

To: A. Hal Key, Jacqueline E. Schafer

May 9, 2000

Uniform Plumbing Code Commission

Re: State Plumbing Code

Arizona Department of Environmental Quality

I00-011  
(R00-006)

### Question Presented

You submitted a joint opinion request asking the following:<sup>(1)</sup>

1. Enforcement. What board, department or agency administers and enforces the State Plumbing Code ("Code"); whether the Arizona Department of Environmental Quality ("ADEQ")

has authority to administer or enforce the Code; and whether a city, town or county may enforce the Code without a delegation from ADEQ pursuant to Arizona Revised Statutes ("A.R.S.") §§ 49-106 or -107.

2. Relationship Between Code and ADEQ-Administered Laws. Whether the Code or an ordinance adopting the Code pre-empts or supersedes any laws ADEQ administers; and whether the Code can conflict with other State or local laws that address the same subject.

3. Authority of the Arizona Uniform Plumbing Code Commission ("Commission").

Whether the Commission's authority extends to:

(a) the types of wastewater and reclaimed wastewater systems covered by Appendices G, I and J of the 1994 Uniform Plumbing Code ("UPC");

(b) evaluation of site conditions and testing and evaluation of soil absorption characteristics in connection with the design and siting of systems for sewage treatment and effluent disposal to ensure environmental protection;

(c) adoption of locational setbacks established for the purpose of ensuring environmental and public health protection from the discharge of an on-site wastewater treatment and disposal system; and,

(d) selection of an on-site wastewater treatment and disposal system to ensure environmental protection when the site and soil conditions do not allow the installation of a private sewage disposal system in accordance with the specific standards provided in Appendices G or I.

4. Adoption of Local Ordinances. Whether municipalities and counties have a deadline for adopting the Code by ordinance.

5. Variances. What procedures cities, towns or counties must follow to grant variances to the Code; whether variances are limited in any way by laws administered and enforced by ADEQ; and whether the Commission can authorize ADEQ to grant variances to the Code.

### Summary Answers

1. Enforcement. Municipalities and counties enforce the Code. No State agency, including ADEQ, may enforce the Code. Local governments do not need a delegation of authority from ADEQ to enforce the Code.
2. Relationship Between the Code and ADEQ-Administered Laws. The Code does not supersede any laws ADEQ administers. The Code must be read in conjunction with other legal requirements.
3. Scope of Commission's Authority. The Commission's statutory authority extends to any subject in the UPC. The Commission may modify UPC provisions as it deems appropriate.
4. Deadline for Adopting Local Ordinances. Municipalities and counties should adopt the Code as an ordinance within six months after adoption by the Commission.
5. Variances. A city, town, or county may grant variances to the Code on an individual project basis. Any variances must be consistent with all other applicable laws. The Commission does not have the authority to allow ADEQ or any other State agency to grant variances to the Code.

### **Background**

In 1997, the Legislature established the Commission to "promote statewide, uniform plumbing standards." 1997 Ariz. Sess. Laws ch. 112, § 6 (the "Act"). The Legislature required the Commission to adopt the Code through the State rule-making process by May 1, 1998, and to adopt periodic amendments to the Code. A.R.S. § 41-619(B). The Act provided that "the initial State plumbing code adopted by the . . . [C]ommission shall be based on the 1994 Uniform Plumbing Code and its appendices and installation standards promulgated by the International Association of Plumbing and Mechanical Officials." 1997 Ariz. Sess. Laws ch. 112, § 7(B). The legislation required counties and municipalities to adopt the Code by ordinance.

According to your opinion request, in December 1997, the Commission began drafting rules based on the UPC. When the Governor's Regulatory Review Council ("GRRC") reviewed the Commission's rule package, ADEQ raised questions concerning that agency's regulatory authority over issues addressed in Appendices G, I and J, which deal with gray water systems for single family residences, private sewage disposal systems, and reclaimed waters systems for nonresidential buildings, respectively. GRRC initially approved the Code, except for Appendices G, I and J. See Arizona Administrative Code ("A.A.C.") R4-48-101, -102. According to your opinion request, GRRC referred Appendices G, I and J to the Commission for additional work, and the Commission formed a subcommittee to work with ADEQ to resolve issues concerning those appendices. As a result of the subcommittee's work, rules regarding Appendices G and J were subsequently adopted as part of the Code. See A.A.C. R4-48-125, R4-48-128. Your opinion request addresses legal issues that arose in the course of the subcommittee's work.

