Lowndes

Insights

Buying or Selling in Florida? Beware of Mineral Rights

Article
01.10.2022

Related Attorneys

Gary M. Kaleita

It is not unusual to find mineral reservations in the chain of title to real properties located in Florida. When the State of Florida first conveyed title to state owned lands, it was customary for the state to reserve an interest in all oil, gas and minerals on the property, including the right to drill, mine and excavate for them. These rights were not necessarily a problem if the property was being used for agricultural purposes. However, if the property was to be developed, these rights raised significant issues for developers and their lenders who were not looking to risk a large investment in property that was subject to third parties exploring for or mining minerals.

To release the right of entry and make the title marketable, it was necessary to submit an application to the state, pay a fee and endure a long waiting period. As Florida became more populated, this process delayed economic development. As a result, the state adopted a statute identified in F.S. 270.11(3), stating that "*The right of entry to any interest in phosphate, minerals, and metals or any interest in petroleum reserved in favor of the Board of Trustees of the Internal Improvement Trust Fund, the State Board of Education, a local government, a water management district, or other agency of the state is released for any parcel of property that is, or ever has been, a contiguous tract of less than 20 acres in the aggregate under the same ownership.*"

This statute is relied on to extinguish the right of entry for parcels whose size qualifies them for that treatment. In those cases, title insurance companies will affirmatively state in title insurance policies that this statute applies to release the state's right of entry. If a parcel is too large, it is still necessary to request the state to release its right of entry.

Florida properties are also sometimes subject to mineral reservations held by private parties, as opposed to the state. Typically reserved in deeds when owners sold their properties, they will include a right of entry even if it is not stated in the reservation (unless such a right is expressly disclaimed).

No Florida statute exists protecting improvements if a private party exercised its right to enter your property to excavate or mine. However, there is case law in Florida's 1st, 2nd and 5th District Courts of Appeal holding that a mineral rights holder cannot so abuse the surface estate as to

unreasonably injure or destroy its value. Additionally, the mineral rights holder is answerable in damages to the surface estate owner for any unreasonable injuries done.

While this remains good law in those Districts, this has not been decided at the Florida Supreme Court level. As with any similar situation, "unreasonable" injuries and appropriate recovery would be questions of fact. In reality, it would be an expensive inconvenience if the rights were exercised and improved property was damaged, even if recovery from the exploring party was possible.

Florida's Marketable Record Title Act (MRTA) may operate to extinguish a private right of entry for exploration, mining, drilling, etc., pursuant to F.S. 704.05, even if the mineral reservations themselves remain. It is worth requesting a title insurer to make the necessary analysis to determine if that applies. They typically do not do this unless requested.

If the right of entry has been extinguished by either of the above statutes, the title insurer should be able to affirmatively state in a title insurance policy that there is no right of entry regardless of the existence of mineral reservations. This renders the title marketable unless the property is to be used for mineral extraction. If that is the case, even though the right of entry is no longer applicable, any minerals extracted by the owner would still belong to the party (if any) who held the mineral reservations.

Even if a right of entry exists, some comfort may be obtained if the property's zoning does not allow for mining, excavating, drilling, etc. Local land use and zoning regulations could protect the property unless the nature of the area and the zoning were to change.

In addition to the risk of property damage by the exercise of mineral reservations, there is also the business concern of marketability when you sell or finance the property. This could be a threshold issue for a buyer or lender. Title insurance companies will not insure over the right of entry unless it is expressly released by statute or in a recorded instrument, so that is what typically needs to happen. An owner must often negotiate a release price with mineral reservation holders (who are sometimes difficult to locate) to remove the right of entry (if not the entire reservation). Most, if not all, buyers expect this from their sellers.

By consulting with a real estate attorney when buying or selling property subject to mineral reservations, you can minimize their potential adverse impact on the proposed transaction.

Gary M. Kaleita is a shareholder at Lowndes and has been certified by the Florida Bar as a specialist in real estate law since 1993. He can be reached by phone at 407-418-6334 or gary.kaleita@lowndes-law.com.