

**FIRE PROTECTION HISTORY-PART 240: 1919
(THE ORIGINS OF THE CERTIFICATE OF OCCUPANCY)**

By Richard Schulte

The twenty-third Annual Meeting of the National Fire Protection Association was held in Ottawa, Canada in May 1919. Among the subjects discussed at this meeting was the topic of the “certificate of occupancy”. The following is a transcript of a presentation on the “certificate of occupancy” given by Rudolph Miller, followed by a brief discussion:

*“**The President:** The next item on the program is a discussion of the subject of Certificate of Occupancy, by Mr. Rudolph P. Miller. (Applause.)*

***Mr. Miller:** In these days of investigations perhaps a little explanation of why this is brought up might not be amiss, and would be the only excuse I have for a little personal reference before reading the paper. Some of you know I have been identified with the administration of the Building Laws of New York for some years, though I do not happen to be now; but this suggestion of Certificate of Occupancy is the outcome of a trouble that was experienced in our work for many years.*

**Certificate of Occupancy.
Paper by Mr. Rudolph P. Miller of New York.**

Most of our building laws, certainly those of the larger cities, specify how buildings of various occupancies shall be constructed and arranged to secure at least a reasonable measure of safety with respect to stability, fire prevention, exit facilities, habitability and sanitation. That is the purpose of a building law and the aim of its requirements. Some laws go into considerable detail in one or more of these respects. Drastic penalties are prescribed, though unfortunately not always imposed, for failure to comply with the several provisions of the laws.

The alteration of existing buildings to adapt them for new purposes, too, receives more or less attention in the building laws, though often the matter is disposed of by a general provision that such buildings after alteration shall conform to all the requirements applying to new buildings of the same occupancy as proposed for the building undergoing alterations. Depending on the extent to which neighborhoods are changing in character, on the value of property and other conditions, this provision may or may not be rigidly enforced.

Few of the laws, however, make suitable provisions for the maintenance of the proper conditions or the continuance of the legal requirements in either new or altered buildings. It is this feature of a comprehensive building law that is to be considered, and how the defect, where it exists, can perhaps be corrected by what is here called a certificate of occupancy.

Lest there be any doubt as to the insufficiency of the provision noted above, which applies to altered buildings the same requirements as are specified for new buildings, a few examples of actual occurrence may be cited. For this purpose the experience of New York City, where the provision referred to was in effect, will serve very well, as, it is believed, the situation there has been fairly well met in the latest revision of its code by the requirements as to certificate of occupancy.

*Some years ago a six-story building of ordinary, that is, nonfire-resistive construction, was erected in the borough of Brooklyn under a permit issued by the proper official. For the proposed occupancy lofts, as specified in the application on which the permit was based, the building was lawful as a non-fire-resistive building. After its completion the owner, for reasons which did not appear, leased the building for school purposes, the necessary equipment being installed without alterations to the building. Under the law a new building to be used as a school was required to be fire-resistive when over thirty-five feet in height. **An action by the city authorities to vacate the building was dismissed by the court on the ground that no permit or approval of the building authorities was required for the change in occupancy so long as no alterations were made.***

The case just cited above served as an appropriate precedent in the case of an owner who converted a five-story non-fire-resistive building designed for and for some years occupied as a private residence into a private hospital. In spite of the fact that in making the change partitions had been erected dividing two of the existing rooms and a beautifully tiled laundry in the top story had been converted into an operating room by a substitution of plumbing fixtures, it was held that there was no violation of the law; the partitions and change in plumbing fixtures could not be deemed to be alterations requiring a permit.

It was not an uncommon practice before the law was changed to convert existing non-fire-resistive residence buildings into private schools, hospitals or asylums, irrespective of the fact that the law required new buildings, erected over thirty-five feet in height for similar purposes, to be of fire-resistive construction. The conversion was made without structural alterations to the building, and no notice of the change to the building authorities was required. Later, after the new use had been well established, such alterations as were desired by the occupants would be made under lawful permits to the extent permissible in buildings where there is no change of occupancy.

Formerly under the New York law a tenement house could be of non-fire-resistive construction if it did not exceed seventy-five feet in height. Hotels, however, were limited to a height of thirty-five feet, unless constructed fire-resistive. A certain owner managed to squeeze into the seventy-five-foot limit a seven-story non-fire-resistive tenement house with a store in the first story, planned and, constructed in full accordance with the laws relating to tenement houses. The building, however, never was occupied as the approved application stated. Ever since its completion it has been used as a hotel. It is probable that the owner never intended it to be used as a tenement. Had the application stated the use as a hotel, a permit to construct would have been refused on the sole ground that the building must be fire-resistive for the height given; in other respects the plans conformed to the requirements for hotels. There is nothing unlawful in the case as it stands, as the law did not prevent the owner from changing his mind as to the occupancy of the building after its completion, nor did it require him to give notice of the change or secure approval of it so long as he did not make any structural alterations.

