



**THE ATTORNEY GENERAL  
OF TEXAS**

**AUSTIN, TEXAS 78711**

**CRAWFORD C. MARTIN  
ATTORNEY GENERAL**

August 28, 1970

Honorable Ted Butler  
Criminal District Attorney  
Bexar County  
San Antonio, Texas

Opinion No. M- 676

Re: Do the installers and operators of the city's skyride hold a taxable leasehold interest in real property or a mere operating agreement or license not taxable?

Dear Mr. Butler:

We have received your request for an opinion on the captioned subject from which we quote as follows:

"A question has arisen as to the tax status of an elevated skyride located on certain city-owned property known as HemisFair within the Civic Center Urban Renewal Project No. 5, City of San Antonio, which is operated by a Concessionaire as a sight-seeing and entertainment ride for the public at a patronage charge per ride from which the City is paid compensation in an amount equal to a percentage of gross annual receipts agreed upon by written contract between the parties.

"Your opinion is respectfully sought on the following question:

"Does the use, operation and maintenance of the elevated skyride as more fully described below constitute a leasehold interest which is taxable by the State of Texas, and the County of Bexar, under Article 7173, Vernon's Civil Statutes?

"Pursuant to a contract executed on 18 October, 1966, Austin Hemphill and Billy J. McCombs, hereinafter referred to as 'Hemphill-McCombs', in conjunction with Aerial Transportation, Inc., hereinafter referred to as 'Concessionaire',

agreed to install, operate and maintain an elevated skyride on City of San Antonio-owned property within Urban Renewal Civic Center Project No. 5, during the exposition known as HemisFair 1968, and for a period of years thereafter. (See copy of contract attached hereto).

"Construction was at the expense of Hemphill-McCombs and ownership remained in Hemphill-McCombs until it was completed and accepted by the City of San Antonio upon delivery of a Bill of Sale, dated 29 May, 1968. Since said conveyance to the City of San Antonio, the skyride has been operated by Concessionaire.

"Charles G. Davis, Tax Assessor-Collector for Bexar County, has assessed the property and established an account on the tax rolls for the taxation of the Skyride property as a leasehold interest in public lands in accordance with Articles 7145, 7143, and 7174, Vernon's Annotated Texas Statutes. The leasehold interest is not presently taxed by the City or School District.

"A contrary view that has been expressed is that the property, being wholly owned by the City of San Antonio, is exempt, and further, that it is not taxable to Hemphill-McCombs or Concessionaire under Article 7173, V.A.T.S., for the reason that it is being operated under a mere operating agreement or license as distinguished from a leasehold."

The general distinction between a lease and a license is:

"A lease is a grant of an estate in land for a limited term with conditions attached, and it creates both privity of estate and privity of contract between the parties. The relation of landlord and tenant is created where the owner of land consents to the occupancy thereof by another and the occupant holds in recognition of, or subordination to, the title of the owner. . . ." 35 Tex.Jur.2d 484-485, Landlord and Tenant, Sec. 1. (Emphasis added.)

" . . . in the law of real property a license is a privilege or authority given or retained by one to do some particular act or series of acts upon the land of another, but which does not amount to an estate or interest in the land itself." 36 Tex.Jur.2d 587-588, License, Sec. 1. (Emphasis added.)

Our Supreme Court has recently reiterated the principal that ". . . ordinarily licenses are revocable; . . ." Drye v. Eagle Rock Ranch, 364 S.W.2d 196, 203 (Tex.Sup. 1963); this had been declared in the early case of Merriwether v. Dixon, 28 Tex. 15, 18 (1866).

In the case of Priddy v. Green, 220 S.W. 243 (Tex.Civ. App. 1920, no writ), involving the construction of an oil and gas lease for a primary term of five years and as long thereafter as oil or gas is produced from the land, the Court said, in part:

"We think the instrument evidences more than a mere license to go upon the land. A mere license is a personal privilege to do some act on the land without passing any estate therein. The conveyance by the licensee or licensor would revoke it. . . ." (at p. 248) (Emphasis added.)

The contract in question unequivocally conveys to the named installers and operators of the concession the exclusive use and control of an area defined therein for the installation, operation and maintenance of such concession, referred to as "Skyride", for definite primary and secondary terms from 1968 continuously through October 31, 1983, at a stated consideration passing from such installers and operators to the City, as owner of the concession and land upon which it is situated. The consideration is based upon the annual gross receipts gleaned from patronage by the public of such concession during the life of the contract. Also, such contract specifically uses the term "leasehold improvements" wherein the concessionaire is required to procure and maintain fire and extended coverage insurance on the improvements.

We point out that a conveyance by the City of its freehold interest in the property involved would not, in any way,

affect the leasehold interest of such named installers and operators or otherwise restrict their rights and obligations under such contract. The contract by its express terms prohibits said installers and operators from assigning, transferring, conveying or otherwise disposing of the contract or any portion thereof without permission of the City. Therefore, under the terms of such contract, the operation of the concession in question cannot be a mere personal privilege revocable by a conveyance of either party's interest therein, as would be true in the case of a mere license to do some act on the land without passing any estate therein. Settegast v. Foley Bros. Dry Goods Co., 114 Tex. 452, 270 S.W. 1014 (1925); Chicago R. I. & G. Ry. Co. v. Johnson, 156 S.W. 253, 256 (Tex.Civ.App. 1913, error ref.), and Priddy v. Green, (supra; Hancock v. Bradshaw, 350 S.W.2d 955 (Tex.Civ.App. 1961, no writ). A lease confers more comprehensive rights than does a license. Texas Pacific Coal & Oil Co. v. Fox, 228 S.W. 1021 (Tex.Civ. App. 1921, no writ).

It seems clear that the instrument in question granted a leasehold interest in property for a term of more than three years which is taxable as the property of the installers and operators under the terms and provisions of Article 7173, Vernon's Civil Statutes, which provides in its portion which is applicable here, as follows:

"Property held under a lease for a term of three years or more, or held under a contract for the purchase thereof, belonging to this State, or that is exempt by law from taxation in the hands of the owner thereof, shall be considered for all the purposes of taxation, as the property of the person so holding the same, except as otherwise specially provided by law. . . ." (Emphasis added.)

For related questions involving the scope and applicability of Articles 7173 and 7174, we refer you to our Opinion M-319 (1968), a copy of which is in your possession.

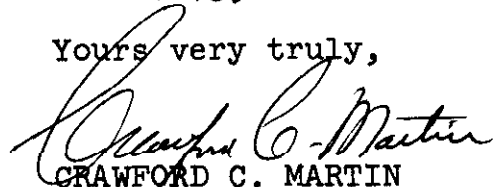
#### S U M M A R Y

The contract in question, which granted a leasehold interest in property for more than

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three years, conveyed a leasehold estate  
in the elevated skyride property, which  
is taxable under Article 7173, V.C.S.

Yours very truly,

  
CRAWFORD C. MARTIN  
Attorney General of Texas

Prepared by R. L. Lattimore  
Assistant Attorney General

APPROVED:

OPINION COMMITTEE

Kerns Taylor, Chairman  
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MEADE F. GRIFFIN  
Staff Legal Assistant

ALFRED WALKER  
Executive Assistant

NOLA WHITE  
First Assistant