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ATTORNEY GENERAL OF TEXAS

June 16, 2021

The Honorable Larry Taylor
Chair, Senate Committee on Education
Texas State Senate
Post Office Box 12068
Austin, Texas 78711-2068

Opinion No. KP-0373

Re: Authority of a municipality to establish development regulations for open-enrollment charter schools that are different than regulations for other public schools (RQ-0392-KP)

Dear Senator Taylor:

You ask about the authority of a municipality to place certain planning and zoning requirements upon facilities constructed by open-enrollment public charter schools that are not otherwise applied to facilities constructed by independent school districts.¹

Background

You tell us the City of Dallas (“the City”) adopted an ordinance that governs the use of land in agricultural districts. Request Letter at 1. While it limits most commercial and business service uses on such land, the ordinance authorizes certain “institutional and community service uses,” including the use of land for open-enrollment charter schools, private schools, and public schools:

- (1) Purpose. There exists in certain fringe areas of the city, land which is presently used for agricultural purposes and to which urban services are not yet available. These lands should appropriately continue to be used for agricultural purposes until needed for urban purposes in conformity with the orderly growth of the city. The uses permitted in the A(A) district are intended to accommodate normal farming, ranching, and gardening activities. It is anticipated that all of the A(A) district area will be changed to other urban zoning categories as the area within the corporate limits of Dallas

¹Letter from Honorable Larry Taylor, Chair, Senate Comm. on Educ., to Honorable Ken Paxton, Tex. Att’y Gen. at 1 (Dec. 18, 2020), <https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/rq/2020/pdf/RQ0392KP.pdf> (“Request Letter”).

becomes fully developed. Newly annexed territory will be temporarily zoned as an A(A) district until permanent zoning is established.

(2) Main uses permitted.

....

(D) Institutional and community service uses.

....

-- Open-enrollment charter school or private school. [SUP]

-- Public school other than an open-enrollment charter school. [RAR]

DALLAS, TEX., CODE OF ORDINANCES, vol. III, ch. 51A, art. IV, § 51A-4.111 (2020) (Dallas Dev. Code: Ordinance 19455, as amended).² Relevant here, the City provides different zoning requirements for the land depending on whether it will be used for an open-enrollment charter school or used as a public school other than an open-enrollment charter school. Use of agricultural land for an open-enrollment charter school requires a specific use permit (“SUP”), which involves an extensive application, review, and hearing process, and requires approval by the city council. *Id.* § 51A-4.219. Use of the agricultural land for a public school other than an open-enrollment charter school, on the other hand, is subject to the less burdensome residential adjacency review.³ You state that requiring open-enrollment charter schools to obtain a specific use permit “represents a significant administrative and financial hurdle.” Request Letter at 1. You therefore ask five questions about whether state law allows for the disparate treatment between open-enrollment charter schools and public schools other than open-enrollment charter schools in this manner.

Analysis

“An open-enrollment charter school is part of the public school system of this state.” TEX. EDUC. CODE § 12.105. The Texas Charter Schools Act (“the Act”) authorizes the Commissioner of Education to grant eligible entities—usually private, tax-exempt nonprofits—charters to operate open-enrollment schools. *Id.* § 12.101(a); *see also Neighborhood Ctrs. Inc. v. Walker*, 544 S.W.3d 744, 750 (Tex. 2018). Generally, open-enrollment charter schools are “subject to federal and state laws and rules governing public schools,” but they are subject to the Education Code and rules adopted under it “only to the extent the applicability to an open-enrollment charter school . . . is

²Available at https://codelibrary.amlegal.com/codes/dallas/latest/dallas_tx/0-0-0-36849.