### **Analysis**

#### **1. Municipalities and counties enforce the Code; ADEQ does not.**

Although the Commission must adopt and amend the Code, A.R.S. § 41-619(B)(3), (4), (F), the Legislature did not give the Commission enforcement authority. Moreover, neither the Act nor any other statute gives ADEQ or any other State agency the authority to enforce the Code.<sup>(2)</sup> Instead of establishing an enforcement mechanism at the State level, the Act requires

municipalities and counties to adopt the Code by ordinance. 1997 Ariz. Sess. Laws ch. 112, § 7(A). The absence of any state-level enforcement mechanism and the requirement that counties and municipalities adopt the Code by ordinance indicate the Legislature intended that municipalities and counties enforce the Code. Local governments typically enforce the ordinances they adopt. See, e.g., *City of Tucson v. Rineer*, 193 Ariz. 160, 166, 971 P.2d 207, 213 (App. 1998) (noting that City of Tucson charter gives mayor and council the power to adopt and enforce by ordinance all measures necessary for promotion of "health, comfort, safety, life, welfare and property" of inhabitants). The Act also gave cities, towns and counties the authority to grant variances from the Code, see A.R.S. § 41-619(C), which also suggests that those local governments are responsible for enforcing the Code.

In addition, a municipality or county does not need a delegation from ADEQ pursuant to A.R.S. §§ 49-106 or -107 to enforce the Code.<sup>(3)</sup> Although local governments are responsible for administering the Code, ADEQ may also have regulatory responsibility over some of the subjects that are addressed in the Code. If ADEQ has delegated enforcement responsibility to a local jurisdiction pursuant to A.R.S. §§ 49-106 or -107, that local government would be responsible for enforcing both bodies of law. If not, the local jurisdiction enforces the Code, and ADEQ enforces the laws within its jurisdiction.

## 2. The Code Does Not Preempt or Supercede Any ADEQ Regulatory Responsibilities or Authority.

Even though the Code and certain ADEQ regulatory responsibilities concern the same subjects, the Code does not supercede ADEQ's authority. Courts attempt to give full force to all statutes and construe them "in a manner that 'will best serve the legislature's purposes, policies, and goals' apparent from the whole body of relevant law." *Achen-Gardner, Inc. v. Superior Court*, 173 Ariz. 48, 54, 839 P.2d 1093, 1099 (1992). Courts will not presume the Legislature intended to supersede or impliedly repeal an earlier statute. *Id.*

The Legislature's express purpose for creating the Commission is to "promote statewide, uniform plumbing standards." 1997 Ariz. Sess. Laws ch. 112, § 6. The Act does not indicate or imply any legislative intent to supercede ADEQ's statutory authority that focuses on environmental protection. Therefore, the Act does not supercede any statutes governing ADEQ or the rules promulgated to carry out those responsibilities.

In addition, the statutes governing ADEQ and the Act do not conflict. The Commission is to establish uniform plumbing standards based initially on the UPC; ADEQ is charged with protecting the environment, and, to that end, has specific responsibilities on various subjects. Appendices G, I and J of the UPC concern gray water systems for single family residences, private sewage disposal systems and reclaimed water systems for nonresidential buildings. These issues are also within ADEQ's regulatory authority. For example, among other responsibilities, the Legislature has required ADEQ to adopt and enforce rules regarding "sanitary engineering and other facilities for disposing of solid, liquid and gaseous deleterious matter" and regarding sewage systems, including "minimum standards for the design [and operation of] . . . sewage collection systems." A.R.S. § 49-104(B)(10),(13); see also A.A.C. R18-9-801 through R18-9-819. ADEQ also enforces the Aquifer Protection Permit ("APP") program that protects Arizona's groundwater. A.R.S. §§ 49-241 through -252.

