

Energy Codes in the Home Rule West

How home rule affects building energy code adoption and implementation in Arizona and Colorado

Arizona

Political Culture

Even in the midst of rapid demographic shifts over the past thirty years that have brought millions of new people to and through the state, Arizona has maintained its strong political and legal tradition of local government and home rule authority. Staunchly Republican and anti-big government, the political culture at the local level, particularly for the native Arizonans who participate in governance (and not the newer, highly transient population), is one of resistance to state controls and all “mandatory” regulations, such that the word is taboo in the state legislature.¹

Home Rule History

As a state settled during Western expansion, Arizona has always had a strongly individualistic disposition. It was founded during the heart of the progressive government movement, and its 1912 constitution reflects the desire of reformers to prohibit special legislation and ensure the rights of localities to exercise exclusive jurisdiction over purely local matters. It granted municipalities with 3,500 people or more the right to create their own city charters, “consistent with, and subject to, the Constitution and the laws of the State.” While only about half of eligible municipalities have adopted their own home rule charters, the more significant point is that local autonomy is an established, deeply engrained and cherished practice in Arizona, and, by and large, both state and local political forces are comfortable with this century-old arrangement.²

Energy Codes in Arizona

All building codes in Arizona fall under local jurisdiction. In the 1990s, the legislature passed a statewide plumbing code, roundly acknowledged now as a complete disaster. Without the state infrastructure to support it, local jurisdictions ignored the mandate and continued updating the plumbing code on their own. The statewide minimum fell behind and ceased to provide any benefit. The attitude at the local level is that the state should not mandate statewide minimum standards if it is not going to provide local jurisdictions with the resources to implement them.

In general, Arizona municipalities view buildings, particularly residential, as an issue that is, at its heart, about personal safety and, therefore, of local concern. They are reluctant to cede any authority to the state, believing that doing so would break the personal connection between homeowners and building officials. On a philosophical level, local authorities believe that they know what building practices are

best for their communities and that state intrusion into how they construct buildings is ineffectual at best and harmful at worst. On a practical level, their most common argument is that more stringent code adoption and the ensuing enforcement process is too costly and time-consuming for the builder and that, since the state bears none of this burden, it has no grounds for mandating such regulations. This is hardly a contrarian opinion in the state, as the state legislature, buoyed by a powerful home rule lobby, generally agrees to leave building codes to local jurisdictional control.

Energy code adoption in Arizona is erratic and ranges from jurisdictions working on advanced codes to others that have yet to adopt any. As in other home rule states³, the majority of densely urbanized areas have adopted an energy code, but many of the smallest and least affluent jurisdictions have not. The local building code official holds significant power over this process, as he or she makes recommendations to the city council on which codes to adopt. Multiple organizations and committees recommend code adoption policies and provide training, as well, including The Arizona Building Officials (AZBO) and the Maricopa Association of Governments (MAG) Building Codes Committee, among others.

The role of the state Department of Commerce Energy Office is to provide educational information and supporting materials to local jurisdictions. It is proactive in approaching jurisdictions, but careful not to represent the will of the state and only support those communities that request its expertise. While the Energy Office, along with some code officials, acknowledges the inefficiencies inherent in adopting codes on a jurisdiction-by-jurisdiction basis, it believes that, based on the political climate of the state and in the absence of sufficient state funding, this method is more effective than a coercive effort to force through a mandatory statewide code. The Energy Office cites strong enforcement as one benefit of local adoption, stemming from each municipality's sense that it—and not the state—has chosen the right path for its own community.

Still, there are statewide energy code advocates working in Arizona, most notably the Southwest Energy Efficiency Partnership (SWEET). They provide outreach and educational services to builders, designers and code officials, including above-code work, and lobby the legislature on a small number of code-related bills. Representative Lucy Mason is the strongest code supporter in the legislature, having introduced multiple energy- and code-related bills this year and in the past. One such bill currently up for debate is HB 2337, which would establish “voluntary statewide goals” for energy efficiency in buildings. Some building officials, too, are frustrated with the patchwork nature of code adoption and implementation statewide, although this group is in the minority. For the moment, it is unclear if the legislature can pass “voluntary statewide goals,” much less a mandatory statewide energy code. Furthermore, there is concern among code advocates that the legislature could consider adding an amendment to HB 2267 that would mandate a five-year moratorium on new code adoption.

