



BUSINESS OF THE CITY COUNCIL CITY OF MERCER ISLAND

AB 6284
June 6, 2023
Regular Business

AGENDA BILL INFORMATION

TITLE:	AB 6284: Repeal Ordinance No. 23C-04 related to the Adoption of the 2021 Construction Codes	<input type="checkbox"/> Discussion Only <input checked="" type="checkbox"/> Action Needed: <input type="checkbox"/> Motion <input checked="" type="checkbox"/> Ordinance <input type="checkbox"/> Resolution
RECOMMENDED ACTION:	Adopt Ordinance No. 23C-07, repealing Ordinance No. 23C-04 and maintaining the current construction codes in MICC Title 17.	

DEPARTMENT:	Community Planning and Development
STAFF:	Jeff Thomas, Director Community Planning & Development Don Cole, Building Official Jeromy Hicks, Fire Marshal
COUNCIL LIAISON:	n/a
EXHIBITS:	1. Ordinance No. 23C-07
CITY COUNCIL PRIORITY:	n/a

AMOUNT OF EXPENDITURE	\$ n/a
AMOUNT BUDGETED	\$ n/a
APPROPRIATION REQUIRED	\$ n/a

EXECUTIVE SUMMARY

The purpose of this agenda bill is to repeal the state-mandated updates to the City’s construction codes to align with a recent State Building Code Council (SBCC) vote to delay the effective date of the 2021 Construction Code updates.

- A ruling by the Ninth Circuit Court created legal uncertainties related to provisions in the 2021 energy codes restricting natural gas piping in new construction.
- The SBCC delayed the adoption of the 2021 construction codes for 120 days to consider modifications to the energy codes.
- The City of Mercer Island must comply with the delayed timeline, requiring the repeal of Ordinance No. 23C-04, which would have adopted the 2021 construction codes effective July 1, 2023.
- City staff will monitor the situation and bring a new ordinance to adopt updated construction codes when they have been finalized by the SBCC.

BACKGROUND

2021 Construction Code Adoption

As mandated by the State of Washington, City staff prepared the 2021 updated construction codes for City Council review and adoption in Q2 2023. On May 2, 2022, the City Council approved [Ordinance No. 23C-04](#) adopting the 2021 construction codes with an effective date of July 1, 2023 ([AB 6262](#)).

However, on May 24, 2023, the SBCC voted to delay the implementation of the 2021 Washington State Building Codes under emergency rule for 120 days, starting on June 30, 2023. The SBCC also voted to enter rulemaking to revise portions of the 2021 Washington State Energy Code (residential and commercial) that would mitigate legal risks for Washington State based on new legal precedent from a recent decision of the Ninth Circuit Court (see more information below).

Legal Risks for Washington State

These actions were taken during a Special Meeting of the SBCC that was called to address legal uncertainty stemming from the decision in [California Restaurant Association v. City of Berkeley](#) issued April 18, 2023, by the Ninth Circuit Court of Appeals. The ruling states that the City of Berkeley cannot enforce a ban on natural gas piping installation in new buildings, finding that the U.S. Energy Policy and Policy Conservation Act (EPCA) preempts the city's regulation.

EPCA sets federally mandated minimum efficiency standards for a multitude of consumer products and industrial equipment including furnaces, HVAC equipment, and hot water heaters. EPCA preempts state and city governments from setting energy standards for these pieces of equipment. State and local governments, including Berkeley, have focused on regulating gas piping, rather than specific types of equipment. A 2021 ruling by the Northern District of California supported this approach, concluding that EPCA preemption should be interpreted as limited and that the EPCA did not preempt local ordinances like Berkeley's. However, the Ninth Circuit's decision overturns this ruling, thereby invalidating Berkeley's natural gas ban and holding that it was preempted by EPCA. A more thorough legal analysis of the Ninth Circuit decision and its potential implications is available [here](#).

Additionally, on May 22, 2023, the SBCC was served with a [Federal Complaint for Declaratory and Injunctive Relief Lawsuit](#) that was filed by Rivera, et al, based on the federal preemption ruling in the Berkeley case. The SBCC is also still litigating a separate lawsuit from Northwest Regional Council of The National Construction Alliance, et al, on adopted 2021 rules.

At the May 24 Special Meeting, the SBCC directed their staff to convene Technical Advisory Groups to consider stakeholder proposals to modify sections in the commercial and residential energy codes to mitigate legal risks. SBCC staff report they will be working on these proposals at a later date. The timeline for completion of these modifications to the energy codes is currently unknown.

Previously, the effective date for the adoption of the 2021 Construction Codes was July 1, 2023. With the 120-day delay, the newly proposed effective date for all building codes is October 29, 2023. However, additional delays are anticipated as experienced during the adoption of the 2018 construction codes. Therefore, it is recommended that the proposed effective date of October 29, 2023, is not utilized. It is recommended that the City take a "wait and see approach", monitoring the SBCC's progress on updating the energy codes. A new ordinance will be prepared to adopt the 2021 construction codes when a firm timeline for the mandated adoption is determined by the SBCC.

ISSUE/DISCUSSION

With the SBCC vote to delay the adoption of 2021 Construction Codes, the City of Mercer Island is now required to delay adoption of the construction codes. Without taking action to delay adoption, the City would be required to seek State approval of the code provisions and the City would face similar risks currently faced by the State as outlined above. This course of action is not recommended.

Instead, staff recommend repealing the 2021 code adoption undertaken in May 2023. Because the City Council approved Ordinance No. 23C-04, adopting the 2021 construction codes with an effective date of July

1, 2023, the ordinance must be repealed to maintain the exiting 2018 construction codes in the Mercer Island City Code (MICC) Title 17 and comply with the SBCC ruling.

Proposed Ordinance No. 23C-07 (Exhibit 1) repeals Ordinance No. 23C-04 and maintains the 2018 construction codes. Due to the timing of the effective date of the original ordinance, and the time required for publication of the new ordinance, it is recommended that the City Council adopt Ordinance No. 23C-07 at first reading under City Council Rules of Procedure 6.3 (C)(3), which permits adoption of an ordinance at first reading when its effective date precludes a second reading. Ordinance No. 23C-07 must become effective before July 1, 2023, which precludes a second reading of the ordinance at the next City Council Meeting on June 20, 2023. If it were adopted at the June 20, 2023, Meeting, Ordinance No. 23C-07 would be published on June 28, 2023 and would not become effective until July 3, 2023.

NEXT STEPS

Adopting Ordinance No. 23C-07 on June 6, 2023, will repeal the prior ordinance adopting the 2021 construction codes currently set to be effective on July 1, 2023. This action will maintain the existing 2018 construction codes in MICC Title 17 and comply with the recent SBCC emergency ruling. The City anticipates that the SBCC may extend the delay in adopting the construction codes beyond the current timeline of 120 days. City staff will monitor the situation throughout the summer and fall and keep the City Council informed as to when an updated construction code adoption is likely to occur.

RECOMMENDED ACTION

Adopt, at first reading under City Council Rules of Procedures 6.3(C)(3), Ordinance No. 23C-07 repealing Ordinance No. 23C-04 and maintaining the current construction codes in MICC Title 17.