

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO**

DATE/TIME:	August 27, 2021 10:00 a.m.	DEP. NO.:	27
JUDGE:	HON. STEVEN M. GEVERCER	CLERK:	N. SMITH
Public.Resource.Org., Inc., Petitioner, v. California Office of Administrative Law, and the California Building Standards Commission, Respondents.		Case No. 34-2021-80003612	
Nature of Proceedings:		Motion to Intervene; Applications to as Counsel Appear <i>Pro Hac Vice</i>	

I. TENTATIVE RULING.

The following shall constitute the Court’s tentative ruling on the above matters, set for hearing in Department 27, on Friday, August 27, 2021, at 10:00 a.m. This tentative ruling shall become the court’s final ruling and statement of decision unless a party wishing to be heard so advises the clerk of this department no later than 4:00 p.m. on the court day preceding the hearing, and further advises the clerk that such party has notified the other side of its request for hearing.

If a hearing is requested, it will be conducted remotely through the Zoom application and live-streamed on the court’s YouTube page. The parties may join the Zoom session by audio and/or video through the following link/telephone number:

https://saccourt.zoom.us/my/dept27a	(888) 475-4499 ID: 553-829-7195
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Proposed Intervenors National Fire Protection Association, Inc. (NFPA) and International Code Council, Inc. (ICC) have filed a motion to intervene as respondents. Proposed Intervenor ICC has also moved for attorneys J. Kevin Fee and Jane W. Wise to appear *pro hac vice* on its behalf. These motions are granted.

1. Intervention.

Petitioner Public.Resource.Org, Inc. seeks a writ of mandate against Respondents Office of Administrative Law (OAL) and the California Building Standards Commission (Commission). Petitioner alleges that it made a request under the Public Records Act (Gov. Code, §§ 6250 *et seq.*) (PRA) for Titles 1-5, 7-23, and 25-28 of the California

Code of Regulations (CCR),¹ to be provided in all formats, including electronic copies or “structured, machine-readable digital formats, such as XMF or PDF files.” (Petition, ¶13, Exh. C.) Petitioner also made a nearly identical, separate PRA request for Title 24 of the CCR (Title 24) to the Office of Public Affairs, which contains the Department of General Services, and the Commission (Petition, Exh. F.)

OAL responded² that the CCR titles were available from West online, and that OAL was willing to scan paper copies of the CCR and send them to Petitioner. (Petition, ¶14, Exh. D.) OAL stated that it did not have an electronic, machine-readable copy of the CCR. (Petition, ¶18.)

The Commission also responded that it could not produce the records. The Commission stated that a print copy of Title 24 was available for inspection at the Commission’s office, and noted that many state and local libraries have print copies of Title 24. (Petition, Exh. G.) The Commission stated that Title 24 may be viewed online on the Commission’s website, but because the Commission did not have publishing rights, it could not provide copies to the public. (*Ibid.*) The Commission explained that this is because Title 24 is based on and includes model codes produced by the publishing entities, proposed Intervenor NFPA, ICC, and the International Association of Plumbing and Mechanical Officials. (*Ibid.*) The Commission also responded that individual parts or a full set of Title 24 may be purchased from these three publishing entities. (*Ibid.*)

Petitioner then filed a petition for writ of mandate, alleging that OAL and the Commission violated the PRA.

NFPA and ICC move to intervene as a matter of right, and alternatively, request “permissive” intervention under Code of Civil Procedure section³ 387, subdivisions (d)(1)(B) and (d)(2). Petitioner opposes NFPA and ICC’s motion to intervene.

a. Mandatory Intervention.

Section 387, subdivision (d)(1)(B) provides that a Court shall, upon timely application, grant a motion to intervene if the proposed intervenor “claims an interest relating to the property or transaction that is the subject of the action and...is so situated that the disposition of the action may impair or impede [the proposed intervenor’s] ability to protect that interest, unless that...interest is adequately represented by one or more of

¹ Respondent OAL oversees the publication and distribution of Titles 1-5, 7-23, and 25-28 of the CCR. (Petition, ¶16.) Respondent Commission administers the adoption of, and codifies and publishes the California Building Standards Code as Title 24 of the CCR. (Petition, ¶17.)

² West is a publisher that has contracted with OAL to maintain a complete copy or “Master Database” of the CCR, from which West publishes print copies and an online version available for a fee. (Petition, ¶¶10-12.)

³ Unless otherwise specified, all statutory references shall be to the Code of Civil Procedure.

the existing parties.” (Code Civ. Proc., § 387, subd. (d)(1)(B).) The Court agrees that NFPA and ICC meet the criteria for mandatory intervention.

