REPORT OF THE CITY ATTORNEY

Date Presented to Council: October 7, 2008

TO THE MAYOR AND COMMON COUNCIL:

RE: Legistar File No. 07734
SUBSTITUTE ORDINANCE - Creating Sections 27.05(2)(aa), (bb), (cc), and (dd) and Section 29.20(21) of the Madison General Ordinances to require bulbs with an energy efficiency of at least thirty (30) lumens in some common areas and dwelling units in residential buildings.

This report has been requested to provide an analysis of the proposed ordinance regulating the use of certain types of light bulbs following the enactment of federal energy law in December of 2007.

A. Proposed Madison Ordinance.

The proposed ordinance amends three provisions in Chapter 27, The Minimum Housing Code and one provision in Chapter 29, The Building Code, to require:

- That all light fixtures in the common areas of certain buildings with rental dwelling units have light bulbs with a minimum efficacy of 30 lumens/watt by June, 2008; fixtures with a candelabra bases are excepted
- That all exit lights in certain buildings contain light emitting diode light bulbs by June, 2008
- That all mounted fixtures with Edison bases in certain buildings with rental dwelling units have light bulbs with a minimum efficacy of 30 lumens/watt by June 1, 2009
- That all new construction of certain buildings have exit lights with light emitting diode light bulbs

The reason that most of the ordinances that were amended are in Chapter 27, the Minimum Housing Code, rather than the Building Code is due to the prohibition in the State Codes regarding its application to existing structures.[1] The State Code, as well as any local Building Code, can be applied only to new construction, alterations, additions, and certain repairs, but not to general maintenance of existing buildings. Because the proposed ordinance is intended to reach beyond the context in which any Building Code can be applied, ordinances in Chapter 27 were amended.

[1] The State Building Code includes Wis. Adm. Code Comm Ch. 20-25 (The Uniform Dwelling Code) and Comm Ch 60-66 (The Commercial Building Code).

As will be discussed below, the fact that only one of the proposed amendments is in the Building Code prevents it from withstanding a federal preemption challenge.

B. Energy Efficiency Standards for Lamps (Light Bulbs) in the 2007 Act.

The Energy Independence and Security Act of 2007 was enacted on December 19, 2007 and amended an existing Act. Among its numerous amendments were the provisions relating to energy efficiency in 42 USC §6291-§6297. These provisions regulate the testing and labeling and energy efficiency of a number of consumer products. The specific consumer products that are regulated are called "covered products" and one of the consumer products that became a "covered product" under the 2007 amendments is the general service lamp (for purposes of the 2007 Act, the term "lamp" is commonly known as a light bulb). The "general service lamp" includes:

(I) general service incandescent lamps;
(II) compact fluorescent lamps;
(III) general service light-emitting diode (LED or OLED)lamps; and
(IV) any other lamps that the Secretary determines are used to satisfy lighting application traditionally served by general service incandescent lamps.

The first of the above listed lamps, the "general purpose incandescent lamp", includes most incandescent and halogen lamps for general service applications that have a medium screw-base, are capable of operating within 110-130V and have wattage designations of 40-100. Some of the specialized uses that are not included are lamps in appliances, black lights, and marine lights. 42 USC §6291(30).

The energy efficiency standards for all general service lamps go into effect on January 1, 2012. Of importance to the proposed ordinance are the standards that require general service incandescent lamps to have a minimum efficacy of 21-36 by that date.[2] Efficacy is a measure of the amount of light (lumens) per Watt (power). For reference, almost all incandescent lamps currently available have an efficacy in the range of 10-20 lumens/W. In comparison, a compact fluorescent lamp currently has an efficacy of 50-90 lumens/W. Because the 2007 Act is intended to be technology-neutral, the effective date was set at January 1, 2012 to give the incandescent lamp industry time to meet standards of greater efficacy. If by that date, these products have not reached the required efficacy standard, it is expected that compact fluorescent lamps will take over the market.

The proposed ordinance requires the use of lamps with an efficacy of 30 lumens/W in certain locations. This standard currently cannot be met with incandescent lamps, therefore, the effect of the proposed ordinance is that only compact fluorescent lamps may be used in certain circumstances.

C. Federal Preemption of State and Local Regulation.

42 USC §6297 contains provisions relating to preemption of State or local regulation of covered products. This provision is not new, but has been amended to make an express exception to federal preemption for regulation of general service incandescent lamps, intermediate base

[2] Higher efficacy standards will be phased in, with a required efficacy of 45 lumens/W by 2020.

incandescent lamps, or candelabra lamps by the states of California and Nevada. This added exception for CA and NV lasts only until the effective date of the federal standards, which is January 1, 2012 for general service incandescent lamps. At that time, those states also will be expected to comply with the federal standards.

Until the new standards become effective in 2012, the following language controls regulation by other states, including Wisconsin:

> "42 USC §6297(1)(B)(iii) all other States may, at any time, modify or adopt a State standard for general service lamps to conform with Federal standards and effective dates."

This provision allows all states to enact efficiency standards, as long as they are the same as federal standards and have the same effective date. In other words, no states other than California or Nevada are excepted from this general preemption language during the time between the present and 2012.

There is, however, an existing exception to federal preemption that continues for certain types of regulations "prescribed or enacted in a building code for new construction ... ". The building code exceptions vary, depending on when the building code provisions were adopted and whether their application continues beyond the effective date of the federal standard. 42 USC §6297(3).

