Quarterly Report on Current Developments in Real Estate Law

April 1, 2007 to June 30, 2007

Sponsor:

ABA Section on Real Property,
Trust & Estate Law
American Bar Association

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This publication is intended to provide experienced real estate practitioners with information on recent decisions and writings affecting real estate practice. Although there are occasional reports of administrative or legislative decisions or related matters, the primary focus of the Report is on appellate court decisions. Members of the Committee are assigned to review all reported decisions in standard reporting services received in their libraries prior to the close of the stated reporting period. They forward their summaries those cases that they deem to be of interest to a nationwide audience. They forward their summaries and copies of the cases to the editor, who substantially edits the summaries and frequently adds comments.

The editors hope to provide a comprehensive review of significant new developments, but obviously they cannot warrant that every new case is reported. Further, readers should be aware that the editors specifically eliminate from coverage cases that are of interest primarily to lawyers within a given state. Thus, significant interpretations of state statutes or constitutions, even if of critical importance to local practitioners, may not appear in the Report. Readers should rely upon update services provided by state or local sources to stay current on such developments.

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ADVERSE POSSESSION; PUBLIC PROPERTY: Municipal property devoted to a public use may not be acquired by adverse possession. ***Solid Rock Church, Disciples of Christ v. Friendship Public Charter School, Inc., 925 A.2d 554 (D.C. 2007).*** Landowner, a public school, brought an action against a neighboring landowner, a church, for declaratory judgment as to the ownership of property previously conveyed by the District of Columbia to the school. The church claimed ownership of the property in question by adverse possession.

Noting that the District of Columbia "has limited case law concerning whether the applicable statute of limitations runs against a municipality in adverse possession claims[,]" the court looked to Maryland common law for guidance and determined that the following principle controlled: municipal property devoted to a public use may not be acquired by adverse possession. The court found that, when the District of Columbia was the owner of the property in question, the District of Columbia held title to the property in its governmental capacity and operated the property as a public school. The property in question was thus devoted to a public use. Therefore, the church could not acquire the property by adverse possession.

ASSOCIATIONS; FREE SPEECH: The New Jersey Supreme Court balances the contractual rights of homeowners associations against the free speech rights of its homeowner-members, holding that an association has considerable power to affect those free speech rights. Such associations are not "quasi municipal" entities, but in New Jersey this may not matter. The question is one of degree of suppression and degree of alternative communication means. ***Committee for a Better Twin Rivers v. Twin Rivers Homeowners' Association (N.J. Supr. Ct. 2007). No official citation available yet.***

A planned unit development consisted of "privately owned condominium duplexes, townhouses, single-family homes, apartments, and commercial buildings." It "cover[ed] approximately one square mile and ha[d] a population of approximately 10,000 residents." It was governed by a trust "for the stated purpose of owning, managing, operating, and maintaining [its] residential common property." The "[t]rust-owned property and facilities [were] for the exclusive use of … residents and their invited guests." The general public was not invited to use those facilities. The trust was controlled by its trustee, a homeowners association. The association maintained the development's residential roads, provided street lighting and snow removal, assigned parking spaces in its parking lots, and collected rubbish in portions of the development. Upon acquiring property in the development, each owner automatically became a member of the association and subject to the association's Articles of Incorporation and Bylaws. Those Articles authorized the association to "exercise all of the powers, rights and privileges provided to corporations under the New Jersey Nonprofit Corporation Act. . . ." The Bylaws additionally authorize the Association to "adopt, publish and enforce rules governing the use of common areas and facilities." The association had a board of directors. Its members were elected by all eligible members of the association.

A committee of property owners sought to affect the manner by which the development was governed. In pursuance of their goal, they sued the association and others. "The thrust of the complaint was that the Association had effectively replaced the role of the municipality and the lives of its residents, and therefore, the Association's internal rules and regulations should be subject to the free speech and free association clauses of the New Jersey Constitution." One count of their complaint "sought to invalidate the Association's policy relating to the posting of signs. The Association's sign policy provided that residents may post a sign in any window of their residence and outside in the flower beds so long as the sign was no more than three feet from the residence." Only one sign per lawn and one per window were permitted. No signs were permitted on utility poles or natural features within the community. "The stated purpose for the sign policy [was] to avoid the clutter of signs and to preserve the aesthetic value of the common areas, as well as to allow for lawn maintenance and leaf collection." The committee's members sought injunctive relief to permit posting of signs on the private property of community residents and, subject to reasonable regulation, on the common elements.

The second complaint related to use of the development's community room. Although the room was generally available to residents of the development and to clubs, organizations, and committees approved by the association, the association's policy "involved a two-tiered rental charge system that differentiated between uses of the room." During the pendancy of the litigation, the association changed the system in favor of the uniform rental fee and a refundable security deposit. In its suit, the committee argued that the association's "community room policy denied them equal protection of the laws and unreasonably and unconstitutionally violated their right to access the community room on a fair and equitable basis." They also argued that the rental fees were excessive and were unrelated to the association's actual rental cost.

The last major complaint from the committee was that owners in the development "were denied equal access to the Association's monthly newspaper." The newspaper's purpose was "to provide residents with news and information that concern[ed] the community." It had an editorial community that selected the newspaper's content. The paper was delivered to all residents in the development, but not to the general public. The committee sought a declaration that all residents should have "equal access" to the newspaper. In addition, the committee "sought a permanent injunction enjoining the president of the Board from using [the newspaper] 'as his own personal political trumpet'."

The lower court, while noting "that the Association asserted considerable influence on the lives of [the development] residents, [felt that such] impact was a function of the contractual relationship that residents entered into when they elected to purchase property in [the development]." It "applied the traditional test for evaluating the reasonableness of restrictive covenants and found that the covenant relating to the posting of signs was reasonable and enforceable." It found that the community room regulations were impermissibly vague and ordered that they be modified to provide clear standards. Lastly, the lower court concluded that the committee had not been denied access to the association's newspaper.

The Appellate Division reversed the lower court, "holding that the Association was subject to state constitutional standards with respect to its internal rules and regulations." The association filed a further appeal with the New Jersey Supreme Court.

In that appeal, the association argued that a precedential case in New Jersey, *State v. Schmidt,* 84 N.J. 535 (1980), set forth a test and under that test, " it was error to impose constitutional obligations on its private property. The Association urge[d] [the Supreme Court] to follow the vast majority of other jurisdictions that have refused to impose constitutional obligations on the internal membership rules of private homeowners' associations." It emphasized that the association did not invite public use of its property and that its members participated in the association's decision making process. It also argued that the business judgment rule protected association members from arbitrary decision making. It reiterated that the association's relationship with its members was a contractual one, "set forth in reasonable and lawful restrictive covenants that appear[ed] in all property deeds."

The New Jersey Supreme Court first affirmed that under the New Jersey Constitution, individuals have the right of speech and assembly and every person "may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right." It also pointed out that people have the right to freely assemble together. On the other hand, while "the rights of speech and assembly cannot be curtailed by the government," only "under limited circumstances" have New Jersey courts enforced those constitutional rights against private entities. Thus, it framed the issue as to whether the case before it "present[ed] one of those limited circumstances where, in the setting of a private community, the Association's rules and regulations [were] limited by the constitutional rights of [the association's members]." In doing so, it engaged in an extensive review of federal case law, concluding "that there must be 'state action' to enforce constitutional rights against private entities."

Noting that New Jersey's "jurisprudence has not been as confining," it then reviewed New Jersey's case law history, emphasizing that in the *Schmidt* case, the "constitutional equipoise between expressional rights and property rights must be similarly gauged on a scale measuring the nature and extent of the public's use of such property. Thus, even as against the exercise of important rights of speech, assembly, petition and the like, private property itself remains protected under due process standards from untoward interference with or confiscatory regulations upon its reasonable use." The decision in the *Schmidt* case set forth a test to accommodate that balancing of rights. "That test requires courts to consider (1) the nature, purposes, and primary use of such property, generally its 'normal' use, (2) the extent and nature of the public's invitation to use that property, and (3) the purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property." In assessing the reasonableness of any restrictions, a New Jersey court is required to consider "whether there exist convenient and feasible alternative means to individuals to engage in substantially the same expressional activity."

Case law has evolved under the *Schmidt* case. The Court pointed to one such expansion in *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.,* 138 *N.J.* 326 (1994). This was a shopping center leaflet distribution case where the New Jersey Supreme Court "recognized that regional shopping centers have broad powers to adopt reasonable conditions 'concerning the time, place, and manner of such leafleting'." In that case, "[t]he Court emphasized that '[n]o highway strip mall, no football stadium, no theater, no single high suburban store, no stand-alone use, and no small to medium shopping center sufficiently satisfi[ed] the standard of *Schmidt* to warrant the constitutional expression of free speech to those premises,' …."

The Court also reviewed case law in other jurisdictions and found "that only a handful of states recognize a constitutional right to engage in free speech, assembly, or electoral activity on privately owned property held open to the public, such as shopping mall or college campus." It found that "[m]any other states have declined to recognize a constitutional right to free speech at privately owned malls, largely on the ground that malls are not 'state actors'." It also took special note that, "in the context of an apartment complex, the California Supreme Court modified its position [in an earlier case], and now require[d] state action before free speech rights will be recognized."

Lastly, by way of background, the Court pointed out, "[s]imply stated, we have not followed the approach of other jurisdictions to require some state action before the free speech and assembly clauses under our constitution may be invoked." That comment noted that the New Jersey Constitution's "free speech provision is 'broader than practically all others in the nation'." Lastly, it pointed to an additional complication in this particular case in that the restrictions complained of by the committee affected "conduct both on the private housing association's property and on the homeowners' properties. However, '[i]t is the extent of the restriction, and the circumstances of the restriction that are critical, not the identity of the party restricting free speech'."

Applying the first test, that is looking at the "nature, purposes, and primary use" of the property in question, the Court found that the development was primarily residential and that even though there were privately owned businesses within its borders, the association derived no revenues from them. The municipality, not the association, provided schools, police, and fire protection, as well as a municipal court system court and first aid services. Consequently, it found that the "nature, purposes and primary use" of the development was for private purposes and this factor did not "favor a finding that the Association's rules and regulations violated [the residents'] constitutional rights."

It then looked at the second test to see and explore the "extent and nature of the public's invitation to use [the property]." Here, it was clear that the association had not invited the public to use the property. Even though it was not a gated community and "its roads [were] accessible to public traffic," it accepted the association's position that the property was for the exclusive use of residents and their invited guests. "[T]he mere fact that owners may sell or rent property to members of the public who were invited to come into [the development] and inspect such property hardly implicate[d] a public invitation." Consequently, the Court concluded that the limited nature of the public's invitation did not "favor a finding that the Association's rules and regulations violated [the residents'] constitutional rights."

The third factor concerned "the purpose of the expressional activity in relation to both private and public use of the property." Consequently, the Court was required to examine "the compatibility of the free speech sought to be exercised with the uses of the property." Essentially it looked to the fairness of the association's restrictions in relationship to the residents' free speech rights. Here it looked at the posting of political signs, free use of the community room, and access to the community newspaper. After examining the record before it, the Court found that the residents' "expressional activities [were] not unreasonably restricted." It accepted the Association's position that "the relationship between it and the homeowners [was] a contractual one, formalized in reasonable covenants that appear[ed] in old deeds." It rejected the notion that unlike the university in *Schmidt*, and a very large shopping center in another case, the development was "not a private forum that invite[d] the public on its property to either facilitate academic discourse or to encourage public commerce." Rather, according to the Court, the development was "a private, residential community whose residents have contractually agreed to abide by the common rules and regulations of the Association. The mutual benefit and reciprocal nature of those rules and regulations, and their enforcement, [was] essential to the fundamental nature of the communal living agreement that [the development's] residents enjoy[ed]."

The Court asserted that it was "mindful that at least in regard to the signs on the property of the homeowners, it [was] the private homeowners' property and not that of the Association that [was] impacted." Consequently, it emphasized that a private property owner, even in the community association environment, is "protected under due process standards from untoward interference with or confiscatory restrictions upon [its property's] reasonable use" and the New Jersey Constitution "affirmatively grants the homeowner free speech and assembly rights that may be exercised on that property." ***No official citation available yet.***

In conclusion, the Court, asserting that "[w]e do not interfere lightly with private property rights," found that the minor restrictions on these particular residents' "expressional activities [were] not unreasonable or oppressive, and [their] Association [was] not acting as a municipality." It felt that the Association's restrictions on signs, the community room, and access to its newspaper were reasonable "concerning the time, place, and manner of" such restrictions. According to the Court, the residents had "other means of expression beyond the Association's newspaper." Each of them could "walk through the neighborhood, ring the doorbells of their neighbors, and advance their views." Further, as found by the lower court, residents could "distribute their own newspaper to [other] residents and [had] done so." They can also vote, "run for office, and participate through the elective process in the decision-making of the Association."

Lastly, the Court pointed out that its holding did not suggest "that residents of a homeowners' association may never successfully seek constitutional redress against a governing association that unreasonably infringes their free speech rights." Further, residents in community association developments are protected by the business judgment rule from arbitrary decision-making and, an association's governing body has "a fiduciary relationship to the unit owners, comparable to the obligation that a board of directors of a corporation owes to its stockholders." Two other protections noted by the New Jersey Supreme Court were New Jersey statutory protections that limit the powers and duties of associations and "traditional principles of property law – principles that specifically account for the rights afforded under [New Jersey] constitution's free speech and association clauses." Further, "restrictive covenants on real property that violate public policy are void as unenforceable."

Editor's Comment: Note that this is not exactly a ringing endorsement of the power of New Jersey private community associations to regulate speech activities as they wish. But it is an acknowledgment that New Jersey jurisprudence in this area departs dramatically from that of most other states, so the precedential impact of this decision, in either direction, is somewhat limited.

Note also that the Restatement of Servitudes also authorizes judges to invoke their own view of what constitutes appropriate "public policy" in deciding whether to enforce private restrictions. Earlier drafts of the Restatement expressly invoked the Bill of Rights as relevant standards by which to judge public policy. The final product is more restrained, but certainly would support an argument in other jurisdictions similar to the approach taken in New Jersey, and could elevate unit owner speech to a protected status.

BANKRUPTCY; PROPERTY OF THE ESTATE; LIQUOR LICENSE; LANDLORD/TENANT; Whether, for bankruptcy purposes, a liquor license is property of the state depends on the state law characterization of the interest as subject to reach by judgment creditors. ***Aboboud v. The Ground Round, Inc., (In re The Ground Round, Inc.) 482 F.3d 15 (1st Cir. 2007),*** discussed under the heading: "Landlord/ Tenant; Termination; Liquor License; Bankruptcy."

BOUNDARIES; ACQUIESCENCE: Boundary be acquiescence, an independent doctrine from adverse possession, is triggered by an agreement between adjoining owners to accept a certain boundary as the true boundary, even though different from the legal boundary, and such agreement can be implied from acceptance by one neighbor of another neighbor's occupancy of the area bounded by the revised boundary, even if such occupancy does not satisfy all the elements of adverse possession. ***Huntington v. Riggs, 862 N.E. 2d 1263 (Ind. App. 2007)***

This is a fascinating decision because the majority opinion spends most of its time trying to demonstrate that the doctrine of boundary by acquiescence is a viable modern doctrine, even though the court eventually holds, as an alternate holding that the dispute in question could have been resolved by adverse possession. The concurrence on the other hand, agrees that the doctrine of boundary by acquiescence does find support in old authorities in Indiana and remains a valid doctrine in the state, but contends that it has been more or less fully replaced by adverse possession and contends that future courts ought to ignore it whenever possible.

In 1954, the county constructed a road that was intended to run along the boundary of the two lots in question, but for unexplained reasons, the completed road in fact ran across one owner's property, leaving a triangular portion on the other side of the road. Thereafter, the neighbor on that side of the road made some use of the triangular parcel, mowing it periodically. But parts of it were heavily wooded and apparently not occupied at all. Perhaps most importantly, the neighbor built a driveway on this parcel that became the neighbor's access to the highway.

During the ensuing half century, the legal owners of the property paid taxes on the property, although they never went on it, and there was never any confrontation between the two sides about ownership. Eventually, both properties passed into the hands of others.

As indicated, the court held that the doctrine of adverse possession would have resulted in ownership passing to the neighbors who occupied it, notwithstanding that the "true owners" paid taxes all these years. But the court apparently thought it important to treat this holding as a secondary holding and instead to emphasize that, even if the possessory characteristics necessary to satisfy a claim of adverse possession had not been met, the doctrine of boundary by acquiescence also applied and that its requirement of an implied agreement between the original parties was satisfied by their conduct over almost fifty years before the properties changed hands. Subsequent owners were bound by the implied agreement whether they knew of it or not.

Comment 1: This doctrine is by no means as well established as adverse possession, and many states recognize it only when laden with so many special requirements as to render it essentially a useless concept. The editor has seen some states emphasizing that there must be evidence of a uncertain boundary that the parties elected to resolve by recognizing an alternative line. *See, e.g. Goodman v. Menzies*, LLC No. 00-004011-CH (Mich.

App. 9/16/04) (unpublished) (the DIRT DD for 10/1/04) (reversing a finding of boundary by acquiescence where no evidence of uncertainty regarding boundary.) http://www.michbar.org/opinions/appeals/2004/091604/24520.pdf

In some of these states, once the agreement is established, no particular period of occupancy is necessary. In other states, if the agreement is implied, it must be followed by occupancy sufficient to satisfy the statute of limitations for adverse possession (*see:Lloyd vs. Montecucco*, 924 P.2d 927 (Wash. App. Div. 2, 1996) (the DIRT DD for 3/2/97) (recognizing the rule, but holding that the doctrine will not apply when no well-defined physical monument to define the claimant's boundary is present which makes the doctrine virtually the same as adverse possession in those states.)

On the facts of this case, the court had occupancy sufficient to satisfy the adverse possession statute, but made a point of indicating that possession for such period of time would not necessarily by required to support the implied agreement that is at the heart of the doctrine.

Comment 2: Although the editor believes that a strong argument can be made that the adverse possession doctrine is still necessary to resolve many boundary disputes in the U.S., the editor sees no need for a supplemental doctrine such as this. Modern surveying techniques and clearer understanding of boundaries ought to be enough to render the benefits of the doctrine not worth the uncertainty that it might cause.

CONSTITUTIONAL LAW; ELEVENTH AMENDMENT: Although federal court cannot adjudicate claims by a private party against a state without the state's consent, it cannot adjudicate a tax lien dispute between the federal government and the state government. ***Hudson Savings Bank v. Austin, et al., 479 F.3d 102 (1st Cir. 2007).***

CONSTITUTIONAL LAW; STATE ACTION; OWNER'S ASSOCIATION: The New Jersey Supreme Court balances the contractual rights of homeowners associations against the free speech rights of its homeowner-members, holding that an association has considerable power to affect those free speech rights. Such associations are not "quasi municipal" entities, but in New Jersey this may not matter. The question is one of degree of suppression and degree of alternative communication means. ***Committee for a Better Twin Rivers v. Twin Rivers Homeowners' Association (N.J. Supr. Ct. 2007),*** discussed under the heading: "Associations; Free Speech."

CONTRACTS; CONSTRUCTION; INTEGRATION: Although note is unambiguous on its face and contains an integration clause, borrowers can introduce additional evidence of mortgage broker fraud to show that the parties did not intend an integrated agreement, that their consent was fraudulently induced, and even that the document was ambiguous on the basis of evidence outside the four corners of the document. ***The Cantamar, L.L.C. v. Champagne, 142 P. 3d 140 (Utah App. 2006)***

Another aspect of this case is reported under the heading: Mortgages; Interest; Default Interest.

For several years, Champagne and his colleagues (Champagne) had been working with a financial consultant/loan broker (Thuett) to find a $15 million investor for their proposed business. Apparently the consultant had done a reasonably good job of convincing them that financing was right around the corner, as they executed two consecutive notes arranged by the consultant with a principal amount of around $260,000, with principal payable only when the equity investment arrived. These notes carried ruinous interest rates – in one case 72% and in the second 60%, but with a 120% default rate. (Utah has no usury laws affecting commercial loans).

When the ship carrying the $15 million did not materialize on the horizon, these loans had to be refinanced, and the consultant brokered a third loan taking out the second of the two earlier notes. This loan had an interest rate of 8%, payable monthly, but with principal deferred until the Due Date three months thereafter. Unlike the notes it replaced, this note, to a new lender, Cantamar, did not state that principal would not be payable until the capital infusion arrived.

Champagne paid the interest during the stated term of the note, but, (surprise!) when the note fell due three months later there still was no $15 million on the table. Champagne believed that there was no obligation to pay the principal, as before, but the lender (crazy as it sounds) expected to be paid as provided in the note. Champagne argued that Thuett had informed them orally that this note was subject to the same condition on payment as the earlier notes. When the dispute was joined, Champagne stopped making the interest payments also.

In the predictable lawsuit, the trial court, following depositions of principals on both sides of the deal, found on summary judgment that the note, which contained an integration clause, was a complete statement of the understanding of the parties, and contained no condition on payment relating to the proposed search for capital for the business. The court further rejected Champagne's arguments that the note was fraudulently induced or that it was ambiguous (on the basis of evidence outside the four corners of the instrument). Both of these latter issues also depended upon the same critical allegation – that Thuett had represented that no principal was payable until an investor had been found.

The appeals court reversed and remanded all of the above determinations. Champagne will be able to defend on the basis of the alleged representations by Thuett that the production of the $15 million investor was a condition to payment.

Interestingly, there is not one word in the opinion about any representations made by Cantamar. Similarly, there is nothing in the opinion to show that Thuett was Cantamar's agent. In fact, everything stated in the opinion appears to indicate that Thuett was Champagne's agent. Further, there is nothing in the appeals court opinion to indicate that Cantamar was aware of Thuett's alleged fraudulent statements. A chat with counsel, however (the case has settled) indicates that there was some evidence that raised a colorable claim of agency and, of course, denials by Cantamar's principles that they knew anything about Thuett's activities had to be believed. No one had been able to get process served on Thuett himself and he had not been deposed.

In sum, then, indulging in the presumption that there was a factual dispute about whether in fact Cantamar was aware of or, through its agent, had actually made, representations that the principle was subject to a contingency relating to the funding, was the borrower able to present evidence on that claim when there was a final executed note containing a due date, payment schedule, and integration clause? The trial court said no, but the appeals court said yes, yes, yes.

The appeals court, in fact, identified three separate bases upon which extraneous evidence could be introduced.

The first analysis had to do with the question of whether the note, which stated a specific due date and nothing about a payment contingency, was an integrated document – the final and complete expression of the parties. The note contained an integration clause that said exactly that. But the court said that this only raises a presumption of integration, and that a party is free to introduce "all relevant evidence" to rebut the presumption. Although Champagne raised no evidence that the interest obligation was not an integrated agreement, he did allege that the principal obligation was subject to a condition not expressed in the note. The appeals court reversed the trial court and found that the issue of integration could not be resolved on summary judgment.

Next, the court turned to the Champagne's allegation that it had been fraudulently induced to execute the note. The court indicates that it would have been able to reach this argument even if the instrument was deemed integrated as a matter of law, since fraudulent inducement raises quite separate issues. The court really had little trouble here. It concluded that Champagne had alleged adequately that Thuett had induced them to sign the note by telling them, fraudulently, that it would not be enforced absent the $15 million in funding arriving.

To the editor, perhaps the most interesting discussion was that on ambiguity. Champagne argued that the note was ambiguous and that therefore evidence extraneous to the note should be admissible to interpret it. Presumably, even if the court found the note to be integrated and not fraudulently induced, this argument would permit consideration of further evidence to demonstrate that the parties didn't intend to sign what they signed. The editor suspects that this defense would be useful if it was found that Thuett was not Cantamar's agent and that Cantamar was ignorant of the condition. If the document was ambiguous, evidence of an intent other than that set forth on the face of the note might be useful to Champagne. In most jurisdictions, it would be very difficult to construe a plan promissory note as ambiguous, because the ambiguity must be shown to arise with the "four corners" of the instrument in question. But apparently not in Utah. The law in Utah on ambiguity is that "when determining whether a contract is ambiguous, any relevant evidence must be considered...[-] by requiring at least a preliminary consideration of all credible evidence offered to prove the intention of the parties...the court can place itself in the same situation in which the parties found themselves at the time of contracting."

Comment: This last is obviously not the "four corners" doctrine. Far from it. In Utah, it appears, there is very little point in reducing an agreement to paper. One is free to argue to a court later whatever one wants to convince the court that some other deal, or no deal at all, was in fact intended. Pretty scary for real estate deals, at least – and possibly for most deals. The editor understands that a similar rule might exist in New Mexico.

Comment 2: Compare: Carrow v. Arnold, 2006 WL 3289582 (Del. Ch. Oct. 31, 2006). (The DIRT DD for 1/22/07) (A buyer may obtain specific performance of a written agreement of sale, notwithstanding parol evidence suggesting different terms, where the court concludes that the contract was integral, despite the absence of an integration clause, and there is no evidence of fraud or misrepresentation.)

