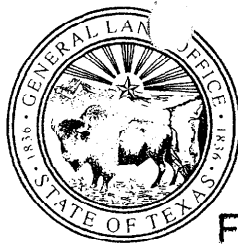


TEXAS



RQ-0388-GA
GENERAL LAND OFFICE

JERRY PATTERSON, COMMISSIONER

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August 26, 2005

FILE # ML-44361-05

I.D. # 44361

EXECUTIVE ADMINISTRATION
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AUG 30 2005

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

AUG 26 2005

OPINION COMMITTEE

ACTION BY N. Fuller
COPY TO Burbach
Kornell
McBee

RE: Constitutionality of Senate Bill 1044, Section 3 (adding § 33.613 to the Natural Resource Code, which allows for the restoration of land affected by coastal erosion).

Dear Attorney General Abbott:

As Commissioner of the General Land Office (GLO) and Chairman of the School Land Board (Board), I am writing to seek your opinion regarding the constitutionality of Section 3 of Senate Bill 1044 (S.B. 1044 or the Act), which allows a littoral property owner (Property Owner) to obtain title to submerged land dedicated to the Permanent School Fund (Submerged PSF Land) through self-help and without compensating the PSF.

The Act amends Chapter 33 of the Natural Resources Code by adding Section 33.613. This section allows Property Owners to construct bulkheads and backfill land that has become submerged through erosion, provided that the land is one acre or less as reflected on a subdivision plat recorded on or before December 31, 1955, and it was privately-owned and not submerged or owned by the Board at that time. The Act further provides that after restoration, the Property Owner owns the restored land in fee simple, subject to the common law rights of the public in public beaches and rights of public school land lessees holding a lease on the property on September 1, 2005. Ironically, the Act specifically does not apply to property bordering the Gulf of Mexico, so there are no public beaches affected by the Act.

Further, Section 6 of the Act requires the GLO to adopt rules for the administration and regulation of the restoration of land, as authorized by Section 33.613 no later than December 1, 2005.

Questions Posed

1. Does Section 33.613, which allows the restoration of Submerged PSF Land and, subsequently, the granting of title to the Property Owner without compensation to the PSF, violate Article VII, Sections 4 and 5 of the Texas Constitution?
2. Can the GLO adopt rules concerning the restoration of land as required by Section 33.613(d) without violating Article VII, Sections 4 and 5 of the Texas Constitution or related statutory constraints on the alienation of PSF lands?

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MEMORANDUM BRIEF

Questions Posed

1. Does Section 33.613, which allows the restoration of Submerged PSF Land and, subsequently, the granting of title to the Property Owner without compensation to the PSF, violate Article VII, Sections 4 and 5 of the Texas Constitution?
2. Can the GLO adopt rules concerning the restoration of land as required by Section 33.613(d) without violating Article VII, Sections 4 and 5 of the Texas Constitution or related statutory constraints on the alienation of PSF lands?

Background

Each year, the state of Texas loses approximately two hundred thirty-five (235) acres of fast land along its shoreline through coastal erosion.¹ Because Texas “owns the water and the beds and shores of the Gulf of Mexico” within tidewater limits, any privately-owned coastal land that becomes submerged loses its character and becomes state-owned submerged land, which is dedicated to the PSF (Submerged PSF Land).² Despite the littoral property owner’s (Property Owner) loss of the land, Article VII, Section 4 of the Texas Constitution (Section 4) provides that PSF lands “... shall be sold ... as provided by law” and prohibits the Legislature from granting “any relief” to purchasers of any PSF land.³ Further, Article VII, Section 5 of the Texas Constitution (Section 5) prohibits the Legislature from enacting any law that appropriates any PSF Land for “any other purpose” other than for “the support of the public free schools.”⁴ The Attorney General’s Office has previously opined that “[t]hese constitutional provisions render the Legislature powerless to make a free grant of [PSF] lands.”⁵

During the 79th session, however, the Texas Legislature passed Senate Bill 1044 (S.B. 1044 or the Act), which added Section 33.613 to the Texas Natural Resources Code.⁶ Section 33.613 allows Property Owners, pursuant to rules to be drafted by the GLO,⁷ to construct bulkheads and backfill land that has become submerged through erosion.⁸ Section 33.613 further provides that after restoration the Owner owns the restored land in fee simple, subject to the common law rights of the public in public beaches and rights of public school land lessees holding a lease on the property on September 1, 2005.¹ To qualify for restoration, however, the land must have been a privately-owned lot of one acre or less in a platted subdivision and not

¹ See Coastal Erosion Planning and Response Act: Report to the 79th Texas Legislature (April 2005) (Texas General Land Office).

