ORAL ARGUMENT – 02/04/04
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TX DEPT OF TRANSPORTATION V. SUNSET VALLEY

CRAFT: Sunset Valley brought this inverse condemnation action against the state under three distinct theories: Ch. 203 of the Transportation Code; the common law of nuisance; and art. 1, §17 of the Texas Constitution. But the TC lacked jurisdiction over the first two of these claims, because the state's sovereign immunity has not been waived as to those claims. The TC had jurisdiction only over the art. 1, §17 taking claim.

Sunset Valley cannot recover on that claim, however, for two independent reasons: 1) the property allegedly taken was a public road, and, therefore, the property of the state and not the city; and 2) as a municipality created by the state, Sunset Valley could not invoke the rights of afforded persons under art. 1, §17 to thwart the will of the state.

A waiver of sovereign immunity must be clear and unambiguous. There is no clear and unambiguous waiver of sovereign immunity in ch. 203 of the Transportation Code.

O'NEILL: How many of the 50 states have adopted this substitute facility sort of theory in this situation?

CRAFT: I'm not aware of how many states have adopted it. I would point out that it is just a theory of damages. It is not a theory of recovery. It only comes in once you've established a right to recover damages. Once that is established, then the substitute facility doctrine is a way to measure those damages if you cannot ascertain the market value of the facility that was taken.

O'NEILL: Respondent's brief cites several states that have applied it in this context - Pennsylvania, W. VA, four or five. Do you know if that's the minority? is that the majority? do you know what states across the country do?

CRAFT: I'm not aware of how many states have adopted the substitute facility's doctrine as a measure of damages. I do know that in this court's opinion in the Religion of the Sacred Heart case, which is cited in our brief, this court went on at length about how that doctrine has been discredited by the US SC. But we don't even get to deciding whether they are entitled to damages under the measurement of substitute facility.

O'NEILL: Do you know how many states allow the liability determination to go on the substitute facility's question?

CRAFT: I do not know how many states have provided by statute that...

O'NEILL: Not by statute. Just under their takings clause, their constitutional takings clause.

CRAFT: I'm not aware of how many states do that. There are no magic words in ch.

203 of the Transportation Code that waive the state's sovereign immunity. And nothing in ch. 2 or 3 indicates that the legislature intended beyond doubt to waive the state's sovereign immunity under that chapter. There's no provision that requires the state to be joined in the lawsuit, and it's not necessary to read a waiver into §203.058 to give it meaning. It simply establishes an interagency accounting mechanism. When TXDOT acquires property from another state agency this provision provides for adequate compensation to be made to that state agency. And it's effected with vouchers. We fill out forms. We give them to the comptroller. The comptroller moves some numbers around on the state ledger. And that's how it's done.

If TXDOT and the state agency cannot agree as to adequate compensation, the Gen. Land Office steps in and decides what will be adequate. None of that requires reading a waiver of sovereign immunity. It doesn't involve public funds going out of the state treasury. It's moving funds around within the state treasury.

O'NEILL: You've acknowledged that there is a claim under the constitutional takings clause, but it's just that the City of Sunset Valley is not a proper entity to bring that claim.

CRAFT: Yes. Any waiver of sovereign immunity must be strictly construed. So the wavier of sovereign immunity in art. 1, §17 would waive the state's immunity only for an art. 1, §17 claim.

O'NEILL: So let's look at that claim. The one that you do agree is appropriate. I'm a little bit curious because I feel like each side is going to tell me that the only reason this is just now come up for the first time is because the state has either always paid or they've never paid. What has happened in the past in these type of claims, and why shouldn't the state pay a municipality when it takes property?

CRAFT: It actually has come up. In Robbins v. Limestone County, the state took over a public road in the county, a county road. And the county alleged that that was a taking under art. 1, §17 by the state. This court said it's not, because a public road is owned by the state, not the political subdivision in which it is located. This court said it doesn't matter that the public road was built with funds generated through local taxation. That process occurred because the state gave the city the authority to raise those funds. Also it doesn't matter that the road may be primarily used by people in that locality. This court said the interest in a public road is in the general public. We don't distinguish between primary and secondary beneficiaries of the road. The general traveling public has an interest in the road. That's why it is owned by the state. That's why the county cannot assert a taking of that road because it's not the county, or in this case, the city's property.

O'NEILL: Do you think the City of Chester v. Commonwealth was just wrong, or distinguishable?

