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## Property Law: 1995 Survey of Florida Law

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# Property Law: 1995 Survey of Florida Law

Ronald Benton Brown<sup>\*</sup>  
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Manuel R. Valcarcel, IV<sup>\*\*\*</sup>

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## I. INTRODUCTION

This survey covers decisions of the Florida courts and Florida legislation produced during the period from July 1, 1994 through June 30, 1995 that the authors selected as being of special interest to the real estate practitioner.

## II. ADVERSE POSSESSION

*Seton v. Swann.*<sup>1</sup> The Supreme Court of Florida has eliminated any question as to the requirements for obtaining title by adverse possession under color of title. In 1982, the Setons acquired the lot next to the one owned by the Swanns. A 1951 survey properly located the common boundary, but surveys in 1959, 1972, 1976, and again in 1984 had placed the boundary between the two lots in the wrong place. Relying on the 1984 survey, the Setons improved a strip of land which actually belonged to their neighbors. In addition, the Swanns built a fence along the incorrect boundary, although Mrs. Swann testified that she knew the fence was not at the edge of her land when the fence was built. When a 1992 survey revealed the correct boundary, the Swanns brought this ejectment action against the Setons. The trial court, accepting the defense of adverse possession under color of title, ruled for the Setons finding that they had acquired title.<sup>2</sup>

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1. 650 So. 2d 35 (Fla. 1995).

2. *Id.* at 36.

The Fifth District Court of Appeal reversed<sup>3</sup> and the Supreme Court of Florida affirmed the district court in an unanimous opinion written by Justice Harding.<sup>4</sup> Adverse possession under color of title was in this case, and still is, controlled by section 95.16 of the *Florida Statutes* as amended in 1987.<sup>5</sup> In *Seddon v. Harpster*,<sup>6</sup> the Supreme Court of Florida interpreted an earlier version of this statute to allow an adverse possessor "under color of title" to acquire title to land which was not described in a written instrument if it was contiguous to the land described and protected by a substantial enclosure. Before the 1987 amendment, the statute read: "If only a portion of the land protected by the enclosure is included within the description of the property in the written instrument, judgment, or decree, only that portion is deemed possessed."<sup>7</sup> The supreme court held that this language clearly required all of the claimed land to be described in a recorded instrument in order to acquire title to it under this statute.<sup>8</sup> Thus, *Seddon* was the law in effect only between 1975 and 1987.<sup>9</sup>

### III. BOUNDARIES

*DuBois v. Amestoy*.<sup>10</sup> The record in this ejectment action established that: 1) the appellees decided, based on a government survey, the proper boundary was a dike and ditch; 2) their neighbors' surveyor placed boundary stakes beyond that point on land the appellees considered to be theirs; 3) appellees pulled up the stakes and told their neighbors that they considered the dike and ditch to be the proper boundaries; and 4) their claim was not challenged by the neighbors. The appellees claimed that this established the dike and ditch as the boundary by the doctrine of acquiescence. The well-established element for locating a boundary by this doctrine is uncertainty or dispute as to the boundary's correct location by neighboring landowners

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3. *Swann v. Seton*, 629 So. 2d 935, 937 (Fla. 5th Dist. Ct. App. 1993), *aff'd*, 650 So. 2d 35 (Fla. 1995).

4. *Seton v. Swann*, 650 So. 2d at 38. Chief Justice Grimes and Justices Overton, Shaw, Kogan, Wells, and Anstead concurred.

5. See FLA. STAT. § 95.16(1), (2) (1991).

6. 403 So. 2d 409 (Fla. 1991).

7. FLA. STAT. § 95.16(2)(b) (Supp. 1974), *amended by* FLA. STAT. § 95.16 (1991).

8. Note, title can be acquired by adverse possession without color of title under section 95.18 of the *Florida Statutes*, but that was not discussed in this case.

9. The court expressly disapproved *Turner v. Valentine*, 570 So. 2d 1327 (Fla. 2d Dist. Ct. App. 1990), *review denied*, 576 So. 2d 294 (Fla. 1991) and *Bailey v. Hagler*, 515 So. 2d 679 (Fla. 1st Dist. Ct. App.), *review denied*, 587 So. 2d 1327 (Fla. 1991), which applied the *Seddon* logic after the 1987 amendment to section 95.16.

10. 652 So. 2d 919 (Fla. 4th Dist. Ct. App. 1995).

who acquiesce in a particular location for the prescriptive period. The district court concluded that the appellees were not entitled to summary judgment because “the record evidence permits different reasonable inferences on the issues of mutual uncertainty, location of a boundary by the parties, and acquiescence . . . .”<sup>11</sup> The moving party must establish all the elements and, having failed to do so, the district court reversed.<sup>12</sup>

*Evers v. Department of Agriculture and Consumer Services.*<sup>13</sup> The Division of Forestry filed an action for declaratory judgment seeking to locate the boundary of property it was leasing for a state forest from the Internal Improvement Trust Fund. A 1984 survey revealed that the neighboring landowners were using and claiming ownership to part of the land. The neighbors argued that there was an old agreement among their predecessors in title that a certain fence line constituted the boundary, and that subsequent owners, including the Division of Forestry, had acquiesced to that boundary.

The Division of Forestry claimed that a 1938 eminent domain proceeding by the federal government had vitiated the prior agreement and any boundary by acquiescence. It also claimed that the doctrine of boundary by acquiescence was not available to establish a boundary to public lands. The trial court granted summary judgment in favor of the Division.<sup>14</sup> The First District Court of Appeal reversed, in an opinion written by Judge Mickle, finding that there were genuine issues of material fact still in dispute.<sup>15</sup> First, the record did not establish that the neighbors or their predecessors were parties to the eminent domain proceeding. Second, the neighbors claimed that their predecessors had established a boundary by acquiescence against the predecessors of the Division. The First District Court of Appeal characterized the correct, but still unresolved issue as: “whether a governmental entity can later be bound as a successor in interest and therefore take the property subject to a previously acquiesced to boundary.”<sup>16</sup>

*Shultz v. Johnson.*<sup>17</sup> Janice Shultz brought suit in circuit court seeking to ascertain the boundary line of her property, alleging boundary by acquiescence, boundary by agreement, and adverse possession. After the

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11. *Id.* at 920.

12. *Id.* Judge Stevenson wrote the opinion. Judges Polen and Klein concurred.

13. 651 So. 2d 802 (Fla. 1st Dist. Ct. App. 1995).

14. *Id.* at 803.

15. *Id.* at 804.

16. *Id.*

17. 654 So. 2d 567 (Fla. 1st Dist. Ct. App. 1995).

trial court directed verdicts against Shultz in the acquiescence and agreement claims and vacated a jury verdict in favor of Shultz on her adverse possession claim, Shultz appealed.<sup>18</sup>

The First District Court of Appeal affirmed the directed verdict entered on the boundary by agreement claim because there was insufficient evidence of any agreement.<sup>19</sup> The court also affirmed the order vacating the jury verdict in favor of Shultz on her adverse possession claim because there was insufficient evidence to prove the essential element of the property being enclosed by a substantial enclosure for the seven-year period under section 95.16 of the *Florida Statutes*.<sup>20</sup>

However, it reversed and remanded on the boundary by acquiescence claim, and set out the elements of an acquiescence claim: 1) a dispute or uncertainty as to the location of the true boundary, implying a cognizance by both parties that the true boundary is in doubt; 2) location of a boundary line by the parties; and 3) the continued occupancy of, and acquiescence to, a line other than the true boundary line for a period of more than seven years.<sup>21</sup> The defendant claimed that there was no uncertainty as to the true boundary. The court disagreed, finding the requisite element of uncertainty as to the location of the true boundary.<sup>22</sup>

#### IV. BROKERS

*Gauthier v. Florida Real Estate Commission*.<sup>23</sup> The Smiths advertised their business for sale. When Gauthier, a broker, contacted them stating that he had a potential buyer, the Smiths responded that they did not want to use a broker or pay a brokerage commission. Subsequently, Gauthier and his prospect joined in making a purchase offer which was accepted. When the transaction broke down, the Smiths sued and won a \$25,000 judgment against the two co-buyers. Because the money judgment was not satisfied, the Smiths filed a claim with the Real Estate Recovery Fund, the fund created by the legislature to protect the public from the misconduct of real estate brokers. After the Florida Real Estate Commission granted the claim and suspended Gauthier's license, the broker appealed.

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18. *Id.* at 568.

19. *Id.* at 569.

20. *Id.* at 569-70.

21. *Id.* at 568.

22. *Shultz*, 654 So. 2d at 569.

23. 654 So. 2d 580 (Fla. 5th Dist. Ct. App. 1995).

The Fifth District Court of Appeal reversed in a soundly reasoned opinion written by Judge Cobb, finding no basis on which to hold the fund liable.<sup>24</sup> The plaintiffs would be entitled to recover from the fund if they had obtained a judgment holding that they had “suffered monetary damages by reason of [certain enumerated] acts committed as a part of any real estate brokerage transaction . . .”<sup>25</sup> or a judgment for damages “wherein the cause of action was based on a real estate brokerage transaction . . . .”<sup>26</sup> However, Gauthier, the broker, had not acted as a broker for these sellers. They had refused to hire him and they never relied on him as a broker. The sole reason the deal fell through was that the buyers did not perform their portion of the contract; the co-buyers had breached the purchase agreement, and the sellers had obtained a judgment for breach of the purchase contract. That judgment did not satisfy the statutory condition precedent to recovery from the Real Estate Recovery Fund.

Judge Thompson dissented, stating that the statute does not require an agency relationship to exist with the broker as a prerequisite to recovery from the fund.<sup>27</sup> In this case, the broker first became involved in the case in the role of a broker even though he later became a co-buyer. The Real Estate Commission predicated recovery on its finding that the sellers’ harm resulted from incompetent drafting of the contract which the sellers allowed Gauthier to do because he was a licensed broker. Judge Thompson argued that the appellate court should not substitute its findings of fact for those of the Florida Real Estate Commission.<sup>28</sup>

*Rauch v. Chama Investments, N.V.*<sup>29</sup> Rauch, a real estate broker, procured a commercial tenant under a thirty-year lease for the landlord, Chama Investments. The brokerage agreement provided that the broker’s commission was to be three percent of the gross annual rental for the term of the lease and any extensions of it.

Twenty years into the lease, the landlord and tenant modified the lease without the participation of the broker and after that the landlord refused to continue making commission payments. The trial court accepted the landlord’s argument that Rauch was not entitled to further commissions because he had not taken part in the new lease. This was apparently based

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24. *Id.* at 582.

25. FLA. STAT. § 475.482(1) (1991).

26. *Id.* § 475.483(1)(a).

27. *Gauthier*, 654 So. 2d at 583 (Thompson, J., dissenting).

28. *Id.*

29. 641 So. 2d 501 (Fla. 4th Dist. Ct. App. 1994).



upon the cases<sup>30</sup> which hold that a broker is not entitled to a commission under an extension clause if the parties enter into a lease after the original expires if it is substantially different from the original.<sup>31</sup> The Fourth District Court of Appeal reversed and remanded in a per curiam opinion,<sup>32</sup> finding this situation to be entirely different. Since this broker was seeking his commission for the original term, he could not be deprived of it because the landlord and tenant still enjoyed the benefits of the original lease, although under somewhat modified terms. The court, however, volunteered dicta that the broker's claim for annual commissions could be defeated by the tenant's abandonment.

Legislation of note with regard to brokers is Chapter 95-274 which amended section 721.20 to prohibit brokers from collecting advance fees for listing timeshares.<sup>33</sup>

## V. CONDOMINIUMS

*Casa Del Mar Condominium Ass'n v. Richartz.*<sup>34</sup> The condominium association brought an action for an injunction to prevent future acts of physical violence against the association and its members perpetrated by Mr. Richartz. Mr. Richartz, irate about ongoing work related to his unit, had thrown the association president to the floor and uttered various threats.<sup>35</sup>

The trial court erroneously dismissed the action, holding that the association did not have standing because the dispute was between Richartz and the association president in his individual capacity.<sup>36</sup> Section 718.303 of the *Florida Statutes* specifically allows such actions to be brought by the association or by the individual unit owner, and the statute authorizes the use of injunctions to enforce condominium bylaws.<sup>37</sup>

*Charley Toppino & Sons, Inc. v. Seawatch at Marathon Condo. Ass'n, Inc.*<sup>38</sup> The Supreme Court of Florida answered the following certified question in the affirmative:

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30. *Woodard Tire Co. v. Hartley Realty, Inc.*, 596 So. 2d 1114 (Fla. 3d Dist. Ct. App. 1992), *review denied*, 605 So. 2d 1264 (Fla. 1992); *Cushman & Wakefield of Fla., Inc. v. Williams*, 551 So. 2d 1251 (Fla. 2d Dist. Ct. App. 1989); *Strano v. Reisinger Real Estate, Inc.*, 534 So. 2d 1214 (Fla. 3d Dist. Ct. App. 1988), *review dismissed*, 542 So. 2d 1334 (Fla. 1989).

31. *Rauch*, 641 So. 2d at 502.

32. Judges Anstead, Hersey, and Senior Judge Mager concurred.

33. See Ch. 95-274 discussed *infra* part XVIII.

34. 641 So. 2d 470 (Fla. 3d Dist. Ct. App. 1994).

35. *Id.* at 470.

36. *Id.*

37. *Id.* at 470-71.

38. 658 So. 2d 922 (Fla. 1994).

Does section 718.124, Florida Statutes[(1987)], grant a condominium association an extended period of time in which it may assert a cause of action for damage to common elements in condominium buildings, beyond the time granted in section 718.203, Florida Statutes [(1987)], after unit owners have elected a majority of the members of the board of administration?<sup>39</sup>

The Seawatch Condominium was built and occupied by 1983, and control of the association passed from the developer to the unit owners on August 10, 1985. The association filed a section 718.203 breach of implied warranty suit on May 13, 1988, for damages due to the developer's use of allegedly defective concrete and metal decking resulting in cracking and seepage of rust-stained water onto cars parked below the building.<sup>40</sup>

The statute of limitations for implied warranty actions is four years.<sup>41</sup> However, section 718.124 tolls the running of the limitation period until control of the association passes from the developer to the unit owners.<sup>42</sup> The Third District Court of Appeal reversed the circuit court's dismissal, based on the tolling provision, but nevertheless certified the above question for clarification.<sup>43</sup> The Supreme Court of Florida approved the District Court of Appeal's decision, noting that the right to bring a warranty action belongs to the unit owners, and that they can exercise their right collectively through their association.<sup>44</sup>

In his dissent, Justice Harding argued that *expressio unius est exclusio alterius*, when applied to the tolling provision, indicated that it only applied to actions in which the association was the real party in interest, and not in actions accorded to the unit owners individually.<sup>45</sup> Justice Harding found nothing in the language of section 718.203 [breach of warranty section] to support the majority's holding that such actions can be brought by condominium associations on behalf of the unit owners. As such, he argued that the unit owners had sat on their rights and were using the association to revive their cause of action.

Under the facts of this case, where the defects involved the building's internal structure and composition, it seems more appropriate to have the association represent the common interests of the unit owners, making Justice Harding's position unpersuasive.

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39. *Id.* at 923.

40. *Id.*

41. FLA. STAT. § 95.11(3)(c) (1987).

42. *Id.* § 718.124.

43. *Charley Toppino & Sons, Inc.*, 658 So. 2d at 923.

44. *Id.* at 924.

45. *Id.* at 926. (Harding, J., dissenting).

*Horizons Condominium Management Ass'n. v. Salvato.*<sup>46</sup> The Salvatos owned a unit in the condominium. The declaration of condominium had an incorrect legal description of the unit, erroneously including a side yard as part of the unit. As a result of this error the Salvato's unit was assessed higher ad valorem property taxes and higher condominium assessment fees, causing a pending sale of the unit to fall through when the potential buyer found out about the higher charges on that unit.<sup>47</sup>

The Salvatos sued for damages for the lost sale, the higher taxes, and for reformation of the legal description in the declaration of condominium. The trial court held in their favor. The Fifth District Court of Appeal affirmed the reformation, but reversed the damage award.<sup>48</sup> It reasoned that damages for the lost sale were not based on any legally acceptable evidence of loss.<sup>49</sup> The overpaid taxes were a matter for the Salvatos to litigate against the county tax assessor, not the association.<sup>50</sup>

*Ocean Trail Unit Owners Ass'n, Inc. v. Mead.*<sup>51</sup> The Supreme Court of Florida answered the following certified question from the Fourth District Court of Appeal in the affirmative:

WHETHER A CONDOMINIUM ASSOCIATION CAN ENFORCE A SPECIAL ASSESSMENT IMPOSED TO PAY JUDGMENTS, ATTORNEY'S FEES AND COSTS INCURRED IN CONNECTION WITH A LAWSUIT BROUGHT BY UNIT OWNERS AGAINST THE ASSOCIATION IN WHICH THE ASSOCIATION'S PURCHASE OF REAL PROPERTY WAS INVALIDATED AS AN UNAUTHORIZED ACT AND SUBSEQUENTLY RESCINDED.<sup>52</sup>

The case involved the association's attempt to purchase real property apparently valued at over \$630,000. The association imposed a \$1500 special assessment to pay for the purchase, and 150 unit owners brought suit, claiming that the attempted purchase was beyond the power of the association's board of directors. The unit owners prevailed, and their attorneys were awarded \$194,079.37 in fees. The association had to refund the special assessment, and sought to impose another special assessment of

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46. 641 So. 2d 922 (Fla. 5th Dist. Ct. App. 1994), *review denied*, 651 So.2d 1195 (Fla. 1995).

47. *Id.* at 924.

48. *Id.*

49. *Id.*

50. *Id.*

51. 650 So. 2d 4 (Fla. 1994).

52. *Id.* at 5-6.

\$500 to pay for the attorney's fees resulting from the litigation. The unit owners again sued for a declaratory judgment that the \$500 special assessment was unauthorized, and for breach of fiduciary duty arising from the selective disbursement of the refunds to only those unit owners who sued.

The circuit court held that the \$500 special assessment was an authorized common expense, but the Fourth District Court of Appeal reversed, holding that the association could not be authorized to impose assessments to pay for the consequences of acts which were themselves unauthorized.<sup>53</sup> The Supreme Court of Florida reversed the Fourth District Court of Appeal's decision and remanded with orders to affirm the circuit court's judgment.<sup>54</sup> The court based its decision on a logical reading of chapter 718, finding that judgments against an association make the common elements subject to execution and levy, and an association is empowered to impose special assessments to protect the common elements.<sup>55</sup> Justice Kogan argued in his partial dissent that the Condominium Act did not sanction such a result, in which the unit owners were forced to pay the judgment they obtained.<sup>56</sup>

*Residential Communities of America v. Escondido Community Ass'n.*<sup>57</sup> Escondido Community Association ("ECA"), recorded an amendment to the declaration of condominium which prevented the sale of any condominium unit to a person unless the occupant was fifty-five or older. The developer, Residential Communities of America ("RCA"), sued because the amendment was passed without the necessary approval of RCA. RCA also sought damages and attorney's fees in the trial court, claiming that the amendment amounted to a slander of title. The case ultimately reached the Fifth District Court of Appeal, which ruled in favor of the developer RCA, holding that ECA had acted in good faith, and therefore that RCA was required to prove actual malice in order to prevail in its slander of title claim.<sup>58</sup> Since ECA had made no false or malicious statement, RCA was unable to prove damages.

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53. *Id.* at 6.

54. *Id.*

55. *Id.*

56. *Ocean Trail Unit Owners Ass'n, Inc.*, 650 So. 2d at 8 (Kogan, J., dissenting).

57. 645 So. 2d 149 (Fla. 5th Dist. Ct. App. 1994).

58. *Id.* at 151.

Chief Judge Harris dissented, arguing that good faith and lack of malice was irrelevant and that RCA should be awarded attorney's fees for having to bring the suit in the first place.<sup>59</sup>

*Rosso v. Golden Surf Towers Condominium Ass'n.*<sup>60</sup> The condominium association owned a dock. Rosso used the dock to moor his forty-seven foot sailboat. The association informed Rosso that there was a monthly charge of \$2.00 per linear foot for the exclusive use of the dock space. Rosso paid the fee initially, but stopped paying when the association increased the fee to \$3.00 per linear foot. The association then obtained a preliminary injunction removing the sailboat from the dock, and it sued to collect the unpaid fees. Rosso claimed that no fee for the use of common elements was permitted under chapter 718 of the *Florida Statutes*, but the Fourth District Court of Appeal disagreed.<sup>61</sup>

The association can charge a fee for the use of common elements if the declaration of condominium provides for such practice and a majority of the association votes to adopt the practice, unless the charges relate to one owner having exclusive use of the property.<sup>62</sup> The court held that a genuine issue of material fact existed as to whether the association had met any of the alternatives to support its action in charging the fee.<sup>63</sup>

Additionally, if the fee were permitted, the association would have to, under section 718.111(4), create rules and regulations regarding the terms of the usage fees. The district court affirmed the injunction, reversed the summary judgment in favor of the association, vacated the award of attorney's fees, and remanded.<sup>64</sup>

*Greens of Town 'N Country Condominium Ass'n v. Greens of Tampa, Inc.*<sup>65</sup> The condominium association appealed a dismissal with prejudice of its complaint against the developer and the pre- and post-turnover directors. The cause of action was negligence in design, construction, inspection, repair, and maintenance of the condominium's roof and electrical wiring. The Second District Court of Appeal affirmed the dismissal based on the economic loss rule which requires the remedy to be in contract when

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59. *Id.* at 151 (Harris, J., dissenting).

60. 651 So. 2d 787 (Fla. 4th Dist. Ct. App. 1995).

61. *Id.* at 788.

62. *Id.*

63. *Id.* at 789.

64. *Id.*

65. 653 So. 2d 1136 (Fla. 2d Dist. Ct. App. 1995).

a contract exists.<sup>66</sup> However, it reversed the order making the dismissal without prejudice, allowing the association to amend its complaint.<sup>67</sup>

With regard to legislation, Chapter 95-274 made important changes to Chapter 718 as well as homeowner association provisions in Chapter 617. Chapter 95-274 is discussed in Part XVIII.

## VI. CONSTRUCTION

*Murthy v. N. Sinha Corp.*<sup>68</sup> The contract provided for the N. Sinha Corporation to build additions and improvements to the owners' home. The corporation commenced this action to foreclose on its mechanic's lien and for breach of contract. The homeowners counterclaimed and filed affirmative defenses based upon claims that the work was defective. The homeowners also filed a third-party complaint against the corporation's president, N. Sinha, as the corporation's qualifying agent. Chapter 489 of the *Florida Statutes* requires that a business organization such as a corporation, acting as a contractor, have an individual licensed contractor act as the "qualifying agent" for the corporation.<sup>69</sup> The homeowners claimed that the statute's imposition of duties on the qualifying agent to supervise the construction impliedly created a private cause of action for breach of that duty.<sup>70</sup> The Third District Court of Appeal dismissed the claim because N. Sinha individually was not a party to the contract. The Supreme Court of Florida, in an unanimous opinion written by Senior Justice McDonald,<sup>71</sup> agreed. The court stated that "legislative intent, rather than the duty to benefit a class of individuals, should be the primary factor considered by a court in determining whether a cause of action exists when a statute does not expressly provide for one."<sup>72</sup> It found no evidence in the language of the statute or the legislative history suggesting the legislature intended to create a private cause of action. The general rule is that a statute which provides for the safety or welfare of the general public will not be construed to create a private cause of action in the absence of express language. Consequently, no cause of action existed against the qualifying agent for breach of his supervisory duties.

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66. *Id.* at 1137.

67. *Id.*

68. 644 So. 2d 983 (Fla. 1994).

69. FLA. STAT. § 489.119 (1991).

70. *Murthy*, 644 So. 2d at 985. See FLA. STAT. §§ 489.105(4), 489.115 (1991).

71. Chief Justice Grimes and Justices Overton, Shaw, Kogan, and Harding concurred.

72. *Murthy*, 644 So. 2d at 985.

*Hendry Corp. v. Metro-Dade County*.<sup>73</sup> This case involved a contract to demolish the old Rickenbacker Causeway connecting Key Biscayne to the mainland. The County withheld part of the payment under the contract when the contractor failed to complete the work as scheduled. Hendry sued the County, alleging the County was liable for costs arising from unexpected site conditions which it failed to disclose (such as subsurface debris and pilings of wood instead of concrete, both making the job more difficult). The trial court rejected Hendry's request to have the jury instructed that the County had a duty to disclose all available information on the project and to warrant that plans and specifications provided were full, complete, and accurate.<sup>74</sup> The district court held that was not an error.<sup>75</sup> Judge Jorgenson's majority opinion stated, "our courts have recognized only that the government has an affirmative duty to provide bidders with information that will not mislead them."<sup>76</sup>

Judge Baskin dissented based upon the terms of the contract. The contract contained a differing site condition ("DSC") clause which provided:

The Contractor shall promptly, and before such conditions are disturbed, notify the Engineer in writing of: (1) Subsurface or latent physical conditions at the site differing materially from those indicated in this Contract, or (2) unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as in work of the character provided for in this Contract. The Engineer will promptly investigate the conditions, and if he finds that such conditions do materially differ and cause an increase or decrease in the Contractor's cost of, or the time required for, performance of any part of the work under this contract, whether or not changed as a result of such conditions, an equitable adjustment will be made and the contract modified accordingly.<sup>77</sup>

This type of clause is common in public works contracts. It "shifts the normal contractual risk of additional costs incurred from an unexpected condition from the bidder [i.e., the contractor] to the contracting public

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73. 648 So. 2d 140 (Fla. 3d Dist. Ct. App. 1994), *review denied*, 659 So. 2d 1087 (Fla. 1995). This replaces the original opinion at 18 Fla. L. Weekly D2301a which was withdrawn after the granting of a motion for rehearing.

74. *Id.* at 141.

75. *Id.* at 142.

76. *Id.* at 141 (citations omitted).

77. *Id.*

authority.”<sup>78</sup> The contractor need not allege or prove fraud or misrepresentation on the part of the public authority. Judge Baskin concluded that the requested jury instruction was accurate given the DSC clause in this contract and thus the contractor should have been entitled to reversal.

*Hummel v. Stenstrom-Strump Construction & Development Corp.*<sup>79</sup> Owners of land entered into a contract for the construction of a home on their lot. The builder submitted the plans to the City of Sanford for approval, and then built the home. After the City issued a certificate of occupancy, the landowners moved in. A short time later, stormwater caused significant physical damage to the home and the contents. The landowners sued the builder under a variety of theories and also sued the City of Sanford for negligence in approving the plans and inspecting the builder’s work, for breach of the City’s warranties contained in the certificate of occupancy, and for negligent operation and maintenance of its stormwater drainage system. The City asserted sovereign immunity and argued that it owed no duty to the plaintiffs.

The Fifth District Court of Appeal<sup>80</sup> affirmed the trial court’s dismissal of the claims against the City for negligence in approving the plans and inspecting the construction, as well as the claims for breach of warranties based on the certificate of occupancy.<sup>81</sup> This case presented a novel situation because this landowner was the one who had paid the inspection fee to the City.<sup>82</sup> Regardless of that distinction, the court followed the policy set out by the Supreme Court of Florida in *Trianon Park Condominium Ass’n, Inc. v. City of Hialeah*,<sup>83</sup> where it said, “[w]e find that the enforcement of building codes and ordinances is for the purpose of protecting the health and safety of the public, not the personal or property interests of individual citizens. . . .”<sup>84</sup> The district court, however, reversed the trial court’s dismissal of the action based on failure to maintain and operate its stormwater drainage system.<sup>85</sup> Such actions may be brought

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78. *Hendry Corp.*, 648 So. 2d at 143 (Baskin, J., dissenting).

79. 648 So. 2d 1239 (Fla. 5th Dist. Ct. App. 1995).

80. Chief Judge Harris wrote the opinion in which Judges Goshorn and Diamantis concurred.

81. 648 So. 2d at 1240.

82. *Compare* *Victoria Village G Condominium Ass’n v. City of Coconut Creek*, 488 So. 2d 900 (Fla. 4th Dist. Ct. App.), *review denied*, 497 So. 2d 1218 (Fla. 1986) *with* *Friedberg v. Town of Longboat Key*, 504 So. 2d 52 (Fla. 2d Dist. Ct. App. 1987).

83. 468 So. 2d 912 (Fla. 1985).

84. *Hummel*, 648 So. 2d at 1240 (quoting *Trianon*, 468 So. 2d at 922-23).

85. *Id.* at 1240-41.



against municipalities if their drainage systems fail to operate as intended or fail to meet the standards required by the building codes.<sup>86</sup>

*Martin v. Jack Yanks Construction Co.*<sup>87</sup> The homeowner appealed the trial court's judgment in favor of Yanks Construction, holding that the landowner had breached the construction contract the parties had entered into, and denying Martin punitive damages in its action to remove a lien fraudulently filed by Yanks.

