

RECENT DEVELOPMENTS IN INDIANA REAL PROPERTY AND RELATED AREAS OF LAW

MARCI A. REDDICK*

As any first year law student quickly discovers, to say that property law is well settled is a gross understatement. With a foundation in English common law dating back centuries, property law provides few opportunities for courts to consider new issues. However, several cases presenting issues of first impression came before Indiana appellate courts during the survey period for this Article.

I. CONVEYANCES

A. Deeds

Two interesting cases concerning partitioning real property came before the Indiana Court of Appeals during the survey period. In *Ramer v. Smith*,¹ members of a family sought to partition property that had been conveyed to them.² Betty Smith and Richard Smith owned about seventy-eight acres of land and permitted Betty's daughter, Janice Ramer, and Janice's husband, Burdette, to construct a home on the land in 1998.³ The Smiths conveyed a 6.6-acre tract of the land to Janice and Burdette on May 17, 2000.⁴ The granting clause of the warranty deed ("Deed I") stated: "RICHARD W. SMITH and BETTY J. SMITH, husband and wife, . . . Conveys and warrants to BURDETTE RAMER and JANICE RAMER, husband and wife" ⁵ As the result of problems with the local zoning authority, the Smiths and the Ramers executed a second warranty deed ("Deed II"), and the granting clause stated: "RICHARD W. SMITH and BETTY J. SMITH, husband and wife, and BURDETTE RAMER and JANICE RAMER, husband and wife, . . . Conveys and warrants to: RICHARD W. SMITH, BETTY J. SMITH, BURDETTE RAMER, and JANICE RAMER, as Joint Tenants With right [sic] of Survivorship" ⁶ Richard died in November of 2004, and Betty filed a petition to partition the property two years later.⁷

The trial court concluded that Deed II conveyed a one-half joint tenancy interest in the property to the Smiths, which they held as tenants by the entireties, and a one-half joint tenancy interest to the Ramers, which they also held as

* Partner, Taft Stettinius & Hollister LLP. B.A., 1978, Indiana University (double degree); J.D., 1984, Indiana University School of Law—Indianapolis. The author thanks Michele Richey, Associate, Taft Stettinius & Hollister LLP, for contributing her excellent editing skills to this Article.

1. 896 N.E.2d 563 (Ind. Ct. App. 2008).
2. *Id.* at 565.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.* at 566.
7. *Id.*

tenants by the entirety.⁸ The court also concluded that Betty succeeded to Richard's interest in the property upon his death.⁹ The trial court did not adjust the partition of the property to include any alleged contribution made by the Ramers to its value.¹⁰ Finally, the court ruled that the property could not be divided into equal shares without physically dividing the residence, and, as a result, it appointed a commissioner to sell the property at a public sale.¹¹

The Indiana Court of Appeals noted that, as a general rule under Indiana law, where a deed conveys real estate to a married couple, they take the property as tenants by the entirety.¹² The court reasoned, therefore, that when two married couples take title to real estate jointly, "each couple takes an undivided one-half interest as tenants by the entirety, which they share as joint tenants with the other couple."¹³ However, a conveyance to two married couples may be treated as a joint tenancy or as a tenancy in common between all four individuals if the deed unambiguously states such an intent.¹⁴

The court found that the granting clause in Deed II expressed the intent to convey the property to the parties as joint tenants, which treated the parties differently in their capacities as grantees than in their capacities as grantors.¹⁵ As a result, the court concluded that Deed II gave Betty, Burdette, and Janice each a one-third undivided interest in the property as joint tenants.¹⁶ Finally, the court recognized the longstanding rule of equity that joint tenants have an equal right to share in the real estate and an equal share upon partition, but that equitable adjustments are only permissible when property is held as tenants in common.¹⁷ The court remanded the case to the trial court to determine the proper method of partitioning the property.¹⁸

A second case where the parties disputed the intent of the language in a deed included elements rivaling those that seem more likely to be found in a script for a reality television show. In *Hardy v. Hardy*,¹⁹ a daughter sought the partition and sale of real estate while her father and brother requested reformation of a warranty deed to create a life estate for her father.²⁰ The father owned eighty acres of Cass County farmland, including a home on a ten-acre tract within the total acreage.²¹ The father faced multiple methamphetamine drug charges in

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 567 (citing *Richards v. Richards*, 110 N.E. 103, 104 (Ind. App. 1915)).

13. *Id.* at 568.

14. *Id.*

15. *Id.*

16. *Id.* at 569.

17. *Id.* (citing *Cunningham v. Hastings*, 556 N.E.2d 12, 14 (Ind. Ct. App. 1990)).

18. *Id.* at 570.

19. 910 N.E.2d 851 (Ind. Ct. App. 2009).

20. *Id.* at 854.

21. *Id.* at 853.

Oklahoma and Indiana and owed five years of federal income taxes.²² To avoid the possibility of being hit with a controlled substance excise tax if he was convicted in Indiana, the possible forfeiture of his real estate, a fine in Oklahoma, and the potential for a federal income tax lien attaching to the real estate, the father conveyed seventy acres of his land to his son and daughter as joint tenants with the right of survivorship.²³ The daughter, age seventeen, was not told of the conveyance.²⁴ She learned that she owned the property with her brother a year later when her father and brother asked her to quitclaim two acres to her brother and his then-wife to build a home.²⁵ She signed the quitclaim deed but did not receive the sale price of \$4,000 that her father promised to pay her for the property.²⁶ The father was convicted of methamphetamine offenses and was incarcerated in Oklahoma and Indiana.²⁷ At some point during his incarceration, the father conveyed the remaining ten acres of the farmland to his son to avoid forfeiture, seizure, or a tax lien.²⁸ In addition, father and son leased sixty-eight acres of the property for three years and collected over \$52,000 in rent without telling the daughter.²⁹ The rent proceeds were deposited into an account for the sole benefit of the father.³⁰

The daughter filed a complaint requesting partition and sale of the real estate, an accounting from her brother, and a determination of whether she was entitled to any credits or reimbursements.³¹ The son filed an answer requesting reformation of the deed to honor his father's intent to establish a constructive trust to protect the interests of father, son, and daughter.³² The father joined the action later as a party defendant.³³ The father's former wife and the mother of the son and daughter testified before the trial court on behalf of the father that he had conveyed the seventy acres to the son and daughter intending to reserve a life estate for himself and that, upon his death, the daughter and son would inherit the land.³⁴

The trial court awarded the daughter \$22,830, her share of the rent, and granted the daughter's request to partition the property.³⁵ The court further held that the son and daughter owned the property, but it could not be partitioned without damaging the owners' interests. Thus, the court ordered the property

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 853-54.

30. *Id.*

31. *Id.* at 854.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 855.

sold.³⁶ The father and son appealed.³⁷

The facts of the case provided the perfect framework for the Indiana Court of Appeals to analyze the equitable doctrines of “unclean hands” and failure to “do equity.”³⁸ The court determined that the evidence clearly demonstrated that the father and son could not meet either equitable standard and, as a result, held that they were not entitled to the equitable remedy of reformation of the deed.³⁹ In addition, the court held that the language of the deed could not be construed as creating an implied trust requiring son and daughter to re-convey the property to the father.⁴⁰ The court concluded that the father’s fraudulent transfer to avoid creditors (including federal tax obligations), failure to have clean hands, and failure to do equity supported the trial court’s judgment that the property should be partitioned and sold.⁴¹

The race to the courthouse has rarely been as complicated as it was in the case of *Weathersby v. JPMorgan Chase Bank, N.A.*⁴² In *Weathersby*, a bank brought a declaratory judgment action against another mortgagee and deed holder alleging that the mortgage and deed were invalid because they were recorded outside the chain of title.⁴³ The trial court granted summary judgment to the bank resulting in the appeal.⁴⁴

Property in Gary, Indiana was transferred to the Blair Family Trust by a warranty deed recorded on June 25, 1997.⁴⁵ This transfer set the stage for the creation of the first chain of title to the property.

The Blair Trust transferred the property to the 5285 Adams Trust by a quitclaim deed dated October 8, 1998, recorded October 13, 1998.⁴⁶ Attorney Michael Delfine, who served as trustee for the Adams Trust, prepared and signed the deed.⁴⁷ Delfine transferred the property to Tony Blair, individually, via a trustee’s deed, which was recorded June 17, 1999.⁴⁸ Blair transferred the property back to the Adams Trust with a quitclaim deed dated and recorded July 19, 1999; however, he also transferred the property to Bessie Lewis by warranty deed dated November 23, 1999, recorded January 20, 2000.⁴⁹ Lewis gave JPMorgan Chase a mortgage on the property on the date that she received the

36. *Id.*

37. *Id.*

38. *Id.* at 856-57.

39. *Id.* at 858.

40. *Id.*

41. *Id.* at 859.

