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Sponsor:
Section of Real Property,
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Quarterly Report on Current Developments in Real Estate Law

July 1 to September 30, 2008

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ADVERSE POSSESSION; ADVERSE POSSESSION TITLE: Once adverse possession is completed, the adverse possessor will be viewed as transferring the adversely possessed property if such possessor also transfers adjacent property of which the adversely possessed parcel is an apparent part, even though not described in the deed. ***Lacy v. Adams, 256 S.W. 2d 610 (Mo. App. 2008)***

In 1938, one Allen owned adjacent parcels, and conveyed one of them to a relative, Eichler, and her husband. The property had a house on it, which Eichlers used as a rental. In 1971, Eichler's daughter, husband and child moved into the house. Mr. Eichler built a fence to protect the child. The fence enclosed a portion of the adjacent property, which apparently was still owned by Allen.

The Eichler's daughter, Allen, lived in the property for most of the ensuing 10 years. They then had a home elsewhere, but continued to visit and use the house occasionally until 1991, when they resumed residency there. In 1993, Mrs. Eichler, then a widow, transferred the house to Allen. In 1993, Allen removed the fence.

In 2005, plaintiffs purchased the adjacent property, apparently from relatives of Allen, and in the course of remodelling that property they fell into a dispute with Allen about the area of their legally described parcel that had been enclosed by the fence.

Held: Under Missouri's ten year adverse possession statute, Eichlers had obtained title by adverse possession to the property during the period 1971-1981. Thus, when Mrs. Eichler transferred to Allen in 1983, adverse possession was completed.

Plaintiffs pointed out that the deed from Eichler to Allen did not describe the property. But since the property at the time was fenced together with the house, the court concluded that the Eichler's obvious intent was to transfer the adversely possessed property together with the rest of the parcel. The question is not what was described in the deed, but "the intended and actual transfer of possession of the land held adversely."

Plaintiffs also argued that a great degree of stronger evidence of adverse possession is necessary to support a claim by a relative against adjacent property owned by another relative. The court confessed that this was true under Missouri authority, but does not mean that there can never be adverse possession in such cases. Here we had a fence that stood for the entire statutory period (and for far beyond that).

Comment: This is hornbook law, but it is always worth reviewing these principles. A completed adverse possession remains after the evidence of it is gone. Further, an intent to transfer adversely possessed property will pass that property along with a deed that describes adjacent property, notwithstanding Statute of Frauds, recording acts, and other issues. Note further that adverse possession need not be recorded, so subsequent BFP's of the described property are out of luck, even if they had no knowledge, actual or constructive that the property they bought had earlier been adversely possessed by another.

This case is a good example of the problem. The plaintiffs here were caught completely by surprise. There was no fence when they bought their lot, and they had every reason to believe they owned what their deed described. Not so, unfortunately, but for what the editor believes to be good and sufficient reasons.

ADVERSE POSSESSION; REQUIREMENT OF HOSTILITY; PERMISSION: Adverse possessor's use is "hostile" even if it permits tenants of true owner to park on its land. ***England v. Eaton, ___ S.W.3d ___ , 2008 Westlaw 1734935 (Ark. Ct. App. 4/18/08).***

In 1990, England purchased a tract of land and began using a building located on the tract in dispute that was adjacent to England's property and owned by Eaton. England maintained and improved the disputed tract, used the building for his business, ran cattle on the western part of the disputed tract, made improvements to a road running through the western part of the disputed tract to the building, and constructed a gravel parking lot located on the western part of the property, and in fact fenced some of the tract in order to control the cattle. The fence lasted nine years. The adverse possession period in Arkansas is seven years.

In 2006, England conducted a survey and realized the disputed tract was owned by Eaton. Soon thereafter, England brought an adverse possession action. While Eaton conceded she was unaware that a building existed on the east side of her property, she attempted to distinguish England's adverse use of the two portions of the disputed tract by arguing that her tenants used the first 30 feet of the road constructed by England.

The evidence also showed that England gave some of Eaton's tenants, a motorcycle club, permission to park in the gravel lot, and that he acknowledged Eaton's ownership of the lot. Thus, Eaton argued, England's use was not "exclusive." England had permitted the club to use his parking lot periodically when they conducted rallies – about once a year. After 2006, but before filing suit, England had commented to one of the tenants that they were permitted to use the land "because [Eaton] owns in anyway." Eaton herself only visited the land three times in twenty years – a true absentee landowner.

The trial court after actually visiting the property twice to get a sense of the physical layout, resolved these issues by (1) excluding the first 30 feet of the road from the part England adversely possessed, and (2) splitting the property into east and west portions, finding that England proved he had adversely possessed the eastern portion of the strip, but not the western portion. On appeal, England conceded Eaton's use of the 30-foot strip, but argued that arbitrarily splitting the remainder of the property constituted clear error.

The Arkansas Court of Appeals reversed, by a 3-2 vote. It began by reciting the established elements of adverse possession: possession of the disputed property must be continuous for more than seven years and must be visible, notorious, distinct, exclusive, hostile, and with intent to hold against the true owner. Because Eaton's tenants used the driveway on the 30-foot strip to access Eaton's property, the court agreed with the circuit court's resolution as to that strip. It distinguished, however, Eaton's tenants' use of the western portion beyond the 30-foot strip. In *Anderson v. Holliday*, 986 S.W.2d 116 (Ark. Ct. App. 1999), the court held that permissive use by others does not destroy the exclusiveness of an adverse claimant's possession. While Anderson involved permissive use by the public, the court here held that this principle governs as to those holding record title as well.

The court noted that nothing in the record indicated Eaton or her tenants ever attempted to oust England or assert rights in the property. In addition, although England acknowledged Eaton's ownership after he obtained a survey of the property, this did not outweigh the clear preponderance of the evidence showing England's assertion of exclusive dominion over the property for 16 years. Finally, the court held that dividing the property in half had no adequate basis under the facts of the case, and therefore the arbitrary resolution of the dispute constituted clear error. England's use of the property (including the western portion) was sufficiently exclusive, and he became the owner of the property as a result.

Two judges dissented. They reasoned that "[n]either this case, nor any other, supports the premise that an adverse possessor has any legal or equitable authority to grant permission to a record owner to use the property titled in his or her name," and given the court's standard of review (clear error), the trial court's decision should be affirmed. The dissent discussed the facts in more detail, focusing on Eaton's use of the rental house and warehouse near the road on her property, the distinction between England's use of the eastern and western portions of Eaton's property, and England's admissions that he did not own the property and that his use was not exclusive. The dissent emphasized that a court conducting an appellate review of an equity matter should not reverse unless it determines that the trier of fact's findings were clearly erroneous. The dissent also noted the importance of the trial court's physical inspection of the disputed tract (twice) due to the complexities of the facts, and believed the majority should not have ignored the trial court's first-hand knowledge of the property. It concluded that the trial court's findings were far from clearly erroneous, and the line dividing the property should be upheld.

Comment 1: There have been other cases where the true owner's use of the adversely possessed land has been with the clear permission of the adverse possessor. They have reached the same result. But this case seems more equivocal than those. The dissenters would hold that permitting the true owner on the land always is fatal to the hostility requirement. The majority maintains that where the true owner's actions are not possessory in character, they can be dismissed as permitted by the adverse possessor and not inconsistent with hostility. The editor is somewhere in between. Although minor, occasional intrusions by the true owner are unlikely to disturb hostility any more than intrusions by strangers, a significant, periodic occupation, such as that involved here, would appear to derive out of the continued possession of the adjacent parcel actually possessed by the true owner, and would constitute a break in the continuity, exclusivity and hostility of the adverse possession activity. There are, it is true, cases in which true owners have intruded openly on the adversely possessed land for some time, but usually in such cases the true owners are acquiescing in the permission the adverse possessor gives, basically conceding the adverse possessor's claim. That didn't occur here.

Comment 2: But there is some question here of the adverse possessor's hostility. First, there is the statement that "it's [Eaton's] land anyway." The court viewed this as "some evidence" of a lack of hostility, but noted that it happened after adverse possession would have run anyway and after the survey. The editor isn't convinced. There is not much indication that the survey told England anything that he didn't know already, and the statement suggests that England was simply relying on Easton's implied permission in using the unused property as a parking lot. Of course, the editor can't dispute that the exclusive use of the buildings gave England adverse possession of those portions of Eaton's land, but the rest of the possession was far more equivocal, and more consistent with a simple "borrowing" of Eaton's land while Eaton didn't need it. Also, the majority doesn't make enough of Eaton's claim that she hired land maintenance people to mow the land. The editor would have left the trial court's determination undisturbed, as the dissenters argued.

ADVERSE POSSESSION; TITLE BY PRESCRIPTION; CO-TENANTS AS MINORS: A party seeking to claim title to property on the basis of title by prescription must show that all co-tenants of the property had reached the age of majority during the period in which the claimant exercised dominion over the property. ***Amos v. Taylor, ___ S.W.3d ___ , 2008 Westlaw 1891443 (4/28/08).***

When Mary Lou Locklayer died in 1958 without issue, several nieces and nephews acquired an undivided interest in the subject property as tenants in common. One of those nephews, Pete Amos, was the father of the plaintiffs in this case. Upon Locklayer's death, the property contained a modest residence without heat, electricity or indoor plumbing, situated in a rural farming community. Pete chose to move onto the property with his wife (Alberta Amos) and four children, where he grew tobacco and raised livestock between 1958 and 1979, collecting all of the income from those operations. In addition to the farming activities, Pete made numerous improvements to the residence, including the installation of indoor plumbing, made repairs and paid taxes. At no time did the family ask for or receive financial assistance from any other co-tenant.

In 1979, Pete died intestate and was survived by his wife and four children, who received his interest in the property and are the plaintiffs in the case. After Pete's death, his wife and some of the children continued residing in the house, but did not actively farm the property after Alberta's death in 1987. Jan Hammer, the daughter of one of the plaintiffs, resided in the residence until 1993. After that time, the plaintiffs have rented out the property for farming operations, but no one has lived in the residence.

In January 2000, the plaintiffs filed an action against the numerous co-tenants, claiming title to the property by prescription during the time Pete worked the property. The defendants in the case consisted of 21 known co-tenants and other unknown co-tenants, whom the plaintiffs solicited by publication. The plaintiffs argued that Pete exercised "uninterrupted possession, dominion, and control over the real property from December 1958 until his death in August 1979." One of the defendants filed an amended response to plaintiff's statement of facts asserting that two of the co-tenants were minors during the time Pete exercised dominion and control over property, and thus were under the disability of minority at the time. The trial chancellor granted summary judgment to the plaintiffs on their claim of title by prescription, and the defendants appealed.

The Tennessee Court of Appeals first set forth the well-settled elements of title by prescription: "First, the prescriptive holder must show exclusive and uninterrupted possession of the land in question for more than twenty years, during which time he must claim the same as his own without any accounting to his co-tenants or claim on their part." . . . "Second, the party asserting title must also show that none of the co-tenants were under a disability to assert their rights to the property." In this case, the evidence was clear that several of the original co-tenants were under the disability of being minors during the prescriptive period.

The plaintiffs argued that based on a state statute, the fact that some defendants were under a disability during the time in question was not fatal to the claim; it merely extended the time to contest the prescriptive period by three years. However, the court distinguished this statute because it applied to adverse possession rather than title by prescription, and held that because some of Pete's co-tenants were under a disability during the period he exercised dominion, the second element could not be established.

Comment: Title by prescription is an obscure and rarely invoked alternative to adverse possession available in some, but not all, jurisdictions. It is more commonly seen in claims for easements by prescription. As to the claim of title by prescription, sometimes there is a distinct statute setting forth a specific time period possession in order to establish such a claim. But in many cases the concept is based upon judicial doctrine and there is no distinct time period, although sometimes courts will "borrow" the statute of limitations available for adverse possession. Tennessee courts apparently have recognized the doctrine and have a judicially announced twenty year period that must run. This, the editor believes, is longer than the statutory adverse possession period in Tennessee.

The courts in Tennessee have accepted that in a claim by a possessing cotenant against other nonpossessing cotenants, a claim of title by prescription need not involve a clear and unequivocal "ouster" of the nonpossessing cotenant, such as might be required for adverse possession to begin to run. Instead, evidence of a long continued possession will suffice. This is probably why the claimants in this case relied upon prescription rather than adverse possession.

The notion of title by prescription is that, at some earlier time, there was an actual grant of the disputed interest from the true owner to the prescriptive claimant, but that the granting document has been lost. But the behavior of the prescriptive claimant during the intervening years is deemed to be substantive evidence of the original grant. Thus, although payment of taxes may not be relevant for an adverse possession claim in a given jurisdiction, it might well be relevant for a claim of prescriptive title.

Similarly, as the Tennessee court here concludes, it would run counter to the notion of a lost grant to conclude that the prescriptive period could commence at a time when one of the putative "grantors" was a minor, since such grant would be invalid.

ALTERNATIVE DISPUTE RESOLUTION; ARBITRATION: Federal Arbitration Act preempts state law invalidating provisions requiring arbitraton outside the state in contracts involving in-state real estate improvements. ***LaSalle Group, Inc. v. Electromation of Delaware County, 880 N.E.2d 330 (Ind. Ct. App. 2008).***

Electromation of Delaware County ("Electromation"), a subcontractor, sued LaSalle Group, Inc. ("LaSalle"), the general contractor, for breach a of contract for work to be performed in Indiana. The contract gave LaSalle the right to compel arbitration in Michigan. Electromation challenged the arbitration provision in the trial court. That court held the contract's arbitration provision void under state law. LaSalle appealed, arguing that the state law was preempted by the Federal Arbitration Act (the "Act").

By statute, Indiana law provides that, "A provision in a contract for the improvement of real estate in Indiana is void if the provision… requires… arbitration… occur in another state." Ind. Code § 32-28-3-17(2) (2008). The Act however, requires that a court enforce arbitration clauses in contracts involving interstate commerce. The Act permits the invalidation of such arbitration clauses pursuant only to generally applicable state law defenses.

Here, the Indiana Court of Appeals held that the Indiana statute applied only to arbitration provisions in Indiana-based real estate improvement contracts and that the statute presented an obstacle to Congressional intent to "foreclose state attempts to undercut the enforceability of arbitration agreements." 880 N.E.2d at 333. The appeals court held that the Act preempted the state law and enforced the arbitration venue provision.

BANKRUPTCY; ESTATE; DIVORCE DECREES: If prior to filing for bankruptcy, the debtor had been ordered to transfer ownership of property to a former spouse in a divorce proceeding, the debtor's equitable interest in the property is not part of the debtor's bankrupt estate because, at best, the debtor was holding only bare legal title on the date of the petition. ***In Re McLaughlin, 2008 WL 619214 (Bkrtcy. Ct. D. N.J. 2008), Unpublished; March 4, 2008:***

Two lienholders had obtained judgments against two properties owned by a husband. Subsequently, the husband and wife were divorced with a court approved Property Settlement Agreement (PSA). The husband then filed for bankruptcy and a bankruptcy trustee was appointed

By order, the trustee was authorized to sell one of the properties and to give the former wife half of the proceeds at closing, with the remaining half to be held in escrow until further order of the court or an agreement of the parties. The bankruptcy debtor's ex-wife later sought an order directing the bankruptcy trustee to turn over the escrowed funds to her, alleging that she owned the proceeds from the sale free and clear of the two lienholders.

The Bankruptcy Court noted that a property in which a debtor holds only bare legal title as of the date of the debtor's bankruptcy petition becomes property of the estate only to the extent of that legal title. It noted that, in this case, the husband had been ordered under the PSA, approved ten days before he filed for bankruptcy protection, to transfer ownership of the property to his former wife by way of a quitclaim deed. Therefore, his equitable interest in the property was never a part of his bankrupt estate, and at best, the husband held only bare legal title to it on the date of his bankruptcy petition. Additionally, the court noted that a prior adversarial hearing had concluded that the PSA did not result in a fraudulent transfer, but only resulted in the husband transferring his one-half interest in the property.

The trustee argued that the estate was entitled to transfer of the escrowed funds because the wife would receive more than she would have received had she sold the property herself, given that a trustee can sell a property with avoidance of unperfected judgment liens. In response, the Court found the sole argument of a windfall insufficient as to entitle the trustee to the escrowed funds. Further, the Court held that the two judgment lienholders were free to litigate their claims against the wife in state court. Accordingly, the Court ordered the trustee to turn over the escrowed funds to the debtor's ex-wife.

BANKRUPTCY; "FREE AND CLEAR SALES;" FINALITY: Ninth circuit BAP restricts bankruptcy "mootness" doctrine for sales under Bankruptcy Code Section 363. ***In re PW, LLC, 2008 WL 2840659 (9th Cir. BAP (Cal.), July 18, 2008)***

The Ninth Circuit BAP held that, notwithstanding the junior lienholder's failure to obtain a stay pending appeal of the bankruptcy court's order approving a sale of the estate property free and clear of the junior lien, § 363(f) of the Bankruptcy Code did not permit the senior secured creditor to credit-bid its debt and purchase the estate property free and clear of the junior lien based on the "mootness" doctrine.

In this single asset real estate case, the bankruptcy trustee and DB Burbank, LLC ("DB"), which held a first-priority secured lien of more than $40 million on substantially all of the assets owned by the debtor, PW, LLC ("PW"), entered into a "Binding Term Sheet" that established specific procedures for an auction and sale of PW's assets. The Binding Term Sheet also provided that DB would serve as a "stalking horse" bidder for a sale of the property, and that if there were no qualified bidders for an amount greater than the "strike price" of $41,434,465, DB would buy PW's property for that amount. In addition, DB agreed to pay the Trustee a "Carve-Out Amount" of up to $800,000 for certain administrative fees and other costs and expenses. (DB also agreed not to seek relief from the automatic stay and to refrain from communicating with third parties regarding the sale of PW's assets.)

On March 20, 2007, the bankruptcy court entered an order establishing a procedure for the sale of PW's property, and the trustee moved to approve the sale free and clear of liens under § 363(f)(3) and (f)(5) of the Bankruptcy Code. The junior lien creditor, Clear Channel Outdoor, Inc. ("Clear Channel," whose consensual lien secured a claim for $2.5 million), opposed the motion, arguing that § 363(f) was not applicable. On April 26, 2007, over Clear Channel's objection, the bankruptcy court entered a separate order authorizing the sale free and clear of Clear Channel's lien under § 363(f)(5) ("Sale Order"). Only three bids for the property were timely received, and none qualified because they were not in excess of the strike price. (The highest was a nonconforming contingent bid of only $25.25 million.) Therefore, the trustee sold PW's property to DB at the strike price, and DB paid the trustee the Carve-Out Amount for the receiver's fees and certain other administrative fees and expenses.

On May 31, 2007, the bankruptcy court confirmed the sale to DB and found that DB was a purchaser in good faith. The court entered a "Confirmation Order" to this effect, and declined to stay that order pending appeal (as did a prior motions panel of the BAP). The sale closed on June 15, 2007. Clear Channel received no payment under the terms of the sale because DB's credit bid meant that there were no proceeds to which Clear Channel's lien could attach.

On Clear Channels appealed, attempting to reverse the sale order and confirmation order and to establish that its lien ought to extend to the Carve Out Amount.

According to the 9th Circuit BAP:

This appeal presents a simple issue: outside a plan of reorganization, does § 363(f) of the Bankruptcy Code permit a secured creditor to credit bid its debt and purchase estate property, taking title free and clear of valid, nonconsenting junior liens? We hold that it does not. In reaching this conclusion, we reject the contention that once the sale is consummated, the appeal from the order stripping the junior creditor's liens is moot and immune from scrutiny, and we hold that, in the circumstances of this case, the junior lienholder's rights are preserved. . . .

We conclude that while any relief related to the transfer of title to [the purchaser] is moot, stripping the [objecting lienholder's] lien and related state law rights present an issue that is discrete and separable from title transfer. That part of the [objecting lienholder's] appeal is not moot."

The court evaluated the issue under various mootness tests in reaching its conclusion. The BAP excused the failure of Clear Channel to obtain a stay pending appeal by stating that in the particular circumstances of this case, "when a bond staying the consummation of the deal would have been far in excess of the lien that Clear Channel is trying to protect, we question whether that remedy is exclusive."

The BAP further concluded that neither § 363(f)(3) or (5) (the only two provisions of § 363(f) deemed applicable by the BAP in this particular case) permitted the "stripping" of liens. (Sec. 363(f) provides, in pertinent part, that the trustee may sell property free and clear of any interest in the property only if . . . (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property; . . . (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest").

"The Trustee asserts that the "aggregate value of all liens" in this paragraph means the economic value of such liens, rather than their face value. This argument arises from § 363(f)(3)'s variance from general Code usage; that is, whether its reference to "value of all liens" is simply an unfortunate deviation from the Code's general preference to refer to claims, and not liens, or whether it has some other significance."

"The Trustee and DB assert that, under conventional bankruptcy wisdom, supported by § 506(a), the amount of an allowed secured claim can never exceed the value of the property securing the claim. Since a secured claim is a form of "lien," see 11 U.S.C. § 101(37), some courts have found that an estate representative may use § 363(f)(3) to sell free and clear of the property rights of junior lienholders whose nonbankruptcy liens are not supported by the collateral's value. That is, there may be a sale free and clear of "out-of-the-money" liens (citations omitted)."

"We disagree. This reading expands § 363(f)(3) too far. It would essentially mean that an estate representative could sell estate property free and clear of any lien, regardless of whether the lienholder held an allowed secured claim. We think the context of paragraph (3) is inconsistent with this reading. If Congress had intended such a broad construction, it would have worded the paragraph very differently."

The BAP did affirm that portion of the bankruptcy court's decision holding that certain "carveout" payments by the purchaser (to pay trustee's fees, administrative fees and certain other costs and expenses) were not "proceeds" of the sale and that they did not constitute part of the objecting lienholder's lien.

With respect to § 363(f)(5), the BAP determined that: (1) "interest'" includes a lien; (2) sec. 363(f)(5) refers to a legal or equitable proceeding in which the nondebtor could be compelled to take less than the value of the claim secured by the interest (not simply by paying the money owed under a lien obligation); and (3) the bankruptcy court must make a finding of the existence of such a mechanism and the trustee must demonstrate how satisfaction of the lien "could be compelled." The BAP rejected the trustee's argument that "cramdown" under § 1129(b)(2) is a qualifying legal or equitable proceeding (disagreeing with other courts that have so held). The BAP held that because of the bankruptcy court's "incorrect interpretation" of § 363(f)(5), it would remand the case for the purpose of allowing the parties "to attempt to identify a qualifying proceeding under nonbankruptcy law (if one exists) that would enable them to strip Clear Channel's lien and make the sale of PW's property to DB free and clear under § 363(f)(5)."

Reporter's Comment 1: The BAP's specific holding on the "mootness" issue appears to be one of first impression in the Ninth Circuit (or elsewhere), and could have severe consequences for bankruptcy debtors hoping to sell estate assets to prospective purchasers, as such prospective purchasers will not actually know if they are receiving title to the property "free and clear" of all other liens and interests, even if the sale order states that it is free and clear of such interests and no stay of the sale order is obtained by the objecting party. It will also give title insurers pause when deciding if (or under what conditions) they will insure such sales.

Reporter's Comment 2: The BAP's narrow reading of § 363(f) in the *PW* case could have disastrous consequences – at least with respect to cases with similar fact situations within the jurisdiction of the Ninth Circuit that involve sales "free and clear" of existing liens – even where no stay of the bankruptcy court's sale order was obtained and the purchaser was determined by the court to have made a good-faith offer. The *PW* decision could make it far more difficult to extinguish junior liens through a § 363 sale, impairing the ability of debtors to orderly liquidate estate property and significantly reducing the number of interested purchasers.

