



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

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March 3, 2010

VIA ELECTRONIC MAIL AND FEDERAL EXPRESS

Mr. Charles R. Fulbruge III, Clerk
U.S. Court of Appeals for the Fifth Circuit
600 S. Maestri Place
New Orleans, LA 70130-3408

Re: *Carol Severance v. Jerry Patterson, et al.*, No. 07-20409
(Before Jones, C.J., and Wiener and Clement, JJ.)

Dear Mr. Fulbruge:

As requested by the clerk's office, the State submits the following status report for the above-captioned case. The matter is currently under submission, before the Supreme Court of Texas, following an oral argument on November 19, 2009. Plaintiff has submitted a post-submission letter, and the State is currently in the process of preparing a response (which we anticipate filing in the near future).¹

In addition, the State also attaches a copy of a pre-submission letter it had sent to the state supreme court. This letter is a definitive response to Plaintiff's status report of January 15, 2009, which repeated the same misrepresentations found in her earlier filings with the state supreme court.

Please do not hesitate if you need anything further. Thank you for your assistance.

Sincerely,

Daniel L. Geysler
Assistant Solicitor General

cc: Blake A. Hawthorne, Clerk of the Supreme Court of Texas
J. David Breemer
Barry C. Willey
Kenneth C. Cross

¹ This is the same response referenced in our last status update; due to a number of urgent and unavoidable deadlines, including those in matters pending in both this Court and the Supreme Court of Texas, we are still completing our response to Plaintiff's submission.

ENCLOSURE



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November 17, 2009

VIA HAND DELIVERY

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

Re: *Carol Severance v. Jerry Patterson, et al.*, No. 09-0387
(Oral argument scheduled for Nov. 19, 2009, at 9:00 a.m.)

Dear Mr. Hawthorne:

Enclosed for filing are the original and twelve copies of a letter calling the Court's attention to recent developments in the above-captioned case. In light of the upcoming argument date, please distribute the enclosed copies at your earliest convenience to the members of the Court; please also file-mark the extra copy and return it to the courier for my files. All appellate counsel of record are being served a copy of this letter by electronic and certified mail. Thank you for your assistance in this matter.

TO THE HONORABLE SUPREME COURT OF TEXAS:

The State respectfully submits the following response to Plaintiff's recent letter regarding her decision to participate in the FEMA grant program. That letter contains a series of inaccurate statements that warrant correction.

1. Plaintiff is wrong, first and foremost, that she has two years to postpone the closing. There is indeed a "two year performance period" (Pltf's Ltr. at 1), but that period is the deadline for the project and appropriation to *expire*, not a window for Plaintiff to delay her own closing. The City, as the grant administrator, has the right to schedule the closing date. *See, e.g.*, <http://www.fema.gov/government/grant/resources/acqhandchap.shtm>, at III-33. Nor is that fact at all surprising. It would be an odd system that authorized a single litigant, at her sole discretion, to hold up a federal-state program, freeze two appropriations in place, and delay the start of important public-safety projects—notwithstanding that the official contracts are signed and the closing funds are ready for disbursement.

In addition, simply closing escrow before the deadline does not itself satisfy the City's obligations under the FEMA grant. The federal program mandates the imposition of an open-space deed restriction prohibiting any permanent structures that block natural water flow across the property. *See* 42 U.S.C. § 5170c(b)(2)(B). (This restriction remains in effect in perpetuity.) In order to clear the property, the City must perform the required inspections, environmental surveys, and demolitions before the two-year deadline. It accordingly would be especially curious to leave the timing of the transaction to the sole discretion of the private party who is *not* responsible for performing these additional tasks by the program deadline. And, at the very least, this highlights the fact that not even the City has the option to wait out the full appropriations period and still close in time to satisfy these additional requirements.

Plaintiff therefore does not have the full two-year *appropriation* window, but rather must sell or withdraw by the final closing date set by the City; she cannot demand a new date. This fact was explained to both Plaintiff and her counsel before Plaintiff submitted her letter to this Court.¹ Contrary to Plaintiff's contention, once the closing date arrives—as we fully anticipate it will in early 2010, if not before—Plaintiff's rights are limited to closing escrow or withdrawing from the FEMA program. She, however, does not have the power to instruct the federal and state governments to wait and proceed on her own timeline.²

2. Plaintiff contends that the City has suggested “it might use FEMA funds to buy Severance's properties for *significantly less* than the appraised value.” Pltf's Ltr. at 2. This is highly misleading for a variety of reasons. First, Plaintiff neglects to mention the actual (and significant) amounts offered for each property—\$335,685.73 and \$611,588.79, *see* attachments A and B—or the fact that each figure substantially *exceeds* the corresponding price that Severance paid in 2005 (\$278,500 and \$365,000), *see* USCA5 608-09. (Plaintiff presumably paid a discounted price in 2005 for buying property that was already subject to a public easement. *See, e.g.*, Defendants-Appellees' Joint Answering Br. 14-20, 28-34; *see also Palazzolo v. Rhode Island*, 533 U.S. 606, 628 (2001); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992).) A rate is not “discounted” simply because Plaintiff believes she can locate her own appraiser to estimate the price at a higher value.

