

May 23, 1962



Honorable E. J. Cantrell
State Representative
3rd District, St. Louis County
3406 Airway
Overland 14, Missouri

Dear Mr. Cantrell:

Subsequent to our letter to you of April 25, 1962, regarding permissible sources of fire protection district ordinances, we were contacted by Mr. T. Douglas Moore, an attorney representing the Community Fire Protection District of St. Louis County. Mr. Moore advised that he initially addressed the questions to you which gave rise to your request for advice, and stated further that he was calling upon us with your consent to amplify the questions put by your letter.

As we understand the request now, it contains three questions which may be stated thusly:

1. May a fire protection district adopt a code which is denominated as a "building" code, where its provisions govern matters directly related to fire security and prevention.
2. If a fire protection district desires to adopt a code, such as the BOCA Basic Building Code, may it do so by simply enacting an ordinance which refers to that code by name alone; or is it necessary to set the entire code out at length and act upon it directly.

3. May a fire protection district adopt a building code, such as the BOCA Basic Building Code, as it exists at the time of adoption and provide for the automatic incorporation in future of any amendments or additions thereto by the agencies which compile and publish such code.

As pointed out in our first letter, fire protection districts are empowered to enact ordinances which are "necessary for the carrying on of the business, objects and affairs of the board and the district . . ." Section 321.210 (12), RSMo 1959. If the provisions of the proposed code bear a reasonable relationship to the ends provided in the statute, the code may be adopted regardless of the fact that it is named and known as a "building" code. Each section of the code would, of course, have to qualify on its own merits, but the fact that the code is denominated as a "building" code would not ipso facto disqualify it as a source of ordinances to be enacted by a fire protection district. The answer to the first question is, therefore, in the affirmative.

Neither the statutes nor the Missouri cases relating to fire protection districts give us any assistance in the resolution of the second question as to whether the code need be set out at length if it is to be adopted. Our examination of the copy of the 356 page BOCA Basic Building Code which was furnished to us by Mr. Moore reveals that it is a product of the Building Officials Conference of America, a private organization composed of civic minded members of the building industry. The code, though apparently well known to those in the industry, is not a matter of public record.

In *Thompson v. Scenic Ry. Co. v. McCabe*, (Mich. Sup. 1920) 178 NW 662, the City of Detroit had adopted a lengthy building code by reference to it in an enacting ordinance. When the Commissioner of Buildings refused to issue a building permit to allow the construction of a roller coaster because it violated one of the provisions of the code, the efficacy of the method of adopting the code by reference was challenged in the courts.

The city charter required publication at length of all ordinances, however, the defendants countered that such publication would have cost upwards of \$8000 and defended on the theory that an ordinance may properly incorporate by reference existing laws, ordinances, and public records. The defense contended that the filing of a copy of the code with the city clerk made the code a public record.

The Michigan court rejected all these contentions and, while agreeing that public records may be incorporated by reference, held that the code could not be so regarded as it was a "fugitive paper" which happened to be in the possession of the clerk. The court concluded that mandamus should issue to compel the granting of the permit.

In *City of Hazard v. Collins* (Ky. 1947) 200 SW2d 933, the court summed up the primary issue thusly, l.c. 933-934:

"The question presented on this appeal is whether or not the City of Hazard, a fourth class city with a commission form of government, could adopt a building code (hereinafter referred to as the Code) of 300 pages merely by referring to such Code in an ordinance duly passed, recorded and published. The chancellor held that such reference did not make the Code a part of the law of the city, and it appeals."

The affirmance of the decision of the trial court was based largely upon Kentucky statutes relating to cities of the fourth class which generally required publication and reading at length. The court rejected the contention that the code was made a matter of public record by the mere filing of copies with the city clerk, but suggested an alternative method, l.c. 935:

"We do not hold that a fourth class city cannot adopt a building code or a health or a safety regulation as a part of its law by reference in a duly passed ordinance without publishing and spreading such code or regulation on the ordinance book, as is required by statutes. But we do say that before such a document may be adopted by reference in an ordinance

that the document must first be read and approved by the law making body of the city in a formal session by a resolution duly passed and recorded showing that such action has been taken. If this is done and the document thus made a part of the public records of the city, we see no reason why it cannot be enacted into law by reference in a duly passed and published ordinance without spreading the document itself on the ordinance book as required by KRS 89.540 or by publishing it in conformity with KRS 86.090."