Observations

In speaking with people involved on all sides of the energy code debate, we believe that Arizonans are the most loyal and resolute defenders of home rule authority; they are also the fiercest. It is apparent that there is a deep sense of pride in the right of municipalities to provide services on the local level and

to rule without state interference into such concerns, as well as a general mistrust of regulatory government on the state and federal levels. Arizonans believe that nobody at these levels should tell them what to do. The League of Arizona Cities and Towns and others protect local government independence and authority in the state legislature, and the AZ Building Officials (AZBO) and the National Association of Homebuilders (and their three regional chapters in the state) do the same with regards to local control of building energy code adoption.

More than in any other state researched⁴, home rule in Arizona is a real barrier to statewide code adoption. The local authorities want to adopt codes on the local level, and the state is content to continue this arrangement. Although, as mentioned above, there is sporadic support from some code officials and legislators, until support grows for a statewide energy code from involved parties within the state political system itself in a unified and coordinated manner, we doubt that outside forces will find much success advocating for an overhaul or adjustment of this system.

This is not to say that a statewide energy code is impossible. There is nothing in the state constitution that would prevent it, and it is not beyond reason to believe that enough political actors could change their positions in the future. This would require a significant shift in the political culture, which, by nature, would take time and effort. However, in the current political and economic environment, we do not believe that code advocates should devote much energy on a statewide code (see Strategies below). Furthermore, it is a question of effort: should we choose to work hard or work smart? With limited labor and resources, we would be better served by focusing on the many more manageable, realistic and shorter-term goals around the country than to engage in a problematic and fractious long-term fight with the goal of upending a deeply rooted political tradition.

Strategies to Consider

We recommend that, for now, we accept that jurisdiction-by-jurisdiction code adoption works best in Arizona. Arguing that statewide code adoption is more efficient and citing successful models in other states will not easily convince Arizonans that it is the right system for them. Such an approach would risk the ability of organizations to offer much-needed services on the local level. It is not a question of defeating or overcoming home rule so much as working with it.

Education and training are the areas in which we believe that advocates can provide the most help to Arizona, as misinformation and lack of knowledge do more to deter the adoption and implementation of energy codes than the home rule system ever could. All involved parties need to know the true benefits and costs of energy codes, just as builders and code officials need to understand how to comply and enforce them. We should reach out, in particular, to code officials, who hold considerable sway in the adoption process. Moreover, increasing education and training now will lay the groundwork for finding receptive partners for statewide adoption in the future, should that become a viable strategy.

There are multiple reasons why the current economic environment further supports education and training on the local level. First, misinformation regarding the costs of building and updating codes to

newer codes is especially detrimental when home builders and building departments alike are struggling financially. Arizona had a large construction bubble burst in the aftermath of the subprime mortgage crisis, and the home builders are reacting defensively to any, and all, perceived additional costs. In this climate, exaggerated price tags such as \$40,000 to adopt the 09 IECC have even more influence than usual. It is, therefore, more important than ever to counter the home builder lobby's data with our own.

Second, now is the perfect time to educate and train home builders and code officials. To be blunt, they have the time because there are fewer new buildings to construct or inspect. The opinion of energy code advocates in the state is that, while builders and code officials might be more skeptical than ever, they are also more inclined to listen to ideas that cut costs or increase savings. It is important to take advantage of this unfortunate downturn to advance the cause of energy codes because, as has become cliché in Washington, a crisis is a terrible thing to waste.

Third, as mentioned above, the anti-statewide code lobbies are fighting harder than ever against code legislation due, in part, to the 2009 IECC provision in the American Recovery and Reinvestment Act (ARRA). The state legislature will not introduce a mandatory statewide code this session. Despite accepting ARRA funding, they might put a moratorium on all code updates. With money tight and anti-code lobbying in full force, it would be better to wait for a more opportune time to reintroduce the statewide code debate.

