by Benjamin A. Blair, JD

Recent Court Decisions on Real Estate and Valuation

Portion of residence used as boarding house not entitled to homestead tax exemption

The Florida Constitution governs "homestead property" in several ways. Homesteads are protected from forced sale by creditors. Alienation and devising of a homestead is restricted. And homesteads are exempted from certain ad valorem taxes, and a 3% cap on annual assessment increases is imposed through the "Save Our Homes" amendment. The latter two provisions are intertwined, because the 3% assessment increase cap applies only to property that is entitled to a homestead tax exemption.

The homestead tax exemption provides that "every person who has the legal or equitable title to real estate and maintains thereon the permanent residence of the owner… shall be exempt from taxation" up to specified amounts. This provision has two components: ownership and residency. At issue in the current case is the question of how to determine the scope of a property owner's residence.

Rod Rebholz owns a two-story residential structure in Sarasota, Florida. He initially applied for a homestead exemption in 1996, and for the tax years 2004 through 2013 (as well as earlier and later years). County tax officials treated the entire structure as a homestead property. Rebholz lived in a portion of the structure at all relevant times, but he also rented a portion of the structure to at least one tenant. Rebholz lived on the bottom floor, but the upper floor had four individual rooms with their own living areas and bathrooms. At least one tenant rented one of the rooms without interruption from 1996 until 2013. He and Rebholz had a written rental agreement describing the rate for his unit.

In 2014, the Sarasota County property appraiser (Appraiser) became aware that Rebholz might have received homestead benefits to which he was not entitled. An investigation revealed the configuration of the property and its rental situation. The Appraiser revoked the homestead exemption on the 15% of the property corresponding to the known tenant, leaving intact the exemption on the remaining 85%.

In Florida, when a property appraiser determines that a person has improperly received a homestead tax exemption or Save Our Homes benefit, the law requires the appraiser to impose the additional taxes that would have been due for up to the preceding ten years, plus a penalty and interest. Therefore, the Appraiser recalculated Rebholz's taxes for the 2004 to 2013 tax years, and applied to the non-homestead portion a 10% annual assessment increase cap, instead of the 3% Save Our Homes cap. The resulting assessment was $7,000 in back taxes. Rebholz paid the tax lien, but then sued the Appraiser for a refund and a reinstatement of homestead status to the entire property.

After a bench trial, the circuit court entered judgment in Rebholz's favor. The court reasoned that "merely sharing the residence with a tenant does not create a classification of property not exempted," and the Appraiser was not authorized to deny a homestead exemption for a room rented within a residence while the owner simultaneously maintains the property as his permanent residence. The court of appeal affirmed. The Appraiser appealed to the state supreme court.

The Appraiser argued that the lower courts erred at the threshold by concluding that the entire structure was Rebholz's residence. The state supreme court agreed. In the eyes of the court, Rebholz did not use the 15% of the prop-

erty rented to a tenant as his own residence. The record left "no doubt" that Rebholz gave exclusive use of that portion to a tenant, subject to the tenant's compliance with the terms of the rental agreement. Thus, it was not the Appraiser who divided or "carved up" Rebholz's residence; it was Rebholz. Instead, the Appraiser applied the statutory scheme to discern the scope of Rebholz's residence in the first instance.

The supreme court explained why the lower courts had analyzed the facts wrongly. The property was effectively a boarding house, a part of which Rebholz lived in and used as his residence. The court of appeal purported to distinguish Rebholz's property from "a multifamily apartment of individual autonomous units." But assuming the property owner were to live in one of those apartment units, the court failed to see a meaningful difference between that hypothetical and Rebholz's property. Under the constitutional and statutory scheme, how an owner uses a property—not its physical structure or what it is called—dictates the availability of the homestead tax exemption.

Unlike the court of appeal, which equated Rebholz with the "countless Florida citizens" who reside within their permanent residences while working from home, the state supreme court opined that the phrase "working from home" speaks to activity occurring within property already found to be the owner's residence. Rebholz's case was about defining the scope of the residence in the first place. The portion of the property to which Rebholz gave exclusive use to a tenant was not Rebholz's residence. The lower courts' rulings were quashed, and the case was remanded to the trial court for further proceedings.

Furst v. Rebholz
Florida Supreme Court
April 6, 2023
2023 WL 2799413

Damages based on breach of real estate contract not reasonably foreseeable

In 2011, Gulley-Hurst LLC (GH) sold a one-half interest in a landfill it owned in Texas to MSW Corpus Christi Landfill Ltd. (MSW) for $7,500,000. MSW financed the transaction by executing a promissory note payable to GH for $3,500,000 and acquiring $5,000,000 in loans. The parties entered a landfill operating agreement that provided MSW would operate the landfill and pay GH 50% of the net operating income.

Following some disagreements, MSW and GH entered into a mediated settlement agreement in 2015, which allowed MSW to purchase GH's remaining one-half interest in the landfill within 120 days. If MSW did not purchase GH's one-half interest by the deadline, MSW was required to sell its one-half interest back to GH.

MSW did not purchase GH's one-half interest by the deadline. As a result, MSW was required to provide clear title to GH, and GH was required to refinance the $5 million loan and write off the $3.5 million promissory note. Thus, MSW was the seller and GH was the buyer. MSW fulfilled its requirements and conveyed the property to GH. GH wrote off the note, but did not timely refinance the loan, though it made the payments required under the loan. MSW sued GH for, among other things, breach of contract due to GH's failure to refinance the loan.

By the time of trial, the value of the landfill had appreciated significantly, to an estimated market value of $35,470,000. A jury awarded MSW two types of damages: lost "benefit of the bargain" damages of $10,235,000, and lost "opportunity cost" damages of $372,485. The trial court had instructed the jury to calculate MSW's benefit of the bargain damages as the difference between the market value of the property at the time of the breach and the contract price. The opportunity cost damages were calculated based on MSW's expert testimony that

GH's failure to refinance the loan prevented MSW from receiving another loan, the proceeds of which MSW could have invested at a return of $372,485.

After the jury's award, the trial court granted GH's motion for a judgment notwithstanding the verdict (JNOV), stating that the court did not submit the proper measure of damages to the jury. The court reduced the benefit of the bargain damages to $0. But the lost opportunity cost damages were left intact. The court of appeals affirmed, and both parties appealed to the state supreme court—MSW seeking to have the benefit of the bargain damages reinstated, and GH seeking to have the lost opportunity cost damages deleted.

The general rule for measuring benefit of the bargain damages is to calculate the difference between what was promised and what was received. When the breached contract is for real estate, the measure of the seller's damages is the difference between the contract price and the property's market value at the time of the breach. But this formula applies only when the value of the property has remained the same or decreased after the purchaser's breach, leaving the seller unable to receive the expected value of the contract. When the property's market value at the time of breach exceeds the contract price, the correct measure of damages is the difference between the promised contract price and what the seller received.

This result is compelled by policy and precedent. The purpose of benefit of the bargain damages is to place the seller in the same economic position he would have been in had the contract been performed. Permitting a seller to recover more than the contract price would place him in a better position than had the contract been performed, and that windfall would come at the buyer's expense. The seller loses the opportunity to sell the property at market value not because of the buyer's actions, but because the seller decided to contract with the buyer for a lower price.

Here, had the contract been performed, MSW would have received $7.5 million for its ownership interest in the landfill, not $10.235 million. As MSW only expected $7.5 million, the damages to which MSW is entitled are the difference between $7.5 million and what MSW received. Here, MSW received $3.5 million when GH wrote off the note, and GH made payments on the loan. GH remains obligated to refinance that loan, and MSW requested no other measure of damages. The state supreme court affirmed the trial court's JNOV deleting the jury's award of those damages.

The jury also awarded MSW lost opportunity cost damages based on what MSW could have received by investing the proceeds of another loan, which would be consequential damages. A plaintiff may recover consequential damages only if the parties contemplated at the time they made the contract that such damages would be a probable result of the breach. But MSW did not cite any evidence that GH knew at the time the settlement agreement was executed that MSW intended to use the refinancing proceeds to obtain another loan or that MSW would be unable to secure alternative financing if GH breached its commitment to refinance MSW's original loan. Therefore, MSW did not show that the damages awarded based on GH's breach were reasonably foreseeable, and the supreme court reversed the portion of the judgment awarding lost opportunity cost damages.

Thus, while GH remained obligated to refinance the loan, the supreme court affirmed the court of appeals' judgment in part, reversed in part, and rendered judgment that MSW take nothing from its action.

MSW Corpus Christi Landfill Ltd. v. Gulley-Hurst LLC
Texas Supreme Court
March 24, 2023
664 S.W.3d 102

Tenant has standing to bring claim for prescriptive easement

The Hidden Valley Ranches subdivision (Ranches) was created in 1977 in Ravalli County, Montana. To ensure that property owners could access the individual tracts within the Ranches, a survey created a private roadway and utility easement. The Ranches' homeowner's association (HOA) maintains the roads subject to this easement, and maintenance of the private roads is paid for by assessments on its members, who are all property owners in the Ranches.

In 2001, Ronald Oberlander acquired leases for state school trust land covering 327 grazing acres and 352 agricultural acres. He then purchased an adjacent parcel of land within the Ranches, which he used to access the leased land by traveling over portions of two private roads maintained by the HOA.

In 2021, the HOA filed a complaint against Oberlander and applied for a preliminary injunction, alleging that Oberlander used private roads to transport his farming equipment "without an easement or legal right to do so and without contribution for the added burden and damage to the roads." The HOA requested that the court enjoin Oberlander from using the private roads to access the leased state land for the pendency of litigation. Oberlander filed a counterclaim against the HOA and a third-party complaint against individual property owners within the Ranches whose property he entered to reach the leased land. He claimed a prescriptive easement appurtenant to his state leasehold.

The trial court dismissed Oberlander's claim for prescriptive easement, concluding that he lacked standing to bring such a claim, reasoning that only the state could bring a prescriptive easement claim as owner of the land benefitted by such an easement. The court also enjoined Oberlander from entering upon the property owners' properties including the Ranches private road easements for the purpose of accessing the state land. Oberlander appealed to the state supreme court.

On appeal, Oberlander argued that the trial court erred when it determined he did not have personal standing to bring a prescriptive easement claim. He maintained that his leasehold in the state land is the dominant tenement of the alleged easement, allowing him therefore to bring his prescriptive easement claim as owner of the dominant tenement. The property owners argued that Oberlander as "a mere leaseholder" did not have standing to bring a prescriptive easement claim. According to the property owners, only the owner of the land—the state—could bring such a claim.

An easement appurtenant is one that benefits a particular parcel of land, i.e., it serves the owner of that land and passes with the title to that land. The land to which an easement is attached (and which the easement benefits) is called the dominant tenement, and the land upon which a burden is held is called the servient tenement. According to the property owners, because an appurtenant easement runs with the land, it cannot attach to a leasehold interest. Thus, a leasehold cannot be the dominant tenement in a prescriptive easement claim.

The court disagreed with Oberlander's contention that he can establish a prescriptive easement appurtenant because his leasehold itself is the dominant tenement. But earlier case law did not answer the question of whether Oberlander had standing through his leasehold interest to assert the prescriptive easement claim, i.e., whether a tenant can bring a claim for a prescriptive easement, or if only the owner of the dominant tenement can do so.

Montana, however, has a statute expressly allowing "the owner of any estate in a dominant tenement *or the occupant of such tenement* to maintain an action for the enforcement of an easement attached thereto." This statute is part of the original Civil Code of 1895 and has never changed. The plain language of the statute authorizes an occupant of a dominant tenement to enforce a

prescriptive easement claim. Oberlander undisputedly occupies the dominant tenement, so he has standing to bring a prescriptive easement claim. Accordingly, the trial court erred when it determined only the owner of the dominant tenement has standing to bring such a claim.

