Chapter 2
Mandating Sustainability: When Federal Legislation May Preempt the Best Green Building Code Intentions

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Abstract As sustainable practices continue to sweep across the country, the federal, state, and local governments chose to further encourage the construction industry through various legislative and regulatory actions. In these initiatives, the policymakers need to decide on whether to incentivize participants or compel compliance as well as whether to set their own standards legislatively or to adopt programs developed by third party organizations. In making these decisions and adopting legislation, the state and local policymakers may inadvertently spark another round in the lengthy struggle for power with the federal government under the Supremacy Clause of the Constitution. With this situation at hand, this chapter considers the approaches taken by federal and state governments, the solutions presented by third party organizations, and the responses by the courts to such legislative initiatives relating to environmentally friendly policies that promote sustainability mandates in construction.

2.1 Introduction

In a recent special report from the University of Pennsylvania's Initiative for Global Environmental Leadership, the authors point out that many state and local governments are rethinking their approach to green buildings and are promoting new methods to achieve greater energy efficiency from the built environment (Institute for Global Environmental Leadership). They observe that "green building has gone from a feel-good exercise to an impending baseline for all construction." Illustrating this point, policymakers around the country collectively face the daunting task of

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D.R. Cahoy and J.E. Colburn (eds.), *Law and the Transition to Business Sustainability*, Perspectives on Sustainable Growth, DOI 10.1007/978-3-319-04723-2_2,

implementing strategies that will motivate participants into embracing environmentally friendly construction practices and structures while advancing their sustainability goals (Prum, Aalberts, & Del Percio, 2012).

Accordingly, each jurisdiction takes a different approach to addressing their own sustainability goals within their sphere of influence. For instance, some policymakers made the goals internally applicable to projects undertaken by the government; while others attempt to set requirements for private developers.

In taking these actions, each group of policymakers needed to address whether to set their own standards through statutes and regulations or to compel compliance through the use of programs developed by third party organizations. Consequently, these actions may trigger a conflict between the federal and state government laws and regulations that requires the courts to intervene and determine whether the Supremacy Clause of the Constitution applies.

To better comprehend how such conflicts happen, the varying approaches undertaken by the different sets of policymakers needs a further explanation. To this extent, I present the core policies pursued by the federal government followed by an overview of some of the jurisdictions with pioneering solutions along with a summary of some of the more prominent third party offerings to assist policymakers with their task. This provides the underlying foundation for the consideration of the Supremacy Clause and two separate cases where the federal courts came to opposite conclusions as to whether a lowered tiered government's efforts to promote sustainable building codes within its jurisdiction was preempted by a national policy promulgated by Congress decades earlier.

2.2 Green Buildings in the United States

Given the desire by policymakers to promote sustainable construction and buildings within their jurisdictions, a patchwork of approaches currently exists across the country. Each level of government maintains its own unique mission, must respond to different sets of stakeholders and constituencies, and draws upon distinct resources on both a financial and physical level. However, all levels of government must address whether to mandate or incentivize sustainable building policies as well as whether to determine such standards internally or to take advantage of the offerings made by third party organizations. As a result, the stimulus and approach offered by the different levels of government and the programs that they implement requires consideration.

2.3 The Federal Government's Approach

When taking into account the federal government's approach to the nation's building inventory, the main policies tend to focus on internal activities that reduce its environmental footprint rather than regulating private development standards.

In 2005, Congress instructed the National Institute of Building Sciences to determine whether the currently applied benchmarks for construction incorporated the latest technological standards. This legislative directive led to the Office of the Federal Environmental Executive (OFEE) conceiving and obtaining the signature of President George W. Bush on January 24, 2007, of Executive Order 13423 (EO), which reinforced and provided instructions for all parts of the executive branch of government to adhere to the Federal Leadership in High Performance and Sustainable Buildings Memorandum of Understanding previously agreed upon by 19 different agencies in January 2006.

