

**Office of the County Attorney  
Montgomery County, Maryland**

**MEMORANDUM**

October 16, 1996

TO: James A. Caldwell, Director  
Department of Environmental Protection

VIA: Charles W. Thompson, Jr. *Charles W. Thompson*  
County Attorney *CHW*  
and  
Marc P. Hansen *Marc Hansen*  
Senior Assistant County Attorney

FROM: John J. Fisher *J.J. Fisher*  
Assistant County Attorney

RE: Legal Effect of Executive Regulation 68-91AM

This memorandum is in response to your memorandum to our office of October 1, 1996, in which you requested a response to the following questions:

1. To what agencies is Executive Regulation 68-91AM applicable? Specifically, is it only Executive Branch agencies, or are the school system, M-NCPPC, Montgomery College, etc., subject to its provisions?
2. Who should have enforcement responsibility?
3. How should agencies demonstrate compliance?

**Brief Answer**

Executive Regulation 68-91AM is applicable to any building for which the county government finances all or part of the cost of construction, without regard to who is the owner of the building. §8-14A(a), Montgomery County Code (1994); Reg. 68-91AM §3.0

Who should have enforcement responsibility for Executive Regulation 68-91AM is a policy question distinct from the question of who is currently charged with enforcement responsibility under the regulation. As currently drafted Regulation 68-91AM requires the

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architect and/or engineer designing the building to comply with the energy specifications referenced in the regulation. See e.g. Reg. 68-91AM §§3.6, 4.0, 4.1, 4.3 and 4.4. The department or agency responsible for the design and construction of the building is in turn required to enforce the architect's and/or engineer's compliance with those specifications; this may be accomplished by including the requirements of Regulation 68-91AM in all contracts for the design of buildings or renovations covered by the regulation. Reg. 68-91AM §5.0. Responsibility for enforcement of Code Section 8-14A (and in turn Regulation 68-91AM) is also shared with the Department of Permitting Services. See e.g. §§8-2, 8-11, 8-12 and Emergency Bill 20-96 §§8-2 and 8-11.

How an agency should demonstrate compliance with Regulation 68-91AM is a policy question distinct from how, under the current regulation, agency compliance is assured. Under the current regulation, compliance is obtained through a self-regulating policy requiring the department or agency responsible for the design and construction of the building to provide copies of the "certificate of compliance" in the Resource Conservation Plan for the appropriate year. Reg. 68-91AM, § 5.1. If a building permit for a County financed building is obtained, the Department of Permitting Services is also responsible for assuring that the building's design plan complies with the energy requirements of Section 8-14A and Regulation 68-91AM.

In any event, compliance with Section 8-14A and Regulation 68-91AM is a condition imposed on using County funds to construct or renovate a building. Therefore, no County financed building should be constructed absent compliance with the energy specifications mandated by Section 8-14A and Regulation 68-91AM.

### **Discussion**

1. Applicability of Executive Regulation 68-91AM — Section 8-14A and Regulation 68-91AM are not limited in their applicability to executive branch agencies but include any building the construction or renovation of which is financed in whole or part by Montgomery County. §8-14A(a), Reg. 68-91AM §3.0. As a general rule neither a county code provision nor executive regulation is applicable to the State or a state agency such as the Montgomery County School System (MCPS), M-NCPPC or Montgomery College unless there is a state statute specifically requiring compliance by the State agency with that county code provision or regulation.

However, the County may condition its contribution to financing a project upon compliance with conditions imposed by the County on the grant of that financing absent any mandatory requirement on the part of the County to provide funding to one of these State agency's projects (which arguably could prevent the County from imposing conditions on the financing). Section 8-14A and Regulation 68-91AM do not force compliance on any state agency

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but rather simply condition the County's contribution to the financing of construction or renovation upon the state agency's compliance with the provisions of Section 8-14A and Regulation 68-91AM. The state agency is free to reject the funds as so conditioned, but if the state agency accepts the funds then it is bound to comply with the conditions imposed upon that financing, in this case compliance with Section 8-14A and Regulation 68-91AM.

