

April 9, 1996

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**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE  
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Re: Local Government Adoption of Building Codes

Dear Mr. Jones:

Michael Jacobs of the Coeur d'Alene Building Department has requested an opinion from the Office of the Attorney General regarding whether local governments must adopt the same provisions, sections and appendices of the Uniform Building Code, and other uniform codes, as the State of Idaho itself adopts. For the reasons set forth herein, it is the opinion of this office that local governments have the ability to adopt or not adopt any codes of their choice.<sup>1</sup>

The Idaho Building Code Advisory Act ("Act"), chapter 41, title 39, Idaho Code, was adopted to provide uniform adoption and interpretation of building and safety codes in the State of Idaho. Idaho Code § 39-4101. To accomplish this goal, Idaho Code § 39-4116, as originally adopted, provided in relevant part:

Local governments shall, effective January 1, 1976, comply with the codes enumerated in this act, and such codes, rules and regulations promulgated pursuant to this act, and such inspection and enforcement may be provided by the local government, or shall be provided by the department if such local government opts not to provide such inspection and enforcement, except that the department shall retain jurisdiction of inspection and enforcement of construction standards enumerated in Section 39-4109(1), Idaho Code, for mobile homes and recreational vehicles, and for inspection and enforcement of construction standards for manufactured buildings and commercial coaches.

(Emphasis added.) Thus, local governments were originally required to adopt and comply with the codes enumerated in the Act. However, they were given the option to provide the inspection and enforcement under such codes.

In 1977 the legislature amended § 39-4116 to provide that the adoption and compliance with the enumerated codes by local governments was optional rather than mandatory. This amendment was rushed through both houses of the Idaho Legislature during the last days of the 1977 session, and there is no legislative history which would provide any insight into the intent behind the amendment.<sup>2</sup> As amended, § 39-4116 now provides in relevant part:

Local governments may, effective July 1 of any year, by affirmative action by resolution or ordinance taken by the governing board of a local government, prior to December 31 of the previous year, comply with the codes enumerated in this chapter, and codes, rules and regulations promulgated pursuant to this chapter, and inspection and enforcement may be provided by the local government, or may be provided by the department if such local government opts to comply with the provisions of this chapter but not to provide inspection and enforcement. . . . Any decision to comply with the provisions of this chapter must be communicated to the director in writing, and compliance must be for an entire year commencing July 1. The minimum codes a local government must adopt in order to opt into this chapter are the latest editions of the Uniform Building Code and the Uniform Mechanical Code. Except as listed in subsection (2) of this section, the remaining codes enumerated in the act are optional as to whether or not the local government wishes to adopt them.

(Emphasis added.)

Apparently, there has been some confusion with the language of the statute as to whether local governments are still required to adopt the latest editions of the Uniform Building Code and the Uniform Mechanical Code. However, based upon this amendment, it is the opinion of this office that local governments have the option of adopting and complying with the codes enumerated in the Building Code Advisory Act. If the local government wishes to adopt and comply with any codes enumerated in the Act, it must pass an ordinance to that effect. However, it is no longer required to adopt and comply with such codes. If the local government adopts a code(s) it can provide the relevant inspection and enforcement. If the local government opts to comply with the provisions of the Act, but does not wish to perform the inspection and enforcement, such activities can be provided by the Department of Labor and Industrial Services (“Department”). However, in order to opt into compliance with the Act, the local government must perform the steps set forth in § 39-4116 as well as adopt the latest editions of the Uniform Building Code and Uniform Mechanical Code.<sup>3</sup> If the local government fails to accomplish these steps, according to the statute it has not opted to comply with the Act, and, thus, is not required to adopt the latest editions of the Uniform Building Code and Uniform Mechanical Code or, for that matter, any code.

To interpret the statute differently would neglect established maxims of statutory construction. When a statute is clear, we must follow the law as written, and, thus, when language is unambiguous, there is no occasion for application of rules of construction. Sweeney v. Otter, 119 Idaho 135, 804 P.2d 308 (1990). The plain language of the statute (through the use of the word “may” as well as the requirement of affirmative action to “opt in” to the state system) provides local governments with the ability to adopt or not adopt any of the enumerated code provisions. Further, when the legislature amends a statute, it is deemed, absent express indication to the contrary, to be indicative of changed legislative intent. In other words, it is presumed that the legislature intended the statute to have a different meaning. Nebeker v. Piper Aircraft Corp., 113 Idaho 609, 747 P.2d 18 (1987). If the present § 39-4116 were interpreted to require the local governments to adopt the latest edition of the Uniform Building Code or Uniform Mechanical Code, absent affirmative action to opt into compliance with the Act, the 1977 amendment would be rendered superfluous. Changing the word “shall” to “may” evidences legislative intent to make adoption and compliance with certain enumerated codes optional rather than mandatory. If the local government must still adopt the latest edition of the Uniform Building Code or Uniform Mechanical Code, what is the purpose of the requirement of an ordinance and annual notification to the Department?

