

# VESTED RIGHTS, EXCLUSIVE USES, AND ADVERSE POSSESSION: RECENT DEVELOPMENTS IN INDIANA REAL PROPERTY LAW

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This Article takes a topical approach to the notable real property cases in this survey period, October 1, 2004, through September 30, 2005, and analyzes noteworthy cases in each of the following areas: land use law, real estate contracts, landlord/tenant law, and developments in the common law of property.

## I. LAND USE LAW

### *A. Revisiting the Vested Rights Doctrine in Indiana*

*Metropolitan Development Commission of Marion County v. Pinnacle Media, LLC*<sup>1</sup> first arose in 1999, when Pinnacle Media (“Pinnacle”), which develops billboards, applied for a permit to build two signs in a railroad corridor near I-465. The Department of Metropolitan Development of Marion County (“DMD”) responded to Pinnacle’s request with a letter that stated that the land in question was unzoned and that DMD therefore lacked jurisdiction to issue or require an improvement location permit.<sup>2</sup> Pinnacle applied for and received permits to build from the Indiana Department of Transportation (“INDOT”), which were required because the sites were in a state highway right-of-way. After building the first two signs, Pinnacle leased more unzoned property in Marion County with the intention of building fifteen more signs. Pinnacle did not apply for improvement location permits from DMD for the additional signs, but did submit applications for permits to INDOT.<sup>3</sup> After Pinnacle had filed the last of its permits with INDOT, DMD proposed an amendment to the Zoning Ordinance of Marion County, Indiana which filled in the gaps of the ordinance by assigning zoning classifications to any unzoned land in the county, including

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1. 836 N.E.2d 422 (Ind. 2005), *aff’d on reh’g*, 846 N.E.2d 654 (Ind. 2006).

2. *Id.* at 423.

3. Brief of Appellee at 6, *Metro. Dev. Comm’n of Marion County v. Pinnacle Media, LLC*, 836 N.E.2d 422 (Ind. 2005) (No. 49S05-0511-CV-510).

the fifteen sites leased by Pinnacle (the “Amendment”).<sup>4</sup> INDOT subsequently denied all fifteen building permits requested by Pinnacle.<sup>5</sup> A few months later, the City-County Council of the City of Indianapolis and Marion County enacted the Amendment.<sup>6</sup> Following an appeal by Pinnacle of its denial, INDOT agreed to grant ten of the fifteen permits. Shortly after construction began on the first sign, DMD issued a stop work order because Pinnacle failed to obtain an improvement location permit.<sup>7</sup>

Pinnacle filed an action against DMD asking for a declaratory judgment that the Amendment did not apply to the billboards for which INDOT permits were pending at the time the Amendment was passed. The trial court granted summary judgment in favor of Pinnacle. DMD appealed, and the court of appeals upheld the grant of summary judgment. DMD requested transfer, and the Indiana Supreme Court granted transfer and reversed the trial court.<sup>8</sup>

The supreme court held that “[b]ecause no construction or other work that gave Pinnacle a vested interest in the billboard project had begun on the billboards at the time of the ordinance change, the ordinance change did apply to the 10 billboards.”<sup>9</sup> To arrive at this holding, the court discussed two lines of Indiana cases which define “vested rights” in two different circumstances.<sup>10</sup> The first line of cases discuss the zoning law principle of nonconforming use. The court cited the general rule that a change in the applicable zoning ordinance will not disturb an existing nonconforming use.<sup>11</sup> The court focused its discussion on a 1951 case, *Lutz v. New Albany City Plan Commission*,<sup>12</sup> which it found to be directly on point. In *Lutz*, the developer had acquired an unzoned parcel, which had previously been used for single family homes, for the purpose of building a gas station. After the developer had obtained financing and entered into a lease with a company to operate the service station, but before construction began, the city enacted a zoning ordinance that prohibited a gas station on the parcel.<sup>13</sup> The developer appealed a subsequent denial of a variance request, arguing that he had acquired a vested right in developing the property as a gas station prior to the enactment of the zoning ordinance and that the application to him was therefore unconstitutional.<sup>14</sup> The trial court and the supreme court upheld the application of the ordinance in *Lutz*:

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4. *Id.* at 7.

5. *Pinnacle Media*, 636 N.E.2d at 424.

6. *See* INDIANAPOLIS, IND., REV. CODE §§ 730-100 to -103.

7. Brief of Appellee at 8, *Pinnacle Media*, 836 N.E.2d 422 (Ind. 2005) (No. 49S05-0511-CV-510).

8. *Pinnacle Media*, 836 N.E.2d at 424-25.

9. *Id.* at 423.

10. *Id.* at 425.

11. *Id.*

12. 101 N.E.2d 187 (Ind. 1951).

13. *Pinnacle Media*, 836 N.E.2d at 426.

14. *Id.*

The zoning ordinance herein is, of course, subject to any vested rights in the property of appellants acquired prior to the enactment of the zoning law. But where no work has been commenced, or where only preliminary work has been done without going ahead with the construction of the proposed building, there can be no vested rights. The fact that ground had been purchased and plans had been made for the erection of the building before the adoption of the zoning ordinance prohibiting the kind of building contemplated, is held not to exempt the property from the operation of the zoning ordinance. Structures in the course of construction at the time of the enactment or the effective date of the zoning law are exempt from the restrictions of the ordinance. The service station was not in the course of construction so as to give to appellants vested rights, and was not a nonconforming use existing at the time of passage of the ordinance.<sup>15</sup>

The second line of cases discussed by the court in *Pinnacle* have been used for the proposition that if a person has submitted an application for a permit with a governmental agency, a subsequent change in the law cannot be applied to that pending permit. The leading case in this line is *Knutson v. State ex rel. Seberger*,<sup>16</sup> a 1959 subdivision plat case that held that “a municipal council may not, by the enactment of an emergency ordinance, give retroactive effect to a pending zoning ordinance thus depriving a property owner of his right to a building permit in accordance with a zoning ordinance in effect at the time of the application of such permit.”<sup>17</sup> *Knutson* has been relied upon broadly by the supreme court and the court of appeals as recently as 2004 “for the proposition that a change in law cannot be applied retroactively” if an application for a permit has been submitted to a governmental agency at the time of the change.<sup>18</sup>

The court found that these two lines of cases are consistent in one respect, that is changes in zoning ordinances are “subject to any vested rights,” and that such changes “are unconstitutional if they disturb or destroy existing or vested rights.”<sup>19</sup> The court found “uneasy tension” between *Lutz* and *Knutson* with respect to the question of when those rights vest. “If the land acquisition, demolition, and site preparation work in *Lutz* is not enough to establish a vested interest, how can it be that the mere filing in *Knutson* of a building permit (when, by definition, no construction has yet begun) is enough to do so?”<sup>20</sup> The court

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15. *Id.* (quoting *Lutz*, 101 N.E.2d at 190).

16. 160 N.E.2d 200 (Ind. 1959).

17. *Pinnacle Media*, 836 N.E.2d at 427 (quoting *Knutson*, 160 N.E.2d at 201).

18. *See, e.g.*, *Fulton County Advisory Plan Comm’n v. Groninger*, 810 N.E.2d 704, 707-08 (Ind.), *reh’g denied* (Ind. 2004); *Equicor Dev., Inc. v. Westfield-Washington Twp. Plan Comm’n*, 758 N.E.2d 34, 40 (Ind. 2001); *Steuben County Waste Watchers v. Family Dev., Ltd.*, 753 N.E.2d 693, 703 n.7 (Ind. Ct. App. 2001); *Brant v. Custom Design Constructor Corp.*, 677 N.E.2d 92, 98 (Ind. Ct. App. 1997).

19. *Pinnacle Media*, 836 N.E.2d at 427.

20. *Id.*

concluded that the proper resolution of this apparent disconnect was to overrule *Knutson* to the extent that it stands for the proposition that “having a building permit on file creates a vested right that cannot be overcome by a change in zoning law.”<sup>21</sup>

If “there can be no vested rights” where “no work has been commenced, or where only preliminary work has been done without going ahead with the construction of the proposed building,” then in logic, the filing of a building permit—an act that must be done before any work is commenced—cannot alone give rise to vested rights.<sup>22</sup>

Although the court tangentially acknowledged the fundamental differences between *Lutz* and *Knutson*, it did not recognize that these differences make it impossible and unnecessary to reconcile them. *Knutson* sets up a bright line test—if an application for a permit has been filed, the filer has a right to have the application reviewed under the law that existed at the time that the application was filed.<sup>23</sup> It is not necessary to delve into whether the developer has taken extra-governmental steps to develop its property, such as land acquisition, leasing, and financing. The question is simple and objective—is a permit application on file. *Lutz* used a very different bright-line test than *Knutson* because the parcel was unzoned and the developer did not have a permit to apply for. Because the *Lutz* court analyzed the case under the nonconforming use doctrine, the applicable bright line test asked whether a use existed at the time of the zoning change which would be in nonconformance to the zoning change. The *Lutz* court concluded that no use yet existed because no construction had yet begun; therefore, no rights in that existing use could have vested.<sup>24</sup> So when the court in *Pinnacle* wondered why the “land acquisition, demolition, and site preparation work in *Lutz* is not enough to establish a vested interest,” the answer is clear—the court in *Lutz* did not consider those factors at all.<sup>25</sup> It was simply interested in whether or not there was an existing use. That framework is completely inapplicable to *Knutson* and similar cases in which no construction could have possibly taken place because the developer had “merely” applied for a permit. But in attempting to reconcile these two cases, the *Pinnacle* court awkwardly tries to shoehorn *Knutson* into the nonconforming use framework. It will not fit because there are two separate, although confusingly interrelated, issues in the two cases.

