

BUILDING INSPECTION OF/UL LISTING AND LABELING REQUIREMENT FOR INDUSTRIAL MACHINERY

North Carolina is apparently unique among states, with which it regularly competes in economic development projects, by requiring that industrial machinery be subject to building code inspections. This creates a distinct competitive disadvantage in that many companies must expend hundreds of thousands of dollars to retrofit industrial machinery to meet the inspection requirement that such machinery be UL listed or labeled, as well as lost revenues while such machinery is idle, while being retrofitted. This law firm has spoken with several companies that have already indicated their intention to place no further projects or expansions in North Carolina, and some companies have already diverted expansions to other states. At the same time there is no objective evidence of any safety issues related to industrial equipment which is CE certified (the standard in the world except for the United States and Canada), as opposed to being UL listed or labeled.

Without going into detail, this “requirement” arises out of a convoluted and incorrect reading of the National Electrical Code.

Sanford Holshouser LLP represented ZF Lemforder in an appeal of this requirement for its facility in Catawba County, North Carolina. Below are the legal brief filed on behalf of that company in its appeal before the North Carolina Building Code Council, that outlines the main legal arguments against this interpretation, and a copy of the order of that Council ruling in favor of ZF Lemforder.

The fact that ZF LEMforder prevailed in this appeal does not put an end to this issue. That order is limited to the “particular industrial machinery” in that case. As of this writing, there has been no regulatory, judicial or legislative change in this incorrect interpretation.

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applicable to this matter now before the BCC, and cannot be retroactively applied to the matter now before the BCC.

4. Pursuant to relevant state statutory provisions which grant the BCC authority to adopt code provisions, a code provision must be “reasonable” in its impact to be valid, and the evidence in this case shows that the Department of Insurance’s (hereinafter “DOI”) interpretation in this matter will have a devastating impact on the Company and economic development interests in this State, and therefore the interpretation urged by DOI is not valid and is not supported by statutory authority.
5. The enforcement regimen urged by the DOI, by extending building inspections to safety issues related to industrial machinery, is prohibited in that federal (or state enforcement by delegation) of the Occupational and Safety and Health Act (hereinafter “OSHA”) is within the sole authority of agencies charged with enforcing OSHA requirements, and any other regulatory agency is preempted by federal law from requiring duplicative and unnecessary regulatory requirements of the same nature.

No State Statutory Authority

N.C.G.S. §143-138 gives the BCC authority to adopt code provisions. This is the only authority under which the BCC may adopt code provisions. N.C.G.S. §143-138(a) states that such code provisions must be adopted pursuant to the process prescribed by the “requirements of Article 2A of Chapter 150B of the General Statutes.” Article 2A of Chapter 150B contains the rule making provisions which are applicable to most state agencies, including the BCC. Consequently no code provision which the BCC purports to adopt or in effect adopts by way of interpretation is valid and enforceable unless it is in strict compliance with the requirements of Article 2A of Chapter 150B.

For a rule or code provision to be adopted, directly or by interpretation, it must have an underlying statutory authority. The BCC and no agency of the state can “bootstrap” additional authority for itself by adopting a rule or code provision. This requirement is embodied in N.C.G.S. §150B-19 which provides in pertinent part that:

“An agency may not adopt a rule that does one or more of the following:

- (1) Implements or interprets a law unless that law or another law specifically authorizes an agency to do so.” (Emphasis added)

The statute which authorizes the BCC to adopt code provisions in accordance with the rule making provisions as cited above is N.C.G.S. §143-138. Subsection (b) of this section sets forth specifically the types of code provisions which the BCC may adopt. The first three paragraphs of N.C.G.S. §143-138(b) contain the specific authority the BCC has as to the type of code provisions in question in this appeal, with the remainder of this subsection speaking to specific circumstances not applicable in this case (e.g.,

farm structures, holding liquefied gas, etc.) These relevant provisions of N.C.G.S. §143-138(b) read as follows:

(b) (Effective until July 1, 2006) Contents of the Code. – The North Carolina State Building Code, as adopted by the Building Code Council, may include reasonable and suitable classifications of buildings and structures, both as to use and occupancy; general building restrictions as to location, height, and floor areas; rules for the lighting and ventilation of buildings and structures; requirements concerning means of egress from buildings and structures; requirements concerning means of ingress in buildings and structures; rules governing construction and precautions to be taken during construction; rules as to permissible materials, loads, and stresses; rules governing chimneys, heating appliances, elevators, and other facilities connected with the buildings and structures; rules governing plumbing, heating, air conditioning for the purpose of comfort cooling by the lowering of temperature, and electrical systems; and such other reasonable rules pertaining to the construction of buildings and structures and the installation of particular facilities therein as may be found reasonably necessary for the protection of the occupants of the building or structure, its neighbors, and members of the public at large.

In addition, the Code may regulate activities and conditions in buildings, structures, and premises that pose dangers of fire, explosion, or related hazards. Such fire prevention code provisions shall be considered the minimum standards necessary to preserve and protect public health and safety, subject to approval by the Council of more stringent provisions proposed by a municipality or county as provided in G.S. 143-138(e). These provisions may include regulations requiring the installation of either battery-operated or electrical smoke detectors in every dwelling unit used as rental property, regardless of the date of construction of the rental property. For dwelling units used as rental property constructed prior to 1975, smoke detectors shall have an Underwriters' Laboratories, Inc., listing or other equivalent national testing laboratory approval, and shall be installed in accordance with either the standard of the National Fire Protection Association or the minimum protection designated in the manufacturer's instructions, which the property owner shall retain or provide as proof of compliance.

The Code may contain provisions regulating every type of building or structure, wherever it might be situated in the State.

This case arose prior to July 1, 2006 and is governed by this language, but it should be noted that the amended statute effective after July 1, 2006 has exactly the same language as the above, with other parts of subsection (b) changing after July 1, 2006.

Read the above statutory provision closely. No one can state in good faith that this language “specifically authorizes” the BCC to extend NEC provisions to include industrial machinery, as required by the rule making provisions contained in N.C.G.S. §150B-19(1). (Quoted above). The word specifically means something. It means that one cannot take the words “electrical systems” out of N.C.G.S. §143-138 and stretch it by way of mental gymnastics to extend to “industrial machinery”. The question for the BCC is where is the specific statutory authorization to extend its NEC provisions to include purview over industrial machinery? The answer is that there is none.

This is further supported by the last paragraph of the portion of N.C.G.S. §143-138(b) which is quoted above. It states that, “(t)he Code may contain provisions regulating every type of building or structure....” No logical interpretation of the words “building or structure” can be contorted to include “industrial machinery.”

Respectfully, the BCC does not have authority to adopt code provisions which extend to free standing “industrial machinery” which is not affixed to or a part of a “building or structure”, because the statute which gives the BCC authority to adopt code provisions does not “specifically” authorize this. If the BCC cannot adopt a code provision of this nature, it cannot back into this by way of a contorted interpretation of existing NEC provision.

Equipment Does Not Include Industrial Machinery

Of course the term “equipment”, which is central to this case, is defined in Article 100 of the NEC. It reads as follows:

“Equipment. A general term including material, fittings, devices, appliances, luminaries (fixtures), apparatus, and the like used as a part of, or in connection with, an electrical installation.”

The bottom line is that if the term “equipment” includes: “industrial machinery” (defined in §670.2 of the NEC) then “industrial machinery” is subject to a building code inspection. If “industrial machinery” is not included within the definition of “equipment”, “industrial machinery” is not the proper subject of a building code inspection.

Counsel for the Department of Insurance (hereinafter “DOI”) attempts to make his case by a convoluted “leap frogging” back and forth through NEC provisions. The Company will not in this Brief go through all of those mental gyrations because they are illogical. However as an example of DOI’s logic, its counsel points to the definition in Article 100 of the NEC of “utilization equipment”, which is defined as “(e)quipment that utilizes electric energy for electronic, electromechanical, chemical, heating, lighting, or similar purposes.” By arguing that “industrial machinery” utilizes “electric energy” he argues that “industrial machinery” must be included within the purview of the NEC. But this begs the point. For something to be “utilization equipment” it must first be “equipment”. (Emphasis added).

