The President's Conference on

FIRE PREVENTION

Report of the Committee on Laws and Law Enforcement

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"The serious losses in life and property resulting annually from fires cause me deep concern. I am sure that such unnecessary waste can be reduced. The substantial progress made in the science of fire prevention and fire protection in this country during the past forty years convinces me that the means are available for limiting this unnecessary destruction."

Harry S. Truman

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1. INTRODUCTORY STATEMENT

It is generally recognized that one of the most serious problems in the field of fire prevention is the lag of laws and ordinances behind the technical knowledge in this field. It is basic that before a State or city can carry out a proper fire prevention program, adequate laws and ordinances must be adopted.

It is often said that ours is a "government of laws rather than men"; and there is no field in which a more apt illustration of that statement exists than in the field of fire prevention. With many building codes 10, 20, and more than 30 years old,[1] it can readily be appreciated that State and local officials charged with fire prevention work cannot find, in these antiquated and obsolete laws and ordinances, an adequate legal basis for proper administrative action for utilization of present engineering and safety knowledge in the field of fire prevention.

It comes as rather a shock to many people to learn of the 16,220 municipalities in the United States,[2] less than 2,000 have a building code. There were 2,033 cities of over 5,000 population according to the 1940 census, and many of the codes that are in effect have been adopted by cities of a smaller population, so that the field for adoption of new building codes is large. In the field of State fire prevention laws, most States have confined themselves to statutes authorizing cities to adopt building codes, with a few States having laws of Statewide application that apply to places of public assembly, storage of inflammable liquids, and safety standards for construction work. In some States, there is a fire marshal charged with the administration and enforcement of such legislation. In other States, persons charged with administration of State labor, health, and insurance laws are given this responsibility, because the State has concerned itself chiefly with particular safety standards. The States, with few noteworthy exceptions, have not been too active in the field of fire prevention, but have left this matter to municipalities.

This committee has surveyed the legal problems that exist with respect to laws and ordinances in the field of fire prevention, and this report contains the information it has accumulated and its recommendations based thereon. It is so generally conceded that the enactment and enforcement of fire prevention regulations is valid under the police power of States and cities that this committee does not deem it necessary to refer to the hundreds of court decisions on this point.[3]

2. MODEL BUILDING CODES AND STANDARDS

There are several so-called "model" building codes, such as those prepared by the National Board of Fire Underwriters, the Pacific Coast Building Officials Conference, and the

[1] A report released February 19, 1947, by the New York Legislature's Joint Legislative Committee on Statewide Building Codes states that of the 175 building codes in effect in that State (602 New York cities were surveyed by the committee), 15 are over 30 years old, 53 are over 20 years old, 54 are over 15 years old, and 16 are over 10 years old.

[2] Municipal Year Book (1945), p. 17.

[3] The decisions referred to in appendix A and B herein offer an ample starting point for any research in this general field.

Southern Building Code Congress. Other so-called "model" codes cover specific subjects, such as the National Electric Code prepared by the National Fire Protection Association, the National Elevator Code prepared by the National Elevator Manufacturing Industry, Inc., and the more than 100 American standards concerned with industrial safety that have been prepared and approved by the American Standards Association. The last-named standards cover steel, reinforced concrete, foundries and other subjects, and give what is considered by members of the American Standards Association as good engineering practice in each field. The American Standards Association will soon release a proposed revision of "American Administrative Requirements for Building Codes.' An American Standard Plumbing Code is being prepared, and there is a boiler code that has already been approved. The National Housing Agency shortly will publish a proposed building code covering requirements for dwellings, which will be a revision of "Recommended Building Code Requirements for New Dwelling Construction" prepared by the Central Housing Committee in[4] 1942. Recently the Association of Washington Cities issued "A Suggested Basic Code for Washington Cities" that has the merit of briefness as well as the approval of many experts in the field. Many small cities do not have any building codes because the voluminous recommended model codes are too long and involved for these cities. A real progressive step was made by the League of Oregon Cities recently, when it published "A Proposed Building Code for Small Cities." In the opinion of the committee, such codes for small cities fill a real need.

The Building Officials Conference of America is drafting a new building code that warrants special attention because of some new ideas that Conference is following. Rather than attempting to state in detail the specific technical rules and requirements for all construction, this proposed code (which is in the drafting stage) is to be merely a statement of basic requirements, such as the necessary fire resistance, the necessary strength, and the maximum volume of buildings. The code is to be divided into three parts. The first part will be the basic code proper, containing a statement of fundamental functional requirements based upon the use of the building itself and those principles that can be commonly accepted as standard and that will remain fixed rather than become antiquated or obsolete in a short time. The idea is that this part will not be subject to constant revision and amendment. Parts 2 and 3 of the proposed code will be the rules and specifications relating to construction and maintenance of buildings. It is expected that these rules and specifications will be subject to constant revision as new developments, new principles, and new methods of construction arise.

The American Society for Testing Materials has developed standards to make performance, rather than specific materials, the basis for standards in codes. This is an improvement over earlier ideas of requiring certain thicknesses of materials, rather than performance, as a standard.

While the so-called "model" codes and standards referred to in the foregoing are in constant use as the chief source of technical information on what should be contained in such codes, there is in fact little uniformity in local building codes, because of the variations made to fit local conditions.

[4] The Central Housing Committee, created by the President in 1941, was composed of the representatives of all of the housing agencies of the National Government.

3. USE OF MODEL CODES AND STANDARDS

The many excellent codes and standards that have been developed from an engineering viewpoint cannot become effective, however, until they are actually taken over into the law of local communities by ordinances legally adopted. It is the function of the Laws and Law Enforcement Committee of the President's Conference on Fire Prevention to inquire into the best way to bridge the gap between the good engineering and safety standards that have been developed and the codes and standards actually in existence. A great many of the building codes in effect are antiquated and obsolete in their provisions; and one of the big difficulties in the building field today is the lag of laws and ordinances behind the engineering knowledge that has been developed as to new methods and new materials for building construction in the light of new fire hazards. For example, very few codes today allow the use of prefabricated housing, and very few codes allow the use of material-saving construction methods that have developed during the war period. Too many codes have been hastily adopted after great disasters, such as the Coconut Grove Night Club fire in Boston or the recent hotel fires in Chicago, Atlanta, and other cities. Some impetus other than such disasters is essential to keep building codes up to date.

Before proceeding with an inquiry into the legal ways whereby proper engineering standards may be taken over into local laws, it might be well to point out that many of the codes developed by private interests and private organizations are "suspect", because they contain provisions for the "protection" of the industry that developed the code. Anyone who has had much connection with the field of local government knows that certain codes are so designed that only a particular type of material legally can be used. Such codes are designed to foster a monopoly on behalf of the particular industry developing the code. Nothing said below is to be taken as a suggestion that such codes be adopted by any city. It is also true that many cities do not have the technically qualified officials to ferret out particularly vicious provisions of codes promoted by special interests, as those codes are necessarily written in technical engineering language. Perhaps the development of a code, or codes, that are above suspicion would help to eliminate, or at least soften, many of the legal technicalities often raised to prevent the full use of some of these so-called "model" codes. The excellent and unbiased work of the National Bureau of Standards, the American Standards Association, and the American Society for Testing Materials has been of great value in eliminating suspicion as to engineering standards contained in various codes and in promoting the development of proper fire prevention methods.

4. METHODS OF ADOPTION OF MODEL CODES AND STANDARDS

Assuming, therefore, that there are codes and standards above suspicion which should be adopted by State and local governments, the duty of this Committee would seem to be to inquire into the legally approved methods whereby such adoption can take place. The following methods of adoption have been considered in the past:

1. Adoption and publication in full of a so-called "model" code after it has been adapted to local conditions and requirements.

2. Incorporation by reference of a so-called "model" code through the simple expedient of a short ordinance referring to a named code as of a certain date.

3. Adoption of an ordinance containing legally sufficient standards requiring "reasonably safe" construction or "good engineering practices" in all building construction, and then reference in such an ordinance to certain named "model" codes as being "prima facie" evidence as of a fixed date of what is "reasonably safe" construction or "good engineering practices" in construction.

Where a so-called "model" code is adopted as an ordinance and properly published in full in local newspapers under the publication requirements for all ordinances, no legal question can arise as to the validity of the adoption of the code. The only problem is that of the extremely high cost. Because building codes are extremely lengthy, few cities can afford to spend the thousands of dollars required by this costly publication procedure. The result is that the city goes along for years with an antiquated and obsolete building code, or in fact without any code whatever.

There is set forth as Appendix A a survey of the law on incorporation of model codes and standards into municipal ordinances by reference, which collects the statutes and legal authorities on this subject. This appendix also covers the adoption of ordinances containing adequate legal standards with reference to model codes and standards as "prima facie" evidence of compliance under No. (3) above. This survey of statutes and court decisions has enabled the Committee to reach the following conclusions:

1. In the few States that have adopted enabling acts authorizing cities to incorporate codes by reference, such action results in the removal of the initial bar to incorporation by reference. However, the danger of incorporating future changes in the codes by reference should be guarded against.

