

FILLING IN THE GAPS: THE CONTINUING EVOLUTION OF PROPERTY LAW IN INDIANA

ROBERT G. SOLLOWAY*
TANYA D. MARSH**

In this survey period, October 1, 2001, through September 30, 2002, the state appellate and federal courts tackled a number of discrete issues regarding property law. This Article examines those cases which clarified an existing rule or applied the principles of the common or statutory law to a new situation. The first four sections of this Article correspond with four thematic divisions of property law: (1) relationships between private parties; (2) the creation and enforcement of property interests; (3) land use law; and (4) developments in the common law of property. These sections abstract and analyze a handful of cases which either depart from or clarify existing property law in a significant way. The fifth section describes two significant revisions to the Indiana Code made in the 2002 session of the Indiana General Assembly: the recodification of Title 32 and the Landlord/Tenant Act of 2002. The sixth and final section contains brief summaries of a number of other cases handed down during the survey period which may be of interest to practitioners.

I. RELATIONSHIPS BETWEEN PRIVATE PARTIES

One of the most important practical aspects of property law concerns the rules governing relationships between private parties with respect to real property. The principal relationships which arise are: (1) a buyer and seller of property; (2) a landlord and tenant; (3) a holder of a lien on property and the owner of the property; and (4) holders of competing liens on property. Of course, the contracts that the parties enter into govern the bulk of their relationship, but the rules that govern how those contracts are to be construed and enforced become as much a part of the contract as the words with which they are written.

A. *Buyers and Sellers*

Buyers and sellers of property typically are most concerned about the practical terms of their transaction—what is to be included with the property, what the price will be, when closing will occur—and that their contracts are carefully prepared with those issues in mind. Unfortunately, the buyer and seller do not typically spend a lot of time thrashing out what will happen if one of them fails to live up to his or her part of the bargain. These issues are usually left to the form of contract used and virtually dismissed as “boilerplate.”

The Indiana Court of Appeals recently had occasion to address the damages

* Of Counsel, Ice Miller, Indianapolis. B.A., B.S., 1986, Purdue University; J.D., 1989, Indiana University School of Law—Indianapolis.

** Associate, Ice Miller, Indianapolis. B.A., 1994, Indiana University—Bloomington; J.D., 2000, Harvard Law School. Many thanks to those who contributed ideas to this Article, especially Phyl Bayt, Tim Ocho, and Michael Lewinski. The authors are responsible for any inaccuracies.

provision of one of these standard forms of contract in *Rogers v. Lockard*.¹ In that case, the Rogerses recovered a judgment in an unrelated matter for \$2.6 million and decided to use those funds to buy a new house. They entered an agreement with the Lockards to acquire a home in Plainfield, Indiana, and paid an earnest money deposit to the Lockards under the agreement.² As fate would have it, an appeal in the unrelated matter delayed the payment of the judgment and the Rogerses were not able to close upon the property at the time required. After one extension of the closing date, the Rogerses still did not have their money and could not close. The Lockards terminated the agreement, retained the earnest money and eventually sold the home to another buyer some months later.³ Before that sale, however, the Lockards filed suit against the Rogerses for breach of contract and eventually obtained a judgment against them for: (1) the retention of the earnest money deposit, (2) the difference between the actual sales price of the home and the price at which the Rogerses had agreed to buy it under the agreement, and (3) consequential damages. The Rogerses appealed.⁴

The court of appeals expressed concern over the following contractual provision: "If this offer is accepted and the buyer fails or refuses to close the transaction, without legal cause, the earnest money shall be forfeited by the buyer to seller as *liquidated damages*, and seller may pursue any other legal and equitable remedies."⁵ The court noted that liquidated damages clauses are generally enforceable where damages are difficult to ascertain or determine and that the use of the phrase "liquidated damages" generally connotes a limitation on the recovery of a non-breaching party in the event the contract is breached.⁶ Accordingly, the inclusion of the phrase "seller may pursue any other legal and equitable remedies" in the provision created an ambiguity which must be resolved by resort to the parties' intentions when entering into the contract. The court noted that such an inconsistency would cause the damages not to be "truly liquidated, but a forfeiture or penalty,"⁷ which is not favored in the law and is unenforceable.

The court relied on two factors in determining that the provision would not be enforced as a true liquidated damages clause. First, the contract specifically permitted the seller to pursue other remedies.⁸ Thus, notwithstanding that the parties used the phrase "liquidated damages" which would imply a limitation of damages, the inclusion of additional remedies and damages available to the seller

1. 767 N.E.2d 982 (Ind. Ct. App. 2002).

2. The initial offer called for an earnest money deposit of \$1000. The Lockards submitted a counter offer in which the earnest money deposit was to be increased to \$5000. This counteroffer was accepted, but no additional earnest money was ever deposited. *Id.* at 984-85, 993 n.12.

3. *Id.* at 984-85.

4. *Id.* at 986.

5. *Id.* at 989 (emphasis added by the court). This language is in the approved form of purchase agreement of the Indiana Association of Realtors and is in use throughout the State of Indiana. *Id.* at 990 n.8.

6. *Id.* at 990.

7. *Id.*

8. *Id.* at 992.

entirely negates this implication. In so holding, the court brushed aside language in the earlier Indiana Court of Appeals case of *Beck v. Mason*,⁹ which provided that parties to a contract may “stipulate that liquidated damages are supplementary to the rights and remedies of the non-breaching party”¹⁰ by noting that in such a case the damages are not truly liquidated.¹¹ The *Beck* court apparently did not consider the two provisions to be as antagonistic to one another as the court has found in *Rogers*.

The second factor cited by the *Rogers* court is that damages for breach of real estate contracts are not in general particularly difficult to ascertain.¹² Because such damages are not difficult to ascertain, construing the contract to provide for liquidated damages would be inappropriate. The court went on to find that “the Lockards seemed able to adequately ascertain their actual damages.”¹³ This statement is undoubtedly true; however, the Lockards had the advantage of quantifying their damages after the fact. By the time the judgment was entered, the Lockards had already found another buyer for their home and had closed on that sale.¹⁴ All damages they were going to incur had already occurred. It was a simple thing to then add them up. The difficulty in ascertaining damages should be viewed from the perspective of the two parties at the time they entered into the contract. At this time, if the seller were to consider the potential of a breach of the contract by the buyer, the seller would not know how much another buyer would pay for the property, how long the property would sit on the market pending such other sale, whether the seller would have been required to vacate the house at the time of the breach and incur expense for alternative housing or storage, and so on. From that standpoint, damages are anything but certain and are quite difficult to ascertain, as in any other contract.

Nevertheless, the decision in *Rogers* is sound. The phrase “liquidated damages” seems to have lost some of its meaning through inaccurate usage in the residential real estate industry. *Rogers* certainly should cause the industry to correct this ambiguity in the forms utilized in many residential real estate transactions throughout the state. What remains to be seen is how the industry will respond to this case. One might suspect that the forms will be revised by deleting the phrase “liquidated damages” and stating that the deposit may be paid over to and retained by the seller in the event of a breach as an advance on damages the seller has or will incur, with the seller retaining all rights to seek recovery under its other remedies at law and in equity. Meanwhile, purchasers should try to negotiate the true liquidated damages concept into every contract they sign. Unfortunately, *Rogers* may cause purchasers to lose this bargaining alternative because of the supposed ease with which damages for a breach of this type of contract may be determined. To restrict the ability of contracting parties to agree upon true liquidated damages merely because the subject matter of their

9. 580 N.E.2d 290 (Ind. Ct. App. 1991).

10. *Id.* at 294.

11. *Rogers*, 767 N.E. 2d at 992 n.10.

12. *Id.* at 992-93.

13. *Id.* at 993.

14. *Id.* at 985.

contract is real property does not seem to be sound policy.

The United States Court of Appeals for the Seventh Circuit weighed in on a contract interpretation matter in *Allen v. Cedar Real Estate Group*.¹⁵ In this case, Mr. Allen desired to purchase some property in Lake County, Indiana, from Cedar Real Estate Group. Allen submitted his offer to purchase the property on a standard pre-printed form with a separate page entitled “FURTHER CONDITIONS” which stated, in part, that the offer to purchase was subject to certain matters, one of which was Allen’s review of particular environmental matters.¹⁶

During Allen’s investigation of the property, it was discovered that some environmental contamination was likely present. Allen responded by requesting that Cedar contribute to the remediation of the environmental defects. The parties corresponded for a few months regarding the issues but never came to an agreement. Meanwhile, Cedar solicited other offers to buy the property and eventually gave Allen written notice that the agreement had been terminated.¹⁷ Allen sued Cedar for specific performance of the agreement. The district court granted summary judgment to Cedar, holding that Allen’s satisfaction with the environmental condition of the property was a condition precedent to the agreement and, since the condition was never met, no contract between Allen and Cedar had been formed.¹⁸

The court of appeals agreed with the district court. The effect of a condition precedent to a contract is “either a condition . . . must be satisfied before an agreement becomes a binding contract or a condition . . . must be fulfilled before the duty to perform an already existing contract arises.”¹⁹ The court found that the unmistakable intent of the parties was that Allen’s satisfaction with the environmental condition of the property was a condition precedent to the formation of the contract.²⁰

The court cited two factors in making that determination. First, the language at issue was contained on the separate page entitled “FURTHER CONDITIONS.” Second, the language was preceded by the phrase “*this offer to purchase is subject to Purchaser’s approval of the following.*”²¹ The court found it vitally important that Allen’s choice of language indicated the *offer* was subject to Allen’s approval, rather than the agreement of the parties. Accordingly, the only reasonable interpretation of Allen’s language regarding approval of the environmental condition of the property was that it was a condition precedent to the formation of the contract.²² Because the condition was never satisfied, no contract ever became effective between the two parties.

Allen also argued that he effectively waived the condition during the course

15. 236 F.3d 374 (7th Cir. 2001).

16. *Id.* at 377-78.

17. *Id.* at 378-80.

18. *Id.* at 380.

19. *Id.* at 381 (citing *Dvorak v. Christ*, 692 N.E.2d 920, 924 (Ind. Ct. App. 1998)).

20. *Id.*

21. *Id.* (emphasis in original).

