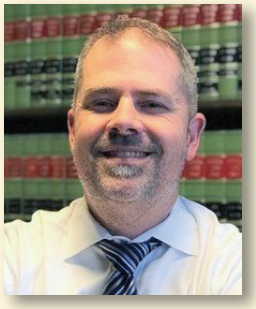
Real Property Law Section NEWSLETTER

State Bar of Georgia

A Publication for Real Property Lawyers — Fall 2018

REAL PROPERTY LAW SECTION

Comments from the Chair



Chad Henderson, Chair
Henderson Legal, LLC

A FIFTY YEAR SEARCH OF OUR HISTORY AS A SECTION

Recently, someone searching online for our model opinion letter stumbled across an historical artifact. Among their search results was the very first Real Property Law Section website, launched in 2005 and apparently never updated. It was a time capsule of sorts, archived by the original web hosting service and preserved there more or less intact. As much as I wanted to explore this treasure trove, I knew I had to get back to work, but history was at the front of my mind as I reviewed the next title report on my desk.

Like most of you, most of the titles I deal with day to day are pretty vanilla. Rarely are any of us required to dig deeply into the chain of title going back much farther than the most recent arms-length insured transaction. We begrudgingly examine the history, but only because it's required to determine what we're really concerned with, which is the present state of title, and the future deal we hope to close.

We are always looking forward, rarely backward, as perhaps it should be. This is certainly true for the leadership of the Real Property Law Section. The RPLS has a number of forward-looking initiatives, from our pro bono projects to the seminars we sponsor. We concern ourselves much more with pending legislation than with legislative history, as indeed we should. We have a committee that monitors recent appellate decisions but no official historian, and our newest committee is called the Innovations Committee.

But like a thorny chain of title, the 50+ year history of our section is worth examining and holds a few surprises. Most of what I've learned about the history of our section is from a lengthy essay written in 1999 by the late Bruce Cohen, one of the founding fathers of our section. This essay was buried among the

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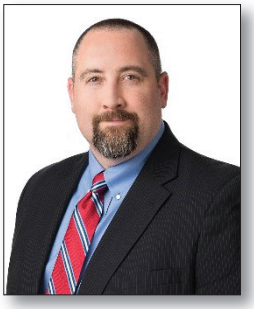
ZONING DUE DILIGENCE 101

Rusty A. Fleming, Esq.
Nelson Mullins Riley & Scarborough LLP

Frances H. Kim, Esq.
Nelson Mullins Riley & Scarborough LLP



In commercial real estate transactions, zoning diligence for existing developments can often be overlooked or treated as an easy "check the box" item on the closing checklist. However, conducting proper due diligence on zoning matters should be viewed in the same light and with the same importance as title and survey matters. There are various zoning issues that may currently impact a commercial property or could impact the property in the event of a future casualty or condemnation. In fact, similar to obtaining title insurance, the owner and/or its lender may need to obtain insurance for zoning matters. In this article, we will discuss the scope of zoning diligence, the types of zoning conformance and tools available to owners and their lenders to address zoning matters.

Zoning Letters vs. Zoning Reports

For all real estate deals, ordering a zoning report is highly recommended. However, on some occasions, a borrower may only want to provide a lender with a zoning letter, or, in the case of a real estate purchase, the seller may want to limit the due diligence to a zoning letter. Zoning letters, which are handled by the

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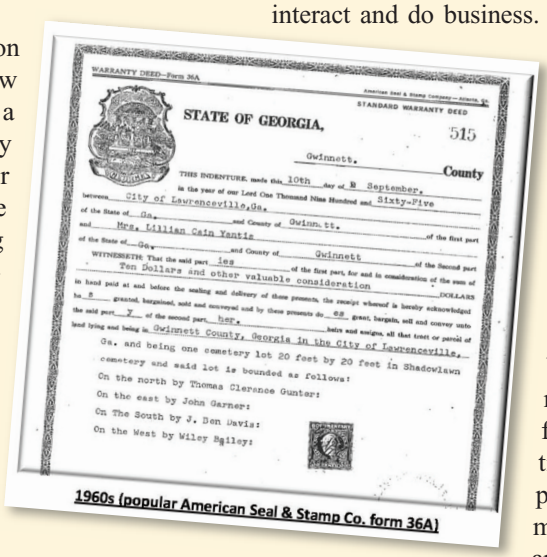
"web pages" preserved on our archived website and has now been uploaded to our current website. It can be found in its entirety here:
https://www.garealpropertylaw.com/Bruce-Cohen-Article.html

I learned from Bruce's essay that our section was created in 1965, at a time when most law offices were within walking distance of a courthouse. Manual typewriters were slowly being replaced by electric. Some of the larger firms had "Xerox machines" (which were the size of a small jeep) but most were still using carbon paper for multiple copies. All documents were delivered either by mail or courier. And the State Bar of Georgia had just recently become a mandatory bar for Georgia lawyers, spawning numerous new sections to be formed, including our own.



