FILE # ML-44983-06
I.D. # 44983

The Senate of The State of Texas

SENATOR RODNEY ELLIS
District 13

PRESIDENT PRO TEMPORE
1999 - 2000

COMMITTEES:

Chair, Government Organization
Criminal Justice
Transportation & Homeland Security
State Affairs

EXECUTIVE ADMINISTRATION
MAIL DISTRIBUTION
SEP 01 2006
ACTION BY Nancy Fuller
COPY TO Ellen Stitt

September 1, 2006

Gregg Abbott
Office of the Attorney General
PO Box 12548
Austin, TX 78711-2548

RQ-0527-GA

RECEIVED
SEP 06 2006
OPINION COMMITTEE

Re: Request for opinion

Dear General Abbott,

I am writing to request an opinion concerning the tax appraisal of land used for wildlife-management activities. The authorization for this tax benefit is found in Art. VIII, §1-d-1 of the Texas Constitution and in §23.51 *et seq.* of the Texas Tax Code, which make wildlife-management land a species of open-space agricultural land. My request concerns §23.521 of the Tax Code, enacted in 2001 by House Bill 3123 and the administrative rules adopted pursuant to that statute. The applicable rules, formulated by the Parks and Wildlife Department (the Department) and adopted by the Comptroller, are found in §9.4003 of the Texas Administrative Code. The statute and the rules establish minimum-size requirements that must be met by tracts of land before those tracts can qualify for the tax benefit. An individual appraisal district is given a small amount of discretion concerning the minimum-size requirements. The Bastrop Central Appraisal District (BCAD) has asked for guidance concerning the circumstances under which a tract is subject to these minimum-size requirements.

Section 23.521 lists several factors for the Department to consider in applying minimum-size requirements to tracts of wildlife-management land. The first three factors are: (1) the activities listed in Section 23.51(7), i.e., the types of wildlife-management activities being conducted on the land; (2) the type of indigenous wild animal population the land is being used to propagate; and (3) the region in this state in which the land is located. Each of these factors is directly related to the question of whether a tract of a certain size in a particular part of the State can be used effectively for a particular kind of wildlife management. The statute does not direct the Department to consider factors such as whether a tract was ever part of a larger tract or whether the ownership of a tract has changed. The Department, however, is authorized to consider "any other factor that [it] determines to be relevant."

The rules developed by the Department do not reflect the first two factors listed in the statute. Under the rules, it does not matter what wildlife-management activities a landowner might be

Lyric Centre
440 Louisiana, Suite 575
Houston, Texas 77002
(713) 236-0306
FAX: (713) 236-0604

P.O. Box 12068
Austin, Texas 78711
(512) 463-0113
FAX: (512) 463-0006
Dial 711 For Relay Calls

2440 Texas Parkway, Suite 110
Missouri City, Texas 77489
(281) 261-2360
FAX: (281) 261-4726

E-Mail: rodney.ellis@senate.state.tx.us

performing or what kind(s) of wildlife he is trying to propagate. The Department, however, adopted some confusing rules that, in some cases, seem to consider the other factors identified above, i.e., subdivision and changes in ownership. Specifically §9.4003 (e) (3) and (4) provide as follows:

> (3) The [minimum-size] provisions of subsection (f) of this section apply to any application for appraisal based on wildlife management use if:
>
> (A) in the previous tax year the tract was part of a larger tract which was appraised under any provision of Tax Code, Chapter 23, Subchapter D; and
>
> (B) ownership of the tract is different from the ownership that existed on January 1 of the previous tax year.
>
> (4) The provisions of subsection (f) of this section apply to any application for appraisal based on wildlife management use if:
>
> (A) in the previous tax year the tract was appraised based on wildlife management use; and
>
> (B) ownership of the tract is different from the ownership that existed on January 1 of the previous tax year and the resulting tract contains less acreage than the tract contained prior to the change in ownership.

Several questions present themselves with respect to the validity and effect of these rules.

1.

