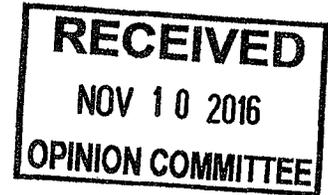


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OPINION COMMITTEE

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FILE # ML-48106

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November 10, 2016

(Via E-Mail: Opinion.Committee@texasattorneygeneral.gov
and Certified Mail, RRR # 7015 3010 0001 1543 1408)

Honorable Ken Paxton
Office of the Attorney General
Attention: Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548

RE: Request for an Attorney General Opinion; School District Building Construction

Dear Sir:

Please accept this letter as a request for an Attorney General Opinion with respect to the following legal question:

Whether all new school district building construction begun after November 1, 2016 require adherence to the latest published edition of the International Energy Conservation Code, which applies to commercial buildings, as provided under Texas Health & Safety Code §388.003(b) and as promulgated by Texas Administrative Rule under Title 34, Chapter 19, rule §19.53(b)?

I submit the following legal brief on the issue for your consideration.

The United Independent School District is located within the territorial and extra territorial limits of the City of Laredo ("City"), which is a corporate municipal entity, operating as a "home rule" city in this State pursuant to its City Charter. The United Independent School District has undertaken and will continue to undertake school construction projects pursuant to the passage of a \$408.7 million dollars bond proposal, which passed in 2013. Construction projects include the construction of several ninth grade campuses, middle schools, and

the final phase of construction scheduled for 2017 and 2019. Since the City has adopted local building construction codes, the United Independent School District, in its construction of school facilities, must comply with those codes including energy conservation.¹ The City planned to adopt, by ordinance, the 2015 International Energy Conservation Code as its local energy code for commercial construction; however, the City has deferred adopting the 2015 International Energy Conservation Code for the next ninety days following the November 1, 2016 date or until February 1, 2017 when the City will adopt, by ordinance, the Code.²

Chapter 388 of the Health and Safety Code, enacted by the Seventy-Seventh Legislature, adopted “the International Energy Conservation Code *as it existed on May 1, 2001* ... as the energy code for use in this state for all *other residential, commercial, and industrial* construction (*emphasis added*).³ In enacting chapter 388, in particular, the state legislature articulated a need for “an effective building energy code” to reduce “air pollutant emissions,” to moderate “future peak electric power demand,” to assure the electrical grid’s reliability” and to control “energy costs for residents and businesses in this state.”⁴ Chapter 388 further provides that a “municipality shall establish procedures for the administration and enforcement of the codes [International Residential Code and International Energy Conservation Code] and to ensure that code certified inspectors shall perform inspections and enforce the codes in the inspectors’ jurisdictions.”⁵ The Health and Safety Code does authorize municipalities to establish procedures to adopt local amendments to the International Energy Conservation Code.⁶ However, the Health and Safety Code does contain the limitation that “local amendments may not result in less stringent energy efficiency requirements in nonattainment areas and in affected counties than the energy efficiency chapter of the ... International Energy Conservation Code.”⁷

In 2015, the state legislature amended Health and Safety Code section 388.003 specifically as it relates to building energy efficiency standards. Specifically, section 388.003, which adopted the International Energy Conservation Code, *as it existed on May 1, 2001*, as the energy code for use in this state for all *other residential, commercial, and industrial construction* was amended to authorize the State Energy Conservation Office to adopt and substitute the International Conservation Code as it existed on May 1, 2016 for the latest published edition of the International Energy Conservation Code.⁸ In 2016, and as published in the January 1, 2016 edition of the Texas Register, the State Comptroller of Public Accounts, through the State Energy Conservation Office, amended 34 Texas Administrative Code §19.53 establishing the 2015 International Energy Conservation Code as the energy code *for certain type of*

¹ 19 Tex. Admin. Code §61.1036(f)(1)(A)(2008)(Tex. Educ. Agency).

² Conversation with City of Laredo Building Development Services Department which oversees Building Code Enforcement within the City of Laredo and its Extra Territorial Jurisdiction.