WARRANTY DEED—Form 36A — STANDARD WARRANTY DEED

STATE OF GEORGIA, 515

Gwinnett. County

THIS INDENTURE, made this 10th day of September, in the year of our Lord One Thousand Nine Hundred and Sixty-Five between City of Lawrenceville,Ga. of the State of Ga. and County of Gwinnett of the first part and Mrs. Lillian Cain Yantis of the State of Ga. and County of Gwinnett of the Second part

WITNESSETH: That the said part ies of the first part, for and in consideration of the sum of Ten Dollars and other valuable consideration DOLLARS in hand paid at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, ha granted, bargained, sold and conveyed and by these presents do es grant, bargain, sell and convey unto the said part y of the second part, her heirs and assigns, all that tract or parcel of land lying and being in Gwinnett County, Georgia in the City of Lawrenceville, Ga. and being one cemetery lot 20 feet by 20 feet in Shadowlawn cemetery and said lot is bounded as follows:

On the north by Thomas Clerance Gunter:

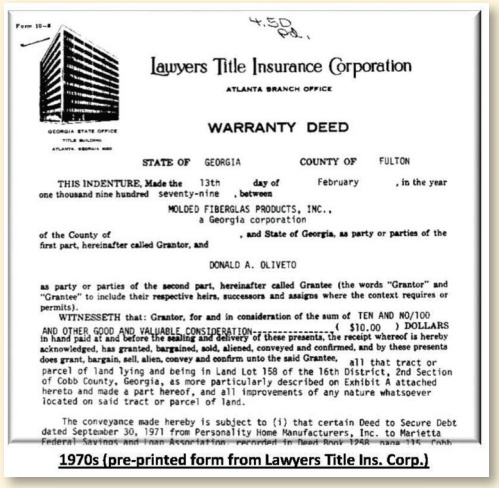
On the east by John Garner:

On The South by J. Don Davis:

On the West by Wiley Bailey:

1960s (popular American Seal & Stamp Co. form 36A)

In the mid-1960s, closing statements were calculated manually, and each lender had its own forms. Most lenders were locally chartered and operated. There was no HUD-1, and no RESPA or Truth In Lending Act. Nor was there much of a secondary market for residential mortgages, so the uniformity we have today among various lenders and their loan documents did not exist. There was perhaps more uniformity in legal fees, however, since without any real antitrust concerns, fee schedules were common among various segments of the bar, including the real estate lawyers.



Form 10-8

Lawyers Title Insurance Corporation

ATLANTA BRANCH OFFICE

WARRANTY DEED

STATE OF GEORGIA COUNTY OF FULTON

THIS INDENTURE, Made the 13th day of February, in the year one thousand nine hundred seventy-nine, between

MOLDED FIBERGLAS PRODUCTS, INC.,
a Georgia corporation

of the County of , and State of Georgia, as party or parties of the first part, hereinafter called Grantor, and

DONALD A. OLIVETO

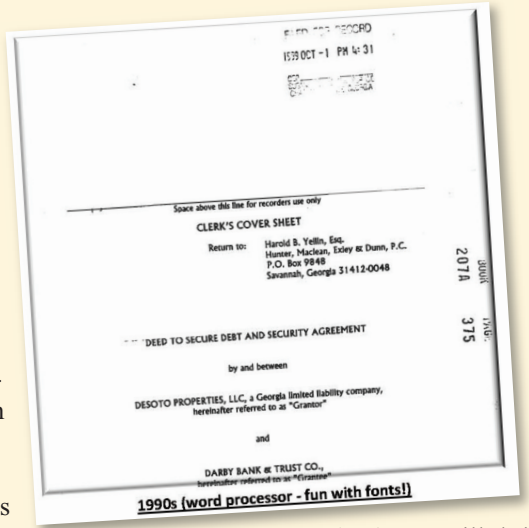
as party or parties of the second part, hereinafter called Grantee (the words "Grantor" and "Grantee" to include their respective heirs, successors and assigns where the context requires or permits).

WITNESSETH that: Grantor, for and in consideration of the sum of TEN AND NO/100 AND OTHER GOOD AND VALUABLE CONSIDERATION ($10.00) DOLLARS in hand paid at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold, aliened, conveyed and confirmed, and by these presents does grant, bargain, sell, alien, convey and confirm unto the said Grantee, all that tract or parcel of land lying and being in Land Lot 158 of the 16th District, 2nd Section of Cobb County, Georgia, as more particularly described on Exhibit A attached hereto and made a part hereof, and all improvements of any nature whatsoever located on said tract or parcel of land.

The conveyance made hereby is subject to (1) that certain Deed to Secure Debt dated September 30, 1971 from Personality Home Manufacturers, Inc. to Marietta Federal Savings and Loan Association recorded in Deed Book 1268, page 116, Cobb

1970s (pre-printed form from Lawyers Title Ins. Corp.)