Subsequently, Congress turned many parts of EO 13423 into law when it passed the Energy Independence and Security Act of 2007 (EISA). Through this legislation, Congress revised sections of the National Energy Conservation Policy Act and mandated energy management goals across the federal government. In addition, the EISA directed different organizations within the government like the General Services Administration (GSA) and the Department of Energy (DOE) to take action with regard to high performance and green buildings.

Raising the standards even higher on specific types of structures, President Barack Obama signed EO 13514, which included additional goals and objectives applicable to high performance buildings for all parts of the executive branch of the government. Beyond the existing goals in EO 13423, EO 13514 repeated the requirement to achieve 15 % of an agency's existing building inventory via sustainable practices and instructed the executive branch to make annual progress towards 100 % conformance with the guiding principles established in the 2006 Memorandum of Understanding (Green Building Certification Institute, 2011).

In response to these directives, the Environmental Protection Agency, the OFEE, and the Whole Building Design Guide (2010) of the National Institute of Building Sciences jointly developed the Federal Green Construction Guide for Specifiers (FGCGS). In this document, the drafters developed recommendations for internal use when listing specifications for a project in order to ensure compliance with all applicable high performance and green building directives (GSA, 2010).

Contained in Section 1.3 Environmental Goals, the FGCGS addresses independent verification requirements with details covering the directives arising from different parts of the government. The Specifier Note begins by explaining that after modification in 2002, OMB A-11 now states, "Agencies are encouraged to incorporate Energy Star or LEED building standards into up front design concepts for new construction and/or building renovations." It further clarifies that the GSA supports the adoption of the USGBC's LEED program and the availability of other systems since 2003. The note specifically mentions other programs like the Austin Green Building Program and Green Globes while the guide contains language for these as well as the ASTM 2430 and ICC-700-2008 National Green Building Standards (Meadows, 2010).

Moreover, the GSA (n.d.) may promote the LEED program as its main third party verifier for high performance or green buildings; but it does not remain an exclusive one for the federal government. Other organizations within the executive

branch like the Department of Veterans Affairs (2010) decided to partner with Green Globes as its standard when building its different facilities across the country to comply with the goals of EO 13423.

Nevertheless, Congress also chose to enact legislation in several instances that mandated energy efficiency for heating, ventilation, and air conditioning (HVAC) products placed in private developments. In response to the 1973 oil crisis, Congress decided to set federal energy efficiency standards for HVAC products when it passed the Energy Policy and Conservation Act of 1975 (EPCA) followed by the amendments contained in National Appliance Energy Conservation Act of 1987 (NAECA) and the Energy Policy Act of 1992 (EPACT).

Collectively, these pieces of legislation established national standards for the performance of HVAC equipment in buildings. Meanwhile, Congress included language that attempted to preempt lower tiered policymakers from undermining national goals with respect to energy efficiency, energy use, or water use of any covered product with limited exceptions.

However, in the 1992 amendments of EPACT, Congress tried to clarify its prior position as having a dual purpose "to reduce the Nation's consumption of energy and to reduce the regulatory and economic burdens on the appliance manufacturing industry through the establishment of national energy conservation standards for major residential appliances." The EPCA included provisions to encourage states to adopt and update energy efficiency codes as well as provided grants to fund such initiatives.

Hence, the federal government's main efforts appear to focus on its own building initiatives and not setting a national standard; but in limited situations where a broader policy exists like protecting a national market, Congress demonstrated the willingness to legislate and set a benchmark that may inhibit state and local jurisdictions to promote sustainability in its construction codes.

2.4 State and Local Governments with Internal Approaches

On the state and local government level, two different programs blazed the trail for some of the most popular verification systems in use today. The Austin Energy Green Building program (AEGB) pioneered the methodology of evaluating and measuring the impact of a building upon the environment; while the State of New York introduced the concept of using tax incentives as an enticement to motivate private developers into voluntarily choosing to pursue certification of their projects. In 2007, the State of California decided to eschew the voluntary compliance model and developed CALGreen as the first statewide and comprehensive green building standard. Accordingly, this section examines the three different policy approaches implemented internally by state and local governments to certify buildings as sustainable and gain participation from private developers and others involved in the construction industry.

