

Legal Q&A

(Editor's note: This is the first part of a two-part Q&A on building codes. The second part will appear in the December 2019 edition of *Texas Town & City*.)

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

A. 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.

In 2001, the Texas legislature began enacting a series of laws to adopt the International family of codes for the state. Currently, cities that choose to adopt and enforce building codes should normally be operating under: (1) the International Residential Code (IRC) for residential construction; (2) the National Electrical Code (NEC) for electrical construction in both residential and commercial construction; and (3) the International Energy Conservation Code (IECC) and the International Building Code (IBC) for all construction other than single-family residential. With regard to plumbing codes, a city may be operating under the plumbing provisions of the IRC and/or either the plumbing provisions of the Uniform Plumbing Code (UPC) or International Plumbing Code (IPC).

Q. What did the evolution of the International Code Council model code adoptions look like?

A. The following is a brief synopsis of the evolution of the International 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 IRC and the NEC as the standard building codes for residential construction in Texas cities starting January 1, 2002. Under the statute, cities are authorized to make any amendments to these codes to meet local concerns, regardless of whether the amendments are “less stringent” than the original code provisions. *See 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 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 that date. Under this law as well, cities are authorized to make amendments to the codes to meet local concerns. With regard to the energy codes, however, local amendments may not result in less stringent energy efficiency requirements in nonattainment areas and in affected counties than the energy efficiency

chapter of the IRC or IECC. However, legislation in 2015 authorized an “alternate compliance path for residential construction (see below). A “nonattainment” area is one that has failed to meet federal standards for ambient air quality. The major metropolitan areas of the state are all in nonattainment status. An “affected county” is one listed in state law that is typically surrounding a nonattainment area. *See* Tex. Health and Safety Code § 386.001.

- Finally in 2001, the legislature adopted H.B. 217, which is now codified at § 1301.255 of the Texas Occupations Code (the plumbing license law). The section requires the Texas Board of Plumbing Examiners to adopt the UPC and the IPC. Currently, the board has adopted the 2012 editions of those codes. 22 T.A.C. § 367.2(a). Section 1301.255(d) provides that a city may amend any provisions of a plumbing code to conform to local concerns that do not substantially vary from board rules or other rules of this state. (Note that plumbing installed under a plumbing code must be inspected by a licensed plumbing inspector who is paid directly by the city. Tex. Occ. Code § 1301.255(e).)

The attorney general, in 2002, opined on the relationship between S.B. 365 (adopting the International Residential Code, which contains plumbing provisions) and H.B. 217 (adopting separate plumbing codes). The attorney general concluded that the two bills could be harmonized, and opined that “the International Residential Code is the uniform residential building code for municipalities in this state, and its plumbing provisions are the uniform plumbing code for residential construction,” and that cities may choose either the UPC or the IPC to govern nonresidential plumbing. Op. Tex. Att’y Gen. No. JC-0453 (2002).

- In 2003, S.B. 283 was passed and 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. This bill was an anomaly related to one city, and shouldn’t be applicable to most cities. The bill is codified at § 214.215 et seq. of the Texas Local Government Code.
- In 2003, H.B. 730 was passed and created the Texas Residential Construction Commission. The purpose of the bill was to create standards for home buyer complaints against builders. The bill used the IRC as the standard for those complaints. However, the bill did not affect city authority or impose any additional requirements on cities. (In 2009, the commission was abolished, and H.B. 2833 granted 253 counties limited enforcement authority relating to building codes.)
- In 2005, S.B. 1458 was passed and provides that: (1) the 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 National Electrical Code 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 or NEC.

