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George S. Bayoud, Jr.
SECRETARY OF STATE

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VOTE
Every One Matters.

February 7, 1990

Mr. Marco A. Gomez
Elections Administrator
Bexar County
419 South Main
Suite 202
San Antonio, Texas 78204-1179

Election Law Opinion GSB-1

Re: Whether a public school may charge for expenses that are incurred from the use of the building as a polling place prior to and after normal business hours.

Dear Mr. Gomez:

This is in response to your letter, in which you inquired about House Bill 642, which was recently enacted by the 71st Legislature. You asked whether a public school may seek reimbursement for actual expenses incurred as a result of the use of the building for election purposes prior to and after normal business hours.

This official election law opinion is rendered by me as chief elections officer of the state in accordance with Tex. Elec. Code Ann. §§ 31.001(a), 31.004(a) (Vernon 1986).

House Bill 642 amended Section 43.033(a) of the Texas Election Code to read as follows:

> No charge may be made for the use of a public building for a polling place if the day of the election is a day on which the building is normally open for business. If the day of the election is a day on which the building is not normally open for business, a charge may be made only for reimbursement for the actual expenses resulting from the use of the building in the election.

Before the legislature amended this section, the statute read:

> No charge may be made for the use of a public building for a polling place except for reimbursement for the actual expenses resulting from the use of the building in the election.

Under the previous law, schools would charge for custodial fees and utility costs which were incurred before and after business hours on election day. These "actual expenses" included the cost for utilities used before and after business hours, as well as the wages paid to a custodian to open and close the building before and after business hours. The unequivocal language of the new statute serves as evidence of the legislative intent to prohibit <u>any</u> charges for use of the building on days the building is open at all, even for part of the day. It does not qualify what types of charges may be made, as provided by the previous law. It simply states that if the building is open, no charge may be made for its use. Allowing schools to charge for expenses incurred before and after business hours would render House Bill 642 ineffective, as it would constitute no change at all from the previous law.

The legislative intent and the clear language of House Bill 642 indicate that a public school may not seek reimbursement for the actual expenses resulting from the use of its building as a polling place prior to and after normal business hours.

There have been concerns voiced as to the legality of House Bill 642, in light of Section 20.48(a) of the Education Code and Article VII, Section 3, of the Texas Constitution. Section 20.48(a) of the Education Code reads as follows: "The public free school funds shall not be expended except as provided by this section."

The section goes on to enumerate the types of expenses that may be paid out of the public free school funds. Election expenses are not included in Section 20.48(a) of the Education Code. It is, therefore, argued that expenses incurred before and after business hours on election day do not fall within the authorized expenditures of the public free school funds.

It has long been held in Texas that an act which is later in point of time controls or supersedes an earlier act insofar as the two are inconsistent and irreconcilable. Esquivel v. Reeves, 555 S.W.2d 152 (Tex. Civ. App.–El Paso 1977, no writ); Texas State Board of Pharmacy v. Kittman, 550 S.W.2d 104 (Tex. Civ. App.– Tyler 1977, no writ). If statutes have conflicting provisions, the earlier statute will be held to be repealed to the extent of the conflict; otherwise, it will be construed as remaining in effect. Mingus v. Kadane, 125 S.W.2d 630 (Tex. Civ. App.–Fort Worth 1939, writ dism'd judgmt cor.) The statute later in point of time should prevail as expressing the present legislative intent. Halsell v. Texas Water Commission, 380 S.W.2d 1 (Tex. Civ. App.–Austin 1964, writ ref'd n.r.e.). House Bill 642 was enacted in 1989, and therefore it controls and supersedes Section 20.48(a) of the Education Code, which was adopted in 1969. We presume that the Legislature intended to amend Section 20.48(a) of the Education Code to the extent it is in conflict with House Bill 642.

The second argument against House Bill 642 is based on Article VII of the Texas Constitution. Section 3 of Article VII provides for funds that are to be used annually "for the benefit of the public free schools" of the state. Over time, many claims have arisen under this section to determine if certain expenses are sanctioned expenditures of the public school funds. It has been claimed that because public school funds and property may only be used for the benefit of the public free schools, the use of such property or funds to hold an election in a school building would divert school funds or property, or both, from their intended use.

Having determined that the legislative intent of House Bill 642 was to prevent any charge whatsoever for the use of a public building if the election falls on a day when the building is ordinarily open, we look at the constitutionality of such statute when applied to school districts.

It is well settled in Texas that every statute is presumed to be valid and that the Legislature acted in light of the Constitution, unless the contrary is clearly apparent. Watson v. Sabine Royalty Corporation, 120 S.W.2d 938, 941 (Tex. Civ. App.-Texarkana 1938, writ ref'd); Mumme v. Marrs, 25 S.W.2d 215, 217 (Tex. Civ. App.--San Antonio 1930), writ ref'd, 120 Tex. 383, 40 S.W.2d 31 (1931). Bearing this rule of statutory construction in mind, we turn to the cases construing the use of school district property for purposes other than educational purposes.