CRAFT: I think it may be distinguishable because the court in that case relied on a prior decision of the Pennsylvania SC in which it had acknowledged there was a statute that gave the city the right to be compensated when the state took over some public property. I think it was wrong in relying on cases, and when you look at City of Chester and that holding, it relies on cases where the

US has paid compensation to municipalities for a taking of their property. That's different, because the US and a municipality are two distinct sovereigns. So you don't have this agency problem that arises when a municipality is trying to assert a takings claim against the very state that created it. In City of Trenton v. New Jersey, the US SC acknowledged that distinction and said that the constitutional guarantee against uncompensated takings does not apply in favor of municipalities against the state. And then later in US v. Carmack, the US SC said when a sovereign state transfers its own public property from one governmental use to another a like obligation does not arise to pay just compensation for it.

HECHT: So if the state needed to condemn city hall it just wouldn't owe the City of Austin anything?

CRAFT: In that case, we would have to look and examine whether city hall was considered to be property of the city or property of the state.

HECHT: Why? Because you are making two arguments: 1) that they don't own property, and, therefore, there's nothing to compensate; and 2) that they are not a person who can bring a takings claim in the first place. So those are not co-extensive. Right?

CRAFT: They are not. If city hall is state property...

HECHT: What if it's city property?

CRAFT: If it's city property then it's not state property, and, therefore, it's not a taking. Now if you're asking can the city independent of whether it's city or state property assert the rights of a person for a taking? The answer is no. Because the city holds that property only by virtue of authority given by the legislature.

HECHT: If the state wanted to condemn city hall to build a state office building there, it would owe the city nothing?

CRAFT: If it brought a condemnation action. By virtue of bringing the condemnation action, it would be admitting that title was in the city. If it just took it, then an obligation would not arise to pay damages under an inverse condemnation claim under art. 1, §17, because the authority for the city to have the land and to build city hall derives from the state. That's the rationale behind these cases that say a political subdivision cannot invoke art. 1, §17 rights against the state.

The only reason Sunset Valley exist is because the state legislated its existence. The only reason that Sunset Valley can raise money to build a road and can be the build and can maintain a road and has control over a road is because of authority granted by the legislature through the transportation code.

HECHT: It grants that authority generally, not just to Sunset Valley.

CRAFT: It grants that authority generally.

HECHT: Whereas raising Austin City Hall would be pointed at Austin not in all the cities in Texas. They would be taking over one piece of property.

CRAFT: They would be taking over that property but if the authority for the City of Austin to buy land and to build city hall came from statute, it would be no different than Sunset Valley's authority to build and maintain a road by statute.

HECHT: And I suppose that would be true of a hospital district, or a water district, any place?

CRAFT: There are some provisions of the constitution that give rights directly to political subdivisions for certain public property. That's Love v. City of Dallas. That's Milam County v. Bateman. That's where in art. 7 the constitution gives political subdivisions rights in school funds and school districts. So yes in that circumstance the legislature cannot by statute come in and deprive a political subdivision of rights guaranteed by another provision of the constitution. But in this case the authority comes from the state, but the state has taken it away in ch. 203. The state has said TXDOT can close a public road where it intersects with a controlled access highway. It can appropriate a public road for an access road or a right of way for a controlled access highway. It can do it without the consent of the municipality. Any conflicting municipal ordinances do not apply, and, most importantly, there is no provision to pay the municipality in that circumstance.

The only provision in ch. 203 for the payment of taking state property is when it is taken from a state agency. If that is a harsh consequence that complaint is best directed across the street to the legislature. The legislature could certainly say, TXDOT when you engage in this activity under your authority to build controlled access highways, and you close the road in a municipality or you appropriate it for an access ramp, even though that's state property when you do so you need to pay the municipality for its trouble. It could do that. But it has not done it yet. That's why they have no right under the constitution or under any statute for compensation in this circumstance.

This court has split on the issue of whether a political subdivision has the rights of a person under the due process equal protection guarantees in the bill of rights in the Texas Antiquities Commission case. It was a 4-4 split. And then later in Wilson v. Andrews, the court simply assumed that they had those rights without deciding it. But in the case of Deacon v. City of Euless, this court held that a municipality could not invoke the rights under art. 1, §16 against a retroactive deprivation of a vested property right to claim municipal annexation act was constitutional. In that case the issue was the municipal annexation act applied retroactively to annexations that the city had already started engaging in before the act was passed. This court held that the city could not invoke art. 1, 16 powers to invalidate the act because municipal corporations do not acquire vested rights against the state.

If municipal corporations don't have vested rights against the state for purposes of art. 1, §17, they don't have them for purposes of art. 1, §17 because you have to have a vested right to bring a claim for a taking under art. 1, §17. They don't have it.