One of DOI's witnesses Mr. Mark Ode, at page 138-139 of his deposition transcript conceded that despite the references in his testimony to multiple code provisions, it all comes back to the definition of "equipment".

Q: But suffice it to say that everything in all these various definitions "utilization equipment," "appliance," [it] all ties back to equipment. I mean -- is that right?

A: Yes.

No logical interpretation of "equipment" includes "industrial machinery." The definitions will not be repeated here for the sake of brevity, in that they were displayed and discussed extensively during the hearing. Suffice it to say that the types of "equipment" listed in the definition of that term clearly do not include "industrial machinery". "Material" clearly does not include "industrial machinery"; "fittings" clearly does not include "industrial machinery"; "devices" clearly does not include "industrial machinery"; "appliances" clearly does not include "industrial machinery" and in fact its definition notes that it is "generally other than industrial" equipment; and "luminaries" clearly does not include "industrial machinery."

DOI's counsel seizes on three words in the definition of "equipment", which are "and the like". Certainly not every type of "equipment" can be listed in the definition of that term, and therefore some catch-all phrase such as "and the like" must be used. But the term "and the like" refers back to things which are affixed to and a part of a structure being inspected (e.g., "material, fittings, devices" etc). The term "and the like" does not contemplate leaping out of a logical interpretation of components of a building or structure, to embrace transitory "industrial machinery" which can be moved into and out of a building or structure. That is why "industrial machinery" is defined specifically under Article 670 of the Code, wherein the only requirement of industrial machinery is that it have an identification plate setting forth its electrical specifications.

The lack of logic of this interpretation is bolstered by the case authority that counsel for DOI cites. Jenkins v. Starrett Corp, 13 N.C. App. 437, 186 S.E.2d 198 (1972). This case dealt with an ice machine, in effect a refrigerator or freezer accessible by the general public at a retail store. It has absolutely nothing to do with "industrial machinery".

Obviously the definition of "equipment" in its original form did not include "industrial machinery". That is why the BCC, based upon the urging of the DOI, adopted an amendment to this definition which added the words "industrial equipment, industrial machinery". The rationale for this rule contained language that made clear that this was a change and not a clarification, such as:

The Council feels it is imperative to immediately take measures to correct the Code, to require that the Authority Having Jurisdiction approve all

industrial equipment and industrial machinery installed in buildings. This Emergency Rule is necessary to correct this deficiency. 20:10 N.C. Reg. 830 (November 15, 2005).

If the definition of “equipment” so clearly included “industrial machinery”, why amend the definition? The reason the definition of “equipment” was amended to include “industrial equipment, industrial machinery” is that the definition of “equipment” prior to this amendment did not include “industrial machinery” and it was never intended to.

Note that this analysis related to the amendment to the definition of “equipment” does not concede that this amendment was pursuant to required statutory authority. As noted in the first legal argument above, there is no statutory authority for this change.

In conclusion, because the definition of “equipment” does not include “industrial machinery” the Company’s industrial machinery is not subject to the building Code inspection in question, despite how much one may leap around in the NEC to fashion an argument to the contrary.

Original Definition of “Equipment” Applies

When the inspection in question was performed, and when the decision of the Catawba County Building Services Division was rendered (August 22), Article 100 of the NEC, defined “equipment” as quoted above.

Only on October 13, 2005, was a motion approved “to initiate the emergency and temporary rules to add the following” to the Code, as taken from the approved minutes of the BCC meeting of that date. In part 1 of the motion it was indicated that the BCC’s was asked to “(a)dd industrial equipment and industrial machinery to the definition of equipment”. Following the addition this additional language, Article 100 of the North Carolina Electrical Code would read as follows:

“A general term including material, fittings, devices, appliances, luminaries (fixtures), apparatus, industrial equipment, industrial machinery, and the like used as a part of, or in connection with, an electrical installation.”

A copy of the above referenced BCC resolution is attached for ease of reference.