The BAP's analysis of § 363(m) of the Bankruptcy Code also is troubling. Section 363(m) states as follows:

The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

In the *PW* case, DB clearly was a good-faith purchaser that purchased the estate property pursuant to a valid bankruptcy court order (which was not stayed pending an appeal), after long and difficult negotiations regarding the terms of the sale. Because DB was in fact the buyer at the sale, the BAP's decision may have effectively discharged DB's first mortgage lien (by merger as it was now the owner of the property) and elevated Clear Channel's $2.5

million lien to a first-priority position. See Thomas L. Kent and Cynthia M. Cohen, Buyer Beware: Bankruptcy Sales Under Section 363 of the Bankruptcy Code May be Subject to Attack (Paul Hastings – Staying Current, June 23, 2008), p.1, http://www.paulhastings.com/publicationDetail.aspx?PublicationId=935; written before the PW decision was formally published and while a motion for reconsideration was pending):

"Unless the [*PW*] decision is changed on reconsideration, it will likely reduce interest in buying at section 363(f) sales. Its impact will be strongest when the amount of the claims secured by the property to be sold exceeds the value of the property and one or more of the lienors does not consent to a sale free and clear. Buyers participate in section 363 sales in substantial part because the sale process is relatively quick, less expensive than the plan confirmation process, and – until now – thought to be final and binding on all parties. If, as a result of the BAP's decision, buyers' interest in section 363 sales wanes, Chapter 11 debtors may be impelled to conduct sales pursuant to a plan of reorganization, which will take substantially more time and, with the additional confirmation risks, be much more expensive. (The authors also note that "The BAP opinion used the terms free and clear and lien-stripping as if they were interchangeable. Lien-stripping is a different concept from selling free and clear." Id. at p.4, n. 3)".

See also Bankruptcy Service, Lawyers Edition (Database updated July 2008), 2c BANKR. SERVICE. L. ED. § 20-419 (stating that "Under 11 USCA § 363(m), appeal of sale of debtor's assets to good faith purchaser is moot where appealing party has failed to obtain stay of sale," and collecting and summarizing cases from federal circuit courts of appeal (including the Ninth Circuit).

The article notes that Third Circuit has rejected a *per se* rule mooting appeals absent a stay of the sale of estate property at issue. On the other hand, the majority of the federal courts of appeals follow a per se rule, automatically mooting appeals absent a stay of the sale or lease at issue. *Weingarten Nostat, Inc. v. Service Merchandise Co., Inc.,* 396 F.3d 737, 741 (6th Cir. 2005) ("'Bankruptcy' [or "statutory"] mootness [under § 363(m)] is predicated on the particular need to encourage participation in bankruptcy asset sales and increase the value of the property of the estate by protecting good faith purchasers from modification by an appeals court of the bargain struck with the debtor").

Reporter's Comment 3: As a result of the BAP's holding in the PW case, a purchaser of a bankruptcy estate's real property assets pursuant to § 363 may be unable to obtain title insurance prior to expiration of the applicable appeal period and confirmation that no appeal of the bankruptcy court's sale order was timely filed, without a specific exception for any subsequent reversal or modification of all or part of the bankruptcy court's sale order, even if the sale order has not been stayed.

Reporter's Comment 4: The BAP, in the *PW* case, argued that it was not setting aside the sale of the debtor's assets, which it acknowledged was valid and final, but that it was instead reversing only so much of the bankruptcy court's order as "stripped" the junior creditor's lien. The BAP stated that "Such relief might be difficult or inequitable, but it is not impossible." *In re PW, LLC*, 2008 WL 2840659 at *4. But, as noted above, many otherwise interested prospective purchasers likely will not be willing to take the risk of purchasing the debtor's real property or other assets when they unsure if and when the sale will be final or if the property can truly be purchased "free and clear" of existing liens and other interests (and whether and other what circumstances they will be able to obtain title insurance for the transaction). The BAP stated in its opinion that DB "was aware of the risks of going forward with the sale," *Id.*, but it is difficult to believe that DB truly believed (after all the planning and negotiations preceding the sale and its willingness to act as a "stalking horse") that the sale might be set aside under any conceivable set of circumstances. The BAP reasoned that in this particular case, "[b]oth parties are before the court and no third-party action is required to reestablish Clear Channel's position," Id. at *5, and therefore found that no third party would be prejudiced because it relied on the bankruptcy court's sale order. The BAP ruled that it was possible to "reverse the transfer of Clear Channel's lien to the nonexistent sales proceeds and hold that it remains attached to the property transferred." Id. But certainly this is not what DB expected (or had reason to expect) would happen when it purchased the estate assets "free and clear" of all claims and interests. It will be interesting to see if the bankruptcy courts (and federal appellate courts) in other jurisdictions: (1) follow the holding in the PW case; (2) limit the holding to virtually identical fact situations, or; (3) reject it altogether.

Editor's Comment: Jack Murray, the above commentator, has a point, of course, and a sharp one. But the "mootness" doctrine can also be a blunt instrument bludgeoning victims of overzealous Bankruptcy rulings and leaving them with effectively no appeal of a single judge's mistake. This doctrine, for instance, was implicated in the now infamous *Qualitech* case, which permitted a sale free and clear of leases. Even if the court's determination that leases should not be sacrificed in a free and clear sale was wrong as a matter of law, tenants protesting such ruling would be unable to challenge it if the same judge also refused to stay the sale on appeal of his or her ruling. Here is what the editor said about that problem in connection with another DD discussion of this issue, *Weingarten Nostate v. Service Merchandise*, 396 F. 3d 7347 (6^{th} Cir. 2005) (Under the "mootness" doctrine contained in Bankruptcy Code Section 363, the courts' decision to deny a stay pending landlord's appeal of a bankruptcy judge's order authorizing an assumption and assignment of a lease concludes the landlord's ability to appeal whether such authorization provided "adequate protection" to the landlord as required by Code Section 365.):

"Precision Industries, Inc. v. Qualitech, 327 F. 3d 537 (7th Cir. April 23, 2003) (the DIRT DD for 4//29/03) [held] that a "free and clear" sale of landlord's property under Section 363 wiped out the protections that a tenant had pursuant to Section 365 to preserve its possessory rights notwithstanding the landlord's rejection of the lease. Some Pollyanna commentators have dismissed *Qualitech* as based entirely on the notion that the tenant did not properly object to the sale in the bankruptcy court, but the editor has pointed out that even if the tenant had objected, the bankruptcy court might have denied the objection, and then refused to stay the sale. Now we see what would happen to that tenant if it was unable to stay the sale, which might be a problem for the tenant if all the landlord's property is being "jobbed out" in one sale. A court would be loathe to hold up such an advantageous event for one little tenant. Once the sale had occurred, as we see here, even purchasers with knowledge of the tenant's objections would buy free of them. .

Yes, Children, the Armageddon clock has moved a few notches along its fateful path for leasaehold rights on bankruptcy."

BROKERS; COMMISSIONS; PROCURING CAUSE: Real estate agents who are admittedly the "procuring causes" for sales are not entitled to commissions because the Procuring Cause Doctrine does not apply when an express contract with brokerage that established the conditions under which a commission was to be paid. ***Hill v. Boozer, 658 S.E.2d 268 (Ga. Ct. App. 2008).***

Two real estate agents entered into independent contractor agreements with a broker. The agreements controlled the conditions under which a commission was to be paid. Before being terminated, the agents allegedly secured several home sales for the broker. The agents sued for the unpaid commissions. The trial court found that the agents were the procuring causes of the sales and were entitled to real estate commissions. Under the Procuring Cause Doctrine, an agent or broker is entitled to a real estate commission "as soon as she finds a ready, able, and willing buyer".

The appellate court, however, reversing the trial court's determination, held that the Procuring Cause Doctrine does not apply when an express contract establishes the conditions under which a commission is to be paid. Here, the independent contractor agreements established a set rate of commission payable to the agents. The agreement specified that the agents earned a commission once the transaction closed. The sales closed after the agents' termination, so the commissions were not yet earned at the agents' termination.

BROKERS; BUYER'S BROKER DISCLOSURE: Broker for proposed lessee has no duty to disclose to lessor during negotiations any financial difficulties faced by proposed lessee. ***Blickman Turkus, LP v MF Downtown Sunnyvale, LLC 162 CA4th 858, 76 CR3d 325 (2008)***

CPS entered into a listing agreement, on commission (to be paid one half on lease execution and one half on commencement of rent), to obtain a lessee for buildings to be built on property owned and managed, respectively, by MF Downtown Sunnyvale, LLC and Mozart Development Co. (collectively, Mozart). The agreement provided that cooperating brokers would receive half of any commission paid. In early 2001, Mozart signed written leases with Handspring, Inc. for two buildings to be completed to Handspring's specifications by approximately September 2002. Handspring's obligations were secured by letters of credit. Blickman Turkus, LP, doing business as BT Commercial Real Estate (BTC), represented Handspring in the lease transaction.

Handspring began to have financial difficulties beginning in October 2001. Mozart learned of Handspring's financial problems in August 2002, when it was contacted by another agent for Handspring to negotiate a termination of the leases. In exchange for termination of the leases, Mozart received stock, notes, and cash, and was permitted to draw on the letters of credit for a total consideration valued at more than $50,000,000.

BTC claimed that it was the procuring agent and a cooperating broker under Mozart's listing agreement with CPS and entitled to a commission. Claiming that Mozart had paid the first half of the commission but had refused to pay the second, BTC asserted claims for breach of contract, the covenant of good faith and fair dealing, an implied promise to complete the lease transaction, and tortious interference with advantageous relationship. Mozart cross-claimed, alleging that BTC had been aware of Handspring's financial problems as early as October 2001 and had failed to inform Mozart, which suffered damages as a result. Mozart and BTC both successfully challenged the other's claims before trial, and the superior court entered judgment that neither party take anything. Mozart's motions to vacate the judgment and for attorney fees were denied. Both sides appealed. The court of appeal affirmed the judgment.

The fatal flaw of Mozart's cross-claims was that BTC had no duty to disclose to Mozart the information about Handspring's financial problems – whether as agent for Handspring or, hypothetically, for Mozart or as a result of representations made at the time Handspring entered into the lease. Mozart never believed or rationally could have believed that BTC represented Mozart's interests.

Further, there was no evidence in the record of any basis for Mozart to expect that BTC would disclose Handspring's confidential information other than as Handspring might direct. Nor was there any duty for BTC to correct statements, made before execution of the lease, that allegedly became incorrect thereafter.

Mozart sought to recover for alleged harm not in entering into the lease, but from the failure to withdraw from the lease sooner than it did. Mozart's claims based on dual agency also failed because even if BTC were a dual agent, its obligation, when faced with a conflict between two principals, would be to withdraw from the representation rather than to disclose confidential information.

Mozart's claim for attorney fees failed as well. Even if BTC had succeeded in its claims, it would not have been entitled to attorney fees because it was not a party to the contract (between Mozart and CPS) containing the attorney fee provision.

Comment 1: In *Lombardo v. Albu,* 14 P. 3d 288 (Ariz. 2000) (the DIRT DD for 12/14/00) the Arizona Supreme Court found that is a general duty at common law for both a buyer in the course of contract negotiations and the buyer's agent to disclose adverse financial information concerning the buyer's ability to purchase even when that information is available to the seller in some other way. The same rule would apply, of course, by extension to lessees and lessee's agents. Although the California court here does not cite the Arizona precedent in *Lombardo*, it seems to be at odds with that decision. The editor, incidentally, criticized the Arizona decision and began uttering "Pandora's box" comments.

Comment 2: The NAR inspired statute in Missouri presents an interesting research task. First, there is the language, repeated several times, to the following effect:

"A licensee acting as a buyer's or tenant's agent shall not disclose any confidential information about the client unless disclosure is required by statute, rule, or regulation or failure to disclose the information would constitute a misrepresentation or unless disclosure is necessary to defend the affiliated licensee against an action of wrongful conduct in an administrative or judicial proceeding or before a professional committee. No cause of action for any person shall arise against a licensee acting as a buyer's or tenant's agent for making any required or permitted disclosure." RMS 339.740. 2.

But the statute otherwise requires licensees to disclose to "customers" (that's the other side of the deal – not the broker's client) "adverse material facts actually known or that should have been known by the licensee." And the same statute defines "adverse material facts as including: "Material limitation of the party's ability to perform under the terms of the contract." Some in Missouri view this language as requiring disclosure to the other side of the inability of one's client to perform the contract. It makes sense that the legislature intended this result, but the statute literally requires that the broker disclose such information only to the broker's own client. Lombardo, incidentally, would require the tenant to disclose this information as well. And another provision of Missouri law makes unlawful the "concealement, suppression or omission" of any material fact" in connection with any transaction in commerce. RMS 407.020 (1)

BROKERS; MORTGAGE BROKERS; FRAUD; CONSPIRACY: Mortgage originator and its sole owner liable for conspiracy to violate Mortgage Broker Act where affiliated mortgage brokerage companies committed fraud by inflating appraisals and borrowers' worth. ***Roark v. Rydell, 881 N.E. 2d 333 (Ohio Ct. App. 2008).***

Cynthia and Steven Roark, and Danyel Jones ("Borrowers") bought homes with mortgage loans from Ashore Funding, Inc. (the "Lender"). The Lender transferred the mortgages, via Washington Mutual, to Fannie Mae. Fannie Mae foreclosed upon the mortgages after the Borrowers defaulted. The Borrowers impleaded the Lender, the Lender's sole owner Clifford Rydell ("Rydell") and Airline Union's Mortgage Company and Airline Union's Mortgage Co., Ltd. (collectively, the "Mortgage Brokers"). Rydell also wholly owned Airline Union's Mortgage Company and formed Airline Union's Mortgage Co., LTD. but named his son as 95% owner. The Borrowers claimed at trial that the Mortgage Brokers conspired with the Lender and Rydell to commit fraud by inflating property appraisals and knowingly providing false documentation related to the Borrowers' assets.

The trial court found that Rydell, the Lender and the Mortgage Brokers engaged in a civil conspiracy to violate the state's Mortgage Broker Act (the "Act") and awarded compensatory and punitive damages to Borrowers. Rydell and Lender appealed the finding that they participated in the conspiracy. Rydell and Lender argued that the Mortgage Brokers committed the acts in violation of the Act.

A civil conspiracy occurs when 2 or more persons combine to injure another, provided that the claim is accompanied by an underlying unlawful act. The Act generally bans dishonest and fraudulent activities by mortgage brokers. The Ohio Court of Appeals found that the trial court heard sufficient evidence to find the Lender and Rydell conspired to violate the Act.

The appeals court upheld the trial court's piercing of the corporate veil of one of the mortgage brokers, Airline Union's Mortgage Company, to include Rydell individually as a member of the conspiracy based on Rydell's effective combination of the two mortgage brokers into two indistinct entities, naming of his son as a "dummy majority" owner to protect Rydell's interests benefitting personally from the conspiracy. The appeals court also upheld Lender's liability as a co-conspirator by pointing the Lender's overlooking the obvious problems with the Borrower's mortgage applications provided by the Mortgage Brokers.

EASEMENTS; DAMAGES TO SERVIENT ESTATE; DAMAGE COMPUTATION: New Mexico Supreme Court modernizes and summarizes the law on (1) the liability of a mineral lessee to the surface owner for environmental contamination resulting from the mineral lessee's operations, (2) the measure of damages for that liability, (3) the general liabilities of the owners of mineral interests to surface owners, and (4) the standing to sue of a surface owner who acquires an interest in the land long after the contamination occurred, but before it was discovered. ***McNeill v. Burlington Res. Oil & Gas Co., 2008-NMSC-022, 143 N.M. 740, 182 P.3d 121 (2008)***, discussed under the heading: "Mines and Minerals; Contamination; Damages."

EMINENT DOMAIN; COMPENSATION; LACK OF ACCESS: The city's denial of a curb cut and driveway permit, which effectively destroyed the applicant's right of access to the public road, was a taking, even though it did not deprive the landowner of all economically viable uses of the property, and the landowner had not developed the property in reliance on the existing grade of the abutting public street. ***The State ex rel. Hilltop Basic Resources, Inc. v. City of Cincinnati, 886 N.E.2d 839 (Ohio 2008).***

Hilltop owned 30 acres of riverfront property in the City of Cincinnati. Much of the property was separated from the abutting road by two rail lines, over which Hilltop purchased the right to construct a roadway. In 1996, the City granted Hilltop's application for a permit to construct a curb cut and driveway connecting the property to River Road. Construction never commenced, however, and the permit expired.

In 2004, Hilltop leased the property to Queensgate Terminals, LLC ("Queensgate"), which planned to develop the property as a barge-to-rail transportation facility. Nearby bridge improvement needs made it necessary for the City to make plans to elevate River

Road by seven feet, eliminating the property's access to River Road. When Hilltop again applied for a curb cut and driveway permit to connect the property to the street, the City denied its application due to the proposed project's incompatibility with the pending bridge reconstruction.

Hilltop and Queensgate responded by petitioning for a writ of mandamus to compel the city to institute eminent domain proceedings, claiming the city's actions constituted a taking of their property. The Court of Appeals, Hamilton County, issued the writ of mandamus, which the City appealed.

The Supreme Court of Ohio found that while mandamus will not issue if an adequate remedy, such as an administrative appeal, exists in the ordinary course of law, Queensgate lacked a sufficient alternative under the Cincinnati Municipal Code. The Supreme Court rejected the City's argument that the denial of curb cut and driveway access does not constitute a compensable taking because it does not deny the landowner all economically viable use of the property. Where a fundamental element of ownership has been eliminated, deprivation of all economically viable uses need not be established. Instead, the test is whether governmental action has substantially or unreasonably interfered with the landowner's right of access to the abutting public street. Ohio courts also have rejected making an arbitrary distinction between developed and undeveloped property with respect to whether a compensable taking has occurred.

The Supreme Court affirmed that there is no requirement that the affected parcel have been developed in reliance on the existing road grade in order to qualify as a taking. The right to compensation can be established by a reasonable potential future use. Thus, the Court of Appeals properly concluded that the city's preclusion of curb cut and driveway construction substantially and unreasonably interfered with Queensgate's right of access to the abutting public road. The Court of Appeals was justified in issuing the writ of mandamus to compel Cincinnati to initiate an appropriation proceeding.

Comment: The case seems consistent with others the editor has seen viewing the right of access to a public street as an independent property right that is compensable, even if the property retains some value. Note that here we had a regulatory taking, not a physical taking. But the rule likely would be the same.

EMINENT DOMAIN; DEMAGES; TEMPORARY TAKINGS; EASEMENTS: Temporary easements of road frontage that briefly obstruct interior acreage should be valued on the basis of rental value of the easement for its duration, plus, the rental value of the interior acreage only when actual obstruction occurs or when the condemnee shows that the temporary easement impeded the property's sale or development. ***McMurdy v. State of New York, 10 N.Y.3d 234, 2008 N.Y. Slip Op. 02499.***

In 1980, Claimant purchased a vacant, unimproved parcel of land in Islip, New York. The Parcel had 75 feet of frontage on Montauk Highway and was zoned for residential use. In April 1999, the State of New York permanently claimed a 2.5 foot-deep strip along the length of the Parcel's frontage as part of a highway project. The State also took a temporary easement over a 10 foot-deep strip along the entire front of the parcel for grading purposes. Claimant commenced a proceeding for damages from the Appropriation and the Easement.

The parties agreed to damages for the Appropriation, but disputed how to calculate consequential damages for the Easement – i.e., the damages associated with loss of access to the unencumbered interior portions of the Parcel. Relying upon *Matter of Kadlec v. State of New York*, 264 A.D.2d 420 (2d Dept 1999), Claimant sought the rental value for the whole parcel for the full period of time the easement was in effect – regardless of how long access to the Montauk Highway was actually obstructed. The State countered that consequential damages were only appropriate for those days when access to the interior was actually blocked. Based on *Kadlec*, the trial court found for the Claimant and awarded rental value for the entire duration of the Easement.

The State appealed, arguing that damages were only appropriate for the duration during which the Easement either obstructed access to the Parcel, or interfered with the Parcel's sale or development into its highest and best use. The Court of Appeals reversed.

The Court cited *Village of Highland Falls*, 44 N.Y.2d 505 (1978): "[it] has been held by this court … that compensation need not be paid for the State's taking of a temporary easement when there is no actual interference with the property owner's use of his property" (*Id.* at 507, citing *Great Atl. & Pac. Tea Co. v. State of New York*, 22 N.Y.2d at 75, 87 (1968)). The

Court also noted, however, that *Village of Highland Falls*: warned that uncertain access may not be access:

"[not] to be ignored … although not always measurable, is the damage to a property owner caused by uncertainty regarding the condemnor's intention. A temporary easement that leaves the property owner under constant threat that his use of the property may be curtailed or stopped is likely to affect business or other financial decisions even if use is never interrupted … "(44 N.Y.2d at 509).

The Court found that Claimant was not entitled to consequential damages for the entire period of the easement because, unlike *Kadlec*, the State proved the actual interval of obstruction – 10 days in this case. The Court found that Claimant was not entitled to damages based on uncertainty of the State's intention because the Easement did not thwart the Parcel's highest and best use. Specifically, 1) the Easement reserved Claimant a concurrent right of access; 2) there was no evidence that Claimant had sought the zoning change needed for commercial development; 3) Claimant never applied for a work permit to build an entrance connecting the Parcel to Montauk Highway; 4) Claimant had not sought a yard-width variance required for commercial development; and, 5) there was no evidence that Claimant was planning to sell or develop the property. The proper measure of damages was the rental value of the land encompassed within the Easement plus, as consequential damages, the rental value of the unencumbered interior for any period when highway access was not possible because the Easement was in use.

EMINENT DOMAIN; DAMAGES; "UNITY RULE;" EFFECT ON CONDEMNEE'S SURROUNDING PROPERTY: A condemned parking lot serving surrounding properties is not unified with those properties under the "unity rule" if the taking does not result in a permanent injury to the property or substantial interference with the property's continued use, and therefore the owner of such properties cannot recover compensation for diminution in value. ***Bianchi v. City of Harlan, ____ S.W. 3d _____ , 2008 WL 2166001 (Ky. 2008) (not yet released for publication) .***

City brought two petitions to condemn four parcels of land in its downtown for use in conjunction with a convention center and water park. Three of the parcels were owned by the Bianchi and were used as parking lots for nearby businesses also owned by Bianchi. The fourth parcel was owned by a Bianchi family member, but was held for the benefit of and was managed by the partnership. Bianchi also owned several other properties surrounding the condemned lots. Bianchi moved to have all four condemned lots evaluated as one unit, and the court awarded $101,500 for the combined parcel.

Bianchi filed an exception to the valuation and also filed a counterclaim seeking compensation for "reverse condemnation" or loss in value of certain of the surrounding properties. After a jury trial, the court awarded Bianchi $120,000 for the four parcels, and $43,640 for loss in value of certain of the surrounding properties. Both parties appealed the trial court's ruling. The Court of Appeals upheld the compensation for the taking of the four parcels, but reversed the reward for lost value for the surrounding properties because they were not "united" with the condemned parcels for condemnation purposes. Bianchi then appealed the reversal to the Kentucky Supreme Court.