¹ In her letter, Plaintiff also ignored the State's explanation that the transactions are expected to close quickly in order to accommodate a related beach-nourishment project administered jointly by the City and the GLO.

² In any event, Plaintiff is also incorrect that she “has two years to close escrow.” Pltf's Ltr. at 1. The two-year period commenced months ago: the state appropriation expires on May 31, 2011—approximately 18 months from now—and the project deadline elapses on July 23, 2011. *See* Tex. H.B. 4586, 81st Leg., R.S., § 87 (2009). Given that a three-judge panel of the Fifth Circuit took nearly 11 months, after oral argument, to issue its certification order in this case, it is highly unlikely that even this appeal (much less the entire litigation) will conclude before the appropriations expire.

Second, no one forced Plaintiff to accept the value offered for her properties; she could have refused to execute the agreements at their current value. Her decision to nonetheless sign and execute the contracts, negotiated at arms-length, suggests that the prices are fair.

Finally, Plaintiff fails to disclose that the FEMA program determines the base appraisal at a *pre-storm* fair-market value—meaning that the initial value does not discount for the fact that her structures are currently at least 50% damaged (as they must be in order to qualify for the grant program). The ultimate so-called “discount” presumably accounts for the fact that the appraisal is not linked to the current (and *reduced*) value of the property in its present condition.

3. Plaintiff, however, is correct on one point: she does have the right to withdraw from the FEMA program before the closing date, as the State’s letter already disclosed. *See also* Pltf’s Ltr. at 2 (so acknowledging). This means that Plaintiff, and Plaintiff alone, is capable of instructing this Court whether the dispute will become moot in the near future. If it is in fact true that Plaintiff (who is a lawyer) “will not close on all properties while this suit is pending”—a factual representation made by Plaintiff’s counsel in her last letter, *see ibid.*—then Plaintiff herself can eliminate any confusion by submitting a formal declaration announcing her intention to pursue this litigation instead of the FEMA buy-out. She alone can provide the factual basis to show that the Court will not invest substantial resources in hearing oral argument and drafting an opinion, only to watch the matter disappear in a few short months once the properties in question are sold.

The State accordingly does not “fault” Severance for “investigating the buy-out program” (Pltf’s Ltr. at 2)—and the State never intimated otherwise. But the State does suggest, if Plaintiff intends to go forward with her signed contracts, that she disclose that fact to the Court: although Plaintiff is certainly wrong that these issues are “long-festering”—contrary to decades of uniform and settled precedent suggesting otherwise—the issues are indeed important. They affect the public’s property rights in a crucial easement of longstanding duration; they implicate a doctrine consistently understood and enforced alike by all three branches of Texas government; and they affect a principle now enshrined as part of the Texas Constitution. If a doctrine this important is to be upended at this late hour, as Plaintiff has proposed, the matter should not be determined in a case on the brink of becoming moot. Nor should the Court’s important and limited judicial resources be consumed by a matter that is poised to resolve itself.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Daniel L. Geysler", with a long horizontal flourish extending to the right.

Daniel L. Geysler
Assistant Solicitor General

cc: Charles R. Fulbruge III, Clerk of the U.S. Court
of Appeals for the Fifth Circuit (via Federal Express)
J. David Breemer (via electronic and certified mail)
Barry C. Willey (via electronic and certified mail)
Kenneth C. Cross (via electronic and certified mail)

ATTACHMENT A

FLOOD DAMAGED PROPERTY CONTRACT FOR SALE

THIS AGREEMENT is made and entered into this 2nd day of Oct, 2009, by and between City of Galveston, Texas, hereinafter referred to as the City, and Carol Severance, hereinafter referred to as the SELLER.