*There is no intention of discussing here whether or not any harm has been done or hazard created in these and similar cases. It may be contended that a small number of scholars and their teachers, occupying a certain building during the day only, are quite as safe, and perhaps safer, than a good-sized family, with a goodly retinue of servants, whose sleeping rooms are always on the top floor, living in the same building day and night. So, too, a building used as a hotel will probably be occupied by fewer persons, better able to take care of themselves than would be the case if it were used as a tenement house. **The point that it is desired to make here, irrespective of the merits of the provisions of the law, is that the purpose of the law has been defeated.***

It is believed that in New York the defect has been cor[r]ected by the enactment of a provision (as part of the recently revised building code, and later embodied by the state legislature in the city charter) requiring a certificate of occupancy for all new and altered buildings, and prohibiting the conversion of any building, new, altered or existing, from any one purpose to another without the approval of the building authorities. This law became effective in 1916, and in 1917, as a judicial test, was sustained to the extent of showing its effectiveness. The case involved a four-story-and-basement non-fire-resistive building occupied as a private residence for one family. It was desired to change the occupancy of the building so as to use it in part as the private residence of a physician and in part for patients under treatment. No structural changes were to be made. The superintendent of buildings refused to issue a certificate of occupancy authorizing the proposed new use on the ground that the change of occupancy would not be lawful unless the building were made fire-resistive, as required by the building code for new hospitals, sanitarium and similar buildings over twenty feet high. The court, "after a careful examination of the various sections of the building code," concludes that "in the case of any building then (at the time of the adoption of the code) existing no change of occupancy or

use shall be made that brings it (the building) within some special provision of the code until plans are filed and the building altered to conform to the requirements of such special provisions and the issuance of a certificate of approval by the superintendent of buildings."

The use of a certificate of occupancy is not a new or recent thought. It has been required as a condition of occupancy for theatres in New York for many years and for tenement houses since 1902. Its use for all buildings has been advocated and agitated for nearly twenty years, but it was not until 1915 and after much argument that the opposition to it was overcome. Owners and real estate men seemed to fear its misuse by the building officials as a club over their property. A properly prepared certificate of occupancy, however, is really a guarantee and prima facie evidence that the building is a safe structure, arranged and erected in accordance with the laws relating to its construction, sanitation and other features of safety, and that it may be occupied undisturbed for the uses for which it was designed and approved so long as no changes or departures are made without approval from the provisions of law under which it was created.

Of the fifteen leading cities of the United States outside of New York City, according to population, only two, Detroit and San Francisco, require a certificate of occupancy for all buildings before they may be legally occupied. Cleveland requires such a certificate for all buildings except dwellings for not more than two families, stables, barns, slaughter houses and buildings included in the same grades. In Chicago an annual inspection is prescribed "of all theatres and places of amusement, worship, instruction or entertainment, and also of all other buildings over two stories in height, except residences and except buildings in which automobiles are housed, and except tenements three stories or less in height," and if they are found to comply with the requirements "with respect to stairways, means of egress, and in all other respects," a certificate to that effect is issued.

Where special licenses for certain uses or industries are required, provision is almost universally made that the license shall not issue until an inspection has been made and it has been certified by the proper officials that the building and premises comply with the prescribed requirements as to exit facilities, fire appliances and other safeguards. This in effect is a certificate of occupancy, issued periodically, limited to the duration of the license.

Some cities make it unlawful to convert a building from one use to another unless a permit is obtained from the building official, and in these cases provision is generally made that the permit shall not issue until the building is made to conform to the requirements for new buildings of similar occupancy.

Other cities endeavor to guard against an unauthorized conversion of use by making the definition of the term "alteration" include any change in "character or grade of occupancy." They presumably rely on the provision requiring the filing of an application for a permit before any "alteration" may be legally commenced or made.

These various methods are more or less effective in preventing the use of buildings for purposes for which they are not safe or properly adapted, considered from the standpoint of physical safety to their occupants or the general public. Perhaps each of these several methods accomplishes the purpose as well as the certificate of occupancy, but the latter seems preferable because it is as effective as any of the several methods and secures certain benefits not inherent in the others.

