

OP. NO. 03-115

FIRE PROTECTION: STATEWIDE FIRE PREVENTION CODE ACT.

HOUSING: UNIFORM STATEWIDE BUILDING CODE.

**HIGHWAYS, BRIDGES AND FERRIES: COMMONWEALTH
TRANSPORTATION BOARD, ETC.**

State-owned vehicular tunnels and other transportation-related structures, regardless of age, are subject to Statewide Fire Prevention Code provisions applicable to structures.

Mr. William C. Shelton
Director, Department of Housing and Community Development
February 18, 2004

Issues Presented

You ask whether the Statewide Fire Prevention Code applies to structures such as tunnels that are constructed and maintained by the Department of Transportation. You also ask if the response would be different for any such structure that originally was not constructed in accordance with the Code or its fire prevention regulations.¹

Response

It is my opinion that state-owned vehicular tunnels and other transportation-related structures, regardless of their age, are subject to the provisions of the Statewide Fire Prevention Code applicable to structures.

Background

You relate that the State Fire Marshal² is aware of problems with respect to the maintenance of fire protection systems in the Department of Transportation's vehicular tunnels connecting the cities of Norfolk and Portsmouth. The Fire Marshal is concerned that the Department has not performed the necessary maintenance work on the tunnels' older systems³ to assure adequate fire protection in the event of an emergency. You state that when the State Fire Marshal and local fire officials raised this matter, a representative of the Department of General Services⁴ responded that, except as to buildings, the Statewide Fire Prevention Code does not apply to work performed within a Department of Transportation right-of-way.

Applicable Law and Discussion

Both the Uniform Statewide Building Code⁵ and the Statewide Fire Prevention Code⁶ are applicable to state buildings and structures.⁷ Section 36-997 of the Building Code defines "structure" as

an assembly of materials forming a construction for occupancy or use including stadiums, gospel and circus tents, reviewing stands, platforms, stagings, observation towers, radio towers, water tanks, storage tanks (underground and aboveground), trestles, piers, wharves, swimming pools, amusement devices, storage bins, and other structures of this general nature but excluding water wells.

Although it does not explicitly include the term "tunnels," the Building Code's definition of "structure" is broad enough to include vehicular tunnels. Other statutes within the Virginia Code include vehicular tunnels as "structures."⁸ Clearly, a tunnel is an assembly of materials forming a construction for use. Moreover, I am unable to locate any statutory authority suggesting that the term "structure," as used in the Building Code and Fire Prevention Code, is not intended to include vehicular tunnels. Therefore, unless otherwise excepted by statute, vehicular tunnels should not be excluded as "structures" for purposes of the Statewide Building and Fire Prevention Codes.

The Commonwealth Transportation Commissioner is charged with doing "all acts necessary or convenient for constructing, improving and maintaining ... the systems of state highways."⁹ This authorization does not, however, constitute a basis for exempting tunnels or other highway-related structures from the Fire Prevention Code. The Commissioner must follow and obey all state laws pertaining to the Transportation Department and state highway system. It appearing that there is no statute specifically exempting tunnels and other highway-related structures from the Fire Prevention Code, all such state-owned structures must of necessity be subject to the Code.¹⁰

It makes no difference that a tunnel or other structure was constructed prior to the establishment of the Statewide Fire Prevention Code.¹¹ Section 27-99 addresses the applicability of the Code to "state-owned buildings and structures," and states that "[e]very agency ... shall permit ... a local fire official reasonable access *to existing structures* or a structure under construction or renovation, for the purposes of performing an informational and advisory fire safety inspection."¹² (Emphasis added.) Section 27-97 of the Code provides that "*buildings* constructed prior to 1973 be maintained in accordance with state fire and public building regulations in effect prior to March 31, 1986." This requirement relates to *buildings*, not to *structures*.¹³ Therefore, state-owned tunnels and other transportation-related structures, regardless of when they were constructed, are subject to the Statewide Fire Prevention Code provisions applicable to structures.