2. In the States that have not adopted any of the above mentioned statutes, the validity of incorporation by reference can be seriously questioned. The chief objection is that codes are not published in accordance with the charter, statutory, or constitutional provisions requiring the publication of all local ordinances, and the further objection is that adoption by reference delegates unlawfully the power of a municipal corporation to a private organization.

3. In the States that have no statute authorizing adoption by reference, one answer would appear to be the adoption of an ordinance containing general safety and engineering standards complete within themselves, but which refer to the standards established by a named national code as of a fixed date as "prima facie" evidence of detailed compliance with the ordinance. The same procedure must be followed in

adopting future amendments to the national code referred to, so as to avoid the delegation problem above.[5]

4. In any State, whether or not incorporation of codes by reference has been authorized, the dangers and difficulties inherent in such incorporation may be avoided by the creation of a State Board of Standards, as provided in Massachusetts (referred to hereafter), which, upon application, may furnish to any municipality fully drafted codes of almost any required nature, which codes will become effective upon official acceptance by the municipality. Under such legislation and procedure, the question of delegation of legislative powers does not arise; such codes are developed by a board of experts at State expense; and, since publication is not required, the tremendous expense of publication is eliminated.

It cannot be emphasized too strongly that any model code or standard that is referred to as "prima facie" evidence of "reasonably safe" construction or "good engineering practices" in building construction should be referred to by date, so as to avoid all questions of delegation of the legislative power of the municipality to the private organization or group, or the governmental group, that has developed the particular code or standard. This is essential because most codes and standards are constantly being changed to bring them up to date. Care should also be exercised to have an adequate number of copies of any code or standard, which is adopted by reference or referred to as such "prima facie" evidence of compliance with general standards, officially on file with the city clerk so as to be readily available as a public record.

In Massachusetts, as a result of the Coconut Grove Night Club fire, the powers of the State Department of Public Safety were expanded greatly to meet the situation revealed by a Statewide investigation conducted by a Legislative Commission on Safety of Persons in Buildings. This Commission discovered that there were 257 towns in Massachusetts that make no provisions for the inspection of buildings in their respective areas and concluded that "it is next to impossible for many small towns to draft their own building codes, partly because of the expense involved and partly because persons qualified to draft such codes are not generally available to such towns." The Commission further stated that its study had revealed that something must be done to "make it easier and less expensive for those cities and towns having building codes to keep them up to date."

The Commission recommended the adoption of new statutes and amendments to existing statutes in Massachusetts, whereby any city, by vote of the city council, or any town, by a vote of a town meeting, may petition the Board of Standards in the State Department of Public Safety to prepare and furnish to any such city or town a building code, electrical code, or other code to be used in connection with the construction of buildings, such code to be drafted to meet the particular conditions of the specific city or town. Upon the delivery of such a code to the petitioning city or town, the question of its acceptance is subject to a vote of the city council or the town meeting. Upon acceptance by such a vote, the code becomes a part of the ordinances of the city or a part of the bylaws of the town. A copy is to be filed in the office of the State Secretary within 10 days of such acceptance. To encourage the cities

[5] See New Hampshire Statute – New Hampshire Laws of 1945, ch. 105.

and towns to keep such a code up to date, any such city or town can, by a similar vote, petition the Board of Standards for revisions to the code; and, in the event that the city or town fails to petition for the revisions within a reasonable time of the need for them, the Board of Standards may draft such revisions, send them to the city or town clerk of the city or town by registered mail, return receipt requested, and file a copy with the State Secretary with the revisions thereupon to become a part of the ordinances or bylaws, as the case may be.

It can be seen that the above method removes one of the chief practical objections to incorporation by reference that have existed in the past; i.e., that such codes were drafted by private "interests" rather than public officials or public agencies. The Massachusetts law really furnishes cities and towns, at State expense, a board of experts to prepare codes for any municipality requesting such assistance. The city or town then adopts the full code prepared by the Board of Standards of the Department of Public Safety, and no question of incorporation by reference arises. The Massachusetts law also eliminates the requirement of publication in these circumstances, so that both the expense of preparation of the model code and the publication cost are eliminated. It is to be noted that the adoption by municipalities of State statutes or State regulations by reference is not condemned by the authorities collected in Appendix A of this report.

The Committee is impressed with the tremendous amount of work that the Recess Commission on Safety of Persons in Buildings has done in Massachusetts since the Coconut Grove disaster. The States interested in setting up a Board of Standards similar to the Massachusetts Board can profit greatly by a study of the experience of that State.

5. APPLICATION OF NEW FIRE PREVENETION REGULATIONS TO EXISTING BUILDINGS

Many lives have been lost in recent years through the failure of legislative bodies to make new fire prevention regulations applicable to existing buildings. The primary reason for their failure to do so is the economic burden involved. In many instances, the cost of making antiquated buildings reasonably safe, under current knowledge of adequate fire prevention methods, may seem rather high. But when one weighs the value of human life against such economic reasons, the economic reasons fade into insignificance. Because much of the litigation concerning building codes has involved the reasonableness of applying new fire prevention regulations to existing buildings, this committee has inquired into the legality of such application.

The application of new fire prevention regulations to existing buildings is sometimes referred to as giving a "retroactive effect" to such regulations, in that the new regulations require buildings that were constructed in strict conformity with the regulations in effect at the time of their construction to be changed to meet new ideas as to safety developed over a period of 10, 20, or 30 years since the original construction of the building. The many decisions of the courts cited in Appendix B herein on validity of statutes or ordinance "Applying New Fire

Prevention Regulations to Existing Buildings" amply demonstrate that so long as they are reasonable, new fire prevention regulations can apply to existing buildings.

The so-called "vested rights" arguments, contending that a building owner, by erecting his structure in compliance with the existing building code regulations, is not subject to the application of new fire prevention regulations, and the argument that application of new fire prevention regulations to such buildings is retroactive in effect, have not met with favor in the courts.

> "The public safety and welfare is the highest consideration of all legislation, and to this consideration private rights must yield. No man has a right to so use a dangerous species of property as to put the safety of others in peril. Liberty does not imply the right of one to so use property as to put the safety of others in peril, nor does ownership imply any such right. This is rudimental. It must, therefore, be true that the owner of property of such a dangerous nature as to require regulations to prevent injury to others can have no right paramount to the police power. This is not too much to say that, as against the police power, there is no such thing as a vested right. " (***Jamiesen v. Indiana Natural Gas and Oil Company***, 128 Ind. 555, 28 N. E. 76, 12 L.R.A. 652.)

The argument of economic burden has not generally been regarded as of great weight when courts have before them regulations reasonably necessary for proper fire prevention.

> "The imposition of the cost of the required alterations as a condition of the continued use of antiquated buildings for multiple dwellings may cause hardship to the plaintiff and other owners of the 'old-law tenements'; but, in a proper case, the legislature has the power to enact provisions reasonably calculated to promote the common good even though the result be hardship to the individual." (***Adamec v. Post***, 273 N. Y. 250, 7 N. E. [2d] 120, 109 A. L. R. 1110 [1937].)

This Committee therefore concludes that any new fire prevention regulations that is reasonably necessary for the protection of human life or safety can be applied to existing buildings as well as new construction without doubt as to its validity.

6. STATEWIDE BUILDING CODES

It has been suggested that the Committee should inquire into the adoption of Statewide building codes. This matter has been given very serious consideration in a number of States in recent years. In New York, a special legislative committee has spent a year in studying the subject and has filed a preliminary report surveying the arguments for and against such codes.[6] While this New York committee in fact announced no final conclusions, it pointed out that such a code has much merit. The report states that out of 602 cities of New York State responding to a questionnaire from the committee, only 175 have building codes. The

[6] See footnote 1.

committee also developed the fact that of the 175 building codes, 15 are over 30 years old, 53 are over 20 years old, 54 are over 15 years old, and 16 have been in effect for more than 10 years. In reviewing the existing codes, the committee pointed out that "there is no standardization of requirements for particular situations which are common to all and peculiar to none." Since this report reveals that much of the construction in New York State is being erected and maintained without any control whatever, the report states that the committee is convinced "upon the basis of existing evidence of the need for minimum standards throughout the entire State, although it recognizes the difficulties involved in the imposition of such minimum standards."

George N. Thompson, Chief of the Division of Codes and Specifications of the National Bureau of Standards, in his splendid article entitled "*The Problem of Building Code Improvements," 12 Law and Contemporary Problems 95* (1947), points out that in Ohio, Indiana, Wisconsin, and a few other States "actual State codes exist." (P. 104.) He notes that in Wisconsin the State code does not apply to one- and two-family houses, and research indicates that the codes in Ohio and Indiana apply only to public buildings, places of public assembly such as theaters, other limited subjects and safety requirements relating to protection of laborers. The New York report refers to the same type of State legislation as being in existence in that State and as being a part of the labor law statute. The National Fire Protection Association has prepared a chart, set forth herein as Appendix C, indicating the type of State legislation which that association's study has revealed in the State field. The chart in Appendix C reveals that few States have attempted to do more than enact legislation on specific subjects, such as hotels, places of public assembly, and storage of inflammable liquids. In view of the rather limited application of the State laws in existence, it is doubtful that they are of much assistance in studying the possibilities of a Statewide building code.