22. *Id.* at 382.

of the parties' negotiations after the initial report indicated some environmental problems. The court noted that a party in whose favor a condition runs may waive a condition and that such waiver may be made by express communication or by conduct.²³ Cedar, however, failed to present evidence that Allen expressly waived the condition. In addition, nothing he did suggested that he was willing to buy the property notwithstanding the environmental problems which were brought to his attention.²⁴ Allen, having chosen to express the condition as he had, and not having ever backed off from that choice, "now must accept the consequences of his decision."²⁵

The Indiana Supreme Court discussed the effect of a condition precedent and the waiver thereof in *Harrison v. Thomas*.²⁶ Perhaps the most significant aspect of this case is that it vacated a decision of the court of appeals²⁷ which contained an analysis of the waiver of a condition precedent. The supreme court disagreed with that analysis.²⁸

The facts of the case were not in dispute. Harrison sought to build a facility for the Social Security Administration in Richmond, Indiana. He and the Thomases entered into a purchase agreement whereby Harrison would purchase a piece of property owned by the Thomases. Three provisions of the purchase agreement were at issue in the case: (1) Harrison's obligation to purchase the property was contingent upon his ability to purchase a nearby vacant lot; (2) time was of the essence of the agreement; and (3) closing was to occur on July 30, 1998, or within fifteen days after tenant approval, whichever was later.²⁹

The July 30 deadline passed, and Harrison did not close. In fact, it was not until September 11, 1998, that Harrison made any attempt to close the property. On that date, Harrison's broker contacted the Thomases to notify them that Harrison desired to close. The Thomases informed the broker that they were no longer interested in selling the property to Harrison.³⁰ Harrison brought suit for specific performance and the Thomases counterclaimed for damages due to Harrison's breach of the purchase agreement. The trial court entered judgment for the Thomases and Harrison appealed. The court of appeals affirmed the trial court, and the supreme court accepted transfer.³¹

The supreme court rested its affirmation of the trial court on the theory that Harrison did not attempt to close the transaction within a reasonable time.³² The contract failed to include a "drop dead" date by which the closing must have

23. *Id.* at 383 (citing *Salcedo v. Toepp*, 696 N.E.2d 426, 435 (Ind. Ct. App. 1998) and *Parrish v. Terre Haute Sav. Bank*, 431 N.E.2d 132, 135 (Ind. Ct. App. 1982)).

24. *Id.*

25. *Id.*

26. 761 N.E.2d 816 (Ind. 2002).

27. *Harrison v. Thomas*, 744 N.E.2d 977 (Ind. Ct. App. 2001) (*Harrison I*), *vacated*, 761 N.E.2d 816 (Ind. 2002) (*Harrison II*).

28. *Harrison II*, 761 N.E.2d at 819.

29. *Id.* at 818.

30. *Id.*

31. *Id.*

32. *Id.* at 819.

occurred. It merely stated that closing was to occur on July 30, 1998, or within fifteen days after tenant approval, whichever was later. The Thomases argued that the contract could not be construed to permit a closing after July 30, 1998, as it would create an indefinite time to close.³³ The court discounted that argument and held that when the parties to a contract fail to set a time for performance, the “law implies a reasonable time.”³⁴ The judgment of the trial court was affirmed because the evidence was sufficient to support a finding that Harrison unreasonably delayed the closing and, therefore, breached the contract.³⁵

Having disposed of the matter, the court went on to discuss the principles upon which the court of appeals affirmed the trial court in order to express its disagreement with the lower court’s reasoning. The decision of the court of appeals turns on two conditions in the contract: (1) that Harrison be able to close upon a nearby vacant lot, which was a condition precedent, and (2) that the closing occur by the later of July 30, 1998, or fifteen days after tenant’s approval, which was a condition subsequent.³⁶ The court of appeals held that because the condition precedent was solely for Harrison’s benefit, only Harrison could have waived the condition. The court, principally relying on *Dvorak v. Christ*,³⁷ held that any waiver of a condition precedent must be in writing.³⁸ Therefore, because Harrison did not notify the Thomases of his waiver of the condition by the time for performance, July 30, 1998,³⁹ the condition was not waived and the contract “became legally defunct”⁴⁰ after July 30, 1998.

The supreme court found that the court of appeals’ “rigid requirement that every waiver of a condition precedent must be expressly made”⁴¹ was not a correct statement of the law. Instead, conditions precedent may be waived by a party’s conduct. In this case, Harrison owned a fifty percent interest in an entity that had actually acquired title to the nearby vacant lot.⁴² The supreme court found that the purchase of the lot by that entity was “substantial compliance with the condition”⁴³ and no waiver was necessary. Even if that were not the case, the court noted that Harrison’s agent’s communication with the Thomases that Harrison was ready to close the transaction would have sufficed for the

33. *Id.* at 818.

34. *Id.* at 819.

35. *Id.*

36. *Harrison I*, 744 N.E.2d at 983.

37. 692 N.E.2d 920 (Ind. Ct. App. 1998).

38. *Harrison I*, 744 N.E.2d at 983.

39. The court of appeals found, rather summarily, that because Harrison did not have tenant approval by July 30, 1998, the fifteen-day “extension” of the closing date did not apply. *Id.* at 982. The court did not cite any provision of the contract requiring the tenant approval be received by this or any other date.

40. *Id.* at 983.

41. *Harrison II*, 761 N.E.2d at 820.

42. *Id.* at 819.

43. *Id.* at 820.

communication of the waiver the court of appeals was seeking.⁴⁴ At any rate, the supreme court clarified that communication of the waiver of a condition precedent in a real estate purchase contract is not necessary, but such a waiver may occur in a number of ways, including the conduct of a party.

In an apparent case of first impression in *Kashman v. Haas*,⁴⁵ the court of appeals determined the extent of liability a seller of residential property may face in connection with the delivery to the buyer of a statutorily required disclosure form. In this case, the sellers owned and resided in property in Crawfordsville, Indiana, in which, as it turns out, some termites also resided. In 1990, the sellers discovered their fellow residents and called Terminex International to evict them. Terminex treated the house, but in 1994, the sellers discovered termite damage. Terminex had that repaired, but in 1997, the sellers again discovered termite damage in the home. Terminex re-treated the home and again repaired the damage.⁴⁶ The contractor doing the work “orally assured Sellers that all known termite damage had been repaired.”⁴⁷

In 1998, the sellers sold the home to the buyers. Sellers dutifully complied with Indiana law by delivering to the buyers a disclosure form, which did not disclose any termite damage. The buyers had the property inspected and the inspector found no evidence of termite damage.⁴⁸ At the closing, the sellers gave the buyers a copy of the contract the sellers had with Terminex and told the buyers that the sellers had obtained it as a precaution because some homes in the neighborhood had suffered some termite infestation.⁴⁹ After closing, the buyers then discovered some termite damage in several areas throughout the home. The buyers sued for breach of contract and fraud based upon the “representations” made by the sellers in the disclosure form. The trial court granted the sellers’ motion for summary judgment.⁵⁰

The court of appeals affirmed, holding that the buyers had no right to rely on the sellers’ statements in the disclosure form. First, the statute mandating the disclosure form specifically states that “[a] disclosure form is not a warranty by the owner or the owner’s agent, if any, and the disclosure form may not be used as a substitute for any inspections or warranties that the prospective buyer or owner may later obtain.”⁵¹ The form promulgated by the Indiana Real Estate Commission also recites this provision of the statute.⁵² The court also found it important that the buyers had an opportunity to inspect the home for termite damage prior to closing. True to the long-standing rule of *caveat emptor* in Indiana law regarding sales of real property, the court noted that “[a] purchaser of property has no right to rely upon the representations of the vendor of the

44. *Id.*

45. 766 N.E.2d 417 (Ind. Ct. App. 2002).

46. *Id.* at 418-19.

47. *Id.* at 422.

48. *Id.* at 419.

49. *Id.*

50. *Id.*

51. IND. CODE § 32-21-5-9 (2002).

52. IND. ADMIN. CODE tit. 876, r. 1-4-2 (2002).

property as to its quality, where he has a reasonable opportunity of examining the property and judging for himself as to its qualities.”⁵³

Second, the statute also contains a provision specifically excusing a seller from errors in a disclosure form if “the error, inaccuracy, or omission was not within the actual knowledge of the owner or was based on information provided . . . by another person with a professional license or special knowledge who provided a written or oral report or opinion that the owner reasonably believed to be correct.”⁵⁴ There was no evidence that the sellers actually knew of any termite damage that had not been repaired. Also, the sellers were informed in 1997 by the contractor doing the work that all known termite damage had been repaired. Therefore, the sellers could rely on the statute and had no liability for the misstatement in the disclosure form.

The last case to be discussed regarding interpretation of contracts between buyers and sellers is the court of appeals decision in *Warner v. Allen*.⁵⁵ This case serves as a potent reminder to contract drafters to pay attention to the survivability of certain provisions of real estate contracts. In this case, the seller owned property in Delaware County, Indiana. On May 18, 2000, a hailstorm caused some damage to the slate roof of the home. In June, the buyer and the seller entered into a contract for the purchase and sale of the home. The agreement contained a provision requiring the seller to maintain the property in its “present” condition. In addition, a typical provision was included that placed the risk of loss on the seller until closing. That provision went on to state that if there were any damage or destruction to the property prior to the closing, then the buyer could either terminate the agreement or close on the purchase and the seller’s right to insurance proceeds “shall be assigned in writing by Seller to Buyer.”⁵⁶ Apparently, no written assignment of insurance proceeds was executed at the closing.

It is unclear whether the buyer conducted any inspection of the property, but some time after closing the buyer noticed the damage to the roof. The buyer made a claim against his policy of insurance. The insurer denied the buyer’s claim because his policy was not in effect at the time of the damage. As fate would have it, the seller also used the same insurance company who determined that the claim was proper under the seller’s policy and issued a check jointly to the buyer and the seller for the damages. That check was never negotiated because the parties could not agree upon the proper distribution of the money.⁵⁷

53. *Kashman*, 766 N.E.2d at 422 (citing *Pennycuff v. Fetter*, 409 N.E.2d 1179, 1180 (Ind. Ct. App. 1980)). It is interesting to note that the court did not focus on the fact that the sellers informed the buyers at closing that they had a termite protection plan under the pretext that others in the area had termite problems. The sellers even advised the buyers to renew the contract. Those statements, if given prior to the delivery of the deed at closing, would seem to merit further discovery into the fraud claims asserted by the buyer and make summary judgment ill-advised.

54. IND. CODE § 32-21-5-11 (2002).

55. 776 N.E.2d 422 (Ind. Ct. App. 2002).

56. *Id.* at 424.

57. *Id.* at 425.

The trial court ultimately found in favor of the seller and the buyer appealed.⁵⁸

The court affirmed in rather summary fashion. The court stated that even if the casualty provision of the contract controlled this situation, the contract itself became ineffective as of the closing and delivery to the buyer of the deed.⁵⁹ The merger by deed doctrine is a long-standing doctrine and may be stated as follows: "In the absence of fraud or mistake, all prior or contemporaneous negotiations or executory agreements, written or oral, leading up to the execution of a deed are merged therein by the grantee's acceptance of the conveyance in performance thereof."⁶⁰ In other words, in this situation, the buyer could have prevailed only if the deed or another document executed at closing would have assigned the insurance proceeds to the buyer.

The court also addressed whether, in subsequent conduct of the seller, a promise was made that the seller would repair the roof. Several admissions made by the seller in discovery seemed to imply that the seller had agreed to repair the roof. However, the court dispatched those arguments by stating that no consideration was given by the buyer for that promise by the seller.⁶¹ Without consideration, the seller's promise was completely unenforceable.

