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# The State of South Carolina

## Office of the Attorney General

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February 15, 1991

The Honorable Joe Wilson
Senator, District No. 23
Post Office Box 5709
West Columbia, South Carolina 29171

Dear Senator Wilson:

You have requested the opinion of this Office on questions involving the newly-enacted Clean Indoor Air Act. First, you wish to know whether smoking would be allowed in an open, with partition, work station. Second, you have asked whether a state agency can ban smoking within a building. Each of your questions will be addressed following a discussion of the new act.

Background

The Clean Indoor Air Act of 1990, Act No. 503 enacted by the General Assembly in 1990, was enacted because the legislature found it to be "desirable to accommodate the needs of nonsmokers to be free from exposure to tobacco smoke while in public indoor places" and further that the Clean Indoor Air Act would be "an appropriate action to achieve this important objective." See, preamble to Act No. 503. Section 2 of the Act details the areas where smoking or the possession of lighted smoking materials is prohibited and exceptions thereto. Signs designating smoking and nonsmoking areas are required to be posted under section 3. Section 4 requires that an owner, manager, or agent make "every reasonable effort to prevent designated smoking areas from impinging upon designated smoke-free areas by the use of existing physical barriers and ventilation systems." A penalty for violations of the Act, upon conviction, is mandated in section 6.

Section 2 of the Act provides:

> It is unlawful for any person to smoke, or possess lighted smoking material in any form in the following public indoor areas except where a smoking area is designated as provided for

herein:

(1) Public schools, including pre-schools and day care centers, except in enclosed private offices and teacher lounges.

(2) Health care facilities as defined in Section 44-7-130 of the Code of Laws of South Carolina, 1976, except where smoking areas are designated in employee break areas. No section of this act shall prohibit or preclude a health care facility from being smoke free.

(3) Government buildings (except health care facilities as provided for herein), except that smoking shall be allowed in enclosed private offices and designated areas of employee break areas; provided that smoking policies in the State Capitol and Legislative Office Buildings shall be determined by the office of government having control over that area of the buildings.

"Government buildings" shall mean buildings or portions thereof which are leased or operated under the control of the State or any of its political subdivisions, except those buildings or portions thereof which are leased to other organizations or corporations.

(4) Elevators.

(5) Public transportation vehicles, except for taxicabs.

(6) Arenas and auditoriums of public theatres or public performing art centers; except that smoking areas may be designated in foyers, lobbies, or other common areas; and smoking is permitted as part of a legitimate theatrical performance. [Emphasis added.]

Question 1

You first asked whether the Act would permit smoking in a workplace which consists of open, with partition, work stations. For purposes of this opinion, it is assumed that the language "enclosed private offices" is in question. It is further assumed that health care facilities which may have adopted a smoke-free policy,

the State Capitol, and Legislative Office Buildings are not under consideration for purposes of this question.

In construing the terms of a statute, it is the primary objective of both the courts and this Office to ascertain and effectuate legislative intent if at all possible. McGlohon v. Harlan, 254 S.C. 207, 174 S.E.2d 753 (1970). Courts are not always confined to literal interpretations of terms; the intent of legislators will be deemed controlling over literal meanings. Caughman v. Columbia Y.M.C.A., 212 S.C. 337, 47 S.E.2d 788 (1948). "A statute as a whole must receive a practical, reasonable and fair interpretation consonant with the purpose, design and policy of the lawmakers." Id., 212 S.C. at 341. Where a statute is remedial in part and penal in other parts, the remedial portions are to be construed liberally, to carry out the purpose of the act; the penal portions are to be construed strictly. McKenzie v. Peoples Baking Co., 205 S.C. 149, 31 S.E.2d 154 (1944). See also 73 Am.Jur.2d Statutes § 278 (remedial statute is to be liberally construed "in favor of those entitled to the benefits of the statute.")

The term "enclosed" 1/ is not defined in the Act. Judicial decisions construing the terms "enclose" or "enclosure" or variations thereof indicate that to enclose something is "to surround; to encompass; to bound, fence, or hem in, on all sides." White Chapel Memorial Ass'n v. Willson, 260 Mich. 238, 244 N.W. 460, 461 (1932); also Application of Loose, 107 Ohio App. 47, 153 N.E.2d 146 (1958). Virtually all of the annotated judicial decisions construed the notion of enclosure as surrounded or bounded on all sides, as a fence or wall or such as that surrounding a parcel of property. However, in Wannmacher v. Baldauf Corp., 262 Wis. 523, 57 N.W.2d 745 (1953), the definition of "enclosure" was deemed to include "the reduction of things common to private appropriation." 57 N.W.2d at 747. In People v. Kraft, 85 Ill. App.2d 435, 228 N.E.2d 738 (1967), the term "enclosure" was defined as "something that encompasses, surrounds, shuts or fences in." 228 N.E.2d at 740. In that case, a shed with four walls, a floor, and a roof (no door, access being through a window) was deemed to be an enclosure for purposes of animal confinement. An automobile trunk was considered an enclosure in People v. McDonald, 26 Ill.2d 325, 186 N.E.2d 303 (1962).

