

State Building Code

TO: City Commission
FROM: David V. Gliko, City Attorney
DATE: June 3, 1996
SUBJECT: State Building Code

To resolve the question of the City's ability to supercede the state building code by ordinance, it is necessary to review the pertinent portions of the state statutes:

50-60-201. Purpose of state building code.

The state building code shall be designed to effectuate the general purposes of parts 1 through 4 and the following specific objectives and standards to: (1) provide reasonably uniform standards and requirements for construction and construction materials consonant with accepted standards of design, engineering, and fire prevention practices; (2) permit to the fullest feasible the use of modern technical methods, devices, and improvements which tend to reduce the cost of construction consistent with reasonable requirements for the health and safety of the occupants or users of buildings and, consistent with the conservation of energy, by design requirements and criteria that will result in the efficient utilization of energy, whether used directly or in a refined form, in buildings; (3) eliminate restrictive, obsolete, conflicting, and unnecessary building regulations and requirements which tend to increase unnecessarily construction costs, retard unnecessarily the use of proven new materials which have been found adequate through experience or testing, or provide unwarranted preferential treatment to types or classes of materials, products, or methods of construction.

50-60-205. When state building code applies-health care facility doors. (1) If a municipality or county does not adopt a building code as provided in 50-60-301, the state building code applies within the municipal or county jurisdictional area and the state will enforce the code in these areas.

50-60-301. Municipal and county building codes authorized-health care facility doors. (1) The local legislative body of a municipality may adopt a building code by ordinance to apply to the municipal or county jurisdictional area.

(2) A municipal or county building code may include only codes adopted by the department.

50-60-302. Certification of municipal and county building codes. (1) A county or municipality may not enforce a building code unless the code adopted and a plan for enforcement of the code have been filed with the department.

(2) The department shall set forth rules and standards governing the certification of municipal and county building code programs as required by subsection (1).

Of particular importance is 50-60-301 (1) (2) MCA, which was reviewed in an opinion by the Attorney General in 1977 - Volume Attorney General's Opinion No. 81. The Attorney General opined the legislative amendment in 1977 omitted reference in the statute to a municipal ordinance requiring "standards equal to those of the state building code or higher standards." The amendment as the statute currently reads, allows no exception to the state code and requires the city to adopt "only codes adopted by the department (state)." The Attorney General said: "This would apply either to lower or higher standards.....The affect of section 69-2112(1), now (50-60-301(1) (2) MCA), makes the (state) building codes the only standards local governing bodies may adopt."

As conclusive as all the above would seem, the Attorney General did not address self-governing powers of a charter form of city government.

I have reviewed all the statutes concerning self-governing powers and find two problem areas:

First

7-1-113. Consistency with state regulation required. (1) A local government with self-government powers is prohibited the exercise of any power in a manner inconsistent with state law or administrative regulation in any area affirmatively subjected by law to state regulation or control.

(2) The exercise of a power is inconsistent with state law or regulation if it establishes standards or requirements which are lower or less stringent than those imposed by state law or regulation.

(3) An area is affirmatively subjected to state control if a state agency or officer is directed to establish administrative rules governing the matter or if enforcement of standards or requirements established by statute is vested in a state officer or agency.

Given the 1977 opinion of the Attorney General, based upon the legislative history of 50-60-301, MCA, who opines that cities are prohibited from adopting either "lower or higher standards," such inflexibility dictates that any variation from the state building code would be "inconsistent with state law" as referenced in 7-1-113, MCA.

Further, given all the regulatory authority invested in State Department of Commerce by the above referenced statutes, it seems impossible to deny that it (State Department of Commerce) is not a "state agency...directed to establish administrative rules governing the matter...."

In other words, our self-governing authority appears to be preempted by a state agency vested with the power of control for the ostensible purpose of effecting uniform standards throughout the state.

Second

7-1-114. Mandatory provisions. (1) A local government with self-governing powers is subject to the following provisions:

...

(f) Any law directing or requiring a local government or any officer or employee of a local government to carry out any function or provide any service;....

(2) These provisions are a prohibition on the self-government unit acting other than as provided.

In *Phillips v. City of Livingston*, 268 Mont. 156, the Supreme Court found Livingston's policy and procedural manual, adopted by resolution, which allowed the city manager to hold a determination hearing prior to discharge and where only the city manager could discharge an employee, was in conflict with state statute regarding the discharge of firefighters (7-33-4124, MCA requires the council or commission to hold a hearing to impose suspension). The court held the policy violated 7-1-114 (1)(f) and (2) MCA and therefore, the policy did not supercede state legislation for termination of firefighters even where the city had self-governing powers.

In our case, the city has the option to adopt the state building code or not adopt the state building code. If we choose not to adopt the state building code, the state building code applies anyway and the state will enforce the same. But, double take aside, if the city takes legislative action and adopts a code, it must be the state code and the city must exercise enforcement thereof. In other words, the state is directing the city to carry out a function and to provide a service. Such a requirement would seem to meet the restraining language of 7-1-114 (1)(f) and (2) MCA.

Considering the overall purpose of the state building code, (to effectuate uniform state wide standards), the absolute legislative directions to only adopt the state building code and the prohibition of enforcing anything but the state building code, I believe we are preempted from adopting any ordinance which purports to supersede state building code in spite of self-governing powers - self-governing powers having been restricted as described above.

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