B. Landlords and Tenants

We turn our attention now to cases dealing with the relationships between landlord and tenant. Perhaps the most significant case⁶² in this area is the 3-2 decision in the Indiana Supreme Court case of *Turley v. Hyten*.⁶³ This decision overturned a somewhat controversial court of appeals decision, which applied a standard of strict adherence to the notice provisions of the Indiana security deposits statute.⁶⁴ Regular readers of this publication may recall that last year's article roundly criticized the court of appeals decision.⁶⁵

This case involved a tenant who vacated the landlord's property in Darlington, Indiana, and left it in extremely poor condition. The tenant vacated the property in February, leaving a window open near the house's thermostat. That thermostat was set on high and all of the furnace's propane had been used up. These factors, in addition to extremely cold weather, caused significant damage to the house's plumbing system due to bursting of pipes and toilets.⁶⁶ A few weeks after the tenant vacated the house, the tenant wrote the landlord asking

58. *Id.* at 424-25.

59. *Id.* at 427.

60. *Id.* (quoting *Thompson v. Reising*, 51 N.E.2d 488, 491 (Ind. Ct. App. 1943)).

61. *Id.* at 428.

62. The most significant development is the adoption by the legislature of the Landlord/Tenant Act of 2002, discussed *infra* notes 194-207 and accompanying text.

63. *Turley v. Hyten*, 772 N.E.2d 993 (Ind. 2002).

64. IND. CODE §§ 32-31-3-1 to -19 (2002).

65. Lloyd T. Wilson, Jr., *Fulfilling the Deterrent and Restitutionary Goals of the Security Deposits Statute and Other Developments in Indiana Property Law*, 35 IND. L. REV. 1501, 1503-18 (2002).

66. *Turley*, 772 N.E.2d at 994-96.

for the return of his security deposit. The landlord promptly wrote back stating with some specificity the various types of damages that the tenant had caused to the house. The landlord's letter also stated that he had not gotten complete estimates for all of the repairs, but that the initial estimates were over \$1400.⁶⁷

The court of appeals found that although the landlord's letter was timely given in accordance with the security deposits statute,⁶⁸ the letter was deficient in that it did not specifically give an estimate for each damaged item.⁶⁹ Because of this deficiency, the tenant "was unable to discern whether the individual charges that comprised the \$1,400 were proper or reasonable."⁷⁰

The Indiana Supreme Court disagreed, holding that under these facts the landlord had complied with the statute in that the landlord's letter gave the tenant "more than enough information with which to contest the costs to which his security deposit was being applied."⁷¹ The landlord had complied with the statute to the best of his ability and in good faith. The damages the landlord had noted were far in excess of the \$450 security deposit the tenant had made.

Justice Rucker, in a dissent in which Justice Dickson concurred, argued that the court of appeals used long-standing rules of statutory construction to apply the security deposit statute to this case. In Justice Rucker's view, the language of the statute clearly obligates a landlord to give notice in a certain form if the landlord wants to apply any portion of the security deposit to repair damage to the property.⁷² Because the landlord here did not provide the itemized list required, the landlord should not be entitled to retain any portion of the security deposit. Justice Rucker "would insist that the landlord do what our legislature said it must do."⁷³

This may be a case where bad facts make bad law. Requiring the refund of a security deposit in light of extensive damage caused by the tenant himself seems patently unfair. However, the landlord could have avoided this situation by simply providing an itemized list as the statute requires. As Justice Rucker pointed out, "[t]he notice provision does not impose a difficult burden on the landlord."⁷⁴ Perhaps this case points out that the burden turns out to be more severe than previously thought. If so, it would seem that the legislature should remedy the requirement, not the courts.

67. *Id.* at 996.

68. The statute gives a landlord forty-five days after termination of occupancy to provide the notice of any damage and to return any portion of the security deposit to which the tenant is entitled. IND. CODE § 32-31-3-14 (2002).

69. *Turley v. Hyten*, 751 N.E.2d 749, 752 (Ind. Ct. App. 2001), *superceded by* 772 N.E.2d 993 (Ind. 2002).

70. *Id.*

71. *Turley*, 772 N.E.2d at 997.

72. *Id.* at 997-98 (Rucker, J., dissenting).

73. *Id.* at 998.

74. *Id.* (quoting *Pinnacle Props. v. Saulka*, 693 N.E.2d 101, 104 (Ind. Ct. App. 1998)).

C. Lienholders

Indiana law has for some time provided for married couples to own real property as “tenants by the entireties.”⁷⁵ Essentially, when spouses own property in this manner, neither can be thought of as having a divisible interest in the property. Instead, “property held in a tenancy by the entireties is held by a single legal entity created by the fiction of the unity of husband and wife.”⁷⁶

Those who own real estate as tenants by the entirety may not unilaterally transfer their interest in the property without the consent of their spouse. Neither spouse may unilaterally destroy the tenancy by the entirety, and neither spouse may oust the other from possession. With few exceptions, a tenancy by the entirety can be destroyed only by divorce⁷⁷ or by death.⁷⁸ Indiana law regarding tenancy by the entirety is similar to the laws in many other states, including Michigan. A case decided by the United States Supreme Court,⁷⁹ arising out of a dispute over real estate located in Michigan, may have dramatic implications for the meaning of many states’ laws regarding property held as tenants by the entireties.⁸⁰

In this case, the husband failed to pay federal income taxes for five years, and the IRS filed a federal tax lien against his property pursuant to a federal statute.⁸¹ After the lien was filed, husband and wife executed a quitclaim deed which purported to transfer husband’s interest in certain Michigan real estate owned by the couple as tenants by the entireties to the wife. The IRS agreed to release the lien and allow the wife to sell the property with half of the net proceeds to be held in escrow pending resolution of the question of whether the tax lien could attach to the husband’s interest in the property. The district court held that the federal tax lien could attach to the husband’s interest in the real estate and awarded half of the net proceeds of the sale to the IRS.⁸² On appeal, the United States Court of Appeals for the Sixth Circuit reversed, holding that under Michigan state law, the husband had no separate interest in the property held as a tenant by the entireties and therefore the tax lien could not have attached to any interest he held in the property.⁸³

75. IND. CODE §§ 32-17-3-1 to -3 (2002).

76. Dep’t of State Revenue v. Union Bank & Trust Co., 380 N.E.2d 1279, 1280 (Ind. App. 1978).

77. IND. CODE § 32-17-3-2.

78. *Id.* § 32-17-3-1.

79. United States v. Craft, 535 U.S. 274 (2002)

80. *But see* Steve R. Johnson, *Why Craft Isn’t Scary*, 37 REAL PROP. PROB. & TRUST J. 439 (2002). In this article, Johnson argues that the holding in the *Craft* case is and should be limited to federal tax liens, as the federal tax lien scheme involves a definition of “property” that does not rely on or comport with the states’ laws regarding whether a tenancy by the entireties interest is an interest in property that cannot be reached by creditors.

81. 26 U.S.C. § 6321 (2000).

82. United States v. Craft, 65 F. Supp.2d 651, 652 (W.D. Mich. 1999), *rev’d*, 535 U.S. 274 (2002).

83. *Craft v. United States*, 140 F.3d 638, 643 (6th Cir. 1998).

The United States Supreme Court granted certiorari to consider the IRS's claim that the husband had a separate interest in the entireties property to which the federal tax lien attached.⁸⁴ The court noted that the federal tax lien statute was drafted broadly so that it might reach "every interest in property that a taxpayer might have."⁸⁵ The question for the court, then, was to determine whether Congress intended the word "property" as used in the statute to include an individual's interest in property held as tenants by the entirety. The court began its analysis by noting as follows:

A common idiom describes property as a "bundle of sticks"—a collection of individual rights which, in certain combinations, constitute property. . . . State law determines only which sticks are in a person's bundle. Whether those sticks qualify as "property" for purposes of the federal tax lien statute is a question of federal law.

In looking to state law, we must be careful to consider the substance of the rights state law provides, not merely the labels the State gives these rights or the conclusions it draws from them.⁸⁶

The court noted that the husband had the right to use and possess the real estate; to sell the real estate with the consent of his spouse and that he would be entitled to one-half of the proceeds from such a sale; to inherit the real estate if his spouse predeceased him; and to mortgage the real estate with the consent of his spouse.⁸⁷ The only right that the husband did not have was the right to unilaterally alienate the real estate. The court held that this right was not "essential" to the definition of "property" in the federal tax lien statute.⁸⁸ The court appeared to be at least partially persuaded by practical concerns:

[The wife] had no more interest in the property than her husband; if neither of them had a property interest in the entireties property, who did? This result not only seems absurd, but would also allow spouses to shield their property from federal taxation by classifying it as entireties property, facilitating abuse of the federal tax system.⁸⁹

The obvious implication of *United States v. Craft* is that federal tax liens may attach to an individual spouse's interest in real estate held as tenants by the entireties, but they have the potential to remove many of the benefits of owning property as tenants by the entireties. The court has opened the door for state and federal courts to interpret liens and other encumbrances on "property" to attach to an individual spouse's interest in entireties property. Congress will also take note of this decision as it drafts new laws or evaluates old ones.

84. *United States v. Craft*, 535 U.S. 274 (2002).

85. *Id.* at 283 (quoting *United States v. Nat'l Bank of Comm.*, 472 U.S. 713, 713-20 (1985)).

86. *Id.* at 278-79.

87. *Id.* at 282.

88. *Id.* at 283.

89. *Id.* at 285.

II. CREATION AND ENFORCEMENT OF PROPERTY INTERESTS

Easements and restrictive covenants are largely the creatures of the common law, although there are some statutes which deal with some aspects of each property interest. Four cases during the survey period presented the courts with the opportunity to address significant or interesting issues regarding the creation and enforcement of easements and restrictive covenants.

A. *Limiting Injunctive Relief for Violations of Restrictive Covenants*

Dean owned a home in a residential subdivision in Indianapolis that was developed by Crossmann Communities (“Crossmann”).⁹⁰ The plat of the subdivision contained certain restrictive covenants, including a minimum side yard setback of five feet so as to maintain a distance of at least ten feet between homes. Dean built her home six feet inside the property line in order to establish more space between structures.⁹¹ After Dean’s house was finished, Crossmann began construction on the adjoining lot 196. A staked survey of lot 196 indicated that the improvements under construction were only 4.6 feet inside the property line, rather than the five feet required by the restrictive covenant. After Crossmann laid the foundation, Dean filed a request for a temporary restraining order to prevent Crossmann from continuing work on lot 196. The trial court granted the order, and Dean filed a complaint requesting a permanent injunction and damages. The trial court granted a preliminary injunction, and Crossmann appealed.⁹²

The question before the Indiana Court of Appeals in *Crossmann* was whether the trial court abused its discretion by granting Dean a preliminary injunction. Among the factors to be considered by the trial court in deciding whether or not injunctive relief is appropriate is whether the plaintiff’s remedies at law are adequate.⁹³ Dean argued that, in this case, monetary damages would be inadequate because the diminished setback would present drainage and fire hazard issues. On this point, the court began by stating that: “A restrictive covenant constitutes a compensable interest in land.” As such, the violation of restrictive covenants is necessarily subject to an economic assessment.⁹⁴ The

90. *Crossmann Cmtys., Inc. v. Dean*, 767 N.E.2d 1035 (Ind. Ct. App. 2002).

