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OPINION COMMITTEE

District 28

TEXAS HOUSE OF REPRESENTATIVES

FILE # ML-48142-17
ID # 48142

April 20, 2017

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

RQ-0159-KP

Re: Whether an independent school district must hold a tax ratification election (TRE) pursuant to Texas Tax Code Section 26.08 when it adopts a lower tax rate.

Dear Attorney General Paxton:

I am writing to seek your opinion regarding whether an independent school district must hold a TRE when its governing board proposes to adopt a lower tax rate.

By way of background, FBISD is the seventh largest school district in Texas serving a student population of approximately 75,000 students. The District is governed by a seven-member board of trustees that is annually required to adopt a budget and tax rate for each succeeding fiscal year. The processes for adoption of the budget and tax rate are governed by Subchapter A, Chapter 44 of the Texas Education Code and Subtitle D, Chapter 26 of the Texas Tax Code.

Having successfully managed its debt service over many years, FBISD proposes to lower its overall ad valorem tax rate by 2 cents per \$100 of valuation. To accomplish its desired result, it intends to reduce its debt service rate by 4 cents per \$100 valuation while raising its maintenance and operations (M&O) rate by 2 cents per \$100 of valuation. For the reasons explained below, it is FBISD's view that a TRE is not required in these circumstances.

Section 26.08(a) of the Texas Tax Code authorizes and requires a district to hold a TRE if a school board adopts a tax rate that exceeds its calculated rollback rate. Tex. Tax Code § 26.08(a).¹ The term "tax rate" is defined in Section 26.05(a) of the Texas Tax Code to include

¹ Section 26.08(a) reads, in relevant part, as follows:

"If the governing body of a school district adopts a tax rate that exceeds the district's rollback tax rate, the registered voters of the district at an election held for that purpose must determine whether to approve the adopted tax rate." Tex. Tax Code §26.08(a).



the sum of two component rates, the M&O and debt service rates. Similarly, the rollback rate includes the sum of the M&O and debt service rates.² See Tex. Tax Code § 26.08(n). Accordingly, the plain text of Section 26.08(a) makes clear that the legislature only intended to authorize a TRE if the sum of the M&O and debt service rates adopted by the school board exceed the calculated rollback rate (i.e. the sum of the M&O calculated rate under Section 26.08(n) combined with the debt service rate).

Your predecessor, in Attorney General Opinion GA-0775, considered application of Section 26.08(a) in circumstances in which a district adopts a higher M&O rate while simultaneously lowering its debt service rate by an equal amount, such that the overall tax rate remains the same. Tex. Att’y Gen. Op. No. GA-0775 (2010). Limited to this scenario in which the overall tax rate was not being lowered, Attorney General Abbott opined that a school district is not authorized to increase its adopted M&O tax rate above the maximum M&O tax rate component without a rollback election.

In reaching his conclusion, Attorney General Abbott acknowledged that “standing alone” Section 26.08(a) would not apply, but then relied upon canons of statutory construction to conclude that Section 26.08(a), when read in harmony with Section 26.08(n) (which merely provides how the M&O rate is to be calculated), requires a TRE when the adopted M&O rate is increased beyond the maximum M&O rate. The Attorney General’s reliance upon canons of construction rather than unambiguous statutory text cannot be squared with your opinion in Attorney General Opinion KP-0001, or Texas Supreme Court authority declining to rely on canons of statutory construction where a statute is unambiguous. See Tex. Att’y Gen. Op. No. KP-0001 (January 20, 2015) (declining to depart from plain meaning of statutory text “out of a concern for generalized policy goals not contained in the text”); see also *Texas State Board of Examiners v. Texas Medical Assoc.*, ___ S.W.3d ___ (Tex. February 24, 2017) (citing *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 438 (Tex. 2011)); accord *Iliff v. Iliff*, 339 S.W.3d 74, 79 (Tex. 2011); *Tex. Lottery Comm’n v. First State Bank of DeQueen*, 325 S.W.3d 628, 639 (Tex. 2010).³

Regardless of the issue of statutory construction, and more relevant to what FBISD proposes, Attorney General Abbott made clear in the same opinion that **“a district may, of course, adopt a tax rate that is lower than the rollback rate without a rollback election.”** That is precisely what FBISD intends to do here—lower its ad valorem tax rate by 2 cents per \$100 of valuation.

I agree with FBISD that no plausible interpretation of Section 26.08 would require it to incur costs associated with a TRE should it adopt a tax rate that is lower than its calculated rollback

² The method of calculation for the rollback tax rate is found in Texas Tax Code Section 26.08(n). It splits the tax rate into two separate components - a maintenance and operations (M&O) rate and a debt service rate.

