

Legal Q&A

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What is the current state of uniform building codes for Texas cities?

Prior to 2001, Texas had no statewide standards for any residential or commercial buildings constructed within a city. Each city chose what, if any, building code(s) to adopt for construction in the city limits, and each city amended its code to meet local concerns. The most common codes were the Uniform Building Codes and the Southern Standard Building Code. The following is a brief synopsis of the evolution of uniform building codes in Texas:

- In 2001, at the behest of homebuilders, the Texas Legislature adopted S.B. 365, now codified at § 214.211 et seq. of the Texas Local Government Code. S.B. 365 adopted the International Residential Code (IRC) and the National Electrical Code (NEC) as the standard building codes for residential construction in Texas cities starting January 1, 2002. Under the statute, cities are authorized to make amendments to these codes to meet local concerns. *See also* Op. Tex. Att’y Gen. No. GA-0297 (2005).
- In 2001, the legislature also adopted S.B. 5, which is now codified at § 388.003 of the Texas Health and Safety Code. S.B. 5 adopted the Energy Efficiency Chapter of the IRC for single-family residential construction and the International Energy Conservation Code (IECC) for all other residential, commercial, and industrial construction. The bill became effective on September 1, 2001, and cities were required to establish procedures for the administration and enforcement of the codes by September 1, 2001. Under this law as well, cities are authorized to make amendments to the codes to meet local concerns. However, local amendments to energy codes may not result in less stringent energy efficiency requirements in nonattainment areas (that is, areas that have failed to meet federal standards for air quality) and in affected counties (for example, certain specifically-defined counties that are near nonattainment areas), and must comply with the National Appliance Energy Conservation Act of 1987, as amended.
- In 2003, the legislature passed S.B. 283, which requires any city that adopts a building code, other than the IRC, to adopt and enforce either prescriptive provisions for the rehabilitation of buildings or the rehabilitation code that accompanies the city’s building code. The bill is codified at § 214.215 et seq. of the Texas Local Government Code.
- In 2003, the legislature enacted H.B. 730 to create the Texas Residential Construction Commission (TRCC). The purpose of the bill is to create standards for home buyer complaints against builders. The bill uses the IRC as the standard for those complaints. In 2007, the legislature enacted H.B. 1038, which provides that a city may not issue a building permit to a builder who is required to register with the TRCC for construction that is subject to the TRCC Act unless the city has verified that the builder is registered with the TRCC or is exempt from registration.

- In 2005, S.B. 1458 was passed. It provides that: (1) the International Building Code (IBC) is adopted as the municipal building code in Texas for commercial and multi-family construction; (2) a city that has adopted a more stringent commercial building code before January 1, 2006, is not required to repeal that code and may adopt future editions of that code; and (3) the NEC applies to all commercial buildings in a city for which construction begins on or after January 1, 2006, and to any alteration, remodeling, enlargement, or repair of those commercial buildings. Again, nothing in the bill prohibits a city from adopting local amendments to the IBC.

Currently, cities that choose to adopt and enforce building codes should be operating under: (1) the IRC and NEC for residential construction; (2) the IECC, IBC, and NEC for all construction other than single-family residential; and (3) if the city adopts a building code other than the IRC, either prescriptive provisions for the rehabilitation of buildings or the rehabilitation code that accompanies the city's building code.

Is a city required to take steps to administer and enforce building codes?

Probably not. While the enforcement of building codes is a core function for many cities, others choose not to enforce building codes and/or do not have the resources to do so. Whether to do so is likely better defined as a policy issue instead of a legal one. Thus, TML has advised its member cities that lack the resources to enforce building codes that: (1) no action is required on their part; or (2) they may adopt the codes, but may usually delete provisions such that require the city to issue a permit or perform an inspection. This arrangement appears to comply with the requirements of state law, and places the burden of compliance on the builder. Practically speaking, this is the only option for many cities. Whether the reasons are economic, safety-related, or climate-specific, Texas cities arguably have the right to decide how, when, and if to enforce building codes.

What is the relationship of the Texas Residential Construction Commission and cities?

