

2019 EDITION

# Virginia Construction Law Deskbook

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Jennifer A. Mahar  
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Continuing Legal Education  
by the Virginia Law Foundation



## Virginia Construction Law Deskbook

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VIRGINIA LAWYERS PRACTICE DESKBOOK

VIRGINIA CONSTRUCTION LAW  
DESKBOOK

Volumes I & II

FOURTH EDITION

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## CHAPTER 3

### BUILDING CODES, PERMITS, ZONING, AND SPECIAL ISSUES

#### 3.1 BUILDING CODES AND PERMITS

##### 3.101 Uniform Statewide Building Code.

**A. In General.** The Virginia Uniform Statewide Building Code [USBC] is a set of state regulations governing construction of new structures and additions or renovations to existing structures. The USBC<sup>1</sup> was adopted and is amended by the Board of Housing and Community Development. The USBC is based upon nationally recognized model building and fire codes, which are incorporated by reference. The USBC is usually revised on a three-year cycle. As of September 4, 2018, Virginia uses the 2015 edition of the USBC.

**B. Statutory Provisions.** The USBC is part of the Virginia Administrative Code and is referenced in section 36-97 through 36-119.1 *et seq.* of the Virginia Code. The Virginia Supreme Court has determined that the enabling language in section 36-98 implicitly grants the power to adopt administrative rules and procedures to implement the building code.<sup>2</sup> Section 36-99 explicitly grants this power. The building code also is to be applied retrospectively, and because an owner has no vested right to own and enjoy his property absolutely free from government interference, retrospective application of the building code does not violate the owner's due process rights.<sup>3</sup>

##### **C. Enforcement.**

**1. In General.** Under section 36-105(A) of the Virginia Code, local building departments are charged with enforcing the USBC.<sup>4</sup> Each

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<sup>1</sup> The USBC is available online at <https://law.lis.virginia.gov/admincode/title13/agency5/chapter63/>.

<sup>2</sup> *Board of Supervisors v. Miller & Smith, Inc.*, 222 Va. 230, 236-37, 279 S.E.2d 158, 162 (1981).

<sup>3</sup> *Rainey v. City of Norfolk*, 14 Va. App. 968, 974, 421 S.E.2d 210, 214 (1992).

<sup>4</sup> *Dunn v. City of Williamsburg*, 35 Va. Cir. 420, 422 (Williamsburg/James City County 1995).

jurisdiction with a local building department is required to establish a local board of building code appeals. Section 36-105(A) also provides that if a county or municipality does not have a building department or local board of building code appeals, the local governing body must enter into an agreement with the local governing body of another county or municipality or some other agency to provide for enforcement and related appeals. The section permits towns with populations of less than 3,500 to elect to administer the building code for the town.

**2. Criminal Liability.** Under section 36-106(A) of the Virginia Code, it is a misdemeanor for any owner or other person, firm, or corporation to violate any provisions of the USBC. In general, violations are punished by a fine of not more than \$2,500.<sup>5</sup> A second offense within five years is subject to a fine of not less than \$1,000 nor more than \$2,500, and a second offense between five and ten years carries a fine of not less than \$500 nor more than \$2,500. Each day the violation continues after conviction or expiration of a court-ordered abatement period constitutes a separate offense. Any person convicted of a third or subsequent offense involving the same property committed within ten years of an offense under the USBC after having been convicted previously at least twice is punished by confinement in jail for not more than ten days and a fine of not less than \$2,500 nor more than \$5,000. No portion of a fine for a third or subsequent offense within ten years of another offense can be suspended.

The punishment provisions apply only to violations that result in a dwelling not being “safe, decent and sanitary,” and the local governing body must have taken official action to enforce the adopted provisions. Section 36-106(E) provides that a local enforcement officer may issue a summons or a ticket for violations of any Code provisions to the lessor or sublessor of a residential dwelling unit, so long as a copy of the notice is also served on the owner of the unit.

A landlord who violates any provision of the building code relating to lead hazard controls that poses a hazard to the health of pregnant women and children under age six is subject, upon conviction, to a fine of not more than \$2,500.<sup>6</sup>

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<sup>5</sup> Violators must abate or remedy any uncorrected violations within six months of the date of conviction, unless otherwise provided by the court for good cause shown.

<sup>6</sup> Va. Code § 36-106(D).