Unlike today, in the mid-1960s the deed records in metro Atlanta counties were considered more reliable by the title insurance underwriters than other outlying counties. As a result, title insurance premiums were often lower for properties located in Atlanta and other metro areas than in rural counties. In Atlanta at least, Lawyers Title Insurance was by far the largest and most comprehensive title plant, and thus the starting point for most title searches. The memos issued over the years by Lawyers Title, on how to clear common title problems, became the foundation for George Pindar's treatise, which was not published for the first time until 1971. The vast majority of all title searches were still completed by attorneys, who certified their searches to the title company underwriters, who in turn issued the title binders and policies.



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CLERK'S COVER SHEET

Return to: Harold B. Yellin, Esq.
Hunter, Maclean, Exley & Dunn, P.C.
P.O. Box 9848
Savannah, Georgia 31412-0048

DEED TO SECURE DEBT AND SECURITY AGREEMENT

by and between

DESOTO PROPERTIES, LLC, a Georgia limited liability company, hereinafter referred to as "Grantor"

and

DARBY BANK & TRUST CO., hereinafter referred to as "Grantee"

2078 375

1990s (word processor - fun with fonts!)

During the 50+ years since our section was formed, our industry has navigated an incredible amount of change and disruption. For starters, a steady stream of technological advances has exponentially increased our capabilities, efficiency and productivity, and thus the expectations we all place on each other. New technologies sometimes have been resisted and sometimes embraced, but always eventually have been adopted by us practitioners and the investors, developers, lenders, governments and other entities with whom we interact and do business. This historical perspective will serve us well over the next months and years as we begin to grapple with the wave of e-signing, e-notary and remote notary services that are knocking at the door of the Georgia real property bar.

As we grapple with these and other changes, we can also reflect on how competition from within and outside the state, and from within and outside the bar, has forced us over the years to reevaluate the business side of our profession. Over the past 50+ years, residential closings have evolved from a budding practice area in the larger firms in each major county seat, to a boutique practice area, to a retail service geared toward the convenience of homeowning and home-buying consumers. Barriers to entry in all areas of real estate practice have been reduced over the years with the advent of the Attorneys Title Guaranty Fund, standardization and automation of loan documents, and online resources that have eliminated the need for proximity to a law library, courthouse or title plant. Meanwhile, lenders, brokers and lay title agencies have made inroads into areas which were once (and are still) recognized as the practice of law.

As we adapt to these changes, we must continue our long-term fight for the crucial role that trained, experienced real estate attorneys have always played in all matters affecting title to real property in Georgia. We are trustees of the ground that was laid by our predecessors, the foundation they built, and myriad improvements they made over the years. The current leadership of our section is committed to continuing to build upon that foundation over the coming year and beyond, with help from each of you who count yourselves among the members of our bar and its largest section, the Real Property Law Section. We strive to continue the work of those who came before us, with the expectation that our profession, not just our business, will thrive, and with the hope that our successors in interest will look back as we do, fifty years from now, with pride and appreciation.

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local municipality where the property is located, will often consist of two components:

1. They will provide the current zoning classification of the property: industrial, retail, planned unit development, residential, special zone, and so on. The current classification is not always helpful, however, because the property could have been built prior to the current zoning ordinance being passed.

2. They will usually say that there are no open violations. This does not mean that there are no non-conformance issues; it merely means the applicable zoning governance entity is not aware of any violations.

Ultimately, the zoning letter will provide some basic information, but zoning codes change from time to time, and real estate usually has a useful life that outlives the frequent changes to zoning codes. Therefore, one should order a zoning report and can choose from several companies to do so.

The Planning & Zoning Resource Company is one of the most well-known zoning consultants. From a branding standpoint, its name dominates the market to the point where some refer to zoning reports as "PZRs." Other brands, like Zoning Info, also provide zoning reports. Each will provide a report consisting of a five- to ten-page summary addressing use, setbacks, heights, parking, side yards, and other characteristics that are covered by the zoning code. The report will also include a summary categorizing the property as one of three things: (1) non-conforming, (2) legal non-conforming, or (3) conforming.

Conforming, Non-conforming and Legal Non-conforming Classifications

a. Conforming Properties

If a property is designated as "conforming," that means the building is built perfectly within the *current* zoning codes applicable to the property. This means that there are no violations of uses, setback lines, landscape buffers, height restrictions, parking requirements, or other zoning requirements. If a zoning report comes back with a conforming designation, there is nothing further to be done, and the deal can move forward toward closing.

b. Non-Conforming Properties

The second type of zoning designation is "non-conforming." A non-conforming property does not comply with the current zoning code and is not grandfathered in, meaning that the property was built prior to the existence and enforcement of the current zoning code and that there is no special permit for the property or statutory exception. There is usually no "quick fix" for a non-conforming property. For example, the owner could apply for a variance, but there is no certainty that an exception would be granted. The owner may have to engage in extensive renovation, such as tearing down a portion of the building or adding additional parking to comply with the code.