The same principle runs through both cases—retroactive laws are unconstitutional if they destroy existing or vested rights. How does one “vest” a right in the development context? A person can have a vested right to consideration of a permit under the law in effect at the time that the application was filed. What if a permit is not required under the law when pre-development

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21. *Id.* at 428.

22. *Id.* (quoting *Lutz v. New Albany City Plan Comm'n*, 101 N.E.2d 187, 190 (Ind. 1951)).

23. *Knutson v. State ex rel. Seberger*, 160 N.E.2d 200, 201 (Ind. 1959).

24. *Lutz*, 101 N.E.2d at 189.

25. *See id.* at 190.

begins, but the law changes such that a permit is required before actual construction begins? That is the unexpressed question at the heart of *Pinnacle*. As in *Lutz*, the developer in *Pinnacle* desired to develop unzoned land. When it undertook the primary steps of development, there was no requirement in place at the county level that it must acquire a building permit. Before construction began, that requirement was put into place. The fact that *Pinnacle* had to apply for the INDOT permits under a different regulatory scheme made it impossible to begin construction before the Amendment was enacted, but that is irrelevant to the application of *Knutson*. Under *Knutson*, the developer in *Pinnacle* would have no right to fix the application of the Marion County zoning ordinance in time simply because it had applied for a completely different permit. In the real world, development often requires a half dozen or more permits from different regulatory agencies. No Indiana appellate case stands for the proposition, nor does it stand to reason that the application for one of those permits freezes the law that can apply to the remainder.

If *Lutz* is directly on point and the INDOT permit applications are irrelevant, why did the *Pinnacle* court disturb the holding in *Knutson* at all? The court could have upheld *Knutson* with respect to zoned land in which permits are required and, with respect to unzoned land, adopted what it characterized as a “general proposition”—that a

developer acquires a “vested right[.]” such that a new ordinance does not apply retroactively if, but only if, the developer “(1) relying in good faith, (2) upon some act or omission of the government, (3) . . . has made substantial changes or otherwise committed himself to his substantial disadvantage prior to a zoning change.”<sup>26</sup>

The position of developers post-*Pinnacle* is significantly riskier. Under what circumstances is a developer entitled to believe that it has a right to have his permit application considered under the law in effect at the time of the application? Clearly not with respect to a building or improvement location permit. What about an application for a subdivision plat? A stormwater drainage plan? A traffic plan? The public policy reasons for this bright line rule enunciated in *Knutson* are clear: “[a] government which exercises . . . police power over the property of its citizens without any fixed standards which are known to the citizens and the enforcing officials is government by men, and not by law.”<sup>27</sup>

There is an inevitable tension between real estate developers and local governments because the development process takes time and significant resources can be invested in a project before dirt is turned. Developers (and their lenders) have a strong desire for certainty during this period that the rules that are in place at the beginning of the entitlement process will remain static through the

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26. *Pinnacle Media*, 836 N.E.2d at 425-26 (quoting John J. Delaney & Emily J. Vaias, *Recognizing Vested Development Rights as Protected Property in Fifth Amendment Due Process and Takings Claims*, 49 WASH. U. J. URB. & CONTEMP. L. 27, 31-35 (1996)).

27. *Knutson*, 160 N.E.2d at 202.

completion of construction. Local governments, on the other hand, understandably want the ability to revise zoning and other regulations as needed in order to exercise their police powers and maintain flexibility for changing circumstances. The vested rights doctrine, as expressed in *Knutson*, represented a bright line compromise. Uncertainty benefits neither the developer nor, ultimately, the community in which it wishes to invest.

At the time this Article went to press, the Indiana General Assembly had responded to *Pinnacle* by passing House Bill No. 1102-4 and Senate Bill No. 35. Both bills codify what the court stripped out of *Knutson*, namely, that a petitioner has the right to have his building permit considered under the law in place when the application was submitted. Although this legislative action resolves one of the key issues created by the court's ruling in *Pinnacle*, this case and its aftermath are illustrative of the reality that the common law and statutory rules that developers must follow in Indiana are in need of a comprehensive overhaul to bring consistency, predictability, and balancing of the rights of developers and the needs of local government.

#### *B. Consideration of Statutory Factors in Re-Zoning Petitions*

In *Borsuk v. Town of St. John*,<sup>28</sup> the western half of the parcel that Borsuk owned in Lake County was zoned as residential, and a residence was located on this portion, while the eastern half of Borsuk's property was zoned commercial. Borsuk petitioned the St. John Plan Commission (the "Commission") in 2000 to have the entire parcel zoned commercial, in the hope of later building a gas station on the property. All other lots on the block in which Borsuk's property was located were zoned commercial, and the Commission's comprehensive zoning plan (the "Plan") anticipated that the entire tract would ultimately be rezoned commercial. The Commission denied Borsuk's request after a large group of remonstrators expressed their concerns that a gas station on Borsuk's property would exacerbate existing problems with heavy traffic congestion and create dangers for residential neighborhoods and an elementary school in the area. Borsuk filed suit, contending that the Commission's decision was arbitrary and capricious.<sup>29</sup> The Indiana Supreme Court found, per the Indiana Code ("Code"), that a municipality is permitted to create a planning commission to create comprehensive zoning plans that may be used to help guide the municipality when faced with land use and development issues.<sup>30</sup> When considering how to zone a tract, the Code requires a "plan[ning] commission and the legislative body [of the municipality] to 'pay reasonable regard to' the comprehensive plan . . . current structures and uses, the most desirable use for the land," as well as the impact of zoning on property values.<sup>31</sup> The Indiana Court of Appeals, in its decision of this case below, held that the statute required a

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28. 820 N.E.2d 118 (Ind. 2005).

29. *Id.* at 120.

30. *Id.* at 121 (citing IND. CODE § 36-7-4-502 (2005)).

31. *Id.* at 122 (citing IND. CODE § 36-7-4-603).

municipality to follow the comprehensive plan unless the planning commission could show a compelling reason to deviate from the plan.<sup>32</sup> The supreme court rejected the lower court's reasoning, holding that the testimony from the remonstrators with regard to their concerns about traffic and safety issues demonstrated that the Commission did pay reasonable regard to the statutory factors, and therefore the Commission's decision was found not to be arbitrary or capricious.<sup>33</sup>

### *C. Effect of Recording a PUD*

The Indiana Supreme Court also examined the issue of the enforceability of conditions imposed in connection with a Planned Unit Development ("PUD") against a subsequent purchaser of property subject to the PUD in *Story Bed & Breakfast, LLP v. Brown County Area Plan Commission*.<sup>34</sup> Story Group, Inc., a prior owner of the twenty-two acre property at issue in this case, petitioned the Brown County Plan Commission ("Plan Commission") in 1986 to designate a seven acre tract as a PUD so that Story Group, Inc. could construct and operate a bed and breakfast on the tract. The Plan Commission granted primary approval of the PUD "subject to the following conditions: See list of covenants attached."<sup>35</sup> The attached list of covenants provided that no loud speakers, excess lighting, or overnight camping were permitted on the seven acre tract.<sup>36</sup> In 1992, the entire twenty-two acres were included in the PUD, again subject to the covenants approved by the Plan Commission in 1986.<sup>37</sup> Although the Plan Commission's conditions for approval of the PUD were never recorded, they were at all times available for public inspection.<sup>38</sup> The property was transferred to Story Bed & Breakfast, LLP ("Story") in 1999, and evidence presented to the trial court showed that before the property was conveyed. Story was aware that the property was designated a PUD. Story, however, was not aware of the specific PUD restrictions at that time and never contacted the Plan Commission regarding the restrictions or otherwise made any attempt to discover them. Story converted a mill on the property to a bar and grill and invested over \$100,000 in remodeling and repairs.<sup>39</sup> The property was used by Story for several events that drew thousands of patrons and included loud outdoor concerts and overnight camping. In late 1999, the Plan Commission sent Story a copy of the PUD covenants and notified Story that it intended to enforce the PUD restrictions.<sup>40</sup>

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32. *Id.* at 120-21 (citing *Borsuk v. Town of St. John*, 800 N.E.2d 217, 223 (Ind. Ct. App. 2003), *vacated*, 820 N.E.2d 118 (Ind. 2005)).

