A Reprint from *Tierra Grande*, the Real Estate Center Journal

Public Access to Private Land

The New Range War

By Judon Fambrough

Texas population is growing faster than the national average. With 97 percent of Texas land in private ownership, the demand for more public access will grow.

The problem has not gone unnoticed by the Texas Legislature nor by policymakers. The issue was one of five singled out by the recent Agricultural and Natural Resources Summit Initiative held in Kerrville.

While many landowners and policymakers are aware of the problem, they may be unaware of the current incentives encouraging landowners to allow public access. This article reviews the status of current laws.

Most initiatives generated by statutes reduce or eliminate landowner liability in lieu of allowing public access. The legislature has, in essence, created two new categories of persons entering property.

Common law (case law) recognizes four categories. These include invitees, licensees, trespassers and children under the attractive nuisance doctrine. The landowners' duties and liabilities vary with each group.

Invitees have an express or implied invitation to enter the premises. This group, composed primarily of business guests, enters for the economic gain of the landowner. Customers at a grocery store or restaurant are invitees. Fee-paying hunters are invitees.

Landowners owe the highest duty to invitees. Landowners must repair (make safe) or warn invitees of dangerous conditions known to the landowner or those that would be revealed by a reasonable inspection.

However, landowners do not guarantee the safety of invitees. Invitees have a duty to be on the lookout for open and obvious dangerous conditions. If injuries occur, judgments against landowners are reduced by the percentage that invitees contributed toward their own injuries. If invitees are more than 50 percent responsible, Texas Law of Comparative Negligence negates any recovery.

Licensees have express or implied permission (not an invitation) to enter. This group includes primarily social guests. They have the right to enter but are not on the property for the landowners' economic gain.

Landowners have a duty to warn or make safe all **known** dangerous conditions. An inspection is not required. Again, Texas rules of comparative negligence reduce or negate any recoveries by licensees for injuries caused by open and obvious conditions.

Trespassers have neither the express nor implied right (invitation or permission) to enter. Landowners owe no duty to trespassers. Landowners may not injure trespassers except for personal or property protection.

Trespassing children unaccompanied by adults receive special protection because of their inability to perceive a dangerous condition. Landowners have a duty to keep areas safe where children are apt to trespass according to the attractive nuisance doctrine. For more information on this topic, order reprint 475, "Liabilities for Injuries: Landowners, Children and Perilous Conditions," on page 24.

In 1989, the Texas Legislature added a fifth category known as *recreational guest* by amending Chapter 75 of the Texas Civil Practices and Remedies Code. Landowners who give permission to enter for recreational purposes owe the person no greater duty of care than is owed a trespasser. The landowner is not liable for any injury to the individual nor for property damages caused by the individual. Some restrictions apply.

- Permission must be for recreational purposes—i.e., hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, cave exploration, water-skiing and other water sports.
- The landowner is liable when the entrant is injured by acts that are grossly negligent or inflicted in bad faith or with malicious intent.
- The landowner may not charge, in total, more than twice the amount of ad valorem taxes imposed on the property during the previous year.

- The attractive nuisance doctrine still applies until the entrant is older than 16 years.

Until recently, categorizing social guests who enter the property for recreational purposes was confusing. Are they classified as *licensees* under the common law or *recreational guests* under the statutes? Texas courts ruled that they are *licensees*. Recreational guests are those who would not otherwise have been on the property except for the limited-liability status.

Effective September 1, 1995, the 74th Texas Legislature amended

An obscure law in the Texas Parks and Wildlife Code prohibits the sale of freshwater lakes, rivers, creeks or bayous on private land. They must remain open to the public.

Chapter 87 of the Texas Civil Practices and Remedies Code, essentially creating a sixth category for persons involved in equine activities. Any person, including sponsors of equine activities and equine professionals, is exempt from liability for injuries, property damage or death caused by inherent risks associated with equine activities. A column in this issue of *Tierra Grande* discusses the exemption more fully.

Another statutory change, effective September 1, 1995, did not create a new category of guests but capped recoveries when injuries are caused by acts or omissions related to the premises. The 74th Texas Legislature capped all recoveries regardless of the legal classification of the injured party (Texas Civil Practices and Remedies Code, Section 75.004). However, the landowners must have liability insurance coverage in place equal to or greater than the caps, which are:

- $500,000 for each person,
- $1 million for each single occurrence of death or injury and
- $100,000 for each single occurrence for injury or destruction of property.

Texas courts, through case decisions, have granted land owners some relief. The Texas Supreme Court and the Civil Courts of Appeal recognize limited use of waivers. Essentially, the landowners allow third parties to enter the premises only if the visitors sign a waiver form releasing the landowner from liability.

To be effective, the waivers must meet certain criteria. First, the agreement must be based on an offer and acceptance between parties who have equal bargaining power. For this reason, a recent Texas appellate court ruled that parents can not release, in advance, a minor's right to recover for personal injuries caused by the negligence of another (*Munoz v. II Jaz Inc.* d/b/a Physical Whimsical, 836 S.W. 2d 207 [1993]).

