

Recent Court Decisions on Real Estate and Valuation

Property taxes still owed during condemnation proceedings

In October 2005, the City of Joliet, Illinois (City), filed a condemnation complaint seeking to acquire, through eminent domain, a low-income apartment complex known as Evergreen Terrace. The property was owned and managed by a collection of entities, including MB Financial Bank and Burnham Management Company (collectively, the Owners).

Because the US Department of Housing and Urban Development had an interest in the property, the condemnation action was removed to federal court, where the case was in litigation for nearly twelve years. While the case was in litigation, the apartment complex remained in operation, and the Owners continued to pay the property taxes that were due without filing any protest. Ultimately, the City acquired fee simple title to the property on August 25, 2017.

In August 2018, the Owners filed a tax objection complaint in Will County Circuit Court against the county treasurer. The complaint sought a refund of over \$6 million in property taxes paid between the date the City filed its condemnation complaint and the date the City acquired the Owners' property. The Owners asserted that under Illinois law, once title to a property acquired by condemnation vests with the condemning authority—here the City—it vests retroactively to the date of filing the condemnation petition and, therefore, the landowner is entitled to a refund for any taxes paid after the date of the filing.

The county treasurer filed a motion to dismiss, which the trial court granted. It read the Owners' complaint as alleging that because the City's acquisition of the property was effective retroac-

tive to the date the condemnation complaint was filed, the property was retroactively exempt from taxation from that date. The trial court then concluded that the Owners lacked standing because only the City itself could seek tax-exempt status.

The Owners appealed to the appellate court. The appellate court found that the trial court had misinterpreted the Owners' complaint. Rather, the Owners were seeking a refund because they had overpaid their taxes. On that claim, the appellate court found for the Owners. The court concluded that once the condemnation proceedings were complete and title to the property was conveyed to the City, the title "related back" to the date the condemnation complaint was filed. And because the City owned the property during that 12-year period, the City was retroactively responsible for the property taxes during that time. The treasurer appealed to the state supreme court.

Illinois law states that the owner of property on January 1 of each year is liable for the taxes for that year. The key elements for defining ownership are control and the right to enjoy the benefits of the property. Although the Owners had enjoyed the benefits of their property during the pendency of the litigation, the appellate court concluded that the Owners were not the owners of the property during that 12-year period, relying on a 1942 case from the Illinois Supreme Court, *City of Chicago v. McCausland*.

In *McCausland*, the court held that a lien for unpaid taxes could not be deducted from the property owner's just compensation award. When the compensation award is actually paid—which is the event that completes the taking—the title acquired relates back to the point when the condemnation action was filed; thus, only liens that existed at that time are liens against

the fund. Hence, although property taxes continued to accrue while the condemnation action was being litigated, the property owner could not be held responsible for those taxes because the taking effectively took place on the date the action was filed.

Here, the appellate court determined that it would be nonsensical to hold that a condemnee who failed to pay taxes during the pendency of the proceedings is not liable for the taxes but find a condemnee who continued to pay taxes liable. The Illinois Supreme Court disagreed, expressly finding that *McCausland* is no longer good law.

McCausland was based on the proposition that a taking occurs on the date the government deposits a compensation award to the property owner and acquires the title. It was also based on the proposition that the valuation of the property is fixed at the time the condemnation action is filed. But neither of those points is true under current Illinois law. The relation back rule cannot stand because, under current law, there is no taking to relate back to. The legal rationale underlying *McCausland* has thus been eliminated.

Because title no longer “relates back” during condemnation proceedings, the Owners remained liable for all taxes owed during the period of the condemnation proceedings. The Owners also argued that the mere act of filing a condemnation complaint burdened their property, but the court found this argument unpersuasive. Further, the Owners did not appeal their annual taxes, nor had they argued that their annual taxes should be reduced because of the impact of the condemnation complaint on their property’s value.

Accordingly, the decision of the appellate court in favor of the Owners was reversed, *McCausland* was overturned, and the trial court’s dismissal of the Owners’ claims was affirmed.

MB Financial Bank NA v. Brophy
Illinois Supreme Court
September 21, 2023
2023 WL 6153041

Reducing access from road is not a compensable taking

Barham Investments LLC (Barham) owns a car dealership in northern Indianapolis, on the border with neighboring Carmel, Indiana, near the intersection of Keystone Avenue and 96th Street. The City of Carmel (City) used its power of eminent domain to convert that intersection into a roundabout interchange.

Barham’s dealership was positioned toward its main entrance on Threel Road, which was a frontage road running alongside Keystone Avenue. In an earlier case (the County Line Action), the City had been granted the total acquisition of Threel Road in April 2018. The City then filed a condemnation complaint against Barham, claiming it needed to acquire three separate property interests from Barham: 0.017 acres in fee simple, an access-control line, and 0.0111 acres as a temporary right-of-way during construction (collectively, the Property).

Barham objected to the City’s complaint, claiming that the City had failed to properly identify all the ownership interests being extinguished in the taking, namely the easement rights of Barham to access and use Threel Road. The trial court denied Barham’s objection, and the parties entered into an agreed order authorizing the City’s acquisition of the Property. The agreed order set the access-control line as the new western property line of the Property, with the intent to limit any access to the west of that line toward Keystone Avenue.

Following the appointment of appraisers to value the Property, Barham disputed their determination of total compensation due—an award of \$163,000—because the damages from the taking of access to Threel Road were substantial. The City moved for partial summary judgment, arguing that Barham was not entitled to compensation for its loss of access to Threel Road. The trial court denied the City’s motion, explaining that the City had cited no law that definitively fore-

closed Barham's arguments for compensation for the elimination of the ingress and egress easements or the diminution of value to Barham's property. A jury subsequently awarded Barham \$2.4 million in damages. The City appealed.

Although Indiana law was silent on the issue, other states have held that the taking of real property by eminent domain extinguishes any easements burdening the property.

