



## Use of Public Funds by Community Colleges<sup>1</sup>

**Public funds** are funds from taxes or fees imposed by a governmental entity to raise revenues and any funds under the control of a governmental entity. Therefore, community college funds, including local tax revenue and fees, funds from state and federal entities, and cash and other assets obtained through gifts and fundraising, are considered public funds. State and federal law provide direction as to the appropriate use of those funds. Court and Texas attorney general opinions interpreting those provisions provide additional guidance. *San Antonio Bldg. & Constr. Trades Council v. City of San Antonio*, 224 S.W.3d 738 (Tex. App.—San Antonio 2007, pet. denied) (adopting the definition of public funds from Tex. Att’y Gen. Op. No. DM-489 (1998)); *see also* Tex. Gov’t Code § 552.003(5) (defining public funds under the Texas Public Information Act).

### **Restrictions on the Use of Public Funds**

#### ***Texas Education Code—Expenditures Must Be “Necessary”***

The Texas Education Code limits expenditures of community college funds to specifically enumerated uses and purposes necessary in the conduct of the public schools determined by the board of trustees. Tex. Educ. Code §§ 45.105(c), 130.084(a); *see also* Tex. Att’y Gen. Op. No. WW-892 (1960) (applying the predecessor to section 45.105(c) to colleges by virtue of the predecessor of section 130.804(a)).

The term *necessary* should be read broadly to include purposes “appropriate or conducive to the conduct of a public school rather than indispensable thereto.” Tex. Att’y Gen. Op. No. KP-204 (2018) (quoting Tex. Att’y Gen. Op. No. JM-1265 (1990)).

No clear test or definition of *necessary* has been established. A community college board has the initial discretion to determine whether an expenditure is necessary, but the question whether a true public purpose has been served is ultimately up to the state courts. Tex. Att’y Gen. Op. No. KP-11 (2015); *see also Thomas v. Beaumont Heritage Soc.*, 296 S.W.3d 350, 354 (Tex. App.—Beaumont 2009, no pet.) (holding the trial court had the authority to enjoin the use of public funds for demolition of a school despite the school district’s determination to the contrary).

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<sup>1</sup> An electronic version of this document is available on [TASB College eLaw](http://tasb.org/services/community-college-services/resources/tasb-college-elaw/documents/cc-use-of-public-funds.pdf) at [tasb.org/services/community-college-services/resources/tasb-college-elaw/documents/cc-use-of-public-funds.pdf](http://tasb.org/services/community-college-services/resources/tasb-college-elaw/documents/cc-use-of-public-funds.pdf)

### ***Texas Education Code—Expenditures Must Be Budgeted***

The governing board of a community college must establish an itemized operations budget and furnish it to the Texas Higher Education Coordinating Board. Tex. Educ. Code §§ 51.001, .0051.

### ***Texas Constitution—Expenditures Must Have a Public Purpose***

The Texas Constitution contains several restrictions on the use of public funds:

- ***Tex. Const. art. III, § 44:*** “The Legislature shall provide by law for the compensation of all officers, servants, agents and public contractors, not provided for in this Constitution, but shall not grant extra compensation to any officer, agent, servant, or public contractors, after such public service shall have been performed or contract entered into, for the performance of the same; nor grant, by appropriation or otherwise, any amount of money out of the Treasury of the State, to any individual, on a claim, real or pretended, when the same shall not have been provided for by pre-existing law; nor employ any one in the name of the State, unless authorized by pre-existing law.”
- ***Tex. Const. art. III, § 50:*** “The Legislature shall have no power to give or to lend, or to authorize the giving or lending, of the credit of the State in aid of, or to any person, association or corporation, whether municipal or other, or to pledge the credit of the State in any manner whatsoever, for the payment of the liabilities, present or prospective, of any individual, association of individuals, municipal or other corporation whatsoever.”
- ***Tex. Const. art. III, § 51:*** “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; provided that the provisions of this Section shall not be construed so as to prevent the grant of aid in cases of public calamity.”
- ***Tex. Const. art. III, § 52(a):*** “Except as otherwise provided by this section, the Legislature shall have no power to authorize any county, city, town or other political corporation or 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, or to become a stockholder in such corporation, association or company.”
- ***Tex. Const. art. III, § 53:*** “The Legislature shall have no power to grant, or to authorize any county or municipal authority to grant, any extra compensation, fee or allowance to a public officer, agent, servant or contractor, after service has been rendered, or a contract has been entered into, and performed in whole or in part; nor pay, nor authorize the payment of, any claim created against any county or municipality of the State, under any agreement or contract, made without authority of law.”

