

01-117

HOUSING: UNIFORM STATEWIDE BUILDING CODE.

**COMMON LAW, STATUTES AND RULES OF CONSTRUCTION:
GENERAL PROVISIONS.**

State Building Code supersedes design elements in Suffolk city ordinance requiring use of specific building materials and finishes in construction of all buildings.

The Honorable Martin E. Williams
Member, Senate of Virginia
November 19, 2001

You ask whether the third paragraph of § 36-98 of the *Code of Virginia*, as amended by the 2001 Session of the General Assembly,¹ supersedes all residential architectural design feature requirements of an ordinance adopted by the City of Suffolk.

You relate that, in September 1999, the City of Suffolk adopted a comprehensive ordinance, entitled the Unified Development Ordinance, in an attempt to regulate development in the city.² You advise that the ordinance contains certain residential architectural design features which are required for single family homes constructed in a planned development zone.³ Furthermore, you advise that the ordinance contains a listing of residential architectural design features which the City is attempting to enforce on all single family residential projects built in the city.⁴ The portion of the subject ordinance about which you specifically inquire requires that "[e]xterior materials and finishes such as brick, stone, wood, clapboard, cedar shake, stucco, drivet or similar material shall be provided on all exterior elevations on not less than fifty (50%) percent of all buildings".⁵ For the purposes of this opinion, you ask that I assume that you are referring to projects involving single family residential construction.

Section 36-98, a portion of the Uniform Statewide Building Code⁶ ("Building Code"), directs and empowers the Board of Housing and Community Development "to adopt and promulgate a Uniform Statewide Building Code," and expressly provides that "[s]uch building code shall supersede the building codes and regulations of the counties, municipalities and other political subdivisions and state agencies." Prior opinions of the Attorney General conclude that the Building Code supersedes all building and maintenance codes and regulations of counties,

municipalities, political subdivisions and state agencies that have been or may be enacted or adopted.⁷ The dominant purpose of the Building Code is "to protect the health, safety and welfare of the residents of this Commonwealth."⁸ Another important purpose of the Building Code is to provide for "the safety of ultimate construction."⁹

The third paragraph of § 36-98 pertains to the effect of the Building Code on local ordinances, and provides:

Such [Building] Code also shall supersede the provisions of local ordinances applicable to single family residential construction that (a) regulate dwelling foundations or crawl spaces, (b) require the use of specific building materials or finishes in construction, or (c) require minimum surface area or numbers of windows; however, such Code shall not supersede proffered conditions accepted as a part of a rezoning application, conditions imposed upon the grant of special exceptions, special or conditional use permits or variances, or land use requirements in airport or highway overlay districts, or historic districts created pursuant to § [15.2-2306](#), or local flood plain regulations adopted as a condition of participation in the National Flood Insurance Program.

A rule of statutory construction requires the presumption that, when new provisions are added to existing legislation by an amendatory act, a presumption normally arises that a change in the law was intended.¹⁰ In addition, two bodies of law which pertain to the same subject matter are said to be *in pari materia*.¹¹ Where possible, the two should be harmonized in order to give effect to both.¹² "If both the statute and the ordinance can stand together and be given effect, it is the duty of the courts to harmonize them and not nullify the ordinance."¹³ Of course, consistent with Dillon's Rule, the local ordinance must be supported by adequate enabling legislation.¹⁴

When the state in the exercise of its police power enacts certain laws, however, a political subdivision may in the exercise of its delegated police powers legislate on the same subject.¹⁵ The exercise of this power by a locality cannot, however, be inconsistent with state law.¹⁶ An ordinance is inconsistent with state law if state law preempts local regulation in the area, either by expressly prohibiting local regulation or by enacting state

regulations so comprehensive that the state may be considered to occupy the entire field.¹⁷ Section 1-13.17 precludes a local governing body from enacting ordinances "inconsistent with" state law.¹⁸ It is beyond doubt that § 1-13.17 can have the effect of invalidating local ordinances under appropriate circumstances.¹⁹

The design element contained in the Suffolk city ordinance, requiring that "[e]xterior materials and finishes such as brick, stone, wood, clapboard, cedar shake, stucco, drivet, or similar materials shall be provided on all exterior elevations on not less than fifty (50%) percent of all buildings,"²⁰ clearly mandates the use of specific building materials or finishes in construction. The third paragraph of § 36-98 unambiguously "supersede[s] the provisions of local ordinances applicable to single family residential construction ... requir[ing] the use of specific building materials or finishes in construction." The third paragraph of § 36-98 is clearly "so comprehensive that the state may be considered to occupy the entire field." Consequently, I must conclude that design elements of the Suffolk city ordinance quoted above are preempted by the provisions of the third paragraph of § 36-98.