Whether a taking has occurred is a question of law. When considering that question, a threshold question is whether the plaintiff landowner has a property interest in the property that is being acquired by the state. In the context of property owners abutting public roads, two principles are well settled in Indiana: first, the right of an abutting landowner to ingress and egress over the public roads is a cognizable property right, and interference with that right is a compensable taking (the "ingress-egress rule"); second, an abutting landowner has no cognizable property right in the free flow of traffic past its property (the "traffic-flow rule").

The City argued that in this case it did not acquire Threel Road or an easement in Threel Road, so the traffic-flow rule applies. Barham argued, in contrast, that the case involves an easement and a substantial change in how its Property is used. The court of appeals agreed with the City that it did not acquire Barham's easement in this case, and even if it had, Barham's easement granted it only a right to ingress and egress over Threel Road, not a curb cut.

The court analyzed the agreed order, which appropriated an area adjacent to Threel Road,

but which was silent as to any alleged interest of Barham in Threel Road itself. Easements are limited to the purpose for which they are created, and they convey no other rights beyond those necessary for the enjoyment of the easement. Barham's deeded easement did not expressly reserve a curb cut right; it simply reserved an easement "over, across, and under Threel Road for pedestrian and vehicular traffic, sewer lines, and other utilities." Based on the language of Barham's deeded easement, Barham had ingress and egress rights in Threel Road but not to any specific curb cut onto Threel Road or in the Property that the City was acquiring.

Furthermore, the City had already appropriated Threel Road in the County Line Action, which had resulted in the permanent closure of the road. With its total acquisition of Threel Road, the City acquired all of the interests therein, including Barham's easement. Although Indiana law was silent on the issue, other states have held that the taking of real property by eminent domain extinguishes any easements burdening the property. The default rule in federal eminent domain cases, for example, is that a taking in fee simple establishes new title and extinguishes all possessory and ownership interests not specifically excepted. Adopting this rule, the court concluded that the City extinguished Barham's easement in Threel Road when the City acquired it in its entirety in the County Line Action. Therefore, there was no easement to take in the current case.

To the extent the parties were arguing whether a compensable taking occurred in this case, rather than in the County Line Action, they characterized it as one of traffic flow versus ingress-egress. But the court held that under either analysis, Barham would lose. Under the ingress-egress rule, interference with those rights is only compensable if it is substantial or material; but here the interference is neither, because Barham maintained sufficient access to another road to run its business. And under the traffic-flow rule, the mere reduction in traffic flow is not a compensa-

ble property right, which would make Barham's loss of access non-compensable since it maintained two other access points.

The court of appeals found that the trial court erred when it denied the City's motion for partial summary judgment on the issue of whether Barham was entitled to compensation for loss of access to Threel Road. The trial court's judgment was reversed.

City of Carmel v. Barham Investments LLC
Indiana Court of Appeals
October 30, 2023
2023 WL 7119594

Department's failure to record and index plan invalidated easement

In 2015, the Pennsylvania Department of Transportation (PennDOT) began constructing a diamond interchange and installing a drainage system on property abutting Interstate 70 in Washington County, Pennsylvania. The property was owned by Donald Bindas, who filed a petition seeking compensation for the encumbrance on his land. PennDOT asserted that its predecessor, the state Department of Highways (DOH) had secured a highway easement for the land in question in 1958.

The state legislature enacted the State Highway Law in 1945, which included a provision empowering the state Secretary of Transportation to establish or change state highways, but which required first the submission and recording of a plan of the proposed change (Section 210). Once the plan is approved by the governor, the plan becomes a condemnation of an easement for highway purposes.

Thirteen years later, in 1958, the governor approved a plan providing for the expansion of Interstate 70. The prior owners of the property now owned by Bindas signed quitclaim deeds to DOH, which were not recorded. The chain of

title for subsequent deeds included an exception and reservation for the portion condemned by the state for highway purposes.

Nevertheless, when Bindas hired a title searcher to investigate PennDOT's claim, the title searcher found no encumbrances on the property. Only when PennDOT's counsel alerted the title searcher to its existence did she find a copy of the 1958 plan on microfilm, in an unlabeled and unindexed drawer at the county recorder's office. Bindas then petitioned for the appointment of a board of viewers, and PennDOT filed preliminary objections.

Bindas argued that Section 210 required not only recording the 1958 plan but indexing it within a locality index. Because it was PennDOT's duty to ensure the plan was properly indexed, the DOH's failure to do so left it without an enforceable interest in the property. PennDOT, in contrast, argued that the fact that the 1958 plan was not properly indexed does not void the condemnation action so long as it was properly filed and recorded.

The trial court granted PennDOT's objections, finding that the lack of indexing was the fault of the county recorder. The trial court therefore refused to divest PennDOT of its property interest because of a third party's error. The court pointed to the fact that several deeds expressly referenced the easement, and PennDOT's employee was able to locate the document at the county recorder's office in a matter of minutes.

Bindas appealed, and the commonwealth court affirmed. It found that the recording of the 1958 plan provided Bindas with constructive notice of the easement. It is a purchaser's duty to investigate its title and exercise due diligence, so Bindas should have known to examine the extent of PennDOT's interest in the property. Bindas appealed again to the state supreme court.

On appeal, Bindas argued that the commonwealth court ignored Section 210's use of the mandatory "shall," and that the court considered improper factors, such as the payment of compensation and whether he had actual or constructive

notice of the plan. While there may have been evidence of the plan in the chain of title, it did not reveal itself in a title search, “lending further credence to the importance and necessity of proper recording and indexing required by Section 210.” According to PennDOT, though, all the actions necessary for the condemnation of the property occurred in 1958, including the payment of just compensation to the property’s prior owners. To PennDOT, the governor’s approval of the plan effectuated the condemnation.

The state supreme court began by finding that DOH, and now PennDOT, had a duty to ensure that the 1958 plan was properly recorded and indexed. The purpose of statutes mandating the indexing of mortgages and other encumbrances is to give notice to intended purchasers that the conveyance or encumbrance stands in the line of title to the property that is described. Here, while it is true that the statutory language imposes a duty upon the county recorder, and not PennDOT, to maintain an adequate locality index and plan book, that language does not pass PennDOT’s burden onto the county recorder. Rather, the county recorder “is simply responsible for offering Section 210 filings a home with the appropriate documents.”

