



Slow Down... Speed Bumps Are Back!

by Michael J. Gelfand, Esq.

Speeding vehicles are too often a common problem. In a pedestrian community particularly, but in all communities, unrestrained speed is not only disconcerting, but dangerous! While you can ask, does anyone really like speed bumps, most associations have been asking can they install speed bumps to slow down the traffic?

A recent appellate court decision seemingly expands the opportunity for Florida community associations to install speed bumps to regulate traffic speed so long as the installation does not substantially or unreasonably interfere with easement holders' right of passage. In *Wingate v. Wingate*, Fla. L. Weekly D 776 (Fla. 1st DCA, April 2, 2012), the court adopted a test that appears to curtail long-standing decisions that effectively prohibit speed bumps on private access easements.

The facts recited in the *Wingate* decision indicated that in 1999, an easement was created to allow a neighbor access to a residence. Ten years later, the owner of the property over which the easement passed, placed speed bumps across the easement. The owner claimed the placement was

allegedly for the safety of small children who lived adjacent to the easement. The neighbor stated that the speed bumps impeded access and sued to have the speed bumps removed.

The trial court, following precedent, found that it was not reasonable to place speed bumps across the easement and ordered removal of the speed bumps. The Florida appellate court rejected the proposition that speed bumps are impermissible as a matter of law. Instead, the appellate court held that the test justifying speed bumps in Florida is whether the installation was “unreasonable interference.”

The appellate court pointed out that the owner of an easement is entitled to use the land of another. An easement does not transfer title to the land on which the easement is imposed. Thus, implicitly, the holder of an easement is not raised to the prominence of the underlying property owner.

Expanding the potential of speed bump installation, the appellate court held that unless the easement states otherwise, the following factors should be looked at when considering whether the installation is sustainable in a Florida community:

- the number of speed bumps
- the height of speed bumps
- the spacing between speed bumps
- the necessity for their placement in the particular area
- their effect on vehicles and traffic flow

Applying these factors, it is anticipated that in this day and age with the proliferation of speed bumps and speeding

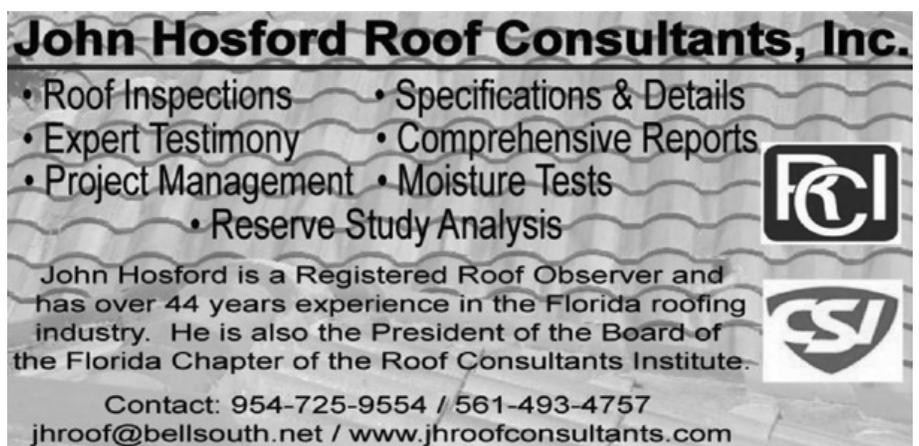


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vehicles, and particularly as municipalities install bumps and speed tables, all but the highest or too closely placed speed bumps will likely survive this test.

Of course, this does not mean that every Florida community with speeding cars can install speed bumps or speed tables. The community's documents must be reviewed by counsel to determine limitations on the association's authority to add to property, how funds can be expended, and particular restrictions on use of roads and easements.

Bankruptcy: Adding Insult to Injury for Community Associations

Suffering the injustices of mortgage foreclosures, Florida communities must gird themselves for more potential bad news. Following losses resulting from mortgage foreclosures, now bankruptcy filings bring further losses.

It now appears that when a home is "underwater," the homeowner can "strip off" or remove and extinguish a Florida community association's claim of lien. The United States 11th Circuit Court of Appeals recently ruled that when a Florida association's lien is "wholly unsecured" because the first mortgage secures a debt greater than the value of the property, then the lien can be "stripped off," or in other words, removed and declared not effective.

The facts of *McNeal v. GMAC Mortgage, LLC*, ___ F.3d ___ (11th Cir. 2012), indicate that homeowner McNeal filed a voluntary petition for bankruptcy under Chapter 7, the procedure for liquidation of assets. McNeal's home was subject to a first mortgage in

the amount of \$176,413, and a second lien in the amount of \$44,444. McNeal reported her home's value was only \$141,416.

McNeal sought to "strip off" the second lien because the first mortgage exceeded the home's fair market value. Thus, she argued, the second lien was wholly unsecured. The bankruptcy court denied the motion and did not permit the debtor to "strip off" the wholly unsecured second lien. The United States District Court for the Northern District of Georgia affirmed the decision of the bankruptcy court.

The 11th Circuit reversed the decision of the bankruptcy court, concluding that the second lien, which was wholly unsecured, was voidable. The court recognized that a Chapter 7 debtor could not "strip down" a partially secured lien but ruled that a wholly unsecured lien could be "stripped off" in a Chapter 7 case.

This decision can have a very negative impact on an association's ability to collect past due assessments if an owner files a Chapter 7 bankruptcy petition. Previously, an association's lien survived the bankruptcy. Although the association could not obtain a personal judgment for any amounts accruing before the petition was filed, the association could still foreclose on the property if the amounts were not paid. Now, it would appear that an association may not even have the option to foreclose on the property if a claim of lien is "stripped off."

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