

OP. NO. 03-125

HOUSING: UNIFORM STATEWIDE BUILDING CODE.

ADMINISTRATION OF GOVERNMENT: VIRGINIA REGISTER ACT.

USBC regulations incorporating copyrighted model codes by reference represent enforceable law; are not unconstitutionally vague.

The Honorable William G. Petty
Commonwealth's Attorney for the City of Lynchburg
February 23, 2004

Issues Presented

You ask whether the enforcement of building regulations adopted by the Board of Housing and Community Development must await resolution of whether copyrighted material incorporated into the regulations by reference have lost their protection under federal copyright laws.¹ Further, you ask whether the regulations are unconstitutionally vague and thus violative of the due process provisions of the Constitution of the United States.

Response

It is my opinion that the Virginia Uniform Statewide Building Code regulations, which incorporate copyrighted model codes by reference,² represent enforceable law. It is also my opinion that the Virginia Uniform Statewide Building Code regulations are not unconstitutionally vague.

Background

You state that building regulations promulgated by the Board of Housing and Community Development incorporate by reference two model codes, which are copyrighted and published by a private organization. You relate that, upon requesting a copy of one of the codes, the Board informed your office that you must purchase the document.³ You believe that several provisions of the code you requested and the building regulations are unconstitutionally vague, i.e., they contain vague standards or are susceptible to arbitrary enforcement.

Applicable Law and Discussion

The Board of Housing and Community Development has adopted regulations, known as the Virginia Uniform Statewide Building Code ("USBC regulations"),⁴ which are enforced pursuant to § 36-106.⁵ The USBC regulations include portions of two model codes—the 2000 editions of the International Building Code and the International Property Maintenance Code, which are copyrighted and published by a private organization.⁶

The Virginia Register Act⁷ recognizes the authority of agencies to adopt regulations which incorporate textual matter by reference to other publications.

When regulations are adopted in this manner, the Act requires that the agency state the places where copies of the publications may be procured *and* make such copies available for public inspection and copying.⁸ Since the model codes on file with the Board of Housing and Community Development are copyrighted, you question whether members of the public may copy the codes⁹ and, therefore, ask whether enforcement of the USBC regulations must await resolution of this issue.

I am of the opinion that the enforceability of the USBC regulations does not depend on resolution of any uncertainty regarding copyright protection. Section 2.2-4103 of the Virginia Register Act not only imposes access and copying obligations on the Board, but also prescribes a remedy for noncompliance with these requirements:

It shall be the duty of every agency to have on file with the Registrar [of Regulations] the full text of all of its currently operative regulations *No regulation or amendment or repeal thereof shall be effective until filed with the Registrar.*

....

Where regulations adopt textual matter by reference to publications other than the Federal Register or Code of Federal Regulations, the agency shall (i) file with the Registrar copies of the referenced publications, (ii) state on the face of or as notations to regulations making such adoptions by reference the places where copies of the referred publications may be procured, and (iii) make copies of such referred publications available for public inspection and copying along with its other regulations.

Unless he finds that there are special circumstances requiring otherwise, the Governor, in addition to the exercise of his authority to see that the laws are faithfully executed, may, until compliance with [the Virginia Register Act] is achieved, withhold the payment of compensation or expenses of any officer or employee of any agency in whole or part whenever the [Virginia Code] Commission certifies to him that the agency has failed to comply with [the Act] in stated respects, to respond promptly to the requests of the Registrar, or to comply with the regulations of the Commission. [Emphasis added.]

Section 2.2-4103 specifically provides that the failure of an agency to file regulations with the Registrar's office makes them ineffective. Noncompliance with other provisions of § 2.2-4103 is remedied by the Governor, in some instances, by withholding compensation from agency personnel until compliance is achieved.

