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COMMERCIAL REAL ESTATE: PROPERTY-RELATED ISSUES

2025 Edition

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1

Site Selection

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I. [1.1] SCOPE OF CHAPTER

Site selection is a process of elimination. The process can be as broad as a 50-state search for the new 2,000-employee world headquarters of a Fortune 500 business or as narrow as selecting one of two competing intersections for a new service station location. The process includes both business and legal decisions, but to yield the most successful results, the site selection process must be structured. Properly identified goals, implemented by comprehensive processes measured by objective standards, are more likely to result in a successful real estate project than a poorly defined objective sought to be achieved by incomplete or inconsistent processes that are subjectively measured. The site selection process, like any other process, cannot be successful without well-defined goals and appropriate process components, whether the components are the human resources involved or the mechanisms used for developing and analyzing all relevant data and information.

This chapter systematically explores the requirements, elements, and issues involved in site selection. To make this chapter meaningful to the widest spectrum of practitioners, it focuses on middle market projects or clientele. Notwithstanding the applicability of site selection to any size real estate transaction, the practitioner is unlikely to consult this handbook should the client's project be so economically significant as to be the subject of well-publicized and widespread courtship by multiple jurisdictions competing with each other to lavish millions of dollars of economic incentives and assistance to land the prized facility, all in the context of competition orchestrated by highly qualified and well-compensated national site selection consultants. Nor is the attorney counseling his or her client on the leasing of a retail location for a single neighborhood convenience store likely to have the time, budget, or mandate from the client to undertake even the most important components of the most basic or minimal site selection process.

For purposes of this chapter, it is assumed that the attorney has been consulted by a client in connection with a specific real estate acquisition, leasing, or development project in the conceptual stages, with a request for assistance or guidance from counsel in ensuring that the client selects the best possible location for the project as budget, timing, and other limitations permit.

While site selections can be national or within the same zip code, this chapter focuses principally on the State of Illinois, though it should be understood that in most middle market site searches, it is not uncommon for the client to consider multiple locations within different states or to have no preestablished criteria limiting it to only a particular state. Other than the forgoing limitations on scope, the information presented in this chapter should be applicable to leased or acquired property and to corporate, industrial, commercial, recreational, and (to a somewhat lesser extent) institutional uses.

II. [1.2] SITE SELECTION RESOURCES — BIASES AND BENEFITS

The two fundamental tools in the site selection process are information and expertise. Information — what to obtain, how to develop or discount it, how to interpret it, and how to apply it — is dealt with throughout the remainder of this chapter. Expertise brought to the site selection process for the client, in the form of the consultants and advisors the client selects or who are

selected for the client to comprise the project or site selection team, is the human element dealt with in the following sections. Depending on the sophistication, in-house capabilities, and experience of a client, the preliminary stage of the site selection process — the decision-making required to conceptualize the client’s project program — can either be conducted in-house before the composition of the project team or developed with the assistance of the project team once engaged. Therefore, assembly of the search team is either the first or second step in the site selection process.

The client should constitute its project team by using the services of the most appropriate and qualified individuals or firms. The human resources that consult with, assist, and represent the client in the site selection process may be temporary or location-specific members of the team or full-time members of the team involved in the process from start to finish and in connection with all potential sites. They may be from the private sector or the public sector. Each such human resource presents different biases and benefits that require analysis and ultimately a choice by the client.

A. Public Sector Human Resources

1. [1.3] Economic Development Officers

Virtually every state and county in the United States and most sizable municipalities make available the services of an economic development officer (EDO). An EDO may be a direct governmental employee or employed by a not-for-profit corporation, foundation, or association that is governmentally funded, in whole or in part, and has economic development as its chartered mission.

The biases of an EDO are obvious. The mission of the EDO is to bring economic development (in effect, your client and the jobs to be created by your client) to the state, county, or municipality or more specifically to a particular development or area. Reliable data and information and accurate comparison between multiple sites typically cannot be obtained from an EDO specific to a particular development.

With respect to EDOs in general, their usefulness ends at the borders of the jurisdiction that they represent. However, when, due to internally or externally imposed limits, the client’s project is limited to a particular jurisdiction, the EDO for that jurisdiction can be helpful in comparing and analyzing different site alternatives. Typically, this information is reliable, being taken from various governmental sources. The services of EDOs are free of charge to the client. EDOs are typically dedicated and well connected to the local community and other service providers in the area. This institutionalized bias to an EDO’s particular jurisdiction hinders the identification of issues or deficiencies with respect to a site or the failure of available sites to comply with the requirements and criteria of the client.

Nevertheless, many clients, for cost-saving reasons or due to the narrow scope of their site search, incorporate the services of an EDO in the search team. If an EDO is involved in the search, then the amount of information disclosed about the client should be limited to virtually the same extent that disclosures to a prospective seller might be withheld. The obvious reason for this is that if the decision is ultimately made to select a site promoted by the EDO, you and your client will be negotiating against that same EDO as the site selection phase transitions into the site acquisition phase.

2. [1.4] Other Governmental Officials

In smaller, rural, or even many suburban jurisdictions, no economic development officer is involved. In these situations, the best source of site selection information can be the mayor, town manager, or appropriate committee or commission chair. Alternatively, the client or its counsel may at initial contact find itself directed to a staff member of the planning or like department of the jurisdiction. These other governmental officials not only have the same biases and limitations as EDOs but also lack, in many instances, the expertise, motivation, and involvement level that an EDO would bring to a site search. There is virtually no valid reason for a client's involvement of any other governmental official in the site selection process or project team except as a source of information.

3. [1.5] Public Utilities

Most public utilities have personnel dedicated to promoting undeveloped or underdeveloped properties. The more development and building utilization within the area served by the utility, the more utility service is required and consumed. Interaction with the appropriate personnel of the public utilities that are involved in new development or redevelopment is a useful part of the site selection process. For utility-intense uses that are considering competing locations within the same utility service area, involvement of the utility service provider in the project team at an early stage is helpful. The public utilities provide an information source for the project team and are potential providers of economical development assistance in the form of favorable negotiated utility rates, abatement of utility taxes, reductions or waivers of tap-in or hookup charges, or favorable terms for extending utility service to a project.

4. [1.6] Committee on Foreign Investment in the United States (CFIUS)

The Committee on Foreign Investment in the United States (CFIUS) plays a critical role in site selection for companies with foreign ownership or foreign investment. CFIUS filings are divided into two categories: personal property (31 C.F.R. pt. 800) and real property (31 C.F.R. pt. 802). The filings can either be voluntary or required, and there are many aspects to consider when determining whether a filing falls into one of those categories. CFIUS is primarily tasked with reviewing transactions that affect or impact national security. When foreign ownership (*i.e.*, a foreign-owned company in the United States or subsidiary owned by foreign parent) or foreign investment is involved, CFIUS may intervene to protect national security interests, influencing site selection decisions on the prospective purchaser. CFIUS tends to intervene when the location of the real estate is located within 100 miles of military installations, government facilities, or what CFIUS calls "critical infrastructure."

CFIUS reviews are especially pertinent for site selection when considering the foreign-owned business's operation. For example, a robotics company with foreign ownership that wants to be within 100 miles of a military installation will have to consider CFIUS review as part of its site selection process because robotics present a greater national security risk when compared to a company that produces paint. As a result, a foreign-owned business must consider CFIUS scrutiny during the site selection process to avoid any increased costs or delays. CFIUS scrutiny goes beyond the review process, at times, as CFIUS has broader U.S. priorities regarding foreign influence and political relationships.

Finally, after CFIUS completes its review, it may impose conditions or mitigation agreements, which would restrict the type of information, technology, or operations at the property. Obviously, this type of agreement affects the way a business conducts its operation at the site. Knowing of these agreements and understanding CFIUS's regulations regarding the same are key to avoiding costly restrictions.

B. Private Sector Human Resources

1. [1.7] Real Estate Brokers

Unless the client maintains a national real estate brokerage relationship or engages a real estate broker whose company has national reach and scope, the involvement of the real estate broker in the site selection process is geographically limited and biased to the extent that the ultimate compensation to the real estate broker is conditioned on the successful completion of a site purchase that the broker has demonstrated or introduced to the client. Ethics issues are also encountered with real estate brokers in dual agency situations with respect to which care must be taken. However, ultimately dual agency does not, in and of itself, negate the possibility of using the services of a real estate broker as part of the search team.

Like the economic development officer in the public sector, the real estate broker's expertise, knowledge, and information that would be relevant to the site selection process is secondary to the broker's principal task of brokering the real estate to the point of sale or purchase either on behalf of its listing client or, when engaged by a prospective buyer, its purchaser client. When the real estate broker's involvement and expertise are geographically limited, an additional, inherent ethical conflict can arise from the broker's involvement in site selection. It is unlikely for a broker to counsel a client to select a site outside the broker's jurisdiction or in connection with which the broker would not receive commission compensation. Nevertheless, as with public utilities, real estate brokers provide a viable source of available properties at the early stage of the site selection process and, as the site selection process evolves into an acquisition, can provide the typical range of services that real estate brokers do in sale and purchase transactions.

2. [1.8] Private Consultants

By far, the most reliable and useful expertise in the client's site search team is provided by a qualified and experienced site selection consultant. While not by any means having a monopoly on the ability to properly consult with and advise the client, a site selection expert typically has the breadth of knowledge and familiarity with the search process to make him or her invaluable as a member of the project team. Typically, it is recommended that the site selection consultant be engaged on a fee basis (as opposed to some type of commission or percentage basis) and be provided with a reasonably detailed written description of the scope of engagement or services to be provided.

In terms of qualifications, a site selection consultant should

- a. have a reasonable level of experience, usually a minimum of five to seven years in site selection;

- b. have experience in most if not all of the geographical areas being considered by the client;
- c. be capable of conducting negotiations with the governments involved, especially in the incentive and assistance negotiation and procurement phase of the site selection process;
- d. have in-depth general real estate knowledge;
- e. have experience representing parties in the particular business sector of the client;
- f. be versatile enough to either take the lead within the project team or provide a major supporting role to either the client or one of the other consultants to the client; and
- g. be properly “sized” to the client.

3. [1.9] Engineers and Architects

As the suitability of each site being considered in the search process must ultimately be matched to the project to be constructed or developed thereupon by the client, early involvement in the site selection process and the search team of an architectural and/or engineering consultant is quite valuable. This is so not only in the project conceptualization and criteria development phases but also in connection with overseeing the analysis of the physical condition of the land or buildings under consideration.

The expertise of engineers and architects in connection with confirming the sufficiency of governmental assistance relative to infrastructure and site-supporting public improvements is also important in the incentive negotiations phase of the site search. It is somewhat irrelevant whether the architect or engineer involved in the site selection process is limited in the scope of his or her services to just that or also involved in the development, redevelopment, construction, or rehabilitation of the real estate ultimately acquired. This is true as long as these professional advisors have a solid grasp of the client’s business and the nature of the client’s project.

4. [1.10] Attorneys

While sometimes overlooked, especially by larger clients, and often pushed aside by site selection consultants or economic development officers, a competent real estate attorney, especially if possessing a solid understanding of the client’s organizational structure, internal decision-making processes, financial condition, and business, is invaluable in the site selection process.

While not necessarily possessing the expertise of an architect or engineer or the experience in the site selection process of a well-established site search firm, most experienced real estate attorneys are capable of absorbing and analyzing relevant data and counseling the client with respect to the significant amounts of information likely to be generated during the site selection process. Further, unlike the biases of many of the potential advisers to the client in a site search, the attorney is legally and ethically bound to the client’s best interests as his or her highest priority.

The potentially significant role that the attorney can play in the client's site search should not be taken as license to ignore the recommendations of other members of the search team with greater expertise in particular fields or to superimpose the attorney's personal preferences on those of the client in the ultimate decision. Nevertheless, regardless of the phase in the site selection process in which the attorney becomes involved (though preferably it should be at the earliest possible time), the attorney can be a valuable contributor if he or she understands the site selection process.

In sum, for most site search projects, it is prudent to advise the client to form the project team as early as possible and to be flexible and open to the composition of the team. A blending of the involvement and input of economic development officers, architects or engineers, professional site selection consultants, and real estate brokers will often yield the most effective and time- and cost-efficient search team for the client. This is especially true if the client itself acts as, or if the client appoints its attorney to act as, the coordinator of the team.

III. [1.11] PROJECT PROGRAMMING AND COORDINATION

Whether it be the client, the site selection consultant, or even the attorney — control or coordination of the search team must be established once the team is finalized. The function of the coordinator is to clearly identify the scope of responsibilities of the various team members and the proper collection, distribution, and analysis of the information that is developed by the site selection process. Without the establishment of a coordinator for the search team, the client runs the risk of having the various consultants that it has engaged moving in different directions, each thinking that his or her particular skill is controlling.

Whether prior to or after formation of the search team, the client must develop the program for the project. There are three critical components to the project program. These are the scope of the project, the prioritized criteria for the project, and the scheduling of the project, discussed in §§1.12 – 1.14 below.

A. [1.12] Scope of the Project

In virtually all instances, the basic scope of the project has been or is developed by the client. The client, with its marketing, financial, production, service, and general knowledge of its business, has identified a need or objective to be served by the project. Whether the project is the establishment of an outpatient surgery clinic, a parking garage, an automobile tire manufacturing facility, a hotel, or a banquet facility, neither the attorney nor any of the other advisors or consultants to the client understand the client's business better than the client. Therefore, the concept of the project must originate with the client.

Once conceived or originated, the scope of the project continues to evolve and become better defined and specified by the client internally, by the site selection team, or by other consultants or advisors to the client not specifically involved in the site search. When the site search commences, it is important for the attorney and other members of the site search team to develop a working understanding, either from the client or third-party sources, of the industry, market, or business sector of the client and obtain from the client the most comprehensive and detailed written

description of the project scope available. While the description may vary in sophistication and specificity from client to client, it is all that the search team has to work with initially and constitutes the starting point for commencing the site selection process.

B. [1.13] Development of Project Criteria

Once the scope of the project is identified by the client, the requirements, objectives, and parameters for the site on which the project is to be situated (in effect, the criteria for the site) must be developed. These are most effectively developed by the collaboration of the assembled site selection team and the appropriate personnel of the client. These criteria can range from financial to geographical to physical to political and cover all subcategories in between. Among the criteria, a prioritization must occur. Once the site criteria are prioritized, the key criteria — those without which the project will not succeed — will be apparent and take the lead in the site selection process. It is in the course of developing and prioritizing the criteria that the attorney can provide valuable services to the client by serving as coordinator of the process. Attorneys experienced in the site selection process develop inquiries, questions, models, and outlines to comprehensively generate all conceivable and relevant criteria for the project site. See the standard inquiries in §1.37 below. Similar input should be collected from other search team members such as the architect, engineer, or professional site selection consultant.

C. [1.14] Scheduling

Either a site search is driven by the client's schedule for the project or the site search drives the schedule for the project. Regardless of which timing framework exists, it is important to the successful completion of the project and cost-effective success of the site selection process that a schedule is established. While the time period within the schedule may fluctuate based on business priorities, the political environment, the site project, and numerous other factors, the schedule should include, at a minimum, reasonable time components for the phases of the site selection process reviewed in this chapter. Specifically, these phases are

1. conceptualization of the project;
2. composition of the project team;
3. project programming, including identification and prioritization of criteria;
4. identification of potential sites;
5. analysis of potential sites;
6. procurement of incentives;
7. governmental assistance; and
8. acquisition.

No universal standards exist with respect to the amount of time that should be allocated to these components of the schedule. It is sufficient to say that once the components of the site selection process are understood, the attorney, together with the client and based on an understanding of the client's business priorities and driving forces, can develop with the other members of the search team reasonable scheduling for all the various components of the site selection process.

While it is important to develop the schedule, the ramifications of missing the schedule must be understood. That is, when certain time parameters are established simply as a matter of convenience, there needs to be flexibility when there is greater benefit to be gained from modifying the allocated time. Alternatively, when a project needs to be completed for the client to bid on a significant project or due to tax considerations, financing or lease commitments, or other business reasons, the schedule can be the most compelling decision-making factor. When urgency exists, the expertise and experience of the search team members are important as they and the client seek to streamline the process yet continue to strive for the benefits that adherence to the process will ultimately yield for the client.

IV. [1.15] IDENTIFICATION OF POTENTIAL SITES

Within the criteria for the project and being led by the key criteria, the next task of the project team is to identify all potential qualified sites. This preliminary listing should be as broad as possible, including all properties that could conceivably satisfy most of the important site criteria. The identification of potential sites is accomplished by the members of the project team using their resources and by the involvement of the other human resources described in §§1.3 – 1.10 above. The most obvious of these are real estate brokers in the geographical areas included within the project criteria, economic development officers representing jurisdictions or developments within the geographic parameters of the project, public utilities, and governmental officials. When assembling the pool of potential sites, it is recommended that only the most important project criteria be applied initially. Principal among these would be (a) proximity to specific targets, such as particular transportation modes, suppliers, or customers; (b) general site physical conditions; and (c) preferred political jurisdictions.

In 2025, sites for data center development have become increasingly in demand. The demand for data centers surged in the past decade due to the technological transformation and digitization of information. Increasingly, companies rely on complex data for decision-making, consumer services, and automation. E-commerce, social media, and other data-heavy sectors are all contributing to the growing demand. Data centers attract skilled jobs, tax revenue, and stimulate secondary businesses benefitting from data center operations. For site selection purposes, one must consider the following: (1) power availability and cost, (2) network connectivity and latency, (3) security and risk factors, and (4) regulatory and compliance environment.

When selecting a site for a data center, it is important to consider their high-energy, intensive draw on the electrical infrastructure of the surrounding area. Power costs and expenses may account for a large portion of your operating expenses. A data center requires a high-speed, reliable network infrastructure to operate, as there is a need for an extraordinary amount of data flow. Data centers also hold sensitive data, which makes the security of that data paramount to data center operations.

Inefficient or insufficient data protection can present severe risks; if a CFIUS review is prompted, CFIUS will dedicate a large portion of its time to the security of sensitive data to ensure that the data center operation does not present a national security risk. Regulatory and legal compliance of a data center should also be considered with site selection, as companies may need to seek out regions of the country that have less stringent data privacy laws.

A. [1.16] Alternative Approaches to Prioritization of Sites

The pool of potential sites should be proportionate to the size and scope of the project program. In effect, the scope of the project should govern and limit the time and resources that are consumed as all such sites are prioritized and analyzed. It is not feasible, cost-effective, or necessary to develop 42 sites within a four-county area for a potential strip store location. Correspondingly, a 1 million-square-foot distribution center that must be located within a five-state region could initially begin with a pool of 50 to 100 sites.

Once developed, the pool of sites must be prioritized. The most common factors for prioritization of the sites are size, geographic location, and sale price. Once prioritized according to any one or more of these criteria, numerous factors that address key criteria can move a site's priority ranking up or down. For example, a site that is larger than the size criteria for the project can move up in priority if it is readily or easily divisible and the seller is amenable to such division. A favorably priced site can move down the site priority ranking if costs to renovate and/or adopt an existing structure, when added to the sale price, increase overall costs to more than that of expensive sites that contain more suitable conditions and facilities. Thus, the principal prioritization criteria are simply a means of organizing and preliminarily ranking sites, as opposed to a method of eliminating sites.

B. [1.17] Importance of Secrecy

When developing the list of potential sites, minimal information should be provided to the broker, economic development officer, or public utility referring sites. The minimal information typically should be those aspects of the project that are perceived to be most favorable to the owner and desirable by the governmental jurisdiction in which the site is located. These include (1) the financial strength of the client, (2) the amount of the client's investment in the project, (3) the jobs likely to be created by the project, and (4) the prominence of the client. However, at the preliminary stage of identification and prioritization of sites, the identity of the client should be concealed and contacts with third parties limited to members of the project team.

C. [1.18] Importance of Public Disclosure

As important as secrecy is in the early phases of the site selection process, some public disclosure also provides benefits. Specifically, appropriately made disclosures to owners, governmental officials, or economic development officers that they are involved in a competitive site search for the location of a desirable project often result in more generous benefit packages and governmental cooperation. The best method for these disclosures to be made is typically in the form of a press release by the real estate broker or site selection consultant in the project team who announces his or her mandate to assist an undisclosed principal in the identification and selection of a site for the particular type of project (*e.g.*, entertainment complex, health services facility, manufacturing operation, corporate headquarters, etc.).

D. [1.19] Solicitation of Governmental Assistance and Incentives

The last step in the phase of the site selection process in which potential sites are identified and prioritized is actually also the first step in the next phase — the solicitation of governmental assistance. Based on the identification of potential sites and their prioritization, a solicitation should be sent to the state and relevant local economic development officers to solicit a preliminary indication of the assistance and incentives that might be available based on a general description of the project. The solicitation letter must highlight the aspects of the project that would be viewed as being most favorable and beneficial to local and state governments.

While it is important for the description of the project to not be misleading, it is more beneficial for the initial solicitation to focus on the high range of investment, job creation, tax revenues, and other functions of the project that have an overall favorable impact on the local economy. It is also important for the key criteria for the project site selection to be disclosed. When multiple sites in the same state are under consideration, a single letter to the state EDO with an indication that the future location of the project is being considered in a number of counties or cities and the client's key criteria, with a listing of those counties or cities and the client's key criteria, is appropriate. See the sample solicitation letter in §1.40 below.

With respect to the specific site locations, a solicitation letter should also be sent to each municipality and county EDO or governmental official in charge of economic development to solicit responses. This should be done for every state in multi-state site searches. These solicitations can be sent by any member of the project team, but they are most often sent by the site selection consultant or attorney. Upon receipt of responses to the solicitation letters, the project team needs to develop a monetary valuation of the incentives and assistance that are offered, which then can be used as the final preliminary ranking criteria for the pool of potential project sites.

V. [1.20] ANALYSIS OF POTENTIAL SITES

By far the most time-consuming, detail-oriented, and complex phase of the site selection process is the analysis of potential sites. In this phase, the project team analyzes the potential sites under all of the project criteria, again being led by the key criteria. It is in this phase that the majority of the sites are eliminated from consideration and a short list of sites is developed. It is also in this phase that the project team, either as a group or by individual assignment, inspects each of the potential sites. Lastly, it is in this phase that preliminary due diligence is conducted for all of the potential sites. In that site selection is a process of elimination, this phase attempts to eliminate the least feasible of the sites to develop a more manageable list for closer analysis and scrutiny.

A. [1.21] Site Inspections

At least one member of the project team should visit and inspect each potential site. The inspection should be coordinated with the local economic development officer or governmental official, the listing real estate broker if one is involved, the developer, and/or some other representative of the property owner. The property should be digitally videoed or photographed, as should the immediate vicinity of the property. The project team member should also collect as

much local information as possible from the chamber of commerce, governmental offices, local real estate brokers, EDO, or other available sources. Property-specific information such as existing title insurance, surveys, environmental site assessments, engineering reports, tax bills, subdivision plats, covenants of record, and other material should also be collected.

If no response to the solicitation of governmental assistance or incentives with respect to the particular site has been received, the project team member should encourage the appropriate persons to respond to the solicitation. After the “official” site visit, before departing the area, the project team member should drive the vicinity (alone) and observe any significant positive or negative conditions, such as traffic congestion, development or construction activity, apparent vacancies, presence of potential or current competitors of the client, and other relative information.

Immediately upon completion of the site visit, the project team member should prepare a summary report attaching or excerpting relevant information from the material obtained and observations made. This summary, along with the digital pictures of the site and the vicinity of the site, should be duplicated so that each member of the project team receives a copy.

B. [1.22] Preliminary Due Diligence

Contemporaneous to the site inspections, preliminary inquiries should be sent out with respect to the property. These include

1. Freedom of Information Act (FOIA), 5 ILCS 140/1, *et seq.*, requests to state and local environmental officials and building, zoning, and fire departments with respect to outstanding citations and violations;
2. review of the tax roll;
3. review of the flood zone map;
4. review of the relevant zoning map and code provisions and master or comprehensive plan, if existing;
5. contacts with the local tax assessor, collector, or treasurer offices in connection with potential special assessments, special service areas or districts, or recapture fees and charges; and
6. inquiries to the state and local departments of transportation with respect to planned local road and highway improvements or recent condemnations in the area.

Additionally, a general review of applicable income tax, transfer tax, sales tax, franchise tax, and use tax rates should be made, and the existence of city or county versions of such taxes should be determined. Lastly, the identities of, and posted rates for, local utility service providers together with connection and hook-up charges should be obtained. See the detailed list of inquiries for site search and selection in §1.38 below.

All the information and material collected from the site inspections and solicited as described in §1.21 above must be categorized for each potential site. All this information must be developed into comparison factors that are ranked for each potential site. Additionally, the responses to the incentive and governmental assistance letters need to be quantified and also collated for each potential site. To avoid overly complicating this process or overburdening the project team or the client, these comparison factors should be very simply ranked or prioritized with either a plus, neutral, or minus. Alternatively, a simple ranking system between one to five or one to three can be utilized to rank the sites in relation to each other. A sample categorization of comparison factors and some of the most important questions or inquiries about these factors is offered below:

Comparison Factors

1. Climate

- a. Does climate affect transportation or commuting?**
- b. Does climate affect construction?**
- c. Does climate affect operating costs?**

2. Construction Costs

- a. Do either material or labor costs exceed regional or national norms?**
- b. Do the specific conditions of the site suggest construction costs or delays that are out of the ordinary?**
- c. Are code requirements excessive and likely to drive up construction costs?**
- d. Can the building permit, inspection, or occupancy certificate process unreasonably delay the completion of the project?**
- e. Are there a sufficient number of suitable contractors, architects, and/or design builders of such qualifications as to permit competitive bidding or negotiation among a reasonable selection of qualified builders or architects?**
- f. Are sales tax exemptions or other incentives available due to the location of the property in an enterprise zone or like development district, or otherwise, so as to reduce costs?**
- g. Are there hidden costs in existing construction to bring the real estate up to legal compliance, including not only local law but also national requirements such as the Americans with Disabilities Act?**

3. Demographics

- a. What are the local population densities, demographics, income levels, and consumption capacities?
- b. What is the local crime rate?
- c. Can employees at the project be compatible with the local demographics and be able to enjoy a reasonable quality of life within the prevailing demographics?
- d. For existing construction, what are its conservation, efficiency, and sustainability attributes?

4. Environmental Conditions and Regulation

- a. Though no Phase I environmental site assessment has been completed for the property at this phase of the site selection process, based on the inquiries to environmental offices and site inspection, are there, in general, any environmental concerns that might be present?
- b. Can local or state environmental regulations place burdens on either the project development or the operations of the client to an extent that is disproportionate to other competing sites?
- c. To the extent environmental regulations that would be applicable to the unique or specific operations of the project are determined at this point, have they been included in the ranking of the particular site as to environmental conditions or regulations?
- d. Are there any bodies of water that could create the possibility of wetlands being located at or on the property?

5. Geographical Location

- a. Is the site centrally located to important targets, suppliers, or services?
- b. Is the preference of the client or need of the project a rural or urban location?
- c. Are the aesthetics presented by the location a positive or negative factor?
- d. Based on the local geography, would the project physically be a desirable addition to the area or out of place and undesirable?
- e. Is the project located within 100 miles of a military installation that could initiate a CFIUS review of the transaction? For purposes of finding the nearest military installation to the property, visit CFIUS Part 802 Geographic Reference Tool at <https://mtgis-portal.geo.census.gov/arcgis/apps/webappviewer/index.html?id=0bb1d5751d76498181b4b531987ce263>.

