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COMMISSIONER

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December 12, 1985

Hon. Thea Hoeth, Director
Executive Department Office of Business
Permits & Regulatory Assistance
Governor Alfred E. Smith Office Bldg.
Albany, New York 12225

Re: Uniform Fire Prevention and
Building Code - Proposed
Regulation for Combustion/Toxicity
Testing - New York State Register
I.D. #HCR-42-85-00026-P
October 16, 1985

Dear Ms. Hoeth:

This is in response to your letter of November 15, 1985 which was submitted pursuant to Section 202-c(5) of the State Administrative Procedure Act with respect to the above item.

The Division of Housing and Community Renewal on behalf of the State Fire Prevention and Building Code Council has proposed to amend the New York State Uniform Fire Prevention and Building Code (9 NYCRR 600 et seq.). The amendment would add a new Part 1120 to address the combustion toxicity of certain products used in building construction. Such products would be required to undergo the test procedure specified in the proposed rule, and the use of the product would be conditioned on the filing of the results of the test with the Department of State. No particular score would be required, disclosure being the objective of the proposal.

Following its review pursuant to State Administrative Procedure Act §202-c, the Office of Business Permits and Regulatory Assistance concluded:

- 1) The proposed rule does not comply with SAPA §202-c(4)(a)(i) in that it is not clearly within the authority delegated by law to the extent that it requires toxicity testing without establishing performance standards; and
- 2) The proposed rule does not comply with SAPA §202-c(4)(b) in that the Regulatory Impact Statement and Regulatory Flexibility Analysis are

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insufficient to enable interested persons to evaluate the impact of the proposed rule to the extent that the rule may prohibit products which test more toxic than untreated wood or paper.

Notice of these objections was served in a letter from the Office to the Division dated November 15, 1985. SAPA §202-c(6) provides that the proposing agency may submit to the Office further clarifications or justifications of the rule. The following constitutes such response.

I. The proposed rule is within the statutory authority pursuant to which the Uniform Code is promulgated and amended.

There are three separate bases for the proposed regulation: (1) the powers of the Code Council to adopt and amend the Uniform Code under Executive Law Sections 375, 377 and 378; (2) the power of the Secretary of State to approve the Uniform Code and amendments to it under Executive Law Section 377; and (3) Chapter 552 of the Laws of 1982. These authorities are more elaborately described in the attached memorandum. We agree with the memorandum's conclusion that there is "abundant authority for the contemplated amendments to the [uniform] code."

II. The Regulatory Impact Statement and Regulatory Flexibility Analysis are sufficient to permit evaluation of the impact of the proposed rule.

Three substantially similar provisions of the Uniform Code (9 NYCRR 719.1d, 741.1d, 773.1d) provide for one- and two-family dwellings, multiple dwellings, and general building construction, respectively, that:

"(d) Plastic materials which give off smoke or gas denser or more toxic than is given off by untreated wood or paper under comparable exposure to heat or flame, or which burn faster than 2½ inches per minute as determined by tests conducted in conformity with generally accepted standards, shall not be permitted."

The combustion/toxicity testing proposal does not specifically call for the elimination of these three provisions. Moreover, when coupled with the proposed rule, these provisions will continue to have the effect of prohibiting such products, a fact not specifically addressed in the Regulatory Impact Statement. The Council, in its deliberations leading to the instant proposal, was fully aware of the cited sections. Because changes in the proposal could reasonably be anticipated in response to the public hearings, it was determined to defer amending these sections until the final form of the proposal has been established. If the proposal is adopted, the cited provisions will simultaneously be modified or deleted to conform to the language and intent of the new rule.

Consequently, the Regulatory Impact Statement and Regulatory Flexibility Analysis accurately reflect the thrust of the proposal and permit its full and fair evaluation.

We respectfully submit that the proposed rulemaking is a regular and proper exercise of the Council's power to promulgate and amend the Uniform Code and should be allowed to proceed.

