

NEW YORK CITY FIRE DEPARTMENT

Notice of Public Hearing and Opportunity to Comment on Proposed Rule

What are we proposing? The Fire Department is proposing to amend 3 RCNY Section 102-01, entitled “Pre-Existing Facilities and Conditions,” to address pre-existing facilities and conditions arising from enactment of an amended New York City Fire Code by Local Law No. 148 of 2013, and projects in progress as of March 30, 2014, the effective date of the amended Fire Code.

When and where is the hearing? The Fire Department will hold a public hearing on the proposed rule. The public hearing will take place at 11:00 a.m. on Monday, September 15, 2014. The hearing will be in the Fire Department Auditorium at 9 MetroTech Center, Brooklyn, NY 11201.

How do I comment on the proposed rule? Anyone can comment on the proposed rule by:

- **Website.** You can submit comments to the Fire Department through the NYC rules website at <http://rules.cityofnewyork.us>, or through the Fire Department’s website at <http://www.nyc.gov/fdny> (use the “FDNY Rules” link).
- **Mail.** You can mail written comments to Code Revision Unit, Bureau of Legal Affairs, New York City Fire Department, 9 MetroTech Center, 4th Floor, Brooklyn, NY 11201.
- **Speaking at the hearing.** Anyone who wants to comment on the proposed rule at the public hearing must sign up to speak at the hearing. The time that you can speak may be limited.

Is there a deadline to submit written comments? Yes, you must submit written comments by September 15, 2014.

Do you need assistance to participate in the hearing? You must notify the Bureau of Legal Affairs if you need a sign language interpreter or other reasonable accommodation for a disability at the hearing. Write to us at the address above or telephone us at (718) 999-2040. You must notify us by August 29, 2014.

Can I review the comments made on the proposed rule? You can review the comments made online on the proposed rule by going to the website at <http://rules.cityofnewyork.us>. A few days after the hearing, a record of the hearing and copies of the written comments will be available to the public at the Bureau of Legal Affairs.

What authorizes the Fire Department to make this rule? Sections 489 and 1043 of the New York City Charter and Section 102.6.3 of the New York City Fire Code, Title 29 of the New York City Administrative Code authorize the Fire Department to propose this rule. This proposed rule amendment was not included in the Fire Department’s regulatory agenda for this

Fiscal Year because the need for it arose upon enactment of Local Law No. 148 of 2013 on December 30, 2013.

Where can I find the Fire Department rules? The Fire Department rules are codified in Title 3 of the Rules of the City of New York.

What rules govern the rulemaking process? The Fire Department must meet the requirements of Section 1043 of the City Charter when creating or changing rules. This notice is made in accordance with the requirements of Section 1043(b) of the City Charter.

Statement of Basis and Purpose of Proposed Rule Amendments

The Fire Department is proposing to amend rule 3 RCNY §102-01, entitled “Pre-Existing Facilities and Conditions,” to address pre-existing conditions and facilities arising from enactment of an amended New York City Fire Code by Local Law No. 148 of 2013, and projects in progress as of March 30, 2014, the effective date of the amended Fire Code.

Section 102-01 currently expands upon the Fire Code provision (FC102.3) that addresses facilities and conditions lawfully existing on July 1, 2008, the effective date of the Fire Code. Section FC102.3 allows facilities and conditions lawfully existing as of that effective date to be continued under the laws, rules and regulations under which those facilities and conditions were allowed or approved, subject to certain conditions.

The proposed rule would amend and update Section 102-01 to address facilities designed and installed under the Fire Code that took effect on July 1, 2008 (or other lawful conditions arising after that date) that would no longer be allowed under the amended Fire Code that took effect on March 30, 2014. The section would also be amended to clarify the purpose and meaning of the section and provide additional illustrative examples. For example, dead end fire apparatus turnarounds and paint spray booths that were approved and constructed under pre-existing Fire Code and Fire Department rule provisions may be maintained in accordance with those provisions even though the Fire Code or rule requirements for such facilities have changed.