42. 906 N.E.2d 904 (Ind. Ct. App.), *reh’g denied*, 2009 Ind. LEXIS 1233 (Ind. July 22, 2009).

43. *Id.* at 905.

44. *Id.* at 907.

45. *Id.* at 906.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

deed. The mortgage was also recorded on January 20, 2000.⁵⁰

The second chain of title for the property was created when Delfine, also trustee of the Blair Trust, transferred the property by quitclaim deed to Financial Help & Consulting Services (FHCS) on July 24, 1998, recorded November 13, 1998. The transfer occurred a month after the quitclaim deed from the Blair Trust to the Adams Trust was recorded on October 13, 1998.⁵¹ FHCS conveyed the property back to the Blair Trust by corporate warranty deed dated March 29, 1999, recorded April 9, 1999.⁵² Then, on August 4, 1999, Delfine, in his capacity as trustee of the Blair Trust, gave a mortgage on the property to Harjit Sahi as security for the payment of a \$37,440.80 promissory note. That mortgage was recorded April 9, 1999.⁵³ Sahi filed a complaint to foreclose on the mortgage and obtained a judgment against the Blair Trust in September 2004.⁵⁴ Sahi purchased the property at a sheriff's sale and received a sheriff's deed dated March 4, 2005.⁵⁵

Sahi transferred the property to Weathersby by warranty deed dated May 6, 2005, recorded May 26, 2005.⁵⁶ Weathersby gave PHH Mortgage Services a mortgage on the property dated May 25, 2005, recorded May 26, 2005.⁵⁷ PHH Mortgage Services assigned the mortgage to Mortgage Electronic Registration Systems, Inc. (MERS) less than two months later.⁵⁸

Chase filed a declaratory action against Weathersby and MERS seeking a declaration that since the Weathersby deed and the MERS mortgage were recorded outside the proper chain of title, they were invalid.⁵⁹ Chase amended the complaint adding the Adams Trust as a defendant alleging it had no right, lien, or other interest in the property, and therefore, Lewis owned the property and Chase's mortgage was valid.⁶⁰ Chase then followed with a motion for summary judgment.⁶¹ The trial court ruled in favor of Chase, invalidating the Weathersby deed and MERS mortgage.⁶²

The Indiana Court of Appeals observed that to qualify as a bona fide purchaser, one must purchase the property "in good faith, for valuable consideration, and without notice of the outstanding rights of others."⁶³ The court noted that it recognizes both constructive and actual notice in analyzing

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 907.

62. *Id.* at 908.

63. *Id.* at 909 (quoting *Bank of New York v. Nally*, 820 N.E.2d 644, 648 (Ind. 2005)).

whether a party has acquired property as a bona fide purchaser in good faith.⁶⁴

The court discussed the Indiana recording statute, which requires a mortgagor in interest in land to be recorded.⁶⁵ It also explained how the concept of “chain of title” to property functions in Indiana and what happens in a title search.⁶⁶ The court then discussed the presumption under Indiana law that a purchaser of real estate is presumed to have reviewed the records of deeds and other documents that are part of the chain of title in the Recorder’s Office in the county where the real estate is located, and, as a result, a purchaser is charged with notice of all facts recited in the records.⁶⁷ Finally, the court mentioned the general rule that when multiple parties claim adverse interests in the same land, the date of recording these interests provides the mechanism in which to determine priority.⁶⁸

The court sorted through all the transactions in the chains of title for the property and concluded that the central issue was whether Adams Trust had actual knowledge in October 1998 of the prior unrecorded deed given to FHCS.⁶⁹ The court held that there was a question of fact concerning the trustee’s knowledge and whether the Adams Trust was a bona fide purchaser.⁷⁰ For those reasons, the court reversed the grant of summary judgment in favor of Chase and remanded the case to the trial court to address these issues.⁷¹

The much simpler case of *Kumar v. Bay Bridge, LLC*⁷² dealt with a purchaser of property at a tax sale who failed to record the tax deed. Defendant, Atul Kumar, purchased property in Cedar Lake, Indiana at a tax sale but did not record his deed.⁷³ After the tax deed was issued, the bank that owned the property conveyed it to Bay Bridge, LLC via a trustee’s deed.⁷⁴ Bay Bridge filed a quiet title action in January 2007, after discovering that Kumar claimed an interest in the real estate.⁷⁵ Kumar recorded his tax deed on February 6, 2007.⁷⁶ Both parties filed motions for summary judgment.⁷⁷ Bay Bridge alleged that Kumar’s tax deed was either void or a bona fide purchaser of the property.⁷⁸ Kumar countered that the tax sale provided adequate notice to the bank, as the record

64. *Id.*

65. *Id.*; IND. CODE § 32-21-4-1 (2008).

66. *Weathersby*, 906 N.E.2d at 910.

67. *Id.*

68. *Id.*

69. *Id.* at 911.

70. *Id.*

71. *Id.* at 911-12.

72. 903 N.E.2d 114 (Ind. Ct. App. 2009).

73. *Id.* at 114.

74. *Id.* at 115.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

owner of the real estate, of his purchase of the real estate at the tax sale.⁷⁹

The court held that the deed, which was outside the chain of title until it was recorded, did not provide notice to Bay Bridge, which made Bay Bridge a bona fide purchaser for value.⁸⁰ The court also held that constructive notice is only provided when a deed or mortgage is properly acknowledged and placed on the record as required by the Indiana recording statute.⁸¹

II. RESTRICTIVE COVENANTS

The tension between obtaining a variance from local zoning ordinances and enforcing restrictive covenants in a development often plays out before boards of zoning appeals, as well as in trial courts in Indiana. The case of *Highland Springs South Homeowners Ass'n v. Reinstatler*⁸² provides a good summary of how conflicts between zoning ordinances and restrictive covenants are resolved. The Highland Springs South Homeowners Association (HOA) brought an action against Vanessa Reinstatler to obtain an injunction to prevent her from building an addition that would violate the restrictive covenants of the subdivision.⁸³ Property in the Highland Springs South subdivision is subject to restrictive covenants requiring a property owner to submit plans to the HOA for review before construction to make certain that the plans do not violate the restrictive covenants of the subdivision.⁸⁴ Another covenant requires that the design or color scheme is in harmony with the general surroundings of the subdivision, and that proposed improvements are not contrary "to the interests, welfare, or rights" of the other homeowners.⁸⁵

Reinstatler requested approval from the HOA for a first floor room addition to her home.⁸⁶ The HOA denied the request saying that the addition would violate the set back guidelines for the subdivision, would not be in harmony with the general surroundings of the lot, and would be contrary to the interests, welfare, and rights of the other owners.⁸⁷

The day before the HOA took action, Reinstatler filed a petition with the McCordsville Division of the Hancock County Area Board of Zoning Appeals (BZA) seeking approval of a variance of the set back standards of the zoning ordinance to permit the construction of the addition.⁸⁸ The BZA granted the variance with the conditions that the addition comply with the plans submitted with the petition and that the color of the addition match the home to the

79. *Id.*

80. *Id.* at 117.

81. *Id.*

82. 907 N.E.2d 1067 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 560 (Ind. 2009).

83. *Id.* at 1069.

84. *Id.* at 1069-70.

85. *Id.* at 1070.

86. *Id.*

87. *Id.*

88. *Id.*

satisfaction of the Hancock County Planning Director.⁸⁹ The BZA also gave Reinstatler its approval to obtain building permits.⁹⁰

Shortly thereafter, the HOA sought injunctive relief to prevent Reinstatler from constructing the proposed room addition because it violated set back requirements of the covenants of the subdivision.⁹¹ The trial court upheld the BZA's decision, and the HOA appealed.⁹²

As part of its analysis, the Indiana Court of Appeals explained that a restrictive covenant is governed by contract law and is an express contract between the grantor and grantee restraining the grantee's use of the land.⁹³ Further, in Indiana, restrictive covenants have a strong presumption of validity because a property owner purchases property knowing and accepting the restrictions of the covenants.⁹⁴ There is also a long-established Indiana rule that zoning ordinances and statutes cannot be used to remove valid restrictive covenants from real estate.⁹⁵ The court held that although Reinstatler received a variance from the BZA, *implementation* of that variance may not violate the restrictive covenants on the property.⁹⁶ The court held that "[t]he BZA decision is not relevant and does not deprive the trial court of jurisdiction in this action to enforce the restrictive covenants."⁹⁷

In *Applegate v. Colucci*,⁹⁸ the Indiana Court of Appeals addressed a question of first impression as part of a controversy about enforcing a subdivision's covenants—whether cabin rentals constituted a residential use according to a restrictive covenant.⁹⁹ Neighbors in a subdivision along the Ohio River sought to enforce restrictive covenants against Colucci, a property owner who began renting cabins after constructing a home and a cabin on each of three lots owned by him.¹⁰⁰ Colucci formed Colucci Cabin Rentals, LLC (collectively, "Colucci") to rent the cabins and used half of a garage on one of the lots with a cabin and a residence for a real estate office.¹⁰¹ The neighbors filed a complaint alleging that renting the cabins was not a "residential use," that using part of the garage as a

89. *Id.*

90. *Id.*

91. *Id.* at 1070-71.

