TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-17-00077-CV

City of Rollingwood, Texas, Appellant

v.

Owen Brainard and Sally Brainard, Appellees

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 53RD JUDICIAL DISTRICT
NO. D-1-GN-15-004220, HONORABLE GISELA D. TRIANA, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

This case arises from flooding on property belonging to Owen and Sally Brainard that the City of Rollingwood allegedly caused. The Brainards sued the City for an intentional constitutional taking. The City filed a plea to the jurisdiction, and the trial court denied the plea. In its sole appellate issue, the City contends that the trial court erred in denying its plea to the jurisdiction. We will affirm the trial court's order denying the City's plea to the jurisdiction.

BACKGROUND[1]

In early 2009, John Andrews filed an application with the City to plat his property into two lots. As a condition for approval of his application, the City required Andrews to dedicate a drainage easement on his property and install a "flume" to convey storm water from Pickwick

[1] Unless otherwise noted, the following facts are undisputed.

Lane, a street bordering the property. Before the City approved the application, Andrews sold part of his property to the Brainards. The Brainards' property is situated downhill from what remained of the Andrews property and from Pickwick Lane. After the Brainards refused to grant the easement, the City waived the requirement in exchange for an additional payment of $2,500 from Andrews. The City approved Andrews's application with respect to the property he had not sold to the Brainards.

Colleen and Todd Preheim later purchased two lots, one of which was the Andrews lot uphill from the Brainards. The Preheims wanted to build a large house on the lot neighboring the Brainards' property, and they filed a subdivision application and an application for a building permit. The Preheims' plans would increase the amount of impervious cover on their property, and the Preheims' engineers called for the construction of a detention pond to hold the excess runoff and dissipate it. The City approved the Preheims' applications, and the Preheims constructed a drainage system on their property, including a detention pond. The Brainards allege that, after the construction of the Preheims' system, their yard now frequently floods and is unfit for the uses the Brainards had intended for it.

Much of the debate in this case concerns a curb on Pickwick Lane. The City asserts that a "break" in the curb has existed since a water line broke in 2005 and that runoff from the street has flowed down onto what is now the Brainards' property since that time. The Brainards, on the other hand, allege that no "break" in the curb existed until the Preheims constructed their drainage system. According to the Brainards, "the City worked together with the [Preheims] to create a scenario . . . where all of the stormwater from Pickwick could enter the [Preheims'] drainage facility and flow onto" the Brainards' yard. The Brainards allege that this collusion between the City and

the Preheims included "paving over the Pickwick curb" and that "[t]he City performed the work that created these current roadway-curb conditions."

The Brainards sued the City,[2] bringing causes of action for an unconstitutional taking (inverse condemnation) and nuisance.[3] The City filed a plea to the jurisdiction, which the trial court denied. This appeal followed.

STANDARD OF REVIEW

"Sovereign immunity from suit defeats a trial court's subject matter jurisdiction and thus is properly asserted in a plea to the jurisdiction." *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225–26 (Tex. 2004); *see Engelman Irrigation Dist. v. Shields Bros., Inc.*, __ S.W.3d __, No. 15-0188, 2017 WL 1042933, at *4 (Tex. Mar. 17, 2017) ("In *Houston Belt* and *Miranda*, we held that sovereign immunity concerns jurisdiction and therefore 'is properly asserted in a plea to the jurisdiction.'"). "Where, as here, evidence is presented with a plea to the jurisdiction, the court reviews the relevant evidence and may rule on the plea as a matter of law if the evidence does not raise a fact issue on the jurisdictional question, a standard that generally mirrors the summary-judgment standard." *Harris Cty. Flood Control Dist. v. Kerr*, 499 S.W.3d 793, 798 (Tex. 2016) (citing *Miranda*, 133 S.W.3d at 227–28). "Appellate courts reviewing a challenge to a trial court's subject matter jurisdiction review the trial court's ruling *de novo*." *Miranda*, 133 S.W.3d

[2] The Brainards also sued the Preheims, but the Preheims are not parties to this appeal.

[3] It is undisputed that the resolution of the Brainards' takings claim is dispositive of their nuisance claim. *See Harris Cty. Flood Control Dist. v. Kerr*, 499 S.W.3d 793, 795 n.1 (Tex. 2016). We also note that the Brainards originally brought a claim for alleged violations of the Texas Water Code but later abandoned those claims.

at 228. "When reviewing a plea to the jurisdiction in which the pleading requirement has been met and evidence has been submitted to support the plea that implicates the merits of the case, we take as true all evidence favorable to the nonmovant," and we "indulge every reasonable inference and resolve any doubts in the nonmovant's favor." *Id.*

