RECENT REAL PROPERTY DEVELOPMENTS: LAW PROFESSORS' REPORT

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(1) Jones v. Miles, 658 S.E.2d 23 (N.C. App. 2008) (Title by Adverse Possession – Permission Granted During Limitation Period). JVO

This case revisits the difficult issue of the adverseness of the possession required for the recognition of title based on the running of the statute of limitations. In 1965 a landowner built a house and installed a driveway. Because of a mistaken survey, the driveway encroached on the adjacent lot. The driveway and associated shrubbery have been continuously maintained until the present. Through a mesne conveyance the property passed to plaintiffs in 1981. A resurvey in 1992 revealed the fact of the encroachment. Although plaintiffs testified without contradiction that they believed they had already acquired title by adverse possession, they approached their neighbors and offered to purchase the tenth-of-an-acre on which the driveway and shrubbery were located. The neighbors refused the offer of purchase but told plaintiffs to "just enjoy the land" and "don't worry about it." Plaintiffs testified that they continued to believe they had title to the driveway. In 2003 the neighboring lot was sold, passing through a mesne conveyance to defendant. In 2005 plaintiffs brought this action seeking recognition that they had acquired title to the disputed strip of land by adverse possession. Defendant moved for summary judgment, which was granted. A divided panel of the Court of Appeals affirmed the judgment.

The case proceeded on the understanding that plaintiffs had been in adverse possession of the strip of land when they approached their neighbors with the offer of purchase in 1992, but that their possession had not yet satisfied the 20 year requirement for title by adverse possession because they had acquired their property, and begun the use of the driveway, only in 1981. (Apparently no argument was made concerning the possible "tacking" of plaintiffs' adverse possession onto that of their predecessors in interest.) So the issue presented was whether the permission given by the neighbors interrupted the running of the statute of limitations. Plaintiffs relied on a statement concerning prescriptive easements in *Webster's Real Estate Law in North Carolina* § 15-18(a) (5th ed. 1999): "Permission given after the hostile use has begun does not destroy the hostility." The Court of Appeals did not agree and held that permission does destroy the hostility unless the possessor either rejects the permission or takes action that puts the owner on notice that the possessor's use continues to be adverse. Because plaintiffs apparently did neither, the grant of summary judgment in favor of defendant was affirmed.

The dissenting judge believed *Webster's* correctly stated North Carolina law concerning limitation title, and an owner cannot defeat an adverse possessor simply by giving permission. "Once adverse possession has begun and the owner is on notice, the burden shifts to the record owner to take physical or legal action to interrupt the running of the twenty year statutory period." (29) Furthermore the dissenter thought that even if the majority's statement of the law were correct, a genuine issue of material fact concerning plaintiffs' continued use under a claim of right required a remand for trial.

(2) Bayshore Gardens Owners, Inc. v. Meersand, 867 N.Y.S.2d 372, 2008 NY Slip Op 51770U (N.Y. Sup. Ct. 2008) (This is the last of the New York adverse possession cases to allow possession to ripen into title absent a showing that the possessor had the good faith, albeit mistaken, belief that he owned the land in dispute. By recent legislative enactment, today, in New York, it is considered bad faith, and a bar to recovery, for a possessor to know that he is encroaching upon the land of another.). PAF

Bayshore Gardens Owners Inc., plaintiff, and Meersands, defendants, own adjacent parcels of land. Bayshore moved to eject Meersands from a triangular-shaped portion of Bayshore's parcel. Meersands counterclaimed for summary judgment, on the basis that it had succeeded in acquiring title through adverse possession. The court granted summary judgment for Meersands.

Until recently, a successful adverse possession claim in New York required possession, by clear and convincing evidence, to "be (1) hostile and under claim of right; (2) actual; (3) open and notorious; (4) exclusive; and (5) continuous for the duration of the statutory period." Bayshore maintained that Meersands' possession was permissive, and therefore neither hostile nor under claim of right, since Bayshore's predecessor in interest had installed the gate around the disputed parcel. The court finds the initial placement of the fence not dispositive: "In fact it is not the act of putting up the original enclosure that gives rise to a finding of hostility; the possession itself is the hostile act." *Bayshore Gardens*, No. 34382/2007, slip op. at 3. The court also deemed irrelevant to the hostility element the fact that the possessor may have known that another owned the parcel in dispute. While hostility and claim of right can be defeated by permission, permission was neither sought nor received in this case.

Finally, the court considered the Meersands' showing on the continuity requirement. In New York, adverse possessors must occupy the land for a continuous period of ten years, and may tack onto their time with the land their predecessors' time, so long as there is privity. The court found that Meersands made the requisite showing of privity with their predecessors in interest, which included family members and former tenants. This result obtains despite a lack of explicit inclusion of the disputed portion of land in the transferred deed, as "[s]uccessive adverse possessions of property omitted from a deed description . . . may be tacked" if the transferor intended to and did convey the portion in question with the actually deeded land. *Id.* at 6 (quoting Brand v. Prince, 35 N.Y.2d 634, 324 N.E.2d 314, N.Y. (1974)).

Today, by legislative enactment passed in July, 2008, a valid adverse possession claim in New York depends on the showing that the possessor had a "reasonable basis for the belief" that he or she owned the property in question. N.Y. REAL PROP. ACTS. LAW § 501[3] (McKinney 2008). This language imposes a good faith element onto New York adverse possession law and, according to the Sponsor's Memo, targets "offensive use of adverse possession" after cases such as Walling v. Przybylo, 7 N.Y.3d 228 (2006) and Robinson v. Robinson, 34 A.D.3d 975, 825 N.Y.S.2d 277 (3d Dept 2006), wherein mere possessors ripened into rightful owners no matter that they knew that they were encroaching upon land of another.