"[W]here a statute creates a right and provides a remedy for the vindication of that right, then that remedy is exclusive unless the statute says otherwise."¹⁰ Accordingly, it is my opinion that the General Assembly did not intend the enforceability of the USBC regulations to be impaired by the failure of the Board of Housing and Community Development to enable the public to copy a model code incorporated in the regulations by reference.¹¹

Furthermore, it is my opinion that the notice requirements of the Due Process Clause do not imply that citizens be permitted to photocopy an entire model code. Due process requires that one must have "fair warning ... of what the law intends to do if a certain line is passed."¹²

Due Process requires people to have notice of what the law requires of them so that they may obey it and avoid its sanctions. So long as the law is generally available for the public to examine, then everyone may be considered to have constructive notice of it; any failure to gain actual notice results from simple lack of diligence. But if access to the law is limited, then the people will or may be unable to learn of its requirements and may be thereby deprived of the notice to which due process entitles them.^[13]

According to the Department of Housing and Community Development, every locality and building code official is provided a copy of the Uniform Statewide Building Code. Further, it is also my understanding that the Board advises that it pays for each locality to be a member of the International Code Council, the organization that publishes "nationally recognized model building and fire codes."¹⁴ Each locality should purchase its own copies of the model codes at a "membership price." For example, the City of Lynchburg's Inspection Division reports that it has copies of the USBC regulations and that each inspector has a copy of the model codes. Consequently, there is no doubt that the USBC regulations and the model codes incorporated by reference are available for inspection.

Given the availability of inspection locally of the model codes, any restriction on wholesale copying of the codes would *not* constitute a due process violation that would render the USBC regulations unenforceable.

You next inquire whether the USBC regulations violate the Due Process Clause of the Constitution of the United States.

"All legislation is presumed to be constitutional"¹⁵ "Any reasonable doubt whether a statute is constitutional shall be resolved in favor of its validity, and courts will declare a statute invalid only if it is plainly repugnant to some constitutional provision."¹⁶

A penal statute is unconstitutionally void for vagueness if it does not "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."¹⁷ "Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement."¹⁸

This doctrine recognizes, however, that there are "practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited."¹⁹ "But few words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out

prohibitions."²⁰ Consequently, penal statutes need only define crimes to "a reasonable degree of certainty."²¹

You refer to various provisions of the International Property Maintenance Code²² that you believe are unconstitutionally vague. For example, you refer to subsection 303.1, which requires generally that "[t]he exterior of a structure shall be maintained in good repair, structurally sound and sanitary so as not to pose a threat to the public health, safety or welfare." You also refer to 302.1, which states that "[a]ll exterior property and premises shall be maintained in a clean, safe and sanitary condition. The occupant shall keep that part of the exterior property which such occupant occupies or controls in a clean and sanitary condition." Subsection 303.2 provides for protective treatment of exterior surfaces:

All exterior surfaces, including but not limited to, doors, door and window frames, cornices, porches, trim, balconies, decks and fences shall be maintained in good condition. Exterior wood surfaces, other than decay-resistant woods, shall be protected from the elements and decay by painting or other protective covering or treatment. Peeling, flaking and chipped paint shall be eliminated and surfaces repainted.... All metal surfaces subject to rust or corrosion shall be coated to inhibit such rust and corrosion and all surfaces with rust or corrosion shall be stabilized and coated to inhibit future rust and corrosion. Oxidation stains shall be removed from exterior surfaces. Surfaces designed for stabilization by oxidation are exempt from this requirement.

These provisions, however, do not violate the void-for-vagueness test.

Subsection 303.1 requires that the exterior of the structure be maintained in "good repair." While the term "good repair" may be a broad term, this fact does not render it unconstitutionally vague, as regulations may be broad in order to take into account a variety of situations.²³ Further, the term "good repair" in 303.1 is modified by subsequent language stating that it must not "pose a threat to the public health, safety or welfare," a phrase used *extensively* throughout the Virginia Code.²⁴ Guided, therefore, by this conventional terminology, a person of ordinary intelligence could readily understand what is required to keep an exterior structure in "good repair."

Moreover, the title of subsection 303.1 is "General," and a review of the remainder of Section 303 of the International Property Maintenance Code reveals that subsequent provisions provide the necessary detail to determine what constitutes "good repair" of an exterior structure. There are sixteen other provisions in Section 303 delineating specific requirements, which if not complied with would render the exterior structure in disrepair. For example, subsection 303.4 states that "[a]ll structural members shall be maintained free from deterioration, and shall be capable of safely supporting the imposed dead and live loads," and subsection 303.6 states that "[a]ll exterior walls shall be free from holes, breaks, and loose or rotting materials; and maintained weatherproof and properly surface coated where required to prevent deterioration." Subsection 303.1 must be considered in the context of the more detailed provisions in Section 303 to determine its meaning. "Statutes which have the same general or common purpose or are parts of the same general plan are ... ordinarily considered as *in pari materia*."²⁵ Consequently, an owner or occupant of

reasonable intelligence would understand what is required to properly maintain an exterior structure.

