

Building Materials (2021)
Legal Q&A
TML Staff

1. What is House Bill 2439?

House Bill 2439 by Representative Dade Phelan (R – Beaumont) was adopted during the 2019 legislative session. The bill was effective September 1, 2019, and is codified at Chapter 3000 of the Texas Government Code (Chapter 3000).

House Bill 2439 generally provides – with some exceptions – that a governmental entity, including a city, may not adopt or enforce a rule, charter provision, ordinance, order, building code, or other regulation that: (1) prohibits or limits, directly or indirectly, the use or installation of a building product or material in the construction, renovation, maintenance, or other alteration of a residential or commercial building if the building product or material is approved for use by a national model code published within the last three code cycles that applies to the construction, renovation, maintenance, or other alteration of the building; or (2) establishes a standard for a building product, material, or aesthetic method in construction, renovation, maintenance, or other alteration of a residential or commercial building if the standard is more stringent than a standard for the product, material, or aesthetic method under a national model code published within the last three code cycles that applies to the construction, renovation, maintenance, or other alteration of the building. *See* TEX. GOV'T CODE § 3000.002(a)(1)-(2).

A rule, charter provision, ordinance, order, building code, or other regulation adopted by a city that conflicts with the prohibitions is void. *Id.* § 3000.002(e).

2. Why was the bill needed?

According to the Texas House Business and Commerce Committee Report:

There have been concerns raised regarding the elimination of consumer and builder choice in construction through overly restrictive local municipal zoning ordinances, building codes, design guidelines, and architectural standards. Critics argue that these restrictive ordinances, codes, guidelines, and standards create monopolies, increase the cost of construction, and ultimately price thousands of Texans out of the housing market. C.S.H.B. 2439 seeks to address these concerns and eliminate the ability of a governmental entity to enact overly restrictive, vendor-driven building regulations.

In other words, the belief was that cities were enacting ordinances that required builders to use products available from only one or a few sources to benefit those vendors. Of course, the bill goes much, much further than that, and soon after its enactment legislators heard from city officials about the bill's detrimental effects.

3. What is meant by a city regulation that “prohibits or limits, directly or indirectly, the use or installation of a building product or material in the construction, renovation, maintenance, or other alteration of a residential or commercial building if the building product or material is approved for use by a national model code published within the last

three code cycles that applies to the construction, renovation, maintenance, or other alteration of the building”?

The best way to understand this core provision of House Bill 2439 is to break it down into two elements:

First, the bill clearly applies only to residential or commercial “buildings.” *Id.* § 3000.002(a)(1). Those terms are not defined, so their normal meaning applies. *Id.* § 311.011. That means it is safe to say that single- and multi-family homes, as well apartments, are subject to the bill’s limitations. Commercial buildings typically include retail and warehouses, but not industrial or more intense uses. A city can define the terms by ordinance, but shouldn’t be unreasonable. In other words, it doesn’t make sense to classify a single-family home as an industrial use. “Construction, renovation, maintenance, or other alteration” appears to cover just about any type of change to a building.

Second, the bill applies to a “building product or material [that] is approved for use by a national model code published within the last three code cycles that applies to the construction, renovation, maintenance, or other alteration of the building.” *Id.* § 3000.002(a)(1).

Most agree that the language above references the International Code Council model codes and a handful of others. Currently, cities should normally be operating under: (1) the International Residential Code (IRC) for residential construction; (2) the National Electrical Code (NEC) for electrical construction in both residential and commercial construction; and (3) the International Energy Conservation Code (IECC) and the International Building Code (IBC) for all construction other than single-family residential. With regard to plumbing codes, a city may be operating under the plumbing provisions of the IRC and/or either the plumbing provisions of the Uniform Plumbing Code (UPC) or International Plumbing Code (IPC). Other ICC Codes include the International Fire Code (IFC), the International Fuel Gas Code (IFGS), the International Property Maintenance Code, and several more. The ICC code cycles update every three years. The last three code cycles as of 2019 are 2018, 2015, and 2012.

