

Chapter 3 – Local Governmental Law

This chapter will give a brief overview of the major types of local governments and the powers that each of them possess.

Topics

- Forms of Local Government
- Dillon's Rule
- Home Rule Municipalities
- Local Adoption of a Building Code

Terms

- Dillon's Rule
- home rule
- null and void
- statute
- ultra vires*

Introduction

In the day-to-day administration and enforcement of a building code, building officials need not worry about the power and authority of local governments to enact legislation or to otherwise act. When building officials recommend to the local legislative body the adoption of a particular building code, they must be concerned with the specific power of local government. At that point, the building official is very much concerned with the power of the municipality to enact the desired legislation. This chapter will give a brief overview of the major types of local governments and the powers that each possess. Because the differences between the many forms of local government are vast, the chapter will speak in generalities. To decide the nature of the legislation to be recommended and enacted, each building official must work with his or her own legal advisor to determine the powers and authorities of local government. Be advised that reading this chapter does not take the place of legal advice from an attorney who is familiar with the peculiarities of local governmental law in the state where the building official works.

This chapter will discuss and distinguish municipalities and counties. In most states, they have been the smallest units of government for many years. This chapter will also briefly discuss the different types of municipalities. Additionally, the power of home rule municipalities will be analyzed in some depth. The chapter will close by looking at the process of adopting a building code, along with some pitfalls that must be avoided.

Forms of Local Government

Local governments exist in a variety of forms. Each form generally has different characteristics and, while the specifics may vary from state to state, some general observations can be made about three forms of local government: counties, municipalities, and home rule.

Counties

The great dividing line in local government is between the county and municipal forms. A county is usually considered an arm of the state that has been created by the state for governmental purposes. It may be seen as a unit of state government—a part of the state itself. As part of the state, a county is entitled to many of the privileges of the state, particularly the doctrine of sovereign immunity. This doctrine will be examined in more detail in Chapter 4, but for now it should be understood to mean that the state cannot ordinarily be sued for any wrongdoing of which it may be guilty. A state is immune from suit; therefore, because the county is considered an arm of the state, a county is also immune from suit. Even today, as the U.S. Supreme Court chips away at the doctrine of sovereign immunity, the county, through its relationship with the state, is usually immune.

Municipalities

A municipality is very different from a county. Generally, a municipality is viewed as a corporation established by the state legislature for the good of inhabitants who live in a prescribed area. In most cases, a municipality is created by the incorporation of the people who live in a certain area, and it is invested with subordinate powers of legislation so that it may assist in the civil government of the community. It is created by charter, which is often adopted in a public referendum. The charter, like that of a private corporation, establishes the powers and duties of the municipal government. A municipal government may not act beyond the scope of that authority.

Unlike counties, municipalities do not have the full protection of sovereign immunity. Because they are considered public corporations, they are responsible under the law for their corporate acts. The theory for this reduced immunity is that in many respects the municipal corporation undertakes activities that are similar to, if not the same as, those taken by a private corporation or business. To impose legal liability on those activities is, therefore, seen by the courts as no different than ordinary, nonpublic cases. Naturally, there are some municipal activities that have no analog in the private sector. As to those “governmental” or “discretionary” activities, the doctrine of sovereign immunity does indeed apply and no liability may be imposed.

Municipalities exist in great variety today. Cities, towns, townships, villages, and boroughs are all different forms of municipalities. Many states also distinguish between classes of municipalities. For example, New York and Indiana have cities of the first, second, and third classes. Class differentiation is important. Frequently, different classes of municipalities have different powers and authorities under state law. In the same way, the county form of local government may also have authority totally different from the municipalities. The class of local government must always be accurately identified before examining the power or authority of a particular governmental entity to undertake a specific action. Because they differ from state to state, it is not possible in this limited space to describe any of the intrinsic differences between these municipal classes. The laws of each state must be explored to determine the limits of the powers of law.

Home Rule

Finally, in some states one very special type of local government is known as **home rule**. This form of government enjoys greater latitude and discretion in enacting legislation than do other forms of municipalities. While there are certainly very distinct limits to its authority, home rule government may act in areas without specific authorization from the state. This freedom enables a home rule government to act in any area it deems appropriate. Home rule municipalities are discussed in greater length later in this chapter.

