

AGENDA

STATE BUILDING CODE TECHNICAL REVIEW BOARD

Friday, January 25, 2013 - 10:00 a.m.

Virginia Housing Center - Henrico Room II, 4224 Cox Road  
Glen Allen, Virginia

TABS

1. Roll Call
2. Approval of November 16, 2012 Minutes
3. Appeal Hearing  
    In Re: Appeal of Richard Clayton  
          Appeal No. 12-5
4. Interpretation Request  
    County of York
5. Secretary's Report

STATE BUILDING CODE TECHNICAL REVIEW BOARD

Updated October 2012

J. Robert Allen, CBO  
Building Inspections Dept.  
Henrico Co. Gov't Center, 2nd  
Fl.  
Post Office Box 90775  
4301 East Parham Road  
Henrico, Virginia 23273-07753  
H (804) 330-9637  
Fax (804) 501-4984  
E: [all56@co.henrico.va.us](mailto:all56@co.henrico.va.us)  
(VBCOA)

Matthew Arnold  
1640 Trap Road  
Vienna, VA 22182  
W (703) 801-4337  
E: [mda1618@gmail.com](mailto:mda1618@gmail.com)  
(Virginia Society of AIA)

W. Keith Brower, Jr.  
39320 Rickard Road  
Lovettsville, Virginia 20180  
W: 703-777-0333  
[keith.brower@loudoun.gov](mailto:keith.brower@loudoun.gov)  
(Commonwealth at large)

J. Daniel Crigler  
935 Good Hope Church Road  
Aroda, Virginia 22709  
W (540) 948-6230  
Fax (540) 948-5617  
Cell phone: (540) 718-5602  
(Va. Assoc. of PHCC)  
E: [jdc@ldassociatesinc.com](mailto:jdc@ldassociatesinc.com)

James R. Dawson  
111 Spinnaker Run Court  
Smithfield, Virginia 23430  
W (804) 717-6838  
E: [DawsonJ@chesterfield.gov](mailto:DawsonJ@chesterfield.gov)  
(Va. Fire Chiefs Assoc.)

John H. Epperson, PE  
Wiley and Wilson, Inc.  
7428 Johnsonville Way  
Mechanicsville, Virginia 23111  
W (804) 254-6679  
Cell (757) 615-4066  
E: [jepperson@wileywilson.com](mailto:jepperson@wileywilson.com)  
(Va. Soc. of Professional  
Engineers)

Joseph A. Kessler, III  
1033 Locust Avenue  
Charlottesville, Virginia 22901  
W (434) 220-0862  
Cell: (434) 962-0044  
E: [jay@kesslermail.com](mailto:jay@kesslermail.com)  
(Assoc. General Contractors)

John A. Knepper, Jr.  
Trumbo Electric  
Post Office Box 1  
Broadway, Virginia 22815  
W (540) 896-7095 Ext. 115  
E: [jak@trumboelectric.com](mailto:jak@trumboelectric.com)  
(Electrical Contractor)

James N. Lowe  
1351 Orphanage Road  
Danville, Virginia 24540  
W (434) 836-6777  
H (434) 724-4465  
Fax (434) 836-9749  
Cell phone: (434) 251-9940  
(Va. Assoc. of PHCC)

Steven Jack, Asst. Atty. Gen.  
Office of the Attorney General  
900 East Main Street  
Richmond, VA 23219  
[sjack@oag.state.va.us](mailto:sjack@oag.state.va.us)  
(804) 786-2071

Eric Mays  
12905 Chaparral Drive  
Woodbridge, Virginia 22192  
W (703) 792-6873  
E: [emays@pwcgov.org](mailto:emays@pwcgov.org)  
(VBCOA)

Joanne D. Monday  
Wilton Capitol Mgmt. Svcs.  
P. O. Box 29628  
Richmond, Virginia 23242  
2520-A Gaskins Road  
Richmond, Virginia 23238  
H (804) 750-2272  
W (804) 290-0808  
Fax (804) 290-0838  
Cell phone: (804) 212-4434  
E: [jmonday@wiltoncms.com](mailto:jmonday@wiltoncms.com)  
(Va. Bldg. Owners and Mgrs.)

Patricia S. O'Bannon  
County Administrator's Office  
Henrico Co. Gov't Center, 3rd Fl.  
Post Office Box 27032  
4301 East Parham Road  
Richmond, Virginia 23273  
W (804) 501-4208  
Fax (804) 501-5361  
E: [pob@patobannon.com](mailto:pob@patobannon.com)  
(Commonwealth at large)

R. Schaefer Oglesby  
Oglesby Management Group,  
Inc.  
2309 Heron Hill Place  
Lynchburg, Virginia 24503  
W (434) 385-5938  
H (434) 384-6616  
Cell: (434) 258-6616  
Fax (434) 384-3025  
E: [ssoglesby@comcast.net](mailto:ssoglesby@comcast.net)  
(National Apartment Assoc.)

# DRAFT MINUTES

## STATE BUILDING CODE TECHNICAL REVIEW BOARD

MEETING  
November 16, 2012

GLEN ALLEN, VIRGINIA

### Members Present

Mr. J. Robert Allen, Chairman  
Mr. R. Schaefer Oglesby, Vice-Chairman  
Mr. J. Daniel Crigler  
Mr. James R. Dawson  
Mr. Joseph A. Kessler, III  
Mr. John A. Knepper, Jr.  
Mr. James N. Lowe  
Mr. Eric Mays  
Ms. Joanne D. Monday  
Ms. Patricia S. O'Bannon

### Members Absent

Mr. Matthew Arnold  
Mr. W. Keith Brower, Jr.  
Mr. John H. Epperson

- Call to Order                      The meeting of the State Building Code Technical Review Board (Review Board) was called to order by the Chairman at approximately 10:00 a.m.
- Roll Call                              The attendance was established by Mr. Vernon W. Hodge, Secretary, and constituted a quorum. Mr. Steven Jack, Assistant Attorney General in the Office of the Attorney General, was present and serving as the Board's legal counsel.
- Approval of Minutes              Mr. Oglesby moved to approve the minutes of the July 20, 2012 meeting as presented in the Review Board members' agenda package. The motion was seconded by Mr. Lowe and passed unanimously with Mr. Knepper and Ms. Monday abstaining from the vote.
- Final Orders                        Appeal of Lee Roy Trent (Firewater Transport, LLC); Appeal No. 12-2:
- After consideration, Mr. Oglesby moved to approve the final order as presented in the Review Board members' agenda package. The motion was seconded by Mr. Lowe and passed with Messrs. Dawson and Mays and Ms. O'Bannon voting in opposition and Mr. Knepper and Ms. Monday abstaining from the vote. Ms. O'Bannon stated for the record her belief that local zoning restrictions are pertinent in these situations.

Interpretations

An interpretation request from the County of Henrico concerning the use of open-flame cooking devices on the decks of townhomes was considered. Representatives of the County fire and building departments were present for the discussion. After consideration, Mr. Mays offered a motion with language clarifying the code provision in question. The motion was seconded by Mr. Kessler. There was further discussion concerning whether the interpretation response should address Group R-3 and well as Group R-5 townhouses. Mr. Kessler withdrew the second on the motion and Mr. Mays offered a substitute motion to issue the following interpretation of Section 308.1.4 of the Statewide Fire Prevention Code:

Question: Does Section 308.1.4, Exception 1 include townhouses?

Answer: Yes.

The substitute motion was seconded by Mr. Kessler and passed with Messrs. Dawson and Lowe and Ms. O'Bannon voting in opposition.

The Chairman then acknowledged a request from the State Fire Marshal's Office to provide public comment. As part of the comment, legal counsel for the State Fire Marshal's Office requested that the minutes from the July 20, 2012 meeting reflect an exhibit submitted during the hearing of Appeal No. 12-2 and that it be noted that the State Fire Marshal's Office objected to the staff document. There was discussion that the exhibit in question was already part of the record in a different format and that a footnote to the final order would be added reflecting the objection to the staff document; although written objections submitted by the State Fire Marshal's Office were already part of the record in the appeal.

A second interpretation request concerning the sizing of a wet vented fixture branch drain line submitted by the City of Chesapeake was then considered. After consideration, staff was directed to provide a response to the requestor since there was no interpretative issue necessary to resolve.

Secretary's Report

Suggested revisions to a code change proposal from the Review Board to the Board of Housing and Community Development based on comments received when the proposal was considered by a code development workgroup organized by the Department was discussed. The revision was to move the proposal from Chapter 9 of the International Building Code to Chapter 10 since it addressed single exit buildings. After consideration, Mr. Oglesby moved to approve the revisions to the proposal. The motion was seconded by Mr. Lowe and passed with Mr. Dawson abstaining from the vote.

A calendar of 2013 meeting dates was considered. Mr. Oglesby moved to approve the following meeting dates, if there was business to be conducted:

January 25	July 19
February 15	August 16
March 15	September 20
April 19	October 18
May 17	November 15
June 21	December 20

The motion was seconded by Mr. Crigler and passed unanimously.

Mr. Jack then provided training to the Board members concerning the Virginia Conflict of Interests Act.

Adjournment

There being no further business, the meeting was adjourned by motion of Mr. Dawson at approximately 1:15 p.m.

Approved: January 25, 2012

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Chairman, State Building Code Technical Review Board

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Secretary, State Building Code Technical Review Board

VIRGINIA:

BEFORE THE  
STATE BUILDING CODE TECHNICAL REVIEW BOARD

IN RE: Appeal of Richard Clayton  
Appeal No. 12-5

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VIRGINIA:

BEFORE THE  
STATE BUILDING CODE TECHNICAL REVIEW BOARD (REVIEW BOARD)

IN RE: Appeal of Richard Clayton  
Appeal No. 12-5

REVIEW BOARD STAFF DOCUMENT

Suggested Statement of Case History and Pertinent Facts

1. Richard Clayton (Clayton), the owner of a condominium in the Fort Ellsworth Condominium complex, in the City of Alexandria, appeals a determination of the City's Fire Department concerning the application of the Virginia Statewide Fire Prevention Code (SFPC).

2. In early March of 2012, Clayton sent correspondence to the City of Alexandria Fire Department concerning the provisions of a new section (§ 703.1) of the International Fire Code (IFC), the nationally recognized model code incorporated by reference in the SFPC, asking for a determination of whether the condominium association or its board was required to conduct an annual inspection of an interior wall in his unit which was common to other units in his building.

3. After receiving a response from the City that the appropriate person to receive his inquiry was Assistant Fire Chief Rudolph Thomas (the fire official), Clayton sent an email dated March 20, 2012 to the fire official asking for a formal determination. The fire official responded to Clayton by email dated March 27, 2012 indicating that the issues had previously been addressed by the City and through appeals to the City SFPC appeals board and to the Review Board and that no new issues had been raised.

4. Clayton filed an appeal of the March 27, 2012 correspondence to the City SFPC appeals board and through a letter dated April 20, 2012, the fire official informed Clayton that after reviewing his appeal application, he was revising his decision to require the condominium association to perform visual inspections of accessible fire-resistance-rated construction. The fire official also stated that Clayton's appeal fee was being refunded as his appeal was no longer necessary.

5. Clayton then sent a series of correspondence to the fire official stating that the fire official was required to issue a notice of violation under the SFPC to the condominium association for the lack of conducting inspections and to provide them with a deadline for achieving compliance with the SFPC. There was then additional correspondence between Clayton and the fire official with the fire official indicating that inspections were ongoing and Clayton stating that he would be filing another appeal since the condominium association had not been given a deadline for compliance.

6. Clayton filed a second appeal on May 23, 2012 and an appeal hearing before the City SFPC appeals board was scheduled for June 18, 2012.

7. On June 12, 2012, the fire official provided a "Memorandum in Support of the Fire Official" to the members of the City SFPC appeals board with a copy to Clayton and the condominium association's attorney. The memorandum provided three arguments in support of the fire official's position that no notice of violation or deadline for inspections needed to be issued under the SFPC. The first argument was that Section 703.1 of the IFC was administrative in nature and superseded by Chapter 1 of the SFPC and Chapter 1 of the SFPC does not have a requirement for owners to do inspections. The second argument was that dwelling units are exempt from routine inspections under the SFPC and the third argument was that the

construction of the buildings does not provide for access to any fire-resistant-rated elements or assemblies.

8. Clayton submitted a “Opening Statement for the June 18th Local Appeals Hearing for Clayton” in response to the memorandum submitted by the fire official in which Clayton asked for a continuance due to what he termed “new statements and decisions” in the fire official’s memorandum.

9. Clayton submitted additional information and arguments to the City SFPC appeals board and a hearing was held on August 7, 2012. After the hearing, the City SFPC appeals board ruled to uphold the fire official’s decision that § 703.1 was not applicable to the Fort Ellsworth condominium buildings.

10. Clayton then further appealed to the Review Board.

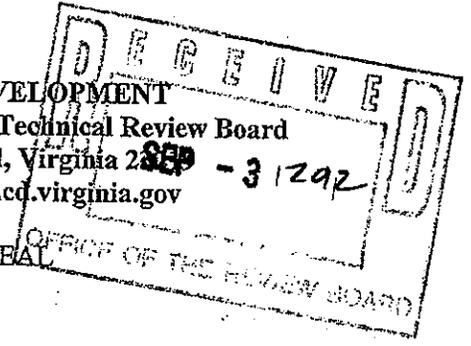
11. Review Board corresponded with the parties permitting an opportunity to submit additional documents and then drafted this staff document based upon a review of the documents. The staff document will be submitted to the parties along with all documents submitted and opportunity given to the parties for the submittal of additions, corrections or objections to the staff document and for the submittal of additional documents and arguments. The hearing before the Review Board will then be scheduled with the parties and the Review Board members receiving the full record prior to the hearing.

Suggested Issue for Resolution by the Review Board

1. Whether to overturn the decision of the fire official and City SFPC appeals board and find that the Fort Ellsworth Unit Owner’s Association is in violation of § 703.1 of the IFC as part of the SFPC and that the fire official is required to issue a SFPC notice of violation to the condominium association which includes a deadline for compliance.

# Documents Submitted by Clayton

COMMONWEALTH OF VIRGINIA  
DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT  
Technical Assistance Services Office (TASO) and Office of the State Technical Review Board  
Main Street Centre, 600 E. Main Street, Suite 300, Richmond, Virginia 23299  
Tel: (804) 371-7150, Fax: (804) 371-7092, Email: TASO@dhcd.virginia.gov



APPLICATION FOR ADMINISTRATIVE APPEAL

Regulation Serving as Basis of Appeal (check one):

- Uniform Statewide Building Code
- Statewide Fire Prevention Code
- Industrialized Building Safety Regulations
- Amusement Device Regulations

Appealing Party Information (name, address, telephone number and email address):

RICHARD CLAYTON, 120 ROBERTS LANE, #300, ALEXANDRIA, VA 22314, phone 703-836-5773, fax 815-572-9573, RNCLAYTON@YAHOO.COM

Opposing Party Information (name, address, telephone number and email address of all other parties):

Mary Elliott O'Donnell, Assistant City Attorney, City of Alexandria, 301 King Street, Ste. 1300, Alexandria, VA 22314 (703) 746-3750 FAX: (703) 838-4810  
Mary.ODonnell@alexandriava.gov

Michael Thorsen, attorney for Fort Ellsworth Unit Owners Association Board, BANCROFT, McGAVIN, HORVATH, & JUDKINS, P.C.,  
3920 University Drive, Fairfax, Virginia 22030, Telephone: (703) 385-1000, Facsimile: (703) 385-1555, MThorsen@bmhlaw.com

Additional Information (to be submitted with this application)

- Copy of enforcement decision being appealed
- Copy of record and decision of local government appeals board (if applicable and available)
- Statement of specific relief sought

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of September, 2012, a completed copy of this application, including the additional information required above, was either mailed, hand delivered, emailed or sent by facsimile to the Office of the State Technical Review Board and to all opposing parties listed.

**Note:** This application must be received by the Office of the State Technical Review Board within five (5) working days of the date on the above certificate of service for that date to be considered as the filing date of the appeal. If not received within five (5) working days, the date this application is actually received by the Office of the Review Board will be considered to be the filing date.

Signature of Applicant: \_\_\_\_\_

Name of Applicant: Richard Clayton

(please print or type)

# APPLICATION FOR APPEAL

Office of Building and Fire Code Administration  
301 King Street, Suite 4200  
Alexandria, Virginia 22314  
703.746.4200 (tel) 703.838.3880 (fax)

Building Code Board of Appeals

**TYPE OR PRINT ALL INFORMATION**

1. Date of appeal submission: 05/23/2012
  - 1a. Date of Code Application: 05/10/2012
2. Type of Appeal Hearing Requested: (applicant must indicate only those that apply)

<input type="checkbox"/> Building Code	<input type="checkbox"/> Elevator Code
<input type="checkbox"/> Electrical Code	<input checked="" type="checkbox"/> Fire Code (requested)
<input type="checkbox"/> Mechanical Code	<input type="checkbox"/> Property Maintenance Code
<input type="checkbox"/> Plumbing Code	<input type="checkbox"/> Amusement Device Regulations
<input type="checkbox"/> IRC-Residential Code	<input type="checkbox"/> Other (specify)
<input type="checkbox"/> Virginia Rehab Code	
3. Applicant's name: Richard N. Clayton
4. Applicant's address: 120 Roberts Lane, #300, Alexandria, VA 22314
5. Applicant's daytime phone/fax information: 703-836-5773  
Email address: RNClayton@yahoo.com
6. Representing: Self
7. Owner of Project/Property: Fort Ellsworth Unit Owner's Association (FEUOA)
8. Address of Project/Property: 100-136 Roberts Lane, Alexandria, VA 22314
9. Permit/Complaint Number (if applicable): \_\_\_\_\_
10. Applicable Code(s): Fire Code 11. Edition (s): \_\_\_\_\_
12. Applicable Code Section(s): 106.1, 106.6, 111.1, 703.1
13. Applicant's understanding of the applicable code requirements (please attach additional sheets as needed):

SFPC 106.1 requires the fire official to enforce the provisions of the SFPC.

SFPC 106.6 requires the fire official to issue all necessary notices or orders to ensure compliance with the SFPC. SFPC 111.1 requires fire marshal to issue notice upon discovery of an alleged violation of a provision of the SFPC, namely SFPC 703.1 in this instance, specifying time limitations for required abatement of the lack of annual visual inspections due March 1, 2012 as per SFPC 703.1.
14. Grounds for Appeal: Check all that apply (USBC Section 119.5 for new construction and the rehabilitation of existing structures; Section 106.5 for property maintenance; Section 112.5 for the fire prevention code; Section 13VACS-31-60 for amusement device regulations): SFPC 112.5 applies

I claim that:

- a)  the Building Official/Code Official/Fire Official has refused to grant a modification which complies with the intent of the provisions of the code;
  - XXb)  the true intent of the code has been incorrectly interpreted; failure to enforce code requirements of SFPC 106.1, 106.6, 111.1, 703.1
  - c)  the provisions of the code do not fully apply;
  - d)  the use of a form of construction/compliance that is equal to or better than that specified in the code has been denied.
15. Please attach 8 1/2 x 11" sheets of paper with reason(s) for each of the items checked in section 14. Please print or type reasons. Manufacturer information, cut sheets, data sheets from approved testing agencies may also be attached.

**THE SPACES IN THE BOX ARE TO BE COMPLETED BY THE BOARD SECRETARY**

<b>BOARD ACTION</b>	
Date of Board Appeals Hearing: _____	
Number of Board Members Present: _____	
The decision of the board was to <input type="checkbox"/> UPHOLD <input type="checkbox"/> DENY the decision of the Building/Code/Fire Official.	
Number in Agreement: _____	Number Opposed: _____
Appeal is: <input type="checkbox"/> DENIED <input type="checkbox"/> GRANTED	
Conditions/Comments:	
_____	
_____	
_____	
_____	
_____	
_____	



DEPARTMENT OF CODE ADMINISTRATION

301 King Street, Room 4200  
Alexandria, Virginia 22314

John D. Catlett  
Director

Phone: 703.746.4200  
FAX: 703.549.4589  
www.alexandriava.gov

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**CITY OF ALEXANDRIA**  
**LOCAL BOARD OF FIRE CODE APPEALS**  
**REPORT OF FINAL DETERMINATION**  
August 7, 2012  
Richard Clayton, 120 Roberts Lane #300

The meeting was conducted in the office of Code Administration, 301 King Street, Room 4200, Alexandria, Virginia at 10:00a.m

**BOARD MEMBERS PRESENT**

Richard Clausen, Chair  
Joseph Berchenko  
Robert Emard  
Magnus Monson

**STAFF PRESENT**

Assistant Chief Rudolph Thomas, Chief Fire Marshal  
Jim Sullivan, Deputy Fire Marshal  
Mary O'Donnell, Assistant City Attorney  
  
Penny Gausman, Secretary  
John Catlett, Director – Board Secretary

**APPELLANT**

Richard Clayton

**IN OBSERVATION**

Gregg Fields, Deputy Director Code Administration  
Michael Thorsen, Attorney for Ft. Ellsworth

In the case of Richard Clayton versus the City of Alexandria Fire Code Official, the Local Board of Fire Code Appeals voted unanimously to uphold the decision of the Fire Code Official that VFPC Section 703.1 would not apply to Mr. Clayton's condominium complex.

Final Determination: The Fire Code Official's determination upheld.

Richard Clausen, Chair

Aug 14, 12  
Date

Any person who was a party to the appeal may appeal to the State Review Board by submitting an application to such Board within 21 calendar days upon receipt by certified mail of this resolution. Application forms are available from the Office of the State Review Board, 501 North Second Street, Richmond, Virginia 23219 (804) 371-7150

STATEMENT OF SPECIFIC RELIEF SOUGHT FOR APPEAL OF  
RICHARD CLAYTON RE ENFORCEMENT OF VFPC 703.1

Appellant, Richard Clayton, a unit owner at Fort Ellsworth condominiums located at 100-136 Roberts Lane, Alexandria, VA 22314, seeks specific relief to include a proper notice of violation be issued by the City of Alexandria to the Fort Ellsworth Unit Owners Association for failure to comply with annual inspections as per VFPC § 703.1 with a time certain for compliance as required per VFPC §§§ 106.1, 106.6 and 111.1.

## **Opening Statement for the June 18<sup>th</sup> Local Appeals Hearing for Clayton**

On June 14<sup>th</sup>, appellant Clayton (Clayton) received for the first time an email copy of the June 12<sup>th</sup> memorandum from Fire Marshall Thomas, through counsel, sent to this local appeal board. In this memorandum, Fire Marshall Thomas makes new statements and decisions affecting the enforcement of the Statewide Fire Prevention Code (SFPC) which were not known or in effect on May 10<sup>th</sup>, the last email communication of a clear statement from Fire Marshall Thomas received by Clayton and serving as the basis for his appeal (exhibits A1 and A2) on May 23<sup>rd</sup>. At that time, Fire Marshall Thomas (Thomas) stated he was still working with the Fort Ellsworth Unit Owner's Association (FEUOA) and no notices of violation had been issued as yet.

Clayton has asked the City of Alexandria for a postponement of the June 18<sup>th</sup> hearing to allow time for an amended or new appeal which incorporates the June 12<sup>th</sup> memorandum information as well as providing the local appeal board more time to consider Clayton's response to the new information in the June 12<sup>th</sup> memorandum. If rescheduling is denied, Clayton hereby formally enters a protest on consideration by the local appeal board of the new information provided per the June 12<sup>th</sup> memorandum and the prejudicial bias it creates against Clayton. Assuming the June 18<sup>th</sup> hearing will go on as scheduled with the June 12<sup>th</sup> information already under consideration by the local appeal board, to the detriment of Clayton, Clayton will attempt to provide a rebuttal to same in the abbreviated time allowed but under protest and with all rights reserved.

Thomas is now arguing SFPC 703.1 does not apply to FEUOA for various reasons which he did not make clearly known to Clayton prior to May 23<sup>rd</sup> when Clayton filed his appeal based on information known to him on May 10<sup>th</sup>. Clayton specifically asked Thomas in his opening paragraph to clarify his May 11<sup>th</sup> email as to whether Thomas believed SFPC 703.1 still applied to FEUOA (exhibit A3) but Thomas remained silent until the June 12<sup>th</sup> memorandum. Thus, Clayton was not able to incorporate this information into his appeal on May 23<sup>rd</sup>.

In his May 11<sup>th</sup> email (exhibit A3), Thomas placed qualifiers on the application of SFPC 703.1 but he did not definitively state that SFPC 703.1 did not apply to all buildings under the control of the FEUOA such that annual inspections of all buildings were not required by the FEUOA. He merely stated those buildings inspected did not have any openings which required further inspection as per SFPC 703.1. Even so, the FEUOA would still have to make annual inspections to all buildings to determine whether new fire related openings were created due to new construction or new damage which might affect conditions not found the year before. So the need for annual inspections of all buildings by the FEUOA is still present regardless of current findings limited to a few inspections.

In Clayton's May 11<sup>th</sup> response to Thomas (exhibit A3), Clayton elaborated on why SFPC 109.1 was a separate matter and not relevant to the application of SFPC 703.1. Clayton also clearly stated openings exist in his unit which qualifies for annual inspection per SFPC 703.1. Thomas did not respond and Clayton was left to conclude Thomas

believed SFPC 703.1 did apply per earlier emails and the April 20, 2012 letter (exhibit A4) from Thomas stating such.

As stated above, Clayton assumed there was no disagreement on the validity of SFPC 703.1 as of May 23<sup>rd</sup> and its application to FEUOA requiring compliance with annual inspections as per the April 20, 2012 communication (exhibit A4) but rather the only disagreement was the need for a proper notice of violations with a stated specified time limit for compliance. A time for compliance was the only element missing from the April 20, 2012 letter to the FEUOA as per SFPC 111.1 requirements on notice of violations.

Thomas stated in his May 10<sup>th</sup> email (exhibit A2) to Clayton that no notice of violations had been issued to FEUOA as yet despite evidence to the contrary as per the April 20, 2012 letter to the FEUOA. Clayton demanded the April 20, 2012 letter be perfected with a stated time for compliance or a new notice be issued as required per SFPC 106.1, 106.6 and 111.1, collectively. Thomas did not respond affirmatively to Clayton's May 10<sup>th</sup> request and Clayton then filed on May 23<sup>rd</sup> an appeal on the basis a proper notice of violation should be issued by Thomas to the FEUOA per SFPC 111.1 for alleged violations of SFPC 703.1 annual inspection requirements.

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### **Argument and Rebuttal to June 12 Memorandum by Fire Marshall Thomas**

#### **1. The requirement for annual inspections in SFPC Section 703.1 has not been deleted in Virginia per SFPC Section 103.2.**

SFPC § 103.2 does not delete all standards that require inspections unless they are specifically stated in Chapter 1 of the SFPC as stated by Fire Marshall Thomas but only applies to referenced codes and standards outside the IFC itself (but referenced by the IFC). Specifically, SFPC § 103.2 only affects all requirements of "referenced codes and standards" relating to procedural and administrative matters as found in Chapter 47 of the IFC as per the definition of "referenced codes and standards" found in SFPC Section 102.4. Chapter 47 contains a long list of reference source materials independent of the IFC but referenced by the IFC such as standards on measuring certain values, etc.

**102.4 Referenced codes and standards.** The codes and standards referenced in the IFC shall be those listed in Chapter 47 and considered part of the requirements of the SFPC to the prescribed extent of each such reference. Where differences occur between the provisions of this code and the referenced standards, the provisions of this code shall apply.

**103.2 Amendments.** All requirements of the referenced codes and standards that relate to fees, permits, unsafe notices, disputes, condemnation, inspections, scope of enforcement and all other procedural and administrative matters are deleted and replaced by the provisions of Chapter 1 of the SFPC.

If one were to apply Fire Marshall Thomas interpretation then all of the chapters of the SFPC which begin with Scope would also have to be specifically incorporated into Chapter 1 of the SFPC in order to be valid as the scope of enforcement definitions for many of the chapters in the SFPC are found at the beginning of each chapter and not in chapter 1 of the SFPC. Examples are given below:

**SFPC Section 301.1 Scope.** The provisions of this chapter shall govern the occupancy and maintenance of all structures and premises for precautions against fire and the spread of fire and general requirements of fire safety.

**SFPC Section 401.1 Scope.** Reporting of emergencies, coordination with emergency response forces, emergency plans and procedures for managing or responding to emergencies shall comply with the provisions of this section.

**SFPC Section 701.1 Scope.** The provisions of this chapter shall specify the requirements for and the maintenance of fire-resistance-rated construction. New buildings shall comply with the *International Building Code*.

Clearly, SFPC 103.2 does not negate all of Chapter 7 of the SFPC or SFPC Section 703.1 as a subset of Chapter 7 of the SFPC. To apply Fire Marshall Thomas definition of SFPC Section 103.2 would eliminate most of the SFPC leaving little for Chapter 1 to enforce. Furthermore, SFPC Section 703.1, for reasons other than annual inspection requirements, has been argued before the courts in the earlier appeals referenced by the June 12 Memorandum. The State Building Code Technical Review Board (TRB) has never incorporated Fire Marshal Thomas interpretation of SFPC Section 103.2 to defeat the requirements of SFPC Section 703.1. This is conceivable if truly a valid argument since the definition of scope found in Chapter 7 is not also found in Chapter 1 of the SFPC. However, this argument was not used by the TRB in the earlier referenced appeals and one may conclude it is not a valid argument.

**2. SFPC Section 109.1 has no bearing on the requirements for annual inspection by the FEUOA per SFPC Section 703.1 or the order to make inspections per Fire Marshall Thomas April 20, 2012 letter of notice and instruction to FEUOA.**

Fire Marshall Thomas raises an argument over a fire code that is not in dispute. Nor does this particular code have anything to do with the FEUOA's responsibility under SFPC 703.1 to make annual inspections. Clayton has not raised this code as an issue under appeal.

The FEUOA is required to make annual inspections per SFPC 703.1. The April 20, 2012 letter of instruction from Fire Marshall Thomas instructed the FEUOA to get in compliance with SFPC 703.1 and make the required annual inspections. Furthermore, he ordered the inspection reports to be provided to him. FEUOA has not completed inspections of all building and therefore cannot submit the required inspection reports as ordered by Fire Marshall Thomas. There is no requirement for the Fire Marshall's office to make routine inspections of the buildings at Fort Ellsworth to the best of my knowledge. Nor is this a precondition for the FEUOA to meet its obligations under SFPC 703.1.

**3. SFPC Section 703.1 does apply to Fort Ellsworth condominiums and the FEUOA as the physical structure of some of the buildings allows for access to interior fire-resistance rated construction elements or assemblies in some of the**

**buildings as evidenced by historical photos in the possession of the City of Alexandria per earlier appeals. And only after making annual inspections for all buildings can the FEUOA determine whether openings related to SFPC 703.1 currently exist for further inspection in compliance with SFPC 703.1 requirements.**

The claim made by Fire Marshall Thomas that none of the limited inspections made recently with the FEUOA, under his supervision, had any noticeable openings as defined in SFPC 703.1 does not mean none of the buildings have interior openings as defined in SFPC 703.1 which require visual inspection. It is known by Fire Marshall Thomas that Clayton's unit has provided photo evidence taken by fire officials of the City of Alexandria in the fall of 2007 which show extensive evidence of areas open for inspection which relate to fire related issues as mentioned in SFPC 703.1 such as ducts and pipes running between floors, etc. Furthermore, Clayton has provided extensive photos of areas which meet the requirements found in SFPC 703.1 as to fire-rated construction related to requirements of annual visual inspection as defined in SFPC 703.1. These same photos were provided to Fire Marshall's counsel, Mary O'Donnell, at the TRB appeal hearing held June 18, 2010 as per the TRB record (exhibits A5) and thus are available to Fire Marshall Thomas, also.