The Supreme Court examined the unity rule, which states that "two parcels may be unified for valuation purposes if the proponent can show that 'they are contiguous and are united in use and ownership.'" The court specifically considered the rule as it applies to a condemned property that provided parking for nearby businesses occupying other parcels owned by the same landowner. Some courts in other jurisdictions have held that parking lots serving nearby parcels owned by the same landowner are unified, and other courts have held that they are separate. In deciding which approach to take, the court here determined that the appropriate analysis is whether the "taking will necessarily and permanently damage the remainder," or "the parcel taken is substantially necessary to the reasonable use of the remainder."

Bianchi relied on a California case, *City of Los Angeles v. Wolfe*, 491 P.2d 813 (Cal. 1971), where the severing of an office building's parking lot threatened to render the building permanently out of compliance with zoning requirements and freeze the building at its current size. This was a substantial and permanent injury to the property itself, not simply to the business conducted thereon. In the instant case, the court responded, there was no necessary or permanent injury to or substantial interference with the use of the remaining property as a result of the condemnation of the parking lots. In fact, the City built a public parking lot on the condemned parcels, available to Bianchi, its tenants and their customers.

Bianchi essentially alleged that the taking of its four parking lots rendered its remaining parcels less convenient and therefore less attractive to tenants, and this could affect the profitability of its leases. But the court noted that usefulness of parcels taken is a factor adequately reflected in their market value separate from the remaining parcels, and injury to business or loss of profits is not a proper element of compensation in condemnation proceedings. Bianchi could have acquired additional property for parking or converted some of its remaining property to parking, so there was no permanent injury to or substantial interference with Bianchi's nearby property. The court held that the unity rule did not apply and it was thus proper to determine the market value of the taken parking lots in isolation from the other property owned by the Bianchis. The court also concluded that potential inconvenience and business losses flowing from a condemnation are not the type of permanent injury or substantial interference with use necessary to invoke the unity rule.

EMINENT DOMAIN; EASEMENTS; SCOPE OF TAKING: Where a condemnation authority takes an easement to construct a water diversion facility, it does not acquire the ownership of the dirt that it excavates to build that facility, and therefore is liable additionally for taking the value of that dirt and using it as fill in another construction project. ***Brownlow v. Texas, 251 S.W. 3d 756 (Tex. App. 2008)***

The State highway authority ("State") sought to condemn Brownlow's property to construct a water detention facility that was part of the State's highway widening project. Although it originally applied for a fee simple condemnation, it did not complete the lawsuit, but rather entered into a "agreed judgment" stipulating that the State took "a permanent easement in the property."

State proceeded to remove 87,455 cubic meters of dirt and used it in another section of the highway widening project. Brownlows brought suit contending that the excavated soil was not part of the easement condemnation. The appeals court here agreed, reversing the judgment below. By taking the dirt, State had engaged in an inverse condemnation and was liable for the value.

The court found it necessary to deal with a 1913 precedent that apparently had found the State not liable for excavation of dirt in the development of an easement. The court commented that that case might remain good law "[i]nsofar as the State comes into incidental possession of soil while grading a highway." But it overruled the case insofar as it suggested that the State was authorized to remove thousands of cubic meters of dirt and use it for a purpose unrelated to the detention facility. It appears that the court is holding that the court can dig out the dirt, but cannot reuse it.

Comment 1: The State argued, of course, that the nature of the detention facility was evident to the Brownlows, and that they should have expected that dirt would be removed. Although the decision is not crystal clear, it appears that the court's real objection is not that the dirt was removed, but that it was reused.

Comment 2: Would the State have avoided liability if it had tendered the dirt to the Brownlows? Likely so, because, as the court makes clear, the dirt had a market value and likely the Brownlows could have realized upon that value.

What if condemning authority removes brush or timber or dirt in the course of excavation and just trucks it away and dumps it somewhere else? The editor assumes that this is not a taking, so long as the material is made reasonably available to the condemned parties if they want it.

Comment 3: Although this case arises in the context of the a public road development easement, is there really any reason to believe that it would not also be relevant to the identification of the relative rights of the parties in the transfer of a private easement? The editor thinks that it is relevant, and that's one more thing that parties drafting an easement ought to be thinking about. As the editor has often commented, easements generally are undernegotiated and underdrafted. If there hasn't been a case like this as yet involving a private easement, we're likely to see one at some point.

EMINENT DOMAIN; TAKINGS; INVERSE CONDEMNATION: Delay of construction project is not an inverse condemnation. ***Prime Home Properties LLC v. Rockdale County Board of Health, 660 S.E.2d 44 (Ga. Ct. App. 2008).***

A developer purchased a subdivision with the intent to develop lots between 25,000 feet and three acres and sought the required approval from the county to proceed with its development. Prior to the purchase, the county board of health mandated that lot sizes in the county must be a minimum 25,500 feet for homes using septic systems.

The board rejected 6 out of the 112 proposed lots because the lots did not meet the minimum size. Two and a half years later, the board revised its assessment when it modified its methods of calculating lot sizes. The developer claimed that the board's improper interpretation and enforcement of its regulations that delayed the development of the property constituted a temporary taking of the six lots.

The court acknowledged that the developer experienced a delay in developing the lots. However, the court found that the developer was not prevented from marketing and developing the subdivision and had not sold all the lots in the subdivision at the time the board re-approved the plan. The court also found that the developer could have made other uses of the six lots or could have reconfigured the lots to conform to the original ordinance. All approvals had ultimately occurred, and there was no evidence that the lots decreased in value as a result of the delay. In fact, the lots maintained their value and the developer expected to sell them.

The court held that these circumstances are insufficient as a matter of law to establish the requisite taking for purposes of a claim of damages for inverse condemnation. The developer did not suffer a compensable taking.

EMINENT DOMAIN; INVERSE CONDEMNATION; ACCESS: Reconfiguration of road was taking of shopping center owner's right of access. ***State v. Kimco of Evansville, Inc., 881 N.E.2d 987, (Ind.App. 2007)***.

Kimco of Evansville, Inc. ("Kimco") owns the Plaza East Shopping Center ("Plaza East"), located to the northwest of the intersection of State Route 66 ("Route 66") and Green River Road ("Green River") in Evansville, Indiana. Green River runs north and south, and Route 66 runs east and west. Plaza East had ingress or egress on Green River, but not on Route 66. In 2000, the State filed a complaint to, among other things, improve access to Route 66 and limit the ingress and egress to Plaza East. The trial court allowed the State to go ahead with the construction, but left open the issue of damages. Construction was completed in 2004.

Prior to the construction, the primary entrance to Plaza East was through the Southern Entrance on Green River, which drivers could access from either northbound or southbound lanes. Such entrance placed them into the middle of the parking lot. The Northern Entrance was a smaller entrance next to the sidewalk of several stores that allowed "right in/right out" access to Green River's northbound travelers. Post-construction, introduction of a concrete median to Green River limited the Southern Entrance to "right in/right out" access for northbound travelers and no access for southbound travelers. Additionally, travelers entering the Southern Entrance while driving now had to cross a solid white line. Post-construction, the Northern Entrance provided entrance and exit for travelers moving either northbound or southbound on Green River. Traffic on Green River, however, made the Northbound Entrance congested, and cars would stack up in front of sidewalks, making it difficult and even dangerous for pedestrians to navigate between the parking lot and stores.

During and after construction Plaza East stores experienced a decline in sales. From 2004 to 2006, Plaza East dropped from 94% occupied to 56% occupied, and to keep one remaining tenant, Kimco signed a lease at a discount of $90,000, or 60% of prior value. Plaza East also dropped in classification from Class B community shopping center to Class C after the construction. In 2006, a jury returned a verdict in favor of Kimco and awarded damages of $2,300,000 plus costs and interest for a total verdict of $3,196,859.82. The State appealed, asserting that Kimco could not be compensated for loss of access to Green River as a matter of law.

The court in *Biddle v. BAA Indianapolis, LLC*, 806 N.E.2d 570 (Ind. 2007) established the principle that the determination of whether a taking has occurred or not is a matter of law, not a matter of fact. Here, the instructions of the trial court to the jury were enough to show that the court determined a taking of Kimco's access right had occurred. Prior courts had articulated that "an abutting property owner has an easement of ingress and egress to and from a public highway which constitutes a property right and cannot be substantially interfered with or taken away without due compensation." *State v. Geiger & Peters, Inc.*, 196 N.E.2d 740, 742–43 (1964). A taking of this right has occurred where the plaintiff has suffered an injury that is both different in kind from that suffered by the general public and exceeds mere inconvenience. Kimco showed that their right of ingress and egress had been taken in a way that injured them more than the general public, and that the injury they suffered was substantial. The entrances were reconfigured by concrete medians and solid white lines, traffic became congested, pedestrians were confronted with new safety problems, and sales and leasing suffered.

After settling that a taking of Kimco's access right had occurred as a matter of law, the question of damages was a matter properly left to the jury. Given the evidence presented, the jury's $2,300,000 award was within their prerogative.

EMINENT DOMAIN; TAKINGS; LOSS OF "ASSEMBLAGE:" Public acquisition of a party adjacent to that of a private landowner is not a taking of the landowner's right of "assemblage," even where landowner can show that combining its property with the acquired property would have enhanced the value of its property, where the public entity is not otherwise effecting a taking of the landowner's property. ***Tornatta Investments LLC v. Indiana Dep't of Transp., 879 N.E.2d 660 (Ind. App. Ct 2008).***

Plaintiff landowner was negotiating with a buyer for the sale of its property, which was leased to a tire company related to Plaintiff. The potential sale was contingent upon the potential buyer being able to also purchase an adjacent piece of property. INDOT acquired the adjacent lot before the potential buyer; thus, the potential buyer terminated the contract with the landowner. INDOT was aware of the agreement between Plaintiff and its buyer.

Plaintiff filed a complaint against INDOT for a taking without just compensation, arguing that INDOT had deprived it of its right of "assemblage." This doctrine states: "[w]here the highest and best use of separate parcels involves their integrated use with lands of another, such prospective use may be properly considered in fixing the value of property if the joinder of the parcels is reasonably practicable."

Plaintiff argued that INDOT's acquisition of the Mead property was done intentionally to depreciate the value of Plaintiff's land in order to facilitate a future acquisition of the land by INDOT to improve a local expressway. Therefore, it was a taking.

The court concluded that the doctrine of assemblage is only to be used to determine the fair market value of real estate after determining a taking has occurred. Here, the plaintiff had not established that a taking occurred, and therefore, the doctrine was inapplicable. The proper question to be asked was "whether the action of the governmental entity diminished the value of the property in its present use." The court explained that INDOT's purchase of the land had no affect on the plaintiff's tire business. Consequently, the acquisition of the adjacent property did not diminish the value of the property in its present use.

EMINENT DOMAIN; INVERSE CONDEMNATION; CONDEMNATION BLIGHT: A property interest-holder may recover pre-condemnation damages for "condemnation blight" which results from aggravated delay in instituting or continuing the condemnation proceedings. ***Clay County Realty Co. v. City of Gladstone, 254 S.W.3d 859 (Mo. 2008).***

Clay County Realty Company and Edith Investment Company owned a retail building in Gladstone, Missouri. In May 2003, the city declared the property blighted. The city and a developer entered into a redevelopment agreement. After that agreement fell through in 2005, the city began soliciting tax increment financing (TIF) proposals for the property. Shortly after beginning this process, the city approved a TIF plan for the property and adopted an ordinance declaring the property blighted. However, the city had never approved a specific TIF project for the property, nor had it ever completed formal condemnation proceedings against the property. After five years, the property owners sued the city, alleging that its actions in failing to proceed with redevelopment in a timely manner constituted a de facto taking of the property, and sought consequential damages for increased operating costs and lost rental and lease income. The city alleged that the property owners' suit was not ripe and that they had failed to state a claim for an unconstitutional taking. The trial court granted the city's motion for summary judgment, and the property owners appealed.

In a case "involv[ing] a problem which has plagued the judiciary of this state for some time without satisfactory resolution," the Missouri Supreme Court, en banc, addressed the issue of "whether Missouri recognizes a cause of action for precondemnation damages when the condemning authority is alleged to have caused undue delay and committed untoward acts in implementing condemnation proceedings." The property owners alleged that the city's actions caused significant diminution of the value of the property, constituting a taking, and have caused ongoing consequential damages for increased operating costs, lost rental and lease income due to the owner's inability to obtain new tenants or to renew existing leases.

"Condemnation blight" occurs when a lengthy period of time elapses between the time the property is declared blighted and the time the property is taken for condemnation purposes, and is "marked by departure of rental tenants, unmarketability, and declines in rentability, capital values, and profits." The court noted that while Missouri cases have identified this issue as a concern in dicta, it has not yet officially adopted the doctrine as a basis for which property owners could recover more damages. Specifically, in State ex rel. *Washington University Medical Center Redevelopment Corp. v. Gaertner*, 626 S.W.2d 373 (Mo. banc 1982), a property owner whose property had been designated as blighted claimed the blight designation put the property under a "cloud of condemnation" during the period the property was declared blighted but was not yet under a formal condemnation order. The court in that case, in dicta, rejected the owner's claim that he had suffered an unconstitutional taking, noting that a blighted designation "is treated much the same as the threat of condemnation proceedings, the initiation of condemnation proceedings, and negotiation by the condemnor with property owners for the purchase of their property, all of which are considered neither taking nor damaging within the meaning of Mo. Const. art. 1, [Section] 26." The court in the Gaertner case also suggested in dicta that remedies other than a condemnation proceeding can be sought to recover damages incurred as a result of a pending condemnation proceeding. Similarly, in Tierney v. Planned Industrial Expansion Authority of Kansas City, where the property owner asserted condemnation blight, the court rejected a claim based on the city's "passage of the blighting ordinance and the ordinance approving the initial redevelopment plan," noting that the taking does not occur when such ordinance is passed "because there is not any assurance in a blight declaration that development of the property will proceed."

However, the Missouri Supreme Court here noted several cases from other jurisdictions that recognize claims for condemnation blight under an inverse condemnation theory. The court further noted that while a 2006 Missouri statute, Section 523.259 RSMO (Supp. 2007), provides some relief to landowners who suffer damages under the "cloud of condemnation," if the condemnor abandons condemnation proceedings, there is not yet a legislative remedy where condemnation actions have not been abandoned.

The court held that "actions for condemnation blight are inverse condemnation claims that property owners may advance in order to recover consequential pre-condemnation damages, such as the claims brought by Property Owners in this case for increased operating costs and for lost rental and lease income." To have a viable cause of action, a property owner must establish that there has been "aggravated delay or untoward activity in instituting or continuing the condemnation proceedings at issue." Determinations of undue delay should consider statutory time limits for condemnation proceeds, and where those limitations have not been exceeded, delays should not be deemed "aggravated" unless there is additional evidence of unrelated "untoward activity." Further, property owners have the considerable challenge of proving that their damages were caused by the actions or inactions of the condemnation authority.

In this case, the court found genuine issues of material fact such that the property owners' claims survived summary judgment, and rejected the city's contention that the owners' claims were not ripe. The judgment below was reversed and the case remanded.

ENVIRONMENTAL LAW; CERCLA; MORTGAGEE LIABILITY: Bank that arranges with environmental clean up firm to dispose of hazardous substances after it has sold the property is not an "owner or operator" under CERCLA when clean up firm releases substances into the ground during the course of clean up and is not an "arranger" within meaning of state environmental statute. ***Hicks Family Limited Partnership v. 1st National Bank of Howell, 2008 Mich. App. LEXIS 1444 (Mi. Ct. App.7/15/08)*** (unpublished opinion)

Defendant bank had foreclosed on property formerly operated by a defunct paint manufacturer in 1983. In the same year, Bank sold the property to the predecessor of the Plaintiff's estate. When the bank acquired the property, it was contaminated with buried drums of paint and paint thinners. The 1983 purchase agreement provided in part that "Sellers agree to have all equipment inside and out, all stock, debris and residue removed from premises at time of closing, in compliance of E.P.A. Rules & Regulations."

Defendant bank performed remedial activities from 1983 to 1997. But there was evidence that a contractor hired by the bank had damaged a barrel during remedial activities that led to another discharge. In 1997, the bank requested that the site be delisted but the state of Michigan refused.

In 2004, plaintiff began developing the property and discovered several additional buried drums and additional groundwater and soil remained contaminated. In December 2004, plaintiff then sought to recovery its cleanup costs from the defendant bank under the state superfund law and common law claims.

The trial court looked to CERCLA caselaw to determine whether the plaintiff, a PRP ("potentially responsible party"), had a right to bring a contribution action under the state superfund law since that right was modeled after CERCLA section 113. The trial court ruled consistent with the majority of split authority under CERCLA, that a PRP did not have a statutory right of contribution and also dismissed the common law claims. Ultimately, on later appeal in this case, court ruled that the trial court had erred when it granted defendant's motion for summary disposition because of the U.S. Supreme Court ruling in *United States v Atlantic Research Corp*, 127 S. Ct. 2331; 168 L. Ed. 2d 28 (2007) that PRPs could bring contribution actions.

The trial court dismissed the common law claims based on the statute of limitations. It held that the "discovery rule" tolling the statute of limitations did not apply because because the plaintiff failed to exercise reasonable diligence in monitoring defendant's performance of the cleanup operation. The court said that even if the plaintiff did not know the particular facts concerning the buried drums or the ruptured barrel, it had sufficient grounds for knowing no later than 1997 that defendant may not have been adequately fulfilling its alleged cleanup obligations. In the absence of evidence that plaintiff made reasonable efforts to ascertain the condition of the property, the trial court determined that it was not appropriate to apply the discovery rule in this case. The appeals court affirmed the dismissal of plaintiff's various common-law claims.

Because the appeals court found that a PRP could bring a contribution action, however, it then had to deal with the question of whether defendant was either an "operator" nor an "arranger" under the state superfund law. The appeals court, however, held that the defendant bank was not an "operator" or "generator" at the site. While the defendant bank exercised control over the site when carrying out its remedial actions, the court said that plaintff had to show that the defendant must have had authority to control the operations or decisions involving the disposal of the hazardous substance, or must have assumed responsibility or control over the disposition of the hazardous substance. Since the defendant's only connection to the site was its remedial clean-up effort, the court said this was insufficient to establish the requisite nexus required for liability as an operator.

On the 'arranger' theory of liability, the plaintiff had introduced evidence that a contractor hired by defendant ruptured a barrel during the cleanup operations in 1984 and that this was sufficient to show that defendant disposed of a hazardous substance and was responsible for an activity causing a release. However, the court ruled that defendant could not be held liable as an arranger as it did not intend the 1984 disposal.

Reporter's Comment 1: It is interesting that the defendant did not try to assert the secured creditor exemption under the Michigan superfund law which appears to be broader than the CERCLA secured exemption . In particular, foreclosing lenders may assert the exemption if they take certain steps to dispose of the property and has taken reasonable care in maintaining and preserving the real estate and permanent fixtures; provides to the department all environmental information related to the facility that is available to the lender; has complied with any order issued by the state environmental agency and if conditions on the property pose a threat of fire or explosion or present an imminent hazard through direct contact with hazardous substances, the lender has undertaken appropriate response activities to abate the threat or hazard.

Perhaps the bank did not comply with the foreclosure rules set forth in the state secured exemption or felt it did not act retroactively. In any event, the bank was forced to defend itself as a former landowner of the property without the extra layer of protection that is provided by the expansive state secured creditor defense.

Reporter's Comment 2: This case can be contrasted to the enforcement action from last year in State of *New York vs. HSBC* where the bank agreed to pay $850,000 in fines and reimburse environmental agencies for response costs involving a facility that was abandoned by a borrower. In this case, HSBC 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, 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. The bankruptcy trustee then got into the act, filing 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.

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. 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.

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 taketitle 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 theauction is conducted, the drums and barrels are then left in the abandoned facility. At somepoint, 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.

JOINT TENANCIES; SEVERANCE; MORTGAGES: Joint tenancy not severed when joint tenant executes security deed. ***Biggers v. Crook, 656 S.E.2d 835 (Ga. 2008).***

Appellee and decedent inherited real property which they took as joint tenants with rights of survivorship. Before he died, decedent executed a promissory note in favor of a creditor and signed a deed to secure debt against the property in order to secure payment of the note. After decedent died, the creditor claimed an interest in the property.

In a question of first impression, the Georgia Supreme Court held that a joint tenant execution of a security deed in real property was a severance of the joint tenancy as it was not a sufficient transfer of all or part of the joint tenant's interest in the property as would sever a joint tenancy with right of survivorship. Although the court was construing statutory language, the decision relies on out of state authority and it appears to contribute to the common law in this area.

The creditor asserted that when decedent granted her a deed to secure debt, he legally severed his interests as co-tenant. The court disagreed. The court, relying on authority from the California Court of Appeals, reasoned that the conveyance "carrie[d] none of the incidents of ownership of the property, other than the right to convey upon default on the part of the debtor in the payment of his debt." When the decedent died, his death terminated his interest that was encumbered by the security agreement and extinguished the security interest held by the creditor. Therefore, the deed to secure debt did not sever the joint tenancy between decedent and appellee.

Comment 1: This in fact is a very difficult issue for many courts. They recognize that to hold that there is no severance leaves the mortgagee unsecured at the critical time – the death of their debtor. They are concerned that this almost certainly was not the intent of the mortgagee at the time of the mortgage. It probably wasn't the intent of the mortgagor to expose the mortgagee to this risk. Remember, as prior recent postings have indicated, courts in this area often try to discern the intent of the grantor in determining whether a given grant constituted a severance.

The problem with finding that there is a severance, and thus protecting the mortgagee, is that if the mortgagor repays the debt, as the mortgagor likely intended, and then dies, the property passes as a tenancy in common and the other joint tenant is denied his survivorship right. According to Stoebuck and Whitman, The Law of Property, it is "well settled" in those states that use the "title theory" of mortgages that a mortgage is a severance, but that treatise maintains that the cases are split in "lien" and "modified title" states. The treatise really cites very little authority to support any firm conclusion.

Some "lien theory" cases, including *Hamel v. Gootkin,* 202 Cal. App. 2d 27 (1962), relied upon by the Georgia court, find no severance because the transfer of a lien is not the transfer of an ownership interest, even if the form of the security instrument is a deed of trust or, as in the instant case, a Georgia "deed to secure a debt." A few other cases cited by Stoebuck and Whitman, including *dicta* in an earlier California case, and cases in Arizona, Illinois, Iowa and Oklahoma, attempt to use a "partial severance" concept – permitting severance only to the extent necessary to protect the mortgagee, and, once the debt is paid, restoring the survivorship completely. The Georgia court apparently rejects this notion without comment.

Comment 2: To the editor, the mortgagee ought to be aware of the state of the title and, just as it can demand a mortgage to secure the debt, can demand a severance to make the mortgage a safer one, or else can demand consent of the other joint tenants to some arrangement that gives it good security. Given that the mortgagee is in a position to protect itself, there is no reason for the courts to go out of their way to protect the mortgagee. For that reason, the editor would find no severance in any case. None of this reasoning found its way into the Georgia decision, which is based pretty much on technical analysis and some weak precedent. Still, to the editor, the outcome is the right one.

