



COMMONWEALTH of VIRGINIA

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May 4, 2015

The Honorable Marissa J. Levine, MD, MPH, FAAFP
State Health Commissioner
Virginia Department of Health
Post Office Box 2448
Richmond, Virginia 23218

Dear Commissioner Levine:

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

Issues Presented

You ask whether the Board of Health may require that facilities in existence before the enactment of the Regulations for Licensure of Abortion Facilities¹ satisfy the “design and construction standards”² in those regulations. You also ask if the Board of Health has the discretion under § 32.1-127.001 of the *Code of Virginia* to decide which prevails—the Uniform Statewide Building Code³ or the Guidelines for Design and Construction of Hospitals and Outpatient Facilities⁴—when the two standards contain conflicting requirements. Finally, you ask what § 32.1-127.001 means when it provides that the regulations must be “consistent with” the current edition of the Guidelines for Design and Construction of Hospital and Health Care Facilities.

Background

Section 32.1-127 of the *Code of Virginia* requires the Board of Health (the “Board”) to adopt regulations governing hospitals, nursing homes, and certified nursing facilities.⁵ These regulations must include minimum standards for “the construction and maintenance of [facilities] to ensure the environmental

¹ 12 VA. ADMIN. CODE § 5-412.

² *Id.* at § 5-412-370.

³ 13 VA. ADMIN. CODE § 5-63.

⁴ The Facility Guidelines Institute (the “FGI”) publishes minimum recommendations for the design and construction of health care facilities. The 2010 edition of the publication was called *Guidelines for Design and Construction of Health Care Facilities* [hereinafter 2010 Guidelines]. In 2014 the FGI issued an updated set of guidelines called *Guidelines for Design and Construction of Hospitals and Outpatient Facilities* (2014) [hereinafter 2014 Guidelines]. As required by § 32.1-127.001, the Board will use the 2014 Guidelines during its current review of the regulations. See VA. CODE ANN. § 32.1-127.001 (2011).

⁵ Section 32.1-127(B)(1) (Supp. 2014).

protection and the life safety of its patients, employees, and the public.”⁶ In 2005, the General Assembly enacted § 32.1-127.001, which requires that these design-and-construction standards be “consistent with the current edition of the Guidelines for Design and Construction of Hospital and Health Care Facilities issued by the American Institute of Architects Academy of Architecture for Health” (the “Guidelines”).⁷ Pursuant to §§ 32.1-127 and 32.1-127.001, the Board adopted regulations in 2005 relating to the construction of new hospital,⁸ outpatient hospital,⁹ and nursing facility¹⁰ buildings. Those regulations generally require new facilities to follow relevant state and local laws, including both the Virginia Uniform Statewide Building Code (the “USBC”) and the Guidelines.¹¹ The Board did not require facilities constructed before the Board promulgated the new standards to comply with the design-and-construction sections of those regulations.¹²

In 2011, the General Assembly amended § 32.1-127(B)(1) so that, for the purposes of the minimum standards required in regulations promulgated by the Board under that paragraph, “facilities in which five or more first trimester abortions per month are performed shall be classified as a category of ‘hospital.’”¹³ The Board subsequently promulgated new emergency regulations, adopted as final regulations in 2013, addressing the clinical operation, staffing, and equipment of such facilities. Applying the provisions of § 32.1-127.001, the new regulations also imposed new design-and-construction standards on facilities that perform five or more first trimester abortions a month. The Board’s authority to adopt appropriate standards governing the clinical operation of those facilities is not in question. Consequently, this Opinion addresses only the scope of the Board’s authority to impose design-and-construction regulations under §§ 32.1-127(B)(1) and 32.1-127.001.

Like the design-and-construction regulations previously promulgated by the Board with respect to hospitals and nursing facilities, the Board required regulated health care facilities that provide abortion services to comply with state and local codes, zoning and building ordinances, the USBC, and the relevant sections of the Guidelines.¹⁴ Unlike its design-and-construction regulations for hospitals and nursing facilities, however, the Board applied the new design-and-construction standards to both new regulated facilities that provide abortion services as well as those built *before* the regulations were adopted.¹⁵ The

⁶ *Id.*

⁷ Section 32.1-127.001.

⁸ 22:8 VA. R. 1130 (Dec. 26, 2005).