The fact that the state did not claim a prescriptive easement does not change this result. Nothing in the statute requires the owner of the dominant tenement to support a tenant's adverse use of a property in bringing a prescriptive easement claim. Whether Oberlander can establish the alleged prescriptive easement goes to the heart of his third-party claim against the property owners, but because the trial court dismissed the claim for lack of standing, the parties did not develop the issues, facts, or legal arguments associated with the merits of Oberlander's claim.

The supreme court reversed the trial court's judgment, and reversed the preliminary injunction against Oberlander, since it was grounded in the improper conclusion that Oberlander lacked standing. The case was remanded for further proceedings.

Oberlander v. Hennequin III
Montana Supreme Court
March 14, 2023
525 P.3d 1176

Requirement for good-faith offer in taking satisfied despite mistaken understanding of appraisal conclusion

The Octagon Earthworks (Earthworks) are part of a system of interconnected earth structures called the Newark Earthworks that covers four square miles in Newark, Ohio. The Earthworks were built at the dawn of the Common Era with a sophisticated understanding of soil engineering and astronomy. The Earthworks align with the cycle of the moon's orbit around the earth with geometric precision. The historical, archaeological, and astronomical significance of the Earthworks is arguably equivalent to Stonehenge or Machu Picchu. The Newark Earthworks are Ohio's official state prehistoric monument.

Moundbuilders Country Club Company (Club) has leased the property where the Earthworks are located since 1910 and has used the site for a private club and golf course. Ohio History Connection (Connection) is a state-funded entity that became the owner of the land burdened by the Club's lease in 1933. Connection allowed the Club to renew its lease over the years, most recently in 1997. Under the terms of the deed and the Club's lease, Connection reserved a right of public access to the Earthworks but allowed access to be limited by the Club's "reasonable rules."

Eventually, Connection explored the possibility of nominating the Earthworks as a World Heritage Site with international recognition and legal protection. In order to qualify for the nomination, Connection was informed it would need to terminate the Club's lease and physically remove the golf course.

In early 2017, in an attempt to assess the value of the Club's leasehold before negotiating an early termination of the lease, Connection hired two appraisers. Connection's chief executive officer reviewed the reports and believed that the appraisers had valued the leasehold at $500,000 and $795,000, respectively. Connection made a written offer to buy the Club's leasehold for $800,000, but the Club did not respond.

After it was unable to negotiate the purchase, Connection filed an appropriation action in county court using its power of eminent domain. During discovery, Connection's attorney discovered that the $500,000 figure in one of the appraisals was the value of the leased fee, not the value of the leasehold interest. The appraised value of the unencumbered fee simple was $2.25 million, mathematically resulting in an unspecified $1.75 million valuation of the leasehold.

The Club argued that the appropriation was

not necessary, because the purpose of seeking heritage designation was speculative and was not a public use. The Club also asserted that Connection had acted in bad faith by purposefully hiding the appraisal with the higher concluded value. After a trial, the court denied the Club's challenges to Connection's authority to commence appropriation proceedings. It found that Connection's full ownership of the disputed land was required to allow public use and access, and that Connection had made a good-faith offer. The court of appeals affirmed, and the Club appealed to the state supreme court.

In Ohio, an agency seeking to acquire a property interest from a private owner through eminent domain is statutorily required to provide a written good-faith offer to purchase the property at least thirty days before it files an appropriation petition. The Club argued that the requirement of good faith is a higher standard than the mere absence of bad faith, and that the lower courts allowed Connection to prevail solely because it did not act with blatant dishonesty or ill intent. The statute provides only a tautology rather than a definition, essentially defining a "written good-faith offer" as a "written good-faith offer."

After analyzing prior case law, the state supreme court concluded that good faith can be demonstrated by objective factors such as the party's full cooperation in the procedural matters of a claim, rational evaluation of the risks and potential liabilities of a cause of action, and a lack of foot-dragging or other dilatory tactics. Behavior that is unreasonable, uninformed, or irrational in light of circumstances can establish a lack of good faith irrespective of a party's subjective intentions. Applying that test, the court found no indicia of a lack of good faith. The record showed that Connection did not shop for low appraisals, and any misrepresentation about the value conclusion in one appraisal was based on a reasonable, though mistaken, understanding.

The state supreme court then turned to the question of necessity. A government agency is prohibited from using eminent domain to acquire a property that is not "necessary and for a public use." The Club argued that the inquiry into necessity should determine not only whether the taking was for a public use, but also whether it is in the best interest of the public as a whole. The court disagreed. And though it is well-settled that public parks are public uses, the Club argued that the creation of *this* park would not serve the public interest. But the court, noting that the park will help preserve and ensure perpetual public access to one of the most significant landmarks in Ohio, concluded that the trial court appropriately found that the Club had not rebutted the presumption that appropriating the golf course was necessary to fulfill a public purpose.

The trial court's decision was affirmed, and the supreme court remanded the case for the trial court to proceed to a trial in Connection's appropriation action.

State ex rel. Ohio History Connection v.
Moundbuilders Country Club Co.
Ohio Supreme Court
December 7, 2022
2022 WL 17479895

Unrecorded instrument that encumbers real estate void against subsequent good-faith purchaser except where there is constructive notice

Eugene and Carol Hanson (the Hansons) owned a property including mineral interests in Mountrail County, North Dakota. In 2006, Ritter Laber and Associates (Ritter) was part of a joint venture that was locating mineral owners and leasing their interests. A Ritter representative contacted the Hansons, and their meeting resulted in the Hansons mailing documents to one of Ritter's partners. One document was a fully executed oil and gas lease dated December 20, 2006 (the EOG Lease). Another document, also dated December

20, 2006, was a "Side Letter Agreement" containing terms allowing Ritter to "exercise its option" to lease the minerals. If Ritter chose not to exercise the option, Ritter was required to immediately release the Hansons from any further obligation. The EOG Lease was not immediately recorded.

In April 2007, the Hansons executed a warranty deed to their son, which included the minerals in question, and it was recorded. The deed reserved a 50% life estate in the minerals. In May 2007, Ritter recorded a Memorandum of Oil and Gas Lease Option that referenced the EOG Lease. Shortly thereafter, Ritter recorded the EOG Leases and sent the Hansons a letter saying it had elected to exercise its option to lease. In August 2007, Ritter's partner sent the Hansons a $37,000 check as total consideration for the paid-up oil and gas lease.

In September 2007, Ritter assigned the EOG Lease to EOG Resources Inc. (EOG). The assignment was recorded. Then, in December 2007, Ritter obtained an oil and gas lease from the Hansons' son listing the tracts in question (the Northern Lease). It was recorded in January 2008 and assigned to Northern Oil & Gas Inc. (Northern) in June 2008.

Northern filed suit in 2016 requesting a declaration that it owns the disputed mineral interests. The trial court quieted title in Northern. The court reached this conclusion by determining that the transaction between the Hansons and Ritter created an option to lease, the Hansons' son had no notice of the option, and he took title to the minerals free of it. Thus, the EOG Lease was deemed not valid insofar as it conflicts with the Northern Lease. EOG appealed.

An oil and gas lease constitutes a real property interest in North Dakota. A lease of real property is both a contract and a conveyance of an interest in land.

On appeal, EOG argued that the transaction between the Hansons and Ritter created an immediately effective lease. EOG asserted that the delivery of a grant, here the fully executed EOG Lease, cannot be conditional. And even if the parties had intended to condition effectiveness of the lease upon exercise of the option, the lease would still have taken effect upon delivery. EOG thus claimed that the disputed leasehold transferred to Ritter when the EOG Lease was mailed, before the Hansons divested themselves of the mineral interests. Conversely, Northern argued the transaction created an option to lease rather than an immediately effective lease. Because the option was not exercised before the minerals transferred to the Hansons' son, Northern claimed its lease prevails.

A transfer in writing is called a grant, and it takes effect so as to vest the interest intended to be transferred only upon the grant's delivery. Whether a delivery of a grant has occurred depends on the grantor's intent. For a delivery to occur, the grantor must intend to pass title. But delivery of a grant with intent that title transfer upon some contingency or condition is prohibited under North Dakota law. A conditional delivery is necessarily absolute and the instrument takes effect upon delivery, discharged of any condition on which the delivery was made. And while conditional delivery of a grant to a grantee is prohibited, the effectiveness of a real property grant itself may be conditional.

Because the Hansons were unable to recall the details of their transaction with Ritter, the only evidence of what the Hansons intended to accomplish by mailing the documents to Ritter are the documents themselves. The agreement accompanying the EOG Lease promised title would transfer to Ritter on the condition Ritter accepted the lease and paid for it. They relinquished their authority over the EOG Lease with conditions precedent to the transfer of title that were expressed in a contemporaneous agreement. Such a conditional delivery of a grant to a grantee becomes absolute. Any conditions the Hansons agreed to or created outside the four corners of the lease are void for purposes of delivery as a matter

of law. Accordingly, the supreme court held that the trial court erred by determining that the EOG Lease did not become effective upon delivery.

Having concluded that the EOG Lease was effective before the Hansons transferred the minerals to their son, the supreme court next turned to the implications of the EOG Lease being recorded after the mineral transfer. Northern claimed ownership under the lease it took from the Hansons' son. Northern's claim to ownership thus requires a determination that the unrecorded EOG Lease was not valid as to him.

Recording an instrument puts everyone on notice of its contents. An unrecorded instrument is valid as to the parties to the instrument and those with notice of the instrument. But an unrecorded instrument that encumbers real estate is void against a subsequent good-faith purchaser for valuable consideration.

Here, the record showed that the Hansons' son knew that the interests had been leased before the transaction with his parents. He knew none of the details of the lease, but he repeatedly agreed that he was aware of the mineral lease. Those facts were sufficient to give rise to a determination that he was put on inquiry notice, i.e., notice sufficient to assert the existence of an interest as a fact, which in turn gives rise to a duty to investigate. Because the Hansons' son had knowledge of the facts giving him at least constructive notice of the EOG Lease, his mineral interests were encumbered by the EOG Lease when he executed the Northern Lease. The EOG Lease was also recorded before the Northern Lease. The EOG Lease therefore takes priority.

Accordingly, the supreme court held that the trial court erred when it quieted title in Northern, and it reversed the lower court's judgment.

Northern Oil & Gas Inc. v.
EOG Resources Inc.
North Dakota Supreme Court
October 27, 2022, corrected January 5, 2023
981 N.W.2d 314

Annexation based on financial as well as growth consideration is valid

In 2019, the City of Bellevue, Nebraska (City), considered an annexation package made up of several sanitary and improvement districts and unincorporated parcels of land in its extraterritorial jurisdiction. The City ultimately adopted ordinances annexing various areas, including a portion of land referred to as Area 9. Area 9 consisted of properties owned by Darling Ingredients Inc. (Darling) and Frank Krejci.

In May 2019, the City's planning director had sent a memorandum to the mayor and the city council, explaining the planning department's recommendation that the City annex Area 9 based upon the positive financial impact on the City and the natural growth and development of the City. The city council subsequently voted to adopt the ordinance annexing Area 9.

Darling and Krejci separately brought complaints against the City, alleging that the City had exceeded its annexation authority under Nebraska law, which provides that the mayor and city council may by ordinance include within the City's corporate limits any contiguous or adjacent lands that are urban or suburban in character. Darling and Krejci argued that the City enacted the ordinance solely for the purpose of increasing revenue.

Following trial, the court declared the City's ordinance invalid, reasoning that Area 9 was rural in character and neither contiguous nor adjacent to the City. The court did not address the question of whether the ordinance was enacted for an improper purpose. The court permanently enjoined the City from taking any action to enforce the ordinance, and the City appealed. In the first appeal, the state supreme court concluded that the annexation of Area 9 was not invalid based on the character of the use and that Area 9 was adjacent and contiguous to the City. The Court remanded to the trial court to consider the improper purpose challenges.

