local judge to determine whether a computer model is a sufficient basis for an administrative inspection warrant. See 1999 Op. Va. Att’y Gen. 90. The court in *Logie v. Town of Front Royal*, 58 Va. Cir. 527 (Warren Cnty. 2002), upheld a periodic inspection program triggered by a change in occupancy occurring two years after the last certificate of compliance was issued.

In *Nelson v. City of Rochester*, 90 A.D.3d 1480, 935 N.Y.S.2d 748 (N.Y. App. Div. 2011), landlords and tenants challenged the city ordinance that allowed inspectors to obtain inspection warrants to search rental properties for housing code violations even though the inspectors lacked individualized suspicion to believe housing code violations existed in the properties that were being inspected. The petitioners alleged: (1) the Fourth Amendment prohibits the issuance of general inspection warrants to search occupied private dwellings, without individualized suspicion of wrongdoing, for the purpose of seeking evidence of zoning, housing code, and other administrative violations that are punishable by fines and/or incarceration; (2) the Fourth Amendment’s requirement that warrants particularly describe the things to be seized applies to an administrative search warrant authorizing the search of an occupied private dwelling; and (3) a local law that authorizes the periodic issuance of general warrants against rented homes, without any factual showing of wrongdoing, offends the Equal Protection Clause. The New York State Appellate Court upheld the issuance of the inspection warrants, the petitioners appealed to the U.S. Supreme Court, and the Supreme Court denied the petition for a writ of certiorari.

In *Mimics, Inc. v. Village of Angel Fire*, 394 F.3d 836 (10th Cir. 2005), the Tenth Circuit Court of Appeals held that a code official violated lessees’ constitutional rights by conducting warrantless and nonconsensual inspections of the lessees’ business premises. The code official made an initial inspection of property without the lessees’ permission, the permission of the property owner, or an administrative inspection warrant. When the lessees discovered the code official on the property, they objected to his presence, asked him to leave, and told him not to come back onto the property. The code official replied that he “could come into any business anytime I want to” and went onto the property on another occasion. The court held that the code official’s inspection was unreasonable, was not authorized by state law or local ordinance, and was a violation of the lessees’ Fourth Amendment rights.

Code officials are required to carry proper credentials when inspecting structures in the performance of their duties under the USBC. Citizens are entitled to see proper credentials before consenting to an inspection. USBC, Part I, § 113.2 (13 VAC 5-63-130(E)), Part III, § 104.5.3 (13 VAC 5-63-480(P)).

22-2.03(d)(2)(iii) Inspection of Rental Properties

Virginia Code § 36-105.1:1 and USBC, Part III, § 103.4 (13 VAC 5-63-470(G)) authorize localities to adopt a residential rental dwelling unit inspection ordinance after notice and a hearing. The locality must designate an area as a rental inspection district based upon findings that: (i) the units within that district are blighted, deteriorating, or in danger of deterioration; (ii) the living conditions in the area are unsafe, indecent, or unsanitary; or (iii) there is a need to protect the health, safety, and welfare of occupants of dwelling units in the district. Residential rental dwelling units outside the designated district may also be subject to the inspection ordinance if similar, but stricter, individualized findings are made.

Upon establishment of the rental inspection district, the locality must notify the owners or managing agents of the affected residential rental dwelling units of their rights and obligations under the ordinance.

After the adoption of the ordinance, the building department may inspect any dwelling units in the district to determine if they are in fact rental units. Periodic inspections of residential rental dwelling units inside the district, unless otherwise exempt, may be conducted no more than once a calendar year. Follow-up inspections of properties found to be in violation of a Building Code provision affecting the safe, decent, and sanitary living conditions of tenants ("tenant provision") may be conducted as often as the building department deems necessary until the buildings are in compliance. In *Jones v. Wildgen*, No. 06-3384 (10th Cir. July 27, 2007) (unpubl.), the federal court of appeals upheld the routine, periodic inspection of rental properties, finding that such inspections did not violate the tenants' Fourth Amendment rights.

If a multi-family development has more than ten dwelling units, only a sample of between 2 percent and 10 percent of units may be inspected. If a tenant provision violation is found, as many units as necessary to enforce the Code may be inspected.

Residential rental dwelling units must be made exempt from inspections for a minimum of four years if the initial or a periodic inspection reveals no tenant provision violations. If the unit is sold, however, a periodic inspection may be conducted after the sale. Units issued a certificate of occupancy are exempt for a minimum of four years after its issuance. Any exemption may be revoked if a residential rental dwelling unit becomes in violation of the Building Code during the exemption period.

A locality may exempt residential rental units that are managed by professional property managers.

A locality may establish a fee schedule for such inspections. Penalties for violations are the same as those provided in the Building Code.

In the event a code official is denied access to a rental property covered by such an inspection program, the code official should be able to obtain an administrative inspection warrant to gain access to the rental property. It has been suggested that when obtaining an administrative inspection warrant to inspect a residential rental property, a code official must meet the probable cause standard because the code official is inspecting someone's residence. However, a number of cases have held that inspections that are being done to enforce a regulatory scheme do not have to meet the probable cause standard. As the Seventh Circuit Court of Appeals explained in *Platteville Area Apartment Ass'n v. City of Platteville*, 179 F.3d 574 (7th Cir. 1999):

It is difficult to enforce such a code without occasional inspections; the tenants cannot be counted upon to report violations, because they may be getting a rental discount to overlook the violations, or, as we noted earlier, may be afraid of retaliation by the landlord or unaware of what conditions violate the code. And it is impossible to rely on a system of inspections to enforce the code without making them compulsory, since violators will refuse to consent to being inspected. In these circumstances the Fourth Amendment's requirement that all search warrants be supported by "probable cause" can be satisfied by demonstrating the reasonableness of the regulatory package that includes compulsory inspections.

See also *Ashcroft v. al-Kidd*, 563 U.S. 731, 131 S. Ct. 2074 (2011), which held that a judicial warrant and traditional probable cause are not needed where the search or seizure is in execution of an administrative warrant authorizing, for example, an inspection of fire-damaged premises to determine the cause, as allowed in *Michigan v. Clifford*, 464 U.S. 287, 104 S. Ct. 641 (1984) (plurality opinion), or an inspection of residential premises to assure compliance with a housing code, as allowed in *Camara v. Municipal Court of City of San Francisco*, 387 U.S. 523, 87 S. Ct. 1727 (1967).

A locality does not have the authority to create one or more locality-wide rental inspection districts, and a locality must limit the boundaries of its rental inspection districts to such areas of the locality as meet the criteria set out in Va. Code § 36-105.1:1 and USBC, Part III, § 103.4 (13 VAC 5-63-470(G)). A circuit court did uphold a local ordinance that created two rental inspection districts that encompassed all of Fairfax City. The ordinance was adopted on September 23, 2008, pursuant to the authority granted by Va. Code § 36-105.1:1(B). In 2009, the General Assembly amended Va. Code § 36-105.1:1 to prohibit a locality from establishing one or more rental districts that encompass an entire locality. But the 2009 amendments contained a clause providing that nothing in the statute should be construed as invalidating a rental inspection district established by a locality on or before January 2, 2009. The circuit court held that the 2009 amendments were not retroactive and that the creation of two rental inspection districts that encompassed the entire locality was within the express powers granted under the enabling statute. *MacDonald v. City of Fairfax*, 80 Va. Cir. 567 (Fairfax Cnty. 2010).

22-2.03(d)(3) Fire Code Inspections

The [Virginia Statewide Fire Prevention Code](#) (VSFPC or Fire Prevention Code) is based on the 2021 International Fire Code. See Va. Code § 27-94 et seq.; 13 VAC 5-52-10 et seq. The VSFPC provides for optional local enforcement. 13 VAC 5-52-40(A)). Any local government may enforce the VSFPC in its entirety or with respect only to those provisions of the Fire Prevention Code relating to open burning, fire lanes, fireworks, and hazardous materials. One Attorney General's opinion is that a locality may not, however, selectively enforce the open burning regulations promulgated pursuant to the Code on a geographic basis. 2000 Op. Va. Att'y Gen. 127. Localities wishing to limit leaf burning at residential properties to specific geographic areas within their jurisdiction may do so under Va. Code § 10.1-1308. Any local fire code may provide for an appeal to a local board of appeals. If no local board of appeals exists, the State Building Code Technical Review Board (TRB) hears appeals of any local fire code violation.⁵ Fees, a schedule for which must be adopted by ordinance, may be levied by the local governing body in order to defray the cost of such enforcement and appeals. Va. Code § 27-98. The State Fire Marshal also has the authority, in cooperation with any local governing body, to enforce the Code. The Virginia Fire Marshal has the authority to enforce the Code in those jurisdictions in which the local governments do not enforce the Code and may establish any necessary

⁵ A circuit court held that the TRB does not have jurisdiction to hear appeals involving *local* (as opposed to state) fire code violations when a local jurisdiction has a local appeal process. *Poplar Place Homeowners Ass'n v. Va. Dep't of Hous. & Cmty. Dev.*, 91 Va. Cir. 157 (Fairfax Cnty. 2015) (construing Va. Code § 27-98).

enforcement or administrative procedures or requirements in such jurisdictions. In addition, subject to the approval of the Board of Housing and Community Development, the State Fire Marshal may charge a fee to recover the actual cost of administering and enforcing the Code in jurisdictions for which he serves as the enforcement authority. *Id.*

The VSFPC supersedes all local fire prevention regulations except for the fire protection requirements for new construction mandated by the USBC. 13 VAC 5-51-21. Fire inspections for new construction are frequently conducted in conjunction with building inspections, and the issuance of an occupancy permit in a newly constructed building is contingent upon passing both a fire and safety inspection. See Va. Code §§ 27-34.4, 36-105. During the construction of a building, the code official is solely responsible for the inspection of the building. See Va. Code §§ 27-34.4, 36-105.1. However, the Building Code official has the authority to delegate responsibility under the USBC for fire protection systems to the fire official. See USBC, Part I, § 106.2 (13 VAC 5-63-60(B)). In many localities the code official delegates responsibility for fire suppression system inspections to the fire official, but the fire official is not acting under the Statewide Fire Prevention Code; the fire official is taking action under the USBC pursuant to a delegation of authority from the code official. Also, the code official remains responsible for assuring that the inspections are carried out in accordance with the provisions of the USBC. *Id.*

Once the new construction is completed, Va. Code §§ 27-34.4 and 36-105.1 provide that the responsibility for fire safety passes to the fire official, and the fire official may perform routine inspections of all buildings, structures, and premises except for single-family dwellings, dwelling units in two-family and multifamily dwellings, and farm structures. 13 VAC 5-51-91. In addition, the fire official is obligated to undertake an inspection in connection with the issuance of any permit for the handling, storage, or use of hazardous substances, materials, or devices. *Id.*

Administrative inspection warrants can be issued under the VSFPC. See Va. Code § 27-98.2. Such inspection warrants must be issued by a judge or magistrate whose territorial jurisdiction encompasses the building, structure, property, or premises to be inspected or entered. Any inspection warrant must be based upon probable cause, supported by affidavit, particularly describing that which is to be inspected and the purpose for the inspection. Probable cause is deemed to exist if the inspection is necessary to ensure compliance with the Fire Prevention Code for the protection of life and property from the hazards of fire or explosion. The supporting affidavit must contain either a statement that consent to inspect was sought and refused or facts or circumstances reasonably justifying the failure to seek such consent. In the case of an inspection warrant based upon legislative or administrative standards for selecting buildings, structures, property, or premises for inspections, the affidavit must contain factual allegations sufficient to justify an independent determination by the judge or magistrate that the inspection program is based on reasonable standards and that the standards are being applied to a particular place in a neutral and fair manner.

Even though Va. Code § 36-105(C)(3) provides for administrative inspection warrants pursuant to the USBC, consent to building and fire inspections of new construction is presumed when the inspection is undertaken at the permit holder's request. However, a building or fire inspector should be aware that if a warrantless inspection is conducted without the consent of a property owner, the inspector may be subject to a civil tort action by the owner for invasion of privacy. If the inspection is found to be an unconstitutional search, the inspector may forfeit his right to share in governmental sovereign immunity. See section 22-5.01. Inspectors who undertake routine building maintenance or fire inspections, absent a report of a specific violation, are further advised to comply with the warrant procedures set out by the Virginia Supreme Court in *Mosher Steel-Virginia v. Teig*, 229 Va. 95, 327 S.E.2d 87 (1985).

22-2.03(d)(4) Zoning Inspections

For years, the Code of Virginia did not contain any statutory authority for the issuance of inspection warrants for suspected zoning violations. However, in 1976, the Attorney General advised that a zoning administrator had the authority to seek an inspection warrant to inspect property for a suspected zoning violation if the property owner refused to allow an inspection. 1976-77 Op. Va. Att’y Gen. 338. For many years, zoning officials throughout the Commonwealth relied upon the Attorney General’s opinion as their authority to seek inspection warrants as part of their investigation of suspected zoning violations.

Since 2008, Va. Code § 15.2-2286(A)(15) has provided that a local governing body may include a provision in the local zoning ordinance providing for the issuance of administrative inspection warrants for the inspection of zoning violations. Virginia Code § 15.2-2286(A)(15) provides that a zoning official or his agent:

may make an affidavit under oath before a magistrate or court of competent jurisdiction and, if such affidavit establishes probable cause that a zoning ordinance violation has occurred, request that the magistrate or court grant the zoning administrator or his agent an inspection warrant to enable the zoning administrator or his agent to enter the subject dwelling for the purpose of determining whether violations of the zoning ordinance exist. After issuing a warrant under this section, the magistrate or judge shall file the affidavit in the manner prescribed by § 19.2-54. After executing the warrant, the zoning administrator or his agents shall return the warrant to the clerk of the circuit court of the city or county wherein the inspection was made. The zoning administrator or his agent shall make a reasonable effort to obtain consent from the owner or tenant of the subject dwelling prior to seeking the issuance of an inspection warrant under this section.

However, Va. Code § 15.2-2286(A)(15) only authorizes the issuance of an inspection warrant for a “dwelling.” Zoning officials that wish to seek an inspection warrant to inspect a commercial property for a suspected zoning violation may have to continue to rely on the 1976 Attorney General’s opinion as their authority to obtain an inspection warrant.