2.5 City of Austin

In response to more stringent local government requirements, the local utility in Austin, Texas, developed and introduced the Austin Energy Green Building (AEGB, 2010a, 2010a, 2010c, n.d.) program in 1985. Initiating an innovative approach to quantifying the sustainability features of a building, the creators of the AEGB program developed a system that awarded a structure a rating based on a five-point scale for its impact upon the environment and community. By considering many complex and contributing features (e.g.; climate, building and energy efficiency, water and materials, durability, health, and safety) found in commercial, residential, and multifamily structures, the program introduced a novel approach that formed the basis of other programs.

In its current form, the AEGB comprises three different programs: Commercial Green Building, Residential Green Building, and Multi-Family Green Building. The programs utilize a computerized rating system to assign points to a project that follows sustainable building practices and construction while verifying the participants' actions though site visits. This means an AEGB representative will physically examine the site and building during all phases of the construction project in order to ensure compliance.

Offering a flexible approach as part of the program, the rating system allows applicants to choose between "Performance" or "Prescriptive" tracks for earning credits. The "Prescriptive" approach supplies exact solutions on how to gain points for particular aspects of a project; whereas the "Performance" direction provides the applicant with the leeway to choose other methods to fulfill the requirement but with the burden of demonstrating equivalency to other sustainable practices in order to receive the credit. Based on this adaptable model, the rating program can evaluate the sustainable features of the building and assign it a star level based on the total points achieved. Accordingly, the more stars assigned to a building signifies an increase in its green features above the basic requirements at the one star level.

Hence, the AEGB program pioneered a novel and rigorous approach to measuring the sustainable features found within a building while launching a subsequent movement and inspiring other third party verification systems across the country.

2.6 New York

Initially proposed in 1995, the State of New York launched the country's first tax-based incentive program (GBTC) for green buildings in 2000. As part of the unique challenges in determining the qualifications for the tax credit, the drafters of the legislation needed to create its own program because state law prohibited the adoption of external standards that may change over time. Consequently, New York developed its own system that prescribed the qualifications for the tax credit; although most of the projects eventually received LEED certification on their own volition.

Heavily relying on a structure's energy usage as its method for determining compliance, this unique aspect of the GBTC creates ongoing obligations for those receiving the benefit. As such, the program participants bear the burden of monitoring the performance of the building and its associated tenants.

Moreover, the GBTC expects the completion of an indoor air quality plan prior to and during construction as well as in the operation and maintenance of the building following its commissioning; however a LEED rated building need not complete one in order to be deemed compliant. This recordkeeping covers performance reports for indoor air quality and energy. These documents include findings from annual air monitoring evaluations along with the verification of the enforcement of smoking provisions and evidence demonstrating a responsible party resolved any requests to sort out any indoor air quality issues.

Also, the participants must keep records of the monthly and initial performance results of photovoltaic and fuel cell technologies in conjunction with the annual energy consumption for the building; however, the regulations leave any comparisons between theoretical and actual performance to research projects. The GBTC determines energy consumption compliance based on the structure's usage; whereas the LEED requirements use material costs as a basis for its choices.

While the New York approach for certifying a green building differs from the alternative based LEED program, it also maintains some similarities as well. This occurs with the use of refrigerants and the associated equipment. In these situations, the regulations turn to the LEED rating system's language for compliance. Likewise, the enabling legislation also requires the GBTC to follow the LEED program in building materials, finishes, and furnishings (NYSDEC, n.d.). Thus, the GBTC program generally corresponds with the LEED requirements as long as it also includes the Additional Commissioning Credit with Systems and an Energy Management manual and post-occupancy review (Kneeland, 2006).