JOINT TENANCY; SEVERANCE; PARTITION: Upon the death of one of two joint tenants with right of survivorship, the entire undivided property interest automatically vests in the surviving individual, thereby eliminating any pending partition action. ***Rusnak v. Phebus, ___ S.W.3d ___, 2008 Westlaw 2229514 (Ten. Ct. App. 2008).***

In 1995, Oliver executed a durable power of attorney in favor of Phebus, her daughter, giving Phebus the right to manage Oliver's property. Oliver became ill and moved closer to Phebus, and Phebus attempted to obtain Medicaid benefits to defray the cost of Oliver's nursing care at Northside Health Care Center. However, Oliver's financial assets prevented her from qualifying for the program. Acting on the advice of an attorney, Phebus used her power of attorney to transfer $45,000 of Oliver's assets to Phebus in return for a 45% share in Phebus's Nashville condominium. A deed was executed, which created a joint tenancy with right of survivorship.

Subsequently, Phebus stopped making full payments to Northside (though she did pay the entire amount of Oliver's monthly social security income and the rental income attributed to her 45% ownership of the Nashville condominium) and applied for Medicaid benefits. When her application was denied due to Oliver's husband's assets, Northside petitioned the circuit court for appointment of a conservator. The court found that the deed for the Nashville condominium was a self-serving transaction, and that when coupled with Phebus' failure to bring Oliver's account current with Northside, court assistance was necessary. Therefore, the court appointed Rusnak as conservator, terminated Phebus' rights under the power of attorney, and ordered Rusnak to submit an inventory of Oliver's property within 60 days. Rusnak filed a complaint for partition of the Nashville condominium. Shortly thereafter, Oliver died.

Phebus filed a motion to dismiss the complaint, asserting that the conservatorship ended when Oliver died, and that Phebus (as the survivor) held the undivided title to the condominium by operation of law. Rusnak argued that the suit should be allowed to continue due to a state statute providing that civil actions "do not abate by the death, or other disability of either party, or by transfer of any interest therein, if the cause of action survives or continues." Northside filed a motion to intervene and also requested that the court not dismiss the claim. The court granted Northside's motion to intervene and denied the motion to dismiss the partition action. In granting Northside's motion for summary judgment, the circuit court held that "[b]ecause the suit was commenced before the death of Ms. Oliver, we find that the action may continue now . . . ." It therefore ordered the condominium to be sold, with 45% of the proceeds payable to Oliver's estate.

On appeal, Phebus argued that when considering this issue as a matter of first impression, the Tennessee Court of Appeals should follow the "well-established rule" applicable to joint tenancies with right of survivorship, that "the death of a joint tenant during the pendency of a partition action extinguishes the partition action, leaving 100% of the ownership with the surviving tenant." To address this issue, the court first discussed *Cobb v. Gilmer*, 365 F.2d 931 (D.C. Cir. 1966), which analyzed the rationale for the general rule. Specifically, at the moment of death, title to property vests exclusively in the surviving tenant, and severance of the joint tenancy does not occur until the suit for partition reaches final judgment.

The court concluded that "the [general] rule is a sound one that was created to protect the integrity of survivorship interests in joint estates," and it held in favor of Phebus that "a partition action abates upon the death of a joint tenant where ownership of the whole vests in the other joint tenant by operation of law."

Comment: We have set forth previously a number of cases that have recognized a severance of a joint tenancy by relatively minor transfers by one of the joint tenants without the knowledge or consent of the other.

In the situation in this case – an action for partition – one joint tenant actually addresses the other joint tenant through court proceedings and demands that the court not only sever but actually divide the property. Note that a necessarily implied part of any partition is a severance. Note that if the partition suit were a severance, then of course there would be no survivorship and the partition could proceed against the deceased mother's estate.

It seems odd to the editor that a joint tenant can accomplish by a secret, even sneaky, act what the joint tenant cannot accomplish by an open declaration that it chooses to end the joint tenancy. What is the rationale for such a rule?

The authorities cited by the Tennessee court certainly support its contention that the rule exists, but, except for relatively formalistic pronouncements, none propounds a thoughtful policy rationale.

LANDLORD/TENANT; ATTORNEY'S FEES: Where landlord seeks excessive damages from tenant for holding over, tenant may obtain attorney's fees for defending against such claim, even it landlord is able to obtain an eviction order for the holdover. ***Charles Downey Family Ltd. v. S & V Liquor, Inc., 880 N.E.2d 322 (Ind. App. 2008).***

Downey acquired a lease in which the Defendant had the option to renew for five years if it gave notice within 120 days of the expiration of the lease, January 31, 2005. Defendant never sent notice, and on November 15, 2004, Downey sent Defendant a letter explaining the new terms if Defendant decided to enter into a new lease. The new terms raised the rent to $9,167.67 per month – up from $3,333 per month under the previous lease.

Defendant never acknowledged the letter or paid a new security deposit. Rather, Defendant sent a letter to Downey explaining that it was going to holdover until June 30, 2005, and continued to pay $3,333.00 per month. During this time, Downey entered into a separate lease with All Glass LLC ("Glass Lease") that was to begin on February 1, 2005, with rent of $6,000 per month. The Glass Lease was terminated in January, for reasons unrelated to the situation with Defendant.

Downey never cashed Defendant's rent checks for the months of February and March. On March 15, 2005, Downey filed suit against Defendant seeking eviction. In Count II of its Complaint, Downey also claimed for damages of $6,000 per month based upon the broken Glass Lease.

Defendant filed an amended answer in June, and counterclaimed against Plaintiff for frivolously claiming its damages were grounded in the Glass Lease because All Glass was not going to take occupancy, irrespective of the holdover tenancy. Downey then amended its complaint to seek damages in the amount of the fair market value of the premises. The trial court concluded in its summary judgment order that Plaintiff was entitled to $3333.33 per month – the fair market value of the premises. The court awarded damages to Plaintiff for $16,666.65.

It also concluded that Downey was entitled to attorney fees for prosecuting the action in the amount of $5,464.50. The court also determined, however, that Defendant was entitled to attorney fees of $26,179.75 for defending against Count II of Downey complaint. Downey appealed.

On appeal, Plaintiff argued that the November 15th letter set the terms of the rent for the Defendant's holdover months. The Appeals Court disagreed, noting that case law holds otherwise. "The only damages recoverable by the [landlord from a holdover tenant] were the fair market rental value of the property . . . ." Thus, the appeals court held that the trial court correctly calculated and determined the fair market rental value of the property.

Downey also argued in the alternative that it was entitled to treble damages, because Defendant was a trespasser. The court held that the treble damages statute only applies to criminal trespassers and not to holdover tenants. "Referring to a tenant remaining on the property without the permission of the landlord as a 'trespasser' does not, however, indicate the tenant is guilty of criminal trespass." Downey finally argued that the court wrongly awarded Defendant attorney fees under Count II of the complaint. The appeals court held that the evidence clearly showed that Count II was frivolous and attorney fees were warranted under the circumstances.

Comment: Note that the Landlord Downey had stated to the Tenant that its holding over would be a consent to the new lease terms. Had it done so, it might have been able to argue that there was an implied extension of the lease at the new rent. The extension would be limited to the number of years permitted for an unwritten lease agreement to be valid – usually one or two years.

Rather than doing this, Downey had simply indicated the terms for a new tenancy if Tenant desired to stay. Although it might have been possible for Downey to argue that Tenant's holdover implicitly agreed to this, it would have been tough sledding, as the parties apparently did not treat the lease as extended and in fact Landlord was negotiating with All Glass.

LANDLORD/TENANT; DEFAULT; NON WAIVER CLAUSE; RENEWAL: A landlord may not rely on a no waiver provision in a lease to enforce a tenant's past defaults after acquiescing to those defaults through a lease renewal. ***Rehoboth Mall Limited Partnership v. NPC International, Inc., No. 419, 2007, 2008 WESTLAW 2600980 (Del. App. 7/2/08) (not yet released for publication).***

In 1984, a Pizza Hut franchise entered into a ground lease with Rehoboth Mall Limited Partnership ("RMLP") for a term of fifteen years. The lease provided the tenant with an option to extend the lease for seven successive renewal periods of five years each. In 1997, Pizza Hut assigned its interest to NPC. In 1998, NPC made four late rent payments, and in 2000, a propane leak was found at the premises in violation of state law. The late payments and the propane leak were defaults under the lease.

At the end of the fifteen year original term, NPC notified RMLP that NPC was exercising its renewal option, and RMLP did not object. No defaults occurred during the first renewal term from 2001 to 2006. In November 2005, NPC again notified RMLP of its desire to exercise the renewal option, but RMLP objected, citing the defaults in 1998 and 2000.

Under the lease's renewal option, "Provided Lessee is not in default at any time during the term of this lease, Lessee shall have the right and option to extend the term of this Lease . . . ."

The no waiver provision in the lease provided that "[f]ailure of the Landlord to insist upon the strict performance of any provision of this Lease . . . shall not be construed as a waiver for the future of any such provision . . . ."

The trial court held that the first renewal period created a new lease and that only defaults occurring under the new lease could be considered when deciding whether NPC could exercise the second renewal option. The trial court also ruled that RMLP could not use the no waiver provision to resurrect prior defaults.

The Delaware Supreme Court found that the renewal did not create a new lease. The intent of the parties evidenced by the language in the lease controlled. Since the lease provided that all rights and obligations from the original lease continued after renewal (except for an adjustment of rent) and renewal automatically extended the term of the lease without the execution of a new lease, the court concluded that the original lease continued without the creation of a new lease.

The court nevertheless found in favor of tenant NPC, however. It appears to state (in its opening paragraph) that the landlord waived the right to refuse an extension under the clause for the second extension period when it failed to invoke it for the first.

As to the "no waiver" clause, the court stated that no waiver provisions generally protect a waiving party by providing that individual waivers of certain rights will not operate as permanent waivers. RMLP asserted that the no waiver provision not only protected a lessor prospectively but also allowed the landlord to require strict performance of past defaults already waived. But court noted that the express language of the no waiver provision in the lease provided that RMLP's failure to insist upon strict performance would not be construed as a waiver "for the future," rejecting RMLP's contention.

Finally, the landlord argued that as a matter of fact there could be no waiver where the landlord in fact had no intent to grant a waiver and its failure to deny the first extension was a "mere oversight." the court held that even if RMLP meant to object to the first renewal and failed to do so because of an oversight, the fact that RMLP took rent payments and allowed NPC to maintain possession for five years constituted a waiver of the no default requirement as a matter of law.

Comment 1: Of course, courts should enforce contract language in commercial leases voluntarily accepted as a bargain by landlord and tenant. The language here was quite explicit – if tenant has defaulted – no extension rights. Thus the court had to do a little tap dance here to conclude that the "non extension" clause for the first term did not apply to the second renewal term. Literally, the "life of the lease" ought to include the initial terms and any extensions. So the court clearly was stretching the language to bail out the tenant here. But, on the other hand, the evidence of waiver, by most standards, was very clear.

Comment 2: This area is discussed generally in Friedman on Leases (Randolph edition) at Section 14.1.1.

Generally, the treatise reveals, the cases are split on whether a landlord's acceptance of rent following tenant default is a waiver of the requirement that a tenant be "in good standing" in order to effect a renewal or extension.

Generally, the better rule is that if the defaults have been cured and the landlord has thereafter accepted rent, the landlord should not be able to invoke a clause that denies extension or renewal rights on the basis of tenant default without complaint or reservation of rights absent very clear language – clearer than "in good standing." (Note that the language in the instant lease in fact was much more clear as to the landlord's rights.)

Of course, even if the landlord has accepted rent, it is difficult for the tenant to make out a waiver of a continuing default if the default is significant and uncured.

The treatise argues that where a default has occurred but the cure period has not yet run, the landlord should be required to extend unless the lease contains some language more pointed than a simple requirement that the tenant be "in good standing."

LANDLORD/TENANT; LANDLORD LIABILITY FOR INJURY TO TENANT'S GUESTS; EVICTION PROCEEDINGS: Following judgment for possession in unlawful detainer action, even though sheriff has not yet served a writ of possession, landlord has duty to conduct periodic inspections to insure that the premises are safe for tenant's guests, even where the tenant remains in possession and is operating a dance club in defiance of a lease prohibition. ***Stone v Center Trust Retail Props., Inc. 163 CA4th 608 (2008), 77 CR3d 556 For a summary of the prior court of appeal decision in Stone v Center Trust Retail Props., Inc. 146 CA4th 1435, 53 CR3d 668 (2007)***

Center Trust owned a retail mall with a restaurant tenant that defaulted on its rent in August 2001. Center Trust began unlawful detainer proceedings in October 2001 and in late December was awarded a judgment of possession. The restaurant, however, continues to operate past the time of judgment.

Before the sheriff served the writ of possession, Stone, an invitee, hosted a party at the restaurant. While dancing on a temporary wooden dance floor, Stone slipped in water and fell, fracturing her ankle. (One assumes that the jury concluded the water came from a leak, because some evidence indicated that there was a lot of water on the floor.) . Stone had to have several operations and suffered diminished range of motion and lingering pain. Stone sued Center Trust and the restaurant owner. Center Trust cross-claimed against the owner for indemnity, but the owner was never served with either complaint and eventually was dismissed.

Following a jury trial on liability and damages, the court found Center Trust partially responsible awarded damages to Stone. Center Trust appealed.

The appeals court first stated the California rule to be that, in order to protect forseeable plaintiffs from personal injury, a landlord of commercial premises must use reasonable care to be sure that property is safe at the beginning of tenancy *and must repair hazards of which it learns thereafter*. During the tenancy, however, the court acknowledged that the tenant had the primary possession and primary ability to remedy conditions, and stated that the landlord's liability for a dangerous condition is limited to matters of which the landlord has actual knowledge and the right and ability to cure.

Here, the court reasoned, the landlord's responsibility was more than that of a landlord out of possession and less than that of an occupying landowner. The court ruled that the trial court should have instructed the jury that the landlord had a duty to inspect during the unlawful detainer proceedings, because Center Trust knew that defaulting tenants sometimes neglect property and that the restaurant was violating its lease by running an after-hours dance club.

The court of appeal ruled that, to balance between safety and landlord self-help, Center Trust's duty to inspect accrued on entry of judgment of possession and included making reasonable periodic inspections thereafter. The trial record, however, did not indicate at what point the jury concluded the landlord's duty to inspect began. Therefore, the court of appeal remanded for retrial of liability so that the parties could present evidence of whether reasonable inspection on entry of the judgment of possession or later inspections would have discovered the leak. After the jury determined responsibility for Stone's injuries, the trial court was to recalculate the damage award using the first jury's determination of Stone's total damages.

The dissent objected to the majority's unsolicited announcement of a new rule of law, essentially that a right to inspect creates a duty to inspect. The dissent argued that it was unnecessary to formulate a new rule or to remand, because substantial evidence supported the jury's verdict. Apparently the dissent argued that the landlord's knowledge that tenant was unlawfully operating a dance club created some duty of responsibility to the plaintiff for the consequences of such operation. The dissent concluded that any change to the balance of duties between landlord and tenant should be left to the legislature.

Reporter's Comment: This "bright line" rule creates too many shadows on the issue of a landlord's liability for defective premises. If the duty to inspect arises upon entry of a judgment of possession, as the opinion holds, does that imply that before that time there is no such duty (as this court implied out of its reading of *Martinez v Bank of America*)? A bright line rule is not much good if the duty is the same on both sides of the line; the dissent quotes the lease as giving the landlord the right to inspect "at all times."

The dissenting opinion's version of the lease gives the landlord the right to reenter-rather than the right to inspect-on default, and perhaps that is the significant feature the majority meant. But in light of California's statutory prohibition of forcible entry, I do not believe that a landlord has a meaningful right to enter (and alter leased premises) just because its lease says so. A writ of possession entitles a landlord only to instruct a sheriff to dispossess a tenant, not to do so itself.

The California rule requires a landlord to exercise due care with regard to the premises it owns. That duty of care must be reconciled with the fact that it does not have actual possession of those premises. Even if there is an explicit or implicit right to inspect, it is unclear what a landlord should do when an inspection reveals a danger to the public. Since self-help is prohibited, the landlord cannot padlock the premises on its own; it must get judicial assistance. Perhaps knowledge of the illegal after-hours dancing should have led this landlord to call the police, but how would that have to led to avoidance of the plaintiff's slip and fall so as to call it lack of due care?

Editor's Comment: It's been some time since the editor was a full time California, and consequently the editor perhaps should be excused for his failure to appreciate the "open checkbook" attitude toward premises liability demonstrated here.

Outside of California, the editor does not understand it to be the law that a landlord is responsible for conditions in areas turned over to the tenant's control. Although it might be argued that a ceiling leak, for instance, could be ascribed to a failure of the landlord to maintain the roof structure – an area likely within the landlord's control – there appears to be no discussion of the source of the water in either the majority or the dissent, and it appears that the court assumed that the source of the water was from the area within the control of the tenant.

If a landlord has actual knowledge of a dangerous condition being maintained by the tenant, there is some authority that the landlord must take steps to correct that condition. That's the extent of responsibility.

Here the court concludes that a landlord that was out of possession of the premises, but had an unserved writ of possession pending, had a duty to inspect the premises (apparently on a 24 hour basis) to protect dance hall patrons against wet dance floors. California law does not give a landlord the right of self help. But the court argued that the lease gave the landlord the right to come onto the premises and inspect and (apparently) repair. Here, however, the tenant was in default and being evicted. Further, it was in blatant violation of the use restrictions by operating the dance club. Is it logical to believe that the landlord had the practical ability to go on the premises and maintain it? How, exactly, was that going to be accomplished?

Well, in light of the fact that the court remanded, it is unlikely we're ever going to find out, since the case almost certainly will be settled. But what of the next case? How does an out of possession landlord with no right of self help and with a tenant that refuses to abide by the lease insure that the premises are safe? Well, there is legal process, but legal process takes time, and in this case the landlord had promptly sought legal process but the time was still running. What a dilemma?

There was an appeal, by the way, and the California Supreme Court denied review on August 27.

The Reporter for this item was Professor Roger Bernhardt of the Golden Gate Law School, writing in the California CEB Real Property Reporter.

LANDLORD/TENANT; RESIDENTIAL; LOW INCOME HOUSING: Housing Preservation Department and a landlord who accepted Mitchell-Lama housing regulations could not be estopped from evicting a tenant who did not meet eligibility requirements for succession rights under Mitchell- Lama Law even where they had acquiesced for a time in his continued occupation of the premises.. ***Matter of Schorr v. NYC Dept. of Housing Preservation, 886 N.E.2d 762 (N.Y. 2008)***.

The evicted tenant ("Petitioner") moved into the apartment at issue with his parents in 1987, but he was not a tenant of record because he was only 14 at the time. In the early 1990's, he left the apartment to go to college, and his name first appeared on record in 1999. Petitioner's parents, the last tenants of record, vacated the apartment in February 2000, and Petitioner continued to live there with landlord's acquiescence. After Petitioner brought two successful lawsuits against the landlord in 2001 and 2004, the landlord sought and received an eviction order against the petitioner from the housing department, which had rejected Petitioner's claim to successor rights under the Mitchell- Lama Law. A New York Supreme Court held that East Midtown and HPD were estopped from evicting the petitioner because of East Midtown's apparent consent to his tenancy. The Appellate Division affirmed.

On appeal: *Held: Reversed.*

Citing *Matter of New York State Med. Transporters Assn. v. Perales,* 566 N.E.2d 134 (NY 1990), the New York Court of Appeals held that "estoppel cannot be invoked against a governmental agency to prevent it from discharging its statutory duties." Here, the court found that under Mitchell- Lama Law Petitioner was an illegal tenant because Petitioner had not lived in the apartment for two consecutive years as a tenant of record before the last tenants of records vacated the apartment. Therefore, the court held that because HPD is statutorily required to enforce the Mitchell-Lama Law, it would be impermissible to invoke estoppel against HPD here as such an invocation would prevent HPD from performing its statutory duty of enforcing the eligibility guidelines of the Mitchell-Lama Law. The court reversed the lower court's order and dismissed the petition.

LANDLORD/TENANT; RESIDENTIAL; SECURITY DEPOSITS; SECURITY DEPOSIT STATUTES; DAMAGES: Where tenants are properly evicted for failure to pay rent, landlord may recover back rent without providing tenants an itemized list of damages. Additionally, statutory 45 days period for landlord to mail to tenant itemized list of damages for purposes of security deposit claims does not begin when landlord informs tenant of intent to evict, but rather with acceptance of surrender. ***Klotz v Hoyt, 880 N.E.2d 1234 (Ind.App., 2008).***

Tenants rented a property to live in from Landlord, agreeing to pay $600 a month and a daily late fee of $10 for late rent until the payment was made, as well as giving Landlord a $600 security deposit. Tenants moved in on July 1, 2006 a few weeks after signing the lease. Tenants paid their first month's rent in a timely fashion and half of the August rent, but thereafter failed to pay any rent. In addition, Tenants moved out without giving Landlord notice and without removing their personal possessions.

On November 8, 2006, Landlord attempted to notify Tenants of his intention to evict them due to their failure to pay rent. Receiving no response, Landlord obtained a court order to evict Tenants on February 20, 2007. On the same day, Tenants claimed that since more than 45 days had passed since eviction that they were entitled to the return of their security deposit and personal property based on Ind. Code § 32-31-3-12. On March 16, 2007, there was a hearing on back rent and damages in which Landlord made a claim for back rent and damages. The court dismissed Landlord's claim on the basis that he failed to provide Tenants with an itemized list of damages in a timely fashion.

The Court of Appeals held that the statute in no way affects or hampers a landlord's ability and right to sue tenants for the rent they are contractually obligated to pay, and rather relates only to a landlord's right to use the security deposit to offset the amounts owed. The court acknowledged that this holding may be in conflict with the reading of the same statute in *Durf v. Molter*, 839 N.E.2d 1208 (Ind.Ct.App. 2005). Despite the *Durf* holding, the court held that Landlord was entitled to sue for back rent regardless of whether he complied with the security deposit statute.

The court went on, however, to address whether Landlord did comply with the statute. Tenants claimed that the rental agreement was terminated when Landlord sent the letter notifying of his intent to evict. The court rejected this argument. First, the court stated the relevant standard, that "termination of [a] rental agreement occurs after surrender by the tenant and acceptance of surrender by the landlord," citing *Lae v. Householder*, 789 N.E.2d 481 (Ind.2003). Applying this standard to the present case, the court held that termination did not in fact occur until the trial court entered its order evicting Tenants from the premises as Landlord did not act in a manner consistent with eviction until that time. Finally, Tenants argued that Landlord should have provided the list of damages before the hearing on March 16th. The court, while sympathetic to the claim, held that Landlord followed the letter of the law by providing the list within the 45 day period regardless that he did not provide the list until the date of the hearing. The court noted in *dicta* that Tenants could have filed for a continuence so as to factor the list into trial strategy.

The Court of Appeals reversed the judgment of the trial court and remanded with instructions to enter an award for Landlord of the maximum damages allowed by the small claims court in which the case was filed.

LANDLORD/TENANT; TERMINATION; ACCORD & SATISFACTION: If a party to a lease breaches a lease provision, a lease termination agreement executed prior to the discovery of such breach constitutes an accord and satisfaction of the lease and extinguishes any rights or duties thereunder. ***Gibby Gilbert's Driving Range, LLC v. L.B. Austin IV, ____ S.W.3d ____ , 2008 Westlaw 2502131 (Tenn. Ct. App. 6/23/08).***

In October, 2000, Austin and Gibby's entered into a 15-year lease for approximately 23 acres. The lease included a right of first refusal if Austin decided to sell the property during the lease term, stating that Austin was required to give Gibby's notice of the sale and that Gibby's had the opportunity to match the offer within 30 days of such notice. If Gibby's declined to match the offer, Austin was allowed to buy out the remainder of Gibby's lease term for $160,000 if the buyout occurred in the second year.