91. *Id.* at 1037-38.

92. *Id.* at 1037-40.

93. *Id.* at 1040.

94. *Id.* at 1042 (citation omitted). The citation for the proposition that “a restrictive covenant constitutes a compensable interest in land” is *Dible v. City of Lafayette*, 713 N.E.2d 269, 273 (Ind. 1999). In *Dible*, landowners sued the city in order to halt construction of a storm sewer drain and sewage lift station that the plaintiffs contended was being constructed in violation of a restrictive covenant. The Indiana Supreme Court concluded that although a restrictive covenant is not enforceable against a city, which has the power of eminent domain, the violation of a covenant is a taking that entitles the landowners to compensation. *Id.* at 273. See also *Daniels v. Area Plan Comm’n*, 306 F. 3d 445 (7th Cir. 2002), discussed *infra* Part III.A. The statement in *Dible* that a restrictive covenant is a “compensable interest in land” is thus tied to the landowners’ ability to seek relief through the law of eminent domain, not an injunction. 713 N.E.2d at 273. A fee simple is

court then dismissed Dean's arguments that the violation of the restrictive covenant would cause irreparable harm because her safety concerns were "subjective" and "directed to the possibility of a future injury."⁹⁵ This reasoning implies that the violation of the restrictive covenant did not constitute, by itself, irreparable harm. Instead, it suggests that to avail herself of injunctive relief, a plaintiff must show evidence of some other injury that rises to the level of irreparable harm and flows from the defendant's violation of the restrictive covenant. This appears to be a new principle of law that is inconsistent with a number of prior holdings by the Indiana appellate courts.⁹⁶ It also suggests a high bar for plaintiffs seeking injunctive relief as a remedy for the violation of a restrictive covenant.

The court cites no precedent for the proposition, implicit in its analysis, that it may conduct an inquiry into the merits and value of the restrictive covenant that has been violated in order to determine whether monetary damages are an adequate remedy. However, it appears likely that future defendants will attempt to use *Crossmann* to urge trial courts to conduct just such an inquiry. The potential significance of the *Crossmann* decision is most obvious with respect to the common restrictive covenants in residential subdivisions which restrict the aesthetics of the community. Under the reasoning used in *Crossmann*, it may be difficult for homeowners' associations suing to enforce such restrictive covenants to obtain injunctive relief because it will be difficult to prove an injury which both: (1) is a result of the violation of the restrictive covenant; and (2) constitutes irreparable harm. It may be harder still to arrive at an amount of monetary damages which would adequately compensate a neighborhood for, say, a renegade homeowner's decision to paint his home lime green in violation of a restrictive covenant.⁹⁷ The long-term significance of *Crossmann* may be that it

also a compensable interest in the context of eminent domain, but it does not follow that a plaintiff suing for specific performance of a contract for the purchase of real estate would therefore not be entitled to injunctive relief. In fact, the opposite is true. *See Ruder v. Ohio Valley Wholesale, Inc.*, 736 N.E.2d 776, 779 (Ind. Ct. App. 2000) ("Specific performance is a matter of course when it involves contracts to purchase real estate.")

95. *Id.* at 1042.

96. *See, e.g.,* *Crawley v. Oak Bend Est. Homeowners Ass'n, Inc.*, 753 N.E.2d 740 (Ind. Ct. App. 2001) (concerning the violation of a restrictive covenant that forbids parking recreational vehicles in homeowner's driveways); *Highland v. Williams*, 336 N.E.2d 846 (Ind. Ct. App. 1975) (affirming order to remove home built in violation of restrictive covenant); *Vogel v. Harlan*, 277 N.E.2d 173 (Ind. Ct. App. 1971) (affirming injunction ordering removal of home that was being constructed in violation of restrictive covenants); *Schwartz v. Holycross*, 149 N.E. 699, 702 (Ind. App. 1925) ("It is well settled that a court of equity has the power . . . to enjoin the violation of restrictive building covenants . . . and that a mandatory writ may be issued to compel the modification, or even the removal, of a building erected in violation of such covenants.").

97. As the Indiana appellate courts have noted in the line of cases concerning injunctive relief for violation of a covenant not to compete, injunctive relief is appropriate in those situations where damages are difficult to quantify. *See, e.g., Roberts' Hair Designers, Inc. v. Pearson*, 780 N.E.2d 858, 864 (Ind. Ct. App. 2002) (quoting *Washel v. Bryant*, 770 N.E.2d 902, 907 (Ind. Ct. App. 2002) ("A legal remedy is adequate only where it is as plain and complete and adequate - or, in

frustrates the enforcement of some restrictive covenants and gives homeowners who do not wish to comply the opportunity to opt-out if they are willing to pay for the privilege. Either possibility undermines the rationale behind the restrictive covenants: to preserve neighborhood character and property values. Unfortunately, the Indiana Supreme Court will not have an immediate opportunity to review *Crossmann*, as the deadline for Dean to file a petition for rehearing or transfer has lapsed without her action.

B. Restrictive Covenants Limiting Satellite Dishes and Antennae

Crooked Creek, a residential subdivision in Marion County, is subject to plat covenants and restrictive covenants that were recorded in 1994.⁹⁸ In 1995, the Hollidays purchased a lot in Crooked Creek. When they built their home, the Hollidays installed three satellite dishes and six masts behind their home, secured by guy wires.⁹⁹ Five of the masts were approximately thirty feet tall, roughly even with the roofline of their home. Five television antennae and three satellite dish antennae were attached to the masts. All of these communication devices supplied various signals to seventeen televisions, nine videocassette recorders, and seven satellite receivers in the Hollidays' home.¹⁰⁰

In 1998, the Crooked Creek Villages Homeowners' Association (the "Association") notified the Hollidays that the antennae and satellite dishes were in violation of the restrictive covenant which required homeowners to obtain approval from Crooked Creek's architectural committee before erecting any "structure."¹⁰¹ The Hollidays responded that the covenant was in violation of Federal Communications Commission ("FCC") rules and thus unenforceable as written. Crooked Creek filed a lawsuit, asking for an injunction to require the Hollidays to remove their satellite dishes, masts, and antennae. The Hollidays asked for, and were granted, a continuance in order to obtain a declaratory ruling from the FCC regarding the enforceability of the covenant under 47 C.F.R. section 1.400.¹⁰²

The FCC responded that the covenant is "prohibited and unenforceable" to the extent that it impairs the installation, maintenance, or use of over-the-air reception antennae protected by the federal rule.¹⁰³ The FCC noted that Crooked

other words, as practical and efficient to the ends of justice and its prompt administration - as the remedy in equity.")); *Norlund v. Faust*, 675 N.E.2d 1142, 1149-50 (Ind. Ct. App.), *clarified on denial of reh'g*, 678 N.E.2d 421 (Ind. Ct. App. 1997), *trans. denied* ("It would be pure speculation to place a dollar amount on the damages, and an injunction against the prohibited behavior is the most efficient way to lift the burden of that harm from the shoulders of the employer who contracted so as not to suffer such harm.").

98. *Holliday v. Crooked Creek Villages Homeowners Ass'n*, 759 N.E.2d 1088 (Ind. Ct. App. 2001).

99. *Id.* at 1090.

100. *Id.* at 1090-91.

101. *Id.* at 1091.

102. *Id.* (citing 47 C.F.R. § 1.400 (2002)).

103. *Id.* at 1093.

Creek has a stated policy of limiting homeowners to one satellite dish antennae and one television antennae, a limit apparently based on aesthetic concerns rather than safety. The FCC found that, in the absence of a valid safety justification, such an arbitrary limit can violate the federal rule if the viewer needs more than the number of antennae allowed to receive an acceptable quality signal. The FCC also found that “[a] restricting entity may prohibit the installation of equipment that is merely duplicative and not necessary for the reception of video programming.”¹⁰⁴ After considering the FCC’s ruling, the trial court found that the Hollidays’ antennae and dishes were duplicative and issued an order requiring the Hollidays to take down all but one mast attached to their house capable of supporting one satellite dish and one antennae.¹⁰⁵ The Hollidays appealed, arguing that the undisputed evidence demonstrated that the Hollidays designed their system to provide an acceptable quality signal to *all* of the television sets in the home and that it was therefore not duplicative.

The court of appeals noted that the FCC ruling indicates that federal law guarantees a homeowner the right to an acceptable quality signal to receive all television programming which they wish to receive, not necessarily on every device where such programming is desired. It also noted that Mr. Holliday admitted that he receives all of the television programming that he wishes to receive (DirecTV, cable and local stations) on the television set in the master bedroom. In light of this evidence, the court of appeals concluded that because the Hollidays’ satellite dish and antenna system was “merely duplicative,” it was subject to the prohibition of the restrictive covenant. The injunctive relief granted by the trial court was affirmed.¹⁰⁶

The Hollidays challenged the trial court’s ruling on the basis that the evidence was insufficient to support the judgment, not that injunctive relief was inappropriate.¹⁰⁷ If that issue had been raised after the court’s decision in *Crossmann*, assuming that *Crossman*’s reasoning would have been followed, it is possible that the court would have remanded for the calculation of monetary damages on the basis that Hollidays’ violation of the restrictive covenant did not cause irreparable harm to Crooked Creek because, as the FCC pointed out, the restrictive covenant was motivated by aesthetic rather than safety concerns.¹⁰⁸

C. Fiber Optics Cables in Railway Right-of-Way Easements

The plaintiffs in *Hynek v. MCI World Comm., Inc.*,¹⁰⁹ were land owners in northern Indiana whose property borders a railroad corridor. Plaintiffs challenged the right of several railroad companies, which owned interests ranging from a fee simple to a right-of-way easement in the railroad corridor, from granting an easement to telecommunications companies for the purpose of

104. *Id.*

105. *Id.* at 1091.

106. *Id.* at 1094-95.

107. *Id.* at 1090.

108. *Holliday* was decided before *Crossmann*.

109. 202 F. Supp. 2d 831 (N.D. Ind. 2002).

installing fiber optic cable lines in the corridor.¹¹⁰ Defendants filed a motion to dismiss for failure to state a claim.

For purposes of its decision on the motion to dismiss, the district court assumed that the railroad companies simply held a railroad right-of-way easement rather than a larger estate in the corridor. It then considered whether, under Indiana law, the owners of such easements have the “legal right to license the use of their railroad corridor for the purpose of installing fiber optic communications without being required to seek permission from or compensate the holders of the fee simple interest in the railroad corridor.”¹¹¹

The district court gleaned a three-part analytical framework from a handful of federal opinions which dealt with the same issue. It considered: (1) the extent to which the fiber optic cable burdened the railroad easement; (2) the extent to which the fiber optic cable related to or benefited the railroad easement; and (3) whether the railroad company had a legal right to place the fiber optic cable in the railroad easement pursuant to statutory law.¹¹²

Although the district court noted that the Indiana appellate courts have not yet expressly determined the scope of a railroad right-of-way easement or the right of railroad companies to use or license such an easement for other purposes, the court read a handful of cases together to find that under Indiana law, “a railroad easement may be used for certain additional uses by the railroad that are both consistent with its current uses and/or those uses that do not involve an additional burden to the servient estate.”¹¹³

Hynek is interesting because, although it was guided by divergent opinions from other jurisdictions, the district court was essentially forced to create an analytical framework to address the issue out of whole cloth. Applying the three criteria outlined above to this case, the court found that the buried fiber optic cable would not place an additional burden on the adjoining landowners which held the fee simple interest in the corridor, would be incidental to the railroad’s own use, and is consistent with Indiana law.¹¹⁴ Based upon the court’s interpretation of what it characterized as “Historical and Public Policy

110. *Id.* at 831-32.

