LEGAL ASPECTS OF ENFORCEMENT
OF THE VIRGINIA UNIFORM STATEWIDE BUILDING CODE
BY CODE OFFICIALS

VIRGINIA BUILDING CODE ACADEMY
CORE MODULE
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I. **Sources of Authority**

A. **Background:**

1. **State and Federal Governments:**

   As between the state and federal governments, the Tenth Amendment to the United States Constitution set the framework for the division of power. The Tenth Amendment states:

   The powers not delegated to the United States by the Constitution not prohibited by it to the States are reserved to the States respectively, or to the people.

   The Tenth Amendment was proposed by the First Congress on September 25, 1789 and ratified on December 15, 1791. It is the same as the Second Article of the Articles of Confederation, except that in the Tenth Amendment, the word “expressly” was eliminated before “delegated”.

   A number of early cases helped further define the division of power:

   a) **McCulloch v. Maryland,** 17 U.S. 406 (1819). (The courts will look to the whole Constitution to determine if a particular power is granted to one government or prohibited to the other.)

   b) **U. S. v. Cruickshank,** 92 U.S. 550 (1876), (The people of the United States are subject to two governments: the state in which they reside and the national government. There should be no problems, because the power one possesses the other does not.)

   Examples of how the Tenth Amendment has been used to define the division of powers between the federal and state governments are as follows:


c) Direct control of the medical profession is left to the states, and federal government has no such power. *FTC v. Simeon Management Corp.*, 391 F.Supp. 697 (D.C. Cal. 1975), aff’d 532 F.2d 708.

2. **State and Local Governments:**

   a) **Home Rule:**

   Every locality possesses the power to regulate and legislate, unless that power is expressly delegated to the state government.

   b) **Dillon’s Rule followed in Virginia:**

   [A] municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; Second, those necessarily or fairly implied in or incident to the powers expressly granted; Third, those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable.

B.  **Dillon’s Rule and the USBC:**

1.  **Virginia Code § 36-98:**

   Board of Housing and Community Development directed and empowered to adopt and promulgate a USBC.

2.  **Virginia Code § 36-98:**

   The USBC supercedes the building codes and regulations of all localities and state agencies. Limited exceptions.

3.  **Limitations on Grant of Authority – Virginia Code § 36-99:**

   a) The provisions thereof shall be such as to protect the health, safety and welfare of the residents of this Commonwealth, provided that buildings and structures should be permitted to be constructed at the least possible cost consistent with recognized standards of health, safety, energy conservation and water conservation and barrier-free provisions for the physically handicapped and aged. Such regulations shall be reasonable and appropriate to the objectives of this chapter.

   b) Where practical, the Code provisions shall be stated in terms of required level of performance, so as to facilitate the prompt acceptance of new building materials and methods.

4.  **Applicability to State-Owned Buildings (Virginia Code § 36-99):**

   Any state-owned building or structure for which preliminary plans were prepared or on which construction commenced after the initial effective date of the Uniform Statewide Building Code, shall remain subject to the provisions of the Uniform Statewide Building Code that were in effect at the time such plans were completed or such construction commenced. Subsequent reconstruction, renovation or demolition of such building or structure shall be subject to the pertinent provisions of the Building Code.
Acting through the Division of Engineering and Buildings, the Department of General Services shall function as the building official for state-owned buildings. The Department shall review and approve plans and specifications, grant modifications, and establish such rules and regulations as may be necessary to implement this section. It shall provide for the inspection of state-owned buildings and enforcement of the Building Code and standards for access by the physically handicapped by delegating inspection and Building Code enforcement duties to the State Fire Marshal’s Office, to other appropriate state agencies having needed expertise, and to local building departments, all of which shall provide such assistance within a reasonable time and in the manner requested. State agencies and institutions occupying buildings shall pay to the local building department the same fees as would be paid by a private citizen for the services rendered when such services are requested by the Department of General Services. The Department of General Services may alter or overrule any decision of the local building department after having first considered the local building department’s report or other rationale given for its decision. When altering or overruling any decision of a local building department, the Department of General services shall provide the local building department with a written summary of its reasons for doing so. (1981, c. 325; 1982, c. 97): 1986.

5. **Enforcement of USBC by Locality – Virginia Code § 36-105:**

   “Enforcement of the Building Code shall be the responsibility of the local building department.”

II. **Due Process of Law and Enforcement of the USBC**

   A. **Substantive Law:** The technical provisions of the USBC.

   B. **Procedural Law:** How the USBC must be enforced.
C. Violation of Procedural Requirements of the USBC:

1. Fourteenth Amendment of the U. S. Constitution (Section 1):

   All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Procedural Rules Authorized by Virginia Code § 36-99:

   “The Building Code shall prescribe ... procedures for the administration and enforcement of such regulations.”

   *See, also, Board of Supervisors v. Miller & Smith, Inc.*, 222 Va. 230, 279 S.E.2d 158 (1981) (holding that VDHCD had the inherent power to adopt administrative rules and procedures prior to 1977, when the above language was added to the USBC).

3. Violation of Established Procedural Rules:


III. Provisions of USBC Requiring Building Official to Exercise Discretion (Professional Judgment)

A. Article One of USBC: The following are selected provisions of Article One of the USBC that require the Building official to use his/her discretion:

1. Selected General Provisions of Article of the USBC:

   a) 102.2 Scope. This section establishes the scope of the USBC in accordance with § 36-98 of the Code of Virginia. The USBC shall
supersede the building codes and regulations of the counties, municipalities and other political subdivisions and state agencies. This code also shall supersede the provisions of local ordinances applicable to single-family residential construction that (i) regulate dwelling foundations or crawl spaces, (ii) require the use of specific building materials or finishes in construction, or (iii) require minimum surface area or numbers of windows; however, this code shall 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 through standards, conditions, and criteria established by a locality pursuant to subdivision 8 of §15.2-2242 of the Code of Virginia or subdivision A 12 of §15.2-2286 of the Code of Virginia, or land use requirements in airport or highway overlay districts, or historic districts created pursuant to §15.2-2306 of the Code of Virginia, or local flood plain regulations adopted as a condition of participation in the National Flood Insurance Program.

Note: Requirements relating to functional design are contained in Section 103.11 of this code.

b) 102.3 Exemptions. The following are exempt from this code:

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6. Farm buildings and structures, except for a building or a portion of a building located on a farm that is operated as a restaurant as defined in §35.1-1 of the Code of Virginia and licensed as such by the Virginia Board of Health pursuant to Chapter 2 (§35.1-11 et seq.) of Title 35.1 of the Code of Virginia. However, farm buildings and structures lying within a flood plain or in a mudslide-prone area shall be subject to flood-proofing regulations or mudslide regulations, as applicable.

c) 106.1 Powers and duties, generally. The building official shall enforce this code as set out herein and as interpreted by the State Review Board.
d) **112.1 General.** It shall be the duty of any person performing work covered by this code to comply with all applicable provisions of this code and to perform and complete such work so as to secure the results intended by the USBC.

e) **112.2 Alternative methods or materials.** In accordance with §36-99 of the Code of Virginia, where practical, the provisions of this code are stated in terms of required level of performance so as to facilitate the prompt acceptance of new building materials and methods. When generally recognized standards of performance are not available, this section and other applicable requirements of this code provide for acceptance of materials and methods whose performance is substantially equal in safety to those specified on the basis of reliable test and evaluation data presented by the proponent. In addition, as a requirement of this code, the building official shall require that sufficient technical data be submitted to substantiate the proposed use of any material, equipment, device, assembly or method of construction.

f) **113.2 Prerequisites.** The building official may conduct a site inspection prior to issuing a permit. When conducting inspections pursuant to this code, all personnel shall carry proper credentials.

2. **Enforcement:**

   a) **State-Owned Buildings:**

   **103.13 State buildings and structures.**

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   Acting through the Division of Engineering and Buildings, the Virginia Department of General Services shall function as the building official for state-owned buildings. The department shall review and approve plans and specifications, grant modifications, and establish such rules and regulations as may be necessary to implement this section. It shall provide for the inspection of state-owned buildings and enforcement of the USBC and standards for access by the physically handicapped by delegating inspection and USBC enforcement duties to the State Fire Marshal's Office, to
other appropriate state agencies having needed expertise, and to local building departments, all of which shall provide such assistance within a reasonable time and in the manner requested. State agencies and institutions occupying buildings shall pay to the local building department the same fees as would be paid by a private citizen for the services rendered when such services are requested by the department. The department may alter or overrule any decision of the local building department after having first considered the local building department's report or other rationale given for its decision. When altering or overruling any decision of a local building department, the department shall provide the local building department with a written summary of its reasons for doing so.

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b) **Residential Rental Units:**

104.1 **Scope of enforcement.**

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...upon a finding by the local building department, following a complaint by a tenant of a residential dwelling unit that is the subject of such complaint, that there may be a violation of the unsafe structures provisions of Part III of the Virginia Uniform Statewide Building Code, also known as the "Virginia Maintenance Code," or the “VMC,” the local building department shall enforce such provisions.

If the local building department receives a complaint that a violation of the VMC 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 present sworn testimony to 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 VMC exist. 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.

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3. **Department of Building Inspections:**

   a) **105.1 Appointment of building official:** Every local building department shall have a building official as the executive official in charge of the department. The building official shall be appointed in a manner selected by the local governing body. After permanent appointment, the building official shall not be removed from office except for cause after having been afforded a full opportunity to be heard on specific and relevant charges by and before the appointing authority. DHCD shall be notified by the appointing authority within 30 days of the appointment or release of a permanent or acting building official.

   **Note:** Building officials are subject to sanctions in accordance with the VCS.

   **Reference:** See *Dodson v. Shenandoah County* on p. 57.

   b) **105.2 Technical assistants.** The building official, subject to any limitations imposed by the locality, shall be permitted to utilize technical assistants to assist the building official in the enforcement of the USBC. DHCD shall be notified by the building official within 60 days of the employment of, contracting with or termination of all technical assistants.

   **Note:** Technical assistants are subject to sanctions in accordance with the VCS.
4. **Duties and Powers of the Building Official:**

   a) **106.2 Delegation of authority.** The building official may delegate powers and duties except where such authority is limited by the local government. However, such limitations of authority by the local government are not applicable to the third-party inspector policy required by Section 113.7.1 nor shall such limitations of authority by the local government have the effect of altering the provisions of this code or creating building regulations. When such delegations are made, the building official shall be responsible for assuring that they are carried out in accordance with the provisions of this code.

   b) **106.3 Issuance of modifications.** Upon written application by an owner or an owner's agent, the building official may approve a modification of any provision of the USBC provided the spirit and functional intent of the code are observed and public health, welfare and safety are assured. The decision of the building official concerning a modification shall be made in writing and the application for a modification and the decision of the building official concerning such modification shall be retained in the permanent records of the local building department.

   **Note:** The USBC references nationally recognized model codes and standards. Future amendments to such codes and standards are not automatically included in the USBC; however the building official should give them due consideration in deciding whether to approve a modification.

   c) **106.3.1 Substantiation of modification.** The building official may require or may consider a statement from an RDP or other person competent in the subject area of the application as to the equivalency of the proposed modification. In addition, the building official may require the application to include construction documents sealed by an RDP.

   d) **106.3.2 Use of performance code.** Compliance with the provisions of a nationally recognized performance code when approved as a modification shall be considered to constitute compliance with this code. All documents submitted as part of
such consideration shall be retained in the permanent records of the local building department.

5. **Fees:**

a) **107.1 Authority for charging fees.** In accordance with §36-105 of the Code of Virginia, fees may be levied by the local governing body in order to defray the cost of enforcement of the USBC.

b) **107.1.1 Fee schedule.** The local governing body shall establish a fee schedule incorporating unit rates, which may be based on square footage, cubic footage, estimated cost of construction or other appropriate criteria. A permit or any amendments to an existing permit shall not be issued until the designated fees have been paid, except that the building official may authorize the delayed payment of fees.

c) **107.1.2 Refunds.** When requested in writing by a permit holder, the locality shall provide a fee refund in the case of the revocation of a permit or the abandonment or discontinuance of a building project. The refund shall not be required to exceed an amount which correlates to work not completed.

Reference: See Miller & Smith case on page 46.

d) **107.2 Code Academy fee levy.** In accordance with subdivision 7 of § 36-137 of the Code of Virginia, the local building department shall collect a 2.0% levy of fees charged for permits issued under this code and transmit it quarterly to DHCD to support training programs of the Virginia Building Code Academy. Localities that maintain individual or regional training academies accredited by DHCD shall retain such levy.

6. **Application for Permit:**

a) **103.3 Change in occupancy.** No change of occupancy shall be made in any structure when the current USBC requires a greater degree of accessibility, structural strength, fire protection, means of egress, ventilation or sanitation. When such a greater degree is required, the owner or the owner's agent shall make written
application to the local building department for a new certificate of occupancy and shall obtain the new certificate of occupancy prior to the new use of the structure. When impractical to achieve compliance with this code for the new occupancy classification, the building official shall consider modifications upon application and as provided for in Section 106.3.

Exception: This section shall not be construed to permit noncompliance with any applicable flood load or flood-resistant construction requirements of this code.

b) 103.5 Reconstruction, alteration or repair. The following criteria is applicable to reconstruction, alteration or repair of buildings or structures:

1. Any reconstruction, alteration or repair shall not adversely affect the performance of the building or structure, or cause the building or structure to become unsafe or lower existing levels of health and safety.

2. Parts of the building or structure not being reconstructed, altered or repaired shall not be required to comply with the requirements of this code applicable to newly constructed buildings or structures.

3. The installation of material or equipment, or both, that is neither required nor prohibited shall only be required to comply with the provisions of this code relating to the safe installation of such material or equipment.

4. Material or equipment, or both, may be replaced in the same location with material or equipment of a similar kind or capacity.

Exceptions:

1. This section shall not be construed to permit noncompliance with any applicable flood load or flood-resistant construction requirements of this code.
2. Reconstructed decks, balconies, porches and similar structures located 30 inches (762 mm) or more above grade shall meet the current code provisions for structural loading capacity, connections and structural attachment. This requirement excludes the configuration and height of handrails and guardrails.

c) **103.11 Functional design.** The following criteria for functional design is in accordance with § 36-98 of the Code of Virginia. The USBC shall not supersede the regulations of other state agencies that require and govern the functional design and operation of building related activities not covered by the USBC, including but not limited to (i) public water supply systems, (ii) waste water treatment and disposal systems, (iii) solid waste facilities, nor shall state agencies be prohibited from requiring, pursuant to other state law, that buildings and equipment be maintained in accordance with provisions of this code. In addition, as established by this code, the building official may refuse to issue a permit until the applicant has supplied certificates of functional design approval from the appropriate state agency or agencies. For purposes of coordination, the locality may require reports to the building official by other departments or agencies indicating compliance with their regulations applicable to the functional design of a building or structure as a condition for issuance of a building permit or certificate of occupancy. Such reports shall be based upon review of the plans or inspection of the project as determined by the locality. All enforcement of these conditions shall not be the responsibility of the building official, but rather the agency imposing the condition.