⁹ 22:8 VA. R. 1152 (Dec. 26, 2005).

¹⁰ 22:7 VA. R. 1022 (Dec. 12, 2005).

¹¹ 22:8 VA. R. 1130 & 1152; 22:7 VA. R. 1022.

¹² I refer to regulations generally related to the design and construction of buildings as “design-and-construction” standards. They are found under the subheadings “General building and physical plant information” in 12 VA. ADMIN. CODE § 5-410-650 (standards for hospitals); “Codes; fire safety; zoning; construction standards” in § 5-410-1350 (standards for outpatient hospitals); and “Architectural drawings and specifications” in § 5-371-410 (standards for nursing facilities).

¹³ 2011 Va. Acts ch. 670 (amending § 32.1-127(B)(1)).

¹⁴ 12 VA. ADMIN. CODE § 5-412-370.

¹⁵ Compare 12 VA. ADMIN. CODE § 5-412-370 (“abortion facilities shall comply”), with § 5-371-410 (applying nursing home regulations to “*new* buildings”) (emphasis added), § 5-410-1350 (applying outpatient hospital regulations to “construction of *new* buildings”) (emphasis added), and § 5-410-650 (applying hospital regulations to “*new* buildings”) (emphasis added).

Board established a two-year window during which existing facilities must bring themselves into compliance with the new construction standards.¹⁶

Notably, in its initial approval of the final regulations, the Board did *not* make the design-and-construction section applicable to existing facilities.¹⁷ Instead, like the regulations governing hospitals and nursing facilities, the design-and-construction section of the regulations would have applied only to “construction of *new* buildings and additions, renovations, alterations, and repairs.”¹⁸ The Office of the Attorney General, however, advised the Board¹⁹ that it “does not have the statutory authority to exempt existing facilities” from the new design-and-construction standards.²⁰ The Office of the Attorney General then refused to certify the version of the regulations that would have applied the design-and-construction standards only to new construction.²¹ In response, the Board reversed its decision and promulgated final regulations requiring existing facilities to come into compliance with the design-and-construction standards within two years.²²

In 2014, Governor Terence R. McAuliffe directed the Board to conduct a periodic review of the regulations governing the licensure of abortion facilities.²³ That review resulted in the adoption and publication of a Notice of Intended Regulatory Action (“NOIRA”) to amend those regulations. According to the NOIRA, the Board intends to update a variety of aspects of the regulations, including the requirements for facility design and construction.²⁴

¹⁶ 12 VA. ADMIN. CODE § 5-412-370. The Commissioner has the authority to grant a variance if adherence to the requirement poses an impractical hardship and if granting the temporary variance would not endanger the safety or well-being of patients. Section 5-412-80.

¹⁷ See *Minutes of the Board of Health* (June 15, 2012), at 6-8, available at <http://www.vdh.state.va.us/Administration/meetings/documents/2012/pdf/Minutes%20June%2015%202012.pdf>. The emergency regulations, however, had applied the design-and-construction standards to facilities constructed before the regulations were adopted.

¹⁸ *Id.* at 6-7 (emphasis added).

¹⁹ That advice was not provided in a formal Opinion requested under § 2.2-505.

²⁰ *Minutes of the Board of Health* (Apr. 12, 2013), at 6, available at http://www.vdh.state.va.us/Administration/Meetings/documents/2013/pdf/Minutes%20April%2012_2013.pdf.

²¹ See *id.* at 7 (“[T]his [non-retroactivity language] is the same language that the Board adopted during its meeting in June 2012 that the Office of the Attorney General did not certify.”).

²² *Id.* at 8.

²³ Governor Terence R. McAuliffe, Executive Directive 1 (2014), available at <https://governor.virginia.gov/media/3392/ed-1-directing-the-board-of-health-to-conduct-a-periodic-review-of-regulations-governing-licensure-of-abortion-facilities-12vac5-412.pdf>.

²⁴ Notice of Intended Regulatory Action, 12VAC5-412, 33:10 VA. R. 752 (Jan. 12, 2015), available at <http://register.dls.virginia.gov/details.aspx?id=4777>.

Applicable Law and Discussion

I. The Board's authority to apply the design-and-construction section of the regulations to previously constructed facilities.

