ILLINOIS STATE BAR ASSOCIATION

SEPTEMBER 2017 VOL 63 NO. 3

Real Property

The newsletter of the Illinois State Bar Association's Section on Real Estate Law

To record or not to record, that is the question

BY JOHN C. ROBISON, JR.

Recently this writer submitted mineral deeds, both lacking acknowledgments, to recorders in two separate counties. Both recorders rejected the deeds for recording because they lacked an acknowledgment.

Entitled to Be Recorded

The duty of a recorder with respect to instruments submitted for recording is set forth in Section 3-5010 of the Counties Code (55 ILCS 5/3-5010), which provides in pertinent part as follows:

> Every recorder shall, as soon as practicable after the receipt of any instrument in writing in his office, *entitled to be recorded*, record the same at length in the order of time of its reception, in well bound books to be provided for that purpose. (Emphasis added.)

It is readily apparent that the threshold question in determining whether a

Continued on next page

Regulatory taking: A review of *Murr v. Wisconsin*

BY BARBARA STARKE TISHUK

In June 2017, the United States Supreme Court established a new—and potentially unwieldy—test for defining the unit of property subject to an alleged regulatory taking.[1] In so doing, the Court moved beyond the parameters of state and local law, the framework by which takings cases had previously been analyzed, and created a standard that includes such factors as the land's physical characteristics, topography, its prospective value, as well as "whether reasonable expectations" would cause landowners to anticipate how their land holdings would be treated.

Background

The Petitioners' parents purchased two adjacent lots, Lot E and Lot F, at different

Continued on page 4

If you're getting this newsletter by postal mail and would prefer electronic delivery, just send an e-mail to Ann Boucher at aboucher@isba.org

To record or not to record, that is the question

CONTINUED FROM PAGE 1

particular instrument can be recorded is whether the instrument is "entitled to be recorded." There is little jurisprudence with respect to what instruments are " entitled to be recorded." However, in *Mack v. McIntosh*, 181 Ill. 633, 54 N.E. 1019 (1899), it was held that the original of a contract could be recorded, but a copy of a contract could not.

In a 1972 opinion of the Attorney General (1972 Op. Atty. Gen. No. S-513), the Attorney General concluded that a notice of a claim of mineral interest could not be challenged by the recorder even though the instrument contained neither a legal description of the subject land, nor a description of the interest claimed. The Attorney General, in reaching his conclusion, cited *People v. Mortenson*, 404 Ill. 103, 88 N.E.2d 35 (1949).

Registrar vs. Recorder

In the *Mortenson* case, the issue was one that had arisen under the Torrens Act. In its opinion, the court compared the function of a registrar under the Torrens system to the function of a recorder with respect to land not under the Torrens system.

In *Mortensen*, 404 Ill. 112, 88 N.E.2d 38, the court describes the function of a registrar under the Torrens system as follows:

> [T]he registrar of titles, *unlike the recorder of deeds*, investigates to determine the validity of the transfer, and the registrar will not issue his certificate of title without proof that the instrument is valid, and that the grantee is the owner.

(Emphasis added.)

In contrast, in *Mortensen*, 404 Ill. 111, 88 N.E.2d 38, the court describes the function of a recorder with respect to land not under the Torrens system as follows:

> Instruments affecting title to *land not registered under the Torrens system* will be recorded by the recorder without passing upon their validity or effect, and the extent to which some instruments affect title is left to the judgment of persons examining the record of such instruments.

(Emphasis added.)

Recorded Instruments Lacking an Acknowledgment Are Valid

The validity of instruments lacking an acknowledgment, together with their legal effect, and the requirements for their admission into evidence have been determined by the legislature. Section 31 of the Conveyances Act (765 ILCS 5/31) provides as follows:

> Deeds, mortgages and other instruments of writing relating to real estate shall be deemed, from the time of being *filed for record*, notice to subsequent purchasers and creditors, *though not acknowledged or proven* according to law; but the same shall not be read as evidence, unless their execution be proved in manner required by the rules of evidence applicable to such writings, so as to supply the defects of such acknowledgment or proof.

(Emphasis added.)

Conclusion

A recorder is required to record any instrument that is "entitled to be recorded." There is little jurisprudence with respect to what instruments are "entitled to be recorded." However, with respect to instruments lacking an acknowledgment, the legislature has determined their validity, their legal effect, and the requirements for them to be admitted into evidence.