Those who have studied the subject of Statewide building codes so far have generally concluded that one of two types could be followed: (1) a mandatory building code applicable to all building construction within the State, or (2) a so-called "recommended" code, which would apply in any instance where there was not a local building code of more stringent character in effect. For example, in the draft of a proposed model State statute entitled "The Model Hotel Safety Law," drafted by the National Fire Protection Association's Fire Marshal Section, and now being circulated for comment and criticism, it is provided in section 2: "Nothing in this act shall affect any ordinance or code relating to the matters contained herein legally adopted by any county, city, town or district, in so far as such ordinance or code specifies requirements equal to or additional or more stringent than the requirements of this act or the regulations issued under the authority thereof." This quoted section is similar to the suggested provisions of the so-called "recommended" State building code. The greatest danger in such a provision would seem to be divided responsibility between State and local officials for enforcement of fire prevention regulations. We believe there would be too great a tendency for the city to rely upon the State to perform the necessary inspection and enforcement, or too much reliance by the State upon the city. If an ordinance on hotel safety did exist, there would appear to be no person having the responsibility of determining whether or not in contained "requirements equal to or additional to or more stringent than the requirements of this act or the regulations issued under the authority thereof." Divided

responsibility usually results in no enforcement, a situation that must be avoided in a field where adequate enforcement is essential.

Adoption of a Statewide building code poses many problems of interference with local home rule, administration, and enforcement, which require extensive study before a conclusion can be announced on this subject. For example, it is essential that some board be set up with power to vary the requirements of the State code to meet particular situations, so as to avoid hardship, practical difficulties, and other problems. Buildings simply do not fit into a common mold, and some kind of controlled discretion is essential so as to cover the acceptance of new materials and new methods of construction. Having to apply the State Capitol for a permit covering every little change in construction of every building in the State presents untold financial and practical difficulties. Enforcement of a Statewide code in cities that have the administrative machinery for such work might well be carried out by taking over municipal building departments; but even this would be a rather large extension of State controls into the commonly accepted sphere of local government.

It has been pointed out how difficult it is to secure amendments to existing Statewide statutes. For example, in Ohio the statute relating to construction of buildings used for public assembly was adopted in 1910; and because conflicting interests fail to agree on amendments made necessary by technical advancements, no major amendments has been possible since that time. The statute is thus out-of-date, and there seems to be little prospect of securing agreement among the various conflicting interests to permit revision of this statute. In most instances, State legislatures meet only every 2 years, and the possibility of securing changes in a field so controversial as building regulations is not considered too good by those familiar with State legislative processes. There is also the matter of control of many State legislatures by the rural elements, a fact that makes it extremely doubtful whether a Statewide building code could be adopted that would apply in an impartial manner to all construction.

It is conceded that the great problem in building code enforcement today is that which exists on the "fringe" area of cities; and it is as a proposed solution of this problem that the Statewide building code is receiving its most serious study. Walter J. Mattison, city attorney of Milwaukee, in his paper entitled "Building Codes Kill Low-Cost Housing" (*Municipalities and the Law in Action* [1939], pp. 151-158), pointed out that stringent requirements of building codes have forced low-cost construction outside the corporate limits of many cities. When cities seek at annex this adjacent territory, the cost of bringing it up to the standard required by city building codes is so great in many instances as to make annexation impractical. Whether a Statewide building code would answer this problem or not is a matter requiring much study. That some answer to the problem should be arrived at is conceded. In many instances cities are trying to achieve a solution by securing an extension of their police powers for 5 to 10 miles outside of their corporate limits. In this way they can apply their building codes to this fringe area and prevent the development of slum districts. Perhaps this extension idea will prove the most feasible, as it may not conflict so greatly with the interests that might oppose any Statewide code applicable to all buildings in the whole State.

7. OTHER FIRE PREVENTION LEGISLATION

The Committee has not overlooked other legislation so essential to a well-rounded fire prevention program, as, for example, arson laws, fire marshal laws, and Statewide inspection laws of various kinds. These laws are listed in Appendix C of this report. Building codes are the most important legislation in this field, but the Committee does not mean to imply by its emphasis on these that this other essential legislation should be neglected. The Committee believes that the desirability and essential character of the laws listed in Appendix C are so apparent from their titles that detailed analysis is unnecessary in this report. The Committee believes that every State should examine its statutes to determine whether it has adopted this essential legislation in an up-to-date form.

8. ENFORCEMENT OF FIRE PREVENTION REGULATIONS

The first and paramount conclusion of the Committee on this subject is that the field of enforcement of fire prevention regulations is one that has received too little attention. Lack of properly qualified officials to enforce State statutes and local building codes has prevented the achievement of the maximum fire prevention possible under existing statutes and ordinances. Political influence has too often allowed continued existence of buildings that were known to be unsafe and known to violate existing statutes and ordinances. Lack of aggressive enforcement, through a proper understanding of fire prevention regulations, often results in interpretations of existing statutes and ordinances that classify buildings as complying with applicable regulations. Division of responsibility among various municipal officials, such as building, health, labor, and fire department officials, often results in confusion as to responsibility and lack of proper enforcement of fire prevention regulations.

It has been brought to the attention of this Committee that some of the recent fires resulting in a large loss of life were caused by a lack of proper inspection, rather than a lack of adequate statutes or ordinances. In too many instances, insurance companies, rather than public officials, have, as a matter of political necessity, taken the lead in inspection work. Perhaps one cause of inadequate enforcement of fire prevention regulations has been lack of a properly controlled discretion in local building officials to pass upon questions of compliance with building codes. It is certainly true that few buildings fit into a common pattern, so that every building presents some questions as to compliance with requirements of the building code. Too few codes contain an adequate statement of the authority of building officials to meet this situation. The drafting of a proper provision which grants adequate discretion to building officials, but which also sets up adequate controls to prevent arbitrary action, is essential. As an example of a discretionary clause that the courts have upheld, attention is directed to the New York City law, which provides that in addition to the requirements set forth in that city's code, the owners and proprietors of buildings shall provide such other means of fire extinguishment and means of controlling the spread of fire as the fire commissioner may deem necessary in the interest of public safety.

The best statutes and the best ordinances that expert engineering and other technical knowledge can develop are worthless without proper enforcement. States and cities must

give more attention to this important field, or even worse disasters than those of recent months are bound to occur. Every State and every city should immediately make a study of the administrative and enforcement staff and the procedures which it now has, to determine whether or not this staff and those procedures can perform the necessary work in the enforcement field. From available information, it appears that few States and cities will find that they meet the minimum requirements for proper enforcement of fire prevention.

9. FINDINGS AND CONCLUSIONS

1. Most of the existing statutes, codes, and ordinances in the field of fire prevention are antiquated and obsolete. This unfortunate lag of law behind technical achievements in the field allows dangerous buildings to escape the regulation that is essential to the safety of human life.

2. Each State and each municipality should initiate immediately a study to determine whether its present fire prevention regulations are so antiquated and obsolete as to create perils to human life.

3. Recognizing that engineering and other technical research is discovering constantly new materials and new methods for building construction which render existing fire prevention regulations inadequate, each State and municipality should create a continuing advisory board of experts, including representatives of industry, charged with the duty of making recommendations that will keep the respective State or city fire prevention regulations up-to-date.

4. Fully realizing the dangers inherent in so-called "model building codes" and standards designed by certain industries for their own protection, cities should be given adequate legal authority to adopt properly prepared and approved "model" codes and standards by reference, or by some other simplified method, to avoid the prohibitive cost of publishing lengthy codes in local newspapers. The cost of compliance with the usual requirement that all ordinances be published in a newspaper of general circulation in the city that enacts them is so great in the case of voluminous building codes that many cities are unable to adopt a building code or to revise their existing codes. The incorporation by reference should be to a named code as of certain fixed date, to avoid delegation of legislative powers to the preparers of the "model" code or standard, and adequate provisions should be made to insure that copies of the "model" code or standard which is adopted by reference are readily available.

5. Adoption of a general ordinance containing legally sufficient standards governing building maintenance and construction, with reference in such a general ordinance to certain properly prepared and approved "model" codes and standards as "prima facie" evidence of compliance with such standards, is another method of avoiding the prohibitive cost of publishing lengthy building codes that should receive the most careful study.

6. Adoption of Statewide fire prevention laws and building codes is a subject that needs further study by all interested in adequate fire prevention. Division of enforcement responsibility and administrative problems, which appears to be rather difficult in connection with a Statewide building code, does not appear to be an impediment where the State legislation covers specific subjects, such as places of public assembly, hotels, and other structures designed primarily for public use or subject to a particular hazard. Where such State laws are desirable, division of enforcement responsibility should be avoided.

7. In the entire field of fire prevention there is no subject that needs attention more than that of statute and ordinance enforcement. Steps should be taken by all States and cities to insure that they are not among the States and cities where future disasters will be caused by lack of adequate enforcement of existing laws.

8. Creation by the Council of State Governments, the National Association of Attorneys General, the United States Conference of Mayors, and the National Institute of Municipal Law Officers, of standing committees with a militant program on building codes and fire prevention ordinances is highly desirable. The drafting, by representatives of these organizations, of a model statute permitting adoption of codes and ordinances by reference is recommended.