For the following reasons, it is my opinion that in 2011 and 2013 the Board did not have the authority to apply the design-and-construction section of the regulations to facilities built before the regulations took effect, nor does it have the authority to do so now.

First, when it amended § 32.1-127(B)(1) in 2011, the General Assembly did not use language authorizing the Board to apply design-and-construction standards to facilities built before the new regulations took effect. In Virginia, there is a strong presumption against the retroactive application of a statute unless the statute makes that intention unmistakably clear.²⁵ The Supreme Court of Virginia has explained that “a statute is *always* to be construed as operating prospectively, unless a contrary intent is manifest.”²⁶ The General Assembly expresses that intent when it uses statutory language clearly calling for retroactive application.²⁷ For example, in § 36-99.3, the General Assembly expressly directed colleges and universities in Virginia to install and maintain USBC-compliant smoke detectors “*regardless of when the building was constructed.*”²⁸ That statute makes the retroactive intent clear. The 2011 amendment to § 32.1-127(B)(1) contained no similar language requiring that building standards be applied to already-constructed facilities.

The language of § 32.1-127.001, which predated the 2011 amendment to § 32.1-127(B)(1), also expresses no intent to impose new design-and-construction requirements on existing hospital or nursing facilities. Section 32.1-127 requires the Board to create standards for the “construction” and maintenance of facilities and § 32.1-127.001 requires the Board to create standards for the “design and construction” of facilities. Black’s Law Dictionary defines “construction” as “*the act of building*”²⁹ and “design” as “a plan or scheme.”³⁰ Consequently, the plain meaning of the statutes is that the regulations are to apply to *new* design and construction of facilities or renovations to existing facilities—not to facilities already built and completed. When interpreting statutes in Virginia, we “assume that the legislature chose, with care, the words it used when it enacted the relevant statute.”³¹ The terms in both § 32.1-127(B)(1) and § 32.1-127.001 express only prospective application. Under the clear-statement rule, therefore, they do not have retroactive application and apply only to new construction.

²⁵ *Adams v. Alliant Techsystems*, 261 Va. 594, 599 (2001) (explaining that “[r]etroactive laws are not favored”); *Rainey v. City of Norfolk*, 14 Va. App. 968, 972 (1992).

²⁶ *Adams*, 261 Va. at 599 (emphasis added) (citing *Duffy v. Hartsock*, 187 Va. 406, 419 (1948) (quoting *Whitlock v. Hawkins*, 105 Va. 242 (1906)); see also *Bailey v. Spangler*, No. 141702, 2015 Va. LEXIS 52, at *8 (Apr. 16, 2015) (“Absent an express manifestation of intent by the legislature, this Court will not infer the intent that a statute is to be applied retroactively.”); *Bd. of Supvrs. v. Windmill Meadows, L.L.C.*, 287 Va. 170, 180 (2014).

²⁷ See, e.g., 2011 Op. Va. Att’y Gen. 171, 176-77 (finding the requisite manifest intent because the General Assembly “expressly provide[d]” for retroactive application).

²⁸ VA. CODE ANN. § 36-99.3(A) (2014) (emphasis added); see also VA. CODE ANN. § 6.2-620 (1999) (applying the provisions of the article to multiple-party accounts *regardless of when* such multiple-party accounts were opened or created) (emphasis added); VA. CODE ANN. § 55-66.3 (2012) (allowing the procedure for the release of a deed of trust to be applied to deeds of trust after July 1, 2002 *regardless of when* the deed of trust was created) (emphasis added).

²⁹ BLACK’S LAW DICTIONARY 379 (10th ed. 2014) (emphasis added).

³⁰ *Id.* at 541.

³¹ *Alger v. Commonwealth*, 267 Va. 255, 261 (2004) (quoting *Barr v. Town & Country Props., Inc.*, 240 Va. 292, 295 (1990)) (internal quotation marks omitted).