*The applicant for a permit to construct a new building or to alter an existing one is required, and properly so in the interest of the general welfare and safety, to file certain papers, specifications, plans, affidavits, etc., showing his intentions respecting his property; he is restricted by laws and ordinances to the character of the materials and methods he may employ in the construction, to the height and size to which his building may be erected, to the amount of his land which he may utilize; all dependent on the use to which the premises will be put; he must in many cases pay a fee for the permission he seeks to develop his own property; in the execution of his operation he is subject to heavy penalties for any departure from the approved plans or the numerous, and sometimes complicated, legal requirements, whether these departures are due to his own shortcomings or those of his contractor or numerous sub-contractors, or perhaps even of his architect. **Having satisfactorily met these several obligations toward the public, he certainly is entitled to a statement to that effect and a guarantee from the authorities that, so long as he maintains the premises in statu quo, he may use and occupy his building for the purposes specified in the permit issued to him.** On the other hand, the certificate, a copy of which is, of course, kept in the files of the office issuing the same, will be the permanent record for future guidance of what has been approved and permitted. **If the certificate at completion can be withheld for non-compliance, the owner, in order to guard against future disturbance from the authorities in the possession of his premises, is likely to exercise greater care to comply with the law in the prosecution of his building operation.** So, too, the administrative official, realizing that his signature to the certificate places him on record for the future, will probably be more careful to secure a safe result.*

A certificate of occupancy should be a useful instrument in connection with the transfer of property. The vendor can use it as evidence that the building complies with the laws and ordinances and may be used for the purposes represented. From its contents the purchaser may verify for himself the correctness of the representations, either by an inspection of his own or by requests for a search of the records of the building authorities.

From what has been said it is evident that the properly executed certificate of occupancy is an instrument of some importance and value. It should, therefore, be prepared with care. It represents something more than an occupancy license.

There are three different conditions for which the certificate of occupancy may be desired: (a) those applying to a new building; (b) those applying to an existing building in which structural alterations have been made or which is being converted from one use to another; and © those applying to existing buildings in which old uses are to be continued without alterations. In the first and second cases the certificate should always be required, and in the first case it should issue upon the completion of the building and before its occupancy.

In the second case there are varying situations. If it is a simple conversion of use, the certificate should issue when an inspection shows that the building, considered as though it were an existing building in which structural alterations have been made, meets the requirements of law for the new use, and before the building is put to the new use. In the case of a building undergoing alterations, whether or not there is a change of occupancy, there may be two situations: the alterations may be limited in extent and possible of execution without rendering the building hazardous to the occupants so that they remain in the building while the work is going on; or the alterations may be too extensive or may render conditions too hazardous to permit the occupants to continue their possession while the work is going on. In the former situation the certificate should issue on the completion of the alterations, but in order that its issuance may not be unduly delayed provision should be made that, unless the certificate has been secured within thirty days after the completion of the work by the person entitled to it and required to have it, the building must be vacated; in the latter situation the certificate should issue, as in the case of a new building, when the work is completed and before occupancy.

*For any existing building the certificate should be issued when requested by the owner. **Nothing should prevent the continuance of an existing occupancy and use except some prohibition by law found necessary for the safety of life or for the general welfare.** When the certificate is requested for an existing building it should issue only after inspection of the premises, and should be limited to the occupancy or use existing then and for at least three months previous to the inspection. When inspections are required in connection with licenses for certain uses, and no certificate has previously been issued, such license should not be granted until the certificate has been issued; this would, of course, hold in any case, whether new building, alteration, or existing use.*

Where it can be shown that life or property will not be jeopardized thereby, a certificate for temporary occupancy of a building or part of same may be issued, the limitations and conditions under which it is issued being clearly set forth.

The contents of the certificate is important and, as already intimated, should be carefully prepared. The most important items, of course, are the purposes for which the building may be used. Then there must be a statement, which may very well be the leading one, that the building conforms to the requirements of law applying to buildings to be occupied in the manner and for the purposes enumerated in the certificate. A schedule of the live loads which each of the several floors or parts of floors are capable of sustaining and prescribing them as the maximum permissible loads to which the floors may be subjected, should be incorporated. Another schedule giving the maximum number of persons that may be accommodated in the several parts of the building should also be inserted. Any special provision of law peculiar to the particular occupancy should be embodied. Any condition under which the permit was granted should also be mentioned.

