



ATTORNEY GENERAL OPINIONS
OP – 6491
MAY 13, 1968

January 16, 1968

Honorable Robert Y. Thornton
Attorney General
Supreme Court Building
Salem, Oregon 97310

Sir:

We would like an opinion from your office as to the degree of authority and responsibility conferred upon fire officers of local government under ORS 476.030 and 476.060.

Specifically does a fire officer of a subdivision of State government when aware of a violation of State Fire protection statutes have authority and responsibility to:

1. Take action to correct such violation?
2. If so, what degree of action must be taken to discharge any responsibility?
3. Does any such responsibility vary with the officer's knowledge, training and opportunity for fire prevention activities, i.e., as part time volunteer chief who supports himself with a full time job not connected to the Fire Service, and with his Fire Service activity limited to response during times of emergency if he is available and on occasional organization meeting, perhaps only once a month?

Would any such authority and responsibility conferred by statutes also apply to State fire protection regulations adopted by this office under administrative rules?

This problem has created confusion and has been of considerable concern to this office and local fire officers for many years. This has resulted in instances where local officers although aware of conditions seriously violating State statutes did not take action because of the opinion that this was a responsibility of the State only.

Similar instances have occurred in other states such as the Indiana Ice Rink Explosion involving illegal (under State regulations) use of L.P. Gas where a number of lives were lost and subsequent grand jury investigation indicated both local and State fire officials for improper actions.

There have also been instances in Oregon when violations known to local authorities continued without abatement efforts such as hotels having fire escape exits but without balance stairs as required by ORS 479.020-479.050, and dead end corridors of 80' or more, or corridors with more than one intervening room, 479.060.

Most recently there have been many instances of structures build without approval of this office prior to construction as required by ORS 479.155 although such construction was known and approved by local authorities.

Any clarifying opinions in this area will be much appreciated.

Very truly yours,

C. Walter Stickney
State Fire Marshal

CWS:maf

FIRE AND LIFE SAFETY AWARENESS I

ROBERT Y. THORNTON
ATTORNEY GENERAL

STATE OF OREGON
DEPARTMENT OF JUSTICE
SALEM

May 13, 1989

Mr. C. Walter Stickney
State Fire Marshal
668 Church Street N.E.
Salem, Oregon 97310

No. 6491

You ask what is the "degree of authority and responsibility" conferred upon fire officers of local government under ORS 476.030 and 476.060. Specifically you wish to know (1) whether a fire officer of a subdivision of state government when aware of a violation of state fire protection statutes has the authority and responsibility to take action to correct such violation, and (2) if so, what degree of action must be taken to discharge that officer's responsibility.

As examples you note that there have been instances in Oregon when violations known to local authorities have continued without direct efforts by local officials to personally abate such conditions such as residential occupancies having fire escape exits but without balance stairs as required by ORS 479.020 to 479.050, or with dead end corridors of 80 feet or more and more than one room intervening between the corridor and the fire escape in violation of ORS 479.060 (3).

ORS 476.030 (1) provides in part as follows:

"The State Fire Marshal shall enforce all statutes, and make rules and regulations relating to:

- "(a) The prevention of fires.
- "(b) The storage and use of combustibles and explosives.
- "(c) The construction, maintenance and regulations of fire escapes.
- "(d) Over seeing the safety of and directing the means and adequacy of exits in case of fire from factories, asylums, hospitals, churches, schools, halls, theaters, amphitheaters, all buildings except private residences, which are occupied for sleeping purposes, and all other places where large numbers of persons work, live or congregate from time to time for any purpose." (Emphasis supplied)

ORS 476.060 (1) provides as follows:

"All fire marshals in those governmental subdivisions having such officers, and where no such officer exists, the chief of the fire department of every city or rural fire protection district in which a fire department is established. The marshal or chief or chief of police, officer of any city or town in which no fire department exists, and the constables within their districts outside of cities and towns shall be, by virtue of the offices held by them, assistants to the State Fire Marshal without additional recompense, subject to the duties and obligations imposed by law, and shall be subject to the direction of the State Fire Marshal in the execution of the provisions of this section and ORS 476.070, 476.090, 476.090 and 476.210." (Emphasis supplied)

The above statute makes all local fire chiefs and marshals and all local officers where there is no fire department by virtue of their office "assistants to the State Fire Marshal" and "subject to the direction of

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the State Fire Marshal” in the execution of the mandate of the statute and “subject to the duties and obligations imposed by law.”

The purpose of the above statute is not obscure. Fire is an ever-present hazard which is everywhere. The conditions that produce fire or safety hazards are also state-wide.

The legislature deemed that the most efficient way to control fire and safety hazards was to put the fire marshal in charge of fire prevention, protection and safety on a state-wide basis, ORS 476.030 (1), supra, but at the same time to require local fire chiefs and marshals and other local officials to be, by virtue of their office, his assistants for that purpose. ORS 476.060, supra.

Accordingly, the duty of the State Fire Marshal to enforce statutes as set forth in ORS 476.030 (1), supra, pertaining to (1) the prevention of fires, (2) the storage and use of combustibles and explosives, (3) the construction, maintenance and regulations of fire escapes, (4) overseeing the safety of and directing the means and adequacy of exit from buildings in case of fire, also becomes the duty of the local fire officer in those local subdivisions not exempt from regulations by the State Fire Marshal under ORS 476.030 (4).

Similarly, any regulations enacted by the State Fire Marshal pursuant to ORS 476.030 (1) also have the effect of law and the fire marshal is under a duty to enforce such regulations. And, again such duty becomes the duty of the local fire officer by virtue of his office.

