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Via Email

March 7, 2019

California Building Standards Commission
Attention: Mia Marvelli, Executive Director
2525 Natomas Park Drive, Suite 130
Sacramento, CA 95833

Re: Public Comments Regarding the Department of Housing and Community Development's Proposed Changes to the California Existing Building Code

Dear California Building Standards Commission:

I am taking this opportunity to provide public comments regarding the second iteration of changes to the *California Existing Building Code* (CEBC) proposed by the Department of Housing and Community Development (HCD). Unfortunately, the proposed changes still continue to violate both the letter and the legislative intent of state law.

History

At the Building Standards Commission hearing on December 4, 2018, I verbally communicated my concerns that HCD's proposed amendments violate state law, and I provided a six-point list of items that HCD needed to address in order to address the violations. I suggested that HCD open another comment period, and I specifically suggested the option of a 45-day comment period if required to give HCD time to correct their errors. A few days after the hearing, I followed up with HCD in a series of emails, including proposed changes that would satisfy my concerns. For reasons unknown, HCD chose not to implement most of the changes that I recommended. I also offered several times to talk with HCD about my concerns, but HCD did not take me up on my offers.

On December 19, 2018, HCD opened a 15-day comment period for consideration of certain changes. On January 2, 2019, I submitted public comments for HCD's consideration, stating that HCD had failed to address the concerns I expressed at the hearing and that their proposed changes still violate state law. Upon receipt of my written comments, HCD failed to make substantive changes that addressed my concerns and failed to respond to my public comments and the public comments from others in a timely manner.

At the January 15, 2019 Building Standards Commission hearing, HCD belatedly provided a handout at the back of the room that purportedly addressed the public comments that had been submitted. In addition, HCD provided a proposed change to their regulations and failed to provide the public and the Commission time to review it.

At that same hearing, I again provided verbal testimony. At the beginning of the second day, after wasting a significant amount of time of both the Commission and the public, HCD stated that they needed to withdraw all of their proposed changes because they had failed to give timely responses to the public commenters. In addition, they withdrew one of their proposed changes, because, as they informed the Commission and the public, it was substantive.



On February 8, 2019, I attended an “ad hoc” meeting with HCD staff to discuss the proposed changes. The meeting did not result in HCD altering their stance in any meaningful way.

Now a second 15-day public comment period has been opened, with two proposals under consideration. Neither proposal addresses HCD’s proposed violations of state law, as discussed below.

Proposal 1

This is a substantive change that is a bad idea for which there is no need, and is a change that does not address my concerns.

The original proposed wording stated that “substandard” buildings shall be considered to be “unsafe”. The new proposed wording turns the initial proposal on its head and states that “unsafe” buildings shall be considered to be “substandard”.

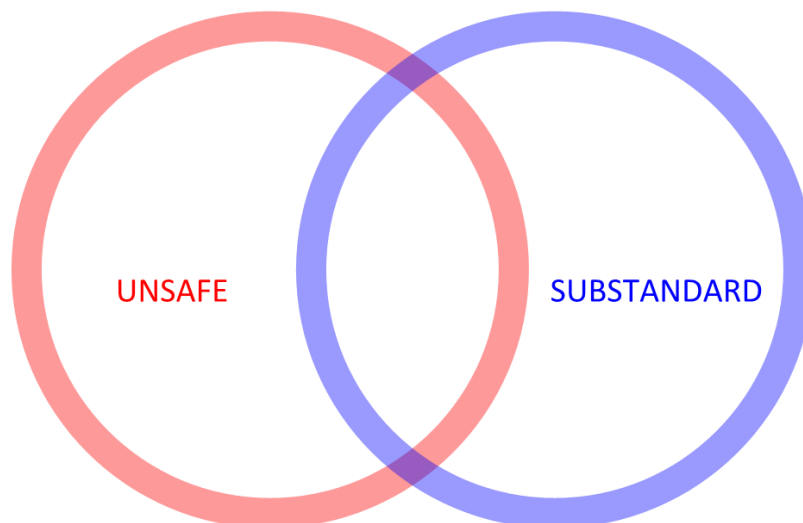
The term “unsafe” is defined by the CEBC as a laundry list of conditions, many of which are undefined:

“UNSAFE. Buildings, structures or equipment that are unsanitary, or that are deficient due to inadequate means of egress facilities, inadequate light and ventilation, or that constitute a fire hazard, or in which the structure or individual structural members meet the definition of “Dangerous,” or that are otherwise dangerous to human life or the public welfare, or that involve illegal or improper occupancy or inadequate maintenance shall be deemed unsafe. A vacant structure that is not secured against entry shall be deemed unsafe”

The term “substandard” is defined by Section 17920.3 of the *Health and Safety Code* with an even longer laundry list of ill-defined terms that is too long to enumerate in this letter.

One of the flaws with HCD’s proposal is that both definitions contain ill-defined terms. As such, each term is subjective and highly dependent on the judgment of the building official.

To illustrate how problematic this is, consider the following Venn diagram that shows the words “unsafe” and “substandard”:





In this case, the definition of “unsafe” encompasses an ill-defined set of buildings that is not necessarily the same set of buildings that is encompassed by the ill-defined term “substandard”. Clearly there are buildings that are “unsafe” that are also “substandard” (i.e., the intersection of the two circles in the Venn diagram). But there are also buildings that, in the opinion of the building official, might be “unsafe” but not “substandard”, just as there may be buildings that, in the opinion of the building official, are “substandard” but are not “unsafe”.

For example, a building with “inadequate light” might be a building where the foot-candles of illumination provided in its parking garage fall slightly below the minimum required by the building code. This condition might qualify as “unsafe” per the vague definition provided in the CEBC. While it might seem reasonable to assume that if a condition is unsafe, it is also substandard, the definition of “substandard” requires that such any such condition be to the *“extent that endangers the life, limb, health, property, safety or welfare of the public or the occupants thereof”*. Therefore, the two definitions are not the same, and declaring that the slightly deficient lighting that might qualify as “unsafe” must also be considered “substandard” is wrong. The fact that some of these conditions might be the result of newer building codes becoming more conservative/onerous over time compared to the building code at the time of original construction further ensures that the two terms are not identical.

HCD’s proposal violates state law by effectively redefining “substandard” -- a definition that was set by the Legislature -- by adding to it all buildings that are “unsafe”.

In addition, this proposal is not needed. Definitions and remedies for both “unsafe” and “substandard” conditions are provided in the CEBC and in state law, and there is simply no need to conflate the two.

Another one of the problems with HCD’s proposal is that one of HCD’s staff apparently informed a member of the public that they planned to correct their initial proposal with a substantive change but would claim that it was non-substantive in their proposal to ensure that it is accepted. This tactic is offensive. The change from the first proposed change to the second proposed change is most certainly not “editorial”, and HCD’s apparent desire to hide their true intent from the public and the Commission is both shameful and disturbing.

Proposal 2

This proposal is identical to the proposal that was submitted to the Commission on January 15, 2019, and that the Commission was informed by HCD was substantive the following day. HCD’s rationale for this proposal makes the following claim:

“This amendment was proposed after the first California Building Standards Commission (BSC) meeting on December 4, 2018 and made available for comments during a 15-day public comment period that ended January 3, 2018 [sic].”

HCD’s claim that this change was made available for comments during the first 15-day public comment period, which ended on January 3, 2019, appears to be completely false. Furthermore, the rationale also includes the following statement: *“The proposed amendments have no intended change in regulatory effect.”* This statement contradicts the statements given by HCD on January 16, 2019 that the proposed change was substantive and therefore had to be withdrawn.



Unlike the first proposal, this proposal is actually good; however, it fails to address the root of my concerns. Specifically, the upgrade triggers in the *Existing Building Code* are still being proposed for adoption by HCD, and these upgrade triggers blatantly violate both the letter and spirit of the Health and Safety Code.