Shortly after Hurricane Andrew, the landowner signed a repair "proposal" to return the home to its pre-hurricane condition with the final price for the work to be worked out between Yanks and Martin's insurer. After the landowner prevented Yanks from commencing the work, Yanks filed a claim of lien for the entire \$107,208.60 insurance check issued by Martin's insurer, arguing that it was entitled to file the lien based on the underlying contract.

The Third District Court of Appeal, in an opinion by Judge Nesbitt, agreed with the homeowner. It held the contract was void for indefiniteness because of the "absence of a definite price or a means of determining a price not left solely to the contractor's discretion . . . ."<sup>88</sup> The court also concluded that the landowner was entitled to claim punitive damages under *Florida Statutes* section 713.31. A contractor may have a lien "for any money that is owed to him for labor, services, materials, or other items required by, or furnished in accordance with the direct contract."<sup>89</sup> Since Yanks had not furnished anything, the lien was held to be fraudulent.

*Nystrom v. Cabada.*<sup>90</sup> Nystrom built his own house even though he was not a licensed contractor. After living there for about one year, he sold it. The buyer experienced problems with walls cracking and doors sticking. Engineers inspected the property and reported it to be hazardous. The buyer sued, claiming breach of implied warranty, fraud, rescission of contract, breach of contract, negligence, and violation of the county building code. After winning on the merits, the court gave the buyer the option of rescinding the purchase and getting back the purchase price or a damage judgment for the full purchase price. Of course, she chose the latter because that meant she could also keep the property and continue to live in the house. The Second District Court of Appeal, in an opinion by Judge

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86. *Id.* at 1240; *see* *Slemp v. City of North Miami*, 545 So. 2d 256 (Fla. 1989).

87. 650 So. 2d 120 (Fla. 3d Dist. Ct. App. 1995).

88. *Id.* at 121.

89. *Id.* (quoting FLA. STAT. § 713.05 (1993)).

90. 652 So. 2d 1266 (Fla. 2d Dist. Ct. App. 1995).

Patterson, affirmed<sup>91</sup> on the issue of liability, holding that the Nystroms had a duty to disclose the defects and the fact that the house was built by an unlicensed contractor. The court reversed on the issue of damages, however, holding that Cabada should not have been given the option of obtaining a money judgment for the full purchase price of the property and keeping the property.<sup>92</sup> Therefore, the case was remanded for a new trial on the issue of damages.

*Oriole Homes Corp. v. Bellsouth Telecommunications, Inc.*<sup>93</sup> The developer and the utility were involved in a dispute over who should bear the cost of road widening. *Florida Statutes* sections 125.42 and 337.403 allocate responsibility between a public body and a utility in a road widening or extension case. Judge Glickstein's opinion relied upon the first district's interpretation of an earlier statute<sup>94</sup> to reach the conclusion that the developer must bear the cost of road widening when the decision to widen to road is made by a developer for private benefit.

## VII. COVENANTS, DEEDS, AND RESTRICTIONS

*Antioch University v. Dept. of Natural Resources.*<sup>95</sup> Antioch University sued to enforce the reverter clause contained in two deeds which conveyed land in Broward County to the State of Florida with the proviso that it "shall be used and devoted solely and exclusively for State Park purposes . . . ."<sup>96</sup> The land became known as Hugh Taylor Birch State Park, named after the original grantor, who granted the reverter interest to Antioch. The basis for Antioch's claim to enforce the reverter was that the installation of storm water outfall pipes, use of structures as concession or refreshment stands, the presence of a Department of Transportation trailer, power lines and water mains, and the operation of a landfill or dump violated the exclusive use provision in the deeds. The Fourth District Court of Appeal affirmed the trial court's decision holding that the above did not violate the deed conditions and that Antioch was not entitled to enforce the reverter clause.<sup>97</sup>

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91. Acting Chief Judge Danahy and Judge Fulmer concurred.

92. *Nystrom*, 652 So. 2d at 1268.

93. 641 So. 2d 504 (Fla. 4th Dist. Ct. App. 1994).

94. *Century Constr. Corp. v. Central Tel. Co.*, 370 So. 2d 825 (Fla. 1st Dist. Ct. App. 1979) (interpreting FLA. STAT. § 338.19 (1977)).

95. 647 So. 2d 915 (Fla. 4th Dist. Ct. App. 1994), *review denied*, 659 So. 2d 270 (Fla. 1995).

96. *Id.* at 915.

97. *Id.* at 915-16.

*Blue Reef Holding Corp., Inc. v. Coyne*.<sup>98</sup> Blue Reef appealed the denial of a temporary injunction after the trial court determined that a declaration of restrictions to real property gave a developer the right to change the size and configuration of the recreation area in the development without obtaining the consent of the owners. The developer of Jupiter Key recorded covenants and restrictions describing the recreation area and stating that the designated area could only be used for recreational purposes. The declaration also stated that the covenants could be amended by the developer without consent of the owners, but “no amendment to this declaration shall be effective which would increase the liabilities of the then Owner or prejudice the rights of a then Owner . . . to utilize or enjoy the benefits of the then existing Common Property unless the Owner or Owners . . . consent to such amendment . . . .”<sup>99</sup> The developer reduced the size of the recreational area without recording any amendment, and without obtaining the consent of the appellant owner.

The Fourth District Court of Appeal reversed the denial of the temporary injunction because the reduction meant that the land was not going to be used only for recreational purposes, and it prejudiced the rights of the owners to enjoy the “then existing Common Property” in violation of the covenants.<sup>100</sup> Consent from the owners was required.<sup>101</sup>

*Brower v. Hubbard*.<sup>102</sup> The Browers owned a single-family home in a subdivision called Suburban Acres. The deed to their property contained restrictive covenants prohibiting any building in excess of two stories in height, and prohibiting noxious or offensive activity which may be a nuisance to the neighborhood. Their eighty-seven foot tower antenna was held to be a violation of these covenants, and they were ordered to remove it and to refrain from further radio transmissions. The Fourth District Court of Appeal affirmed the trial court’s ruling that the antenna had to be removed, but reversed on the prohibition against further transmission on grounds that this part of the decision was overly broad.<sup>103</sup>

*Dolphins Plus, Inc. v. Hobdy*.<sup>104</sup> Dolphins Plus is a volunteer nonprofit organization dedicated to caring for and rehabilitating injured or sick marine mammals in Key Largo. The organization owns land in Key

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98. 645 So. 2d 1053 (Fla. 4th Dist. Ct. App. 1994).

99. *Id.* at 1054.

100. *Id.* at 1055.

101. *Id.*

102. 643 So. 2d 28 (Fla. 4th Dist. Ct. App. 1994).

103. *Id.* at 29.

104. 650 So. 2d 213 (Fla. 3d Dist. Ct. App. 1995).

Largo Ocean Shores addition subdivision, as does Hobby and several others. Hobby and others sought declaratory and injunctive relief against Dolphins Plus because the organization had fenced in the area depicted on a platted subdivision as a "boat basin," and used it as a pen for the injured marine mammals. Dolphins Plus had previously obtained a lease from the heirs of the subdivision developer to use the "boat basin" as a pen, and had also obtained permission from Monroe County and the Department of Environmental Regulation.<sup>105</sup>

Hobby and the other property owners argued that the fence and Dolphins Plus's use of the basin for purposes unrelated to the mooring of boats violated the plat restrictions and unreasonably interfered with their use and enjoyment of the basin. The Declaration of Restriction reads: "No structure, building, dock, ramp, barge or any other thing or condition shall be permitted to impede or obstruct navigation in the waterway; boat basins excepted . . . ."<sup>106</sup>

The trial court ruled in favor of the objecting property owners, holding that the restriction and the term "boat basin" clearly prohibited Dolphins Plus's use of the basin as a pen.<sup>107</sup> Furthermore, the lease from the developer's heirs did not release or terminate the plat restriction. The Third District Court of Appeal affirmed, stating that, "a restriction imposed alike upon all the lots of a block or tract of land cannot be released to one purchaser or his grantee without the assent of the other purchasers, or their grantees, for whose benefit it was imposed."<sup>108</sup>

*Metropolitan Dade County v. Sunlink Corp.*<sup>109</sup> Sunlink entered into a contract to sell forty acres of vacant land in northern Dade County. The land was encumbered by a restrictive covenant which prevented the land from being sold to anyone other than an entity owned, controlled by, or affiliated with AT&T. The covenant was created before AT&T was restructured, and Sunlink was a former AT&T affiliate. The covenant was to run from December, 1974, for thirty years, and to be extended automatically for successive ten-year periods unless an instrument recorded and signed by a majority of the then owner(s) of the real property, and a majority of those owners within 500 feet of the boundary of the property, agree to change the

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105. *Id.* at 213-14.

106. *Id.* at 214.

107. *Id.*

108. *Id.* (quoting GEORGE W. THOMPSON, THOMPSON ON REAL PROPERTY § 3173 (4th ed. 1962)).

109. 642 So. 2d 551 (Fla. 3d Dist. Ct. App. 1994), *review denied*, 651 So. 2d 1196 (Fla. 1995).

covenants in whole or in part, providing the covenants have first been released by the [Dade County] Commission. The prospective buyer did not fit this restriction and the County argued that Sunlink could not sell the land without obtaining the permission of the several thousand neighboring property owners to release the restrictive covenant.<sup>110</sup>

Sunlink sued in circuit court, seeking termination of the covenant due to changed circumstances, and argued in the alternative that the covenant was an unlawful restraint against alienation. The circuit court granted Sunlink summary judgment, holding that the covenant was an illegal restraint against alienation, and the County appealed.<sup>111</sup> The initial decision from the Third District Court of Appeal affirmed the circuit court. However, the County's motion for a rehearing en banc was granted and the en banc court reversed, instructing Sunlink to seek the permission to release the covenant from the neighboring property owners. The court held that the restriction was not an unreasonable restraint against alienation because it was subject to cancellation or modification and was not perpetual.<sup>112</sup> The goal of the covenant, to preserve the character of the neighborhood for the general welfare of the public, was reasonable.

Judge Baskin's dissent restated the law in Florida on the validity of restraints against alienation: validity is determined by measuring the term of duration of the restraint, the type of alienation precluded, and the size of the class precluded from taking. Here, Judge Baskin argued that these factors clearly indicated that the restraint should be void, and criticized the majority's reliance on *Metropolitan Dade County v. Fountainbleu Gas & Wash, Inc.*<sup>113</sup> That case dealt with an attempt to circumvent a zoning restriction, which Judge Baskin explained is a different issue from an unreasonable restraint against alienation.<sup>114</sup>

Judge Cope argued that the answer to this case was given in *Davis v. Geyer*.<sup>115</sup> The Supreme Court of Florida in *Davis* held that "[a] condition to alien only to a particular person . . . is void . . ." citing the *Statute of Quia Emptores* in support of its decision.<sup>116</sup> Judge Cope went further, however, stating that the remedy in such a case should be determined by an

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110. *Id.*

111. *Id.* at 552.

112. *Id.* at 556.

113. *Id.* (Baskin, J., dissenting); see *Metropolitan Dade County v. Fountainbleu Gas & Wash, Inc.*, 570 So. 2d 1006 (Fla. 3d Dist. Ct. App. 1990).

114. *Sunlink Corp.*, 642 So. 2d at 556.

115. *Id.* at 558; see *Davis v. Geyer*, 9 So. 2d 727 (Fla. 1942).

116. *Davis*, 9 So. 2d at 730.

evidentiary hearing, because the covenant may have been taken into consideration when negotiating the sale of the property.<sup>117</sup>

Legislation impacting the law of covenants consisted of Chapter 95-274 which provides in relevant part, that homeowner association covenants survive after tax and foreclosure sales.<sup>118</sup>

### VIII. EASEMENTS

*Cook v. Proctor & Gamble Cellulose Co.*<sup>119</sup> Proctor & Gamble brought an action to establish a prescriptive easement for ingress and egress over property owned by the appellants Cook and Rives. Proctor & Gamble had no action in its own right because the property owners' predecessor in title had given Proctor & Gamble's predecessors permission to construct and use the roadway. In fact, the former owner used the road herself. The land in question consisted of the southernmost 700 feet of a twenty-two mile road which had been used for many years by Proctor & Gamble and its predecessor for commercial purposes. In support of its action to establish a public easement, Proctor & Gamble presented evidence of only four people who testified that they had used the road for more than the required twenty years.

The requirements in Florida to obtain a right of use by prescription are: actual, continuous, adverse, and inconsistent uninterrupted use of the lands of another for the prescribed twenty-year period. Therefore, Proctor & Gamble sought to establish a "public" prescriptive easement. The trial court held in favor of Proctor & Gamble and the property owners appealed.<sup>120</sup> The First District Court of Appeal reversed, holding that use by four people was insufficient to establish substantial use by the public so as to lead to a public prescriptive right.<sup>121</sup> In order to establish a public prescriptive easement, the land must be used by the public in general.<sup>122</sup> Additionally, the First District Court of Appeal held that Proctor & Gamble's use was not inconsistent with the owner's use of the land. "Doubts as to the creation of a prescriptive right must be resolved in favor of the landowner. . . . Under

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117. *Sunlink Corp.*, 642 So. 2d at 558.

118. Chapter 95-274 is discussed later in this article. See *infra* part XVIII.

119. 648 So. 2d 180 (Fla. 1st Dist. Ct. App. 1994).

120. *Id.* at 180-81.

121. *Id.* at 181.

122. *Id.*

Florida law, any use in common with the owner is presumed to be subordinate to the owner's title and with the owner's permission."<sup>123</sup>

Finally, the court held that Proctor & Gamble lacked standing to assert the rights of the public.<sup>124</sup> It was plain to the court that Proctor & Gamble's purpose in bringing the action was not to benefit the public, but instead to benefit its own interests, because during the three years of litigation, no other member of the public or representative body had come forward to establish the easement. The court stated that in order to bring an action to redress a public wrong, a plaintiff must demonstrate that he suffered or is threatened with some special, particular, or peculiar injury growing out of the public wrong.<sup>125</sup> Associate Judge Reynolds disagreed on the standing issue in his partial dissent, arguing that the longer route Proctor & Gamble must now take was a sufficient injury to provide standing.<sup>126</sup>

*Enzor v. Rasberry.*<sup>127</sup> Rasberry filed suit to extinguish Enzor's claim to a common law way of necessity across Rasberry's land. The trial court entered a final judgment quieting title to the disputed road, holding that Enzor had reasonable and practicable alternative means of ingress and egress to his property.<sup>128</sup> The First District Court of Appeal disagreed, reversed, and remanded.<sup>129</sup>

Section 704.01(1) of the *Florida Statutes* codifies the common law rule of an implied grant of a way of necessity where:

a person . . . grants lands to which there is no accessible right-of-way except over his land . . . . Such an implied grant or easement in lands or estates exists where there is no other reasonable and practicable way of egress, or ingress and same is reasonably necessary for the beneficial use or enjoyment of the part granted or reserved. An implied grant arises only where a unity of title exists from a common source other than the original grant from the state or United States.<sup>130</sup>

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123. *Id.* (citations omitted).

124. *Cook*, 648 So. 2d at 181.

125. *Id.* at 182.

126. *Id.* (Reynolds, J., dissenting).

127. 648 So. 2d 788 (Fla. 1st Dist. Ct. App. 1994).

128. *Id.* at 789.

129. *Id.* at 795.

130. FLA. STAT. § 704.01(1) (1993).

Once established, a way of necessity passes by each conveyance to subsequent grantees. The proponent of an implied grant of a way of necessity must establish three elements:

(1) both properties must at one time have been owned by the same party, (2) the common source of title must have created the situation causing the dominant tenement to become landlocked, and (3) at the time the common source of title created the problem the servient tenement must have had access to a public road.<sup>131</sup>

Rasberry owned three parcels and sold two of them to a Mr. Adams, causing the conveyed parcels to become landlocked at the time when the third parcel, retained by Rasberry, had access to a public road. Enzor owned one of the parcels formerly owned by Adams, and, therefore, also obtained the way of necessity. He used this easement to reach another landlocked parcel he owned and used as a hunting camp. Later, the State of Florida, during construction of Interstate 10, condemned a portion of Rasberry's property and created a service road leading from a public road through part of Enzor's easement, but stopping short of Enzor's land. Enzor still had to use the end part of the easement to reach his property. The service road, however, did provide an alternate route for the initial part of the journey. Enzor made use of this new road. However, the State later transferred the road to Okaloosa County, which vacated it and quitclaimed the road to Rasberry. At that time, Rasberry gave Enzor permission to use what was formerly the service road to reach his parcels. Rasberry now wanted to revoke such permission, arguing that Enzor had another implied easement of necessity through the parcel kept by Adams when Adams sold one parcel to Enzor. Adams, however, obtained an easement from Rasberry when he purchased two parcels from Rasberry. Adams then sold one of those parcels to Enzor. When Adams conveyed one parcel to Enzor, it was not only accessible through the parcel retained by Adams, but it was also accessible through the easement over Rasberry's parcel. Therefore, there existed only one easement, the original one over Rasberry's land. Although a road was subsequently created across the parcel that Adams had retained, Enzor had no right to use it, and the road was not always usable.<sup>132</sup>

The First District Court of Appeal held that the original easement was still valid because the necessity which gave rise to it still existed.<sup>133</sup>

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131. *Enzor*, 648 So. 2d at 791 (citations omitted).

132. *Id.* at 794.

133. *Id.* at 795.



## IX. EMINENT DOMAIN

A. *Condemnation*

*Finkelstein v. Department of Transportation*.<sup>134</sup> The Supreme Court of Florida considered the question, although it was not properly certified, “[w]hether evidence of environmental contamination is relevant and otherwise admissible in an eminent domain valuation trial” and answered in the affirmative.<sup>135</sup>

In this case the subject property was a gas station with petroleum contamination. In the valuation trial, the Department of Transportation (“DOT”), moved in limine to include evidence that the property was contaminated, but the trial court ruled that the proffered evidence of contamination due to the stigma that would attach to the property was not relevant because the contamination was being remedied under the Early Detection Incentive program, which would reimburse property owners for the costs of eliminating the problem. The property was then valued as if not contaminated.

The Fourth District Court of Appeal reversed, and the Supreme Court of Florida, in an opinion by Justice Wells, affirmed in part, but reversed in part.<sup>136</sup> Under the circumstances of the reclamation program, the property should have been valued as if clear of contamination. However, evidence that the existence of prior contamination would stigmatize the property, affecting its market value, would be relevant and admissible in a valuation trial if the proper predicate was laid. The court expressed concern over the prejudicial nature of evidence of contamination. In order to be admissible, the evidence of contamination must “have a basis in facts and data reasonably relied upon by experts in the field of real property valuation, section 90.704, Florida Statutes (1993), and pass the test of section 90.705(2), Florida Statutes (1993).”<sup>137</sup> Evidence of sales of comparable, contaminated property would provide an adequate factual basis. The supreme court agreed with the trial court that evidence of the cost of remediation should not be admitted where those costs were not to be born by the landowner.

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134. 656 So. 2d 921 (Fla. 1995).

135. *Id.* at 922.

136. *Id.* at 925.

137. *Id.*

Justice Anstead expressed his concern that the majority opinion was going too far, answering questions that had not been asked.<sup>138</sup> Quite prudently, he would have simply answered the question in the affirmative and awaited later cases to elaborate on issues of evidence and valuation.

*Basic Energy Corp. v. Hamilton County.*<sup>139</sup> The City of Jasper wanted to attract the prison industry for economic reasons, such as to provide jobs for local citizens and add to the City's revenues. Consequently, it commenced this condemnation action to acquire land which it would offer to donate to the state as a site for a state prison. The property owner challenged the taking, contending that the City had no authority to exercise eminent domain powers for this purpose. The landowner lost in the circuit court, but prevailed in the First District Court of Appeal. This was not a case which analyzed the limits of the eminent domain power, but rather focused on the limits of power granted to this particular governmental entity. The court noted that the City is granted power by the *Florida Constitution*<sup>140</sup> to perform municipal functions, but concluded that securing the construction or operation of a state prison did not fit within the scope of municipal function. Furthermore, the statutory grant of authority to construct and operate jails to municipalities<sup>141</sup> did not include authority to engage in prison construction or operation. A prison and a jail are not the same thing. A jail is a short-term lockup, holding prisoners awaiting trial or serving short sentences and operated by a city or county. A prison, on the other hand, is for long-term incarceration and is operated by the state.

*Department of Transportation v. Manoli.*<sup>142</sup> DOT appealed the amount awarded to the appellee as business damages after DOT took a portion of appellee's gas station as part of its highway widening project. The business was incorporated, but the appellee was personally the lessee of the gas station and worked there as an employee of the corporation. Appellee's expert convinced the trial court that the wages the appellee received should not be considered in calculating his business loss. His damages were calculated by deducting from gross income the cost of goods sold, wages, rent, and other operating expenses, but not the wages he received as an employee. Judge Klein, writing for the Fourth District Court of Appeal, concluded<sup>143</sup> that was incorrect. He noted that business

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138. *Id.* at 926.

139. 652 So. 2d 1237 (Fla. 1st Dist. Ct. App. 1995).

140. FLA. CONST. art. VIII, § 2.

141. FLA. STAT. § 180.06 (1993).

142. 645 So. 2d 1093 (Fla. 4th Dist. Ct. App. 1994).

143. Judges Hersey and Gunther concurred.

damages are entirely based upon a statute,<sup>144</sup> not the constitution. Business damages are based on lost profits. To ignore the profits he had received, even in the form of wages, would inflate his damages. The court noted that the amount of lost profits is not the only way of computing business damages, but that when lost profits is the method used, the reasonable value of the self-employed owner's services must be deducted.

*Downtown Square Assoc. v. Florida Department of Education.*<sup>145</sup> In this condemnation action, the landowner sought fees for attorneys and experts. At the time that the litigation began, *Florida Statutes* section 73.092 provided:

(1) In assessing attorney's fees in eminent domain proceedings, the court shall give greatest weight to the benefits resulting to the client [condemnee] from the services rendered.

. . . .

(2) In assessing attorney's fees in eminent domain proceedings, the court shall give secondary consideration to: (a) The novelty, difficulty, and importance of the questions involved. (b) The skill employed by the attorney in conducting the cause. (c) The amount of money involved. (d) The responsibility incurred and fulfilled by the attorney. (e) The attorney's time and labor reasonably required adequately to represent the client in relation to the benefits resulting to the client.

. . . .

(4) In determining the amount of attorney's fees to be paid by the petitioner, the court shall be guided by the fees the defendant would ordinarily be expected to pay if the petitioner [condemnor] were not responsible for the payment of fees and costs.<sup>146</sup>

The Fourth District Court of Appeal, in an opinion by Judge Polen,<sup>147</sup> decided that this list was exclusive, relying without elaboration on an earlier supreme court decision.<sup>148</sup> Consequently, the trial court erred when it considered factors outside the list, although the court did not specify what

144. FLA. STAT. § 73.071(3)(b) (1991).

145. 648 So. 2d 1265 (Fla. 4th Dist. Ct. App. 1995).

146. FLA. STAT. § 73.092 (1993), amended by Ch. 94-162, § 3, 1994 Fla. Laws 564, 566-67.

147. Chief Judge Dell and Judge Stone concurred.

148. *Schick v. Department of Agric. & Consumer Servs.*, 599 So. 2d 641 (Fla. 1992).

those factors were. Because the trial court had been thoughtful enough to specify what the reasonable fees would have been had it not considered those additional factors, the Fourth District Court of Appeal simply reversed and ordered fees to be awarded on that basis.<sup>149</sup>

*JFR Investment v. Delray Beach Community Redevelopment Agency*.<sup>150</sup> After the City declared an area to be blighted and in need of rehabilitation, it created a community redevelopment agency ("CRA"). The CRA moved to take this land with plans to use it:

for off street parking and two historic homes will be relocated there. One of these homes will serve as the CRA headquarters and the other is expected to house the Palm Beach County Historic Preservation Board. A walkway through the block will link the Old School Square with municipal offices and other structures to the west. . . . The parking facilities planned . . . will serve as overflow parking for the tennis center and the community center and also provide parking for offices to be located in the relocated historic houses.<sup>151</sup>

The landowner challenged the taking, claiming that it was being done for private rather than public use because the parking would be used for the benefit of private development. The Fourth District Court of Appeal, in this per curiam decision,<sup>152</sup> properly distinguished this case from *Baycol, Inc. v. Downtown Development Authority of City of Fort Lauderdale*.<sup>153</sup> The court observed that this project "will end up with a combination public use, retail, office, and entertainment center that will need parking."<sup>154</sup> The record supported the conclusion that the parking provided on this land would primarily benefit the public usage.<sup>155</sup> The private benefit was incidental, and an incidental private use of taken land is permissible.

*White v. Department of Transportation*.<sup>156</sup> The landowner was a real estate broker. At the condemnation trial, he did not call an appraiser but offered his own testimony regarding the value of the property. On cross-examination, he was required to publish portions of an appraisal report, revealing that he had hired an appraiser, received that appraiser's report, and

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149. 648 So. 2d at 1266.

150. 652 So. 2d 1261 (Fla. 4th Dist. Ct. App. 1995).

151. *Id.* at 1262.

152. Judges Stone, Warner, and Farmer concurred.

153. 315 So. 2d 451 (Fla. 1975).

154. 652 So. 2d at 1263.

155. *Id.*

156. 645 So. 2d 114 (Fla. 5th Dist. Ct. App. 1994).

did not call that appraiser as an expert. According to the Fifth District, this was reversible error because it might create the inference that he was concealing or covering up evidence harmful to his case. A brief opinion by Judge Griffin<sup>157</sup> pointed out the district court had, a decade earlier in *Sun Charm Ranch, Inc. v. City of Orlando*,<sup>158</sup> established a rule allowing a landowner to use the condemnor's expert only where such inference is carefully avoided. The rule was here applied with equal force against the condemnor.

### B. *Inverse Condemnation*

*Rubano v. Department of Transportation*.<sup>159</sup> The Supreme Court of Florida, in an opinion written by Justice Anstead,<sup>160</sup> answered the following certified question in the negative:

DID THE DEPARTMENT OF TRANSPORTATION ENGAGE IN A COMPENSABLE TEMPORARY TAKING OF ACCESS WHEN IT ELIMINATED PETITIONERS' DIRECT ACCESS TO A STATE ROAD BY PLACING PETITIONERS' PROPERTY ON A SERVICE ROAD, ELIMINATED A PROTECTED U-TURN AND REPLACED IT WITH ANOTHER U-TURN WHICH ADDED ONE AND ONE-HALF MILES OF TRAVEL TO REACH THE PROPERTIES, AND SEVERED THE CONNECTIONS FROM INTERSTATE 95 TO STATE ROAD 84?<sup>161</sup>

This case involved five separate inverse condemnation actions which were consolidated. The properties were all located in Broward County west of I-95 between Southwest 26th and 23rd Terrace on the north side of S.R. 84. Before the construction, the properties were accessed by eastbound traffic on S.R. 84 by making a u-turn. Traffic exiting the properties could get back on the eastbound lanes of S.R. 84 by another u-turn. During construction of a new bridge on S.R. 84 over I-95, a u-turn was eliminated so that eastbound traffic from S.R. 84 would have to go an additional mile and a half to reach the property and the property could not be directly

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157. Judges Cobb and Peterson concurred.

158. 407 So. 2d 938 (Fla. 5th Dist. Ct. App. 1981).

159. 656 So. 2d 1264 (Fla. 1995).

160. Chief Justice Grimes and Justices Overton, Shaw, Kogan, and Harding concurred. Justice Wells also wrote a short special concurring opinion in which Chief Justice Grimes concurred.

161. 656 So. 2d at 1265.

reached from S.R. 84. It was now reached only through a service road. In addition, the construction eliminated an exit from I-95 to S.R. 84, so I-95 traffic could not reach the properties by that direct route. I-95 traffic would have to exit onto I-595 and then exit onto S.R. 84 which runs parallel to it.

The supreme court held that this did not constitute a compensable taking. It cited *Department of Transportation v. Gefen*<sup>162</sup> for the proposition that no one has vested rights to the maintenance of a public highway in any particular place.<sup>163</sup> Similarly, no owner has a vested right in the continuation of traffic flow past his property. In this case, access was not completely eliminated, not even temporarily. The petitioners just lost their most convenient means of access.

Justice Wells agreed with the court's analysis and conclusions, but was uncomfortable with the results.<sup>164</sup> With Chief Justice Grimes' concurrence, he called on the legislature to provide relief to the victims of long disruptions caused by road construction.

