

Real Property Law Section NEWSLETTER State Bar of Georgia

A Publication for Real Property Lawyers

Winter 2007

COMMENTS FROM THE CHAIR WINTER, 2007

David J. Burge
Smith, Gambrell & Russell, LLP

On January 8, 2007, the Georgia General Assembly convened following the 2006 elections. The number of lawyers serving in the Georgia legislature is at an all time low, and many legislators do not have a favorable impression of lawyers. Much of this anti-lawyer feeling stems from recent battles in the General Assembly over tort reform and other insurance and liability issues that do not directly affect real estate transactions. Some of it comes from the heated rhetoric from recent judicial elections about the proper role of lawyers who practice personal injury and criminal law. However, anti-lawyer feelings in the legislature, and in the public at large, are usually directed to our profession as a whole and make little, if any, distinction between specific areas of practice. Moreover, this anti-lawyer feeling may not fade with time after the end of these policy debates and political campaigns. Many legislators are owners of small businesses who see lawyers, not as the protector of important legal rights, but simply as part of the ever increasing insurance premium and regulatory compliance expense they must bear to operate their businesses.

The State Bar has taken a number of important steps in the past year to improve relations with the General Assembly, and I commend those efforts. Both the State Bar as a whole and the State Bar's Advisory Committee on Legislation have a number of ongoing initiatives, many of which are listed on the State Bar's web page and in the Georgia Bar Journal. The State Bar's Sections, including our own Real Property Law Section, can play an important role in this effort. The General

CHANGES TO ELEVATION CERTIFICATE CREATE PITFALLS

Robert B. Brannen, Jr.
Inglesby, Falligant, Horne, Courington & Chisholm, P.C.

Katrina and other hurricane related flooding in the last few years have revealed many pitfalls for homeowners pursuing flood insurance claims and real estate practitioners advising them. FEMA addressed some of these concerns with changes to the elevation certificate form that became effective on December 31, 2006. [See www.fema.gov/business/nfip/elvinst.shtm]. Notwithstanding the new form, FEMA still accepts the old form on existing construction. Therefore, a purchaser can rely on the

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Assembly meets for only forty days each year and has very limited professional staff. As such, legislators often turn to the various Sections of the State Bar for objective professional advice on legislative proposals that involve our respective areas of law practice. Before I became Section Chairman, I chaired our Section's legislative committee for several years, and I truly enjoyed each request from a Georgia legislator to review a bill that involved real estate in some way. I was even asked to testify at committee hearings a time or two. Our Section's legislative work is now chaired by Patrise Perkins-Hooker, assisted by an active and involved committee of volunteers. It is a compliment to their collective professionalism and expertise each time a legislator asks their input on a bill.

In addition to providing advice on pending legislation, our Section is an active participant in the State Bar's legislative advocacy program. Two bills proposed by our Section were enacted into law in recent years, and our Section has a proposal pending before the General Assembly this session as part of the State Bar's 2007 legislative package. This legislative program is funded by the \$100 voluntary legislative contribution found on your annual State Bar dues statement, which is, in my opinion, money very well spent.

I would ask all members of our Section to join in this effort to improve the Bar's standing with the General Assembly. Please speak to your own representatives to thank them for their service and remind them of the important role our Section's lawyers play in keeping our state's housing and property markets open and fair to all participants. Legislators do listen to the folks back home. If all 2,700 of our Section members were to join this conversation, imagine the results.

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old elevation certificate provided by the seller for the purpose of purchasing flood insurance.

In the interest of saving time and money, real estate practitioners, insurance agents, surveyors and realtors will sometimes assist the purchaser in obtaining an old elevation certificate. The use of the old elevation certificate may not be the best alternative for the purchaser, and may result in liability for the real estate professionals that assist them. The new elevation certificates are designed to reveal conditions that might exacerbate flood damage, but also have the effect of disclosing conditions that might allow the insurance company to reduce or adjust the flood claim payment to the homeowner. Attorneys handling residential closings need to be aware of these pitfalls so that they can properly advise purchasers.

Changes in the elevation certificate include:

- a. The form now mandates a minimum of two exterior photos as attachments.
- b. Square footage is now separated out between enclosure/crawl space and garage.
- c. Vent information is also separated for these two areas. The square inches of open vents starting within one foot of the grade elevation must equal the square footage in the residence to allow flood waters to flow through the foundation.