9. The Committee earnestly supports the statement of the President that these problems are of first importance to the highest officials of the States and municipalities, and it is from them that the leadership necessary to the prompt advancement of remedial measures must come.

APPENDIX A

VALIDITY OF MUNICIPAL ORDINANCES WHICH INCORPORATE VARIOUS TECHNICAL CODES BY REFERENCE

As a prerequisite to effectiveness and validity, ordinances of a municipality are generally required to be published. These are statutory or charter requirements which have been held to be mandatory and not merely directory provisions (19 R. C. L. Mun. Corps., § 201). Their purpose is to insure that the citizens of the city are fully informed as to the passage or the proposal of ordinances for the city in which they abide and to which they will be expected to conform. The soundness of these publication requirements need not be questioned.

Because of this requirement, however, the question arises as to the validity of ordinances which adopt, by reference, various technical codes prepared by national trade or other associations. These codes are generally exhaustive and lengthy treatments of the subject, prepared by recognized experts and published in pamphlet or booklet form by national trade associations or organizations. They set forth the standards which that particular organization considers to be minimum standards in the field of endeavor covered by their code. The codes are many and cover variety of subjects: building construction, plumbing installation codes, electrical wiring codes, inflammable liquids codes, sanitary codes, and fire prevention codes, to mention a few.

Adoption of these codes by reference has the advantage of circumventing the usual publication requirements and thereby avoiding the enormous expense for the publication of the code which would be necessary if set forth in full in the ordinance. That would appear to be the primary justification for adoption or incorporation by reference.

As opposed to the above advantage, however, there are several serious objections to incorporation by reference, the chief of which is the fact that, by such incorporation, the city council or governing body of the city is unlawfully delegating its legislative functions to a private organization. The second objection has been suggested above, and that is the inability of citizens to know exactly what legislation is being passed to which they will have to conform.

The reconciliation of the advantages and disadvantages of incorporation by reference, in accordance with the pertinent State constitutional and statutory provisions, may not be a simple task. The problem is arising with more frequency with the development of many new technical codes by organizations. That cities will need the benefit of the studies and recommendations of these private organizations is not doubted, but they should be made aware of the limitations under which their city operates, so as to avoid the inherent objections to such action of incorporation by reference.

I. Some States Have Granted Authority to Cities to Incorporate Codes by Reference

State statutes are generally silent on the question of the adoption by reference of the codes of private organizations, so as to avoid the necessity of setting forth in full in the ordinance the code being adopted. There are, however, 10 States (California, Colorado, Illinois, Minnesota, Nebraska, New Hampshire, New Mexico, Oregon, Pennsylvania, and Washington) which have explicit enabling legislation authorizing cities to incorporate certain codes by reference. This is indeed a far step toward the solution of the problem, because in the absence of such a statute, the act of incorporating by reference would be of extremely doubtful validity.

Typical of these statutes is that of Colorado, which provides as follows:

> *Adoption of Codes by Reference.* – Notwithstanding the provisions of any general or special law, any municipality shall have the power, and it is hereby authorized, to enact ordinances adopting or amending any previously published code or specified part or parts thereof by reference. After the first reading of such a code, the city council or board of trustees shall schedule a hearing thereon. Notice of the hearing shall be printed once weekly in a newspaper of general circulation in the municipality for three consecutive weeks preceding the hearing. If there is no such newspaper, the notice shall be posted in the same manner as provided for the posting of an ordinance under the same circumstance. The notice shall state that the code is being considered for adoption by the city council or board of trustees, that copies of the text are available for inspection at the office of the city clerk or town clerk and shall stipulate the time and place of the hearing. All official references in notices and ordinances to the code shall contain as a minimum description the title of the publication, the author, the date of publication, and the address from which the citizens may secure additional copies. After the hearing, the city council or board of trustees may amend, adopt, or reject the ordinance which adopts the code by reference in the same manner as any other ordinances.
>
> Three copies of the code certified to be true copies by the mayor and clerk shall be filed in the office of the city clerk or town clerk, and one copy of the code so certified shall be filed in the office of the chief enforcement officer. Any subsequent amendments or change in the code shall either be enacted in the same manner as is provided for ordinances or shall be adopted by reference through the same procedure as required for the adoption of the original code. If the amendment or change is to be adopted by reference, published copies of the amendment or change must be available to the public. It shall be the duty of the city clerk or the town clerk to correct all certified copies of the code when amendments or changes are made.

The California statute (Act 5692, Stats. 1927) applies to codes for the construction of buildings, the installation of plumbing, the installation of electric wiring or other similar work; the Nebraska statute (ch. 18, § 102, Rev. stat., 1943) allows incorporation of future amendments to an adopted code by the original adopting ordinance; the Illinois statute

(Illinois Annotated Statutes, § 10-3) applies to "rules and regulations for the construction of buildings"; the Minnesota statute (approved March 31, 1945) applies to "any code" which is defined as "any code or part thereof prepared by any governmental agency or any trade or professional association for general distribution in printed form as a standard or model on the subject of building construction, plumbing, electric wiring, inflammable liquids, sanitary provisions, public health, safety or welfare"; the New Hampshire statute (laws of 1945, ch. 105, amending ch. 66 of the revised laws) applies to codes "for the construction of buildings, relating to the installation of plumbing, the use of concrete, masonry, metal, iron and wood, and other building material, the installation of electric wiring, and fire protection incident thereto"; the New Mexico statute (Statutes, 1941 Annotated, § 14-2501) applies to building codes; the Oregon statute applies to "rules and regulations for the construction of buildings, the installation of plumbing, the installation of electric wiring or other similar work"; the Pennsylvania statute (Purdon's P.S.A., Title 53) applies to "any standard building code"; the Washington statute (Pierce's Code, 1943, § 412.1) applies to codes pertaining to "the construction of buildings, the installation of plumbing, the installation of electric wiring, health and sanitation, the slaughtering, processing, and selling of meats and meat products for human consumption, the production, pasteurizing, and sale of milk and milk products, or subjects."

The variance in the subject matter of the above statutes is not without significance. What may be legally adoptable by reference in one State may not be authorized in another. For example, the Illinois, New Mexico, and Pennsylvania statues are limited to building codes. Consequently other codes could not be legally incorporated by reference in those States unless the term "building codes" is construed to include all fire prevention and other codes. This variance should be borne in mind.

These statutes have, in general, the effect of removing the initial barriers to incorporation by reference of the particular codes to which they refer, although, as hereinafter pointed out, other objections may exist to the statutes themselves.

The State of North Dakota has an interesting statutory provision which may enable cities to avoid the necessity for publishing a complete electrical, building, or other code, and which reads as follows:

> 40.1106. *Publication of ordinances.* - The title and penalty clause of every ordinance imposing any fine, imprisonment, or forfeiture for a violation of its provisions, after the final adoption of such ordinance, shall be published in one issue of the official paper of the municipality.

Such a statute would work no particular hardship is so far as the publication of an ordinance which adopts a code is concerned, for the title and penalty clause of a building or fire prevention code would be little, if any, longer than an ordinary ordinance passed by the city.

Despite these enabling acts of the States, the objection that legislative authority is being delegated to a private organization may still exist. This would be particularly true if the statute authorized the adoption of any amendments to the code being incorporated by

reference *in futuro*. Such, clearly, would seem to be a complete abdication of legislative power and would, of course, be held invalid under the theory that a municipal ordinance could not be amended by any except the governing body of the city. See the cases of ***Santee Mills v. Query***, 122 S. C. 158, 115 S. E. 202 (1922); ***State ex rel. Davis v. Fowler***, 94 Fla. 752, 114 So. 435 (1927); ***Scottish Union and National Ins. Co. v. Phoenix Title & Trust Co.***, 28 Ariz. 22, 235 Pac. 137 (1925); ***Machinery Co. v. Browne***, 206 Pa. 543, 56 Atl. 43 (1903); ***In re Opinion of Justices***, 239 Mass. 606, 612, 133 N. E. 453, 455 (1921); Note (1935) 3 George Wash. Law Rev. 482 entitled "Incorporation by Reference of Federal Recovery Laws and Administrative Regulations in State Acts."

In the New Hampshire statute referred to above, an interesting provision with respect to this matter appears. It provides as follows:

> *Amendment.* - Any such ordinance may be amended or supplemented in like manner, provided, that three copies of such ordinance, as amended or supplemented, shall be filed, as provided in section 1, in the office of the building inspector and three copies filed in the office of the city clerk for use and examination by the public.

This statutory provision recognizes the difficulties that might be encountered from future amendments to the code being incorporated by reference. It may prove to be the solution, although the provision has not been judicially tested.

Another objection that has been raised in the past has been that the constitutional limitations of over two-thirds of the States, which provide that no law shall be revived or amended by reference to its title only, would be a bar to incorporation by reference. This constitutional limitation should not, of itself, be sufficient to bar incorporation by reference in a municipal ordinance of a technical code. As a matter of fact, this constitutional limitation in the State of Louisiana has been held inapplicable to municipal corporations. ***State v. Cozzens***, 42 La. Ann. 1069, 8 So. 268. There are many court decisions interpreting these limitations, and it is evident that they were designated for the purpose of insuring that State legislators knew exactly what they were amending or reviving. The purpose of these constitutional provisions is clear, and the reason behind such purpose sound. These provisions will be found in approximately 30 of the State constitutions, but it is not believed that they are applicable to this review.