Prosecutions for violations of the building code must be commenced as provided in section 19.2-8<sup>7</sup>—“within one year of discovery of the offense 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, whichever is later. Prosecutions . . . relating to maintenance of existing buildings and structures [must] commence within one year of the issuance of a notice of violation for the offense by the building official.”<sup>8</sup>

A jurisdiction cannot adopt penalties inconsistent with the USBC by ordinance.<sup>9</sup> No private right of action arises under section 36-106 of the Virginia Code.<sup>10</sup> Nor may a locality terminate utility service as a result of USBC property maintenance code violations.<sup>11</sup>

**3. Civil Penalties.** Pursuant to section 36-106(C) of the Virginia Code, any locality may adopt an ordinance establishing a uniform schedule of civil penalties for violations of the USBC that are not abated, or otherwise remedied through hazard control, promptly after notice of violation from the local enforcement officer. A civil penalty cannot exceed \$100 for the initial summons and \$350 for each additional summons. Each day of violation constitutes a separate offense, but violations arising from the same set of facts cannot be charged more than once in a ten-day period. A series of violations arising from the same operative facts may not result in civil penalties that exceed a total of \$4,000. Designation of a particular violation for a civil penalty must be in lieu of criminal sanctions, and except for violations

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<sup>7</sup> Va. Code § 36-106(F).

<sup>8</sup> Va. Code § 19.2-8.

<sup>9</sup> *Granny's Cottage, Inc. v. Town of Occoquan*, 3 Va. App. 577, 582, 352 S.E.2d 10, 14 (1987) (invalidating town's ordinance-imposed sanctions when inconsistent with USBC); *but see Miller v. Commonwealth*, No. 2971-02-2, 2005 Va. App. LEXIS 64, at \*19, 2005 WL 350746, at \*7 (Va. Ct. App. Feb. 15, 2005) (noting that where both the statute and the ordinance can stand together, courts are obligated to harmonize them rather than nullify the ordinance).

<sup>10</sup> *Ripley Heatwole Co. v. John E. Hall Elec. Contractor, Inc.*, 69 Va. Cir. 69, 71-72 (Norfolk 2005) (noting that despite numerous amendments to this statute, the General Assembly has never provided a private right of action); *Foglia v. Clapper*, No. 1:12cv104, 2012 U.S. Dist. LEXIS 30783, at \*6-7, 2012 WL 777492, at \*3 (E.D. Va. Mar. 7, 2012) (noting that no private right of action exists under the USBC, but since the building code provides the standard of care to be exercised by a contractor, violation of the code or other statute enacted by the General Assembly to protect health, safety, or welfare can serve as the grounds for a cause of action for negligence *per se*).

<sup>11</sup> *Logie v. Town of Front Royal*, 58 Va. Cir. 527, 539 (Warren 2002) (warning against the slippery slope of using termination of utility service to enforce town ordinances).

resulting in injury to persons, precludes the prosecution of the violation as a misdemeanor.

**3.102 State Building Code Technical Review Board.** Section 36-108 *et seq.* of the Virginia Code establishes the State Building Code Technical Review Board. The review board consists of 14 members from different technical disciplines and is appointed by the governor. The board has the power and duty to hear all appeals arising from the building code and several other codes. Proceedings before the board are governed by the Administrative Process Act.<sup>12</sup>

Section 36-105 provides that appeals from the local building department concerning application of the USBC or the refusal to grant a modification of USBC requirements lie first with the local board of building code appeals. No appeal to the State Building Code Technical Review Board lies until after a final determination by the local board of building code appeals.

### **3.103 Building Permits.**

**A. Overview.** It is well settled in Virginia that localities may require, under a valid zoning ordinance, that building permits be obtained.<sup>13</sup> The USBC also requires that a permit be issued before the construction of any building to ensure that the proposed building conforms to the requirements of the USBC.<sup>14</sup>

Building permits are regulated in the USBC, but also may require review by a zoning official to determine compliance with local zoning regulations. The interaction between building permits and zoning requirements may give rise to a separate track for certain appeals, which would lie with the local board of zoning appeals and the circuit court.<sup>15</sup>

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<sup>12</sup> Va. Code § 2.2-4000 *et seq.* The informal conference provided for in section 2.2-4019 of the Act is not required in matters before the review board.

<sup>13</sup> *Segaloff v. City of Newport News*, 209 Va. 259, 261, 163 S.E.2d 135, 137 (1968).

<sup>14</sup> USBC §§ 110.2, 110.5.