6. Geology and Topography

- a. Based on U.S. Geological Survey data or other available information for the vicinity of the site, are there unique subsurface conditions that can make construction more expensive, time consuming, or even impossible?**
- b. Is the area prone to geophysical issues such as earthquakes, and is such a factor important to the project?**
- c. Is the topography such as to be a factor affecting the cost of or time for construction?**
- d. Are there aesthetic attributes to the topography?**
- e. How does the topography affect transportation, if at all? Is the topography consistent with the corporate or business image of the client?**

7. Income, Sales, and Other Taxes

- a. Based on general state and local tax information, have the tax rates applicable to the business activities to be conducted at the site been compared with similar tax loads at other sites? (This factor can also be affected by tax abatements and exemptions that have been offered or are likely to be obtained from applicable governmental authorities or public utilities.)**
- b. Is the site, based on applicable tax structures, an acceptable location for the project given the intended activities to be conducted by the client at the project?**
- c. If relevant to the client, is the site within a Foreign-Trade Zone, Enterprise Zone, or Opportunity Zone?**

8. Infrastructure

- a. To what extent are all infrastructures necessary to serve the project in place?**
- b. To what extent are special assessments, recapture charges, or other burdens on the site for purposes of paying for or recouping infrastructure costs likely to be imposed?**
- c. What are the capacities of the infrastructure?**
- d. Do roads and highways servicing the site accommodate the projected traffic volume for the project?**
- e. What are the load-bearing specifications for the roads and highways servicing the project?**
- f. How does the local transportation system fit into the regional transportation grid?**

- g. Are there redundant transportation routes to the site?**
- h. What is the availability or suitability of mass transportation for employees or customers to reach the site when the project is operational?**
- i. Are the age, condition, and capacities of infrastructure adequate not only for the initial phase of the project but also for potential expansions of the project?**
- j. What share, if any, of the costs of the infrastructure is to be borne by the client? Can these be recaptured by the client?**
- k. What additional infrastructure needs to be completed, and what is the timing for the completion of that infrastructure?**
- l. Are site-specific infrastructures (e.g., deceleration or turning lanes) required?**
- m. Are signalization, on-site detention/retention, additional power generation or transmission, or additional waste treatment facilities required, or is the existing infrastructure adequate?**

9. Labor Market

- a. Is the area pro-union or open shop?**
- b. What are the experiences of existing businesses and operations of a nature similar to the project with organized labor activities?**
- c. What are the prevailing wage scales and employee benefits standards that need to be met by the client, and are these consistent with wage scale and employee benefits throughout the client's other operations?**
- d. Is the potential employee pool adequate?**
- e. What are the education levels and job experiences of the employment base?**
- f. What is the local unemployment rate?**
- g. What is the availability and distribution of the available employment base for various levels of the project operations, such as management, technical, production, service, and administrative?**

10. Sale Price

- a. What is the offering price for the property?**
- b. How does this compare to recent sales of comparable properties in the vicinity?**

- c. Is the pricing for the property hard or soft?
- d. Is the seller motivated?
- e. After consideration of other factors that ultimately will affect the total project cost, is the property sale price reasonable?
- f. How do land and construction costs compare to finished building pricing in the vicinity?
- g. Does the sale price dictate that the client should consider leasing as opposed to purchasing the site?
- h. What type of financing, either third-party or seller-provided, is available?
- i. What level of government source financing is available?

11. Private Covenants and Restrictions

- a. What are the private covenants and restrictions that govern the use and development of the site, and are these more restrictive than the applicable zoning or building codes?
- b. What sort of approvals need be procured from a developer or property owners' association with respect to construction, renovation, or future expansion?
- c. Is the developer or association that administers the covenants and restrictions performing adequately?
- d. What are the penalties for noncompliance with the covenants and restrictions?
- e. Are any of the covenants and restrictions unenforceable?
- f. Are any covenants and restrictions apparently violated by existing improvements or conditions?

12. Public Services

- a. Is the site within an incorporated or unincorporated area?
- b. Can the client's insurance rates be affected by the quality or availability of public services?
- c. Who is responsible for road maintenance, snow removal, and median/shoulder maintenance?
- d. What is the level of police services?

- e. Are police services provided by a municipality or a sheriff's office?
- f. Is fire protection provided by a full-time, organized fire department or a volunteer fire department?
- g. Are there special taxing authorities established for any of the public services?
- h. Is waste hauling to be publicly provided or contracted for privately?
- i. What emergency medical services are available?
- j. What hospital or other healthcare institutions service the site?
- k. What is the quality of primary and secondary education in the vicinity of the site?
- l. What is the prevalence of private, parochial, or public education?
- m. Are there junior colleges, state colleges, or universities that service the community in which the site is located?

13. Quality of Life

- a. Do adequate parks, recreational activities, community centers, libraries, and other such institutions provide services for the area around the site?
- b. Is there acceptable quality, appropriately priced housing for employees within appropriate commuting distance from the site?
- c. Are shopping locations and commercial or cultural entertainment facilities available?
- d. Are there restaurants or other food services in the vicinity of the site?
- e. Is congestion or overcrowding a concern?
- f. Are there personal or employee safety issues relating to the location of the site?
- g. What is the nature of the area around the site during off-business hours?
- h. What is the prevalence of green/open space and public amenities?

14. Real Estate Taxes

- a. What projected real estate taxes are likely to be assessed against the project when completed based on prevailing rates, assessment practices, equalization factors, etc.?
- b. What abatements and/or exemptions are available to the project based on the nature of the project or the location of the site?

- c. **How often are reassessments made?**
- d. **What is the basis for assessing real estate in the jurisdiction?**

15. Site Improvements

- a. **Are there any unique or unusual requirements for site improvements?**
- b. **To what extent are site improvements to be paid for by the developer or seller of the property and to what extent by local or state government?**
- c. **Are current site improvements, if any, adequate?**

16. Surrounding Uses

- a. **Does the project fit into the area based on the existing surrounding uses?**
- b. **Are the surrounding uses complementary to or competitive with the project?**
- c. **Are any of the surrounding uses in the immediate vicinity of the site likely to detract from the value or character of the site?**
- d. **Has proper enforcement of applicable zoning code or private covenants to regulate uses surrounding the site been maintained?**
- e. **Is the site in a distressed area? And if so, is it located in a Qualified Opportunity Zone, or is there available allocation of New Markets Tax Credits?**

17. Supply and Demand Factors and Competition

- a. **Who are the identified competitors of the client already in the vicinity of the site?**
- b. **Has the locale in which the site is located experienced an oversupply of the goods or services to be provided by the project?**
- c. **What is the proximity of goods or services providers to the project?**
- d. **What is the population density and the population distribution for individual consumers of the goods and services produced by the project?**
- e. **Is the site convenient to corporate or business consumers of the goods and services to be generated by the project?**
- f. **What are the entry barriers to the area of the site in connection with the future arrival of competition?**
- g. **How are current and future projected supply and demand factors and competition likely to affect the future expansion and current size of the project?**

18. Transportation

- a. What transportation services are available to the site?
- b. What are the peak and off-peak traffic loads (vehicle counts) on the roads and highways servicing the site?
- c. How will traffic loads affect deliveries, customer accessibility, and employee commuting?
- d. If public transportation is important to either customer or client access or employee commuting, are there alternative means of public transportation to counter any interruptions or stoppages?
- e. Where are the nearest terminals or stations for public buses or commuter rail service?
- f. What are the distances to local municipal airports or commercial airports?
- g. What are the air carriers that serve the airports nearest the site?
- h. Where is the nearest major airline hub?
- i. Are the available transportation sources for servicing the site a negative, neutral, or positive factor with respect to overall operating expenses of the site?
- j. Is the available public transportation to the site a negative, neutral, or positive factor with respect to the hiring and retention of quality employees?

19. Utilities

- a. Is utility service to the site reliable and of the capacities required for the project?
- b. Are there independent sources and redundant independent supply lines for essential utilities supplying the site?
- c. What is the feasibility of procuring alternative utility suppliers for the project?
- d. What are the service rates for the utilities required for the project?
- e. How recently have the rates for utilities serving the project been adjusted?
- f. What is the mechanism for the adjustment of utility rates in the area?
- g. What utility service contracts must the client enter into for the project?
- h. Are there any environmental conditions related or attributed to utility service to the site?

- i. What additional utility infrastructure needs to be constructed or installed to bring service to the site?**
- j. What are the potential costs of any utility service infrastructure needed for the project, and who will be responsible for such costs?**
- k. What are the applicable utility connection or tap-in charges for the site?**

20. Zoning and Land Use Restrictions

- a. What is the current zoning classification of the site?**
- b. What are the uses permitted under the classification?**
- c. Is there any need to obtain a variance to the requirements of the zoning classification?**
- d. Is the use contemplated by the project explicitly permissible under the zoning code?**
- e. Is the permissibility of the use contemplated by the project inferable from the zoning code?**
- f. Is a special-use permit required?**
- g. What are the zoning code interpretive and enforcement procedures of the local government?**
- h. Are there currently any zoning code violations affecting the subject property?**

21. Nature of the Site

- a. Is the site or the improvements thereto historically, archaeologically, culturally, or naturally significant?**
- b. If the above is so, what impact does this have on the intended use or development of the site or the schedule of the client?**
- c. Is the use or ownership of the site such that it could be covered by an inchoate super lien or trust rights under the federal Perishable Agricultural Commodities Act, Packers and Stockyard Act, or state law counterparts?**

C. [1.23] Revisiting the Scope of the Project

After the project team has gone through the exercise of analyzing and prioritizing all potential sites and before beginning to eliminate sites to arrive at a short list of potential sites, the project team should revisit the scope of the project. The purpose of this is to confirm that the scope, given

the project criteria and scheduling and pool of potential sites, remains feasible. To the extent that issues with the scope of the project become apparent during this reexamination, the client should be consulted immediately so a decision can be made to alter the scope of the project to better adapt to the available sites.

Whether the scope of the project is altered or refined or remains as originally developed, the project team is at the point of considering all potential sites as compared to and ranked against each other. This consideration should yield the project team's recommendations to the client for a short list of sites. The fewer the number of sites that were originally identified as potential locations for the project, the smaller the short list should be. If the project team is uncertain about eliminating sites, it is better to err on the side of inclusion rather than exclusion. When completed, the short list should be presented to the client for confirmation of the recommendations of the project team.

D. [1.24] Final Site Selection

After confirmation by the client that it will select one of the short-listed sites recommended by the project team, the site search process begins to enter a phase of direct and competitive negotiations. It is at this time that complete disclosure of the project and the client should be made to the prospective property owners or developers and interested governmental authorities. Typically, face-to-face meetings between the project team and representatives of each of the involved jurisdictions, the jurisdictions' economic development officers, and the owners of the sites are scheduled.

In preparation for such a meeting, the project team generally must prepare three documents. These are (1) a preliminary response to the proposal for governmental incentives and assistance that was received by the client with respect to the particular site in response to the solicitation for them, (2) a letter of intent with respect to the acquisition of the site, and (3) a description of the project and disclosure of the client.

Through the negotiating process regarding governmental assistance and incentives, which includes issues relative to public utilities, and through the negotiating process for the acquisition of the site, the members of the project team ultimately reach the point at which their consensus is that they have negotiated the best deal for a site and obtained as much governmental assistance or incentives as possible. On the basis of these negotiations, the project team makes its recommendation to the client, preferably after making a side-by-side comparison of the results of their negotiations for all short-listed sites. The site finally selected by the client then proceeds through the normal acquisition process to closing.

The only significant residual site selection issues are incentives and governmental assistance. These remain critical issues through the completion of the purchase and beyond. The most significant of the incentive issues are dealt with in §§1.25 – 1.35 below.

VI. CONSIDERATIONS

A. [1.25] But-For Test

The most important consideration in connection with governmental assistance and incentive procurement during the site selection process is to avoid violation of the but-for test on which many, if not most, economic development incentives are based. For an example of this standard, see 14 Ill.Admin. Code §527.30(d), which deals with the Economic Development for a Growing Economy (EDGE) Program. The premise of this standard is that to justify the granting of the incentives, it must be established that but for the incentive, the site in question would not have been selected for the particular project. See the chart in §1.39 below. This is a virtually universal standard that, unfortunately, is not interpreted consistently by all agencies or governments. Nevertheless, it behooves the entire site selection team to carefully avoid violation of this test.

To ensure that the project satisfies the but-for test, it is important that no formal or informal indication of the selection of a particular site be made prior to the issuance of an inducement commitment by the involved governments. If a commitment or indication of the site selection decision of the client must be made, then it should always be presented as being conditioned on the receipt of the incentives and other governmental assistance that are being sought. Areas of special concern that should be watched are

1. press releases;
2. statements made by the client or other project team members to local governmental officials, customers, or suppliers;
3. orders for goods or services with respect to a specific site, such as title insurance, surveys, and the like;
4. application for a building permit;
5. application for planning commission approval for the project;
6. entering into a letter of intent that does not contain an appropriate condition with respect to the incentives and governmental assistance being sought; and
7. entering into a contract with respect to the particular site without the proper contingency (definitely to be avoided).

Regardless of the level of adherence to a but-for test by the involved governmental authorities, the project team needs to be mindful of the incentives or assistance being challenged by third parties such as special-interest groups, labor unions, competitors of the client, school districts, or disgruntled owners whose sites were eliminated from the search. To be safe, all statements, communications, and documentation relative to a particular site with respect to which assistance and incentives are being sought should be reviewed or controlled by the attorney. The consequence of failing to comply with the but-for test is in almost all instances — when the incentives are part of the enabling statute or ordinance — disqualification from eligibility for the benefits.

B. [1.26] Inducement Commitment

In response to either the solicitation of governmental assistance and incentives or a counterproposal with respect to the response to such solicitation, the involved governments issue inducement commitments in the form of a letter to the client that summarizes the incentives and other benefits that have been negotiated and agreed on. This inducement letter serves as the road map for the project team and the client to understand the incentives that are being provided and what the client must do to receive the incentives.

C. [1.27] Qualification for Incentives

Virtually all incentives or governmental assistance are provided pursuant to specific statutes or ordinances. These enabling statutes or ordinances are likely to be supplemented by regulations, internal guidelines, or procedures of the particular agency or governmental entity and, occasionally, attorney general opinions or judicial decisions. Seldom are all requirements for qualifying for the benefits contained in the inducement commitment.

Consequently, after review of the inducement commitment, the attorney must refer to the enabling statutes or ordinances and carefully review them to confirm whether any issues presented by the requirements must be met by the client. When, with respect to assistance being provided by a local government, an ordinance must be adopted to establish the qualifications for the granting of a particular incentive, the attorney should work with counsel to the local government to confirm that the ordinance complies in all respects with the inducement commitment and with any enabling state statute.

D. [1.28] Incentive Application Process

Certain incentives are automatically available to a client with respect to a particular site, such as sales tax exemptions with respect to sites located in enterprise zones. Still other incentives are considered procured upon the adoption of appropriate ordinances, such as real estate tax abatements or exemptions. Other incentives (*e.g.*, loans obtained through the Illinois Large Business Development Program, 14 Ill.Admin. Code pt. 590, created by the Large Business Development Act, 30 ILCS 750/10-1, *et seq.*) are subject to appropriate completion of the loan application process. That is, while the inducement commitment indicates the eligibility of the client and the project for such an incentive, only upon completion of the application and entering into a loan agreement pursuant thereto and satisfaction of the conditions contained in the application and loan agreement is the loan actually available to the client. See, *e.g.*, 30 ILCS 750/10-4, 750/10-5.

It is prudent for the attorney to procure copies of all applications that are required for the incentives covered in the inducement commitment, as well as copies of all agreements that need to be entered into when the applications are completed and approved. Coordination is required between the site acquisition agreement and the incentives as to timing, cooperation of the seller, and whether completion of any incentive application or entry into any incentive agreement should be a contingency in the site acquisition agreement.

With respect to some incentives, the acquisition agreement need only be conditioned on the inducement commitment to satisfy the but-for test. For other incentives (*e.g.*, those requiring an application to be submitted and approved and then an agreement for the incentive entered into between the client and relevant governmental entity), the acquisition agreement should additionally, for purposes of protecting the interests of the client, be made contingent on either the approval of the application or the entering into of the relevant agreement by the client and the governmental entity.

E. [1.29] Binding Nature of Incentives

One of the most difficult tasks that the attorney involved in the site selection process faces is to reconcile the enthusiasm of the client when an incentives and benefits package is finalized by issuance and acceptance of an inducement commitment with the reality of the client actually receiving these benefits.

In many jurisdictions throughout the country, there is little formality with respect to the incentives that are offered and accepted by the client. Such formality comes, if at all, in the form of county or local governmental ordinances that may not be adopted until well after a site acquisition agreement has been signed and the client is required to make the transaction firm. Hardly ever is an inducement letter, in and of itself, completely binding on the issuer. It is the role of the attorney to disclose to the client all instances in which incentives being relied on by the client are not clearly binding and require an additional agreement, adoption of an ordinance, or at a minimum an appropriate condition to remain in the acquisition agreement until the incentives are actually delivered.

This problem is particularly prevalent when inducement letters are issued by economic development officers, who typically lack the legal authority to bind the county or municipality and certainly have no authority to bind the state. In these instances, inducement letters become merely an indication of support or an offer to undertake to obtain for the client the indicated incentives. Again, every incentive that is of importance to the client must be thoroughly understood, and legal counsel must (1) assure the client that each incentive is secured or (2) if not secured, inform the client of the conditions to securing it or what further actions or steps must be taken.

F. [1.30] Timing of Incentives

Inevitably, the incentives and benefits that are offered by relevant governmental entities represent fiscal commitments for expenditures that, typically, need to be incurred and paid in a particular fiscal year or other fixed time period. To that end, the inducement commitment must be carefully reviewed and compared with the project schedule to determine whether there is adequate time for the client to satisfy the conditions to procurement of the incentives.

Additionally, definitional issues (*e.g.*, when a project starts for purposes of measuring hiring or investment) need to be made clear, not only with the issuer of the inducement commitment but also with the client so that the parties are consistent as to the obligations of the client. For example, due to the need to start up a new operation and train employees, most clients would feel it unfair to

measure the time within which certain employee levels must be obtained from the date of completion of construction or the date of a closing on the acquisition of a project site. Therefore, it would be important to build in some type of ramp-up period of a set number of months after which the first compliance time period for employment begins to run.

It is also important for the client to understand the consequences of failing to comply with a requirement for governmental assistance within a particular time. Is the incentive lost, is it reduced, or must the client reapply? In advance of accepting an inducement commitment and certainly before waiving conditions contained in the acquisition agreement relating to the incentives, the ability to extend any important time periods should be explored and, if possible, built into the transaction.

G. [1.31] Types of Incentives

There are several basic categories of governmental incentives. See §1.38 below for an example (summary of current State of Illinois development incentives). The most common are as follows:

Grants. These are outright gifts of funds typically justifiable by the relevant government as necessary to further investment in job creation. These are typically administered at the state level. An example in Illinois is the Large Business Development Program.

Infrastructure. This is typically an undertaking by state or occasionally county governments to absorb the costs of extending, improving, or installing appropriate infrastructure to permit a site to be developed for a particular project.

Job training. This subsidization is typically provided on a per-employee basis for certain types of technical or vocational education. An example of this is the Illinois Industrial Training Program.

Land price subsidization. This is typically provided through local governments or economic development entities funded by, supported by, or affiliated with local governments that provide previously undeveloped land for development at below-market costs. This does not typically entail direct payments to the client to offset land acquisition costs.

Municipal bond financing. This includes vehicles such as industrial development revenue bonds issued by the Illinois Development Finance Authority that provide low-interest, tax-exempt funding for qualifying projects. However, in low conventional interest rate markets, often the transaction or soft costs of these types of financing make them less competitive.

Relocation assistance. This is typically provided at the local government level and can include everything from waiver of real estate brokerage commissions for services provided by local real estate firms to banking, school admission, country club membership, and other types of assistance for relocating executives.

Tax abatements, exemptions, or credits. These can be comprised of abatements of certain tax rates in connection with particular development areas or zones or in connection with specific classes of uses. These abatements are typically limited in duration and may be limited to abatement of the value of improvements. Sales tax exemptions are typically available on a statewide basis

pursuant to enterprise zone programs and may cover machinery, equipment, or raw materials included in manufacturing processes and building materials used to construct the project. Tax credits may also include exemptions on utility taxes, per-employee tax credits, or income tax credits based on new employees or retained employees.

H. [1.32] Alternative Immigrant Investor Financing

The “EB-5” Immigrant Investor Program was created by the U.S. Congress in 1990 to stimulate job growth and capital investment in the United States. The EB-5 program has been used successfully to develop projects such as hotels, sports arenas, commercial mixed-use projects, and warehouse/office projects. An EB-5 visa provides a method for foreign investors (and their immediate families) to obtain permanent resident status (a “green card”) in the United States by investing funds in a U.S. commercial enterprise, thereby creating economic impact and job growth. Generally, the minimum qualifying investment is \$1 million (in the form of cash, equipment, inventory, other tangible property, and cash equivalents). The source of an EB-5 investor’s investment must be from a provable, lawful source. The investment must be “at risk,” meaning that there can be absolutely no guarantee of a profit or return of capital investment. If the investment is made within a “targeted employment area,” the minimum qualifying investment is \$500,000. A targeted employment area is an area that either has an unemployment rate of at least 150 percent of the national average or is outside of a metropolitan statistical area or outside the boundary of any city or town having a population of 20,000 or more according to the last census. Thus, site selection might need to focus on these criteria if EB-5 funding is being considered or sought.

An EB-5 investor must show that as a result of the investment, ten full-time jobs were created or preserved. If an EB-5 investor has invested in an approved “regional center,” as designated by the U.S. Citizenship and Immigration Services, indirect job creation or preservation will qualify. The EB-5 investor must also be involved in the management of the new commercial enterprise. Under the regional center and direct investment programs, an EB-5 investor meets the management test by simply being a limited partner in a partnership with rights as granted under the Uniform Limited Partnership Act. Just as with the identification of targeted employment areas, the determination of whether a site is within a regional center should be a priority if EB-5 funding is important.

I. [1.33] Prevailing Wage Compliance

Even when incentives are secured and retained, under certain circumstances, the receipt of the benefit of such incentives can have unintended consequences. This is one of the most potentially significant results from the receipt of “public funds” or governmental benefits. In these situations, the project team should be cognizant of the Prevailing Wage Act, 820 ILCS 130/0.01, *et seq.* The Prevailing Wage Act provides:

It is the policy of the State of Illinois that a wage of no less than the general prevailing hourly rate as paid for work of a similar character in the locality in which the work is performed, shall be paid to all laborers, workers and mechanics employed by or on behalf of any and all public bodies engaged in public works. 820 ILCS 130/1.

“Public works” has been defined to mean, among other things, all fixed works paid for wholly or in part out of public funds and includes all projects financed in whole or in part with bonds, grants, loans, or other funds made available by or through the state or any of its political subdivisions, which includes local municipalities. A public work does not include work done directly by any public utility company, whether done under public supervision or direction or paid for wholly or in part out of public funds. 820 ILCS 130/2.

The Prevailing Wage Act was amended effective January 1, 2010, to clear up certain ambiguities as to which projects were covered by the Act and which were not. Prior to January 1, 2010, the Prevailing Wage Act included a list of public funding mechanisms to which the Act applied, which created doubt as to whether projects financed through public funding mechanisms not specifically enumerated in the Act were covered work. In amending the Prevailing Wage Act, the Illinois legislature made it clear that the list of public funding mechanisms was not exhaustive and that any project financed in whole or in part with bonds, grants, loans, or other funds made available by or through the state or any of its political subdivisions are to be included under the scope of the Act. Receipt of incentives such as free land, free materials incorporated into fixed works, grants, loans, or other funds may subject a project to the Prevailing Wage Act and such possibility should be carefully analyzed and considered by the project team in advance.

J. [1.34] Committee on Foreign Investment in the United States

If the client is a foreign person or entity (or is controlled by a foreign person or entity), it is important for the practitioner to confirm the sites being considered are not subject to the review authority of the Committee on Foreign Investment in the United States. Under the final regulations implementing the Foreign Investment Risk Review Modernization Act of 2018, Pub.L. No. 115-232, Title XVII, Subtitle A, 132 Stat. 2174, CFIUS jurisdiction to review transactions for national security purposes for the first time extends to “covered real estate” transactions. If the client wants to pursue any site that falls within CFIUS review authority, the practitioner should assist the client in determining whether it would be beneficial to submit the transaction to CFIUS review.

“Covered real estate” is defined in 31 C.F.R. §802.211. See also 31 C.F.R. pt. 802, app. A. Generally, sites constitute covered real estate if located within a covered port, in close proximity of certain military installations, in the extended range of other military installations, located in any counties associated with other military installations, or part of still other military installations to the extent located within the limits of the territorial seas of the United States. The terms “close proximity,” “covered port,” and “extended range” are defined in the regulations. See 31 C.F.R. §§802.203, 802.210, 802.217.

Even if a site constitutes covered real estate, it may be part of an “excepted real estate transaction,” in which case it would not be subject to CFIUS review. 31 C.F.R. §802.216 should be consulted for a full list of such excepted real estate transactions, but among these are purchases or leases within an urbanized area or urban cluster, subject to certain exceptions. An “urban cluster” is an area that has at least 2,500 (31 C.F.R. §802.239) but fewer than 50,000 individuals, and an “urbanized area” is one with 50,000 or more individuals (31 C.F.R. §802.240).

Although the analysis to determine whether a site is subject to CFIUS review can be complex, it is important that it be completed. If CFIUS chooses to investigate a transaction, it can recommend to the President of the United States that the transaction be completely prohibited or suspended. In addition, it can force the client and the other parties to the transaction to accept an agreement or certain obligations in order to mitigate the threat that CFIUS believes the transaction represents to national security.

K. [1.35] Opportunity Zones

To spur investment in low-income areas, the Tax Cuts and Jobs Act of 2017 (TJCA), Pub.L. No. 115-97, 131 Stat. 2054, provides tax benefits to those who invest in “Qualified Opportunity Zones” (QOZs), which are low-income communities that have been nominated by the states in which they are located.

Tax benefits include an investor’s ability to possibly defer income tax on gains from the sale or exchange of capital assets in a QOZ.

If the client is interested in seeking sites in Opportunity Zones, there are a number of resources at their disposal for choosing the right site. The U.S. Department of Housing and Urban Development maintains an interactive map of all Opportunity Zones in the country, available at <https://opportunityzones.hud.gov/resources/map>. Additionally, the U.S. Department of the Treasury maintains an Opportunity Zone Resources page that includes a list of all designated QOZs, available at www.cdfifund.gov/opportunity-zones. The Internal Revenue Service also maintains a helpful website of frequently asked questions regarding Opportunity Zones at www.irs.gov/credits-deductions/opportunity-zones-frequently-asked-questions.

VII. [1.36] RECAPTURE (CLAWBACKS) AND OTHER NONQUALIFICATION ISSUES

Increasingly, especially as the demands for public resources become greater and more diverse, governments are being held accountable for the incentive packages that are provided in connection with the enticement of new projects into their jurisdictions. As long as governments can justify the tax relief, low-interest loans, grants, and other benefits under the auspices of job creation and investment attraction, they will probably be free to continue to bid against each other for the prize project. Nevertheless, it is not uncommon for the assistance package to be subject to project specific or general recapture or claw-back provisions or other consequences for the failure of the project to attain the investment and employment goals on which the inducement commitment was made or for failure of the project to remain in operation for less than a specific duration.

An example of the general recapture approach is the Corporate Accountability for Tax Expenditures Act, 20 ILCS 715/1, *et seq.* This Act generally requires the recipient business to continue operations for at least five years after receipt of the incentives to avoid the possibility of recapture (repayment) of such benefits.

Other states (*e.g.*, Kansas) build complex attainment thresholds and noncompliance penalties into the grant agreements. Effectuation of these claw-back provisions or other nonqualification consequences create unfavorable publicity with respect to the project and difficulty for the governmental officials involved as well as potential embarrassment for the client.

The best means of avoiding these issues is for the client's final projections on investment, job creation, startup timing, sales, and other project specifications on which the governmental assistance is based to be accurate. This is unlike the initial solicitation of incentives in which it is customary to present these performance levels of the project on the high end of the reasonable range of projections. Through a properly engineered and executed site selection process, these performance projections can and should be continually refined so that by the time of the acceptance of the final inducement commitment, there is every reasonable and realistic expectation that the client can comfortably obtain the particular performance criteria on which the incentives and other forms of assistance were premised.

VIII. APPENDIX

A. [1.37] Standard Inquiries

Standard Inquiries with Respect to Demographic, Fiscal, Legal, and Physical Factors for Development of Project Criteria

I. General

- A. What is the anticipated timing of phases of the project (*e.g.*, site/facility acquisition, construction, start-up, full operations)?**
- B. Do you plan to purchase or lease the facility?**
- C. What is the project budget?**

II. Demographic

- A. What is the type of housing stock that is required for employees (such as multifamily residential, middle income suburban dwelling, in-city culturally enriched dwelling, suburban upper-bracket dwelling, etc.)?**
- B. What types of personnel are to be hired locally, and what are their desired skill, education, or experience levels (*e.g.*, college educated, skilled machinists/operators, warehouse/stocking, clerical/administrative, sales)?**
- C. What are the critical skills required in the facility and training requirements?**

III. Property Characteristics

- A. Is prestige/visibility of the facility important?
- B. What are the projected short-term and long-term needs as expressed in total square footage?
- C. What are your site requirements (including minimum and maximum number of acres, preferred and critical dimensions, special load-bearing characteristics, preferences for site environment, and rail service and/or highway access requirements)?
- D. What are the facility requirements (including number of square feet required, size of major areas, minimum or maximum ceiling height, floor thickness and load capacity, bay spacing, truck docks and drive-in doors, facility dimensions, type of construction preferred, air conditioning and sprinkler requirements, rail service requirements, and parking requirements)?