Comment 3: After chatting with some people knowledgeable about the case, the editor has reason to believe that the court smelled a rat here and did rough justice to protect the borrowers. The problem is that the case is precedent and doesn't indicate the court's concerns. If the court doesn't mean what it says, that's bad law making. If it does, in this case, well…

EASEMENTS; CREATION; DEDICATION: Easement dedicated to public (as opposed to a public agency) takes effect immediately, is irrevocable, needs no special form for creation, and members of the public making frequent use of the easement may have a duty to contribute to its maintenance. ***Hunt v. Richardson, 216 Ariz. 114 163 P.3d 1064 (Ariz. App. Div. I 2007)***

Owner of a fifteen acre parcel recorded a survey indicating the existence of a fifty foot "non- exclusive perpetual easement for ingress, egress and public utilities" along the edge, and a similar thirty foot easement across the middle of the parcel. A few days later, the owners actually recorded an instrument granting such easement to the general public as reflected in the survey.

A year later, the owner sold the entire parcel to Richardson's. Richardson's widened and paved the easement within the fifty foot parcel, and built a fence "along the forty foot line." (The editor assumes that this means that they cut off ten feet of the easement's width with the fence.) They installed a gate across the easement, and gave remote controls to operate the gate to all their neighbors.

Simpson, a neighbor who had been using the easement for the movement of cattle, objected that the fence and the gate interfered with his use of the easement. Richardson's counterclaimed challenging the validity of the easement and asking for a declaration that the neighbors had a duty to contribute to the maintenance of the easement and that they would be liable for injuries caused by lack of maintenance.

The first issue addressed by the court was Richardson's claim that the easement was invalid because the instruments creating it did not constitute a valid deed under Arizona law. The court indicated that a formal deed is not required to create an easement. Any of a variety of methods can be used. The court does say that a valid dedication to the general public must include an offer by the landowner to dedicate and an acceptance by the general public.

Richardson's alleged that the general public had not "accepted" the dedication. The court responded, however, that no particular method was required to demonstrate acceptance, and certainly action by a public agency is not required (here the local county had expressly rejected the dedication.) Several owners, the court noted, had purchased their properties with reference to the very recorded survey that shows the dedication. That alone established evidence of acceptance, even if the parties who so acquired their properties never actually used the road. The fact that the survey did not create a subdivision did not matter. Finally, the fact that, necessarily, only a small number of people can use the easement does not make it any less a dedication to "public use."

Perhaps the more interesting part of the opinion is the discussion of whether Richardson's gate unduly interfered with the use of the easement by the neighbors, members of the public. The trial court had found that it did constitute an interference and granted summary judgment to the neighbors. Perhaps it was influenced by Arizona authority, acknowledged the appeals court, that in Arizona a dominant tenant is entitled to travel on every part of an easement, a curb installed by the servient owner cutting off seven feet of a forty foot wide express access easement was held to be an unlawful obstruction without any consideration of whether the remaining 33 feet were sufficient to provide adequate access.

Although this authority clearly might have invalidated the fence cutting off ten feet of the easement, the court stated in a footnote that Richardson's had not adequately appealed the lower court's holding on this point, and thus did not discuss the fence any further, leaving the fence barred.

As to the gate, however, the court said that a rule against permanent obstructions in an easement does not necessarily lead to the conclusion that the servient owner cannot erect a gate, so long as the gate can be opened by those seeking to use the easement, as was the case here. Not only was the gate unlocked, but it was an automatic gate that could be opened by the push of a button on the post or the use of a remote controller, which Richardson's had supplied to their neighbors.

The court noted that the grant of an easement may expressly preclude any gate, but a general grant of a right of ingress and egress does not in and of itself prohibit the servient from erecting such a gate. Further, the prohibition in Arizona of permanent obstructions does not necessarily prohibit gates. The questions is one of "reasonableness" – meaning whether the gate is reasonable in light of the degree of justification and the degree of interference – of course keeping in mind that very little interference will be tolerated, whatever the justification.

The Arizona appeals court decided that the trial court should have more thoroughly reviewed the evidence to balance the impact of the gate on the neighbors versus the justification for the gate given by the Richardson's. The neighbors argued that the Richardson's were required to show that the gate was essential to their use in light of the fact that it impaired the easement access. The trial court apparently bought that argument, but the appeals court demurred. It stated that the benefit of the gate need only be "appropriate" for the servient tenant and that the gate may not be placed for the purpose of annoying the dominant or obstructing the dominant's use. Noting that there is some authority for the notion that the need for the servient's benefit be "essential," the court commented that "the better approach is to assess whether the improvement is appropriate to use of the servient estate and then balance the need for that improvement against the impact on easement holders."

The trial court apparently had assumed both that the servient need had to be of an "essential" character and that there was a presumption that any interference with the easement use was "unreasonable." The appeals court held that there was no such presumption, but that the interference alleged by the neighbors was sufficient that the trier of fact would have to evaluate the evidence, and not just the allegations, to reach a conclusion. They had alleged that it was dangerous for their visitors (who lacked the remote control device) to get out of their vehicles to operate the gate, that the gate sometimes didn't work at all, and was difficult to operate, and that the gate constituted an unreasonable delay. Richardson's had argued that the gate was necessary as a secondary barrier to protect against horses escaping from their property and that it deterred entry by criminals.

Comment 1: These folks ought to work it out. The factual claims of both sides seem wishy-washy to the editor. He's glad that his taxes are going to resolve this stupid dispute. Note that now that the fence is coming down, the issue of the gate may disappear.

Comment 2: But the court's analysis of Arizona law in this area is certainly helpful. Note that other courts might resolve the case differently. Some do not start with the assumption that any permanent obstruction is impermissible, even if there is adequate area left for the purposes for which the easement was created. Gates, however, are frequently tolerated, even without remote control buttons.

Comment 3: The court failed to note that remote controllers have a way of migrating to the far side of the moon whenever they are needed. At least that's the editor's experience.

EASEMENTS; TERMINATION; VIEW EASEMENTS: View easements that confer a right to enter and use land are affirmative easements and therefore not subject to a 30-year statute of limitations applicable to negative land use restrictions. ***Patterson v. Paul, 863 N.E.2d 527 (Mass. 2007).***

Plaintiffs, owners of a parcel of land and neighbors, Defendants, occupied adjacent three-one acre lots that were subdivided from a three-acre parcel in 1986. The lots were conveyed individually by deeds recorded in 1999, and each contains the same view easement in favor of the other properties for scenic vistas of Little Pleasant Bay and the Atlantic Ocean.

Each easement provided that the other parcel owners could enter the subject property to trim trees and other vegetation to maintain an unobstructed view, but not more frequently than once per year. In 2003, Defendants gave notice to Plaintiff of intent to prune several new plants along a shared boundary line.

Plaintiff brought suit in the Land Court seeking declaratory and injunctive relief with respect to the scope and duration of the view easements: (1) a declaration that the view easements benefitting the Defendants were valid only for a thirty-year period pursuant to the limitation on the duration of restrictions on land in Mass. Gen. Laws Ann. ch. 184, §23; (2) enjoining the Defendants from entering their property to trim vegetation unless authorized by court order; and (3) defining the views protected under the easements. The Land Court initially found that such easements were affirmative and therefore were not subject to the thirty-year durational.

After reviewing the properties, the Land Court judge ruled in favor of Plaintiff, noting that the easements must be construed in "context of the circumstances that existed when the deeds were executed."

Defendants appealed. On appeal: Held: reversed.

The Supreme Judicial Court agreed with the Defendants that the view easements explicitly conferred an affirmative right to enter onto the Plaintiffs' property "to trim and top trees and other vegetation within the easement area... so as to clear and maintain an unobstructed view across the entire view easement areas." Finding the right to physically enter and use land in the possession of another to be dispositive, the court concluded that it was dealing with an affirmative easement, and not a simple land use restriction.

EASEMENTS; RIGHTS OF SERVIENT OWNERS; PARKING IN ACCESS EASEMENTS: Although an ingress/egress easement does not specifically reserve parking rights to the servient tenant, the servient tenant retains such rights as long as the parking does not unreasonably interfere with the ingress/egress rights. ***Patterson v. Sharek, 924 A.2d 1005 (D.C. 2007)***.

In a dispute between adjoining landowners involving a right-of-way for automobile ingress and egress across a portion of one of the landowner's property, the owner of the dominant tenement argued that the owner of the servient tenement may not park an automobile within the area that is subject to the ingress/egress easement, as there was no reservation of parking rights in the deed of easement itself. Using principles applied by the court in two previous cases, the court concluded that, even though was no reservation of parking rights in the deed of easement, the owner of the servient tenement retained the right to park in the right-of-way, as long as he could park without unreasonably interfering with the other landowner's right-of-way for ingress and egress.

The servient owner had argued, in fact, that the continued use of a portion of the right of way for parking established a termination of the right of way as to that portion of the right of way. The court affirmed the trial court's denial of this claim. Since the servient owner had the right to share the use of the easement with the dominant, to the extent that there was no unreasonable interference with access, the servient's parking activities were not hostile and therefore had no impact on the continued rights of the dominant tenant.

Comment 1: There is uniform agreement that a servient tenant can make use of a the dominant easement area to the extent that there is no unreasonable interference with the carrying out of the activities for which the easement was created. Parking in a right of way that does no obstruct ingress and egress is virtually always regarded as permissible.

The cases are not in accord concerning more permanent activities, such as curbs, trees, or even fences, that encroach onto the easement area but still leave enough room for ingress and egress. Some view the rights of the dominant to a clear path within the easement area as paramount, and will permit no permanent installations. Others view the permanent installations in the same way they view temporary interference such as parking: so long as there is no immediate impact on the dominant right, the activity is permitted. Gerald Korngold, in his Hornbook: Private Land Use Arrangements, has an excellent discussion of the principles and cases in Section 4.06, including many right of way cases.

For a fascinating look at how issues like this can go far, far wrong, see Reichardt v. Hoffman, 52 Cal. App. 4th

754 (1997) (Cal. App. 6 Dist., 1997), where a bitter and nasty servient tenant made life miserable for the dominant tenants because they and their friends occasionally parked in the easement area for the servient's property, which he used only to store junk. The defendant servient tenant almost literally drove his neighbors to ruin, and the trial court in fact terminated his easement on the basis of his outrageous behavior. The appeals court reversed that aspect of the opinion, without condoning the behavior. It acknowledged the rule that, absent specific language prohibiting dominant parking on the servient area, such parking is permitted.

Comment 2: The more interesting issue, of course, is whether the grant of a right of ingress and egress carries with it the right to park on the servient tenant's land. Again, the cases are in dispute. Of course, whether rights are exclusive and other specific language of a grant will be relevant. The editor sent off his copy of the wonderful Bruce and Ely treatise on Easements and Licenses in Land to be updated, and it's disappeared. There may be some specific case discussion on this point there. The Korngold materials, although excellent on the servient parking, become more general in discussion the scope of a dominant's rights.

EASEMENTS; SCOPE; EASEMENTS TO PROTECT VIEW: View easements that confer a right to enter adjacent land and to protect view must be limited to extent of view that was in place when easement was created. ***Patterson v. Paul, 863 N.E.2d 527 (Mass. 2007).***

Defendants' easement rights provided that they had the right to enter the subject property to trim trees and other vegetation to maintain an unobstructed view, but not more frequently than once per year. In 2003, Defendants gave notice to Plaintiff of intent to prune several new plants along a shared boundary line.

The Defendants argued that the an intention of the easement was to allow fully unobstructed views. The Supreme Judicial Court again agreed with the lower court judge, noting that the language of the easements, in sum, suggested an intent to maintain the *status quo*, holding that the easements "were intended to prevent the continual growth of vegetation that would, over time, gradually block the views that had existed [when the easements were granted], just as the construction of any structure in the view easement area would have a similar effect."

The court determined that due to heavy tree coverage, the Defendants did not have completely unobstructed views when the easements were created, therefore, they could not demand such a view now.

The court also interpreted the one-year limitation to apply to frequency of entry and not to the volume of vegetation to be trimmed, which it found did not need to be limited to one year's prior growth.

EMINENT DOMAIN; DAMAGES; LOSS OF ACCESS: Where a condemning authority appropriates portions of an owner's property for a public purpose and simultaneously reestablishes access to a public road implicitly through an easement grant, the owner is not entitled to consequential damages based on lack of legal access to his parcel. ***Lake George Associates v. State, 857 N.E.2d 517, 7 N.Y.3d 475 (N.Y. 2006).***

Lake George Associates ("Claimant") owns a parcel of land used as a shopping plaza on the southeast corner of U.S. Route 9 and State Route 149 in Queensbury, New York, bounded to the south and east by lots owned by David White ("White") and Michael Tatko ("Tatko"), respectively. Prior to July 13, 1998, Claimant's property had two 50-foot curb cuts that provided access to and from each respective highway. However, as part of a highway improvement project, the State obtained a fee interest in the frontage strip of Claimant's land and that of its neighbors, White and Tatko, so that it could install turning lanes and sidewalks abutting the highways on Routes 9 and 149.

The State also obtained permanent easements over all three properties for the purpose of constructing new driveways and included in each easement a reservation of rights in favor of the property owners to allow them to use such easements for access to the highway and to construct and maintain a driveway thereon.

Following the State's project, a system of shared driveways was implemented among the three parcels but Claimant's access to Routes 9 and 145 were restricted considerably. One could exit directly onto Route 9 north solely from Claimant's property, but entering from Route 9 or exiting onto Route 9 south would require crossing over the easement on White's property. Similarly, direct entry from Route 149 onto Claimant's property existed, but to exit onto Route 149 required traversing the easement on Tatko's land.

Claimant brought an eminent domain action seeking damages resulting from the condemnation of its land by the State. The trial court awarded Claimant $98,786.63 as direct compensation for the appropriation of its land but denied Claimant's request for consequential damages. Claimant appealed the decision to deny consequential damages, the Appellate Division affirmed, and Claimant brought this appeal.

Claimant argued that the State failed to give it an enforceable legal right in the easements over the adjoining parcels such that it is entitled to consequential damages in addition to the direct damages. Property owners are entitled to consequential damages when the State's appropriation of their property results in "the loss of their right to enter and exit their property" In this case, the State appropriated land from Claimant and its neighbors and required under its permanent easements that the use of the appropriated land be to reestablish access and that the roads only be used for that purpose. The State's failure to maintain the entry and egress roads would give claimant an enforceable right absent a failure of the easements, however, the mere diminution in access is not compensable.

EMINENT DOMAIN; DAMAGES; "UNITY OF OWNERSHIP:" When valuing adjacent properties, the condemning authority must take into account the possibility of "unity of ownership" in a flexible way, using the "substantially identical ownership" test. ***Union County Improvement Authority v. Artaki, LLC, 392 N.J. Super. 141, 920 A.2d 125 (App. Div. 2007)***

Pursuant to New Jersey's Eminent Domain Act of 1971, a county improvement agency sought to acquire, by condemnation, a parcel of land owned by a limited liability company. The company's members were two parents and their three children. The agency also sought to condemn four other parcels, all owned solely or collectively by the members. These condemnation actions were all made pursuant to a municipality's redevelopment ordinance and consequent rezoning of the area where these land parcels were all located.

The lower court found that the agency had properly exercised its eminent domain powers over the parcels in question. Neither the company nor its members disputed this finding. Instead, they disagreed with the prices proposed by the condemning authority.

The agency originally moved to consolidate the two matters for trial, later joined by the company and its members. The agency then withdrew the motion, and the consolidation was denied. The company and its members argued that consolidation was proper because there was unity of title, use, and physical contiguity among all of the parcels in question. The agency argued that the company and its members had filed for consolidation out of time, and that consolidation was inappropriate because separate tracts of land should be dealt with separately at trial.

The lower court considered a motion to consolidate even though made out of time, because it was an appropriate exercise of discretion and served the interests of justice. It then ruled against consolidation because of the different types of ownership over the parcels of land – one of the lots was owned by the limited liability company, while the other four were owned individually by the company's members. The lower court also found that these parcels lacked a unity of use that would merit consolidation of the actions.

On appeal, the Appellate Division noted that each of the parcels, while not owned in an identical way, shared some common ownership with the other parcels. While the present situation differed from previous case law in that percentage of ownership held by each individual was different, and because all of the disputed parcels were condemned in their entirety, the Court still found the case law supported construing "unity of ownership" in a flexible way. It further found that the lower court failed to completely analyze the ownerships of each parcel under the "substantially identical ownership" test as established by prior case law.

The limited liability company had no written operating agreement addressing its management. In the absence of this, the Court looked to provisions of the New Jersey's Limited Liability Company Act, which states that profits, losses, and other assets are to be allocated on the basis of the values of each member's contributions to the company. Additionally, members who own more than a 50% membership interest of the interest may control the company. Here, this was true of three of the individual owners, and the Court thus found that economic control and ownership of all of the parcels belonged to these three individual owners. Thus, a commonality of ownership existed across all of the disputed parcels.

As a result, the Court reversed and remanded the issue for further consideration of the ownership and management structure of the corporation.

Unity of the parcels' uses had to be established by the landowners by showing that the lots were constituent parts of a single economic unit. Here, the company and its members argued that the parcels were all used as a "family enterprise," and had a shared accounting department.

Tied to this idea, the Court held that the pivotal issue for the situation was that of "the highest and best use" of the lots. The limited liability company and its members asserted that the reasonable value of the property could not be found by separately valuing each individual parcel; instead the total value of the whole tract was the best representation of value and that was also how the agency planned to utilize the parcels. The Court, citing that a proposition that courts should be liberal in admitting evidence of market value, agreed with the whole tract methodology as being the "highest and best" use of the parcels. As the lower court might have been influenced by the unity of ownership issue on the point of unity of use, the Court also sent this issue for remand.

Comment: This item was reported by Ira Meislick of the New Jersey bar. Although most eminent domain cases necessarily deal only with local statutes and state Constitutional provisions, here we have a principle of interpretation that might be of great significance in the condemnation of family owned businesses or other entities that cooperate in the mutual use of separately owned properties.

Family politics and historical business considerations might lead to a relatively vague set of ownership relationships even though properties are unified in use, and this case gives the eminent domain defendants considerable latitude in rasing these issue in valuation disputes.

EMINENT DOMAIN; PROCEDURE; STATUTE OF LIMITATIONS; INVERSE CONDEMNATION: An action alleging a taking by way of inverse condemnation must be filed within six years from the date of accrual, which is either when the landowner became aware, or should have been aware, of the taking through due diligence, or when the owner was deprived of all reasonably beneficial use of its property. ***Raab v. Borough of Avalon, 392 N.J. Super. 499, 921 A.2d 470 (App. Div. 2007)***

The owners of certain beachfront property could not build anything because of destruction from a violent storm. The municipality then adopted a resolution to restore its shoreline. The property in question lay within the zone of restoration and the municipality resolved to acquire the land. The resolution provided that the owners should be justly compensated for the taking. The plan was to use a property-exchange program between the existing owners and the municipality for municipality-owned lots of equal or greater value if the private owner paid the difference.

There was evidence in the form of a letter establishing that the previous owner of the beachfront property had been aware that the property could not be built upon and had wished to participate in the land-exchange program. The previous owner's desired land-exchange was not acceptable to the municipality; therefore, no deal was made. After the present property owners had the land conveyed to them, street access was eliminated by way of another municipality ordinance. Later, the area was rezoned from residential use to public use. Later ordinances banned construction on the property as well.

The owners sent a letter to the municipality claiming that development had become impossible on the property. A later letter offered the property for sale to any willing buyer, including the municipality, based on the fair market value if a residence could be built on it; conversely, if the municipality did not want the property, the owners requested the property be rezoned for residential use. The municipality rejected this offer and the owners brought suit.

The Court framed the issue as determining what the appropriate limitation period was for the private land owners to bring an action challenging a taking of private property by a public entity, when the taking did not comply with governing statute's safeguard provisions. It held the taking at issue to constitute an inverse condemnation because the municipality physically occupied the property without judicial process. The aggrieved landowner thus had the burden to discover the property encroachment and to take timely action to recover compensation.

The lower court found that the owners' claims were time-barred. Since the owners were successors-in-interest to the original owners, the present owners were bound by a 1965 letter that displayed the then-owners' awareness of the municipality's intent to take the property. That is when the municipality took exclusive possession and built on the property to accomplish its express public purpose of restoring the shoreline. Therefore, the Court found that the doctrine of a "continuing wrong" could not be used by the new owners to extend the time for filing.

An action alleging a taking by inverse condemnation must be filed within six years from the date of the accrual, which is either the date the landowner became aware, or should have been aware of the taking through due diligence, or when the owner was deprived of all reasonably beneficial use of its property. Thus, the Appellate Division affirmed the lower court's grant of summary judgment on this issue, since the owners filed more than six years after the accrual date.

ENVIRONMENTAL LAW; LENDER LIABILITY: Bank agrees to pay nearly $1 million for environmental conditions at defunct borrower's facility. ***(not a decided case – report of settlement)***

HSBC Bank USA, N.A. agreed to pay $850,000 in fines and reimburse environmental agencies for response costs involving a facility that was abandoned by a borrower. The bank also agreed to implement an internal environmental awareness training program for its staff and to adopt revised workout procedures. This case highlights the risks that lenders face during workouts and foreclosure involving manufacturing facilities or contaminated property.

HSBC had extended a $4.1 million loan to Westwood Chemical Corp. After the borrower defaulted, HSBC established a lockbox and directed customers to forward payments to that account. A few months later, HSBC seized Westwood's operating funds and asked the company to prepare a plan for an orderly shutdown. As part of this request, Westwood requested approximately $60,000 to properly dispose of hazardous materials in drums, containers and wastewater tanks as well as raw materials and work in process. HSBC refused this request and also declined to follow the recommendations of its consultants to winterize the facility.

During the winter, pipes from the fire suppression system burst as well as many of the containers storing hazardous materials. The contents of the drums mixed with water when the weather warmed. At some point in early 2005, the local code enforcement officer became aware of the conditions and notified the New York State Department of Environmental Conservation (NYSDEC), which then referred the matter to EPA.

In the meantime, the trustee for the bankrupt debtor filed a motion under section 506(c) of the bankruptcy code seeking to subordinate the bank's lien. EPA, DEC and the town also filed administrative claims seeking reimbursement of their response costs. In the fall of 2006, HSBC arranged for the sale of the property for $3 million. Approximately $2.3 million of the sales price was used to reimburse some of the costs incurred by the regulatory agencies.

In its lawsuit against HSBC, the New York Attorney General asserted that HSBC was not entitled to the secured creditor exemption because it had become involved in the management of the facility when it seized the operating funds, refused to allow money to be used to properly dispose of the hazardous materials or otherwise enable the borrower to comply with its closure obligations, and failed to properly winterize the facility when it had assumed control of the building and constructive possession of the hazardous materials.

The attorney general also charged that the bank had an obligation to notify the NYSDEC of the conditions at the facility.

As part of the settlement, HSBC must implement a training program that will educate its employees on the environmental compliance obligations of companies facing financial difficulty and a lender's obligations in such circumstances. In particular, the training program must address the extent to which facilities shut down without an opportunity to perform appropriate wind-down and environmental compliance measures can present significant hazards. In addition, the training program must also review the applicability of state and federal laws disclosure obligations for persons having knowledge of the release or threat of release of hazardous substances.

Reporter's Comment: Perhaps the most interesting aspect of the HSBC case is the state's view that the bank had an obligation to notify the state about the presence of the drums and containers in the borrower's facility.

Lenders encounter their greatest risk of liability during post-foreclosure activities, and the HSBC case highlights the importance of a lender exercising extreme caution when winding down operations at a borrower's manufacturing facilities.

Many banks have become somewhat cavalier about environmental liability and have been accepting substandard Phase I ESA reports and otherwise diluting their environmental due diligence standards as part of a general decline in lending standards. They mistakenly believe that federal law has been amended to relieve them of most potential liability. Under the 1996 Asset Conservation, Lender Liability Deposit Insurance Act, also known as the Lender Liability Amendments, a lender may maintain business operations, wind down operations, take measures to preserve, protect and prepare the vessel or facility for sale or disposition, and even undertake response actions under section 107(d)(l) of CERCLA so long as the lender seeks to sell or re-lease (in the case of a sale/leaseback transaction) and complies with certain foreclosure requirements. But this doesn't absolve lenders from disclosure of environmental issues when disposing of the property or otherwise acting as a "good steward" when they control it, either through ownership or in post default activities.

Perhaps because of these developments, banks continue to find themselves subject to environmental issues because of the actions they took during workouts or following foreclosures. Many of these enforcement actions involve administrative orders or lawsuits that are quietly settled by governmental agencies. These situations have typically taken place when a borrower has gone out of business and the bank takes control of the facility in order to sell off the inventory, fixtures, machinery and equipment of the borrower subject to the bank's lien. The bank typically does not take title to the property because of fear that it will lose its exemption, but instead hires an auction house to conduct the sale of the property. Usually, there are barrels or drums of hazardous waste strewn about the facility and the equipment that is being auctioned off may even contain hazardous wastes. To avoid any suggestion that the bank or the auction had any control over hazardous wastes, the auction will often rope off the area where the drums or barrels are found. After the auction is conducted, the drums and barrels are then left in the abandoned facility. At some point, government authorities discover that there are abandoned drums at the facility and order the lender to pay for the removal of the materials.

