IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
IN AND FOR INDIAN RIVER COUNTY, FLORIDA

INDIAN RIVER COUNTY,
A political subdivision of
the State of Florida.

Plaintiff,

vs.

TWENTY-TWO BEACHFRONT PROPERTIES LOCATED BETWEEN, AND INCLUDING, 9586 DOUBLOON DR., AND, BUT NOT INCLUDING, 1820 WABASSO BEACH RD., VERO BEACH, FLORIDA, 32963, AND SUMMERPLACE IMPROVEMENT ASSOCIATION, INC.

Defendants.
_____/

Case No.: 31 2018 CA 000881
Judge: Janet C. Croom

FINDINGS OF FACT AND CONCLUSIONS LAW

This cause came before the Court for a Non-Jury Trial on September 27, 2023 and September 28, 2023 upon the Counter-Plaintiff's, ROBERT M. JAFFE, as Trustee of The Robert M. Jaffe Trust ("Mr. Jaffe"), Counterclaim against the Counter-Defendant, INDIAN RIVER COUNTY ("County"). The Court, having reviewed the Court file, received evidence, heard testimony, and considered arguments of counsel, finds as follows:

Findings of Fact

Background and Procedural History

1. Mr. Jaffe is the owner of certain real property in Indian River County, Florida, more particularly identified as Lot 7, Block B of Summerplace Unit Two with an address of 1802 East Barefoot Place, Vero Beach, Florida 32963. The property is located in the Summerplace Subdivision. Mr. Jaffe purchased the property from William and Jeri Glynn in 2012.

2. On October 2, 2018, Indian River County ("County") held a public hearing in front of the Board of County Commissioners pursuant to section 163.035 Fla. Stat., where it heard

evidence relating to recreational customary use of certain private beachfront properties, including a portion of beachfront owned by Mr. Jaffe.

3. At this public hearing, the Indian River County Board of County Commissioners voted to approve a Notice of Intent to Affirm Recreational Customary Use on the Beachfront Properties ("Notice of Intent") that contained a map of the property at issue in the litigation.

4. The Notice of Intent identifies: "(1) the specific parcels of property, or the specific portions thereof; (2) the detailed, specific, and individual use or uses of the parcels of property; and (3) each source of evidence that the governmental entity would rely upon to prove a recreational customary use has been ancient, reasonable, without interruption, and free from dispute."

5. The specific beach property at issue—as identified by the County—consisted of the private beach property in the Summerplace Subdivision. This property included twenty-two (22) separate, privately-owned beachfront parcels.

6. The specific beach property subject to the County's claim included a portion of Mr. Jaffe's private property located east of his private seawall.

7. The specific uses that the County sought to affirm the public's right of recreational customary uses on Mr. Jaffe's private beach, included "sunbathing, shell hunting, picnicking, exercising (walking, running, yoga), fishing, accessing the area for swimming, surfing and skin-boarding, observing and researching sea turtle nests, and enjoying the shade of the erected sea wall."

8. Following several years of litigation against Mr. Jaffe, the County took the position that Mr. Jaffe could not continue to defend his private property because he did not own the property east of the seawall.

9. After consideration of the pleadings and argument of Counsel, the Court issued an Order adopting the arguments and legal position of Mr. Jaffe for the reasons set forth in his Motion and Memorandum of Law in Support of Intervention and granting Mr. Jaffe's Motion to Intervene because his private beach property east of the seawall was at issue in the litigation.

10. On May 6, 2022, Mr. Jaffe was granted leave to file and Mr. Jaffe did file a Counterclaim for the County's breach of an easement encumbering his property.

11. On May 19, 2022, this Court entered an Order granting Mr. Jaffe's Motion for Summary Judgment on the County's claims for customary use, determining that the County proceeded to trial with evidence not allowed under Florida Statute Section 163.035(3).