*Weaver Oil Co. v. City of Tallahassee*.<sup>165</sup> The lessee of a commercial gas station and convenience store enjoyed two points of access from the main street. As part of a road improvement scheme, the City took a strip of land along the frontage. The City also constructed a traffic control island on city-owned property. This island reduced the width of one access from forty-four to twenty-seven feet. In response, the lessee sought statutory business damages and won \$94,000 in the trial court. The First District Court of Appeal reversed, but certified the following question concerning a 1987 Florida statute:

DOES SECTION 73.071, FLORIDA STATUTES, PERMIT A CLAIM FOR STATUTORY BUSINESS DAMAGES FOR AN ALLEGED SUBSTANTIAL IMPAIRMENT OF ACCESS RESULTING FROM GOVERNMENTAL CONSTRUCTION ON EXISTING RIGHT-OF-WAY ABUTTING THE OWNER'S PROPERTY, WHERE NO LAND IS TAKEN?<sup>166</sup>

In an unanimous opinion written by Justice Overton,<sup>167</sup> the Supreme Court of Florida answered the certified question in the negative. A loss of

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162. 636 So. 2d 1345-46 (Fla. 1994).

163. 656 So. 2d at 1267-68.

164. *Id.* at 1271.

165. 647 So. 2d 819 (Fla. 1994).

166. *City of Tallahassee v. Boyd*, 616 So. 2d 1000, 1004 (Fla. 1st Dist. Ct. App. 1993).

167. Chief Justice Grimes, and Justices Shaw, Kogan, Harding, Wells, and Anstead concurred.

access can constitute a taking for which compensation is required even though no land is actually lost. The taking occurs when a landowner has suffered an unreasonable interference with the access to or from his property to an existing street. However, the loss of access must be substantial. The supreme court quoted from its earlier opinion in *Palm Beach County v. Tessler*<sup>168</sup> that, "the fact that a portion or even all of one's access to an abutting road is destroyed does not constitute a taking unless, when considered in light of the remaining access to the property, it can be said that the property owner's right of access was substantially diminished."<sup>169</sup> The facts in the case at bar did not support the conclusion that a taking had occurred and, consequently, business damages could not be recovered.

The court went on to provide some interesting dicta. It reiterated that the legislature had provided for business damages, available only when there has been a partial taking of land. The statute did not provide for business damages where there had been a partial taking of access, even though that required compensation. Although this case arose in conjunction with the condemnation of a strip of land, the basis for the business damages claim was the creation of the traffic island limiting access. Consequently, even if the loss of access had required compensation, the landowner would still not have been entitled to statutory damages for injury to the business.

*Department of Transportation v. Gefen*.<sup>170</sup> The landowner prevailed in the trial court in an action for inverse condemnation, but lost on appeal. She then filed a motion for appellate attorney's fees based upon *Florida Statutes*, section 73.131(2).<sup>171</sup> The statute provides for a condemning authority to pay appellate attorney's fees except in cases where the landowner had appealed unsuccessfully, and that was not the situation in this case. That statute had been interpreted to apply to inverse condemnation cases,<sup>172</sup> so it would appear at first glance that the landowner would be entitled to attorney's fees here. The supreme court disagreed. In unani-

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168. 538 So. 2d 846, 849 (Fla. 1989).

169. *Weaver Oil Co.*, 647 So. 2d at 821-22 (emphasis omitted) (quoting *Palm Beach County v. Tessler*, 538 So. 2d 846, 849 (Fla. 1989)).

170. 636 So. 2d 1345 (Fla. 1994).

171. Section 73.131(2) provides in relevant part: "(2) The petitioner shall pay all reasonable costs of the proceedings in the appellate court, including a reasonable attorney's fee to be assessed by that court, except upon an appeal taken by a defendant in which the judgment of the lower court shall be affirmed." FLA. STAT. § 73.131(2) (1993).

172. *County of Volusia v. Pickens*, 435 So. 2d 247 (Fla. 5th Dist. Ct. App.), *review denied*, 443 So. 2d 980 (Fla. 1983); *State Road Dep't v. Lewis*, 190 So. 2d 598 (Fla. 1st Dist. Ct. App.), *cert. dismissed*, 192 So. 2d 499 (Fla. 1966).

mously denying the motion,<sup>173</sup> the court found, without elaboration, that an unsuccessful litigant should not recover appellate attorney's fees even if the appeal had been filed by the State. The court concluded that "a landowner claiming inverse condemnation is only entitled to appellate attorney's fees if the claim is ultimately successful."<sup>174</sup>

*Department of Transportation v. Heckman.*<sup>175</sup> A landowner seeking a building permit to construct an indoor gun range was required by the City of Oakland Park to convey a seven-foot strip in exchange for waiver of platting requirements. Later, the City conveyed the strip to the Department of Transportation for widening the highway. When the Department of Transportation later condemned additional portions of the owner's property for a drainage easement, the owners sued for compensation for the taking of the seven-foot strip, claiming inverse condemnation in that the City had been acting as an agent for the Department of Transportation when it had improperly required them to give up the land. The owners prevailed in the trial court, but the Fourth District Court of Appeal, in an opinion written by Judge Klein,<sup>176</sup> reversed, holding that there was no evidence of a direct agency relationship.<sup>177</sup> The court distinguished this case from out of state examples<sup>178</sup> in which the state agency was directly involved and thus

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173. Chief Justice Grimes, Justices Overton, Shaw, Kogan and Harding, and Senior Justice McDonald all concurred in the order. The author was not identified.

174. *Gefen*, 636 So. 2d at 1347.

175. 644 So. 2d 527 (Fla. 4th Dist. Ct. App. 1994), *review denied*, 651 So. 2d 1194 (Fla. 1995). The original opinion, which appears at 19 Fla. L. Weekly D1926 (4th Dist. Ct. App. Sept. 14, 1994), differed from the final opinion only in that the following was deleted from the next to last paragraph of the original: "Nor are courts unwilling to compensate property owners for egregious conduct by local governments. See, e.g., *Town of Highland Beach v. Resolution Trust Corp.*, 18 F.3d 1536 (11th Cir. 1994), in which a verdict in excess of \$30 million was affirmed against a town as a result of an unconstitutional regulatory taking of property" and the elimination of a footnote which stated: "We are aware that the property owners have a separate lawsuit pending against the city. Although the trial court found that the city acted improperly in this case, the city is not a party here, and our mention of that finding in this opinion is nothing more than a description of what the trial court found. Our conclusion does not require us to consider the propriety of the city's conduct." 19 Fla. L. Weekly at D1927 n.1.

The appellate review of the suit against the City appears as *Heckman v. City of Oakland Park*, 655 So. 2d 525 (Fla. 4th Dist. Ct. App. 1994), in which summary judgment was reversed due to the existence of a factual issue.

176. Judge Gunther concurred.

177. *Heckman*, 644 So. 2d at 529.

178. *Roth v. State Highway Comm'n*, 688 S.W.2d 775 (Mo. Ct. App. 1984); *Gaughen v. Commonwealth Dep't of Transp.*, 554 A.2d 1008 (Pa. Commw. Ct. 1989); *Orion Corp. v. State*, 747 P.2d 1062 (Wash. 1987), *cert. denied*, 486 U.S. 1022 (1988).



liable for a taking and also because in none of those cases had the landowner conveyed the land to the agency.<sup>179</sup>

Nor did the court find there was agency by estoppel. The necessary elements of agency by estoppel are: "(1) that the principal manifested a representation of the agent's authority or knowingly allowed the agent to assume such authority; (2) that the third person in good faith relied upon such representation; and (3) that relying upon such representation such third person has changed his position to his detriment."<sup>180</sup> Therefore, DOT was not liable under agency theory for the City's prior demand for the seven-foot strip of land. Since the landowner's entire case against DOT was founded on agency theory, it could not prevail.

In Judge Stevenson's dissent, he noted that the opinion of the trial court was "well reasoned"<sup>181</sup> and found sufficient facts in the record to support the trial court's conclusion of fact that an agency relationship existed.<sup>182</sup> Once that had been established, the Department of Transportation, as the principal, would be responsible for the acts of its agent, the City.

*Department of Transportation v. Zyderveld.*<sup>183</sup> The Department of Transportation had filed a map of reservation pursuant to *Florida Statutes*, sections 337.241(2) and 337.241(3) for the planned realignment of a state road, but in 1990 the Supreme Court of Florida held that such reservations without compensation were unconstitutional<sup>184</sup> so the Department had withdrawn the map. In 1991, Zyderveld sued for inverse condemnation, arguing that he had suffered a temporary taking due to the filing of a map of reservation. The trial court granted summary judgment for the landowner on the issue of liability. The landowner had suffered a temporary taking, and proceeded to trial on the issue of damages. The jury returned a verdict of \$375,000 for the temporary taking and \$70,000 for severance damages. The Fifth District Court of Appeal reversed after finding three errors.<sup>185</sup>

First, the trial court had allowed the landowner's experts to testify about the appropriate compensation for a temporary taking of the entire property, but the Department of Transportation was prohibited from introducing evidence rebutting the claim that the entire parcel had been

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179. *Heckman*, 644 So. 2d at 530.

180. *Id.* at 529 (quoting *Carolina Georgia-Carpet & Textiles, Inc. v. Pelloni*, 370 So. 2d 450, 451 (Fla. 4th Dist. Ct. App. 1979)).

181. *Id.* at 531.

182. *Id.*

183. 647 So. 2d 308 (Fla. 5th Dist. Ct. App. 1994).

184. *See Joint Ventures, Inc. v. Department of Transp.*, 563 So. 2d 622 (Fla. 1990).

185. *Zyderveld*, 647 So. 2d at 309-10.

taken. Second, the trial court had relied upon an earlier precedent<sup>186</sup> to the effect that the filing of the map constituted a *per se* taking. The Fifth District had already receded, in an opinion approved by the Supreme Court of Florida,<sup>187</sup> from that holding and had adopted the rule that even where such a map of reservation had been filed the inverse condemnation claimant had the burden of showing that he had been deprived of all or substantial economic use of his property. Consequently, the landowner here was not entitled to summary judgment on the liability issue. Finally, the court had allowed the landowner's expert to testify on the issue of severance damages after testifying that the whole parcel had been taken. This was an error because severance damages are applicable only in the case of a partial taking.

*Tampa-Hillsborough County Expressway Authority v. Harrell*.<sup>188</sup> also dealt with the filing of a map of reservation pursuant to *Florida Statutes*, section 337.241. In condemnation proceedings, landowners of two parcels claimed additional damages based upon an earlier temporary taking of their property by the filing of a map of reservation. That claim was supported with affidavits stating that the recording of the map of reservation prevented them from developing additional dwelling units on the property, refinancing or selling the property although they had no plans to do any of those things and had continued to live on the property. The Authority appealed a judgment awarding damages and the Second District Court of Appeal reversed.<sup>189</sup> Noting that the Supreme Court of Florida had held that the recording of a map of reservation pursuant to section 337.241 of the *Florida Statutes* did not amount to a *per se* taking of property,<sup>190</sup> the court held these assertions were insufficient to meet the burden of proving loss of all economically beneficial or productive use.

*Sarasota County v. Ex.*<sup>191</sup> Mr. and Mrs. Ex had sought permits to build a condominium on their land. After being informed that the permits could be obtained only if a ten-foot strip of land was deeded to the county, they deeded the land to the county. This occurred in 1983. Mr. and Mrs.

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186. *Orlando/Orange County Expressway Auth. v. W & F Agrigrowth-Fernfield, Ltd.*, 582 So. 2d 790 (Fla. 5th Dist. Ct. App.), *review denied*, 591 So. 2d 183 (Fla. 1991).

187. *Department of Transp. v. Weisenfeld*, 617 So. 2d 1071 (Fla. 5th Dist. Ct. App. 1993), *approved*, 640 So. 2d 73 (Fla. 1994); *see also Tampa-Hillsborough County Expressway Auth. v. A.G.W.S. Corp.*, 640 So. 2d 54 (Fla. 1994).

188. 645 So. 2d 1026 (Fla. 2d Dist. Ct. App. 1994).

189. *Id.* at 1027.

190. *See Tampa-Hillsborough County Expressway Auth.*, 640 So. 2d at 54.

191. 645 So. 2d 7 (Fla. 2d Dist. Ct. App. 1994), *review denied*, 654 So. 2d 918 (Fla. 1995).

Ex lost the land through judicial sale in 1987. In 1991, they brought this action against the County for compensation for the ten-foot strip on the theory that the conveyance had been involuntary, meaning that they had been coerced, and therefore amounted to inverse condemnation. Since eight years had passed between the conveyance and the filing of the action, the County raised the defenses of estoppel and the statute of limitations.

The Second District, in an opinion by Judge Altenbernd,<sup>192</sup> considered the proposition that, in the absence of a specific statutory period for inverse condemnation, the adverse possession statute of limitations is generally applied. The court however, concluded that it would not make sense in this situation because, unlike most inverse condemnation situations where the government is effectively adversely possessing the property, the landowners here validly deeded the property to the government. Since the government became the owner at that date, it could not be an adverse possessor. That reasoning was based upon the court's finding that the record would not support a claim that the deed was either void or voidable. However, the lack of reasoning for that conclusion, including that duress would be inapplicable, is troublesome. The district court did not decide which statute of limitations did apply. It reasoned that the longest possible statute of limitations period which might apply was seven years,<sup>193</sup> and that period had expired before Mr. and Mrs. Ex had filed this action.

*City of Pompano Beach v. Yardarm Restaurant, Inc.*<sup>194</sup> This case also involved a statute of limitations defense although the parties there agreed that the four-year statute should apply.<sup>195</sup> The City appealed a non-final order in an action finding the City liable for inverse condemnation of the restaurant's property. The Yardarm Restaurant is located on a parcel of land overlooking the Hillsborough Inlet with a view of the lighthouse. In 1972, the owners decided to expand their business by building a 165-unit hotel and marina on the lot. The City opposed the plan, and passed an ordinance imposing a ten-story height restriction on new buildings in Pompano Beach. Litigation challenging the restriction ensued over the next five years, resulting in the issuance of a building permit in 1977. By then, the restaurant was unable to finance the costs of construction on its own. The restaurant struggled to find financing, yet continued construction. In

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192. Acting Judge Campbell and Judge Fulmer concurred.

193. 645 So. 2d at 10 (citing FLA. STAT. § 95.14 (1991)).

194. 641 So. 2d 1377 (Fla. 4th Dist. Ct. App. 1994), *review denied*, 651 So. 2d 1197 (Fla.), *cert. denied*, 115 S. Ct. 2583 (1995).

195. FLA. STAT. § 95.11(3)(f) (1985); *see also id.* § 95.11(3)(p).

1985, the mortgagee foreclosed, and the restaurant filed a bankruptcy petition. When the stay was later lifted, the property was sold to the City.

This action was brought by the restaurant in 1987, alleging inverse condemnation due to the City's extended obstruction of the restaurant's attempts to build a hotel and marina. After prevailing in the trial court, the City lost on appeal. The exhaustive and well-reasoned opinion by Associate Judge Griffin<sup>196</sup> concluded that this did not amount to a taking because the activity complained of, the City's improper use of land use regulations, had been struck down by the court based upon a due process challenge.<sup>197</sup> Moreover, the inverse condemnation claim would be barred by the statute of limitations since the City's last action had taken place more than four years prior to the institution of this suit. The court rejected the restaurant's argument that the taking did not occur as long as the landowner continued to contest the City's invalid regulations.

*Tinnerman v. Palm Beach County*.<sup>198</sup> The landowner petitioned the County to rezone his property to general commercial with a special exception to permit his planned commercial development of the property as an office/warehouse. The county's planning and zoning board recommended the approval, subject to certain conditions, and then the Board of County Commissioners approved the petition but provided that: "No building permits . . . shall be issued until construction has begun for West Atlantic Avenue from Military Trail to Jog/Carter Road as a 6 lane section plus the appropriate paved tapers . . . ." <sup>199</sup> Because of this indefinite delay in being able to begin his project, the landowner sued for inverse condemnation.

The Fourth District Court of Appeal noted, in a per curiam opinion,<sup>200</sup> that some uses did not require a building permit, so this moratorium on building permits had not deprived this landowner of all use of his land. At most, there was only a temporary taking, but the extent of that taking would still be subject to speculation. The County's decision, although technically final after the County Commission vote, was still subject to alteration, variance, or modification and the landowner had made no effort to persuade the board to alter its decision nor any alternative

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196. Associate Judges Cobb and Peterson concurred.

197. *Yardarm Restaurant, Inc.*, 641 So. 2d at 1388. These might amount to temporary takings and a basis for a successful claim under title 42, § 1983, of the *United States Code*, but the court was careful not to issue any advisory opinions on those possibilities.

198. 641 So. 2d 523 (Fla. 4th Dist. Ct. App. 1994).

199. *Id.* at 524.

200. Judge Gunther, Judge Stevenson, and Associate Judge Mickle concurred.

proposals which might have convinced the County to lift the moratorium. "Ripeness requires a firm delineation of permitted uses so that the extent of the taking can be analyzed."<sup>201</sup> Therefore, the inverse condemnation claim was not ripe.

The *Bert J. Harris, Jr., Private Property Rights Protection Act*,<sup>202</sup> which becomes effective on October 1, 1995, may turn out to be the most important piece of legislation this session and possibly this decade. The legislature has provided a remedy for situations which do not amount to a taking under existing state or federal law,<sup>203</sup> but in which a landowner has been "inordinately burdened" by the action of the State of Florida, one of its agencies, or one of its political subdivisions.<sup>204</sup> An "inordinate burden" is defined as a direct restriction or limit of an existing use or vested right so that landowner is permanently unable to attain the reasonable, investment-backed expectation in a way that is disproportionate in comparison to the burden on others.<sup>205</sup> The Act provides the procedures to be followed by a property owner in making a claim,<sup>206</sup> allows settlements, and provides for attorney's fees and costs.<sup>207</sup>

## X. ENVIRONMENTAL LAW

*Davey Compressor Co. v. City of Delray Beach*.<sup>208</sup> Davey Compressor was sued by the City of Delray Beach for trespass, negligence, private nuisance, and strict liability, after Davey Compressor's chemical dumping at its worksite contaminated some of the City's wellfields. The jury awarded the City \$3,097,488 for past damages plus \$5,600,000 for estimated future response costs. The Fourth District Court of Appeal affirmed the past damages award but reversed on the future damages.<sup>209</sup> The issue before the court was whether the award for future restoration costs should be limited to a maximum equal to the value of the property.<sup>210</sup>

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201. 641 So. 2d at 526.

202. Ch. 95-181, 1995 Fla. Sess. Law Serv. 1311 (West).

203. *Id.* § 1(1), 1995 Fla. Sess. Law Serv. at 1311.

204. *Id.* § 1(3)(c), 1995 Fla. Sess. Law Serv. at 1312.

205. *Id.* § 1(3)(e), 1995 Fla. Sess. Law Serv. at 1312.

206. *Id.* § 1(4), 1995 Fla. Sess. Law Serv. at 1312.

207. Ch. 95-181, § 1(6)(c)(3), Fla. Sess. Law Serv. 1311, 1314 (West).

208. 613 So. 2d 60 (Fla. 4th Dist. Ct. App.), *review granted*, 626 So. 2d 204 (Fla.), *and decision approved*, 639 So. 2d 595 (Fla. 1994).

209. *Id.* at 63.

210. *Id.* at 61.

The court discussed the “restoration” rule, which states that damages for the wrongful injury of property are measured either by the diminution in value or the costs of repairing or restoring the property to its prior condition, whichever is less.<sup>211</sup> This rule does not allow restoration costs to be the measure of damages when this amount exceeds the value of the property. The rationale for the rule is to prevent overcompensation of plaintiffs.<sup>212</sup>

The court ruled here that the negligible risk of overcompensation did not justify limiting the City’s damages to the value of its wellfields.<sup>213</sup> Therefore, defendants held liable for environmental torts involving government property may have to pay full restoration costs, even if this amount exceeds the value of the property. In a secondary issue of whether the City was the proper party to bring the suit, the court ruled in favor of the City. Although the state owns natural resources such as groundwater, the City has standing because it has the duty to supply safe drinking water to the residents.<sup>214</sup>

*Legal Environmental Assistance Foundation, Inc. v. Board of County Commissioners.*<sup>215</sup> This case came to the Supreme Court of Florida on a certified question from the United States Court of Appeal for the Eleventh Circuit.<sup>216</sup> The question certified was:

UNDER EXISTING FLORIDA LAW, NOT LIMITED TO THE STATE’S EPA-APPROVED UNDERGROUND INJECTION CONTROL PROGRAM, WHERE A HOLDER OF AN EXPLORATORY WELL CONSTRUCTION AND TESTING PERMIT HAS MADE A TIMELY APPLICATION FOR AN INJECTION WELL OPERATING PERMIT, DOES THE CONSTRUCTION AND TESTING PERMIT CONTINUE IN EFFECT PAST ITS EXPIRATION DATE UNTIL THE FLORIDA DEPARTMENT OF ENVIRONMENTAL REGULATION HAS ACTED ON THE PENDING APPLICATION?<sup>217</sup>

The Board of Commissioners of Brevard County had applied for an exploratory well construction and testing permit for testing at the Indian River. The County wanted to use the well for treated sewage disposal, with

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211. *Davey Compressor Co.*, 639 So. 2d at 596.

212. *Id.*

213. *Id.*

214. *Id.*

215. 642 So. 2d 1081 (Fla. 1994).

216. 10 F.3d 1579 (11th Cir. 1994).

217. *Id.* at 1584-85; 642 So. 2d at 1081-82.

a plan to inject the treated sewage underground. The County later filed a timely application for an operating permit. While the application was pending approval, the County was given verbal approval to begin using the well for sewage disposal. The Legal Environmental Assistance Foundation challenged such use in federal court, arguing the County was operating the well without having been formally granted the operating permit. The County argued that its timely application for the operating permit operated to continue its now expired permit for construction and testing, and that this permit allows for operation incident to testing.<sup>218</sup>

The Supreme Court of Florida held that such renewal of the construction and testing permit would only be valid for construction and testing, and not for a new and different function, which is operation. The two types of permits are different for a reason, and the applicable law, section 120.60(6) of the *Florida Statutes*, as well as *Florida Administrative Code*, section 17-4.090(1), cannot be construed to extend the expiration date of a construction and testing permit when an application for an operating permit has been submitted.<sup>219</sup>

## XI. EQUITY

*Alexdex Corp. v. Nachon Enterprises*.<sup>220</sup> Nachon filed an action in county court to foreclose a construction lien. The landowner filed an action in circuit court challenging the county court's jurisdiction. The circuit court discharged the lien on the theory that by statute lien foreclosure actions must be brought in circuit court.<sup>221</sup> The Third District Court of Appeal reversed and its opinion was affirmed by the Supreme Court of Florida.<sup>222</sup>

It had long been established that a lien foreclosure is an action in equity. *Florida Statutes*, section 34.01(4), provides that: "[j]udges of county courts may hear all matters in equity involved in any case within the jurisdictional amount of the county court, except as otherwise restricted by the State Constitution or the laws of Florida."<sup>223</sup> Under this section, it appears that the lien foreclosure was properly commenced in county court if the amount did not exceed the jurisdictional amount. However, *Florida*

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218. *Legal Envtl. Assistance Found., Inc.*, 642 So. 2d at 1082.

219. *Id.* at 1084.

220. 615 So. 2d 245 (Fla 3d Dist. Ct. App.), *review granted*, 626 So. 2d 203 (Fla. 1993), and *decision approved*, 641 So. 2d 858 (Fla. 1994).

221. *Id.* at 862-63.

222. *Id.* at 247.

223. FLA. STAT. § 34.01(4) (1993).

*Statutes*, section 26.012(2)(g), provides that circuit courts have exclusive original jurisdiction “[i]n all actions involving the title and boundaries of real property.”<sup>224</sup> The Supreme Court of Florida concluded that foreclosure of a lien on real estate did involve the title and, therefore, fit within this exclusive jurisdiction.<sup>225</sup> So there appeared to be a conflict in the statutes for which the constitution did not provide a solution.

The supreme court looked to the legislative history and invoked the plain meaning approach to statutory construction, but it solved the dilemma by holding that the 1990 amendment to section 34.01(4) impliedly amended the inconsistent provisions of the earlier statute, section 26.012. The court concluded that, “the legislature intended to provide concurrent equity jurisdiction in circuit and county courts, except that equity cases filed in county courts must fall within the county court’s monetary jurisdiction, as set by statute.”<sup>226</sup> It went on to decide that satisfaction of the monetary limits would be determined in a lien foreclosure by reference to the debt, not the value of the property subject to the lien.

Justice Shaw, considering the unsigned majority opinion<sup>227</sup> to be “badly flawed in parts,”<sup>228</sup> wrote an opinion concurring in the result, but challenging the conclusion that a lien foreclosure involves the “title and boundaries” of real property as required by section 26.012(2)(g).<sup>229</sup> The conjunction “and” convinced him that both title and boundaries must be the subject of the action to fit within this section, but this lien foreclosure involved only title. Consequently, he would have preferred the supreme court to conclude that the lien foreclosure was properly filed in the county court because there was no conflicting statute giving exclusive original jurisdiction over this case to the circuit court.

The supreme court had thus finally settled the confusion over the foreclosure jurisdiction of the county court. Subsequent buyers and title insurers, who were in grave danger because they had a county court foreclosure in their chain of title, can breathe a sigh of relief. The next case, *Sea Breeze, Video, Inc. v. Federico*,<sup>230</sup> illustrates how this will be

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224. *Id.* § 26.012(2)(g).

225. *Alexdex*, 641 So. 2d at 862.

226. *Id.*; see FLA. STAT. § 34.01(1) (Supp. 1990) (stating the necessary monetary amounts).

227. Chief Justice Grimes, Senior Justice McDonald, and Justices Overton, Harding, and Kogan concurred in the *per curiam* opinion. Justice Shaw concurred in the result only.

228. *Alexdex*, 641 So. 2d at 862.

229. *Id.*

230. 648 So. 2d 226 (Fla. 2d Dist. Ct. App. 1994).



applied to an injunction action. Still unanswered, however, is how this might translate into county court jurisdiction to hear quiet title actions. Apparently the county court would have jurisdiction because such actions would involve title or boundaries if the jurisdictional amount can be determined. How that would be done remains uncertain. Furthermore, it is worth noting that there is an Article V Task Force in existence which is expected to issue a report in December of 1995, and may spur further changes.

*Sea Breeze, Video, Inc. v. Federico*.<sup>231</sup> Sea Breeze sued Pinellas County in circuit court requesting a declaration that certain county ordinances were invalid and an injunction against their enforcement. The complaint alleged subject matter jurisdiction in the circuit court based on value of the business property exceeding \$15,000. Sea Breeze sought review by mandamus of the circuit court's *sua sponte* transfer of the action to the county court. Although the petitioners conceded that county courts now have equitable jurisdiction, they argued that the new concurrent jurisdiction did not extend to injunctive relief. The respondents challenged the basis for the amount in controversy.

The Second District Court of Appeal held that county courts can now issue injunctions, under the reasoning of *Alexdex Corp. v. Nachon Enterprises, Inc.*<sup>232</sup> in which the supreme court held that the county and circuit courts have concurrent jurisdiction in equity over lien foreclosures. The district court stated that:

[t]he circuit court's exclusive jurisdiction is invoked by a good faith allegation that the amount in controversy is within the jurisdictional amount. Where an action for declaratory and injunctive relief does not reach the threshold jurisdictional amount of the circuit court, a plaintiff may choose either court, each court having concurrent jurisdiction.<sup>233</sup>

Because the petitioners alleged the amount in controversy to be more than \$15,000, the action should not have been transferred.

The court did not specifically address the issue of whether the amount in controversy in a declaratory and injunctive relief action is based on the value of the property involved, as alleged by the petitioners. However, in a footnote, the court did mention that federal diversity cases involving such

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231. *Id.*

232. 641 So. 2d at 858.

233. *Sea Breeze, Video, Inc.*, 648 So. 2d at 228 (citations omitted).

relief have based amounts in controversy on the value of the right sought to be protected, the value of the right to be free of the particular regulation, not the entire value of the business.<sup>234</sup>

*Koschler v. Dean.*<sup>235</sup> On March 1, 1966, a warranty deed dated February 28, 1966 was recorded in the public records conveying the property at issue to "William H. Dean and Mary Dean, his wife." William and Mary were divorced at that time. On June 21, 1966, they remarried and remained legally married until William's death in 1990, but they did not live together. Only William lived on the property. Mary lived with another man, acting and holding herself out to be his wife. After William died, Mary and the man with whom she lived gave a mortgage to the Koschlers. The person who conducted the title search concluded from the record that title to the property vested in Mary as the surviving spouse of William. Mary and her boyfriend executed an affidavit stating that no one else had a legal or equitable interest in the property.

Meanwhile, unknown to the Koschlers, the personal representative of her late husband had begun an adversary proceeding in the probate division of the circuit court against Mary, challenging her interest in the property and seeking a declaration that she was not entitled to participate in William's estate as an heir. On the day before the closing of the mortgage transaction, the personal representative filed a notice of lis pendens against the property in the probate division of the circuit court. However, he did not record the notice of lis pendens in the official county records after obtaining a judgment divesting Mary of any interest in this property.

