

IN THIS ISSUE:

- Rights of Owners with Easements on Their Property
- The Dog Days of Summer - an Excellent Time to Review Property Tax Issues
- Lenders and Homeowners' Associations Affected by Recent Amendments

Rights of Owners with Easements on Their Property



By: Richard K. Fueyo
E-Mail: rfueyo@trenam.com

The Second District Court of Appeal's opinion in *Brannon v. Boldt*, issued January 24, 2007, should prove of significant importance to both developers and anyone living in a waterfront community in Florida. The Court found that the beneficiaries of an easement that crosses

private property to reach water and is expressly labeled as an easement for ingress and egress, a relatively common occurrence in waterfront communities, can only use the easement for that purpose, and not to remain on the private property to undertake other activities incidental to waterfront life, such as fishing or watching the sunset. The easement beneficiaries had unsuccessfully sought discretionary review from the Florida Supreme Court, making the Second District's holding binding and final.

Florida courts long have wrestled with waterfront easements in determining proper title and associated rights incidental to waterfront lands, as the 1920's "land boom" in Florida saw speculators record numerous plats for waterfront developments that never happened. See, e.g., *Powers v. Scobie*, 60 So. 2d 738 (Fla. 1952). Most of those developments sought to maximize the value of the overall project in which only a limited number of the lots actually touched the water by giving water access to the remaining lots via an easement traversing one of the waterfront lots. The easement often terminated in a neighborhood dock.

The easement rights typically were not included in the actual deed from the developer. Instead, the deed would reference the neighborhood plat, which showed the easement. Such easements are referred to as "implied easements", because they are implied rather than set forth in the deed. An easement granted by deed is referred to as an "express easement". While the distinction sounds simple, it has continually frustrated courts and counsel in application, as noted by the Florida Supreme Court.

continued on following page...

The Dog Days of Summer - an Excellent Time to Review Property Tax Issues



By: Stephen Tabano
E-Mail: stabano@trenam.com

The middle of Summer is

not the time that most of us think about real estate taxes or tangible personal property taxes. Typically, those taxes find their way back into our memories when we receive our Truth in Mileage or TRIM Notices later in the year. However, the middle of Summer is an excellent time to review these matters, especially if you want to challenge the property appraiser's assessment.

The Hillsborough County Property Appraiser's Office, and likely many others, has typically determined its assessments on real and personal property by July 1st of the tax year. Rather

continued inside...

Rights of Owners continued...

“It is often stated that an easement may be created by express grant, by implication or by prescription. While this statement is correct it is easily and often misunderstood and misinterpreted.” *Tortoise Island Communities, Inc. v. Moorings Ass’n, Inc.*, 489 So. 2d 22 (Fla. 1986), *adopting* the dissent in *Moorings Ass’n, Inc. v. Tortoise Island Communities, Inc.*, 460 So. 2d 961.

Express easements have not created the legal problems that implied easements do, as the rights of the parties are set forth in the direct chain of title. To the extent that a lot is subject to an easement providing other parties the right to pass over the land, that right/limitation is set forth in the deed, placing prospective purchasers on direct notice. Disputes regarding the scope of easement rights granted are therefore resolved according to ordinary legal principles used to construe deeds.

In contrast, implied easements are only referenced in the plat, not in the deed. They are considered an exception to the “Statute of Frauds”, as they are an interest in land not created by a formal instrument of title. As such, they have the capacity to create significant disputes in title, as many of the original plats reflect development plans that never reached fruition and do not reflect the current layout of the neighborhood. The land

boom in Florida simply made the problem worse.

Florida courts have addressed these issues in a series of significant decisions. The Florida Supreme Court, in *Powers v. Scobie*, mentioned above, adopted the “beneficial” or complete enjoyment rule, holding that a platted easement was not valid unless the property owner claiming the benefit of the easement could also establish that the easement rights were strictly necessary to the complete enjoyment of their land, and that the benefits conferred were unique to the neighborhood and were not shared with the public at large.