92. *Id.* at 1071.

93. *Id.* at 1073 (citing *Villas W. II of Willow Ridge Homeowner's Ass'n v. McGlothin*, 885 N.E.2d 1274, 1278 (Ind. 2008), *cert. denied*, 129 S. Ct. 1527 (2009)). For a discussion of *Villas West II*, see Marci A. Reddick & Danielle B. Tucker, *Property Law: Recent Developments in Indiana Real Property Law*, 42 IND. L. REV. 1187, 1192-96 (2009).

94. *Highland Springs*, 907 N.E.2d at 1073 (citing *Villas West II*, 885 N.E.2d at 1278-79).

95. *Id.* (quoting *Suess v. Vogelgesang*, 281 N.E.2d 536, 541 (Ind. App. 1972)).

96. *Id.*

97. *Id.*

98. 908 N.E.2d 1214 (Ind. Ct. App. 2009), *trans. denied*, 2010 Ind. LEXIS 7 (Ind. Jan. 7, 2010).

99. *Id.* at 1219.

100. *Id.* at 1216-17.

101. *Id.* at 1217.

real estate office was not a residential use, and that constructing multiple dwellings on the same lot violated the covenant prohibiting subdividing lots.¹⁰² The trial court issued a partial summary judgment in favor of the neighbors on the issue of multiple dwellings on the same lot and partial summary judgment in favor of Colucci on the rental issues.¹⁰³

The Indiana Court of Appeals tackled the residential use covenant first and observed that the precise issue appeared to be an issue of first impression, but also noted that in *Stewart v. Jackson*,¹⁰⁴ the court faced the issue of whether an unlicensed daycare operated out of a home violated restrictive covenants in that neighborhood.¹⁰⁵ In *Stewart*, the homeowner cared for six children, including her child and her nephew.¹⁰⁶ The *Stewart* court found that the daycare was minimally obtrusive and, relying on Indiana's public policy favoring home daycare as well as the plain and ordinary meaning of the term "residential purpose," concluded that the unlicensed home daycare was a residential use not violating restrictive covenants.¹⁰⁷ More recently, in *Lewis-Levett v. Day*,¹⁰⁸ a case reported in last year's survey article,¹⁰⁹ the Indiana Court of Appeals examined whether a larger, state licensed daycare operation was residential or whether it violated the restrictive covenants in the neighborhood. In *Lewis-Levett*, the homeowner cared for twelve children and sixty percent of her home was used for the daycare business.¹¹⁰ The court drew a distinction between licensed and unlicensed daycare facilities and concluded that where a daycare facility is the extensively regulated type, it is a business enterprise, not a residential use.¹¹¹

The *Applegate* court then contrasted these cases against whether Colucci's short-term rental of cabins constituted a residential use. The covenants imposed on Colucci's property stated, "[n]othing herein contained shall prevent the *leasing or renting* of property or structures for residential use."¹¹² The court analyzed the plain meanings of the term "residential use" and held that even though the renters only used the cabins on a temporary basis, the use was residential and therefore not at odds with the covenants.¹¹³ The court then held that there was a question of fact whether maintaining a real estate office in the neighborhood violated the covenants and returned this portion of the case to the trial court for an evidentiary hearing.¹¹⁴ Finally, as to the issue of the subdivision of Colucci's lots, the court

102. *Id.* at 1217-18.

103. *Id.* at 1218.

104. 635 N.E.2d 186 (Ind. Ct. App. 1994).

105. *Applegate*, 908 N.E.2d at 1219.

106. *Stewart*, 635 N.E.2d at 192.

107. *Id.* at 193.

108. 875 N.E.2d 293 (Ind. Ct. App. 2007).

109. Reddick & Tucker, *supra* note 93, at 1196.

110. *Lewis-Levett*, 875 N.E.2d at 294.

111. *Id.* at 297-98.

112. *Applegate*, 908 N.E.2d at 1220.

113. *Id.*

114. *Id.* at 1221.

concluded that, although more than one structure had been built upon a lot, it did not constitute subdividing the lot and there were no restrictions in the covenants prohibiting it.¹¹⁵

III. LAND USE

A case reported in the 2009 survey period surfaced again as a vested rights case in the Indiana Court of Appeals this term, *City of New Haven v. Flying J, Inc.*¹¹⁶ The prior case, “Flying J I,”¹¹⁷ concerned an appeal of the Board of Zoning Appeals’ (BZA) decision rejecting Flying J’s plan to build a travel plaza.¹¹⁸ The zoning director of the City of New Haven determined that certain activities proposed at the travel plaza were not permitted in a district zoned C-1 including tractor-trailer truck fueling stations, services for recreational vehicles, RV waste tank disposal facilities, and parking for up to eleven RVs and 187 trucks at a time.¹¹⁹ Flying J appealed the zoning director’s determination to the New Haven BZA.¹²⁰ The BZA found that the fueling stations were permitted in a C-1 district but agreed with the zoning director that the other uses were prohibited.¹²¹ Flying J then filed a petition for writ of certiorari with the trial court, which upheld the BZA’s decision.¹²² In the appeal of *Flying J I*, the Indiana Court of Appeals held that the uses were permitted in a C-1 district and remanded the case to the trial court with instructions to enter summary judgment in favor of Flying J.¹²³

During the appeal process, the City of New Haven amended its zoning ordinance restricting the size of service stations permitted in a C-1 district, and, as a result of these changes, Flying J’s travel plaza would no longer comply with the ordinance.¹²⁴ The city notified the public of the proposed amendment to the ordinance by publication, but Flying J was not aware of the change and submitted a development plan to the zoning director, which was again rejected.¹²⁵ Flying J appealed the zoning director’s decision to the BZA and presented evidence that it had spent more than \$4 million in developing the proposed travel plaza.¹²⁶ The BZA rejected Flying J’s vested rights argument; however, on appeal the trial court reversed the BZA’s decision and directed approval of Flying J’s

115. *Id.* at 1221-22.

116. 912 N.E.2d 420 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 560 (Ind. 2009).

117. *Flying J, Inc. v. City of New Haven, Bd. of Zoning Appeals*, 855 N.E.2d 1035 (Ind. Ct. App. 2006).

118. *Flying J II*, 912 N.E.2d at 421.

119. *Id.* at 421-22.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 423.

126. *Id.*

development plan.¹²⁷ This ruling resulted in an appeal by the BZA, “Flying J II.”¹²⁸

The Indiana Court of Appeals examined whether the amended zoning ordinance applied to Flying J’s planned travel plaza.¹²⁹ The court acknowledged that zoning ordinances are subject to vested property rights and that a “nonconforming use” cannot be terminated because of a subsequent amendment to a zoning ordinance.¹³⁰ The court explained that if a landowner’s use of the property begins before that use is non-conforming, the landowner has acquired a vested property right; therefore, a legislative body may not terminate that right without triggering a due process or Takings Clause claim under the Fifth Amendment of the U.S. Constitution (applicable to Indiana through the Fourteenth Amendment’s Due Process Clause).¹³¹

The BZA argued on appeal that despite Flying J’s significant expenditures, it had not commenced construction of the travel plaza, and, as a result, it did not have a vested right before amendment of the zoning ordinance.¹³² In order to determine whether Flying J could establish a vested property right before commencing construction, the court of appeals considered precedent handed down in a noteworthy line of cases¹³³—*Pinnacle I*,¹³⁴ *II*,¹³⁵ and *III*.¹³⁶ In *Pinnacle I*, the Indiana Supreme Court held that simply filing an application for a building permit is not sufficient to establish a vested property right.¹³⁷ After granting a rehearing, the Indiana Supreme Court, in *Pinnacle II*, clarified that vested rights could accrue before construction.¹³⁸ On remand to the Indiana Court of Appeals in *Pinnacle III*, the court of appeals followed the Indiana Supreme Court’s lead by holding that “[t]here is no bright line rule that construction must have commenced in order to show a vested right.”¹³⁹ After considering this line of cases, the court of appeals in *Flying J II* held that the trial court correctly ruled that the zoning ordinance amendments were subject to Flying J’s vested rights in the property to develop it as a travel plaza.¹⁴⁰

127. *Id.*

128. *Id.*

129. *Id.* at 424.

130. *Id.*

131. *Id.* (quoting *Metro Dev. Comm’n of Marion County v. Pinnacle Media, LLC (Pinnacle I)*, 836 N.E.2d 422, 424 (Ind.), *reh’g granted, opinion clarified*, 846 N.E.2d 654 (Ind. 2006)).