In addition to the above exceptions to preemption, a State or local government may request a waiver under 42 USC §6297(d). The standards for obtaining a waiver are very difficult to meet and the majority are denied.[3]

In its current form, it is unlikely that the proposed ordinance would survive a preemption challenge for the following reasons.

1. The ordinance does not meet the exception to the general preemption in 42 USC §6297(1)(B)(iii) because it is effective prior to the effective date of the federal standards.

The proposed effective date of the proposed ordinance is prior to January 1, 2012, which is the date established in the general preemption exception. Essentially, there is no way for a state other than California or Nevada to regulate general service lamps prior to January 1, 2012. The only way to avoid preemption would be to meet the requirements of another exception

[3] In order to obtain a waiver, a State or local government must establish "unusual and compelling State or local energy or water interests". 42 UCS §6297(d)(1)(B). Unusual or compelling interests are those that are "substantially different in nature or magnitude than those prevailing in the United States generally" and are such that, "the costs, benefits, burdens, and reliability of energy or water savings resulting from State regulation make such regulation preferable or necessary when measured against the costs, benefits, burdens, and reliability of alternative approaches to energy or water savings or production, including reliance on reasonably predictable market-induced improvements in efficiency of all products subject to the State regulation". 42 USC §6297(d)(1)C). Furthermore, any waiver that is granted generally is not effective until the effective date of the federal regulation, unless there is an emergency situation at the State or local level. 42 USC §6297(d)(5)(B).

(discussed below) or regulate in a way that does not implicate federal preemption. It has been suggested that if the language of the ordinance is changed so that it does not regulate a covered product, i.e., a general service lamp, then preemption would not be an issue

For several reasons, this position is unlikely to be successful. First of all, modifying the language to appear to regulate *fixtures* rather than *lamps* (light bulbs) does not change the fact that ultimately it is the lamp that will determine compliance with the ordinance. The ordinance does not prohibit *fixtures* that are not of a minimum level of efficiency because that would require retrofitting fixtures that could accommodate a lamp with an efficacy less than 30 lumens/W. Instead it prohibits lamps with an efficacy of less than 30 lumens/W to be placed in the fixtures.

Provisions in other state codes have been pointed to as examples of this strategy. Those other states, however, are regulating through their building codes, using a preemption exception that allows regulation of covered products. Therefore, there is no reason, based on preemption concerns, to avoid use of the term 'lamp'. Building codes generally would not regulate light bulbs because their use extends beyond the reach of the codes, which are concerned with permanently installed fixtures, not plug-in lighting. By regulating the fixtures, states, such as California, can prohibit installation of fixtures that can even accommodate an incandescent light bulb. This strategy also makes more sense from an enforcement perspective because compliance can be determined when a permit is pulled and work is inspected, rather than basing compliance on an ongoing monitoring of the type of light bulb that is put in a fixture In short, these building code regulations are not examples of how labeling something a fixture gets around the general preemption.

Another further reason why this strategy is unlikely to succeed is because one of the stated purposes of the 2007 Act is that it be technology neutral. The delayed effective date gives all industries a chance to have compliant products available on January 1, 2012. The proposed ordinance requires an efficacy that can only be met with certain current technologies, e.g., compact fluorescent lamps. That result is not technology neutral and is contrary to the intent of the 2007 Act.

2. The exception to preemption for certain building code provisions can apply to only one of the proposed amendments because all the others are not in the Building Code.

The amendments that are in the Minimum Housing Code are not eligible for the exception for regulation under building codes. To avoid federal preemption, the amendments could be moved into Chapter 29, the City's Building Code, however, additional changes would be necessary. The exception in 42 USC §6297 applies to building codes for *new construction.* Chapter 29 adopts by reference the State Commercial Building Code and that code applies to new construction, additions, alterations, and some repairs. It does not apply to the general maintenance and basic repair of buildings. As building code provisions, the proposed amendments would unlawfully conflict with the State Code. Changes could be made to remove the conflict, however, the application would be pursuant to the reach of the Building Code - new construction, alteration, additions, and some repairs of existing buildings.

If the exemption for building codes is used, there are some conditions that would apply to such regulation between now and January 1, 2012, and after that date, the regulations would be required to comply with the federal standards unless many additional conditions are met or a federal waiver is obtained. Several states, including California, Washington, Massachusetts, and Oregon have energy efficiency regulations in their building codes for covered lighting products. Like the Wisconsin State Code, these provisions apply to new construction (and generally also to alterations and additions).

California and Nevada are the only two states that may regulate covered products outside of their building codes prior to the effective date of the federal standards, pursuant to their exception under 42 USC §6297(b)(1)(B).

3. The proposed amendment that may be eligible for the building code exception.

The proposed ordinance has one provision that is located in the building code and would be eligible as an exception to federal preemption. It requires light emitting diode bulbs in exit signs in certain buildings. If this provision remains, it should be changed to conform to the federal standard for exit signs, which prohibits illumination from exceeding 5W per face of any exit signs, rather than specifying the specific product to be used.

D. Conclusion.

The proposed ordinance is not likely to survive a challenge because it regulates a covered product outside of a building code. Simply changing the language to require fixtures to have certain types of lamps does not save the ordinance because it still is the lamp that is being regulated. The determination of compliance would be based solely on the type of lamp a fixture contained, not anything inherent in its structure (such as a design that precluded inserting a lamp that was not of a minimum efficacy). The current version cannot qualify for the building code exception because the State building code cannot be applied to existing buildings unless in the context of an addition, alteration, or certain repairs.

Respectfully submitted,

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