II. Other States Have Not Granted Authority to Incorporate by Reference

From a practical viewpoint, the publication of lengthy technical codes would serve no particularly useful purpose, and would hardly fulfill the legislative intent of requiring publication of enactments so that the people of a city may be made aware of what their governing bodies have done. In all instances, the codes are of nationwide reputation, and are well known to the professions that apply them in their work. Nonavailability would be no bar, for they are readily obtainable, and are widely circulated. Furthermore, any codes adopted by reference are required to be, or should be required to be, filed in some public

office for inspection by the public at all times. The code is not something that is far removed from those who will have to comply with it.

Despite the practicability of dispensing with the publication of a code in full, the aforementioned objections will have to be first removed or satisfied in some manner. With the exception of those States mentioned in the foregoing section, there is no enabling legislation permitting cities to adopt these codes by reference. It is in the States with no enabling legislation that the greatest difficulty might lie, and where a special effort to solve the problem will have to be made.

One solution, and it appears to be the only one, is for the ordinance of a city which establishes a building, plumbing, electrical or other code, to be complete within itself, and not to incorporate any other code by reference. This, it may be argued, does not avoid the problem of publishing a lengthy document. However, it does permit the adoption of a shorter enactment in this fashion. The ordinance can set up the standards of compliance with the particular subject matter, and refer, as "prima facie" evidence of such compliance, to the various national trade codes. This would avoid the attack that the ordinance is not complete within itself, and that legislative power is being delegated. The next section on court decisions, however, will point out how this theory was rejected by the Arizona Supreme Court in a case that arose several years ago.

III. Court Decisions

While there are a number of court decisions involving the right of a city to adopt, by reference, a State statute, or a Federal regulation, or a former municipal ordinance, there is a dearth of decisions directly in point with the subject matter of this paper, i.e., the validity of a municipal ordinance incorporating the provisions of technical codes by reference. As a matter of fact, all of the reported decisions studied may only be used inferentially to sustain the conclusions herein reached.

Probably the most pertinent case is that of ***City of Tucson v. Stewart***, 45 Ariz. 36, 40 P. (2d) 72, 96 A. L. R. 1492 (1935), involving the validity of a municipal ordinance that incorporated, by reference, an electrical code adopted by the city. The ordinance referred to the regulations of the National Electrical Code, and provided:

> "No certificate of approval shall be issued unless the wiring, devices, apparatus or equipment installations conform with the provisions of this Ordinance, the Electrical Code of the city of Tucson, as adopted by the mayor and council by Resolution No. 1309 and, as the same may be amended, the statutes of the State of Arizona, and with approved methods of construction for safety to life and property. The regulations contained in the present National Electrical Code, and subsequent editions thereof, and in the present National Electrical Safety Code, and subsequent editions thereof, shall be prima facie evidence of such approved methods, provided that the Electrical Code of the city of Tucson shall govern in all cases where there are conflicting provisions."

Here, the court held that since the electrical code of the city was a public record, as it has been adopted by the city, the ordinance was not required to set the code forth in full, and therefore the code did not have to be published. The court cited numerous authorities for the proposition of adopting prior ordinances and statutes by reference. ***Sloss-Sheffield Steel & Iron Co. v. Smith***, 175 Ala. 260, 57 So. 29; ***Napa v. Easterby***, 76 Cal. 222, 18 Pac. 253; ***Southern Operating Co. v. Chattooga***, 128 Tenn. 196, 159 S. W. 1091, Ann. Cas. 1914D, 720; ***City of Milwaukee v. Krupnik***, 201 Wis. 1, 229 N. W. 43. See also ***City of Litchfield v. Thorworth***, 337 Ill. 469, 169 N. E. 265; ***Croker v. Board of Excise Comrs. of City of Camden***, 73 N. J. L. 461, 63 Atl. 901; ***Baumgartner v. Hasty***, 100 Ind. 575, 50 Am. Rep. 830; ***Greene v. Town of Lakeport***, 74 Cal. App. 1, 239 Pac. 702. On this same question, McQuillin, *Municipal Corporations* (2d Ed) says:

> "An ordinance may, by reference, adopt the provisions of statutes or prior ordinances, and in such case the statute need not be set out in totidem verbis, and entered upon the minutes of the corporation."

A law review article appearing in 5 Geo. Was. Law Rev. 198 states that "it is obvious that a legislature is not delegating power, legislative or otherwise, if it refers to a law, to an ordinance, or to any other document or writing in its existing form." (1934) 8 Cin. L. Rev. 310; ***State v. Armstrong***, 31 N. M. 220, 243 Pac. 333 (1924); ***Santee Mills v. Query***, 122 S. C. 158, 115 S. E. 202 (1922).

In the *Tucson* case, however, the theory of prima facie evidence of compliance with the terms of the ordinance by reference to the provisions of a national electrical code was stricken down, the court stating:

> "The fact that the ordinance provides that in determining the approved methods the regulations of the present National Electrical Code and the present National Electrical Safety Code and subsequent editions thereof may be taken as prima facie evidence of such methods, but that in case of conflict the electrical code of the city of Tucson shall govern, does not lend clarity, certainty, or definiteness to the regulations, but rather suggests conflicts for an administrative officer of the city to reconcile.
>
> "The electrical code was adopted by reference 'as is', and not as it may be changed or altered. Likewise the rules of evidence to be applied in determining whether construction is in conformity with the ordinance and electrical code, if such a rule may be adopted, is the one subsisting at the time of its adoption and not one later promulgated by the national societies mentioned."

This decision would point to the need for care in setting up the provisions of a national code as evidence of compliance. The question of adopting *in futuro* measures is too dangerous. In this connection, reference is made to the provision of the New Hampshire statute, quoted above.

On October 11, 1921, the Supreme Judicial Court of Massachusetts rendered its decision in ***Cawley v. Northern Waste Company***, 239 Mass. 540, 132 N. E. 365. In that case a State

statute, authorizing cities to "designate or provide for the appointment of an officer who shall supervise *** every wire within a building when such wire is designed to carry an electric light or power current ***" and requiring a written permit from the inspector of wires to connect a current of electricity, was involved. The court held that an ordinance forbidding an officer to issue a permit under this statute, unless "the established rules and regulations of the National Board of Fire Underwriters" shall have been complied with, was unauthorized. The Court said:

> "There is nothing in that statute *** which empowers a city council to adopt by mere reference the rules and regulations of another and foreign body as the basis for determining the suitableness or safety of the installation, attachments, supports or appliances for wiring designed to carry electric currents."

Reference is here made to section 4 of the report of the committee, where there is a discussion of the method evolved by Massachusetts to escape the adoption by reference that is condemned in this decision.

Another case was that of ***L. A. Thompson Scenic Ry. Co. v. McCabe***, 211 Mich. 133, 178 N. W. 662 (1920), involving the adoption by reference of a city building code in the city of Detroit. There, the court reached an opposite conclusion from the *Tucson* case, chiefly on the ground that that which was being adopted by reference was not a public record, and had no character as such. This distinction was carefully drawn by the Arizona Supreme Court in the *Tucson* case above. In the *McCabe* case, the building code incorporated by reference had not, itself, been adopted by the city and for that reason can be distinguished from the Arizona decision. The Michigan Supreme Court said:

> "It, therefore, was entirely lacking in those characteristics necessary to entitle it to be filed as a 'public record.'"

See cases cited above involving the adoption of public records or statutes.

In ***Ex parte Hollyfield***, 88 S. W. (2d) (Tex. Cr. App., Nov. 20, 1935), the court upheld an ordinance governing the operation of steam boilers and providing that reference should be had to the rules of the "A. S. M. E." Code in computing heating surface boilers. In so holding, the Court said:

> "*** the computation of 'heating surface,' as that expression is used in this ordinance, is a mere matter of the use of a standard rule or tape measure aided by the ordinary rules of arithmetic, and *** the reference to the A. S. M. E. Code is but a matter of universal definition; the expression having but one meaning, and being so understood by all text writers and boiler engineers."

In ***Blitch v. City of Ocala***, 142 Fla. 612, 195 So. 406 (1940), an ordinance of the city of Ocala, designating the city manager as the person to issue building permits in accordance with the provisions that all buildings except enumerated exceptions should have roof which "would rank as class A or class B under the test specifications of the National Board of Fire

Underwriters," was not invalid on the ground that it unlawfully delegated enforcement of the city's legislative powers, since the test specifications, while not set forth in full, could be readily ascertained and would be deemed to be those in effect at the time the ordinance was enacted and not the specifications subsequently adopted. The Court said in part:

> "So construed, the meaning of the ordinance could be made certain, and its validity upheld. If it should be held to mean not only present, but also future specifications, or any changes therein that might be adopted by the National Board of Fire Underwriters, section 31 of the ordinance would be invalid as being a delegation of authority to an outside board to alter a municipal ordinance."