At the time of the inspection in question and when the order under appeal was rendered, the definition of “equipment” in Article 100 of the NCEC did not include in the words “industrial equipment, industrial machinery.”

Quite obviously, the definition of “equipment” in Article 100 of the NCEC, prior to the adoption of the amendments, did not include “industrial machinery”. That is consistent with the BCC’s previous decision in a case which involved Regional Construction and Design, Inc. It is apparent from the language of the motion in the BCC

resolution that for the definition of “equipment” in the Code to apply to “industrial machinery”, those words had to be added. That is what the resolution of the BCC said. Indeed a common sense reading of that Code provision prior to its amendment on October 13, 2005 would never lead one to the conclusion that the Code definition of “equipment” in Article 100 was ever contemplated to include “industrial machinery”.

A change in regulation cannot by law retroactively apply to a prior event or issue. Consequently when the inspection in question was conducted and the order being appealed from was entered, the “industrial machinery” in question was not subject to the building code inspector’s purview.

In making the above argument, the Company is not conceding that the amendment to Article 100 of NCEC was appropriate or supported by statutory authority.

Consistent with its ruling in the Regional Construction and Design, Inc. case, the BCC should rule in favor of the Company.

An Interpretation that Industrial Machinery is subject to a Building Inspection is not Reasonable

The BCC should consider the enormously negative impacts that this continued regulatory scheme will have on North Carolina’s ability to attract new investments and jobs, and to retain planned expansions.

This is not a side or ancillary issue. A rule adopted by the BCC must be reasonable in its impact or it does not have statutory authority and therefore is invalid. Counsel for DOI argues that this requirement of reasonableness applies only to rule making. However logically the BCC cannot interpret a code provision to stretch it to include a new requirement on “industrial machinery” and get around the requirement that a rule be reasonable.

The fact that very few states, and virtually no regular competitor state to our state, routinely enforces this interpretation statewide puts North Carolina at an extreme competitive disadvantage. Few companies will locate a manufacturing facility in this State, as opposed to South Carolina or Virginia, if North Carolina is the only state imposing on a company increased costs, sometimes in six figures, to retrofit perfectly sound, safe industrial equipment; delays in start-up operations due to down time to retrofit equipment, which would translate into hundreds of thousands or millions of dollars in lost income; and increased uncertainties as to complying with a regulatory requirement which will be unique to most industry representatives because other states do not require this. Credible evidence on this point is replete in the record of this hearing from Jeff Edge, Bob Leak and Bill Hadley. Certainly the BCC would not want to see the unintended consequences of its actions to result in what will be significant losses in jobs and new investments for most counties in our state. For this reason alone, the BCC should overrule the objection and allow this testimony to be heard.

However there is a better reason than that for the BCC to overrule this objection. The BCC is statutorily required to consider negative economic impacts of its actions. If a regulatory scheme is not reasonable in its impact, that regulatory effort has no statutory authority, and therefore the Company cannot be in violation of a regulatory requirement which has no statutory authority, and therefore is void. Consequently, evidence of the impact on the economic projects in areas of this state directly relates to the Council's deliberations in this case. If the regulation the state proceeds under does not have statutory authority, the Council must rule for the Company.

Several statutory references give certain authorities to the BCC, which make it clear that the BCC's regulatory discretion is limited by the bounds of reasonableness, so as to avoid the catastrophic economic results which the testimony before the BCC has outlined. Some of these relevant statutory provisions are as follows.

N.C.G.S. §143-138(c) sets forth, according to its caption, "Standards to be followed in Adopting the Code." In pertinent part this section reads:

All regulations contained in the North Carolina State Building Code shall have a reasonable and substantial connection with the public health, safety, morals, or general welfare, and their provisions shall be construed reasonably to those ends

The "general welfare" clearly includes whether people have jobs, or whether those jobs have been run off to other states. The "general welfare" certainly includes the consideration of whether the neediest areas of our State have a chance at attracting new investments that provide the tax base which supports schools, social programs, etc. Any code provision adopted by this BCC must be "reasonable" as to the impacts it will have on the "general welfare". A code provision which exceeds these bounds of reasonableness is not a valid, enforceable requirement.