Although non-conformance is a major issue, it is also a rare one. Builders, developers and their lenders are cognizant of non-conformance issues and ensure that newly constructed properties comply with the local zoning code.

c. Legal Non-Conforming Properties

In between "conforming" and "non-conforming" is "legal non-conforming." Legal non-conforming means that the property was constructed prior to the current zoning code, and while the property may violate the current code, it is grandfathered in. As such, the property is not in any violation of the code; it is non-conforming, but legally so.

What kinds of non-conformances designate a property as legal non-conforming? It could be something minor; for instance, the property may be missing two parking spaces, which could be fixed by re-striping the lot. Another common legal non-conforming zoning issue is found in cities which are trending towards having more green space. Consequently, these cities require setbacks to be positioned farther back and enforce more restrictive side yard and green space requirements. A property may have a specific use, such as an office or a gas station, that was built in an area that has since implemented more permitted uses. Even so, as long as the property is grandfathered in, there is not much cause for concern.

However, the significant area of concern with respect to legal-non-conforming properties lies in issues such as condemnation or casualty. In the instance of casualty, since the zoning code under which the property was built no longer exists and the property does not comply with current zoning codes, the owner's sole option may be to look to a rebuildability clause in the local zoning code. These clauses state that if a building is legal non-conforming, the property may be rebuilt in accordance with the original structure and continue to be grandfathered in, but only under certain parameters. Such parameters may include a timing threshold, which provides a finite amount of time in which the owner has to rebuild the property as it was. Another, more concerning parameter is a damage threshold, which requires the owner to comply with the current zoning code in rebuilding the property if a certain percentage of the building is destroyed. Depending on the type of structure of the building, an especially limiting damage threshold could make rebuilding the property as a legal non-conforming structure very difficult.

Ordinance and Law Insurance

The best way to mitigate the risks posed by a damage threshold is by obtaining ordinance and law insurance. Unlike a normal property insurance policy, ordinance and law insurance provides additional coverage beyond mere repair of the damage by giving the insured additional resources to comply with the current zoning. Most insurance providers can provide ordinance and law coverage through an endorsement to the title policy.

Ordinance and law insurance can provide coverage in three different ways:

1. It will cover the cost of demolishing the undamaged portion of the property where a municipal entity may require

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Newsletter Submissions

Section members are invited to submit articles for consideration and publication in the Newsletter. If you are interested in doing so please call or email Matthew James at 770.690.4741, matthew.james@voya.com or Jimmy Miller at 229.244.5400, jmiller@langdalelaw.com.

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the entire building to be torn down. An insurance policy without ordinance and law coverage might not cover the cost of such demolition.

2. Similarly, ordinance and law insurance will also cover the cost of rebuilding the originally undamaged, now-demolished portion of the property.

3. Finally, in the event that the local zoning code has changed since the time the property was initially built, the municipality may require the building to be rebuilt up to current code. Ordinance and law coverage will pay for such changes, whereas an insurance policy without ordinance and law coverage would only cover rebuilding the property in accordance with its pre-destruction form.

Conclusion

Zoning is a significant part of a commercial real estate transaction and should not be overlooked. It is important, both as a lender and as a buyer, to know where the property stands with respect to zoning so as to not run into any issues to could have easily been avoided. Additionally, best practice is to order a zoning report and obtain proper insurance if the property is classified as legal-nonconforming.

VOTERS BEWARE: WHY CASTING YOUR BALLOT FOR CITYHOOD MAY BE A VOTE FOR EMINENT DOMAIN OR A LOSS OF PROPERTY RIGHTS

Christian F. Torgrimson
Pursley Friese Torgrimson, LLP

For years a cityhood movement has been growing in Georgia as voters continue to support a unique trend of incorporating themselves into smaller cities in order to capture valuable resources and improve utilization of the tax base. With the General Assembly's passing of Senate Bills 262 and 263 during this year's legislative term, the new city of Eagle's Landing became the latest. Come November, voters will decide whether they would like to be part of a new city, created from land taken in part from the almost 100-year old city of Stockbridge. The Eagle's Landing Educational Research Committee said the group in favor of cityhood wants to establish a "tighter grip on services" in the area: additional police, a more responsive and updated zoning code to control development, and the addition of public use facilities such as a library and parks. While economic growth and redevelopment such as what is proposed at Eagle's Landing are usually celebrated as signs of a healthy economy, many voters do not realize the potential downside when standing at the ballot box.