22-2.04 Entry Into Homes to Advise of Violations Not a Search

In *Artes-Roy v. City of Aspen*, 31 F.3d 958 (10th Cir. 1994), the Tenth Circuit ruled that no infringement of constitutional rights occurred when a building inspector entered a home to advise the owner that construction work must be stopped because provisions of a building code were being violated. The plaintiff and her husband were renovating their house and had not contacted the code officials to perform the required inspections. When contacted by telephone, the plaintiff’s husband agreed to stop the work and asked the inspectors not to come to the house because his wife suffered from an anxiety disorder. The work did not stop, and a code official went to the house to issue a stop work order. The court noted that no illegal search occurred because the inspector had not gone to the home to inspect for violations, the violations being readily apparent, but to put a stop to improper work.

See also *Widgren v. Maple Grove*, 429 F.3d 575 (6th Cir. 2005), holding that posting a civil infraction notice on the front door of a house was not an illegal search (discussed in section [22-2.02\(a\)](#)).

22-2.05 Accompanying Others on Searches or Inviting Others to Attend a Search

Public officials should be careful about accepting invitations to accompany others during searches, and must be careful about inviting third parties to accompany them during searches.

In *Wilson v. Layne*, 526 U.S. 603, 119 S. Ct. 1692 (1999), the United States Supreme Court ruled that law enforcement officials did not have the authority to invite members of the media to accompany them in the execution of an arrest warrant. The Court noted that the

reporters' presence was not necessary to assist the officers in performing their tasks. Therefore, it was "a violation of the Fourth Amendment for police to bring members of the media or other third parties into a home during the execution of a warrant when the presence of the third parties in the home was not in aid of the execution of the warrant." *Id.* The Court further held that in order for law enforcement officers to justify a third party's presence during the execution of a warrant the officers must be able to show that the third party directly aided them in the execution of the warrant. By way of illustration, the Court noted that if officers entered a home under the authority of a search warrant to search for stolen property, it would be appropriate to invite the owners of the property to accompany them for the purpose of identifying their stolen property.

Law enforcement officials who obtain a search warrant allowing them to enter a building to search for illegal drugs might invite code or zoning officials to accompany them during the search. If a code official is going to accompany law enforcement officers or anyone else during a search, the code official must be able to show his presence directly aided the search. For example, if law enforcement officers have a warrant to search a dilapidated building for the presence of illegal substances, it might be possible to justify the presence of a code official in order to keep the officers from doing something that could cause the building to collapse or could endanger the officers' or occupants' safety. If a code official cannot show that his presence will directly aid a search, the code official should ask the owner's/occupant's permission to search or obtain a separate administrative inspection warrant.

22-3 UNIFORM STATEWIDE BUILDING CODE

The Virginia Uniform Statewide Building Code (USBC) incorporates many of the provisions contained in the International Building Code. Every three years, the International Code Council updates and adopts a new edition of the International Building Code, and the Virginia Department of Housing and Community Development (DHCD) revises the International Building Code to meet Virginia's needs. The current version of the USBC is based on the 2021 edition of the International Building Code.

22-3.01 Mandatory Codes and Optional Codes

Local governments are required to enforce various codes and regulations dealing with the safety of structures. These mandatory codes and regulations that localities must enforce include the Virginia Construction Code, the Virginia Existing Building Code,⁶ portions of the Virginia Property Maintenance Code, Virginia Amusement Device Regulations, Virginia Manufactured Homes Safety Regulations, and the Virginia Industrialized Buildings Safety Regulations. Localities also have the option of enforcing the majority of the provisions of the Property Maintenance Code and enforcing the Virginia Statewide Fire Prevention Code.

22-3.02 History and Authority

The General Assembly has given the Virginia Board of Housing and Community Development the authority to adopt a USBC for the Commonwealth. See Va. Code § 36-98. The Virginia Uniform Statewide Building Code adopted by the Board of Housing and Community Development is divided into three parts.⁷ Each of the three parts of the USBC was adopted at a different time.

⁶ During the 2015 updating of the Codes, the Virginia Rehabilitation Code was renamed the Virginia Existing Building Code.

⁷ This chapter cites the USBC directly. See the following website links: [Construction Code](#); [Existing Building Code](#); [Property Maintenance Code](#); [Amusement Device Regulations](#); [Manufactured Home Safety Regulations](#); [Industrialized Building and Safety Regulations](#); and [Statewide Fire Prevention Code](#). The regulations may also be found at 13 VAC 5-63-10 et seq.

22-3.02(a) USBC: Part I

Part I of the USBC, the Virginia Construction Code, contains the regulations and standards that apply to the construction of new buildings and structures and to the alteration, addition, renovation, and change of occupancy or use of existing buildings and structures.

The Construction Code was first adopted on September 1, 1973. It superseded all local construction codes, and local governments were required to enforce it. See Va. Code §§ 36-98, 36-105; 1986-87 Op. Va. Att’y Gen. 221; 1985-86 Op. Va. Att’y Gen. 185; 1981-82 Op. Va. Att’y Gen. 402; 1977-78 Op. Va. Att’y Gen. 470; 1976-77 Op. Va. Att’y Gen. 106. Further, local governments are forbidden to adopt any local ordinances or regulations that conflict with the provisions of the Code. See Va. Code § 36-98; USBC, Part I, § 102.2; 2017 Op. Va. Att’y Gen. 185 (construction and retrofitting of building governed by USBC; no authority to require retrofitting of commercial building with manual door entry hardware); 2001 Op. Va. Att’y Gen. 141 (ordinance requiring certain finishes for single-family construction invalid as inconsistent with Va. Code § 36-98); see *also* 1981-82 Op. Va. Att’y Gen. 404. Specifically, the Code supersedes the provisions of local ordinances applicable to single-family residential construction that (a) regulate dwelling foundations or crawl spaces, (b) require the use of specific building materials or finishes in construction, or (c) require minimum surface area or numbers of windows; however, the Code does not supersede proffered conditions accepted as a part of a rezoning application, conditions imposed upon the grant of special exceptions, special or conditional use permits or variances, conditions imposed upon a clustering of single-family homes and preservation of open-space development established by a locality pursuant to Va. Code §§ 15.2-2242(8) or 15.2-2286(A)(12), land use requirements in airport or highway overlay districts, historic districts created pursuant to Va. Code § 15.2-2306, or local flood plain regulations adopted as a condition of participation in the National Flood Insurance Program. Va. Code § 36-98.

22-3.02(b) USBC: Part II

Part II of the USBC, the Virginia Existing Building Code, contains optional regulations for the renovation of existing buildings and structures that may be used as an acceptable alternative to the Virginia Construction Code. The provisions of the Virginia Existing Building Code are supposed to be less costly and time-consuming than the construction regulations contained in the Construction Code and are designed to make it easier to renovate existing structures. The Existing Building Code was adopted for the first time on November 16, 2005.

22-3.02(c) USBC: Part III

Part III of the USBC, the Virginia Maintenance Code, contains the regulations for the maintenance of existing buildings and structures.

The Maintenance Code was first adopted on October 1, 1986. Like the Construction Code, the Maintenance Code supersedes all local codes, and local governments are forbidden to adopt ordinances that are inconsistent with the provisions of the Maintenance Code. See Va. Code § 36-98; USBC, Part III, § 102.2; 1983-84 Op. Va. Att’y Gen. 431. Unlike the Construction Code, for the most part, enforcement of the Maintenance Code remains optional. For general authority concerning the adoption and enforcement of the USBC, see Chapter 6 of Title 36 of the Code of Virginia. For a discussion of inspections pursuant to the Maintenance Code, see section [22-2.03\(d\)\(2\)\(ii\)](#).

22-3.03 Structure of USBC

DHCD has adopted the 2021 editions of the Building Codes published by the International Code Council, Inc., as the Uniform Statewide Building Code for the Commonwealth. Each of the parts of the USBC is designed to stand alone.

The technical requirements for new construction, rehabilitation, and the maintenance of existing buildings are contained in the International Building Code (IBC), the International Existing Building Code (IEBC), and the International Property Maintenance Code (IPMC).

However, instead of following the Chapter 1 administrative regulations contained in the IBC, the IEBC, and the IPMC, the Virginia Board of Housing and Community Development deleted the administrative regulations contained in those chapters and adopted its own administrative regulations for code enforcement. USBC, Part I, § 101.7 (13 VAC 5-63-10(G)); Part II, § 101.7 (13 VAC 5-63-400(G)); Part III, § 101.4 (13 VAC 5-63-450(D)).

When enforcing the Virginia Maintenance Code, it is necessary to refer to the following documents:

1. the sections of the Code of Virginia that deal with the USBC. See Va. Code §§ 36-97 through 36-119.1;
2. the Virginia Uniform Statewide Building Code (2021 Edition) adopted by the Virginia Department of Housing and Community Development;
3. the technical requirements contained in the IBC, IEBC, and IPMC; and
4. the referenced standards contained in Chapter 8 of the Virginia Maintenance Code.

Note: It is important to keep in mind that in the event of any conflict between the provisions of the USBC and the provisions of the international codes, the provisions of the USBC will generally control. The USBC, Part III, § 101.6 (13 VAC 5-63-450(F)) provides that the order of preference for the Maintenance Code is as follows:

1. The provisions of Chapter 1 of this code supersede any provisions of Chapters 2-8 of the IPMC that address the same subject matter and impose differing requirements.
2. The provisions of Chapter 1 of this code supersede any provisions of the codes and standards referenced in the IPMC that address the same subject matter and impose differing requirements.
3. The state amendments to the IPMC supersede any provisions of Chapters 2-8 of the IPMC that address the same subject matter and impose differing requirements.
4. The state amendments to the IPMC supersede any provisions of the codes and standards referenced in the IPMC that address the same subject matter and impose differing requirements.
5. The provisions of Chapter 2-8 of the IPMC supersede any provisions of the codes and standards referenced in the IPMC that address the same subject matter and impose differing requirements.

See a similar order of preference for the Construction Code, USBC, Part I, § 101.6 (13 VAC 5-63-10(F)), and for the Existing Building Code, USBC, Part II, § 101.6 (13 VAC 5-63-400(F)).

22-3.04 Justification for the USBC

The USBC was adopted for several reasons. When local governments were allowed to adopt their own building codes, a great deal of diversity existed among localities concerning code requirements. This caused compliance problems for individuals who owned properties in adjoining jurisdictions. The adoption of the USBC was an attempt to create uniform building code standards throughout the state. However, because enforcement of the Maintenance Code is mostly optional, and because some localities are enforcing only selected portions of the Code, diversity in the application of the Maintenance Code throughout the state continues.

The Construction Code sets technical standards for the construction, renovation, and repair of structures and provides building maintenance officials with access to a building during construction. Once construction has been completed and a certificate of occupancy has been issued, the Construction Code does not provide code officials with any means of getting back into the building to determine if the building is being properly maintained. The Maintenance Code provides a means of getting code officials back into a building for ongoing monitoring.

22-3.05 Scope of the Maintenance Code

22-3.05(a) Purpose

The purpose of the Maintenance Code is to “[p]rotect the health, safety and welfare of the residents of the Commonwealth of Virginia,⁸ provided that buildings and structures should be permitted to be maintained at the least possible cost consistent with recognized standards of health, safety, energy conservation and water conservation, including provisions necessary to prevent overcrowding, rodent or insect infestation, and garbage accumulation; and barrier-free provisions for the physically handicapped and aged.” USBC, Part III, § 102.1 (13 VAC 5-63-460 (A)). The Maintenance Code applies to both occupied and vacant buildings and structures. See Va. Code § 36-105; USBC, Part III, § 104.1 (13 VAC 5-63-480(A)).

Following a nationwide survey, the Insurance Institute for Business & Home Safety gave [Virginia](#) and Florida the highest marks for building codes in hurricane-prone states. In each of its editions (2012, 2015, 2018, 2021, 2024), the Institute awarded Virginia a score of 94 to 96 out of a possible 100 points because of its combination of strong statewide residential building codes and comprehensive regulatory processes for building code officials, contractors, and subcontractors. The rating confirms that the Uniform State Building Code is achieving its goal of protecting the health, safety, and welfare of the residents of the Commonwealth.

22-3.05(b) Enforcement of the Majority of the Maintenance Code is Optional

The Maintenance Code automatically became applicable to all counties, cities, and towns on its effective date of October 1, 1986. Unlike the Construction Code, until July 1, 1995, the enforcement of the Maintenance Code was optional. See USBC, Part I, § 104.1 (13 VAC 5-63-40(A)). During its 1995 session, the General Assembly amended Va. Code § 36-105 to require local governments to enforce the provisions of the Maintenance Code dealing with unsafe buildings in response to complaints by tenants of residential units. In 1999, the General Assembly amended Va. Code §§ 36-105 and 36-105.01 to require local governments to enforce the provisions of the Maintenance Code dealing with the inspection of elevators, except for elevators in single and two-family homes and townhouses. With the exception of the two areas where compliance was mandated by the General Assembly, enforcement of the Maintenance Code is still optional. USBC, Part III, Preface, Overview.

If a locality elects to enforce the Maintenance Code, it must take “official action” by adopting an ordinance or resolution stating that it is electing to enforce the provisions of the Virginia Maintenance Code, before doing so. USBC, Part III, § 104.1 (13 VAC 5-63-480(A)).

When the Maintenance Code was originally adopted, it contained language allowing a locality to elect to enforce only selective portions of the code. This language was removed in 1997, and a locality’s ability to enforce only selective portions of the Maintenance Code became questionable. When the Maintenance Code was amended in 2003, language was included in what was then Part III, § 125.1(i) that restored a locality’s ability to enforce the Maintenance Code in “whole or in part.” However, that language was not carried over in the subsequent editions of the USBC. Without such language, a locality’s ability to enforce only

⁸ Although the Code refers to “the residents of the Commonwealth of Virginia,” it is interpreted, for purposes of negligence *per se* claims, as intending to protect the public generally, including non-residents. *Wallace v. Love’s Travel Stops & Country Stores*, No. 3:21-cv-111 (E.D. Va. July 20, 2022).

selective portions of the Virginia Maintenance Code is once again uncertain. However, a locality can argue that because it has the express authority to enforce all of the Virginia Maintenance Code, it therefore has the implied power to elect to enforce only selected portions. The Department of Housing and Community Development has not taken an official position on selective enforcement of the Maintenance Code and allows localities to decide if they believe they have the authority to implement selective enforcement.

