KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 20, 2020

The Honorable Sharen Wilson
Tarrant County Criminal District Attorney
401 West Belknap
Fort Worth, Texas 76196

Opinion No. KP-0338

Re: Whether an independent school district may 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 will exceed the current value of a sale of the property (RQ-0350-KP)

Dear Ms. Wilson:

You ask whether an independent school district may 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[.]"[1] You explain that the Fort Worth Independent School District (the "District") "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." Request Letter at 1. You further explain that the District will make a finding that the properties are "no longer necessary for the operation of a school district" and that surplus land will be disposed of by sale or lease. *Id.* You tell us a lease would provide that the property developed under the lease will revert back to the District with greater value than it has now. *See id.* 1–2.

An independent school district's board of trustees holds school property in trust to be used for the benefit of school children in the district. *See Love v. City of Dallas*, 40 S.W.2d 20, 26 (Tex. 1931); *see also Trs. of Indep. Sch. Dist. of Cleburne v. Johnson Cty. Democratic Exec. Comm.*, 52 S.W.2d 71, 72 (Tex. 1932) (recognizing that the management and control of school district property is vested in the board of trustees of such district). Provisions in Education Code chapter 11 authorize a board of trustees to "dispose of property that is no longer necessary for the operation of the school district" and to sell property held in trust for public school purposes. *See* TEX. EDUC. CODE §§ 11.151(c), .154(a); *see also id.* § 11.1541 (authorizing an independent school district board of trustees to donate surplus real property). Yet, no statutory provision expressly

[1] *See* Letter from Honorable Sharen Wilson, Tarrant Cty. Crim. Dist. Att'y, to Honorable Ken Paxton, Tex. Att'y Gen. at 1 (Apr. 14, 2020), https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/rq/2020/pdf/RQ0350KP.pdf ("Request Letter").

authorizes a board of trustees to lease school district real property to another entity. *See generally id.* §§ 11.001–.356.

However, in *Royse Independent School District v. Reinhardt*, a Texas court of appeals determined that a school board had implied authority to lease school district real property to another entity. 159 S.W. 1010, 1011 (Tex. App.—Dallas 1913, writ ref'd). With respect to the particular lease terms at issue in the case, the court observed that the "primary object in granting the privilege to [the lessee] to use its school grounds as a place to play baseball is to subserve a public purpose, and not to promote some private end." *Royse*, 159 S.W. at 1011. The court then determined that the lease would not harm the property or interfere with school activities. *See id.* The court concluded that "such use [of the property] is not so inconsistent with the purposes to which the property has been dedicated or set apart as renders the contract . . . illegal or unauthorized." *Id.* Attorney general opinions, relying on the *Royse* opinion, recognize "boards of trustees' implied authority to permit private groups to lease school property when the lease does not interfere with the property's school purpose." Tex. Att'y Gen. Op. No. GA-0321 (2005) at 5; *see also* Tex. Att'y Gen. Op. Nos. GA-0252 (2004) at 5, WW-1364 (1962) at 6, O-5354 (1943) at 9. A more recent judicial opinion considering a long-term lease concluded that a board of trustees lacks authority to enter a lease that relinquishes the board's authority to control the property's use. *See River Rd. Neighborhood Ass'n v. S. Tex. Sports*, 720 S.W.2d 551, 559–60 (Tex. App.—San Antonio 1986, writ dism'd). Thus, while a school district's board of trustees may lease school district real property, it may not "(i) permit uses of the property that would interfere with the property's use for district purposes; or (ii) divest itself of the exclusive right to manage and control the property in question." Tex. Att'y Gen. Op. Nos. GA-0321 (2005) at 6, GA-0252 (2004) at 6.

Because this property is no longer necessary for the school district's operation, you suggest that any noneducational use of the property by the lessee will not interfere with the District's use of the property for school purposes and that the board of trustees need not retain its right to manage and control the property for school district purposes. *See* Request Letter at 4. As this office recognized in Opinion GA-0321, the "fact that the land is not used by the school district is relevant to whether the proposed lease would permit uses of the property that would interfere with the property's use for district purposes." Tex. Att'y Gen. Op. No. GA-0321 (2005) at 7. Similarly, a finding that the land is no longer necessary for the operation of the school district is relevant to the question whether a lease divests the board of trustees of the right to manage and control the property. *Id.* Ultimately, the determination whether a particular lease satisfies the limitations involves questions of fact and contract interpretation and is thus beyond the purview of an attorney general opinion. *See id.*; *see also* Tex. Att'y Gen. Op. Nos. GA-0252 (2004) at 6, JM-531 (1986) at 2.

Lastly, the District should consider Texas Constitution, article III, section 52(a), which prohibits gratuitous payments or gifts of public funds to individuals, associations, or corporations. *See* TEX. CONST. art. III, § 52(a). "[A] school district's agreement to permit a private entity to use its land constitutes a 'thing of value' for purposes of article III, section 52(a)." Tex. Att'y Gen. Op. No. GA-0321 (2005) at 9. In *Texas Municipal League Intergovernmental Risk Pool v. Texas Workers' Compensation Commission*, the Texas Supreme Court articulated a three-part test by which to determine whether an expenditure or transfer of public funds satisfies article III, section 52(a). 74 S.W.3d 377, 384 (Tex. 2002). The test requires that (1) the predominant purpose of the

expenditure is "to accomplish a public purpose, not to benefit private parties"; (2) the public entity must retain sufficient control over the expenditure to ensure that the public purpose is accomplished; and (3) the public entity receives a return benefit. *Id.* The determination whether a particular transaction satisfies this three-part test is for the District to make in the first instance, subject to judicial review for abuse of discretion. *See* Tex. Att'y Gen. Op. Nos. KP-0204 (2018) at 2, KP-0007 (2015) at 2. The fact that the property is no longer necessary for the District's operation does not negate article III, section 52(a)'s requirements, but is a factor for the District to consider as it evaluates the lease against the *Texas Municipal League* test. Similarly, the property's reversion back to the District as well as long-term expected financial benefit are other factors in the District's *Texas Municipal League* evaluation.

S U M M A R Y

Under the common law, an independent school district may lease school district real property to a private entity provided the lease does not interfere with the property's use for district purposes or divest the school district of the exclusive right to manage and control the property. That the real property is surplus and no longer necessary for the operation of the school district is a factor relevant to the district's determination that a proposed lease complies with these limitations.

Texas Constitution article III, section 52(a) prohibits gifts of public funds for private purposes. The District's agreement to permit a private entity to use its land constitutes a thing of value within the scope of article III, section 52(a) but does not violate that provision so long as the District: (1) ensures the expenditure is to accomplish a public purpose of the school district, not to benefit private parties; (2) retains sufficient control over the public funds to ensure the public purpose is accomplished; and (3) ensures the school district receives a return benefit. Whether a particular lease agreement satisfies this three-part test is a determination for the District in the first instance.

Very truly yours,

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