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MEMORANDUM

DATE: January 12, 2018

TO: Board of Supervisors
Department of Planning and Building Services

FROM: Matthew T. Kiedrowski, Deputy County Counsel *MK*

SUBJECT: Opinion #18-002: Class K Housing

Question 1: Is the County required to permit Class K buildings only under the standards of the current version of the California Building Standards Code, or may the County look to earlier versions of the California Building Standards Code?

Short Answer 1: The County may modify the State's Limited Density Owner-Built Rural Dwellings Regulations pursuant to Health and Safety Code section 17958.2, after making findings based on local conditions. In addition, Section 126 of the State's Limited Density Owner-Built Rural Dwellings Regulations provides that current technical codes are to be used as a basis for approval, but are not absolutely required. It appears that the County has the authority to modify its regulations to review buildings pursuant to standards other than those found in the current California Building Standards Code, after making required findings. However, there is minimal review of this code section and how it may need to be reconciled with other statutes.

Question 2: Is the County able to exempt construction pursuant to the State's Limited Density Owner-Built Rural Dwellings Regulations from building requirements related to fire sprinklers or wildland-urban interface ("WUI") standards?

Short Answer 2: The County has the authority to adopt and modify the State's Limited Density Owner-Built Rural Dwellings Regulations pursuant to Health and Safety Code section 17958.2, after making findings based on local conditions. Based on this section, the County may have the authority to exempt such buildings from the fire sprinkler requirements in the California Building Standards Code, but other statutes exist that complicate the analysis. It does not appear that the County may exempt such buildings from the WUI standards.

Discussion

1. *Relevant Statutes and Regulations*

Adoption of the California Building Standards Code. The State Housing Law (Health and Safety Code section 17910 *et seq.*) expressly requires cities and counties to adopt the minimum building

standards to be established by the state. (*Leslie v. Superior Court*, 73 Cal.App.4th 1042, 1048.) In enacting the State Housing Law, the Legislature has clearly expressed its intent to fully occupy the field of building standards. Consequently, local governments are precluded from enacting building standards that differ from state standards unless a state statute specifically authorizes a local government to do so. (*Id.*) Pursuant to Health and Safety Code section 17958, the provisions of the California Building Standards Code (“CBSC”) shall be applicable to a city and county and shall become effective 180 days after publication by the California Building Standards Commission (“Commission”). Cities and counties specifically have the ability to amend, add or repeal ordinance or regulations to impose the CBSC requirements or make changes or modifications in those requirements upon express findings.

Health and Safety Code section 17958.5 provides that a city or county may make modifications to the requirements published in the CBSC that it determines are reasonably necessary because of local climatic, geological or topographical conditions. Health and Safety Code section 17958.7 requires that such findings and determinations be filed with the Commission. No modification or change is effective until filed with the Commission and the Commission may reject a modification or change if no finding is submitted. However, the California Attorney General has issued an opinion that the State is not required or permitted to undertake any review or interpretation of the propriety of the findings made by the city or county. (55 Cal.Ops.Atty.Gen. 157) This is not to say that the findings could not otherwise be challenged through the filing of a legal action.

Adoption of the State Regulations for Limited Density Owner-Built Rural Dwellings. Health and Safety Code section 17958.2, adopted in 1980, provides for the adoption by cities and counties of the State’s regulations for limited-density owner-built rural dwellings, which are codified at Title 25, Code of California Regulations, section 74 *et seq* (“State Regulations”). Section 17958.2 provides that the State Regulations only become operative in a city or county after the governing body makes an express finding that the application of those regulations is “reasonably necessary” because of “local conditions.” Section 17958.2 also permits a city or county to make any changes or modifications to the State’s regulations that the city or county determines are “reasonably necessary,” again because of local conditions.