22-3.05(c) Minimum Maintenance vs. Upgrading/Retrofitting Under the Maintenance Code

The Maintenance Code requires that buildings and structures be maintained in good repair in accordance with the version of the USBC that was in effect when the building was constructed. As a general rule, the Maintenance Code does not require alterations to be made to an existing building or structure or to equipment unless conditions are present that meet the definition of an unsafe structure or a structure unfit for human occupancy. USBC, Part III, §§ 103.2, 106.5 (13 VAC 5-63-470(B), 13 VAC 5-63-490(D)). Also, alterations may not be required to be made to existing buildings and structures that are occupied in accordance with a certificate of occupancy issued under any edition of the USBC. See *id.* § 103.3 (13 VAC 5-63-470(F)). If a building or structure contains nonrequired components and systems, such nonrequired components and systems may be discontinued in use provided that no hazard results from such discontinuance of use. *Id.* § 103.2.1 (13 VAC 5-63-470(C)).

Buildings and structures that were built prior to the adoption of the USBC do not have to comply with new construction standards until they are altered, repaired, or converted in use. In *Gaines v. Department of Housing & Community Development*, 71 Va. App. 385, 837 S.E.2d 54 (2020), the owners were required to retrofit their rental property with a heating system, even though the building was constructed prior to enactment of the USBC, because the lack of heating rendered the property unfit for human occupancy. The court cited 13 VAC 5-63-490(D) (“conditions may exist in structures constructed prior to the initial edition of the USBC because of faulty design or equipment that constitute a danger to life or health or a serious hazard”) and 13 VAC 5-63-485 (the locality is empowered to institute “legal proceedings to restrain, correct or abate the violation or to require the removal or termination of the use of the building or structure involved”).

Some exceptions exist to the general rule that buildings constructed prior to the adoption of the USBC do not have to be brought up to current standards. For example, Va. Code § 55-225.3 requires landlords to install smoke alarms in all rental properties. Other laws require the installation of: smoke alarms and automatic sprinkler systems in dormitories of institutions of higher education (Va. Code § 36-99.3); smoke alarms in certain juvenile care facilities (Va. Code § 36-99.4); smoke alarms for persons who are deaf or hard of hearing (Va. Code § 36-99.5); and smoke alarms and fire suppression systems in assisted living facilities, adult care centers, and nursing homes and facilities (Va. Code § 36-99.5:1). Other examples of required retrofitting include: the replacement of broken glass with currently approved glass (Va. Code § 36-99.2; USBC, Part II, § 102.2.2(5); 13 VAC 5-63-410(D)(5)); removal or covering of lead-based paint (USBC, Part III, § 310.1); and identification of handicapped parking spaces (Va. Code § 36-99.11).

Section 15.2-922 of the Code of Virginia provides that a locality may adopt an ordinance requiring smoke alarms in: (i) any building containing one or more dwelling units; (ii) a hotel or motel providing overnight sleeping; and (iii) rooming houses providing overnight sleeping. However, the Attorney General has advised that adopting such an ordinance does not “necessitate the retrofitting with smoke detectors of existing buildings containing dwelling units.” See 2013 Op. Va. Att’y Gen. 35.

Because as a general rule the Maintenance Code does not require retrofitting, the Maintenance Code does not establish a minimum set of core maintenance standards that apply to all buildings. Instead, the Virginia Court of Appeals has held that three different standards apply to the maintenance of buildings, and the standards depend upon when the

building in question was constructed, and, for buildings constructed prior to September 1, 1973, whether or not the locality in which the building is located had adopted a local building code. The three categories of buildings are as follows:

1. Buildings that were constructed after September 1, 1973. Such buildings must be maintained in accordance with the construction standards of the version of the USBC that was in effect at the time of construction.
2. Buildings that were constructed prior to September 1, 1973, in a locality that had adopted a local building code. Such buildings must be maintained in accordance with whatever construction standards had been adopted by the locality at the time of construction.
3. Buildings that were constructed prior to September 1, 1973, in a locality that had not adopted a local building code. For these buildings, no general construction standards exist for the building's maintenance.

The Virginia Court of Appeals held that the Maintenance Code did not require the owner of a thirty-five-year-old condominium constructed prior to the adoption of the USBC in 1973 to retrofit the building with firestops, because firestops were not required when the building was constructed. *Clayton v. State Bldg. Code Tech. Review Bd.*, No. 1847-10-4 (Va. Ct. App. Feb. 8, 2011) (unpubl.).

22-3.06 Structures That Are Exempt From the USBC

In general, the Construction Code and Maintenance Code exempt the same structures from regulation. These structures are listed in USBC, Part I, § 102.3 (13 VAC 5-63-20(D)), which provides that exempt structures include: (1) equipment and wiring used for providing utility, communications, information, cable television, broadcast, or radio service; (2) support structures owned or controlled by a provider of a publicly regulated utility service or its affiliates for the transmission and distribution of electric service; (3) direct burial poles used to support equipment or wiring providing communications, information, or cable television services; (4) electrical equipment, transmission equipment, and related wiring used for wireless transmission of radio, broadcast telecommunications, or information service; (5) manufacturing, processing, and product handling machines and equipment that do not produce or process hazardous materials; (6) parking lots and sidewalks that are not part of an accessible route; (7) nonmechanized playground equipment where no admission fee is charged for its use; (8) industrialized buildings subject to the Virginia Industrialized Building Safety Regulations and manufactured homes subject to the Manufactured Home Safety Regulations; (9) farm buildings and structures, except for a building or portion of a building located on a farm that is operated as a restaurant; (10) federally owned buildings and structures unless federal law requires a local permit; (11) off-site manufactured intermodal freight containers, moving containers, and storage containers placed on site for storage; and (12) automotive lifts.

The Attorney General has advised that the occasional use of a farm building for nonagricultural events such as concerts, wedding receptions, dances, and similar events does not require the owner to obtain an occupancy permit for the events as long as the primary use of the building is for farm purposes. See 2010 Op. Va. Att'y Gen. 146. In 2018, the General Assembly requested a review of agritourism enterprises and application of the building code "to better understand the issue and its potential negative impact on rural economic development."⁹ No legislative action has been taken on the issue to date.

22-3.07 State-Owned Buildings & Structures on State-Owned Property

The Maintenance Code applies to state-owned buildings and structures and buildings and structures on state-owned property. The USBC provides that the Virginia Department of General Services shall function as the code official for state-owned buildings. Va. Code § 36-98.1; USBC,

⁹ Walker, Martha, et al., [2018 Agritourism and Building Codes Review](#), Nov. 1, 2018.

Part I, § 103.7, Part III, § 104.3. The Department of General Services can delegate inspection and code enforcement duties to local building departments. Absent an express delegation, however, a locality has no enforcement power. 2002 Op. Va. Att’y Gen. 176. The Department of General Services also may alter or overrule any decision of local code officials regarding the enforcement of the USBC to state-owned buildings. Va. Code § 36-98.1; USBC, Part I, § 103.7 (13 VAC 5-63-30(I)).

22-3.08 Enforcement of the Building Code on Indian Reservations

Virginia Code § 36-105.5(A) states:

Recognizing the unique relationship between the Commonwealth and certain of its state-recognized Indian tribes, and notwithstanding any other provision of law, neither the Commonwealth nor any locality therein is responsible for the enforcement of the provisions of the Uniform Statewide Building Code (§ 36-97 et seq.) on any Indian reservation recognized by the Commonwealth whereupon a state-recognized Indian tribe has, by duly enacted tribal ordinance, adopted the Uniform Statewide Building Code and (i) assumed sole responsibility for existing buildings and new construction on the reservation and (ii) for purposes of enforcing the ordinance, retained firms or individuals to function as the building official on such reservation.

22-3.09 Modifications of the Maintenance Code

The USBC specifically authorizes code officials to grant modifications to the USBC provisions. USBC, Part I, § 106.3 (13 VAC 5-63-60(C)), Part III, § 104.5.2 (13 VAC 5-63-480(N)). After the Virginia Court of Appeals ruled that under state law, USBC modifications could be related to only the manner of construction or materials, *Avalon Assisted Living Facilities v. Zager*, 39 Va. App. 484, 574 S.E.2d 298 (2002) (modification in use classification not allowed), state law was amended to expressly provide that any provision of the USBC could be modified, “provided the spirit and functional intent of the [USBC] are observed and public health, welfare and safety are assured.” Va. Code § 36-99. The court in *Avalon* interpreted similar language prior to the amendment to require that the alternative provided for by the modification be the functional equivalent of the USBC’s express requirement. The application for a modification and the decision of the code official must be in writing and included in the permanent records. USBC, Part III, § 104.5.2 (13 VAC 5-63-480(N)). The code official may also require statements from architects, engineers, or other competent persons as to the equivalency of a proposed modification. *Id.* § 104.5.2.1 (13 VAC 5-63-480(O)).

22-3.10 Enforcement of the Maintenance Code

22-3.10(a) Code Official

Localities need to appoint a code official to oversee enforcement. USBC, Part I, § 105.1 (13 VAC 5-63-50(A)), Part III, § 104.4 (13 VAC 5-63-480(F)). The qualifications for the code official are contained in the USBC, Part I, § 105.1.1 (13 VAC 5-63-50(B)) and Part III, § 104.4.1 (13 VAC 5-63-480(G)). After the initial employment period is over, the code official shall not be removed from office except for cause and after having been afforded a full opportunity to be heard before the appointing authority. USBC, Part I, § 105.1 (13 VAC 5-63-50(A)), Part III, § 104.4 (13 VAC 5-63-480(F)); *see Hale v. Town of Warrenton*, 293 Va. 366, 798 S.E.2d 595 (2017). In *Hale*, the Supreme Court reversed the dismissal of a building official’s lawsuit challenging his termination. The building official had been hired as an at-will employee subject to a six-month probationary period. Five years later, the town manager notified the plaintiff that he was being relieved of his supervisor role, and the town later announced that another employee had been appointed as the new building official. The plaintiff alleged that he had been removed from his position as the building official without the benefit of a hearing or an opportunity for a hearing. The circuit court dismissed the plaintiff’s lawsuit, but the Supreme Court reversed, finding that the town manager’s actions in hiring the plaintiff as the town’s sole building official on a full-time basis, subject only to a six-month at-will probationary period, could be construed as a permanent appointment of the plaintiff as the building official upon the expiration of his

probationary status, and the plaintiff was entitled to a hearing before he could be removed from office.

In *Compton v. Town of Pulaski*, 88 Va. Cir. 41 (Pulaski Cnty. 2014), the court held that even though the petitioner was never formally appointed as the town's code official, he served in that capacity, and as the de facto code official was entitled to a hearing before he could be terminated.

The locality may assign enforcement responsibility for code enforcement to agencies of the locality's choice and appoint a code official to oversee such enforcement. USBC, Part III, § 104.4 (13 VAC 5-63-480(F)). The code official is required to enforce the Maintenance Code but may make arrangements with other individuals and agencies to assist in the enforcement of the Code, unless the locality limits the code official's authority to delegate code enforcement duties. *Id.* §§ 104.5 (13 VAC 5-63-480(L)), 104.5.1 (13 VAC 5-63-480(M)). For example, a local health department might be assigned the enforcement of those provisions of the Maintenance Code dealing with lead-based paint. However, the ultimate responsibility for enforcement of the Maintenance Code rests with the code official. *Id.* § 104.5.1 (13 VAC 5-63-480(M)). The code official is required to coordinate inspections and administrative orders with other state or local agencies having inspection powers and to coordinate fire inspections required by the Fire Prevention Code with the code official. *Id.* § 105.5 (13 VAC 5-63-485(105.5)).

In *Board of Supervisors of Culpeper County v. State Building Code Technical Review Board*, 52 Va. App. 460, 663 S.E.2d 571 (2008), the Court of Appeals held that the board of supervisors had the authority to set qualification standards requiring that all third-party inspectors hired by the local code official be licensed engineers or architects.

If a locality wishes for the code official to exercise certain powers under the Maintenance Code, the locality must specifically authorize the code official to do so. For example, the Maintenance Code provides that the code official may, "to the extent permitted by the locality," make arrangements for the emergency repair of a structure (USBC, Part I, § 118.6 (13 VAC 5-63-180(G)), Part III, § 106.8 (13 VAC 5-63-490(G))), and "where the locality or legal counsel so authorizes," the code official can issue or obtain a summons or warrant charging a property owner with a violation of the Code (USBC, Part I, § 115.3 (13 VAC 5-63-150(D)), Part III, § 105.6 (13 VAC 5-63-485(105.6))). If a code official wants the authority to do these things without having to go back to the local governing body for approval, such authority should be included in an ordinance or resolution that is adopted by the local governing body.

If a locality does not have a local building department, the locality must enter into an agreement with the local governing body of another county or municipality, some other agency, or a state agency approved by the Department of Housing and Community Development for purposes of enforcing the USBC. Even if a locality has a local building department, the locality may enter into an agreement with another locality for technical assistance with administration and enforcement. Towns with a population of less than 3,500 may elect to administer and enforce the USBC for the town; however, where the town does not elect to enforce the USBC, the county in which the town is situated must do so. Note, however, that the Attorney General has opined that this obligation applies only to the Construction and Existing Building Codes, not the Maintenance Code. See 2010 Op. Va. Att'y Gen. 149 (where a town has chosen to enforce the maintenance provisions of the Building Code but has not designated an agency or department of the town to fulfill this role, the county is not responsible for administering the maintenance component of the USBC). If a town is situated in two or more counties, those counties shall administer and enforce the USBC for that portion of the town that is situated within their respective boundaries. See Va. Code § 36-105.

22-3.10(b) Enforcement of Occupancy Limits

Virginia Code § 36-105.4 authorizes an owner or managing agent of a residential dwelling unit to develop and implement reasonable occupancy standards restricting the maximum number of occupants permitted to occupy a dwelling unit to two persons per bedroom. Any occupancy standards adopted by an owner or managing agent are subject to the provisions of applicable state and federal laws and regulations, and under the USBC, each bedroom shall contain at least seventy square feet of floor area, and each bedroom occupied by more than one person shall contain at least fifty square feet of floor area for each occupant. However, Va. Code § 36-105.4 also provides that the occupancy limits established by an owner or managing agent shall not be enforceable under the provisions of the USBC.