(3) 16 Cobalt LLC v. Harrison Career Institute, 2008 WL 5135633 (D.D.C. 2008) (Landlord & Tenant – Tenant's Anticipatory Repudiation – Measure of Damages). JMO

In December 2003, landlord entered a ten-year office lease with tenant commencing in January 2004 for one and a half floors of space in a D.C. office building. The tenant ceased paying rent in June 2005. Landlord and tenant signed an agreement in which landlord agreed to accept tenant's surrender of the space on January 6, 2006, after which tenant vacated the premises but failed to pay all rent due and owing at that time.

Landlord filed suit against the tenant to collect damages resulting from tenant's breach of the lease. The tenant failed to respond and the landlord requested a default judgment for $1,972,247.62 which the court granted. This amount reflected "(a) the total value of the lease (i.e. past rent due and future rent that would have been paid through the term of the lease ending in 2014), late charges, attorney's fees and costs, as well as leasing commission fees and tenant improvement costs incurred in reletting the premises, minus (b) the security deposit paid by [the tenant] and the rental payments (both past and future) due from three new tenants to whom [the landlord] had relet portions of the Leased Premises."

The tenant filed a motion to set aside the default judgment. Although the court denied the tenant's motion because the tenant could not demonstrate excusable neglect or meritorious defense to liability, the court reconsidered the award of damages, noting that it was unable to determine the amount and timing of payments of damages due and chastising the parties for their "extremely sparse and cursory briefing" on these issues. The court requested briefing on two issues: "(a) whether the amount of damages must be reduced to reflect [the landlord's] reasonable efforts to relet the Leased Premises and any rents thus obtained, and, if so, by how much; and (b) whether the damages, as related to future rents owed, could be legally paid in a single lump sum now or rather must be paid in periodic installments as such rents become due."

In its opinion, again noting that the parties' briefs failed to explain well this murky and confusing area of the law, the court did permit the landlord to recover damages, although not in the entirety demanded by the landlord. The landlord sought remedies under two provisions of the lease, but the court limited the landlord to recovery under only one section of the agreement.

The lease contained the following pertinent provisions:

13.3. Landlord's Rights on Event of Default. On the occurrence of any Event of Default, the Landlord may... take any or all of the following actions, inter alia:

13.3.1. re-enter and repossess the Premises and any and all improvements thereon and additions thereto;

13.3.2. declare the entire balance of the Rent for the remainder of the Term to be due and payable, and collect such balance in any manner not inconsistent with applicable law;

13.3.4. relet any or all of the Premises for the Tenant's account for any or all of the remainder of the Term... in which event the Tenant shall pay to the Landlord, at the times and in the manner specified by the provisions of Section 2, the Base Rent and any Additional Rent accruing during such remainder, less any monies received by the Landlord, with respect to such remainder, from such reletting, as well as the cost to the Landlord of any attorneys' fees or any repairs or other action (including those taken exercising the Landlord's rights under any provision of this Lease) taken by the Landlord in account of such Event of Default;

13.3.6. pursue any combination of such remedies and/or any other remedy available to the Landlord on account of such Event of Default under applicable law.

The landlord expressly invoked section 13.3.2 and section 13.3.4 in its specific request for damages to cover leasing commissions and tenant improvements incurred as a result of tenant's breach. The tenant argued that section 13.3.4 exclusively governed the determination of damages.

The landlord argued that 13.3.2 was enforceable and permitted the landlord, upon the tenant's default, "to collect all past and future rent in a single damages payment." In a case of first impression in D.C., the court looked to the Restatement (Second) of Property – Landlord & Tenant 12.1 cmt. k., which notes that a landlord has the choice of accelerating the rent and giving up the right to terminate the lease or terminating the lease and giving up the right to future rents pursuant to the acceleration clause. Because the parties in 16 Cobalt terminated the lease by agreement in which the landlord accepted surrender, the court concluded that the landlord gave up its right to accelerate.

Although it denied Section 13.3.2 acceleration, the court permitted the landlord damages under Section 13.3.4., which effectively functions as a mitigation provision in the context of anticipatory repudiation by the tenant. The court was faced with a practical problem, however, that commonly arises in these types of cases. The landlord was not able to find tenants to take all of the premises for the remainder of the duration of the lease. As a result, the court stated that "it is premature to grant damages as to future lost rent" until such time as it is clear what these damages will be. In other words, because the landlord had a duty to mitigate, and because some of the space was not yet leased, the landlord could still reduce the amount tenant owes landlord in damages if the landlord were to secure additional replacement tenants. As a result, the court required landlord to bring a second suit at some point in the future.

The court would have been willing to grant damages to landlord for rent from the date of termination of the lease through the date of the court's opinion because this amount could have been fairly easily calculated. Because the record did not contain sufficient information to make the calculation, however, the court deferred issuing a judgment for damages from termination through the date of its opinion. Nonetheless, the court was comfortable awarding damages for past rent (prior to surrender) along with late fees, as well as the costs of reletting the premises – attorneys fees, leasing commissions and tenant improvement costs – all total, roughly $800,000.