Georgia's cityhood trend began with a 1993 Georgia statute establishing the minimum conditions necessary for a community to remain or become a municipality. In addition to performing at least three public services from a prescribed list, the municipality must hold at least six regular officially recorded public meetings each year and hold regular municipal elections. In metro Atlanta, the cityhood trend has thrived, leading to a surge of nearly 10 new cities across the beginning with Sandy Springs in 2005. It has been driven by several factors. Voters continue to want more for their tax dollars at a local level without higher tax bills. Many favor the idea of more localized control in government as they feel over-taxed and under-served by county governments that often are viewed as ineffective. By voting to incorporate and form a new city, they are rejecting the political leadership and withdrawing most of their resources from the county's tax pool. The objective is to reprioritize and increase services to meet the needs of their constituencies, without raising taxes.

By a 94% pass rate, Sandy Springs voters decided overwhelmingly to incorporate after a 20-year effort wrought with legal challenges from those who opposed the move. As a core part of the redevelopment plan, Sandy Springs officials planned a new city center, comprised of a downtown area using administrative buildings and a police headquarters, as well as recreational areas such as parks, and corresponding roads and intersection improvements. However, the land needed for all these projects was owned by private property owners, requiring the use of eminent domain. Under this authority, the government has the power to expropriate or take and damage private property and interests for public use upon payment of compensation. Sandy Springs has exercised its authority to achieve its objective, acquiring or formally condemning acres of land, resulting in a loss of many of the area's established, older businesses and a wholesale change to the area.

Other newly created cities have and are following suit, including John's Creek (2006), Milton (2006), Chattahoochee Hills (2007), Dunwoody (2008), Brookhaven (2012), Peachtree Corners (2012), Stonecrest (2016), Tucker (2016), and South Fulton (2016). Other neighborhoods have attempted to gain entry to the ballot box: Greenhaven, LaVista, and Sharon Springs.

Along with the use of eminent domain, new zoning codes often are established to support these new cities, adding to the existing complexity of property ownership and use in these communities, and impacting a wide range of commercial and residential developments from permitting to signage to setbacks to certain types of commercial enterprises. These zoning codes seek to add a certain look or style to a downtown, pedestrian friendly area.

While existing businesses may be grandfathered in, others businesses may be restricted from coming to specific portions, leaving those businesses with few options. For example, Sandy Springs recently revised its zoning code to prohibit rental car companies from obtaining licenses to operate in certain zones.

While the cityhood movement has gone full speed ahead, a national tightening of eminent domain laws occurred, redefining the government's ability to take private property after the U.S. Supreme Court's widely unpopular decision in *Kelo v. City of New London*, 545 U.S. 469 (2005). This decision led to sweeping changes across the country, and Georgia responded quickly with reforms. At that time, 83 percent of Georgians sent a strong message to legislators that they were not in favor of the government seizing private property for city

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or downtown economic development projects involving private entities. Many Georgia laws were amended to provide a more robust process in favor of owners when governments take private property, leading to the Landowners Bill of Rights and Property Protection Act of 2006, O.C.G.A. §§ 22-1-9 through 22-1-14. The Act was passed to ensure good faith negotiations for compensation by requiring disclosure of information, prohibiting bad faith conduct, and inviting the owners to participate in the process, all part of an effort to avoid formal condemnation or litigation and ensure the payment of just and adequate compensation. Unfortunately, the broadening of property owner rights under the Landowners Bill of Rights did not translate fully to the process of acquiring and condemning property by all governing entities, whether city, county or the state. In October of 2017, the Georgia Supreme Court issued a direct decision in City of *Marietta v. Summerour*, 302 GA 645, 807 S.E.2d 324 (2017), upholding the Landowners Bill of Rights in full and applicable to all condemnation proceedings.

With the drive and excitement to incorporate, what many voters may not contemplate is that a vote for creating a municipality authorizes the new government to, and potentially increases, the exercise of that power against the very same voters. Impacted property owners often have no recourse to stop it. Although the use of eminent domain may bring much needed improvements and help vitalize the economy, it can create an unintended result of devastating individual interest in properties and businesses. Compensation in exchange for the use of eminent domain is intended to be based on fair market value. However, public funds are limited and often do not match true fair market value, leaving owners impacted by eminent domain without fair compensation.

A major point of opposition in these moves to incorporate – as with the Eagle's Landing debate – is the question as to whether municipalities should be given the opportunity to remove portions of their current cities if they do not want them. What happens to those left behind – and worse, to those in the way? To start, less money in the pool requires them to raise taxes or provide fewer services. There is a perception that many of these new cities tend to leave poorer areas outside of their new boundaries, and yet the burden of paying for county-provided services steadily increases for those left behind in unincorporated areas.

Georgia Senate Bill 375 proposes write into law the process for incorporating new cities and new municipalities and require these groups to show their financial viability as well as the financial impact on unincorporated areas. The Bill – while passed by the Senate in 2016 – is still being considered by the House of Representatives. At the same time, there has been a resurgence this year in the Georgia Assembly of bills designed to foster economic growth through redevelopment. Old debates have been renewed because the economy and real estate market are back, and developers are active. But what does this mean for the local business owners who now face, again, the very real threat of governments taking property through eminent domain?