132. *Id.* at 425.

133. *Id.* at 424-27.

134. *Id.* at 422.

135. *Metro. Dev. Comm’n of Marion County v. Pinnacle Media, LLC (Pinnacle II)*, 846 N.E.2d 654 (Ind. 2006).

136. *Metro. Dev. Comm’n of Marion County v. Pinnacle Media, LLC (Pinnacle III)*, 868 N.E.2d 894 (Ind. Ct. App. 2007).

137. 836 N.E.2d at 429.

138. 846 N.E.2d at 655.

139. 868 N.E.2d at 900.

140. *City of New Haven v. Flying J., Inc.*, 912 N.E.2d 420, 427 (Ind. Ct. App. 2009).

Indiana courts are frequently asked to determine who may protest the decision of a land-use body. In *Liberty Landowners Ass'n v. Porter County Commissioners*,¹⁴¹ the Indiana Court of Appeals followed precedent by holding that a homeowner's association did not have standing to sue over the rezoning of property despite arguing that its claim survived under a "public standing doctrine."¹⁴² Northwest Indiana Health System (NIHS) filed an application with the Porter County Plan Commission requesting an amendment to the zoning map so that land could be converted from residential zoning to an institutional category permitting it to construct a hospital.¹⁴³ Liberty Landowners remonstrated against the petition at the county commissioners' hearing arguing that rezoning the property to an institutional district would be inconsistent with the adjacent use provisions of the Porter County Unified Development Ordinances.¹⁴⁴ Despite Liberty Landowners' remonstrance, the commissioners approved the rezoning.¹⁴⁵ Following the commissioners' decision, Liberty Landowners' filed a complaint for declaratory judgment against the commissioners seeking a determination that the rezoning action was arbitrary and capricious because (1) the commissioners did not consider the incompatibility of an institutional zone adjacent to R-1 zones; and (2) the vote of one commissioner was invalid due to a conflict of interest.¹⁴⁶ NIHS intervened in the proceedings joining the commissioners in a motion to dismiss Liberty Landowners' complaint for lack of standing, because NIHS and the commission argued that Liberty Landowners did not own real estate in proximity to the rezoned property.¹⁴⁷ The trial court agreed with NIHS and the commissioners concluding that Liberty Landowners did not have standing because it did not own any real estate and it had not offered evidence that it had suffered a pecuniary loss as the result of the re-zoning.¹⁴⁸

On appeal, Liberty Landowners made an unsuccessful attempt at arguing that a doctrine known as "public standing" permitted it to proceed with its claims against the commissioners.¹⁴⁹ The Indiana Court of Appeals rejected this argument noting that Indiana law is well settled that to challenge a rezoning ordinance, one must have "a property right or some other personal right and a pecuniary injury not common to the community as a whole."¹⁵⁰ The court explained that a person must be "aggrieved" by BZA's decision to have standing to seek judicial review was well established in *Bagnall v. Town of Beverly*

141. 913 N.E.2d 1245 (Ind. Ct. App. 2009).

142. *Id.* at 1250-51.

143. *Id.* at 1248.

144. *Id.*

145. *Id.*

146. *Id.* at 1248-49.

147. *Id.* at 1249.

148. *Id.*

149. *Id.* at 1250.

150. *Id.*

Shores.¹⁵¹ The court also observed that it has “consistently held that landowner associations lack standing to challenge zoning decisions.”¹⁵² Furthermore, “[the Indiana] Supreme Court recently determined that a landowner whose property line was less than a mile from a proposed confined animal feeding operation was not an ‘aggrieved party’ within the meaning of *Bagnall*.”¹⁵³ The court ruled that Liberty Landowners did not raise the argument of public standing before the trial court and, as a result, it was waived on appeal.¹⁵⁴ Regardless of the waiver, the court also observed that “the public standing doctrine or the availability of taxpayer or citizen standing is limited to extreme circumstances and should be applied with ‘cautious restraint.’”¹⁵⁵

Confined animal feeding operations (CAFO) are frequently in the news and just as frequently the subject of hotly contested proceedings before local land use boards. In *Thomas v. Blackford County Area Board of Zoning Appeals*,¹⁵⁶ the Indiana Supreme Court addressed the issue of standing in the appeal of the approval of a CAFO by the Blackford County Area Board of Zoning Appeals (BZA).¹⁵⁷ Thomas appealed the BZA’s decision approving a special exception for the CAFO alleging that she was an “aggrieved party” because her property line was approximately a third of a mile from the proposed CAFO.¹⁵⁸

The trial court rejected Thomas’ claim in a summary judgment proceeding and the Indiana Court of Appeals reversed and remanded the case to permit the parties to fully present evidence; however, in the interim, a petition to transfer was granted by the Indiana Supreme Court before the evidentiary hearing could take place.¹⁵⁹ The court held that the case is governed by the rule in *Bagnall v. Town of Beverly Shores*,¹⁶⁰ which held that a person seeking judicial review of a BZA’s decision must be “aggrieved” in that the petitioner,

must experience a substantial grievance, a denial of some personal or property right or the imposition of a burden or obligation. The board of zoning appeals’s decision must infringe upon a legal right of the petitioner that will be enlarged or diminished by the result of the appeal and the petitioner’s resulting injury must be pecuniary in nature. A party seeking to petition for certiorari on behalf of a community must show some special injury other than that sustained by the community as a

151. 726 N.E.2d 782 (Ind. 2000).

152. *Liberty Landowners*, 913 N.E.2d at 1250.

153. *Id.* at 1251 (citing *Thomas v. Blackford County Area Bd. of Zoning Appeals*, 907 N.E.2d 988, 991 (Ind. 2009)).

154. *Id.*

155. *Id.* (quoting *State ex rel. Cittadine v. Ind. Dep’t of Transp.*, 790 N.E.2d 978, 983 (Ind. 2003)).

156. 907 N.E.2d 988 (Ind. 2009).

157. *Id.* at 990.

158. *Id.*

159. *Id.*

160. *Id.* at 991 (citing *Bagnall v. Town of Beverly Shores*, 726 N.E.2d 782 (Ind. 2000)).

whole.¹⁶¹

Thomas argued that she was an aggrieved party because the CAFO would significantly affect the value of her home.¹⁶² Thomas and Oolman presented evidence concerning the impact of CAFOs on residential property values, including expert testimony that Thomas's property value would decrease by seventy percent.¹⁶³ However, on cross-examination, Oolman demonstrated that the experts relied on articles from 1999 and 2001 that used data from other states permitting more intense operations involving swine, not cows.¹⁶⁴ Oolman refuted Thomas's property value argument with expert testimony that real estate within two miles of four dairy CAFOs in Huntington County sold quicker and at a higher price than other real estate in the county.¹⁶⁵ The court affirmed the trial court's ruling that Thomas could not establish she was an "aggrieved party" to have standing to appeal the BZA decision.¹⁶⁶

In *Bonewitz v. Parker*,¹⁶⁷ the Indiana Court of Appeals held that even if a use is approved as the result of a variance, it still may constitute a nuisance.¹⁶⁸ Parker owned farmland and sold a portion of it with the farmhouse to Bonewitz.¹⁶⁹ Parker later obtained a variance to produce dry mycelium, which is used for animal feed.¹⁷⁰ Parker built a furnace using sawdust as fuel to dry the mycelium to produce "food-grade" mycelium.¹⁷¹ The business ran twenty-four hours a day, seven days a week.¹⁷² Bonewitz complained of emissions from the drying process, which included gases and sawdust ash discharged from a smokestack about 100 to 150 feet from Bonewitz's home.¹⁷³ In addition, three to five semi-tractor trailers delivered wet mycelium to the Parker facility each day.¹⁷⁴ Product was stored outside and emitted a strong odor.¹⁷⁵ Bonewitz filed a complaint alleging that Parker's business constituted a nuisance and sought a total permanent injunction or, in the alternative, damages.¹⁷⁶ The trial court entered a partial permanent injunction enjoining Parker from unloading sawdust outside

161. *Id.* (quoting *Bagnall*, 726 N.E.2d at 786).

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. 912 N.E.2d 378 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 558 (Ind. 2009).

168. *Id.* at 382.

169. *Id.* at 379.

170. *Id.*

171. *Id.*

172. *Id.* at 380.

173. *Id.* at 379.

174. *Id.* at 380.

