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THE SENATE OF TEXAS
COMMITTEE ON EDUCATION

December 18, 2020

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

RQ-0392-KP
File# **ML-48916-20**
I.D.# **48916**

Dear General Paxton:

Per Section 402.042 of the Texas Government Code, I respectfully request your opinion on matters related to local governments placing planning and zoning burdens and requirements upon facilities constructed by open-enrollment public charter schools that are not otherwise applied to facilities constructed by independent school districts.

Relevant Law

Among other local governments, the City of Dallas has adopted a development code containing ordinance No. 19455. Section 51A-4.111 of this ordinance establishes guidelines for the use of land presently utilized for agricultural purposes. Subsection (2)(D) establishes the manner in which the agricultural land can be worked for Institutional and Community Service Uses. The ordinance requires an "open-enrollment charter school" to obtain a Special Use Permit to operate on such land, while only requiring a Residential Adjacency Review ("RAR") for a "public school other than an open-enrollment charter school." This represents a significant administrative and financial hurdle, the cost of which is ultimately paid from state funds.

Open-enrollment public charter schools were created by the Texas Legislature in 1995. Along with school districts, open-enrollment public charter schools were authorized and expressly recognized as one of the two "public school system[s] of this state" charged with the "…primary responsibility for implementing the states system of public education and ensuring student performance." See Tex. Educ. Code Ann. §§ 12.105 and 11.002 (West 2018). Open-enrollment public charter schools are "part of the public school system of this state." Tex. Educ. Code § 12.105. In addition, the Texas Supreme Court recently held that open-enrollment public charter schools are in an "arm of the state" as part of the public school system and are subject to the same privileges and immunities as other public schools. See El Paso Education Initiative, Inc., D/B/A Burnham Wood Charter School v. AMEX Properties, LLC, Cause No. 18-1167 (Tex. May 22, 2020).

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Texas law makes clear that open-enrollment public charter schools are "an integral part of Texas's public education system." Texas Educ. Agency v. Academy of Careers and Techs, Inc., 499 S.W.3d 130, 135 (Tex. App.—Austin 2016, no pet.) (discussing the constitutionality of the state's ultimate dominion over all charter school property and restrictions on property and use of state funds). The above case also recognized open-enrollment public charter schools are an integral part of Texas's public education system and may be considered governmental units subject to the TEA's direct oversight and control). As such, open-enrollment public charter schools exercise state authority. Id. at 135-36 (citing HWY 3 MHP, LLC v. Electric Reliability Council of Tex., 462 S.W.3d 204, 210 (Tex. App.—Austin 2015, no pet.) ("open-enrollment charter schools should be treated as governmental units because they are given [state] taxpayer money to use when accomplishing the public goal of educating children")).

Specifically, on point, Section 12.103 of the Texas Education Code ("TEC") established that "…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." As such, the Texas Legislature established that open-enrollment public charter schools are only subject to zoning ordinances "governing public schools." Accordingly, case law which controls such interactions between districts and municipalities is, therefore, equally applicable and controlling of such interactions between open-enrollment public charter schools and municipalities.

In general, Texas courts have held that municipalities cannot use their zoning powers to exclude the reasonable location of school facilities within the municipality's boundaries. Specifically, in City of Addison v. Dallas Independent School District, the Court of Appeals of Texas, Dallas held that "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." 632 S.W.2d 771, 773 (Tex. App. 1982), writ refused NRE (June 16, 1982) (emphasis added). The Court unequivocally stated that "[t]he zoning authority of a municipality is subservient to the reasonable exercise of school district authority." Id. at 772. The Court reasoned that both municipalities and school districts are granted separate and, at times, overlapping authorities by the legislature. However, overlapping as they may be, "[i]n order to carry out the purposes for which they were created, the reasonable exercise of those powers must not conflict." Id. The Court specifically relied upon the Supreme Court's determination that school districts' powers to locate school facilities takes command over the police power of municipalities to zone them out, stating that to reach a contrary conclusion would be to frustrate the legislative purpose of delegating such location selection to the school districts. In the case of an open-enrollment charter school, the State has acted (through the approval of a charter expansion amendment) to determine that a site is appropriate for the construction and operation of a public school.

The Addison Court also relied upon the Texas Supreme Court's decision in Austin Independent School District v. City of Sunset Valley, 502 S.W.2d 670 (Tex. 1973), which it interpreted to mean "school district authority predominates over the zoning power of a municipality, absent a claim of unreasonable exercise of power or of nuisance, but that school boards remain subject to the building codes and regulations of the municipality in which they function." Id. As such, for a district's site-selection authority to be usurped, it must be shown that the district abused such

authority, or that the specific site selection constitutes a public nuisance. Sunset Valley also provides a separate crucial piece of the puzzle: namely, that the burden of proof in such cases of claimed district abuse of power or nuisance is placed upon the municipality. In sum, the Sunset Valley Court held that school districts' immunity from municipality zoning ordinances "is absolute unless the City in a given instance can show that its exercise is unreasonable or arbitrary." Id. at 674.

Question 1: Does a City Ordinance that establishes different requirements for open-enrollment public charter schools and other public schools, principally school districts, comply with state law?

Question 2: If a municipal zoning ordinance distinguishes open-enrollment public charter schools, does it "govern public schools" as contemplated in Section 12.103? If not, are open-enrollment public charter schools limited by their provisions?

Question 3: Does an ordinance requiring a special use permit or other permission or consent from a municipality before using land usurp the State's authority to select and approve for open-enrollment public charter schools?

Question 4: Does a municipality have authority to use its zoning or other authority to regulate open-enrollment school's location absent manifest health and safety concerns or clear error by the State?

Question 5: Is a municipality required to enforce planning and zoning regulations equally with respect to all public schools?

I request that your office review these ordinances and statutes, and provide an opinion on the questions presented.

Sincerely Yours,

Larry Taylor
Texas Senator
Senate District 11