The personal representative sought, obtained, and brought this quiet title judgment against the mortgagees. The trial court held that the Koschlers were not "bona fide mortgagees for value" because if they had searched in the public records for the name of Mary's boyfriend, they would have found an affidavit falsely claiming that Mary was married to her boyfriend. The Second District Court of Appeal reversed, holding that this was not in the chain title to this property and did not have any bearing on the title.<sup>236</sup> The Koschlers were entitled to rely on the chain of title found in the official records unless they had actual knowledge of an adverse unrecorded right. The court stated that the fault lies with the personal representative for failing to record the notice of lis pendens in the public records at the time he began the litigation.<sup>237</sup> Merely filing the documents in the probate division of

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234. *Id.* at 228 n.4.

235. 642 So. 2d 1119 (Fla. 2d Dist. Ct. App. 1994).

236. *Id.* at 1121.

237. *Id.*

the court does not constitute constructive notice to subsequent purchasers of real property, so they take without constructive notice.

## XII. FORECLOSURE

*A.J. Stanton, Jr., P.A. v. Ivey.*<sup>238</sup> Stanton filed a mortgage foreclosure action against Ivey based on a \$10,000 note and mortgage executed by Ivey in settlement of an attorney's fee dispute. Ivey had defaulted on the mortgage payments but asserted the defense of unclean hands, contending that he was not aware that Stanton had represented other clients with interests conflicting with his, thereby breaching his fiduciary duty.<sup>239</sup>

The trial court submitted the equitable issue of unclean hands to the jury. The Fifth District Court of Appeal saw this as a potential error, although judges can sometimes use advisory juries for guidance in equitable matters. However, the Fifth District Court of Appeal reversed the trial court's judgment in favor of Ivey based on other grounds. The evidence to support a finding of breach of fiduciary duty on the part of Stanton was sufficient to avoid enforcement of the mortgage. The mortgage and note arose from a fee dispute regarding Stanton's representation of Ivey in a divorce, and Stanton was unaware at the time he represented Ivey that those other clients in question had conflicting interests from prior dealings with Ivey.<sup>240</sup>

*A Mortgage Co. v. Bowman.*<sup>241</sup> This case involved the foreclosure of a VA mortgage. The foreclosure sale was set for July 8, 1993, but could not be held on that date because the bidding instructions could not be obtained from the VA in time. Section 3701 of the *United States Code*, and those that follow thereafter, require that bidding instructions be obtained from the VA before a foreclosure sale can occur. Otherwise, the VA can refuse to guarantee the loan. Because of the delay in issuing the instructions, the lender moved to reschedule the sale. The request was denied without explanation. The Fourth District Court of Appeal held that such refusal was an abuse of discretion, and reversed and remanded.<sup>242</sup>

*Amos Fowler & Amylene, Inc. v. First Federal Savings & Loan Ass'n.*<sup>243</sup> Amylene, Inc. and its president, Mr. Fowler, appealed a final

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238. 645 So. 2d 1050 (Fla. 5th Dist. Ct. App. 1994).

239. *Id.* at 1051.

240. *Id.*

241. 642 So. 2d 123 (Fla. 4th Dist. Ct. App. 1994).

242. *Id.* at 124.

243. 643 So. 2d 30 (Fla. 1st Dist. Ct. App. 1994).

judgment of foreclosure entered in favor of First Federal. The appellants executed a note and mortgage to the lender in 1977, for \$275,000 at ten percent interest. The purpose of the loan was to refinance a mortgage held on a sixty-five unit motel complex. The lender later approved Fowler's plan to convert the motel into a condominium, and Fowler began to sell the units subject to the mortgage. In 1985, the appellants stopped paying the mortgage, and the lender accelerated the loan and foreclosed. In July of 1985, the court appointed a receiver at the request of the lender.<sup>244</sup>

In 1992, after a one-day trial, the trial court entered final judgment of foreclosure in favor of the lender, in the amount of \$606,449.51, well in excess of the original loan amount. This amount included \$233,345.97 in unpaid principal, \$243,556.84 in interest from December of 1984 until the date of the judgment on a per diem basis, \$17,140.14 in late charges, \$62,406.56 as costs, and \$50,000 as attorney fees.<sup>245</sup>

The mortgage had a paragraph providing for interest to accrue on expenses the lender incurs to protect its interest when the borrower fails to perform the covenants and agreements contained in the mortgage. On appeal, the court held that this provision in the mortgage justified the disputed interest charges.<sup>246</sup> However, the appellate court reversed and remanded on the award of interest because the per diem was based on 360 and not 365 days per year, and it was not clear whether it was based on simple or compound interest.<sup>247</sup> Additionally, the court reversed the award of late charges because it should not have included charges for each month after acceleration.<sup>248</sup> The lender is only entitled to late charges accrued up until acceleration of the note. Similarly, the court reversed the \$50,000 attorney fee award because it lacked competent, substantial evidence of both the services performed and the reasonable value of such services.<sup>249</sup> Apparently there was no transcript of the hearing on attorney fees.

*Batchin v. Barnett Bank of Southwest Florida.*<sup>250</sup> Mr. Batchin was the deceased mortgagor's heir. Barnett began foreclosure of the deceased's mortgage and attempted to serve the decedent, apparently unaware that he had died. Mr. Batchin advised the process server that his father, the mortgagor, was deceased. The return of service stated this. The bank

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244. *Id.* at 32.

245. *Id.*

246. *Id.* at 32-33.

247. *Id.* at 33.

248. *Amos Fowler & Amylene, Inc.*, 643 So. 2d at 33.

249. *Id.*

250. 647 So. 2d 211 (Fla. 2d Dist. Ct. App. 1994).

subsequently served Mr. Batchin with a notice of deposition, at which he testified that he was the sole beneficiary under the decedent's will, and that the will had not yet been probated.

Despite this and other communications between Mr. Batchin and the bank through its attorneys, the bank's attorneys later attempted service by publication, and changed the name of the defendant in the foreclosure from the decedent to the decedent and all parties claiming interests by, through, under or against the decedent. Notice was published, and when no one responded, the court appointed a guardian ad litem, who filed an answer on behalf of the decedent. Final summary judgment was entered, and the property was sold to an individual.

Mr. Batchin then sought to enjoin the issuance of a certificate of title to the property, seeking a declaration that he was the owner of the equity of redemption, either as the heir under the will or under intestate succession. The court initially granted a temporary injunction but later vacated it.<sup>251</sup>

On appeal, the court held that service by publication was improper here because there had not been a diligent search for interested parties, especially since the same law firm had deposed the one interested party.<sup>252</sup> Because there had been no valid service of process, the foreclosure judgment was entered without authority. The court mentioned but left unresolved whether the judgment would be void or voidable.<sup>253</sup> The court said such a determination would be relevant when determining the rights of the purchaser at foreclosure sale.<sup>254</sup> However, the court noted that the purchaser in this case was not a bona fide purchaser because she had actual notice of Mr. Batchin's claim to the property one day before the certificate of title was to issue.<sup>255</sup> The bank would have to reforeclose and personally serve Mr. Batchin, or if unable to do so, file a more complete affidavit of diligent search.<sup>256</sup>

*BSL Investors, II v. Downey Savings & Loan Ass'n.*<sup>257</sup> The Fifth District Court of Appeal reversed a partial summary judgment entered in favor of the lender, holding the individual general partners of BSL Investors jointly and severally liable in the amount of \$847,155.74.<sup>258</sup> Downey

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251. *Id.* at 213.

252. *Id.*

253. *Id.*

254. *Id.*

255. *Batchin*, 647 So. 2d at 213.

256. *Id.*

257. 649 So. 2d 331 (Fla. 5th Dist. Ct. App. 1995).

258. *Id.* at 332.

Savings brought an action to foreclose the appellants' property, the Colony Plaza Hotel. The lender moved for summary judgment, and a hearing was set for October 7, 1993. On that date, in open court, the lender filed an "Emergency Motion for Turnover of Property to Receiver," claiming that BSL and its general partners had been siphoning the hotel "rents" during the eighteen months since the foreclosure action was commenced. The trial court entered summary judgment against BSL Investors and granted Downey's Motion for Turnover of Property in the amount of \$847,155.74. Next, the court entered the disputed partial summary judgment holding the general partners jointly and severally liable for that amount, and authorized a writ of execution.<sup>259</sup>

The Fifth District Court of Appeal agreed with the appellants that the partial summary judgment should not have been granted because the lender never moved for such action and the procedure followed by the lender in obtaining the judgment was "so thoroughly defective as to constitute a denial of due process."<sup>260</sup>

*County Collection Services, Inc. v. Allen.*<sup>261</sup> County Collection Services brought a lien foreclosure action. However, the circuit court, having first granted summary judgment for the Collection Service, ultimately dismissed the case for lack of subject matter jurisdiction, finding the amount in controversy to be within the county court's jurisdictional amount.<sup>262</sup>

The subject lien arose from the property owner Allen's violation of the Palm Beach Zoning Code, resulting in a fine of \$75 per day. The claim of lien was recorded on March 12, 1990 after the fines totaled \$9900. On March 12, 1990, the jurisdictional amount in controversy limit for the county courts was \$5000.<sup>263</sup> The relevant section of the *Florida Statutes*, section 34.01(1)(c), was amended in 1990 to provide for the increased amount in controversy currently in place for the county courts. The amended statute provides that the county court has subject matter jurisdiction "[a]s to causes of action accruing . . . [o]n or after July 1, 1990 . . . at law in which the matter in controversy does not exceed the sum of \$10,000, exclusive of interest, costs, and attorney's fees, except those within the exclusive jurisdiction of the circuit courts."<sup>264</sup> The statute provides for a further increase of subject matter jurisdiction for causes of action accruing

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259. *Id.*

260. *Id.*

261. 650 So. 2d 650 (Fla. 4th Dist. Ct. App. 1995).

262. *Id.* at 650.

263. *Id.*

264. FLA. STAT. § 34.01(1)(c)3 (1993).

on or after July 1, 1992, where the amount in controversy does not exceed \$15,000, the current jurisdictional limit of the county courts.<sup>265</sup>

Because the jurisdictional limit was \$5000 at the time that the claim of lien was filed, the Fourth District Court of Appeal held that the \$9900 action was clearly not within the county court's jurisdiction, and should not have been dismissed by the circuit court.<sup>266</sup> The Fourth District Court of Appeal noted further that *Florida Statutes*, section 162.09(3), provides for continued accrual of the fine until judgment is rendered, so that the current amount of the lien would be well within the circuit court's jurisdiction.<sup>267</sup>

The court made no mention of the provision in section 34.01(1)(b) of the *Florida Statutes* which states that the county courts have original jurisdiction "[o]f all violations of municipal and county ordinances. . . ."<sup>268</sup> This provision seems to support the circuit court's dismissal for lack of subject matter jurisdiction. This was, after all, an action based on the violation of the Palm Beach County Zoning Code.

Although the action arose from violations of county ordinances, it was a foreclosure action. Foreclosure actions are in equity, and equitable jurisdiction was, at the time that the cause of action accrued, exclusively within the circuit courts. This seems to support the Fourth District Court of Appeal's holding that the action belonged in the circuit court, but the Fourth District Court of Appeal made no mention of this. It seems as though the court intentionally avoided any mention of equitable jurisdiction in its opinion.<sup>269</sup>

It was as recent as September 9, 1994 that the Supreme Court of Florida held that the county and circuit courts had concurrent jurisdiction in equity, in a decision which involved the jurisdictional statutes as amended effective October 1, 1990, after the cause of action had accrued in this case.<sup>270</sup> Therefore, the recent holding that the two courts have concurrent jurisdiction, if applied retroactively, would have affected the disposition of this action.

*Dvorak v. First Family Bank.*<sup>271</sup> First Family Bank foreclosed the Dvorak's mortgage, but two hours before the commencement of the foreclosure sale, the Dvorak's filed a Chapter 11 petition for bankruptcy.

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265. *Id.*

266. *County Collection Servs.*, 650 So. 2d at 650.

267. *Id.*

268. FLA. STAT. § 34.01(1)(b).

269. *Id.*

270. *Alexdex*, 641 So. 2d at 858.

271. 639 So. 2d 1076 (Fla. 5th Dist. Ct. App. 1994).

The bankruptcy was later converted to Chapter 7. Two years later, the bankruptcy trustee conveyed the mortgaged property to the Bank for \$6000, the amount of equity that the Dvoraks had in the property. The bank then filed a motion in state court to amend its prior foreclosure judgment, requesting a new sale date and adding more attorney's fees and interest to the judgment amount.

The issue was one of first impression: whether a bank which purchases the mortgaged property from the debtor as part of the debtor's bankruptcy liquidation can subsequently continue its former foreclosure action and add the attorney's fees incurred due to the bankruptcy.<sup>272</sup>

The Fifth District Court of Appeal ruled en banc that attorney's fees for work before the bankruptcy court must be sought in the bankruptcy action against the appropriate fund being held in that court, as stated in title 11, section 506(b), of the *United States Code*. Failure to collect the fees through the bankruptcy action when the creditor's claim is oversecured, such as when there is money available for payment of fees, results in waiver of the fees. Because the claim was oversecured, the bank's failure to collect the fees through the bankruptcy action was held to constitute a waiver of the fees.<sup>273</sup> The court, in a footnote, however, commented that in certain circumstances, a state court has the power to award attorney's fees for a bankruptcy action.<sup>274</sup>

As footnote four mentions, it is also apparent that the bank, by purchasing the property from the trustee, discharged the Dvoraks.<sup>275</sup> The court stated that merger did not occur because of an anti-merger clause in the deed from the trustee. However, the purchase operated as a deed in lieu of foreclosure. Thus, the bank now owned the property subject to its own mortgage. It could foreclose itself to eliminate junior lienors, but it could not seek a deficiency against the original mortgagors.<sup>276</sup>

*First Union National Bank of Florida v. Goodwin Beach Partnership*.<sup>277</sup> First Union appealed a denial of a deficiency judgment because the trial court determined that the fair market value of the property exceeded the judgment at the time of the foreclosure sale. The final judgment amount was \$4,986,487. First Union purchased the property at the foreclosure sale for the nominal sum of \$1000 and moved for entry of a deficiency

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272. *Id.* at 1077.

273. *Id.* at 1079.

274. *Id.* at 1079 n.8.

275. *Id.* at 1077.

276. *Dvorak*, 639 So. 2d at 1077.

277. 644 So. 2d 1361 (Fla. 5th Dist. Ct. App. 1994).



judgment. While still in the deficiency proceedings, First Union sold the property for \$2.5 million. First Union used this sale amount, in addition to the tax assessed value of \$3,106,500 and an appraisal using the income approach giving a value of \$2.18 million, in support of its deficiency argument.<sup>278</sup>

Goodwin presented its own experts who arrived at values in the \$5 million range using the comparable sales approach. The trial court declined to award a deficiency judgment, and specifically rejected any consideration of \$124,953 in unpaid real estate taxes due as of the date of foreclosure sale, on res judicata grounds. The judge ruled that the unpaid taxes should have been included in the final judgment of foreclosure.<sup>279</sup>

The Fifth District Court of Appeal found this to be error.<sup>280</sup> Res judicata applies when there are two actions. Here, the deficiency was sought by motion within the same foreclosure action. "Section 702.06, Florida Statutes, authorizes entry of a deficiency decree, should a deficiency exist, in all suits for the foreclosure of mortgages."<sup>281</sup> Therefore, the delinquent taxes should have been considered in arriving at the fair market value for determining the deficiency.<sup>282</sup>

According to the lengthy dissent by Judge Sharp, this decision is in conflict with *Horne v. Smith*<sup>283</sup> and *Consales, N.V. v. Sunshine State Mortgage Co.*<sup>284</sup> Judge Sharp argued that even though claiming the unpaid taxes as part of the deficiency decree might not be barred by res judicata because the deficiency was sought within the same action, it should be barred because it was sought after the mortgagee became the owner of the property at the foreclosure sale. This proposition seems to be supported by the doctrine of merger and the *Statute of Quia Emptores*. First Union could have amended its foreclosure judgment to include the delinquent taxes, but failed to do so.<sup>285</sup>

*Ginsberg v. Lennar Florida Holdings, Inc.*<sup>286</sup> Appellant Ginsberg is the owner and operator of a property management firm. He is also the general partner of two limited partnerships which own apartment complexes

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278. *Id.* at 1361.

279. *Id.* at 1362.

280. *Id.*

281. *Id.*

282. *First Union Nat'l Bank*, 644 So. 2d at 1362.

283. 368 So. 2d 392 (Fla. 1st Dist. Ct. App. 1979).

284. 639 So. 2d 170 (Fla. 3d Dist. Ct. App. 1994).

285. *First Union Nat'l Bank*, 644 So. 2d at 1367.

286. 645 So. 2d 490 (Fla. 3d Dist. Ct. App. 1994).

located in Broward County, Florida. The apartment complexes were managed by the appellant's property management firm. In 1988 both of the partnerships gave mortgages on the apartment complexes to Amerifirst. In 1991, the Resolution Trust Company ("RTC") acquired the mortgages as part of the liquidation of Amerifirst.

The appellees purchased the appellant's mortgages from the RTC after the RTC had already commenced foreclosure proceedings against the appellant, who had defaulted. Lennar subsequently obtained a foreclosure judgment and scheduled a foreclosure sale for January of 1993. The sale was stayed after the two limited partnerships sought protection under Chapter 11 of the Bankruptcy Code.

In March of 1993, Lennar filed a five-count complaint against Ginsberg. The counts consisted of conversion, waste, civil theft, violation of Florida's RICO statute, and violation of section 772.103(4) of the *Florida Statutes*, a conspiracy count. The counts related to Ginsberg and his management company's wrongful diversion of rents to Ginsberg's personal use. The loan documents gave Lennar a right to the rents from the apartment buildings. Ginsberg used delay tactics in responding to the complaint, and Lennar finally obtained a default judgment in August of 1993, after four tries. In January of 1994, Ginsberg moved to vacate the default judgment, arguing excusable neglect. The motion was denied and Ginsberg appealed.<sup>287</sup>

The Third District Court of Appeal rejected the excusable neglect argument, but vacated the default judgment on other grounds.<sup>288</sup> The court held that the complaint failed to set forth a viable cause of action and could not support a judgment even by default.<sup>289</sup> The reason for this was that the relationship between the parties was explicitly expressed in the loan documents, making the claims purely contractual in nature: "breach of contractual terms may not form the basis for a claim in tort. Where damages sought in tort are the same as those for breach of contract a plaintiff may not circumvent the contractual relationship by bringing an action in tort."<sup>290</sup> The court cited cases supporting the principle that purely economic losses are not recoverable in tort. This negated any claim for conversion, civil theft, and RICO. Lennar could not sue for waste because "[w]here the cause of action arises out of an injury to property, that action is personal to the owner of the property and a party who subsequently

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287. *Id.* at 493.

288. *Id.* at 502.

289. *Id.* at 494.

290. *Id.*

takes title to the property, without receiving an assignment of that cause of action, may not pursue that cause of action."<sup>291</sup> The assignment of mortgage was silent regarding any waste cause of action held by the RTC. Furthermore, waste is a valid cause of action only when the property is rendered less valuable than the outstanding debt. There was no evidence of such impairment of security.<sup>292</sup>

Additionally, the court held that section 697.07, the assignment of rents provision, applies retroactively to the date of default.<sup>293</sup> The court, however, disagreed with Lennar's claim that under 697.07(3) the parties have the power to contract away their right to a written demand for the rents.<sup>294</sup> According to the court, a written demand for the rents is still a prerequisite. Furthermore, section 697.07 creates a lien for the rents after the written demand is made; the lien must be foreclosed before any right to possession of the rents arises. Therefore, Lennar had no right to the rents immediately upon default. The only action Lennar had the immediate right to bring was to pursue its remedies under the loan documents. Because Lennar had no possessory right to the rents, Ginsberg, the rightful possessor, could not steal them. Therefore, the theft, RICO, and conspiracy counts failed.<sup>295</sup>

*Levine v. FDIC.*<sup>296</sup> The Levines appealed a circuit court judgment holding that the FDIC, under the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"), could repudiate the deed in lieu of foreclosure agreement entered into by the Levines and their now insolvent and liquidated lender, First American Bank & Trust. The deed in lieu agreement covering three properties was very beneficial to the Levines. It allowed them to set the minimum prices for the lender's sale of the properties and provided that the Levines would potentially receive \$500,000 from the sales proceeds of the three properties. The agreement also allowed the Levines to live rent free in one of the properties until sold. In May of 1988, First American sold two of the lots but refused to pay the Levines their share of the proceeds as agreed to in the deed in lieu agreement. The Levines sued.<sup>297</sup>

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291. *Ginsberg*, 645 So. 2d at 496.

292. *Id.* at 500.

293. *Id.* at 497.

294. *Id.* at 498.

295. *Id.* at 501-02.

296. 651 So. 2d 134 (Fla. 4th Dist. Ct. App. 1995).

297. *Id.* at 135.

First American was declared insolvent on December 15, 1989 and the FDIC was appointed receiver. The FDIC then notified the Levines that it was repudiating the 1987 agreement pursuant to section 1821(e) of FIRREA. The circuit court held that the repudiation provision, which became effective on August 9, 1989, nearly a year and a half after the deed in lieu agreement was executed, applied retroactively. This was the issue upon which the Levines based their appeal.<sup>298</sup>

The Fourth District Court of Appeal reversed, holding that the statute did not apply retroactively.<sup>299</sup> The court noted the tension between the two possible approaches, one being the presumption against retroactivity, and the other being the maxim that courts must apply the law in effect when a decision is rendered.<sup>300</sup> The decision was based on the Supreme Court of the United States' recent clarification of the conflict in *Landgraf v. USI Film Products*.<sup>301</sup> In *Landgraf*, the Court provided an analytical framework for determining whether a federal statute can be applied retroactively. First, the statute's legislative history is analyzed to determine whether Congress has stated the proper scope of application. If not, the statute must be analyzed to determine whether it will have "genuinely retroactive effect," such as impairing rights possessed when the party acted, increasing liability for past acts, or imposing new duties with regard to completed transactions. If so, a presumption against retroactivity applies.

In this case, the Fourth District Court of Appeal applied the above analysis, finding no congressional statement of the statute's proper scope, and then finding that the statute did have truly retroactive effect because it impaired the Levine's contract rights. Therefore, the court held that the presumption against retroactive effect applied.<sup>302</sup>

*Morgan v. Kelly*.<sup>303</sup> Morgan appealed a post-foreclosure deficiency judgment, claiming the trial court erred in entering a judgment for less than the amount due. Morgan was the foreclosing mortgagee, and obtained a foreclosure judgment of \$387,087.28. He purchased the property at sale for \$100,000. The court determined fair market value to be \$215,000. The trial court determined the deficiency by subtracting the sales price from the fair market value, arriving at the judgment amount of \$115,000. The Third

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298. *Id.*

299. *Id.* at 138.

300. *Id.* at 136.

301. 114 S. Ct. 1483 (1994).

302. *Levine*, 651 So. 2d at 137.

303. 642 So. 2d 1117 (Fla. 3d Dist. Ct. App. 1994).

District Court of Appeal reversed, holding that the trial court applied an incorrect formula for arriving at the deficiency judgment.<sup>304</sup>

The correct formula for determining a deficiency judgment is the total debt, as secured by the final judgment of foreclosure (here, \$387,087.28) minus the fair market value of the property as determined by the court.<sup>305</sup> Although the court has discretion in determining deficiency judgments, a departure from the above formula must be supported by a statement of legal or equitable justification. Otherwise, it is an abuse of discretion.<sup>306</sup>

*Ocean Village Condominium Ass'n v. Brooks.*<sup>307</sup> This case involved the foreclosure of a condominium association's lien for unpaid association dues. The lien amount was under \$15,000 and the action was originally brought in the circuit court. The Third District Court of Appeal dismissed, holding that the circuit court lacked subject matter jurisdiction, and that the county court had exclusive jurisdiction in equity to hear the foreclosure.<sup>308</sup> The Supreme Court of Florida quashed the Third District Court of Appeal's decision based on the recent holding in *Alexdex Corp. v. Nachon*<sup>309</sup> that the county and circuit courts have concurrent jurisdiction in equity.

### XIII. HISTORIC PRESERVATION

*Metropolitan Dade County v. P.J. Birds, Inc.*<sup>310</sup> Metro-Dade petitioned for a writ of certiorari to quash the circuit court's order which overturned the designation of part of Parrot Jungle in Miami as a historic site. The County, by local ordinance in 1990, declared a twelve-acre portion of Parrot Jungle a historic site because the property had achieved exceptional significance for over fifty years. The ordinance provides that generally properties must achieve significance during a period of over fifty years in order to be considered historic sites. This is known as the over fifty rule. Parrot Jungle qualified through the above described rule as well as through the exceptional significance exception which allowed a property to be considered if it has not been significant for over fifty years, but its significance has been exceptional. The County used this dual rationale

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304. *Id.* at 1117-18.

305. *Id.* at 1117.

306. *Id.* at 1118.

307. 649 So. 2d 230 (Fla. 1995), *on remand*, 656 So. 2d 275 (Fla. 3d Dist. Ct. App. 1995).

308. *Brooks v. Ocean Village Condominium Ass'n, Inc.*, 625 So. 2d 111, 112 (Fla. 3d Dist. Ct. App. 1993).

309. 641 So. 2d 858 (1994).

310. 654 So. 2d 170 (Fla. 3d Dist. Ct. App. 1995).

because it was uncertain as to which justification was necessary because the property had been in existence for over fifty years but significant structures had been built within the last fifty years.<sup>311</sup>

The owner of Parrot Jungle contested the County's determination, arguing that the standard of "exceptional importance" was undefined and that his procedural due process rights were violated.<sup>312</sup> The court disagreed, overlooking the fact that the County had based its designation on both alternatives (the over fifty rule and the under fifty exception) so that a lack of clarity in the "exceptional importance" standard would not be dispositive.<sup>313</sup> Furthermore, the standard was not vague because there were prior administrative law cases setting out recognized professional criteria for interpreting "exceptional importance." Besides, it is a determination which must be made on a case-by-case basis.<sup>314</sup> Judge Barkdull dissented, arguing that the court should have denied review.<sup>315</sup>

#### XIV. HOMESTEAD

*King v. Ellison.*<sup>316</sup> The Supreme Court of Florida answered the following certified question in the negative:

WHETHER SECTION 732.401(1), FLORIDA STATUTES (1991), WHICH VESTS A REMAINDER INTEREST IN HOMESTEAD PROPERTY IN LINEAL DESCENDANTS, IS UNCONSTITUTIONAL WHEN APPLIED TO DEFEAT A TESTATOR'S INTENT TO DEVISE HOMESTEAD PROPERTY EQUALLY TO ADULT STEPCHILDREN AS WELL AS ADULT LINEAL DESCENDANTS?<sup>317</sup>

In so doing, the court found no conflict between section 732.401(1) and article X, section 4(c) of the *Florida Constitution*.<sup>318</sup>

Florence and Hubert Calhoun, a married couple each with children from prior marriages, purchased property in Indian River County. They both drew up their own wills, in which they bequeathed their entire estates

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311. *Id.* at 173-74.

312. *Id.* at 172.

313. *Id.* at 175.

314. *Id.* at 178.

315. *P.J. Birds*, 654 So. 2d at 181 (Barkdull, J., dissenting).

316. 648 So. 2d 666 (Fla. 1994).

317. *Id.* at 667.

318. *Id.* at 668.

to each other. The wills each contained a provision that the one who lived longest would pass his property to the children and stepchildren. When Florence died, Hubert married Rosemarie, establishing homestead in the Indian River property. Hubert died two years later, leaving Rosemary as the surviving spouse. Because there was a surviving spouse and a homestead, and because article X, section 4(c), of the constitution does not allow homestead to be devised when the owner is survived by a spouse, the devise in the will was invalid. Section 732.401(1) governs the requirement that the surviving spouse receive a life estate in the homestead with a vested remainder going to the decedent's lineal descendants. In response to the stepchildren's claim that the statute constitutes an improper and unconstitutional restraint on alienation, the court responded that the statute does not restrict the right to devise homestead property, but merely states how homestead property will descend if it is not devised as permitted by the *Florida Statutes* or the constitution.<sup>319</sup> The constitutional provision restricts the right to devise homestead.<sup>320</sup>

*Miami Country Day School v. Bakst.*<sup>321</sup> The school obtained a money judgment against the Baksts for failure to pay tuition, and sought to enforce the judgment against the Baksts' residence, a houseboat. The trial court held that the houseboat qualified as homestead pursuant to article X, section 4, of the *Florida Constitution*, and section 222.05 of the *Florida Statutes*.<sup>322</sup> The Third District Court of Appeal affirmed.<sup>323</sup> The court restated that the homestead provision is to be broadly construed as a matter of public policy. Thus, a "dwelling house," as used (but not defined) in section 222.05, is now extended past the inclusion of mobile homes to houseboats.<sup>324</sup>

## XV. INSURANCE

*Preferred Mutual Insurance Co. v. Martinez.*<sup>325</sup> Preferred issued a homeowner's policy to the Martinezes who subsequently filed a claim after Hurricane Andrew. The parties disagreed on the amount of the claim, and the Martinezes sued, arguing that Preferred failed to offer them the full

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319. *Id.*

320. *Id.*

321. 641 So. 2d 467 (Fla. 3d Dist. Ct. App. 1994), *review denied*, 651 So. 2d 1195 (Fla. 1995).