N.C.G.S. §143-138(b) states in pertinent part that regulations as to the matters that the BCC is authorized to regulate must be "reasonable and suitable". It is noteworthy that among all of the types of things that this BCC is authorized to regulate by the statutory provision, there is not one mention of "industrial machinery". However, to the extent that one stretches the definition of electrical systems built into a building, to include "industrial machinery", such regulations and NEC provisions must be reasonable. Impacts on individual companies in the hundreds of thousands of dollars, and catastrophic economic development losses in the State are not "reasonable and suitable" consequences to accept.

Interestingly the statute which gives the BCC its authority actually defines in economic terms, what "reasonable" is. N.C.G.S. §143-138(a) directs the BCC to get a fiscal note for any proposed Code change that has a significant economic impact, and obviously to consider those impacts as to whether or not to promulgate the change in question. This statutory provision goes on to define a substantial economic impact as one which increases the price of a residential home by \$80 (whereas the impact in this case is

in the hundreds of thousands of dollars that the Company would have to absorb) and as defined in N.C.G.S. §150B-21.4(b1). That statutory provision is a part of the Administrative Procedures Act which describes the manner in which rules may be promulgated. This provision states that before an agency publishes a final rule that if it “would have a substantial economic impact...the agency must obtain a fiscal note ... from the office of State Budget...” which quantifies the impact. Obviously this statutory requirement clearly implies that the agency in question must consider those impacts in promulgating a rule, otherwise this requirement would be of no purpose. Therefore the BCC must consider economic impacts, as testified to by Jeff Edge, Bob Leak and Bill Hadley, in determining the statutory basis of and enforceability of an NEC provision.

The BCC is obligated by the above statutory provision to assure that its regulations and code provisions are reasonable in their enactment and enforcement. Any NEC provision adopted or interpretation rendered which results in an unreasonable economic impact on the “general welfare” of the citizens of North Carolina must be invalidated.

Consequently, the Council should, and by statute must, find that the interpretation urged by DOI is not enforceable.

BCC is Preempted from Enforcing OSHA

Even if the General Assembly did, contrary to appearances, intend for the BCC to regulate the field of general workplace safety with respect to industrial machines placed in buildings, such regulation would be invalidated by the preemptive effect of federal OSHA regulations. Workplace safety is regulated, with permission of the United States Secretary of Labor, by the North Carolina Department of Labor. The North Carolina Occupational Safety and Health Division of the Department of Labor is expressly charged with carrying out the responsibilities of the State of North Carolina as prescribed by the federal Occupational Safety and Health Act of 1970 (“OSHA”). N.C.G.S. §95-133; 29 C.F.R. §1952.1250. The federal OSHA regulations enforced by the Department of Labor, including those concerning listing and labeling of industrial machinery, prohibit supplemental regulation in the workplace safety field by other state laws.

Under federal OSHA, states are permitted to assume and maintain regulatory responsibility for areas in which the federal Occupational Safety and Health Administration has promulgated a federal standard, and operate their own state plans under federal supervision. 29 U.S.C.A. §667. To do this, the state’s plan, with proposed state standards must be approved by the federal Secretary of Labor. 29 U.S.C.A. §667. North Carolina adopted the federal OSHA regulations and has such an approved plan. N.C.G.S. §95-131. As demonstrated by the certified copy of the table of contents of North Carolina’s OSHA plan (attached hereto as Exhibit A), neither the Building Code nor the NEC is part of North Carolina’s approved OSHA plan.

The U.S. Supreme Court has made it clear that provisions of federal OSHA express Congress’ clear and manifest intent to preempt state law. Gade v. National Solid

Wastes Management Ass'n., 505 U.S. 88, 112 S.Ct.2374 (1992). In Gade, the Supreme Court held that federal OSHA “preempts any state law or regulation that establishes an occupational health and safety standard on an issue for which OSHA has already promulgated a standard, unless the State has obtained the Secretary’s approval for its own plan.” 505 U.S. at 97, 112 S.Ct. at 2382. This preemption analysis has been held to extend to states with approved plans such as North Carolina:

[B]y including *some* occupational safety issues in a state plan, a state is not freed from the preemptive grasp of federal standards for occupational safety issues not within the plan. Further, a state may not submit some regulations on a worker safety issue to OSHA as part of its state plan and omit other regulations relating to the same issue from the plan. The omitted regulations, even if complementary to the Occupational Safety and Health Act’s scheme, are subject to the “background pre-emption” of the federal standard.

