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November 13, 2009

ENERGY CODE ADOPTION BY THE STATE OF TENNESSEE AND ITS EFFECTS ON CITIES

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INTRODUCTION

This Hot Topic: (1) Analyzes the new energy code legislation; (2) describes what the state of Tennessee is doing to prepare for implementation of this law and how cities can prepare; and (3) outlines the resources that MTAS will provide to assist cities in this process.

I. ENERGY CODE

During this most recent legislative session, the General Assembly passed Public Chapter No. 529, the Tennessee Clean Energy Future Act of 2009. Central to the bill, which amends T.C.A. § 68-120-101, are authorization for adoption of energy efficiency standards and implementation of the broadened statewide building standards that take effect July 1, 2010. Currently, the state requirements apply only to municipal, county, state and certain private buildings and include regulation of various structural and safety factors. This legislation broadens the applicability of these standards to cover newly constructed one- and two-family dwellings.

Applicability of the new standards, however, is not absolute as this legislation effectively creates three classes of code enforcement across the state:

1. **Exempt** — Cities where local building codes and local code enforcement meet state minimum standards. These cities will continue to adopt and enforce their own building codes.

2. **Nonexempt state enforcement** — Cities where local residential building codes and local residential code enforcement do not meet minimum state standards. Here, at the request of the city or upon the department of commerce and insurance's own initiative, the state will enforce state-adopted building codes.
3. **Opt-out** — Cities that have passed a resolution exempting their jurisdiction from the applicability of minimum state standards for one and two-family dwellings.

Cities can avoid state enforcement by adopting and enforcing codes that meet minimum state standards. However, where cities do not meet these state minimums, the state standards will apply as will state enforcement. Cities also have limited authority to opt out of the application of the state standards in their jurisdictions.

EXEMPT CITIES

The aim of the legislation and the hope of the state entities charged with enforcing it are to encourage as many cities as possible to become exempt. Obtaining exempt status not only provides a city and its residents with the highest level of protection and safety in new home construction, it also allows a city to retain local control of its own development.

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The designation “exempt” was already defined prior to passage of this legislation. Under that previous definition an exempt city was one that had adopted the building and fire codes required by the state, was adequately enforcing those codes, and performing reviews of construction plans and specifications. Under this new regulatory scheme, however, the requirements for obtaining exempt status, and thus the definition of “exempt,” has changed. For purposes of this writing, “exempt” as defined by the new legislation is assumed.

The new legislation requires a city to adopt and enforce minimum building codes to become exempt. The specific prerequisites for exemption will be set out in the state fire marshal’s rules and regulations; however, the general requirements are as follows. State enforcement remains limited to state buildings, educational occupancies and any other occupancy requiring inspection for initial licensure if the local government has chosen to adopt and enforce building codes for construction of all buildings, for construction of all buildings other than one- and two-family dwellings, or for one- and two-family dwellings only; and:

1. For one- and two-family dwellings, it has adopted the International Residential Code;
2. For construction other than one- and two-family dwellings it has adopted a building construction safety code consisting of the International Building Code and either the International Fire Code or the Uniform Fire Code, if adopted on or after July 1, 2006; and

3. The city is adequately enforcing its locally adopted building code and performing reviews of construction plans and specifications and inspections required by the state fire marshal. Requirements vary depending on the type of construction.

Furthermore, an exempt city’s building code edition for one- and two-family dwellings must be current within seven years of publication unless otherwise approved by the state fire marshal. If your city meets and adequately enforces the aforementioned standards then you will retain local control and be exempt from statewide codes and enforcement.

According to these requirements, a city may choose to adopt and enforce codes for specific buildings, and state enforcement will apply where the city is not regulating and enforcing. Hence, within the exempt city classification, there will be a further breakdown of groupings. They are:

1. Cities that adopt and enforce codes for buildings other than one- and two-family dwellings. Here, the state will regulate residential construction with enforcement by deputy building inspectors.
2. Cities that adopt and enforce codes for one- and two-family dwellings only. Here, the state will regulate buildings other than one- and two-family dwellings.
3. Cities that adopt and enforce codes for both one- and two-family dwellings and other buildings. Here, the state will not regulate within the city’s jurisdiction except state buildings, educational facilities, etc.

