

**NINE-POINT CRITERIA ANALYSIS
FOR
PROPOSED BUILDING STANDARDS
OF THE
OFFICE OF THE STATE FIRE MARSHAL
REGARDING THE 2010 CALIFORNIA BUILDING CODE
CALIFORNIA CODE OF REGULATIONS, TITLE 24, PART 2
2010 INTERIM RULEMAKING CYCLE**

Health and Safety Code Subsection 18930(a) require building standards submitted to the California Building Standards Commission for approval to be accompanied by an analysis, which will, to the satisfaction of the commission, justify the approval thereof in terms of the following criteria:

1) The proposed building standards do not conflict with, overlap, or duplicate other building standards.

The Office of the State Fire Marshal has determined that the proposed building standards do not conflict, overlap or duplicate other building standards.

2) The proposed building standards are within the parameters established by enabling legislation, and are not expressly within the exclusive jurisdiction of another agency.

The Office of the State Fire Marshal has proposed these building standards under the direct statutory authority to adopt, amend and or repeal rules and regulations for fire and life safety regulations. The proposed building standards are not within the exclusive jurisdiction of another agency.

The Office of the State Fire Marshal is proposing this regulatory action pursuant to Health and Safety Code Sections 1250, 1568.02, 1502, 1569.72, 1569.78, 1569.698, 1597.44, 1597.45, 1597.46, 1597.54, 1597.65, 13100.1, 13108, 13113, 13113.5, 13114, 13211, 13132.7, 13133, 13135, 13143, 13143.1, 13143.6, 13143.9, 13146, 17921, 18897.3, 18928, 18949.2, 222155, Education Code 17074.50, 52, 54, 32020, Government Code Sections 51189 and 11152.5. The purpose of these building standards is to implement, interpret, and make specific the provisions of Health and Safety Code section 18928.

During this rulemaking cycle the State Fire Marshal's authority to write regulations was challenged by a member of the Building Standards Commissions (CBSC) Ad HOC Code Advisory Committee (CAC) at their meeting conducted March 24, 2011, as an advisory panel pursuant to HSC § 18927. This challenge centers on the authority to write and propose building standards and regulations for statewide application relating to smoke and heat vent provisions for firefighter operations and exit access travel distance limitations for very large warehouse and/or factory buildings.

This challenge is similar to that of one made during the CBSC Building, Fire and Other CAC meeting conducted January 18, 2008 relating to building standards that were proposed for Group L occupancy laboratories contained in CBC Section 443. In that rulemaking, the SFM provided a legal opinion to the CBSC based on the same principles and legal authority the current proposals are being proposed under and further challenged. At the September 11, 2008 CBSC meeting the CBSC acted on this legal opinion and agreed with the SFM's authority and approved and adopted the building standards. The following legal opinion and justification is provided regarding the SFM's authority to develop these regulations for statewide application:

Issue: The State Fire Marshal's authority to promulgate building standards and other regulations related to fire and panic safety for statewide application in ALL occupancies.

Building Standards – Building standards apply to all occupancies throughout the state, (HSC §18938(b), 90-305 Ops. Cal.Atty.Gen. letter from Senator Milton Marks to Executive Director, State Building Standards Commission 3/12/1990), unless the standard specifically states that it is only applicable to a particular type of occupancy.

This means that a building standard applies to all occupancies, even those that are outside the specific area(s) of jurisdictional concern of the state agency which adopts it. This would cause a problem were it not for the restrictions of HSC § 18932 wherein it states that the building code must indicate the agency having responsibility vested by law for the administration of each building standard and the occupancy(ies) affected by each building standard. The theory is if the agency adopting the standard does not have legislative authority to do so, the Building Standards Commission will not accept the proposed standard.

However, what if the legislature did not specifically give any agency the authority to adopt building standards related to particular occupancies? If this happened, the legislature would have given private entities (the original model code authors) the power to make state law. "... [W]hile the Legislature can provide for and encourage the participation of private associations in the regulatory process, it must stop short of giving such groups the power to initiate or enact rules that acquire the force of law." (*King v. Meese (1987) 43 Cal.3d 1217, 1234.*) Thus, every model building standard needs to fall within at least one state agency's jurisdiction for review. To hold otherwise would require that portions of the model code be adopted without review, thus giving the private code author the power to make state law for those portions. The state agency with jurisdiction may accept the model code as written, but it must review the model code first.