(4) Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666 (2008) (clarification of liability of internet service providers (ISPs)pursuant to Section 3604(c) of the Fair Housing Act for illegal housing advertisements). CNB

The Chicago Lawyers' Committee for Civil Rights Under Law (The Lawyers' Committee) sued craigslist, Inc. (Craigslist) for allegedly violating Section 3604(c) of the Fair Housing Act (FHA). Craigslist defended by alleging that it was immune from liability pursuant to Section 230(c)(1) of another federal law, the Communications Decency Act of 1996 (CDA). The district court granted Craigslist's motion to dismiss (Rule 12(c)). The Seventh Circuit Court of Appeals affirmed the decision of the district court.

Section 3604(c) of the FHA prohibits advertisements "with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin. . . ." The Lawyers' Committee sued Craigslist for hosting notices on the housing portion of its website that stated preferences against classes of individuals who are protected under the FHA such as minorities and people with children. Craigslist defended by asserting that it was immune from liability under Section 230(c)(1) of the CDA which states that no providers "of an interactive computer service" will be treated as the speaker or publisher of information that is provided by an "information content provider" – user.

Judge Easterbrook distinguished between newspapers and other publishers, against which the FHA is routinely enforced, and internet service providers (ISPs). ISPs, according to Judge Easterbrook, were more "like common carriers such as telephone services, which are unaffected by Section 3604(c) because they neither make nor publish any discriminatory advertisement, text message, or conversation that may pass over their networks." He opined that vetting the postings on Craigslist would be expensive and futile as automated filters and human reviewers, alike, would encounter the problem of false positives and false negatives in the more than 30 million monthly notices posted to Craigslist (except in the most blatant cases).

Applying the CDA to this case, Judge Easterbrook clarified the circuit court's earlier opinion in *Doe v. GTE Corp.*, 347 F.3d 655 (7^{th} Cir. 2003). The circuit court held that Section 230(c) (1) of the CDA does not treat ISPs as publishers or speakers of information if that information is provided by a third-party. Thus, ISPs would be immune from causes of action that require, in order to establish liability, that an ISP was a publisher of third-party content.

Because Craigslist had not authored the advertisements that were the subject of the lawsuit, it was not a publisher or speaker under the CDA and, the court further stated that Craigslist could only be liable under the FHA if it was a publisher. Thus, according to the court, Craigslist had not violated the FHA. The Lawyers' Committee responded by arguing that the CDA did not immunize ISPs from liability under the FHA. The court noted that the CDA was a general statute and that the relevant inquiry was not whether Congress thought about using the CDA to immunize ISPs from liability under the FHA; rather, the relevant inquiry was whether Congress excluded Section 3604(c) of the FHA from the reach of Section 230(c)(1) of the CDA. As a general statute without any express limitations, the court found that Section 3604(c) of the FHA was not outside of the reach of Section 230(c)(1) of the CDA.

The decision is an important one for considering the extent to which the FHA should apply to ISPs like Craigslist. Can the ideas of the FHA be more fairly and fully implemented if the FHA can give rise to liability for not only newspapers that publish discriminatory and offensive ads, but also to ISPs? Also, is media neutrality important, conceptually – meaning the notion that anti-discrimination and other rules should apply to content independent of the form of media that is used to disseminate the content?

(5) Bloch v. Frischholz, 533 F.3d 562 (7th Cir. 2008) (condominium association does not violate the Fair Housing Act by enforcing a generally applicable rule against the placing signs and objects on doors). JF

The Shoreline Tower Condominium Association adopted rules against the placement of any sign or other object outside of doors. Lynne Bloch, an observant Jew, was an association Board member and did not imagine that the rule would affect the mezuzah on the doorpost of her unit. For a while, the Association did not object to the mezuzah. A few years later, however, Bloch (and other Jewish residents) suffered several incidents in which custodians or other Association agents repeatedly removed the symbols from their doors. Considering the placement of a mezuzah on the outside of her door to be a religious requirement, Bloch sued the Association for religious discrimination in violation of the federal Fair Housing Act.

The Seventh Circuit Court of Appeals, in an opinion by Judge Easterbrook, upheld the granting of summary judgment in favor of the Association. The Court first noted that the Fair Housing Act addresses discrimination in the “terms, conditions or privileges of sale or rental” of housing, and does not generally govern discrimination after ownership has changed hands. However, the Court noted that discrimination severe enough to constitute constructive eviction might qualify as making a dwelling unavailable.

Nevertheless, the Court held that it does not matter whether the Association’s rule would effectively evict Bloch due to her religious requirements, because there is no evidence of religious targeting on the Association’s part. The FHA does not require religious accommodation, and here the evidence only showed that the Association was enforcing a generally applicable rule in a neutral manner against all residents. Thus, the Fair Housing Act permits associations to be indifferent to the religious requirements of residents, so long its rules are neutral and uniformly enforced. Judge Wood dissented on the basis that she interpreted Bloch’s claim as including the allegation that the Association had in fact targeted Jewish members for enforcement of the rule.

The case shows that the circumstances in which a private condominium or homeowner association is liable under the FHA for discrimination against existing residents is limited, and that judges are not inclined to expand the notion of religious discrimination to include the denial of religious accommodations.