- **Tex. Const. art. XI, § 3:** “No county, city, or other municipal corporation shall hereafter become a subscriber to the capital of any private corporation or association, or make any appropriation or donation to the same, or in anywise loan its credit; but this shall not be construed to in any way affect any obligation heretofore undertaken pursuant to law or to prevent a county, city, or other municipal corporation from investing its funds as authorized by law.”

### **Compensation Increases**

Texas Constitution article III, section 53 prohibits the grant of extra compensation to a public employee or contractor after service has been rendered or performance has begun on a contract. While the language of Section 53 applies to municipalities and counties, the Texas Commission on Appeals concluded that these terms include public school districts. In addition, Texas Constitution article III, section 44 prohibits the legislature from granting extra compensation to a public employee after a contract has been entered into under pre-existing law. Tex. Const. Art. III, §§ 44, 55; *see also*, *Harlingen Indep. Sch. Dist. v. C.H. Page & Bro.*, 48 S.W.2d 983 (Tex. Comm’n App. 1932) (holding that public school districts are municipalities within the meaning of section 53).

The purpose of these constitutional restrictions is to prevent political subdivisions from giving away public money for services previously rendered, for which no valid legal authorization exists or for which the public would receive no return. In other words, once a person has agreed to provide services to a college at a certain price, the college must have a legal reason for paying more than the person bargained for. Tex. Att’y Gen. Op. Nos. GA-368 (2005), GA-204 (2004).

### **The Three-Part Test**

The Texas attorney general has long held that Texas Constitution article III, sections 51 and 52 do not preclude the state or a political subdivision from making an expenditure of public money that benefits a private person or entity if the appropriate governing body follows a two-part test by (1) determining in good faith that the expenditure serves a public purpose and (2) placing sufficient controls on the transaction to ensure that the public purpose is carried out. Tex. Att’y Gen. Op. No. JC-113 (1999).

The Texas Supreme Court created a three-part test to determine if a statute accomplished a public purpose. In 2003, the attorney general adopted this three-part test to determine constitutional use of public funds and concluded that the three-part test also applied to political subdivisions exercising delegated legislative powers. The three-part test requires governmental bodies to: (1) ensure that the predominant purpose is to accomplish a public purpose, not to benefit private parties; (2) retain public

control over the funds to ensure that the public purpose is accomplished and to protect the public's investment; and (3) ensure that the political subdivision receives a return benefit. *Tex. Mun. League Intergovernmental Risk Pool v. Tex. Workers' Comp. Comm'n*, 74 S.W.3d 377 (Tex. 2002); Tex. Att'y Gen. Op. No. GA-76 (2003).

As the governing body of a community college, the board of trustees is empowered to make an initial determination of whether a proposed expenditure meets the three-part test. Generally, the analysis is thought to be embedded in the board's financial decision-making, such as adoption of the college's budget, setting the compensation plan, and entering contracts for goods and services. Occasionally, however, a college will face a determination about an expenditure that either was not anticipated in the adoption of the budget or otherwise presents a question about the public purpose of the use of funds. In these instances, the best practice is to place the proposed expenditure on a board agenda for board approval after consideration of the three-part test and amend the budget as necessary. See Tex. Att'y Gen. Op. No. LO-93-93 (1993) (finding the board of trustees of an independent school district must first determine whether an expenditure serves a public purpose).