Although the 1977 amendment to § 39-4116 does not seem to comport with the earlier stated legislative intent in providing uniformity, such stated intent was enacted prior to the 1977 amendment and must give way to such later enactment. Presumably, in 1977 the legislature balanced the interests of local governments, industry, and the statewide uniformity goal and made the decision that uniformity throughout all levels of government was not as important as providing local governments with flexibility in adopting (or not adopting) relevant building codes.<sup>4</sup>

It should be noted that § 39-4116, as amended, has never been interpreted by the Department and local governments of Idaho as requiring local governments to adopt the latest edition of the Uniform Building Code or Uniform Mechanical Code, or other enumerated code provisions. According to the Department, no local government has attempted to opt into compliance with the Act in the required manner, including the City of Coeur d'Alene. Thus, it would appear that no local government is required to adopt the latest edition of the Uniform Building Code or Uniform Mechanical Code. In a recent statewide survey conducted in February 1995 by the Department, only approximately fifty percent (50%) of Idaho cities have even adopted a Uniform Building Code. Of those cities that have adopted the Uniform Building Code, 32 have adopted the 1994 edition, 50 have adopted the 1991 edition, 8 have adopted the 1988 edition, 3 have adopted the 1985 edition, 1 has adopted the 1982 edition, 3 have adopted the 1976 edition, and 1 has adopted the 1957 edition.<sup>5</sup>

In conclusion, local governments in Idaho are not required to adopt the latest edition of the enumerated codes in the Building Code Advisory Act. The 1977 amendment to § 39-4116 allows local governments the option of adopting such codes and, if they desire, opt into compliance with the Building Code Advisory Act. However, certain steps must be accomplished to opt into compliance.<sup>6</sup> Absent such action local governments are free to adopt or not adopt any of such codes.

I hope this letter is of assistance to you. If you have any questions, please feel free to contact me.

Very truly yours,

THOMAS F. GRATTON  
Deputy Attorney General  
Intergovernmental & Fiscal Law Division

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<sup>1</sup> This does not include the National Electric Code and Uniform Plumbing Code, which must be adopted to some extent by local governments. See Idaho Code §§ 54-1001B and 54-2601. In addition, there are certain federal guidelines which must be adopted regardless of whether the local government opts to comply with the Building Code Advisory Act.

<sup>2</sup> It is my understanding in talking with Jack Raynor of the Idaho Department of Labor and Industrial Services that the amendment arose out of a dispute regarding a state inspector's attempting to enforce certain codes against the builder of a log home.

<sup>3</sup> In 1981 this office issued Attorney General Opinion 81-5 which interpreted § 39-4116, as amended. 1981 Idaho Att'y Gen. Ann. Rpt. 73. In particular, Opinion 81-5 discussed the requirements necessary to opt into the state program, which would require the local government to adopt certain codes. Specifically, the local government must (1) adopt by December 31 of the previous year an ordinance or resolution providing for such compliance, (2) its ordinance must provide for compliance for a one-year period commencing July 1 of the year after the ordinance is adopted, and (3) the Director of the Department of Labor and Industrial Services must be notified of the election to comply. *Id.* at 74-75. As more fully discussed below, no local government has elected to opt into the state program in the required manner.

<sup>4</sup> Your letter references State v. Gage, 123 Idaho 875, 853 P.2d 620 (1993). In Gage, the court, citing § 39-4116, stated that local governments may opt local ordinances "incorporating and supplementing the latest mandatory provisions of the Uniform Building Code." *Id.* at 878. The court further provided that the Uniform Building Code had been adopted in Idaho. This language is not in conflict with this opinion, but specifically recognizes the ability of local governments to adopt the latest provision of the Uniform Building Code. In any event, the language is dicta as the court was not addressing the specific issue discussed in this opinion.

<sup>5</sup> In addition, only approximately fifty percent (50%) of Idaho counties have adopted a Uniform Building Code. Of that number 9 have adopted the 1994 edition, 10 have adopted the 1991 edition, 2 have adopted the 1988 edition, 1 has adopted the 1985 edition, and 1 has adopted the 1976 edition.

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<sup>6</sup> While the legislature has given local governments the option of whether to adopt certain uniform codes, neither such enactment nor this opinion should be read as support for not adopting a Uniform Building Code or Uniform Mechanical Code. The adoption and enforcement of such codes provides a valuable service to our communities.