From an economic growth perspective, incorporating new cities unquestionably provides positive benefits to both taxpayers and businesses. However, in the rush to incorporate, voters should arm themselves with information about the short and long-term ramifications of doing so. The impact of new zoning codes, restrictions on development, and the property needs of the new government to affect its planning should all be considered carefully.

Christian Torgrimson is a founding and managing partner of Pursley Friese Torgrimson in Atlanta. She has litigated eminent domain proceedings, private property disputes, and other real-estate-related matters for 19 years. She has extensive experience to all aspects of eminent domain proceedings brought by state, county and local governments throughout Georgia, representing a wide variety of owners and business operators, including shopping center owners, franchisors and franchisees, developers, and retail owners and operators.

If you have further questions about eminent domain, please contact the author of this article at ctorgrimson@pftlegal.com.

REMEMBER, JUST BECAUSE YOU HAVE A SAFETY NET DOES NOT MEAN THAT YOU SHOULD PURPOSEFULLY FALL OFF OF A HIGH WIRE.

T. Matthew Mashburn
Aldridge Pite LLP

PNC Bank, N.A. v. Gazaway, A18A0779 (March 29, 2018). Ellington, P.J. writing for Bethel, J. and Senior Appellate Judge Phipps.

Closing Attorneys still need to be mindful of Justice Nahmias' admonition that formed the basis of the *Gordon I* and *Gordon II* opinions. To paraphrase: "It's just one witness and one unofficial witness, why can't you get this right?" On the other hand, closing attorneys will be greatly rejoicing when the news of three recent cases make the rounds (well, one very recent case, one fairly recent case and one case at the beginning of last year). These three cases form a safety net for closing attorneys but should be seen as a safety net for tight rope walkers (i.e. the kind that saves your life at the very last second and is one's very last hope) and not as a safety net for trapeze artists (i.e. the kind that you intentionally launch into and do tricks during the rebound).

STANDARD FACTS

Mr. and Ms. Gazaway took out two loans with Bank of America in 2002 and secured the loans with 5288 Brown's Bridge Road, Gainesville, Georgia.

In 2005, Ms. Gazaway passed away. She was survived by her spouse and four adult children. Ms. Gazaway's Will gave everything to her husband, Mr. Gazaway, but the Will was not probated.

In 2006, Sunshine Mortgage made a loan that paid off the Bank of America loans and Bank of America cancelled its security deeds.

In 2013, Mr. Gazaway passed away.

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In 2014, Sunshine Mortgage assigned the Note and Security Deed to PNC.

NON-STANDARD FACTS

The Security Deed for Sunshine Mortgage was recorded but it was missing the notary's seal or the notary seal was not apparent on the deed records.

PNC filed to quiet title and the Special Master found that (1) "…when Ray Gazaway executed the Sunshine security deed, Sunshine '…failed to account for the interests of' the Gazaway's children as heirs at law of Betty Gazaway;" (2)[1]"…because the security deed lacked a notary's seal, the deed failed to convey legal title to PNC;"[2] and (3) "…the doctrine of equitable subrogation is not applicable to the facts of this case."[3]

THE STATUS OF THE CASE

The trial court entered judgment in accordance with the special master's findings (without holding a hearing first) and PNC appealed.

BLACK LETTER LAW ON RECORDING

Judge Ellington recited Black Letter Law with regard to Recording:

1. A security deed that is not properly attested, that is, by a notary and an additional witness, may not legally be recorded and does not count as constructive notice even if it makes it into the deed records because it was not "duly recorded.": *Id.* at 6 citing OCGA § 44-14-61, *Wells Fargo Bank, N.A. v. Gordon,* 292 Ga. 474, 475 (749 SE2d 368)(2013)("*Gordon II*") and OCGA § 44-14-33.

2. An unrecorded deed is enforceable against the Grantor of the deed. *Id.* at 6-7 citing *Bramblett v. Bramblett,* 252 Ga. 21, 22(2)(b)(310 SE2d 897)(1984).

3. "[A] deed with a patent defect in attestation is not a nullity. Rather, it is still binding between the parties to the assignment." *Id.* at 7 ft 4 citing *Baxter v. Bayview Loan Servicing, LLC,* 301 Ga. App. 577, 583 (688 SE2d 363)(2009)(accord); *Hooten v. Goldome Credit Corp.,* 224 Ga. App. at 581 (accord); *Haynes v. McCalla Raymer, LLC,* 793 F3d 1246, 1252 (11th Cir. 2015).