These changes increase the probability of discovering whether improvements might have been constructed below the finished floor elevation listed on the elevation certificate, and provide information needed to reform the policy in the event of a flood loss. Consider the following example.

Many homes in flood plains are constructed high off of the ground with a garage underneath. Owners of these homes commonly convert their garages into playrooms or additional bedrooms after the issuance of the elevation certificate.

From an insurance adjuster's standpoint, the conversion of these spaces below the finished floor elevation means that flood insurance would only have been available at a much higher premium than the owner was paying. After a flood insurance loss in such case:

- a. FEMA could reform the policy and give the owner 30 days to pay the remainder of the premium for the current and prior policy term in order to get the increased coverage amount.

While this sounds like a good deal, FEMA still does not provide insurance coverage for the additional finished space. The changes to the elevation certificate increase the probability this condition would be discovered.

- b. If the information needed to compute the revised premium is incomplete, FEMA will ask you to provide the additional information, and will not pay a claim until said information is available.

If the needed information is not available, the owner might not receive a payment. The photographs, and separation of the square footage for the garage increase the probability that the required information will be available from the existing elevation certificate.

- c. If you do not or cannot pay the additional premium, your claim will be processed based on the reduced amount of coverage. Since flood insurance is capped at \$250,000.00 for a

residence, such a reduction could be significant.

- d. Finally, if FEMA finds that the owner intentionally did not disclose the condition, or falsified any important fact of circumstance or did anything fraudulent relating to the insurance, the entire claim could be denied.

These last two adjustments demonstrate some of the risk involved in not obtaining a new certificate.

Even if the house does not flood, the bona fide purchaser who buys based on the existing elevation certificate might suffer a significant reduction in value if he sells the house to someone who obtains a new elevation certificate, and discovers the problems.

All of these situations create problems for the purchaser that we can help him avoid. In addition, when the owner finds his flood insurance claim denied or significantly reduced, he will look for other sources of compensation. The closing attorney that assisted the purchaser in obtaining the existing elevation certificate so as to save the cost of a new one is a likely target.

Therefore, I recommend requiring a new elevation certificate on every purchase, even if an existing elevation certificate is provided by the seller. If the purchaser insists on utilizing the existing elevation certificate, obtain a waiver that fully explains the risks that the purchaser is assuming.

Georgia has escaped a direct hurricane hit for many years, but our time will come. Fortunately, disasters like Katrina provide an opportunity for learning that can help us protect our clients and ourselves.

The Fight Against Mortgage Fraud

*Peter Lublin and Kurt Hilbert
Adorno Et Yoss, LLC*

One of the more prevalent mortgage fraud schemes in Georgia includes identity theft and forgery. Those who represent title companies and lenders in Georgia are constantly litigating issues of forgeries and identity theft and their effects on the title chain. Given the nature of the real estate closing practice, closing attorneys must be vigilant in protecting sensitive financial documents, and should take extra care in evaluating title documents.

At no time should documents be filed of public record which include social security numbers or tax IDs. In fact, many of the courts in Georgia have standing orders forbidding the filing of any pleadings or real estate records containing social security numbers. A review of a bankruptcy docket will reflect social security numbers blocked out except for the last four numbers. Closing attorney and mortgage broker files are replete with information that if not adequately protected could lead to identity theft. Moreover, a closing attorney should not make it a practice to draft deeds to be handed in blank form to sellers/purchasers for execution outside the presence of the closing attorney. Such practice can certainly lead to forgery and identity theft.

It is also important when closing loans to verify the identification of the parties to the transaction. It is imperative to obtain legible copies of legitimate identification cards and to copy the cards during the closing. Gym cards and Costco cards just don't cut it as identification. Also, the photocopies of IDs need to be readable or they are of no use and value. A red flag for mortgage fraud is unnecessary "friends" or "estate interests" that attend closings. It is often these extra individuals, sometimes called "strawmen", that are orchestrating mortgage fraud. A typical purchaser does not simply bring friends to the closing. You would be wise to copy their identification and to get them to sign some form indicating their attendance. Remember at most closings your client is the lender and your duty is to protect your client. Doing so will also protect you, your license, your errors and omissions coverage, and your firm and the title company.

ALL WORK AND NO PLAY? WE DON'T THINK SO!!!