This should not pose a problem, as supporting the local jurisdictions on code adoption and implementation is a weighty task that will require much investment in time and resources. Should advocates pursue the adoption of a statewide code in the future, it is imperative that we reach out to the code officials, who hold considerable sway in the adoption process. Convincing the code officials to support a statewide code enforced on the local level would be crucial to its ability to pass the legislature. AZBO's official position is to maintain the traditional practice of local control of codes. Yet there are minority voices in the organization that believe in a more practical, less philosophical approach and might support a well-written and funded mandate created in partnership with the code officials.⁵

Colorado

Political Culture

Colorado has a well-defined and comfortable relationship between state and local governments, with separate and concurrent powers for each delineated in the state constitution and through established legal rulings. Local jurisdictions exercise considerable authority from state intervention, such that local regulations supersede state law on issues of purely local importance. Some characteristics of the local political culture include a sense of cooperation among jurisdictions, the expectation of independence from state authority on most issues and the firm belief that local governments do a better job of

delivering services to their constituents. Within clearly defined limits, cities in Colorado are free to chart their own courses.⁶

Home Rule History

Home Rule in Colorado begins with the people. Drafted in 1902, Article XX of the 1876 state constitution, still in effect today, declares that “the people of each city or town of this state, having a population of two thousand inhabitants...are hereby vested with, and they shall always have, power to make, amend, add to or replace the charter of said city or town, which shall be its organic law and extend to all its local and municipal matters.” The constitution confirms that home rule authority “shall supersede...any law of the state in conflict therewith” for such matters. Much like Arizona, the framers of the state constitution embodied the independent spirit of the state’s settlers. They also shared a desire to protect the people from special legislation that permitted state interference in municipal concerns, particularly in the capital and largest city, Denver. The framers, though, took their support of home rule authority one crucial step further by expressly prohibiting the state from revoking the citizens’ right to charter adoption. This unique constitutional feature of home rule in Colorado thus ensures that home rule is and will remain the dominant political system in the state until the people decide to change it.⁷

Energy Codes in Colorado

Colorado adopts and enforces building energy codes at the local level. The electrical code is the only true statewide mandatory code, though local building departments often enforce it within their own jurisdictions. This practice reflects the general attitude of local code and elected officials across the state, who believe that they are capable of making intelligent decisions regarding building code adoption and implementation for their own communities. Cities in Colorado have greater fiscal autonomy and are responsible for a larger percentage of their revenues than cities in most other states, providing them with the resources to manage every step of the code process with little need for state assistance.

HB 1146, passed in 2007, is an interesting piece of legislation as it sets the 2003 IECC as the minimum energy code requirement, albeit with an important caveat: it applies only to jurisdictions that a) have adopted any type of building code or b) will do so in the future. Since a large percentage of jurisdictions in Colorado fall under the former, the bill is a de facto mandatory minimum. However, some of these jurisdictions have been proactive about adopting and updating their energy codes on a three-year cycle. A number of them had already adopted or were in the process of adopting the 03 IECC prior to the passage of the bill; others were working on adoption of the 06 IECC or above-code measures. Having set the bar sufficiently low, HB 1146 functioned more as a catalyst for slower jurisdictions to catch up. For the mostly small and rural jurisdictions in the latter category without building codes of any kind, it does serve as a mandatory minimum, should they decide to adopt a building code in the future. The bill also allows jurisdictions who adopt only the IRC to substitute Ch. 11 for the 2003 IECC.

Although it varies somewhat by jurisdiction, the adoption process is straightforward: building department officials review the newest codes and present their recommendations to the city council, which then votes on adoption. Building departments enforce codes within their jurisdictions, and county building departments cover unincorporated land. Under the umbrella of the Colorado Chapter of the ICC, local building departments cooperate to provide educational and training services. The Governor's Energy Office (GEO) also works in conjunction with the Chapter and the EPA ENERGY STAR program on these services. In 2008, it ran thirty workshops in cities across the state to provide training on the 2006 IECC. GEO's position is to be proactive in providing whatever support, funding and resources it can to any municipality that wants its assistance. There seems to be an understanding between GEO and local jurisdictions that regular, uniform code adoption on the local level works best for Colorado. On a related note, the state legislature is not considering any bills related to energy codes at this time, and SWEEP is not active in advocating for a statewide energy code.

