

ANNUAL REAL ESTATE SECTION LAW UPDATE 2011

ALASKA CASES

By

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1. Chambers v. Scofield, 247 P.3d 982 (March 4, 2011)

Reggie Chambers purchased a triplex from Curtis Carley in 2006. In 2007 Dana Scofield was appointed Carley's guardian due to his mental condition. Scofield subsequently sued Chambers alleging that Chambers had fraudulently induced Carley to sell the triplex for less than fair market value. The parties entered into a settlement agreement to rescind the sale and restore the parties to the position they would have been in had the sale not occurred. Adjustments were made for the down payment, rents, management, and utilities, taxes and insurance actually paid.

Additionally, Chambers was to be reimbursed for the "fair market cost" of repairs and improvements he made to the triplex. This ill chosen and undefined term became the cause of the litigation. The first appraisal by Keith Halsey, gave Chambers a credit of \$25,525 for work performed on the triplex. This was a reduced amount due to poor workmanship, lack of permits, and similar deficiencies. The inclusion of value in addition to cost and the lack of clear instructions led the Superior Court to reject the appraisal.

The parties met off-record to draft rules for a new inspection by William Roberts which would be attended by Judge Christen. Roberts determined the "fair market cost" to be \$86,692.29 less \$14,016.99 for work done to less-than-workmanlike standards. Judge Christen accepted the \$86,692.29 but only reduced it by \$5,693.73 for deficient work. No award was made for the profit and overhead normally part of a construction contract. She further declined to award attorneys fees and costs to either parties finding neither was fairly deemed the prevailing party in the case.

The Supreme Court (Christen not participating) affirmed the Superior Court. It pointed out there is little legal precedent defining the term "fair market cost" and no industry standard clearly indicating it includes profit and overhead. As such it would not be interpreted as part of the settlement agreement. It also pointed out that Chambers could have made it an explicit part of the agreement had he intended to be compensated for it. It further stated that it was within the trial court's discretion to deny attorney's fees and costs altogether so long as its reasons for doing so are clear in the record.

2. Horan v. Kenai Peninsula Borough Board of Equalization, 247 P.3d 990 (March 11, 2011)

This case of limited application deals with the property tax valuation of property participating in the low-income housing tax credit (LIHTC) as part of the Tax Reform Act of 1986. In it a developer can receive federal income tax credits by committing to rent to low-income households at restricted rental rates. This raises issues of how the tax credits and restricted rents affect property tax assessment. Other states are briefly surveyed but have little consistency in the resolution of these issues.

Although AS 29.45.110(d) provides that the assessment is based on the actual income from the property without adjustment based on the amount of any federal income tax credit (\$383,833 here), local governments can determine by ordinance whether to determine on a parcel by parcel basis whether to use the mandatory income approach. In 2005, 2006, and 2007 the Assessor valued the apartments owned by Pacific Park Limited Partnership (Pacific Park) at \$2,930,700 using the cost approach. In 2007, Pacific Park had the apartments independently appraised using the income approach and the restricted rents resulting in a value of \$652,000.

Pacific Park appealed the Assessor's valuation to the Borough's Board of Equalization (Board). The Board approved the use of the cost method, but based on the rent restrictions or economic obsolescence reduced the apartment's improvement value by 40%. The Assessor appealed the Board's decision to the superior court and Pacific Park cross-appealed. The superior court addressed four issues. First, the Board did not err by not adopting the income approach to value the apartments. Second, the Board did not violate state law, borough code, or legislative intent by adjusting the Assessor's valuation. Third, the Board did not err by finding the Assessor's application of the cost approach resulted in an overvalued and grossly disproportionate valuation. Finally, the facts and law supported the Board's valuation, including the 40% reduction.

The Supreme Court affirmed the use of the income approach holding that a taxing authority is allowed to choose a reasonable method for determining the value of a property "so long as there was no fraud or clear adoption of a fundamentally wrong principle of valuation." It further affirmed the superior court's approval of the Board's consideration of the rental restrictions when valuing the apartments under the cost approach. However, it found the record not clear on why 40% was chosen for the reduction or the basis for finding that the valuation was grossly disproportionate to similar properties and remanded for further proceedings on those issues.

3. Roberson v. Southwood Manor Associates, LLC, 249 P.3d 1063 (April 8, 2011)

This case presents the issue of whether Alaska's Unfair Trade Practices and Consumer Protection Act (UTPA) applies to residential leases. Southwood Manor Associates, LLC (Southwood) filed a complaint against tenant Diane Roberson seeking eviction, back rent, late charges, and other damages. Roberson filed an answer and class action counterclaims alleging in part that the late charges violated the UTPA. The trial court held that the UTPA does not apply

to residential leases. The Supreme Court granted Roberson's petition for review.