³Residential adjacency exists if the lot on which the school is built is within certain proximity to other types of zoning districts. *See* DALLAS, TEX., CODE OF ORDINANCES, vol. III, ch. 51A, art. IV, § 51A-4.803(d)(3) (2020) (Dallas Dev. Code, Ordinance 19455, as amended), https://codelibrary.amlegal.com/codes/dallas/latest/dallas_tx/0-0-0-36849. If a lot has a residential adjacency, the developer must submit a site plan providing details about the planned development, which is reviewed by the director of sustainable development and construction and either approved, approved with conditions, or denied. *Id.* § 51A-4.803(d)(2), (e).

specifically provided.” TEX. EDUC. CODE § 12.103(a), (b). They have “the powers granted to schools” by law, except the power to tax. *Id.* §§ 12.104(a), .102(4). And they receive state funding and services as if they were a school district. *Id.* §§ 12.104(c), .106(a). The Texas Supreme Court has stated that open-enrollment charter schools are governmental entities operating as an “arm of the state,” generally enjoying the same privileges and immunities as other public schools. *See El Paso Educ. Initiative, Inc. v. AMEX Props., LLC*, 602 S.W.3d 521, 529–30 (Tex. 2020).

Authority to Regulate Public School Building Locations

We first address your question regarding municipal authority to regulate the location of public schools, including open-enrollment charter schools. *See* Request Letter at 3. The Legislature has a constitutional duty to “establish . . . an efficient system of public free schools.” TEX. CONST. art. VII, § 1. It has delegated this duty in part to independent school districts and in part to open-enrollment charter schools. *See* TEX. EDUC. CODE § 7.003 (“An educational function not specifically delegated to the [Texas Education Agency] or the [State Board of Education] under this code is reserved to and shall be performed by school districts or open-enrollment charter schools.”). Pursuant to the delegation to school districts, the Texas Supreme Court “has determined that the school district’s authority to locate school facilities overrides the police power of municipalities to zone them out in order that the legislative purpose in delegating this authority to the school district might not be frustrated.” *City of Addison v. Dallas Indep. Sch. Dist.*, 632 S.W.2d 771, 773 (Tex. App.—Dallas 1982, writ ref’d n.r.e.) (discussing *Austin Indep. Sch. Dist. v. City of Sunset Valley*, 502 S.W.2d 670 (1973)).

In *Austin Independent School District v. City of Sunset Valley*, the Texas Supreme Court considered a municipal ordinance that zoned the entire municipality for residential use, which the City argued excluded from within its boundaries all school facilities. 502 S.W.2d 670, 672 (Tex. 1973). While emphasizing that a school district could be subject to municipal safety regulations and building codes, the Court concluded that the City could not use its zoning power to exclude school buildings from its boundaries. *Id.*

Subsequently, the Dallas Court of Appeals addressed the application of a municipal zoning and nuisance ordinance to a school district’s attempt to build a bus facility on property zoned residential. *City of Addison*, 632 S.W.2d at 772. The Dallas court concluded that the “zoning authority of a municipality is subservient to the reasonable exercise of school district authority.” *Id.* A “school district may place any school facility within an area zoned residential, unless the school district action is unreasonable or a nuisance, because the school district authority is paramount.” *Id.* at 773.

Although a public school, an open-enrollment charter school is generally not treated as a school district. *Neighborhood Ctrs., Inc. v. Walker*, 544 S.W.3d 744, 753 (Tex. 2018) (“[A]n open-enrollment charter school is not to be treated as a . . . school district unless a statute specifically states that it is . . .”). No Texas court has squarely addressed whether a municipality may regulate the location of open-enrollment charter schools. But for the same reasons applied to traditional public schools, a court would likely conclude that the zoning authority of a municipality is subservient to the reasonable exercise of an open-enrollment charter school in choosing a building location. *See City of Addison*, 632 S.W.2d at 772.

Different Treatment for Open-Enrollment Charter Schools

You also ask whether a municipal zoning ordinance may treat open-enrollment charter schools differently from other public schools or whether they must instead treat all types of public schools similarly. *See* Request Letter at 3. Open-enrollment charter schools are part of the public-school system. TEX. EDUC. CODE § 12.105. Furthermore, the Legislature has provided that open-enrollment charter schools are generally subject to the municipal zoning ordinances applicable to public schools:

(a) Except as provided by Subsection (b) or (c), an open-enrollment charter school is subject to federal and state laws and rules governing public schools and to municipal zoning ordinances governing public schools.

(b) An open-enrollment charter school is subject to this code and rules adopted under this code only to the extent the applicability to an open-enrollment charter school of a provision of this code or a rule adopted under this code is specifically provided.

(c) Notwithstanding Subsection (a), a campus of an open-enrollment charter school located in whole or in part in a municipality with a population of 20,000 or less is not subject to a municipal zoning ordinance governing public schools.