(6) Johnson v. Schultz, 671 S.E.2d 559 (N.C. App. 2009) (Vendor & Purchaser – Attorney Misbehavior – Allocation of Risk of Loss). JVO

This case answered the question: As between vendor and purchaser, who bears the risk of loss when the attorney who handled the closing misappropriates the purchase price? The attorney retained by the purchasers handled the closing for both parties, billing the vendors for the preparation of the deed. The attorney delivered to the vendors a check for the purchase price drawn on his trust account and caused the deed delivered to the purchasers to be recorded 4:45 that afternoon. On the day of the closing, the trust account contained sufficient funds, but on the following day the attorney wrongfully withdrew the money. The vendors did not discover the defalcation until they attempted to cash the check five months later.

The vendors sued to rescind the deed or for damages, but the trial court granted a motion for summary judgment in favor of the purchasers. The purchasers, joined by the North Carolina Land Title Association, argued that the attorney's trust account constituted an escrow. Under traditional escrow law, the escrow agent (the party holding the funds) holds them on behalf of the depositor until the fulfillment of a condition. Once the condition is satisfied, the funds are no longer the property of the depositor, but are held on behalf of the other party. The vendors, joined by the North Carolina State Bar, denied that an attorney's trust account is an escrow and argued that the law of principal and agent should govern the result. Principals are, in general, responsible for the misconduct of their agents.

A divided Court of Appeals agreed that the law of principal-and-agent should apply and that no escrow was involved. It held that where neither vendors nor purchasers are at fault, as here, the risk of attorney misconduct falls on the party with the attorney-client relationship. Because in this case, it was possible that the attorney represented both vendors and purchasers, the Court remanded for consideration of whether the loss must be shared between them.

A dissenting judge, who would have affirmed the trial court, accepted the escrow argument and reasoned that title to the real estate had passed to the purchasers and that the purchase price belonged to the vendors when the embezzlement occurred. He pointed out that pursuant to the standard form real estate contract, which was used for this transaction, the vendors were entitled to payment in "cash" and therefore they assumed the risk of loss when they accepted the attorney's check.

(7) American Capital Corporation v. Blixseth, 575 F.Supp.2d 379 (D. Rhode Island 2008) (a seller's failure to disclose that a parcel is located in a historic district allows termination of the contract by the buyer). JF

American Capital Corporation (ACC) signed an agreement to sell three parcels of property in Rhode Island to Timothy and Edra Blixeth. ACC knew that the three parcels were located within the Newport Historic District, and therefore subject to the rules of the Newport Historic District Commission, but did not disclose this to the Blixeths. The Blixeths later sought to terminate the agreement.

Rhode Island law allows a purchaser to terminate an agreement for the sale of real estate if the seller failed to disclose a "materially deficient condition." The fact that state law requires the disclosure of certain information does not necessarily mean that the information is material, or that it constitutes a defect. Nevertheless, in this case the parcels' location in a historic zone does qualify as a materially deficient condition. Presence within a historic zone has a significant effect on what the owners may do with the property. Moreover, Rhode Island's Real Estate Disclosure Act indicates both (i) that the term defect may encompass land use regulations; and (ii) that the legislature contemplated the disclosure of historic preservation regulations.

State laws vary on the subject of whether sellers must disclose to buyers the presence of zoning or historic preservation regulations. This case indicates that, where there is doubt, sellers should disclose the regulatory conditions, and that failure to do so may undermine enforcement of the agreement. The fact that regulatory information is a matter of public record does not mean that it isn't material.

(8) Moran v. Erk, 11 N.Y.3d 452, 901 N.E.2d 187 (New York 2008) (Vendor & Purchaser – Real Estate Contract – Attorney Approval Contingency). JMO

A contract for the purchase of residential real estate contained an express contingency for attorney approval – "This contract is contingent upon approval by attorneys for Seller and Purchaser by the third business day following each party's attorney's receipt of a copy of the fully executed contract (the "Approval Period").... If either party's attorney disapproves this Contract before the end of the Approval Period, it is void and the entire deposit shall be returned." This language was in a rider, which along with the base contract, was a form document copyrighted and approved by both the local bar association and association of realtors. Right after signing the contract, the buyers developed qualms and instructed their attorney to disapprove the contract, which their attorney did within the required three-day period.

The sale price under the contract was $505,000. The sellers had to carry the house for three years before finally selling it for $385,000. Sellers sued purchasers for the lost purchase price and carrying cost arguing a breach of the implied covenant of good faith and fair dealing. Sellers recovered a judgment for $234,000 at the trial court, which was affirmed on appeal. Both the trial court and the appeals court viewed the purchasers to have acted in bad faith in instructing the attorney to disapprove the contract.

Purchasers appealed and the New York Court of Appeals reversed. First, the Court noted that "[r]equiring a real estate contract to be… 'contingent upon' the approval of attorneys for both contracting parties ensures that real estate brokers avoid the unauthorized practice of law…, and allows both contracting parties to have agents representing their respective legal interests…."

Second, in response to Sellers' argument, the Court of Appeals stated that "[t]he implied covenant of good faith and fair dealing between parties to a contract embraces a pledge that 'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." Because of the attorney approval contingency, however, the Court noted that "the plain language of the contract in this case

[made] clear that any ‘fruits’ of the contract were contingent on attorney approval, and that any reasonable person in the [seller’s] position should have understood” that “no vested rights are created by the contract prior to the expiration of the contingency period.”

In reaching its decision the Court of Appeals relied on the principle that “[c]larity and predictability are particularly important in the interpretation of contracts,” both of which would be eroded by reading “a bad faith exception into an attorney approval contingency” because this would be a “novel notion… entirely dependent on the subjective equitable variations of different Judges and courts instead of the objective, reliable, predictable and relatively definitive rules” of plain text contractual language. The Court also expressed concern that such a bad faith exception would impair the attorney-client relationship because evidence would almost always require disclosure of confidential conversations between attorney and client.

