

Opinion No. 2011-140

February 14, 2012

The Honorable Jeffrey R. Wardlaw  
State Representative  
810 East Church Street  
Warren, Arkansas 71671-34354

Dear Representative Wardlaw:

I am writing in response to your request for my opinion on three questions I will paraphrase as follows:

1. In light of Hampton City Ordinance 2011-07, is the city following Codes, especially as regards Section 8 of the Ordinance?
2. Is it the duty of the city attorney to write municipal ordinances?
3. Does the city have to own its own Code books for fire codes?

The referenced Hampton City Ordinance No. 2011-07 (the “Ordinance”), dated October 2011 and attached to your request in unexecuted form, imposes a building fee requirement for specified construction, purports to adopt “the 1999 State Fire Code” and details a qualified right of entry into structures within the city to inspect for fire hazards. For purposes of my discussion, I will assume the draft copy of the Ordinance was indeed enacted by the city council and executed by the mayor in October 2011.

**RESPONSE**

With respect to your first question, I cannot opine whether the city is “following Codes” in light of the Ordinance, which mentions only the “1999 State Fire Code” and bears no direct relation to any other codes that might be binding on the city.

The question of whether city practices, including those prescribed in Section 8 of the Ordinance, comply with applicable codes is properly addressed by local counsel acquainted with all of the attendant circumstances. The answer to your second question is “no.” With respect to your third question, a city wishing to adopt by ordinance any technical code must provide notice of its intention to do so and make available three copies of the code for inspection prior to enactment of the ordinance. I am unaware of any provision of law that requires a city to “own” copies of codes that apply by operation of state law or that have been enacted by ordinance.

***Question 1: In light of Hampton City Ordinance 2011-07, is the city following Codes, especially as regards Section 8 of the Ordinance?***

The interpretation of local ordinances is an activity this office has consistently declined to undertake because it necessarily involves determining of the intent of the city council – a determination far more readily made by local officials than by myself.<sup>1</sup> Local counsel acquainted with all pertinent circumstances would be far better situated than I to determine whether the city’s practices, perhaps including observance of the inspection standards set forth in Section 8 of the Ordinance, accord with applicable codes, as well as statutory and constitutional imperatives. Accordingly, I must respectfully decline to answer this question.

***Question 2: Is it the duty of the city attorney to write municipal ordinances?***

No. The city attorney is under no statutory obligation to draft municipal ordinances, although his or her input may prove beneficial to lawmakers.

Chapter 55 of Title 14 of the Arkansas Code governs “Ordinances of Municipalities.”<sup>2</sup> Nothing in this chapter indicates that the city attorney need be involved in any way in the drafting of municipal ordinances.

One of my predecessors addressed a similar issue in answering the following question: “In the absence of an ordinance prescribing the manner of setting the agenda for a council meeting, may ordinances and/or resolutions be introduced without first submitting them to the mayor or city attorney for advance review and

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<sup>1</sup> See, e.g., Ops. Att’y Gen. Nos. 2004-064; 2003-198; 99-068.

<sup>2</sup> A.C.A. § 14-55-101 through -704 (Repl. 1998 & Supp. 2011).

approval?”<sup>3</sup> My predecessor correctly concluded – and the law has not changed in this regard – that the Arkansas Code contains no section providing “that an ordinance or resolution be submitted to either the mayor or the city attorney for advance review or approval.”<sup>4</sup>

***Question 3: Does the city have to own its own Code books for fire codes?***

A city that wishes to adopt a technical code, as the City of Hampton purports to have done in enacting the Ordinance, is required “to own its own Code” at least in electronic form for the purpose of allowing public inspection prior to enactment of the code. In this regard, the Arkansas Code provides as follows:

(a) Every municipality in the State of Arkansas is authorized by the passage of a municipal ordinance to adopt by reference technical codes, regulations, or standards, without setting forth the provisions of the code or parts thereof, if three (3) copies of the code, or the pertinent parts thereof, and any related documents are filed either electronically or by hard copy in the office of the clerk of the municipality for inspection and view by the public before the passage of the ordinance.

(b) The term “technical codes” shall include any building, zoning, health, electrical, or plumbing codes, and the term “regulations” shall include any criminal code of the State of Arkansas.