Upon review, the trial court entered an order determining that Darling and Krejci failed to meet their burden of establishing that the City's annexation was motivated by an improper purpose. The court found that no evidence negated its finding that the City acquired Area 9 as part of a larger plan to annex numerous properties for the stated purpose of the "natural growth and development of the City." The trial court found that to be a legitimate purpose.

Darling then appealed. Darling argued that the trial court erred in finding that the City's annexation was not motivated by an improper purpose based on the evidence received at the prior trial.

In Nebraska, it is improper for an annexation to be solely motivated by an increase in tax revenue. Proving that the City acted pursuant to an improper purpose was Darling's burden, because the burden is on one who attacks an ordinance otherwise valid on its face to prove facts to establish its invalidity.

As the trial court observed, there was substantial evidence that the natural growth and development of the City was a factor in the City's decision to annex properties, including Area 9. The City's comprehensive plan indicated that the City consisted of 10,601 acres but needed another 7,835 acres to accommodate expected population growth by 2030. The plan included detailed annexation goals and explained that the City's planning department would conduct an annual study consisting of a cost-benefit analysis of potential areas for annexation. Areas as to which the costs significantly outweigh the benefits were not generally considered for annexation.

The state supreme court recognized that the City considered the financial impacts of potential annexations, and not just the natural growth and development of the City. But prudent annexation planning compels the City to consider any revenue to be engendered by annexation, in light of the liabilities to be incurred. The legal proscription against annexation solely for revenue purposes does not mean that a municipality cannot consider potential revenues in deciding whether to proceed with an annexation. Thus, although the City considered the financial impact of annexing Area 9, that financial impact was not the sole basis for the annexation.

Because the state supreme court agreed with the trial court's conclusion that Darling failed to meets its burden of establishing that the City acted for improper purpose, the court affirmed the lower court's judgment.

Darling Ingredients Inc. v. City of Bellevue
Nebraska Supreme Court
March 24, 2023
986 N.W.2d 757

Homeowner entitled to homestead exemption where property owned in another state is not primary residence

Mack Stirling has lived in his home in Leelanau County, Michigan, since 1990. His wife, Dixie Stirling, owned two rental properties in Utah. Neither Mack nor Dixie ever resided at the Utah properties. Instead, Dixie rented the properties to tenants who used the properties as their primary residences. Dixie claimed an applicable Utah tax exemption during the relevant tax years.

The Stirlings applied for the Michigan principal residence exemption (PRE) for their Leelanau County home. The County denied the application because it concluded that the Utah exemption rendered the Stirlings ineligible for the PRE. The Stirlings appealed to the Michigan Tax Tribunal, which granted the Stirlings' motion for summary judgment. The tribunal concluded that the Utah exemption received by Dixie was not substantially similar to the PRE, primarily because to be eligible for the PRE a person had to be both an owner and occupier of the residence, while under Utah law a person was eligible if they owned a residence and had tenants occupying the home as a primary residence. The County

appealed to the court of appeals, which reversed the tribunal's judgment, and the Stirlings appealed to the state supreme court.

Michigan's PRE is part of the General Property Tax Act. It permits taxpayers to exempt their homestead from their local school district property tax. A taxpayer is not entitled to claim the PRE if the taxpayer owns property in a state other than Michigan for which the person or their spouse claims an exemption, deduction, or credit substantially similar to the PRE. The term "substantially similar" in this instance is not defined, but the court of appeals concluded that the requirement means that "the sister state's exemption must be largely but not wholly alike in its characteristics and substance to the PRE." The state supreme court adopted that definition as its own.

Comparing the two exemptions revealed that they are not alike in substance or characteristics. The Michigan law defines a "principal residence" as "the one place where an owner of the property has his or her true, fixed, and permanent home to which, whenever absent, he or she intends to return and that shall continue as a principal residence until another principal residence is established." The Utah statute, on the other hand, provides that the fair market value of a residential property located in the state is allowed a residential exemption equal to a 45% reduction in the value of the property, and taxpayers can claim a residential exemption for each residential property they own that is the primary residence of a tenant, as well as one exemption for their own primary residence.

Dixie claimed an exemption under the Utah law as the owner of a property that is the primary residence of a tenant. The state supreme court held that this Utah exemption is not substantially similar to the Michigan PRE because it does not require the subject property to be the owner's residence. The exemption is in substance a landlord tax exemption; the PRE, by contrast, is in substance a homestead exemption.

A person cannot principally reside in two places. But the Stirlings do not claim to reside in two different residences. They steadfastly maintained that they reside exclusively in Michigan, and they never represented to Utah that their Utah property was their primary residence. Given that the touchstone of the PRE—owner residency—is not in any way relevant to the claimed Utah landlord exemption, these two provisions are not, as a matter of law, largely alike in characteristics or substance.

The state supreme court therefore held that the Utah tax exemption claimed by Dixie was not substantially similar to Michigan's PRE, and therefore the Stirlings were eligible to claim the PRE. The tax tribunal's order granting summary judgment to the Stirlings was reinstated.

Stirling v. County of Leelanau
Michigan Supreme Court
March 24, 2023
2023 WL 2627986

Reasonable amount of time needed to trigger cessation-of-production clause

Tres C LLC (Tres C) owns certain mineral interests in a 320-acre lot in Blaine County, Oklahoma, that were formerly owned by George and Coral Cowan. In 1955, the Cowans executed an oil and gas lease (Lease) in favor of a lessee. Under its habendum clause, the Lease would remain valid for a primary term lasting ten years and then, so long as a producing well was drilled, for a secondary term lasting as long as oil or gas could be produced. The Lease also contained a cessation-of-production clause that provided "if, after the expiration of the primary term of this lease, production on the leased premises shall cease from any cause, this lease shall not terminate provided lessee resumes operations for drilling a well within sixty days from such cessation."

During the primary term of the Lease, the lessee drilled and completed a well (the Cowan Well). The Cowan Well produced oil and gas in

paying quantities, and the Lease moved into the secondary term defined by the habendum clause shortly after completion.

In 2012, Raker Resources LLC (Raker) purchased the interest in the Cowan Well and became the operator of the Cowan Well. When Raker first acquired the Cowan Well, the well was producing, but at low rates. The well had good pressure, though, so under Raker's supervision, production increased by twenty-fold within the first year. Things continued as normal until early 2016, when Tres C's royalty checks from Raker began to arrive sporadically. Tres C hired a lawyer, who sent a letter to Raker claiming that the production records for the Cowan Well showed that the well had ceased producing in paying quantities, so the Lease had expired by its terms and the well should be plugged and abandoned.

Raker responded that the well was still producing in paying quantities, and it provided figures showing the gas production for each month since January 2012. The figures showed a dip in production in December 2015 but nothing out of the ordinary. The Cowan Well became profitable again, but "not too profitable."

Then in September 2016, the Cowan Well experienced another month of low production and unprofitability, and the well failed to produce anything by mid-October. Raker was proactive in trying to address these production problems, including by using soap to aerate the fluid and moving a compressor to the Cowan Well to help draw fluid out of the wellbore. The Cowan Well was back in operation by November 4, and it was producing enough gas to meet the benchmark for profitability. Still, October, November, and December 2016 would prove to be unprofitable for the Cowan Well.

Meanwhile, Tres C entered into a lease option agreement with J&R Energy Resources (J&R), whereby J&R would fund legal proceedings to secure the release and termination of the Lease in exchange for Tres C's promise to give J&R an exclusive option to file a top lease later. Ultimately, J&R exercised its rights under the lease option and filed an equitable quiet title action on Tres C's behalf in February 2017. The petition alleged that the Cowan Well had ceased producing in paying quantities, and that the Lease had therefore expired.

Tres C offered an expert who opined that the well ceased to produce in paying quantities in September 2016, relying on a three-month period. Raker and the other defendants offered witnesses who opined that the Cowan Well maintained production, either through actual profitability or mere capability. Raker's witness concluded that in various twelve-month periods over the relevant time, the well was profitable. Raker's witness did not think a three-month period was adequate for determining whether the well had become unprofitable.

The trial court issued judgment cancelling the Lease in favor of Tres C. When comparing the well's net revenues and lifting costs, the trial court found that the Cowan Well ceased to produce in paying quantities because lifting costs exceeded revenues in September 2016 and the next two months. Having found a cessation of production, the trial court found that Raker did not restore production in paying quantities within the sixty-day grace period of the cessation-of-production clause. Consequently, the trial court quieted title and entered judgment in favor of Tres C.

Raker appealed, alleging that the trial court erroneously held that production ceases any moment profitability is interrupted, instead of analyzing profitability over a reasonable accounting period. Whether a well remains capable of production should be evaluated over a reasonable lookback period, and the sixty-day savings period does not become relevant until a longer lookback period demonstrates a cessation, not merely an interruption, of profitable production. Stated more broadly, the issue concerned how to determine whether production that maintains a gas lease under the habendum clause has ceased, including whether a cessation-of-production clause

plays any role in narrowing the window of time that should be considered.

The state supreme court agreed with Raker that the trial court erred in determining that a cessation of production had occurred based on three months of unprofitability. A three-month period "is, as a matter of law, too short for determining whether a cessation of production in paying quantities has occurred."

The supreme court reasoned that a cessation-of-production clause is only implicated where production has already ceased. Such a provision is a "savings clause" that defines the grace period for reestablishing production in paying quantities. Therefore, the cessation-of-production clause and the sixty-day period therein have no bearing on anything that is done before the cessation occurs, including an assessment of whether a cessation has occurred.

Second, it is not the purpose of a cessation-of-production clause to establish an accounting period. Otherwise, leasehold operators subject to a sixty-day clause would be required to commence drilling operations immediately upon sustaining a slight loss for one month without regard to whether they believed the next month's production might be profitable, because another month of slight loss could result in forfeiture of the lease. This would "indubitably burden leasehold operators with a duty to market continually" to maintain profitable production necessary to sustain the lease.

The reasonable amount of time needed for assessing a well's profitability and for determining whether a cessation has occurred is typically much longer than three months, varying based on the facts and circumstances in each case. Here, Raker was still in the process of testing whether the Cowan Well's pressure and fluid build-up problems could be remedied by the installation of a compressor or by using more soap. Such a temporary interruption in profitable production should not trigger the sixty-day time limit in the cessation-of-production clause, particularly since that clause was really designed to provide a grace period for protecting Raker's leasehold interest.

Accordingly, the supreme court determined the trial court erred by relying on a three-month time period for assessing whether a cessation of production had occurred. Judgment should have been entered in favor of Raker because Tres C failed to meet its burden of proof. The court therefore quieted title in favor of Raker.

Tres C LLC v. Raker Resources LLC
Oklahoma Supreme Court
February 14, 2023
2023 WL 1990113

Encroaching improvements not acquisitive prescription where no just title can be shown

Lot 289 and Lot 290 in the Flower Estates Subdivision in Covington, Louisiana, are adjacent neighboring parcels with frontage along Louisiana Highway 21. Lot 290 had been owned by Dayle Bradford or Bradford Land Company LLC (collectively, Bradford) since 1977. Lot 289 has been owned by Oliver Montagnet or Montagnet Properties #2 LLC (collectively, Montagnet) since 1998. Both lots were purported to be 100 feet wide and 400 feet deep.

In 1999, Montagnet completed construction of a commercial building, parking lot, and other improvements on Lot 289. A survey was performed that shows that the building was within the boundaries of Lot 289. The city reinspected the property and found items not in compliance with the city ordinances, including a five-foot setback requirement. In 2006, in connection with a loan, Montagnet again requested a survey, which indicated that the improvements on Lot 289 were within the boundary lines for Lot 289.

Beginning in 2006, the Louisiana Department of Transportation and Development (DOTD) began a government expropriation of certain

property for the widening of a section of Highway 21. Portions of Lots 289 and 290 fronting Highway 21 were procured for the project. During the project, surveyor Bonneau & Associates was hired to survey the lots. The Bonneau survey showed that the DOTD acquired 6.97 feet from the boundary between Lot 289 and Lot 290, but Bonneau also notified Bradford that Montagnet's improvements might be encroaching on Lot 290.