Section 80 of the State Regulations additionally provides that the governing body shall adopt regulations imposing the same requirements as the State Regulations, pursuant to Health and Safety Code sections 17958, 17958.5 and 17958.7. This reference would appear to require the adoption of the State Regulations by the city or county to include findings not just regarding the “local conditions” pursuant to Health and Safety Code section 17958.2 but the “local climatic, geological or topographical conditions” pursuant to Health and Safety Code section 17958.5. Research has not revealed any case law review of either Health and Safety Code section 17958.2 or the State Regulations.

Implementation of the State Regulations. The State Regulations contain several sections that appear to provide local governments with flexibility as to applying the California Building Standards Code. The starting point for construction under the State Regulations is found in Section 122, which provides that structures shall be constructed in accordance with applicable requirements found in Title 24 of the California Code of Regulations – the CBSC.

Section 126 provides for flexibility, stating that except as otherwise provided by the State Regulations, dwellings and appurtenant structures constructed pursuant to the State Regulations “need not conform with the construction requirements prescribed by the latest applicable editions of the Uniform Building, Plumbing, and Mechanical Codes, the National Electrical Code, or other applicable technical codes.” Subsequent sections specify certain mechanical, electrical, and plumbing requirements. Section 126 does temper the initial flexibility, additionally stating that “it is not the intent of this section to disregard nationally accepted technical and scientific principles relating to design, materials, methods of construction, and structural requirements for the erection and construction of dwelling and appurtenant structures as are contained in the uniform technical codes.”

Lastly, Section 124 contains a statement of intent for the application of the general requirements of Section 122. It states that the purpose of the State Regulations is to facilitate alternatives to the uniform technical codes “to the extent that a reasonable degree of health and safety is provided by such alternatives, and that the materials, methods of construction, and structural integrity of the structure shall perform in application for the purpose intended.”

California Fire Sprinkler Requirement. Beginning with the 2010 CBSC cycle, California Residential Code section R313.2 requires that an automatic residential fire sprinkler system be installed in one- and two-family dwellings. Section R313.2 explicitly states that such sprinkler systems shall not be required for additions or alterations to existing buildings that are not already provided with an automatic sprinkler system. Government Code section 65852 provides that accessory dwelling units shall not be required to provide fire sprinklers if they are not required for the primary residence.

California Wildland-Urban Interface Fire Area Requirements. Requirements related to WUI fire areas are found in several locations, including California Government Code section 51175 *et seq.*, California Health and Safety Code section 13108.5, California Public Resources Code section 4291, Chapter 7A of the California Building Code, Chapter 49 of the California Fire Code, California Residential Code section R337, Title 14 California Code of Regulations section 1299.01 *et seq.*, and Title 19 California Code of Regulations section 3.07. The requirements generally encompass building standards and maintenance of vegetation and fuels surrounding buildings.

Fire Protection Statutes. Health and Safety Code section 18941.5 generally provides that nothing in either the State Building Standards Law (Health and Safety Code section 18901 *et seq.*), nor the application of the CBSC itself, shall limit the authority of a city or county to establish more restrictive building standards that are reasonably necessary because of local climatic, geological or topographical conditions. Health and Safety Code section 13143.5 provides that notwithstanding either the State Building Standards Law or the State Housing Law (which includes Health and Safety Code section 17958.2), any city or county may make changes or modifications that are more stringent than the CBSC relating to fire and panic safety.

Health and Safety Code section 13143.5 was reviewed at length in *Bldg. Indus. Ass'n v. City of Livermore*, 45 Cal. App. 4th 719. That case reviewed whether a city could require fire sprinklers

to be installed in new residential construction, at a time when the California Fire Code did not require sprinklers. The case found that local governments had the ability to adopt more restrictive standards than the building code. The case did not involve a local government that had adopted the State Regulations.

