ANNUAL REAL ESTATE SECTION LAW UPDATE 2010

ALASKA CASES

By

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September 23, 2010

1. Hillstrand v. City of Homer, 218 P.3d 685 (October 30, 2009)

The City of Homer sought land through eminent domain to expand its water treatment plant. Hillstrand, the property owner, objected to the taking asserting that it would close off an access route to her remaining property, that the City had not dedicated replacement access in a binding way, and that the City sought a fee simple interest, rather than an easement, in the portion of the land to be used as an undeveloped protective buffer for the plant. The land owner also sought an order directing the City to obtain final plat approval for the property by a specific date. The Superior Court granted the requested taking without specifying a deadline for the final plat.

The Supreme Court found that the legislative amendment of AS 09.55.275 in 2004 eliminated the language making preliminary replat approval an express precondition to a taking. Although still required, there is no express deadline for final replat approval. The Court upheld the size of the buffer as not being arbitrary. In discussing AS 09.55.250, related to the type of estate to be taken in a condemnation, the Court held that when a condemnor takes land for a public building, land may be taken in fee for subsidiary features such as the protective buffer, so long as those features are reasonably necessary to accomplish the condemnor's purpose. The Court held that the replacement access issues were more appropriately considered in subsequent proceedings to determine just compensation.

2. AAA Valley Gravel, Inc. v. Alicia Totaro and Herman Ramirez, 219 P.3d 153 (October 30, 2009)

This Per Curiam decision was presumably written by Winfree since Carpeneti joined Fabe in concurring in part and dissenting in part and Eastaugh joined Matthews in concurring in part and dissenting in part. In 1984, Bill Nelson, acting on behalf of his corporation, Cosmos Development, Incorporated, entered into a gravel lease with Herman Ramirez who owned a parcel of approximately one hundred acres near the Palmer-Wasilla Highway. This was a do it yourself lease notable for its bevity and lack of

sophistication. It was not recorded. It provided for a per yard payment to Ramirez for the gravel, among other provisions. It did not specifically address the issue of whether or not it was exclusive.

A few months later Nelson sold another of his corporations, AAA Valley Gravel, Inc. to Bill Fuger and Ken Mearkle and subleased the gravel lease to that corporation with AAA agreeing to pay (1) the royalties due Ramirez under the Ramirez/Cosmos lease and (2) overriding royalties to Cosmos. In 1986 Cosmos assigned all of its overriding royalty rights to Nelson's wife, Alicia Totaro. In 1993, Nelson assigned fifty percent of the overriding royalty rights to a company owned by Mike Palmquist. AAA and Totaro were found to have ratified this assignment and Palmquist's company and Totaro begin each receiving fifty percent of the overriding royalty.

In 1998, AAA purchased the property from Ramirez receiving title through a warranty deed which did not mention the Ramirez/Cosmos lease as an exception to title. After AAA bought the property, it stopped paying the overriding royalties. Palmquist told Totaro he was not interested in suing and "wanted her to have my half." He later so testified as trial. In 2000 Totaro sued AAA for the overriding royalty payments. AAA answered denying liability and filed a third-party complaint against Ramirez claiming breach of his warranty against encumbrances. After a bench trial, the trial court ruled that AAA was liable to pay Totaro her half of the overriding royalty, but not Palmquist's and that Ramirez was not liable for breach of his warranty against encumbrances since he and AAA were aware of the Cosmos/AAA lease when the sale was negotiated. AAA appealed and Totaro cross-appealed.

AAA's main point on appeal in relation to Totaro was that the gravel lease was not exclusive so that AAA as owner could extract gravel on its own behalf without making royalty payments to Totaro. The per curiam decision found the lease ambiguous regarding whether it was exclusive and remanded for further hearings and findings on the factual issues related to whether the parties to the lease intended it to be exclusive. Fabe and Carpeneti dissented on this issue finding the lease was not ambiguous. Since it did not mention exclusivity, the owner retained a concurrent right to mine the gravel on his property and the lease was not exclusive. Matthews and Eastaugh dissented in the opposite direction finding based on the lease and the evidence presented at trial that the lease was not ambiguous but was clearly intended to be exclusive.