Second, the Board's interpretation that the design-and-construction standards under §§ 32.1-127 and 32.1-127.001 apply retroactively to pre-existing facilities is contrary to longstanding administrative practice. It is well settled in Virginia that when the interpretation of a statute has been uniform for many years in administrative practice, that interpretation is entitled to great weight.³² In such cases, the General Assembly is presumed to be aware of the agency's interpretation and to have acquiesced in it.³³ In this case, in the six years between 2005, when § 32.1-127.001 was first enacted, and 2011, when its scope was extended, all regulations promulgated by the Board pursuant to §§ 32.1-127 and 32.1-127.001 applied only to new buildings and renovations of existing buildings.³⁴ Accordingly, the General Assembly is presumed to have expected that the Board would continue to use its consistent, longstanding interpretation that §§ 32.1-127 and 32.1-127.001 have only prospective effect.³⁵

Third, applying the Guidelines to buildings already constructed contravenes both the plain language of the Guidelines themselves and their intended purpose. By their own terms, the Guidelines do not apply to facilities that have already been built. The 2014 Guidelines explicitly limit the scope of their application to "new construction and major renovation projects."³⁶ New construction includes only "entirely new structures and systems,"³⁷ "additions to existing facilities that result in an increase of occupied floor area,"³⁸ and a "[c]hange in function in an existing space,"³⁹ while major renovations include "[a] series of planned changes and updates" or "modification of an entire building or entire area . . . to accommodate a new use or occupancy."⁴⁰ The 2010 Guidelines also clearly explained that they applied only to new construction and renovation projects.⁴¹ The Guidelines are and have been clear—they are not meant to apply to existing facilities that are not undertaking a major renovation.

³² *Dan River Mills, Inc. v. Unemployment Comp. Comm'n*, 195 Va. 997, 1002 (1954).

³³ *See Commonwealth v. Am. Radiator & Standard Sanitary Corp.*, 202 Va. 13, 19 (1960) ("When [the construction of a statute] has long continued without change the legislature will be presumed to have acquiesced therein."); *Miller v. Commonwealth*, 180 Va. 36, 42 (1942) ("The Legislature is presumed to be cognizant of [the interpretation of a statute by public officials], and, when long continued, in the absence of legislation evincing a dissent, the courts will adopt that construction.").

³⁴ *See* 12 VA. ADMIN. CODE § 5-371-410 (applying to "construction of new [nursing home] buildings and additions, renovations or alterations of existing buildings"); § 5-410-1350 (applying to "construction of new [outpatient hospital] buildings and additions[,] alterations or repairs to existing buildings"); § 5-410-650 (applying to "construction of new [hospital] buildings and additions, renovations, alterations or repairs of existing buildings").

³⁵ *Cf. Beck v. Shelton*, 267 Va. 482, 492 (2004) (holding that an opinion of the Attorney General interpreting a statute was entitled to particular weight "when the General Assembly has known of the Attorney General's Opinion, in this case for five years, and has done nothing to change it").

³⁶ 2014 Guidelines § 1.1-1.2.1 ("Each chapter in this document contains information intended as minimum standards for [the] design and construction of *new*, and for major renovations of existing, health care facilities.") (emphasis added). The sections of the Guidelines incorporated in the abortion facility regulations do contain an appendix that offers some non-binding *recommendations* that existing facilities follow. For example, the Guidelines recommend that "[o]wners of existing facilities should undertake an assessment of their facilities' ability to withstand the effects of regional natural disasters." *Id.* at § A1.2-5.5.1.

³⁷ *Id.* at § 1.1-2.1.

³⁸ *Id.* at § 1.1-2.2.

³⁹ *Id.* at § 1.1-2.3.

⁴⁰ *Id.* at § 1.1-3.1.1.2. The 2011 amendment to § 32.1-127(B)(1) changed the statutory scheme regulating abortion facilities—but it did not change the function or use of those facilities. Nothing in the statute changed the types of services offered to patients.

⁴¹ *See* 2010 Guidelines § 1.1-1.3.2 (explaining that "this document contains information intended as minimum standards for designing and constructing new health care facility projects"); § 1.1-3.2 ("In renovation projects and

Fourth, when the USBC applies, retroactive enforcement violates the plain language and intent of the General Assembly. Under the USBC:

Any building or structure, for which a building permit has been issued or on which construction has commenced, or for which working drawings have been prepared in the year prior to the effective date of the Building Code, *shall remain subject to the building regulations in effect at the time of such issuance or commencement of construction.*^[42]

That language is unambiguous—facilities are to be regulated according to the version of the USBC in effect when they were constructed, not newer versions of the USBC enacted years or even decades later.⁴³

Accordingly, the Board has no authority to apply the design-and-construction section of the regulations to pre-existing facilities. To the extent this Office previously provided advice that conflicts with this formal Opinion, that advice is revoked and overruled.

