THE ATTORNEY GENERAL
OF TEXAS

April 12, 1990

JIM MATTOX
ATTORNEY GENERAL

Honorable Mike Driscoll
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LO-90-16

Dear Mr. Driscoll:

Your questions relate to a statute regarding the fire codes for unincorporated areas in counties with populations over 250,000. Sections 235.001 of the Local Government Code, added by House Bill 2252, Acts 1989, 71st Leg., ch. 296, § 1, at 1253 (effective January 1, 1991), provides, "The commissioners court of a county with a population of over 250,000 may adopt a fire code and rules necessary to administer and enforce the fire code."

Section 235.002 of the Local Government Code provides for the "application and content of the fire code." Section 235.002 provides:

> (a) The fire code applies only to the following buildings constructed in an unincorporated area of the county:
>
> (1) a commercial establishment; and
>
> (2) a public building.
>
> (b) The fire code does not apply to an industrial facility having a fire brigade that conforms to requirements of the Occupational Health and Safety Administration.

You ask:

> 1. What is the meaning of the term 'commercial establishment' as used in Tex. Loc. Gov't Code § 235.002 (Vernon Supp. 1990)?

> 2. Is an apartment a 'commercial establishment' within the meaning of the term as used in Tex. Loc. Gov't Code § 235.002 (Vernon Supp. 1990)?
>
> 3. What is the meaning of the term 'public building' as used in Tex. Loc. Gov't Code § 235.002 (Vernon Supp. 1990)?
>
> 4. Does Commissioners Court have the authority to limit enforcement of a fire code enacted pursuant to Tex. Loc. Gov't Code ch. 235 to high rise structures or buildings and to specify what type of buildings it chooses to regulate?

In regard to your first question, whether a particular building or type of building is a "commercial establishment" is a fact question to be determined in the first instance by the commissioners court. We can, however, provide some guidelines.

The County Fire Code does not define "commercial establishment." Section 311.011 of the Government Code addresses the matter of "common and technical usage of words," as follows:

> (a) Words and phrases shall be read in context and construed according to the rules of grammar and common usage.
>
> (b) Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.

It appears that "commercial establishment" and related terms may have a broad or narrow meaning depending upon the context in which they are used. The variance in the definition that may be given the term "commercial" was considered by the United States Supreme Court in Jordan v. Tashiro, 278 U.S. 123 (1928), the court stating:

> While in a narrow and restricted sense the terms 'commerce,' or 'commercial,' and 'trade' may be limited to the purchase and sale or exchange of goods and commodities, they may connote, as well, other occupations and other recognized forms of business

> enterprise which do not necessarily involve trading in merchandise. Asakura v. Seattle, supra. [265 U.S. 332 (1924)]. And although commerce includes traffic in this narrow sense, for more than a century it has been judicially recognized that in a broad sense it embraces every phase of commercial and business activity and intercourse. See Gibbons v. Ogden, 9 Wheat. 1, 189, 6 L. Ed. 23.

In Direlco, Inc. v. Bullock, 711 S.W.2d 360 (Tex. App. - Austin 1986, writ ref'd n.r.e.), the court rejected the defendant's position that he was entitled to recover taxes paid under protest for purchase of gas and electricity for leased office and retail space in four buildings he owned in that such use was not "commercial use" under section 151.317 of the Tax Code. After stating that the definition of "commercial use" is subject to two or more reasonable interpretations, the court accepted the comptroller's construction that "commercial use" encompasses all areas of commerce, including the leasing of commercial real estate except those specifically exempted.[1] We note that "residential use" is defined in section 151.317 of the Tax Code as "a family dwelling or a multi-family apartment or housing complex or building or part of a building occupied as a home or residence."

While Black's Law Dictionary, 245 (5th ed. 1979) gives a narrow construction of "commercial establishment," a much broader definition is given to "commercial property," as reflected by its definition of the two terms:

> Commercial establishment. A place where commodities are exchanged, bought or sold. State ex rel. Kansas City Power and Light

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1. Section 151.317(2) of the Tax Code defines "commercial use:"

> 'Commercial use' means use by a person engaged in selling, warehousing, or distributing a commodity or a professional or personal service . . . .

Among businesses expressly excepted by subsections (2) are agriculture, dairy, and mining.

> Co. v. Smith, 342 Mo. 75, 111 S.W.2d 513, 515.
>
> Commercial property. Income producing property (e.g. office buildings, apartments etc,) as opposed to residential property.

Subsection (b) of section 235.002 of the Local Government Code provides, "The fire code does not apply to an industrial facility having a fire brigade that conforms to the requirements of the Occupational Health and Safety Administration." A well recognized rule of statutory construction is that the express mention or enumeration of one thing or class is tantamount to the exclusion of all others. Southern County Mut. Ins. Co. v. Smith, 529 S.W.2d 618 (Tex. Civ. App. - Tyler 1975, no writ); Attorney General Opinion JM-251 (1984). By excluding a certain class of industrial facilities, the legislature has evidenced its intent that all other industrial facilities are not exempt from the fire code. The inclusion of industrial facilities evidences a legislative intent that "commercial establishment" have a broader definition than a place where commodities are bought and sold. The provision relating to buildings to be covered by a fire code in section 235.002 is a remedial statute and should be liberally construed to effect its purpose. Board of Ins. Comm'rs. v. Great S. Life Ins. Co., 239 S.W.2d 803 (Tex. 1951). In Jordan the United States Supreme Court stated that the terms "commercial" or "commerce" had for more than a century been judicially recognized to "embrace every phase of commercial and business activity and intercourse." We believe that the legislature intended "commercial establishment," as that term is used in section 235.002, to include any building in which any business activity coming within the foregoing definition of "commerce" or "commercial" is transacted.