On July 19, 2001, Austin contracted to sell a large tract of land, including the land leased to Gibby's, to the Church of Christ for $1,400,000. Austin notified Gibby's of the Church's offer and Gibby's declined to match it. Later, however, the parties to the sale readjusted he final purchase price of the tract to $1,095,000and Austin failed to inform Gibby's of the downward price adjustment. Gibby's discovered the change after the termination of its lease and payment of the $160,000 buyout price. Gibby's then sued Austin for breach of contract, alleging that Austin had not afforded Gibby's the opportunity to exercise its right of first refusal to match the adjusted purchase price.

The trial court granted summary judgment in favor of Austin and held that Gibby's execution of the lease termination agreement and acceptance of the $160,000 lease buyout payment constituted an accord and satisfaction, and all duties and rights under the lease were terminated. Because Gibby's did not raise any issue prior to such termination, Gibby's waived its rights under the lease and was estopped from enforcing those rights. Gibby's appealed the judgment to the Tennessee Court of Appeals.

On appeal, the court addressed whether the execution of the lease termination agreement and acceptance of the buyout payment constituted a waiver of Gibby's right of first refusal and an accord and satisfaction of all of Gibby's rights under the lease. Gibby's argued that because it was not aware of the reduced purchase price when it signed the lease termination agreement, there could be no waiver or accord and satisfaction.

The court began its analysis by discussing the elements of the accord and satisfaction affirmative defense: (1) the tendered consideration be offered to extinguish the original obligation; (2) the debtor intended the consideration as complete satisfaction for the original obligation; (3) the debtor's intent be made known to the creditor; and (4) the creditor accepts the consideration with the understanding that the original obligation is completely satisfied. Here, the primary accord and satisfaction element at issue was (4) above; specifically, whether Gibby's accepted the $160,000 buyout with the understanding that it completely satisfied Austin's obligation under the lease. Gibby's argued that when it accepted the $160,000, "it did not understand the conditions under which it was accepting such payment in that it was unaware of [Austin's] noncompliance with [the right of first refusal provision] of the lease."

The court noted that Gibby's was only required to understand the conditions of the lease termination agreement itself in order to satisfy element (4) of the accord and satisfaction defense. Gibby's understood that upon payment of the $160,000, the lease (and Austin's obligations thereunder) would terminate. Gibby's "deliberately and intentionally cancelled [its] contract with the Lessor and failed to reserve a right of action for alleged breach of such contract. In so doing, [Gibby's] waived all causes of action for breach of the lease." The court concluded that termination of the lease and acceptance of the termination payment constituted an accord and satisfaction and a waiver of Gibby's legal rights under the lease.

LANDOWNER LIABILITY; INJURY TO PARTIES ON NEIGHBORING PROPERTY: Baseball stadium owner not liable when plaintiff outside of stadium is injured while chasing a foul ball, even when promotion was running that permitted retrieved balls to be exchanged for free tickets. ***Haymon v Pettit, 880 N.E.2d 416 (N.Y., 2007)***.

Plaintiff is the mother of L.H , a minor who was injured when he rushed into the street in wanton pursuit of a foul ball and was subsequently struck by an intoxicated driver. As a result of L.H.'s injuries, his mother filed suit on behalf of L.H. against the owner and operator of Falcon Park, the City of Auburn and Auburn Community Non-Profit Baseball Association, respectively (collectively, the "Defendant").

At the time of the incident, Defendant offered free baseball tickets to nonpatrons outside of the park who retrieved foul balls and returned them to the ticket window. Plaintiff sued Defendant on the basis of negligence. Defendant moved for summary judgment claiming that it owed no duty to L.H. The Supreme Court denied this motion, finding that Defendant owed a duty to its fans outside the stadium "to prevent them from chasing foul ball into the nearby public street, a foreseeably dangerous condition it took part in creating." The Appellate Division reversed and dismissed Plaintiff's claim on the basis that Defendant owed no duty to L.H.

Plaintiff claims on appeal that Defendant's foul ball promotion gave rise to a duty to warn or protect the participants as the foreseeability of children chasing balls into the street, coupled with Defendant's incentive for them to do so required Defendant to provide some measure of protection or warning.

The court first outlined the general rule: that the owner of land generally has no duty to warn unless the owner created or contributed to the condition. Citing *Galindo v Town of Clarkstown*, 2 N.Y.3d 633, 636 (2004). Next the court cited to an earlier case *Akins v. Glens*, 53 N.Y. 2d 325 (1981) for the proposition that "the practical realities" of the game that errant balls are part of the sport. Finally, the court held that Defendant had no duty to L.H., because the "dangers of crossing the street-and individuals electing to cross it in pursuit of foul balls-exist independently" of the Defendant's promotion.

The court found the present case comparable to that of *Darby v. Compagnie National Air France*, 753 N.E.2d 160 (N.Y., 2001) in which the court found that a hotel owner who promoted use of a beach it did not own was not responsible for people harmed at the beach, finding that there are inherent risks to crossing the street, just as there are inherent risks of using a beach, and that neither defendant should be held responsible for those risks. The court found that it was "constrained from imposing a requirement that the stadium exercise control over nonpatron, third persons outside the premises over whom it has not actual authority to do so." The Court of Appeals affirmed the Order of the Appellate Division.

LENDER LIABILITY; PREDATORY LENDING; SUBPRIME LENDING: New York trial court holds that a loan to a minority borrower in a minority neighborhood, with an APR more than 3% above the comparable Treasury rate, is presumed to be illegally discriminatory. ***M & T Mortg. Corp. v. Foy, 20 Misc.3d 274, 858 N.Y.S.2d 567 (Supp. 2008)***

In 2000 Foy obtained a mortgage loan on a house she owned in a predominantly Black and Hispanic area of Brooklyn. The loan was for a 30-year term with an interest rate of 9.5%. Foy was a military reserve officer and had served several recent active duty tours overseas. The property was evidently used for rental, at least when she was out of the country, but she alleged that it was difficult to manage the property and keep viable tenants.

Foy moved for reformation of the mortgage pursuant to New York Military Law, and apparently also alleged that the loan was racially discriminatory. The form of discrimination alleged was "reverse red-lining," under which a lender makes loans on more burdensome terms in minority areas. Apparently the court viewed this allegation as a potential violation of the Fair Housing Act. Initially the court placed the burden of proving discrimination on Foy, but in the present opinion it reverses that decision.

Thus, the court holds that a "higher priced loan" (one exceeding 9% interest), if made to a minority borrower in a predominantly minority area, is presumed to have been discriminatory, placing the burden on the lender to show that it is not. If the lender is unable to rebut the presumption, the court says that it will impose equitable remedies, without saying exactly what they might be. It implies that it might deny the lender's right to pursue the foreclosure, or might refuse to grant a deficiency judgment.

Reporter's Comment 1: The 9% level used by the court is "borrowed" from the Home Mortgage Disclosure Act, which requires separate reporting by lenders of "higher priced loans," defined as loans with an APR of more than 3% above the rate on Treasury securities of comparable maturity. Using the APR makes sense because it takes into account high loan fees as well as high stated interest rates. During nearly all of the 2000-2008 period, long Treasury bonds were below 6%.

It's significant that the court did not use the "high cost loan" definition of the Home Ownership and Equity Protection Act (HOEPA); it defines "high cost loan" to be a loan with an APR of more than 8% above the comparable Treasury rate – a definition which would only be triggered by loans of around 14%. This is one of many reasons that HOEPA is often ridiculed by predatory loan opponents as a "toothless tiger."

Reporter's Comment 2: The original lender in this case was Community Bank, which subsequently sold the loan to M&T Mortgage. A finding of discrimination might not be difficult, since the Bank was presumably making plenty of normal-rate (e.g., around or below 6%) loans during the same period it made this 9.5% loan. But suppose the lender in question was only in the business of making high-rate loans in minority areas. How does one prove discrimination? Indeed, how can there be discrimination if the lender only loans to minorities, and only at high rates?

Reporter's Comment 3: What about the underlying issue? It is perfectly clear from the HMDA data that minorities are much more likely that white borrowers to receive high-priced loans. Lenders typically claim that this is because they have weaker underwriting qualifications: more marginal incomes, worse credit histories, and the like. Borrower advocates typically claim that it's because they are targeted by predatory lenders, and that in many cases they are fully qualified for prime loans. Who is right? The HMDA data turn out not to be useful in answering this question, because those data don't contain any information about credit-worthiness; no FICO scores, for example, nor any reasonable substitute for them. This fact, and the history behind it, is nicely summarized and documented at the following blog, which is well worth reading. http://calculatedrisk.blogspot.com/2007/10/hmda-data-on-high-priced-loans.html.

Reporter's Comment 4: If you're in the mood for a little fun, check out Jon Stewart's interview with former subprime wholesale lender Richard Bitner, available at http://www.thedailyshow.com/video/index.jhtml?videoId=177062&title=richard-bitner

The Reporter for this item was Dale Whitman of the Missouri, Columbia, Law School, emeritus.

MECHANIC'S LIENS; *LIS PENDENS*: Materialman's liens in Arkansas are subject to *lis pendens*, and a party acquiring such a lien need not be joined in the cause of action in order for the lis pendens statute to apply to that party. ***National Home Centers, Inc. v. Coleman 373 Ark. 246, ___ S.W.3d ___, 2008 Westlaw 1747108 (Ark. 2008)***, discussed under the heading: "Mechanic's Liens; *Lis Pendens*."

On August 13, 2004, Coleman granted Regions Bank a note and construction mortgage on property in Little Rock. Within months, Coleman had defaulted on the loan and ceased construction. On January 4, 2005, Regions filed a complaint of foreclosure and a *lis pendens* in the county recorder's office. Regions then purchased the property at foreclosure in June 2005 and sold to Cain.

On January 25, 2005, National Home Centers, Inc. ("National"), a materials supplier for Coleman, filed a materialman's lien on the property. In April 2006, National filed a complaint in foreclosure against the property, listing Coleman, Cain, Regions, and Newoods, Inc. as defendants. Regions and Cain filed a motion for summary judgment, alleging that National's lien was filed after the *lis pendens* in Regions' action, and therefore the materialman's lien was subject to the outcome of that litigation, and National was consequently barred from bringing its own foreclosure action.

The circuit court granted summary judgment in favor of Regions and Cain and denied National's motion, which National appealed. The arguments addressed by the Arkansas Supreme Court were (1) whether the *lis pendens* statute applies to materialman's liens, and (2) whether National's claims were barred despite the fact it had not been joined as a party to Regions' foreclosure action.

The court held that materialman's liens are not exempt from *lis pendens*, even though the Arkansas *lis pendens* statute does not explicitly include materialman's liens. The court noted that the general rationale behind a *lis pendens* motion is that it is "prospective in operation, giving notice to persons who may thereafter acquire an interest in property." The court reasoned that such considerations of public policy and convenience support the application of the *lis pendens* statute to materialman's liens, since a materialman's lien does not create a property interest until the lien is perfected, which in this case was after the *lis pendens* motion.

In addition, the court noted that a relation-back provision contained in the Arkansas Code does not mean that a materialman's lien will be deemed to predate a *lis pendens*. Rather, the relation-back merely addresses perfection and priority of materialman's liens. The court held that National did not obtain an interest in the property until it perfected its lien, 21 days after Regions filed the *lis pendens*, and was therefore subject to Regions' lis pendens. "When a materialman delivers the last supplies to a construction site, he or she accrues an expectant interest in the property, but that interest does not vest and become enforceable until it is perfected. Finally, the court rejected National's argument that Regions should have conducted another title search on the property 120 days after the foreclosure complaint. The court held that such a search to assess any materialman's liens that could have been perfected up to that point was an excessive burden for a creditor foreclosing on its own lien.

On the second issue raised at appeal, the Supreme Court applied the established rule that a person who acquires an interest in property subject to *lis pendens* is treated as a party to the lawsuit and need not be joined in the suit to be affected by its result. Therefore, National's claims on appeal were appropriately barred despite the fact that National was not joined in the action.

Comment: Note that the case appears to deal with the question of whether National should have been named as a party in the foreclosure, and not with National's priority as against Regions. The court indicates that National's priority dated back to the time the materials in question were supplied to the project. Although the court doesn't say so expressly, this would appear have been *after* Regions filed its mortgage. Consequently, even if named, Nationals would have had to deal with a large senior foreclosing mortgagee. National didn't lost much, most likely, and it is curious that the case went up on appeal.

MINES AND MINERALS; CONTAMINATION; DAMAGES: New Mexico Supreme Court modernizes and summarizes the law on (1) the liability of a mineral lessee to the surface owner for environmental contamination resulting from the mineral lessee's operations, (2) the measure of damages for that liability, (3) the general liabilities of the owners of mineral interests to surface owners, and (4) the standing to sue of a surface owner who acquires an interest in the land long after the contamination occurred, but before it was discovered. ***McNeill v. Burlington Res. Oil & Gas Co., 2008-NMSC-022, 143 N.M. 740, 182 P.3d 121 (2008)***

Surface Owners owned the surface rights of the McNeill Ranch. Mineral Lessee was the former oil, gas, and mineral lessee under a portion of Surface Owners' property. Mineral Lessee's predecessor- in-interest drilled an oil well on the McNeill Ranch in 1951. The oil well ceased production in 1986, and in 1992 Mineral Lessee closed a "reserve pit," used to dispose of waste from the well. Surface Owners alleged that the manner in which Mineral Lessee closed the pit was contrary to industry standards and resulted in subsurface contamination of their property. They filed a lawsuit against Mineral Lessee alleging negligence and trespass, and later amended their complaints to include a claim for private nuisance. The only issues before the Supreme Court related to the negligence claim and the standing of one of the plaintiffs.

In reaching its decision the Supreme Court affirmed in part and reversed in part the decision of the New Mexico Court of Appeals, reported in an ABA Quarterly Report (cited below), which had done the same thing with the decision of the trial court. See also *McNeill v. Burlington Res. Oil & Gas Co., 2007-NMCA-024, 141 N.M. 212, 153 P.3d 46* (published in ABA Real Estate Quarterly Report, Spring, 2007).

Central to the litigation was the proper measure of damages to Surface Owners' land. The Court of Appeals analyzed this issue and concluded that the proper measure of damages for injury to real property depends on whether the injury is permanent or temporary. The Court of Appeals also held that the cost of repair could be relevant and, therefore, admissible in analyzing the diminution in value for permanent damage to a surface estate. Finally, the Court of Appeals held that the value of the entire property, not just the affected portion, should be considered in awarding damages for diminution in value.

The Supreme Court revisited the permanent/temporary dichotomy and concluded that such a distinction is no longer useful in analyzing damages to a surface estate by a mineral lessee. Instead, the jury should determine the most reasonable means of making a surface estate owner whole. The Supreme Court did, however, agree with the Court of Appeals that the cost of repair *may* be relevant in analyzing the diminution in value of real property in a negligence claim against a mineral lessee. But the Court ruled that damages under a cost-of-repair theory could not exceed the diminution in value of the property. In the instant case, the trial court's exclusion of Surface Owners' evidence of the cost to repair prejudiced Surface Owners and amounted to reversible error. The Supreme Court also agreed with the Court of Appeals that the proper vehicle for comparison of the pre- and post-negligent injury values is the property as a whole, rather than just the affected portion of the property.

The Supreme Court also held that in order to prevail on a negligence claim against a mineral lessee, damages must result from the mineral lessee's unreasonable, excessive or negligent use of a surface estate. The reason for this holding is that in New Mexico the surface estate is subservient to the mineral estate. Because the mineral lessee is entitled to use as much of the surface area as is reasonably necessary for extraction, the mineral lessee is not liable for damages resulting from the reasonable use. In addition, the owner of the mineral estate has no duty to restore the surface to its pre-drilling state, absent negligence or a contract otherwise.

New Mexico has adopted the "discovery rule" for the accrual of a cause of action and for the start- date of the statute of limitations for negligent injury to property. The "discovery rule" states that a cause of action arises when the plaintiff discovers or with reasonable diligence should have discovered that a claim exists. Because the property owner was found to have acquired the property before the cause of action was discovered, it had standing to bring this action.

Comment 1: The reporters, Amanda Sanchez and Jack Burton of the New Mexico bar, view this case as very significant in New Mexico and likely influential in other jurisdictions as well. The editor has seen question of whether damages are "permanent" arise in a number of cases evaluating environmental damages in various circumstances. The concept has been relevant particularly in evaluating whether the statute of limitations has run, as it would have once an injury has become "permanent." It's uncertain, of course, whether the court's decision to abandon the distinction in computing damages would affect statute of limitations considerations.

Comment 2: The notion that a mineral lessee has an "estate" in form of a dominant interest (likely an easement) is reasonably well established, but kudos to the court here for taking that concept to its logical conclusion and identifying the reasonable extraction activities as to measure of the mineral owner's rights to invade the surface owner. This seems appropriate, and avoids any absolute rule protecting the surface owner from any residual effect or completely protecting the lessee, even when the lessee is unreasonable. Of course, "reasonableness" can be measured by the parties' actual or probable intent, and the language of the agreement and the circumstances surrounding it, as well as custom and practice within which the parties were operating *at the time of the agreement* seem relevant.

Comment 3: Note the standing issue tagging along at the end. If the cause of action had been discovered before the conveyance, one would have assumed that the parties took it into account in setting the price for the conveyance and the cause of action would have remained with the transferor, unless it was assigned as part of the conveyance. Parties acquiring property with environmental injury shouldn't lose sight of this important distinction. It's a lot easier to get the assignment of rights as part of the conveyance rather than later, when it becomes clear that that the potential claim has value and that there is a solvent defendant.

Compare: Corbello v. Iowa Production, 850 So.2d 686 (La. 2003) (Where tenant contractually agreed to "reasonably restore the premises as nearly as possible to their present condition," in a lease for an oil and gas terminal, jury may properly award $33 million in damages for cost of restoration even when property, as restored, will be worth $106,000 and even when landlord has no duty to use the damages proceeds actually to restore the property.)

MORTGAGES; DISCHARGE; EQUITABLE ESTOPPEL: Where a deed of trust securing a line of credit is paid off but not released, and concurrently with that payoff another lender records its deed of trust securing a separate loan, and the first lender subsequently advances additional funds under the line of credit, the second lienholder cannot assert equitable estoppel in a priority dispute where he has record notice of additional requirements (in addition to the payoff) to obtain a release of the prior-recorded deed of trust. ***Washington Mutual Bank, F.A. v. ORNL Federal Credit Union,___S.W.3d___, 2008 WESTLAW 2510587 (Tenn. Ct. App. 6/24/08).***

In April 2001, Locketts borrowed $100,000 from ORNL under a home equity line of credit loan, secured by a deed of trust on their home. The deed of trust was recorded in May, 2001. In March 2002, the Locketts refinanced their home with TNBank for $127,000. This loan was also secured by a deed of trust on their home. TNBank's title company obtained payoff amounts from ORNL on two loans of $98,418.43 and $2,050. The title company sent checks to ORNL for these payoff amounts, but failed to request a release of ORNL's deed of trust. On March 25, 2002, ORNL sent TNBank vouchers verifying full payment of the ORNL loans, and TNBank assigned its $127,000 note and deed of trust to Washington Mutual. On April 3, 2002, the deed of trust and the assignment to Washington Mutual were recorded.

Unknown to the title company, TNBank and Washington Mutual, ORNL failed to release its deed of trust, and the home equity line of credit with ORNL remained open. Between April 18, 2002 and January 22, 2004, the Locketts borrowed an additional $95,887.87 from ORNL. The title company and Washington Mutual later discovered that the ORNL deed of trust had not been released and the Locketts had incurred the additional debt. Around the same time, the Locketts began to default on their loan payments to both lenders, and eventually filed a bankruptcy petition. Predictably, ORNL did not comply with the title company's request that ORNL release its deed of trust against the property, and began foreclosure proceedings.

Washington Mutual filed a complaint against ORNL for "deliberately and wrongfully refus[ing] to release its Deed of Trust," seeking to enjoin ORNL from foreclosing on the property and requesting that Washington Mutual's deed of trust be given priority over ORNL's. The parties allowed the foreclosure sale to take place and have the proceeds ($108,293.09) placed in escrow pending the trial court's decision. The trial court held that ORNL's deed of trust was released and awarded Washington Mutual the foreclosure proceeds as first lien holder, reasoning that ORNL failed to follow its standard procedure of advising parties requesting a line of credit payoff of the steps required to cancel the line of credit and have the deed of trust released. ORNL appealed.

The issue on appeal was whether the trial court erred in ruling that Washington Mutual's deed of trust had priority over ORNL's on the theory that ORNL was equitably estopped from asserting its deed of trust as a result of its failure to comply with its own company procedure by not notifying the title company of additional action required for release of the deed of trust. The court of appeals stated the elements of equitable estoppel as follows: First, with respect to the party against whom equitable estoppel is asserted, the plaintiff must show "(1) Conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) Intention, or at least expectation that such conduct shall be acted upon by the other party; [and] (3) Knowledge, actual or constructive of the real facts." Second, with respect to the party asserting estoppel, the plaintiff must show "(1) Lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) Reliance upon the conduct of the party estopped; and (3) Action based thereon of such a character as to change his position prejudicially" (emphasis in original).

The title company and Washington Mutual failed to prove that they lacked "the means of knowledge of the truth as to the facts in question," because they had record notice of the steps required to release ORNL's deed of trust. Those steps were included in a release provision filed with ORNL's deed of trust in 2001. The court took the view that due diligence required the title company to examine the contents of the ORNL deed of trust for any requirements concerning its release. Under

Tennessee statutes, record notice is notice of both the existence and content of a document. In addition, ORNL made no affirmative misrepresentation that a release of the deed of trust would require no action beyond a payoff of the underlying debt, nor did ORNL "induce any party to believe that it would claim no lien on the Locketts' home as a result of payoff alone." Therefore, the court of appeals reversed the judgment of the trial court, holding that ORNL could not be estopped from asserting its deed of trust. Because it was recorded first, ORNL's deed of trust had priority over Washington Mutual's.

MORTGAGES; FORECLOSURE; FINALITY: Purchaser of property at sheriff's sale may not have the sale set aside by alleging that it had been unaware that the property was subject to a first mortgage, even where the notice of sale does not reveal the existence of the prior mortgage. ***Indi Investments, LLC v. Credit Union, 1, 884 N.E.2d 896 (Ind.App. 2008).***

Credit Union, filed an action to foreclose its second mortgage on a piece of residential real estate located in Indianapolis, Indiana. It named Waterfield Mortgage as a party to the foreclosure action, but apparently the parties entered into a stipulation just prior to the judgment that Waterfield held a a first mortgage on the property. The trial court entered a default judgment and decree of foreclosure that foreclosed Credit Union's mortgage and ordered that the property be sold by sheriff's sale subject to Waterfield's first mortgage.

Indi purchased the property for $40,500 following publication of a Notice of Sherriff's Sale, which described the property but did not mention the Waterfield mortgage. Shortly thereafter, Indi Investments received a sheriff's deed—providing that the property was subject to the first mortgage rights of Waterfield—and subsequently recorded the deed.

After Citimortgage, the successor and assignee of Waterfield, filed a foreclosure action, Indi petitioned the court to set aside the sheriff's sale, alleging that it did not become aware of the Waterfield mortgage until sometime after it recorded the deed.