12. The only claim that remained at issue for the bench trial was Mr. Jaffe's Counterclaim for Breach of Easement.

Mr. Jaffe's Property at Issue

13. Mr. Jaffe's deed and the Summerplace Plat established Mr. Jaffe's ownership and the specific dimensions and location of Mr. Jaffe's private property as Lot 7, Block B of Summerplace Unit Two.

14. Mr. Jaffe's surveyor, Wayne Parker, testified that the private property of Mr. Jaffe has an eastern boundary line that extends between nine and twelve feet east of a private seawall on Mr. Jaffe's lot. This area of Mr. Jaffe's private property east of the seawall is white sand beach and Mr. Jaffe's private beach stairs are located within this area of private beach.

15. Mr. Jaffe's surveyor actually prepared a signed and sealed boundary survey of Mr. Jaffe's property and testified that in conducting the field survey, the "edge of vegetation" could not be located, however, the eastern boundary of the lot, as platted, could be located and that is where the edge of vegetation was in 1961 and therefore that is the location of the fixed eastern

boundary of Mr. Jaffe's lot.

16. The County's surveyor, David Schryver, testified that the "edge of vegetation" was the eastern boundary line of Mr. Jaffe's lot, but agreed with Wayne Parker's survey that the eastern boundary shown on the plat was correctly shown on the survey and was located between nine and twelve feet east of the seawall.

17. James Gray, the County's former Natural Resources Manager, testified that the dunes and vegetation in that area of the beach were dynamic until the installation of the private seawall in 1996.

18. The County's surveyor, David Schryver, testified that he only got involved in this case recently and did not conduct a survey of Mr. Jaffe's lot or any of the property subject to the customary use litigation or the beach nourishment easements.

19. Mr. Jaffe's surveyor, Wayne Parker, also testified that the area covered by the Notice of Intent and the area covered by the 2009 Easement included portions of Mr. Jaffe's private property east of the seawall. This evidence was not rebutted by the County.

The 2009 Easement

20. In 2009, the prior owners of Lot 7, Block B of Summerplace Unit Two (Mr. Jaffe's property), William and Jeri Glynn, conveyed a Temporary Beach Restoration Easement to Indian River County so that the County could implement its Sector 3 Beach Restoration Project (hereinafter, "2009 Easement").

21. The 2009 Easement was drafted by the County attorney, was not recorded in the public record, and provided that the covenants, rights, restrictions, and reservations would "run with the land."

22. The 2009 Easement provides it is "Not a Public Dedication. Nothing herein contained shall be deemed to be a gift or dedication to or for the general public and this Easement shall be strictly limited to and for the purposes expressed herein."

23. The property subject to the 2009 Easement included the beach seaward (east) of the seawall on Mr. Jaffe's private property and continued all the way east to the mean high water line of the Atlantic Ocean.

24. In the 2009 Easement, the private property owners reserved the right "...to continued free use of the Easement Premises…" subject to terms and conditions, including no public dedication and … that the County would not "unreasonably interfere" with the private property owners' use of the Easement premises.

25. The unrecorded 2009 Easement document was in the possession of the County until it was located and produced in response to written discovery propounded by Mr. Jaffe in this present litigation.

26. The County is neither a creditor nor a subsequent purchaser for value without notice of the 2009 Easement.

27. The 2009 Easement has a termination date of May 1, 2025.

28. There was no evidence introduced that either the County, the Glynns, or Mr. Jaffe took any action to amend, modify, or terminate the 2009 Easement.

Use by the County of the 2009 Easement Against Mr. Jaffe and the 2019 Easement

29. The County performed beach nourishment and dune nourishment projects under the authority granted by the 2009 Easement in 2014 or 2015, while Mr. Jaffe owned the property.

30. This nourishment action involved physically entering upon the private property of Mr. Jaffe with heavy machines and depositing sand against his seawall and within the private property boundary of Mr. Jaffe's private beach lot.