33. *Id.* at 122.

34. 819 N.E.2d 55 (Ind. 2004).

35. *Id.* at 57.

36. *Id.*

37. *Id.*

38. *Id.* at 59.

39. *Id.*

40. *Id.* at 58-59.

Story filed suit in 2001 seeking a preliminary injunction to prevent the Plan Commission from enforcing the PUD conditions.<sup>41</sup>

The Indiana Code permits a planning commission to establish conditions or compel a property owner to make commitments when approving a PUD.<sup>42</sup> Although the Code does not define these terms, the court concluded that “commitments” are submitted by the land owner to persuade a planning commission to approve a zoning variance or PUD. The Code requires commitments to be recorded in order for them to be effective against a subsequent purchaser.<sup>43</sup> “Conditions,” however, are restrictions imposed by a legislative body and are not required to be recorded to be enforceable against a future property owner.<sup>44</sup> The trial court found that although some of the PUD restrictions were characterized as directives, or conditions, others were written as agreements between the developer and the Plan Commission, and thus the trial court classified them as commitments.<sup>45</sup> When it examined this issue in the case below, the court of appeals held that the terms “conditions” and “commitments” as used in the statutes were too difficult to distinguish, and instead focused on the issue of whether or not Story had sufficient notice of the PUD requirements. Because the PUD restrictions were not recorded, the court of appeals found that Story did not have sufficient notice and therefore was not subject to the PUD restrictions.<sup>46</sup>

The majority of the Plan Commission’s “covenants” on which the PUD approval was based were written as directives, and as such were considered by the Plan Commission to be conditions for purposes of the Code.<sup>47</sup> The supreme court determined that “the legislative distinction between commitments and conditions must be given effect” even though their definitions are “murky” because the terms have been given meaning in practice.<sup>48</sup> Because the Code provides that “conditions imposed on the granting of an exception, a use, or a variance are not subject to the rules applicable to commitments[,]”<sup>49</sup> conditions attached to the approval of a PUD are not required to be recorded to be enforceable against a subsequent property owner, as long as they are publicly available.<sup>50</sup> Finding that conditions put in place when a PUD is approved are akin to zoning ordinances, the court reasoned that conditions are enforceable against the public at large, provided that they are available for public

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41. *Id.* at 59.

42. IND. CODE § 36-7-4-1512 (2005).

43. *Story Bed & Breakfast*, 819 N.E.2d at 62; *see also* IND. CODE §§ 36-7-4-1512(b)(2), -615(c).

44. *Id.* at 62; *see also* IND. CODE § 36-7-4-921(e).

45. *Id.* at 59.

46. *Id.* at 59-60 (citing *Story Bed & Breakfast, LLP v. Brown County Area Plan Comm’n*, 789 N.E.2d 13, 17-18 (Ind. Ct. App. 2003), *vacated*, 819 N.E.2d 55 (Ind. 2004)).

47. *Id.* at 63.

48. *Id.* at 62.

49. *Id.* at 61-62 (citing IND. CODE § 36-7-4-921(e)).

50. *Id.* at 64.

inspection.<sup>51</sup> A subsequent property owner such as Story, therefore, has the burden to investigate what conditions are connected to a PUD.<sup>52</sup> Because the PUD conditions in *Story* were publicly available, the court also found that Story was a bona fide purchaser without notice of the unrecorded restrictions in the PUD, because Story had actual knowledge that the property was subject to a PUD when it purchased the property, which put it on inquiry notice that unrecorded conditions may be attached.<sup>53</sup>

## II. REAL ESTATE CONTRACTS

### *A. Enforcement of Commercial Exclusive Use Provisions*

The Indiana Supreme Court, in a three to two decision, overturned a ruling of the Indiana Court of Appeals in *Tippecanoe Associates II, LLC v. Kimco Lafayette 671, Inc.*<sup>54</sup> The central issue in the case concerned the enforcement of a provision in a shopping center lease which prohibited the landlord from leasing space in the shopping center to another grocery store user. The supreme court refused to enforce the provision solely because the tenant in whose favor the restriction ran was not then operating a grocery store in the shopping center.<sup>55</sup> The court of appeals would have enforced the restriction when it reversed the trial court, which had determined that there was a sufficient change in circumstances to warrant its refusal to enforce the covenant.<sup>56</sup> The facts in this case are fairly straightforward.

In 1973, Kimco's predecessor-in-interest owned some land in Lafayette, Indiana, and desired to develop the land by building a shopping center which it called the Sagamore Center. The landlord reached an agreement with Kroger to lease a portion of the Sagamore Center. That lease contained an initial term of twenty years and granted the grocery store tenant four options to extend the term for five years each.<sup>57</sup> The lease contained the following restriction in favor of the tenant:

Landlord covenants and agrees, from and after the decree hereof and for so long as this lease shall be in effect, not to lease, rent, occupy, or suffer or permit to be occupied, any part of the Shopping Center premises or any other premises owned or controlled directly or indirectly either by Landlord, its successors, heirs or assigns, or Landlord's principal owners, stockholders, directors, or officers, or their assignees (hereinafter called owners) which are within 2 miles of the Shopping

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51. *Id.*

52. *Id.* at 62.

53. *Id.* at 64-65.

54. 829 N.E.2d 512 (Ind. 2005).

55. *Id.* at 514-15.

56. *Tippecanoe Assocs. II, LLC v. Kimco Lafayette 671, Inc.*, 811 N.E.2d 438, 449 (Ind. Ct. App. 2004), *vacated in part*, 829 N.E.2d 512 (Ind. 2005).

57. *Tippecanoe*, 829 N.E.2d at 513.

Center premises for the purpose of conducting therein or for the use as a food store or a food department or for the storage or sale for off-premises consumption of groceries, meats, produce, dairy products, or bakery products, or any of them; and further, that if Landlord or owners own any land, or hereinafter during the term of this lease Landlord or Owners acquire any land within such distance of the Shopping Center, neither will convey the same without imposing thereon a restriction to secure compliance with the terms of this lease. . . . This covenant shall run with the land. Landlord acknowledges that in the event of any breach hereof Tenant's remedies at law would be inadequate and therefore, in such event, Tenant shall be entitled to cancel this lease or to relief by injunction, or otherwise, at Tenant's option, and Tenant's remedies shall be cumulative rather than exclusive.<sup>58</sup>

Kroger operated in the shopping center for approximately ten years when it sold all of its three Tippecanoe County stores to entities affiliated with Pay Less Supermarkets, which "at the time operated two other grocery stores within two miles of the Sagamore Center."<sup>59</sup> Pay Less never actually operated a grocery store in the Sagamore Center, but approximately one year after it had acquired the lease, subleased the location to H.H. Gregg, an appliance store operator, who appears to remain open at the location now.<sup>60</sup> There is no indication that Pay Less has failed to pay any rent due on the space or that there is any default on the part of Pay Less under the lease.

Naturally, the Sagamore Center had other tenants too. One of those other tenants was Target Corporation who operated its store in the Sagamore Center until 2000 when it closed the store and left Kimco, who had acquired the Sagamore Center in 1997, with roughly one-half of the shopping center vacant. Kimco searched far and wide for a new tenant like Target, but the only potential tenant it could find who was interested in leasing space in the Sagamore Center was a grocery store operator based in Missouri.<sup>61</sup> Anxious to sign a lease with someone and earn some return on its investment in the Sagamore Center, Kimco filed an action to obtain a declaratory judgment that the prohibition on leases to other grocery store operators was unenforceable.<sup>62</sup>

Initially, Kimco's strategy seemed successful, as the trial court refused to enforce the covenant on the basis that "the use of the property and the surrounding area have changed so radically"<sup>63</sup> that the initial intent and purpose of the restriction were no longer served. The trial court cited three facts that constituted this radical change: first, that the tenant was not operating as a grocery store; second, that the tenant's subtenant would not be harmed by a

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58. *Tippecanoe*, 811 N.E.2d at 442-43.