## **1. Public Purpose**

The constitution does not bar a governmental expenditure that "incidentally benefits a private interest if it is made for the direct accomplishment of a legitimate public purpose." *Brazoria County v. Perry*, 537 S.W.2d 89, 91 (Tex. App.—Houston [1st Dist.] 1976, no writ); see also *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 740 (Tex. 1995) (stating a "transfer of funds for a public purpose, with a clear public benefit received in return, does not amount to a lending of credit or grant of public funds in violation of Article III, Sections 51 and 52."); Tex. Att'y Gen. Op. No. KP-40 (2015) (opining that a community college may in some instances expend public funds to reimburse legal expenses of an officer or employee incurred in litigation designed to impact the college's work).

## **2. Sufficient Controls**

For colleges in particular, the board of trustees must determine that an expenditure serves a valid college purpose and must impose sufficient controls, subject to judicial review. Tex. Att'y Gen. Op. No. GA-252 (2004) (noting that a college's board of trustees must include sufficient controls in a lease to ensure the public purpose is carried out).

Whether sufficient control measures are in place for an expenditure is not determined by who implements the control measures but rather by whether such controls were put into place at the time the expenditure was made. Tex. Att'y Gen. Op. No. KP-99 (2015) (noting that the fact that the trustees had been replaced by a board of managers did not affect whether control measures were put into place when the expenditure was made).

### **3. Return Benefit**

A college board's evaluation of an expenditure of public funds to benefit a private person or entity requires a determination that the contemplated expenditure furthers a public purpose; that the board retains sufficient control over the funds to ensure the public purpose is accomplished; and through this control, the college receives a benefit. It is important to note that the board's determination that the expenditure would serve a public purpose must be made prior to the expenditure. A college should not reimburse expenses requested after the fact. *Tex. Mun. League Intergovernmental Risk Pool v. Tex. Workers' Comp. Comm'n*, 74 S.W.3d 377 (Tex. 2002); Tex. Att'y Gen. Op. No. JC-432 (2001).

#### **Misuse of Public Funds**

A public official who misuses public funds could be subject to civil and criminal liability.

#### ***Civil Liability***

Generally, community college officers and employees are immune from civil liability. This official immunity protects government employees who perform discretionary functions in good faith and within their authority. *City of Lancaster v. Chambers*, 883 S.W.2d 650 (Tex. 1994). Without that protection, officers or employees could be liable for their actions in civil court. The attorney general has discussed the potential liability of a school board trustee for wrongful payment of public funds in a case involving payment of an employee's legal fees. The attorney general determined that official immunity must be decided on a case-by-case basis. Tex. Att'y Gen. Op. No. GA-115 (2003).

#### ***Criminal Liability***

Texas Penal Code section 39.02 defines the offense of abuse of official capacity:

A public servant commits an offense if, with intent to obtain a benefit or with intent to harm or defraud another, he intentionally or knowingly violates a law relating to the public servant's office or employment; or misuses government property, services, personnel, or any other thing of value belonging to the government that has come into the public servant's custody or possession by virtue of the public servant's office or employment.

Tex. Penal Code § 39.02(a).

The penalties for abuse of official capacity range from a Class A misdemeanor to a first-degree felony depending on the seriousness of the offense and the value of the thing misused. The district or county attorney with jurisdiction will decide whether and what charges should be filed. A governmental officer or employee who misuses public funds could be prosecuted under this law. Tex. Penal Code § 39.02.

To help interpret and clarify this law, the Texas Ethics Commission has stated the following:

This criminal statute does not reach every instance in which state resources are used for personal purposes. Rather, a violation occurs if a public servant “misuses” something of value belonging to the state and does so “with intent to obtain a benefit or with intent to harm or defraud another.” . . . [T]here are circumstances in which incidental use of state property for personal purposes is not a “misuse” for purposes of Penal Code section 39.02.

Op. Tex. Ethics Comm’n No. 372 (1997).

Examples of incidental use include making personal phone calls on state telephones, using state cell phones or computers for personal use, and attending to personal matters on state time for short time periods. These types of common, incidental uses likely will not be considered criminal violations; however, the value of any equipment use or activity that incurs a direct cost or impedes agency functions should be reimbursed to the governmental entity. Op. Tex. Ethics Comm’n No. 372 (1997).