Lenders should be aware that the definition of "release" under CERCLA includes abandonment of drums. Thus, a lender who has taken control of a facility to conduct an auction and leaves behind drums or equipment containing hazardous wastes could be deemed to have caused a threatened release of hazardous substances. EPA has consistently taken the position that such action constitutes abandonment of hazardous wastes (when the borrower is insolvent) and creates generator liability for the lender. As a result, financial institutions should consult with environmental counsel prior to taking possession of a former borrower's facility or conducting any auction at a manufacturing facility. It would also be advisable for lenders to retain an environmental consultant or environmental attorney to inspect the facility prior to taking control in order to evaluate the possible environmental liabilities that might be associated with the auction. The financial institution could have its environmental consultant or attorney perform a regulatory review of the facility to minimize the possibility that the lender could incur liability for releases of hazardous substances at that treatment or disposal facility.

The Reporter for this item was Larry Schnapf of the New Jersey bar, writing in his excellent periodical: "Environmental Journal."

FEDERAL INCOME TAX; LIENS: Although federal court cannot adjudicate claims by a private party against a state without the state's consent, it cannot adjudicate a tax lien dispute between the federal government and the state government. ***Hudson Savings Bank v. Austin, et al., 479 F.3d 102 (1st Cir. 2007)***

LANDLORD/TENANT; COMMERCIAL; RADIUS CLAUSE: Maryland high court reverses *Diamond Point* radius clause decision – where clause provides that tenant will not open or invest in a store within the identified radius that competes with business *then being operated* on target premises, there is no violation where tenant first goes dark on target premises, even though it otherwise remains liable on lease. ***Diamond Point Plaza Limited Partnership v. Wells Fargo Bank, 2007 Westlaw 2128169, not reported in A.2d (July 27, 2007)***

The lower appeals court decision in this case was reported as the DD for 10/4/06. Other DD's dealt with other aspects of this decision.

Wal Mart "inherited" a lease that contained a radius clause requiring that tenant not "during the term of the lease, own, operate, manage or have any financial interest in, any store or business located within a radius of seven miles...that is similar to that then being conducted upon the demised premises." Wal Mart (operating a Sam's Club) had managed to negotiate a clause in the lease, when it took the lease over, that it made no representation of continuous operation. Thus, it clearly had a right to "go dark" and it did so.

Wal Mart developed another store well within the seven mile radius and commenced operations there the day after closing at the Diamond Point location. Later, the Diamond Point shopping center collapsed, and the lenders sued Wal Mart for operating in breach of the radius clause, to the detriment of the center. The Diamond Point center had plenty of other problems, but the lower appeals court, reversing the trial court, found Wal Mart in breach of the radius clause and remanded for a damages determination. The lower appeals court found the radius clause ambiguous on the point of whether it covered operations when the target store was dark, and turned to other information to interpret the ambiguity.

The editor, in critiquing the case, quacked that there was no ambiguity at all. That the phrase "then being operated" was crystal clear in stating that there was no breach when the target store was not operating. The obvious purpose of the clause was to protect the Sam's Club in Diamond Point from dilution in percentage rents while it was operating. And the language clearly expressed that idea.

The Court of Appeals, likely totally unaware of the editor's quacks, nonetheless reached the same conclusion:

"[W]e agree with the conclusion of the Circuit Court that there is no ambiguity in the language of Article 4(H) and that its plain intent and meaning is to prohibit Sam's Club, while operating a store in the leased premises at Diamond Point Plaza, from simultaneously owning, managing, or operating another similar store within seven miles from that shopping center. A reasonably prudent person could reasonably find the language susceptible of the meaning ascribed to it by Wells Fargo only if the ending phrase were not part of it – if it simply prohibited Sam's Club, during the term of the lease, from owning, managing, or having a financial interest in a store or business located within a radius of seven miles from the Diamond Point Plaza shopping center. Then, the prohibition would be broad, clear, and absolute: any store or business would be precluded for the entire duration of the lease, regardless of whether a Sam's Club store at Diamond Point Plaza was operational.

That is not what the contract says, however. The prohibition is clearly limited. What is precluded is owning, managing, operating, or having a financial interest in a store or business, during the term of the lease, that is "similar to that then being conducted upon the demised premises." (Emphasis added). That necessarily requires that there be a store or business presently being conducted at Diamond Point Plaza and that the second store or business within the seven mile radius be similar to it. For the language to be reasonably susceptible to Wells Fargo's construction, that ending phrase, adding the requirement of similarity between the second store and that "then being conducted upon the demised premises," would have to be virtually ignored, which our jurisprudence does not allow. The Court of Special Appeals was wrong in declaring Article 4(H) ambiguous and in effectively vacating the partial summary judgment entered by the Circuit Court."

Comment 1: Has the Maryland Court of Appeals concluded that, at least in part, the Maryland Court of Special Appeals is not "reasonably prudent?" Maybe we can say that the conclusion is "ambiguous."

Comment 2: In general, both as to continuous operations clauses and radius protections, courts are becoming increasingly cautious in "reading in" more than the parties provide. And well they should be. These are concepts arising in complex economic relationship between sophisticated parties. It is up to the parties to say what they intend, and if they can't get it right, the courts need not bail them out. It's only money, after all.

Comment 3: What about the rest of that complicated dispute, which in general was a huge payday for the lenders and their counsel (assuming there is money to pay the judgments)? Some aspects, such as the claim relating to Sam's Club letting the premises to a movie production company, were not appealed. The judgment for diversion of rents and fraud was affirmed, on the basis that the rents were diverted after the borrower had in fact failed to pay the debt. Rents included already earned rents still in the rents fund. The court did not reach the issue of whether there was a default at the inception of the loan due to the fraud leading to the making of the loan.

As to the fraud claim, the court reached the obvious. But interesting, conclusion that fraud is the proximate cause of a loss from a failed loan if the lender would not have made the loan had the fraud not occurred, even if the fraudulent representations did not address the real causes of the later collapse of the deal.

LANDLORD/TENANT; HOLDOVER TENANTS; TRESPASS: Maryland high court holds that tenant's actions in leaving significant amount of hazardous materials on the premises does not constitute "trespass" because materials originally came onto the property lawfully. ***Hanna v. ARE Acquisitions, LLC, 2007 Westlaw 2376694 (8/22/07) (not yet approved for publication) No official citation available yet.***

The facts of this case are quite simple. The court's conclusion, in the editor's view, quite remarkable.

Tenant under a ten year lease defaulted in rent and landlord terminated the lease. Tenant was a biomedical research company that developed and tested vaccines. By the time of the termination demand, Tenant was in arrears over $400,000 on rent, but requested and received an extra two weeks to clear out of the premises.

Landlord, in its subsequent complaint, alleged that tenant "left the Premises in disarray, abandoning large quantities of unwanted hazardous waste and contaminated materials, including but not limited to biological agents, radioactive materials and dangerous chemicals at the Premises. Landlord was therefore delayed in showing or even entering the building until it arranged for a specialist company to remove the materials in a safe manner. This effectively barred landlord from coming on the Premises for two months. When landlord eventually sued the various principles of Tenant (which had gone bankrupt), it alleged tortious trespass, among other claims. Although the court doesn't say so, this may have been because these individuals were not contractually liable on the lease as guarantors. Landlord also sued two companies it apparently was prepared to argue were successor *alter egos* of tenant, also in trespass. Landlord sought compensatory and punitive damages.

By the time the case reached the Maryland Court of Appeals, the issue had been reduced to whether the complaint stated a cause of action in trespass. The intermediate appeals court had concluded that there was such a cause of action, but the Court of Appeals here reversed.

The lower court had relied upon the Restatement of Torts (Second) Sec. (Liability for Intentional Intrusions on Land):

"One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally . . .

(c) fails to remove from the land a thing which he is under a duty to remove."

Note that Section 161 of the Restatement expresses the notion that a trespass occurs from the continued presence of land of a "thing which the actor has tortiously placed there, whether or not the actor has the ability to remove it."

Prior Maryland authority, *Rosenblatt v. Exxon*, 642 A. 2d 180 (Md. 1994), involving contamination of the soil by a prior tenant, had stated in *dicta* that Section 158, as well as Section 161, required that the offending thing be placed on the land tortiously and that a thing that entered the land under the alleged trespasser's lawful possession does not constitute a trespass when left there after the possession ends. In such cases, the prior authority had held, there is no "duty to remove." The lower court had distinguished this *dicta* by noting that it arose in a case by a successor tenant against a prior tenant, and not by the landlord.

The Maryland high court disagreed, and viewed *Rosenblatt* as on target and applicable. Further, it agreed that Section 168(c), quoted above, applies only to items originally placed on the land tortiously, even though it doesn't say so and even though Section 161 specifically applies to such situations. Where the thing remains on the land after being lawfully placed there, the court maintained, there can be no trespass.

The opinion is based almost entirely on a discussion of the prior authority and contains no useful policy analysis as to why that prior case was right.

Comment 1: In the widely cited and discussed case of *Mangini v. Aerojet-General Corp.*, 31 Cal. Rptr. 2d 272 (Cal. 1996), Aerojet, a prior tenant on the land, had left the land heavily polluted when it departed. Aerojet reached a relatively cheap settlement with its landlord, but later the property passed into the hands of a new owner, which sued Aerojet for nuisance for the pollution to the property. There were many decisions, (one of which was the DIRT DD for 9/12/96), where the court held that, as the pollution possibly was abatable, it ought to be regarded as a continuing nuisance (in the form of a trespass) and not a permanent nuisance, and consequently the statute of limitations did not bar a claim.

Compare also: The Manor Enterprises, Inc. v. Vivid, Inc., 596 N.W.2d 828 (Wis. Ct. App. 1999). (the DIRT DD for 3/7/00) (When an easement holder abandons an easement, it has a duty to remove materials related to its carrying out of its easement rights, and failure to do so constitutes a continuing trespass.)

Comment 2: Friedman on Leases (Randolph edition) discusses in section 18.1 the issue of a tenant's liability for leaving stuff on the land. The decisions tend to favor the tenant when the items left were part of the original business deal of the parties, such as supports for billboards or structures that the parties contemplated the tenant would build. Aside from these exceptional circumstances, however, the cases cited are consistent with the notion that a tenant has an implied obligation to deliver the premises to the landlord. There are many cases discussed, but one interesting one is *San Nicolas v. United States,* 617 F. 2d 246 (Ct. Cl. 1980), which held that tenant was liable for leaving construction debris on the property, lightly covered but uncompacted, because it made best use of the land impossible.

The editor hasn't reviewed the *Friedman* cases with the trespass issue in mind. Perhaps all of these cases are based upon a contractual duty of the tenant, and never reached the trespass issue.

Comment 3: It is frequently stated that if a tenant refuses to leave the premises after the termination of the lease, the landlord has the option to declare the tenant to be a trespasser and to collect trespass damages. This point is discussed in Section 18.2 of *Friedman*, and every lawyer learns the rule in first year Property class. Why doesn't this doctrine apply in Maryland? The editor isn't really sure, unless in this case the landlord never contacted the tenant after it discovered the waste materials on the premises, and so there was not an independent volitional act by which the tenant demonstrated an intent to occupy the premises with its waste. The case doesn't make this distinction, and if it relies upon it, it probably should. Otherwise, the editor believes that Maryland is wildly out of step here.

LANDLORD/TENANT; INSURANCE; DEDUCTIBLES: Where a lease does not specify any particular insurance deductible amount, a court may look at a tenant's creditworthiness and other factors bearing upon the risk of loss or damage to which its landlord might be realistically exposed, and decide whether an insurance policy with the proper coverage limits is still satisfactory under the lease even if it has a high deductible amount. ***Boston Market Corporation v. Hack, (N.J. Super. App. Div. 2007)***

A retail lease required the tenant to maintain certain property and liability insurance. The property insurance was to be written for not less than the full insurable value of the leased premises. Liability insurance coverage limits were specified within the lease. Notably, the lease made no reference to permissible deductible amounts and generally did "not expressly prohibit insurance with a high deductible amount." It did require minimum amounts of $500,000 for property insurance and $1,000,000 for liability insurance.

The tenant, a national restaurant chain, carried a property insurance deductible of up to $1,000,000. The liability insurance policy was a blanket policy that covered all of the tenant's stores, and all of the stores of its much larger parent company. "Although there was a deductible the policy provided first-dollar coverage, pursuant to which [the carrier] would pay the claims fully on a first-dollar basis; [the tenant] would then reimburse [the insurance company] up to the deductible amount." In addition, the tenant had posted a $7 million letter of credit backing up its obligation to compensate the insurer for any claims it paid up to the deductible. Consequently, under the tenant's liability insurance policies, the landlord was "unaffected by the size of the deductible." By agreement between the tenant and its insurance company, the tenant issued a substantial letter of credit in favor of the insurance company to secure the tenant's deductible obligation to its insurance company.

Even though there was no loss at the property, the landlord sought to evict the tenant based upon the landlord's contention that the high deductibles under the tenant's insurance coverage "constituted self-insurance or no insurance at all." Both the lower court and the Appellate Division disagreed, finding that the tenant's insurance structure satisfied the requirements of the lease. The appeals court commented that it appeared that the landlord in fact was trying to escape a disadvantageous lease and dedicated much of the beginning of its opinion to a discussion of the landlord's duty of good faith and fair dealing, even though the final determination was no more than that the tenant had not breached the lease.

During the course of the dispute between the tenant and its landlord, the tenant first offered the indemnification agreement and then offered to obtain retroactive insurance coverage. (The property policy, unlike the liability policy, did not have the "first dollar" feature.) This was an attempt to placate the landlord. In testimony before the lower court, the landlord's insurance consultant opined that an attempt by the tenant "to reduce the property insurance deductible from one million dollars to $25,000 by way of an indemnification agreement did not in fact reduce the deductible on the policy. However, he agreed that, if in fact the policy deductible was reduced to $25,000, then [the tenant] would be in compliance with the lease." Notably, the landlord himself, disagreed with his own expert and "maintained that no deductible was allowed under the terms of the lease." In addition, the landlord was concerned that the tenant's "original million-dollar deductible was higher than any potential loss [he] would sustain if the property were totally destroyed, effectively making [him] relying on [his tenant] for repayment."

Ultimately, it appeared that the tenant did in fact achieve a $25,000 property insurance deductible policy, but by this time the landlord had already declared the lease in default.

As to the tenant's revisions to its insurance coverage, the landlord argued that "a tenant may not avoid termination of [its] lease by retroactively curing the breach." In that regard, the Court disagreed, pointing out that "the asserted breach [was] purely technical" and that "there was no material breach of the lease." Further, according to the Court, the tenant always had acceptable insurance coverage. It characterized the tenant's attempts to satisfy the landlord as being made "in apparent good faith, to accommodate the landlord's stated concern by lowering the deductible." To the Court, "[u]nder such totality of the circumstances, there was no material breach and no grounds for [the Court] to reverse the trial court's determination that [the tenant] had insurance within the meaning of the lease."

The Court, in reaching its conclusion that the tenant's coverage satisfied the lease's requirements, relied on a number of general legal principals and its sense as to whether the insurance program used by the tenant violated the reasonable expectations of the parties at the time that the lease was signed. It endorsed the lower court's approach when the lower court considered the tenant's "creditworthiness, post-termination efforts to cure the [alleged] breach, [the landlord's] failure to purchase insurance itself and seek reimbursement from [its tenant] for its costs, and [the landlord's] motivation in terminating the lease." As to each of those factors, the Court believed that the lower court properly considered them when determining whether the landlord was observing the "implied covenant of good faith and fair dealing, which exists in every contract." It pointed out that, under New Jersey law, when a party exercises a contract right, such as the right to terminate a lease, that party "breaches the duty of good faith and fair dealing if [it] exercises its discretionary authority arbitrarily, unreasonably, or capriciously, with the objective of preventing the other party from receiving its reasonably expected fruits under the contract." Here, the lower court observed "with justification, that 'the real motivation [was] to escape from a lease that [was] economically disadvantageous to [the] landlord and becoming more so over the years'." Further, the Court relied on the doctrine that "[l]anguage in a contract that may result in a forfeiture of one party's interest should be strictly construed."

According to the Court, "[t]he obvious purpose of the insurance provisions of the lease in this case [was] to require the tenant to obtain insurance naming the landlord as an additional insured to protect the landlord by eliminating or reducing the risk of financial loss to the landlord during the term of the lease." In that regard, it gave "deference" to the "feel" of the lower court when the lower court "thoughtfully analyzed [the tenant's] deductible of up to one million dollars and found, nevertheless, that the insurance program that included such a large deductible was 'not in and of itself violative of the lease provisions respecting insurance'." The lower court looked at the tenant's creditworthiness and other factors bearing upon the risk of a loss or damage to which the landlord might be realistically exposed as a result of the insurance program utilized by [the tenant]."

In conclusion, it agreed with the lower court's conclusion that "the insurance dispute was, at worse, technical and that it did not relate to a material breach that would justify termination of the lease."

Comment 1: The landlord bargained for insurance because, clearly, it felt a need for a third party with significant resources to be available as a source of funds should casualty strike. Presumably the landlord had the right to approve the identity of the insurer to be certain that the third party's pockets were deep enough. Just as clearly, the landlord was not satisfied with relying upon the tenant as its source of casualty coverage. Otherwise, there would have been no need to require insurance. If the tenant offered an insurance practice that significantly transferred the economic risk of casualty to the tenant, and away from a resourceful third party, one would assume that this would be inconsistent with the bargaining intent of the parties in drafting the insurance policy.

Now, is this case inconsistent with the rather obvious interpretation of the parties' intent set forth in the preceding paragraph? The editor's answer is: "yes."

As to the argument that the arrangement constituted deductible insurance, the editor also agrees that insurance with a deductible amount, even one not protected by "first dollar" guarantee, as was the case with the property insurance, would have satisfied the lease. The landlord was capable of bargaining for a stipulation that only no-deductible insurance was required. Failing to do so, the landlord ought to accept some deductible amount, since virtually all insurance policies have some deductibles, and, as the lease was silent on the point, it is appropriate to conclude that the parties anticipated that there would be a reasonable deductible.

As to liability coverage, the sole question is whether a million dollar deductible was acceptable, in conjunction with the first dollar coverage. Of course, as indicated, the court properly concluded that it was.

As to the property coverage, the question is whether a $25,000 is adequate. Again, the editor agrees with the court that it was. This was a gigantic tenant with significant assets, and in that context a $25,000 deductible is not a significant transfer of economic risk beyond that reasonably expected by the landlord.

Comment 2: Another interesting question, of course, is whether the tenant can "undo" the default by correcting the insurance coverage after the landlord has attempted to invoke default language and terminate the lease. New Jersey clearly applies good faith and fair dealing principles to the landlord's decision to view a default as material enough to terminate the lease, and the editor believes that most modern courts would do the same. This is not to say that the parties can't bargain for language that would make failure to achieve required insurance coverage an incurable event of default, but the language would have to be specific.

Comment 3: The editor does not disagree with the appeals court's decision. But the editor cautions that any evaluation of the acceptability of the deductible must begin with the proposition that the landlord should not be required to rely heavily on the creditworthiness of the tenant for its casualty coverage. We are not given all the details of the arrangement by which the landlord obtained insurance for its properties, but it is likely that there were various conditions and restrictions. Not all deductible insurance would satisfy the lease, and not even all deductible insurance with "first dollar coverage" would do so, depending upon what conditions and restrictions might apply.

Comment 4: In some future case, it might be that the tenant's indemnification of the insurer as to a large deductible amount might endanger the tenant's financial responsibility. The landlord then might argue that even though the landlord is protected as to the instant claim, it would suffer the long term deterioration of the tenant's ability to continue performance on the lease. The landlord would argue that requiring the tenant to buy insurance is in part reflecting the concern that the tenant ought to protective itself against ruinous unexpected losses.

LANDLORD TENANT; LANDLORD'S DUTIES; CERTIFICATE OF OCCUPANCY: Commercial lease is not rendered unenforceable because landlord has not obtained a certificate of occupancy, and tenant therefore is liable for rent when tenant occupies premises notwithstanding answer of such certificate. ***A & M Towing and Recovery, Inc. v. Guay, 923 A. 2d 628 (Conn. 2007)***

For some time, landlord had been attempting to obtain a certificate of occupancy on a certain building that it owned. The city had been unwilling to grant the certificate because of a zoning dispute with landlord concerning another building on the same parcel. The denial of the certificate had nothing to do with the noncompliance of the building in question with any building code requirements.

Believing that it would be able to resolve its problems with the city, Landlord orally leased the building to Tenant on a month to month basis. It did not tell Tenant of its problem with the City. Shortly thereafter, Tenant attempted to get a business license to operate on the premises and was frustrated because of the lack of the certificate of occupancy.

Landlord and Tenant then agreed that Tenant would continue to occupy the premises and Landlord would provide Tenant with repair work. Tenant argued that this agreement constituted a modification of the original agreement, and that the repair work constituted barter that substituted for its rent obligation, but the court found that there was insufficient evidence that the original month to month had been so modified. (Tenant apparently did pay rent in months in which it had no repair work from Landlord.)

After a while, the relationship with Landlord appeared to sour and Tenant got no further repair work from Landlord. About six months later, Tenant, still in occupancy, stopped paying rent. A year after that, Landlord succeeded in evicting tenant through a possession action and sued Tenant for the unpaid rent.

Tenant raised a series of defenses at trial and on appeal, and the Connecticut Supreme grumped that it seemed to be continually changing theories as time went on. Nevertheless, the Supreme Court elected to reach the Tenant's final issue, although it hadn't been raised below – the claim that the lease was illegal and against public policy and that therefore landlord could not collect rent because of the absence of a certificate of occupancy. There is no doubt that Connecticut law does provide that it is unlawful for a landlord to permit occupancy of a premises that has no certificate of occupancy.

Tenant cited a 1983 case in which residential tenants were able to muster a defense to rent on the basis of their landlord's failure to obtain a certificate of occupancy because of numerous code violations. The court, however, indicated that the public policy considerations were different for commercial premises, and even the precise nature of the required certificates of occupancy were different. It noted that the Connecticut Legislature had adopted residential landlord/tenant legislation providing numerous remedies, including rent withholding, for residential tenancies, and that none of these were available to commercial tenants. It also noted that a provision of Connecticut law that might have been read to preclude collection of rent for noncomplying buildings had been amended, providing now only for an administrative find for a landlord who violates the provision.

The court concluded that all the evidence suggested that there is no public policy in Connecticut against commercial landlords recovering rent if they have failed to secure a certificate of occupancy for the premises.

Although up to this point, it appeared that the court was moving to a definitive conclusion that commercial tenants will never be able to defend rent claims on the basis of the landlord's failure to obtain a certificate of occupancy, the opinion ended "not with a bang, but a whimper." The court noted that, in any event, the asserted problems leading to the denial of a certificate of occupancy in this case were not materially related to any habitability issues, much less health and safety issues, concerning the building that Tenants occupied. As noted, the problems related to another building on the premises, as to which Landlord was in ongoing negotiations with the city throughout the lease term. In fact, the city officials were fully aware of Tenant's occupancy and had done nothing to stop it in light of the apparent good faith negotiations over the problem.

Comment: The case arguably stands for the proposition that Connecticut has clearly rejected any notion that there is an implied warranty of habitability of any kind in commercial leases.

As a second level analysis, it arguably stands for the proposition that a commercial landlord can collect rent notwithstanding the absence of a certificate of occupancy.

But as a third level of analysis, one could argue that the court is saying nothing more than "no harm, no foul."

LANDLORD/TENANT; LANDLORD LIABILITY; LIABILITY FOR INJURIES TO TENANTS;

CRIMINAL ATTACKS: The simple act of leasing a mobile home space to persons who have known affiliations with juvenile gangs is not an act of negligence that will render a landlord liable for subsequent injuries caused by such persons on premises. ***Castaneda v. Olsher, 41 Cal. 4th 1205, 162 P. 3d 610 (Cal., 2007)***

Another tragic and all-too-often repeated story. The stark words of the court convey it well:

On the night of his injury, plaintiff [a seventeen year old boy] attended a party outside the mobile home park [where he lived with his grandmother]. Sometime after 1:00 or 2:00 a.m., he drove home with three friends. Plaintiff went inside his mobile home briefly to let his sister know they were there, while his friends waited in the car. A few minutes later, another car, with four young men in it, pulled up behind plaintiff's car. Around the same time, two young men came out of the mobile home across the street and, according to one of plaintiff's friends, Christina Sandoval, started "exchanging words and gang slurs" with the men in the second car. Sandoval recognized one of the men from the mobile home as Manuel Viloria and saw what she thought was a gun in his hand. One of the men in the second car yelled, "Westside Centro, Westside Centro," while the men from the mobile home called out, "Northside Centro." After a few minutes, as Sandoval and another friend started toward plaintiff's home, "shots were fired." Plaintiff, who had reemerged from his home to his front porch area, was hit in the back.