59. *Tippecanoe*, 829 N.E.2d at 513.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Tippecanoe*, 811 N.E.2d at 447.

grocery store operating in the center; and third, that Target, a major anchor tenant, had closed.<sup>64</sup> Unfortunately for Kimco, the court of appeals scrutinized the trial court's reasoning and concluded that the changes in circumstances noted by the trial court were not sufficient under prior case law to justify any refusal to enforce an unambiguous restriction.<sup>65</sup>

The supreme court accepted transfer of this case and vacated the opinion of the court of appeals as it related to the enforceability of the restrictive covenant. The supreme court first set forth the general rule that restrictive covenants are permissible but that they are "disfavored and justified only to the extent they are unambiguous and enforcement is not adverse to public policy."<sup>66</sup> The court further stated that restrictive covenants in leases that prevent competition are routinely enforced and set out many of the economic reasons justifying such restrictions, such as the protection of investments made in the shopping center by both the landlord and the tenant.<sup>67</sup> But, the court noted, these reasons "support limiting the covenant to the protection of current tenants of the center."<sup>68</sup> Accordingly, if the covenant no longer protects current tenants of the center, then it would seem that the covenant becomes an undue restraint of trade and, perhaps, unenforceable.<sup>69</sup>

The supreme court stated that the court of appeals's discussion of changes in circumstances was unnecessary as "there is only one factor that is central and dispositive here. Because the Kroger site in the Sagamore Center is no longer being used as a grocery store location, there is no interest within the center for the restrictive covenant to protect."<sup>70</sup> There is no dispute that if Pay Less had continued grocery store operations at the center, this restrictive covenant would be enforceable, and the supreme court stated as much.<sup>71</sup> However, when Pay Less assumed the lease and elected not to operate as a grocery store, that election "severed the restrictive covenant from the occupancy."<sup>72</sup> Once this severance occurs, the covenant loses its enforceability. The dissenting opinion challenges the majority on this point by stating "[t]his rewrites existing commercial leases and restrains the ability of parties in the future to enter them on terms they view to be mutually beneficial, regardless of whether there is any demonstrable adverse effect on competition."<sup>73</sup>

The court's willingness to intrude upon the parties' freedom to contract indeed seems troubling. Clearly, if the parties had intended the restriction to lapse upon the cessation of the operation of a grocery store in the leased

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64. *Id.*

65. *Id.* at 447-49.

66. *Tippecanoe*, 829 N.E.2d at 514.

67. *Id.*

68. *Id.*

69. *See id.* at 515-16.

70. *Id.* at 514-15.

71. *Id.* at 515.

72. *Id.*

73. *Id.* at 517 (Sullivan, J., dissenting).

premises, they could have plainly stated as much in the lease document. That the lease did not so provide could be an indication that the parties considered such a notion and agreed not to address it, thus leaving the covenant intact following such cessation; in which case, the court's decision would fail to embrace the parties' intentions. Of course, the parties may not have considered this possibility while negotiating the lease and, thus, its omission does not provide any evidence of the intent of the parties. However, under the supreme court's holding, the intent of the parties does not appear to be the guiding consideration.

The majority opinion of the supreme court favorably cited the Restatement (Second) of Contracts regarding covenants in restraint of trade, which, in its comments,<sup>74</sup> discusses two situations where such a restraint may be unreasonable. "The first occurs when the restraint is greater than necessary to protect the legitimate interests of the promisee."<sup>75</sup> In this case, the court deemed it necessary to "narrow" the "protected activity" of the tenant in order to determine the reasonableness of the covenant. In holding as it does, the court seemed to be requiring that in order to establish an enforceable restrictive covenant in favor of a tenant in a lease of real property, the covenant must protect some aspect of the tenant's occupancy at the property. Accordingly, one must wonder whether, following this opinion, a landowner could enter into an enforceable agreement to restrict his or her land in favor of a third party to protect some interest of such party outside of such land. Conservation easements, historical preservation easements and, indeed, any easement in gross would seem to fit within this framework.

The second situation discussed by the comments in the Restatement is where the "hardship to the promisor and the likely injury to the public"<sup>76</sup> outweigh any benefit in enforcement accruing to the promisee. The court here found that both the "convenience to the public and certainly the interest of the landlord are served by having a grocery store in the center."<sup>77</sup> These interests, when balanced against the interest of "someone foreign to the center who simply acquires the right to exclude competition without making any investment in the center[,]"<sup>78</sup> are too strong for the court to enforce the restrictive covenant and exclude the competition. The dissent criticized the majority opinion on this point as well because there were no findings by the trial court "as to the degree of competition among grocery stores in the Lafayette market."<sup>79</sup>

The supreme court seemed to be charting new territory with its holding that a restrictive covenant becomes unenforceable when it is severed from the occupancy of the tenant. The parameters of this principle will undoubtedly be defined and refined as cases arise. Many questions arise. For example, at what

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74. RESTATEMENT (SECOND) OF CONTRACTS § 188 cmt. a (1981).

75. *Tippecanoe*, 829 N.E.2d at 515 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 188 cmt. a (1981)).

76. *Id.* (quoting RESTATEMENT (SECOND) OF CONTRACTS § 188 cmt. a (1981)).

77. *Id.* at 516.

78. *Id.* at 515.

79. *Id.* at 517 (Sullivan, J., dissenting).

point does the restrictive covenant become severed? One can imagine a tenant whose business in the leased premises changes over time so that what was at the beginning of the lease term the tenant's primary business and the business covered by a restrictive covenant, now represents only a fraction of the tenant's business. Would the landlord be justified in leasing space in the center to another occupant to engage in that initial use? Also, if the tenant ceases operating for a time and later reopens for the initial, protected use, does the prior severance cut off the enforceability of the covenant for all time or can it be revived by that subsequent re-opening?

Another example is suggested by the covenant in this case. The covenant prohibited the landlord from leasing any property it acquired after the lease was executed within two miles of the Sagamore Center for use as a grocery store. If Pay Less had operated a grocery store in the Sagamore Center, would the covenant as applied to this extended area not be "severed" from Pay Less's occupancy because Pay Less has no interest in and is not operating in that other center? Also, as an operating grocery store, would Pay Less's interest in Sagamore Center be sufficient to justify the prohibition imposed on other centers in a two-mile radius, or would the hardship on the landlord or the public injury in such lack of competition outweigh the benefit to the tenant?

#### *B. Forfeiture Provisions in Land Sale Contracts*

Morris McLemore ("Morris") owned a parcel of land in Osceola.<sup>80</sup> In 1998, Morris entered into a conditional land sales contract to sell the parcel to his nephew Brian McLemore ("Brian"). The contract called for a purchase price of \$185,000 with a down payment of \$25,000 and monthly payments of \$1545.21, with interest at ten percent per annum. The contract included a provision which called for forfeiture unless Brian had paid a "substantial amount" of the purchase price at the time of default:

The rights of the Purchaser shall terminate and all payments heretofore made shall remain the property of the Seller as rent for the use of the premises and as liquidated damages, and the Purchaser shall immediately surrender possession to Seller. Provided, however, that if the Purchaser has paid a "substantial amount" on the principal purchase price, the provisions of this section shall not apply and the Seller may pursue such other remedies as herein provided or permitted by Indiana Law. It is stipulated and agreed by the parties that the Purchaser shall have paid a "substantial amount" of the purchase price when the fair market value of the real estate at the time of default exceeds the sum of (a) the then remaining unpaid balance of the purchase price with accrued interest thereon, (b) the estimated cost of resale, (c) the amount of any additional liens on the real estate, and (d) reasonable attorney fees of the enforcement of this contract[.]<sup>81</sup>

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80. McLemore v. McLemore, 827 N.E.2d 1135, 1138 (Ind. Ct. App. 2005).

81. *Id.* at 1138-39 (alteration in original).

Brian made monthly payments for approximately three years. In September 2001, things went sour between Morris and Brian. Morris went to the property to collect a late payment and words were exchanged. Shortly thereafter, Morris changed the locks at the property and Brian sent a letter to the property tenants, instructing them to send their rent checks to Morris. Brian then filed a complaint against Morris, alleging constructive fraud, wrongful forfeiture, breach of contract, and conversion. The trial court found the land contract to be forfeited. Brian appealed.<sup>82</sup>

The court first stated that forfeitures are generally disfavored at law and that “[t]he court, in the exercise of its equitable powers, does not infringe upon the rights of citizens to freely contract, but the court [may] refuse, upon equitable grounds, to enforce the contract because of the actual circumstances at the time the court is called upon to enforce it.”<sup>83</sup> The appropriate test, taken from *Morris v. Weigle*,<sup>84</sup> is that “[f]orfeiture may be considered an appropriate remedy only in the limited circumstances of: (1) an abandoning or absconding vendee or (2) where the vendee has paid a minimal amount and the vendor’s security interest in the property has been jeopardized by the acts or omissions of the vendee.”<sup>85</sup>

The court rejected the contract’s attempt to define a “minimal amount” and noted that it had previously rejected similar contract provisions.<sup>86</sup> The court noted that Brian had paid 18.2% of the purchase price and concluded that under the facts and circumstances, Brian had made more than the required “minimal payment.”<sup>87</sup>

*McLemore v. McLemore* is interesting to those observers of Indiana jurisprudence concerned with the remedies available under real estate contracts because it illustrates that the cherished principle of freedom to contract can sometimes be abrogated in order to enforce equity, as the court perceives it. Although the court stated that “[f]orfeiture provisions in a land sales contract are not per se to be deemed unenforceable,”<sup>88</sup> it gave little hope that such provisions could be held to be enforceable in any but the most extreme set of facts. The court’s analysis in this case should certainly dissuade parties to a land sale contract from drafting a forfeiture remedy provision, or at least from attempting to enforce one.

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82. *Id.* at 1139.

83. *Id.* at 1140 (quoting *Morris v. Weigle*, 383 N.E.2d 341, 344 (1978)).

84. 383 N.E.2d 341.

