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Brainard v. State, No. 98-0578, 1999 WL.. 795545 (Tex. Oct. 7, 1999)

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vested right in a particular use of government property and therefore denied Barnhill's regulatory takings claim.

When addressing the equal protection claim, the court held that an equal protection claim is actionable if a municipality intentionally enforced a law discriminatorily. The court held the municipality did not enforce this ordinance discriminatorily. The ordinance survived all of Barnhill's challenges.

Amy W. Beatie

TEXAS

Brainard v. State, No. 98-0578, 1999 WL 795545 (Tex. Oct. 7, 1999)
(holding that the doctrines of riparian ownership, such as accretion, reliction, and erosion, apply to changes in a river's course due to artificial as well as natural causes for deciding boundary disputes).

In 1962, the United States Bureau of Reclamation constructed the Sanford Dam on the Canadian River to create a water supply for city members and to provide regional flood controls. Three years after the dam's completion, the Canadian River Municipal Water Authority ("CRMWA"), a state agency, took control of the dam. The dam reduced the flow of river water and encouraged more vegetation in the river's former riverbed.

Twenty years later, in 1985, the General Land Office ("GLO") announced its intention to determine the historical gradient line prior to the artificial changes caused by the dam. In 1987, the GLO sent a position paper to the people who owned land along the river ("Landowners"), claiming the former streambed was the State's property. The GLO's artificial change theory asserted that surveyors marking the gradient boundary of the river need not consider conditions on a river influenced by human activity, like the Sanford Dam's construction. The Landowners disagreed with the State's position. Although both parties agreed that the Landowners were riparian owners and that the State owned the bed of the Canadian River, each party sought a judicial declaration of the boundary between the State's riverbed and Landowner's riparian tracts. The parties also agreed that the gradient boundary methodology would determine the line between public and private ownership along the banks of a navigable stream.

The Landowners sued the State and the GLO to establish the boundary of the Canadian River. Both parties filed motions for summary judgment asking the trial court to rule on the correct survey to mark the boundary. The GLO asked for a ruling based on the artificial change theory, and the Landowners asked for the court to consider the present conditions. The trial court rejected the State's artificial change theory as a matter of law. The court held that the

Landowners were entitled to the riparian land established by the survey done under present conditions of the Canadian River, and not as of a date before the Sanford Dam was built. The trial court awarded the Landowners attorney's and surveyor's fees and found the State and GLO actions unreasonable under the Frivolous Claims Act.

The Court of Appeals reversed the part of the judgment decreeing Landowners' recovery of attorney's and surveyor's fees. It also held that the trial court erred by holding the State's survey inadmissible. The Court of Appeals thus reversed the summary judgment and remanded for a factual determination of the correct gradient boundary. Both parties filed petitions for review.

The Texas Supreme Court reinstated, in part, the trial court's judgment declaring that the Landowners' survey correctly marked the boundary between the State's riverbed and the riparian tracts. The court held that determining which survey used the correct methodology to mark the boundary was a question of law, not a question of fact. Instead, the validity of the parties' conflicting surveys required a determination of the validity of the artificial change theory in light of: (1) the accepted method for determining the boundary between state riverbed and riparian land; and (2) the traditional rules of riparian ownership. Because the parties already agreed on the gradient methodology, the Court determined the general rules of riparian ownership.

The court followed the accepted rule in Texas that when the margin or bed of a body of water that is the boundary of a tract of land is gradually and imperceptibly changed or shifted by accretion, reliction, or erosion, the margin or bed of the body of water, as so changed, remains the boundary line of tract. Accretion is the process of increasing real estate by the gradual and imperceptible disposition by water of solid material, through the operation of natural causes so as to cause that formerly submerged land to become dry. Accretion by reliction is the gradual addition made to land by a recession of the water, as when the water shrinks below the usual watermark.

The court also determined that the riparian rights to additions by accretion or reliction were vested property rights. In addition, the court made no distinction between naturally and artificially created gains and losses to riparian land due to accretion, reliction, and erosion. However, the court noted that if the riparian owner caused the accretion herself or directly participated in the accretion, the owner lost her rights to the accreted land. The court rejected the artificial change theory in the context of an artificial structure that merely affected the current or flow of a river so as to cause artificial accretion. The court also rejected the State's argument that the doctrine of avulsion applied to the changes created by the Sanford Dam and did not to alter the boundary of the Canadian Riverbed.

The court next determined which survey established the boundary as a matter of law. Since the State's survey did not reflect changes in the Canadian River that occurred after the closing of the dam, it did not represent a present-day survey. The court therefore rejected the

State's survey. The court instead relied on the Landowners' survey, which comported with the gradient boundary methodology, to serve as the correct marker.

In addressing attorney's fees, the court rejected the Landowners' characterization that the suit was a boundary dispute and a declaratory judgment action. Instead, the court held the legislative resolution authorizing the suit did not entitle Landowners' recovery of attorney's fees. Finally, the court found the Frivolous Claims Act did not apply. Because the State's defense to the boundary dispute demonstrated an arguable basis for the claim, the court found it was not frivolous.

M. Elizabeth Lokey

City of Saginaw v. Carter, 996 S.W.2d 1 (Tex. Ct. App. 1999) (holding that the City of Saginaw cannot claim sovereign immunity to deny jurisdiction to a claimant pleading an intentional taking and intentional nuisance by the City's operation of street and storm sewers resulting in intentional flooding of claimant's property).

An increased volume and velocity of diverted surface water allegedly caused by the City of Saginaw's ("City") operations resulted in erosion, destruction, and endangerment to human lives on the Carter property. The Carters alleged the City caused intentional flooding of the property by their operation, control, and maintenance of street and storm sewers. The Carters asserted two claims: (1) intentional taking under Article I, § 17 of the Texas Constitution; and (2) intentional nuisance.

The City filed a plea arguing the trial court lacked subject matter jurisdiction due to sovereign immunity. The trial court denied the City's plea. The City brought an interlocutory appeal alleging erroneous denial.

The court affirmed the trial court's denial of the plea. A governmental entity cannot use sovereign immunity to end a suit on jurisdictional grounds without a showing of fraudulent pleading to confer jurisdiction by the plaintiff. The City did not show fraudulent pleading by Carter. The pleading alleged intentional acts and, therefore, did not lack jurisdiction due to sovereign immunity, as it would if it were a claim for negligent performance of governmental functions. The court also reported summary judgment was the proper avenue if the City believed Carter did not tender sufficient facts to show intentional acts.

Tiffany Turner