Having found that PennDOT and DOH had a duty to ensure proper recording and indexing, the court was left with the question of whether the condemnation of Bindas’s property was effective. The 1958 plan at issue here was not recorded in a plan book, nor was it indexed in a locality index. Section 210’s requirements were not met. Had they been, Bindas’s title searcher would have had no trouble locating evidence of the plan in the county recorder’s office; it would have been in the plan book as opposed to an unlabeled drawer in a filing cabinet, and such proper filing would have relieved the public of the burdens associated with hunting for items the legislature intended to be matters of public record.

The court held that DOH’s failure to comply with the requirements of Section 210 renders the

1958 plan invalid insofar as it purported to establish an easement upon Bindas’s property. To hold otherwise would endorse a reading of Section 210 that reduces its explicit references to recording and indexing to mere superfluity. The order of the commonwealth court was vacated, and the case was remanded to the trial court for further proceedings.

Bindas v. Pennsylvania Dept. of Transportation
 Pennsylvania Supreme Court
 August 22, 2023
 302 A.3d 644

Subsequent purchaser rule prohibits inverse condemnation claims for damage occurring prior to ownership

The Box Canyon Hydroelectric Project is a run-of-river facility located on the Pend Oreille River in northeastern Washington State. The Box Canyon Dam was built in 1955 to generate low-cost electricity and is owned and operated by the Pend Oreille Public Utility District (PUD). The dam’s turbine and spillway gates control the water surface elevation of the river. Before the dam was constructed, the natural high-water elevation at the Cusick Gage was 2,028 feet above sea level; it is now 2,030.6 feet.

The PUD operates the dam within the constraints of its Federal Energy Regulatory Commission (FERC) license. To comply with its operational parameters, the PUD monitors the river’s elevation and adjusts the gates on a daily and sometimes hourly basis. The dam’s FERC license has been amended several times. A 1999 amendment included the full extent of lands inundated by the project reservoir up to 2,041 feet and noted that the proposed changes would keep the dam “continuing operating as it had been under the 1963 license amendment.”

In July 1993, Brock and Diane Maslonka (Maslonkas) purchased 535 acres of pastureland

bordering the Pend Oreille River upstream from the Box Canyon Dam. Prior to the sale, Herbert Cordes, the then-current owner of the property, and the Maslonkas discussed the flood hazards on the property. Cordes specifically informed them that the lower part of the river flooded periodically in abnormally wet years.

When the dam was constructed, the Maslonkas' predecessors-in-interest sold express easements to the PUD. The easements allowed the PUD to intermittently or continuously overflow, flood, or submerge the land with river water in the operation of the dam. The easements covered most flooding up to an elevation of 2,041 feet.

In 2016, the Maslonkas filed a complaint against the PUD for a governmental taking, statutory trespass, and nuisance. The PUD countered to quiet title to a prescriptive easement. The PUD alleged it had continuously used the Maslonkas' property above elevation 2,035.5 feet since it began operating the dam in 1955, and the Maslonkas and their predecessors knew this but failed to timely assert or enforce any right they may have had.

After the parties filed various dispositive motions, the trial court issued a ruling in the PUD's favor. Noting that an inverse condemnation claim is actionable only by the property owner at the time of the taking, the court ruled that the Maslonkas' claim was foreclosed by the "subsequent purchaser doctrine." The court also dismissed the trespass and nuisance claims.

An appeal ensued. The court of appeals reversed the dismissal of the inverse condemnation, trespass, and nuisance claims. It held that the subsequent purchaser rule did not bar the inverse condemnation claim, because the burden was on the PUD to prove that it had reduced the value of the property before the Maslonkas' purchase. It also held that the Maslonkas' alternative theory of recovery in tort was not subsumed in the inverse condemnation action. The PUD appealed to the state supreme court.

Under constitutional eminent domain principles, the government cannot take or damage private property for public use without just compensation. An inverse condemnation action seeks to recover the value of property affected by a governmental taking that occurred without a formal exercise of the power of eminent domain. But not all landowners can recover damages caused by governmental conduct through an inverse condemnation action. The

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subsequent purchaser rule prohibits landowners from suing for property damage caused by governmental conduct that occurred prior to their ownership. Because the right to damages for an injury to property is a personal right belonging to the property owner, the right does not pass to a subsequent purchaser unless expressly conveyed. No damages should be awarded to plaintiffs who acquired property for a price commensurate with its diminished value.

In reversing the trial court's inverse condemnation ruling, the court of appeals reasoned that the subsequent purchaser rule is a defense, so the PUD must prove that it reduced the value of the property before the Maslonkas' purchase—a burden which the PUD failed to carry. The PUD argued that the subsequent purchaser rule is not a defense, but is instead a doctrine of standing. Standing requires a party to have a real interest in the litigation and generally prohibits a litigant from asserting the legal rights of another.

Washington case law does not expressly characterize the subsequent purchaser rule as one of standing, but it limits who may sue for inverse condemnation by prohibiting a subsequent purchaser from asserting the legal rights of the owner at the time of the alleged taking. The state supreme court thus agreed with the Maslonkas that standing refers to a party's right to bring a legal claim and that it is not intended to be a high bar. But the court disagreed that the subsequent purchaser rule was a high bar to overcome; it simply requires the proper plaintiffs to bring suit. The court of appeal opinion flipped the standing burden by requiring the PUD to show that the Maslonkas lacked standing.

Here, the taking occurred when the dam was built in 1955; thus, the proper inverse condemnation claimants were the owners of the land at that time. The PUD's dam operations have flooded the property since 1955, well before the Maslonkas purchased the property in 1993. The supreme court "assume[d] the Maslonkas' purchase price reflected this known seasonal flooding." The Maslonkas therefore had no inverse condemnation claim unless they established a new taking occurring after 1993.