This code cycle, HCD has provided substantial testimony to the Commission and to the public that in the last three code cycles, there was simply not enough time in those nine years to figure out what to do with the code upgrade triggers in the model code. Not only is this testimony not credible, it is also patently false. During the ad hoc meeting on February 8, 2019, I asked one of the HCD staff how they can keep claiming that there was insufficient time, when prior HCD Statements of Reasons are clear that the issue was never about lack of time, and that HCD's position was always that the upgrade triggers violate state law and that is why the upgrade triggers cannot be adopted. The HCD staff member responded that the issue is that HCD has simply changed their mind -- which is an entirely different position than claiming that there was insufficient time in the past nine years to consider adopting the triggers.

Other false statements have been made to the Commission and the public, including a claim by HCD staff that as more and more upgrade triggers are added to the IEBC, the IEBC is getting closer and closer to the intent of state law as more and more upgrade triggers are added to the IEBC -- a laughable but also false claim.

HCD's Proposed Changes Still Violate the Letter of State Law

Section 17958.8 of the Health and Safety Code (i.e., state law) states:

“Local ordinances or regulations governing alterations and repair of existing buildings shall permit the replacement, retention, and extension of original materials and the use of original methods of construction for any building or accessory structure subject to this part, including a hotel, lodginghouse, motel, apartment house, or dwelling, or portions thereof, as long as the portion of the building and structure subject to the replacement, retention, or extension of original materials and the use of original methods of construction complies with the building code provisions governing that portion of the building or accessory structure at the time of construction, and the other rules and regulations of the department or alternative local standards governing that portion at the time of its construction and adopted pursuant to Section 13143.2 and the building or accessory structure does not become or continue to be a substandard building.”

HCD is still proposing to adopt all of the upgrade triggers in Section 405.2, including the snow damage upgrade trigger (Section 405.2.1.1), the disproportionate earthquake damage trigger (Section 405.2.2), and the two substantial structural damage triggers (Sections 405.2.3 and 405.2.4). All of these triggers violate the letter of Section 17958.8 of the Health and Safety Code (HSC), which specifically permits replacement of original materials, retention of original materials, and the use of the original methods of construction for repairs in accordance with the building code at the time of construction.

In the 2016 CEBC (and prior codes), these triggers were explicitly not adopted by HCD to avoid conflicting with state law. Section 17958.8 of the Health and Safety Code has not changed; therefore, HCD must make their proposal match the prior code (after adjusting for movement of various provisions) or their proposed changes will be in conflict with Section 17958.8 of the Health and Safety Code, and will thus be illegal.

Similarly, Section 302.5.1 requires that new structural members and connections comply with the detailing provisions for new buildings; this is a violation of the HSC in cases where repairs require new structural members or connections.



HCD's Proposed Changes Still Violate the Spirit of State Law

The relevant statement of legislative intent for Section 17958.8 of the Health and Safety Code can be found in the Legislative Counsel's Digest for Assembly Bill 1034 in 2003, which is the last time Section 17958.8 was amended. The Digest states that the amendment was meant to permit materials and methods of construction that *"comply with the building code provisions governing that portion of the building or accessory structure at the time of its construction and other requirements governing the building or accessory structure at that time..."*

The intent of Legislature to permit repairs that conform to the original building code under which the structure was built could not be clearer. The spirit/intent of the law will be violated if the upgrade triggers that HCD has proposed for adoption in Sections 405.2.1.1, 405.2.2, 405.2.3, and 305.2.4 are adopted.

It is for this reason that the upgrade triggers were not adopted for the last four code cycles (i.e., the 2016 CEBC, the 2013 CBC, the 2010 CBC, and the 2007 CBC). If HCD adopts the code upgrade triggers it has proposed, it would be violating that intent as well as the letter of the law. HCD would also be dramatically changing how HCD deals with existing residential structures, which would have a dramatic financial impact on California. Although HCD claims that they are not legally required to consider fiscal impacts unless someone questions their initial estimate, their initial estimate is clearly incorrect, and the fact that HCD is hiding behind a statute to avoid considering the economic impact of their proposed changes is a clear dereliction of duty.