Viloria, the young man involved in the altercation whom witnesses described as holding a gun, was the son of the owner of the mobile home across the street from plaintiff's, and was known to management of the mobile home park to be "hanging out" there, although his mother, who was on the lease, did not live there.

Fortunately, Plaintiff did not die from his wound, but sued the mobile home park owners for his injuries on the claim that harboring a known gang member was an act of negligence that was the proximate cause of his injury. He presented as a witness his grandmother who had had a conversation with defendant's on-site manager, during which she complained about gang related vandalism and other gang activity within the park. The manager told her that another gang member was moving in "right across from you." When asked whether she could prevent this, the manager said she could not: she had talked to the owner, but he had told her, "Go ahead and rent to them. Their money is as good as yours," or something to that effect.

There was other evidence of gang activity annoying to other tenants at or around the mobile home from which the shot was fired, and lots of evidence of gang presence around the mobile home park in general. There had been two prior gunshot incidents. One involved a shot fired outside the park that entered the park. Another involved a young man attempting to hide a gun after a shooting incident outside the park. The landlord had taken steps to evict his family after he was arrested, and he never returned to the park after his arrest.

At the close of plaintiff's case, defendants moved for nonsuit, contending no duty was established and causation was unproven. Plaintiff argued Olsher had a duty "not to rent to [the Viloria's] in the first place," to "remove them once he began to get complaints from the tenants that they constituted an annoyance," or, failing that, to take additional security measures such as hiring guards. The trial court granted the nonsuit, but the Court of Appeals reversed, and this appeal ensued:

The California Supreme Court found for defendants and affirmed the granting of a nonsuit. On these facts, landlord did not have a duty to refrain from renting to the tenant in question or to evict her.

"Landlords, including mobile home park owners, ordinarily have no duty to reject prospective tenants they believe, or have reason to believe, are gang members. To recognize such a duty would tend to encourage arbitrary housing discrimination and would place landlords in the untenable situation of facing potential liability whichever choice they make about a prospective tenant. With regard to eviction, we agree that a residential tenant's behavior and known criminal associations may, in some circumstances, create such a high level of foreseeable danger to others that the landlord is obliged to take measures to remove the tenant from the premises or bear a portion of the legal responsibility for injuries the tenant subsequently causes. In the present case, however, the facts known to [the owner] did not make a violent gang confrontation involving these tenants so highly foreseeable as to justify imposition of a duty to undertake eviction proceedings."

The court acknowledged that a landlord in California "owes a tenant the duty, arising out of their special relationship, to take reasonable measures to secure areas under the landlord's control against foreseeable criminal acts of third parties." But the scope of that duty depends upon a number of factors, including the forseeability of the harm in question to the plaintiff in question and the burden of the measures that might be appropriate to protect against such harm. Other issues, such as moral culpability of defendant and general public policy are also relevant, but usually less significant.

The public policy considerations turned out to be quite significant here, as the court concluded that a high level of foreseeability of harm ought to be necessary to justify imposing on a landlord the duty to refuse to rent to a suspected gang member. If such a duty generally existed, the court stated: "The result in many cases would be arbitrary discrimination on the basis of race, ethnicity, family composition, dress and appearance, or reputation. All of these are, in at least some circumstances, illegal and against public policy and could themselves subject the landlord to liability [citations omitted]."

Interestingly, the court did not go on to conclude that refusing to rent to persons with known criminal records involving violence might not be within the landlord's scope of duty. It indicated simply that to go from knowledge of gang affiliations to a duty of inquiry about criminal background would be too burdensome on the landlord, cause delay and unfair treatment to many tenants, and might not result in much information about relevant criminal history, in light of the fact that many of the criminal records in question would be juvenile court records and not readily available to public inspection. This analysis leaves open the question as to whether a landlord who has knowledge of possible criminal background concerning a tenant has a duty to research further.

In fact, the evidence at the time of renting was sketchy as to whether the owner had "hard" evidence that he was renting to gang members, although his expressed attitude might be viewed as an effective rejection of any further inquiry into this question. ("Their money is as good as yours.") But the court concluded that in fact there is never a duty of inquiry arising from gang membership alone.

As to whether there was a duty to evict the gang members once they had started to harass the other tenants, the court concluded that the conduct complained of was insufficiently related to serious injury of the type that plaintiff suffered to justify such a draconian step. Perhaps the landlord might have hired security guards, but the court concluded that this precaution was unlikely to have prevented the rapidly escalating confrontation resulting in plaintiff's injury. There had been no specific evidence of gun violence associated with these juveniles at this location. Enhanced lighting, also, likely would have had no effect here.

Comment 1: If this sounds like the court is embracing a "sitting duck" rule – saying that landlords have no duty to protect their tenants against gang activities unless and until a tenant gets injured – you have the same sense as the editor. It is an unfortunate reality in our society that poor families often are given little alternative than to live in circumstances that expose them to a relatively high risk of crime, and those who offer them accommodation had very little duty to protect them from this risk.

Comment 2: The editor is no fan of solving social problems through tort liability, and so he must concur that liability ought to apply only in egregious cases. This one comes close for the editor, in light of the callous attitude allegedly expressed by the owner, but unfortunately such evidence often is generated conveniently when a high dollar insurance-backed claim is at stake, and may not be as reliable as one would like.

Comment 3: But the editor does believe that landlords ought to be permitted to refuse to rent to tenants on the basis of criminal backgrounds. Such proactive activity is an important safeguard to low income tenants. Whether or not there is a liability issue, landlords ought to be able to take the step to choose tenants who are least likely to be involved in criminal attacks or other offensive behavior toward their neighbors. To those who argues that this stigmatizes convicted criminals and increases the risk of recidivism, the editor responds that public policies against recidivism ought not be implemented by exposing poor tenants and their families to a high risk of thuggery.

Interesting, the issue is "live" at the moment at the Uniform Laws Commissioners deliberations. And ABA promoted statute was presented earlier this week that would have prohibited public housing authorities and other public landlords from denying housing to persons on the basis of their prior criminal records. Landlords would have had to go through an involved administrative determination (involving the expenditure of time and money that the public housing authorities can ill afford) to exclude convicted criminals. There is an obvious conflict between the ABA policy here and the "zero tolerance" policies that public housing tenants themselves believe is their best protection. The editor threw himself under this train, and the issue has been put over for a year, and indications are that NCCUSL will not adopt this aspect of the proposed legislation. But the story is interesting because it highlights the swirling countercurrents of policy here. Poor people have tough lives. So do ex cons. There is no easy answer.

LANDLORD/TENANT; LANDLORD LIABILITY; LIABILITY FOR INJURIES TO TENANTS: Virginia decides that there is no tort remedy for breaches of implied warranty as defined in Virginia version of the Uniform Residential Landlord/Tenant Act. ***Isbell v. Commercial Investment Assoc. Inc., 644 SE 2d 72 (Va. 2007)***, discussed under the heading: "Landlord/Tenant; Residential; Implied Warranty of Habitabillity; Tort Claims."

LANDLORD/TENANT; LANDLORD LIABILITY; WRONGFUL EVICTION: Where lease not lawfully terminated, landlord's changing locks and refusing the tenant a key amounts to a wrongful action, even where tenant leaves the place open to vandals with all locks removed. Landlord may change locks, but must give tenant a key. ***Hinton v. Sealander Brokerage Co., 917 A.2d 95 (D.C. 2007)***, discussed under the heading: "Landlord/Tenant; Landlord's Remedies; Eviction; Wrongful Eviction."

LANDLORD/TENANT; LANDLORD'S REMEDIES; EVICTION; WRONGFUL EVICTION: Where lease not lawfully terminated, landlord's changing locks and refusing the tenant a key amounts to a wrongful action, even where tenant leaves the place open to vandals with all locks removed. Landlord may change locks, but must give tenant a key. ***Hinton v. Sealander Brokerage Co., 917 A.2d 95 (D.C. 2007)***

Tenant sued her landlord for locking her out of her house before her lease ended and before she was able to remove all of her belongings. Landlord responded that it had changed the locks because it had appeared that the tenant had abandoned and damaged the property. Landlord countersued the tenant for full holdover rent throughout the entire time it had to keep the tenant's belongings in storage before she finally got them.

The trial court, which heard the witnesses and made judgments on the factual issues, entered judgment for the landlord. Therefore, the appeals court tended to accept Landlord's version of the story, as follows:

Tenant paid rent through September 30. Although Tenant claimed that she had notified landlord that she was leaving in September, Landlord denied this (and the trial court apparently agreed with Landlord). According to the Landlord, it got notice from a neighbor of the premises that it was "open and unsecured." Arriving on September 26, landlord discovered that "[i]t looked like someone had abandoned it, left it, and that somebody was ransacking. . . Windows were broken, doors had been torn off the hinges[;]. . . it looked like someone was trying to, you know, maliciously damage the place." Landlord identified that there were "many items" of personal property in the place "in various states of disarray." He discovered that, although he could lock the front door with a small hand lock, all the other locks had been removed, including on the back door and the front gate, and all the dead bolt locks. He submitted photos of the property as he found it as exhibits at the trial.

The landlord brought in a locksmith on September 29th, secured the premises, and left a note to the tenant on the door containing a phone number for the tenant to call in order to gain entry for removal of her belongings. The landlord also left a message for tenant with what it believed to be her new landlord, but had no other way to contact Tenant. The parties thereafter were in contact, with Landlord offering from time to time to accompany Tenant and Tenant insisting that she had a right to a key so she could remove her belongings at her own convenience.

Despite all of this, the D.C. Court of Appeals reversed the judgment for Landlord, holding that while most of the landlord's actions were reasonable under the circumstances, it is unlawful to terminate possession before the end of the term, and there is no "self help" eviction remedy in D.C. Tenant admittedly had paid rent through September, and the proper method for terminating a residential lease for breach, such as for waste, is through a court action.

The court held that D.C. Municipal Code imposes a duty on landlord to maintain the property as locked and secure. Thus, the landlord was within its rights in changing the locks. The lease indicated that vacating the premises was an event of default, but required a 30 day notice before Landlord could terminate for such a breach. Nonetheless, the court held that Landlord's duty under the municipal code "trumped" the lease, and consequently Landlord had the right to change the locks and did not by doing so "evict" the tenant.

But when Tenant responded to the lock changing by asserting vociferously that she still had the right to a key through the end of the lease term, the court ruled, Landlord had no choice but to give her a key, as she had the right to possession. Fortunately for Landlord, the court ruled that Tenant's actions and statements established beyond doubt that she intended that the lease would end on September 30. Therefore, landlord's liability for wrongful withholding of possession amounted only to September 29, when Tenant demanded a key, and September 30.

Landlord counterclaimed for the cost of storage of Tenant's goods, first on the premises and later in a storage locker. Note that the court interpreted Tenant's conduct as terminating the lease as of October 1, so from then on her goods were on Landlord's premises. Thus she had no right to a key after October 1. The trial court had awarded Landlord $700 per month for the ten months the goods remained on the premises, plus storage costs thereafter.

The court held that, although Landlord had the right to take possession of the premises, and Tenant, by leaving her goods there after September 30, was trespassing, Landlord was subject to the "avoidable consequences" doctrine in the determination of its damages. Although the court appears to view this as separate from the concept of "mitigation of damages" where the landlord lawfully terminates a lease, the court later used the mitigation term to describe the doctrine. The court reversed the $7000 judgment to Landlord and remanded to the trial court to ascertain whether Landlord's decision to leave the goods on the premises and treat it as "unrentable" for seven months was reasonable, or whether Landlord ought to have removed the goods to storage on or off premises so that it could relet the place sooner.

The court did uphold a damages award for the $800 cost of removing and storing the goods – as the landlord ultimately did. It is likely that this far exceeds any wrongful eviction claim the tenant has against landlord, and also likely that it pales in comparison to the landlord's attorney's fees and further likely that none of the award is collectible.

Comment 1: The tenant appeared *in pro per* and the court suggested that the trial court assist Tenant in finding some legal advice, perhaps through a law school internship program.

Comment 2: Given the well established rule in D.C. against "self help" eviction, the case is probably right. It seemed clear, at least when Tenant started kicking and screaming, that she hadn't abandoned. Landlord is extremely fortunate that the court construed the lease as having terminated at the end of September in any event. Otherwise, Tenant's damages claim could have been much greater.

Comment 3: Indeed, this case was a grand waste of time and money. Had Tenant retained legal representation, her lawyer might have talked some sense into her. But note that the outcome here is that, when a tenant is acting obstinate, such as here, Landlord is expected to mitigate its damages by taking further steps to remove and store Tenant's goods, even though it is highly unlikely that any such costs in fact represent a collectible claim.

LANDLORD/TENANT; LANDLORD'S REMEDIES; DAMAGES; ACCELERATED RENT: Massachusetts high court upholds rent acceleration clause. ***Cummings Properties, LLC v. National Communications Corp., 869 NE.2d 617 (Mass 2007)***

The lease provided that the parties stipulated that nonpayment by the tenant of a number of charges provided for under the lease, including nonpayment of rent, would be a "significant breach of the lease," and that "payment of rent in monthly installments is for the sole benefit of [Tenant]." The lease went on to say that in the event of Tenant's uncured default in one of these payments "The entire balance of rent which is due [under the lease] shall become immediately due and payable as liquidated damages."

Based upon earlier authority in Massachusetts, the lower courts had treated the clause as an unenforceable penalty because it could have been triggered by a relatively insignificant failure to pay a charge (other than rent) and thus was not proportionate to the potential damage to be suffered by landlord. But the Supreme Court here elected to reverse the prior authority upon which these decisions were based. The court stated that it still might not grant enforcement of an acceleration clause in the event of an insignificant default, but that nonpayment of rent certainly is significant and it didn't wish to deprive the landlord of the benefit of the clause in such a case. It commented that the language of the lease could be interpreted to apply only to truly significant types of nonpayment, even though all nonpayments were stipulated in the lease language to be "significant."

Interestingly, the court commented that an increasing number of courts are electing to leave sophisticated parties where their lease takes them, rather than to undertake unnecessarily protective penalty analysis, citing cases in Kansas, New York, the 7th Circuit, which in turn listed other jurisdictions following such an approach.

The trial court already had awarded damages based upon the landlord's mitigation duty that in fact amounted almost to the award that would be made by the liquidated damages computation – only 6% short. This appeal was about that 6%, but of course it was much more about the ability of a landlord to insert such an *in terrorrum* clause in the lease, where the world falls in on the tenant if it tries to get tough on the lease payments.

Comment 1: Although the publishers of the excellent Commercial Lease Law Insider describe this case as "maverick," there certainly have been a number of cases upholding commercial lease acceleration clauses of this type over the years. In fact, the editor was moved to do a state by state summary of the cases recently in the Randolph Edition of Friedman on Leases. They are set forth in a lengthy footnote 162 in Section 5.3 of the latest version of the Treatise.

Some of these cases prohibit landlord from both collecting accelerated rent and retaking possession of the premises. Others require that if the landlord does retake possession, landlord must pay over to tenant any proceeds received from such reletting. The Massachusetts court does not appear to deal with either of these variations. The landlord was permitted to terminate the tenant's possession *and* to collect accelerated rent. It apparently did collect some rent during the balance of the term (reflected in the alternate judgment by the trial court based upon mitigation principles), but was not required to pay over these proceeds by the court. At the end of the opinion, however, the court says that the tenant did not properly raise certain mitigation arguments, and therefore it cannot be said that a future Massachusetts court will not require the landlord to disgorge later earned rents.

Comment 2: As the editor has commented before, these kinds of provisions certainly tilt the scales in favor of the landlord, even if the landlord does have to pay back collected rent later. The landlord gets the money up front, and the tenant must chase the landlord to get money in the future. The real advantage to the landlord is that it gets an immediate judgment for the whole rent without waiting to see whether it will be able to relet. As mentioned, this is such a significant threat to the tenant that it certainly will deter the tenant from attempting to play too much "hardball" with the rent. See the editor's discussion in the DD for 7/3/96, *Aurora Business Park Associates v. Albert* 548 N.W.2d 153 (Iowa 1996) and the DD for 01/23/04, *Onal v. BP Amoco Corp.*, 2003 WL 21887770 (E.D. Pa. 2003).

LANDLORD/TENANT; RESIDENTIAL; IMPLIED WARRANTY OF HABITABILITY; TORT CLAIMS: Virginia decides that there is no tort remedy for breaches of implied warranty as defined in Virginia version of the Uniform Residential Landlord/Tenant Act. ***Isbell v. Commercial Investment Assoc. Inc., 644 SE 2d 72 (Va. 2007)***

Tenant allegedly suffered injuries as a consequence of stairs within her living unit that were in poor repair. Tenant sued landlord in tort for personal injuries, alleging that the landlord had a duty to maintain the premises in good repair during the term of the tenancy, and that the landlord's failure to so maintain the premises led to the injury.

As the court noted, the landlord has no duty at common law to maintain a premises in good repair after letting. But the tenant alleged that this duty arose as a consequence of Virginia's adoption of the Uniform Residential Landlord/Tenant Act. This Act imposes on the landlord many responsibilities with respect to maintenance of the premises – a statutory version of the common law "implied warranty of habitability" adopted in some other states.

The court stated that there is nothing in the Virginia legislation expressly giving a tort remedy for personal injuries as a consequence of a landlord's failure to maintain a residential premises. It concluded that there was no basis for inferring an intent on the part of the legislature that such a remedy ought to exist.

Particularly at issue were the provisions of Virginia Code Sec. 55-248.40, which provides that damages were available in connection with an award of an injunction. Tenant argued that the statutory recognition of damages here demonstrated that the legislature did see fit to permit personal injury damages as a consequence of breaches of the implied warranty. The court instead read the section to permit only contractual damages for breach of the implied contract remedies made available to the tenant under the Act. Thus, if the premises are in disrepair, the tenant can obtain damages for breach of contract for an unsatisfactory premises, but cannot obtain personal injury damages. The court noted also that the tenant in this case had not sought an injunction anyway, since it had already moved out.

Comment 1: Friedman on Leases (Randolph edition) discusses the issue in Section 10:1.6. The editor acknowledges that the editing in that section is unsatisfactory and he'll clean it up in the next supplement, due out around Thanksgiving. But the editor also has included at the end of chapter 10 in Friedman a state by state analysis on various implied warranty issues, including the availability of tort damages. Again, this appendix will be reworked as a consequence of this decision and a few others.

Comment 2: The implied warranty of habitability is a non-waivable duty arising as a consequence of a landlord entering into a landlord-tenant relationship. The reasons for refashioning this relationship go beyond ordinary tort theory, and it is not surprising that courts would follow to their logical end the logical ramifications of the duty established under the implied warranty.

Comment 3: The case also is significant because the Uniform Act has been enacted in many states – as many as 30, the editor believes, and consequently the impact of this construction of the Act is significant. In states where the courts had already changed the common law to impose an implied warranty duty on landlord, a court might be more likely to find in such duty a tort duty as well.

LANDLORD/TENANT; TENANT RIGHTS; TENANT PROPERTY: Where lease not lawfully terminated, landlord's changing locks and refusing the tenant a key amounts to a wrongful action, even where tenant leaves the place open to vandals with all locks removed, if tenant's leaving of her own property on premises indicates that, although tenant has vacated, she has not abandoned. After termination of lease, however, landlord may control tenant's access, although giving reasonable access opportunity to regain personal property. ***Hinton v. Sealander Brokerage Co., 917 A.2d 95 (D.C. 2007)***, discussed under the heading: "Landlord/Tenant; Landlord's Remedies; Eviction; Wrongful Eviction."

LANDLORD/TENANT; TENANT OPTIONS TO PURCHASE; FIRST REFUSAL: A probate planning exchange of property, structured as a for value exchange, in which grandchildren of principles of LLC landlord/optionor trade their interests in other property for interests in property owned by LLC, does not trigger right of first refusal held by tenant of LLC in the property in which grandchildren have acquired their interest, but the refusal right is not destroyed and remains applicable to land in hands of grandchildren. ***Hartzheim v. Valley Land & Cattle Co., 153 Cal. App. 4th 383, 62 Cal Rptr. 3d 815 (Cal. App. 6 Dist., 2007),*** discussed under the heading: "Options; First Refusal Rights."

LANDLORD/TENANT; TERMINATION; LIQUOR LICENSE; BANKRUPTCY: Whether, for bankruptcy purposes, a liquor license is property of the state depends on the state law characterization of the interest as subject to reach by judgment creditors. ***Aboboud v. The Ground Round, Inc., (In re The Ground Round, Inc.) 482 F.3d 15 (1st Cir. 2007).***

Lessor partners leased to a Howard Johnson's for ten years with six five year renewals. Shortly thereafter, assignee Ground Round succeeded to Howard Johnson's. Shortly after that, the lessor partners obtained a liquor license for the premises and transferred title to the license to The Ground Round. This, the court says, was "contemplated" (whatever that means) by an addendum to the initial lease providing that:

"[A]t the termination of the Lease, Lessee shall, in consideration of this Lease and One ($1) Dollar transfer such liquor license to Lessor free of all claims or violations."

Later, while still operating under an extension of the lease, The Ground Round declared bankruptcy and rejected the lease, claiming the liquor license as property of the estate. The partnership brought an adversary action against The Ground Round, seeking specific performance of the lease provision. The bankruptcy court and the BAP granted such relief to the lessors, and lessee appealed to the First Circuit.

Held: *Affirmed.* Although it's a close call, and might be different under the amended version of Pennsylvania statutes, the Landlord can enforce language of this type.

The court noted that the landlord could not lease the license to the tenant because of the restrictions of Pennsylvania law, and that what it did was the best attempt to structure a deal that accomplished the same thing. Had the license have been part of the lease, then the license would have passed back to the landlord when the tenant rejected the lease. (Of course, local government would have to approve the landlord's actually using the license.)

Tenant first argues that, at the time the lease was executed, a liquor license was considered "a personal privilege" and not "property." But the court held that the Bankruptcy Code Section 541(a) would view the licenses as "property" regardless of the state law characterization, since it was transferrable and valuable. The fact that a government agency must approve the transfer does not prevent it from meeting the test.

The court then noted that a bankruptcy estate cannot succeed to greater rights than those held by the debtor prior to bankruptcy. The debtor's interest in the liquor license was subject to the "transfer back" requirement in the lease.

The Ground Round argued, however, that allowing specific performance here would undercut the rejection power. Here, the court acknowledged "remarkable confusion" in the case law. It sided with cases and commentators that hold that a specific performance right to regain property following lease rejection is not inconsistent with the rejection right. It admitted that the Code does not specifically address the problem. In a remarkable phrase, the court commented that "we see no need here to attempt an overall solution, a bright-line solution may be a bad answer." [That's your bankruptcy judges for you.]

The court said that the partnership lessor's interest in the liquor license in Pennsylvania is "pretty close to that of a lessor," even though it technically could not enter into a lease of the right. Tenant insisted that to in fact give the landlord treatment analogous to that of a lessor was inconsistent with public policy because it was tantamount to recognizing an unlawful contract. This failed to persuade the court, both because it really wasn't clear that the contract in question was unlawful or that, if it was, the tenant would have had any interest in the lease in the first place.

Tenant Ground Round went on to argue that the Bankruptcy Code itself blocked the return of the license because the right to such return was a "claim" that was discharged in the tenant's bankruptcy. A "claim" includes a "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment . . . ." But the court held it doesn't matter whether the right to have the license returned is a "claim," because the concept is only relevant in determining whether the claimant shares in the distribution of the estate, and lessor partnership did not attempt to make a claim against the estate for the loss of the license.

Here's where things get tricky. Tenant Ground Round went on to argue that, although there was no claim against the estate, giving the valuable liquor license to the landlord would interfere with the rights of creditors under Section 544 (a)(1), which makes the Trustee a "hypothetical lien creditor." Under Pennsylvania law as of the time of the case, a creditor could attach a lien to a liquor license held by a debtor, although this was not possible under Pennsylvania law at the time the lease was executed. The court said that to make the Pennsylvania law retroactive, although this is the usual approach, would "undermine reasonable expectations" and that it surmised that that state's courts would not view the license as lienable here.

Although, still, someone might have loaned money to The Ground Round post amendment, believing that the license was part of the available assets, the court concluded that this didn't happen here, so there was not need to speculate about such eventuality. Substantial justice was reached when the landlord, which structured the deal so as to retain the liquor license as Pennsylvania law then regarded it, gets the license back.

Comment 1: The real benefit of the case, of course, is getting a read on how these things will be treated in bankruptcy. Of course, anyone interested in the issue is going to have to read the cases and commentators on both sides of the question of whether recognition of "rights of return" in leases is inconsistent with the rejection right. Even when it is not inconsistent, this case instructs that if the property is lienable in the hands of the tenant, it apparently will not be returned.

