

1988

Real Property and Real Estate Transactions

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Recommended Citation

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Real Property and Real Estate Transactions

Fred I. Feinstein*
and Timothy G. McDermott**

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I. INTRODUCTION

The most notable development in Illinois real property law during the *Survey* period involved legislation. The state enacted the new Illinois Mortgage Foreclosure Law,¹ which clarified and restructured existing law in several notable ways, especially regarding the timing of the foreclosure sale.

Furthermore, Illinois courts addressed many cases involving real property issues during the *Survey* year. The Illinois Supreme Court addressed, among other things, issues involving landlord liability,² termination of a lease relationship,³ sufficiency of a lease agreement,⁴ and real estate tax sales.⁵ Also, several decisions of the Illinois appellate courts clarified prior supreme court rulings in many areas.

II. PROPERTY TAXES

A. Scavenger Tax Sales

In *In re Application of Rosewell*,⁶ the Illinois Supreme Court addressed notice and due process issues arising under the Scavenger Act.⁷ In *Rosewell*, the Cook County assessor mailed a notice to the

1. See *infra* notes 253-359 and accompanying text.

2. See *infra* notes 116-46 and accompanying text.

3. See *infra* notes 147-53 and accompanying text.

4. See *infra* notes 183-95 and accompanying text.

5. See *infra* notes 6-20 and accompanying text.

6. 117 Ill. 2d 479, 512 N.E.2d 1256 (1987).

7. *Id.* at 485, 512 N.E.2d at 1258 (citing ILL. REV. STAT. ch. 120, para. 716(a) (1983)). The court stated:

The Scavenger Act requires the county collector to "publish an advertisement

assessee of record for certain parcels of real estate. The notice stated that the parcels had escaped assessment for the years 1965 through 1978, and that a hearing for back taxes for those years would be held.⁸ The record on appeal indicated that the assessee received the notice, but the record did not show whether the assessee attended the hearing. Following the hearing, the collector issued a bill for the back taxes. The bill was not paid, and subsequently the county collector published notice of his intention to file for judgment and order of sale. The circuit court entered a judgment and order of sale on May 6, 1983.⁹

One month later, the taxpayer filed a petition to vacate the judgment and order. The taxpayer alleged that no notice of the proceeding had been sent by mail and, therefore, that the court improperly invoked its jurisdiction.¹⁰ The circuit court denied the petition, and on appeal, the appellate court reversed after determining that notice by mail to the taxpayer was required.¹¹

The supreme court determined that the county's long-standing

giving notice of the intended application for judgment for sale of all tracts of lands and lots upon which all or a part of the general taxes for each of 5 or more years are delinquent as of the date of the advertisement."

Id. (citing ILL. REV. STAT. ch. 120, para. 706 (1983)).

The appellate court concluded that the notice provision of the Revenue Act, which requires that "the Collector shall publish an advertisement, giving notice of the intended application for judgment for sale of such delinquent land and lots," ILL. REV. STAT. ch. 120, para. 711 (1983), and the United States Constitution required notice by mail to the taxpayer before a court could grant a default judgment of sale for unpaid taxes. *In re Application of Rosewell*, 139 Ill. App. 3d 482, 486, 487 N.E.2d 952, 955 (1st Dist. 1985).

Following the appellate court decision, the county collector suspended Cook County scavenger sales pending the Illinois Supreme Court's final resolution of whether notice by mail was required. *Rosewell*, 117 Ill. 2d at 482, 512 N.E.2d at 1257. The supreme court stated that the suspension of the scavenger sales seemed unnecessary because the collector could have complied with the appellate court's holding by sending a notice of the scavenger sale by registered or certified mail to taxpayers. *Id.* The county assessor, however, had not held a scavenger sale since 1983 because of the potential cloud over titles conveyed in such sales and the resulting negative effect on bidders. *Id.* at 484, 512 N.E.2d at 1258.

8. *Id.* at 482, 512 N.E.2d at 1257.

9. *Id.*

10. *Id.* at 482-83, 512 N.E.2d at 1257.

11. *Id.* at 483, 512 N.E.2d at 1257. The taxpayer, who appealed from the order of sale, had since paid the amount of tax sought by the county. Furthermore, the evidence did not indicate that the property had been sold or offered for sale at the 1983 scavenger sale. *Id.* at 484, 512 N.E.2d at 1258. The supreme court, therefore, concluded that any issue regarding the parties' rights against each other was moot. *Id.* Nevertheless, in order to remove the potential cloud over titles that had led to the cancellation of scavenger sales in Cook County since 1983, the supreme court accepted the case to determine the notice requirements under the Scavenger Act. *Id.* at 484-85, 512 N.E.2d at 1258. The court determined that the public importance of renewing the scavenger sales constituted a "narrow exception to the mootness doctrine." *Id.*

interpretation that the Scavenger Act did not require notice by mail was reasonable.¹² The court, therefore, held that the Act did not require notice by mail of applications for judgment under the Act.¹³ The court noted that the Revenue Act, which provides for the annual sale of tax delinquent properties, requires that notice be mailed to assesses of property subject to annual sale.¹⁴ The taxpayer contended that consistencies in the language used in the Scavenger Act and the Revenue Act indicated a legislative intent that the notice provisions for the latter act should apply to the former act.¹⁵ The supreme court, however, accepted the collector's argument that the county's long-standing interpretation of the Scavenger Act was not unreasonable given the ambiguous wording of the statute.¹⁶ The court, therefore, concluded that the statute did not mandate notice by mail of applications for judgment under the Scavenger Act.¹⁷

The taxpayer also contended that the fourteenth amendment to the United States Constitution required notice by mail.¹⁸ The court distinguished prior case law¹⁹ and concluded that, in the context of all the notices and other safeguards provided by the Revenue Act, the failure to provide notice by mail of a scavenger application is not "unreasonable" within the meaning of the fourteenth amendment.²⁰

12. *Id.* at 487, 512 N.E.2d at 1259.

13. *Id.*

14. *Id.* at 486, 512 N.E.2d at 1259. The Revenue Act requires "notice by mail of application for judgment for sale of delinquent lands or lots." *Id.* (quoting ILL. REV. STAT. ch. 120, para. 706 (1983) (emphasis in original)).

15. *Id.*

16. *Id.* at 487, 512 N.E.2d at 1259. The court noted that the wording of the requirement of mailed notice "tracks precisely" the wording of the annual sale provision in the Revenue Act, but not the wording of the Scavenger Act. The court, therefore, reasoned that the legislative intent regarding the notice provision was ambiguous. *Id.*

17. *Id.*

18. *Id.* The taxpayer cited for support *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306 (1950) (requiring notice "reasonably calculated . . . to apprise the parties" of hearings that finally affect a deprivation), and *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983) (prohibiting a tax sale under Indiana law unless notice of the hearing in which an order of sale might be entered had been mailed to the mortgagee). *Rosewell*, 117 Ill. 2d at 487, 512 N.E.2d at 1259.

19. *Rosewell*, 117 Ill. 2d at 488-89, 512 N.E.2d at 1260 (distinguishing *Mullane*, 339 U.S. 306 (1950), and *Mennonite*, 462 U.S. 791 (1983)). The court, in distinguishing *Rosewell*, stated that "the interests of the owner and mortgagee are not affected until the issuance of a tax deed," and furthermore, such a "deed will not issue until the redemption period—with its attendant notices in person, by mail and through publication—has passed, and a petition for a tax deed—with its own stringent notice requirements—has been made and acted upon." *Id.* at 488-89, 512 N.E.2d at 1260.

20. *Id.* at 489, 512 N.E.2d at 1260. The court also rejected the taxpayer's argument

*B. The Owner's Right to Redeem Following
A Tax Foreclosure Sale*

In *In the Matter of the Application of Rosewell* ("Rosewell 2"),²¹ the Illinois Appellate Court for the First District addressed the issue of the owner's right to redeem following a tax foreclosure sale. In *Rosewell 2*, the Phoenix Bond & Indemnity Co. ("Phoenix") purchased real estate at a 1979 annual tax sale pursuant to section 272 of the Illinois Revenue Act of 1939.²² Phoenix purchased the parcel of real estate on November 31, 1981.²³ The purchased property was subject to a redemption period which ran to November 14, 1983. Subsequently, a deputy county clerk erroneously changed the redemption date to February 15, 1984.²⁴ The Federal Deposit Insurance Corp. (the "FDIC"), the assignee in liquidation of the legal owner of the land trust holding the property, received an original notice of the November 14, 1983 redemption date, and then received three notices of the February 15, 1984 date. The FDIC redeemed the property during the erroneously extended redemption period. Phoenix brought suit to expunge the FDIC's redemption, and to obtain an order directing the clerk to issue a tax deed to Phoenix.²⁵ The trial court granted FDIC's motion for summary judgment and granted the assessor's motion to dismiss Phoenix's petition for a tax deed.²⁶

On appeal, the Illinois Appellate Court for the First District stated that, because the law favors redemption, it would construe redemption laws liberally unless injury resulted to the purchaser at the sale.²⁷ Further, the court noted that the purchaser's right to a deed was inferior to the owner's right to redeem.²⁸ The court reasoned that, because the right to redeem was a substantial right, a

that the interest in receiving notice of a hearing on the application for a tax sale was a protected property interest under the Illinois Constitution of which the taxpayer was deprived unconstitutionally because the notice was insufficient. *Id.* at 491, 512 N.E.2d at 1261.

21. 148 Ill. App. 3d 297, 498 N.E.2d 790 (1st Dist. 1986).

22. *Id.* at 299, 498 N.E.2d 791 (citing ILL. REV. STAT. ch. 120, para. 753 (1981) (amended 1985)). Section 272 provided for the purchase of properties for delinquent real estate taxes, yet allowed for a redemption of the property within a certain period. *Id.* at 300, 498 N.E.2d at 791 (citing ILL. REV. STAT. ch. 120, para. 753(2) (1981)(amended 1985)).

23. *Id.* at 299, 498 N.E.2d at 791.

24. *Id.* at 300, 498 N.E.2d at 792.

25. *Id.*

26. *Id.* at 299, 498 N.E.2d at 791.

27. *Id.* at 303, 498 N.E.2d at 794.

28. *Id.*

person should not lose that right by mistake or misinterpretation.²⁹ Focusing on the mistake by a public official and the FDIC's good faith reliance on that mistake, the court concluded that the trial court properly exercised its equitable powers in allowing redemption after the statutory period had run.³⁰

C. *Constitutional Challenge to Assessment Based on Zoning Classification*

In *DuPage Bank & Trust v. Property Tax Appeal Board*,³¹ the plaintiff contended that the defendant's improper refusal to zone plaintiff's property as farm land resulted in improper taxation on that property.³² The plaintiff argued that the real estate taxes on the property violated the Illinois and United States Constitutions on uniformity³³ and equal protection³⁴ grounds. The court held that the taxes were constitutional because they uniformly affected the class of similarly zoned properties upon which they operated.³⁵ Further, the court held that the taxes did not offend the equal protection clause because the taxation scheme treated members of the same class similarly.³⁶

29. *Id.* at 303-04, 498 N.E.2d at 794.

30. *Id.* at 304, 498 N.E.2d at 794.

31. 151 Ill. App. 3d 624, 502 N.E.2d 1250 (2d Dist. 1986).

32. *Id.* at 626, 502 N.E.2d at 1252. The plaintiff argued that the different zoning classifications of similar properties surrounding the plaintiff's property resulted in a lack of uniform taxation, in violation of constitutional requirements. *Id.*

33. *Id.* at 628, 502 N.E.2d at 1253. The plaintiff contended that the wide disparity in assessed values of similar, though differently classified, parcels constituted a violation of the uniformity clause of the 1970 Illinois Constitution. *Id.* The uniformity clause states that, "[e]xcept as otherwise provided in this Section, taxes upon real property shall be levied uniformly by valuation ascertained as the General Assembly shall provide by law." ILL. CONST. art. IX, § 4(a).

34. *DuPage Bank & Trust*, 151 Ill. App. 3d at 628, 502 N.E.2d at 1253. The plaintiff argued that the differences between the assessed value of his property and the assessed values of comparable properties resulted in a violation of the Equal Protection Clause of the United States Constitution. *Id.* (citing U.S. CONST. amend. XIV, § 1).

35. *Id.*

36. *Id.* The Illinois Appellate Court for the Second District decided another case confronting a constitutional issue in the area of property taxation in *Lake County Bd. of Review v. Property Tax Appeal Bd.*, 152 Ill. App. 3d 1093, 504 N.E.2d 1333 (2d Dist. 1987), which involved a taxpayer's right to due process of law regarding the taking of property. The court held that the trial court did not abuse its discretion in refusing to order the county treasurer to rebate the taxpayer's refund directly to the taxpayer rather than offsetting that refund against the taxpayer's existing obligation to pay subsequent taxes. *Id.* at 1099, 504 N.E.2d at 1337.

III. REAL ESTATE BROKERS

A. Broker's Liability for Breach of Duty

In *Stefani v. Baird & Warner*,³⁷ the Illinois Appellate Court for the First District considered whether the defendant, a broker, violated provisions of the Real Estate License Act.³⁸ In *Stefani*, the plaintiffs contacted an employee of the defendant-real estate broker for assistance in purchasing a residence.³⁹ The parties orally agreed that the broker would be the plaintiffs' agent, but that the broker would receive its commission from the seller. Subsequently, the plaintiffs, through the broker's employee, became involved in negotiations with a seller.⁴⁰

During these negotiations, another employee of the broker contacted a third party and received a higher offer for the purchase of the seller's property.⁴¹ The broker failed to advise the plaintiffs of the broker's representation of the third party or of the third party's offer. Subsequently, the seller listed the property with the broker. On the same day, the broker arranged a sale between the seller and the third party, and received a commission from both.⁴²

The appellate court, affirming the trial court, held that the plaintiffs failed to state a cause of action under the Real Estate License Act.⁴³ The plaintiffs relied on a 1982 Illinois Supreme Court decision⁴⁴ which held that a private right of action existed under the broker's licensing statute.⁴⁵ The *Stefani* court determined, subsequent to that decision, and while the present case was pending, that the General Assembly had amended the Real Estate License Act.

37. 157 Ill. App. 3d 167, 510 N.E.2d 65 (1st Dist. 1987).