Epilogue

In response to the rejection of the mineral deeds for recording, I sent to the recorders a copy of Section 31 of the Conveyances Act. Both deeds have now

Real Property

Published at least four times per year. Annual subscription rates for ISBA members: $25.

To subscribe, visit www.isba.org or call 217-525-1760.

OFFICE
ILLINOIS BAR CENTER
424 S. SECOND STREET
SPRINGFIELD, IL 62701
PHONES: 217-525-1760 OR 800-252-8908
WWW.ISBA.ORG

EDITORS
Michael J. Maslanka
Joel L. Chupack

MANAGING EDITOR / PRODUCTION
Katie Underwood
kunderwood@isba.org

START YOUR
Career Right

Protect yourself, your clients, and your financial future against unintended mistakes. It's easy to apply and (really!) affordable. Your first year probably costs less than your annual smartphone bill.

New lawyer pricing for those who:

- **Are claims-free**
- **Are solo practitioners**
- **Passed the bar within the past 3 years**

Visit isbamutual.com/newlawyer or call 800 473-4722 to get coverage now!

ISBAMutual
Lawyers' Malpractice Insurance

been recorded.

Both recorders attached copies of my letters and of Section 31 of the Conveyances Act to the deed and recorded them as parts of the deed. In addition, one recorder placed on the deed the following note:

> [Omitted.] COUNTY RECORDER'S NOTE: ATTORNEY ACKNOWLEDGES THE LACK OF NOTARY SIGNATURE & SEAL. LETTERS FROM ATTORNEY ATTACHED. ■

This article was originally published in the June 2017 issue of the ISBA's Mineral Law newsletter.

Regulatory taking: A review of *Murr v. Wisconsin*

CONTINUED FROM PAGE 1

times in the early 1960s and built a small recreational cabin on Lot F. They later transferred ownership of Lot F to the family's plumbing business while holding undeveloped Lot E in their own names.

The Wisconsin property at issue in this case sits along the Lower St. Croix River, a place protected since the mid-1970s under both federal and state laws intended to maintain the natural and recreational qualities of the river and the surrounding areas. Under the state and local rules, landowners may not use or sell adjacent lots under common ownership as separate building sites unless each lot has at least one acre of land suitable for development. Thus, due in part to the topography of the two lots, the amount of land suitable for development on either lot is less than the requisite one acre.

The Petitioners' parents transferred Lot F to the Petitioners in 1994, transferring the other lot to them about a year later. Although the two parcels came under the Petitioners' common ownership upon the transfer of the second parcel, the property descriptions in the Petitioners' deeds remained unchanged, showing the lots as two separate parcels.

The rules prohibiting the separate sale or development of either lot kicked in when the Petitioners sought to sell Lot E. The Petitioners applied for variances, which local officials denied, and the state courts upheld the denial in the ensuing litigation.

In their suit, the Petitioners argued that the regulations deprived them of the use of Lot E. In granting summary judgment to the state of Wisconsin, the trial court explained that the Petitioners had "other options" to enjoy and use their property and that the Petitioners had not been deprived of all economic value of their property. Affirming the lower court, the Wisconsin Court of Appeals determined that the local ordinance effected a merger of the two lots, thereby allowing the Petitioners to sell or develop their property *only* as a single, combined parcel and that, given the resulting single parcel, no regulatory taking had occurred. Moreover, the Wisconsin Court of Appeals explained that the Petitioners could not have reasonably expected to be able to use the lots separately, given the zoning laws in effect at the time they acquired the second parcel. After the Supreme Court of Wisconsin denied review, the United States Supreme court granted certiorari.

U.S. Supreme Court Decision

Rejecting the Petitioners' contention that lot lines define the relevant parcel for purposes of this case, the Court stated that the proper focus was the effect of the state and local regulations on the "property as a whole," i.e. as a single unit.[2] In so doing, the Court expanded on its prior takings analyses by introducing additional case-specific factors and "flexibility" into an already murky area of law.