### **Allowable Public Funds Expenditures**

The following are examples of expenditures that have received review by courts or the attorney general. In most cases, the expenditures were made by a governmental body other than a community college and the issue was whether the expenditures were prohibited by certain provisions in the Texas Constitution that also apply to community colleges. Any expenditure must also be allowable under any other applicable law. A community college should consult counsel regarding its specific facts when considering whether a particular expenditure is allowable.

<b>Gifts and Compensation</b>	<b>Allowable Expense of Public Funds?</b>
Living Quarters for Teachers	Yes. <sup>2</sup>

<sup>2</sup> A board of trustees may use public funds to provide living quarters for teachers, if determined by the board as necessary. See *Adams v. Miles*, 300 S.W. 211 (Tex. App.—San Antonio 1927), *aff’d*, 41 S.W.2d 21 (Tex. App.—San Antonio 1931) (holding that school district trustees had authority to spend budget surplus on living quarters for teachers).

Back Pay	Yes, if a mistake or error caused underpayment. <sup>3</sup>
Early Exit	Yes, if the college received consideration. <sup>4</sup>
Salary Advances	No. <sup>5</sup>
Extra Compensation (e.g., raises, bonuses)	Probably not. Extra compensation is prohibited after performance of the contract has begun. For contract employees, authorization for additional payment may be included in the contract or a board-adopted policy or compensation plan before the employee begins performance under the contract. A non-contract employee's future rate of pay may be raised between pay periods. <sup>6</sup>
Reimbursement at Retirement	Only for leave days accrued after adoption of the reimbursement policy. <sup>7</sup>

<sup>3</sup> If mistake or error causes an employee to be underpaid, the employee may be fully compensated for back pay to which the employee is entitled. *Douthit v. Ector County*, 740 S.W.2d 16 (Tex. App.—El Paso 1987, writ denied) (holding that a county may provide reasonable compensation to a constable as back pay to which he was entitled).

<sup>4</sup> A college's payments under an "early exit" plan would not be unconstitutional if the college received consideration from participating employees in return for the payments. *See N. Natural Gas Co. v. Conoco, Inc.*, 986 S.W.2d 603, 607 (Tex. 1998) (defining consideration for a valid agreement as "either a benefit to the promisor or a loss or detriment to the promise"); Tex. Att'y Gen. Op. No. JC-165 (2000) (providing a constitutional analysis for a school district's early exit plan).

<sup>5</sup> Salary advances to employees could constitute lending a college's credit in violation of Texas Constitution article III, section 52. *See Tex. Att'y Gen. Op. No. JM-1194* (1990) (stating that salary advances to municipal employees was clearly a loan within the constitutional prohibition).

<sup>6</sup> In the absence of additional consideration, a college may not increase a contract employee's annual compensation once part performance has been rendered. *See Tex. Att'y Gen. Op. No. MW-68* (1979) (considering a school district's increase of a teacher's salary under contract). Retroactive salary increases are also prohibited. *Tex. Att'y Gen. Op. Nos. JC-376* (2001) (stating a county's payment of one-time salary supplements to court personnel after services are rendered would violate Texas Constitution article III, section 53). Although gratuitous mid-contract pay raises are prohibited, the same effect may be achieved lawfully through the requirement of additional duties and consideration or by having contracted in advance for the raise. *Tex. Const. art. III, § 53; Fausett v. King*, 470 S.W.2d 770 (Tex. App.—El Paso 1971, no writ) (concluding that a constitutional violation would take place if a county retroactively increased salaries); *Tex. Att'y Gen. LO-94-067* (1994). *See also Hardison v. Beard*, 430 S.W.2d 53 (Tex. App.—Dallas 1968, writ ref'd n.r.e.) (permitting school districts to increase an employee's salary by executing new contract before old contract expires).

<sup>7</sup> Reimbursement to a retiring employee for unused leave is constitutional only if the benefit applies to days of leave accrued after adoption of the reimbursement policy. *Lee v. El Paso County*, 965 S.W.2d 668 (Tex. App.—El Paso 1998, pet. denied); *Tex. Att'y Gen. LO-98-99* (1998) (county may compensate employees for unused sick leave through "buy back" policy that is applied prospectively).

