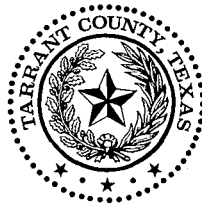


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SHAREN WILSON

Criminal District Attorney
Tarrant County

April 14, 2020

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

Re: Fort Worth Independent School District – Request for Legal Opinion

Dear Attorney General Paxton and Opinion Committee:

At the request of the Board of Trustees for the Fort Worth Independent School District, I respectfully seek your opinion regarding the issue set forth below.

ISSUE

May a Texas independent school district enter into a long-term ground lease with a private entity that intends to develop surplus property owned by the District for non-educational purposes, where the expected financial benefit to the District over the term of the lease is anticipated to far exceed the current value of a sale of the property?

FACTS

In conjunction with a real estate brokerage firm and after careful analysis of future district needs, the Fort Worth Independent School District has identified 18 underused school-owned properties that are not needed in the present nor likely to be used for school district purposes in the future. The properties are either not currently in use or will be replaced with more appropriate structures that are better suited for educational purposes. As a result, the Board of Education will make a finding, by Resolution, that each property is no longer necessary for the operation of a school district. The surplus properties will be disposed of by public sale, if not leased.

The District will follow Chapter 272, Texas Local Government Code, for the potential sale and/or ground lease of any properties declared no longer necessary for the operation of the school district.

A sale of school property would permanently divest the District of its exclusive right to manage and control school property. Under any ground lease entered into, the property would

revert back to the District's ownership at the end of the term in accordance with the provisions contained in the lease.

The present value of any ground lease would meet or exceed the fair market value of the property, if sold today.

Based on the expected terms/duration of a potential ground lease, the District is likely to benefit financially on an annual basis throughout the term of the lease, with the lease proceeds available for investment in school district educational programs. While the District will also benefit financially from a present sale of the properties, the District anticipates a significantly greater financial benefit from a long-term lease of the properties, with the added benefit that the properties will revert back to the District's ownership at the end of the lease term.

The development of the property by a private developer would place the ground leased property back onto the property tax rolls, providing a further public benefit in the form of an increase in property tax collections. The development of the property would also likely significantly increase its value over the term of the lease, thereby benefiting all taxing entities in Tarrant County over the life of the ground lease. Accordingly, the value of the property when the District re-takes possession at the end of the lease term is expected to be far greater than the value of the property now.

If the property is leased, the District has the ability to choose the use to which the property will be put, via an RFP process conducted pursuant to Chapter 272. The District has no control over the use to which the property will be put if it is sold outright.

ARGUMENTS AND AUTHORITIES

Authority to Lease

Although the Texas Education Code does not explicitly give school districts the right to lease property, Texas courts beginning in 1913 have consistently held that an implied right to lease exists. *Royse Indep. Sch. Dist. v. Reinhardt*, 159 S.W. 1010 (Tex. App.—Dallas 1913). The current statutory basis for the implied right to lease is pursuant to Texas Education Code sec. 11.151(a) and (b):

- (a) The trustees of an independent school district constitute a body corporate and in the name of the district may acquire and hold real and personal property, sue and be sued, and receive bequests and donations or other moneys and funds coming legally into their hands.
- (b) The trustees as a body corporate have the exclusive power and duty to govern and oversee the management of the public schools of the district. All powers and duties not specifically delegated by statute to the agency or to the State Board of Education are reserved for the trustees, and the agency may not substitute its judgment for the lawful exercise of those powers and duties by the trustees.

Limitations on Leasing Authority

- A. The lease may not permit uses of the property that would interfere with its use for school district purposes or divest the board of trustees of its exclusive right to manage and control the property.

The Texas Supreme Court has described a public school district as a “trustee for the local public” insofar as it has acquired and holds property. *Love v. City of Dallas*, 120 Tex. 351, 368 (Tex. 1931). Its property “belongs to the... public, and must be, in some way, applied to its use.... [T]he public that it represents has a vested right in the municipal property acquired for its benefit, and is entitled to demand that such property be applied to its uses.” *Id.*

In accordance with this principle, there are limitations on a school district’s right to lease its land to private entities. Texas cases hold that the implied right to lease can only be exercised if the lease:

- (1) does not interfere with the district’s use of the property for school purposes, and
- (2) does not divest the board of trustees of its exclusive right to manage and control the property.

Royse Indep. Sch. Dist. v. Reinhardt, 159 S.W. 1010 (Tex. App.—Dallas 1913) (applying test and finding that lease of school property for use by private entity during summer holidays while property was not in use by school was acceptable because lease did not affect property’s use by school). If either of these factors is not met, the lease may be invalidated.

