ANNUAL REAL ESTATE SECTION LAW UPDATE 2018

ALASKA CASES

By

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1. Dickson and DeFusco v. State of Alaska Department of Natural Resources, 433 P.3d 1075 (October 5, 2018)

Kelly Dickson and Donna Defusco are appealing the superior court ruling that the adjoining properties they own near Big Lake are subject to a RS 2477 right of way over their properties for the Historic Iditarod Trail and subject to a prescriptive easement for public use for a road known as the Homestead Road. They are also appealing the award of attorney's fees in the amount of approximately $225,000.

Section 8 of the Lode Mining Act of 1866 granted "the right of way for construction of highways over public lands, not reserved for public uses;" these are known as RS2477 rights of way. An RS 2477 right of way is "self-executing, meaning that an RS2477 right of way automatically came into existence if a public highway was established across public land in accordance with the law of Alaska." It requires public acceptance of he grant through either public use or the manifestation of official intent. Although Section 8 of he Lode Mining Act was repealed in 1976, existing rights of way were left intact. For both RS2477 and prescriptive easement, the party claiming the right has the burden of proving it by clear and convincing evidence.

The superior court held a 27 day bench trial. It found that the Historic Iditarod Trail crossed Dickson's and DeFusco's property on a 100-foot right of way established by federal law and recognized thereafter by official acceptance and use. It further found that the Homestead Road enjoyed a 20 foot wide prescriptive easement across the properties. The basis of the review of the superior court factual determinations was the clearly erroneous standard, and the Supreme Court found that the factual determinations were not clearly erroneous. Since they are specific to this case, the factual determination and disputes will not be set forth in detail.

The Supreme Court also affirms the superior court's rejection of the estoppel defense based on past DNR employee statements asserting or implying that there were no easements on the property. However, there was no evidence that the DNA employees were "apprised of the true state of the State's title" at the time they made the statements as required for an estoppel defense.

However, the case was remanded to the superior court for further consideration of the award of attorney's fees. Although the superior court applied the presumptive 30% for cases following trial, it indicated that consideration needed to be given to Alaska Civil Rule 82(b)(3)(I) and (J). (I) deals with possible variation if the award would otherwise be "so onerous to the non-prevailing party that it would deter similarly situated litigants from the voluntary use of the courts." (J) allows a variance to "the extent to which the fees incurred by the prevailing party suggest that they had been influenced by considerations apart from the case at bar, such as a desire to discourage claims by others against the prevailing party."

2. <u>Fannon v. Estate of June Scheele</u>, 436 P.3d 956 (February 8, 2019)

This case deals with the interpretation of property restrictions, one found in a subdivision declaration and the other in a deed's greenbelt covenant. Between 1984 and 1986 the Scheele Solid Subdivision was developed in Wasilla. It consisted of seven lots with Lot 1, Block 1 having a water well historically supplying the other lots through a subdivision water system.

Covenants were adopted for the subdivision which prohibited using the lots for: (1) residential housing; (2) the sale of alcoholic beverages; (3) junkyards, dumps, or rubbish disposal or storage; and (4) churches or places of worship. In 1998 Lot 1, Block 1 was conveyed to a new owner who signed an agreement assuming responsibility for the well and water system. The quitclaim deed for the lot was signed by the buyer and made subject to assumption of the water system obligations and the following restrictive greenbelt covenant:

> **Allowed Uses.** Lot 1, Block 1 Schelle Solid Subdivision may not be used for any purpose other than use as a greenbelt and use for continued maintenance and operation of the water system located thereon. For the purposes of this covenant, "Greenbelt" means maintenance of trees and natural cover in those areas and of the kind, as presently exist. In interpreting this covenant, a court should resolve doubts in meaning against the free use of land, rather than in favor of the free use of land.

In 2014 Link Fannon acquired the lot, along with the well and water system, from an owner subsequent to the 1998 transaction. The deed to Fannon made no mention of the Greenbelt Covenant. Fannon intended to increase the well's production to service at least another ten acres of neighboring commercial property and to sell "bulk water" to the Department of Transportation for a Parks Highway upgrade. Fannon then begin clear-cutting trees on the lot.

The estate brought suit against Fannon for violating the Greenbelt Covenant's terms; the estate sought damages, a preliminary injunction against further clear-cutting, and an affirmative injunction to restore trees. The superior court entered a preliminary injunction barring further tree clearing but required the estate to post a $60,000 bond before the injunction took effect. When the estate was unable to do so, the preliminary injunction was lifted and Fannon resumed clear-cutting trees on the lot.