In its later decision in *Tortoise Island Communities, Inc. v. Moorings Ass’n, Inc.*, the Florida Supreme Court confirmed that an easement cannot be implied based on an oral promise from a developer, and that an easement cannot benefit a general class of people such as a homeowners association. For an implied easement to be valid, it must be set out in a recorded plat. Only the properties deeded by reference to that plat and who otherwise show “beneficial use” can use that easement. Though the courts were sympathetic to claims that purchasers had been defrauded by a developer’s promise to provide legal access to the water, the court could not fashion an easement over

privately held land or permit doubt about a generalized right to traverse undefined lands to get to the water. That would create too much uncertainty in the state of title of all the neighborhood lands.

The uncertainty addressed in *Brannon* involves the scope of the “riparian” rights enjoyed by beneficiaries of an easement that touches water. Riparian rights are essentially the right of the public to enjoy the navigable waters of the state. A general listing of the riparian rights enjoyed by waterfront owners was provided in *Shore Village Property Owners Ass’n v. State*, 824 So. 2d 208 (Fla. 4th DCA 2002), including “(1) general use of the water adjacent to the property, (2) to wharf out to navigability, (3) to have access to navigable waters and (4) the right to accretions.” Florida law is also unique in recognizing the right to an unobstructed view of the water. *Brannon*, at *6. There is no dispute that a waterfront (upland) landowner enjoys all these rights, including the right to fish and take in the view. But are those same rights granted to the upland owner’s neighbors holding easement rights, who would literally have to stand in the upland owner’s backyard to exercise them? That was the issue in *Brannon*.

The facts in *Brannon* are straightforward. The Brannons purchased a waterfront lot in St. Petersburg in 2000.

The subdivision was platted in the 1950s, when the lot the Brannons purchased was undeveloped. The lot showed an easement running across the edge of the lot for “ingress & egress and utilities.”

At that time, the easement ran across the lot to a neighborhood dock. The dock was destroyed by a hurricane in 1960 and never rebuilt. A seawall had been built in the intervening years such that there was no practicable access to the water from the Brannons’ property. At the time of the Brannons’ purchase, the historical easement showed little to no evidence of recent use and the sellers certified that they had never seen the easement used during the years they owned the property.

After the Brannons installed a gate, the neighbors sued, claiming that the gate blocked their easement rights. The neighbors testified to sporadic use of the easement to fish or view the sunset from the Brannons’ backyard. The trial court ruled in favor of the neighbors, holding that they had the right to continue to enjoy the water from the Brannons’ backyard. A three judge panel of the Second District affirmed, with a substantial dissent from Judge Kelly.

The Second District subsequently granted rehearing, agreeing to have the full court hear the dispute. On rehearing, the Court framed the issue as follows:

What rights do the residents in a neighborhood receive, as dominant estate holders under an implied easement created by a denotation on a plat map of an “easement for ingress and egress” to a body of water, when the servient estate is part of a residential lot on which there exists an occupied family dwelling?

The key legal issue involved the application of a prior Second District decision in *Cartish v. Soper*, 157 So. 2d 150 (Fla. 2d DCA 1963). That decision also involved Boca Ciega Bay, and held that holders of an easement reaching the bay enjoyed the riparian rights “necessary and incidental to access and egress” and “necessary to or consistent with the purposes of the easement”. In the *Cartish* case, the Court agreed that the easement holders could build a dock, so they could “wharf out to navigability,” a key riparian right.

Brannon did not alter that holding. Holders of an easement that touches water continue to hold all riparian rights incidental to access to the water, such as building a dock. In *Brannon*, however, there was no issue regarding entering the water or rebuilding the neighborhood dock. Intervening changes in the waterfront and the law made the former impracticable and the latter a legal impossibility. So the

only question was whether the occupants of the other twenty-two neighborhood lots had the right to “fish, watch fireworks, watch the sunset, and generally enjoy the view of Boca Ciega Bay” from the Brannons’ backyard.

The full Second District ruled in the negative, holding that such uses were inconsistent with the uses of an easement intended solely for ingress and egress. The Brannons’ neighbors primarily sought to exercise the right to enjoy an unobstructed view unique to Florida law. But that right could only be exercised from the Brannons’ backyard. The Court ruled that the purpose of the easement was ingress and egress, not the right to remain on the property for extended periods. The Court did note that the neighbors still had the right to traverse the Brannons’ yard to launch a canoe or small boat over the seawall.

