

**HENSLEE
SCHWARTZ** LLP
ATTORNEYS AT LAW

306 W. 7TH STREET
SUITE 1045
FT. WORTH, TEXAS 76102

AUSTIN • DALLAS • FT. WORTH • HOUSTON • SAN ANTONIO

PHONE: (817) 810-0717
TOLL FREE: (866) 810-0717
FAX: (817) 810-0811

DERON ROBINSON
Attorney at Law
drobinson@hensleeschwartz.com

November 28, 2011

Jimmy Cox
Superintendent
Waskom Independent School District
P.O. Box 748
Waskom, TX 75692

Via Email to jcox@waskomisd.net

Re: Real Property Sale Process

Dear Mr. Cox:

You've asked for guidance regarding the potential sale of real property owned by the Waskom ISD (the "District") by the Waskom ISD Board of Trustees (the "Board"). This Opinion Letter (the "Letter") will provide a discussion and an overview of the sales process. The Texas Education Code (the "Education Code" or "TEC") expressly provides the Board authority to dispose of or sell District property. Section 11.151 of the Education Code states all "rights and titles to the school property of the district, whether real or personal, shall be vested in the trustees and their successors in office. The trustees may, in any appropriate manner, dispose of property that is no longer necessary for the operation of the school district." TEC §11.151(c). The Education Code, along with Texas Local Government Code §272.001 ("§272.001"), provide a specific process for the sale of real property, which is outlined below.

My understanding is that the Board is only considering the sale of real property. Nonetheless, I feel it prudent to mention that in some circumstances a school district may be allowed to lease real property. Unlike the sale process, there is no express statutory authority for a school district to enter into a lease of school land. However, Texas courts have concluded that implied authority exists which allows a school board of trustees to lease school real property to another entity. *See Royse Independent School District v. Reinhardt*, 159 S.W. 1010 (Tex. Civ. App.-Dallas 1913, writ ref'd). Accordingly, in order to determine whether such a conveyance would be legal we must analyze existing court decisions and Texas Attorney General (the "Attorney General") Opinions to provide guidance. In addition, State law does allow for the donation of real property in a few very limited circumstances. Education Code §11.1541(a) states that the "board of trustees of an independent school district may, by resolution, authorize the donation of real property and improvements formerly used as a school campus to a municipality, county, state agency, or nonprofit organization". Such a grant may only be done

November 28, 2011

Page 2

when certain requirements are met. These two methods for disposal of real property are quite unique and each comes with certain stipulations. I want the Board to know that these methods are available; however any serious discussions toward either avenue should include our firm.

SALE PROCESS: NOTICE, BIDDING, & FAIR MARKET VALUE

Statutory guidance for the process of a school district's sale of real property is found in Texas Education Code §11.154, Texas Local Government Code §272.001, and WISD Policy CDB (Legal). Texas Education Code §11.154 provides that the Board may, by resolution, authorize the sale of property, which allows the Board president to execute a deed of conveyance. The statute requires that the deed of conveyance recite the resolution of the Board. Education Code §11.154 also allows the District to employ a licensed real estate broker or salesperson for assistance. In addition to TEC §11.154, Texas Local Government Code §272.001 establishes the procedure that governmental units must follow when selling real property.

In general, §272.001(a) requires that: (1) the District provide notice (the "Notice") to the general public of the intent to sell land; (2) the Notice must include a description of the land, including its location, and the procedure by which sealed bids to purchase the land or offers to exchange the land may be submitted; (3) the Notice must be published on two separate dates in a newspaper of general circulation in either the county in which the land is located or, if there is no such newspaper, in an adjoining county; (4) the sale or exchange of land cannot occur until 14 days after the publication of the second advertisement. The intention of these requirements is very clear. Texas Courts have explained that the purpose of §272.001 is to: (1) ensure that public property is not disposed of for less than true value; and, (2) prevent favoritism, stimulate competition, and secure the best price for the property. *See City of Dallas v. McKasson*, 726 S.W.2d 173 (Tex. App.--Dallas 1987, writ ref'd n.r.e.); *West Orange-Cove Consol. Indep. Sch. Dist. v. Smith*, 928 S.W.2d 773 (Tex. App.--Beaumont 1996, no writ).