IV. Operational

- A. What are the activities or processes to be conducted at the facility?
- B. Do any of the activities or processes dictate special requirements (*e.g.*, redundant water supply for high fire risk facilities, extraordinary building heights for special storage racking or manufacturing processes)?
- C. What are the primary functions and unique code requirements of the proposed facility?
- D. What is the size of the anticipated work force? What are the average hourly earnings in the new facility for the anticipated positions to be created?
- E. Are any seasonal adjustments expected to the employment figures indicated in IV.D above?
- F. What is the anticipated hiring schedule at the facility?
- G. Are particular unions a concern? If so, which ones?
- H. Is the facility to operate on a multiple-shift schedule? How many days per week?
- I. Are any temporary or part-time employees to be utilized at the facility? If so, what are the typical jobs and the estimated number of employees required?
- J. What is the anticipated number of employees to be transferred to the facility by job?

- K. Who are to be the major suppliers? List the product(s) supplied by each, the location of each, and the annual weight, average weight per shipment, and method of shipment of such products.**
- L. Are there alternative sources of these products (see IV.K above) that should be considered?**
- M. What is the average cost per mile for inbound shipments?**
- N. What are to be the outbound shipments? Describe the contents of such shipments, the destinations, the annual weight, average weight per shipment, and method of shipment.**
- O. What is the average cost per mile for outbound shipments?**
- P. What are the requirements for utility services?**
- 1. Electric Power**
 - a. Estimated total billing demand**
 - b. Estimated total monthly usage**
 - c. Anticipated power factor**
 - d. Anticipated load factor**
 - e. Major applications of power**
 - f. Susceptibility to interruption in service**
 - 2. Natural Gas**
 - a. Estimated monthly usage for natural gas**
 - b. Type of service preferred**
 - 3. Water and Wastewater**
 - a. Estimated total consumption in gallons of process and potable water per day**
 - b. Estimated total volume of sanitary waste discharge in gallons per day**
 - c. Unusual water quality or demand characteristics**

- Q. What are the waste characteristics?**
- R. What type of municipal sewage treatment plant is required to handle any pretreated liquid waste — primary, secondary, or tertiary?**
- S. Is there a potential for air, water, noise, vibration, or visual pollution to be generated by the facility? If so, what is the pollutant (are pollutants)?**
- T. Is recycling an integral component of the facility? If so, what are the logistics of recycling presented by the particular site?**
- U. Does the site/facility support sustainability?**

V. Geographic

- A. What distance (expressed either in miles or in traveling time during peak rush-hour traffic) would be the optimal distance from the nearest significant urban business center?**
- B. What ground, air, water, or rail transportation must be in proximity to the facility, and what would be the optimal distance(s) to them?**
- C. What is the optimal distance between the facility and housing stock acceptable to personnel?**
- D. Is proximity to other particular types of businesses important? If so, what should be the optimal distances from them?**
- E. Are there any location preferences (*e.g.*, geographic boundaries of search area, specific areas of interest, specific areas to avoid, preferred size of community)?**
- F. What is the relative importance of orientation to other locations or facilities, if any (*e.g.*, markets of specific customers; sources of materials or components; support services; colleges, universities, or trade schools; and competitors)?**
- G. What is the relative importance of proximity to the facility of interstate highways, commercial airport facilities, overnight and package delivery services, bulk mail centers, and rail?**

B. [1.38] Site Search and Selection Inquiries

Site Search and Selection Inquiries

I. Land and Natural Environment

- A. Location**
- B. Size and configuration, development potential**

- C. Geography, topography, geology, load-bearing capacity**
 - D. Drainage, riparian or littoral, wetlands, flood zone**
 - E. Zoning**
 - F. Lot coverage, floor area ratio, setbacks, easements, parking, landscaping**
 - G. Land price (whole or unit pricing)**
 - H. Meteorological conditions**
 - I. Covenants and restrictions**
 - J. General physical condition of site**
 - K. Environmental condition of site**
- II. Improvements**
- A. Building (type, age, construction material, height, foundation, interior and roof condition)**
 - B. Mechanical, electric, plumbing**
 - C. Cranes**
 - D. Truck docks (interior or exterior)**
 - E. Driveways, sidewalks, parking areas, entrances/exits**
 - F. Environmental issues**
 - G. Utility service (capacity, locations)**
 - H. Floor load-bearing capacity**
 - I. Bay dimensions**
 - J. Office area ratio**
 - K. Floor plan**
 - L. Required improvements/deferred maintenance/legal compliance**
 - M. Signage**

N. LEED Certifications**O. Amenities****III. Governmental Regulations and Assistance****A. Environmental criterion and performance standards**

- 1. Air**
- 2. Wastewater (including thermal pollution)**
- 3. Solid waste**
- 4. Noise**
- 5. Vibration**
- 6. Dust**

B. Non-environmental permitting**C. Required public improvements****D. Public services****E. State, county, or local income taxes****F. Real property taxes, personal property taxes****G. Sales and use taxes****H. Special assessments, annexation fees, recapture charges, drainage district charges, and special service area charges****I. State-assisted site search services****J. Tax incentives****K. Financing****L. Vocational training program/recruiting services****M. Obligatory nature of governmental incentive commitments, qualifications, maximum amounts, matching percentages, reserved funds, conditions**

IV. Operational Environment

- A. Distance to major customer locations**
- B. Level of integration of related businesses**
- C. Utilities, including reliability, rates, and connection charges**
 - 1. Electricity**
 - 2. Gas**
 - 3. Water**
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NOTE: A but-for test is the determination of whether the project is conditioned on the receipt of a particular incentive. See §1.24 above. See Chapters 5 and 6 of COMMERCIAL REAL ESTATE: FINANCING AND TRANSACTIONAL ISSUES (IICLE®, 2021) (2025 edition coming soon), for more detail on many of these programs.

Incentive	State or Local Grant	Impact	But-For Standard?	Use Requirement/Criteria	Miscellaneous Notes
Real Property Tax and Assessment Abatement	Local	<ul style="list-style-type: none"> Results in an abatement of a certain municipal tax rate levy or an abatement in the real estate tax assessment 	Yes	<ul style="list-style-type: none"> Industrial, manufacturing, and distribution in limited circumstances 	<ul style="list-style-type: none"> Abatement of tax levy is on local level; abatement of tax assessment only available in Cook County www.cookcountya ssessor.com
Tax Increment Financing	State	<ul style="list-style-type: none"> State distributes state sales tax collections to municipalities that have TIF districts for state sales tax, state utility tax, or both that produced an incremental growth in retail sales or gas and electricity consumption State also distributes property tax collections among businesses in the TIF district, so that as businesses develop, additional property tax receipts go to the TIF district for further redevelopment 	Yes	<ul style="list-style-type: none"> Each TIF district is subject to the following reduction to determine the net state sales tax increment (the maximum amount available to each municipality for each TIF district): 80% of the increment up to and including \$100,000; 60% of the increment exceeding \$100,000 but not exceeding \$500,000; 40% of all amounts exceeding \$500,000 For each quarterly distribution, each eligible municipality receives a prorated share of the available distribution amount 	<ul style="list-style-type: none"> https://dceo.illinois.gov/expandrelocate/incentives/taxincrementfinancing.html

Incentive (cont.)	State or Local Grant (cont.)	Impact (cont.)	But-For Standard? (cont.)	Use Requirement/Criteria (cont.)	Miscellaneous Notes (cont.)
		<ul style="list-style-type: none"> • Municipality expends funds for the development of real estate in the TIF district that will have the effect of increasing sales taxes and property taxes 		<ul style="list-style-type: none"> • Business must be located in the TIF zone 	
Illinois Department of Revenue Building Sales Tax Exemption	State	<ul style="list-style-type: none"> • Contractors and other entities participating in real estate construction, rehabilitation, or renovation project in an Enterprise Zone, River Edge Redevelopment Zone, or state-certified High Impact Business may purchase building materials exempt from sales tax 		<ul style="list-style-type: none"> • Applications must be submitted to Zone Administrators and a certificate issued to each contractor • Certificates are valid for a maximum of two years 	<ul style="list-style-type: none"> • https://tax.illinois.gov/businesses/incentives/reporting/building-materials-exemption-certificate-report.html
Enterprise Zone Program	State	<ul style="list-style-type: none"> • Sales tax exemption for materials to be affixed in zone project • Investment tax credit of up to 0.5% against state income tax • Machinery/equipment of 6.25% sales tax exemption • Utility tax exemption of 5% on gas, electricity, and the IL Commerce 0.1% charge • Property tax incentives (abatements for zone improvements) 	No	<ul style="list-style-type: none"> • Purchase of materials affixed in zone project from zone retailer • Improvements to land, and depreciable assets placed in service within zone boundaries • Investment of at least \$5 million in zone and a project that creates 200 jobs • Taxes are abated only on increase in assessed value 	<ul style="list-style-type: none"> • Certificate of Eligibility issued by the Illinois Department of Revenue required for benefits • https://dceo.illinois.gov/expandrelocate/incentives/taxassistance/enterprisezone.html

Incentive (cont.)	State or Local Grant (cont.)	Impact (cont.)	But-For Standard? (cont.)	Use Requirement/Criteria (cont.)	Miscellaneous Notes (cont.)
Economic Development for a Growing Economy (EDGE) Program	State	<ul style="list-style-type: none"> • Credit against income tax calculated on a case-by-case basis • Tax credit could be as high as the amount of state income taxes withheld from salaries of employees in the newly created jobs 	Yes	<ul style="list-style-type: none"> • Tier 1: lesser of 50 new employees or 5% of world-wide employment if company has 100 or fewer world-wide employees; lesser of 50 new full-time employees or 10% of world-wide employment and investment of \$2.5 million if company has more than 100 world-wide employees • Tier 2: 100 new full-time employees and investment of \$50 million • Must demonstrate that if not for the credit, the project would not occur in Illinois 	<ul style="list-style-type: none"> • https://dceo.illinois.gov/expandrelocate/incentives/edge.html
High Impact Business	State	<ul style="list-style-type: none"> • Eligible for state sales tax exemption on building materials, investment tax credit, and a state sales tax exemption 	Yes	<ul style="list-style-type: none"> • Project must involve a minimum of \$12 million investment causing the creation of 500 full-time jobs or an investment of \$30 million causing the retention of 1,500 full-time jobs • Investment must take place at a designated location in Illinois outside of an enterprise zone 	<ul style="list-style-type: none"> • https://dceo.illinois.gov/expandrelocate/incentives/highimpactbusinessprogram.html
River Edge Redevelopment Zone Program	State	<ul style="list-style-type: none"> • Eligible for investment tax credits, environmental remediation tax credit, dividend income deduction, interest income deduction, building materials sales tax exemption, and property tax abatement 		<ul style="list-style-type: none"> • Project must revive and redevelop property in challenged areas and only in zones of: Aurora, East St. Louis, Elgin, Peoria, and Rockford 	<ul style="list-style-type: none"> • https://dceo.illinois.gov/expandrelocate/incentives/taxassistance/riversedge.html

Incentive (cont.)	State or Local Grant (cont.)	Impact (cont.)	But-For Standard? (cont.)	Use Requirement/Criteria (cont.)	Miscellaneous Notes (cont.)
<p>Advantage Illinois Capital Access Program</p>	<p>State</p>	<ul style="list-style-type: none"> • A CAP loan is a private market transaction between a lender and a borrower • Designed to encourage financial institutions to make loans to small and new businesses that do not qualify under conventional lending policies 	<p>No</p>	<ul style="list-style-type: none"> • Business must be located in Illinois, and employ 750 employees or fewer • Maximum loan size is \$1 million • Loans can be term loans up to 5 years or revolving lines of credit • Program does not assist in financing of construction, renovation or purchase of residential or rental property 	<ul style="list-style-type: none"> • https://dceo.illinois.gov/smallbizassistance/advantageillinois.html
<p>Advantage Illinois Participation Loan Program</p>	<p>State</p>	<ul style="list-style-type: none"> • 4 product lines <ol style="list-style-type: none"> 1 — Standard participation 2 — Minority, women, disabled, or veteran owned businesses 3 — Revolving line of credit 4 — SBA supported activity • Loans support businesses with projects that create or retain jobs and/or modernize business to improve competitiveness • DCEO seeks to encourage new bank lending to small business by purchasing portions of bank term loans and revolving lines of credit, applying below market interest rates to DCEO’s portion, and subordinating its interest to those of the lending entities 	<p>No</p>	<ul style="list-style-type: none"> • For-profit businesses with 750 employees or less <ol style="list-style-type: none"> 1, 3, 4 — Maximum support is the lesser of 25% of the project, 50% of the loan, or an amount determined based on job creation/retention 1, 3, 4 — Loan size of no less than \$10,000 or more than \$2,000,000 2 — Loan size for minority is no less than \$10,000 or more than \$200,000 2 — Maximum support for minority owned business is lesser of 40% of the project, 50% of the loan, or an amount determined based on job creation/retention; support may also range from \$25,000 to \$65,000 per full-time employee 1 — Term no longer than 10 years 2 — Term no longer than 7 years 3 — Term no longer than 2 years 	<ul style="list-style-type: none"> • https://dceo.illinois.gov/smallbizassistance/advantageillinois.html

Incentive (cont.)	State or Local Grant (cont.)	Impact (cont.)	But-For Standard? (cont.)	Use Requirement/Criteria (cont.)	Miscellaneous Notes (cont.)
Illinois Finance Authority Industrial Development Revenue Bond Program	State	<ul style="list-style-type: none"> • IFA issues tax-exempt bonds on behalf of manufacturing companies for acquisition of fixed assets • Long-term financing at lower than prime interest rates, financing of up to 100% of the project cost, interest is exempt from federal income tax 	No	<ul style="list-style-type: none"> • Bond proceeds may be used for new construction or renovation, and may be used to purchase new equipment 	<ul style="list-style-type: none"> • www.il-fa.com/programs/business
Illinois Finance Authority Participation Loan Program	State	<ul style="list-style-type: none"> • IFA assists businesses that create or retain jobs by purchasing the lesser of \$500,000 or 50% participation in the borrower's loan • Lower blended interest rate, with a fixed rate for up to 5 years • Interest rate for IFA is bank's interest rate less 100 basis points • Maximum term of 10 years 	No	<ul style="list-style-type: none"> • Funds must be used for the purchase of land and buildings, construction or renovation of buildings, and acquisition of machinery and equipment 	<ul style="list-style-type: none"> • www.il-fa.com/programs/business
Illinois Department of Transportation Economic Development Program	State	<ul style="list-style-type: none"> • Grants for roadway improvements necessary to new or expanding industrial, manufacturing, or distribution facilities • 100% funding for state owned routes, and 50% funding for locally owned route 		<ul style="list-style-type: none"> • Projects must be sponsored by a local government body • Retail, offices, parks, or government facilities not eligible • Company must commit to creating or retaining employment 	<ul style="list-style-type: none"> • https://idot.illinois.gov/transportation-system/local-transportation-partners/county-engineers-and-local-public-agencies/funding-opportunities/economic-development-program

D. [1.40] Sample Solicitation Letter

[attorney information]

[date]

[state or local economic development office address]

Attn:

Re:

Dear _____ :

We are writing this letter on behalf of our client, [name of client], which is planning a [description of project]. The purpose of this letter is to request the assistance of the proper authorities of the [state or local government] to determine the types and extent of financial incentives that would be available if this project were to be located in [jurisdiction].

[name of business] is headquartered in [city], [state]. It is the worldwide leader in [business]. It uses state-of-the-art advanced technology. The company was founded in [year of founding] and currently has over [number of employees] employees worldwide.

The new facility will combine manufacturing with research and development, executive office functions, warehousing, and sales and marketing. The facility will hire between [lower number of range] and [higher number of range] new employees and have a payroll approaching [dollar amount] per year. The building to be constructed will be approximately [number of square feet] square feet in size, with [number of square feet] square feet of manufacturing space. It will be built on a site of approximately [number of] acres.

It will take approximately [number of months] months to construct the building and will provide employment for an average of approximately [number of construction workers] construction workers throughout the construction period. The total investment for this project will be approximately \$[dollar amount], which is comprised of approximately \$[dollar amount] for land purchase, site improvements, design, and construction and \$[dollar amount] for machinery and equipment. Approximately [numeral] percent of this amount will be expended through local contractors and suppliers.

The present plans of [name of business] are to expand this facility within the next [numeral] years to accommodate more manufacturing. This will add approximately [numeral] more workers and increase the total investment to over \$[dollar amount].

The initial site search conducted by our client identified [numeral] potential sites throughout [city, state, etc.]. The search is now focused down to two sites. One of these is in [city or county], Illinois, and the other is in [city or county], [state]. The key criteria for location of the project are [state 3 – 6 key criteria].

Even though the Illinois site is in an enterprise zone, it suffers from a competitive operating cost disadvantage versus the [city or county], [state] site. Specifically, based on the requirements of the project, the Illinois site shows the following annual cost penalties versus the [city or county], [state] site:

Category	Annual Illinois Site Penalty
a. Hourly Labor	[\$dollar amount]
b. Electric Power	[\$dollar amount]
c. Infrastructure	[\$dollar amount]
d. Land Cost	[\$dollar amount]
TOTAL PENALTY	[\$dollar amount]

We thank you for your consideration of this request, and we look forward to hearing from you soon. If you have questions, please contact the undersigned directly.

Very truly yours,

(signature)

2

A Guide to Commercial Surveys

DANIEL L. JOHNSON

Huck Bouma PC
Wheaton

IICLE® gratefully acknowledges the contribution of J. Cole Helfrich, who authored this chapter for the previous edition and on whose work this edition is based.

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I. [2.1] INTRODUCTION

The English word “survey” is derived from the Old French word “sourveoir,” which in turn was derived from the Latin words “super video,” but the consistent meaning across all three languages has been “to look over.” In modern usage, real estate professionals use the phrase “to survey” to refer to the process of researching a parcel of real property in order to delineate the boundaries of the parcel on a two-dimensional depiction of the parcel, which is also commonly called a “survey” or a “plat of survey.” At a minimum, the survey discloses the boundaries of the parcel and will usually show the buildings and other improvements located on the land.

The survey is prepared by a professional land surveyor. Surveyors are licensed under the laws of the State of Illinois to practice land surveying. The survey is the surveyor’s professional opinion as to the location of the boundary lines of a parcel of land. Because it is an opinion, the survey is subject to review by a court in the event of a boundary dispute or other litigation. See Illinois Professional Land Surveyor Act of 1989, 225 ILCS 330/1, *et seq.*; Permanent Survey Act, 765 ILCS 215/0.01, *et seq.*; 68 Ill.Admin. Code §1270.56; Mitchell G. Williams and Harlan J. Onsrud, Ch. 1, *What Every Lawyer Should Know About Title Surveys*, in Mitchell G. Williams, ed., *LAND SURVEYS: A GUIDE FOR LAWYERS AND OTHER PROFESSIONALS* (3d ed. 2015).

There are multiple types of surveys that a professional land surveyor can prepare. The most basic survey is commonly known as a boundary survey and typically includes only the boundary lines of the parcel and the location of any improvements within those boundary lines. See 68 Ill.Admin. Code §1270.56(b). In the field of commercial real estate, it is more common to use an ALTA/NSPS land title survey, also colloquially known as an ALTA survey, which is subject to strict standards set forth by the American Land Title Association (ALTA) and the National Society of Professional Surveyors (NSPS). See 68 Ill.Admin. Code §1270.56(a); 2021 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys (ALTA/NSPS Standards) (see §2.7 below). Additionally, topographic surveys show the elevation of the parcel above sea level. See 68 Ill.Admin. Code §1270.56(f). Plats of subdivision are used to subdivide one parcel into multiple smaller parcels. See 68 Ill.Admin. Code §1270.56(d). Condominium surveys are used to establish the exterior boundaries of a parcel on which condominiums will be built. See 68 Ill.Admin. Code §1270.56(c). See also Condominium Property Act, 765 ILCS 605/1, *et seq.* A commercial real estate attorney will likely encounter all of these types of surveys in their practice.

A. [2.2] How Land Is Legally Described

Real estate is conveyed by deed, and the deed must include the legal description of the property being sold or conveyed. The legal description is used by the surveyor to physically locate the parcel and distinguish it from neighboring parcels. Legal descriptions in many cases have been established through a chain of title from one landowner to the next, but surveyors may also be called on to write a new legal description, such as in the case of a new subdivision or a consolidation of multiple parcels into one.

When a plat of subdivision has been recorded, legal descriptions typically consist of a lot number and a subdivision name with a reference to the recorded plat. The legal description is thus

based on the original plat of subdivision and the work performed by the surveyor who prepared the plat of subdivision. When a subsequent surveyor prepares a new survey of a subdivided parcel, the new surveyor relies on the plat of subdivision to locate the boundary lines of the lot and locate the improvements within those lot lines.

For unsubdivided land, legal descriptions instead rely on a rectangular survey system of land description devised by Thomas Jefferson and adopted by the Continental Congress in 1785. See United States Continental Congress, *An Ordinance for Ascertaining the Mode of Disposing of Lands in the Western Territory*, 33 JOURNALS OF THE CONTINENTAL CONGRESS, p. 753 (1785). See also Logan D. Fitch, REAL ESTATE TITLES IN ILLINOIS, pp. 2 – 6 (1948). This system relies on the division of states into counties with each county consisting of sections of land. Such a division may be described either by an “of” description or by a metes and bounds description.

An “of” description is more formally termed “the division of sectionalized land into aliquot parts.” This type of legal description consists of references to the boundaries of one or more sections within a county. An example of such a legal description could be: “The northwest quarter of the southeast quarter of Section 1 in DuPage County, Illinois.” In cities, villages, and other populated places, it is unlikely for a section to have only a few owners; thus, an “of” description is not usually possible.

Instead, a metes and bounds legal description is used for unsubdivided land when each section has been divided into numerous different parcels. A metes and bounds legal description traces the perimeter of the parcel by reference to section lines, neighboring parcels, roads, bodies of water, railroad rights-of-way, or other verifiable location points. The legal description begins at a point of beginning or commencement point and then proceeds to measure the boundaries of the parcel with reference to the foregoing types of location points. Thus, a metes and bounds legal description commonly includes directional coordinates, angles, arcs, and other geometric concepts to accurately describe the parcel being surveyed.

B. [2.3] Real Estate Contract

The real estate contract between a buyer and seller of commercial real estate specifies which party is required to obtain a survey of the real estate. In the absence of any such specification, a seller is not required to provide a survey to the buyer, although the buyer is typically permitted to obtain their own survey if desired.

It is in the buyer’s best interests to obtain a survey of the real estate prior to closing on the purchase. The survey will enable the title insurance company to delete the standard exceptions from the buyer’s title insurance policy by issuing an extended coverage endorsement. The survey will also permit the buyer to examine the boundaries of the real estate to determine if there are any encroachments onto the land of neighboring owners or encroachments by neighboring owners onto the real estate being purchased. If a land title survey is obtained, the buyer will also be able to examine the location of any easements or other restrictions on the use of the real estate that are matters of record in order to ensure that such restrictions do not interfere with the buyer’s intended use of the land.

Occasionally, a seller of commercial real estate will ask the buyer and the title insurance company to rely on a historical survey of the real estate. In this scenario, the seller typically will sign an affidavit stating that the historical survey continues to accurately depict the subject real estate and that no improvements have been made or altered on the subject real estate since the date of the historical survey. Many title insurance companies will accept such a historical survey, together with the seller's affidavit, to delete the standard exceptions from the buyer's title insurance policy, but the buyer should inquire with the title insurance company regarding such deletion prior to accepting a historical survey from the seller.

C. [2.4] Owner's Title Insurance Policy

Every title insurance policy contains five standard exceptions, also called the "general exceptions," which are substantially as follows:

1. **Rights or claims of parties in possession not shown by the public records.**
2. **Encroachments, encumbrances, violations, variations, or adverse circumstances affecting the title that would be disclosed by an accurate and complete land survey of the land.**
3. **Easements, or claims of easements, not shown by the public records.**
4. **Any lien, or right to a lien, for services, labor, or material heretofore or hereafter furnished, imposed by law, and not shown by the public records.**
5. **Taxes or special assessments that are not shown as existing liens by the public records.**

If the title insurance company receives certain documentation, including (but not limited to) a survey, and this documentation reveals no additional matters or adverse interests, it can waive or delete these standard exceptions from the owner's title insurance policy by issuing an "extended coverage" endorsement. Any adverse matters disclosed by the survey or other documentation will be shown as special exceptions to any title insurance policy issued.

The current forms of title insurance policies were adopted by ALTA in 2021. The 2021 ALTA Owner's Policy of Title Insurance contains ten covered risks. Covered Risk 2(c) reads:

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B, AND THE CONDITIONS, [the Title Insurance Company] insures as of the Date of Policy . . . against loss or damage, not exceeding the Amount of Insurance, sustained or incurred by the Insured by reason of:

* * *

2. **Any defect in or lien or encumbrance on the Title. Covered Risk 2 includes, but is not limited to, insurance against loss from:**

* * *

- c. the effect on the Title of an encumbrance, violation, variation, adverse circumstance, boundary line overlap, or encroachment (including an encroachment of an improvement across the boundary lines of the Land), but only if the encumbrance, violation, variation, adverse circumstance, boundary line overlap, or encroachment would have been disclosed by an accurate and complete land title survey of the Land.**

Thus, it is in the buyer's best interests as the insured under the title insurance policy to obtain an accurate and complete survey prior to purchasing real estate because the survey will establish what defects, liens, and encumbrances are insured against by Covered Risk 2(c). Without an accurate and complete survey, there will be a possibility of disagreement over whether a defect, lien, or encumbrance would have been disclosed on a survey.

Unfortunately, Covered Risk 2(c) also includes terms that are not specifically defined. For example, "violation," "variation," and "adverse circumstance" are terms that rely on other provisions of law for their definitions, potentially including statutes and caselaw. It seems clear that underwriting survey problems in light of the various interpretations of these terms will be an issue with both the title insurance company and the attorney.

PRACTICE POINTER

- ✓ In addition to the survey, the general exceptions are usually waived upon the seller's execution of a title insurance company affidavit in which the seller makes certain statements relative to possible mechanics liens, unrecorded leases, and other matters. Title insurance companies have different names for this affidavit; one of them is an "ALTA Statement." Note that some of the general exceptions overlap. For example, although the first general exception might relate to someone in possession of the land pursuant to an unrecorded lease, it might also concern the encroachment of an adjoining property owner's fence (General Exception 2) or driveway (General Exceptions 2 and 3).
-

II. [2.5] THE LAND TITLE SURVEY

When insuring commercial real estate, a title insurance company will probably require a "land title survey" before it will consider deleting standard Exceptions 2 and 3 of the 2021 ALTA Owner's Policy of Title Insurance. A land title survey is the same as an ALTA survey in common usage. This type of survey is prepared in accordance with the land title survey standards discussed in §2.7 below.

PRACTICE POINTER

- ✓ If the commercial property is fairly small, it is possible that the title insurance company will accept a boundary survey. The standards for boundary surveys are discussed in §2.6 below. They are not nearly as detailed as the standards for land title surveys. See 68 Ill.Admin. Code §1270.56(b).
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A. [2.6] Boundary Surveying Standards of Practice

Illinois's boundary survey standards are located at 68 Ill.Admin. Code §1270.56(b). At a minimum, a boundary survey shall include the following:

- A) Gathering and evaluating the best available evidence indicating where the boundary lines being retraced have become established on the ground.**
- B) Clear and legible field notes containing all pertinent information, measurements and observations made in the course of the field survey.**
- C) Unless requested otherwise by the client or his/her agent, a plat of survey.**
- D) A legal description for any parcel surveyed.**
- E) Monuments or witness points shall be set for all accessible corners of the survey except when, in the opinion of the professional land surveyor, corner monuments would be destroyed by development, re-development construction, grading or utility construction. In this case, monumentation may be delayed until construction or grading is completed and must be in place within 12 months of the date of field work of the last survey. 68 Ill.Admin. Code §1270.56(b)(4).**

In addition, the survey itself must contain the following items:

- A) [Surveyor's firm] name, address and registration number.**
- B) Professional land surveyor seal, signature, date of signing, and license expiration date. . . .**
- C) Client's name.**
- D) North arrow.**
- E) Scale[, either] written or graphic.**
- F) Date of completion of field work.**
- G) Legal description of the property.**
- H) Legend for all symbols and abbreviations used on the plat.**
- I) Monuments or witness corners, whether set or found, intended to represent or reference corners of the survey, shall be shown and described as to size, shape and material, and their positions noted in relation to the survey corners.**

- J) Sufficient angles, bearings or azimuths, linear dimensions and curve data shown on the plat to provide a mathematically closed figure for the exterior of the survey. . . .**
- K) Where bearing, azimuth or coordinate systems are used, the basis or proper names of the system shall be noted on the plat.**
- L) If the survey is a parcel in a recorded subdivision, any adjacent rights of way or easements and setback lines shown on the recorded plat that affect the subject parcel shall be shown and dimensioned.**
- M) The character and location of evidence of possession or occupation along the perimeter of the surveyed property and by adjoining owners, observed in the process of conducting the fieldwork.**
- N) Show visible evidence of improvements, rights of way, easements, or use, when requested by the client.**
- O) Exculpatory statements that attempt to restrict the uses of boundary surveys shall not be affixed to any plat.**
- P) The following statement shall be placed near the professional land surveyor seal and signature: “This professional service conforms to the current Illinois minimum standards for a boundary survey.” 68 Ill.Admin. Code §1270.56(b)(9).**

The surveyor’s field procedures are outlined in 68 Ill.Admin. Code §1270.56(b)(10). The standards advise the surveyor to perform all field work “with accepted methods of surveying theory, practice and procedures.” 68 Ill.Admin. Code §1270.56(b)(10). Thus, even though a boundary survey must include certain specific items on the face of the survey and even though the surveyor must perform certain work in preparing the survey, the accepted methods of surveying are not specifically defined and are subject to change based on the prevailing methods in the surveying industry at the time.

