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OPINION COMMITTEE

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January 29, 2007

VIA FEDERAL EXPRESS

The Honorable Greg Abbott
Attorney General of the State of Texas
ATTN: Opinion Committee Chairperson
300 W. 15th Street
Austin, TX 78701

RQ-0566-GA

RE: Authority of Home Rule Municipality to Convey or Lease Real Property to an Independent School District

Dear Attorney General Abbott:

I am soliciting your opinion at the request of and on behalf of the Ysleta Independent School District ("YISD"). My questions are as follows:

1. Does a home rule municipality have the authority to enter into a long term lease with an independent school district, covering a portion of an existing city park, and to include in the instrument the right of the school district to renew the lease for an indefinite period (exceeding 40 years) at the end of the primary term without conducting an election or publishing notice and taking bids?
2. Does a home rule municipality have the authority to convey fee simple title to a portion of an existing city park to an independent school district without conducting an election or publishing notice and taking bids as might be required in the event of sale to a private party?
3. If the answer to either 1 or 2 above is in the affirmative, what steps are required of the home rule municipality and the independent school district to affect the conveyance or lease of city park land to an independent school district for the purpose of construction of a public school?
4. If the answer to number 1 above is in the affirmative, would the independent school district have the authority to expend school district funds for the purpose of constructing a school building and related facilities upon the leased property?

Background

The Ysleta Independent School District ("YISD") has an enrollment of approximately 49,000 students. YISD is located in a built out area of the City of El Paso, which provides few opportunities for land acquisition to accommodate the needs of the YISD student population. In addressing the problem of the District's inability to acquire useable land for the expansion of existing schools, and the construction of new schools, YISD has considered non-traditional methods of securing real property on which to construct new schools. In surveying novel approaches implemented by other school district's across the country, YISD has identified an approach involving a joint venture of sorts with the City of El Paso. Specifically, YISD is contemplating securing the use of city park land through a long term lease or conveyance from the City of El Paso for construction of a school. This type of cooperative effort provides YISD with much needed real property in a strategic location, at what could be a nominal cost. The City of El Paso, in turn, benefits from this arrangement by allowing its citizens secure access and use of certain facilities located within the school campus at no added expense to the municipal taxpayer. Both the City of El Paso and YISD have considered the potential benefits of this arrangement and would like to move forward with securing this land and construction of school facilities. The parties decided to request this opinion to clear up any questions regarding the authority for the proposed conveyance. There does not appear to be any deed restrictions on the municipality's authority to convey the land or on the use of the park land.

Home Rule Municipalities Have Broad Authority

Home-rule municipalities are cities that have adopted a charter which complies with Art. XI Section 5 of the Texas Constitution. As a home-rule city, the City of El Paso, possesses the full power of a self-governing entity; therefore, El Paso has the authority to do all things except those expressly forbidden. TEX. GOV'T CODE ANN. §791.001 et seq. (Vernon 2005), *See also* TEX. LOC. GOV'T CODE ANN. § 5.004 (Vernon 2005); *Hollingsworth v. City of Dallas*, 931 S.W.2d 699 (Tex. App. —Dallas, 1996, writ denied). The legislature has promulgated many such limitations, including those which address the management and use of park land. TEX. LOC. GOV'T CODE ANN. §306.001 et seq. (Vernon 2005), allows home-rule municipalities to create a park board of trustees, and also allows for the management of parks and park facilities. In addition the Office of the Attorney General has stated that a home-rule municipality may convey land to the state for use as a park, even if the transfer made is below market value. Op. Tex. Att'y Gen. No. JM-997 (1988). The City of El Paso has created the Department of Parks and Recreation ("Department"). The Department is managed by a Director who works in conjunction with The Board of Parks and Recreation ("Board"). The Board, which is comprised of volunteers from the El Paso community and the Director, act as an advisory committee to the Mayor and City Council in the development, supervision, and administration of the affairs of the Department of Parks and Recreation. Moreover, the El Paso Municipal Code contains rules that apply to the dedication of land to be developed as city parks. EL PASO, TEX. CODE 19.12.040 (1997).

El Paso, a Home Rule Municipality, Has The Authority to Convey or Lease City Park Lands to an Independent School District For Construction of a Public School

The El Paso Municipal Code requires property owners who plat subdivisions to provide park land. This land is conveyed in fee simple to the City. The land conveyed and deeded to the City cannot be subject to any reservations, restrictions, or easements. EL PASO, TEX. CODE 19.12.20 (1997). In *Zachry v. City of San Antonio*, 305 S.W.2d 558 (Tex. 1957), the City of San Antonio ("City") sought to set aside as void a lease of municipal park land that was entered into by Zachry and the City. *Id.* at 559. The park land was dedicated to the City by Mr. Samuel A. Maverick. Maverick's deed contained a reverter to, his heirs and assigns, should the land stop being used as a public park. Approximately 100 years after Maverick's dedication of parkland, the City leased the park land to Zachry for a period of 40 years. Zachry was to construct and operate an underground parking garage beneath the park land. After the City and Zachry entered into the lease agreement, Mrs. Green, one of Mr. Maverick's heirs, filed a trespass to try title suit. Mrs. Green asserted that the lease triggered the reversion because the land was no longer going to be used as a public park. After the court found in favor of Mrs. Green, the City sought to set aside the lease agreement. Zachry relied on San Antonio's home-rule status, arguing that under a general power provision the City had the power to purchase, take, hold, acquire, convey, lease, mortgage and dispose of any property within the city limits. *Id.* at 561. The court stated that the City had no authority to make or enter into the lease and the lease was set aside. *Id.* at 563. Some concerns have been expressed that the Zachry decision would limit a municipality's authority to convey title to city park land. We contend this is not the case unless the title to the land is encumbered by some deed restriction or revision since the deed to the El Paso land does not contain such deed restriction, we submit that the Zachry opinion is inapplicable.