(c) It is the duty of the municipality to give a notice to the public, by publication in a paper of general circulation within the municipality, stating that copies of the code, or the pertinent parts thereof, and the related documents are open to public examination either electronically or by hard copy before the passage of the ordinance adopting the code.<sup>5</sup>

In my opinion, your general reference to “fire codes” would fall under the rubric of “technical codes” as that term is used in subsection (b) of the statute just

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<sup>3</sup> Op. Att’y Gen. No. 96-328.

<sup>4</sup> *Id.*

<sup>5</sup> A.C.A. § 14-55-207 (Supp. 2011).

quoted. Although this catalog of codes does not specify a “fire code,” all three volumes of the Arkansas Fire Prevention Code (the “AFPC”), which include the “fire code” and have been adopted as a group by the Arkansas Fire Marshal, contain provisions setting forth “building” and “electrical” requirements, rendering all three “technical codes” under the statutory definition.<sup>6</sup> Moreover, as regards the absence of an express reference in the statute to the “fire code,” the statute specifies that the term “technical codes” merely “include[s],” rather than consisting only of, the codes denominated in the statutory listing.

Left unaddressed in this statute is the question of what might be the effect if a city were to adopt, as the City of Hampton purports to have done in the Ordinance, the AFPC without having provided the referenced notice or without having made available for inspection three copies of the code. In my opinion, the effect would *not* be to render the AFPC inapplicable. As noted above,<sup>7</sup> the AFPC constitutes a binding set of state standards that cities are obliged to observe or exceed in enforcing the regulations set forth therein. In accordance with this principle, my predecessor concluded that a current edition of the AFPC will control even if a city had adopted a previous edition that imposes less stringent regulations.<sup>8</sup>

I appreciate that this conclusion might raise the additional question of what might be the purpose of authorizing a city to adopt a code that already applies as a matter of state law. Without venturing to offer a definitive answer to this question, I will merely note that a city’s adoption of a particular code by local ordinance would at the very least expedite local revenue-generating and enforcement mechanisms such as the imposition of fees and fines. Moreover, a city might presumably adopt

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<sup>6</sup> The Arkansas Fire Marshal, pursuant to his statutory authority under A.C.A. § 12-13-105 (Repl. 2009), has adopted as the 2007 edition of the AFPC slightly modified versions of the International Fire Code (2006), the International Building Code (2006) and the International Residential Code (2006). This most recent version of the AFPC is necessarily applicable to the state’s political subdivisions unless a political subdivision has adopted by ordinance a more stringent standard. Ops. Att’y Gen. Nos. 2005-075 and 2003-198; *compare* AFPC, Vol. 1, § 101.2.2 (2007 ed.) (declaring that political subdivisions “ shall only adopt and enforce the provisions of the *Arkansas Fire Prevention Code*, 2007 Edition”).

<sup>7</sup> See note 6, *supra*.

<sup>8</sup> See Op. Att’y Gen. No. 2003-198. In the present case, the city in Section 7 of the Ordinance purported to adopt the “1999 State Fire Code,” although it unaccountably referenced in the course of so doing “Code 2002.” Whatever the significance of this reference, the most recently adopted AFPC is the 2006 International Fire Code, as modified and adopted by the Fire Marshal in 2007, which automatically provided a baseline for regulation applicable to municipalities as of that date.

a code such as the AFPC subject to certain specified, more stringent regulations. However, no court has yet found occasion to address this issue.

In summary, if the City of Hampton effectively adopted a version of the AFPC, the city would at the least have been obligated to own three copies of that version for purposes of inspection and review prior to its adoption. However, the possibility of effectively adopting a superseded version of the AFPC might be ruled out by the provision in the current version directing that cities adopt only the most recent version.<sup>9</sup> Moreover, any adoption of a previous version would be potentially effective only to the extent that the current version of the AFPC did not impose more stringent conditions. Finally, I am unaware of any requirement that a city own one or more copies of the AFPC in any edition following the time of its adoption by local ordinance.

Assistant Attorney General Jack Druff prepared the foregoing opinion, which I hereby approve.

Sincerely,

DUSTIN McDANIEL  
Attorney General

DM/JHD:cyh

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<sup>9</sup> See note 7, *supra*.