The Supreme Court first reviewed its past cases where it held that the UTPA did not apply to real estate transactions involving mortgages and the sale of standing timber. Some legislative history was reviewed including the legislature's adding some mortgage practices within the UTPA following the Supreme Court's holding that the UTPA did not apply to Mortgages. It also pointed out that the legislature's adoption of the Uniform Residential Landlord and Tenant Act was consistent with the conclusion that the UTPA did not apply to residential leases. It affirmed the decision that the UTPA does not apply to residential leases.

4. Cowan v. Yeisley, 255 P.3d 966 (May27, 2011)

The Cowans were deeded a portion of a larger tract of land in Ketchikan including a thirty foot "right of way" for access to it. Other portions of the tract were later deeded out which did not mention the right of way or attempt to convey the portion of the tract upon which it was located. All of the tract except the Cowans' portion was later subjected to two plat which dedicated the right of way to the Borough which approved the plats. The Cowans did not sign the plats.

In 2006 the Cowans filed suit against the Yeisleys, other owners of property in the tract, and the Borough seeking ownership of the thirty foot strip either as part of the original conveyance to them or by adverse possession. The trial court ruled that the original deed did not convey a fee interest in the property and that they did not meet the requirements of the 2003 legislative amendments to the adverse possession statute, AS 09.45.052, requiring color of title or a "good faith but mistaken belief" that the disputed land was within the boundaries of their property.

The Cowans appealed arguing that the original deed must have intended them to be the owners of the right of way since the grantor never deeded the disputed portion to anyone else and it would be illogical that he intended to keep it for himself after deeding away the rest of the tract. The Court pointed out that the general rule is that the term "right of way" is synonymous with "easement." Therefore, the deed is unambiguous and there is no need to seek to determine intent.

The Cowans also argued that it was error to apply the 2003 version of AS 09.10.030 to their adverse possession claim because the Cowans were vested with title to the disputed land before the statute was changed, the legislative history indicates that the changes were not intended to be applied to vested adverse possession rights, and the Legislature did not indicate that the law changing AS 09,10.030 was retrospective.

The Court points out that AS 01.10.090 states that "[n]o statute is retrospective unless expressly declared therein." The 2003 amendments to AS 09.10.030 specifically stated that the amended version "applie[d] to actions that have not been barred before [July 18, 2003] by AS 09.10.030 as it read before [July 18, 2003]. Its application here would be retrospective since it would prevent a claim for adverse possession that could have been ripe prior to the time of the

statute. The Cowans claimed they had adversely possessed the disputed land for more than ten years before 1980. Since title automatically vests in the adverse possessor at the end of the statutory period, the Cowans would be deprived of a valid claim, if they proved their case.

Since the factual disputes regarding the elements of adverse possession had not been determined, the case was remanded for further factual findings, particularly on the hostility element. The trial court's finding that the disputed land was validly dedicated to the Borough was vacated. If the Cowans are found to be owners at the time the plats were approved, their signatures would be required while the signatures of easement holders are not required.

5. Varilek v. Burke, 254P.3d 1068 (June 10, 2011)

This pro se appeal arises for the 2008 valuation of a parcel of property by the personal representative of the estate that owns the property. The initial valuation was \$146,200. It was reduced to 112,100 by the Senior Municipal Appraiser who determined that the building was 50% incomplete. Varilek claimed that the home was 75% incomplete and the valuation should be reduced by another \$35,000. He appealed to the Board of Equalization for a hearing on valuation.

At the hearing, his evidence was reviewed and discussed, but the valuation was not changed. Varilik appealed to the superior court which affirmed the Board. The Supreme Court points out that AS 29.45.210(b) gives one appealing an assessment valuation the burden of proof that the valuation is improper. It agrees with the superior court that Varilek did not meet this burden and affirms its decision upholding the Board's valuation.

6. Griswold v. City of Homer, 252 P.3d 1020 (June 10, 2011)

This case is the fifth Supreme Court case in the last fifteen years by "frequent flyer" Frank Griswold against the City of Homer on land use and zoning. In it he filed a notice of appeal of the Homer Advisory Planning Commission's grant of a conditional-use permit to a mariculture association to construct an "8,373 square foot two-story structure using the existing platform at 3851 Homer Spit Road.

