

OP. NO. 03-087

**EDUCATIONAL INSTITUTIONS: VIRGINIA COMMONWEALTH UNIVERSITY
HEALTH SYSTEM AUTHORITY.**

**HOUSING: DEPT. OF HOUSING AND COMMUNITY DEVELOPMENT —
UNIFORM STATEWIDE BUILDING CODE.**

No requirement that State Fire Marshal perform, without compensation, preoccupancy inspections of capital projects owned by Virginia Commonwealth University Health System Authority. Requirement that Fire Marshal or his designee perform, without compensation, preoccupancy inspections of capital projects owned by Virginia Commonwealth University and leased under conventional lease to Authority.

Mr. William C. Shelton
Director, Department of Housing and Community Development
July 22, 2004

Issue Presented

You ask whether the State Fire Marshal is required to perform preoccupancy inspections for capital projects of the Virginia Commonwealth University Health System Authority without compensation.

Response

It is my opinion that the State Fire Marshal or his designee is not required to perform, without compensation, preoccupancy inspections of capital projects owned by the Virginia Commonwealth University Health System Authority. The Fire Marshal or his designee is required to perform, without compensation, preoccupancy inspections of capital projects owned by Virginia Commonwealth University and leased under conventional lease to the Authority.¹

Background

You relate that the Virginia Commonwealth University Health System Authority entered into a memorandum of agreement with the Department of Housing and Community Development. You also relate that, pursuant to the agreement, the Authority compensated the State Fire Marshal's Office² to act as its building official and perform preoccupancy inspections of its capital projects. You further relate that the Authority terminated its agreement with the Department and entered into an agreement with the Department of General Services. Under the new agreement, the General Services' Bureau of Capital Outlay Management is the building official for the Authority's capital projects.³ You note that the Authority asserts that the Fire Marshal must now perform the preoccupancy inspections at no cost, as it does for "other" state buildings.

You advise that the former agreement between the Virginia Commonwealth University Health System Authority and the Department of Housing and Community Development stated that Virginia Commonwealth University leased

certain of its buildings to the Authority. Further, you relate that the Authority presumably would pay for the renovation of these buildings. You also note that the agreement provides that the Authority may construct new buildings and renovate others on and off the MCV campus. The wording of the agreement suggests that the University may not own these other buildings or the land on which the proposed buildings will be situated.

Applicable Law and Discussion

In 1996, the General Assembly established the Virginia Commonwealth University Health System Authority Act.⁴ Section 23-50.16:3(A) of the Act identifies the Virginia Commonwealth University Health System Authority "as a public body corporate and as a political subdivision of the Commonwealth." Section 23-50.16:17(A) grants Virginia Commonwealth University the authority

to lease, convey or otherwise transfer to the Authority any or all assets and liabilities appearing on the balance sheet of the Medical College of Virginia Hospitals and any or all of the hospital facilities, except real estate which may be leased to the Authority for a term not to exceed ninety-nine years, upon such terms as may be approved by the University.

Section 36-139.4 authorizes the Department of Housing and Community Development "to enter into agreements with federal agencies, other state agencies and political subdivisions for services directly related to enforcement and administration of laws, rules, or regulations, or ordinances of such agencies affecting fire safety in public buildings." Section 23-50.16:18(C) requires the Virginia Commonwealth University Health System Authority to ensure that the State Fire Marshal or his designee inspect all its capital projects⁵ "prior to certification for building occupancy." Section 23-50.16:18 is silent regarding the payment or nonpayment of fees to the Fire Marshal for preoccupancy inspection services.

The Virginia Commonwealth University Health System Authority, by the terms of its organic statute, is a "public body corporate and ... a political subdivision."⁶ Section 23-50.16:5(E) authorizes the Authority to employ "a director, officers, employees and agents ..., including engineers, consultants, lawyers and accountants as the Board [of Directors of the Authority] deems appropriate." It has the power to sue and be sued in its own name; to locate and maintain offices; to accept, hold, and enjoy any gift, devise, or bequest; to borrow money and issue bonds; and to seek financing from and enter into contractual commitments with the Virginia Public Building Authority, the Virginia College Building Authority, and the Commonwealth.⁷ "Until July 1, 2001, employees of the Authority shall be considered employees of the Commonwealth."⁸ Further, it is my understanding that the Authority does not directly receive any appropriations from the Commonwealth.⁹

A 2002 opinion of the Attorney General concludes:

A political subdivision is created by the legislature to exercise some portion of the state's sovereignty in regard to one or more specific governmental functions. It is independent from other governmental bodies, in that it may act to exercise those powers conferred upon it by law without seeking the approval of a

superior authority. It employs its own consultants, attorneys, accountants and other employees whose salaries are fixed by the political subdivision, and it often incurs debts which are not debts of the Commonwealth but are debts of the political subdivision.^[10]

The general obligation of the State Fire Marshal to inspect capital projects without payment of a fee is subject to the project being a "state-owned building."¹¹ As a "public body corporate" and a "political subdivision of the Commonwealth," the Virginia Commonwealth University Health System Authority is neither a state agency nor a state institution¹² for the purpose of answering the question you pose. Therefore, its buildings are not "state-owned buildings."¹³ Since consideration is given solely to ownership of the building, ownership of the land is not relevant. Consequently, the Authority must compensate the Fire Marshal for inspections of Authority-owned buildings.

