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Paul T. Morin: *BOARD CERTIFIED – Civil Trial Law*

February 8, 2021

Mike McHone
Applicant for Congress 4802, LLC

via email:

RE: 4802 S. Congress, SP-2019-0600C PARD Public Access Easement

Liability analysis of a Public Access Easement on a 225 ft. long, 25 ft. wide Driveway/Fire Lane in a 125 unit condo project—**The Wilder**

Dear Mr. McHone:

In connection with your work for the land/project owner, **Congress 4802, LLC**, for The Wilder condominium project (new construction) located at 4802 S. Congress, Austin, Texas, you have asked for an analysis of the landowner's liability arising from the use by the general public of a public access easement that the City of Austin Parks and Recreation Department is requiring the landowner to grant on this 125 unit condo project's 225 ft. long, 25 ft. wide Driveway/Fire Lane in order to give the general public access to the Williamson Creek Greenbelt. It is my understanding that you will share this analysis with the City of Austin Planning Commission.

It is my understanding that in your meeting with the Parks and Recreation Board on January 26, 2021, the Board (and/or staff and/or City legal staff), in response to your concerns about the public access easement creating liability for the landowner to the general public, mentioned that the Texas Recreational Use Statute would protect the landowner. Consequently, on behalf of the landowner, you have asked me for this analysis.

The Texas Recreational Use Statute and the case law:

Texas Civil Practice Remedies Code Chapter 75 discusses limitations on a landowner's liability arising from a third party's recreational use of the landowner's property (the **Texas Recreational Use Statute** or "RUS"). Specific to this discussion, sections 75.002 and 75.003 pertain to the private, non-agricultural land that is used for recreational purposes. The RUS defines recreational activity broadly, including hunting, fishing, swimming, boating, camping, hiking, exploring, bicycling, dog-walking, and "pleasure driving", among other activities. Additionally,

soccer,[1] diving,[2] and playing on playground equipment[3] have been held to be recreation within the meaning of the statute.

Under the Texas RUS, a landowner who gives permission for others to enter their property for recreational purposes does not assure that the property is safe and does not owe their guest any greater duty than they would owe to a trespasser. Similarly, the landowner cannot be held liable for any injuries that are caused by the guest while on their property.

However, if someone is injured on another's property, and their injury was due to the landowner's gross negligence, bad faith, or intentional conduct, then the RUS will not bar the accident victim's recovery. This exception can apply in situations where a landowner knows about a dangerous hazard on their property but fails to act to correct the hazard.

While the Texas RUS can present a problem for some injury victims, there are many ways to get around its application because of a landowner's various duties in certain situations, such as the duty to warn, the duty to make safe, and the duty to inspect.

Under the common law, a person who visits for recreational purposes with consent of the owner would be classified as a licensee or invitee, meaning the owner has a duty to warn or make safe dangerous conditions, and in the case of invitees, a duty to inspect for the presence of dangerous conditions. The RUS raises the burden of proof for recreational users by **requiring proof of gross negligence, willful or wanton acts, malicious intent, or bad faith** on the part of the owner.

Although the statute provides that a landowner does not owe a duty of care to recreational visitors,[4] nevertheless, a landowner who fails to warn or make safe hidden dangers may be guilty of gross negligence. In the case of *State v. Shumake*,[5] a young girl tubing the river in a state park was swept into a submerged culvert and drowned. The landowner was aware that other people had nearly drowned at the same spot. The plaintiffs alleged that because the danger was hidden to the public and known to the landowner, the owner was grossly negligent in not warning them or eliminating the danger. The court defined "gross negligence" as used in the RUS to be the traditional, commonly accepted meaning of the term: An act or omission involving subjective awareness of an extreme risk of serious injury or death, indicating conscious indifference to the

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[1] *Garcia v. City of Richardson*, 2002 WL 1752219 (Tex. App. — Dallas 2002, rev. den., not designated for publication).