4. The basic requirements of an enforceable deed are that "…the deed is written, identifies the land being conveyed, is supported by consideration, is signed by the grantor, and is delivered to the grantee [and is accepted by the grantee]." *Id.* citing *Z & Y Corp. v. Indore C. Stores, Inc.,* 282 Ga. App. 163,173 (638 SE2d 760)(2006).

5. The failure of a notary to place the notary's official seal on the deed does not make the deed improperly attested "because such failure 'did not defeat the effect of [the notary's] signature as a witness in [the notary's] notarial capacity.'" *Id.* at 6

Judge Ellington ruled that even under a clearly erroneous standard, the special master got it totally wrong and the trial judge was wrong to adopt the totally wrong findings of the special master. Note that the trial court did not hold a hearing after the special master issued the special master's report as is customary so the trial judge did not hear any objections to the special master's report.

Judge Ellington therefore held that to the extent that the missing notary seal was a cloud on PNC's title, it was removed as a cloud.

THE THREE AMIGOS, *GAZAWAY, IN RE PERRY* and *IN RE KRIEG*

When *Gazaway* is coupled with *In re Perry* and *In re Krieg*, Closing Attorneys will be sleeping well for the first time since *Gordon I.*

In re Perry holds (consistently with *Gordon II*) that while the Waiver of Borrower's Rights does not cure the lack of the attesting or acknowledging witness, a ***properly*** drafted Closing Attorney's Affidavit DOES! Note also that *In re Perry* was decided ***after*** the 2015 Amendment that took acknowledgements out of the witnessing statutes. In this regard, *In re Perry* can be seen as re-affirming *In re Kim*, 571 F.3d 1342 (11th Cir. 2009) which was pre-*Gordon I* and was also a missing notary seal case.

The reason that the Closing Attorney's Affidavit saves the security deed against a BFP is that the remedial statute O.C.G.A. § 44-2-18 says that a DSD lacking an official attesting witness can be cured by a statement of an attesting witness before a notary public as long as the statement "shall testify to the execution of the deed and its attestation according to law." *Id.* at 444. This is exactly what a properly drafted Closing Attorney's Affidavit does in establishing that the closing attorney explained the non-judicial foreclosure and then watched the borrower sign the security deed. The notary's signature

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CALENDAR NOTES

2018

November 6
Commercial Real Estate Seminar
State Bar Headquarters

November 7
Real Property Foreclosure Seminar
State Bar Headquarters

2019

January 16
Residential Real Estate Seminar
State Bar Headquarters

May 9-11
Real Property Law Institute
Omni, Amelia Island

[1] *Id.* at 4. Thus, one half of the Gazaway property was owned by Mr. Gazaway and the four Gazaway children as the heirs at law of Ms. Gazaway at the time of the Sunshine loan and mortgage.

[2] *Id.* We have previously coined the phrase "constructive notice myopia" for the Special Master and Trial Court's failure to recognize the distinction between the requirements for a deed to be **recorded** (and thus valid against a BFP) and the requirements for a deed to be **enforceable** against the grantor/borrower (but not valid against a BFP, or a hypothetical BFP like a Trustee in Bankruptcy, after *Gordon I* and *Gordon II*). See Mashburn, *Inquiry Notice is the Most Dangerous Notice of All*, UNDILUTED CLARITY June 25, 2015 reviewing *Caraway v. Spillers,* A15A0162 (2015) Branch, J. writing for Andrews, P.J. and Miller, J.

[3] *Id.*

[4] Not required but as we will see, would have probably been a good idea to have had one.

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on the Closing Attorney's Affidavit does not take the place of the missing attesting witness. Rather, the Closing Attorney's signature and the notary's signature on it meet the standards for a curative affidavit under O.C.G.A. § 44-2-18.

It is super important for Closing Attorneys to recognize that neither *In re Perry* nor *In re Kim* held "…that the attestation or the notary's seal on the Affidavit substitutes for the necessary attestation in the Security Deed." *In re Kim*, 571 F.3d at 1345 ft. 7. Rather, *In re Kim* and *In re Perry* both stand for the proposition both before and after *Gordon I* and *Gordon II* and before and after the 2015 Amendment "…that the [Closing Attorney's] Affidavit meets the requirements under § 44-2-18 to cure a defective official witness attestation and that the [Closing Attorney's] Affidavit testifies to both the execution and the attestation of the Security Deed as required by the statute." *Id.* *In re Krieg* was decided on March 21, 2018. It involved a pre-2015 Amendment Deed to Secure Debt where the unofficial witness signed the attestation twice and the notary executed an acknowledgement instead of an attestation.[5]

THE BEST HIGH-WIRE SAFETY NET IS THE ONE THAT IS NEVER USED.

Accordingly, while it is a time of great rejoicing for Closing Attorneys, it is also a time for circumspection.

In re Krieg only applies to pre-2015 Amendment acknowledgements.

HOWEVER, *In re Perry* might save you if you have a properly worded Closing Attorney's Affidavit.