22-3.09(c) Reasonable and Uniform Enforcement

A fundamental rule to be followed in the enforcement of the Maintenance Code is that the application and enforcement of the code must be reasonable, and decisions by building maintenance officials cannot be arbitrary. Also, the Maintenance Code must be uniformly applied. The key to enforcing the Maintenance Code is to use common sense and good judgment. It is not enough to simply know the technical requirements of the Maintenance Code. The code official must also understand the spirit, intent, and reasoning behind the Maintenance Code.

22-3.09(d) The Dillon Rule

Few court cases and Attorney General opinions construe the Maintenance Code. Therefore, many unanswered questions exist regarding building maintenance officials' powers to enforce the Code. In deciding what building maintenance officials can and cannot do under the Maintenance Code, remember the Dillon Rule. Under the Dillon Rule, local governments possess only those powers specifically granted to them by the General Assembly and those implied powers necessary to carry out such specific powers. See *Commonwealth v. Brown*, 106 Va. Cir. 69 (City of Fredericksburg 2020) (discussing the Dillon Rule in the context of an emergency curfew order). If there is any doubt about whether a local government has a specific power under the Dillon Rule, the courts assume that the local government does not have the power in question.

As such, when evaluating the authority of a code official to perform an act not specifically authorized by the USBC, keep the Dillon Rule in mind. If questions exist about whether or not the code official has certain powers, the courts will tend to follow this rule of strict construction. See, for example, *Logie v. Town of Front Royal*, 58 Va. Cir. 527 (Warren Cnty. 2002), in which a provision that the town would terminate electric service for properties not in compliance with the Maintenance Code was found to violate the Dillon Rule. However, the court also held that the express authority to enforce the Maintenance Code gave the town the implied power to establish a rental property inspection program. See also 2013 Op. Va. Att'y Gen. 93 (no authority under Dillon Rule enabling Virginia localities to enter into agreements with another state to inspect locally-manufactured industrialized buildings to determine such structures' compliance with that other state's building code).

22-3.09(e) Opinions From State Officials

If a code official is uncertain as to the interpretation of provisions of the USBC, the official should consult his or her local government attorney. The Training and Certification Office, which is part of the Department of Housing and Community Development's Division of Building and Fire Regulations, is also available to provide interpretations of provisions of the USBC to local government attorneys and code officials. Also, the local government attorney who assists the building maintenance official may be able to obtain an opinion from the Attorney General.

22-3.09(f) Fees

Local governing bodies are authorized to levy fees to help defray the cost of code enforcement and appeals. See Va. Code § 36-105; USBC, Part I, § 107.1 (13 VAC 5-63-70(A)), Part III,

§ 104.2 (13 VAC 5-63-480(C)).¹⁰ If imposed, a schedule of “fair and reasonable” fees must be adopted by the local governing body in an ordinance. The issuance of a building permit cannot be denied to a tenant or owner of an easement solely upon the basis that the property owner has financial obligations to the locality that constitute a lien on such property. A locality may deny a building permit to the property owner until the lien is discharged; however, the owner must be given in writing the reasons why the permit was denied. Va. Code § 36-105(D).

22-3.11 Notice of Violations of the Maintenance Code

Once a violation of the USBC has been discovered, the code official must, except in emergency situations, give the owner, tenant, or the person responsible for the maintenance or use of the structure notice of the violation and an opportunity to remedy the violation. The notice requirement raises a number of issues, such as what information the notice should contain, to whom the notice should be given, etc. The following section describes the procedure for a violation of the Maintenance Code. The procedure for a violation of the Construction Code is similar and is found at USBC, Part I, § 115 et seq. (13 VAC 5-63-150).

22-3.11(a) Contents of Notice

Once a violation of the Maintenance Code has been discovered, the code official, except in the case of emergencies, must send the owner, tenant, or the person responsible for the maintenance or use of the structure either (i) a correction notice or (ii) a notice of violation. USBC, Part III, §§ 105.2, 105.4 (13 VAC 5-63-485(105.2), (105.4)). When the owner is not the responsible party, a copy of the notice must also be delivered to the owner. *Id.*

A code official is not required to issue a correction notice or a notice of violation within any particular time. The code official has the discretion as to when it is appropriate to issue such notices.

For violations of the Maintenance Code, the code official has the option of issuing either a correction notice or violation notice. USBC, Part III, §§ 105.2, 105.3, 105.4 (13 VAC 5-63-485(105.2), (105.3), (105.4)). Once a correction notice has been issued, if the violation is not corrected, a notice of violation shall be issued. USBC, Part III, § 105.4 (13 VAC 5-63-485(105.4)).

22-3.11(a)(1) Correction Notice

A correction notice must be in writing, must advise the owner or the person responsible for the maintenance of the structure of the defective conditions that need to be corrected, and must require correction and reinspection of the violation or violations within a reasonable period of time. If the correction notice does not reference the sections of the Maintenance Code that serve as the basis for the notice, the owner or the person responsible for the maintenance of the structure may request that the correction notice reference such Code sections. USBC, Part III, § 105.3. To avoid having to issue a second correction notice, the code official should always reference the sections of the Maintenance Code that serve as the basis for the notice.

22-3.11(a)(2) Notice of Violation

As required by USBC, Part III, § 105.4 (13 VAC 5-63-485(105.4)), a notice of violation must:

1. Be in writing.

¹⁰ There is some ambiguity in the Codes regarding the type of action necessary to establish fees. For example, Va. Code § 36-105 and the Construction Code (USBC, Part I, § 107.1 (13 VAC 5-63-70(A))) provide generally that “fees may be levied by the local governing body in order to defray the cost of enforcement,” implying that a resolution would be sufficient, while the Property Maintenance Code (USBC, Part III, § 104.2 (13 VAC 5-63-480(C))) specifies that a schedule of such fees “shall be adopted by the local governing body in a local ordinance.” The Existing Building Code is silent regarding the levying of fees.

2. Identify the property.
3. Reference the sections of the Maintenance Code that serve as the basis for the notice.
4. Specify the repairs or improvements necessary to bring the property into compliance and, unless an emergency exists, give a deadline for making the repairs (“within a reasonable time”).
5. When giving notice of an unsafe structure or unfit structure, require the person notified to immediately declare to the property maintenance official acceptance or rejection of the terms of the notice. See USBC, Part III, § 105.4.
6. Advise person notified of their right to appeal the property maintenance official’s decision to the local building code board of appeals. Suggested language: “All actions and orders by the code official are subject to appeal as provided in the USBC, Part III, § 107.5, Right of Appeal, Filing of Appeal Application.”

Optional information the code official may also wish to include:

1. A statement that the failure to correct the violation constitutes a misdemeanor and may result in the initiation of legal proceedings. State that the fine for a USBC violation may be up to \$2,500, on the theory that the amount may motivate the owner to make corrections.
2. Attach copies of the sections of the Maintenance Code that are being violated so the owner cannot claim he did not understand the nature of the violations.

A notice of violation must be issued except when dealing with unsafe structures, unsafe equipment, or structures unfit for human occupancy. Additionally, notices of violation issued for failing to maintain buildings and structures as required by USBC, Part III, § 103.2 (13 VAC 5-63-470(B)), as evidenced by multiple or repeated violations on the same property, are not required to include a compliance deadline for correcting defects. USBC, Part III, § 105.4 (13 VAC 5-63-485(105.4)).

In *Lee v. City of Norfolk*, 281 Va. 423, 706 S.E.2d 330 (2011), the city sent a property owner a notice of demolition of a structure on the grounds that the structure was unsafe because of numerous Maintenance Code violations. The property owner failed to demolish the structure, so the city proceeded with the demolition. The owner sued the city, alleging a violation of his federal and state due process rights on the grounds that the notice of demolition contained certain deficiencies and did not satisfy the requirements of the Maintenance Code. In upholding the dismissal of the owner’s lawsuit, the Supreme Court held that even though the notice of demolition contained some deficiencies, it was sufficient to put the owner on notice and did not violate his due process rights. See also *Clark v. Va. Dep’t of Hous. & Cmty. Dev. State Bd. Code*, No. 1537-16-4 (Va. Ct. App. Aug. 15, 2017) (unpubl.) (when notice informed appellants of their rights and appellants availed themselves of those rights, notice was constitutionally adequate).

The time given to repair or demolish a structure must be reasonable. In a 1995 case, *Appeal of Mr. Tom Sotos*, Appeal No. 95-9, the City of Emporia ordered two buildings to be demolished within thirty days or repaired within sixty days on the grounds that they were a public nuisance and could not be economically repaired—i.e., the cost of the repairs would exceed the value of the buildings. The State Technical Review Board found that the order to demolish the buildings was inconsistent with the provisions of the Maintenance Code. The buildings were reasonably secure against entry, were structurally sound, and were not

unhealthy. Given these circumstances, the buildings did not meet the criteria for demolition. Also, the Board found that the sixty-day limit set for the repair of the buildings was unreasonable due to the extent of the repairs needed.

In *McGary v. City of Portland*, 386 F.3d 1259 (9th Cir. 2004), the court held that the Americans With Disabilities Act required city officials to give a homeowner additional time to clean his yard because of his disability. City officials ordered the homeowner to remove the trash and debris from his yard within fifteen days. The homeowner advised the city that he suffered from AIDS and that the disability limited his ability to work in his yard; he requested additional time to remove the trash and refuse. The city denied the homeowner's request for additional time, cleaned up the yard, billed the homeowner for the removal costs, and placed a lien on his home to pay for the cleanup. The court held that the Americans With Disabilities Act required the city to make a reasonable accommodation for the homeowner by giving him additional time to clean his yard.

22-3.11(b) On Whom and How Notice Issued

The USBC requires that the code official issue a notice of a violation to the owner, tenant, or the person responsible for the maintenance or use of the building or structure (or both, if the owner is not the responsible party), but does not specify how a notice of correction or notice of violation is to be delivered. USBC, Part III, §§ 105.3, 105.4 (13 VAC 5-63-485(105.3), (105.4)). However, the provisions of the USBC provide that when dealing with unsafe structures or structures that are unfit for human occupancy, a copy of the notice "shall be issued by personal service to the owner, the owner's agent or the person in control of such structure." *Id.* § 106.3 (13 VAC 5-63-490(B)). If the code official is unable to deliver the notice in person, "then the notice shall be sent by registered or certified mail to the last known address of the responsible party and a copy of the notice shall be posted in a conspicuous place on the premises." *Id.* § 106.4 (13 VAC 5-63-490(C)).

The code official may wish to follow these same procedures when issuing a correction notice or notice of violation. However, because the USBC does not give specific instructions on issuing a correction notice or notice of violation, it is possible to take the position that such notices may be issued by mail. Sending notice by mail to the proper address with the postage prepaid creates a presumption that the addressee received the notice, but this presumption is rebuttable. Sending a notice by a registered/certified letter generates a receipt that proves the notice was received. However, some people will not accept a registered/certified letter, suspecting that it is something they do not want. One alternative is to send the notice by both methods. The uncertainty of service by mail is a good reason to deliver the notice in person whenever possible. Also, following the same procedures that are used for unsafe and unfit structures allows the code official to use a single procedure for giving notice and eliminates confusion that may result from having different notice procedures.

The notice provisions in the USBC do not cover certain situations—e.g., what to do if the owner is a corporation or a minor, if the address is unknown, etc. Localities should consider adopting an ordinance more specifically detailing the notice procedures to be used in such situations. Because a locality has the express authority to issue notice of violations, it can make a reasonable argument that it has the implied power to provide for service of notice in situations that are not addressed by the Maintenance Code.

The USBC provides that notice must be given to the "owner" of a building or structure. It is important to make sure that all persons with an ownership interest in the property are given notice of a violation, especially in demolition situations. For the purpose of the USBC, Va. Code § 36-97 defines owner as follows: "the owner or owners of the freehold of the premises or lesser estate therein, a mortgagee or vendee in possession, assignee of rents, receiver, executor, trustee, or lessee in control of a building or structure." For unsafe and unfit structures, whenever possible, notice should also be given to the tenants of the affected structure. USBC, Part III, § 106.3.

If a notice of violation is issued to the owner of a manufactured home park for violations that jeopardize the health or safety of the tenants of the park, notice shall also be provided to each affected tenant. USBC, Part III, § 104.5.4 (13 VAC 5-63-480(U)).

In the case of *Combs v. City of Winchester*, 25 Va. Cir. 207 (City of Winchester 1991), a circuit court held that notice given by the city for the demolition of a building was invalid because the notice was sent only to the life tenants and not to the remaindermen. The court concluded that the remaindermen were “owners” as that term is used in the USBC and were entitled to notice prior to demolition. Due to the lack of notice, the court ruled that the remaindermen could sue the city.

22-3.11(c) Tenants’ Responsibility for Violations of the Maintenance Code

The Virginia Supreme Court’s decision in *Wohlford v. Quesenberry*, 259 Va. 259, 523 S.E.2d 821 (2000), may become an issue when enforcing the Maintenance Code. In this case, Wohlford rented a house under an oral, month-to-month lease from Quesenberry. Nothing was said in the oral lease about who would maintain the premises. The roof leaked, and the furnace malfunctioned. Both of these conditions damaged Wohlford’s personal property, and soot and fumes from the furnace made her sick, so she sued the landlord for damages.

At common law, a landlord had no obligation to maintain the premises of a tenant in possession absent a promise to do so. Wohlford argued that the common law rule had been modified by the adoption of the Maintenance Code, which specifically requires an “owner” to maintain the roof and heating system of a structure in good repair. However, the Supreme Court noted that Va. Code § 36-97 defines owner for USBC purposes to include a “lessee in control of a building or structure.” Because the definition of an owner includes a tenant in possession, the Court reasoned tenants in rental properties are deemed to be owners and are responsible for Maintenance Code repairs, in the absence of an agreement in which the landlord assumes such responsibility.

Note: In *Cherry v. Lawson Realty Corp.*, 295 Va. 369, 812 S.E.2d 775 (2018), tenants sued their landlord and real estate management company, alleging that the apartment they rented exposed them to excessive moisture and mold. The trial court held that under Va. Code § 8.01-226.12, a cause of action for damages is established whenever a landlord fails to remediate mold in accordance with the appropriate standards. But the court also held that the adoption of § 8.01-226.12 abrogated the application of all common law claims for personal injury involving landlord/tenant claims and dismissed the tenants’ common law claims for negligence. The Supreme Court of Virginia reversed the trial court’s decision, finding that § 8.01-226.12 did not abrogate common law tort liability. Although the statute created new obligations and clarified existing immunities, it did not abrogate any common law remedies the tenants might have against the landlord and managing agent.