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NONEXEMPT CITIES

If, however, a city cannot or chooses not to adopt and enforce the minimum standards, the state will enforce the applicable statewide codes in the city. The commissioner of commerce and insurance is authorized to contract with local governments to use their employees for inspections of one- and two-family residences. These contracts can allow inspectors to charge a fee as set out by the state fire marshal's soon-to-be-developed fee schedule. Deputy building inspectors must be state certified as a:

1. Licensed building inspector;
2. Licensed plumbing inspector; or
3. Licensed mechanical inspector.

OPT-OUT CITIES

Whether or not it is enforcing a locally adopted code or has no code at all, a city can completely avoid state regulation of one- and two-family dwellings in its jurisdiction by opting out of the statewide standards. This can be accomplished by a specific and recurring resolution process. This requires a city to pass a resolution by a two-thirds vote of the governing body exempting one- and two-family dwellings in its jurisdiction from the applicability of the statewide standards and to forward the resolution to the state fire marshal. The resolution, however, expires 180 days following the date of the next election. Hence, each new governing body must pass a subsequent resolution to continue avoiding applicability of the state standards. Furthermore, once a city opts to make the standards applicable in its jurisdiction or allows a resolution to expire before passage of a new resolution, that city is permanently prohibited from passing another resolution opting out. A county resolution cannot exempt a municipality within its borders.

II. WHAT IS THE STATE OF TENNESSEE CURRENTLY DOING REGARDING THIS ENERGY CODE?

The Department of Commerce and Insurance already is in the process of complying with the new law. A survey of local governments relating to the enforcement of one- and two-family residential codes shows that many local governments have adopted versions of a residential code but that some have adopted the old Southern Building Code, which is no longer in print and whose publisher is out of business. Some cities have decided, either consciously or unconsciously, not to adopt or enforce codes at the local level.

The State Fire Marshal's Office of the Department of Commerce and Insurance currently is drafting a proposed set of rules and regulations that will apply codes to newly constructed one- and two-family residential properties and provide for statewide enforcement. The State Fire Marshal's Office is conducting four public hearings (in Knoxville, Chattanooga, Jackson and Nashville) to discuss recommendations for code adoption. Further information on these hearings is available at www.tn.gov/commerce/sfm/index.shtml. These hearings are part of the formal rulemaking process, which also includes a determination of legality by the attorney general and the filing of a final rule, which takes effect 90 days after filing with the secretary of state. This process will occur this year (2009) and is the reason that the law does not take effect until July 1, 2010. This gives local governments and other interested parties the opportunity to participate in the decision of which code is adopted prior to any determination of what, if any, action the local government needs to take.

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It should be noted that there is no need for a city to opt out at this time since the act is not self-executing. Each municipality will have until July 1, 2010, or 90 days from the date any rules are filed with the secretary of state, whichever is later, to opt out. If a city determines that it does not want to have a minimum one- and two-family residential code in its jurisdiction, there will be plenty of time to exercise the opt-out provisions. One consideration to think about before taking any action to opt out of the law is that the one- and two-family homes built in your community will be much less energy efficient than the homes in cities that are in the program. Incentives are another consideration.

The Department of Economic and Community Development (ECD) is administering a \$500,000 appropriation from the General Assembly that was budgeted for “start-up costs” associated with this new legislation. The \$500,000 will be used to aid state and local governments in training, purchasing code books, and supporting cities that do not exercise the opt-out provision of the new law. Also, Governor Bredesen announced a \$9.3 million energy initiative incentive that will be available for small- and mid-sized cities in grants of up to \$100,000, with a preference for local governments planning to enforce or have the state enforce one- and two-family residential codes.

The Tennessee Valley Authority (TVA) will be another important partner in the energy code process. TVA supports energy codes and is a reliable source of information about effective enforcement. At this time, the specific program that TVA will offer to cities is unknown, but we anticipate some very helpful and accommodating programs

may be offered either directly or through local power distributors.

Again, with the financial assistance available and since the state codes have yet to be adopted, it is prudent for local governments to wait to consider any opt-out resolutions until all information is available.

III. HOW IS MTAS GOING TO HELP CITIES WITH THIS ENERGY CODE LEGISLATION?

In addition to the efforts of the aforementioned state agencies, MTAS is taking a proactive approach to assisting municipalities. The first step, this writing, hopefully has provided some clarity and alleviated some concerns, and as the state releases more information MTAS will continue to keep cities updated. We also will develop and distribute the requisite legal documents cities will need to exercise their choice of the three energy code options. Finally, as part of our annual Municipal Administration Program (MAP), we are developing a comprehensive course covering the energy code legislation and the requirements for cities. This course will be delivered in six cities across the state in early 2010.

If you have questions, please contact your MTAS management consultant.

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