AAA's other significant point on appeal was that if royalties were owed they should be paid by Ramirez since he conveyed the property by warranty deed without excepting the lease. The per curiam decision analyzes this as a reformation issue with Ramirez seeking to have the deed reformed to express the parties' actual agreement. It points out that reformation requires proving its elements by clear and convincing evidence and remands for further proceeds. If Ramirez cannot prove entitlement to

reformation, he will be liable to AAA for provable damages. Fabe and Carpeneti would not reach this issues since they would not require royalty payments. However, they state that if royalties are required Ramirez would be liable to AAA for payment since the lease was not excepted from the warranties of title. Matthews and Eastaugh would uphold the trial court's decision that Ramirez was not liable for breach of warranty since the parties were aware of the lease. In fact, AAA was party to the sublease that created the overriding royalty.

Totaro's primary point on appeal was that she should be entitle to the entire overriding royalty since Palmquist testified he wanted to give it to her. The trial court held that it could not award the interest to Totaro since Palmquist was not a party to the case and the assignment was barred by the statute of frauds. The Supreme Court reversed pointing out that AS 09.25.020(4) provides an exception to the statute of frauds if the transferor admits the transaction in court. Since no one dissented, the case may have provided one reliable precedent.

3. Hansen v. Davis, 220 P.3d 911 (November 6, 2009)

When William Rodgers sold Lot 53-A in Ketchikan to Marvin and Arlene Lani Davis in 1984 he reserved an easement across it to adjoining Lot 52, which he apparently hoped to buy at a future date. In 2006 Harvey and Annette Hansen purchased Lot 52 and subsequently bought the rights to the easement across Lot 53-A from Rodgers's widow in June 2007. The Hansens then cleared the easement, built a road, and almost completed installing water and sewer lines. In July 2007 the Davises sued the Hansens for trespass, alleging that their adverse us of the easement had extinguished it and that, alternatively, Rodgers's widow had ineffectively transferred title to the easement to the Hansens for failure to comply with the Alaska Probate Code. The Hansens counterclaimed asking that title to the easement be quieted in them. Following a two day trial, the trial court determined that the easement had been extinguished by the Davises' adverse use before the Hansens purchase the adjacent property.

The Supreme Court first holds that an easement can be extinguished by prescription and that the prescriptive period commences when the conduct of the servient estate owner unreasonably interferes with the current or prospective use of the easement by the easement holder. The Court discusses the legislative amendments of 2003 which curtailed adverse possession by requiring color of title or a good faith but mistaken belief that the claimed property is within the boundaries of the adjacent property of the claimant. Ch. 147, §3, SLA 2003. Hansens had argued that the legislation meant that termination of an easement by prescription was against public policy. This argument was rejected and that Court held that an easement can be extinguished by prescription.

The court further held that a party claiming that an easement was extinguished by

prescription must prove continuous and open and notorious use of the easement area for a ten year period by clear and convincing evidence. The nature of the use of the easement must unreasonably interfere with the current or prospective us of the easement by the easement holder. The Court gives the general guideline that temporary improvements to an unused easement area that are easily and cheaply removed will not trigger the prescriptive period; permanent and expensive improvement that are difficult and damaging to remove will trigger the prescriptive period. As a matter of law, the maintenance of a garden on the easement area did not constitute an improvement sufficiently adverse to commence the prescriptive period although it had existed for more than ten years. The Court declined to decide whether the construction of a greenhouse triggered the prescriptive period since ten years had not yet elapsed.

Since the trial court did not address the quiet title issue of whether the widow's deed was invalid, the Court remanded for further hearing noting that chain of title issues are often fact intensive.

4. Lundgren v. City of Wasilla, 220 P.3d 919 (November 6, 2009)

Lundgren challenged the City of Wasilla's delay in replatting and providing an accurate legal description of land it took by eminent domain, alleging that it unnecessarily interfered with his remainder property rights. As a remedy he requested that the superior court dismiss the previously approved taking. His claim was based on the City not receiving preliminary replat approval for seven months or recording a final replat for three years from the filing of the declaration of taking.

