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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES M. CONDON
ATTORNEY GENERAL

August 12, 1999

The Honorable Joe Wilson
Member, South Carolina Senate
Post Office Box 142
211 Gressette Senate Office Building
Columbia, South Carolina 29202

RE: Informal Opinion

Dear Senator Wilson:

You have requested an opinion from this Office concerning the appropriate language to be used in future legislation to provide consistent construction standards in state owned buildings by the adoption of the latest edition of standard codes.

By way of background, you state that several agencies are responsible for the design and construction of buildings and structures. These agencies enforce nationally recognized codes that they have adopted, either by law or regulation. The General Assembly is considering legislation that will provide for the automatic adoption of the latest edition or revision of a nationally recognized code within one year of its official publication, adoption or approval date, unless the agency sooner publishes notice of adoption in the State Register. Presumably, the General Assembly intends that all future revisions and changes to these nationally recognized codes would be incorporated by reference into statutory law without further action by the regulatory agencies of the General Assembly.

ISSUES

1) Can the General Assembly adopt by reference these nationally recognized codes?

2) Can the General Assembly delegate to the agencies the authority to adopt by reference the nationally recognized codes through regulation?

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3) Can the General Assembly adopt by reference, without further action, future amendments or revisions to these nationally recognized codes?

BRIEF ANSWER

1) The General Assembly may adopt by reference the nationally recognized codes because this is not an impermissible delegation of power.

2) The General Assembly may delegate to the agency the authority to adopt by reference, through regulation, nationally recognized codes if they are consistent with an articulated legislative policy.

3) Neither the General Assembly nor the agency may adopt by reference future revisions, amendments, or versions of these nationally recognized codes because this would be an impermissible delegation of legislative power to a private organization.

LAW / ANALYSIS

The General Assembly creates the agencies charged with the oversight of design and construction of structures and buildings in this state and places certain duties and responsibilities upon them to enforce their authority. The General Assembly is limited, however, in their delegation of legislative power, as stated in South Carolina State Highway Department v. Harbin, 226 S.C. 585, 86 S.E.2d 466 (1955):

> It is well settled that while the legislature may not delegate its power to make laws, in enacting a law complete in itself, it may authorize an administrative agency or board to fill up the details by prescribing rules and regulations for the complete operation and enforcement of the law within its express general purpose. (Citations omitted) . . . "However, it is necessary that the statute declare a legislative policy, establish primary standards for carrying it out, or lay down an intelligible principle to which the administrative officer or body must conform, with a proper regard for the protection of the public interests and with such a degree of certainty as the nature of the case permits, and enjoin a procedure under which, by appeal or otherwise, both public interests and private rights shall have due consideration." (quoting State v. Stoddard, 126 Conn. 623, 13 A.2d 586, 588 (1940)).

Thus, the legislature may delegate power to administrative officers or agencies to adopt rules and regulations to enforce statutory law, but the regulations must be consistent with a definitive legislative policy.

After determining that the legislative power may be delegated, the next step in the analysis is to determine whether agency regulations exceed the authority delegated from the legislature. Often the agency adopts nationally recognized codes to establish consistent guidelines. The adoption is either specifically authorized by statute, or again, consistent with the legislative policy. For example, in Johnson v. Roberts, 269 S.C. 119, 236 S.E.2d 737 (1977), the Supreme Court of South Carolina upheld the state fire marshal's adoption of the Fire Prevention Code. The General Assembly lawfully delegated their legislative power to the marshal's discretion in requiring conformance with minimum standards "based on nationally recognized standards." In that case, the fire marshal's choice of the Fire Prevention Code was an appropriate example of the national standards to be adopted.

Sometimes, the mandate from the General Assembly is more specific. For example, in South Carolina Code Section 6-9-50, the General Assembly requires municipalities and counties to adopt by reference "only those provisions of the latest editions of the following nationally known codes and standards referenced in the codes for regulation of construction." The section then proceeds to list several nationally recognized codes, such as the Standard Building Code, the Standard Mechanical Code, etc. The legislation under consideration here would be similar to Section 6-9-50 in that it authorizes the state agencies to adopt by reference the "latest editions" of nationally recognized codes. While the General Assembly may delegate the power to adopt such codes (see Johnson v. Roberts), use of the terms "latest edition" or "most current" or "most recent" has been the subject of litigation.