While the Maslonkas offered speculative evidence about increases in flooding, the PUD's evidence firmly rebutted that evidence. The 1999 FERC license amendment, for example, included lands already being flooded up to an elevation of 2,041 feet. And while there may have been occasions when flooding occurred above that level since 1993, they produced no evidence that the dam's operations changed in any way after 1993 to cause that increased flooding. Thus, without evidence of a new taking, the Maslonkas' inverse condemnation claim could not survive summary judgment.

On the Maslonkas' tort claims, the supreme court also disagreed with the court of appeals. Generally, when the government takes private property for public use, eminent domain principles apply. Takings claims have long been distin-

guished from tort claims. The court of appeals held that inverse condemnation claims do not foreclose tort recovery. And it is true that tort actions are unnecessary where the defendant is a governmental entity and the recovery sought is only for loss of property rights, not personal or other injuries.

Here, however, the parties agreed that a taking has occurred. Even though the Maslonkas were precluded from filing an inverse condemnation claim, the theory is available to them. They sought damages from loss of property rights against a defendant to which eminent domain principles apply. They simply could not show that the taking occurred after their purchase. Under these facts, the Maslonkas are not disadvantaged if they are denied recourse to a tort cause of action.

In sum, there is no authority that inverse condemnation claimants barred by the subsequent purchaser rule are entitled to alternative tort recovery. The Maslonkas alleged one governmental action—the continuous flooding caused by the dam's construction in 1955—as the basis for both their tort and inverse condemnation claims. If tort claims could exist as a backup theory of recovery for otherwise barred inverse condemnation claims, subsequent purchasers could endlessly sue governmental entities in tort. The Maslonkas cannot maintain a tort action for conduct that undisputedly constitutes a taking.

Accordingly, the supreme court reversed the court of appeals' decision and remanded to reinstate the trial court's order granting summary judgment to the PUD and dismissing the Maslonkas' trespass and nuisance claims.

*Maslonka v. Public Utility Dist. No. 1
of Pend Oreille County*
Washington Supreme Court
August 3, 2023
533 P3d 400

Airport property leased to fixed-base operators entitled to tax exemption

The Hillsborough County Aviation Authority (Authority) owns regional and international airports in Hillsborough County, Florida. For several years, the Authority has applied for an ad valorem property tax exemption for fifteen properties located within those airports and leased to private entities. The lessees use the properties for fixed-based operations (FBOs) and related activities, including aircraft maintenance and repair, fueling, flight instruction, and air cargo transport.

In its exemption applications, the Authority claimed these properties were exempt because their uses met the statutory definition of “governmental purpose”; for several years, the then-elected county property appraiser approved those exemptions. But in 2019, the Hillsborough County Property Appraiser, Bob Henriquez (Henriquez), changed course and denied the exemption applications, in whole or in part, on all fifteen properties. In the denial notice, Henriquez explained that the properties no longer met the statutory criteria for government use.

The Authority appealed this decision to the county Valuation Adjustment Board, which overturned Henriquez’s denial and reinstated the exemptions. Henriquez then filed suit in circuit court, seeking to tax the properties. Both parties filed for summary judgment, with the Authority arguing that its tenants’ uses of the properties fell squarely within the statutory definition of a governmental purpose, and Henriquez arguing that for an exemption the property must serve a “governmental-governmental” purpose—that is, be owned by the government and used for administration of some phase of government.

The trial court agreed with Henriquez. The court found that “while the activities undertaken by the tenants are useful to the public and the users of the airports in particular, the uses are not the administration of some phase of government,”

and thus were not exempt. The Authority appealed to the district court of appeal.

In Florida, various statutes control property tax exemptions. Of relevance here, Sections 196.199(2) and 196.012(6) exempt leasehold and other interests in government property if they meet certain criteria. The lessee must serve or perform a governmental, municipal, or public purpose or function in order for the property to be exempt. Among the functions included in the statutory definition is activity “undertaken by a lessee which is permitted under the terms of its lease of real property designated as an aviation area on an airport layout plan... and which real property is used for the administration, operation, business offices and activities related specifically thereto in connection with the conduct of an aircraft full service fixed base operation.” Such activities are deemed to be activities “which serve a governmental, municipal, or public purpose or function.” These code provisions were first adopted in 1971, in an act seeking to tighten exemption requirements, and then expanded in 1993 to include the sentence deeming FBOs to serve a governmental purpose.

The trial court, though, found that the Authority’s properties did not serve a governmental purpose under the statutes because their uses did not satisfy a judge-made “governmental-governmental test.” This test began shortly after the 1971 legislation, when a case involving airport property leased for use as a for-profit racetrack was decided by the state supreme court, which held that such a use was not exempt. As a result, the court developed the so-called governmental-governmental test. Under the governmental-governmental test, an exemption is constitutionally permitted only if the use by the private entity could properly be performed or served by a governmental unit serving the administration of some phase of government. A governmental-proprietary function, in contrast, occurs when a nongovernmental lessee uses government property for proprietary and for-profit

aims; though such a use might serve the public, it does not fit the definition of a public purpose.

The question here is whether FBOs and comparable aviation activities undertaken by private lessees on airport property serve a governmental purpose. It was undisputed that the properties at issue were operated as FBOs, which expressly fall within the legislative definition of governmental purpose. By statute, then, the lessee's interests in the properties are exempt from property taxation. While the trial court looked beyond the plain language of the statutes and found that the properties did not satisfy the governmental-governmental test, the court held that that ruling—and Henriquez's arguments in support of it—directly contravenes the plain language of the statute that expressly and mandatorily deems FBOs to serve a governmental purpose.

Because courts lack the power to construe an unambiguous statute in a way that would extend, modify, or limit its express terms or its reasonable and obvious implications, the trial court's ruling could not stand. The court of appeal reversed and remanded the case to be decided in the Authority's favor.