85. *McLemore*, 827 N.E.2d at 1140 (citing *Morris*, 383 N.E.2d at 344).

86. *Id.* at 1142; *see, e.g.*, *Parker v. Camp*, 656 N.E.2d 882 (Ind. Ct. App. 1995) (rejecting definition of “substantial equity” as seventy-five percent of the purchase price); *Johnson v. Rutoskey*, 472 N.E.2d 620, 620 (Ind. Ct. App. 1984) (rejecting contract provision requiring \$12,000 payment on a purchase price of \$52,000 as the “minimal equity threshold”).

87. *McLemore*, 827 N.E.2d at 1142.

88. *Id.* at 1140.

*C. Reformation of Deeds*

In *Wright v. Sampson*,<sup>89</sup> the Indiana Court of Appeals addressed when a deed may be reformed for unilateral mistake. The property at issue in this case was a twenty-five acre tract in Miami County owned by Ray Wright (“Ray”).<sup>90</sup> A junkyard business operated by both Ray and his son, Roger Wright (“Wright”), was located on the eastern portion of the property. Rebecca Sampson (“Sampson”), Ray’s daughter, owned property adjoining Ray’s at the western border of the twenty-five acre tract. Ray intended to convey to Sampson, as a gift, the western half of his property, and therefore executed a deed prepared by counsel in May 1997 for that purpose. Sampson immediately recorded the deed. Unbeknownst to Ray, the deed given to Sampson included an incorrect legal description of the property, and thereby the entire twenty-five acres was conveyed to Sampson. Before his attorney informed him of the error, Ray executed a second deed and gave it to Wright in September 1997, intending to convey to his son a gift of the eastern half of his property.<sup>91</sup> Wright also recorded his deed the day it was delivered to him. The legal description contained in Wright’s deed, however, not only described the western half and not the intended eastern half of the property, but also property that had already been conveyed to Sampson in the first of the deeds Ray executed. Neither Sampson nor Wright paid any consideration for their respective deeds. When the error was discovered, Wright asked Sampson to sign several documents prepared by counsel in order to correct both deeds. Sampson, however, refused to sign, and in June 2001, filed suit to quiet title to all twenty-five acres that were conveyed to her in the first deed.<sup>92</sup> Wright counterclaimed to have both deeds reformed to carry out the conveyances as Ray had intended. The trial court held that title to the entire twenty-five acres should be quieted in Sampson, and found that there was no mutual mistake and therefore reformation was not an appropriate remedy.<sup>93</sup>

First, the court addressed Sampson’s challenge to Wright’s standing to bring an action for reformation because Wright was not the grantor for either deed.<sup>94</sup> The court of appeals concluded that Wright did have standing to request reformation of his deed because he was a party to that deed, and that he could also seek reformation of Sampson’s deed because Wright was in privity with Ray, a party to Sampson’s deed.<sup>95</sup> Second, the court addressed when a court could offer the remedy of reformation based on mistake. The court acknowledged that Indiana common law generally does not allow for reformation of a deed unless the petitioning party is able to show, by clear and convincing

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89. 830 N.E.2d 1022 (Ind. Ct. App. 2005).

90. *Id.* at 1024.

91. *Id.*

92. *Id.* at 1024-25.

93. *Id.* at 1025.

94. *Id.* at 1026.

95. *Id.* at 1026-27.

evidence, that there was mutual mistake or fraud.<sup>96</sup> Distinguishing *Wright* from that precedent, the court of appeals found jurisprudence from other states persuasive and held that when a deed is conveyed as a gift, it may be reformed if the party seeking reformation can prove a unilateral mistake by clear and convincing evidence.<sup>97</sup> The court reasoned that a deed conveyed as a gift was not a typical contractual relationship with mutual obligations, and because a gift is unilateral in nature, “only a unilateral mistake can occur.”<sup>98</sup> However, although a deed given as a gift may be reformed due to mistake if requested by the grantor, the same remedy generally has not been available at common law if requested by a grantee.<sup>99</sup> The *Wright* case, however, was again considered distinguishable from this principle, and the court held that reformation is available when it is sought by a grantee against another grantee.<sup>100</sup> As in the instant case where *Wright* was able to prove by clear and convincing evidence that there was unilateral mistake, the court held that a deed given as a gift may be reformed.<sup>101</sup>

In *Patterson v. Seavoy*,<sup>102</sup> the Indiana Court of Appeals decided a matter of first impression regarding the ability of a grantee of an unrecorded deed to sue for damages as a real party in interest.<sup>103</sup> *Patterson* conveyed a parcel of real estate in Bloomington to Bradley via warranty deed in 1993, and recorded that deed. Almost four years later, Bradley re-conveyed the same property back to *Patterson* by executing a second warranty deed, but did not record it for several years (the “Second Deed”). After the Second Deed had been delivered to *Patterson*, but before it was recorded, a tree on *Seavoy*’s property fell onto the house located on *Patterson*’s property during a thunderstorm. *Patterson* filed a claim against *Seavoy* seeking damages for *Seavoy*’s alleged negligence in maintaining the tree, and *Seavoy* filed a motion for summary judgment asserting that *Patterson* was not a real party in interest. After the trial court granted summary judgment to *Seavoy*, *Patterson* recorded the Second Deed and filed an appeal.<sup>104</sup>

*Seavoy* argued that Bradley was the owner of record until the Second Deed was recorded, and therefore *Patterson* did not prove ownership of the damaged property.<sup>105</sup> As such, *Seavoy* contended, because *Patterson* could not prove that he owned the property that the tree damaged, he was not the true owner of the right to seek such damages, and therefore was not a real party in interest pursuant to Indiana Trial Rule 17(A).<sup>106</sup> The *Patterson* court held that “for a valid transfer of legal title, the grantor must make, execute, and deliver a deed to the grantee

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96. *Id.* at 1027.

97. *Id.* at 1027-28.

98. *Id.* at 1027 (citing *Schulz v. Miller*, 837 P.2d 71, 76 (Wyo. 1992)).

99. *Id.* at 1028.

100. *Id.* at 1029 (citing *Simms v. Simms*, 249 N.Y.S. 171, 174 (N.Y. Sup. Ct. 1931)).

101. *Id.*

102. 822 N.E.2d 206, 210 (Ind. Ct. App. 2005).

103. *Id.* at 209.

104. *Id.*

105. *Id.* at 211.

106. *Id.* at 210.

containing words of conveyance and describing the property and the interest to be conveyed.”<sup>107</sup> The court therefore concluded that although record title is evidence of ownership and gives notice of such ownership, recording a deed has no effect on the instrument’s validity and therefore Patterson was a real party in interest who could seek damages from Seavoy.<sup>108</sup>

### III. LANDLORD/TENANT LAW

#### A. Residential Real Estate Disclosures

The court of appeals addressed again this year a dispute concerning the effect of statements made by a seller of residential real estate in the required sales disclosure form.<sup>109</sup> In *Reum v. Mercer*,<sup>110</sup> Reum purchased a home in 1990 and leased it to her granddaughter. In 1996 the occupants noted a problem with the septic system of the property that was then repaired by the tenant. After that repair, the occupants had no further problems with the septic system.<sup>111</sup> In 2001, Reum sold the home to Mercer and, as required by law, completed and delivered to Mercer a disclosure form which indicated the septic system was not defective.<sup>112</sup> Mercer was informed by a neighbor nearly one year after the sale that sewage from Mercer’s home was being discharged onto the neighbor’s property. After spending over fourteen thousand dollars to repair the septic system, Mercer brought suit alleging fraud, constructive fraud, and breach of warranties.<sup>113</sup>

The trial court found in favor of Mercer finding that “[t]he law in Indiana is clear, that if a seller sells real estate with knowledge of its defects and those defects are not disclosed to the purchaser then seller is liable to the buyer for the correcting of those defects.”<sup>114</sup> The trial court determined that it is not reasonable for a buyer to inspect a home’s septic system because to do so would require the home’s yard to be dug up. The trial court did note that the statute requiring the disclosure statement provides that the seller is not liable for errors in the disclosure statement if the seller, in making those statements, has relied on the opinion of an expert.<sup>115</sup> Here, however, the trial court found no justified

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107. *Id.* (citing IND. CODE § 32-17-1-2 (2005); *id.* § 32-21-1-15).

108. *Id.* at 211.

109. See generally Tanya D. Marsh & Robert G. Solloway, *Let the Seller Beware: The Slow Demise of Caveat Emptor in Real Property Transactions and Other Recent Developments in Indiana Real Property Law*, 38 IND. L. REV. 1317 (2005) (discussing certain recent case law having the effect of imposing upon sellers of residential real estate liability for false, misleading, incomplete, or incorrect information contained in the required forms).

110. 817 N.E.2d 1267 (Ind. Ct. App. 2004).

111. *Id.* at 1268.

112. *Id.* at 1269.

113. *Id.*

114. *Id.* at 1270.