**Note:** Identified state agencies with functional design approval are listed in the "Related Laws Package," which is available from DHCD.

d) **108.2 Exemptions from application for permit.** Notwithstanding the requirements of Section 108.1, application for a permit and any related inspections shall not be required for the following; however, this section shall not be construed to exempt such activities from other applicable requirements of this code. In
addition, when an owner or an owner’s agent requests that a permit be issued for any of the following, then a permit shall be issued and any related inspections shall be required.

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13. Construction work deemed by the building official to be minor and ordinary and which does not adversely affect public health or general safety.

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e) 108.3 Applicant information; processing by mail. Application for a permit shall be made by the owner or lessee of the relevant property or the agent of either or by the RDP, contractor or subcontractor associated with the work or any of their agents. The full name and address of the owner, lessee and applicant shall be provided in the application. If the owner or lessee is a corporate body, when and to the extent determined necessary by the building official, the full name and address of the responsible officers shall also be provided.

A permit application may be submitted by mail and such permit applications shall be processed by mail, unless the permit applicant voluntarily chooses otherwise. In no case shall an applicant be required to appear in person.

The building official may accept applications for a permit through electronic submissions provided the information required by this section is obtained.

f) 108.4 Prerequisites to obtaining permit. In accordance with §54.1-1111 of the Code of Virginia, any person applying to the building department for the construction, removal or improvement of any structure shall furnish prior to the issuance of the permit either (i) satisfactory proof to the building official that he is duly licensed or certified under the terms or Chapter 11 (§54.1-1000 et seq.) of Title 54.1 of the Code of Virginia to carry out or superintend the same or (ii) file a written statement, supported by an affidavit, that he is not subject to licensure or certification as a contractor or subcontractor pursuant to Chapter 11 of Title 54.1 of the Code of Virginia. The applicant shall also
furnish satisfactory proof that the taxes or license fees required by any county, city, or town have been paid so as to be qualified to bid upon or contract for the work for which the permit has been applied

g) **108.5 Mechanics' lien agent designation.** In accordance with §36-98.01 of the Code of Virginia, a building permit issued for any one- or two-family residential dwelling shall at the time of issuance contain, at the request of the applicant, the name, mailing address, and telephone number of the mechanics' lien agent as defined in §43-1 of the Code of Virginia. If the designation of a mechanics' lien agent is not so requested by the applicant, the building permit shall at the time of issuance state that none has been designated with the words "None Designated."

Note: In accordance with §43-4.01A of the Code of Virginia, a permit may be amended after it has been initially issued to name a mechanics' lien agent or a new mechanics' lien agent.

h) **108.6 Application form; description of work.** The application for a permit shall be submitted on a form or forms supplied by the local building department. The application shall contain a general description and location of the proposed work and such other information as determined necessary by the building official.

i) **108.8 Time limitation of application.** An application for a permit for any proposed work shall be deemed to have been abandoned six months after the date of filing unless such application has been pursued in good faith or a permit has been issued, except that the building official is authorized to grant one or more extensions of time if a justifiable cause is demonstrated.

j) **109.2 Site plan.** When determined necessary by the building official, a site plan shall be submitted with the application for a permit. The site plan shall show to scale the size and location of all proposed construction, including any associated wells, septic tanks or drain fields. The site plan shall also show to scale the size and location of all existing structures on the site, the distances from lot lines to all proposed construction, the established street
grades and the proposed finished grades. When determined necessary by the building official, the site plan shall contain the elevation of the lowest floor of any proposed buildings. The site plan shall also be drawn in accordance with an accurate boundary line survey. When the application for a permit is for demolition, the site plan shall show all construction to be demolished and the location and size of all existing structures that are to remain on the site.

**Note:** Site plans are generally not necessary for alterations, renovations, repairs or the installation of equipment.

**k) 109.3 Engineering details.** When determined necessary by the building official, construction documents shall include adequate detail of the structural, mechanical, plumbing or electrical components. Adequate detail may include computations, stress diagrams or other essential technical data and when proposed buildings are more than two stories in height, adequate detail may specifically be required to include where floor penetrations will be made for pipes, wires, conduits, and other components of the electrical, mechanical and plumbing systems and how such floor penetrations will be protected to maintain the required structural integrity or fire-resistance rating, or both. All engineered documents, including relevant computations, shall be sealed by the RDP responsible for the design.

**l) 109.4.1 Expedited construction document review.** The building official may accept reports from an approved person or agency that the construction documents have been examined and conform to the requirements of the USBC and may establish requirements for the person or agency submitting such reports. In addition, where such reports have been submitted, the building official may expedite the issuance of the permit.

**m) 109.6 Phased approval.** The building official is authorized to issue a permit for the construction of foundations or any other part of a building or structure before the construction documents for the whole building or structure have been submitted, provided that adequate information and detailed statements have been filed complying with pertinent requirements of this code. The
holder of such permit for the foundation or other parts of a building or structure shall proceed at the holder's own risk with the building operation and without assurance that a permit for the entire structure will be granted.

7. **Permits:**

a) **110.1 Approval and issuance of permits.** The building official shall examine or cause to be examined all applications for permits or amendments to such applications within a reasonable time after filing. If the applications or amendments do not comply with the provisions of this code or all pertinent laws and ordinances, the permit shall not be issued and the permit applicant shall be notified in writing of the reasons for not issuing the permit. If the application complies with the applicable requirements of this code, a permit shall be issued as soon as practicable. The issuance of permits shall not be delayed in an effort to control the pace of construction of new detached one- or two-family dwellings.

b) **110.2 Types of permits.** Separate or combined permits may be required for different areas of construction such as building construction, plumbing, electrical, and mechanical work, or for special construction as determined appropriate by the locality. In addition, permits for two or more buildings or structures on the same lot may be combined. Annual permits may also be issued for any construction regulated by this code. The annual permit holder shall maintain a detailed record of all construction under the annual permit. Such record shall be available to the building official and shall be submitted to the local building department if requested by the building official.

c) **110.6 Abandonment of work.** A building official shall be permitted to revoke a permit if work on the site authorized by the permit is not commenced within six months after issuance of the permit, or if the authorized work on the site is suspended or abandoned for a period of six months after the permit is issued; however, permits issued for plumbing, electrical and mechanical work shall not be revoked if the building permit is still in effect. It shall be the responsibility of the permit applicant to prove to the building official that authorized work includes substantive
progress, characterized by approved inspections as specified in Section 113.3 of at least one inspection within a period of six months or other evidence that would indicate substantial work has been performed. Upon written request, the building official may grant one or more extensions of time, not to exceed one year per extension.

Reference: See McCain v. York County on page 54.

d) **110.7 Single-family dwelling permits.** The building official shall be permitted to require a three year time limit to complete construction of new detached single-family dwellings, additions to detached single-family dwellings and residential accessory structures. The time limit shall begin from the issuance date of the permit. The building official may grant extensions of time if the applicant can demonstrate substantive progress, characterized by approved inspections as specified in Section 113.3 of at least one inspection within a period of six months or other evidence that would indicate substantial work has been performed.

e) **110.8 Revocation of a permit.** The building official may revoke a permit or approval issued under this code in the case of any false statement, misrepresentation of fact, abandonment of work, failure to complete construction as required by Section 110.7 or incorrect information supplied by the applicant in the application or construction documents on which the permit or approval was based.

8. **Professional Engineering and Architectural Services:**

**111.1 When required.** In accordance with §54.1-410 of the Code of Virginia and under the general authority of this code, the local building department shall establish a procedure to ensure that construction documents under Section 109 are prepared by an RDP in any case in which the exemptions contained in §§54.1-401, 54.1-402 or §54.1-402.1 of the Code of Virginia are not applicable or in any case where the building official determines it necessary. When required under §54.1-402 of the Code of Virginia or when required by the building official, or both, construction documents shall bear the name and address of the author and his occupation.
**Note:** Information on the types of construction required to be designed by an RDP is included in the “Related Laws Package” available from DHCD.

9. **Workmanship, Materials and Equipment:**

a) **112.2 Alternative methods or materials.** In accordance with §36-99 of the Code of Virginia, where practical, the provisions of this code are stated in terms of required level of performance so as to facilitate the prompt acceptance of new building materials and methods. When generally recognized standards of performance are not available, this section and other applicable requirements of this code provide for acceptance of materials and methods whose performance is substantially equal in safety to those specified on the basis of reliable test and evaluation data presented by the proponent. In addition, as a requirement of this code, the building official shall require that sufficient technical data be submitted to substantiate the proposed use of any material, equipment, device, assembly or method of construction.

b) **112.3 Documentation and approval.** In determining whether any material, equipment, device, assembly or method of construction complies with this code, the building official shall approve items listed by nationally recognized testing laboratories (NRTL), when such items are listed for the intended use and application, and in addition, may consider the recommendations of RDPs. Approval shall be issued when the building official finds that the proposed design is satisfactory and complies with the intent of the provisions of this code and that the material, equipment, device, assembly or method of construction offered is, for the purpose intended, at least the equivalent of that prescribed by the code in quality, strength, effectiveness, fire resistance, durability and safety. Such approval is subject to all applicable requirements of this code and the material, equipment, device, assembly or method of construction offered is, for the purpose intended, at least the equivalent of that prescribed by the code in quality, strength, effectiveness, fire resistance, durability and safety. Such approval is subject to all applicable requirements of this code and the material, equipment, device, assembly or method of construction shall be installed in accordance with the conditions of the approval and their listings. In addition, the building official may revoke such approval whenever it is discovered that such approval was issued in error or on the basis of incorrect information, or where there are repeated violations of the USBC.
c) **112.4 Used material and equipment.** Used materials, equipment and devices may be approved provided they have been reconditioned, tested or examined and found to be in good and proper working condition and acceptable for use by the building official.

10. **Inspections:**

a) **113.1 General.** In accordance with §36-105 of the Code of Virginia, any building or structure may be inspected at any time before completion, and shall not be deemed in compliance until approved by the inspecting authority. Where the construction cost is less than $2,500, however, the inspection may, in the discretion of the inspecting authority, be waived. The building official shall coordinate all reports of inspections for compliance with the USBC, with inspections of fire and health officials delegated such authority, prior to the issuance of an occupancy permit.

b) **113.2 Prerequisites.** The building official may conduct a site inspection prior to issuing a permit. When conducting inspections pursuant to this code, all personnel shall carry proper credentials.

c) **113.4 Additional inspections.** The building official may designate additional inspections and tests to be conducted during the construction of a building or structure and shall so notify the permit holder.

d) **113.7 Approved inspection agencies.** The building official may accept reports of inspections and tests from individuals or inspection agencies approved in accordance with the building official’s written policy required by Section 113.7.1. The individual or inspection agency shall meet the qualifications and reliability requirements established by the written policy. Under circumstances where the building official is unable to make the inspection or test required by Section 113.3 or 113.4 within two working days of a request or an agreed upon date or if authorized for other circumstances in the building official’s written policy, the building official shall accept reports for review. The building official shall approve the report from such approved individuals or
agencies unless there is cause to reject it. Failure to approve a report shall be in writing within two working days of receiving it stating the reason for the rejection. Reports of inspections conducted by approved third-party inspectors or agencies shall be in writing, shall indicate if compliance with the applicable provisions of the USBC have been met and shall be certified by the individual inspector or by the responsible officer when the report is from an agency.

**Note:** Photographs, videotapes or other sources of pertinent data or information may be considered as constituting such reports and tests.

**Reference:** See *Strawbridge v. Chesterfield* on page 44.

e) **113.7.1 Third-party inspectors.** Each building official charged with the enforcement of the USBC shall have a written policy establishing the minimum acceptable qualifications for third-party inspectors. The policy shall include the format and time frame required for submission of reports, any prequalification or pre-approval requirements before conducting a third-party inspection and any other requirements and procedures established by the building official.

f) **113.8 Final inspection.** Upon completion of a building or structure and before the issuance of a certificate of occupancy, a final inspection shall be conducted to ensure that any defective work has been corrected and that all work complies with the USBC and has been approved, including any work associated with modifications under Section 106.3. The building official shall be permitted to require the electrical service to a building or structure to be energized prior to conducting the final inspection. The approval of a final inspection shall be permitted to serve as the new certificate of occupancy required by Section 116.1 in the case of additions or alterations to existing buildings or structures that already have a certificate of occupancy.
11. **Temporary and Moved Structures:**

a) **117.1 Temporary buildings and structures.** The building official is authorized to issue a permit for temporary buildings or structures. Such permits shall be limited as to time of service, but shall not be permitted for more than one year, except that upon the permit holder’s written request, the building official may grant one or more extensions of time, not to exceed one year per extension. The building official is authorized to terminate the approval and order the demolition or removal of temporary buildings or structures during the period authorized by the permit when determined necessary.

b) **117.2 Moved buildings and structures.** Any building or structure moved into a locality or moved to a new location within a locality shall not be occupied or used until a certification of occupancy is issued for the new location. Such moved buildings or structures shall be required to comply with the requirements of this code for a newly constructed building or structure unless meeting all of the following requirements relative to the new location:

1. There is no change in the occupancy classification from its previous location.

2. The building or structure was in compliance with all state and local requirements applicable to it in its previous location and is in compliance with all state and local requirements applicable if originally constructed in the new location.

3. The building or structure did not become unsafe during the moving process due to structural damage or for other reasons.

4. Any alterations, reconstruction, renovations or repairs made pursuant to the move are in compliance with applicable requirements of this code.
12. **Certificate of Occupancy:**

a) **116.1.1 Temporary certificate of occupancy.** Upon the request of a permit holder, a temporary certificate of occupancy may be issued before the completion of the work covered by a permit, provided that such portion or portions of a building of structure may be occupied safely prior to full completion of the building or structure without endangering life or public safety.

b) **116.3 Suspension or revocation of certificate.** A certificate of occupancy may be revoked or suspended whenever the building official discovers that such certificate was issued in error or on the basis of incorrect information, or where there are repeated violations of the USBC after the certificate has been issued or when requested by the code official under Section 105.7 of the Virginia Maintenance Code. The revocation or suspension shall be in writing and shall state the necessary corrections or conditions for the certificate to be reissued or reinstated in accordance with Section 116.3.1.

c) **116.4 Issuance of certificate for pre-USBC buildings or structures.** When a building or structure was constructed prior to being subject to the initial edition of the USBC and the local building department does not have a certificate of occupancy for the building or structure, the owner or owner’s agent may submit a written request for a certificate to be created. The building official, after receipt of the request, shall issue a certificate provided a determination is made that there are no current violations of the Virginia Maintenance Code or the Virginia Statewide Fire Prevention Code (13VAC5-51) and the occupancy classification of the building or structure has not changed. Such buildings and structures shall not be prevented from continued use.