B. [2.7] Land Title Surveying Standards of Practice

As with boundary surveys, surveyors are bound by minimum standards of practice in the preparation and completion of land title surveys. The standards for land title surveys are stricter and more detailed than the standards for boundary surveys.

At one time, surveyors had the option of surveying pursuant to the 1962 survey standards that were promulgated by a joint committee of the Illinois State Bar Association, the Chicago Bar Association, and the Illinois Professional Land Surveyors Association. These standards are no longer used.

Instead, all land title surveys are performed pursuant to the Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys adopted by ALTA and the National Society of

Professional Surveyors (NSPS). See also 68 Ill.Admin. Code §1270.56(a). The current version of the ALTA/NSPS Standards was issued in February 2021; earlier editions are dated 1962, 1986, 1988, 1992, 1997, 1999, 2005, 2011, and 2016. Versions prior to 2016 set forth different surveying requirements for four different types of properties: urban, suburban, mountain/marshland, and rural. These separate requirements have been omitted from the 2021 ALTA/NSPS Standards. The current standards are available on the ALTA website at www.alta.org/policies-and-standards and on the NSPS website at <https://nsps.us.com/page/2021alta>.

The 2021 ALTA/NSPS Standards consist of detailed instructions concerning the preparation of a land title survey. The Standards address such issues as unrecorded easements, possessory evidence, and encroachments — matters that go to the heart of extended coverage. The 2021 ALTA/NSPS Standards not only meet the concerns of the title insurance company but also guide the surveyor in the preparation of the land title survey, leaving virtually no issues of interpretation unaddressed. This is why title insurance companies usually require a land title survey as a condition to issuing extended coverage on title insurance policies for commercial property.

C. [2.8] An Analysis of the 2021 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys

The 2021 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys are available for download at <https://nsps.us.com/page/2021alta>. Also available is a red-lined version of the standards that highlights all the changes made for this iteration. As of February 23, 2021, all previous iterations of the Minimum Standard Detail Requirements were superseded, leaving the 2021 ALTA/NSPS Standards as the sole standards with which surveyors must comply for land title surveys.

1. [2.9] Purpose

Section 1 of the 2021 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys is an introduction that briefly describes the Standards. In particular, Section 1 specifically states that clients, insurers, insureds, and lenders are entitled to “rely on surveyors to conduct surveys and prepare associated plats or maps that are of a professional quality and appropriately uniform, complete, and accurate.” 2021 ALTA/NSPS Standards, §1.

Section 1 also sets forth four requirements for any land title survey, as follows:

- (i) the on-site fieldwork required pursuant to Section 5,**
- (ii) the preparation of a plat or map pursuant to Section 6 showing the results of the fieldwork and its relationship to documents provided to or obtained by the surveyor pursuant to Section 4,**
- (iii) any information from Table A items required by the client, and**
- (iv) the certification outlined in Section 7.**

2. [2.10] Request for Survey

Section 2 of the 2021 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys discusses the procedure for requesting a survey from a surveyor. A written authorization for an ALTA/NSPS Land Title Survey is required from the party responsible for paying the surveyor for the survey. The request must also specify which Table A items are required in connection with the requested land title survey. Table A items are discussed in further detail in §§2.17 – 2.37 below.

PRACTICE POINTER

- ✓ When an attorney orders a survey from a surveyor, typically the attorney's firm is considered the party responsible for paying the surveyor for the survey, even when the firm obtains reimbursement from their client. To avoid the scenario in which the client fails to pay the attorney in a timely manner and the firm bears the cost of the survey, the attorney should obtain the written authorization for the survey from the client directly and simply act as the point of contact with the surveyor on behalf of the client.
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3. [2.11] Surveying Standards and Standards of Care

Section 3 of the 2021 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys discusses certain standards with which the surveyor must comply. In addition to the 2021 ALTA/NSPS Standards, which supersede all prior versions of the Minimum Standard Detail Requirements, surveyors must also comply with any standards provided by the jurisdiction in which the surveyor operates. Each state and some local jurisdictions may have different standards for land title surveys. In the event of a conflict between the 2021 ALTA/NSPS Standards and any standards provided by state or local authorities, the surveyor is required to comply with the more stringent of the conflicting standards.

Section 3 also sets forth standards for boundaries and measurements used in preparing the land title survey. These are technical standards with which the surveyor must comply. In particular, the surveyor must comply with a maximum allowable Relative Positional Precision, which is used to represent the uncertainty in the position of a monument marking any boundary corner of the surveyed property. 2021 ALTA/NSPS Standards, §3.E. In the event the surveyor is unable to comply with the Relative Positional Precision standard, the surveyor must include a statement on the face of the survey explaining why the surveyor was unable to comply. 2021 ALTA/NSPS Standards, §6.B.x.

4. [2.12] Records Research

Section 4 of the 2021 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys describes the different documents that must be furnished to the surveyor for use in conducting the survey. These include the legal description of the property, the most recent title insurance commitment for the property, the current record descriptions of any adjoining to the

property; any recorded easements benefitting the subject property; any recorded easements, servitudes, or covenants burdening the subject property; and, if desired by the client, any unrecorded documents affecting the subject property. In the event such documents are not provided to the surveyor, the surveyor may still have a duty to investigate the subject property in order to comply with any jurisdictional requirements imposed on surveyors and/or the terms of any contract between the surveyor and the client.

5. [2.13] Fieldwork

Section 5 of the 2021 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys describes the fieldwork that the surveyor must address when preparing the survey. This fieldwork includes locating monuments; addressing rights of way and access issues; locating evidence of possession or occupation along the perimeter of the subject property; locating buildings, easements, and servitudes on the subject property; identifying any cemeteries or burial grounds on the subject property; and locating springs, ponds, and other water features on the subject property.

6. [2.14] Plat or Map

Section 6 of the 2021 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys is the heart of the survey standards. Section 6 lays out with a high level of detail the items that the survey should include as a result of the fieldwork described in Section 5. These requirements include the monuments and lines located during the fieldwork, the boundary, descriptions, dimensions, and closures of the subject property, and the easements, servitudes, rights of way, access, and documents affecting the subject property.

Section 6 also sets forth the technical requirements for the presentation of the survey, such as the items required on the physical drawing and the explanatory notes and symbols used in preparing the drawing. If the survey is going to be recorded for any reason, the surveyor must also comply with any jurisdictional requirements applicable to recorded documents.

7. [2.15] Certification

Section 7 of the 2021 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys sets forth the surveyor's certification that must be included on the survey. Section 7 contains the full certification to be used and signed by the surveyor, which must be unaltered except as may be required by any applicable jurisdictional requirements. Survey certifications are discussed in further detail in §§2.38 – 2.43 below.

8. [2.16] Deliverables

Section 8 of the 2021 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys describes how and to whom the survey should be delivered. In the absence of any alternative instructions or contract requirements, the survey should be delivered as a hard copy on durable and dimensionally stable material. However, the client and/or contract may specify that the survey may be delivered in a digital form in addition to or in lieu of a hard copy.

PRACTICE POINTER

- ✓ Hard copies of surveys are commonly delivered in a large format on specialized paper that cannot easily be scanned or converted to digital form. When preparing the real estate contract and/or the written authorization to the surveyor, the attorney should specify the requested format of the survey, whether hard copy or digital, and the number of hard copies required, if any. At the end of the legal representation, hard copies should be delivered to the client, while the attorney retains only a digital copy for future reference.
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9. [2.17] Table A

Appended to the 2021 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys is Table A, titled “Optional Survey Responsibilities and Specifications.” This is a list of 20 optional items that, if requested, can be included on a land title survey.

When ordering a land title survey from a surveyor, the surveyor may ask what items, if any, from Table A should be shown on the survey. These Table A items must be requested by the client and agreed to by the surveyor before they become applicable to the land title survey. Some Table A items will incur an additional charge from the surveyor, which the surveyor will disclose upon request. A title insurance company will usually not require that *any* Table A items be shown in order to issue its extended coverage over matters of survey.

PRACTICE POINTER

- ✓ In order to properly allocate the cost of the Table A items, the real estate contract should specify which Table A items are required on the survey and who is responsible for paying for them. If the contract is silent on this issue, the seller will not be required to pay for any Table A items and the survey will be subject only to the 2021 ALTA/NSPS Standards without any Table A items. Alternatively, the buyer may request Table A items directly from the surveyor, but the buyer will then be responsible for paying any additional costs above the Minimum Standard Detail Requirements.
-

a. [2.18] Item 1: Monuments

1. ____ Monuments placed (or a reference monument or witness to the corner) at all major corners of the boundary of the surveyed property, unless already marked or referenced by existing monuments or witnesses in close proximity to the corner. 2021 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys, Table A, Item 1.

If Item 1 is included on the land title survey, the surveyor will place monuments or witnesses at all corners of the subject property for future reference in locating such corners. However, in many cases, the subject property may have existing monuments or witnesses, such as surveyors' pins, in place. If the surveyor discovers any such existing monuments or witnesses, the surveyor will instead note the location of these monuments and witnesses on the land title survey.

b. [2.19] Item 2: Address

2. ____ Address(es) of the surveyed property if disclosed in documents provided to or obtained by the surveyor, or observed while conducting the fieldwork. 2021 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys, Table A, Item 2.

Although a street address is not a definitive description of any parcel of real estate, it is usually helpful to identify the street address on the survey as a reference. The street address may be readily available from the client, the title insurance commitment, or evidence observed at the property itself, such as lettering on a building or mailbox. If no street address has been assigned to the subject property, whether because it is not registered with the United States Post Office or for some other reason, Item 2 will not be available for the survey.

c. [2.20] Item 3: Flood Zones

3. ____ Flood zone classification (with proper annotation based on federal Flood Insurance Rate Maps or the state or local equivalent) depicted by scaled map location and graphic plotting only. 2021 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys, Table A, Item 3.

For properties located near or within flood zones, the Federal Emergency Management Agency (FEMA) publishes flood maps that are used by lenders and insurers when assessing the risk of the property. Thus, it is typically beneficial — and in many cases required — to include Item 3 on the survey to note the particular flood zone in which the subject property is located and to identify the extent of the particular flood zone if multiple classifications affect the same property.

d. [2.21] Item 4: Gross Land Area

4. ____ Gross land area (and other areas if specified by the client). 2021 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys, Table A, Item 4.

The gross land area may be measured in square footage or acreage, but in either case, it is typically useful for the surveyor to provide this measurement on any survey. The surveyor will also measure any specific portions of the subject property that may be less than the whole parcel if requested in advance by the client. This can be useful for properties encompassing more than one tax parcel or that will be subdivided into smaller parcels.

e. [2.22] Item 5: Vertical Rule

5. ____ Vertical relief with the source of information (e.g., ground survey, aerial map), contour interval, datum, with originating benchmark, when appropriate. 2021 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys, Table A, Item 5.

While not typically a major source of concern in the prairies of Illinois, vertical relief information can be included on the survey to provide insight into the differing elevation points within the subject property. Otherwise, a typical land title survey provides only a two-dimensional depiction of the subject property.

f. [2.23] Item 6: Zoning

6. ____ (a) If the current zoning classification, setback requirements, the height and floor space area restrictions, and parking requirements specific to the surveyed property are set forth in a zoning report or letter provided to the surveyor by the client or the client's designated representative, list the above items on the plat or map and identify the date and source of the report or letter.

____ (b) If the zoning setback requirements specific to the surveyed property are set forth in a zoning report or letter provided to the surveyor by the client or the client's designated representative, and if those requirements do not require an interpretation by the surveyor, graphically depict those requirements on the plat or map and identify the date and source of the report or letter. 2021 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys, Table A, Item 6.

While Item 6 might at first glance appear to be highly desirable, in practice it is simply a reiteration of the survey of information previously provided to the surveyor. The surveyor is not permitted to conduct any independent investigation of the zoning classification, setback requirements, area restrictions, or parking requirements within a particular zone. Instead, Item 6 requires the surveyor to review materials provided by the client directly and then copy and paste the zoning information onto the survey. If the client was already in possession of such information, Item 6 does not add to the client's knowledge about these matters.

g. [2.24] Item 7: Dimensions

7. ____ (a) Exterior dimensions of all buildings at ground level.

(b) Square footage of:

____ (1) exterior footprint of all buildings at ground level.

____ (2) other areas as specified by the client.

- ____ **(c) Measured height of all buildings above grade at a location specified by the client. If no location is specified, the point of measurement shall be identified.** 2021 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys, Table A, Item 7.

If the subject property is improved with one or more buildings, Item 7 can be requested to provide additional details regarding the height, width, depth, and area of the buildings on the face of the survey. As with Item 5 (see §2.22 above), these details can provide additional insight into the subject property that would not ordinarily be apparent from a two-dimensional depiction.

h. [2.25] Item 8: Substantial Features

- 8. ____ Substantial features observed in the process of conducting the fieldwork (in addition to the improvements and features required pursuant to Section 5 above) (e.g., parking lots, billboards, signs, swimming pools, landscaped areas, substantial areas of refuse).** 2021 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys, Table A, Item 8.

When the subject property contains improvements or features other than buildings, Item 8 should be requested in order to depict all of such improvements and features that may be permanently or temporarily present on the land. If these improvements and features are omitted from the survey, the survey will appear to depict vacant land surrounding the buildings rather than the full array of possible features typically present on improved properties.

i. [2.26] Item 9: Parking

- 9. ____ Number and type (e.g., disabled, motorcycle, regular, and other marked specialized types) of clearly identifiable parking spaces on surface parking areas, lots and in parking structures. Striping of clearly identifiable parking spaces on surface parking areas and lots.** 2021 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys, Table A, Item 9.

While Item 8 (see §2.25 above) would require a surveyor to depict the location of parking areas within the subject property, Item 9 goes further in requiring the depiction of the details of the parking areas, such as striping and specially designated parking spots. In a typical commercial real estate transaction, the number and details of the parking spaces is usually important to the buyer, especially when the subject property may be subject to one or more leases.

j. [2.27] Item 10: Party Walls

- 10. ____ As designated by the client, a determination of the relationship and location of certain division or party walls with respect to adjoining properties.** 2021 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys, Table A, Item 10.

Party walls are present when one or more buildings are permanently attached to each other or so close to each other as to share one or more walls, even though the building straddles one or more distinct properties with one or more distinct owners. In these cases, Item 10 will require the surveyor to designate which walls of the building are party walls and thus shared with adjacent landowners, as well as any agreements of record governing such party walls.

k. [2.28] Item 11: Underground Utilities

11. Evidence of underground utilities existing on or serving the surveyed property (in addition to the observed evidence of utilities required pursuant to Section 5.E.iv [of the 2021 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys].) as determined by:

____ (a) plans and/or reports provided by client (with reference as to the sources of information)

____ (b) markings coordinated by the surveyor pursuant to a private utility locate request.

Note to the client, insurer, and lender — With regard to Table A, item 11, information from the sources checked above will be combined with observed evidence of utilities pursuant to Section 5.E.iv. to develop a view of the underground utilities. However, lacking excavation, the exact location of underground features cannot be accurately, completely, and reliably depicted. In addition, in some jurisdictions 811 or other similar utility locate requests from surveyors may be ignored or result in an incomplete response, in which case the surveyor shall note on the plat or map how this affected the surveyor’s assessment of the location of the utilities. Where additional or more detailed information is required, the client is advised that excavation may be necessary. 2021 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys, Table A, Item 11.

As with Item 6 (see §2.23 above), the surveyor will be unable to comply with Item 11 unless the client provides certain documents or reports to the surveyor regarding the location of underground utilities. If provided, the surveyor will attempt to locate all such utilities on the survey.

l. [2.29] Item 12: Governmental Requirements

12. ____ As specified by the client, Governmental Agency survey-related requirements (e.g., HUD surveys, surveys for leases on Bureau of Land Management managed lands). The relevant survey requirements are to be provided by the client or client’s designated representative. 2021 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys, Table A, Item 12.

As with Items 6 and 11 (see §§2.23 and 2.28 above, respectively), the client must provide the necessary requirements related to governmental agencies before the surveyor will be able to comply with Item 12. The surveyor will be unable to undertake an independent investigation of these matters and will instead rely on the documents provided in order to certify this item.

m. [2.30] Item 13: Adjoining Owners

13. ____ Names of adjoining owners according to current tax records. If more than one owner, identify the first owner's name listed in the tax records followed by "et al." 2021 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys, Table A, Item 13.

The record owner of adjacent properties may be determined from the tax rolls of the county in which the subject property is located. If requested, the surveyor will include names of adjacent owners, the parcel identification numbers for adjacent parcels, and the location where each adjacent parcel abuts the subject property.

n. [2.31] Item 14: Intersecting Streets

14. ____ As specified by the client, distance to the nearest intersecting street. 2021 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys, Table A, Item 14.

In the course of the fieldwork, the surveyor will measure the distance from a point on the subject property, which is usually a corner or wall of a building, to the nearest street. This is useful in fixing the location of the building within the boundary lines of the subject property.

o. [2.32] Item 15: Alternative Surveying Technologies

15. ____ Rectified orthophotography, photogrammetric mapping, remote sensing, airborne/mobile laser scanning and other similar products, tools or technologies as the basis for showing the location of certain features (excluding boundaries) where ground measurements are not otherwise necessary to locate those features to an appropriate and acceptable accuracy relative to a nearby boundary. The surveyor must (a) discuss the ramifications of such methodologies (e.g., the potential precision and completeness of the data gathered thereby) with the insurer, lender, and client prior to the performance of the survey, and (b) place a note on the face of the survey explaining the source, date, precision, and other relevant qualifications of any such data. 2021 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys, Table A, Item 15.

As more and more sophisticated technologies are developed, Item 15 has been added to accommodate their use in preparing the survey. These technologies typically allow the surveyor to perform at least a portion of the fieldwork without physically examining the subject property in person and instead relying on such photographic and other remote means to develop the survey. However, if ground measurements are necessary to accurately locate certain features of the subject property, Item 15 makes it clear that the surveyor is not permitted to rely solely on these technologies and instead must use a combination of technological and in-person fieldwork.

p. [2.33] Item 16: Recent Construction

16. ____ Evidence of recent earth moving work, building construction, or building additions observed in the process of conducting the fieldwork. 2021 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys, Table A, Item 16.

In the case of properties under construction, newly completed, or having recently undergone earthmoving, there will usually be evidence that large quantities of soil or other ground materials have been deposited and/or removed from the subject property. Excavations, gradings, and other significant landscaping work may all result in such evidence being observable by the surveyor in the field. In such case, the surveyor will include notes and/or depictions of such evidence on the face of the survey.

q. [2.34] Item 17: Changes to Rights-of-Way

17. ____ Proposed changes in street right of way lines, if such information is made available to the surveyor by the controlling jurisdiction. Evidence of recent street or sidewalk construction or repairs observed in the process of conducting the fieldwork. 2021 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys, Table A, Item 17.

The first part of Item 17 depends on the controlling jurisdiction providing the relevant information to the surveyor. Nothing requires the jurisdiction to do so, although the burden is placed on the surveyor to make the request. The second part of Item 17 includes observable evidence of street or sidewalk construction at the subject property and does not require any additional investigation other than the surveyor's fieldwork.

r. [2.35] Item 18: Easements Appurtenant

18. ____ Pursuant to Sections 5 and 6 (and applicable selected Table A items, excluding Table A item 1), include as part of the survey any plottable offsite (i.e., appurtenant) easements disclosed in documents provided to or obtained by the surveyor. 2021 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys, Table A, Item 18.

Item 18 refers to the surveying of appurtenant easements, including access easements. If access to the subject property is via a circuitous or complex easement, the title insurance company may ask that the easement be surveyed before it can issue its title insurance policy free and clear of a "no access" exception. Additionally, the buyer or lender may require such depictions as part of the survey in order to establish the location of these easements appurtenant for future reference.

s. [2.36] Item 19: Professional Liability Insurance

19. ____ Professional liability insurance policy obtained by the surveyor in the minimum amount of \$_____ to be in effect throughout the contract term. Certificate of insurance to be furnished upon request, but this item shall not be addressed on the face of the plat or map. 2021 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys, Table A, Item 19.

Item 19 will not be reflected on the face of the survey, other than typically in the survey certification. Instead, Item 19 is a requirement for the surveyor to maintain professional liability insurance with regard to the contracted survey work. In many cases, surveyors are already maintaining such insurance but maybe not in the specified amount required by the buyer or lender.

t. [2.37] Item 20: Other Requests

At first glance, Item 20 of 2021 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys, Table A, is simply a blank. However, Item 20 is intended to be used for any additional, unique requests made to the surveyor by the buyer or lender. This is specified in the preamble paragraph at the beginning of Table A. Such additional items should be specified as Item 20(a), Item 20(b), etc.

III. [2.38] SURVEY CERTIFICATIONS

As noted in §2.15 above, Section 7 of the 2021 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys sets forth the survey certification that should be shown on the survey. This certification in Section 7 is not the only certification used by surveyors. Attorneys for owners and lenders will sometimes ask surveyors to sign “long form” certifications. These certifications often impose increased liability on the surveyor, so it is possible that the surveyor will refuse to sign a “hybrid” certification until one or more paragraphs are modified or deleted.

A. [2.39] In General

Survey certifications have been a controversial subject for years. Surveyors will argue, “Attorneys don’t certify their work product, so why should I certify mine?” But the attorney’s work is subjective and cannot be quantified or evaluated on a specific standard. The work of surveyors, however, is largely objective and thus can be set to a specific standard.

A survey certification should (1) define the standards by which the survey was completed, (2) establish the basis of the surveyor’s professional opinion, and (3) define the scope of the surveyor’s professional liability and, thus, serve to *limit* the surveyor’s liability. In other words, a survey certification is the surveyor’s affirmation as to the nature of the fieldwork the surveyor has performed and the type of survey or plat the surveyor has produced. Mitchell G. Williams, Ch. 6, *The Annotated Surveyor’s Certificate*, and Robert W. Foster, Ch. 7, *Certification from a Surveyor’s Point of View*, in Mitchell G. Williams, ed., *LAND SURVEYS: A GUIDE FOR LAWYERS AND OTHER PROFESSIONALS* (3d ed. 2015).

B. [2.40] Certified Parties

Surveyors will normally certify their land title surveys to specifically named parties, usually the purchaser, owner, lender (if any), and the title insurance company. By including such a certification on the survey, the surveyor acknowledges that these named parties have a right to rely on the applicable survey. This reliance forms the primary basis of recovery against a surveyor in the event the survey is later determined to be defective.

Section 7 of the 2021 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys sets forth three parties to be included in the certification: the insured, the lender, and the insurer, but only if those parties are known to the surveyor. Additionally, Section 7 states that the certification should include the names of others “as negotiated with the client.” Thus, at a minimum, the surveyor should certify the survey to the title insurance company, the owner of the property as the insured under the title insurance policy, and the owner’s lender, if any. If the client requests additional certified parties, the surveyor is entitled to negotiate with the client as to the inclusion of these parties.

Even if the survey is not certified to certain parties, it is possible for these uncertified parties to hold the surveyor accountable for a defective survey if the surveyor has otherwise certified the survey as accurate and in compliance with the 2021 ALTA/NSPS Standards. In *Rozny v. Marnul*, 43 Ill.2d 54, 250 N.E.2d 656 (1969), the Illinois Supreme Court held that no privity of contract is required between the plaintiff and the surveyor based on a defective survey because the lack of privity of contract is not a defense in a tort claim.

Other cases dealing with surveyor liability include *Barnes v. Rakow*, 78 Ill.App.3d 404, 396 N.E.2d 1168, 33 Ill.Dec. 444 (1st Dist. 1979) (holding that surveyors have no duty to investigate prior surveys of subject property for errors when hired to prepare new survey), and *Hasselbring v. Lizzio*, 332 Ill.App.3d 700, 773 N.E.2d 770, 266 Ill.Dec. 35 (3d Dist. 2002) (declining to disqualify surveyor as expert witness when surveyor admitted to preparing defective survey solely based on improper legal description provided by client). For an article that discusses surveyor liability to third parties, see Richard F. Bales, *Land Surveyor Liability to Third Parties in Illinois*, 95 Ill.B.J. 136 (Mar. 2007).

PRACTICE POINTER

- ✓ Despite the holding of *Rozny, supra*, the 2021 ALTA/NSPS Standards call for a certification on the face of the survey and the attorney should remember to specify the names of the certified parties required for the particular transaction. However, the title insurance company should not reject a land title survey solely because it is not certified to the title insurance company.
-

C. [2.41] A Questionable “Long Form” Survey Certification

Consider this sample certification, the questionable portions of which have been italicized:

I hereby certify that on this the ___ day of _____, 20__:

1. This survey was made on the ground as per the field notes shown on this survey and *correctly* shows (a) the boundaries and areas of the subject property and the size, location, and type of buildings and improvements thereon (if any) and the distance therefrom to the *nearest facing exterior property lines* of the subject property; (b) the location of all *rights-of-way, easements, and any other matters of record (or of which I have knowledge or have been*

advised, whether or not of record) affecting the subject property; (c) the location of the parking areas on the subject property showing the number of parking spaces provided thereby; (d) all abutting dedicated public streets providing access to the subject property together with the width and name thereof; and (e) all other significant items on the subject property;

2. Except as shown on the survey, *there are no (a) encroachments on the subject property by improvements on adjacent property; (b) encroachments on easements or on adjacent property, streets, or alleys by any improvements on the subject property; (c) party walls; or (d) conflicts or protrusions;*

3. The subject property is contiguous to Barrington Road and Lakewood Boulevard, *the same being paved, dedicated public rights-of-way maintained by the Illinois Department of Transportation and the Village of Hoffman Estates, respectively;*

4. *All building setback lines on the subject property required by recorded documents are located as shown hereon, provided, where applicable, the addressee has provided information concerning which yards are front, rear, side, etc.; and*

5. Except as shown on the survey, *the subject property is not situated within a flood hazard area (as defined in the document entitled “Department of Housing and Urban Development, Federal Insurance Administration — Special Flood Hazard Areas Maps”) nor is it shown on any U.S. Department of Housing and Urban Development Flood Insurance Boundary Map.*

This certification contains myriad problems for the surveyor.

Paragraph 1. The term “correct” is a layperson’s term, implying 100-percent accuracy, but no survey is 100 percent accurate. The surveyor will instead prefer to survey the land to the 2021 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys because these standards contain positional tolerances of slight degrees of inaccuracy.

The phrase “nearest facing exterior property lines” is not further defined and is ambiguous. If the goal is to measure the distance from the buildings and improvements to the boundaries of the subject parcel of land, then the wording should be revised to be more specific. If there is some other goal, then the surveyor will not be able to discern the true intent of the client from this certification.

How can the surveyor certify to matters of record? Has the surveyor performed a title search? Any certification as to recorded matters should be limited to those items set forth on a title insurance commitment or policy.

What if a surveyor does not have actual knowledge of an unrecorded easement that affects the land being surveyed, but another surveyor in the same firm does have knowledge of it? Should the knowledge of one surveyor be imputed by operation of law to the other?

How does the surveyor know which streets are dedicated and which ones are not? How does a surveyor determine which streets are “public” and which ones are not? Is a dedicated street a public street?