The term "private" is defined as "not of a public nature, unconnected with others," Stocking v. Johnson Flying Service, 143 Mont. 61, 387 P.2d 312, 318 (1963); or "particularly relating to individuals as opposed to that which is 'public or general,'" Stovall v. Gartrell, 332 S.W.2d 256, 260 (1960); peculiar to an individual,

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1/ This term is alternatively spelled "inclosed." Cases annotated in West's Words and Phrases may be found under both headings. Additional annotations are also found for "enclosure," "inclosure," and phrases including those terms and variations thereof.

Reconstruction Finance Corp. v. Foust Distilling Co., 204 F.2d 343 (3d Cir. 1953); or "personal, separate, sequestered from company or observation, secret, secluded, lonely, solitary," Timber v. Desparois, 18 S.D. 587, 101 N.W. 879, 881 (1904).

One final consideration is the public nature of the workplace in question. Generally, the term "public" is used in contradistinction to the term "private." City of Lowell v. Marden & Murphy, Inc., 321 Mass. 597, 74 N.E.2d 666 (1947); People v. Powell, 280 Mich. 699, 274 N.W. 372 (1937). A public place or area is a place to which the general public is invited, Babb v. Elsinger, 147 N.Y.S. 98 (N.Y. App. Term 1914); permitted to go or to congregate, People v. Simcox, 379 Ill. 347, 40 N.E.2d 525 (1942); has the right of access, State v. Lawson, 776 S.W.2d 139 (Tenn. Crim. App. 1989); or uses or attends for reasons of business, entertainment, instruction, or the like, State v. Boles, 5 Conn. Cir. 22, 240 A.2d 920 (1967).

In construing a Wisconsin statute which prohibits smoking in "any enclosed, indoor area of a state ... building" with certain exceptions, the court in Rossie v. State/Department of Revenue, 133 Wis.2d 341, 395 N.W.2d 801, 65 A.L.R.4th 1191 (1986), gave reasons for permitting smoking in private offices:

> [The Wisconsin statute] prohibits smoking in government buildings. Nonsmokers, as government employees or members of the public, may not avoid these buildings without great inconvenience. Smoking is similarly prohibited in other areas that the public may not easily avoid, such as public conveyances, hospitals, and public waiting rooms.... The smoking ban does not apply, in contrast, to areas that nonsmokers may easily avoid, such as privately owned and occupied offices, private halls, small restaurants, and bowling alleys.
>
> These distinctions are both substantial and germane to the purpose of the statute, which is to regulate smoking. [The statute] was enacted after the legislature heard testimony concerning the health and safety risks of smoking and of exposing nonsmokers to cigarette smoke. The statutory smoking ban is a valid exercise of the legislature's police power.... The areas excepted from the ban, for the most part, do not present the same degree of risk to nonsmokers because those places can be avoided without great inconvenience to the nonsmoker, because

> nonsmokers are not present, or because the plenary authority of those in charge makes state regulation of smoking unnecessary.
>
> ... [The statute] prohibits smoking in many public places where people must go, and does not prohibit it in many places where people need not go.

Id., 65 A.L.R.4th at 1203. The rationale thus expressed could apply equally well to this State's Clean Indoor Air Act of 1990. 2/

The above-cited definitions, coupled with the legislative finding that "it is desirable to accommodate the needs of nonsmokers to be free from exposure to tobacco smoke while in indoor public places" (emphasis added) suggest two possible ways, at least, to construe these statutes. On one hand, the General Assembly could be saying that all government buildings are public in nature, as opposed to privately owned and operated, or within the private sector. On the other hand, the General Assembly may be suggesting that access to a particular area by the public be determined. It is beyond argument that a county courthouse and the building housing the South Carolina Tax Commission, as examples, are both public in nature, yet access to Tax Commission offices by the public is much more restricted than access to various offices in a county courthouse. Legislative clarification would be desirable on this point. (If the second argument reflects the intention of the General Assembly, then the Act may not apply at all if the public does not have access to a particular area. See also footnote 2, supra.) Unless and until such legislative clarification be enacted it is suggested that each agency or political subdivision subject to the Clean Indoor Air Act examine its facilities and determine which areas would be "public" or accessible to the public and thus subject to the Act.