38. *Id.* at 170, 510 N.E.2d at 67 (citing ILL. REV. STAT. ch. 111, paras. 5818(e)(1), (3), (5), (15), (18) (1985)). The court also considered whether the broker breached its fiduciary duty to the plaintiffs or violated the Consumer Fraud and Deceptive Business Practices Act. *Id.* (citing ILL. REV. STAT. ch. 121 1/2, para. 262 (1985) (amended 1986)).

39. *Id.* at 169, 510 N.E.2d at 67.

40. *Id.*

41. *Id.* at 170, 510 N.E.2d at 67.

42. *Id.*

43. *Id.* at 174, 510 N.E.2d at 70. At the same time, however, the appellate court partially reversed the trial court, holding that the plaintiffs sufficiently stated causes of action for breach of fiduciary duty and violation of the Consumer Fraud and Deceptive Business Practices Act. *Id.* at 173, 175, 510 N.E.2d at 69, 70-71 (citing ILL. REV. STAT. ch. 121 1/2, para. 262 (1985) (amended 1986)).

44. *Sawyer Realty Group v. Jarvis Corp.*, 89 Ill. 2d 379, 432 N.E.2d 849 (1982) (a private right of action could be implied from the express provision of the broker's licensing statute).

45. *Stefani*, 157 Ill. App. 3d at 174, 510 N.E.2d at 70 (citing *Sawyer*, 89 Ill. 2d 379, 432 N.E.2d 849).

This amendment expressly provided that no private right of action arose under the Act.⁴⁶ The *Stefani* court concluded, therefore, that the amendment to the Real Estate Licensing Act barred the plaintiffs' action.⁴⁷

The Illinois Appellate Court for the First District decided *Zimmerman v. Northfield Real Estate, Inc.*,⁴⁸ which also addressed whether a private right of action existed under the broker's licensing act.⁴⁹ In *Zimmerman*, the plaintiffs purchased a single family residence from the defendant-sellers. The defendant-broker represented the sellers in the transaction.⁵⁰ After the purchase was complete, the plaintiffs discovered that the lot was forty percent smaller than the one acre size that the broker's listing had claimed.⁵¹ Further, the property suffered from severe flooding problems.⁵² Although the broker had knowledge of the flooding, the broker failed to inform the plaintiffs of the problem.⁵³ The trial court dismissed the plaintiffs' complaint, and the plaintiffs appealed.⁵⁴ The appellate court determined that the broker had a duty imposed by the Real Estate Brokers and Sellers Licensing Act ("REBSLA")⁵⁵ to disclose material facts to all purchasers.⁵⁶

In *Zimmerman*, the appellate court reviewed the same 1982 Illinois Supreme Court decision⁵⁷ cited in *Stefani*⁵⁸ and held that the

46. *Id.* The Real Estate License Act was amended to provide that "[n]othing in this Act shall be construed to grant any person a private right of action for damages to enforce the provisions of this Act." ILL. REV. STAT. ch. 111, para. 5832 (1985) (amended 1986).

47. *Stefani*, 157 Ill. App. 3d at 174, 510 N.E.2d at 70. The court noted that the amendment unconditionally repealed any private right of action under the remedial act without a savings clause. The court held that the amendment stopped all pending actions, including the present one, at the time the amendment became effective. *Id.*

48. 156 Ill. App. 3d 154, 510 N.E.2d 409 (1st Dist. 1986).

49. *Id.* at 158, 510 N.E.2d at 411.

50. *Id.*

51. *Id.* at 162, 510 N.E.2d at 414.

52. *Id.* at 161-62, 510 N.E.2d at 413.

53. *Id.* at 161, 510 N.E.2d at 413.

54. *Id.* at 158, 510 N.E.2d at 411.

55. ILL. REV. STAT. ch. 111, para. 5701 (1981) (repealed 1984).

56. *Zimmerman*, 156 Ill. App. 3d at 168, 510 N.E.2d at 418. On appeal, the *Zimmerman* court also determined that the brokers' misrepresentations and omissions were material because the plaintiffs could be expected to rely on them. Furthermore, the court found that plaintiffs did in fact rely to their detriment on the misrepresentations and omissions. *Id.* at 162, 510 N.E.2d at 414. Hence, the court concluded that dismissal of plaintiffs' cause of action for common law fraud was improper. *Id.* at 163, 510 N.E.2d at 414.

57. *Sawyer Realty Group v. Jarvis Corp.*, 89 Ill. 2d 379, 432 N.E.2d 849 (1982).

58. 157 Ill. App. 3d 167, 510 N.E.2d 65. For a discussion of *Stefani*, see *supra* notes 37-47 and accompanying text.

plaintiffs had a private right of action under the REBSLA.⁵⁹ The *Zimmerman* court did not mention the amendment to the statute, which, according to the *Stefani* court, eliminated a private right of action under REBSLA.⁶⁰ Thus, the appellate court concluded that the plaintiffs sufficiently alleged the broker's failure to disclose all material knowledge and that the trial court erred in dismissing plaintiffs' action.⁶¹

In *Jeffrey Allen Industries v. Sheldon F. Good & Company*,⁶² the plaintiff alleged that the defendant-broker breached its duty to inform the plaintiff, its principal, of material facts within its knowledge.⁶³ The broker failed to inform its principal that a third party, provided by another broker, was preparing an offer for the plaintiff's house on more favorable terms than the offer provided by the plaintiff's broker.⁶⁴ To avoid splitting its commission with the other broker, the plaintiff's broker closed the deal with the less valuable offer.⁶⁵ The Illinois Court of Appeals for the First District held that the broker-agent's failure to disclose the third-party offer constituted a breach of that broker's duty to inform the seller

59. *Zimmerman*, 156 Ill. App. 3d at 165, 510 N.E.2d at 416.

60. See *supra* note 47 and accompanying text.

61. *Zimmerman*, 156 Ill. App. 3d at 168, 510 N.E.2d at 418. The appellate court also concluded that, although the trial court properly dismissed the plaintiffs' negligent misrepresentation cause of action against defendant-sellers, the plaintiffs properly stated a cause of action for negligent misrepresentation against the defendant-brokers. *Id.* at 163-64, 510 N.E.2d at 415. The court reasoned that, because the brokers were in the business of supplying information for the guidance of others, the brokers could be liable for the plaintiffs' economic loss. Also, the court determined that an exculpatory clause in the real estate contract was invalid because it violated a public policy that the public should be protected from incapable or dishonest persons. *Id.* at 165-66, 510 N.E.2d at 416.

Further, the court concluded that the Consumer Fraud Act applied to intentional misrepresentations made by the brokers to prospective purchasers. The court stated that, because the plaintiffs had sufficiently stated a cause of action for common law fraud, the plaintiffs stated a sufficient cause of action under the Consumer Fraud Act. *Id.* at 168, 510 N.E.2d at 418.

62. 153 Ill. App. 3d 120, 505 N.E.2d 1104 (1st Dist. 1987).

63. *Id.* at 122, 505 N.E.2d at 1105.

64. *Id.* at 123, 505 N.E.2d at 1105-06. The plaintiff entered into an exclusive brokerage agreement with the defendant, which provided for a broker's commission and reimbursement of advertising expenses upon sale. The agreement provided that if a cooperating broker supplied the buyer, the defendant was to split the commission evenly with that broker. The broker failed to inform plaintiff of a third party's three inspections of the property or the same third party's statement that he was preparing an all cash offer; a cooperating broker supplied the third party. Subsequently, the plaintiff agreed to sell to a buyer supplied by the defendant for \$350,000 at terms including monthly payments and a five year balloon note. The next day, the defendant-broker rejected the third party's all cash offer of \$350,000, because the property already had been sold to the buyer. *Id.* at 122-23, 505 N.E.2d at 1105-06.

65. *Id.* at 123, 505 N.E.2d at 1106.

of material facts that may affect the transaction.⁶⁶

B. Broker's Right to Commission

In *Otto Real Estate v. Shelter Investment*,⁶⁷ the court considered whether a broker was entitled to partial compensation based on the modified terms of a sale.⁶⁸ In *Otto*, the defendant contacted the plaintiff's agent and offered the plaintiff a \$50,000 broker's commission if the plaintiff obtained a buyer for both of the defendant's apartment complexes.⁶⁹ The plaintiff arranged a meeting between the defendant and the eventual purchaser of only one of defendant's apartment complexes.⁷⁰ Although the purchase was completed with ongoing assistance from the broker, the defendant refused to pay the broker a commission because only one of the properties was sold.⁷¹ The broker sued to recover a partial commission.⁷²

The court held that an implied-in-fact contract existed,⁷³ which made the defendant-seller liable to the broker for a commission under general agency principles.⁷⁴ The court noted the general rule that a principal's acceptance of a broker's different service, knowing that the broker expects compensation for that service, creates a promise by the principal to pay at a reasonable rate.⁷⁵ The court reasoned that, although the plaintiff was to provide a buyer for the properties in tandem, the defendant's sale of the individual property to the buyer provided by the plaintiff constituted an implied-in-fact contract.⁷⁶ The court concluded, therefore, that the defendant was liable under the implied contract.⁷⁷

In *Cinman v. Reliance Savings & Loan Association*,⁷⁸ the Illinois

66. *Id.* at 124, 505 N.E.2d at 1107.

67. 153 Ill. App. 3d 756, 506 N.E.2d 351 (4th Dist. 1987).

68. *Id.* at 759, 506 N.E.2d at 353.

69. *Id.* at 758, 506 N.E.2d at 352.

70. *Id.*

71. *Id.* at 758, 506 N.E.2d at 352-53.

72. *Id.* at 758, 506 N.E.2d at 353.

73. *Id.* at 759, 506 N.E.2d at 353.

74. *Id.* at 761, 506 N.E.2d at 355.

75. *Id.* at 760, 506 N.E.2d at 354 (citing 3 A. CORBIN, CONTRACTS § 567, at 318 (1960)).

76. *Id.* at 760-61, 506 N.E.2d at 354.

77. *Id.* at 761, 506 N.E.2d at 354. The case was remanded for a determination of the proper amount of damages. The trial court erroneously based the original calculation of damages on a theory of *in quantum meruit*, whereas the proper measure should have been calculated based on general agency principles. *Id.* at 762, 506 N.E.2d at 355. See also RESTATEMENT (SECOND) AGENCY § 447 (1958).

78. 155 Ill. App. 3d 417, 508 N.E.2d 239 (1st Dist. 1987).

Appellate Court for the First District considered two consolidated cases. In *Cinman*, the broker delivered to the defendant the purchaser's letter which confirmed the terms of a prior telephone conversation.⁷⁹ Later, following further negotiations and several delays, the defendant's attorney told the broker that the deal was off and that there was no contract.⁸⁰ The trial court consolidated the purchaser's action for specific performance of the alleged contract for the sale of defendant's building with the broker's action for a commission on the proposed sale.⁸¹ The trial court found that a valid contract existed and ordered the defendant to specifically perform the contract. The trial court also granted the broker a commission.⁸²

On appeal, the court addressed two questions. First, the court addressed the question of specific performance.⁸³ The court required, as a prerequisite for specific performance, a clear and precise understanding by the parties of the terms of the contract.⁸⁴ Although the letter contained the essential terms of the parties' agreement, the court found that the letter contemplated further negotiations between the parties, and that the parties did continue to negotiate material elements of the proposal for a long period of time after the writing of the letter.⁸⁵ The court, therefore, concluded that the trial court erred in ordering specific performance based on the letter.⁸⁶

The court then turned to the question of the broker's commission. A real estate broker generally is entitled to a commission if he produces a buyer who is ready, willing, and able to make the

79. *Id.* at 420, 508 N.E.2d at 241. The letter described the property and included the following terms: a sales price of \$1,620,000; a down payment of \$340,000 consisting of a \$100,000 payment at closing and \$240,000 to be paid within ninety days of closing; a \$1,280,000 mortgage from the defendant at 12.25% interest to be amortized over twenty-nine years; a commitment fee of \$25,600 and an option for the defendant to buy back the property at the end of ten years for \$2,050,000. *Id.* at 420, 508 N.E.2d at 241-42. The letter also memorialized other aspects of the parties' negotiations and was signed by the parties. *Id.*

80. *Id.* at 420-21, 508 N.E.2d at 242.

81. *Id.* at 418, 508 N.E.2d at 240.

82. *Id.*

83. Specific performance is "[t]he remedy of performance of a contract in the specific form in which it was made . . . where damages would be inadequate compensation for the breach of [the contract]." BLACK'S LAW DICTIONARY 1024 (5th ed. 1979).

84. *Cinman*, 155 Ill. App. 3d at 423-24, 508 N.E.2d at 244 (citing *Carver v. Brien*, 315 Ill. App. 643, 43 N.E.2d 597 (1st Dist. 1942)).

85. *Id.* at 424-25, 508 N.E.2d at 244-45.

86. *Id.* at 426, 508 N.E.2d at 245.

purchase.⁸⁷ In this case, however, the parties had agreed that a commission would be due only if the contract for sale was formed.⁸⁸ Because the appellate court found that a contract was not formed, it concluded that the trial court erred in awarding a commission to the broker.⁸⁹

IV. LANDLORD/TENANT & INSTALLMENT CONTRACT RELATIONSHIPS

A. *Implied Warranty of Habitability*

During the *Survey* period, the Illinois appellate courts considered three cases involving the implied warranty of habitability. In two of these cases, *Abram v. Litman*⁹⁰ and *Housing Authority v. Melvin*,⁹¹ the court considered the implied warranty in light of *Glaoe v. Trinkle*,⁹² a 1985 Illinois Supreme Court decision that expanded the application of the implied warranty of habitability to all residential leases.⁹³ The other case, *Fischer v. G & S Builders*,⁹⁴ detailed what a purchaser must prove in order to establish a cause of action for breach of the implied warranty of habitability.⁹⁵

In *Abram v. Litman*,⁹⁶ the plaintiff leased property from the defendant pursuant to an oral lease.⁹⁷ A fire on the premises damaged the plaintiff's personal property. The plaintiff alleged that the fire resulted from faulty wiring, which was a defect rendering the premises uninhabitable and unreasonably dangerous.⁹⁸ The court reasoned that if the defect was of a latent nature and the landlord did not receive actual notice from the tenant, or have actual or constructive knowledge of the defect, the landlord could not be held liable for breach of the implied warranty.⁹⁹ The court concluded, therefore, that the complaint was dismissed properly be-

87. *Id.* (citing *United Investors, Inc. v. Tsotsos*, 132 Ill. App. 3d 175, 477 N.E.2d 40 (1st Dist. 1985)).