**Exception:** When no certificate exists, but the local building department has records indicating that a certificate did exist, then the building official may either verify in writing that a certificate did exist or issue a certificate based upon the records.
13. **Stop Work Order:**

   a) **114.1 Issuance of order.** When the building official finds that work on any building or structure is being executed contrary to the provisions of this code or any pertinent laws or ordinances, or in a manner endangering the general public, a written stop work order may be issued. The order shall identify the nature of the work to be stopped and be given either to the owner of the property involved, to the owner's agent or to the person performing the work. Following the issuance of such an order, the affected work shall cease immediately. The order shall state the conditions under which such work may be resumed.

   b) **114.2 Limitation of order.** A stop work order shall apply only to the work identified in the order, provided that other work on the building or structure may be continued if not concealing the work covered by the order.

14. **Violations:**

   a) **115.1 Violation a misdemeanor; civil penalty.** In accordance with §36-106 of the Code of Virginia, it shall be unlawful for any owner or any other person, firm or corporation, on or after the effective date of any code provisions, to violate any such provisions. Any locality may adopt an ordinance that establishes a uniform schedule of civil penalties for violations of specified provisions of the code that are not abated or remedied promptly after receipt of a notice of violation from the local enforcement officer.

      **Note:** See the full text of §36-106 of the Code of Virginia for additional requirements and criteria pertaining to legal action relative to violations of the code.

   b) **115.2 Notice of violation.** The building official shall issue a written notice of violation to the responsible party if any violations of this code or any directives or orders of the building official have not been corrected or complied with in a reasonable time. The notice shall reference the code section upon which the notice is based and direct the discontinuance and abatement of
the violation or the compliance with such directive or order. The notice shall be issued by either delivering a copy to the responsible party by mail to the last known address or delivering the notice in person or by leaving it in the possession of any person in charge of the premises, or by posting the notice in a conspicuous place if the person in charge of the premises cannot be found. The notice of violation shall indicate the right of appeal by referencing the appeals section. When the owner of the building or structure, or the permit holder for the construction in question, or the tenants of such building or structure, are not the responsible party to whom the notice of violation is issued, then a copy of the notice shall also be delivered to the such owner, permit holder or tenants.

c) **115.4 Penalties and abatement.** Penalties for violations of the USBC shall be as set out in §36-106 of the Code of Virginia. The successful prosecution of a violation of the USBC shall not preclude the institution of appropriate legal action to require correction or abatement of a violation.

B. **Limitations of Use of Discretion:**

1. **Cannot be Arbitrary in Exercise of Discretionary Power:**


2. **Court Intervention:**

   Courts have the power to compel an action unreasonably delayed or set aside an action that is arbitrary and capricious. *Mitchell v. Block*, 551 F.Supp. 1011 (D.C. Va. 1982); however, generally a complainant must exhaust all administrative remedies (i.e., request for modification; appellate procedures) prior to seeking court intervention/review. *Board of Supervisors of Henrico County v. Market Inns, Inc.*, 228 Va. 82 (1984). The standard or arbitrary and capricious is a refusal to consider all factors properly before the building official and relevant to the decision at hand. *Cousins v. Oliver*, 369 F.Supp. 553 (D.C. Va. 1974).
3. **Weight Given by Courts:**

The courts will defer to the “specialized competence” of building officials in interpreting the USBC so long as the decision is not arbitrary and capricious. See, McCain v. York County Board of Building Code Appeals, (1994 Va. App. LEXIS 141 – not designated for publication) (holding that the Technical Review Board’s interpretation of when “work is suspended or abandoned” under the USBC cannot be overturned by a court unless it is arbitrary or capricious. Such interpretations are “... entitled to great deference and should not be disturbed unless it is arbitrary or capricious.”).

**IV. Provisions of the USBC that Mandate Certain Actions**

**A. Mandatory Requirements of Article One of the USBC:** The following are selected provisions of Article One of the USBC that require the building official or others to act in a prescribed fashion:

1. **Technical Review Board Interpretations:**


2. **Application of Code:**

   a) **103.6. Use of rehabilitation code.** Compliance with Part II of the Virginia Uniform Statewide Building Code, also known as the "Virginia Rehabilitation Code," shall be an acceptable alternative to compliance with this code for the rehabilitation of such existing buildings and structures within the scope of that code. For the purposes of this section, the term "rehabilitation" shall be as defined in the Virginia Rehabilitation Code.

   b) **103.7. Retrofit requirements.** The local building department shall enforce the provisions of Section 3413, which require certain existing buildings to be retrofitted with fire protection systems and other safety equipment. Retroactive fire protection system requirements contained in the International Fire Code shall not be
applicable unless required for compliance with the provisions of Section 3413.

c) **103.13. State buildings and structures.**

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Acting through the Division of Engineering and Buildings, the Virginia Department of General Services shall function as the building official for state-owned buildings. The department shall review and approve plans and specifications, grant modifications, and establish such rules and regulations as may be necessary to implement this section. It shall provide for the inspection of state-owned buildings and enforcement of the USBC and standards for access by the physically handicapped by delegating inspection and USBC enforcement duties to the State Fire Marshal's Office, to other appropriate state agencies having needed expertise, and to local building departments, all of which shall provide such assistance within a reasonable time and in the manner requested. State agencies and institutions occupying buildings shall pay to the local building department the same fees as would be paid by a private citizen for the services rendered when such services are requested by the department. The department may alter or overrule any decision of the local building department after having first considered the local building department's report or other rationale given for its decision. When altering or overruling any decision of a local building department, the department shall provide the local building department with a written summary of its reasons for doing so.

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3. **Enforcement:**

**104.1. Scope of enforcement.** This section establishes the requirements for enforcement of the USBC in accordance with § 36-105 of the Code of Virginia. Enforcement of the provisions of the USBC for construction and rehabilitation shall be the responsibility of the local building department. Whenever a county or municipality does not have such a building department, the local governing body shall enter into an agreement with
the local governing body of another county or municipality or with some other agency, or a state agency approved by DHCD for such enforcement. For the purposes of this section, towns with a population of less than 3,500 may elect to administer and enforce the USBC; however, where the town does not elect to administer and enforce the code, the county in which the town is situated shall administer and enforce the code for the town. In the event such town is situated in two or more counties, those counties shall administer and enforce the USBC for that portion of the town situated within their respective boundaries.

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4. Local Building Department:

a) **105.1 Appointment of building official.** Every local building department shall have a building official as the executive official in charge of the department. The building official shall be appointed in a manner selected by the local governing body. After permanent appointment, the building official shall not be removed from office except for cause after having been afforded a full opportunity to be heard on specific and relevant charges by and before the appointing authority. DHCD shall be notified by the appointing authority within 30 days of the appointment or release of a permanent or acting building official.

*Note:* Building officials are subject to sanctions in accordance with the VCS.

b) **105.1.1 Qualifications of building official.** The building official shall have at least five years of building experience as a licensed professional engineer or architect, building, fire or trade inspector, contractor, housing inspector or superintendent of building, fire or trade construction or at least five years of building experience after obtaining a degree in architecture or engineering, with at least three years in responsible charge of work. Any combination of education and experience that would confer equivalent knowledge and ability shall be deemed to satisfy this requirement. The building official shall have general knowledge of sound engineering practice in respect to the design and construction of structures, the basic principles of fire
prevention, the accepted requirements for means of egress and the installation of elevators and other service equipment necessary for the health, safety and general welfare of the occupants and the public. The local governing body may establish additional qualification requirements.

Reference: See the Vanity Stores case on page 51.

c) 105.1.2 Certification of building official. An acting or permanent building official shall be certified as a building official in accordance with the VCS within one year after being appointed as acting or permanent building official.

Exception: A building official in place prior to April 1, 1983, shall not be required to meet the certification requirements in this section while continuing to serve in the same capacity in the same locality.

d) 105.1.3 Noncertified building official. Except for a building official exempt from certification under the exception to Section 105.1.2, any acting or permanent building official who is not certified as a building official in accordance with the VCS shall attend the core module of the Virginia Building Code Academy or an equivalent course in an individual or regional code academy accredited by DHCD within 180 days of appointment. This requirement is in addition to meeting the certification requirement in Section 105.1.2.

e) 105.1.4 Requirements for periodic maintenance and continuing education. Building officials shall attend periodic maintenance training as designated by DHCD. In addition to the periodic maintenance training required above, building officials shall attend 16 hours of continuing education every two years as approved by DHCD. If a building official possesses more than one BHCD certificate, the 16 hours shall satisfy the continuing education requirement for all BHCD certificates.

f) 105.2 Technical assistants. The building official, subject to any limitations imposed by the locality, shall be permitted to utilize
technical assistants to assist the building official in the enforcement of the USBC. DHCD shall be notified by the building official within 60 days of the employment of, contracting with or termination of all technical assistants.

**Note:** Technical assistants are subject to sanctions in accordance with the VCS.

g) **105.2.1 Qualifications of technical assistants.** A technical assistant shall have at least three years of experience and general knowledge in at least one of the following areas: building construction; building, fire or housing inspections; plumbing, electrical or mechanical trades; or fire protection, elevator or property maintenance work. Any combination of education and experience that would confer equivalent knowledge and ability shall be deemed to satisfy this requirement. The locality may establish additional qualification requirements.

h) **105.2.3 Requirements for periodic maintenance and continuing education.** Technical assistants shall attend periodic maintenance training as designated by DHCD. In addition to the periodic maintenance training required above, technical assistants shall attend 16 hours of continuing education every two years as approved by DHCD. If a technical assistant possesses more than one BHCD certificate, the 16 hours shall satisfy the continuing education requirement for all BHCD certificates.

i) **105.3 Conflict of interest.** The standards of conduct for building officials and technical assistants shall be in accordance with the provisions of the State and Local Government Conflict of Interests Act, Chapter 31 (§2.2-3100 et seq.) of Title 2.2 of the Code of Virginia.

j) **105.4 Records.** The local building department shall retain a record of applications received, permits, certificates, notices and orders issued, fees collected and reports of inspection in accordance with The Library of Virginia's General Schedule Number Six.
5. **Duties and Powers of the Building Official:**

   a) **106.1 Powers and duties, generally.** The building official shall enforce this code as set out herein and as interpreted by the State Review Board.

   b) **106.3 Issuance of modifications.** Upon written application by an owner or an owner's agent, the building official may approve a modification of any provision of the USBC provided the spirit and functional intent of the code are observed and public health, welfare and safety are assured. The decision of the building official concerning a modification shall be made in writing and the application for a modification and the decision of the building official concerning such modification shall be retained in the permanent records of the local building department.

   **Note:** The USBC references nationally recognized model codes and standards. Future amendments to such codes and standards are not automatically included in the USBC; however the building official should give them due consideration in deciding whether to approve a modification.

6. **Fees:**

   a) **107.1.1 Fee schedule.** The local governing body shall establish a fee schedule incorporating unit rates, which may be based on square footage, cubic footage, estimated cost of construction or other appropriate criteria. A permit or any amendments to an existing permit shall not be issued until the designated fees have been paid, except that the building official may authorize the delayed payment of fees.

   **Reference:** See the W. S. Carnes case on page 45.

   b) **107.1.2 Refunds.** When requested in writing by a permit holder, the locality shall provide a fee refund in the case of the revocation of a permit or the abandonment or discontinuance of a building project. The refund shall not be required to exceed an amount which correlates to work not completed.

   **Reference:** See the Miller & Smith case on page 46.
7. Application for Permit:

a) **108.1 When applications are required.** Application for a permit shall be made to the building official and a permit shall be obtained prior to the commencement of any of the following activities, except that applications for emergency construction, alterations or equipment replacement shall be submitted by the end of the first working day that follows the day such work commences. In addition, the building official may authorize work to commence pending the receipt of an application or the issuance of a permit.

1. Construction or demolition of a building or structure. Installations or alterations involving (i) the removal or addition of any wall, partition or portion thereof, (ii) any structural component, (iii) the repair or replacement of any required component of a fire or smoke rated assembly, (iv) the alteration of any required means of egress system, (v) water supply and distribution system, sanitary drainage system or vent system, (vi) electric wiring, (vii) fire protection system, mechanical systems or fuel supply systems or (viii) any equipment regulated by the USBC.

2. For change of occupancy, application for a permit shall be made when a new certificate of occupancy is required under Section 103.3.

3. Movement of a lot line that increases the hazard to or decreases the level of safety of an existing building or structure in comparison to the building code under which such building or structure was constructed.

4. Removal or disturbing of any asbestos containing materials during the construction or demolition of a building or structure, including additions.

b) **108.3 Applicant information, processing by mail.** Application for a permit shall be made by the owner or lessee of the relevant property or the agent of either or by the Registered Design
Professional, contractor or subcontractor associated with the work or any of their agents. The full name and address of the owner, lessee and applicant shall be provided in the application. If the owner or lessee is a corporate body, when and to the extent determined necessary by the building official, the full name and address of the responsible officers shall also be provided.

A permit application may be submitted by mail and such permit applications shall be processed by mail, unless the permit applicant voluntarily chooses otherwise. In no case shall an applicant be required to appear in person.

The building official may accept applications for a permit through electronic submissions provided the information required by this section is obtained.

c) **108.5 Mechanics' lien agent designation.** In accordance with § 36-98.01 of the Code of Virginia, a building permit issued for any one- or two-family residential dwelling shall at the time of issuance contain, at the request of the applicant, the name, mailing address, and telephone number of the mechanics' lien agent as defined in § 43-1 of the Code of Virginia. If the designation of a mechanics' lien agent is not so requested by the applicant, the building permit shall at the time of issuance state that none has been designated with the words "None Designated."

Note: In accordance with § 43-4.01A of the Code of Virginia, a permit may be amended after it has been initially issued to name a mechanics' lien agent or a new mechanics' lien agent.

d) **108.6 Application form, description of work.** The application for a permit shall be submitted on a form or forms supplied by the local building department. The application shall contain a general description and location of the proposed work and such other information as determined necessary by the building official.

e) **108.7 Amendments to application.** An application for a permit may be amended at any time prior to the completion of the work governed by the permit. Additional construction documents or
other records may also be submitted in a like manner. All such submittals shall have the same effect as if filed with the original application for a permit and shall be retained in a like manner as the original filings.

8. **Construction Documents:**

a) **109.1 Submittal of documents.** Construction documents shall be submitted with the application for a permit. The number of sets of such documents to be submitted shall be determined by the locality. Construction documents for one- and two-family dwellings may have floor plans reversed provided an accompanying site plan is approved.