In 2003, the legislature enacted H.B. 730, the Texas Residential Construction Commission Act (Act). The Act (Title 16 of the Texas Property Code) creates a dispute resolution process for homebuyer complaints against builders. The bill uses the IRC as the standard for those complaints. Section 430.001(d) of the Property Code expressly provides that the version of the IRC that applies for purposes of the limited statutory warranties and building and performance standards for residential construction in a city or its extraterritorial jurisdiction is "the version of the International Residential Code applicable to...residential construction in the municipality under Section 214.212, Local Government Code." Nothing in the Act affects the police-power authority of a city to choose how to enforce the IRC or to amend the IRC as it sees fit. The Act was enacted solely to provide a process by which homeowners and builders can resolve complaints out of court. Except for the requirement in Local Government Code Section 214.906 that a city must verify a homebuilder's TRCC registration prior to issuing a building permit, the Act does not grant the Texas Residential Construction Commission any authority over cities or affect city authority in any way.

Has the legislature imposed additional requirements on cities that enforce building codes and issues building permits?

Yes. The answer above mentions that a city must verify a homebuilder's registration with the TRCC prior to issuing a building permit. State law also requires a city to obtain evidence that a person has performed an asbestos survey prior to issuing a permit for renovation or demolition of a public or commercial building. The Texas Asbestos Health Protection Act (TAHPA) provides (in Texas Occupations Code Section 1954.259(b)) that:

- (b) A municipality that requires a person to obtain a permit before renovating or demolishing a public or commercial building may not issue the permit unless the applicant provides:
 - (1) evidence acceptable to the municipality that an asbestos survey, as required by this chapter, of all parts of the building affected by the planned renovation or demolition has been completed by a person licensed under this chapter to perform a survey; or
 - (2) a certification from a licensed engineer or registered architect, stating that:
 - (A) the engineer or architect has reviewed the material safety data sheets for the materials used in the original construction, the subsequent renovations or alterations of all parts of the building affected by the planned renovation or demolition, and any asbestos surveys of the building previously conducted in accordance with this chapter; and
 - (B) in the engineer's or architect's professional opinion, all parts of the building affected by the planned renovation or demolition do not contain asbestos.

Both federal and state law have long required a building owner to obtain an asbestos survey before renovating or demolishing a public or commercial building, but the above provision was added by S.B. 509 in 2001.

The Texas Department of State Health Services (DSHS) has recently requested an attorney general opinion (RQ-0775-GA) as to whether it may pursue enforcement action under the TAHPA (which could include a civil penalty) against a city that fails to verify that the survey was performed. TML and the Building Officials Association of Texas filed comments on the request and asked DSHS to withdraw it. DSHS declined to do so, but has offered its assistance in educating city officials on the issue. For more information, please contact DSHS at www.dshs.state.tx.us/asbestos or 512-834-6787.

How does the Texas Engineering Practices Act affect the building permit process?

A few years ago, the Texas Board of Professional Engineers (TBPE) sought enforcement action against at least one Texas city. A city employee issued a building permit to an applicant for plans that required the seal of a licensed engineer. The plans were sealed by a licensed architect, but not by an engineer. Apparently, the building shown in the plans developed defects that were attributable to poor engineering. Subsequent to the appearance of the defects, the TBPE informed the city that it had violated the Engineering Practices Act by accepting the plans and issuing the permit. An agreement was ultimately reached on the issue.

Similarly, a 2005 attorney general opinion request asked “whether a city building official may rely on a professional engineer’s seal and certification that a plat or plan complies with the city’s building codes.” That opinion resulted in the issuance of attorney general opinion GA-0439 (2006), which failed to provide definitive answers on the question. In any case, city officials should be aware of the statutory provision at issue. Texas Occupations Code Section 1001.402, entitled “Enforcement by Certain Public Officials,” provides that:

A public official of the state or of a political subdivision of the state who is responsible for enforcing laws that affect the practice of engineering may accept a plan, specification, or other related document only if the plan, specification, or other document was prepared by an engineer, as evidenced by the engineer’s seal.

The TBPE has created the Government Advisory Committee, which includes municipal officials, to provide a forum for various issues related to the practice of engineering for governmental entities.

If a city does enforce building codes and issues building permits, are there any statutory limitations on that process?

Yes. In the past, cities have always had broad local control to administer building codes and to decide when, if, and how a building permit will be issued. H.B. 265, passed in 2005 and now codified as Local Government Code Section 214.904, requires a city to either grant, deny, or provide written notice to an applicant stating the reasons that the city has been unable to act on a building permit within 45 days after an application is submitted. A city that chooses to provide the written notice must either: (1) grant or deny the permit not later than the 30th day after the date the notice is received; or (2) either not collect or refund any fees associated with the permit. While the League was opposed to this legislation, an informal survey of building officials revealed that most cities issue permits well within the time frame provided by the bill.