The State Fire Marshal's Office – The function of the Office of the State Fire Marshal is to "foster, promote and develop ways and means of protecting life and property against fire and panic." HSC §13100.1

The State Fire Marshal has been specifically given the task of preparing and adopting building standards related to fire protection in:

- Any state institution or other state-owned building or in any state-occupied building HSC §13108(a);
- Buildings in fire hazard severity zones. HSC §13108.5(a);
- Wildland interface communities HSC §13108.5(c);
- Access to roof areas of commercial establishments HSC §13108.6;
- Any building used or intended for use as an asylum, jail, mental hospital, hospital, home for the elderly, children's nursery, children's home or institution, school, and in any assembly occupancy where 50 or more persons may gather together in a building, room, or structure for the purpose of amusement, entertainment, instruction, deliberation, worship, drinking or dining, awaiting transportation, or education. HSC §13143.6;
- Any building or structure used or intended for use as a home or institution for the housing of any person of any age when such person is referred to or placed within such home or institution for protective social care and supervision services by any governmental agency. HSC §13211;
- High-rise structures. HSC §13211; and
- Other areas specified in statute.

In an effort to streamline the accountability and authority for the overall regulatory system for building standards, the legislature transferred various responsibilities related to building standard adoption from state agencies to the Building Standards Commission. Under HSC §18949.2, the responsibility for the State Fire Marshal to go through the formal rulemaking process to adopt building standards was transferred to the Building Standards Commission. However, it was specifically noted that the "State Fire Marshal shall remain the state agency responsible for developing building standards to implement the state's fire and life safety policy." HSC §18949.2(b).

It should also be noted that if another state agency proposes a building standard that addresses fire and panic safety, written approval of the State Fire Marshal is needed before the Building Standards Commission can adopt that standard. HSC §18930(a)(9). Additionally, the Building Standards Commission may not rewrite or modify any fire or life safety building standard without the express mutual agreement of the State Fire Marshal.

Conclusion – Clearly the State Fire Marshal's Office has been tasked with developing building standards to implement the state's fire and life safety policy. And just as clearly, those standards that are adopted by the Building Standards Commission apply to all occupancies in the state. If another state agency has been given the authority to develop fire and life safety building standards for certain occupancies, the State Fire Marshal may not have the authority to develop those standards for the same occupancy. However, the agency in question would still need written approval from the Office of the State Fire Marshal before the Building Standards Commission could adopt those standards. For any occupancies that are not specifically delegated to a state agency, the State Fire Marshal, under its blanket authority to implement the state's fire and life safety policy, would have the obligation to develop fire and life safety standards. To not do so would mean that the fire and life safety standards within the model code that are not subject to any state agency review would be adopted without review and thus the legislature would have made an unauthorized delegation of rulemaking authority to a private entity.

3) The public interest requires the adoption of the building standards.

The Office of the State Fire Marshal finds that the proposed amendments are in the best interest for the protection of life and property against fire and panic in occupancies addressed in the 2010 California Building Standards Code.

The Office of the State Fire Marshal finds that these proposed building standards are necessary for maintaining the highest level of safety for the construction, alteration, movement, enlargement, replacement, repair, equipment, use and occupancy, location, maintenance, removal and demolition of buildings or structures. The Office of the State Fire Marshal proposes, where necessary to ensure, that the regulations of the California Building Standards Code, establish and or maintain minimum requirements for the prevention of fire and for the protection of life and property and to provide safety to fire fighters and emergency responders during emergency operations, against fire and panic in accordance with Health and Safety Code 13100.1 that foster, promote and develop ways and means of protecting life and property against fire and panic

4) The proposed building standards are not unreasonable, arbitrary, unfair, or capricious, in whole or in part.

The Office of the State Fire Marshal has determined that the proposed building standards are not unreasonable, arbitrary, or capricious, in whole or in part.

5) The cost to the public is reasonable, based on the overall benefit to be derived from the building standards.

The Office of the State Fire Marshal finds that utilizing a National model code that results in costs savings to the public because it updates health and safety standards, provides the most recent methods, and promotes affordable costs. The Office of the State Fire Marshal has determined that the cost to the public is reasonable, based on the overall benefit to be derived from the building standards. Furthermore, these proposed regulations, in whole or in part, do not create additional requirements; however, elevate potentially restrictive provisions that are not intended.

6) The proposed building standards are not unnecessarily ambiguous or vague, in whole or in part.

The Office of the State Fire Marshal has determined that the 2010 California Building Standards Code with California amendments are neither ambiguous nor vague, either in whole or in part. The language of these modifications to the standards have been reviewed, edited, and developed to avoid ambiguity or vagueness.

7) The applicable national specifications, published standards, and model codes have been incorporated therein as provided in this part, where appropriate.

Health and Safety Code Section 18928.1 directs the Office of the State Fire Marshal to propose the adoption by reference of the most recent edition of the model code, applicable national specifications, or published standards, into the text of the California Building Standards Code. These amendments modify the most recent edition of the model code and referenced national standards that have been included.

8) The format of the proposed building standards is consistent with that adopted by the Commission.

The Office of the State Fire Marshal is using formats obtained from the California Building Standards Commission.

9) The proposed building standards, if they promote fire and panic safety as determined by the State Fire Marshal, have the written approval of the State Fire Marshal.

The State Fire Marshal has the statutory authority to propose rules and regulations regarding fire and life safety regulations for the State of California.