111. *Id.* at 832.

112. *Id.* at 834-35.

113. *Id.* at 836-37 (citing *Consumers’ Gas Trust Co. v. Am. Plate Glass Co.*, 68 N.E. 1020 (Ind. 1903); *Ritz v. Ind. & Ohio R.R., Inc.*, 632 N.E.2d 769 (Ind. Ct. App. 1994); *Calumet Nat’l Bank v. AT&T*, 682 N.E.2d 785 (Ind. 1997)).

114. *Id.* at 839. The conclusion that this scheme was consistent with Indiana law was based upon the court’s interpretation of IND. CODE §§ 32-5-12-1 to -15 (1998) (*repealed by* Pub. L. 2-2002, § 128) (current version at IND. CODE §§ 32-23-11-1 to 32-23-11-15 (Supp. 2002)), the Abandoned Right-of-Way Act, which protected utility lines in the railroad corridor after the underlying easement was abandoned. Although the cited code sections did not expressly state that utility companies, specifically telecommunications companies, had the right to locate in the right-of-way, to conclude that this law was not consistent with permitting such use “would require the court to draw the inference that such prior conveyances, legal occupancy or license to such third-party utility companies by the railroad would have been a mistake or fraud.” *Id.* at 837.

Considerations,”¹¹⁵ it appears that, in the court’s view, a railroad company would be limited to using or licensing others to use the corridor for communications lines that place no additional burden on the fee owners and are otherwise incidental to the railroad’s own use.¹¹⁶

D. Creating Easements on Platted Land

Nichols, a developer, sought to plat a residential subdivision consisting of 183 lots and one common park area.¹¹⁷ The Columbus Plan Commission approved the request subject to Nichols adding “mid-block pedestrian easements where required by ordinance for access to the park.”¹¹⁸ After reviewing a plat of the subdivision, the Joneses purchased lot 164.¹¹⁹ At the time of their purchase, the plat showed a ten-foot-wide pedestrian and utility easement between lot 164 and the adjoining lot 163, and a twenty-foot-wide utility easement along the backside of lot 164 and the adjoining backside of lot 153.¹²⁰ A few months after their purchase, Nichols installed sidewalks on all of the subdivision’s pedestrian easements. He also installed a sidewalk on the utility easement between lots 164 and 153.¹²¹ In 1998, Nichols recorded a fifteen-foot-wide pedestrian easement along the rear of lot 153, where he had already installed the sidewalk.¹²² The Joneses and some of their neighbors filed complaints against Nichols, alleging that the 1998 pedestrian easement was contrary to the platted utility easement and that the pedestrian easement was not being used for a *residential purpose*, in violation of the subdivision’s restrictive covenants.¹²³ The trial court granted summary judgment to Nichols on all claims and the plaintiffs appealed.¹²⁴

The first question before the court in *Nichols* was whether a developer may grant easements over lots that it still owns after the first lot in a platted subdivision has been sold to a third party. The plaintiffs argued, without citing direct authority, that a subdivision’s plat gives notice of its contents both by “that which *is* affirmatively delineated and designated upon the plat (easements, roads, etc.) and that which *is not* seen upon the plat, i.e., an *absence* of a pedestrian easement.”¹²⁵ In other words, the Joneses argued that a plat contains an implied covenant that restricts a developer from creating any further encumbrances in lots it retains. The Joneses relied on *Wischmeyer v. Finch*¹²⁶ for the proposition that

115. *Hynek*, 202 F. Supp. 2d at 837-38.

116. *Id.* at 838.

117. *Jones v. Nichols*, 765 N.E.2d 153 (Ind. Ct. App. 2002).

118. *Id.* at 154.

119. *Id.* at 155.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 155-56.

124. *Id.* at 156.

125. *Id.* at 156 (emphasis added by the court) (quoting Brief for Appellants at 17).

126. 107 N.E.2d 661 (Ind. 1952) (holding that an Indiana statute which addresses to the vacation of a restrictive covenant also applies to a modification of a restrictive covenant.)

in order to create an easement after selling a lot, a developer should be required to vacate and re-plat the subdivision with the easement.¹²⁷

The Indiana Court of Appeals was unpersuaded by the Joneses' arguments, finding that *Wischmeyer's* requirement that a developer vacate and re-plat a subdivision in order to modify, add, or delete restrictive covenants is a strict rule that should not be extended to a developer who wishes to grant easements in lots it retains.¹²⁸ The court distinguished between a restrictive covenant, which is "a creature of equity arising out of contract,"¹²⁹ and an easement, which "is essentially an inherently legal interest in land."¹³⁰ By highlighting this distinction, the court of appeals summarily dismissed the relevance of *Wischmeyer* and held that a plat does not contain an implied covenant that a developer will not establish any further easements on lots that it owns.¹³¹

The court then turned to the plaintiffs' second argument, that the sidewalk in the pedestrian easement on lot 153 was a violation of the subdivision's restrictive covenant that "[n]o lot shall be used for anything except residential purposes."¹³² Nichols, the developer, was the owner of lot 153 at the time that he granted the pedestrian easement across the lot. The plaintiffs argued that the Nichols had no intent to reside on lot 153 and granted the pedestrian easement for the benefit of the subdivision, in other words, for a commercial purpose.¹³³ Without citing authority, the court held that "Nichols' status as a developer and motivation for granting the pedestrian easement are irrelevant. Instead, we focus on the purpose for which the pedestrian easement is used."¹³⁴ Because the granting language of the pedestrian easement limited its use to the residents of the subdivision and "foot traffic only," the court concluded that it did not violate the restrictive covenant.¹³⁵

III. LAND USE LAW

Two significant cases in the survey period examined the constitutionality of state action in the context of land use law. The first ruled on the constitutionality of an Indiana statute permitting local planning commissions to vacate a plat and accompanying restrictive covenants. The second dealt with a local ordinance restricting the number of non-related adults who may co-habitate in an area zoned for single family dwellings.

127. *Jones*, 765 N.E.2d at 157-58. In order to re-plat, a developer would be required to comply with an expensive and time-consuming process. The steps include obtaining the subdivision's landowners' written consent to the vacation, the consent of the appropriate plan commission, and the consent of the interested landowners.

128. *Id.* at 158.

129. *Id.* (quoting *Shiner v. Baita*, 710 So. 2d 711, 712 (Fla. Dist. Ct. App. 1998)).

130. *Id.*

131. *Id.*

132. *Id.* at 158.

133. *Id.* at 159.

134. *Id.*

135. *Id.*

A. Vacation of Restrictive Covenants and Plats

In 1940, the Broadmoor addition in Fort Wayne was surveyed and platted for eighty lots.¹³⁶ The plat contained a restrictive covenant limiting lots to residential uses.¹³⁷ In 1999, HNS Enterprises, LLC and LST, LLC (collectively, “HNS”), as owners of Broadmoor lots numbered three through five, submitted a rezoning petition and application for primary development to the Area Plan Commission of Allen County (the “Plan Commission”). In the application, HNS asked the Plan Commission to vacate their lots and the accompanying restrictive covenants from the Broadmoor plat pursuant to Indiana Code section 36-7-3-11.¹³⁸ HNS also asked the Plan Commission to rezone the lots to a commercial rather than residential zoning designation and to approve a primary development plan to build a 12,000 square foot shopping center on the lots.¹³⁹ After a public hearing and at least one meeting, the Plan Commission approved the application. The Commission found that it was in the public interest to vacate the lots and covenants from the Broadmoor plat because it would allow the site to be redeveloped with commercial uses which would be more appropriate uses for the property than the “uninhabited and deteriorating residential structures” that were then situated on the lots.¹⁴⁰ In addition, the Plan Commission found that the value of the other lots in Broadmoor would not be diminished by the vacation.¹⁴¹ After the ruling by the Plan Commission, the Daniels, who also owned a lot in Broadmoor, filed a complaint seeking damages under 42 U.S.C. § 1983, and a declaratory judgment that the Plan Commission violated the Fifth and Fourteenth Amendments to the United States Constitution, as well as the Indiana Constitution.¹⁴² The federal district court, on cross-motions for summary judgment, found that the Plan Commission violated the Daniels’ Fifth Amendment rights by vacating the restrictive covenant without a public purpose.¹⁴³ The district court also found that Indiana’s statutory provision for filing a petition to vacate¹⁴⁴ was unconstitutional because it does not require the Commission to follow the procedure for determining public use set forth in the State’s eminent domain statute.¹⁴⁵ The Plan Commission appealed.

The Seventh Circuit was faced with two significant questions.¹⁴⁶ First, did

136. *Daniels v. Area Plan Comm’n of Allen County*, 306 F.3d 445 (7th Cir. 2002).

137. *Id.* at 449. The restrictive covenant read: “No building other than a single family dwelling and a private garage shall be built on any one lot.” *Id.*

138. IND. CODE § 36-7-3-11 (1998).

139. *Daniels*, 306 F.3d at 449.

140. *Id.* at 449-50.

141. *Id.* at 450.

142. *Id.* at 451.

143. *Id.*

144. IND. CODE § 36-7-3-11 (1998).

145. *Daniels*, 306 F.3d at 451.

146. The Seventh Circuit also considered the Plan Commission’s claim that the federal court did not have subject matter jurisdiction over the Daniels’ claim because the Daniels failed to

the Plan Commission's vacation of the plat and restrictive covenant on lots three through five constitute a taking of the Daniels' property for a private purpose? Second, is Indiana Code section 36-7-3-11 facially unconstitutional under the Takings Clause of the United States Constitution?