Very truly yours,



William B. Eimicke
Commissioner and Chairman
State Fire Prevention and Building
Code Council

cc: Hon. Mario M. Cuomo
Hon. Gerald G. Crotty
Hon. Warren M. Anderson
Hon. Manfred Ohrenstein
Hon. Stanley Fink
Hon. Clarence Rappleyea
Hon. Jess J. Present
Hon. Edward C. Sullivan
Hon. Vincent Tese
Hon. Gail S. Shaffer

Enc.

WBE/cj

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Toxicity Amendments
to
Uniform Fire Prevention and Building Code

The proposed amendment to the Uniform Fire Prevention and Building Code would require the testing of building materials in accordance with a prescribed test which measures their toxicity when burned. The proposed amendment would require the filing of the test results with the Secretary of State before the material could be used for construction. There would not be any particular score threshold which must be met before the material could be so used -- the disclosure being the requirement of the Code.

It is clear that this proposed amendment is within the statutory authority pursuant to which the Uniform Fire Prevention and Building Code is promulgated and amended.

There are three separate and independent statutory bases for the proposed regulation: (I) the inherent powers of the Code Council to adopt a Uniform Code and amendments that encompass all aspects of fire safety in building construction; (II) the approval powers conferred upon the Secretary of State to assure that the Uniform Code and amendments to it effectuate the fire-safety objectives and purposes of the Legislature; and (III) the legislatively mandated study of the toxicity of burning synthetics and test methods which provided for a set of recommendations to the Code Council on the subject of combustion toxicity.

I. Inherent Powers of the Code Council

The Code Council has the inherent power to adopt the proposed regulation. Article 18 of the N.Y. Executive Law provides for the adoption and amendment of a Uniform Code of statewide applicability and establishes a seventeen-member

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Code Council responsible for the development, promulgation, and periodic review of the Code. The inherent powers of the Code Council to adopt a toxicity testing and data bank regulation are set forth in the following provisions of Article 18:

A. N.Y. EXECUTIVE LAW, SECTION 377(1). This section confers upon the Code Council wide-ranging power and authority to formulate and periodically amend the Uniform Code so that it "effectuates the purpose" of Article 10 and incorporates developments in the field of fire safety that further the objective of the Uniform Code. It provides, in relevant part, as follows:

1. The council may from time to time amend particular provisions of the uniform code and shall periodically review the entire code to assure that it effectuates the purposes of this article and the specific objectives and standards hereinafter set forth.

Governor Hugh L. Carey stated in his Approval Memorandum of July 21, 1981:

The code will be developed and periodically reviewed by a broadly representative council of State officials, local officials, and members of the fire service and construction industry. This will ensure input from those by and against whom the code will be enforced and will also ensure that the code will incorporate technological changes and remain up-to-date. (Emphasis supplied)

In proposing a combustion toxicity testing regulation as an amendment to the Uniform Code, the Code Council incorporates a technological advance represented by the University of Pittsburgh toxicity test, deemed capable of measuring the toxic properties of burning synthetics. Clearly, this directly implements the intention at the time the law was enacted.

The change also clearly is within the quoted language providing for review and amendments to insure that the Code effectuates the purposes of Article 18. These purposes are set forth in Executive Law, §371. Section 371(1)(a) states that the people of the State have "yet to receive the basic level of protection to which they are entitled in connection with the construction and maintenance of buildings." §371(2)(b) declares the basic public policy of the Legislature

to have been promulgation of a uniform code "...addressing building construction and fire prevention in order to provide a basic minimum level of protection... from hazards of fire..."

Because of this key legislative declaration of a policy that the Code "address...construction", the broad definition given the term "construction" in §372(5) is important. The term is defined to mean not only construction, reconstruction, etc., but also "...requirements or standards relating to or affecting materials used in connection therewith..." (Emphasis added)

Thus it is clear that the Legislature and Governor intended a Code which could address any kind of requirement dealing with materials, whether or not a traditional "standard", as long as such requirement provided protection from the hazards of fire. It is actually clear that the Code was not meant to be a static document, but that it was expected that it would change with evolving technology.

B. N.Y. EXECUTIVE LAW, SECTION 375(3). This section authorizes and empowers the Code Council to:

recommend tests and approvals or to require the testing and approval of materials, devices and methods of construction to ascertain their acceptability under the requirements of the Uniform Fire Prevention and Building Code.