Comment 2: Although the court comments that there is no third party creditor who specifically relied upon the property being lienable, the editor believes that, if the statute had provided that the license was lienable, it became part of the estate. It seems odd for the court to interpret state law on the basis of the equities as it perceived them. But that must be part of the avoidance of "bright line solutions."

LANDOWNER LIABILITY; "FREQUENT TRESPASS DOCTRINE:" Railroad company and park district did not owe a duty of care under the frequent trespass doctrine where a young child was struck by a train while crossing railroad tracks bordering a city park when there was no evidence that conditions exposed children to an unusual risk of injury or that there was a regular or worn path where the accident occurred. ***Vega v. Northeast Illinois Regional Commuter R.R. Corp., 863 N.E.2d 733 (Ill. App. Ct. 2007).***

Vega was hit and injured by a train on July 26, 2000 after reaching the track by sidestepping a fence that partly blocked the park area from the railroad track. Plaintiff brought suit claiming that Northeast Illinois Regional Commuter Railroad Corp. ("Metra") was "negligent in failing to fence or otherwise barricade adequately its tracks and right of way, failing to erect signs or warn pedestrians of the dangers of crossing its tracks and right-of-way and failing to keep a proper lookout," and that the Chicago Park District ("Park") was negligent as owner of the park.

At trial, limited evidence was presented regarding the use of the path to the tracks and the ownership of the fence as between Metra and Park, and the trial court dismissed the complaint finding neither entity breached a legal duty owed to Vega. Vega appealed. The appeals court provided an extensive review of both Illinois railroad negligence law and the duty owed by landowners to trespassers.

The court concluded that the key facts alleged when invoking the frequent trespass doctrine in a railroad-accident case include the existence of a "well-worn" path, evidence of a constant infringement on the tracks by pedestrians accustomed to crossing the tracks, and evidence that Metra or the Park recognized and tolerated the situation. The court determined that the required frequency of use had not been alleged or demonstrated, because only limited anecdotal evidence about ownership of the fence had been provided and no evidence of a regular crossing or path had been presented, and the parties therefore did not owe Vega a duty. Judgment affirmed.

LIENS; DEMOLITION LIENS: Where a municipality fails to strictly comply with statutory notice provisions at every stage of a demolition proceeding, it is not entitled to impose a demolition lien on the affected property. ***21-23 Seidler Associates, L.L.C. v. City of Jersey City, 391 N.J. Super. 917 A.2d 808 (App. Div. 2007)***, discussed under the heading: "Municipal Corporations; Demolition Liens."

MARITAL PROPERTY; TENANCY BY ENTIRETIES; FRAUDULENT CONVEYANCE: A debtor spouse's interest in a property held as a tenancy by the entirety has value to that debtor spouse's creditors for the purpose of claiming a fraudulent conveyance, although such creditor's rights are wholly defeasible should the nondebtor spouse survive the debtor spouse. ***Alma Mary Innis v. George E. Robertson, 854 N.E.2d 105 (Mass. Ct. App. 2006).***

Robertson and Innis each owned a one-half interest in a real estate development company, Hopedale Development. Robertson acquired Innis' interest for a promissory note of $900,000. After Innis' death in 1989, Innis' wife ("Plaintiff") sued Robertson for both nonpayment of the note and fraud in the acquisition of Innis' interest in Hopedale. During the pendency of that case, Robertson and his wife engaged in a series of real estate transactions in which they conveyed four properties owned by them as tenants in the entirety to either Robertson's wife individually or a family realty trust created for that transfer. The consideration recited in each deed was less than one hundred dollars. In December, 1991 Plaintiff prevailed in the 1989 suit, and after the transfers pursuant to the settlement agreement did not produce proceeds sufficient to satisfy the judgment debt, Plaintiff commenced this action in 1997 to set aside the above-mentioned conveyances.

The trial court concluded that the conveyances were indeed fraudulent and that Plaintiff was authorized to reach and apply the assets in question to satisfy the judgment debt. The Appeals Court of Massachusetts affirmed.

The defendants argued that there was no fraud on creditors as a result of the transfers because, even prior to the transfers, property held by tenancy by the entireties was immune from the reach of the plaintiff's potential judgment. But the court noted that, in Massachusetts, that fact that real property is owned by the entirety does not mean that a debtor spouse's interest has no value to his or her creditors.

Acknowledging the evolution of the tenancy by the entirety in the modern age, the court noted that while "either spouse may convey or encumber his or her interest in property held as tenants by the entirety … the right of survivorship of the nondebtor spouse is 'indestructible'." But where the property is not the principal residence of the nondebtor spouse, a judgment creditor still is free to seize the debtor spouse's interest, subject to dispossession should the nondebtor spouse survive the debtor. If it is the principal residence at stake, as was the case for one of Robertson's four conveyances, such a creditor is precluded from seizing the property but still has a right to the debtor spouse's interest, which will ripen into ownership should the debtor survive the nondebtor spouse.

Under these circumstances, the conveyance of these assets had the effect of potentially moving these assets out of reach of the plaintiff. Under the relevant statute, this made such conveyance fraudulent.

Comment 1: Note that different states view tenancies by the entireties differently. In the majority of the states, a tenancy by the entireties is completely "slippery" – a creditor of an individual spouse has no ability to attach or execute upon any interest in the property, as the law envisions the property as belonging to the marital "entirety". Even the survivorship expectation of the debtor spouse cannot be attached, because until the death of the other spouse, such debtor spouse has no interest that can be attached. The judgment creditor is left simply with the right to record its judgment lien and hope that, at some future time, the debtor will pass into sole title of an interest in the property due to death of the other spouse or divorce.

In these jurisdictions, one would assume that the spouses themselves could encumber the property or transfer the property and such activities would "prime" any judgment. Of course, the proceeds of any transactions in the property might be within the reach of the creditor to the extent that they constitute the sole property of the debtor spouse.

Other jurisdictions recognize that there is a potential interest in a tenancy by the entireties available to creditors or others, but they differ as to the details. No one approach has any substantial number of adherents.

Comment 2: Note that in a "slippery theory" jurisdiction, a transfer by a spouse of property in which the spouse does have an interest into an entireties estate, at a time when the spouse is insolvent, or with the intent to avoid creditors, might be a fraudulent conveyance.

MECHANIC'S LIENS; **EASEMENTS:** A mechanic's lien for work performed on easement property may not attach to the principle property of the dominant estate unless the work was performed in connection with improvements to the principle property. ***Matanky Realty Group v. Katris, 856 N.E.2d 579 (Ill.App. 1 Dist. 2006)***.

In 1984, Defendant's purchased an outlot from the owner of an adjacent shopping center and were granted an appurtenant easement for use of the shopping center parking lot for purposes of ingress, egress and parking. The easement specified that Defendants were obligated to pay 5.8% of the cost of reasonable and necessary maintenance and repair of the parking lot.

In May of 2005, Plaintiff, the property manager hired by the owner of the shopping center, sent Defendants an invoice for ten years worth of maintenance and repairs to the parking lot, claiming Defendants had failed to respond to monthly invoices that had been sent by Plaintiff over the past ten years. In June of 2005, after Defendants had failed to respond to the most recent invoice, Plaintiff recorded a mechanic's lien attaching to both the easement property and the Defendants' outlot.

Defendants filed a motion to dismiss Plaintiff's lien on the outlot property, arguing that, since the work concerned was not performed on Defendants' property, the lien could not properly attach to the outlot. The trial court granted Defendants' motion and subsequently granted Defendants' motion to release the lien in accordance with its judgment. Plaintiff appealed.

The Appellate Court reviewed the grant of Defendants' motion *de novo* and, noting that this was an apparent matter of first impression in Illinois, affirmed. In evaluating the proper scope of the lien in question, the Court first noted that the basis for mechanic's liens is entirely statutory and thus, a contractor must strictly comply with the terms of the statute in order to obtain relief thereunder. Citing the statute governing mechanic's liens, the Court noted the definition of a contractor under the Act as "[a]ny person who shall by any contract…, express or implied, … with the owner of a lot or tract of land, or with whom the owner has authorized or knowingly permitted to contract, to improve the lot or tract of land." *Id*. at 583 (quoting 770 ILCS 60/1 (West 2004)). Accordingly, the Court found that, as a threshold issue, Plaintiff must demonstrate that Defendants were "owners of the lot or tract of land" on which the work was performed in order for the lien to attach to Defendants' property.

The Court recognized that ownership in the context of the statute was broader than the simple fee interest and could include other interests in land such as beneficiary interests in land under a trust and leasehold interests. Defendants' property interests in the easement property, however, were limited to the right of use and did not include any cognizable ownership interest in that property. As Defendants were not the owners of the easement property, the lien could not attach to their property under the terms of the statute.

Plaintiff argued that attachment to Defendants' outlot was nonetheless proper, as Plaintiff had been hired by the owner of the easement property, and the work performed benefitted Defendants' dominant estate. Again noting Defendants' lack of ownership interest in the easement property, the Court found that "a contractor may obtain a lien only 'upon the whole of such lot or tract of land and upon adjoining or adjacent lots or tracts of land of [the owner of the tract or lot on which the work was performed']." *Id*. At 583 (quoting 770 ILCS 60/1 (West 2004)). As the owners of the easement property did not own Defendants' outlot, the attachment of the outlot was improper as a matter of law.

The Court distinguished *Fairfax v. Ramirez*, 133 Idaho 72, 982 P.2d 375 (1999), in which the Idaho Supreme Court held that a mechanic's lien for work performed on an easement road leading to the principle property could attach to the principle property even if said property was owned by someone other than the owner of the easement property. In that case, the work at issue was found to be "essential preparatory work for…requested repairs to the principle property." *Matanky* at 584. Here, the Court found that, while the improvements to the easement property benefitted Defendants, they were not sufficiently related to the Defendants' principle property to merit attachment of the lien to that property. Again citing the principle of strict statutory construction, the Court declined to extend *Fairfax* to the case before it.

Comment 1: A nice question, and one that is likely to arise under the wording of most mechanic's liens statutes. In fact, it likely would be a question of first impression in most jurisdictions.

What about the flip side – the dominant owner contracts for work on easement property. Should the lien attach to the dominant estate in this case? The editor thinks that most statutes define the estate broadly enough to permit such attachment, and it is proper.

Comment 2: The editor concludes that this is not the sort of extension of the mechanic's lien statute that courts ought to create if the legislature has not been specific. Likely the drafters of the legislation originally creating the mechanic's lien remedy in Illinois did not have this situation in mind.

In the editor's experience, those backing mechanic's lien remedies (big contractors and materials suppliers hiding behind "fronts" of overall-clad carpenters and brick mason subcontractors) have plenty of power in most state legislatures. They don't need the courts to bail them out, and, as this remedy does not exist at common law, it would be imprudent of courts to do so.

Note, however, that landlords frequently discover that the mechanic's lien remedy does reach their fee interest when the lease requires tenant to undertake improvements and repairs and then the tenants stiff the contractor.

MORTGAGES; ACCELERATION; WAIVER: Extended period of acceptance of late payments will not establish waiver of acceleration where loan documents contain "anti-waiver" clause. ***Buckeye Retirement System, L.L.C. v. Walling, 2006-Ohio-7059, 2006 Westlaw 3849863 (Ohio App. 12/26/07) (slip opinion – may be unpublished) No official citation available yet.***

In 1991, Borrowers borrowed $60,000 from Lender and executed a promissory note and mortgage deed on their residence. Monthly payments on the loan were $560.00. Many of the payments from 1991 to 1998 were sent late, and Appellants would periodically combine payments in order to make the loan current. For example, on May 12, 1997, Appellants paid $1,176.00, which represented two monthly payments, and on July 10, 1997, they paid $3,164.00, which represented five monthly payments. The Bank regularly assessed late charges for Borrowers' untimely payments.

Borrowers did not make any payments on the loan in the months of November and December of 1997, and January and February of 1998. On February 20, 1998, the Lender sent them a letter notifying them that they were in default and that the loan was being accelerated. The Lender demanded payment of the entire outstanding balance of the loan by March 7, 1998. The letter was signed by a vice-president of the Lender. Borrowers responded to the letter by sending a letter to the Lender along with a check for $2,940.00, which represented five monthly payments and late charges. The letter stated that Borrowers were not able to pay off the outstanding balance of the loan. The letter also stated that the Lender, "may endorse and negotiate that check only with the understanding that such endorsement, presentment and negotiation removes the loan from default status." The letter also included a proposal for making current and future payments.

The Lender didn't cash the check. It referred the matter to counsel.

The next month, borrowers sent in another check for that month's payment, subject to a similar restriction. The Lender held that check as well.

In April of 1998, the Lender's computer sent a demand notice for all payments and penalties to date. In response to that notice, Borrowers sent a check for the entire overdue amount plus penalties, and the Lender's automatic system cashed that check. Thus, counting the two checks sent in with the restriction that acceleration be cured as a condition of payment, the Borrowers had overpaid the loan by several months.

The Borrowers failed to make the next two scheduled payments. (Remember that their position is that they had already made these payments and the Lender was holding the money.) The Lender filed foreclosure without further notice. The dispute here is over the validity of the foreclosure. Borrower argued that it had made all late payments and that Lender had no right to accelerate to begin with, since it had not provided prior notice to cure any waiver based on its prior acceptance of late payments.

Lender responded that it had no duty to cash the checks with the restriction. Borrowers pointed to authority in Ohio in which a lender had been denied the right to accelerate when the borrower had submitted checks for the overdue amount and the lender had not cashed them.

The court held that the prior authority was inapposite because of the fact that there was a restriction on the checks in this case, and not in the prior case. In the prior case, however, the checks had been submitted prior to acceleration. So no similar condition would have been necessary. As to the conditions on the checks, Borrowers argued here that the condition to withdraw acceleration was in fact consistent with the Bank's duty because it had accepted so many late payments in the past that it did not have the right to accelerate without prior notice that late payments would no longer be tolerated.

In response to this, Lender pointed to the "anti waiver" language in the loan papers:

"Any grant by the Mortgagee of any extension of time for the payment of any obligations secured hereby, either to the Mortgagor or to any other maker, endorser or other person, or the taking of other or additional security for any such obligation, or Mortgagee's waiver of or failure to exercise any right hereunder, including the right to accelerate the whole or any part of the debt secured hereby, shall not in any way affect this mortgage, nor the rights of the Mortgagee hereunder, nor operate as a release from any personal liability upon the obligations secured hereby or under any covenant or stipulation herein contained."

Lender argued that this language is dispositive of the issue. It cited some Ohio authority relying on such a clause. It stated that the Restatement of Mortgages has embraced anti waiver language and has concluded that where such language exists, a lender will never be barred from accelerating due to prior acceptance of late payments.

A dissenting judge disagreed vehemently with the majority's interpretation of the Restatement. In fact, this judge would rely on the Restatement to prohibit accelerations without notice where, as here, there is a long history of acceptance of late payments, notwithstanding an anti waiver clause. This judge would set aside prior Ohio authority that had not followed the Restatement. Here is that judge's analysis:

"Although there is an anti-waiver provision in the mortgage document, the Restatement states in its 'Comments and Illustrations' section that, '[w]hile such a provision may, in close cases, tip the balance against a finding of waiver (see Illustration 14), it usually will not be dispositive on the waiver issue. For example, its effect will be negated where the pattern of accepting late payments is sufficiently continuous and prolonged to justify the conclusion that the mortgagee has abandoned or waived the protection of the provision. See Illustration 15.'

Illustration 15 is as follows:

'15. Mortgagor delivers to Mortgagee a promissory note secured by a mortgage on Blackacre. The mortgage documents contain an acceleration provision. They also contain an anti-waiver provision . . . .The documents call for payment of monthly installments of principal and interest on the first day of each month. During the first 18 months after the loan is made, Mortgagor makes each monthly payment on the 14th or 15th day of the month. In the 19th month, Mortgagor fails to pay that month's installment when it is due. Mortgagee then accelerates the mortgage obligation. Mortgagor then tenders the past due installment. Mortgagee refuses the tender. The acceleration is ineffective and the default is cured'."

The dissenting judge noted that, based upon the loan records submitted by Lender here, the frequency of acceptance of late payments was more pronounced than in the above example.

Comment 1: It is interesting to see the two sides disagree on something as fundamental as the meaning of the Restatement. The editor believes that the Restatement authors do believe that the right to accelerate and foreclose is subject to equitable principles and an anti waiver clause in the legal instruments does not trump significant equities in favor of the Borrower.

The majority noted that in the comparison Ohio precedent, where the court had set aside the foreclosure, the borrower had continued to make payments all through the loan dispute following acceleration and up to the time of foreclosure. It viewed this as significant. The editor does not.

Comment 2: Of course, in general, borrowers should measure up to the performance standards set by the loan documents and pay on time. But most home mortgage documents provide for plenty of pre-acceleration notice and even give post-acceleration right to cure. It is interesting that the 1991 loan papers used here apparently did not meet the FNMA/FHLMC model and did not include a cure right.

Further, anti waiver clauses usually are not raised to a level of absolute enforceability in consumer documents such as the Ohio court finds here. (The court also give some credence to a *cognovit* agreement appearing in the loan documents.) But there apparently was no successful appeal here. So borrowers should walk carefully in Ohio.

MORTGAGES; FORECLOSURE; JUNIOR LIENHOLDERS: Under Washington Deed of Trust Act, foreclosure of a senior deed of trust does not extinguish the debt owed to a sold out junior lienholder, although it extinguishes the lien securing that debt. ***Beal Bank, SSB v. Sarich, No. 79875-3 (Wash. 9/13/07) No official citation available yet.***

Borrowers had three deeds of trust encumbering their property. The first was apparently a purchase money deed of trust, the second was a commercial promissory note for $344,000, and the third was delivered to the same lender as the second deed of trust holder, securing another commercial loan in the amount of $420,000 (made to only one of the two owners, although both borrowers executed the deed of trust.)

The holder of the second and third deeds of trust assigned them to Beal. Borrowers went into default on all three deed of trust loans.

Beal filed a lawsuit to collect on the notes and to foreclose juridically the deeds of trust. A few months later, the senior deed of trust holder initiated a nonjudicial foreclosure and sold the property and, based upon the sketchy in information in the opinion, apparently bid in the debt at the sale. Beal did not bid at the sale.

Beal amended its complaint to eliminate the foreclosure claim but continued to press the suit to collect on the debt (now unsecured, since Beal's deeds of trust were extinguished.) Borrowers filed for summary judgment in their favor, and the court granted summary judgment, on the authority of a Washington statute denying deficiencies following deed of trust foreclosures:

"[as to deeds of trust on residential real estate] a deficiency judgment shall not be obtained on the obligations secured by a deed of trust against any borrower, grantor, or guarantor after a trustee's sale under that deed of trust."

The trial court relied on Washington Mutual Savings Bank v. United States, 800 P.2d 1124 (Wash. 1990), which had held that, under the above statute, a nonforeclosing junior lienholder who bids and buys at a foreclosure sale of a senior lien may not recover a deficiency judgment for the balance of its debt.

In that case, the IRS, holder of a junior lien, had attempted a redemption of the property Washington Mutual had bought at foreclosure of a lien senior to its own. Under the federal tax lien redemption provision, a junior creditor from which the IRS redeems following a sale at which it buys must deduct from the redemption price the amount of an deficiency judgment to which it is entitled. In responding to a certification of a question to the federal courts, the Washington Supreme Court had held that Washington Mutual had no right to collect a deficiency judgment because: "There is no authority in Washington permitting **any** lienholder to sue for a deficiency following a nonjudicial foreclosure sale." (Emphasis added)

Dismissing other arguments of the parties regarding whether Washington Mutual might be permitted to obtain a partial deficiency judgment, the court stated:

"[W]e hold here that [no deficiency judgment] may be obtained by a nonforeclosing junior lienholder following a nonjudicial sale."

Note that there was no mention of whether the junior lienholder in question did or did not buy at the senior foreclosure sale.

Later, the court qualified its opinion, at the urging of a concurring judge, to state that it was not really considering the issue of "a junior deed of trust holder's continuing right to sue the debtor on the promissory note because it is not before us."

Argument before the court in the instant case, not surprisingly, included lots of discussion about whether the suit on the note following a senior foreclosure sale is or is not an attempt to collect a "deficiency judgment." The editor certainly has heard such a suit described in that way frequently before, whether or not it is correct technically.

In any event, the Supreme Court in the instant case concluded that the trial court had misapprehended its decision in *Washington Mutual* and that the junior note was not extinguished by the sale and could still be collected.

Comment: Although the distinction drawn by the court in the instant case may appear to the members of the Washington Supreme Court to be plain as day, it certainly has perplexed several generations of Washington real estate lawyers since 1990. The *Washington Mutual* case was severely criticized in journal commentary, but many a Washington lawyer felt that it meant that there could be no recovery of any kind in favor of a junior following a senior foreclosure.

It is a relief to have this issue clarified. Although, technically, *Washington Mutual* is not overruled, its meaning for the Washington bar now changes, and it is a paper tiger. Note that there is no reason not to apply the reasoning of the instant case, *Beal,* to a situation in which a junior is seeking to recover on the note after actually bidding and buying at the senior's foreclosure sale, as was the case in the 1990 decision. It was a public auction, after all, and the junior bought the property presumably for what it was worth at foreclosure. (In a non-judicial foreclosure, the junior could not credit bid.)

This should not preclude the junior from collecting its debt. This is good public policy. The junior had evaluated the property when it took its second mortgage, knows something about it, and is a logical party to encourage to bid at the sale. More bidders at the sale are to the advantage of the borrower. Why penalize logical bidders for their participation?

MORTGAGES; FORECLOSURE; NON-JUDICIAL FORECLOSURE; PROCEDURE; STATUTE OF LIMITATIONS: Failure to take advantage of injunction remedy provided by statute to prevent foreclosure of deed of trust bars trustor from asserting statute of limitations defense to debt, even when defense is raised not to set aside foreclosure sale, but to make a claim for refund of sale proceeds, and even when trustor in fact had filed a declaratory relied action raising defense prior to foreclosure. ***CHD, Inc., v. Boyles, 157 P.3d 415 (Wash. App. 2007)***

This may be another of those "cheated widows never lose" cases. But the court appears to be making relatively clear precedent for situations not so laden with equitable considerations.

CHD, a developer, had acquired land on a purchase money deed of trust from Boyles and her husband. The husband died and Boyles was left to deal with CHD in the collection. A lengthy song and dance ensued, marked by constant reassurances that the check was on its way and, ultimately, by two successive bankruptcies.

Ultimately, Boyle's lawyer got relief from the stay on the second bankruptcy and noticed a non- judicial foreclosure sale. Trustor CHD then filed a declaratory action and recorded a *lis pendens.* The trustee postponed the sale several times, but ultimately a successor trustee proceeded with the sale, and Boyles bid in her debt and acquired the property at the auction. The trustor never enjoined the sale, as Washington law permits in connection with disputes as to validity of the beneficiary's claim to foreclose.

About six months later, CHD brought an action alleging that at the time of the sale the debt was barred by the six year statute of limitations in Washington, it was entitled to the proceeds of the sale. Boyles vigorously defended, and the trial court entered summary judgment for her and awarded her $7,500 in attorney's fees.

The appeals court affirmed, agreeing that Washington statutes make plain that "the sole method to contest and enjoin a foreclosure sale is to file an action to enjoin or restrain the sale in accordance with [Washington statutes]. Failure to bring such an injunction lawsuit may result in a waiver of any proper grounds for invalidating the trustee's sale. The statutes require a notice of the right to enjoin and the possibility of waiver in connection with the notice of the sale itself.

CHD argued that it was not contesting the validity of the sale, but rather contesting the existence of the debt at the time of the sale, due to the running of the statute of limitations. If the debt was barred, CHD argued, it was entitled to the money paid for the property at the sale (coincidentally, of course, the amount of the debt.)

The court found this argument "unsustainable."

"A debt is not extinguished by the expiration of the statute of limitation on its remedy for enforcement of the contract. . . . Similarly, the trust deed securing the obligation is voidable, not void, upon the expiration of the contract's statute of limitation . . . thus, CHD's debt was not extinguished and power of sale was merely subject to challenge – as provided for in the statute. And that challenge is subject to waiver – also noted in the statute. . . . CHD argues that it need not restrain the sale under the trust deed in order to claim the proceeds. But in order to prevail on its claim for the proceeds, CHD would need to litigate the statute of limitations defense, which challenges the underlying debt. . . . This is not a sensible interpretation of the statute. . . . A person waives the right to contest the underlying obligations on the property in foreclosure proceedings when there is no attempt to employ the [injunction remedy]."

The court also upheld the awarding of attorney's fees against CHD's argument that the non-judicial foreclosure was already completed and constituted an election of remedies, barring further claims on the instruments.

Comment: Veteran readers will know that the editor frequently quotes extensively from the reasoning of the case when he doesn't get it. The editor hasn't read the underlying statutes, and of course any thoughtful analysis would require that. But the editor simply notes that the apparent purpose, to him, of barring claims concerning foreclosures that the trustor fails to enjoin is to protect the security of the title coming out of the foreclosure sale. That policy is not at stake here.