31. Mr. Jaffe was aware of the County's beach nourishment activities on his private property in 2014 or 2015 and believed that the County must have had the legal authority to carry out the nourishment project.

32. In 2019 (after the present litigation commenced), the County sought a separate easement from Mr. Jaffe for beach nourishment.

33. Unlike the 2009 Easement, the proposed 2019 Easement contained specific language to the effect that the private property owners were granting the public the right of recreational customary use of their private property.

34. When the County presented the proposed 2019 Easement to Mr. Jaffe, they did not reveal the existence of the 2009 Easement.

35. Mr. Jaffe did not sign the proposed 2019 Easement. Other property owners also did not sign the proposed 2019 Easement because of the language granting customary use rights to the public.

36. Mr. Jaffe first became aware of the existence of the 2009 Easement in 2022 after the document was produced by the County in discovery following a Motion to Compel granted by the Court in late 2021.

County's Breach of the 2009 Easement

37. In 2018, Mr. Jaffe exercised his right as an owner to properly post his private property and he directed the installation of monopoles and no trespassing signage on his beach property east of the seawall.

38. Around this time, Mr. Jaffe's private property around the bottom of his beach access stairway was vandalized with broken beer bottles and other debris.

39. Bill Stoddard, an engineer hired by Mr. Jaffe, verified that the Florida Department of Environmental Protection's rules governing structures on the beach allowed monopoles.

40. However, the County responded with letters and civil citations demanding Mr. Jaffe to remove the monopoles and telling Mr. Jaffe that the monopoles and signage interfered with the public's right of customary use of that area of Mr. Jaffe's private property. These demands each occurred prior to the County's announcement of the customary use litigation or any recognition that a customary use had been established for the Summerplace properties.

41. The County's actions against Mr. Jaffe were reported in news outlets with public distribution in Indian River County.

42. Eric Charest testified that the County pursued the customary use litigation against Mr. Jaffe because of his actions in seeking to deny the general public access to the private beach area near his seawall.

43. Mr. Jaffe testified that the actions of the County against him, including the initiation of the present lawsuit, disturbed his quiet enjoyment of his property and prevented him from being secure in his own property and unable to exclude the public which caused him reasonable fear of safety and negatively impacting his family and his own health.

44. The evidence established that the Easement premises (that area covered by the 2009 Easement) includes the white sand beach portion of Mr. Jaffe's private property over which the County: (1) cited Mr. Jaffe for legally posting his property, (2) issued him a civil citation with fine for legal activities he was conducting, (3) told Mr. Jaffe he could not exclude the public from his property based on customary use, (4) initiated the present litigation seek to affirm the public's right

to recreational customary use and enjoin Mr. Jaffe from preventing such use, and (5) sought to obtain Mr. Jaffe's acquiescence to a new easement containing terms contrary to the easement that the County had in force.

45. Each of the County's actions detailed above were contrary to the clear language of the 2009 Easement. Mr. Jaffe testified, based on the express language of the 2009 Easement, that: (a) the beach area east of the seawall was not be a dedication to the public; (b) that the private beach area was to be subject to the continued free use of the Easement premises by Mr. Jaffe; (c) the Easement was strictly limited to the purposes expressed (beach renourishment); and, (d) the County agreed not to unreasonably interfere with the grantor's use of the Easement premises. Mr. Jaffe testified that the County breached each of the foregoing provisions through its efforts to establish and enforce customary use and also its code enforcement efforts to prevent Mr. Jaffe's demarcation of his private property.

46. As a result of the County's lawsuit, Mr. Jaffe had to decide between paying the cost of intervening and defending his private property or risk losing the reasonable use of an important portion of his private property.

47. The County's foregoing actions were, in fact, a breach of the easement in that they sought to impose a right of the public to use Mr. Jaffe's private property and unreasonably interfered with Mr. Jaffe's free use of his own private property.