An insight into whether the legislature intended that an apartment come within the meaning of a "commercial establishment" is found in the history of House Bill 2252. As originally introduced, subsection (a) of section 235.002 of the Local Government Code provided:

> The fire code applies only to the following buildings constructed in an unincorporated area of the county:
>
> (1) a multifamily dwelling;
>
> (2) a commercial establishment; and

> (3) a public building. (Emphasis in original.)

The conference committee deleted multi-family dwellings from buildings covered by the fire code and, as amended, the House and the Senate adopted the conference committee report. In Transportation Ins. Co. v. Maksyn, 580 S.W.2d 334 (Tex. 1979), the court stated:

> Deletion of a provision in a pending bill discloses legislative intent to reject proposal, and courts should be slow to put back that which the legislature has rejected.

See also Grasso v. Cannon Ball Motor Freight Lines, 125 Tex. 154, 81 S.W.2d 482 (1935); Love v. Wilcox, 119 Tex. 256, 28 S.W.2d 515, 524 (1930).

The deletion of the "multi-family dwelling" in conference committee evidences a legislative intent to reject this provision.[2] We believe that the legislature intended that an apartment that is operated as a "multi-family dwelling" be excluded from the buildings covered by the fire code.[3]

Your third question concerns the meaning of the term "public building" as used in section 235.002. Again, we can only provide guidelines regarding the interpretation of that term. It appears that the term "public building" is also

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2. Attorney General Opinion JM-1102 (1989) discusses the distinction between the deletion of a provision in a pending bill and the rejection of an amendment to a bill. While noting that the deletion of a provision in a pending bill evidences legislative intent, less weight should be given to the rejection of an amendment, especially where no other provision of the act supports such a conclusion.

3. "Dwelling" is defined in Black's Law Dictionary 454 (5th ed. 1979), as:

> The house or other structure in which a person or persons live; a residence; abode; habitation; the apartment or building, or group of buildings, occupied by a family as a place of residence. Structure used as place of habitation.

subject to different meanings dependent upon the context in which it is used. While statutes relating to "public buildings," as hereinafter noted, normally define the term, section 235.002 fails to contain a definition.

In Dancy v. Davidson, 183 S.W.2d 195 (Tex. Civ. App. - San Antonio 1944, writ ref'd), the court addressed the matter of the authority of a commissioners court to purchase a building and lot for certain offices. The court construed the term "public buildings" in article 2351, V.T.C.S., now section 291.001, as authorizing the commissioners court to "provide and keep in repair courthouses, jails and other necessary public buildings" to mean "a building used primarily for governmental purposes, that is, to house public or governmental agencies."

Article 4477-3a, V.T.C.S., relating to the licensing and regulation of businesses removing asbestos from public buildings, defines "public building" as "a building that is open to the public or that has public access, including but not limited to government buildings and public schools."

42 U.S.C.A. section 6326 relating to "energy conservation" defines "public building" to mean "any building which is open to the public during normal business hours."

Ballentines' Law Dictionary 1020, 1021 (3rd ed. 1969), defines "public building" as a "building owned by a public body, particularly if it is used for public offices or for other public business." However, Ballentine defines "public house" as a "house commonly open to the public, either for business, pleasure, religious worship, the gratification of curiosity, or the like, and including all houses made public by the occupation of them, as taverns, or inns, or in any other way."

A review of cases found in 35 Words and Phrases Public Buildings 74-83, reflects that statutes dealing with the maintenance, purchase, and construction of public buildings define "public building" to mean a building owned by a public body and used to house public offices or government agencies. On the other hand, statutes dealing with the health, safety, and welfare of the public define "public building" as any building open to the public. The fire code, as a remedial statute, should be liberally construed to effect its purpose. Since it is a statute relating to the health, welfare, and safety of the public, we do not believe the legislature intended to limit the meaning of

"public buildings" to buildings owned by the public. We believe that "public building," as that term is used in the fire code, includes any building open to the public.

Your last question is whether the commissioners court has the authority to limit enforcement of the fire code "to high rise structures or buildings and to specify what type of buildings it chooses to regulate."

Section 235.003 of the Local Government Code relates to the necessity of compliance with the requirements of the fire code in order to obtain a building permit in an unincorporated area of the county. Section 235.003 provides:

> (a) A person may not construct a building described by Section 235.002(a) in an unincorporated area of the county unless the person obtains a building permit issued in accordance with this chapter.
>
> (b) A person may apply for a building permit by providing to the commissioners court:
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> (1) a plan of the proposed building containing information required by the commissioners court; and
>
> (2) an application fee in an amount set by the commissioners court.
>
> (c) Within 30 days after the date the commissioners court receives an application and fee in accordance with Subsection (b), the commissioners court shall:
>
> (1) issue the permit if the plan complies with the fire code; or
>
> (2) deny the permit if the plan does not comply with the fire code.

You suggest that since under section 235.001 of the Local Government Code, the commissioners court has discretion to enact a fire code, the commissioners court has the authority to determine the buildings that will be subject to the code.

Section 235.002 of the Local Government Code applies to "commercial establishments" and "public buildings" in unincorporated areas of the county. We believe that a fire code adopted by the commissioners court that limited enforcement to certain types of "commercial establishments" and "public buildings" would be contrary to the legislative act. Therefore, act of the legislature must prevail.

Very truly yours,

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Opinion Committee

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TGD/er

Ref.: ID-8788
RQ-1926