As an initial matter, the motion is timely, and the parties do not dispute the timeliness of the motion. (*Allen v. Cal. Water & Tel. Co.* (1941) 31 Cal.2d 104, 108 [“a right to intervene should be asserted within a reasonable time”].) NFPA and ICC have asserted a right to intervene within a reasonable time, as a merits hearing is set in December 2021, and briefing has not commenced.

The parties do, however, dispute whether NFPA and ICC have significant, direct, and immediate interests in the litigation. Whether NFPA and ICC meet this test is dispositive for purposes of this motion.

The parties agree that Petitioner seeks electronic versions of the CCR (which includes Title 24) without restrictions on use, copying or dissemination.

NFPA and ICC assert that federal copyright law protects them. NFPA develops and publishes safety standards, including the National Electric Code (NEC), which appears in Title 24, to which it owns the copyright. (Declaration of Christian Dubay (Dubay Decl.), ¶¶2-3, 5.) The California Electrical Code (CEC), which appears in Title 24, “incorporates by reference” portions of the NEC. (Dubay Decl., ¶4.) ICC publishes the International Building Code (IBC), International Residential Code (IRC), International Fire Code (IFC) and International Existing Building Code (IEBC), which set forth safety standards. (Declaration of Mark Johnson (Johnson Decl.), ¶3.) Like NFPA, ICC owns the copyright to the IBC, IRC, IFC, and IEBC. (Id. ¶5.) Title 24 “incorporates substantial portions of” the IBC, IRC, IFC, and IEBC. (Id. ¶4.) NFPA and ICC both assert that their licenses with the Commission do not permit the Commission to disseminate electronic copies of their copyrighted works. (Dubay Decl. ¶¶5-7; Johnson Decl., ¶¶6-7.)

NFPA and ICC also note that state and federal law allow and contemplate that state and federal agencies incorporate technical standards by reference. For example, federal regulations allow publications to be incorporated by reference, if that publication meets certain criteria, including whether it is “[i]s published data, criteria, standards, specifications, techniques, illustrations, or similar material,” and whether it “[i]s reasonably available to and usable by the class of persons affected.” (1 C.F.R. Part 51, *et seq*; *id.*, § 51.7(a); *see also* 5 U.S.C., §552(a); *Am Soc’y for Testing and Materials v. Public.Resource.Org, Inc. (ASTM)* (D.C. Cir., 2018) 896 F.3d 437 [noting that federal law encourages the practice of incorporating technical standards developed by third parties into law].) California law also allows agencies to incorporate standards by reference, upon the satisfaction of certain criteria, including that “the document was made available upon request directly from the agency, or was reasonably available to the affected public from a commonly known or specified source. (Cal. Code. Regs., tit. 1, § 20 (c)(2).)

Petitioner argues that NFPA and ICC do not have an interest in this litigation because 1) NFPA and ICC are not protected by copyright law; and 2) under the PRA, an agency

may not consider the motive of the person or entity requesting the records, e.g., whether the person to whom the records are disclosed may potentially violate copyright protections.

NFPA and ICC respond that they do have a copyright interest under federal law. NFPA and ICC also note that Petitioner's suggestion that NFPA and ICC seek an injunction for copyright infringement should the Court grant this writ, concedes that the proposed intervenors in fact have an interest that may be impaired or impeded,

The government edicts doctrine prevents governmental bodies, such as judges or legislators, from owning a copyright interest in works that they produce in the course of their official duties. (*Georgia v. Public.Resource.Org, Inc. (Georgia)* (2020) 140 S. Ct 1498, 1508.) This is because these governmental bodies, acting in discharge of their official duties (e.g., making, interpreting, or enacting law), are not "authors" under federal copyright law. (*Id.* at p. 1507.)

Thus, when a legislative body adopts the entire model code drafted by a private company, that model code is now "the law," and no is longer subject to copyright protection. (*Veek v. So. Building Code Cong. Int'l* (Fifth Cir. 2002) 293 F.3d 791, 793, 800.) However, the nature and scope of a private entity's copyright protection is a closer question if the legislative body does not wholesale adopt a model code or standards developed by a third party, but incorporates standards by reference, as NFPA and ICC contend has occurred here. (See *ASTM, supra*, 896 F.3d 437.) First, the legal consequences of incorporation by reference vary depending upon the practice adopted by the jurisdiction. (*Id.* at p. 442-443.) Second, standards incorporated by reference, may resemble "ordinary binding law," in that these standards impose legally binding requirements. (*Id.* at p. 443.) "At the other end of the spectrum lie standards that serve as mere references but have no direct legal effect on any private party's conduct." (*Ibid.*) And between these examples lie "countless other varieties of incorporation." (*Ibid.*) Thus, the nature and extent to which standards developed by third parties, such as NFPA and ICC, are incorporated by reference determines the extent of their interest.