In Professional Houndsmen of Missouri, Inc. v. County of Boone, 836 S.W.2d 17 (1992), the Missouri Court of Appeals interpreted an ordinance that defined a "Rabies Compendium" as "the most current edition of a document by that name published by the National Association of State Public Health Veterinarians . . . ." The court said the incorporation by reference was appropriate, but the adoption of the document takes the provisions as they exist "at the time of adoption and does not include subsequent additions or modifications of the statute so taken unless it does so by express intent." The court further rejected the argument that "most current edition" would include all future additions because "that would be an unlawful delegation. The right to exercise police power 'cannot be delegated to private persons.'" *Id* (citing State v. Donnelly, 285 S.W.2d 669, 674 (Mo. 1956)). Instead, the court held that the ordinance should be interpreted to mean "only the current list in effect" at the time of adoption to avoid any delegation problems. *Id.*

The Houndsmen case illustrates the difficulty in this type of legislation. The reference to "the latest edition" of the code is not in itself problematic, but the proposed provision for the automatic adoption of the latest revision or edition of the codes one year after they have been published would be an attempt to incorporate by reference all future additions. Many jurisdictions have held that this

would unlawfully delegate legislative power to a private entity because such a law would, in effect, grant to the private groups the power to initiate and enact rules that become law. See International Association of Plumbing and Mechanical Officials v. California Building Standards Comm'n., 55 Cal.App. 4th 245, 64 Cal.Rptr.2d 129, 134 (1997). "Manifestly, any association may adopt a 'code' but the only code that constitutes the law is a code adopted by the people through the medium of their legislature." Columbia Specialty Co. v. Breman, 90 Cal.App.2d 372, 202 P.2d 1034 (1949).

The Attorney General of California addressed the same issue in 1980 when a provision of the Health and Safety Code authorized the Commission of Housing and Community Development to exercise its discretion to enact certain nationally recognized codes. The act further specified that "upon the failure of the commission . . . to take such action within one year of the publication of future editions of such a model code, then such model code provisions shall be considered to be adopted by the commission." 63 Ops. Cal. Atty. Gen. 566 (1980). The Attorney General said:

> Viewing these provisions broadly it seems apparent that the new methodology was intended not only to relieve the Legislature from the continuing burden of considering these detailed uniform codes each time they might be revised but also intended to permit California to be more responsive to such changes since it may be presumed that the commission might evaluate and respond to such changes in a more timely manner than would the Legislature. It is of considerable significance that the Legislature imposed a one-year requirement with respect to adopting such "most recent editions." This requirement supports the conclusion that the Legislature intended that each new edition be evaluated by the commission for possible revision to meet California's needs, but in the event of the commission's failure to act . . . the most recent edition would . . . go into effect.

The opinion concluded that the commission was authorized to amend their regulations as the codes are revised, appropriately thereby relieving the Legislature of their burden, but neither the Legislature nor the commission could adopt the revisions prospectively. See also Dawson v. Hamilton, 314 S.W.2d 532 (Ky Ct. App. 1958), State v. Christie, 766 P.2d 1198 (Haw. 1988); Hillman v. Northern Wasco County People's Utility District, 213 Or. 264, 323 P.2d 664 (1958) (stating neither Public Service Commissioner nor successor, "without hearing or further consideration," could adopt prospective changes in code) *overruled on other grounds by* Maulding v. Clackamas County, 278 Or. 359, 563 P.2d 731 (1977).

Similarly, the legislation now being considered attempts to provide for the same automatic adoption of future revisions of nationally recognized codes in the absence of any further consideration of the changes by the legislature or the agency charged with enforcing them. Multiple jurisdictions have struck down such attempts as impermissible delegations of legislative power to private entities, as these private organizations would have the power to formulate rules that would

ultimately acquire the status of law. Therefore, no language that attempts to adopt all prospective revisions or editions, either by direct legislative mandate or by delegation to an agency, would be appropriate. The proposed legislation should contain some provision directing the agencies involved to consider future changes to the codes as they are enacted and then amend their regulations accordingly.

I trust this information is responsive to your inquiry. This letter is an informal opinion only. It has been written by a designated Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Sincerely yours,

Zeb C. Williams, III

Zeb C. Williams, III
Deputy Attorney General

ZCW/ph