Fire Marshall Thomas has not provided any information on the specific units that he referenced as having been inspected recently so there is no way for Clayton or this board to confirm his statements as to the conditions found. Nor would it matter since the requirements under SFPC 703.1 require the FEUOA to make annual visual inspections of all buildings to then determine as to whether further inspection within interior walls is warranted based on openness definitions found in SFPC 703.1. It is not possible for Fire Marshall Thomas to make a general conclusion about all buildings at FE based on limited selection of units. And if in fact only units were chosen which did not have openings requiring further inspections as per SFPC 703.1 then one might conclude the Fire Marshall's office conspired with the FEUOA to purposely select units that would fit a desired outcome in an effort to defeat Clayton's rights under SFPC 703.1.

Clayton is concerned not only about his unit being properly inspected by FEUOA but all units at FE. Without proper inspection by the FEUOA of all buildings, Clayton and the FE community are at risk for the possible spread of fire and a general liability to owners and renters at FE due to failure to make required annual inspections.

**4. SFPC Sections 106.1, 106.6 and 111.1 collectively require Fire Marshall Thomas to issue a notice of violation to the FEUOA for failure to make annual required inspections as per SFPC 703.1 on or before March 1, 2012 as per information filed May 23, 2012 in local appeal application.**

The April 20, 2012 letter from Fire Marshall Thomas put the FEUOA on notice they needed to comply with the annual inspection requirements of SFPC 703.1 and turn the inspection reports in to the Fire Marshall. It is presumed the authority for Fire Marshall Thomas to write this letter stems from SFPC Sections 106.1, 106.6 and 111.1 based on allegations by Clayton that the FEUOA did not comply with SFPC 703.1 by the March 1, 2012 deadline for annual inspections. Nothing provided by Fire Marshall Thomas has shown this allegation of noncompliance on annual inspections for all

buildings has been satisfied to date. He is therefore compelled by law to issue a notice of violation to the FEUOA or perfect the April 20, 2012 notice already provided to the FEUOA by including a specified time for compliance. FEUOA, in turn, can appeal the notice if they believe that is appropriate. If the FEUOA determines that all areas are concealed (despite evidence to the contrary), they can make that statement publically and provide unit owner Clayton with a copy. But they have not made inspections of Clayton's unit or building at this time to the best of his knowledge as required by SFPC 703.1 nor have any statements or evidence from Fire Marshall Thomas satisfied these same overall requirements of the FEUOA with respect to SFPC 703.1.

**106.1 General.** The fire official shall enforce the provisions of the SFPC as provided herein and as interpreted by the State Building Code Technical Review Board (TRB) in accordance with Section 36-118 of the Code of Virginia.

**106.6 Notices and orders.** The fire official shall issue all necessary notices or orders to ensure compliance with the SFPC.

**111.1 Notice.** When the fire official discovers an alleged violation of a provision of the SFPC or other codes or ordinances under the fire official's jurisdiction, the fire official shall prepare a written notice citing the section allegedly violated, describing the condition deemed unsafe and specifying time limitations for the required abatements to be made to render the structure or premises safe and secure.

**703.1 Maintenance.** The required fire-resistance rating of fire-resistance-rated construction (including walls, firestops, shaft enclosures, partitions, smoke barriers, floors, fire-resistive coatings and sprayed fire-resistant materials applied to structural members and fire resistant joint systems) shall be maintained. Such elements shall be visually inspected by the owner annually and properly repaired, restored or replaced when damaged, altered, breached or penetrated. Where concealed, such elements shall not be required to be visually inspected by the owner unless the concealed is accessible by the removal or movement of a panel, access door, ceiling tile or similar movable entry to the space. Openings made therein for the passage of pipes, electrical conduit, wires, ducts, air transfer openings and holes made for any reason shall be protected with approved methods capable of resisting the passage of smoke and fire. Openings through fire-resistance-rated assemblies shall be protected by self- or automatic-closing doors of approved construction meeting the fire protection requirements for the assembly.

Wherefore, for the reasons stated above, Appellant Clayton asks this local appeal board to order Fire Marshall Thomas to issue a notice of violation of SFPC 703.1 to the FEUOA forthwith with a time certain for compliance as required per SFPC 111.1.



DEPARTMENT OF CODE ADMINISTRATION

301 King Street, Room 4200  
Alexandria, Virginia 22314

John D. Catlett  
Director

Phone: 703.746.4200  
FAX: 703.549.4589  
www.alexandriava.gov

Mr. Richard N. Clayton  
120 Roberts Lane, #300  
Alexandria, VA 22314

RE: Board of Fire Prevention Code Appeals Hearing

Dear Mr. Clayton:

This letter will provide formal written notice of the hearing of Alexandria's Board of Fire Prevention Code Appeals related to your appeal of a May 10, 2012, decision of the City of Alexandria Fire Official. The appeal hearing will be held on June 18, 2012, starting at 2:00 p.m., in Room 4200 of City Hall, 301 King Street, Alexandria, VA 22314.

You agreed to this date after a phone call from my staff on May 31, 2012.

Sincerely,

John Catlett  
Secretary  
City of Alexandria Board of Fire Prevention Code Appeals

Cc: Members of the City of Alexandria Board of Fire Prevention Code Appeals

Fort Ellsworth Condominium Association  
Ms. Althea Burns  
President  
120 Roberts Lane, #401  
Alexandria, VA 22314

Michael E. Thorsen, Esq.  
Counsel for Fort Ellsworth Condominium Association  
Bancroft, McGavin, Horvath & Judkins, P.C.  
3920 University Drive  
Fairfax, VA 22030

Exhibit A1

**Subject:** Fw: time is of the essence for annual fire inspections at Fort Ellsworth condominiums  
**From:** Richard Clayton (mclayton@yahoo.com)  
**To:** Rudolph.Thomas@alexandriava.gov;  
**Cc:** Mary.ODonnell@alexandriava.gov; william.coates@alexandriava.gov; mark.jinks@alexandriava.gov; sjack@oag.state.va.us; vernon.hodge@dhcd.virginia.gov;  
**Date:** Thursday, May 10, 2012 11:27 AM

Mr. Thomas,

I am not clear on what to do about your lack of enforcement. I have forwarded my concerns to the State Attorney General's office and the State Technical Review Board as per the email attached below. As an added measure, I am in the process of preparing a local appeal on your lack of action on enforcing SFPC 703.1 annual inspections through the proper issuance of a notice of violation. I thought you had agreed to enforce SFPC 703.1 need for annual inspections when you refunded my earlier appeal check per your April 20, 2012 letter reversing your earlier determination letter whereby you refused to act on or enforce SFPC 703.1. Apparently you have decided not to honor your letter.

Please advise ASAP as to whether you will in fact send the FEUOA a proper notice of violation of SFPC 703.1 with a time certain for compliance. I demand copies on any enforcement effort. Otherwise, I will conclude you have rescinded your April 20, 2012 letter and it was sent in bad faith. I will also use today's date as the date for the 14 day clock on filing a local appeal. I reserve all other rights or actions to which I may be entitled in this matter.

Richard Clayton  
120 Roberts Lane, #300  
Alexandria, VA 22314  
703-836-5773

— Forwarded Message —

**From:** Richard Clayton <rnclayton@yahoo.com>  
**To:** Jack Steven <sjack@oag.state.va.us>  
**Cc:** Vernon Hodge <8043717092@smartfax.com>  
**Sent:** Thursday, May 10, 2012 10:09 AM  
**Subject:** Fw: time is of the essence for annual fire inspections at Fort Ellsworth condominiums

Mr. Jack,

I wish to file an inquiry and demand for action with the State Attorney General's office

Exhibit A2

and the State Technical Review Board as to a the City of Alexandria's stated refusal to issue a notice of violation with time limits for compliance to the Fort Ellsworth Unit Owner's Association (FEUOA) for failing to conduct annual inspections as per SFPC 703.1, due on or before March 1, 2012.

I am not familiar with proper procedure for filing a complaint/inquiry in the above matter. Please accept or redirect my effort as appropriate. Time is of the essence. See attachment.

Thank you,

Richard Clayton  
120 Roberts Lane, #300  
Alexandria, VA 22314  
703-836-5773

----- Forwarded Message -----

**From:** Richard Clayton <rnclayton@yahoo.com>

**To:** Rudolph Thomas <Rudolph.Thomas@alexandriava.gov>

**Cc:** Mary Odonnell <Mary.ODonnell@alexandriava.gov>; William Coates <William.Coates@alexandriava.gov>; "mark.jinks@alexandriava.gov" <mark.jinks@alexandriava.gov>

**Sent:** Thursday, May 10, 2012 9:33 AM

**Subject:** Re: time is of the essence for annual fire inspections at Fort Ellsworth condominiums

Mr. Thomas,

Your stated failure to issue a notice of violations with a time limit for correction as per the requirements of the SFPC based on the FEUOA's failure to have a timely annual inspection by March 1, 2012 as per SFPC 703.1 strikes me as a dereliction of duty if not a blatant and willful disregard for the law. You seem to be in violation of SFPC sections 106.1, 106.6 and 111.1.

Per your earlier letter to the President of the FEUOA date April 20, 2012, you did seemingly in effect issue a notice of violation by ordering the FEUOA to conduct the required annual inspections as per SFPC 703.1 (but one that needs to be perfected by stating the time limit for taking corrective action).

I am demanding you perfect this notice by stating the time limit for compliance. If you insist you have not issued a notice of violation then I demand you do so immediately with a stated time limit for compliance in keeping with standard practice and the importance of compliance in a timely manner. The FEUOA is already well past the March 1, 2012 deadline for compliance and your stalling on enforcement is only allowing for further delay at the expense of public safety.

I will look to further inquiries with the State Attorney General's office as well as the State Technical Review Board as to your lack of action in these matters. Time is of the essence for proper action on your part.

Richard Clayton

---

**From:** Rudolph Thomas <Rudolph.Thomas@alexandriava.gov>  
**To:** Richard Clayton <rnclayton@yahoo.com>  
**Cc:** Mary Odonnell <Mary.ODonnell@alexandriava.gov>; William Coates <William.Coates@alexandriava.gov>  
**Sent:** Thursday, May 10, 2012 8:14 AM  
**Subject:** RE: time is of the essence for annual fire inspections at Fort Ellsworth condominiums

Mr. Clayton,

No violations have been issued at this time and we are still actively working with the Fort Ellsworth Unit Owners Association.

Thank you again for your patience.

---

V/r

*Rudolph Thomas*  
Assistant Fire Chief/Fire Marshal  
City of Alexandria  
900 Second Street  
Alexandria, VA 22314  
(O) 703.746.5227  
(C) 703.801.3758

**From:** Richard Clayton [mailto:rnclayton@yahoo.com]  
**Sent:** Tuesday, May 08, 2012 6:23 PM  
**To:** Rudolph Thomas  
**Cc:** Mary Odonnell; William Coates  
**Subject:** Fw: time is of the essence for annual fire inspections at Fort Ellsworth condominiums

Mr. Thomas,

Please see Section 111 of the SFPC and specifically 111.1. Have you issued a violation notice for failure to perform annual inspections by March 1, 2012 with a time certain for compliance to the FEUOA as required by SFPC Section 111.1? If so, please provide me with a copy. If not, please do so forthwith and provide me a copy.

Richard Clayton  
120 Roberts Lane, #300  
Alexandria, VA 22314  
703-836-5773

----- Forwarded Message -----

**From:** Richard Clayton <rnclayton@yahoo.com>  
**To:** Rudolph Thomas <Rudolph.Thomas@alexandriava.gov>  
**Cc:** Mary Odonnell <Mary.ODonnell@alexandriava.gov>; William Coates <William.Coates@alexandriava.gov>  
**Sent:** Tuesday, May 8, 2012 5:52 PM  
**Subject:** Re: time is of the essence for annual fire inspections at Fort Ellsworth condominiums

Mr. Thomas,

Please elaborate on what you are actively doing with the FEUOA. As one who lives in the complex, there has been no general announcement on inspections. Are you stating the City of Alexandria is directly making the annual inspections for FEUOA? What specifically are you doing in terms of your referenced activities with the FEUOA. Please be date specific as well.

Finally, I want to know why your department has failed to issue a violation notice formally to the FEUOA with a time certain for correction. This should be standard operation procedure. ~~Certainly your department issued me one in the past without~~ hesitation upon discovery of a code violation. I believe it may be a requirement for your office. Please explain your lack of action in this regard.

Richard Clayton  
120 Roberts Lane, #300  
Alexandria, VA 22314  
703-836-5773

---

**From:** Rudolph Thomas <Rudolph.Thomas@alexandriava.gov>  
**To:** Richard Clayton <rnclayton@yahoo.com>  
**Cc:** Mary Odonnell <Mary.ODonnell@alexandriava.gov>; William Coates <William.Coates@alexandriava.gov>  
**Sent:** Tuesday, May 8, 2012 5:27 PM  
**Subject:** RE: time is of the essence for annual fire inspections at Fort Ellsworth condominiums

Mr. Clayton,

Thank you for forwarding your most recent concerns related to this matter. I assure you that we are actively working with the Fort Ellsworth Unit Owners Association to ensure compliance and will communicate to you when inspections have been completed.

Thank you in advance for your patience.

Respectfully,

*Rudolph Thomas*  
Assistant Fire Chief/Fire Marshal

City of Alexandria  
900 Second Street  
Alexandria, VA 22314  
(O) 703.746.5227  
(C) 703.801.3758

**From:** Richard Clayton [mailto:rnclayton@yahoo.com]  
**Sent:** Monday, May 07, 2012 2:28 PM  
**To:** Rudolph Thomas  
**Cc:** Mary Odonnell  
**Subject:** time is of the essence for annual fire inspections at Fort Ellsworth condominiums

Mr. Thomas,

Your recent decision to reverse your earlier determination letter of March 27, 2012 and enforce the annual inspection requirement of SFPC 703.1 per your instructions to the President of the Fort Ellsworth Unit Owners Association (FEUOA) dated April 20, 2012 did not give a deadline as to when the inspections should be completed and the report submitted to your attention. Inasmuch as the FEUOA has already failed to meet its annual inspection obligations due by March 1, 2012, why have you not ordered a time certain for completion of this process and issued a violation notice to the FEUOA for failure to meet the annual deadline by March 1, 2012? I personally notified the FEUOA of this deadline in February of 2012. So they were certainly aware of it.

I have heard no word from the FEUOA as to planned inspections. It appears to me the association is purposely continuing to delay compliance with an implicit understanding your office is not serious about enforcing this requirement. Please issue a violation notice for failure to meet the March 1, 2012 deadline requirement or show good cause why you are not doing so. Also, there needs to be a deadline for compliance with your April 20, 2012 order so the FEUOA will understand they are in serious noncompliance with the SFPC and time is of the essence. This is standard operating procedure for most violation notices, I presume. You appear to not be treating this with the importance it deserves.

Meanwhile, lives are at risk. Just recently several fire trucks were sent here on concerns of a fire. The possible lack of proper fire safeguards (yet to be determined by the FEUOA due to lack of timely annual inspections) presents a great present danger to the FE community. Your seeming indifference to the lack of compliance with the SFPC is concerning, to say the least.

Please issue a violation notice now to the FEUOA along with the usual ten day notice to comply as is standard (based on a violation notice issued to me in the past) and copy me

on your efforts so I may know there is a real effort for compliance or show good cause otherwise. Time is of the essence.

Richard Clayton  
120 Roberts Lane, #300  
Alexandria, VA 22314  
703-836-5773

**Subject:** Re: Fort Ellsworth Condominiums  
**From:** Richard Clayton (mclayton@yahoo.com)  
**To:** Rudolph.Thomas@alexandriava.gov;  
**Cc:** Vemon.Hodge@dhcd.virginia.gov; sjack@oag.state.va.us; Mark.Jinks@alexandriava.gov;  
 Emory.Rodgers@dhcd.virginia.gov; Adam.Thiel@alexandriava.gov; Mary.ODonnell@alexandriava.gov;  
 William.Coates@alexandriava.gov;  
**Date:** Friday, May 11, 2012 11:54 AM

Mr. Thomas,

SFPC 109.1 only exempts routine inspection by the Fire Marshall. It does not affect the SFPC 703.1 requirement of the owner of the building to conduct annual visual inspections as agreed by you in your April 20, 2012 letter. Are you now stating the FEUOA has no obligation to make routine annual visual inspections of all of the units at Fort Ellsworth as per SFPC 703.1 which were due on or before March 1, 2012?

Please identify the specific units you referenced in your letter as having been inspected, who all was present at each inspection, the specific instructions or guidelines provided to the FEUOA by you or your office, either in writing or verbally, and whether any personnel from your office was present during the inspections referenced. Please provide the written reports provided by the FEUOA per your instruction letter of April 20, 2012. Is your office officially providing or pre-approving the inspection reports that you ordered the FEUOA to provide in your April 20, 2012 letter? Was a structural engineer involved in the inspections?

Speaking for my unit which has not been inspected by the FEUOA, I know there are definitely areas which qualify per SFPC 703.1 for annual visual inspections including a removable return air vent common to at least four of the five building plans here. This opening is definitely fire rated as it has elements of a party wall to the unit directly above and below as well as missing firestops between floors and ceilings and openings directly through the party wall.

Also, I have a removable panel in the wall opening behind the hallway bathroom, a removable ceiling tile (presently open), and an opening in the wall directly behind the second bathroom which allows for visual inspection of common pipes extending throughout the building and requiring firestop materials through the floor and ceiling passage openings.

I still repeat my earlier demands for either perfecting the earlier notice sent to the

Exhibit A3

FEUOA on April 20, 2012 to include time for compliance or sending a separate notice of violation with time compliance requirements re satisfying SFPC 703.1 requirements for annual inspections due on or before April 20, 2012. Time is of the essence.

Richard Clayton  
120 Roberts Lane, #300  
Alexandria, VA 22314  
703-836-5773

---

**From:** Rudolph Thomas <Rudolph.Thomas@alexandriava.gov>  
**To:** "Richard Clayton (rnclayton@yahoo.com)" <rnclayton@yahoo.com>  
**Cc:** "Hodge, Vernon (DHCD)" <Vernon.Hodge@dhcd.virginia.gov>; "Jack, Steven P." <sjack@oag.state.va.us>; Mark Jinks <Mark.Jinks@alexandriava.gov>; "Rodgers, Emory (DHCD)" <Emory.Rodgers@dhcd.virginia.gov>; Adam Thiel <Adam.Thiel@alexandriava.gov>; Mary ODonnell <Mary.ODonnell@alexandriava.gov>; William Coates <William.Coates@alexandriava.gov>  
**Sent:** Friday, May 11, 2012 11:09 AM  
**Subject:** Fort Ellsworth Condominiums

Mr. Clayton,

---

Thank you for communicating your concerns in regards to the enforcement of the Virginia Statewide Fire Prevention Code at the Fort Ellsworth Condominiums. Your concerns have been taken into consideration and the following information is for your reference.

On May 1, 2012, a visual inspection of several units was conducted. As a result of this inspection, there were no interior fire-resistance rated construction elements or interior fire-resistance rated assemblies identified to be maintained. In addition, there were no removable access panels, access doors, or ceiling tiles within units inspected to provide access to any interior fire-resistance rated construction elements or interior fire-resistance rated assemblies. The Fort Ellsworth Unit Owners Association (FEUOA) has conducted a visual inspection per my direction, however, the 2009 Virginia Statewide Fire Prevention Code (VSFPC) Section 703.1 would only apply if the fire-resistance rated construction elements or fire-resistance rated assemblies existed and were accessible by the above stated means.

Also, please note that per the 2009 (VSFPC) Section 109.1 Inspection (exemption):

"Single family dwellings and dwelling units in two family and multiple family dwellings and farm structures shall be exempt from routine inspections".

If I may be of further assistance, please do not hesitate to contact me.

Respectfully,

**Rudolph Thomas**  
Assistant Fire Chief/Fire Marshal  
City of Alexandria  
900 Second Street  
Alexandria, VA 22314  
(O) 703.746.5227  
(C) 703.801.3758



FIRE DEPARTMENT  
900 Second Street  
Alexandria, Virginia 22314

Phone (703) 746-5200  
Fax (703) 838-5093

Adam K. Thiel  
Fire Chief

April 20, 2012

RE: 120 Roberts Lane/Appeal of Decision of Fire Code Official from March 27, 2012

Mr. Clayton:

After review of your appeal application, I wish to modify my decision in this matter. As you know, you have asked for a determination if the Fort Ellsworth Condominium Association is required to conduct annual inspections of the "fire-resistance-rated construction" of their buildings. I now agree that the Association is required to make visual inspections of such construction, to the extent that such elements are open, or able to be inspected by the removal of a removable panel or the like, as stated in the 2009 Virginia Statewide Fire Prevention Code.

However, I maintain that the Fire Code, and the previous rulings in cases involving you and the Association, does not require the Association to repair, restore, or replace items of fire-resistance-rated construction that were never installed in the buildings.

By copy of this letter, I am directing that the Fort Ellsworth Condominium Association conduct the required inspection, in the manner provided in Section 703.1 of the 2009 Virginia Statewide Fire Prevention Code, and inform my office after such inspections are completed.

Due to this decision, your appeal is no longer needed. Therefore, I am returning the original check for the appeal fee with this letter.

Sincerely,

Rudolph Thomas  
Assistant Fire Chief/Fire Official

Enclosure

cc: Ms. Althea Burns  
President, Fort Ellsworth Condominium Association  
124 Roberts Lane, Suite 401  
Alexandria, VA 22314

Michael E. Thorsen, Esq.  
Counsel for Fort Ellsworth Condominium Association  
Bancroft, McGavin, Horvath & Judkins, P.C.  
3920 University Drive  
Fairfax, VA 22030

Exhibit A4

VIRGINIA STATE BUILDING CODE TECHNICAL REVIEW BOARD

REGISTRATION FOR TESTIMONY IN APPEAL HEARING

APPEAL CASE: Richard Clayton (Appeal No. 10-2)

DATE: June 18, 2010

NAME OF PERSON (Please print clearly)

PARTY AFFILIATION

Mary O'Donnell

Appellee

John Cahill

Appellant

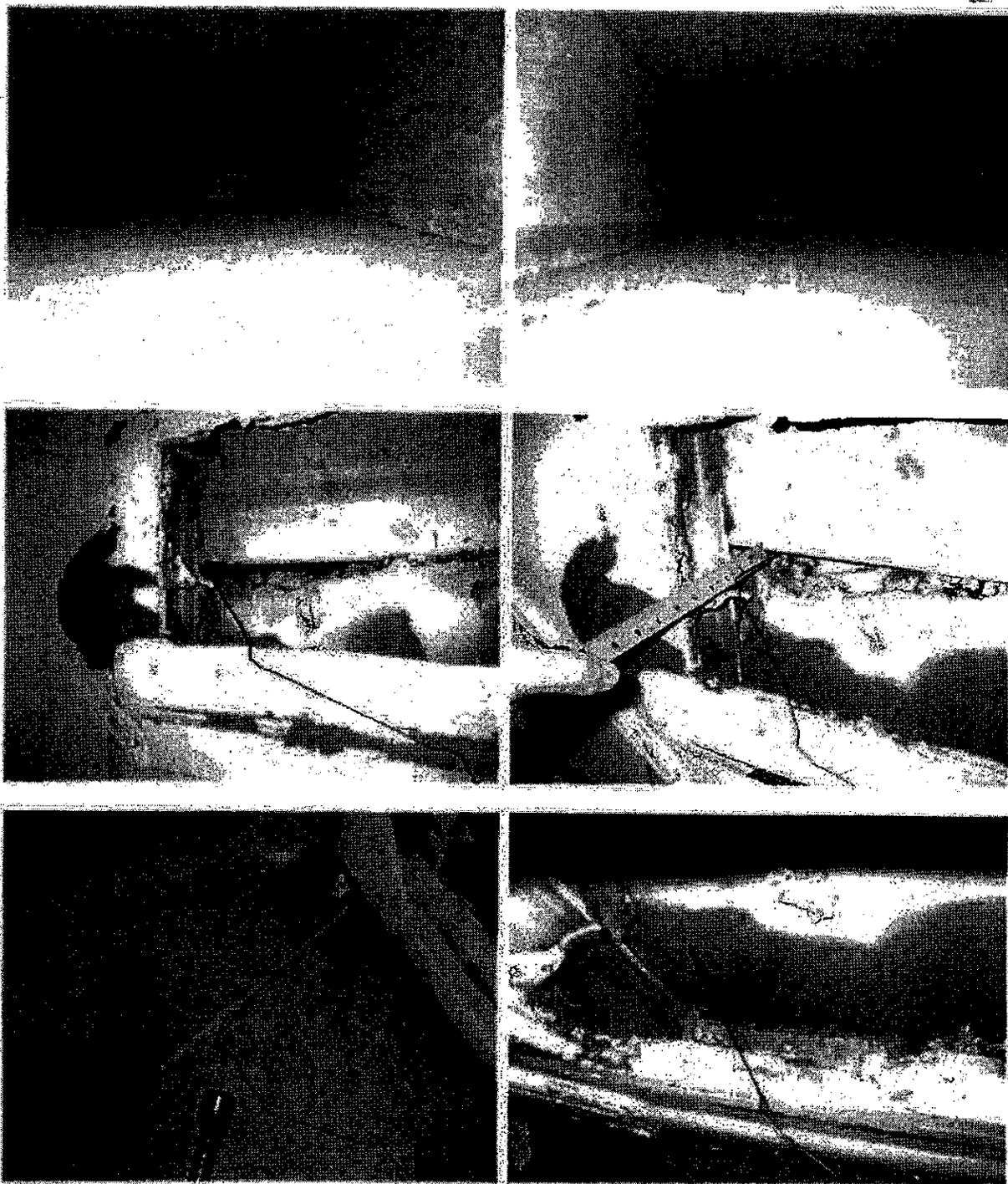
Michael Thorsen

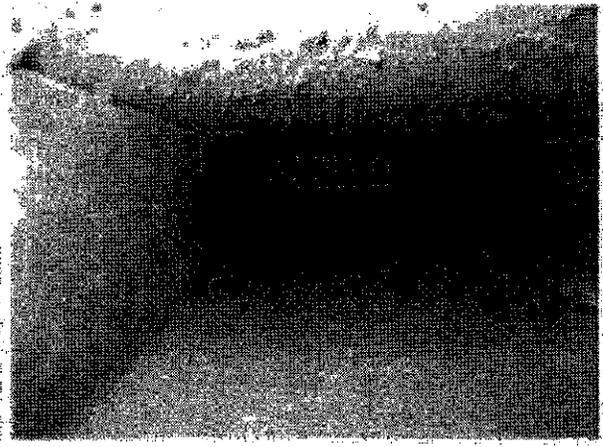
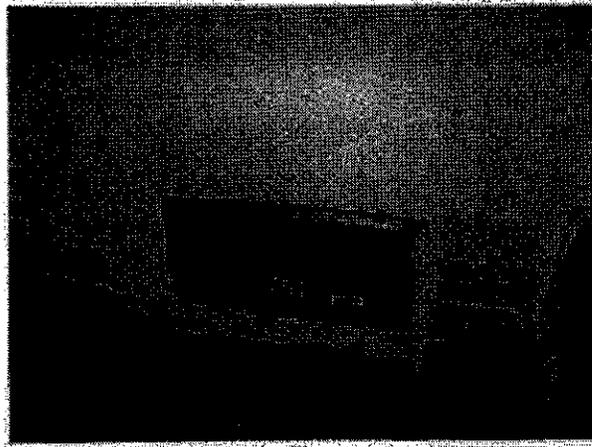
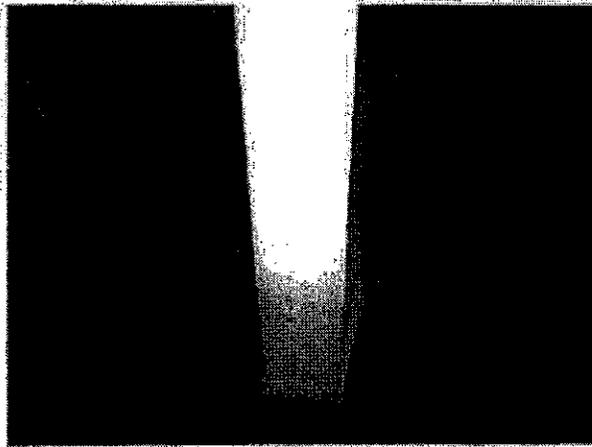
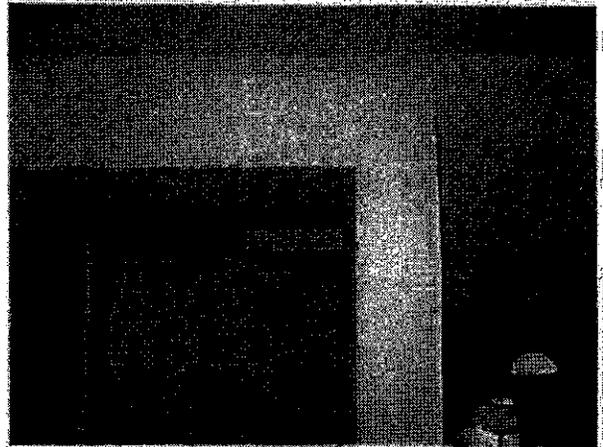
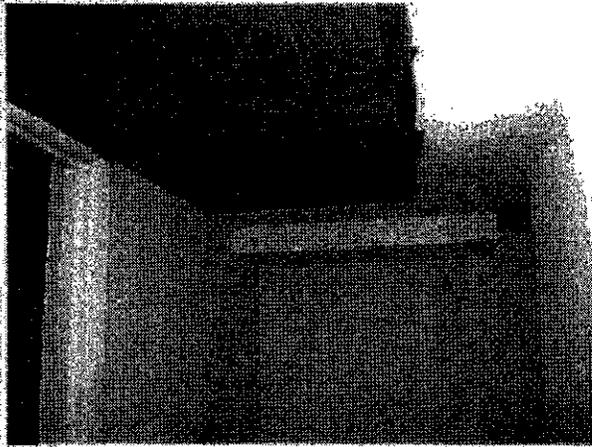
Appellee (Fort Ellsworth)

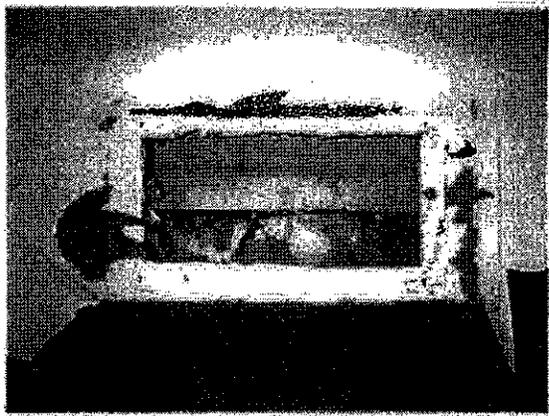
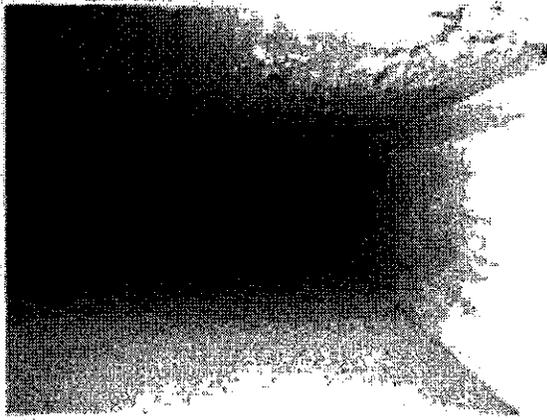
Richard Clayton

Appellant

Exhibit A5







**Penny Gausman**

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**From:** Richard Clayton <rnclayton@yahoo.com>  
**Sent:** Friday, June 22, 2012 12:54 PM  
**To:** Penny Gausman  
**Cc:** Rudolph Thomas; Mary Odonnell; John Catlett; Gregg Fields  
**Subject:** Fw: new submissions for July 10 appeal hearing Clayton

Penny,

These documents are a supplement to those provided earlier. I expect all earlier submissions have already been sent and will also be included at the hearing on July 10. Just want to be clear these are supplemental submissions and not a full replacement of earlier submissions. Please make sure this is understood at large to all recipients.

