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OPINION COMMITTEE

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Michael Williams
Commissioner

December 21, 2015

The Honorable Ken Paxton
Texas Attorney General
Attn: Jennie Hoelscher, Chair, Opinion Committee
P.O. Box 12548
Austin, TX 78711

FILE # MC-47916-15

I.D. # 47916

RQ-0086-KP

Re: The legal status of real property described by section 12.128 of the Education Code that is returned to the State

Dear General Paxton:

I write to obtain your guidance related to the legal status and disposition of real property that has been purchased by a charter school that is revoked or otherwise ceases to operate. Specifically, this request seeks an opinion as to whether real property that is returned to the state pursuant to section 12.128 of the Education Code is "unappropriated public domain" that must be returned to the School Land Board (SLB) as part of the Permanent School Fund (PSF) under section 43.001(a)(2) of the Texas Education Code?

Education Code

Section 12.128(a) of the Education Code provides that real property purchased or leased with state funds received by a charter holder after September 1, 2001, is property of this state held in trust by the charter holder for the benefit of the students of the open-enrollment charter school and may be used only for a purpose for which a school district may use school district property. When an open-enrollment charter school ceases to operate, the Commissioner of Education is required to take possession, assume control, and supervise the disposition of property purchased or leased with state funds in accordance with law. See Tex. Educ. Code § 12.128(c). The Texas Education Code does not provide any specific process dictating how the commissioner is to take possession and assume control of the property, nor how disposition of the property is to occur. Thus, it is unclear whether the mandate that the commissioner supervise the disposition of the real property that is returned to the state under that section grants the Commissioner authority to sell that property independent of the legislature's general right to control state real property. See Tex. Op. Att'y Gen. GA-0270 (2008) (opining that the legislature generally has exclusive control over the disposition of state-owned land, "the power of a state agency or official to convey state property may be exercised only under the legislature's statutory authorization," and "the terms of any legislative authorization for the conveyance of land must be strictly complied with."). While the Commissioner has rulemaking authority under section 12.128(d) of the Education Code, to give effect to the phrase "in accordance with law," the agency seeks to ascertain what statutory provisions apply to the disposition of property pursuant to section 12.128(c) of the Texas Education Code.

There is other law that is directly applicable to real property described in section 12.128 of the Education Code. The General Appropriations Act passed during the 84th Regular Legislative Session, 2015 (Appropriations Act) authorizes your office to represent the Texas Education

Agency (TEA) in transferring title to the state and provides that the Commissioner may request that the General Land Office (GLO) enter into an interagency agreement to assist with the marketing and sale of the state real property. Art. IX, §8.02(h)(1) and (2). The Appropriations Act further provides that any proceeds from the sale of real property returned to the state due to revocation or other cessation of operation are appropriated to TEA. Art. IX, §8.02(h).

Section 43.001(a)(2) of the Education Code states that the PSF consists of "all of the unappropriated public domain remaining in this state, including land recovered by the state by suit or otherwise." Art. 7, sec. 5 of the Texas Constitution also governs the use and management of land and funds dedicated to the PSF. While section 12.128 of the Education Code does not reference section 43.001 of the code, section 12.128 is also silent as to proper and lawful sale or disposition of real property recovered by the Commissioner under that section, thus, creating the possibility that recovered former charter school facilities are unappropriated public domain that become part of the PSF.

Natural Resources Code chapters 11, 31, and 51

In addition to the provisions of the Education Code, several provisions of the Natural Resources Code appear to possibly apply to real property that must be returned to the state by operation of section 12.128 of the Education Code. Section 11.082 of the Natural Resources Code expressly provides that a state agency or political subdivision may not formally take any action that may affect state land dedicated to the PSF without noticing the SLB¹ in compliance with statute. Additionally, section 11.077 of the Natural Resources Code provides that the attorney general must file suit to recover land that is forfeited to the state or claimed adversely to the state. Chapter 51, subchapter B, imposes specific requirements for the use and disposition of PSF property.

Assuming the real property is not dedicated to the PSF, chapter 31 of the Natural Resources Code also governs the disposition of unused real property. See Tex. Op. Att'y Gen. GA-0270. Because chapter 12 of the Education Code does not expressly dictate under what conditions the agency may sell property recovered under that chapter, I also ask whether any provisions within chapter 31 of the Natural Resources Code apply to the disposition of these properties. e.g. are there specific processes prescribed for the marketing and sale of the property and must the TEA obtain fair market value for the real property?

The language of the provisions discussed above, as well as several Attorney General Opinions,² lead us to question whether all recovered real property is part of the PSF that must be handled and disposed by the SLB.

Questions Posed:

I specifically seek clarification of the following questions:

1. Is real property described by section 12.128(a) that is returned to the State:
 - a. property of this state appropriated *to TEA* by section 12.128 of the Education Code and Art. IX §8.02(h) of the Appropriations Act;

¹ Chapter 51, subchapter B of the Natural Resources Code governs the School Land Board's management of PSF land and the SLB's rules setting out the processes for the administration and disposition of PSF land can be found in 31 Tex. Admin Code ch. 151.

² Tex. Att'y Gen. Op. No. JM-1242 at 5 (1990) states that the "legislature has generally adopted a specific statute granting a particular agency the use of a particular tract of land." ; Tex. Att'y Gen. Op. No. MW-18 (1979) states that "as early as 1899 the legislature has...consistently demonstrated its clear intent that all state lands not designated to a specific agency should become part of the [PSF]." Tex. Att'y Gen. Op. Nos. GA-848 (2011) and DM-316 (1995), found that land just needs to be recoverable to vest in the PSF and be subject to its restrictions, not actually recovered.

- b. unappropriated property of this State and, thus, part of the PSF pursuant to section 43.001(a)(2) of the Education Code; or
 - c. of some other legal nature?
2. If sections 12.128 and 43.001(a)(2) of the Education Code apply to make the real property part of the PSF, when does the PSF interest or status attach? For example, does the property become part of the PSF: (1) when state funds are first spent on the purchase of the property by the former charter holder; (2) when the former charter school ceases operations; (3) when the commissioner takes possession and control of the property; (4) upon transfer of the title to the State, or at some other time?
 3. If all of the real property is currently part of the PSF by operation of sections 12.128 and 43.001(a)(2) of the Education Code, as written, would a statutory amendment that appropriated to TEA all real property returned to the State pursuant to section 12.128 change the nature of such returned property from PSF to non-PSF property?
 4. If all of the real property is currently part of the PSF by operation of sections 12.128 and 43.001(a)(2) of the Education Code, as written, would a statutory amendment adopted during the next legislative session appropriating real property returned to the state to TEA convert the legal status of real property to TEA of a former charter holder that has not been disposed of at the time the statutory amendment takes effect or would the real property remain a part of the PSF?
 5. If the legislature enacted an amendment to the Education Code that authorized the transfer of public real property described in sections 12.128(a) and/or (b) from a former charter holder to another current charter holder (without returning the real property to the state), would that lawfully avoid the application of section 43.001 of the Education Code, such that the real property would only become PSF property if and when the real property was no longer held in trust for the students of a current charter holder?
 6. If the real property described by section 12.128(a) is appropriated to TEA under current law, does Chapter 31 of the Natural Resources Code, or any part thereof, govern the disposition of the property? If not, are Art. 3, sec. 51 of the Texas Constitution and Art. IX, §8.02 of the Appropriations Act the only law governing disposition of the property?

Your guidance in this matter would be greatly appreciated. If you have any further questions, please contact Von Byer, General Counsel at (512) 463-9720.

Sincerely,



Michael Williams
Commissioner of Education

MW/vb/ds