Bradford did not take any action until August 2009, when its attorney sent a letter to Montagnet alleging that the improvements on Lot 289 encroached onto Lot 290 and demanding equitable rent for the property encroached upon. Eventually, in September 2011, Bradford filed suit against Montagnet, asserting that Montagnet constructed parking structures, concrete pads, sewer and drain cleanouts, and piping across the boundary line into Lot 290 illegally and without Bradford's permission. Bradford sought removal of the encroachments and reasonable rent, as well as damages.

The trial court held a two-day trial in July 2020. Each party submitted a separate survey and the testimony of an expert surveyor. Bradford offered the Bonneau surveys, which showed that the 1999 improvements on Lot 289 extended more than three feet past the boundary line. Montagnet's surveys showed that none of the improvements extended over the boundary line. Montagnet also asserted that even if it was not the title owner of the disputed area, it possessed the land in good faith and with just title for over ten years, and it was therefore the owner by acquisitive prescription.

The trial court fixed the boundary line as depicted in the Bonneau survey. The court found that Bonneau's opinions showed definitive proof of the boundary line since they relied on the record title documents and the subdivision plats, after finding that the boundary could not be located based on the subdivision plats alone. Bonneau also surveyed the entirety of the Highway 21 corridor in the area, and they used that data to determine the boundary location. Montagnet's surveys, on the other hand, only located the building on Lot 289 with a vague reference to concrete parking and did not identify the other site improvements at all.

Because the trial court found that the improvements on Lot 289 encroached onto Lot 290, the court ordered the establishment of a predial servitude. A *predial servitude* is a charge on a servient estate for the benefit of a dominant estate. Legal servitudes are limitations on ownership for the benefit of the general public or for particular persons. In such a case, the court allows the encroaching structure to remain, but the owner of the structure acquires a predial servitude on the land occupied by the structure upon payment of compensation for the value of the servitude taken and for any other damages suffered by the neighbor.

With respect to damages, the trial court adopted the values determined by Bradford's expert appraiser, who appraised the fair market value of the portion of Lot 290 used by Montagnet at $14.50 per square foot. The appraiser opined that the servitude should have a width of six feet and be a straight line, resulting in a total appraised value of $33,500. The court awarded Bradford those damages for the value of the predial servitude but declined to award Bradford rent. Montagnet appealed.

Montagnet's appeal involved two issues: whether the boundary line was properly set or should it have been adjusted for acquisitive prescription, and whether the compensation was correctly determined.

Louisiana law provides that "the requisites for the acquisitive prescription of ten years are possession of ten years, good faith, just title, and a thing susceptible of acquisition by prescription." At issue was whether Montagnet had just title. To have just title over a particular property, one must have a recorded act translative of title that contains a description of the property. Montagnet pointed to a consent judgment it obtained in the 1998 litiga-

tion with the city regarding the building's setbacks, which Montagnet argued provides just title.

The court of appeal disagreed, noting that judgments do not constitute just title; they are declarative rather than translative of rights. Further, the judgment made no finding regarding the boundary to Lot 289 nor was it translative of any rights. Thus, without just title, Montagnet failed to establish that it was the owner of the disputed property based on acquisitive prescription.

Montagnet also argued that the trial court erred in fixing the boundary line when it adopted surveys with "defects and inconsistencies." The court of appeal disagreed, stating that the state supreme court had established that in cases where boundary questions exist, the legal guides for determining the location of a land line are, in order: natural monuments, artificial monuments, distances, courses, and quantity. A survey predicated on sound surveying principles should be accepted unless the record shows it is incorrect. Here, the record showed that Bonneau had surveyed the entire highway in the area, locating monuments along the front and rear property boundaries for all of the lots in the area. The court found a reasonable basis for the trial court's factual finding regarding the location of the boundary line between Lots 289 and 290.

Finally, Montagnet challenged the amount of damages. Montagnet argued that the actual size of the encroachment was 526 square feet of concrete parking and 32 square feet of gravel. Accepting the appraiser's valuation of $14.50 per square foot, Montagnet argued that the value for the actual size of the encroachment should be $8,091.

Bradford's appraiser testified that a six-foot buffer was fairly small, considering the encroachment of 4.6 feet determined by Bonneau. The court of appeal found no error by the trial court in the granting of a six-foot straight-line predial servitude or in its calculation of the compensation for the value of the servitude. The court did amend the judgment of the trial court, though, to order the predial servitude to include an award of interest owed by Montagnet on the $33,500 from the September 2011 date of demand until paid.

The judgment of the trial court in favor of Bradford was affirmed, subject to the amendment to include the award of interest.

Bradford Land Company LLC v. Montagnet Properties #2 LLC
Louisiana Court of Appeal, First Circuit
November 17, 2022
356 So. 3d 1101

Where an intangible necessary to the productive use of property can be fairly identified and valued, assessors must deduct that amount from assessment

In the late 1990s, the City of Los Angeles (City) decided its downtown convention center was uncompetitive in the national market because it lacked an adjoining convention hotel. The City concluded that a large hotel project would be publicly beneficial but privately uneconomic: a private developer would be unlikely to speculatively build such a hotel because the cost would outweigh the private payoff. So, the City agreed to pay Olympic and Georgia Partners LLC (Olympic) a monthly subsidy to build a tall convention hotel, which today is a feature of the downtown Los Angeles skyline. The City agreed to pay Olympic the room tax the City collects from Olympic's guests.

Although Olympic owns the hotel, it contracted with two established hoteliers—Ritz-Carlton and Marriott (collectively, the Managers)—to manage and operate the hotel. Olympic's hotel operates under the Managers' respective flags and franchises. Olympic pays a percentage of the hotel's gross revenues and cash flow to the Managers for their management services. But the Managers also made a one-time, up-front payment of $36 million to Olympic as "key money," which was later described as a discount the Man-

agers paid to secure their deal with Olympic, akin to a cash rebate given by a dealership to prompt a car sale on credit.

Once Olympic completed construction, Los Angeles County (County) sought to value the new building and levy property taxes upon it. In the proceedings at the County Assessment Appeals Board (AAB), Olympic argued that the assessor should subtract from the hotel's assessment three amounts for intangible value: \$80 million attributable to the value of the City subsidy; \$36 million key money payment from the Managers; and \$34 million attributable to "hotel enterprise assets," namely flag and franchise value, assembled workforce, and miscellaneous other intangibles. Olympic offered the opinion and testimony of a business valuation expert, who used established appraisal methods to identify and value the enterprise assets.

The AAB rejected Olympic's request. Regarding the subsidy, the AAB ruled it would include the \$80 million because it was an intangible that ran with the land and associated with ownership of the property. The AAB reasoned that the key money was a payment received in exchange for a tangible right in real property. Finally, the AAB was not persuaded that the enterprise assets could be isolated from the real estate value.

Olympic took the matter to the superior court. At trial, the court ruled that the AAB was right to include the subsidy and discount in its valuation, but that the enterprise assets should be deducted. Olympic and the County both appealed the adverse portions of the judgment.

The court of appeal began its analysis by recounting California law on intangibles. Only select forms of intangible property can be directly taxed; all other intangibles are immune from direct property taxation. A 2013 decision from the state supreme court resolved an earlier contradiction in treatment of intangible assets by holding that when using the income method to ascertain property value, assessors must quantify and subtract income fairly ascribed to such assets. Although it is not always possible to articulate a basis for attributing a separate stream of income to an intangible asset, where the taxpayer can fairly identify and value an intangible necessary to the productive use of the property, assessors must deduct that amount from the final assessment.

Turning to the intangibles at issue here, the court began with the subsidy paid by the City. It was both intangible and capable of valuation. It also plainly contributed to the hotel's income stream, and it was necessary because, without it, the hotel would not have been built. The County's argument that the subsidy runs with the land was irrelevant, because running with the land is not part of the relevant test. It was necessary for the AAB to deduct the subsidy.

Moving to the \$36 million key money payment, the court described the amount as a discount. The discount was not income to the hotel; it was a price break the Managers gave the hotel on payments from the hotel. A discount is not income, so the County's argument that the key money was like prepaid rent was not persuasive. Likewise, it was not relevant that the contract gave the Managers rights and duties tied to the use of the hotel property. The payment meets the test to require deduction from the assessment.

Finally, the court turned to the enterprise assets. The AAB rejected those deductions because Olympic did not own the intangibles, and the expert's analysis was not compelling or reliable. But the court disagreed, finding that the evidence must be meaningfully analyzed.

The County argued that its assessment identified and completely removed the value of Olympic's interest in the Manager's franchises and workforces because "the deduction of the hotel owner's payment of a franchise fee to an operator completely accounts for the value of the franchise affiliation and the associated workforce. The court found this argument "incorrect." If the franchise fee were so high as to account completely for all intangible benefits to a hotel owner, the owner would have no reason to agree to the fran-

chise deal. The article offered by the County, written by an appraiser, contained "no empirical support for the illogical premise that every franchise fee wipes out all intangible benefits a franchise agreement might offer a hotel owner."

Accordingly, the Court reversed the superior court's and AAB's ruling that the subsidy and key money are taxable as real property, but affirmed the trial court's order remanding for the AAB to value and deduct the hotel enterprise assets. The court expressly ordered that the values of the subsidy, the key money, and whatever values the AAB assigns to the enterprise assets be excluded from the property assessment and ordered further proceedings.

Olympic and Georgia Partners LLC v. County of Los Angeles
California Court of Appeal, Second District
April 7, 2023
90 Cal. App. 5th 100

Note: On July 12, 2023, the California Supreme Court granted a petition to review the Court of Appeal's decision. 531 P.3d 966.

Trade fixture installed in leased property can be removed prior to termination of lease

In August 2006, Urge Food Corporation (Urge) and EBC Properties LLC (EBC), as tenant and landlord, respectively, entered into a thirteen-year lease contract in which Urge rented a commercial retail space in a strip mall in Adelphi, Maryland. The lease permitted Urge to freely make improvements and alterations to the premises, so long as such improvements did not affect the building's structure. The lease further provided that such improvements, including trade fixtures, not permanently affixed to the building would remain Urge's property unless abandoned in the event of default or the termination of the lease. In the event of default, EBC reserved the right to terminate the lease and repossess the premises, including all of Urge's property deemed abandoned therein.

The lease imposed on Urge the responsibility to pay two categories of rent: "basic rent," which was the yearly cost for Urge to use and enjoy the premises, and "additional rent," which included common area maintenance costs like utilities and security. Failure to pay either type of rent would be treated as a default under the lease.

When Urge took possession, the premises were completely empty, and Urge undertook extensive efforts to ready the location for its intended use as a grocery store. Urge installed numerous chattels, including deli counters, a bakery, display cases, and interior freezer cases. Urge also installed four walk-in coolers connected to the outside of the building that required holes to be cut in an exterior wall. EBD approved all such improvements.

Shortly after Urge began operating its grocery store, crime became an issue. After notifying EBC and finding their response insufficient, Urge began hiring its own security personnel to keep watch of its store and parking lot, but not the other properties in the strip mall. By December 2017, roughly a decade later, EBC also became concerned about crime and hired its own security company to patrol the entire strip mall property. When EBC sought proportional compensation from Urge, Urge refused to pay, maintaining that it did not see a need to pay for redundant security services. EBC pointed out that security costs were part of the common area maintenance (CAM) charges that Urge was required to pay as additional rent.

Through counsel, EBC sent a letter to Urge in May 2019 noting that the lease was set to terminate on September 30, 2019, at which point Urge should vacate the premises. The letter also demanded Urge cure its breach pertaining to $52,084 in unpaid CAM charges. A subsequent letter warned Urge that failure to pay the overdue amounts would be considered a default under the lease, and reminded Urge that, in the event of default, the lease prevented Urge from removing its installed chattels.