As a result, many other states took notice of New York's strategy that gained significant support and participation from private industry by offering a tax incentive as a reward for further advancing the sustainability and environmental policies and goals of the jurisdiction (Prum, 2009).

2.7 CALGreen

Taking a far more ambitious approach to incorporating sustainable features into development projects by addressing a larger scope than previously attempted while following in the footsteps of other governments that created their own standards, The California Building Standards Commission received direction from Governor Schwarzenegger in early 2007 to draft regulations for the 2010 code adoption process with respect to residential, commercial, and public green building construction. This directive brought about the drafting and adoption of the nation's first statewide and comprehensive green building standard called CALGreen. California began

implementing this behemoth endeavor on January 1, 2011, which set minimal construction requirements for the entire jurisdiction with respect to sustainability.

Keeping with the existing structure in the California Building Standards Code, the CALGreen regulations continues with provisions for application and responsibility. It applies different sections for residential and nonresidential uses as the first division. Then, the regulations separate the two divisions based on the type of structure and between the four state agencies that maintain specific authority over certain building standards. Within each category, CALGreen creates an underlying group of mandatory requirements, which requires adoption by each municipality. In addition, the code offers two supplementary and voluntary code provisions referred to as CALGreen Tier 1 and CALGreen Tier 2 for adoption by each municipality as well.

In terms of compliance, a building will automatically be considered "CALGreen certified" if it adheres to this building code, which was already part of its legal obligations under the statewide regulations. Likewise, a building that meets the more rigorous Tier 1 or 2 standards could assert "CALGreen Tier 1 Certified" or "CALGreen Tier 2 Certified" based on its additional features. Interestingly and in contrast to the later discussed LEED and Green Globes programs, the state does not demonstrate any intention to create a registry or identifying mark for those buildings that meet any of its standards.

Thus, the recent implementation of CALGreen offers one of the first broad based mandatory policies that will take time to determine whether private developers and others involved in the construction industry will accept it as progress or choose to fight its implementation across the state. Hence, each of the three governmental approaches pioneered a different aspect of the modern movement to motivate participants to support and promote environmentally friendly practices across the construction industry that coincide with a jurisdiction's sustainability goals while developing a system to evaluate and assess green or high performance buildings in quantifiable terms.

2.8 Private Approaches

In some instances, a jurisdiction may wish to promote environmentally friendly policies to attain important goals but may not maintain adequate enough resources to implement a program or properly draft legislation on its own. To assist in these types of situations, a number of different third party organizations offer a variety of approaches to fill this need. Some organizations offer full service programs that try to quantify and signify a building's sustainability features, while others provide policymakers with tools and language for adoption that get incorporated into the law either in part or as a whole. Accordingly, this section addresses a representative sample of the many programs under consideration or already adopted in many jurisdictions around the country as well as the latest model green building code available.

2.9 Leadership in Energy and Environmental Design

The United States Green Building Council (USGBC) owns and operates the Leadership in Energy and Environmental Design (LEED) program, which provides the vast majority of certifications. The program emerged in 1998 after 4 years of intense development. Building upon the AEGB program and its resources, the USGBC team decided to utilize a market based approach that rewarded developers for choosing sustainable alternatives in their construction and completed structure instead of compelling compliance through regulations while meeting the diverse needs of the many participants in the industry and across the country as a workable system.

Consequently, the LEED program encompasses a collection of rating systems that attempts to quantify the sustainability features contained in the construction and operation of the building. Within this collection, the LEED program offers different certification tracks for New Construction (NC), Existing Building Operations (EB), Commercial Interiors Projects (CI), Core and Shell Projects (CS), Homes (H), and Neighborhood Development (ND). Moreover, LEED now includes applications for lodging, retail stores, campuses, volume building programs, healthcare facilities, laboratories, and multifamily residences due to market demands for new guides; even though the developers of the program originally created it to measure office buildings.

