

## **Legal Q&A PART II – August 2014**

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(Editor's note: This is the second part of a two-part Q&A on building codes. The first part appeared in the July 2014 edition of *Texas Town and City*.)

### **Has the legislature imposed additional requirements on cities that enforce building codes and issue building permits?**

Yes. Three examples include: (1) asbestos abatement; (2) architectural barriers; and (3) plumbing limitations.

#### **Asbestos Abatement**

State law 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.

The Texas Department of State Health Services (DSHS) 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 offered its assistance in educating city officials on the issue. For more information please contact DSHS at [www.dshs.state.tx.us/asbestos](http://www.dshs.state.tx.us/asbestos) or at (512) 834-6787.

The attorney general later released Op. Tex. Att'y Gen. No GA-0729 (2009). The opinion concluded that there is no "clear and unambiguous waiver of immunity from suit for a violation

of” the TAHPA. Thus, successful enforcement against a city by the DSHS is unlikely, although it has been attempted since.

### **Architectural Barriers**

The Texas Architectural Barriers Act (TABA) is a state law that is intended to encourage and promote the rehabilitation of persons with disabilities and eliminate unnecessary barriers encountered by persons with disabilities. It came on the heels of a similar federal law, the Architectural Barriers Act of 1968.

TABA is complex, and includes many administrative provisions. Essentially, certain projects that will be used by those with disabilities (e.g., most public facilities and many commercial facilities) must provide plans to be approved by the Texas Department of Licensing and Regulation (TDLR). (TDLR outsources plan review to private companies.)

TABA provides that “[a] public official of a political subdivision who is legally authorized to issue building construction permits may not accept an application for a building construction permit for a building or facility subject...[TABA]...unless the official verifies that the building or facility has been registered with the department as provided by rule.” Tex. Gov’t Code 469.102(d). However, current administrative rules appear to place the burden on the person responsible for the building – typically the owner or architect/engineer – to submit plans for approval to TDLR. 16 T.A.C. 68.50.

### **Plumbing Limitations**

The plumbing license law provides that, in a city that has adopted a plumbing code, a person must obtain a permit before the person performs plumbing. Tex. Occ. Code § 1301.551(c)(the repairing of leaks, the replacement of lavatory or kitchen faucets, the replacement of ballcocks or water control valves, the replacement of garbage disposals, or the replacement of water closets are excepted from the permit requirement).

The law also mandates – among other things – that cities accept permit applications by telephone, fax, or email, and provides that a city that requires a permit may not charge a plumber a registration fee. Tex. Occ. Code § 1301.551(g). Finally, a city that requires a plumber to obtain a permit must verify through the Texas Board of Plumbing Examiners’ website, or by contacting the board by telephone, that the plumber has a certificate of insurance on file with the board. Tex. Occ. Code § 1301.552.

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

Several years ago, the Texas Board of Professional Engineers (TBPE) sought enforcement action against at least one city in Texas. 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 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 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.

Nevertheless, the issue arose again in 2009. The TBPE sought to enforce its rules against a city, resulting in a state legislator requesting an attorney general opinion on the issue. That request, RQ-0832-GA, was later withdrawn after the city and the TBPE entered into an agreed order to close the case.

**If a city does enforce building codes, and issues building permits, are there any other 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 TML 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.

The 2009 session brought a bill that, as filed, would have been detrimental to all cities. The bill, S.B. 820, ultimately became a negotiated compromise that all parties could accept. It applies only to a city with a population of more than 100,000, and it provides that on or before the 21st day before the date the governing body takes action to consider, review, and recommend the adoption of or amendment to a national model code governing the construction, renovation, use, or maintenance of buildings and building systems, the governing body: (1) shall publish notice of the proposed action conspicuously on the city's Internet website; (2) shall make a reasonable effort to encourage public comment from persons affected by the proposed adoption or

amendment; and (3) on the written request of five or more persons, shall hold a public hearing open to public comment on the proposed adoption or amendment on or before the 14th day before the date the governing body adopts the ordinance. The bill also provides that if the governing body has established an advisory board, or substantially similar entity, for the purpose of obtaining public comment on the proposed adoption of or amendment to a national model code, the requirements described above do not apply. In addition, the bill provides that the governing body of a city with a population of more than 100,000 that adopts an ordinance or national model code provision that is intended to govern the construction, renovation, use, or maintenance of buildings and building systems in the city shall delay implementing and enforcing the ordinance for at least 30 days after final adoption, unless a delay in implementing or enforcing the ordinance would cause imminent harm to the health or safety of the public.

S.B. 1410 was a bill that passed in 2009 despite strong municipal opposition. The bill makes various changes to the requirements to obtain a state plumbing license. Of interest to cities, the bill provides, among other things, that: (1) notwithstanding any other provision of state law, after January 1, 2009, a city may not require the installation of a fire sprinkler system in a new or existing one- or two-family dwelling; (2) a city may allow a multipurpose residential fire protection sprinkler specialist or other contractor to offer, for a fee, the installation of a fire sprinkler protection system in a new one- or two-family dwelling; and (3) a multipurpose residential fire protection sprinkler specialist may install a sprinkler system in a new or existing one- or two-family dwelling.

In 2011, H.B. 1168 was the only-building permit-related bill that passed. The bill modifies the law relating to a landlord's duty to install smoke alarms in a rental unit. Of particular interest to cities, the bill provides that, if a dwelling unit was occupied as a residence before September 1, 2011, or a certificate of occupancy was issued for the dwelling unit before that date, a smoke alarm installed in accordance with law may be powered by battery and is not required to be interconnected with other smoke alarms, except that a smoke alarm that is installed to replace a smoke alarm that was in place on the date the dwelling unit was first occupied as a residence must comply with residential building code standards that applied to the dwelling unit on that date.