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October 30, 1991

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Hon. Dan Morales
Attorney General of Texas
Supreme Court Building
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Opinion Committee

Attention: Madeleine B. Johnson
Chairman, Opinion Committee

- Re: 1. TO WHAT EXTENT CAN A COMMISSIONERS COURT IN A COUNTY WITH A POPULATION OVER 250,000 ENACT AND ENFORCE FIRE CODE PROVISIONS WHICH WOULD REQUIRE MORE THAN THAT BUILDING OWNERS SUBMIT PLANS, OBTAIN A BUILDING PERMIT, CONSTRUCT BUILDINGS IN ACCORDANCE WITH THE FIRE CODE, OBTAIN A "FINAL CERTIFICATE OF COMPLIANCE" WITH THE FIRE CODE AND PAY APPLICABLE FEES?
2. IS A COUNTY WITH A POPULATION OF OVER 250,000 AUTHORIZED TO ADOPT REQUIREMENTS FROM THE UNIFORM BUILDING CODE INSOFAR AS IT APPLIES TO PUBLIC BUILDINGS AND COMMERCIAL ESTABLISHMENTS BUILT AFTER THE ENACTMENT OF THE COUNTY FIRE CODE, AND IF SO, IS THIS LIMITED ONLY TO BUILDING STANDARDS FOUND TO RELATE TO FIRE PROTECTION?
3. WOULD ADOPTION OF ALL OR PART OF THE STANDARD BUILDING CODE OR THE UNIFORM FIRE CODE MEET THE REQUIREMENT OF TEX. LOC. GOV'T CODE §235.002(c)(1), OR WOULD THE REQUIREMENT OF TEX. LOC. GOV'T CODE §235.002(c)(2) HAVE TO BE MET, AND IF THE LATTER, MUST THE PROTECTIVE STANDARDS OF ALL DESCRIBED CODES OR MERELY ONE OF THE DESCRIBED CODES BE EXCEEDED?

ACCOMPANIED BY ENCLOSURES -
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Dear Sir:

Harris County is considering the development of a fire code. On April 12, 1990, your office issue LO-90-16 in response to questions regarding the types of buildings to which the fire code could apply. Since that date, commissioners court has appointed a fire code study committee. The committee has met with

First Assistant: Marsha L. Floyd • Bureau Chiefs: James E. McKnight, Admin. Services, Jerry B. Schank, David R. Hurley • Division Chiefs: Dori A. Wind, Harold M. Streicher, Russell L. Drake, Mary J. McKerall, Donald W. Jackson, Rock W. A. Owens, Frank E. Sanders, Richard S. Hill

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representatives of the International Conference of Building Officials, The Southern Building Code Congress International, Inc. and the National Fire Protection Association, who have asked the County to consider adopting national codes promulgated by their organizations as the Harris County Fire Code. The committee has been informed that Dallas County has adopted the Uniform Fire Code, promulgated by the International Conference of Building Officials, as its fire code, and that Bexar County is considering the adoption of one or more national codes as its fire code. Confusion has arisen as to the extent of a county's authority to adopt provisions from these national codes. Therefore, we are presenting the above questions.

Please furnish us with your opinion on the questions presented. A Memorandum Brief is enclosed.

Sincerely,

MIKE DRISCOLL
County Attorney



By DON C. WHITLEY
Assistant County Attorney

MD:DCW

MEMORANDUM BRIEF

1. TO WHAT EXTENT CAN A COMMISSIONERS COURT IN A COUNTY WITH A POPULATION OVER 250,000 ENACT AND ENFORCE FIRE CODE PROVISIONS WHICH WOULD REQUIRE MORE THAN THAT BUILDING OWNERS SUBMIT PLANS, OBTAIN A BUILDING PERMIT, CONSTRUCT BUILDINGS IN ACCORDANCE WITH THE FIRE CODE, OBTAIN A "FINAL CERTIFICATE OF COMPLIANCE" WITH THE FIRE CODE AND PAY APPLICABLE FEES?