As a consequence of the Supreme Court’s ruling in *Wohlford*, tenants in rental properties may be civilly and criminally liable under the Maintenance Code for failing to maintain and repair their landlords’ property unless the landlord expressly assumes the duty to repair. Under the common law, landlords still have a duty to maintain in a safe condition any part of the leased premises reserved for the common use of all the tenants. However, landlords do not have a duty to maintain those portions of the premises under the tenant’s control. See *Kesler v. Allen*, 233 Va. 130, 353 S.E.2d 777 (1987); *Paytan v. Rowland*, 208 Va. 24, 155 S.E.2d 36 (1967). In light of the *Wohlford* decision, building maintenance officials should give tenants notice of violations of the Maintenance Code because the tenants may be ultimately responsible for correcting the violations.

Virginia Code § 36-106(E) authorizes a local enforcement officer to issue a summons or a ticket to the lessor or sublessor of a residential dwelling unit for violations of any Building Code provision, provided a copy of the notice is also served on the owner of the property. This amendment to § 36-106 supports the position that in appropriate situations, tenants can

be charged with Maintenance Code violations. *See also Sanders v. UDR Inc.*, No. 3:10cv459 (E.D. Va. Jan. 12, 2011) (violation of Maintenance Code may establish negligence per se between residential landlord and tenant); *Jenkins v. Daniels Inst. of Holistic Health, Inc.*, 62 Va. Cir. 246 (City of Roanoke 2003) (tenant subject to liability for personal injury damages for negligence per se claim resulting from violation of the Building Code).

The Maintenance Code provides that the owner of a structure shall provide and maintain all buildings, structures, systems, facilities, and associated equipment in compliance with the Code unless the Code specifically expresses or implies that this is the responsibility of the tenant or occupant. Where an owner states that a tenant is responsible for performing any of the owner's duties under this Code, the code official may request information needed to verify the owner's statement, as allowed by Va. Code § 55.1-1209(A)(5). USBC, Part III, § 103.2.3 (13 VAC 5-63-470(E)).

22-3.11(d) Publication in Newspaper

In addition to the powers given to localities under the USBC, Va. Code §§ 15.2-900, 15.2-906, and 15.2-1115 authorize localities to adopt ordinances requiring an owner to repair, remove, or secure an unsafe structure. Section 15.2-906 requires local governments to give notice of repair or demolition by publication in a newspaper unless the action was allowed under the USBC pursuant to an emergency. Sections 15.2-900 and 15.2-1115 have no such requirement. Also, the USBC does not require code officials to give notice of repair or demolition by publication in a newspaper.

Because the Code of Virginia has one set of procedures for notification and the USBC has another, code officials sometimes ask if Va. Code § 15.2-906 requires a code official to publish a notice in a newspaper prior to removing, repairing, or securing an unsafe structure, in addition to giving the notice required by the USBC. It appears that a locality is not required to give notice by newspaper publication when enforcing the USBC.

Virginia Code § 15.2-906 (formerly § 15.1-11.2) was adopted in 1968, well before the adoption of the USBC in 1973 and 1986. This section of the state Code gave localities the authority to adopt ordinances dealing with unsafe structures before localities had access to the USBC.

If a locality elects to enforce the Maintenance Code, it can follow the notice requirements in the Code and is not required to publish a notice of repair/removal in a local newspaper. If a locality elects not to enforce the Maintenance Code and instead adopts a local ordinance pursuant to § 15.2-906 to deal with unsafe structures, publication of a notice of repair/removal in a newspaper is required. The Attorney General advises that some localities are giving the notice required by both Va. Code § 15.2-906 and USBC in order to be safe.

Nonetheless, the USBC contains a warning regarding newspaper publication:

Code officials and local governing bodies should be aware that other statutes and court decisions may impact on matters relating to demolition, in particular whether newspaper publication is required if the owner cannot be located and whether the demolition order must be delayed until the owner has been given the opportunity for a hearing. In addition, historic building demolition may be prevented by authority granted to local historic review boards in accordance with Va. Code § 15.2-2306 unless determined necessary by the code official.

USBC, Part I, § 118.6 (13 VAC 5-63-180(G)), Part III, § 106.8 (13 VAC 5-63-490(G)). Even though the Construction Code (Part I, § 118) has provisions dealing with unsafe buildings, most problems with unsafe buildings come within the scope of the Maintenance Code.

The USBC does not address how a code official gives notice if the identity or location of the owner is unknown. As a best practice, the last address listed for the owner on the

locality's real estate assessment records for the property may be considered an official address for purposes of sending notice. Additionally, when the property is owned by a corporate entity, it is appropriate to send notice to the entity's registered agent at the address listed with the State Corporation Commission. A locality may wish to adopt a local ordinance under Va. Code §§ 15.2-900, 15.2-906, or 15.2-1115 to deal with situations where the identity or location of an owner is unknown. Also, such an ordinance may be needed to deal with the repair or removal of structures that are exempt from the USBC.

A cardinal rule to follow in giving notice is that you rarely, if ever, will get in trouble for giving too much notice, only for giving too little.

It is important for the code official to keep copies of all written notices that are issued, including return receipts for certified and registered mail and copies of invoices for legal notices in the newspaper. The copies are important if it becomes necessary to initiate legal proceedings against the owner or to support the code official's actions.

22-3.11(e) Transfer of Property After Receiving Notice of Violation

Virginia Code § 36-107.1 requires owners of homes with excessive levels of lead-based paint to notify prospective purchasers of the violation. However, in other situations it is not uncommon for the owner of a building that violates the USBC to sell the building after receiving notice without advising the new owner of the violation. The new owner then demands additional time to correct the violation. To try and stop these delays, consider filing a notice of the violation in the land records in the local circuit court clerk's office. The notice details the violations and states that no additional time to correct the violation will be granted simply because of a change in ownership. The information contained in the land records is deemed to be constructive notice to all interested parties, and the purchaser of property is charged with constructive notice of what is in the public records. *Chavis v. Gibbs*, 198 Va. 379, 94 S.E.2d 195 (1956). Once the violation has been corrected or the building has been demolished or repaired, the notice of violation needs to be released so it will not be a defect in the title to the property.

If an enforcement action has been initiated against the owner of a building or structure and the owner subsequently transfers the ownership of the building or structure to an entity in which the owner holds an ownership interest greater than 50 percent, the pending enforcement shall continue to be enforced against the owner. USBC, Part III, § 104.1.1 (13 VAC 5-63-480(B)).

Virginia Code § 55.1-706 requires that the disclosure and disclaimer forms required by the Virginia Residential Property Disclosure Act must contain a notice from the seller to the purchaser that there are no pending Building Code enforcement actions that affect the safe, decent, and sanitary living conditions on the property, of which the owner has been notified by the locality.

22-3.12 Structures That Are Unsafe or Unfit for Human Occupancy

Code officials have the authority to secure, repair, vacate, condemn, and even demolish unsafe structures and structures that are unfit for human occupancy. USBC, Part III, § 202 (13 VAC 5-63-510((B))) defines unsafe structures and structures that are unfit for human occupancy as follows:

Unsafe structure—An existing structure determined by the code official to be dangerous to the health, safety, and welfare of the occupants of the structure or the public because of but not limited to an of the following conditions: (1) the structure contains unsafe equipment; (2) the structure is so damaged, decayed, dilapidated, structurally unsafe, or of such faulty construction or unstable foundation that partial or complete collapse is likely; (3) the structure is vacant, unsecured, or open; (4) the degree to which the structure is in disrepair or lacks maintenance, ventilation, illumination, sanitary or heating facilities, or other

essential equipment, or (5) the required plumbing and sanitary facilities are inoperable.

The USBC, Part III, § 106.1 (13 VAC 5-63-490(A)) provides that all structures that are classified as unsafe or unfit for habitation shall be made safe through code compliance, vacated and secured against public entry, or razed and removed. In *Gaines v. Department of Housing & Community Development State Building Code Technical Review Board*, 71 Va. App. 385, 837 S.E.2d 54 (2020), the court upheld the review board's finding that the lack of a heating system in a rental property rendered the property unfit for human occupancy. This was true even though the rental property was empty at the time of the notice of violation and the building was constructed prior to enactment of the USBC.

Virginia Code § 36-98 provides that the USBC regulations shall not supersede land use requirements in historic districts created pursuant to Va. Code § 15.2-2306. Virginia Code § 36-105(C)(6) provides that a locality may require by ordinance that any landmark, building, or structure that contributes to a historic district shall not be razed, demolished, or moved until the razing, demolition, or moving is approved by the historic district review board, or, on appeal, by the governing body after consultation with the review board, unless the local Maintenance Code official determines that it constitutes such a hazard that it must be razed, demolished, or moved. USBC, Part III, § 106.8 provides that historic building demolition may be prevented by authority granted to local historic review boards "unless determined necessary by the code official."

22-3.12(a) Inspection of Unsafe and Unfit Structures

If the local building department receives a complaint or discovers that a structure is unsafe or unfit for human habitation, the code official must inspect the structure, prepare a report describing the inspection, file the report in the code official's records, and send a copy to the owner. USBC, Part III, § 106.2. For a discussion of a code official's authority to seek an inspection warrant to inspect a structure that is unsafe or unfit for human habitation, see section [22-2.03\(d\)\(2\)\(ii\)](#).

22-3.12(b) Emergency Measures

22-3.12(b)(1) Vacating or Securing a Structure

22-3.12(b)(1)(i) Vacating a Structure

A code official can order that a structure that is unsafe or unfit for human habitation be vacated. When an unsafe structure is ordered to be vacated, the code official must post a notice with the following wording at each entrance as follows: "THIS STRUCTURE IS UNSAFE AND ITS USE OR OCCUPANCY HAS BEEN PROHIBITED BY THE CODE OFFICIAL." USBC, Part III, § 106.5 (13 VAC 5-63-490(D)). Once the notice is posted, entering the building is prohibited except as authorized by the code official to make inspections, to perform required repairs, or to demolish the building. USBC, Part III, § 106.5 (13 VAC 5-63-490(D)).

22-3.12(b)(1)(ii) Revocation of the Certificate of Occupancy

If an unsafe structure or unfit structure is not brought into compliance within the time period stipulated on the notice of violation, the code official can request that the certificate of occupancy be revoked. USBC, Part III, § 106.6 (13 VAC 5-63-490(E)).

22-3.12(b)(1)(iii) Vacant and Open Structures

When an unsafe structure or a structure unfit for human habitation is open for public entry, the code official has the authority to authorize the necessary work to make the structure secure. USBC, Part III, § 106.7 (13 VAC 5-63-490(F)).

22-3.12(b)(1)(iv) Notice to Occupants

Whenever possible, notice of an unsafe structure or a structure unfit for human occupancy should be given to the tenants of the affected building. See USBC, Part III, § 106.3 (13 VAC 5-63-490(B)). The occupants are the individuals most impacted by a decision to vacate the premises. Also, it is necessary to give the occupants notice so they can be charged with a

violation of the code if they fail to vacate the structure. The case of *Flatford v. City of Monroe*, 17 F.3d 162 (6th Cir. 1994), demonstrates the importance of giving notice to tenants. In that case, the Court of Appeals for the Sixth Circuit held that a building inspector could be liable for his failure to give tenants notice of an eviction order. A family that was evicted from their apartment sued the building inspector when the inspector ordered an entire apartment building be vacated due to hazardous conditions. Due to the emergency nature of the hazards, it was not possible to give the tenants prior notice. However, the inspector also failed to give the tenants notice after the eviction advising them of their right to an administrative hearing. It was later determined that the violations were in the apartments of other families. The court held that fundamental fairness required prompt notice to the tenants of their right to an administrative hearing after the eviction had occurred.

22-3.12(b)(2) Emergency Repairs and Demolition

To the extent permitted by the locality, the code official may authorize emergency repairs to unsafe structures or structures unfit for human habitation when it is determined that there is an immediate danger of any portion of such structure collapsing or falling and when life is endangered. Emergency repairs can also be authorized when a code violation poses an immediate serious and imminent threat to the life and safety of the occupants. In addition, whenever the code official determines that an unsafe structure or unfit structure constitutes a “hazard” and the owner of such structure fails to comply with a notice to demolish, the code official can cause the structure to be demolished. Demolition is not limited to situations where a structure is in danger of collapse. Any condition that poses a hazard will justify the demolition of a structure. The costs of the emergency repairs or demolition can be billed to the owner of the premises and such costs, if unpaid, constitute a lien against the property. USBC, Part III, § 106.8 (13 VAC 5-63-490(G)).

An immediate or imminent threat denotes something that is “ready to happen on the instance, close at hand, impending, menacingly near, without appreciable lapse of time as opposed to something that will happen in the future.” *Webster’s New World Dictionary; Words and Phrases*, Volume 20.¹¹

A “hazard” is defined as a “risk; peril; danger; jeopardy,” or an “exposure to chance of injury or loss.” *Webster’s New World Dictionary; Words and Phrases*, Volume 19.¹²

Virginia Code § 15.2-906(2) also allows local governments to make emergency repairs to unsafe structures to protect the public safety. The definition of “repair” includes “maintenance work to the exterior of a building to prevent deterioration of the building or adjacent buildings.” In addition, Va. Code § 15.2-907.2 allows a locality to petition the circuit court to appoint it or a land bank entity (see Chapter 28, Blight and Nuisance, section 28-5.06) to act as a receiver to sell blighted residential properties that are in need of repairs at a public auction to a person who can demonstrate an ability to complete the needed repairs within a reasonable time as determined by the court.

In addition, localities may, after official action, maintain an action to compel a responsible party to abate, raze, or remove an unsafe structure that constitutes a public nuisance. Va. Code §§ 15.2-900, 15.2-906(4) and 15.2-1115.

In *Pisner v. State Building Code Technical Review Board*, No. 0461-13-14 (Va. Ct. App. Aug. 13, 2013) (unpubl.), the court of appeals affirmed the trial court’s decision upholding a decision of the State Building Code Technical Review Board (TRB) finding a property owner to be in violation of the Maintenance Code for not removing rubbish resulting from the demolition of an unsafe house. The house had been damaged by a falling tree, and Fairfax County issued a notice of unsafe condition and ordered the owner to: (i) obtain a permit to repair or demolish

¹¹ The term is not defined in the Code of Virginia or USBC.