Further, the editor suspects that many of the precedent cases involve situations where the trustor did not raise any defense until after foreclosure. Here, the trustor had already filed a lawsuit and a *lis pendens* asserting the statute of limitations defense. So it is hard to decide what exact policy is furthered by the judgment for the trustor here except finality following a nonjudicial foreclosure. As that's sort of the same policy behind statutes of limitations, perhaps that's enough.

MORTGAGES; FORECLOSURE; PROCEDURE; COLLATERAL ESTOPPEL: Even though a foreclosing mortgagee may already have obtained a judgment for collection of the note, it may still seek to recover additional fees and charges in a subsequent foreclosure action provided those fees and charges do not arise out of the same circumstances as were litigated in the collection action. ***First Union National Bank v. Penn Salem Marina, Inc., 190 N.J. 342, 921 A.2d 417 (N.J., 2007)***

Mortgagors on a commercial loan defaulted and, as a result, the mortgagee sued on the note and also initiated foreclosure proceedings. The note was partially secured by a first mortgage. The note also laid out the terms under which the mortgagee could recover the debt in the event of a default.

In the action on the note, the mortgagee sought the principal due at the time of default, plus late charges, insurance, escrowed taxes, and interest accrued from the time of default through the date of judgment. The mortgagor failed to respond, and the mortgagee was awarded the amount it sought along with attorneys' fees on its claim against the promissory note.

Although both the suit on the note and the foreclosure suit were filed about the same day, they were heard in different divisions. The foreclosure action, in the equity division, ultimately proceeded to judgment about a year and a half after the judgment in the suit on the note in the law division. In the foreclosure action, the lower court in the foreclosure proceedings awarded, over the objection of the mortgagors, an amount that was nearly two hundred thousand dollars more than what had been awarded by the lower court that had heard the note collection matter. The foreclosure award included the same unpaid principal as owned at the time of the default on the loan, but included a larger amount of interest and taxes because they had accrued over a longer period of time. The mortgagees also sought a prepayment penalty and default interest, items that had not been part of their earlier claim.

The mortgagors appealed the foreclosure decision, arguing that the foreclosure award should not have exceeded the amount of the decision that enforced the note. Applying issue preclusion principles of collateral estoppel, the Appellate Division affirmed the lower court's decision and had found that the foreclosure ruling was not precluded by the ruling on the note enforcement. The Appellate Division also found that principles disallowing a matter that has been resolved from being re-litigated did not apply because legal actions and remedies to enforce the terms of a note were different than legal actions and remedies for adjudicating a foreclosure. The mortgagors appealed the Appellate Division's decision.

Before the New Jersey Supreme Court, the mortgagors argued that the amount awarded to the mortgagee in the note enforcement action fixed the amount to be awarded in the foreclosure proceedings. First, the Court noted that the relief sought in the foreclosure was more extensive than the relief sought in the enforcement of the note, but that the underlying claim for relief was largely the same. It concluded that the lender was limited to the recovery already granted as to matters that had in fact been litigated in the earlier action. For instance, in the earlier action, the court had established a certain figure for per diem interest. The foreclosure court, studying the same documents, came up with a different conclusion. But the Supreme Court held that the foreclosure court was precluded from reexamining that issue, and rolled back the *per diem* interest to that determined by the original court in the suit on the note. That issue had been resolved, albeit by default judgment.

But the Court held that a foreclosure action adjudicated following the adjudication of note enforcement is bound by the first decision only as to damages that are similar to those claimed in the second action. Damages of a different type, not sought in the first proceeding, could still be awarded in a subsequent adjudication. In the case at hand, the mortgagee had not asked for a prepayment penalty or default in interest in its claim for relief in the law court action on the note, and they were not "essential" to recovery of the amounts that the trial court in that action did award. So the mortgagee was free to raise these issues in the foreclosure action.

Further the Court held that issue preclusion does not bar a lender from recovering monies in excess of the first judgment where further charges are later accrued such as for interest, costs, and attorneys' fees.

The Court reversed the Appellate Division's decision that the foreclosure action was not precluded at all by the note enforcement action, and held that the foreclosure was precluded only as to those issues that were the same in both proceedings.

Note: The court does not mention in any detail the question of late charges. The mortgagee had included an item for late charge in the first proceeding, but there was a much larger item for late charges in the foreclosure award. The court notes in a footnote that the appeals court had lowered the amount, but still it does not appear to have lowered the amount back to what had been in the first award. So far as the editor understands the case, there should be no additional award for late charges, as a late charge can only be imposed once, and the amount of that charge had been resolved in the suit on the note. The editor is concerned that the court doesn't explain the apparent discrepancy in the two claims on this score, but it does indicate that on remand the principles it dictates may result in further changes.

Comment: Of course, the question of procedure for judicial recovery on notes secured by mortgages varies dramatically from one jurisdiction to another. Some courts would permit only one lawsuit to run at a time. It may be that some courts would require that all actions that reasonably could be included in a suit between the parties on basically the same facts should be included or be forever barred. In is interesting that New Jersey, apparently because a foreclosure suit is for different relief in a different court, takes such a generous view toward the mortgagee on the question of issue preclusion.

MORTGAGES; INTEREST; DEFAULT INTEREST: Default interest rate of 30% in commercial lending instrument is not "unconscionable" and is enforceable. ***The Cantamar, L.L.C. v. Champagne, 142 P.3d 140 (Utah App. 2006)***

This case raises a number of interesting issues concerning fraudulent inducement, ambiguity and integration, but these will be considered elsewhere. The sole focus of this report is on the issue of default interest.

A financial consultant and a loan broker had arranged for a series of notes to be executed by the borrowers. These notes provided that the principal would not be payable unless and until the consultant had located a satisfactory equity investor who would provide $15 million in capital. They had very onerous terms otherwise. (70% and 60% interest rates, respectively.) Ultimately, the broker arranged a refinancing of the earlier debt with another loan from another lender. The documentation for this last loan provided for an 8% interest rate, a specific due date, and a default interest rate of 30%.

Ultimately, the borrowers stopped paying interest on the note and argued that the obligation to pay principal was contingent, as with the prior notes, upon the $15 million capital infusion. They further argued that the 30% default interest claimed by the lender was unconscionable and unenforceable. The trial court found for the lender on all issues, but the appeals court here remanded for further consideration of the question of whether the obligation to pay principal was subject to the alleged contingency. But the appeals court refused to conclude that the 30% default interest rate was unconscionable. Thus, if the contingency ultimately was found not to be an obstacle to payment, the borrower (and the guarantors) were stuck with the 30% default interest.

The court acknowledged that default interest rates are in fact unenforceable if unconscionable, but evaluated the discrete factors followed by Utah courts in determining unconscionability, and concluded that this transaction was not unconscionable.

The court commented that it would not "assume the paternalistic role of declaring that one who has freely bound himself need not perform because the bargain is not favorable," and further noted that Utah places no usury limit on the bargaining of the parties for interest rates in commercial loans of this nature.

The specific analysis of the court may prove useful, so we will set it forth verbatim here:

"Unconscionability 'has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party'…Utah courts engage in a two-pronged analysis to determine whether a contract is unconscionable: (1) substantive unconscionability and (2) procedural unconscionability.…While a determination of substantive unconscionability may by itself lead to our concluding the contract was unconscionable, procedural unconscionability alone 'rarely render[s] a contract unconscionable'.

Under the substantive unconscionability prong, we 'focus on the contents of the agreement'. 'Even if a contract term is unreasonable or more advantageous to one party, the contract, without more, is not unconscionable.' Instead, the terms must be 'so one-sided as to oppress or unfairly surprise an innocent party or… there exists an overall imbalance in the obligations and rights imposed by the bargain...according to the mores and business practices of the time and place.'

Turning to the second prong, procedural unconscionability, we 'focus on the negotiation of the contract and the circumstances of the parties.' In considering procedural unconscionability, '[o]ur princip[al] inquiry is whether there was overreaching by a contracting party occupying an unfairly superior bargaining position.' Factors that we consider in our determination include:

(1) whether each party had a reasonable opportunity to understand the terms and conditions of the agreement; (2) whether there was a lack of opportunity for meaningful negotiation; (3) whether the agreement was printed on a duplicate or boilerplate form drafted solely by the party in the strongest bargaining position; (4) whether the terms of the agreement were explained to the weaker party; (5) whether the aggrieved party had a meaningful choice or instead felt compelled to accept the terms of the agreement; and (6) whether the stronger party employed deceptive practices to obscure key contractual provisions.

None of the above factors is dispositive and we consider the factors in light of the unconscionability doctrine's objective of preventing oppression and unfair surprise."

This statement of the factors tips off the likely result here. This was a venture capital project. The borrowers readily admitted that there was no way they would be able to pay off the loan if they didn't get the $15 million capital that they were seeking. Under these circumstances, the court noted, terms that might otherwise appear overly harsh become less so. Further, the court noted that if the borrowers were correct in their claim that no principal was payable unless the capital was found, the lender was certainly entitled to a significant protection against default in the payment of interest.

As to the procedural issues, assuming that they could be dispositive, the court found no real evidence that there was "oppression or unfair surprise."

Comment 1: It is a rare appellate case that is so clear in affirming a high default interest rate in a note carrying such a low initial rate. The circumstances of the loan, of course, are somewhat special, but most of these circumstances are simple allegations, and the court more or less ignores them in approving the rate.

Comment 2: Borrowers attempted to argue that the default rate was not a proper liquidated damages clause, and operated as a penalty. The court indicated that it would not reach the question of whether default interest in promissory notes should be analyzed as liquidated damages. It commented that even if the rate did not meet the liquidated damages test, the overriding question was unconscionability. This strikes the editor, frankly, as nonsense. If the provision operated as a penalty, then unconscionability factors might not have to be considered. But many courts have a high tolerance for default interest – viewing it as a bargained for return for repayment under specialized circumstances: *i.e.* acceleration.

MORTGAGES; PREPAYMENT; YIELD MAINTENANCE; FEDERAL FUNDS RATE: *River East* reversed!! Whether Illinois would treat a yield maintenance prepayment provision as liquidated damages or as optional performance, the use of federal funds as the index to establish the hypothetical return on the invested prepaid sums is not a penalty and is enforceable. ***River East Plaza, L.L.C. v. The Variable Annuity Life Insurance Company, No. 06-3856 (7th Cir. 8/22/07), 2007 WL 2377282 official citation not avilable yet***

This widely watched (and feared) case was the subject of the DIRT DD for 10/03/06. The federal district court had held a relatively standard yield maintenance clause in a commercial mortgage was unenforceable as a penalty because it used a hypothetical investment in Treasury obligations to determine the return that the lender would be able to get with the prepaid loan proceeds, requiring the borrower to pay the present value between the yield on that hypothetical investment and the projected return on the prepaid note had it continued to be paid as originally scheduled to maturity.

The trial court had first concluded that Illinois law would view such a provision as a liquidated damages clause, which would be valid only if it constituted a reasonable attempt by the parties to estimate the probable loss to the lender as a consequence of the prepayment. The court then concluded that the use of the Treasury index made the computation under the yield maintenance clause unreasonable, because a Treasury investment is much safer than any mortgage loan and the lender would always be "overcompensated" by using such an index as opposed to looking at its hypothetical return should it make a real estate investment similar to that involved in the prepaid loan.

The appeals court, for purposes of analysis, accepted the trial court's conclusion that Illinois would use liquidate damages analysis to approach a prepayment clause. It noted that there was no relevant Illinois case so holding, and that in many jurisdictions [in fact, most] such provisions are treated as setting forth an alternative form of performance, and not as a response to a "default" at all. The court also carefully distinguished both cases involving prepayment provisions calling for the payment of a premium upon acceleration and also bankruptcy cases. It said nothing, however, that would suggest that it would find the use of Treasuries in a yield maintenance provision in either case to be unenforceable or unreasonable. In fact, in the case of acceleration – in which the use of a liquidated damages analysis is always appropriate – this opinion will certainly help lenders.

The court took a somewhat different take in the analysis of a liquidated damages provision. Analyzing Illinois law, it appeared to view the analysis of whether the estimated damages actually corresponded to the probable damages to be suffered from breach as only a step to the ultimate conclusion of whether the provision in question operated as a penalty. In other words, the primary focus on the court is whether the clause in question serves a "neutral" purpose of compensation or an inappropriate purpose in threatening a party with undue reprisal in the event of a breach.

Looked at in this way, the court stated, the clause in question could not possibly be viewed as a threat designed to force the borrower to pay over time, rather than to prepay. It noted that if the borrower in this case had paid the note off over its term, the borrower would have paid over $13 million in interest. As a consequence of paying early, the borrower avoided paying that interest but paid a "penalty" – the prepayment premium – of around $3.9 million. Of course, the value of paying $13 over time, brought down to the present day, may be somewhat less than $3.9 million, depending upon what indices are used. But the court noted River East got a bargain by avoiding paying the interest. In any event, the court concluded "[t]his [prepayment provision] hardly seems to be a clause whose 'sole purpose is to secure performance of the contract'." [quoting from Illinois precedent.] In fact, the court posited, the borrower gets a benefit by having any credit against its interest obligation at all. Compelling the lender to use the Treasury index to compute a credit against the Borrower's obligation to pay interest, in the court's view of the case, actually hurts the position of the Lender and helps the Borrower.

The court, quite properly, went on to comment that a liquidated damages approach is not necessarily the proper analysis in a case like this, where the borrower is paying voluntarily, and not as a consequence of an acceleration following default. The court as noted, simply accepted the trial court's premise that liquidated damages analysis was appropriate and then reversed the trial court's conclusion even with such premise.

In a minor, but possible significant *coda*, the court noted that there was a comparatively tiny disagreement between the parties concerning the precise amount of the prepayment premium. The lender had first demanded an erroneously high premium – more than a million dollars overstated. The borrower paid under protest. During discovery the lender's error was uncovered, and the lender reimbursed the borrower for the overpayment, with interest. But the parties disputed whether in fact the reimbursement was $1,600 too much. The court remanded on this issue, as it said that it did not understand fully enough the approach taken by the trial court in resolving this dispute. Ironically, this kept the court from ruling on the entire issue of attorney's fees, which of course is likely to be a rather large number here. If the borrower should prevail on the refund dispute, the court noted, the trial court might treat the attorney's fee issue differently than if the lender prevailed. But it is unlikely that this case ever will again reach the trial court, as the attorneys in the case likely would generate far more than $1,600 in attorney's fees in prehearing phone calls. It's better at this point to settle the remaining difference.

Comment: This case has ramifications for disputed prepayment premium claims all over America. The original decision had put into question probably thousands of attorney opinions approving the enforceability of prepayment premium provisions. (Borrower's counsel refused to opine as to enforceability here in the event the court elected to treat the provision as a possible penalty.)

This decision resolves these issues. Like a number of other high profile cases, it really should have been expected. Remember *de la Cuesta* – the predictable U.S. Supreme Court overruling of *Wellenkamp*? Even *Kelo*, the editor believes, was a predictable result, although not necessarily a predictable analysis. In short – emergency's over and we can all go back to afternoon squash games.

MUNICIPAL CORPORATIONS; DEMOLITION LIENS: Where a municipality fails to strictly comply with statutory notice provisions at every stage of a demolition proceeding, it is not entitled to impose a demolition lien on the affected property. ***21-23 Seidler Associates, L.L.C. v. City of Jersey City, 391 N.J. Super. 201 917 A.2d 808 (App. Div. 2007)***

Two limited liability companies (LLCs) held tax sale certificates respectively for two real properties which had been demolished by the municipality two years earlier. The demolition charges were not recorded against one of the properties until much later, approximately two months after the LLC bought the tax sale certificates on the property. With regard to the other property, the LLCs alleged that the municipality never provided notice of the demolition proceedings to the current holder of tax sale certificates or its predecessors-in-title. The principal of the LLCs certified that before he bought tax sale certificates for the two properties, he requested tax redemption statements from the municipality's tax collector's office. He certified that the statements he received did not disclose the demolition liens, and that the LLCs did not have notice of the liens at any time before it bought the certificates. The LLCs, in an action to quiet title, sought summary judgment invalidating municipality's demolition cost liens against the two properties. The LLCs argued that the liens were invalid because the municipality failed to comply with applicable statutory requirements. The lower court invalidated the demolition lien on one property, but not against the other. As to the lien it upheld, the lower court found that the LLC failed to act with due diligence to discover it even though it had been recorded before the tax sale certificates were assigned to that LLC. The municipality appealed the order invalidating the one lien, and the LLCs appealed the order denying invalidation of the remaining lien.

The Appellate Division concluded that both demolition liens should have been invalidated, and it reversed and remanded for an entry of order consistent with its opinion. The Court first examined the municipality's notice obligations to the LLCs as assignees of the tax sale certificates. It held that it is not necessary for parties-in-interest to have both possessory and record interests to be entitled to notice of demolition proceedings. The Court concluded that the municipality failed to provide documentary evidence showing that notice was served in compliance with the statutory notice provisions. It observed that the statutes governing demolition proceedings impose obligations on municipalities, before demolition begins, to notify all parties-in-interest. Furthermore, the statutes require that property owners and parties-in-interest be served personally or by registered mail, or if the public officer cannot ascertain the whereabouts of such parties in the exercise of reasonable diligence, then by publication. First, the Court observed that the municipality failed to supply any proof that it had served a demolition complaint on the LLCs predecessors with respect to the two properties. Second, the Court stated that there was no evidence that the municipality served the demolition order for one of the properties on one of the LLCs predecessors, then a party-in-interest, as required by statute. Third, the municipality failed to serve the demolition complaint as to one of the properties and order by publication. Lastly, the municipality failed to prove service of a detailed statement of costs upon the owner of both properties before imposition of the demolition liens as required by law. Therefore, the Court concluded that the municipality failed to strictly comply with the statutory notice provisions at every stage of the demolition proceedings, and both demolition liens should have been invalidated by the lower court.

The Court dismissed the municipality's claim to a late right of redemption when the municipality argued that its costs of demolition were incurred to preserve the health, safety, and welfare of its inhabitants. The Court found that it was not reasonable for the municipality to expect, based upon invalid demolition liens, permission to redeem tax certificates and deprive the holders of the tax sale certificates of the opportunity to foreclose the properties.

MUNICIPAL CORPORATIONS; PUBLIC PURPOSE; "TRANSIT FACILITY": A rail line and right-of-way acquired by a metro regional transit authority may be considered a "transit facility" and thus statutorily authorized, even though it is being leased to a private company for the operation of a dinner-excursion train. ***Village of Silver Lake v. Metro Regional Transit Authority, 856 N.E.2d 236 (Ohio 2006)***, discussed under the heading: "Railroads; Transit Facility".

MRTA was created in 1972 by the cities of Akron, Barberton, and Cuyahoga Falls, Ohio for the purpose of preserving and maintaining mass transit service in the area and providing the financial capability to upgrade that service in the future. In 1995, the MRTA purchased a certain line of tracks and the associated right-of-way (the "Akron Secondary") using federal and state funds. In 2002, after a public bidding process, the MRTA leased the Akron Secondary to the Cuyahoga Falls & Hudson Railway Company ("Cuyahoga") for the operation of a dinner train, with passengers departing from and returning to Cuyahoga Falls on each excursion. In addition, Cuyahoga agreed to maintain and improve the railroad infrastructure.

The village of Silver Lake sued the MRTA to enjoin the lease to Cuyahoga, arguing in pertinent part that the MRTA lacked the statutory authority to engage in such a lease since a dinner-excursion train is not a "transit facility". The trial court agreed with Silver Lake, but the Summit County Court of Appeals reversed, holding that the MRTA had statutory authority regardless of whether Cuyahoga's use of the Akron Secondary was as a transit facility.

The Supreme Court of Ohio affirmed the decision of the Court of Appeals. The Supreme Court held that there were two bases in which authority for the lease to Cuyahoga could be found. The first is that, assuming the Akron Secondary is a transit facility, the MRTA is authorized to lease it as one way of holding it for future use. The second is that the MRTA is authorized to lease the Akron Secondary because under the governing statute it would be considered real property that is being leased for the "protection of or improvement and access to transit facilities, or for any other necessary purpose." The Supreme Court found that securing a revenue stream for the transit system while holding ownership of the Akron Secondary for future use, as well as requiring Cuyahoga to maintain and improve the line, was such an obvious "necessary purpose" that the statute need not be interpreted any further. Although the line is not currently used by the MRTA for the "regularly scheduled mass movement of passengers," as required by statute, it nonetheless constituted a transit facility as it was acquired with federal and state funds to "preserve a potential future commuter rail line." The dissenting opinion differed in its definition of "transit facility," and argued that the majority's holding goes far beyond the express language of the governing statute despite the majority's claim that the statutory terms are clear. Instead, the dissent focused on the current use of the Akron Secondary, and found that there was no "tangible nexus" between Coyahoga's dinner train and the "regularly scheduled mass movement of passengers," the MRTA had exceeded its authority. Ultimately, however, the Court of Appeals was affirmed in its decision.

NUISANCE; TREES: Virginia high court reviews, revises view on bothersome trees on neighboring property. ***Fancher v. Fagella, 2007 WESTLAW 22683665 (Va. 9/14/07) No official citation available yet.***

Plaintiff and defendant owned townhouse properties in Fairfax County with abutting rear yards. Defendant's property was at a higher grade than Plaintiff's, and a masonry retaining wall ran between the properties, permitting Plaintiff to have a sunken rear patio.

On Defendant's property there was located a large sweet gum tree. Sweet gum trees are native to the area, and the facts of the case do not indicate whether Defendant or anyone else planted the tree. Plaintiff alleged that the tree was a "noxious nuisance" because its roots had invaded and would continue to damage and displace the retaining wall protecting Plaintiff's patio, as well as the pavers that formed its base. Plaintiff also complained that the tree roots blocked his sewer lines and were affecting his foundation. Plaintiff also complained that overhanging branches from the tree grew onto his roof, depositing leaves and other debris there and in the rain gutters. Plaintiff brought suit for an injunction compelling removal of the tree.

An expert for Plaintiff testified that the tree, in fact, was just getting started, that it would grow to twice its present girth and height, and that cutting the roots away would do no good as the root systems would quickly return. He described the droppings from the tree as including "spiky gumballs" and stated that "no amount of concrete" would keep the tree's invasive root system at bay.

Following Plaintiff's testimony, which also included engineering evidence that the tree was the source of damage to the wall, Defendant moved to strike Plaintiff's plea for injunctive relief. The trial court granted the motion to strike on the authority of a 1930's Virginia decision, *Smith v. Holt,* 5 S.E. 2d 492 (Va. 1939), which adopted what is known as the "Virginia rule" on invading trees. This rule states that the intrusion of roots and branches from a neighbor's plantings which were not "noxious in their nature" were not actionable at law, and the plaintiff is limited to his right of self- help. When there is a "sensible injury," a party suffering from the protrusion of roots from a "noxious" planting has a right, after notice, to an action in trespass.

The court noted that in fact four distinct common law rules had developed over time in this area: Under the Massachusetts rule, protruding branches or roots of planted or natural trees on adjoining land are "damnum absque injuria," although the injured part retains a right of self help. The "Virginia rule," is close to this, but apparently would not apply to rule to "noxious" trees and other vegetation. There is the Restatement Rule, based upon the Restatement (Second) of Torts, sections 389, 840 (1979) which imposes an obligation on a landowner to control vegetation that encroaches on adjoining land if the vegetation is "artificial" – planted or maintained by a person but not if the vegetation is natural. This appears also to be the rule in California and Washington. The third variant, "Hawaii Rule," holds that living trees and plants ordinarily are not nuisances, but can become so when they cause actual harm or pose an imminent danger of actual harms to adjoining property. Under this rule, the harm may be from overhanging branches or protruding roots, where the danger or actual injury involved harm to property other than plant life, in ways other than by casting shade or dropping leaves, flowers or fruit.

The court noted that the Massachusetts Rule seems ill suited to modern conditions where neighbors live in close proximity to one another, and the Virginia variant, with the exception for "noxious" trees and vegetation depends upon a very vague and ultimately "unworkable" concept – noxious is in the eye of the beholder. The Restatement Rule struck the court as impracticable, as it often is difficult to ascertain whether a given plant arrived at is location artificially or naturally, and because it tends to penalize those who care for their property and reward those who let vegetation run wild.

The court concluded that it would overrule the Virginia precedent establishing the "Virginia Rule" and adopted the Hawaii rule as to responsibility for invading roots. This rule preserves a right of self help in the landowner affected by the intrusion, but also holds that such landowner may seek equitable relief to compel the neighbor on whose land the tree originates to cut back or otherwise relieve the condition causing damage.