Id. § 12.103. When read alongside section 12.105 and in the context of the Act as a whole, subsection 12.103(a) evidences the Legislature’s intent that municipalities apply their zoning ordinances to open-enrollment charter schools in the same way they do to traditional public schools. *See El Paso Educ. Initiative, Inc.*, 602 S.W.3d at 531 (explaining that a court’s goal is “to ascertain and give effect to the Legislature’s intent”); *see also Silguero v. CSL Plasma, Inc.*, 579 S.W.3d 53, 59 (Tex. 2019) (explaining that to determine legislative intent, courts start with the plain language of the text, construing it “in light of the statute as a whole”). Subsection 12.103(a) supersedes a municipality’s zoning ordinances that treat charter schools differently than public schools by providing that charter schools will instead be subject to the same zoning laws as public schools. TEX. EDUC. CODE § 12.103(a). The only exception to this rule is in municipalities with a population of 20,000 or less, wherein open-enrollment charter schools are expressly exempted from municipal zoning ordinances governing public schools. *Id.* § 12.103(c). Thus, a court would likely conclude that a City of Dallas zoning ordinance that treats open-enrollment charter schools differently from other public schools is inconsistent with section 12.103.⁴

⁴You also ask whether a municipal zoning ordinance that distinguishes between open-enrollment charter schools governs public schools, and if so, whether the open-enrollment charter schools are limited by its provisions. *See* Request Letter at 3 (Question 2). Because we conclude that the law prohibits a municipal zoning ordinance that disparately impacts open-enrollment charter schools when compared to traditional public schools, we do not separately answer this question.

Permitting Requirements to Construct School Buildings

You also ask whether an ordinance requiring a special use permit or other permission or consent from a municipality prior to construction usurps State authority to select and approve locations for open-enrollment public charter schools. Request Letter at 3. Authority to operate an open-enrollment charter school is granted by the Commissioner of Education after an investigation and evaluation of the applicant. TEX. EDUC. CODE § 12.101(a), (b). Nothing in the Act specifies that the Commissioner, the Texas Education Agency, or any other state entity shall select the location for an open-enrollment charter school.

Furthermore, while Texas courts have limited the application of municipal land use regulations to public schools, they have recognized the ongoing applicability of building codes and safety regulations. *See Austin Indep. Sch. Dist.*, 502 S.W.2d at 674 (distinguishing between regulations governing school construction and regulations governing selection of school sites). A municipality may enforce its reasonable land development regulations and ordinances against an independent school district for the purposes of “aesthetics and the maintenance of property values” as long as those regulations and ordinances do not effectively deny the district the ability to reasonably choose a building site. *Tex. Att’y Gen. Op. No. GA-0697* (2009) at 3; *see also Tex. Att’y Gen. Op. No. JM-514* (1986) at 2 (concluding that a municipality has authority to require a school district to obtain a specific use permit under certain circumstances). Thus, we cannot conclude as a matter of law that an ordinance requiring a special use permit or other permission or consent from a municipality before beginning construction is invalid. The validity of any ordinance requiring a public school, including an open-enrollment charter school, to obtain a permit or other permission before beginning construction must be evaluated on a case-by-case basis, but the permitting process may not be used to effectively deny public schools the right to choose reasonable locations for their buildings.

S U M M A R Y

A court would likely conclude that the zoning authority of a municipality is subservient to the reasonable exercise of an open-enrollment charter school in choosing a building location.

Section 12.103 of the Education Code provides that an open-enrollment charter school is subject to municipal zoning ordinances governing public schools. Pursuant to this section, a court would likely conclude that a municipal zoning ordinance that treats open-enrollment charter schools differently from other public schools is inconsistent with state law.

While Texas courts have limited the application of municipal land use regulations to public schools, they have recognized the ongoing applicability of building codes and safety regulations. The validity of any ordinance requiring a public school, including an open-enrollment charter school, to obtain a permit or other permission before beginning construction must be evaluated on a case-by-case basis, but the permitting process may not be used to effectively deny public schools the right to choose reasonable locations for their buildings.

Very truly yours,

A handwritten signature in black ink that reads "Ken Paxton". The signature is written in a cursive, flowing style.

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