The city clerk rejected his appeal for lack of standing because Griswold did not show that the permitted action would have an adverse effect on the use, enjoyment, or value of his property, and because Griswold's interests were not distinct from those of the general public. Griswold appealed to the superior court which affirmed. On May 14, 2009, the superior court issued its "Decision of Appeal." On December 16, 2009 the superior court issued "Final Judgment" dismissing the case and awarding attorney's fees and costs. On December 23, 2009 Griswold filed his appeal to the Supreme Court.

The Supreme Court discusses in some detail the provisions of the Homer City Code in relation to the rules on standing and finds them in compliance. Perhaps more important to appellate practice is the finding that the appeal to the Supreme Court was not timely under Appellate Rule 204(a)(1) requiring the appeal to be filed within thirty days of the judgment

appealed from. When the superior court is sitting as an intermediate appellate court, Appellate Rule 507(a) applies which states that “[t]he opinion of the appellate court...shall constitute its judgment.” The Supreme Court further points out that Civil Rule 58 regarding judgments does not apply since the superior court is not acting as a trial court.

The appeal is allowed by relaxing the rule primarily because, even though experienced, Griswold is still a pro se litigant. The Court further states that “[T]he application of Appellate Rule 204(a)(1) in the present case might have confused even a law-trained individual.” (We have been warned.)

7. Trask v. Ketchikan Gateway Borough, 253 P.3d 341 (June 17, 2001)

Leta Trask owns a house in the Ketchikan Gateway Borough and wrote a letter to the Borough asking if she would need a permit to refresh and modify a painted Biblical message on her roof. The Borough responded that she did not need a permit because the message was not a sign as defined by the Borough Code. The painted message read: “DO UNTO OTHERS...:BY YOUR DEEDS YOU’RE KNOWN: LOVE YOUR NEIGHBOR: YOU’RE WELCOME.” The message being modified resulted from a dispute with her uphill neighbors as set forth in Lybrand v. Trask, 31 P.3d 801.

After some of Trask’s neighbors complained, the Borough sent her several letters informing her that the message violated the Borough Code and instructed her to remove it. She did not do so and the Borough filed a superior court complaint seeking to enjoin her from displaying the message and seeking a \$200 fine. Trask counterclaimed alleging that as applied to her the ordinance violated her constitutional right to free speech. She also sought relief under 42 U.S.C. § 1983 as being deprived of constitutional rights by a government entity.

Following motion practice, the superior court dismissed the Borough’s enforcement action finding the roof message was not a sign under the Borough Code. It also ruled that Trask lacked standing to challenge the constitutionality of the Code provision. The § 1983 action was dismissed as the superior court concluded that there was no constitutional violation and Trask did not have standing to litigate the constitutionality of the ordinance. Trask was ruled the prevailing party and awarded 20% of her actual reasonable attorney’s fees under Rule 82(b)(2). She appealed the superior court’s dismissal of her § 1983 claim and its decision to not award enhanced attorney’s fees.

The Supreme Court finds that Trask has standing to bring her § 1983 claim citing with approval its past holding “...that an identifiable trifle is enough for standing to fight out a question of principle.” It further held that it was error to dismiss her § 1983 claim as she had alleged sufficient violation of her First Amendment rights to survive a motion to dismiss. The Rule 82 attorney’s fees award is vacated, and the Supreme Court points out that she may be entitled to attorney’s fees under federal statute if she prevails on her § 1983 claim on remand.

8. Price v. Eastham, 254 P.3d 1121 (July 15, 2011)

This is the third time this prescriptive easement case has been to the Supreme Court. In 1978 Thomas Price purchased an agricultural interest from the State of Alaska in land located at the head of Kachemak Bay. A group of snowmachiners had used a seismic trail that crosses the land for a number of years. After Price posted “No Trespassing” signs on his property in the winter of 1998-99, Eastham and almost another one hundred snowmachiners sued Price alleging that they had established an easement by prescription before Price posted the signs. The earlier appeals established that the snowmachiners had a prescriptive easement but struggled with its size and who was entitled to use it.

In the current appeal the superior court had determined that the public entitled to use the easement included not only the snowmobilers but four-wheelers, hikers, persons training their sled dogs, occupants of residences along the trail, hunters, and berry pickers. The Supreme Court rejects this expansion. It points out that although the prescriptive easement has been determined to be public, that does not mean that the public can use it other than for snowmobile use. The other uses would depend upon independently proving the right to a prescriptive easement or obtaining the permission of the land owner.

Another issues was whether the uses of the easement, particularly volume, seasonality, and width, had unduly expanded beyond the use during the original prescriptive period. In reviewing these issues, the Supreme Court sets forth the general principle that although the use made of a prescriptive easement may evolve beyond the original prescriptive uses, new uses cannot substantially increase the burden on the servient estate or change the nature and character of the easement’s original use.

