

A Construction Law Update

2/11/11

Washington's Stricter Building Energy Code Withstands Legal Challenge

A federal court judge in Tacoma has ruled that revisions to Washington's building energy code properly set energy efficiency standards for new residential construction in the state that are more strict than federal rules. The decision by Judge Robert Bryan rejected the Building Industry Association of Washington's ("BIAW") lawsuit that asserted the federal Energy Policy and Conservation Act ("EPCA") preempts state imposition of higher standards. The decision now clears the way for implementation of the new state code.

In addition to establishing federal energy efficiency guidelines for residential appliances, including heating, ventilation and air conditioning ("HVAC") equipment, EPCA directed the states to adopt and periodically revise their building energy codes to comply with the Council of American Building Officials' Model Energy Code. While EPCA prohibits imposing state regulations stricter than the Model Energy Code, it does allow for exceptions subject to a state code meeting several enumerated requirements.

The Washington Building Code Council ("Council") adopted a building energy code in 2006 for new construction in the state. The standards under that state code did not exceed the federal requirements. The Council, however, revised the code in 2009 to add a 15 percent annual net energy consumption reduction requirement to be achieved through a point system, which awards credits under various options for addressing the efficiency of a building's shell,

the home's heating equipment and other energy consuming devices. That revised standard is stricter than the federal EPCA. The revised standards were to take effect July 1, 2010, but were delayed until January 1, 2011.

BIAW sued the Council in U.S. District Court in Tacoma seeking an injunction and declaratory relief that EPCA preempted the 2009 revisions. Judge Bryan issued a decision that rejected all of BIAW's arguments. Judge Bryan ruled:

- The revised state building energy code provides other means for compliance than solely using products that are more energy efficient than federal standards, in fact the code contains as many options for using products that do not exceed federal standards as options that do;
- Whether those alternative options are more expensive to the builder is not a factor under the legal standard for reviewing BIAW's challenge to the code because EPCA does not require financial equivalence in costs;
- EPCA does not require an identical one-for-one correspondence between credits awarded for energy savings and a particular covered product, and the BIAW had failed to show that any variation in the state code failed to satisfy the exemption; and
- EPCA allows credits to be awarded based on energy use or equivalent cost basis and the Washington code met that requirement.

Judge Bryan's decision referred to, but declined to follow, a case in New Mexico, *The Air Conditioning, Heating and Refrigeration Institute v. City of Albuquerque*, that struck down portions of Albuquerque's energy conservation code as preempted by EPCA. In that case, the city unsuccessfully argued the parts of its code that prescribed use of more efficient HVAC

products or water heaters than federal standards was not preempted because it presented builders with viable, non-preempted options for compliance. The New Mexico court said that was an insufficient basis because the prescriptive standards could complicate the design, production and marketing plans of appliance manufacturers contrary to Congressional intent.

Although an appeal of Judge Bryan's decision is likely, for the time being the revised Washington building energy code applies to new residential construction in the state. Therefore, design professionals and builders will need to consider the various pathways and options in the code for compliance, as well as factor in the costs of those options.

For more information, please contact the Construction Law Practice Group at Lane Powell:

206.223.7000 Seattle

503.778.2100 Portland

lppc@lanepowell.com

www.lanepowell.com

We provide the *Construction Law Hotsheet* as a service to our clients, colleagues and friends. It is intended to be a source of general information, not an opinion or legal advice on any specific situation, and does not create an attorney-client relationship with our readers. If you would like more information regarding whether we may assist you in any particular matter, please contact one of our lawyers, using care not to provide us any confidential information until we have notified you in writing that there are no conflicts of interest and that we have agreed to represent you on the specific matter that is the subject of your inquiry.

Copyright © 2011 [Lane Powell PC](http://www.lanepowell.com)

Seattle - Portland - Anchorage - Olympia - Tacoma - London