

STATE OF KANSAS

Office of the Attorney General

1st Floor, State Capitol Bldg. (913) 296-2215 Topeka, Kansas 66612

Curt T. Schneider
Attorney General

August 29, 1978

ATTORNEY GENERAL OPINION NO. 78-275

Ms. Patricia K. Stahlschmidt
Flood Insurance Specialist
Department of Housing and
Urban Development
911 Walnut Street
Kansas City, Missouri 64106

Re: Cities--Ordinances--Incorporation by Reference

Synopsis: A federal regulation, which is not itself drawn and promulgated as a standard or model code or ordinance, may not be incorporated by reference in a municipal ordinance under K.S.A. 12-3009.

* * *

Dear Ms. Stahlschmidt:

I have your letter of August 18, 1978, concerning the adoption of ordinances by Kansas communities in their implementation of the National Flood Insurance Program.

You advise that in order to fulfill requirements for participation in that program, communities are required to adopt a flood plain management ordinance which meets the requirements as published in the October 26, 1978, Federal Register, Vol. 41, No. 207, Subpart 1910.3. These requirements are now found at 24 C.F.R. § 1910.3. This section enumerates minimum standards prescribed by either the Federal Insurance Administrator or the Secretary of Housing and Urban Development for adequate flood plain management regulations for flood-prone areas which must be satisfied by a community to be eligible for participation in the program. Recently,

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you advise, a few Kansas communities have indicated a desire to adopt these regulations by reference, rather than a separate program ordinance, in an understandable effort to reduce publication costs. However, a question has arisen whether the Federal Register or the Code of Federal Regulations may be adopted by reference.

K.S.A. 12-3009 provides in pertinent part thus:

"Any city is hereby authorized and empowered to incorporate in an ordinance by reference, in the manner hereinafter provided, any standard or model code or ordinance, regulation having the effect of law of a state officer, board or other agency, or statute, or portions thereof on any subject on which a city may legislate, which standard or model code or state regulation is available in book or pamphlet form"

The statute permits the incorporation by reference of three separate categories of material: (1) any standard or model code or ordinance; (2) regulations having the effect of law of a state officer, board or other agency; and (3) any statute. The only regulations which may be adopted by incorporation by reference are those of a state officer, board or other agency, which, of course, does not include regulations of federal agencies.

Title 23, C.F.R. § 1910.3 is not itself a standard or model code or ordinance. It does enumerate requirements which participating communities must satisfy, but it does not set out those requirements in the form of a model code or ordinance. Lastly, of course, the regulations, while having the force and effect of law, are not themselves statutes.

Thus, the referenced regulations do not fall within any of the three categories of subject matter which a city may adopt in an ordinance by reference.

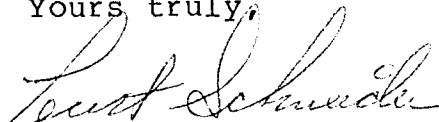
One possible argument should be noted. It may be argued that the phrase "any standard or model code or ordinance" describes not one, but two separate categories of subject matter which may be incorporated by reference, *i.e.*, first, "any standard," and secondly, "any model code or ordinance." The structure and punctuation of the clause argues against such a construction, in my judgment. The term "standard" is used as an adjective, together

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with the alternative adjective "model," to describe two kinds of ordinances which may be adopted, *i.e.*, either standard or model codes and ordinances. The term "standard" is not separated from the remaining words in the clause, "model code or ordinance" by a comma or otherwise to suggest that it is used as a noun to denote a separate and independent category of material which may be adopted by reference.

Accordingly, in my judgment, the regulations found at 24 C.F.R. § 1910.3 are not permitted by K.S.A. 12-3009 to be incorporated by reference in a municipal ordinance. There is, certainly, no apparent distinction to be drawn between state and federal regulations, which would permit the former to be incorporated by reference and not the latter. For whatever reason, however, the legislature has not included federal regulations among the subject matter which may be adopted in an ordinance by reference.

Yours truly,



CURT T. SCHNEIDER
Attorney General

CTS:JRM:kj