Thanks,

Richard Clayton

----- Forwarded Message -----

**From:** Richard Clayton <rnclayton@yahoo.com>  
**To:** Penny Gausman <Penny.Gausman@alexandriava.gov>  
**Cc:** Rudolph Thomas <Rudolph.Thomas@alexandriava.gov>; Mary O'Donnell <Mary.ODonnell@alexandriava.gov>; John Catlett <john.catlett@alexandriava.gov>; Gregg Fields <gregg.fields@alexandriava.gov>  
**Sent:** Friday, June 22, 2012 12:49 PM  
**Subject:** new submissions for July 10 appeal hearing Clayton

Penny,

Please see attached documents I would like you to provide to all appropriate parties for the July 10 appeal hearing. Let me know if you have any questions. I may have more information to submit before COB today (let's say 4:45 p.m) but the information supplied here is what I know about at the moment. I doubt I will have additional information but I want to leave the door open as new information may be coming to me.

Thanks,

Richard Clayton  
120 Robert Lane, #300  
Alexandria, VA 22314  
[RNClayton@yahoo.com](mailto:RNClayton@yahoo.com)  
703.836.5773

**Appellant Clayton's Amended rebuttal of June 12 Memorandum by Assistant Fire Marshall Thomas**

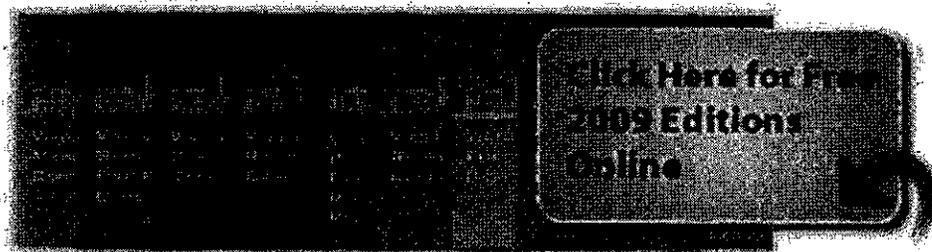
One can easily get confused when researching the 2009 Virginia Statewide Fire Prevention Codes. The published PDF version provided by the state only covers the administrative changes and amendments to the IFC codes (incorporated by reference into the SFPC). The final full version of the SFPC can be viewed online for free but one must pay to have a printed copy or a downloadable PDF version. Complete printed copies of both should be available at the code library at City Hall.

<http://www.dhcd.virginia.gov/StateBuildingCodesandRegulations/>

State Building Codes and Regulations

2009 Virginia Code Series Published

The 2009 Virginia Code series, published by the International Code Council (ICC), are available for purchase through the ICC website store in either the printed version or electronic versions at the following link <http://www.iccsafe.org/Store/Pages/default.aspx>



To view the 2009 Editions of the codes you may use the link above at no charge to the user; the e-Codes will be posted in the order in which they were finalized by ICC. *The files found on this site are in a read only format and are not available for printing. You will need to have Adobe® Reader® 8.0 or higher installed to be able to read these files. If you do not have Adobe® Reader® 8.0 or higher you can download it for free at [www.adobe.com](http://www.adobe.com)*

The administrative provisions of the 2009 Virginia Uniform Statewide Building Code, Virginia Statewide Fire Prevention Code, and the Related Regulations may also be accessed on our DHCD website and are downloadable at no charge to the user at either of the following links: [State Building Codes and Regulations](#) or [Forms and Publications](#).

The 2009 Virginia Codes were effective March 1, 2011. The Virginia Construction Code permits the use of the 2006 edition for any permit applications submitted until March 1, 2012. The 2006 Virginia Codes and the related regulations continue to be available on the ICC eCodes Web site [http://ecodes.biz/product.cfm?category\\_id=94](http://ecodes.biz/product.cfm?category_id=94), with unlimited electronic access provided at no charge to the user.

I have copied the links to both the administrative changes only (can be downloaded as a PDF but does not contain the complete 2009 fire codes) as well as the online complete version of the 2009 fire codes which have incorporated all of the administrative changes and amendments:

The administrative provisions of the 2009 Virginia Statewide Fire Prevention Code only:

<http://www.dhcd.virginia.gov/StateBuildingCodesandRegulations/PDFs/2009/Code%20-%20SFPC.pdf>

The complete provisions of the 2009 Virginia Statewide Fire Prevention Code with all administrative changes and amendments above incorporated:

[http://www.ecodes.biz/ecodes\\_support/free\\_resources/virginia2009/09fire\\_prevention/09fire\\_prevention\\_main.html](http://www.ecodes.biz/ecodes_support/free_resources/virginia2009/09fire_prevention/09fire_prevention_main.html)

I have also included selected pages from the DHCP PDF version of the SFPC as a separate exhibit showing the title page of VIRGINIA STATEWIDE FIRE PREVENTION CODE. This shows administrative changes only to the IFC incorporated into the final full SFPC as per the free online copy. This may serve as a reference source for the convenience of the appeal board. A full printed copy of the final SFPC showing all code information including the incorporated administrative changes should be available online or in the code library located in the hearing room for the appeal.

**1. The requirement for annual inspections in SFPC Section 703.1 has not been deleted in Virginia per SFPC Section 103.2.**

The complete SFPC already incorporates all administrative changes and amendments to the IFC which are incorporated by reference per SFPC section 103 and as published in the DHCP PDF copy of the SFPC which shows all administrative changes and amendments incorporated into the IFC for the final complete version of the SFPC.

SFPC § 703.1 is complete as written and fully enforceable, including the need for annual inspections by the owner of the building, after consideration of SFPC § 103.2 which allowed in part for the final version of the SFPC containing all administrative changes and amendments desired by the State of Virginia.

SFPC § 103.2 does not delete all standards that require inspections unless they are specifically stated in Chapter 1 of the SFPC as stated by Fire Marshall Thomas. **SFPC § 103.2 only applies to referenced codes and standards** outside the IFC itself (but referenced by the IFC).

Specifically, SFPC § 103.2 only affects all requirements of "referenced codes and standards" relating to procedural and administrative matters **as found in Chapter 47** of the IFC **as per the definition of "referenced codes and standards" found in SFPC Section § 102.4**. Chapter 47 contains a long list of reference source materials independent of the IFC but referenced by the IFC such as standards on measuring certain values, etc. To the extent these same referenced codes and standards may contain requirements for inspections, they are deleted per SFPC § 103.2 and no longer considered part of the IFC which has been incorporated by reference into the SFPC.

SFPC § 703.1 has not been amended for administrative changes or amendments of any kind by the State of Virginia as evidenced by the Table of Contents in the Administrative Changes to the SFPC version published by the Department of Housing and Community Development (DHCP). This PDF publication should be renamed as the

title implies it is the complete SFPC when in fact it only publishes changes incorporated into the IFC which then leads to the complete version of the SFPC, available online for free. It lists amendments to the original language of the IFC, as allowed per SFPC section 103, by Chapter. Chapter 7 is not listed in the Table of Contents of the DHCP version of the SFPC and this indicates there have been no administrative changes or amendments made to it or its contents, including Section § 703.1. This is verified when one looks at the complete online version of the SFPC referenced above.

**102.4 Referenced codes and standards.** The codes and standards referenced in the IFC shall be those listed in Chapter 47 and considered part of the requirements of the SFPC to the prescribed extent of each such reference. Where differences occur between the provisions of this code and the referenced standards, the provisions of this code shall apply.

### **SECTION 103 INCORPORATION BY REFERENCE**

**103.1. General.** The following document is adopted and incorporated by reference to be an enforceable part of the SFPC:

The International Fire Code -- 2009 Edition, hereinafter referred to as "IFC," published by the International Code Council, Inc., 500 New Jersey Avenue, NW, 6th Floor, Washington, DC 20001-2070, 1-888 422-7233.

**103.1.1 Deletion.** Delete IFC Chapter 1.

**103.1.2 Appendices.** The appendices in the IFC are not considered part of the IFC for the purposes of Section 103.1.

**Note:** Section 101.5 references authority contained in the Code of Virginia for local fire prevention regulations that may be evaluated by localities to determine whether provisions in the IFC appendices may be considered for local fire prevention regulations.

**103.2 Amendments.** All requirements of the referenced codes and standards that relate to fees, permits, unsafe notices, disputes, condemnation, inspections, scope of enforcement and all other procedural, and administrative matters are deleted and replaced by the provisions of Chapter 1 of the SFPC.

**103.2.1 Other amendments.** The SFPC contains provisions adopted by the Virginia Board of Housing and Community Development (BHCD), some of which delete, change or amend provisions of the IFC and referenced standards. Where conflicts occur between such changed provisions and the unchanged provisions of the IFC and referenced standards, the provisions changed by the BHCD shall govern.

**Note:** The IFC and its referenced standards contain some areas of regulation outside of the scope of the SFPC, as established by the BHCD and under state law. Where conflicts have been readily noted, changes have been made to the IFC and its referenced standards to bring it within the scope of authority; however, in some areas, judgment will have to be made as to whether the provisions of the IFC and its referenced standards are fully applicable.

If one were to apply Fire Marshall Thomas interpretation then all of the chapters of the SFPC which begin with Scope would also have to be specifically incorporated into Chapter 1 of the SFPC in order to be valid as the scope of enforcement definitions for many of the chapters in the SFPC are found at the beginning of each chapter and not in chapter 1 of the SFPC. Examples are given below:

**SFPC Section 301.1 Scope.** The provisions of this chapter shall govern the occupancy and maintenance of all structures and premises for precautions against fire and the spread of fire and general requirements of fire safety.

**SFPC Section 401.1 Scope.** Reporting of emergencies, coordination with emergency response forces, emergency plans and procedures for managing or responding to emergencies shall comply with the provisions of this section.

**SFPC Section 701.1 Scope.** The provisions of this chapter shall specify the requirements for and the maintenance of fire-resistance-rated construction. New buildings shall comply with the *International Building Code*.

Clearly, SFPC § 103.2 does not negate all of Chapter 7 of the SFPC or SFPC Section 703.1 as a subset of Chapter 7 of the SFPC. To apply Fire Marshall Thomas definition of SFPC Section 103.2 would eliminate most of the SFPC leaving little for Chapter 1 to enforce. Furthermore, SFPC Section 703.1, for reasons other than annual inspection requirements, has been argued before the courts in the earlier appeals referenced by the June 12 Memorandum. The State Building Code Technical Review Board (TRB) has never incorporated Fire Marshal Thomas interpretation of SFPC Section 103.2 to defeat the requirements of SFPC Section 703.1. This is conceivable if truly a valid argument since the definition of scope found in Chapter 7 is not also found in Chapter 1 of the SFPC. However, this argument was not used by the TRB in the earlier referenced appeals and one may conclude it is not a valid argument.

Any changes to SFPC § 703.1 found in Chapter 7 of the IFC and adopted as an enforceable part of the SFPC as per SFPC 103.1 would show up in the amendments section of the DHCP version of the SFPC. As shown below in the table of contents, there are no amendments specified whatsoever for Chapter 7 of the IFC, including SFPC § 703.1.

Copied from the Table of Contents of the DHCP PDF version of the SFPC:

**INTERNATIONAL FIRE CODE CHAPTERS**

Chapter	
2 Definitions . . . . .	18
3 General Requirements . . . . .	20
4 Emergency Planning and Preparedness . . . . .	21
5 Fire Service Features . . . . .	22
6 Building Services and Systems . . . . .	24
8 Interior Finish, Decorative Materials and Furnishings . . . . .	25
9 Fire Protection Systems . . . . .	25
10 Means of Egress . . . . .	27
22 Motor Fuel Dispensing Facilities and Repair Garages . . . . .	27
27 Hazard Materials—General Provisions . . . . .	28
33 Explosives and Fireworks . . . . .	29
38 Liquefied Petroleum Gases . . . . .	37
46 Construction Requirements for Existing Buildings . . . . .	39
47 Referenced Standards . . . . .	39

Sample of amendments to IFC found above:

**CHAPTER 3  
GENERAL REQUIREMENTS**

Add Section 301.3 to read:

**301.3 Occupancy.** The occupancy of a structure shall be continued as originally permitted under and in full compliance with the codes in force at the time of construction or alteration. The occupancy of a structure shall not change to another occupancy that will subject the structure to any special provisions of this code or the USBC without the approval of the building official.

Change Section 304.3.2 to read:

**304.3.2 Capacity exceeding 5.88 cubic feet.** Containers with a capacity exceeding 5.88 cubic feet (44 gallons) (0.17 m<sup>3</sup>) shall be provided with lids. Containers and lids shall be constructed of noncombustible materials or approved combustible materials.

Change Section 314.1 to read:

**314.1 General.** Indoor displays constructed within any building or structure shall comply with Sections 314.2 through 314.5.

Add Section 314.5 to read:

**314.5 Smokeless powder and small arms primers.** Venders shall not store, display or sell smokeless powder or small arms primers during trade shows inside exhibition halls except as follows:

1. The amount of smokeless powder displayed by each vender is limited to the amount established in Section 3306.5.1.1.
2. The amount of smokeless powder each vender may store is limited to the storage arrangements and storage amounts established in Section 3306.5.2.1. Smokeless powder shall remain in the manufacturer's original sealed container and the container shall remain sealed while inside the building. The repackaging of smokeless powder shall not be performed inside the building. Damaged containers shall not be repackaged inside the building and shall be immediately removed from the building in such manner to avoid spilling any powder.
3. There shall be at least 50 feet separation between venders and 20 feet from any exit.
4. Small arms primers shall be displayed and stored in the manufacturer's original packaging and in accordance with the requirements of Section 3306.5.2.3.

Change Section 315.3 to read:

**315.3 Outside storage.** Outside storage of combustible materials shall not be located within 10 feet (3048 mm) of a property line or other building on the site.

**Exceptions:**

1. The separation distance is allowed to be reduced to 3 feet (914 mm) for storage not exceeding 6 feet (1829 mm) in height.
2. The separation distance is allowed to be reduced when the fire official determines that no hazard to the adjoining property exists.

Change Section 315.3.1 to read:

**315.3.1 Storage beneath overhead projections from buildings.** To the extent required by the code the building was constructed under, when buildings are required to be protected by automatic sprinklers, the outdoor storage, display and handling of combustible materials under eaves, canopies or other projections or overhangs is prohibited except where automatic sprinklers are installed under such eaves, canopies or other projections or overhangs.

**2. SFPC Section 109.1 has no bearing on the requirements for annual inspection by the FEUOA per SFPC Section 703.1 or the order to make inspections per Fire Marshall Thomas April 20, 2012 letter of notice and instruction to FEUOA.**

Fire Marshall Thomas raises an argument over a fire code that is not in dispute. Nor does this particular code have anything to do with the FEUOA's responsibility under SFPC § 703.1 to make annual inspections. Clayton has not raised this code as an issue under appeal.

The FEUOA is required to make annual inspections per SFPC 703.1. The April 20, 2012 letter of instruction from Fire Marshall Thomas instructed the FEUOA to get in compliance with SFPC § 703.1 and make the required annual inspections. Furthermore, he ordered the inspection reports to be provided to him. FEUOA has not completed inspections of all building and therefore cannot submit the required inspection reports as ordered by Fire Marshall Thomas. There is no requirement for the Fire Marshall's office to make routine inspections of the buildings at Fort Ellsworth to the best of my knowledge. Nor is this a precondition for the FEUOA to meet its obligations under SFPC 703.1.

**3. SFPC Section 703.1 does apply to Fort Ellsworth condominiums and the FEUOA as the physical structure of some of the buildings allows for access to interior fire-resistance rated construction elements or assemblies in some of the buildings as evidenced by historical photos in the possession of the City of Alexandria per earlier appeals. And only after making annual inspections for all buildings can the FEUOA determine whether openings related to SFPC § 703.1 currently exist for further inspection in compliance with SFPC § 703.1 requirements.**

The claim made by Fire Marshall Thomas that none of the limited inspections made recently with the FEUOA, under his supervision, had any noticeable openings as defined in SFPC § 703.1 does not mean none of the buildings have interior openings as defined in SFPC § 703.1 which require visual inspection. It is known by Fire Marshall Thomas that Clayton's unit has provided photo evidence taken by fire officials of the City of Alexandria in the fall of 2007 which show extensive evidence of areas open for inspection which relate to fire related issues as mentioned in SFPC § 703.1 such as ducts and pipes running between floors, etc. Furthermore, Clayton has provided extensive photos of areas which meet the requirements found in SFPC § 703.1 as to fire-rated construction related to requirements of annual visual inspection as defined in SFPC 703.1. These same photos were provided to Fire Marshall's counsel, Mary O'Donnell, at the TRB appeal hearing held June 18, 2010 as per the TRB record (exhibits A5) and thus are available to Fire Marshall Thomas, also.

Fire Marshall Thomas has not provided any information on the specific units that he referenced as having been inspected recently so there is no way for Clayton or this board to confirm his statements as to the conditions found. Nor would it matter since the requirements under SFPC § 703.1 require the FEUOA to make annual visual inspections of all buildings to then determine as to whether further inspection within interior walls is warranted based on openness definitions found in SFPC 703.1. It is not possible for Fire Marshall Thomas to make a general conclusion about all buildings at FE based on limited selection of units. And if in fact only units were chosen which did not have openings requiring further inspections as per SFPC § 703.1 then one might conclude the Fire Marshall's office conspired with the FEUOA to purposely select units that would fit a desired outcome in an effort to defeat Clayton's rights under SFPC 703.1.

Clayton is concerned not only about his unit being properly inspected by FEUOA but all units at FE. Without proper inspection by the FEUOA of all buildings, Clayton and the FE community are at risk for the possible spread of fire and a general liability to owners and renters at FE due to failure to make required annual inspections.

**4. SFPC Sections 106.1, 106.6 and 111.1 collectively require Fire Marshall Thomas to issue a notice of violation to the FEUOA for failure to make annual required inspections as per SFPC § 703.1 on or before March 1, 2012 as per information filed May 23, 2012 in local appeal application.**

The April 20, 2012 letter from Fire Marshall Thomas put the FEUOA on notice they needed to comply with the annual inspection requirements of SFPC § 703.1 and turn

the inspection reports in to the Fire Marshall. It is presumed the authority for Fire Marshall Thomas to write this letter stems from SFPC Sections 106.1, 106.6 and 111.1 based on allegations by Clayton that the FEUOA did not comply with SFPC § 703.1 by the March 1, 2012 deadline for annual inspections. Nothing provided by Fire Marshall Thomas has shown this allegation of noncompliance on annual inspections for all buildings has been satisfied to date. He is therefore compelled by law to issue a notice of violation to the FEUOA or perfect the April 20, 2012 notice already provided to the FEUOA by including a specified time for compliance. FEUOA, in turn, can appeal the notice if they believe that is appropriate. If the FEUOA determines that all areas are concealed (despite evidence to the contrary), they can make a statement to that effect to Assistant Fire Marshall Thomas per his order to provide inspection reports on April 20, 2012 and provide unit owner Clayton with a copy. But they have not made inspections of Clayton's unit or building at this time to the best of his knowledge as required by SFPC § 703.1 nor have any statements or evidence from Fire Marshall Thomas satisfied these same overall requirements of the FEUOA with respect to SFPC 703.1.

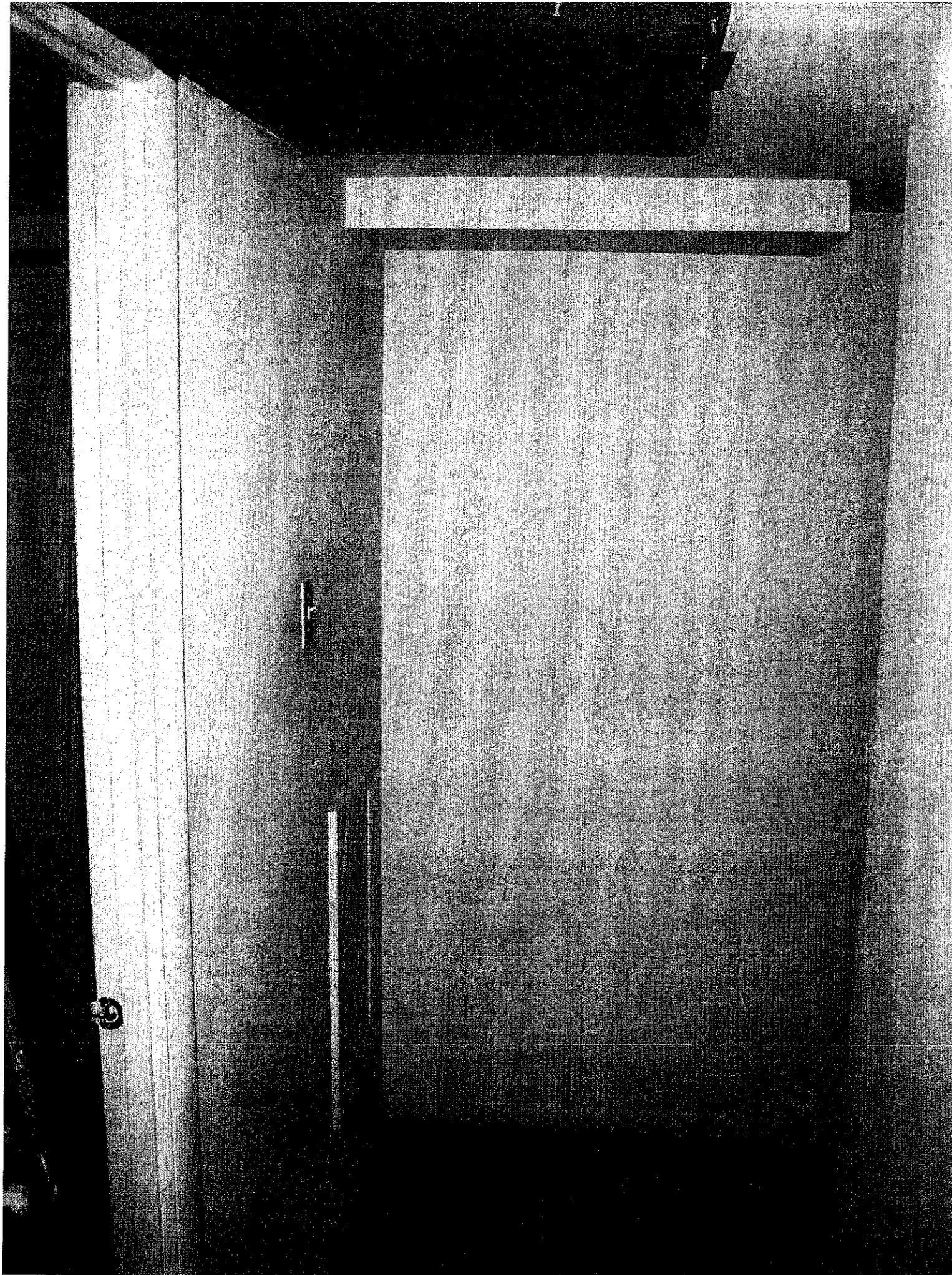
**106.1 General.** The fire official shall enforce the provisions of the SFPC as provided herein and as interpreted by the State Building Code Technical Review Board (TRB) in accordance with Section 36-118 of the Code of Virginia.

**106.6 Notices and orders.** The fire official shall issue all necessary notices or orders to ensure compliance with the SFPC.

**111.1 Notice.** When the fire official discovers an alleged violation of a provision of the SFPC or other codes or ordinances under the fire official's jurisdiction, the fire official shall prepare a written notice citing the section allegedly violated, describing the condition deemed unsafe and specifying time limitations for the required abatements to be made to render the structure or premises safe and secure.

**703.1 Maintenance.** The required fire-resistance rating of fire-resistance-rated construction (including walls, firestops, shaft enclosures, partitions, smoke barriers, floors, fire-resistive coatings and sprayed fire-resistant materials applied to structural members and fire resistant joint systems) shall be maintained. Such elements shall be visually inspected by the owner annually and properly repaired, restored or replaced when damaged, altered, breached or penetrated. Where concealed, such elements shall not be required to be visually inspected by the owner unless the concealed is accessible by the removal or movement of a panel, access door, ceiling tile or similar movable entry to the space. Openings made therein for the passage of pipes, electrical conduit, wires, ducts, air transfer openings and holes made for any reason shall be protected with approved methods capable of resisting the passage of smoke and fire. Openings through fire-resistance-rated assemblies shall be protected by self- or automatic-closing doors of approved construction meeting the fire protection requirements for the assembly.

Wherefore, for the reasons stated above, Appellant Clayton asks this local appeal board to order Fire Marshall Thomas to issue a notice of violation of SFPC § 703.1 to the FEUOA forthwith with a time certain for compliance as required per SFPC 111.1.





**Penny Gausman**

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**From:** Richard Clayton <rnclayton@yahoo.com>  
**Sent:** Friday, June 22, 2012 3:12 PM  
**To:** Rudolph Thomas  
**Cc:** Mary Odonnell; Penny Gausman; John Catlett; Gregg Fields  
**Subject:** Fw: need technical expertise on SFPC feedback ASAP

Penny,

I am including this email as part of the package to send to the parties to the appeal. I don't know if Mr. Rodgers will respond in a timely way to my request for more information by COB today. I may have additional information later to send your way.

If you are out till Monday, perhaps the package can go out on Monday and that will give time needed for a full response from Mr. Rodgers to my request.

Thanks,

Richard Clayton  
120 Roberts Lane, #300  
Alexandria, VA 22314  
RNClayton@yahoo.com  
703.836.5773

----- Forwarded Message -----

**From:** Richard Clayton <rnclayton@yahoo.com>  
**To:** "Rodgers, Emory (DHCD)" <Emory.Rodgers@dhcd.virginia.gov>; "Hodge, Vernon (DHCD)" <Vernon.Hodge@dhcd.virginia.gov>  
**Cc:** "Eubank, Paula (DHCD)" <Paula.Eubank@dhcd.virginia.gov>; John Catlett <John.Catlett@alexandriava.gov>  
**Sent:** Friday, June 22, 2012 2:58 PM  
**Subject:** Re: need technical expertise on SFPC feedback ASAP

Mr. Rodgers,

Your reasoning is incoherent and not based on the SFPC. Please provide a more logical proof to support your statements. The City of Alexandria has elected to enforce the SFPC in its entirety. This therefore includes enforcement of annual inspection requirements by the true owners of the building, the Fort Ellsworth Unit Owners Association (FEUOA). These inspections are past due as of March 1, 2012. Clearly this is a violation and demands a Notice of Violation as per SFPC 111.1.

Your viewpoint as expressed lacks any legal support. Please provide same if you can. Otherwise, you seem to be making pure speculation as to what the SFPC states. Quote the code

that supports your position. If the local agency is truly not enforcing the SFPC in its entirety, then the State must enforce SFPC 703.1 as per SFPC 104.2. Is that your position? Is the State required to enforce SFPC 703.1?

I will remind you, Asst. Fire Marshall Thomas has already issued a notice to the FEUOA on April 20, 2012 demanding SFPC 703.1 inspections take place. He failed to put a time for compliance in the notice. This is at the heart of the appeal. This new idea that SFPC 703.1 is void in Virginia is a novel argument and not supported by law. Generally, only the General Legislative body can suspend a law as per Article 7 of the Constitution of Virginia. It is not up to you or Fire Marshall Thomas to suspend SFPC 703.1.

104.1 Local enforcement. Any local government may enforce the SFPC following official action by such body. **The official action shall (i) require compliance with the provisions of the SFPC in its entirety or with respect only to those provisions of the SFPC relating to open burning, fire lanes, fireworks, and hazardous materials and (ii) assign enforcement responsibility to the local agency or agencies of its choice.** Any local governing body may establish such procedures or requirements as may be necessary for the administration and enforcement of this code. If a local governing body elects to enforce only those provisions of the SFPC relating to open burning, it may do so in all or in any designated geographic areas of its jurisdiction. The terms "enforcing agency" and "fire official" are intended to apply to the agency or agencies to which responsibility for enforcement of the SFPC has been assigned. The terms "building official" or "building department" are intended to apply only to the local building official or local building department.

104.2. State enforcement. In accordance with Section 27-98 of the Code of Virginia, the State Fire Marshal shall also have the authority, in cooperation with any local governing body, to enforce the SFPC. The State Fire Marshal shall also have authority to enforce the SFPC in those jurisdictions in which the local governments do not enforce the SFPC and may establish such procedures or requirements as may be necessary for the administration and enforcement of the SFPC in such jurisdictions.

106.1 General. The fire official shall enforce the provisions of the SFPC as provided herein and as interpreted by the State Building Code Technical Review Board (TRB) in accordance with Section 36-118 of the Code of Virginia.

106.6 Notices and orders. The fire official shall issue all necessary notices or orders to ensure compliance with the SFPC.

111.1 Notice. When the fire official discovers an alleged violation of a provision of the SFPC or other codes or ordinances under the fire official's jurisdiction, the fire official shall prepare a written notice citing the section allegedly violated, describing the condition deemed unsafe and specifying time limitations for the required abatements to be made to render the structure or premises safe and secure.

As to my right to get technical assistance on the SFPC through your office, I disagree you can arbitrarily discriminate against me in this regard.

Your response full legal basis for your answer is needed ASAP. Please provide. Time is of the essence.

Richard Clayton  
120 Roberts Lane, #300  
Alexandria, VA 22314  
703.836.5773

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**From:** "Rodgers, Emory (DHCD)" <Emory.Rodgers@dhcd.virginia.gov>  
**To:** Richard Clayton <rnclayton@yahoo.com>; "Hodge, Vernon (DHCD)" <Vernon.Hodge@dhcd.virginia.gov>  
**Cc:** "Eubank, Paula (DHCD)" <Paula.Eubank@dhcd.virginia.gov>; John Catlett <John.Catlett@alexandriava.gov>  
**Sent:** Friday, June 22, 2012 1:37 PM  
**Subject:** RE: need technical expertise on SFPC feedback ASAP

Mr. Clayton, the SFPC is adopted by localities for enforcement. In that regard a locality can take enforcement on a complaint basis or have pro-active enforcement programs at their discretion. You seem to be demanding pro-active enforcement of the SFPC by the city in your and other owner's dwelling unit. You and the fire official are in disagreement so you have filed an appeal. You are demanding the city issue a notice of violation to the building owners, one of whom is yourself. for their failure to conduct annual inspections in the common areas or dwelling units.

Since the SFPC is discretionary for enforcement, the city can choose how they desire to inspect buildings. My opinion is the fire official is empowered to make the decisions rendered to date. I believe they have applied the provisions being contested in a reasonable and appropriate manner. Your referenced to the Preface that is not an enforceable part of the SFPC regulations.

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**From:** Richard Clayton [<mailto:rnclayton@yahoo.com>]  
**Sent:** Thursday, June 21, 2012 3:24 PM  
**To:** Hodge, Vernon (DHCD)  
**Cc:** Rodgers, Emory (DHCD); Eubank, Paula (DHCD)  
**Subject:** Re: need technical expertise on SFPC feedback ASAP

Mr. Hodge,

Mr. Rodgers has already involved himself to a degree in advising the City of Alexandria on my appeal. I believe he should be on the record fully in this matter and as a matter of my right to feedback per the SFPC preface stating same. I don't loss my right for technical assistance on the SFPC just because there is an appeal process underway.

I would appreciate his email response by noon tomorrow so I may include it in the package to be delivered to the local hearing board. Time is of the essence.

Thank you,

Richard Clayton

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**From:** "Hodge, Vernon (DHCD)" <[Vernon.Hodge@dhcd.virginia.gov](mailto:Vernon.Hodge@dhcd.virginia.gov)>  
**To:** "[rnclayton@yahoo.com](mailto:rnclayton@yahoo.com)" <[rnclayton@yahoo.com](mailto:rnclayton@yahoo.com)>  
**Cc:** "Rodgers, Emory (DHCD)" <[Emory.Rodgers@dhcd.virginia.gov](mailto:Emory.Rodgers@dhcd.virginia.gov)>; "Eubank, Paula (DHCD)" <[Paula.Eubank@dhcd.virginia.gov](mailto:Paula.Eubank@dhcd.virginia.gov)>  
**Sent:** Thursday, June 21, 2012 2:34 PM  
**Subject:** RE: need technical expertise on SFPC feedback ASAP

Mr. Clayton,

This is in response to your email to [taso@dhcd.virginia.gov](mailto:taso@dhcd.virginia.gov). The Technical Services Unit, of which I am the manager, monitors that email address.