- In 2007, H.B. 3693 authorized the State Energy Conservation Office (SECO) to – by administrative rule – adopt and substitute the energy efficiency provisions of the latest published editions of the IRC or the IECC for residential or commercial energy efficiency and air quality for the previously-adopted 2001 version. SECO did so, and the 2015 energy code provisions are now adopted by SECO rule. 34 T.A.C. § 19.53.
- In 2011, H.B. 51 made minor modifications to the Health and Safety Code provisions relating to SECO energy code authority by providing that the Energy Systems Laboratory at Texas A&M University may provide technical assistance to cities, including those relating to local amendments. Tex. Health and Safety Code § 388.007.
- In 2014, pursuant to Texas Occupations Code Section 1305.101(a), the Texas Department of Licensing and Regulation adopted the 2017 version of the NEC. Cities are still authorized to make amendments to the NEC, so long as the amendments achieve similar objectives and safety.
- In 2015, H.B. 1736 made various changes related to energy efficiency standards. It provides that: (1) on September 1, 2016, the energy efficiency chapter of the International Residential Code, as it existed on May 1, 2015, is adopted as the energy code in this state for single-family residential construction; (2) on or after September 1, 2021, the State Energy Conservation Office (SECO) may adopt and substitute for that energy code the latest published edition of the energy efficiency chapter of the International Residential Code (IRC), based on written findings on the stringency of the chapter submitted by the Texas A&M Energy Systems Laboratory; (3) SECO may not adopt an edition of the code more often than once every six years and by rule shall establish an effective date for an adopted edition that is not earlier than nine months after the date of adoption; and (4) SECO may adopt and substitute for the International Energy Conservation Code (IECC), which applies to all other residential, commercial, and industrial construction, the latest published edition of the IECC, based on written findings on the stringency of the edition submitted by the laboratory, and SECO by rule shall establish an effective date for an adopted edition that is not earlier than nine months after the date of adoption.

In addition, the bill added an “Energy Rating Index Compliance Alternative” or “subsequent alternative compliance path” to measure compliance for single-family residential construction. The bill was brought forth by homebuilders who felt the energy efficiency standards in the code were too costly. The optional compliance paths expire September 1, 2025, and a city located in a nonattainment area or in an affected county may establish procedures to adopt local amendments to them.

- In 2019, H.B. 2858 was passed and provides that: (1) to protect the public health, safety, and welfare, the International Swimming Pool and Spa Code, as it existed on May 1, 2019, is adopted as the municipal swimming pool and spa code in this state; (2) the International Swimming Pool and Spa Code applies to all construction, alteration, remodeling, enlargement, and repair of swimming pools and spas in a city that elects to regulate pools or spas, including by requiring fencing under current state law; (3) a city

may establish procedures for the adoption of local amendments to the International Swimming Pool and Spa Code and the administration and enforcement of the International Swimming Pool and Spa Code; and (4) a city may review and adopt amendments made by the International Code Council to the International Swimming Pool and Spa Code after May 1, 2019.

What does all of the above mean in plain English? It means that, currently, cities that choose to adopt and enforce building codes should be operating under: (1) the IRC (and possible alternative energy compliance paths) and NEC for residential construction (a city could adopt a plumbing code for residential construction, but most rely on the plumbing provisions of the IRC instead); (2) the NEC, IECC, IBC, and a Texas Board of Plumbers adopted plumbing code 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.

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

A. Maybe. 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 lacking 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 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.

Plumbing inspection might be one exception to the above. A city with a population of more than 5,000 must adopt a plumbing code. Tex. Occ. Code § 1301.551(a). A city of less than 5,000 may, but is not required to, do so. Tex. Occ. Code § 1301.551(b). Any city that has adopted a plumbing code is *required* to employ or contract with a plumbing inspector and *to inspect plumbing installed in the city*. Tex. Occ. Code § 1301.255(e).

In other words, adoption of a plumbing code requires a city to hire or contract with a plumbing inspector and enforce the code. *See* Tex. Occ. Code § 1301.255(e). However, the attorney general has stated that “not every political subdivision in the state is required by the plumbing licensing law to adopt a plumbing code,” and “[c]ities of fewer than 5,000 inhabitants may, but are not required, to adopt a plumbing code pursuant to the plumbing licensing law.” Op. Tex. Att’y Gen. No. JC-0453 (2002).

In spite of the plumbing license law, not inspecting may be the only option for many cities. This means that some smaller cities may choose not to adopt a plumbing code, which imposes a statutory inspection requirement. 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.

Q. Must a city adopt a building code by ordinance to enforce it?

A. Yes. While state law generally “adopts” for the state certain codes, and some state agencies have the power to adopt certain codes, a city arguably can’t enforce those codes without an ordinance in place.