WORKING OUT | jeff schneider



ZACHARY D. PORTER/GOODLIFE

Cyclist

RACE TO THE COAST:
approximately 300 miles
in three days

AGE: 42

TRAINING: 2,200 miles per
year

KEY EQUIPMENT: Specialized
Allez Pro bike frame

RESTING HEART RATE:
61 bpm

Specialized Allez Pro frame with Shimano Ultegra components, Mavic Ksyrium wheels, Speedplay Zero pedals and a Polar M32 heart rate monitor. For distance riding, a good pair of shorts is the most important piece of equipment. I like Pearl Izumi Microsensor shorts and a Giro Atmos helmet.

What is your training like? I ride an average of 2,200 miles each year. But I only train regularly when I'm training for a three-day event. Then I'll ride indoors for about 45 minutes, four days a week. I try to work in a real ride outside as often as possible. I also do two days of weight training on my legs.

What's your diet like when you're training? For the event in April, I stop eating red meat in January, and that helps me drop a bit of body fat. During the event, I drink energy or high-carb drinks like GU 20 Hydration or Gatorade Endurance.

Is your training more mental or physical? For the event, about 70 percent of the training is mental. At this age, the physical focus is more on training your heart.

If you couldn't cycle, what would you be doing? If I could fit a pool in my truck, I'd be swimming. My dad was an Olympic diving coach, so growing up I was constantly surrounded by Olympic athletes, and they were all swimmers. My family was very involved in the sport at a high level.

Jeff Schneider

*Alternative resolution and real property lawyer
with Weissman, Nowack, Curry & Wilco*

How did you get into cycling? I got into it during law school. I needed an outlet, and I was doing a lot of swimming and cycling. I chose cycling because I couldn't carry a pool around.

Tell me about the event you organize: Each year for the last 18 years, I've organized a three-day, 300-mile race from Atlanta to Savannah. For four years we've ridden to Charleston, and this year we'll ride to Beaufort, S.C. For the last six years, the event has been a fundraiser for the Special Olympics' cycling program.

What is the most challenging thing about cycling? In Atlanta, the traffic is the most difficult thing. I've been hit twice. One time I went through someone's windshield. As an attorney, it's hard to find the time to ride and to find the motivation to do it consistently.

What's your personal goal when you're cycling? I ride for the experience of it. It's a release for me, so often it's a way to return to the present. Instead of worrying about something that's going to happen in six months, I think about which way the wind is blowing.

What equipment do you use? I ride on a

Section's 2007 Legislative Proposal

The Real Property Law Section has a legislative proposal before the 2007 General Assembly to require Superior Court Clerks to cross-index a recorded document that contains multiple cross-references to earlier recorded documents to each of those earlier documents and to collect an additional filing fee for each additional cross reference.

This proposal was drafted by our Section's legislative committee, chaired by Patrise Perkins-Hooker, to address the problem of recorded documents, including lien releases that cross reference a large number of previously recorded documents, but that are not cross-indexed by the Clerks to those earlier documents in the recording process. Our proposal, which was adopted by the State Bar Board of Governors as part of the State Bar's 2007 legislative package, is sponsored in the General Assembly by Representative Roger Lane of Darien and was filed by Representative Lane as House Bill 386.

A copy of the bill can be found at http://www.legis.ga.gov/legis/2007_08/fulltext/hb386.htm.

UPCOMING CALENDAR DATES REAL PROPERTY LAW SECTION

— 2007 —

MARCH 20th, 2007
RPLS EXECUTIVE BOARD
MONTHLY MEETING

APRIL 6th, 2007
FORECLOSURE SEMINAR

APRIL 17th, 2007
RPLS EXECUTIVE BOARD
MONTHLY MEETING

MAY 3rd - 6th, 2007
Real Property Law Institute,
Destin, Florida

MAY 18th, 2007
Construction Materialmen's &
Mechanics' Lien Seminar

CURRENT DECISIONS

By: Dan Hinkel

ING Investment Management LLC

No Exhibit, No Lease

A communications company entered into a lease with an owner for the purpose of constructing and using a cell phone tower on the owner's property. The lease identified the lease property as "real property comprised of approximately 10,000 square feet of land located "in or upon" the owner's property and "described on said Exhibit B". However, Exhibit B was left blank at the time the lease was signed. The bottom of Exhibit B contained the language "This Exhibit shall be replaced by a land survey of the Premises at Verticality's sole cost and expense". No survey was attached or otherwise made a part of the agreement at the time it was signed.

