



**COMMONWEALTH of VIRGINIA**  
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**MEMORANDUM**

To: William C. Shelton, Director  
Department of Housing and Community Development

From: William A. Diamond  
Assistant Attorney General

Date: June 2, 2004

Subject: Proposed Regulation – Amendment to Statewide Fire Prevention Code  
(13 VAC 5-51-10 et seq.)

At your request, I have reviewed the proposed amendment to Section 804.1.1 of the International Fire Code/2000 (“IFC”). The IFC is incorporated by reference into the Virginia Administrative Code at 13 VAC 5-51-31 as part of the Statewide Fire Prevention Code.

In my view, as counsel to your agency, the Board of Housing and Community Development possesses the statutory authority to promulgate the aforesaid revisions under § 27-97 of the Code of Virginia.

With respect to whether the Board is authorized to promulgate this regulation on an emergency basis we must look to Virginia Code § 2.2-4011. Under most circumstances, the existence of an emergency situation is a factual finding by the agency, and therefore no opinion is expressed by this Office. In this instance, however, we must look to (A)(ii) of Code § 2.2-4011, which refers in pertinent part to a situation “in which Virginia statutory law ...requires that a regulation be effective in 280 days or less from its enactment, and the regulation is not exempt under the provisions of subdivision A.4. of § 2.2-4006.”

The 2004 regular session of the General Assembly enacted Chapter 138, approved on March 15, 2004, as follows:

1. *The use of natural cut Christmas trees in places of worship and in apartment dwelling units.*

*The Board of Housing and Community Development shall promulgate regulations in accordance with the Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia) to permit the use of natural cut Christmas trees in places of worship and apartment dwelling units without an approved automatic sprinkler system. In the development of the regulations, the Board of Housing and Community Development shall seek input from state and local fire code officials, local building code officials, representatives of apartment owners and managers, and representatives of places of worship.*

2. That an emergency exists and this act is in force from its passage.

Chapter 138 was the legislative response to the prior adoption of the International Fire Code/2000 by the Board. A provision in that Fire Code made it illegal to keep a natural cut Christmas tree in places of worship and apartment dwelling units lacking an approved automatic sprinkler system.

The determination as to whether the wording of Chapter 138 is sufficient to meet the requirements of Code § 2.2-4011(A)(ii) is subject to legal interpretation and is therefore appropriate for review by this Office.

Promulgation of the proposed regulation is not exempt from the Virginia Administrative Process Act (“VAPA”). If the first section of Chapter 138 had stopped at the end of the first sentence, then it would have placed a requirement on the Board of Housing and Community Development to act without qualification of any kind, and would likely have made the Chapter subject to § 2.2-4006(A)(4) of VAPA. However, by adding the second sentence to the first section of the Chapter, the General Assembly was directing the Board to exercise some discretion with respect to the regulation. Such discretion is inconsistent with the provisions of A.4 of § 2.2-4006. Furthermore, by its own terms, Chapter 138 requires the Board to promulgate the regulation in accordance with the VAPA.

By its express terms Chapter 138 does not literally comply with the 280 day implementation requirement of § 2.2-4011(A)(ii). However, for two reasons Chapter 138 strongly suggests an intent that the regulation go into effect very rapidly if not immediately. First, while the first section of Chapter 138 does not meet the requirement for exemption of the regulation from the VAPA, any discretion given to the Board is severely limited. The General Assembly gave a clear mandate to the Board that it must promulgate a regulation that permits the use of natural cut Christmas trees in places of worship and apartment dwelling units without an approved automatic sprinkler system. Regardless of the input received by the Board from other parties, as required by the second sentence of the first section of Chapter 138, the resulting regulation must make natural cut Christmas trees permitted uses in such places of worship and apartment dwelling units. The General Assembly was not merely asking the Board to look into this matter and to act as the Board felt appropriate. Rather, the General Assembly was directing the result. Any discretion that the Board retained was extremely limited in scope. Second, the General Assembly stated that “an emergency exists and this act is in force from its passage.” Such language, by itself, may be insufficient to evidence a legislative intent that emergency regulations are authorized, but such intent may be derived from the context of the legislation. The statute was enacted on March 15, 2004. If the amendment to the existing regulation was not handled on an emergency basis, it would be impossible to have the amended regulation in effect in time for the following Christmas celebration. Clearly, this was the result that the General Assembly wished to avoid. *See 2004 Va. A.G. S-3* (“The ultimate purpose of all rules of construction is to ascertain the intention of the legislature, which must prevail in all cases.”).

For the foregoing reasons, we are of the view that an emergency situation exists and that the requirements of Code § 2.2-4011(A) have been met.