The Seventh Circuit began by noting that under Indiana law, a restrictive covenant is a constitutionally protected property interest.¹⁴⁷ Because the Daniels no longer have the ability to prevent commercial development on lots three through five, the court concluded that they had demonstrated that a property right has been taken by state action.¹⁴⁸ The next question was whether the property interest, i.e., the restrictive covenant, was taken for a public use. The court noted that it is an established principle that implicit in the Fifth Amendment is a requirement that the government not take property for private purposes, even with just compensation.¹⁴⁹ Although the existence of public use is required to justify a taking, the burden on the State is "remarkably light."¹⁵⁰ The State must merely show that its exercise of eminent domain power is "rationally related to a conceivable public purpose."¹⁵¹ In this case, the General Assembly did not define what constitutes a "public use" under Indiana Code section 36-7-3-11(e)¹⁵² and instead delegated that duty to local plan commissions.¹⁵³ The Seventh Circuit was clearly troubled by a situation in which a "local plan commission is making legislatively unrestrained decisions as to what constitutes a public use."¹⁵⁴ The Seventh Circuit noted that upon judicial review, the Plan Commission's determination of a public use would be afforded almost complete deference unless it fell outside of the definitions of "public use" used in other areas of state law.¹⁵⁵

In this case, the Plan Commission determined that the vacation was in the public interest because it would allow lots three through five to be redeveloped with commercial uses which would be more appropriate for the property and a benefit for the immediate neighborhood. It further found that the uninhabited and deteriorating residential structures on those three lots at the time would be

exhaust their remedies in state court through the inverse condemnation statute. The Seventh Circuit noted that the Daniels suffered no monetary loss because of the violation of the restrictive covenant and that injunctive relief was not a potential remedy under the Indiana inverse condemnation statute. Because the state inverse condemnation procedure is thus inadequate, the Seventh Circuit held, to address the Daniels' injury, that Daniels satisfied the futility requirement under *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), and that the federal courts had subject matter jurisdiction. *Daniels*, 306 F.3d at 457-58.

147. *Daniels*, 307 F.3d at 459.

148. *Id.*

149. *Id.*

150. *Id.* at 460.

151. *Id.*

152. IND. CODE § 36-7-3-11(e) (1998).

153. *Daniels*, 306 F.3d at 460-61.

154. *Id.* at 461.

155. *Id.*

removed.¹⁵⁶ The Plan Commission made a number of findings of fact in support of this stated public use.¹⁵⁷ However, the Seventh Circuit noted that the vacation of the restrictive covenant itself would not provide any public benefit unless the lots were actually developed and the dilapidated houses thereon were actually removed. In the meantime, HNS, as owner of property with a more valuable potential use, was the recipient of an immediate, direct, and valuable benefit.¹⁵⁸

The Seventh Circuit next examined what public purposes the General Assembly had established in other contexts and noted that the General Assembly has determined that economic development on its own does not constitute a public purpose sufficient to satisfy the public use requirement inherent in the exercise of the power of eminent domain under Indiana law. Instead, economic development is a public purpose only if the area has been determined to be “blighted” in compliance with certain other statutes.¹⁵⁹

Next, the Seventh Circuit examined whether the Plan Commission’s stated public purpose for the Broadmoor vacation satisfies the Fifth Amendment’s public use requirement. The court noted precedent for the proposition that the public use must be “substantially related to the advancement of the public health, safety, or welfare.”¹⁶⁰ After examining a number of relevant cases, the Seventh Circuit determined that in this case, the Plan Commission’s stated purpose was not substantially related to the state’s police powers because there was no requirement that the vacated lots be developed in a manner which benefited the public interest.¹⁶¹ Instead, it held that “[t]he public use requirement would be rendered meaningless if it encompassed speculative future public benefits that could accrue only if a landowner chooses to use his property in a beneficial, but not mandated, manner.”¹⁶²

In sum, the Seventh Circuit concluded that the Plan Commission violated the public use requirement because it did not follow a legislative determination of the factors constituting a public use and did not demonstrate that the vacation of the restrictive covenant was substantially related to a public interest.¹⁶³

Although the Seventh Circuit upheld the district court’s ruling with respect to the application of Indiana Code section 36-7-3-11 to the vacation of the Broadmoor lots, it reversed the district court with respect to the Daniels’ facial challenge to the statute’s constitutionality. The Daniels argued that the statute is facially invalid because it does not define what constitutes a public purpose, a deficiency that the Seventh Circuit recognized.¹⁶⁴ However, the Seventh Circuit noted that neither the Supreme Court nor the Seventh Circuit has ever required a specific legislative statement as to the limits of a public purpose.

156. *Id.* at 461-62.

157. *Id.* at 462.

158. *Id.*

159. *Id.* at 462-64.

160. *Id.* at 464.

161. *Id.* at 465-66.

162. *Id.* at 466.

163. *Id.* at 466-67.

164. *Id.* at 467.

Instead, “because the power of eminent domain is coterminous with the police power, as long as a taking is substantially related to the advancement of the health, safety and welfare of the public it is constitutionally sound under the Public Use Clause.”¹⁶⁵ The Seventh Circuit found that the limits contained in Indiana Code section 36-7-3-11(e)¹⁶⁶ “sufficiently direct a plan commission to act only in concert with the Fifth Amendment. . . . Therefore, since the covenant vacation statute has potential constitutional applications, this facial attack fails.”¹⁶⁷

Although it upheld Indiana Code section 36-7-3-11, the *Daniels* opinion provides lot owners who oppose the vacation of restrictive covenants by local plan commissions several powerful arguments in as applied challenges. Because the statute lacks a clear description of the factors which constitute proper public purposes, opponents will likely challenge future vacations of covenants on the grounds that they were not substantially related to a bona fide public purpose. An amendment to the statute which limits the discretion of plan commissions and defines permissible public purposes would likely satisfy some of the Seventh Circuit’s concerns and provide plan commissions with greater confidence that their determinations will withstand challenge. Additionally, the court’s emphasis on the fact that the Plan Commission did not tie the vacation to a particular use for the site may further complicate matters. The Seventh Circuit appeared to suggest that some uses for a non-blighted site may be permissible public purposes, but general use as a commercial site would not be permissible. It noted that a vacation would be constitutional, for example, “if the commission found that an area was under-served by doctors’ or dentists’ offices, or day care facilities, and the vacation would substantially serve to fill that need.”¹⁶⁸ If a plan commission made such a finding to justify a vacation, would it be required to create a kind of conditional vacation that permits only that specific public purpose? If the doctor’s office closed, would the vacation automatically terminate? These are uncertainties that clearly need to be addressed by the General Assembly. Until they are, it is likely that local plan commissions will have some hesitancy before they grant vacations similar to that overturned in *Daniels*, regardless of their findings of public purpose.

B. Constitutionality of Zoning Ordinance Defining “Family”

The City of Bloomington had a municipal zoning ordinance that limits the number of unrelated adults who may occupy a “dwelling unit” in areas of the City zoned for single family dwellings.¹⁶⁹ Dvorak was the owner of residential

165. *Id.*

166. IND. CODE § 36-7-3-11(e) (1998).

167. *Daniels*, 306 F.3d at 468-69.

168. *Id.* at 469.

169. “Family” means a family consisting of an individual or people related by blood, marriage, or legal adoption, and any other dependent children of the household. In the RE and RS districts and in the RT7 district except where overlaid by a PRO 15 district, “family” also includes a group of no more than three adults, and their dependent children, living together as a single housekeeping

property in an area of Bloomington so zoned.¹⁷⁰ In 1996, the City filed a complaint against Dvorak, claiming that he and his five tenants were in violation of the ordinance.¹⁷¹ Dvorak filed a motion for summary judgment, claiming that the ordinance was void as an *ultra vires* act, that it violated the article I, section 23 of the Indiana Constitution, and that it violated Dvorak's right to due process.¹⁷² The trial court denied the motion and the court of appeals accepted the case on an interlocutory appeal, vacated the decision of the trial court, and remanded for further proceedings, including a determination of the goals the ordinance was designed to promote.¹⁷³ In 2000, the trial court found the ordinance to be constitutional. Dvorak again appealed.¹⁷⁴

In *Dvorak II*, the court of appeals considered whether the Bloomington ordinance, which limits the number of unrelated adults who may live together in a single family residence, is constitutional under article I, section 23 of the Indiana Constitution, commonly known as the Privileges and Immunities Clause.

The court noted that a 1994 opinion by the Indiana Supreme Court, *Collins v. Day*, sets forth the framework for analyzing challenges to state action under article I, section 23.¹⁷⁵ Under *Collins*, a state actor may create a legislative classification so long as: (1) the different statutory treatment is reasonably related to the inherent characteristics that distinguish the unequally treated class; and (2) the preferential treatment is uniformly applicable and equally available to all persons similarly situated.¹⁷⁶

Under this framework, the court of appeals defined the "issue" in *Dvorak II* as "whether there are inherent distinctions between households consisting of unrelated adults versus those consisting of related adults that are reasonably connected to imposing the burden of exclusion from some neighborhoods."¹⁷⁷ The court examined a number of cases from other states dealing with similar ordinances and found those authorities to be split.¹⁷⁸ Turning back to the *Collins* test, the court noted that at the trial court level, the city presented evidence, via the testimony of the its planning director, that the goal of the ordinance was the

unit in a dwelling unit. In all other districts, "family" also includes a group of no more than five adults and their dependent children, living together as a single housekeeping unit in a dwelling unit. Bloomington Municipal Code § 20.02.01.00 (2000).

170. *Dvorak v. City of Bloomington*, 768 N.E.2d 490 (Ind. Ct. App.), *trans. granted, vacated by* 783 N.E.2d 695 (Ind. 2002) (*Dvorak II*). The authors of this Article represent the Indiana Association of Cities and Towns, which has been involved in *Dvorak* as an amicus curiae and has filed several briefs with the Indiana Court of Appeals and the Indiana Supreme Court supporting the position taken by the City of Bloomington in this matter.

171. *Dvorak v. City of Bloomington*, 702 N.E.2d 1121, 1122 (Ind. Ct. App. 1998) (*Dvorak I*).

172. *Id.*

173. *Id.* at 1125-26.

174. *See Dvorak II*, 768 N.E.2d at 493.

175. *Id.* at 494-95 (citing *Collins v. Day*, 644 N.E.2d 72 (Ind. 1994)).

176. *Id.* at 495.

177. *Id.*

178. *Id.* at 495-97.

“protection of core neighborhoods through the reduction of adult population density and the reduction of external impacts such as traffic, trash generation, noise, and inappropriate parking of vehicles.”¹⁷⁹ The planning director had further testified that “the basis for his conclusion that regulating unrelated adults would promote these values was based on ‘professional literature’ and ‘planning premises’ that unrelated adults cause greater external impacts than related adults through more independent lifestyles.”¹⁸⁰ The court, unpersuaded by this testimony, held that the city failed to show that the legislative classification was “reasonable or substantial” because it was “based on mere planning premises without any documented support in professional literature.”¹⁸¹

The application of *Collins* to the Bloomington ordinance in *Dvorak II* appears to be inconsistent with prior caselaw and *Collins* itself. The problem began in *Dvorak I*, when the court of appeals remanded the case to the trial court so that the challengers would have an “opportunity for discovery in order to determine what goals the Ordinance was designed to promote.”¹⁸² In doing so, the *Dvorak I* court cited no precedent for its departure from the previously accepted understanding of *Collins*, which provides that all presumptions are in favor of the state actor and that the challenger must disprove “every conceivable basis” for the legislation, not simply those that were readily apparently or supplied to the trial court by counsel or evidence.¹⁸³

179. *Id.* at 497.