(9) Steel Los III, LP v. Power Authority of State of New York, 864 N.Y.S.2d 749, 2008 NY Slip Op 28367 (N.Y. Sup. Ct. 2008) (Signaling a departure from the posture of deference to government’s determinations of public use, the New York Supreme Court deemed unconstitutional a taking of private property by the State’s power authority for the purpose of benefiting a private power company.). PAF

In this eminent domain proceeding, the court looked behind the Power Authority of New York’s (“NYPA’s”) stated public purpose and held that the agency impermissibly intended to benefit a private party when it condemned petitioner’s property.

Petitioner, Steel Los III, LP, owned property adjacent to land owned by Calpine Corporation, a private company that develops power plants and produces power. In 2003, the Long Island Power Authority (“LIPA”) and Calpine began negotiations for the company to build a new power plant. Calpine tried to purchase petitioner’s property during the negotiations period, offering $1.6 million, but petitioner declined. LIPA ended the exclusive negotiations, and in February 2004, made the project a public endeavor by issuing a Request for Proposals (RFP). The RFP required bidders to have control over the proposed power plant site, but permitted this control in the form of a leasehold. The following month, Calpine’s affiliate entered into a lease with petitioner, in order to build a power plant on the leased site that would conform to the specifications sought in the LIPA RFP. Thereafter, it submitted its proposal to LIPA, and was awarded the project.

Subsequently, LIPA assigned project control to respondent NYPA. In early 2005, just months before the power plant was to become operational, NYPA sought on an emergent basis to acquire through condemnation proceedings that portion of petitioner’s property leased to Calpine. NYPA offered $357,600 in compensation, in contrast to Calpine’s earlier offer of $1.6 million. Thereafter, Calpine and LIPA entered into a new 20-year lease that essentially relieved Calpine of its duty to pay rent by amortizing the cost of Calpine’s acquisition costs over the lease term. The justification for this new lease was NYPA’s “policy to acquire the property underlying power plant construction sites” out of a desire for ownership as a proxy for control. It is also noteworthy that LIPA’s RFP specified a 20-year term for provision of power from the new plant, a term of years corresponding to the new 20-year lease to Calpine.

Petitioner challenged the taking as unconstitutional, insofar as the condemnation for the benefit of Calpine, a private entity, failed to satisfy the public use requirement. Relying on dicta found in *Kelo*, petitioner asserted that the alleged public use was a mere pretext, and that "a governmental body may not take property by eminent domain under the pretext of a public purpose, when the actual purpose was to bestow a private benefit." (Citing Kelo v. City of New London, Connecticut, 545 U.S. 469, 477–78 (2005); Matter of 49 WB, LLC v. Village of Haverstraw, 44 A.D.3d 226, 238 (2d Dept 2007)). The New York court agreed, rejecting respondent's contention that its acquisition on an emergent basis was valid, insofar as the public interest would be endangered by any delay. The putative "emergency" was the forecasted increase in power demands for the summer of 2005. The court, suggesting that NYPA might have in fact created the "emergency," deemed the acquisition pretextual in order to give Calpine the private benefit of avoiding future rent payments. Respondent demonstrated no valid public use or public benefit for the taking, particularly in view of the fact that the RFP permitted leasehold ownership as a form of control over the subject property.

(10) Chapel Hill Title and Abstract Company, Inc. v. Town of Chapel Hill, 362 N.C. 649 (2008) (effect of restrictive covenants should be considered when deciding whether to grant owner a variance from a land use ordinance). CNB

Chapel Hill Title and Abstract (Chapel Hill Title) owned a vacant lot zoned for residential use. Most of the lot, 78.5%, was located within a Resource Conservation District (RCD) and the lot was subject to an ordinance that prohibited construction within the RCD area. The RCD ordinance pre-dated Chapel Hill Title's acquisition of title and Chapel Hill Title was aware of the ordinance when it purchased the lot. Restrictive covenants also applied to the lot and prohibited Chapel Hill Title from building on the portion of the lot that was not subject to the RCD ordinance. So, absent a variance from the RCD ordinance, Chapel Hill Title would not be able to build on the lot.

In December 2002, Chapel Hill Title obtained a building permit to build a residence on the lot outside of the RCD. Because of the restrictive covenants though, in April 2003, Chapel Hill Title was enjoined from using the building permit to construct outside of the RCD area of the lot. In 2004, Chapel Hill Title sought a variance from the RCD ordinance to build a residence. The Board of Adjustment denied the variance on January 30, 2007. The trial court reversed the Board of Adjustment's decision and remanded with instructions to issue the variance. The Court of Appeals reversed the trial court on May 20, 2008 and remanded with instructions to reinstate the Board of Adjustment's denial of the variance. And, on appeal to the North Carolina Supreme Court, that Court reversed the Court of Appeals and remanded with instructions that the Board of Adjustment issue the variance.

According to the RCD ordinance, the Board of Adjustment "shall" grant a variance if it finds there is no "legally reasonable use" left by the ordinance and that failure to grant a variance would result in "extreme hardship." The Town of Chapel Hill (Town) conceded that if Chapel Hill Title could not build at all unless a variance was granted then denial of a variance would constitute an extreme hardship under the RCD ordinance. Nevertheless, the Town argued that [1] any hardship was self-created as Chapel Hill Title knew of the RCD ordinance prior to acquiring title to the lot; and [2] issuance of the building permit for the portion of the lot outside of the RCD meant that the operation of the RCD ordinance was not the cause of Chapel Hill Title having no reasonable use of the property.