The necessity to obtain true value or fair market value is the fundamental requirement for conveyances of public property. When selling, leasing or otherwise conveying property, be it real or personal, it is imperative the Board ensure that the District receives fair market value for that property to comply with state law. Article III, section 52(a) of the Texas Constitution prohibits the legislature from authorizing any political subdivision of the state "to lend its credit or to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever." Tex. Const. art. III, § 52(a). A companion provision in article III, section 51(a) states that the "Legislature shall have no power to make any grant or authorize the making of any grant of public moneys to any individual, association of individuals, municipal or other corporations whatsoever." Tex. Const. art. III, § 51(a). The Texas Supreme Court has explained that the general purpose of both sections 51 and 52 is to prevent the gratuitous gift or application of public funds to private individuals or entities. *See Byrd v. City of Dallas*, 6 S.W.2d 738, 740 (Tex. 1928); *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717 (Tex.

November 28, 2011

Page 3

1995). The Supreme Court and numerous opinions of the Attorney General have also established that payments of public funds or conveyances of public property are not gratuitous or illegal if the political subdivision receives return consideration or the transfer of funds is for a legitimate public purpose. *See Tex. Mun. League Intergovernmental Risk Pool v. Tex. Workers' Comp. Comm'n*, 74 S.W.3d 377, 383 (Tex. 2002); *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d at 740; *Byrd*, 6 S.W.2d at 740; Tex. Att'y Gen. Op. Nos. GA-0188 (2004); GA-0078 (2003); JC-0113 (1999); GA – 0321 (2004). Accordingly, the Board must obtain fair market value or some consideration in any exchange for property.

I recommend that the District obtain an appraisal before beginning the sales process in order to ensure the District is receiving fair market value for the property. Although §272.001 is silent on the requirement that the District obtain an appraisal for use in evaluating bids, at least one Texas court has concluded that an appraisal to determine fair market is an “implicit requirement” of §272.001. *See Collins v. County of El Paso*, 954 S.W.2d 137 (Tex. App. El Paso 1997). In addition, the Attorney General has further explained that §272.001 prohibits the conveyance of public land for less than fair market value. *See Tex. Att'y Gen. Op. No. DM-232* (1993). However, Local Government Code §272.001(b) does provide a limited exception to the requirement for obtaining fair market value. This provision allows the District to sell property to abutting landowners for less than fair market value. Local Government Code §272.001(b) states, in part: “The land and those interests described by this subsection may not be conveyed, sold, or exchanged for less than the fair market value of the land or interest unless the conveyance, sale, or exchange is with one or more abutting property owners who own the underlying fee simple.” It should be noted that although this provision permits the District to sell land for less than fair market value to abutting landowners, this provision does not require the District to do so. *Soncy Rd. Prop., Ltd. v. Chapman*, 259 F. Supp. 2d 522, 529 (N.D. Tex. 2003). Nonetheless, even if this exception may apply I recommend obtaining an appraisal of the property in order to create a basis for establishing value. Keep in mind that any conveyance may be subject to challenge in a County or District court. Having a proper appraisal done by a licensed professional will create a significant impediment to any such challenge brought regarding the value received for the property.

EXCEPTIONS TO NOTICE AND BIDDING REQUIREMENTS OF §272.001(a)

There are certain exceptions enumerated to the notice and bidding requirements of §272.001(a) enumerated in §272.001(b)-(d). Based on the limited information I have it is impossible for me to determine if any of these exceptions apply. An abbreviated list of exceptions enumerated in Texas Local Government Code §272.001(b)-(c) includes:

1. Narrow strips of land, or land that because of its shape, lack of access to public roads, or small area cannot be used independently under its current zoning or under applicable subdivision or other development control ordinances;

November 28, 2011

Page 4

2. Streets or alleys, owned outright or used by easement;
3. Land or a real property interest originally acquired for streets, rights-of-way, or easements that the political subdivision chooses to exchange for other land to be used for streets, rights-of-way, easements, or other public purposes, including transactions partly for cash;
4. Land that the District wants to have developed by contract with an independent foundation;
5. A real property interest conveyed to a governmental entity that has the power of eminent domain; or
6. The land or interests described by items 1 and 2 above may be sold to:
 - a. Abutting property owners in the same subdivision if the land has been subdivided; or
 - b. Abutting property owners in proportion to their abutting ownership, and the division between owners must be made in an equitable manner. This section does not require the Board to accept any bid or offer or to complete a sale or exchange.

In addition to the exceptions listed above, §272.001(j) allows the District to donate or convey real property to an institution of higher education without complying with the requirements of §272.001(a) and to make such a conveyance for less than the property's fair market value. Such a conveyance must be done under terms and conditions which will ensure the properties maintain a public purpose and inure to the benefit of the public. In addition, Texas Local Government Code §272.005 allows the District to lease property to another political subdivision or agency of the state or federal government without following the requirements of §272.001(a).