88. *Id.*

89. *Id.*

90. 150 Ill. App. 3d 174, 501 N.E.2d 370 (4th Dist. 1986).

91. 154 Ill. App. 3d 999, 507 N.E.2d 1289 (5th Dist. 1987).

92. 107 Ill. 2d 1, 479 N.E.2d 915 (1985).

93. *Glaoe*, 107 Ill. 2d at 10, 479 N.E.2d at 918. See also J. Chatz & K. Hazel, *Real Property and Real Estate Transactions, 1985-86 Illinois Law Survey*, 18 Loy. U. Chi. L.J. 743, 744-48 (1986).

94. 147 Ill. App. 3d 168, 497 N.E.2d 1022 (3d Dist. 1986).

95. See *infra* notes 111-15 and accompanying text.

96. 150 Ill. App. 3d 174, 501 N.E.2d 370 (4th Dist. 1986).

97. *Abram*, 150 Ill. App. 3d at 175, 501 N.E.2d at 370.

98. *Id.*

99. *Id.* at 178, 501 N.E.2d at 372. The *Abram* court distinguished *Glaoe v. Trinkle*, which addressed a situation involving patent defects, based on *Abram's* allegation of a

cause the plaintiff failed to allege that the landlord was on notice of the defects.¹⁰⁰

In *Housing Authority v. Melvin*,¹⁰¹ the Illinois Appellate Court for the Fifth District determined the appropriate method for calculating the rent reduction for a breach of the implied warranty of habitability when the contract rent amount was the result of federal assistance and did not represent fair market value.¹⁰² In *Melvin*, the tenant rented an apartment in a public housing development for sixty-two dollars per month. The rent was determined by a formula based on the tenant's income.¹⁰³ The tenant stopped paying rent because the landlord failed to make requested repairs.¹⁰⁴ The landlord filed an action for possession and rent due.¹⁰⁵ The trial court found that the tenant was liable for the fair rental value of the premises while she remained in possession and granted judgment for the landlord. The tenant appealed.¹⁰⁶

The *Melvin* court considered two methods of calculating the appropriate rent reduction for breach of the implied warranty of habitability.¹⁰⁷ The reduction can be calculated based on the percentage of reduction in value,¹⁰⁸ or the percentage of reduction in use.¹⁰⁹ The court concluded that because the contract rent was

latent defect in the wiring. *Id.* at 177, 501 N.E.2d at 372 (citing *Glasoe v. Trinkle*, 107 Ill. 2d 1, 479 N.E.2d 915 (1985)).

100. *Id.* at 178, 501 N.E.2d at 372. Further, the court held that "the implied warranty of habitability cannot serve as the basis for recovery of property damages." *Id.*

101. 154 Ill. App. 3d 999, 507 N.E.2d 1289 (5th Dist. 1987).

102. *Id.* at 1005, 507 N.E.2d at 1293-94.

103. *Id.* at 1000, 507 N.E.2d at 1290.

104. *Id.* at 1001, 507 N.E.2d at 1291. In the event that repairs were not made, the lease provided for an abatement of rent in proportion to the seriousness of the damage and loss in the value as a dwelling. *Id.* at 1000, 507 N.E.2d at 1291.

105. *Id.* at 999, 507 N.E.2d at 1290. Two months after the landlord filed this action, a city housing inspector disapproved the apartment for occupancy. *Id.* at 1000, 507 N.E.2d 1290. Evidence indicated that the unit had the following problems: no lavatory, falling ceiling plaster, wires hanging from the junction box, live wires hanging from the leaky living room ceiling, a front door that could not be locked, rats, and a leaky bathtub. *Id.* at 1000, 507 N.E.2d 1290-91.

106. *Id.* at 1003, 479 N.E.2d at 1291-92.

107. *Id.* at 1005, 507 N.E.2d at 1293-94 (citing *Glasoe v. Trinkle*, 107 Ill. 2d 1, 479 N.E.2d 915 (1985)).

108. The percentage reduction in value can be calculated two different ways. Under the first calculation,

the tenant's damages are measured by the difference between the fair rental value of the premises if they had been as warranted and their fair value during their occupancy Under the second[,] . . . the tenant's damages are measured by the difference between the agreed rent and the fair rental value of the premises during their occupancy.

Id.

109. *Id.* The percentage reduction in use calculation "reduces the tenant's rent by a

the result of federal assistance and bore no relationship to fair market value, the appropriate method was the percentage reduction in use method.¹¹⁰

In *Fischer v. G & S Builders*,¹¹¹ the Illinois Appellate Court for the Third District evaluated the sufficiency of an installment contract purchaser's cause of action for breach of the implied warranty of habitability. In *Fischer*, the parties executed an installment contract for the purchase of a home.¹¹² Three weeks before the balloon payment of \$44,589.56 was due, the plaintiffs filed an action for breach of the implied warranty of habitability, fraud, and deceptive trade practices.¹¹³ The court found that the lessee failed to prove that "the home had a latent defect caused by improper design, material or workmanship in its construction which rendered the property unsuitable for use as a home."¹¹⁴ The court, therefore, held that the plaintiffs failed to establish a cause of action for breach of the implied warranty of habitability.¹¹⁵

B. Liability of Landlord to Third Parties

1. Liability for Injuries Caused by Tenant's Animals

In *Steinberg v. Petta*,¹¹⁶ the Illinois Supreme Court addressed whether an absentee-landlord could be held liable as one who harbors a dog under the Dog Bite Statute¹¹⁷ for injuries inflicted on a third party by the tenants' dog.¹¹⁸ The court held that the absentee landlord did not exercise the necessary degree of care, custody, or control over the dog to qualify as an "owner" under the

percentage reflecting the diminution in the value and enjoyment of the premises by reason of the existence of defects which give rise to the breach of implied warranty of habitability." *Id.* at 1005, 507 N.E.2d at 1294.

110. *Id.* at 1007, 507 N.E.2d at 1295. The court indicated that the application of the percentage reduction in use method reduces the need for expensive expert testimony, because the determination of the percentage reduction in use of a residence is within the capability of the layman. *Id.*

111. 147 Ill. App. 3d 168, 497 N.E.2d 1022 (3d Dist. 1986).

112. *Id.* at 170, 497 N.E.2d at 1023.

113. *Id.* The plaintiffs based their claims on allegations of a sewer gas odor which permeated the house, a continual accumulation of water which soaked the basement carpet, and seven violations of the Illinois State Plumbing Code. *Id.* at 174, 497 N.E.2d at 1026.

114. *Id.* at 175, 497 N.E.2d at 1027. The court noted that the alleged defects were not latent but, in fact, were noticed by the plaintiffs when they originally inspected the home before their purchase. *Id.* at 176, 497 N.E.2d at 1027.

115. *Id.* at 175-76, 497 N.E.2d at 1027.

116. 114 Ill. 2d 496, 501 N.E.2d 1263 (1986).

117. *Id.* at 501, 501 N.E.2d at 1265 (citing ILL. REV. STAT. ch. 8, para. 366 (1983)).

118. *Id.*

statute.¹¹⁹

In *Steinberg*, the tenants obtained permission from the manager of a house owned by an absentee-landlord to build a fence to contain the tenants' dog.¹²⁰ After several neighbors and another tenant complained to the manager about the dog being noisy, messy, and bothersome, the manager spoke to the tenants about the animal.¹²¹ Subsequently, the plaintiff, an eleven-year-old boy, leaned over the fence, and the dog bit him.¹²²

After reviewing the pertinent statutory language,¹²³ the court reasoned that a landlord does not "harbor" a dog, and hence, is not an "owner" under the Dog Bite Statute, unless that landlord exercises "some measure of care, custody, or control" over the dog.¹²⁴ The court then noted that the mere fact that the defendant, acting through his manager, allowed the tenants to erect a fence and keep a dog on the premises did not establish the necessary degree of care, custody, or control required under the statute.¹²⁵ The court refused to expand the scope of the Dog Bite Statute¹²⁶ and concluded that the landlord was not liable to the third party for injuries caused by the tenants' dog.¹²⁷

2. Liability for Criminal Acts of Third Parties

In *Duncavage v. Allen*,¹²⁸ the Illinois Appellate Court for the First District addressed landlord liability for the criminal acts of third parties in the context of a motion to dismiss. In *Duncavage*, a criminal hid in overgrown weeds near an unlighted exit area on the defendant's property.¹²⁹ The criminal then climbed a ladder, which the defendant stored in the yard, and entered the tenant's

119. *Id.* at 502, 501 N.E.2d at 1266.

120. *Id.* at 498, 501 N.E.2d at 1264.

121. *Id.* at 498-99, 501 N.E.2d at 1264.

122. *Id.* at 498, 501 N.E.2d at 1264.

123. *Id.* at 501, 501 N.E.2d at 1265. The Dog Bite Statute provided that an "owner" is "any person . . . who keeps or harbors a dog or other animal, or who has it in his care, or acts as its custodian, or who knowingly permits a dog or other domestic animal to remain on or about any premises occupied by him." ILL. REV. STAT. ch. 8, para. 352.16 (1983).

124. *Steinberg*, 114 Ill. 2d at 501, 501 N.E.2d at 1265.

125. *Id.* at 502, 501 N.E.2d at 1266. Any benefits that the landlord received as a result of erecting the fence "were merely incidental to the tenants' activity." *Id.*

126. *Id.*

127. *Id.* at 502-03, 501 N.E.2d at 1267. See also *Smith v. Gleason*, 152 Ill. App. 3d 346, 349, 504 N.E.2d 240, 242 (2d Dist. 1987) (drawing an analogy to *Steinberg*, the court refused to find the defendant-lessor liable after the lessee's horse escaped from the defendant-lessor's property and struck the plaintiff's car).

128. 147 Ill. App. 3d 88, 497 N.E.2d 433 (1st Dist. 1986).

129. *Id.* at 92, 497 N.E.2d at 435.

apartment through a window that could not be locked. After entering the apartment, the criminal attacked and killed the tenant, the plaintiff's decedent.¹³⁰ Upon review of an order granting the landlord's motion to dismiss, the appellate court determined that the murder of the tenant was "not so unforeseeable as to make the question of proximate cause a matter of law."¹³¹ Further, the court concluded that the landlord owed the tenant a duty of reasonable care to protect her from criminal acts of third parties when prior criminal activity has occurred.¹³² Moreover, the court concluded that the landlord also owed the tenant a duty of reasonable care under applicable building codes.¹³³ Accordingly, the court reversed the order granting the landlord's motion to dismiss.¹³⁴

The appellate court's conclusion regarding the duty imposed by building codes may lend itself to a broader range of cases than merely those cases that mirror the *Duncavage* fact patterns.¹³⁵ The court reasoned that the harm which occurred¹³⁶ was the type of harm that the Chicago Building and Housing Code was intended

130. *Id.*

131. *Id.* at 97, 497 N.E.2d at 438. The court indicated that proximate cause is generally a question of fact for the jury. *Id.* at 96, 497 N.E.2d at 437. The court stated that proximate cause depended on whether the landlord reasonably should have foreseen the intervening criminal act as a natural and probable result of its negligence. *Id.* at 97, 497 N.E.2d at 438. The court, however, cautioned that the jury need not find that the precise injury that occurred was foreseeable. *Id.*

132. *Id.* at 97, 497 N.E.2d at 438. According to the court, the duty of reasonable care is imposed on a landlord following the occurrence of "prior incidents similar to the one complained of and . . . connected with the physical condition of the premises." *Id.* (citing *Stribling v. Chicago Housing Authority*, 34 Ill. App. 3d 551, 340 N.E.2d 47 (1st Dist. 1975)).

In *Stribling*, burglars entered the tenants' apartment on three occasions by breaking through the wall between the tenants' apartment and an adjacent vacant apartment. *Stribling*, 34 Ill. App. 3d at 554, 340 N.E.2d at 49. After the first burglary, the tenants informed the landlord of the burglary. *Id.* The *Stribling* court imposed liability on the landlord for his failure to take reasonable precautions against subsequent similar burglaries after receiving notice of the first burglary. *Id.* at 556, 340 N.E.2d at 50.

Although *Stribling* has been limited strictly to its facts, the *Duncavage* court reasoned that the two cases "embodied the same three factors posed in a motion to dismiss context." *Duncavage*, 147 Ill. App. 3d at 98, 497 N.E.2d at 439. Those three factors are previous identical criminal activity, notice to the landlord, and connection to the leased premises. *Id.* In addition to recognizing the limited applicability of *Stribling*, the *Duncavage* court reaffirmed the general rule that a landlord's liability for the criminal acts of third parties is "limited to criminal intrusions which are reasonably foreseeable." *Id.* at 103, 497 N.E.2d at 442. The holding in *Duncavage*, therefore, may be limited to its narrow facts.

133. *Duncavage*, 147 Ill. App. 3d at 99, 497 N.E.2d at 439.

134. *Id.* at 103, 497 N.E.2d at 442.

135. *Id.* at 99, 497 N.E.2d at 439.

136. The tenant was raped and murdered. *Id.* at 92, 497 N.E.2d at 435.

to prevent.¹³⁷ Accordingly, the court concluded that the landlord's alleged code violations¹³⁸ raised a jury question regarding actionable negligence.¹³⁹ Thus, *Duncavage* arguably expands landlord liability for the criminal acts of third parties. The court, however, concluded its opinion by reaffirming the general rule that such liability is "limited to criminal intrusions which are reasonably foreseeable."¹⁴⁰

After the *Duncavage* decision, the Illinois Appellate Court for the Second District applied the general rule on landlord liability in *Rowe v. State Bank*.¹⁴¹ In *Rowe*, a criminal entered the defendant-landlord's office building while the plaintiff worked the midnight to 8:00 a.m. shift inside an office.¹⁴² The landlord alleged that the door to the office was locked. Nevertheless, the criminal gained entrance to the office, shot the plaintiff, and killed another worker.¹⁴³ The plaintiff alleged that the landlord failed to maintain the security of the door lock system by neglecting to properly control access to master keys.¹⁴⁴ The appellate court stated that the injuries suffered by the plaintiff "must have been more than a simple possibility;" the injury must have been "foreseeable as likely to happen by a reasonably prudent person."¹⁴⁵ The court concluded that, although the landlord did not have strict control of the master keys, the risk of severe injury to the plaintiff was not reasonably foreseeable at the time.¹⁴⁶

137. *Id.* at 100, 497 N.E.2d at 440 (citing *Gula v. Gawel*, 71 Ill. App. 2d 174, 218 N.E.2d 42 (1st Dist. 1966) (in which the court considered the code as a public safety measure), and *City of Chicago v. Hadesman*, 17 Ill. App. 2d 150, 149 N.E.2d 425 (1st Dist. 1958) (in which the court determined that one of the purposes of the code was to fight crime)).