Hillsborough County Aviation Authority v. Henriquez
Florida District Court of Appeal, 2nd District
July 7, 2023
370 So.3d 334

Transfer to state was a fee simple transfer and a public road dedication

The Scotland Beach subdivision was established in the early 1920s on a peninsula that borders and extends on the shore of the Chesapeake Bay in St. Mary's County, Maryland (County). In the 1940s, the State Roads Commission of Maryland, a predecessor to the State Highway Administration (collectively, the State), proposed a series of road projects to construct a seven-mile-long highway, which was intended to follow along the northern

and eastern boundaries of the Scotland Beach subdivision, eventually turning south toward Point Lookout. In addition, the State and County agreed to extend and improve an internal road, renamed Bay Front Drive, through the middle of the subdivision.

In October 1944, the State prepared and recorded two plats to lay out, establish, and construct Bay Front Drive. To construct the road, the State acquired property through conveyances and condemnation proceedings from Scotland Beach lot owners, including Joan Brady. In July 1945, Brady deeded portions of her property to the State for construction of the highway and the extension of Bay Front Drive. The deed granted and conveyed to the State "forever in fee simple, all our right, title, and interest, free and clear of liens and encumbrances" in order to construct a public highway and bridge.

In 1954, severe storms and Hurricane Hazel resulted in severe erosion along the Scotland Beach shoreline. Large portions of the peninsula and subdivision became submerged into the bay. Accordingly, construction of the southern portion of Bay Front Drive was not completed, and the State never completed its highway project. In September 1988, the State conveyed its interest in the land to the County, which the County used as public access to the beach.

In 1995, John and Susan Wilkinson (Wilkinsons) purchased three lots in the subdivision, and in 2004, Barbara and Christopher Aiken (Aikens) purchased undeveloped lots to the south of the Wilkinsons' property. Disputes eventually arose between the Aikens and the Wilkinsons concerning the Aikens' right to use a 0.196-acre property (the Property) for ingress and egress. The Property was part of the Brady deed.

In 2007, the Wilkinsons placed barriers on the Property to prevent the Aikens from crossing it, and then petitioned the County to close the Property as a road. In 2017, the County adopted an ordinance stating that the public interest would be served by closing that portion of Bay Front Drive.

In 2018, the Wilkinsons filed suit against the County asserting ownership of the Property based on theories of adverse possession, abandonment, and estoppel. The County countersued, seeking a declaration that it owned the Property in fee simple, and the Aikens intervened, asserting a right to use Bay Front Drive to access their property. The trial court eventually determined that (1) the County owns the Property in fee simple; (2) neither the Wilkinsons nor the Aikens have any private property interest in the Property; and (3) the Property is not a public road as a matter of law.

The Wilkinsons and the Aikens appealed. The appellate court held that the trial court did not err in determining that the County owns the Property in fee simple absolute, but it erred in determining that there was no public road. In doing so, the appellate court rejected the Wilkinsons' argument that the Brady deed conveyed the Property to the State in fee simple determinable rather than fee simple absolute, but agreed with the Aikens that a public road exists on the Property by virtue of it being dedicated for that purpose. The County appealed to the state supreme court.

On appeal, the County argued that the Brady deed conveyed the Property to the State in fee simple absolute, but that the appellate court misconstrued the 1988 deed as dedicating the Property for a transportation purpose. The Wilkinsons argued that the Brady deed conveyed an easement for a specific purpose that was later made impossible. They also argued that even if it was a fee simple transfer, it was a fee simple determinable rather than fee simple absolute, because it was for a purpose later abandoned. The Aikens largely agreed with the appellate court.

In interpreting deeds, the language of the deed is of foremost importance. If a deed is unambiguous, then courts construe it without examining extrinsic evidence. On appeal, the state supreme court's first task was to determine the type of interest conveyed by the Brady deed to the State.

Under Maryland law, unless a contrary intention appears by express terms or is necessarily

implied, every grant of land passes a fee simple estate. A fee simple interest in land is the broadest possible interest allowed by law, and the owner of a fee simple estate has absolute and exclusive control and dominion over the property. An estate in fee simple absolute is an estate of indefinite or potentially infinite duration. An estate in fee simple determinable, on the other hand, is created by any limitation that provides the estate shall automatically expire upon the occurrence of a stated event. Thus, the grantor retains a possibility of reverter, to reacquire the land by reason of the occurrence of the named contingency.

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Here, the language of the Brady deed clearly and unambiguously intended to convey the entire interest in the Property in fee simple absolute. It clearly did not convey an easement, as the Wilkinsons contended. And although the conveyance was specifically for the purpose of constructing Bay Front Drive—an event which never occurred—the “mere expression of a purpose will not of and by itself debase a fee.” Nothing in the Brady deed suggested that the parties intended to create a reversionary interest or conveyance other than a fee simple absolute. That portion of the appellate court's decision was affirmed.

The state supreme court then turned to the question of whether a public road was established on the Property by dedication. In Maryland, public roads can be established in one of three ways: by public authority, by dedication, or by prescriptive easement. The first category addresses roads created through condemnation proceedings pur-

suant to public authority, i.e., eminent domain. This case does not involve condemnation proceedings because Brady conveyed the Property to the State in fee simple absolute. As a result, no road was established by public authority. The case also did not involve a prescriptive easement. Thus, this case involves a question of common law dedications.

Generally, common law dedications are voluntary offers to dedicate land to public use, and the subsequent acceptance by a public entity. Thus, dedication requires (1) an offer to dedicate, and (2) an acceptance of that offer. No particular form or ceremony is necessary; the key ingredient is the landowner's intent to dedicate the property to public use. Following the landowner's offer, acceptance may be evidenced by deed or by the public's continued use of the land, among other actions.

The court first concluded that the Brady deed reflected evidence of an offer. The deed was sufficient to establish Brady's intent because it expressly stated that her property would be used for public convenience and for a public highway, without any limiting language. The court further held that the State accepted Brady's offer to dedicate the Property for public use. The State recorded the instrument, which effected the acceptance.