What are “significant items”? Although Item 13 of Table A of the 1997 ALTA/ACSM Standards included the requirement that the surveyor certify to “[s]ignificant observations not otherwise disclosed,” this requirement was not carried forward on the 1999 Standards and beyond.

Paragraph 2. The statement in the second paragraph should be limited to visible evidence of encroachments and party walls. How can the surveyor certify to those matters of which the surveyor has no knowledge? See *Kayfirst Corp. v. Washington Terminal Co.*, 813 F.Supp. 67 (D.D.C. 1993), in which the court determined that a step footing that was buried four feet underground, but extended seven feet inside the property line, was an encroachment. No surveyor would be able to discover this underground encroachment unless notified of its existence by a third party.

Compare this survey certificate requirement to the 2021 ALTA/NSPS Standards. The fieldwork described in Section 5 of the 2021 ALTA/NSPS Standards requires the surveyor to include such details as the “character and location of evidence of possession or occupation along the perimeter of the surveyed property, both by the occupants of the surveyed property and by adjoining, observed in the process of conducting the fieldwork”; “the character and location of all walls, buildings, fences, and other improvements within five feet of each side of the boundary lines observed in the process of conducting the survey”; and evidence of easements or servitudes not disclosed in the record documents provided to the surveyor but observed in the process of conducting the survey.

What is a “conflict or protrusion?” These terms are not defined and are not commonly used in the real estate or surveying fields.

Paragraph 3. Did the surveyor confirm that the roads are dedicated and public and that they are maintained by the Illinois Department of Transportation and the Village of Hoffman Estates?

Paragraph 4. Did the surveyor conduct a title search to confirm the existence of all building lines? Probably not. The surveyor should either limit any representations to those building lines shown on a title commitment or policy or indicate the source of their information (*e.g.*, a zoning ordinance) on the survey.

Paragraph 5. Has the surveyor performed the necessary research to determine that the land does not fall within a special flood hazard area? Can the surveyor certify that the land is not shown on *any* flood map? Again, the surveyor should limit any representations to a specific flood map.

D. [2.42] A Revision of the Questionable Survey Certification

It seems clear that the long form survey certification in §2.41 above exposes the surveyor to excessive and unwarranted liability. A suggested revision of this certificate follows, with important changes italicized:

1. This survey was made on the ground and was made *in accordance with the 2021 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys*, jointly established and adopted by ALTA and NSPS, and shows, to the accuracy requirements of this survey standard, (a) the boundaries and areas of the subject property and the size, location,

and type of buildings and improvements thereon (if any) and the distance therefrom to the nearest property line of the subject property; (b) the location of those rights-of-way and easements set forth as Schedule B exceptions _____ in the title insurance commitment of _____ Title Insurance Company, dated _____, order number _____; (c) the location of the parking areas on the subject property, including the number of parking spaces; and (d) all physically open abutting streets providing access to the subject property, together with the width and common names thereof;

2. Except as shown on the survey, there are no (a) visible encroachments onto the subject property by improvements on adjacent property, (b) visible encroachments onto easements or onto adjacent property, streets, or alleys by any improvements on the subject property, or (c) visible evidence of party walls;

3. The subject property is contiguous to Barrington Road and Lakewood Boulevard, which are physically open rights-of-way;

4. All building setback lines, as set forth as Schedule B exceptions in the title insurance commitment of _____ Title Insurance Company, dated _____, order number _____, are shown hereon; and

5. According to the Federal Emergency Management Agency Map number _____, dated _____, the subject property, unless otherwise noted, is not situated within a flood hazard area, as defined in that map.

E. [2.43] An Explanation of the Revisions to the Survey Certification

In the certification in §2.42 above, all questionable wording in the certification in §2.41 above has been deleted. An explanation of the other changes to this certification is as follows:

Paragraph 1. The standard for the survey is no longer “correct”; it is now performed to a certain survey standard. The location of easements and other matters of record are shown as per a specific title insurance commitment; the surveyor is no longer certifying as to the location of “all” easements and rights-of-way. Streets are limited to those that are physically open. The statement concerning “all other significant items” has been deleted.

Paragraph 2. The surveyor is now obligated to show only visible evidence of encroachments and party walls on the survey.

Paragraph 3. Reference to “dedicated” rights-of-way has been changed to “physically open” rights-of-way.

Paragraph 4. Setback lines are limited to those set forth on a title insurance commitment.

Paragraph 5. Flood insurance information is limited to a specific flood map.

IV. [2.44] EXAMINING SURVEYS OF COMMERCIAL PROPERTIES

To a large degree, the process of examining surveys of commercial property is very similar to the examination of residential plats of survey. Is there a building line violation? If so, can it be endorsed over on the title insurance policy? If there is an encroachment onto adjoining property, can it be endorsed over? If an encroachment onto the land in question cannot be endorsed over on an owner's title insurance policy, will the parties sign an easement or license agreement? All of these items must be considered when reviewing the commercial survey.

However, the review of surveys of commercial property is more than merely looking for encroachments and building line violations. The attorney must also be aware of myriad other issues, items, and concepts, some of which are rather subtle.

A. [2.45] “As Shown on the Survey”

The surveyor will usually show recorded Schedule B title commitment exceptions, such as building lines and easements, on the survey. Lenders and attorneys may ask that the title insurance company amend these Schedule B exceptions with the added phrase, “as shown on the survey prepared by _____, job number _____, dated _____.”

Courts have held that this language on a title insurance policy results in the title insurance company being liable when the easement or building setback line is located in an area other than as noted on the survey. For this reason, the title examiner may be unwilling to add this additional language unless or until the examiner can review both the recorded document and the survey and independently verify that the surveyor has properly located the excepted interest.

B. [2.46] The Survey Seal, Certification, and Notes

When reviewing a survey, the attorney should study the surveyor's seal, the certification, and any notes that may be appended to the plat.

1. [2.47] Seals

The attorney should be concerned if a survey does not have a raised or inked seal or if the seal looks “fake.” On occasion, clients have altered a completed survey or plat of subdivision, photocopied the plat, and then passed it off as the original. To combat this problem, many surveys will contain a disclaimer indicating that they are not valid unless they have a raised seal. To address the problem of alterations of plats of subdivision, §2 of the Plat Act, 765 ILCS 205/0.01, *et seq.*, provides that only the surveyor or the surveyor's designee can record a plat of subdivision.

2. [2.48] Certifications

As noted in §2.38 above, a suggested survey certification is included in the 2021 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys. The attorney should always read the survey certification of any survey they are reviewing and examine closely any certification

that deviates substantially from the ALTA/NSPS certification. Generally speaking, the survey should contain words to the effect that the surveyor has *surveyed* the subject property. If instead the plat indicates that the surveyor has *platted* or *located* the subject property, the attorney should ask the surveyor to clarify the certification.

Consider, for example, the following survey certifications:

I, _____, hereby declare that this plat is a correct representation of a survey made from existing plats and records.

This certification suggests that the surveyor was never in the field at all. It is clearly ambiguous and should be explained.

Another variation of this certification is the following:

I, _____, hereby state that this map or plat was based on existing maps, plats, and surveys previously prepared by this office to ALTA/NSPS standards.

A nonstandard survey certification is not necessarily an indication that the surveyor is trying to limit their liability. It is possible that, because of either time or cost considerations, the surveyor's client has asked the surveyor to perform nonstandard services.

For example, a surveyor wrote the second of the above two certifications after the surveyor was given only two days to survey a large tract of land. The surveyor had surveyed the property a year earlier but was not able to re-survey the property in the time allotted. As a result, the surveyor updated the survey without performing additional field work.

Finally, consider this certification:

I, _____, an Illinois Professional Land Surveyor, hereby certify that the parcel plat hereon drawn has been prepared under my direction, and this plat is a correct representation of the property described therein.

When the surveyor was asked to explain this certification, he replied that his "survey" was actually a drawing based on a proposed plat of subdivision that he had prepared for a developer.

3. [2.49] Notes

Any surveyor's notes should be read carefully. Usually, these notes will aid the attorney in better understanding any issues or problems that the surveyor encountered while surveying the property. In addition, surveyors will often include information for the convenience of the client. This additional information might include the common address of the property or the identification of title commitment exceptions. If the legal description on the survey differs from the legal description in the title commitment, the surveyor might add a statement as to why this is the case.

It is possible, however, that a surveyor will include a note that limits the assurances of the survey certification. Again, this may be due to the demands of the surveyor's client, *e.g.*, "Observable evidence of utility easements is not shown pursuant to the client's request." Clearly, this note significantly alters the survey certification.

On the other hand, surveyors will sometimes add notes to their surveys that limit their liability under the survey certification. Consider the following survey note:

No statement is made concerning subsurface conditions, the existence of underground or overhead containers, or facilities that may affect the use or development of this tract. The underground, surface, and overhead utilities have been located from field survey information and existing drawings. The surveyor makes no guarantees that the underground, surface, and overhead utilities shown comprise all such utilities in the area, either in service or abandoned. The surveyor further does not warrant that the underground utilities shown are in the exact location indicated, although he does state that they are located as accurately as possible from information available. The surveyor has not physically located the underground utilities. The surveyor makes no claim to specific knowledge regarding the usage or type of overhead wiring shown hereon.

It appears that this surveyor has placed himself in an interesting dilemma. Generally, the land title survey standards require that the surveyor show only observable evidence of utilities on the survey, but once the surveyor decides to show the location of underground utilities, what is the liability of the surveyor?

This surveyor has attempted to limit his liability with this note, but the note also refers to above-ground utilities and, by adding this reference, the note takes away some of the assurances of the survey certification. For example, by indicating that "no statement is made concerning subsurface conditions, the existence of underground or overhead containers, or facilities that may affect the use or development of this tract," it appears that there may be other overhead utilities on the property that are not shown on the survey. Such a statement dilutes the survey certification because Section 5.E.ii of the 2021 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys requires the surveyor to show "[e]vidence of easements, servitudes, or other uses by other than the apparent occupants of the surveyed property not disclosed in the documents provided to or obtained by the surveyor pursuant to Section 4, but observed in the process of conducting the fieldwork if they are on or across the surveyed property."

Instead of drafting a note that may cause problems at closing, this surveyor should instead consider including Table A, Item 11, in the survey certification. As discussed in §2.28 above, Item 11 requires the surveyor to show on the survey

[e]vidence of underground utilities existing on or serving the surveyed property (in addition to the observed evidence of utilities required pursuant to Section 5.E.iv.) as determined by:

____ (a) plans and/or reports provided by client (with reference as to the sources of information)

____ (b) markings coordinated by the surveyor pursuant to a private utility locate request.

Item 11 sufficiently protects the surveyor as it limits the surveyor's liability regarding the location of underground utilities to observable evidence of the utilities and to plans provided by the client and other sources.

PRACTICE POINTER

- ✓ Surveyor's notes may include many other potential matters not discussed above and not predictable in the ordinary course of survey examination. Thus, all notes should first be reviewed to determine if they pertain to Table A items or to more unusual matters. Then, the attorney should examine the survey in its entirety to see how the note in question has affected the survey and/or the subject property. Finally, the attorney should analyze how the note in question may or may not limit the surveyor's liability or the client's ability to rely on the survey in the event of a legal dispute.
-

C. [2.50] Fences

While boundary lines of a property are imaginary lines that have no physical dimensions, fences are physical objects that do have height, width, and depth. They are physical objects present on the subject property that constitute improvements to the subject property, even if fences are temporary and nonpermanent in nature. In other words, fences can be added, removed, relocated, and torn down at any time, as opposed to building or other structures, which are not often capable of additions, removals, or relocations without considerable time, effort, and expense.

1. [2.51] Fences "on Line"

Many surveys will indicate that a fence is "on line" — that is, the fence has been constructed along the boundary line of the subject property — but how can a fence be "on line" without some portion of the fence being across the boundary line and encroaching onto adjoining property? Because a boundary line has no physical aspect to it, a fence that is "on line" must necessarily fall on one side of the boundary line or the other or, in many cases, both sides at the same time.

A fence is "on line" when any visible part of the fence is on the boundary line of the property. If, for example, three fourths of the width of a board fence is on adjoining property, but the remaining one fourth is on the land being surveyed, that fence is still "on line." Only when the fence is completely on the adjacent property, with no part of the fence "on line," is there a fence encroachment.

PRACTICE POINTER

- ✓ When surveyors survey land, they usually will not know who owns a fence. Therefore, fences will not be labeled as “encroachments” on the survey — that is, there will not be a statement on the survey that *A*’s fence encroaches onto *B*’s property. Rather, surveyors will usually simply depict the location of the fence and indicate the distance from the fence to the boundary line of the land without any further determination or comment. It is up to the attorney and the client to determine ownership of a fence and determine whether it is an encroachment on the subject property, the adjacent property, or both. Further, due to their nonpermanent nature, title insurance companies will not insure or endorse over a fence, regardless of whether it constitutes an encroachment.
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2. [2.52] Fences and the Rectangular Survey System

Residential legal descriptions may simply consist of a lot number and a subdivision name, but as suggested in §2.2 above, legal descriptions for commercial property often can be much more complex. A metes and bounds description of unsubdivided property might be several pages long, especially if it is a large tract that falls in two or more sections of land.

When reviewing a survey of unsubdivided land (*e.g.*, a quarter-quarter section, or approximately 40 acres), the attorney may want to question a survey that discloses a fence that is “on line” relative to an interior section line, such as a quarter section line or a quarter-quarter section line. See §2.160 below. These interior lines were never surveyed by the original government surveyors; they can be located only by protracting (*i.e.*, by measuring and then establishing on the ground) the original section. Often, landowners would construct boundary fences by running a line inward from the north, south, east, or west quarter section corner. However, because these interior lines were never surveyed, these interior boundary fences were not always constructed on these interior lines. A survey that shows a fence “on line” relative to an interior section line might be an indication that the surveyor merely assumed that the fence marked the location of the interior line.

On the other hand, the exterior section lines and all eight exterior section corners *were* plotted by the government surveyors. Often, fences located along these exterior lines are the only remaining evidence of these section lines. It is possible that a fence constructed along an exterior section line accurately marks the location of the section line. Nonetheless, the attorney may want to question a survey that shows a fence “on line” relative to an exterior section line or discloses a fence along an exterior section line but gives no dimensions relative to the location of the fence and the section line. Again, it is possible that the surveyor assumed that the fence marked the exterior section line without performing the necessary field work to verify the location of the section line.

For further information on fences, see §§2.142 and 2.157 below.

PRACTICE POINTER

- ✓ Although fences constructed along interior section lines may not be accurate evidence of the location of these section lines, the attorney and the surveyor should not automatically dismiss these fences as irrelevant and unimportant. As shown in §2.161 below, these fences may tie into the north, south, east, or west quarter section corners, which were established by the original government surveyors. Although these fences may not be constructed along the interior section lines, they may aid in the location of these exterior section corners.
-

D. [2.53] “Actual” and “Occupied” Boundary Lines

The attorney should question a survey that discloses two identically named section lines or record monuments, *e.g.*, the south line of the northwest quarter and the south line of the northwest quarter *as occupied*. See §2.161 below. Strictly speaking, this notation is incorrect; there can be only one section line, as this is a *record monument* or *title line* that never changes location. On the other hand, the location of *ownership lines* can change, such as due to certain legal doctrines like adverse possession.

EXAMPLE: Jane owns the northwest quarter of section 3. The four boundaries of this quarter section are title lines; the location of these lines cannot change. Jane fences in and adversely occupies a portion of the adjoining quarter section, the northeast quarter of section 3, for 20 years. It is possible that because she has adversely occupied a portion of the northeast quarter for the statutory period, her ownership lines have changed to include this additional land.

PRACTICE POINTER

- ✓ Although the identification of section lines and lot lines “as occupied” is, strictly speaking, incorrect, a survey disclosing the use of this term is probably not defective. For example, it is possible that the surveyor who surveyed the property shown in §2.161 below realized that there could be only one south line of a quarter section but wanted to point out that the field location of the fence traditionally thought to be located along the quarter section line and the location of the actual quarter section line, as determined by the surveyor, were not in one and the same place. When used in this manner, the identification of a section line or lot line is an acceptable “phrase of convenience.”
-

Consider the survey of the following described property (see §2.162 below):

Beginning at the southwest corner of Blackacre Subdivision; thence south 5 degrees east to the south line of the southwest quarter of Section 1 *as occupied*; thence east along said south line to the west line of Plank Road; thence north 20 degrees east along said west line to the southeast corner of lot 10 in Blackacre Subdivision; thence west along the south line of said Blackacre Subdivision to the point of beginning.

This is another example of a survey that discloses two south lines, one actual south line and a south line “as occupied” by a fence, but here the surveyor has actually amended the legal description to reference the south line of the southwest quarter “as occupied.” Again, perhaps the surveyor knows that there can be only one south line of a quarter section, but wanted to point out that the fence, which third parties thought was built along the quarter section line, and the actual quarter section line are not in the same location. In this instance and in the previous example, the attorney will have to work with the surveyor and the title insurance company to resolve this apparent conflict.

How can this matter be rectified? The surveyor should examine the legal descriptions of deeds of the adjoining property and compare the descriptions to the legal description of the subject property. Are there any gaps or overlaps? The surveyor should talk to other surveyors who have worked in this area and examine their surveys, if possible. How did these surveyors address this problem? Did their legal descriptions monument to this occupation line? Have improvements been constructed along this occupation line? Because there can be only one quarter section line, the surveyor may want to rewrite the legal description. For example, the surveyor could either eliminate the reference to the south line of the southwest quarter as occupied or reference the location of the “occupied” south line relative to the location of the “real” south line. Note that 225 ILCS 330/5 allows a surveyor to prepare or amend legal descriptions.

Consider the survey shown in §2.163 below. Note that the surveyor has labeled the east line of the property as the “property line as occupied.” What does this mean? What is the significance of the line east of this line? Is there an “occupied” property line and a “legal description” property line? Is the “legal description” property line 16.5 feet east of the “occupied” property line? Why has the surveyor described the “occupied” property line in this manner? What property is the title insurance company insuring? Is the title insurance company insuring that strip of land east of the “occupied” property line? Clearly, this surveyor has raised questions that need answers.

Note that the survey shown in §2.164 below indicates that lot 37 has two south lines, a south line “as occupied” and a south line “per subdivision plat.” Furthermore, it appears that an owner of lot 37 has placed a fence *north* of the true south line of the lot. This fence is as much as 4.2 feet north of the southwest corner of lot 37. Has the owner of lot 37 given up all right, title, and interest to that part of lot 37 that is south of the fence? Is the owner of the land south of the fence now occupying this area of conflict?

Lot 37 has only one south line. The south line of lot 37 is another example of a *title line* that is also a *record monument*. If a title insurance company were asked to insure this lot, it would probably ask the surveyor to rewrite the legal description to exclude the property between the fence and what appears to be the true south line. In the alternative, the title insurance company might insure the entire lot but raise an exception in the title commitment as to the rights of the property owner to the south in this area. Assuming that the southerly property owner is not currently adversely occupying the area south of the fence, the exception could be waived once the southerly owner quitclaimed any interest it had in the area to the owner of lot 37.

E. [2.54] “Record” vs. “Measured” Distances of Land Boundaries

Surveys will sometimes show “record” and “measured” distances. That is, a lot line might have a platted or “record” dimension of a certain number of feet. When the surveyor goes out into the field and actually measures this lot line, the surveyor discovers a “measured” distance that may be more or less than the actual record distance. This difference between record and measured distances is sometimes due to the greater accuracy of new technology. However, the attorney should question large variations between “record” and “measured” distances.

EXAMPLE: A surveyor is hired to survey a lot in a small five-lot commercial subdivision. The record dimension of each lot is 50 feet in width, for a total of 250 feet. The surveyor goes to the property and locates iron pipes set near each corner of the lot in question. The surveyor then measures the distance between the two pipes and determines the width of the lot to be 49.5 feet. The surveyor indicates on the survey that the width of the lot is “50 feet record, 49.5 feet measured.” However, it is possible that if the surveyor had measured the entire width of the subdivision, the surveyor would have found original lot corners indicating that the subdivision was indeed 250 feet in length and that the lots were all 50 feet in width. Such a finding would suggest that at least one of the iron pipes the surveyor measured from was in the wrong location.

Experienced surveyors know that a pipe in the ground is not sacrosanct. Monuments are often moved; common culprits are utility companies, cable companies, and fence installers. Also, subsequent surveyors (usually called “retracement surveyors”) may not find an original monument in the ground when performing their fieldwork. Rather than perform the necessary fieldwork to properly restore the lost corner, they may instead place a new pipe in the ground at what they feel is the lot corner. Indeed, surveyors often tell of instances in which two or more pipes can be found at a lot corner. A measurement taken from the wrong pipe can obviously produce a difference between record and measured distances.

So how much of a difference between record and actual measurements is questionable? Even three tenths of a foot in a one-hundred-foot length might be considered a substantial deviation in some cases. Although a marked difference between record and measured distances does not automatically mean that the survey is defective, the attorney may want to ask the surveyor to explain, if possible, the reason for the difference between the two distances.

The attorney should realize, however, that the issue of record and measured distances is extremely subjective. For example, sometimes the age of the subdivision is a factor. That is, there might be a rather large (but still legitimate) difference between record and measured distances in a very old subdivision. Unfortunately, there is no “table of tolerable deviation” to which the attorney can refer. Every situation is different.

Furthermore, in the City of Chicago, there are unique reasons for differences between record and measured distances. The first one stems from the plethora of subdivisions in Chicago, with resubdivisions and resubdivisions of the same property literally piled on top of each other. Some of these subdivisions are merely “paper” subdivisions — that is, subdivisions in name only that were never laid out in the field. Also, some surveyors in the past, fearing the rigidity of the Torrens system of document registration that is no longer used, were reluctant to change the legal

descriptions of their surveys and plats of resubdivision to reflect more accurate legal descriptions that resulted from advances in surveying technology. Now that Torrens is obsolete (see Torrens Repeal Law, 765 ILCS 40/1, *et seq.*), surveyors are more willing to disclose these differences between record and measured distances on their plats.

When land surveying was in its infancy, the Gunter's chain and compass were used to measure distances and bearings. Surveyors today have electronic wonders like GPS and EDMs (electronic distance measurements) at their disposal. Is it any wonder that there are differences between record and measured distances and bearings? Should these differences be memorialized in the public record? That is, should legal descriptions be amended to reflect both the record and measured distances and bearings?

For example, consider this record description:

thence north 30 degrees 46 minutes 18 seconds east 246.00 feet to the east line of the northwest quarter of Section 6; thence . . .

After the surveyor surveys the land and discovers a difference between the record distance and the measured distance, the surveyor revises the description to disclose both these record and measured distances:

thence north 30 degrees 46 minutes 18 seconds east 246.00 feet record (246.59 feet measured) to the east line of the northwest quarter of Section 6; thence . . .

This issue of amending legal descriptions to reflect differences between record and measured distances is an extremely controversial one, especially among surveyors. Some people feel that the record description is virtually sacred and that any revised description should contain the original record distances and bearings. On the other hand, other people feel that, if the legal description contains references to artificial, natural, or legal monuments, the legal description can be amended without including the old record distance or bearing as these monuments take precedence over any conflicting distance or bearing.

Note, for example, how the second description has been revised to delete the references to the original distance:

thence north 30 degrees 46 minutes 18 seconds east 246.59 feet to the east line of the northwest quarter of Section 6; thence . . .

For more information on monuments, see §§2.116 and 2.127 below.

EXAMPLE: A bearing and distance of the record legal description for the west line of the property in question reads as follows:

thence north 0 degrees 13 minutes 14 seconds west, 1000 feet . . .

However, the survey of the same bearing and distance consists of two courses:

thence north 0 degrees 15 minutes, 16 seconds west, 500 feet; thence north 0 degrees, 16 minutes, 17 seconds west, 500 feet . . .

How should the attorney, the surveyor, and the title insurance company handle this discrepancy?

Section 6.B.ii of the 2021 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys indicates that the preparation of a new legal description should be avoided. Instead, the surveyor should use the record legal description but reflect the two different courses on the face of the survey, next to the west line of the property. (This is consistent with Section 6.B.iii of the 2021 ALTA/NSPS Standards, but see Section 6.B.viii, which states: “When, in the opinion of the surveyor, the results of the survey differ significantly from the record, or if a fundamental decision related to the boundary resolution is not clearly reflected on the plat or map, the surveyor must explain this information with notes on the face of the plat or map.”)

The title insurance company should examine the legal description of the adjoining property to the west to make sure that the west line of the land being insured is coincident with the east line of the adjoining property with no gaps or overlaps between the two lines.

F. [2.55] The Apportionment or Proportional Measurement Rule

One possible explanation for differences between record and measured lot distances may be record and measured differences between subdivision corners or block corners. When a surveyor uncovers original subdivision monuments or can reconstruct original monumentation and thereby discovers legitimate differences between record and measured distances that are between subdivision corners or between block corners, the surveyor will use the apportionment rule to apportion these differences among the various lots. That is, the excess or deficiency that the surveyor discovers is added to or subtracted from each lot in direct proportion to the size of each lot. Thus, if lot 1 is 100 feet wide and lot 2 is 200 feet wide, lot 1 gets one third of any excess or deficiency, and lot 2 gets two thirds of any excess or deficiency. This only makes sense; because lot 2 is twice as big as lot 1, lot 2 gets twice as much excess or deficiency as lot 1. Rarely, however, are excess and deficiency problems as easy to solve as this. As noted in the following cases, the apportionment rule is recognized in Illinois; because the surveyor uses this rule to *identify* lot boundaries and not *change* lot boundaries, the surveyor can unilaterally apply the rule without first requiring deeds from the lot owners. *See Francois v. Maloney*, 56 Ill. 399 (1870) (finding it just and reasonable to divide deficiency in front lot line of subdivision pro rata amongst owners abutting said front line); *Clayton v. Feig*, 179 Ill. 534, 54 N.E. 149 (1899) (acknowledging rule set forth in *Francois, supra*, that law will apportion shortage in entire tract between all lots comprising tract and locate dividing line(s) accordingly); *Nilson Bros. v. Kahn*, 314 Ill. 275, 145 N.E. 340 (1924); *Reynolds v. Heerey*, 88 Ill.App.3d 101, 410 N.E.2d 334, 43 Ill.Dec. 334 (1st Dist. 1980); *May v. Nyman*, 3 Ill.App.3d 580, 278 N.E.2d 97 (3d Dist. 1972) (acknowledging apportionment rule in holding that defendant was not entitled to compensation for deficiency allocated to his parcel); *Balzer v. Pyles*, 350 Ill. 344, 183 N.E. 215, 217 (1932) (“Where a block has been platted into lots, and the lots have been sold, in the absence of any agreement or question of title by adverse possession, a shortage in the block will be prorated among the several lots.”); *Evers v. Watkins*, 72

Ill.App.3d 113, 390 N.E.2d 612, 614, 28 Ill.Dec. 445 (5th Dist. 1979) (“As the application of this [apportionment] rule affects all lots, relief cannot be provided until all interested and necessary parties are joined in one action.”); *Dobrinsky v. Waddell*, 233 Ill.App.3d 443, 599 N.E.2d 188, 174 Ill.Dec. 642 (4th Dist. 1992) (acknowledging normal rule would apportion excess among all affected lots); 5 I.L.P. *Boundaries* §2 (2012).

PRACTICE POINTER

- ✓ The apportionment rule is the proper means of addressing differences between record and measured distances when the lots are created simultaneously, resulting in no junior or senior rights between parcels. For a discussion of this concept of junior and senior rights due to gaps and overlaps, see §§2.91 – 2.104 below.
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EXAMPLE: There is a four-lot platted industrial park. The subdivision is rectangular in shape. The lots have record widths of 50 feet, 100 feet, 100 feet, and 350 feet. Thus, there is a record distance of 600 feet. However, the surveyor locates the four original subdivision corners and determines that the measured length of the subdivision is actually 603 feet. There is 3 feet of excess within the subdivision. This 3 feet of excess length must now be apportioned among all four lots. The procedure is as follows:

First, take the excess (or deficiency, as the case may be), which in this example is 3 feet, and divide it by the record subdivision distance (or block distance, if one is apportioning the distance within a block):

$$3 \div 600 = 0.005; \text{ this figure is called the “constant.”}$$

Now multiply the constant (0.005) by the record width of each lot. This is the proration that is added to each lot. The record distance plus this proration is the measured distance:

$$0.005 \times 50 = 0.25; \text{ therefore, the 50-foot lot has a measured distance of 50.25 feet.}$$

$$0.005 \times 100 = 0.5; \text{ therefore, one 100-foot lot has a measured distance of 100.5 feet.}$$

$$0.005 \times 100 = 0.5; \text{ therefore, the other 100 foot-lot has a measured distance of 100.5 feet.}$$

$$0.005 \times 350 = 1.75; \text{ therefore, the 350-foot lot has a measured distance of 351.75 feet.}$$

Note that if these measured distances are added together, the total is 603 feet, which is the measured distance of the length of the subdivision:

$$50.25 + 100.5 + 100.5 + 351.75 = 603$$

However, if there is a street or alley within the block or subdivision, one does not prorate the width of the right-of-way. The “surveyor’s rule” (which dates back to old English common law) is that streets and alleys get their full measure; the “sovereign” cannot be dispossessed of its land.