First, in noting that the first step in a regulatory takings case is identifying the specific property at issue, the Court explained that the separation of the lots according to the official boundary lines incorporated into their deeds is only one factor among others to be applied in identifying the relevant property. Second, stressing that flexibility is the "central dynamic of the Court's regulatory takings jurisprudence,"[3] the Court stated that a proper analysis requires consideration of a number of factors that serve to inform a landowner's reasonable expectations about his property. Those factors include: (1) the land's characteristics and topography, as well as the physical relationship between distinguishable tracts. . . and the surrounding human and ecological environment; (2) the prospective value of the regulated land, with special attention to the effect of burdened land on the value of other property held by the landowner; and (3) whether objective "reasonable expectations about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel. . . ."[4]

Next, the Court explained that the Wisconsin lot-merger rules in this case reflect a legitimate exercise of government power owing to their consistency with historical merger regulations, a "classic way" of gradually reducing the number of substandard lots.[5] Rejecting state lot lines as a "standard measure" due to the variation from state to state in lot identification methods and the ease with which landowners may in some jurisdictions alter lot lines (which, in the Court's view, created a "risk of gamesmanship" in the state land-use arena[6]), the Court applied its new multifactor test and concluded that the relevant parcel in this case was the single parcel resulting from the merger of Lots E and F. As the Court explained, the new multifactor standard not only shows "respect for state law," but also "weighs" whether state laws "accord with other indicia of reasonable expectations about

property."[7]

Possible Impact

The flexible, multifactor standard introduced by this decision seems likely to add to the uncertainty in the regulatory takings area. As the dissenting opinion points out, the definition of "private property" now turns not only on state law, but also considers an elaborate litigation-specific set of factors. In defining the relevant property, the new test appears to conflate the steps involved in the regulatory takings analysis. For example, the Court's flexible new standard seems to suggest that a determination of the challenged rules' impact on the value of "the property" is required without a prior identification of the relevant parcel.[8] In this instance, in deciding whether Lots E and F should be considered a single parcel, the majority focuses on factors such as the importance of the regulations, and the extent to which the Petitioners may have been harmed or surprised by the application of the rules to their property. These issues, the dissent writes, are to be reserved for deciding if a regulatory taking has in fact occurred, not for defining the property.

In light of the Court's new standard for analyzing regulatory takings, property owners should consider how the additional factors set forth in *Murr* may affect their "reasonable expectations" about their property. The flexible, indeed murky, framework presented in this opinion, does little to identify one's reasonable expectations regarding property rights and may encourage litigants to define the relevant parcel by referencing the reasonableness of applying the challenged regulation to a particular claimant, whose expectations are assessed according to the reasonable government regulation. The test becomes circular.

Questions are bound to arise as a result of this decision, some of which are:

- to what extent can property owners rely on state and local law to define their property rights;
- how should property owners protect their property rights in light of "reasonable expectations" and the other *Murr* factors;
- how should purchasers take title when multiple parcels are involved; and
- how does *Murr* affect existing lot merger rules and land-use regulations? ■

---

1. *Murr v. Wisconsin*, No. 15-214, 2017 WL 2694699 (U.S.S.C. June 23, 2017).

2. *Id.* at *17.

3. *Id.* at *7 (citing *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001), the Court referred to a "complex of factors, including (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action").

4. *Id.* at *11-12 (stating "the inquiry is objective, and the reasonable expectations at issue derive from background customs and the whole of our legal tradition").

5. *Id.* at 16.

6. *Id.* at 17.

7. *Id.* at *11 (suggesting caution is in order when referencing state law: "defining the parcel by reference to state law could defeat a challenge even to a state enactment that alters permitted uses of property in ways inconsistent with reasonable investment-backed expectations"); *id.* at *8 (recognizing that state law and land-use customs may form basis for limiting compensation for deprivation of use of property where the challenged rules "inhere . . . in the restrictions that background principles of the State's law of property and nuisance already placed upon land ownership"). See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992).

8. *See id.* at *10 (stating "[i]n some, but not all, cases the effect of the challenged regulations must be assessed and understood by the effect on the entire property held by the owner, rather than just some part of the property that, considered just on its own, has been diminished in value").

Articles, articles, articles!

