

**OP. NO. 05-036**

**HOUSING: UNIFORM STATEWIDE BUILDING CODE.**

**COUNTIES, CITIES AND TOWNS: GENERAL POWERS OF LOCAL GOVERNMENTS – PUBLIC HEALTH AND SAFETY, NUISANCES — GENERAL POWERS AND PROCEDURES OF COUNTIES – MISCELLANEOUS POWERS — JOINT ACTIONS BY LOCALITIES – JOINT EXERCISE OF POWER.**

**Authority for county to enforce Uniform Statewide Building Code in any town located within county with population of less than 3,500, provided that town has not elected, or contracted with another authorized governmental entity, to enforce Code. County may bring suit against public nuisance located anywhere within county, including any town.**

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**Issues Presented**

You seek guidance concerning the enforcement of the Uniform Statewide Building Code and actions against public nuisances by a county for property located within an incorporated town, which has a population of less than 3,500, that is entirely within that county. Specifically, you ask whether a county is authorized to enforce the Building Code when a town does not have a building department or an agreement to enforce the Building Code. You also ask whether a county is authorized to bring a suit against an alleged public nuisance located within the town limits, whether or not it is contrary to the wishes of the governing body of the town.

**Response**

It is my opinion that a county is authorized to enforce the Uniform Statewide Building Code in any town located within the county that has a population of less than 3,500, provided that the town has not elected, or contracted with another authorized governmental entity, to enforce the Building Code. It is further my opinion that a county may bring suit against a public nuisance located anywhere within the territory of the county, including any town located therein.

**Background**

You indicate that several towns with populations of less than 3,500 are located within Sussex County. Further, you note that at least two of these towns currently do not have building departments and are negotiating with Sussex County and others to enforce the Uniform Statewide Building Code<sup>1</sup> (the "Building Code"). You further indicate that no contract has been signed at this time. Finally, you relate that one town takes the position that absent such contract or other agreement with the town's governing body, Sussex County has no authority to bring a suit against an alleged public nuisance located within the town limits.

### **Applicable Law and Discussion**

Enforcement of the Building Code is governed by § 36-105(A), which provides that:

Enforcement of the provisions of the Building Code 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 or board of Building Code appeals, 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 the Department [of Housing and Community Development] for such enforcement and appeals resulting therefrom. For the purposes of this section, towns with a population of less than 3,500 may elect to administer and enforce the Building Code; however, where the town does not elect to administer and enforce the Building Code, the county in which the town is situated shall administer and enforce the Building Code for the town.

Section 15.2-900 governs the issue of public nuisance and provides, in pertinent part, that:

In addition to the remedy provided by § 48-5 and any other remedy provided by law, any locality may maintain an action to compel a responsible party to abate, raze, or remove a public nuisance. If the public nuisance presents an imminent and immediate threat to life or property, then the locality may abate, raze, or remove such public nuisance, and a locality may bring an action against the responsible party to recover the necessary costs incurred for the provision of public emergency services reasonably required to abate any such public nuisance.

Additionally, § 15.2-1200 relates to public nuisance and provides that:

Any county may adopt such measures as it deems expedient to secure and promote the health, safety and general welfare of its inhabitants which are not inconsistent with the general laws of the Commonwealth. Such power shall include, but shall not be limited to, the adoption of quarantine regulations affecting both persons and animals, the adoption of necessary regulations to prevent the spread of contagious diseases among persons or animals and the adoption of regulations for the prevention of the pollution of water which is dangerous to the health or lives of persons residing in the county.

Finally, § 15.2-1300(A) relates to public nuisances and provides that:

Any power, privilege or authority exercised or capable of exercise by any political subdivision of this Commonwealth may be exercised and enjoyed jointly with any other political subdivision of this Commonwealth having a similar power,

privilege or authority except where an express statutory procedure is otherwise provided for the joint exercise.