Section 131.0(4) of the USBC regulations deletes subsection 302.1 of the International Property Maintenance Code. Therefore, I do not offer an opinion on the constitutionality of this provision.

Subsection 303.2 of the International Property Maintenance Code, concerning wood and metal surfaces, provides detailed guidance as to necessary actions. It requires that peeling, flaking and chipped paint be eliminated and the surfaces repainted. Metal surfaces subject to rust or corrosion must be coated to inhibit such deterioration, and surfaces with rust or corrosion must be stabilized to inhibit future rust and corrosion. Oxidation stains must be removed. This language provides necessary detail and is not vague.

Furthermore, it is significant, when considering whether the provisions at issue are void for vagueness, that the USBC regulations provide first for notice of violation and then for initiation of legal proceedings. The issuance of a notice of violation is not a prosecution.²⁶ Subsection 105.2 of the USBC regulations provides for notice of violation to the responsible party. If the responsible party does not comply with such notice, subsection 105.3 authorizes "the building official/building maintenance official [to] request, in writing, the legal counsel of the locality to institute the appropriate legal proceedings," or, in the alternative, the "official may issue or obtain a summons or warrant where the locality so authorizes."

You also express concern about the risk of arbitrary enforcement. You refer to § 36-99, which requires the Building Code to "prescribe procedures for the administration and enforcement of regulations, including procedures to be used by the local building department in the evaluation and granting of modifications for any provision of the Building Code."²⁷ You view this provision as a delegation of authority to the locality arbitrarily to choose not to enforce the Building Code.

"It is ... presumed that public officials will discharge their duties honestly and in accordance with law."²⁸ The Supreme Court of Virginia has explained that it is not improper to invest an administrative officer or bureau with the power to ascertain and determine the qualifications, facts or conditions required by general terms, as those officials possess the technical knowledge and experience necessary to make such decisions.²⁹

Section 36-99 and subsections 109.2 and 129.5 of the USBC regulations merely delegate power authorizing the building official or building maintenance official to ascertain the facts surrounding a request for modification and to apply those facts in determining whether such modification would endanger the public health, safety and welfare. "A delegation of the power to exercise a discretion based upon a finding of facts is not of itself an arbitrary or capricious delegation."³⁰

"[W]here protection is afforded by appeal and by review in the courts, ... the requirements of procedural due process are satisfied."³¹ Subsections 106.1 and 106.5 of the USBC regulations provide for appeal to the local Board of Building Code Appeals of the building official or building maintenance official's refusal to grant a modification. Further, subsection 106.9 provides that a final determination by the local Board may be appealed to the Technical Review Board. Judicial review of the Review Board's decisions is governed by the Administrative

Process Act.³² These protections provided by the USBC regulations, therefore, eliminate the risk of arbitrary enforcement.

You find other standards of enforcement in the USBC regulations arbitrary. Specifically at issue are subsections 101.8, 109.1, and 109.2.³³ Subsection 101.8 requires that the USBC regulations and model codes be applied and enforced as interpreted by the Technical Review Board. Subsection 109.1 requires that the building official enforce the USBC regulations as interpreted by the Technical Review Board. Section 36-108 provides that the membership of the State Building Code Technical Review Board shall include, among others, a professional engineer, a registered architect, a residential builder, a general contractor, and persons with experience in enforcement of building regulations. Clearly, the makeup of the Review Board provides for the technical knowledge and expertise necessary for interpretation of the USBC regulations. Thus, these provisions do not encourage arbitrary enforcement.