The County contended that the 1988 deed from the State to the County did not convey a public road because the deed sought to accomplish something that was no longer feasible due to storm damage and erosion. But the court held that this argument ignored the plain language of the 1988 deed and failed to consider the statutory authority granted to the State to convey title to public roads and the County's authority to close them. The relevant statutes contemplate a transfer of property no longer needed for a State transportation purpose could be conveyed to a local government for a local transportation purpose. The 1988 deed stated it was made under that statutory authority. Thus, the 1988 deed conveyed a public road for further local transportation purposes. The 2017

ordinance closing the road served as public notice of when the road was closed.

Accordingly, the court agreed with the appellate court's analysis and affirmed its judgment. The County owns the Property in fee simple absolute, the Brady deed and its recording effected a dedication of the Property for public road purposes, and it was not until the 2017 ordinance that the public road over the Property was closed.

*Bd. of County Comm'rs
of St. Mary's County v. Aiken*
Maryland Supreme Court
June 20, 2023
296 A.3d 933

Owner of property abutting a newly constructed controlled-access highway has no compensable right of access

William and Elise Wood (Landowners) own farmland in Blue Earth County, Minnesota. The farmland abuts the Mankato city limits. In 2016, Blue Earth County (County) filed a quick-take petition in district court to condemn a portion of the Landowners' property to construct a new section of County Highway 12. No road previously existed when the new section of Highway 12 was planned, and the new section of highway crossing the Landowners' property was designated a "controlled access highway."

The district court granted the petition and appointed commissioners to determine the compensation due to the Landowners resulting from the taking. Both parties offered appraisals. The Landowners' appraisal was higher because it included compensation for loss of access to Highway 12; the County's appraisal did not include any amount of damages for loss of access to the highway. The commissioners awarded the Landowners compensation consistent with the County's appraisal, including severance damages because the property was bisected by the highway.

The Landowners appealed the award to the district court, which affirmed the award. The court reasoned that, because the new highway did not previously exist, the Landowners had not been deprived of any right of access for which they should be justly compensated. The Landowners appealed next to the court of appeals, and then ultimately to the state supreme court.

A right of access is an independent property right that must be compensated for if taken or impaired, and it must be taken separate from the land to which it is appurtenant. The fundamental question before the court—a matter of first impression, meaning the court had never been asked to answer the question before—was whether a person who owns property abutting a newly constructed controlled-access highway has a right of access thereto.

Under Minnesota law, a government generally must provide to an abutting landowner a reasonable means of access to either a newly constructed highway or a relocated or reconstructed highway. But the statute also defines a particular class of highway called a controlled-access highway, which is a highway “over, from, or to which owners or occupants of abutting land or other persons have no right of access, or only a controlled right of the easement of access, light, air, or view.” Here, the County designated the portion of Highway 12 through the Landowners’ property as a controlled-access highway, and that decision was not at issue.

The court noted that a separate statute provided that no person has any rights of ingress or egress to, from, or across controlled-access highways to or from abutting lands except that the road authority, in its discretion, may provide such access. Taken in conjunction with the other statutory provisions, the court held that—unlike the general rule for highways and roads—abutting landowners have no right of access to a controlled-access highway.

Finally, the court noted that another statute specified that “in the case of any elimination of

existing access... or other compensable property rights, the owner shall be compensated for the loss by purchase or condemnation.” Thus, when a road authority converts an *existing* highway to which an abutting property has access to a controlled-access highway, the road authority must compensate the owner for the loss of that access. But when a road authority constructs a *new* controlled-access highway, it is not eliminating existing access and thus no compensation is owed.

Accordingly, because Highway 12 did not previously exist, the Landowners were not deprived of any right of access for which they should be justly compensated. The district court’s judgment in favor of the County was affirmed.

Wood v. County of Blue Earth
Minnesota Supreme Court
August 23, 2023
994 N.W.2d 309

HOA authority ratified by repeated conduct of HOA members over time

In 1973, Charles Lewton signed and recorded protective covenants and a certification of incorporation for Hi-Country Estates Homeowners Association, Phase II (HOA). The documents established the HOA and included within its boundaries about 2,000 acres of land near Herriman, Utah. The 1973 protective covenants stated that the owners of the described property “hereby subject said property to the following covenants, restrictions, and conditions,” including that each lot owner would be a member of the HOA and would pay annual assessments for the costs to maintain roads and common areas.

The HOA’s governing documents were revised and amended over the years, including amended protective covenants in 1980 and bylaws in 1988, all of which were enacted at annual meetings of the HOA members. All the original and current governing documents were duly recorded with

the Salt Lake County Recorder. There are currently hundreds of HOA members, most of whom have paid their annual assessments to the HOA.

In 2009, Robbie Frank, as the trustee of two trusts, bought two lots within the HOA's boundaries (Trust Lots). The prior owners of the Trust Lots paid the HOA's annual assessments. But Frank refused to pay the assessments levied by the HOA, although he participated and voted in HOA meetings on behalf of the trusts.

In 2012, the HOA sued the trusts to obtain the past-due assessments. Meanwhile, in 2015, other lot owners sued the HOA claiming that they had discovered evidence that when Lewton established the HOA in 1973, he owned less than 1% of the property he included in the HOA's boundaries. Those lot owners sued to quiet title against the HOA, moving for a declaration that the governing documents signed by Lewton were void, because it violated public policy for Lewton to encumber property that he did not own. That case was eventually decided by the Utah Supreme Court, against the lot owners and for the HOA.

In 2016, the HOA filed another suit against Frank on behalf of the trusts for past-due assessments. Frank's defense focused, in part, on the allegation that the HOA does not legally exist and therefore has no right to make any assessments. The district court granted partial summary judgment in favor of the HOA. The court determined that even assuming that the HOA's founding documents were faulty, the HOA still had authority to assess the Trust Lots because the members of the HOA had subsequently ratified the HOA's authority, including Frank himself by voting in HOA meetings. Frank appealed.