² Tex. Nat. Res. Code Ann. §§ 11.012(c), 11.041(a)(3) (Vernon 2001); see also *State v. Balli*, 190 S.W.2d 71, 100 (Tex. 1944); *City of Port Isabel v. Missouri Pacific R. Co.*, 729 S.W.2d 939, 942 (Tex. App.-Corpus Christi 1987, writ re’ d n.r.e.); *City of Corpus Christi v. Davis*, 622 S.W.2d 640, 644 (Tex. App.-Austin 1981, writ re’ d n.r.e.).

³ Tex. Const. art. VII, § 4 (emphasis added).

⁴ Tex. Const. art. VII, § 5.

⁵ Tex. Att’y Gen. Op. No. H-881 at 3712 (1976).

⁶ See Act of June 1, 2005, 79th Leg., R.S., S.B. 1044, § 3 (to be codified at Tex. Nat. Res. Code Ann. § 33.613).

⁷ See *id.* (no later than December 1, 2005, the Commissioner of the GLO must adopt administrative and regulatory rules regarding the restoration of this PSF land).

⁸ See *id.*

submerged or owned by the Board on December 31, 1955.⁹ Surprisingly, Section 33.613 does not require compensation for the value of the Submerged PSF Land so acquired.¹⁰

Discussion

The Constitution provides that PSF lands may be “sold,” which, by logical inference, requires consideration to be paid by the party acquiring the land. Section 33.613 appears to be unconstitutional because it allows Property Owners to obtain title (a fee simple interest) to Submerged PSF Land through self-help without requiring compensation.¹¹ This grant of title to Submerged PSF Land without requiring payment is completely unrelated to “the support of the public free schools,” and is the type of “relief” specifically prohibited by Section 4 of the Constitution.¹²

The land remains state-owned, despite the Property Owner’s efforts to dry it up through bulkheading and filling, because reclamation of eroded lands through self-help does not change the character or ownership of the land.¹³ Therefore, Section 33.613 is essentially granting the Property Owner a free grant of state-owned, Submerged PSF Land.

Further, as noted above, Section 33.613 requires that the GLO adopt implementation rules for this statute.¹⁴ In the event that Section 33.613 is found to be a constitutional exercise of legislative authority, the GLO will require guidance to draft rules that are consistent with laws applicable to both the Board’s and its own current fiduciary duties to the PSF.

The Character of Submerged PSF Land Cannot Be Changed Through Self-Help or by the Legislature.

Accretion is defined as the “gradual accumulation of land by **natural** forces.”¹⁵ Courts have held that “[w]here dry land is added seaward by accretion to an upland owner’s tract, the upland owner acquires title to the dry land thus added.”¹⁶ Therefore, if the eroded land is restored by natural means, the character of the land changes from state-owned submerged land to privately-owned land, and in turn the Property Owner gains title to that land.¹⁷ The self-help reclamation contemplated by Section 33.613, however, is a type of artificial accretion that has never been viewed as a valid way for a Property Owner to change the character of Submerged

⁹ *See id.*

¹⁰ *See id.*

¹¹ *See id.*

¹² *See* Tex. Const. art. VII, §§ 4, 5 (Section 4 prohibits the Legislature from granting “any relief” and Section 5 prohibits the Legislature from appropriating for purposes other than “the support of the public free schools”).

¹³ *See* Tex. Nat. Res. Ann. § 33.136(d) (Vernon 2001); *see also* Tex. Att’y Gen. Op. No. JM-1123 (1989).

¹⁴ *See* Act of June 1, 2005, 79th Leg., R.S., S.B. 1044, § 3 (to be codified at Tex. Nat. Res. Code Ann. § 33.613) (no later than December 1, 2005, the Commissioner of the GLO must adopt administrative and regulatory rules regarding the restoration of this PSF land).

¹⁵ Black’s Law Dictionary 22 (8th ed. 2004) (emphasis added).

¹⁶ Tex. Att’y Gen. Op. No. JM-1123 (1989) at 5899-5900 (*citing Humble Oil & Ref. Co. v. Sun Oil Co.*, 190 F.2d 191, 196 (5th Cir.)).

¹⁷ *See id.* (there are two additional requirements to this provision: i) a change in the shoreline, and ii) that the claimant is entitled to benefit from the change).

consideration.³⁶ Assuming, however, that a Property Owner could purchase coastal public lands, at best, he or she could only do so in exchange for the fair market value of the land. Because Section 33.613 is silent on consideration and attempts to change the character of Submerged PSF Land through self-help, it appears that Section 33.613 is unconstitutional.

If, on the other hand, Section 33.613 is found constitutional or if artificial accretion is a valid means of reclaiming title to Submerged PSF Land, the GLO will have to draft implementation rules that are contradictory to the GLO's and the Board's fiduciary duties to the PSF. The GLO, therefore, requests guidance regarding the drafting of such rules.

ⁱ *See id.*

³⁶ *See Tex. Nat. Res. Code Ann. § 33.001(g)* (Vernon 2001).