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Herrmann v. Lindsey, No. 04-02-00184-CV, 2003 Tex. App. LEXIS 1498 (Tex. App. Feb. 19, 2003)

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specific to alert the general public to the topic to be considered. The court addressed the City's argument that because the word "consideration" does not mean "action" the agenda items did not give notice of the possibility that the TNRCC would take action. The court stated the Act requires that the TNRCC give "written notice of the date, hour, place, and subject of each meeting held." When the notice specifically discloses the subject to be considered at the upcoming meeting, the notice requirement is met. The court also relied on *Texas Turnpike Auth. v. City of Fort Worth*, in which the Texas Supreme Court held it unnecessary to state all consequences which may necessarily flow from the consideration of the subject stated. Furthermore, the court interpreted "consideration" as necessarily encompassing "action." Applying these principles, the court held that the TNRCC did not have to include additional language in its public notice indicating it might act on issues under consideration.

The court also addressed the City's argument that TNRCC gave a narrow and restricted notice limited to consideration of specific legal issues, while acting on more general issues outside the scope of the agenda. The court stated that in order to satisfy the Act's intent of giving the public opportunity to inform itself of the topic of each given meeting under the Act, the notice must be sufficiently descriptive to alert readers to the particular issue the governing body will address. Looking at the agenda in its entirety, the court held the agenda items were sufficiently descriptive to inform a reader of the broad topics to be addressed at the meeting and that it was not necessary for the agenda to enumerate the specific legal issues.

Finally, the court dismissed the City's claim that TNRCC's referral of the petitions to SOAH precluded TNRCC from finding the petitions were insufficient to warrant appointment of a watermaster. The court found that in referral, TNRCC actually afforded the City's interests greater procedural protection, and the referral did not preclude TNRCC from action. Thus, the court affirmed the trial court's judgment.

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Herrmann v. Lindsey, No. 04-02-00184-CV, 2003 Tex. App. LEXIS 1498 (Tex. App. Feb. 19, 2003) (holding the grantor of a warranty deed had no right to rescission based on an illegal reservation of base irrigation groundwater rights).

In 1996 E.J. Hendrix filed an application for an initial regular permit with the Edwards Aquifer Authority ("Authority") to irrigate 500 acres of land in Medina County. Hendrix then sold his land and water rights to Ronald and Karen Herrmann ("Herrmanns"). On August 1, 1998, the Herrmanns transferred a one-half interest in the permit consisting of unrestricted groundwater to Columbia Realty ("Columbia"). On August 5, 1998, the Herrmanns transferred the

remaining one-half interest in the permit consisting of base irrigation water to Columbia. On October 28, 1998, the Herrmanns sold 209 acres of their 500-acre tract of land to Glenn and Cynthia Lindsey ("Lindseys"). The Herrmanns reserved all water rights under the permit except for 25,000 gallons per day for domestic and livestock use in a warranty deed. In May of 1999, the Herrmanns and Columbia sued the Lindseys in the thirty-eighth Judicial District Court in Medina County seeking a declaratory judgment that the transfers to Columbia were valid under the Edwards Aquifer Act.

The Lindseys counterclaimed, seeking a declaratory judgment that they were entitled to the base irrigation water rights portion of the permit. The Herrmanns responded to the counterclaim arguing the deed should be set aside because of a mutual mistake in the reservation of rights in the base irrigation water. The Lindseys then filed a notice of transfer with the Authority, claiming they acquired the rights to the base irrigation water from the sale. The Authority approved the transfer, finding: (1) Columbia owned the unrestricted groundwater portion of the permit; (2) the Hermann's sale to the Lindseys voided the transfer of the base irrigation water portion to Columbia; and (3) the Herrmann's sale to the Lindseys effected a valid transfer of the base irrigation water portion of the permit. The Lindseys then filed a motion for summary judgment on their counterclaim alleging a valid interest in one half of the permit rights from the sale. The trial court granted the Lindsey's motion, ordering reformation of the warranty deed to reserve only one half of all water. The Herrmanns appealed the trial court's order to the Fourth District Texas Court of Appeals.

On appeal, the Herrmanns first claimed the Lindseys' motion incorrectly alleged that they were entitled to judgment pursuant to Texas Rules of Civil Procedure Rule 166(a)(i), which allows a party to move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial. The court denied this claim because the Herrmans failed to file special exceptions to the pleadings under Texas Rules of Civil Procedure 90, requiring pleading of specific exceptions to avoid waiver of a claim. The Herrmanns also made three arguments supporting the merits of their appeal. First, they argued lack of consideration because the Lindseys did not pay for the water rights received. Second, they argued the illegal reservation was material to the contract. Third, they argued including the illegal reservation in the deed was a mutual mistake of fact allowing rescission of the contract.

The court held contract principles did not apply to the dispute because the contract between the parties no longer existed and nothing was left to be enforced after payment of consideration and delivery of the deed. The court instead applied property principles to determine the rights of the parties. The court stated: (1) a grantor of a deed is afforded no right of rescission by reason of total or partial failure of consideration; (2) an illegal provision in a deed is simply not

enforced; and (3) a mistake of law is not a ground for rescission or cancellation of a deed. Applying these rules, the court found the Herrmanns had no remedy of rescission or cancellation of the warranty deed and thus affirmed the trial court's judgment.

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WASHINGTON

Kim v. Pollution Control Hearing Bd., 61 P.3d 1211 (Wash. Ct. App. 2003) (holding an "industrial purposes" exception to a permitting requirement for public ground waters applies to commercial horticultural uses).

Joo Il Kim and Keum Ja Kim ("Kims") sought judicial review of a final decision by the Pollution Control Hearing Board of Olympia, Washington ("PCHB"). PCHB affirmed an order by the Department of Ecology ("DOE"), requiring the Kims to apply for a permit to use well water for their commercial nursery. The Superior Court for Kitsap County affirmed the decision of the PCHB. The Kims appealed to Division Two of the Court of Appeals of Washington. The court decided the issue of whether the use of 100 to 300 gallons per day to water plants for sale to the general public constituted "an industrial purpose," thus falling under an exception to the permitting requirement. The court reversed and held that the Kim's nursery fell within the industrial exception.

The main controversy came from an interpretation of a 1945 statute requiring a permit to use the public ground waters of Washington subject to a "small withdrawals" exception. This exception applied in four instances: (1) any quantity of water for livestock; (2) any amount of water for a noncommercial garden of a half acre or less; (3) not more than 5,000 gallons per day for domestic use; and (4) not more than 5,000 gallons per day for an industrial purpose.

In 1995, the DOE altered its interpretation of "industrial purposes." DOE first asserted that the term "industry" excluded agriculture. Second, the DOE argued that interpreting the industrial exception to apply to irrigation made the exemption for noncommercial gardens of one-half acre or less meaningless. Third, it concluded that defining industrial purposes to include agriculture or horticulture drastically increased the scope of the exception and undermined the statute's purpose. In 1998, the DOE required that the Kims file for a permit.

The court rejected all of the DOE's changed interpretations of the 1945 statute. The court noted that twenty-four Washington statutes, ten Washington cases, and six Washington regulations refer to the "agriculture industry." The court also used the dictionary and numerous other examples of reference to the "agriculture industry"