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January 3, 2024

Blake Hawthorne
Clerk, Supreme Court of Texas
201 W. 14th Street, Room 104
Austin, Texas 78701

Re: Case No. 22-0585; *TxDOT v. Self*; in the Supreme Court of Texas

Dear Mr. Hawthorne:

Please present this letter to the Court, which more fully answers questions raised during the November 30, 2023, oral argument.

I.

With respect to the intent element of the Selfs' inverse-condemnation claim, Justice Busby requested additional briefing regarding *Koch v. Texas General Land Office*, 273 S.W.3d 451 (Tex. App.—Austin 2008, pet. denied). In *Koch*, the General Land Office contended "that if the State believes it is the owner of property, its use of that property cannot be an intentional act to take the property of another." *Id.* As the court of appeals summarized, the "GLO's position on the takings claim is, at its essence, an attempt to add an intent standard regarding the ownership of the property alleged to be taken." *Id.* at 460.

In this case, TxDOT makes the same argument: "TxDOT, moreover, did not deliberately order the removal of trees from Plaintiffs' land," and if "TxDOT was ignorant that the trees were on Plaintiffs' property, then TxDOT would have no knowledge that ordering their removal would constitute a taking." TxDOT Response Br. at 18–19.

The court of appeals accepted TxDOT's argument and held that the evidence did not raise a "fact question regarding whether TxDOT acted with the type of intent necessary to support an inverse-condemnation claim." 2022 WL 1259094, at *21. In analyzing this issue, the court of appeals wrote: "Though cutting down a tree is

an intentional act, the proof is lacking that TxDOT intended to cut down those of the Selfs' trees beyond the right-of-way or was substantially certain that any trees on their private property would be cut down," and "there is no evidence that TxDOT knew that trees were being removed outside the right-of-way until Mr. Self informed TxDOT of that fact." *Id.* at *20–21.

Faced with the same argument, the *Koch* court held:

> Whether the GLO acted in good faith in physically removing the limestone or believed that its taking of the limestone was not a "taking" of property as a constitutional matter, has no impact on whether the State's act in taking the limestone was intentional. Such a belief—whether or not in good faith—also should not impact whether the State's act of physical taking was a compensable taking under the constitution.

273 S.W.3d at 460. The same analysis should be applied here.

The *Koch* court further held that the *Jennings* intent standard—which considers whether the government knows a specific act will cause (or is substantially certain to cause) specific property damage—was not applicable to cases, such as *Koch* and the instant case, where "the intentional act is the taking of the property at issue." *Id.* at 460 (citing *City of Dallas v. Jennings*, 142 S.W.3d 310, 314 (Tex. 2004)).

This is the correct conclusion because *Jennings* was a collateral damage case. The City project at issue was an effort to "dislodge[] a sewer main." *Id.* at 312. Unfortunately, the "dislodged material caused another sewage backup and resulted in a raw sewage flood" in Jennings' home. *Id.* Jennings argued that "occasional flooding damage is inherent in the operation of any sewer system, and that the City should bear the cost of such damage," but this Court held:

> In this case, there is no evidence that the City knew, when it unclogged the sewer line, that any flooding damage would occur. Nor is there evidence that the act of unclogging was substantially certain to lead to such damage; the record reflects that unclogging backups does not ordinarily cause residential flooding, and the plaintiffs themselves allege only that unclogging "sometimes" results in such damage.

> Because there was no evidence that the City possessed the knowledge required to establish an intentional taking, the trial court correctly granted the City's summary judgment motion, and the court of appeals therefore erred in reversing the trial court.

Id. at 315.

Here, the record confirms that "Tree and Brush Removal" was the stated purpose and goal of the project (*see, e.g.*, C.R. 331), and that TxDOT inspector Todd Russell "did direct the contractor to cut the trees down" (C.R. 158). Thus, the *Jennings* standard—which focuses on whether and to what degree of specificity and likelihood certain categories of collateral damage can be anticipated—does not provide a sensible rule of decision here.

II.

In response to a question from Justice Blacklock, TxDOT's post-hearing letter brief describes the process for submitting claims under the Tort Claims Act "no later than six months after the day that the incident giving rise to the claim occurred," and states: "If TxDOT investigates the claim and believes it is liable, the settlement (depending on the nature of the claim) is paid from TxDOT's appropriation under the General Revenue Fund."

For the avoidance of any doubt, the Selfs did timely submit such a claim to TxDOT. *See, e.g.*, C.R. 245–51 (copy of claim and response), TxDOT's Br. on Merits at 8 (confirming Plaintiffs submitted written claim and TxDOT denied claim).

III.

In response to questions from Justices Blacklock and Young, TxDOT's post-hearing letter brief suggests that only "landowners (Plaintiffs here)"—meaning the Selfs, but *not* TxDOT—are "presumed to know the boundaries of [their] own land." TxDOT Letter Br. at 4 (citing *McCabe v. Moore*, 38 S.W.2d 641, 643 (Tex. App.—Austin 1931, writ dism'd w.o.j.)).

But that principle applies equally to TxDOT as holder of an easement interest in property, particularly when TxDOT's interest was created by an express written and publicly recorded instrument of conveyance. *See, e.g., Cosgrove v. Cade*, 468

S.W.3d 32, 34 (Tex. 2015) ("Also disputed in this case is whether Property Code section 13.002—'[a]n instrument that is properly recorded in the proper county is . . . notice to all persons of the existence of the instrument'—provides *all persons*, including the grantor, *with notice of the deed's contents as well*. *We hold that it does*.") (emphasis added).

Moreover, TxDOT has a statutory duty to retain all instruments conveying an interest in real property to the State for a highway purpose, and to maintain an updated and complete map of State roads. TEX. TRANSP. CODE § 201.502 ("A deed that conveys any interest in real property to the state for a highway purpose shall be deposited and retained in the Austin office of the department."); *id.*, § 201.302 ("The director shall make, regularly revise, and keep in a form convenient for examination in the office of the department a complete road map of the state that shows road construction in the counties.").

Accordingly, TxDOT is held to an even higher standard than ordinary real-property owners, and even such ordinary owners (a) are presumed to know the contents of instruments of conveyance to which they are parties, (b) are presumed to know the extent of their land-interest holdings, and (c) cannot assert ignorance of boundaries as a defense to liability. *See, e.g., Warren v. Swanzy*, 361 S.W.2d 479, 486 (Tex. App.—Beaumont 1962, writ ref'd n.r.e.) ("A person is presumed to know the extent of the boundaries of his land."); *Oddo v. Union Pac. R.R. Co*., No. CV 4:17-03350, 2019 WL 2176170, at *5 (S.D. Tex. May 20, 2019) ("Purchasers of real property are deemed to have constructive notice of matters reflected in real property records chain of title."); *cf. Coinmach Corp. v. Aspenwood Apartment Corp.*, 417 S.W.3d 909, 921 (Tex. 2013) ("one who invades or trespasses upon the property rights of another, while acting in the good faith and honest belief that he had the lawful and legal right to do so is regarded as an innocent trespasser and liable only for the actual damages sustained," meaning "the sum necessary to make the victim whole, no more, no less") (citations omitted).

Respectfully submitted,

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This post-submission letter contains 1281 words, excluding the parts of the post-submission letter exempted by the Texas Rules of Appellate Procedure.

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/s/ Andrew York
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