For each LEED program type, an oversight committee sets the standard by assigning points for each category based on agreed upon sustainable practices (LEED committees, LEED rating systems). This allows each program type to emphasize different sustainable practices based on its committee's judgment while creating minimum standards and characteristics. To give extra recognition for those projects that incorporate more sustainable features, the LEED program offers the tiers of silver, gold, and platinum for those buildings that exceed the required points for the basic certification.

In order to confirm the qualifications of a given project, the LEED program follows a document based verification approach. The program sets forth basic criteria for sustainable practices across all categories, but it also allows for different alternatives within a set list of options for an adaptable compliance standard. Consequently, the LEED program standard provides for geographic variability while ensuring a level of sustainable compliance for each project it endorses through certification.

Given the flexibility and rigor associated with the LEED program as well as many other beneficial aspects, various different governmental entities adopted it for use within their jurisdiction because it offers a sufficiently rigorous and reliable solution that coincides nicely with their own sustainable policy objectives.

2.10 Green Globes

Competing with the LEED program, Green Globes provides the other main third party certification for green buildings in the U.S. This program traces its roots to the United Kingdom's efforts between 1988 and 1992 to advance high performance

standards during the construction of office buildings within England, which lead to the Building Research Establishment's Environmental Assessment Method (BREEAM). After garnering support and popularity from the Canadian Government and trade organizations under the name Go Green Plus, the Green Building Institute brought the program to the U.S.

Taking a different approach, Green Globes supplies a tool for developers to ascertain the environmental sensitivity for new construction projects or those undergoing continual improvements within an existing structure. It completes the task through a self-assessment and verification approach based upon a customized questionnaire derived from the construction documents section of the applicable program that establishes the level of qualification. The Green Globes method assigns the points to categories based on sustainability practices and characteristics but calculates its level of achievement using only those features available to the project and not those considered outside of a developer's control. Upon attaining a minimal compliance level of 35 %, an independent third party assessor reviews the documents, visits the project, and makes a recommendation to the Green Building Institute to issue certification for the building based on a scale of one to four green globes.

In explaining the contrasting approaches, commentator and academic Charles Kibert (2008) pointed out many of the differences between the Green Globes system and the LEED program. He explains that, in the LEED system, a project team completes and submits documents electronically to an evaluation group, but those with intimate knowledge neither contact nor discuss the project and its green features with the reviewers. Furthermore, the independent assessor in Green Globes physically examines the project to determine whether the constructed building matches the upfront promises, a step that is not required under current versions of LEED. Finally, Green Globes uses a variable method to calculate the total achievable points whereas LEED utilizes a fixed system. Accordingly, Green Globes includes only those categories and subcategories available to a project; the LEED system does not reduce its certification criteria for characteristics that may be outside of a development's control.

Therefore, the Green Globes system offers an alternative to many jurisdictions that desire a different approach than required by the LEED program but still wishes to impose a robust and rigorous third party evaluation that also includes a compliance aspect to the prevailing goal of promoting sustainability in the built environment.

2.11 International Green Construction Code

Considered another third party organization but with a different mission, the International Code Council (ICC) developed its own standard "to meet new market needs through model code regulations that promote safe and sustainable

construction in an integrated fashion with the ICC Family of Codes" (International Code Council, 2010). Following several years of development and time set aside for public comment, the ICC released public code version 2.0 of the International Green Construction Code (IgCC, n.d.) in March 2012. This newcomer to the sustainably built environment market looked "to drive green and sustainable building significantly beyond the market segment that has been transformed by voluntary rating systems" (International Code Council, 2010).

To this end, the IgCC offers adopting jurisdictions a comprehensive approach for new and existing buildings as well as to all residential structures over three stories a solution that augments existing ICC model codes with specifications that address sustainable performance characteristics such as energy, water, natural resources, and material conservation. It looks to piggyback on existing governmental administration and enforcement mechanisms to deliver a more environmentally friendly result where adopted and implemented.