Second, the agreement for the release must be based on consideration, but it need not be monetary. The agreement not to sue in exchange for the right to enter may be sufficient.

Third, the provision must state that the entrant indemnifies (releases) the landowner from any acts arising "from the landowner's negligence." This is sometimes referred to as the Express Negligence Doctrine (*Ethyl Corp. v. Daniel Const. Co.*, 725 S.W. 2d 705 [Tx. S. Ct., 1987]).

Fourth, the written contract must give the entrant fair notice of the release provision. The fair-notice principle focuses on the appearance and placement of the provision, not its content. However, the fair-notice requirement is not necessary if the landowner can prove the entrant possessed actual notice or knowledge of the provision (*Spense & Howe Constr. Co. v. Gulf Oil Corp.*, 365 S.W. 2d 631 [Tx. S. Ct., 1963]).

Fifth, the release provisions must be conspicuous. The element of "conspicuousness" is tied to the previous "fair-notice" requirement. Basically, the release provision must be sufficiently conspicuous to give the entrant fair notice of its existence (*Dresser Industries, Inc. v. Page Petroleum, Inc.*, 853 S.W. 2d 505 [Tx. S. Ct., 1993]).

How "conspicuous" is conspicuous? No absolute answer can be given. However, the following suggestions may be useful.

- Make the written provision noticeable.
- Emphasize the entire paragraph—not just a portion. Better still, place the waiver statement at the beginning or end of any agreement on a separate sheet of paper.
- Use headings but not misleading ones.
- Italicize the headings.
- Ask the entrant to initial the waiver paragraph if it is part of the contract or sign the page if written on a separate sheet.

Aside from limiting liability, another statutory approach lowers property taxes if public access is allowed. According to the Texas Tax Code, an owner of at least five acres may restrict the use of the property to recreational, park or scenic purposes. To do so, the owner must file with the county clerk a written instrument in the form and manner of a deed. The restriction must last at least ten years, and this must be stated in the document.

The phrase *recreational, park or scenic use* is defined in Section 23.81 of the Texas Tax Code as "uses for individual or group sporting activities; for park or camping activities; for development of historical, archaeological, or scientific sites; or for the conservation and preservation of scenic areas."

The owner is entitled to have the property valued subject to the restriction if four conditions are met.

1. The owner devoted the land exclusively to the restricted use during the preceding year.
2. The owner files a formal application for the special valuation with the chief appraiser before May 1.
3. The owner intends to use the land in compliance with the deed restriction for the duration of the current year.
4. The owner does not generate a financial gain in excess of the reasonable allowances for salaries or other compensable services.

Landowners at the conference in Kerrville criticized the statutory incentives. If landowners allow public access, problems other than liability arise. First, any property damaged or littered by the public goes uncompensated. Second, any information gained about the property by the public is not kept confidential.

One landowner who allowed the public to visit a spring on the property had to pay $10,000 for the removal of an abandoned dump site. A member of the public saw the site and reported it to the Texas Natural Resources Conservation Commission.

Landowners felt that the risks outweigh the gains under the present statutes.

A little known statute contained in the Texas Parks and Wildlife Code also deals with public access to private property. The statute, entitled "Private Fresh Water" and found in Section 1.012, has never been enforced even though it has been enacted for more than 20 years. If enforced, its impact on public access would be extensive.

The statute states that "[a]ny freshwater lake, river, creek, or bayou in this state contained in any survey of private land may not be sold but shall remain open to the public. If the Parks and Wildlife Department stocks the water with fish, it is authorized to protect the fish under rules as it may prescribe." A Real Estate Center publication entitled "Freshwater Lakes and Streams" (reprint 1009) discusses the statute in detail.

Any legislation such as Section 1.012 of the Texas Parks and Wildlife Code forcing landowners to allow the general public on their property faces problems if enacted after September 1, 1995. The 74th Texas Legislature added Chapter 2007 to the Texas Government Code (better known as the Private Real Property Rights Preservation). The amendment allows Texas landowners to recover from the state for any diminution of at least 25 percent in the market value of land caused by a rule or regulation. If the state does not pay the judgment, the rule or regulation becomes invalid.

"Private Property: How Private Is It?" a Real Estate Center publication (reprint 1053), discusses when a private individual has the right to enter the property of another without permission. However, the article does not discuss public access.

This paper summarizes the current status of the Texas statutes and case law that grant landowners an incentive to allow public access. So far, the major thrust focuses on reducing the landowners' liability in return for allowing specific types of entry. Only one statute deals with lowering property taxes.

This article is for information only and is not intended as a substitute for legal counsel. For specific advice, an attorney should be consulted.

Fambrough is an attorney, member of the State Bar of Texas and senior lecturer with the Real Estate Center at Texas A&M University.

REAL ESTATE CENTER

Tierra Grande (ISSN 1070-0234), formerly *Real Estate Center Journal*, is published quarterly by the Real Estate Center at Texas A&M University, College Station, Texas 77843-2115.

Subscriptions are free to Texas real estate licensees who provide their name, address, telephone and license numbers to Department JS at the address given. Other subscribers, $30 per year.