DISCUSSION

Under the Texas Constitution, "[n]o person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made." Tex. Const. art. I, § 17(a). Governmental immunity does not bar a takings claim "even though the judgment would require the government to pay money for property previously taken." *City of El Paso v. Heinrich*, 284 S.W.3d 366, 376 (Tex. 2009); *see Kerr*, 499 S.W.3d at 799 ("Sovereign immunity does not shield the government from liability for compensation under the takings clause."). To state a valid takings claim, a plaintiff must allege: (1) intentional, affirmative government conduct; (2) that results in property being taken; (3) for public use. *See Kerr*, 499 S.W.3d at 799; *Guadalupe Cty. v. Woodlake Partners, Inc.*, No. 04-16-00253-CV, 2017 WL 1337650, at *3 (Tex. App.—San Antonio Apr. 12, 2017, no pet. h.) (mem. op.). The governmental entity must intend to take the property or must be substantially certain that the taking will occur. *See Kerr*, 499 S.W.3d at 799. Furthermore, the governmental entity must intend to take specific property—"in order to form the requisite intent, the government ordinarily knows which property it is taking." *Id.* at 800.

Here, the City argues that the Brainards have presented no evidence that the City committed an affirmative act that caused the alleged flooding. According to the City, "the only affirmative act taken by the City of Rollingwood was approval of the Preheims' construction, which

does not rise to the level of an intentional taking." We disagree. The Brainards presented evidence that the City itself, and not the Preheims, altered the curb on Pickwick Lane. In his affidavit, Owen Brainard avers the following:

> I understand that the City of Rollingwood is claiming in this case that, when my wife and I bought Lot 1, there was a "break" in the curb on the north side of Pickwick Lane that caused stormwater runoff from Pickwick Lane to enter Lot 2, cross over Lot 2, and ultimately travel onto and across our property, Lot 1. This contention is absolutely false.
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> ***
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> [I]n the spring of 2015, *after* the City worked together with the neighbors to create a scenario (including paving over the Pickwick curb) where all of the stormwater from Pickwick could enter the neighbors' drainage facility and flow onto our yard, I have personally observed rainfall events that have cause[d] extensive flooding of our yard, such that it has been rendered unusable for its intended and anticipated purposes.
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> ***
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> The City performed the work that created these current roadway-curb conditions.

Because this affidavit is evidence that the City altered the curb in a way that increased the amount of water that flowed onto the Brainards' property, we conclude that the Brainards have raised a fact question as to whether the City committed an affirmative act that caused the Brainards' flooding.

The City also argues that the Brainards presented no evidence that the City intended to cause the Brainards' flooding. According to the City, the record demonstrates that it relied on engineers' reports when it granted the Preheims' permit applications. The City contends that these reports show that the construction of the Preheims' drainage system, with its detention pond, would *prevent* flooding, not cause it.

Again, we must disagree. The Brainards presented the affidavit of Chris Randazzo, a professional engineer, who avers the following:

> I have reviewed the February 2011 engineering report submitted to the City of Rollingwood . . . . Under [the conditions described in that report], it appears that storm water runoff from the surrounding western area was collected in Pickwick Lane and conveyed along Pickwick Lane and around the subject subdivision via Hubbard Circle.
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> I have visited the site and observed that the current conditions are such that the Pickwick roadway is now flush with a flattened length of curb at the western border of the site, such that, today, an offsite drainage area of an additional approximate 2.50 acres contributes off-site storm water runoff that is collected in Pickwick Lane conveyed across the subject tracts.
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> I have also reviewed the attached photo . . . . This photo supports the findings in the February 2011 report that storm water runoff from the Pickwick roadway was being conveyed in the roadways around the subject tracts at that time.

Randazzo's affidavit then discusses a report from an engineering firm that the Preheims submitted to the City in October 2012. This report states that there was "a failure in the roadway pavement (a sag)" and a "cracking of the curb" on Pickwick Lane. The report predicts that if this "failure" were repaired, the drainage to the Preheims' property would decrease because more water would continue flowing down Pickwick Lane. The report includes two charts showing different scenarios. One scenario, called "S2," is based on the conditions that existed at the time of the report as described by the engineering firm, which included the "failure." Given these conditions, the chart shows the existing and proposed discharge during major rain events:

	2-Year Discharge		100-Year Discharge	
	Existing	**Proposed**	**Existing**	**Proposed**
To Exist Drainage Feature	5.4	4.5	21.8	21.5
To Lot to Northwest	0.1	0.1	0.5	0.2
To Lot to East (west P.L.)	0.3	0.2	1.1	0.8
To Pickwick	0.7	0.5	2.4	1.6

Another scenario, "S1," is based on the conditions that would allegedly exist if the "roadway were fixed and the run-off in Pickwick were routed around the tract." Again, the chart gives the existing and proposed discharge levels:

	2-Year Discharge		100-Year Discharge	
	Existing	**Proposed**	**Existing**	**Proposed**
To Exist Drainage Feature	1.4	1.4	5.7	5.7
To Lot to Northwest	0.1	0.1	0.5	0.2
To Lot to East (west P.L.)	0.3	0.2	1.1	0.8
To Pickwick	0.7	0.5	2.4	1.6

The charts show that less water would flow into the Preheims' "drainage feature" in the S1 scenario (with the street repaired) than in the S2 scenario (without the repair).

