

July 16, 2009

NEW STATEWIDE ONE- AND TWO-FAMILY RESIDENTIAL CONSTRUCTION STANDARDS LEGISLATION

In order to increase the state's energy efficiency, the Tennessee General Assembly has enacted the "Tennessee Clean Energy Future Act of 2009." As part of this Act, the legislature amended § 68-120-101 of the *Tennessee Code Annotated*, which provides for minimum statewide building construction standards, to authorize the Department of Commerce and Insurance to adopt a one- and two-family residential code. The State Fire Marshal (SFM), who is also the Commissioner of Commerce and Insurance, will be responsible for enforcement of the code it adopts. Many local governments already have adopted and are enforcing, to varying degrees, a one- and two-family residential construction code. The legislation, however, grants the opportunity for a one- and two-family residential construction code to apply to all areas of the state.

BUILDING CODE ENFORCEMENT PRIOR TO ENACTMENT OF THE TENNESSEE CLEAN ENERGY FUTURE ACT OF 2009

Building Codes (for buildings other than one- and two-family residential construction) — The SFM's office is currently charged with enforcement of building construction safety standards. Minimum building construction standards have been adopted by the SFM by rule for state, city, and county buildings and certain private buildings other than one- and

two-family dwellings. The standards include provisions relating to structural strength and stability, means of egress and fire safety. T.C.A. 68-120-101(b) allows local governments to adopt and enforce their own building construction safety standards for buildings (other than state buildings, educational occupancies or any other occupancy requiring inspection by the SFM for initial licensure which are always reviewed by the SFM's office but may also be reviewed locally). According to the SFM, 35 jurisdictions (so called "exempt" jurisdictions) presently enforce building construction safety standards pursuant to this authority. Being an "exempt" jurisdiction basically means that the local jurisdiction enforces the codes themselves instead of the state. Local jurisdictions can lose this exemption if they fail to adequately enforce the codes or if the codes they have adopted are not current within seven years of the latest edition (unless otherwise approved by the SFM, which will be required to be in writing under the new law). This regulatory scheme remains in place under the new Act.

WHAT HAS CHANGED UNDER THE ACT?

1. As part of the effort to improve energy efficiency in the state, the Act amends § 68-120-101 to add energy efficiency to the standards to consider in adoption of the minimum statewide building construction standards.

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2. The Act also adds one- and two-family dwellings, except renovations, to the list of structures that may be subject to a building code adopted by the SFM. This is the most significant change in the Act as it relates to building construction standards and is the part of the Act that grants the opportunity for a one- and two-family residential construction code to apply to all areas of the state without any local government mandate. The Act makes it clear that the statewide standards will not include mandatory sprinklers for one- and two-family dwellings, but local governments may adopt more stringent standards should they choose to do so.

State enforcement v. local enforcement —

As in the prior version of § 68-120-101, local government jurisdictions can be exempt from statewide standards by enforcing standards themselves. In order to provide flexibility to local governments, the Act allows a local government to:

- (1) enforce the construction codes for non-one- and two-family residences as in current law (according to the SFM, a few counties currently do this),
- (2) enforce the one- and two-family residential code, so long as current within seven years (according to the SFM, a significant number of counties already do this), or
- (3) enforce both.

In other words, the local government can enforce either one or both of these codes and the state will enforce the codes the local government chooses not to enforce. 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 some have adopted the old *Southern Building Code*, which is no longer in print, and some do not have the means to enforce the code they have adopted.

State adoption of the residential code — With respect to the new part of the law relating to one- and two-family residential construction, the International Residential Code (IRC) is the only code with 2003, 2006 and 2009 editions. The SFM's office will determine which code will be adopted during a formal rulemaking process conducted by the SFM's office, and this process will involve proposed rules, public hearings, 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. The SFM's office has advised that this process will occur this year and is the reason that the law does not take effect until next year. Local governments and other interested parties will have an opportunity to participate in the process and see which code will be adopted prior to making any determination with respect to what, if any, action the local government might need to take.

The changes made to § 68-120-101 will obviously increase the workload for the SFM. To handle this increased volume of enforcement, the Act authorizes the SFM to contract with cities and counties, as well as with individuals from the private sector, to act as deputy building inspectors. The inspectors will be paid a fee for the inspections they perform. The schedule of fees will be set during the rulemaking process discussed previously.

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Opt-out provision for one- and two-family residential codes available to all local governing bodies — Local governing bodies are allowed to opt out of minimum statewide standards applicable to one- and two-family dwellings regardless of whether the local jurisdiction is enforcing its own code or has no code at all. This opt-out requires a two-thirds vote by the local governing body and expires 180 days after the next local legislative body election (or at an earlier date if set out in the resolution). Thus, should a county legislative body choose to opt-out of the application of minimum statewide standards to one- and two-family dwellings in its jurisdiction, the opt-out will last only from the effective date of the resolution until 180 days after the next county legislative body election. At such time, in order to continue the opt-out, the county legislative body will need to pass another resolution by a two-thirds vote.

It should be noted that **there is no urgency for a county to opt-out at this time. The Act does not go into effect until July 1, 2010.** Also, the Act is not self-executing, and a county will have at least 90 days from the date any rules are filed with the Secretary of State to exercise an opt-out should the county determine that it does not desire to have minimum one- and two-family residential codes in its jurisdiction. Further, there is presently no state-adopted code to take effect, so local governing bodies do not have complete

information upon which to make a decision to opt out. Lastly, counties should take the time to consider whether they want to take advantage of the state incentives that will be offered to encourage the application of a one- and two-family residential code, including a \$500,000 budget appropriation to aid state and local governments in training and purchasing code books and the recently announced \$9.3 million energy initiative incentive that will be available to small- and mid-sized cities and counties in the form of grants of up to \$100,000, which will have a preference for local governments that plan to enforce or have the state enforce one- and two-family residential codes.

Should a local governing body change its mind about opting out of the one- and two-family residential code, the Act does permit a local governing body to reverse its action at any time by a simple majority vote. Taking such action would make one- and two-family dwellings subject to the minimum statewide code.

Under the Act, local governing bodies are required to transmit any resolutions adopted under § 68-120-101, whether they are opting out or back in, to the SFM's office.

Effective date — The provisions of the Act amending § 68-120-101 become effective on July 1, 2010.

THE UNIVERSITY of TENNESSEE 
COUNTY TECHNICAL ASSISTANCE SERVICE