

**COMMUNITY AFFAIRS**

**DIVISION OF CODES AND STANDARDS**

**Uniform Construction Code**

**Proposed Amendments: N.J.A.C. 5:23-2.16, 2.18, and 2.29**

Authorized By: Charles A. Richman, Commissioner, Department of Community Affairs.

Authority: N.J.S.A. 52:27D-124.

Calendar: See Summary below for explanation of exception to calendar requirement.

Proposal Number: PRN 2016-103.

Submit written comments by September 3, 2016, to:

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The agency proposal follows:

**Summary**

P.L. 2013, c. 123, which was enacted August 9, 2013, authorizes municipalities to adopt ordinances requiring a successor developer to furnish a replacement performance guarantee to assure the installation and maintenance of on-tract improvements and providing for the release of the predecessor obligor and surety. This statute includes a companion change to the State Uniform Construction Code Act (N.J.S.A. 52:27D-130) prohibiting local construction code

enforcing agencies from approving applications for construction permit updates until receiving proof that the new owner has furnished an adequate replacement performance guarantee in municipalities that have adopted ordinances requiring the posting of a replacement performance guarantee. The proposed amendment at N.J.A.C. 5:23-2.16 incorporates this statutory requirement into the administrative rules.

The proposed amendments at N.J.A.C. 5:23-2.18 and 2.29 address the need to obtain an administrative search warrant when access is denied. The need to make such an amendment to the Uniform Construction Code (UCC) came to light through an Appellate Division decision. In the case of *State v. Heine*, 424 N.J.Super. 48 (App. Div. 2012), the Appellate Court held that the municipality could not enforce a violation notice issued under a local ordinance because of the failure of the local code official to obtain an administrative search warrant after being denied entry.

The Court pointed out approvingly that the requirement of an administrative search warrant when entry is denied is set forth in Hotel and Multiple Dwelling, Rooming and Boarding House, and Uniform Fire Code rules. Denial of entry has not been an issue under the UCC rules because, the unsafe structure provisions or work without a permit aside, inspections are generally conducted at the request of the property owner. The existence of an open permit constitutes a right of entry and enables code officials to make inspections; denial of access is the basis for issuance of a Notice of Violation. In light of the *Heine* case, however, it is deemed appropriate to have the UCC rules reflect the requirement for code officials to secure administrative search warrants in any case in which entry may be denied for any reason.

As the Department has provided a 60-day comment period on this notice of proposal, this notice is excepted from the rulemaking calendar requirement pursuant to N.J.A.C. 1:30-3.3(a)5.

### **Social Impact**

The proposed amendments improve the administration of the State Uniform Construction Code by incorporating an administrative search warrant procedure based on those used in other codes and approved by the courts (N.J.A.C. 5:23-2.18 and 2.29) and by incorporating a statutory requirement for replacement performance guarantees into the rules (N.J.A.C. 5:23-2.16).

### **Economic Impact**

These proposed amendments are not expected to have any economic impact. As discussed in the Summary above, the ability of municipalities to require a replacement performance guarantee and the requirement for proof that the replacement performance guarantee has been posted upon filing of a permit update for a change of ownership are statutory. The requirements for an administrative search warrant do not have any independent economic impact. As demonstrated by the *Heine* decision, the requirement to obtain an administrative warrant already exists.

### **Federal Standards Statement**

No Federal standards analysis is required because these amendments are not being proposed under the authority of, or in order to implement, comply with, or participate in, any program established under Federal law or any State statute that incorporates or refers to any Federal law, standards, or requirements.

### **Jobs Impact**

The proposed amendments are not expected to have an impact on the generation or loss of jobs.

### **Agriculture Industry Impact**

The Department does not anticipate that the proposed amendments would impact the agriculture industry.

### **Regulatory Flexibility Statement**

The proposed amendments are not expected to impose any reporting, recordkeeping, or compliance requirements on small businesses or to require them to engage any professional services they would not otherwise need to engage. As stated in the Economic Impact above, inasmuch as the proposed amendments reflect existing legal requirements, there are no costs associated with these proposed amendments.

### **Housing Affordability Impact**

It is not expected that the proposed amendments will have any impact on the affordability of housing in New Jersey and there is an extreme unlikelihood that the rules would evoke a change in the average costs associated with housing because the rules pertain to the requirement for a replacement performance guarantee, which already exists in State statute. Similarly, as demonstrated in the *Heine* decision, the requirement to obtain an administrative warrant already exists.

### **Smart Growth Development Impact**

It is not expected that the proposed amendments will have an insignificant impact on smart growth and there is an extreme unlikelihood that the rules would evoke any impact upon housing production within Planning Areas 1 or 2, or within designated centers, under the State Development and Redevelopment Plan in New Jersey because the rules pertain to the requirement for a replacement performance guarantee, which already exists in State statute.

Similarly, as demonstrated in the *Heine* decision, the requirement to obtain an administrative warrant already exists.

**Full text** of the proposal follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

## SUBCHAPTER 2. ADMINISTRATION AND ENFORCEMENT; PROCESS

### 5:23-2.16 Construction permits--procedure

(a) – (i) (No change.)

(j) Conditions of permit: The issuance of the construction permit shall be conditioned upon the following:

1. – 3. (No change.)

4. That the owner, his **or her** agent, contractor or other employees will assist the enforcing agency in its inspection work, if requested; [and]

5. That all escrows required to be paid by the applicant, pursuant to N.J.A.C. 5:23-4.17(d), in connection with work done under permits issued for development-wide violation correction, pursuant to N.J.A.C. 5:23-2.35(a)1, have been paid unless there is an appeal pending. For purposes of applying this paragraph, any escrow due from any person or entity affiliated with the applicant by way of having any common officers, directors, or shareholders with at least a [ten] **10** percent interest shall be deemed to be due from the applicant[.]; **and**

**6. That any change in owner is reported through a permit update and that any required replacement performance guarantee has been furnished.**

(k) (No change.)

### 5:23-2.18 Inspections

(a)-(h) (No change.)

**(i) If the owner or occupant improperly denies entry, the construction official, or his or her authorized representative, shall obtain an administrative search warrant or other legal remedy to secure entry issued by a court of competent jurisdiction.**

5:23-2.29 Entry

(a) – (d) (No change.)

**(e) If the owner or occupant improperly denies entry, the construction official, or his or her authorized representative, shall obtain an administrative search warrant or other legal remedy to secure entry issued by a court of competent jurisdiction.**

[(e)] **(f)** (No change in text.)