The Supreme Court referred to its recent case of Hillstrand v. City of Homer, 218 P.3d 685 for a more detailed examination of the eminent domain process. Lundgren conceded at oral argument to the Supreme Court that the actual taking occurred in 2002. Lundgren's objections to the taking were overruled and were not appealed. Title vested at that time as well as actual possession with construction on the property. It pointed out that Rule 72 (i)(3) provides that a court may not dismiss the action as to any part of the property of which the plaintiff has taken possession or . . . title . . . but shall award just compensation.

The Court noted that Lundgren was not without a remedy for the alleged interference with his remainder property rights. He could have pursued additional temporary taking or interference damages, such as those awarded by the special master to compensate for the second temporary taking of two of his other three parcels. The Court further indicated that although there is not a deadline for required plats, failure to timely file a replat might be the basis for a claim for compensation for a temporary taking. It might also be a claim for unreasonable interference with the remainder property rights, such as making it difficult or impossible to sell. The Court went out of its way to discuss

this although it had not been specifically appealed.

5. Williams v. Fagnani, 228 P.3d 71 (March 5, 2010)

This case is before the Supreme Court a second time. The first case, Williams v. Fagnani, 175 P.3d 38 (Alaska 2008), held that Williams was entitled to an implied roadway easement over property owned by Fagnani. On remand the Superior Court ruled that Fagnani was entitled to maintain a locked gate across the roadway, so long as Williams was advised of the combination. Williams appealed this issue.

The Court extensively reviews the law of locked gates. It concludes that locked gates amount to a significant burden an a rural homeowner's right of access, especially in the ice and darkness of an Alaska winter. It may deter guests, visitors, delivery and service providers, and emergency vehicles. For these reasons, gates must serve a substantial benefit to the servient land. Typical examples of benefits found sufficient are to prevent livestock from straying, to prevent valuable property form being stolen or vandalized (usually in light of a history of such conduct), or to protect personal safety. Even where reasons of substance justify maintaining a gate, they may be outweighed by the inconvenience suffered by the owner of the dominant estate.

The Court held that the record on appeal is insufficient to determine whether the Superior Court struck an appropriate balance in permitting Fagnani to maintain a closed and locked gate across the roadway easement. The judgment of the Superior Court is vacated insofar as it permits Fagnani to maintain a closed and locked gate across the roadway easement. On remand the Superior Court is to determine whether the gate is an unreasonable interference with William's use of the easement.

6. Anchorage Board of Adjustment and Anchorage School District v. LBJ, LLC, 228 P.3d 87 (April 2, 2010)

The Anchorage School District appealed the superior court's decision reversing the Anchorage Board of Adjustment's Decision and reinstating the Anchorage Platting Board decision that the School District upgrade the access along Yosemite Drive to standards equivalent to urban collector standards The Supreme Court affirmed by attaching the superior court's decision in its entirety rather than writing its own opinion.

LBJ, LLC had developed Eagle Pointe Subdivision, a large development along Yosemite Drive which was 24 feet wide, paved with gravel shoulders except for the portion within the subdivision which was built to urban collector standards, meaning it is 33 feet wide with paved shoulders, curbs, gutters, and street lights. The final approval of the Platting Board included those standards and added sidewalks as critical safety issue. The School District appealed to the Board of Adjustment which determined that the Platting Boards

decision was not supported by substantial evidence, substituted its own judgment, and concluded that Yosemite Drive did not need to be upgraded to urban collector standards.

Although the School District emphasizes the long and somewhat convoluted procedural history of the case, the court determines that the significant factor is whether the proposed school plat is within an urban area, pointing out that by ordinance it must be compatible with the surrounding area. It reviews the record which shows that the surrounding properties are primarily R-1 and I-2 which are urban. The court determines as a matter of law that Yosemite Drive is an urban collector street and that the standards for that classification must be applied.

7. Krause v. Matanuska-Susitna Borough, et. al., 229 P.3d 168 (April 23, 2010)

This case is primarily about statute of limitations issues and, to a smaller extent, remedies in relation to platting board decisions. Property owners obtained preliminary approval for a plat after agreeing to certain conditions regarding easements and rights-of-way. They submitted a final version of the plat that did not comply with the conditions, but the Platting Board accepted it for recording. The Krauses were affected by these changes and met with the Borough Manager and Acting Planning Director to explain their grievances. On March 3, 2003 they received a letter from the Borough Manager stating that review of the platting action was closed. They appealed to the Borough Board of Adjustment and Appeals which on April 1, 2005 ruled that the Manager's letter was not a decision from which it could properly hear an appeal. Krauses then appealed to the superior court which on March 12, 2007 ruled that only the Board of Adjustment and Appeals, not the Borough Manager, had authority to hear appeals of platting decisions. They did not appeal that ruling.

