



TEXAS EDUCATION AGENCY

1701 North Congress Ave. ★ Austin, Texas 78701-1494 ★ 512/463-9734 ★ FAX: 512/463-9838 ★ <http://www.tea.state.tx.us>

Robert Scott
Commissioner

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OPINION COMMITTEE

September 8, 2008

FILE # ML-45823-08
I.D. # 45823

Honorable Gregg Abbot
Attorney General of Texas
Post Office Box 12548
Austin, Texas 78711-2548

RQ-0741-GA

Re: Attorney General Opinion Request

Dear General Abbott:

I am requesting your opinion on behalf of Mansfield Independent School District regarding the ability of a home-rule city to enforce certain building restrictions and requirements against a school district. A copy of their request is attached.

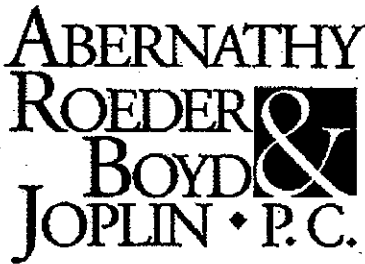
Thank you for your consideration of these issues. Should you need any additional information from this agency, please feel free to contact me or David Anderson, General Counsel, at (512) 463-9720.

Sincerely,

Robert Scott

Robert Scott
Commissioner of Education

RS/da/ds



1700 Redbud Boulevard, Suite 300 • P.O. Box 1210 • McKinney, Texas 75070-1210
Metro 214.544.4000 • Fax 214.544.4040

ATTORNEYS AT LAW

MERIDITH HAYES

mhayes@abernathy-law.com
Direct Dial 214.544.4008

September 5, 2008

Commissioner Robert Scott
Commissioner of Education
of the State of Texas
1701 N. Congress Avenue
Austin, Texas 78701

Re: Request for an Attorney General Opinion to Resolve a Conflict between the City of Mansfield's City Ordinances and Mansfield Independent School District

Dear Commissioner Scott:

We are requesting that you submit this important question to the Attorney General on behalf of Mansfield Independent School District regarding whether the City of Mansfield ("City") may enforce ordinances against Mansfield Independent School District ("MISD" or "the District") that are drafted for the purpose of protection of the aesthetic appearance of and property values of the commercial properties within the City. The City's attorney has stated the two preceding reasons for enforcement of the ordinances against the District. The City attorney also stated that the City can enforce the ordinances because it is a home rule city. The Texas Supreme Court, in *Forwood v. City of Taylor*, summarized the home rule doctrine set forth in Article 11, Section 5 of the Texas Constitution:

It was the purpose of the Home-Rule Amendment [to the Texas Constitution]...to bestow upon accepting cities and towns of more than 5,000 population full power of self-government, that is full authority to do anything the legislature could theretofore have authorized them to do. The result is that now it is necessary to look to the acts of the legislature not for grants of power of such cities but only for their limitation on their power. *Forwood v. City of Taylor*, 214 S.W.2d 282, 286 (Tex. 1948.)

In order for the parties to facilitate construction, we request an opinion from the Attorney General to determine whether the City, as a home rule city, may enforce the ordinances in question. Further, we request an opinion regarding whether aesthetics and protection of property values falls in the category of ordinances that protect the health, safety and welfare of the City. Please note that these ordinances come at a great cost to taxpayers, the Federal Government and the State of Texas. As a result of these ordinances in question, MISD will be forced to use bond

proceeds to comply, in turn using Existing Debt Allotment (EDA) funds and Instructional Facilities Allotment (IFA) funds to pay for the debt service.

Based on case law and opinions from the Attorney General's office, it appears existing precedent grants the home rule cities the power to enforce zoning ordinances against public school districts that are reasonably related to the health, safety and welfare of the community. However, it is not clear whether the City, as a home rule city, has the power to enforce ordinances affecting only the aesthetics and property value of commercial buildings or whether property value is a health, safety or welfare concern.

The Supreme Court of Texas addressed a conflict between a home rule city and school district in the case of Port Arthur Independent School District v. City of Groves, 376 S.W.2d 330 (Tex. 1964). In this case, Port Arthur I.S.D. contended that, as an independent school district, city ordinances regarding building permits and construction requirements were not enforceable against it. However, the Texas Supreme Court rejected this argument, stating that the city had the power to enforce its ordinances against the school district within the boundaries of a home rule city, as part of the city's power to regulate the health and safety of the community.