Section 102-01 also makes provision for buildings designed and approved for construction prior to July 1, 2008, the effective date of the Fire Code, but not completed. It allowed, for a specified period of time, such “projects in progress” to be constructed in accordance with the Fire Code design and installation requirements in effect at the time the Department of Buildings work permit was issued, subject to certain conditions.

The proposed rule would amend and update Section 102-01 to address buildings designed and approved for construction prior to March 30, 2014, the effective date of the amended Fire Code, but not completed. It would allow, for 18 months, such “projects in progress” to be constructed in accordance with the Fire Code design and installation requirements in effect at the time the Department of Buildings work permit was issued, subject to certain conditions.

The Fire Department's authority for this rule is found in Sections 489 and 1043 of the New York City Charter and Section FC102.6.3 of the New York City Fire Code, Title 29 of the New York City Administrative Code.

Terms used in the proposed rule that are defined in the Fire Code or elsewhere in the Fire Department's rules are indicated by *italics*.

New material is underlined. Material to be deleted is in [brackets].

“Shall” and “must” denote mandatory requirements and may be used interchangeably in the rules of this department, unless otherwise specified or unless the context clearly indicates otherwise.

Guidance with respect to the interpretation of the Fire Code and Fire Department rules may be obtained using the Public Inquiry Form on the Fire Department's website, www.nyc.gov/html/fdny/html/firecode/index.shtml#p6.

§ 102-01 Pre-Existing Facilities and Conditions

(a) Scope. This section consolidates requirements for [*facilities*, or parts thereof, and] *conditions* that were lawfully existing on [July 1, 2008, the effective date of the Fire Code] the effective date of a Fire Code provision, and that, [pursuant to FC102.3,] in accordance with FC 102.3 or 102.4, may be continued in compliance with laws, rules, regulations and *permit* conditions [pre-dating the Fire Code] applicable at the time such condition was lawfully allowed or approved.

(b) Definitions. The following term shall, for the purposes of this section and as used elsewhere in the *rules*, have the meaning shown herein:

Pre-existing (facility or condition). [Solely for purposes of implementing the provisions of FC102.3, a *facility*, or part thereof, or *condition* that was lawfully existing on July 1, 2008, and that, pursuant to FC102.3, may be continued in compliance with the requirements of the New York City Fire Prevention Code and other laws, rules, and regulations or permit conditions applicable at the time such *facility* or *condition* was lawfully allowed or *approved*, as such provisions may be amended from time to time.] Any condition, including the design and installation of any *facility*, lawfully existing on the effective date of a Fire Code provision that, in accordance with FC 102.3 or 102.4 and this rule, may be continued in compliance with laws, rules, regulations and *permit* conditions applicable at the time such *facility* was lawfully allowed or approved, and which is not determined by the *Department* to be subject to the provisions of FC102.5.

[(c) Provisions of Law Applicable to Pre-Existing Conditions and Design and Installation of Pre-Existing Facilities. Pursuant to FC102.3, *conditions* and *facilities* lawfully existing on July 1, 2008 that would not be allowed or approved under the Fire Code may be continued in compliance with the New York City Fire Prevention Code and other laws,

rules and regulations or *permit* conditions applicable at such time as such condition or facility was lawfully allowed or approved. In accordance with FC102.3:

- (1) *Conditions* or *facilities* lawfully existing on July 1, 2008, or any part thereof, that are allowed and would be approved under the applicable provisions of the Fire Code and the *rules*, shall comply with such provisions. For example, an existing underground *liquid motor fuel* storage tank designed and installed after April 2000 pursuant to provisions of Subchapters 8, 9 and 11 of the New York City Fire Prevention Code and 3 RCNY §21-20 that are substantively identical to the provisions of the Fire Code and the *rules* is not a *pre-existing facility* within the meaning of this section and shall comply with the requirements of the Fire Code and the *rules*.
- (2) Unless one of the exceptions set forth in FC102.3 is applicable, and except as otherwise provided in R102-01(c)(3) and (c)(4), *pre-existing conditions* or *facilities*, or any part thereof, that would not be allowed and could not be approved under the applicable provisions of the Fire Code and the *rules* shall comply with the provisions of the New York City Fire Prevention Code and the *rules* in effect on June 30, 2008, including applicable provisions consolidated in Chapter 48 of the *rules*, and any other applicable laws, rules and regulations. For example, an existing below-grade storage facility for flammable liquids lawfully designed and installed in a mercantile establishment prior to July 1, 2008, and that on June 30, 2008 was in compliance with the design and installation requirements for such facilities set forth in Administrative Code §27-4066 of Subchapter 9 of the New York City Fire Prevention Code, is a *pre-existing facility* which may be continued in compliance with the provisions of the New York City Fire Prevention Code and the *rules* in effect on June 30, 2008, notwithstanding the fact that such below-grade *facility* would not be allowed or approved in a *control area* under the Fire Code.
- (3) Unless one of the exceptions set forth in FC102.3 is applicable, a *pre-existing condition* or *facility*, or part thereof, that was lawfully allowed or approved under the provisions of the Fire Prevention Code or *rules* or other laws, rules or regulation no longer in effect on June 30, 2008, and that had been lawfully continued under such earlier provisions through June 30, 2008, shall comply with such earlier design and installation provisions, to the extent applicable, and any other applicable laws, rules and regulations. Two examples are:
 - (A) an existing *refrigerating system* that was lawfully designed and installed on a *premises* pursuant to Subchapter 18 of the New York City Fire Prevention Code prior to the enactment of the 1968 *Building Code*, and that had not been required by reason of *alteration* or otherwise to be replaced to comply with the superseding 1968 Building Code or 2008 *Construction Codes* requirements for such systems, may be continued in compliance with the earlier provisions of the New York City Fire

Prevention Code, notwithstanding the fact that such *refrigerating system* would not be allowed or approved under the Fire Code.

(B) an existing *LPG* storage facility that was lawfully designed and installed on a *premises* pursuant to Fire Prevention Directive 2-88, and that had not been required by reason of *alteration* or otherwise to be replaced or discontinued, may be continued in compliance with said directive, notwithstanding the fact that the quantity of *LPG* storage authorized by said directive exceeds the quantity that would be allowed or approved under the Fire Code.

(4) *Conditions or facilities*, or any part thereof, existing on July 1, 2008 that had not been approved, prohibited or otherwise regulated under the New York City Fire Prevention Code or New York City Building Code prior to such date, and that would not be allowed and could not be approved under the applicable provisions of the Fire Code and the *rules*, shall constitute a *pre-existing condition or facility* within the meaning of this section, if:

(A) on June 30, 2008, the condition or *facility* was in compliance with the requirements of any applicable Federal, New York State or other laws, rules or regulations; and

(B) at the time the *condition* or *facility* was established, it was substantially in compliance with national or industry standards or practices; and

(C) the *condition* or *facility* is not determined by the *Department* to be subject to any of the exceptions set forth in FC102.3.]

(c) Types of Pre-Existing Conditions. The Fire Code was originally enacted effective July 1, 2008. It has been amended since its original enactment. *Pre-existing conditions* include *facilities*:

(1) pre-dating the Fire Code that were lawfully designed and installed in accordance with the New York City Fire Prevention Code and/or other laws, rules, regulations, permit conditions and national standards in effect prior to July 1, 2008; and

(2) lawfully designed and installed in accordance with the applicable provisions of the Fire Code and *rules* in effect on and after July 1, 2008, but which could no longer be designed and installed in the same manner as a result of a subsequent amendment to the Fire Code or *rules* that prohibits, or amends the requirements for, such *facility*.

Pre-existing conditions do not include facilities that were designed under prior laws, rules or repealed or amended Fire Code provisions, if the *facility* is allowed or would be approved under the Fire Code, as subsequently amended.