II. The Board’s authority to determine whether, in cases of conflict, the USBC or the Guidelines prevail.

As explained in the Background section above, pursuant to §§ 32.1-127 and 32.1-127.001 the Board has issued regulations setting out the requisite design-and-construction standards for inpatient hospitals, outpatient hospitals, nursing facilities, and abortion facilities.⁴⁴ These regulations generally require that a health care institution follow local codes, zoning and building ordinances, the USBC, and the applicable sections of the Guidelines.⁴⁵ The 2013 regulations applicable to regulated health care facilities that provide abortion services explain that, when there is a conflict between the requirements contained in the Guidelines and the USBC, the Guidelines “shall take precedence.”⁴⁶ The 2005 regulations applicable to inpatient hospitals, outpatient hospitals, and nursing facilities state the opposite—that when there is a conflict between the USBC and the Guidelines, the USBC prevails.⁴⁷

You ask whether the Board has the discretion to choose whether the USBC or Guidelines control if the two conflict, and, if not, which standard takes precedence. It is my opinion that the Board was correct in its determination in 2013 that the Guidelines prevail over the USBC. The Board does not have the discretion to decide otherwise.

additions to existing facilities, only that portion of the total facility affected by the project shall be required to comply with applicable sections of these Guidelines.”).

⁴² Section 36-103 (2014) (emphasis added); *see also* § 36-119.1 (2014) (“This chapter shall not supersede provisions of the Fire Prevention Code . . . that prescribe standards to be complied with in existing buildings or structures, provided that such regulations shall not impose requirements that are more restrictive than those of the [USBC] *under which the buildings or structures were constructed.*”) (emphasis added).

⁴³ The USBC addresses the specific circumstances and exceptions where retroactive application is necessary to protect lives. For example, certain facilities are required to meet fire-suppression, fire-alarm, and fire-detection system standards and must install smoke detectors, regardless of when the structure was constructed or modified. 13 VA. ADMIN. CODE § 5-63-445(C)-(E) (smoke detectors); § 5-63-445(F) (fire-protective signaling systems and fire-detection systems); § 5-63-445(H), (I), (M) (fire-suppression, fire-alarm and fire-detection systems).

⁴⁴ *See* 12 VA. ADMIN. CODE § 5-410-650 (inpatient hospitals); § 5-410-1350 (outpatient hospitals); § 5-371-410 (nursing facilities); § 5-412-370 (abortion facilities).

⁴⁵ 12 VA. ADMIN. CODE § 5-410-650; § 5-410-1350; § 5-371-410; § 5-412-370.

⁴⁶ 12 VA. ADMIN. CODE § 5-412-370.

⁴⁷ 12 VA. ADMIN. CODE § 5-410-650; § 5-410-1350; § 5-371-410 (all noting that in case of a conflict between the Guidelines and another source of law “the requirements of the Uniform Statewide Building Code and local zoning and building ordinances shall take precedence”).

Section 32.1-127.001 provides:

Notwithstanding any law or regulation to the contrary, the Board of Health shall promulgate regulations pursuant to § 32.1-127 for the licensure of hospitals and nursing homes that shall include minimum standards for the design and construction of hospitals, nursing homes, and certified nursing facilities *consistent with* the current edition of the [Guidelines].^[48]

The meaning of the statute is unambiguous. The plain language of “notwithstanding any law or regulation to the contrary” is that the General Assembly intended for § 32.1-127.001 to supersede any provision of the *Code* or any regulation that contradicts or conflicts with the requirements of § 32.1-127.001.⁴⁹ Moreover, § 32.1-127.001 instructs the Board to issue regulations that are “consistent with” the Guidelines; it would not be “consistent with” the Guidelines for the Board to determine in every instance that the USBC takes precedence over the Guidelines when the two conflict.

III. The Board’s discretion in the regulatory process.

I turn now to your question about the meaning of the term “consistent with” in § 32.1-127.001 when it provides that the regulations must be “consistent with” the current edition of the Guidelines. Answering this question requires a broader discussion of the Board’s discretion in the regulatory process.