The land subject to the lease was sold to a new owner who filed an injunction to prevent the construction of the cell phone tower on the property and sought a declaratory judgment that the lease was void for lack of any description of the property covered by the lease. The trial court and the Court of Appeals agreed.

The Court of Appeals stated that when a description of the property in a lease agreement is indefinite, and contains no descriptive terms by the use of which the land intended to be conveyed can be definitely located and identified, such lease is fatally defective and void. However, such instrument is not void for want of description if it furnishes the key to the identification of the land intended to be conveyed. Here, the "key" to the description of the property was an exhibit which was left blank.

The reference to a future survey does not cure this defect. Although a contract which contains a valid description of the property may rely on a subsequent survey to determine the exact acreage, a post-contract survey cannot be used to provide the description itself. The "key" relied upon must be sufficient to provide identification by reference to extrinsic evidence which exists at the time the contract is entered into by the parties. As the exhibit here was blank and the agreement did not refer to other extrinsic evidence in existence at the time of the lease, the description was insufficient. Verticality, Inc. v. Warnell, 06 FCDR 3902 (12/13/06).

No Exhibit, No Contract

To quote Yogi Berra, "it's déjà vu all over again". The decision involves another missing exhibit and another unenforceable contract. A buyer and seller entered into a contract, which on the face of the contract provided for a sale of 4.218 acres of land to be described on "an Exhibit "A" attached hereto and by this reference made a part hereof". No exhibit, however, was attached to the agreement at the time it was executed by the parties. The question presented was whether the property was described in the contract in a manner that satisfies the test for admissibility of parol evidence. The buyer argued that two keys provided a description of the land sufficient to satisfy this test: (1) the words Exhibit "A"; and (2) the notation that the contract was for the sale of 4.218 acres of land.

The Court of Appeals disagreed and held that given the fact that these words offer no indication of the location of the property,

they are legally insufficient to permit the admission of extrinsic evidence. "Because the Final Agreement contained neither a legal description of the Property sufficient to satisfy the Statute of Frauds nor any language that would allow the introduction of evidence to supply such description, the Final Agreement was legally unenforceable." McClung v. Atlanta Real Estate Acquisitions LLC, 639 S.E. 2d 331 (2006).

Practice Pointer: When preparing a contract or a lease, make certain that all Exhibits are in existence and attached to the contract or lease at the time of signature.

Proving Incapacity

Each of four witnesses who testified to incapacity of a grantor of a deed was either a present or former registered nurse or licensed practical nurse who provided care for the grantor during his bout with Alzheimer's disease. None of the four witnesses were witnesses to the deed. The appellant contended that the trial court erred in setting aside the deed because the witnesses were not physicians and there was no evidence of the grantor's incompetency at the precise time of execution of the deed. The Supreme Court of Georgia disagreed.

The law does not require that only physicians be allowed to give testimony regarding a medical issue; others with certain training and experience **can** testify on issues within the scope of their expertise. Any licensed practical nurse or registered nurse is qualified to testify as an expert witness within the areas of his or her experience. As to the appellant's complaint that the testimony regarding capacity did not address specifically the time of execution of the deed, it is not essential to establish incapacity by someone who was present when the deed was signed or who saw the grantor on the day that the deed was executed because evidence about the state of mind of the grantor prior to and subsequent to the date of the execution of the deed is illustrative of the competency of the grantor at the time of execution. Moreover, when incapacity is shown to exist prior to the execution of the document and it is further shown that the condition continues for a period of time subsequent to the date of execution, it is evidence showing incapacity at the time of execution. There was ample evidence to support the trial court's finding of incompetency on the part of the grantor. Smith v. Smith, 637 S.E. 2d 662 (2006).

PRO BONO MATCHMAKER PROJECT (PBMP)

PBMP Success Story: We wanted to inform our membership that the Pro Bono Matchmaker Project (PBMP) has successfully matched several of our Matchmaker volunteers with real estate pro bono needs throughout the state. We would like to recognize and thank John Taylor and Angela Ligouri of Carlton Fields for their recent work for the DeKalb County Habitat for Humanity. By sending letters on behalf of delinquent homeowners, John and Angela were able to help these Habitat homeowners prevent foreclosures. John and Angela are also working

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on behalf of DeKalb County Habitat for Humanity to secure variances and/or rezoning to enable the organization to develop more homes in DeKalb County. Great work!