**Exception:** Construction documents do not need to be submitted when the building official determines the proposed work is of a minor nature.

**Note:** Information on the types of construction required to be designed by an RDP is included in the "Related Laws Package" available from DHCD.

b) **109.4 Examination of documents.** The building official shall examine or cause to be examined all construction documents or site plans, or both, within a reasonable time after filing. If such documents or plans do not comply with the provisions of this code, the permit applicant shall be notified in writing of the reasons, which shall include any adverse construction document review comments or determinations that additional information or engineering details need to be submitted. The review of construction documents for new one- and two-family dwellings for determining compliance with the technical provisions of this code not relating to the site, location or soil conditions associated with the dwellings shall not be required when identical construction documents for identical dwellings have been previously approved in the same locality under the same edition of the code and such construction documents are on file with the local building department.

c) **109.5 Approval of construction documents.** The approval of construction documents shall be limited to only those items
within the scope of the USBC. Either the word "Approved" shall be stamped on all required sets of approved construction documents or an equivalent endorsement in writing shall be provided. One set of the approved construction documents shall be retained for the records of the local building department and one set shall be kept at the building site and shall be available to the building official at all reasonable times.

9. **Permits:**

a) **110.1 Approval and issuance of permits.** The building official shall examine or cause to be examined all applications for permits or amendments to such applications within a reasonable time after filing. If the applications or amendments do not comply with the provisions of this code or all pertinent laws and ordinances, the permit shall not be issued and the permit applicant shall be notified in writing of the reasons for not issuing the permit. If the application complies with the applicable requirements of this code, a permit shall be issued as soon as practicable. The issuance of permits shall not be delayed in an effort to control the pace of construction of new detached one- or two-family dwellings.

b) **110.3 Asbestos inspection in buildings to be renovated or demolished; exceptions.** In accordance with §36-99.7 of the Code of Virginia, the local building department shall not issue a building permit allowing a building for which an initial building permit was issued before January 1, 1985, to be renovated or demolished until the local building department receives certification from the owner or his agent that the affected portions of the building have been inspected for the presence of asbestos by an individual licensed to perform such inspections pursuant to §54.1-503 of the Code of Virginia and that no asbestos-containing materials were found or that appropriate response actions will be undertaken in accordance with the requirements of the Clean Air Act National Emission Standard for the Hazardous Air Pollutant (NESHAPS) (40 CFR Part 61, Subpart M), and the asbestos worker protection requirements established by the U.S. Occupational Safety and Health Administration for construction workers (29 CFR 1926.1101). Local educational agencies that are subject to the requirements established by the
Environmental Protection Agency under the Asbestos Hazard Emergency Response Act (AHERA) shall also certify compliance with 40 CFR Part 763 and subsequent amendments thereto.

To meet the inspection requirements above, except with respect to schools, asbestos inspection of renovation projects consisting only of repair or replacement of roofing, floorcovering, or siding materials may be satisfied by a statement that the materials to be repaired or replaced are assumed to contain friable asbestos and that asbestos installation, removal, or encapsulation will be accomplished by a licensed asbestos contractor.

The provisions of this section shall not apply to single-family dwellings or residential housing with four or fewer units unless the renovation or demolition of such buildings is for commercial or public development purposes. The provisions of this section shall not apply if the combined amount of regulated asbestos-containing material involved in the renovation or demolition is less than 260 linear feet on pipes or less than 160 square feet on other facility components or less than 35 cubic feet off facility components where the length or area could not be measured previously.

An abatement area shall not be reoccupied until the building official receives certification from the owner that the response actions have been completed and final clearances have been measured. The final clearance levels for re-occupancy of the abatement area shall be 0.01 or fewer asbestos fibers per cubic centimeter if determined by Phase Contrast Microscopy analysis (PCM) or 70 or fewer structures per square millimeter if determined by Transmission Electron Microscopy analysis (TEM).

c) **110.4 Fire apparatus access road requirements.** The permit applicant shall be informed of any requirements for providing or maintaining fire apparatus access roads prior to the issuance of a building permit.

d) **110.5 Signature on and posting of permits; limitation of approval.** The signature of the building official or authorized representative shall be on or affixed to every permit. A copy of the permit shall be posted on the construction site for public inspection until the work is completed. Such posting shall include
the street or lot number, if one has been assigned, to be readable from a public way. In addition, each building or structure to which a street number has been assigned shall, upon completion, have the number displayed so as to be readable from the public way.

A permit shall be considered authority to proceed with construction in accordance with this code, the approved construction documents, the permit application and any approved amendments or modifications. The permit shall not be construed to otherwise authorize the omission or amendment of any provision of this code.

10. **Approval of Materials and Equipment:**

   a) **112.1 General.** It shall be the duty of any person performing work covered by this code to comply with all applicable provisions of this code and to perform and complete such work so as to secure the results intended by the USBC. Damage to regulated building components caused by violations of this code or by the use of faulty materials or installations shall be considered as separate violations of this code and shall be subject to the applicable provisions of Section 115.

   b) **112.2 Alternative methods or materials.** In accordance with §36-99 of the Code of Virginia, where practical, the provisions of this code are stated in terms of required level of performance so as to facilitate the prompt acceptance of new building materials and methods. When generally recognized standards of performance are not available, this section and other applicable requirements of this code provide for acceptance of materials and methods whose performance is substantially equal in safety to those specified on the basis of reliable test and evaluation data presented by the proponent. In addition, as a requirement of this code, the building official shall require that sufficient technical data be submitted to substantiate the proposed use of any material, equipment, device, assembly or method of construction.
11. **Inspections:**

   a) **113.1 General.** ... The building official shall coordinate all reports of inspections for compliance with the USBC, with inspections of fire and health officials delegated such authority, prior to the issuance of an occupancy permit.

   b) **113.1.2 Duty to notify.** When construction reaches a stage of completion that requires an inspection, the permit holder shall notify the building official.

   c) **113.1.3 Duty to inspect.** Except as provided for in Section 113.7, the building official shall perform the requested inspection in accordance with Section 113.6 when notified in accordance with Section 113.1.2.

   d) **113.3 Minimum inspections.** The following minimum inspections shall be conducted by the building official when applicable to the construction or permit:

   1. Inspection of footing excavations and reinforcement material for concrete footings prior to the placement of concrete.

   2. Inspection of foundation systems during phases of construction necessary to assure compliance with this code.

   3. Inspection of preparatory work prior to the placement of concrete.

   4. Inspection of structural members and fasteners prior to concealment.

   5. Inspection of electrical, mechanical and plumbing materials, equipment and systems prior to concealment.

   6. Inspection of energy conservation material prior to concealment.

   7. Final inspection.
e) **113.6 Approval or notice of defective work.** The building official shall either approve the work in writing or give written notice of defective work to the permit holder. Upon request of the permit holder, the notice shall reference the USBC section that serves as the basis for the defects and such defects shall be corrected and reinspected before any work proceeds that would conceal such defects. A record of all reports of inspections, tests, examinations, discrepancies and approvals issued shall be maintained by the building official and shall be communicated promptly in writing to the permit holder. Approval issued under this section may be revoked whenever it is discovered that such approval was issued in error or on the basis of incorrect information, or where there are repeated violations of the USBC. Notices issued pursuant to this section shall be permitted to be communicated electronically provided the notice is reasonably calculated to get to the permit holder.

f) **113.7 Approved inspection agencies.** The building official may accept reports of inspections and tests from individuals or inspection agencies approved in accordance with the building official's written policy required by Section 113.7.1. The individual or inspection agency shall meet the qualifications and reliability requirements established by the written policy. Under circumstances where the building official is unable to make the inspection or test required by Section 113.3 or 113.4 within two working days of a request or an agreed upon date or if authorized for other circumstances in the building official’s written policy, the building official shall accept reports for review. The building official shall approve the report from such approved individuals or agencies unless there is cause to reject it. Failure to approve a report shall be in writing within two working days of receiving it stating the reason for the rejection. Reports of inspections conducted by approved third-party inspectors or agencies shall be in writing, shall indicate if compliance with the applicable provisions of the USBC have been met and shall be certified by the individual inspector or by the responsible officer when the report is from an agency.
Note: Photographs, videotapes or other sources of pertinent data or information may be considered as constituting such reports and tests.

g) **113.7.1 Third-party inspectors.** Each building official charged with the enforcement of the USBC shall have a written policy establishing the minimum acceptable qualifications for third-party inspectors. The policy shall include the format and time frame required for submission of reports, any prequalification or pre-approval requirements before conducting a third-party inspection and any other requirements and procedures established by the building official.

Reference: See Bd. of Supervisors v. TRB on page 49.

h) **113.8 Final inspection.** Upon completion of a building or structure and before the issuance of a certificate of occupancy, a final inspection shall be conducted to ensure that any defective work has been corrected and that all work complies with the USBC and has been approved, including any work associated with modifications under Section 106.3. The approval of a final inspection shall be permitted to serve as the new certificate of occupancy required by Section 116.1 in the case of additions or alterations to existing buildings or structures that already have a certificate of occupancy.

12. **Certificate of Occupancy:**

116.1 **General; when to be issued.** A certificate of occupancy indicating completion of the work for which a permit was issued shall be obtained prior to the occupancy of any building or structure, except as provided for in this section generally and as specifically provided for in Section 113.8 for additions or alterations. The certificate shall be issued after completion of the final inspection and when the building or structure is in compliance with this code and any pertinent laws or ordinances, or when otherwise entitled. The building official shall, however, issue a certificate of occupancy within five working days after being requested to do so, provided the building or structure meets all of the requirements for a certificate.
**Exception:** A certificate of occupancy is not required for an accessory structure as defined in the International Residential Code.

13. **Stop Work Order:**

   a) **114.1 Issuance of order.** When the building official finds that work on any building or structure is being executed contrary to the provisions of this code or any pertinent laws or ordinances, or in a manner endangering the general public, a written stop work order may be issued. The order shall identify the nature of the work to be stopped and be given either to the owner of the property involved, to the owner's agent or to the person performing the work. Following the issuance of such an order, the affected work shall cease immediately. The order shall state the conditions under which such work may be resumed.

   b) **114.2 Limitation of order.** A stop work order shall apply only to the work identified in the order, provided that other work on the building or structure may be continued if not concealing the work covered by the order.

14. **Violations:**

   a) **115.1 Violation a misdemeanor; civil penalty.** In accordance with §36-106 of the Code of Virginia, it shall be unlawful for any owner or any other person, firm or corporation, on or after the effective date of any code provisions, to violate any such provisions. Any locality may adopt an ordinance that establishes a uniform schedule of civil penalties for violations of specified provisions of the code that are not abated or remedied promptly after receipt of a notice of violation from the local enforcement officer.

   **Note:** See the full text of §36-106 of the Code of Virginia for additional requirements and criteria pertaining to legal action relative to violations of the code.

   b) **115.2 Notice of violation.** The building official shall issue a written notice of violation to the responsible party if any violations of this code or any directives or orders of the building official have not been corrected or complied with in a reasonable time. The notice shall reference the code section upon which the
notice is based and direct the discontinuance and abatement of the violation or the compliance with such directive or order. The notice shall be issued by either delivering a copy to the responsible party by mail to the last known address or delivering the notice in person or by leaving it in the possession of any person in charge of the premises, or by posting the notice in a conspicuous place if the person in charge of the premises cannot be found. The notice of violation shall indicate the right of appeal by referencing the appeals section. When the owner of the building or structure, or the permit holder for the construction in question, or the tenants of such building or structure, are not the responsible party to whom the notice of violation is issued, then a copy of the notice shall also be delivered to the such owner, permit holder or tenants.

c) **115.2.1 Notice not to be issued under certain circumstances.**
When violations are discovered more than two years after the certificate of occupancy is issued or the date of initial occupancy, whichever occurred later, or more than two years after the approved final inspection for an alteration or renovation, a notice of violation shall only be issued upon advice from the legal counsel of the locality that action may be taken to compel correction of the violation. When compliance can no longer be compelled by prosecution under §36-106 of the Code of Virginia, the building 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.

d) **115.3 Further action when violation not corrected.** If the responsible party has not complied with the notice of violation, the building official shall submit a written request to the legal counsel of the locality to institute the appropriate 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. In cases where the locality so authorizes, the building official may issue or obtain a summons or warrant. Compliance with a notice of violation notwithstanding, the building official may request legal proceedings be instituted for prosecution when a person, firm or corporation is served with three or more notices of violation within one calendar year for
failure to obtain a required construction permit prior to commencement of work subject to this code.

Note: See §19.2-8 of the Code of Virginia concerning the statute of limitations for building code prosecutions.

e) **115.4 Penalties and abatement.** Penalties for violations of the USBC shall be as set out in §36-106 of the Code of Virginia. The successful prosecution of a violation of the USBC shall not preclude the institution of appropriate legal action to require correction or abatement of a violation.

f) **116.3.1 Reissuance of reinstatement of certificate of occupancy.** When a certificate of occupancy has been revoked or suspended, it shall be reissued or reinstated upon correction of the specific condition or conditions cited as the cause of the revocation or suspension and the revocation or suspension of a certificate of occupancy shall not be used as justification for requiring a building or structure to be subject to a later edition of the code than that under which such building or structure was initially constructed.

B. **Failure to Perform Mandatory Functions and Duties:**

Writ of Mandamus:

A writ of mandamus is a command issued by a court of competent jurisdiction requiring the performance of a duty required to be performed by a public official (or private official). Before a writ will be issued, the following elements must coexist: (a) The existence of a clear right in plaintiff to the relief sought; (b) The existence of a legal duty on the part of the respondent to do the thing which the plaintiff seeks to compel; (c) The absence of another adequate remedy at law; (d) The defendant must refuse to perform the act; and (e) The act to be compelled must be ministerial (mandatory) not discretionary.

See:


Nuckols wanted to install windmills on his airport in Middlesex. Building official denied building permit. Technical Review Board reversed. Three days before Technical Review Board decided case, Middlesex adopted ordinance disallowing windmills. Nuckols seeks *mandamus* against building official to issue building permit, as required by the Technical Review Board. Lower court threw out case because no “claim” filed under Virginia Code § 15.1-550. Supreme Court reversed and stated a valid claim for writ of *mandamus* had been pled.


Developer seeks *mandamus* requiring county building official to issue permit after zoning issues resolved by court. Building official refused permit. County building official argued that issuing permit was not ministerial. Supreme Court and trial court issued writ of *mandamus*. Case involved town vs. county authority.