The parties filed cross motions for summary judgment. The superior court granted the estate's motion for partial summary judgment and denied Fannon's. Finding that neither covenant presented any ambiguity, the court limited its inquiry to the plain language of the restrictive covenants. The court also found that the Declaration was not intended to be "the exclusive source of restrictions on the lots" and thus did not prohibit lot owners from imposing subsequent restrictions upon their land and that the Declaration and the Greenbelt Covenant did not conflict. The court found that Fannon had violated the Greenbelt Covenant and entered a permanent injunction preventing Fannon from conducting activities outside of its scope.

The partial summary judgment ruling narrowed the issues, and the resulting trial focused almost entirely on damages and affirmative injunctive relief. The superior court found that the estate "failed to establish damages" or to provide a reason "why the greenbelt should be restored." It confirmed the permanent injunction prohibiting violation of the Greenbelt Covenant.

In review, the Supreme Court points out that the interpretation of a covenant is a question of law to which it applies its independent judgment. As authority, it cites HP Ltd. Partnership v. Kenai River Airpark, LLC, 270 P.3d 719 (Alaska 2012). Although for procedural issues it finds that Fannon did not preserve the argument that the Greenbelt Covenant is ambiguous, it approves the determination by the superior court that neither the declaration or the Greenbelt Covenant are ambiguous. It further states that where a covenant is unambiguous, a court is limited to applying the words of the agreement and is prohibited from considering extrinsic regarding the parties' intent. (This is contrary to the rule in contract cases where a court could look to relevant extrinsic evidence without determining that it was ambiguous. Miller v. Fowler, 424 P.3d 306 (Alaska 2018).

The Supreme Court further determines that the Declaration does not delineate an express intent to limit the subdivision to commercial use only as Fannon contended. The declaration makes it clear that the subdivision is non-residential, but does not prohibit a lot's use as a greenbelt. Nor does it address the water system on Lot 1, Block 1. By its plain language, the Greenbelt Covenant merely adds a new restriction on Lot 1, Block 1 - a restriction on which the Declaration is silent. The superior court's summary judgment is affirmed.

3. Rosauer v. Manos, Liddicoat and Greatland Tree Service, 440 P.3d 145 (March 8, 2019)

Homeowners had trees removed from a municipal right-of-way across the road from their home, only obtaining a required permit several months later. Neighbors, whose property abutted the right-of-way and whose house had been behind the removed trees, sued the homeowners and the tree-removal company under the timber trespass statute, AS 09.45.730, which allows triple damages from a person who without lawful authority cuts down a tree on the land of another or on the street or highway in front of a person's house.

The superior court granted summary judgment to the defendants concluding that the retroactive permit from the Municipality conferred legal authority. The Supreme Court affirms the decision permitting the retroactive permit. It references the significant authority and discretion over public-use permits delegated to the Department of Development Services in the Anchorage Municipal Code.

4. Frank Griswold v. Homer Board of Adjustment, et. al.,440 P.3d 248 (April 19,2019)

Homer residents Terry and Jonnie Yager applied for a conditional use permit to build a covered porch ten feet into a twenty-foot setback along Pioneer Avenue in Homer's Central Business District. Frank Griswold, who has litigated numerous land use cases against the City of Homer, objected and appealed the granting of the conditional use permit that was granted. He owns several lots within the Business District, one of which is approximately 3,280 feet from the Yagers' property. He explained that he passed he Yagers' property, "often several times a day" and that he appreciated the open space that the setback created along the street. He also argued that the permit would adversely affect the value of his Business District properties. The Homer Board of Adjustment rejected his appeal for lack of standing. The superior court upheld the determination that he lacked standing.

The Supreme Court examines the Homer City Code regarding standing and finds that "The HCC thus requires only that a property owner produce *some evidence* supporting the owner's claim that the city's action could *potentially* adversely affect the owner's *use or enjoyment* of the owner's property." (Emphases in opinion.) Based on this liberal standard, the superior court's judgment that Griswold lacks standing is reversed and the matter is remanded for reconsideration by the Homer Board of Adjustment.

Justice Bolger dissented stating that he would affirm the Homer Board of Adjustment because the Board reasonable concluded that Frank Griswold was not aggrieved by the Homer Advisory Planning Commission's setback decision.

5. Markham v. Kodiak Island Borough Board of Equalization, 441 P.3d 943 (May 24, 2019)

Gerald Markham has been an attorney in Alaska since 1972. He is over the age of 65 and in 2013 and 2014 applied for the senior property tax exemption from the Kodiak Island Borough for a home he owns in the Borough. He also owns a home in Anchorage, two homes in Washington, one of which was his contact address throughout the litigation, and a home in Arizona.