There is a distinction between the power of a municipality to enforce *building ordinances* against a school district, and the power of a municipality to enforce *zoning* ordinances against a school district. This distinction was explained by the Supreme Court in Austin Independent School District v. City of Sunset Valley, 502 S.W.2d 670 (Tex. 1973). In this case, the Court held that, while a city could regulate school construction pursuant to health and safety concerns, the city could not override a school's decision regarding location of school facilities. The particular regulation at issue was a zoning ordinance which designated the entire city as residential. The school district planned to locate a centralized auxiliary facility in the city, and requested a building permit. The city denied the permit, on the basis that the school's proposed facility violated the city's residential zoning ordinance. In holding that the school district was not bound by the zoning ordinance, the Court was careful to distinguish this case from the earlier Port Arthur I.S.D. case, explaining:

The enforcement of health and safety regulations is not before the court in the instant case. What is before the court is a zoning ordinance of the City which wholly excludes the school facilities in issue. (Austin I.S.D. at 673).

In addition, the Court in City of Addison v. Dallas Independent School District, 632 S.W.2d 771 (Tex.Civ.App.—Dallas 1982, writ ref'd n.r.e.) also addressed this situation, holding that the city's zoning ordinance was inapplicable to the school district in this case, and stated:

[T]he 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. (Id. at 773).

The Dallas I.S.D. in this case was proposing to locate a bus parking facility in the City of Addison. The City held that the proposed bus parking use violated both a zoning ordinance as well as a nuisance ordinance. The Court rejected both arguments, holding that a school district

can place any school facility within an area zoned residential, and further, that a valid act of the school district could not be a nuisance per se, as argued by the City. However, the Court did not rule that a school's district actions could never constitute a nuisance in actuality, only that such actions could not be considered a nuisance per se.

Finally, the Attorney General applied this distinction to a city's power to issue specific use permits in Opinion No. JM-514 (1986), as follows:

Accordingly, so long as a city's specific use permit and procedures and conditions do not attempt to *totally exclude* a school district's facilities and are reasonably related to the protection of the health, safety, and welfare of the community, the school district must comply with those procedures and conditions. (emphasis added).

This opinion held that the Beaumont I.S.D. was required to obtain a special building use permit in order to convert a school facility to an administrative facility.

Therefore, while a city cannot use its zoning powers to exclude school facilities, it can use its municipal power to regulate the construction of school facilities in compliance with city ordinances. However, the ordinances being enforced must be reasonably related to protection of the health, safety, and welfare of the community. Whether a particular ordinance is reasonable is a question of law, and there is a presumption that municipal ordinances are valid. (City of Lucas v. North Texas Municipal Water District, 724 S.W.2d 811, 820 (Tex. App.—Dallas 1986, writ ref'd n.r.e.)

The City of Mansfield's zoning ordinances may not limit the schools location, however, they greatly affect the school's ability to build the schools in a cost effective manner and in some cases, build them at all. The ordinances in question do not facially appear to protect the citizens or to consider the health and welfare of the citizens. Further, through enforcement, the ordinances do not seem to address any issues of health, safety, and welfare. The effects of the ordinances on the District are that they are costly, unreasonable, and are enforced almost solely for aesthetic purposes. The following City of Mansfield Zoning Ordinances are the ordinances in question with regards to their application toward MISD:

1. Section 1, Article 4, Section 4500, Area, Setback and Height Regulations. - MISD High School Building exceeds the approximate 2 story height restriction. Therefore, it must be re-zoned to Hospitals, C2 or C3 Districts and requires City Council Approval of the actual height as "deemed appropriate" according to the City Council. The City Council's view of what is an "appropriate" height does not affect the health, safety, and welfare of the citizens.

2. Section 1, Article 4, Section 4600. Community Design Standards. - A number of specified "Architectural Attributes" under this Section 4600 have been identified by MISD's retained Architects and Engineers as excessive and at variance to their recommended Best Design Practices for K-12 Grade Schools. The Architects and Engineers have stated to MISD that these requirements should not be accepted by the MISD, including but not limited to, Paragraphs D4 and D5 which state:

Paragraph D4. All non-residential buildings with facades greater than one hundred (100') feet in length shall incorporate wall plane projections or recesses that are at least four (4') feet deep. Projections/recesses must be at least four (4') feet in length. No uninterrupted length of façade may exceed fifty (50') feet in length.

Paragraph D5. All non-residential buildings with flat roof planes greater than one hundred (100') feet in length shall incorporate variations in the height of the roof plane that differ by at least two (2') feet in height. Variations to flat roof planes may include pilasters and projected or raised entry features. No uninterrupted length of any flat roof plane may exceed fifty (50') feet in length.