Whether a given area is considered an "enclosed private area" must be determined. The language in sections 2 and 4 of the Act suggests that smoking be permitted in offices which may be separated from areas designated to be smoke-free. Section 4 specifically requires that "[i]n complying with Section 3, the owner, manager, or agent in charge of the premises shall make every reasonable effort

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2/ While the view of a legislator or sponsor of a bill cannot be considered in interpreting a legislative act, Tallevast v. Kaminski, 146 S.C. 225, 143 S.E. 796 (1928), you advised that the purpose of the Act was not to create a smoke-free workplace but was instead to prevent the public from coming into contact with tobacco smoke in public places which the public must frequent to transact business. Thus, the Wisconsin decision is, in many respects, in accord with the motives of at least one legislator. By way of contrast, see Act No. 593 of 1990, "The Drug-free Workplace Act," relating specifically to the workplace.

to prevent designated smoking areas from impinging upon designated smoke-free areas by the use of existing physical barriers and ventilation systems."

Because the notion of "enclosure" is generally "fenced in" or "surrounded on all sides" and not necessarily a wall which extends from floor to ceiling with closing door, the exact meaning of the legislature in permitting smoking in "enclosed private offices" cannot readily be determined. If smoking be permitted in a room or office containing multiple offices separated only by partitions rather than floor-to-ceiling walls and doors, it goes without saying that tobacco smoke will likely not be confined to a single cubicle or partitioned area. To permit smoking in a less than completely enclosed (floor-to-ceiling walls with closing door) office would seem to defeat the stated desirable purpose of the Act; perhaps the legislature would consider clarifying the notion of enclosure for purposes of the Act. When read with the requirements of section 4 that "existing physical barriers" be used to keep smoking areas from impinging on nonsmoking areas, arguably an "enclosed private office" would be one which is segregated from all other offices by means of floor-to-ceiling walls and a closing door; some definitions of "enclosed" or "enclosure" would support this notion. See also Opinion No. 6460 of the Michigan Attorney General dated August 25, 1987 (cubicle enclosed by only five-foot partitions within a room in a public place is not a private, enclosed room for smoking purposes).

In light of the foregoing, this Office must leave to the appropriate entity (school district, municipality, county, state agency, or the like) the finding of fact that an office is an "enclosed private office" so that smoking may be permitted therein. The finding of fact is outside the scope of an opinion of this Office. Op. Atty. Gen. dated December 12, 1983.

Question 2

Your second question is whether a state agency can ban smoking within a building. For purposes of this opinion, it is assumed that the state agency in question would not be the owner or operator of a health care facility as defined in Section 44-7-130 of the South Carolina Code of Laws, which would be specifically authorized by Section 2(2) of the Act to be smoke-free. By your reference to "state agency" it is further assumed that you are referring to governmental buildings.

The prohibitions in section 2 of the Act apply in "public indoor areas except where a smoking area is designated" in "Government buildings (except health care facilities as provided for herein), except that smoking shall be allowed in enclosed private offices and designated areas of employee break areas ...." The term "shall"

ordinarily connotes mandatory compliance. S.C. Dep't of Hwys. and Public Transp. v. Dickinson, 288 S.C. 189, 341 S.E.2d 134 (1986). The plain language of the enactment seems to mandate that smoking be permitted in enclosed private offices and in designated areas of employee break areas of a given governmental building.

Further, because "health care facilities" are specifically authorized to be designated smoke-free whereas the Act does not accord the same privilege to any other category of buildings, it is questionable whether the legislature intended other categories of buildings, not so mentioned, to be designated smoke-free. Express mention of some things in a statute implies exclusion of other things not so mentioned. Home Bldg. & Loan Ass'n v. City of Spartanburg, 185 S.C. 313, 194 S.E. 139 (1938). Thus, it must be concluded that in government buildings as defined in section 2 of the Act, smoking may not be entirely prohibited. If such interpretation does not comport with legislative intent, the General Assembly may wish to so clarify the Clean Indoor Air Act of 1990. See Op. Atty. Gen. dated December 5, 1990, enclosed.

With kindest regards, I am

Sincerely,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General

PDP/an
Enclosure

REVIEWED AND APPROVED BY:

Robert D. Cook

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