Planning to move to a new location, in September 2019, Urge began removing most of the items it had installed as it prepared to vacate. After a confrontation with EBC's security personnel, EBC told their security not to intervene and to avoid conflict with Urge.

Later that month, Urge filed a complaint, alleging that EBC breached the lease by preventing Urge from removing all of its property, including the exterior walk-in coolers, which were trade fixtures. EBC counterclaimed, alleging that Urge breached the lease by failing to pay additional rent and then further breached by removing fixtures. Following a trial, the court found Urge to be in default for its failure to pay the CAM charges. But the chattels Urge installed at the premises were all trade fixtures, and had not been permanently attached to the realty. As such, the chattels remained the property of Urge, which could remove the items prior to the conclusion of the lease. And while Urge had an obligation to return the premises to their original state, by locking Urge out of the building, EBC prevented Urge from removing its chattels and repairing the damage to the premises. EBC appealed.

The appellate court first found that the trial court was factually and legally correct in finding that the property installed by Urge constituted trade fixtures because of their movable status coupled with Urge's clear intention to use them to carry out its grocery business. Whether a chattel changes from personal property to a fixture attached to the realty is a mixed question of fact and law. The general rule is that whatever is once annexed to the freehold becomes part of it, and cannot afterwards be removed except by the person who is entitled to the inheritance. The exception to this common law rule pertains to trade fixtures, which are not treated as part of the realty but remain removable by the tenant. A trade fixture is an item affixed to realty for the purpose of enabling the tenant to perform a trade, which can be removed without material or permanent injury to the realty.

Here, the record contained ample evidence from which the trial court arrived at the sound conclusion that the chattels installed by Urge prior to the operation of their grocery business constituted trade fixtures. The court therefore affirmed the trial court's ruling that the chattels installed by Urge were trade fixtures, and Urge could remove them prior to termination of the lease, barring any controlling provisions of the lease to the contrary.

Urge's breach of the lease due to its failure to pay the outstanding additional rents was not before the appellate court. But germane to the matter regarding the removal of the trade fixtures, though, is the timing of when Urge defaulted, and how that default affected other rights and obligations under the lease. The lease defined the tenant's default as a failure to pay rent within ten days of written notice and provided the landlord the option upon such default of terminating the lease. Reading the various lease provisions in concert, the appellate court agreed with EBC that Urge was in default when it failed to cure within 10 days of receiving notice of its delinquency. As such, EBC could have exercised its remedies under the lease at any point between the close of the ten-day notice period and the actual termination date of the lease. But EBC never took such steps, allowing Urge to remain on the premises until the end of the lease term, so Urge retained its ownership of the trade fixtures. Consequently, Urge did not commit further breach by removing its trade fixtures.

The appellate court did, however, reverse the trial court in one respect. Both the common law regarding trade fixtures and the terms of the lease required Urge to repair the damage to the premises caused by the installation and removal of its trade fixtures and to do so by the end of the lease term. Thus, by the express provisions of the lease, Urge's repairs were to have been completed by September 30, 2019. The appellate court "struggled to decipher" the evidence as to whether and how Urge may have been frustrated in completing

its contractual obligations. Urge's witness testified that Urge would have completed all repairs had its efforts not been thwarted by EBC's security personnel. But EBC's security manager testified he was instructed not to interfere with Urge's access to the premises. Based on this conflicting testimony, the court found insufficient clarity in the trial court's ruling that Urge was relieved from this obligation and the resulting damages.

Accordingly, the trial court's findings as to Urge's ownership of the trade fixtures were affirmed, but the case was remanded to the trial court for further proceedings on the question of whether Urge's failure to repair the premises should result in liability for damages regarding the repairs.

EBC Properties LLC v. Urge Food Corp.
Maryland Appellate Court
February 28, 2023
290 A.3d 1053

Ambiguous contract language requires weighing of external evidence

29 Main Street LLC (29 Main Street) owns a building in New Milford, Connecticut, a portion of which has been leased to the US Postal Service (USPS) since 1969. The building is located on a prime corner on the town green. The 1969 lease provides a purchase option for the property, giving the government the "option to purchase the fee simple title to the leased premises, including the underlying land," at certain times and prices. There was also another, subsequent lease for additional portions of the property executed in 2000. On the same day as the execution of the 2000 additional space lease, a USPS contract officer executed a Memorandum of Lease (Memorandum) memorializing certain terms of the 2000 additional space lease.

Eventually, USPS exercised its purchase option, but the parties disagreed about the scope of the option in the lease, ultimately leading to litigation in the US District Court for the District of Connecticut. The district court granted summary judgment in favor of USPS. The district court concluded that the 1969 lease was unambiguous, and therefore did not require or permit consideration of extrinsic evidence concerning the parties' intent. 29 Main Street appealed to the Second Circuit Court of Appeals.

When construing the terms of a contract, a court must first consider whether the relevant provisions are ambiguous. A contract is ambiguous if it is susceptible to two different and reasonable interpretations, each of which is found to be consistent with the contract language. When a contract's terms are ambiguous, the weighing of external evidence is required and the matter is not amenable to summary resolution.

The court of appeals found that the purchase option in the 1969 lease is ambiguous because it is susceptible to more than one reasonable interpretation. The ambiguity surrounds the parties' use of the phrase "leased premises, including the underlying land."

On the one hand, in its description of the leased premises, the lease contains metes-and-bounds language describing the contours of the entire subject property. So "fee simple title to the leased premises, including the underlying land" could mean "fee simple to… the underlying land" of the entire subject property and the entirety of the structures built on top of that land. This was the interpretation adopted by the district court. By deleting the "leased-premises" qualifier, the district court concluded that the subject of the sale was title to the underlying land and, as a matter of law, the entire building thereon.

But on the other hand, the 1969 lease makes clear that the leased premises did not include all of the subject property. It expressly carved out spaces from the leased premises, resulting in a lease that covered only about 80% of the first floor and less than 10% of the basement. Thus, it is equally plausible that "fee simple title to the

leased premises, including the underlying land" would include only the leased portions of the building and the land underlying those areas, but not the balance of the subject property or the land beneath the unleased portions.

Because there are two different and reasonable interpretations of the language in the 1969 lease consistent with the contract language, the district court erred in granting summary judgment to USPS; the matter required a weighing of external evidence as to the intended meaning of the 1969 lease.

29 Main Street also argued that the 2000 Memorandum extinguished the purchase option in the 1969 lease. The parties executed an additional lease to cover areas of the first floor and basement that were not leased under the 1969 lease. The 2000 Memorandum declares that "there are no purchase options available." 29 Main Street argued that this language conflicts with and thus supersedes the purchase option in the 1969 lease.

The court of appeals did not agree with 29 Main Street. The court found that nothing about the natural and ordinary meaning of the language in the 2000 Memorandum—which did not even reference the 1969 lease—suggests that the parties intended to have the 2000 Memorandum supersede, modify, or rescind the 1969 lease. Thus, the court of appeals agreed with the district court that the no-purchase-options language is unambiguous and susceptible to only one reasonable interpretation—that there are no purchase options with regard to the property covered by the 2000 lease of additional space.

In light of the ambiguity surrounding the 1969 lease, but not the 2000 Memorandum, the district court erred in granting summary judgment to USPS. Its judgment was vacated, and the case was remanded for further proceedings.

29 Main Street LLC v. U.S. Postal Service
US Second Circuit Court of Appeals
May 4, 2023
2023 WL 3243478

In partition of property, the parties' relative ability to timely buy out interests is appropriate equitable consideration

Beverly Wells and her brother Robert Newton each owned a half-interest in a property in Stowe, Vermont, as tenants in common. The property is 0.39 acres and contains two buildings separated by a shared driveway leading to a parking area at the rear of the lot. One building was a single-family home, and the other was a 1,500-square-foot office building.

At some point, Beverly transferred her interest to her children Newton and Jason Wells (the Wellses), and Robert transferred his interest to Pall Spera. Prior to Beverly's transfer of her interest, she signed a partnership agreement with Spera, which provided certain duties and rights accruing to each owner, and established accounting procedures to distribute profits and pay expenses.

By 2017, the house on the property had fallen into significant disrepair, so the Wellses began a major reconstruction project on the house. Without first obtaining Spera's consent, and eventually over his objection, the Wellses spent $394,632 on labor and materials. The Wellses prepared and submitted to the town an application to subdivide the property, but Spera refused to sign it. The Wellses filed suit seeking to partition the property.

The court appointed three commissioners and directed them to determine whether the property could be divided, assigned to one of the parties, or sold. They were also ordered to determine the fair market value of the property and each party's equitable share. The commissioners held an evidentiary hearing in 2021. Neither party obtained an appraisal. Newton Wells, who was not a real estate broker and did not have specialized training in Vermont real estate matters, testified that the combined value of the property was $2,000,000. Spera, who was a real estate broker, testified that the property's value was $1,500,000,

with one-third attributable to the office building and two-thirds to the house. The commissioners credited Spera's testimony.

The commissioners also found that the property was nonconforming, and division would result in increased nonconformity with respect to lot size and setback requirements. The probability of obtaining variances for the nonconformities was "unlikely at best." Also, physical changes to the parking area under separate ownership would greatly inconvenience separate owners.

Based on these findings, the commissioners concluded that physical division would cause great inconvenience to the parties. Subdivision without zoning approval would likely render the divided properties unmarketable, thereby decreasing the combined value of the property. Finding division inequitable, the commissioners awarded Spera first right of assignment due to his ability to buy out the Wellses' interest immediately, while the Wellses would have required a loan to do so, and because partition would constitute dissolution of the partnership agreement. The court entered judgment adopting the commissioners' findings, and the Wellses were awarded half of the $1,500,000 value plus half of their reconstruction costs. The Wellses appealed to the state supreme court.

The Wellses' contention on appeal was that the commissioners' conclusions regarding potential zoning violations were mistaken as a matter of law, and alternatively that the commissioners abused their discretion by awarding first right of assignment to Spera and miscalculated their equitable interest.

The Wellses first argued that the failure to divide the property offends the long-standing preference to order partition in kind over assignment or sale. The court agreed that partition in kind is favored over assignment, but it noted that the test used to determine if division is possible is whether it would materially decrease the property's value. Given the serious zoning hurdles, the commissioners concluded that the property could not be physically divided without creating great inconvenience to the parties and doing so "has the very real potential to materially decrease or perhaps even extinguish the property's value." Thus, the issue is not whether the commissioners concluded partition in kind was inequitable purely because division would create zoning violations; instead, the question is whether the commissioners' findings regarding potential zoning violations supported their conclusion that division would materially decrease the property's value.

The court left for another day the question of whether zoning violations alone can override a court's power to divide real property. But taken together, the commissioners' findings demonstrated that they did not abuse their discretion in determining that division would cause great inconvenience to the parties. The trial court did not err in accepting that portion of the commissioners' report.

The Wellses further argued that the commissioners erred in how they assigned the property to Spera. The Wellses maintained that any debt they would incur to buy out Spera is not a proper equitable consideration in assigning the property. But the court disagreed. Citing precedent, the court noted that the parties' relative abilities to timely buy out each others' interests are appropriate equitable considerations. Furthermore, the commissioners' decision to assign the property to Spera was based on both the ability to pay and fairness with respect to the partnership Spera otherwise wished to continue.

Finding no error in the trial court's decision to adopt the report of the commissioners, the court affirmed.

Wells v. Spera
Vermont Supreme Court
March 17, 2023
293 A.3d 330

Different rules control compensation for eminent domain powers and police powers

DEKK Property Development LLC (DEKK) owns a four-acre lot at the southeast corner of State Highway 50 and County Highway H in Kenosha County, Wisconsin. The parcel has one driveway connecting it with Highway 50, which runs along the parcel's north edge, and one driveway connecting it with Highway H, which runs along its western edge.

