



**TARRANT COUNTY**  
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MBJ

RQ-385

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April 24, 1992

APR 24 92

The Honorable Dan Morales  
Attorney General of Texas  
P. O. Box 12548  
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Opinion Committee

Re: Constitutionality of § 756.042  
of the Texas Health & Safety  
Code

Dear General Morales:

We request an opinion from your office regarding the constitutionality of section 756.042 of the Texas Health & Safety Code. Section 756.042 provides:

The owner of an outdoor shooting range shall construct and maintain the range according to standards that are at least as stringent as the standards printed in the National Rifle Association range manual.

Tex. Health & Safety Code Ann. (Vernon Supp. 1992). Failure to comply with these standards could result in the assessment of civil and criminal penalties against the owner of the outdoor shooting range. Id. §§ 756.043-756.044. The general public may purchase copies of the current manual by calling Richard Whiting at (202) 828-6190 or writing Richard Whiting, National Rifle Association, 1600 Rhode Island Ave. NW, Washington, D.C. 20036. Our copy of the range manual shows a 1988 copyright and a revision date in December, 1989.

The constitutionality of a legislative delegation of a building standard to a private concern has been a source of debate for many years. In 1919 Kansas law provided, "All electrical wiring shall be in accordance with the national electrical code." Kansas v. Crawford, 104 Kan. 141, 177 P. 360, 2 A.L.R. 880 (1919). The Kansas Supreme Court struck down this provision for a variety of reasons. One, "the power to make, amend, alter and repeal the laws is vested in the legislature" and therefore, the legislature may not abdicate or delegate its function and powers. Id. at 2 A.L.R. 881. Two, revisions of

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these private electrical codes are not part of the officially adopted laws of the state. Id. at 882. Finally, a citizen seeking changes to these private codes has no method to redress his valid grievances against the proponents of these private codes. Id. at 882.

Contrast the Kansas legislation with the Texas legislation the Texas Supreme Court upheld in 1946. The pertinent part of that legislation as quoted in the case provided,

"... as specified under the published regulations of the National Board of Fire Underwriters for the design ... as recommended by the National Fire Protection Association, effective July, 1937, a copy of said regulations known as National Board of Fire Underwriters Pamphlet No. 58 being on file with the Gas Utilities Division of the Railroad Commission of Texas."

Dudding v. Automatic Gas Co., 193 S.W.2d 517, 519 (Tex. 1946). The Dudding court said in turning back the challenge to the statute, "We do not have before us a situation where future rules of an unofficial agency have been prospectively adopted by the Legislature or the Railroad Commission." Id. at 520.

When you compare the statutes considered by the Kansas and Texas Supreme Courts, you can readily see that the Texas statute in Dudding refers to a specific body of regulations on file with a public agency which are available from that public agency. Even were the National Fire Protection Association to meet and change its regulations Texas citizens would still know that Texas followed regulations effective July, 1937. A detailed review of West Constitutional Law key number 64 reveals that the prevailing view remains that if the legislature will refer to a specific edition of a set of standards set by the private concern the courts will uphold the legislation. However, a reference like that found in Kansas v. Crawford and that found in section 756.042 of the Texas Health and Safety Code will not survive a challenge based on improper delegation of legislative power.

Other examples of statutes and ordinances held unconstitutional for improperly delegating the legislative power to private entities include so-called consent statutes for land use development. Typically, these statutes or ordinances require consent of a certain percentage of citizens owning property within a specified distance from the regulated entity. The Fort Worth Court of Appeals in holding an ordinance unconstitutional said, "Consent statutes have uniformly been held unconstitutional when they lack sufficient standards concerning how to exercise

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the delegated power." Minton v. Fort Worth Planning Com'n, 786 S.W.2d 563 (Tx.App. -- Fort Worth 1990, no writ). Section 756.042 provides no standard for the National Rifle Association to follow in changing its range manual. Such a broad delegation to a state agency would fail in Texas courts. Texas Antiquities Committee v. Dallas Co. Community College, 554 S.W.2d 924 (Tex. 1977).

Consent statutes have been upheld where the final decision rested in an elected or appointed body. Spann v. Dallas, 189 S.W. 999 (Tex. Civ. App. -- Dallas 1916, no writ). In the situation of section 756.042, until the legislature meets, the National Rifle Association could meet, change its manual, and, under this statutory scheme, mandate changes in every shooting range in Texas.

The legislation which we question contains all of these evils: One, no standards in the delegation to the private concern a la Minton v. Fort Worth Planning Com'n; two, no access to the range manual at a public agency as was approved in Dudding; and three, no legislative reference to which version of the range manual is applicable.

In conclusion the courts have expressed the general policy that the people give the power to legislate to the legislature and when the legislature in turn gives that power to private entities the people lose their ability to influence the legislature to improve or change the regulations issued by the private entities. Our office is confident that you will find that section 756.042 is unconstitutional.

Sincerely,



TIM CURRY  
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TC/kb