Randazzo describes these charts and their implications as follows:

> This report reflects [two] "scenarios" based on two possible "existing conditions." One scenario (S1) assumes that no offsite storm water runoff enters the site from the Pickwick roadway. The other scenario (S2) assumes that an additional 2.23 acres of storm water runoff enters the site from the Pickwick roadway. According to the calculations in this report, if the true "existing condition" is represented by scenario S1, and the post-development condition is represented by S2, then the project significantly increases peak flows onto the [Brainards'] tract, and does not comply with state law or City of Rollingwood regulations.

In other words, according to Randazzo, the Preheims' engineering report shows that more water will flow onto the Preheims' property (and thence to the Brainards' property) if water flows from Pickwick Lane onto the Preheims' property. While the Preheims' engineering report states that water was already flowing from Pickwick Lane through a "failure" in the curb before the construction occurred, the affidavit of Owen Brainard, as discussed above, avers that, in fact, there was no failure in Pickwick Lane until the City altered the curb to allow additional water to flow onto the Preheims' property. Thus, according to Owen Brainard, the S1 scenario existed before construction, and the S2 scenario exists after the construction. And Randazzo avers that significantly more water will flow onto the Brainards' property in the S2 scenario than in the S1 scenario.[4]

Considering this evidence as a whole and indulging every reasonable inference in the Brainards' favor, we conclude that the Brainards have raised a fact question as to whether the City was substantially certain that its alleged alteration of the Pickwick curb would cause flooding on the Brainards' property. We further conclude that the Brainards have raised a fact question as to whether the City's intention was specific—that is, it knew with substantial certainty that the Brainards' property, in particular, would be subject to flooding. Therefore, the trial court did not err in refusing to grant the City's plea on the ground that the Brainards failed to present evidence to support their allegations of an intentional taking.

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[4] We also note that the City had sought an easement on what later became the Brainards' property while it still belonged to Andrews. The Brainards argue that this shows that the City "had designs" on their property, distinguishing this case from *Kerr*. *Cf. Kerr*, 499 S.W.3d at 803 ("[T]here was no evidence that the County ever had designs on the homeowners' particular properties, and intended to use those properties to accomplish specific flood-control measures.").

Finally, the City argues that it did not damage the Brainards' property for "public use" because the only affirmative conduct it engaged in was approving "the Preheims' private use of their land." However, as discussed above, we have concluded that the Brainards presented evidence that the City went beyond merely approving the Preheims' applications; there is evidence that the City actually altered the curb to allow more water to flow out of Pickwick Lane to the subject properties. In other words, the Brainards have presented evidence that, at a minimum, raises a fact question with regard to whether the City decided to use the Brainards' property to alleviate street flooding.

Assuming the Brainards' allegations are true, as we must when reviewing the trial court's ruling on this plea to the jurisdiction, we conclude that alleviating street flooding is a "benefit" the public received from diverting water out of the street and onto the Brainards' property. *See Kerr*, 499 S.W.3d at 801 ("We have recognized that a taking may occur if an injury results from either the construction of public works or their subsequent maintenance and operation . . . .") (internal quotation marks omitted); *Hearts Bluff Game Ranch, Inc. v. State*, 381 S.W.3d 468, 478 (Tex. 2012) ("Hearts Bluff rightfully acknowledges that water management and conservation is a legitimate public use."); *Tarrant Reg'l Water Dist. v. Gragg*, 151 S.W.3d 546, 554 (Tex. 2004) ("At the heart of the takings clause lies the premise that the government should not 'forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'") (quoting *Steele v. City of Hous.*, 603 S.W.2d 786, 789 (Tex. 1980)); *City of Amarillo v. Burch*, 369 S.W.3d 684, 686 (Tex. App.—Amarillo 2012, no pet.) ("A governmental entity's intentional building of streets, drainage systems, and other infrastructure that divert sufficient water on or into property of another with the destructive force averred here raises a question of fact

regarding whether a taking has occurred."); *City of Borger v. Garcia*, 290 S.W.3d 325, 330 (Tex. App.—Amarillo 2009, pet. denied) ("The key consideration in assessing whether a particular taking was for a public use is whether the public is bearing a cost for which it received a benefit.").

In summary, we have concluded that the Brainards presented evidence raising a fact question as to whether the City intentionally engaged in affirmative conduct that resulted in the Brainards' specific property being taken for public use. Accordingly, we conclude that the trial court did not err in denying the City's plea to the jurisdiction, and we overrule the City's sole appellate issue.

CONCLUSION

We affirm the trial court's order denying the City's plea to the jurisdiction.

Scott K. Field, Justice

Before Chief Justice Rose, Justices Field and Bourland

Affirmed

Filed: May 31, 2017