Dillon's Rule

One important rule governs all municipal law, and municipal attorneys must constantly refer to it in advising clients as to the extent of the power and authority of any local government. It is **Dillon's Rule**. It states that a municipal corporation has only those powers which are: (a) expressly granted to it by charter or other state legislation; (b) implied or necessarily incident to the express powers; and (c) essential and indispensable to the declared objects and purposes of the corporation. Almost every power and function of a municipal corporation must be traceable, directly or indirectly, to some state authorizing (enabling) legislation. If no authorizing legislation can be found, then the local government most likely lacks authority to undertake the operation.

Expressed Power

An expressed power under Dillon's Rule is one that has been "set forth and declared exactly." These powers may and do form the basis for direct municipal actions insofar as they are consistent and within the bounds of other higher laws. Examples of those laws are the state and federal constitutions and the state and federal laws of general application. Frequently, state law expressly authorizes or mandates the adoption of a building code by a local governmental entity. For example, in New Jersey a statute expressly states it is required for all localities to adopt a building code. This authorizing **statute** is a classic example of the exercise of an expressed power.

Implied Power

Implied powers either arise from those powers expressly granted or essential to the operation of the powers that are expressly granted. For example, in the context of building codes, the legislation may not specifically authorize the issuance of a certificate of occupancy, but its issuance may easily be viewed as necessarily implied in the powers granted.

Essential and Indispensable

Powers that are "essential and indispensable to the declared objects and purpose of the corporation" may be seen either as a subset of the implied powers or some kind of inherent power of the municipality. For states that use the first approach, the difficulty arises in determining what is essential and indispensable. For example, in some states, the authority to adopt a building code is viewed as essential and indispensable, but in others it is not. Because an attorney can never be sure that the state courts will uphold a municipal legislative enactment that is not based on an express authority, the best advice is always to enact enabling legislation prior to the adoption of municipal legislation affecting any topic.

Enabling Legislation

In the area of building code adoption, many states have held, notwithstanding the general application of Dillon's Rule, that there are certain inherent municipal powers and that no

enabling legislation need exist in order to justify the enactment of such legislation. The adoption of a building code appears to be one of those inherent municipal powers. The courts have ruled that if the adoption, administration, and enforcement of a building code are of such fundamental importance to the health and welfare of a community, it is not necessary for that community to have special and express legislation permitting it to regulate the construction of buildings in the area. It still must be emphasized, however, that if the municipality or other form of local government has a choice between attempting to enact a building code in the absence of express authority, and the possibility of gaining expressed authority from the legislative body of the state, the local government should first attempt to gain approval from the state before proceeding with the adoption of the local building code. (Further discussion of enabling legislation may be found in Chapter 4.)

***Ultra Vires* Legislation**

If a building code must be enacted in the absence of any express legislation, the opposing lawyer will undoubtedly argue that the legislation is *ultra vires*, which means that the local governmental entity has acted beyond the scope of its powers. The phrase is customarily applied to private corporations, but it may be and often is employed in analyzing the actions of public corporations, such as a municipality. *Ultra vires* is defined as the “modern legal designation, in the law of corporations, of acts beyond the scope of the powers of the corporation, as defined by its charter or acts of incorporation.” For example, if a municipality attempts to adopt a building code in the absence of enabling legislation in its charter or otherwise, and, if upon challenge, a court is not convinced that the adoption of a building code is one of the municipality’s implied or inherent powers or functions, the court would most probably declare the building code an *ultra vires* action and therefore **null and void**. Something that is null and void has no legal force or binding effect. The law in question is therefore unable to support the purpose for which it was intended. Most often this type of challenge will arise in a lawsuit by the municipality to enforce some provision of a building code. As a defense the alleged building code offender will challenge the validity of the enactment of the code itself. If there is no enabling legislation authorizing the adoption of the building code, the probability of this defense being raised increases. The reasoning is that the defendant cannot be guilty of violating the code as law because the code was never actually the law in that municipality. Therefore, it pays to be careful when adopting a building code. Not only must proper enabling legislation be in place at the state level, but all other procedural requirements must be met and documented by the municipality. It is normally not the job of the building official to ensure that these conditions be met. For greater peace of mind, however, the building official should keep a sharp eye out for the details involved in the process.