2. *Ability to Modify What Requirements Apply to Class K Type Buildings*

Pursuant to Health and Safety Code section 17958.2 and section 80 of the State Regulations, the County may adopt and modify the State Regulations, so long as the County adopts findings stating the local climatic, geological or topographical conditions that make adopting and modifying the State Regulations reasonably necessary. Adoption and modification of the State Regulations would take the form of an ordinance creating a chapter of the County Code incorporating the State Regulations (such as the County's existing Chapter 18.23), and making modifications to various sections based on the local condition findings.

The baseline requirement of the State Regulations is compliance with the CBSC. Section 122 of the State Regulations provides that buildings shall be constructed in accordance with applicable requirements contained in subchapters 2 through 12 of Title 24 of the California Code of Regulations, which is the CBSC. The CBSC is updated every three years; in making a general reference to Title 24 and the CBSC, the State Regulations are most reasonably read as requiring that buildings under the State Regulations be reviewed against the current version of the CBSC.

This baseline requirement is softened by other sections of the State Regulations. Section 124 provides that alternatives to the specifications of the uniform technical codes should be facilitated to the extent that a "reasonable degree of health and safety" is still provided by such alternatives. The enforcement agency is to exercise "reasonable judgment" in determining compliance. Section 126 additionally provides that conformance with "requirements prescribed by the latest applicable editions" of the codes is not required (except as specifically required by the State Regulations), but that the codes should be used as a basis for approval. Section 126 provides some guidance in further stating that the intent is not to disregard "nationally accepted technical and scientific principles" relating to design, materials, methods of construction and structural requirements.

Without modification, the State Regulations appear to provide discretion to the enforcement agency as to what provisions of the CBSC must be applied. However, the ability to modify the State Regulations pursuant to Health and Safety Code section 17958.2 appears to enable the County to more particularly specify what provisions of the building, plumbing, mechanical, electrical "or other applicable technical codes" do not apply within the County. Upon making the local condition findings, the County would seemingly have the ability to modify the requirements of the California Residential Code, or provide that older versions of the CBSC could be relied upon for permit review and issuance.

However, there has been minimal review of Health and Safety Code section 17958.2 or the State Regulations at any level, either administrative or judicial. This makes it difficult to discuss limitations or boundaries on the grant of authority provided to local governments under these provisions, or how these provisions can or should be reconciled with other state statutes that

govern amendments to the CBSC.

3. *Ability to Exempt from Fire Sprinkler Requirements*

As discussed above, the provisions of Health and Safety Code section 17958.2 are potentially broad enough to permit amending the State Regulations (as applied through a local ordinance) to refer to older versions of the CBSC – though only based on findings showing that doing so is reasonably necessary based on local conditions. In this case, the older code version may predate the fire sprinkler requirement so a specific exemption is not necessary. Alternatively, if the local ordinance follows the State Regulations and refers generally to the CBSC, the County would need to specifically exempt construction from the fire sprinkler requirement.

The requirement to install fire sprinklers in dwelling units is found in the California Residential Code, which contains the construction requirements for dwelling units and is analogous to either the “building” code as referenced in Section 126 or is an “other applicable technical code.” As such, the overarching ability of the County to amend the State Regulations would appear to allow for amending how provisions found in the California Residential Code apply to construction under the State Regulations within the County.

However, it is not clear whether or to what extent the ability to modify the State Regulations under Health and Safety Code section 17958.2 must be reconciled with other statutory provisions. Health and Safety Code section 13143.5 prompts particular concerns. This section was initially adopted in 1990, years after the initial adoption of Health and Safety Code section 17958.2, and years before the inclusion of the fire sprinkler requirement in the California Residential Code in 2010 (which was also the first time the California Residential Code was adopted).

The permissive grant of authority of Health and Safety Code section 13143.5 is that a city or county may make changes or modifications that are *more stringent* than those in the CBSC relating to fire and panic safety, and the other regulations adopted pursuant to Part 2 of Division 12 of the Health and Safety Code, regarding Fire Protection. What is not granted by the section is the ability to adopt *less stringent* requirements relating to fire and panic safety.