Statements of the Law

Chapter 163.035 and Mr. Jaffe's Eastern Boundary

1. Chapter 163.035(3) Fla. Stat. states that "[a] governmental entity that seeks to affirm the existence of a recreational customary use **on private property** must follow the procedures set forth in this subsection." (emphasis added).

2. Counties do not need to use the procedures of Chapter 163.035 to affirm recreational customary use on public property.

3. There are special considerations involved where water serves as the property boundary. See Ch. 177, Part II, Fla. Stat. (1974).

4. Meander lines are always identifying the course of a body of water. *Parish v. Spense*, 149 So. 2d 58, 63 (Fla. 1st DCA 1963).

5. The edge of vegetation is not a meandering boundary line; the only boundary that may meander is water. *Parish*, 149 So. 2d at 63.

6. Natural monuments only take priority when they can be ascertained; where a natural monument no longer exits or cannot be located with legal precision, as is the case here, it no longer has priority and the metes and bounds description on the plat will prevail. *Trustees of Internal Imp. Fund v. Wetstone*, 222 So. 2d 10, 14 (Fla. 1969).

7. Even if the edge of vegetation were to be considered a natural monument demarcating the eastern boundary of Mr. Jaffe's property, the edge of vegetation as it existed in 1961 when originally platted would be controlling—not the edge of vegetation that the County alleges exists today. *Beckham/Tillman v. Bennett*, 118 So. 3d 896, 898 (Fla. 1st DCA 2013) ("[B]oundaries originally located and set (right, wrong, good or bad) are primary and controlling….").

8. Mr. Jaffe acquired an interest in his property as described on the Summerplace plat. The fixed boundary lines of Mr. Jaffe's property are not determinate on the survival of vegetation, they are instead fixed and permanent. *Akin v. Godwin*, 49 So. 2d 604, 607 (Fla. 1950); *Barba Inv. Co.*, 350 So. 2d at 510 (instructing that a retracement and reestablishment of the lines "in their true original positions" should be performed).

9. The Court resolved the eastern boundary issue against the County in its earlier Order granting Mr. Jaffe the right to intervene in the customary use litigation. Moreover, the County waived the right to contest, at trial, the location of Mr. Jaffe's eastern boundary line, since the County elected to include his property in the customary use litigation and previously contracted with his predecessor in title for the 2009 Easement over that very same property. Additionally, the County never raised the eastern boundary issue as an affirmative defense to the Counterclaim.

2009 Easement

10. The scope of an easement by agreement is determined by the grant, not by what is excluded, and all rights not granted remain with the grantor. *Trailer Ranch, Inc. City of Pompano Beach*, 500 So. 2d 503, 506 (Fla. 1986)(an easement that "runs with the land" may be used by others than the named grantees).

11. The language and the surrounding circumstances will determine whether the easement holder is entitled to the use of the property exclusively or in conjunction with the property holder. *Richardson v. Jackson*, 667 So. 2d 928 (Fla. 5th DCA 1996)(grant of easement was coterminous with the use of the property by the owner).

12. An easement may be negative in character. A negative easement is one that gives the holder of the easement the right to insist that some act or thing not be done on or with respect to the servient or burdened land. Florida Real Property Sales Transaction (Fla. Bar CLE 8th edition 2014) Easements §10.2.

13. Unrecorded easements are enforceable; they are just not enforceable "against creditors or subsequent purchasers for valuable consideration and without notice." Chapter 695.01 Fla. Stat.