Examples of materials allowed by the 2018 IRC for home exteriors include, among others: (1) concrete, stone, or masonry; (2) fiber cement siding; (3) horizontal aluminum; (4) vinyl siding; or (5) wood siding. *See* Table R703.3(1). A city that has, through an IRC amendment or any other regulation, mandated a percent masonry requirement is thus preempted. A builder can now use vinyl siding or wood siding if he or she chooses because those are a “building product or material [that] is approved for use by a national model code published within the last three code cycles that applies to the construction, renovation, maintenance, or other alteration of the building.”

The bill’s prohibitions aren’t limited to aesthetic building products or materials. Any city that has amended any ICC or other code should review those amendments with their building official and legal counsel to determine if an amendment runs afoul of the bill’s prohibitions.

4. What is meant by a city regulation that “establishes a standard for a building product, material, or aesthetic method in construction, renovation, maintenance, or other alteration of a residential or commercial building if the standard is more stringent than a standard for the product, material, or aesthetic method under a national model code published within the last three code cycles that applies to the construction, renovation, maintenance, or other alteration of the building”?

Most agree that any city regulation requiring that a building look a certain way (i.e., above-and-beyond an appearance that comes about through compliance with minimum national model code standards) is prohibited. *Id.* §3000.002(a)(2). Some have argued that architectural features, front elevation requirements, roof pitch, window size, and similar requirements may be preempted.

When faced with the question of whether a city was prohibited by Section 3000.002 of the Government Code from adopting paint color and pattern requirements, the attorney general opined that a court could consider this to be an aesthetic method standard, but that the model codes’ silence as to color palette and pattern could mean that the requirement is allowed. Tex. Att’y Gen. Op. No. KP-0370 (2021). The attorney general determined that an “aesthetic method” concerns procedures or processes to satisfy considerations of beauty or appearance in building construction, renovation, maintenance, or other alterations. *Id.* The attorney general ultimately concluded that whether such a requirement was prohibited was a fact question that could not be addressed in the opinion process. *Id.*

Because these issues are fact-sensitive, each city should consult its attorney on specifics.

5. Can a city continue to adopt local amendments to its building codes?

Yes, but they can’t conflict with the prohibitions in Chapter 3000. A city that adopts a building code governing the construction, renovation, maintenance, or other alteration of a residential or commercial building may amend a provision of the building code to conform to local concerns if the amendment does not conflict with the prohibitions discussed in questions 3 and 4, above. TEX. GOV’T CODE § 3000.002(b). In other words, the prohibition against amendments that conflict with House Bill. 2439 overrides authority in other law to make amendments. See, e.g., TEX. LOCAL GOV’T CODE §§ 214.212(C); 214.214(B); 214.216(C).

6. May a city use private deed restrictions to require certain materials or methods?

State law authorizes the City of Houston and any city that doesn’t have zoning to enforce certain private deed restrictions. TEX. LOC. GOV’T CODE Chapter 212, Subchapter F (an authorized city may enforce a deed restriction that “regulates architectural features of a structure”). Senate Bill 1090, adopted during the 2021 Regular Session, and effective September 1, 2021, also added the City of Horseshoe Bay to Subchapter F.

Senate Bill 1090 provides that Chapter 3000 does not affect “the enforcement of land use restrictions contained in plats and other instruments under Subchapter F, Chapter 212, Local Government Code.” While it preceded adoption of Senate Bill 1090, the attorney general also discussed this issue in Attorney General Opinion Number KP-0333 (2020).

Finally, it's important to note that private deed restrictions between property owners are still enforceable.

7. Does a city have any option at all with regard to controlling building materials or construction methods?

That's debatable, but the obvious method is by agreement. A city can enter into an agreement wherein a person voluntarily agrees to abide by certain standards. For commercial construction, the incentivizing tool could be a Local Government Code "Chapter 380 agreement." For residential and commercial, it could be a "neighborhood empowerment zone" under Chapter 378 of the Local Government Code. Property and/or sales tax abatements could be other options.