PBMP Summary: As announced in previous newsletters, the RPLS has created PBMP to increase pro bono participation by real property attorneys by matching attorneys with pro bono opportunities. We are pleased to inform you that over 70 attorneys have already volunteered to be a part of PBMP. Thanks to all of the attorneys who have volunteered to be a part of this project, particularly those who have already agreed to provide legal assistance.

How PBMP Works: The RPLS Pro Bono Committee has established points of contact with several qualifying organizations that need real property legal services. Attorneys can simply volunteer to be part of a pool of attorneys available to take on such projects. Once an organization communicates a real property pro bono project to us, we send an e-mail solely to the pool of volunteer attorneys with a project description. Once volunteer(s) respond to the e-mail agreeing to assist with the project, we put the organization and volunteer(s) in contact with each other to coordinate handling of the project. Potential projects include land closings, declarations, easements, affordable housing, single-family housing, property tax appeals, etc. If you are interested in joining our pool of volunteers for the Pro Bono Matchmaker Project, please email Angela McCord at amccord@pogolaw.com.

PBMP NEEDS PROJECTS: You can assist us by identifying projects for our volunteer attorneys. If you become aware of any pro bono needs with which our group of volunteers may be able to assist, feel free to pass such information along to Angela McCord as well.

COMMERCIAL SEMINAR HELD AT STATE BAR OFFICES

The Annual ICLE Fall Commercial Real Estate Seminar was held on November 9, 2006 at the Bar Center Building, 104 Marietta Street, N.W., Atlanta. The Program was hosted by the Executive Committee of the Real Property Law Section, and was attended by over 140 attorneys. The Program contained information on Executive Order No. 13224, otherwise known as "The Patriot Act", new Environmental Site Assessment Standards and the new ALTA/ACSM Land Title Survey Standards. The attendees were provided practical solutions to resolving title issues and avoiding litigation for drafting issues.

In addition, there was a presentation on Shopping Center lease provisions. Finally, the Program included a professionalism/ethics presentation. The location and the speakers received favorable comments from the attendees. Program materials are available from ICLE.

Following the seminar, the Executive Committee of The Real Property Law Section hosted a dinner at the Commerce Club to honor and thank the speakers. It was well attended by the speakers, past RPLS chairs and the current RPLS Executive Committee. Also at the dinner were several recipients of the Section's scholarships, which are awarded each year to deserving law students. In addition to the scholarship, they were each presented with a set of Pindar.

Recipients for 2006 are from: Georgia State, Jason Cox; Emory, Chris Lee; Georgia, Jeffrey Gibson, Jessica Lawrence, Merritt McAlister, Ansly Paulk; and Mercer, Scott Newland.

ServiceJuris Day June 30, 2007

On Saturday, June 30, 2007, Hands On Atlanta together with Presenting Sponsor Sutherland Asbill & Brennan LLP will host the 8th Annual ServiceJuris Day, a community service day in which over 800 members of Atlanta's legal community will gather to undertake extensive volunteer renovation work in the Vine City neighborhood. The Real Property Section is proud to be a \$5,000 sponsor of this event.



Over the past seven years, over 3,500 ServiceJuris volunteers have undertaken comprehensive renovation and landscaping projects and helped revitalize at-need local schools and parks, contributing close to 14,040 service hours to the Atlanta community. ServiceJuris volunteers have improved the learning environment for 1,567 children in Atlanta Public Schools, renovated 7 major parks to enhance the green space for 2 million annual visitors, and have enabled 6,500 people to properly utilize their neighborhood community centers. Last year alone, ServiceJuris volunteers transformed Bolton Academy into a great school for children to learn and enjoy by painting murals, installing a playground and classroom gardens, building reading lofts, picnic tables, benches and the outdoor classroom.

ServiceJuris Day provides a unique opportunity for the Atlanta legal community to engage in volunteer service. Hands On Atlanta welcomes your participation in ServiceJuris Day to continue and expand this tradition in an effort to build a stronger and more engaged community. The projects for ServiceJuris Day are scheduled to be announced in April. If you would like more information or to volunteer to participate in ServiceJuris Day, please contact Lindsey Wolfe King of Hands On Atlanta at lking@handsonatlanta.org or (404) 979-2838.