175. *Id.*

176. *Id.*

a pole building that contained the sawdust and did not award damages.¹⁷⁷

The Indiana Court of Appeals observed that operating a business according to local ordinances and regulations does not necessarily mean that such use of property is reasonable.¹⁷⁸ Whether a nuisance exists depends upon the effect of the use on the neighbors in the particular circumstances and locality; it does not solely rest upon whether one operates the business within the confines of particular authority or a permit.¹⁷⁹ The court found that the evidence clearly demonstrated that Bonewitz suffered unreasonable infringements on the use and enjoyment of his home because of Parker's business.¹⁸⁰ The court concluded that Parker conducted a commercial business that is not typical of farming operations, defeating Parker's arguments that it was within the permitted use.¹⁸¹ The court remanded the case to the trial court to determine whether Bonewitz could be made whole with a money judgment, noting that an injunction is only available if a remedy at law is inadequate.¹⁸²

The Seventh Circuit Court of Appeals took up two Indiana cases concerning adult bookstores during the survey period. In *Annex Books, Inc. v. City of Indianapolis*,¹⁸³ the Seventh Circuit Court of Appeals ordered the U.S. District Court for the Southern District of Indiana to hold an evidentiary hearing on whether the restricted hours in the recently revised adult business ordinance of the City of Indianapolis violated Annex Books' constitutional rights.¹⁸⁴ The City of Indianapolis amended its adult business ordinance in 2003 expanding the definition of "adult entertainment business" to include a retail business where twenty-five percent or more of its space or inventory is for adult literature, films, or devices or a business with twenty-five percent or more of its revenue derived from adult-themed items.¹⁸⁵ Before the amendment, the definition was broader and the requirement was fifty percent.¹⁸⁶ The amended ordinance also required adult entertainment businesses to be licensed, well lit, sanitary, and closed on Sundays or between midnight and ten a.m. on other days of the week.¹⁸⁷

The only issue brought before the Seventh Circuit was whether the definition of "adult entertainment business," and its corresponding limits on the hours of operations that other general book stores and video outlets do not have, violates the owner's constitutional rights.¹⁸⁸ Chief Judge Easterbrook wrote that the city incorrectly assumed that any empirical study of morality offenses near an adult

177. *Id.*

178. *Id.* at 382.

179. *Id.* at 384.

180. *Id.*

181. *Id.*

182. *Id.* at 384-85.

183. 581 F.3d 460 (7th Cir. 2009).

184. *Id.* at 466-67.

185. *Id.* at 461.

186. *Id.*

187. *Id.*

188. *Id.*

business in any city justifies a wide range of legal restrictions.¹⁸⁹ Easterbrook held that the city must demonstrate some basis upon which to regulate adult businesses that effectively suppresses the adverse secondary effects of adult businesses (crime and disorderly conduct) without running afoul of the constitutional right to free speech.¹⁹⁰ He pointed out that the rational-relation test does not apply to the analysis requiring the city to provide evidence supporting the benefits of the restrictions in the ordinance.¹⁹¹

The Seventh Circuit decided *New Albany DVD, LLC v. City of New Albany*¹⁹² a week after *Annex Books*. *New Albany DVD* concerned a section 1983 challenge to a city ordinance prohibiting operation of a sexually oriented business within 1,000 feet of a church or residential district.¹⁹³ Chief Judge Easterbrook ordered an injunction to remain in place pending the outcome of an evidentiary hearing consistent with its decision in *Annex Books* to determine whether sufficient evidence existed to justify the New Albany ordinance.¹⁹⁴

Determining whether a practical difficulty exists in order to grant a variance of development standards can be a challenging question for boards of zoning appeals. In *Town of Munster Board of Zoning Appeals v. Abrinko*,¹⁹⁵ the property owner received a variance of development standards from the Munster Board of Zoning Appeals (BZA) to permit the construction of a single-family dwelling contrary to the local setback requirements.¹⁹⁶ The city filed a petition for writ of certiorari to appeal the BZA's decision, and the trial court reversed citing that there was no practical difficulty in developing the property based on the standards found in Indiana Code section 36-7-4-918.5.¹⁹⁷

The lot was described as a "reverse pie shape" and the property owner wanted to reduce the rear yard setback from twenty-five percent, which was required by the city ordinance, to twenty percent.¹⁹⁸ Neighbors remonstrated at the BZA hearing that the house was too large for the lot and that the value of homes in the area would be reduced if the variance was granted.¹⁹⁹ The BZA approved the variance petition; but in the writ case, the trial court held that the BZA's finding of practical difficulty was not supported by substantial evidence and denied the variance.²⁰⁰ Explaining its decision, the court held that drawings alone were not adequate to support the practical difficulty finding, even if the

189. *Id.* at 463.

190. *Id.*

191. *Id.*

192. 581 F.3d 556 (7th Cir. 2009).

193. *Id.* at 556-57.

194. *Id.* at 561.

195. 905 N.E.2d 488 (Ind. Ct. App. 2009).

196. *Id.* at 490-91.

197. *Id.* at 491.

198. *Id.*

199. *Id.*

200. *Id.*

BZA ignored the option of reducing the size of the house to fit the lot.²⁰¹ The court pointed out that the BZA never considered other options for the landowner to comply with the local ordinance.²⁰² As a result, it held that the BZA's "finding of a practical hardship [did] not rest upon a rational basis, since the evidence supporting [the] finding [was] so meager."²⁰³

The Indiana Court of Appeals agreed with the trial court that the BZA's record lacked significant evidence of probative value to demonstrate practical difficulties, as required under the statute.²⁰⁴ The court observed that the standard of practical difficulty has generally required an area variance, which it defined as one that does not affect the use of the land, is less drastic in effect, and does not pose a threat of an incompatible use in the neighborhood.²⁰⁵ The court also noted to determine the existence of a practical difficulty, a BZA may also examine whether the harm "is self-created or self-imposed," as well as whether any feasible alternative is available within the terms of the ordinance that will achieve the goals of the property owner.²⁰⁶ Abrinko testified that the house could fit on the lot if it were reduced by three to four hundred square feet.²⁰⁷ The builder's testimony inferred that a smaller house meant less profit and perhaps that was how the BZA concluded that the smaller house would cause significant economic injury.²⁰⁸ The court held that the record did not contain evidence establishing either economic impact if the home was built according to the standards of the ordinance or that the pie shape of the lot created a practical difficulty preventing the property owner from constructing a home.²⁰⁹

IV. PRIORITY OF REAL PROPERTY LIENS

In the challenging economic climate during the survey period, many mortgages continue to be foreclosed upon with attendant disputes concerning the rights of secured parties and the priority of various liens on properties. The Indiana Court of Appeals had an opportunity to examine the question of merger as it relates to strict foreclosure of a mortgage lien in the case of *Deutsche Bank National Trust Co. v. Mark Dill Plumbing Co.*²¹⁰ The bank foreclosed the mortgage it held on the debt of Mark Dill Plumbing Company and requested that the trial court extinguish the junior liens.²¹¹ The trial court denied the bank's

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.* at 492.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* at 493.

209. *Id.*

210. 908 N.E.2d 1273 (Ind. Ct. App. 2009).

211. *Id.* at 1274.

request, and its decision was affirmed on appeal.²¹² The bank petitioned for rehearing to clarify the court's prior ruling and requested that the court instruct the trial court about the order of priority for payment among the junior lienholders.²¹³ It also sought an instruction from the court to inform the trial court that it could order junior lien holders to redeem the property from the bank instead of ordering a second sheriff's sale of the property.²¹⁴ The Indiana Land Title Association was permitted to file an amicus brief supporting the bank's position.²¹⁵

The court reviewed the merger doctrine and noted that, unless a written instrument provides otherwise, when a mortgagee acquires fee simple title to mortgaged property, the mortgage merges with the title to the property and thereby extinguishes the mortgage lien.²¹⁶ The court explained, however, that if the writing is ambiguous, courts will presume that merger was not intended if it will benefit the mortgagee.²¹⁷ The "anti-merger rule" allows the mortgagee to prohibit junior lien holders from moving up in priority and foreclosing on the property, thereby further reducing the mortgagee's recovery because it preserves the right of the mortgagee to be the sole lienholder to re-foreclose or resell the property.²¹⁸ The anti-merger rule also guarantees the mortgagee's priority in any proceeds.²¹⁹ The court held that merger did not occur because it would violate principles of equity or harm the bank's interest.²²⁰ As a result, the priority of the junior lienholders was unchanged, and the court refused to determine the priority of the junior lienholders.²²¹ The court decided to let the trial court determine "whether to order another sheriff's sale or provide another remedy equitable to the parties" including giving the junior lienholders an opportunity to purchase the property from the bank for the full amount under the mortgage,²²² consistent with the rule set forth in *Hosford v. Johnson*.²²³

In *Lincoln Bank v. Conwell Construction*,²²⁴ the Nichols Group obtained a development loan from Lincoln Bank for a residential subdivision in Johnson County.²²⁵ Nichols hired Conwell Construction to develop the land and provide

212. *Deutsche Bank Nat'l Trust Co. v. Mark Dill Plumbing Co.*, 903 N.E.2d 166, 171 (Ind. Ct. App. 2009).

213. *Deutsche Bank*, 908 N.E.2d at 1274.