The determination that the property to be leased is no longer needed by the school district is a positive factor in analyzing whether the lease would interfere with the use of the property for school purposes. For example, in a 2005 Texas Attorney General Opinion (the “Huntsman Opinion”), the AG left open the possibility that a lease with a potential term of 100 years could be valid if the board of trustees “can expressly find that the property is no longer necessary for operation of the school district.” Tex. Atty. Gen. Op. GA-0321 (2005). That opinion considered a long-term property exchange in which a private party, Huntsman, would lease its land to a school district for 50 years, with a 50-year option at the district’s sole discretion, for \$1/year and Huntsman’s ability to use unused excess land of the district. Huntsman would only use district land for a community soccer league and would leave land in a similar condition if the district did not exercise its renewal option. The district had no right to terminate the lease before expiration of the 50-year period. The AG noted that “[o]pinions addressing long-term leases have concluded that boards of trustees lack authority to enter into a lease that interferes with the property’s use for school purposes or that relinquishes the board’s authority to control the property’s use.” However, the AG specifically noted that the school district described the land to be leased as “unused excess land” that was “in contrast to the actively used facilities at issue in *Royse* and *River Road*.” Cautioning the board of trustees to “consider whether [the district] may need the land for school district purposes over the term of the lease, and, if so, whether the lease would permit the school district to use the land,” the AG opined that “[a] lease divesting [the district] of any right to manage and control the property for a term of 50 to 100 years is problematic under relevant precedent,

unless the board of trustees can expressly find that the property is no longer necessary for the operation of the school district.” *Id.* (emphasis added).

The FWISD Board of Education will expressly find that the properties considered for ground lease are no longer necessary for the operation of the school district. Therefore, any non-educational use of the ground-leased property will not interfere with the District’s use of the property for school purposes. Additionally, as the property would expressly be declared surplus and no longer necessary for the operation of the school district, there is no need for the board to retain its right to manage and control the property for school district purposes.

B. The Texas Constitution places further limits on a potential lease transaction to serve a public purpose.

The Texas Attorney General has opined that Art. III, sec. 52(a) of the Texas Constitution does not prohibit a school district from leasing school land to a private entity so long as the board of trustees (a) determines that the expenditure or use of the thing of value **serves a public purpose** and (b) **places sufficient controls on the transaction** to ensure that the public purpose is carried out. Tex. Atty. Gen. Op. GA-0321 (Tex. A.G.), 2005 WL 1046489, *8-9. Art. III, sec. 52(a) provides in part:

Except as otherwise provided by this section, the Legislature shall have no power to authorize any county, city, town or other political corporation or subdivision of the State to lend its credit or to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever, or to become a stockholder in such corporation, association or company.

The purpose of this provision is to prevent the **gratuitous** transfer of public funds to any individual. *Walker v. City of Georgetown*, 86 S.W.3d 249, 260 (Tex. App.—Austin 2002). A school district’s agreement to permit a private entity to use its land constitutes a “thing of value” for purposes of Art. III, sec. 52(a). *Id.* However, the Constitution does not bar an expenditure which incidentally benefits a private entity if it is made for the accomplishment of a legitimate public purpose. *Id.* In *Walker*, a city’s lease for the development of batting cages in a public park was challenged by private competitors as failing to comply with this constitutional provision by leasing the land at less than fair market value. *Id.* The lessee would pay \$400 per month but at the end of the lease term, the batting cages would revert to the city. *Id.* at 252. The city also retained control over certain elements of the lease. *Id.* The court rejected the plaintiffs’ contention, finding that the lease was supported by “valuable consideration.” *Id.* at 260.

The Huntsman Opinion also considered the proposed long-term property exchange under this constitutional provision. In light of the District’s statements that it would obtain an interest in a valuable piece of land without significant cost and below fair market value, and because the Huntsman land was ideal for the construction of new schools and almost twice the acreage of the land the District was leasing to Huntsman, the AG opined that the lease “would serve a school district purpose, school construction, and would be supported by valuable consideration.” *Id.* at *8. Assuming the lease had sufficient controls to ensure the public purpose was carried out, it would comply with Art. III, sec. 52(a). Tex. Atty. Gen. Op. GA-0321 (Tex. A.G.), 2005 WL

1046489, *8; *see also* Tex. Atty. Gen. Op. GA-0252 (2004) (favorable opinion regarding public purpose of college's proposed 50-year lease to nonprofit that would pay \$1/month but would build student center and classrooms whose primary use would be for college students to use, and would build excess parking that would revert to the college at the end of the lease term).

The financial benefit of a long-term ground lease would prevent the transaction from being considered "gratuitous," and would serve a public purpose through the support of the District's educational programs. The District has the ability to control how any of its properties under ground leases would be developed through an RFP process conducted pursuant to Chapter 272. The District has no control if it is sold outright.

SUMMARY:

In the disposition of surplus property, the Fort Worth Independent School District Board of Education believes it has a duty to choose the most beneficial option for the stakeholders the District serves. As it relates to some of the 18 surplus properties identified by the District, it may be in the best interest of the District to enter into long-term ground leases with private entities that plan to develop those sites for non-educational purposes. The District believes Section 11.151(c) of the Education Code allows it to enter into long term ground leases of District-owned surplus property for non-educational purposes. The District further believes that long-term ground leases on properties that have been expressly declared surplus and are no longer needed for school purposes, will not interfere with the District's use of the property for school purposes, will not divest the board of trustees of its exclusive right to manage and control the property, will serve a public purpose, and may be sufficiently controlled to ensure that the public purpose is carried out.

Thank you, in advance, for your response concerning this issue.

Respectfully submitted,



SHAREN WILSON
CRIMINAL DISTRICT ATTORNEY
TARRANT COUNTY, TEXAS

cc: Dr. Kent Scribner, Superintendent
Jacinto Ramos, Jr., President of the Board of Trustees
Fort Worth Independent School District
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Fort Worth, Texas 76107