In 2019, the Wisconsin Department of Transportation (DOT) sought to acquire a part of the property, a strip of land abutting Highway H, as part of a project to improve Highway 50. DOT commissioned an appraisal of the property as required by state statute. The appraisal valued the part of the parcel that was to be taken and explained that DOT was not seeking to acquire any access rights. But the report also noted that the driveway between the property and Highway 50 would have to be closed, and that DOT would not compensate DEKK for the closure, because the building the driveway served had been demolished and redevelopment of the parcel would require new driveway approvals at a location farther from the intersection.

After DOT provided the appraisal report to DEKK, DEKK asked about the lack of compensation for the driveway closure. A DOT employee explained that at the time of the acquisition the driveway would remain in place, and that any revocation of the access point would be non-compensable now—because it had not happened yet—and if it did occur, it would be revoked through DOT's police power. DOT then issued an offer to DEKK as required by statute, offering $272,100 for the permanent taking. It did not offer to purchase any access rights, nor did it reference any driveway closures. DEKK did not challenge the purchase of its land or the related easements.

After DOT issued the offer, DEKK filed an action under one of the state taking statutes, Wisc. Stat. § 32.05(5), challenging DOT's right to remove DEKK's rights of access to Highway 50.

Shortly afterwards, DOT sent a letter to DEKK providing official notice that it planned to remove the existing driveway. The letter explained that DEKK could contest the removal by submitting an objection letter. It is not clear if DEKK took advantage of this administrative review process. But after receiving the notice, DEKK filed a motion for a temporary restraining order and injunction to prevent DOT from closing the driveway. The circuit court granted the motions, and DOT appealed. The court of appeals reversed, reasoning that DOT was within its rights to close the driveway without compensation as an exercise of police power. DEKK appealed to the state supreme court.

When DOT determines that it is necessary to take private property under its eminent domain authority, it must pay just compensation. But not all state actions that affect private property result in a compensable taking. Injuries to property that result from a valid exercise of the state's police power are generally not compensable. Compensable eminent domain and non-compensable police power actions can occur contemporaneously, and DOT may exercise both powers as part of the same highway construction project.

When DOT exercises its eminent domain authority, it must follow the procedures in Wis. Stat. § 32.05, namely obtaining an appraisal, negotiating with the owner, and making an offer to purchase the property. If the owner rejects the offer, the owner may file a "right to take" action under § 32.05(5).

But § 32.05(5) is just one of several statutes that enable property owners to challenge DOT actions affecting private property. The appropriate statute depends on the facts of the case and the nature of the challenged governmental action. The statutes are not, however, interchangeable, and even if a construction project results in damages that are compensable under a particular statute, those damages cannot be recovered in a

claim brought under the wrong statute. Moreover, even when DOT undertakes different projects that are part of the same overall highway construction project, that does not necessarily merge each project into a single compensable act, even when the projects affect the same property owner and occur at the same time.

DEKK filed its claims under § 32.05(5). That statute sets out a process by which DEKK may "contest the right of the condemnor to condemn the property described in the offer." Thus, if the offer had addressed DEKK's access to Highway 50, or if DEKK sought to challenge DOT's right to take the parcel, then § 32.05(5) would be the proper procedural mechanism by which DEKK could bring its claim. Here, the offer addressed only permanent and temporary takings along Highway H, and that parcel did not touch the driveway to Highway 50. The offer did not indicate that DOT was seeking to remove any access rights.

Thus, the court concluded that § 32.05(5) was not the appropriate means for determining the nature of DEKK's access rights to Highway 50, whether those rights were being impeded, or whether such impediment is compensable. The court did not need to decide whether DEKK might recover damages for the driveway closure through a different procedural avenue, but in this case, the trial court should have granted summary judgment in DOT's favor.

DEKK Property Development LLC v. Wisconsin Dep't of Transportation
Wisconsin Supreme Court
April 18, 2023
988 N.W.2d 653

Property taken by adverse possession cannot be conveyed in mortgage

In 1982, John and Suzan Driscoll purchased property at 19 Crestwood Road in North Reading, Massachusetts. They had a house built on their lot, and they moved there in late 1982. The neighboring lot, 17 Crestwood Road, was sold to Diane Russo (who eventually remarried and took the name Thornton). She moved into the newly built home in 1984. When the Driscolls and Russo moved to Crestwood Road, the front yards were unfenced and their lawns were continuous.

In 1985, Russo built an in-ground pool. To meet local regulations, a large part of the backyard was surrounded with a solid fence. One part of the fence ran parallel to, but nine feet inside, the property line between the lots. Another part of the fence ran parallel to, but sixteen feet inside, the property line with the abutting lot at 15 Crestwood Road. A house was later built on 15 Crestwood Road. John Driscoll's brother, Fred, and his wife Michelle ultimately purchased the house.

In 1986, John and Suzan installed a pool in their backyard and also built a fence around their rear yard. The fence began at the side of their residence, then encroached five feet into 17 Crestwood, then ran parallel to the property line until meeting the corner of the Russo fence. Thus, the two fences effectively surrounded a portion of 17 Crestwood Road and made that area appear to be part of John and Suzan's yard.

Thornton did not give John and Suzan permission to install their fence on her lawn, but after it was built, John and Suzan maintained the enclosed area exclusively. They chose its landscaping, and installed part of their irrigation system within it. At all times, John and Suzan's maintenance of the enclosed area was or should have been apparent to Thornton.

When Fred and Michelle moved to 15 Crestwood in 1989, the fence had already been built, and they maintained the area between the fence and their property line. Shortly after moving in,

they installed a playset in the area (without obtaining permission from Thornton). In 1998, Fred and Michelle built a two-foot-tall retaining wall running perpendicular to the property line, which encroached into 17 Crestwood by seventeen feet. The wall's construction caused the area to be surrounded by artificial barriers, and Fred and Michelle continued to maintain the area exclusively. Fred and Michelle's activities in the area, and those of their children and grandchildren, were obvious to Thornton.

Fred and Michelle also created a garden bed in the corner of their property in 1992. The bed encroaches into 17 Crestwood, as does the underwater irrigation system installed by Fred and Michelle. As with the other areas, Thornton never gave permission to extend the garden into her property. There were also unenclosed areas of the front yard that both Thornton and Fred and Michelle mowed and maintained.

In February 2015, Thornton granted a mortgage on the property to Quicken Loans, which was later assigned to Rocket Mortgage. The mortgage states it includes the entirety of 17 Crestwood Road. The mortgagor was not granted a right to possess 17 Crestwood, however, prior to default or foreclosure under the mortgage.

The conflict eventually resulted in Thornton suing the various Driscolls for trespass, with the Driscolls counterclaiming that, by virtue of their landscaping and other activities, they had respectively acquired areas of 17 Crestwood by adverse possession. The case was tried by the Massachusetts Land Court in 2022.

Title by adverse possession can be acquired only by proof of nonpermissive use that is actual, open, notorious, exclusive, and adverse for twenty years. To establish "actual" use, the claimant must prove changes upon the land that constitute control and dominion over the premises commonly associated with ownership. The use must also be "adverse," but under state law, if the claimant establishes actual, open, and exclusive use of a disputed area for 20 years, a rebuttable presumption arises in favor of the claimant that his use is adverse.

The court found that the strongest claim for adverse possession was that of John and Suzan over the enclosed area. They continuously used the area after 1986, well over twenty years prior to counterclaiming adverse possession. The court found that all of the requirements of the five-part test were met. The fact that Thornton erected the first of the fences that subsequently surrounded the enclosed area did not defeat John and Suzan's claim.

The court found that at the other end of the spectrum were the Driscolls' claims regarding unenclosed lawn areas. Routine lawn maintenance, with little or nothing more, does not serve to sufficiently exert dominion and control or place the true owner on notice of an adverse claim. This is particularly true where, as here, the property's rightful owner concurrently maintained the disputed area in the same manner as the claimant.

Fred and Michelle's activities in the garden bed and area enclosed by the wall fell between these extremes. Once they built the wall, the area was enclosed on three sides, and their maintenance and construction in the area showed dominion and control. Similarly, the garden bed was landscaped, maintained, and controlled by Fred and Michelle. But the area outside the wall and fence, though similarly dominated and controlled by Fred and Michelle, was only controlled beginning in 2005 when they added a water feature in the area. Thus, twenty years had not passed by the time Thornton sued them for trespass, so it was not taken by adverse possession.

The court, having concluded that some areas of 17 Crestwood were taken by adverse possession, then turned to the question of the 2015 mortgage on the property. Mortgage transactions are conveyances of title in Massachusetts, because Massachusetts is a "title theory" state. That means that when the owner/borrower grants a mortgage in a property, the owner is conveying to

the mortgagee/lender the owner's legal title in the property, with equitable title remaining with the owner. It is axiomatic, however, that a grantor can only convey that which is theirs to convey; thus if a person lacks title to a property, they have nothing to convey to a mortgagee.

Thornton lost the enclosed area to John and Suzan in 2006 (twenty years after the 1986 construction of the fence) and the garden bed to Fred and Michelle in 2012, before Thornton granted the mortgage. The mortgage thus did not include those areas, and the new owners of those areas hold their title free and clear of the mortgage.

The situation was different, though, for the area enclosed by Fred and Michelle's wall. The wall was built in 1998, so Thornton still had title to that area at the time she granted the mortgage in 2015. By virtue of state statute, Thornton validly granted the mortgage, notwithstanding Fred and Michelle's long-open, obvious, adverse, and exclusive use of the area. But under Massachusetts law, a mortgagee who lacks possession of a mortgaged property generally is unable to protect the premises from an adverse possessor's activities. The recording of a mortgage puts the adverse possessor on constructive notice, though, that a disputed property is subject to a mortgage, so the adverse possessor is free to continue or suspend his possession of that property.

Given these factors, the court held that Fred and Michelle had acquired the area behind their wall subject to the mortgage. Fred and Michelle were, however, ordered to remove all encroachments from the areas not taken by adverse possession. Thus, the Driscolls all took some of 17 Crestwood by adverse possession, and Thornton was granted relief from the Driscolls' trespass on the property that remained hers.

Thornton v. Driscoll
Massachusetts Land Court
September 8, 2022
2022 WL 4102263

Determination of loss value and covered loss value are separate determinations

Edmond and Kathleen Krafchow owned real property on the island of Maui. There were three structures on the property: a villa, a cottage, and a garage. The structures were insured under separate insurance policies issued by Dongbu Insurance Co. (DB) to the Krafchows. A homeowners policy covered the villa, while the cottage and the garage were covered by dwelling fire policies.

The policies contained appraisal provisions. If both parties failed to agree on the amount of loss, either may demand an appraisal of the loss. Each party would choose a competent and impartial appraiser, and the appraisers would choose an umpire. The appraisers would separately set the amount of loss, and if they disagreed, the matter would go to the umpire. A decision agreed to by any two would set the amount of the loss.

The structures and their contents were damaged because of a wildfire. The Krafchows made insurance claims for their loss. DB tendered over $300,000 to the Krafchows under reservations of rights, pending preparation of final settlement figures. DB also raised issues about coverage and limits of liability. The parties disagreed on the amount of the Krafchows' loss. The Krafchows invoked the appraisal provisions of the insurance policies, but DB did not name an appraiser. The Krafchows then sued DB, alleging that DB breached the insurance policies by failing to participate in the appraisal process.

The Krafchows filed a motion to compel appraisals, which DB opposed. DB argued it was premature to appraise the amount of loss because coverage issues had not been resolved. The trial court granted the motion to compel appraisal, without referring to insurance coverage, and appointed a retired judge to serve as umpire.

The parties' selected appraisers did not agree on the amount of loss. The umpire agreed with the Krafchows' appraisals, which each stated that the appraisers "carefully examined the documents and/or the damaged property and/or evidence thereof and have determined the following values and loss." Each appraisal established actual cost value for various categories of loss, reduced the appraised amount by a deductible amount, and stated that the award "shall be payable within twenty calendar days."