115. *Id.* at 1273 (citing IND. CODE § 32-21-5-11 (2004)).

reliance on the statements or opinion of an expert because the seller relied on the statements of the tenant, admittedly not an expert, that the septic problem was repaired in 1996 and thereafter did not present a problem.

The court of appeals reversed the trial court on the basis that the seller did not have any knowledge of an existing defect in the septic system at the time she signed the disclosure statement.<sup>116</sup> After the 1996 repair, there was no evidence of any defect at all in the system until nearly one year after the sale of the property to Mercer.<sup>117</sup> Accordingly, the seller, not knowing of any defect, cannot be required to seek the advice and opinion of an expert in septic systems in order to avail herself of the disclosure statute's exception for reliance on the opinion of an expert.<sup>118</sup> The court of appeals rejected the notion required by the trial court that a seller must disclose any defect in the home that was ever repaired by someone other than an expert.<sup>119</sup> Indiana law simply does not require such disclosure but only requires the seller to "disclose existing defects of which she has actual knowledge at the time of the disclosure."<sup>120</sup>

The court of appeals decision is a welcome addition to this often confusing and developing body of law regarding the obligations of a casual seller of residential real estate for disclosing defects in that real estate. Although the law is clearly moving away from the traditional notions of caveat emptor, this case clarifies that the law does not place liability on the seller for every problem and defect in the home. However, the decision of the trial court seems to highlight the confusion that may exist in our collective understanding of the effect of the disclosure statute. The disclosure statute was not intended to provide any warranty by the seller regarding the condition of the home, but to encourage disclosure of existing, known problems in the home that otherwise would not be discovered by the buyer's inspections.

### *B. Residential Lease Security Deposit*

The court of appeals case of *Hill v. Davis*<sup>121</sup> serves as a reminder to landlords under leases for residential property to be ever vigilant regarding the statutory notice requirements<sup>122</sup> for the return of tenants' security deposits upon termination or expiration of the lease. In this case, the Hills leased a home in Coatesville, Indiana, under a lease for one year and paid a \$500 security deposit.<sup>123</sup> The following May, the tenants sent the landlord a notice that they were dissatisfied with the premises and would be vacating in approximately one

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116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 1274.

120. *Id.*

121. 832 N.E.2d 544 (Ind. Ct. App. 2005).

122. IND. CODE § 32-31-3 (2005).

123. *Hill*, 832 N.E.2d at 545.

month's time.<sup>124</sup> Before the tenants moved out, the landlord filed a small claims action for breach of the lease and claimed damages due for unpaid rent and utility bills.<sup>125</sup> The tenants then moved out and did not leave a forwarding address with the landlord because they were homeless.<sup>126</sup> During the hearing on the small claims action at which the tenants requested an enlargement of time to engage counsel, the court inquired as to where the tenants were then living and where they were receiving mail.<sup>127</sup> Tenants supplied an address, which the court noted in its chronological case summary and which the court then mailed to the landlord's attorney and to the tenants.<sup>128</sup>

At a subsequent hearing on the merits, the small claims court entered judgment for the landlord, and the tenant appealed.<sup>129</sup> On appeal, the tenants claimed that the judgment was erroneous because the landlord had not supplied the tenants with an itemized list of damages within forty-five days after receiving the tenants' forwarding address as required by the security deposit statute.<sup>130</sup> Accordingly, the landlord had to return the tenants' security deposit in full, along with attorneys' fees incurred in responding to the landlord's action.<sup>131</sup> The court of appeals agreed and held the tenants were entitled to the return of their security deposit, plus attorneys' fees.<sup>132</sup> The landlord received adequate notice of the tenants' forwarding address when the tenants stated in open court what the address was and when the court forwarded to the landlord's attorney the chronological case summary which included that information.<sup>133</sup> The landlord's attorney was engaged specifically to represent the landlord in connection with the lease matter and, therefore, delivery of the forwarding address to the attorney was deemed sufficient to put the landlord on notice of that address.<sup>134</sup> Once a landlord has a tenant's forwarding address, the statute clearly and without exception provides that the landlord must send the tenant an itemized list of damages due under the lease.<sup>135</sup>

The landlord argued that the small claims complaint served upon the tenants fulfilled the requirements of the statute to provide such itemized list of damages.<sup>136</sup> The landlord's complaint stated that the tenants were "in breach of a lease due to unpaid rent and utility bills. The damage deposit should be applied

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124. *Id.*

125. *Id.* at 545-46.

126. *Id.* at 546.

127. *Id.*

128. *Id.* at 545-46.

129. *Id.* at 546-47.

130. *Id.* at 549-50.

131. *Id.*

132. *Id.* at 555.

133. *Id.* at 551-52.

134. *Id.* at 551.

135. IND. CODE § 32-31-3-12 (2005).

136. *Hill*, 832 N.E.2d at 552.

toward any judgment rendered herein.”<sup>137</sup> The court of appeals found that summary description of damages to be lacking and specifically noted that

[w]e cannot say that the purpose of the security deposit statute’s itemized damages notice requirement, which is to inform the tenant of why the landlord is keeping the security deposit and providing the tenant an opportunity to challenge the costs, has been met where the landlord merely provides a lump sum request for claimed damages in an alias notice of claim filed in small claims court.<sup>138</sup>

The effect upon the landlord’s claim for damages when the landlord fails to comply with the statute is severe indeed. As the court of appeals stated, that failure “constitutes an agreement that no damages are due and requires that she return the \$500 security deposit to Tenants as well as pay Tenants’ attorney fees and costs.”<sup>139</sup> Therefore, instead of a judgment in the landlord’s favor of over \$3000 for unpaid rent under the lease, landlord loses that claim and instead is obligated to return \$500 to the tenant and pay the tenant’s attorneys fees and costs.

### C. *Extent of Landlord’s Rights in Common Areas*

In a matter of first impression, the court of appeals has held that an apartment complex landlord has exclusive possession of the common areas of its apartment complex.<sup>140</sup> This case was brought by ninety-six apartment complexes in central Indiana against the publisher of a free weekly paper, *The Renter’s Gazette*, whose ostensible aim appeared to be finding first time home buyers.<sup>141</sup> Between 25,000 and 50,000 copies of *The Renter’s Gazette* are published each week and distributed free of charge directly to the doorstep of each apartment in each of the targeted apartment communities. The apartment complex owners objected to this distribution scheme as it tended to cause excess litter in the common area that maintenance staff for the complex had to remove and which detracted from the curb appeal of the apartment communities.<sup>142</sup> The apartment complex owners had requested on a number of occasions that the publisher cease distributing the paper at their communities.<sup>143</sup> The publisher, naturally, has refused their requests and continued to distribute the paper on a weekly basis.<sup>144</sup> The apartment complex owners brought an action seeking an injunction against the publisher of the paper to prohibit the publisher’s distributors from entering the apartment

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137. *Id.*

138. *Id.* at 553.

139. *Id.* at 555.

140. *Aberdeen Apartments v. Cary Campbell Realty Alliance, Inc.*, 820 N.E.2d 158, 165 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 178 (Ind. 2005).

141. *Id.* at 161-62.

142. *Id.* at 162-63.

143. *Id.* at 162.

144. *Id.*

complexes to distribute the paper.<sup>145</sup>

The trial court refused to grant a preliminary injunction, finding that the apartment complex owners were unlikely to prevail on the merits.<sup>146</sup> The trial court found specifically that upon leasing the apartments in the complex, the landlord lacked exclusive possession of the common areas of the complex necessary to maintain an action for trespass.<sup>147</sup> The court of appeals analyzed applicable case law and determined that there is an ambiguity in the case law as to whether an aggrieved party must have exclusive possession of the premises in order to maintain an action for trespass upon those premises.<sup>148</sup> However, the court of appeals did not attempt to resolve this ambiguity, holding instead that, as a matter of law, the apartment complex owners had exclusive possession of the common areas of the apartment complex.<sup>149</sup> The court compared approaches to the question as set forth in a decision by the Michigan Court of Appeals,<sup>150</sup> which held that the landlord retained exclusive possession of the common areas and the tenants were granted licenses to use the common areas as an appurtenance of their leased premises,<sup>151</sup> and by the Supreme Court of Washington,<sup>152</sup> which found that authority in the common areas was common to both the landlord and tenant,<sup>153</sup> and found the Michigan approach to be the better approach.<sup>154</sup> The Washington approach leaves the parties in a position that no party can maintain an action for trespass upon the common areas because no party has exclusive possession of the common areas.<sup>155</sup>

Judge Baker filed a dissenting opinion in this case challenging the majority on this matter. He would instead have held that the landlord retained a possessory interest in the common areas sufficient to maintain and repair them, but would not extend the possessory interest of the landlord beyond that.<sup>156</sup> Judge Baker argued that granting or confirming that the landlord has exclusive possession of the common areas would give the landlord “the right to bar anyone of its choosing—not just solicitors—from the premises.”<sup>157</sup> Although a tenant may agree to such a provision in the tenant’s lease, it is unwise, in his opinion, to read it into the lease. The majority responded to this criticism by stating that the license granted to the tenants protected them from arbitrary action by the landlord in excluding potential guests and invitees generally and that arbitrary

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145. *Id.* at 163.