In deciding whether to set aside a sheriff's sale, Indiana courts take into consideration all circumstances, such as the inadequacy of the price, the effect of procedural irregularities, inequitable conduct, evidence of mistake or misapprehension, and problems with title. *Finucane v. Union Planters Bank, N.A.,* 732 N.E.2d 175, 177 (Ind.Ct.App. 2000). The trial court evaluated these factors and denied Indi's petition. Indi appealed.

On appeal, the Appeals Court examined the three main arguments advanced by Indi to determine whether the trial court did in fact abuse its discretion in denying Indi Investments' motion. Firstly, Indi argued that Indiana law requires that the notice of sale include information on the existence of any senior mortgage. Indiana Code Section 32-29-7-3 governs the notice of sale and provides in § 32-29-7-3(g) that such notice need only contain the address of the property "for informational purposes only." Therefore, the Appeals Court found no statutory authority to support Indi's claim that the existence of a first mortgage was required to be in the notice of sale.

Secondly, Indi argued that the foreclosure Judgment mandated that the information related to Waterfield's mortgage be included in the notice of sale. The Appeals Court found that the Judgment did not require that the notice of sale mention the Waterfield mortgage, only that the property be sold subject to the mortgage.

Lastly, Indi argued that the sheriff's sale should be set aside because it lacked knowledge of the Waterfield mortgage and Indiana Code Section 32-29-8-3 protects persons as bona fide purchasers who act in good faith without actual or constructive notice. The Appeals Court found that Indi had the means of obtaining information regarding the Waterfield mortgage by performing a title search or reviewing the trial court's file and the Judgment to discover that the property was being sold subject to the Waterfield mortgage; thus, Indi is charged with actual notice and therefore is not protected as a bona fide purchaser under the statute. The Appeals Court held that the trial court's denial of Indi's motion to set aside the sheriff's sale was correct and affirmed the judgment of the trial court.

Comment: What the editor finds interesting about this case is that the court never states that the senior Waterfield mortgage was in fact recorded. The on line appellant's brief (2008 Westlaw 466040) doesn't say that either. The brief says that Indi could have discovered the existence of the senior mortgage by ordering a title search – apparently arguing that such a search would have compelled a professional title examiner or title company to review the court file, which would have indicated the existence of the Wakefield mortgage.

Each jurisdiction has its own peculiarities about what constitutes "constructive notice" and usually the search expectation goes far beyond the simple searching of a grantor grantee index. But, if we assume that the senior mortgagee did not record, then it certainly got a nice break here when the court record was made part of the foreclosure purchaser's search burden.

Note that the Waterfield mortgage was named as a party defendant in the original foreclosure. There apparently was some negotiation among the parties before they stipulated to the court that the Waterfield mortgage was senior. Again, all in the court file, but do foreclosure purchasers routinely check such files? Note that Indi argued that it had already made significant improvements to the premises. There is no suggestion of "good faith improver" payments or other equitable relief, perhaps because Indi elected to go for all or nothing.

Note further that the same rule of constructive notice would apparently apply to subsequent purchasers from Indi.

MORTGAGES; FORECLOSURE; PARTIES; MERS: Although MERS is recorded as a mortgagee, it is not entitled to be served or joined as a party to the foreclosure of a senior mortgage because it is a "mere" nominee, and not a true obligee under the debt or holder of rights under the mortgage. ***Landmark Nat'l Bank v. Kessler, 2008 Westlaw 4180346 (Kansas App. 9/12/08)***

This is really quite an awful opinion awful for MERS and still another body blow to securitized mortgages if it stands. It formally addresses only a narrow point of law, but does not appear to acknowledge established law that is relevant to the eventual outcome of the case, so we're left uncertain as to what the court really intends There will be an appeal, but right now it's the law in at least part of Kansas and will start the wolves howling elsewhere as well. Some of the factual detail comes from one of the lawyers in the case.

Kessler had a first mortgage on Kansas property securing a debt of about $60,000. There was a second mortgage securing a debt of $90,000 loaned by Millennia, but Millennia participated in the MERS process and anticipated transferring its loan on the secondary market, so it arranged for the original recording of the loan to be in the name of MERS, as nominee for Millennia or its assigns. Subsequently, the mortgage was assigned on to Sovereign Bank, and the assignment was duly recorded on MERS database. No assignment was recorded, of course, since MERS, by virtue of agreement of Millennia and Sovereign, now stood as nominee of Sovereign.

Kessler defaulted on the first mortgage and Landmark, the first mortgagee, instituted judicial foreclosure proceedings. Apparently it sought advice from a title insurer, which advised it to serve only Millennia and Kessler, even though MERS was of record, and even though the identity of the current owner of the mortgage could have been found by checking with MERS. Note that Millennia was not of record as the holder of the mortgage, but one assumes that the title company somehow was informed that Millennia was the original mortgagee of the MERS recorded mortgage.

The second mortgage contained language requesting that any senior mortgagee provide the holder of the second mortgage with notice of the default and foreclosure. This language was irrelevant in Kansas, to the editor's knowledge, and conferred no duty on the senior and no rights on the junior. It likely was part of a "national" form.

Both Kessler and Millennia failed to show at the foreclosure hearing, and the court entered a default judgment of foreclosure, with the sale to be conducted at a later date by the sheriff and thereafter to be confirmed by the court. Before the sheriff's sale, Sovereign got wind of what was happening and appeared in court asking to intervene and to set aside the judgment. Sovereign appeared after the sheriff's auction, but before the required judicial confirmation of the sale. The trial court ruled, however, that Sovereign was far beyond the ten day period following the judgment that Kansas permits for intervenors.

Apparently the trial court expressed the view that Sovereign lacked standing to intervene, as it was not a record owner of the mortgage, so Sovereign sought out MERS and MERS brought its own action to intervene and set aside the foreclosure. It appears that the MERS petition was before the confirmation of the sale (but after the sheriff's auction itself), and MERS made the point that the it was a necessary party to the foreclosure action as it held a recorded mortgage. MERS further argued that to terminate its interest without notice and hearing violated its due process rights.

The trial court ruled that MERS was not a necessary party to the action because, as it readily admitted, it was a nominee, and not, in the view of the court, the holder of any real interest in either the note or mortgage. As to due process rights, the court noted that since MERS had no property right at stake it was not entitled to due process. The court did not mention that Sovereign, the lawful assignee of the mortgage, was certainly discoverable and should have been served, either through its nominee MERS or otherwise. The court also was of the view, apparently, that neither MERS nor Sovereign had any further rights as an omitted junior lienholder, and that the mortgage terminated their rights. This finding may not have been necessary to the ruling on the motion to intervene.

On appeal, a three judge Kansas Appellate panel upheld the trial court's ruling in all respects.

The appeals court relies upon Black's Law Dictionary for a significant portion of its analysis. The analysis itself is so incredible to the editor that he feels that it is best that he merely set it forth *verbatim:*

". . . [T]he tie between a mortgage and an underlying debt is so intrinsic that Kansas law provides that "[t]he assignment of any mortgage . . . shall carry with it the debt thereby secured." K.S.A. 58-2323. Indeed, an assignment of a mortgage without the debt transfers nothing. 55 Am. Jur. 2d, Mortgages § 1002. Thus, the mortgagee, who must have an interest in the debt, is the lender in a typical home mortgage.

But for reasons thought beneficial by a group of lenders who trade mortgages, the form of mortgage used in this case designates an entity that is not the lender as the mortgagee. See *MERSCORP, Inc. v. Romaine*, 8 N.Y.3d 90, 96, 828 N.Y.S.2d 266, 861 N.E.2d 81 (2006) (MERS was established by large lenders to allow easy electronic trading and tracking of mortgages). Specifically, the mortgage says that the mortgagee is MERS, though "solely as nominee for Lender." Does this mean that MERS really was the mortgagee, even though it didn't lend money or have any rights to loan repayments? Assuming so, MERS argues that it was a necessary party to the foreclosure and that the foreclosure must be set aside. But the premise upon which MERS bases this argument is flawed.

What is MERS's interest? MERS claims that it holds the title to the second mortgage, not the real estate. So it does, but only as a nominee. In terms of the roles that we've discussed in the mortgage business, MERS holds the mortgage but without rights to the debt. The district court found that MERS was merely an agent for the principal player, Millennia. While MERS objects to its characterization as an agent, it's a fair one.

MERS had no right to the underlying debt repayment secured by the mortgage; MERS did not even act as the servicing agent to receive the payments and remit them to the lender. MERS's right to act to enforce the mortgage was strictly limited: if "necessary to comply with law or custom," MERS could foreclose the mortgage or enter a release of the mortgage. MERS certainly could not act at odds to its principal, the lender. Its role fits the classic definition of an agent: one "'authorized by another to act for him, or intrusted with another's business.'" *In re Tax Appeal of Scholastic Book Clubs, Inc.,* 260 Kan. 528, 534, 920 P.2d 947 (1996) (quoting Black's Law Dictionary 85 [4th ed. 1968])."

Do you think that MERS, both by custom and practice and by agreement, performs the function of a legal representative of the owner of a mortgage, and that its nominee status therefore entitles it to be a party to an action involving that mortgage? Do you think that, at the very least, MERS serves as a record indicator to a party searching title that there is a possible holder of a mortgage interest in the property and that inquiry of MERS would be appropriate? Unfortunately, you don't sit on the Kansas Court of Appeals, and the views of that body, set forth above, are so far controlling.

As to Sovereign's motion, the court ruled simply that it didn't act in a timely fashion, and doesn't discuss its due process rights

The only sop given to the parties is a paragraph stating the limitations of the court's precise ruling:

"We do not attempt in this opinion to comprehensively determine all of the rights or duties of MERS as a nominee mortgagee. As the mortgage suggests may be done when "necessary to comply with law or custom," courts elsewhere have found that MERS may in some cases bring foreclosure suits in its own name. *Mortgage Electronic Registration v. Azize*, 965 So. 2d 151 (Fla. Dist. App. 2007). On the other hand, some have suggested potential problems created by MERS's practices, *MERSCORP, Inc. v. Romaine*, 8 N.Y.3d 90, 100-04, 828 N.Y.S.2d 266, 861 N.E.2d 81 (2006) (Kaye, C.J., dissenting), or with the handling of paperwork documenting who owns what in the residential-mortgage industry in general. *E.g., In re Nosek*, 386 B.R. 374, 385 (Bankr. D. Mass. 2008); *In re Foreclosure Cases*, 2007 WL 3232430 (N.D. Ohio 2007) (unpublished opinion). In this case, we are only required to address whether the failure to name and serve MERS as a defendant in a foreclosure action in which the lender of record has been served is such a fatal defect that the foreclosure judgment must be set aside. We hold that it is not."

Thus, although MERS and Sovereign begged the appeals court in oral argument to find at least that the Sovereign mortgage was not cut off by the foreclosure, it said nothing express on this issue, at least in writing. As noted, the court appeared to be of the view that the mortgage was cut off. The trial court had stayed the delivery of the deed to the foreclosure purchasers pending this appeal, so that issue may still be resolved if the appeal continues.

Comment 1: This case certainly does some damage to MERS claims in other courts that it is entitled to bring foreclosure actions or perform other functions as the nominee of the owner of the note and mortgage. The relatively unusual context of the foreclosure of a first mortgage may limit the damage, but it is still significant, as it permits foreclosure of junior mortgages held by MERS as a nominee of record without notice or hearing.

Comment 2: According to hearsay, the property sold at foreclosure to third parties for $90,000 – significantly more than the $60,000 debt; and Kessler, who had defaulted at the foreclosure proceeding, got wind of this and appeared in court to collect his $30,000 surplus. He apparently has declared bankruptcy and discharged the $90,000 debt, so if Sovereign loses its security interest here, Kessler will get to keep the money. Kessler still apparently also has statutory redemption rights, and the property in fact may be worth close to $130,000. Kessler will be able to redeem that property for $90,000 and reap another $40,000 gain – a $70,000 windfall when he didn't even show up. That's show business!!

Comment 3: The editor understands that there will be an attempt to get a rehearing *en banc* and a possible appeal to the Kansas Supreme Court. Perhaps *amicus* briefs would be acceptable. Interested parties might want to check with MERS general counsel's office.

MORTGAGES; JOINT TENANCY; SEVERANCE: Joint tenancy not severed when joint tenant executes security deed. ***Biggers v. Crook, 656 S.E.2d 835 (Ga. 2008).***, discussed under the heading: "Joint Tenancies; Severance; Mortgages."

MORTGAGES; PRIORITY; DISCHARGE: Where a deed of trust securing a line of credit is paid off but not released, and concurrently with that payoff another lender records its deed of trust securing a separate loan, and the first lender subsequently advances additional funds under the line of credit, the second lienholder cannot assert equitable estoppel in a priority dispute where he has record notice of additional requirements (in addition to the payoff) to obtain a release of the prior-recorded deed of trust. ***Washington Mutual Bank, F.A. v. ORNL Federal Credit Union,___S.W.3d___, 2008 WESTLAW 2510587 (Tenn. Ct. App. 6/24/08).*** , discussed under the heading: "Mortgages; Discharge; Equitable Estoppel."

MORTGAGES; PRIORITY; MECHANIC'S LIENS: Materialman's liens in Arkansas are subject to *lis pendens*, and a party acquiring such a lien need not be joined in the cause of action in order for the *lis pendens* statute to apply to that party. ***National Home Centers, Inc. v. Coleman 373 Ark. 246, ___ S.W.3d ___, 2008 Westlaw 1747108 (Ark. 2008)***, discussed under the heading: "Mechanic's Liens; *Lis Pendens*."

MORTGAGES; SUBROGATION: Assignee of a mortgage obtained pursuant to refinancing was entitled to equitable subrogation such that its mortgage took priority over a mortgage held by second mortgagee. ***JPMorgan Chase Bank, as Trustee for Equity One ABS, Inc. v. Howell, 883 N.E.2d 106 (Ind. App. 2007).***

Howell owned property upon which Irwin held a first conventional mortgage, Bank One held a second mortgage securing a line of credit, and Accredited Home Lenders, Inc. held a third mortgage. The dates of execution and recording for Irwin's mortgage were unknown, but all parties agreed that it was the first mortgage. Bank One's second mortgage was executed on October 5, 1999 and recorded on October 15, 1999. Accredited's third mortgage was executed on May 24, 2002 and eventually assigned to Equity One on February 28, 2003. Equity One paid off the first mortgage in Irwin's favor and that mortgage was released.

Equity One then attempted to pay off the second mortgage in Bank One's favor. Equity One's closing agent, Nations Title Agency of Indiana sent Bank One a payoff check as well as a letter signed by Howell instructing Bank One to close the line of credit and notify Nations Title of any shortage in the payoff amount. The payoff check, however, was short by approximately $300.00. Bank One deposited the check, but neither informed Nations Title of the shortage, nor closed Howell's line of credit, which Howell continued to draw upon after the payoff, resulting in a final balance of $42,235.

Howell then defaulted on the notes and mortgages held by Equity One and Bank One. Equity One filed against Howell and Bank One seeking to foreclose its mortgage and for a judgment that it held the first priority lien against the property. Bank One answered with a claim asserting first priority and the trial court granted summary judgment. Equity One appealed, claiming that its mortgage should have priority based on the doctrine of equitable subrogation.

The Court of Appeals (the "Court") discussed Indiana Code sections pertaining to filing, priority, and equitable subrogation. The Court quoted the Indiana Supreme Court's decision in *Bank of New York v. Nally*, 820 N.E.2d 644 (Ind.2005): " 'a mortgagee who refinances an existing mortgage is entitled to equitable subrogation even if it had actual or constructive knowledge of an existing lien on the property unless the junior lienholder is disadvantaged or the mortgagee is 'culpably negligent' [.]' " Equity One contended that it was entitled to equitable subrogation because: 1) Equity One refinanced Irwin's senior mortgage; 2) Bank One would not be disadvantaged because it remained the second lienholder; and, 3) Equity One was not culpably negligent. The Court agreed, finding: 1) Bank One was bound by the acknowledgment in its request for summary judgment that Equity One had refinanced and paid off the first mortgage; 2) Bank One did not argue that it would be disadvantaged by equitable subrogation; and, 3) Bank One was not prejudiced by Equity One's failure to verify whether it had fully paid off Bank One's mortgage. Finally, the Court found that allowing Bank One priority would result in unearned windfall. As a result, the Court held that Equity One was entitled to equitable subrogation, reversed the trial court's grant of summary judgment to Bank One, and remanded with instructions to enter summary judgment for Equity One.

Comment 1: Although the law around the country is unsettled as to the availability of equitable subrogation "sandwiched" prior lienholder whose existence was known known to the subrogation candidate at the time it paid a more senior loan, the law in Indiana is quite generous. Even in those states that require some "equitable argument" to support subrogation, Equity One has a very strong argument here, as the court notes. Bank One received a clear instruction that the line of credit was to be closed, and knew that Equity One believed that it had fully paid the Bank One mortgage, but said nothing, and in fact continued to make advances to the borrower.

Under the Restatement and under a number of state statutes, a communication from the mortgagor terminating a line of credit secured loan is viewed as a final termination. It is likely that the sent by the borrower here was such a communication. Bank One may be lucky to have a secured claim at all (at least beyond the $300 shortfall), much less a prior one.

Comment 2: It appears, however, that after the payoff the Equity One mortgage was further assigned into securitization. Should this matter? The court assumes, likely correctly, that subrogation rights go with any assignment of a secured claim.

An interesting question, not raised here, is whether such rights ought to exist if, at the time the assignment occurred, everyone was already aware of the fuss with Bank One and that Bank One was claiming a prior claim. Should one be able to "buy in" to such an equitable position? The editor believes that the Indiana court would say "yes" to this, since it would have permitted the original refinancing lender to claim subrogation even if it had knowledge of the intervening lien at the time. Its view (and that of the Restatement) is that failure to grant subrogation virtually always results in an inequitable windfall to the intervening lienholder, and no special equities need exist on behalf of the candidate for subrogation.

Comment 3: Note that the subrogation is only to the amount of the Irwin first lien, which was about $77,000. That's standard. You only get the amount of the original priority (and you must have paid off the whole amount of the lien occupying that priority). According to Dale Whitman, who is certainly the "source" an matters of this nature, Equity One should otherwise get all the original terms and conditions of its own mortgage, limited only as to the amount of the lien.

The editor had believed that subrogation was only as to priority, and that otherwise the subrogated party lives with the terms of the loan into which it subrogates. But he'll concede Dale has read a lot more cases on this point a lot more carefully. The difference really is less than it seems, as most often the lender and borrower could agree to change the terms of their mortgage without loss of priority unless there is significant negative impact on a junior lienholder. Although the borrower in these cases may desire to have the terms of the original senior lien, it has already agreed to the terms of the subrogated party's lien, so it has a weak position.

Dale admits that there would be no substitution of priority for any terms that would have a significant negative effect on the junior without the junior's consent.

NUISANCE; DAMAGES: Where trust beneficiary's house was held for personal use, had been her family's home for almost 80 years, damage to the house was permanent, the proper measure of damages against neighbor who caused the structural damage was the cost of repair to the house as opposed to the diminution of value attributable to the damage. ***LaSalle National Bank v Willis, 880 N.E.2d 1075 (Ill.App.1d., 2007).***

Willis began work on his property, acting as his own general contractor. As part of this work he had the preexisting building torn down and built an expensive new residence for himself. Willis knowingly failed to take proper protective measures during the construction process to protect Witt's home, located next door, and as a result Witt's home suffered structural damage making the home unsafe, forcing Witt to move out and sell her home. LaSalle, Witt, and after her death, her estate, (collectively, the "Plaintiff") filed suit against Witt on a number of claims. As a motion in limine, Willis requested that the court bar all evidence of the cost or repair damages. The court denied Willis's motion, holding that the proper measure of damages was the cost of repair but certified the issue for appeal.

The Appellate Court was asked to decide whether the proper measure of damages was the difference between the market value of the property before the injury and its value after the injury, or in the alternative, the reasonable expense of repairs to restore the property to its original condition.

The court found that the a fact based inquiry provides the correct answer in any given case. First, relying on *Arras v Columbia Quarry Co.*, 367 N.E.2d 580 (Ill.App.2d., 1977), the court held that a court must look to the nature of the thing injured to determine whether an injury to realty is permanent or temporary, and in cases where the injury is not permanent, the ordinary proper measure of damages is the cost of repair. Second, a court must look at the exact interest harmed. When land is held for a personal use such as a family residence and the harm may be corrected with a reasonable expenditure even though the expenditure exceeds the amount the land has diminished in value, again, the cost of repairs is ordinarily the proper measure of damages.

The court noted that if the proper measure of damages in these cases was held to be the change in fair market value, such a holding would effectively give owners a right of private eminent domain.

The court also distinguished the present case from *Ceres Terminals, Inc. v Chicago City Bank & Trust Co.*, 635 M.E.2d 485 (Ill.App.3d., 1994) in which the proper measure of damages was change in fair market value primarily on the basis that the property in *Ceres* was commercial property and therefore the owner could be made whole by an award of the diminution of fair market value. Here, where the damage to the property was reparable and the property owner had an interest in having the property restored to its original condition, the proper measure of damages was the cost of repair plus the value of the loss of use of the building during the time of repair. The court answered the certified question and affirmed the lower court's decision.

NUISANCE; TRESPASS; DAMAGES: Neighbors who had landowner's trees cut to improve their ocean view are liable for cost of restoration, and not just for diminution in value, trebled under trespass statute. ***Glavin v. Eckman, 881 N.E.2d 820, (Mass. App .Ct. 2007).***

Eckmans owned a parcel of land on Martha's Vineyard close to the land of Glavin. Glavin owned two parcels to the west of the Eckmans. The closer of the two featured a knoll that previously contained a stand of ten oak trees providing shade to wetlands that Glavin planned to convert into a pond. In 1996, Eckmans asked Glavin for permission to trim or cut down the trees to improve their view of the ocean, which Glavin denied. In 2001, Eckmans hired Jon Fragosa and his landscaping company ("Fragosa") to top and remove various trees on their property to improve their water view. Eckmans and Fragosa did not walk the boundaries of their land, but Fragosa was instructed to open the ocean view "to the max."

While cutting down trees, Fragosa crossed fifty to one hundred feet across the boundary line onto Glavin's land and cut down all ten oak trees, which measured from eleven to thirty inches in diameter. It was readily apparent that the oaks were not on the Eckmans' property.

Neither Eckmans nor Fragosa contend that they had good reason to believe that the oaks were on the Eckmans' property. Massachusetts statues prohibit the willful cutting down or destruction of trees on the property of another, and a person who does so with no good reason to believe the trees were on their own property is liable for treble damages. At trial, the Eckmans were held liable for the destruction of the trees because they had instructed Fragosa to maximize their view and "retained ultimate control over the scope of Fragosa's work.

The jury rendered a special verdict on favor of Glavin and ordered damages of $30,000 as reasonable cost of restoration of the trees. Additionally, because the Eckmans and Fragosa had no good reason to believe the trees were on the Eckmans' property, treble damages were assessed.

The defendants argued on appeal that the trial court had erred it permitted the jury to measure damages as cost of restoration rather than as timber value or diminution of market value of the property.

The appellate court held that generally, a plaintiff may opt for either the value of the timber cut or the diminution in value of his property as the measure of damages. But, where the diminution in value does not fairly represent the damages, the plaintiff may opt for restoration costs for damages.

