

# Texas Department of Transportation

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April 4, 1997

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Opinion Committee

The Honorable Dan Morales  
Attorney General  
Office of the Attorney General  
P.O. Box 12548  
Austin, Texas 78711-2548

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FILE # ML-39503-97  
D. # 39503

Re: Whether the Texas Department of Transportation may issue permits for the erection of billboards on Dallas/Fort Worth International Airport property

Dear General Morales:

The Texas Department of Transportation is responsible for administering and enforcing the Texas Litter Abatement Act, Chapter 391 of the Transportation Code, which controls the erection and maintenance of outdoor advertising signs along certain classes of highways. Recently, the Dallas/Fort Worth International Airport Board requested permission to erect billboards on airport property adjacent to a highway controlled under the Act. We would like to request an opinion on whether TxDOT could legally issue permits for these billboards.

The federal Highway Beautification Act, at 23 U.S.C. §131(b), requires that states make provisions for "effective control of the erection and maintenance along the Interstate System and the primary system of outdoor advertising signs. . . ." In response to this mandate, the Texas legislature enacted the Litter Abatement Act, which at Section 391.031 of the Transportation Code states:

(a) A person commits an offense if the person wilfully erects or maintains outdoor advertising:

- (1) within 660 feet of the nearest edge of a right-of-way if the advertising is visible from the main-traveled way of the interstate or primary system; or
- (2) outside an urban area if the advertising is located more than 660 feet from the nearest edge of a right-of-way, is visible from the main-traveled way of the interstate or primary system, and is erected for the purpose of

having its message seen from the main-traveled way of the interstate or primary system.

(b) A person does not commit an offense if the person erects or maintains in an area described by Subsection (a):

(4) outdoor advertising located within 660 feet of the nearest edge of a right-of-way in an area in which the land use:

(A) is designated industrial or commercial under authority of law; or

(B) is not designated industrial or commercial under authority of law but the land use is consistent with an area designated industrial or commercial.

(C) The determination of whether an area is to be designated industrial or commercial must be made under criteria established by commission rule and according to actual land use.

The Highway Beautification Act states that signs may be permitted "within areas adjacent to the Interstate and primary systems which are zoned industrial or commercial under authority of State law, or in unzoned commercial or industrial areas as may be determined by agreement between the several states and the Secretary." The Transportation Commission has consequently adopted rules to satisfy the requirements of both the Highway Beautification Act and the Litter Abatement Act that establish the criteria for industrial or commercial designation. In order to meet the criteria, an area must either be actually used for a commercial or industrial purpose or it must be zoned commercial or industrial.

The property in question is currently unused; therefore, in order for signs to be permitted it must meet the definition of "zoned commercial or industrial area" found in 43 TAC §21.142. According to the rule, a zoned area is "[a]n area designated for general commercial or industrial use by ordinance or other official act of the State of Texas or by any political subdivision thereof to which legal authority to zone has been delegated by state law."

The D/FW Airport Board argues that municipal airport property is limited by statute to commercial and industrial use; thus the area has been so designated by an "official act of the State of Texas." Section 22.021 of the Transportation Code sets the terms under which an airport owned, leased, or controlled by a local government may allow others to use airport property. According to the statute, a government may grant a person the privilege of using airport property for commercial purposes, for supplying goods, services, or facilities, or for making available services to be furnished by the government. Section 22.087 authorizes a joint board to use airport property to sell aviation-related goods and equipment or to lease the property to third parties for that purpose.

No other statute appears to address directly the permitted or prohibited uses of airport property. Under the Board's argument, all municipal airport property would be considered commercial or industrial property under the Litter Abatement Act simply by virtue of its status as airport property, *whether or not the property is zoned commercial or industrial.*

If the above-referenced statutes do not serve as designation by the legislature of airport property as commercial or industrial, the question arises as to whether action by the D/FW Airport Board designating the property commercial or industrial rises to the level of "zoning."

The zoning of airport property is generally provided for in Chapter 241 of the Local Government Code, which authorizes the formation of joint airport zoning boards made up of representatives of certain municipalities affected by the airport. However, land use regulation of the D/FW Airport is governed not by the Local Government Code but by §22.074 of the Transportation Code, regarding Joint Airport Boards. That statute, under which the D/FW Airport Board was created, authorizes airport boards to "plan, acquire, establish, construct, improve, equip, maintain, operate, regulate, protect, and police an airport, air navigation facility, or airport hazard area jointly acquired, controlled, and operated." Under §22.074(d), if the constituent agencies of an airport board are home rule municipalities with populations of more than 400,000 each, as only the *constituents of the D/FW International Airport Board are, the aforementioned powers are:*

*exclusively the power[s] of the board regardless of whether all or part of the airport, air navigation facility, or airport hazard area is located in or outside the territory of any of the constituent agencies. Another local government or other political subdivision may not enact or enforce a zoning ordinance, subdivision regulation, construction code, or other ordinance purporting to regulate the use or development of property applicable in the geographic boundaries of the airport as it may be expanded.*

The legislature has not explicitly delegated to any political subdivision the authority to zone D/FW Airport property. While §22.074(d) grants the D/FW Airport Board exclusive authority to regulate its property, it does not go so far as to grant explicit authority to zone, which is clearly required by TxDOT's rules. However, in the latest of several cases dealing with the issue of authority to regulate uses of D/FW Airport property, the Fort Worth Court of Appeals stated,

*. . . the Legislature reallocated the regulatory authority from the Cities over the property on which D/FW airport is located to the airport board. . . . Although the authorities relied upon by the Cities make it clear that one home-rule city cannot deprive another of its sovereignty, those authorities do not establish that the Legislature cannot partially withdraw the Cities' home-rule authority over D/FW airport's property and allow the Board to act as the Legislature's agent in the regulation of the airport. In fact, the Cities never respond to the Board's implicit argument that, because the Legislature may properly allow a *city* to act as its agent, the Legislature may properly allow an airport board, whose members are appointed by a city, to act as its agent. We see no reason that the Legislature could not so*

delegate that authority to the Board and find that Senate Bill 348 [§22.074] does not unconstitutionally transfer power from one home rule city to another because of the State's power to allocate governmental functions among cities as it deems appropriate.

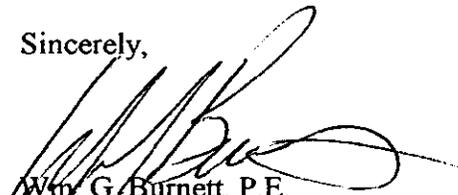
*City of Irving, Texas v. Dallas/Fort Worth International Airport Board*, 894 S.W.2d 456, 468 (Tex. App.--Fort Worth, 1995).

The court here clearly considers the authority granted the D/FW Airport Board in §22.074 to be the equivalent of the zoning authority normally granted to municipalities. Zoning is an exercise of the police power through which the government controls land use; implicit in the concept is that the land being controlled belongs to a third party. It is only logical that the legislature would have stopped short of authorizing the Board to invoke the police power against itself.

It appears that TxDOT could legally issue permits for outdoor advertising signs on airport property only if the property is statutorily designated as commercial or industrial or if the legislature's action in turning over exclusive control of airport property to the D/FW Airport Board constitutes a delegation of zoning authority to the Board.

My staff and I are available to assist your office. Please call me at 305-9501 if you have any questions concerning this matter.

Sincerely,



Wm. G. Burnett, P.E.  
Executive Director