It is also important to note that the holding was based on the limiting language describing the easement in the original plat that the easement was only for ingress and egress. A differently worded easement might create different results. As the Court noted in *Brannon*, “[t]he vision of developers and the reality of development have often parted ways in Florida.” The Second District has taken another key step in clarifying the scope of rights created by these implied easements. ■

Dog Days of Summer continued...

than wait for the TRIM Notice, which is typically not received until late August or early September, a taxpayer can go online to the Property Appraiser's website in July, pull up his or her properties and get a pretty reliable idea of what the TRIM Notice will say. At that point, the taxpayer can request an informal meeting with the Property Appraiser's staff to discuss any issues related to the assessment for that year. The Property Appraiser's Office is required by law to have this meeting with any taxpayer who requests it.

The advantage to having this meeting in July or August is that the TRIM Notices have not yet been received and the Property Appraiser's Office is not besieged with requests for informal meetings or Value Adjustment Board hearings. Sitting down with the Property Appraiser's staff before that chaos begins will likely mean that you will have the more undivided attention of that staff person. If some adjustment is appropriate, it is again more likely that the staff will have an opportunity to review the issue thoroughly and carefully and agree to the adjustment. Once the "Value Adjustment Board

season" begins, it is less likely that the Property Appraiser's staff will have the time and energy to devote to each claim, making it less likely for the taxpayer to succeed. Handling tax matters in this early, informal way can save the much higher cost of attempting to resolve them at a Value Adjustment Board hearing or in the Circuit Court.

Another important tip to remember is that business owners should check tangible personal property inventories on a regular basis to ensure that items which are no longer in their possession have been removed from the tangible personal property tax return given to the Property Appraiser's Office. For example, computer equipment and related items of tangible personal property are replaced on a regular basis in order to keep up with the latest technology. Unfortunately, many businesses fail to remember to remove the outdated equipment they no longer have from their tangible personal property return, and the Property Appraiser happily continues to assess these items. It is especially important for this type of equipment as the depreciation schedules used and the useful lives applied to computer equipment by a

property appraiser typically do not reflect the rapid changes in technology and their greatly diminished value. A simple review of one's tangible personal property return each year could save considerably on taxes.

Finally, the taxpayer should be sure to respond to all relevant inquiries made by the Property Appraiser's Office early in the tax year regarding their real or tangible personal property. Should a dispute occur later on that ends up in Circuit Court, the taxpayer will likely not be allowed to present evidence that might reduce an assessment if that information had been requested earlier in the year by the Property Appraiser's Office and not provided by the taxpayer. The Property Appraiser is required to make his or her assessment on the best information that can be obtained and the law will not allow a property owner to withhold that information and use it to his or her advantage at a later time.

Devoting a little early and extra time to these ad valorem tax issues each year should go a long way toward keeping tax obligations accurate and fair. ■

LENDERS AND HOMEOWNERS' ASSOCIATIONS AFFECTED BY RECENT AMENDMENTS



By: Nathan A. Carney
E-Mail: ncarney@trenam.com

Effective July 1, 2008, the Florida

Legislature made several changes to the laws regulating the collection of delinquent assessments by homeowners' associations. Two important amendments, especially in light of the record number of foreclosures, address the priority of homeowners' association liens for unpaid assessments as to the holders of first mortgages, and clarify the liability of first mortgage holders for outstanding assessments.

Prior to July 1, 2008, Florida Statute § 720.3085, did not address the priority of a homeowners' association's lien for unpaid assessments. The priority of a homeowners' association's lien was typically set forth in the community's declaration of covenants, conditions and restrictions. Where the declaration provided that a claim of lien was effective as of the date the declaration was recorded, the association's lien took priority over all mortgages and other liens against the property. More often than not, however, there was a clause in the declaration providing that first

mortgages took priority over the association's lien. Such a clause was necessary because most financial institutions would not provide mortgages to prospective borrowers to purchase homes in communities where an association failed to have such a clause in its declaration.

The Legislature amended the homeowners' association statute as follows:

The effective date of a claim of lien for unpaid assessments relates back to the date the original declaration of the community was recorded. As to first mortgages, however, a claim of lien is only effective from the date the lien is recorded.