V. Cases Involving USBC


Appellants contended that the County did not have standing to appeal the Review Board's decision to the circuit court. The court disagreed. Proceedings of the Review Board were governed by the Administrative Process Act (APA). Under the APA, any party aggrieved by and claiming unlawfulness of a case decision would have a right to direct review. The Review Board's decision was a "case decision," because it was an agency proceeding in which a named party either was or was not in compliance with any existing requirement for obtaining or retaining a right or benefit. The County was a named party in the Review Board's proceedings and was aggrieved by the ruling. Therefore, the court held that the County met the requirements to appeal the Review Board's decision. The County argued that the engineer did not have standing to appeal the County official's decision. The court held that the engineer met the requirement under § 116.7 of USBC of any other person directly involved in the construction and had standing to appeal the County official's decision. The engineer's inspections were
necessary to the construction of the building, because the USBC required measurements of concrete pours.

B. **W.S. Carnes, Inc. v. Board of Supervisors, 252 Va. 377 (Va. 1996):** The County adopted two ordinances, which imposed an increase in the permit fee charged for all new residential construction. Thereafter, builders filed a motion for declaratory judgment against the County, seeking an order declaring such ordinances invalid. The trial court ruled that the ordinances were valid. On review, the court held that the trial court (1) erred by holding that the builders’ association had standing in a representative status; (2) properly sustained the County’s demurrer, because the ordinances were general, rather than special laws; (3) properly excluded proffered evidence of the Board’s minutes, because evidence of the County’s intent or motive in enacting ordinances was irrelevant to a consideration of whether the laws were valid; (4) properly found that the fee ordinances did not violate Va. Code Ann. § 36-105, the Uniform Statewide Building Code § 104.3, and Va. Code Ann. § 15.1-37.3:9(B), in that the evidence and or the record supported such findings; and (5) properly found that the expenditures funded by the fee ordinances were rationally related to the cost of building code enforcement in that the evidence supported such finding.

C. **Granny's Cottage, Inc. v. Occoquan, 3 Va. App. 577 (Va. Ct. App. 1987):** The convictions were based upon the Town's contention that five condominium units were occupied without a final inspection or Certificate of Use and Occupancy. The trial court found that the violations of § 119.2 were continuing and imposed a fine of $20.00 per day for the 23-month period at issue. The court found that the trial court properly found that defendant was guilty of violating § 119.2. The court held that the correct interpretation of the definition of a "building" made the Uniform Statewide Building Code applicable to each condominium unit constructed within the building. However, the court agreed with defendant that Town of Occoquan, Virginia Code § 4-14 permed the Town to impose sanctions far in excess of the penalty permitted by Va. Code Ann. § 36-106. The court determined that the inconsistent penalty provisions of the Town ordinance and the state statute could not be harmonized. Thus, the court held that the sanctions imposed under Town of Occoquan, Virginia Code § 4-14 were invalid.

D. **Combs v. City of Winchester, 25 Va. Cir. 207 (Winchester Cir. Ct. 1991):** Remaindermen of the estate sued the City engineer and the City for demolishing their home when notice was only given to the life tenant. The City sought to have the lawsuit thrown out. The court did not throw the suit out. The court held:
A governmental function is one that advances, protects, or preserves the general public health and safety. The general public health and safety specifically includes the demolition of structures that endanger or imperil the public health. The enforcement of the building code by a city is a governmental function clothing the city and its building officials with sovereign immunity. Where a defendant's actions are clothed with sovereign immunity, a plaintiff must establish gross negligence in order to prevail. Gross negligence is the absence of slight diligence, or the want of even scant care.

The Uniform Statewide Building Code, Volume 2, § 107.3, provides that: If a building is found to be unsafe, the Code official shall serve a notice to the owners, the owner's agent, or person in control of the unsafe building. The notice shall specify the required repairs or improvements to be made to the building or require the unsafe building, or portion of the building, to be taken down and removed within a stipulated time. Such notice shall require the person notified to declare to the designated official without delay the acceptance or rejection of the terms of the notice. Statutes giving building officials the authority to condemn structures which endanger public safety must respect the right of the property owner to due process of law. The statutes in question must be construed and applied to afford the owners of the property notice of the proposed demolition and an opportunity for a hearing to contest the decision of the building official to raze the structure, and arguendo, to show that the structure could be brought into conformity with the building code.

E. **Board of Supervisors v. Miller & Smith, Inc., 222 Va. 230 (1981):** The case involved a refund request by the permit holder. The court held:

The refund provision of Building Officials and Code Administration/Uniform Statewide Building § 118.8 is worded in part: in the case of a revocation or abandonment or discontinuance of a building project, the volume of the work actually completed shall be computed and any excess fee for the incomplete work shall be returned to the permit holder. Fairfax
County argued that because of the elaborate service provided on building permit applications, and the time and number of its employees involved, it is entitled to some consideration on a quantum meruit basis. But nothing in BOCA/U.S.B.C regulation (§ 118.8) or the local ordinance so provides. At the trial, Fairfax County took the position that "work actually completed" and "for the incompleted work" had reference to the work of county employees in processing and issuing building permits. The trial court disagreed. The phrases "work actually completed" and "incompleted work" obviously refer to "building project" mentioned immediately before. We agree with the court and affirm the judgment in that regard.

F.  *Jenkins v. Daniels Inst. of Holistic Health, Inc., 62 Va. Cir. 246 (Roanoke Cir. Ct. 2003)*: Ms. Jenkins was a student in a massage therapy school that Daniels Institute operated and thus a business visitor on the defendant's premises. Having been instructed to do so, she was descending a wooden stairway in her stocking feet. The surface of the steps was slick, and her foot slipped on this slick surface. This caused her to fall and sustain severe injuries. The stairway did not comply with applicable USBC standards, including standards governing handrails, slip-resistant material and the "minimum static coefficient of friction." She sued the school for her injuries. The school sought to throw the case out, because it said that it was not the owner of the building but was a tenant and was not required to modify the building to meet the maintenance code requirements. The court disagreed and stated:

The dominant purpose of the [Uniform Statewide] Building Code ... is to provide comprehensive protection of the public health and safety. We must construe the Building Code broadly enough to give substantial effect to this manifest legislative purpose... A lessee, as possessor and occupant of the leased premises, owes the same duty to its invitees as an owner owes to its own invitees. Each is chargeable with constructive as well as actual knowledge of the condition of the property. the term 'owner' is defined in Code § 36-97 and in the BOCA Code [USBC]...'Owner' means 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.

**G. Wohlford v. Quesenberry, 259 Va. 259 (2000):** Plaintiff landlord filed an unlawful detainer warrant against defendant tenant, and defendant tenant filed a counterclaim for personal injuries and property damage arising from a leaky roof and malfunctioning furnace. Although the parties agreed that the maintenance of the roof and furnace was governed by National Property Maintenance Code, PM-603.1, PM-304.7, they disputed who was responsible for the maintenance. The court held:

Where a tenant leases the entire premises, she has the duty at common law to maintain the premises if the lease is silent on the subject. Uniform Statewide Building Code § 201.3 provides where terms are not defined in this code and are defined in three other listed codes, none of which is the National Property Maintenance Code, such terms shall have the meanings ascribed to them as in those codes. Virginia Code § 36-97 defines as follows: “Owner" means 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.

**H. Logie v. Town of Front Royal, 58 Va. Cir. 527 (Warren Cir. Ct. 2002):** Plaintiffs filed a lawsuit seeking to declare a town ordinance invalid because it authorized inspections by Town building officials to determine whether residential rental property was being maintained in accordance with the Uniform Statewide Property Maintenance Code. The ordinance also authorizes the town to discontinue electric service to any property found to be in violation of the Uniform Statewide Property Maintenance Code. The court held:

The state enabling statute has no provision for the termination of electric service in the event that maintenance deficiencies are discovered in a property. Pursuant to Virginia Code § 15.2-2109, the Town of Front Royal provides electricity in the Town. The Town’s Ordinance, § 125-11(A), provides that when inspections are triggered under the Ordinance that the unit's electricity shall not be reconnected without a certificate of compliance, and § 125-10(D)(2) provides for a temporary certificate of compliance, valid for up to 21 days, to permit the unit to be occupied. If, at the
end of the 21 day period, the structure is found not to be in compliance, the property shall be vacated and the electric service terminated until the property is in compliance. Ordinance § 125-10(D)(2)(c). Under Dillon's Rule, [local governing bodies] have only those powers have only those powers which are expressly granted by the state legislature, those powers fairly or necessarily implied from expressly granted powers, and those powers which are essential and indispensable." With regard to the application of Dillon's Rule to the enforcement of the Property Maintenance Code on existing residential rental units, the General Assembly has authorized localities to enforce the Property Maintenance Code but has not specifically prescribed the method of enforcement. The enabling statute, § 36-105, provides a mixture of instances in which the locality is mandated to enforce the Code and those in which it has the discretion to enforce. For existing buildings, like the rental units at issue in this case, where there is no elevator, nor complaint by a tenant, nor the presence of a conservation or rehabilitation district, the section grants the locality the discretion to enforce the Property Maintenance Code without specifically setting out the method. The power to provide and to terminate electricity derives from a grant from the General Assembly to enable the Town to provide utility services in the town, and the power to terminate electric service to enforce the Property Maintenance Code is not a power directly or inferentially conferred upon the town by the General Assembly. Therefore, the Town may not terminate electric service as a means of enforcing its Property Maintenance Ordinance.

I. **Bd. of Supervisors v. State Bldg. Code Tech. Review Bd., 52 Va. App. 460 (Va. Ct. App. 2008):** This case was based on an administrative appeal by the Culpeper County Board of Supervisors. The Board argues that the circuit court erroneously affirmed a case decision by the State Building Code Technical Review Board. The Technical Review Board held that the Board of Supervisors had no authority to set qualifications standards for third-party inspectors under the Virginia Uniform Statewide Building Code (USBC). The Court reversed and held:

We find the Technical Review Board's reasoning, as well as the circuit court's endorsement of it, to be plainly wrong. USBC § 109.3 authorized the locality to impose "any limitation" it chose on the delegation by its building official of his duties to third-party
inspectors. The Board of Supervisors chose to limit the delegation to certified engineers and architects. USBC § 115.8.1 merely authorized the county building official to accept inspection reports from "approved" inspectors satisfying the necessary "qualifications and reliability requirements." Nothing in § 115.8.1 contradicted § 109.3. To be sure, the two provisions complemented each other. Section 109.3 gave the locality the ultimate authority to establish criteria for who may act as a delegate of the building official's authority. Section 115.8.1, on the other hand, merely confirmed that the building official may accept inspection reports from approved inspectors and said nothing about delegating his authority to any third party.

J. **Moskowitz v. Renaissance at Windsong Creek, Inc.,** 52 Va. Cir. 459 (Fairfax Cir. Ct. 2000): Plaintiffs filed suit for injury to their homes caused by the allegedly defective exterior insulation and finish system. When plaintiffs filed an amended motion for judgment on a theory of negligence per se for violation by defendant subcontractor of the Uniform Statewide Building Code (USBC), defendant subcontractor filed a demurrer. The court sustained the demurrer and held:

In order to maintain a claim of negligence per se, a plaintiff must allege: (1) that the defendant violated a statute that was enacted for public safety, (2) that plaintiff belongs to the class of persons for whose benefit the statute was enacted, and that the harm that occurred was of the type against which the statute was designed to protect, and (3) that the statutory violation was a proximate cause of his injury. The Uniform Statewide Building Code was enacted to protect the health, safety, and welfare of the residents of the Commonwealth. Va. Code Ann. § 36-99(A) (1950). No provision of the statute indicates that its purpose was to protect the economic interests of homeowners. Where a plaintiff alleges that one component of a dwelling damages the rest of the structure, only economic loss is realized. Because a subcontractor has no common law duty to protect a homebuyer from purely economic loss, the Uniform Statewide Building Code cannot serve as a basis for a negligence per se claim.

refusing to comply with its prior decree in the injunction suit brought by the City of Norfolk. In the prior decree, the trial court ordered the homeowner to bring his residence into compliance with the Virginia Uniform Statewide Building Code and Norfolk City Code § 11-1 et seq. The court held:

The sanctions the trial court imposed, included mandatory repairs to be made by city contractors at the homeowner's expense were affirmed. The contempt citation was civil rather than criminal because it was remedial and was designed to compel the homeowner to comply with building codes and to protect the city's rights. Thus, the citation did not violate the constitutional prohibition of ex post facto laws, which only applied to criminal proceedings.

The court also ruled that the injunction and contempt sanctions did not violate the homeowner's due process rights under U.S. Const. Amend. XIV, because they did not deprive him of vested property rights. The court also ruled that the contempt sanctions were not excessive because under the circumstances, they were reasonable and necessary to afford the city remedial relief for the injury caused by the homeowner's violation of the building codes.

L. Vanity Stores, Inc. v. Town of Kilmarnock, 49 Va. Cir. 533 (Lancaster Cir. Ct. 1998): Plaintiffs, a corporation and four stockholders, filed a complaint in the Circuit Court of Lancaster County (Virginia) that defendant Town discriminated against them because of their race and religion in denying a certificate of occupancy for a business building. Plaintiffs claimed that the Town was negligent in hiring an uncertified building inspector, that their reputation was injured, and that they suffered discrimination in violation of Va. Code § 8.01-42.1. The court sustained the demurrer filed by the County. The court held:

The Virginia Uniform Statewide Building Code does not forbid hiring uncertified or unlicensed officials. Section 102.2.3 of the Code provides that the building official shall be certified in accordance with Part III of the Virginia Certification Standards within three years after the date of employment. Thus, it is not per se improper to hire someone who lacks certification. Further the Court held that governmental functions are those conferred by law for the general benefit, health, welfare, and safety of its citizens. The enforcement of uniform statewide building codes is delegated by the state to the localities. In undertaking to enforce
the building code, a municipality is performing a governmental function and enjoys immunity from suit.

M. **Wilson v. Bd. of Supervisors**, 66 Va. Cir. 427 (Bedford Cir. Ct. 1998): Plaintiff filed a negligence action against the County, alleging negligence by the County in the issuance of a certificate of occupancy for a home. The court held:

It is well established in Virginia that the state and its counties are immune from tort liability. However, this immunity is only applicable when the sovereign body is engaged in a governmental, and not proprietary, function. In looking at these functions performed by the county in the enforcement of the Building Code, the governmental function seems to be most dominant. Accordingly, the doctrine of sovereign immunity bars this action by the Plaintiff and this suit must be dismissed.

N. **Dunn v. City of Williamsburg**, 35 Va. Cir. 420 (Williamsburg/James City. Cir. Ct. 1995): The building inspector issued a certificate of use and occupancy to the builder, who subsequently sold to the homeowners. Several months after purchasing the house, the homeowner discovered major structural defects. Plaintiff homeowner filed an action against defendants, City and building inspector, arising from the building inspector's alleged improper inspection of the homeowners' house. The City asserted that the case was barred by the doctrine of sovereign immunity.