(d) Illustrative Pre-Existing Conditions. The following facilities illustrate the application of FC 102.3 and FC102.4:

(1) Conditions or facilities approved prior to July 1, 2008 that are pre-existing facilities. Approved facilities lawfully existing on June 30, 2008, may be *pre-existing facilities* under provisions of law that were in effect on that date but repealed effective July 1, 2008, or laws that had been repealed before June 30, 2008, where the *facility* was lawfully continued until that date. For example:

(A) A below-grade storage *facility* for *flammable liquids* lawfully designed and installed in a mercantile establishment prior to July 1, 2008, and that on June 30, 2008 was in compliance with the design and installation requirements for such facilities set forth in Subchapter 9 of the New York City Fire Prevention Code (New York City Administrative Code §27-4066), is a *pre-existing facility* which may be continued in compliance with the provisions of the New York City Fire Prevention Code and the *rules* in effect on June 30, 2008, notwithstanding the fact that such below-grade *facility* would not be allowed or approved in a *control area* under the Fire Code.

(B) A *refrigerating system* that was lawfully designed and installed on a *premises* pursuant to Subchapter 18 of the New York City Fire Prevention Code prior to the enactment of the 1968 *Building Code*, and that had not been required by reason of *alteration* or otherwise to be replaced to comply with the superseding 1968 Building Code or subsequent *construction code* requirements for such systems, may be continued in compliance with the earlier provisions of the New York City Fire Prevention Code, notwithstanding the fact that such *refrigerating system* would not be allowed or approved under the Fire Code.

(C) An *LPG* storage facility that was lawfully designed and installed on a *premises* pursuant to Fire Prevention Directive 2-88, and that had not been required by reason of *alteration* or otherwise to be replaced or discontinued, may be continued in compliance with said directive, notwithstanding the fact that the quantity of *LPG* storage authorized by said directive exceeds the quantity that would be allowed or approved under the Fire Code.

(2) Conditions or facilities not approved prior to July 1, 2008 that are pre-existing facilities. Any condition or *facility* lawfully existing on July 1, 2008, that had not been regulated under the New York City Fire Prevention Code or New York City Building Code prior to such date, and which are not allowed and could not be approved under the Fire Code or the *rules*, may be a *pre-existing condition* or *facility* within the meaning of this section, if:

- (A) prior to June 30, 2008 or other effective date of the applicable Fire Code provision, the condition or *facility* was in compliance with the requirements of any applicable Federal, New York State or other laws, rules or regulations; and
- (B) at the time the condition or *facility* was established, it was substantially in compliance with national or industry standards or practices.
- (3) Conditions or facilities lawfully existing prior to July 1, 2008 that were not pre-existing facilities but become pre-existing facilities as a result of subsequent Fire Code amendments. Any condition or *facility* which was lawfully existing on June 30, 2008, and which was allowed or approved under the Fire Code may become a *pre-existing facility* by a Fire Code amendment or rule that no longer allows or authorizes approval of the condition or *facility*. For example:
- (A) An existing underground *liquid motor fuel* storage tank designed and installed after April 2000 pursuant to provisions of Subchapters 8, 9 and 11 of the New York City Fire Prevention Code and former 3 RCNY §21-20 that are substantively identical to the provisions of the Fire Code and the *rules*, was not a *pre-existing facility* within the meaning of former FC 102.3 and this section and was required to comply with the applicable provisions of the Fire Code and the *rules*. However, effective March 30, 2014, the Fire Code's design and installation requirements for underground *liquid motor fuel storage and dispensing systems* were amended. As a result, an underground *liquid motor fuel* storage tank designed and installed in accordance with these former Fire Prevention Code and *rule* provisions would not be allowed or approved under the Fire Code. Accordingly, such an underground *liquid motor fuel* storage tank, which was not previously a *pre-existing facility*, became a *pre-existing facility* pursuant to FC 102.3 and 102.4 on March 30, 2014, provided that, on March 29, 2014, its design and installation remained in compliance with the design and installation requirements under which it was originally approved or allowed.
- (4) Conditions or facilities designed or installed under the Fire Code (on or after July 1, 2008) that are pre-existing facilities. Any condition or *facility* designed and installed on or after July 1, 2008, pursuant to provisions of the Fire Code, or which was not regulated by the Fire Code between July 1, 2008 and the date of a Fire Code amendment, may be a *pre-existing facility* if the condition or *facility* was lawfully existing on the day prior to the effective date of an amendment of the Fire Code. For example:
- (A) A fire apparatus access road dead end turnaround designed and installed in compliance with the Fire Code requirements for such turnarounds in effect prior to March 30, 2014 (as set forth in former FC503.2.5), and lawfully continued until March 29, 2014, is a *pre-existing facility* that may be

continued in compliance with the laws, rules, regulations and *permit* conditions applicable at the time such turnaround was lawfully allowed or approved, notwithstanding the fact that the turnaround would not be allowed or approved under the amended Fire Code, which increased the required size of the turnaround.