At trial, Glavin showed that he planned to create a pond from his wetlands, and that the oak trees would provide both shade for the pond as well as a backdrop to the view of the pond from his house, two losses that cannot be adequately measured by diminution in value. Replacing such old oak trees would be nearly impossible, so Glavin put forth expert arborists who testified about determining the cost-of-cure of the destruction of the oaks. These experts determined that replacement costs would be more than $55,000. The appellate court held that in light of the circumstances and the expert testimony, the $30,000 in damages awarded by the jury was not unreasonable, and that the General Laws mandated treble damages while showcasing a legislative intent to dissuade wrongdoers.

Comment: Was it really the intent of the legislature to triple the damages even when they were restoration damages? Typically the cost of restoration is invoked when it is higher, and such damages measures are not available, as this case shows, without special justification. The owner just got a windfall when, in addition to the special justification, it got triple damages based upon restoration costs. The outcome here strikes the editor as excessive.

NUISANCE; SPITE FENCES: A local permit granting landowners permission to build a wooden fence parallel to their property line did not trump the spite fence statute under which the landowners' construction of an eight-foot high fence was considered a nuisance. ***Gertz v. Estes, 879 N.E.2d 617 (Ind. App. 2008).***

In 2003, Defendants bought a neighboring home to Plaintiffs. Defendants equipped their home with a public address system and surveillance cameras, and in 2004, the parties disputed the location of the property line. While this dispute was resolved, enmity remained, and Defendants received a permit for, and built on their property, an eight-foot wooden fence that ran parallel to, and eight inches away from, the property line. Thousands of nails extending between a quarter-inch and a half-inch protruded from the side of the fence facing Plaintiffs' property.

In 2005, Plaintiffs filed a complaint, alleging that the fence violated the Indiana "spite fence" statute. Indiana Code Section 32-26-10-1 provides for a cause of action where a fence is "maliciously erected . . . for the purpose of annoying the owners or occupants of adjoining property." In 2007, the trial court ordered Defendants to remove the fence, the public address system, and the surveillance cameras within thirty days.

The trial court also ordered Defendants to pay Plaintiffs for damages amounting to $2,500 and entered protective orders prohibiting each family from contacting, harassing or annoying the other family. Defendants appealed, seeking to maintain their fence, but did not challenge the rest of the trial court's order.

On appeal, Defendants argued that the spite statute was inapplicable because they had received a local permit for the fence. The Appeals Court stated that municipal ordinances and regulations are subordinate to state laws and statutes, and that the spite statute made no reference to any required conformity with local ordinances. Thus, the fact that Defendants were issued a permit was irrelevant to the discussion of the applicability of the statute. The trial court's holding that receipt of a local permit was not a defense for purposes of the spite fence statute was correct.

Defendants further argued that the trial court clearly erred in making its findings of fact, arguing specifically that Plaintiffs did not establish that the fence was unnecessary or that Defendants used their public address system to make disparaging comments about Plaintiffs' family. The Court found that the evidence and reasonable inferences drawn from it supported the trial court's findings that the fence was unnecessary and not intended for agricultural purposes, as Defendants had asserted.

Comment: Not exactly "Happy Valley Subdivision," eh? Anyway – to the legal issues. Of course state law prevails over local ordinance, but there still could be a fundamental question as to whether a fence built consistent with local ordinance ought to be regarded as "maliciously erected."

Clearly local law intended that the fence Defendants erected was a proper fence for that area. The point made in the case is that even perfectly lawful activities carried out with "malicious intent" are actionable. This might sound nice, but where does it take us? The usual rule with respect to claims for tortious interference with contractual expectation or other "bad faith" torts is that the action in question itself would be improper. Generally, parties are free to exercise perfectly valid contract rights even if they do so in order to injure their competitors or their enemies. That is not the standard in this case. Here, we have a long history of enmity and perhaps pretty strong evidence of malicious intent. But isn't a fence just a fence?

QUIET TITLE; PARTIES; ADVERSE POSSESSION: For quiet title actions to be brought properly before a court, record owners must be named as parties to such actions. ***Baker v. Weinberg, ___ S.W.3d ___, 2008 Ky. App. LEXIS 159 (Tenn. Ct. App. 5/16/08). (Ky. Ct. App. 2008).***

Bates transferred gas and mineral leases to Martin and later transferred title in the same property to his sons. Later the sons and their transferees chased off the representatives of the mineral and gas interests with a shotgun. They obtained a quiet title action recognizing their rights, and that action declared ownership of the mineral and gas rights to be in the heirs of Martin, but did not thereafter make much attempt to draw out the minerals or gas for several decades.

Then certain holders of the mineral and gas interests, including a majority of the heirs of Martin, decided that they did wanted to come back onto the property to exercise their rights, and the successors to the sons blocked them with felled trees.

The mineral and gas interests brought another quiet title action, and the surface occupants responded with an adverse possession claim. The trial court awarded summary judgment in favor of the mineral and gas interests on the basis that the 1982 court judgment was *res judicata* as to all issues in the quiet title action.

On appeal, the Kentucky Court of Appeals addressed the issue of whether the record owner must be named as a party to a quiet title action, even though the applicable quiet title statute does not specify that such owners must be joined. The court, citing recent case law from other jurisdictions, adopted the rule that "the owner of record must be named as a party to a quiet title action." But here, not all of the heirs of Martin were included as parties to the lawsuit, and the quiet title action and the associated adverse possession claim could not proceed without their being joined.

SERVITUDES; RESTRICTIVE COVENANTS; USE RESTRICTIONS; COMMERCIAL USE: A restrictive covenant prohibiting commercial use of property is violated when commercial vehicles are parked in a residential driveway. ***Roberts v. Lee, 658 S.E.2d 258 (Ga. Ct. App. 2008).***

Homeowner resided in a subdivision subject to restrictive covenants, including a restriction that the property is to be used for residential purposes only.

Homeowner parked his business vehicles in the circular driveway and in front of his home. The vehicles included a dump truck, a box van, and a pickup truck, among others. He occasionally changed the oil there as well, and every morning between four and five AM would "crank" the truck for about twenty minutes before leaving for work.

Homeowner convinced the trial court that there was no violation of the subdivision's restrictive covenants, as they did not prohibit specifically the parking of commercial vehicles within the subdivision; that the covenants only prohibited commercial and business "activities" and were not specific enough to be enforced against the alleged violation.

The appeals court disagreed. Construing the covenants to effect the intention of the parties, the court held that the homeowner violated the intent of the covenants to protect the residential character of the neighborhood when he used his residential property to advance his business purposes.

The homeowner also argued that the plaintiff was not entitled to equitable relief because she lacked clean hands. Plaintiff is a court reporter who typed transcripts on her home computer. The court held that the plaintiff was not in violation of the covenants because her activity had no effect on the "value, status, stability, and residential character of her home or the subdivision."

Comment 1: The "no commercial use" restriction often is a most difficult one to construe. The editor can't argue with the notion that parking commercial vehicles such as dump trucks and box vans are a business activity. But what about a pickup truck? If so, what about when the resident drives a car provided by his or her employer, which otherwise looks like any other car? Do designations on the outside of the car matter? Then what about bumper stickers? Are they more or less intrusive than neat lettering on the side of a pickup saying "Jones Cement Company."

In this case, the court dodged the question somewhat by noting that there were several pickup trucks parked on the circular driveway, none of them driven by residents of the home and all owned and operated by the company. But it really doesn't answer the question of how it would deal with a truck that was driven by the homeowner.

Here, note, the court refused to apply the rule literally to a resident who unquestionably was making a business use of her property. This also is a very troublesome issue for courts. Should courts be "philosopher kings" here, divining the probable intent of parties who for the most part bought into the subdivision without paying much attention to the covenant language at all? Or should the force associations to use their amendment power or adjudicative function to provide more clear and predictable enforcement, and otherwise cut ruthlessly where the express language takes them? These are two of many answers, but all answers have their problems, at least to the editor.

Comment 2: For a case taking an approach similar to this one, and prohibiting an activity that violates the spirit, if not the letter, of the restriction, see *Tipton v. Bennett,* 934 P.2d 203 (Mont. 1997) (3,200 square-foot storage building violates restrictive covenant limiting use of property to "residential purposes" as it is too big and intrusive to be regarded as an "ancillary use" to a residence even if used only to store personal property.) Also see: *Namleb Corp. v. Garrett,* 814 A. 2d 585 (Md. App. 2002) (A roadway built across a residential restricted lot that provides access to other residential property outside the restricted subdivision is a violation of restrictions providing that there be only one single family dwelling erected on any one lot and that all lots be used only for "residential purposes." Driveways may serve only the residence on the given lot.).

For application of the approach to affirm uses that are "commercial" but not intrusive, see *Gabriel v. Cazier*, 938 P.2d 1209 (Idaho 1997) DD 12/3/07) (A covenant prohibiting "business or trade" activity in a subdivision does not prohibit swimming lessons conducted by a homeowner's children for profit during the summer months.) *9394 LLC v. Farris,* 782 N.Y.S.2d 281 (A.D. 2 Dept. 2004). (A restrictive covenant prohibiting "manufactory, trade or business of any kind" did not prohibit a property owner from engaging in certain business activities on his premises, such as maintaining his "corporate headquarters" there.)

Also see the many cases permitting short term rentals and "bed and breakfast" uses in subdivisions requiring "residential only" activities and often prohibiting "commercial" or "business" uses: *Scott v. Walker*, 645 S.E. 2d 278 (Va. 2007) (DD 6/27/07); *Persson-Mokvist v. Anderson,* 942 P.2d 1154 (Alaska 1997) (use of property a bed and breakfast did not violate a plat note restricting property use in a subdivision to residential/recreational use) (DD 3/26//98); *Catawba Orchard Beach Assn. v. Basinger*, 685 N.E. 2d 584 (Ohio App. 6 Dist. 1996) (rental of three vacation cottages was a "private residential use.") (DD 2/16/98); *Yogman v. Parrott,* 937 P.2d 1019 (Or. 1997) (short term vacation rentals are a "residential purpose" and are not a "commercial enterprise") (DD 9/19/97).

STATE AND LOCAL TAXATION; PROPERTY TAXES: A religiously affiliated conference center and RV Park may qualify for tax exempt status on the ground that the RV park was for religious use because its income came predominantly from persons participating in religious programming. ***Cedar Lake Conference Ass'n v. Lake County Property Tax Assessment Board of Appeals, 887 N.E.2d 205 (Ind. Tax Ct. 2008).***

Cedar Lake Conference Association ("CLCA") is organized as a non-profit corporation with stated religious and educational purposes. It owns two parcels in Cedar Lake, Indiana. One parcel (the "Conference Center") consists of lodging, restaurant, conference facilities, and recreational areas and is tax exempt due to its use for religious purposes. The other parcel contains a campground and an RV park, among other things (the "RV Park"). After the RV Park was used in conjunction with the Conference Center, CLCA filed for a tax exemption for the RV Park which the Lake County Property Tax Assessment Board of Appeals denied. The Indiana Board of Tax Review (the "Indiana Board") upheld the denial on the basis that CLCA failed to demonstrate that the RV Park's predominant use was for religious purposes because it did not provide a breakdown of the time spent on religious and non-religious activities. CLCA appealed this ruling to the Indiana Tax Court on the basis that the Indiana Board's final determination was not supported by substantial evidence.

The Indiana Tax Court reviews fact-finding by the Indiana Board deferentially only when the Indiana Board's conclusions are supported by substantial evidence that a "reasonable mind might accept as adequate to support a conclusion." *Amax Inc. v. State Bd. Of Tax Comm'rs*, 552 N.E.2d 850, 851 (Ind. Tax Ct. 1990). Here, because CLCA submitted an affidavit that the RV Park was used for religious purposes and a park income report showing that 67.2% of the RV Park's income was attributable to individuals participating in the Conference Center's religious programming, the court held that the Indiana Board's conclusion was not supported by substantial evidence in the record. The court went on to further find that the use of the RV Park for recreational activities, "does not necessarily lead to the conclusion that CLCA's use of the property does not further its religious purposes." The denial of tax-exempt status to CLCA for the RV Park was reversed and the matter was remanded to the Indiana Board.

TITLE INSURANCE; DUTY TO DEFEND: Tender of title may not solve claim under homeowner's policy. ***Soto v. First American Title Ins. Co., 2008 WL 3049982 (E.D.Mich. 8/1/08) (not yet released for publication)***

A title insurer bought the insured property at a foreclosure sale and gave a deed to the insured. The insured wanted money instead, and claimed that he had been effectively evicted for several months. The federal court denied summary judgment to the insurer, concluding that there was still a question of fact as to whether the insurer had fulfilled its contract responsibilities.

Emanuel Soto bought a home in Detroit for $160,000, obtaining an ALTA Homeowner's policy from First American Title .

Thereafter, apparently there were two lawsuits. The first was a quiet title suit in which, in the words of the court, Soto "became a party," First American defended, but a consent judgment was entered declaring Spriggs to be the fee simple owner of the property.

While that was pending, apparently, a lender foreclosed on a mortgage, and a sheriff's deed was recorded putting title in U.S. Bank as trustee. "Following the foreclosure of Plaintiff's mortgage and after losing ownership of the Property to Spriggs," First American bought the property from Spriggs for about $100,000 and conveyed it to Soto.

The facts are unclear, but it appears that U.S. Bank was trustee under a deed of trust and that the Soto's gripe seems to be that he wanted money, not the property. He sued First American. The court characterized the action as "a dispute over whether First American then vested Soto with a covenant deed, or a fee simple interest. [First American] claims that [it] has cured the title defect and Soto now owns the property he purchased, free and clear of any adverse claims against his title." Soto argued that he had been dispossessed for several months, and also that First American "breached the Title Insurance Policy by clearing the Westmoreland Property's defective title rather than paying him $160,000."

The court quoted the following provisions from paragraph 6 of the Conditions to the Homeowner's policy:
§ 6.b.(1): If (First American) remove(s) the cause of the claim with reasonable diligence after receiving notice of it, all (of First American's) obligations for the claim end, including any obligation for loss (Soto) had while (First American was) removing the cause of the claim.

The court then held that there was a question of fact as to which party bore the risk of the foreclosure that occurred while First American was defending Soto's title:

"Inherent in fee simple ownership is the right to quiet enjoyment and possession . . . Defendant did not provide plaintiff with possession for several months, the result of which ended in the property falling into foreclosure. It was foreseeable that the Property would go into foreclosure, and Plaintiff alleges that Defendant delayed curing the defect in title to secure a more desirable purchase price. . . . "[T]he general rule in breach of contract actions is that damages recoverable for a breach of contract are those arising naturally from the breach or those which were within the parties' contemplation at the time of contracting." . . . Plaintiff has presented a question of fact as to whether the house falling to foreclosure arose naturally from Defendant's delay in curing the breach, and damages relating to the foreclosure are recoverable . . . ."

"Because Defendant's actions to cure the title defect may have been too little too late, and did not make Plaintiff whole, Defendant is not entitled to Summary Judgment on Counts I and IV, and their Motion for Partial Summary Judgment is DENIED."

Reporter's Comment: This decision is reminiscent of *Baker v. Cambridge Chase, Inc*., 725 A.2d 757 (Pa.Super. 1999), which held that a title insurer had not delivered the same title as insured when it tendered title by a quit claim rather than a limited warranty deed. This opinion further highlights the desirability of refining and clarifying the ALTA policy forms, particularly as to the measure of loss. See (m) of the draft policy loss provision on page 10 which, if implemented, would eliminate the Soto/Baker argument.

The Reporter for this item was J. Bushnell Neilson, writing in the excellent Title Insurance Law Newsletter, info@woodbridgelegal.com.

VENDOR PURCHASER; CONSIDERATION; ILLUSORY CONTRACTS: "Real Estate Purchase Contract" was no more than an unenforceable option agreement that failed for lack of consideration because buyer had no obligation to perform at all. ***Steiner v Thexton (2008) 163 CA4th 359, 77 CR3d 632 (Cal. App. 2008)***

Steiner desired to acquire and develop a 10 acre parcel from Thexton's. This required subdivision of Thexton's 12-acre parcel. In September 2003, Steiner persuaded Thexton to sign a document entitled "Real Estate Purchase Contract," which offered to purchase the 10 acres for a specified amount on successful subdivision of the parcel. The contract would remain open for three years.

The agreement provided that Steiner would obtain all necessary government approval and permits at his own expense. But Steiner was not obligated to do anything and could abandon the project at any time. Even the deposit that opened the escrow was applicable to the purchase price or refundable. Although Steiner agreed that he would deliver to Thexton any work already performed if he abandoned the project, the agreement did not require Steiner to perform that work in the first place. In May and August 2004, Thexton cooperated by signing, as property owner, documents required by the county planning department. In October 2004, Thexton cancelled the escrow. Steiner continued seeking county approval and sued for specific performance of the Real Estate Purchase Contract.

The agreement set an outside deadline for buyer to purchase, September 10, 2006, about seven months after the contract date.

Following the bench trial, the trial court, noting that the unilateral nature of the contract was the classic feature of an option agreement, decided that the contract could only be construed as an option agreement. Even as an option agreement, however, the contract failed for lack of consideration. Steiner could walk away from the deal in his sole discretion. The agreement was no more than a continuing offer to sell that could be revoked at any time.

Moreover, the court rejected Steiner's claim for promissory estoppel. Promissory estoppel was not pled in the complaint and no amendment had been sought. In any event, even though Steiner did obtain approval of a tentative map at some expense, the equities were not in his favor. Steiner was never obligated to seek the approvals; nothing prevented his abandoning the project. The elements of promissory estoppel were not established.

On appeal: *Affirmed.*

Reporter's Comment: The sentence highlighted in the court's extensive quoting of the contract language is the one saying that the buyer has "absolute and sole discretion [to] elect not to continue." (The opinion also highlights the next sentence, that payment is due "upon successful completion of subdividing," but I am not sure why.) I would conclude from the highlighting that this is the language not to use if you want to be sure that your putative purchaser has not entered into a "disguised option," as the court called it, or an illusory contract, as it might also be considered. Certainly, that language is a red flag. Could a nearly similar deal have been concluded, with a different judicial result, if that language had been eliminated or perhaps replaced by clauses that said some of the efforts that the buyer was intending to undertake were being treated by the parties as consideration to the seller?

As written and interpreted, this agreement was a dream for the seller. Under it, the buyer intended to – and apparently, in fact, did – perform considerable work obtaining entitlements for the property, while the seller was free to wait until the last minute and then withdraw. I wish that someone would come along and make an offer like that to me.

Editor's Comment: Although, at trial, Thexton argued that there could be no estoppel because there was no benefit to him, the stated facts indicate that Thexton had sought to sell the property for $750,000, but the buyer would have required Thexton to do the subdividing. Later, when Steiner subdivided, Thexton got the benefit of that. Although Thexton testified that he intended to live on the property and didn't benefit from the subdividing, the fact is that Thexton had twice attempted to subdivide and sell. The editor believes that there was a mutual benefit to be derived from Steiner's subdivision efforts. Perhaps the court should have reviewed the estoppel question a little more thoroughly.

The Reporter for this item was Roger Bernhardt, writing in the California CLE Real Property Reporter.

WORDS AND PHRASES; "NATURAL WATER-WAY:" In order to determine whether the "common enemy" or "reasonableness" rule for water diversion applies, water which runs through a definite channel and ultimately discharges itself into a tributary in a swampy lowland area enticing to beavers is a "natural watercourse" rather than mere surface water, even in the absence of well-defined beds or banks, and thus reasonableness doctrine applies. ***Bilo v. El Dorado Broadcasting Co., ___ S.W.3d ___ (Ark. Ct. App. 2008).***, discussed under the heading: "Waters and Water Rights; Diversion of Water; Common Enemy Doctrine; Natural Watercourses:."

WATERS AND WATER LAW; DIVERSION OF WATER; COMMON ENEMY DOCTRINE; NATURAL WATERCOURSES: Even in the absence of well-defined beds or banks, water that runs through a definite channel and ultimately discharges itself into a tributary in a swampy lowland area enticing to beavers is a "natural watercourse" rather than mere surface water, resulting in the court's application of the "reasonableness" doctrine over the "common enemy" doctrine when a landowner diverts such water from his land. ***Bilo v. El Dorado Broadcasting Co., ___ S.W.3d ___ (Ark. Ct. App. 2008).***,

Bilo owned a rectangular tract of land that historically was a swampy lowland containing willow trees, mud, and beaver dams. Prior to Bilo developing the land in 2004, the topography of the land was such that water flowed from upland areas north of Bilo's tract, through Bilo's tract, and continued south and east through a valley. In 2004, after obtaining a permit from the Corps of Engineers, Bilo placed land fill (consisting of large mounds of dirt and shards of concrete) on his entire tract. This fill activity elevated Bilo's tract considerably higher than EDB's neighboring tract and caused 100% of the upland water to flow onto EDB's land. Because the water endangered a broadcast tower on EDB's land, EDB sued Bilo, asking the court to order that Bilo either (i) restore the natural water flow, or (ii) install a ditch or culverts to direct and control the water flow as it made its way southward.

Evidence at trial revealed that the area "was a significant drainage area with enough flow to entice beavers to 'do their work' building dams." Specifically, the city director of public works testified that in 2003, the city had removed beaver dams from the Bilo tract because "through that creek bottom there is a flood plain," and "when the creek is obstructed . . . the base flood [level] then rises." Bilo testified that the area in question was a flood plain, a significant drainage area, and was (at least in part) a "wetland." In addition, there was evidence that the city permit authorizing the fill expressly stated that it did not authorize work that could adversely affect adjacent property. Bilo argued that he was merely filling in his property to prevent erosion.

The trial court found that the drainage across Bilo's land was part of a natural watercourse because (among other reasons) (1) the watershed producing the drainage is large in area, (2) beavers used to inhabit the area, and (3) Bilo's land was identified as wetlands by the U.S. Corps of Engineers. In addition, the court found that Bilo's diversion of the water onto EDB's property was unreasonable. Accordingly, the trial court enjoined further fill activities, and Bilo appealed.

On appeal, the primary issued addressed by the court was whether Bilo diverted a "natural watercourse" or "mere surface water." In this situation, the distinction was substantial, because if Bilo was diverting mere surface water, he would be entitled to benefit from the "common enemy doctrine," which provides that a landowner can defend against surface water runoff without incurring liability for damages where no watercourse exists, "unless injury is unnecessarily inflicted upon another which, by reasonable effort and expense, could be avoided." If Bilo was diverting a natural watercourse, he must prove his conduct was reasonable.

The court began by examining Arkansas law on the definition of a watercourse, which has been defined in Arkansas case law as:

"[A] running stream of water; a natural stream, including rivers, creeks, runs and rivulets. There must be a stream, usually flowing in a particular direction, though it need not flow continuously. It may sometimes be dry. It must flow in a definite channel, having a bed and banks, and usually discharges itself into some other stream or body of water. It must be something more than mere surface drainage over the entire face of the tract of land occasioned by unusual freshets or other extraordinary causes."

While the court noted the absence of well-defined bed and banks (explained by a past diversion), it held that when applying the definition quoted above, the trial court did not commit clear error in its finding that the diverted water was a watercourse. Further, evidence showed (1) there was a definite channel, (2) a neighbor constructing a large drainage ditch indicated the water's force, volume and constant flow along this path, (3) the water was referred to as a "creek" and "water way" by the public works director, and (4) the water ultimately discharged itself into a tributary south of the property. These factors demonstrated the water was properly held to be a natural watercourse, not mere surface water flow.

Finally, the court summarily dismissed Bilo's arguments that the trial court was required to provide a legal description of the portion of his land he was enjoined from filling, finding no case law in support of that proposition. Because Bilo did not argue the reasonableness of his conduct, the court's analysis ended and it held for EDB.