It is obvious that if the State Fire Marshal is under the obligation to perform these duties of fire prevention and protection and if the local fire officers are the fire marshal's assistants and subject to his direction and control, ORS 476.060, supra, then the local fire officers must also perform such duties.

Such legal responsibility means that if the local fire chief for example discovers or knows of a three-story frame building with only one fire escape which is obstructed in violation of ORS 476.060 (4), such officer cannot ignore the hazard and fail to promptly order and effectuate the elimination of the fire safety hazard on the theory that the State Fire Marshal has a duty to enforce ORS 479.060.

For as an assistant to the State Fire Marshal the local chief himself is under a legal duty to the public in his local community to promptly order and effectuate the elimination of the first safety hazard. ORS 476.060, supra.

Failure of the fire chief to so perform that duty or negligent performance of that duty could result in personal liability of the fire chief in damages to any member of the public injured by the chief's failure to perform his duty or through the chief's negligent performance of his duty.

Thus in *Svenson v. Brix*, (1937) 156 Or. 236, 241-242, 64 P. (2d) 830 the court said:

“ * * * The only ground on which there is an attempt to hold the superintendent of banks liable is that he failed to perform some duty imposed upon him by law. In other words, he is charge with nonfeasance in office.

“In *Throop on Public Officers*, § 724, it is said:

“With respect to officers exercising ministerial powers, the rule of law is well settled, that where an individual sustains an injury by the malfeasance, misfeasance, or nonfeasance of such an officer, acting or omitting to act contrary to his duty, the law gives redress to the injured person by action for damages. The officer is liable for nonfeasance, that is, for an omission to do his duty, only to the person who has a special interest in the performance of that duty; as where a sheriff, or other officer having corresponding functions, fails to fulfill the directions of the process delivered

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to him; in which case he is liable only to the party interested in the execution of the process. But for misfeasance, or negligence in the performance of his duty, and also for malfeasance, or excess or abuse of his powers, his is liable to any person who sustains injury thereby." (Emphasis supplied)

And in *Antin v. Union High School District No. 2*, (1929) 130 Or. 4761, 478, 280 P. 664, the court said

" * * * A public officer, however, is responsible to a private party for his own negligence or wrongful acts when acting beyond the scope of his authority, or when acting within the scope of his authority if the wrong done is not a violation of a duty which he owes solely to the public. If the duty is solely a duty which the officer owes to the public, then the officer is not subject to the suit of a private party, even though it has resulted in injury to such party. But if the duty is one which the officer owes both to the public and to a private individual, and the private individual is injuriously affected specially, and not as a member of the public, then for such violation the injured party may sue for the wrong done. * * * " (Emphasis supplied)

In the case of *State ex rel. and to the Use of City of St. Louis vs. Priest*, (1941) 348 Mo. 37, 152 S.W. (2d) 109, 112 the court said:

" * * * But negligence on the part of an officer consists only in a failure to use that degree of care which an ordinary reasonable and prudent man would exercise under the same or similar circumstances and conditions. A reasonable effort to perform he duties pertaining to such office is all the law requires. * * * " (Emphasis supplied)

Thus, generally speaking, local fire chiefs or other local fire officers are not only a legal duty to enforce the statutes and regulations of this state pertaining to fire matters, but also they may be subject to personal liability for the failure to perform or the negligent performance of that duty. See also ORS 30.260 et seq.

However as the just quoted Priest case states "A reasonable effort to perform the duties pertaining to * * * [their] office is all that the law requires."

You mention the situation of structures being build without the plans having been first approved by the State Fore Marshal as required by ORS 479.155 "although such construction was known and approved by local authorities."

ORS 479.155 (1) requires that prior to the alteration or construction of certain buildings outside of an area exempted from fire marshal regulations the owner

" * * * shall submit to the State Fire Marshal two copies of a plan or sketch showing the location of the building or structure with relation to the premises, distances, lengths and details of construction as the State fire Marshal shall require.

ORS 479.155 (4) provides as follows:

"The State Fire Marshal or his staff shall be furnished with not less than two accurate copies of the plan or sketch and details for the purpose of ascertaining compliance with applicable fire prevention and protection statutes and regulations. The plan examiner shall indicate on the plan or sketch in writing his approval or disapproval and conditions for approval of the construction or alteration. * * * No building or structure shall be erected or constructed without approval by the State Fire Marshal or his deputy if the building or structure requires approval. * * * " (Emphasis supplied)

The policy expressed by the above statute is clear. Certain buildings must be located and con-

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structured in such manner as to effectuate fire prevention and safety principles.

To accomplish this the legislature requires that the plans for the buildings in question must first be submitted to the fire marshal for his approval before the building is constructed and altered.

And no such building requiring approval of the plans therefore by the fire marshal shall be erected or constructed without such approval. ORS 479.155 (4), supra.

Accordingly, in view of the plan terms of ORS 476.060 and 479.155, supra, local fire officials are not only under a positive legal duty to require the plans for local construction subject to ORS 479.155 to be submitted to the State Fire Marshal, but also such local officials are prohibited by ORS 479.155 (4), supra, from approving or permitting such local construction prior to fire marshal approval of the plans therefore.

In conclusion and in answer to your question it is our opinion that local fire officials by virtue of their office are not only assistants to the State Fire Marshal, but also along with him are personally under the legal duty to take whatever action is reasonable necessary to correct or prevent violations of fire prevention and protection statutes and regulations.

It is also our opinion that such duty must be personally discharge by such local officers or by their assistants unless relieved therefrom by order of the State Fire Marshal.

Very truly yours,

ROBERT Y. THORNTON
Attorney General

By 
Peter S. Herman
Assistant

PSH/jk