On April 25, 2007, the Krauses filed a separate complaint in superior court against the Borough and the individual property owners involved in the plat. The causes of action included failure to follow platting requirements, deprivation of constitutional rights to equal protection and due process, damages from the Borough and the property owners, and a decree returning to the status quo prior to the modification of the preliminary plat. the superior court dismissed the Krauses' suit. The claim for damages from infringement of a constitutional right was not allowed since an alternative statutory remedy under AS 29.40.190.

The superior court ruled that the two year limitation of AS 09.10.070 for injury to the rights of another not arising on contract and not specifically provided otherwise barred the claims under the Borough ordinances and the claims against the other property owners for compensatory damages for injunctive relief. The one year limitation of As 09.10.090 prevented the Krauses from bring a claim for statutory penalties. The court denied the motion to amend the complaint to assert that the statute of limitations was tolled by their

administrative appeal.

The Supreme Court affirmed the denial of damages for infringement of a constitutional right but reversed regarding the dismissal of constitutional claims for declaratory and injunctive relief holding that those actions are particularly appropriate with respect to unconstitutional statutes. It further held that the superior court applied the correct statutes of limitations but erred by not allowing the Krauses to amend their complaint to allege that the equitable tolling doctrine applied.

The equitable tolling doctrine applies when a plaintiff has more that one legal remedy available to him. The elements are (1) pursuit of the initial remedy gives defendant notice of plaintiff's claim, (2) defendant's ability to gather evidence is not prejudiced by the delay, and (3) plaintiff acted reasonably and in good faith. The statute is tolled only when the initial remedy is pursued in a judicial or quasi-judicial forum. The Court also held that the Krauses were entitled to present their claim that the doctrine of equitable estoppel was a defense to the statute of limitations based on alleged misrepresentations by the Borough.

8. State of Alaska, Dept. of Natural Resources v. Alaska Riverways, Inc., and Tanana River Properties, L.L.C., 232 P. 3d 1203, (May 21, 2010)

This case deals with whether the State of Alaska has the authority to require private parties who construct wharves into adjacent navigable waters to enter into leases, and, if so, what is the permissible lease amount under federal law related to navigable waters.

Alaska Riverways Inc. was incorporated in 1953 and operates paddlewheel tour boats on the Chena River in Fairbanks. Tanana River Properties, L.L.C. owns riverside property utilized in the operation. (Hereinafter collectively Riverways) Since 1972 Riverways has owned the riverside property subject to this dispute and in about 1980 built a system of floating docks and bulwarks secured to the property for mooring boats and loading passengers. Because the Chena River is navigable, the State of Alaska owns the riverbed below the ordinary high water mark. This riverbed land is referred to as shoreland and the adjoining property owner is known as a "riparian landowner".

In 1979 Riverways applied for a lease of the shoreland from the State. Intermittent discussions went on for almost three decades with the primary issues being the authority of the State to require a lease, whether payments should be retroactive, and whether the lease payment should be a fixed amount based on appraised value or a variable amount based on passenger count. In 2006 DNR issues a final finding and decision for a twenty-five year lease to Riverways for $1,000 a year or 25 cents a passenger whichever is greater. Riverways appealed and the superior court reversed holding that the State does not have the authority to require a lease by Riverways. For completeness, the superior

court held that if the State had authority for a lease, the proposed fee structure was legally permissible.

The Supreme Court first examines pre-statehood law and determines that prior to statehood, a riparian owner, while having no right or title to the shoreland, had a common-law right to wharf out that, once vested, could not be taken without compensation. The exercise of this right had to be reasonable; the wharf could be constructed only to the extent necessary to reach navigable waters, with reference to its intended use. After discussing the public trust doctrine, the Court concludes that DNR's authority to require riparian owners to enter into leases for the use of shoreland arises, if at all, independent of the public trust doctrine.