At a later court hearing to confirm the appraisals, DB argued that the function of appraisers is to determine the amount of damage resulting to various items submitted for their consideration; it is not their function to resolve questions of coverage and interpret provisions of the policy. The trial court rejected the argument that the appraisers and umpire exceeded their scope of authority, because the court ordered them to determine the appraisal amounts. DB appealed from the order granting the Krafchows' motion to confirm the appraisals.

On appeal, DB contended that the trial court erred by adopting the appraisals, because the appraiser and umpire exceeded their authority when they considered insurance coverage issues and decided whether the policies provided coverage for certain claimed loss. The appellate court agreed.

The appraisal provisions in the insurance policies state that the appraiser and the umpire, if necessary, are to determine the amount of loss. None of the policies defined the word *loss*, though the word appeared 258 times in the homeowners policy and 149 times in each of the dwelling fire policies, with and without qualifiers. The court thus gave the word its common meaning as a "decrease in amount, magnitude, value, or degree."

DB and the Krafchows disagreed on the amount of the Krafchows' loss because of the wildfire. The insurance policies require that the amount of loss be determined by the appraisers and, if needed, the umpire. But not all of the loss is necessarily insured or covered under the insurance policies: DB's liability to pay for a loss is limited by the coverage provisions exclusions, and other terms and conditions of the policies. The appraisal provision does not limit itself to *covered* loss; it does not preclude appraisal of non-covered or excluded loss; and it does not empower the appraisers to consider policy or coverage defenses.

Under the circumstances of this case, the unqualified word *loss* in the appraisal provision refers to the Krafchows' loss because of the wildfire, not what DB is obligated to pay under any of the Krafchows' insurance policies. The appraisers and umpire had no power to decide what amounts DB owed to the Krafchows under the insurance policies, because those coverage issues must be decided by the trial court.

Because the appraiser and umpire exceeded their powers, the trial court erred by granting the Krafchows' motion to confirm the appraisals, and by denying DB's motion to vacate the appraisals. The case was remanded to the trial court for further proceedings.

Krafchow v. Dongbu Insurance Co.
Intermediate Court of Appeals of Hawai'i
February 17, 2023
525 P.3d 697

Owners of life estate can execute leases that extend beyond their lifetime

In 1987, C Bar J Ranches owned 100% of the surface and minerals of property located in Laramie County, Wyoming. In May 1987, C Bar J sold the property to William and Charlotte Hutton (Huttons) and provided them a warranty deed conveying the property and one-half of the existing mineral rights. It reserved one-half of the mineral rights for twenty years, providing that at the end of the twenty years, the mineral rights would become the property of the purchaser.

In 1992, before C Bar J's twenty-year reserved mineral interest terminated, the Huttons sold the property to the Woods family by a contract for deed. A warranty deed conveying the property to the Woods was held in escrow pending the Woods' performance of their obligations under the contract. The deed granted the Woods "all rights" to the property, but reserved a life estate in all minerals owned by the Huttons and the right to develop those minerals during their lifetimes. On termination of this reservation, the interest would be owned by the Woods. In 2008, the Woods fulfilled the terms of the contract and recorded the deed.

Also in 2008, the Woods entered into two separate contracts for deed, one with Kristin Deselms and one with Hugh Deselms. By those deeds, the Woods conveyed the property and "one-half of the oil, gas, and other minerals" the Woods "now owned" or would later acquire, and reserved the other half for their lives and their children's lives. The Huttons' reservation was expressly noted. The Deselms completed their obligations under the deed contracts and recorded the deeds in 2013.

In 2010, after C Bar J's twenty-year reserved mineral interest terminated, the Huttons leased all of their mineral interests to Cirque Resources, with an option to extend. Cirque exercised its option in 2015, and through a series of assignments in 2018 and 2019, North Silo Resources (NS) acquired Cirque's interests under the lease and is the current mineral lessee.

NS filed suit seeking a declaration as to the percent of the mineral estate encumbered by its lease. NS asserted that the deed between C Bar J and the Huttons transferred one-half of the minerals to the Huttons outright and one-half of the minerals to the Huttons as a vested remainder subject to C Bar J's reservation. Therefore, the Huttons own a life estate in 100% of the minerals, measured by the lives of William and Charlotte Hutton. Accordingly, NS argued that its mineral lease encumbered 100% of the minerals.

The Deselms, the Woods, and the Huttons interpreted the transactions differently. They asserted that the minerals reserved by C Bar J were unvested, and that they had not vested when the Huttons sold the property to the Woods in 1992. The Huttons' reservation of a life estate in all minerals from the property was limited to the minerals conveyed and did not include minerals reserved by C Bar J. The reserved, unvested minerals transferred to the Woods when the twenty-year contingency expired. Thus, they asserted that the Huttons owned a life estate in 50% of the minerals; the Woods received the 50% C Bar J remainder and subsequently sold half to the Deselms, along with half of their future interest in the Huttons' half, resulting in them owning a present 25% life estate; and the Deselms own a present interest in 25% of the minerals and a future interest in 25% of the minerals reserved by the Huttons. From that position, they argued that NS's lease encumbers only 50% of the minerals (those subject to the Huttons life estate).

Following NS's filing of its lawsuit seeking to quiet title to its mineral lease, the remaining parties filed motions to dismiss, which the trial court largely granted, along with summary judgment motions. The court concluded that the Huttons owned only 50% of the minerals and NS's lease covered only the Huttons' 50% mineral interest measured by the life estate of the Huttons. NS appealed.

In construing deeds affecting mineral interests, Wyoming courts focus on the general intent of the parties, concentrating on the purpose of the grant. The parties do not dispute that after the conveyance from C Bar J, the Huttons owned all the surface estate and 50% of the mineral estate. They disagree about the effect of the C Bar J reservation. NS claims the deed vested title to half of the minerals in the Huttons outright and gave them a vested remainder in the other half. After twenty years, the Huttons realized the remainder, giving them a life estate in 100% of the minerals.

The other parties asserted that the reserved minerals did not transfer to the Huttons, because the Huttons had only a contingent remainder, and ownership of the reserved minerals had not yet vested in the Huttons when they sold the property to the Woods.

The state supreme court found the deed to be unambiguous. C Bar J retained a present interest in the reserved half of the mineral estate, and conveyed the remainder of this interest on the expiration of twenty years. A remainder is a future interest created in a transferee. A property interest vests at the point when no contingency can defeat the interest. The remainder created by the deed was vested if some person took the estate under terms that no contingency could defeat. The passage of twenty years was certain to occur and thus was not a contingency that could be defeated.

Here, the Huttons acted as owner of all the mineral rights in the property. They executed an oil and gas lease with Cirque in 2010, and through 2015 they accepted bonus payments under that lease for 100% of the net mineral acreage. None of the other parties did anything indicating that they owned mineral interests during this time. It was not until August 2019, after NS began drilling operations on the property, that the other parties took quarrel with the ownership of the mineral rights. Given the unambiguous terms of the deed, the Huttons received a vested remainder in the reserved 50% of the minerals.

The trial court concluded that the Huttons only owned 50% of the minerals, and they reserved only those minerals that they owned when they entered into the contract with the Woods. But the court held that the Huttons owned a vested remainder in the C Bar J reserved minerals when they executed that contract for deed, and the Huttons expressly reserved "all minerals they may own" for their lifetimes. This clearly reserved a life estate in their presently held mineral interest and their vested remainder. The Woods therefore received the property subject to the Huttons' reservation of a life estate in 100% of the mineral interests and the executory rights to lease those minerals.

The final question of deed interpretation regarded the scope of the Huttons' right to encumber the minerals. The trial court concluded that the Huttons' executive rights permitted them to execute leases, but any such lease is limited by the life estate and cannot extend beyond their lifetimes. NS argued that because the Huttons reserved the mineral estate and executive rights for life, they can execute leases that extend past the life estate.

As a matter of first impression, the court held that while typically a lease executed by a term interest holder would not endure beyond the interest holder's estate, if a life tenant is granted the power to lease but cannot bind future interests, there would be very little utility to the power because of the natural reluctance of any lessee to accept a lease that might be terminated by the death of the lessor. Here, the reservation of rights limits the period during which the Huttons have the right of making, executing, and delivering leases to their lifetimes. It does not, however, limit the nature of the leases that the Huttons can make. The Huttons retained the power to execute oil and gas leases that extended beyond their lifetimes.

Accordingly, the court held that the lease to NS remains in effect according to its terms, even when the Huttons life estate terminates. The Huttons owned 100% of the mineral interests in the property for their lifetimes, and thus NS's mineral lease encumbers 100% of the minerals. The trial court's judgment was reversed.

North Silo Resources LLC v. Deselms
Wyoming Supreme Court
October 26, 2022
518 P.3d 1074

Predevelopment lease to a government agency does not constitute a public work construction contract

PSP NE, LLC (Developer) owns land in Luzerne County, Pennsylvania. In July 2019, the Pennsylvania Department of General Services executed a twenty-year lease of a facility to be constructed by Developer and used by the State Police as a barracks and training center. Developer hired, at its own expense, engineers, architects, and others to develop plans incorporating State Police specified requirements. Developer also selected the contractors to prepare the site and build the facility. To finance the construction, Developer took out a bank loan for $15,400,000. The loan was secured by Developer's land, the facility to be built, Developer's personal guarantee, and an assignment of all leases. Upon completion, the State Police would take occupancy of the building as tenant and begin lease payments.

The predevelopment lease provided that if the Commonwealth terminated or cancelled the lease before completion of the twenty-year term, the Commonwealth would reimburse Developer for any unamortized costs of renovations, but that would leave Developer with a loss of any difference between the total project and unamortized costs.

In response to a request from Developer for confirmation that its construction of the facility to be leased to the Commonwealth was not subject to the Pennsylvania Prevailing Wage Act (Act)—which ensures that workers employed on public works are paid not less than the prevailing minimum wages—the Bureau of Labor Law Compliance (Bureau) informed Developer that the Act covers the construction project. The Bureau explained that although Developer will provide the initial funds for this project, the lease payments from the State Police will reimburse this initial outlay and, as such, are the ultimate source of funds for this construction.

Developer filed a grievance with the Pennsylvania Prevailing Wage Appeals Board (Board) seeking review of the determination of the Bureau. The Board issued a decision denying Developer's grievance and affirming the Bureau's determination. In reaching this decision, the Board applied a state supreme court decision providing that a "public work" is one that involves work performed under contract "paid for in whole or in part with funds from a public body." Because Developer's loan agreement required the Commonwealth's lease payments to be sufficient to cover Developer's debt service, this established funding by a public body. Developer would recover its amortized construction costs either through rental payments or reimbursement of unamortized costs should the lease terminate early. The Board thus concluded that the agreement did not establish a landlord-tenant lease but rather a public work or construction contract subject to the Act.

Developer appealed to the Commonwealth Court, raising several issues that effectively turned on the single question of whether construction of the facility is a public work subject to the Act. A public work does not require a public body to be directly involved, only that the project must be paid for in whole or in part with public funds.

Developer focused on several factors in arguing that the Act does not apply to its construction project: the Commonwealth did not own the land, did not hire Developer to construct the facility for the Commonwealth to own, and did not provide any funding for the construction of the facility. Developer used its own funds and its own bank loan to purchase the land and construct the facility. The only funds ever to be generated from a public body would be in the form of rent and only after construction was complete and the State Police took occupancy. The rent payments merely give the State Police the right to occupy the facility.

The Bureau, conversely, contended that the predevelopment lease placed the financial risk of the construction upon the Commonwealth,

because it must cover unamortized construction costs should the lease terminate early. Further, the lease has a potential thirty-year duration, should it be extended, which constitutes a real estate transfer for purposes of the tax laws. This supports the Board's conclusion that Developer has been engaged to construct a public work within the meaning of the Act.