In an opposite approach to the LEED and Green Globes programs that offer numerous options with few requirements, the IgCC follows a strategy formed mainly around mandatory directives. The IgCC provides some flexibility in its compliance paths by allowing projects to choose between a prescriptive based option and modeled performance solution.

However, a jurisdiction may use its discretion to include additional requirements in whole or separately that require project owners to select "electives" for a particular project. These "electives" then turn into compulsory requirements for the particular building once selected by the project owner. Accordingly, a jurisdiction or political subdivisions may choose to adopt the IgCC or a portion thereof through the use its administrative powers.

In response to this option, Rhode Island became the first state to adopt a preliminary version of the IgCC when Governor Carcieri signed the Green Buildings Act into law on November 9, 2009. Following Rhode Island, the North Carolina Building Code Council (2010) adopted the Rainwater Collection and Distribution Systems section of the IgCC, Florida passed legislation allowing the IgCC as an option for the retrofitting and new construction of all state-owned facilities (Energy Conservation and Sustainable Buildings Act), Oregon based its alternate building code called the Commercial Reach Code on the IgCC, and Maryland allowed its Department of Housing and Community Development to adopt by regulation the IgCC (Maryland Public Safety Code).

Thus, these private organizations serve important roles in advancing a jurisdiction's sustainability goals with respect to providing an infrastructure and methodology to help quantify these difficult to capture objectives while cost effectively supplying policymakers with resources that they could not access otherwise. Consequently, policymakers across the country have at their disposal a wide range of options and experience from both the public and private sectors when trying to advance their sustainability goals as applied to building policy; but they must also keep in mind that their powers to effect change maintain limitations as well.

2.12 Federal Preemption

Historically, the federal and state governments struggled over the scope of regulatory authority. In response to this adversarial situation, the drafters of The Constitution employed a variety of solutions to resolve the degree and magnitude of authority afforded each level of government (U.S. Const. amend. X; U.S. Const. art. I, § 3, cl. 1, I, § 8, I, § 10, II § 1, V). As such, Article VI of the Constitution recognized that federal laws provided superior authority to conflicting state statutes and became known as the Supremacy Clause.

Further refining this Constitutional directive, the courts began to hold that preemption could exist either expressly or impliedly (Nowak, 2010). Under express preemption, Congress must explicitly state its intention to regulate and directly prohibit a state from enacting conflicting legislation. Whereas in an implied preemption situation, Congress must decide to dominate the entire field of regulation and effectively leave nothing more for the state to control.

As such, the inevitable conflict between the federal and state governments regarding the authority and scope to adopt more environmentally friendly building codes to address sustainability policies turned to the courts to determine whether the Supremacy Clause applied to some of these progressive pieces of legislation.

2.13 AHRI v. City of Albuquerque

In an effort to upgrade the City of Albuquerque's building regulations, the Mayor formed a Green Ribbon Task Force in 2007 charged with the task of developing and implementing directives to make meaningful reductions in greenhouse gas emissions in a manner that also afforded industry a flexible framework for innovative solutions that corresponded with progressive energy applications. After holding meetings to discuss the issues, the task force put forward recommendations on various alternatives on how to improve energy efficiency in the built environment. Based on these recommendations, the City's Green Building Manager drafted a two volume code for later adoption by the Albuquerque City Council called the Albuquerque Energy Conservation Code and High Performance Building Ordinance (Albuquerque Green Building Code). In 2007, the city council adopted both volumes for implementation as of October 1, 2008.

In both volumes of the code, a controversial requirement addressed the replacement of HVAC equipment in existing buildings and homes. Both codes mandated that a building owner that decided to replace the existing HVAC equipment exceed federal energy efficiency requirements by at least 30 %. In order to comply with this requirement, the code allowed the building owner several options. The building owner could either attain a LEED Silver certification and demonstrate that the designs provided 30 % more efficiency or implement and install the specific components specified in the code that met the City of Albuquerque's energy goal. However, in a residential dwelling, the structure could also become compliant if it

met the guidelines of Build Green New Mexico or if the owner met certain mandatory requirements that exceeded federal energy efficiency specifications on a standard reference design.