The Commission should ensure that the provisions of the Code are consistent with the related statutes and regulations ADEQ administers. Although the Legislature required that the Code be

"based on" the UPC, it did not require that the Commission simply adopt the UPC, and it did not restrict the Commission's ability to modify the UPC as the Commission deems appropriate. Indeed, if the Legislature simply wanted to require the adoption of the UPC, the Commission would have been unnecessary. Therefore, in developing and amending the Code, the Commission should focus on its specific legislative purpose -- which is to establish uniform plumbing standards -- and should accomplish this task in a manner that is consistent with other State laws, respecting the expertise and responsibilities of ADEQ and other agencies on matters within their jurisdiction. Similarly, ADEQ must recognize the Commission's statutory responsibility for developing uniform plumbing standards for the State.

If, however, the Code and ADEQ regulations conflict in areas within ADEQ's specific statutory responsibility, ADEQ's authority prevails over the Code. See *Pima County v. Heinfeld*, 134 Ariz. 133, 134, 654 P.2d 281, 282 (1982) (specific statute governs over more general one).<sup>(4)</sup> The resolution of specific conflicts that may arise will depend on the applicable statutory authority.

You also asked whether the Commission must reference any ADEQ administered or enforced laws within the Code. Nothing requires the Commission to cross reference other laws within the Code; however, nothing prohibits the Commission from doing so. All related laws remain applicable and must be construed together, regardless of whether the Code directly references them.

### 3. The Commission Has Authority Over Subjects Covered by the UPC and Its Appendices.

The Legislature required that the initial Code be "based on the 1994 uniform plumbing code and its appendices and installation standards, promulgated by the International Association of Plumbing and Mechanical Officials." 1997 Sess. Laws, ch. 112, § 7(B). Licensing is the only subject the Legislature expressly prohibited the Commission from addressing A.R.S. § 41-619(B)(3), and licensing is not covered by the 1994 UPC. Thus, any subject covered by the 1994 UPC is within the Commission's statutory authority. *Boyce v. The City of Scottsdale*, 157 Ariz. 265, 267, 756 P.2d 934, 936 (App. 1988) (powers and duties of administrative agencies are limited by statute).

Your opinion request specifically asked about the Commission's jurisdiction regarding: the subjects covered by Appendices G, I and J; evaluations of site conditions, testing and evaluating soil characteristics; design and siting of sewage disposal systems to ensure environmental and public health protection; and setbacks for onsite wastewater treatment and disposal systems to ensure environmental and public health protection. The Commission may address these subjects in the Code because they are addressed in the UPC. Specifically, Appendix I provides that the appropriate private sewage disposal system is determined based on "location, soil porosity, and groundwater level." UPC Appendix I, § 1. See *also* UPC Appendix G, § 1(B) (parallel provision regarding residential gray water system). In addition, Appendix I establishes requirements for the location of private sewage disposal systems. See UPC Appendix I, § I(f), Table I-1. Because the UPC addresses site conditions, soil characteristics, and design, and location of sewage systems, the Commission may address these issues; however, the Commission should focus on its express statutory responsibility, which is to promote uniform plumbing standards. In addition, because the Legislature has specifically given ADEQ responsibilities regarding sewage systems, the Commission rules on this subject should not conflict with ADEQ rules on this subject. See A.R.S. §§ 49-104(10), (13), -361, 362. If there is a conflict, the ADEQ's more specific authority would govern over the Code.

Your opinion request also asks about the Commission's authority to select onsite wastewater



treatment and disposal systems where conditions do not meet the specific standards provided for in the UPC. Because the Commission may modify the UPC as it deems appropriate, the Commission may adopt standards concerning the subject matter governed by the UPC but that differ from the UPC. Again, however, to the extent ADEQ also has regulatory responsibility over wastewater treatment and disposal systems, the Commission's rules should not conflict with ADEQ rules in this area and, if there are conflicts, ADEQ's more specific statutory responsibilities would govern over the Code.