Turning back to the issue of whether the public roads are owned by the state. That proposition that the public roads are owned by the state has been reaffirmed by this court again and again and again since Robbins v. Limestone County.

HECHT: To put a fine point on it, you don't always claim ownership I take it, but the superior interest. Is that true or not?

CRAFT: It is a superior interest but when the state exercises the rights attendant to ownership...

HECHT: It might be an easement.

CRAFT: Well in this case it is an easement. The state has only taken over an easement because the road is a public road and when they dedicated the portion that they had in fee by operation of law created a dedicated easement in the public road. That's the only thing they are claiming a taking of is the road as a road and at the easement address(?).

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RESPONDENT

YOUNG: TXDOT contends that the state can take a city street regardless of the effect on the city and its population and regardless of the cost without paying compensation therefor, thereby concentrating all the laws, all the costs on the city and the public that it serves. That kind of injustice can't be required by the law and in fact is not required under precedents of this court.

O'NEILL: We haven't really addressed it have we. I can't see anything that's directly on point addressing what type of property interests a city like this maintains on its roads.

YOUNG: Not directly on point. However, in Love v. City of Dallas and Milam County v. Bateman, those courts have distinguished two kinds of rights that a political subdivision has: political rights; and property rights. The courts in those two cases made clear that as to political rights a political subdivision has no right as against a superior right of the state. However it's a different story with a property right. A city or a political subdivision holds its property as a trustee for the public that it represents.

O'NEILL: That's vis a vis the city and the public, but we don't have much authority on city vis a vis the state.

YOUNG: In Milam County that involved a county vis a vis the state. But there this court clearly ruled that "property rights is a general rule protected by the same constitutional guarantees which shield the property of individuals. And in that case that was the legislation that would take property use for school purposes from the county and vest it in private individuals for an entirely different purpose. The court held that if the legislature assumes control over the property it must be subject to the restriction that the property be used for the original purpose. What these cases stand for is that a property interest arises in the city as trustee over the property that it owns

and it only comes into play if the state takes or destroys the property in contravention of the trust for which the city held the property. Otherwise, it's a political act.

Some of the cases cited by the state - for instance a case involving where the legislature passed an act divesting a school district of its property, investing it in a newly formed school district. The city complained that that was a taking of its property in violation of the constitution. That clearly involved a political act where there was no inference from that case that the school property was going to be used for any other purpose than to continue to provide education for the school children in the area. That's the distinguishing factor in the cases where the courts have ruled that a city's rights must give way to the rest of the state under the constitution.

HECHT: I'm puzzled by one statement in your brief that says "it should be noted that Sunset Valley does not contend that the state must compensate a city or other local government each time the state takes or destroys a street for highway purposes."

YOUNG: That's right and here's why. Let's say in a normal case of square grid of streets, the state has to take or destroy a street in connection with the construction of a highway. In that case that particular street would not be impressed with the kind of trust that Jones road was impressed with in this case. It wasn't the exclusive means of access used by the residents of those cities that give rise to the protected property interest of the city as the trustee for the public. Furthermore...

HECHT: Your argument is that the city is a person, for purposes of art. 1, §17, and sometimes it has an interest in streets that if taken is compensable and sometimes it doesn't?

YOUNG: Yes.

HECHT: And whether it does or it doesn't depends on how important the street is to the people of the city or what?

YOUNG: Not necessarily how important it is, but what is the purpose for which the street is held. If in the normal case of a regular square grid, I would say the purpose was for general transportation purposes if that's distinguishable from a case as in this case. After the taking with Jones Road in this case, the center of the city where city hall and the police station, the main part of the city was completely cutoff from a couple of islands that were no longer accessible from the city, including the commercial area of the city of Sunset Valley. The DC found that there was a significant impact on the city's ability to provide police protection and to respond to emergencies. After the take in order to go West from the center of the city you would have to go 1-1/2 miles due East outside the city, come back around not on local streets, but other streets, the city of Austin in this case, to come back to where you wanted to go, which was just a couple of 100 yards away from where you were standing originally.

PHILLIPS: Why is all that a test for a taking?

YOUNG: Because Jones Road was the only street that provided access to what became

isolated islands after the destruction of Jones Road. It was impressed with a special trust because it was the exclusive means by which the city's police could provide protection throughout the city as well as the means for the city to have access to all parts of the city from possible city.

PHILLIPS: No taking if there had been another route for all of that, or if what there was no longer a route for was not so vital to the citizens of the city?