214. *Id.*

215. *Id.* at 1274 n.1.

216. *Id.* at 1274.

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.* at 1275.

221. *Id.*

222. *Id.*

223. 74 Ind. 479 (1881).

224. 911 N.E.2d 45 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 557 (Ind. 2009).

225. *Id.* at 46.

construction plans.²²⁶ Conwell hired three subcontractors to assist it with the work, Hedger Construction, Mitchell Construction, and Grady Brothers.²²⁷ Lincoln Bank recorded its mortgage in 2006.²²⁸ After a dispute arose during the development of the subdivision, the four construction companies each filed mechanic's liens on the property in 2007.²²⁹ Conwell, Hedger, and Mitchell sued Nichols Group for non-payment and to foreclose on their mechanic's liens.²³⁰ They also named the bank and Grady as defendants. Nichols Group counterclaimed.²³¹ Grady filed claims against the other five parties.²³² Lincoln Bank filed claims against the other five parties as well as the guarantors of the mortgage.²³³ The trial court entered judgment for Conwell, Hedger, and Mitchell and ordered the Johnson County Sheriff to sell the real estate and to determine and distribute Conwell, Hedger, and Mitchell's shares of the proceeds.²³⁴ Lincoln Bank appealed asserting that its mortgage had priority over the four mechanic's liens.²³⁵

The Indiana Court of Appeals noted that, according to the Indiana mechanic's lien statute,²³⁶ a recorded mortgage has priority over a subsequently recorded mechanic's lien "to the extent of the funds actually owed to the lender for the specific project to which the lien rights relate."²³⁷ The court observed that none of the parties disputed that the bank's mortgage was recorded before the four mechanic's liens were recorded, and they did not dispute that the mortgage was for the specific project subject to the lien.²³⁸ The mechanic's lien statute contains a significant group of exceptions for mechanic's lien projects over which a mortgage lien will not have priority: houses, improvements auxiliary to houses, and property controlled by a utility.²³⁹ The court observed that even though the mortgage secured a loan for a residential subdivision, no homes had been constructed and until construction began, there was no certainty that the land would be used to construct single-family dwellings. Therefore, the mechanic's lien exception regarding homes did not apply.²⁴⁰ Based upon these reasons and the facts, the court held "that the trial court erred in ordering the five

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.* at 46-47.

235. *Id.* at 47.

236. IND. CODE § 32-28-3-5(d) (2008).

237. *Lincoln Bank*, 911 N.E.2d at 47 (quoting IND. CODE § 32-28-3-5(d)).

238. *Id.* at 47-48.

239. *Id.* at 48.

240. *Id.* at 49.

creditors to share equally in the foreclosure proceeds.”²⁴¹ The court held that the mortgage had first priority based on its recording date and that the four mechanic’s liens had equal priority thereafter.²⁴²

V. LANDLORD/TENANT RELATIONS

Self-help by landlords presents a dilemma that many attorneys deal with during their career of advising landlords and tenants. The case of *Romanowski v. Giordano Management Group, LLC*²⁴³ is a good illustration of the problems that arise when a landlord locks out a tenant from residential property without a court order.²⁴⁴

Giordano Management entered into a one-year lease with Ryan Romanowski for a home in Noblesville.²⁴⁵ Ryan’s father, James, lived in Texas and co-signed the lease for Ryan.²⁴⁶ About eight months into the lease, Giordano Management learned of problems with Ryan’s tenancy of the home.²⁴⁷ James Giordano, the owner of Giordano Management (collectively “Giordano”), called the Noblesville Police Department to have the house inspected.²⁴⁸ Giordano contacted James to inform him about the condition of the house and discussed terminating the lease early.²⁴⁹ James and Giordano agreed to terminate the lease, but the Romanowskis were required to fulfill various conditions, including cleaning up the home.²⁵⁰ James sent a letter to Giordano stating that they would move forward with termination of the lease and that they needed until August 6, 2007, to vacate the house.²⁵¹ James cleaned the inside of the house and otherwise met the conditions required by Giordano.²⁵² Ryan went to the house on August 1, 2007, to remove the remainder of his personal property but discovered Giordano locked him out.²⁵³ James made several requests, written and verbal, to Giordano requesting access to the house so that Ryan could obtain his property.²⁵⁴ Giordano filed a small claims eviction complaint against the Romanowskis on August 3, 2007, and sought damages for breach of the lease.²⁵⁵ Giordano removed Ryan’s personal property from the house and put it in storage

241. *Id.* at 50.

242. *Id.*

243. 896 N.E.2d 558 (Ind. Ct. App. 2008).

244. *Id.* at 559-60.

245. *Id.* at 559.

246. *Id.* at 559-60.

247. *Id.* at 560.

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

on August 14, 2007.²⁵⁶ The property was damaged when it was returned to Ryan two months later.²⁵⁷

The Romanowskis filed a counterclaim and a third-party complaint against Giordano alleging that they had unlawfully locked Ryan out of the house and unlawfully exerted unauthorized control over Ryan's personal property.²⁵⁸ After the trial in small claims court ruled in favor of Giordano, the Romanowskis appealed.²⁵⁹

The Romanowskis alleged that Giordano violated Indiana Code section 32-31-5-6, which prohibits changing the locks on a residence without a court order.²⁶⁰ The Romanowskis also appealed the possession of Ryan's property, noting that Indiana Code section 32-31-5-5 provides that a landlord may not take possession of a dwelling or remove the tenant's property in order to enforce an obligation of the tenant to the landlord under a lease agreement.²⁶¹ Giordano argued that this statute did not apply because Ryan abandoned the home and the exemption under Indiana Code section 32-31-5-6(a) applied.²⁶² To support its position, Giordano relied on the definition of abandoned rental property in Indiana Code section 32-31-5-6(b)(2): "such that a reasonable person would conclude that the tenants have surrendered possession of the dwelling unit."²⁶³

The Indiana Court of Appeals reviewed the evidence and concluded that the trial court erred in finding that Ryan abandoned the house.²⁶⁴ The court held that parties had agreed to the move-out date of August 6, 2007, and the action by the landlord before that date was contrary to that agreement.²⁶⁵ The court held that the landlord wrongfully evicted the Romanowskis by changing the locks and preventing Ryan from removing his personal property.²⁶⁶ The court added that the Romanowskis could pursue recovery in a replevin action against the landlord for wrongful detention of their property, noting that once wrongful detention is established, at least nominal damages may be awarded.²⁶⁷ The court remanded the case to the small claims court for determination of the amount of Ryan's damages for loss of use of his property.²⁶⁸ The court rejected the Romanowskis's claim that Ryan's property was wrongfully removed from the house based on Giordano's testimony that he thought he had the Romanowskis's consent to

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.* at 561.

261. *Id.* at 562.

262. *Id.* at 561.

263. *Id.* (citing IND. CODE § 32-31-5-6(b)(2) (2008)).

264. *Id.*

265. *Id.* at 561-62.

266. *Id.* at 562.

267. *Id.*

268. *Id.*

remove the property from conversations with counsel.²⁶⁹ Yet, the Romanowskis prevailed on their third party claim alleging “that Giordano was liable for civil conversion for exerting unauthorized control over Ryan’s personal property.”²⁷⁰ The court noted that a civil action under the criminal conversion statute is permitted by Indiana Code section 34-24-3-1, which also allows the victim to recover three times the amount of actual damages in addition to costs of the action and attorney’s fees.²⁷¹ Because the court found that Giordano unlawfully denied the Romanowskis access to Ryan’s personal property, it remanded the case to the trial court to determine the amount of Ryan’s damages.²⁷²

The next case in this summary addresses modification of a lease using electronic communication. *Indiana Bureau of Motor Vehicles v. Ash, Inc.*²⁷³ concerned two leases between Ash and the Indiana Bureau of Motor Vehicles (BMV), as tenant, in the communities of Rockport and Mount Vernon, Indiana.²⁷⁴ The principal issue in the case was whether a facsimile transmission modifying the terms of the lease constituted a contract.²⁷⁵ The BMV argued that the fax did not comply with the Indiana statute of frauds, Indiana Code section 32-21-1-1, because it was not “in writing,” it had not been “signed” by the BMV, and the time for performance would exceed a year.²⁷⁶ The Indiana Court of Appeals disagreed with the BMV’s analysis finding that the fax was a writing (or a contract), was signed by a representative of the BMV, and the work would be completed within a year.²⁷⁷ As a result, the statute of frauds did not apply.²⁷⁸

In a case with a great deal of legal maneuverings and complicated cross-claims, *T-3 Martinsville, LLC v. U.S. Holdings, LLC*,²⁷⁹ the Indiana Court of Appeals addressed the concepts of waiver and estoppel as well as whether it was appropriate to award pre-judgment interest in an action where a landlord and sublandlord claimed that a tenant and subtenant of a skilled nursing facility failed to pay rent.²⁸⁰ The court analyzed the default provisions of the lease, which provided:

10.1.1 The failure to pay within five (5) business days of the date when due any Rent, taxes or assessments, utilities, premiums for insurance or other charges or payments required of Tenant under this Lease;

269. *Id.*

270. *Id.* at 563.