Are the two circumstances described above the exclusive circumstances under which the minimum-size requirements apply? The rules do not state that Subsections (3) and (4) are exclusive or that the minimum-size requirements apply *only* under the circumstances described. Other parts of the rule indicate that the circumstances described in Subsections (3) and (4) are not exclusive. Consider the following:

- Subsection (b)(8) defines "wildlife use percentage" as "the percentage of a tract of land that the Texas Parks and Wildlife Department has determined must be in wildlife management use for the land to be qualified for appraisal based on wildlife management use." This does not suggest that the requirements apply to only certain properties.
- Subsection (f) itself says that its requirements apply to "*each tract of land* for which a wildlife use qualification is sought." (emphasis added).
- Subsection (g) states that land must "meet the standards established by this section." It does not indicate that some land must meet standards that do not apply to other land.
- Subsection (h) is a grandfather clause for land appraised as wildlife-management land prior to 2002. Such land can continue to qualify for wildlife-management appraisal regardless of its size as long as a qualifying tract does not get smaller. If subsection (f) applies only where a smaller tract is carved out of a larger tract, there

would be no need for this grandfather clause. Subsection (f) would not even apply to tracts for which subsection (h) purports to create an exception.

If the purpose of the statute and the rules is to ensure that tax benefits go to only those properties that are large enough to be used effectively for wildlife management, there would be no rational reason for applying the minimum-size requirements in only the circumstances described in Subsections (3) and (4).

More specifically, would the minimum-size requirements apply to the following tracts?

A. Tract A has been appraised as open-space agricultural land by virtue of a conventional agricultural use. Its ownership has not changed and neither have its boundaries. The owner discontinues his conventional agricultural use and begins using the tract for wildlife management.

B. Tract B has been appraised as wildlife-management land since 2003. Now it is sold to a new owner, but its boundaries do not change. It continues to be used for wildlife management.

C. Tract C has been appraised as wildlife-management land since 2003. Now the owner divides the tract into two smaller Tracts, C1 and C2. He keeps Tract C1 but sells Tract C2. Both of the smaller tracts continue to be used for wildlife management.

D. Tract D has been appraised as open-space agricultural land by virtue of a conventional agricultural use. Now the owner divides the tract into two smaller Tracts, D1 and D2. He keeps Tract D1 but sells Tract D2. The owners of both tracts discontinue their conventional agricultural uses and begin using the tracts for wildlife management.

If the circumstances described in Subsections (3) and (4) are the only circumstances under which minimum-size requirements apply, does that mean that those requirements would apply to a tract for only one year? Suppose Tract E (appraised as wildlife-management land since 2003) was subdivided and the smaller tracts sold to new owners in late 2005. The smaller tracts would be subject to the minimum-size requirements in 2006, but what about 2007?

Subsection (3) applies to a tract that "in the previous year . . . was part of a larger tract." Subsection (4) concerns a "resulting tract" that "contains less acreage than the tract contained prior to the change in ownership." Both subsections seem to contemplate circumstances under which some part of a tract is severed from the rest and the resulting tract is smaller, but they use different language to describe those circumstances. Does the quoted language from Subsection (3) mean the same thing as the quoted language from Subsection (4)? If not, what is the difference between their meanings?

3.

If a tract meets the minimum-size requirements specified in §9.4003(f), may an appraisal district still consider the size of a tract in determining whether the tract "is instrumental in supporting a sustaining, breeding, migrating, or wintering population indigenous wildlife" as required by Subsection (e)(1)(B) of the rules? For example, suppose Tract F meets the minimum-size requirements specified in Subsection (f), but wildlife experts advise the appraisal district that Tract F is simply not large enough to be instrumental in supporting or sustaining a population of the species for which the property claims to be providing habitat. This is especially likely to occur when the species in question is wild turkeys, mountain lions or another species requiring a very large range. I recognize that your opinions may not address factual disputes, but, assuming that the experts are correct, is the appraisal district justified in denying the tax benefit for the tract?