YOUNG: Yes. That's what impresses it with the special trust. If the city were on an island with only one road leading off over the water, and if that road was taken by the state pursuant to its ____ authority, that road would have been impressed with a special trust for the residents of that island and the city as the trustee for those residents would have had a property interest in that road.

O'NEILL: Do you have any authority for the sort of significant impact analysis?

YOUNG: The authority is Love v. City of Dallas and Milam County v. Bateman. They do not say exactly as I have applied the principles to this case, but they do say that there is a difference between the political rights of the city and the property rights. And it stresses that those property rights arise in connection with the special trust with which the local property is impressed.

O'NEILL: But this significant impact test that you've put forth, that's a jury question? Who decides?

YOUNG: I'm not sure. I would say that as a matter of law. I can't point to a case where the court has decided whether or not that is for the jury or a matter of law. I can just say that the courts in Love and Milam County said that as a principle this notion of a special trust does affect property. How I am applying it to this case is to say that normally a street would not be impressed with a special trust. And again also what distinguishes this case is that in the normal case there is going to be no need for a substitute facility. It's only because the only access by the police, by the residents of the main part of the city was destroyed that a substitute facility was found by the TC to be reasonably necessary.

JEFFERSON: Does Sunset Valley own Jones Road, and if it does, in what context? What is the ownership right that Sunset Valley has on Jones Road?

YOUNG: I would suggest the only ownership right necessary under Love and Milam county is as trustee for the public. But as a matter of fact half of the road was conveyed by deed and then immediately dedicated as a road. Half of it was an easement dedication for a roadway purposes. The important point was that it was dedicated for roadway purposes and under the circumstances it was impressed with a special trust because it was the exclusive access for the city.

OWEN: The CA characterized this as an inverse condemnation proceeding. Do you think that's accurate?

YOUNG: Yes it is. That's how the case was brought by the city of Sunset Valley.

BRISTER: So you own it, but you couldn't shut it down?

YOUNG: Well the city could have shut it down.

BRISTER: Could have just closed Jones Road because you are the owner?

YOUNG: Yes. There is statutory authority for a city to close its road with certain restrictions. There's no question the city had that authority for its public.

BRISTER: But the state couldn't?

YOUNG: The state couldn't without having to pay compensation, because of the loss occasioned to the public in Sunset Valley. The same kind of dichotomy discussed in Love and County of Milam with regard to whether a city or a political subdivision has a protected constitutional right can be applied to the cases discussing whether the city has a property interest at all as against the state.

HECHT: So if the state is just building an interstate or the state is building a FM road off across the country side and it needs to close and change an intersection in a local town, that might or might not be compensable?

YOUNG: Might or might not be. I would suggest that probably in most cases...

HECHT: Wouldn't be?

YOUNG: Well I think the state makes provision for that. If it's going to cutoff all access in a city from one part to another it's going to build a bridge. It's going to provide for that. It's because Sunset Valley is so small that gives rise to the very peculiar circumstance that the state apparently didn't take heed of when it made the improvements to Hwy 290 in this case, but it cut the city in half, significantly impacted its ability to police itself. This is a peculiar case. It doesn't pretend today when the state is going to have to pay for every affect it has on a street when it builds a highway it's only because of the very unique affect that this had on Sunset Valley that it was proper for the TC to find that damages were proper and awarded it.

SMITH: The state says this is a legislative matter. Did the city seek any legislative relief from their state representative, state senator?

YOUNG: No.

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HARRINGTON: I think in reality the issues that we want a jury or not in front of the court, they haven't been really briefed or addressed at any great length. And they touched on issues that are very different than what you've been discussing today. And that basically is the two interveners that we represented prevailed on their claims in the TC and one of them secured some damages, and both of them secured injunctive relief. And whatever this court does we would ask you to take note of

that and protect that verdict. I don't think it's been put at issue in front of you.

The expert in this case, Nancy Clinton, analyzed all the lights in the area, and around the state, and found that these were very different lights than everybody else had. They weren't the directional lights that are now used to keep lights from shining in people's houses, as happened in this case, and that these particular lights caused the kind of denial of equal protection that everybody else had by virtue of the lights that TXDOT was using. And that these lights were so powerful you could sit in your house and read the newspaper. And that was the sort of finding that went on that these were particularly unique and troublesome lights that apply to this case.

O'NEILL: I'm a little bit confused on the basis of the equal protection claims. Are the interveners asserting particularized injury to them as residents of Sunset Valley? In other words, are you asserting sort of representational standing, or are you saying that they are individual as to them vis a vis their fellow Sunset Valley residents?

HARRINGTON: I think it's the former.