138. The plaintiff alleged numerous violations of the Chicago Housing and Building Code, including lack of window screens, defective windows and doors, high weeds, inoperable or burned out interior and exterior lighting, and the failure to remove refuse and debris (including the ladder) from the yard. Moreover, the plaintiff alleged that leasing the apartment while the building was in violation of these building regulations violated the Chicago Building Code. *Duncavage*, 147 Ill. App. 3d at 93, 497 N.E.2d at 435.

139. *Id.* at 100, 497 N.E.2d at 440.

140. *Id.* at 103, 497 N.E.2d at 442.

141. 153 Ill. App. 3d 788, 505 N.E.2d 1380 (2d Dist. 1987).

142. *Id.* at 790, 505 N.E.2d at 1382.

143. *Id.*

144. *Id.* at 791, 505 N.E.2d at 1382.

145. *Id.* at 797, 505 N.E.2d at 1387.

146. *Id.* The court summarized the three exceptions to the general rule of non-liability, as follows:

A landlord may be liable to a tenant if (1) the injury, although due to criminal activity, occurs because of a condition of the premises [citing *Stribling*, 34 Ill. App. 3d 551, 340 N.E.2d 47]; (2) the landlord attempts to safeguard the premises but does so negligently [citing *Pippin v. Chicago Housing Authority*, 78 Ill.

C. Termination of Relationships

1. Actions in Equity

In *Kanter & Eisenberg v. Madison Associates*,¹⁴⁷ the Illinois Supreme Court addressed whether a tenant could obtain a temporary injunction restraining a landlord from instituting a forcible entry and detainer action.¹⁴⁸ The defendant, a landlord, argued that the plaintiff, a tenant, could pay the disputed rent and then sue for damages arising from the defendant's allegedly fraudulent misrepresentations.¹⁴⁹ The plaintiff argued that if he paid the disputed rent, then the "voluntary payment doctrine"¹⁵⁰ would foreclose any legal remedy otherwise available to the plaintiff.¹⁵¹ The court expressly rejected the plaintiff's interpretation of the voluntary payment doctrine, which would require all tenants to request preliminary injunctive relief before instituting actions to recover disputed rent payments.¹⁵² The court then concluded that the plaintiff had an adequate remedy at law and, because no showing of irreparable harm was made, the plaintiff could not receive preliminary injunctive relief.¹⁵³

2d 204, 399 N.E.2d 596 (1979)]; or (3) the landlord, by his acts, creates a hazard which did not previously exist [citing *Cross v. Wells Fargo Alarm Services*, 82 Ill. 2d 313, 412 N.E.2d 472 (1980)].

Rowe, 153 Ill. App. 3d at 794-95, 505 N.E.2d at 1385.

147. 116 Ill. 2d 506, 508 N.E.2d 1053 (1987).

148. *Id.* at 511, 508 N.E.2d at 1055. The defendant served the plaintiff with a five day notice of the defendant's intent to evict the plaintiff and take possession of the premises under the forcible entry and detainer statute. *Id.* at 509, 508 N.E.2d at 1054 (citing ILL. REV. STAT. ch. 110, para. 9-209 (1985)).

149. *Id.* at 511, 508 N.E.2d at 1055.

150. *Id.* at 511-12, 508 N.E.2d at 1055 (citing *Illinois Merchants Trust Co. v. Harvey*, 335 Ill. 284, 167 N.E. 69 (1929)). In *Illinois Merchants*, the court held that the tenant could not recover his payments of the landlord's income taxes under the "voluntary-payment doctrine." *Illinois Merchants*, 335 Ill. at 296, 167 N.E. at 74. According to the lessor, the lease required the tenant to make the payments, and the lessor threatened forfeiture unless payment was made. After the tenant made the payment, the Illinois Supreme Court ruled in another case that a similar lease provision did not require payment of income taxes by the lessee. The tenant then filed suit to recover the amounts paid under protest. *Id.* at 288, 167 N.E. at 71. The court, however, determined that the tenant could have obtained equitable relief against the threatened forfeiture, and therefore, the payment by the tenant was voluntary and not made under compulsion or duress. *Id.* at 296, 167 N.E. at 74.

151. *Kanter*, 116 Ill. 2d at 511, 508 N.E.2d at 1055.

152. *Id.* at 512, 508 N.E.2d at 1056.

153. *Id.* at 515, 508 N.E.2d at 1057. The court also indicated that the plaintiff would suffer no irreparable injury because the plaintiff had adequate funds to pay the disputed rent due, and no evidence was offered to show that the defendant would mishandle the funds after payment. *Id.* at 516, 508 N.E.2d at 1057.

2. Actions under the Lease

In *Steven W. Barrick & Associates v. Witz*,¹⁵⁴ the Appellate Court of Illinois for the Second District considered whether a lessor's waiver of a breach during the lease term affected his right to terminate a renewable lease upon expiration of the lease term.¹⁵⁵ In *Barrick*, the defendant-tenant complained regularly to his neighbors about noise, and physically threatened several neighbors, a maintenance man, and the building manager.¹⁵⁶ Despite the tenant's acts, the plaintiff-lessor continued to accept the tenant's rent payments. Subsequently, the lessor sent a termination notice to the tenant, detailing the reasons for termination of the lease and informing him that the termination would be effective upon the expiration of the current lease.¹⁵⁷ The court held that by silently accepting the rent payments following breach of the lease, the lessor waived the right to terminate the tenancy at the end of the lease term.¹⁵⁸

In *ARCO Petroleum Products v. Williams*,¹⁵⁹ the Illinois Appellate Court for the First District considered whether a landlord was required to comply with the five-day statutory notice provision for the termination of a lease. In *Williams*, the lessor had the right under the lease to terminate immediately the lease for criminal misconduct by the tenant that related to the operations of the leased premises.¹⁶⁰ The lessor also had the right to terminate the lease for nonpayment of rent following at least five days prior written notice.¹⁶¹ On July 11, 1984, the plaintiff-lessor sent the defendant-tenant a letter notifying the defendant that he was in default with his rent payments and that failure to pay within five days would constitute a default under the lease. On August 27, 1984, the plaintiff mailed to the defendant a notice of termination, which was to be effective August 31, 1984. The letter stated criminal misconduct and nonpayment of rent as reasons for the termination.¹⁶²

The court concluded that the lessor properly notified the tenant

154. 147 Ill. App. 3d 615, 498 N.E.2d 738 (2d Dist. 1986).

155. *Id.* at 616, 498 N.E.2d at 740.

156. *Id.* at 616, 498 N.E.2d at 739.

157. *Id.*

158. *Id.* at 620, 498 N.E.2d at 742. The court reasoned that the plaintiff's silent acceptance of the tenant's breaches led the tenant to believe that strict compliance with the lease was not required. *Id.* The case is silent about whether the lease contained a "non-waiver of rights" clause allowing the lessor to enforce selectively lease terms.

159. 146 Ill. App. 3d 218, 496 N.E.2d 1098 (1st Dist. 1986).

160. *Id.* at 219, 496 N.E.2d at 1099.

161. *Id.*

162. *Id.* at 219-20, 496 N.E.2d at 1099. The lessee allegedly had attacked one of the plaintiff's employees with an ax. *Id.*

of the lessor's intent to terminate the lease in compliance with the lease provisions.¹⁶³ The court reasoned that because the lease provision gave the landlord the right to terminate the lease immediately upon criminal conduct by the tenant, the landlord did not need to comply with the five-day statutory notice provision. Furthermore, the court concluded that the lessor did not waive the right to immediately terminate the lease by his letter of August 27, 1984.¹⁶⁴

In *Bales v. Nelson*,¹⁶⁵ the Illinois Appellate Court for the Third District determined the effect of abandonment on a contract purchaser's subsequent right to possession.¹⁶⁶ In *Bales*, the plaintiffs, purchasers under an installment contract, failed to make timely monthly installments.¹⁶⁷ The plaintiffs allowed the property insurance to lapse, failed to pay two property tax installments, and vacated the premises.¹⁶⁸ The court concluded that, when the plaintiffs vacated the premises, they abandoned the contract.¹⁶⁹ Further, after the plaintiffs abandoned the contract, their right to possession terminated as a matter of law when the defendants gave the plaintiffs a thirty-day notice of default and then peaceably took possession of the property.¹⁷⁰ Accordingly, the court affirmed the trial court's conclusion that the defendants took the proper steps to extinguish any right of possession that the plaintiffs may have had against the defendant-vendors and the subsequent purchasers of the property.¹⁷¹

3. Rescission for Breach of Warranty

The Illinois Appellate Court for the Second District examined a lessee's appropriate remedy for breach of warranty in *Klucznik v. Nikitopoulos*.¹⁷² In *Klucznik*, the tenants filed suit for breach of

163. *Id.* at 221, 496 N.E.2d at 1100.

164. *Id.* The tenant argued that because the letter referred to the five-day provision for termination in the lease, the lessor waived the right to terminate immediately. The court, however, determined that the letter concerned termination for non-payment of rent, which had no effect on the lessor's other rights under the lease. *Id.*

165. 148 Ill. App. 3d 7, 499 N.E.2d 144 (3d Dist. 1986).

166. *Id.* at 8, 499 N.E.2d at 145.

167. *Id.*

168. *Id.* at 8, 499 N.E.2d at 147.

169. *Id.* at 10, 499 N.E.2d at 146.

170. *Id.* at 10-11, 499 N.E.2d at 146. The court indicated that, before instituting a forcible entry and detainer action against a defaulting purchaser, a vendor must give thirty days notice and make a subsequent statutory demand for immediate possession. *Id.* (citing *Given v. Lofton*, 359 Ill. 228, 194 N.E. 512 (1935)).

171. *Id.* at 11, 499 N.E.2d at 147.

172. 152 Ill. App. 3d 323, 503 N.E.2d 1147 (2d Dist. 1987).

warranty in a restaurant lease, seeking damages for lost profits and requesting rescission of the lease.¹⁷³ The lessor had warranted expressly that the heating and cooling systems were in good working order. The systems, however, failed to work properly from the time the plaintiffs assumed the lease until nine months later, when the city closed the restaurant for having insufficient heating.¹⁷⁴ The court refused to grant rescission.¹⁷⁵ The court, however, determined that the lower court's finding that the lease terminated as of January 1985 was, in effect, a partial rescission.¹⁷⁶ Further, the court determined that the proper remedy for the period prior to the termination of the lease was money damages for lost profits.¹⁷⁷

D. Lease Interpretation

Illinois courts addressed a variety of issues concerning lease interpretation during the *Survey* period. These issues included evaluating the sufficiency of a lease agreement,¹⁷⁸ interpreting undefined terminology,¹⁷⁹ and assessing rights and responsibilities under ambiguous,¹⁸⁰ unambiguous,¹⁸¹ or inarticulate¹⁸² lease provisions.

173. *Id.* at 325, 503 N.E.2d at 1149.

174. *Id.* at 326-27, 503 N.E.2d at 1149. The five-year lease term began on November 1, 1983. The plaintiffs assumed the lease in April, 1984, and the city of Dekalb closed the restaurant in January, 1985. *Id.*

175. *Id.* at 328, 503 N.E.2d at 1151. The court concluded that the tenants had complicated unnecessarily any possible rescission by continuing the lease for seven months after learning of the heating and cooling systems' malfunctions. *Id.* at 328, 503 N.E.2d at 1150.

176. *Id.* at 328, 503 N.E.2d at 1150-51 (termination of the lease "rescinded" the remaining term of the lease from January, 1985 to November 1, 1988).

177. *Id.* at 328-29, 503 N.E.2d at 1150. The court ruled that the parties could not properly be restored to their *status quo ante*, and therefore, money damages were sufficient. *Id.* The court stated that the plaintiff may establish the amount of lost profits by introducing the amount of profits realized in prior years. *Id.* at 329, 503 N.E.2d at 1151. The court also stated that the plaintiff is required to establish a basis for assessing the amount of lost profits with reasonable certainty, not mathematical accuracy. *Id.*

178. *See infra* notes 183-95 and accompanying text.

179. *See Anest v. Bellino*, 151 Ill. App. 3d 818, 503 N.E.2d 576 (2d Dist. 1987). In an action for an accounting for gross sales of a restaurant, the court determined that the term "gross sales" under the lease did not include the total amount paid by customers for lottery tickets, but only the agency fee received by the restaurant for each ticket sold. *Id.* at 822, 503 N.E.2d at 579-80.

180. *See First Nat'l Bank of Elgin v. G.M.P., Inc.*, 148 Ill. App. 3d 826, 499 N.E.2d 1039 (2d Dist. 1986). In *G.M.P.*, the plaintiffs leased a commercial building to the defendant-lessee under a lease providing that "the lessee at his own expense will keep all improvements in good repair (injury by fire, or other causes beyond lessee's control excepted)." *Id.* at 829, 499 N.E.2d at 1041. Following a fire which started when one of the lessee's employees was working with flammable chemicals, the lessor sued for rent due and damages for the loss of the building. *Id.* at 827-28, 499 N.E.2d at 1040. The court concluded that the lessee should bear the risk of fire loss because the lessee-drafted lease

In *Ceres Illinois, Inc. v. Illinois Scrap Processing*,¹⁸³ the Illinois Supreme Court evaluated the sufficiency of a lease agreement.¹⁸⁴ In *Ceres*, the predecessor of the plaintiff, Ceres Illinois, Inc., orally agreed to lease certain lakefront warehouse property to the defendant, Illinois Scrap Processing, Inc., for fifteen years.¹⁸⁵ Both parties anticipated that the agreement would be reduced to a writing. In fact, the defendant drafted a letter to the plaintiff's predecessor that referred to the agreement as "tentative."¹⁸⁶ While negotiations for a final written agreement continued, the defendant received permission to move scrap onto the premises¹⁸⁷ and to install a scrap press on the premises.¹⁸⁸ The plaintiff subsequently determined that the defendant's use of the property was detrimental to the plaintiff's operations on an adjoining parcel and requested the defendant to discontinue its operation.¹⁸⁹ The defendant refused to vacate the property, and the plaintiff brought suit seeking permanent injunctive relief and money damages.¹⁹⁰

The supreme court stated the general rule that a valid lease contract must include an "agreement as to the extent and bounds of

was ambiguous and the lessee had a common law responsibility for his own negligence. *Id.* at 830, 499 N.E.2d at 1042.