8. Are there exemptions from the prohibitions adopted by House Bill 2439?

Yes. The prohibitions in questions 3 and 4, above, do not apply to:

1. a program established by a state agency that requires particular standards, incentives, or financing arrangements in order to comply with requirements of a state or federal funding source or housing program;
2. a requirement for a building necessary to consider the building eligible for windstorm and hail insurance coverage;
3. an ordinance or other regulation that: (i) regulates outdoor lighting for the purpose of reducing light pollution; and (ii) is adopted by a city that is certified as a Dark Sky Community by the International Dark-Sky Association as part of the International Dark Sky Places Program;
4. an ordinance or order that: (i) regulates outdoor lighting; and (ii) is adopted under the authority of state law; or
5. a building located in a place or area designated for its historical, cultural, or architectural importance and significance that a city may regulate through zoning, if the city: (i) is a certified local government under the National Historic Preservation Act; or (ii) has an applicable landmark ordinance that meets the requirements under the certified local government program as determined by the Texas Historical Commission (a city that doesn't meet (i) or (ii) can adopt or enforce a regulation in questions 3 and 4, above, that applies to a building located in a place or area designated on or after April 1, 2019, by the city for its historical, cultural, or architectural importance and significance, if the city has the voluntary consent from the building owner);
6. a building located in a place or area designated for its historical, cultural, or architectural importance and significance by a city, if designated before April 1, 2019;
7. a building located in an area designated as a historic district on the National Register of Historic Places;
8. a building designated as a Recorded Texas Historic Landmark;
9. a building designated as a State Archeological Landmark or State Antiquities Landmark;
10. a building listed on the National Register of Historic Places or designated as a landmark by a city;
11. a building located in a World Heritage Buffer Zone; or
12. a building located in an area designated for development, restoration, or preservation in a

main street city under the main street program.

TEX. GOV'T CODE §§ 3000.002(c)(1)-(12); 3000.002(d).

In addition, the prohibitions do not affect provisions regarding the installation of a fire sprinkler protection system under Section 1301.551(i) of the Texas Occupations Code. *Id.* § 3000.004. Section 1301.551(i) provides that: “[n]otwithstanding any other provision of state law, after January 1, 2009, a municipality may not enact an ordinance, bylaw, order, building code, or rule requiring the installation of a multipurpose residential fire protection sprinkler system or any other fire sprinkler protection system in a new or existing one- or two-family dwelling. A municipality may adopt an ordinance, bylaw, order, or rule allowing a multipurpose residential fire protection sprinkler specialist or other contractor to offer, for a fee, the installation of a fire sprinkler protection system in a new one- or two-family dwelling.”

9. Were additional exemptions adopted in the Eighty-Seventh Legislative Session?

Yes, Senate Bill 1090, effective September 1, 2021, exempts the following from Government Code Section 3000.002:

1. an ordinance or other regulation that regulates outdoor lighting that is adopted for the purpose of reducing light pollution and that is adopted by a city that has adopted a resolution stating the city’s intent to become certified as a Dark Sky Community and that does not regulate outdoor lighting in a manner that is more restrictive than the prohibitions or limitations required to become certified as a Dark Sky Community*;
2. a standard for a plumbing product required by an ordinance or other regulation implementing a water conservation plan or program described by Section 11.1271 or 13.146 of the Water Code; and
3. a standard for a plumbing product imposed by the Texas Water Development Board as a condition for applying for or receiving financial assistance under a program administered by the board.

*To learn more about the requirements for certification as a Dark Sky Community, visit the International Dark-Sky Association website at www.darksky.org. The website also contains a number of example resolutions and ordinances used by Texas cities related to Dark Skies and night sky protection.

10. How are the prohibitions in Chapter 3000 enforced?

The attorney general or an aggrieved party may file an action in district court to enjoin a violation or threatened violation of the statute. *See* TEX. GOV'T CODE § 3000.003. The attorney general may recover reasonable attorney’s fees and costs incurred in bringing an action, and sovereign and governmental immunity to suit is waived and abolished to the extent necessary to enforce the bill. *Id.*