Since funds are often appropriated as part of the County's budgetary process directly to a state agency like MCPS and Montgomery College and are not the subject of a specific grant agreement in which the conditions could be made explicit, there is no express language in the funding instrument that requires compliance with Section 8-14A or Regulation 68-91AM. However, the absence of express language in an appropriation resolution conditioning funding does not change the fact that both Code Section 8-14A and Regulation 68-91AM are implied as a matter of law as a condition of the funding. Accordingly, the applicability of Code Section 8-14A and Regulation 68-91AM is not limited to executive branch agencies but applies to any building for which the County government finances all or part of the cost of construction or renovation.

2. Enforcement Responsibility — Regulation 68-91AM requires the architect and/or engineer hired to design the building to comply with the energy specifications set forth in the regulation. Reg. 68-91AM §§3.6, 4.0, 4.1, 4.3 and 4.4. Read as a whole the regulation imposes on the agency or department responsible for the construction and design of the building the obligation to see that the designer complies with the energy specifications required by the regulation. See e.g. generally Sections 4.2 and 4.5 and in particular 5.0 of Regulation 68-91AM.

The only reference in Section 8-14A to any other agency which has enforcement responsibility is the reference to the authority vested in the Department of Facilities and Services to grant variances or modifications from the energy specifications.<sup>1</sup> Regulation 68-91AM, however, in turn has delegated this authority to the Director of the agency or department responsible for the design and construction of the building (See Section 4.5). Thus, it is the agency or department responsible for the design and construction of the building which is charged with responsibility for enforcement of the designer's compliance with the energy specifications required by the regulation.

3. Compliance Assurance — The only mechanisms contained in Regulation 68-91AM to assure compliance are the requirement that the department responsible for design and

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<sup>1</sup>The functions of the Department of Facilities and Services under Section 8-14A(d) were transferred to the Department of Public Works and Transportation pursuant to Emergency Bill No. 20-96 §8-14A(d) effective July 9, 1996 (the relevant portion of which is attached).

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construction monitor the building subsequent to its construction (Section 4.6) and the requirement that the department provide copies of the "certificate of compliance" in the Resource Conservation Plan for the appropriate year (Section 5.1). Each of these, however, occur after construction is complete. There is not any express requirement contained in Regulation 68-91AM conditioning the issuance of a building permit upon evidence of compliance with the energy specifications.

Sections 8-11 and 8-12 provide that no building permit should be issued absent evidence of compliance with the requirements of Chapter 8 which includes the energy specifications mandated by Section 8-14A and Regulation 68-91AM. Under the current organization of executive agencies, the Department of Permitting Services enforces Chapter 8. Emergency Bill 20-96, §§8-2 and 8-11.<sup>2</sup> While MCPS is required to obtain a building permit, M-NCPPC and Montgomery College are not required to obtain a County building permit. Thus, to the extent a building permit is obtained, voluntarily or otherwise, the Department of Permitting Services is also responsible for assuring that there has been compliance with Section 8-14A and Regulation 68-91-AM prior to issuing a building permit.

I hope this memorandum is responsive to your inquiry of October 1, 1996. If you have any questions, please do not hesitate to contact me. I may be reached on my direct line at 217-2669.

JJF:mdm:pb

cc: Robert C. Hubbard, Director  
Department of Permitting Services

Robert K. Kendal, Director  
Office of Management and Budget

Tim Firestine, Director  
Department of Finance

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<sup>2</sup>Section 8-2 of Emergency Bill 20-96 substitutes the Department of Permitting Services (DFS) for the Department of Environmental Protection (DEP) and the Director of DFS for the Director of DEP. Section 8-11, provides that the "Director [of DFS] enforces and administers this Chapter [Chapter 8]" which includes Section 8-14(A) and in turn Regulation 68-91AM which was adopted pursuant to subsection (c) of Section 8-14A.