¹² The term is not defined in the Code of Virginia or USBC.

the house; (ii) install a fence around the house to make it secure; and (iii) remove all rubbish from the property. The owner appealed the notice of violation; while the appeal was pending, the owner obtained a demolition permit and demolished the house, but did not remove the rubbish. The local Board of Building Code Appeals upheld the notice of violation, and the owner appealed to the TRB. The TRB found the owner to be in violation of USBC, Part III, § 301.3 for failing to remove the rubbish, and the owner appealed to the court of appeals, which upheld the TRB's decision. During the appeal, the owner also argued that the "rubbish" he had been ordered to remove included materials that could have been used to renovate the house, and the removal order therefore constituted a taking of his property. The court dismissed the owner's claim, holding that "[i]t is settled law that a public body abating a nuisance is not a compensable taking."

22-3.12(b)(3) Avoid Questionable Vacations or Demolitions

In *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996), the Ninth Circuit held that local code officials could be sued for improperly requiring occupants to vacate buildings. Building maintenance officials in San Bernardino, California were condemning properties for housing code violations. A number of displaced residents sued the code officials on the grounds that alleged Building Code violations were a pretext and that the city's real purpose in the condemnations was to force suspected criminals to relocate to other areas. The court held that if the plaintiffs could prove the alleged housing code violations did not constitute emergencies, it would be a violation of the residents' constitutional rights for their properties to be condemned, and the violations would subject the local officials to liability. Citizens are exerting increasing pressure to use Building Code violations as a means to deal with properties where criminal activity is suspected. This case demonstrates the need for code officials to verify and document that housing code violations do in fact exist and constitute emergencies before condemning properties.

The building maintenance official must resist the pressure to declare something unsafe simply as a means to deal with an annoying condition. The Virginia Supreme Court and the Attorney General have pointed out that a locality may not condemn a building simply because it is an eyesore. *City of Roanoke v. Bolling*, 101 Va. 182, 43 S.E. 343 (1903); 1993 Op. Va. Att'y Gen. 79.

Generally, aesthetic considerations alone do not justify the exercise of local police powers to regulate or control private property. An ordinance or public action must be based on promoting the public's safety, health, or welfare in order to be valid. However, the fact that aesthetics are also considered will not invalidate an ordinance or action if other factors are also present. *Bd. of Sup'rs of James City Cnty. v. Rowe*, 216 Va. 128, 216 S.E.2d 199 (1975); *Kenyon Peck, Inc. v. Kennedy*, 210 Va. 60, 168 S.E.2d 117 (1969).

22-3.13 Appeals

Once a violation of the USBC has been identified and the owner given notice of the violation, no guarantee exists that the violation will be corrected. The owner may choose to take advantage of the appeals process offered by the USBC.

22-3.13(a) Local Board of Building Code Appeals

22-3.13(a)(1) Creation of Board

USBC, Part I, § 119.5 (Construction) (13 VAC 5-63-190(E)) and Part III, § 107.5 (Maintenance) (13 VAC 5-63-500(E)) provide that a decision of the code official may be appealed to the Local Building Code Board of Appeals. The locality is responsible for maintaining a duly appointed Local Building Code Board of Appeals, which shall meet as necessary to assure a duly constituted board, appoint officers as necessary, and receive such training on the code as may be appropriate or necessary from the staff of the locality. USBC, Part III, § 107.1 (13 VAC 5-63-500(A)). The Board of Building Code Appeals must consist of at least five members appointed by the locality. USBC, Part I, § 119.2 (13 VAC 5-63-190(B)), Part III, § 107.2 (13 VAC 5-63-500(B)). The board members are to be selected on the basis of their ability to render

fair and competent decisions. To the extent possible, at least one member should be an experienced builder, at least one member should be a registered design professional (RDP), and at least one member should be an experienced property manager. Employees or officials of the locality may not serve as board members. USBC, Part I, § 119.3 (13 VAC 5-63-190(C)), Part III, § 107.3 (13 VAC 5-63-500(C)). The board has the authority to uphold, reverse, or modify the decision of the code official. USBC, Part I, § 119.7 (13 VAC 5-63-190(G)), Part III, § 107.7 (13 VAC 5-63-500(G)). See also Va. Code § 36-105 for additional information on the Local Building Code Board of Appeals.

22-3.13(a)(2) Appeals to Board

Any person aggrieved by the application of the Code or refusal to grant a modification may appeal to the local board. Va. Code § 36-105(A). Appeals to the board concerning the Maintenance Code must be made within fourteen calendar days of the receipt of the decision. USBC, Part III, § 107.5 (13 VAC 5-63-500(E)). Appeals to the board concerning the Construction Code must be made within thirty calendar days of the receipt of the decision. USBC, Part I, § 119.5 (13 VAC 5-63-190(E)). Applications for appeals must be in writing, and the local board must hold a hearing on an appeal, unless properly postponed, within thirty calendar days of the filing of the appeal (forty-five days if meetings are scheduled monthly). Notice of the hearing must be sent to the parties at least fourteen calendar days prior to the date of the hearing unless the parties agree to a lesser time period. The hearing is open to the public, the board must render a written decision that must include a notice of the right of appeal to the State Review Board, and copies of the decision must be sent to all of the parties. USBC Part I, §§ 119.6, 119.7 (13 VAC 5-63-190(F), (G)), Part III, §§ 107.6, 107.7 (13 VAC 5-63-500(F), (G)).

Because a hearing before the board is an administrative hearing, it should be conducted in an informal manner and not as a judicial trial. While each participant should have an opportunity to present pertinent information and question adverse witnesses, the rules of evidence that are used in judicial trials do not apply. *Baker v. Babcock & Wilcox Co.*, 11 Va. App. 419, 399 S.E.2d 630 (1990). A circuit court has held that this is the exclusive remedy for a property owner who alleged the locality violated the Building Code in demolishing his building. *Comfort v. City of Norfolk*, 82 Va. Cir. 89 (City of Norfolk 2011).

22-3.13(b) Appeals to State Technical Review Board

Any person dissatisfied with a decision of a local appeals board may appeal such decision to the State Building Code Technical Review Board. An appeal must be made within twenty-one calendar days after receiving the decision of the local board. USBC, Part I, § 119.8 (13 VAC 5-63-190(H)), Part III, § 107.8 (13 VAC 5-63-500(H)).

The State Building Code Technical Review Board (TRB) has twelve members who are selected from the occupations set forth in Va. Code § 36-108. The TRB conducts a hearing on an appeal and has the authority to subpoena witnesses and administer oaths. See Va. Code § 36-115. The appeal before the TRB will be conducted in accordance with the requirements of the Administrative Process Act, which is found in Va. Code §§ 2.2-4000 through 2.2-4033. While the appeal before the TRB is still an administrative hearing, it is more formal than the proceeding before the local appeals board. A local code official should comply with the Board's decisions, or the code official's actions may be subject to challenge for failure to do so. A county building inspector acted arbitrarily in refusing to accept inspection reports based on an engineer's method of inspection when the TRB held such method acceptable. *Strawbridge v. Cnty. of Chesterfield*, 23 Va. App. 493, 477 S.E.2d 789 (1996). For additional information on the TRB, see Va. Code §§ 36-108 through 36-119.

A circuit court held that the TRB does not have jurisdiction to hear appeals involving *local* (as opposed to state) fire code violations, unless a local jurisdiction lacks a local appeal process. *Poplar Place Homeowners Ass'n v. Va. Dep't of Hous. & Cmty. Dev.*, 91 Va. Cir. 157 (Fairfax Cnty. 2015) (construing Va. Code § 27-98).

22-3.13(c) Appeals to the Circuit Court

Any person dissatisfied with a decision of the TRB may appeal such decision to the circuit court in the locality where the alleged violation of the Maintenance Code occurred. See Va. Code §§ 2.2-4025 through 2.2-4030; Va. Code § 36-114.

The burden is on the party filing the appeal to demonstrate that the TRB committed an error of law. The appeal to the circuit court is not a de novo hearing. If the TRB made an evidentiary record of its hearing, the circuit court's review is limited to an examination of such record. If no evidentiary record was made, the circuit court will review whatever documents were made and any additional evidence the court deems to be appropriate. The findings of the TRB are to be accorded great deference by the circuit court. See Va. Code § 2.2-4027.

If, during an appeal pursuant to the Administrative Process Act (Va. Code § 2.2-4000 et seq.) of the Review Board's decision with respect to the issuance of a stop work order by a local building official, the court finds in favor of the party that was issued the stop work order, such party shall be entitled to recover its actual costs of litigation, including court costs, attorney fees, and witness fees, from the locality responsible for issuing the stop work order. Va. Code § 36-114.1.

22-3.14 Legal Proceedings to Correct Violations

If an owner does not comply with the notice of violation and no appeal is noted or the appeal process has been completed, legal proceedings can be initiated to force the owner to remedy the violation of the USBC. The USBC provides that the code official may request, in writing, the legal counsel of the locality to initiate appropriate legal proceedings to restrain, correct, or abate the violation or require the removal or termination of the structure's use. Alternatively, the USBC allows the code official, where the locality or legal counsel so authorizes, to issue or obtain a summons or warrant. USBC, Part I, § 115.3 (13 VAC 5-63-150(D)), Part III, § 105.6 (13 VAC 5-63-485(105.6)). Some localities have had their code officials appointed as special conservators of the peace¹³ pursuant to Va. Code § 19.2-13 so they will have the authority to issue summons for Building Code violations. The Attorney General has opined that even though local code officials are responsible for the enforcement of the USBC, violations of the Construction Code are punishable as misdemeanors under state law, and a person alleged to be in violation of the USBC should be charged with a violation of the State Code rather than a local ordinance. See 1985-86 Op. Va. Att'y Gen. 184. At the time the Attorney General issued this opinion, only the provisions of the USBC dealing with the construction of new buildings and structures and alterations, additions, and changes in occupancy in existing buildings and structures—the Virginia Construction Code—were in effect. The Maintenance Code was not adopted until October 1, 1986. In the opinion, the Attorney General emphasized that enforcement of the Building Code was mandatory, and localities were not required to pass any ordinances adopting the Building Code in order to enforce it. An argument can be made that because the Maintenance Code is optional and localities must adopt a local ordinance in order to enforce the property Maintenance Code, violations of the Maintenance Code can be prosecuted as violations of a local ordinance, allowing the locality to keep any fines imposed for violations of the Maintenance Code.

Virginia Code § 15.2-1542(D) allows a local government attorney to prosecute misdemeanor violations of the State Code with the authorization of their local governing body and the concurrence of the local Commonwealth's Attorney.

The Attorney General has opined that the USBC regulations were not unconstitutionally vague and could be enforced throughout the Commonwealth. 2004 Op. Va. Att'y Gen. 138.

¹³ Note, however, that the chief law enforcement officer of the locality must first provide to the appointing court a written assessment of the need for the appointment and any limitations that should be imposed. Va. Code § 19.2-13.1.

22-3.14(a) Alternatives to Try First**22-3.14(a)(1) Administrative Hearings**

Before initiating legal proceedings to force compliance with the USBC, a code official should consider holding an administrative hearing with the owner. The code official and other appropriate representatives (e.g., a supervisor, attorney, etc.) might offer to meet with the owner to explain the violation and to try to reach an agreement about what must be done to correct it. The benefits of an administrative hearing are that it offers an informal method of trying to achieve compliance. In the event the matter ends up in court, an administrative hearing indicates to the court that the code official made every effort to accommodate the owner. If an administrative hearing is held, the code official should keep accurate and detailed notes of the hearing. After the hearing, the code official should send the owner a written letter confirming the hearing, pointing out what the violations are, explaining what the owner must do to correct the violations, and stating the time frame within which the violations must be corrected.

22-3.14(a)(2) Disconnect Utilities

Another option that may be considered before resorting to legal proceedings to correct USBC violations is to disconnect utility services. For utilities to be disconnected, the USBC violation must be related to the utility service in question. For example, the public works department could turn off water service if problems with a septic overflow are present; the electric company could be instructed to disconnect electrical service if problems with wiring are present; etc. However, in *Logie v. Town of Front Royal*, 58 Va. Cir. 527 (Warren Cnty. 2002), the court held that the provision that the town would terminate electric service for property not in compliance with the Maintenance Code violated the Dillon Rule because it was not provided for in the Code's penalty provisions.

22-3.14(b) General District Courts

Because a violation of the USBC is punishable as a misdemeanor (Va. Code § 36-106), prosecutions are initiated in the general district court of the county or city where the violation occurred. See Va. Code § 16.1-123.1. To initiate proceedings in a general district court, the code official will appear before the local magistrate and fill out the proper form alleging that an owner has violated the provisions of the USBC. If there is reason to believe that the owner will voluntarily appear before the court to answer the charges, a summons can be issued that advises the owner of the date, time, and place to appear. Va. Code § 19.2-73. If there is reason to believe that the owner will not voluntarily appear to answer the charges, the magistrate will issue a warrant directing the local law enforcement agency to arrest the owner. Va. Code § 19.2-72. Except in very unusual circumstances, persons charged with violations of the USBC would be issued a summons rather than a warrant. However, if the owner is a nonresident, some localities will obtain a warrant for a Building Code violation in the hope that the threat of an arrest if the owner returns to the locality will encourage the owner to correct the violation.

One difficulty frequently encountered in enforcing the Maintenance Code is dealing with nonresident owners who are outside the jurisdiction of the local courts. Because the definition of an owner is very broad, it is possible to use the cases of *Wohlford v. Quesenberry*, 259 Va. 259, 523 S.E.2d 821 (2000), and *Combs v. City of Winchester*, 25 Va. Cir. 207 (City of Winchester 1991), to try to make tenants correct Building Code violations.

If a building or structure is owned by a corporation, the code official may need to take enforcement action against the corporate officials. As a general rule, a corporation is liable for criminal activities committed by the corporation. See *Postal Tel-Cable Co. v. City of Charlottesville*, 126 Va. 800, 101 S.E. 357 (1920). Also, all persons in a corporation who share in criminal conduct can be held accountable for corporate violations of the law. See *United States v. Hong*, 242 F.3d 528 (4th Cir. 2001). Where a corporation through its officers and agents engages in an activity that involves a violation of the law, all who participate in it are liable. See *Crall v. Commonwealth*, 103 Va. 855, 49 S.E. 638 (1905).