Under the Texas Constitution, public education is a function of the government, and in the conduct of which the Legislature has all legislative power not denied it by the Constitution. Mumme v. Marrs, 120 Tex. at ___, 40 S.W.2d at 35. Public schools are state schools and control of their operation, except as otherwise provided, is included among the powers conferred upon the Legislature. Id. The Legislature, in turn, has delegated the "exclusive power to manage and govern the public free schools" to the board of trustees of independent school districts. See Tex. Educ. Code Ann. § 23.26 (Vernon 1987). The courts in Texas have long recognized that the determination of the use of school property is vested in the school trustees and that the board of trustees has exclusive power to manage and control school property. Trustees of Independent School Dist. of Cleburne v. Johnson County Democratic Executive Committee, 122 Tex. 48, _, 52 S.W.2d 71, 72 (1932); see also Op. Tex. Att'y Gen. No. JM-1000 (1988); Op. Tex. Att'y Gen. No. JM-531 (1986); Op. Tex. Att'y Gen. No. M-1047 (1972). The Board's discretion is limited to the extent that use of school property for non-school purposes will not interfere with the operation of the school property for school purposes. River Road Neighborhood Association v. South Texas Sports, 720 S.W.2d 551 (Tex. App.--San Antonio 1986, writ dism'd); Royse Independent School District v. Reinhardt, 159 S.W. 1010 (Tex. Civ. App.--Dallas 1913, writ ref'd); Op. Tex. Att'y Gen. No. JM-531 (1986); Op. Tex. Att'y Gen. No. M-1047 (1972). In South Texas Sports, the court did not question the school district's right to permit others, including private persons or organizations, to use the district facilities during times and under conditions which did not interfere with the use of the facilities for school purposes. 720 S.W.2d at 559. In Royse, the trustees had leased public school property to a private organization which used the property as a baseball field. In allowing such a non-educational use of school property, the Court of Civil Appeals compared the powers conferred to a board of trustees to the powers granted to a city council over the property of a city. The court stated that, when parts of a school building are not being used for school use or when it does not interfere with the building's public use, the trustees could permit the school building to be used either gratuitously or for compensation, for private purposes.

The most forceful case for the constitutionality of using school property and funds to hold an election is the per curiam memorandum stated by the Supreme Court in refusing the application for a writ of error in South San Antonio Independent School District v. Martine, 275 S.W. 265 (Tex. Civ. App.--San Antonio), writ ref'd per curiam,

115 Tex. 145, 277 S.W. 78 (1925). In that case, the Court of Civil Appeals had held that the district court had no jurisdiction to entertain a suit for injunction against the school board prior to a submission of such complaint to the school authorities. The appellee had sought an injunction to prevent the board of trustees from permitting the use of school property for any purpose other than school purposes. The complaint arose because the electric lights and water facilities, as well as the upkeep and maintenance of the building, were being paid for out of school taxes, and the board of trustees had allowed various organizations to use the building for sectarian and political purposes. The appellee claimed that all the people that used the building for other than school-related purposes used water andelectricity, and increased expenses and caused wear and tear on the building. Such use, the appellee claimed, would be a diversion of school property contrary to its intended use.

In refusing the application for writ of error, the Supreme Court held that, although the district court had jurisdiction over a suit to prevent the improper use of school property, the petition in that case failed to disclose an abuse of discretion on the part of the trustees. Therefore, allowing the gratuitous use of school property for non-school purposes during non-school hours has been held not to be an abuse of discretion on the part of the board of trustees.

If the board of trustees, as an agency of the state who receives all of its authority from the Legislature, may lawfully permit such use under its conferred powers, the Legislature, which creates the board and delegates such authority, may itself grant the authority to so use the property and may direct the board to permit such use. It is fundamental that an agent can have no greater authority than the principal, and once we concede that the board may permit such use of school property, we must admit that the Legislature may require such use. Trustees of Independent School Dist. of Cleburne v. Johnson County Democratic Executive Committee, 52 S.W.2d 68 (Tex. Civ. App.--Waco), rev'd on other grounds, 122 Tex. 48, 52 S.W.2d 71 (1932).

SUMMARY

House Bill 642 prohibits any charge for expenses incurred by a school district for the use of a school building as a polling place on a day when the building is open for business. This includes expenses incurred before and after regular school hours. Such gratuitous use of a school building for election purposes is not an unconstitutional diversion of school property or funds.

Sincerely,

George S. Bayoud, Jr.
Secretary of State

APPROVED:

Pete Wassdorf
Assistant Secretary of State and General Counsel

PREPARED BY:

Gisela D. Triana
Staff Attorney

APPROVED:

OPINION COMMITTEE

Tom Harrison, Chairman
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