So, the issue for the North Carolina Supreme Court was whether the Board of Adjustment should have considered the effect of the RCD ordinance separately, or rather in conjunction with the private restrictive covenants, when determining whether Chapel Hill Title was entitled to a use variance. The Court held that the variance language contained in the ordinance instructed the Board of Adjustment to consider the actual state of the property when determining whether a variance was necessary if an owner is to have a remaining legally reasonable use of its property. The relevant language in the ordinance stated: "'In making such findings [as to legally reasonable use and extreme hardship], the Board of Adjustment *shall consider the uses* available to the owner of the entire zoning lot that includes area[s] within the Resource Conservation District.'" Thus, the Board of Adjustment should have considered the physical and legal conditions of the property and how those conditions interacted with the RCD ordinance. Ultimately, the Court held that the Board of Adjustment failed to properly consider the available uses of the entire lot for the property owners within the context of the restrictive covenants and the RCD ordinance.

The existence of a private land use control device in the form of a restrictive covenant was very important to the resolution of this case. Applying the whole parcel rule, in the absence of the restrictive covenant, could have resulted in a different decision. This case offers a compelling opportunity to consider the role of private land use control devices in takings cases.

(11) Walgreen Co. v. City of Madison, 311 Wis.2d 158, 752 N.W.2d 687 (Wis. 2008) (Landlord & Tenant – Taxation – Valuation of Leased Property). JMO

Walgreens sought review of a published court of appeals opinion affirming a judgment of the Dane County Circuit Court, adopting assessments of two Walgreens stores located in Madison, Wisconsin, conducted by the City of Madison (City) for tax purposes. Walgreens leases the two stores for which it is responsible for paying both rent and the property taxes for the property. The lease for each of the properties was for a term of 60 years, terminable after 20 years, with one calling for monthly rent of roughly $36,000 and the other for monthly rent of roughly $30,000. Because the properties were developed pursuant to a business model in which Walgreens rents property from a developer at rents that include compensation to the developer for all financing, land acquisition, construction, and development costs, along with a profit margin, the rents were understood to be in excess of market rate rental payments.

The City's assessment reports for the properties described the "market value" as $4.6 million for one of the properties and $3.8 million for the other property, based on an income approach with the lease payments under the leases representing the income on which valuation was calculated. The primary difference between the appraisal approaches of the parties is that the income approach analysis in Walgreens' appraisals analyzed the market rent, as opposed to the contract rent, while the City's appraisals specified that they were "[u]sing the actual income from the [Walgreens' property] lease." As a result of their different methodologies, Walgreens' appraisals assessed the properties as valued at roughly $2 million and $1.8 million for the two parcels. According to Walgreens, this resulted in inflated property tax payments that cost it more than $100,000.

The Wisconsin Supreme Court indicated that it was being asked to determine "whether a property tax assessment of retail property leased at above market rent values should be based on market rents (as Walgreens argued) or if such assessments should be based on the above market rent terms of Walgreens' actual leases (as the City argued)." This case required the Court to identify the correct methodology for assessing leased retail property for purposes of municipal taxation when the leases for such property contain monthly payments significantly above the market rental rate in part as a result of certain unique business and financing terms being incorporated into the contractual lease terms.

As to the proper method of property tax assessment, the Wisconsin Supreme Court reaffirmed that case law and section 70.32(1) of the Wisconsin statutes "proscribes assessing real property in excess of market value." Noting that this holding "is consistent with the nationally recognized principle that '[a] lease never increases the market value of real property rights to the fee simple estate,' Appraisal Institute, *The Appraisal of Real Estate* 473 (12th ed.2001)," the Court also affirmed that section 70.32(1) requires adherence to the *Wisconsin Property Assessment Manual* (the *Property Assessment Manual*) absent conflicting law. "The Manual is consistent with both statutory and case law in this state requiring an income approach assessment of a leased retail property's fair market value of the fee simple interest to be based on market lease rates, not actual contract rates, as long as encumbrances to the property do not cause its leased fee value to fall below a market rate value." Thus, the Court reversed the decision of the court of appeals and remanded the case for further proceedings consistent with its opinion.

(12) Old Port Cove Holdings, Inc. v. Old Port Cove Condominium Association One, Inc., 986 So.2d 1279 (Fla. 2008) (statutory changes to the rule against perpetuities do not apply retroactively; the common law rule against perpetuities does not apply to rights of first refusal). JF

In 1977, OPCI, as the owner of real property, signed an agreement granting a right of first refusal to Old Port Cove Condominium Association (Association). The agreement provided essentially that if OPCI ever elected to sell the parcel (to a non-related entity), the Association would have a right to purchase the parcel on the same terms and conditions within 30 days. The Agreement contained no expiration date. In 2002, OPCI's successor sued to obtain a declaratory judgment and to quiet title to the property, arguing that the right of first refusal violated the common law rule against perpetuities.

Lower courts disagreed over resolution of the case. The trial court held that the right of first refusal did indeed violate the common law rule. A court of appeals reversed, holding that the Florida's 1988 adoption of the Uniform Statutory Rule Against Perpetuities had abrogated the common law rule. Under the USRAP, which allows a wait-and-see period of 90 years, the Association's right of first refusal is valid.