The court found that all claims against the City were barred by sovereign immunity. The court determined that the City's actions in enforcing the building code constituted a governmental function, because such acts were done to protect the public's health, safety and welfare. The City enjoyed sovereign immunity for damages arising from the performance of governmental functions. The court also found that the claims for negligence against the building inspector were claims for personal injuries, not property damage, and barred by the two-year statute of limitations.

O. **Family Home Servs., Inc. v. City of Norfolk**, 72 Va. Cir. 320 (Norfolk Cir. Ct. 2006): City issued a notice declaring the property at 965 Maltby Avenue to be unsafe and a public nuisance. As required by § 105.5 of Part III of the Uniform Statewide Building Code, the notice was sent to the petitioner by certified mail that day and posted on the property. The Postal Service returned the certified letter to the City "unclaimed" sometime after February 6. The City complied with
§ 105.5 of the USBC, since Mr. Johnson failed to go the Post Office to obtain the letter after two attempts at delivery. Clark Ray, a City officer, personally gave a copy of the letter to Mr. Johnson in court on January 19. Mr. Johnson sought to enjoin the demolition of the property. The City argued that since Mr. Johnson did not appeal the original notice declaring the property unsafe and a public nuisance, he was barred from bringing a court action. The court agreed with the City and held:

The letter clearly informed the petitioner of its appeal rights, and the petitioner clearly failed to pursue them. Section 106.5 of the USBC provides for an appeal of a building code official's decision to a local board of building code appeals, and it further provides: "Failure to submit an application for appeal within the time limit established by this section shall constitute acceptance of a code official's decision." Section 106.8 of the USBC provides for appeals from a local board to the State Review Board. See also Code of Virginia § 36-105. Pursuant to Va. Code § 36-114, proceedings before the State Review Board are governed by the Administrative Process Act (Va. Code § 2.2-4000 et seq.). That act provides for review by the circuit courts. Va. Code § 2.2-4025 et seq. This is due process of law.

P. **MacCoy v. Colony House Builders, Inc., 239 Va. 64 (1990):** This case involved homeowners who sued their builder and the subcontractor of their builder for a construction defect. Defendant electrician, hired by defendant contractor as a subcontractor, installed a service cable into an electrical panel box located in the garage of plaintiff homeowners. A building inspector required more service cable. The electrician apparently remedied the problem, because the inspector approved the work after a subsequent inspection. The service box caused a fire that damaged the home.

The court held that the general contractor was not liable for the acts of the independent subcontractor under the general rule that one who employs an independent contractor is not liable for injuries to third parties resulting from the contractor's negligence.

The MacCoys argued that the Court should make an exception to this general rule when the USBC is violated, because a violation of the USBC is wrongful per se. The court held:
We agree with the MacCoys that the violation of the Building Code, like the violation of any statute enacted to protect health, safety, and welfare, is negligence per se. See, e.g., VEPCO v. Savoy Const. Co., 224 Va. 36, 45, 294 S.E.2d 811, 817 (1982). The MacCoys, however, invite us to hold that whenever an independent contractor violates the Building Code, the "wrongful per se" exception applies and the contractor's employer is vicariously liable for the independent contractor's negligence. We decline the invitation. Thus, a general contractor is not liable for the negligence of a subcontractor even if that negligence involves a violation of the USBC.

Q. McCain v. York County Bd. of Building Code Appeals, 1994 Va. App. LEXIS 141 (Va. Ct. App. Mar. 22, 1994): This case involved the issue of when a building permit is deemed abandoned under the USBC. McCain’s permit was deemed abandoned by the building inspector, because no work “on-site” had been performed for 6 months pursuant to USBC § 109.8, which provided that a permit was invalidated if the authorized work was not commenced within six months after issuance of the permit, or if the authorized work was suspended for a period of six months after commencing the work. The Technical Review Board interpreted the term "authorized work" to include "any activity related to the progress of that particular job." The circuit court rejected the Board's interpretation and concluded the term included only actual work on the property. The Virginia Court of Appeals reversed the circuit court and held that in questions of interpretation, an administrative agency's decision "within the specialized competence" of the agency, was entitled to great deference and should not be disturbed unless it was arbitrary or capricious. The court concluded the Board had the authority to interpret the Uniform Statewide Building Code and that the decision was not arbitrary or capricious.

R. Andrews v. Ring, 266 Va. 311 (2003): This was a malicious prosecution case brought by the Chairperson of the Grayson County School Board and the Director of School Maintenance for Grayson County against the building official and the Commonwealth’s Attorney for Grayson County. The School Maintenance Department applied for and received a building permit to install an above-ground storage tank on the premises of Grayson County High School. However, before the permit was issued, the maintenance department dug and poured a slab to support the tank. The building official appeared before a magistrate for Grayson County and filed a criminal complaint against the Plaintiffs, alleging that they "failed to obtain a Building Permit before beginning work on a 10,000
Gallon Storage tank" and "conceal[ed] work prior to the required inspection by pouring concrete slab." The case was later *nolle prosequied*. The Court held:

The Commonwealth’s Attorney is entitled to absolute immunity from suit on the counts in each motion for judgment alleging malicious prosecution. The cases against him were dismissed. The court also held that probable cause existed for the issuance of the warrant by the building official against the Director of School Maintenance for Grayson County because he was in charge of the work that was done without a permit. However, the Court held that the warrant against Chairperson of the Grayson County School Board could go forward because she had not participated in any acts in violation of the law. She was merely the Chairperson of the Grayson County School Board, an unlikely person to be directing on-site construction and pouring concrete.

S. **Clayton v. State Bldg. Code Tech. Review Bd., 2011 Va. App. LEXIS 36 (Va. Ct. App. Feb. 8, 2011):** Mr. Clayton maintained that the condominium project in which he lived was required, under the building code that was in effect when it was built, to have fire stops. Therefore, he wanted the project to be declared "unsafe" and "unfit for human occupancy" under the Maintenance Code. The Technical Review Board refused to issue a decision that the lack of fire stops violated the VMC or that the buildings were "unsafe" and "unfit for human occupancy." Mr. Clayton appealed to the circuit court, which agreed with the Technical Review Board’s decision. He then appealed to the Court of Appeals of Virginia. The court upheld the previous rulings and stated:

The Review Board concluded that the lack of compliance with the operative building code at the time the condominiums were built "may not be treated as [a] violation of the VMC." The Review Board found that "the lack of firestopping is not a condition which in and of itself rises to the level of meeting the definition of an unsafe structure in [13 VAC 5-63-510(B)]." The Review Board noted that, "accepted practices at the time of construction of the building may have permitted the use of alternative materials or methods of construction negating or minimizing the need for firestopping."

Review Board’s not requiring retrofitting of fire stops in the project under the Fire Prevention Code. That ruling was upheld by the Fairfax Circuit Court.

The Review Board upheld the local fire official's determination that the SFPC did not require retrofitting of fire stops in appellant's building, because the SFPC was a maintenance-and-use code and only required repair to existing fire stops that had been breached or damaged. The Review Board found that fire stops had not been provided in the hollow-wall cavity common to appellant and another condominium unit when appellant's building was constructed. Accordingly, the Review Board concluded that "Section 102.2 of the SFPC cannot be used as the basis for [appellant's] building to be in violation of the SFPC" because "there is no lack of maintenance of any provided and approved equipment, systems, devices or safeguards."

The court held: “Because the Review Board's findings were not arbitrary and capricious, and because the SFPC and VPBSR by their plain language support the Review Board's conclusions, we will not disturb its decision on appeal.”

U. **Cromer v. Johnson Vill., L.L.C., 68 Va. Cir. 442 (Charlottesville Cir. Ct. 2005):** The decedent died as the result of a fall of approximately 15 feet off the deck on the back of a home that she rented from the landlord. There were no eyewitnesses to the incident. The court held that despite a clause in the lease that the decedent was to maintain the premises, Va. Code § 55-248.13(A)(2) of the Virginia Residential Landlord and Tenant Act, Va. Code § 55-248.2 et seq., controlled and created a statutory warranty of habitability that could not be contracted away in the lease. In addition, Va. Code § 55-248.16(A)(1) mandated that the landlord comply with the requirements of applicable building and housing codes, including the Uniform Statewide Building Code, Va. Code Ann. § 36-97, et seq. The administrators were afforded the presumption that the decedent acted with ordinary care for her own safety. Consequently, the decedent could not be found contributorily negligent as a matter of law. As to the issue of proximate cause, the administrators proffered evidence sufficient to take the issue outside of the realm of speculation. Therefore, summary judgment was denied, and the case could go to trial.

V. **Christian v. Corniel, 73 Va. Cir. 528 (Norfolk Cir. Ct. 2007):** Defendant landlord filed a demurrer to plaintiff visitor's complaint for personal injury sustained when she slipped and fell on a step on the landlord's property. She alleged negligence and liability under both Virginia common law and the International
Property Maintenance Code. The landlord's demurrer argued that the visitor failed to identify any breach of a legal duty owing to her. The Court held:

In addressing a landlord's duties under the International Property Maintenance Code, where a lessee is in exclusive possession of the premises, the lessee is required to maintain the premises as stated under the Code. Under the Uniform Statewide Building Code, the owner of property is required to maintain the property, and all sidewalks, driveways, and similar areas shall be kept in a proper state of repair, and maintained free from hazardous conditions. Virginia Maintenance Code §§ 301.2 and 302.3 (2003). Under the common law, if the lease is silent, the tenant has such responsibilities. The visitor did not have a cause of action against the landlord.

W. **Dodson v. Shenandoah County, 27 Va. Cir. 479 (Shenandoah Cir. Ct. 1983)**: The County implemented new policies and directives in reorganizing a department. The employee was transferred from the position of building official to that of chief building inspector. His salary was not reduced. The employee filed an action against the County, contending that the transfer was a grievable matter. The court granted judgment to the employee, holding that the transfer was a grievable matter and that the state grievance procedure in Va. Code § 2.1-114.5:1 (1950) was the applicable procedure for the employee's grievance. The court held that the transfer, even though part of a departmental reorganization, was in fact a demotion. The employee's job responsibilities were substantially reduced. The court further held that an alleged reinstatement of the employee to his position did not render the matter moot. The reinstatement was not in fact a true reinstatement, because immediately after the employee was reinstated, he was placed on administrative leave and relieved of all of his duties. The employee's grievance entitled to him to a panel hearing, as defined in § 2.1-114.5:1(A).

X. **Lee v. City of Norfolk, 281 Va. 423 (2011)**: Lee’s duplex was damaged by an accidental fire. He applied for and received a building permit to repair the duplex and elevate it out of the flood plain. Four months after the permit was issued, a building inspector came to the property and observed most of the roof missing, an unsecured roof gable, shattered brickwork (some of which was falling off), glass windows pulled loose from their frames, rotten portions along the base of certain walls, some walls raised off the foundation with improperly used jacks, dangling electrical wires at the point where the service was connected to the
house and piles of dangerous debris strewn about. The next day, the inspector called Mr. Lee and told him that the permit was revoked, because the duplex was nonconforming and needed more than 50% repairs; thus, it could not be rebuilt under Norfolk’s ordinances. Later, the building official sent a certified letter to Mr. Lee, stating that the duplex

...was inspected and found to be open providing a haven for undesirable & criminal activities. THE STRUCTURE HAS BEEN RENDERED UNSAFE BY ATTEMPTED REPAIRS. The property is in violation of health and safety regulations of Section 130.0 of the Virginia Uniform Statewide Building Code (USBC) and Article I, Chapter 27, Section 27-8 of the Code of the City of Norfolk. Therefore it has been declared UNSAFE AND A PUBLIC NUISANCE.

The building official directed Mr. Lee to demolish the duplex by a date certain. Another notice was sent, reiterating the first. No appeal was taken to the directive. The City demolished the duplex. Mr. Lee sued for damages by inverse condemnation.

The court upheld that the ruling of the circuit court that the City's demolition of Lee's property was not a taking but, rather, the abatement of a nuisance, for which no compensation is due.

Y. Virginia Electric & Power Co. v. Savoy Constr. Co., 224 Va. 36 (1982): Savoy's lawsuit alleged that the Arlington County Pollution Control Plant, which was being constructed by Savoy, as general contractor, was damaged in an explosion and fire resulting from VEPCO's negligence. Savoy's theory was that VEPCO's crew had torn the insulation on electrical cable while installing the cable in the conduits between the manhole vault and the transformer. VEPCO countered by presenting evidence that the first explosion occurred when an accumulation of methane gas arising from effluent in the plant and decay in the soil ignited. VEPCO's witnesses contended that if the conduits had been plugged and sealed by Savoy, as good workmanship required, there would have been no explosion. The Chief Electrical Inspector for the consultants employed by Arlington County to inspect the construction as it progressed testified as a witness for VEPCO. He said that three times before the explosion, he had instructed Savoy, either verbally or in writing, to comply with VEPCO's specifications by putting holes in the manhole cover. Cook also testified that under the conditions prevailing at the job site, where there was a "high water table," the conduits should have
been plugged and sealed in accordance with normal practice in the industry. He had placed the plugging and sealing of conduits on his preliminary "punch list," dated October 21, 1975, and in subsequent punch lists he had requested that all items on previous lists be completed. Savoy introduced the testimony that it was normal practice in the electrical contracting industry to seal conduits only before turning a construction project over to the owner. According to its expert, compliance with the National Electric Code, which requires the sealing of conduits, is usually provided by the final punch list for the project. In this instance, the final punch list had not been prepared, and the project had not been tendered to Arlington County. At the conclusion of the evidence, the trial judge also informed the jury that the provisions of the National Electric Code requiring the capping and sealing of conduits were not applicable until the project was "offered for acceptance" to the owner. The rationale of the trial court was that the project was still under construction until presented to the owner for acceptance and that if a contractor were arrested on a charge of violating the statute, he could successfully defend on the ground that he had not completed his work. The jury found for Savoy. The Supreme Court reversed and held:

There must be compliance with the Building Code not only when work is performed but also when work required by the Building Code should be done to safeguard persons and property. Compliance only upon completion of the entire project in many instances may be sufficient, but earlier compliance is necessary where danger may arise from delay in the performance of required work. Specifically, we hold that the requirement that conduits be plugged and sealed was applicable when the conduits were completed, the cables were installed, and the system was ready to be energized. To hold otherwise would be to leave at risk unnecessarily some of those very persons and the property that the statute was intended to protect.