#### 4. Municipalities and Counties Should Adopt the Code within Six Months after the Commission Adopts the Code.

The Act required the Commission to adopt the Code by May 1, 1998, and all municipalities and counties to adopt the Code by August 1, 1998. 1997 Ariz. Sess. Laws ch. 112, §§ 4, 7. The Commission did not adopt the Code until 1999, and as a result local governments could not adopt the Code by the August 1, 1998 deadline. The Act also provided, however, that "any subsequent amendments to the . . . Code adopted by the . . . Commission . . . , shall be adopted by all municipalities and counties within six months after the Commission's adoption." 1997 Ariz. Sess. Law ch. 112, § 7(A). This provision recognizes that the Commission might take actions after the initial statutory deadline of May 1, 1998. Accordingly, local governments should adopt within six months any provisions of the Code that the Commission adopts after May 1, 1998; however, an ordinance adopted after six months is not invalid. See *Watahomigie v. Board of Water Quality Appeals*, 181 Ariz. 20, 32, 887 P.2d 550, 562 (App. 1994) ("shall" in statute states a preference for acting by a certain date, but rules adopted later not invalid).

#### 5. A City, Town, or County May Grant Variances to the Code on an Individual Project Basis: ADEQ Is Not Authorized to Grant Variances to the Code.

Cities, towns or counties "may grant variances to the . . . [C]ode on an individual project basis." A.R.S. § 41-619(C). The Act does not establish procedures for granting variances; therefore, the local governments authorized to grant variances determine the applicable procedures. To the extent the variances impact other laws, such as those administered by ADEQ, the local jurisdiction must comply with all applicable laws when determining whether to grant a variance for a project. In addition, the Act did not authorize any other entity, including ADEQ, to grant variances; therefore, the Commission does not have the authority to allow ADEQ to grant variances.

### **Conclusion**

Although developed and adopted as a rule at the State level, the Code will be enforced at the local level as an ordinance. Municipalities and counties will enforce the Code as they do other ordinances, and no separate delegation of authority from ADEQ is necessary. Municipalities and counties should adopt the Code, and any amendments, within six months after adoption by the Commission.

The Commission's statutory authority to adopt the Code extends to all provisions, appendices, and standards in the UPC. The Code, however, does not preempt or supercede any other statutory or regulatory requirements. Rather, the state plumbing code must be read in conjunction with other legal requirements. If conflicts arise in areas in which ADEQ has specific statutory authority, those environmental laws prevail over the Code.

In addition, a city, town, or county may grant variances to the Code on an individual project basis, and such variances must comply with all other applicable laws. The procedure for

granting ordinances is determined at the local level, and the Commission does not have the authority to allow ADEQ to grant variances to the Code.

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Attorney General

1. Your opinion request listed fifteen separate questions. Where appropriate, this Opinion consolidates questions that address similar issues.
2. The State Plumbing Code itself incorporates by reference the UPC with some modifications. A.A.C. R4-48-101, -102. The UPC provides that it shall be administered and enforced by the "administrative authority," and defines "administrative authority" as the individual, official, board, department or agency established and authorized by a State, county, city or other political subdivisions created by law to administer and enforce the provisions of the plumbing code as adopted or amended. This definition shall include the administrative authority's duly authorized representative. Uniform Plumbing Code, ch. 2, part. 202.0, Definition of Terms. The Code did not amend this definition. Thus, the Code itself does not identify the particular entity that will enforce it.
3. Section 49-106, A.R.S., provides in part: The rules adopted by the department apply and shall be observed throughout this state, or as provided by their terms, and the appropriate local officer, council or board shall enforce them. . . .

Section 49-107(A), A.R.S., provides:

The director may delegate to a local environmental agency, health department or municipality or a county board of health . . . any functions, powers or duties which the director believes can be competently, efficiently and properly performed by the local agency if the local agency accepts the delegation and agrees to perform the delegated functions, powers and duties according to the standards of performance required by law and prescribed by the director.

4. Another principle applied when there is an irreconcilable conflict between statutes is that the more recently-enacted statute controls. *See Mead, Samuel & Co. v. Dyar*, 127 Ariz. 565, 568, 622 P.2d 512, 515 (App. 1980). However, a later general statute does not prevail over a more specific statute enacted earlier. 2A Norman J. Singer, Sutherland on Statutes and Statutory Construction § 51.05 (5<sup>th</sup> ed. 1992).

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