The Florida Supreme Court disagreed with the reasoning of both courts below. First, it held that Florida's adoption of USRAP did not abrogate the common law rule with respect to previously created interests. Statutory changes to settled laws are presumed to operate prospectively only, and the court of appeal erred in interpreting Florida's statutory rule to apply retroactively.

Nevertheless, the Florida Supreme Court ruled in favor of the Association by holding that the common law rule does not apply to rights of first refusal anyway. Under Florida law, a right of first refusal is not an equitable or legal interest in real property, but is only a contractual interest; for this reason it is beyond the scope of the common law rule against perpetuities. The more appropriate rule for preventing the abuse of such interests is the rule prohibiting unreasonable restraints against alienation. The court recognized that states are divided on the question whether rights of first refusal are subject to the rule against perpetuities; with the majority holding that such rights are subject to the rule.

(13) Monks v. City of Rancho Palos Verdes, 167 Cal. App. 4th 263 (Cal. App. 2008) (longstanding moratorium on residential development in the city's landslide area was determined to be a permanent taking under state constitution). CNB

Several landowners filed suit claiming that a longstanding moratorium on development in the landslide area (Zone 2) of the City of Rancho Palos Verdes (the City) was an unconstitutional taking under the California Constitution. The landowners also filed suit in federal court alleging a taking under the Fifth Amendment to the United States Constitution and violation of the Equal Protection Clause of the Fourteenth Amendment (Monks v. City of Rancho Palos Verdes (U.S. District Court Case No. 02-5424-RSWL)). The federal district court abstained from hearing the case pending resolution of the state case.

The City imposed a moratorium on the construction of new homes in 1978 in Zone 2 and passed a resolution in 2002 that toughened the criteria for obtaining an exclusion from the moratorium. The affected landowners sued alleging an inverse condemnation under the takings clause of the California Constitution according to which "'[p]rivate property may be taken . . . for public use only when just compensation… has first been paid to, or into the court for, the owner.'" The trial court held that the City acted with proper authority and that a permanent taking had not occurred. The Court of Appeal reversed and held that the resolution, by implementing the moratorium and continuing the prohibition on building, deprived the landowners of all economically beneficial use of property in violation of the state takings clause.

Pursuant to the City's resolution, in order to obtain an exclusion from the moratorium, landowners in Zone 2 had to prove that the forces of stability for the *entirety* of Zone 2 (gross safety factor) were 1.5 or higher. Prior to passage of the resolution, landowners only had to provide information regarding the geologic conditions of their individual lots (local safety factor). Experts estimated the costs of determining the gross safety factor to range from $500,000 to $1,000,000. The Court of Appeal held that there had been a taking under *Lucas* and used the case as an opportunity to apply California common law nuisance doctrine in the context of a *Lucas* takings challenge. In essence, once the Court of Appeal found that the moratorium resulted in a *Lucas* taking, the burden was on the City to prove that state nuisance law supported the moratorium if it was to avoid liability.

The Court of Appeal held that the moratorium was not justified under California nuisance law for six reasons. First, Zone 2 was zoned solely for residential purposes and there was nothing inherently harmful about the landowners' desire to build for this purpose. Second, the City had the burden of establishing "a reasonable probability of significant harm" to support its development restrictions and, at best, there was mere uncertainty regarding the stability of Zone 2. Third, the risk of harm to health or safety was de minimis. Fourth, the City's decision to approve numerous exemptions and exception permits for existing homes in Zone 2 undermined its nuisance rationale for forbidding these landowners to build. Fifth, the risk of personal injury and property damage was, practically speaking, insufficient to justify the moratorium. And, finally, speculation regarding the City's possible exposure to future legal liability should a landslide occur in Zone 2 did not support a nuisance exception to *Lucas*.

The facts of the case provided an interesting opportunity for the court to address a situation in which a municipality makes it exceedingly expensive for a landowner to develop his/her property when the proposed development is consistent with the present zoning classification. The moratorium attempted to impose a permanent ban on construction in areas that were already developed; the existing development was not being phased out; and the area was relatively safe for construction. The court seems to be saying that even under the deferential standard of review attending most land use decisions, municipalities in California will find it difficult to avoid a *Lucas* takings challenge under similar facts.

(14) City of Long Branch v. Anzalone, 2008 WL 3090052 (N.J. App. Div. 2008) (Accepting the U.S. Supreme Court's invitation in *Kelo v. City of New London* to apply its own State constitutional and statutory standards to rein in the scope and extent of governmental takings, the New Jersey Appellate Division determined that a mere insufficiency of economic growth and development fails to provide "substantial evidence of blight" under New Jersey eminent domain law.). PAF

In 1995, the City of Long Branch began a redevelopment plan that was to be conducted in various phases involving different segments of the city designated as "blighted." In January of 2005, condemnation proceedings were brought against appellants, who owned property on one such three block segment.

On appeal, the court reversed the lower court and concluded that the City had not satisfied its burden of demonstrating substantial evidence of blight, as required under N.J.S.A. 40A:12A-5. The appellate division found that the City had presented little evidence beyond 'a bland recitation of applicable statutory criteria and a declaration that those criteria are met." The court's ruling relied on the New Jersey Supreme Court's recent decision in *Gallenthin Realty Development, Inc. v. Borough of Paulsboro*, 191 NJ 344 (2008), which was decided after the trial court's decision in *Anzalone. Gallenthin* reaffirmed that the New Jersey Constitution requires a finding of actual blight before private property may be taken for the purpose of redevelopment, and found that the blight conclusion could not extend to an area in which the only negative condition was suboptimal land use. Rather, a blight designation requires that there be substantial evidence of deterioration or stagnation that might harm surrounding areas.