14. An easement is a contract. "An ambiguous term in a contract is to be construed

against the drafter." *City of Homestead v. Johnson*, 760 So. 2d 80, 84 (Fla. 2000). "Generally, ambiguities are construed against the drafter of the instrument." *Hurt v. Leatherby Ins. Co.*, 380 So. 2d 432, 434 (Fla. 1980). "[A] provision in a contract will be construed most strongly against the party who drafted it …." *Sol Walker & Co. v. Seaboard Coast Line R.R. Co.*, 362 So. 2d 45, 49 (Fla. 2d DCA 1978). Where the language of contract is ambiguous or doubtful, it should be construed against the party who drew the contract and chose the wording. *Vienneau v. Metropolitan Life Ins. Co.*, 548 So. 2d 856 (Fla. 4th DCA 1989); *Am. Agronomics Corp. v. Ross*, 309 So. 2d 582 (Fla. 3d DCA 1975). "To the extent any ambiguity exists in the interpretation of [a] contract, it will be strictly construed against the drafter." *Goodwin v. Blu Murray Ins. Agency, Inc.*, 939 So. 2d 1098 (Fla. 5th DCA 2006); *Russell v. Gill*, 715 So. 2d 1114 (Fla. 1st DCA 1998).

15. While sovereign immunity was not plead by the County and therefore waived, it is clear in this State that "where the state has entered into a contract fairly authorized by the powers granted by general law, the defense of sovereign immunity will not protect the state from action arising from the state's breach of that contract." *Pan-Am Tobacco Corp. v. Department of Corrections*, 471 So. 2d 4, 5 (Fla. 1984).

16. The 2009 Easement affirmed that the County was not seeking a public dedication over the beach property now owned by Mr. Jaffe and therefore is contrary to the actions of the County in seeking to affirm, through the procedures of Chapter 163.035, the public's recreational customary use of that same property. Such an action, together with the County's civil citations following the County Attorney's threating letters which wrongfully presumed customary use, constituted a breach of the 2009 Easement.

17. The County's pursuit of a public use of Mr. Jaffe's private property constitutes a breach of the easement. *See, e.g., Akers v. Canas*, 601 So.2d 305 (Fla. 3d DCA 1992)(where the

grant of an easement specifically states the uses or purposes for which the easement was created, the use of the easement must be confined strictly to the purposes for which it was granted or reserved and it cannot be enlarged by any change in the use or character of the dominant estate); *Amer Quick Sign Inc. v. Reinhardt*, 899 So.2d 461, 468 (Fla. 5th DCA 2005)(the burden of the easement on the servient property may not extend beyond that which was reasonably contemplated at the time of the creation of the easement).

18. The use of monopoles and signage by Mr. Jaffe was legal and proper and did not interfere nor breach the terms of the 2009 Easement. Chapter 62B-33 F.A.C. (2018).

Damages

19. It is a fundamental principle of contract law that once liability is established, an injured party is entitled as a matter of right to compensatory damages or, at the very least, nominal damages. *Land and Sea Petroleum Holdings, Inc. v. Leavitt*, 321 So. 3d 310 (Fla. 4th DCA 2021) (Nominal damages are awardable regardless of pleading or proof). As written above, the County's liability has been established.

20. The Court received testimony that Mr. Jaffe hired an engineer, Bill Stoddard, to advise him as to the property line and on the legality of installing monopoles and demarcating his private beach property following instances of vandalism and trespass. Mr. Jaffee paid the $600.00 cost of Mr. Stoddard's professional fee.

21. The County undoubtedly temporarily interfered with Mr. Jaffe's enjoyment and use of his private property when it cited Mr. Jaffe with code violations for legally demarcating his private property using monopoles and filing this present action seeking a declaration of the public's right to recreational customary use of Mr. Jaffe's property together with an injunction against Mr. Jaffe personally.

22. Mr. Jaffe, however, did not pay the civil citations which carried a $250 dollar-a-day penalty.

23. Mr. Jaffe testified that he consulted with numerous law firms to determine the likely cost to defend his private property against the County's lawsuit that sought to affirm the public's right to use his private property and eliminate Mr. Jaffe's right to exclude the public from his private property.

24. While Mr. Jaffe received estimates averaging around $350,000.00 from those law firms, Mr. Jaffe testified he is not seeking attorneys' fees as damages.