Subsection 109.2 of the USBC regulations provides that, upon application by an owner or his agent, a building official may grant a modification, provided that the spirit and intent of the regulations are observed and the health, welfare and safety of the public are assured. Furthermore, subsection 109.2.1 provides that a building official may require that the application for modification "include architectural and engineering plans and specifications that include the seal of a professional engineer or architect." Further, "[t]he building official may require and consider a statement from a professional engineer, architect or other competent person as to the equivalency of the proposed modification."³⁴ Subsection 109.2.2 provides that "[t]he application for modification and the final decision of the building official shall be in writing and shall be recorded with the certificate of occupancy in the permanent records of the local building department." Subsection 129.5 of the USBC regulations, regarding modifications by a building maintenance official, is followed by subsections 129.5.1 and 129.5.2, which contain many of the additional safeguards set forth in subsections 109.2.1 and 109.2.2.³⁵ These provisions regarding modification requests do not encourage arbitrary enforcement.

Conclusion

Accordingly, it is my opinion that the USBC regulations, which incorporate copyrighted model codes by reference, represent enforceable law. It is also my opinion that the USBC regulations are not unconstitutionally vague.

¹17 U.S.C.A. §§ 101-122 (West 1996 & Supp. 2003).

²It is my understanding that the Virginia Uniform Statewide Building Code is available for inspection.

³For purposes of this opinion, I assume that the document was available for purchase at a reasonable price.

⁴Section 36-98 directs and empowers the Board of Housing and Community Development "to adopt and promulgate a Uniform Statewide Building Code."

⁵Section 36-106(A) provides that a violation of the Uniform Statewide Building is a misdemeanor punishable by a civil fine up to a specified amount.

⁶See Virginia Uniform Statewide Building Code §§ 108.0, 127.0 (2000 ed.) (effective Oct. 1, 2003) [hereinafter USBC reg.], available at <http://www.dhcd.virginia.gov/Forms/DBFR/1USBC.pdf>. The USBC regulations adopt and incorporate by reference portions of nationally recognized copyrighted model codes published by the International Code Council, Inc. See *Preface to USBC reg.*

⁷Va. Code Ann. §§ 2.2-4100 to 2.2-4104 (LexisNexis Repl. Vol. 2001 & Supp. 2003).

⁸Section 2.2-4103 (LexisNexis Repl. Vol. 2001) (emphasis added). The Act further requires that "each agency shall ... allow public copying [of its operative regulations] or make copies available either without charge, at cost, or on payment of a reasonable fee." *Id.* (emphasis added).

⁹*But see* Veeck v. S. Bldg. Code Cong. Int'l, Inc., 293 F.3d 791 (5th Cir. 2002) (en banc) (holding that model building codes enter public domain when adopted as law of jurisdiction; once adopted, model codes become "facts" that are not copyright-protected), *cert. denied*, 123 S. Ct. 2636, 156 L. Ed. 2d 674 (U.S. 2003). Compare Practice Mgmt. Info. Corp. v. AMA, 121 F.3d 516, 518-20 (9th Cir. 1997) (holding that incorporation of AMA's copyrighted medical procedure coding system in Medicare and Medicaid regulations does not render copyright invalid; however, if AMA limited publication, "fair use" would permit copying).

The First Circuit has noted that "judicial decisions and statutes are in the public domain. This straightforward general rule has proven difficult to apply when the material in question does not fall neatly into the categories of statutes or judicial opinions. A number of appellate courts have reached arguably inconsistent results in such cases." *John G. Danielson, Inc. v. Winchester-Conant Props., Inc.*, 322 F.3d 26, 38 (1st Cir. 2003) (citations omitted).

¹⁰*Sch. Bd. v. Giannoutsos*, 238 Va. 144, 147, 380 S.E.2d 647, 649 (1989), *quoted in* *Vansant & Gusler, Inc. v. Washington*, 245 Va. 356, 360, 419 S.E.2d 31, 33 (1993); see *Concerned Taxpayers v. County of Brunswick*, 249 Va. 320, 330, 455 S.E.2d 712, 717 (1995).

¹¹I do not assume that such a failure has occurred in the situation presented; however, the remedial scheme in § 2.2-4103 makes it unnecessary to reach such an issue.

¹²*McBoyle v. United States*, 283 U.S. 25, 27 (1931).