¹2001 Va. Acts ch. 525, at 588.

²Suffolk, Va., Unified Development Ordinance (Jan. 26, 2000) [hereinafter Suffolk Ordinance].

³*See id.* art. 4, § 31-410.

⁴*See id.* table 410-2.

⁵*Id.* at 4-55.

⁶Va. Code Ann. §§ 36-97 to 36-119.1 (Michie Repl. Vol. 1996 & Supp. 2001).

⁷*See Op. Va. Att'y Gen.*: 1986-1987 at 221, 221; 1985-1986 at 184, 184; *see also* Fairfax County v. M. & S., Inc., 222 Va. 230, 279 S.E.2d 158 (1981).

⁸Section 36-99(A) (Michie Supp. 2001). "The Building Code shall prescribe building regulations to be complied with in the construction of buildings and structures, and the equipment therein as defined in § 36-97, and shall prescribe regulations to insure that such regulations are properly maintained, and shall also prescribe procedures for the administration and enforcement of such regulations. The provisions thereof shall be such as to protect the health, safety and welfare of the residents of this Commonwealth, provided that buildings and structures should be permitted to be constructed at the least possible cost consistent with recognized standards of health, safety, energy conservation and water conservation and barrier-free provisions for the physically handicapped and aged." *Id.*

⁹VEPCO v. Savoy Const. Co., 224 Va. 36, 44, 294 S.E.2d 811, 817 (1982) (quoting Jan. 2, 1980, trial court judge op.).

¹⁰Wisniewski v. Johnson, 223 Va. 141, 144, 286 S.E.2d 223, 224-25 (1982); *see also* Op. Va. Att’y Gen.: 1996 at 61, 61; 1990 at 156, 157; 1986-1987 at 272, 273.

¹¹*See* Op. Va. Att’y Gen.: 1983-1984 at 135, 135; 1982-1983 at 343, 344; 1981-1982 at 273, 274.

¹²Prillaman v. Commonwealth, 199 Va. 401, 405, 100 S.E.2d 4, 7 (1957).

¹³King v. County of Arlington, 195 Va. 1084, 1091, 81 S.E.2d 587, 591 (1954).

¹⁴City of Virginia Beach v. Hay, 258 Va. 217, 221, 518 S.E.2d 314, 316 (1999) (holding that, under Dillon’s Rule, local governing bodies have only those powers expressly granted by legislature, those powers fairly or necessarily implied from expressly granted powers, and those powers which are essential and indispensable. Where legislature grants power to local government but does not specify method of implementing power, local government’s choice as to how to implement conferred power will be upheld, provided method chosen is reasonable).

¹⁵Ticonderoga Farms v. County of Loudoun, 242 Va. 170, 175, 409 S.E.2d 446, 449 (1991); *King*, 195 Va. at 1088, 81 S.E.2d at 590.

¹⁶"When the council ... of any city ... [is] authorized to make ordinances, ... it shall be understood that the same must not be inconsistent with the Constitution and laws of ... this Commonwealth." Va. Code Ann. § 1-13.17 (Matthew Bender Repl. Vol. 2001); *see* 1995 Op Va. Att’y Gen. 85, 86.

¹⁷*See King*, 195 Va. at 1087, 81 S.E.2d at 590; 1983-1984 Op Va. Att’y Gen. 86, 87; *see also* Hanbury v. Commonwealth, 203 Va. 182, 185, 122 S.E.2d 911, 913 (1961).

¹⁸Loudoun County v. Pumphrey, 221 Va. 205, 269 S.E.2d 361 (1980).

¹⁹*Id.*; Wayside Restaurant, Inc. v. City of Virginia Beach, 215 Va. 231, 208 S.E.2d 51 (1974); *Kisey*, 212 Va. at 693, 187 S.E.2d at 168; *King*, 195 Va. at 1087, 81 S.E.2d at 590.

²⁰Suffolk Ordinance, *supra* note 2, art. 4, § 31-410, table 410-2, at 4-55.

[Back to November Index](#)