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Commissioner George P. Bush
Texas General Land Office
1700 N. Congress Ave.
Austin, Texas 78701-1495

Submitted via Electronic Mail

Re: Request to enforce Art. 1, Sec. 33 of the Texas Constitution and the Texas Open Beaches Act

July 31, 2020

Commissioner Bush:

Earlier this month, over the Fourth of July weekend, several local governments closed Texas public beaches in violation of both Texas law and the Texas Constitution. We write today to request that you enforce Article I, Section 33 of the Texas Constitution and the Texas Open Beaches Act (“OBA”) against any future violations as the legislature intended.

The Texas Bill of Rights contains a provision granting the public the right to unrestricted use and access to Texas public beaches. Article I, Sec. 33(b) of the Texas Constitution specifically provides that “[t]he public, individually and collectively, has an unrestricted right to use and a right of ingress to and egress from a public beach.”¹ This right is even acknowledged on the GLO’s webpage related to open beaches, to which it says “[i]n Texas, public access to Gulf Coast beaches is not just the law, it is a constitutional right.”² However, even though the Texas Constitution grants the public this right, the drafters of this constitutional amendment made it a right that the public cannot on their

¹ Tex. Const., art. I, § 33(b)

² *Open Beaches*, TEXAS GENERAL LAND OFFICE, <https://glo.texas.gov/coast/coastal-management/open-beaches/index.html> (last accessed July 27, 2020).

own enforce.³ Rather, the Legislature has empowered your office with the power to enforce it.⁴ The GLO's website again acknowledges this when it explains that "[c]ities and counties along the coast are required to adopt laws to protect the public's beach access rights and outline local coastal construction requirements." The website further states that the "*Land Office reviews local beach access plans and certifies that they meet the minimum state standards set forth in the Open Beaches Act, Dune Protection Act, and the General Land Office Beach/Dune Rules.*"⁵

Upon review, the reasons local governments have given for such closures are not tenable. For example, as its rationale for closing the beaches under its jurisdiction, the City of Galveston reported that "the resources available to the City are diminished and therefore the efficient allocation of personnel and resources to protect the public health and safety requires the closure of beaches and beach access points throughout the City."⁶ Constitutional limitations aside, lack of adequate funding is not appropriate grounds for suspending beach access.⁷

These local governments and the GLO itself point to Sec. 418.108(g) of the Government Code as giving local governments power to close and prohibit the public from entering beaches.⁸ This section of code, however, along with the executive orders closing Texas beaches, are in direct conflict with the Texas Constitution. The Texas Supreme Court has recently made it clear that "[t]he Constitution is not suspended when the government declares a state of disaster,"⁹ and that "[a]ll government power in this country, no matter how well-intentioned, derives only from the

³ Tex. Const., art. I, § 33(d) (explaining that this section does not create a private right of enforcement).

⁴ Tex. Nat. Res. Code § 61.011(c) ("The commissioner shall strictly and vigorously enforce the prohibition against encroachments on and interferences with the public beach easement.").

⁵ *Open Beaches*, *supra* note 2 (emphasis added); *see also* Tex. Nat. Res. Code § 61.015(b) (requiring "[l]ocal governments [to] submit proposed beach access and use plans to the commissioner for certification as to compliance with such policies and rules.")

⁶ Order Closing Beaches and Public Vehicular Beach Access Points, Prohibiting Parking on Seawall Boulevard between Boddeker Drive and the Western Terminus of the Seawall, Prohibiting Picnics or other Sedentary Activities on the Galveston Seawall in the City of Galveston, Issued by the Mayor of the City of Galveston, at 1 (July 1, 2020), *available at* <https://www.galvestontx.gov/DocumentCenter/View/10891/Independence-Day-beach-closure-order>.

⁷ Tex. Nat. Res. Code § 61.011(b) ("The legislature recognizes that, in order to provide and maintain public facilities and public services to enhance access to and safe and healthy use of the public beaches by the public, adequate funds are required to provide public facilities and public services. Any local government responsible for the regulation, maintenance, and use of such beaches may charge reasonable fees pursuant to its authority to cover the cost of discharging its responsibilities with respect to such beaches, provided such fees do not exceed the cost of such public facilities and services, and do not unfairly limit public access to and use of such beaches.").

⁸ Tex. Gov't Code § 418.108(g) ("The county judge or the mayor of a municipality may control ingress to and egress from a disaster area under the jurisdiction and authority of the county judge or mayor and control the movement of persons and the occupancy of premises in that area.").

⁹ *In re Abbott*, No. 20-0291, 63 Tex. Sup. Ct. J. 909, 2020 Tex. LEXIS 351, at *1 (Tex. Apr. 23, 2020).

state and federal constitutions.”¹⁰ Government power, the Court continues, “cannot be exercised in conflict with these constitutions, even in a pandemic.”¹¹ Needless to say, local authorities do not have the ability to suspend the Texas Constitution.

In addition to our request for enforcement, we additionally request a list of any entity that closed or prohibited public beach access over the July 4th holiday weekend that sought guidance, approval, or—at a minimum—presented evidence demonstrating the negative consequences of leaving beaches open to your office before closing them. Such evidence would at the very least demonstrate a desire to not flagrantly violate the law by local government.

Many Texas families plan to exercise their constitutional right to enjoy Texas beaches in just a few short weeks this upcoming Labor Day weekend, and many small businesses along the coast are counting on the beaches being open for their survival. Accordingly, we thank you for your prompt attention to this matter and look forward to your response.

Sincerely,

A handwritten signature in black ink, appearing to read "Mayes Middleton", written in a cursive style.

Rep. Mayes Middleton
Chair, Texas Freedom Caucus

¹⁰ *In re Salon A La Mode*, No. 20-0340, 63 Tex. Sup. Ct. J. 1123, 2020 Tex. LEXIS 389, at *1 (Tex. May 5, 2020).

¹¹ *Id.*