EXAMPLE: A block in a subdivision has four lots; each lot is 50 feet wide. A 16-foot alley runs through the middle of the block. The surveyor finds the original block corners and determines that although the record distance of the block is 216 feet, the measured distance is actually 214 feet. That is, there is a 2-foot deficiency within the block. Because streets and alleys get their full measure, however, the deficiency is apportioned only to the four lots and not to the 16-foot alley. The width of the alley remains the same. Therefore, in order to compute the constant, the surveyor first must deduct the width of the alley before dividing the deficiency by the adjusted record block distance:

216 (record block distance)

less 16 (width of alley)

is 200 (adjusted block distance)

Again, divide the deficiency by the (adjusted) record block distance:

$$2 \div 200 = 0.01$$

Now multiply the constant by the record width of each lot:

$$0.01 \times 50 = 0.5$$

Now deduct 0.5 from the width of each lot:

$$50 - 0.5 = 49.5 \text{ feet.}$$

The measured distance of the block is 214 feet. Each lot in the subdivision has a measured distance of 49.5 feet. The width of the 16-foot alley is not adjusted; it remains the same. Therefore:

$$49.5 + 49.5 + 49.5 + 49.5 + 16 = 214$$

G. [2.56] Measured Distances from Improvements to Property Lines

When reviewing a survey, the attorney should be concerned if there are no “ties,” or measured distances, from any building on the property to the boundary line of the land. This could be an indication that the surveyor did not perform all the necessary fieldwork. Similarly, the attorney should question a survey that depicts a fence along a property line but does not disclose either that the fence is “on line” or the distance from the fence to the property line.

PRACTICE POINTER

- ✓ Sections 5.C.ii and 5.D of the 2021 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys require the surveyor to show building and fence ties on the survey. If the surveyor has not shown this information, it is possible that the surveyor's client requested that this information not be disclosed, perhaps due to either time or cost considerations. If this is the case, however, the surveyor will probably qualify the survey certification accordingly. The title insurance company may question any amended survey certification.
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H. [2.57] Evidence of Adverse Possession

Contrary to what many people believe about land ownership, it is possible for someone to gain title to a property without ever purchasing it from the record owner. In the extraordinary remedy of adverse possession, a plaintiff may prevail an action to quiet title against the owner of record if the plaintiff can establish five elements by clear and unequivocal evidence: “(1) continuous, (2) hostile or adverse, (3) actual, (4) open, notorious, and exclusive possession of the premises, (5) under claim of title inconsistent with that of the true owner.” *Joiner v. Janssen*, 85 Ill.2d 74, 421 N.E.2d 170, 174, 51 Ill.Dec. 662 (1981).

The illustration in §2.165 below indicates that the owner of the adjoining property to the north has been mowing and landscaping a portion of the land in question. This owner has also placed plastic playground equipment on the property. Along the east line, an owner to the east has placed planting material in the southeast corner of the land. Another owner has dumped yard waste on the land.

Could this be evidence of adverse possession? In *Joiner, supra*, the Illinois Supreme Court found that there were sufficient acts of adverse possession in that the “[p]laintiffs mowed the grass on the 14-foot strip in question, raked leaves, planted and removed trees, bushes and flowers, gave away trees, bushes and flowers from the land as gifts, buried their pet dog on the strip when it died, shoveled snow from the walk in front of the strip, and generally maintained the property.” 421 N.E.2d at 173. See also 735 ILCS 5/13-101, *et seq.*

Note that the surveyor has a duty to show evidence of adverse possession on the survey. Section 5.C.i of the 2021 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys provides that the surveyor must locate “[t]he character and location of evidence of possession or occupation along the perimeter of the surveyed property, both by the occupants of the surveyed property and by adjoining, observed in the process of conducting the fieldwork.”

The enclosing of land with a fence by a third party has always been the classic and textbook example of adverse possession. *But see Burlew v. City of Lake Forest*, 104 Ill.App.3d 800, 433 N.E.2d 353, 60 Ill.Dec. 556 (2d Dist. 1982), holding that an encroachment of a fence over an insubstantial portion of a lot is not sufficient notice of possession to constitute adverse possession of said portion.

PRACTICE POINTER

- ✓ How can a title exception relative to the possible possessory rights of adjoining neighbors be waived from the title commitment? In this instance, the attorney for the seller went to the site and talked to the owners of the land to the north and to the east. Neither neighbor was attempting to acquire any ownership rights to the land. As indicated by photographs taken by the attorney, the property was simply a huge tract of weeds and brush that the two men were using as a dumping ground for yard waste. These pictures, together with the attorney's letter of explanation, convinced the title insurance company that it need not be concerned about these neighbors attempting to acquire an ownership interest in the land.
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I. [2.58] Tree Encroachments

Unless specifically requested to do so, most surveyors will not show tree “encroachments” on their surveys. The reason for this is that in Illinois a tree that is located on the common boundary line of two adjoining landowners is the common property of these owners, held as tenants in common. See *Ridge v. Blaha*, 166 Ill.App.3d 662, 520 N.E.2d 980, 981 – 982, 117 Ill.Dec. 629 (2d Dist. 1988) (upholding “well-established rule that a tree standing on the division line between adjoining proprietors, so that the line passes through the trunk or body of the tree above the surface of the soil, is the common property of both proprietors as tenants in common”), quoting 1 AM.JUR.2d *Adjoining Landowners* §22 (1962). Thus, as with a fence, the surveyor may depict trees on the survey where appropriate but will not label them as belonging to the owner of the subject property or an adjacent owner.

For information about issues concerning trees, see Richard F. Bales, *Tree Encroachment Law and Litigation in Illinois*, 39 Real Prop.Newsl., No. 7, pp. 1, 3 – 4 (1994); Richard F. Bales, *Illinois Law Relating to Tree Encroachments*, Real Prop.L. Communicator, p. 4 (Winter 1994); and Richard F. Bales, *Illinois Law Relating to Tree Encroachments*, 45 Real Prop.Newsl., No. 2, pp. 3 – 8 (Nov. 1999).

J. [2.59] Unrecorded Easements

The examination of surveys of commercial property is more than just looking for encroachments and building line violations. Even such matters as unrecorded easements take on a whole new dimension when working in the commercial arena.

The survey of an industrial building in §2.166 below indicates that an adjoining commercial structure was built along the east line of the subject property. Note that the surveyor has indicated that two doors along this east line swing out and thus over onto the subject property. As the easterly portion of this property is a parking lot, it appears that the owner of this building (and possibly the owner's customers) has been walking back and forth over the property in question in order to enter and exit this east building. If this is the case, then it is possible that the land in question is subject to at least two unrecorded easements — an easement for the two doors that swing out and over onto

the land and an easement for pedestrian access. If the owner and the owner's customers are parking their cars on this parking lot, there may be a third easement. *But see Rita Sales Corp. v. Bartlett*, 129 Ill.App.2d 45, 263 N.E.2d 356, 362 (3d Dist. 1970) (“[A] permissive use will never ripen into an easement by prescription.”).

Is there any way that a title insurance company might underwrite these survey matters to the satisfaction of its insured's counsel? With appropriate affidavits or releases in which, for example, the owner of the adjoining property affirmed that he and his customers do not normally use the doors, the title insurance company might be willing to raise an exception but also include an endorsement indicating that, as of the date of policy, there has been no easement created as a result of the doors swinging out onto the insured land. Such an endorsement might read as follows:

The Company hereby insures the Insured against loss or damage that the Insured shall sustain by reason of the entry of any final judgment by a court of competent jurisdiction, determining that as of the date of policy the owner of the adjoining land to the east has acquired an easement (by prescription or otherwise) over the land described in Schedule A, as noted in Schedule B at exception _____ and as shown on the land title survey of _____, dated _____, job number _____.

The title insurance company will probably want the seller's assurances that it will pay all defense costs in the event that the neighbor later litigates the right to use the doors for ingress and egress. These assurances are usually memorialized in a document called either a “personal undertaking” or a “title indemnity.” In the event that a court later determines that the neighbor had already established an easement over the insured property as of the date of the policy, the title insurance would have liability under the endorsement.

Note that the endorsement would be applicable only to the possible creation of an easement prior to the date of the title insurance policy. The endorsement would not protect against a court-ordered determination that an easement was created sometime after the date of the policy.

The 2021 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys impose a duty on the surveyor to disclose these doors, even though they are appurtenant to a building that is located on adjoining property. Sections 5.C.i and 5.C.iii of the 2021 ALTA/NSPS Standards indicate that these doors, as well as other matters, should be shown on the survey, requiring that the field work include the following:

- i. The character and location of evidence of possession or occupation along the perimeter of the surveyed property, both by the occupants of the surveyed property and by adjoining, observed in the process of conducting the fieldwork.**

* * *

- iii. Without expressing a legal opinion as to the ownership or nature of the potential encroachment, the evidence, location, and extent of potentially encroaching structural appurtenances and projections observed in the process of conducting the fieldwork (e.g., fire escapes, bay windows, windows and doors that open out,**

flue pipes, stoops, eaves, cornices, areaways, steps, trim) by or onto adjoining property, or onto rights of way, easements, or setback lines disclosed in documents provided to or obtained by the surveyor.

Note that Section 5.C.iii also offers an enlightening observation on what the surveyor should *not* show on their survey. This paragraph provides that the surveyor should disclose encroachments “[w]ithout expressing a legal opinion.” *Id.* Thus, the surveyor will indicate on the survey that the doors “swing out” onto the adjoining property without adding that “the neighbor to the east has acquired an easement by prescription over a portion of the surveyed property.”

Surveyors normally will avoid making such legal conclusions. Most surveyors are not lawyers and therefore do not have the legal training to make such statements. In addition, it is possible that the provisions of their errors and omissions insurance mandate that they show only *facts* on their surveys and that they not draw legal *conclusions* from these facts. Therefore, surveyors may show physical evidence of encroachments or easements but will not make any conclusions relative to this evidence. For example, although the surveyor may show a building encroaching onto adjoining property, the surveyor will not state on the survey that “the owner of the land described on this plat now owns by adverse possession the land underneath the encroaching building to the east.”

As mentioned in §2.51 above, although a surveyor may show an encroaching fence on the survey, the surveyor will not normally indicate who owns the fence.

Although the surveyor may show a vacated right-of-way appurtenant to other surveyed property, the surveyor will not state that “upon vacation of the right-of-way, the owner of the adjoining property acquired a fee-simple interest in said right-of-way.”

Although a surveyor may indicate on the survey that a driveway encroaches onto the land in question, the surveyor will not label the encroachment a “prescriptive easement.”

K. [2.60] Rectangular Coordinates

On occasion, a “coordinate table” will be shown on a survey or plat of subdivision. This table will include numbers at various “northing” and “easting” points of reference, *e.g.*, “Point 1: Northing 35052.187; Easting 17401.211.” In the alternative, this information may be shown at the lot corners of the building or buildings on the land, *e.g.*, “N 9618.6184; E 11172.4589.”

This listing is merely a local assumed coordinates system (as compared to the system under the Illinois Coordinate System Act, 765 ILCS 225/1, *et seq.*, which was repealed as of January 1, 2025). The table sets forth the coordinates of the lot corners of building corners so that a surveyor can reestablish, if necessary, the location of the corners. This information is useful only to surveyors; the attorney or title insurance company need not be concerned with it.

V. [2.61] ADVANCED SURVEY ISSUES

When representing a client in the purchase or sale of commercial property, the attorney must be able to do more than simply review and approve a completed survey. A myriad of survey-related

matters can confront and confound both the surveyor and the title insurance company. The attorney must be prepared to step in and help solve any problem and guide all parties to a successful closing. Sections 2.62 – 2.118 below discuss four of the more esoteric issues that might arise during the course of the commercial transaction: water boundaries (§§2.62 – 2.85); the center-of-section problem (§§2.86 – 2.90); the gap/overlap problem (§§2.91 – 2.104); and the problems in determining the width of an undedicated road and locating its center (§§2.105 – 2.119).

A. [2.62] Water Boundaries

Land adjacent to creeks, streams, rivers, and lakes is called “riparian” land. Surveys of riparian land can present special issues, if not problems, to the surveyor and the real estate attorney.

1. [2.63] Navigable Waters — In General

A body of water is navigable if it is used, “or is susceptible of being used, in its ordinary condition, or with reasonable improvements, as a highway for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.” [Emphasis omitted.] *Senko v. La Crosse Dredging Corp.*, 16 Ill.App.2d 154, 157, 147 N.E.2d 708 (4th Dist. 1957), quoting *Davis v. United States*, 185 F.2d 938, 942 – 943 (9th Cir. 1950). See also *People ex rel. Deneen v. Economy Light & Power Co.*, 241 Ill. 290, 89 N.E. 760 (1909), writ of error dismissed sub nom. *People ex rel. Dunne v. Economy Light & Power Co.*, 234 U.S. 497, 58 L.Ed. 1429, 34 S.Ct. 973 (1914) (describing certain canals and dams in Des Plaines River as navigable and thus properties bordering them as riparian); *Bofman v. Material Service Corp.*, 125 Ill.App.3d 1053, 466 N.E.2d 1064, 1073, 81 Ill.Dec. 262 (1st Dist. 1984) (“Waters are navigable and amenable to federal regulations if they are subject to tidal fluctuations or have been, are, or in the future could be used for interstate transport or foreign commerce. . . . Inland waters not subject to tidal ebb and flow must be deep and wide enough to permit commercial vehicles to pass, in other words be ‘navigable in fact,’ and must link up with an interstate navigable waterway.” [Citations omitted.]); *People ex rel. Commissioners of Highways v. Board of Supervisors*, 122 Ill.App. 40 (2d Dist. 1905); *Du Pont v. Miller*, 310 Ill. 140, 141 N.E. 423 (1923), writ of error dismissed, 46 S.Ct. 17 (1925) (holding that clear and convincing evidence of dedication to public of privately owned waters is required in order for such waters to be considered navigable); *Schulte v. Warren*, 218 Ill. 108, 75 N.E. 783 (1905); Margit Livingston, *Public Recreational Rights in Illinois Rivers and Streams*, 29 DePaul L.Rev. 353 (1980).

The federal government has the right to enact legislation and thereby regulate commerce over navigable waters. See *Bofman, supra*, 466 N.E.2d at 1068 (waters within State of Illinois are subject “to the power of the Federal government to enact such legislation and make such regulations as relate to interstate commerce”), quoting *Du Pont, supra*, 141 N.E. at 425.

Regardless of who owns the bed of a navigable body of water, the public has an easement for navigation over these waters. See *Schulte, supra* (holding that owners of lands inundated by Illinois River, covering waters of which were of such depth and volume as to be navigable, retained ownership of lands subject only to public easement of navigation on waters overflowing land permanently submerged).

2. [2.64] Navigable Rivers and Streams

Navigable rivers and streams in Illinois include, but are not limited to, the Chicago River (see *Leitch v. Sanitary Dist. of Chicago*, 369 Ill. 469, 17 N.E.2d 34 (1938)), the Illinois River (see *Schulte v. Warren*, 218 Ill. 108, 75 N.E. 783 (1905); *Bofman v. Material Service Corp.*, 125 Ill.App.3d 1053, 466 N.E.2d 1064, 81 Ill.Dec. 262 (1st Dist. 1984)), the Des Plaines River (see *People ex rel. Deneen v. Economy Light & Power Co.*, 241 Ill. 290, 89 N.E. 760 (1909), writ of error dismissed sub nom. *People ex rel. Dunne v. Economy Light & Power Co.*, 234 U.S. 497, 58 L.Ed. 1429, 34 S.Ct. 973 (1914)), and the Mississippi River (see *Senko v. La Crosse Dredging Corp.*, 16 Ill.App.2d 154, 157, 147 N.E.2d 708 (4th Dist. 1957)). For others, see 17 Ill.Admin. Code §3704.APPENDIX A. However, it is important to note that, despite not previously having been identified as a navigable body of water, whether in caselaw or otherwise, other bodies of water may in fact qualify as navigable pursuant to the definitions and standards set forth in applicable caselaw.

3. [2.65] Nonnavigable Waters

The public has no easement for navigation over a nonnavigable body of water. Otherwise, riparian rights and servitudes along navigable and nonnavigable waters are similar. For example, the owners along both navigable and nonnavigable waters cannot obstruct or divert the water flow to the injury of other riparian owners. See *Leitch v. Sanitary Dist. of Chicago*, 369 Ill. 469, 17 N.E.2d 34 (1938); *Vogler v. Chicago & Carterville Coal Co.*, 180 Ill.App. 51 (4th Dist. 1913); *Eberle v. Greene*, 18 Ill.2d 322, 163 N.E.2d 822 (1960); *Indian Refining Co. v. Ambraw River Drainage Dist.*, 1 F.Supp. 937 (E.D.Ill. 1932); *Cook v. City of Du Quoin*, 256 Ill.App. 452 (4th Dist. 1930); *Atherton v. East Side Levee & Sanitary District*, 211 Ill.App. 55 (4th Dist. 1918); *Clark v. Lindsay Light & Chemical Co.*, 405 Ill. 139, 89 N.E.2d 900, transferred, 341 Ill.App. 316 (2d Dist. 1950); *Berry v. Schneider*, 27 Ill.App.3d 274, 327 N.E.2d 143 (5th Dist. 1975); *Druley v. Adam*, 102 Ill. 177 (1882); *Beidler v. Sanitary Dist. of Chicago*, 211 Ill. 628, 71 N.E. 1118 (1904); *Bouris v. Largent*, 94 Ill.App.2d 251, 236 N.E.2d 15 (3d Dist. 1968); 33 U.S.C. §21, et seq.; 36 I.L.P. *Waters* §1, et seq. (2018); Logan D. Fitch, REAL ESTATE TITLES IN ILLINOIS, pp. 469 – 470 (1948).

4. [2.66] The Conveyance of Lands Abutting Creeks, Streams, or Rivers

When a tract of land is bounded by a creek, stream, or river (hereafter generically called a “stream”), a conveyance of that tract will convey the land under the water to the center of the stream (assuming the grantor owns to the center) unless the deed indicates an intent to convey only to the edge of the stream. This is the case regardless of whether the body of water is navigable. See *Helmer v. Castle*, 109 Ill. 664 (1884); *Kinsella v. Stephenson*, 265 Ill. 369, 106 N.E. 950 (1914); *Carter Oil Co. v. Delworth*, 120 F.2d 589 (7th Cir. 1941); *Albany R. Bridge Co. v. People ex rel. Matthews*, 197 Ill. 199, 64 N.E. 350 (1902); *People ex rel. Deneen v. Economy Light & Power Co.*, 241 Ill. 290, 89 N.E. 760 (1909), writ of error dismissed sub nom. *People ex rel. Dunne v. Economy Light & Power Co.*, 234 U.S. 497, 58 L.Ed 1429, 34 S.Ct. 973 (1914); *Carter Oil Co. v. Watson*, 116 F.2d 195 (7th Cir. 1940); *Allott v. Wilmington Light & Power Co.*, 288 Ill. 541, 123 N.E. 731 (1919); *Rowland v. Shoreline Boat & Ski Club*, 187 Ill.App.3d 144, 544 N.E.2d 5, 135 Ill.Dec. 648 (3d Dist.), appeal denied, 128 Ill.2d 672 (1989); Logan D. Fitch, REAL ESTATE TITLES IN ILLINOIS, pp. 467 – 468 (1948).

If a riparian owner owns the land on both sides of a stream, the landowner owns the entire bed of the stream that is appurtenant to such lands. *Deneen, supra*; *Washington Ice Co. v. Shortall*, 101 Ill. 46 (1881); *Schulte v. Warren*, 218 Ill. 108, 75 N.E. 783 (1905).

In determining whether a conveyance of riparian land extends to the center of the stream or only to the bank of the stream, the courts will look to the language used by the parties and all of the attendant circumstances of the transaction. *See Rockwell v. Baldwin*, 53 Ill. 19 (1869); *Piper v. Connelly*, 108 Ill. 646 (1884); *Watson, supra*; *Delworth, supra*; *Heckman v. Kratzer*, 43 Ill.App.3d 844, 357 N.E.2d 1276, 2 Ill.Dec. 833 (2d Dist. 1976); *Rowland, supra*.

Does a riparian owner who owns land only to the edge of a body of water have the right to the use and enjoyment of the water? The answer appears to be “yes.” In *Roketa v. Hoyer*, 327 Ill.App.3d 374, 763 N.E.2d 417, 421, 261 Ill.Dec. 447 (5th Dist. 2002), the court noted that the lake in question was created to benefit the land that surrounded it. Citing the famous easement case *Beloit Foundry Co. v. Ryan*, 28 Ill.2d 379, 192 N.E.2d 384 (1963), the court indicated that the use of the lake was an easement appurtenant that benefited the adjoining land. Despite the holding in *Roketa*, unless there is a formal grant of easement, it is doubtful that a title insurance company would insure that a riparian landowner has the right to use the waters of any adjoining lake or stream.

a. [2.67] *Determining the Center of the Stream*

What is the “center” of the stream? Several cases refer to the center of a stream as the “thread.” *See, e.g., City of Chicago v. Laflin*, 49 Ill. 172 (1868); *City of Peoria v. Central Nat. Bank*, 224 Ill. 43, 79 N.E. 296 (1906); *Kinsella v. Stephenson*, 265 Ill. 369, 106 N.E. 950 (1914).

BLACK’S LAW DICTIONARY (12th ed. 2024) defines “middle thread” as “[t]he center line of something; esp., an imaginary line drawn lengthwise through the middle of a stream’s current.” Edward S. Bade, author of *Title, Points and Lines in Lakes and Streams*, 24 Minn.L.Rev. 305, 307 (1940), similarly suggests that the thread of a stream is a line midway between the two banks of the channel: “The term ‘thread of the stream’ means the geographical center of the stream at ordinary or medium stage of the water, disregarding slight and exceptional irregularities in the banks. It is fixed without regard to the main channel of the stream.” If the stream is made a boundary in a private conveyance, then the thread of the stream will be the stream boundary.

However, Walter G. Robillard and Donald A. Wilson, authors of EVIDENCE AND PROCEDURES FOR BOUNDARY LOCATION, p. 195 (4th ed. 2002), point out that some courts hold that the center or thread of a stream is the “thalweg” or deepest part of the channel. A surveying dictionary published jointly by the American Society of Civil Engineers and the American Congress on Surveying and Mapping (now the National Society of Professional Surveyors), DEFINITIONS OF SURVEYING AND ASSOCIATED TERMS (1984), appears to list both definitions for a stream’s thread and then adds a cautionary note: “Thread of river (or stream): The line equidistant from the edge of the water on the two sides of the stream at the ordinary stage of the water. In some cases it has been construed to mean the median line of the main channel of the stream; the state law should be consulted in any case.”

Houck v. Yates, 82 Ill. 179, 181 (1876), indicates that title to riparian land runs to the “center of the thread of the current of the river,” as do *Piper v. Connelly*, 108 Ill. 646, 651 (1884), *Bellefontaine Imp. Co. v. Niedringhaus*, 181 Ill. 426, 55 N.E. 184, 188 (1899), and *Turner v. Pierson-Hollowell Walnut Co.*, 260 Ill.App. 158, 162 – 163 (3d Dist. 1931). This phrase seems to suggest that Illinois follows the latter definition, *i.e.*, that the center is the deepest part of the channel. Indeed, the court in *Buttenuth v. St. Louis Bridge Co.*, 123 Ill. 535, 17 N.E. 439, 443 (1888), appears to concur: “Should the expression, ‘middle of the river,’ be construed to mean a line midway of the water surface, that would give no permanent boundary that could be ascertained. It would be at one point at one time, and some distance away at another.” However, *Buttenuth* was a state boundary case; the court was referring to the Mississippi River as the dividing line between the states of Illinois and Missouri. Also, the *Buttenuth* court seemed to disagree with the idea that the center of a river is its deepest part. Quoting *Rowe v. Smith*, 51 Conn. 266, 271 (1883), the court stated that “[t]he expression, ‘middle of the channel of the bay or harbor,’ does not refer to the thread of deepest water, but to that space within which ships can and usually do pass.” 17 N.E. at 444. See also Op. Att’y Gen. (Ill.) No. 352 (1944).

PRACTICE POINTER

- ✓ Although Illinois caselaw appears to be unclear as to the legal definition of the center of a stream, this should be of little concern to surveyors, title insurance companies, and attorneys. The survey certification will indicate that the survey was prepared pursuant to the 2021 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys, Section 6.B.vi of which warns of the uncertainties of water boundaries. Title insurance companies will raise a policy exception as to rights of third parties to the land. See §2.84 below. Because the boundaries of riparian land can change (see §2.80 below), it is doubtful that a title insurance company will give affirmative coverage concerning the location of a center of a stream, even when this center is the boundary line of the insured property.
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b. [2.68] Words That Carry Title to the Center of the Stream

The following are examples of language found to carry title to the center of the stream:

“[T]hence north to the creek being the north boundary line thence on the south side of creek.” *Carter Oil Co. v. Watson*, 116 F.2d 195, 196 (7th Cir. 1940).

“[I]t has almost universally been held that a description ‘to’ a stream does not exclude the stream as a boundary.” 116 F.2d at 198.

“All that part of the North half of the North West quarter . . . lying South of Big Creek, and all that part of said North Half of the North West Quarter, lying North of Big Creek.” *Carter Oil Co. v. Delworth*, 120 F.2d 589, 590 (7th Cir. 1941).

“All that part of the said East Half of Section 1 lying south of the center of the Public Highway which runs diagonally across said Section 1, and north of Rock River.” *Heckman v. Kratzer*, 43 Ill.App.3d 844, 357 N.E.2d 1276, 1278, 2 Ill.Dec. 833 (2d Dist. 1976).

c. [2.69] *Words That Do Not Carry Title to the Center of the Stream*

The following are examples of language found insufficient to carry title to the center of the stream:

“[T]o the west side of Cedar creek, thence down the west line of said creek.” *Rockwell v. Baldwin*, 53 Ill. 19, 22 (1869).

“[T]hence down the meanderings of said branch to the margin of Cahokia creek; thence down on the left bank of said creek to the line between sections No. 3 and 4.” *People ex rel. Commissioners of Highways v. Board of Supervisors*, 125 Ill. 9, 17 N.E. 147, 152 – 153 (1888).

PRACTICE POINTER

- ✓ If your surveyor tells you that a “record” metes and bounds legal description of a riparian parcel of land does not coincide with the “measured” dimensions of the parcel, ask the surveyor if these rules of law concerning the measurement of riparian boundaries were considered.
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d. [2.70] *Examples of “Attendant Circumstances” of the Transaction*

As noted in §2.66 above, the court will look to not only the language used by the parties to a transaction but also the attendant circumstances of the transaction in determining whether a conveyance of riparian land runs to the center of a stream or only to its bank. Examples of what the court reviewed in these circumstances are as follows.

In *Rockwell v. Baldwin*, 53 Ill. 19 (1869), the court ruled that the boundary line of the conveyance ran only to the bank of the stream. The court determined that the grantor limited the conveyance to the bank because he needed the free and uninterrupted flow of the water to run a mill. The court said that it would not be reasonable to suppose that the grantor would grant away the use of the creek without express words showing that intention.

In *Piper v. Connelly*, 108 Ill. 646, 652 (1884), the legal description in the deed ended with the words “according to the map drawn on back hereof.” The court determined that this map became a part of the description. The land was bounded in part by the Des Plaines River. As this map identified the river with only a single line, the court ruled that the conveyance went to the center of the river; it did not stop at the bank.

In *Carter Oil Co. v. Watson*, 116 F.2d 195 (7th Cir. 1940), the court was asked to interpret a 1905 deed and decide whether the parties intended the conveyance to run to the center of a creek. The court ruled that the northern limit of the land was the middle of the creek and not its south bank. The court noted that the grantor in the deed had no access to the creek after he executed the document, that he moved to Indiana in 1910, and that there was no road or trail along the creek after 1915. The court also observed that when the grantee of this deed subsequently sold the land, the grantee told the purchaser, “I’ll give you that road. If you want to sell this land to anybody across the creek . . . they should have a right of way in the premises.” 116 F.2d at 198.