O'NEILL: Are you seeking damages to their backyard caused by the lights to that individual, or are they as representatives of Sunset Valley seeking damages for the community? There seems to be an overlap.

HARRINGTON: There is an overlap in terms of – the injunctive and declaratory relief would take care of all of the Sunset Valley residents that have been affected by this peculiar lighting scheme. The damages claims were only brought on behalf of the two interveners themselves.

O'NEILL: So the equal protection analysis then would be that they as individuals were treated differently from other Sunset Valley residents?

HARRINGTON: No. That all of the Sunset Valley people were treated differently than everybody else in Texas in terms of how TXDOT...

O'NEILL: On one level it's individual to the interveners vis a vis their fellow Sunset Valley residents. And on another level it's vis a vis everyone else in Texas.

HARRINGTON: I think another way to look at that is that our position is that everybody in Sunset Valley that was affected by the light could have brought their own individual lawsuit if they wanted to.

O'NEILL: So they are asserting representational standing for the equal protection claim?

HARRINGTON: I think that's the practical effect when you look at the injunctive and declaratory relief. Yes. In terms of the damages claim that was only brought as to them. In fact as you know the jury sorted that issue out and only awarded specific damages as to one of the two interveners.

O'NEILL: The underlying liability question to support those damages though, walk me through the equal protection analysis on the liability question that yielded individualized damages?

HARRINGTON: Everybody in Sunset Valley that was affected by the lights, this particular lighting scheme, could have brought a damage claim had they wanted to. Because the way they were treated by TXDOT was different from how everybody else in Texas was treated in terms of lighting schemes along TXDOT highways. Only two of those who could have brought damages of that group, that pool of people, did so.

O'NEILL: The particularized injury analysis we have to undergo for equal protection purposes, you're phrasing that in terms of a particularized Sunset Valley verses the rest of Texas?

HARRINGTON: Yes.

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REBUTTAL

CRAFT: As this court directed in Richards v. LULAC, the threshold question is, what classification is being challenged under the equal protection claim? And here it's clear that classification is geographical. The findings of fact that supported the TC's conclusions on equal protection were: number 23, defendants have treated Mr. Cowan and Mr. Hurwitz as residents of the City of Sunset Valley disparately when compared to residents of other municipalities. Finding of fact 24 - defendants decision to erect and maintain high mast floodlights within and surrounding the city of Sunset Valley singles out Mr. Cowan and Mr. Hurwitz as residents of the city for disparate _____. This court held in Richards v. Lulac that claims of disparate treatment of geographic areas don't state an equal protection claim at all, because the equal protection clause protects individuals not areas. So you can't bring an equal protection claim on the basis that TXDOT or the state is doing one thing in Sunset Valley that it's not doing somewhere else in the state.

As a practical matter the state would be sued out of existence. You would get suits everyday where people said you're paving more roads in Dallas than you are in Houston. Equal protection violation. It's not an equal protection issue at all. So if that classification isn't valid, the only thing that leaves us with is the class of one theory...

PHILLIPS: So the state could say no state money for schools in Dallas county. At least from an equal protection standpoint that's okay?

LAWYER: It would be okay except to the extent that the constitution guarantees certain school funding to the city of Dallas.

PHILLIPS: So from a purely equal protection standpoint.

LAWYER: Right. Not to say they wouldn't have some other claim.

PHILLIPS: No county that voted for a democrat in the last election will receive state

money for its schools?

LAWYER: Not an equal protection claim if it's based on the county. That goes back to McCowan v. Maryland. It was a blue law case and the blue laws in Maryland let you do some things in some counties on Sunday, and the blue laws in other counties you couldn't do certain things. And the SC said, this is not an equal protection issue. It doesn't address disparities in areas. And it didn't even go through a rational basis analysis. It just said this is a matter for legislative discretion.

The only other classification possibly is the class of one theory described in the SC's case in Village of Willowbrook v. ____. To state a claim under the class of one theory, a plaintiff must show that he was intentionally treated differently from others similarly situated and there is no rational basis for the difference in treatment. But here there's no evidence that Mr. Cowan and Mr. Hurwitz were treated differently from others similarly situated, others in Sunset Valley. Much less in the evidence that they were intentionally treated differently. So that claim has to fail.

Public roads are different from public schools. The public trust in public roads is in the general public. Period. There is no differentiation for roads that are a particular value to a particular city. The public trust is for the general public. That was announced by this court in Robbins v. Limestone County and has never retreated from that.

Public schools are different because public schools are created for the benefit of educating the students in that locality. And moreover that authority in Milam and Love is given by a constitutional provision. Here the right in public road is given by statute and the legislature has taken that away.