As to the granting of the injunctive relief sought, the court commented that the decision to grant an injunction "always rests in the sound discretion of the chancellor, and depends on the relative benefit an injunction would confer upon the plaintiff in contrast to the injury it would impose on the defendant. Any burden imposed on the public should also be weighed." The court suggested that it might be unreasonable to impose a removal burden on the owner of"historically forested or agricultural land" but more reasonable to impose such a requirement where the parties reside in adjoining residential lots. Further, in some cases it might be sufficient to leave a plaintiff to his right of self help in cutting back roots and branches, coupled with an action for damages for the expenses.

Note: The court specifically withheld ruling on the situation in which a large undeveloped and forested lot abuts a lot that has been subdivided into a residential subdivision.

Comment 1: Of course, the court could not consider all the ramifications of its decision in this one case. For instance, although the court resoundingly affirms that there is a self help remedy, its opinion probably should not be read to approve such remedy without advance notice to the defendant or other actions that would reasonably provide the defendant with the continued right to a healthy tree. The proper remedy, it would appear, would vary with each case.

Comment 2: Since an intruding tree now can be a trespass, can it also establish a prescriptive easement? See *Koresko v. Farley, 2003 WL 23318662 (844 A.2d 607) (Pa. Cmwlth. 2003)* (the DIRT DD for 5/6/05) In a case of first impression, the Commonwealth Court of Pennsylvania decided that a prescriptive easement did not arise from encroaching tree roots and overhanging branches. The Editor agreed with the result, but criticized the reasoning that the intruding tree limbs were not "open and notorious." He would have preferred a conclusion that, until an objection was made, such intrusions are "implicitly permissive." Of course, intruding roots typically are invisible until damage begins to occur, and the court's analysis works there.

Compare: Ballard v. Harman, 737 N.E.2d 411 (Ind.App. 2000) (the DIRT DD for 7/5/01) (Actual; hostile possession is established where adverse claimant planted 50 trees on a five foot strip of land on neighbor's property and watered and maintained the trees for 18 years.)

OPTIONS; FIRST REFUSAL RIGHTS: A probate planning exchange of property, structured as a for value exchange, in which grandchildren of principles of LLC landlord/optionor trade their interests in other property for interests in property owned by LLC, does not trigger right of first refusal held by tenant of LLC in the property in which grandchildren have acquired their interest, but the refusal right is not destroyed and remains applicable to land in hands of grandchildren. ***Hartzheim v. Valley Land & Cattle Co., 153 Cal App. 4th 383 (Cal. App. 6 Dist., 2007)***

As the caption suggests, this was an old California family that over time had acquired interests in a number of properties. Some of that property had been leased to a car dealership, subject to a right of first refusal. The right of first refusal provided that the lessee had a right to purchase the property in the event the landlord obtained a "bona fide offer from any third party" that the landlord was willing to accept. The ownership of this property was in a partnership (an LLC by time of decision) owned by various members of the family. Several of them had established trusts to hold their partnership interests with their grandchildren as contingent beneficiaries.

The family resolved to a part of the original family ranch, which the family had owned for about twelve decades. Obviously, there was substantial capital gain. A separate corporation owned by the family partnership, however, had substantial operating losses. The scheme was developed to transfer ownership of the ranch property to the corporation, which then could sell the property and offset gain with its operating losses to effect the transfer. The grandchildren of the partners transferred their interests in the ranch property to the corporation in exchange for interests in the property leased to the car dealership.

The grandchildren's transfer was reported to the IRS as a sale for $4 million – the value placed on the ranch property transferred to the corporation.

The lessee of the car dealership later argued that the car dealership property had been sold to the children and therefore that he should have been given the opportunity to acquire the property for the $4 million price. It acknowledged that the deal had been done for tax planning purposes, and not for a profit, but claimed that the landlord was estopped from denying that there had been a sale when the transaction was reported to the IRS as a $4 million sale. Apparently that price was a bargain price for this property, and was selected in order to meet other tax planning needs for the landed family.

The court here upheld summary judgment for the landlord/optionor on the grounds that the right of first refusal was not triggered by the transfer to the grandchildren because the transfer was part of the grandmothers' estate planning and, therefore, it was not transferred pursuant to a "bona fide offer" from a "third party" as required by the first refusal option of the lease.

The court noted that the grandchildren, although admittedly strangers to the ownership of the partnership and the corporation it owned, in fact were contingent beneficiaries of the interests of certain of the principles. Further, they did not participate in the transaction at all, as they were minors, and everything was done for them by their uncle – the business manager for the family. In sum, the grandchildren never made an "offer" to buy the leased property, and therefore the right of refusal was not triggered.

Based upon California precedent, the court identified three important considerations that ought to be reviewed in cases like this: First, the court should consider the contract terms themselves to ascertain what the parties had determined would trigger the refusal right; second, where the right is triggered by an offer to purchase, a mere conveyance of the property does not supply that trigger. There must be "arm's length dealing" and a potential change in control over the property; third, the court must look through the formalities of the transaction to determine its true nature. So a device that appears not to meet the formalities of the refusal right may be found to be a "trigger" if its design appeared to be a deliberate circumvention. On the other hand, a device that has some of the stated characteristics but really is intended to meet other needs (as in this case) would not be found to be a "trigger."

The court noted that the property in question clearly was not for sale, was transferred inter family, with the family interests remaining in control (albeit through new individuals in the control group) and that there was no arms length bargaining for a price set by considerations other than market, all militated toward the conclusion that the right was not triggered.

The court was careful to note that the right, as it was not triggered, remained in effect. It had not been eliminated by the transfer to the children, and they held their interest subject to the right.

Comment 1: Also see: Cottrell v. Beard, 9 S.W.3d 568 (Ark. Ct. App. 2000), the DIRT DD for 9/27/00, involving a similar analysis and intra family gifts. There, however, the court did not indicate clearly that the right had been preserved. Here the court is clear on that point.

Comment 2: From the standpoint of the tenant, this right of refusal was a business asset involving extremely valuable property of special value to the tenant, and the tenant deserves a hard eyed, market-oriented review of the situation. When courts get goosey and start saying things like "I know it when I see it," parties to business transactions start to feel that there is no predictability other than that the judge's favorite will win.

Of course, the editor has no evidence that the family got preferential treatment here. But the family did get a reading of the document that not only favored the family but also relied heavily on the court's reading of the situation that the family didn't intend that the right would be triggered. So what? The optionor in these deals typically is trying to avoid the refusal right. That certainly doesn't mean that the right doesn't exist. Nor does it matter that the optionor had some other motive in doing what it did. The question is whether the trigger was squeezed. The editor might have come out the same way as the court here, but he thinks we have a much closer question. When, for whatever reason, the owner of property enters into a transaction characterized as a "sale" for tax purposes, its hard for the editor to see very far beyond that characterization in reviewing the rights of the parties.

RAILROADS; "TRANSIT FACILITY": A rail line and right-of-way acquired by a metro regional transit authority may be considered a "transit facility" and thus statutorily authorized, even though it is being leased to a private company for the operation of a dinner-excursion train. ***Village of Silver Lake v. Metro Regional Transit Authority, 856 N.E.2d 236 (Ohio 2006).***

MRTA was created in 1972 by the cities of Akron, Barberton, and Cuyahoga Falls, Ohio for the purpose of preserving and maintaining mass transit service in the area and providing the financial capability to upgrade that service in the future. In 1995, the MRTA purchased a certain line of tracks and the associated right-of-way (the "Akron Secondary") using federal and state funds. In 2002, after a public bidding process, the MRTA leased the Akron Secondary to the Cuyahoga Falls & Hudson Railway Company ("Cuyahoga") for the operation of a dinner train, with passengers departing from and returning to Cuyahoga Falls on each excursion. In addition, Cuyahoga agreed to maintain and improve the railroad infrastructure.

The village of Silver Lake sued the MRTA to enjoin the lease to Cuyahoga, arguing in pertinent part that the MRTA lacked the statutory authority to engage in such a lease since a dinner-excursion train is not a "transit facility." The trial court agreed with Silver Lake, but the Summit County Court of Appeals reversed, holding that the MRTA had statutory authority regardless of whether Cuyahoga's use of the Akron Secondary was as a transit facility.

The Supreme Court of Ohio affirmed the decision of the Court of Appeals. The Supreme Court held that there were two bases in which authority for the lease to Cuyahoga could be found. The first is that, assuming the Akron Secondary is a transit facility, the MRTA is authorized to lease it as one way of holding it for future use. The second is that the MRTA is authorized to lease the Akron Secondary because under the governing statute it would be considered real property that is being leased for the "protection of or improvement and access to transit facilities, or for any other necessary purpose."

The Supreme Court found that securing a revenue stream for the transit system while holding ownership of the Akron Secondary for future use, as well as requiring Cuyahoga to maintain and improve the line, was such an obvious "necessary purpose" that the statute need not be interpreted any further. Although the line is not currently used by the MRTA for the "regularly scheduled mass movement of passengers," as required by statute, it nonetheless constituted a transit facility as it was acquired with federal and state funds to "preserve a potential future commuter rail line."

The dissenting opinion differed in its definition of "transit facility," and argued that the majority's holding goes far beyond the express language of the governing statute despite the majority's claim that the statutory terms are clear. Instead, the dissent focused on the current use of the Akron Secondary, and found that there was no "tangible nexus" between Coyahoga's dinner train and the "regularly scheduled mass movement of passengers," the MRTA had exceeded its authority.

RECORDING ACTS; RECORDATION: A deed is deemed recorded from the moment it is delivered to the City Register's office, not the date the deed is actually recorded by the City Register. ***NYCTL 1998-1 Trust v. Ibrahiem, 832 N.Y.S.2d 767 (N.Y. Sup., 2007)***

2688 Pitkin Ave, LLC ("LLC") intervened in a foreclosure action affecting its property to vacate the judgment of foreclosure and order of sale dated February 3, 2006 because LLC was neither named nor served in the foreclosure proceeding. LLC acquired title to the property from the Defendant on May 27, 2004 and delivered its deed to the City Register's office for recording on June 23, 2004.

The deed was actually recorded by the City Register on July 12, 2004 at 3:27 pm. Earlier that afternoon, Plaintiff commenced a foreclosure action on the transferred property and failed to name or serve LLC in the foreclosure proceeding.

The court commented that if a foreclosure action is commenced prior to the recording of a deed, then the purchaser is considered on notice of the foreclosure action. If, however, a deed is recorded after the foreclosure action is commenced, then in order for the purchaser to be bound by the proceeding, it must have been named and served in the proceeding. The court found that a deed is deemed recorded from time it is delivered for recording because by statute every instrument that is entitled to be recorded must be recorded.

Comment 1: Note that the mortgage was recorded, apparently, so the grantee of the deed still took subject to the mortgage, but not to the foreclosure of the mortgage. Presumably the foreclosure sale purchaser can elect to be subrogated to the position of the mortgagee and reforeclose.

Comment 2: Although there is a significant split on the issue of whether an instrument is deemed recorded from the time of delivery to the recorder's office, this case follows what is likely the majority rule on the point. But the case goes on to cite with apparent acquiescence another New York case from an intermediate appellate court that stands for an interesting counterproposition.

"The Appellate Division Second Department in the case of *Baccari v. De Santi*, 70 A.D.2d 198, 431 N.Y.S.2d 829 (1979), assumed the continuing viability of this rule deeming the instrument recorded upon delivery putting the world on constructive notice of its contents with respect to when the clerk fails to record the instrument duly delivered to him for recording. The court distinguished this from an improperly recorded instrument holding that the erroneous indexing by the clerk fails to give constructive notice of the existence and contents of the instrument."

The editor read this authority, and the instant court's description of it is correct. But can this be the New York law? It would mean that an instrument would be deemed to provide constructive notice to the world from the time it is delivered to the recorder, but if the recorder, some days or weeks later, misindexes the instrument, then it suddenly loses its constructive notice effect. The editor has not seen this twist in other jurisdictions (which doesn't mean that the rule wasn't there to be found, and the editor just missed it.)

Comment 3: In fact, most commentary on this area of the rule concludes that it is appropriate to put the risk of improper indexing on the party submitting an instrument for record, as that party is in a better position to go back and check the record later to insure that it is properly indexed.

In theory, it's a good approach. But how does it work in practice? Let's say you go back to the courthouse and can't find your document in the index. Does this mean that the recorder simply hasn't gotten around to recording the instrument, in which case you still enjoy constructive notice status, or does it mean that the recorder has misindexed your instrument (so that you can't find it) – meaning that you have fallen out of constructive notice status.

The problem gets even more acute in a jurisdiction like New York, which is a race-notice jurisdiction. Are you treated as having satisfied the race-notice requirement when you deliver the deed? What if later the recorder misindexes your instrument? Are you no longer "recorded" and so you have lost the race not only as against subsequent takers but also against prior unrecorded interests who managed to record in the interim?

The problem is that there is no good answer to all of this. The only answer is that clerks should promptly and accurately record in every instance. Of course, we pay them enough to insure that we get high quality people in these jobs who will perform perfectly every time. Don't we?

SERVITUDES; RESTRICTIVE COVENANTS; INTERPRETATION: For a permanent servitude to arise, it is not necessary that a covenant in a deed restricting the grantee's use of the property state the beneficiary of the promise or the term during which the restriction will apply, or that, when the deed is not given in the subdivision context, that the restriction be part of a mutually beneficial scheme. The court may assume that a permanent restriction has arisen in favor of the grantor's retained parcel. ***Perelman v. Casiello, 392 N.J. Super 412, 920 A. 2d 782 (App. Div. 2007)***

In 1907, Newton owned two adjacent lots, each with 85 feet of frontage on the Atlantic City boardwalk. Each lot was 275 feet deep. He sold the south lot to Sharp, subject to a covenant that stated that "party of the second part, his heirs and assigns, shall not at any time hereafter, erect . . . more than one building, which shall be used for no other purpose than as a place of residence. . . ." The covenant also prohibited outbuildings and specifically established setbacks both in terms of distance from the side boundary and, on the ocean side, in relationship to other residences that apparently then existed. (The appeals court record does not indicate whether the reference buildings still exist.)

Later, Newton sold the retained lot. In fact he sold it and repurchased and resold it twice. At some point, Newton attached covenants to the deed to this property of similar content to that in the deed sold to Sharp, except that this covenant was stated to be effective "only so long as the Boardwalk remains in its present location." Plaintiff purchased the lot – the one originally retained when Newton sold to Sharp – in 1986.

The Newton-Sharp property had passed to Bradway, who subdivided the lot into four parcels in 1983. One of the owners of the four lots erected a single residence on a lot consisting of two of these parcels. This residence, incidentally, did intrude somewhat on the side yard setback restriction, but no one did anything about it. Bradway retained the two lots closest to the ocean, and sold them together to defendant in 1999. The parties were well aware at the time of sale of the recorded covenant, limiting the entire four parcels to one residence (which seems already to have been constructed on the back lots sold earlier) and aware if the setback restrictions (as to the meaning of which there appears to be no dispute, at least not on this appeal.)

The trial court found that the covenants in the deed were personal to Newton. On appeal: *Held: reversed.*

Although the deed did not state that Newton's property was a benefitted parcel, the appeals court took the view that an express statement of such intent is not necessary. "Even though restrictive covenants are not favored and will be strictly construed where there is ambiguity, courts determine and give effect to the intent of the parties expressed in the deed with reference to the attendant circumstances." The court cited the Restatement of Servitudes for the proposition that: "Absent intent to impose a burden of limited duration or for the benefit of an individual, changed conditions that frustrate the purposes of the restriction, or equities that make enforcement unjust or require modification, covenants that the parties intend to burden one property for the benefit of another are deemed to be servitudes that run with the land benefitted and burdened and transfer with its ownership."

The court noted that the restriction stated specifically that Sharp and his heirs and assigns were bound and stated no termination date for the restrictions. Clearly defendant was aware of that language and should have understood its meaning. As the restriction clearly provided benefits to the view from the parcel retained by Newton in the original transaction, it was evident that the parties intended to provide a benefit to that lot and its subsequent owners.

The fact that Newton had twice sold and repurchased the benefitted parcel struck the court as irrelevant to its inquiry, since it is not necessary that any transfer subsequent to the creation of a recorded benefit mention that benefit, and there was no evidence that Newton ever intended to relinquish the benefit.

The court did remand the case for a determination of whether "plaintiff's conduct, changed circumstances or the relevant equities preclude enforcement or warrant modification of the restrictive covenant." In light of the trial court's decision, these issues were not fully explored in the first trial.

Comment 1: There must, in fact, be something in the equities here that the court doesn't tell us. Defendant paid $220,000 for the lot, which was a bargain price, but managed to convince a title insurance company to insure that the property was free of the restrictions. Perhaps the title company was boxed in because of a prior faulty search, but there's also the possibility that the company saw a changed circumstance argument or another equitable issue about which we aren't told.

Comment 2: The editor finds the case useful to underscore the notion that covenants, like easements, often are simply assumed to run with the retained land of a grantor, especially when the statement of the covenant runs expressly to "heirs and assigns."

The case is also useful because it differentiates those troublesome "mutual benefit" cases and limits them, to the extent that they make sense at all, to the subdivision context. For a discussion of the troublesome "uniform scheme" doctrine, see *Multari v. Gress,* 155 P. 3d 1081 (Ariz. App. 2007), the DIRT DD for 8/16/07.

SERVITUDES; USE RESTRICTIONS; LEASING; FAIR HOUSING: A restrictive covenant against renting houses in a CCR subdivision violated the Fair Housing Act because of its disparate impact on minorities in Kokomo, Indiana. Quoting from the opinion as to the statistical analysis supporting the disparate impact finding that "the covenants exclude 56% of racial minority householders from the subdivision, and only 34% White alone householders from the subdivision." ***Villas West II of Willowridge, Homeowners Association, Inc., v. Mcglothin, 841 N.E.2d 584; 2006 Ind. App. LEXIS 123 (Ind. Ct. App. 2006)***.

Of the 149 lots in Villas West II, there are 147 dwellings owned by white persons and 2 dwellings owned by African Americans. The racial mix of Villas West II is 98.7% white to 1.3% African American. The racial mix of the City of Kokomo is 86.69% white to 10.54% African American and 2.77% other racial minorities.

A plaintiff's expert brought in models that he used showed that African American householders in Kokomo are far more likely to rent their homes than white householders. For example, comparing 30 year old persons with $40,000 per year income, an African American person has a 68% chance of renting a home as compared to a white person who has only a 34% chance of renting a home.

In light of this evidence, the trial court ruled, and the appeals court agreed, that the covenants have a greater adverse effect on the African American and racial minority householders than on white householders. The court concluded that the covenants limit interracial association between residents of Villas West II and householders of minority races to those householders of minority races who are able to buy homes in the subdivision, to the total exclusion of racial minority households who could rent homes in the subdivision if homes were available.

According to the evidence adduced by the association, 27% or 28% of African American households have income sufficient to rent homes in Villas West II if such homes were available for rent. By excluding all renters from Villas West II, the court concluded that the Association excludes minority households who can afford to rent homes in the subdivision as well as those who cannot afford to rent homes in the subdivision.

The court concluded that the evidence presented at trial establishes that plaintiff made a significant statistical showing of a disparate impact, and this factor weighs in favor of plaintiff's case. The court cited *Hispanics United*, 988 F.Supp. at 1155 (concluding that the plaintiffs demonstrated a discriminatory effect where 49 percent of those affected by the redevelopment plans were Hispanic while only 13.4 percent of the village's population was Hispanic).

Although the association had established a legitimate justification for the leasing restriction – that leased units could adversely affect property values – the court ultimately concluded that the plaintiffs had established that there were less restrictive alternatives available to accomplish the association's objective, namely, enforcement of the covenants concerning maintenance and upkeep of units. The covenants cited by the trial court in its findings govern exterior maintenance, maintenance of the dwelling, watering of lawns and shrubs, and prohibited uses and nuisances, such as noxious or offensive activities, accumulation of litter or trash, accumulation of junk vehicles, campers, boats, etc. on the property, construction of outbuildings, and leaving garage doors open. The trial court basically found that, if the basis for the leasing covenant is to maintain property values because renters do not care for the residences as well as owners, the properties can be maintained just as well through the covenants listed above. The appeals court affirmed.

In summary, the court concluded that plaintiff made a *prima facie* showing of a violation of the Act, and, although the Association demonstrated a *bona fide* and legitimate justification for the housing action, plaintiff showed that less discriminatory alternatives were available.

The court indicated that this was a close case, but balanced in favor of affirming the holding that the leasing restrictions constituted discrimination in violation of federal law. The court, however, was cautious in forecasting the impact of this decision:

"In [affirming here], we do not intend to imply that all restrictive covenants prohibiting leasing violate the federal Fair Housing Act. Rather, this is complex, fact-sensitive analysis that should not be taken to apply to all such covenants."

Reporters Comment: Obviously, the plaintiffs' attorneys in this case did an exceptional job of preparing and presenting their evidence, especially their expert testimony. It will be interesting to see whether the detailed and thoughtful analysis in this case, fact intensive as it may be, is sufficiently persuasive to be followed elsewhere.

Editor's Comment: The editor is dumbfounded, frankly. Unless we have a federal policy that states that it is unlawful to discriminate on the basis of wealth, the case strikes the editor as wrong. Is it unlawful for Yankee Stadium to charge $40 for a low end baseball ticket because the impact is to exclude racial minorities from regular attendance at their games?

The plaintiffs made a nice little twist of federal anti-discrimination policy, but the editor doubts that the concept will gather traction. He's been wrong before, of course.

The Reporter here was Rory O'Bryan of the Indiana Bar.

STATE AND LOCAL TAXATION; LIENS; PRIORITY; CONFLICT WITH FEDERAL GOVERNMENT LIENS: Although federal court cannot adjudicate claims by a private party against a state without the state's consent, it cannot adjudicate a tax lien dispute between the federal government and the state government. ***Hudson Savings Bank v. Austin, et al., 479 F.3d 102 (1st Cir. 2007).***

STATE AND LOCAL TAXATION; TAX EXEMPTION: Where a public authority enlarges a tax exempt project without any reasonable nexus to that project's original purposes, the expansion is not within the scope of the original tax exemption and therefore is not entitled to tax immunity. ***Township of Holmdel v. New Jersey Highway Quthority, 190 N.J. 74, 918 A.2d 603 (N.J., 2007)***

In 1954, the New Jersey Highway Authority acquired land to construct an Arts Center. This was done pursuant to legislation, the Highway Act, that permitted the construction and operation of tax exempt highway projects that would include park or recreational facilities necessary and desirable to promote the public health and welfare. An amphitheater was constructed and completed thirteen years later. No reception facilities existed at that time.

During the same year, a study commission created by the New Jersey Assembly concluded that the Arts Center was only tenuously connected to the Highway Authority's statutory mandate. Accordingly, the New Jersey Legislature amended the definition of "highway authority" to include only facilities directly related to use of the highways. However, the amendment did not affect the continued operations of "existing facilities", therefore grandfathering the Arts Center. Four years later, the Authority converted a building on the grounds to a full-service reception facility. A separate larger facility was constructed years later. In response, the New Jersey Senate convened a special investigation committee which concluded that the new construction violated the amended legislation. No corrective legislation ensued.

Both amphitheater and reception area were leased to administrator companies who made minimum annual rental payments to the Authority and retained substantial control over the facilities. The municipal tax assessor determined that these areas were no longer eligible for property tax exemption under the Highway Act's immunity provision, as the Authority had leased those facilities to private, for profit entities. A challenge by the Arts Center to this determination worked its way through the judicial system where ultimately on remand, the Tax Court concluded that the amphitheater and reception center were significantly different, physically and in their operation, than that the Legislature contemplated when it amended the definition of "highway authority". The Appellate Division affirmed this ruling. The New Jersey Supreme Court granted both parties' motions for leave to appeal.

The Supreme Court held that the amphitheater's current operation furthered the Arts Center's original purposes of providing public access to performing arts and generating revenue and so was exempt from local property taxation. However, it found that the reception center's construction and privatization departed dramatically from the Authority's statutory mandate, and therefore was subject to taxation for all years under appeal. The Court noted that the amphitheater and its purposes were grandfathered under the statutory amendment, and that private leasing maintained the purposes contemplated by the amendment (continuing as a public performing arts center that generated revenue for the Authority).

With regard to the reception center, the Court noted that the legislative amendment did not contemplate its subsequent construction and actually intended to prevent future repetitions of unauthorized projects like the amphitheater. As such, the Court found that the reception center was an unexpected project without any reasonable nexus to the Arts Center's original purposes. It concluded that the reception center was beyond the intended scope of the tax exemption and was not entitled to tax immunity.

TRUTH IN LENDING; RESCISSION; CLASS ACTIONS: Under TILA, class certification is not available for rescission claims. Congress intended rescission claims to be totally unavailable in class action suits because of its large-scale liability. Rather, TILA gives individuals the ability to pursue rescissions on their own. ***McKenna v. First Horizon Home Loan Corp., 475 F.3d 418 (1st Cir. 2007).***

VENDOR/PURCHASER; DISCLOSURE: Under statutory requirement that sellers disclose to buyers any "defect" in residential property – defined as a condition that materially affects the value or use of [the property] in an adverse manner, seller is under no duty to disclose that property was damaged substantially by a water leak if obvious damage from leak was repaired and seller has no actual knowledge of the fact of mold contamination or the danger of mold contamination resulting from the event. ***Nelson v. Heer, 163 P.2d 420 (Nevada 2007)***

In 1998, a water pipe on the third floor of Nelson's cabin burst, flooding the cabin. Nelson promptly had the water turned off and reported the damage to her insurance carrier. An adjuster and contractor surveyed the damage and the contractor made substantial repairs and replacements. The contractor did not perform any mold remediation.