Conclusion

Accordingly, it is my opinion that state-owned vehicular tunnels and other transportation-related structures, regardless of their age, are subject to the provisions of the Statewide Fire Prevention Code applicable to structures.

¹Section 27-97 provides that "[t]he Fire Prevention Code shall prescribe regulations to be complied with for the protection of life and property from the hazards of fire."

²Section 36-139.2 requires that the Director of the Department of Housing and Community Development "appoint a State Fire Marshal ... to carry out the provisions of the Statewide Fire Prevention Code."

³You indicate that some of the fire protection systems have been in the tunnels over forty years.

⁴Section 36-98.1 provides that, "[a]cting through the Division of Engineering and Buildings, the Department of General Services shall function as the building official for state-owned buildings."

⁵Va. Code Ann. tit. 36, ch. 6, §§ 36-97 to 36-119.1 (Michie Repl. Vol. 1996 & LexisNexis Supp. 2003) ("Uniform Statewide Building Code"). Section 36-98 authorizes the Board of Housing and Community Development "to adopt and promulgate a Uniform Statewide Building Code."

⁶Va. Code Ann. tit. 27, ch. 9, §§ 27-94 to 27-101 (LexisNexis Repl. Vol. 2001 & Supp. 2003) ("Statewide Fire Prevention Code Act"). Section 27-97 authorizes the Board of Housing and Community Development "to adopt and promulgate a Statewide Fire Prevention Code."

⁷See § 36-98.1 (Michie Repl. Vol. 1996); § 27-99 (Michie Repl. Vol. 2001) (applying Uniform Statewide Building Code and Statewide Fire Prevention Code, respectively, to "state-owned buildings and structures"). By using the terms "buildings" and "structures" in the preceding statutes, the General Assembly is evidencing an intent that they are not one and the same, and that a "structure" clearly is something different from a building. See *generally* Gray v. Graves Mountain Lodge, Inc., 26 Va. App. 350, 494 S.E.2d 866 (1998).

⁸See, e.g., Va. Code Ann. § 46.2-881 (LexisNexis Repl. Vol. 2002) ("The Commonwealth Transportation Commissioner ... may conduct an investigation of any ... *tunnel* and ... may set the maximum speed of vehicles which such *structure* can withstand"); Va. Code Ann. § 15.2-3105 (LexisNexis Repl. Vol. 2003) ("The boundary of every locality ... shall embrace all wharves, piers, docks and other *structures*, except bridges and *tunnels*"). (Emphasis added.)

⁹See Va. Code Ann. § 33.1-13 (Michie Repl. Vol. 1996).

¹⁰The conclusion that such structures are subject to the Statewide Fire Prevention Code does not mean that there are fire protection *issues* with respect to *all* such structures. To the extent no such issues exist, no action is required of the Commonwealth Transportation Commissioner, nor is any action by fire officials authorized under the Fire Prevention Code. Clearly, however, there are fire protection issues with respect to vehicular tunnels.

¹¹See 1986 Va. Acts ch. 429, at 726, 726-28 (adding Chapter 9 in Title 27, consisting of §§ 27-94 to 27-101, relating to establishment of Statewide Fire Prevention Code).

¹²If the agency does not make the corrective measures recommended by the local fire official, the State Fire Marshal is authorized to enforce the Fire Prevention Code in the manner prescribed in § 27-98. See *also* 2002 Op. Va. Att'y Gen. 176 (providing that municipalities may not enforce Fire Prevention

Code absent appropriate delegation by State Fire Marshal or Director of Department of Housing and Community Development).

¹³See *Turner v. Wexler*, 244 Va. 124, 127, 418 S.E.2d 886, 887 (1992) ("Thus, the maxim *Expressio unius est exclusio alterius* is applicable here. This maxim provides that mention of a specific item in a statute implies that omitted items were not intended to be included within the scope of the statute.")

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