146. *Id.* at 164.

147. *Id.*

148. *Id.* at 164-65.

149. *Id.* at 165.

150. *Stanley v. Town Square Coop.*, 512 N.W.2d 51, 54 (Mich. Ct. App. 1994).

151. *Id.*

152. *City of Seattle v. McCready*, 877 P.2d 686 (Wash. 1994).

153. *Id.* at 690.

154. *Aberdeen Apartments*, 820 N.E.2d at 165.

155. *Id.*

156. *Id.* at 171 (Baker, J., dissenting).

157. *Id.*

action by a landlord would not be in the best interests of the landlord because tenants would eventually object and landlord's ability to continue to lease the property would be hampered.<sup>158</sup>

As further support for the court of appeals holding, the opinion cited a United States Supreme Court holding that "one of the essential sticks in the bundle of property rights is the right to exclude others."<sup>159</sup> A court's refusal to provide redress in the form of an action for trespass would infringe on the property owners' rights. Failure to afford this protection to landlords would open the common areas to use by the public without restriction, which would have a "deleterious effect on the landlord's business and would interfere with the privacy and repose that tenants expect from what is their home."<sup>160</sup> The opinion further discussed whether granting the injunction would violate the First Amendment free speech rights of the newspaper publisher and ultimately determined, over the objection of the dissent, that it does not constitute a prior restraint.<sup>161</sup>

#### IV. DEVELOPMENTS IN THE COMMON LAW OF PROPERTY

##### A. Adverse Possession

During the survey period, the Indiana Supreme Court decided *Fraleley v. Minger*<sup>162</sup> and re-characterized the common law requirements to establish title in land through adverse possession. In *Fraleley*, the Mingers purchased twenty-four acres of farm land in rural Ripley county in 1955 from the Chaney's.<sup>163</sup> At the time they purchased the farm, the Mingers inquired as to the ownership of an adjoining two and a half acre tract, and were told by the Chaney's that they neither owned the tract nor knew the identity of the true owner. Later, the Mingers asked Truman Belew, their neighbor, if he was the owner of the two and a half acres. Belew told the Mingers that he did not own the parcel, and after Belew's death in 1994, the two-and-a-half acre tract was deeded unknowingly to Fraleley in 1996.<sup>164</sup> Between the time of Belew's death and Fraleley's acquisition of his property, the Mingers made inquiries about purchasing the disputed tract from Belew's estate, although nothing ever came of the inquiries.<sup>165</sup> After Fraleley discovered that the disputed tract had been deeded to him, he filed suit to quiet title in the property.<sup>166</sup>

The trial court found that the Mingers believed that the property was

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158. *Id.* at 165 n.3 (majority opinion).

159. *Id.* at 166 (citing *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980)).

160. *Id.* at 167.

161. *Id.* at 169.

162. 829 N.E.2d 476 (Ind. 2005).

163. *Id.* at 480.

164. *Id.*

165. *Id.* at 487.

166. *Id.* at 480.

unclaimed when they purchased their farm, and that they considered the two and a half acre tract as theirs as of 1956. The Mingers fenced the disputed tract in 1972 and installed a culvert in a ditch in order to access the property. Further, the trial court found that friends and neighbors believed that the tract belonged to the Mingers, and that it was used by the Mingers for pasturing livestock, cutting timber and as a recreational area for the Minger children and their friends.<sup>167</sup>

Reaffirming the precedent of several earlier cases, the supreme court determined that a heightened standard of clear and convincing evidence is required to prove a claim of adverse possession.<sup>168</sup> The court noted that the law of adverse possession has a long history in Indiana, and that through the years courts have used different terms in defining the necessary elements for such claims, but overall, a claimant usually has been required to establish that her possession was actual, visible, open and notorious, exclusive, under claim of ownership, hostile, and continuous for the statutory-defined period.<sup>169</sup> In *Fraley*, however, the Indiana Supreme Court restated the test for adverse possession, holding that a claimant may obtain title to real estate by way of adverse possession by establishing, through clear and convincing evidence, the four elements of (i) control, (ii) intent, (iii) notice, and (iv) duration.<sup>170</sup> Control replaces the former elements of “actual” and “exclusive” possession and instead requires a claimant to prove that she has used and controlled the disputed property in a way that is customary considering the characteristics of such property. The element of intent replaces the former elements of “claim of ownership,” “exclusive,” “hostile,” and the more rarely used term “adverse.” Intent is established by the claimant showing that her intent was to establish complete ownership of the disputed property, superior to all others, above all that of the owner of record. Notice replaces the former elements of “visible,” “open,” “notorious,” and to a lesser degree, the element of “hostility,” by requiring a claimant to demonstrate that the title owner of the disputed property had actual or constructive notice of the claimant’s intent to exert exclusive control over the land. Finally, the *Fraley* element of duration replaces the former element requiring a claimant’s use to be “continuous,” and is established by the claimant demonstrating that she has fulfilled the other three elements for the requisite time period.<sup>171</sup>

The *Fraley* court held that all four of these elements were established by the Mingers. In applying the restated test, the court concluded that the trial court’s findings that the Mingers fenced the property and used it as a supply of timber, pasture land for cattle, and a recreational area, all supported the Mingers’ satisfaction of the element of control.<sup>172</sup> The supreme court specifically

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167. *Id.* at 480-81.

168. *Id.* at 483.

169. *Id.* at 483-85.

170. *Id.* at 486.

171. *Id.*

172. *Id.* at 488.

addressed Fraley's contention that the Mingers could not have adversely possessed the disputed tract because they did not use the tract under a mistaken belief of their actual ownership of the property.<sup>173</sup> Dismissing Fraley's argument, the court held that a claimant's possession need not be under any color of title to establish adverse possession.<sup>174</sup> Despite finding that a claimant does not need to address claim of ownership under the newly restated test, the court found that the Mingers established the element of intent by demonstrating that they believed that the disputed tract was unclaimed when they began to use it in 1956; others believed the tract belonged to the Mingers; they used the tract as their own; and "they claimed ownership hostile to Fraley's predecessors in title."<sup>175</sup> These factors, along with the installation of the culvert, were regarded by the court as sufficient to establish the element of notice.<sup>176</sup> Even though Fraley also attempted to disprove the Mingers' claim to the disputed property by arguing that their use of the land was not sufficiently continuous to establish adverse possession, the court reaffirmed two earlier adverse possession decisions where the characteristics of the land determined the continuity of use.<sup>177</sup> The Mingers' use of the property was found to be continuous despite its sporadic nature, because the property was rural and undeveloped, and was therefore not of a nature that would be used without interruption.<sup>178</sup> This, in addition to the trial court's finding that the Mingers' use of the two and a half acre tract continued from 1956 to 2002, was found to be sufficient to establish the element of duration for the required statutory period of ten years.<sup>179</sup>

Further, Fraley also asserted that the Mingers' possession was not hostile since they asked about buying the disputed property after Belew's death, thus acknowledging the superior title of Fraley's predecessor in interest. The court quickly dispensed with this argument, however, by highlighting that title is vested through adverse possession at the end of the statutory period of ten years, which for the Mingers would have been approximately 1966. The court continued that if title had vested in the Mingers at that time, no subsequent inquiry on the part of the Mingers, even their expressed interest in buying the property sometime after Belew's death in 1994, could divest them of such title.<sup>180</sup>

Despite having found that the Mingers had established the necessary elements for adverse possession at common law, the court ruled that the Mingers did not comply with the adverse possession tax statute, and therefore did not obtain title to the two and a half acre tract.<sup>181</sup> Indiana Code section 32-21-7-1 stipulates that no person may obtain title through adverse possession "unless the

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173. *Id.* at 485-86.

174. *Id.*

175. *Id.* at 488.

176. *Id.*

177. *Id.* at 487.

178. *Id.* at 487-88.

179. *Id.* at 488.

180. *Id.* at 487.

