



How *AHRI v. Albuquerque* Puts Municipal Green Building Codes at Risk:

Challenges Faced by Local Governments in Mandating
Green Building

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Local Government Green Building Programs

- LEED initiatives in 138 cities, 36 counties, and 28 towns.
 - Mandates for public construction
 - Incentives for private construction
 - **Mandates for private construction**

Source: USGBC, Dec. 2009

Green Building Mandates

- Local governments increasingly require private developers to build to green standards, frequently LEED-NC/EB.
 - Size
 - Type
 - Location/Zone
 - Certification

****30-40 in this category****

Sample Programs

- LEED
 - San Francisco, CA
 - Boston, MA
 - Washington, DC
 - Conyers, GA
- In-House
 - Boulder, CO
 - Frisco, TX

Legal Challenges to Green Building Mandates

Antitrust

Delegation

Dormant Commerce Clause

Equal Protection

Dillon's Rule / State Preemption

Federal Preemption

Federal Preemption

- Supremacy Clause (Art. IV, cl. 2):
 - “This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”
- Federal laws preempt state laws where preemption is:
 - Express
 - Implied by Conflict
 - Implied by Occupation of the Field

The Air Conditioning, Heating &
Refrigeration Institute, et al.
v. City of Albuquerque

District Court for the
District of New Mexico

Citation: 2008 U.S. Dist. LEXIS 106706

Docket: Civ. No. 08-633 MV/RLP

The Parties

- City of Albuquerque, NM
 - Signatory to U.S. Conference of Mayors Climate Protection Agreement
 - Albuquerque Green Initiative
- Air-Conditioning, Heating, & Refrigeration Institute (AHRI)
 - Trade association with over 300 members in HVACR manufacturing
 - Advocacy, certification, market research

The Codes At Issue (AECC)

- ABQ Energy Conservation Codes:
 - Volume I: Commercial & Multi-Family Residential Buildings
 - Volume II: One- and Two-Family Detached Dwellings and Townhouses
- Adopted September 2007
- Scheduled to be in effect April 2008

Compliance Paths in Volumes I & II

- Volume I (commercial)
 1. Prescriptive path
 2. 30% greater efficiency than ASHRAE 90.1-1999
 3. LEED-NC Silver
- Volume II (residential)
 1. Prescriptive path
 2. 30% greater efficiency than IECC 2006
 3. Improvement of individual building components
 4. LEED-H Silver
 5. Build Green New Mexico

The Decision

- Preliminary Injunction Granted:
 1. **Substantial likelihood of success**
 2. Irreparable injury to moving party if injunction is denied
 3. Balance of the equities
 4. Public interest is not harmed by the injunction

Preemption Allegation

- The code is preempted by federal law:
 - Energy Policy & Conservation Act (EPCA), as modified by:
 - National Appliance Energy Conservation Act (NAECA)
 - Energy Policy Act of 1992 (EPACT)
 - Performance standards for HVACR
 - States may request waivers

Questions Presented:

1. Are the codes “regulation[s] concerning the energy efficiency, energy use, or water use” of a covered product?
2. If so, do they fit within a federal exemption to preemption?

Volume I is preempted.

Compliance Path	Effect of Court's Decision
30% greater efficiency than a baseline commercial building under ASHRAE Standard 90.1-1999 (PRM)	Preempted. Although § 6316(b)(2)(B)(ii) allows state or local governments to adopt ASHRAE Standard 90.1 in building codes, the standard that is adopted must be in effect in order for the exception to be valid.
Prescriptive requirements for small retail and office buildings	Preempted. Its requirements are more stringent than those found in EPCA.
Certification as LEED Silver	Possibly preempted. Plaintiffs provided testimony stating that LEED Silver certification cannot be achieved without products that exceed EPCA standards.

Volume II is preempted.

Compliance Path	Effect of Court's Decision
Performance option 1: improvement of performance of individual building components	Preempted. Section 6297(f)(3) only allows performance-based building codes for new construction, so this provision cannot apply to major renovations. Moreover, with regard to new construction, it does not pass § 6297(f)(3)'s seven-part test.
Performance option 2: 30% greater efficiency than a baseline residential building under the 2006 IECC	Preempted. Same rationale as for performance option 1.
Prescriptive requirements for building equipment	Preempted. Its requirements are more stringent than those found in EPCA.
Certification as LEED-H Silver	Possibly preempted. Court notes that Plaintiffs provided testimony stating that LEED Silver certification cannot be achieved without products that exceed EPCA standards.
Certification as Build Green New Mexico Silver	Possibly preempted. Same rationale as for LEED.

Lingering Questions

- Is LEED an “energy code” or a “sustainability code”?
- DOE certification of updated ASHRAE Standard 90.1
- Waxman-Markey/Bingaman bills

Current Disposition

- City enacted an interim energy code.
- AHRI motioned for summary judgment; City opposed.

Best case scenario? Trial.

Is This Affecting Other Cities?

- The bottom line: YES.
 - Threats of litigation
 - Uncertainty
- California cities seem less concerned—the federal laws contain many exemptions for them already.

Recommendations

- For now . . .
 - Don't include prescriptive paths.
 - Enact through the zoning code, where local governments traditionally have strong police powers.
 - Keep the lawyers involved.
- Ultimately: federal fix?

For More Information



Green Building Law Blogs:

- Shari Shapiro
- Stephen del Percio
- Chris Cheatham

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