As it has done in *ASTM*, Petitioner argues that incorporation by reference makes these works "the law," and the "law" can never be copyrighted. Thus, Petitioner argues, NFPA and ICC have no "interest" for the purposes of intervention. The Court is not persuaded. The *ASTM* court rejected a similar argument advanced by Petitioner in the context of reviewing an appeal of a motion for summary judgment. This is because the record did not reveal the nature of any given incorporation, and the *ASTM* court did not address "whether the Constitution permits copyright to persist in works incorporated by reference into law." (See *ASTM, supra*, 896 F.3d, at p. 447.)

The Court also rejects Petitioner's argument that *Georgia* is binding and militates against intervention. Although *Georgia* makes clear that *government entities* are not entitled to assert copyright protection for works produced in the course of their official duties, it does not address copyright availability for a third party publisher of materials incorporated by reference into government regulations. Further, as demonstrated in

ASTM, because the method of and legal consequences of material incorporated by reference into law varies. Thus, the Court cannot say that NFPA and ICC have *no* interest for the purposes of intervention.

NFPA and ICC assert that some parts of Title 24 requested by Petitioner contain “substantial portions” of codes and standards drafted by them. The declarations in support of this motion also aver that this material is “incorporated by reference” in Title 24. (Dubay Decl. ¶¶3-4; Johnson Decl. ¶¶3-4.) Petitioner also appears to concede that this material is “incorporated by reference.” Accordingly, the Court cannot dispositively state that NFPA and ICC have no copyright protection in that material. Thus, for the purposes of this motion, NFPA and ICC may have an “interest” in the litigation. The Court emphasizes that it does *not* address whether NFPA or ICC are entitled to copyright protection--it simply concludes they have an interest here in how the Court applies the PRA.

The Court also rejects Petitioner’s second argument, that NFPA and ICC have no interest because the PRA does not enable agencies to place use restrictions on records. This fact underscores why NFPA and ICC have an interest in the outcome of the proceeding. Additionally, parties impacted by the potential disclosure of records have standing to assert PRA exemptions through “reverse PRA” actions. (See, e.g., *City of Los Angeles v. Met. Water Dist. of So. Cal.* (2019) 42 Cal.App.5th 290, 311; *Nat’l Conference of Black Mayors v. Chico Cmty Publishing, Inc.* (2018) 25 Cal.App.5th 570, 580.)

Thus, NFPA and ICC have asserted some interest in the litigation, and have fulfilled the “interest” criterion for mandatory intervention under Section 387.

NFPA and ICC meet the remaining criteria for mandatory intervention. They are so situated so that the disposition of this litigation “may impair or impede” their ability to protect their interests. A sufficient showing has been made that if the Court granted the Petition, and ordered Respondents to furnish NFPA and ICC’s copyrighted materials without any restriction on dissemination, copying or use, their ability to protect their interest may be impaired or impeded.

Finally, NFPA and ICC’s interests are distinct from those of Respondents OAL and the Commission, and NFPA and ICC may not be adequately represented by the existing parties. As noted by NFPA and ICC, Respondents do not hold copyrights, and do not have the same level of interest in protecting copyrights.

b. Permissive Intervention.

As the Court finds that NFPA and ICC meet the criteria for mandatory intervention, it need not address whether NFPA and ICC meet the criteria for permissive intervention.

2. Pro Hac Vice Applications.

Additionally, the applications of ICC's attorneys, J. Kevin Fee and Jane W. Wise, to appear in this matter as counsel *pro hac vice* are granted.

Pursuant to California Rules of Court, Rule 9.40, ICC filed a Notice of Application and Memorandum of Points and Authorities in support of Mr. Fee's and Ms. Wise's applications to appear in this matter as counsel *pro hac vice*. Mr. Fee and Ms. Wise are each admitted to practice in numerous state and federal jurisdictions. Both Mr. Fee and Ms. Wise are practicing attorneys with Morgan, Lewis & Bockius LLP. Mr. Fee and Mrs. Wise request to appear as counsel *pro hac vice* in association with Louis Y. Lee, an active member of the State Bar of California.

The Court has reviewed the applications and finds Mr. Fee and Ms. Wise have met all the requirements of Rule 9.40. Additionally, the Court has not received any opposition to the applications. Therefore, the applications of Mr. Fee and Ms. Wise to appear in this matter as counsel *pro hac vice* in association with Mr. Lee are granted.

NFPA and ICC's motion to intervene is granted. An answer in intervention shall be filed forthwith.

ICC's *pro hac vice* motion is granted.

If this ruling becomes the final ruling of the Court, it shall be confirmed by minute order and no further order is required.