180. *Id.*

181. *Id.* At the end of the opinion, the court also summarily suggested that a constitutional right to privacy may be implicated by the ordinance because staying in compliance “may involve decisions relating to marriage, family, and child rearing.” The court continued that “[c]onstitutional protection of the right to privacy applies regardless of the choice an individual makes with regard to marriage and family. Therefore, the City may not burden those who exercise the choice not to create a ‘family’ as defined by the City.”

182. *Dvorak I*, 702 N.E.2d at 1125-26.

183. *Collins*, 644 N.E.2d at 80. The language in *Collins v. Day* was obviously crafted in light of the well-known and sometimes frustrating fact that the Indiana General Assembly has no legislative history. In deference to separation of powers, and recognizing that the judiciary should not substitute its judgment for that of the legislature, the Indiana Supreme Court did not require “evidence” of the goals that may have motivated a legislative body to create a classification. Instead, *Collins* directed trial courts to rely upon any reasonable set of circumstances which might validate a legislative classification. In *Collins*, the court recognized that the heavy burden assumed by challengers to a legislative action was consistent with longstanding precedent. *See, e.g., Sperry & Hutchinson Co. v. Indiana*, 122 N.E. 584, 587 (Ind. 1919). Deference to the elected legislature is a long-standing principle in Indiana common law. The Indiana appellate courts have repeatedly endorsed the notion that absent the implication of a fundamental constitutional right, public policy should be determined at the ballot box, through the legislature, rather than through the courts. *See, e.g., Sanchez v. State*, 749 N.E.2d 509, 516 (Ind. 2001).

[C]ourts must be careful to avoid substituting their judgment for those of the more politically responsive branches We [must also consider] the constitutional directive in Article I, Section 1 that “all power is inherent in the people.” This too suggests deference to legislation that does not run afoul of a specific constitutional provision.

On remand of *Dvorak I*, the trial court noted several possible bases for the ordinance, including the preservation of core neighborhoods and the desire to limit the negative impacts caused by a number of unrelated adults living together in a single dwelling unit. Dvorak asserted that these premises were insufficient to support the ordinance, but presented no evidence demonstrating that they were incorrect. By declaring the ordinance to be unconstitutional on this set of facts, *Dvorak II* essentially shifted the burden to the city to prove, through a certain quality of evidence, that: (1) the disparate treatment accorded by the ordinance is reasonably related to inherent characteristics which distinguish the unequally treated classes; and (2) that the preferential treatment is uniformly applicable and equally available to persons similarly situated. *Dvorak II* cites no precedent for this implicit burden shifting. Indeed, there appears to be none.¹⁸⁴

In September 2002, the Indiana Supreme Court granted transfer in *Dvorak II* and vacated the court of appeals opinion. At the time this Article was written, it had not yet handed down its own opinion.

IV. DEVELOPMENTS IN THE COMMON LAW OF PROPERTY

Only one case during the survey period had a significant impact on the common law of property. The court of appeals was asked to decide a case involving a claim of adverse possession in *Allen v. Moran*.¹⁸⁵ In this case, Mr. Moran purchased property in Morgan County, Indiana, and was told by his seller that a fence designated the eastern boundary of the property. The fence apparently was erected by the neighbor for the purpose of restraining the neighbor's cattle. In 1995, the Allens purchased the neighboring tract and the survey prepared in connection with that closing showed that the fence was to the west of the boundary line. Three years later, the Allens removed the fence and began clearing the property line as shown on the survey they had obtained in order to construct a new fence on that line.¹⁸⁶ This action displeased Moran, and he eventually brought suit to quiet title to the land to the west of the old fence line. The trial court agreed with Moran and entered judgment accordingly. The Allens appealed and the court of appeals reversed the judgment of the trial court.¹⁸⁷

The court found that Moran had not satisfied his burden of showing that his

Id.

184. See, e.g., *Lake County Clerk's Office v. Smith*, 766 N.E.2d 707, 713 (Ind. 2002) ("In determining whether a statute complies with or violates Article I, Section 23, courts must exercise substantial deference to legislative discretion.") (citing *Martin v. Richey*, 711 N.E.2d 1273, 1280 (Ind. 1999)); *Linke v. Northwestern School Corp.*, 763 N.E.2d 972, 986 (Ind. 2002) (holding that "the Linkes have not carried their burden to 'negative every reasonable basis' for random drug testing imposed on the class of which they are member."); *IHSAA v. Carlberg*, 694 N.E.2d 222 (Ind. 1997) ("We find that Carlberg has not carried the burden to 'negative every reasonable basis' for his burden of limited eligibility imposed upon the class of which he is a member.").

185. 760 N.E.2d 198 (Ind. Ct. App. 2002).

186. *Id.* at 199.

187. *Id.* at 200-01.

alleged possession of the land up to the old fence line was sufficient to show that he had adversely possessed that property.¹⁸⁸ One factor the court noted was that there was no evidence that the parties ever agreed with one another that the old fence line was actually the boundary between the two properties. Moran argued that this case was similar to the 1995 case of *Clark v. Auckerman*¹⁸⁹ in which a fence was found to be the border between two parcels. In *Clark*, the court relied on prior case law to hold that if the parties have agreed upon a boundary between their respective properties and have made improvements in accordance with that understanding, each party is estopped from denying the agreed-upon boundary regardless of the time period of the possession.¹⁹⁰ However, the court pointed out that in *Clark* there was evidence that both parties believed the fence to be the boundary and the adverse claimant had made a number of substantial improvements to the fence and the area in dispute over the years.¹⁹¹

In this case, the court found that Moran did not meet the burden of making this showing. He presented no evidence that both parties believed the actual boundary of the properties was the old fence line, nor had he ever undertaken any improvements to the strip of land in question. In short, Moran did not exhibit “palpable and continuing acts of ownership over the fence or the land around the fence that was found, by the survey, to be the Allens’ land.”¹⁹² Because of this failure, the court held that Moran had not adversely possessed the land in question.

V. NEW STATUTES

Two statutes passed by the 2002 General Assembly made noteworthy changes to Indiana property law. The first relates to the respective responsibilities and obligations of residential tenants and landlords. The second recodified Title 32 of the Indiana Code.

A. *The Landlord/Tenant Act of 2002*

The Landlord/Tenant Act of 2002 became effective as of July 1, 2002.¹⁹³ This legislation was aimed at improving the stock of rental housing throughout

188. A party asserting adverse possession must prove that his “possession was (1) actual, (2) visible, (3) open and notorious, (4) exclusive, (5) under claim of ownership, (6) hostile, and (7) continuous for the statutory period.” *Penn. Cent. Transp. Co. v. Martin*, 353 N.E.2d 474, 476 (Ind. Ct. App. 1976) (citing *Longabaugh v. Johnson*, 321 N.E.2d 865, 868 (Ind. App. 1975)). In addition, the claimant must also have paid the taxes with respect to the property during the period of adverse possession. IND. CODE § 32-21-7-1 (Supp. 2002).

189. 654 N.E.2d 1183 (Ind. Ct. App. 1995).

190. *Id.* at 1186 (citing *Adams v. Betz*, 7 N.E. 649 (Ind. 1906)).

191. *Allen v. Moran*, 760 N.E.2d 198, 201 (Ind. Ct. App. 2002).

192. *Id.* at 202. In addition, the court of appeals cites to no evidence that Moran paid any taxes on the property in question. This should be, in and of itself, sufficient to deny Moran’s claim of adverse possession.

193. Pub. L. 92-2002, § 2 (codified at IND. CODE §§ 32-31-7-1 to -7 and §§ 32-31-8-1 to -6 (Supp. 2002)).

the state by requiring landlords to adhere to a certain level of maintenance of residential property they lease,¹⁹⁴ and requiring tenants to adhere to use standards.¹⁹⁵ The new act applies to dwelling units that are leased after June 30, 2002,¹⁹⁶ unless the lease contains an option to purchase.¹⁹⁷ Any attempt to waive compliance with the statute is void.¹⁹⁸

The principal portion of the statute requires a landlord to do the following with respect to the landlord's rental premises:

- (1) Deliver the rental premises to a tenant in compliance with the rental agreement, and in a safe, clean, and habitable condition.
- (2) Comply with all health and housing codes applicable to the rental premises.
- (3) Make all reasonable efforts to keep common areas of a rental premises in a clean and proper condition.
- (4) Provide and maintain the following items in a rental premises in good and safe working condition, if provided on the premises at the time the rental agreement is entered into:
 - (A) Electrical systems.
 - (B) Plumbing systems sufficient to accommodate a reasonable supply of hot and cold running water at all times.
 - (C) Sanitary systems.
 - (D) Heating, ventilating, and air conditioning systems. A heating system must be sufficient to adequately supply heat at all times.
 - (E) Elevators, if provided.
 - (F) Appliances supplied as an inducement to the rental agreement.¹⁹⁹

The tenant's remedies under the statute for a failure of the landlord to comply with these obligations are condition upon first giving written notice to

194. IND. CODE § 32-31-8-5 (Supp. 2002).

195. *Id.* § 32-31-7-5.

196. Unfortunately the phrase "dwelling units" is not defined in the statute. However, the definitions of the Security Deposit statute, *id.* §§ 32-3-1 to -19, which includes a definition of "rental unit," *id.* § 32-31-3-8, are to apply to the Landlord/Tenant Act of 2002. *See id.* §§ 32-31-7-2 and 32-31-8-2. On the other hand, the statute governing the modification of rental agreements and tenant's access to the rented premises uses the phrase "dwelling unit." *Id.* § 32-31-5-3. Perhaps a technical correction bill is necessary in order to clarify these terms and make them consistent throughout the Code.

197. *Id.* §§ 32-31-7-1 and 32-31-8-1.

198. *Id.* §§ 32-31-7-4 and 32-31-8-4.

199. *Id.* § 32-31-8-5.

landlord and then giving the landlord a reasonable time to complete the repairs.²⁰⁰ The tenant may recover the tenant's actual and consequential damages for landlord's breach, as well as attorney's fees, injunctive relief and any other relief which is "appropriate under the circumstances."²⁰¹

On the other hand, a tenant must comply with all health and housing codes to the extent they impose obligations primarily on the tenant, keep the rental premises reasonably clean, use the facilities and systems landlord is obligated to maintain in a reasonable manner, refrain from defacing or damaging the rental premises and comply with reasonable rules and regulations of the landlord.²⁰² In addition, the tenant must vacate the rental premises at the end of the lease term in a "clean and proper manner."²⁰³

The landlord's remedies for tenant's breach of these obligations are likewise conditioned upon prior written notice given to the tenant and a reasonable time to remedy the problem, unless the rental agreement has terminated.²⁰⁴ If the non-compliance has caused physical damage to the rental premises, then the landlord must give notice to the tenant specifying the repairs needed and documenting the landlord's cost in making such repairs.²⁰⁵ The landlord may recover actual damages from the tenant (but apparently not consequential damages), as well as attorney's fees, injunctive relief and any other relief which is "appropriate under the circumstances."²⁰⁶ The statute does not provide an independent right of the landlord to terminate the rental agreement of a tenant for non-compliance with the tenant's requirements in this statute. Ostensibly, it would be a remedy which is "appropriate under the circumstances" if a court should so find. Landlords will likely be making non-compliance with this statute an additional event of default under the lease, which would have the effect of giving the landlord the right to terminate the lease for non-compliance.