Four years later, Nelson sold the contract to Heer. She completed a disclosure form as required by Nevada law, listing all defects of which she was aware. She did not disclose the 1998 water damage. But some time after Heer bought the cabin, his homeowner's insurance cancelled his policy, citing information it had of the prior water damage. Heer obtained a more expensive policy with a mold exclusion. But even worse, when Heer then proceeded to do a mold analysis, he discovered sufficient evidence of a mold problem to occasion $81,000 in recommended repairs.

The trial court, after a jury trial, awarded Heer almost $280,000 in damages, based upon breach of contract, intentional misrepresentation and a breach of the duty of good faith and fair dealing.

The Nevada Supreme Court here reversed, holding that, as a matter of law, that a seller has no duty to disclose a prior condition that affects value if the seller "does not realize, perceive, or have knowledge of that defect or condition." The prior water damage, in the view of the court, notwithstanding the jury verdict, "no longer constituted a condition that materially lessened the value or use of the cabin" after it has been repaired. According to the court "the record is devoid of any evidence that the later damage to the cabin caused the presence of elevated amounts of mold."

Comment 1: Of course, the water damage did affect value because the fact of the water damage (not the mold) cause the insurance carrier to cancel the insurance and to require a higher premium without mold coverage. So the premise of the court is demonstrably wrong.

It is true, however, that Nelson may not have been aware that the fact that the history of water damage was a defective condition. So, at least in this case, the statutory requirement probably didn't apply.

Comment 2: But what about the broker? At least after this case, if not before, this broker, and most brokers in Nevada, will know about the fact that prior evidence of water damage affects insurance coverage and can lead to mold problems. Undoubtedly this case will be the subject of frequent broker education programs in Nevada.

If Heer had a broker who knew that water damage would cause insurance problems, shouldn't Heer have been instructed to ask about water damage? Since the court has held that the seller need not disclose it without prompting, should buyers be instructed to prompt? Is it possible that the broker need not tell the client about possible additional problems not disclosed by the seller?

In Missouri, the standard form disclosure, prepared by brokers, requires the seller to disclose information about any prior water leaks, repaired or not.

VENDOR/PURCHASER; MISREPRESENTATION; FRAUD; ENVIRONMENTAL ISSUES: Fact that EPA is conducting investigation of contamination on property is a material fact of independent significance, even when evidence of such contamination is evident from an inspection of the property, and seller's failure to disclose investigation is fraudulent, even where sale agreement contains "as is" clause**.** ***Hess v. Chase Manhattan Bank, U.S.A., N.A., 220 S.W. 3d 758 (Mo. 2007)***

A prior owner, owner of a paint company, had instructed his employees to bury some drums of old paint on his small farm property, and also to dump many old paint cans out behind the barn. When the employees later became "former employees," they ratted out the boss to the federal EPA. Soon thereafter, the boss declared bankruptcy and defaulted on the mortgage on the farm.

The EPA searched the property, found lots of evidence of environmental crimes, and ultimately the boss became a criminal defendant who pleaded guilty and served a year in prison.

The mortgagee, Chase, apparently obtained leave to foreclose from the bankruptcy court to foreclose and purchased the property at the foreclosure sale. Chase was aware of the contamination problems all along and a Chase employee that specialized in contaminated properties arranged for an appraisal of the property, which appraisal stated that the property was being evaluated by the EPA.

Chase offered the property for sale. There was a lot of interest, and three people, including Hess, submitted offers. The other two offerors did observe the paint cans on the property, but Hess did not make such a thorough inspection. The sale agreement did require Chase to deliver a written disclosure of material adverse information concerning the property, but it never did so. There was no disclosure to any of the offerors of the EPA interest in the property. All of them, along with Hess, testified at trial that they would not have purchased it had they known of the EPA's continuing interest. The sale papers also contained an "as is" clause and a disclosure the seller had never been in active possession of the property.

After closing, Hess discovered the paint cans and, still unaware of their significance, ordered his employees to bury them. A year later, the EPA ordered the exhumation of the cans, and Hess knew he had environmental problems. He brought suit against Chase for common law fraud and under the Missouri Merchandising Practices Act, which applied because Hess bought the property as a home. The trial court denied Chase's motions for a directed verdict and the jury found for Hess and awarded damages in the amount of the purchase price, $52,000. The court denied punitive damages under the MPA, as it had not been amended to provide for individual actions until after the sale in this case.

The appeals court found that failure to disclose a fact that a seller has a duty to disclose amounts to fraud. Here both the common law and the MPA required disclosure of latent defects known to seller. The court found that the information about the EPA investigation was distinct information from the discoverable information about the discarded paint cans. Chase knew of this information, and Hess would have had difficulty, at least, in discovering it. Expert witnesses – experienced real estate brokers in the area, testified that this was the sort of information that would be deemed relevant to a buyer.

As to the "as is" clause, the court found that Missouri will not honor such a clause in fraud cases where the fraud amounts to fraud in the inducement – where it led the victim to accept the contract and the "as is" clause when he would not have done so had he known of the fraud. The fact that Hess and all other potential buyers testified that they would not have bought the property with knowledge of EPA's interest was effective evidence here.

Chase marketed the property through its own employees, and the court did not believe that the employee who supervised the sale had no knowledge of the environmental problem, as she had received information in several ways of the EPA investigation.

The jury did not award punitive damages under the fraud claim, and the court held (by a split decision) that punitive damages were not available under the MPA, although actual damages and attorney's fees were available, where private rights of action did not exist under the MPA at the time of the events here.

Comment 1: Undoubtedly the case was so carefully prepared and presented because the plaintiff's attorneys saw a deep pocket here for punitive damages. Chase dodged the bullet here, but look for the next shoe to drop on another corporate seller in the near future. The wave of foreclosures on junk properties resulting from the current subprime mortgage debacle is going to create lots of opportunities here, so probably the investment in this case will pay off to the plaintiffs' bar in the long run.

Comment 2: The nondisclosure of the environmental problem was just corporate carelessness, and there likely was no deliberate intent to deceive, so the jury's finding of no punitive damages likely was just. But where the statute authorizes punitive damages, will the standards for awarding them be less stringent? This seems a ripe area for exploitation, and a scary one for foreclosing mortgagees. Regular homeowners selling their properties likely will not get caught up in this issue because the MPA may not apply to them and in any event, a typical broker-supervised home sale in Missouri likely would have resulted in disclosure here.

VENDOR/PURCHASER; CONDITIONS; ATTORNEY APPROVAL: Phrase "subject to approval of both attorneys before 7/12/05" establishes a condition of attorney approval, and contract is not enforceable if attorneys do not approve before the set date, even though no indication of such approval is required. ***Kellie Auto Sales, Inc. v. Rabhars & Ritters Ents., L.L.C., 2007 WESTLAW 2398483, (8/23/07), (Ohio App. 10 Dist., 2007), official citation not available yet.***

Ritter, a licensed broker, and her husband were two of four equal partners in a land company. Buyer Said met with Ritter in her office, where she prepared a purchase agreement for him to sign for the sale of certain property owned by the land company. She used a form agreement, but handwrote several provisions into the agreement, including the language: "Final terms and conditions are subject to approval by both parties attornies [*sic*] prior to 7/12/05." The contract set a closing for 7/13/05.

Said signed the contract as an individual and Ritter and her husband each signed the contract, designated as "partner". There were two lines below their signature with the word "partner" written below the line. These lines were blank.

On 7/13/05, Said's lawyer received a contract from Ritter's lawyer containing a number of new conditions and provisions – a material modification of the original deal. When Said objected, Ritter's group declared that the contract was not valid because it had never been signed by all four partners and because the attorney approval requirement had not been satisfied.

The trial court found that the signatures of the two partners bound the partnership, but that the contract nevertheless was void because the condition for attorney approval had not been satisfied. Counsel for Ritter testified that he had never approved the contract prior to 7/12/05, although he had reviewed it, and instead that he had proposed the revisions discussed above.

On appeal: *Held: Affirmed.* The appeals court specifically refused to evaluate the trial court's discussion of the signature issue because it deemed that issue moot when it affirmed the trial court's decision that the attorney approval condition had not been satisfied.

The court noted that Ohio courts had discussed this issue a number of times in the past, and had held consistently that attorney approval can be viewed as a condition precedent to a contract becoming binding, and that if the parties do not stipulate that expression of disapproval by a certain date is required to invoke the condition, then there is no such requirement. Basically, the court held that the court's role is simply to carry out the expressed intent of the parties, and that their intent here was clearly expressed. The court held that the clause was not ambiguous – the attorneys had to approve by the set date if there was no contract.

In response to the buyer's argument that a party could avoid the contract entirely by not submitting it to an attorney, the court noted simply that a duty of good faith and fair dealing might preclude this tactic.

Comment 1: In light of the established Ohio authority discussed by the courts, the case seems to be on strong ground in concluding that a requirement that attorney approval be expressed is something that the parties must put into the agreement. This is not such an uncommon provision. Although Said was not represented by counsel, he was operating in a business environment and could have had an attorney with him had he chosen to do so. An attorney probably wouldn't have agreed to a clause written in this way, but to say that indicates that an attorney would have understood that the phrasing of the requirement is dangerous. Said shouldn't have agreed to it either, for that reason. But he did.

Comment 2: That being said, the editor finds interesting the role of the broker/seller here – Ritter. She delivered to the buyer a document indicating that she functioned as broker for the seller partnership. Of course, the likely reason she did this was to accomplish a formal disclosure that she was not representing the buyer, even though she was a broker. Good enough. But did this disclosure also mean that Ritter was functioning as a real estate licensee in addition to functioning as a seller?

The editor isn't sure the distinction really matters, because even when functioning expressly as a seller, a licensee owes duties of fair play and, the editor believes, competency, to all parties. But the distinction may matter if we ask whether Ritter had a duty of competency at the standard of an attorney in drafting legal language for a contract. Acting as a broker, she certainly did. Acting as a seller, perhaps she didn't. And if she did have such duty, to whom did she owe it? Only to the seller? Or to both sides?

If, as the editor has argued, a competent attorney would have seen the hidden shoals in the attorney approval clause as written – with a condition coming to fruition one day prior to a scheduled closing, and with no requirement for any indication that the condition hasn't been satisfied – any such competent attorney would have warned both sides from agreeing to this term unless, in fact, they were expecting to spring a complete change on the other side at the last minute. If this was Ritter's purpose, she was treating Said unfairly in drafting the clause in this way. If this wasn't her purpose, she was incompetent. But my problem, as noted, is that I'm not sure she owed a duty of competency to Said. Had she been simply a broker, and not the seller, I think that she would have, regardless of which party she represented.

WATERS AND WATER RIGHTS; RIPARIAN GRANTS: A riparian right and a riparian grant are not identical because a riparian right is a license or privilege to access or make reasonable use of water whereas a riparian grant is no different from any other conveyance of land that creates a separate tract of land, separate and apart from the upland tract that shares its boundary. ***Panetta v. Equity One Inc., 190 N.J. 307, 920 A.2d 638 (N.J., 2007)***

The New Jersey Supreme Court was faced with the question of "whether a conveyance of real property that makes no mention of an abutting riparian grant can be construed under [a particular New Jersey statute] to include that grant as an appurtenance."

Several generations of a family owned property which consisted of both an upland lot designated as a particular tax lot and a riparian grant separately designated as another tax lot. The riparian grant was created in 1928 and was properly recorded. A time came when the property was owned by a mother and her son. They then deeded the property to themselves and to the son's wife. "That deed specifically included and described the upland lot and the riparian grant as tract one and tract two, respectively." A few years later, the son applied for a mortgage loan. In connection with that loan, his mother and wife deeded their interests in the upland property to him and his wife. "That deed did not mention the adjacent riparian grant, but only described the upland lot by reference to its tax lot and with a metes and bounds description." The mortgage was granted using the description on the contemporaneous deed. "Although the mortgage documents provided that all improvements, easements, appurtenances, and fixtures were included, no mention of the riparian grant [lot] was contained therein."

When the borrower (son) defaulted on the loan, foreclosure followed. A sheriff's deed was issued and it contained the property description without any mention of the riparian grant lot. The mortgagee was the successful bidder. It then solicited no-reserve bids for the property and each of the bids, but one, were tendered not only for the property, but also for the riparian grant incorporated therein. The mortgagee accepted one of the bids that expressly called for the riparian grant lot as part of the property to be sold. The sole bidder who did not condition its bid on inclusion of the riparian grant lot sued the mortgagee for specific performance.

In the initial court proceedings before the lower court, it was ruled that the borrower had "intentionally excluded the riparian grant in securing the mortgage and that [the mortgagee] was unaware of the grant." The lower court also "held that nothing requires that the riparian grant follow the upland property as a matter of law." The lower court thus ordered specific performance in favor of the one bidder who had not, in its bid, required that the riparian grant lot be included.

The Appellate Division reversed the judgement for the specific performance, holding that the riparian grant was included in the conveyance that had been made by the mother and the son's wife to the son and his wife. This resulted in a further appeal to the New Jersey Supreme Court.

The Supreme Court held that "[a] riparian grant is a conveyance in fee simple of real property. As such, without specific mention in the deed or other evidence that the parties intended its inclusion, a riparian grant will not pass as an appurtenant to another distinct parcel." Reaching this holding, it opined that the "Appellate Division failed to distinguish between a riparian right and a riparian grant, which are not identical and not similarly governed by" New Jersey statute. Here, the riparian grant lot was identified on the municipality's tax map "as distinct from the upland lot." The Court rejected the Appellate's Division view that this distinction was inconsequential. Instead, it found it to be a critical distinction.

According to the Court, "[a] riparian right is a license or privilege to access or make reasonable use of water. Riparian lands are lands lying along the banks of a stream or water body. A riparian grant is the method by which the State conveys riparian lands to its citizens. A riparian grant is not limited to an upland owner but may, after being offered by the State to the upland owner, be granted to persons who are unconnected to the upland property. A riparian grant is no different from any other conveyance of land."

The unsuccessful bidder argued "that deed language shows a riparian grant is not like other conveyances because, if separated from the uplands, it reverts to the State." The Court disagreed, stating that the unsuccessful bidder misapprehended "the import of the language." Instead, according to the Court, "[s]uch clauses are placed in deeds in the event that the initial claim of upland ownership turns out to be false. The requirement of upland ownership only inheres in the initial transaction with the State. A riparian grant is the conveyance of real property divided from the uplands by a fixed boundary, no different from any other conveyance of land."

In addition, the Court held that "[t]he law governing mortgages leads to the same conclusion. Generally, if property is not expressly included in the instrument's description, it will not be covered by the mortgage. Here the mortgage did not reference the riparian grant either expressly or obliquely."

Consequently, the bidder "who bid on the uplands and did not attempt to include the riparian grant, was the only responsive bidder at the without-reserve auction." Consequently, that bidder was held to have an enforceable contract with the foreclosing mortgagee and was entitled to specific performance.

Editor's Comment: The "riparian grant" is clearly a creature of New Jersey statute, but may also be present in other states. The right in question appears to be an access right, and not a right to take water from the water source. It is unclear to the editor why a riparian owner would require such an access right and how that right could be implemented if sold separately from riparian lands. Perhaps we will get some clarification from other DIRTers.

The Reporter for this item was Ira Meislick of the New Jersey Bar, with the editor's editing, of course.

WORDS AND PHRASES; "TRANSIT FACILITY": A rail line and right-of-way acquired by a metro regional transit authority may be considered a "transit facility" and thus statutorily authorized, even though it is being leased to a private company for the operation of a dinner- excursion train. ***Village of Silver Lake v. Metro Regional Transit Authority, 856 N.E.2d 236 (Ohio 2006)***, discussed under the heading: "Railroads; Transit Facility".

ZONING AND LAND USE; CONDITIONAL USE PERMITS. Commission's denial determining that probable drawbacks of proposed gasoline station outweighed the probable benefits was not arbitrary and capricious in, moreover, upon de novo review, Superior Court could consider evidence not submitted at trial. ***Tisbury Fuel Service, Inc. v. Martha's Vineyard Comm'n, 864 N.E.2d 1229 (Mass. App. Ct. 2007).***

This case involves a project of a type identified to be a "development of regional impact," requiring an individual application and exercise of discretion by local zoning authorities. The editor assumes that the standard applicable to this concept is similar to that for a special use permit in other jurisdictions.

Tisbury Fuel submitted an application to the town of Tisbury building inspector to build a gasoline station. This application was then referred to the Martha's Vineyard Commission ("MVC") for consideration as a development of regional impact ("DRI"). The MVC is empowered by Massachusetts chapter 831 §14 (1977), to review and approve projects referred to it by the town permit-granting authorities. The statute permits the MVC to consider (1) "whether the probable benefit from the proposed development will exceed the probable drawbacks" and (2) "whether the proposed development will not substantially or unreasonably interfere with the achievement of the objectives of the general plan of the county and municipalities."

The MVC voted eight to three to deny the application. Tisbury Fuel appealed to the Superior Court, citing the scarcity of gasoline stations on Martha's Vineyard, high average fuel prices, and the appropriateness of the proposed site.

After a six-day *de novo* trial, the trial judge found against Tisbury Fuel and dismissed the complaint. On appeal, the Appeals Court noted that "[t]he [MVC] statute … expressly authorizes the [MVC] to consider 'the amount of pedestrian and vehicular traffic likely to be generated' in determining what is a DRI. This provision, and the fact that the stated purpose of the [MVC is] to protect 'values…which contribute to public enjoyment, inspiration and scientific study,' indicate that the Legislature intended to preserve the unique features of Martha's Vineyard." *Woods Hole, Martha's Vineyard & Nantucket S.S. Auth. v. Martha's Vineyard Comm'n.*, 405 N.E.2d 961 (1980).

Additionally, the Appeals Court found it significant that the judge viewed the proposed project site. The court held that the MVC acted reasonably in determining that there was evidence that the station would cause traffic congestion, citing the MVC submitted traffic analysis. The court rejected Tisbury Fuel's claim that the judge's admission of the traffic report prepared by MVC's traffic-consultant firm was "unduly prejudicial," noting that in *de novo* appeals the trial court is not restricted to hearing the evidence produced before the commission. *Pendergast v. Board of Appeals of Barnstable,* 120 N.E.2d 916 (Mass. 1954). The court found the evidence before the Superior Court supported its determinations and those of the MVC, and MVC therefore did not act in an arbitrary or capricious manner in deciding that the probable drawbacks of adding a gasoline station "outweighed the probable benefits." Judgment affirmed.

ZONING AND LAND USE; PROCEDURE; APPEALS; CHANGE IN SUBSTANTIVE LAW: Where, in process of appeal of denial of zoning benefit, the substantive law applicable to such benefit changes in favor of appellant, court will apply the revised law in dealing with the appeal. ***Layton v. Howard Cty. Bd. of Appeals, 399 Md. 36, 922 A.2d 576 (2007)***

A property owner was denied permission from the county board to use her land as a wildlife sanctuary because such a use violated the land use laws in place at the time of her application and the county board's initial decision.

While the property owner was appealing, the county code was amended to allow wildlife sanctuaries. The Maryland Court of Appeals reaffirmed the rule from *Yorkdale Corp. v. Powell*, 237 Md. 121, 205 A.2d 269 (1964), which says that a substantive change in statutory law that takes place during the course of the litigation of a zoning or land use issue will be retroactively applied by appellate courts.

Although the general rule is to apply the law that was in effect at the time of the event leading to the litigation, Maryland continues to recognize an exception for zoning and land use cases. The court remarked that this was the first time the *Yorkdale* rule operated in favor of a property owner to expand allowable uses.

ZONING; NOTICES; EXTENSIONS: When a challenge to a land use board's resolution raises public concerns involving the use of private land encroaching on public land, and there will be no prejudice arising out of a small delay in challenging the resolution, a court should extend the normal 45 day appeal period within which a challenge may be made. ***Gregory v. Borough of Avalon, 391 N.J. Super. 181, 917 A.2d 796 (App. Div. 2007)***

A beach front motel sought approval from its municipality's zoning board to expand a building. It also sought variances for relief from protection ordinances as well as conditional use, parking, and design waivers. The motel and the municipality both procured land surveys and it was revealed that the motel encroached upon municipal land. In particular, a portion of the motel encroached on sand dunes and some motel parking spaces encroached on a municipal street and rights of way. Other encroachments included a roof eave that extended out over municipal property and one wall of a rest room facility built as a separate structure. It was also discovered that a sidewalk, water and sewer lines, a beach stand, and a sign were all built on municipal property.

Before a hearing on the motel's application was held for the building expansion and the variances, the municipality and the motel reached an agreement on the parts of the motel and its grounds that were encroaching on municipal property. The motel was allowed to continue using the parking spaces that encroached on the municipal right of way and it agreed to maintain those portions of the right-of-way. The municipality agreed to grant the motel a license for the area under the roof eave, the sidewalk portion, the wall of the restroom building, and the water and sewer lines. The motel was required to remove the beach stand, sign, and portions of the sidewalk, and was also required to make the restroom and other portions of the sidewalk available to the public. The motel also agreed to obtain insurance for all areas of municipal land that were encroached upon by the hotel, and to indemnify the municipality from any claims arising out of the use of those areas by patrons or the public.

The board later approved the motel's variance requests and its application to modify its premises. On the date that the resolution was adopted, a condominium building adjacent to the motel property applied to the board for reconsideration of approval for the motel's requests. The condominium, referring to a transcript of a hearing on the motel's application for a renewal of its liquor license, claimed that the motel made misrepresentations before the board in its application for the modifications. The board received the application from the condominium and informed counsel for the condominium that a decision would be made at a later time. The board then reviewed the condominium's request and allowed the motel to respond but ultimately never ruled on the request. The condominium brought an action in lieu of prerogative writs against the municipality, challenging the site plan approval and related variances. The condominium contended that the resolutions were beyond the scope of the zoning board's authority. In response to the municipality's motion to dismiss, the condominium asserted that the resolution was not published after it was adopted, and it, the condominium, should not have been subject to the forty-five day limitation period for reconsideration of a resolution. The lower court rejected the condominium's claims as untimely since court rules state that actions brought in lieu of prerogative writs must be brought within forty-five days. The lower court also refused to consider evidence presented by the condominium because it was not part of the record and also concluded that the board's resolution was supported by sufficient evidence and was neither arbitrary nor capricious.

The Appellate Division discussed the rule limiting actions brought in lieu of prerogative writs to a forty-five day limit which starts when a claimant gains the knowledge and opportunity to seek relief, review, or a hearing. The Court also pointed to a portion of the law that allows this period of time to be extended in the interest of justice. Examples of such cases are when the action involved significant and novel constitutional matters, where there were informal or ex-parte decisions of legal questions by administrative officials, or in cases of questions affecting public, but not private, interests in need of clarification or adjudication. The municipality moved for dismissal based on the forty-five day limit. The condominium however, did not argue for an enlargement of time for challenging the motel's application, but instead contended that the forty-five day limit for bringing an action in lieu of prerogative writs never began to run because the agreements were *ultra vires* and also had not been published.

The Court found that the condominium's challenge to the resolution raised public concerns involving the use of private land that encroaches on public land. It also found that neither the motel nor the municipality would suffer any prejudice out of the condominium's delay in challenging the agreements, or as a result of having to defend both the board's approval and the governing body's resolutions. In this matter, the Court noted that although the condominium's challenge to the dune and parking agreements fell outside the forty-five day limit, it was still closely related to the site plan approval that had been challenged by the condominium in a timely manner. Evidence presented by the condominium indicated that the motel's prior application for a liquor license renewal contained information that the hotel had previously expanded without authorization. The condominium wanted to point out that even though the motel testified before the board that the ordinance mandating separation between existing structures from dune lines had passed before any expansions took place, this information was never acted on by the board, and the lower court refused to consider it because it was not included in the administrative record.

Thus, the Court reversed the lower court's decision which dismissed the condominium's challenge to the parking and dune agreements. It reasoned that if either of the agreements dealing with the encroachment of the motel onto municipal property were to be found invalid by the lower court, then such a finding, and the evidence revealed in the condominium's challenge, would be have to be considered by the board in making a decision on the motel's expansion request.

ZONING AND LAND USE; RELIGIOUS ACTIVITIES: Where a church's land use activity is useful to its religious purpose, but not fundamental, it is not protected by Pennsylvania state land use religious protection laws. ***Ridley Park United Methodist Church v. Zoning Hearing Bd. of Ridley Park Boro., 920 A.2d 953 (Pa. Cmwlth. 2007)***.