The court analyzed the economic reality of the transaction, since that is what controls rather than simply referring to the labels appended to documents. Here, the predevelopment lease states that the State Police shall pay rent for the use and occupancy of the premises, not for construction. Developer funded the construction and solely bears responsibility for the repayment of the loan. In short, the economic reality is that Developer provided the funds for the construction of the facility to be leased to the Commonwealth.

The court concluded that the Board erred in holding that the lease was not a bona fide lease. Because Developer established a bona fide lease, the burden shifted to the Bureau, which did not present any evidence that the contractual arrangement was not as it seemed, such as evidence that the reversionary interest was fictional because the building would cease to be useful by the end of the lease term.

Additionally, the court rejected the Bureau's argument that the predevelopment lease effected a real estate transfer. State law treats a build-to-suit lease with a thirty-year term as a transfer that triggers a realty transfer tax. Here, the lease provides one twenty-year term followed by two five-year renewal terms. Renewal of the lease agreement beyond the initial twenty-year term, though, is speculative and not certain. And even assuming the lease effected a real estate transfer for purposes of the tax laws, that is not a factor to be used to determine whether the lease is a construction contract for a public work.

Ultimately, if developers did not expect to cover their construction costs with rental payments, few commercial buildings would ever be built. But Developer's expectation that, over time, it would recover its costs did not convert the bona fide lease into a construction contract. The court reversed the Board's determination and held that the Act did not apply to Developer's construction project.

PSP NE LLC v.
Pennsylvania Prevailing Wage Appeals Board
Commonwealth Court of Pennsylvania
March 30, 2023
292 A.3d 1175

Damage to property after closing delay by buyer does not release buyer from specific performance

Duane Bender owned property near Shepherd, Montana. A dispute arose between Bender and Stacey Rosman regarding Rosman's use of a road crossing Bender's property over which Rosman claimed to have an easement to access his residence. Bender filed suit against Rosman in 2018 alleging trespass and tortious interference with contract, and seeking to quiet title.

In December 2019, prior to trial, the parties reached a settlement agreement through mediation. The settlement agreement provided for the purchase of Rosman's property by Bender. The agreement stated that Bender agreed to purchase Rosman's property "for a sum equal to the greater of the appraised value or $170,000." The closing was to be on or before April 1, 2020, and Bender would not be obligated to purchase the property if it was not "in substantially the same condition on the date of closing" as it had been at the time of the inspection. Finally, the parties agreed to specific enforcement of the agreement if it was breached by any party.

Following the execution of the agreement, Bender conducted a walkthrough of the property and scheduled an appraisal for January 2020. But

Bender cancelled the appraisal on the day it was scheduled to occur, and he continued to delay the proceedings. After more delays, Rosman hired an appraiser who valued the property at $202,000. Bender never fulfilled his obligation under the agreement to have the property appraised, so only the appraisal commissioned by Rosman was timely accomplished.

In time for the April 1, 2020 closing, Rosman vacated the property in preparation for delivering possession to Bender. However, Bender rejected the appraisal and insisted he would only pay $170,000 for the property, and failed to close by the deadline. Rosman filed an emergency motion asking the court to enforce the settlement agreement, but attempts to conduct a hearing were hampered by a series of delays solely attributable to Bender. The night before the case was set for a final hearing, the residence on the property burned and was a complete loss. When the case was later heard by the trial court, the court issued an order enforcing the agreement and concluding that, under the agreement, Bender was required to purchase the property for $202,000. Bender appealed.

Settlement agreements are contracts, subject to the provisions of contract law. There was no dispute that a contract for sale of the property was formed by the parties' agreement. Rather, the parties dispute the effect of the agreement's terms. Bender argued that he is not obligated to purchase the property because it burned down and was therefore not in "substantially the same condition" as when he inspected it. Bender alternatively argued that the agreement's language functions as a "risk of loss provision" that assigned the risk of loss to Rosman as the seller. Rosman countered that the property burned after the contractual closing deadline was missed due to Bender's breach, and therefore the doctrine of equitable conversion dictates the risk of loss lay with Bender.

A "condition precedent" is one that is to be performed before some right dependent thereon accrues or some act dependent thereon is performed. A condition precedent can apply to either the formation of a contract (which predicates the existence of the contract on satisfaction of the condition) or the performance of the contract obligation (which predicates the duty to perform on satisfaction of the condition). Non-satisfaction of a condition precedent to contract formation renders the contemplated contract non-existent, whereas non-satisfaction of a condition precedent to performance generally constitutes a breach of an enforceable contract.

The state supreme court concluded that the agreement had two conditions precedent: that Bender would pay for an appraisal of the property for the purchase price to be set, and that the property remain in substantially the same condition at closing. Rosman was bound to sell the property for the purchase price determined upon appraisal, and Bender was bound to commission an appraisal and purchase the property if the condition of the property remained substantially the same. Thus, the parties formed an agreement that included provisions that functioned as conditions precedent to performance of the agreement.

If Rosman did not adequately maintain the property to the agreed date of closing, then the condition precedent would fail, and Bender would be excused from purchasing it. Conversely, if Rosman adequately maintained the property to the date of closing, the condition precedent would be satisfied, and Bender would be obligated to purchase the property. Here, the record showed that the condition of the property remained the same through April 1, 2020, the contractual date of closing. Thus, no later than April 1, 2020, Bender was required to purchase the property at the determined purchase price. Bender repeatedly interfered with the process, all in an effort to force Rosman to sell the property for $170,000 in contravention of the agreement's appraisal process, and that was the reason closing did not occur by that date.

As for the condition precedent that Bender

obtain an appraisal, a condition may be waived by the party for whose benefit it is made. It may not be waived by the party it binds. There was thus no merit to Bender's assertion that his failure to pay for an appraisal freed him from the obligation to buy the property. Only Rosman could wield non-satisfaction of that duty to excuse himself from performance, and he did not.

Finally, as to the assignment of risk of loss, Montana courts have adopted the doctrine of equitable conversion to adjudicate interests of parties. Under the doctrine generally, when a contract for sale of real property is formed, the beneficial interest of the property vests with the buyer, while the seller retains legal title only as security for the purchase price. When a contract is silent regarding allocation of risk of loss, equitable conversion places upon the buyer the risk of loss during the course of the contract.

Bender argued that the provision requiring the property be kept in the same condition through closing assigned the risk of loss to Rosman. The court agreed, but not in the way Bender intended. Had the property burned down before closing, this language would excuse Bender from his contractual obligation to purchase the property, and thus it placed the risk of loss on Rosman as the seller. But the operable period of this provision was limited in duration, placing the risk of loss upon Rosman only through closing. The closing deadline was breached by Bender, the risk of loss thereafter shifted to Bender, and the property burned three months later.

Because Bender breached his vested performance obligation to purchase the property by the closing deadline, his breach triggered the agreement's specific enforcement provision. Rosman was entitled to relief, and the trial court's judgment in favor of Rosman was affirmed.

Bender v. Rosman
Montana Supreme Court
July 18, 2023
2023 WL 4571938

Board of Equalization may substitute alternative valuation approach for tax purposes where statutory approach does not produce actual value

In 2017, Western Tabor Ranch Apartments LLC (Western) acquired a 49-unit apartment complex in North Platte, Nebraska, for $1,340,000. Under a land use restriction agreement with the Nebraska Investment Finance Authority, the property was subject to rent restrictions until 2046. Before Western acquired the property, a private appraisal indicated the leased fee interest in the property had a market value of $1,350,600.

For the 2018 tax year, the Lincoln County assessor's office (Assessor) attempted to appraise the property using the income approach, as contemplated by statute. The statute supports a preference for the income approach to result in the most accurate determination of the actual value of rent-restricted housing projects. To facilitate this income approach, the statute requires that owners of rent-restricted housing projects file annual reports that detail the actual income and expense for the prior year. Each county assessor must use that actual income expense data to value such properties, unless certain exceptions applied.

For 2018, the Assessor received two different income and expense reports for the property for 2016 that resulted in significantly different valuations. Under the first report, the value of the property would be $1,040,800. Under the second report, the value was $1,546,500. The Assessor's practice for all rent-restricted properties was to average the last three years of available income and expense reports. Doing so here resulted in a market value of $1,519,000 for 2018. And because Western did not file the required reports for the 2019 and 2020 tax years, the Assessor carried over the same income calculation from 2018.

Western protested the 2018, 2019, and 2020 assessments, and the county Board of Equaliza-

tion (Board) affirmed the Assessor's value for each year. Western appealed to the state Tax Equalization and Review Commission (TERC).

At the TERC hearing, Western's owner testified that he was unaware that the property was rent restricted and subject to the statute. He argued that the purchase price and private appraisal were evidence that the property's actual value was lower than the Assessor's $1,519,000 assessment. The Assessor testified that it lacked enough information to determine which income report to use, and that using a single year of data for 2018 would have resulted in a higher value than using three years of data as the Assessor had done.

TERC determined that the appraisal rebutted the presumption that the Board acted with sufficient competent evidence and satisfied Western's burden to demonstrate that the Board's decision was arbitrary or unreasonable. TERC reasoned that the statute did not change the overall requirement that all real property be valued at its full market value. The Assessor failed to use any of the statutory methods of valuation in carrying over its 2018 value for 2019 and 2020. Thus, TERC accepted the appraisal's valuation of $1,350,600 for all three tax years. The Board appealed to the state supreme court.

On appeal, the Board argued that TERC erred by determining that its decision to uphold the Assessor's value of the property was unreasonable. The Board claimed that the statute required TERC to use the income approach to calculate actual value, and TERC was not permitted to consider the private appraisal as evidence of the property's actual value. On appeal, the state supreme court did not agree.

Although appraisal is not an exact science, Nebraska's statutes provide a framework for assessing real property and appealing those assessments. With limited exceptions, all real property shall be valued at its actual value (i.e., market value). Because this case involves a rent-restricted housing project, it is specifically governed by the statute requiring the use of an income approach to value such properties. The statute provides three exceptions: assessors can use any accepted method to value property if the owner fails to timely file actual income data; assessors can use an alternate method if the assessor believes the income approach does not result in a valuation at actual value; and the assessor can adjust the capitalization rate using a similar procedure.

All three exceptions, though, contemplate scenarios where the income approach methodology will not result in the most accurate determination of actual value of the rent-restricted project. But nothing in the statute permits the use of actual income and expense data from years other than the prior year, and nowhere does the statute contemplate using multiple years of data when using the income approach.

For the 2018 tax year, an income and expense report was required by July 2017 for the previous year, 2016. Two reports showing such data were timely provided, and therefore the first exception to the statute was not at issue. The fact that two conflicting reports were submitted for 2016 does not alter the statute's requirements. The statute did not allow the Assessor to average the 2016 data with earlier years. If the two data sets caused the Assessor to doubt the accuracy of the income approach valuation, it should have petitioned to use a different valuation method under that exception rather than substituting its own modified income approach.

For 2019 and 2020, the case was just as clear. Nothing in the statute allows for the prior year's value to be simply carried forward, even if no new income reports are filed. Carrying over the 2018 income approach calculation "only compounded the violation" of the statute. There was also no evidence that the Assessor determined the actual value of the property for 2019 and 2020 based on any generally accepted methodology.

Finally, the supreme court rejected the Board's argument that TERC was subject to the restric-

tions of the statute and therefore erred by adopting the independent appraisal. TERC has the power and duty to determine whether the income approach would result in actual value and to substitute whatever method TERC deems suitable to determine actual value. TERC was therefore free to consider the appraisal, and given the similarity between the sale price and the appraisal, the court ruled that TERC's valuation was supported by competent evidence.

TERC's determination that the assessed value of the property was arbitrary and unreasonable was affirmed, as were its determinations of the actual value of the property.

Lincoln County Bd. of Equalization v.
Western Tabor Ranch Apartments LLC
Nebraska Supreme Court
June 23, 2023
991 N.W.2d 889

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