322. *Id.* at 468.

323. *Id.* at 470.

324. *Id.* at 469.

325. 643 So. 2d 1101 (Fla. 3d Dist. Ct. App. 1994).

replacement value of their home. The policy stated that in the event of such a dispute, either party could demand an appraisal. The insurance company made such demand, but the trial court denied it, holding that the insurance company had waived this right by not demanding appraisal earlier in the negotiations. The Third District Court of Appeal reversed and remanded for entry of an order compelling appraisal.<sup>326</sup> The court held that such appraisal provisions, like arbitration clauses, are deemed to be conditions precedent to recovery under the insurance policies.<sup>327</sup>

## XVI. LAND USE PLANNING

*Equity Resources, Inc. v. County of Leon.*<sup>328</sup> Leon County adopted an ordinance to insure that property owners' vested rights would not be lost by operation of the County's adoption of the 2010 Comprehensive Land Use Plan. Equity resources owned forty-seven acres: ten acres had already been developed; on thirty acres, permits for development had been issued and construction of multifamily housing had begun when the permits were revoked due to down-zoning,<sup>329</sup> and the remaining land was zoned commercial. Equity Resources and Richard Pelham, Equity's president and one of its co-owners, applied for a determination that their development rights had vested; however, the application was denied. Equity Resources then petitioned the circuit court for certiorari which was also denied. The First District Court granted certiorari and, in an extensive and well-reasoned opinion written by Chief Judge Zehmer,<sup>330</sup> the decision of the trial court was quashed.

The focus of the opinion was on "whether the trial court observed the essential requirements of the law in ruling on the petition."<sup>331</sup> The ordinance recognized equitable estoppel as a basis for granting a vested rights determination. Equitable estoppel based upon the actions of a zoning authority has the following elements: 1) a property owner's good faith reliance, 2) on some act or omission of the government, and 3) a substantial change in position or the incurring of excessive obligations and expenses so

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326. *Id.* at 1103.

327. *Id.*

328. 643 So. 2d 1112 (Fla. 1st Dist. Ct. App. 1994), *review denied*, 651 So. 2d 1194 (Fla. 1995).

329. Note that the down-zoning occurred prior to the adoption of the plan. This has led to litigation in federal court. *See Villas of Lake Jackson, Ltd. v. Lake County*, 796 F. Supp. 1477 (N.D. Fla. 1992).

330. Judge Miner and Senior Judge Smith concurred.

331. *Equity Resources, Inc.*, 643 So. 2d at 1117.



that it would be highly inequitable and unjust to destroy the right he acquired.<sup>332</sup> The trial court erred by confusing these elements with the requirements of standing. The trial court had concluded that Equity Resources lacked standing because Pelham, not Equity Resources, was the one who had relied upon the government's position. Further, Pelham lacked standing because Equity Resources was now the owner. Pelham, as an indirect owner of the property, did have standing. Equity Resources, as a vehicle created and controlled by Pelham to invoke estoppel based upon Pelham's acts of reliance which a stranger successor would not.

The trial court had also ruled against the petitioners because "there is no evidence they incurred expenses *exclusively for the undeveloped* portion of the property, because the expenditures were not made in reliance on any promise by the County and because the [Petitioners] waited far too long to complete the project."<sup>333</sup> The district court found that there was "no basis in law for this ruling."<sup>334</sup> There is no requirement that the claimant have incurred expenses exclusively for one particular piece of land; there is no requirement that the County have made any promise; and there is no requirement that development have been commenced within any particular time or a reasonable time.<sup>335</sup> The case was remanded to the trial court with directions to order the County to give further consideration to the original application in a manner consistent with the opinion.

*City of Jacksonville v. Wynn.*<sup>336</sup> Wynn and other property owners in a Jacksonville residential subdivision sued seeking a declaration that the City's comprehensive zoning plan was invalid as applied to their property. They also sought an injunction to prevent the City from imposing on their property any use classifications more restrictive than "neighborhood commercial," and claimed inverse condemnation.

The reason behind the property owners' opposition to the City's plan was that their six residential lots, five improved with single-family homes and one vacant lot, were zoned as "residential low density" in the City's plan. The property owners claimed that their lots had gradually become less conducive to residential use and that the best use for the property was now neighborhood commercial. The City refused to change its plan and the property owners argued that the zoning of their properties under the plan did

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332. *Id.* (quoting *Franklin County v. Leisure Properties, Ltd.*, 430 So. 2d 475, 479 (Fla. 1st Dist. Ct. App. 1975), *review denied*, 440 So. 2d 352 (Fla. 1983)).

333. *Id.* at 1119.

334. *Id.*

335. *Id.*

336. 650 So. 2d 182 (Fla. 1st Dist. Ct. App. 1995).

not bear a substantial relation to the public health, safety, morals, or general welfare, and was thus an invalid exercise of police power. The circuit court held that the plan failed to meet the requirements of chapter 163 of the *Florida Statutes*. It entered judgment in the property owners' favor with regard to all their claims except inverse condemnation, finding that the injunctive relief would prevent a taking from occurring. The First District Court of Appeal, in an opinion written by Judge Kahn,<sup>337</sup> reversed on two grounds.

First, the court determined that the circuit court lacked subject matter jurisdiction to hear the action.<sup>338</sup> Part II of chapter 163 of the *Florida Statutes* provides that an administrative hearing before the Division of Administrative Hearings is the sole method available for the determination of whether a local government's plan is in compliance with chapter 163.<sup>339</sup> The Division of Administrative Hearings has exclusive original jurisdiction over such challenges.<sup>340</sup> Even before such hearing is requested, the Department of Community Affairs must make an initial determination as to whether the plan is in compliance. This means that the circuit courts have jurisdiction to review the decisions of the Division of Administrative Hearings regarding the disputed plan, but cannot hear claims such as those made in the instant case which bypassed the administrative remedy.<sup>341</sup> The court explained that the rationale behind depriving circuit courts of subject matter jurisdiction to determine the validity of comprehensive plans is to prevent piecemeal changes to comprehensive plans from resulting, in effect, in spot zoning.<sup>342</sup> The legislature has decided that the administrative agency is better equipped to analyze the impact that individual changes might have on the overall plan.

The second basis for reversal was lack of ripeness. The landowners here did not know what uses the government might permit on their properties and they never submitted a development plan for the government to accept or reject. They never received a final determination of the permissible uses. It does not appear that a claim was made that such an attempt would be futile, and there does not seem to have been any basis for such a claim. Therefore, their taking claim was not ripe.

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337. Judges Ervin and Wolf concurred.

338. *Id.* at 185.

339. *Id.*

340. *Id.*

341. *Wynn*, 650 So. 2d at 185.

342. *Id.*

*Metropolitan Dade County v. Blumenthal*.<sup>343</sup> Blumenthal wanted to have his twenty-acre parcel to RU-4L (Residential Limited Apartment House with a maximum of twenty-three units per acre) rezoned so he could build a 360-unit apartment complex. The planned development would have eighteen units per acre. Nevertheless, a neighboring federation of homeowner associations objected, claiming that a trend had begun in the area to limit density to thirteen units per acre. The County Commission denied the rezoning application, agreeing that there was an emerging trend to limit density in the area and that the current application was inconsistent with that trend. Blumenthal successfully petitioned the circuit court for a writ of certiorari. The circuit court held that the Commission lacked substantial competent evidence because the neighbor's testimony was conclusory and lacked adequate support. The County then sought review by a petition for a writ of certiorari to the district court.

The Third District Court of Appeal denied the writ. The court noted<sup>344</sup> that the standard of review is narrow in such cases and the district court should determine two things: whether procedural due process was afforded, and whether the circuit court applied the correct law. Procedural due process was not raised as an issue and the district court ruled that the circuit court had applied the correct law. It refused to reconsider the question of whether the commissioner presented substantial competent evidence because to do so would be to exceed the proper scope of review.

Judge Cope wrote a lengthy dissent to the effect that the circuit court had applied incorrect law which may be characterized as follows. First, the circuit court reviewed the remarks of an individual commissioner. The circuit court should have determined whether the Commission's resolution was based upon substantial competent evidence rather than on whether the comments of an individual commissioner were based upon such evidence. Second, based upon the facts in this record, the Commission had a choice of alternatives. The fact that the circuit court would not have made the same choice should not have been the question because there was sufficient evidence in the record to support the choice that the Commission made. Third, the circuit court's denigrating characterization of the testimony was unwarranted. The court noted that, "[t]he citizen testimony in this case was fact-based, and perfectly proper. In reality, there was no dispute as to the material facts of the case in any event."<sup>345</sup> Fourth, the majority has applied the scope of review for administrative decisions, rather than the

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343. 20 Fla. L. Weekly D1445 (3d Dist. Ct. App. June 21, 1995).

344. Judges Hubbart and Goderich concurred in the *per curiam* opinion.

345. *Blumenthal*, 20 Fla. L. Weekly at D1449.

review which a district court may exercise over a circuit court decision. The district court may determine whether the law has been correctly applied to the facts in the record. Fifth, the majority has made a factual error about the record.<sup>346</sup>

*City of Punta Gorda v. Burnt Store Hotel.*<sup>347</sup> The City appealed an order determining that a capacity increase fee was actually an illegal tax. The issue arose from a utility contract between the City and Burnt Store, which had purchased an existing hotel already connected to the City's water and sewer system. As a new utility customer, Burnt Store was required to sign an agreement to pay for increases in average consumption. Due to increased consumption, Burnt Store was charged \$154,000. The City argued that the costs of increased consumption should be charged to the party responsible for the increased consumption. Burnt Store argued that because the newly acquired property had not been changed structurally and had existed in the same capacity under prior ownership, there was no new increase for which the City had not previously accounted.

The district court affirmed<sup>348</sup> the lower court's ruling that this was an illegal tax. It stated that impact fees are justified when there is a nexus between new construction and a population increase which leads to increased consumption. This affects the infrastructure and requires an additional capital expenditure.<sup>349</sup> A change in the ownership of an existing business does not provide the required nexus even though the continuation of the business results in increased usage. In dicta, the court reaffirmed the proposition that structural changes alone are insufficient to justify an impact fee when there is no showing of additional usage.<sup>350</sup>

*Sarasota County v. Webber.*<sup>351</sup> Webber sought a variance so he could build a home within the protected Gulf Beach Setback Line. The Board of County Commissioners initially approved the variance by a 3-2 vote.

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346. The majority stated that a citizen had testified about a trend and that the Commission had based its decision on the existence of that trend even though the citizen was not an expert qualified to testify about such trends. However, the only time the word "trend" appears in the record is in the remarks of a County Commissioner at the conclusion of the hearing. The resolution made no mention of any such trend as being the basis for the Commission's decision.

347. 639 So. 2d 679 (Fla. 2d Dist. Ct. App. 1994).

348. Judge Blue wrote the opinion. Acting Chief Judge Schoonover and Judge Threadgill concurred. *Id.*

349. *Id.* at 680.

350. See *City of Tarpon Springs v. Tarpon Springs Arcade Ltd.*, 585 So. 2d 324 (Fla. 2d Dist. Ct. App.), *review denied*, 593 So. 2d 1051 (Fla. 1991).

351. 658 So. 2d 1069 (Fla. 2d Dist. Ct. App. 1995).

However, after a recess, one commissioner claimed a mental lapse and moved to reopen the matter. The Board voted again and, this time, denied the variance. Webber, claiming a violation of Florida's Government in the Sunshine Law and a denial of procedural due process, sought certiorari review in the circuit court which reversed the board. The Board and the County brought this petition for a writ of certiorari in the district court which held that the circuit court had erred by failing to determine whether the Board's denial of the variance was supported by substantial, competent evidence. Furthermore, the circuit court had applied the incorrect law in assigning error to the Board's reconsidering a matter after having voted. The Board properly followed the requirements of parliamentary procedure<sup>352</sup> and satisfied the requirements of procedural due process. The district court found no evidence in the record of any violation of the Government in Sunshine Law.

*3299 N. Federal Highway, Inc. v. Broward County.*<sup>353</sup> This case was primarily a First Amendment case dealing with the free speech issue of regulating nude dancing, but one novel issue relating to real property law was unsuccessfully raised. The bar argued that the Broward County Adult Entertainment Code, because it affected land use within the meaning of section 125.66 of the *Florida Statutes*, was subject to the zoning and land use ordinance requirements of notice and public hearings.<sup>354</sup> The Fourth District Court of Appeal held<sup>355</sup> that the legislature intended to impose those requirements only when an ordinance's effect on land use might be substantial, meaning that it must be more than merely an incidental effect on the use of land.<sup>356</sup> Ordinances which require minimum distances between residential areas and liquor establishments, or set moratoria on building, or prohibit the keeping of horses, do affect the use of land. On the other hand, ordinances which change building codes are not considered to affect land use because their effect is incidental.<sup>357</sup>

In this case, the county ordinance sets a minimum distance between the audience and nude performers. The court held that this is a regulation of

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352. The motion to reconsider was made by a member of the original majority and only a short time had passed between the votes. The applicant's attorney was still present in the hearing room when the announcement was made. Apparently, there was no further discussion or testimony. *Id.*

353. 646 So. 2d 215 (Fla. 4th Dist. Ct. App. 1994).

354. *Id.* at 222.

355. Judges Glickstein and Warner concurred in the *per curiam* opinion. Judge Gunther concurred specially without opinion.

356. *Id.* at 224.

357. *Id.*

conduct, not land use, although it may necessitate some structural changes in the interior of the buildings. Regulation of land use was not the primary goal of the ordinance. Any such effect was incidental and not sufficient to trigger the notice and hearing requirements.<sup>358</sup>

The bar filed a motion for rehearing which the district court denied, but the court<sup>359</sup> certified the following question as being of great public importance:

IS AN ORDINANCE THAT REQUIRES MODIFICATIONS TO ONLY THE INTERIOR STRUCTURE OF A BUILDING AN ORDINANCE THAT "AFFECTS THE USE OF LAND" WITHIN THE MEANING OF SECTION 125.66, FLORIDA STATUTES?<sup>360</sup>

*Florida Land Use and Environmental Dispute Resolution Act.*<sup>361</sup> This act, which becomes effective October 1, 1995, provides, "(3) Any owner who believes that a development order . . . or an enforcement action of a governmental entity, is unreasonable or unfairly burdens the use of his real property, may apply within 30 days after receipt of the order or notice of the governmental action for relief under this section."<sup>362</sup> The relief cited consists of a hearing before a special master<sup>363</sup> or, for a landowner who has been denied an application for an amendment to a comprehensive plan, mediation or other alternative dispute resolution.<sup>364</sup>

The Florida Legislature also amended section 177.142 of the *Florida Statutes*,<sup>365</sup> authorizing local governments to change the name of any subdivision, street, plat or other name appearing on an official plat or map, and even on any unofficial map or plat maintained by the clerk of the circuit court, if it finds that the name constitutes an ethnic or racial slur.

## XVII. LANDLORD AND TENANT

*Flanigan's Enterprises, Inc. v. Barnett Bank of Naples.*<sup>366</sup> Flanigan's subleased its bar and sold the bar's furnishing and liquor license to the

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358. 3299 N. Federal Highway, Inc., 646 So. 2d at 224.

359. Judges Glickstein, Gunther and Warner concurred in this *per curiam* opinion.

360. 3299 N. Federal Highway, Inc., 646 So. 2d at 228.

361. Ch. 95-181, § 2, Fla. Sess. Law Serv. 1311, 1315 (West).

362. *Id.* at 1316.

363. *Id.* § 2 (5)-(29).

364. *Id.* § 4 (amending FLA. STAT. § 163.3181).

365. Ch. 95-176, § 2, Fla. Sess. Law Serv. 1305, 1305 (West).

366. 639 So. 2d 617 (Fla. 1994).

subtenant. Under the sublease, Flanigan's had a security interest in the liquor license. The subtenant later granted a security interest in the liquor license to Barnett Bank. Barnett Bank recorded, but Flanigan's did not. Therefore, Flanigan's apparently could not claim priority based upon the security interest. Flanigan's advanced a different theory. It claimed to have a statutory landlord's lien,<sup>367</sup> which was prior to Barnett's security interest and, therefore, the subtenant's sale of the license gave rise to a statutory action for damages for disposing of personal property that was under a lien.<sup>368</sup>

The Supreme Court of Florida, in an opinion written by Justice Shaw, rejected this claim. The court had recently held a liquor license was not personal property to which a landlord's lien could attach.<sup>369</sup> Although the liquor license was represented by a certificate which the licensee was required to locate on the property, the certificate was not the license. Lacking a lien on the property, the damage theory was fatally defective.

*American Linens, Inc. v. Venmall International Group.*<sup>370</sup> The landlord brought an action for breach of the lease. The trial court found that the tenant owed \$5325 in back rent and taxes, but that it was otherwise entitled to a return of its \$12,834 security deposit. The tenant appealed, *inter alia*, the denial of prejudgment interest on the security deposit. The Third District Court of Appeal reversed on this point,<sup>371</sup> holding that interest should have been awarded from the date that the tenant demanded the return of its security deposit because the claim for \$7509 was a liquidated contractual claim which became due upon demand.

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367. *Id.* at 618.

Landlord's lien for rent. Every person to whom rent may be due, his heirs, executors, administrators or assigns, shall have a lien for such rent upon the property found upon or off the premises leased or rented, and in the possession of any person, as follows:

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Upon all other property of the lessee or his sublessee or assigns, usually kept on the premises. This lien shall be superior to any lien acquired subsequent to the bringing of the property on the premises leased.

FLA. STAT. § 83.08 (1977).

368. *Id.* § 818.01.

369. *Flanigan's*, 617 So. 2d at 618 (citing *Walling Enters., Inc. v. Mathias*, 636 So. 2d 1294 (Fla. 1994)).

370. 645 So. 2d 1059 (Fla. 3d Dist. Ct. App. 1994).

371. *Id.* at 1060. Judges Hubbard, Baskin, and Green concurred in the per curiam opinion.

*Anderson v. Fiocchi*.<sup>372</sup> The tenant cut his hands trying to open a glass shower door in a leased mobile home. The shower door, which would not open with ordinary pressure and was made of plain glass instead of safety glass, as required by the building code. The door had been installed before the current landlords purchased the property. The trial court granted summary judgment for the landlords, holding that they were not liable because they had no duty to determine what type of glass was in the door. The Second District Court of Appeal reversed. Judge Blue's opinion<sup>373</sup> agreed with the trial court to a limited extent. If the sole basis for the claim was based upon the glass used in the shower door, the plaintiff would lose. However, the plaintiff testified in his deposition that he had complained about the sticking door to the landlords' agent. The Supreme Court of Florida has stated, "[a]fter the tenant takes possession, the landlord has a continuing duty to exercise reasonable care to repair dangerous defective conditions upon notice of their existence by the tenant, unless waived by the tenant."<sup>374</sup> There was a genuine issue of material fact as to whether the door was opening and closing properly, and whether the landlord was on notice of its defective condition. Therefore, the motion for summary judgment should not have been granted.

*Lynch Austin Realty, Inc. v. Engler*.<sup>375</sup> The tenants apparently operated a consignment business. After defaulting on the lease, owing \$45,000 in unpaid rent, they removed \$55,000 in inventory, fixtures, and equipment regularly kept on the premises. The landlord brought an action for tortious interference with a commercial landlord's lien, distress for unpaid rent, and violation of the landlord's lien rights. The landlord also appealed a final judgment in favor of the corporate tenant's guarantors.

The tenants claimed that more than half of the removed items had not been paid for and were therefore subject to claims of their suppliers. The trial court held that the suppliers' claims were superior to the landlord's, and also absolved two of the four guarantors of liability. The Second District Court of Appeal reversed on the issue of the suppliers' superior claims. Under section 83.08(2) of the *Florida Statutes*, the landlord had a lien for unpaid rent "upon all other property of the lessee or his sublessees or assigns, usually kept on the premises."<sup>376</sup> The lien would attach either at

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372. 640 So. 2d 275 (Fla. 2d Dist. Ct. App. 1994).

373. Associate Judge Campbell and Judge Schoonover concurred.

374. *Anderson*, 646 So. 2d 276 (quoting *Mansur v. Eubanks*, 401 So. 2d 1328, 1330 (Fla. 1981)).

375. 647 So. 2d 988 (Fla. 2d Dist. Ct. App. 1994).

376. FLA. STAT. § 83.08(2) (1991).



the time of the commencement of tenancy or when a chattel was brought on the premises, whichever was later, and would be superior to a subsequently created chattel lien. Based on the *Uniform Commercial Code*,<sup>377</sup> the landlord's lien would not have to be recorded to have priority over a subsequently acquired security interest or lien. However, under the *Uniform Commercial Code*,<sup>378</sup> the suppliers must give some form of public notice that they retained an interest in the goods. Since there was no evidence that the suppliers had perfected their claim by giving notice, the landlord's lien had priority.

*Premici v. United Growth Properties, L.P.*<sup>379</sup> The shopping center tenant stopped paying rent after a sewage system malfunctioned and damaged the leased premises. The tenant sued the landlord for damages. The landlord counterclaimed for eviction and back rent plus interest and moved to bifurcate the actions in order to expedite its summary action for possession. The trial court granted the landlord's motion.

The tenant asserted several defenses, including constructive eviction. The landlord then filed a "Motion for Determination of Rent Due and Payment of Rent Into Registry of Court," pursuant to the new procedure established by section 83.232 of the *Florida Statutes*. The court ordered the tenant to pay \$28,886.35 to the registry of the court. When the tenant did not comply, the landlord moved for and won a default judgment on its possession claim on the theory that the tenant's failure to pay the rent due into the registry of the court constituted a waiver of all defenses. The landlord then moved for entry of final judgment on the money damages claim alleging that the default judgment for possession constituted an admission by the tenant of all the landlord's allegations. The trial court agreed and entered final judgment for damages.

The tenant appealed and the Fifth District Court of Appeal reversed.<sup>380</sup> The court held, in the opinion written by Judge Griffin,<sup>381</sup> that the failure to make court-ordered rent payments into the court registry waived all defenses only in the action for possession. The legislative history revealed that the statute was intended to prevent commercial tenants from having the benefits of continued possession during litigation without paying rent. The court then utilized the purpose approach to overcome the inadequate draftings found in this statute and concluded that the evil feared

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377. *Id.* § 679.104(2).

378. *Id.* § 672.326(3).

379. 648 So. 2d 1241 (Fla. 5th Dist. Ct. App. 1995).

380. *Id.* at 1244.

381. Judges Cobb and Sharpe concurred.

would be eliminated by applying this section only to the action for possession.<sup>382</sup> That interpretation would be consistent with the interpretation of the similar residential statute.<sup>383</sup>

*Thor Bear, Inc. v. Crocker Mizner Park, Inc.*<sup>384</sup> The tenant leased space in a shopping complex for the purpose of operating a retail movie video store. He paid \$75,000 as a security deposit and spent about \$160,000 on improvements. The store failed a little more than a month after it was occupied due to lack of business. The tenant blamed the problem on inadequate parking and access. He had raised these issues with the lessor during the lease negotiations and before occupying the building. However, the lessor had repeatedly reassured him that his needs would be accommodated. The existence of a parking problem was well established, having, *inter alia*, been the subject of newspaper coverage.

The tenant sued, claiming about \$400,000 in losses and alleging constructive eviction and fraudulent misrepresentation. The jury returned a verdict for the tenant. However, the verdict was rejected by the trial court which granted a belated directed verdict in favor of the lessors. The tenants appealed.

The district court, in a *per curiam* opinion,<sup>385</sup> recognized that the verdict should not have been set aside if a reasonable jury could have reached that verdict. The court then set out the elements for fraudulent misrepresentation:

- (1) a false statement or misrepresentation of a material fact; (2) the representor's knowledge at the time the misrepresentation is made that such statement is false; (3) such misrepresentation was intended to induce another to act in reliance thereon; (4) action in justifiable reliance on the representation; and (5) resulting damage or injury to the party so acting.<sup>386</sup>

The court then concluded that a reasonable jury could have concluded from the evidence in the record that these elements were satisfied.<sup>387</sup>

The general rule of law is that the false statement of fact must concern a past or existing fact to be actionable. But that rule is subject to an

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382. *Premici*, 648 So. 2d at 1243.

383. *See K.D. Lewis Enters. Corp. v. Smith*, 445 So. 2d 1032 (Fla. 5th Dist. Ct. App. 1984).

384. 648 So. 2d 168 (Fla. 4th Dist. Ct. App. 1994).

385. Judges Hersey, Glickstein and Klein concurred.

386. *Thor Bear*, 648 So. 2d at 172 (citations omitted).

387. *Id.*

exception: a promise of future action made with no intention of performing or with a positive intention not to perform is also actionable. In effect, the fact which is the subject of the fraud is the promisor's intention. There was testimony that the lessor's vice president told the tenant that additional parking would be added when the leasing trailer was removed. However, the vice president's successor told the tenant such additional parking was never planned. A reasonable jury could infer from that evidence that the landlord had made a false statement or misrepresentation of a material fact. In addition, the lessor's vice president made statements that the needs of the tenant could be accommodated. Such an assertion made by one with superior knowledge or who appeared to have superior knowledge could constitute a false statement or misrepresentation of a material fact rather than merely an opinion. Furthermore, a reasonable jury could have decided that the tenant's reliance on the vice president's assertions was reasonable under the circumstances. Consequently, a directed verdict should not have been granted.

*Walgreen Co. v. Habitat Development Corp.*<sup>388</sup> This case involved a long-term commercial lease of the Walgreen building, a landmark in downtown Miami. The landlord sought a declaration on the meaning of the lease's surrender clause which required that the property be returned "in a 'safe condition and reasonably in good order and repair.'"<sup>389</sup> The parties and the trial court agreed that the phrase was clear and unambiguous and, therefore, should have been given its plain meaning. However, then the trial court construed that language to require the tenant to return the property "in tenantable and rentable condition so that the premises are returned in reasonably like-new or nearly-new condition, safe and fit for immediate occupancy and rental."<sup>390</sup> The Third District Court of Appeal reversed,<sup>391</sup> holding that the trial court had gone far beyond what the words expressed since "reasonably good repair" did not imply like-new or nearly-new condition.<sup>392</sup>

Furthermore, the trial court held that to be in a safe condition, the property would have to be in compliance with the building code at the time of the surrender.<sup>393</sup> The district court held that the order would have to be amended to provide, in essence, that the building not be in violation of

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388. 655 So. 2d 164 (Fla. 3d Dist. Ct. App. 1995).

389. *Id.* at 165 (quoting article 27 of the lease agreement).

390. *Id.*

391. Judges Hubbard, Levy and Goderich concurred in the per curiam opinion.

392. *Id.* at 165.

393. *Id.*

the code, considering any exemptions or grandfathering-in which would be applicable to the building.<sup>394</sup>

*TCY, Ltd., Inc. v. Johnson.*<sup>395</sup> This circuit court decision merits attention. The defendant rented a boat slip at the plaintiff's marina. Alleging breach of the lease,<sup>396</sup> the plaintiff filed a residential eviction action in state court under chapter 83 of the *Florida Statutes*. Among the defenses was a challenge, which Circuit Court Judge Linda Singer Stein rejected, to the court's jurisdiction based upon the theory that such an eviction fell within the exclusive admiralty jurisdiction of the federal court. For a contract to fall within admiralty jurisdiction, it must "relate to the ship as an instrument of commerce."<sup>397</sup> In this case, the defendant's boat was moored to the dock, remained stationary, and was used exclusively as defendant's residence. Thus, it had been withdrawn from commerce and an action for possession of the slip where it was moored did not fall within admiralty jurisdiction.

#### XVIII. LEGISLATION

The *Homebuyer's Protection Act*<sup>398</sup> broadens the protections provided against unscrupulous contractors. The act provides that contractors must now at all times, not merely in hurricane situations, apply for permits within thirty days of receiving more than ten percent of the total contract price for any construction work on residential properties. Additionally, for construction of completed homes, the deposit money must be placed in an escrow account. All withdrawals from the escrow account require the signatures of both the buyer and the contractor. The contractor must begin work within ninety days from the issuance of permits unless the person ordering the work agrees in writing to extend the period. A contractor who receives payment in excess of the work already completed cannot fail to perform any further work for any ninety-day period. The Act provides a procedure for giving thirty-days notice to contractors when work has halted for sixty days.