181. See *Meeker-Magner Co. v. Globe Life Ins. Co.*, 152 Ill. App. 3d 534, 504 N.E.2d 854 (1st Dist. 1987). The court reviewed lease provisions which permitted the lessor to terminate the tenant's lease and sell the building, and which provided that the lessor would pay the lessee \$100,000 in stipulated damages if the lessor cancelled the lessee's right to extend the lease term under an option. *Id.* at 536, 504 N.E.2d at 854. The court held that these lease provisions were not ambiguous. *Id.* at 538-39, 504 N.E.2d at 857. The court also determined that the stipulated damage provision applied only if the lessor owned the building at the time the lessee tried to exercise its option to extend. *Id.* at 538, 504 N.E.2d at 856. Hence, the court concluded that the lessor properly terminated the lease and was not liable for damages. *Id.* at 538-39, 504 N.E.2d at 857.

182. See *Tishman Midwest Management Corp. v. Jarvis, Ltd.*, 146 Ill. App. 3d 684, 500 N.E.2d 431 (1st Dist. 1986). The plaintiff contended that a paragraph in the lease required the lessor to credit the plaintiff's rent for any expenses incurred in the pursuit of a reduction in assessed value. The plaintiff claimed this credit in addition to a credit for any reduction in taxes which was obtained. *Id.* at 687, 500 N.E.2d at 433. Although the court found that the real estate tax clause in the lease was "inarticulate," the lease was not ambiguous because the rational and probable meaning of the clause allowed the landlord to deduct expenses incurred in obtaining tax savings from the total amount of savings passed on to the tenant. *Id.* at 690-91, 500 N.E.2d at 435-36.

183. 114 Ill. 2d 133, 500 N.E.2d 1 (1986).

184. *Id.* at 145, 500 N.E.2d at 6.

185. *Id.* at 136, 500 N.E.2d at 2. The plaintiff's parent corporation purchased all of the stock of the plaintiff's predecessor and changed the name of the company to Ceres Illinois, Inc., the present plaintiff.

186. *Id.* at 138, 500 N.E.2d at 2.

187. *Id.*

188. *Id.* at 139, 500 N.E.2d at 3.

189. *Id.* at 140, 500 N.E.2d at 3.

190. *Id.* at 136, 500 N.E.2d at 1.

the property, the rental price and time and manner of payment, and the term of the lease."¹⁹¹ The court then determined that the parties did not intend their oral agreement to be binding.¹⁹² Accordingly, the court held that a binding fifteen-year lease did not exist.¹⁹³ The court, however, found that an oral agreement for an indefinite term existed which the plaintiff could properly terminate.¹⁹⁴ The court, therefore, concluded that the plaintiff properly terminated the oral agreement within its contractual rights.¹⁹⁵

V. ZONING

During the *Survey* period,¹⁹⁶ Illinois appellate courts addressed

191. *Id.* at 145, 500 N.E.2d at 6 (citing *Bournique v. Williams*, 225 Ill. App. 12, 20-21 (1st Dist. 1922)).

192. *Id.* The court noted that the defendant's asking permission to enter the property indicated that the parties contemplated something less than an enforceable leasehold interest. Further, the plaintiffs clearly indicated in correspondence that a subsequent written lease would supercede any prior negotiations. *Id.* at 145-46, 500 N.E.2d at 6.

193. *Id.* at 147, 500 N.E.2d at 6.

194. *Id.* at 147, 500 N.E.2d at 7.

195. *Id.*

196. The United States Supreme Court recently decided two cases involving zoning and land use. In *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 107 S. Ct. 2387 (1987), the Court considered whether the Just Compensation clause of the Fifth Amendment to the United States Constitution required the government to pay for a temporary regulatory taking. *Id.* at 2385. In *First English*, the defendant passed an interim ordinance that prevented the plaintiff from rebuilding a campground that had been destroyed by a flood. *Id.* at 2381-82. The Court held that temporary takings which restrain the landowner from all use of his property are essentially equivalent to permanent takings and, therefore, require compensation. *Id.* at 2388. Further, the court stated that this compensation should include the fair value of the regulated property right for the entire period of regulation. *Id.* at 2389.

In *Nollan v. California Coastal Commission*, 107 S. Ct. 3141 (1987), the defendant demanded that the plaintiff grant an easement for a public walkway across plaintiff's beachfront property in return for a building permit to tear down and replace an existing structure on the property. *Id.* at 3143. The Court held that the defendant's demand was an unconstitutional taking of property in violation of the Fifth Amendment to the United States Constitution. *Id.* at 3148. The Court reasoned that the demand for an easement lacked the "essential nexus" to the request for a building permit which would justify the complete denial of the permit. *Id.* The *Nollan* decision raised a question about the authority of the government to mandate the property rights of private parties in return for public approvals.

After the close of the *Survey* period, the Illinois Appellate Court for the Second District decided a notable case concerning the standing of one municipality, the Village of Riverwoods, to challenge an ordinance of another municipality, the Village of Buffalo Grove. *Village of Riverwoods v. Village of Buffalo Grove*, 159 Ill. App. 3d 208, 511 N.E.2d 184 (2d Dist. 1987). Riverwoods challenged a Buffalo Grove ordinance that approved a planned unit development in an area of Buffalo Grove that was separated from Riverwoods by approximately sixteen hundred feet of forest preserve property and a river. *Id.* at 210, 511 N.E.2d at 185. Evidence showed that the proposed development would increase traffic in Riverwoods and would also increase that village's expenses for

several zoning issues including the construction of a zoning ordinance,¹⁹⁷ and the validity of zoning ordinances.¹⁹⁸ The courts addressed also some specific constitutional aspects of zoning ordinances.¹⁹⁹

A. Generally

In *City of Pekin v. Kaminski*,²⁰⁰ the Illinois Appellate Court for the Second District addressed the issue of the proper construction of a zoning ordinance.²⁰¹ In *Kaminski*, the defendant, who was in the insurance business, included his home address and telephone number in a yellow pages advertisement. He also advertised his home telephone number in a commercial on cable television.²⁰² The city contended that the defendant's failure to obtain a home occupation permit to conduct business in his home violated a city ordinance requiring such a permit.²⁰³ The court held that the defendant's advertisements did not violate a local zoning ordinance requiring home occupation permits for offices at home.²⁰⁴ In so ruling, the court stated that zoning laws detract from the common law right to use property, and are, therefore, strictly construed in favor of the right of the property owner to enjoy the unrestricted use of his property.²⁰⁵ Finally, the court noted that the purpose of the ordinance was to protect the character of the residential neighborhood. The court then concluded that the defendant's advertisements did nothing to impinge on this purpose.²⁰⁶

The Illinois Appellate Court for the Third District evaluated the validity of a zoning ordinance in *National Bank of Joliet v. County*

police protection and road maintenance. The court, however, held that Riverwoods lacked standing to challenge the approval of a planned unit development within the corporate limits of Buffalo Grove. *Id.* at 212, 511 N.E.2d at 186. The court reasoned that Riverwoods offered generalized and speculative evidence about the effects of the development, which failed to show a sufficiently substantial adverse effect upon the performance of its municipal corporate obligations. *Id.*

197. See *infra* notes 200-06 and accompanying text.

198. See *infra* notes 207-12 and accompanying text.

199. See *infra* notes 213-40 and accompanying text.

200. 155 Ill. App. 3d 826, 508 N.E.2d 776 (3d Dist. 1987).

201. *Id.* at 831, 508 N.E.2d at 779.

202. *Id.* at 827, 508 N.E.2d at 777.

203. *Id.*

204. *Id.* at 831, 508 N.E.2d at 779.

205. *Id.* at 830, 508 N.E.2d at 779 (citing *City of Rockford v. Eisenstein*, 63 Ill. App. 2d 128, 211 N.E.2d 130 (2d Dist. 1965)). Cf. *Knor v. County of Madison*, 151 Ill. App. 3d 767, 774, 502 N.E.2d 1063, 1068 (5th Dist. 1986) (zoning is a proper exercise of the police power of the state, and in construing a zoning ordinance, effect should be given to the drafters' intention.)

206. *Kaminski*, 155 Ill. App. 3d at 830, 508 N.E.2d at 779.

of Will.²⁰⁷ In *National Bank of Joliet*, a change in a county zoning ordinance prohibited further residential development of a subdivision. Development of the subdivision had been started under a previous zoning classification that allowed residential development.²⁰⁸ The court considered eight factors articulated in earlier cases to assess the validity of the zoning ordinance.²⁰⁹ The court held that six of the factors²¹⁰ favored the plaintiff's argument and that the two remaining factors²¹¹ favored neither the plaintiff nor the defendant. The court concluded that the plaintiffs established by clear and convincing evidence that the ordinance was arbitrary, unreasonable, and bore no substantial relation to the health, safety, and welfare of the public.²¹²

B. Constitutional Decisions

Illinois appellate courts addressed several zoning cases that involved constitutional issues during the *Survey* year. The matters addressed include an unconstitutionally vague zoning ordinance,²¹³

207. 151 Ill. App. 3d 957, 503 N.E.2d 842 (3d Dist. 1987).

208. *Id.* at 959, 503 N.E.2d at 843.

209. *Id.* at 960, 503 N.E.2d at 846-48. The eight factors that measure the validity of a zoning ordinance are as follows:

- (1) the existing uses and zoning of nearby property;
- (2) the extent to which property values are diminished by the particular zoning restrictions;
- (3) the extent to which the destruction of property values of plaintiff promotes the health, safety, morals or general welfare of the public;
- (4) the relative gain to the public as opposed to the hardship imposed upon the individual property owner;
- (5) the suitability of the subject property for the zoned purposes; . . . (6) the length of time the property has been vacant as zoned considered in the context of land development in the area in the vicinity of the subject property[;] . . . (7) the care with which the community has undertaken to plan its land use development; and (8) the evidence or lack of evidence of community need for the use proposed by the plaintiff.

Id. at 960, 503 N.E.2d at 844 (citing *LaSalle Nat'l Bank v. County of Cook*, 12 Ill. 2d 40, 145 N.E.2d 65 (1957); *Sinclair Pipe Line Co. v. Village of Richton Park*, 19 Ill. 2d 370, 167 N.E.2d 406 (1960)).

210. *Id.* at 963-66, 503 N.E.2d at 846-48. Factors (1), (2), (3), (4), (5), and (8) favor the plaintiff. *See supra* note 209.

211. *Nat'l Bank of Joliet*, 151 Ill. App. 3d at 965, 503 N.E.2d at 847-48. Factors (6) and (7) favor neither party. *See supra* note 209.

212. *Nat'l Bank of Joliet*, 151 Ill. App. 3d at 966, 503 N.E.2d at 848. *Cf.* *Family Christian Fellowship v. County of Winnebago*, 151 Ill. App. 3d 616, 503 N.E.2d 367 (2d Dist. 1986). In *Family Christian Fellowship*, the court applied six factors enunciated in *LaSalle Nat'l Bank v. County of Cook*, 12 Ill. 2d 40, 145 N.E.2d 65 (1957), to determine the validity of a zoning decision. The court concluded that the defendant's denial of plaintiff's proposed church/school use was arbitrary and unreasonable, and bore no substantial relation to the public health, safety, and welfare. *Family Christian Fellowship*, 151 Ill. App. 3d at 619, 503 N.E.2d at 373.

213. *See infra* notes 216-22 and accompanying text.

a "content neutral" zoning ordinance that restricted the locations of uses protected by the first amendment,²¹⁴ and constitutional notice requirements for an effective rezoning.²¹⁵

In *Union National Bank & Trust v. Village of New Lenox*,²¹⁶ the plaintiffs requested a special use permit from the defendant village under the village zoning ordinance for land that was zoned for limited industrial use. After the village denied the request, the plaintiffs filed an action for injunctive relief, alleging that the zoning ordinance established unconstitutionally vague zoning classifications.²¹⁷ The court applied the general rule that an ordinance is unconstitutionally vague when persons of common intelligence

214. See *infra* notes 223-34 and accompanying text.

215. See *infra* notes 235-40 and accompanying text.

216. 152 Ill. App. 3d 919, 505 N.E.2d 1 (3d Dist. 1987), *reh'g denied*, Apr. 3, 1987.

217. *Id.* at 920, 505 N.E.2d at 2. Under the pertinent section on "Limited Industrial Districts," the ordinance provided as follows:

USES PERMITTED: No land shall be used . . . for other than one or more of the following specified uses:

A. Industrial type uses, *such as but not limited to*:

1. All manufacturing and industrial activities, including fabrication, processing, assembly, disassembly, repairing, cleaning, servicing, testing, packaging and storage of materials, products and goods that can be conducted wholly within enclosed buildings.
2. Laboratories and research firms. . .
3. Printing, publishing or lithography establishments.
4. Railroad freight yards.

. . . .

SPECIAL USES PERMITTED: The following uses shall be permitted only if specifically authorized by the Zoning Board of Appeals . . . :

- A. Similar and compatible uses to those allowed as permitted uses in this district.
- B. Drive-in banking facilities.
- C. Planned unit development.
- D. Residence of the proprietor, caretaker or watchman, when located on the premises of the commercial or industrial use.
- E. Radio and television towers.
- F. Filling of holes, pits or lowlands with non-combustible material free from refuse and/or food wastes.
- G. Mining, loading and hauling of sand, gravel, topsoil or other aggregate or minerals. . . .

. . . .

PROHIBITED USES: All uses not expressly authorized [as Uses Permitted or Special Uses Permitted], *including but not limited to*:

- A. Residential uses, except as a special use.
- B. Drive-in restaurants.
- C. Wrecking, dismantling or automotive salvage yard.