Paid Leave	Yes, with proper statutory authority. <sup>8</sup>
Gifts	Maybe. Small gifts might be allowable if the board of trustees determines they serve a legitimate public purpose. <sup>9</sup>
Release Time for Professional Organizations	Probably not. <sup>10</sup>
Travel Expenses of an Applicant	Yes, with proper statutory authority. <sup>11</sup>

<b>Board Member Expenses</b>	<b>Allowable Expense of Public Funds?</b>
Conference Attendance Costs	Yes, if the board of trustees makes certain determinations. <sup>12</sup>
Travel Expenses	Yes, if determined to be necessary in the conduct of public schools and to serve a public purpose. <sup>13</sup>
Spouse Travel Expenses	No. <sup>14</sup>

<sup>8</sup> Colleges have authority to adopt policies to pay their employees for accrued sick leave. See Tex. Att’y Gen. Op. No. DM-48 (1991) (school districts may adopt policies to pay employees for accrued sick leave).

<sup>9</sup> Plaques, flowers, frozen turkeys, and other small gifts to employees are allowable expenditures as long as the college board determines that these items serve a legitimate public purpose, such as increasing employee morale or productivity. See Tex. Att’y Gen. LO-96-136 (1996) (opining a county would likely not violate Texas Constitution article III, section 52 by providing small gifts to employees if county determined it would serve a public purpose).

<sup>10</sup> Providing “release time” to pay for an employee’s salary for the benefit of professional organizations is a prohibited gift of public funds if the board fails to articulate a public purpose or place adequate controls on that time to ensure that a public purpose is served. See Tex. Att’y Gen. Op. No. MW-89 (1979) (opining a school district’s policy allowing teachers to work for professional organizations while being paid by the district is unconstitutional grant of public funds to a private organization).

<sup>11</sup> A college may pay for the travel expenses associated with the recruitment and interviewing of prospective employees if there is a public purpose and adequate controls to further that purpose. See Tex. Att’y Gen. Op. No. DM-317 (1995) (stating a county may pay an applicant’s travel expenses in some circumstances).

<sup>12</sup> A college may pay conference registration fees for board members and employees, as well as pay for the lodging while the board member or employee is attending, so long as the board determines that the expenditures will serve a public purpose and attaches conditions to the expenditure to ensure accomplishment of that purpose. See Tex. Att’y Gen. Op. No. JC-80 (1999) (stating constitutional provisions do not prohibit a county from paying certain conference registration and lodging expenses for officials or employees in some circumstances).

<sup>13</sup> Reimbursement of travel expenses of board members is not illegal if the payment is determined to be necessary and serves a proper public purpose. See Tex. Att’y Gen. Op. No. JH-133 (1973) (stating school district’s reimbursement of certain travel or legal expenses for board members).

<sup>14</sup> Reimbursement of travel expenses for a board member’s spouse constitutes a prohibited gift of public funds. Tex. Att’y Gen. Op. No. MW-93 (1979) (concluding that school district trustees may not ordinarily pay travel expenses of spouses and others who accompany board members to board-related activities).

<b>Medical Expenses and Insurance</b>	<b>Allowable Expense of Public Funds?</b>
Student Medical Expenses	Maybe. The board must first determine the medical costs and associated travel costs for a student injured at the college or during a college-related activity are necessary in the conduct of the college. <sup>15</sup>
Student Insurance	Yes, if determined to be necessary in the conduct of the college. <sup>16</sup>
Trustee Insurance	Yes. <sup>17</sup>

<b>Legal Defense Costs and Civil Fines</b>	<b>Allowable Expense of Public Funds?</b>
Civil Suit Defense Costs	Maybe. <sup>18</sup>
Criminal Defense Expenses	Potentially, but not until the outcome of the prosecution is known and only if the payment will serve a public interest. <sup>19</sup>

<sup>15</sup> The attorney general has determined that public expenditures cannot lawfully benefit private individuals in ways that are out of proportion to the overall public benefit. Tex. Att’y Gen. Op. Nos. JM-220 (1984), JM-65 (1983). However, the attorney general also determined that a school board may pay medical costs and associated travel costs for a student injured at school or during a school-related activity if the expenditures are necessary in the conduct of the school. The voluntary provision of travel costs does not constitute a “gift” of public funds as long as the expenditure’s predominant purpose is to accomplish a public purpose, such as the health and safety of students, not to benefit private parties. The board must ensure that the school district receives a return benefit and must retain sufficient control over the funds/expenditure to ensure that the public purpose is met. Tex. Att’y Gen. Op. No. GA-76 (2003).