We generally defer from providing technical assistance when there is a pending appeal situation, as the appeal may end up before the State Review Board, which we staff. I am forwarding your email to our Deputy Director, Emory Rodgers, should he wish to respond, as he is outside of the loop of staffing the Review Board; however, it is likely that he would prefer that the appeals process resolve the situation.

Vernon Hodge, Technical Services Manager  
Technical Assistance Services Office (TASO)  
Division of Building and Fire Regulations  
Va. Department of Housing and Community Development  
Direct Dial: (804) 371-7174  
Email: [Vernon.Hodge@DHCD.virginia.gov](mailto:Vernon.Hodge@DHCD.virginia.gov)  
Blackberry: (804) 382-2973

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**From:** Richard Clayton [<mailto:rnclayton@yahoo.com>]  
**Sent:** Thursday, June 21, 2012 8:46 AM  
**To:** DHCD-TASO  
**Subject:** need technical expertise on SFPC feedback ASAP

To Whom It May Concern:

I request your immediate assistance in the proper interpretation of the SFPC as per the technical assistance offered in the preface to the SFPC and due to the current lack of assistance from the State Fire Marshall's office as evidenced below. I have provided attachments showing arguments presently put forth by the local Assistant Fire Marshall in a June 12 Memorandum and my counter arguments. Please provide feedback ASAP, preferably by the close of business today, so I may include it in a package on Friday being prepared for distribution to the local appeal board. Time is of the essence.

Thank you,

Richard Clayton  
120 Roberts Lane, #300  
Alexandria, VA 22314  
[RNClayton@yahoo.com](mailto:RNClayton@yahoo.com)  
703.836.5773

----- Forwarded Message -----

From: Richard Clayton <[mcclayton@yahoo.com](mailto:mcclayton@yahoo.com)>

To: "Reynolds, Ron (VDFP)" <[Ron.Reynolds@vdfp.virginia.gov](mailto:Ron.Reynolds@vdfp.virginia.gov)>

Cc: "Payne, Thomas (VDFP)" <[Thomas.Payne@vdfp.virginia.gov](mailto:Thomas.Payne@vdfp.virginia.gov)>; "Altizer, Ed (VDFP)" <[Ed.Altizer@vdfp.virginia.gov](mailto:Ed.Altizer@vdfp.virginia.gov)>; Jack Steven <[sjack@oag.state.va.us](mailto:sjack@oag.state.va.us)>

Sent: Thursday, June 21, 2012 8:28 AM

Subject: Re: need technical expertise on SFPC feedback[A/V SCAN WARNING: MESSAGE ENCRYPTED][A/V SCAN WARNING: MESSAGE ENCRYPTED]

Mr. Reynolds,

I feel your organization has a responsibility to me, as a private citizen, as well as the local Fire Marshall and local appeal board to provide assistance in the proper interpretation of the SFPC as stated in the introduction to the preface to the Virginia Statewide Fire Prevention Code. I was told on the phone that your organization provides this assistance. I will continue my efforts to find someone at your organization who will provide assistance in interpreting the SFPC. Perhaps you are not the right person.

Are you available for the appeal at the state level? Do you prefer to be subpoenaed to provide testimony in this matter? Please tell me under what circumstances you will provide either myself or the local Fire Marshall assistance as to the proper interpretation of the SFPC from your organization's perspective. Have you or your organization provided feedback to Assistant Fire Marshall Thomas in the proper interpretation of the SFPC at any time? Did your organization help train or certify Assistant Fire Marshall Thomas? Have you or your organization provided feedback to any private citizen or local Fire Marshall in the proper interpretation of the SFPC. Is this part of your mission or not?

Your failure to provide feedback as requested damages my efforts and does not lend itself to the overall safety of the Virginia community or your organization's mission and purpose. I will try to bring the proper attention to this matter from those who have oversight on your activities. I am referring this matter to the state attorney general's office for starters and ask their immediate assistance in gaining your cooperation.

From the Virginia State Fire Code introduction:

Technical Assistance

DHCD, the State Fire Marshal's Central and Regional Offices and local enforcing agencies may be contacted for further information concerning the SFPC. Contact information for DHCD and the State Fire Marshal's Office is below. Additional contact information, including the regional State Fire Marshal's Offices, is available at the websites.

DHCD, Division of Building and Fire Regulation

Technical Assistance Services Office

600 East Main Street, Suite 300  
Richmond, Virginia 23219  
Phone: (804) 371-7150  
Email: [taso@dhcd.virginia.gov](mailto:taso@dhcd.virginia.gov)  
Website: [www.dhcd.virginia.gov](http://www.dhcd.virginia.gov)  
Virginia Department of Fire Programs  
State Fire Marshal's Office  
1005 Technology Park Drive  
Glen Allen, Virginia 23059  
Phone: (804) 371-0220  
Email: [statefiremarshal@vdfp.virginia.gov](mailto:statefiremarshal@vdfp.virginia.gov)  
Website: [www.vafire.com](http://www.vafire.com)

Richard Clayton  
120 Roberts Lane, #300  
Alexandria, VA 22314  
[RNClayton@yahoo.com](mailto:RNClayton@yahoo.com)  
703.836.5773

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**From:** "Reynolds, Ron (VDFP)" <[Ron.Reynolds@vdfp.virginia.gov](mailto:Ron.Reynolds@vdfp.virginia.gov)>  
**To:** Richard Clayton <[rnclayton@yahoo.com](mailto:rnclayton@yahoo.com)>  
**Cc:** "Payne, Thomas (VDFP)" <[Thomas.Payne@vdfp.virginia.gov](mailto:Thomas.Payne@vdfp.virginia.gov)>; "Altizer, Ed (VDFP)" <[Ed.Altizer@vdfp.virginia.gov](mailto:Ed.Altizer@vdfp.virginia.gov)>  
**Sent:** Thursday, June 21, 2012 6:41 AM  
**Subject:** RE: need technical expertise on SFPC feedback[A/V SCAN WARNING: MESSAGE ENCRYPTED][A/V SCAN WARNING: MESSAGE ENCRYPTED]

Mr. Clayton,

I am in receipt of your email and understand your concerns. However, this is a local jurisdiction and appeals board matter, and therefore, we will not be providing comments.

Thank-you.

Ron Reynolds, MPA, MPH, CBO, CFO  
Deputy, State Fire Marshal's Office  
1005 Technology Park Drive  
Glen Allen, VA 23059

Office 804-612-7268  
Fax 804-371-3367

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**From:** Richard Clayton [<mailto:rnclayton@yahoo.com>]  
**Sent:** Wednesday, June 20, 2012 8:57 PM  
**To:** Payne, Thomas (VDFP); Reynolds, Ron (VDFP)  
**Subject:** Re: need technical expertise on SFPC feedback[A/V SCAN WARNING: MESSAGE ENCRYPTED][A/V SCAN WARNING: MESSAGE ENCRYPTED]

Mr. Reynolds,

I am trying to avoid the need for a local appeal. I understand your office provides help on technical interpretations of the SFPC. Please respond to my inquiry sent earlier below to Fire Marshall Payne. I am resending the attachments provided earlier.

I would appreciate your response by COB Thursday to help with a package being prepared by the city to go out on Friday. Your help in this matter is greatly appreciated. I believe you may be able to clear up this matter early on and save everyone a lot of time in the process. If the hearing is held, you may be required to attend or provide answers through interrogatories to be shared with the board at the July 10 hearing at 10 a.m.

Thanks,

Richard Clayton  
120 Roberts Lane, #300  
Alexandria, VA 22314  
[RNClayton@yahoo.com](mailto:RNClayton@yahoo.com)  
703.836.5773

---

**From:** "Payne, Thomas (VDFP)" <[Thomas.Payne@vdfp.virginia.gov](mailto:Thomas.Payne@vdfp.virginia.gov)>  
**To:** "rnclayton@yahoo.com" <[rnclayton@yahoo.com](mailto:rnclayton@yahoo.com)>; "Reynolds, Ron (VDFP)" <[Ron.Reynolds@vdfp.virginia.gov](mailto:Ron.Reynolds@vdfp.virginia.gov)>; "Payne, Thomas (VDFP)" <[Thomas.Payne@vdfp.virginia.gov](mailto:Thomas.Payne@vdfp.virginia.gov)>  
**Sent:** Wednesday, June 20, 2012 7:42 PM  
**Subject:** Re: need technical expertise on SFPC feedback[A/V SCAN WARNING: MESSAGE ENCRYPTED]

Since this may require a technical interpret , you should direct inquiry to Ron Reynolds SFMO chief Deputy. Appeals from local boards go to the technical review board at DHCD

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**From:** Richard Clayton [<mailto:rnclayton@yahoo.com>]  
**Sent:** Wednesday, June 20, 2012 09:31 AM  
**To:** Payne, Thomas (VDFP)  
**Cc:** Mary O'Donnell <[Mary.ODonnell@alexandriava.gov](mailto:Mary.ODonnell@alexandriava.gov)>; Rudolph Thomas <[Rudolph.Thomas@alexandriava.gov](mailto:Rudolph.Thomas@alexandriava.gov)>; Gregg Fields <[gregg.fields@alexandriava.gov](mailto:gregg.fields@alexandriava.gov)>; John Catlett <[john.catlett@alexandriava.gov](mailto:john.catlett@alexandriava.gov)>; Penny Gausman <[Penny.Gausman@alexandriava.gov](mailto:Penny.Gausman@alexandriava.gov)>  
**Subject:** need technical expertise on SFPC feedback[A/V SCAN WARNING: MESSAGE ENCRYPTED]

Fire Marshall Payne:

I am forwarding my response to a June 12 Memorandum from the City of Alexandria Fire Marshall Thomas as well as the excerpts from the June 12 Memorandum showing arguments by the City of Alexandria Fire Marshall Thomas. Please comment on your understanding of the

correct interpretation of the SFPC codes put forth by Assistant Fire Marshall Thomas and the counter arguments by Clayton.

A local appeal hearing has been rescheduled for July 10, 2012 at 10 a.m. Your feedback is needed as to the correct interpretation of SFPC codes presented and the need for the City of Alexandria to issue a proper notice of violation as per SFPC 111.1 requirements.

Your testimony may be required if the local hearing takes place. Perhaps your early feedback can help settle the matter now. Let me know if you need additional information or if another party should be contacted for this feedback. I am trying to get your response in full no later than COB Thursday to be included in a Friday package. Time is of the essence.

Thank you,

Richard Clayton  
120 Roberts Lane, #300  
Alexandria, VA 22314  
[RNClayton@yahoo.com](mailto:RNClayton@yahoo.com)  
703.836.5773

**Penny Gausman**

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**From:** Richard Clayton <rnclayton@yahoo.com>  
**Sent:** Friday, June 22, 2012 3:26 PM  
**To:** Penny Gausman  
**Cc:** Rudolph Thomas; Mary Odonnell; John Catlett; Gregg Fields  
**Subject:** Fw: time is of the essence for annual fire inspections at Fort Ellsworth condominiums

Penny,

Please include this in the package as well. It does not lay out a proper legal argument for any positions suggested by Mr. Rodgers. Rather, it seems to show he is not sure what the SFPC really means, by my read. He seems to be speculating, looking for an answer to satisfy a desired result.

Thanks,

Richard Clayton

----- Forwarded Message -----

**From:** Mary Odonnell <Mary.ODonnell@alexandriava.gov>  
**To:** Richard Clayton <rnclayton@yahoo.com>  
**Cc:** John Catlett <John.Catlett@alexandriava.gov>; Gregg Fields <Gregg.Fields@alexandriava.gov>; Penny Gausman <Penny.Gausman@alexandriava.gov>; Rudolph Thomas <Rudolph.Thomas@alexandriava.gov>  
**Sent:** Thursday, June 21, 2012 11:12 AM  
**Subject:** FW: time is of the essence for annual fire inspections at Fort Ellsworth condominiums

Mary Elliott O'Donnell  
Assistant City Attorney  
City of Alexandria  
301 King Street, Ste. 1300  
Alexandria, VA 22314  
(703) 746-3750  
FAX: (703) 838-4810

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**From:** Rodgers, Emory (DHCD) [mailto:Emory.Rodgers@dhcd.virginia.gov]  
**Sent:** Friday, May 11, 2012 7:11 AM  
**To:** John Catlett; rudolph.thomas@alexandria.gov  
**Cc:** Mary Odonnell  
**Subject:** RE: time is of the essence for annual fire inspections at Fort Ellsworth condominiums

Vernon and I did discuss briefly using SFPC 103.2 deletes all inspections so the IFC 703 is only enforceable if the fire official does so by our SFPC Chapter 1 thus I am not certain there is anything to appeal due to the IFC 703. Now that Rudolph has committed to doing this inspection, I am not convinced yet there is any appeal by Clayton at all to have him tell the fire official how to do his job.

---

**From:** John Catlett [mailto:John.Catlett@alexandriava.gov]  
**Sent:** Thursday, May 10, 2012 5:01 PM  
**To:** Rodgers, Emory (DHCD); rudolph.thomas@alexandria.gov

**Cc:** Mary Odonnell

**Subject:** RE: time is of the essence for annual fire inspections at Fort Ellsworth condominiums

Emory.

We have chatted and he is well aware of previous actions. Thanks for the feedback

John Catlett, CPCA, MCP, CBO  
Director  
Alexandria Department of Code Administration  
301 King Street, Room 4200  
Alexandria, Virginia 22314  
(703) 746-4200  
[www.alexandriava.gov/code](http://www.alexandriava.gov/code)

*“One Team, One City – Our City”*

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**From:** Rodgers, Emory (DHCD) [<mailto:Emory.Rodgers@dhcd.virginia.gov>]  
**Sent:** Thursday, May 10, 2012 3:00 PM  
**To:** John Catlett; [rudolph.thomas@alexandria.gov](mailto:rudolph.thomas@alexandria.gov)  
**Subject:** FW: time is of the essence for annual fire inspections at Fort Ellsworth condominiums

John, if you and Mr. Thomas would like to chat I am open to do so. I believe SFPC IFC 703.1 that this section can be enforced by the fire official or can not be enforced. Not sure what Vernon believes, but he has to stay out of the discussions and the chance Mr. Clayton will appeal is about 100%. Clayton has lost all other appeals, so is this another take on the other appeals these past 3 plus years, I guess? Unfortunately, the SFPC doesn't contain the much better language that is in the USBC Section 101 with respect to what administrative provisions found in the model codes technical section can be used such as for testing and inspections. This is something to be discuss for 2012. I do believe Rudolph could under the vague SFPC 102.7 say owners need to do annual inspections or could also say they are not to be enforced in the city just like is done for other type of occupancies based on resources and a determination not do so. Now that Rudolph has directed the inspection by the condo association, then it is his discretion to send a letter, or at some later date do a NOV that could describe what is to be inspected that can be visually done such as only common areas or storage areas and by what date. As a resident, I can only assume Clayton has appeal rights too under the SFPC on the application of the code that being not to issue a NOV for an annual inspection? Just like smoke detectors and other life safety systems, the fire official can dictate the time frames from the referenced model codes or standards or can set other options for inspections and who shall do them.

If this type of inspection wasn't done before, then the fire official would normally set a written policy outlining time frames and what is to be done and apply it across the board for all R occupancies or others based on public input.

It seems like the time frame for appeal has expired, but that could be waived unless you and Clayton agree a formal NOV will go out for not doing the inspection and then setting a time frame such as 30 days.

---

**From:** Richard Clayton [<mailto:rnclayton@yahoo.com>]  
**Sent:** Thursday, May 10, 2012 11:27 AM  
**To:** Rudolph Thomas  
**Cc:** Mary O'Donnell; Bill Coates; [mark.jinks@alexandriava.gov](mailto:mark.jinks@alexandriava.gov); Jack Steven; Hodge, Vernon (DHCD)  
**Subject:** Fw: time is of the essence for annual fire inspections at Fort Ellsworth condominiums

Mr. Thomas,

I am not clear on what to do about your lack of enforcement. I have forwarded my concerns to the State Attorney General's office and the State Technical Review Board as per the email

attached below. As an added measure, I am in the process of preparing a local appeal on your lack of action on enforcing SFPC 703.1 annual inspections through the proper issuance of a notice of violation. I thought you had agreed to enforce SFPC 703.1 need for annual inspections when you refunded my earlier appeal check per your April 20, 2012 letter reversing your earlier determination letter whereby you refused to act on or enforce SFPC 703.1. Apparently you have decided not to honor your letter.

Please advise ASAP as to whether you will in fact send the FEUOA a proper notice of violation of SFPC 703.1 with a time certain for compliance. I demand copies on any enforcement effort. Otherwise, I will conclude you have rescinded your April 20, 2012 letter and it was sent in bad faith. I will also use today's date as the date for the 14 day clock on filing a local appeal. I reserve all other rights or actions to which I may be entitled in this matter.

Richard Clayton  
120 Roberts Lane, #300  
Alexandria, VA 22314  
703-836-5773

----- Forwarded Message -----

**From:** Richard Clayton <[rnclayton@yahoo.com](mailto:rnclayton@yahoo.com)>  
**To:** Jack Steven <[sjack@oag.state.va.us](mailto:sjack@oag.state.va.us)>  
**Cc:** Vernon Hodge <[8043717092@smartfax.com](mailto:8043717092@smartfax.com)>  
**Sent:** Thursday, May 10, 2012 10:09 AM  
**Subject:** Fw: time is of the essence for annual fire inspections at Fort Ellsworth condominiums

Mr. Jack,

I wish to file an inquiry and demand for action with the State Attorney General's office and the State Technical Review Board as to a the City of Alexandria's stated refusal to issue a notice of violation with time limits for compliance to the Fort Ellsworth Unit Owner's Association (FEUOA) for failing to conduct annual inspections as per SFPC 703.1, due on or before March 1, 2012.

I am not familiar with proper procedure for filing a complaint/inquiry in the above matter. Please accept or redirect my effort as appropriate. Time is of the essence. See attachment.

Thank you,

Richard Clayton  
120 Roberts Lane, #300  
Alexandria, VA 22314  
703-836-5773

----- Forwarded Message -----

**From:** Richard Clayton <[rnclayton@yahoo.com](mailto:rnclayton@yahoo.com)>  
**To:** Rudolph Thomas <[Rudolph.Thomas@alexandriava.gov](mailto:Rudolph.Thomas@alexandriava.gov)>

**Cc:** Mary Odonnell <[Mary.ODonnell@alexandriava.gov](mailto:Mary.ODonnell@alexandriava.gov)>; William Coates <[William.Coates@alexandriava.gov](mailto:William.Coates@alexandriava.gov)>;  
"mark.jinks@alexandriava.gov" <[mark.jinks@alexandriava.gov](mailto:mark.jinks@alexandriava.gov)>  
**Sent:** Thursday, May 10, 2012 9:33 AM  
**Subject:** Re: time is of the essence for annual fire inspections at Fort Ellsworth condominiums

Mr. Thomas,

Your stated failure to issue a notice of violations with a time limit for correction as per the requirements of the SFPC based on the FEUOA's failure to have a timely annual inspection by March 1, 2012 as per SFPC 703.1 strikes me as a dereliction of duty if not a blatant and willful disregard for the law. You seem to be in violation of SFPC sections 106.1, 106.6 and 111.1.

Per your earlier letter to the President of the FEUOA date April 20, 2012, you did seemingly in effect issue a notice of violation by ordering the FEUOA to conduct the required annual inspections as per SFPC 703.1 (but one that needs to be perfected by stating the time limit for taking corrective action).

I am demanding you perfect this notice by stating the time limit for compliance. If you insist you have not issued a notice of violation then I demand you do so immediately with a stated time limit for compliance in keeping with standard practice and the importance of compliance in a timely manner. The FEUOA is already well past the March 1, 2012 deadline for compliance and your stalling on enforcement is only allowing for further delay at the expense of public safety.

I will look to further inquiries with the State Attorney General's office as well as the State Technical Review Board as to your lack of action in these matters. Time is of the essence for proper action on your part.

Richard Clayton

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**From:** Rudolph Thomas <[Rudolph.Thomas@alexandriava.gov](mailto:Rudolph.Thomas@alexandriava.gov)>  
**To:** Richard Clayton <[rcclayton@yahoo.com](mailto:rcclayton@yahoo.com)>  
**Cc:** Mary Odonnell <[Mary.ODonnell@alexandriava.gov](mailto:Mary.ODonnell@alexandriava.gov)>; William Coates <[William.Coates@alexandriava.gov](mailto:William.Coates@alexandriava.gov)>  
**Sent:** Thursday, May 10, 2012 8:14 AM  
**Subject:** RE: time is of the essence for annual fire inspections at Fort Ellsworth condominiums

Mr. Clayton,

No violations have been issued at this time and we are still actively working with the Fort Ellsworth Unit Owners Association.

Thank you again for your patience.

V/r

*Rudolph Thomas*  
Assistant Fire Chief/Fire Marshal  
City of Alexandria

900 Second Street  
Alexandria, VA 22314  
(O) 703.746.5227  
(C) 703.801.3758

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**From:** Richard Clayton [<mailto:rnclayton@yahoo.com>]  
**Sent:** Tuesday, May 08, 2012 6:23 PM  
**To:** Rudolph Thomas  
**Cc:** Mary Odonnell; William Coates  
**Subject:** Fw: time is of the essence for annual fire inspections at Fort Ellsworth condominiums

Mr. Thomas,

Please see Section 111 of the SFPC and specifically 111.1. Have you issued a violation notice for failure to perform annual inspections by March 1, 2012 with a time certain for compliance to the FEUOA as required by SFPC Section 111.1? If so, please provide me with a copy. If not, please do so forthwith and provide me a copy.

Richard Clayton  
120 Roberts Lane, #300  
Alexandria, VA 22314  
703-836-5773

----- Forwarded Message -----

**From:** Richard Clayton <[rnclayton@yahoo.com](mailto:rnclayton@yahoo.com)>  
**To:** Rudolph Thomas <[Rudolph.Thomas@alexandriava.gov](mailto:Rudolph.Thomas@alexandriava.gov)>  
**Cc:** Mary Odonnell <[Mary.ODonnell@alexandriava.gov](mailto:Mary.ODonnell@alexandriava.gov)>; William Coates <[William.Coates@alexandriava.gov](mailto:William.Coates@alexandriava.gov)>  
**Sent:** Tuesday, May 8, 2012 5:52 PM  
**Subject:** Re: time is of the essence for annual fire inspections at Fort Ellsworth condominiums

Mr. Thomas,

Please elaborate on what you are actively doing with the FEUOA. As one who lives in the complex, there has been no general announcement on inspections. Are you stating the City of Alexandria is directly making the annual inspections for FEUOA? What specifically are you doing in terms of your referenced activities with the FEUOA. Please be date specific as well.

Finally, I want to know why your department has failed to issue a violation notice formally to the FEUOA with a time certain for correction. This should be standard operation procedure. Certainly your department issued me one in the past without hesitation upon discovery of a code violation. I believe it may be a requirement for your office. Please explain your lack of action in this regard.

Richard Clayton  
120 Roberts Lane, #300  
Alexandria, VA 22314  
703-836-5773

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**From:** Rudolph Thomas <[Rudolph.Thomas@alexandriava.gov](mailto:Rudolph.Thomas@alexandriava.gov)>  
**To:** Richard Clayton <[rnclayton@yahoo.com](mailto:rnclayton@yahoo.com)>  
**Cc:** Mary Odonnell <[Mary.ODonnell@alexandriava.gov](mailto:Mary.ODonnell@alexandriava.gov)>; William Coates <[William.Coates@alexandriava.gov](mailto:William.Coates@alexandriava.gov)>  
**Sent:** Tuesday, May 8, 2012 5:27 PM  
**Subject:** RE: time is of the essence for annual fire inspections at Fort Ellsworth condominiums

Mr. Clayton,

Thank you for forwarding your most recent concerns related to this matter. I assure you that we are actively working with the Fort Ellsworth Unit Owners Association to ensure compliance and will communicate to you when inspections have been completed.

Thank you in advance for your patience.

Respectfully,

*Rudolph Thomas*

Assistant Fire Chief/Fire Marshal  
City of Alexandria  
900 Second Street  
Alexandria, VA 22314  
(O) 703.746.5227  
(C) 703.801.3758

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**From:** Richard Clayton [<mailto:rnclayton@yahoo.com>]  
**Sent:** Monday, May 07, 2012 2:28 PM  
**To:** Rudolph Thomas  
**Cc:** Mary Odonnell  
**Subject:** time is of the essence for annual fire inspections at Fort Ellsworth condominiums

Mr. Thomas,

Your recent decision to reverse your earlier determination letter of March 27, 2012 and enforce the annual inspection requirement of SFPC 703.1 per your instructions to the President of the Fort Ellsworth Unit Owners Association (FEUOA) dated April 20, 2012 did not give a deadline as to when the inspections should be completed and the report submitted to your attention. Inasmuch as the FEUOA has already failed to meet its annual inspection obligations due by March 1, 2012, why have you not ordered a time certain for completion of this process and issued a violation notice to the FEUOA for failure to meet the annual deadline by March 1, 2012? I personally notified the FEUOA of this deadline in February of 2012. So they were certainly aware of it.

I have heard no word from the FEUOA as to planned inspections. It appears to me the association is purposely continuing to delay compliance with an implicit understanding your office is not serious about enforcing this requirement. Please issue a violation notice for failure to meet the March 1, 2012 deadline requirement or show good cause why you are not doing so.

Also, there needs to be a deadline for compliance with your April 20, 2012 order so the FEUOA will understand they are in serious noncompliance with the SFPC and time is of the essence. This is standard operating procedure for most violation notices, I presume. You appear to not be treating this with the importance it deserves.

Meanwhile, lives are at risk. Just recently several fire trucks were sent here on concerns of a fire. The possible lack of proper fire safeguards (yet to be determined by the FEUOA due to lack of timely annual inspections) presents a great present danger to the FE community. Your seeming indifference to the lack of compliance with the SFPC is concerning, to say the least.

Please issue a violation notice now to the FEUOA along with the usual ten day notice to comply as is standard (based on a violation notice issued to me in the past) and copy me on your efforts so I may know there is a real effort for compliance or show good cause otherwise. Time is of the essence.

Richard Clayton  
120 Roberts Lane, #300  
Alexandria, VA 22314  
703-836-5773

# Documents Submitted by City of Alexandria Fire



OFFICE OF THE CITY ATTORNEY

301 KING STREET, SUITE 1300  
ALEXANDRIA, VIRGINIA 22314

JAMES L. BANKS, JR.  
CITY ATTORNEY

CHRISTOPHER P. SPERA  
DEPUTY CITY ATTORNEY

JILL A. SCHAUB  
SENIOR ASSISTANT CITY ATTORNEY

<http://alexandriava.gov>

(703) 746-3750

FACSIMILE  
(703) 838-4810

ASSISTANT CITY ATTORNEYS  
JOANNA C. ANDERSON  
CHRISTINA ZECHMAN BROWN  
GEORGE McANDREWS  
MARY ELLIOTT O'DONNELL  
MEGHAN S. ROBERTS  
HEATHER SKEELES-SHINER  
KAREN S. SNOW

TO: Members of the City of Alexandria Local Board of  
Fire Prevention Code Appeals

FROM: Rudolph Thomas  
Fire Official and Assistant Fire Chief for the City of Alexandria

Mary O'Donnell  
Assistant City Attorney for the City of Alexandria

DATE: June 12, 2012

RE: Appeal by Richard Clayton of May 10, 2012, decision of the Alexandria Fire  
Official/Scheduled Hearing of June 18, 2012

MEMORANDUM IN SUPPORT OF THE FIRE OFFICIAL

COMES NOW the City of Alexandria Fire Official, Rudolph Thomas, by counsel, and submits this Memorandum to the City of Alexandria Local Board of Fire Prevention Code Appeals in support of the decision of the Fire Official appealed by Richard Clayton related to the Fort Ellsworth Condominiums (Fort Ellsworth), located at 100-136 Roberts Lane in the City of Alexandria, Virginia. Mr. Clayton's Application for Appeal seeks to compel the Fire Official to enter Notices of Violation against the Fort Ellsworth Unit Owners Association related to an alleged failure to inspect the property under Section 703.1 of the 2009 Virginia Statewide Fire Prevention Code (SFPC). The Fire Official asserts that (1) Section 703.1 of the SFPC does not

apply in Virginia due to Section 103.2 of the SFPC, (2) Section 109.1 of the SFPC exempts the Fort Ellsworth Condominium Association from inspection, and (3) even if inspections are required, the physical structure of these particular units make inspections impossible.

#### FACTUAL HISTORY

Mr. Clayton first complained to the City of Alexandria regarding his concerns regarding his condominium in 2007, complaining of cigarette smoke migration into his condominium. On October 19, 2007, Chief Fire Marshall and Alexandria Fire Official Robert Rodriguez held that no violations of the Virginia Maintenance Code were found at Fort Ellsworth. (Exhibit 1) Mr. Clayton appealed that decision to this Board, which upheld the decision of the Fire Official on January 4, 2008. (Exhibit 2) Mr. Clayton appealed this Board's decision to the Virginia Department of Housing and Community Development State Building Code Technical Review Board (TRB). On September 18, 2009, the TRB ruled that the absence of firestops at Fort Ellsworth does not violate the Virginia Maintenance Code and that retrofitting of the buildings is not required under the Virginia Maintenance Code. (Exhibit 3). Mr. Clayton appealed that decision to the City of Alexandria Circuit Court. On June 22, 2010, the City of Alexandria Circuit Court upheld the TRB Order. On February 8, 2011, after an appeal by Mr. Clayton, the Virginia Court of Appeals upheld the decision of the Alexandria Circuit Court (Exhibit 4). Mr. Clayton petitioned for an appeal of that decision to the Virginia Supreme Court. The Virginia Supreme Court refused to hear his appeal on May 19, 2011.

In September 2009, Mr. Clayton asked for a determination from the City of Alexandria that the lack of firestopping between his unit and an adjacent unit and a common return air duct between the units constituted a violation of the SFPC. On October 7, 2009, John Catlett, then acting as Fire Official for the City of Alexandria, ruled that such conditions did not constitute a

violation of the SFPC (Exhibit 5). Clayton appealed such decision to this Board, which upheld the decision of the Fire Official on November 23, 2009. (Exhibit 6). Mr. Clayton appealed this Board's decision to the TRB, which upheld this Board's decision on June 18, 2010. (Exhibit 7) Mr. Clayton appealed the TRB decision to the City of Alexandria Circuit Court. The Circuit Court upheld the TRB decision on September 21, 2011. Mr. Clayton appealed the decision of the Circuit Court to the Virginia Court of Appeals. The Virginia Court of Appeals has not yet ruled on Mr. Clayton's appeal, as of the date of this Memorandum.

On March 20, 2012, Alexandria Fire Official and Assistant Fire Chief Rudolph Thomas received an email from Mr. Clayton requesting that he make a formal determination of the applicability of SFPC Section 703.1, as it related to Fort Ellsworth. After reviewing documentation from the previous fire official, rulings from the local board and the SFPC, Chief Thomas emailed Mr. Clayton that his email raised no new issues of fact or law related to the application of the SFPC to his unit and was, in effect, the same request as the request made in 2009. (Exhibit 8) Mr. Clayton appealed that decision.

Chief Thomas reviewed the appeal documents, and decided to revise his opinion. Due to this revision, on April 20, 2012, he sent a letter to Mr. Clayton documenting his opinion and copied the Fort Ellsworth Unit Owners Association (Association) and directed them to conduct the required inspection in the manner provided in Section 703.1 of the SFPC. (Exhibit 9). The April 20, 2012 letter provides that the Association was required to make visual inspections of such construction, to the extent that such elements are open, or able to be inspected by the removal of a removable panel or the like, as stated in the SFPC. Furthermore, it provided that the SFPC, and the previous rulings in cases involving Mr. Clayton and the Association, did not require the Association to repair, restore, or replace items of fire-resistance-rated construction

that were never installed in the buildings.