BY MIKE MASLANKA

Over 2,000 ISBA members are also members of the Real Estate Law Section. Many real estate practitioners come across unique situations and, therefore, our section is soliciting articles from you, the section members, to inform the rest of the membership as to a particular fact pattern you have encountered or a nuance in the law, or even something you believe needs to be changed in the law, such as concerning conveyances, ownership, trusts, mortgages, etc. Please feel free to author an article and email it to Katie Underwood at ISBA (kunderwood@isba.org), who will then forward it to the newsletter editors for review. Again, with 2,000 plus members of the Real Estate Law Section, there must be a multitude of situations which you have encountered which are worthy of relating to the membership. We thank you in advance for your article offerings, as this newsletter is for you, the section members. ■

Meet our new section council members

Vincent R. Vidmer

Vincent R. Vidmer practices in Chicago, handling various legal matters, including general civil litigation, real estate transactions, estate planning and general legal drafting. A major component of Vincent's practice resides as Staff Attorney with the Liquor and Allied Worker's Union, assisting in collective bargaining, fringe benefits, pension and 401(K) plan administration, grievances and arbitrations, and general administration. Vincent has been recognized multiple times by Illinois Super Lawyers as a "Rising Star," and voted as an Emerging Lawyer, a distinction earned by fewer than 2 percent of all Illinois attorneys. He is an active member of the ISBA, member to the ISBA's Real Estate Section Council, West Loop Community Organization among other groups. ■

Upcoming CLE programs

TO REGISTER, GO TO WWW.ISBA.ORG/CLE OR CALL THE ISBA REGISTRAR AT 800-252-8908 OR 217-525-1760.

October

Wednesday, 10-04-17 LIVE Webcast— Issues to Recognize and Resolve When Dealing With Clients of Diminished Capacity. Presented by Business Advice and Financial Planning. 12-2 pm.

Thursday, 10-05-17 - Webinar— Introduction to Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members only. 12:00-1:00 pm.

Thursday, 10-05-17 – Chicago, ISBA Regional Office—The New Bankruptcy Rules and Advanced Topics in Consumer Bankruptcy. Presented by Commercial Banking, Collections & Bankruptcy. 8:55am – 4pm.

Thursday, 10-05-17 – LIVE Webcast—The New Bankruptcy Rules and Advanced Topics in Consumer Bankruptcy. Presented by Commercial Banking, Collections & Bankruptcy. 8:55am – 4pm.

Friday, 10-06-17 – Holiday Inn and Suites, East Peoria—Fall 2017 Beginner DUI and Traffic Program. Presented by Traffic Law. Time: 8:55 am – 4:45 pm.

Friday, 10-06-17 – Holiday Inn and Suites, East Peoria—Fall 2017 Advanced DUI and Traffic Program. Presented by Traffic Law. Time: 8:55 am – 4:30 pm.

Friday, 10-06-17 – Chicago, ISBA Regional Office—Pathways to Becoming Corporate General Counsel and the Issues You Will Face. Presented by Corporate Law. Time: 9:00 am – 12:30 pm

Monday, 10-09-17 – Chicago, ISBA Regional Office—Workers' Compensation Update – Fall 2017. Presented by Workers' Compensation. Time: 9:00 am – 4:00 pm. ■

ISBA LAW ED
CLE FOR ILLINOIS LAWYERS

SAVE THE DATE

Real Estate Law Update

October 19, 2017 • 8:15 a.m. - 4:45 p.m.
Live program in Bloomington
Presented by Real Estate Law
CLE Credit: 6.50 MCLE

FREE ONLINE CLE:
All eligible ISBA members can earn up to 15 MCLE credit hours, including 6 PMCLE credit hours, per bar year.

For more information:
www.isba.org/cle/upcoming

BLOOMINGTON
HOLIDAY INN & SUITES
3202 EAST EMPIRE STREET

Member Price: $135.00

Join us for this full-day seminar that focuses on a number of key real estate updates, including recent case law, legislation changes, and the ethical issues you need to consider. Commercial and residential real estate lawyers with intermediate practice experience who attend this seminar will better understand:

- The Illinois Supreme Court's new proactive management-based regulation (PMBR) self-assessment program;
- The professional responsibility issues that can arise when non-attorneys represent parties in a transaction;
- The pros and cons of seller financed installment contracts;
- The terms, conditions, and coverages of title insurance;
- Abuses in seller real estate financing;
- The adverse effect of recent banking regulations on community bank mortgage loans;
- Changes in federal real estate closing regulations;
- Enforcing judgments against real estate; and
- Much more!

Real Property
Illinois Bar Center
Springfield, Illinois 62701-1779
September 2017
Vol. 63 No. 3

The Only Bar Association Representing The Interests Solely Of Real Estate Attorneys In Illinois

Illinois Real Estate Lawyers Association
1701 East Woodfield Road | Suite 910
Schaumburg, Illinois 60173
312.600.7720 | 847.273.8701 Fax
www.irela.org