Section 32.1-127(B)(1) requires the Board to promulgate regulations treating health care facilities in which five or more first trimester abortions per month are performed as a “category of ‘hospital,’” and § 32.1-127.001 requires the regulations governing design-and-construction standards for “hospitals” to be “consistent with the current edition of the Guidelines.” The Guidelines, however, include standards for different categories of hospitals. Part 1 contains standards generally applicable to all categories of hospitals and health care facilities.⁵⁰ Part 2 includes additional standards for general hospitals, freestanding emergency facilities, critical-access hospitals, psychiatric hospitals, rehabilitation hospitals, and children’s hospitals.⁵¹ Part 3 includes additional standards for “outpatient facilities . . . used primarily by patients who are able to travel or be transported to the facility for treatment” and includes “outpatient units in a hospital, a freestanding facility, or an outpatient facility.”⁵² There are chapters within Part 3 that include standards for primary care facilities,⁵³ outpatient surgical facilities,⁵⁴ and facilities that include office-based procedure and operating rooms.⁵⁵

Under § 32.1-127 the Board is required to promulgate standards for “hospitals, nursing homes, and certified nursing facilities”⁵⁶ that:

⁴⁸ Section 32.1-127.001 (emphasis added).

⁴⁹ See *Lamar Co. v. City of Richmond*, 287 Va. 348, 352 (2014) (interpreting the phrase “notwithstanding any local ordinance to the contrary”); *Green v. Commonwealth*, 28 Va. App. 567, 570 (1998) (defining “notwithstanding” as “without prevention or obstruction from or by,” and concluding that the inclusion of the phrase “notwithstanding any other provision of law” in a statute means that it prevails over other conflicting laws).

⁵⁰ 2014 Guidelines § 1.1-1.1.

⁵¹ *Id.* at §§ 2.1-1.1.1 & 2.1-1.1.2.

⁵² *Id.* at § 3.1-1.

⁵³ *Id.* at § 3.2.

⁵⁴ *Id.* at § 3.7.

⁵⁵ *Id.* at § 3.8.

⁵⁶ Section 32.1-127(B).

shall be in *substantial conformity to the standards of health, hygiene, sanitation, construction and safety as established and recognized by medical and health care professionals and by specialists* in matters of public health and safety, including health and safety standards established under provisions of Title XVIII and Title XIX of the Social Security Act, and to the provisions of Article 2 (§ 32.1-138 et seq.).^[57]

Therefore, the Board's task is to determine which parts of the Guidelines should apply to which facilities so that those regulations substantially conform to the standards established by professionals.

When issuing hospital regulations, the Board "may classify hospitals and nursing homes by type of specialty or service and may provide for licensing hospitals and nursing homes by bed capacity and by type of specialty or service."⁵⁸ The Board has established definitions of categories of hospitals including "general hospital," "special hospital," and "outpatient hospital," and has issued regulations that vary based upon those classifications.⁵⁹ For example, the Board has determined that to conform to the standards established by professionals, inpatient hospitals should be consistent with Part 1 and §§ 2.1-1 through 2.2-8 of the Guidelines,⁶⁰ but outpatient hospitals should be consistent with Part 1, §§ 3.1-1 through 3.1-8, and § 3.7.⁶¹

Just as the Board has determined that inpatient and outpatient categories of hospitals should be consistent with different sections of the Guidelines, the Board has the discretion to determine which parts of the Guidelines are appropriately applied to regulated health care facilities that provide abortion services, in keeping with their treatment as a category of hospital for the purposes of § 32.1-127(B)(1).⁶² In accordance with § 32.1-127(A), however, the standard chosen must be in "substantial conformity to the standards of health, hygiene, sanitation, construction and safety as established and recognized by medical and health care professionals and by specialists in matters of public health and safety."⁶³

The Board has also applied different design-and-construction regulations to facilities within the same general category of hospitals that offer different types of services. For example, the design and construction of general hospital nurseries are required to be consistent with §§ 2.2-2.12.1 through 2.2-2.12.6.6 of the Guidelines while "higher-level nurseries" are required to be consistent with §§ 2.2-2.10.1 through 2.2-2.10.9.3 of the Guidelines.⁶⁴ The Board may, in its discretion, make similar distinctions between types of facilities.⁶⁵ For example, the Board might decide that it is in substantial conformity with standards recognized by experts to distinguish between facilities that offer surgical procedures and those that do not. As long as the Board is acting in substantial conformity with the standards established by medical and health care professionals, the Board may apply different standards and Guidelines to different types of facilities.