271. *Id.*

272. *Id.*

273. 895 N.E.2d 359 (Ind. Ct. App. 2008).

274. *Id.* at 362.

275. *Id.* at 365.

276. *Id.* at 367.

277. *Id.*

278. *Id.*

279. 911 N.E.2d 100 (Ind. Ct. App. 2009).

280. *Id.* at 103-04.

...

10.1.9 The failure to perform or comply with any other term or provision of the Lease not requiring the payment of money . . . provided, however, the default described in this Section 10.1.9 is curable and shall be deemed cured, if: (a) within ten (10) business days of Tenant's receipt of a notice of default from Landlord. . . .²⁸¹

Overturning the findings of the trial court, the court held that an event of default for failure to make a payment of money required by the lease did not require notice from the landlord or an opportunity to cure the default.²⁸² The court also rejected the argument that the common law of Indiana required notice and an opportunity to cure for non-payment of rent.²⁸³ The court concluded that the common law would not produce a different result.²⁸⁴

The landlords asserted that the tenants had waived their rights concerning notice. The court disagreed with this theory reasoning that it was more appropriate to apply the standards of estoppel to the parties' course of conduct.²⁸⁵ The court explained that waiver "is an intentional relinquishment of a known right involving both knowledge of the existence of the right and the intention to relinquish it."²⁸⁶ Estoppel, on the other hand, is based on the premise that a person who by deed or conduct has induced another to act in a particular manner may not then be permitted to adopt an inconsistent position, attitude, or course of conduct that causes injury to such other.²⁸⁷ The court held that the landlords had acquiesced to late payments of rent by the tenants for a year and a half, and, as a result, they were estopped from claiming that the tenants breached the lease by failing to timely make rent payments.²⁸⁸

VI. MISCELLANEOUS

A tragic case of the death of a young boy while trying to cross a street on his bicycle in *Jackson v. Scheible*²⁸⁹ raised an issue of first impression before the Indiana Supreme Court—whether the seller under an installment land contract was liable for the condition of the property where a tree obstructed the boy's view of the street.²⁹⁰ In its analysis of the case, the court first noted that one who possesses property is defined as "a person who is in occupation of the land with

281. *Id.* at 105.

282. *Id.* at 111.

283. *Id.* at 113.

284. *Id.* at 113-14.

285. *Id.* at 116.

286. *Id.* (quoting *van de Leuv v. Methodist Hosp. of Ind., Inc.*, 642 N.E.2d 531, 533 (Ind. Ct. App. 1994)).

287. *Id.* (quoting *Brown v. Branch*, 758 N.E.2d 48, 51-52 (Ind. 2001)).

288. *Id.* at 116-17.

289. 902 N.E.2d 807 (Ind. 2009).

290. *Id.* at 809-10.

intent to control it" in premises liability cases in Indiana where a party has actual control over the condition causing the injury.²⁹¹ The court added that a vendor in a land-sale contract typically has no liability for the condition of the property under the theory expressed above, because the vendor no longer occupies or controls the condition of the property, even if the vendor retains legal title as security until the contract is paid.²⁹²

Scheible, the buyer of the property, argued that Jackson, the seller, should have been held liable for the condition of the property because he continued to act like a landlord after the land contract was executed because he maintained insurance on the property and the buyer had to ask for permission prior to making improvements on the property.²⁹³ The court rejected this argument stating that there was no evidence that Jackson exercised control over the property.²⁹⁴ The court held that these provisions in the land-sale contract reflected Jackson's desire to protect the property, which served as security for the land-sale contract, not as evidence of control.²⁹⁵

Scheible also argued that because Jackson drove past the property several times each month, he was aware of the problem and should have fixed it.²⁹⁶ Finally, Scheible argued that Jackson's receipt of a notice from the city concerning tree saplings on the property was evidence of Jackson's control of the property even though after Jackson received the notice, he gave it to his purchaser who agreed to address the problem.²⁹⁷ The court held that Jackson surrendered control of the property to the purchaser and, as a matter of law, any liability rested in the purchaser as the one who possessed and controlled the land.²⁹⁸

The final argument offered by Scheible was that violating a city ordinance concerning trimming trees to certain specifications constituted negligence per se on the part of the property owner.²⁹⁹ The court rejected this argument holding that it did not believe that the ordinance applied to Jackson.³⁰⁰ The court explained that it is well established under Indiana law that "[w]hen the parties enter into the [land-sale] contract, all incidents of ownership accrue to the vendee."³⁰¹ The court stated that at the time of the accident, Jackson, as the vendor under the land-sale contract, was in the position of being a lien holder, not the owner of the property.³⁰²

291. *Id.* at 810 (quoting RESTATEMENT (SECOND) OF TORTS § 328E(a) (1965)).

292. *Id.*

293. *Id.* at 810-11.

294. *Id.* at 811.

295. *Id.*

296. *Id.*

297. *Id.* at 812.

298. *Id.*

299. *Id.*

300. *Id.* at 813.

301. *Id.* (quoting *Skendzel v. Marshall*, 301 N.E.2d 641, 646 (Ind. 1973)).

302. *Id.*

In *Rockford Mutual Insurance Co. v. Pirtle*,³⁰³ the Indiana Court of Appeals had an opportunity to consider, as a matter of first impression, whether an owner's failure to repair or replace a building was excused, permitting the owner to recover replacement costs under a fire insurance policy.³⁰⁴ The court also examined other issues relating to consequential damages sought by the property owner.³⁰⁵ Pirtle purchased a historic building in Terre Haute, Indiana, obtained a mortgage, and insured the building through a policy with Rockford Mutual Insurance Company.³⁰⁶ The mortgage was for \$140,250.³⁰⁷ Pirtle rented the property while it was being restored.³⁰⁸ In early 1999, the historic building was valued at \$165,000; however, it was damaged in an accidental fire on November 11, 2000.³⁰⁹ Rockford's independent adjuster estimated the damage to be worth \$79,907.49.³¹⁰ Rockford gave its adjuster the authority to settle the claim for \$80,000.³¹¹ Pirtle rejected this settlement stating that it was not enough to satisfy the mortgage or to repair the building.³¹² In addition, because of the damage to the building, it could no longer be leased to Pirtle's tenants.³¹³

Pirtle hired a contractor in 2001 who estimated the damage at \$232,915.39.³¹⁴ Rockford's claims supervisor reviewed the claim and obtained authority to settle the claim for the policy limit of \$193,000.³¹⁵ However, Pirtle's attorney only received an offer of \$69,874.62 from Rockford's adjuster because he considered that amount to be the actual case value of the building.³¹⁶ Rockford's adjuster held firm, arguing that this value was calculated using an estimate for the repairs, less depreciation of the property.³¹⁷ Pirtle's attorney made a demand for the policy limits under Pirtle's coverage, minus a ten percent discount, but Rockford's adjuster maintained that he was only permitted to offer the actual cash value of the building.³¹⁸ Another independent adjuster completed an analysis of the building and determined that it was worth \$86,146.66.³¹⁹

Pirtle retained another attorney and filed suit against Rockford alleging

303. 911 N.E.2d 60 (Ind. Ct. App. 2009).

304. *Id.* at 62.

305. *Id.*

306. *Id.* at 62-63.

307. *Id.*

308. *Id.* at 63.

309. *Id.*

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.*

318. *Id.*

319. *Id.*

breach of contract and bad faith.³²⁰ The court dismissed the bad faith claim with prejudice when Rockford paid \$86,146.66, the building's actual cash value, to Pirtle.³²¹ Rockford filed a motion for summary judgment stating that the court should deny Pirtle's claim because it had paid the actual cash value of the building to Pirtle.³²² The court denied summary judgment. At trial, the jury found that Rockford breached the insurance contract and awarded \$124,149.55 to Pirtle under the policy plus consequential damages of \$406,136.58.³²³ Rockford appealed the decision.³²⁴

Pirtle's policy with Rockford provided for replacement coverage without deduction for depreciation; however, Rockford claimed that Pirtle had received all that he was entitled to receive because he did not comply with the terms of the contract requiring Pirtle to repair the building.³²⁵ On the other hand, Rockford had not obtained a certified real estate appraisal to determine the actual cash value of Pirtle's property as required by the contract.³²⁶

The Indiana Court of Appeals concluded that Pirtle had no choice but to use the actual cash value he received from Rockford to satisfy his mortgage, leaving him nothing for repairs.³²⁷ The court noted that a cash value policy is a pure indemnity policy, while replacement cost coverage is optional and purchased at an additional cost.³²⁸ Applying equitable principles, the court held that not to enforce the repair or replacement endorsement paid for by Pirtle would have rendered the contract illusory.³²⁹ Because Rockford failed to advance funds for repair or replacement of the building according to the endorsement Pirtle purchased, the court excused Pirtle's failure to rebuild the building as a condition precedent for recovery under a fire insurance policy.³³⁰ The court also rejected Rockford's claim that its liability should be capped at the policy limits stating that a party injured as the result of the other party's breach may recover consequential damages caused by the breach.³³¹

A dispute over a real estate commission led to an appeal in *Niezer v. Todd Realty, Inc.*³³² Niezer entered into a listing agreement with Todd Realty to sell property he owned on Lake Wawasee in northern Indiana.³³³ Todd found a buyer for the property; however, Niezer refused to sign a counteroffer and tried to play

320. *Id.*

321. *Id.*

322. *Id.*

323. *Id.* at 64.