Although the Thompson and City of Hazard cases were each grounded on some statutory basis, we think they are helpful in determining judicial attitude toward the incorporation of codes by reference. As mentioned above, we are not assisted in the instant case by any statute setting out the formalities to be followed by a fire protection district in enacting ordinances; and the only case our research has uncovered which presents an analogous situation is State v. Waller, (Ohio App., 1943) 69 NE 2d 438.

In that case, defendant had been found guilty of a violation of a regulation of a county board of health requiring anyone selling milk to have a permit to do so. The regulation had been enacted by reference thereto, the source being forms published by the United States Public Health Service. Although no specific provisions were made by Ohio law for the method of adopting regulations by a board of health, the court said, l.c. 439:

"From a reading of section 1261-42, General Code, it is apparent that the rules and regulations of a duly constituted District Board of Health, such as that of Butler County, were, by the legislature, considered to be in the nature of City ordinances, and their adoption and promulgation intended by the legislature to be accomplished in similar manner and form, including publication as set forth in that section, and surrounded with similar procedural safeguards. It would

therefore, seem that their publication should be substantially as required for city ordinances and the right to adopt them in abbreviated form incorporating material therein by reference governed accordingly."

The court then held that cities could incorporate into their law by reference only matters officially adopted of public record, and all other matters were required to be set out in full as required by statute. The regulation was therefore ruled invalid.

We believe this is a reasonable view and would be adopted by a Missouri court, if confronted with the instant problem. In this connection, we note the existence of statutory provisions relating to Missouri cities of the third and fourth class which require that all ordinances be passed by bill, that they be read three times prior to passage, that no ordinance be revived or reenacted by mere reference to the title thereof but be "set forth at length, as if it were an original ordinance." Sections 77.080 and 79.130, RSMo 1959.

We express no opinion as to whether all of the formalities required for the passage of ordinances by cities of the third and fourth class are applicable to the adoption of ordinances by fire protection districts. However, we are of the opinion that a fire protection district may not incorporate into its law a model code which is not a subject of public record by simply referring to that code by name in an enacting ordinance.

In further support of this position we cite the following texts: McQuillin, Municipal Corporations, Vol. 5, Section 16.12, pp. 180-181, wherein we find:

"In recent years there has been some tendency to adopt by reference nationally or regionally recommended or standard ordinances, such as building codes or milk ordinances. Generally speaking, incorporation by reference of such a standard or code, without more, cannot constitute the effective and valid enactment of an ordinance. Nor does it

suffice for enactment of such an ordinance or code merely to leave copies of it in the clerk's office and then refer to it in an ordinance duly passed. * * *

In Charles S. Rhyne's Municipal Law, Section 9-6, pp. 232-233, appears the following:

"Many states have authorized municipalities to incorporate by reference the provisions of certain technical codes and statutes, thus dispensing with the requirement of publication. The courts have generally sustained ordinances adopting by reference the provisions of statutes, prior ordinances or other codes or regulations which were found to be matters of public record. However, attempts to adopt by reference amendments in future to such provisions or regulations not officially matters of public record have been held invalid."

The foregoing quote from Mr. Rhyne's treatise touches on the final question, i.e. whether future amendments of any code adopted can be provided for so as to make them a part of the existing law as soon as the amendment is accomplished and with no further action on the part of the fire protection district. For example, under the terms of such a provision, any changes in the BOCA Code effected by the next conference of its members would "automatically" become an ordinance of the Community Fire Protection District or amend any existing ordinance of that agency.

We believe that a negative answer to this question requires no citation of authority. The plan proposed amounts not only to a delegation of ordinance making power but, indeed, to the virtual abdication of it. The legislature has granted the duty as well as the power to operate fire protection districts to the board of directors of each district. Such duty may

Honorable E. J. Cantrell -7-

not be avoided by passing it on to a private organization, regardless of the high motives and professional qualifications of the members of that organization.

We sincerely hope that the foregoing will be of assistance to you.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

AJS:ms