Industrial Truck Ass’n, Inc., v. Henry, 125 F.3d 1305,1311 (9th Cir. 1997). In other words, where a state such as North Carolina has an approved OSHA plan, and a state regulation affecting workplace safety exists, but is not part of that plan, the state regulation is preempted by federal law if there is a federal OSHA regulation governing the same issue.

Safety of industrial machines is thoroughly regulated under OSHA. The “Design Safety Standards for Electrical Systems” set forth in 29 CFR §§302-399 are in fact similar to language in the Electrical Code, but they apply specifically to “utilization equipment”. Similar to the Electrical Code, OSHA requires that for an installation of equipment to be acceptable or approved, it must be listed or labeled “or otherwise determined to be safe by a nationally recognized testing lab...” 29 CFR §1910.399. The OSHA regulation, however, also permits custom manufactured machinery to be tested and certified by its manufacturer, with test data furnished to OSHA on demand.

In DOI’s “Hearing Brief”, counsel for DOI cites the case of Township of Greenwich v. Mobil Oil Corp. and the United States, 505 F.Supp. 1275 (D.N.J. 1981) as the only case that counsel for DOI could find which indicates that the OSHA preemption is not absolute. But that case dealt with “building codes and zoning ordinances”. There was no issue in that case of the building code being extended to “industrial machinery”. This case cited by DOI has no bearing on or relationship to the issues in this case before the BCC.

In this case before the BCC, DOI has repeatedly made clear references to the BCC rules regarding building inspections being extended to “industrial machinery” in place of and in addition to OSHA regulatory oversight. Counsel for DOI has repeatedly elicited from witnesses statements that this NEC oversight of “industrial machinery” is necessary because OSHA inspectors are not present at the outset of the start of a manufacturing operation (Ode Dep. P.120); OSHA inspectors are understaffed (Ode Dep. P.170); OSHA inspectors are not capable to doing this type of inspection (Ode Dep.

P.174); and that OSHA is not sufficient protection for the worker (Ode Dep. P.174). The above references are to Mark Ode's deposition transcript but counsel for DOI made statements to this effect and elicited responses from other witnesses to this effort repeatedly, but those transcripts are not available.

Consequently unlike the case that DOI cites, it is clear that the regulatory oversight urged by DOI is directly intended to take the place of and preempt OSHA enforcement.

Because of the existence of this OSHA regulation, North Carolina is precluded from regulating workplace safety of "industrial machinery" through the BCC or DOI notwithstanding the opinions of the Department's witnesses that such regulation is desirable as a matter of policy. Preemption applies whether or not the state-adopted regulation is expressly stated to be for workplace safety purposes as long as it "directly, substantially, and specifically regulates occupational safety and health" *Gade*, 507 U.S. at 107. If the NEC's listing and labeling requirements are aimed specifically at "industrial machinery" and not due to an inherent relationship with a regulated building or structure, they are preempted by OSHA and could not be enforced.

CONCLUSION

For the foregoing reasons, "industrial machinery", including machines located in the Company's facility in Catawba County, are not subject to U.L. listing and labeling requirements and are not the proper subject of a building code inspection. Accordingly, the orders, decisions, and determinations upon which this appeal is taken should be vacated, and the Company's building should be issued a final certificate of occupancy. The BCC should further order the DOI and local building code inspectors to adopt policies and procedures consistent with these conclusions.

Respectfully submitted this 28th day of September, 2006.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **Trial Brief** was served upon all counsel for the opposing party in the foregoing matter by depositing a copy of such document in the United States Mail, postage prepaid and addressed as noted below, in the manner prescribed by Rule 5 of the Rules for Civil Procedure.

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