Z. **Boyd v. Brown, 12 Va. Cir. 54 (Newport News. Cir. Ct. 1986):** This suit was brought against the City of Newport News and its employees, alleging they were negligent because they failed (1) to abate or cause abatement of the alleged dangerous condition of the structure located at 2002 Jefferson Avenue and (2) to place barrels and/or barricades around said structure to protect would-be pedestrians, and, particularly, the plaintiff, who on September 26, 1982, while allegedly walking north in the 2000 block of Jefferson Avenue beside said building, was severely injured when a wall of the same suddenly and without
warning collapsed on him. The City and its employees filed a plea in bar, based on the doctrine of sovereign immunity. The court held that the suit was barred, because enforcement of the Building Code was a governmental function of protecting the health, safety and welfare of the public.

VI. Potential Liability for Conduct within Scope of Employment:

A. Negligence:

1. Elements:

   a) Duty

   b) Breach of Duty

   c) Causation

   d) Damages

2. "Public Duty":

   a) Virginia recognizes that some public officials have no duty to an injured party whose injury was caused by the conduct of a third party unless there is a “special relationship” between the public official and either the injured party or the third party. A “special relationship” is formed when either: (i) the public official has a duty to control the conduct of the third party or (ii) the relationship between the public official and the injured party gives a right of protection. Marshall v. Winston, infra.

   b) Public officials are only civilly liable for violations of a special duty owed to a specific, identifiable person or class of persons and not for violation of his public duty to citizens in general. Marshall v. Winston, 239 Va. 315, 389 S.E.2d 902 (1990) (holding that generally a public official has no duty to control the conduct of third parties in order to prevent physical harm to another).

   c) Note: Contractor’s failure to comply with the USBC is negligence per se. See, Maccoy v. Colony House Builders, 239 Va. 64 (1990)
(electrical fire caused by USBC violation gives *per se* liability to electrical subcontractor, not to general contractor hiring him).

3. **Types of Negligence:**
   
a) **Malfeasance**

b) **Misfeasance**

c) **Nonfeasance**

d) **Gross Negligence**

B. **Immunity for Public Officials:**

1. **Historical Theory of Sovereign Immunity**

2. **Governmental Function vs. Proprietary Function**

3. **Ministerial vs. Discretionary:**

   “The line between line between ministerial and discretionary functions is not always clear, for it is difficult to conceive of any official act that does not admit to some discretion in the manner of performance.” Justice Cochran, dissent: *Lawhorne v. Harlan*, 214 Va. 405 (1973)

4. **Virginia’s Test:**

   *James v. Jane*, 221 Va. 43 (1980); *Messina v. Burden*, 228 Va. 1984): In 1980, the Virginia Supreme Court, while ignoring the ministerial vs. discretionary test, tried to give a better set of guidelines for determining which public employees are immune. In each case, the Court said it would decide if sovereign immunity would be granted by examining the following factors:

   a) the nature of the function performed by the employee;

   b) the extent of the sovereign entity’s interest and involvement in the function;
c) the degree of control and direction exercised by the sovereign entity over the employee; and

d) whether the act complained of involved the use of judgment and discretion in its performance.

The upshot of cases decided under this test is that narrowly-framed job descriptions mean liability, while broadly-framed job descriptions will result in immunity.

5. Selected Cases Involving a Code Official’s Liability:


   Enforcement of building code is a “governmental function, so code official had sovereign immunity.


   Enforcing the USBC is a” governmental function” that is protected by sovereign immunity.


   The functions of enforcement of the USBC appears to be predominately a “governmental function” protected by sovereign immunity.


   Declaring a building to be unsafe and demolishing it, is a “governmental function” so that the city engineer and City are protected by sovereign immunity.
C. **Doctrine of Respondeat Superior:**

1. **106.2 Delegation of Authority.** The building official may delegate powers and duties except where such authority is limited by the local government ... When such delegations are made, the building official shall be responsible for assuring that they are carried out in accordance with the provisions of this code.


A building official who delegates a discretionary (subjective) act under the code may be liable under the doctrine of *respondeat superior* for any wrong committed by his deputy, whether that wrong is ministerial or discretionary in character. The Court’s rationale for this holding is:

... Now, with the advent of comprehensive personal liability insurance and the growth of the employees as well as their superiors in the risk insured in performance bonds (a practice followed here), financial considerations have become a concern of secondary importance. As we have recently observed, government can function only through its servants, and certain of those servants must enjoy the same immunity in the performance of their discretionary duties as the government enjoys; but there is “no justification for treating a present day government employee as absolutely immune from tort liability, just as if he were an employee of an eighteenth century sovereign.” *James v. Jane*, 221 Va. 43, 53, 282 S.E.2d 864, 869 (1980).

Therefore, although the building official himself may not be liable for wrongs committed by himself in the exercise of sovereign immunity, he may be liable for all wrongs committed by deputies under the doctrine of *respondeat superior*.

VII. **Potential Liability for Conduct Outside of Scope of Employment**

A. **Definition:** “Scope of employment” means doing the business of the employer and not acting in conflict of material orders given to the employee by the

Acting outside of the scope of employment occurs when the employee: (a) forms the intent to pursue a purpose of his own; or (b) disobedys an instruction of his employer; or (c) takes a trip outside of the area or zone of operation in which the terms of his employment require him to remain. Master Auto Service Corp. v. Bowden, 179 Va. 507, 19 S.E.2d 679 (1942).

B. **Acts Outside Scope of Employment:**

1. **Assault and Battery**

2. **Trespass:**
   
   Common-law action for warrantless search.

3. **Malicious Destruction of Property**

4. **Defamation (Libel or Slander)**

5. **Interference with a Business Relationship**

6. **Malicious Prosecution:**
   
   See Andrews v. Ring on page 53 concerning Building Officials liability.

7. **42 U.S.C. § 1983; 1985:**
   
   Not just discrimination but all constitutional violations.

8. **Discrimination:**
   
   Based on age, sex, race, national origin or creed
9. **Warrantless Search:**

   a) **Virginia Code § 19.2-59 states:**

   Search without warrant prohibited; when search without warrant lawful. -- 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. Any officer found guilty of a second offense under this section shall, upon conviction thereof, immediately forfeit his office, and such finding shall be deemed to create a vacancy in such office to be filled according to law.


   c) **Buonocore v. C&P Tel. Co., 254 Va. 469 (1997):**

   This provision applies only to law enforcement persons and does not give a claim against private citizens.


VIII. An Overview of Administrative Search Law

A. Fourth Amendment: The Fourth Amendment to the U. S. Constitution states: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated ... “.

B. Virginia Constitution: Article 1, Section 10 of the Virginia Constitution 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.

C. United States v. Calandra, 414 U.S. 338, 348 (1974): Violation of protected rights means that evidence gathered contrary to these protections is inadmissible in a criminal prosecution. This is called the “exclusionary rule”.

D. Applicability of Fourth Amendment to Administrative Searches:

1. Background:

   a) Camara v. Municipal Court, 387 U.S. 523 (1967); See v. City of Seattle, 387 U.S. 541 (1967) held that federal administrative searches must be made pursuant to a valid search warrant (case involved federal OSHA inspections).

   b) Mosher Steel v. Teig, 229 Va. 95 (1985), held that the principals of Camara and See apply to Virginia administrative searches (case involved a warrant to inspect Mosher Steel in accordance with a planned schedule to determine whether there were violations of safety laws).

   c) The purpose of a warrant is to ensure that a decision to enter and inspect will be reviewed and not left to the mere discretion of the field officer.
d) **Mosher Steel** reaffirmed that two types of inspection search warrants may be issued by a magistrate:

i) **Specific Evidence of Existing Violation**: An affidavit must be filed with a detached judicial officer. Affidavit must recite facts of some underlying circumstances from which the affiant’s conclusions were formed. From this affidavit the judicial officer must make a probable cause determination.

ii) **Plan of Random Inspections**: An application for a search warrant must provide a detached judicial officer with factual allegations sufficient to justify an independent determination that the inspection program is based on reasonable standards and that the standards are being applied to a particular building/owner in a neutral and nondiscriminatory manner. In addition to describing the procedure by which a building is selected for an administrative search, the affidavit must provide the specific facts underlying each step of the selection process.


f) **1986 Va. AG LEXIS 70 (Va. AG 1986) (Maintenance Search Warrant Opinion)**:

The Attorney General opines that a search warrant can be issued to check to see if an existing building is in compliance with the Maintenance Code when the owner refuses to allow the inspection. The warrant is an administrative search warrant, not an inspection warrant authorized by Virginia Code 19.2-393.

Probable cause is not required for the issuance of an administrative search warrant; instead, facts that would justify an independent determination that the inspection is reasonable is what is required.

The Attorney General opined that the use of computer models to identify buildings that are most likely to be deteriorating can be the basis of obtaining an administrative search warrant. He refused to say that it is conclusive; that decision is up to the circuit court judge. The computer model point systems are disclosed.

The Attorney General discusses who should issue administrative search warrants and concludes that any circuit court judge whose jurisdiction includes the area to be inspected must sign off on the search warrant.

h) 1979 Va. AG LEXIS 135 (Va. AG 1979): Discusses Search and Seizure at Buildings where Fires have Occurred:

The opinion deals with the requirement under Virginia Code 27-58 that the state police investigate fires and the decision by the U.S. Supreme Court in Tyler v. Michigan (1978).

The Attorney General opined that Virginia Code § 27-58 was too broad and that Tyler v. Michigan only allowed warrantless searches of buildings where fires had occurred in the following circumstances: (a) the entry to fight the fire and (b) a reasonable time after the blaze has been extinguished to investigate the cause. In all other cases, a search warrant must be obtained. If the purpose is to investigate the source of the fire, then an administrative search warrant should be obtained. If the purpose is a criminal investigation, then a criminal search warrant should be obtained.

i) Owner/occupant can challenge search in court by declaratory judgment action before search is executed. See, Mosher Steel v. Tieg (search was not allowed because affidavit failed to show a standard for searches that was neutral and nondiscriminatory).

j) Mosher Steel held that random inspections must be based on affidavits that reveal inspection history to assure the issuing
officers that there was no harassment or subterfuge in the selection process.

2. Exceptions to Obtaining a Warrant:

a) Emergency Inspections:

Nonconsensual inspections conducted during emergencies, without proper warrants, may be legal in Virginia. See, Bennett v. Commonwealth, 212 Va. 863 (1972); and Jones v. Commonwealth, 29 Va. App. 363 (1999) (firefighters’ discovery of crack cocaine and firearm when responding to fire in apartment is ok).

b) Express Consent:

i) Fourth Amendment rights to be free from unreasonable searches and seizures may be waived orally or in writing by a voluntary consent to a warrantless search. Bumper v. North Carolina, 391 U.S. 543, 20 L.Ed.2d 797 (1968).

ii) Whether there is a voluntary consent to a search or whether consent was the product of duress or coercion (express or implied) is a question of fact to be determined by all the circumstances surrounding the consent. Schneckloth v. Bustamone, 412 U.S. 218, 227 (1973); Commonwealth v. Rice, 28 Va. App. 374 (1998).


c) Implied Consent:

i) Virginia Code § 36-105: “Any building or structure may be inspected at any time before completion .... .”
ii) **113.2 Prerequisites.** The building official may conduct a site inspection prior to issuing a permit. When conducting inspections pursuant to this code, all personnel shall carry proper credentials.

*Note:* Section 36-105 of the Code of Virginia provides, when enforcing the USBC, that any structure may be inspected at any time before completion. It also permits a local governing body to provide for the re-inspection of existing structures, see Part III (13 VAC 5-62-420, et seq.) of this code.

iii) A building permit may qualify as an implied consent to search.

iv) Implied consent can be withdrawn.

d) **“Plainview”:**

There is no reasonable expectation of privacy in items that are in plain view. *Ker v. California*, 374 U.S. 23 (1963); *Arnold v. Commonwealth*, 17 Va. App. 313, 318 (1993); *Illinois v. Andreas*, 463 U.S. 765, 771 (1983). Two elements are essential for plain view: (i) the official must be lawfully in a position to view the activity; and (ii) it must be immediately apparent that a violation of the law has occurred.

e) **Abandoned Property:**


ii) Trespassers have no expectation of privacy in an abandoned building. *Id.*

f) **Leases:**

Lessee, not owner, must give consent.

3. **Obtaining the Search Warrant**

**IX. Sanctions and Remedies for USBC Violations:**

Virginia Code § 36-106 provides two mutually exclusive forms of sanctions for USBC violations:

**A. Criminal Prosecution; Virginia Code § 36-106(A):**

It shall be unlawful for any owner or any other person, firm or corporation, on or after the effective date of any Code provisions, to violate any such provisions. Any such violation shall be deemed a misdemeanor and any owner or any other person, firm or corporation convicted of such a violation shall be punished by a fine of not more than $2,500. In addition, each day the violation continues after conviction or the court-ordered abatement period has expired shall constitute a separate offense. If the violation remains uncorrected at the time of the conviction, the court shall order the violator to abate or remedy the violation in order to comply with the Code. Except as otherwise provided by the court for good cause shown, any such violator shall abate or remedy the violation within six months of the date of conviction. Each day during which the violation continues after the court-ordered abatement period has ended shall constitute a separate offense. Any person convicted of a second offense committed within less than five years after a first offense under this chapter shall be punished by a fine of not less than $1,000 nor more than $2,500. Any person convicted of a second offense committed within a period of five to ten years of a first offense under this chapter shall be punished by a fine of not less than $500 nor more than $2,500. Any person convicted of a third or subsequent offense committed within ten years of an offense under this chapter shall be punished by confinement in jail for not more than ten days and fine of not more than $2,500, either or both.
B. **Civil Fines; Virginia Code § 36-106(B):**

Any locality may adopt an ordinance which establishes a uniform schedule of civil penalties for violations of specified provisions of the Code which are not abated or remedied promptly after receipt of notice of violation from the local enforcement officer.

This schedule of civil penalties shall be uniform for each type of specified violation, and the penalty for any one violation shall be a civil penalty of not more than $100 for the initial summons and not more than $150 for each additional summons. Each day during which the violation is found to have existed shall constitute a separate offense. However, specified violations arising from the same operative set of facts shall not be charged more frequently than once in any ten-day period, and a series of specified violations arising from the same operative set of facts shall not result in civil penalties which exceed a total of $3,000. Designation of a particular Code violation for a civil penalty pursuant to this section shall be in lieu of criminal sanctions, and except for any violation resulting in injury to persons, such designation shall preclude the prosecution of a violation as a misdemeanor.

Any person summoned or issued a ticket for a scheduled violation may make an appearance in person or in writing by mail to the department of finance or the treasurer of the locality prior to the date fixed for trial in court. Any person so appearing may enter a waiver of trial, admit liability, and pay the civil penalty established for the offense charged. Such persons shall be informed of their right to stand trial and that a signature to an admission of liability will have the same force and effect as a judgment of court. As a condition of waiver of trial, admission of liability, and payment of a civil penalty, the violator shall agree in writing to abate or remedy the violation within six months after the date of payment of the civil penalty.

