Coates' Canons Blog: Building Occupancy and Turning on the Juice

By Richard Ducker

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My blog from December 15 of last year ("Preoccupied with Occupancy Certificates: Part I") was intended to provide an introduction to the use of a certificates of occupancy (CO) by local inspections agencies to ensure that a development project is ready for use before it is occupied. This blog concerns the interplay between certificates of occupancy and the connection of electric power to a building or other structure.

Let's begin with the 1967 North Carolina Supreme Court case of Dale v. City of Morganton, 270 N.C. 567, 155 S.E.2d 136 (1967). In that case the tenant of a house in "terribly run down condition" (according to a Morganton housing official) moved out and the electricity was turned off. When a new tenant moved in and applied for a reconnection of the power, Morganton (the electric power provider) refused to provide service. Apparently it did so both because the house was structurally dilapidated, failing to meet the standards of the city's minimum housing ordinance, and because the electrical system was unsafe. The Supreme Court ruled that the city could withhold power for the second reason but not the first. According to the court, the city, operating in its capacity as a proprietary utility, could refuse electric service if there were evidence that the wiring was in dangerous condition. The justification offered was that the city would be liable for damages caused by such a condition if it proceeded with the connection. However, the city was unauthorized to refuse to allow the reconnection of electric service simply because the house was in violation of the housing code. The court referred to the enforcement of the housing code as a "matter collateral to the duty of the city to supply electric power. . . "

The *Dale* case applied to the reconnection of electrical power and was decided almost 45 years ago on the basis of North Carolina common law. Does it imply that the initial provision of electrical service to a building must be accomplished without regard to the compliance of the property with other parts of the North Carolina State Building Code or without regard to applicable zoning and environmental health regulations? It well may.

G.S. 143-143.2 reflects the holding in *Dale* in part by making it unlawful for an electricity provider (e.g., investor-owned power company, electric membership cooperative, or electric city) to turn on or initially furnish electric current for a building unless the building is first inspected by a certified electrical inspector and an electrical certificate issued "approving the wiring of such building." The statute also states that electric wiring "shall conform to the requirements of the State Building Code, which includes the National Electric Code and any amendments and supplements thereto as adopted and approved by the State Building Code Council, and any other applicable State and local laws." A careful look at this language suggests that "any other applicable State and local laws" in this context likely refers just to laws concerning electric systems and not to the other systems of the building or to various other non-building-code-related laws and regulations. This statute and *Dale* also imply that a local inspection department must authorize a utility provider to allow initial connection to its electricity distribution system without regard to whether a building under construction is currently in compliance with the other features of the SBC or other development-related requirements such as zoning and environmental health regulations.

In contrast (and as discussed in the December blog) a local government certificate of occupancy may be withheld until there is evidence that a building (or portion of it) complies not only with the various technical and administrative codes that make up the North Carolina State Building Code (SBC), but also with the local zoning ordinance and, in some cases, with a variety of other applicable State and local regulations and laws.

The distinction between the initiation of electric power and building occupancy is complicated by the fact that time (and timing) is of the essence in many construction projects. There may exist some very practical incentives for contractors and owners to move in inventory or otherwise occupy a building before the CO is issued. This is particularly true once some or all of the electrical system of a building is energized. Since electricity is inevitably required *during* construction and not simply *after* construction, and portable generating equipment can be costly, the incentive to connect the power before a building is found to comply in all respects with the SBC can be substantial.

Both the 2008 version of the North Carolina Electrical Code and the 2011 version (originally to become effective September 1, 2011, but now being reviewed by the General Assembly) provide for “temporary power” (TP). Local governments now routinely authorize investor-owned electric utilities, electric membership cooperatives, and electric cities to provide temporary power during the construction process for project upfits, for tenant changeovers after the power has been turned off with respect to the prior occupant, and for buildings during initial construction. Temporary power is intended to allow contractors to test heating and air-conditioning systems, water heaters, certain electrical appliances, and, in some cases, to allow heating or air-conditioning systems to be used to keep areas at room temperature while certain moldings, floorings, and the like are allowed to set. The Electrical Code provides room for local governments to establish procedures for authorizing power providers to provide temporary power.

An electrical inspection by the code-enforcement authority is typically required in advance of the TP authorization. The electrical system in the building space (which may involve only a portion of a building) must meet many, but not all, of the standards that apply before a final electrical certificate of compliance authorizing permanent power is provided. The responsible party for the building space must secure the space, notify other sub-contractors that the space has been energized, and, in some cases, secure their permission. Some local governments even require evidence that subcontractors have waived the right to sue for damages that grow out of the use of temporary power. In addition, application forms for temporary power are replete with warnings to contractors and property owners that temporary power does not authorize the occupancy of the premises and that only an overall certificate of compliance or certificate of occupancy will do so. Moving inventory, equipment, or furniture into the premises before such a certificate is issued is prohibited. Local governments sometimes limit the duration of temporary power; periods may range from a few weeks to several months. Local governments also may notify the service provider if the terms of temporary service are violated, and the provider may disconnect service when the terms of the agreement between the utility and the customer provide for such. (For more on a utility’s right to disconnect service for nonpayment see Kara Millonzi’s blog of August 9, 2009.)

Because temporary power is generally easy to arrange, there is less pressure on contractors and owners to obtain permanent power, which is commonly in the name of the property owner. In order to qualify for permanent power the premises must pass a final electrical inspection and an electrical certificate of compliance must be issued.

So, in summary, a provider of electric power must provide service to those with electric systems and wiring that meets code standards without regard to “collateral” construction and development regulations that may not have been met. Electrical inspectors probably lack the authority to delay notifying utilities that a particular property qualifies to be “cut in” to the grid. Local governments must acknowledge that as a rule electrical service cannot be directly used as a lever to induce compliance with other regulations. Nonetheless because of the prevalence of “temporary power” arrangements, local governments do have some ability to ensure that the “energizing” of a building is coordinated in some way with the proper completion of its construction and the installation of other building service systems and that a building is not occupied prematurely.

Links

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- www.ncdoi.com/OSFM/Engineering_and_Codes/Documents/2008_NC_Electrical_ICC_Print.pdf
- canons.sog.unc.edu/?p=296