Zoning ordinances are good examples of *ultra vires*. Most states have enacted a standard state-zoning enabling act developed by the U. S. Department of Commerce in 1926. Zoning law is, as a result of this standard act, uniform in many respects from one state to another. Under the act, the powers of the board of zoning appeals are broken into three parts. If a municipality enacting a zoning ordinance attempts to vest the board with a power beyond that authorized by its state’s version of the act, the action is *ultra vires* and subject to being declared unenforceable by the courts. This, of course, holds true of a board of building code appeals as well.

In the majority of the United States today, Dillon's Rule still survives intact. There is at least one state, Utah, that has explicitly done away with Dillon's Rule. The supreme court of that state has ruled that Dillon's Rule no longer applies there. It will be some time before the ramifications of this decision are fully understood.

Home Rule Municipalities

The county form of government was briefly described at the beginning of this chapter. Municipalities were also discussed along with enabling and *ultra vires* legislation. The third form of government has been reserved for special attention because if building officials happen to live in a home rule municipality, certain special rules apply. Generally these rules make it easier for the government to enact legislation to protect the public welfare. This section will briefly discuss some of these differences. Unfortunately, there are probably as many different types of home rule municipalities as there are home rule municipalities. The focus here will be on the two most important categories and their impact on building code enactment and enforcement.

The home rule municipality is distinguished from the other types of local government in that its charter is constitutionally derived from an authorization in a state's constitution. A state whose constitution contains a provision authorizing home rule municipalities allows the people of a city to establish their own charter by referendum. Most municipal charters are acts of the state legislative body. In other words, the state legislature enacts the charter and grants the powers to the local communities under which they must govern. A charter in a home rule municipality is directly passed by the people who live in the community. The home rule is adopted directly by the citizenry of the affected locale. In fact, one of the main reasons for the development of this type of municipality was the desire to stop the state legislative bodies from interfering with purely local affairs of which the state had limited knowledge. Interference from the state level was the decisive factor in the rise of many home rule municipalities. The provisions of the state constitution allowing the direct adoption of the city charter are of prime importance when examining the powers of the home rule city.

Legally, the effect of a home rule charter is the same as if it were passed by the state legislature. It is considered a state law. It has the same force and effect as a law directly enacted by the state legislature. Generally, when viewed from this perspective, the home rule charter is seen as a grant of virtually unlimited powers to the municipality over local affairs. Essentially, this means that where there is no provision in the local charter granting the authority to the municipality to enact a law in a certain area (for example, building codes), the city may go ahead and enact legislation; therefore, a building code could be adopted even without state-authorizing legislation. Of course, if the charter did specifically provide for the adoption of a particular type of law, the city could pass it just as in any other ordinary municipality. The only area in which the city would lack authority to enact legislation would be where the state had previously enacted legislation and specifically denied the city the right to enact similar legislation. In those areas the city is powerless to control its own

affairs. But in all other areas, whether expressly provided for in its charter or not, the city is free to act as it deems appropriate within the limits of state and federal constitutional law.

Other home rule charters are deemed limitations on the exercise of municipal power. In those areas specific authority, in the charter or elsewhere, must be found for the exercise of a specific legislative action. It cannot be emphasized enough that given the multiplicity of constitutional provisions, reference must always be made to the particular state constitution involved, as well as to the local charter that is the subject of scrutiny.

Home rule was theoretically a great advance in the law of municipal corporations and has freed local governments to regulate their own affairs as they see fit. In practice, the result is somewhat more mixed. Generally, the local government must be somewhat careful as to how freely it acts in any given area. In many states there is a constant ebb and flow as to areas in which the home rule municipalities may adopt legislation without garnering state approval. This should be of little consequence to building officials, at least in the area of the adoption of a building code itself. Some of the more peripheral codes, such as storm water management ordinances and solar access ordinances, may be controlled more tightly by the state general assembly, and thus the municipality may not have as much discretion. Even so, home rule offers great advantages to those municipalities that are fortunate enough to have it.

Local Adoption of a Building Code

The creation and enactment of a building code by a local governmental entity is an important legal step requiring caution and the advice of an attorney. While the selection or development of a building code is usually the task of a building official, responsibility for getting it legally operative must rest with a municipal attorney. There must be a close working relationship between the attorney and the building official in both areas in order to pass successfully an ordinance adopting a particular code.

