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SAND BEACH RESERVE

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October 15, 1997

I have been requested to provide information regarding boundary issues connected with what has become known as the Sand Beach Reserve. In order to do so, a considerable amount of historical background, a discussion of the surveying and conveyance record and finally an introduction to applicable legal principles would need to be included. What follows then is a discussion of these three determining elements.

History

The property is located along the north bank of Town Lake (Colorado River) in Austin, Texas, and bounded on the east by the original west line of West Avenue, on the north by the south line of Outlots 1 and 11, Division Z of the Government Outlots adjoining the (original) City of Austin and on the west by the east line of the George W. Spear Survey (approximately a southerly prolongation of the east line of West Lynn Street to the river). Contrary to what is generally believed, the property was not part of the 400 acres of land to be reserved in the Act for the location of the Seat of Government as found in Gammel's The Laws of Texas, Volume 2, Page 161-162. Originally, Division Z was to include Outlots 1-13, 12 and 13 lying south of 1 and 11 respectively. The reserve contemplated above consisted mainly of what became known as Division E and was subdivided in 1850. On the original map this area (Division E) would have been delineated as "Reserve".

The delineation of the Government Outlots first appeared on a map drawn by William Sandusky in 1840. There were three copies of the original map¹ none of which have survived that anyone knows of. The General Land Office of the State of Texas has on file a "copy" dated 1863. This map is a compilation map containing updated information as of that year rather than an accurate copy of the original. The map contains a reference "as surveyed by S. C. Wilcox" leading the reader to believe that the map was actually prepared from an on the ground survey. This assumption is in part true. The surveyor's actual name was S. C. Wiltse whose correspondence² with James Starr, then Secretary of the Treasury (charged with selling off the public land) reveals the extent of the actual surveying and includes an overall boundary (the metes of which as prepared

¹ Letterbook B - Treasury Department, PP 143-144 (2-7/1008) State Archives.

² Texas Treasury Papers, edited by Seymour V. Conner, Texas State Library, 1955.

by Wiltse can be found in the General Land Office in the Travis County file) and mapping topographic features which generally show the location of creeks, rivers, bluffs and other natural features which a potential buyer would be interested in (arable land, access to water, building material, etc.). Future work would include delineating the required area to be reserved mentioned above and laying out the outlots as soon as then President Mirabeau Lamar devised a plan. There is considerable evidence that the plan of the outlots was done in haste and no surveying relating to the delineation of outlots occurred in advance of the production of the maps. I believe that the intention to delineate the outlots on the ground in advance of sale yielded to the enormous pressures brought about by the need to raise money on the part of the cash strapped government. There was simply not enough time to do the work.

Surveying and Conveyance Record

Aside from the Sandusky map discussed above, the first reference which might help frame the boundaries of the Sand Beach Reserve can be located in "An Act for the Relief of Francis C. Gordon"³ dated January 25, 1841. This act, upon fulfillment of certain conditions, conveys a land certificate to Francis C. Gordon and her heirs for Outlot 11, Division Z and includes a description defining the southern boundary of Outlot 11 as "Thence with the meanderings of the bluff, including sixty yards below to west Avenue near the Penitentiary Square". The Penitentiary Square consisted of what later became Blocks 185-188 in the Original City of Austin in 1850 when Huntsville was selected as the site for the state prison. There are two further points of interest in this act which might have some relevancy to defining boundaries of the Sand Beach Reserve (remember the north line of the reserve is defined by the south line of Outlots 1 and 11, Division Z). The phrase "provided the quantity (of land) shall not exceed sixty acres" appears at the end of the description. This phrase has significant weight when determining the intent of the Congress of the Republic regarding what was being conveyed. The second point of interest is the requirement that Francis C. Gordon have the property surveyed within 20 days after the passage of the act. I have not been able to locate a record of this survey and Francis C. Gordon apparently defaulted on payment to the Republic and the land subsequently reverted to the government.

In 1849, James Raymond, a prominent land owner, developer and politician (Secretary of State) received a patent for Outlot 11, Division Z, which included virtually

³ The Laws of Texas 1822-1897, H. P. N. Gammel, The Gammel Book Company, 1898.

the same description as the relief act to Francis Gordon, with one major exception, notably the exclusion of the phrase "not to exceed 60 acres". This omission significantly blurs the intent on the part of the conveyor and puts the citation of acreage amount at the bottom of the list as being a determining element of the description. In surveying terms acreage generally carries the least weight in determining boundary locations. James Raymond added a potentially critical piece of evidence by platting a subdivision known as Raymond's Plateau (Book 1 Page 30) which includes a graphic depiction of the location of the bluff and covers all of the area from 6th street south to the bluff and from the new west line of West Avenue below and west of Shoal Creek, westerly to the east line Outlot 1 (Samuel Haynie, mayor of the City of Austin, sold (illegally) the west 120 feet of West Avenue (200') to Raymond in 1863). Using this subdivision, a line created 60 yards below the depiction of the bluffs on the map would result in a north line of the Sand Beach Reserve significantly north of where the line is observed to be today. More on this later.