Subsequently, three trade associations representing manufacturers, distributors and installers of HVAC products as well as 12 local distributors and contractors who sell and install HVAC products challenged specific provisions of the newly adopted code as improper under the Supremacy Clause of the Constitution. The plaintiffs asserted that the EPCA, NAECA, and EPACT preempted the Albuquerque Green Building Code because Congress already set minimum energy efficiency standards for buildings. Following the filing of the claim, the plaintiffs sought and received a preliminary injunction suspending the enforcement of the Albuquerque Green Building Code.

In its final decision on the matter, the New Mexico District Court evaluated each volume and related requirement separately to determine if the Supremacy Clause applied. In evaluating the Albuquerque Green Building Code, the court explained that "[t]he plain language of the preemption statute makes clear that Congress intended the preemption to be broad in scope. Congress recognized that [NAECA] 'preempts state law under most circumstances.'" This served as the basis for the court to invalidate the more stringent energy efficiency standards required in the Albuquerque Green Building Code.

Separately, the court also considered the standard reference design aspects in relation to one preemption exception contained in the underlying statute. In the statute, one of the requirements allows an exception

> [i]f the code uses one or more baseline building designs against which all submitted building designs are to be evaluated and such baseline building designs contain a covered product subject to an energy conservation standard … the baseline building designs are based on the efficiency level for such covered product which meets but does not exceed such standard… (42 U.S.C. § 6297 (f)(3)(D))

Consequently, the court held that the exception did not apply because the higher level energy efficiency requirements served as the basis for the standard reference design.

Also involving this exception, the court considered a motion from the plaintiffs that asserted the LEED and Build Green New Mexico programs failed to qualify as well. While the applicable programs might qualify on specific products needed to attain certification, the plaintiffs failed to indicate a specific element within each program that would cause a preemption situation. Thus, the court left untouched the LEED and Build Green New Mexico aspects of the Albuquerque Green Building Code with the exception of the higher energy efficiency requirements.

2.14 BIAW v. Washington State Building Code Council

Based on a determination by the State of Washington Legislature that in excess of 30 % of the jurisdiction's greenhouse gases emanate from energy used in buildings, it directed the adoption of a new building code. In making this declaration, the

Washington Legislature stated that the "residential and nonresidential construction permitted under the 2031 state energy code must achieve a 70 % reduction in annual net energy consumption, using the adopted 2006 Washington state energy code as a baseline." With these directives in mind, the Washington State Building Council (Council, 2011, 2012) needed to review and revise the energy provisions of the state's building code to meet the new policy.

Upon revising the state's building code, the Council kept in tact the underlying mechanism that offered a litany of options for compliance. The new proposal required that a structure earn at least 1.0 credit from a list of nine options that range from 0.5 to 2.0 credits unless a computer simulation or "alternative calculation" procedure shows that the expected annual energy use of a proposed design uses less energy than a code-defined target home. Consequently, a consortium of plaintiffs challenged this action on the grounds that various federal regulations preempt the Council's new code because it required homes to have HVAC, plumbing, or water heating equipment whose efficiency exceeds the standards set forth by the federal government in applicable legislation.

In conducting its legal analysis on whether the EPCA overrides the Council's actions, the court found prima facie evidence of preemption; but it also considered the enumerated exceptions contained within the statute. Within 42 U.S.C. § 6297 (f)(3)(B), the court determined that the Council's approach did "not require use of covered products exceeding federal efficiency standards as the only way to comply with the code." Further clarifying its position with regard to preemption in situations considered as "some circumstances", the court explained that the plaintiffs "must show that under no circumstances is the Code constitutional," which did not happen in the case it was deciding.

