



**STATE OF ARIZONA**

**OFFICE OF THE ATTORNEY GENERAL**

<p>ATTORNEY GENERAL OPINION</p> <p>By</p> <p>MARK BRNOVICH ATTORNEY GENERAL</p> <p>March 3, 2016</p>	<p>No. I16-001 (R15-025)</p> <p>Re: State Fire Marshal's Adoption of National Fire Protection Association Code</p>
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To: Representative Steve Montenegro  
Arizona House of Representatives

**Questions Presented**

Whether Arizona Revised Statutes (A.R.S.) § 36-1609 requires the State Fire Marshal to promulgate a rule that adopts the 2013 edition of the National Fire Protection Association (NFPA)<sup>1</sup> 1124 (also known as the “*Code for the Manufacture, Transportation, Storage and Retail Sales of Fireworks and Pyrotechnic Articles*”)?

If the Fire Marshal is required to enact such a rule, would a subsequent change in the publication status of NFPA 1124 impact the legal operation of A.R.S. § 36-1609, or any other rules adopted under the statute’s 2013 directive?

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<sup>1</sup> According to its website, NFPA is a global nonprofit membership organization with more than 70,000 members from over 100 nations “devoted to eliminating death, injury, property and economic loss due to fire, electrical and related hazards. The association delivers information and knowledge through more than 300 consensus codes and standards, research, training, education, outreach and advocacy; and by partnering with others who share an interest in furthering the NFPA mission.” *About NFPA*, <http://www.nfpa.org/about-nfpa>. (accessed Dec. 15, 2015).

### **Summary Answer**

Arizona Revised Statutes § 36-1609 was amended in 2013 and required the State Fire Marshal to enact a rule adopting NFPA 1124. 2013 Ariz. Sess. Laws ch. 124, § 1. Because the 2013 enacted modification to A.R.S. § 36-1609 did not address any subsequent modifications or withdrawals of NFPA 1124 (2013 edition), any change (including NFPA's subsequent withdrawal of NFPA Code 1124) does not affect A.R.S. § 36-1609(A)'s 2013 directive. In 2015 the State Fire Marshal complied with his legal duty, and submitted a final rulemaking notice for Administrative Code (A.A.C.) § R4-36-401 to the Secretary of State. 21 Ariz. Admin. Reg. 571-73 (Apr. 24, 2015). The amended rule became effective on June 7, 2015. *Id.* at 571. The Rule was properly enacted and has the weight of law, regardless of the status of the NFPA's subsequent withdrawal.

### **Background**

Arizona Revised Statute § 36-1609(A), as amended in 2013, became effective on September 13, 2013 and has not been modified since its amendment.<sup>2</sup> *Id.*; 2013 Ariz. Sess. Laws ch. 124, §1. It states:

The state fire marshal shall adopt rules pursuant to title 41, chapter 6 to carry out this article, including a rule that adopts the national fire protection association code for the manufacture, transportation, storage and retail sales of fireworks and pyrotechnic articles, 2013 edition as published in August, 2012. A person who sells permissible consumer fireworks to the public shall comply with those rules relating to the storage of consumer fireworks and relating to the retail sales of consumer fireworks before selling permissible consumer fireworks to the public.

2013 Ariz. Sess. Laws ch. 124, § 1.

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<sup>2</sup> The prior version of the statute referenced the 2006 edition of NFPA 1124.

On September 13, 2013, the Fire Marshal opened a rulemaking docket to carry out the mandate in A.R.S. § 36-1609(A). 19 Ariz. Admin. Reg. 2824. The Arizona Secretary of State published a *Notice of Proposed Rulemaking* for A.A.C. § R4-36-401 on November 1, 2013. 19 Ariz. Admin. Reg. 3409. In March, 2014, however, the NFPA Standards Council withdrew the 2013 edition of the NFPA 1124. *Archive of 2014 Standards and Council Meetings Re: D#14-3*, <http://www.nfpa.org/codes-and-standards/standards-development-process/standards-council/agendas-minutes-and-decisions> (last visited February 1, 2016). On June 24, 2014, the State Fire Marshal nonetheless drafted the amendment to A.A.C. § R4-36-401, as required by A.R.S. § 36-1609(A). The amendment incorporated by reference the 2013 version of NFPA 1124 “as published August 29, 2012”. Accordingly, the Secretary of State published a *Notice of Supplemental Proposed Rulemaking* on August 22, 2014, in which the Fire Marshall explained that:

The 2013 edition of *NFPA 1124: Code for The [sic] Manufacture, Transportation, Storage, and Retail Sales of Fireworks and Pyrotechnic Articles* is provided for historical reference only. This edition of *NFPA 1124* was temporarily withdrawn by Standards Council Decision #14-1. In Decision #14-1, the Standards Committee directed that *NFPA*® cease all standards development activity regarding the retail sale and storage of consumer fireworks and that the Technical Committee on Pyrotechnics revise *NFPA 1124* in accordance with the newly revised committee and document scopes. The Standards Council will consider the reissuance of *NFPA 1124* once the Technical Committee has completed this work.