Other surveys and maps locate the south line of Outlot 11 at various locations from as far south as the present acknowledged location to approximately 100' north of the presently acknowledged location. In 1916, owing in part to the threat of contamination of the city's drinking water supply, O. E. Metcalfe was employed to survey the boundaries of Outlots 1 and 11 and define the boundaries and area of the Sand Beach Reserve. In addition, he was to perform a complete topographic survey of all the major features of the Sand Beach Reserve. The results of his work are on file in the engineering records of the Infrastructure Support Services at 505 Barton Springs Road. Mr. Metcalfe prepared a report of the methods of construction of the boundaries in question relying heavily on the 1863 copy of the Sandusky map in the General Land Office. The results of his survey yielded over 12 acres of excess in Outlot 11, due in part to what Metcalfe explained as an excess of 250 feet in the east/west width of the Outlot as measured on the ground after constructing Outlot 1 to conform to called for locations and area in the patent to Raymond. In addition to the boundary map and topographic map, Mr. Metcalfe wrote a surveyor's report to accompany the map. While the report does contain deficiencies it does provide a clear understanding of what the locations were based on. It is a little unconvincing as to the "why". The failure to mention the locative merits of the subdivision plat by Raymond and two other subdivisions, Duval Subdivision and Sayers Subdivision, as well as other documents which might have

supported his placement of the corner locations leave the reader somewhat critical on the basis of the presented evidence. The City of Austin has maintained and perpetuated the location of these lines as surveyed by Mr. Metcalfe until the present time.

In 1945, the State of Texas, after years of leasing the land to the City of Austin, patented to the city along with other property, the area known as the Sand Beach Reserve. Interestingly enough, the description of the property in the patent does not include calls for course and distance based on Metcalfe's survey but simply uses the bounds which includes the south line of Outlots 1 and 11 on the north. The statement of the area containing 77 acres more or less suggests the contemplation of Metcalfe's survey (his area was 77.15 acres). It's useful to note that in the lease documents the full use of metes and bounds were used to describe the property by the State and matched Metcalfe's map of 1916 exactly.

Application of Legal Principles

Laches - "...signifies an undue lapse of time in enforcing a right of action, and negligence in failing to act more promptly." States and their subdivisions are not subject to this concept under the law. Ordinarily an unusual lapse of time in bringing an action creates an inequitable situation for a defendant in that witnesses or evidence favorable to defense owing to the length of time have become lost or unavailable. This principle in this case could not be used against the city if the city chose to bring a title action against adjoining owners.

Reliance - For over 80 years the state and city have observed the survey line that Metcalfe established in 1916 separating the Sand Beach Reserve from Outlots 1 and 11, Division Z. Both we and the adjoining land owners have relied on the location established by the 1916 survey. Courts typically, for reasons of equity, place great emphasis on reliance.

Limitation of Title/Adverse possession - Again under current law adjoining land owners to a tract owned by a corporate entity can not obtain title by limitation as by adverse possession.

Acquiescence - conduct which may imply consent, tacit acceptance.

The application of these concepts in this instance should be discussed with a qualified land attorney. I include them here for informational purposes only.

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Solutions/recommendations

There appear to be at least two separate and distinct locations of the south line of Outlot 11, Division Z. Mr. Metcalfe's (1916) location is based on the 1863 copy of the Sandusky map in conjunction with the patent issued by the State to Raymond and a second location based on the subdivision map of Raymond's Plateau together with other subdivisions in the 1880s. Page 7 of this report shows graphically this relationship. The Railroad's own property map (the railroad being the predecessor in title to virtually all adjoiners to the Sand Beach) seems to be based on a slightly different location of the bluff line. This issue, as to the correct location of the common line between the city owned Sand Beach Reserve and the adjoining property owners to the north, has been an ongoing concern for some years now. One of the reasons for this is that the city has not invested the resources and time necessary to fully develop the historical and legal facts surrounding the issue. The State Archives which houses most of the early records is a dynamic place in the sense that as time passes the staff indexes more and more of their holdings and new sources of information are added each year. Much is known regarding the tracts involved but there are references in the written record to documents not yet recovered (for example the survey description/map required of Francis Gordon and the H. Grooms Lee survey). If after a diligent and exhaustive search of the State Archives and other records is completed, the facts are ascertained fully and the compelling arguments are made, we have the option of either entering into an agreement with adjoining property owners establishing the present observed location (Metcalfe's) as permanent, negotiate another line or bringing an action to recover in the event that a strong enough argument could be made that the line should have been located farther north. A third option is to do nothing and revisit the issue as I have done several times. It is my opinion that based on the currently known facts and evidence there is not a surveying solution to this situation and to try to impose one will surely bring about a legal action.