On May 1, 2012, a visual inspection of several units was conducted by an Alexandria Fire Marshal, an Association representative, a property management official, the maintenance engineer, and a legal representative for the Association. As a result of this inspection, there were no interior fire-resistance rated construction elements or interior fire-resistance rated assemblies identified to be maintained. In addition, there were no removable access panels, access doors, or ceiling tiles within units inspected to provide access to any interior fire-resistance rated construction elements or interior fire-resistance rated assemblies. As a result, no notice of violation was issued. This information was relayed to Mr. Clayton on May 11, 2012 via email. (Exhibit 10). Mr. Clayton filed an appeal of this decision on May 23, 2012.

Mr. Clayton argues that SFPC Section 703.1 requires that Fort Ellsworth conduct annual inspections and that the Fire Official must issue notices of violation for their alleged failure to do so. SFPC Section 703.1 states:

**703.1 Maintenance.** The required fire-resistance rating of fire-resistance-rated construction (including walls, firestops, shaft enclosures, partitions, smoke barriers, floors, fire-resistive coatings and sprayed fire-resistant materials applied to structural members and fire-resistant joint systems) shall be maintained. Such elements shall be visually inspected by the owner annually and properly repaired, restored or replaced when damaged, altered, breached or penetrated. Where concealed, such elements shall not be required to be visually inspected by the owner unless the concealed space is accessible by the removal or movement of a panel, access door, ceiling tile or similar movable entry to the space. Openings made therein for the passage of pipes, electrical conduit, wires, ducts, air transfer openings and holes made for any reason shall be protected with approved methods capable of resisting the passage of smoke and fire. Openings through fire-resistance-rated assemblies shall be protected by self- or automatic-closing doors of approved construction meeting the fire protection requirements for the assembly.

The Fire Official asserts that no such inspections are needed, under the SFPC, and that, in any case, all such elements, if they exist, are concealed and unable to be visually inspected.

## ARGUMENT

### I. **The requirement for inspections in SFPC Section 703.1 has been deleted from the Virginia amendments to the SFPC**

The Virginia Statewide Fire Prevention Code incorporates the International Fire Code. SFPC Section 103.1. However, the SFPC does not incorporate the International Fire Code without any amendment. SFPC Section 103.2 provides:

**103.2 Amendments.** All requirements of the referenced codes and standards that relate to fees, permits, unsafe notices, disputes, condemnation, inspections, scope of enforcement and all other procedural, and administrative matters are deleted and replaced by the provisions of Chapter 1 of the SFPC.

The Fire Official asserts that Section 103.2, by deleting all standards that require inspections unless they are specifically stated in Chapter 1 of the SFPC, deletes the requirement for owners to conduct visual inspections as stated in SFPC 703.1. Chapter 1 of the SFPC does not include any requirement by owners to inspect as stated in SFPC Section 703.1.

### II. **Multi-family dwellings are exempted from routine inspection under the SFPC in SFPC Section 109.1**

In addition, Chapter 1 of the SFPC explicitly exempts the inspection of multiple family dwellings from routine inspection. Section 109.1 of the SFPC provides:

**109.1 Inspection.** The fire official may inspect all structures and premises for the purposes of ascertaining and causing to be corrected any conditions liable to cause fire, contribute to the spread of fire, interfere with firefighting operations, endanger life, or any violations of the provisions or intent of the SFPC.

**Exception:** Single family dwellings and dwelling units in two family and multiple family dwellings and farm structures shall be exempt from routine inspections. This exemption shall not preclude the fire official from conducting routine inspections in Group R-3 or Group R-5 occupancies operating as a commercial bed and breakfast as outlined in Section 310.1 of the USBC or inspecting under Section 27-98.2 of the Code of Virginia for hazardous conditions relating to explosives, flammable and combustible conditions, and hazardous materials.

Fort Ellsworth consists of a series of garden-style condominium buildings, with several units per

building, clearly falling under the definition of "multiple family dwellings". Pursuant to SPFC 109.1, the Fire Official may not require routine inspections of these type of dwellings.

**III. If SFPC 703.1 applies to Fort Ellsworth, the physical structure of the buildings do not allow for access to any interior fire-resistance rated construction elements or assemblies**

SPFC Section 703.1 applies if the fire-resistance rated construction elements or fire-resistance rated assemblies existed and were accessible by the above stated means. Fort Ellsworth conducted a visual inspection per Chief Thomas' direction, however, the inspection showed that there were no interior fire-resistance rated construction elements or interior fire-resistance rated assemblies identified to be maintained. In addition, there were no removable access panels, access doors, or ceiling tiles within units inspected to provide access to any interior fire-resistance rated construction elements or interior fire-resistance rated assemblies. Therefore, in effect, there was nothing to inspect, so no requirement to inspect is required.

WHEREFORE, the Fire Official, by Counsel, requests that the City of Alexandria Local Board of Fire Prevention Code Appeals uphold the decision of the Fire Official to find Fort Ellsworth in compliance with the SPFC.

cc: Richard Clayton, Appellant  
Michael Thorsen, Counsel for Fort Ellsworth



CODE ENFORCEMENT

P.O. Box 178  
Alexandria, Virginia 22313

Phone (703) 838-4360  
Fax (703) 838-3880  
alexandriava.gov

John Catlett  
Director

October 19, 2007

Mr. Richard Clayton  
120 Roberts Lane, #300  
Alexandria, VA 22314

Re: Drifting Smoke Conditions at Fort Ellsworth Condominiums

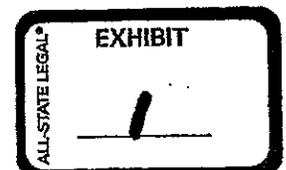
Dear Mr. Clayton,

I have reviewed your concerns for the address located at 120 Roberts Lane in the City of Alexandria, Virginia. Your e-mails have identified an issue concerning cigarette smoke migration into your apartment unit. Unfortunately there are no provisions in the Virginia Maintenance Code (VMC) that are enforceable in this matter.

The buildings located at Fort Ellsworth Condominiums were constructed in 1974, which predated the Virginia Uniform Statewide Building Code. All final inspections and approvals were completed and a Certificate of Occupancy was issued for your building in August of 1976. At that time the building complied with the code under which the building was constructed. Any code violations relating to construction would have been required to be reported within two years after the issuance of the certificate of occupancy. According to our records, no such violations were noted and the statute of limitations has expired. There have been no permits recorded for any modifications to the existing, approved ventilation system; therefore the system continues to function as approved.

During discussions involving this case, you provided a code cite from the VMC, in particular, section 403.4 Process Ventilation, as a basis for enforcement of your situation. This section addresses ventilation requirements for "injurious, toxic, irritating or noxious fumes, gases, dusts or mists" when generated through a "process" within a structure. The intent of this code section is to address process ventilation issues associated with various equipment such as clothes dryers, combustion equipment such as furnaces, water heaters, automobile garage exhaust systems, etc. This code section is not applicable to the migration of cigarette smoke from one residential unit to another.

Staff from Code Enforcement inspected your unit on September 14 and 21. An inspection of your unit's mechanical ventilation system determined that it was functioning as designed and approved.



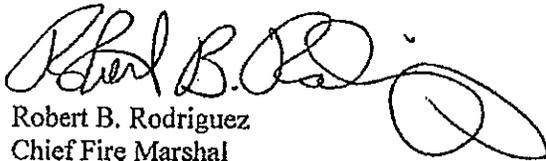
Ltr to R.Clayton frm. R.Rodriguez  
Re: Drifting Smoke Conditions at Fort Ellsworth Condominiums  
Page 2

In addition, as staff did a more detailed inspection of the ventilation system, no odors of cigarette smoke was noted.

Finally, on October 15 you provided an e-mail to Assistant City Attorney Mary O'Donnell in which you cited VMC Section 105.3.1 Limitation to requirements for retrofitting, which addresses retrofitting requirements to pre-USBC buildings "because of faulty design or equipment that constitute a danger to life or health or a serious hazard." As indicated earlier in this letter, the building was approved for occupancy in 1976 and a recent inspection of the mechanical system determined that it continues to function as designed and originally approved. The design and functioning of this equipment was not determined to be faulty and therefore VMC Section 105.3.1 is not applicable.

City staff has looked into this matter from both a code and legal standpoint. Inspection staff has determined that the mechanical system is functioning satisfactorily as approved. The City Attorney's Office has reviewed these findings, the code requirements of the Virginia Maintenance Code, and the homeowner association documents for the Fort Ellsworth Condominiums and has determined that this is a civil matter and not a property maintenance code issue. Therefore the city will not take any further action on this matter. Should you wish to appeal this matter, I have enclosed an Appeal Application for your use.

Sincerely,



Robert B. Rodriguez  
Chief Fire Marshal

Enclosure (1)

Cc: John Catlett, Director, Code Enforcement  
Adam Thiel, Fire Chief  
Mary O'Donnell, Assistant City Attorney  
Russell Furr, Assistant Fire Marshal  
William Coates, Assistant Fire Marshal  
Andrea Buchanan, Assistant Fire Marshal  
Project File

CITY OF ALEXANDRIA  
LOCAL BOARD OF BUILDING CODE APPEALS  
REPORT OF FINAL DETERMINATION

January 4, 2008  
(CMP 2007-06576)

Richard Clayton, 120 Robert's Lane #300

The meeting was conducted in the office of the Code Enforcement Bureau, 301 King Street, Room 4200, Alexandria, Virginia at 10:00 am.

BOARD MEMBERS PRESENT

Rick Clausen, Chairman  
Tom Downey  
Andrew Campanella  
Russell Kopp

STAFF PRESENT

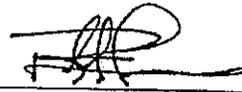
John Catlett, Director  
Bob Rodriguez, Chief Fire Marshal  
Russell Furr, Assistant Fire Marshal  
Tom Rose, Deputy Fire Marshal

APPEALANT

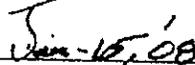
Richard Clayton

In the case of Richard Clayton versus City of Alexandria Code Official, the Local Board of Building Code Review voted unanimously to uphold the findings of the Code Official John Catlett through the final determination letter by Chief Fire Marshal Robert Rodriguez. In addition, the Board determined that the local code official did not have the authority through the Virginia Maintenance Code (VMC) to require compliance with possible building code violations under a code pre-existing the Virginia Uniform Statewide Building Code unless the condition resulted from a lack of maintenance or constituted an Unsafe Building by definitions established by the VMC. The meeting was adjourned at 11:15 am.

Final Determination: Code Official determination upheld.



Richard Clausen, Chairman



Date

"Any person who was a party to the appeal may appeal to the State Review Board by submitting an application to such Board within 21 calendar days upon receipt by certified mail of this resolution. Application forms are available from the Office of the State Review Board, 501 North Second Street, Richmond, Virginia 23219, (804) 371-7150."



VIRGINIA:

BEFORE THE  
STATE BUILDING CODE TECHNICAL REVIEW BOARD

IN RE: Appeal of Richard Clayton  
Appeal No. 08-2

Hearing Date: July 17, 2009

DECISION OF THE REVIEW BOARD

I. PROCEDURAL BACKGROUND

The State Building Code Technical Review Board ("Review Board") is a Governor-appointed board established to rule on disputes arising from application of the Virginia Uniform Statewide Building Code ("USBC") and other regulations of the Department of Housing and Community Development. See §§ 36-108 and 36-114 of the Code of Virginia. Enforcement of the USBC in other than state-owned buildings is by local city, county or town building departments. See § 36-105 of the Code of Virginia. An appeal under the USBC is first heard by a local board of building code appeals and then may be further appealed to the Review Board. See § 36-105 of the Code of Virginia. The Review Board's proceedings are governed by the Virginia Administrative Process Act. See § 36-114 of the Code of Virginia.



## II. CASE HISTORY

Richard Clayton ("Clayton"), owner of condominium unit #300/120 Roberts Lane, in the Fort Ellsworth Condominiums in Alexandria, appeals determinations by the City of Alexandria USBC official (the "code official") relative to the migration of cigarette smoke into his unit.

In October of 2007, after inspection of Clayton's unit and investigating a complaint by Clayton that cigarette smoke from other parts of the building containing his unit was infiltrating his unit, the code official informed Clayton that no violations of the Part III of the USBC, known as the Virginia Maintenance Code ("VMC") were present.

Clayton appealed the code official's determination to the City of Alexandria Building Code Board of Appeals ("City USBC board"), which ruled to uphold the code official's determination. Clayton then further appealed to the Review Board.

In August of 2008, staff of the Review Board conducted an informal fact-finding conference to clarify the issues in Clayton's appeal. The conference was attended by Clayton and the code official. At the conference, Clayton raised issues concerning possible fire safety violations in the original construction of the building containing his unit.

Review Board staff advised Clayton and the code official that the issue of whether or not there were fire safety violations may not be properly under appeal. At the conference, Review Board staff established a time frame for Clayton to submit documentation that he had alleged fire safety violations and received a decision from the code official that no fire safety violations existed prior to his appeal to the City USBC board.

Clayton did not provide further documentation, so the Review Board staff summary of the appeal, prepared for the Review Board members for the hearing of Clayton's appeal, included an issue of whether Clayton's appeal of whether fire safety violations were present was properly before the Review Board.

Clayton, the code official and representatives of the Fort Ellsworth Condominium Association were present at the hearing before the Review Board.

### III. FINDINGS OF THE REVIEW BOARD

Whether any fire safety issues are properly before the Review Board.

Representations were made at the hearing before the Review Board by Clayton and the code official that subsequent to Clayton's filing the appeal to the City USBC board, Clayton raised issues concerning whether the original construction of the building containing his condominium unit was in violation of the

code in effect at the time of construction of the building, specifically alleging that the code required firestopping materials between floor levels which were not present and prohibited the recirculation of air from one dwelling unit to another. Further, representations were made that the code official determined that the lack of firestopping was not a violation of the VMC and communicated this determination to the City USBC board, which upheld the determination.

Based on those representations, the Review Board finds that the issue of whether violations of the VMC exit relative to the lack of firestopping between floors is properly before the Review Board. No other fire safety issues were decided and appealed.

Whether the lack of firestopping between floors is a violation of the VMC.

Based on the evidence and testimony, Clayton's condominium building was constructed in 1974 and was not subject to the USBC when constructed. The initial edition of the USBC was effective on September 1, 1973; however, the enabling legislation for the USBC permitted local building codes to remain in effect for up to two years after the effective date of the USBC and also provided that buildings for which a building permit had been obtained or on which construction had commenced prior to the effective date of the USBC would remain subject to the codes in effect at the time of construction.

The VMC was made part of the USBC by authorizing legislation in 1982 to establish minimum regulations for existing buildings to insure the protection of the public health, safety and welfare. The VMC, from its inception, took into consideration that existing buildings could fall into one of three categories: a building constructed where no codes were in effect at the time of construction; a building constructed where a local building code was in effect at the time of construction; and, a building which was subject to the USBC when constructed. The VMC sets different standards for those three categories of buildings.

Clayton's condominium building is subject to the category of VMC provisions for buildings subject to a local building code at the time of construction. Accordingly, Section 105.3 of the VMC provides limitations in addressing potentially unsafe conditions in such buildings and states as follows:

105.3 Unsafe conditions not related to maintenance. When the code official finds a condition that constitutes a serious and dangerous hazard to life or health in a building or structure constructed prior to the initial edition of the USBC and when that condition is of a cause other than improper maintenance or failure to comply with state or local building codes which were in effect when the building or structure was constructed, then the code official shall be permitted to order those minimum changes to the design or construction of the building or structure to remedy the condition. (Emphasis added.)

As is made clear by the above language and in accordance with §§ 103.2 and 105.3.1 of the VMC, which further address limitations in the use of the VMC to require alterations to the design or

construction of existing buildings, conditions in buildings subject to a local building code when constructed which are caused by the lack of compliance with that code may not be treated as violations of the VMC.

Therefore, as the issue in Clayton's appeal is that the local building code in effect when Clayton's condominium building was constructed required firestopping between floor levels and that such firestopping is not present in certain areas between floor levels in Clayton's condominium building, the code official was correct in determining that the VMC cannot be used to require the firestopping to be retroactively installed.

In addition, the code official's determination that the lack of firestopping is not a condition which in and of itself rises to the level of meeting the definition of an unsafe structure in § 202 of the VMC is correct. Accepted practices at the time of construction of the building may have permitted the use of alternative materials or methods of construction negating or minimizing the need for the firestopping.

Further, Clayton's argument that the phrase "shall be maintained" where used in the VMC means "to comply with the code in effect at the time of construction" is incorrect. Section 201.4 of the VMC states that "[w]here terms are not defined through the methods authorized by this section, such terms shall have ordinarily accepted meanings such the context implies."

The common, ordinary meaning of the term "maintained" is "to keep in an appropriate condition" and "to keep in a condition of good repair or efficiency."<sup>1</sup>

Whether the migration of cigarette smoke into Clayton's condominium unit from other parts of the building is a violation of the VMC.

As previously stated, the purpose of the VMC is to require the maintenance of existing buildings. Therefore, unless there is an underlying condition caused by a lack of maintenance which is causing the migration of cigarette smoke into Clayton's unit, there is no violation of the VMC. No such conditions were identified.

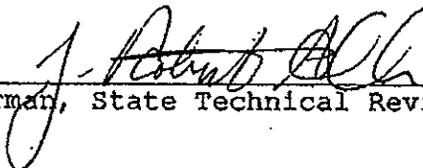
Further, even the current USBC for the construction of new buildings does not contain provisions specifically for preventing the migration of cigarette smoke in buildings. Therefore, while modern construction techniques and provisions of the USBC addressing the tightness of walls and floors for fire safety and energy efficiency purposes may to some extent prevent or limit the movement of air through building components and areas, the evidence of migration of cigarette smoke in a building does not, in and of itself, constitute a violation of the USBC.

#### IV. FINAL ORDER

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<sup>1</sup> See Random House Dictionary and American Heritage Dictionary of the English Language, Fourth Edition

The appeal having been given due regard, and for the reasons set out herein, the Review Board orders the decisions of the code official and the City USBC board that no violations of the VMC are present relative to firestopping or the migration of cigarette smoke in the building containing Clayton's condominium unit to be, and hereby are, upheld.

  
\_\_\_\_\_  
Chairman, State Technical Review Board

Sept. 18, 2009  
Date Entered

As provided by Rule 2A:2 of the Supreme Court of Virginia, you have thirty (30) days from the date of service (the date you actually received this decision or the date it was mailed to you, whichever occurred first) within which to appeal this decision by filing a Notice of Appeal with Vernon W. Hodge, Secretary of the Review Board. In the event that this decision is served on you by mail, three (3) days are added to that period.

COURT OF APPEALS OF VIRGINIA

Present: Judges Humphreys, Haley and Alston  
Argued at Alexandria, Virginia

RICHARD CLAYTON

v. Record No. 1847-10-4

MEMORANDUM OPINION\* BY  
JUDGE ROBERT J. HUMPHREYS  
FEBRUARY 8, 2011

STATE BUILDING CODE TECHNICAL REVIEW BOARD

FROM THE CIRCUIT COURT OF THE CITY OF ALEXANDRIA  
Nolan B. Dawkins, Judge

Richard N. Clayton, *pro se*.

Steven P. Jack, Assistant Attorney General (Kenneth T. Cuccinelli,  
II, Attorney General, on brief), for appellee.

Richard Clayton ("Clayton") appeals an order entered by the Circuit Court for the City of Alexandria ("circuit court"), upholding the State Building Code Technical Review Board's ("Review Board") decision that the absence of firestops in Clayton's condominium building does not violate the Virginia Maintenance Code ("VMC"). For the following reasons, we disagree with Clayton and affirm the circuit court.

I. ANALYSIS

Clayton contends on appeal that the circuit court erred in concluding the Review Board "committed no error of law and properly interpreted its regulations" when it ruled that the absence of firestops in Clayton's condominium building does not violate the VMC. Specifically, Clayton argues the Review Board "improperly relied solely on section 105.3 of the VMC and disregarded sections 105.1 and 703.1 of the VMC, which mandate installation of fire stops

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\* Pursuant to Code § 17.1-413, this opinion is not designated for publication.



because they were required at the time of construction and their absence creates an unsafe condition." We disagree with the legal position advanced by Clayton.

"On appeal of an agency decision, 'the sole determination as to factual issues is whether substantial evidence exists in the agency record to support the agency's decision. The reviewing court may reject the agency's findings of fact only if, considering the record as a whole, a reasonable mind necessarily would come to a different conclusion.'" Avalon Assisted Living Facilities v. Zager, 39 Va. App. 484, 499-500, 574 S.E.2d 298, 305 (2002) (quoting Johnston-Willis, Ltd. v. Kenley, 6 Va. App. 231, 242, 369 S.E.2d 1, 7 (1988)). "In making this determination, 'the reviewing court shall take due account of the presumption of official regularity, the experience and specialized competence of the agency, and the purposes of the basic law under which the agency has acted.'" Id. "[W]here the question involves an interpretation which is within the specialized competence of the agency and the agency has been entrusted with wide discretion by the General Assembly, the agency's decision is entitled to special weight in the courts." Johnston-Willis, 6 Va. App. at 244, 369 S.E.2d at 8.

"The rationale of the statutory scheme is that the [administrative agency] shall apply expert discretion to the matters coming within its cognizance, and judicial interference is permissible only for relief against the arbitrary or capricious action that constitutes a clear abuse of the delegated discretion. The reviewing judicial authority may not exercise anew the jurisdiction of the administrative agency and merely substitute its own independent judgment for that of the body entrusted by the Legislature with the administrative function."

Virginia Alcoholic Beverage Control Com. v. York Street Inn, Inc., 220 Va. 310, 315, 257 S.E.2d 851, 855 (1979) (alteration in original) (quoting Schmidt v. Board of Adjustment of City of Newark, 88 A.2d 607, 615-16 (N.J. 1952)). "Whether the issue is one of law or fact or substantial evidence, we are directed to take account of the role for which agencies are created and public policy as evidenced by the basic laws under which they operate." Johnston-Willis, 6 Va. App. at 244, 369 S.E.2d at 8 (citation omitted).

Clayton's appeal rests largely upon principles associated with statutory interpretation, which is a question of law that we review *de novo*. Grafmuller v. Commonwealth, 57 Va. App. 58, 61, 698 S.E.2d 276, 278 (2010). "[W]e determine the legislative intent from the words used in the statute, applying the plain meaning of the words unless they are ambiguous or would lead to an absurd result." Id. (quoting Wright v. Commonwealth, 278 Va. 754, 759, 685 S.E.2d 655, 657 (2009)). "[W]e must give effect to the legislature's intention as expressed by the language used unless a literal interpretation of the language would result in a manifest absurdity." Convers v. Martial Arts World of Richmond, Inc., 273 Va. 96, 104, 639 S.E.2d 174, 178 (2007). "If a statute is subject to more than one interpretation, we must apply the interpretation that will carry out the legislative intent behind the statute." Id. "The plain, obvious, and rational meaning of a statute is to be preferred over any curious, narrow, or strained construction." Commonwealth v. Zamani, 256 Va. 391, 395, 507 S.E.2d 608, 609 (1998).

As the Review Board correctly notes, the Uniform Statewide Building Code ("USBC") is divided into three distinct parts. Part I pertains specifically to the construction of new buildings and is referred to as the Virginia Construction Code. See 13 VAC 5-63-10(A). Part II pertains to the rehabilitation of existing buildings and is referred to as the Virginia Rehabilitation Code. See 13 VAC 5-63-400(A). Part III pertains to the maintenance of existing structures and is referred to as the VMC.<sup>1</sup> See 13 VAC 5-63-450(A). These distinct parts "must be considered together in construing their various material provisions." Colbert v. Commonwealth, 47 Va. App. 390, 395, 624 S.E.2d 108, 110 (2006). "This requires that 'the literal meaning of separate provisions, if in apparent conflict[,] . . . must yield to a reasonable and fair interpretation

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<sup>1</sup> According to the Review Board, the VMC contemplates three distinct types of existing structures: buildings constructed where no codes were in effect at the time of construction; buildings constructed where a local building code was in effect at the time of construction; and buildings that were subject to the USBC at the time of construction. Clayton's condominium falls into the category of a structure constructed under a local building code in effect at the time of construction.

to be gathered from the context, the subject matter and the reason and spirit of the law.” *Id.* at 395, 624 S.E.2d at 110-11 (alteration in original) (quoting *Buzzard v. Commonwealth*, 134 Va. 641, 653, 114 S.E. 664, 667 (1922)). In other words, “we have a ‘duty to interpret the several parts of a statute as a consistent and harmonious whole so as to effectuate the legislative goal.’” *Id.* at 395, 624 S.E.2d at 111 (quoting *Virginia Elec. & Power Co. v. Bd. of County Supervisors*, 226 Va. 382, 387-88, 309 S.E.2d 308, 311 (1983)).

Several sections of the VMC are especially pertinent to this appeal. Section 103.1 of the VMC provides in relevant part, “[t]his code prescribes regulations for the maintenance of all existing buildings and structures and associated equipment, including regulations for unsafe buildings and structures.” 13 VAC 5-63-470(A). To that end, Section 103.2 states,

Buildings and structures shall be maintained and kept in good repair in accordance with the requirements of this code and when applicable in accordance with the USBC under which such building or structure was constructed. *No provision of this code shall require alterations to be made to an existing building or structure or to equipment unless conditions are present which meet the definition of an unsafe structure or a structure unfit for human occupancy.*

13 VAC 5-63-470(B) (emphases added). In accordance with Section 105.1, “[a]ll conditions causing such structures to be classified as unsafe or unfit for human occupancy shall be remedied or as an alternative to correcting such conditions, the structure may be vacated and secured against public entry or razed and removed.” 13 VAC 5-63-490(A). A structure “unfit for human occupancy” is defined in the VMC as

[a]n existing structure determined by the code official to be dangerous to the health, safety and welfare of the occupants of the structure or the public because (i) of the degree to which the structure is in disrepair or lacks maintenance, ventilation, illumination, sanitary or heating facilities or other essential equipment or (ii) the required plumbing and sanitary facilities are inoperable.

13 VAC 5-63-510(B). An "unsafe structure" is

[a]n existing structure (i) determined by the code official to be dangerous to the health, safety and welfare of the occupants of the structure or the public, (ii) that contains unsafe equipment, or (iii) that is so damaged, decayed, dilapidated, structurally unsafe or of such faulty construction or unstable foundation that partial or complete collapse is likely.

Id.

When the code official finds a condition that constitutes a serious and dangerous hazard to life or health in a building or structure constructed *prior to* the initial edition of the USBC and when that condition is of a cause *other than* improper maintenance or failure to comply with state or local building codes that were in effect when the building or structure was constructed, then the code official shall be permitted to order those minimum changes to the design or construction of the building or structure to remedy the condition.

13 VAC 5-63-490(C) (emphasis added). Thus, although the VMC "[i]n accordance with Section 103.2 . . . does not generally provide for requiring the retrofitting of any building or structure,"

13 VAC 5-63-490(D), Section 105.3.1 acknowledges that "conditions may exist in buildings or structures constructed prior to the initial edition of the USBC because of faulty design or equipment that constitute a danger to life or health or a serious hazard," 13 VAC 5-63-490(D).

However, Section 105.3.1 also provides,

Any changes to the design or construction required by the code official under this section shall be only to remedy the *serious hazard or danger to life or health* and such changes shall not be required to fully comply with the requirements of the Virginia Construction Code applicable to newly constructed buildings or structures.

13 VAC 5-63-490(D) (emphasis added).

Upon a review of these provisions, the Review Board concluded that the lack of compliance with the operative building code at the time the condominiums were built "may not

be treated as [a] violation[] of the VMC.”<sup>2</sup> The Review Board found that “the lack of firestopping is not a condition which in and of itself rises to the level of meeting the definition of an unsafe structure in [13 VAC 5-63-510(B)].” The Review Board noted that, “accepted practices at the time of construction of the building may have permitted the use of alternative materials or methods of construction negating or minimizing the need for firestopping.” The Review Board further observed, “even the current USBC for the construction of new buildings does not contain provisions specifically for preventing the migration of cigarette smoke in buildings.” In fact, all final inspections and approvals under the operative building code were completed at the time of construction and a certificate of occupancy was issued for the condominiums in August 1976.<sup>3</sup> The Review Board, thus, concluded that because the lack of firestops in the condominiums does not render the condominiums unsafe for human occupancy or otherwise dangerous to the life and health of its occupants, the insertion of firestops is not mandated by the VMC. The Review Board’s findings and conclusions are in keeping with the “experience and specialized competence of the agency,” and they are in accord with the basic law under which the agency has acted.” See Johnston-Willis, 6 Va. App. at 244, 369 S.E.2d at 8. We are, thus, bound by the Review Board’s decision. In other words, because the Review

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<sup>2</sup> The parties do not dispute the fact that the lack of firestopping in the condominiums resulted in a violation of the building code under which they were built. The parties merely disagree as to the appropriate remedy.

<sup>3</sup> According to the local department, “any code violations relating to construction would have been required to be reported within two years after the issuance of the certificate of occupancy.” See 13 VAC 5-63-150(C). Because “no such violations were noted,” the local department found that “the statute of limitations has expired.”

Board's findings are not arbitrary and capricious, and because the VMC by its plain wording supports the Review Board's conclusions, we may not disturb its decision on appeal.

Indeed, Clayton's suggestion that the condominiums are "unsafe" and "unfit for human occupancy" is untenable under the VMC's articulated definitions of those terms. The condominiums were not in disrepair, they contained all necessary and functioning utilities, they were structurally sound, and they did not impose any particularized danger to the occupants or the public. In fact, the building has existed in this current condition since it was built more than 35 years ago. Thus, contrary to Clayton's assertion, the Review Board did not err in finding the condominiums do not meet the definition of "unsafe" or "unfit for human occupancy" under the plain language of the VMC. It follows that, because the condominiums are not, in fact, "unsafe" or "unfit for human occupancy," the Review Board was correct in finding that the lack of firestopping does not violate the VMC, or that retrofitting is not required under the VMC. See 13 VAC 5-63-490. The circuit court did not, therefore, abuse its discretion in upholding the decision of the Review Board.

Clayton, nevertheless, disagrees with the ultimate conclusions reached by the Review Board, arguing instead that the delineated sections of the VMC support his assertion that the lack of firestopping in his building is a clear violation of the VMC and, as such, the installation of firestopping is mandated by the VMC. Fundamentally, Clayton disagrees with the Review Board's finding that the lack of firestopping does not render the condominiums "unsafe" or "unfit for human occupancy." Clayton suggests that the lack of firestopping is a fire hazard under Section 703.1 of the VMC, which provides that, "[t]he required fire resistance rating of fire-resistance-rated walls, fire stops, shaft enclosures, partitions and floors shall be

maintained.”<sup>4</sup> Clayton interprets the phrase “shall be maintained” in Section 703.1 essentially as meaning “shall be brought into compliance with the original building code.” In support of his assertion, Clayton cites the Virginia Public Building Safety Regulations (“VPBSR”), which provides that “an existing building is required to be maintained in accordance with the building code that was in effect at the time the building was constructed and with the requirements of any applicable maintenance provisions of Virginia’s fire code.” However, the VPBSR also states,

This means that many conditions identified in an older building that may not be in full compliance with today’s codes are acceptable because these conditions were okay at the time the building was constructed. As long as the use of the building is not changed, the building owner is not legally required to retrofit the building to meet the current code.

VPBSR, page ii.

For all of these reasons, we hold that the Review Board did not act arbitrarily or capriciously in finding that retrofitting of firestops in Clayton’s condominium is not required as a matter of law. We, thus, affirm the circuit court.

## II. CONCLUSION

For the foregoing reasons, we conclude the circuit court did not abuse its discretion in finding that the Review Board “committed no error of law and properly interpreted its regulations,” in upholding the Review Board’s decision. We, thus, affirm the circuit court.<sup>5</sup>

Affirmed.