A building owned by Virginia Commonwealth University and leased to the Virginia Commonwealth University Health System Authority remains a state-owned building. This situation, however, would require that the lease be a conventional lease, and not (1) a financing lease pursuant to which title will change hands at the end of the term for nominal or no consideration, or (2) a lease of such duration, or other good cause, that it is construed to create a freehold estate. You do not suggest that any special leases exist, and therefore, I do not express an opinion with respect to such leases.

As previously noted, the State Fire Marshal's obligation to provide services at no cost to the building owner applies only to state-owned buildings. Section 23-50.16:18(C), which requires that the Authority use the services of the Fire Marshal to conduct inspections, does not address the compensation issue. Therefore, it does not affect the outcome expressed in this opinion. The determination regarding which capital projects, if any, the Fire Marshal must inspect without compensation is subject to the principles outlined above.

Conclusion

Accordingly, it is my opinion that the State Fire Marshal or his designee is not required to perform, without compensation, preoccupancy inspections of capital projects owned by the Virginia Commonwealth University Health System Authority. The Fire Marshal or his designee is required to perform, without compensation, preoccupancy inspections of capital projects owned by Virginia Commonwealth University and leased under conventional lease to the Authority.¹⁴

¹A capital project leased by Virginia Commonwealth University to the Virginia Commonwealth University Health System Authority is subject, however, to the requirement that the University pay some or all inspection costs when any part of the funding derives from private or foundation sources. See *infra* note 11. The outcome may also be different should the University and the Authority enter into a nonconventional lease that provides that ownership of the project be conveyed to the Authority at the end of its term, or any other lease that gives a freehold estate to the Authority. See *id.*

²The Director of the Department of Housing and Community Development administers the Statewide Fire Prevention Code and appoints the State Fire

Marshal. See Va. Code Ann. § 36-139(13) (LexisNexis Supp. 2004); § 36-139.2 (Michie Repl. Vol. 1996).

³I do not have a copy of the agreement between the Authority and Department of General Services. Such agreement is not directly relevant to the issues presented in this opinion. Therefore, I am unable to review this agreement or comment on the authority to enter into such agreement.

⁴The 1996 Session of the General Assembly originally enacted the Virginia Commonwealth University Health System Authority Act as the Medical College of Virginia Hospitals Authority Act. *Compare* 1996 Va. Acts chs. 905, 1046, at 1706, 1721-34, 2628, 2643-56, respectively (adding Chapter 6.2 in Title 23, consisting of §§ 23-50.15:2 to 23-50.15:36 (codified as amended at §§ 23-50.16:1 to 23-50.16:35)), *and* 2000 Va. Acts ch. 720, at 1428, 1449-52 (amending and reenacting §§ 23-50.16:1, 23-50.16:3, 23-50.16:4, 23-50.16:5, 23-50.16:7).

⁵All capital projects must be approved by the Board of Directors of the Virginia Commonwealth University Health System Authority. Va. Code Ann. § 23-50.16:18(A) (LexisNexis Repl. Vol. 2003). Any capital project exceeding \$5 million must be approved by the House Appropriations and Senate Finance Committees prior to being undertaken by the Authority. Section 23-50.16:18(A)-(B).

⁶Section 23-50.16:3(A) (LexisNexis Repl. Vol. 2003).

⁷Section 23-50.16:6(1), (4), (8)-(11) (LexisNexis Repl. Vol. 2003); *see also* § 23-50.16:25 (LexisNexis Repl. Vol. 2003) ("[B]onds may be issued ... without obtaining the consent of any commission, board, bureau or agency of the Commonwealth," subject to determination by State Treasurer that such bonds do not constitute tax-supported debt, and will not adversely affect debt capacity, of Commonwealth); § 23-50.16:26 (LexisNexis Repl. Vol. 2003) ("Bonds of the Authority shall not be a debt of the Commonwealth or any political subdivision thereof other than the Authority....").

⁸Section 23-50.16:24(A) (LexisNexis Repl. Vol. 2003).

⁹The General Assembly has not assigned the Authority a three-digit agency code in the Appropriation Act, and it does not receive direct appropriations from the Commonwealth.

¹⁰2002 Op. Va. Att'y Gen. 281, 283 (footnotes omitted).

¹¹See § 36-98.1 (Michie Repl. Vol. 1996) (authorizing Department of General Services, which functions as state-owned buildings official, to delegate inspection of state-owned buildings to Fire Marshal, other appropriate state agencies, and local building departments, and requiring state agencies and institutions to pay local building departments for inspections requested by Department).

¹²Prior opinions of the Attorney General have established that a "political subdivision" is not necessarily a state agency. *See, e.g.*, 1999 Op. Va. Att'y Gen. 39, 41, and opinions cited at 43 n.8.

¹³ See § 36-98.1 (providing that Uniform Statewide Building Code "shall be applicable to all state-owned buildings"); Va. Code Ann. § 27-99 (Michie Repl. Vol. 2001) (providing that Statewide Fire Prevention Code "shall be applicable to all state-owned buildings"). If a building is owned by an entity other than a state agency or institution, such building may not be classified as a "state-owned building."

¹⁴ See *supra* note 1.

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