



HENRY McMASTER
ATTORNEY GENERAL

December 2, 2008

The Honorable Chip Huggins
Member, House of Representatives
308 Wayworth Court
Columbia, South Carolina 29212

Dear Representative Huggins:

We understand from your letter that you desire an opinion of this Office concerning implementation of the new state building code by municipalities and counties in South Carolina. In your letter, you provide the following information:

During the 2008 legislative session, the General Assembly passed a state budget proviso of \$100,000 allocated to Clemson University and the Citadel to do research on our state's new building code in the area of wind and seismic requirements. As part of this small proviso, a requirement was included that would delay the implementation of the new state building code until July 1, 2009. There was also passed in a separate bill language that allowed the adoption of the new building code by coastal counties, only if FEMA moved to retrograde their flood insurance discount rate. FEMA subsequently issued a directive from Washington, DC that said FEMA would not use the lack of adoption of the new building code as a reason to retrograde flood insurance while the research was being conducted. Until the study is finished next year, the compliance or the non-compliance with the new building code will not be a factor in determining local insurance ratings. Despite the clear directive in the budget proviso, one or two jurisdictions have passed local ordinances to implement the new building code.

As such, you are requesting that this Office

review the existing law and the 2008 legislation to determine if it is legal for a local South Carolina jurisdiction to ignore a state budget proviso, existing state law that prohibits a local jurisdiction from implementing any building code that is not in effect statewide, a

FEMA directive, and then implement a new building code by simple local ordinance.

Law/Analysis

Chapter 9 of title 6 of the South Carolina Code governs building codes. These provisions establish a South Carolina Building Codes Council (the “Council”), which is authorized via section 6-9-40 of the South Carolina Code (Supp. 2007) “to review, adopt, modify, and promulgate the building codes referenced in section 6-9-50” Section 6-9-50 of the South Carolina Code (Supp. 2007) requires the Council to adopt by reference and amend only the latest editions of certain nationally recognized codes and standards published by the International Code Council, Inc. Furthermore, section 6-9-10 of the South Carolina Code (Supp. 2007) requires municipalities and counties to enforce the building code as adopted by the Council. Section 6-9-40, in addition to giving the Council authority to review, adopt, modify, and promulgate building codes, provides: “Any amended or modified code shall be codified as provided for in Section 1-23-90. The council shall determine whether the amended or modified code becomes effective on the first day of January or July.” Accordingly, the Council has authority to set forth an implementation date for application of newly adopted versions of building codes.

From your letter, we understand the latest version of the codes and standards published by the International Code Council, Inc. is the 2006 International Residential Code (“2006 IRC”). Furthermore, we understand the Council adopted the 2006 IRC in November 2007 with an implementation date of July 1, 2008. However, as you mentioned in your letter, in the 2008-2009 State appropriations act, the Legislature passed a provision, which provides as follows:

(LLR: Wind and Structural Engineering Research Lab) The Department of Labor, Licensing, and Regulation is directed to utilize \$100,000 of the funds appropriated to the department to contract with Clemson University’s Department of Civil Engineering and Engineering Mechanics and the Citadel in conjunction with the Home Builders Association of South Carolina, to establish a research project to determine the validity of wind and seismic residential building requirements for South Carolina, as prescribed in the 2006 International Residential Code (IRC). A preliminary report on the findings must be submitted to the SC Building Council by June 30, 2009. To ensure the maximum benefit of this study the current SC Residential Building Code will remain in place until June 30, 2009.

2008 S.C. Acts 2483 (emphasis added).

In numerous opinions, this Office recognized the legal principle that “in case of conflict between a Proviso in the state Appropriations Act and a permanent provision of law, the proviso is

generally controlling for that fiscal year.” Ops. S.C. Atty. Gen., November 10, 2004; June 24, 2003; March 19, 2003. “[T]he provisions of the appropriations act would have the effect of suspending the provisions of the conflicting general law.” Op. S.C. Atty. Gen., March 19, 2003. Thus, despite the authority given to the Council to set an implementation date, the proviso cited above requires that the current IRC remain in place until June 30, 2009. Because counties and municipalities are authorized only to enforce those building codes adopted by the Council, they would be prohibited from enforcing the 2006 IRC until Council implements it, which according to the proviso cannot occur until after June 30, 2009.

Nonetheless, as you mentioned in your request letter, in addition to the proviso cited above, the Legislature enacted section 6-9-135 via the Proviso Codification Act of 2007. 2008 S.C. Act No. 353. This provision provides as follows:

Notwithstanding any other provision of law, including specifically any temporary provisions in the general appropriations act for fiscal year 2008-2009, coastal counties and municipalities may adopt by reference or otherwise the provisions in the 2006 International Residential Code (IRC) necessary to prevent properties insured by the National Flood Insurance Program (NFIP) being retrograded to a lower class for purposes of the flood insurance premium discounts allowed jurisdictions participating in the NFIP’s community rating system.

According to the plain language of this provision, coastal counties and municipalities are allowed to adopt the 2006 IRC if such adoption is necessary to prevent properties insured by the NFIP from being retrograded. The common and ordinary meaning of “retrograde” is “[m]oving or tending backward.” The American Heritage College Dictionary 1166 (3rd ed.1997). Thus, this provision is applicable only to those counties and municipalities who need to adopt the 2006 IRC in order to prevent their community rating from decreasing for purposes of flood insurance.

In your letter, you state that FEMA issued a directive stating that it would not use lack of adoption of the 2006 IRC as a basis for retrograding flood insurance. Moreover, you provided us with a memorandum issued by the Community Rating System Coordinator, which explains that whether or not a community adopted and is enforcing the 2006 IRC impacts that community’s Building Code Effectiveness Grading Schedule (“BCEGS”). In turn, a community’s BCEGS classification impacts its Community rating, which impacts the discount a community is entitled to for insurance purposes. Furthermore, the memorandum indicates that Community Rating System (“CRS”) classification are evaluated on a cycle basis and for the most recent cycle changes in classifications become effective October 1, 2008. However, the memo clarifies that “no CRS Class retrogrades are to occur during this cycle.” Thus, the memorandum supports your position that no retrogrades are to occur prior to June 30, 2009. As such, it appears to us that if the CRS

The Honorable Chip Huggins
Page 4
December 2, 2008

classifications cannot be retrograded prior to June 30, 2009, coastal communities will not need to take advantage of section 6-9-135 while the FEMA directive is in place.

Conclusion

Because counties and municipalities are relegated to adopting the building code approved by Council, we do not believe counties and municipalities may adopt a building code not yet adopted by the Council. The proviso contained in the 2008-2009 appropriations Act supercedes Council's ability to adopt the 2006 IRC prior to June 30, 2009. As such, counties and municipalities cannot adopt the 2006 IRC unless they meet the qualifications provided in section 6-9-135. However, you informed us that through a FEMA directive, no retrograde will occur prior to June 30, 2009. Thus, while this directive is in effect, we do not believe that coastal communities and municipalities will find it necessary to take advantage of the exception provided in section 6-9-135.

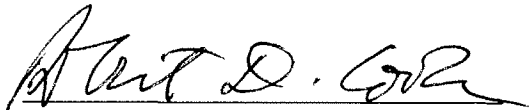
Yours very truly,

Henry McMaster
Attorney General



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