On appeal to the state supreme court, Frank argued that the district court erred in granting judgment to the HOA because the governing documents are "absolutely void and therefore incapable of ratification." He also argued in the alternative that even if the documents are merely voidable, the court incorrectly concluded that ratification had occurred here because the governing

Restrictive covenants, like those here, that are recorded without the signature of the affected landowner are voidable, not absolutely void, and are therefore ratifiable.

documents can only be ratified through a signed writing of the owner of the property at issue.

The court first addressed Frank's argument that the HOA had no authority to assess the Trust Lots because the governing documents that established the HOA are void, and therefore not ratifiable. The distinction between "void" and "voidable" is important because a contract or deed that is void cannot be ratified or accepted, and anyone can attack its validity in court. In contrast, a contract or deed that is voidable may be ratified at the election of the injured party, and once ratified, the voidable contract or deed is deemed valid. There is a presumption that contracts are voidable unless they clearly violate public policy.

Restrictive covenants, like those here, that are recorded without the signature of the affected landowner are voidable, not absolutely void, and are therefore ratifiable. Frank did not overcome the presumption that the governing documents were merely voidable. The result is judicial deference to the HOA members' collective decision to either reject or ratify the HOA's authority, rather than a judicial determination that the members cannot ratify the HOA's authority as a matter of law. And here, the covenants have existed for decades, so the reliance interests of hundreds of other owners in the HOA may be especially substantial.

Having determined that the governing documents were only voidable, not void, the court proceeded to analyze whether the district court correctly concluded that the HOA's members had collectively ratified the HOA's authority to assess

property within its boundaries. Frank contended that because the governing documents encumber real property, the statute of frauds requires that any ratification must be in writing, signed by the affected property owners, who must have known of the defect and had an intent to subject the property to the governing documents despite the defect. The court disagreed.

The court began by clarifying that the question in this case is whether the HOA's members have ratified the HOA's authority in general, and its authority to assess the property within its boundaries. Frank's analysis focused on ratification of the governing documents, but that was not the relevant question. The court focused its analysis on whether the HOA members have collectively ratified its authority.

Where property owners have treated a homeowner's association as one with authority to govern and impose assessments contemplated under the terms of a duly recorded governing declaration, they ratify its authority to act. As the district court found here, decades have passed since the HOA's governing documents were recorded, and the members of the HOA have since acted as though the HOA was a legitimate governing entity for decades. Frank himself implicitly acknowledged its authority by voting on the Trust Lots behalf at HOA meetings. He also provided no evidence that any prior of the Trust Lots objected to the HOA's authority or did anything other than acquiesce to Lewton's actions.

Utah law is clear that even if there is some technical deficiency with an HOA's governing documents, the fact that the HOA has existed for forty years, conducting meetings and elections, making and enforcing assessments, all with the cooperation and participation of its members, means that the authority to act as such has been ratified by the members as a matter of law. Even where real property is involved, Utah's courts do not require that ratification be evidenced in a writing, or that the writing demonstrate an intent to ratify the relevant

defect. Rather, repeated conduct of homeowner association members over time, including treating the association as one with authority to govern, can evidence ratification.

Accordingly, because the district court did not err in its analysis, the state supreme court affirmed its judgment for the HOA and against Frank.

Hi-Country Estates Homeowners Association, Phase II v. Frank
Utah Supreme Court
May 4, 2023, amended July 20, 2023
533 P.3d 1142

Demand for appraisal under insurance policy was not time-barred

On February 5, 2010, the residence owned by Raymond Romeo in Cranston, Rhode Island, suffered a water loss followed by ice and flooding. At the time, the property was insured under a homeowner's policy issued by Allstate Property and Casualty Insurance Company (Allstate). Romeo made a claim for the loss under the policy, and Allstate made a partial payment toward the damages.

Although the parties agreed that the loss was covered by the terms of the policy, they were not able to agree to the extent of the loss and the cost of remediation. The policy mandated that should the parties disagree as to the amount of the loss, either party could make a written demand for appraisal, which would begin a process of retaining appraisers and an impartial umpire to determine the amount of loss.

Romeo initially sought to invoke the appraisal provision within two years after the loss. Allstate refused to proceed to appraisal because it contended that the disagreement involved mixed issues of both valuation and coverage such that appraisal was not appropriate. As a result, Romeo filed suit against Allstate for breach of contract. Based on a then-recent Rhode Island Supreme

Court decision, Allstate took the position that appraisal was a mandatory precondition to plaintiff's suit.

Allstate filed for summary judgment, arguing that the terms of the policy required the dispute to be resolved via appraisal rather than litigation. Allstate then filed an amended answer and counterclaim, alleging that it had made a demand for appraisal in accordance with the policy. During the summary judgment hearing, both parties agreed that the loss was covered but disagreed as to the amount of the loss. Thus, at the end of the hearing, the parties were in agreement that appraisal was the proper forum for resolution of the dispute. Based on this agreement, the trial justice granted summary judgment to Allstate, after the point at which two years had already passed from the date of the loss.

After summary judgment was granted, Romeo alleged he experienced difficulty finding an appraiser who would undertake the appraisal due to the uniqueness of his home.

More than four years later, in March 2017, Romeo designated an appraiser and requested that Allstate do the same. Allstate refused to appoint an appraiser and move forward with the appraisal process based on its assertion that Romeo's demand for appraisal was not timely filed. According to Allstate, this second demand for appraisal was subject to the same two-year limitation period, which had long since passed.

Eventually, in September 2017, Romeo filed suit again, seeking to vacate the earlier judgment and alleging that Allstate breached the insurance contract by refusing to designate an appraiser and

proceed to appraisal. Romeo sought a judgment ordering Allstate to designate an appraiser to complete the appraisal process. In response, Allstate argued that summary judgment was granted in the first action in December 2012, and Romeo never demanded appraisal until March 2017. Following another motion for summary judgment, the trial justice granted Allstate's motion, and Romeo appealed to the state supreme court.