In specifying in the certificate the purposes for which the building may be used, it may be necessary to go into more or less detail depending on how greatly the provisions of law vary with respect to different cases; on how clearly or definitely, if buildings are classified, the law draws the line between classes of occupancy; and on how many different uses the building is designed for.

None of the building laws seem to restrict the number of uses to which a building may be put; but certain uses are prohibited in or in connection with certain kinds of buildings. In several cities, for instance, theatres and hotels, are not permitted in the same building. While stores are not excluded from tenement houses, there are generally restrictions against certain kinds of business, like paints, feed. rags, etc. If a building is occupied for two or more purposes, the particular parts that may be used for each purpose must be designated. This is a little more easily done when provision is made in the law for the classification of buildings, especially if there are only a few broad classes.

The certificate of occupancy here outlined differs in several respects from the occupancy license advocated some time ago before this Association, and is offered as a more rational and perhaps more practicable substitute. The proposition offered was "that an occupancy license be adopted by all fire prevention authorities in cities and states throughout the country, to be issued after inspection by the proper authorities on every substantial change of tenancy and at least annually, on all buildings in fire limits excepting residences; the charge for inspection to be paid for by property owner or occupant."

The occupancy license as then proposed would, in effect, constitute, in the case of all buildings except residences, a yearly renewal of the permit under which the building was erected. The issuance of that permit was conditioned on the use of certain materials and forms of construction within certain limitations as to location and dimensions dependent on the intended use and occupancy of the building. The occupancy license would be a mere repetition of that. This license would no more

insure the proper housekeeping which, it will surely be generally conceded, is the first essential in fire prevention, than proper inspection under any other arrangement. It would not in any way remove the necessity of suitable laws and regulations with respect to the maintenance of safe conditions in buildings.

The certificate of occupancy does not preclude periodic inspections. These are necessary in any case and their frequency; should depend on the degree of hazard of the occupancy and on the likelihood of indifference or carelessness on the part of the occupant. An oil storage house or a badly managed shirtwaist factory would, perhaps, require many inspections at short and frequent intervals, whereas a church would hardly require more frequent inspection than most residences.

Licenses, in the general legal acceptance of that term are for the purpose of either regulation or revenue. With the latter kind we are not particularly concerned, except perhaps as the revenue might be utilized for necessary expenses of inspection. But even in that case it seems unfair to tax the law-abiding citizen for an inspection of his premises that was found to be unnecessary, simply because his neighbor's attitude or action makes governmental supervision imperative. In any circumstances, the license as a source of revenue for this purpose is a matter of local expediency.

*As a matter of regulation, it should first be determined whether the particular purpose for which a building is to be used, the building itself having been suitably constructed and planned, is in need of regulation. **Do we need to be licensed to carry on business any more than to live?** If there is any inherent danger in the conduct of any particular industry that industry should be regulated for the particular reason in which it is hazardous. Professor Freund, in his book on "Police Power" (section 494), gives as the grounds for justification of restraint to business (1) the prevention of crime or of its concealment (e.g., pawnbrokers); (2) the protection of morals and order (e.g., public amusements); (3) the prevention of fraud (e.g., employment offices), and (4) the protection of health and safety (e.g., sale of fireworks). In a sense the carrying off of any business or institution presents some hazard to the public welfare; but so does the unlicensed movement of individuals among their fellow-men. But these hazards are all of a general character, and in the matter of use and occupancy of buildings are covered by specific provisions, such as the proper means of exit, safeguards against fire, ample light and ventilation, etc.*

The discussion on occupancy licenses at the Fire Prevention Convention in Philadelphia in 1913 leads to the conclusion, that after all it is careful and thorough inspection that reduces the hazards to which the public is exposed. Experts at that convention submitted figures to show how improvement of conditions had been secured to cities by that means.

It was also brought out that much governmental supervision is irksome and burdensome to the public. The chairman of the meeting, in referring to the methods in vogue in continental countries, more particularly Germany, expressed his conviction that "our people do not want to be governed in that way, and they will not . . . We must have some more elastic method, because in this country we will not stand for too much police. Some reasonable method of legal regulation does not make for more law (perhaps for less law), but for better law." A too drastic supervision and regulation is not likely to secure the desired results. Freund expresses the general attitude of the courts when he says (section 23, page 18): "Individual liberty is regarded as more important than the advancement of interests which, while admittedly public, are not urgent or primary"; and he concludes (section 495, p. 535) that "it would certainly strengthen the principle of constitutional liberty. . . if at least in all cases in which the public at large is not exposed to the consequences of incompetency, a right to a public certification was substituted for the requirement of a license " That is what the certificate of occupancy would do with respect to the right to use buildings.