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<sup>4</sup> The VMC actually ends at Chapter 6 and does not include a Chapter 7. However, the VMC adopts by reference the International Property Maintenance Code of 2006, which includes Chapter 7 “Fire Safety Requirements.” Section 703.1 of the VMC, thus, refers to Chapter 7 of the International Property Maintenance Code of 2006. See 13 VAC 5-63 Title Doc. Inc. by Ref. (2010).

<sup>5</sup> We deny Clayton his request for attorney’s fees. See Code § 2.2-4030(A) (“In any civil case . . . in which any person contests any agency action, such person shall be entitled to recover from that agency . . . reasonable costs and attorneys’ fees if such person substantially prevails on the merits of the case and the agency’s position is not substantially justified . . . (emphasis added)).



John D. Callett  
Director

OFFICE OF BUILDING AND FIRE CODE  
ADMINISTRATION  
301 King Street  
Room-4200  
Alexandria, Virginia 22314

Phone (703) 746-4200  
Fax (703) 549-4589  
alexandriava.gov

CERTIFIED MAIL

October 7, 2009

Mr. Richard Clayton  
120 Roberts Lane, #300  
Alexandria, Virginia 22314

Dear Mr. Clayton,

This letter is to serve as a response to your email request that the City of Alexandria apply the Virginia Statewide Fire Prevention Code (SFPC) to the fire-stopping and air circulation issues that exist in your condominium unit. I am advising you that the SFPC does not apply as it is a maintenance and use code, and does not contain provisions applicable to requiring construction.

The introduction of the 2006 SFPC clarifies the intended use:

#### *Introduction*

*The Virginia Statewide Fire Prevention Code (SFPC) is a state regulation promulgated by the Virginia Board of Housing and Community Development in cooperation with the Virginia Fire Services Board, both Governor-appointed boards, for the purpose of establishing statewide standards to safeguard life and property from the hazards of fire or explosion arising from the improper maintenance of life safety and fire prevention and protection materials, devices, systems and structures and the unsafe storage handling, and use of substances, materials and devices, including fireworks, explosives and blasting agents, wherever located.*

For something to be maintained, it must exist. The lack of or failure to place fire-stopping is not an issue for the SFPC. If it existed and had been breached or damaged, the SFPC would require repair. However, retrofitting provisions of an existing building for any construction issues fall under the Virginia Maintenance Code.

The application of the VMC has been thoroughly vetted at both the local and state level, and the appeals have been heard. The recent Technical Review Board (TRB) determination in your case did not dispute that the VMC was the appropriate code to address your concerns. However, they determined that the conditions would have to rise to the definition of unsafe or uninhabitable as defined in the VMC to apply the retrofitting requirement. The Board agreed that the concerns do not rise to the level contained



in the unsafe definitions. Therefore, the ability for the City of Alexandria to compel the retrofitting of the structure does not exist. As identified previously, you have the right to appeal the TRB decision to the local court of jurisdiction.

#### **SFPC Application to Pre-USBC Buildings and Structures:**

The SFPC establishes the following application of the code to pre USBC buildings:

##### *102.2 Application to pre-1973 buildings and structures.*

*Buildings and structures constructed prior to the USBC (1973) shall comply with the maintenance requirements of the SFPC to the extent that equipment, systems, devices, and safeguards which were provided and approved when constructed shall be maintained....*

The above code section provides that pre-USBC buildings have to be maintained only to the extent provided in the SFPC for equipment, systems, devices and safeguards which were provided and approved when the building was constructed. This code has no authority to go back and require that something be constructed that did not exist.

#### **Applicability of the Unsafe Provisions of the SFPC:**

Your reference to SFPC Section 110.1, (1) regarding unsafe conditions is not applicable if the SFPC itself is not applicable. As noted previously, this code cannot require the addition of construction or fire safety components. It does provide for the maintenance of features that exist and pertain to the general fire prevention and fire spread within a building. In addition, Sections 110.2 and 110.3 clearly define the maintenance and use role of the SFPC.

##### *110.2 Maintenance.*

*The owner shall be responsible for the safe and proper maintenance of any structure, premises or lot. In all structures, the fire protection equipment, means of egress, alarms, devices and safeguards shall be maintained in a safe and proper operating condition as required by the SFPC and applicable referenced standards.*

##### *110.3 Occupant responsibility.*

*If a building occupant creates conditions in violation of this code, by virtue of storage, handling and use of substances, materials, devices and appliances, such occupant shall be held responsible for the abatement of said hazardous conditions.*

Section 110.4 states what is considered unsafe and applicable under the purview of the SFPC.

##### *110.4 Unsafe structures.*

*All structures that are or shall hereafter become unsafe or deficient in adequate exit facilities or which constitute a fire hazard, or are otherwise dangerous to human life or the public welfare, or by reason of illegal or improper use, occupancy or maintenance or which have*

sustained structural damage by reason of fire, explosion, or natural disaster shall be deemed unsafe structures. A vacant structure, or portion of a structure, unguarded or open at door or window shall be deemed a fire hazard and unsafe within the meaning of this code. Unsafe structures shall be reported to the building official or building maintenance official who shall take appropriate action under the provisions of the USBC to secure abatement. Subsequently, the fire official may request the legal counsel of the local governing body to institute the appropriate proceedings for an injunction against the continued use and occupancy of the structure until such time as conditions have been remedied.

The circumstances provided in your complaint are not the result of any of the conditions noted in this section. They are not a result of improper maintenance or use as pointed to in the preface of the intended use of the SFPC. Therefore, the application of the SFPC does not apply.

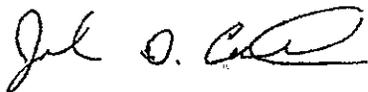
As previously noted, your case was appropriately applied through the Virginia Maintenance Code. However do to limitations in that code regarding retrofitting, there is no compliance requirement available that the City of Alexandria can enforce.

You have the right to appeal this decision to the local appeals board as directed in SFPC Section 112.5 within fourteen days from receipt of this letter. You should be advised the Local Building Code Board of Appeals also serves as the Local Fire Prevention Code Board of Appeals. An application is provided for your use.

Please feel free to contact our office at 703.746.4200 if we can be of any assistance.

In the interest of building safety, I am . . .

Sincerely,



John D. Catlett, MCP, CBO, CPCA  
Director  
Office of Building and Fire Code Administration

CC: Mary A. O'Donnell, Assistant City Attorney  
Fort Ellesworth Condominium Association  
Robert Rodriguez, Chief Fire Marshal

Attachments:

Email of request from Richard Clayton  
State Technical Review Board final determination of appeal

**CITY OF ALEXANDRIA  
LOCAL BOARD OF BUILDING CODE APPEALS  
REPORT OF FINAL DETERMINATION  
November 23, 2009  
Richard Clayton, 120 Roberts Lane #300**

The meeting was conducted in the office of Code Administration, 301 King Street, Room 4200, Alexandria, Virginia at 12:30 p.m.

**BOARD MEMBERS PRESENT**

Joshua Carpenter, Acting Chair  
Robert Emard  
Magnus Monson

**STAFF PRESENT**

John Catlett, Director  
Russell Furr, Assistant Fire Marshal  
James Banks, City Attorney  
Penny Gausman, Secretary

**APPELLANT**

Richard Clayton

In the case of Richard Clayton versus the City of Alexandria Fire Code Official, the Local Board of Building Code Appeals voted unanimously that the Fire Code Official has made the appropriate determination that the Virginia Fire Prevention Code does not require retrofitting of building elements that may not have been previously provided.

Final Determination: Code Official determination upheld.

  
\_\_\_\_\_  
Joshua Carpenter, Acting Chair

11/5/10  
\_\_\_\_\_  
Date

Any person who was a party to the appeal may appeal to the State Review Board by submitting an application to such Board within 21 calendar days upon receipt by certified mail of this resolution. Application forms are available from the Office of the State Review Board, 501 North Second Street, Richmond, Virginia 23219 (804) 371-7150



VIRGINIA:

BEFORE THE  
STATE BUILDING CODE TECHNICAL REVIEW BOARD

IN RE: Appeal of Richard N. Clayton  
Appeal No. 10-2

Hearing Date: June 18, 2010

DECISION OF THE REVIEW BOARD

I. PROCEDURAL BACKGROUND

The State Building Code Technical Review Board ("Review Board") is a Governor-appointed board established to rule on disputes arising from application of the Virginia Statewide Fire Prevention Code (the "SFPC") and other regulations of the Department of Housing and Community Development. See §§ 27-98 and 36-114 of the Code of Virginia. Enforcement of the SFPC in other than state-owned buildings is by local city, county or town fire prevention agencies, if the local government has elected to enforce the SFPC. See § 27-98 of the Code of Virginia. An appeal under the SFPC is first heard by a local board of appeals and then may be further appealed to the Review Board. See § 27-98 of the Code of Virginia. The Review Board's proceedings are governed by the Virginia Administrative Process Act. See § 36-114 of the Code of Virginia.



## II. CASE HISTORY

Richard N. Clayton ("Clayton"), owner of a multi-level condominium identified as Unit #300, 120 Roberts Lane, in the City of Alexandria, appeals a decision of the City of Alexandria SFPC official (the "fire official") that no SFPC violations are present in his unit or in the building in which his unit is located.

In September of 2009, Clayton requested the fire official to determine that his condominium unit and the unit below his were unsafe due to the lack of firestopping in a wall cavity used as a return air chase common to both units.

By letter in October of 2009, the fire official informed Clayton that no SFPC violations were present.

Clayton appealed the fire official's decision to the City of Alexandria Local Board of Building Code Appeals ("City SFPC board"), which is the authorized board to hear appeals from the application of both the Virginia Uniform Statewide Building Code (the "USBC") and the SFPC by the City's code enforcement department.

The City SFPC board heard Clayton's appeal in November of 2009 and ruled to uphold the fire official's decision. The final order of the City SFPC was issued in January of 2010.

Clayton then further appealed to the Review Board and after both parties were given the opportunity to submit supplemental

documents, a hearing was held before the Review Board, attended by both Clayton and the fire official.

### III. FINDINGS OF THE REVIEW BOARD

Clayton's building was constructed prior to the implementation of the USBC and is known as a "pre-1973 building." Section 102.2 of the SFPC sets out the application of the SFPC to pre-1973 buildings and states as follows:

102.2 Application to pre-1973 buildings and structures. Buildings and structures constructed prior to the USBC (1973) shall comply with the maintenance requirements of the SFPC to the extent that equipment, systems, devices, and safeguards which were provided and approved when constructed shall be maintained. Such buildings, if subject to the state fire and public building regulations (Virginia Public Building Safety Regulations, VR 394-01-05) in effect prior to March 31, 1986, shall also be maintained in accordance with those regulations.

The fire official's decision, upheld by the City SFPC board, that there were no violations in Clayton's building was based on the wording in Section 102.2 which only requires equipment, systems, devices and safeguards which were provided and approved when constructed to be maintained. Since the building was constructed and approved under the building code in effect in the City of Alexandria at the time and since there were no maintenance issues, the fire official determined that the building was in compliance with Section 102.2.

Clayton argues that the use of the building wall cavity for a return air chase made the building an unsafe building under the SFPC because no firestopping between floors was provided and that action could be taken under the SFPC's unsafe building provisions. Clayton also provided excerpts from the Virginia Public Safety Regulations addressing firestopping.

The Review Board finds that the fire official is correct that the first part of Section 102.2 of the SFPC cannot be used as the basis for Clayton's building to be in violation of the SFPC as there is no lack of maintenance of any provided and approved equipment, systems, devices or safeguards.<sup>1</sup>

The Review Board further finds that the second part of Section 102.2 requires Clayton's building to be maintained in accordance with the Virginia Public Building Safety Regulations ("VPBSR"). This requirement is copied verbatim from state law in § 27-97 of the Code of Virginia and is based on the requirements of the former "Public Building Safety Law" which required public buildings to comply with minimum standards promulgated by the State Corporation Commission and enforced by the State Fire Marshal's Office and local law enforcement officials. That authority transferred to the SFPC and state and local fire

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<sup>1</sup> This finding is consistent with the Review Board's decision in Appeal No. 08-2, a prior appeal by Clayton concerning the application of the maintenance requirements of the USBC to his building where no violations were found.

officials when the Public Building Safety Law was repealed under Chapter 199 of the 1988 Acts of Assembly.

However, while Clayton's building is subject to the VPBSR and authority exists under the SFPC to compel compliance with the VPBSR, Clayton's building is not in violation of those regulations for the following reasons.

Sections 508 and 509 of the VPBSR address the protection of shaftways and ducts and are exceptions to the requirements for firestopping between floors. Both sections reference Subsection 404-2 for the requirements for interior stairways not part of the means of egress for the requirements for shaftways and for non-standard systems using ducts.

Subsection 404-2 of the VPBSR permits open stairways not part of the means of egress to connect two floors without any enclosure. In addition, enclosures for stairways connecting up to three floors are only required to have a ¼-hour fire resistance rating. This requirement is consistent with the requirements in Sections 508 and 509 of the VPBSR where in Section 508-2(e), only a ¼-hour fire resistance rating is necessary for the enclosures for shafts and in Section 509-1, no more than a ¼-hour fire resistance rating is required for enclosures for ducts.

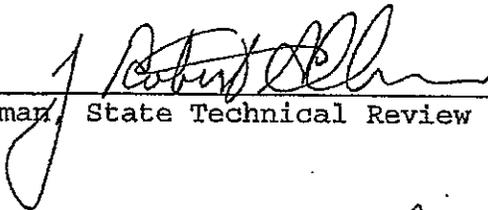
Testimony and evidence was provided indicating that two layers of gypsum wallboard were enclosing the wall cavity used as the return air chase in Clayton's building, as it is part of the

wall separating Clayton's unit from a neighboring unit. This is consistent with the requirements of Section 505-2 of the VPBSR which requires a ¼-hour fire resisting partition to separate apartments. Two layers of gypsum wallboard was typical construction in pre-USBC buildings for a ¼-hour fire resisting partition.

Therefore, the wall cavity used as a return air chase in Clayton's building is in compliance with the shaft and duct requirements of the VPBSR and firestopping is not an issue. In addition, using the wall cavity of a building for a chase for the return air in a ventilation system is common practice and generally does not have to meet the same standards as for the ducts carrying the conditioned air through the duct system. Even the current USBC for newly constructed buildings recognizes the use of gypsum wallboard to form return air plenums and the use of wall cavities for limited return air plenums in Sections 602.2 and 602.3 of the International Mechanical Code.

#### IV. FINAL ORDER

The appeal having been given due regard, and for the reasons set out herein, the Review Board orders the decision of the fire official and the decision of the City SFPC board that no SFPC violations are present in Clayton's building, to be, and hereby are, upheld.

  
\_\_\_\_\_  
Chairman, State Technical Review Board

Aug 20, 2010  
Date Entered

As provided by Rule 2A:2 of the Supreme Court of Virginia, you have thirty (30) days from the date of service (the date you actually received this decision or the date it was mailed to you, whichever occurred first) within which to appeal this decision by filing a Notice of Appeal with Vernon W. Hodge, Secretary of the Review Board. In the event that this decision is served on you by mail, three (3) days are added to that period.

## Mary Odonnell

---

**From:** Rudolph Thomas  
**Sent:** Tuesday, March 27, 2012 5:26 PM  
**To:** rnclayton@yahoo.com  
**Cc:** Adam Thiel; Mary Odonnell; John Catlett; William Coates; Gregg Fields; James Hunt  
**Subject:** Section 703.1 of the SFPC  
**Attachments:** 2009.fireofficialdecision.pdf; 2010.trb.decision.pdf

Mr. Richard Clayton:

I have received your email dated March 20, 2012 requesting that I make a formal determination of the applicability of the Virginia Statewide Fire Prevention Code 2009 Section 703.1, as it relates to your development. After reviewing documentation and SFPC, I must concur with Mr. Catlett's previous determination for the following reasons.

The SFPC Section 701.1, *specifically states that the provisions of this chapter shall specify the requirements for the maintenance of fire-resistance-rated construction*. Furthermore, SFPC Section 102.1 governs the application of this code as it relates to buildings and structures constructed prior to 1973. The intent of this section is to specify the maintenance requirements of equipment, systems, devices and safeguards which were provided and approved when the structure was constructed. Since these elements were not part of the original construction, the SFPC cannot require the construction or maintenance of said elements.

Mr. Clayton, as you know, in late 2007 you approached City officials regarding your concerns about your condominium, including fire-stopping and air circulation issues. City officials inspected your unit and found no violations of the Virginia Maintenance Code. You appealed that decision to the City of Alexandria Local Board of Building Code Appeals and the State Technical Review Board (TRB), both of whom upheld the decision of the building official. You appealed the decision of the TRB to the Alexandria Circuit Court, which also upheld the decision of the building official. You then appealed that decision to the Virginia Court of Appeals and the Virginia Supreme Court, all of whom upheld the decision of the building code official.

In late 2009, using the same underlying facts as the 2007 complaint, you asked the fire official to apply the SFPC to the fire-stopping and air circulation issues you claim exist in your unit. After the fire official opined that the SFPC did not apply to your unit (see attached letter dated October 7, 2009), you appealed that decision to the City of Alexandria Local Board of Building Code Appeals. The local board upheld the decision of the fire official. You appealed the decision of the local board to the TRB, which upheld the fire official's decision on June 18, 2010 (copy attached). You appealed that decision to the Alexandria Circuit Court, who upheld the decision of the fire official on September 21, 2011. You then appealed that decision to the Virginia Court of Appeals, where that appeal remains to be heard.

Your March 20, 2012 email raises no new issues of fact or law related to the application of the SFPC to your unit and is, in effect, the same request as the request made in 2009.

Respectfully,

Rudolph Thomas  
Assistant Fire Chief/Fire Code Official  
City of Alexandria Fire/EMS Department  
900 Second St.





FIRE DEPARTMENT  
900 Second Street  
Alexandria, Virginia 22314

Phone (703) 746-5200  
Fax (703) 838-5093

Adam K. Thiel  
Fire Chief

April 20, 2012

RE: 120 Roberts Lane/Appeal of Decision of Fire Code Official from March 27, 2012

Mr. Clayton:

After review of your appeal application, I wish to modify my decision in this matter. As you know, you have asked for a determination if the Fort Ellsworth Condominium Association is required to conduct annual inspections of the "fire-resistance-rated construction" of their buildings. I now agree that the Association is required to make visual inspections of such construction, to the extent that such elements are open, or able to be inspected by the removal of a removable panel or the like, as stated in the 2009 Virginia Statewide Fire Prevention Code.

However, I maintain that the Fire Code, and the previous rulings in cases involving you and the Association, does not require the Association to repair, restore, or replace items of fire-resistance-rated construction that were never installed in the buildings.

By copy of this letter, I am directing that the Fort Ellsworth Condominium Association conduct the required inspection, in the manner provided in Section 703.1 of the 2009 Virginia Statewide Fire Prevention Code, and inform my office after such inspections are completed.

Due to this decision, your appeal is no longer needed. Therefore, I am returning the original check for the appeal fee with this letter.

Sincerely,

Rudolph Thomas  
Assistant Fire Chief/Fire Official

Enclosure

cc: Ms. Althea Burns  
President, Fort Ellsworth Condominium Association  
124 Roberts Lane, Suite 401  
Alexandria, VA 22314

Michael E. Thorsen, Esq.  
Counsel for Fort Ellsworth Condominium Association  
Bancroft, McGavin, Horvath & Judkins, P.C.  
3920 University Drive  
Fairfax, VA 22030



**Mary Odonnell**

---

**From:** Rudolph Thomas  
**Sent:** Friday, May 11, 2012 11:09 AM  
**To:** Richard Clayton (rnclayton@yahoo.com)  
**Cc:** Hodge, Vernon (DHCD); Jack, Steven P.; Mark Jinks; Rodgers, Emory (DHCD); Adam Thiel; Mary Odonnell; William Coates  
**Subject:** Fort Ellsworth Condominiums

Mr. Clayton,

Thank you for communicating your concerns in regards to the enforcement of the Virginia Statewide Fire Prevention Code at the Fort Ellsworth Condominiums. Your concerns have been taken into consideration and the following information is for your reference.

On May 1, 2012, a visual inspection of several units was conducted. As a result of this inspection, there were no interior fire-resistance rated construction elements or interior fire-resistance rated assemblies identified to be maintained. In addition, there were no removable access panels, access doors, or ceiling tiles within units inspected to provide access to any interior fire-resistance rated construction elements or interior fire-resistance rated assemblies. The Fort Ellsworth Unit Owners Association (FEUOA) has conducted a visual inspection per my direction, however, the 2009 Virginia Statewide Fire Prevention Code (VSFPC) Section 703.1 would only apply if the fire-resistance rated construction elements or fire-resistance rated assemblies existed and were accessible by the above stated means.

Also, please note that per the 2009 (VSFPC) Section 109.1 Inspection (exemption):

"Single family dwellings and dwelling units in two family and multiple family dwellings and farm structures shall be exempt from routine inspections".

If I may be of further assistance, please do not hesitate to contact me.

Respectfully,

*Rudolph Thomas*  
Assistant Fire Chief/Fire Marshal  
City of Alexandria  
900 Second Street  
Alexandria, VA 22314  
(O) 703.746.5227  
(C) 703.801.3758



## APPLICATION FOR APPEAL

Office of Building and Fire Code Administration  
301 King Street, Suite 4200  
Alexandria, Virginia 22314  
703.746.4200 (tel) 703.838.3880 (fax)

Building Code Board of Appeals

TYPE OR PRINT ALL INFORMATION

1. Date of appeal submission: 05/23/2012

1a. Date of Code Application: 05/10/2012

2. Type of Appeal Hearing Requested: (applicant must indicate only those that apply)

Building Code  
Electrical Code  
Mechanical Code  
Plumbing Code  
IRC-Residential Code  
Virginia Rehab Code

Elevator Code  
 Fire Code (requested)  
Property Maintenance Code  
Amusement Device Regulations  
Other (specify)

3. Applicant's name: Richard N. Clayton

4. Applicant's address: 120 Roberts Lane, #300, Alexandria, VA 22314

5. Applicant's daytime phone/fax information: 703-836-5773

Email address: RNClayton@yahoo.com

6. Representing: Self

7. Owner of Project/Property: Fort Ellsworth Unit Owner's Association (FEUOA)

8. Address of Project/Property: 100-136 Roberts Lane, Alexandria, VA 22314

9. Permit/Complaint Number (if applicable): \_\_\_\_\_

10. Applicable Code(s): Fire Code

11. Edition (s): \_\_\_\_\_

12. Applicable Code Section(s): 106.1, 106.6, 111.1, 703.1

13. Applicant's understanding of the applicable code requirements (please attach additional sheets as needed):

SFPC 106.1 requires the fire official to enforce the provisions of the SFPC.

SFPC 106.6 requires the fire official to issue all necessary notices or orders to ensure

compliance with the SFPC. SFPC 111.1 requires fire marshal to issue notice upon discovery of an

alleged violation of a provision of the SFPC, namely SFPC 703.1 in this instance, specifying time

limitations for required abatement of the lack of annual visual inspections due March 1, 2012 as  
per SFPC 703.1.

14. Grounds for Appeal: Check all that apply (USBC Section 119.5 for new construction and the rehabilitation of existing structures; Section 106.5 for property maintenance; Section 112.5 for the fire prevention code; Section 13VACS-31-60 for amusement device regulations): SFPC 112.5 applies

09.09

I claim that:

- a) the Building Official/Code Official/Fire Official has refused to grant a modification which complies with the intent of the provisions of the code;
  - xxb) the true intent of the code has been incorrectly interpreted; failure to enforce code requirements of SFPC 106.1, 106.6, 111.1, 703.1
  - c) the provisions of the code do not fully apply;
  - d) the use of a form of construction/compliance that is equal to or better than that specified in the code has been denied.
15. Please attach 8 1/2 x 11" sheets of paper with reason(s) for each of the items checked in section 14. Please print or type reasons. Manufacturer information, cut sheets, data sheets from approved testing agencies may also be attached.

**THE SPACES IN THE BOX ARE TO BE COMPLETED BY THE BOARD SECRETARY**

<b>BOARD ACTION</b>	
Date of Board Appeals Hearing: _____	
Number of Board Members Present: _____	
The decision of the board was to <b>UPHOLD</b> <b>DENY</b> the decision of the Building/Code/Fire Official.	
Number in Agreement: _____	Number Opposed: _____
Appeal is: <b>DENIED</b> <b>GRANTED</b>	
Conditions/Comments:	
_____	
_____	
_____	
_____	
_____	
_____	

**Appeal Application Item 15:**

On April 20, 2012, Assistant Fire Marshall Thomas (Thomas) issued a letter (attached) to the president of the Fort Ellsworth Unit Owner's Association (FEUOA) in response to Clayton's allegation no annual visual inspections were performed by the FEUOA, as required per SFPC 703.1, on or before March 1, 2012. In this letter, Thomas ordered the FEUOA to make the inspections required and provide inspection reports to Thomas, but he did not include a time certain for abatement of the alleged violation.

In this same letter, Thomas returned Clayton's check for \$125 and advised there would be no further need for follow up on Clayton's earlier local appeal of Thomas's decision not to enforce SFPC 703.1 as he now, in essence, concurred it needed to be enforced.

On May 10, 2012, Clayton stated to Thomas in an email (attached) there had still been no general announcement of inspections at his condo community and he asked that the letter issued by Thomas to the FEUOA be amended to include a time certain for compliance with SFPC 703.1, this being a necessary requirement as per SFPC 111.1 regarding notice of violation. Thomas replied he had not issued a notice of violation to the FEUOA.

As per SFPC 106.1, 106.6 and 111.1, collectively, it is the duty of the fire marshall to issue a notice of violation upon discovery of an alleged violation of provisions of the SFPC. The alleged violation, in this instance, of SFPC 703.1 needs a time certain for abatement to bring the FEUOA back into compliance with the SFPC. Thomas has thus far refused to issue a notice of violation to the FEUOA as stated above. Clayton now appeals to the local board for a determination which requires Thomas to provide a proper notice of violation (see example of past notice of violation to Clayton attached) as per SFPC 111.1 to the FEUOA for alleged violation of SFPC 703.1.



**FIRE DEPARTMENT**  
900 Second Street  
Alexandria, Virginia 22314

Adam K. Thiel  
Fire Chief

Phone (703) 746-5200  
Fax (703) 838-5093

April 20, 2012

RE: 120 Roberts Lane/Appeal of Decision of Fire Code Official from March 27, 2012

Mr. Clayton:

After review of your appeal application, I wish to modify my decision in this matter. As you know, you have asked for a determination if the Fort Ellsworth Condominium Association is required to conduct annual inspections of the "fire-resistance-rated construction" of their buildings. I now agree that the Association is required to make visual inspections of such construction, to the extent that such elements are open, or able to be inspected by the removal of a removable panel or the like, as stated in the 2009 Virginia Statewide Fire Prevention Code.

However, I maintain that the Fire Code, and the previous rulings in cases involving you and the Association, does not require the Association to repair, restore, or replace items of fire-resistance-rated construction that were never installed in the buildings.

By copy of this letter, I am directing that the Fort Ellsworth Condominium Association conduct the required inspection, in the manner provided in Section 703.1 of the 2009 Virginia Statewide Fire Prevention Code, and inform my office after such inspections are completed.

Due to this decision, your appeal is no longer needed. Therefore, I am returning the original check for the appeal fee with this letter.

Sincerely,

Rudolph Thomas  
Assistant Fire Chief/Fire Official

Enclosure

cc: Ms. Althea Burns  
President, Fort Ellsworth Condominium Association  
124 Roberts Lane, Suite 401  
Alexandria, VA 22314

Michael E. Thorsen, Esq.  
Counsel for Fort Ellsworth Condominium Association  
Bancroft, McGavin, Horvath & Judkins, P.C.  
3920 University Drive  
Fairfax, VA 22030

Print

<http://us.mg6.mail.yahoo.com/neo/launch?rand=dg7qff5q492if>

**Subject:** Fw: time is of the essence for annual fire inspections at Fort Ellsworth condominiums  
**From:** Richard Clayton (mclayton@yahoo.com)  
**To:** Rudolph.Thomas@alexandriava.gov,  
**Cc:** Mary.O'Donnell@alexandriava.gov; William.Coates@alexandriava.gov; mark.links@alexandriava.gov; sjack@oag.state.va.us; vermon.hodge@dhcd.virginia.gov,  
**Date:** Thursday, May 10, 2012 11:27 AM

Mr. Thomas,

I am not clear on what to do about your lack of enforcement. I have forwarded my concerns to the State Attorney General's office and the State Technical Review Board as per the email attached below. As an added measure, I am in the process of preparing a local appeal on your lack of action on enforcing SFPC 703.1 annual inspections through the proper issuance of a notice of violation. I thought you had agreed to enforce SFPC 703.1 need for annual inspections when you refunded my earlier appeal check per your April 20, 2012 letter reversing your earlier determination letter whereby you refused to act on or enforce SFPC 703.1. Apparently you have decided not to honor your letter.

Please advise ASAP as to whether you will in fact send the FEUOA a proper notice of violation of SFPC 703.1 with a time certain for compliance. I demand copies on any enforcement effort. Otherwise, I will conclude you have rescinded your April 20, 2012 letter and it was sent in bad faith. I will also use today's date as the date for the 14 day clock on filing a local appeal. I reserve all other rights or actions to which I may be entitled in this matter.

Richard Clayton  
120 Roberts Lane, #300  
Alexandria, VA 22314  
703-836-5773

----- Forwarded Message -----

**From:** Richard Clayton <mclayton@yahoo.com>  
**To:** Jack Steven <sjack@oag.state.va.us>  
**Cc:** Vernon Hodge <8043717092@smartfax.com>  
**Sent:** Thursday, May 10, 2012 10:09 AM

1 of 7

5/19/2012 10:27 PM

Print

<http://us.mg6.mail.yahoo.com/neo/launch?rand=dg7qff5q492ff>

**Subject:** Fw: time is of the essence for annual fire inspections at Fort Ellsworth condominiums

**Mr. Jack,**

**I wish to file an inquiry and demand for action with the State Attorney General's office and the State Technical Review Board as to a the City of Alexandria's stated refusal to issue a notice of violation with time limits for compliance to the Fort Ellsworth Unit Owner's Association (FEUOA) for failing to conduct annual inspections as per SFPC 703.1, due on or before March 1, 2012.**

**I am not familiar with proper procedure for filing a complaint/inquiry in the above matter. Please accept or redirect my effort as appropriate. Time is of the essence. See attachment.**

**Thank you,**

**Richard Clayton  
120 Roberts Lane, #300  
Alexandria, VA 22314  
703-836-5773**

— Forwarded Message —

**From:** Richard Clayton <rcclayton@yahoo.com>  
**To:** Rudolph Thomas <Rudolph.Thomas@alexandriava.gov>  
**Cc:** Mary Odonnell <Mary.ODonnell@alexandriava.gov>; William Coates <William.Coates@alexandriava.gov>; "mark.jinks@alexandriava.gov" <mark.jinks@alexandriava.gov>  
**Sent:** Thursday, May 10, 2012 9:33 AM  
**Subject:** Re: time is of the essence for annual fire inspections at Fort Ellsworth condominiums

**Mr. Thomas,**

**Your stated failure to issue a notice of violations with a time limit for correction as per the requirements of the SFPC based on the FEUOA's failure to have a timely annual inspection by March 1, 2012 as per SFPC 703.1 strikes me as a dereliction of duty if not a blatant and willful disregard for the law. You seem to be in violation of SFPC sections 106.1, 106.6 and 111.1.**

**Per your earlier letter to the President of the FEUOA date April 20, 2012, you did seemingly in effect issue a notice of violation**

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5/19/2012 10:27 PM

Print

<http://es.mg6.mail.yahoo.com/neo/launch?.rand=4g7qff5q492if>

by ordering the FEUOA to conduct the required annual inspections as per SFPC 703.1 (but one that needs to be perfected by stating the time limit for taking corrective action).