The proposed regulation requires certain products to be the subject of combustion toxicity testing. For a product to be deemed "acceptable" for use in the State, toxicity test data relating to it would have to be on file with the Secretary of State. The proposed regulation would assure the availability of this toxicity performance data to building contractors, architects, retailers, suppliers and other qualified design professionals.

Reduced to its simplest form, the proposed amendments are a prohibition of use of materials unless a specified condition (filing of test data) is complied

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with. In that sense it is not conceptually different from the current requirements pertaining to flame spread or smoke development, for example. Certainly, prohibition of a product's use until a specified condition is complied with is well within the broad terms "approval" and "acceptability" in the quoted language of section 375.

C. N.Y. EXECUTIVE LAW, SECTION 377(2)(b). This section provides that the Uniform Code shall:

formulate such standards and requirements, so far as may be practicable, in terms of performance objectives, so as to make adequate performance for the use intended the test of acceptability.

The test prescribed by the proposed regulation uses an LC50 performance standard by which to measure the toxic properties of the products to be tested. This is the standard deemed practicable for measuring the toxic properties of materials. The LC50 standard classifies tested products on a scale based on the amount of toxic fumes ascertained to cause death to 50% of the laboratory test specimens. The creation of a comprehensive bank of performance data under a standard, specified test, will permit the Code Council (i) to ascertain the toxic properties of a wide range of products used in building construction and finishings, and (ii) ultimately to determine whether material-specific requirements concerning acceptable and unacceptable uses of products based on their toxic properties should be adopted.

As indicated earlier, the proposed amendment, since it constitutes a prohibition on the use of materials unless a condition (filing of data) is complied with, is a "requirement"; the specification of the particular test is a "standard". In the specific terms of the quoted provision, there is a "practicable" requirement and standard, since it is within the realm of practical compliance by the regulated parties. Moreover, the regulation is designed to

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enable the Council to ultimately be able to reach conclusions about the adequacy of performance for the use intended and then to be able to base acceptability on such adequacy.

D. N.Y. EXECUTIVE LAW, SECTIONS 377(2)(a) and 378. Section 377(2)(a) provides that the Uniform Code shall:

- a. provide reasonably uniform standard and requirements for construction and construction materials for public and private buildings, consonant with accepted standards of engineering and fire prevention practices;

Section 378 provides that the Uniform Code "shall address the following subjects," which include, among others:

1. Standards for the construction of all buildings...including standards for materials to be used in connection therewith, and standards for safety and sanitary conditions.
2. Standards...for the safeguarding of life and property [of certain existing buildings, structures and premises] from the hazards of fire explosion or release of toxic gases arising from the storage, handling or use of combustible or hazardous substances, materials or devices. (Emphasis supplied)

These key provisions all deal with the substance of the Code.

As indicated in Paragraph A above, the term "construction" is very broadly defined, to include ..."requirements or standards relating to or affecting materials..." (§372(5)). Thus, since the disjunctive "or" is used, construction may encompass requirements for materials which are not "standards" in the sense of specific numerical requirements. The proposed amendments are indeed "requirements." They also constitute a "standard" since a particular test is required. They are therefore within the meaning of the term "construction."

Because all of the quoted provisions empower the Code to deal with "construction", because none specifically directs any particular way of dealing with "construction", and because "construction" is a term of art which broadly includes requirements of any kind as long as they "relate to" or "affect"

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materials, it is clear that the substance of the Code may include the type of requirements embodied in the proposed regulation.

Moreover, it is noted that section 378 provides that the Code shall "address" the enumerated matters. Thus, the requirement is that the Code "address" standards for construction, not that it "contain" them in the sense of requiring specific numerical test thresholds to be met. Clearly, the use of the word "address", coupled with the broad definition of the term "construction" is additional authority for the Code to contain requirements that performance data ascertained from use of a specified standard test be filed before particular materials may be used.

