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State of Texas
House of Representatives
COMMITTEE ON LICENSING AND ADMINISTRATIVE PROCEDURES

RQ-0923-GA

October 11, 2010

The Honorable Greg Abbott
Attorney General of Texas
P.O. Box 12548
Austin, TX 78711-2548

RE: Whether the Eagle Pass Independent School District is subject to a City of Eagle Pass Ordinance which requires the District to expend funds for infrastructure where such infrastructure does not benefit the District or serve an educational purpose.

Dear Attorney General Abbott:

Please accept this letter as a request pursuant to Texas Government Code Section 402.042 for an opinion from your office regarding the application of Article III, Section 52 of the Texas Constitution, Sections 45.105 and 11.168 of the Texas Education Code, and Chapter 395 of the Local Government Code. Specifically, I seek your opinion on whether the Eagle Pass Independent School District is subject to a City of Eagle Pass ordinance which requires the District to expend funds for infrastructure where such infrastructure does not benefit the District or serve an educational purpose.

Background

The Eagle Pass Independent School District (the "District") has completed construction on a new school. The City of Eagle Pass Water Works System (the "City") has informed the District that the District must provide an extension of a waterline along the front of District property continue the waterline to extend 20 feet beyond the District property line. The City of Eagle Pass points to Subdivision Ordinance, Section 23-67, "Water supply and distribution" and its exhibit, "Rules and Regulations Governing the Installation of Water Mains and Services Outside the City Limits" (the "City Ordinance") as its authority to require the District to provide such an extension. The City contends that the waterline extension will arguably benefit the District by conveying water to the property. However, the District believes this waterline extension will not



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serve any purpose for the District. In order to adhere to the City Ordinance, the District will be required to expend funds and resources it believes it cannot legally expend.

Discussion of Law

Education Code Provisions

Section 45.105 of the Texas Education Code expressly forbids any expenditure of school funds except for certain enumerated purposes "and for other purposes necessary in the conduct of the public schools determined by the board of trustees." See TEX. EDUC. CODE ANN. § 45.105(c) (Vernon 2005). It appears that compliance with the City Ordinance would require the District to expend school funds on something other than the enumerated purposes in section 45.105. As such, the District believes expending funds to comply with the City Ordinance requires the District Board of Trustees to determine and approve that such an expenditure is necessary in the conduct of the public schools. *City of Garland v. Garland Indep. Sch. Dist.*, 468 S.W.2d 110, 111-112 (Tex. App.—Dallas [5th District] 1971, n.r.e.). While the City contends that the waterline extension is arguably necessary to provide water to District property and to comply with the City Code (23-67 and any building code regulations that require water to buildings), the District believes it cannot expend funds to comply with the City Ordinance without the District Board of Trustees' determination and approval that such an expenditure is necessary in the conduct of the public schools. The Fifth District Court of Appeals has ruled that a school district could not expend funds on street improvements mandated by a city unless the school district's board of trustees first determined that such expenditure was "necessary in the conduct of the public schools." *Id.* The District believes this case is analogous to the City requiring certain waterline infrastructure construction and, as such, may be prevented from expending funds to comply with the City Ordinance.

Section 11.168 of the Texas Education Code prohibits school districts from entering into an agreement authorizing the use of district employees, property, or resources for the provision of materials or labor for the design, construction, or renovation of improvements to real property not owned or leased by the school district. TEX. EDUC. CODE ANN. § 11.168 (Vernon Supp. 2009). In order to comply with the City Ordinance, the District will have to use District employees and resources to provide the material and labor necessary to construct the waterline extension into property not owned by the District. As a preliminary matter, your office may have to determine whether the City and the District are entering into an "agreement" for the construction of the waterline. In the past, you have held that a "charge or assessment imposed by a political subdivision" is not an agreement for purposes of section 11.168. Tex. Att'y Gen. Op. No. GA-0496 (2006) at 2-3. The City does not contend that the waterline extension constitutes an agreement; rather the City's position is that it is required infrastructure as provided in the



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City's subdivision regulations. However, the City's request to the District to extend a waterline and the District's compliance with such a request could be seen as entering into an agreement for purposes of section 11.168 because, *inter alia*, such an action requires the coordination of both parties. If such actions are viewed as entering into an agreement, the District would presumably be prohibited from complying with the City Ordinance pursuant to section 11.168.

State Constitutional Concerns

Article III, Section 52 of the Texas Constitution prohibits a governmental entity from lending its credit or gratuitously granting public money or things of value in aid of any individual, association, or corporation. TEX. CONST. art. III, § 52. Courts have held that "[t]he clear purpose of this constitutional provision is to prevent the gratuitous application of funds to private use." *Brazoria County v. Perry*, 537 S.W.2d 89 (Tex. App.—Houston [1st District] 1976, no writ) *citing Byrd v. City of Dallas*, 6 S.W.2d 738, 740 (1928). By expending District resources and funds to extend a waterline which does not benefit the District and which additionally extends 20 feet onto public property (not owned by the District), arguably, the City Ordinance is requiring a gratuitous expenditure of the District's public funds for purposes unrelated to the school's public business. Such an expenditure would appear to be prohibited by the Constitution. The Constitution does not, however, prohibit expenditures which incidentally benefit private interests when the expenditure is made for the direct accomplishment of a legitimate public purpose. *Id.* The City contends that the waterline extension for the District is not to aid any individual, association or corporation; rather, the City believes the waterline extension is for a public use — the benefit of the City's citizens attending the District. As such, guidance is needed from you regarding whether the District is constitutionally prohibited from complying with the City Ordinance.

Local Government Code Provisions

Section 395.022(b) of the Local Government Code states that a school district is not required to pay an "impact fee" imposed by chapter 395 of the Local Government Code unless a school district's board of trustees consents to the payment of such fee by entering into a contract with the political subdivision that imposes the fee. TEX. LOCAL GOV'T CODE ANN. § 395.022(b) (Vernon Supp. 2009). An impact fee is a charge or assessment imposed by a political subdivision against new development in order to recoup costs of capital improvements including contributions in aid of construction for certain capital improvements. TEX. LOCAL GOV'T CODE ANN. § 395.001(4) (Vernon Supp. 2009). The City contends that the waterline extension is not an impact fee because it is specifically excluded from the definition of an impact fee. However, the District believes the City Ordinance could be interpreted as requiring the District to pay an impact fee by requiring the District to construct the waterline. If this interpretation is correct, the District believes it cannot be required to construct the waterline extension without the consent of



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the District's board of trustees. Although, your office may be limited in providing an opinion regarding the application of chapter 395 as you have stated before that "whether any particular fee constitutes an "impact fee" under chapter 395 would require the resolution of facts and, as a result, cannot be determined in an attorney general opinion (see Tex. Att'y Gen. Op. No. GA-0637 (2008) at 5), any guidance regarding the application of chapter 395 is appreciated.

Given all of the above, we seek your opinion on this matter. If you have any questions please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink that reads "Edmund Kuempel". The signature is written in a cursive style with a large initial "E" and "K".

Edmund Kuempel

EK:bg