The requirements for a valid claim of lien for unpaid assessments are set forth in the statute.

The homeowner has the opportunity to record a notice of contest of lien and the statute sets forth the form of the notice. If the homeowner records a notice of contest of lien, the association is required to file a foreclosure action within 90 days or the association's lien is void.

The liability of a first mortgage holder who acquires title by foreclosure or by deed in lieu of foreclosure is limited to the lesser of 12 months of assessments or 1% of the original mortgage debt. This limitation applies if the first

mortgage holder files a foreclosure action against the homeowner and joins the association as a defendant.

The form for a qualifying offer from the homeowner after a foreclosure action is filed by the association is set forth in the statute. In a qualifying offer, the homeowner admits liability, agrees to protect the priority of the association's lien and agrees to pay the full amount owed to the association within 60 days. A qualifying offer stays a foreclosure action for up to 60 days.

The new limitations on first mortgagee liability are similar to those set forth in Florida Statute § 718.116 for condominium associations, although a first mortgagee's liability for condominium association assessments is the lesser of 6 months of assessments or 1% of the original mortgage debt. This amendment clarifies changes that were made to the statute last year which have been interpreted to mean that a foreclosing first mortgage holder is liable for all delinquent assessments if the mortgagee obtains title from a foreclosure sale.

Lenders and homeowners' associations alike should be familiar with the applicable Florida Statutes as well as the community's governing documents. In addition, homeowners' associations should review their governing documents to see if revisions are needed in light of the recent amendments. ■

Twenty-One Trenam Kemker Lawyers Named to Best Lawyers in America 2008

Trenam Kemker is pleased to announce that twenty-one of our lawyers have been named by their peers to the 2008 edition of *The Best Lawyers in America*.

The following lawyers were recognized in their respective practice areas:

Thomas D. Aitken - Trusts and Estates

J. Alan Asendorf - Real Estate Law

Marvin E. Barkin - Bet-the-Company Litigation; Commercial Litigation

David R. Brittain - Real Estate Law

Robert H. Buesing - Commercial Litigation; Construction Law

Nelson T. Castellano - Corporate Law; Securities Law

Roberta A. Colton - Bankruptcy and Creditor-Debtor Rights Law

Stanley H. Eleff - Commercial Litigation; Construction Law

William C. Frye - Bet-the-Company Litigation; Commercial Litigation

Michael P. Horan - Bankruptcy and Creditor-Debtor Rights Law

Richard O. Jacobs - Health Care Law

Richard M. Leisner - Corporate Governance and Compliance Law;
Corporate Law; Securities Law

Harold W. Mullis, Jr. - Corporate Law; Tax Law

Albert C. O'Neill, Jr. - Tax Law

Mary H. Quinlan - Real Estate Law

Richard H. Sollner - Real Estate Law

Gary I. Teblum - Corporate Governance and Compliance Law; Corporate Law; Leveraged Buyouts and Private Equity Law; Securities Law

John S. Vento - Construction Law

Roberta Casper Watson - Employee Benefits Law

Don B. Weinbren - Health Care Law

William Knight Zewadski - Bankruptcy and Creditor-Debtor Rights Law

TRENAM, KEMKER, SCHARF, BARKIN, FRYE, O'NEILL & MULLIS

TAMPA OFFICE Bank of America Plaza, 101 East Kennedy Boulevard, Suite 2700, Tampa, FL 33602, Phone 813-223-7474

ST. PETERSBURG OFFICE Bank of America Tower, 200 Central Avenue, Suite 1600, St. Petersburg, FL 33701, Phone 727-896-7171

To Receive This Newsletter Electronically Send your name, title, company name and address to azambrano@trenam.com

**If you have questions or concerns about any of these topics
please call 813-223-7474 or contact the author directly.**

www.trenam.com

The *Trenam Kemker Legal Update* is a publication of Trenam, Kemker, Scharf, Barkin, Frye, O'Neill & Mullis. All rights are reserved. The information contained in this newsletter is general in nature and is not intended to be, and should not be considered, legal advice. For specific advice on any topic, please call your legal advisor.