In *Carter Oil Co. v. Delworth*, 120 F.2d 589, 590 (7th Cir. 1941), the court determined that a grantor who conveyed “all the land north of the creek and all of the land south of the creek,” moved from the community, paid no taxes on the creek bed, made no effort to change the tax records, and asserted no claim to the creek bed for 13 years failed to reserve title to the creek bed.

In *Heckman v. Kratzer*, 43 Ill.App.3d 844, 357 N.E.2d 1276, 2 Ill.Dec. 833 (2d Dist. 1976), the court looked to the wording of the legal description. It noted that the distinction between the two boundaries “north of Rock River” and “lying south of the center of the Public Highway” was so radically different that the drafter must have intended that the two phrases have different meanings. 357 N.E.2d at 1278. Citing *Piper, supra*, the court also examined the plat of subdivision and observed that the boundary line of the subdivision (and the southern lots) was identified by a heavy black line. The river, on the other hand, was separately distinguished by three lighter lines. Accordingly, the court determined that the lot lines did not run to the center of the river.

In *Rowland v. Shoreline Boat & Ski Club*, 187 Ill.App.3d 144, 544 N.E.2d 5, 135 Ill.Dec. 648 (3d Dist.), *appeal denied*, 128 Ill.2d 672 (1989), the court ruled that the use of “+” symbols on a plat suggested an intent to not limit the length of the lots but instead revealed an intent to extend the length of the lots to the thread of the river. The court concluded that if the intent was for the boundary to be a fixed point short of the river, there would have been no need for the “+” symbols. An exact measurement would have been all that was necessary. Also, the court noted that the original owner of the land described one of the lots in a deed as a “water lot.” 544 N.E.2d at 6.

5. [2.71] Lakes and Ponds — In General

A lake is a large inland body of water that has little or no current, that is fed by surface waters or springs, and that occupies a natural depression in the surface of the earth. A pond is similar to a lake, except that it may be natural or artificial and is much smaller in size. The primary difference between a creek, stream, or river and a lake or pond is that creeks, streams, and rivers have a natural motion or current in the water. Lakes and ponds in their natural state have no such motion or current. *See Trustees of Schools v. Schroll*, 120 Ill. 509, 12 N.E. 243, 246 (1887) (“Indeed, the controlling distinction between a stream and a pond or a lake is that in the one case the water has a natural motion, a current, while in the other the water is, in its natural state, substantially at rest.”); 36 I.L.P. *Waters* §28 (2018); 93 C.J.S. *Waters* §203 (2023).

The boundary line of a lake is the line at which water usually stands in its natural state, unaffected by storms or other causes. *See Smith v. City of Greenville*, 115 Ill.App.3d 39, 450 N.E.2d 389, 392, 70 Ill.Dec. 916 (5th Dist. 1983) (“In a conveyance calling for a lake as a boundary line, the boundary line is that line at which the water usually stands when free from disturbing causes.”); *Seaman v. Smith*, 24 Ill. 521 (1860); *Brundage v. Knox*, 279 Ill. 450, 117 N.E. 123 (1917).

a. [2.72] Navigable Lakes

Title to the bed of navigable lakes within the boundary of Illinois is vested in the State of Illinois in trust for all the people of the state. The owners of land adjoining a navigable lake own only to the water’s edge. *See Dupue Rod & Gun Club v. Marliere*, 332 Ill. 322, 163 N.E. 683 (1928); *Wilton v. Van Hessen*, 249 Ill. 182, 94 N.E. 134 (1911); *Chicago Yacht Club v. Marks*, 97

Ill.App. 406 (1st Dist. 1901); *Bowes v. City of Chicago*, 3 Ill.2d 175, 120 N.E.2d 15, *cert. denied*, 75 S.Ct. 81 (1954); *Wilkinson v. Watts*, 309 Ill. 607, 141 N.E. 383 (1923); *Illinois Cent. R. v. State of Illinois*, 146 U.S. 387, 36 L.Ed. 1018, 13 S.Ct. 110 (1892); 615 ILCS 5/24; Logan D. Fitch, REAL ESTATE TITLES IN ILLINOIS, pp. 470 – 471 (1948).

b. [2.73] *Meandered Lakes*

Numerous Illinois court cases refer to “meandered lakes.” A “meandered lake” is a lake that was surveyed by the government surveyors. Title to the bed of a meandered lake also vests in the State of Illinois in trust for its citizens. The court in *Hammond v. Shepard*, 186 Ill. 235, 57 N.E. 867, 867 – 868 (1900), noted that a meandered lake may or may not be navigable: “[S]hore owners on meandered lakes, whether navigable or nonnavigable, take title only to the water’s edge, the bed of the lake being in the state.” See also *Wilton v. Van Hessen*, 249 Ill. 182, 94 N.E. 134 (1911); *Schulte v. Warren*, 218 Ill. 108, 75 N.E. 783 (1905); *Fuller v. Shedd*, 161 Ill. 462, 44 N.E. 286 (1896); *Hardin v. Shedd*, 177 Ill. 123, 52 N.E. 380 (1898), *aff’d*, 23 S.Ct. 685 (1903); *People ex rel. Carlstrom v. Hatch*, 350 Ill. 586, 183 N.E. 610 (1932); *Hardin v. Jordan*, 140 U.S. 371, 35 L.Ed. 428, 11 S.Ct. 808 (1891); Op. Att’y Gen. (Ill.) No. 3591 (1931); Op. Att’y Gen. (Ill.) No. 65 (1949); Logan D. Fitch, REAL ESTATE TITLES IN ILLINOIS, pp. 470 – 471 (1948).

c. [2.74] *Non-Meandered Lakes*

Title of a riparian owner on a non-meandered lake extends to the center of the lake. It is presumed that a riparian owner owns title to the lake bed like a slice of pie. See §2.167 below. There appears to be no case in Illinois that supports this presumption, however. Nonetheless, if one person or entity owned all the land surrounding a non-meandered lake, that party would own the entire lake. A lake that was never meandered is presumed to be nonnavigable. See *Wilton v. Van Hessen*, 249 Ill. 182, 94 N.E. 134 (1911); *Hardin v. Jordan*, 140 U.S. 371, 35 L.Ed. 428, 11 S.Ct. 808 (1891); *Leonard v. Pearce*, 348 Ill. 518, 181 N.E. 399 (1932); Op. Att’y Gen. (Ill.) No. 65 (1949).

d. [2.75] *Nonnavigable Lakes*

The title of a riparian owner on a nonnavigable lake also extends to the center of the lake. *Hardin v. Jordan*, 140 U.S. 371, 35 L.Ed. 428, 11 S.Ct. 808 (1891); 36 I.L.P. *Waters* §30 (2018).

Multiple riparian owners of the bed of a private nonnavigable lake have the right to the reasonable use and enjoyment of the surface waters of the entire lake (not just the portion they own), provided they do not unduly interfere with the adjoining owners’ reasonable use and enjoyment of the lake. See *Beacham v. Lake Zurich Property Owners Ass’n*, 123 Ill.2d 227, 526 N.E.2d 154, 122 Ill.Dec. 14 (1988); *Statler v. Catalano*, 293 Ill.App.3d 483, 691 N.E.2d 384, 229 Ill.Dec. 274 (5th Dist. 1997); *Alderson v. Fatlan*, 372 Ill.App.3d 300, 867 N.E.2d 1081, 311 Ill.Dec. 95 (3d Dist. 2007), *aff’d*, 231 Ill.2d 311 (2008); *Bohne v. LaSalle National Bank*, 399 Ill.App.3d 485, 926 N.E.2d 976, 339 Ill.Dec. 501 (2d Dist. 2010).

e. [2.76] *Artificial Watercourses*

A landowner who constructs an artificial watercourse on their land owns that watercourse. See *Daum v. Cooper*, 208 Ill. 391, 70 N.E. 339 (1904); *Nottolini v. LaSalle National Bank*, 335 Ill.App.3d 1015, 782 N.E.2d 980, 270 Ill.Dec. 421 (2d Dist. 2003); *Alderson v. Fatlan*, 372 Ill.App.3d 300, 867 N.E.2d 1081, 311 Ill.Dec. 95 (3d Dist. 2007), *aff'd*, 231 Ill.2d 311 (2008); *Bohne v. LaSalle National Bank*, 399 Ill.App.3d 485, 926 N.E.2d 976, 339 Ill.Dec. 501 (2d Dist. 2010).

6. [2.77] **Islands**

A riparian owner who owns to the center of a stream owns all the islands in that half of the stream that are adjacent to their land. See §2.168 below; *Heckman v. Kratzer*, 43 Ill.App.3d 844, 357 N.E.2d 1276, 2 Ill.Dec. 833 (2d Dist. 1976); *President, etc., of Kaskaskia v. McClure*, 167 Ill. 23, 47 N.E. 72 (1897); *Davis v. Haines*, 349 Ill. 622, 182 N.E. 718 (1932); *Bellefontaine Imp. Co. v. Niedringhaus*, 181 Ill. 426, 55 N.E. 184 (1899); *Albany R. Bridge Co. v. People ex rel. Matthews*, 197 Ill. 199, 64 N.E. 350 (1902).

If an island straddles the thread of a stream, the owners on each side own a part of the island. See §2.169 below; *Nauman v. Burch*, 91 Ill.App. 48 (4th Dist. 1900).

7. [2.78] **Boundary Changes of Riparian Land by Operation of Law**

Generally speaking, the boundaries of one's property change when the owner conveys a portion of the land by deed, but land boundaries can also change by operation of law. One example is the doctrine of adverse possession. See 735 ILCS 5/13-101, *et seq.* Another example, discussed in §§2.79 and 2.80 below, concerns riparian land.

a. [2.79] *Definitions*

Accretion: The gradual and imperceptible addition to riparian lands that results from water washing up sand, earth, gravel, or other materials.

Alluvium: The land formed as the result of accretion.

Avulsion: The sudden addition or loss of land caused by the action of water or the sudden change in the bed or course of a stream.

Erosion: The gradual and imperceptible loss of riparian land by currents or tides.

Reliction: The process by which land is created by the gradual receding of water from one side of a stream, lake, or pond.

Submergence: The disappearance of land under rising water. Submergence should not be confused with erosion.

b. [2.80] *Rules of Law*

As a stream flows, the water on the inside of a curve moves more slowly than the water on the outside of the curve. Alluvium tends to be deposited along the banks on the inside of the curve, while the bank along the outside of the curve tends to wear away because of erosion. This action, though gradual, can cause a stream to change its course over time.

The riparian owner on the inside of the curve owns the land formed by the deposit of alluvium. The riparian owner on the outside of the curve loses title to land worn away by erosion. See §2.170 below; Philip M. Rice, *A Primer on Riparian Rights*, 7 Title Issues, No. 4 (July/Aug. 1998); *Lovingston v. County of St. Clair*, 64 Ill. 56 (1872), *appeal dismissed*, 85 U.S. 628 (1873); *County of St. Clair v. Lovingston*, 90 U.S. 46, 23 L.Ed. 59 (1874); *McCue v. Carlton*, 399 Ill. 11, 76 N.E.2d 435 (1947).

The riparian owner owns the alluvium, even if it is the result of natural or artificial causes or the acts of third parties, as long as the riparian owner does not create the conditions that cause the deposit of the alluvium. See *County of St. Clair v. Lovingston*, *supra*; *Brundage v. Knox*, 279 Ill. 450, 117 N.E. 123 (1917); *Revell v. People*, 177 Ill. 468, 52 N.E. 1052 (1898).

A prolonged drought may cause the waters of a lake or pond to gradually recede from its banks. A stream may slowly diminish in size. Any land exposed by this reliction becomes the property of the adjoining riparian owner. See *Linn Farms, Inc. v. Edlen*, 111 Ill.App.2d 294, 250 N.E.2d 681 (4th Dist. 1969); *City of Peoria v. Central Nat. Bank*, 224 Ill. 43, 79 N.E. 296 (1906); *Hasselbring v. Lizzio*, 332 Ill.App.3d 700, 773 N.E.2d 770, 266 Ill.Dec. 35 (3d Dist. 2002); *Hammond v. Shepard*, 186 Ill. 235, 57 N.E. 867 (1900).

Similarly, a riparian owner loses title to land that is submerged gradually and imperceptibly. See *Chicago Real Estate Board v. Mullenbach*, 184 Ill.App. 437 (1st Dist. 1913) (abst.); *Schulte v. Warren*, 218 Ill. 108, 75 N.E. 783 (1905).

Unless otherwise qualified, a description of land bounded by water will include any accretions. See *Rutz v. Kehr*, 143 Ill. 558, 29 N.E. 553 (1891); *Chicago Dock & Canal Co. v. Kinzie*, 93 Ill. 415 (1879); *McCue*, *supra*; *Cobb v. Lavelle*, 89 Ill. 331 (1878).

PRACTICE POINTER

- ✓ Because the boundaries of riparian land may change over time, a metes and bounds description of land that borders a stream or lake may disclose significant differences between record dimensions and measured dimensions. See, e.g., *Peoria Gas & Electric Co. v. Dunbar*, 234 Ill. 502, 85 N.E. 229 (1908), in which the plat indicated that the lot was 110 feet deep but, by accretion and fill, its depth was extended to 240 feet. See also *City of Peoria*, *supra*, which concerns the apportionment of accretions.
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The doctrines of reliction and submergence apply only when the changes to riparian land are gradual and imperceptible. An avulsion, or sudden and marked change in the shoreline (resulting, for example, from a violent storm), does not change the boundary line of riparian land even though the land may now be exposed or submerged. *See County of St. Clair v. Lovington, supra; Wall v. Chicago Park Dist.*, 378 Ill. 81, 37 N.E.2d 752 (1941); *Commissioners of Lincoln Park v. Fahrney*, 250 Ill. 256, 95 N.E. 194 (1911); *Chicago Real Estate Board, supra; Schulte, supra*.

8. [2.81] Surveyor Issues Concerning Riparian Land

When preparing surveys of riparian land, the land surveyor must be aware of the uncertainty of water boundaries. The surveyor must also be concerned about matters that may be disclosed on a recorded plat.

a. [2.82] Disclosures on Surveys

Surveyors recognize the fluctuation of the boundaries of riparian land. *See, e.g.*, Section 6.B.vi of the 2021 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys, which warns:

When the surveyed property includes a title line defined by a water boundary, a note on the face of the plat or map noting the date the boundary was measured, which attribute(s) of the water feature was/were located, and the caveat that the boundary is subject to change due to natural causes and that it may or may not represent the actual location of the limit of title. When the surveyor is aware of natural or artificial realignments or changes in such boundaries, the extent of those changes and facts shall be shown or explained.

Because these boundary lines can change, surveyors will often include a note on their surveys of riparian land indicating that the survey depicts the boundary as it existed on a certain date. This note is probably unnecessary as the survey is otherwise dated, but such a note is nonetheless acceptable.

b. [2.83] Meander Lines

A “meander line” is a guide line that was run along bodies of water by government surveyors. Meander lines are usually not considered to be boundary lines. Their original purpose was to aid the government in determining the area of fractional sections of land. (A “fractional section” is a section of land that contains substantially less than the “normal” 640 acres. *See* §2.171 below.) Courts have cautioned that “a meandered line bordering on the bank of a stream is not to be considered as the boundary of the tract, but simply as defining the sinuosities of the bank of the stream, and as a means of ascertaining the quantity of the land in the [fractional section.]” *Fuller v. Shedd*, 161 Ill. 462, 44 N.E. 286, 291 (1896), quoting *Lammers v. Nissen*, 4 Neb. 245, 251 (1876). *See also City of Peoria v. Central Nat. Bank*, 224 Ill. 43, 79 N.E. 296, 297 (1906) (“The rule is settled that meander lines are not intended as boundaries, but that the body of water will be regarded as the true boundary.”); *Houck v. Yates*, 82 Ill. 179, 182 (1876) (“[T]hat a meandered line, which does not appear upon the plats in the United States land office, and which was, no doubt, run for

the sole purpose of ascertaining the quantity of land in the [fractional section], should have the same effect as a visible government monument, is a proposition which we do not feel inclined to sanction.”); *Fuller v. Dauphin*, 124 Ill. 542, 16 N.E. 917 (1888); *Albany R. Bridge Co. v. People ex rel. Matthews*, 197 Ill. 199, 64 N.E. 350, 352 (1902) (“In preparing the official plat from the field notes, the meander line is represented as the border line of the stream, and shows to a demonstration that the water course, and not the meander line as actually run on the land, is the boundary.”); Logan D. Fitch, *REAL ESTATE TITLES IN ILLINOIS*, pp. 6 – 7 (1948).

In the unreported case *Fassnacht v. Baldwin*, 2011 IL App (2d) 101223-U, ¶43, the Illinois Second District Appellate Court gave an excellent explanation of a meander line:

This technique was used in the late 19th and early 20th centuries because, given the technology of the time, a computation of the actual acreage of a parcel of land with an irregular border, such as land abutting a navigable river, was difficult if not impossible to accomplish. The meander line located on a land survey plat would be used to approximate the sinuosity, or bends and curves, of the ordinary high water line of a navigable river. Fixed monuments would be set, in the property being surveyed, at the changes in the water course. The meander line would then be depicted on a plat as a straight line connecting these fixed points. Thus, because the actual, irregular boundary of the land was depicted as a straight line, the acreage computation was greatly simplified. However, the ordinary high water line, rather than the meander line, would remain the true boundary of the parcel of land. Grantees who were purchasing land abutting a navigable river would purchase not to the actual ‘meander line’ but would purchase the land to the ordinary high water line of the river that the ‘meander line’ was meant to represent. This became a legal presumption as to the intent of the parties in purchasing land that abutted a navigable river. Quoting *Houser v. United States*, 12 Cl.Ct. 454, 467 – 468 (1987).

PRACTICE POINTER

- ✓ Recorded plats of subdivision will sometimes disclose meander lines along bodies of water. Attorneys, surveyors, and title examiners should not assume that these lines represent the boundaries of the platted lots. As indicated in *Shedd, supra*, their purpose is to aid in the determination of the approximate area and approximate boundaries of the lot.

However, the *Shedd* rule is not an absolute maxim. There may be instances in which a meander line functions as a boundary line. The court will look to the intent of the parties in making this determination.

If the government surveyors did not erect any monuments or establish any corners at the meander line, the meander line does not serve as the boundary of the property. Similarly, if a government plat does not indicate that the meander line is the boundary line, title to the property would not stop at the meander line but would instead extend to the water’s edge in its natural condition. See *City of Peoria, supra*; *People ex rel. Deneen v. Economy Light & Power Co.*, 241

Ill. 290, 89 N.E. 760 (1909), *writ of error dismissed sub nom. People ex rel. Dunne v. Economy Light & Power Co.*, 234 U.S. 497, 58 L.Ed 1429, 34 S.Ct. 973 (1914); *Dauphin, supra*; *Schulte v. Warren*, 218 Ill. 108, 75 N.E. 783 (1905); 36 I.L.P. *Waters* §30 (2018); Logan D. Fitch, REAL ESTATE TITLES IN ILLINOIS, p. 471 (1948).

On the other hand, courts have determined that a meander line is a boundary line when corners or monuments are set to mark that boundary line. The intent that a meander line is a boundary line might be gleaned from a plat that indicates that title to the land stops at this line. A meander line may also be a boundary line if the area between the meander line and the body of water is so great as to show either an intention that the land be excluded from the tract in question or the possibility of fraud or mistake in making the survey. See *Kinsella v. Stephenson*, 265 Ill. 369, 106 N.E. 950 (1914); *Economy Light & Power, supra*; *Houck, supra*; Logan D. Fitch, REAL ESTATE TITLES IN ILLINOIS, p. 471 (1948).

PRACTICE POINTER

- ✓ Whether a meander line is a boundary line should have little practical impact on surveyors, title insurance companies, and attorneys. The survey certification will indicate that the survey was prepared pursuant to the 2021 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys, Section 6.B.vi of which warns of the uncertainties of water boundaries. Title insurance companies will raise one or more policy exceptions as to rights of third parties to the land. See §2.84 below. It is doubtful that a title insurance company will give affirmative coverage concerning meandered lands (*e.g.*, an endorsement providing assurances that a riparian owner and not the State of Illinois owns the land between a meander line and the edge of a navigable lake) unless the matter was judicially determined by a court of competent jurisdiction.
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9. [2.84] Title Insurance Issues Concerning Riparian Land

Title insurance companies must take into account a variety of concerns when insuring title to riparian lands. For example, they have no way of knowing if land along a water boundary exists because of accretion, reliction, or avulsion. They may not know whether a waterway is navigable. They must take into consideration the fact that adjacent landowners may have the right to use the surface of the waters and that these owners have the right to the unobstructed flow of the watercourse. Consequently, title insurance companies will usually raise one or more title exceptions when insuring riparian lands.

For example, a title insurance company might raise this exception if insuring land adjacent to an apparently navigable river:

Rights, if any, of the United States of America, the State of Illinois, the municipality, and the public in and to that part of the land lying within the bed of the [name of river], and the rights of other owners of land bordering on the river in respect to the water of said river.

If the insured land is bounded by a nonnavigable stream, the title insurance company might raise this exception:

Rights of owners of land bordering on the [name of river] with respect to the water and use of the surface of said body of water.

The following exception might be raised if a stream runs through the insured property:

Rights of adjoining owners to the uninterrupted flow of any stream that may cross the premises.

If the land abuts a large navigable lake, the title insurance company might consider this exception:

Rights, if any, of the United States of America, the State of Illinois, the municipality, and the public in and to as much of the land, if any, as may have been formed by means other than natural accretions or may be covered by the waters of [name of lake].

On the other hand, if the land adjoins a small private lake, the title insurance company would probably raise the following exception in light of *Beacham v. Lake Zurich Property Owners Ass'n*, 123 Ill.2d 227, 526 N.E.2d 154, 122 Ill.Dec. 14 (1988):

Rights of owners of land bordering on [name of lake] relative to said body of water.

10. [2.85] Further Reading

For more information on riparian issues, see Bruce S. Flushman, *WATER BOUNDARIES: DEMYSTIFYING LAND BOUNDARIES ADJACENT TO TIDAL OR NAVIGABLE WATERS* (2001); Logan D. Fitch, *REAL ESTATE TITLES IN ILLINOIS*, pp. 467 – 475 (1948); Walter G. Robillard and Donald A. Wilson, *EVIDENCE AND PROCEDURES FOR BOUNDARY LOCATION*, pp. 173 – 198 (4th ed. 2002); George M. Cole, *WATER BOUNDARIES* (1997); Richard F. Bales, *On the Waterfront: An Illinois Water Law Trilogy*, 53 Real Prop.Newsl., No. 11 (May 2008); Richard F. Bales, *Alderson v. Fatlan: The Illinois Supreme Court's riparian rights case*, 54 Real Prop.Newsl., No. 6 (Feb. 2010); and Richard F. Bales, *Quarries, lakes and riparian rights: The 2d District applies the "artificial-becomes-natural rule,"* 55 Real Prop.Newsl., No. 6 (May 2010).

B. [2.86] The Center-of-Section Problem

At first, one might think that locating the center of a section is fairly simple. For more than 100 years, however, there have been conflicting laws and instructions that have resulted in the mislocation of many centers of sections in Illinois, as well as in other states. This mislocation has created encroachments and boundary line issues. Sections 2.87 – 2.90 below discuss the history of this problem, putting all facets into a historical perspective. They also attempt to outline a practical solution to the problem.

1. [2.87] History of the Problem

An Act Concerning the mode of surveying the Public Lands of the United States of February 11, 1805, ch. 14, 2 Stat. 313 (1805 Act), mandated that surveyors locate the center of a section of land at the intersection of the two straight lines connecting the north and south, east and west, quarter section corners. These lines connecting the four quarter corners form a “+” sign; they delineate the four quarters of a section — the northwest, northeast, southwest, and southeast quarters. See §2.172 below. See generally Bureau of Land Management, United States Department of Interior, *MANUAL OF SURVEYING INSTRUCTIONS*, pp. 80 – 88 (2009).

Notwithstanding the 1805 Act, Justin Butterfield, Commissioner of the General Land Office, issued special instructions from 1849 to 1851 that directed that the center of the section be located at the midpoint of the line connecting the east quarter section corner and the west quarter section corner. Similar instructions were in use from 1856 to 1883; they were issued to deputy surveyors for the District of Illinois and Missouri. They provided that the surveyor should run a line from the east quarter section corner to the west quarter section corner and, at a point equidistant between these two quarter section corners, establish the center of the section. See §2.173 below.

Clearly, both sets of instructions were contrary to the 1805 Act. Confused Illinois surveyors sought an opinion from Abraham Lincoln, who was a prominent surveyor and lawyer before he became President. Just two years before he assumed the presidency, Lincoln reportedly responded, “I think the true rule for dividing into quarters, any interior section, or section which is not fractional is to run straight lines through the section from the opposite quarter-section corners, fixing the point where the straight lines cross, or intersect each other, as the middle or center of the section.” In other words, he agreed with the 1805 Act. See T.S. Madsen II and Louis N.A. Seemann, *FADING FOOTSTEPS, OR, RETRACEMENT AND THE LAND SURVEYOR: A SET OF STANDARDS FOR THE REASONABLE, PRUDENT LAND SURVEYOR TO FOLLOW*, pp. 79, 115 – 116 (Land Surveyors’ Seminar, 1980).

Despite Lincoln’s opinion, many surveyors in Illinois and other states continued to locate the center of section in accordance with the erroneous 1856 instructions. Some surveyors, in fact, even went as far as to locate the center not at the midpoint of that line connecting the east and west quarter section corners, but instead at the midpoint of that line connecting the north and south quarter section corners.

2. [2.88] The Issue

What does the surveyor do when they discover conflicting monumentation at the center of a section? This dual monumentation could result in a section having two centers of section, the “legal” center of section and the “accepted” center of section, and these two centers could be 25 feet or more apart. How should the surveyor proceed after discovering that the section being surveyed was originally surveyed contrary to the 1805 Act and that plats of subdivision of the land have been recorded or improvements have been built on the land, all in reliance on this “wrong” means of surveying? See §2.174 below.

The law seems clear that the surveyor should rely on the “accepted” center of section when resurveying the property. In the landmark case *Cragin v. Powell*, 128 U.S. 691, 32 L.Ed. 566, 9 S.Ct. 203 (1888), the United States Supreme Court held that the General Land Office has the sole jurisdiction over any subsequent corrections or resurveys to the official surveys of public lands, even when a surveyor has discovered an alleged error in the official surveys. The reasoning for this holding is that “great confusion and litigation would ensue if the judicial tribunals were permitted to interfere and overthrow the public surveys on no other ground than an opinion that they could have the work in the field better done and divisions more equitably made than the department of public lands could do.” 9 S.Ct. at 206, quoting *Haydel v. Dufresne*, 58 U.S. (17 How.) 23, 30 (1854). Thus, in regard to defining a retracement survey, “[a] resurvey, properly considered, is but a retracing, with a view to determine and establish lines and boundaries of an original survey.” 9 S.Ct. at 206.

The classic surveying texts seem to echo federal law regarding retracements. For example, Curtis M. Brown, Walter G. Robillard, and Donald A. Wilson state in *BOUNDARY CONTROL AND LEGAL PRINCIPLES*, p. 324 (3d ed. 1986): “The responsibility of the retracement surveyor is to follow the footsteps of the original surveyor as nearly as possible.” Consider also this statement from *A TREATISE ON THE LAW OF SURVEYING AND BOUNDARIES*, p. 339 (4th ed. 1976), by John S. Grimes: “The cardinal principle guiding a surveyor who is running the lines of a previous survey is to follow in the footsteps of the previous surveyor.”

PRACTICE POINTER

- ✓ “Accepted center of section” is a phrase of convenience only. Like section lines (see §2.53 above), there can be only one center of section.
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3. [2.89] The Solution

Because of the issue discussed in §§2.87 and 2.88 above, the surveyor should consider the following procedures when evaluating a center-of-section problem. The surveyor should first do extensive fieldwork, investigate records at the recorder’s office, and discuss the matter with other surveyors who have worked in the area to make sure that there is indeed a center-of-section issue.