<sup>16</sup> The attorney general determined that a school district may obtain insurance against bodily injury sustained by students in athletic competition or while engaged in sponsored activities on campus if the board determines the expenditure is necessary in the conduct of the school. Tex. Att’y Gen. Op. No. GA-76 (2003).

<sup>17</sup> The attorney general determined that a school district may purchase liability insurance to protect the district and the trustees individually for acts or omissions committed in the good faith discharge of official duties. Tex. Att’y Gen. Op. No. JH-70 (1973).

<sup>18</sup> A college may expend public funds for the defense of a trustee in a private lawsuit alleging a tort (e.g., a personal injury) if a majority of the disinterested members of the board make a good faith determination that a defense is in the public interest, but may not expend public funds to represent the purely personal interests of an individual trustee. See Tex. Att’y Gen. Op. Nos. DM-488 (1998) (stating an appraisal district may reimburse an officer’s or employee’s legal fees in some circumstances), JM-968 (1988) (concluding a school district may spend public funds to defend a trustee in a private lawsuit in some circumstances but not to represent purely personal interests of a trustee), JH-70 (1973) (allowing reimbursement of attorney’s fees from an appraisal district). However, in a case involving an administrator filing suit against a third party for defamation related to improprieties in his duties, the attorney general determined that a school district was prohibited from defraying the administrator’s legal costs. Tex. Att’y Gen. Op. No. GA-878 (2011).

<sup>19</sup> A college may not reimburse the defense costs of a trustee or employee who is found guilty. A college also has the authority to pay attorney’s fees for a board member who sought legal representation for a criminal investigation that did not result in any criminal charges filed, provided that the board

A Flat Fee for Legal Services	Probably not. <sup>20</sup>
Election Contest Expenses	Probably not. <sup>21</sup>
Non-Prevailing Party's Legal Fees	No. <sup>22</sup>
Private Party Legal Expenses	No, unless it serves a public purpose, and the college employs the attorney. <sup>23</sup>
Traffic Fines	Yes, if the college is liable. <sup>24</sup>
Claims or Insurance When No College Liability Exists	No. <sup>25</sup>

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determines, subject to judicial review, that the payment will serve a public interest and not merely the member's private interest. See Tex. Att'y Gen. Op. Nos. KP-16 (2015) (stating a county may pay attorney's fees for a member's legal representation in criminal investigation where no criminal charges were filed and the county determines it would serve a public interest), JC-294 (2000) (concluding a city council may reimburse a member for legal expenses in defending against unjustified prosecution for Open Meetings Act violations after knowing the outcome of the prosecution).

<sup>20</sup> A college wishing to enter into a flat-fee legal services contract must determine if the agreement meets the gift of public fund requirements and the expenditure provides a clear public benefit in return. What constitutes a clear public return benefit depends on a variety of specific circumstances and is a fact question subject to judicial review. See Tex. Att'y Gen. Op. No. KP-99 (2016) (considering school district's contract for legal services).

<sup>21</sup> The attorney general opined that a community college may reimburse a trustee for legal expenses in defending a challenge to the trustee's qualifications to hold the office only if it determines, in good faith and subject to judicial review, that the reimbursement concerns a legitimate public interest of the college rather than the trustee's personal interest and that the lawsuit involves acts undertaken by the trustee in good faith within the scope of official duties. However, the attorney general stated it is unlikely a court would conclude there is a public interest in such a lawsuit because it would typically involve only the trustee's personal interest in seeking office, even when the college benefits from the defense. Tex. Att'y Gen. Op. No. KP-40 (2015); see also Tex. Att'y Gen. Op. No. GA-104 (2003) (applying similar analysis to a school district trustee's defense against voting rights claims).