The *Anzalone* court elaborated further still, to conclude that while "redevelopment would be expected to result in enhanced tax revenue and more spending for local business, the difference between the actual level of economic activity in the redevelopment area and the level that might be achieved after its transformation does not by itself amount to blight." The court held that if eminent domain proceedings were allowed to be predicated solely on such a differential, condemnations could occur on the basis of the perception of a given area's insufficiency of wealth. Such a result would exemplify the fear "that most property would be continuously subject to forced redevelopment if the threshold requirement were nothing more than the possibility of a more profitable use of the land."

(15) Borrenpoll v. DaBeers Properties, LLC and Bank of Bennington, 755 N.W.2d 39 (Neb. 2008) (a deed of trust has priority over a simultaneous notice of commencement where that is the party's intent, even if the notice was recorded first). JF

DaBeers, the owner of real property, executed a deed of trust in favor of Bank to secure a construction loan of $66,198. On the same day, DaBeers executed a notice of commencement in accordance with the Nebraska Construction Lien Act (NCLA) (modeled after article 5 of the Uniform Simplification of Land Transfers Act). The Bank's representative mailed both the deed of trust and notice of commencement in a single envelope to the county register of deeds office for recording. On October 19, 2005, the county first recorded the notice of commencement, and five minutes later it recorded the deed of trust.

In 2006, Borrenpol and Bartels made improvements to the property and filed construction liens against the property for those improvements. According to the NCLA, if a lien is recorded while a notice of commencement is effective … the lien attaches as of the time the notice is recorded." Thus, the liens' priority depended upon the timing of the notice of commencement's filing. Borrenpol and Bartels brought the action seeking to collect on the liens and to establish their priority over the deed of trust on the basis that the notice was recorded first.

The Nebraska Supreme Court held that, although the notice of commencement was recorded five minutes before the deed of trust, they were simultaneously recorded for legal purposes. This was established by the fact that both documents were delivered simultaneously to the recorder's office without instructions as to which should be recorded first. In the case of simultaneously recorded documents, priority is determined according to the intent of the parties. Using extrinsic evidence, the court determined that the parties intended for the deed of trust to have priority over the notice of commencement, and therefore ruled in favor of the Bank.

The case illustrates that lenders issuing construction loans secured by a deed of trust – and who wish for the deed to have priority over subsequent liens – should ensure that the deed is recorded before any notice of commencement and that the intent of the parties is clear. Nevertheless, if the documents are delivered together and recorded close to simultaneously, it may not be necessary to show actual prior recording to protect the lender.

(16) Home Realty Lynnwood, Inc. v. Walsh, 164 Wash. App. 231, 189 P.3d 253 (2008) (A contract for the sale of land must contain an adequate description of the property. To satisfy the statute of frauds, the description must be sufficient to locate the property without the need for oral testimony, or it must explicitly reference or attach an instrument that does contain a sufficient description. A contract that does neither fails. The court found it insufficient to rely entirely on oral testimony that the parties intended to incorporate a sufficient description by faxing and placing supporting documents together in the same file folder as the contract.). PAF

In this case, the Washington Court of Appeals reversed the trial court's grant of summary judgment, and concluded that the trial court had erred in considering oral testimony as part of its determination that a land purchase and sale agreement satisfied the statute of frauds. Rather, the appellate court found that the agreement that did not include an adequate description of the land or an appropriately appended legal description of the property to be sold, and therefore failed.

In the of Spring 2006, Jae Won and Mi Ja Lee ("Purchasers") offered to purchase a home ("Property") from John and Marcy Walsh ("Sellers"). The parties negotiated a purchase and sale agreement ("PSA") which contained a financing contingency that would be deemed waived within 20 days of mutual acceptance of the PSA unless the Lees' agent submitted a letter from their lender explaining why the purchasers' loan was not approved. Additionally, the PSA included a forfeiture clause that entitled the sellers to keep the earnest money deposit of $50,000 if the purchasers wrongfully failed to close. Rather than include a legal description of the property, the PSA contained boilerplate language that authorized the seller's agent to attach or correct the legal description of the property.

Purchasers were unable to obtain the requisite funding and failed to provide an explanatory letter from their lender. They executed a letter to rescind and sought return of their deposit. The sellers refused, and counterclaimed for award of the deposit.

The trial court was persuaded by the testimony of the purchasers' real estate agent, who stated that the preliminary title insurance commitment, which included a copy of the deed with a legal description, was sent to the purchasers' realtor. Additionally, the lower court relied on the realtor's testimony that it was standard operating procedure to "attach" documents by placing them in a single file folder, and that a copy of the deed was placed in the same folder as the PSA. Though these documents were not physically appended to the PSA, the realtor maintained that he was certain about the identity of the property that was subject to the PSA.

The Court of Appeals reversed, concluding that the PSA had to contain a description sufficient to locate the property without the need for oral testimony, or had to attach or explicitly reference an extrinsic instrument that did contain a sufficient description. Here, neither prong was satisfied. Moreover, the court deemed insufficient the oral testimony that the parties intended to incorporate the legal description by faxing and placing supporting documents together in the same file folder as the PSA.