Generally, as a political subdivision of the State, the County has the authority provided to it by law. In the context of Health and Safety Code section 13143.5, this would mean that the County could only adopt more restrictive fire and panic safety standards.

That being said, other counties have revised fire sprinkler requirements in their respective “Class K” ordinances. Mono County, which adopted a Class K-type ordinance only as a pilot program (for up to 5 houses or until December 31, 2014, whichever occurs last), provides in Section 15.50.140 of its county code that fire sprinklers are not required. Butte County, in Section 26-91 of its county code, only requires that fire sprinklers be installed in residential structures over 1,250 square feet in size (the Butte County ordinance only applies in a specified area of the County affected by a 2008 fire). Sonoma County, in section 7A-34 of its county code, only requires the installation of fire sprinklers in structures greater than 640 square feet, where a pressurized water delivery system is incorporated into the structure, and where the structure is

located a minimum of 100 feet from all other buildings.

The sections of the California Residential Code requiring fire sprinklers do not contain mechanisms for either reducing in part or completely eliminating the requirement for sprinklers. The only way to do so would be pursuant to the authority of a separate statute, the most on point of which would be Health and Safety Code section 17958.2.

We have been unable to locate research or materials that indicate whether or not changes made pursuant to Health and Safety Code section 17958.2 must be reconciled with other methods for CBSC amendment. The actions of other counties lends support to the idea that the ability to amend the State Regulations pursuant to Health and Safety Code section 17958.2 can be used to revise or eliminate fire sprinkler requirements. But there is no explicit authority showing that the section can be relied upon to avoid the provisions of other sections which would require modifications to be more restrictive.

4. *Ability to Exempt from WUI Requirements*

Unlike the requirement to install fire sprinklers, requirements related to WUI standards are not found only in the CBSC but are imposed through California statute itself. Health and Safety Code section 13108.5 not only provides for the establishment of fire protection building standards, but specifies where they apply: in fire hazard severity zones as designated by the Director of Forestry and Fire Protection pursuant to Public Resources Code section 4200 *et seq.*, or in very high fire hazard severity zones designated pursuant to Government Code section 51175 *et seq.* The section additionally provides that the building standards adopted pursuant to that section shall also apply to buildings located in “urban wildland interface communities,” which is defined as a community listed in a specific report produced by the Department of Forestry and Fire Protection.

Health and Safety Code section 13108.5 also allows local agencies to include or exclude certain areas from the requirements imposed by that section. A local agency may, at its discretion, include or exclude from the requirements of the building standards imposed by that section “any area in its jurisdiction following a finding supported by substantial evidence in the record at a public hearing that the requirements of these building standards are necessary or not necessary, respectively, for effective fire protection within the area. Changes made by a local agency to an urban wildland interface community area following a finding supported by substantial evidence in the record shall be final and shall not be rebuttable.

Health and Safety Code section 17958.2 provides statutory authority to adopt the State Regulations and make changes to the State Regulations as supported by local condition findings. While this is a broad grant of authority to revise CBSC requirements via the State Regulations, this grant of authority does not supersede the requirements of a separate state statute imposing certain building requirements. Since Health and Safety Code section 13108.5 is statutorily imposing the WUI building requirements, the County does not have the ability to amend the State Regulations to exempt Class K buildings from these requirements.

In addition, Health and Safety Code section 13108.5 creates a more specific process for

excluding certain areas from the application of the WUI building standards. This process involves a public hearing and making a finding that the WUI building standards are not necessary for effective fire protection, based on substantial evidence. This is a more onerous standard compared to that required for a typical ordinance, which is normally that there is a rational basis for the regulation. By creating a more specific and onerous process for exemption (or inclusion) in Health and Safety Code section 13108.5, the Legislature indicated that areas should only be removed from the application of WUI standards under those circumstances. If Health and Safety Code section 17958.2 was used to revise the State Regulations to exempt buildings from WUI standards, the more specific statutory process would be undermined.

MTK/jc