Id. at 921-22, 505 N.E.2d at 2-3 (quoting Village of New Lenox, Ill., Ordinance 10-6-2).

necessarily must guess at its meaning.²¹⁸ Based on this standard, the court concluded that the ordinance was unconstitutionally vague.²¹⁹ The court noted that the ordinance described possible "permitted uses" and "prohibited uses," but failed to provide specific standards to determine the appropriate category for a non-listed proposed use.²²⁰ In addition, the ordinance defined the "special uses" category as those uses similar to, and compatible with, "permitted uses." This further confused the categories.²²¹ The court, therefore, rejected the ordinance because it failed to delineate adequately the characteristics of the various zoning classifications.²²²

In *Zebulon Enterprises v. County of DuPage*,²²³ the Illinois Appellate Court for the Second District examined an ordinance that restricted "recreation and amusement establishments," which included adult book and video stores,²²⁴ to control traffic and parking.²²⁵ The plaintiff, who operated an adult book and video store, raised two constitutional challenges to the ordinance. First, the plaintiff contended that a zoning ordinance that required a special use permit for adult book and video stores unconstitutionally restricted the plaintiff's freedom of speech under the first amendment.²²⁶ Second, the plaintiff argued that the ordinance violated the first amendment because it lacked appropriate standards to guide the county board in deciding whether to grant a special use permit.²²⁷

The court rejected the plaintiff's contention that the zoning ordinance unconstitutionally restricted the plaintiff's freedom of speech.²²⁸ The court stated that a "content neutral" zoning ordi-

218. *Id.* at 922, 505 N.E.2d at 3 (citing *Broadrick v. Oklahoma*, 413 U.S. 601 (1973); *Redemske v. Village of Romeoville*, 35 Ill. App. 3d 286, 406 N.E.2d 602 (3d Dist. 1980)).

219. *Union Nat'l Bank*, 152 Ill. App. 3d at 922, 505 N.E.2d at 3.

220. *Id.*

221. *Id.*

222. *Id.* at 922-23, 505 N.E.2d at 3. The court indicated that the ordinance was also unconstitutionally vague because the lack of definite standards for determining zoning classifications improperly vested administrative officials, the village board of trustees, with discretionary powers to determine applicable standards. *Id.* The court ruled that such a practice was an unconstitutional delegation of legislative power. *Id.* at 923, 505 N.E.2d at 4.

223. 146 Ill. App. 3d 515, 496 N.E.2d 1256 (2d Dist. 1986).

224. *Id.* at 518, 496 N.E.2d at 1258.

225. *Id.* at 521, 496 N.E.2d at 1260.

226. *Id.* at 520, 496 N.E.2d at 1260. The first amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I.

227. *Zebulon Enterprises*, 146 Ill. App. 3d at 522, 496 N.E.2d at 1261.

228. *Id.* at 521, 496 N.E.2d at 1260.

nance that restricts the locations of uses protected by the first amendment may be constitutional.²²⁹ The plaintiff conceded that the ordinance was "content-neutral."²³⁰ The court then reasoned that the county had a substantial governmental interest because the ordinance restricted recreation and amusement establishments, including the plaintiff's store, for the purpose of controlling traffic and parking.²³¹

The court, however, agreed with Zebulon that the ordinance violated the first amendment because it lacked sufficiently narrow, objective, and definite standards to guide the county board in deciding whether to allow the special use.²³² The court stated that such standards are required to guide the decisions of legislative bodies, as well as administrative agencies, if restrictions on first amendment freedoms are involved.²³³ The court concluded that the ordinance lacked the appropriate standards to guide the board and, therefore, could not be applied against the plaintiff.²³⁴

The third zoning case involving constitutional issues, *Wells v. Village of Libertyville*,²³⁵ addressed the due process requirements for notice of rezoning.²³⁶ In addition to complying with the statutory notice requirement of publication in a local newspaper, the defendant-village customarily provided personal notice to all adjacent property owners.²³⁷ In the present case, the village published a notice of a public hearing on the ordinance amendment proceedings in a local newspaper. The village, however, failed to send personal notices to the plaintiffs regarding the hearing.²³⁸ The court reasoned that the failure to personally notify the plaintiffs by mail did not deprive the plaintiffs of due process, because the village properly published notice in a local newspaper.²³⁹ The court,

229. *Id.* A "content neutral" zoning ordinance that restricts the locations of uses protected by the first amendment is constitutional if it is "narrowly designed to serve a substantial government interest, and . . . the restrictions do not unreasonably limit alternative avenues of communication." *Id.* at 521, 496 N.E.2d at 1260 (citing *City of Renton v. Playtime Theatres*, 106 S. Ct. 925 (1986)).

230. *Id.*

231. *Id.* The plaintiff also failed to show that the ordinance unreasonably restricted alternative avenues of communication. *Id.*

232. *Id.* at 522, 496 N.E.2d at 1261.

233. *Id.* at 523, 496 N.E.2d at 1261.

234. *Id.*

235. 153 Ill. App. 3d 361, 505 N.E.2d 740 (2d Dist. 1987).

236. *Id.* at 367, 505 N.E.2d at 744.

237. *Id.* at 363, 505 N.E.2d at 741.

238. *Id.*

239. *Id.* at 367, 505 N.E.2d at 744 (citing *Bohan v. Village of Riverside*, 9 Ill. 2d 561, 138 N.E.2d 487 (1956)).

therefore, concluded that the village's long-standing custom of providing personal notice did not create a "self-imposed, legally binding obligation."²⁴⁰

VI. TRANSFERS OF INTERESTS IN PROPERTY

A. *Self-made "Land Patent" to Create Superior Title*

In *Britt v. Federal Land Bank Association*,²⁴¹ the Illinois Appellate for the Second District considered the legal significance of a "land patent" made by a former owner after an entry of a judgment of foreclosure against the property.²⁴² In *Britt*, the plaintiffs, former owners of the subject property, filed documents labeled "Land Patents"²⁴³ in the county recorder's office.²⁴⁴ These documents purported to convey title to the plaintiffs which was superior to any other title.²⁴⁵ The plaintiffs then instituted the present action seeking to quiet title to the property.²⁴⁶ This issue was one of first impression in Illinois, and therefore, the court looked to other jurisdictions for guidance.²⁴⁷ The court concluded that the "patent" involved was not a government grant. Rather, the court determined that the "patent" was a self-serving, gratuitous grant by the plaintiffs to themselves.²⁴⁸ The court stated that such "land patents" create no rights in the former owner.²⁴⁹ The court concluded that such a grant "does not, cannot and will not be sufficient by itself to create good title."²⁵⁰ Moreover, the court determined that such land patents are "frivolous and without basis and should not be raised in the circuit courts of [Illinois]."²⁵¹ The court, therefore, vigorously affirmed the dismissal of this case.²⁵²

240. *Id.* at 369, 505 N.E.2d at 746.

241. 153 Ill. App. 3d 605, 505 N.E.2d 387 (2d Dist. 1987).

242. *Id.* at 607, 505 N.E.2d at 388.

243. A land patent is "the deed by which the government passes fee simple title of government land to private persons." *Id.* at 613, 505 N.E.2d at 392.

244. *Id.* at 607, 505 N.E.2d at 388.

245. *Id.*

246. *Id.*

247. *Id.* at 609, 505 N.E.2d at 390.

248. *Id.*

249. *Id.* at 613, 505 N.E.2d at 392.

250. *Id.* at 610, 505 N.E.2d at 390 (quoting *Hilgeford v. Peoples Bank*, 607 F. Supp. 536 (N.D. Ind. 1985), *aff'd*, 776 F.2d 176 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1644 (1986) (emphasis in original)).

251. *Id.* at 614, 505 N.E.2d at 393.

252. *Id.* at 614-15, 505 N.E.2d at 393-94. Before affirming the lower court's dismissal of the plaintiff's case with prejudice, the court indicated that such suits were frivolous and that a party filing such a suit could be subject to sanctions under Rule 11 of the Federal Rules of Civil Procedure. *Id.* (citing FED. R. CIV. P. 11).

VII. THE ILLINOIS MORTGAGE FORECLOSURE LAW

In an attempt to clarify existing Illinois mortgage foreclosure law, the Illinois legislature recently enacted the Illinois Mortgage Foreclosure Law (the "IMFL" or the "Act")²⁵³ which became effective July 1, 1987. This section will give a brief overview of the important aspects of the IMFL and a summary of the changes that the IMFL made to existing law.²⁵⁴

A. Structure of the Act

Prior to the enactment of the IMFL, mortgage foreclosure law was developed in various statutes and case law. The Act codified the previous statutes and case law, with certain changes mentioned below, into a unified statutory scheme. Under the new scheme, the IMFL contains seven main parts: General Provisions,²⁵⁵ Definitions,²⁵⁶ Mortgage Lien Priorities,²⁵⁷ Methods of Terminating Mortgagor's Interest in Real Estate,²⁵⁸ Judicial Foreclosure Procedure,²⁵⁹ Reinstatement and Redemption²⁶⁰ and Possession During Foreclosure.²⁶¹

B. Major Aspects of the Act

1. Instruments Covered by the Act

The IMFL sets forth the exclusive procedure for the foreclosure of mortgages,²⁶² certain installment contracts²⁶³ for residential real

253. ILL. REV. STAT. ch. 110, para. 15-1101 to 15-1706 (Supp. 1987). The Illinois legislature passed a Technical Corrections Act amending certain provisions of the IMFL. P.A. 85-907, 1987 Ill. Legis. Serv. 127-52 (West) (effective Nov. 23, 1987).

254. For a more in-depth review of the IMFL, see Liss, *Introduction to the Proposed Illinois Mortgage Foreclosure Act*, 9 ILL. FUND CONCEPT 13 (May, 1985) and Note, *The Illinois Mortgage Foreclosure Law and Installment Sales Contracts* 19 LOY. U. CHI. L.J. 245 (1987).

255. ILL. REV. STAT. ch. 110, para. 15-1101 to -1107 (1987).

256. *Id.* at para. 15-1201 to -1222.

257. *Id.* at para. 15-1301 to -1302.

258. *Id.* at para. 15-1401 to -1405.

259. *Id.* at para. 15-1501 to -1512.

260. *Id.* at para. 15-1601 to -1605.

261. *Id.* at para. 15-1701 to -1706.

262. *Id.* at para. 15-1106(a)(1). The Act defines "mortgage" as "any consensual lien created by a written instrument which grants or retains an interest in real estate to secure a debt or other obligation." *Id.* at para. 15-1207. Further, the term "mortgage" includes mortgages securing "reverse mortgage" loans, mortgages securing "revolving credit" loans, equitable mortgages and every deed conveying real estate which, although absolute in its terms, was intended only as a security. *Id.*

263. *Id.* at para. 15-1106(a)(2) (1987). Installment contracts are subject to the provisions of the Act if the purchase price is payable in installments over a period longer than

estate entered into on or after July 1, 1987, and certain collateral assignments of a beneficial interest in a land trust²⁶⁴ made on or after July 1, 1987.²⁶⁵ The Act expanded the category of instruments covered by Illinois' statutory mortgage law to include these latter two types of instruments. Prior statutory law covered only mortgages, trust deeds, and other conveyances in the nature of mortgages.²⁶⁶

In addition to those instruments required to be foreclosed under the IMFL, certain other instruments may be foreclosed under the Act. For example, a secured party under the Uniform Commercial Code²⁶⁷ may invoke the IMFL to enforce a security interest in property, if the interest was created on or after July 1, 1987 by a collateral assignment of a beneficial interest in a land trust or by an assignment for security of a buyer's interest in a real estate installment contract.²⁶⁸ Further, a contract seller may elect to foreclose under the IMFL those real estate installment contracts entered into on or after July 1, 1987 for which the IMFL is not the exclusive foreclosure procedure.²⁶⁹

2. Necessary Parties

Under the Act, the category of "necessary parties" required to be joined as defendants in a foreclosure suit includes only the mortgagor²⁷⁰ and certain other persons²⁷¹ who are indebted or have other obligations secured by the mortgage and against whom the

five years, and if less than eighty percent of the original purchase price remains unpaid at the time the foreclosure complaint is filed. *Id.*

264. *Id.* at para. 15-1106(a)(3). The IMFL precludes a lender from relying on the sale remedies of the Uniform Commercial Code in certain situations when a land trust was formed to circumvent the procedures of the IMFL. Thus, the collateral assignment of a beneficial interest ["ABI"] in a land trust must be foreclosed under the Act if the assignment is made contemporaneously with the creation of the land trust, is required by the holder of the obligation as security for payment, and is evidenced by a writing that permits the underlying real estate to be sold to satisfy the obligation. *Id.* Although the IMFL statutorily recognized this treatment of a collateral ABI for the first time, Illinois case law previously required the same treatment. *See, e.g.,* Horney v. Hayes, 11 Ill. 2d 178, 142 N.E.2d 94 (1957); DeVoigne v. Chicago Title and Trust Co., 304 Ill. 177, 136 N.E. 498 (1922).

265. *See* S. Lindberg & W. Bender, *The Illinois Mortgage Foreclosure Law*, 76 ILL. B.J. 800-02 (Oct. 1987) (discussing the interests to be foreclosed under the Act).

266. ILL. REV. STAT. ch. 110, para. 15-101 (1985) (repealed 1987).

267. ILL. REV. STAT. ch. 26, para. 9-101 to 9-507 (1985) (repealed 1987).

268. ILL. REV. STAT. ch. 110, para. 15-1106(b) (1987).

269. *Id.* at para. 15-1106(c) (e.g., a real estate contract for non-residential real estate).