Chapter 235 of the Local Government Code, promulgated by Acts 1989, 71st Leg., ch. 296, concerns the enactment and enforcement of fire codes for unincorporated areas in counties with populations over 250,000. Section 235.001 states:

The commissioners court of a county with a population of over 250,000 may adopt a fire code and rules necessary to administer and enforce the fire code.

The rest of the chapter goes on to describe the code and its enforcement. TEX. LOC. GOV'T CODE §235.002 (Vernon Supp. 1991), reads as follows:

(a) The fire code applies only to the following buildings constructed in an unincorporated area of the county:

- (1) a commercial establishment; and
- (2) a public building.

(b) The fire code does not apply to an industrial facility having a fire brigade that conforms to requirements of the Occupational Health and Safety Administration.

(c) The fire code must:

(1) conform to the Uniform Building Code or to a national fire code adopted by the Southern Building Code Congress, the National Fire Protection Association, or to the Building Officials and Code Administrators International; or

(2) establish protective measures that exceed the standards of the codes described by Subdivision (1).

Section 2 of Acts 1989, 71st Leg., ch. 296, further limited the buildings to which the fire code would apply, by stating:

(a) This Act takes effect January 1, 1991, and applies only to a building on which construction begins after adoption of a fire code under this Act.

(b) For the purposes of this section, construction begins on the date that ground is broken for the building, or if no

ground is broken, on the date that the first materials are added to the original property.

Section 235.003 requires that a building permit be obtained before constructing a building covered by the Act and describes the process of applying for and receiving such a permit including a requirement that plans meeting requirements set by commissioners court be submitted. Section 235.004 provides for an inspection of the building and the issuance of a "final certificate of compliance". Section 235.005 provides for a fee schedule based on building type along with fees for "an" inspection, issuance of a building permit, and a final certificate of compliance. Sections 235.006 and 235.007 provide for enforcement of the fire code by injunction and civil penalties respectively.

§235.002(c)(1) and (2), quoted above, describe several national codes and require that the county fire code either "conform" to one of those codes or establish protective standards exceeding the standards of those codes. A reading of the codes reveals that many, and in some cases most, of their provisions do not apply to building permits and construction. In fact, as one example, the "national fire code adopted by the Southern Building Code Congress" which apparently refers to the "Standard Fire Prevention Code" promulgated by such group, has no requirements for a building permit and generally refers to a separate "building code" for standards which could be applied to building plans and construction. Instead, the Standard Fire Prevention Code, to the extent it applies to buildings, generally contains provisions relating to the maintenance of such buildings and their contents after their construction. The permits referred to in the code are for activities such as storing hazardous materials rather than for building. The same is true of the Uniform Fire Code. Although not reviewed by this office, it is our understanding that this is also the case with the "fire code" promulgated by the Building Officials and Code Administrators International. On the other hand, the Life Safety Code", promulgated by the National Fire Protection Association contains construction requirements, and the Uniform Building Code deals extensively with building permits, construction, and inspections. But even the last two codes mentioned contain many requirements for maintenance which would be applicable after a "final certificate of compliance". Further, such codes tend to include regulatory and enforcement procedures, with "standards" often being adopted by reference or printed in separate volumes.

A commissioners court can exercise only such powers as are expressly conferred by the constitution or statutes or necessarily implied from those expressly granted. Canales v. Laughlin, 214 S.W.2d 451 (Tex. 1941). The codes referenced in the statute appear to have been written for cities having broad police powers and include

provision regulating many activities and adopting many powers not specifically referred to in the fire code statute or any other statute. It would appear that under the express terms of the act, the County would be required to exclude from its fire code any provisions of the above codes which apply to any fire hazards not involving public buildings or commercial establishments, permit requirements other than building permits, and any requirements for maintenance or future inspections after receipt of a "final certificate of compliance." It would appear that by referring specifically to nationally adopted codes, the legislature did not intend that the codes, including the enforcement procedures found therein, be adopted, but only that "protective measures", in this case standards for buildings plans and construction, conform to or exceed those found in those codes.

