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Malcomson Rd. Util. Dist. v. Newsom, 171 S.W.3d 257 (Tex. App. 2005)

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prior use. Because the Cumminses' prior use of the land did not include docking structures, the court held construction of a private boat dock was not a reasonable use of public trust land as regulated by the District.

The court also denied the Cumminses' claim of an easement entitling use of their land as waterfront property. The court stated an easement holder is only entitled to do what is reasonably necessary to enjoy expressly granted rights. The Cumminses' deed did not expressly provide use of the land as a waterfront property and therefore, the deed did not establish an express easement. In the alternative, the Cumminses claimed an implied easement. The court dismissed this claim, stating apparent, continuous, and necessary use of the land for the desired purpose to predicate existence of an implied easement. Therefore, because the Cumminses had not used their land for boat mooring, no implied easement existed.

Regarding the Cumminses' challenge of the validity of the District's regulations restricting recreation and other activities near the drinking water intake, the court determined the legislature gave the District express authority to enact regulations to protect the health and safety of citizens and natural resources. Therefore, because the District did not enforce the restricted intake barge zones differently against the Cumminses than against any other Lake Travis users, the public interest trumped the private user's right.

Finally, the Cumminses claimed the District's regulation prohibiting all activity within a restricted area surrounding the drinking water intake was inverse condemnation and therefore a compensable taking. They contended that, because the regulation prohibited all activity, it prevented making any productive, economic use of the property and interfered with their investment-backed expectations. The court disagreed and determined a compensable taking had not occurred because the District's restriction of permissible uses did not decrease the property's value, nor substantially interfere with a particular activity nor use and enjoyment of the land. Furthermore, the District's requirement for shoreline warning signs was not a physical invasion and did not constitute a per se taking. The appellate court affirmed the district court's summary judgment on all claims.

Amy Mockenhaupt

Malcomson Rd. Util. Dist. v. Newsom, 171 S.W.3d 257 (Tex. App. 2005) (holding that (1) Malcomson Road Utility District conclusively proved that proposed retention pond and drainage ditch expansion on landowner's property were for public uses; and (2) genuine issue of material fact as to whether Malcomson Road Utility District acted arbitrarily and capriciously by abdicating its discretion to determine whether and how much property to condemn precluded summary

judgment on issue of whether taking was necessary for declared public use).

Malcomson Road Utility District ("District") sought review of the judgments of the County Civil Court at Law No. 3, Harris County, Texas, which denied the District the right to condemn Frank George Newsom's property and awarded Newsom possession of and improvements on the property sought for condemnation.

Newsom owned a tract of undeveloped land outside the District's boundaries. Newsom declined the offers of two residential subdivision developers, David Garrett and John Santasiero, who tried to purchase roughly 2.5 acres each of Newsom's land to build a drainage ditch and a retention pond respectively, as required by the Harris County Flood Control District ("HCFCD"). After the developers asked the District to condemn the lands, the District's board determined that the taking of Newsom's land in the requested amounts for the retention pond and ditch expansion was a public necessity that would serve the public purpose of drainage. The District made an offer to Newsom. Newsom rejected the placement of a pond on his property, refused the amount offered for the land for the ditch expansion, and counter-offered with a higher price. The District filed condemnation proceedings, took possession, and began improvements. Newsom filed objections. Newsom argued that the District had not made good faith offers of damages before filing suit, that his property was being taken for private uses and without public necessity, that the takings were arbitrary, capricious and fraudulent, and that the District improperly "delegated" its eminent domain powers to the nearby competing developers. The Texas First Court of Appeals held that the District conclusively proved that the proposed retention pond and drainage ditch expansion on Newsom's property were for public uses, and a genuine issue of material fact existed as to whether the District acted arbitrarily and capriciously by abdicating its discretion on the necessity issue.

The court identified several factual issues, the first of which was whether the District sought the property for public purposes. The court found that the legislature delegated the power of eminent domain, which extended to conducting activities such as building retention ponds and expanding drainage ditches, and which was tantamount to a legislative determination that such projects were public uses. Such a legislative determination was binding unless the uses were "clearly and palpably" private.

Newsom argued that factual issues existed as to whether the takings were for public use, because the improvements benefited only the developers' lands. Newsom cited the District's statements that the pond was necessary to "serve" Santasiero's property, that the pond was of the size to handle the amount of estimated overflow from Santasiero's development only, and that Garrett was building the ditch to facilitate

HCFCFCD's approval of the Lakewood Grove subdivision. The court found that the important factor in the public-use determination was the character of the right inuring to the public, not the extent to which the public exercised its right. Thus, it was immaterial if the use was limited to citizens of a local neighborhood, so long as it was open to all who choose to avail themselves of it. The court found that the District's evidence that both the ditch expansion and the pond construction would serve the public purpose of draining excess water from the area sufficed for a showing of public use.

Courts do not review a condemnor's exercise of its discretion to determine public necessity without a showing that the condemnor acted fraudulently, in bad faith, or arbitrarily and capriciously. Therefore, the second issue of disputed fact reviewed by the court was whether the District acted fraudulently or arbitrarily in concluding that public necessity justified condemning the property. Newsom argued that the District did not use a reasonable basis for their determination of necessity, but rather abdicated its responsibilities to the developers. The court found that the condemnation agreements signed by the District and the private developers, requiring the developers to front all costs of the condemnation and providing that the District would not have to reimburse the developers if the condemnation proceedings were unsuccessful for any reason, raised an inference that the District had abdicated its discretion to determine whether the condemnation was backed by public necessity. Thus, the court found that a genuine issue of material fact as to whether the utility district acted arbitrarily and capriciously precluded summary judgment.

Keely Downs

Grimes v. Texas, No. 03-04-00154, 2005 Tex. App. LEXIS 6963 (Tex. App. Aug. 26, 2005) (holding that the order from the Texas Railroad Commission granting a permit to Endeavor Energy Resources to operate a saltwater disposal well was supported by substantial evidence, in the public interest, and not arbitrary or capricious).

The Texas Railroad Commission ("Commission") granted a permit to Endeavor Energy Resources ("Endeavor") to operate a saltwater disposal well located on one-third of a surface estate, which Endeavor leased from Howard Hill Grimes ("Grimes"). Grimes, the owner of two-thirds of the surface estate and an undivided interest in the mineral estate of the tract that he leased to Endeavor, opposed Endeavor's permit application because he feared the saltwater operations on the adjacent land would damage his groundwater and surface estate.

After the Commission granted a permit to Endeavor to operate a saltwater disposal well, Grimes brought suit appealing the Commission's order issuing the permit. The District Court of Travis County, 53rd Judicial District, affirmed the Commission's order granting the