(B) A below-grade paint spray booth designed and installed in compliance with the Fire Code requirements for paint spray booths in effect prior to March 30, 2014 (as set forth in former FC1504), and lawfully continued until March 30, 2014, is a *pre-existing facility* which may be continued in compliance with the laws, rules, regulations and *permit* conditions applicable at the time such paint spray booth was lawfully allowed or approved, notwithstanding the fact that such below-grade paint spray booth would not be allowed or approved under the amended Fire Code, which prohibited below-grade paint spray booths.

[(d)](e) Consolidation of Provisions of Law Applicable to Pre-Existing Facilities and Conditions. Provisions of the New York City Fire Prevention Code and the *rules* in effect [on June 30, 2008,] prior to the enactment of the Fire Code effective July 1, 2008, and provisions of the Fire Code and the rules in effect prior to the amendment of the Fire Code effective March 30, 2014, including requirements governing the design and installation of *pre-existing facilities*, and the manufacturing, storage, *handling* and use of materials in *pre-existing facilities* under conditions that would not be allowed or *approved* under the Fire Code, are consolidated in Chapter 48 of the *rules*, as follows:

- (1) The third and fourth characters of the number of each section of Chapter 48 of the *rules* correlate to the Fire Code chapter with that number. For example, R4809-01 refers to *pre-existing* fire protection systems, which are governed by FC Chapter 9. The provisions of law consolidated in each such section are those applicable to *pre-existing* facilities and conditions relating to a material or *facility* governed by that Fire Code chapter.
- (2) The provisions of law consolidated in each such section have been abridged to delete [administrative,] operational and[/or] maintenance requirements, or design and installation requirements that are allowed or approved under the Fire Code, as to which compliance with the Fire Code is required. Deletions are indicated by asterisks (***)
- (3) Any amendments to the provisions of law consolidated in each such section are indicated by underlining, and, if terms defined in the Fire Code or *rules* are used, by *italics*.

[(e)](f) Other Provisions of Law Applicable to Pre-Existing Facilities and Conditions. *Pre-existing facilities* and conditions shall comply with all applicable laws, rules and regulations, including provisions of law not consolidated in Chapter 48 of the *rules*.

[(f)](g) Projects In Progress

- (1) Approved facilities completed prior to January 1, 2010. The design and installation of a *facility*, the construction of which was completed and/or approved for use or occupancy by the *Department of Buildings* on or after July 1, 2008, and which would not be allowed and could not be approved under the applicable provisions of the Fire Code and the *rules*, shall be deemed a *pre-existing facility* under the following circumstances and subject to the following conditions:
 - (A) The design of the *facility* shall have been approved by the *Department of Buildings* and a work permit issued by that agency for the construction thereof prior to July 1, 2008;
 - (B) The design of the *facility* to be constructed was in compliance with all applicable provisions of the *Fire Prevention Code* and Fire Department rules in effect at the time such work permit was issued; and
 - (C) Construction of the *facility* is completed and its use and occupancy approved prior to January 1, 2010.

- (2) Approved facilities completed prior to January 1, 2011. The design and installation of a *facility* otherwise eligible to be deemed a *pre-existing facility* pursuant to R102-01(g)(1), except that construction of the *facility* will not be completed, and/or its use and occupancy will not be approved, prior to January 1, 2010, shall be deemed a *pre-existing facility* under the following circumstances and subject to the following conditions:
 - (A) A showing satisfactory to the *Department* that compliance with the applicable provisions of the Fire Code and *rules* would be an undue hardship; and
 - (B) Compliance with *approved* measures to ameliorate the fire safety concerns arising from non-compliance with the Fire Code and *rule* design requirements constituting the undue hardship; and
 - (C) Construction of the *facility* is completed and its use and occupancy approved prior to January 1, 2011, except that such deadline may be extended by modification upon a satisfactory showing that construction could not be reasonably completed by such date, and the construction continues to be authorized under the work permit issued by the *Department of Buildings*.