On the other hand, it could be argued that the requirements for submitting plans, obtaining a building permit and receiving a certificate of compliance were intended by the legislature as requirements in addition to those which might be included in the nationally promulgated code. Under this argument, the legislature, recognizing that some of the nationally promulgated fire codes relied upon a separate building code for building permit requirements, intended for counties to be able to begin code enforcement before construction started without having to enact a "building code" as such. This interpretation is bolstered if it is found in answer to our second question that the legislature did not intend to allow enactment of the Uniform Building Code as part of the fire code.

In deciding whether the fire code can apply to maintenance after construction, it must be kept in mind that the County Fire Marshall has been given duties and authority in this area by a separate statute. TEX. LOC. GOV'T CODE §352.016, as amended by Acts 1991, reg. sess., ch. 851, reads as follows:

(a) In this section, "fire hazard" means any of the following conditions that endanger the safety of a structure or its occupants and promote or cause fire or combustion:

- (1) the presence of a flammable substance;
- (2) a dangerous or dilapidated wall, ceiling, or other structural element;
- (3) improper lighting, heating, or other facilities;
- (4) the presence of a dangerous chimney, flue, pipe, main, or stove, or of dangerous wiring; or
- (5) dangerous storage.

(b) In the interest of safety and fire prevention, the county fire marshal may inspect for fire hazards any structure, appurtenance, fixture, or real property located within 200 feet of a structure, appurtenance, or fixture.

The fire marshal shall inspect a structure for fire hazards if called on to do so. If the marshal determines the presence of a fire hazard, the marshal may order the owner or occupant of the premises to correct the hazardous situation.

(c) The commissioners court by order may authorize the county fire marshal to charge a fee to the owner of a business, a multi-family dwelling, or commercial property for a fire inspection conducted under this section in a reasonable amount determined by the commissioners court to cover the cost of the inspection.

(d) The commissioners court by order may authorize the county fire marshal to charge a fee to the owner of a single-family residence for a fire inspection conducted under this section in a reasonable amount determined by the commissioners court to cover the cost of the inspection, if the inspections requested by the owner of the property.

Thus, it would appear that the county fire marshal has a broad authority to inspect more than just the public buildings and commercial establishments to which the fire code would apply. It also appears that the standards to be applied in determining the existence of a fire hazard are left to the discretion of the fire marshal. Violation of the fire marshal's order is a Class B misdemeanor, as opposed to a civil penalty of up to \$200.00 per day of violation of the fire code. TEX. LOC. GOV'T CODE §§352.022, 235.007(a). It does not appear that the legislature made any attempt to reconcile the two statutes. This could be due to the fact that there was no intent that the fire code apply to the presence of fire hazards found in buildings after their construction in compliance with the fire code.

Therefore, it would appear that the legislature intended for the fire code to apply to construction of buildings while the Fire Marshal statute would apply to maintenance thereafter. On the other hand, it may be possible to read the two statutes together. Dallas County enacted the Uniform Fire Code apparently with the idea that it would provide standards for the Fire Marshal. TEX. LOC. GOV'T CODE §352.019(a) provides that:

The county fire marshal shall enforce all state and county regulations that relate to fires, explosions, or damages of any kind caused by a fire or explosion.

Of course, it would appear that the county fire code standards as adopted by the Commissioners Court could apply only to public buildings and commercial establishments, while leaving other standards to the fire marshal's discretion. It is not clear whether the fire marshal would be limited to the standards of the code in determining

the existence of fire hazards in such buildings. The \$200.00 per day fines could be seen as merely an additional penalty available for Code violations, the Class B misdemeanor being a separate penalty for failure to comply with the fire marshal's order to remedy the initial violation.

2. IS A COUNTY WITH A POPULATION OF OVER 250,000 AUTHORIZED TO ADOPT REQUIREMENTS FROM THE UNIFORM BUILDING CODE INsofar AS IT APPLIES TO PUBLIC BUILDINGS AND COMMERCIAL ESTABLISHMENTS BUILT AFTER THE ENACTMENT OF THE COUNTY FIRE CODE, AND IF SO, IS THIS LIMITED ONLY TO BUILDING STANDARDS FOUND TO RELATE TO FIRE PROTECTION?