B. Recodification of Title 32

In its 2002 regular session, the Indiana General Assembly recodified Title 32 of the Indiana Code through Senate Enrolled Act 57. The 450-page act made tens of thousands of technical changes to the Code for the purpose of "[recodifying] prior property law in a style that is clear, concise, and easy to

200. *Id.* § 32-31-8-6(b)(6).

201. *Id.* § 32-31-8-6(d).

202. *Id.* § 32-31-7-5.

203. *Id.* § 32-31-7-6.

204. *Id.* § 32-31-7-7(b)(1).

205. *Id.* Unfortunately, the legislature did not utilize the same language in this section as in the Securities Deposit statute which requires a landlord to provide notice to a tenant specifying damages at the termination of the occupancy of the tenant in order to utilize any portion of the tenant's security deposit to effect such repairs. *Id.* § 32-31-3-14. The case law is developing standards for this type of notice which could easily be relied upon to determine the sufficiency of a landlord's notice under IND. CODE § 32-31-7-7.

206. *Id.* § 32-31-7-7(f).

interpret and apply.”²⁰⁷ Essentially, the recodification reorganized statutes and attempted to clarify confusing or arcane language.

Unfortunately, one result of the recodification process was the merging of two chapters, one which had previously expressly controlled over the other, in a manner which creates ambiguity regarding the rights of non-citizens, or aliens, to acquire, own and dispose of real property located in Indiana.²⁰⁸ Essentially, Indiana Code section 32-22-2²⁰⁹ contains statutes which reflect two different paradigms concerning the right of aliens to own real property in Indiana. Indiana Code sections 32-22-2-5 and 32-22-2-6²¹⁰ grant full property rights to all aliens, while Indiana Code sections 32-22-2-2 through 32-22-2-4²¹¹ grant different rights to aliens depending upon whether or not they have declared their intention to become citizens. After the survey period, the Indiana General Assembly enacted legislation repealing Indiana Code sections 32-22-2-2 through 32-22-2-4 and 32-22-2-6, effective July 1, 2003. As a result, aliens currently have full property rights in Indiana.

VI. INDEX OF OTHER CASES

A number of cases handed down by the Indiana Court of Appeals and Indiana Supreme Court this year clarified an existing principle of law but were not, in the opinion of the authors of this Article, significant enough to warrant analysis. As a tool for practitioners, we have included this section as a guide to those opinions handed down between October 1, 2001, and September 30, 2002, which may be relevant to their practice.

In *Allstate Insurance Co. v. Dana Corp.*,²¹² the supreme court held that ground water is the property of the landowner regardless of the landowner's assertion of control over it.

In *Bowling v. Poole*,²¹³ the court of appeals held that a purchase agreement constituted a sale of the property in gross, rather than on a per-acre basis notwithstanding that the seller was mistaken as to the number of acres of property to be sold.

In *Bradley v. City of New Castle*,²¹⁴ the supreme court held that if the requirements of Indiana Code section 36-4-3-13²¹⁵ are met, a court must order annexation and may not refuse to do so based upon procedural irregularities that do not impinge on remonstrators' substantive rights, because “a remonstrator's

207. *Id.* § 32-16-1-2.

208. For a thorough discussion of this issue, see William E. Marsh & Tanya D. Marsh, *Restrictions on Alien Property Rights in Indiana: Contradictory and Unconstitutional*, RES GESTAE, Jan./Feb. 2003, at 19.

209. IND. CODE § 32-22-2 (Supp. 2002).

210. *Id.* §§ 32-22-2-5, -6.

211. *Id.* §§ 32-22-2-5 to -4.

212. 759 N.E.2d 1049 (Ind. 2001).

213. 756 N.E.2d 983 (Ind. Ct. App. 2001).

214. 764 N.E.2d 212, 215 (Ind. 2002).

215. IND. CODE § 36-4-3-13 (Supp. 2002).

challenge to annexation is not a regular lawsuit, but rather a special proceeding the General Assembly may control.”²¹⁶

In *Circle Centre Development Co. v. Y/G Indiana, L.P.*,²¹⁷ the court of appeals upheld a lease provision in which the tenant affirmed that it was not relying on any statements or representations of the landlord regarding the space leased other than as expressly stated in the lease.

In *Citicorp Vendor Finance, Inc. v. WIS Sheet Metal, Inc.*,²¹⁸ the district court held that a contractual provision requiring the payment of attorney’s fees in a stated percentage of the amount delinquent on the contract is an unenforceable penalty as it does not approximate actual damages.

In *Cockrell v. Hawkins*,²¹⁹ the court of appeals held that O’s 1/120th interest in Blackacre was not sufficient to establish unity of title with the adjoining Whiteacre, owned entirely by O, for the purpose of creating an easement by necessity through Whiteacre to Blackacre after P purchased fee simple title to Blackacre.

In *Cyr v. Yoder, Inc.*,²²⁰ the court of appeals held that the Home Improvement Act applies to residential home improvement contracts even where the amounts due under the contract will be paid with insurance proceeds.

In *Encore Hotels of Columbus, LLC v. Preferred Fire Protection*,²²¹ the court of appeals found that a project owner was unjustly enriched in failing to pay a subcontractor the compensation to which it was entitled.

In *Floyd v. Rolling Ridge Apartments*,²²² the court of appeals held that a landlord did not fail to comply with the Indiana Security Deposit statute in providing a notice at the end of the renewed term of the lease as the renewal itself was a continuation of the initial lease and not a new lease.

In *Fort Wayne v. Certain Southwest Annexation Area Landowners*,²²³ the supreme court held that “courts reviewing annexation challenges should focus on whether the municipality made credible and enforceable commitments to provide equivalent services to similar areas. Courts are not authorized to dissect the minutiae of what are essentially legislative decisions.”

In *Kopinski v. Health and Hospital Corp. of Marion County*,²²⁴ the court of appeals held that an enforcement authority may not issue a demolition order for a home which, following a fire, is structurally sound and repairable if the owner is making reasonable efforts to repair the property.

In *Luhnow v. Horn*,²²⁵ the court of appeals held that a landowner is not a third party beneficiary to a contract entered into by a county drainage board with

216. *Bradley*, 764 N.E.2d at 215.

217. 762 N.E.2d 176 (Ind. Ct. App.), *trans. denied*, 774 N.E.2d 518 (Ind. 2002).

218. 206 F. Supp. 2d 962 (S.D. Ind. 2002).

219. 764 N.E.2d 289 (Ind. Ct. App. 2002).

220. 762 N.E.2d 148 (Ind. Ct. App. 2002).

221. 765 N.E.2d 658 (Ind. Ct. App. 2002).

222. 768 N.E.2d 951 (Ind. Ct. App. 2002).

223. 764 N.E.2d 221, 229 (Ind. 2002).

224. 766 N.E.2d 454 (Ind. Ct. App. 2002).

225. 760 N.E.2d 621 (Ind. Ct. App. 2001).

respect to replacement of drainage tiles within the drainage board's easement area adjacent to a legal drain and that the drainage board itself is a landowner to the extent of such easement for purposes of application of the "common enemy doctrine."

In *Macklin v. United States*,²²⁶ the U.S. Court of Appeals for the Seventh Circuit held that a property owner's claims against the IRS were barred as not timely filed.

In *Mercantile National Bank v. First Builders of Ind., Inc.*,²²⁷ the supreme court overruled a court of appeals decision holding that a subcontractor could recover from the owner of property in which it holds a mechanics lien regardless of the net damages due to the owner from the prime contractor.

In *Murdock Construction Management v. Eastern Star Missionary Baptist Church, Inc.*,²²⁸ the court of appeals held that a construction manager is not entitled to a mechanic's lien to secure the fee due it for providing its construction management services.

In *Network Towers, LLC v. Board of Zoning Appeals of LaPorte County*,²²⁹ the court of appeals held that the undocumented opinions of remonstrators that wireless communication tower would adversely affect their property values was not evidence upon which the board of zoning appeals could deny an application for a conditional use permit.

In *PCL/Calumet v. Entercitement, LLC*,²³⁰ the court of appeals held that certain mortgages had priority over a mechanic's lien.

In *Ransburg v. Richards*,²³¹ the court of appeals held that an exculpation clause in a residential lease whereby the tenant waives claims against the landlord based upon the condition of the premises is void as against public policy to the extent that it applies in the event of the negligence of the landlord because of long-standing rules of tort liability in the landlord-tenant relationship.

In *Schuman v. Kobets*,²³² the court of appeals held that consequential damages are not available in an action by a tenant against the landlord for breach of the implied warranty of habitability.

In *SPCA v. City of Muncie*,²³³ the court of appeals held that a Muncie zoning ordinance prohibits an owner from expanding a non-conforming use beyond the original footprint of the building or structure, unless such expansion is "incidental" to the non-conforming use.

In *State v. Bishop*,²³⁴ the court of appeals held that consistent with *Daugherty v. State*,²³⁵ that a trial court has the discretion to disallow a party's request to

226. 300 F.3d 814 (7th Cir. 2002).

227. 774 N.E.2d 488 (Ind. 2002).

228. 766 N.E.2d 759 (Ind. Ct. App. 2002).

229. 770 N.E.2d 837 (Ind. Ct. App. 2002).

230. 760 N.E.2d 633 (Ind. Ct. App. 2001), *trans. denied*, 783 N.E.2d 697 (Ind. 2002).

231. 770 N.E.2d 393 (Ind. Ct. App.), *trans. denied*, 783 N.E.2d 700 (Ind. 2002).

232. 760 N.E.2d 682 (Ind. Ct. App.), *trans. denied*, 774 N.E.2d 515 (Ind. 2002).

233. 769 N.E.2d 669 (Ind. Ct. App. 2002).

234. 775 N.E.2d 335 (Ind. Ct. App. 2002), *vacated*, 2003 Ind. LEXIS 169 (Ind. 2003).

235. 699 N.E.2d 780 (Ind. Ct. App. 1998).

withdraw its previously-filed exceptions in an eminent domain case, but it should allow the withdrawal of exceptions except in cases where injustice would result.)

In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,²³⁶ the Supreme Court held that a temporary moratorium on developing real property does not constitute a per se partial taking requiring compensation under the Takings Clause of the United States Constitution.

In *Town of Lizton v. Storm*,²³⁷ the court of appeals held that a municipality may not simultaneously annex parcels of land which adjoin each other when only one adjoins the municipality itself.

In *Vadas v. Vadas*,²³⁸ the supreme court held that a couple had only “speculative” interest in their home, owned by husband’s father, because there was no purchase agreement or other evidence of present intention to transfer the house to couple after they “got back on their feet financially.”

236. 122 S.Ct. 1465 (2002).

237. 769 N.E.2d 622 (Ind. Ct. App. 2002).

238. 762 N.E.2d 1234 (Ind. 2002).