In ***Natural Milk Producers Association of California v. City and County of San Francisco***, 112 Pac. (2d) 930 (Cal. App., 1941), a subdivision of an ordinance of the city of San Francisco providing as follows was involved:

> "*Certified milk*.- Certified milk is market milk which conforms to the rules, regulations, methods and standards for the production and distribution of certified milk adopted by the American Association of Medical Milk Commissions and must bear the certification of the milk commission of the San Francisco County Medical Society.***"

The contention was made that the rules and regulations may be so amended by the association as to impose additional burdens on the vendors of certified milk. The court held that it would strike out the words "rules, regulations" and uphold the remainder of the ordinance. The California Supreme Court upheld the decision of the lower court (124 Pac. (2d) 25) and the United States Supreme Court held that it could not pass on the validity of the ordinance, since a moot question had been raised by an amendment to the regulations governing the distribution of milk subsequent to the California decision.

The case of ***Kansas v. Crawford***, 104 Kan. 141, 177 Pac. 360, 2 A. L. R. 880 (1919), presented the question as to the validity of a State statute providing that "all electric wiring shall be in accordance with the National Electric Code." The court held the statute unconstitutional as a delegation of legislative authority to private individuals and associations, and void for uncertainty.

The following quotation clearly shows how that court felt about the matter of incorporation by reference:

> "But none of the cases cited has ventured so far afield as to intimate that the legislature might delegate to some unofficial organization of private persons, like the National Fire Protective Association, the power to promulgate rules for the government of the people of this State, or for the management of their property, or that the legislature might prescribe punishment for breaches of these rules. We feel certain that no such judicial doctrine has ever been announced. If assent to such a doctrine could be given, a situation would arise where owners of property with considerable persistence might learn what these code rules were, and incur the

expense of making their property confirm thereto, only to find that the National Fire Protective Association had reconvened in Chicago, New York, or New Orleans, and had revised the code, and that the work and expense has to be undertaken anew. And there would be no end to such a state of affairs. Furthermore, there is no official way for the average property owner to know what these code rules are. The laws of this State to which our people owe obedience must be officially published. The people may learn what these laws are, and they are privileged to meet legislative committees and petition the legislature for amendments, improvements, and amelioration of the laws. Shall it be intimated that if these fire prevention regulations, these 'national electrical code' rules, are oppressive, or otherwise objectionable, the property owners of this State must be referred to some voluntary and unofficial conference of underwriters and electricians, which occasionally meets here, there, or anywhere in North America, for redress of grievances? But the fallacy of such legislation in a free, enlightened, and constitutionally governed State is so obvious that elaborate illustration or discussion of its infirmities is unnecessary. If the legislature desires to adopt a rule of the national electrical code as law of this State, it should copy that rule, and give it a title and an enacting clause, and pass it through the senate and house of representatives by a constitutional majority, and give the Governor a chance to approve or veto it, and then hand it over to the Secretary of State for publication."

The most recent cases on the adoption of Federal regulations by cities may be briefly referred to. These are, ***People v. Sell***, 310 Mich. 305, 17 N. W. (2d) 193 (1945) and ***City of Cleveland v. Piskura***, 60 N. E. (2d) 919 (Ohio, 1943). In the former case, an ordinance of the city of Detroit, which made it unlawful to violate OPA price and rationing regulations, was upheld as a valid exercise of that city's police power. On the other hand, the Ohio Supreme Court held that an ordinance of the city of Cleveland, which made it a misdemeanor to sell commodity that is subject to a ceiling price fixed by or under the authority of the United States at a price in excess of such ceiling price, was invalid because it unlawfully delegated legislative power to a Federal agency. These cases are not too informative in the present study, however, and merely outline the different attitudes of the respective courts toward the general question.

CONCLUSIONS

From the foregoing summary of the statutory, constitutional, and judicial provisions on the subject, the following conclusions might be listed:

1. In the few States that have adopted enabling acts authorizing cities to incorporate codes by reference, such action results in the removal of the initial bar to incorporation by reference. The danger against incorporating future changes in the codes by reference should be guarded against, however.

2. In the States that have not adopted any of the above statutes, the validity of incorporation by reference can be seriously questioned. The chief objection is that codes are not published in accordance with the charter, statutory, or constitutional

provisions requiring the publication, and the further objection is that adoption by reference delegates unlawfully the power of a municipal corporation to a private organization.

3. In the States that have no statute authorizing adoption by reference, one answer would appear to be the adoption of an ordinance containing general safety and engineering standards which are complete within themselves, but which refer to the standards established by a named national code as of a fixed date as "prima facie" evidence of detailed compliance with the ordinance. The same procedures must be followed in adopting future amendments to the national code referred to, so as to avoid the delegation problem mentioned above.

APPENDIX B

APPLYING NEW FIRE PREVENTION REGULATIONS TO EXISTING BUILDINGS

"The authority to enact and enforce building regulations can be sustained only on the ground that it is a part of the police power." 4 R. C. L. p. 395, 109 A. L. R. 1118.

What, then, is police power? Mr. Justice Miller in the *Slaughter House Cases*, 16 Wall. (U. S.) 36, 21 L. ed. 394 (1872), says that police "power is, and must be from its very nature, incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property."

The question is whether the police power is broad enough to validate statutes and ordinances which affect, and require changes in, buildings erected before passage of the legislation, and which met all requirements of the law when erected. It might even be asked whether legislation could adversely affect vested rights. The Indiana Supreme Court, in the case of ***Jamieson v. Indiana Natural Gas and Oil Co.***, 128 Ind. 555, 28 N. E. 76, 12 L. R. A. 652 (1891), at p.655, answers this question very clearly, saying: "The public safety and welfare is the highest consideration of all legislation, and to this consideration private rights must yield. No man has a right to so use a dangerous species of property as to put the safety of others in peril. Liberty does not imply the right of one man to so use property as to put the safety of others in peril, nor does ownership imply any such right. This is rudimental. It must, therefore, be true that the owner of property of such a dangerous nature as to require regulations to prevent injury to others can have no right paramount to the police power. This is not too much to say that, as against the police power, there is no such thing as a vested right."

There have been comparatively few decisions bearing directly on this subject, but in those that have arisen, the courts have generally upheld legislation passed under the police power which requires reasonable changes in already existing structures to meet the new standards, where those standards have a reasonable basis for the protection of health and safety.

One of the leading cases is that of ***Health Department v. Trinity Church***, 145 N. Y. 32, 39 N. E. 833, 27 L. R. A. 710 (1895). The statute involved in this case required that water be furnished on each floor of every tenement house in New York City. There was no arrangement in the houses involved whereby this could be done, and it was shown that alterations would have to be made and money expended in order to comply with the provisions of the law; and it was contended that to so require would be the taking of property for public use without compensation and would be a denial of due process. The court upheld the law as a valid exercise of the police power with respect to the public health and also with respect to the public safety regarding fires and their extinguishment, and said : "*** we do not think it (the statute) can be regarded as invalid because it will cost money to comply with the order of the board, for which the owner is to receive no compensation***. We may own our property absolutely, and yet it is subject to the proper exercise of police power. We have

surrendered, to that extent, our right to its unrestricted use. It must be so used as not improperly to cause harm to our neighbor, including in that description the public generally." The court called attention to the fact that the statute must be reasonable in its application, saying: "*** no one would contend that the amount of the expenditure which an act of this kind may cause, whether with or without a hearing, is within the absolute discretion of the legislature. It cannot be claimed that it would have the right, even under the exercise of the police power, to command the doing of some act by the owner of property, and for the purpose of carrying out some provision of law, which act could only be performed by the expenditure of a large and unreasonable amount of money on the part of the owner. If such excessive demand were made, the act would, without doubt, violate the constitutional rights of the individual. The exaction must not alone be reasonable when compared with the amount of work or the character of the improvement demanded. The improvement or work must, in itself, be a reasonable, proper, and fair exaction, when considered with reference to the object to be attained."

Chicago, Burlington & Quincy R. R. Co. v. State of Nebraska ex rel City of Omaha, 170 U. S. at p. 76, 42 L. ed. at p. 955 (1898), does not concern building, but quotes *Health Dept. v. Trinity Church, supra*, with approval as follows: "Laws and regulations of a police nature, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbances. They do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner. If he suffer injury, it is either *damnum absque injuria*, or, in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure."

In a Massachusetts case, ***Commonwealth v. Roberts***, 155 Mass. 281, 29 N. E. 522, 16 L.R. A. 400 (1892), the statute applied to every building in Boston used as a dwelling, tenement, or lodging house and required that: "Every such building situated on a public or private street, court, or passageway, in which there is a public sewer, and every building connected with such sewer, shall have sufficient water closets connected with the sewer and shall not have a cesspool or privy, except where, in the opinion of the Board of Health, it can be allowed to remain temporarily, and then only as said board shall approve." The court upheld this statute in its application to buildings already in existence which were lawful when built.