270. "Mortgagor" means the person whose interest in the real estate is the subject of the mortgage and any person claiming through a mortgagor as successor. ILL. REV. STAT. ch. 110, para. 15-1209. Also, when a mortgage is executed by a trustee of a land trust, the mortgagor is the trustee and not the beneficiary of the land trust. P.A. 85-907,

mortgagee asserts personal liability.²⁷² Prior law required the identification of, and service upon, all "necessary and indispensable" parties.²⁷³ This required the joinder of parties with less substantial interests in the property, such as junior lienholders, and often led to considerable delay.²⁷⁴

In response to this problem, the IMFL promotes efficiency by allowing the foreclosure to proceed without unduly burdensome notice and joinder requirements.²⁷⁵ At the same time, the IMFL protects the interests of non-joined parties, termed "permissible parties,"²⁷⁶ by permitting joinder of any party with an interest in the property, and by providing that any disposition of the mortgaged real estate is subject to the interests of such non-joined parties.²⁷⁷

Another new aspect of the IMFL involves cases in which the mortgagee may join the State of Illinois as a defendant. The State may be joined if the foreclosure involves real estate upon which the State or any political subdivision of the State has an interest or claim for lien.²⁷⁸ Previously, the State was not a proper party defendant to the foreclosure action. Rather, following a judgment of foreclosure, the mortgagee was required to serve the State with a copy of the certificate of sale and foreclose the State's right to redeem under a separate procedure.²⁷⁹

3. Methods of Terminating Mortgagor's Interest in Real Estate

The IMFL specifies four methods for terminating a mortgagor's

1987 Ill. Legis. Serv. 133 (West) (to be codified at Ill. Rev. Stat. ch. 110, para. 15-1209(ii)).

271. "Other persons" does not include guarantors. ILL. REV. STAT. ch. 110, para. 15-1501(a) (1987).

272. *Id.* Any disposition of the real estate, however, shall be subject to the interests of all other persons not made a party to the action. *Id.*

273. ILL. REV. STAT. ch. 110, para. 2-405(a) (1985).

274. Liss, *supra* note 254, at 15.

275. Ill. Rev. Stat. ch. 110, para. 15-1501 to -1503 (1987).

276. *Id.* at para. 15-1501(b).

277. *Id.* at para. 15-1501(a).

278. *Id.* at ch. 110, para. 15-1501(b)(6). The Act, as amended, clarified the procedure for serving the State of Illinois. The Act requires that a copy of both the summons and the complaint be sent to the Attorney General. P.A. 85-907, 1987 Ill. Legis. Serv. 136 (West) (to be codified at ILL. REV. STAT. ch. 110, para. 15-1501(g)).

279. ILL. REV. STAT. ch. 110, para. 12-401 (1985) (repealed 1987). The mortgagee was required to serve the State's Attorney of the county where the property was located and to obtain an endorsement of the certificate of sale. Then, the mortgagee filed the endorsed certificate with the recorder of deeds of that county. The State's right to redeem terminated between sixty days and twelve months after such filing, depending on the method of foreclosure used. *Id.*

interest in real estate: deed in lieu of foreclosure,²⁸⁰ consent foreclosure,²⁸¹ common law strict foreclosure,²⁸² and judicial foreclosure.²⁸³ The Act expressly provides that foreclosure sales under any power of sale clause in a mortgage will not be allowed.²⁸⁴

The IMFL provides the first statutory recognition of the right to terminate a mortgagor's interest by a deed in lieu of foreclosure.²⁸⁵ Under this section, the mortgagee may accept from the mortgagor a deed in lieu of foreclosure. This acceptance relieves all parties who may owe payment or performance on the mortgage from personal liability.²⁸⁶ A complete release may be avoided if a person agrees in a contemporaneously executed instrument to remain personally liable for existing claims or liens affecting the real estate.²⁸⁷

The second method of termination available to the mortgagee is the consent foreclosure.²⁸⁸ In a consent foreclosure, the mortgagee offers to waive any and all rights to a personal judgment for deficiency against the mortgagor and against all other persons liable for the indebtedness.²⁸⁹ In turn, the mortgagor expressly consents to the entry of a judgment satisfying the mortgage indebtedness. This consent judgment vests absolute title to the real estate in the mortgagee, free and clear of all claims, liens, and interests of the

280. ILL. REV. STAT. ch. 110, para. 15-1401 (1987) (mortgagee may accept from the mortgagor a deed in lieu of foreclosure subject to any other claims or liens affecting the real estate).

281. *Id.* at para. 15-1402 (available when the mortgagee offers to waive any and all rights to a personal judgment for deficiency against the mortgagor and when the mortgagor expressly consents to the entry of a judgment satisfying the mortgage indebtedness by vesting absolute title to the mortgaged real estate in the mortgagee free and clear of all claims, liens and interests of the mortgagor).

282. *Id.* at para. 15-1403 (the mortgagee's right to foreclose by common law strict foreclosure is recognized statutorily for the first time and is preserved in the form which existed as of the effective date of the IMFL).

283. *Id.* at para. 15-1404 (interest of all persons made party to the foreclosure and interests of all non-record claimants given notice shall be terminated by the judicial sale, provided such sale is confirmed or unless otherwise specified in the judgment of foreclosure). *See also* Liss, *supra* note 254, at 14 (judicial foreclosure intended to be the "main method" by which a mortgagor's interest is foreclosed).

284. ILL. REV. STAT. ch. 110, para. 15-1405 (1987) (all such mortgages may be foreclosed only under the IMFL). After receiving and considering many suggestions to allow the enforcement of power of sale clauses, the drafters of the IMFL concluded that the power was too drastic a change from prior law and unnecessary given other provisions of the Act. Liss, *supra* note 254, at 14.

285. ILL. REV. STAT. ch. 110, para. 15-1401 (1987).

286. *Id.* (this provision includes guarantors).

287. *Id.*

288. *Id.* at para. 15-1402. The IMFL expressly recognized that certain liens of the United States cannot be foreclosed without a judicial sale. *Id.* at para. 15-1402(a). *See also* 28 U.S.C. § 2410(c) (Supp. 1985).

289. ILL. REV. STAT. ch. 110, para. 15-1402(a)(1) (1987).

mortgagor.²⁹⁰

Third, the IMFL provides the first statutory recognition of the mortgagee's right to strict foreclosure.²⁹¹ Formerly, this right existed only under Illinois common law.²⁹² The Act preserves the mortgagee's right to strict foreclosure in the form which existed in Illinois as of the effective date of the IMFL.²⁹³

The fourth method of termination under the IMFL is the judicial foreclosure.²⁹⁴ In a judicial foreclosure, the property subject to the judgment shall be sold at a judicial sale. The sale occurs after the entry of a judgment of foreclosure,²⁹⁵ the expiration of the redemption period,²⁹⁶ and the provision of public notice.²⁹⁷ The judicial sale shall terminate the interests of parties to the foreclosure and the interests of all non-record claimants given notice, provided such sale is confirmed by the court.²⁹⁸

Finally, the IMFL expressly prohibits foreclosure sales under any power of sale clause.²⁹⁹ This prohibition reflects the drafters' intent to provide a comprehensive and exclusive system for the foreclosure of mortgages.³⁰⁰ Thus, the Act requires foreclosures to proceed under the IMFL, rather than under a private right.

290. *Id.* at para. 15-1402(a)(3). Under prior law, junior lienholders had three months after the entry of a consent foreclosure judgment to redeem the property. ILL. REV. STAT. ch. 110, para. 12-127 (1985) (repealed 1987). The IMFL, however, eliminates this redemption period, and requires a junior lienholder to file an objection to the consent foreclosure prior to judgment. ILL. REV. STAT. ch. 110, para. 15-1402(b) (1987). If such an objection is filed, the junior lienholder receives thirty days to pay the full amount owed to the foreclosing mortgagee. *Id.* at para. 15-1402(b)(3). On the other hand, if the junior lienholder fails to file such an objection, the consent judgment will be entered and absolute title to the mortgaged real estate will vest in the mortgagee, free and clear of the junior lienholder's interest. *Id.* at para. 15-1402(a).

291. *Id.* at para. 15-1403 (1987).

292. *See, e.g.,* Great Lakes Mortgage Corp. v. Collymore, 14 Ill. App. 3d 68, 71, 302 N.E.2d 248, 250 (1st Dist. 1973) (the common law remedy of strict foreclosure was available upon proof that the mortgagor or owner of the equity of redemption was insolvent; that the value of the property was less than the mortgage indebtedness and taxes on the property; and that the mortgagee accepted title to the property in extinction of the mortgage indebtedness, i.e., that he gave up the right to a deficiency judgment against the mortgagor).

293. ILL. REV. STAT. ch. 110, para. 15-1403 (1987).

294. *Id.* at para. 15-1404. *See also, infra* notes 301-21 and accompanying text. The judicial foreclosure is intended to be the primary method by which a mortgagor's interest is foreclosed. Liss, *supra* note 254, at 14.

295. ILL. REV. STAT. ch. 110, para. 15-1507(a) (1987).

296. *Id.* at para. 15-1507(b).

297. *Id.* at para. 15-1507(c).

298. *Id.* at para. 15-1404.

299. *Id.* at para. 15-1405.

300. *See, generally,* Liss, *supra* note 254.

4. New Foreclosure Sale Procedure

The procedural requirements of a judicial foreclosure sale under the IMFL are both comprehensive and flexible. The IMFL is comprehensive in that the Act describes the requirements of the entire foreclosure process from start to finish in great detail.³⁰¹ Nevertheless, the section is flexible in that the judge presiding over the foreclosure sale may modify or bypass certain statutory provisions.³⁰²

The section relating to the judicial foreclosure sale provides that the property shall be sold after the redemption period has run.³⁰³ This provision represents the major change in the judicial sale procedure from prior law. Previously, a defendant could redeem the real estate sold at a judicial sale for up to six months following the sale.³⁰⁴ Under the IMFL, the sale is deferred until after the redemption period has expired.³⁰⁵

This change in the timing of the foreclosure sale reflects the drafters' intent to maximize the amount of money received at the sale by encouraging many bids at "near-market" prices.³⁰⁶ Under prior law, mortgagees typically purchased the foreclosed property at the foreclosure sale by bidding the amount of the judgment debt.³⁰⁷ In light of the mortgagor's subsequent rights of redemption, other potential bidders saw the purchase of real estate at a foreclosure sale as a risky investment that did not justify a bid at fair market value. The mortgagor's right to possession of the prop-

301. See, e.g., ILL. REV. STAT. ch. 110, para. 15-1504 (1987) (clarifying the required form, content, and meaning of the complaint, including a requirement that the complaint set forth a separately itemized statement of the unpaid principal, interest and other charges, the total amount due, and also the per diem interest accruing under the mortgage).

302. See, e.g., *id.* at para. 15-1501(e)(2)-(3) (permitting persons to intervene); *id.* at para. 15-1506(f)(14) (special matters included in the judgment as approved by the court); *id.* at para. 15-1506(h) (postponement of proving priority); *id.* at para. 15-1507(b) (sale pursuant to terms and conditions as specified by the court); *id.* at para. 15-1507(c)(1)(I) (information to be included in Notice of Sale); *id.* at para. 15-1507(c)(2)(ii) (required publications of Notice of Sale); *id.* at para. 15-1507(d) (division of property for sale); *id.* at para. 15-1512(d) (application of surplus sale proceeds).

303. *Id.* at para. 15-1507(b). The section provides that upon entry of a judgment of foreclosure and the expiration of the redemption period, the property "shall be sold at a sale . . . on such terms and conditions as shall be specified by the court in the judgment of foreclosure." *Id.*

304. ILL. REV. STAT. ch. 110, para. 12-128 (1985). See also H. Seigan & I. Helfgot, *A Guide to Mortgage Foreclosures*, 65 CHI. B. REC. 8, 16 (1983).

305. ILL. REV. STAT. ch. 110, para. 15-1507(b) (1987). But see ILL. REV. STAT. ch. 110, para. 15-1604(a) (1987) (if the price paid for residential real estate at the foreclosure sale is less than the judgment amount and the mortgagee is the purchaser, then the mortgagor has a special right to redeem for thirty days after confirmation of the sale).

306. Liss, *supra* note 254, at 14.

307. *Id.*

erty during the redemption period was considered especially risky. For example, a disgruntled mortgagor who had no funds with which to redeem could damage the property while he was in possession. Moreover, the mortgagor's subsequent right of redemption clouded the purchaser's prospects of eventually obtaining clear title to the property, further reducing potential bids.³⁰⁸

Under the IMFL, which places the foreclosure sale after the redemption period, prospective purchasers have an opportunity to obtain clear title and an immediate right to possession with a winning bid at the foreclosure sale.³⁰⁹ At the same time, the mortgagor's right to redeem has been preserved.³¹⁰ Moreover, both the mortgagor and the mortgagee benefit by a sale price that reflects fair market value.³¹¹ The mortgagor has a chance to receive a portion of any equity developed over the term of the mortgage. At the same time, the mortgagee receives the amounts due under the mortgage without having to repossess and then sell the property. Moreover, holding the sale after the redemption period has run minimizes the foreclosure sale purchaser's risk of damage to the property during the redemption period.

The IMFL has added flexibility in the structuring of the judgment order to allow the court and the parties to reach a speedy and efficient resolution to the sale process.³¹² For example, the judgment order can provide for a manner of sale other than public auction,³¹³ for an exclusive or a non-exclusive broker listing of the property,³¹⁴ or for other specific procedures or terms of the sale.³¹⁵ Further, the Act allows the parties to agree in writing on a satisfactory minimum price at which the real estate may be sold to the first person to offer such a price.³¹⁶ Moreover, the Act allows the parties to defer proving the priority of an interest in the proceeds of the sale until after the confirmation of the sale.³¹⁷ This provision

308. In effect, a purchaser was required to put up money for six months with no guarantee of a completed sale. Thus, bidders further discounted their bids to reflect the potential loss of the time value of the investment upon redemption.

309. ILL. REV. STAT. ch. 110, para. 15-1701(c)(1) (1987).

310. *Id.* at paras. 15-1604 and 15-1605.

311. Although the Act encourages sale prices at or near market value, deficiencies can result. *Id.* at para. 15-1511. The IMFL provides that, except as expressly prohibited by the Act, foreclosure of a mortgage does not affect a mortgagee's rights, if any, to obtain a personal judgment against any person for a deficiency. *Id.*

312. ILL. REV. STAT. ch. 110, para. 15-1506(f) (1987).

313. *Id.* at para. 15-1506(f)(1).

314. *Id.* at para. 15-1506(f)(4).

315. *Id.* at para. 15-1506(f)(14).

316. *Id.* at para. 15-1506(g).

317. *Id.* at para. 15-1506(h) (court approval of any such deferral is required).

has special importance to mechanics' lien claimants and to other junior lienholders who can avoid the expense and time of proving their claims until the extent of available funds from the sale is known.³¹⁸

The notice of sale provisions under the IMFL also reflect the effort to promote a sale price at or near fair market value. The IMFL establishes minimum requirements that a notice of sale should meet.³¹⁹ Further, the Act requires that the notice be published once on each of three consecutive weeks between thirty-five days and seven days prior to the sale.³²⁰ Most importantly, however, the Act requires that an advertisement be published in a newspaper circulated to the general public in the section where real estate is usually advertised as well as in the legal notices section of the same paper or a different paper.³²¹ The notice in the regular real estate section should attract lay people, as well as lawyers and other professionals, to foreclosure sales.