324. *Id.*

325. *Id.*

326. *Id.* at 65.

327. *Id.*

328. *Id.*

329. *Id.* at 66.

330. *Id.* at 67.

331. *Id.* at 67-68.

332. 913 N.E.2d 211 (Ind. Ct. App. 2009).

333. *Id.* at 213.

this offer off against a second offer with a higher purchase price.³³⁴ The court determined that Todd Realty's obligation under the listing contract was merely to secure a buyer who was flexible on the date of possession and willing to negotiate in good faith with Niezer arriving at a mutually acceptable date of possession.³³⁵ The court pointed out that Niezer was not willing to perform his part of that process in which he was also required to act in good faith to transfer the property on a possession date established by negotiation.³³⁶ The court concluded that Niezer's action to play one offer against the other to obtain a higher purchase price and effectively to shut Todd Realty out of a commission was contrary to the terms of the agreement.³³⁷ The court concluded that Niezer's acts constituted "contractual sabotage or other acts in bad faith" ultimately causing Todd Realty's inability to perform, and that Niezer could not be permitted to prevail.³³⁸ As a result, Niezer was required to pay the brokerage commission to Todd Realty.³³⁹

The actions of a homeowners' association to collect delinquent assessments brought the Fair Debt Collection Practices Act (FDCPA), as well as an analysis of the liability standards under the Indiana Nonprofit Corporation Act of 1991 ("Nonprofit Act"), before the Indiana Court of Appeals. In *Baird v. ASA Collections*,³⁴⁰ Baird appealed the trial court's judgment in favor of a collection agency who sought to obtain delinquent dues and assessments from her on lots that she had purchased at a tax sale.³⁴¹ First finding that Baird waived her claim concerning the application of the Nonprofit Act, the court held that debt collection by ASA was not subject to the FDCPA because Baird did not intend to use the lots for "personal, family, or household purposes" as required by the FDCPA.³⁴²

The companion case to *Baird*, *Van Prooyen Builders, Inc. v. Lambert (Van Prooyen I)*,³⁴³ concerned the proration of real property taxes associated with the sale of real estate. In *Van Prooyen I*, VanProoyen Builders, Inc. appealed from the trial court's judgment in favor of Earl and Mildred Lambert for real property taxes owed under their real estate purchase agreement.³⁴⁴ The dispute focused on whether, given the late assessments of real property in Lake County, Indiana,

334. *Id.* at 213-14.

335. *Id.* at 216.

336. *Id.*

337. *Id.* at 217.

338. *Id.* at 218 (quoting *Ind. State Highway Comm'n v. Curtis*, 704 N.E.2d 1015, 1019 (Ind. 1998)).

339. *Id.*

340. 910 N.E.2d 780 (Ind. Ct. App. 2009).

341. *Id.* at 781-82.

342. *Id.* at 786 (quoting Fair Debt Collection Practices Act, 15 U.S.C. § 1692a(5) (2006)).

343. 907 N.E.2d 1032 (Ind. Ct. App.), *aff'd on reh'g*, 911 N.E.2d 619 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 558 (Ind. 2009).

344. *Id.* at 1033.

their agreement required proration of 2006 taxes payable in 2007.³⁴⁵ The trial court concluded that tax bills had not been delivered on time in Lake County since 2002 and held that language in the real estate contract providing “that all real estate taxes ‘assessed against the subject property after closing shall be paid by the Buyer’ is void as against public policy.”³⁴⁶ The Indiana Court of Appeals concurred with this ruling, holding that the purchase agreement unambiguously provided for prorating property taxes and that the statutory assessment date of March 1 controls the tax provision in the contract, which is consistent with the parties’ clear intent to prorate the tax liability.³⁴⁷ The builder therefore was required to pay the Lamberts’s portion of the 2006 property taxes payable in 2007 and attributable to the period when the builder owned the property.³⁴⁸

Van Prooyen petitioned the Indiana Court of Appeals for rehearing in *Van Prooyen II*,³⁴⁹ complaining of several errors in the *Van Prooyen I* opinion.³⁵⁰ The court granted rehearing for the limited purpose of addressing Van Prooyen’s argument that the only issue addressed by the trial court and raised by the parties on appeal was whether the tax proration provision in the purchase agreement violated public policy.³⁵¹ The court held that Van Prooyen had failed to meet its burden of successfully proving that public policy in Indiana favored its position and further concluded that in a contract dispute its first task is to review the terms and conditions of the actual contract.³⁵² The court held “that the contract unambiguously prorated the tax liability.”³⁵³ As a result, affirming the trial court’s ruling based on this legal theory made the discussion of whether the contract violated public policy was irrelevant.³⁵⁴ The court rejected Van Prooyen’s argument that its only duty was to address the legal theory relied upon at the trial court and held that its review was not limited to the public policy issue solely because Van Prooyen did not address the tax provisions in the contract issue in its briefs.³⁵⁵ The court pointed out that a dispute over the meaning of the tax provision is what gave rise to the cause of action.³⁵⁶ As a result, the tax provision was appropriately before the court, and the court was well within its power to make its decision based on the plain language of the contract.³⁵⁷

345. *Id.*

346. *Id.*

347. *Id.* at 1033-34.

348. *Id.* at 1038.

349. 911 N.E.2d 619 (Ind. Ct. App. 2009).

350. *Id.* at 619-20.

351. *Id.*

352. *Id.* at 620.

353. *Id.*

354. *Id.*

355. *Id.* at 620-21.

356. *Id.* at 621.

357. *Id.*

VII. NEW STATUTES EFFECTIVE JULY 1, 2009

A. Homeowners' Associations

Indiana Code section 32-25.5-2 establishes new governance and budgetary requirements for homeowners associations.³⁵⁸ After major changes in 2007, the legislature amended the homeowner's association lien statute in 2009 to permit foreclosure on a lien within one year after the property owner or lienholder receives notice of the lien, instead of thirty days.³⁵⁹

B. Common Law Liens

The holder of a common law lien must foreclose within 180 days after the lien is recorded or it will be extinguished.³⁶⁰ The lien now must be filed no later than sixty days after the date of the last service provided by the person asserting the lien.³⁶¹

C. Residential Mortgage Foreclosure

The legislature added a new chapter to the Indiana mortgage statutes, in response to legislative concern about the high rate of residential mortgage foreclosures in Indiana, to improve communication between lenders and homeowners.³⁶² The statute creates detailed notice requirements for creditors filing foreclosure actions.³⁶³ It also requires settlement conferences and mediation or alternative dispute resolution before the court entering a foreclosure judgment with the goal of the parties entering into a foreclosure prevention agreement.³⁶⁴

D. Disclosure of Flood Plain

The location of the lowest floor of a structure, including a basement, in a 100-year flood plain must now be disclosed by property owners in written rental agreements and in renewals of written rental agreements for residential, agricultural, and commercial properties.³⁶⁵

E. Liens on Special Tools

A new chapter was added to the Indiana lien statutes permitting the end users of "special tools" to file a lien for amounts due from customers for metal

358. IND. CODE §§ 32-25.5-3-1 to -7 (2009).

359. *Id.* § 32-28-14-9.

360. *Id.* § 32-28-13-4(c).

361. *Id.* § 32-28-13-5(a).

362. *Id.* §§ 32-30-10.5-1 to -11.

363. *Id.* § 32-30-10.5-8.

364. *Id.* § 32-30-10.5-9.

365. *Id.* § 32-31-1-21.

fabrication work or work improving a special tool.³⁶⁶ The statute defines “special tools” as “tools, dies, jigs, gauges, gauging fixtures, special machinery, cutting tools, injection molds, or metal castings.”³⁶⁷ This statute supplements the current lien statute for fabricators of dies, molds, forms, and patterns.³⁶⁸

366. *Id.* § 32-33-20-6.

367. *Id.* § 32-33-20-3.

368. *Id.* §§ 32-33-16-0.5 to -9.