[2] *Howard v. East Texas Baptist University*, 122 S.W.3d 407 (Tex. App. — Texarkana 2003).

[3] *City of Bellmead v. Torres*, 89 S.W.3d 611 (Tex. 2002); Kopplin v. City of Garland, 869 S.W.2d 433 (Tex. App. — Dallas 1993, writ den.); *Flye v. City of Waco*, 50 S.W.3d 645 (Tex. App. — Waco 2001).

[4] Civ. Prac. & Rem. Code Sec. 75.002.

[5] *State v. Shumake*, 199 S.W.3d 279 (Tex. 2006).

rights, safety, or welfare of others. The court held that failure to warn of a hidden, dangerous artificial condition can constitute gross negligence when the landowner is aware of both the presence of visitors and the hidden danger. Therefore, it was proper for the trial court to deny the state's motion that attempted to dismiss the case on sovereign immunity grounds.

Similarly, in *City of Houston v. Cavazos*, the court held the city was grossly negligent for not warning the public of a hidden drop off at a concrete slab in a popular fishing spot on land controlled by the city.[6]

In *City of Waco v. Kirwan,*[7] the city had constructed a low wall obstructing access to a cliff in a city park and posted signs reading "For your safety do not go beyond wall." A college student proceeded past the wall and past the signs and was sitting on the edge of the cliff when the ground gave way beneath him and he fell to his death. The court held that under the RUS a landowner does not generally owe a duty to visitors to protect or warn against the dangers of natural conditions on the land. In this case, because the dangers of the cliff were open and obvious, the city had no duty to warn or protect park visitors against them or otherwise refrain from gross negligence with respect to the cliff. However, the court expressly left open the possibility that a landowner may have some duty of care when the landowner knows of a hidden and dangerous natural condition in an area frequented by recreational users, the landowner is aware of deaths or injuries related to that condition, and the danger is something a reasonable recreational user would not expect to encounter on the property. This is very similar to the standard announced by the court in *Shumake* for manmade hazards.

The court also issued a reminder that a duty may be imposed on a landowner who has undertaken affirmative acts to make a natural hazard safe, and negligently carried out that undertaking.[8]

Attractive Nuisance. The attractive nuisance doctrine is intended to protect children who are too immature to appreciate the dangers presented by manmade objects or conditions. A place or object may be an attractive nuisance to a preschooler, but not to a teenager, due to the different levels of maturity.[9] The attractive nuisance doctrine does not apply to naturally occurring hazards, such as rivers and trees. An object need not be attractive or a nuisance in the usual sense of the words to qualify as an attractive nuisance. When an attractive nuisance exists, the landowner must take reasonable steps to locate dangerous artificial conditions and eliminate the danger or otherwise protect children. In order to establish liability under the attractive nuisance doctrine, a

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6 *City of Houston v. Cavazos*, 811 S.W.2d 231 (Tex. App. — Houston 14th 1991 writ dism'd.).

7 298 S.W.3d 618 (Tex. 2009).

8 See also *Wilson v. Tex. Parks & Wildlife Dept.*, 8 S.W.3d 634 (Tex. 1999). (Department installed flood warning sirens, which failed to alert the decedents of a flood.)

9 Compare *Banker v. McLaughlin*, 208 S.W.2d 843 (Tex. 1948) to *Massie v. Copeland*, 233 S.W.2d 449 (Tex. 1950) (flooded sand pits).

four-part test must be met: 1) The child, because of age, cannot realize or appreciate the dangerous condition; 2) The landowner knew or should have known that children frequented the area;[10] 3) The landowner knew or should have known that the dangerous condition presented an unreasonable risk of death or serious injury to children; and 4) The benefit to the landowner from the dangerous condition was slight, compared to the probability of injury to children.[11] The RUS eliminates the doctrine of attractive nuisance but only as to trespassers on agricultural land that are over the age of 16.[12] The attractive nuisance doctrine is still in effect as to all other child trespassers, which would apply to the easement on The Wilder condo property and to the city-owned Williamson Creek Greenbelt parkland.[13]

How does the above statutory and case law discussion apply to this case?