³ Tex. Health & Safety Code Ann. §388.003(b) (*emphasis added*); Act of May 24, 2001, 77th Leg. R.S., ch. 967, sec. 1(b), sec. 388.003(b), 2001 Tex. Sess. Law. Serv.

⁴ Tex. Health & Safety Code Ann. §388.001(a) (Vernon Supp. 2002); Act of May 24, 2001, 77th Leg. R.S., ch. 967, sec. 1(b), sec. 388.001(a), 2001 Tex. Sess. Law. Serv.

⁵ Tex. Health & Safety Code Ann. §388.003(c)(1)&(2); ; Act of May 24, 2001, 77th Leg. R.S., ch. 967, sec. 1(b), sec. 388.003(c)(1)&(2), 2001 Tex. Sess. Law. Serv.

⁶ Tex. Health & Safety Code Ann. §388.003(d) (West 2001)

⁷ Tex. Health & Safety Code Ann. §388.003(e) (West. 2001).

⁸ Texas Health and Safety Code §388.003(b)(*emphasis added*); Acts of 2015, 84th Leg. R.S., ch. 541, sec. 1, sec. 388.003(b), 2015 Tex. Sess. Law Serv.

residential(other), commercial, and industrial construction.⁹ The Administrative Rule made the adoption of the 2015 International Energy Conservation Code as the energy code for these types of constructions which is to become effective November 1, 2016.

A central question that has been brought to my office's attention is whether school buildings (i.e. high school, middle school, elementary school) considered *other residential, commercial, or industrial* buildings for purposes of the 2015 International Energy Conservation Code? The definition section of the International Energy Conservation Code does not define the term *commercial* much less the term *industrial, or other residential building construction*. Further, the definition section of Chapter 388 of the Health and Safety Code does not define the term "*commercial, industrial or other residential construction*."¹⁰ The chapter of the Texas Administrative Rule that adopted the 2015 version of the International Energy Conservation Code as the energy code for the State also does not define the term "*commercial, industrial or other residential building construction*."¹¹ The Texas Health and Safety Code does provide that Chapter 311 of the Texas Government Code ("Code Construction Act") applies to the construction of each provision in the Texas Health and Safety Code, except as otherwise expressly provided by the Texas Health and Safety Code¹² Under the Code Construction Act, "words and phrases" shall be used in context and construed according to the rules of grammar and common usage."¹³ Further, under the Code Construction Act, "words and phrases that have acquired a technical or particular meaning, *whether by legislative definition or otherwise*, shall be construed accordingly."¹⁴

The term *industrial building* refers to a "commercial structure using one or more modular components built at a location other than the commercial site and designed to be used as a commercial building when the module or modular component is transported to the commercial site and erected or installed."¹⁵ The construction of school buildings addressed in this letter does not encompass a "relocatable educational facility" as that term is defined under state law.¹⁶ Clearly, a school constructed building is not an *industrial building* as that term is referred to under the 34 Texas Administrative Code §19.53. The term "*other residential*" construction is not defined under any statute. However, Chapter 388 of the Health and Safety Code does define the term "single family residential" dwelling as having the character of a detached one or two family dwelling or a single-family dwelling not more than three stories high with separate means of egress, including the accessory structures of the dwelling."¹⁷ The 2015 International Energy Conservation Code defines a "residential building" to include "one and two family dwellings and multiple single family dwelling (townhouses) as well as Group R-2, R-3, and R-4 buildings three stories or less in height above grade plan."¹⁸ Clearly, public school buildings which are used to educate the students of this State cannot be classified as *other residential* buildings.

⁹ 34 Tex. Admin. Code §19.53(b) (2016) (Tex. Comptroller of Public Accounts)

¹⁰ Tex. Health and Safety Code Ann. §388.002 (West 2002).