Currently there are only two owners/adjoiners along the south line of Outlot 11, Division Z. The YMCA has the property west of Lamar Blvd. and Temple Inland/Lumberman's Investments east of Lamar Blvd. The City of Austin acquired the YMCA property from the Missouri Pacific Railroad in 1961, then conveyed the property to the Boy Scouts of America, who in turn conveyed the property to the YMCA. All of the

conveyances mentioned above used the south line of Outlot 11, Division Z, as established by the 1916 survey of Metcalfe and perpetuated by the City of Austin since.

Below is a listing of maps and documents relevant to this issue which should be reviewed by interested parties.

1. Sandusky Map- Robert Reich(el) 1863 "copy" at GLO
2. Raymond's Plateau - Bk. 1 Page 30 Travis Co. Plat Records
3. Subd. Of the East ½ of Outlot 1, Div. Z (1884) Bk. 1 Page 23 TCPR
4. Survey of the west line of Outlot 1, Div. Z by Metcalfe (1913) 2-F-912
5. Tracing of Raymond's Plateau (1939) 2-G-100
6. Tracing of the Subd. Of Lots 5,6,7 & 8, Blk 10, Outlot 11. Div. Z (1885) 2-H-733
7. Topographic Map of the Sand Beach Reserve by Metcalfe (1916)(5-A-133)
8. Survey Map of the Sand Beach Reserve by Metcalfe (1916)(2-D-67)
9. Map showing different locations of south line Outlot 11, Div. Z (2-H-200)
10. Deed from Raymond to I. & G. N. RR Vol. 47 Page 419 TCDR
11. Von Rosenberg map of Colorado River Crossings in 1904 (2-G-70)
12. Joseph Sayers Subdivision of Lots 5,6,7 & 8 Blk 10 Raymond's Plateau, Bk. 1 PG. 29, Plat Records of Travis County
13. 1932 Lease Document (State to COA) of area known as Sand Beach Reserve, Vol. 473 Pg. 446.
14. 1941 Lease Document (State to COA) Vol. 681 Pg. 65
15. Patent to James H. Raymond for Outlot 11, Division Z (1949)
16. "An Act for the Relief of Francis C. Gordon" (Jan. 25, 1841), Laws of Texas 1822-1897 H.P.N. Gammel, The Gammel Book Co. , 1898.
17. I. & G. N. RR Company Property Map
18. Metcalfe Report on his Survey of the Sand Beach Reserve 1916.
19. Metcalfe's original field work (copies)
20. Letter Patent of area (77 acres) together with other property by the State of Texas to the City of Austin. (1945)(Vol. 769 Pg. 57 TCDR)
21. YMCA - TOWN LAKE SUBDIVISION (2-A-2316) BK. 87 PG. 146D
22. JETCO PARTNERS INTERNATIONAL RESUBDIVISION ONE (2-H-6562) BK. 83 PG. 184A
23. Vol. 12038 Pg. 535 Deed to Lumbermen's Investment Co.
24. Vol. 28 Pg. 649 - Raymond to Duval, East ½ of Outlot 11, Div. Z
25. 1873 "Bird's Eye View of Austin", Augustus Koch

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Remaining Surveying Questions and Tasks Needing Resolution

Sand Beach Reserve

1. Using the current property descriptions of the adjoiners to the Sand Beach Reserve out of Outlot 11, Division Z, create a map depicting the results of establishing the north line of the Sand Beach Reserve based on the bluff line and information contained in the subdivision plat called Raymond's Plateau (Bk. 1 Pg. 30 - TCPR). What is the area of Outlot 11 using Raymond's Plateau?
2. Compare compatibility of the three 1880s subdivisions Raymond Plateau (Bk. 1 Pg. 30 -TCPR), Subdivision of the East ½ of Outlot 1, Division Z (Bk. 1 Pg. 23 - TCPR) and (Joseph Sayers) Subdivision of Lots 5,6,7 & 8, Block 10, Raymond's Plateau (Bk. 1 Pg. 29 - TCPR) Is the west line of the first, the east line of the second and the west line of the third all the same line? Are there any inconsistencies?
3. Compare the south line of the railroad properties as shown on the railroad company map with Metcalfe's south line of Outlot 11, Division Z. Show calculated/scaled distances and approximate area difference.
4. Search the GLO, State Archives, County Surveyors Records, Travis County Deed and Plat Records and any other sources of surveying data for the following:
 - A. H. Grooms Lee's map of Outlot 11, Division Z
 - B. Survey of Outlot 11, Division Z relating to requirement in "An Act fot the Relief of Francis Gordon" (1841)
 - C. Any Maps or property descriptions relating to the location of the south line of Outlot 11, Division Z not listed in report by Ansel G. Glover, RPLS dated Sept. 19, 1997.
5. In your opinion as a Professional Land Surveyor should O. E. Metcalfe have considered and reported on the existence and relevance of the three 1880s subdivisions listed above in 2?