Virginia Code § 36-105 and the USBC, Part III, § 104.1.1 (13 VAC 5-63-480(B)) provide that when the local code official has initiated an enforcement action against the owner of a building or structure and the owner subsequently transfers ownership of the building or structure to an entity in which the owner holds more than 50 percent of the ownership interest, the pending enforcement action shall continue to be enforced against the owner.

22-3.14(c) Statute of Limitations

Prosecutions relating to the maintenance of existing buildings or structures must commence within one year of the issuance of a notice of violation for the offense. Va. Code §§ 19.2-8, 36-106(F). As the statute of limitations does not begin to run until a notice of violation has been issued, the code official has some flexibility to work with a property owner who may need longer than a year to correct violations but who is making progress.

The statute of limitations for the Construction Code is within one year of discovery of the offense by the code official, provided that such discovery occurs within two years of the date of initial occupancy or use after construction of the building or structure, or the issuance of a certificate of use and occupancy for the building or structure, whichever is later. *Id.* In *County of Frederick v. Strawderman*, No. CR09-258 (Frederick Cnty. Cir. Ct. Sept. 9, 2009), the court held that the time period under Va. Code § 19.2-8(5) does not commence to run “until the later of either the initial occupancy/use of a building/structure after its construction or the issuance of a certificate of use and occupancy for the building/structure.”

The Attorney General has taken the position that the civil enforcement of Building Code violations is subject to the same statute of limitations as criminal prosecutions of Building Code violations. See 1997 Op. Va. Att’y Gen. 126. *But see Zaaki Rest. & Café, LLC v. Va. Dep’t of Hous. & Cmty. Dev. State Bldg. Code Tech. Review Bd.*, No. 0318-21-4 (Va. Ct. App. Jan. 18, 2022) (unpubl.) (holding that statute of limitations for criminal prosecutions provided in § 19.2-8 “does not limit the civil enforcement process” and, therefore, no error in locality’s revocation of business owner’s certificate of occupancy in 2019 for violations dating back to 2013).

When enforcing the USBC, penalties may be assessed against contractors and subcontractors, as well as the owners of buildings or structures. See 1978-79 Op. Va. Att’y Gen. 292.

USBC, Part I, § 115.2.1 (13 VAC 5-63-150(C)) provides that when violations of the Construction Code are discovered after the statute of limitations has expired, a notice of violation shall only be issued by the code official upon advice from local legal counsel that action may be taken to compel correction of the violation. Even though the statute of limitations to prosecute a violation of the USBC has run, the locality could still seek an injunction under Va. Code § 8.01-620 to correct the violation. When prosecution is no longer possible because the statute of limitations has run, the code official, when requested by the owner, shall document in writing the existence of the violation noting the edition of the USBC the violation is under.

22-3.14(d) Penalties

22-3.14(d)(1) Fines

Unless classified as a civil violation (see section [22-3.14\(d\)\(6\)](#)), a violation of the USBC is a misdemeanor punishable by a fine up to \$2,500. Va. Code § 36-106; USBC, Part I, § 115.4 (13 VAC 5-63-150(E)), Part III, § 105.7 (13 VAC 5-63-485(105.7)). If the violation has not been corrected at the time of the conviction, the court shall order the violation to be corrected within six months of the conviction, although a different period may be set for “good cause shown.” Va. Code § 36-106(A).

A violation of any provision of the USBC that results in a dwelling not being a safe, decent, and sanitary dwelling in a locality where the local governing body has taken official

action to enforce the Maintenance Code is a misdemeanor, and any owner, person, firm, or corporation convicted of such violation shall be punished by a fine of not more than \$2,500. Va. Code § 36-106(B).

22-3.14(d)(2) Minimum Fines

Minimum fines apply to subsequent violations of the Building Code. Any person convicted of a second offense within five years shall be punished by a fine of not less than \$1,000 nor more than \$2,500. Any person convicted of a second offense within five to ten years of the first shall be punished by a minimum fine of not less than \$500 nor more than \$2,500. Any person convicted of a third or subsequent offense involving the same property within ten years of the first, after having been twice previously convicted, shall be punished by confinement in jail for not more than ten days and a fine of not less than \$2,500 nor more than \$5,000, which amount shall not be suspended, either or both. See Va. Code § 36-106(A).

Virginia Code § 36-106(B) also provides that when a violation of the Building Code results in a dwelling not being a “safe, decent and sanitary” dwelling, any person convicted of a second offense within five years after a first offense shall be punished by confinement in jail for not more than five days and a fine of not less than \$1,000 nor more than \$2,500, either or both. However, the provision for confinement in jail shall not be applicable to any person, firm, or corporation for a violation involving a multi-family dwelling unit. Any person convicted of a second offense within five to ten years of a first offense shall be punished by a minimum fine of not less than \$500 nor more than \$2,500. Any person convicted of a third or subsequent offense involving the same property within ten years of the first offense shall be punished by confinement in jail for not more than ten days and a fine of not less than \$2,500 nor more than \$5,000, either or both. No portion of the fine imposed for a third or subsequent offense committed within ten years shall be suspended.

22-3.14(d)(3) Continuing Fines

Each day that a violation continues after a conviction or after the court-ordered abatement period has expired constitutes a separate offense and is punishable by the larger fines described in section [22-3.14\(d\)\(2\)](#).

22-3.14(d)(4) Lead-Based Paint

Special penalty provisions apply to lead-based paint violations. A violation of the provisions of USBC, Part III, § 310.1 regarding lead-based paint that poses a threat to a pregnant woman or child under the age of six is subject to a fine of up to \$2,500, and each day the violation continues constitutes a separate violation and is subject to the larger fines described in section [22-3.14\(d\)\(2\)](#). See Va. Code § 36-106(D). While a tenant may terminate a rental agreement for a landlord’s failure to comply with lead-based paint requirements, the termination of a rental agreement by a landlord because a tenant complained about lead-based paint is considered to be retaliation against the tenant and is a violation of Va. Code § 55.1-1258. Va. Code § 36-106(D).

22-3.14(d)(5) Suspended Fines

If an owner has corrected a violation after legal proceedings have been initiated but before the court hearing has been held, the building maintenance official should not automatically drop the legal proceedings. It may be a good idea to require the owner to appear in court. A court appearance can help reinforce to the owner the consequences of disregarding a notice of violation. The building maintenance official might consider advising the court that the violation has been corrected, and while a fine should be imposed, the building maintenance official has no objection to the fine being suspended on the condition that the owner comply with the USBC in the future. A suspended fine has the effect of placing the owner on probation and helps ensure future compliance with the USBC. If the violation has not been corrected by the time it gets to court, the building maintenance official might consider suggesting that the court impose a fine but give the owner an extension of time to correct the violation and then suspend the fine if the owner corrects the violation.

22-3.14(d)(6) Uniform Schedule of Fines

Virginia Code § 36-106(C) and the USBC, Part I, § 115.1 (13 VAC 5-63-150(A)) and Part III, § 105.1 (13 VAC 5-63-485(105.1)) authorize localities to adopt an ordinance establishing a uniform schedule of civil penalties for specified violations of the USBC. The civil penalty can be up to \$100 for the initial violation and up to \$350 for each additional summons. Each day a violation continues constitutes a separate offense. However, a violator cannot be charged for violations arising from the same operative set of facts more than once in any ten-day period, and the total civil penalties cannot exceed \$4,000. A civil action can be brought for a civil violation of the Building Code. However, Va. Code § 36-106(C) specifically provides that, once a violation is designated as a civil violation, except for violations resulting in injury to persons, it cannot be prosecuted as a misdemeanor offense. If a civil violation concerns a residential unit, the court can order a violator to abate the violation within six months of the assessment of the civil penalty, although a different period may be set “for good cause shown.” If the violation concerns a nonresidential building or structure, the court may order the violator to abate within the time specified by the court.

Virginia Code § 36-106(B) also allows a representative of a locality and a code violator to agree in writing to the terms of the abatement and remediation of a Building Code violation if the violator agrees to waive trial, admit liability, and pay the civil penalty. If the code violator does not elect to waive trial, the civil violation is tried in the general district court in the same manner as a criminal trial, and if the violation remains uncorrected at the time of the trial, the court shall order the violator to abate the violation within six months. The court may set a different period to correct the violation for “good cause shown.”

22-3.14(e) Vacation of Premises

A court has the authority to order an owner to vacate their home while a contractor chosen by the local government makes the necessary repairs in order to bring the property up to USBC standards. The court may also enter judgment against the owner for the cost of the repairs. *Rainey v. City of Norfolk*, 14 Va. App. 968, 421 S.E.2d 210 (1992).

22-3.14(f) Appeals

Any person charged with a violation of the USBC may appeal a conviction in the general district court to the local circuit court. Va. Code § 16.1-132. If an appeal is perfected, the circuit court conducts a de novo trial. Va. Code § 16.1-136. Any person convicted in circuit court may appeal such conviction to the Virginia Court of Appeals and ultimately, to the Supreme Court of Virginia. Va. Code §§ 8.01-670, 17.1-405.

22-3.14(g) Injunctions and Contempt of Court

If legal proceedings and the accompanying penalties have not resulted in correction of the violations of the USBC, the building maintenance official may wish to consider seeking an injunction in circuit court. Virginia Code § 8.01-620 authorizes a circuit court to issue injunctions for Building Code violations. Also, if a court orders violations to be corrected under Va. Code § 36-106(A) and (B), the court orders can be enforced through civil or criminal contempt of court proceedings. *See Deeds v. Gilmer*, 162 Va. 157, 174 S.E. 37 (1934).

If a violation is not corrected within the time provided in the notice of violation and the notice is not appealed, the recipient of the notice acquiesces in the building official's determination and the violation becomes a “thing decided.” The building official need not prove the existence of the violation, only that the defendant received notice and did not appeal the notice. *Lee v. City of Norfolk*, 281 Va. 423, 706 S.E.2d 330 (2011). Because there is no question of liability, such cases are appropriately resolved on summary judgment. Va. Sup. Ct. R. 3:20. Additionally, building officials are entitled to prohibitory injunctions as a matter of law once they have demonstrated that the violation is a thing decided. *Carbough v. Solem*, 225 Va. 310, 302 S.E.2d 33 (1983); *see also Cnty. of Chesterfield v. Lane*, 104 Va. Cir. 1 (Chesterfield Cnty. 2019) (unpubl.) (applying these legal principles in the context of zoning violations).

22-3.14(h) Actions to Compel Abatement of Violation

The USBC, Part I, § 115.4 (13 VAC 5-63-150(E)) and Part III, § 105.7 (13 VAC 5-63-485(105.7)) provide that a conviction of a violation of the USBC shall not preclude the institution of appropriate legal action to require correction or abatement of the violation. An authorized representative of the locality and the code violator may agree in writing to terms of abatement or remediation within six months after the date of payment of the civil penalty, if the violator has agreed to waive trial, admit liability, and pay the civil penalty. Va. Code § 36-106(C).

22-4 FOIA AND THE CONFLICT OF INTERESTS ACT**22-4.01 FOIA**

In enforcing the various codes, building maintenance officials are most likely to receive requests for information under the Virginia Freedom of Information Act (FOIA), Va. Code § 2.2-3700 et seq., regarding specific complaints or investigations. Building maintenance officials are particularly likely to receive requests for the names of citizens making complaints. Virginia Code § 2.2-3705.3(9) exempts from disclosure under FOIA the names, addresses, and telephone numbers of complainants furnished in confidence with respect to complaints relating to the Uniform Statewide Building Code. Also, investigations regarding potential violations of many codes could result in misdemeanor prosecutions. In *Lawrence v. Jenkins*, 258 Va. 598, 521 S.E.2d 523 (1999), the Virginia Supreme Court noted that a violation of a local zoning ordinance is a “misdemeanor crime,” and zoning records containing the name of a person making a zoning complaint fell within the criminal records exemption of FOIA. This case was decided before Va. Code § 2.2-3705.3(9) was added to FOIA to provide a specific exemption for the identity of persons making zoning complaints. Because criminal prosecutions are possible for Building Code violations, it can be argued that a code official’s records of possible violations are confidential as memoranda, correspondence, evidence, and complaints related to criminal investigations and do not have to be disclosed under FOIA. See Va. Code § 2.2-3706. Further, memos, working papers, or records specifically compiled for use in potential litigation or as part of an active administrative investigation are confidential under Va. Code § 2.2-3705.1(3). It can be argued that these two sections of FOIA allow code officials to keep records about possible code violations confidential. See generally [Chapter 23, The Freedom of Information and the GDCDP Acts](#).

FOIA provides a specific exemption for protections against terrorism. Portions of engineering and construction drawings and plans submitted for compliance with the Building or Fire Prevention Codes that reveal critical structural components or systems that would be vulnerable to terrorist attacks or other public safety threats are exempt if so requested in writing by the owner or lessee of the property with an explanation of the reasons why such protection from disclosure is necessary. However, such records are not exempt in connection with an inquiry into the performance of that building after it has been subjected to fire, explosion, natural disaster, or other catastrophic event. Va. Code § 2.2-3705.2.

FOIA provides for the protection from disclosure of the engineering and construction drawings and plans of single-family residential buildings. Va. Code § 2.2-3705.6(30). Virginia Code § 36-105.3 provides that Building Code officials shall institute procedures to ensure the safe storage and secure handling of engineering drawings and plans and that

[i]nformation contained in engineering and construction drawings and plans for any single-family residential dwelling submitted for the purpose of complying with the Uniform Statewide Building Code (§ 36-97 et seq.) or the Statewide Fire Prevention Code (§ 27-94 et seq.) shall not be subject to disclosure under the Virginia Freedom of Information Act (§ 2.2-3700 et seq.), except to the applicant or the owner of the property upon the applicant's or owner's request.

22-4.02 Conflict of Interests Act

Code officials need to be aware of the Conflict of Interests Act (COIA) when performing their duties and must be careful to avoid situations in which they could be accused of using their

positions for their personal benefit. The USBC, Part III, § 104.4.4 (13 VAC 5-63-480(J)) specifically makes the provisions of COIA applicable to code officials. See generally [Chapter 27, The State and Local Government Conflict of Interests Act](#).