25. Mr. Jaffe testified to his education and experience in the area of asset litigation valuation, including the calculating of impairment damages resulting from litigation that has the potential, if not defended, to result in a permanent loss of property rights (here, the right to exclude and continued quiet enjoyment in the property).

26. Mr. Jaffe's valuation of what he considers impairment value based upon said prospective loss, and cost to defend adjusted for risk and time value of money against a breach, was $750,000.00.

27. The County called Real Estate Appraiser Peter Armfield who testified that the "right of exclusion" for Mr. Jaffe's property was worth $0. Previously, Armfield had provided other appraisal opinions in unrelated litigation regarding Mr. Jaffe's same property and, in each of those times, his opinion was that there was $0 damages. Moreover, Armfield admitted that the "right of exclusion" is not a recognized method of appraisal, and he opined that there was zero diminution value. Armfield also arrived in Court to testify and relied on an undisclosed nine-page report which he read from, and referred to, as his "notes." The Court found his testimony unpersuasive.

28. The Court received no evidence of any actual diminution in the value of the property or compensable losses as to the property itself.

29. To award pecuniary damages it is essential to prove with reasonable certainty the damages claimed, despite inconvenience and loss of enjoyment based on temporary interference with easement rights. *Dawson v. Jones*, 512 So. 2d 311, 313 (Fla. 2d DCA 1987) (Finding the trial court erred in awarding any damages other than nominal damages given lack of evidence of any permanent loss of value of the property, despite considerable inconvenience due to the temporary interference with easement rights).

30. The Florida Supreme Court has recognized that "[g]enerally, damages for the wrongful injury of property are measured either by the diminution in value or the costs of repairing or restoring the property to its condition prior to the injury, usually referred to as the "restoration" rule." *Davey Compressor Co. v. City of Delray Beach*, 639 So. 2d 595, 596 (Fla. 1994). "[T]he law generally requires that damages be measured by the cost of repairs or restoration." *Id.* In the instant action, there was no evidence presented as to an actual diminution of the property value due to the breach of easement.

31. There was not sufficient evidence of physical or financial injury inflicted to a degree of reasonable certainty as required, despite proof of a clear inconvenience and temporary loss of enjoyment. Thus, Mr. Jaffe may only recover nominal damages in the amount of $1.00, and anything more would be improper. *Kostidakis v. Stracener*, 411 So. 2d 1020, 1021 (Fla. 5th DCA 1982).

Orders of the Court

During the trial, the Court reserved ruling on Mr. Jaffe's Motion to Strike County's expert testimony based on the non-disclosure of his expert report. The Court finds that the County's expert

appraiser, Peter Armfield, arrived for his trial testimony with an expert report, had not disclosed the expert report prior to his testimony, and referred to the report as "notes" during his testimony. While the expert report also was immediately provided to Mr. Jaffe's counsel for review and use in cross examination, the court notes that the report was detailed, nine pages in length, and the last-minute disclosure was prejudicial to any meaningful cross-examination and, importantly, the report was not provided per the Court's Agreed Case Management Plan and Order dated July 12, 2022. Because the report was not provided prior to testimony and was clearly relied upon by the witness, it's use was prejudicial and the Motion to Strike the Report and the testimony of Armfield is granted.

Conclusion

Based on the Findings of Fact as applied to the Statements of Law, the Court finds in favor of the Counter-Plaintiff, ROBERT M. JAFFE, as Trustee of The Robert M. Jaffe Trust, and against the Counter-Defendant, INDIAN RIVER COUNTY, and awards as nominal damages the sum of $1.00 together with costs. The Court reserves jurisdiction on attorneys' fees. All parties to go hence without day.

DONE and ORDERED in Indian River County, Florida on this _____ day of _____ 2023.

02/12/2024 10:15:34
2018 CA 000881

eSigned by JANET CARNEY CROOM (NOT) 02/12/2024 10:15:34 5IZGNz1A

HONORABLE JANET CROOM
CIRCUIT COURT JUDGE

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