In considering the Alaska Constitution, the Court states that Article VIII placed control of all state land, including shoreland, in the legislature. While that Article authorized the legislature to provide for the leasing of any part of the public domain, including submerged land, it did not itself grant DNR authority to require riparian owners who construct wharves to enter into leases for their use of state shoreland.

The Court then discusses the Alaska Lands Act, adopted by the first state legislature, particularly AS 38.05.070. It concludes that the result is that persons who had constructed improvements over submerged land prior to statehood were granted special preference rights to purchase or lease those lands, but those rights would expire if unused. DNR was authorized to enter into leases with all other parties, including upland owners, for their occupancy of state lands either directly if the lease was appraised at $250 or less, or after public auction. To this extent it restricted the common-law right to wharf out when it was passed in 1959. The Supreme Court also discusses the amendments to AS 38.05.075(c) in 1984 and 1997 which gave greater preference to upland owners in the negotiation of submerged land leases with the DNR. The Court also rejects the constitutional arguments that DNR's leasing decision is an impermissible taking, violates equal protection, or is an improper retroactive application of the law.

Riverways finally wins a point regarding DNR's attempt to base the lease fee on the number of paying passengers. 33 U.S.C. 5(b) prohibits taxes, tolls, fees and other charges on vessels, passengers, or crew by any non-Federal interest for operating on navigable waters unless it reasonably approximates the benefit conferred or the cost incurred by the State. Although the per passenger fee fails, the Court approves the lease amount of $1,000 per year since it was determined as fair market value by appraisal.

9. **Shooshanian v. Dire, No. 6499** (August 13, 2000)

Landlord Dire sought possession of her condominium unit from tenant Shooshanian who asserted he had an enforceable right to purchase it based on an option

in his lease. After a Superior Court bench trial at which the tenant appeared pro se, the court ruled in favor of the landlord. The tenant appealed arguing the trial court erred by: (1) refusing to postpone trial to allow him to retain counsel; (2) failing to assist him with evidentiary objections at trial; (3) failing to disqualify the landlord's attorney as trial counsel because the attorney was a necessary witness; and (4) concluding that there was neither an enforceable purchase agreement nor an unexpired option right.

In May 2004 Azuron Shooshanian and Suewanna Ekstrom began leasing a condominium from Colleen Dire for $800 per month. Dire hand wrote a one page lease agreement with blanks for the lessee's names. Shooshanian wrote his name into some of the blanks and his and Ekstrom's first names into others. The lease term was one year with an option to purchase within that year with all payments for repairs and upgrades factored into the "final cost" of the residence. Neither Shooshanian nor Ekstrom signed the lease. The parties agreed that when Dire signed the lease she said the residence was worth approximately $140,000.00.

At some point Shooshanian handwrote at the bottom of the lease, squeezed above Dire's signature "sale price of house is $140,000 with -½% of going rate." At trial he explained that if he purchased the house he would owe Dire interest on the remaining debt at one-half percent less than the "average going rate" in the mortgage industry. Dire testified that he must have added the sentence after she signed the lease and handed it to him. Shooshanian also claimed that when Dire signed the handwritten lease she told him his monthly rental payments would count toward the purchase price and she would finance the purchase. Dire disputed both contentions at trial. The parties agree that within the lease period the tenants verbally informed Dire they wanted to buy the residence. They never applied for alternative financing, got an appraisal, or increased the $800 monthly rent payment, from which the cost of materials for repairs was deducted. Title remained in Dire's name and Shooshanian never paid taxes, insurance, or condominium dues. Although the parties later attempted to fill out a form "Residential Lease with Option to Purchase" it was never completed because of confusion about how to fill it out. Shooshanian also went to Dire's friend and attorney Kevin Brady to discuss a new Lease Agreement which Shooshanian alleged fell through when Brady informed him the sales price had increased above $140,000 and that all back rent must be paid before addressing the lease.

