



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 5, 2021

The Honorable Luis V. Saenz
Cameron County District Attorney
964 East Harrison Street, Fourth Floor
Brownsville, Texas 78520

Opinion No. KP-0370

Re: Whether section 3000.002 of the Government Code prohibits political subdivisions from adopting paint color and pattern requirements (RQ-0387-KP)

Dear Mr. Saenz:

You ask whether section 3000.002 of the Government Code prohibits political subdivisions from adopting paint color and pattern requirements and related questions.¹

Background

Chapter 3000 of the Government Code governs building regulations a governmental entity may adopt with respect to building products, materials, and methods. *See* TEX. GOV'T CODE §§ 3000.001–.005. For purposes of chapter 3000, a governmental entity includes political subdivisions such as a municipality. *Id.* § 3000.001(2) (incorporating section 2007.002 of the Government Code), *id.* § 2007.002(1)(B) (defining governmental entity to include political subdivisions); *Town of Lakewood Vill. v. Bizios*, 493 S.W.3d 527, 530 (Tex. 2016) (stating that municipalities are political subdivisions of the State). Subsections 3000.002(a)(1) and (2) limit ordinances and other rules or regulations that a municipality may adopt:

Notwithstanding any other law and [with certain exceptions], a governmental entity may not adopt or enforce a rule, charter provision, ordinance, order, building code, or other regulation that:

- (1) prohibits or limits, directly or indirectly, the use or installation of a building product or material in the construction, renovation, maintenance, or other alteration of a residential or commercial building if the building product or material is approved for use by a national model code

¹Letter from the Honorable Luis V. Saenz, Cameron Cnty. Dist. Att’y, to the Honorable Ken Paxton, Tex. Att’y Gen. at 1 (Nov. 13, 2020), <https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/rq/2020/pdf/RQ0387KP.pdf> (“Request Letter”).

published within the last three code cycles that applies to the construction, renovation, maintenance, or other alteration of the building; or

(2) establishes a standard for a building product, material, or aesthetic method in construction, renovation, maintenance, or other alteration of a residential or commercial building if the standard is more stringent than a standard for the product, material, or aesthetic method under a national model code published within the last three code cycles that applies to the construction, renovation, maintenance, or other alteration of the building.

TEX. GOV'T CODE § 3000.002(a)(1), (2). You state that the City of South Padre Island (the "City") adopted a form-based code² that mandates specific color palettes and patterns in certain areas of the City. Request Letter at 3. You ask whether subsections 3000.002(a)(1) and (2) prohibit a municipality from adopting rules, regulations, and ordinances that require specific color palettes and color patterns in particular areas within the municipality's jurisdiction. *Id.* at 1.

Construction of Subsections 3000.002(a)(1) and (2)

Courts construing statutes attempt to give effect to the Legislature's intent, as ascertained from the plain meaning of the words used in the statute. *Brazos Elec. Power Coop., Inc. v. Tex. Comm'n on Env't Quality*, 576 S.W.3d 374, 383–84 (Tex. 2019). When the Legislature has defined a statutory term, that definition controls, but for undefined terms courts "construe the statute's words according to their plain and common meaning." *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625 (Tex. 2008).

Subsection 3000.002(a)(1) prohibits a municipality from adopting a regulation that "prohibits or limits . . . the use or installation of a building product or material in the construction, renovation, maintenance, or other alteration of a residential or commercial building" in certain circumstances. TEX. GOV'T CODE § 3000.002(a)(1). The term "building product or material" is not defined. "Product" simply means "something produced." WEBSTER'S THIRD NEW INT'L DICTIONARY 1810 (2002). "Material" commonly means "the basic matter (as metal, wood, plastic, fiber) from which the whole or the greater part of something physical (as a machine, tool, building, fabric) is made." *Id.* at 1392. The context concerns products and materials that are used "in the construction, renovation, maintenance, or other alteration of a residential or commercial building." TEX. GOV'T CODE § 3000.002(a)(1).

Under subsection 3000.002(a)(1), a municipality may not adopt a regulation prohibiting or limiting the use of those building products or materials that have been "approved for use by a

²See Katherine A. Woodward, *Form over Use: Form-Based Codes and the Challenge of Existing Development*, 88 NOTRE DAME L. REV. 2627, 2642 (2013) (defining "form-based codes" as "[a] method of regulating development to achieve a specific urban form that aims to create a predictable public realm primarily by controlling physical form, with a lesser focus on land use, through city or county regulations" (quotation marks and citation omitted)).

national model code published within the last three code cycles that applies to the construction, renovation, maintenance, or other alteration of the building.”³ *Id.* § 3000.002(a)(1). Because the prohibition concerns only a model code that “applies to the construction, renovation, maintenance, or other alteration of the building” under consideration, it concerns model codes that have been adopted by law within the jurisdiction. TEX. GOV’T CODE § 3000.002(a)(1). And the prohibition includes the last three code cycles of the applicable model codes. *Id.* Thus, a municipality may not prohibit or limit the use or installation of those building products and materials that an applicable model code has approved within the last three publication cycles for use in building construction, renovation, maintenance, or other alteration. *Id.*

Subsection 3000.002(a)(2) prohibits a municipality from adopting a “standard for a building product, material, or aesthetic method in construction, renovation, maintenance, or other alteration of a residential or commercial building” more stringent than standards contained in applicable national model codes within the last three publication cycles.⁴ *Id.* § 3000.002(a)(2). Like the key words in subsection 3000.002(a)(1), subsection 3000.002(a)(2) does not define “aesthetic method.” *Id.* “Aesthetic” commonly means “relating to the beautiful as distinguished from . . . the useful and utilitarian.” WEBSTER’S THIRD NEW INT’L DICTIONARY 34 (2002). Aesthetics is a concern in the practice of architecture, which includes establishing “form, aesthetics, materials, and construction technology for a building.” TEX. OCC. CODE § 1051.001(7)(A). And “method” commonly means “the procedure or process for attaining an object.” WEBSTER’S THIRD NEW INT’L DICTIONARY 1422 (2002)⁵. Thus, an “aesthetic method” in subsection 3000.002(a)(2) concerns procedures or processes to satisfy considerations of beauty or appearance in building construction, renovation, maintenance, and other alterations. A court could consider a limitation of the paint color palette or pattern that may be used in a particular part of the city to be an aesthetic method standard.