¹³*Bldg. Officials & Code Adm'rs Int'l, Inc. v. Code Tech., Inc.*, 628 F.2d 730, 734 (1st Cir. 1980). In this case, the First Circuit vacated a preliminary injunction preventing Code Technology from publishing and selling its own edition of a state building code based in part on a model code which purportedly was copyrighted and licensed to the state by the plaintiff. The First Circuit noted that, "[w]hile the court leaned strongly toward a conclusion that the copyright was invalid, it emphasized just as strongly that it declined to reach a definitive conclusion."

Danielson, 322 F.3d at 39. Thus, the First Circuit did not resolve the issue and has not done so since. See *id.*

¹⁴*Preface to USBC reg.*, *supra* note 6.

¹⁵*Walton v. Commonwealth*, 255 Va. 422, 427, 497 S.E.2d 869, 872 (1998).

¹⁶*Id.*

¹⁷*Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

¹⁸*City of Chicago v. Morales*, 527 U.S. 41, 56 (1999).

¹⁹*Colten v. Kentucky*, 407 U.S. 104, 110 (1972).

²⁰*Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 340 (1952).

²¹*Id.*

²²References you make to certain subsections do not correspond to the 2000 edition of the International Property Maintenance Code. The text you provide for subsections 303.1 and 304.1 corresponds to that of 302.1 and 303.1, respectively, of the 2000 Code. With regard to subsection 304.2, the text you quote does not correspond to 304.2 and does not appear in that precise form in the 2000 edition of the Code. These matters are included within subsection 303.2 of the 2000 Code.

²³See *Colten*, 407 U.S. at 110.

²⁴See, e.g., Va. Code Ann. § 18.2-351 (Michie Repl. Vol. 1996) (providing for commitment of persons convicted of certain offenses when court determines "that it is necessary for the protection of the public health or safety or for the promotion of the public welfare"); Va. Code Ann. § 28.2-210 (Michie Repl. Vol. 2001) (providing for adoption of emergency regulations "necessary for the immediate preservation of the public peace, health, safety, and welfare"); Va. Code Ann. § 32.1-137.3 (Michie Repl. Vol. 2001) (requiring State Board of Health to promulgate regulations governing quality of care provided by managed care health insurance plans "to protect the health, safety, and welfare of the public"); § 32.1-164.7 (LexisNexis Supp. 2003) (providing authority for State Health Commissioner to bring action to abate violation of sewage sludge regulations that poses "imminent threat to public health, safety or welfare"); Va. Code Ann. § 45.1-186.1(3) (LexisNexis Repl. Vol. 2002) (authorizing Director of Department of Mines, Minerals and Energy to serve on operator engaged in mining notice of noncompliance with mining regulations that "affect the health, safety and welfare of the Commonwealth"); Va. Code Ann. § 54.1-100 (prohibiting Commonwealth from abridging rights of person engaged in lawful profession or occupation, except when "such abridgement is necessary for the preservation of the health, safety and welfare of the public").

²⁵*Lucy v. County of Albemarle*, 258 Va. 118, 129, 516 S.E.2d 480, 485 (1999) (quoting *Prillaman v. Commonwealth*, 199 Va. 401, 405, 100 S.E.2d 4, 7 (1957)).

²⁶1997 Op. Va. Att'y Gen. 126, 128.

²⁷Section 36-99(A) (LexisNexis Supp. 2003).

²⁸Ours Props., Inc. v. Ley, 198 Va. 848, 850-51, 96 S.E.2d 754, 756 (1957).

²⁹See *id.* at 852, 96 S.E.2d at 757.

³⁰*Id.* at 852, 96 S.E.2d at 758.

³¹*Id.* at 851, 96 S.E.2d at 756.

³²See § 36-114 (LexisNexis Supp. 2003) (authorizing State Building Code Technical Review Board "to hear all appeals from decisions arising under application of the Building Code ..., and to render its decision ..., which shall be final if no appeal is made therefrom"); see *also* USBC reg. subsec. 106.9.2, *supra* note 6.

³³In your letter, you refer to subsections 107.1 and 107.2. The text you cite, however, is in subsections 109.1 and 109.2 of the USBC regulations.

³⁴USBC reg., *supra* note 6, subsec. 109.2.1.

³⁵Section 105 of the International Property Maintenance Code provides detailed requirements regarding modifications, including recording of actions granting modifications and testing of the modifications to assure their compliance.

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