- (3) Approved facilities completed prior to September 30, 2015. The design and installation of a *facility*, the construction of which was completed and/or approved for use or occupancy by the *Department of Buildings* on or after March 30, 2014, and which would not be allowed and could not be approved under the applicable

provisions of the Fire Code and the *rules*, shall be deemed a *pre-existing facility* under the following circumstances and subject to the following conditions:

- (A) The design of the *facility* shall have been approved by the *Department of Buildings* and a work permit issued by that agency for the construction thereof prior to March 30, 2014;
 - (B) The design of the *facility* to be constructed was in compliance with all applicable provisions of the Fire Code and Fire Department rules in effect at the time such work permit was issued; and
 - (C) Construction of the *facility* is completed and its use and occupancy approved prior to September 30, 2015.
- (4) Approved facilities completed prior to September 30, 2016. The design and installation of a *facility* otherwise eligible to be deemed a *pre-existing facility* pursuant to R102-01(g)(3), except that construction of the *facility* will not be completed, and/or its use and occupancy will not be approved, prior to September 30, 2016, shall be deemed a *pre-existing facility* under the following circumstances and subject to the following conditions:
- (A) A showing satisfactory to the *Department* that compliance with the applicable provisions of the Fire Code and *rules* would be an undue hardship; and
 - (B) Compliance with *approved* measures to ameliorate the fire safety concerns arising from non-compliance with the Fire Code and *rule* design requirements constituting the undue hardship; and
 - (C) Construction of the *facility* is completed and its use and occupancy approved prior to September 30, 2016, except that such deadline may be extended by modification upon a satisfactory showing that construction could not be reasonably completed by such date, and the construction continues to be authorized under the work permit issued by the *Department of Buildings*.

**NEW YORK CITY LAW DEPARTMENT
DIVISION OF LEGAL COUNSEL
100 CHURCH STREET
NEW YORK, NY 10007
212-356-4028**

**CERTIFICATION PURSUANT TO
CHARTER §1043(d)**

RULE TITLE: Grandfathering of Fire Code Provisions

REFERENCE NUMBER: 2014 RG 034

RULEMAKING AGENCY: New York City Fire Department

I certify that this office has reviewed the above-referenced proposed rule as required by section 1043(d) of the New York City Charter, and that the above-referenced proposed rule:

- (i) is drafted so as to accomplish the purpose of the authorizing provisions of law;
- (ii) is not in conflict with other applicable rules;
- (iii) to the extent practicable and appropriate, is narrowly drawn to achieve its stated purpose; and
- (iv) to the extent practicable and appropriate, contains a statement of basis and purpose that provides a clear explanation of the rule and the requirements imposed by the rule.

/s/ STEVEN GOULDEN
Acting Corporation Counsel

Date: July 14, 2014

**NEW YORK CITY MAYOR'S OFFICE OF OPERATIONS
253 BROADWAY, 10th FLOOR
NEW YORK, NY 10007
212-788-1400**

**CERTIFICATION / ANALYSIS
PURSUANT TO CHARTER SECTION 1043(d)**

RULE TITLE: Fire Code Conforming Amendments

REFERENCE NUMBER: FDNY-2

RULEMAKING AGENCY: FDNY

I certify that this office has analyzed the proposed rule referenced above as required by Section 1043(d) of the New York City Charter, and that the proposed rule referenced above:

- (i) Is understandable and written in plain language for the discrete regulated community or communities;
- (ii) Minimizes compliance costs for the discrete regulated community or communities consistent with achieving the stated purpose of the rule; and
- (iii) If it establishes or modifies a violation or penalty, provides a cure period, or if it does not provide a cure period, such cure period is not included because the violation cannot be corrected or undone or is due immediate public health.

/s/ Hunter Gradie

Mayor's Office of Operations

July 17, 2014

Date