THAT, the CITY is acting under a federal grant from the Texas Department of Public Safety, Governor's Division of Emergency Management (GDEM) to purchase certain property in the City of Galveston, Texas in which the SELLER owns a parcel of land known by the physical address 13107 Bermuda Beach Dr., and described as Abet 121 Page 54 Lot 17 Bermuda Beach Unrecorded Sub. The Seller represents that this property was damaged by flood, that the Seller qualifies for the assistance being granted and that the Seller understands that there is NO OBLIGATION TO SELL THE PROPERTY UNDER THIS PROGRAM, BUT THE SELLER DOES SO VOLUNTARILY.

The parties agree as follows:

1. The City agrees to pay the SELLER for said property the sum of \$611,588.79 available at settlement after the acceptance of this Agreement and preliminary approval of the Seller's title; provided the Seller can execute and deliver a good and sufficient general warranty deed conveying marketable title to said property in fee simple, clear of all liens and encumbrances.
2. SELLER acknowledges that the price to be paid for the property is seventy-five percent (75%) of the pre-flood value of \$765,000.00 with deductions for any insurance payment received by SELLER for structural damage from flood insurance of \$37,520.25 and structural damage from wind insurance of \$4,119.70 and \$ 0.00 for any Disaster Housing Assistance program (DHA) (structural repairs) and/or \$ 0.00 for Other Needs Assistance (ONA) for which SELLER cannot document as expended on repair of the damaged structure, and a reimbursement of \$ 425.00 for certain repairs for which receipts were provided have been added. The Texas General Land office (GLO) is contributing up to \$65,000.00 toward the required 25% local match. The GLO condition specific to your offer is \$65,000.00.
3. The proceeds from the sale shall first be applied to all liens on the property, including real estate taxes, weedy lot liens, and paying assessments. All lien amounts shall be due and payable to the date of settlement. The Hazard Mitigation Grant Program Funds being used for the purchase of the property cannot and will not duplicate benefits received for the same from any other funds. SELLER will return any disaster aid money received if it duplicates benefits as determined by the City or any federal or state official administering these grant funds.
4. SELLER will execute all necessary documents to transfer marketable fee simple title to the property to the City and also agrees to execute now and in the future, any and all documents required by the City and/or DEM to complete this transaction and to comply with the City, state or Federal Regulations.
5. SELLER will NOT remove any property considered a portion of the real estate without prior written notice to the City and providing appraisals of such properties. The value of the property so removed, as finally determined, will be deducted from the purchase price, if the purchase price has not as yet been paid in full or be repaid by the SELLER within 10 days after removal if the purchase price has been paid to the SELLER. The value of the property removed will be solely determined by the City and must be negotiated prior to removal. SELLER understands that no fixtures, materials or improvements to the real estate may be removed from the premises. The City will NOT permit any materials to be salvaged at this time or at the time of demolition. Any violation of this agreement may result in a reduction of the value of and amount received for the structure.
6. The SELLER understands that no fixtures, materials or improvements to the real estate may be removed from the premises, and, because of legal liability reasons, the CITY will not permit any materials to be salvaged at this time or at the time of demolition. Any violation of this agreement may result in changing the fair market value of the structure.
7. The SELLER understands this is a voluntary transaction and that SELLER is not entitled to relocation benefits provided by the Uniform Relocation Assistance and Real Property Acquisition Policies Act (URA), and will not claim any such benefits.

8. SELLER acknowledges that it has had an opportunity to review this contract and that it has had an opportunity, if it so chooses, to contact an attorney of its choice to review this Agreement. SELLER enters into this Agreement fully understanding the nature thereof. SELLER further releases, indemnifies, and saves and holds harmless the City and the City's officers, employees, agents, and subcontractors from all suits, actions, or claims of any character, name, or description for any matter relating to the subject matter of this contract. The SELLER shall release and indemnify the City from and against any suits, damages, obligations or liability regardless of the negligence, alleged misrepresentations or other intentional or unintentional acts of the City or any of its officers, agents, employees or subcontractors performed in relation to this contract or the administration of this buyout program.

This agreement is binding upon the heirs, executors, successors and assigns of all parties.

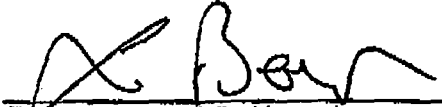
DATED this 8th day of Oct 2009.



Seller Signature

Carol Severance

Seller Printed Name

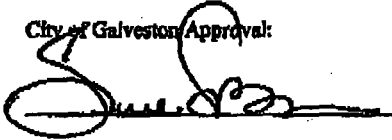


Witness, attesting for Seller (signature)

LES BERGER

Witness, attesting for Seller (Printed Name)

City of Galveston Approval:



APPROVED AS TO FORM


City Attorney

ATTACHMENT B

FLOOD DAMAGED PROPERTY CONTRACT FOR SALE

THIS AGREEMENT is made and entered into this 8 day of Sept, 2009, by and between City of Galveston, Texas, hereinafter referred to as the City, and Carol Severance, hereinafter referred to as the SELLER.