¹¹ 34 Tex. Admin. Code §19.51 (2008) (Tex. Comptroller of Public Accounts)

¹² Tex. Health and Safety Code §1.002 (West 2002)

¹³ Tex. Gov. Code §311.011(a) (West 1985)

¹⁴ *Id.* §311.011(b) (West 1985)

¹⁵ Tex. Occ. Code Ann. §1202.003(a)(1)&(2) (West 2003)

¹⁶ *Id.* §1202.004(a) (West 2009)

¹⁷ Tex. Health and Safety Code §388.002(10) (West 2001)

¹⁸ 2015 International Energy Conservation Code, Chapter 2, Section 202 "General Definitions", International Code Council)

Given construction of a public school building cannot be characterized as either *industrial* or *other residential* construction, is the construction of these school facilities to be characterized as *commercial* construction? The 2015 International Energy Conservation Code, as adopted by the International Code Council, applies only to *commercial buildings* and the buildings' sites and associated systems and equipments.¹⁹ The 2015 International Energy Conservation Code defines a *commercial building* as "all buildings that are not included in the definition of residential building" as defined above. Under this encompassing definition of a "commercial building," if one is to conclude that school buildings would be considered "commercial buildings," then the State Energy Conservation Office's adoption, by administrative rule, of the 2015 International Energy Conservation Code would apply to school districts. However, the intent of House Bill 1736 of the 84th State Legislature (Regular Session), which amended the Health and Safety Code §388.003 to allow the State, by administrative rule, to adopt and substitute the May 1, 2001 International Energy Conservation Code for the latest published edition of said Code in its application to *commercial building construction* was really meant to address energy efficiency standards in residential construction and **not** commercial construction. When the Committee Substitute and its two amendments to House Bill 1736 were introduced by the bill's lead sponsor, Representative Jason Villalba, before the House of Representatives' Business and Industry Committee, Representative Villalba testified that House Bill 1736 did not apply to commercial construction.²⁰ Similarly in the Senate, the Senate sponsor, Senator Troy Fraser, of House Bill 1736, also testified before the Committee on Natural Resources and Economic Development that House Bill 1736 did not apply to commercial construction.²¹ The "statement of legislative intent" on Committee Substitute House Bill 1736 did not address Section one (1) of the Bill, Chapter 388.003(b), which addresses the energy code for other residential, commercial, and industrial construction; although, Representative Coleman thanks Representative Villalaba "for bringing this important bill for adoption of energy codes for single-family homes in Texas, while giving some flexibility to builders to meet the codes."²² Clearly in 2015, the intent of the Committee Substitute of House Bill 1736 was for the bill to address residential and not commercial construction. Thus, if construction of a public school building (i.e. High School, Middle School, Elementary School etc.) is considered commercial construction then the 2015 amendments to section 388.003 of the Health and Safety Code should not affect any commercial construction. Accordingly, we question the authority of the State Energy Conservation Office to adopt and substitute the International Conservation Code as it existed on May 1, 2016 for the latest published edition of the International Energy Conservation Code with said edition being the 2015 edition.

Given the above brief, my office respectfully requests the Attorney General to render an Opinion regarding this issue on whether all new school district building construction begun after November 1, 2016 require adherence to the latest published edition of the International Energy Conservation Code, which applies to commercial construction, as provided under Texas Health

¹⁹ 2015 International Energy Conservation Code, Chapter 1, Part 1, C101.1 (International Code Council)

²⁰Tex. C.S.H.B. 1736, Sec.1, sec. 388.003(b), 84th Leg., R.S. (2015) (House Comm. Report); Testimony of Representative Villalba before the Committee on Business and Industry (tape available from video/Audio Services Office)-*Tape excerpt of testimony is included with this letter.*

²¹Testimony of Senator Troy Fraser before the Committee on Natural Resources and Economic Development (tape available from video/audio Services Office) *Tape excerpt of testimony is included in this letter.*

²²House Journal, 84th Leg. R.S. (2015) page 2120-2122.

& Safety Code §388.003(b) and as promulgated by Texas Administrative Rule under Title 34, Chapter 19, rule §19.53(b)? Please let me know if you require any further detailed information regarding this request. Thank you in advance for your assistance and consideration.

Sincerely,



Marco A. Montemayor
Webb County Attorney

Enclosures: House and Senate Committee Hearings on House Bill 1736, 84th Legislative Session (R.S.).

cc: Mr. Raul Casso (Via Email)
City Attorney
Laredo, Texas

Mr. Roberto J. Santos (Via Email)
Superintendent of Schools
United Independent School District

Mr. Eddie Zuniga (Via Email)
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