The Supreme Court affirmed the superior court’s determination that the volume of showmachine traffic had not unreasonably increased. It remanded for a determination of seasonal use rejecting the superior court’s not doing so because of possible impact on non-snowmachine users. It affirmed the superior court’s determination that the snowmachiners reasonable use of the trail included marking and maintaining it.

The width of the easement continues to be an issue. The only uncontested evidence of width during the prescriptive period is the eight feet necessary for one lane of snowmachine travel. If the easement’s use has evolved to require widening the path, the superior court on remand must make specific findings as to the reasonableness and necessity of increasing the width of the easement. Finally, the Supreme Court rules that AS 09.45.052(d) vesting public access prescriptive easements in the state or a political subdivision of it does not apply since it was enacted in 2003 after the prescriptive easement here was perfected.

9. Safar v. Wells Fargo Bank, N.A., 254 P.3d 1112 (July 15, 2011)

This is a broken construction case. Yvan Safar as owner of Safar Construction, Inc. (Safar) contracted with developer Per Bjornn-Roli as owner of Norway Estates, LLC (Northway) to construct six units of a twelve unit condominium project in Girdwood for a “not to exceed”

proceeding of \$2,990,434. Wells Fargo Bank agreed to loan up to \$3.3 million to Norway to finance the project. The loan funds were all disbursed, but the units were not complete. Safar contended that the Wells Fargo loan officer promised that he would be reimbursed if he continued construction using his personal funds. The loan officer denied making any such promise. Safar alleged damages of at least \$500,000 for personal funds advanced to continue the project on a theory of promissory estoppel. After a bench trial, the superior court found that Wells Fargo made no enforceable promise to Safar to reimburse him, dismissed his claims with prejudice, and entered judgment for Wells Fargo.

The case turns on whether it meets the requirements for promissory estoppel. The Supreme Court points out that the first element of promissory estoppel is an “actual promise” that induced action or forbearance. Since the superior court found that this element was not met, the Supreme Court reviews the superior court’s findings of fact for clear error, giving particular deference to those based primarily on oral testimony. Of particular import was the finding that Safar could not articulate the details of the alleged commitment such as “the amount of the loan, the terms of repayment, the security, the interest rate, or even if the bank’s supposed commitment was a loan or a gift. Finding no clear error, the superior court is affirmed.

10. Gillis v. Aleutians East Borough, No. 6591 (August 19, 2011)

The sole issue of this case is the application of a preference right for the purchase of state land under the Alaska Land Act as amended by the legislature in 1984. The pertinent provision as codified in AS 38.05.035(f) provides in relevant part:

The director shall grant a preference right to the purchase or lease without competitive bid of up to five acres of state land to an individual who has erected a building on the land and used the land for bona fide business purposes for five or more years under a federal permit or without the need for a permit and, after selection by the state, under a state use permit or lease, if the business produced no less than 25 percent of the total income of the applicant for the five years preceding the application to purchase or lease the land.

Melvin Gillis, a professional sport hunting and fishing guide, obtained a 25-year lease of five acres of state land in April 1989. Gillis built a lodge on the land, and the operation of the lodge and his guiding business provided his principal source of income. In 2005 the Department of Natural Resources transferred the subject land and lease to the Aleutians East Borough. Later that year Gillis offered to purchase the land. The Borough rejected his offer but proposed a new lease agreement. Gillis did not execute the lease, and in 2007 claimed he was eligible to purchase the land under the above cited statute. The Borough maintained Gillis did not qualify for a preference right because his lease commenced after the federal government transferred the land to the state. In 2008 Gillis reiterated his preference-right claim.

The Borough then filed a declaratory judgment action. Gillis counterclaimed against the

Borough, filed a third-party complaint against DNR, and moved for partial summary judgment against both parties. The Borough and DNR cross-moved for summary judgment. At issue was whether subsection .035(f) required an applicant to enter land while it was under federal ownership as a condition of the preference right. The court entered summary judgment in favor of the Borough and DNR.

The Supreme Court first determines that the plain language of the statute requires the applicant to have entered the land while it was under federal ownership to qualify for the preference. The critical language is: “erected a building on the land and used the land . . . under a federal permit or without the need for a permit and, after selection by the state, under a state use permit or lease.” The argument by Gillis that interpreting the statute *in pari materia* with the Alaska Land Act’s other preference-right provisions requires granting a preference is rejected. As are arguments based on legislative history and intent, DNR’s Regulations and Decisions, and absurd results. The superior court’s interpretation of the statute and its summary judgment decision are affirmed.