**Due to NFPA’s above referenced actions, the Department decided to cease promulgating rules addressing fireworks. Upon further research and review the Department is re-opening the record to allow more public comment relating to this rule adoption.**

20 Ariz. Admin. Reg. 2333-34 (Aug. 22, 2014) (emphasis added.). The Secretary of State published final rulemaking in the Arizona Administrative Register on April 24, 2015. 21 Ariz. Admin. Reg. 571-73. Amended A.A.C. R4-36-401 became effective on June 7, 2015. *Id.*

### **Analysis**

When it amended A.R.S. § 36-1609(A), the Legislature explicitly directed the Fire Marshal to adopt NFPA 1124. The Legislature has the prerogative to pass laws incorporating other statutes, authorities, and language from other sources—including commercial associations. *Ghera v. State*, 16 Ariz. 344, 353 (1915) (“The legislative department of a state . . . is intrusted with the general authority to make laws at [its] discretion.”) The fact that those other authorities or sources are later modified, revised, or even stricken, does not affect this prerogative. *Dairy and Consumer Coop Assoc.*, 74 Ariz. 35 (1952); *Nelson Machinery Co. v. Yavapai County*, 108 Ariz. 8, 9 (1971) (In Banc) (quoting R.J. Fox, Annotation, *Effect of Modification or Repeal of Constitutional or Statutory Provision Adopted by Reference in Another Provision*, 168 A.L.R. 627, 631 (1947)). The same principle applies here, where NFPA 1124 was incorporated by reference.

The Arizona and United States Supreme Court have recognized the principle of statutes adopting and incorporating other authorities by reference. The Arizona Supreme Court has recognized the following general rule in two cases:

A statute which refers to and adopts the provisions of a prior statute is not repealed or affected by the subsequent repeal of the prior statute. In such case, the incorporated provisions, considered as a part of the second statute, continue in force and are unaffected by the repeal.

*Dairy and Consumer Coop Assoc.*, 74 Ariz. at 38 (quoting *Maricopa County v. Osborn*, 60 Ariz. 290, 296-97 (1943) (quoting 59 C.J. 937, 938, §548).) “The effect of such reference is the same as though the statute or the provisions adopted had been incorporated bodily into the adopting statute.” *Dairy and Consumer Coop Assoc.*, 74 Ariz. at 38 (quoting *Clements v. Hall*, 23 Ariz. 2, 10 (1921) (quoting 2 Sutherland on Stat. Const. § 405)). Such adoption takes the adopted statute as it exists at the time of the passage of the adopting act . . . .” *Dairy and Consumer Coop Assoc.*, 74 Ariz. at 38, quoting *Clements v. Hall*, 23 Ariz. at 10, quoting *People ex rel. v. Crossley*, 261 Ill. 78, 85 (1913).

The U.S. Supreme Court also recognized this rule of statutory construction and found it had substantial support:

A wellsettled [sic] cannon tends to support the position of respondents: “Where one statute adopts the particular provisions of another by a specific and descriptive reference to the statute or provisions adopted, the effect is the same as though the statute or provisions adopted had been incorporated bodily into the adopting statute. \* \* \* Such adoption takes the statute as it exists at the time of adoption and does not include subsequent additions or modifications by the statute so taken unless it does so by express intent.” [Lewis’ Sutherland on Statutory Construction, 2d Ed., Vol. II. pp. 787-8.] The weight of authority holds this rule respecting two separate acts applicable where, as here, one section of a statute refers to another section which alone is amended. [collecting string cites of multi-jurisdictional case authorities].

*Hassett v. Welch*, 303 U.S. 303, 314 (1938).

In light of these authorities, this office previously explained that, “[a]s a general rule, when a statute adopts part or all of another statute, the adoption takes the statute as it exists at the time and does not include subsequent additions or modifications absent clear intent of the drafters to the contrary.” Ariz. Atty. Gen. No. I78-171 at \*2. (citing *Nelson Machinery Co.*, 108

Ariz. at 98 (quoting 168 A.L.R. at 631). Here, as in this Office’s 1978 Opinion, “[w]e believe this principle of statutory interpretation should control in this case.” *Id.* These authorities make it clear that the subsequent repeal of a statute incorporated by reference has no impact on the effectiveness of A.R.S. § 36-1609. The State Fire Marshal was required to pass a rule incorporating NFPA 1124 as it existed when A.R.S. § 36-1609 was amended in 2013.

### **Conclusion**

A.R.S. § 36-1609, as amended in 2013, required the State Fire Marshal to make a rule adopting the 2013 edition of NFPA’s 1124. Because the statute did not address any subsequent modifications or withdrawals of NFPA 1124, the NFPA’s subsequent withdrawal of NFPA 1124 has no effect. The State Fire Marshal complied with his legal duty, and A.A.C. § R4-36-401 was properly amended effective June 7, 2015. The Rule was properly enacted and has the weight of law, regardless of the status of NFPA 1124.

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