

[letterhead]

November 17, 2017

Via E-filing

Blake Hawthorne, Clerk
Supreme Court of Texas
PO Box 12248
Austin, Texas 78711

Re: Petition for Review in No. 17-0597, *Serafine v. Blunt et al.*

Dear Mr. Hawthorne:

The Society for Historic American Homes¹ (the Society) respectfully submits this letter as *amicus curiae* in support of the Court's granting the Petition for Review of Mary Louise Serafine in the above matter.²

In this case the court of appeals cited and relied upon the "casual fence" concept and applied it in a land dispute case arising in a residential neighborhood. The neighborhood is the historic 1891 Hyde Park subdivision in Austin, Texas. This is a well-known historic district on the National Register of Historic Places and the first subdivision in Austin. An important aspect of the case is that the

¹ <http://historicamericanhomes.org/>

² Pursuant to Texas Rule of Appellate Procedure 11(c), the Society for Historic American Homes states that no fees have been paid for the preparation of this letter.

opposing surveyors at trial both testified that original survey monuments in Hyde Park “just do not exist.” Petition for Review at 2. This means that prior case law addressing this situation should have been applied or at least considered, but the court of appeals did not address this aspect of the case. *See Serafine v. Blunt*, No. 03-16-00131-CV, 2017 Tex. App. LEXIS 4606 (Tex. App.—Austin May 19, 2017).

The Society believes that extending the “casual fence” concept from grazing land to residential, urban neighborhoods is error that merits the Court’s review. Particularly where a subdivision more than a century old lacks monuments to show the original surveyor’s line or “footsteps,” the court of appeals should have applied the prior law applicable to this situation.

The court of appeals’ decision creates uncertainty about the role of fences and surveys in urban neighborhoods generally and in particular older or historic ones, and certainly those that lack original monuments.

As shown below, the case is worthy of the Court’s determination.

Statement of Interest

The mission of the Society for Historic American Homes is to preserve historic homes and gardens and to support the preservation efforts of private owners of historic properties. The Society advocates for a favorable fiscal and

economic climate in which to restore and maintain historic property; provides education to its members and to the public on historic preservation; and provides a forum for preservation authorities. The Society is privately funded and members of the Society are primarily citizen-owners of private properties.

The Society maintains a relationship with certain historic museum properties, such as George Washington's *Mount Vernon*, meets with members of the U.S. Senate and House of Representatives, and publishes a quarterly magazine, *Historic American Homes*. The Society is located in Maryland.

The particular interest of the Society in this case is that the court of appeals' decision—because it supports the proposition that a fence not built by the current owner is merely a “casual fence”—would likely operate as an incentive for fence tear-outs whenever a residential property changes hands. This would necessitate needless destruction of historic resources, in addition to disruption of and uncertainty in residential boundaries.

Argument

- I. The “casual fence” concept should not apply to residential settings.**
- A. It appears that the court of appeals over-generalized.**

Casual fence theory was developed by this Court to accommodate the open grazing tradition in Texas. That is, because it is legal for grazing-animals to

wander freely, "limitation title cannot be acquired by grazing unenclosed land." *Orsborn v. Deep Rock Oil Corp.*, 267 S.W.2d 781, 785 (1954). Likewise, it cannot "be acquired merely by fencing land without grazing it or farming it or putting it to other use." *Id.* As a result, "[w]hen the use relied upon to support the statute is grazing, there must be also at the same time sufficient enclosure, such as to give evidence that the land was designedly enclosed and to show the assertion of claim hostile to the true owner." *Id.* (emphasis added)(citation omitted). The *Orsborn* court continued to emphasize the application to grazing land:

The ordinary case for the acquisition of title by adverse possession, when the use is grazing, is one in which the person claiming title under the statute has built a fence or fences enclosing the land and has maintained the enclosure and continuously used the land for grazing during the statutory period.

Id.

Nevertheless, the court of appeals apparently generalized this casual fence concept so that the opinion contemplates that *any* fence, for grazing or not, that is not built by the current owner is a casual fence that cannot establish a boundary. Although there are some exceptions—such as an owner substantially modifying instead of rebuilding the pre-existing fence, or an owner who knows the original builder’s specific “purpose”—these exceptions are likely to be relatively rare.

In its opinion, the court of appeals relies upon its prior decision in *NJ*

Williams Family P'ship, Ltd. v. Winn, No. 03-07-00724-CV, 2010 WL 142879 at *6 (Tex. App.—Austin Jan. 15, 2010, no pet.) (mem. op.), for the proposition that

[u]nless the claimant establishes that he built the fence for the purpose of enclosing the property at issue, the fence is a casual fence rather than one that designedly encloses the property, and use of property inside such fence is not evidence of adverse possession. (internal quotations omitted)

Id.

