



COMMONWEALTH of VIRGINIA

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C. Eric Young, Esquire
County Attorney for Tazewell County
108 East Main Street
Tazewell, Virginia 24651

Dear Mr. Young:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issues Presented

You inquire whether a county may enter into an agreement with another state to perform inspections of industrialized buildings manufactured in a Virginia facility, to determine compliance with the building code of the other state. You also inquire whether the county or its employees would be entitled to the protection of sovereign immunity with respect to the performance of such inspections.

Response

It is my opinion that a county may not enter into an agreement with another state to perform building inspections of industrialized buildings manufactured in a Virginia facility, to determine compliance with the building code of the other state. It is my further opinion that neither the county nor its employees would be entitled to the protection of sovereign immunity with respect to the performance of such inspections.

Background

You relate that a business in Tazewell County has contracted to manufacture metal shell structures to be shipped to the state of Washington for use in the housing of utility equipment. You further relate that the business has requested that the county's building officials inspect the metal shell structures and certify to Washington State that the structures comply with Washington State's building code. You have been advised that Washington State's building code requires that such structures manufactured out of state be inspected for compliance with Washington State's building code by a "government official" in the state where the structure is manufactured. You indicate that Washington State does not accept certifications from licensed private inspectors performing inspections in other states. You have received a form agreement prepared by the Washington State Department of Labor and Industries by which that agency delegates specific inspection authority of factory-assembled structures to government officials in the state of manufacture, in return for certain contractual commitments by the governmental entity that is agreeing to undertake the inspections on behalf of Washington State.

Applicable Law and Discussion

The power to enter into agreements with other states is held by the General Assembly,¹ and those agreements may be negotiated by the Governor.²

Virginia generally follows the Dillon Rule of strict construction and its corollary for municipalities. “[M]unicipal corporations possess and can exercise only those powers expressly granted by the General Assembly, those necessarily or fairly implied therefrom, and those that are essential and indispensable.”³

Enforcement of the provisions of the Virginia Uniform Statewide Building Code for new construction and rehabilitation of existing buildings erected on property in the Commonwealth has been designated as the responsibility of the local building department.⁴ Notwithstanding this statutory authority, the type of building to be manufactured at the facility in your locality is an industrialized building,⁵ to be shipped to Washington State, where it will be affixed to real property, and thus made subject to *that* state’s building code.

I find no statutory authority enabling Virginia localities to enter into agreements with other states to inspect locally-manufactured industrialized buildings to determine such structure’s compliance with that state’s building code.⁶ “If there is any reasonable doubt whether legislative power exists, that doubt must be resolved against the local governing body.”⁷ Therefore, it is my opinion that a county does not have the authority to enter into such an agreement.⁸

You also ask whether the county or its employees would be entitled to the protection of sovereign immunity for tort claims arising from the performance of such inspections. The applicability of such immunity to a given government activity constitutes a question of law, and is subject to a four-part

¹ VA. CONST. art. IV, § 14 (“The authority of the General Assembly shall extend to all subjects of legislation not herein forbidden or restricted”). *See also* *Harrison v. Day*, 201 Va. 386, 396, 111 S.E.2d 504, 511 (1959) (“The Constitution of the State is not a grant of legislative powers to the General Assembly, but is a restraining instrument only, and, except as to matters ceded to the federal government, the legislative powers of the General Assembly are without limit.”).

² VA. CONST. art. V, § 7 (“The Governor shall conduct, either in person or in such manner as shall be prescribed by law, all intercourse with other and foreign states.”). *See also* 1974-75 Op. Va. Att’y Gen. 221, 221-22.

³ *Richmond v. Confre Club of Richmond, Inc.*, 239 Va. 77, 79, 387 S.E.2d 471, 473 (1990).

⁴ VA CODE ANN. § 36-105(A) (Supp. 2013).

⁵ *See* § 36-71.1 (2011) (“‘Industrialized building’ means a combination of one or more sections or modules, subject to state regulations and including the necessary electrical, plumbing, heating, ventilating and other service systems, manufactured off-site and transported to the point of use for installation or erection, with or without other specified components, to comprise a finished building.”).

⁶ In contrast, the General Assembly has granted authority to localities to enter into agreements in certain other specific contexts. *Cf.* VA CODE ANN. §§ 15.2-5100 through 15.2-5158 (2012 and Supp. 2013) (authorizing localities to create a water authority in conjunction with other localities); 2004 Op. Va. Att’y Gen 82 (concluding locality could enter into an agreement with neighboring jurisdiction in North Carolina to create joint water authority). *Cf. also* § 15.2-815 (2012) & § 15.2-932 (2012) (authorizing localities to enter contracts with other entities for garbage disposal services).

⁷ *Richmond v. Confre Club of Richmond, Inc.*, 239 Va. 77, 79, 387 S.E.2d 471, 473 (1990).

⁸ For a locality to exercise such power, the General Assembly would have to enact enabling legislation granting localities that authority.

analysis established by the Virginia Supreme Court.⁹ In the landmark case of *Messina v. Burden*,¹⁰ the Court articulated the legal test as follows:

In *James* we developed a test to determine entitlement to immunity. Among the factors to be considered are the following:

1. the nature of the function performed by the employee;
2. the extent of the state's interest and involvement in the function;
3. the degree of control and direction exercised by the state over the employee; and
4. whether the act complained of involved the use of judgment and discretion.^[11]

This test likewise applies to the actions of a local government, and its employees, respecting the performance of a given function.¹²

Under the factual scenario that you describe, and consistent with the lack of enabling authority for the county to enter into an agreement with another state for the stated purpose, it is apparent that the county would have no lawful interest in the function at issue. Therefore, it is my opinion that the county would not satisfy the legal test to establish an entitlement to the protection of sovereign immunity for it or its employees respecting the performance of the inspections.

Conclusion

Accordingly, it is my opinion that a county may not enter into an agreement with another state to perform building inspections of industrialized buildings manufactured in a Virginia facility, to determine compliance with the building code of the other state. It is my further opinion that neither the county nor its employees would be entitled to the protection of sovereign immunity with respect to the performance of such inspections.

With kindest regards, I am

Very truly yours,



Kenneth T. Cuccinelli, II
Attorney General

⁹ See *Burns v. Gagnon*, 283 Va. 657, 666, 676, 727 S.E.2d 634, 646 (2012).

¹⁰ 228 Va. 301, 321 S.E.2d 657 (1984).

¹¹ *Id.* at 313, 321 S.E.2d at 663 (citing *James v. Jane*, 221 Va. 43-53, 282 S.E.2d 864, 869 (1980)).

¹² See, e.g., *Ligon v. Goochland County*, 270 Va. 312, 316, 689 S.E.2d 666, 668(2010) (wherein the Court stated, "The same immunity principles apply to counties, which are political subdivisions of the Commonwealth."); and see *Colby v. Boyden*, 241 Va. 125, 128-30, 400 S.E.2d 184, 186-87 (1991).