³Section 3000.001 incorporates the definition of “national model code” that appears in subsection 214.217(a) of the Local Government Code:

“[N]ational model code” means a publication that is developed, promulgated, and periodically updated at a national level by organizations consisting of industry and government fire and building safety officials through a legislative or consensus process and that is intended for consideration by units of government as local law. National model codes include the International Residential Code, the National Electrical Code, and the International Building Code.

TEX. LOC. GOV’T CODE § 214.217(a); *see also* TEX. GOV’T CODE § 3000.001(1).

⁴Section 3000.002 does not apply to certain areas of a municipality, such as areas designated historical, cultural, or architectural importance and significance in specified circumstances. *See* TEX. GOV’T CODE § 3000.002(c)(5)–(7).

⁵*See also State v. Terrell*, 588 S.W.2d 784, 788 (Tex. 1979) (“The term ‘method’ is defined as ‘a procedure or process for attaining an object’ and as an ‘orderly arrangement, development or classification.’ . . . The term is synonymous with the words ‘mode,’ ‘plan,’ ‘design,’ or ‘system.’” (citation omitted)).

Application of subsections 3000.002(a)(1) and (2) to Municipal Color Regulations

You state that the City has adopted several national model codes, including the International Building Code, the International Residence Code, and other model codes. Request Letter at 3. The City's Code of Ordinances indicates that it has adopted a number of model codes:

The City adopts the 2015 International Building Code, 2015 International Residential Code without Section R313 (deleted), 2015 International Fire Code without Appendices L and M (deleted), 2015 International Mechanical Code, 2015 International Plumbing Code, 2015 International Fuel Gas Code, 2014 National Electrical Code, 2015 International Energy Conservation Code, 1997 Standard Housing Code, and the 1985 Unsafe Building Abatement Code and all other amendments thereto except as modified by the Code of Ordinances.

S. PADRE ISLAND, TEX., CODE OF ORDINANCES § 4-5(A)(2018).⁶ Thus, subsections 3000.002(a)(1) and (2) require City ordinances to comport with the pertinent approvals and standards contained in these model codes published within the last three code cycles. *See* TEX. GOV'T CODE § 3000.002(a)(1), (2).

You do not identify any provision in these adopted codes relevant to your question. *See* Request Letter at 3. You state that these codes are “silent as to the regulation of color palates and patterns,” but that fact alone does not fully resolve the inquiry. *See id.* at 3. While a local color regulation may not directly prohibit or limit the use or installation of approved materials or products, subsection 3000.002(a)(1) also prohibits indirect prohibitions and limitations having that effect. TEX. GOV'T CODE § 3000.002(a)(1). Determining all potential indirect effects of a color regulation would likely require resolution of the facts concerning particular products or materials. Similarly, whether a particular model code provision establishes a standard for a building product, material, or aesthetic method less stringent than a color regulation would also likely depend on the particular facts. *See id.* § 3000.002(a)(2). While a court could conclude that the model codes' silence allows a governmental entity to regulate in that area without violating section 3000.002, we cannot make that determination as a matter of law. *See* Tex. Att'y Gen. Op. No. KP-0088 (2016) at 3 (stating that investigating and resolving fact questions are beyond the function of the opinion process).

Application of subsections 3000.002(a)(1) and (2) to the Legislature

Your second question is whether subsections “3000.002(a)(1) and (2) establish a more stringent aesthetic method in construction, renovation, maintenance, or other alteration of a building as compared to the national model codes—which are silent as to color palettes and paint color patterns—rendering the Sections unenforceable.” Request Letter at 1–2. Subsections 3000.002(a)(1) and (2) apply to a “governmental entity,” which as defined, includes only entities

⁶*See* SOUTH PADRE ISLAND, TEX., CODE OF ORDINANCES § 4-5(A) (2018), https://library.municode.com/tx/south_padre_island/codes/code_of_ordinances?nodeId=CH4BUCO.

in the executive branch of state government and political subdivisions. *See* TEX. GOV'T CODE § 3000.001(2) (adopting definition in Government Code section 2007.002(1)(B)). Because the Legislature is not an entity in the executive branch or a political subdivision, subsections 3000.002(a)(1) and (2) do not apply to its statutory requirements.

S U M M A R Y

Chapter 3000 of the Government Code governs building regulations a governmental entity may adopt with respect to building products, materials, and methods. Subsection 3000.002(a)(1) prohibits a governmental entity from adopting an ordinance or other regulation that directly or indirectly prohibits or limits the use of products or materials approved for use by certain national model codes. Subsection 3000.002(a)(2) prohibits a governmental entity from establishing standards for building products, materials, or aesthetic methods that exceed the standards in such model codes. Determining whether an ordinance adopting color palette and pattern requirements prohibits or limits, directly or indirectly, a model code approval, or is more stringent than model code standards for building product, material, or aesthetic methods, will likely require investigation into and resolution of fact questions, which is beyond the purview of the opinion process.

Subsections 3000.002(a)(1) and (2) of the Government Code do not apply to the Legislature.

Very truly yours,

A handwritten signature in black ink that reads "Ken Paxton". The signature is written in a cursive, flowing style.

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