Further, suppose the tract in question is adjacent to other land that provides suitable habitat for the species in question. Is that fact relevant? In *Cordillera Ranch, Ltd. v. Kendall County Appraisal District*, 136 S.W.3d 249 (Tex. App. – San Antonio 2004, no pet.), the court ruled that each tract must be viewed separately to determine whether the required three wildlife-support activities were being conducted on the tract. It was not enough that the owner of a tract participated in a cooperative association with the owners of other properties. The court explained that each owner must file an application for the tax benefit, and each application must be independently assessed by an appraisal district. *Id.*, at 254. The *Cordillera Ranch* case suggests that an appraisal district must consider a particular tract separately from other tracts in determining whether that tract is instrumental in supporting or sustaining a population of wildlife. Is an appraisal district within its authority to deny the tax benefit for a property that is too small to be instrumental in supporting or sustaining a population of wildlife even though that property might meet the minimum-size requirements of Subsection (f) and even though that property might be adjacent to other wildlife habitat? Does the answer to this question depend on whether the property owner participates in a "wildlife management property association" contemplated by §9.4003(b)(6)?

4.

If the minimum-size requirements apply to only those circumstances described under Subsections (3) and (4), then their application appears to be based on factors that are arbitrary and irrelevant to the purpose behind the statute. Again, if the legislature's purpose was to ensure that tax benefits go to only those properties that are large enough to be used effectively for wildlife management, why would it matter that a tract had not recently been sold or that it had not formerly been part of a larger tract.

Rules adopted by an administrative agency must be in harmony with the general objectives of the legislation involved. An agency can only adopt rules that are consistent with its statutory authority. *Gulf Coast Coalition of Cities v. Public Utilities Commission*, 161 S.W. 3d 706, 711-712 (Tex. App. – Austin 2005, no pet.) Rule must have a reasoned justification and

cannot be arbitrary and capricious. *Lambright v. Texas Parks and Wildlife Department*, 157 S.W.3d 499 (Tex. App. – Austin, 2005, no pet.) The Comptroller's order adopting these rules appeared in the July 2002 Texas Register (http://texinfo.library.unt.edu/texasregister/html/2002/jul-05/adopted/34.PUBLIC FINANCE.html) and offered no reason why minimum-size standards should be affected by the sale or subdivision of a tract. In light of these considerations, the BCAD asks whether the rules discussed herein are a valid exercise of the Department's and the Comptroller's rulemaking authority?

5.

If Subsections (3) and (4) are read to state the exclusive circumstances under which the minimum-size requirements apply, then the rules will create some interesting distinctions between tracts that qualify for wildlife-management appraisal and tracts that do not. Two adjacent tracts of exactly the same size, used in exactly the same way would be taxed very differently depending upon whether one of them had changed ownership or been severed from a larger tract. The same tract could be taxed differently in two years even though its use remained unchanged.

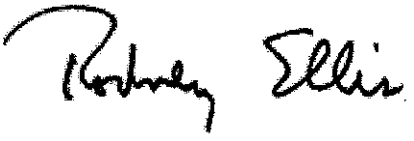
A similarly arbitrary distinction was held unconstitutional in *H.L. Farm Corp. v. Self*, 877 S.W.2d 288 (Tex. 1994). That case concerned a statute that denied open-space agricultural appraisals to land owned by certain foreign-owned corporations. The Supreme Court determined that the purpose behind the constitutional and statutory provisions providing tax benefits to open-space agricultural land was "the preservation of open-space land devoted to farm or ranch purposes." Because foreign-owned corporations could preserve open-space agricultural land as well as American corporations, the statute denying them the tax benefit lacked a rational basis and violated Art. 1, §3, one of the Texas Constitution's Equal-Protection clauses. A distinction based not on the use of the land but on its ownership was unconstitutional.

Article VIII, §1-d-1 of the Constitution and §23.51 *et seq.* of the Tax Code have been amended since the *H.L. Farm* case was decided. Their purpose now includes the preservation of wildlife and wildlife habitat. The legislature, the Department or the Comptroller would certainly have a rational basis for laws aimed at preventing abuse and ensuring that land receiving tax benefits is legitimately and effectively used to benefit wildlife. On the other hand, laws that award tax benefits to some land and deny those benefits to other land based upon distinctions having nothing to do with the quantity of quality of wildlife habitat provided seem to lack such a basis. Do you believe that the rules in question violate Art. 1, §3 or Art. VIII, §§ 1 and 2, the equal-and-uniform-taxation provisions of the Constitution?

Conclusion

On my own behalf and on behalf of the BCAD I thank you in advance for your consideration of the questions presented above. If you or your staff need any further explanation or clarification of the questions presented, please do not hesitate to let me know.

Sincerely yours,



Rodney Ellis