181. *Id.* at 493.

adverse possessor or claimant pays and discharges all taxes and special assessments due on the land or real estate during the period the adverse possessor or claimant claims to have possessed the land or real estate adversely.<sup>182</sup> In analyzing the tax statute, the *Fraleley* court reaffirmed its earlier case of *Echterling v. Kalvaitis*.<sup>183</sup> In *Echterling*, the court held that in addition to establishing the other elements of adverse possession, a claimant must pay all taxes and special assessments due on such land that they are claiming.<sup>184</sup> Although prior to *Fraleley* the Indiana Supreme Court had never reaffirmed or reconsidered *Echterling*, the Indiana Court of Appeals handed down several opinions after *Echterling* holding that where notice to the record title holder was otherwise established, compliance with the tax statute was not required for an adverse possessor to gain title to a parcel of real estate. The court of appeals reasoned that the tax statute was only meant to give notice to the owner of record that another party was using their property, because the title holder of record would receive a tax refund or tax statement showing that the taxes on the parcel being adversely possessed had been paid, thus alerting the owner to the presence of the adverse possessor.<sup>185</sup> The Indiana Supreme Court in *Fraleley*, however, made it clear that it rejected this line of decisions not only because of the conflict these cases presented with *Echterling*, but also because of the longstanding policy that legislative agreement with a particular judicial interpretation is assumed when the legislature does not take steps to modify a statute after the Indiana Supreme Court has applied it in one of its decisions. Because *Echterling* had stood for over fifty years and the General Assembly had not modified the adverse possession tax statute since the decision had been handed down, the court found that this signaled the legislature's agreement with the court's interpretation of the statute in *Echterling*.<sup>186</sup> The *Fraleley* court ultimately held that under *Echterling*, a claimant may satisfy Indiana Code section 32-21-7-1 and obtain title by way of adverse possession if the claimant had a reasonable good faith belief that she had paid taxes on the disputed land throughout the period of adverse possession.<sup>187</sup> The trial court did not make any finding that the Mingers paid, intended to pay, or believed that they were paying, taxes on the disputed property, and therefore the Indiana Supreme Court held that they did not adversely possess the two and a half acre tract.<sup>188</sup>

The suggestion that a claimant's *intent* to pay taxes may satisfy the statutory requirements was not fully addressed in *Fraleley*. The General Assembly after the *Fraleley* decision was issued, however, proposed an amendment that would have Indiana Code section 32-21-7-1 read "unless the adverse possessor or claimant pays and discharges all taxes and special assessments *that the adverse possessor*

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182. IND. CODE § 32-21-7-1 (2005).

183. 126 N.E.2d 573 (Ind. 1955).

184. *Fraleley*, 829 N.E.2d at 489.

185. *Id.* at 490-91 (citing *Kline v. Kramer*, 386 N.E.2d 982, 989 (Ind. Ct. App. 1979)).

186. *Id.* at 492.

187. *Id.* at 493.

188. *Id.*

or claimant reasonably believes in good faith to be due on the land or real estate during the period the adverse possessor or claimant claims to have possessed the land or real estate adversely.”<sup>189</sup> Justices Sullivan and Rucker concurred in the result in *Fraleley*, but argued that *Echterling* should have been overruled and Indiana Code section 32-21-7-1 should be applied in accordance with its terms.<sup>190</sup>

The Indiana Court of Appeals applied the restated *Fraleley* test to establish adverse possession in the claimants in *Nodine v. Mc Nerney*.<sup>191</sup> In this case, the claimants in 1994 were granted title by way of adverse possession to a strip of beachfront property in Steuben County adjoining their residential lots.<sup>192</sup> The claimants filed a second action in 2002, asking the trial court to quiet title to portions of two streets that were bounded by seawalls that the claimants had erected and maintained.<sup>193</sup> In response, the plaintiffs’ neighbors filed a counterclaim asserting a prescriptive easement over portions of the plaintiffs’ property where a gravel path provided access to the nearby lake.<sup>194</sup>

Based on the trial court’s pre-*Fraleley* findings, the court of appeals found that the claimants had not fully established the elements of intent, control, or notice.<sup>195</sup> In the first adverse possession action, the claimants admitted that their neighbors had a right to use the disputed areas of the streets that they were now claiming. The court of appeals reasoned that this acknowledgment demonstrated that the claimants “did not intend to claim full ownership of those areas and that they were not exerting exclusive control thereof” and that their possession “was not adverse or hostile.”<sup>196</sup> Further, before the claimants’ installation of the seawalls, the streets in question were virtually impassable. The court of appeals found that unlike the erection of a fence, which is often sufficiently hostile to establish adverse possession, the seawalls in *Nodine* had the opposite effect of inviting others to use the streets by making the lake more accessible. Thus, the court of appeals held that the claimants had not acquired the disputed areas by adverse possession, because they did not demonstrate the intent to claim full ownership or assert exclusive control over the disputed areas.<sup>197</sup> In regards to the easement for the gravel path, the *Nodine* court found that to establish a prescriptive easement, those claiming the easement must prove that their use was adverse, open notorious, continuous, and uninterrupted for twenty years under a claim of right or by continuous adverse use with the knowledge and acquiescence of the title owner.<sup>198</sup> The court found that it was unnecessary in this case to determine whether or not the *Fraleley* restatement was necessary when

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189. H.B. 1114, 114th Gen. Assem., 2d Sess. (Ind. 2006) (emphasis added).

190. *Fraleley*, 829 N.E.2d at 493-94 (Sullivan, J., concurring).

191. 833 N.E.2d 57 (Ind. Ct. App. 2005).

192. *Id.* at 62.

193. *Id.*

194. *Id.* at 63-64.

195. *Id.* at 65-66.

196. *Id.* at 66.

197. *Id.* at 67.

198. *Id.* at 69.

considering prescriptive easements.<sup>199</sup>

Therefore, after *Fraleley*, a claimant must now establish the four common law elements of control, intent, notice, and duration, as well as the statutory element of paying property taxes in order to adversely possess real estate. Although the test has been restated, it is clear from both *Fraleley* and *Nodine* that the use of hostility, adverse use, and claim of ownership will continue to be employed in some fashion in future adverse possession actions. Because the Indiana Supreme Court addressed adverse possession but not prescriptive easements in *Fraleley*, the appropriate test for those types of easements is now unsettled. If passed, the proposed amendment to Indiana Code section 32-21-7-1 would clarify some of the questions left open in *Fraleley* as to the issue of whether an adverse possessor's intent to pay property taxes on land they were claiming was sufficient to comply with the statute and also would confirm the Indiana Supreme Court's belief that the legislature had approved of *Echterling*.

#### B. Partition

In *Scottish Rite of Indianapolis Foundation, Inc. v. Adams*,<sup>200</sup> the Indiana Court of Appeals ruled that a life tenant does not have standing to force the partition and sale of real property unless the sale would be advantageous to both parties.<sup>201</sup> The property at issue in this case was ninety-two acres of farm land in Hamilton County in which Adams inherited a life estate in 1992. A developer offered Adams and Scottish Rite over two million dollars to purchase the property in 2002, and after Adams and Scottish Rite could not come to terms as to how to allocate the proceeds with one another, Adams filed suit asking that the property be partitioned and sold, and the proceeds equitably divided. The trial court ordered that the farm be sold, holding that the life estate provided Adams with sufficient standing to petition the court for such a remedy and that the developer's interest had so increased the value of the farm that it was advantageous to both Adams and Scottish Rite to sell the property as Adams requested.<sup>202</sup>

Indiana Code sections 32-17-4-1<sup>203</sup> and 32-17-4-23,<sup>204</sup> do not allow a plaintiff to compel the disposition of real estate when the plaintiff only holds a life estate in the disputed property.<sup>205</sup> Adams challenged the statutes as unconstitutional under the Equal Privileges Clause of the Indiana Constitution,<sup>206</sup> but the court held that the Code reasonably, and therefore constitutionally, distinguishes

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199. *Id.*

200. 834 N.E.2d 1024 (Ind. Ct. App. 2005).

201. *Id.* at 1025.

202. *Id.*

203. IND. CODE § 32-17-4-1 (2005).

204. *Id.* § 32-17-4-23.

205. *Adams*, 834 N.E.2d at 1026.

206. IND. CONST. art. I, § 23.

between life tenants and those holding fee simple title.<sup>207</sup> Because a life tenant has a limited interest in a parcel of real estate and may only convey her interest in the right to possession during her lifetime, the court concluded that life tenants have inherent characteristics that allow them to be reasonably distinguished from fee simple owners, who hold the highest form of title and are allowed to freely alienate the property as they see fit.<sup>208</sup>

The court of appeals further reasoned that although at common law and under Indiana Code sections 32-17-4-1 and 32-17-4-23, the remedy of partition would not have been available to Adams, Indiana Code section 32-17-5-2<sup>209</sup> permits those who hold a life estate to compel a sale of the real estate if the sale is “advantageous to the parties concerned.”<sup>210</sup> The availability of a willing buyer alone will not render a potential sale advantageous for purposes of the Code, however. Scottish Rite, in fact, believed that the property would continue to appreciate dramatically, and therefore preferred to delay selling the land. Holding that “appreciation in value accrues solely to the benefit of the remainderman, not to the life tenant,” the court of appeals denied Adams request for partition and concluded that because of the extraordinary increase in the value of the property, an immediate sale would not be advantageous to both parties because such increased value would accrue only to Scottish Rite.<sup>211</sup>

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207. *Adams*, 834 N.E.2d at 1026-27.

208. *Id.* at 1027.

209. IND. CODE § 32-17-5-2.

210. *Adams*, 834 N.E.2d at 1026.

211. *Id.* (citing *Hauck v. Second Nat'l Bank*, 286 N.E.2d 852, 866-67 (Ind. Ct. App. 1972)).