There are safer alternatives for parkland access given the existence of land on the west side of Williamson Creek that cannot be built upon for residential or commercial purposes, but that can be acquired with fee payments in lieu of parkland dedication.

Forcing the public to walk in a driveway, that is also a fire lane, in order to access parkland is an accident waiting to happen. Consider this scenario: Two members of the public—child and parent—who are not residents in the Wilder project, walking down the subject driveway to get to the park, child breaks free from parent's grasp and darts in front of moving vehicle whose driver does not have time to react to avoid hitting the child because of the suddenness of the child's movement and the close proximity of the vehicle proceeding along the driveway. Parent files a lawsuit against landowner (either the current landowner or the future condo association depending on date of accident) for the child's injuries (or worse, death). Even if landowner might have defenses, the landowner is still embroiled in costly litigation. Even if landowner has liability insurance that covers such claim, the landowner's future insurance premiums will increase with every incident of this nature (to say nothing of the increased insurance premium in the first year because of this additional risk existing on the property). In this lawsuit, the parent also sues the City of Austin for requiring a dangerous access to the parkland, especially when a safer alternative access can be provided on the west side of Williamson Creek. And what will be this plaintiff's exhibit #1 against the City? All of the records concerning this public access easement discussion between the landowner and the City, including this letter (and other landowner submittals to the

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[10] Compare *Burk Royalty Co. v. Pace*, 620 S.W.2d 882 (Tex. Civ. App. — Tyler 1981) to *Vista Petroleum Co. v. Workman*, 598 S.W.2d 721 (Tex. Civ. App. — Eastland 1980) (oilfield pumping units).

[11] *Texas Utilities Electric Co. v. Timmons*, 947 S.W.2d 191 (Tex. 1997).

[12] Civ. Prac. & Rem. Code Sec. 75.003(b)

[13] I wish to thank Boyd Kennedy for a significant part of the above discussion on case law authorities and the attractive nuisance doctrine. See his Texas Bar Journal article, *Landowner Liability for Recreational Activities,* (May 2010), at:
www.texasbar.com/AM/Template.cfm?Section=Home&Template=CM/ContentDisplay.cfm&ContentID=9395

City) warning the City of the dangers of this particular public access and advising the City of safer alternative access to the parkland.

Providing warning signs along the public access easement/fire lane might provide some sort of defense to the landowner and the City, but who is going to pay for the signs, for the installation of the signs, and for the future maintenance of the signs?

When one looks at the nature of the different uses of the driveway, the heightened liability risk to the landowner from this proposed Public Access Easement becomes more apparent. The use of the driveway as a driveway by the condo owners is a far different and lesser liability risk to the landowner than the continual, repeated use by the general public walking in the driveway, dodging two-way vehicular traffic.

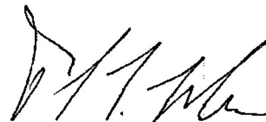
The Fire Lane issue:

As if the concept of a driveway being used by the pedestrian general public does not itself raise a host of liability concerns, there is the added complication of the driveway being designated as the fire lane for the condo project. The letter of February 2, 2021 from the City of Austin Fire Marshal (included in your package) raises more questions than it answers. The Marshal states that "at no time can the Fire Lane be altered or obstructed". Who has the authority to remove an obstruction? Can the landowner (current or future enforce and physically have an "obstruction" removed from the Fire Lane, or, if it is also a Public Access Easement, would the police be required to do any and all enforcement?

CONCLUSION:

Simply put, the requirement that a driveway be used by the pedestrian general public raises grave landowner liability issues (and potential liability issues for the City of Austin) and is not something that I would recommend as a solution to the problem of public access to the Williamson Creek Greenbelt, particularly given the availability of a safer alternative for public access that exists across the creek from The Wilder project.

Sincerely,



Paul T. Morin