In *Kingsville Indep. Sch. Dist. v. Crenshaw*, 164 S.W.2d 49 (Tex. App.— San Antonio 1942, no pet.), the San Antonio court held that park land given to the school district would serve a better public use if the land was converted into a school. *Id.* at 51. The park deed provided that the land was to be a public park for the pleasure and benefit of the people of Kingsville and "shall be maintained as such by the city and no building shall be erected thereon with the exception of a band stand" any violation would have the title interest revert to the Town and Improvement Company. Due to a population boom, KISD found it necessary to build another school in the City. KISD decided that a new school would best fit the City's needs if it was built on the park land. The City and KISD entered into negotiations and the City conveyed the park land to KISD. The Kleberg Town and Improvement Company and King Ranch Company, as Mrs. King's successor, executed a waiver to any rights they would have had to any reverter interest. Thus, the City and KISD entered into an agreement and avoided a condemnation proceeding. The court reasoned that if the City and KISD can agree upon the paramount public use of property then there is no need to enter into extensive litigation on the matter. Again there was a reverter present in the deed as was the case with Zachry, but the successors in interest executed a waiver to any rights they may have had, thus making it possible to use park land to build schools.

Previous Attorney General opinions and Texas courts hold that a home rule municipality has the authority to convey city park land to a public school district. See *El Paso County v. The City of El Paso*, 357 SW 2nd 783 (Tex. Civ. App. 1972); *Kingsville Independent School District v. Crenshaw*, 164 SW 2nd 49 (Tex. Civ. App. 1942, error ref. w.m.); and opinion number M-788 to J.W. Edgar (1971). In the Edgar opinion, the Texas Attorney General ruled that statutes

requiring notice and bids for sale of real property are not applicable to an exchange between a home rule city and an independent school district, where the city proposed to convey park property to be used as a site for a public school. Also see Attorney General Opinion No. H-108 to David Wade (1973) – holding that no election is required for conveyance of city park land if the proposed grantee is a public school district that has eminent domain authority. Ysleta Independent School District has eminent domain authority. See Tex. ED. CODE Ann. §11.155.

Terms of Lease for School Construction on Municipal Park Land

Under TEX. LOC. GOV'T CODE ANN. § 306.038, the municipality is authorized to lease party property. However, the term of the park lease cannot be perpetual. The lease agreement must not to exceed a term of 40 years. TEX. LOC. GOV'T CODE ANN. § 306.038 (b) (Vernon 2005). However, there is no statute or case law that prohibits the city from agreeing to an extension of the lease at the end of the primary term. TEX. LOC. GOV'T CODE ANN. § 306.038 (b) states that “[t]he board may enter into a contract, lease, or agreement with any person relating to the management, operation, or maintenance of any concession, facility, improvement, leasehold, land, or property of any other nature under the management and control of the board. Such a lease or agreement for the use of board properties by others may not exceed a term of 40 years.” It is significant that this statute refers to a lease with a “person”, which indicates that the limitation is intended to apply to a lease with a private property.

We submit that the 40 year limitation of the initial lease term does not apply to a lease between a municipality and an independent school district for construction of a school for two reasons. First, it appears from the language in this statute that it is intended to apply to an operating agreement or concession lease with a private party as opposed to an agreement with another political entity for a separate public use of the property. Second, for the same reasons cited in the *Crenshaw* case and Attorney General opinions cited above, this limitation would not apply to a lease between a municipality and an independent school district that has the power of eminent domain. Therefore, we submit that the City of El Paso would have the authority to lease the park land to YISD for a term in excess of 40 years and to provide for unlimited extensions of this leasehold into perpetuity.

This is an essential element of any lease of the park land for school construction because the school district must be assured that the term of the lease will exceed the expected useable life of school buildings and improvements to be constructed on the property.

Therefore, it appears that the City of El Paso has the discretionary authority to enter into a long term lease (exceeding 40 years) or to convey city park property in *fee simple* to the Ysleta Independent School District without complying with statutes providing for election on requiring bids.

Special Procedures Required to Authorize Lease for Conveyance of City Park Property

Should you determine that the City of El Paso has the authority to convey or enter into a long term lease, with a provision for indefinite renewals, with Ysleta Independent School District for construction of public schools, what steps would be required in order to effectuate transaction under Texas law? Specifically, should the city charter contain restrictions regarding the City's

authority to convey city park land, would these restrictions be applicable to a lease or conveyance from the City to an independent school district?

We seek your opinion as to whether Texas State law would require any public hearings or other special procedures for the City to convey or lease city park land to an independent school district.

We understand that deed restrictions such as reverters that divest title in the event that the property ceases to be used as a city park could impact the authority of the City to convey the property.

Urgent Need to Obtain Decision

Funding for construction of the new school was included in a bond issue approved by the voters within YISD in 2004. Construction of this school has been delayed pending location of a site for the school and confirmation of the authority of the City and the School District to consummate the necessary conveyances and commitments to provide for the school campus on the city park land. Construction of the school will continue to be delayed until these issues are resolved. Therefore, we request that you expedite consideration of this request so as to provide a response as soon as possible.

Should you have questions or require additional information, please do not hesitate to call.

I thank you in advance for your assistance in this regard.

Very truly yours,

Jose R. Rodriguez
Jose R. Rodriguez
El Paso County Attorney *By JB*