FURTHER, *Gazaway* might save you if you can get to a quiet title action before the case hits bankruptcy where *In re Krieg* might save you.

BUT, wouldn't it just be better to remember Judge Nahmias' admonition in *Gordon II* and just get it right in the first place? No document leaves the closing room unless and until the borrower has signed, sealed and delivered the deed in front of an unofficial witness and an official witness.

Wouldn't that be better and easier not to use *Gazaway* at all rather than risk becoming *Gordon III*?

IF THE BORROWER MEANT FOR YOU TO BE A FIRST AND YOU MEANT TO BE A FIRST, WHAT'S THE DAMAGE TO THE BORROWER IF YOU ARE A FIRST AFTER YOU PAY OFF THE FIRST?

Judge Ellington provides more than just undiluted clarity for recording issues in *Gazaway*, he provides a refreshing insight to equitable subrogation.[6]

The purpose of equitable subrogation is to allow a new creditor who is paying off a previous creditor to "step into the shoes" of the previous creditor as long as that was everybody's intention in the first place. *Gazaway* at 9-10 quoting *Chase Manhattan Mortgage Corp. v. Shelton,* 290 Ga. 544, 549 (4)(722 SE2d 7430(2012).

Again, it is an equitable doctrine. It's still not equitable, at least yet, for the lender to provide the borrower with a free house (or an unsecured loan for a house that was not intended to be unsecured) (or a free house as long as the borrower is willing to eat a bankruptcy to do it).

The special master seems to have held that the failure to search the title (and thus discover the potential interests of the *Gazaway* siblings) was inexcusable neglect. Bill Dodson and Marcus Calloway would no doubt agree that the failure to search the title was really not the most wise path to take.

HOWEVER (and it's a big however because it's in all caps), the question is "Should the *Gazaway* siblings get an unencumbered house even if the lender did a dumb thing in not having the title searched?" "[T]he special master found that 'a search of the Hall County, Georgia deed records would have revealed that Ray C. *Gazaway* did not own a 100% interest in the property offered as collateral…" *Id.* at 10-11. That part is unmistakably true *as a matter of law.* However, the doctrine is not called "Subrogation by Operation of Law." It is called *Equitable* Subrogation. Thus, it goes beyond a simple analysis of race-notice constructive knowledge. It seeks to answer the question, "If we intended to have a first and you intended to give me a first and I paid off your first to get to be the first, how are you damaged if the courts make me a first? (and especially if you signed a borrower's affidavit saying that I was going to be a first?)."

HOWEVER, (and again it is a big however) that's the result if you get to the Security Deed before a bankruptcy gets filed. After all, bankruptcy is a strange place. Its purpose is to allow people not to pay their just debts. "To refuse to recognize the priority of Sunshine's secured interest on the basis that it failed 'to account for' the interests of the younger *Gazaways* would be a windfall for them (and potentially other claimants against Ray *Gazaway's* estate). Such a windfall does not comport with the principles of equity." *Id.* , at 13.

But, it does comport with the principles of bankruptcy!

CONCLUSION

Sometimes it feels like being a Closing Attorney is like performing on a high wire in a circus. And just like a high wire artist, it's always nice to have a safety net but it's always best if you don't have to use it. Instead of risking becoming *Gordon III*, it's just best not to let a document that is going to be recorded leave the closing room and the presence of the borrower without being signed, sealed and delivered in the presence of an unofficial witness and a notary public who affixes the notary public's stamp and seal. In the non-words of Justice Nahmias (remember we're just paraphrasing the lesson of the case in *Gordon II* and not quoting his exact words) "It's just one unofficial witness and one notary public, how hard is it to get that right?"

[5] Mashburn, *In an attempt to create Gordon III, did Acknowledgements just get approved and one of the "jewels" get ripped out of the crown? Only for pre-2015 Security Deeds which was already the case and maybe. Gordon II gets major disrespected in bankruptcy court* **UNDILUTED CLARITY April 4, 2018 reviewing** *In re Krieg*, 2018 WL 1448743 (March 21, 2018)(North District of Georgia Atlanta Division) Judge Baisier, U.S. Bankruptcy Court Judge.

[6] I have certainly evolved a long way in my understanding of equitable subrogation from my position in 2003 when a colleague asked me my opinion on equitable subrogation and I said "I don't believe in it" (although my title company still appreciates any closing attorney who holds to the former position and transacts business as if there was no such thing as equitable subrogation).

[7] Mashburn, *Keep your "Gordons" out of bankruptcy court and out of the Georgia Supreme Court* UNDILUTED CLARITY (June 26, 2014) reviewing Vibert v. Bank of America, A14A0696 (2014) Andrews, P. J. writing for McFadden and Ray, JJ (reforming a Security Deed that was missing a borrower's signature relying on Kim v. First Intercontinental Bank A13A1628 (2014)).

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