In 2001, the Texas Legislature adopted S.B. 365, now codified as Sections 214.211 - 214.214 of the Texas Local Government Code. S.B. 365 adopted the IRC as a municipal building code for residential construction in Texas cities starting January 1, 2002. The language of Section 214.212(a) provides that:

[t]o protect the public health, safety, and welfare, the International Residential Code, as it existed on May 1, 2001, is adopted as *a* municipal residential building code in this state.

(Emphasis added.) More importantly, Subsection (b) provides that a “the International Residential Code applies to all construction, alteration, remodeling, enlargement, and repair of residential structures in a municipality.”

Also in 2001, the legislature adopted H.B. 217, now codified in chapter 1301 of the Texas Occupations Code. Section 1301.551 provides that:

- (a) A municipality with more than 5,000 inhabitants *shall* regulate by ordinance or bylaw the material, construction, alteration, and inspection of any pipe, faucet, tank, valve, water heater, or other fixture by or through which a supply of water, gas, or sewage is used or carried.
- (b) Any other municipality *may* regulate by ordinance or bylaw the matters described by Subsection (a).

(Emphasis added.) The language above is one of the few clear mandates related to cities and building code enforcement.

In 2006, the legislature adopted S.B. 1458, now generally codified as Section 214.216 of the Local Government Code. S.B. 1458 adopted the IBC as a municipal building code for commercial construction in Texas cities starting on January 1, 2006. The language of Section 214.216(a) provides that

[t]o protect the public health, safety, and welfare, the International Building Code, as it existed on May 1, 2003, is adopted as *a* municipal commercial building code in this state.

(Emphasis added.) Similar to the IRC provision, Subsection (b) provides that a “International Building Code applies to all commercial buildings in a municipality for which construction begins on or after January 1, 2006, and to any alteration, remodeling, enlargement, or repair of those commercial buildings.”

The language of Chapter 214 makes clear that the International Residential and Building Codes are “a” municipal building code in Texas. With regard to the energy conservation codes, the SECO rules in 34 T.A.C. 19.53 contain similar language:

(a) Single-family residential construction. Effective September 1, 2016, the energy efficiency chapter of the International Residential Code, as it existed on May 1, 2015, and as supplemented by Health and Safety Code, §388.003(i) and (j), *is adopted as the energy code in this state* for single-family residential construction as it is defined in Health and Safety Code, §388.002(12).

(b) All other residential, commercial, and industrial construction. Effective November 1, 2016, the International Energy Conservation Code, as it existed on May 1, 2015, *is adopted as the energy code for use in this state* for all residential, commercial, and industrial construction that is not single-family residential construction under subsection (a) of this section.

(Emphasis added.) The language is somewhat ambiguous, but most would agree that the cited international codes are “the” codes for Texas.

Note that this language is different from the county building code provisions in Local Government Code Section 233.153(a). That provision provides that “[n]ew residential construction of a single-family house or duplex in the unincorporated area of a county to which this subchapter applies *shall conform to* the version of the International Residential Code published as of May 1, 2008, or the version of the International Residential Code that is applicable in the county seat of that county.” (Emphasis added.)

Based on all of the above, the best reading of Local Government Code Chapter 214 and Health and Safety Code Chapter 388 is that any structure built within a city *must comply with the requirements of the International Codes*. (So, for example, a city ordinance providing that no code exists in the city limits would arguably have no effect.)

But the above may be a purely academic analysis. The real issue is not whether the codes apply, but rather *how violations are enforced*. Some cities either choose not to enforce building codes and/or do not have the resources to do so. Practically speaking, this is the only option for many cities.

On the other hand, many cities have an ordinance that formally adopts the codes, with or without local amendments. Those cities do so to avail themselves of: (1) the ability to issue and enforce notices of violation for a violation of a code provision; and (2) to determine which provisions of the code may need modification to fit the city’s needs.

The conclusion that a city must adopt a building code by ordinance to enforce it is bolstered by SECO’s website, which provides that “[l]ocal jurisdictions are responsible for building energy code implementation and enforcement.