³ It is also difficult to logically reconcile the reasoning employed in Attorney General Opinion GA-0775 with Attorney General Opinion GA-0954 in which the Attorney General opined that a county can adopt a component tax rate that is higher than its corresponding component rollback rate without triggering the right to petition for a rollback election so long as the sum of all the county's component tax rates do not exceed the combined rollback tax rate. Tex. Att’y Gen. Op. No. GA-0954 (2012).

rate. Interpreting Section 26.08—which only requires a TRE “[i]f the [board] adopts a tax rate that exceeds the district’s rollback rate”—to require a TRE when the district adopts a lower tax rate than its rollback rate would be contrary to the statute’s plain text and would undermine the legislature’s well-publicized goal of lowering property taxes.

In my judgment, FBISD’s interpretation of Section 26.08 is in harmony with Section 26.08(b) which mandates the following ballot language:

Approving the ad valorem tax rate of \$_____ per \$100 valuation in (name of school district) for the current year, a rate that is \$_____ higher per \$100 valuation than the school district rollback tax rate, for the purpose of (description of purpose of increase)

The presumption from the mandated ballot text is that the adopted ad valorem tax rate is “higher” per \$100 valuation. As this office opined in Attorney General Opinion 93-104, deviation from legislatively prescribed ballot language is not lawfully permitted. *Tex. Att’y Gen. Op. No. 93-104 (1993)*. It would not be possible for FBISD to adhere to the mandatory ballot language in Section 26.08(b) without misleading the voters. It would be an absurd result to require adherence to ballot language that is contextually inapplicable and would work to mislead voters.

By way of illustration, adherence to the Section 26.08(b)’s required ballot language would necessitate that FBISD order ballot language substantially similar to the following:

Approving the ad valorem tax rate of \$1.32 per \$100 valuation in Fort Bend Independent School District for the current year, a rate that is \$ -2 cents higher per \$100 valuation than the school district rollback rate, for the purpose of (description of purpose of increase)

As revealed by this example, requiring a TRE when the adopted ad valorem rate is lower than the rollback rate would necessitate that FBISD insert a negative number when describing the difference between the adopted ad valorem rate and the rollback rate. Doing so would nonsensically result in the declining rate being described as “higher.” It is my view that the legislature could not have intended districts to use ballot language that misleads voters to believe that a “higher” ad valorem rate was adopted when, in fact, a lower ad valorem rate was adopted. This would undoubtedly cause voter confusion putting FBISD’s effort to lower local property taxes at risk.

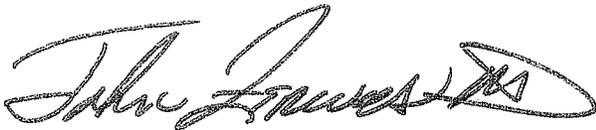
In AG Opinion 93-104, your office opined that a school district could address confusing ballot language by separately communicating to the public by newspaper notice or other means an explanation of the effect passage of the measure would have. *Tex. Att’y Gen. Op. 93-104 at p. 3*. While potentially confusing, nothing in the ballot language at issue in this prior opinion was facially misleading. Here, however, forced use of the mandatory ballot language in a case where the tax rate is being reduced would falsely represent to voters that the adopted tax rate was “higher” than the rollback rate. Moreover, district representatives could be placed in a perilous position should they attempt to explain the obvious resulting inaccuracy in the ballot language lest they be accused of unlawful political advertising. *See Tex. Educ. Code § 255.003*.

In the event Section 26.08 does not apply, not only would FBISD not be required to hold a TRE, it would be without authority to do so. As your office has recognized, a political subdivision may hold elections only if express constitutional or statutory authority exists. *See* Tex. Att'y Gen. Op. No. JC-0247 (2000). Nothing in the constitution or statutes authorizes FBISD to hold a tax ratification election under these circumstances.

In summary, for the many reasons explained above, FBISD seeks confirmation that its adoption of an overall ad valorem tax rate that is lower than its rollback rate will not require it to incur the costs and risks associated with a TRE. Because FBISD must adopt its tax rate by August 2017, I ask for expedited consideration of this request.

If I may provide any additional information to assist you with your consideration of this opinion request, please let me know.

Sincerely,

A handwritten signature in black ink, appearing to read "John Zerwas, M.D.", with a stylized flourish at the end.

John Zerwas, M.D.

cc: Ms. Kristin Tassin, FBISD Board President
Dr. Charles Dupre, FBISD Superintendent of Schools