In a later case, ***Tenement House Department v. Moeschen***, 179 N. Y. 325, 72 N. E. 231, 70 L. R. A. 704, 103 Am. St. Rep. 910, 1 Ann. Cas. 439 (1904), affirmed, 203 U. S. 588, 27 S. Ct. 781, 51 L. ed. 328 (1906), in a decision based principally on *the Health Department v. Trinity Church* and *Commonwealth v. Roberts* cases, *supra*, a statute was upheld which required the removal of all school sinks, privy vaults, or other similar receptacles used to receive fecal matter, urine, or sewage and their replacement by individual water closets, properly sewer connected, with individual traps, and properly connected flush tanks. The court said: "It is a well recognized principle in the decisions of the State and Federal courts that the citizens holds his property subject, not only to the exercise of the right of eminent domain by the State, but also subject to the lawful exercise of the police power by the legislature. In the one case, property is taken by condemnation and due compensation; in the

other, the necessary and reasonable expenses and loss of property in making reasonable changes in existing structures, or in erecting additions thereto, are *damnum absque injuria*."

In ***St. Louis v. Nash***, 260 S. W. 985 (1924) and ***St. Louis v. Howel Real Estate and Building Co.***, 59 S. W. (2d.) 617 (1933), the Supreme Court of Missouri upheld an ordinance similar to that in *Tenement House v. Moeschen, supra*.

Another much cited case, that of ***Seattle v. Hinckley***, 40 Wash. 468, 82 P. 747, 2 L. R. A. (N. S.) 398 (1905), held to be constitutional and applicable to buildings previously erected an ordinance requiring a certain type of fire escape on "all hotels, office buildings, factories, tenements, and lodging houses more than three stories in height." In overruling the contention of the owner of a building that he had an inherent or vested right, because he had complied with the law at the time the building was erected, the court said: "There is no such thing as an inherent or vested right to imperil the health or impair the safety of the community. But to be protected against such impairment or imperilment is the universally recognized right of the community in all civilized governments; a protection which the government not only has a right to vouchsafe to the citizens, but which it is its duty to extend in the exercise of its police power."

Likewise, in ***Fire Department v. Chapman***, 10 Daly (N. Y.) 377 (1882), the court upheld the order of the Superintendent of Buildings, requiring additional fire escapes in accordance with a statute which provided that any dwelling house more than two stories in height, then erected, or to be erected, be provided with fire escapes as directed by the Superintendent of Buildings and that owners of buildings on which fire escapes were then, or might thereafter be erected, should keep them in good repair.

In ***Clarke v. Chicago***, 159 Ill. App. 20 (1910), a case based principally on the *Hinckley* case, *supra*, and *Commonwealth v. Roberts, supra*, the Court upheld the authority of the municipality to adopt certain ordinances regulating theater buildings (admittedly valid with respect to theaters thereafter to be built), as applied to theaters already built, which complied with regulations in effect at the time of their erection, as a proper exercise of police power.

In the case of ***Daniels v. City of Portland***, 124 Or. 677, 625 Pac. 790, 59 A. L. R. 512 (1928), the court held that a municipal ordinance requiring every room occupied for living purposes to have a window of a certain size opening directly to the outer air for lighting and ventilation does not contravene the Fourteenth Amendment to the Constitution of the United States, or the Bill of Rights of the Oregon Constitution, guaranteeing equity of rights, and forbidding the taking of private property for public use without just compensation or the enactment of *ex post facto* laws, as applied to a hotel erected prior to the passage of the ordinance and which was lawful when built. The case arose out of an order made by the Chief Health Inspector of the city of Portland, requiring, under threat of immediate arrest, the removal of a skylight over the opening or court in the plaintiff's hotel building, or immediately to cease using or renting for sleeping purposes the rooms having windows opening on the court. In answer to plaintiff's contention that the ordinance was retrospective, the court said: "The act in question cannot be properly classed as retrospective. It affects no act or fact or right accruing before its enactment. It neither destroys or impairs any vested

right acquired under existing law. A careful reading of the ordinance discloses that it is solely prospective. The building permit granted by the city of Portland for the construction of the Harrison Hotel does not affect the right of the police power of the city of Portland to adopt and apply to it regulative measures looking to the public health."

Doran v. Boston Store of Chicago, 307 Ill. App. 456, 30 N. E. 778 (1941), was a personal injury action arising out of a fall on the stairway of defendant's store. The basis of the claim was the failure of the defendant to construct and maintain a handrail as required by an ordinance of the city of Chicago. Judgment was for the plaintiff, and the court held that the ordinance, which allegedly became effective in 1931, was applicable to require the defendant to maintain a handrail on each side of the store stairway, which was 6 feet ¾-inch wide, not withstanding the building was constructed in 1906-7.

The case of ***Adamec v. Post***, 273 N. Y. 250, 7 N. E. (2d) 120, 109 A. L. R. 1110 (1937) (see annotation beginning at 109 A. L. R. 1117), in an action challenging the New York Multiple Dwelling Law, holds that due process is not denied by a statute that prescribes higher standards of fire protection and sanitation for multiple dwelling buildings erected prior to 1901, which conformed to the standards in effect at the time of their erection, as applied to a tenement house of 40 rooms erected before that date, the cost of necessary changes being upwards of $5,000, although the property is assessed only in the total sum of $13,500, $8,500 of which is represented by the building. The court said: " The imposition of the cost of the required alterations as a consideration of the continued use of antiquated buildings for multiple dwellings may cause hardship to the plaintiff and other owners of the 'old-law tenements'; but, in a proper case, the legislature has the power to enact provisions reasonably calculated to promote the common good, even though the results be hardship to the individual."

However, we cannot forget, or even overlook, the well-established rule that the police power, broad as it is, is not all-inclusive. It must be exercised with discretion and in a reasonable manner. The regulation must not be confiscatory and the benefits to the public must bear at least a reasonable relation to the cost of achieving those benefits. As the court pointed out in *Health Department v. Trinity Church, supra*, the discretion of the legislative body is not absolute. "The improvement or work must in itself be a reasonable, proper, and fair exaction when considered with reference to the object to be attained. If the expense to the individual under such circumstances would amount to a very large and unreasonable sum, that fact would be a most material one in deciding whether the method or means adopted for the attainment of the main objective were or were not an unreasonable demand upon the individual for the benefit of the public." In the same case, the court quoted with approval from the opinion of Mr. Justice Holmes, speaking for the Supreme Court of Massachusetts in ***Rideout v. Knox***, 148 Mass. 368, 19 N. E. 390, 2 L. R. A. 81, 12 Am. St. Rep. 560: " It may be said that the difference is only one of degree; most differences are when nicely analyzed. At any rate, difference of degree is one of the distinctions by which the right of the legislature to exercise the police power is determined. Some small limitations of previously existing rights incident to property may be imposed for the sake of preventing a manifest evil; larger ones could not be except by the exercise of the right of eminent domain." ***Sawyer v. Davis***, 136 Mass. 239, 243.

Thus, in ***Masonic Fraternity Temple Association v. Chicago***, 131 Ill. App. 1 (1907), although the court said that it could easily conceive of circumstances with respect to physical, social, or municipal conditions in which a municipality, in the exercise of property granted police power, might require, to a reasonable degree, alterations in buildings previously erected in accordance with regulations in effect at the time of such erection, the proposed required alterations to the plaintiff's building, a Masonic Temple (which would cost at least $200,000, cause a yearly loss of $50,000 to the plaintiff, in addition to a loss of $18,000 worth of personalty, and result in a defaced but no safer building), were held to be unreasonable. 109 A. L. R. 1123.

Central Savings Bank in City of New York et al. v. City of New York et al., 279 N. Y. 266, 18 N. E. (2d) 151, Court of Appeals of N. Y. (1939), discussed with approval the case of *Adamec v. Post, supra*, but held the amendment of the Multiple Dwelling Law authorizing the city of New York to make certain repairs on old-law tenements and assess the cost as a lien prior to existing mortgages, without affording the mortgagor an opportunity to be heard as to the reasonableness of the proceeding or expenses, to be unconstitutional as an impairment of the obligation of the mortgagees's contract with the mortgagor. The court said: "We, therefore, reverse the judgment below and direct judgment for the plaintiffs, declaring that any liens imposed upon the respective premises for the expenses of making alterations or repairs in accordance with the orders of the Department of Housing and Buildings shall at all times be subject and subordinate to the plaintiff's respective mortgage liens."

In ***Realty Revenue Corp. v. Wilson***, 182 Misc. 552, 50 N. Y. S. (2d) 941, (Supreme Court, Special Term, New York Co., May 21, 1944), the court ruled that the owner of a multiple dwelling was entitled to a permanent injunction restraining enforcement of an order directing the plaintiff's property to be vacated for failure to make repairs deemed necessary for the safety and health of the inhabitants, where the owner attempted to comply with the order, but the materials needed were not available because of Federal regulations, and plaintiff would suffer substantial damage from enforcement of the order, and where evidence did not establish that the hazard to life and health of occupants was so great or imminent as to force evacuation because of plaintiff's inability to comply with the multiple dwelling law. The court ruled that the plaintiff was entitled to an injunction until Federal regulations were lifted so as to enable him to obtain the necessary material.