The court noted that it was confronted with a case in which both parties were in agreement in 2012 that this insurance coverage dispute should be resolved by way of the appraisal process. Unfortunately, an appraisal never occurred. After summary judgment was granted, Romeo alleged he experienced difficulty finding an appraiser who would undertake the appraisal due to the uniqueness of his home—a home with custom bricks from England, custom tile from Italy, and gumwood, which was now illegal to import. An appraiser was eventually found but only after four years. Allstate insisted that the two-year limitation in the insurance contract had expired years earlier.

The rights and liabilities of the parties in an insurance contract are to be ascertained in accordance with the terms as set forth therein. A limitations period in an insurance policy is a term to which the parties are specifically bound. Several cases relied on by Allstate suggested that Romeo's demand for appraisal in 2017 was not timely. The state supreme court found Allstate's reliance on those cases misplaced, though. Unlike the cases cited by Allstate, Romeo in fact made a timely demand for appraisal prior to 2017. Both parties acknowledged that the loss occurred in February 2010, and plaintiff demanded an appraisal shortly thereafter. Allstate refused to proceed to appraisal, and plaintiff sued in 2011. Thus, both Romeo's original demand for appraisal and his initial action were timely, as they fell within the requisite limitation period. Thus, neither was time barred; the clock did not begin to run again.

In the first action, there was a clear understanding that the appraisal process would be, or

already was, ongoing. Indeed, Allstate asserted, in both its motion for summary judgment and its counterclaim, that appraisal was required. The court held that those assertions amounted to a binding judicial admission—a deliberate, clear, unequivocal statement of a party about a concrete fact which is considered conclusive and binding as to the party making it.

Because the court concluded that Romeo's initial demand for appraisal was not time-barred and because Allstate's original motion for summary judgment was granted with the clear understanding that the claim would undergo appraisal, the court concluded that the trial court erred in granting summary judgment to Allstate in the second case. The case was remanded to the trial court with direction to vacate the earlier judgment and order the parties to proceed to appraisal.

Romeo v. Allstate Property and Casualty Ins. Co.
Rhode Island Supreme Court
May 3, 2023
292 A.3d 1190

Granting of water rights is exercise of police power, not a taking

In 2017, the City of Oklahoma City (City) applied for a permit from the Oklahoma Water Resources Board (OWRB) to divert stream water from the Kiamichi River in Pushmataha County, southeast of the City. Eighty-five individuals and entities protested the City's stream water permit application.

Before taking final action on a stream water permit application, the OWRB must determine from the evidence the so-called Four Points of Law: (1) unappropriated water is available in the amount requested; (2) the applicant has a present or future need for the water, and the applicant intends to put the water to a beneficial use; (3) the proposed use does not interfere with domestic or existing appropriative uses; and (4) if the appli-

cation is for the transportation of water for use outside the stream system where the water originates, various statutory provisions are met. If the OWRB determines that the Four Points of Law are met, then the OWRB shall approve the application and issue the permit.

After a hearing, the OWRB found the Four Points of Law were met and issued an order granting the permit. Some of the affected individuals (Petitioners) filed a Petition for Judicial Review in the county district court alleging several purported failures by the City in filing its permit application. After several procedural motions, the district court eventually affirmed the OWRB's order granting the City the stream water permit, and the Petitioners filed an appeal to the Oklahoma Supreme Court.

One of the issues raised by the Petitioners in their appeal was that the OWRB's granting of the City's stream water permit constituted an unconstitutional taking of the Petitioners' water rights. They argued that the City's use of water effected a taking of their water rights. The court disagreed.

Appropriative and riparian rights are coexistent under Oklahoma water law. An appropriative right means the right to take a specific quantity of water by direct diversion and to apply such water to a specific beneficial use. A riparian right, on the other hand, is the right of an owner of land adjoining a stream or waterway to use water for reasonable purposes. Riparian rights are limited to domestic use and pre-1963 vested rights.

The state supreme court held that, when the OWRB granted the City's permit, it was a proper exercise of the state's police power, not a taking. The granting of a permit does not abolish the domestic riparian and appropriative uses of others. Indeed, the evidence before the OWRB showed that the unappropriated water in the Kiamichi River exceeded the City's request, even after considering all existing appropriative and domestic riparian uses were considered. None of the Petitioners offered evidence that their water rights would be or might be harmed by the grant-

ing of the stream water application; rather, they argued general harm without any supporting evidence, which the court found to be insufficient.

Furthermore, the legislature provided a judicial remedy to adjudicate water rights disputes. Under that regime, domestic riparian and existing appropriative users can seek remedy for interference with their water rights. Therefore, if the City's use of the water under the granted permit interferes with their water rights, the Petitioners have recourse. That process, however, is not a prerequisite to granting a water use permit.

The Petitioners also argued that the OWRB should have considered an additional element of environmental issues and impacts on economic activity as part of the beneficial use analysis in the Four Points of Law. They attempted to present evidence of the environmental impacts of the City's water application, but the OWRB's hearing officer excluded that evidence.

The court disagreed with the Petitioners. Under Oklahoma water law, beneficial use is a factor that must be determined before a permit can be issued. A beneficial use is defined as "the use of such quantity of stream or groundwater when reasonable intelligence and reasonable diligence are

exercised in its application for a lawful purpose and is economically necessary for that purpose."

While an applicant may apply for a permit to appropriate water for a fishing pond or to water wildlife, general protection of environmental flows is not one of the statutory elements to be determined by the OWRB. Thus, the hearing officer committed no error in excluding evidence of the purported environmental impacts. Furthermore, even if environmental impacts were a statutory element, the Petitioners offered no evidence to show that granting the City's application would impact the area.

Ultimately, the state supreme court concluded that the district court properly affirmed the OWRB's order. The OWRB correctly applied the Four Points of Law, and its decision to grant the stream water permit was based on substantial evidence containing no clear error that prejudiced the Petitioners. The denial of the Petitioners' challenge to the permit was affirmed.

Leo v. Oklahoma Water Resources Board
Oklahoma Supreme Court
October 3, 2023
536 P.3d 939

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