Attorney Brady, using a limited power of attorney gave, Shooshanian a notice of termination of his tenancy and subsequently filed a Forcible Entry and Detainer (FED) action in district court. Shooshanian opposed the eviction claiming two options to purchase which resulted in the case being transferred to superior court since it raised title issues. Shooshanian moved for a continuance of the trial to allow him to hire an attorney which was denied since he had seven months since the filing of the case to find one. Following trial, the superior court found that Shooshanian held an option to purchase the

residence but that a further contract was needed to accomplish the purchase, which contact was not negotiated. Dire was granted a judgment for possession.

On Appeal the Supreme Court found the trial court did not abuse its discretion by refusing to continue the trial. It was Shooshanian's lack of diligence that caused any possible prejudice to him for not getting a continuance. It was also pointed out that a continuance would have cost Dire the opportunity to re-rent the residence for $1,200 to $1,500 per month - the rental value Shooshanian estimated at trial for the property. The Supreme Court further found that the trial court did not abuse its discretion by not explaining how to make hearsay and relevance objections or not excluding hearsay evidence to which no objection had been raised. The Court held that when a pro se litigant is "obviously attempting to accomplish" an action, the trial court should inform the litigant of the proper procedure for that action; but that instructing a "pro se litigant as to each step in litigating a claim" would compromise the court's impartiality.

The trial court did not commit plain error by not disqualifying Brady as trial attorney for Dire since neither party attempted to call Brady as a witness and Shooshanian never asked the trial court to disqualify Brady for any reason. It further held that his limited involvement did not make him a necessary witness at trial. The Supreme Court affirmed the trial court's determination that Dire was entitled to possession pointing out that it gives great deference to the trial courts credibility findings. It was not clearly erroneous to find that the parties never agreed on a price or financing terms. Since these are necessary terms for an enforceable real estate agreement, Shooshanian had no cognizable interest in the property other than as a month to month tenant.

10. <u>Dias v. State of Alaska, Dept. Of Transportation and Public Facilities</u>, No. 6510 (September 17, 2010)

In 1969 Frank Cornelius conveyed an easement and right of way on land he owned in Palmer to the State of Alaska, Department of Highways. It used a standard form entitled "GRANT OF RIGHT OF WAY EASEMENT." The standard language provided that the grantor conveyed "a perpetual, full and unrestricted easement and right of way." It described a strip of land 150 feet wide, adjacent to the northwesterly side of Trunk Road for a distance of 2000 feet. A consideration of "no/100 dollars" was typed into the corresponding blank on the form. The typewritten description provided that " the State will pay ten cents per cubic yard for gravel or other material removed from the above described area." The form provided space to describe the purpose of the conveyance, which was left blank. In 1992 Cornelius conveyed a portion of the land subject to the easement and right of way to David and Merribelle Dias.

In 2007 the State contacted the Diases to negotiate its use of the easement and right of way and the acquisition of additional right of way for the Trunk Road

Reconstruction Project. The Diases asserted that the State did not have an existing right of way and refused to convey any additional right of way. The Diases filed a Complaint for Quieting Title with the superior court, asking the court to quiet their interest in the property free of any interest of the State. The State counterclaimed asking the court to declare that it had a valid easement for highway right-of-way purposes. Following cross-motions for summary judgment the State's motion was granted concluding the State had a valid and enforceable easement and right-of-way over the property.

In its discussion of the interpretation of conveyances to give effect to the intentions of the parties, the Supreme Court turns to the three-step analysis set forth in Estate of Smith v. Spinelli, 216 P.3d 524 (Alaska 2009). The first step is to look to the four corners of the document to see if it unambiguously presents the parties' intent. The analysis ends here if the instrument, taken as a whole, is only open to one reasonable interpretation. If the instrument is ambiguous, the next step is a consideration of the facts and circumstances surrounding the conveyance. If the parties' intent is still not discernable after examining extrinsic evidence, then the court resorts to rules of construction.

The Diases argued that the instrument's language unambiguously supports the use of the conveyance only for temporary material extraction. The State argued that the instrument unambiguously grants it a perpetual highway right of way. The Court finds that the language of the instrument supports the State's contention. In particular, use of the terms "right of way easement" and "easement and right of way" are examined in relation to their definitions. The lack of consideration other than for gravel removal is not determinative and does not change the plain meaning of the instrument. Cornelius may have been willing to limit his cash payment to materials removed deciding that an improved road would increase the value of his property. The superior court's grant of summary judgment is affirmed.