It could be argued that although the statute specifically states that the fire code must "conform to the Uniform Building Code", that the legislature would not have described the code to be adopted as a "fire code" if the intent were that a building code could be adopted. The argument could be that in saying that the legislature was intending to refer to the Uniform Fire Code, which is, like the Uniform Building Code, promulgated by the International Conference of Building Officials, is written to be used with the Uniform Building Code, and thus could be said to "conform" to the Uniform Building Code. The Uniform Fire Code, although probably the most widely adopted fire code in the country, is not otherwise specifically mentioned in the act.

On the other hand, there are strong arguments that the legislature intended that a "building code", or at least its standards, could be adopted as part of a county fire code. In addition to the fact that the above interpretation is rather strained, as explained above, the remainder of the act appears to envision a county fire code which is much more akin to what is normally described as a "building code" rather than a fire code. Even if it should be determined that a fire code with provisions for maintenance can be adopted, fire codes such as the Standard Fire Code were not written so as to be applied in the absence of a separate building code. They refer to the building code for most structural if not all structural matters. Even with the separate authority from the statute to require a building permit, there must be some standards for the permit issuer and inspector to apply, and the fire maintenance codes do not appear to provide such standards.

Therefore, it would appear that parts of the Uniform Building Code can be adopted at least to the extent that they are found to contribute to fire protection.

3. WOULD ADOPTION OF ALL OR PART OF THE STANDARD BUILDING CODE OR THE UNIFORM FIRE CODE MEET THE REQUIREMENT OF TEX. LOC. GOV'T CODE §235.002(c)(1), OR WOULD THE REQUIREMENT OF TEX. LOC. GOV'T CODE §235.002(c)(2) HAVE TO BE MET, AND IF THE LATTER, MUST THE PROTECTIVE STANDARDS OF ALL DESCRIBED CODES OR MERELY ONE OF THE DESCRIBED CODES BE EXCEEDED?

The act specifically mentions the Uniform Building Code, but fails to mention the Uniform Fire Code, promulgated by the same organization and intended to be used with it. The act also refers to "a national fire code adopted by the Southern Building Code Congress." This would appear to apply to the Standard Fire Prevention Code, but the same group also promulgates a popular building code known as the Standard Building Code. It is curious that the legislature would refer to a building code but not the fire code from one group while referring to the fire code, but not the building code of its biggest competitor. Arguably, the two codes come within the language of subdivision (1). Since each code could be said to "conform" to its sister code, it could be that the codes were thus included. In regard to the Standard Building Code, if "fire code" is given a broad meaning, it is a "fire code adopted by the Southern Building Code Congress".

On the other hand, if either the Uniform Fire Code or the Standard Building Code does not qualify under §235.002(2)(1), then in order to adopt such a code, the commissioners court would have to find pursuant to subdivision (2) that it contained "protective measures that exceed the standards of the codes described by Subdivision (1)". Does this mean that commissioners court would have to find that each protective measure in such a code exceeded the most rigid similar standard found in any of the described codes or that each protective standard exceed the requirements of the least rigid standard on that subject found in the specified codes? Although the latter interpretation is more appealing, the former appears to more clearly follow the plain meaning of the provision. On the other hand, if the county were to adopt provisions from the Code adopted by the Building Officials and Code Administrators International, but wished to apply more strict provisions where that code was less stringent than other of the named codes or where that code did not apply at all, it would not appear to serve the purpose of the statute that the commissioners court have a choice between only (1) the lax standard or no standard of the chosen code or (2) the most stringent standard available. Since the first subdivision would allow adoption of standards verbatim from the least stringent of the listed codes, whichever code that might be, an interpretation merely requiring that an adopted code meet or exceed the lowest standards of the named codes would appear to best meet the legislature's apparent intent.