These Community Design Standards are great expenses to MISD and do not serve any protection to the health, safety or welfare of the community.

3. Section 1, Article 7, Section 7100, Sign Standards. - The Architects' and MISD Committees' recommended site and building signs, including size, color, identification text and lettering size, have been restricted or eliminated by the City under this Ordinance Section as a condition for Permitting or Building Occupancy. For instance, several of the Architect's proposed and MISD approved signs for Mansfield Legacy High School in 2007 were reduced or eliminated by the City, although recommended by the Architect for best school campus buildings identification. Some sign lettering was reduced to being unreadable from the Campus Entries and also identification of the Gymnasium and Theater Arts entries are unreadable. We do not believe that decreases in the size of the signs in any way affects the health, safety, and welfare of the community.

4. Section 1, Article 7, Section 7300, Landscaping and Screening Requirements. - Though many of these section provisions are consistent with other cities and reasonably provided for under MISD Architects and Planners designs, the letter of some paragraphs have been enforced to the extent of impacting the MISD Educational Programs, in particular Paragraph R, Parking Lot Internal Landscaping, as impacting Marching Band Practice Areas, and MISD Police concern with adequate, unobstructed security camera and street area viewing of the parking areas. MISD facilities design must be responsive to the school needs and security needs. In order to protect the students at these campuses, as well as provide for greater uses of MISD property, the Internal Landscaping should not be required as it negatively affects the safety of citizens and there is no justification based on welfare and health.

5. Section 1, Article 7, Section 7301, Supplemental Requirements for Screening of Mechanical Equipment and Service Areas. These screening provisions, particularly Paragraphs B., 1 and 2 on Parapet Heights, are extra-ordinary to the Practice of K-12 Architecture and not in the MISD school facilities best interests as addressed by the Architects and Engineers responsible for the MISD facilities design and construction. The parapets for a future high school are estimated to cost 2.5 million dollars in additional funding and they are purely aesthetic. Therefore, they do not fall under the health, safety and welfare standards.

6. Section 1, Article 7, Section 7302, General Provisions for all Fences and Free Standing Walls. Paragraph A..1.a. requires MISD to build fences and walls on neighbors

properties in replacement of their existing fences and be "perpetually and adequately maintained or replaced" by the MISD, being the "more intensive zoned property" in all City reviewed instances to date of this Ordinance since April 2005 when it was enacted. This does not protect the health, safety and welfare of the community. Additionally, this potentially violates Education Code provision 11.168, which reads:

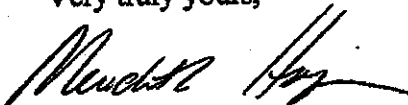
"Sec. 11.168 USE OF DISTRICT RESOURCES PROHIBITED FOR CERTAIN PURPOSES. The board of trustees of a school district may not enter into an agreement authorizing the use of school district employees, property, or resources for the provision of materials or labor for the design, construction, or renovation of improvements to real property not owned or leased by the district."

MISD is not permitted by law to use resources to construct fences on property not owned or leased by the District. This also may be viewed as a gift of public funds under the Texas Constitution, Article III, § 52, which is prohibited by law. The Attorney General held in Opinion No. DM-401 (1996) that "the state chose to fulfill its duties to educate children through the local school districts and its duties to protect the health, safety, and property of the people by delegating them to the cities. In performing its duties, the city does not usurp the school district's authority in the area of education." In that opinion, the Attorney General held that the City has the right to enforce its garbage collection ordinances against the school district, assuming the Courts found the ordinance to be reasonable. However, the Attorney General goes on to say that "the school district must comply with a reasonable ordinance adopted under this provision [health, safety, and welfare] as long as the ordinance is not inconsistent with other legislation specifically governing this subject." This is clearly inconsistent with current legislation.

7. Section 2. - The Owner, MISD, and any Architects, Engineers, Builders, Persons, and all other relevant parties may be convicted of violating "any provisions of the Ordinances"..."shall be guilty of separate offense and upon conviction shall be fined..." This should only be enforced for those provisions violated that affect the health, safety and welfare of the community.

In order to facilitate the construction of new schools and facilities for MISD, we ask for you to request an interpretation and ruling as to whether the City of Mansfield, a home rule city, can enforce zoning ordinances that are for the purposes of aesthetics and maintaining property values. We also ask for you to request this decision with regards to whether the reasons of aesthetics and maintenance of property values falls within the scope of the "health, safety, and welfare" of the community.

Very truly yours,


Meredith Hayes