Observations

Energy codes are gaining momentum in Colorado. Representatives of both the Colorado Chapter of the ICC and the GEO expressed, in a brief interview, their excitement at getting to work on adopting the 2009 IECC. They are confident that their proactive, coordinated efforts will result in a large proportion of jurisdictions updating to the 09, including some who will jump from the 03. Even among smaller jurisdictions, there is growing interest in energy codes, due in large part to HB 1146 and the recent expansion of educational and training seminars to all corners of the state. Similar to Arizona, there is still a strong sense among energy code advocates that jurisdiction-by-jurisdiction adoption is superior to statewide control. Unlike in Arizona, local jurisdictions in Colorado appear to be embracing codes; home rule influences the "how" of code adoption, but not the "why."

It is this optimism more than anything else that persuades us to think that a mandatory statewide energy code might be possible. As adoption and compliance grow and become more uniform, local jurisdictions might come to appreciate and rely on increased support from the GEO. Code supporters might also feel that a mandatory code would be the final step in bringing the last recalcitrant jurisdictions in line and achieving 100 percent compliance. Based on the precedent of a statewide electrical code, adopting a mandatory statewide energy code would be a political battle, as opposed to a legal one. However, it is not a pressing concern, as there is not sufficient political support within the state for such an action.

Nevertheless, we do not believe that pursuing a mandatory statewide energy code should be the top priority in Colorado. Home rule is not a barrier to statewide adoption, but it is a formidable obstacle. The "local-first" political culture of the state is pervasive and firmly rooted. Again, it is a question of allocating limited resources to take on a difficult fight when so much else needs to be done. It may not be beneficial on a practical level, either. The current revenue structure in the state is such that local jurisdictions fund their own building departments with no state support. Without allocating resources for significantly expanding GEO or channeling them to local building departments, passing a statewide

energy code would amount to an unfunded mandate. It might technically require uniform adoption and implementation statewide, but without financial teeth, it will not change the situation on the ground. Moreover, energy code advocates have already developed a statewide energy code support network that essentially carries out all of the functions of a statewide office. Collectively, Colorado jurisdictions are implementing a statewide energy code—it is just not mandatory.

Strategies to Consider

From the outside looking in, it appears that there is reason to be relatively optimistic about the possibilities for code adoption and implementation in Colorado, particularly when considering the complications inherent in home rule authority. Code advocates should find a way to work within the established code advocacy process outlined above. Colorado jurisdictions are taking it upon themselves to improve their building efficiency, albeit on the local level, and we have an opportunity to further their efforts as needed by providing guidance and resources, both on technical side of training and compliance and with advocacy support on the jurisdictional level for code and elected officials.

The state legislature has so far not shown any inclination towards trying to comply with the language of the stimulus bill concerning adoption of the 2009 IECC. It is, therefore, still unclear how much ARRA funding the Governor's Energy Office will receive. Regardless, the number will be in the tens of millions of dollars or more. Having undergone an overhaul in 2007, GEO is a relatively new energy office. The confluence of an influx of federal money and an energetic department still defining its role in the state presents a terrific opportunity to offer strategic consultation, particularly of the best practices and lessons learned variety. Code advocates should work to strengthen their relationship with GEO as it continues its mission of supporting local jurisdictions planning to adopt the 2009 IECC through an aggressive educational and training program.⁸

Endnotes

¹ Berman, David R. and Tanis J. Salant. "Arizona." *Home Rule in America: A Fifty-State Handbook*. Ed. Dale Krane, Platon N. Rigos and Melvin B. Hill Jr. Washington, D.C.: CQ Press, 2001. 41-47.

² Berman and Salant 41-47.

³ Such as Colorado and Illinois

⁴ Colorado, Missouri, Illinois, Texas and Louisiana

⁵ All other information comes from interviews BCAP staff conducted with people involved in the code process

⁶ Stilwell, Jason and Robert W. Gage. "Colorado." *Home Rule in America: A Fifty-State Handbook*. Ed. Dale Krane, Platon N. Rigos and Melvin B. Hill Jr. Washington, D.C.: CQ Press, 2001. 69-76.

⁷ Stilwell and Gage 69-76.

⁸ All other information comes from interviews BCAP staff conducted with people involved in the code process