A dissenting opinion expressed the view that, "if there had ever been a 'tributary' or 'creek,' it has been obliterated by the development of the area. This is now an urban intersection with roads and man-made culverts." The dissent cited a 1908 Arkansas case involving a lot "in the midst of a populous city," held and owned for building purposes, which an owner has a right to fill up, elevate and build upon without incurring liability to adjacent owners, consistent with public policy favoring "advancement and progress of cities and towns."

Comment: The editor, frankly, is surprised to see a modern case which appears to recognize the undiluted common enemy doctrine. In many situations, the impact of the doctrine is altered by local regulation, and a number of states have abandoned it in favor of some modified version requiring reasonableness at one stage or another. But here, although the court appears to acknowledge the doctrine, it quickly finds it inapplicable.

ZONING AND LAND USE; DEVELOPMENT AGREEMENTS; UNIFORMITY REQUIREMENTS: Although process for approving development agreements is the same as the process for validly altering consequences of zoning (such as modification of zoning map or permitting conditional uses), California counties nevertheless cannot use development agreements to avoid uniformity requirements, and any development agreement must be consistent with existing zoning. ***Neighbors in Support of Appropriate Land Use v County of Tuolumne 157 CA4th 997, 68 CR3d 882 (2007)***

Landowners submitted an application to use their property, located in an exclusive agricultural zone, to host weddings and similar events. The local ordinance, dit not permit commercial use, even with a conditional use permit. After public opposition surfaced, county staff and the county planning commission recommended denial and the Petersons withdrew their application.

Landowners later submitted a revised application and a request for a conditional use permit, anticipating proposed amendments to the county zoning ordinance then pending before the county government. But the County Board of Supervisors did not adopt the proposed amendments. Nevertheless, acting on staff recommendation, the Board granted the proposed use as an *ad hoc* exception to the zoning ordinance, by adopting a development agreement. The staff viewed such procedure as appropriate under Cal. Govt C §§65864-65869.5. Neighbors sought judicial review by writ of mandate.

The trial court ruled that the board's actions violated the Planning and Zoning Law (Govt C §§65000-66499.58) because the use granted to the Petersons was not permitted under existing zoning ordinances; therefore, the adoption of the development agreement was an *ultra vires* act and void ab initio. Tuolumne County appealed.

The court of appeal affirmed, emphasizing that the uniformity rule of Govt C §65852 requires that all zoning regulations be uniform as to use throughout each zone, even though the regulation in one zone may differ from that in another type of zone. An "*ad hoc* exception" violated the principle of uniformity.

The appeals court rejected the development agreement (and the associated conditional use permit) between the county and the landowners because, the court held, it was inconsistent with the county's zoning ordinance.

The development agreement purported to permit the Petersons to host lawn parties and weddings on their 37-acre property. Lawn party hosting was neither a permitted nor a conditionally allowed use under the 37-acre minimum lot size agricultural zoning classification the county had previously applied to the property. That made the conditional use permit (CUP) almost *ipso facto* invalid; a permit cannot be issued to cover what has never been declared an appropriate conditional use in the authorizing ordinance.

More important, issuance of the CUP could not be justified under the ordinance on which the development agreement was based, because that ordinance violated Govt C §65852, the uniformity requirement of the Planning and Zoning Law (Govt C §§65000-66499.58), which states that "all [zoning] regulations shall be uniform for each class or kind of building throughout each zone."

Reporter's Comment 1: The philosophic aspects of the controversy must have been deemed important, since the actual fight was more of the tempest-in-a-teapot variety. The landowner's property was bounded by commercially usable property on three sides. So the property might have been rezoned. The county supervisors were considering a text amendment to the zoning ordinance that would have reclassified lawn parties as conditional uses in its 37-acre agricultural zones. No one appeared to contend that either of those acts would have been invalid. In other words, the same result could have been reached, just by a different route, and the politics would probably have been the same, since the same procedural features (public notice, hearing, and vote) would have remained applicable-e.g., same public supporters and opponents, same supervisors. So why did it matter so much that the county attempted to achieve this result by development agreement rather than by zoning amendment?

Reporter's Comment 2: On their face, zoning laws would seem to violate the principle of equal protection: X is permitted to build a factory on his land because it is zoned industrial, whereas Y, a block away, can erect only a house on hers, because it is zoned residential instead. Endorsers of zoning dodge this problem by claiming that there is the necessary uniformity inside each zone, even if it is lacking outside each zone. Without that proposition, all zoning would fail.

But uniformity does not always make for good planning; it too easily leads to a ticky-tacky, monotonous neighborhood where no one wants to live, or even visit. As a consequence, combined with our two-value zoning rules-where every use should be either permitted or prohibited-are escape routes. Land use regulation includes mechanisms designed to reduce rigidity: amending zoning ordinances and maps, conditional uses, and (although not exactly intended to have that effect) variances.

While those devices have been part of the system since its start, more came along later: design review, planned unit developments, floating zones, and historic preservation. The departure from as-of-right zoning has become even more dramatic as the zoning process has become more like that of subdivision regulation, where predetermined rules that had set forth known predictable standards have been replaced by after-the-fact reaction and negotiation from local officials to development proposals that are initiated by developers rather than by planners. We may still pay lip service to the earlier notion of uniformity, but there is no longer much realism behind the idea that all properties are being treated equally now that each proposal is judged separately and independently. Flexibility has won out over equality.

Reporter's Comment 3: Among the many risks that land development entails is the danger that the legal climate that existed while the development was being planned will change for the worse before the project has been completed and taken off the developer's books. If you have already purchased and paid for the land (and perhaps also for, e.g., the building plans), where will you be if the town alters its local height, space, or use limits before your construction has started?

The doctrine of vested rights is designed to protect the finished product from most changes that could materially hurt it thereafter; it is unlikely that a new height limit can have much effect on a completed and tenanted building (although, even then, there is the power to prohibit alteration of nonconforming structures, and the possible right to "amortize" them away over time). But at the front end of the calendar, a vested right generally does not come into being until after there has been substantial reliance upon the right building permit, which is an event that may not occur until after many millions of dollars have been spend on "preliminary" costs. *See, e.g., Avco Community Developers, Inc. v South Coast Reg'l Comm'n* (1976) 17 C3d 785, 132 CR 386, where $2.8 million had been spent before the rules changed.

Since any real estate development inevitably needs significant time from start to completion, a developer has to feel pretty certain that those horribles are unlikely to occur, and the local officials who want to increase their tax revenues through development need to make sufficient assurances to encourage the necessary risk-taking. How can a community cross its heart in that way?

The traditional legal answer was that it cannot be done. Binding assurances can't be given because the police power cannot be bargained away. A local government cannot hamstring itself from passing new laws when new contingencies arise, or prevent its citizens from voting the rascals out of office in order to undo their machinations. But that rule, like the old-fashioned uniformity doctrine, is too detrimental to growth. Developers just cannot afford to take sought-for risks unless there is a way to fetter the police power to ensure that the rules don't change.

Thus, in California (and some other jurisdictions), we now have the statutory Development Agreement Law (Govt C §§65864-65869.5) to provide a different solution to that problem. Government Code §65865.4 creates a way to give assurance to the developer that it may carry out its project in accordance with the rules operative at that time, "notwithstanding any change in any applicable general or specific plan, zoning, subdivision, or building regulation adopted" thereafter. The need to give assurances has prevailed over the sanctity of the police power and the inability to bargain it away.

Since the purpose of the development agreement statutes is to give such agreements the unambiguous protection that developers need to eliminate the uncertainties inherent in the vested rights and sanctity of police powers doctrines (and the gap between them), it would not seem to require that the process also must include a way for allowing additional nonuniform flexibility into the real estate projects created under them. The developer makes sure, independently, that all of the other conditions of the governmental land use regulatory scheme are satisfied, and then seeks the development agreement to guarantee that this current compliance will not be rendered obsolete by a later rule or rule change.

The agreement reached in this case, however, does not seem to have been intended to deal with any problem of developer risk; it is unlikely that lawn party hosting entails much start-up capital investment. Rather, it was contrived to overcome the fact that commercial lawn party hosting was not a permitted use for that property under the existing zoning ordinance. That puts it under the flexibility issues that I earlier discussed, rather than the stability issues. The county had in fact toyed with the idea of amending its zoning ordinance to make lawn parties conditional uses in the 37-acre agricultural zones, which would have had exactly the same effect. (The opinion said that a CUP would have been different because it would have allowed all other owners to make similar requests, although that danger could have easily been avoided by making one of the conditions for this activity a finding that no similar use was too close by.)

But does the fact that a development agreement looks like an inappropriate method to deal with an "inflexible" zoning ordinance make it also an illegal method? Under Govt C §65866, all other land use rules continue to apply in the case of a development agreement "unless otherwise provided," which might make one think that the agreement could thus otherwise provide as to a zoning rule. Government Code §65867.5 mandates that a development agreement can be approved only if it complies with the "general plan and any specific plan," which also does not appear to require compliance with zoning ordinances. Given those provisions, is the legislature really prohibiting a development agreement that carries its own zoning regime with it?

Many California authorities had assumed that the Development Agreement statute in fact permitted departures from zoning requirements, since the agreements in effect constituted zoning ordinance amendments. It is no wonder that Tuolumne County planning staff, and perhaps even county counsel, thought the development agreement was a lawful alternative at the time the deal was drafted.

But none of that persuaded the court in this case. A development agreement could not be its own source of zoning regulations. In order to get around all of the contrary authorities just mentioned, the court had to dance around the statutes and dismiss the Development Agreement Manual on the ground that it contained no legal arguments, even though it was drafted by lawyers.

The chief reason given by the court for refusing to treat a development agreement as an independent source of land use authority (despite a special enabling statute) was the uniformity requirement I earlier discussed: Allowing a parcel to be regulated by a development agreement rather than a zoning ordinance would give its owners a benefit not shared by the owners of other properties similarly zoned. The fact that this already occurs whenever neighboring owners are differently zoned, or a single parcel is rezoned, or a conditional use permit (or variance) is granted to one but not another, was not enough to persuade it to abandon that principle. The fact that such outcomes are also upheld in contract zoning and conditional zoning situations fared no better-those cases were cited by the court, but distinguished away. The rules must be uniform within a district, despite all of these examples to the contrary. Flexibility can go only so far in vanquishing equality.

The Reporter for this item was Roger Bernhardt of the Golden Gate Law School, writing in the California CEB Real Property Reporter. Reprinted with permission.

ZONING AND LAND USE; "FAIR SHARE" ZONING: State Department of Housing and Community Development Housing Appeals Committee cannot order town to convey an easement to a developer of affordable housing. ***Zoning Bd. Of Appeals of Groton v. Housing Appeals Committee, 883 N.E.2d 899 (Mass. 2008).***

In 2003, Washington Green Development, LLC ("Developer") petitioned the Zoning Board of Appeals of Groton (the "Board") for a comprehensive permit under G.L. c. 40B, §§ 20-23 to build a forty-four unit condominium project, which would include eleven affordable units and thirty-three market-rate units. The proposed project site was surrounded by the town of Groton's land on three sides and would be built along a busy, two-lane state highway.

Following a series of public hearings, the Board denied Developer's application for a comprehensive permit in March, 2004. The Board based its denial on several perceived safety hazards, including the belief that the development would create inadequate stopping sight distance for motorists travelling on the state highway and those entering and exiting the project site.

Developer appealed the Board's denial to the Housing Appeals Committee of the Massachusetts Department of Housing and Community Development (the "Committee"). The Committee vacated the Board's denial and directed the Board to issue a comprehensive permit subject to certain enumerated conditions. The Committee – citing its authority "to issue permits or approvals as any local board or official" under G.L. c. 40B, §21 – sought to address the potential lack of stopping sight distance by requiring Groton to grant Developer an easement on town land to permit regrading and clearing of vegetation.

The Board and Groton appealed from the Committee's decision by filing a complaint for judicial review in the Superior Court under G.L. c. 30A. The Superior Court judge denied the Board's motions finding, in part, that the easement only involved "a minimal giving up of a property right." The Board and Groton then filed an application with the Supreme Judicial Court of Massachusetts for direct appellate review.

On appeal, the Supreme Judicial Court held that an order directing the conveyance of an easement cannot be equated with a town's power to grant "permits or approvals under G.L. c. 40B, §21; thus, the Committee lacked the authority to require Groton to grant Developer a sight line easement, no matter how small or unobtrusive. Furthermore, the Supreme Judicial Court noted that apart from the lack of Authority in G.L. c. 40B, §21 for the Committee's decision requiring Groton to convey the land, the Committee's power is further circumscribed by the fact that, more generally, it does not have the authority to override State law. Specifically, G.L. c. 40 §§ 3, 15A requires that orders directing a town to convey an easement be subject to vote in a town meeting, which is a directive imposed by the Massachusetts State Legislature, rather than individual localities. Accordingly, the Committee cannot set this requirement aside without overriding the Legislature. For these reasons, the Supreme Judicial Court found that the Board properly denied the Developer's application for a comprehensive permit and that the Committee exceeded its authority in directing conveyance of the easement. Therefore, the Superior Court's judgment was vacated.

ZONING AND LAND USE; MASTER PLAN; CONFORMITY: A zoning board in Maryland is not required to conform land use decisions to a comprehensive zoning plan because such plans are merely advisory. ***Trail v. Terrapin Run, LLC, 943 A.2d 1192 (Md. 2008)***.

Maryland law provides that if a jurisdiction desires to exercise zoning power, the jurisdiction must first develop a comprehensive or master plan. Alleghany County adopted a comprehensive plan (the "Plan"). The development site at issue was to be located on land zoned as Agricultural, Forestry, and Mining and as Conservation. For the site, planned developments were permitted as special exceptions to zoning code provisions. The Plan also designated the site for urban development, and the site was not included in the Plan as a sensitive area.

Terrapin Run applied to the Board of Appeals of Alleghany County (the "Board") for a special exception allowed by the zoning code to establish a planned residential development. The Board approved the request for a special exception, determining that the proposed development would be "in harmony with" the Plan and stating that the Plan was advisory and not regulatory and that strict conformance was unnecessary. The Plan itself provided that its purpose was to serve as a guide.

Trail and other petitioners appealed to the Maryland court system, arguing that the Board erred in using an "in harmony with" standard and asserting Maryland law required a special exception to "conform[] to" the Plan instead.

The court began by noting that in Maryland, local governments are generally not required to adopt zoning ordinances or comprehensive plans. The law is permissive in that if local jurisdictions choose to do so, the law imposes suggestions and guides on how it is to be done. The zoning legislation does not mandate that local governments adopt zoning, but rather it provides a means to empower them to do so.

Before 1970, state legislation provided that special exceptions could be made if they were in harmony with the general purpose of an ordinance or plan. In 1970, that provision was amended to the "conforms to" language. The court was unable to find any record that through its use of the word "conform" the state legislature intended to force local governments to completely comply with comprehensive plans. Other pieces of legislative history indicated that plans should serve as general guides and not as absolute requirements. Dictionary definitions at the time indicated that "conform" was considered to be equivalent to "in harmony with." Additionally, courts consistently continued to use the "in harmony with" standard after the change in statutory language.

Through extensive review of legislative history, the court also determined that subsequent legislation enacted in 1992 and in 2000 did nothing to impose mandatory requirements for absolute compliance with every provision of a master or comprehensive plan or to change the "in harmony with" standard for considering special exceptions.

Ultimately, the court determined that though the state could probably find ways to impose mandatory requirements on local zoning authorities, the legislature had repeatedly declined to do so. The court noted that "[i]n light of that history, the use of the word 'conform,' standing alone, in the 1970 definition does not create such a mandatory requirement," holding that "conform" is the "semantical equivalent" of "in harmony with."

ZONING AND LAND USE; PROCEDURE; BASIS FOR DENIAL: Department of Buildings application may deny a permit to build a dormitory on the grounds that Applicant had not demonstrated that, as a practical matter, it could actually use the building as a dormitory. ***9th & 10th Street L.L.C. v. Board of Standards and Appeals of the City of New York, 885 N.E.2d 881 (N.Y.App. 2008).***

Applicant acquired a lot from the City of New York on East 9th Street in Manhattan that previously had been occupied by a former school building. Deed restrictions limited development of the property to a "Community Facility Use" as defined by the New York City Zoning Resolution. The Resolution permits the development of "student dormitories."

Applicant submitted an application to construct a nineteen story "dormitory" on the property, to be configured much like a traditional apartment building. The applicable zoning restrictions allow dormitory buildings of such a height, but limit apartment buildings to ten stories. The Department stressed that a building qualifies as a dormitory only if it is operated by, or on behalf of, a college or school. The Department demanded that a "nexus" be established with an educational institution before it would approve the proposed structure. Applicant created an entity, University House Corp., to which it committed itself to lease the property for at least 10 years, guaranteeing that the entity's board of directors would consist exclusively of persons appointed by educational institutions. Applicant, however, did not identify any such institutions that had expressed interest in participating in using the proposed structure for student housing.

The Department subsequently denied the building permit application. Applicant appealed the determination, but the City Zoning Board of Appeals (the "Board") affirmed the denial. Applicant then brought an Article 78 proceeding to annul the Board's ruling. The Supreme Court, New York County, denied Applicant's petition. Upon Applicant's appeal, the Supreme Court, Appellate Division, reversed on the grounds that a building permit could not be denied on the basis of a possible future illegal use and remanded to the lower court. The Board appealed.

The Court of Appeals of New York acknowledged that the mere possibility of a future illegal use remains an inadequate reason for withholding a building permit. In *Matter of Di Milla v. Bennett*, 149 A.D.2d 592 (N.Y. 2nd Dept. 1989), and *Matter of Baskin v. Zoning Bd. Of Appeals of Town of Ramapo*, 358 N.E.2d 1037 (N.Y. 1976), the court held that a building permit could not be denied on the basis of a possible future illegal use. In both cases, however, the Court noted, the reviewing courts found that authorities had improperly denied permits due to feared future illegal uses, not because the legal use proposed was either unlikely or impractical.

Where, as here, however, officials reasonably feared that the proposed legal use will prove impracticable, it is proper to require the applicant to demonstrate the feasibility of its proposal. Here, the Department doubted that dormitory use would ever be plausible, and requested assurances, in the form of some institutional connection, that such a use would indeed be possible, which Applicant did not provide. Use of a nineteen story building as an apartment complex instead of a dormitory would violate applicable zoning laws. Thus, the court held that city officials did not act arbitrarily or capriciously in trying to avoid the dilemma of having to either waive such zoning restrictions or require that the building be torn down in the event that the building was constructed and could not be used as a dormitory.

Comment: New York, of course, has an incredibly dense set of zoning and permitting regulations and basically decides many cases on a "parcel by parcel" basis. One assumes that a reviewing court, evaluating the system as a "uniform zoning scheme," would simply throw up its hands and say that the special problems of a dense area like New York defy any meaningful generalization.

Even given that, however, the editor is a bit skeptical of the denial of an otherwise lawful permit on the grounds that the development scheme is not practical. This is basically admitting that, after the developer has rolled the dice and invested substantially in development of a dormitory, and failed the local authorities will roll over and let the developer use the building for apartment use. The editor admits that there's some logic in this thinking.

ZONING AND LAND USE; SUBDIVISION; CONSTRUCTIVE APPROVAL: Planning Board may rescind constructive approval of subdivision without consent of owner and mortgagees where owner and mortgagees did not rely on the subdivision approval and/or had notice of Planning Board's intent to rescind. ***Dennis v. Planning Board of Winchester, 880 N.E.2d 810 (Mass. App. Ct. 2008).***

In 1999, Michael Green and Janet Burke (the "Original Owners") proposed to subdivide their land (the "Property"). The Planning Board of Winchester (the "Board") failed to timely reject the Plan. Years of litigation ensued after which the Massachusetts Court of Special Appeals held that the Board constructively approved the subdivision. The Board subsequently rescinded the approval without consent of the then-owners or mortgagees (the "Rescission"). As of the date of the Rescission, John and Margaret Dennis (the "Owners"), owned the Property after purchasing it from the Original Owners, Winchester Savings Bank ("Bank") held a first mortgage on the Property, and the Original Owners held a second mortgage. The Owners challenged the Rescission. The trial court affirmed the Rescission and the Owners appealed, arguing that Rescission was invalid because the Board did not obtain their and the mortgagees' consent.

Under Massachusetts law, no rescission of subdivision approval shall "affect the lots in such subdivision which have been sold or mortgaged in good faith and for a valuable consideration…" Mass. Gen. Laws. ch. 41, §81(w).

The Court of Special Appeals held that the Board did not need to obtain the owners' and mortgagees' consent prior to the Rescission. First, the court held that the Owners and the Bank did not rely upon the constructive approval because a certificate of approval had not been issued or recorded, no subdivision plan had ever been recorded, and neither could be said to have relied upon such a plan. Second, the court held that the second mortgagees – the Original Owners – knew of the Board's intent to rescind the approval, and therefore they had notice of the pending rescission and could not be considered good faith purchasers.

ZONING AND LAND USE; PROCEDURES: In making a decision on a variance application, a zoning board cannot take into consideration prior mis-representations made by the applicant as to its intended use or general community opposition based upon activities unrelated to the impact of the proposed variance. ***Caspian Realty v. Zoning Bd. of Appeals, 842 N.Y.S.2d 887 (Sup. 2007).***

Prior to constructing a building, the petitioner obtained approval from the Planning Board. After completing construction and receiving a certificate of occupancy, the petitioner was found to be in violation of zoning ordinances due to undisclosed and unapproved retail use – a furniture outlet – on the lower level. Petitioner argued that it in fact had disclosed that intended retail on the lower level, but the Board found, and the court affirmed, that in fact there had been a misrepresentation that the lower level would be used for storage.

The petitioner then sought area variances and parking variances similar to those that the Board had granted to retail furniture outlets in the past. It indicated it was willing to accept a restriction that it would limit its use to retail furniture sales.

The Zoning Board of Appeal, however, expressly took into consideration the fact that the petitioner earlier misrepresented its intended use of the lower level to the Planning Board. It stated that to grant the variance under such circumstances was against the public interest in that it would encourage lying by future applicants. The Board also took into account neighbors' complaints about various annoying activities on the property, such as trucks arriving too early and improperly unloading, parking of commercial vehicles over night, etc. These activities did not relate to the lower level retail outlet, but to the lawful storage activities on the property.

The court acknowledged that a determination of a zoning board should be sustained if it does not have a rational basis and is not arbitrary and capricious and that the board must engage in a balancing test weighing the benefits to the applicant against the detriment to the community. Tut it also found that the basis for these conclusions must lie in the statutory standards under New York law. Further, the court could not deny variance benefits in one case that it had granted in another case without showing a rationale basis.

The court found that, although it did not condone misrepresentations, the Zoning Board of Appeals improperly considered the misrepresentations in its denial. Furthermore, the court found that the complaints were not associated with the zoning violations and the Zoning Board of Appeals did not properly consider an expert's report. The court annulled the decision and remitted the matter for reconsideration.

Comment: Good luck to the applicant on its next application. The granting of a variance is discretionary, and undoubtedly there are perfectly valid grounds that the zoning board could use to deny the variance. This is a case where a rattlesnake has been stirred. It will be hard to lull it back to sleep, even though the applicant may have felt quite righteous in that, in its view, it had fully disclosed everything originally and had not lied. In this situation, there is no good answer for the applicant.