HCD's Proposed Changes Stemmed from a Mistaken Understanding Regarding Repair of Structural Damage

In HCD's Initial Statement of Reasons, HCD stated several times that the upgrade triggers they were proposing for adoption do not conflict with State Housing Law. The reasoning given for adopting the upgrade triggers was as follows:

"Although the SHL allows the extension of original materials and use of methods of construction, structural damage makes the building a substandard building."

The second half of this reason is false. Structural damage only makes a building "substandard" if the damage is sufficient to endanger the public or the occupants. More importantly, the repair of that damage does not cause the building to become or continue to be substandard; therefore in-kind structural repairs must be permitted according to state law.

HCD's premise that "structural damage" is somehow different than any of the other conditions that may temporarily render a building "substandard" is false. HCD's factually incorrect statements in their Initial Statement of Reasons will result in confusion among engineers, architects, owners, and building officials; HCD must recant the incorrect reasons previously given for adopting triggers that cannot be adopted without violating state law. Sweeping this error under the rug will only sow confusion going forward.

During the hearing on December 4, 2018, HCD staff testified that they did not intend to make any significant changes in how repairs should be implemented; rather, they implied that the changes were made simply to correlate and incorporate HCD's changes from the prior code into the newer code and that this was merely an administrative task. This testimony does not appear to be true. If HCD did not intend to modify how the 2019 CEBC will be implemented for residential structures, they should not have adopted all of the



upgrade triggers that violate Section 17958.8 of the Health and Safety Code. These triggers were not adopted last three code cycles because they would have violated state law; no basis has been provided for adopting the triggers this cycle other than the incorrect justification that structural damage makes a building substandard, and in-kind repairs cannot address the substandard condition.

Proposed Solution

In order to be in conformance with Section 17958.8 of the Health and Safety Code, the following changes must be made:

- Do not adopt Sections 302.5.1, 405.2.1, 405.2.1.1, 405.2.2, 405.2.3, 405.2.3.1, 405.2.3.2, 405.2.3.3, 405.2.4, and 405.2.4.1. These sections are in direct conflict with Section 17958.8 of the HSC and cannot be adopted without violating the requirement that in-kind repairs and in-kind construction be permitted.
- Add a Section 503.1.1:

[HCD 1] 503.1.1 Materials. Local ordinances or regulations shall permit the replacement, retention and extension of original materials, and the use of original methods of construction, for any building or accessory structure, provided such building or structure complied with the building code provisions in effect at the time of original construction and the building or accessory structure does not become or continue to be a substandard building. For additional information, see Health and Safety Code Sections 17912, 17920.3, 17922(d), 17922.3, 17958.8 and 17958.9.

This matches the language in the 2016 CEBC and correctly allows users the option of “extension” of original materials as part of an alteration.

Finally, HCD needs to recant their position that structural damage cannot be repaired in-kind without triggering upgrades of the structure. The Initial Statement of Reasons was factually incorrect on several key points, and unless HCD wishes to further confuse the issue, they need to clearly state that their prior position was incorrect.

Since HCD is clearly unwilling to correct their mistakes, the California Building Standards Commission should reject HCD’s proposed changes and retain the 2016 CEBC for residential structures. Alternately, the Commission can adopt most of HCD’s proposed changes but not adopt the problematic proposal to add a relationship between “unsafe” and “substandard” and not adopt the upgrade triggers in the code. Hopefully, either of these actions will help HCD staff understand that if they want to change state law, they must do so legislatively as opposed to doing it via unilateral executive action as they are currently proposing to do.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Gwennyth R. Searer', with a long horizontal flourish extending to the right.

Gwennyth R. Searer, S.E. #4450