The court in the case of ***Bonnet v. Vallier***, 116 N. W. 885 (Wis. 1908), ruled unconstitutional as an abuse of police power a multiple dwelling law governing the entire State. The court said: "It must be conceded that the degree of regulation of the construction, maintenance, and manner of occupancy of tenement houses and lodging houses which is reasonable must vary greatly according to density of population and other circumstances. What would be reasonable in a very large city might be highly unreasonable in the country or in small cities and villages of the State. Requirements as to large structures to be occupied by many persons might be very unreasonable as to the smaller class of the same general class of structure to be occupied by very few persons. Again, requirements as to water service and fire hazard, not difficult to comply with by moderate expense in cities where there is a water and sewer system which are essential to the equipment of such buildings in those respects,

might be plainly reasonable, while such requirements in the country districts and the smaller cities and villages where there are no such facilities, might be just as plainly absurd. The character of the structure and its equipment, as regards the expense required to comply with the law in a large city, where the added cost is warranted, not only by the degree of danger to be guarded against but by the returns a proprietor could reasonably expect to derive from his investment, might be within the bounds of reason, while the same requirement as to the sparsely settled districts and in small cities and villages, where the conditions as to such dangers and the expense that could prudently be incurred in erecting the structures are entirely different, might be plainly outside the boundaries of reason."

From the foregoing it is clear that the States, and the municipalities under authority granted by the States, can, under their police power, establish new regulations relating to buildings and fire control, such regulations to have full effect on buildings already in existence at the time of passage of the regulations, even though the buildings compiled with all legal requirements at the time of their erection, so long as the regulations are reasonable in the burden they place on building owners and bear a reasonable relation to the end to be attained; namely, the health and safety of the community.

Many of the legal authorities on this general field are also referred to in NIMLO Report No. 111 "Demolition, Vacation, or Repair of Substandard Buildings," and in NIMLO Report No. 98 "Firemen and the Law." In the latter report, see page 34.

APPENDIX C

(Furnished by National Fire Protection Association)

STATE FIRE LEGISLATION

(Number after State Fire Marshal indicates (**1**) Independent State Office, (**2**) Insurance Department, (**3**) State Police, (**4**) Public Safety Department, (**5**) State Auditor, (**6**) Director of Commerce.)

Key to Principal Types of Legislation

- ***a.*** State Fire Marshal Law.
- ***b.*** Arson Law.
- ***c.*** State Building Code.
- ***d.*** Regulations on construction or protection of buildings.
- ***e.*** Fire protection of public buildings.
- ***f.*** Fire protection of places of public assembly.
- ***g.*** Removal of dilapidated buildings.
- ***h.*** Flammable liquid regulations.
- ***j.*** Dry-cleaning plant regulations.
- ***k.*** Fire drills in schools.
- ***m.*** Fire prevention education in schools.
- ***n.*** Fireworks regulations.
- ***o.*** Fire escape regulations.
- ***p.*** Theater or motion picture regulations.
- ***q.*** Hotel regulations.
- ***r.*** Liquefied petroleum gas regulations.
- ***s.*** State electrical Law.

State	***Principal Enforcement Agency***	***Principal types of legislation in force***
Alabama	State Fire Marshal (**2**)	***a-b-d-e-f-h-j-k-n-o-r***.
Arizona	Local police	***b-n***.
Arkansas	State Fire Marshal (**2**)	***a-b-e-f-h-k-m-p-q***.
	Labor Department	***r***.
California	State Fire Marshal (**1**)	***a-b-d-e-f-h-j-n-p***.
	State Division of Housing	***q***.
	State Board of Education	***k-m***.
	State Division of Industrial Safety	***r-s***.

State	***Principal Enforcement Agency***	***Principal types of legislation in force***
Colorado	Labor Commissioner Industrial Commission	***o***. ***s***.
Connecticut	State Fire Marshal (**3**) Department of Education	***a-b-e-f-h-j-p***. ***d***.
Delaware	Local police	***b-n***.
Florida	State Fire Marshal (**2**) State Superintendent of Public Instruction Hotel Commissioner	***a-b-n***. ***k***. ***q***.
Georgia	State Fire Inspector (**2**)	***b***.
Idaho	Local police	***b-o-q***.
Illinois	State Fire Marshal (**4**)	***a-b-d-e-f-g-h-j-k-n-o-p-q***.
Indiana	State Fire Marshal (**1**)	***a-b-c-d-e-f-g-h-j-k-n-p-r-s***.
Iowa	State Fire Marshal (**4**)	***a-b-d-e-f-g-h-k-m-n-o-p-q-r***.
Kansas	State Fire Marshal (**1**)	***a-b-d-e-f-h-j-k-m-n-o-p-r***.
Kentucky	State Fire Marshal (**2**)	***a-b-d-e-f-g-h-j-k-n-o-p-q-r-s***.
Louisiana	State Fire Marshal (**1**) Public Utility Commissioner	***a-b-o***. ***r***.
Maine	State Fire Marshal (**2**)	***b-d-e-f-g-h-m-p-q-r***.
Maryland	State Fire Marshal (**2**)	***b-e-f-g-n***.
Massachusetts	State Fire Marshal (**4**) Commissioner of Public Safety (**4**) Chief of Inspections (**4**) State Examiners of Electricians	***a-b-e-f-h-j-k-m-n***. ***d-o-p***. ***e-f-g-o-p-q***. **s**.
Michigan	State Fire Marshal (**3**)	***a-b-d-e-f-g-h-j-k-n-o-p***.

State	***Principal Enforcement Agency***	***Principal types of legislation in force***
Minnesota	State Fire Marshal (**2**)	***a-b-d-e-f-g-h-j-k-n-o-p-q***.
	Local building officials	***c***.
	State Board of Electricity	***s***.
Mississippi	State Fire Marshal (**2**)	***b-d-e-f-q***.
	Motor Vehicle Commissioner	***r***.
Missouri	Local police	***b-e-f-o-p-q***.
	Inspector of Oils	***h***.
Montana	State Fire Marshal (**5**)	***a-b-e-f-g-k-n-o-p-q***.
	Railway Commission	***r***.
Nebraska	State Fire Marshal (**2**)	***a-b-e-f-g-h-j-k-m-n-o-p-q***.
	Department of Labor	***s***.
Nevada	Local police	***b***.
	State Controller	***e***.
	Fire chiefs	***k***.
New Hampshire	State Fire Marshal (**2**)	***b***.
	Fire chiefs	***e-g-h-n-o***.
New Jersey	State Department of Labor	***d-f-h-j-n-o-p-s***.
	State Board of Education	***k-m***.
	Motor Vehicle Department.	***h***.
New Mexico	Local police	***b***.
	Local city officials	***d-g-h***.
	Health Department	***r***.
	State Electrical Engineer	***s***.
New York	Labor Department	***d-f-j-p-o***.[1]
	Commissioner of Education	***m***.
	Local police	***n***.
North Carolina	State Fire Marshal (**2**)	***a-b-c-d-e-f-g-h-j-k-m-o-p-q-s***.
North Dakota	State Fire Marshal (**2**)	***a-b-d-e-g-k-n-o-s***.
	Hotel inspectors	***q***.

[1] The Multiple Dwelling Law in New York City is concerned entirely with safety and fire prevention. See the discussion of this law in Appendix B of this report in the paragraph devoted to the case of ***Adamec v. Post*** which upholds the validity of the law.

State	***Principal Enforcement Agency***	***Principal types of legislation in force***
Ohio	State Fire Marshal (**6**)	***a-b-d-e-f-g-h-j-k-q***.
	Department of Industrial Relations	***c-n-o-p***.
Oklahoma	State Fire Marshal (**1**)	***a-b-e-f-g-h-o-q-r***.
Oregon	State Fire Marshal (**2**)	***a-d-e-f-h-j-k-n-o-p***.
	State police	***b***.
	Labor Bureau	***s***.
Pennsylvania	State Fire Marshal (**3**)	***a-b-g-h-m-n***.
	Department of Labor and Industry	***d-e-f-j-o-p-q-r***.
	Department of Public Instruction	***k-m***.
Rhode Island	State Fire Marshal (**3**)	***a-b-d-e-f-g-n-o-p-q***.
	Commissioner of Education	***k-m***.
South Carolina	State Fire Marshal (**2**)	***b-c-d-e-g-h-n-o-p***.
	Board of Education	***m***.
South Dakota	State Fire Marshal (**2**)	***a-b-d-e-f-g-o-p-r***.
Tennessee	State Fire Marshal (**2**)	***a-b-d-e-f-g-h-j-k-n-o-p-q-r-s***.
Texas	State Fire Marshal (**2**)	***a-b-d-e-f-g-h-j-k-m-n-o-p***.
	Railroad Commission	***r***.
Utah	State Board of Health	***q***.
	Local police	***b-n***.
Vermont	State Fire Marshal (**2**)	***a-b-g-h-j-n-o***.
Virginia	State Fire Marshal (**2**)	***b-e-f***.
	Commissioner of Labor	***d***.
Washington	State Fire Marshal (**2**)	***b-e-f-g-n***.
	Hotel inspectors	***q***.
	Labor Department	***s***.
West Virginia	State Fire Marshal (**5**)	***a-b-d-e-f-g-n***.
Wisconsin	State Fire Marshal (**2**)	***b***.
	Industrial Commission	***c-d-e-f-h-j-m-n-o-p-s***.
Wyoming	Local police	***b***.

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