The court of appeals likewise quotes its opinion in *Anderson v. Shaw*, No. 03-08-00352-CV, 2010 WL 2428132, at *10 (Tex. App.—Austin June 18, 2010, no pet.) (mem. op.) for the proposition that “[t]he mere presence or maintenance of a fence that existed at the time the claimant began using the land is insufficient to show a designed enclosure.” (internal quotations omitted) *See Serafine v. Blunt*, No. 03-16-00131-CV, 2017 Tex. App. LEXIS 4606 (Tex. App.—Austin May 19, 2017). Petition, Tab 8, Opinion at 5.

Thus, the court of appeals generalized a grazing-land concept to the urban, residential setting.

B. This result incentivizes needless waste and boundary disruption.

It appears that under the court of appeals’ holding in this case, the new owner of a fence that is at risk to be declared “casual” should tear it out and rebuild it, so as to render himself the builder of the existing fence. This is contrary to

public policy for two reasons: First, it turns preservation principles upside down. Preservation concerns not merely the buildings themselves but the settings and landscapes in which historic buildings are located.³ Most preservation of historic buildings and historic places remains voluntary and dependent on private funding; thus, the incentives are crucially important.

Second, incentivizing tear-outs is likely to cause widespread boundary disruption and disputes among neighbors, as well as among buyers and sellers. Buyers might pressure sellers to find out who built the fence and why. A property for which that information is verifiable may become more valuable than one without the information.

The neighborhood in the present case is an urban, lived-in neighborhood. The court of appeals' holding is likely to cause significant disruption, dispute, and destruction of existing settings, including both fences and foliage. It sets the stage for continual replacement of urban neighborhood fencing perhaps as often as each time a property changes hands. This is obviously detrimental economically, socially, and historically.

³ *See, for example*, The Secretary of the Interior's Standards for Rehabilitation, describing as “not recommended,” “[r]eplacing an entire feature of the building or site such as a fence, walkway, or driveway....” *Available at* <https://www.nps.gov/tps/standards/rehabilitation/rehab/building01.htm>. Accessed Nov. 10, 2017.

II. The Austin Court’s decision conflicts with the Houston Court.

The Houston Court of Appeals recently determined that the casual fence concept is “unnecessary in residential neighborhood disputes,” pointing out that the concept “arose to settle land disputes because unenclosed land was grazing commons.” *KB Texas Investments, LLC v. Spiller*, No. 01-16-00068-CV, slip op. at *27 (Tex. App.—Houston [1st Dist.] Jan. 26, 2017)(mem. op.). The Court should resolve the conflict.

Conclusion

The court of appeals has applied the casual fence concept to an urban, residential neighborhood—here, a historic one populated by decades-old fences. The Court should resolve the issue of whether this is correct, particularly because of the conflict with the Houston court.

Respectfully submitted,

/s/ _____

Roger B. Borgelt
State Bar No. 02667960
Borgelt Law
614 S. Capital of Texas Highway
Austin, Texas 78746
512/600-3467 Main
512/870-7533 Direct
roger@borgeltlaw.com

Counsel for *Amicus Curiae*, the Society for Historic American Homes

CERTIFICATE OF COMPLIANCE

As determined by the word-processing software used to produce this document, this document complies with the word-limits of the Texas Rules of Appellate procedure because it contains fewer than 1500 words, not counting letterhead, greeting, inside address, signature block, and certificates.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document has been delivered via email or e-service through the Court's electronic filing system on the counsel below, on this the 17th day of November, 2017.

Mary Louise Serafine
Attorney & Counselor at Law
P.O. Box 4342
Austin, Texas 78765
mlserafine@gmail.com
Attorney for Petitioner Mary Louise Serafine

Amanda G. Taylor
Beck Redden, LLP
515 Congress Avenue, Suite 1900
Austin, Texas 78701
ataylor@beckredde.com
Attorney for Respondents Alexander and Ashley Blunt

Ronald Max Raydon
The Raydon Firm, LLC
Two Riverway, Suite 845
Houston, Texas 77056
ron@raydonlaw.com
Attorney For Respondents Scott Lockhart and Austin Drainage & Foundation, LLC

Wade C. Crosnoe
Jeff D. Otto
Sara B. Churchin

Thompson, Coe, Cousins & Irons, L.L.P.
701 Brazos, # 1500
Austin, Texas 78701
wcrosnoe@thompsoncoe;
jotto@thompsoncoe.com;
schurchin@thompsoncoe.com;
Attorneys for Respondents Viking Fence Company, Ltd. and Viking GP, LLC.

By: _____
Roger B. Borgelt