Section 489.1265 of the *Florida Statutes* was amended to prohibit contractors from allowing non-licensed persons to use the contractors'

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394. *Walgreen Co.*, 655 So. 2d at 165-66.

395. 3 Fla. L. Weekly Supp. 72 (11th Cir. Jan. 18, 1995).

396. Plaintiff alleged breach of the lease by failing to comply with the marina's rules and regulations and § 83.52 of the *Florida Statutes*.

397. *TCY, Ltd., Inc.*, 3 Fla. L. Weekly Supp. at 73 (quoting *Pillsbury Flour Mills Co. v. Interlake S.S. Co.*, 40 F.2d 439 (2d Cir. 1930)).

398. Ch. 95-240, 1995 Fla. Sess. Law Serv. 1688 (West).

registration numbers. Such violations now constitute a first degree misdemeanor. Repeated violations constitute third degree felonies. Contractors must notify homeowners in conspicuous writing, at the time that the homeowner makes initial payment to the contractor, that there is a recovery fund for claims against contractors. The specific form to be used will be prescribed by the Department of Legal Affairs and provided by the Construction Industry Licensing Board by November 1, 1995.

One of the most important changes involves the homeowner's right to obtain a list of all subcontractors and materials suppliers which the contractor will use. This should prevent the general contractor from using unlicensed subcontractors. A contractor's failure to supply such a list within ten days after receipt of a proper request from the homeowner precludes the contractor from asserting liens to the extent that the owner is prejudiced. Furthermore, filing a fraudulent lien is now punishable as a third-degree felony, as does intentionally or knowingly making false statements regarding the payment of subcontractors and suppliers such that a person may rely on the statements and draw payments.

The *Bert J. Harris, Jr., Private Property Rights Protection Act*,<sup>399</sup> which becomes effective as of October 1, 1995, is the most important act relating to real property enacted so far in this legislative session. The act provides remedies for real property owners whose property "has been inordinately burdened by governmental action," which is defined in the act as "an action [that] . . . has directly restricted or limited the use of real property such that the property owner is permanently unable to attain the reasonable, investment-backed expectation for the existing use of the real property . . . ."<sup>400</sup> The definition continues, emphasizing that the burden must be permanent and disproportionate in comparison to the burden on other properties. The act provides the procedures to be followed by property owners in filing claims, allows settlements, and requires court actions if a settlement agreement contravenes the application of state law. Of course, it provides for attorney's fees and costs. It also provides a mediation and dispute resolution mechanism for settling disputes regarding amendments to comprehensive plans. The property owner must, not less than 180 days prior to filing an action, present a written claim to the governmental entity. During this 180-day period, the governmental entity shall make a written offer of settlement, and must notify all contiguous

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399. Ch. 95-181, 1995 Fla. Sess. Law Serv. 1311 (West).

400. *Id.* § 1(3)(e), 1995 Fla. Sess. Law Serv. at 1312.

landowners of the pending claim. If the settlement offer is rejected by the property owner, then suit can be filed in circuit court.

The *Florida Land Use and Environmental Dispute Resolution Act*,<sup>401</sup> which becomes effective October 1, 1995, provides:

(3) Any owner who believes that a development order . . . or an enforcement action of a governmental entity[] is unreasonable or unfairly burdens the use of his real property, may apply within 30 days after receipt of the order or notice of governmental action for relief under this section.<sup>402</sup>

Relief consists of a hearing before a special master<sup>403</sup> or, for a landowner who has been denied an application for an amendment to a comprehensive plan, mediation or other alternative dispute resolution.<sup>404</sup>

The Florida Legislature also amended section 177.142 of the *Florida Statutes*<sup>405</sup> to authorize local governments to change the name of any subdivision, street, plat or other name appearing on an official plat or map, or even on any unofficial map or plat maintained by the clerk of the circuit court if it finds that the name constitutes an ethnic or racial slur.

Chapter 95-274 made comprehensive changes to chapter 721 of the *Florida Statutes* which deals with time-shares.<sup>406</sup> The law also made amendments to chapter 718 which deals with condominiums and expanded the statutory regulation of homeowners' associations under chapter 617 which deals with corporations that are not for profit.

Among the more important changes dealing with time-shares was the creation of new statute, section 721.065, which requires use of time-share resale purchase agreements containing prescribed disclosures about assessments for common expenses, penalties for non-payment, and a ten-day cancellation provision.<sup>407</sup> Also of note is a new section 721.071, dealing with trade secret protection for developers' confidential materials filed in conjunction with a public offering of a time-share plan.<sup>408</sup> Section 721.15

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401. *Id.* § 2, 1995 Fla. Sess. Law Serv. at 1315.

402. *Id.*

403. *Id.* § 2(5)-(29), 1995 Fla Sess. Law Serv. at 1316-1320.

404. Ch. 95-181, § 4, 1995 Fla. Sess. Law Serv. at 1315 (West) (amending FLA. STAT. § 163.3181).

405. Ch. 95-176, § 2, 1995 Fla. Sess. Law Serv. 1305, 1305 (West).

406. Ch. 95-274, 1995 Fla. Sess. Law Serv. 1936 (West).

407. *Id.* § 4, 1995 Fla. Sess. Law Serv. at 1944.

408. *Id.* § 6, 1995 Fla. Sess. Law Serv. at 1954 (to be codified at FLA. STAT. § 721.071).

was amended to prohibit managing entities from commingling of operating funds with reserve funds, or commingling of common expense funds of one time-share plan with common expense funds of other time-share plans, although such funds can be deposited into a common account for a period not to exceed thirty days.<sup>409</sup>

Chapter 95-274 included an amendment to section 721.20 prohibiting real estate brokers and salespersons from collecting advance fees for listing of time-shares.<sup>410</sup> It amends section 721.26 to increase the regulatory powers of the Division of Florida Land Sales, Condominiums, and Mobile Homes, and increases the disclosure requirements for multi-state time-shares.<sup>411</sup> Changes to chapter 718 of the *Florida Statutes* include amendment of section 718.111(15) to prohibit condominium associations from commingling of reserve and operating funds.<sup>412</sup> Section 718.117 was amended to enumerate the powers and duties of condominium directors after commencement of termination proceedings.<sup>413</sup>

With regard to homeowners' associations, sections 617.301 through 617.312 were substantially amended, rewording the definitions and the powers/duties sections, and specifying who may sue and be sued under homeowners' association law.<sup>414</sup> New statutory sections were created to provide for arbitration and mediation of disputes between associations and members and to provide for survival of association covenants after tax and foreclosure sales.<sup>415</sup> Additionally, section 689.26 was amended to include a mandatory disclosure statement which must be provided to prospective purchasers of real property subject to a homeowners' association membership requirement.<sup>416</sup> The disclosure must be supplied by developers of new homes as well as sellers in the resale market.<sup>417</sup>

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409. *Id.* § 13, 1995 Fla. Sess. Law Serv. at 1962 (to be codified at FLA. STAT. § 721.15(8)).

410. *Id.* § 14, 1995 Fla. Sess. Law Serv. at 1963.

411. Ch. 95-274, § 15, 1995 Fla. Sess. Law Serv. at 1963.

412. *Id.* § 35, 1995 Fla. Sess. Law Serv. at 1983.

413. *Id.* § 47, 1995 Fla. Sess. Law Serv. at 1993.

414. *Id.* §§ 52-62, 1995 Fla. Sess. Law Serv. at 1997-2005.

415. *Id.* §§ 61-62, 1995 Fla. Sess. Law Serv. at 2005.

416. Ch. 95-274, § 63, 1995 Fla. Sess. Law Serv. at 2005-06.

417. *Id.*

## XIX. LIENS AND MECHANIC'S LIENS

*Casa Linda Tile & Marble Installers, Inc. v. Highlands Place 1981, Ltd.*<sup>418</sup> The tile installer sued to enforce a mechanic's lien after it ceased work due to nonpayment. The Highlands management counterclaimed for defective work and for punitive damages due to Casa Linda's filing of a lis pendens after the lien had been transferred to bond. Highlands alleged as a defense to payment the condition precedent that the defects in the work, as noted on a punchlist, be corrected.<sup>419</sup>

The court ruled that "[w]hen a contractor has substantially performed and otherwise complied with the mechanic's lien statute, it is entitled to an award on its mechanic's lien claim for the contract price less all damages caused by failure to render full performance."<sup>420</sup> Here, although the tile installer failed to obtain the required architect's certificate of completion, the court found substantial performance.<sup>421</sup> As for the punitive damages for filing a lis pendens after the lien was transferred to bond, the court ruled that, absent a finding of actual malice, punitives are not justified, either by statute or under a slander of title claim.<sup>422</sup>

*Heidle v. S & S Drywall and Tile, Inc.*<sup>423</sup> Ms. Heidle appealed from a denial of her recovery of attorney's fees from S & S Drywall, after a \$10,840 lien foreclosure action filed by S & S was dismissed for lack of prosecution. The Fifth District Court of Appeal reversed, holding that Ms. Heidle was entitled to the attorney's fees under section 713.29, which allows the prevailing party to recover such fees.<sup>424</sup> There is no need to win on a counterclaim to be considered a prevailing party. Ms. Heidle prevailed because the action against her was dismissed.<sup>425</sup>

*Hoepner & Assoc., Inc. v. Stewart Gilman Co.*<sup>426</sup> The Fifth District Court of Appeal affirmed the Orange County Circuit Court's dismissal of Hoepner's action to foreclose a construction lien. Hoepner, a professional engineering company, recorded its original claim of lien on August 27, 1991, and then recorded an amended claim of lien on September 24, 1991. Hoepner filed suit to foreclose the lien on September 24, 1992, exactly one

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418. 642 So. 2d 766 (Fla. 4th Dist. Ct. App. 1994).

419. *Id.* at 767.

420. *Id.* at 768.

421. *Id.*

422. *Casa Linda*, 642 So. 2d at 768.

423. 639 So. 2d 1105 (Fla. 5th Dist. Ct. App. 1994).

424. *Id.* at 1106.

425. *Id.*

426. 648 So. 2d 854 (Fla. 5th Dist. Ct. App. 1995).



year from the record date of its amended claim, but over one year from the original claim date.<sup>427</sup> The action was thus time barred under section 713.22(1) of the *Florida Statutes*, which provides that no lien shall continue for a longer period than one year after the claim of lien has been recorded unless within that time an action to enforce the lien is commenced in a court of competent jurisdiction. Recording an amended claim of lien does not toll the one-year time period.<sup>428</sup>

The court cited *Jack Stilson & Co. v. Caloosa Bayview Corp.*<sup>429</sup> in support of its holding that, "although the lien statutes authorize a correction or a change by way of an amendment to an original claim of lien, such amendment does not toll the statutory time to institute suit."<sup>430</sup> The rationale behind this interpretation is that the original and the amended claim represent only one claim, which begins when first recorded.

*Paulk v. Peyton.*<sup>431</sup> Appellant Paulk entered into a combination written and oral contract with Peyton to perform certain improvements on Peyton's real property. A dispute arose and Paulk instituted this action seeking damages for breach of contract and foreclosure of a mechanic's lien. Specifically, Paulk alleged that he furnished Peyton with a contractor's affidavit stating that all lienors had been paid and that all conditions precedent to the filing of the action had been satisfied. Peyton answered the averment by stating that she was "without knowledge."<sup>432</sup> Later, Peyton was granted summary judgment on the foreclosure claim because she was not furnished with an original contractor's affidavit, but instead was given a copy, which did not comply with the mechanic's lien statute, section 713.06(3)(d).<sup>433</sup>

The First District Court of Appeal reversed, holding that Peyton waived her defense of nonperformance of this condition precedent by not pleading it specifically and with particularity in her answer.<sup>434</sup>

*Shipwatch Development Corp. v. Salmon.*<sup>435</sup> In a construction dispute between Salmon, the contractor, and Shipwatch, the owner, the trial court imposed a lien against Shipwatch's property in the amount of \$16,024.07.

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427. *Id.* at 854-55.

428. *Id.* at 855.

429. 278 So. 2d 282 (Fla. 1973).

430. *Hoepner*, 648 So. 2d at 855 (citing *Jack Stilson & Co. v. Caloosa Bayview Corp.*, 278 So. 2d 282, 283-84 (Fla. 1973)).

431. 648 So. 2d 772 (Fla. 1st Dist. Ct. App. 1994).

432. *Id.* at 773.

433. *Id.*

434. *Id.* at 774.

435. 646 So. 2d 838 (Fla. 1st Dist. Ct. App. 1994).

The lien amount included amounts for Salmon's attorney's fees, as well as prejudgment interest. The First District Court of Appeal reversed the attorney's fees award because the trial court erred in not adjusting the lodestar fee based on the extent of success achieved by counsel for Salmon.<sup>436</sup> The original amount alleged by Salmon to be due was over \$40,000.00, which indicates that the level of success was low.<sup>437</sup>

The court also modified the award of prejudgment interest because it erroneously included interest that accrued prior to the date the contractor's affidavit was served. The trial court had granted prejudgment interest from the date of filing the claim of lien, when the correct starting point is when the contractor's affidavit is served.<sup>438</sup>

*Stunkel v. Gazebo Landscaping Design, Inc.*<sup>439</sup> The Supreme Court of Florida answered the following certified question in the negative because a binding contract is necessary in order to file a mechanic's lien:

DOES A SUBCONTRACTOR BEGIN TO FURNISH SERVICES, FOR THE PURPOSE OF TIMELY PROVIDING A NOTICE TO OWNER IN ACCORDANCE WITH SECTION 713.06(2)(a), FLORIDA STATUTES (1991), WHEN, WITHOUT ANY BINDING CONTRACTUAL OBLIGATION TO DO SO, HE OR SHE BEGINS TO SELECT MATERIALS AT SOME LOCATION OFF THE JOB SITE, FOR FUTURE INSTALLATION ON THE JOB SITE?<sup>440</sup>

The court also held that the forty-five-day period for giving notice to the owner of a possible lien claim under section 713.06 of the *Florida Statutes*, starts when a subcontractor begins to furnish services or materials at the job site.<sup>441</sup>

Gazebo Landscaping was the landscaping subcontractor of a general contractor who was building a home on the Stunkel's property. Gazebo had been orally contacted by the general contractor, and on November 7, 1990 took the Stunkels to select trees for the landscaping. The planting work at the Stunkel property did not begin until December 5, 1990. The Stunkels went bankrupt and Gazebo posted its notice of claim of lien on January 18, 1991. The issue was whether the forty-five-day period for posting a claim

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436. *Id.* at 839.

437. *Id.*

438. *Id.*

439. 20 Fla. L. Weekly S220 (May 11, 1995).

440. *Id.* at S221.

441. *Id.*

of lien under section 713.06(2)(a) began to run on November 7 or December 5 of 1990. Fortunately for Gazebo, the court held that it began to run from the later date, so that Gazebo was within the deadline.<sup>442</sup>

*Sturge v. LCS Development Corp.*<sup>443</sup> The Sturges sought certiorari review of an order denying their motion to discharge a mechanic's lien. The lien arose from hurricane repairs done by LCS on the Sturges' property. LCS recorded a claim of lien after the Sturges refused to pay due to the quality of work and time delays. Subsequent to the filing of claim of lien, the Sturges sued for breach of contract and included a count to discharge the lien pursuant to section 713.21(4) of the *Florida Statutes*. The clerk issued a summons to show cause within twenty days why the lien should not be discharged. On the twentieth day, LCS filed a motion to extend the deadline to respond. After the twenty days had passed, the Sturges moved to discharge the lien and the motion was denied.<sup>444</sup>

The Third District Court of Appeal quashed the order and remanded with instructions to discharge the lien.<sup>445</sup> The court restated that mechanic's lien laws are to be strictly construed.<sup>446</sup> Extensions of time to respond pursuant to section 713.21(4) should only be granted for good cause, and such good cause must be shown within the twenty day period. The lien was discharged due to LCS's failure to comply with this requirement.<sup>447</sup>

Note that section 713.21(4) states that the circuit court of the county where the property is located is the court empowered to discharge liens. With the recent holding that county and circuit courts have concurrent jurisdiction with regard to equitable actions, such as foreclosure of liens, within the county court jurisdictional amount of \$15,000, this statute should probably be amended to state that the county courts can also discharge liens. Although the lien in this case did not involve equity because it had not reached the foreclosure stage, other mechanic's lien cases which reach foreclosure could still involve claims for discharge. If these cases are being heard in county court, the county court should be able to decide the related discharge claims.

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442. *Id.*

443. 643 So. 2d 53 (Fla. 3d Dist. Ct. App. 1994).

444. *Id.* at 54.

445. *Id.* at 55.

446. *Id.* at 54.

447. *Id.* at 55.

## XX. LIS PENDENS

*Acapulco Construction, Inc. v. Redavo Estates, Inc.*<sup>448</sup> The plaintiff, Acapulco Construction, filed a petition for a writ of certiorari seeking review of an order discharging their notice of lis pendens. The Third District Court of Appeal treated the petition as an appeal from a non-final order dissolving an injunction under rule 9.130(a)(3)(B) of the *Florida Rules of Appellate Procedure* and reversed the trial court's order discharging the lis pendens.<sup>449</sup> The plaintiffs sought to impose a constructive trust on the subject property, which was a viable claim entitling them to file a notice of lis pendens. In an action such as imposing a constructive trust which challenges the legal or equitable ownership of the property, a lis pendens is necessary to protect both the parties and subsequent purchasers or encumbrancers. It was not necessary for the plaintiffs to prove their claim in order to file a lis pendens; they only had to show a fair nexus between the apparent legal or equitable ownership of the subject property and the dispute involved in the lawsuit.<sup>450</sup>

*Medical Facilities Development, Inc. v. Little Arch Creek Properties, Inc.*<sup>451</sup> This case addresses the question of under what circumstances must a bond be posted by the proponent of a lis pendens when the lis pendens is not based upon a duly recorded instrument or construction lien. The Third District Court of Appeal affirmed the trial court's imposition of a bond.<sup>452</sup> The lis pendens was filed after Medical Facilities sued for specific performance of an agreement in which it was to purchase a building from Little Arch. Little Arch had entered into another contract to sell the property to someone else for \$6.5 million. Medical Facilities filed a lis pendens preventing Little Arch from closing on the \$6.5 million deal. Little Arch moved to require Medical Facilities to post a bond to protect Little Arch in the event that the lis pendens was later held to have been improperly filed. The trial court ordered Medical Facilities to post a \$1 million bond.<sup>453</sup>

The court referred to section 48.23 of the *Florida Statutes*, which governs lis pendens. There are two types: those involving actions upon a duly recorded instrument of construction lien, which do not require a bond;

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448. 645 So. 2d 182 (Fla. 3d Dist. Ct. App. 1994).

449. *Id.* at 183.

450. *Id.*

451. 656 So. 2d 1300 (Fla. 3d Dist. Ct. App. 1995).

452. *Id.* at 1303.

453. *Id.* at 1301-02.

and those which are not founded on a duly recorded instrument or construction lien, in which a bond might be required. This is controlled in the same manner as the method by which the court grants and dissolves injunctions. However, there are different approaches by the districts. Some courts grant the bond if the owner of the property can show that it will suffer irreparable harm if the lis pendens is unjustified. Others leave it to the court's discretion. The third approach makes the posting of a bond mandatory when the lis pendens is not founded upon a duly recorded instrument. The Third District Court of Appeal follows the mandatory bond approach.<sup>454</sup>

The appellants referred to *Chiusolo v. Kennedy*,<sup>455</sup> in which the Supreme Court of Florida stated, "[w]e agree . . . that the statutory reference to injunctions exists merely to permit property holders to ask in an appropriate case that the plaintiff post a bond where needed to protect the former from irreparable harm."<sup>456</sup> The Third District Court of Appeal stated that this was dicta and non-binding.<sup>457</sup> The lis pendens bond was analogized to a temporary injunction bond, which can be obtained as of right.<sup>458</sup> Judge Green dissented, arguing that lis pendens bonds should not be required unless the owner of the property would suffer irreparable harm. Further, the court stated that monetary harm alone, which is the harm that would have been caused by the lis pendens preventing the \$6.5 million sale of the building, is not irreparable because there was an adequate remedy at law.<sup>459</sup>

## XXI. MARKETABLE RECORD TITLE ACT

*Martin v. Town of Palm Beach*.<sup>460</sup> The 1948 deed to the County of Palm Beach provided that the land be used for no other purpose than as a public park, public beach, and recreational area. The County conveyed the land to the Town of Palm Beach in 1957 by a deed which did not mention the restriction, but did state that the conveyance was "subject to easements, covenants, limitations, reservations and restrictions of record."<sup>461</sup> In 1964, a shack on the property was converted into a fire station, which was

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454. *Id.* at 1303.

455. 614 So. 2d 491 (Fla. 1993).

456. *Id.* at 492-93.

457. *Medical Facilities Dev., Inc.*, 656 So. 2d at 1303.

458. *Id.* at 1304.

459. *Id.* at 1307.

460. 643 So. 2d 112 (Fla. 4th Dist. Ct. App. 1994).

461. *Id.* at 113.

expanded in 1979. When the Town decided to replace the building with a new fire station, a County resident brought this action for an injunction.<sup>462</sup>

The district court decided<sup>463</sup> that the 1957 deed was the root of title for the purposes of the Marketable Record Title Act ("MRTA").<sup>464</sup> The court followed the statutory mandate to liberally construe the statute to effectuate the legislative purpose<sup>465</sup> of simplifying and facilitating land title transactions.<sup>466</sup> Accordingly, the general reference to "limitations, reservations and restrictions of record" was insufficient to preserve the restriction which appeared in a document on the record prior to the root because it did not refer to the book and page where the specific restriction could be found or refer to the name of the recorded plat which imposed the restriction.<sup>467</sup>

A most interesting point is hidden in a footnote.<sup>468</sup> The plaintiff had tried to convince the court to create an exception to MRTA for charitable donations. However, the district court wisely refused.<sup>469</sup> The reasons given were that: 1) to do so would constitute "impermissible judicial legislation"<sup>470</sup> and 2) it was a subject which should be "best addressed to the legislature."<sup>471</sup> However, the best reason for the refusal would have been the above-stated statutory rule of construction. Any exception to MRTA would have the effect of complicating and obstructing land transactions. Furthermore, the one asked for here would be particularly bad. Title searchers would be burdened with determining whether pre-root title transactions contained any limitation, reservation or restriction and, if so, whether the conveyance or devise had been a charitable donation. That information might not be discernible from the public records, so the inquiry might be difficult, slow and costly.

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462. The court declined to rule on the issue of the plaintiff's standing to bring this action because it was raised for the first time on oral argument. *Id.*

463. Associate Judge Diamantis wrote the opinion. Associate Judges Harris and Griffin concurred.

464. *Martin*, 643 So. 2d at 114 (citing FLA. STAT. §§ 712.01-.10 (1993)).

465. FLA. STAT. § 712.10 (1993).

466. *Id.* § 712.02.

467. *See* *Sunshine Vistas Homeowners Ass'n v. Caruana*, 623 So. 2d 490 (Fla. 1993).

468. *Martin*, 643 So. 2d at 115 n.7.

469. *Id.*

470. *Id.*

471. *Id.*

## XXII. MOBILE HOMES

*Doral Mobile Home Villas, Inc. v. Doral Home Owners, Inc.*<sup>472</sup> The appellant, Doral Mobile Home Villas, Inc., owns and operates a mobile home park with more than 500 lots in Pinellas County. In 1991 and 1992, it served notices on its tenants that it intended to raise its rental rates. The mobile home owners opposed the increases and invoked the dispute resolution provisions of the Florida Mobile Home Act.<sup>473</sup> When a negotiated settlement could not be reached, the homeowners' association sued. Some homeowners withheld payment of the increased portion of their rent, and the homeowners' association sought permission to pay the disputed rent into the court's registry. The trial court allowed such payment and the park owner appealed. The parkowner argued that payment into the court registry was permissible only as a defense in actions brought by mobile home park owners against individual homeowners, and could not be used by the representative association. The Second District Court of Appeal agreed, relying upon the plain language of the statute. The court noted that the statute did not provide for payment of disputed rent in an action by a mobile homeowners' association, like it does in an action by the park owner for rent. The court opined, "[w]hether this was an oversight by the legislature or an affirmative decision to limit defenses in section 723.063 to tenants at risk of eviction is unclear. The statute, however, is not ambiguous in its failure to mention the association."<sup>474</sup> Therefore, Judge Altenbernd's opinion<sup>475</sup> held that payment of the disputed rent into the court registry was not available to the homeowners' association.

*Florida Manufactured Housing Ass'n v. Department of Revenue.*<sup>476</sup> The Association filed a petition with the Florida Division of Administrative Hearings challenging the proposed rules<sup>477</sup> dealing with the ad valorem taxation of mobile homes, arguing that the *Florida Constitution* prohibited the ad valorem taxation of mobile homes.<sup>478</sup> The petition was rejected and the First District Court of Appeal affirmed in a per curiam opinion.<sup>479</sup>

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472. 20 Fla. L. Weekly D75 (2d Dist. Ct. App. Dec. 28, 1994).

473. FLA. STAT. §§ 723.001-.0861 (1993).

474. 20 Fla. L. Weekly at D76.

475. Acting Chief Judge Campbell and Judge Quince concurred.

476. 642 So. 2d 626 (Fla. 1st Dist. Ct. App. 1994).

477. Proposed Rule 12D-6.001(3) and 12D-6.002(1)(d)1-2, FLORIDA ADMIN. CODE (published in 18 FLA. ADMIN. WEEKLY 389 (Jan. 24, 1992)).

478. *Florida Manufactured Hous. Ass'n*, 642 So. 2d at 627 (quoting FLA. CONST. art. VII, § 1(b)).

479. Associate Judge Jorgenson and Judges Barfield and Benton concurred.

The court noted that the constitution provides that the term "mobile home" will be "as defined by law,"<sup>480</sup> and in 1991 the legislature had redefined that term so as to exclude, for purposes of this section of the constitution, mobile homes permanently affixed to land owned by the mobile home owner.<sup>481</sup> The court could see no constitutional flaw in the legislative action, so the proposed rules were valid.<sup>482</sup> Judge Benton concurred, noting that since the litigation began, the relevant administrative rules were amended to deal with the association's prime concern, that inventory of dealers and manufacturers might be subject to the tax if permanently affixed to realty as often occurred with models or samples.<sup>483</sup>

### XXIII. MORTGAGES

*Anderson v. North Florida Production Credit Ass'n.*<sup>484</sup> A foreclosure action was brought on a mortgage of a prior owner, which had been improperly indexed by the clerk of court. The current mortgagor and mortgagee were unaware of the improperly indexed mortgage and claimed that they had priority because of the recording error. The trial court disagreed and granted the foreclosure judgment to the prior mortgagee. The First District Court of Appeal affirmed.<sup>485</sup> The rule for mortgage priority is provided in section 695.11 of the *Florida Statutes*, which states that "[t]he sequence of . . . official numbers shall determine the priority of recordation," referring to the official number of recordation given by the clerk of courts when an instrument is recorded.<sup>486</sup> Although indexing is a statutory duty imposed on the clerk of courts, the priority of mortgages is not based on proper indexing. Rather, it is based on ranking of official register number.<sup>487</sup>

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480. FLA. CONST. art. VII, § 1(b).

481. FLA. STAT. § 193.075 (1991).

482. *Florida Manufactured Hous. Ass'n*, 642 So. 2d at 627.

483. FLA. STAT. § 193.075 (as modified by 1993 Fla. Laws ch. 93-132 and 1994 Fla. Laws ch. 94-353).

484. 642 So. 2d 88 (Fla 1st Dist. Ct. App. 1994), *review denied*, 651 So. 2d 1192 (Fla. 1995).

485. *Id.* at 91.