⁵⁷ Section 32.1-127(A) (emphasis added).

⁵⁸ Section 32.1-127(B)(3).

⁵⁹ 12 VA. ADMIN. CODE § 5-410-10.

⁶⁰ 12 VA. ADMIN. CODE § 5-410-650.

⁶¹ 12 VA. ADMIN. CODE § 5-410-1350.

⁶² The Board currently requires abortion facilities to comply with Part 1, §§ 3.1-1 through 3.1-8, and § 3.7 of the Guidelines.

⁶³ Section 32.1-127(A).

⁶⁴ 12 VA. ADMIN. CODE § 5-410-445.

⁶⁵ Section 32.1-127(B)(9) specifically allows the Board to differentiate standards for various levels or categories of neonatal services. There is nothing in the *Code* that would prevent the Board from using its discretion to similarly distinguish between categories of regulated health care facilities that provide abortion services.

Finally, the requirement in § 32.1-127.001 that the Board issue regulations “consistent with” the Guidelines does not mean the regulations must be identical to the Guidelines.⁶⁶ The Guidelines themselves are flexible standards rather than requirements to be followed exactly. The Introduction to the Guidelines recommends that “when used as a regulation, some latitude be granted in complying with the *Guidelines* requirements as long as the health and safety of the facility’s occupants are not compromised.”⁶⁷ To that end, § 1.1-6 of the Guidelines includes guidance about “equivalency concepts,” explaining that jurisdictions should allow “innovations that provide an equivalent level of performance with these standards in a manner other than that prescribed by this document, provided that no other safety element or system is compromised.”⁶⁸

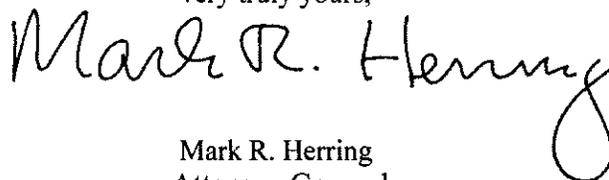
It is consistent with the Guidelines, then, for the Board to adopt standards that differ from the exact text of the Guidelines if the deviation results in an equivalent level of performance and does not compromise health and safety. When considering any deviation from the Guidelines, the Board also must, under § 32.1-127, ensure that the regulations remain in substantial conformity to the standards established and recognized by medical and health care professionals.

Conclusion

Given the plain language of the statutes, the Board’s longstanding interpretation that design-and-construction standards have only prospective effect, and the intent of the Guidelines and USBC to apply only to new construction, it is my opinion that the Board of Health lacks the authority to impose new design-and-construction standards on pre-existing facilities by promulgating regulations under § 32.1-127 and § 32.1-127.001. Under the plain language of § 32.1-127.001, the Board was correct in 2013 that the Guidelines supersede the USBC when the two conflict. The Board does have discretion to determine which sections of the Guidelines should apply to regulated health care facilities that provide abortion services, as long as the regulations are, as required by § 32.1-127(A), in substantial conformity with the standards of health, hygiene, sanitation, construction and safety as established and recognized by medical and health care professionals. The Board also has the discretion to apply different standards to different types of facilities and to deviate from the exact language of the Guidelines, as long the deviation results in an equivalent level of performance, health and safety are not compromised, and the regulations are in substantial conformity with standards established by health care professionals.

With kindest regards, I am

Very truly yours,



Mark R. Herring
Attorney General

⁶⁶ Roanoke Memorial Hosps. v. Kenley, 3 Va. App. 599 (1987) (interpreting “consistent with” to mean “‘in harmony with,’ ‘compatible with,’ ‘holding to the same principles,’ or ‘in general agreement with.’”); *see also* Reston Hosp. Ctr., L.L.C. v. Remley, 63 Va. App. 755, 772 n. 10 (2014); Chippenham & Johnston-Willis Hosps., Inc. v. Peterson, 36 Va. App. 469, 482 (2001).

⁶⁷ 2014 Guidelines at xxiv.

⁶⁸ *Id.* at § 1.1-6.2.