These provisions are permissive, and do not create a requirement for the District to accept any bid or offer for sale. §272.001(d). Again, while the exceptions found in §272.001(b)-(c) are exceptions to the notice and bid requirements of §272.001(a), they are not exceptions to the requirement to obtain fair market value in exchange for property. If you believe any of these special circumstances may apply, please contact me so that I may assist you in moving forward in a very deliberate and cautious manner.

November 28, 2011

Page 5

OUTLINE OF THE SALE PROCESS

As discussed, it is imperative that the District obtain fair market value for any conveyance or sale of real property, even under the narrow exceptions found in §272.001(b)-(d). For this reason I cannot stress enough the importance of obtaining a property appraisal prior to soliciting bids for the sale of property in order to ensure that the District is obtaining fair market value. Below is an outline which succinctly numerates the process for a sale of real property. As mentioned above, I do not believe any of the exceptions found in Texas Local Government Code §272.001(b)-(d) apply in this instance. Accordingly, the outline below assumes that there are no special circumstances which would exempt the property sale from the requirements of §272.001. In addition, the outline assumes that there is no outstanding Bond Debt on the property.

1. Once the Board determines that the real property is no longer needed for school purposes, they may take action authorizing the administration to advertise property for sale. Although not required, I highly recommend the Board pass a resolution memorializing the authorization.
2. The District should obtain an appraisal of the property by a licensed appraiser. The District must obtain fair market value for the property, and legally an appraisal is conclusive proof of fair market value. I suggest obtaining an appraisal and using this as the minimum bid.
3. The District then must perform a sealed bid process with these requirements:
 - a. a notice shall be published that includes a description and location of the land and the procedure by which sealed bids may be submitted; and
 - b. the notice must be published on two separate dates, and the sale cannot be completed any earlier than the 14th day after the date that the 2nd notice is published in the newspaper.
4. The Board may then pass a resolution which:
 - a. determines the highest and best bid; and
 - b. authorizes the District to enter into an earnest money contract with the highest and best bidder, which I can create for the District; and
 - c. authorizes the Board President to execute an earnest money contract, deed conveying the property, and other documents necessary to close the transaction.

November 28, 2011

Page 6

5. Note that the deed conveying the property must recite the Board resolution authorizing the sale.
6. Note that the requirements of the statewide desegregation order, usually referred to as Civil Action 5281, no longer apply to proper conveyances for WISD. Prior to September 2010, all Texas school districts were required to obtain the approval of the TEA and the Commissioner of Education prior to execution of any real property conveyance. Only those nine districts that were party to the original case are now subject to the order. Those districts include: Buffalo ISD; Colmesneil ISD; Daingerfield ISD; Fairfield ISD; Malakoff ISD; Nacogdoches ISD; Oakwood ISD; Smithville ISD; and Whitewright ISD.
7. The sale may then be completed according to the terms in the Earnest Money Contract.

Finally, as you know, any action taken must comply with the Texas Open Meetings Act (the "TOMA") found in Texas Government Code Chapter 551. The TOMA requires that the public receive advance notice of the subjects to be discussed so that citizens can decide if they would want to observe the meetings and that the meetings be open to the public, with a few exceptions. §551.002 & §551.041. One such exception to having meetings open to the public is found in §551.072 which authorizes governmental bodies to "conduct a closed meeting to deliberate the purchase, exchange, lease, or value of real property if deliberation in an open meeting would have a detrimental effect on the position of the governmental body in negotiations with a third person." This exception has been interpreted narrowly and literally by courts. Therefore, if you would like to conduct a closed session meeting to discuss the property conveyance, please contact me beforehand so that we might determine if the exception applies.

This should illustrate a straightforward method for the sale of real property. I can aid throughout the process. If the Board determines to move forward with the sales process, I can provide assistance on the RFP process, including creating the required Notice, the required resolutions, and the sale itself. In particular, I prefer to create the earnest money contract, as the standard earnest money contract will not contain the information required for the District to make the sale. Keep in mind that the majority of court cases involving District property concern the sale or purchase of real property. If you or any of the Trustees should have any questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "Deron Robinson", written in a cursive style.

Deron Robinson

HENSLEE SCHWARTZ LLP

November 28, 2011

Page 7

Cc: Rhonda Crass, Henslee Schwartz, LLP