### **1. Enforcement of the Building Code**

Section 36-105(A) of the Building Code provides that the enforcement thereof by a town with a population of less than 3,500 is optional. Should such a town elect to enforce the Building Code, it may do so through its own building department or board of appeals or by contracting with another party as provided by § 36-105(A). Should the town fail to make such an election, however, § 36-105(A) provides that the county in which the town is located "shall administer and enforce the Building Code for the town."<sup>2</sup>

The word "shall" primarily is mandatory, whereas the word "should" ordinarily implies no more than expediency and is directory only.<sup>3</sup> Although when the word "shall" is used in connection with the actions of a public official, its meaning is usually directory or permissive, and the intent is to be construed from the statute as a whole.<sup>4</sup> Section 36-105, taken as a whole, clearly establishes the intent that the Building Code must be enforced, and that it is the responsibility of each local government to enforce it within its territory. Since a town with less than 3,500 population may elect not to enforce the Building Code, a directory or permissive reading of "shall" with respect to the county would mean that should the county fail to act, then no government entity would enforce the Building Code within that town. Such an interpretation is at odds with the fundamental purpose of the statute.<sup>5</sup>

### **2. Suits by County Against Public Nuisance Located in Town**

Sections 15.2-900 and 15.2-1200, both individually and together, authorize a county to take action against a public nuisance. The fact that land located within the limits of the town remains a part of the county is an established concept in Virginia.<sup>6</sup>

Unlike the limited authority of the county to enforce the Building Code within the town limits only when the town has elected not to act, or when the town has contracted with the county to enforce the Building Code within the town, the authority of the county to take action against a public nuisance is not dependent on the actions or inactions of the town. The town and the county simultaneously have the authority to take action against a public nuisance.<sup>7</sup> Pursuant to § 15.2-1300(A), as long as a power is available to the county generally, it is not prohibited from exercising that power within the town limits merely because the town also has that power.<sup>8</sup>

### **Conclusion**

Accordingly, it is my opinion that a county is authorized to enforce the Uniform Statewide Building Code in any town located within the county that has a population of less than 3,500, provided that the town has not elected, or contracted with another authorized governmental entity, to enforce the Building Code. It is further my opinion that a county may bring suit against a public nuisance located anywhere within the territory of the county, including any town located therein.

<sup>1</sup> See Va. Code Ann. §§ 36-97 to 36-119.1 (Michie Repl. Vol. 1996 & LexisNexis Supp. 2004).

<sup>2</sup> See 1993 Op. Va. Att'y Gen. 163, 165 (concluding that towns with population of less than 3,500 may choose to enforce Building Code themselves, but if they do not, county in which town is situated has that responsibility under § 36-105). In 1992, the General Assembly amended § 36-105 to include the election of enforcement provision relating to towns with a population of less than 3,500. See 1992 Va. Acts ch. 73, at 74.

<sup>3</sup> See *Brushy Ridge Coal Co. v. Blevins*, 6 Va. App. 73, 78, 367 S.E.2d 204, 206 (1988).

<sup>4</sup> See *Commonwealth v. Wilks*, 260 Va. 194, 199, 530 S.E.2d 665, 667 (2000) (noting that courts consistently have held that use of "shall," in statute requiring action by public official, is directory and not mandatory unless statute manifests contrary intent).

<sup>5</sup> Statutes should not be interpreted to produce absurd results or irrational consequences. See *McFadden v. McNorton*, 193 Va. 455, 461, 69 S.E.2d 445, 449 (1952); 2001 Op. Va. Att'y Gen. 164, 165.

<sup>6</sup> "[I]n Virginia[,] an incorporated town continues to be an integral part of the county, subject to the jurisdiction of the county authorities and to taxation for general county purposes." *Nexsen v. Bd. of Supvrs.*, 142 Va. 313, 318, 128 S.E. 570, 571 (1925); see also 1978-1979 Op. Va. Att'y Gen. 288, 288; 1977-1978 Op. Va. Att'y Gen. 131, 133; 1973-1974 Op. Va. Att'y Gen. 273, 273.

<sup>7</sup> See Va. Code Ann. § 15.2-900 (LexisNexis Repl. Vol. 2003) (authorizing localities to maintain action to remove public nuisance); § 15.2-1300(A) (LexisNexis Repl. Vol. 2003) (authorizing joint exercise of authority by political subdivisions).

<sup>8</sup> The last portion of § 15.2-1300(A), "except where an express statutory procedure is otherwise provided for the joint exercise," prohibits the county from exercising its power to enforce the Building Code within the town limits except under the conditions noted in the text. This is because § 36-105 provides the "express statutory procedure" which limits the ability of the county to exercise such power to the specified situations.

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