THAT, the CITY is acting under a federal grant from the Texas Department of Public Safety, Governor's Division of Emergency Management (GDEM) to purchase certain property in the City of Galveston, Texas in which the SELLER owns a parcel of land known by the physical address 22716 Kennedy Dr., and described as Abst 121 Page 16 Lot 4 Sea Isle Sec 23. The Seller represents that this property was damaged by flood, that the Seller qualifies for the assistance being granted and that the Seller understands that there is NO OBLIGATION TO SELL THE PROPERTY UNDER THIS PROGRAM, BUT THE SELLER DOES SO VOLUNTARILY.

The parties agree as follows:

1. The City agrees to pay the SELLER for said property the sum of \$335,685.73 available at settlement after the acceptance of this Agreement and preliminary approval of the Seller's title; provided the Seller can execute and deliver a good and sufficient general warranty deed conveying marketable title to said property in fee simple, clear of all liens and encumbrances.
2. SELLER acknowledges that the price to be paid for the property is seventy-five percent (75%) of the pre-flood value of \$450,000.00 with deductions for any insurance payment received by SELLER for structural damage from flood insurance of \$68,352.50 and structural damage from wind insurance of \$20,733.20 and \$ 0.00 for any Disaster Housing Assistance program (DHA) (structural repairs) and/or \$ 0.00 for Other Needs Assistance (ONA) for which SELLER cannot document as expended on repair of the damaged structure, and a reimbursement of \$ 0.00 for certain repairs for which receipts were provided have been added. The Texas General Land office (GLO) is contributing up to \$65,000.00 toward the required 25% local match. The GLO contribution specific to your offer is \$65,000.00.
3. The proceeds from the sale shall first be applied to all liens on the property, including real estate taxes, weedy lot liens, and paving assessments. All lien amounts shall be due and payable to the date of settlement. The Hazard Mitigation Grant Program Funds being used for the purchase of the property cannot and will not duplicate benefits received for the same from any other funds. SELLER will return any disaster aid money received if it duplicates benefits as determined by the City or any federal or state official administering these grant funds.
4. SELLER will execute all necessary documents to transfer marketable fee simple title to the property to the City and also agrees to execute now and in the future, any and all documents required by the City and/or DEM to complete this transaction and to comply with the City, state or Federal Regulations.
5. SELLER will NOT remove any property considered a portion of the real estate without prior written notice to the City and providing appraisals of such properties. The value of the property so removed, as finally determined, will be deducted from the purchase price, if the purchase price has not as yet been paid in full or be repaid by the SELLER within 10 days after removal if the purchase price has been paid to the SELLER. The value of the property removed will be solely determined by the City and must be negotiated prior to removal. SELLER understands that no fixtures, materials or improvements to the real estate may be removed from the premises. The City will NOT permit any materials to be salvaged at this time or at the time of demolition. Any violation of this agreement may result in a reduction of the value of and amount received for the structure.
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7. The SELLER understands this is a voluntary transaction and that SELLER is not entitled to relocation benefits provided by the Uniform Relocation Assistance and Real Property Acquisition Policies Act (URA), and will not claim any such benefits.

8. SELLER acknowledges that it has had an opportunity to review this contract and that it has had an opportunity, if it so chooses, to contact an attorney of its choice to review this Agreement. SELLER enters into this Agreement fully understanding the nature thereof. SELLER further releases, indemnifies, and saves and holds harmless the City and the City's officers, employees, agents, and subcontractors from all suits, actions, or claims of any character, name, or description for any matter relating to the subject matter of this contract. The SELLER shall release and indemnify the City from and against any suits, damages, obligations or liability regardless of the negligence, alleged misrepresentations or other intentional or unintentional acts of the City or any of its officers, agents, employees or subcontractors performed in relation to this contract or the administration of this buyout program.

This agreement is binding upon the heirs, executors, successors and assigns of all parties.

DATED this 8 day of Sept, 2009.



Seller Signature

Carol Severance

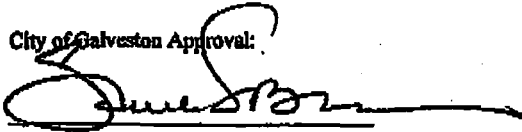
Seller Printed Name



Witness, attesting for Seller (signature)

Witness, attesting for Seller (Printed Name)

City of Galveston Approval:



APPROVED AS TO FORM


City Attorney