<sup>15</sup> See, e.g., *Town of Jonesville v. Powell Valley Village LP*, 254 Va. 70, 78, 487 S.E.2d 207, 212 (1997) (county building inspector deemed to have authority to issue building permit); see also *Staples v. Prince George County*, 81 Va. Cir. 308 (Prince George 2010) (holding that the exhaustion of administrative remedies doctrine does not apply when a suit challenges the constitutionality of the ordinance itself and whether the regulatory board had the power to adopt the rule).

## B. Statutory Provisions.

**1. In General.** Notwithstanding the provisions of the USBC regarding building permits, the General Assembly has enacted additional statutes related to building permits.

**2. Sanitation Approval Required.** Section 32.1-165 of the Virginia Code provides that no county, city, town, or employee thereof shall issue a building permit for a structure designed for human occupancy without the prior written authorization of the State Health Commissioner or his agent. The commissioner or his agent must find either that safe, adequate, and proper sewage treatment is or will be made available to the building or that a permit has been approved by the State Sewage Handling and Disposal Appeals Review Board.

**3. Special Use Permits Not Required.** Section 15.2-2288.1 of the Virginia Code provides that no local ordinance may require, as a condition of approval of a building permit, that a special exception, special use, or conditional use permit be obtained for the construction of residential dwellings at the use, height, and density permitted by right under the local zoning ordinance.<sup>16</sup>

**4. Public Street Exception.** Section 15.2-2233 provides that when an application for a building permit is made to a locality for an area shown on the official map as a future or proposed right-of-way, the locality has 60 days to either grant or deny the building permit. If the permit is denied for the sole purpose of acquiring the property, the locality has 120 days from the date of denial to acquire the property, either through negotiation or condemnation. If the locality fails to act within 120 days, the building permit must be issued, provided that all other requirements have been satisfied.

**5. Proceedings to Stop Construction.** Section 8.01-620 authorizes Virginia circuit courts to grant injunctions for alleged violations of the USBC.

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<sup>16</sup> See, e.g., *Town of Occoquan v. Elm St. Dev., Inc.*, Rec. No. 110075, 2012 Va. LEXIS 104, at \*8 (Va. Sup. Ct. Apr. 6, 2012) (summary judgment granted to developer because statute prohibited town from requiring special permit for steep slope clearing as a precondition to townhouse development otherwise permitted under zoning ordinance).

For alleged violations of a zoning ordinance, a determination by the zoning administrator or other administrative officer interpreting the zoning ordinance ordinarily must be appealed to the board of zoning appeals within 30 days.<sup>17</sup> Otherwise, the issue becomes a “thing decided” and not subject to later attack.<sup>18</sup> However, section 15.2-2313 provides that where a building permit has been issued and a person subsequently seeks to prevent, restrain, correct, or abate the construction as a violation of the zoning ordinance, the court may hear and determine the issues even though no appeal was taken from the decision of the administrative officer to the board of zoning appeals. The suit must be filed within 15 days after the start of construction by a person who had no actual notice of the issuance of the permit. Section 15.2-2311(B) provides that appeals stay all proceedings in the action appealed from unless the zoning administrator certifies to the board that a stay would, in his or her opinion, cause imminent peril to life or property. The zoning administrator has revisory powers over its determination only up to 60 days after the date it issues its decision, except in the case of a clerical error.

**6. Grandfathered Buildings.** Section 36-103 provides that any building or structure for which a building permit has been issued or on which construction has commenced remains subject to the building regulations in effect at the time the permit was issued or the construction commenced. However, reconstruction, renovation, repair, or demolition of such buildings or structures is subject to the pertinent reconstruction and rehabilitation provisions of the building code, as amended, including those applying to equipment. Building owners may elect to install partial or full fire alarms or other safety equipment not required by the building code in effect at the time of construction without meeting current building code requirements, provided that the installation does not create a hazardous condition.

**C. Mechanics’ Lien Agent Requirements.** Section 36-98.01 of the Virginia Code provides that in addition to any information required by the USBC, a building permit issued for any one- or two-family residential dwelling unit must, at the request of the applicant, contain the name, mailing address, and telephone number of the mechanics’ lien agent as defined in section 43-1 of the Virginia Code. If the designation of a mechanics’ lien agent is not requested by the applicant, the building permit shall, at the time of

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<sup>17</sup> Va. Code § 15.2-2311.

<sup>18</sup> *Gwinn v. Alward*, 235 Va. 616, 621, 369 S.E.2d 410, 412 (1988).