486. FLA. STAT. § 695.11 (1993).

487. *Id.*



*BancFlorida v. Hayward*.<sup>488</sup> The bank appealed an order granting priority to purchasers of single family homes over the lender because the lender had actual notice of the buyers' purchase and sale agreements with the developer prior to the bank's loan to developer. The Fourth District Court of Appeal affirmed.<sup>489</sup>

The developer owned the land which was to be developed. Each buyer entered into a purchase and sale contract with the developer who was to build a home on the lot. The developer would, with each transaction, go to the lender and obtain a separate construction loan for each lot. Each loan and mortgage was executed and recorded *after* the purchase and sale contracts were executed. The equitable liens held by the purchasers, of which the bank had actual notice, were superior to the mortgages of the bank.<sup>490</sup>

*Bank One, Dayton v. Sunshine Meadows Condominium Ass'n*.<sup>491</sup> Sunshine Meadows is a condominium equestrian center which was developed in phases. The developer completed and sold the units in phase I and then executed a note and mortgage on 1.43 acres to begin developing phase II. The developer subsequently amended the original declaration of condominium to make phase II part of the common elements of the condominium. The bank consented to the amendment. When the developer defaulted, the bank sought to foreclose the entire condominium, arguing that its mortgage encumbered property which was part of the common elements, and that those common elements were an appurtenance to each unit of the condominium.<sup>492</sup> The trial court agreed with the lender, but the district court of appeal reversed, holding that the lender's consent to the amended declaration of condominium subjected the mortgage to the provisions of condominium law.<sup>493</sup> Section 718.121(1) prohibits liens against the condominium property as a whole unless there is unanimous consent of all unit owners. Additionally, section 718.107 prevents the separation of an individual condominium unit interest from the undivided interest in the appurtenant common elements. The mortgage covered the property which

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488. 20 Fla. L. Weekly D761 (3d Dist. Ct. App. Mar. 29, 1995). The court subsequently withdrew this opinion on rehearing and replaced it with a new one after the end of this article's survey period. See *BancFlorida v. Hayward*, 20 Fla. L. Weekly D2041 (3d Dist. Ct. App. Sept. 6, 1995).

489. *Hayward*, 20 Fla. L. Weekly at D761.

490. *Id.*

491. 641 So. 2d 1333 (Fla. 1994).

492. *Id.* at 1334.

493. *Id.*

was to become the common elements and not the units. Therefore, the lender could not foreclose on the units because it had no mortgage on them. In addition, the lender could not foreclose on the specific mortgaged property because it was now part of the condominium common elements, which cannot be divided from the unit interests. The supreme court, in weighing the equities, agreed that the bank caused its own harm by consenting to the amended declaration and that it would be inequitable to subject the unsuspecting unit owners to the lender's mortgage.<sup>494</sup>

*Bay Financial Savings Bank v. Hook.*<sup>495</sup> The bank obtained a final default judgment against Hook and other guarantors of a mortgage which the bank had foreclosed. Hook moved the lower court to set aside, amend, or reduce the default judgment, arguing that the bank's receipt of monies from collateral sources reduced its deficiency claim. The court denied the motion and Hook filed a complaint in another county asking the court to void the default or reduce the amount awarded and to strike the final judgment from the public records in the county where the foreclosure had been decided. Hook was precluded by *res judicata*. The bank then sought an award of attorney's fees in accordance with sections 57.105 and 57.115 of the *Florida Statutes*. The trial court denied the bank's motion, and the bank appealed.<sup>496</sup>

The Second District Court of Appeal held that Hook was barred by *res judicata* from bringing the same litigation in a different county.<sup>497</sup> Although Hook voluntarily dismissed his complaint after the bank asserted *res judicata*, the Second District Court of Appeal held that "the filing of a lawsuit that is nonjusticiable on its face offers an appropriate setting for the fulfillment of section 57.105's purpose to deter misuse of the judicial system."<sup>498</sup> Therefore, the court reversed and remanded with directions to enter an order awarding the bank a reasonable fee.<sup>499</sup>

*Circle Mortgage Corp. v. Kline.*<sup>500</sup> The Klins applied to Circle Mortgage to secure an adjustable rate purchase money mortgage to buy a condominium unit. The interest rate was to change every twelve months, with the first rate change to occur eleven months after the due date of the first mortgage payment. The closing occurred in December of 1991. At the

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494. *Id.* at 1336.

495. 648 So. 2d 305 (Fla. 2d Dist. Ct. App. 1995).

496. *Id.* at 306.

497. *Id.* at 307.

498. *Id.*

499. *Id.*

500. 645 So. 2d 75 (Fla. 4th Dist. Ct. App. 1994).

closing, one document contained a scrivener's error, providing that the first interest rate change would occur in December of 1993, instead of January of 1993, as contemplated in the previous disclosures. The Klines signed a compliance agreement in which they promised to cooperate in the correction of any clerical or other errors later discovered regarding the closing documents. Circle Mortgage subsequently sold the loan to Beneficial Mortgage Corporation, which discovered the error. Beneficial refused to accept the loan and Circle Mortgage sought to correct the error, but the Klines refused to cooperate. Circle Mortgage then filed a three-count complaint to foreclose the mortgage, reform the note, and recover damages and attorney's fees arising from breach of the compliance agreement.<sup>501</sup>

The trial court held in favor of Circle Mortgage on the reformation count, but denied the foreclosure and breach of contract claims. Circle Mortgage appealed the denial of damages, and the Klines cross-appealed the decision granting reformation.<sup>502</sup>

The Fourth District Court of Appeal affirmed the decision granting reformation because there was a definite prior agreement between the parties.<sup>503</sup> "The rationale for reformation is that a court sitting in equity does not alter the parties' agreement, but allows the defective instrument to be corrected to reflect the true terms of the agreement the parties actually reached."<sup>504</sup> The trial court's decision passed the clearly erroneous standard of review.

The Fourth District Court of Appeal also affirmed the denial of damages because Circle Mortgage could not prove actual losses when it was still collecting the monthly payments.<sup>505</sup> The argument of lost sale value of the loan was unsupported by documentation. Furthermore, after the reformation, the loan would place the parties in the position they would have occupied if the error had not been made, except for the litigation expenses.<sup>506</sup> On the claim for attorney's fees, the District Court of Appeal noted that the trial court had retained jurisdiction to make the award, and therefore, the issue was not yet appealable.<sup>507</sup>

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501. *Id.* at 77.

502. *Id.*

503. *Id.*

504. *Id.* at 78 (citing *Providence Square Ass'n v. Biancardi*, 507 So. 2d 1366, 1370 (Fla. 1987)).

505. *Circle Mortgage Corp.*, 645 So. 2d at 79.

506. *Id.*

507. *Id.*

*FDIC v. Verex Assurance, Inc.*<sup>508</sup> The Supreme Court of Florida answered the following certified question in the affirmative for the United States Court of Appeal for the Eleventh Circuit: “Did Fla.Stat. § 627.409 apply to applications for and contracts of mortgage guaranty insurance prior to the enactment of Fla.Stat. § 635.091 on October 1, 1983?”<sup>509</sup>

The FDIC brought suit against Verex, the insurer, to collect on two policies covering two loans made by Sunrise Savings and Loan. FDIC was the successor in interest of the liquidated S & L. Verex claimed that it was entitled to rescind the two policies because of material misrepresentations contained in the applications. The misrepresentations involved overstating the amounts given as down payment. Section 627.409 provides that when a borrower misrepresents a material fact in a loan application, which misrepresentation forms part of the insurance application, the risk of loss from the loan is placed on the bank and not the mortgage insurer. The district court agreed and entered summary judgment for Verex. The FDIC appealed, arguing that the above statute did not apply to mortgage insurance policies issued before October 1, 1983, such as the two policies in question.<sup>510</sup>

The court noted that although chapter 635 of the *Florida Statutes*, the mortgage guaranty insurance chapter, does not contain a provision similar to section 627.409, that section has been applied to mortgage insurance policies in the past.<sup>511</sup> On October 1, 1983, however, chapter 635 was specifically amended through section 635.091, titled “Provisions of Florida insurance Code applicable to mortgage guaranty insurance.” This new section did not mention section 627.409, so that it would not apply to mortgage insurance policies after October 1, 1983. The question certified asked whether section 635.091 was also meant to make section 627.409 inapplicable to mortgage insurance policies issued prior to October 1, 1983.<sup>512</sup> The Supreme Court of Florida held that section 627.409 *did* apply to pre-October 1, 1983 policies.<sup>513</sup>

The court concluded that the legislature did not intend that mortgage guaranty insurance should be governed only by the provisions of chapter 635, but also by the general insurance provisions of chapter 627.409.<sup>514</sup>

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508. 645 So. 2d 427 (Fla. 1994).

509. *Id.* at 428.

510. *Id.* at 429.

511. *Id.*

512. *Id.* at 430.

513. *Verex*, 645 So. 2d at 432.

514. *Id.*

Mortgage insurance is a form of casualty or surety insurance, as defined in section 635.011, and these are two types of insurance governed by section 627. Therefore, until section 635.091 became effective, mortgage insurers were protected from material misrepresentations.<sup>515</sup>

*First National Bank of Southwest Florida v. Cardinal Roofing & Siding of Florida, Inc.*<sup>516</sup> The bank sought to rescind a satisfaction of mortgage it had filed by mistake. The mortgage secured a loan to the construction company under which Cardinal Roofing was a subcontractor. When Cardinal was not paid, it filed a claim of lien and foreclosed. Cardinal purchased the subject property at a clerk's sale free and clear of the bank's mortgage. When the bank sought rescission of its satisfaction of mortgage and reinstatement of its mortgage, the trial court dismissed for failing to state a valid cause of action.<sup>517</sup>

The Second District Court of Appeal reversed, holding that rescission of a mortgage satisfaction and reinstatement of the mortgage is a valid cause of action in Florida.<sup>518</sup>

*James v. Nationsbank Trust Co.*<sup>519</sup> The appellants purchased homes from General Development Corporation ("GDC"), and financed the purchases with GDC's mortgage subsidiary. Nationsbank subsequently purchased the loans from the originating mortgagee. Shortly thereafter, GDC was indicted for criminal fraud; the appellants stopped paying their mortgages, and Nationsbank foreclosed. The trial court granted a summary judgment to Nationsbank. The appellants alleged that Nationsbank was not a holder in due course, and thus was not free of the personal defense of fraud in the inducement, the borrowers claiming they were fraudulently induced to execute the notes and mortgages.<sup>520</sup>

The appellants argued that Nationsbank, in purchasing the loans, became part of GDC's conspiracy to defraud, because the proceeds from the loan purchases allowed GDC to continue its sales scheme. The Fifth District Court of Appeal rejected this argument.<sup>521</sup> However, the court reversed and remanded on the claim by the borrowers that Nationsbank was aware of GDC's fraud scheme when it purchased the loans.<sup>522</sup> Such

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515. *Id.* at 430

516. 639 So. 2d 1101 (Fla 2d Dist. Ct. App. 1994).

517. *Id.* at 1101-02.

518. *Id.* at 1102.

519. 639 So. 2d 1031 (Fla. 5th Dist. Ct. App. 1994).

520. *Id.* at 1032.

521. *Id.* at 1033.

522. *Id.* at 1034.

knowledge would preclude holder in due course status for Nationsbank. The borrowers had alleged that they were induced to buy their homes for more than they were actually worth, due to fraudulent appraisals which misrepresented their value. Nationsbank was allegedly aware of the invalidity of the appraisals. The issue of knowledge should have precluded entry of summary judgment for Nationsbank.

*Koschler v. Dean*.<sup>523</sup> The Koschlers appealed a final judgment quieting title in favor of Dean, the personal representative of the estate of William H. Dean, and determining that the Koschlers' mortgage was invalid. On March 1, 1966, a warranty deed dated February 28, 1966 was recorded in the public records of Pinellas County, conveying the property at issue to "William H. Dean and Mary Dean, his wife."<sup>524</sup> William and Mary were divorced at that time. However, they did remarry later on June 21, 1966. The two remained legally married until William's death on May 28, 1990, but they did not live together. Only William lived at the property at issue. Mary lived with another man and "held herself out to be his wife . . ."<sup>525</sup> After William died, Mary and the man she was living with, but not married to, gave a mortgage to the Koschlers on William's residence. The person who conducted the title search concluded from the record that title to the property vested in Mary as the surviving spouse of William. Mary and her boyfriend executed an affidavit stating that no one else had a legal or equitable interest in the property.<sup>526</sup>

Meanwhile, unknown to the Koschlers, Robert Dean, as personal representative, began an adversary proceeding in the probate division of the circuit court against Mary, challenging her interest in the property and seeking a declaration that she was not entitled to participate in William's estate as an heir. On the day before the closing date of the above mentioned mortgage transaction, Robert Dean filed a notice of lis pendens against the property in the probate division of the circuit court. However, he did not record the lis pendens in the official county records until 1991 after obtaining a judgment divesting Mary of any interest in William's estate. Hence, he filed the quiet title action against the Koschler mortgage.<sup>527</sup>

The trial court held that the Koschlers were not "bona fide mortgagees for value" because, if they had searched the name of Mary's boyfriend, they

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523. 642 So. 2d 1119 (Fla. 2d Dist. Ct. App. 1994); *see also supra* text accompanying notes 235-37.

524. *Id.* at 1120.

525. *Id.*

526. *Id.*

527. *Id.*

would have found a false affidavit alleging that Mary was married to her boyfriend.<sup>528</sup> The Second District Court of Appeal reversed, holding that this was neither in the chain of the property's title nor of any bearing on its title.<sup>529</sup> The court stated that the Koschlers were entitled to rely on the chain of title found in the official records, absent actual knowledge of an adverse unrecorded right.<sup>530</sup> The court stated that fault lies with Robert Dean for not recording the notice of lis pendens in the public records at the time he filed it in the probate division of the court.<sup>531</sup> "Documents filed in the probate division of the court do not constitute constructive notice to purchasers for value of real property."<sup>532</sup>

*Metroplex Investments, Inc. v. Precision Equity Investments, Inc.*<sup>533</sup> This appeal by Metroplex, the purchaser at a judicial sale, was based on *Florida Statute*, section 45.031(1) as it existed at the time of litigation, prior to the statutory changes in 1993. Section 45.031(1) provided that the owners of property in foreclosure, or their successor in interest, could redeem the property up to the time of the judicial sale. This was consistently interpreted to mean that redemption could occur at any time prior to the issuance of a certificate of title, which could be subsequent to the date of sale. The current version of section 45.031(1), section 45.0315, provides a more limited redemption period: redemption must now occur, if at all, prior to the issuance of the certificate of sale.<sup>534</sup>

The trial court held that Precision, the mortgagor, had complied with the redemption statute, and the Fifth District Court of Appeal affirmed.<sup>535</sup> The judicial sale was held on July 20, 1993 and the property was redeemed on July 28, 1993. The certificate of title was not issued until August 2, 1993. These facts demonstrated clear compliance with the redemption statute. Metroplex argued that the purchaser at sale should not have to search for information concerning redemption, and that the clerk of court should have been put on notice of any attempted redemption. The Fifth District Court of Appeal disagreed, holding that the statute existing at the time of redemption placed no duty on the clerk of court to provide

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528. *Koschler*, 642 So. 2d at 1120-21.

529. *Id.* at 1121.

530. *Id.*

531. *Id.*

532. 653 So. 2d at 1121 (citing *Pierson v. Bill*, 189 So. 679 (Fla. 1939)).

533. 647 So. 2d 304 (Fla. 5th Dist. Ct. App. 1994).

534. *Id.* at 305.

535. *Id.*

information concerning redemption.<sup>536</sup> Furthermore, Metroplex had actual knowledge that the property would be redeemed because the appellees had notified Metroplex.<sup>537</sup>

Chief Judge Harris dissented because the redemption was not completed until after the certificate of title was issued to Metroplex. Specifically, the mortgagor paid the total amount due to the mortgagee, but the record did not reflect when or if a satisfaction of mortgage had been recorded. Additionally, the deed to the redeemer was not recorded until four days after the certificate of title had been issued to Metroplex. To further complicate the situation, Metroplex had already conveyed the property to Mark Orman when the deed to Precision was recorded. However, Metroplex repurchased the property from Mr. Orman in order to bring this action.<sup>538</sup>

While this case seems to implicate the recording act, it is never cited in the decision. One interesting question is whether, based on the recording act, Metroplex would still lose because it had actual notice that the redemption would occur. Metroplex was a purchaser at a judicial sale and was charged with notice that a right of redemption existed. As Chief Judge Harris argued, these problems could be avoided by requiring redemption to occur by depositing the total amount due with the clerk, rather than extrajudicially with the mortgagee.

*Rissman v. Kilbourne*.<sup>539</sup> In 1980, Rissman contracted to purchase real property in Alachua County. The property was encumbered by three mortgages. Rissman gave an "all inclusive" note and mortgage to the seller.<sup>540</sup> After executing the purchase agreement, Rissman obtained estoppel letters stating the balances due from each of the three mortgagees. Two years later, Rissman sued the seller for breach of the purchase warranties concerning the sewer system. As part of the judgment, he again obtained estoppel letters from the three mortgagees.<sup>541</sup>

In 1990, pursuant to a request for a payoff statement from one of the mortgagees, the mortgagee responded by stating that there had been an error in its prior estoppel letters and that an additional \$67,000 was owed.<sup>542</sup>

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536. *Id.*

537. *Id.*

538. *Metroplex*, 647 So. 2d at 306 n.1.

539. 643 So. 2d 1136 (Fla. 1st Dist. Ct. App. 1994).

540. An "all-inclusive" note is like a wrap-around, except that here the seller/mortgagee received only its excess portion of the loan payments; the buyer/mortgagor paid the three preexisting mortgages directly, as if assuming them.

541. *Rissman*, 643 So. 2d at 1138.

542. *Id.*



Rissman responded with three letters from his attorneys stating that the mortgagee was estopped from asserting a different amount due and offering to pay the balance under the estoppel letters. After receiving no response, Rissman filed suit for a declaratory judgment on the balance. The trial judge ruled in favor of the mortgagee without explanation. Rissman appealed, claiming error in not finding estoppel and in holding that his letters were not valid tenders of the amount due.<sup>543</sup> The First District Court of Appeal affirmed the ruling that the three attorneys' letters were not tenders because no actual tender of funds had been made.<sup>544</sup> However, the court reversed on the claim of estoppel, holding that Rissman relied on the mortgagee's statements in the prior estoppel letters to his detriment.<sup>545</sup> The detrimental reliance consisted of Rissman's closing on the original purchase, thereby relying on the amount stated as the balance of the mortgage.<sup>546</sup>

*RSR Investments, Inc. v. Barnett Bank.*<sup>547</sup> Barnett obtained a foreclosure judgment in the amount of \$86,109.59.<sup>548</sup> Due to a clerical error by Barnett's attorney, no one appeared on Barnett's behalf to bid at the foreclosure sale. Further, a provision in the judgment required Barnett to advance the costs of the sale, which it had not done.<sup>549</sup> The clerk of court allowed RSR, along with another investor, to pay the sale costs. The sale was held and RSR purchased the property with an unopposed bid of \$5000. Barnett's counsel then filed a motion to set aside the sale, arguing excusable neglect in the clerical error and the gross inadequacy of the sale price.<sup>550</sup> The trial court found the \$5000 sale price "sublimely inadequate" and that it raised a "presumption of bad faith on the part of the buyer."<sup>551</sup> The property was apparently worth over \$100,000. The Second District Court of Appeal affirmed, holding that the unopposed bid price coming from an investor experienced in real estate supported the trial court's finding that the purchasers were not bona fide purchasers, and it was not inequitable to set aside the sale.<sup>552</sup>

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543. *Id.* at 1137.

544. *Id.* at 1140.

545. *Id.* at 1139.

546. *Rissman*, 643 So. 2d at 1139-40.

547. 647 So. 2d 874 (Fla. 2d Dist. Ct. App. 1994).

548. *Id.* at 874.

549. *Id.*

550. *Id.* at 875.

551. *Id.*

552. *RSR Investments, Inc.*, 647 So. 2d at 875.

Judge Quince dissented, arguing that Barnett had caused its own harm and that the trial court erred in the manner by which it took judicial notice of the value of the property. Specifically, the trial court did not afford the opposing side an opportunity to offer its own evidence on the matter.<sup>553</sup> As such, the trial court was not in a position to conclude that the sale price was inadequate. Consequently, Judge Quince did not believe that the facts justified setting aside the sale.<sup>554</sup>

*United National Bank v. Tellam.*<sup>555</sup> This decision is very relevant to commercial banks and has the effect of invalidating many existing dragnet clauses. The issue on appeal was whether a mortgagee can enforce a dragnet clause in a promissory note against a preexisting obligation, the basic purpose of dragnet clauses.<sup>556</sup> The court held that dragnet clauses are to be strictly construed against the drafter and that debts incurred prior to the security agreement are not covered within a dragnet clause, unless those debts are specifically identified in the security agreement itself.<sup>557</sup> The requirement for specification seems reasonable because the lender will know all prior debts. In addition, the requirement imparts record notice to other lienors of the extent of coverage of the mortgage.<sup>558</sup>

The majority failed to note that in this case, the dragnet clause was located in the note, not the mortgage. Furthermore, the note which contained the dragnet clause was paid in full. The bank sought to use a dragnet clause contained in a paid off note to make a mortgage, which secured the paid off note, cover a separate note, now in default. The court probably could have decided the case on these facts alone, and not set forth a new restriction on dragnet clauses.

#### XXIV. OPTIONS

*Summit Boulevard Animal Clinic v. Lemon Tree Plaza.*<sup>559</sup> The tenant clinic sued the lessee for breach of the option and right of first refusal in a commercial lease.<sup>560</sup> The alleged breach was the lessor's failure to give the clinic the chance to exercise its right to purchase the plaza at a fixed price as provided in the commercial lease. The clinic lost at the trial court

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553. *Id.* at 876 (Quince, J., dissenting).

554. *Id.*

555. 644 So. 2d 97 (Fla. 3d Dist. Ct. App. 1994).

556. *Id.* at 97-98.

557. *Id.* at 98.

558. *Id.* at 99.

559. 641 So. 2d 437 (Fla. 4th Dist. Ct. App. 1994).

560. *Id.* at 438.

on a directed verdict because it failed to submit sufficient proof that it was capable of completing the purchase at the specified price.<sup>561</sup> The Fourth District Court of Appeal affirmed in an opinion written by Judge Stevenson.<sup>562</sup>

The court recognized that there were no Florida cases directly on point and followed "the overwhelming weight of authority,"<sup>563</sup> as illustrated by the Massachusetts case of *Kanavos v. Hancock Bank & Trust Co.*<sup>564</sup> The optionee would only be harmed by the optionor's breach if he was deprived of a right that he was planning to, and able to exercise. The optionee is the one in possession of the evidence concerning his ability to perform, so the burden of producing that evidence should fall on him.<sup>565</sup> Where the optionee's evidence could not establish it had the ability to perform, the trial court properly granted a directed verdict.<sup>566</sup>

## XXV. PREMISES LIABILITY

*National Property Investors, II, Ltd. v. Attardo.*<sup>567</sup> The victim of an abduction and sexual assault sued the owners of the apartment complex where she lived. She claimed the owners were liable due to inadequate lighting and security in the parking lot where the crimes occurred. The owners filed a third-party action against the Southland Corporation, owners of a nearby 7-Eleven store, alleging that Ms. Attardo had been threatened and assaulted in the 7-Eleven parking lot. The trial court dismissed the third-party complaint and Fifth District Court of Appeal affirmed in a brief opinion written by Chief Judge Harris.<sup>568</sup> The court reasoned that the third-party complaint was susceptible to two different interpretations.<sup>569</sup> One was that there had been two separate assaults, one on the 7-Eleven lot and one on the apartment lot.<sup>570</sup> However, Ms. Attardo had not sued the owner of the 7-Eleven for an assault on its lot; therefore, the apartment owners did not have standing to do so.

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561. *Id.*

562. Judge Gunther and Associate Judge Barr concurred. *Id.* at 439.

563. *Id.* at 438.

564. 479 N.E.2d 168 (Mass. 1985).

565. *Summit Boulevard*, 641 So. 2d at 438-39 (citing *Kanavos*, 479 N.E.2d at 172).

566. *Id.* at 439.

567. 639 So. 2d 691 (Fla. 5th Dist. Ct. App. 1994).

568. Judges Peterson and Diamantis concurred.

569. *Id.* at 692.

570. *Id.*

Apparently, the second theory was that only one assault had occurred.<sup>571</sup> It began when the perpetrator was attracted to Ms. Attardo on the 7-Eleven lot and came to fruition on the apartment lot. However, the court found that the allegations did not suggest that any abduction or assault took place on the 7-Eleven property. This led the court to conclude that “[a]pparently the security at 7-Eleven . . . was sufficient to protect its patron so long as she remained there.”<sup>572</sup> Consequently, there was no basis on which the owner of the 7-Eleven could be held liable. The district court suggested that owners of the 7-Eleven might be liable if the abduction actually began on their lot. The court allowed them the chance to amend the third-party complaint accordingly if they could do so “IN GOOD FAITH.”<sup>573</sup>

*Paul v. Sea Watch of Panama City Beach, Inc.*<sup>574</sup> A bar patron sued for damages after she fell from a tall bar stool while tipping one of the male nude dancers performing in the bar’s review. She alleged that the bar was negligent in allowing an unsafe and dangerous condition to exist at the club. Specifically, there was a drastic drop-off of the floor area near the stage where the live entertainers were performing which constituted unsafe seating conditions. The trial court granted summary judgment in favor of the defendant bar, but the First District Court of Appeal reversed.<sup>575</sup>

The court stated: “[i]n Florida, a landowner owes two duties to an invitee: (1) to warn the invitee of concealed dangers which are or should be known to the owner but which the invitee cannot discover through the exercise of due care, and (2) to keep its property in reasonably safe condition.”<sup>576</sup> The district court agreed that the bar had no duty to warn patrons of the difference in elevation of the floors because that was patent. However, a genuine issue existed as to whether the bar was reasonably safe because the bar may have allowed a dangerous condition to exist through its policy of “condoning its patrons’ consumption of unlimited alcohol and permitting contact between the entertainers and the patrons who were seated on high stools immediately next to an elevated dance floor.”<sup>577</sup> Furthermore, liability based upon this theory, rather than on a theory that the dancer acted negligently in his manner of accepting the tip, would have made the

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571. *Id.*

572. *Attardo*, 639 So. 2d at 692.

573. *Id.*

574. 643 So. 2d 665 (Fla. 1st Dist. Ct. App. 1994).

575. *Id.* at 666.

576. *Id.* at 667 (citations omitted).

577. *Id.*

bar's claim that the dancers were independent contractors rather than employees irrelevant.<sup>578</sup>

## XXVI. SALES

*Bodon Industries, Inc. V. Brown.*<sup>579</sup> Bodon was an out-of-state corporation seeking to acquire a concrete plant in Florida. A Texas operator of a concrete plant learned of Bodon's interest and offered to assist Bodon without receiving a commission. He hoped to be hired to work at whatever facility Bodon acquired. He enlisted the help of his sister-in-law, a Florida real estate broker.

The sister-in-law contacted the seller who executed an agreement to pay a \$50,000 commission, to be split equally between the sister-in-law's firm and the seller's broker. Unfortunately, the negotiations fell through. However, without the knowledge of the broker, the negotiations resumed eight months later between the principals. Upon learning of the sale, the brokers brought suit against the seller for the \$50,000 commission or, in the alternative, a commission based on quantum meruit.<sup>580</sup> The jury verdict was based upon the latter in the amount of \$100,000, to be shared equally by the seller's broker and buyer's sister-in-law.<sup>581</sup>

The seller brought this action against the buyer for indemnification based upon a provision in the contract of sale that, "buyer agrees to save harmless the seller from any claim by any party asserted for a real estate commission, finder's fee or other compensation resulting from any action taken by buyer."<sup>582</sup> The seller prevailed in the trial court, but lost on appeal. Judge Peterson, writing for the Fifth District Court of Appeal, applied traditional rules of broker-client relationships.<sup>583</sup> The court found that the brokers were working for the seller, not the buyer.<sup>584</sup> There was no contract between the buyer and his sister-in-law.<sup>585</sup> Rather, she was entitled to a share of the commission as the selling broker due to an independent agreement she had with the listing broker.<sup>586</sup> In the absence

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578. *Id.* at 667-68.

579. 645 So. 2d 33 (Fla. 5th Dist. Ct. App. 1994).

580. *Id.* at 35.

581. *Id.*

582. *Id.*

583. Judges Sharp and Goshorn concurred. *Id.* at 36.

584. *Bodon Indus., Inc.*, 645 So. 2d at 35.

585. *Id.*

586. *Id.* at 35-36.

of a selling broker, the seller would have had to pay the full commission to the listing broker.<sup>587</sup>

The court held that an indemnity clause “must be construed strictly in favor of the indemnitor when such provision is not given by one in the insurance business but is given as an incident to a contract, the main purpose of which is not indemnification.”<sup>588</sup> This indemnity provision was intended to protect the seller from being surprised by a claim for a broker’s commission, a particularly unpleasant surprise if it came after the seller had already paid out the full commission. But since this claim should not have been a surprise to this seller, the seller was not entitled to indemnification.