<sup>22</sup> When a college is not liable and has no obligation to the non-prevailing party, then no public purpose would be served by the payment of attorney's fees for the non-prevailing party. See Tex. Att'y Gen. Op. No. GA-62 (2003) (concluding a school district's payment of legal fees for a non-prevailing employee who filed suit against the district would be a gratuitous donation of public funds in violation of Texas Constitution).

<sup>23</sup> A college may not reimburse a private party for litigation expenses unless the litigation serves a public purpose and the college actually employs the attorney. See Tex. Att'y Gen. Op. No. DM-133 (1992) (concluding a college may not reimburse private landowners for their attorneys' fees).

<sup>24</sup> A college's payment of a civil penalty, for which it is liable due to a statutory violation, would not violate the Texas Constitution. See Tex. Att'y Gen. Op. No. GA-747 (2009) (opining that a school district's payment of a fine under the Transportation Code and city ordinances was constitutional).

<sup>25</sup> The use of public funds to pay claims for which no governmental liability exists is a prohibited gift of public funds. For example, the purchase of personal injury protection coverage or uninsured motorist coverage by a governmental entity is unconstitutional because the coverage would meet the obligation of a third party. *State v. City of Austin*, 331 S.W.2d 737 (Tex. 1960); Tex. Att'y Gen. Op. No. JH-602 (1975).

<b>Construction</b>	<b>Allowable Expense of Public Funds?</b>
Equitable Adjustment	Yes, if it is present in the contract. <sup>26</sup>
Construction on Leased Property	Yes, under certain circumstances. <sup>27</sup>
Improvements to Another's Real Property	Yes, under certain circumstances. <sup>28</sup>

<b>Charitable Contributions</b>	<b>Allowable Expense of Public Funds?</b>
Gifts to Organizations or Individuals	No. <sup>29</sup>
Community Development	No. <sup>30</sup>
Providing Office Space to a Nonprofit	Yes, if it meets certain gift of public funds

<sup>26</sup> A state court considered a contract for demolition of a school district building that provided that the contract sum would be equitably adjusted if a “concealed condition” was encountered. The district was not constitutionally prohibited from paying the contractor an additional sum for removal of additional slabs that constituted a “concealed condition” since the increase was pursuant to the contract and not in excess of the contract sum. *Olshan Demolishing Co. v. Angleton Indep. Sch. Dist.*, 684 S.W.2d 179 (Tex. App.—Houston [14th Dist.] 1984, writ ref’d n.r.e.).

<sup>27</sup> The Texas Constitution does not prohibit a college from using public funds to construct buildings on leased property or from leasing college land to a private entity if the board of trustees determines that the expenditure or use of the thing of value serves a public purpose and places sufficient controls on the transaction to ensure that the public purpose is carried out. See Tex. Att’y Gen. Op. No. GA-321 (2005) (considering school district expending public funds to construct buildings on leased property and leasing land to private entity); see also Tex. Att’y Gen. Op. No. GA-252 (2004) (stating the Texas Constitution would prohibit a college from leasing land to a private entity if the college receives no or nominal return consideration).

<sup>28</sup> A college is authorized to expend public funds for the design, improvement, or construction of certain facilities on property owned by another entity, such as an institution of higher education or certain municipalities, if specified criteria are satisfied. Tex. Educ. Code § 45.109; see also Tex. Att’y Gen. Op. No. GA-528 (2007) (permitting city to use public funds to build a seawall on private land with certain conditions in place to ensure a predominant public purpose is accomplished).

<sup>29</sup> A college may not make gifts to organizations or individuals providing services to the college. See Tex. Att’y Gen. Op. No. JH-1123 (1978) (stating that a county may not make gifts to private organizations or individuals).