II. Approval Powers of the Secretary of State

N.Y. EXECUTIVE LAW, SECTION 377(1). In providing for the Code Council to formulate the Uniform Code and amend it from time to time, the Legislature conferred upon the Secretary of State the final power and authority to approve it:

The secretary shall review such code or amendment...to insure that it effectuates the purposes of this article. Upon being so satisfied, the secretary shall approve said code or amendment prior to its becoming effective.

Thus, the Secretary of State was given the statutory power and authority to ascertain that the Uniform Code "effectuated the purposes" of Article 18, and she exercised this power on December 15, 1983. An integral part of the Secretary of State's statutory finding was predicated on her understanding that the Code Council would adopt provisions governing combustion toxicity on her recommendation:

I note that the Code Council has agreed to reserve a section in the Code to deal with fire gas toxicity. The Department of State is in the process of evaluating this issue, and I will be making recommendations to the Code Council and the Legislature in the near future.

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The proposed regulation satisfies a condition on which the Secretary of State's statutory approval was predicated: it implements the recommendations of the Secretary of State that the Code Council require toxicity testing and a data bank so that the purposes of Article 18 can be completely effectuated.

III. Toxicity Study Legislation

To complement the Code Council's inherent authority to address the subject of toxicity in the Uniform Code, the Legislature, at the request of the Governor, enacted legislation to provide Code Council members with the most current information available to regulate in this area (Chapter 552, Laws of 1982).

The Legislature found that although model toxicity test methods exist to address the growing concern regarding injuries and deaths from the toxic behavior of certain materials, "no adequate program exists to improve upon and integrate such tests into the state uniform fire prevention and building code" (L. 1982, C. 552, §1). It directed the Secretary of State to conduct a study of the toxicity of smoke and gases given off under various temperatures by materials used in building construction and furnishings, and of the feasibility of developing or adopting a system of rating the toxicity of such materials. The study was to result in a set of recommendations to the Code Council. As Governor Carey stated when he approved the toxicity legislation (Chapter 552, Laws of 1982):

The enactment of this bill will ensure that the State Fire Prevention and Building Code Council, in its preparation of the new Uniform Fire Prevention and Building Code pursuant to the Uniform Fire Prevention and Building Code Act - also part of my 1981 legislative program - will have at its disposal the most current information regarding the toxicity of building materials and furnishings. (Emphasis supplied) (Approval Memorandum of Governor Hugh L. Carey, July 20, 1982).

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The findings and recommendations of the Secretary of State have been carefully considered by the Code Council in its adoption of the proposed testing and databank program.

The authors of L. 1982, C. 552 contemplated that the Council would use the then existing powers of the Code Council (described in Sections I and II above) to implement the recommendations resulting from the study of combustion toxicity methods commissioned by that Chapter.

We would note, finally, that to argue that Chapter 552 contemplates a toxicity regulation in a conventional form (analogous to those for flame spread or flammability) would be to propose an all-or-nothing approach inconsistent with the language of §375 quoted above. Such a position would imply that the Code may not keep pace with emerging technologies, but must always lag behind waiting until they are fully evolved. The legislative purposes and the requirement for periodic revisions belie that position. As indicated earlier, when reduced to its simplest form, the proposal is a prohibition on use with a condition. In that sense it is not radically different from the current requirements for flame spread or smoke development, for example. The condition itself is reasonably related to health and safety and is clearly within the scope of Executive Law Article 18.

IV. Conclusion

The proposed amendment to the Code clearly imposes a requirement with respect to materials used in construction. It is not a numerical standard, but rather a prohibition of the use of materials unless a stated condition—filing of certain data—is complied with. To argue that the substance of the Code is limited to numerical standards is to disregard the specific provisions defining the term "construction" to broadly include any requirements, whether or not in the nature of "standards" (§372(5)), and the specific provisions requiring the

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Code to address such requirements (§378(1) and (2)). It is also to ignore the broad legislative intent that the Code protect the people of the State from the hazards of fire (§378(1) and (2)) and the hazards from release of toxic materials due to combustion (§378(2); Chapter 552, Laws of 1982. §1).

Taken together, these provisions are abundant authority for the contemplated amendments to the Code.

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