I am demanding you perfect this notice by stating the time limit for compliance. If you insist you have not issued a notice of violation then I demand you do so immediately with a stated time limit for compliance in keeping with standard practice and the importance of compliance in a timely manner. The FEUOA is already well past the March 7, 2012 deadline for compliance and your stalling on enforcement is only allowing for further delay at the expense of public safety.

I will look to further inquiries with the State Attorney General's office as well as the State Technical Review Board as to your lack of action in these matters. Time is of the essence for proper action on your part.

Richard Clayton

---

From: Rudolph Thomas <Rudolph.Thomas@alexandriava.gov>  
To: Richard Clayton <rclayton@yahoo.com>  
Cc: Mary O'Donnell <Mary.O'Donnell@alexandriava.gov>; William Coates <William.Coates@alexandriava.gov>  
Sent: Thursday, May 10, 2012 8:14 AM  
Subject: RE: time is of the essence for annual fire inspections at Fort Ellsworth condominiums

Mr. Clayton,

No violations have been issued at this time and we are still actively working with the Fort Ellsworth Unit Owners Association.

Thank you again for your patience.

V/r

*Rudolph Thomas*  
Assistant Fire Chief/Fire Marshal  
City of Alexandria  
900 Second Street  
Alexandria, VA 22314  
(O) 703.746.5227  
(C) 703.801.3758

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From: Richard Clayton [mailto:rclayton@yahoo.com]

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5/19/2012 10:27 PM

Print

<http://us.mg6.mail.yahoo.com/neo/launch?rand=dg7qff5q492i>

Sent: Tuesday, May 08, 2012 6:23 PM  
To: Rudolph Thomas  
Cc: Mary Odonnell; William Coates  
Subject: Fw: time is of the essence for annual fire inspections at Fort Ellsworth condominiums

Mr. Thomas,

Please see Section 111 of the SFPC and specifically 111.1. Have you issued a violation notice for failure to perform annual inspections by March 1, 2012 with a time certain for compliance to the FEUOA as required by SFPC Section 111.1? If so, please provide me with a copy. If not, please do so forthwith and provide me a copy.

Richard Clayton  
120 Roberts Lane, #300  
Alexandria, VA 22314  
703-836-5773

----- Forwarded Message -----

From: Richard Clayton <rclayton@yahoo.com>  
To: Rudolph Thomas <Rudolph.Thomas@alexandriava.gov>  
Cc: Mary Odonnell <Mary.ODonnell@alexandriava.gov>; William Coates <William.Coates@alexandriava.gov>  
Sent: Tuesday, May 8, 2012 5:52 PM  
Subject: Re: time is of the essence for annual fire inspections at Fort Ellsworth condominiums

Mr. Thomas,

Please elaborate on what you are actively doing with the FEUOA. As one who lives in the complex, there has been no general announcement on inspections. Are you stating the City of Alexandria is directly making the annual inspections for FEUOA? What specifically are you doing in terms of your referenced activities with the FEUOA. Please be date specific as well.

Finally, I want to know why your department has failed to issue a violation notice formally to the FEUOA with a time certain for correction. This should be standard operation procedure. Certainly your department issued me one in the past without hesitation upon discovery of a code violation. I believe it may be a requirement for your office. Please explain your lack of action in this regard.

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5/19/2012 10:27 PM

Print

<http://us.mg6.mail.yahoo.com/neo/launch7.rand=dg7qf15q492i>

**Richard Clayton**  
120 Roberts Lane, #300  
Alexandria, VA 22314  
703-836-5773

---

**From:** Rudolph Thomas <Rudolph.Thomas@alexandriava.gov>  
**To:** Richard Clayton <rclayton@yahoo.com>  
**Cc:** Mary Odonnell <Mary.ODonnell@alexandriava.gov>; William Coates <William.Coates@alexandriava.gov>  
**Sent:** Tuesday, May 8, 2012 5:27 PM  
**Subject:** RE: time is of the essence for annual fire inspections at Fort Ellsworth condominiums

Mr. Clayton,

Thank you for forwarding your most recent concerns related to this matter. I assure you that we are actively working with the Fort Ellsworth Unit Owners Association to ensure compliance and will communicate to you when inspections have been completed.

Thank you in advance for your patience.

Respectfully,

*Rudolph Thomas*  
Assistant Fire Chief/Fire Marshal  
City of Alexandria  
900 Second Street  
Alexandria, VA 22314  
(O) 703.746.5227  
(C) 703.801.3758

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**From:** Richard Clayton [mailto:rclayton@yahoo.com]  
**Sent:** Monday, May 07, 2012 2:28 PM  
**To:** Rudolph Thomas  
**Cc:** Mary Odonnell  
**Subject:** time is of the essence for annual fire inspections at Fort Ellsworth condominiums

Mr. Thomas,

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5/19/2012 10:27 PM

Print

<http://us.mg6.mail.yahoo.com/neo/launch?rand=dg7qff5q492i>

Your recent decision to reverse your earlier determination letter of March 27, 2012 and enforce the annual inspection requirement of SFPC 703.1 per your instructions to the President of the Fort Ellsworth Unit Owners Association (FEUOA) dated April 20, 2012 did not give a deadline as to when the inspections should be completed and the report submitted to your attention. Inasmuch as the FEUOA has already failed to meet its annual inspection obligations due by March 1, 2012, why have you not ordered a time certain for completion of this process and issued a violation notice to the FEUOA for failure to meet the annual deadline by March 1, 2012? I personally notified the FEUOA of this deadline in February of 2012. So they were certainly aware of it.

I have heard no word from the FEUOA as to planned inspections. It appears to me the association is purposely continuing to delay compliance with an implicit understanding your office is not serious about enforcing this requirement. Please issue a violation notice for failure to meet the March 1, 2012 deadline requirement or show good cause why you are not doing so. Also, there needs to be a deadline for compliance with your April 20, 2012 order so the FEUOA will understand they are in serious noncompliance with the SFPC and time is of the essence. This is standard operating procedure for most violation notices, I presume. You appear to not be treating this with the importance it deserves.

Meanwhile, lives are at risk. Just recently several fire trucks were sent here on concerns of a fire. The possible lack of proper fire safeguards (yet to be determined by the FEUOA due to lack of timely annual inspections) presents a great present danger to the FE community. Your seeming indifference to the lack of compliance with the SFPC is concerning, to say the least.

Please issue a violation notice now to the FEUOA along with the usual ten day notice to comply as is standard (based on a violation notice issued to me in the past) and copy me on your efforts so I may know there is a real effort for compliance or show good cause otherwise. Time is of the essence.

Richard Clayton  
120 Roberts Lane, #300  
Alexandria, VA 22314  
703-836-5773

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5/19/2012 10:27 PM





**ALEXANDRIA FIRE - EMS  
 CODE ENFORCEMENT BUREAU  
 INSPECTION REPORT**

P.O. BOX 178  
 ALEXANDRIA, VIRGINIA 22313  
 703-838-4360  
 FAX 703-838-3880

PAGE 2 OF 2  COMPLIANCE REQUEST  NOTICE OF VIOLATION  KNOCK BOX

LOCATION OF INSPECTION *Clayton Apartments* CENSUS *202* ZONE BOX *13* ONE LINE NO. / FIELD RECORD NO. *2008-00465*

PERSON RESPONSIBLE FOR PROPERTY *Robert Clayton* ADDRESS *12300 Lee Ave 200* CITY *ALEXANDRIA* OFFICE *703 836-5773*

CODE ENFORCEMENT USE ONLY COMPANY CODE PROGRAM CODE INSPECTOR / OFFICE *Jim Sullivan DEB*

FINAL DISPOSITION: APPROVED  DENIED  OTHER  APPEALS TO COMPLY  APPEAL REFERRED TO  UNFOUNDED  CASE OPENED  INSPECTOR / OFFICE CONTACT PHONE *703 519-3300 EXT 125*

CODE SECTION	DESCRIPTION	DUE DATE*
UPMC 169.5.42	<p>These Face This Notice of Violation is being issued to the unit owner to Repair the unit Heating System and Comply with the Requirements of the Virginia Property Maintenance Code.</p> <p>Correction of This Violation is Required within 10 days Subject to Coordination with the Association Ability to drain the system. Upon Completion of the work, Contact Code Enforcement for Reinspection.</p> <p>NOTE: Electrical Space Heaters are Listed to Provide Supplemental Heat only. Space Heaters may NOT be used as Primary Heat Source, Therefore Converter must be repaired.</p>	

\*Use only if multiple due dates are used.

Note: Violations must be corrected prior to 5:00 A.M. (M) on 2/4/2008. \*\* Failure to comply with this order may subject you to penalties as prescribed by law. If you want to appeal this notice you must notify the fire / code official in writing within 30 days of receipt of this notice.

~~Inspector~~ / Officer 1/25/2008 Date ~~Received by~~

\*\* Except as noted by multiple due date column.

IN EVENT OF A FIRE OR MEDICAL EMERGENCY, CALL 9-1-1

White - Serviced

Yellow - Inspector

Pink - File

# Additional Documents Submitted by Clayton

## McMahan, Alan (DHCD)

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**From:** Richard Clayton [rnclayton@yahoo.com]  
**Sent:** Tuesday, October 02, 2012 6:37 PM  
**To:** Hodge, Vernon (DHCD)  
**Cc:** Mary.ODonnell@alexandriava.gov; mthorsen@bmhjlaw.com; McMahan, Alan (DHCD)  
**Subject:** RE: Appeal No. 21-5 to the Review Board  
**Attachments:** March 20 email request Hodge.pdf

Mr. Hodge:

I believe this email covers the full history up to March 27 including the March 20 email you requested. Let me know if you need additional information. Please include this attachment as submitted for inclusion into the material for review.

Thanks,

Richard Clayton

--- On Tue, 10/2/12, Hodge, Vernon (DHCD) <[Vernon.Hodge@dhcd.virginia.gov](mailto:Vernon.Hodge@dhcd.virginia.gov)> wrote:

**From:** Hodge, Vernon (DHCD) <[Vernon.Hodge@dhcd.virginia.gov](mailto:Vernon.Hodge@dhcd.virginia.gov)>  
**Subject:** RE: Appeal No. 21-5 to the Review Board  
**To:** "Richard Clayton" <[rnclayton@yahoo.com](mailto:rnclayton@yahoo.com)>  
**Cc:** "Mary.ODonnell@alexandriava.gov" <[Mary.ODonnell@alexandriava.gov](mailto:Mary.ODonnell@alexandriava.gov)>, "[mthorsen@bmhjlaw.com](mailto:mthorsen@bmhjlaw.com)" <[mthorsen@bmhjlaw.com](mailto:mthorsen@bmhjlaw.com)>, "McMahan, Alan (DHCD)" <[Alan.McMahan@dhcd.virginia.gov](mailto:Alan.McMahan@dhcd.virginia.gov)>  
**Date:** Tuesday, October 2, 2012, 4:02 PM

Attached.

Vernon Hodge, CBO, Technical & Code Development Specialist and Secretary, State Technical Review Board

State Building Codes Office

Division of Building and Fire Regulation

Va. Department of Housing and Community Development

Direct Dial: (804) 371-7174

Email: [Vernon.Hodge@DHCD.virginia.gov](mailto:Vernon.Hodge@DHCD.virginia.gov)

---

**From:** Richard Clayton [<mailto:rnclayton@yahoo.com>]  
**Sent:** Tuesday, October 02, 2012 3:34 PM  
**To:** Hodge, Vernon (DHCD)  
**Cc:** [Mary.ODonnell@alexandriava.gov](mailto:Mary.ODonnell@alexandriava.gov); [mthorsen@bmhjlaw.com](mailto:mthorsen@bmhjlaw.com); McMahan, Alan (DHCD)  
**Subject:** Re: Appeal No. 21-5 to the Review Board

Mr. Hodge:

Please send me a copy of the March 27 email from Asst. Fire Chief Rudolf Thomas you referenced to aid in my search. I am traveling and my response time is slower.

Thanks,

Richard Clayton

--- On Tue, 10/2/12, Hodge, Vernon (DHCD) <[Vernon.Hodge@dhcd.virginia.gov](mailto:Vernon.Hodge@dhcd.virginia.gov)> wrote:

From: Hodge, Vernon (DHCD) <[Vernon.Hodge@dhcd.virginia.gov](mailto:Vernon.Hodge@dhcd.virginia.gov)>  
Subject: Appeal No. 21-5 to the Review Board  
To: "Richard Clayton" <[rnclayton@yahoo.com](mailto:rnclayton@yahoo.com)>  
Cc: "Mary.ODonnell@alexandriava.gov" <[Mary.ODonnell@alexandriava.gov](mailto:Mary.ODonnell@alexandriava.gov)>, "mthorsen@bhmjlaw.com" <[mthorsen@bhmjlaw.com](mailto:mthorsen@bhmjlaw.com)>, "McMahan, Alan (DHCD)" <[Alan.McMahan@dhcd.virginia.gov](mailto:Alan.McMahan@dhcd.virginia.gov)>  
Date: Tuesday, October 2, 2012, 2:53 PM

Mr. Clayton,

We are looking over the documents submitted with the above-referenced appeal to the Review Board. Would you kindly forward a copy of your March 20, 2012 email to the city asking for a formal determination of the fire code. It is mentioned in the March 27, 2012 email from Assistant Fire Chief Thomas, but it was not included in any of the correspondence we received.

Thank you,

Vernon Hodge, CBO, Technical & Code Development Specialist and Secretary, State Technical Review Board

State Building Codes Office

Division of Building and Fire Regulation

Va. Department of Housing and Community Development

Direct Dial: (804) 371-7174

Email: [Vernon.Hodge@DHCD.virginia.gov](mailto:Vernon.Hodge@DHCD.virginia.gov)



**RE: section 703.1 of the SFPC**

Monday, March 26, 2012 12:47 PM

**From:** "William Coates" <William.Coates@alexandriava.gov>

**To:** "Richard Clayton" <rnclayton@yahoo.com>

Mr. Clayton:

I have been asked to respond to your email. Unfortunately, Chief Thomas has been out of the City of Alexandria for three weeks. He is scheduled to return on April 3<sup>rd</sup>. Upon his return, he will respond to your email dated March 20, 2012. If you have any questions regarding this matter please feel free to contact me directly.

Best Regards:

Bill Coates CFEI, CFO, BBA  
Assistant Fire Marshal\Chaplain  
City of Alexandria FPLSD  
900 Second Street  
Alexandria, VA 22314  
703.746.4233  
William.Coates@alexandriava.gov

---

**From:** Adam Thiel  
**Sent:** Monday, March 26, 2012 12:34 PM  
**To:** Rudolph Thomas  
**Cc:** Andrea Buchanan; William Coates; Russell Furr  
**Subject:** Fwd: section 703.1 of the SFPC

Adam

Begin forwarded message:

**From:** Richard Clayton <rnclayton@yahoo.com>  
**Date:** March 26, 2012 12:29:38 EDT  
**To:** "adam.thiel@alexandriava.gov" <adam.thiel@alexandriava.gov>  
**Subject:** Fw: section 703.1 of the SFPC  
**Reply-To:** Richard Clayton <rnclayton@yahoo.com>

----- Forwarded Message -----

**From:** Richard Clayton <rnclayton@yahoo.com>  
**To:** "adam.thiel@alexandriava.gov" <adam.thiel@alexandriava.gov>  
**Sent:** Monday, March 26, 2012 12:20 PM  
**Subject:** Fw: section 703.1 of the SFPC

Fire Chief Thiel:

Mr. James Hunt gave me your contact information so I can forward my email request for a determination of violation of SFPC 703.1 regarding need for annual inspections by the owner of the building (condo board in my case). You can read the emails below to bring you up to speed. It has been ten days sent I first submitted my request but I have not heard back from Asst. Chief Rudolf Thomas at all. I would like to know when I can expect a determination as to whether the condo board needs to make an annual inspection by removing the return air vent on the common wall that connects my unit with the other three units in my stairwell for possible fire code violations.

Thank you,

Richard Clayton  
120 Roberts Lane, #300  
Alexandria, VA 22314  
[RNClayton@yahoo.com](mailto:RNClayton@yahoo.com)  
703-836-5773 office  
815-572-9573 fax

----- Forwarded Message -----

**From:** Richard Clayton <[rnclayton@yahoo.com](mailto:rnclayton@yahoo.com)>  
**To:** John Catlett <[John.Catlett@alexandriava.gov](mailto:John.Catlett@alexandriava.gov)>  
**Cc:** Rudolph Thomas <[Rudolph.Thomas@alexandriava.gov](mailto:Rudolph.Thomas@alexandriava.gov)>; William Coates <[William.Coates@alexandriava.gov](mailto:William.Coates@alexandriava.gov)>; Mary Odonnell <[Mary.ODonnell@alexandriava.gov](mailto:Mary.ODonnell@alexandriava.gov)>  
**Sent:** Friday, March 23, 2012 11:56 AM  
**Subject:** Re: section 703.1 of the SFPC

Mr. Catlett:

In the past, I requested in writing for you to issue to me a written statement per the City Memorandum dated January 30, 2007 (see attachment) with the subject title of "Policy on Certificate of Occupancy Requirements", page 2, "Existing Structures-continued use" section that there are no known Building Code or Fire Prevention Code at the time of the request. You have not satisfied this request or given any reasons as to why. Please issue a written statement per this renewed request or provide valid reasons as to why you are not complying with this request. Time is of the essence.

Mr. Thomas:

I have reported a perceived violation of SFPC 703.1 with regards to required annual inspections by the owner of the building. When may I expect written feedback from you on this inquiry as to the actual requirement for annual inspections of the hollow wall connecting all four units in my building and covered by return air vents? Your office has made several inspections in the past and taken many pictures. I can supply more if you like or you can schedule a time to inspect. Please let me know your plan of action and time table so I may plan accordingly. Time is of the essence.

Thank you,

Richard Clayton  
120 Roberts Lane, #300  
Alexandria, VA 22314  
[RNClayton@yahoo.com](mailto:RNClayton@yahoo.com)  
703-836-5773 office  
815-572-9573 fax

---

**From:** John Catlett <[John.Catlett@alexandriava.gov](mailto:John.Catlett@alexandriava.gov)>  
**To:** Richard Clayton <[rnclayton@yahoo.com](mailto:rnclayton@yahoo.com)>  
**Cc:** Rudolph Thomas <[Rudolph.Thomas@alexandriava.gov](mailto:Rudolph.Thomas@alexandriava.gov)>; William Coates <[William.Coates@alexandriava.gov](mailto:William.Coates@alexandriava.gov)>; Mary Odonnell <[Mary.ODonnell@alexandriava.gov](mailto:Mary.ODonnell@alexandriava.gov)>  
**Sent:** Tuesday, March 20, 2012 12:08 PM  
**Subject:** RE: section 703.1 of the SFPC

Mr. Clayton.

You can now drop me from any future communications on this issue.

Thanks!

John Catlett, CPCA, MCP, CBO  
Director  
Alexandria Department of Code Administration  
301 King Street, Room 4200  
Alexandria, Virginia 22314  
(703) 746-4200  
[www.alexandriava.gov/code](http://www.alexandriava.gov/code)

*"One Team, One City – Our City"*

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**From:** Richard Clayton [<mailto:rnclayton@yahoo.com>]  
**Sent:** Tuesday, March 20, 2012 12:07 PM

**To:** John Catlett  
**Cc:** Rudolph Thomas; William Coates; Mary Odonnell  
**Subject:** Re: section 703.1 of the SFPC

Assistant Chief Thomas:

I disagree with Mr. Catlett's interpretations as stated below. Furthermore, if you give a careful reading to the State Technical Review Board's decisions and briefs filed in the current appeal before the Court of Appeals, you will find that Mr. Catlett's interpretations as stated below do not stand up exactly as he has stated it.

I am including copies of briefs filed with the Court of Appeals for your benefit. Please make a formal determination as to whether or not the owner of the building is required to annually inspect the interior hollow wall covered by a return air vent which is movable. This is the same area under consideration now before the Court of Appeals. I believe an annual inspection is required by the condo board and they will have to make their own determination as to whether repairs are required. I don't believe they will find any structural engineer that will agree with Mr. Catlett's decision but that is their call. I will take appropriate action as needed after the condo board makes its independent finding as per SFPC 703.1 requirements. Again, time is of the essence.

Thank you,

Richard Clayton  
120 Roberts Lane, #300  
Alexandria, VA 22314  
703-836-5773

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**From:** John Catlett <[John.Catlett@alexandriava.gov](mailto:John.Catlett@alexandriava.gov)>  
**To:** Richard Clayton <[rnclayton@yahoo.com](mailto:rnclayton@yahoo.com)>  
**Cc:** Rudolph Thomas <[Rudolph.Thomas@alexandriava.gov](mailto:Rudolph.Thomas@alexandriava.gov)>; William Coates <[William.Coates@alexandriava.gov](mailto:William.Coates@alexandriava.gov)>; Mary Odonnell <[Mary.ODonnell@alexandriava.gov](mailto:Mary.ODonnell@alexandriava.gov)>  
**Sent:** Tuesday, March 20, 2012 11:37 AM  
**Subject:** RE: section 703.1 of the SFPC

Mr. Clayton. Following our separation from the fire department of July 1, 2011, I am no longer the fire official for the city. We are a separate department now. I did see your email and planned to respond. However, I have been out of the office on personal time off, city work, and legislative work.

The fire official for the city is now Assistant Chief Rudolph Thomas with the Alexandria Fire Department, Fire Prevention and Life Safety Section. Any interpretations and application of the Fire Prevention Code would be through their office.

Any final determination would need to come from Chief Thomas, but my take is follows.

There is nothing in this code change that would change my previous opinions or interpretations that you have in appeal. The intentions of the Virginia Fire Prevention Code have not changed. It is a maintenance and use code; it cannot require any type of construction to be performed. The previous long history of cases with you has been less about specific code provisions, but more about the intent of the fire and maintenance codes.

I do not see where this section shifts any more burden to the owner than previously existed; it just was not stated. The building owner is required to make sure that any and all fire protection features *that were installed and approved* be maintained. The section clearly notes that this section applies when someone either removes or penetrates an existing fire rated element. It does not require one to install one that was not previously there. If it was never there, it cannot be damaged, altered, breached or penetrated.

"Such elements shall be... properly repaired, restored or replaced when damaged, altered, breached or penetrated."

If Chief Thomas agrees, he can confirm this email. However, if you intend to have this section applied, Chief Thomas will need to be the final decision maker as the Fire Code Official.

John Catlett, CPCA, MCP, CBO  
Director  
Alexandria Department of Code Administration  
301 King Street, Room 4200  
Alexandria, Virginia 22314  
(703) 746-4200  
[www.alexandriava.gov/code](http://www.alexandriava.gov/code)

*"One Team, One City – Our City"*

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From: Richard Clayton [<mailto:mclayton@yahoo.com>]  
Sent: Tuesday, March 20, 2012 9:04 AM

**To:** John Catlett  
**Subject:** Fw: section 703.1 of the SFPC

Mr. Catlett:

When may I expect your answer to my request for a determination as to possible code violations of the Statewide Fire Prevention Code as stated below? You should have all the information you need to make a determination as my location and circumstances are familiar to you. Time is of the essence.

Richard Clayton  
120 Roberts Lane, #300  
Alexandria, VA 22314  
[RNClayton@yahoo.com](mailto:RNClayton@yahoo.com)  
703-836-5773 office  
815-572-9573 fax

----- Forwarded Message -----

**From:** Richard Clayton <[rnclayton@yahoo.com](mailto:rnclayton@yahoo.com)>  
**To:** "[john.catlett@alexandriava.gov](mailto:john.catlett@alexandriava.gov)" <[john.catlett@alexandriava.gov](mailto:john.catlett@alexandriava.gov)>  
**Sent:** Friday, March 16, 2012 1:46 PM  
**Subject:** section 703.1 of the SFPC

Mr. Catlett:

I am writing you in regard to Virginia 2009 Section 703.1 of the Statewide Fire Prevention Code. By my reading, the owner of the building is required to do annual inspections in the common hollow wall that separates the split levels in my unit as found in four of the five buildings on the Fort Ellsworth condominium property. The return air vent cover can easily be removed with four screws allowing easy access for inspection for fire code violations. The condo board has not performed any such annual inspections to my knowledge during the twelve months following the effective date of the new code on March 1, 2011. I have reminded the board of the changes in the law but they have not responded.

I request your office make a determination as to whether or not the condo board or anyone else is required to make annual inspections per section 703.1 of the SFPC of my unit and other units with a similar floor plan

containing the split level design.

703.1 Maintenance. The required fire-resistance rating of fire-resistance-rated construction (including walls, firestops, shaft enclosures, partitions, smoke barriers, floors, fire-resistive coatings and sprayed fire-resistant materials applied to structural members and fire resistant joint systems) shall be maintained. Such elements shall be visually inspected by the owner annually and properly repaired, restored or replaced when damaged, altered, breached or penetrated. Where concealed, such elements shall not be required to be visually inspected by the owner unless the concealed is accessible by the removal or movement of a panel, access door, ceiling tile or similar movable entry to the space. Openings made therein for the passage of pipes, electrical conduit, wires, ducts, air transfer openings and holes made for any reason shall be protected with approved methods capable of resisting the passage of smoke and fire. Openings through fire-resistance-rated assemblies shall be protected by self- or automatic-closing doors of approved construction meeting the fire protection requirements for the assembly.

Thank you,

Richard Clayton  
120 Roberts Lane, #300  
Alexandria, VA 22314  
[RNClayton@yahoo.com](mailto:RNClayton@yahoo.com)  
703-836-5773 office  
815-572-9573 fax

## FIRE-RESISTANCE-RATED CONSTRUCTION

**[B] FIREBLOCKING.** Building materials, or materials *approved* for use as fireblocking, installed to resist the free passage of flame to other areas of the building through concealed spaces.

- ❖ Fireblocking is required to hinder the concealed spread of flame, heat and other products of combustion within hollow spaces inside of walls or floor/ceiling assemblies. This is done by periodically subdividing that space, as indicated in Section 717.2 of the IBC, using construction materials that have some resistance to fire and by sealing the openings around penetrations through those materials.

Some fireblocking materials are permitted to be combustible based on the rationale that a substantial combustible material will provide a barrier adequate to perform the intended function (also see Section 717 of the IBC).

### SECTION 703 FIRE-RESISTANCE-RATED CONSTRUCTION

**703.1 Maintenance.** The required *fire-resistance rating* of fire-resistance-rated construction (including walls, firestops, shaft enclosures, partitions, *smoke barriers*, floors, fire-resistant coatings and sprayed fire-resistant materials applied to structural members and fire-resistant joint systems) shall be maintained. Such elements shall be visually inspected by the *owner* annually and properly repaired, restored or replaced when damaged, altered, breached or penetrated. Where concealed, such elements shall not be required to be visually inspected by the *owner* unless the concealed space is accessible by the removal or movement of a panel, access door, ceiling tile or similar movable entry to the space. Openings made therein for the passage of pipes, electrical conduit, wires, ducts, air transfer openings and holes made for any reason shall be protected with *approved* methods capable of resisting the passage of smoke and fire. Openings through fire-resistance-rated assemblies shall be protected by self- or automatic-closing doors of *approved* construction meeting the fire protection requirements for the assembly.

- ❖ The code requires that all equipment, systems, devices and safeguards required by the current and previously adopted codes be maintained in good working order (see Section 102.1). Section 703.1 reiterates this requirement specifically for fire-resistance-rated assemblies in existing buildings.

Once a building is occupied, its component parts are often damaged, altered or penetrated for installation of new piping, wiring and the like. These actions may reduce the effectiveness of assemblies that must be fire-resistance rated. This section requires an annual visual inspection by the building owner of nonconcealed elements and that any damage to a fire-resistance-rated assembly be repaired in a manner that restores the original required performance characteristics. Concealed elements must be visually inspected if they may be accessed by a door, removable ceiling tile, access panel or the like. Similarly, if a fire-resistance-rated assembly is altered or penetrated, the alteration or pene-

tration must comply with the applicable requirements of the IBC for the particular type of alteration or penetration.

**703.1.1 Fireblocking and draftstopping.** Required *fireblocking* and draftstopping in combustible concealed spaces shall be maintained to provide continuity and integrity of the construction.

- ❖ Fireblocking and draftstopping retard the spread of fire and the products of combustion. To fulfill their intended function, fireblocking and draftstopping must be properly maintained. Most frequently, damage or repairs to other building components, such as mechanical piping, results in fireblocking or draftstopping being removed and not properly replaced. This section specifically requires that when fireblocking and draftstopping required by the IBC are damaged, removed or otherwise altered, they must be replaced or restored.

**703.1.2 Smoke barriers and smoke partitions.** Required *smoke barriers* and smoke partitions shall be maintained to prevent the passage of smoke. All openings protected with *approved* smoke barrier doors or smoke dampers shall be maintained in accordance with NFPA 105.

- ❖ Smoke barriers divide areas of a building into separate smoke compartments to create an area of safety for occupants. A smoke barrier is designed to resist fire and smoke spread so that occupants can be evacuated or relocated to adjacent smoke compartments (see the commentary to the definitions of "Smoke barrier" and "Smoke compartment" in Chapter 2) This concept has proven effective in Group I-2 and I-3 occupancies, and Sections 407.4 and 408.6 of the IBC identify where smoke barriers are required in those occupancies. Smoke barriers may also be utilized in other applications, such as part of a smoke control system (see Section 909.5), accessible means of egress (see Section 1007.6.2), accessible areas of refuge (see Section 1007.6), compartmentation of underground buildings (see Section 405.4.2 of the IBC) and elevator lobbies in underground buildings (see Section 405.4.3 of the IBC). Other than the wall itself, all of the elements in the smoke barrier that can potentially allow smoke travel through the smoke barrier are required to have a quantified resistance to leakage. This includes doors, joints, through penetrations and dampers. The maximum leakage limits are as established in the individual code sections referenced above for each element. A smoke barrier is not intended or expected to be exposed to fire for extended periods and is, therefore, not required to have a fire-resistance rating exceeding 1 hour. Also, the occupancies in which smoke barriers are required are generally required to be sprinklered by Section 903 of the code. Smoke barriers are to be continuous from outside wall to outside wall and from the top of the foundation or floor/ceiling assembly below to the underside of the floor or roof sheathing, deck or slab. The provisions require the barrier to be continuous through all concealed and interstitial spaces, including suspended ceilings and the space between the ceiling



**RE: Re: Ft. Ellsworth Condominiums**

Tuesday, August 21, 2012 3:41 PM

**From:** "Michael Thorsen" <MThorsen@bmhjlaw.com>  
**To:** "Richard Clayton" <rnclayton@yahoo.com>  
**Cc:** "Althea Burns" <aburns@qem.org>, "Ed McCarthy" <bigedmccarthy@gmail.com>, "Jeff Miller" <jmiller@kpamgmt.com>

Mr. Clayton:

The following units and areas were inspected on May 1, 2012 by the Fire Marshall and his assistant: Unit 100/401; 106/101; 132/401; 124/401; utility closets, the boiler room, stairwells, and the space between the roof and top ceilings in the stairwells.

Representatives of Ft. Ellsworth were present during the inspections.

---

**From:** Richard Clayton [mailto:rnclayton@yahoo.com]  
**Sent:** Tuesday, August 21, 2012 3:36 PM  
**To:** Michael Thorsen  
**Cc:** Althea Burns; Ed McCarthy; Jeff Miller  
**Subject:** RE: Re: Ft. Ellsworth Condominiums

Mr. Thorsen:

You stated you already have this information at the appeal hearing on Aug. 7 and that you would provide it to me. I now demand in writing that you, the board or KPA turn over the list of units actually inspected on May 1, if any, within the next 5 business days, or sooner if possible. I am entitled to this information as per the condo act.