<sup>30</sup> A college may not make donations to community development programs, chambers of commerce, or similar private corporations to fund the promotion of local businesses. See Tex. Att’y Gen. Op. Nos. JM-1199 (1990) (stating a county may not donate to a corporation), JH-397 (1974) (opining the Texas Constitution prohibits a county from paying dues to a chamber of commerce), JM-65 (1983) (stating a county may not contribute to a facility owned and operated or controlled by a private corporation). Becoming a dues-paying member of a chamber of commerce is not a legitimate use of funds. *Kordus v. City of Garland*, 561 S.W.2d 260 (Tex. App.—Tyler 1978, writ ref’d n.r.e.) (stating the Texas Constitution prohibits a city from paying public funds as donations or membership dues to a private chamber of commerce); Tex. Att’y Gen. Op. Nos. DM-0029 (1991) (opining a hospital district may not pay dues to certain private organizations), JH-0397 (1974). Nevertheless, if a contribution of funds or other resources to a community event or organization serves the powers, functions, or public purpose of the college, the board may determine that an expenditure meets the three-part test, even if the event is sponsored by the chamber of commerce or nonprofit entity. See Tex. Att’y Gen. Op. No. KP-181 (2018) (approving use of city resources to support chamber event if three-part test is met).

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<b>Elections and Political Advertising</b>	<b>Allowable Expense of Public Funds?</b>
Political Advertising	No. <sup>32</sup>
Publishing Factual Information	Yes, if it does not advocate for or against a measure, candidate, or officeholder. <sup>33</sup>
Publishing a Link to Political Advertising	No. <sup>34</sup>
Transporting Students to Polling Sites	No, absent educational purpose. <sup>35</sup>
Transporting Employees to Polling Sites	No, unless employee is working on site. <sup>36</sup>

For more information on community college law topics, visit TASB Community College eLaw online at [colleges.tasb.org/elaw](http://colleges.tasb.org/elaw).

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- <sup>31</sup> A college may supply a private, non-profit foundation with office space and the use of other college property as long as it serves a public purpose appropriate to the function of the college, adequate consideration flows to the public, and the board maintains sufficient controls over the foundation's activities to ensure that the public purpose is actually achieved. See Tex. Att'y Gen. Op. No. DM-256 (1993) (analyzing constitutionality of a school district's authority to provide free office space to an education foundation).
- <sup>32</sup> Texas Election Code section 255.003 prohibits the use of public funds for political advertising. An officer or employee of a political subdivision may not knowingly spend or authorize public funds to be spent for political advertising. An officer or employee also may not spend or authorize the spending of public funds for a communication describing a measure if the communication contains information that the person knows is false and that is sufficiently substantial and important as to be reasonably likely to influence a voter to vote for or against the measure. Violation of either prohibition is a Class A misdemeanor. Tex. Elec. Code § 255.003(a)-(c). See also Tex. Att'y Gen. Op. No. KP-177 (2018) (addressing various prohibitions on using public funds for political communications).
- <sup>33</sup> Using public funds to publish information that describes the factual reasons for a measure but does not advocate the passage or defeat of the measure is not prohibited by Texas Election Code section 255.003. On written request of the governing body of a political subdivision that has ordered an election on a measure, the Texas Ethics Commission is required to prepare an advance written advisory opinion as to whether a particular communication relating to the measure violates Section 255.003. Tex. Elec. Code § 255.003(b), (e).
- <sup>34</sup> The use of public funds to link to a website promoting a specific candidate or measure violates the Texas Education Code and Texas Election Code because there is no significant distinction between distribution of political advertising in print as opposed to distribution electronically through email or a website. Tex. Att'y Gen. Op. No. KP-177 (2018) (considering communications made by school district).
- <sup>35</sup> The attorney general has opined that, absent an educational purpose, a court would likely conclude that providing school district students transportation to a polling place serves no public purpose of the school and therefore violates the Texas Constitution. Tex. Att'y Gen. Op. No. KP-177 (2018).
- <sup>36</sup> Funding transportation for employees to polling sites would likely serve no public purpose and therefore violate the Texas Constitution if the employees have no responsibility or duty to perform on behalf of the governmental entity at the polling site. See Tex. Att'y Gen. Op. No. KP-177 (2018) (analyzing a school district board's resolution to provide transportation to district employees to and from polling places).

*This document is provided for educational purposes only and contains information to facilitate a general understanding of the law. It is neither an exhaustive treatment of the law on this subject nor is it intended to substitute for the advice of an attorney. It is important for the recipient to consult with the college's own attorney in order to apply these legal principles to specific fact situations.*