AS 29.45.030 (e) exempts the first $150,000 from local property tax on real estate if the residence is owned by a person over 65 years of age and it is occupied as the primary residence and permanent place of abode of that person. The statute further authorizes a municipality to determine eligibility for the exemption by requiring that an individual meet the requirements of the Permanent Fund Dividend program, which Kodiak did. It denied Markham's application for the senior exemption, which denial was upheld by the superior court.

Markham argued numerous procedural and constitution issues in seeking to obtain the exemption. This includes objecting to the superior court's dismissal of the 2013 appeal for late brief filing after obtaining an extension arguing that as a pro se litigant the court had a duty to advise him of the specific error and allow him to correct it. This argument is rejected with the Court pointing out that he had decades of experience as an practicing attorney, and was not entitled to leniency given to pro se participants solely because he had elected to represent himself. The superior court dismissal of his appeals is affirmed, although the case is remanded for a more complete determination regarding the attorney's fees awarded to the Borough.

6. Kelley v. Municipality of Anchorage, Board of Equalization, No. 7369 (May 31, 2019)

The superior court affirmed the Municipality of Anchorage's tax valuation of Leonard Kelley's property. He appealed arguing primarily that the board applied fundamentally wrong principles of valuation by failing to consider, as definitive evidence of value, either his purchase price for the property or the price for which he sold a neighboring lot. The initial tax valuation of the lot was $318,900 which the assessor said was obtained using a market adjusted cost approach. This was described as including the land value as if vacant plus depreciated replacement value of the improvements calibrated to specific market segments based on a large sampling of sales data.

Kelley alleged that the assessed value was not accurate due to numerous "building deficiencies" including septic system problems, rot in the garage and deck, a leaky roof, windows that needed replacement, as well as a general need for improvements and repairs

and failure to use his initial cash purchase price of $160,000. Although Kelley did not submit itemized estimates of repair costs as requested, the assessor did inspect the property and reduced the valuation to $259,800.

This case can be best understood with the Court's summary of the standard of review applied in tax value cases. We have consistently held that taxing authorities are to be accorded broad discretion in deciding among recognized valuation methods. The taxing authority is not bound by any particular formula, rule or method, either by statute or otherwise. Its choice of one recognized method of valuation over another is simply the exercise of a discretion committed to it by law. What concerns us in nothing less than fraud or the clear adoption of a fundamentally wrong principle of valuation. If the appraiser has not transgressed the bounds of honest judgment, the taxing authority's selected valuation should be upheld.

The superior court's affirmation of the Board of Equalization determination is affirmed by the Supreme Court.

7. <u>McCavitt v. Lacher and State of Alaska, Department of Natural Resources</u>, No. 7398 (August 16, 2019)

Barbara and Louis Lacher own property abutting Wasilla Lake. Jerry and Brenda McCavitt own adjacent property abutting Wasilla Lake to the east. Both families own their respective property up to the ordinary high water mark of Wasilla Lake, making them littoral landowners. The Supreme Court points out that although technically littoral rights relate to lakes and riparian rights relate rivers, they are used interchangeable and does so itself. In 1992, the McCavits were granted a permit from the Alaska Department of Fish and Game (ADFG) to construct a dock from their property into Wasilla Lake, which they did. Between 2011 and 2012 they built a 16x20 foot extension to the original dock for which they did not seek or obtain a permit. The extension was attached at a right angle to the original dock, and extended in the direction of the Lachers' property.

In the spring of 2012 the Lachers informed their daughter, Randy Lacher, who was employed by the Alaska Department of Natural Resources (DNR) that they were unhappy with the McCavits dock in front of their house and she obtained a copy of the agency's Generally Allowed Uses regulation. The regulation allows an upland littoral property owner to build a dock for personal, noncommercial use provided the dock is within the "projected sidelines" of the upland littoral property or is built with consent of the neighboring upland littoral property owner. In the summer of 2012 ADFG sent the McCavits a Notice of Violation advising them that their dock extension was constructed in violation of permitting requirements, but took no further action. When Randy Lacher attempted to have DNR enforce its "Generally Allowed Use" regulation against the McCavits' dock, she was informed that DNR could not enforce the "projected sidelines"

language because the Commissioner had found the language vague and ambiguous.