It is suggested, as the outcome of this review of the subject, that the proposition with regard to the issuance of certificates of occupancy be stated as follows: "That suitable legislation be enacted by states and municipalities having competent jurisdiction to prevent the use and occupancy of any new building or the conversion of use or occupancy of any existing building until, by proper inspection, it has been determined that such building is adapted to such use and occupancy and conforms with the legally prescribed requirements applying thereto, and, further, to insure by systematic periodic inspection the maintenance of the conditions of safety that the law endeavors to secure."

Mr. Miller: *Supplementing what I have written, a thought has come to my mind on some of the discussion brought out yesterday as to the enforcement of these matters. Mr. Wentworth called attention to the fact of the difficulty of enforcement by criminal proceedings, and I think there is no doubt about that. In criminal proceedings the court will insist on absolute proof before conviction. Absolute proof in many of these cases, in most of them, is very difficult to obtain, and Mr. Wentworth has already suggested that as the reason why police departments are not helpful in the administration of laws of this kind. Even when there is a criminal prosecution a conviction still becomes necessary to start a civil proceeding to accomplish what we want in a matter of the kind under discussion; that is, the securing of an actual compliance with the law with respect to the occupancy of a building. From my own experience I have come to the conclusion that if we can simply close up a business place for a while for non-compliance with requirements, that will have more effect than a criminal proceeding. Our experience in New York has been that where we tried criminal proceedings they would drag out so long that whatever deterrent effect such proceedings were intended to have on other violators was lost, and in most cases the persons prosecuted got off anyhow.*

The President: *Gentlemen, we have seen from this excellent paper what an important bearing this matter of Certificate of Occupancy has in connection with building safety, and we are very much indebted to Mr. Miller. Would any of you like to discuss this subject?*

Mr. Price: *While the city of Toronto might possibly not be presumed to come within Mr. Miller's references, being one of the larger cities, still we have had for many, many years this difficulty. We have tried on two occasions to get legislation through the Ontario House to give us power to pass a city regulation governing that matter. I hope we may be able to make use of Mr. Miller's paper today for gaining our end, because we want to have that occupancy permit. We fortunately have not had any bad accidents, such as I heard of in Philadelphia a few years ago, where some houses had been changed into commercial places, and on account of the superimposed load, owing to the water thrown on the buildings next door during a fire, the building collapsed and fourteen firemen were killed.*

Mr. Doull: *I want to say one thing Mr. Miller's modesty forbade him to say, that is, in the preparation of the present building code of New York City the great moving spirit was Mr. Rudolph Miller. The particular section on Certificates of Occupancy was his idea, he was the father of it. Being a resident of New York City and thoroughly acquainted with its building laws I know that the City of New York is indebted to him. (Applause.)*

Mr. Cowles: *A member of my family recently took over a private dwelling and converted it into a hospital. I was asked to inspect the hospital, and I was astonished at the condition I found there. That member of my family had acted in good faith undoubtedly, but being ignorant of fire prevention laws had proceeded to conduct this business in a building which was entirely unsafe for the purpose. Instead of making recommendations for improvement, I suggested he had better close the building, which he did at a loss of \$16,000.*

Mr. Caldwell: *I would like to ask Prof. Woolson if it would not be desirable to have a provision for a Certificate of Occupancy included in the National Board Building Code, which we are constantly suggesting to municipalities?*

Mr. Woolson: *It is there.*

Mr. Caldwell: *Does it meet all the requirements?*

Prof. Woolson: *I do not know whether it does or not; we thought it did when it was written. The building code of the City of New York, which was drafted immediately after, was copied from it, and Mr. Miller and myself conferred on that definition. **You don't catch the National Board Building Code much behind the times!***

The Secretary: *I move a vote of thanks to our distinguished member, Mr. Miller, for his admirable paper on the Certificate of Occupancy.*

The motion was adopted.

Vice-President H. O. Lacount presiding.

The Chair: *The next item on the program is the report of the Electrical Committee, to be presented by the Secretary."*

Although the inclusion of provisions for the issuance of a certificate of occupancy is standard in modern codes, this apparently was not the case in the early 1900's.

Of particular interest in the paper presented above is the concept of periodic inspections of existing building in order to verify that compliance with code requirements is being maintained. Although the idea of conducting periodic inspections of existing buildings is more than a century old, a provision which would mandate periodic code compliance inspections of existing buildings was recently proposed for inclusion in the International Building Code/ International Fire Code, but was rejected.

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