As has been previously discussed, there must be some authority for the enactment of a building code at the state level. This is particularly true if the municipality does not have home rule or if the state does not recognize this power as one of the inherent powers of a municipality. The municipal attorney should be requested to ensure there is ample authority for the adoption of such a code by the local government before proceeding. If there is no such authority, it should be garnered from the state before any code is adopted.

The provisions of the enabling legislation must be followed precisely. Most states that have express provisions allowing the adoption of a building code, and even those states that do not, have legislation that permits the adoption of the various codes by reference. In order to obtain the benefit of adoption by reference, instead of publishing the entire code, great care must be taken to follow exactly the procedural steps established in the state's statute.

A notice of intent must frequently be published in a newspaper of general circulation in the municipality. This is to inform the public of the pendency of an adoption of a building

code. The code itself must normally be filed with the clerk of the municipality or county prior to the adoption. This is for the purpose of public reference. If someone is interested enough to examine the code in detail, a number of copies must be available at some public place for the purpose of that review. Although a specified number of copies must normally be provided, some deviation here may be permitted so long as the availability of the document is not substantially decreased. If, for example, the procedural requirement is to provide five copies at the city recorder's office and only four copies are provided, this is not a deviation from the procedure that would ordinarily void the enactment of the building code; however, great care should be taken in this area. From a practical viewpoint, it is precisely in this phase of the enactment of a building code that not enough care is taken. Frequently no copies are provided for the purpose of public reference, or a number of copies are initially provided, but are somehow misplaced in the clerk's office prior to the time of enactment. It is a good idea for the building official to inspect periodically the copies at the clerk's office to ensure that they are still available to the public.

The normal legislative process must be strictly followed in the case of the adoption of a building code. Many municipalities require a number of "readings" prior to effective passage; the caption of the bill and its effectuation clause must all be in proper order. Any referrals to other governmental units, such as planning commissions, that are required by the state law or local charter, must also be observed. Again, these procedural requirements must be observed strictly. Any deviation from the requirements may mean the avoidance of the entire building code as passed.

All too often once the code is passed very little care is taken to observe the requirements of the ordinance. At any given time, if a citizen were to walk into a city recorder's office and demand to see a copy of the current building code, it would be unlikely that an accurate copy of the code could be produced. This failure to observe the requirements of the code may also lead to a dismissal record of code prosecutions against alleged offenders. (These procedural matters will be discussed more in Chapter 6.) It is prudent, however, to ensure that all required copies of the code are on file at the place of public reference at all times.

Any requirement that a public hearing be held is also of great importance. Failure to hold a public hearing or the mishandling of a public meeting in a manner that prevents the public from effectively voicing its views on the adoption of a building code would condemn the code in the eyes of virtually any court. Once again, great care must be taken in the adoption process.

Conclusion

The powers of a local government are unfortunately quite narrow as compared to the powers of a state government. The state is the ultimate repository of legislative power, and, unless the state has granted the right to a municipality to enact legislation on a given topic, the municipality simply cannot act. Fortunately building codes often fall outside of this general rule. Usually the courts will find that the adoption of a building code is of such paramount importance to the health, safety, and welfare of the populace, that no special or

express enabling legislation at the state level is necessary. Building officials and attorneys must examine carefully and thoroughly the limits of power of the governmental unit within which they operate, be it a municipal or county government. If it is a municipal government, officials must carefully determine what class or category it falls under. Each of these different forms and classes can have special limitations on their powers, and the necessary legal research must be done in order to ascertain whether that will have any impact on the adoption of a building code. When adopting a building code by reference under general legislation allowing such enactments, an official should exercise a great deal of care in attending to the details required by the statute. All procedural requirements must be met meticulously in order for the passage to be valid and lawful. It is primarily the responsibility of the attorney for the legislative body to see that those details are met, but the building official should always be alert so that he or she may help the attorney in the process and oversee the actions of the attorney. Sometimes a friendly suggestion can save an ordinance from being struck down by a court of law as invalidly enacted. The two professionals must work together, closely, in order to pass successfully and then, even more importantly, administer and enforce the adopted building code.