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August 23, 2011

Bill Mitchell
Property Owner
Orange Beach, Alabama

Re: Alabama Riparian Rights Between Property Owner and Easement Holder
(MASCg 11-008-08)

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Dear Bill:

In your email of July 20, 2011, you requested legal research regarding riparian rights to construct structures along waterfront property in Alabama. As requested, the Mississippi-Alabama Sea Grant Legal Program has conducted research on this issue. This memo provides an overview of the rights of riparian owners and how those rights may interact with an easement for ingress and egress held by neighboring condo owners. The following information is intended as academic research only and does not constitute legal representation of you, the condo owners, or any other party. It represents our interpretations of the relevant laws and regulations.

Based on your email, I have summarized my understanding of the factual issues of your question. You own waterfront property along the Intracoastal Waterway (ICW) in Orange Beach, Alabama referred to as Lot 3. Condo owners hold an easement over Lot 3 for rights of ingress and egress. The condo owners also own and use a pier constructed along Lot 3 prior to your purchase of the property. Recently, one of the condo owners has undertaken efforts to construct a boatlift in the riparian zone and is currently seeking a permit for this activity from the U.S. Army Corps of Engineers. You asked how your riparian rights as owner of Lot 3 are impacted by the condo owners' easement over the property. Specifically, you requested information pertaining to the easement holders' rights to expand the pier and construct additional structures.

As an initial matter, it is important to keep in mind that any property right disputes are strictly evaluated based on the written agreement between the parties. As such, any easement dispute between yourself (as the property owner) and the condo owners (as the easement holders) will be governed by the specific written terms of the easement agreement between the two parties. If the easement does not address the issue of riparian rights, courts often look to the intent of the person granting the easement to determine whether he intended to convey riparian rights in the easement. These issues are discussed in more detail below.

Additionally, the U.S. Army Corps of Engineers holds an easement along many of the waterfront properties located along the ICW. If the Corps holds an easement along Lot 3, any activities within the Corps' easement will be subject to Corps' approval, meaning that the Corps may limit or prohibit the construction in some instances. Lastly, even as a riparian owner, the right to construct in the riparian zone is not absolute. Riparian rights generally cannot impede upon public rights in the waterway such as navigation, fishing, and recreation. The exercise of riparian rights remains subject to state and federal regulations and applicable permitting requirements.

The following provides an overview of Alabama riparian rights to construct structures, such as piers and boathouses, along the shoreline of waterfront properties. This memo also provides a short summary of the relationship between the property owner and the easement holder as it pertains to riparian rights. This information is a generalized perspective of the legal issues involved and is not fact-specific to your particular situation.

Riparian Rights to Construct Piers

Riparian (or littoral) rights are specific rights held by waterfront property owners (also referred to as riparian owners) that go beyond the rights of the general public. These rights allow the riparian owner to undertake certain activities in the waters adjacent to his waterfront property within a defined distance from the shore. For example, an Alabama riparian owner may grow oysters in the adjacent waters within 600 yards of his shoreline. (Ala. Code § 9-12-22).

Riparian rights to construct structures over submerged water bottoms are outlined by Alabama statute. The law provides that:

The owner of riparian lands upon navigable waters in the State of Alabama may install in front of their respective riparian lands wharves, docks, warehouses, sheds, tipples, chutes, elevators, conveyors and the like for receiving, discharging, storing, protecting, transferring, loading and unloading freight and commodities of commerce to and from vessels and carriers, and may use their riparian lands in connection therewith and dredge out and deepen the approaches thereto, and may charge and collect reasonable tolls for the use thereof. All such structures are to be subject to such lines and limitations as may at the time of making such improvements be laid or placed by any authority of the United States, or of the State of Alabama, who may have authority to control harbor and pier lines.

Ala. Code § 33-7-50 (1975).

Riparian Rights between Property Owner and Easement Holder

As previously noted, the written language of the agreement will control the terms of an easement. Under Alabama law, an easement is “subject to the provisions of the declaration, a declarant has an easement through the common elements as may be reasonably necessary for the purpose of discharging a declarant’s obligations or exercising special declarant rights, whether arising under this chapter or served in the declaration.” (Ala. Code § 35-8A-216). Furthermore, an easement is not an easement for all purposes, but only those that are reasonably necessary for the purpose of exercising the declarant’s rights. If the easement does not address riparian rights or is unclear on the issue, courts may look to other evidence to determine whether riparian rights have been granted to the easement holder.

Alabama courts have considered the issue of who holds the riparian rights between a property owner and an easement holder. The cases recognize that “riparian rights, which entitle the owner to construct waterfront improvements, belong to the owner of the fee in the riparian lands abutting the water.”

In *Orange Beach v. Benjamin*, the property owners (the Benjamins) argued that Orange Beach did not own the street in fee simple between their property and the water, rather the city only had an easement. If Orange Beach held the title in fee simple, then the Benjamins would not have riparian rights to the water across the street. But if Orange Beach only held an easement, the Benjamins would continue to own riparian rights. The court determined that the city owned the street in fee simple and therefore the Benjamins were not entitled to build and should not be allowed to use and maintain the pier extending into the water because they did not have riparian rights. *Orange Beach v. Benjamin*, 821 So. 2d 193, 196 (Ala. 2001). The facts of the case are somewhat different than the current situation because the case did not involve a written easement agreement between the parties. However, the case does provide guidance on how an Alabama court may consider these issues.

Courts in other states have addressed the issue and determined that an easement to the waterfront does not translate into riparian rights. A Maryland court found that a right-of-way to a body of water, alone, “does not entitle the grantee the right to construct a dock or a pier.” The court adopted a two-part analysis to determine whether the grantor intended to give the grantee a right to construct a pier or dock. The court must determine if the grant expressly grants or denies riparian rights, and if it does then the grant controls the situation. If it is ambiguous, the court may look at extrinsic evidence to discover the grantor’s intent. *Gwynn v. Oursler*, 122 Md. App. 493, 500 (Md. Ct. Spec. App. 1998).

In February 2011, a Michigan court dealing with a dispute between lakefront owners and owners of an easement through their property to the lake, ruled that the language of the easement did not grant general riparian rights. The court used a test similar to the court in *Gwynn* to determine whether an easement granted riparian rights, and also pointed out that the right to build a dock is “a right typically reserved to riparian owners.” *Rudy v. Lints*, 2011 WL 666143 (Mich. Ct. App. Feb. 22, 2011).

Rulings in other states are not binding on Alabama courts, meaning that Alabama courts may not follow these tests. However, these cases suggest that courts will look first to the language of the easement. If the easement does not clearly address the issue of riparian rights, the court may then look at the intent of the person granting the easement to resolve issues of riparian rights.

I hope you find this information helpful.

Sincerely,

/s/ Niki L. Pace
Research Counsel