5. Reinstatement and Redemption

In addition to delaying the judicial sale until after the expiration of the redemption period,³²² the IMFL has made several other changes concerning the mortgagor's rights of reinstatement³²³ and

318. The Act establishes mortgage lien priority by recognizing that mortgages under construction loans, *id.* at para. 15-1302(b)(1), reverse mortgages, *id.* at para. 15-1302(b)(2), revolving credit mortgages, *id.* at para. 15-1302(b)(3), and certain other advances, *id.* at para. 15-1302(b)(4) and (5) shall be liens from the time the mortgage is recorded.

319. *Id.* at para. 15-1507(c)(1). This paragraph provides:

The notice of sale shall include at least . . . : (A) the name, address and telephone number of the person to contact for information regarding the real estate; (B) the common address and other common description . . . of the real estate; (C) a legal description of the real estate sufficient to identify it with reasonable certainty; (D) a description of the improvements on the real estate; (E) the times specified in the judgment . . . when the real estate may be inspected prior to the sale; (F) the time and place of the sale; (G) the terms of the sale; (H) the case title, case number and the court in which the foreclosure was filed; and (I) such other information as ordered by the Court.

Id. However, the Act also provides that an "immaterial error in the information shall not invalidate the legal effect of the notice." *Id.*

320. *Id.* at para. 15-1507(c)(2).

321. *Id.* at para. 15-1507(c)(2)(i) (advertisements in the real estate section need not include legal descriptions, unless the paper does not have a separate section for legal ads, and only the advertisements in the real estate section are published). *See also* P.A. 85-907, 1987 Ill. Legis. Serv. 143 (West) (to be codified at ILL. REV. STAT. ch. 110, para. 15-1507(c)(2)(i)).

322. ILL. REV. STAT. ch. 110, para. 15-1507(b) (1987). *See supra* notes 304-11 and accompanying text.

323. ILL. REV. STAT. ch. 110, para. 15-1602 (1987).

redemption³²⁴. For example, the applicable time period for the mortgagor to reinstate the mortgage has been changed. Under prior law, the mortgagor possessed the right to reinstate the mortgage by curing all existing defaults before the earlier of the expiration of ninety days after the date of service or the entry of a judgment of foreclosure.³²⁵ The IMFL, however, eliminates the second prong of the timing requirement regarding the entry of a judgment of foreclosure. Hence, the right to reinstate must be exercised within ninety days of the date on which all the mortgagors have been served, or within ninety days of the date on which the mortgagors have otherwise submitted to the jurisdiction of the court, without regard to the entry of judgment.³²⁶ The Act also clarified the requirement that a mortgagor not be allowed to reinstate a mortgage for five years after the date of the dismissal of a foreclosure proceeding in which the same mortgage previously had been reinstated.³²⁷

Under prior law³²⁸ and in some situations under the IMFL,³²⁹ the statutory redemption period extends for six months. As previously indicated, however, the redemption period no longer runs after the foreclosure sale.³³⁰ Instead, the IMFL has modified the redemption period for non-residential real estate to end six months from the date on which the mortgagor was served with summons or by publication or submitted to the court's jurisdiction, or three months from the date of entry of a judgment of foreclosure, whichever is later.³³¹ Moreover, the IMFL provides for an extended redemption period for a foreclosure of a mortgage on real estate which is residential at the time the foreclosure is commenced. In cases involving residential foreclosures, the redemption period ends on the later of the date seven months³³² from the date on which the mortgagor was served with summons or by publication or submitted to the court's jurisdiction, or three months from the date of

324. *Id.* at para. 15-1603.

325. ILL. REV. STAT. ch. 95, para. 57 (1981) (curing the default required the payment of the installments in default plus costs, expenses and reasonable fees); *see also*, H. Siegan & I. Helfgot, *A Guide to Mortgage Foreclosure*, 65 CHI. B. REC. 8, 12, 13 (1983).

326. ILL. REV. STAT. ch. 110, para. 15-1602 (1987).

327. *Id.* (the five year limitation becomes applicable only upon an express written finding by the court that the mortgagor has previously exercised the right to reinstate).

328. ILL. REV. STAT. ch. 110, para. 12-128 (1985) (repealed 1987).

329. ILL. REV. STAT. ch. 110, para. 15-1603(b) (1987) (involving real estate which is non-residential real estate at the time the foreclosure is commenced).

330. ILL. REV. STAT. ch. 110, para. 12-128 (1985) (repealed 1987).

331. ILL. REV. STAT. ch. 110, para. 15-1603(b) (1987).

332. The redemption period applying to non-residential real estate is six months. ILL. REV. STAT. ch. 110, para. 15-1603(b) (1987).

entry of a judgment of foreclosure.³³³

In addition to changing the length of the redemption period, the IMFL places several important restrictions on the mortgagor's right of redemption. For example, once the right of redemption has expired, it may not be revived.³³⁴ Also, an owner of redemption who intends to redeem must provide the mortgagee with a written notice of such intent at least fifteen days prior to the date designated for redemption.³³⁵ Finally, under the IMFL, a mortgagor has no equitable right of redemption after a judicial sale or after entry of a judgment of foreclosure.³³⁶ Rather, the right to redeem is purely statutory.

6. Rights of Possession

The IMFL retained, but clarified, many of the concepts of prior law regarding the rights of parties to possession³³⁷ of the foreclosure property and also made significant adjustments to those rights.³³⁸ Moreover, the legislature expressly structured the IMFL to serve as the exclusive source of law regarding possession during

333. *Id.* In addition to the extra redemption period of one month following the foreclosure sale afforded to residential mortgagors under paragraph 15-1603(b) of the Act, other protections for the residential mortgagor have been included in the IMFL. For example, mortgagors of real estate that is residential or agricultural at the time of such attempted waiver may not waive their rights of reinstatement and redemption, except when a foreclosure proceeding has been commenced. *Id.* at para. 15-1601(a) and (c). The Act, however, is silent about whether a non-residential or non-agricultural mortgagor may waive the right to reinstate. Also, although prior law required the mortgagor remaining in possession during foreclosure to pay the mortgagee the fair rental value of the real estate, ILL. REV. STAT. ch. 110, para. 15-309 (1985) (repealed 1987), the IMFL allows the mortgagor to pay the lesser of the interest due under the mortgage as if no default occurred or the fair rental value of the real estate. ILL. REV. STAT. para. 15-1701(c)(2) (1987).

334. ILL. REV. STAT. ch. 110, para. 15-1603(c)(1) (1987). *But see, id.* at para. 15-1604(a) (residential mortgagors have a special right to redeem for a period of thirty days following the confirmation of the sale).

335. *Id.* at para. 15-1603(e). Arguably, in the absence of timely notice, the right to redeem would effectively cease fifteen days before the end of the full redemption period. That is, because the Act requires notice of intent to redeem at least fifteen days prior to the exercise of the right to redeem, a court may consider a mortgagor's failure to provide such notice as jurisdictional. *Id.* Also, following receipt of such a notice of intent to redeem, the mortgagee must file with the clerk of the court a certification of expenses authorized by the court and incurred between the date of judgment and the date of redemption. If the mortgagee fails to file such certification, the mortgagee shall not be entitled to payment for those expenses. *Id.*

336. *Id.* at para. 15-1605.

337. The Act defines possession as including physical possession of the mortgaged real estate to the same extent to which the mortgagor would have been entitled to physical possession had the foreclosure action not been brought. *Id.* at para. 15-1701(a).

338. *Id.* at paras. 15-1701 to -1706.

foreclosure.³³⁹ The Act addresses the rights of the parties during three time periods: the period prior to the entry of judgment of foreclosure,³⁴⁰ the period between the judgment of foreclosure and thirty days after the confirmation of the sale,³⁴¹ and the period following thirty days after the confirmation of sale.³⁴²

Regarding the period prior to the entry of a judgment of foreclosure, the IMFL retains the basic structure of the prior law.³⁴³ Now, as before, the court has wide discretion in determining whether to place the mortgagee in possession of the real estate.³⁴⁴ In the past, however, the courts in some counties rarely granted such possession to the mortgagee. Although the parties continue to rely on the court's discretion under the IMFL, the Act has established a more functional procedure for exercising that discretion. The Act distinguishes between foreclosures involving residential real estate³⁴⁵ and all other foreclosures.³⁴⁶ Regarding residential property, the mortgagor is entitled to retain possession of the real estate in the initial period unless the mortgagee objects and shows good cause³⁴⁷ why the court should not allow such possession to continue.³⁴⁸ As to the non-residential mortgage, however, the burden of proof shifts to the mortgagor to show good cause why the mortgagee should not be put in possession.³⁴⁹

The IMFL applies basically the same standards to the second time period³⁵⁰ as was applied in the first period.³⁵¹ After a sale pursuant to the judgment, however, any holder of the certificate of

339. *Id.* at para. 15-1701(a).

340. *Id.* at para. 15-1701(b).

341. *Id.* at para. 15-1701(c).

342. *Id.* at para. 15-1701(d).

343. ILL. REV. STAT. ch. 110, para. 15-302 (1985) (repealed 1987).

344. ILL. REV. STAT. ch. 110, para. 15-1701(b) (1987).

345. *Id.* at para. 15-1701(b)(1).

346. *Id.* at para. 15-1701(b)(2).

347. The drafters of the Act rejected a statutory definition of "good cause" with the anticipation that a consistent standard would be developed by Illinois courts. Liss, *supra* note 254, at 17.

348. ILL. REV. STAT. ch. 110, para. 15-1701(b)(1) (1987) (*i.e.*, under a residential mortgage, the mortgagee carries the burden of proving good cause.).

349. *Id.* at para. 15-1701(b)(2). Although the non-residential mortgagor carries the burden of proof, the mortgagee must still request to be put in possession upon allegations that the mortgage authorizes the mortgagee to be put in possession and when a reasonable probability exists that the mortgagee will prevail on a final hearing of the cause. *Id.* See also, *id.* at para. 15-1706(a).

350. *Id.* at para. 15-1701(c) (the period between the judgment of foreclosure and thirty days after the confirmation of sale).

351. *Id.* at para. 15-1701(c)(1).

sale receives the mortgagee's right to be placed in possession.³⁵² Also, prior law required the mortgagor remaining in possession during foreclosure to pay the mortgagee the fair rental value of the real estate.³⁵³ The IMFL, however, allows the mortgagor to choose between the lesser of the payments of interest due under the mortgage as if no default occurred and the fair rental value of the real estate.³⁵⁴ During the third period, which begins thirty days after confirmation of the foreclosure sale, the holder of the certificate of sale is entitled to possession of the foreclosed real estate without notice or further order of the court.³⁵⁵

The IMFL also provides for the appointment of a receiver upon the request of any party and a showing of good cause.³⁵⁶ The Act grants the receiver the power to operate, manage, and conserve the property and describes certain specific powers of a receiver.³⁵⁷ Also, the Act provides that the receiver shall operate the property with reasonable prudence, taking into account the interests of the mortgagor.³⁵⁸ This provision reflects the drafters' intent to rely on the mortgagee in possession unless the mortgagor shows the necessity of an impartial administrator or a need for special expertise.³⁵⁹

VIII. CONCLUSION

The most notable development in the area of real property law during the *Survey* period involved the enactment of the new Illinois Mortgage Foreclosure Law. The Real Property Section of the Illinois State Bar Association (the "Association") began drafting the IMFL in an attempt to revise and restructure the mortgage foreclosure law of Illinois.³⁶⁰ The Association's incentive for undertaking such a task was the apparent widespread dissatisfaction with the existing law. The most notable problems with the old law were its disorganization, and its failure to achieve a balance between the risks to the bidder due to the timing of the Sheriff's sale. It also appeared that few defense attorneys achieved sufficient familiarity

352. *Id.*

353. ILL. REV. STAT. ch. 110, para. 15-309 (1985) (repealed 1987).

354. ILL. REV. STAT. ch. 110, para. 15-1701(c)(2) (1987).

355. *Id.* at para. 15-1701(d).

356. *Id.* at para. 15-1704(a).

357. *Id.* at para. 15-1704(b) (including the power to execute leases, collect rents, insure the property, hire employees, and pay taxes).

358. *Id.* at para. 15-1704(c).

359. Liss, *supra* note 254, at 17.

360. Fred I. Feinstein served as chairman of the Real Property Law Section of the Illinois State Bar Association when the section began drafting a revision of the Illinois mortgage foreclosure laws. -ED.

with this specialized area and, therefore, could not adequately defend foreclosure suits.

The Association's goals, therefore, were: (1) to consolidate as much as possible the law of mortgage foreclosure into one statute; (2) to revise the law to balance the rights of lenders and borrowers; and (3) to place potential purchasers of the foreclosed property in a more favorable position in the hopes that such property would be purchased at a price more closely related to that property's fair market value.

When the Association started this project, it intended to address power of sale and how mechanics' liens should be treated in mortgage foreclosure actions. In fact, the first drafts of the proposed statute established foreclosure by power of sale as well as an outline of a modified mechanics' lien procedure. The Association soon realized, however, that the proposed modifications were potentially unpopular with the state legislature. Even so, some are arguing that certain provisions of the IMFL are designed to completely erode the Mechanics' Lien Act. Although it seems that this is not the case, only time will tell how the new provisions will be interpreted by the courts. There is a strong possibility, however, that mechanics' lien claimants will no longer be able to prevent the property from being sold by delaying the resolution of the mortgage foreclosure suit. The impact of the IMFL will not be as material as the first outline of the proposed law, but the IMFL should achieve the modified goals of its drafters.

In other areas, the willingness of the United States Supreme Court to address land use issues is significant because land use is an area which recent Supreme Courts have traditionally refused to address. Although the cases noted in this article are not as definitive as the press would make them appear, their importance will be felt as state courts and local governments evaluate and reevaluate their powers.

The inconsistency in the various state court decisions relating to the liability of real estate brokers has been reflected in this year's Illinois court decisions as well. Because of the important role of brokers in real estate transactions, identification of their responsibilities to both buyers and sellers under the facts of each case should continue to result in frustration for the real estate practitioner in advising clients.