If a person charged with a scheduled violation does not elect to enter a waiver of trial and admit liability, the violation shall be tried in the general district court in the same manner and with the same right of appeal as provided for by law. In any trial for a scheduled violation authorized by this section, it shall be the
burden of the locality to show the liability of the violator by a preponderance of the evidence. An admission of liability or finding of liability shall not be a criminal conviction for any purpose.

If the violation concerns a residential unit, and if the violation remains uncorrected at the time of assessment of the civil penalty, the court shall order the violator to abate or remedy the violation in order to comply with the Code. Except as otherwise provided by the court for good cause shown, any such violator shall abate or remedy the violation within six months of the date of the assessment of the civil penalty.

C. **Separate Criminal Sanctions for Lead-Based Paint Cases; Virginia Code § 36-106(C):**

Any owner or any other person, firm or corporation violating any Code provisions relating to the removal or the covering of lead-base paint which poses a hazard to the health of pregnant women and children under the age of six years who occupy the premises shall, upon conviction, be guilty of a misdemeanor and shall be subject to a fine of not more than $2,500. If the court convicts pursuant to this subsection and sets a time by which such hazard must be abated, each day the hazard remains unabated after the time set for the abatement has expired shall constitute a separate violation of the Uniform Statewide Building Code. Upon a reasonable showing to the court by a landlord as defined in § 55-248.4, that such landlord is financially unable to abate the lead-base paint hazard, the court shall order any rental agreement related to the affected premises terminated effective thirty days from the entry of the court order. For the purposes of the preceding sentence, termination of the rental agreement shall not be deemed noncompliance by the landlord pursuant to § 55-248.21.

D. **Statute of Limitations; Virginia Code § 36-106(D):**

Any prosecution under this section shall be commenced within two years as provided in § 19.2-8.
X. Laws and Regulations that Affect USBC Enforcement

A. Statute of Limitations:

1. Virginia Code § 19.2-8 provides:

   Prosecution of Building Code violations under § 36-106 shall commence within one year of discovery of the offense by the owner or by the building 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. However, prosecutions under § 36-106 relating to the maintenance of existing buildings or structures as contained in the Uniform Statewide Building Code shall commence within one year of the discovery of the offense.

2. Failure to prosecute within the statute of limitations bars the prosecution.

3. 115.2.1 Notice not to be Issued under Certain Circumstances: When violations are discovered more than two years after the certificate of occupancy is issued or the date of initial occupancy, whichever occurred later, or more than two years after the approved final inspection for an alteration or renovation, a notice of violation shall only be issued upon advice from the legal counsel of the locality that action may be taken to compel correction of the violation. When compliance can no longer be compelled by prosecution under §36-106 of the Code of Virginia, the building official shall document the existence of the violation and the edition of the USBC the violation is under.

B. State and Local Government Conflict of Interest Act:

1. 105.3 Conflict of interest. The standards of conduct for building officials and technical assistants shall be in accordance with the provisions of the State and Local Government Conflict of Interests Act, Chapter 31 (§2.2-3100 et seq.) of Title 2.2 of the Code of Virginia.
2. Virginia Code § 2.2-3100, et seq.:

The State and Local Government Conflict of Interest Act is a uniform Act applicable to all state and local government officers and employees.

3. Relevant Definitions in the Act:

a) “Dependent” means a son, daughter, father, mother, brother, sister or other person, whether or not related by blood or marriage, if such person receives from the officer or employee, or provides to the officer or employee, more than one-half of his financial support.

b) “Gift” means any gratuity, favor, discount, entertainment, hospitality, loan, forbearance, or other item having monetary value. It includes services as well as gifts of transportation, local travel, lodgings and meals, whether provided in-kind, by purchase of a ticket, payment in advance or reimbursement after the expense has been incurred. "Gift" shall not include any offer of a ticket or other admission or pass unless the ticket, admission, or pass is used. "Gift" shall not include honorary degrees and presents from relatives. For the purpose of this definition, "relative" means the donee's spouse, child, uncle, aunt, niece, or nephew; a person to whom the donee is engaged to be married; the donee's or his spouse's parent, grandparent, grandchild, brother, or sister; or the donee's brother's or sister's spouse.

c) “Personal interest” means a financial benefit or liability accruing to an officer or employee or to a member of his immediate family. Such interest shall exist by reason of (i) ownership in a business if the ownership interest exceeds three percent of the total equity of the business; (ii) annual income that exceeds, or may reasonably be anticipated to exceed, $10,000 from ownership in real or personal property or a business; (iii) salary, other compensation, fringe benefits, or benefits from the use of property, or any combination thereof, paid or provided by a business that exceeds, or may reasonably be anticipated to exceed, $10,000 annually; (iv) ownership of real or personal property if the interest exceeds $10,000 in value and excluding ownership in a business, income, or salary, other compensation,
fringe benefits or benefits from the use of property; or (v) personal liability incurred or assumed on behalf of a business if the liability exceeds three percent of the asset value of the business.

d) “Personal interest in a contract” means a personal interest which an officer or employee has in a contract with a governmental agency, whether due to his being a party to the contract or due to a personal interest in a business which is a party to the contract.

e) “Personal interest in a transaction” means a personal interest of an officer or employee in any matter considered by his agency. Such personal interest exists when an officer or employee or a member of his immediate family has a personal interest in property or a business, or represents any individual or business and such property, business or represented individual or business (i) is the subject of the transaction or (ii) may realize a reasonably foreseeable direct or indirect benefit or detriment as a result of the action of the agency considering the transaction. Notwithstanding the above, such personal interest in a transaction shall not be deemed to exist where an elected member of a local governing body serves without remuneration as a member of the board of trustees of a not-for-profit entity and such elected member or member of his immediate family has no personal interest related to the not-for-profit entity.

4. **Prohibitions – Virginia Code § 2.2-3103:**

No officer or employee of a state or local governmental or advisory agency shall:

1. Solicit or accept money or other thing of value for services performed within the scope of his official duties, except the compensation, expenses or other remuneration paid by the agency of which he is an officer or employee. This prohibition shall not apply to the acceptance of special benefits that may be authorized by law;

2. Offer or accept any money or other thing of value for or in consideration of obtaining employment,
appointment, or promotion of any person with any governmental or advisory agency;

3. Offer or accept any money or other thing of value for or in consideration of the use of his public position to obtain a contract for any person or business with any governmental or advisory agency;

4. Use for his own economic benefit or that of another party confidential information that he has acquired by reason of his public position and which is not available to the public;

5. Accept any money, loan, gift, favor, service, or business or professional opportunity that reasonably tends to influence him in the performance of his official duties. This subdivision shall not apply to any political contribution actually used for political campaign or constituent service purposes and reported as required by Chapter 9.3 (§ 24.2-945 et seq.) of Title 24.2;

6. Accept any business or professional opportunity when he knows that there is a reasonable likelihood that the opportunity is being afforded him to influence him in the performance of his official duties;

7. Accept any honoraria for any appearance, speech, or article in which the officer or employee provides expertise or opinions related to the performance of his official duties. The term "honoraria" shall not include any payment for or reimbursement to such person for his actual travel, lodging, or subsistence expenses incurred in connection with such appearance, speech, or article or in the alternative a payment of money or anything of value not in excess of the per diem deduction allowable under § 162 of the Internal Revenue Code, as amended from time to time. The prohibition in this subdivision shall apply only to the Governor, Lieutenant Governor, Attorney General, Governor's Secretaries, and heads of departments of state government;
8. Accept a gift from a person who has interests that may be substantially affected by the performance of the officer's or employee's official duties under circumstances where the timing and nature of the gift would cause a reasonable person to question the officer's or employee's impartiality in the matter affecting the donor. Violations of this subdivision shall not be subject to criminal law penalties; or

9. Accept gifts from sources on a basis so frequent as to raise an appearance of the use of his public office for private gain. Violations of this subdivision shall not be subject to criminal law penalties.

5. **Exceptions:**

   a) Virginia Code § 2.2-3104.1 allows acceptance by (i) any employee of a local government of an award or payment in honor of meritorious or exceptional services performed by the employee and made by an organization exempt from federal income taxation pursuant to the provisions of Section 501(c)(3) of the Internal Revenue Code.

   b) **Virginia Code § 2.2-3104.2:**

      The governing body of any county, city, or town may adopt an ordinance setting a monetary limit on the acceptance of any gift by the officers, appointees or employees of the county, city or town and requiring the disclosure by such officers, appointees or employees of the receipt of any gift.

6. **Prohibited conduct concerning personal interest in a transaction:**

   If you have a personal interest (defined as financial benefit or liability to you or immediate family because of 3% or more interest in business or $10,000.00 or more salary or earning per year from real or personal property or business, or liability associated with business that exceeds 3% of asset value of business), then you must disqualify yourself from
participating in official transactions, record your disqualification in the public record, and disclose your personal interest.

But you are not disqualified merely because you are a party to a civil legal proceeding concerning the transaction.

7. **Penalties for Violations:**

   a) Class 1 misdemeanor for knowingly violating Act, except that Class 3 misdemeanor for not disqualifying oneself or making disclosure of conflict of interest.

   b) Commonwealth’s Attorney’s prior opinion is complete defense.

   c) May lose employment if convicted.

   d) Rescission of contracts made in violation.

   e) Forfeiture of money or things of value procured in violation of Act.

8. **Statute of Limitations:**

   One year from date Commonwealth’s Attorney had actual knowledge or five years from date, whichever occurs first.

C. **Freedom of Information:**

1. **Virginia Freedom of Information Act:**

   Virginia Code § 2.2-3700 et seq.

2. **Applicable Provisions for Building officials (Virginia Code § 2.2-3704):**

   a) All official records are open to the public for inspection and copying by any citizen of the Commonwealth or radio, newspaper or television that reaches citizens of the Commonwealth during regular office hours.

   b) Initial response to citizens shall be within five (5) days of receipt of request designating the records with reasonable specificity. Unavailability problem extends time an additional seven days
upon notice; thereafter, can petition court for more time for voluminous records, but must try to make reasonable agreement with requestor prior to going to court. Request by citizen does not have to reference Freedom of Information Act.

c) Denials for exempt records must reference specific section of Code. (See below for some references.)

d) Reasonable charges for copying, search time, and computer time for supplying records; however, cannot exceed actual costs incurred by office. Must give a reasonable estimate of the cost if citizen asks for advanced estimate, and may require advance payment if estimate is given.

**Note:** If estimate of costs is more than $200.00, then can request payment plus 5%, and time to respond is tolled during this period.

3. **Applicable Exclusions:**

**Note:** EXCLUSIONS MAY BE DISCLOSED BY CUSTODIAN, IN HIS DISCRETION, EXCEPT WHERE PROHIBITED BY LAW.

a) Opinions from Commonwealth Attorney, City Attorney, County Attorney protected by attorney-client privilege. [§ 2.2-3705.1(2)]

b) Documents created for use in litigation or for use in active administrative investigation, if matter was properly a subject of a closed meeting [§ 2.2-3705.1(3)]

c) Building Code-related documents (Va. Code § 2.2-3705.2):

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Those portions of engineering and construction drawings and plans submitted for the sole purpose of complying with the Building Code in obtaining a building permit that would identify specific trade secrets or other information, the disclosure of which would be harmful to the competitive position of the owner or lessee. However, such
information shall be exempt only until the building is completed. Information relating to the safety or environmental soundness of any building shall not be exempt from disclosure.

Those portions of engineering and construction drawings and plans that reveal critical structural components, security equipment and systems, ventilation systems, fire protection equipment, mandatory building emergency equipment or systems, elevators, electrical systems, telecommunications equipment and systems, and other utility equipment and systems 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.), the disclosure of which would jeopardize the safety or security of any public or private commercial office, multifamily residential or retail building or its occupants in the event of terrorism or other threat to public safety, to the extent that the owner or lessee of such property, equipment or system in writing (i) invokes the protections of this paragraph; (ii) identifies the drawings, plans, or other materials to be protected; and (iii) states the reasons why protection is necessary.

Nothing in this subdivision shall prevent the disclosure of information relating to any building 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.

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4. Penalties for Violation:

Writ of mandamus, injunction, and civil penalty of between $500.00 and $1,000.00.
D. **Public Records Act:**


2. **109.4 Department Records.** The building official shall keep official records of applications received, permits and certifications issued, fees collected, reports of inspections, and notices, modifications and orders issued. Such records shall be retained in the official records or shall be disposed of in accordance with General Schedule Number Six available from the Library of Virginia.

3. **Definition of “Public Record”:**

   “Public record” is defined as “… recorded information that documents a transaction or activity by or with any public officer, agency or employee of the state government or its political subdivisions.”


5. The State Library Board is required to **formulate and execute** a program to inventory, schedule, and microfilm official records of counties, cities, and towns which it determines have permanent value.

6. The State Library Board is required to give local officials advice and assistance for the creation of programs regarding the creation, preservation, filing, and making available of public records in its custody. (Virginia Code § 42.1-82)

7. Prior to destroying, discarding, selling, or giving away any public records, you shall offer them to the State Library for preservation. (Virginia Code § 42.1-86.1)

8. Must establish consistent program for economic and efficient management of records. (Virginia Code § 42.1-85)
9. Must deliver all public records to successor. Failure to do so within ten days of a request in writing is a Class 3 misdemeanor. (Virginia Code § 42.1-88)

10. Each locality is required to designate a records officer to interface with the Library of Virginia. (Virginia Code § 42.1-85)

E. GOVERNMENT DATA COLLECTION AND DISSEMINATION PRACTICES ACT
(Virginia Code § 2.2-3800, et seq.):

1. Definition of “Personal Information”:

   "Personal information" means all information that (i) describes, locates or indexes anything about an individual including, but not limited to, his social security number, driver’s license number, agency-issued identification number, student identification number, real or personal property holdings derived from tax returns, and his education, financial transactions, medical history, ancestry, religion, political ideology, criminal or employment record, or (ii) affords a basis for inferring personal characteristics, such as finger and voice prints, photographs, or things done by or to such individual; and the record of his presence, registration, or membership in an organization or activity, or admission to an institution. "Personal information" shall not include routine information maintained for the purpose of internal office administration whose use could not be such as to affect adversely any data subject nor does the term include real estate assessment information.

2. Any agency maintaining personal information shall:

   a) Inform the subject whether or not he can refuse to give information and any known consequences;

   b) Give notice of possible dissemination of part or all of data collected;

   c) Allow the individual to inspect data about himself, including sources and names of persons who have access.
3. **Provisions of subject to challenge information in his file:**

   a) Agency must investigate, correct, and purge; or

   b) Subject can file statement not more than 200 words setting forth his position which must be sent to previous recipients of data.