Lachers sued the McCavits in superior court bringing three claims: the dock interfered with their riparian rights, constituted a private nuisance, and was a trespass. The court granted the McCavits' motion to require the Lachers to join DNR as a necessary party because the dock was located on state land. Although the court ordered DNR to be added, it successfully moved for summary judgment arguing that it was not required to act. The court also dismissed the trespass claim since the Lachers' did not have title to the lake. The trial proceeded on the remaining claims of unreasonable interference with riparian rights and private nuisance. After a four day trial, the superior court found that the McCavits' dock unreasonably interfered with the Lachers' riparian rights and constituted a private nuisance. It ordered the McCavits to remove a portion of the dock. The court also awarded the Lachers attorneys fees in the amount of $36,021 which was 30% of their total fees of $120,070, rejecting the argument that some of the fees should be allocated to DNR since the McCavits had insisted that DNR was a necessary party.

After an extensive discussion of the history of littoral and riparian rights and the right to wharf out in Alaska, the Supreme Court adopts a rule of reasonableness stating that riparian and littoral landowners have the right of reasonable access to and use of adjacent navigable and public waters of the State, as they are defined by the legislature, so long as the access or use is lawful and does not unreasonably interfere with the correlative rights of other riparian or littoral landowners. What is reasonable is a question of fact, to be determined by weighing a variety of factors. It then lists 9 factors that could be considered. The case is remanded to the superior court for consideration of the new rule of reasonableness and the attorneys fees award is vacated pending that consideration.

8. <u>Black v. Whitestone Estates Condominium Homeowners' Association, et. al.</u> No. 7400 (August 16, 2019)

Whitestone Estates is a ten-unit condominium, adjacent to Ptarmigan Boulevard, a public street in Eagle River. The condominiums are single-family homes on large parcels of land. Units 1 and 2 access Ptarmigan Boulevard by a short, paved drive; units 3 through 10 access Ptarmigan Boulevard by a longer drive. Craig Black, a member of the Alaska Bar, purchased unit 1 in May 2002 with his wife Camille Brill. Whitestone was assessing monthly dues of $100 to pay for the maintenance of both drives, mostly for snow removal. Black claimed that this arrangement violated the condominium's declaration and proposed an alternative approach that each unit owner pay the percentage of the drive expenses that corresponded to the portion of paved area within the association that serviced his or her unit. Although the owners rejected this proposal, the Blacks began withholding a portion of their assessed dues, paying only what their share would have been under the rejected formula.

In 2014, the Blacks sent a letter to all unit owners announcing their intent to end their dues dispute. They also sent checks intending to cover the $3,800 that had been assessed beginning January 2010, directing the continuing payments be applied to their current dues. The Blacks' position being the earlier dues could not be collected as they were beyond the contract statute of limitations. Whitestone filed a complaint for lien foreclosure in March 2016 seeking to recover $4,714.08 in unpaid assessments and fees from the Blacks, interest on the unpaid amounts and full attorney's fees. Black answered asserting a statute of limitations defense with numerous counterclaims and a request for attorney's fees and punitive damages.

Prior to trial, the superior court granted the Association's motion for a declaratory judgment that the owners of units 1 and 2 could be required to pay the full assessment for the maintenance of the drive. Following a five-day bench trial, the court found in favor of Whitestone on all issues stating that it wasn't a close call. It further found that Black had created a decade of mistrust between himself and his neighbors. It concluded from testimony that Black had "bullied everybody with his position as a lawyer" and that this demeanor was evident in his filings and presentation before the court. The court entered final judgment and decree of foreclosure. The final judgment granted a total monetary judgment of $132,670.16 of which $125,533.96 was attorney's fees and costs.

The Supreme Court affirms the superior court in all regards. The statute of limitations argument is rejected since the declaration indicates application of payments first to interest, then to costs and fees, and then the oldest balance due. It also affirmed that money for reserves kept that status even though commingled with operating funds in a single account, defeating Black's claim that they should be refunded to the unit owners.

The Supreme Court also affirmed the award of $124,043 as the full amount of Whitestone's attorney's fees. The superior court had awarded this amount both because the declaration entitled the prevailing party to actual attorneys' fees and as an enhanced fee award under Civil Rule 82(b)(3). That award is reviewed under an abuse of discretion standard. Black had argued that the fees were not reasonable as they were much higher than the amount in dispute. But the superior court had found that the Blacks' litigation conduct was the cause of Whitestone's high fees. The superior court also found that "the Blacks engaged in non-stop vexatious and bad faith litigation." The award is affirmed as the Supreme Court concludes that the superior court did not abuse its discretion.