Thank you,

Richard Clayton  
120 Roberts Lane, #300  
Alexandria, VA 22314  
703-836-5773  
RNClayton@yahoo.com

--- On Tue, 8/21/12, Michael Thorsen <MThorsen@bmhjlaw.com> wrote:

From: Michael Thorsen <MThorsen@bmhjlaw.com>  
Subject: RE: Re: Ft. Ellsworth Condominiums  
To: "Richard Clayton" <rnclayton@yahoo.com>  
Date: Tuesday, August 21, 2012, 3:23 PM

Mr. Clayton:

As I explained previously, I will provide you the unit nos. upon receipt.

---

**From:** Richard Clayton [mailto:rnclayton@yahoo.com]  
**Sent:** Tuesday, August 21, 2012 3:21 PM  
**To:** Michael Thorsen  
**Subject:** Fw: Re: Ft. Ellsworth Condominiums

Mr. Thorsen:

I have a list of attendees now but I have still not received list of units inspected on May 1 or other days for purposes of SFPC 703.1 annual inspection. Please provide now or explain why and when you will provide. You should already have this information per your statements at the appeal hearing.

Richard Clayton

--- On Tue, 8/21/12, Richard Clayton <rnclayton@yahoo.com> wrote:

From: Richard Clayton <rnclayton@yahoo.com>  
Subject: Re: Ft. Ellsworth Condominiums  
To: "Morgan Snader" <MSnader@bmhjlaw.com>  
Date: Tuesday, August 21, 2012, 2:22 PM

Please provide a list of units inspected on May 1 and/or any other day for purposes of SFPC 703.1 annual inspection requirements.

--- On Tue, 8/21/12, Morgan Snader <MSnader@bmhjlaw.com> wrote:

From: Morgan Snader <MSnader@bmhjlaw.com>  
Subject: Ft. Ellsworth Condominiums  
To: rnclayton@yahoo.com  
Date: Tuesday, August 21, 2012, 2:20 PM

Mr. Clayton:

Please see the attached sign in sheet.

Thank you,

Morgan V. Snader  
Legal Assistant to Michael E. Thorsen  
BANCROFT, McGAVIN, HORVATH, & JUDKINS, P.C.  
3920 University Drive  
Fairfax, Virginia 22030  
Telephone: (703) 385-1000 ext. 140  
Facsimile: (703) 385-1555  
msnader@bmhjlaw.com

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January 4, 2013

VIA ELECTRONIC MAIL  
State Building Code Technical Review Board  
State Building Code Office  
Division of Building & Fire Regulation  
Department of Housing and Community Development  
600 East Main Street, Suite 300  
Richmond, Virginia 23219

RE: Clayton Appeal to the Review Board (Appeal No. 12-5)

To Mr. Vernon Hodge:

Please include this submission as part of the documents for consideration in Appeal No. 12-5.

Thank you,

Richard Clayton, Appellant  
120 Roberts Lane, #300  
Alexandria, VA 22314  
(703) 836-5773  
RNClayton@yahoo.com

**REBUTTAL ARGUMENT AGAINST UNIT OWNER RESPONSIBILITY FOR  
SFPC § 703.1 ANNUAL INSPECTION AS PER THE CITY OF ALEXANDRIA  
FIRE MARSHALL**

Clayton submits the following in rebuttal to the “unit owner” argument by the City of Alexandria as it pertains to responsibility for annual inspections as per the 2009 VIRGINIA STATEWIDE FIRE PREVENTION CODE (SFPC) Section 703.1.

The SFPC defines “Owner” in SFPC § 202 to include persons and associations such that the Fort Ellsworth Unit Owners Association (FEUOA) is eligible for consideration as to “owner” of the annual inspection requirements found in SFPC § 703.1.

SFPC § 202 Definitions.

**OWNER.** A corporation, firm, partnership, association, organization and any other group acting as a unit, or a *person* who has legal title to any structure or premises with or without accompanying actual possession thereof, and shall include the duly authorized agent or attorney, a purchaser, devisee, fiduciary and any *person* having a vested or contingent interest in the premises in question.

The Code of Virginia § 55-79.79(A) reads as follows:

A. Except to the extent otherwise provided by the condominium instruments, all powers and responsibilities, including financial responsibility, with regard to maintenance, repair, renovation, restoration, and replacement of the condominium shall belong (i) to the unit owners' association in the case of the common elements, and (ii) to the individual unit owner in the case of any unit or any part thereof, except to the extent that the need for repairs, renovation, restoration or replacement arises from a condition originating in or through the common elements or any apparatus located within the common elements, in which case the unit owners' association shall have such powers and responsibilities. Each unit owner shall afford to the other unit owners and to the unit owners' association and to any agents or employees of either such access through his unit as may be reasonably necessary to enable them to exercise and discharge their respective powers and responsibilities. But to the extent that damage is inflicted on the common elements or any unit through which access is taken, the unit owner causing the same, or the unit owners' association if it caused the same, shall be liable for the prompt repair thereof.

BY-LAWS OF THE FORT ELLSWORTH CONDOMINIUM APARTMENTS UNIT  
OWNERS' ASSOCIATION  
100 - 136 ROBERTS LANE  
ALEXANDRIA, VA 22314

AS AMENDED APRIL 20, 1982

Section 5. Maintenance and Repair.

(a) By the Board of Directors.

The Board of Directors shall be Responsible for the maintenance, repair, and replacement (unless in the opinion of sixty percent (60%) of the Board of Directors, necessitated by the negligence, misuse, or neglect of a Unit Owner, in which case such expenses shall be charged to such Unit Owner) of the following, the cost of which shall be charged to all Unit Owners as a Common Expense:

- (1) All of the Common Elements, whether located inside or outside of the Units.
- (2) All exterior walls and exterior surfaces, the roof, party walls and other portions of the Units which contribute to the support of any Building, such as the outside walls of a Building and all fixtures on the exterior thereof, (including storm windows and storm doors and appurtenant screens) the boundary walls of Units, floor slabs, floor joist, and attached ceilings, corridor walls, and Unit party walls, but excluding, however, any doors and windows constituting boundaries of Units, interior walls, interior ceilings and interior floors of Units.

As defined in Code of Virginia § 55-79.41:

"Common elements" means all portions of the condominium other than the units.

"Unit" means a portion of the condominium designed and intended for individual ownership and use. (Cf. the definition of condominium unit, supra.) For the purposes of this chapter, a convertible space shall be treated as a unit in accordance with subsection (d) of § 55-79.62.

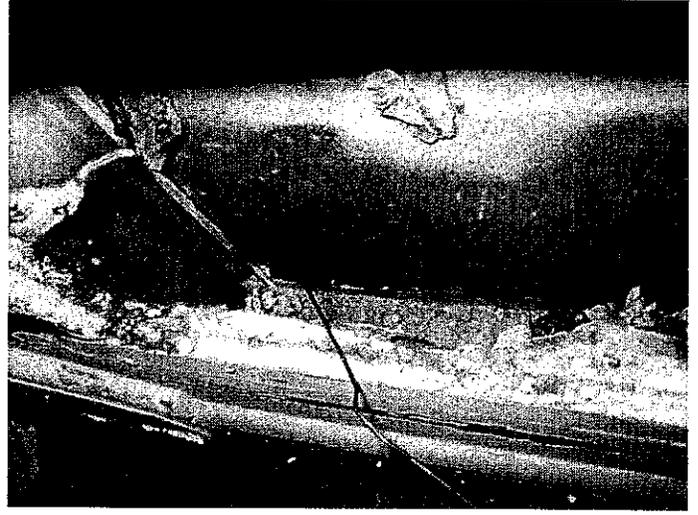
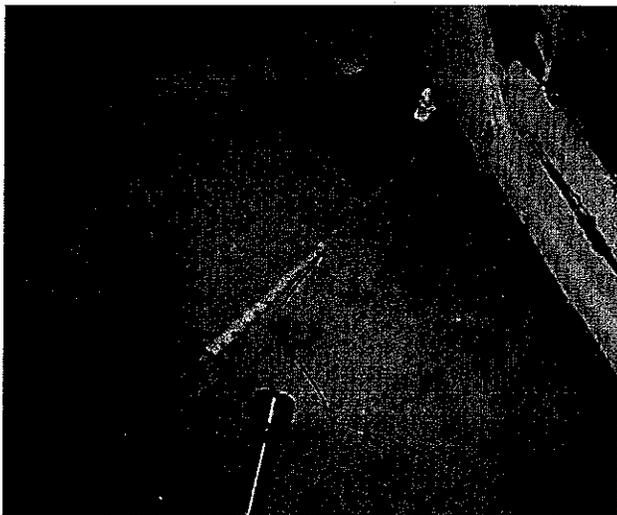
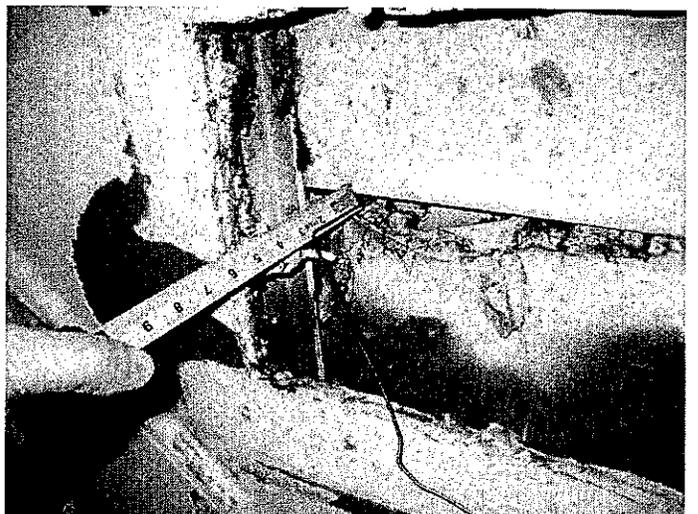
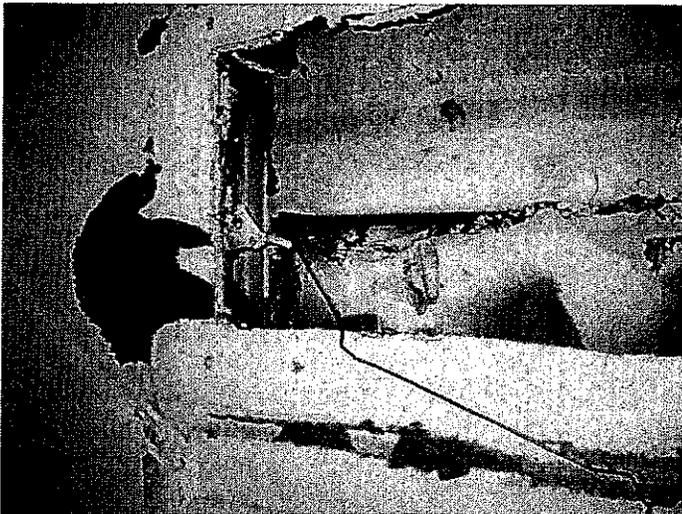
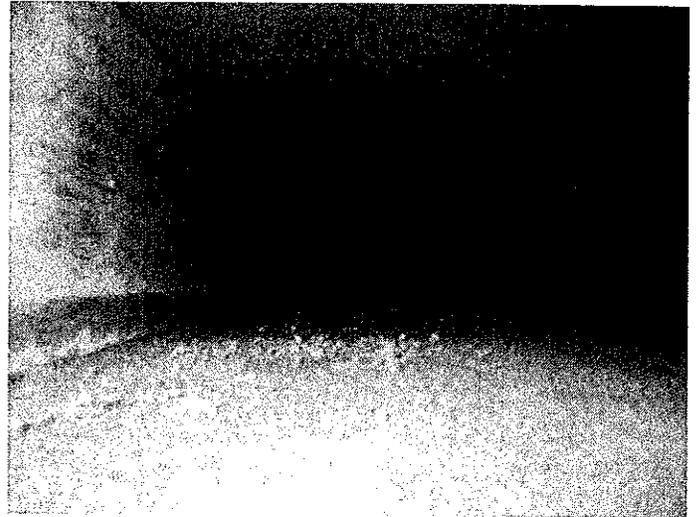
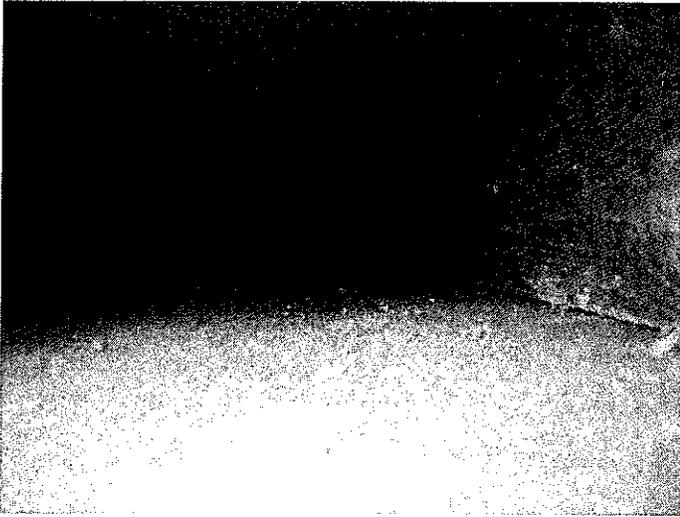
"Unit owner" means one or more persons who own a condominium unit, or, in the case of a leasehold condominium, whose leasehold interest or interests in the condominium extend for the entire balance of the unexpired term or terms. This term shall not include any person or persons holding an interest in a condominium unit solely as security for a debt.

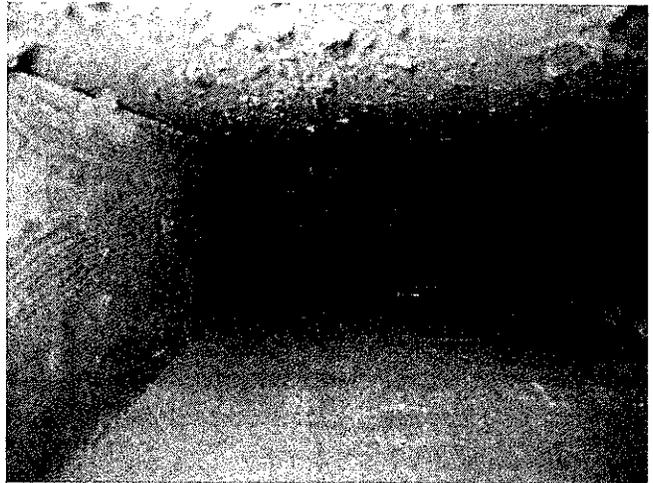
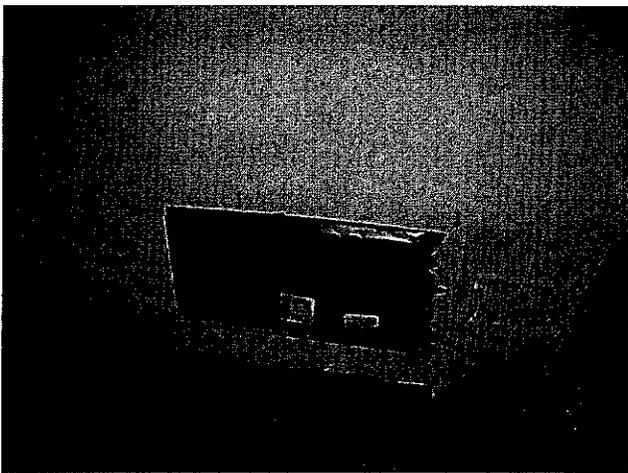
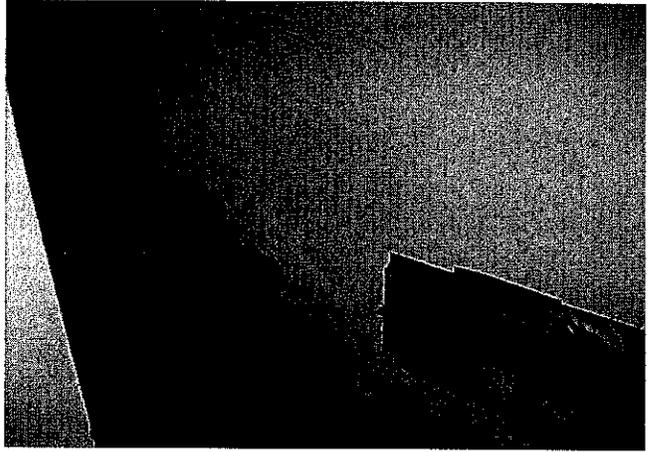
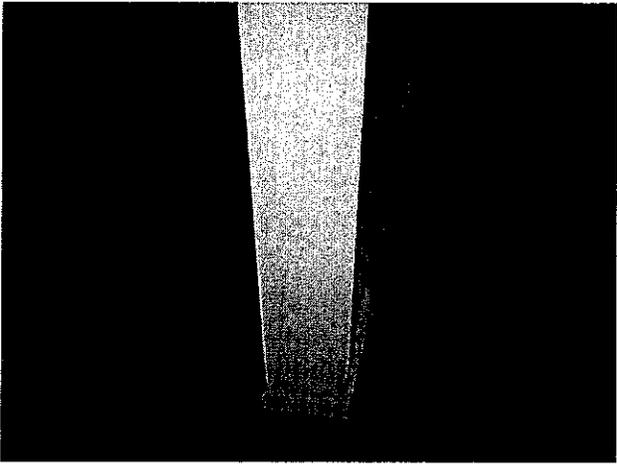
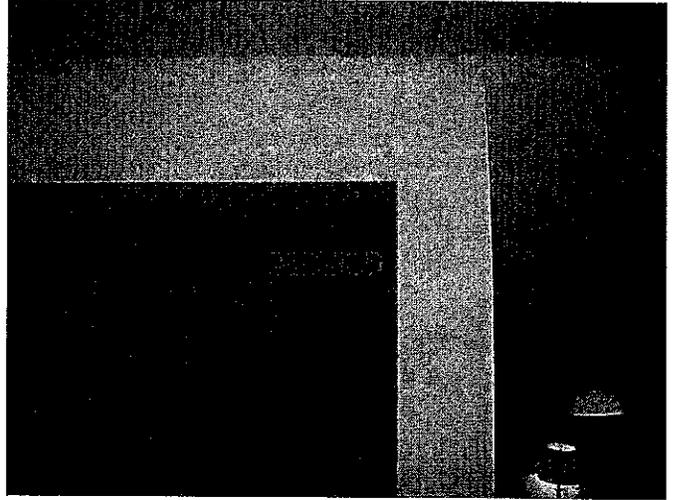
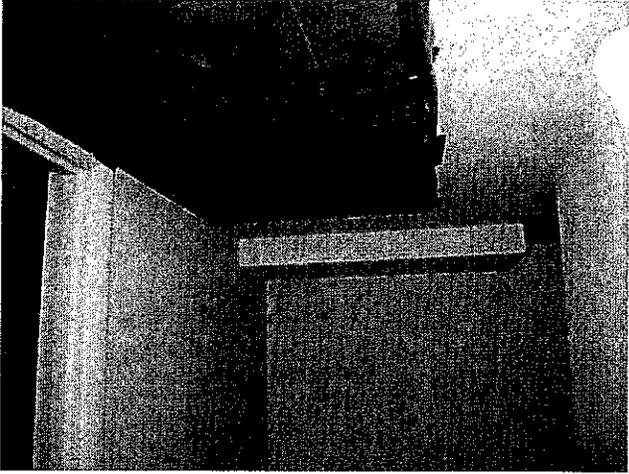
### ARGUMENT AND CONCLUSION

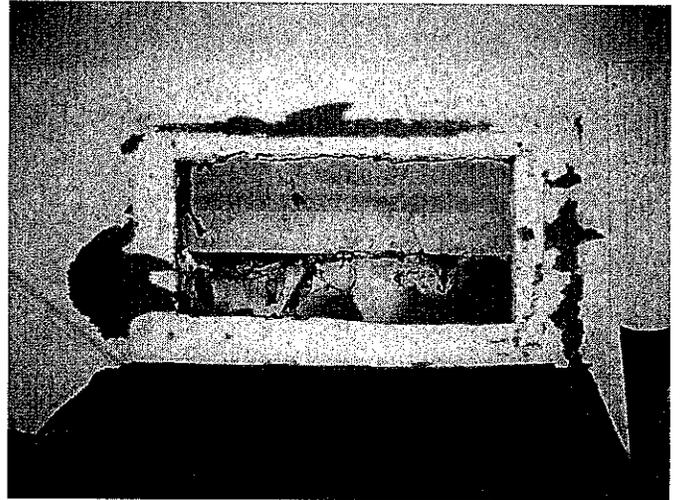
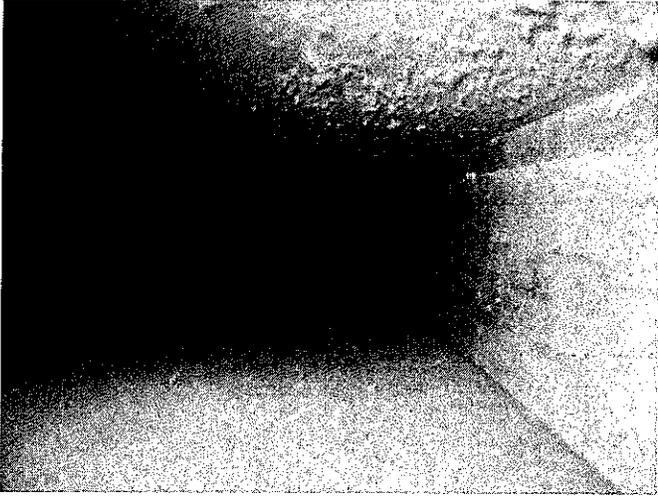
So one may conclude from the language above and arguments below that the FEUOA is the "owner" referenced in SFPC § 703.1 responsible for the maintenance of common elements as represented by firestops (which exist or should exist at the shared boundaries of units such that they are considered common elements which are required to provide 45 minutes of protection from the spread of smoke and fire as per the recent determination by the State Building Code Technical Review Board on Clayton's Appeal 10-2). Furthermore, the FEUOA has authority and duty to enter units as required to carry out their responsibilities under SFPC § 703.1, contrary to the arguments put forth by the City of Alexandria Fire Marshal.

The April 20, 2012 letter to the FEUOA from the City of Alexandria Fire Marshal directed the FEUOA to conduct the annual inspections as required by SFPC § 703.1, not the individual "unit owner", Clayton. The FEUOA has never denied responsibility for SFPC § 703.1 annual inspection requirements nor did it appeal the April 20, 2012 determination letter placing this responsibility on them from the City of Alexandria Fire Marshal in a timely way. Thus, they have officially accepted this decision as final as per SFPC 112.5 which states in pertinent part "[...] Failure to submit an application for appeal within the time limit established by this section shall constitute acceptance of the fire official's decision."

The FEUOA went on to make some interior inspections of several individual units in response to the April 20, 2012 demand letter from the city, further demonstrating their acceptance and "ownership" of SFPC § 703.1 annual inspection responsibilities, as reported by the FEUOA and the City of Alexandria Fire Marshal and as per documents submitted.







**REQUEST FOR INTERPRETATION**

TO: OFFICE OF THE STATE BUILDING CODE TECHNICAL REVIEW BOARD  
VIRGINIA DEPT. OF HOUSING AND COMMUNITY DEVELOPMENT  
Main Street Centre  
600 E. Main Street, Suite 300  
Richmond, Virginia 23219-1321  
Tel: (804) 371-7150 Fax: (804) 371-7092

FROM: Marianne G. Harris

Phone: 757-890-3570 \_\_\_\_\_

Code: 2009

Section(s): 202, 108.1 (3) \_\_\_\_\_

Submitted by (signature): \_\_\_\_\_ Date: \_\_\_\_\_

---

**QUESTION(S):**

Issue: "We have a proposal to run a branch circuit from the building on a legally established lot across a property line to another legally established lot for parking lot lights.

The contention is that the VUSBC does not allow this as Section 202 defines a lot as a portion or parcel of land considered as a unit. A lot is defined as a legally recorded parcel of land with the boundaries described in a deed. Adjacent lots owned by the same party are treated as if they were owned by different parties as ownership could change at any time.

Section 108.1 (3) of the USBC supports this contention as a permit is required for the movement of a lot line that increases the hazard to or decreases the level of safety of a building.

Nothing however in the VUSBC appears specifically to prohibit the line traversing the common boundary between the two parcels. Prior oral advise from your office has been to the effect that it can be allowed provided that an easement were recorded to allow the line to remain in place, at least for so long as both parcels are under common ownership and used for a single use.

Question:

- 1.) Is the application of the VUSBC based on owner or parcel/lot?

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§ 2.2-3707. Meetings to be public; notice of meetings; recordings; minutes.

A. All meetings of public bodies shall be open, except as provided in §§ [2.2-3707.01](#) and [2.2-3711](#).

B. No meeting shall be conducted through telephonic, video, electronic or other communication means where the members are not physically assembled to discuss or transact public business, except as provided in § [2.2-3708](#), [2.2-3708.1](#) or as may be specifically provided in Title 54.1 for the summary suspension of professional licenses.

C. Every public body shall give notice of the date, time, and location of its meetings by placing the notice in a prominent public location at which notices are regularly posted and in the office of the clerk of the public body, or in the case of a public body that has no clerk, in the office of the chief administrator. All state public bodies subject to the provisions of this chapter shall also post notice of their meetings on their websites and on the electronic calendar maintained by the Virginia Information Technologies Agency commonly known as the Commonwealth Calendar. Publication of meeting notices by electronic means by other public bodies shall be encouraged. The notice shall be posted at least three working days prior to the meeting. Notices for meetings of state public bodies on which there is at least one member appointed by the Governor shall state whether or not public comment will be received at the meeting and, if so, the approximate point during the meeting when public comment will be received.

D. Notice, reasonable under the circumstance, of special or emergency meetings shall be given contemporaneously with the notice provided members of the public body conducting the meeting.

E. Any person may annually file a written request for notification with a public body. The request shall include the requester's name, address, zip code, daytime telephone number, electronic mail address, if available, and organization, if any. The public body receiving such request shall provide notice of all meetings directly to each such person. Without objection by the person, the public body may provide electronic notice of all meetings in response to such requests.

F. At least one copy of all agenda packets and, unless exempt, all materials furnished to members of a public body for a meeting shall be made available for public inspection at the same time such documents are furnished to the members of the public body.

G. Nothing in this chapter shall be construed to prohibit the gathering or attendance of two or more members of a public body (i) at any place or function where no part of the purpose of such gathering or attendance is the discussion or transaction of any public business, and such gathering or attendance was not called or prearranged with any purpose of discussing or transacting any business of the public body or (ii) at a public forum, candidate appearance, or debate, the purpose of which is to inform the electorate and not to transact public business or to hold discussions relating to the transaction of public business, even though the performance of the members individually or collectively in the conduct of public business may be a topic of discussion or debate at such public meeting. The notice provisions of this chapter shall not apply to informal meetings or gatherings of the members of the General Assembly.

H. Any person may photograph, film, record or otherwise reproduce any portion of a meeting required to be open. The public body conducting the meeting may adopt rules governing the placement and use of equipment necessary for broadcasting, photographing, filming or recording a meeting to prevent interference with the proceedings, but shall not prohibit or otherwise prevent any person from photographing, filming, recording, or otherwise reproducing any portion of a meeting required to be open. No public body shall conduct a meeting required to be open in any building or facility where such recording devices are prohibited.

I. Minutes shall be recorded at all open meetings. However, minutes shall not be required to be taken at deliberations of (i) standing and other committees of the General Assembly; (ii) legislative interim study commissions and committees, including the Virginia Code Commission; (iii) study committees or commissions appointed by the Governor; or (iv) study commissions or study committees, or any other committees or subcommittees appointed by the governing bodies or school boards of counties, cities and towns, except where the membership of any such commission, committee or subcommittee includes a majority of the governing body of the county, city or town or

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## § 2.2-3714. Violations and penalties.

In a proceeding commenced against any officer, employee, or member of a public body under § [2.2-3713](#) for a violation of § [2.2-3704](#), [2.2-3705.1](#) through [2.2-3705.8](#), [2.2-3706](#), [2.2-3707](#), [2.2-3708](#), [2.2-3708.1](#), [2.2-3710](#), [2.2-3711](#) or [2.2-3712](#), the court, if it finds that a violation was willfully and knowingly made, shall impose upon such officer, employee, or member in his individual capacity, whether a writ of mandamus or injunctive relief is awarded or not, a civil penalty of not less than \$500 nor more than \$2,000, which amount shall be paid into the State Literary Fund. For a second or subsequent violation, such civil penalty shall be not less than \$2,000 nor more than \$5,000.

(1976, c. 467, § 2.1-346.1; 1978, c. 826; 1984, c. 252; 1989, c. 358; 1996, c. [578](#); 1999, cc. [703](#), [726](#); 2001, c. [844](#); 2003, c. [319](#); 2004, c. [690](#); 2008, cc. [233](#), [789](#); 2011, c. [327](#).)

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VIRGINIA DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT  
DIVISION OF BUILDING AND FIRE REGULATION

Code Change Form for the 2012 Code Change Cycle

Code Change Number: \_\_\_\_\_

Proponent Information

(Check one):  Individual  Government Entity  Company

Name: State Building Code Technical Review Board Representing: \_\_\_\_\_

Mailing Address: \_\_\_\_\_

Email Address: \_\_\_\_\_ Telephone Number: \_\_\_\_\_

Proposal Information

Code(s) and Section(s): Virginia Construction Code, Section 102.3 (Exemptions from code)

Proposed Change (including all relevant section numbers, if multiple sections):

Add a new Item 8 to Section 102.3 to read as follows:

8. Storage or shipping containers which are not constructed or altered on site and which are not subject to the change of occupancy provisions.

Supporting Statement (including intent, need, and impact of the proposal):

The Review Board issued Interpretation No. 2/03 clarifying that shipping or storage containers are not regulated unless they are constructed on site or subject to the change of occupancy provisions. The reasoning behind the interpretation was that scope of the code is only for the construction of buildings and structures. The term "construction" is defined as "construction, reconstruction, alteration, repair or conversion of buildings and structures;" therefore, if no construction is taking place, the containers are not subject to the code. This proposal adds an exemption to the code for such storage containers or shipping containers unless construction is taking place. Under the Review Board's statutory authority, interpretations issued by the Review Board, when deemed appropriate by the Review Board members, are forwarded to the Board of Housing and Community Development as recommendations for future amendments to the code.

Submittal Information

Date Submitted: March 16, 2012



VIRGINIA DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT  
DIVISION OF BUILDING AND FIRE REGULATION

Code Change Form for the 2012 Code Change Cycle

Code Change Number: \_\_\_\_\_

Proponent Information

(Check one):  Individual  Government Entity  Company

Name: Ron Clements

Representing: Chesterfield County

Mailing Address: 9800 Government Center Parkway

Email Address: clementsro@chesterfield.gov

Telephone Number: (804) 751-4163

Proposal Information

Code(s) and Section(s): VCC 102.3 and IBSR

VCC section 102.3 Exemptions.

Add new exception #8:

#8 Off-site manufactured intermodal freight containers, moving containers and storage containers placed on site temporarily or permanently for use as a storage container.

IBSR revise as follows:

13 VAC 5-91-20. Application and compliance.

D. Shipping containers and portable on demand storage (PODS) containers Off-site manufactured intermodal freight containers, moving containers and storage containers placed on site temporarily or permanently for use as a storage container are not subject to this chapter.

Supporting Statement (including intent, need, and impact of the proposal):

This code change clarifies that manufactured intermodal freight containres, shipping containers and moving containers placed on a property for use as a temporary or permanent storage container/building are exempt from both the USBC and IBSR.

Submittal Information

Date Submitted: \_\_\_\_\_

The proposal may be submitted by email as an attachment, by fax, by mail, or by hand delivery.

Please submit the proposal to:

DHCD DBFR TASO (Technical Assistance and Services Office)  
The Jackson Center  
501 N. 2nd Street  
Richmond, VA 23219-1321

Email Address: [taso@dhcd.virginia.gov](mailto:taso@dhcd.virginia.gov)  
Fax Number: (804) 371-7092  
Phone Numbers: (804) 371-7140 or (804) 371-7150