Continuing its analysis, the court considered whether the Council's plan sufficiently offered equivalent measures and credits to the greatest degree possible with the standards set by the federal government. In evaluating the plaintiff's assertions that the Council's options did not offer equivalent measures and credits, the plaintiffs failed to persuade the court of a significant disparity in credits with the federal government's standards. This claim of needing to offer equivalent measures also included an assertion by the plaintiffs that the Council did not consider financial costs. The court explained that the applicable provision allowed for energy costs to serve as an equivalent basis, which supported the Council's approach because Congress' choice of language permitted such flexibility.

Finally, the court evaluated the plaintiff's contention that the Council's options that exceeded the federal standard did not provide a sufficient number of choices that also met the national requirement. However, this court immediately explained that the number of selections in the Council's code provided balance but that on December 22, 2010, the DOE issued a waiver of its federal preemption status for state regulations relating to the efficiency of showerheads, faucets, water closets and urinals, which eliminated most of the assertion. Moreover, the court expanded on its prior equivalency notion to reiterate that various options offered under a state plan need not correspond financially for a builder so long as the energy

efficiencies are comparable. Hence, the trial court upheld the Washington State Building Code in a Summary Judgment decision as permissible within the context of EPCA.

On appeal, the Ninth Circuit Court of Appeals reviewed the lower court's analysis and decision and repeatedly validated the opinion. The appellate opinion also distinguished the Washington State Building Code from the Albuquerque Green Building Code. The Albuquerque Green Building Code's approach left no choices for a builder and imposed significant costs on those installing products adhering to federal standards by necessitating additional equipment to meet the higher efficiency requirements. In contrast, the Washington State Building Code did not burden builders with additional costs or require the use of higher efficiency products; so it did not conflict with the federal statutes.

Hence, these two cases demonstrate how the courts will react to the adoption of more stringent building codes that attempt to elevate the energy efficiency standards as part of the policy goals for more sustainable structures. As such, the circuit split appears reconcilable on the grounds that a jurisdiction's approach to advancing its policy goals must be mindful of the national objectives laid out by Congress but can still work within the articulated framework if drafted properly and reviewed by those with knowledge of the many pertinent facets of federal law.

2.15 Conclusion

Given the contrasting styles used by state and local governments to bring forth meaningful change towards a more sustainably built environment, the courts appear willing to support the efforts made by policymakers to adopt green building standards. The opinions in both cases found preemption to exist and then looked to the enumerated exemptions under the law as a possibility for upholding the mandate. A determining factor in both cases appeared within the realm of flexibility exhibited by the two different approaches undertaken by the two codes, which provided a distinction in allowing the Washington State Building Code to survive its challenge. The underlying assumptions that used energy costs in lieu of energy consumption as well as balancing the options available for compliance reinforced the permitted exception defense as acceptable.

On the other hand, the City of Albuquerque chose to include prescriptive provisions within its approach for mandating energy efficiency and ultimately failed to fit within the statutory exemptions allowed by the preempting federal law; yet, the court declined to extend its analysis to the third party verification systems like LEED and Green Globes on the grounds that the plaintiffs failed to connect a product within the program to the federal statute. As such, the court validated the use of third party verification programs as a means to promote sustainability goals because no conflicted existed.

In light of these court decisions, those policymakers that choose to advance their sustainability goals by enacting legislation that obligate developers to include more

environmentally and energy efficient features into newly constructed structures may face many obstacles including a preemption challenge; however, these recent court decisions also reveal a willingness to accommodate the efforts by subnational governments to progress their agenda so long as the enactments offer flexible options to those affected through an internal or externally adopted standard using a supported method of calculation. Hence, the drafters of legislation that promote sustainable solutions within the built environment along with its promoters and supporters need to proceed in a diligent and careful manner if they wish to survive a preemption challenge in the courts.

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