For example, in *Commonwealth v. Allen*, No. LB2461 (City of Richmond Cir. Ct. 1996), the owner of a building that had been damaged by fire was cited for a Building Code violation. The owner wrote the Richmond Inspections Division a “To Whom It May Concern” letter advising that he did not have the resources to maintain the property and asking that the property be taken off his hands. The building inspector who received the letter arranged for the owner to sign a deed giving the inspector title to the property. The inspector then obtained a rehabilitation loan for \$66,000, renovated the property, paid \$3,400 in delinquent real estate taxes on the property, and reported that the Building Code violations had been corrected.

When this transaction was discovered, the building inspector was dismissed from his job. In addition, he was convicted of violating COIA and sentenced to twelve months in jail, suspended; fined \$2,500 with \$1,500 suspended; and ordered to forfeit the house to the City of Richmond. The Circuit Court found that in taking title to the property, the building inspector had improperly accepted a gift and had taken advantage of a business opportunity that rightfully belonged to the city.

22-5 LOCAL GOVERNMENT LIABILITY ISSUES

22-5.01 Types of Claims

Local officials and their local governments face potential liability in a number of areas regarding code enforcement. Lawsuits may be initiated in both the state and federal courts and can be based on any of the following claims:

1. Improper searches;
2. Negligent performance of duties (e.g., failure to discover violations of the Code);
3. Willful misconduct (e.g., deliberate failure to take action to correct violations of the Code);
4. Improper demolition of a building or structure (e.g., failure to give proper notice);
5. Malicious prosecution;
6. Discrimination in the enforcement of the Code¹⁴;
7. 42 U.S.C. §§ 1983 and 1985 claims¹⁵;
8. Religious discrimination¹⁶; or
9. Intentional infliction of emotional distress.¹⁷

¹⁴ See *Altamira-Rojas v. City of Richmond*, 184 F. Supp. 3d 290 (E.D. Va. 2016) (qualified immunity applies for federal claims alleging discrimination in Building Code enforcement).

¹⁵ See *Tri-County Paving, Inc. v. Ashe Cnty.*, 281 F.3d 430 (4th Cir. 2002) (court assumed property interest in obtaining building permit but found no violation of due process or equal protection).

¹⁶ See *Yoder v. Town of Morristown*, No. 7:09-cv-0007 (N.D.N.Y. filed Jan. 6, 2009), in which the Amish community argued that following modern building codes for their homes by adding such features as smoke detectors violated their religious beliefs. The suit was settled and dismissed when the parties agreed that the code inspector would install smoke detectors before giving the homes a final approval, but would not take any action if the Amish removed the detectors after the final inspection.

¹⁷ See *Warner v. Boroff*, 921 F. Supp. 2d 513 (N.D. W. Va. 2013), in which the court found that city officials’ actions in enforcing the building and fire codes against the plaintiffs did not constitute the requisite “outrageous” conduct needed to sustain an action for the intentional infliction of emotional distress.

22-5.02 Potential Defenses**22-5.02(a) Sovereign Immunity**

See [Chapter 20, State Law Immunity of Local Government Entities and Their Employees](#), for a fuller discussion of the issues concerning sovereign immunity.

22-5.02(a)(1) Municipalities

In Virginia, as in most jurisdictions, municipalities, i.e., cities and towns, can be held liable for state law torts committed by their officers, agents, and employees. 18 E. McQuillin, *The Law of Municipal Corporations* § 53.04 (3d. ed. 1984 & 1990 Cum. Supp.); Broughton, *Local Government Liability in Virginia For Negligent Inspection of Buildings, Structures and Equipment*, 18 U. Rich. L. Rev. 809, 814 (1984). Virginia is one of the few states that have retained the traditional common law concept of sovereign immunity for municipalities from tort liability. Municipalities in Virginia act in two different capacities, either in a governmental capacity or in a proprietary capacity. Immunity from liability is granted to municipalities for negligent acts or omissions that occur in the performance of governmental functions. Municipalities are liable for negligent acts or omissions that occur in the performance of proprietary functions. *Taylor v. City of Charlottesville*, 240 Va. 367, 397 S.E.2d 832 (1990); *Freeman v. City of Norfolk*, 221 Va. 57, 266 S.E.2d 885 (1980); *Taylor v. City of Newport News*, 214 Va. 9, 197 S.E.2d 209 (1973).

22-5.02(a)(2) Counties

Counties in Virginia are in a unique position with respect to their state law tort liability for negligent acts or omissions of county officials. In Virginia, counties and municipalities are separate and distinct legal entities. See *Smith v. Kelley*, 162 Va. 645, 174 S.E. 842 (1934); *Fry v. Cnty. of Albemarle*, 86 Va. 195, 9 S.E. 1004 (1889). Counties are local subdivisions of the State, while municipalities are separate and distinct entities from the State. *Smith, supra*. Because of this distinction between counties and municipalities, counties are viewed as extensions of the Commonwealth of Virginia and thus entitled to the sovereign immunity held by the Commonwealth. *Mann v. Cnty. Bd. of Arlington Cnty.*, 199 Va. 169, 98 S.E.2d 515 (1957); *Fry, supra*. Unlike municipalities, which may be liable for negligent acts or omissions in the performance of proprietary functions, the injured parties may not hold counties liable for the tortious acts of their officials. See *Bergen v. Fourth Skyline Corp.*, 501 F.2d 1174 (4th Cir. 1974) (plaintiff's suit alleging county building inspector had negligently failed to enforce the county Building Code and regulations, dismissed on the ground of county's sovereign immunity); *Obenshain v. Halliday*, 504 F. Supp. 946 (E.D. Va. 1980) (plaintiff alleged county negligently failed to assure compliance with Federal Aviation Administration lighting requirements for airport runways; court dismissed, saying counties are immune to actions in tort without statutory consent); *Mann v. Cnty. Bd. of Arlington Cnty.*, 199 Va. 169, 98 S.E.2d 515 (1957) (plaintiff alleged that the county had negligently constructed, maintained, and operated sidewalk; county found not liable for personal injuries because county has immunity and this immunity can only be waived by the state legislature).

Under the doctrine of sovereign immunity, the Commonwealth of Virginia cannot be subject to suits in tort without its express consent. *Va. Elec. & Power Co. v. Hampton Redev. & Hous. Auth.*, 217 Va. 30, 225 S.E.2d 364 (1976); see Va. Code §§ 8.01-195.1 to 8.01-195.9. A county enjoys the same shield of sovereign immunity as the Commonwealth. *Mann, supra*. Counties are not entitled to waive this tort immunity without the consent of the state. *Obenshain, supra*; *Mann, supra*. County tort immunity exists even when a county has taken on the characteristics of a municipality and exercises many of the same powers and services of a municipality. *Obenshain, supra*; *Mann, supra*.

22-5.02(a)(3) Governmental Liability for Building Code Enforcement

Enforcement measures by county officials in building, zoning, health, fire and safety, and other matters do not subject a county to tort liability even if conducted in a negligent manner. Cities and towns should also be immune from claims arising out of the enforcement of the Building

Code if the enforcement of the Building Code qualifies as a governmental rather than a proprietary function.

The Virginia Supreme Court has not had the opportunity to rule on whether an inspection by a municipal officer is a governmental or proprietary function. However, the general rule is that the inspections of buildings, structures, and equipment, and fire and safety inspections are governmental functions for which a municipality is not liable. 18 E. McQuillin, *The Law of Corporations* §§ 53.04b, d, 53.88. The Virginia Supreme Court has not given any indication that an administrative inspection would be considered a proprietary function. Under the test in *Fenon v. City of Norfolk*, 203 Va. 551, 125 S.E.2d 808 (1962), an inspection would likely be found to be an act done “for the common good of all without the element of special corporate benefit, or pecuniary profit.” *Id.* See 1993 Op. Va. Att’y Gen. 163, in which the Attorney General opines that local government code officials and the local governments that employ them are immune from tort liability for negligent acts and omissions in enforcing the USBC. See also *Dunn v. City of Williamsburg*, 35 Va. Cir. 420 (City of Williamsburg 1995); 1990 Op. Va. Att’y Gen. 172.

Courts in other states that have addressed this issue have also held that the enforcement of a building code is a governmental function. See *Devonshire v. Harper*, 416 N.E.2d 59 (Ill. App. 1981); *Bleman v. Gold*, 246 A.2d 376 (Pa. 1968); *Meadows v. Vill. of Mineola*, 72 N.Y.S.2d 368 (N.Y. Sup. Ct. 1947). Also, as a general rule a local government is not liable for the tortious acts of building inspectors in the performance of their duties. See *Bergen v. Fourth Skyline Corp.*, 501 F.2d 1174 (4th Cir. 1974); Annotation, *Municipal Liability for Negligent Performance of Building Inspector’s Duties*, 24 A.L.R.5th 200 (2003); see also Chapter 20, State Law Immunity of Local Government Entities and Their Employees, section 20-2.02(g).

In *Lee v. City of Norfolk*, 281 Va. 423, 706 S.E.2d 330 (2011), the city ordered the demolition of a structure under the USBC on the grounds that the structure was unsafe because of numerous Maintenance Code violations. The property owner failed to demolish the structure, so the city proceeded with the demolition. The owner sued the city, alleging a violation of his federal and state due process rights and a common law property damage claim. In upholding the dismissal of the owner’s lawsuit, the Supreme Court held that the abatement of a nuisance structure under the USBC was the exercise of the police power for which the city enjoyed sovereign immunity for its actions.

City and individual Building Code officials accused of discriminatory enforcement of the Building Code in violation of the federal Fair Housing Act were held to be entitled to qualified immunity. *Altamira-Rojas v. City of Richmond*, 184 F. Supp. 3d 290 (E.D. Va. 2016).

22-5.02(a)(4) Personal Liability of Officials for Negligence

Because the doctrine of sovereign immunity will protect counties, and probably cities and towns as well, from lawsuits arising out of Building Code enforcement, a plaintiff may sue the code official in a personal capacity in an attempt to circumvent the local government’s sovereign immunity. Generally, if an individual works for an immune governmental entity, then the individual is also entitled to sovereign immunity for simple negligence. *Lentz v. Morris*, 236 Va. 78, 372 S.E.2d 608 (1988); *Messina v. Burden*, 228 Va. 301, 321 S.E.2d 657 (1984). The Virginia Supreme Court has listed four factors to be considered in determining whether an employee of an immune governmental entity is entitled to share in that immunity. These are: (1) the nature of the function performed by the employee; (2) the extent of the state’s interest and involvement in the function; (3) the degree of control and direction exercised by the state over the employee; and (4) whether the act complained of involved the use of judgment and discretion. *James v. Jane*, 221 Va. 43, 282 S.E.2d 864 (1980). Applying this test, a code official who negligently performs an inspection should not be subject to any personal liability. Absent gross negligence, code inspectors should meet the requirements of the *James* four-part test.

Building inspectors are not entitled to the absolute immunity afforded by quasi-judicial immunity. *Andrews v. Ring*, 266 Va. 311, 585 S.E.2d 780 (2003) (claim of malicious prosecution). The Virginia Supreme Court has implied, however, that a building inspector would be entitled to qualified immunity for actions taken in good faith and with probable cause. *Id.* In an unpublished case, a federal district court held that a building inspector was entitled to immunity if he acted in good faith and with probable cause. *Proffit v. Ring*, No. 1:01cv00121 (W.D. Va. Jan. 28, 2002, June 2, 2003) (unpubl.). Furthermore, the Attorney General has opined that, in the enforcement of the Building Code, both the locality and the code official enjoy sovereign immunity because the Building Code's purpose is to protect the public health and safety. See 1993 Op. Va. Att'y Gen. 163; 1990 Op. Va. Att'y Gen. 172. Also, Newport News Circuit Court held that in the enforcement of the Building Code, the city and the building maintenance official were entitled to governmental immunity. *Boyd v. Brown*, 12 Va. Cir. 54 (City of Newport News 1986). The Williamsburg Circuit Court reached a similar decision in *Dunn v. City of Williamsburg*, 35 Va. Cir. 420 (City of Williamsburg 1995). See also *Comment: Local Government Liability in Virginia for Negligent Inspection of Buildings, Structures and Equipment*, 18 U. Rich. L. Rev. 809 (1984); Chapter 20, State Law Immunity of Local Government Entities and Their Employees, section [20-7.02\(e\)\(2\)](#).

22-5.03 Public Duty Doctrine

Many states have held that localities and officials are exempt from liability when performing code enforcement activities under the "public duty doctrine." The public duty doctrine provides that public officials are not liable for alleged negligent activities unless the duty of care that was breached was owed to a particular individual and not owed to the public in general. Unless an injured citizen can show some type of "special relationship" with the public employee, they cannot maintain a lawsuit. The Virginia Supreme Court and Court of Appeals have never addressed the application of the public duty doctrine to building maintenance officials. However, the Supreme Court has held that the public duty doctrine prevents state parole officers from being sued for crimes committed by a parolee. *Fox v. Custis*, 236 Va. 69, 372 S.E.2d 373 (1988). Also, Chesterfield County Circuit Court has recognized the public duty doctrine in the context of Building Code enforcement. *Blunt v. Maxie*, No. CL84-17 (Chesterfield Cnty. Cir. Ct. May 25, 1985).¹⁸ For a discussion of Building Code cases and the public duty doctrine in other states, see McQuillin, *Municipal Corporations* § 53.88, and the cases of *Worth Distributors v. Latham*, 464 N.Y.S.2d 435, 451 N.E.2d 193 (1983), and *O'Connor v. City of New York*, 460 N.Y.S.2d 485, 447 N.E.2d 33 (1983). See also Chapter 20, State Law Immunity of Local Government Entities and Their Employees, section [20-8](#).

¹⁸ Note, however, that the public duty doctrine may not be necessary to protect officials engaged in code enforcement activities. In *Commonwealth v. Burns*, 273 Va. 14, 639 S.E.2d 276 (2007), the Supreme Court of Virginia clarified that the public duty doctrine applies "when a special relationship exists (1) between the defendant and the third person which imposes a duty upon the defendant to control the third person's conduct, or (2) between the defendant and the plaintiff which gives a right to protection to the plaintiff." It expressly "decline[d] the defendants' invitation to extend the public duty doctrine" beyond this limited context, and it held that "the expansion of the public duty doctrine is unnecessary because Virginia's sovereign immunity doctrine provides sufficient protection to these employees in the discharge of their public duties." *Id.*