*Munshower v. Martin.*<sup>589</sup> The seller agreed to sell a \$257,000 house to the buyer who, under an oral lease, was allowed to move in before the closing. A short time after the parties signed the purchase and sale agreement, Hurricane Andrew struck and damaged the roof of the house. The seller’s insurance company issued a \$17,000 check for repairs. A dispute ensued over who had a legal right to the funds. The buyer considered the seller’s claim to the funds to be a breach of the purchase and sale agreement and refused to close. The seller then declared the buyer in default. The buyer sued for specific performance, a declaratory judgment that he was entitled to the insurance funds, quantum meruit for the cost of materials and services paid by the buyer to repair the house prior to closing, and breach of the oral lease.<sup>590</sup>

The trial court relied on a provision in the purchase/sale contract, stating that if after a roof inspection, repairs were necessary and the amount was in excess of two percent of the purchase price, the seller had the option of paying the excess or cancelling the contract if the buyer refused to pay for the excess.<sup>591</sup> Because of this option, the seller was not compelled to specifically perform. The Third District Court of Appeal reversed.<sup>592</sup> Judge Nesbitt’s opinion focused upon a different contract provision and it expressly placed the risk of loss prior to closing on the seller.<sup>593</sup> The court held that this risk of loss provision, and not the roof inspection provision, was the controlling clause in the case of casualty loss. The doctrine of equitable conversion, which would have shifted the risk of loss

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587. *Id.* at 35.

588. *Id.* at 36.

589. 641 So. 2d 909 (Fla. 3d Dist. Ct. App. 1994).

590. *Id.* at 910.

591. *Id.*

592. *Id.* at 910-11.

593. *Id.* at 910.

to the buyer, was not applied because the parties had expressly agreed to a different risk allocation.<sup>594</sup> Therefore, the seller would be responsible for the repairs, would have to indemnify the buyer for the buyer's out of pocket repair costs, and would have to specifically perform.<sup>595</sup> Consequently, the seller was entitled to the insurance funds.<sup>596</sup>

*Ivanov v. Sobel.*<sup>597</sup> The Ivanovs sought the assistance of a broker to purchase a home. After negotiations, they entered a contract to purchase a home for \$300,000, placing a \$30,000 deposit in the broker's trust account. To facilitate the closing, the salesperson suggested that the Ivanovs form a Florida corporation, place the money to close in the corporate account, and authorize the salesperson to issue checks from that account. The salesperson then absconded with the money causing the Ivanovs to default on the purchase contract. After the default, the realtor disbursed the deposit to the sellers. The Ivanovs sued the sellers, the broker, and the salesperson.

The trial court granted summary judgment in favor of the sellers and the Third District Court of Appeal affirmed.<sup>598</sup> The court concluded that the sellers were innocent and could not be held responsible for the intentional wrongful act of the real estate salesperson.<sup>599</sup> The salesperson's wrongful act could not have been anticipated and it certainly did not further the seller's interests since it caused them the loss of the sale.<sup>600</sup> The buyers had in fact defaulted and the sellers were, therefore, entitled to rely upon the liquidated damages clause.<sup>601</sup>

It is unfortunate, however, that the court did not elaborate on the agency relationship which the seller had with the broker and its salesperson. Traditionally, the selling broker would be considered to be the sub-agent of the seller unless a different arrangement had been agreed upon. It was not suggested that the Ivanovs had contracted for the broker to be its agent, for example, to act as the buyer's broker. Nor was there any suggestion that a dual agency relationship existed. Consequently, it appeared that the money was probably misappropriated from the sellers' agent. The court referred to the rule, "where one of two innocent persons must suffer from the wrongful

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594. *Munshower*, 641 So. 2d at 911.

595. *Id.*

596. *Id.* at 910-11.

597. 654 So. 2d 991 (Fla. 3d Dist. Ct. App. 1995).

598. Chief Judge Schwartz and Judges Nesbitt and Cope concurred in the per curiam opinion.

599. *Id.* at 992.

600. *Id.*

601. *Id.*

act of a third, the person who made the wrongful act possible must bear the loss."<sup>602</sup> Would the application of that rule put the burden on the agent's principal who, in this case, just might be the seller? It is a thought which bears investigating.

*Wasser v. Sasoni*.<sup>603</sup> The contract to buy a sixty-seven-year-old apartment building expressly provided that the sale was "as is" and contained standard inspection and integration clauses. After the closing, the buyer had the building inspected and discovered that it had structural problems. He sued for fraud and the trial court granted summary judgment to the seller.<sup>604</sup> The Third District Court of Appeal affirmed.<sup>605</sup>

The court held, in an opinion written by Judge Gersten, that *caveat emptor* is still the law in commercial real estate transactions.<sup>606</sup> Here, the sophisticated buyer had agreed to a contract with an "as is" provision and an integration clause. There were no allegations that this agreement was procured by fraud. Moreover, it has long been established that "a misrepresentation is not actionable where its truth might have been discovered by the exercise of ordinary diligence."<sup>607</sup> He had the opportunity to inspect prior to closing, but chose not to exercise that right. The seller's statement that it was "a very good building" and that it required only a "normal type of maintenance"<sup>608</sup> constituted only the seller's opinion or, at most, puffing under the circumstances.

## XXVII. SOVEREIGN IMMUNITY

*Hummel v. Stenstrom-Strump Construction & Development Corp.*<sup>609</sup>

The Hummels, owners of land in Sanford, Florida, contracted with the defendant builder to construct a home on the Hummels' lot. The builder submitted the plans to the City of Sanford for approval and then built the home. The City issued a certificate of occupancy once the home was completed and the Hummels moved in. Shortly thereafter, stormwater

602. *Ivanov*, 654 So. 2d at 992 (citing *Trumbull Chevrolet Sales Co. v. Seawright*, 134 So. 2d 829 (Fla. 1st Dist. Ct. App. 1961), *cert. denied*, 143 So. 2d 491 (Fla. 1962)).

603. 652 So. 2d 411 (Fla. 3d Dist. Ct. App. 1995).

604. *Id.* at 412.

605. *Id.* at 413.

606. *Id.* at 412.

607. *Id.*

608. *Wasser*, 652 So. 2d at 412.

609. 648 So. 2d 1239 (Fla. 5th Dist. Ct. App. 1995). This case was also discussed previously in Part VI with regard to the issues relating to construction. *See supra* text accompanying notes 79-86.



flooded the house and caused physical damage to the home and its contents. The Hummels sued the builder for fraud, negligent misrepresentation with regard to the elevation and drainage capability of the property, as well as breach of contract.<sup>610</sup> The Hummels also sued the City of Sanford for negligence in approving the plans and inspecting the builder's work, for breach of the City's warranties contained in the certificate of occupancy, and for negligent operation and maintenance of its stormwater drainage system.<sup>611</sup> The City asserted sovereign immunity and argued that it did not owe a duty to the plaintiffs.<sup>612</sup> The Fifth District Court of Appeal affirmed the trial court's dismissal of the Hummel's claims against the City for negligence in approving the plans and inspecting the construction, as well as the claims for breach of warranties based on the certificate of occupancy.<sup>613</sup> The court, quoting *Trianon Park Condominium Ass'n, Inc. v. City of Hialeah*,<sup>614</sup> stated:

We find no indication that chapter 553 [Building Construction Standards] was intended as a means to guarantee the quality of buildings for individual property owners or developers. We find that the enforcement of building codes and ordinances is for the purpose of protecting the health and safety of the public, not the personal or property interests of individual citizens . . . .<sup>615</sup>

The Fifth District Court of Appeal reversed the trial court's dismissal of the plaintiff's action based on its failure to maintain and operate its stormwater drainage system. The Hummels were permitted to amend their defective complaint to state a cause of action under the precedent of *Slemp v. City of North Miami*,<sup>616</sup> which held that such actions may be brought against municipalities if their drainage systems fail to operate as intended, or do not meet the standards required by the building codes.<sup>617</sup>

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610. *Id.* at 1240.

611. *Id.*

612. *Id.*

613. *Id.* at 1240-41.

614. 468 So. 2d 912, 922-23 (Fla. 1985).

615. *Hummel*, 648 So. 2d at 1240 (quoting *Trianon Park Condominium Ass'n*, 468 So. 2d 912, 922-23 (Fla. 1985)).

616. 545 So. 2d 256 (Fla. 1989).

617. *Hummel*, 648 So. 2d at 1240-41.

## XXVIII. TAX DEED SALES

*DeMario v. Franklin Mortgage & Investment Co., Inc.*<sup>618</sup> Demario and the other appellants were lienholders of an unsatisfied mortgage on a property sold in a tax deed sale. They appealed a partial summary judgment awarding \$125,000 in surplus funds from the sale to Franklin Mortgage, the last title holder of record.<sup>619</sup> The Fourth District Court of Appeal reversed, holding that the appellants had a superior claim to the surplus funds.<sup>620</sup>

The facts are fairly interesting. DeMario sold the subject parcel of land on Worth Avenue in Palm Beach to a Franklin DeMarco in 1986 for \$3,150,000. DeMarco paid \$900,000 down and DeMario took back a four year, \$4,250,000 note secured by a purchase money first mortgage. In 1990, DeMarco defaulted and DeMario foreclosed. In 1991, the parties entered into a settlement and escrow agreement under which DeMarco was given six months to perform his obligations under the note and mortgage.<sup>621</sup> DeMarco was required to quitclaim the property to an escrow agent, who would convey the property to DeMario if DeMarco failed to perform. However, DeMarco was given further extensions. Somehow, DeMarco was still able to quitclaim the property from himself to the appellee, an insolvent real estate company in which DeMarco was the sole shareholder. The investment company paid no consideration for the property. Furthermore, this rendered the escrowed deed ineffective because it fell outside the property's chain of title.

After the last day of the extension passed without payment, DeMario proceeded with foreclosure. The court granted summary judgment for DeMario, but delayed entry of judgment based on DeMarco's assertion that he had a buyer for the property. Franklin Investment, the quitclaim grantee, then for filed bankruptcy in the United States Bankruptcy Court for the District of Columbia, resulting in an automatic stay of the foreclosure proceeding. The bankruptcy court later dismissed Franklin Investment's petition, finding it constituted a substantial abuse of process and that it was filed in bad faith as a delay tactic.

However, before the foreclosure could be completed, because neither party paid \$355,002.39 in property taxes that had accrued, the property was sold at a tax sale. The buyer at the tax sale purchased the property for a

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618. 648 So. 2d 210 (Fla. 4th Dist. Ct. App. 1994).

619. *Id.* at 211.

620. *Id.*

621. *Id.*

bargain price of \$350,010, leaving a \$125,000 surplus. The clerk of court issued a notarized written notice to all persons having an interest in the property according to the abstract of title. The notice required that anyone claiming the surplus funds must submit a notarized written claim within ninety days. DeMario's wife submitted an unnotarized claim which was rejected. DeMarco submitted a timely notarized claim. DeMario's attorney then filed a notarized claim one day after the ninety-day deadline had expired. The trial court refused to recognize DeMario's late claim.<sup>622</sup>

The Fourth District Court of Appeal referred to *Florida Statutes*, chapter 197, sections 197.582(2), 197.473, 197.502(4) and 197.522(1)(a), and rule 12D-13.065 of the *Florida Administrative Code*, and held that the applicable statute of limitations for claims to surplus funds in a tax deed sale is two years.<sup>623</sup> The court held that the notarized statement of claim required by rule 12D-13.065(4) does not impose a ninety-day claims bar for persons otherwise entitled to distribution of surplus tax sale proceeds.<sup>624</sup> In such instances, if a "particular lien appears to be entitled to priority and the lienholder has not come forward and made a claim to the excess funds, payment cannot be made to other junior lienholders . . . and the clerk should initiate an interpleader action . . ."<sup>625</sup>

In this case, an interpleader action was not required because the appellants had filed their claim, albeit on the ninety-first day.<sup>626</sup> Additionally, the ninety-day time period refers only to the amount of time the clerk must hold the proceeds before turning them over to the board of county commissioners. The board of county commissioners can keep the funds only after two years have passed. Therefore, the DeMarios were entitled to the surplus.<sup>627</sup>

## XXIX. TAXATION OF REAL PROPERTY

*City of Punta Gorda v. Burnt-Store Hotel, Inc.*<sup>628</sup> The City of Punta Gorda appealed an order determining that a capacity increase fee was actually an illegal tax. The issue arose from a utility contract between the City and the hotel, which had purchased an existing hotel property that was

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622. *Id.* at 212.

623. *DeMario*, 648 So. 2d at 212.

624. *Id.* at 213.

625. *Id.*

626. *Id.* at 213-14.

627. *Id.* at 214.

628. 639 So. 2d 679 (Fla. 2d Dist. Ct. App. 1994). This case was discussed previously in Part XVI with regard to land use planning. See *supra* text accompanying notes 347-50.

connected to the City's water and sewer system. As a new utility customer, the hotel was required to sign an agreement to pay for increases in average consumption, also known as an impact fee.<sup>629</sup> Due to increased consumption, the hotel was charged \$154,000. The City argued that the costs of increased consumption should be charged to the party responsible for the increased consumption. The hotel argued that because the newly acquired property had not been changed structurally and existed in the same capacity as it had under previous ownership, the City had already accounted for all new increases.<sup>630</sup>

The court affirmed the lower court's order ruling that the impact fee was an illegal tax.<sup>631</sup> The court stated that impact fees are justified when there is a nexus between new construction and a population increase (increased consumption) that will affect the infrastructure and require additional capital expenditure.<sup>632</sup> The court noted, "[c]hange of ownership of an existing business does not provide the required nexus even though the continuation of the business results in increased usage."<sup>633</sup> Additionally, in dicta, the court reaffirmed the proposition in *City of Tarpon Springs v. Tarpon Springs Arcade, Ltd.*,<sup>634</sup> that structural changes alone are also insufficient to justify an impact fee when there is no showing of additional usage. The present case would add "and vice versa" to the above proposition.

*Davis v. St. Joe Paper Co.*<sup>635</sup> Richard Davis, property appraiser of Bay County, along with Larry Fuchs, Executive Director of the Department of Revenue, appealed the lower court's decision reversing the property appraiser's denial of an agricultural use classification for property owned by the St. Joe Paper Company.<sup>636</sup> Section 193.461 (3)(b) of the *Florida Statutes*, states that lands must be used primarily for "bona fide agricultural purposes" in order to be classified as agricultural. The court noted that, "bona fide agricultural purposes" means good faith commercial agricultural use of the land. Section 193.461 sets forth factors to be considered in making the determination. The First District Court of Appeal held that the property owner failed to show that the property appraiser did not consider

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629. *Id.* at 679-80.

630. *Id.* at 680.

631. *Id.*

632. *Id.*

633. *Punta Gorda*, 639 So. 2d at 680.

634. 585 So. 2d 324 (Fla. 2d Dist. Ct. App. 1991).

635. 652 So. 2d 907 (Fla. 1st Dist. Ct. App. 1995).

636. *Id.* at 908.

the statutory factors or no reasonable hypothesis supported the appraiser's determination that the subject property was not primarily used for bona fide agricultural purposes.<sup>637</sup> Consequently, the court reversed and remanded.<sup>638</sup>

*Florida Department of Revenue v. Canaveral Port Authority*<sup>639</sup> The Fifth District Court of Appeal held that the Canaveral Port Authority, created in 1953 by special act of the legislature for the purpose of operating the port in Brevard County, was not exempt from ad valorem taxation on portions of property leased to nongovernmental lessees who were not performing a governmental-exempt function.<sup>640</sup>

The court stated that political subdivisions, such as counties, are immune from taxation.<sup>641</sup> However, a business-type organization lacking the usual incidents and powers of a governmental subdivision will not be immune, and may not even be exempt, from taxation.<sup>642</sup> The distinguishing quality is that political subdivisions are a branch of the general administration of the policy of the state, as in the case of school boards, state agencies, and departments.<sup>643</sup> The court held that the Canaveral Port Authority did not fit this description, and therefore, was not immune from taxation.<sup>644</sup> The court recognized that the Port does have an exemption, but it only applied to property used for government purposes.<sup>645</sup>

*Florida Manufactured Housing Ass'n, Inc. v. Department of Revenue*.<sup>646</sup> The Florida Manufactured Housing Association ("FMHA"), filed a petition to the Division of Administrative Hearings to challenge proposed *Florida Administrative Code* rules 12D-6.001 and 12D-6.002, which deal with the taxation of mobile homes, on grounds that section 193.075 of the *Florida Statutes* violates the constitutional prohibition against ad valorem taxation of mobile homes. The petition was denied and FMHA appealed.<sup>647</sup>

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637. *Id.* at 909.

638. *Id.*

639. 642 So. 2d 1097 (Fla. 5th Dist. Ct. App. 1994).

640. *Id.* at 1103.

641. *Id.* at 1099.

642. *Id.* at 1100-01.

643. *Id.* at 1101.

644. *Canaveral Port Auth.*, 642 So. 2d at 1101-02.

645. *Id.* at 1103.

646. 642 So. 2d 626 (Fla. 1st Dist. Ct. App. 1994).

647. *Id.* at 626-27.

The First District Court of Appeal affirmed, rejecting the argument that section 193.075 of the *Florida Statutes* is unconstitutional.<sup>648</sup> The court noted that “[a]rticle VII, section (b) of the Florida Constitution provides that ‘mobile homes, as defined by law, . . . shall not be subject to ad valorem taxes.’”<sup>649</sup> Section 193.075, as amended in 1991, takes mobile homes which are permanently affixed to land owned by the mobile home owner out of the definition of mobile homes. Therefore, by changing the definition of mobile homes, they are now subject to ad valorem taxation.<sup>650</sup>

Judge Benton concurred to point out that since the litigation began, the relevant administrative rules were amended to deal with what FMHA was most concerned about, ad valorem taxation of mobile homes inventoried by dealers and manufacturers on grounds that they were permanently affixed to realty.<sup>651</sup> Dealers often have models or samples on display which are anchored down. The court noted that, “[a] mobile home that is taxed as real property shall be issued an ‘RP’ series sticker as provided in [section] 320.0815.”<sup>652</sup>

*Green v. Greider.*<sup>653</sup> Section 125.0104 of the *Florida Statutes* authorizes any county to levy a tourist development tax on leases of certain living accommodations for a term of six months or less. The Clerk of the Lee County Circuit Court imposed such a tax on the appellee’s rental condominium units. The appellee responded to this tax by making the leases last for six months and one day. The Clerk sued and the trial court held that the tax could not be imposed on the appellee’s units because of the manipulated lease terms. The Clerk appealed, arguing that the six-month-and-one-day terms were in effect shorter because the lessees paid the same amount and did not occupy the units for the full term. The Second District Court of Appeal disagreed and affirmed the trial court’s decision denying the imposition of the tax.<sup>654</sup>

*Sebring Airport Authority v. McIntyre.*<sup>655</sup> The Sebring Airport Authority is a legislatively created public body. From 1970 to 1991, it promoted and operated the “12 Hours of Sebring” on its property. In 1991, the Authority leased the raceway to “Sebring International Raceway,” a

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648. *Id.* at 627.

649. *Id.* (emphasis omitted).

650. *Id.*

651. *Florida Manufactured Hous. Ass’n, Inc.*, 642 So. 2d at 627 (Benton, J., concurring).

652. *Id.* (quoting FLA. STAT. § 193.075(1) (1993)).

653. 645 So. 2d 591 (Fla. 2d Dist. Ct. App. 1994).

654. *Id.*

655. 642 So. 2d 1072 (Fla. 1994).

for-profit corporation. The Highlands County Property Appraiser assessed and levied ad valorem real property taxes on the leased property. The Raceway corporation sought an exemption under section 196.199(2)(a) of the *Florida Statutes*, arguing that the property was being used to further a public purpose, as it had been from 1970 through 1991. In the litigation that ensued, both the trial court and the district court of appeal denied the exemption.<sup>656</sup>

The supreme court first set out the general principle that all property is subject to taxation unless expressly exempt and such exemptions are strictly construed against the party claiming them.<sup>657</sup> Then the court analyzed section 196.199(2)(a). The court held that the exemptions contemplated under that subsection of the statute relate to “governmental-governmental” functions as opposed to “governmental-proprietary” functions.<sup>658</sup> The former deals with use of governmental property by non-governmental entities to perform functions which would otherwise be within the traditional administrative duties of the government. The latter deals with use of governmental property by non-governmental entities to carry on functions which are for the profit of the non-governmental entity and would not fall within the valid functions of the government. Although the distinction is not clearcut, the court stated that no exemption is granted to nongovernmental lessees of governmental property when the lessee uses the property for governmental-proprietary purposes.<sup>659</sup> Therefore, because the raceway corporation, as a for-profit lessee, was leasing the property for governmental-proprietary purposes, it was not entitled to an exemption from property taxes.<sup>660</sup> Government-owned property is subject to tax if leased to a private party for that party’s own profit aims.<sup>661</sup>

*Wilkinson v. Kirby*.<sup>662</sup> The Lee County Property Appraiser, Kenneth Wilkinson, and the Lee County Tax Collector appealed judgments granting an agricultural classification under section 193.461 of the *Florida Statutes* to Larry Kirby, the trustee of a land trust in Cape Coral. The land was originally intended to be developed into a planned unit development, but was later used as a tree farm when the prospects for development weakened.

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656. *Id.* at 1073.

657. *Id.*

658. *Id.*

659. *Id.* at 1074.

660. *Sebring Airport Auth.*, 642 So. 2d at 1074.

661. *Id.* at 1073.

662. 654 So. 2d 194 (Fla. 2d Dist. Ct. App. 1995).

In 1991, the trust applied for an agricultural classification, which the Property Appraiser denied.<sup>663</sup> The County Value Adjustment Board denied an appeal and Kirby filed suit.<sup>664</sup> The trial court found that in 1991, eighteen acres had been used for bona fide agricultural purposes, and in 1992 that number rose to twenty-four acres.<sup>665</sup> The Property Appraiser argued that under section 193.461, which sets out the factors for determining bona fide agricultural purpose and includes a catch all, the zoning classification was relevant. Here, the property had been zoned for most of the time as planned unit, also known as PU, and was currently rezoned as residential development, also known as RD. The court stated that this was not important because the land was not zoned agricultural even when the trust purchased it.<sup>666</sup> The Property Appraiser also pointed to the lack of profitability as a factor. The land trust which owned the farm transferred trees to related corporations without generating income. The court stated that the tree farm still had a profit motive and was not a sham.<sup>667</sup> Therefore, the court affirmed the agricultural classification of the land.<sup>668</sup>

### XXX. USURY

*Jersey Palm-Gross, Inc. v. Paper.*<sup>669</sup> Jersey Palm-Gross, a real estate developer, made a loan to the defendant real estate partnership. The loan amount was \$200,000, and the interest rate was fifteen percent for eighteen months, amounting to \$45,000 in interest charges. The developer/lender also demanded a fifteen percent equity interest in the partnership. The court valued the partnership at \$600,000.<sup>670</sup> The borrowers agreed to grant the equity interest, not being in a position to bargain or seek other financing. Therefore, the total charge for the loan was fifteen percent of \$600,000, which equals \$90,000, plus \$45,000, which equals \$135,000. The \$200,000 loan cost \$135,000, which is equivalent to a forty-five percent per annum interest rate over the eighteen month term of the loan. The loan seems to have been a mix between equity sharing and a participating mortgage. The

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663. *Id.* at 196.

664. *Id.*

665. *Id.*

666. *Wilkinson*, 654 So. 2d at 196.

667. *Id.* at 197.

668. *Id.*

669. 639 So. 2d 664 (Fla. 4th Dist. Ct. App. 1994).

670. *Id.* at 667.



lender did not want to be a joint venturer, but did want a portion of the equity in addition to its interest charge.

The borrowers defaulted, the developer/lender sued, and the borrowers made a usury defense, arguing the debt was unenforceable because they were being charged what amounted to forty-five percent per annum in interest. The trial court held in favor of the borrowers, finding usury, and the lender appealed.<sup>671</sup>

The court discussed usury law as stated in chapter 687 of the *Florida Statutes*. The cause of action has four elements:

1. A loan, either express or implied.
2. An understanding that the money must be repaid.
3. In consideration of the loan, a greater rate of interest than is allowed by law is paid or agreed to be paid by the borrower.
4. Intent to charge a usurious rate, sometimes referred to as corrupt intent.<sup>672</sup>

The intent is determined by looking at all the surrounding circumstances, including looking beyond just the loan documents.

Civil usury involves loans of \$500,000 or less, and an interest rate greater than eighteen percent, but less than twenty-five percent. Whereas criminal usury involves any loan amount with a rate of interest greater than twenty-five percent, but less than forty-five percent. Penalties for civil usury include forfeiture of all interest charged. If the usury rises to the level of criminal usury, the penalties include the forfeiture of the right to collect the debt.<sup>673</sup>

In this case the first three elements were conceded by the lender. The lender argued a lack of usurious intent and pointed to a "usury savings clause" in the note. The clause disclaimed intent and would automatically amend the transaction to remove any charges deemed by a court to be usurious. The court held that the lender had knowledge of the amount charged for the loan, which established the intent element.<sup>674</sup> Therefore, "usurious intent" means purpose or knowledge in the way of consciousness, and not necessarily ill will or corrupt motive.<sup>675</sup> The intent is not negated as a matter of law by the insertion of a disclaimer of usurious intent in the

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671. *Id.* at 666.

672. *Id.* (citations omitted).

673. *Id.* at 667.

674. *Jersey Palm-Gross*, 639 So. 2d at 668.

675. *Id.*

note, at least in the case of transactions which are usurious at the outset. The only way a lender can be certain to defeat a claim of usury is through section 687.04(2), which requires the lender to take affirmative action to notify and refund the overcharge *before* the borrower raises the claim of usury in litigation.<sup>676</sup> Of course, this section applies to civil, not criminal usury.<sup>677</sup> Here, because the amount charged exceeded the usury limit from the outset, and exceeded the limit by so much, the court found the savings clause of little weight and affirmed the trial court's judgment for the borrowers.<sup>678</sup>

The dissent, which even quotes Polonius in *Hamlet*, disagreed and questioned the valuation of the fifteen percent equity interest in the partnership, which was the charge which made the transaction usurious.<sup>679</sup> The partnership was arguably fully leveraged, and therefore, there was really no equity. Thus, the fifteen percent interest was not worth anything at the outset. The argument makes sense because it is generally agreed that money, which is not absolutely payable, is not interest for usury purposes. However, the elements of the cause of action as listed by the court do not emphasize this concept. The fifteen percent partnership interest was not absolutely payable. Rather, it was contingent on the presence of real equity, and there was no such showing.

### XXXI. WATER AND WATER COURSES

*Macnamara v. Kissimmee River Valley Sportsman's Ass'n.*<sup>680</sup> Macnamara, a riparian owner, fenced-off a spoil island. Section 253.12(1) of the *Florida Statutes* and article X, section 11 of the *Florida Constitution* provide that spoil islands and navigable waters are public lands held by the state in trust for public use and enjoyment. The island in question was formed in the 1960s from the "spoil" produced from dredging a canal as part of the Southern Florida Flood Control Project.

The Sportsmans' Association, which used the island for recreation, sued as relator for the State of Florida. The title holder of the spoil island, the Internal Improvement Trust Fund, intervened on their side. The court held

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676. *Id.* at 670.

677. *Id.*

678. *Id.* at 671.

679. *Jersey Palm-Gross*, 639 So. 2d at 672 (Farmer, J., dissenting).

680. 648 So. 2d 155 (Fla. 2d Dist. Ct. App. 1994).

that the association had standing as a representative of the people in a quo warranto proceeding.<sup>681</sup>

The issue was whether the island was within the water boundary of Macnamara's lots. Macnamara's lots are government lots. The water boundary of government lots is the "ordinary high water boundary," meaning, the true line of ordinary high water, and not the meander line plotted by the public lands surveyors.<sup>682</sup>

The boundary usually results in the land boundary extending less into the water than when meander lines are used. Using the high water boundary the area fenced off was beyond the land boundary and into the "federal navigation servitude."<sup>683</sup>

Private riparian owners can exclude the public from portions of lakes that have been the subject of sovereignty sales. However, Macnamara did not buy the lake bottoms from the State, and thus could not exclude the public. Therefore, the court ordered Macnamara to remove the fence.<sup>684</sup>

Macnamara made an estoppel argument that he was granted a permit from the Army Corps of Engineers, and obtained verbal approval from the Department of Natural Resources, the Department of Environmental Regulation, and the Water Management District.<sup>685</sup> Macnamara also claimed that he paid ad valorem taxes on the fenced land. The court held that estoppel did not apply because Macnamara had not relied on any positive act from an authorized official. Furthermore, taxes had not been assessed on the area in question because the assessors relied on meander line boundaries.<sup>686</sup>

## XXXII. CONCLUSION

The foregoing survey of cases and legislation presents selected materials of significance to real estate professionals. One thing is clear: there is no shortage of litigation in the real estate area, although there seems to be no consistent pattern to the case law and legislative development.

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681. *Id.* at 163.

682. Meander lines are a series of straight lines intended to approximate the shoreline. Boundaries figured using meander lines will be different from the "ordinary high water boundary," which is figured by a straight line marked at the furthest point actually exposed at the high water mark.

683. *Id.* at 162.

684. *Id.* at 165.

685. *Id.* at 162-63.

686. *MacNamara*, 648 So. 2d at 163.