If improvements have been constructed in reliance on an “accepted” center of section, it seems imprudent for the surveyor and the title insurance company to ignore the admittedly improper means of surveying and to stubbornly insist that the “legal” center is the only “right” center. In this regard, consider the words of Michigan Supreme Court Justice Thomas M. Cooley, quoted in *Westgate v. Ohlmacher*, 251 Ill. 538, 96 N.E. 518, 519 – 520 (1911), which dealt with a boundary problem in DeKalb County:

Nothing is better understood than that few of our early plats will stand the test of a careful and accurate survey without disclosing errors. This is as true of the government surveys as of any others, and, if all the lines were now subject to correction on new surveys, the confusion of lines and titles that would follow would

cause consternation in many communities. Indeed, the mischiefs that must follow would be simply incalculable, and the visitation of the surveyor might well be set down as a great public calamity. Quoting *Diehl v. Zanger*, 39 Mich. 601, 605 (1878).

The *Westgate* court went on to state that Justice Cooley’s remarks were applicable in this case and that “[t]o permit a relocation of the lines dividing the property fronting upon Somonauk street (which would involve the adjoining blocks and streets) would be to unsettle the title and boundary lines of the entire part of the city of Sycamore in which block 15 is located.” 96 N.E. at 520.

After performing the research, the surveyor should prepare the final survey. The surveyor should show both centers of section on the plat. The burden is then on the title insurance company to decide how to underwrite the issue. If one uses the “legal” center of section, are there encroachment problems? On the other hand, if one uses the “accepted” center of section, do these problems disappear? If the title insurance company can verify that the accepted center has been relied on for many years, perhaps it can similarly rely on the accepted center of section when insuring the property.

So that title problems do not arise in the future, the legal description should be amended to refer to the location of the “accepted” center of section relative to the location of the “legal” center. For example:

Commencing at a 6-inch by 6-inch monumental stone at the accepted center of Section _____, said accepted center being _____ feet [north or south] and _____ feet [east or west] of the intersection of the straight lines connecting all four quarter section corners.

4. [2.90] Court Cases

The following cases contain additional information on the center-of-section problem: *Lunz v. Sandmeier’s Estate*, 172 Minn. 338, 215 N.W. 426 (1927); *City of Bloomington v. Bloomington Cemetery Ass’n*, 126 Ill. 221, 18 N.E. 298 (1888); *Bloomington Cemetery Ass’n v. People*, 139 Ill. 16, 28 N.E. 1076 (1891); *Gerke v. Lucas*, 92 Iowa 79, 60 N.W. 538 (1894); *Schoenecke v. Yost*, 776 P.2d 1262 (Okla. 1989); *Tolson v. Southwestern Improvement Ass’n*, 97 Ark. 193, 133 S.W. 603 (1911); *Knauf v. Ryan*, 338 Ill.App.3d 265, 788 N.E.2d 805, 273 Ill.Dec. 214 (2d Dist. 2003).

For more information on the center-of-section problem, see Harlan J. Onsrud, *Legal Reasoning on Both Sides of the Center of Section Debate*, in Wendy Lathrop, ed., *LEGAL TOPICS IN BOUNDARY SURVEYING — A COMPENDIUM*, pp. 241 – 250 (1990); Richard F. Bales, Ch. 17, *Center of Section — Center of Controversy?*, in Mitchell G. Williams, ed., *LAND SURVEYS: A GUIDE FOR LAWYERS AND OTHER PROFESSIONALS* (3d ed. 2015).

C. [2.91] The Gap/Overlap Problem

On occasion, a surveyor may note on their survey a “gap” or “overlap” along the exterior boundary of the surveyed property. Section 6.B.vii of the 2021 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys requires the surveyor to show these inconsistencies. What are gaps and overlaps? How do they arise? Can they be underwritten by the title insurance company? Sections 2.92 – 2.104 below attempt to answer these questions.

PRACTICE POINTER

- ✓ When describing gaps and overlaps along the boundaries of land, title insurance companies will sometimes refer to “gaps, gores, and hiatuses.” A “gore” is an irregularly shaped tract of land, generally triangular, that is left between two adjoining surveyed parcels because of inaccuracies and inconsistencies in the boundary surveys of the two tracts. A “hiatus” is defined as “an area between two surveys of record, which by the record are described as having one or more common boundary lines with no omission.” See American Society of Civil Engineers and American Congress on Surveying and Mapping, *DEFINITIONS OF SURVEYING AND ASSOCIATED TERMS*, pp. 75, 79 (1984) (“gore”; “hiatus”).
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1. [2.92] The Creation of Gaps and Overlaps

Generally, when dividing tracts of land, the surveyor should avoid using legal descriptions that measure or start from two different directions. For example, assume that lot 1 is a square with platted dimensions of 100 feet by 100 feet. If the west 50 feet of lot 1 is to be conveyed, the remainder of the lot should be described as “lot 1, except the west 50 feet thereof.” The remaining portion of the lot should *not* be described as “the east 50 feet.” If the measured lot is not exactly 100 feet wide, a description of “the east 50 feet” would produce a gap or overlap between the two parcels. If lot 1 was actually 99 feet wide, there would be a 1-foot overlap between the two portions of lot 1. If the lot was 101 feet wide, there would be a 1-foot gap between the parcels.

The division of a tract of land by the use of metes and bounds descriptions, whereby the descriptions start from two different directions, should also be avoided. Consider, for example, these two metes and bounds divisions of lot 1; again, if lot 1 was either more than or less than 100 feet wide, the two descriptions would produce respectively a gap or overlap:

Description One: Beginning at the northwest corner of lot 1; then east along the north line thereof 50 feet; thence south parallel to the west line of said lot 1 a distance of 100 feet to the south line thereof; thence west along said south line 50 feet to the west line of said lot; thence north along said west line 100 feet to the place of beginning.

Description Two: Beginning at the northeast corner of lot 1; then west along the north line thereof 50 feet; thence south parallel to the east line of said lot 1 a distance of 100 feet to the south line thereof; thence east along said south line 50 feet to the east line of said lot; thence north along said east line 100 feet to the place of beginning.

See §2.175 below.

An exception to this general rule occurs if the common line between the two parcels can be described identically in both metes and bounds descriptions. Consider this revision of the second description; the italicized words describe the common line:

Amended Description Two: **Beginning at the northeast corner of lot 1; then west along the north line thereof to a point 50 feet east of the northwest corner of said lot 1; thence south parallel to the west line of said lot 1 a distance of 100 feet to the south line thereof; thence east along said south line to the east line of said lot; thence north along said east line 100 feet to the place of beginning.**

See §2.17 below.

Gaps and overlaps can arise in other ways besides platted lot divisions. Gaps and overlaps between two different subdivisions can be several feet wide. Gaps and overlaps between sectionalized land divisions in rural areas can be even greater, sometimes 50 feet or more. See American Society of Civil Engineers and American Congress on Surveying and Mapping, *DEFINITIONS OF SURVEYING AND ASSOCIATED TERMS*, p. 73 (1984) (“gaps and overlaps”).

EXAMPLE: A surveyor divides the northwest quarter of a section of land into two parcels, the north 80 acres of the northwest quarter and the south 80 acres of the northwest quarter. If the quarter section is not exactly 160 acres in area, there could be a gap or overlap — a problem that could be avoided if the surveyor had merely described the parcels as the “north half” and the “south half” of the quarter section.

Some surveyors may argue that dividing lots and sectionalized parcels by “north half” and “south half” is incorrect. They maintain that, if the north half of a quarter section is first conveyed, the remainder should be described as the quarter section, excepting therefrom the north half. Despite these concerns, lot and sectionalized land descriptions of “north half” and “south half” are probably acceptable to all title insurance companies.

2. [2.93] The Overlap

When an overlap exists between two conflicting legal descriptions of adjacent parcels, the attorney, surveyor, and/or title examiner must go back in the chain of title of both parcels to the point at which one person or entity owned both parcels. Working forward, they must then examine all of the subsequent deeds for both parcels, paying particular attention to the chain of title of the land conveyed in the first deed from the original common grantor to the first grantee. Consider the following examples:

EXAMPLE: Smith owns lot 1, which has a record width of 100 feet. He first conveys the west 50 feet to Adam and later conveys the east 50 feet to Baker. When a surveyor surveys lot 1, however, she discovers that the lot is only 99 feet wide, which means that there is a one-foot overlap in the middle of lot 1.

Adam’s deed was first in time; as his deed is “senior,” he owns the one-foot overlap. Although Smith subsequently conveyed the east 50 feet to Baker, one cannot convey what one does not own, and so Baker does not take title to the overlap parcel. This is called the “doctrine of paramount title.” See *Weihe v. Lorenz*, 254 Ill. 195, 98 N.E. 268 (1912) (holding that first conveyance of land from common grantor contained dispositive legal description when subsequent conveyance created overlap).

EXAMPLE: In 1980, *X* buys lot 1; it has a record width of 100 feet. In 1985, *X* deeds the west 50 feet to *A*. In 1990, *X* deeds the east 50 feet to *B*. In 1995, *A* deeds the west 50 feet to *C*. In 2000, *B* deeds the east 50 feet to *D*. The surveyor who surveys lot 1 in 2017 discovers that the lot is actually only 99 feet wide, which means there is a one-foot overlap. Who owns the overlap?

Under the doctrine of paramount title, the first deed from the common grantor *X* was the 1985 deed to *A*. By following this first deed's legal description, *C* must continue to own the west 50 feet of lot 1. Thus, the 1990 deed to *B* and the subsequent 2000 deed to *D* do not alter *C*'s ownership of the west 50 feet. To the extent of the one-foot overlap in the middle of lot 1, *C* is the owner of the alleged overlap, and *D* owns only the east 49 feet of lot 1.

Is it really that simple? What if the first conveyance deeds from the common grantor were executed simultaneously? Perhaps the solution is to see which deed was recorded first. What if the adjoining property owner is adversely occupying the overlap parcel? A successful suit to quiet title based on adverse possession would necessarily imply that the adjoining owner does not have paramount title to the overlap parcel already.

In evaluating a deed, the overriding concern is to ascertain and give effect to the intention of the parties, and the deed should be construed so as to carry out this intention. *Urbaitis v. Commonwealth Edison*, 143 Ill.2d 458, 575 N.E.2d 548, 159 Ill.Dec. 50 (1991). Is it reasonable to conclude that *X* intended to create an overlap when first dividing the parcel? Is it reasonable to conclude that *X* would have intended that only one adjoining property owner receive the entire overlap? After all, had *X* known of the overlap when first dividing the property, perhaps *X* would have intended that both parties share the overlap parcel. However, in the absence of any evidence of such an intention, courts must apply the principles above to reach an equitable resolution of the overlap.

a. [2.94] *Title Insurance and the Overlap*

If the parcels described in §2.93 above had been previously insured by a title insurance company and if that title insurance policy had included “extended coverage” over the general exceptions, it is possible that the lot owners might have a claim under their title insurance policy.

PRACTICE POINTER

- ✓ In the event of a valid claim, the title insurance company has several options. The title insurance company could pay one landowner for a deed of the overlap property to the neighbor. The title insurance company could also pay the other landowner for their loss resulting from the neighbor's rights to the overlap. For further information, see §3.33 and 3.34 of Jerry T. Gorman, Ch. 3, *The 2006 ALTA Owner's Policy and Loan Policy*, TITLE INSURANCE: LAW AND PRACTICE (IICLE®, 2023).

What if the policies were subject to the general exceptions? What if these parcels had never before been insured by a title insurance company? Can the land falling in the overlap ever be insured?

Some title insurance companies feel that the overlap can be insured only if deeds are exchanged between the adjoining property owners. Other title insurance companies feel that the overlap can be prorated — that is, the width of the overlap can be subtracted from the adjoining property owners in direct proportion to the size of the two adjoining properties. Prorating an overlap (or a gap) is just like prorating the difference between record and measured distances. See §2.55 above.

b. [2.95] Prorating the Overlap

When a title insurance company or a surveyor decides to prorate an overlap or a gap between the affected property owners, they look to the relative sizes of the two affected parcels to determine what percentages to use in calculating the proration.

EXAMPLE: Lot 1 in a subdivision has a record measurement of 80 feet in width, and lot 12 in the subdivision to the south has a record measurement of 115 feet in width. See §2.177 below. If one were to look at a county tax map of these two lots, it would appear that the two subdivisions (and the two lots) were contiguous to each other. However, a surveyor discovers that there is actually an overlap of 6.23 feet between the two lots. The overlap is a result of the two subdivisions being incorrectly carved out of a larger tract of land.

Perhaps the subdivision to the north was originally described as the north 20 acres of a quarter-quarter section and the subdivision to the south was originally described as the south 20 acres of a quarter-quarter section. The “perfect” quarter-quarter section is 40 acres in area, but this particular quarter-quarter section contains less land than 40 acres, resulting in an overlap between the two subdivisions. See §2.178 below.

The first step is to add the record widths of the two lots:

$$80 \text{ feet} + 115 \text{ feet} = 195 \text{ feet.}$$

Next, divide the width of the overlap by this total record footage. The result is the constant:

$$6.23 \div 195 = 0.03195.$$

Now multiply the constant by the record widths of each lot. This result will be that portion of the overlap that will be subtracted from the width of each lot.

$$0.03195 \times 80 = 2.56. \text{ Lot 1 will have an adjusted width of } 77.44 \text{ feet.}$$

$$0.03195 \times 115 = 3.67. \text{ Lot 12 will have an adjusted width of } 111.33 \text{ feet.}$$

Prorating the overlap does have its drawbacks. What if one or both of the lot owners do not agree with the prorations? What if the “senior” lot owner feels that he or she owns all of the overlap pursuant to the doctrine of paramount title? What if one lot owner is adversely possessing a portion of the overlap parcel? For these reasons, it is possible that a title insurance company will not insure an overlap unless one or more deeds are executed, conveying record title to the overlap in one (or

both) of the lot owners. It may want the owners to sign and record a boundary agreement (*see* §§2.148 – 2.151 below) so that the issues are clearly explained and memorialized. The title insurance company will also want a survey prepared in order to make sure there are no adverse possession issues.

3. [2.96] The Gap

The problem of the gap is nearly identical to the problem of the overlap. The difference is that, whereas an overlap results from the legal descriptions of two adjacent properties each seemingly covering the overlap parcel, a gap results from the two legal descriptions each failing to account for the gap parcel.

EXAMPLE: Joan owns lot 2, which has a record width of 100 feet. She first conveys the west 50 feet to Alice and later deeds the east 50 feet to Betty. When a surveyor surveys lot 2, however, the surveyor discovers that the lot is actually 101 feet wide, which means that there is a 1-foot gap between the two parcels. Who owns the gap?

A rule of deed construction provides that “[d]eeds are to be construed most favorably to the grantee, and conflicting descriptions should be reconciled, if possible, and the construction adopted which best comports with the intention of the parties.” *Brenneman v. Dillon*, 296 Ill. 140, 129 N.E. 564, 567 (1920). One might argue that the second deed is ambiguous. Did Joan intend to retain or convey the gap parcel? Accordingly, one might argue that the gap vests in Betty, the second grantee, to the detriment of Joan. *See Williams v. Swango*, 365 Ill. 549, 7 N.E.2d 306 (1937); *Brenneman, supra*.

However, the issue is not that simple. As noted in §2.93 above, determining the intent of the parties is a primary concern in deed construction. In this example, it is clear that Joan intended to convey 50-foot parcels to Alice and Betty. Did she also intend to convey the gap solely to one of the grantees or did Joan intend to keep a 1-foot section for herself?

One might argue that Joan did not intend to retain any land, especially if the gap was created several years ago and she owned no other land nearby. Accordingly, one might conclude that the gap vests in Betty.

What if the deeds were signed simultaneously? Would it be reasonable to conclude that Joan intended to convey the entire gap to only Betty, the second grantee? What if the deeds were executed fairly recently? If Joan knew of the problem originally, it seems possible that she never would have created the gap but instead would have divided it between Alice and Betty and not have favored one grantee over the other.

a. [2.97] Title Insurance and the Gap: Insuring the Gap for Both Owners

Unlike an overlap, the discovery of a gap adjacent to insured property should not result in a title insurance claim. Instead, a title insurance company will usually first become aware of a gap when it is asked to insure it. If requested to split the gap between the adjoining owners, the title insurance company may offer to insure it by prorating the width, but the dangers of prorating a gap

are the same as in prorating an overlap — what if one or both (or possibly more, depending on the circumstances) of the owners do not agree with the allotted proration? For this reason, the title insurance company will probably insist on an exchange of deeds, possibly coupled with a boundary agreement, and of course it will want a survey to make sure that no owner is adversely occupying another owner's share of the gap.

b. [2.98] Title Insurance and the Gap: Insuring the Gap for One Owner

Any request to insure the entire gap in favor of just one adjoining owner will probably involve one of four fact situations outlined in §§2.99 – 2.102 below.

(1) [2.99] Insuring the gap for one owner: fact situation number one

One owner has adversely occupied the entire width of the gap for the statutory period of 20 years. See 735 ILCS 5/13-101, *et seq.* For example, perhaps the owner has fenced in the gap. See §2.179 below. In this event, perhaps the title insurance company will insure the gap on a risk basis for an additional premium.

(2) [2.100] Insuring the gap for one owner: fact situation number two

The gap is between an existing subdivision and unsubdivided land. The unsubdivided land is in the process of being subdivided. See §2.180 below. In this instance, the title insurance company may be able to insure that the developer of the new subdivision owns the entire gap, but in order to do so, it should obtain a survey of the gap parcel. The title insurance company must be sure that the adjoining lot owners in the existing subdivision did not buy their lots with the expectation that they would own any portion of the gap parcel. In order to determine this, the title insurance company should have the surveyor confirm that the iron pipes or other monuments that were set at the lot corners for the already subdivided lots do not extend into the gap parcel. The location of these iron pipes (or possibly rectangular stones) should be noted on the survey. If these lot corner monuments are set into the gap parcel, the title insurance company will probably be unwilling to insure the gap unless it obtains a deed from the adjoining landowner(s). See §2.181 below.

The title insurance company should also examine the survey for any encroachments (*e.g.*, sheds, fences) by the lot owners into the gap parcel. If the survey discloses any encroachments, the title insurance company will probably not insure the gap unless it is furnished one or more deeds. Even if the developer of the new subdivision obtains these deeds, the developer's victory is probably an empty one, as any title insurance policy issued will be subject to the encroaching improvements until a subsequent survey indicates that all the encroachments have been removed. See §2.181 below.

If the survey of the gap parcel reveals no encroachments and that all lot monumentation is at the lot corners and not inside the gap, this would indicate that the lot owners are possessing only up to their respective lot lines and that they are not asserting any interest in the gap. The survey, therefore, would suggest that, when these lot owners purchased their lots, they got what they bargained for, no less but no more either. Consequently, in this situation the title insurance company

may be able to insure that the owner of the unsubdivided land owns the gap. After all, once the new subdivision is platted and recorded, the “old” lot owners on the other side of the gap will never even know that the gap existed. As the new lots are sold off, the new lot owners will not know of the gap either.

In at least one instance, however, a local municipality refused to issue a building permit to the developer of property that included a gap, arguing that “you don’t own the land.” It is possible that this refusal is excluded from title insurance policy coverage. See Exclusion from Coverage 1 of the 2021 ALTA Owner’s Policy. Nonetheless, a title insurance company might not insure the gap until it receives assurances that a building permit has been approved.

PRACTICE POINTER

- ✓ If the title insurance company does agree to insure the gap, the client should expect to pay a sizeable additional premium. This extra cost should not deter the attorney. After all, the client is essentially acquiring land without suffering the time and expense of a suit to quiet title.
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(3) [2.101] Insuring the gap for one owner: fact situation number three

The gap is between two existing subdivisions. The title insurance company is asked to insure lot 3 in Blackacre Subdivision and the lot directly in back of this lot is lot 12 in Whiteacre Subdivision. The surveyor discovers that there is a one-foot gap between these two subdivisions. The attorney for the purchaser of lot 3 asks the title insurance company to insure lot 3 and also the entire width of the gap. See §2.182 below.

The title insurance company will probably not insure that the purchaser of lot 3 owns the gap unless it obtains and records a deed from the owner of lot 12. Otherwise, it risks a claim in the event the owner of lot 12 discovers their neighbor’s windfall and attempts to assert their rights to their proportionate share of the gap.

There is a marked difference between this fact situation and the one described in §2.100 above. In the previous fact situation, the lot owners of both subdivisions will never know of the existence of the gap. In this third example, the insured owner will know of the gap and that it was obtained as a windfall. It will be only a matter of time until the adjoining lot owner will know of it as well.

(4) [2.102] Insuring the gap for one owner: fact situation number four

The gap is between two unsubdivided parcels of land. For example, Carla owns the north 20 acres of half a quarter section, and David owns the south 60 acres of the same half a quarter section. Zeke is the proposed purchaser of the north 20 acres. The surveyor discovers that there is a 5-acre gap between these two parcels. Zeke’s attorney asks the title insurance company to insure it. See §2.183 below.

For the reasons outlined in §2.101 above, the title insurance company will probably be unwilling to insure the gap unless it obtains a deed from David. Indeed, in this example, the gap is very large, so the risks of a claim and potential loss are also great.

c. [2.103] How To Insure the Gap

If a title insurance company agrees to insure a gap, it will probably insure the gap as an additional parcel of land in Schedule A of the title insurance policy. In order to do this, it may require that the surveyor write a legal description for the gap parcel. On the other hand, the title insurance company may choose not to amend the legal description in Schedule A and instead issue an endorsement similar to the following:

The Company hereby insures the Insured against loss or damage sustained by the Insured in the event that, at Date of Policy, the land legally described as _____ is not vested in the Insured.

It is probably better, however, for the attorney to ask the surveyor to write a legal description for the gap parcel. This land could then be added to Schedule A of the title commitment and policy as an additional insured parcel.

Note, though, that the title insurance company may raise a “back tax” or “omitted tax” exception on the revised title commitment and policy. The rationale for this stems from §§9-260 through 9-270 of the Property Tax Code, 35 ILCS 200/1-1, *et seq.*, which provide for the assessment of real estate tax arrearages against property that has been omitted from the tax rolls in previous years. This exception might read as follows:

Possible back taxes that may be assessed against the property as a result of the non-assessment of the land in prior year(s).

In any event, this exception could be waived once the title insurance company is furnished evidence that no such taxes will be assessed. The title insurance company might also consider waiving the exception as a matter of risk.

PRACTICE POINTER

- ✓ Practically speaking, the issue of omitted taxes may be theoretical at best. Most tax assessment legal descriptions are purposely vague; such legal descriptions would encompass any such gap. Any supervisor of assessments would probably take the position that the gap parcel would have an assessment (albeit an imprecise one) and that accordingly there would be no omitted taxes. On the other hand, the supervisor of assessments would generally be unaware of the gap. Would a deed of the gap property “tip him or her off” to the existence of the gap and the possibility of levying omitted taxes?
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4. [2.104] Further Reading

For more information on gaps and overlaps, see Richard F. Bales, *A Guide to Gaps and Overlaps in Legal Descriptions*, Real Prop.L. Communicator, p. 6 (Winter/Spring 1993); J. Bushnell Nielsen, TITLE AND ESCROW CLAIMS GUIDE, pp. 373 – 377 (1996); and Richard F. Bales, Ch. 16, *A Guide to Gaps and Overlaps in Legal Descriptions*, in Mitchell G. Williams, ed., LAND SURVEYS: A GUIDE FOR LAWYERS AND OTHER PROFESSIONALS (3d ed. 2015).

D. [2.105] Undedicated Roads

Surveyors often must determine the width of a right-of-way when surveying commercial property. For example, the description of the land might include a course “thence east to the center of Smith Road.” Determining the width (and then the center) of a right-of-way is a fairly simple matter when the road is dedicated pursuant to a recorded document, but what does the surveyor do when there is no recorded dedication? When a right-of-way is not dedicated pursuant to a recorded document, it is possible that the public has the legal right to use the road because the road exists as a prescriptive easement.

PRACTICE POINTER

- ✓ In determining the width of a right-of-way, the surveyor cannot merely measure the width of the paved road. A right-of-way is not just the concrete or asphalt surface of the road. For example, a plat of subdivision might indicate that the dedicated roads are 66 feet wide, but this 66 feet might include the road surface, parkways, and sidewalks on both sides of the road and even some of the landscaping on the other side of the sidewalks.

1. [2.106] Prescriptive Easements

A prescriptive easement (sometimes called an “easement by prescription”) is created by operation of law when someone continuously and openly uses another’s land for a period of at least 20 years. The use of the land cannot be permissive; it must be adverse to the rights of the true owner. *See Leonard v. Pearce*, 348 Ill. 518, 181 N.E. 399, 402 (1932) (“Mere permissive use cannot ripen into a prescriptive right regardless of the length of time such permission to pass over the land of another is enjoyed, and the use of vacant, uninclosed, unoccupied land is presumed to be by consent and not adverse.”); *Duck Island Hunting & Fishing Club v. Whitnah*, 306 Ill. 284, 137 N.E. 840 (1922) (stating that possessory evidence cannot consist merely of acts of trespass or permissive use). *See also Page v. Bloom*, 223 Ill.App.3d 18, 584 N.E.2d 813, 165 Ill.Dec. 379 (5th Dist. 1991); *McRaven v. Charles*, 7 Ill.App.3d 55, 286 N.E.2d 390 (5th Dist. 1972); *Petersen v. Corrubia*, 21 Ill.2d 525, 173 N.E.2d 499 (1961); *Schultz v. Kant*, 148 Ill.App.3d 565, 499 N.E.2d 131, 101 Ill.Dec. 764 (2d Dist. 1986); *Radke v. Independence Tube Corp.*, 301 Ill.App.3d 713, 704 N.E.2d 72, 234 Ill.Dec. 914 (3d Dist. 1998); *Ruck v. Midwest Hunting & Fishing Club*, 104 Ill.App.2d 185, 243 N.E.2d 834 (2d Dist. 1968); *Roller v. Logan Landfill, Inc.*, 16 Ill.App.3d 1046, 307 N.E.2d 424

(4th Dist. 1974); *Light v. Steward*, 128 Ill.App.3d 587, 470 N.E.2d 1180, 83 Ill.Dec. 760 (2d Dist. 1984); *Leesch v. Krause*, 393 Ill. 124, 65 N.E.2d 370 (1946); *Brandhorst v. Johnson*, 2014 IL App (4th) 130923, 12 N.E.3d 198, 382 Ill.Dec. 198; *Chicago Title Land Trust Co. v. JS II, LLC*, 2012 IL App (1st) 063420, 977 N.E.2d 198, 364 Ill.Dec. 709.

At first glance, there appears to be a high degree of similarity between a prescriptive easement and adverse possession sufficient to deprive the owner of title to the land. In order to establish a prescriptive easement in Illinois, the claimant must prove that their use of the subject property not only existed for 20 years or more but was also (a) hostile or adverse, (b) exclusive, (c) continuous and uninterrupted, and (d) under a claim of right inconsistent with that of the true owner. *Brandhorst, supra*, 2014 IL App (4th) 130923 at ¶68. “However, because of the lesser interests at stake, and because it is possible for both the owner and the claimant to simultaneously *use* the same piece of property, prescriptive easement claimant cases need not prove that the true owner was altogether deprived of *use* during the 20-year period.” [Emphasis in original.] 2014 IL App (4th) 130923 at ¶76. In other words, the additional element needed to quiet title due to adverse possession is that the true owner of the subject property must be fully excluded from using the property by the claimant.

The use of the land must be open and obvious in order to succeed in a claim for a prescriptive easement. One cannot obtain a prescriptive easement when the use is invisible to the owner of the servient estate, such as a subsurface sewer or drain line. *See Murtha v. O’Heron*, 178 Ill.App. 347 (1st Dist. 1913).

2. [2.107] Statutory Law and Prescriptive Easements

Section 2-202 of the Illinois Highway Code, 605 ILCS 5/1-101, *et seq.*, provides that a highway can be established, among various other methods, if a public way for vehicular travel has been used by the public as a highway for 15 years. Rather than establishing all of the elements required for a prescriptive easement for use of the undedicated road, the Illinois legislature has instead created a statutory definition whereby the owner of the land underlying an undedicated road is unable to argue that a highway constitutes an undedicated road and thus private property. This statutory scheme is needed because no individual driver is going to claim a prescriptive easement over an undedicated road, but the State of Illinois has an interest in dedicating such roads to public use.

However, such automatic dedication can easily be defeated by the property owner merely by posting the necessary signs:

Posting of notice that right of access is by permission and subject to control of owner. No use of any land by any person or by the public generally, no matter how long continued, shall ever ripen into an easement by prescription, or be deemed to be an implied dedication, or be deemed to give rise to any other right, customary or otherwise, to be on, or to engage in activities on, such land, if the owner of such property for a continuous period posts at each entrance to the property or at intervals of not more than 200 feet along the boundary a sign reading substantially as follows: “Right of access by permission, and subject to control of owner.” 735 ILCS 5/13-122.

Note that this posting of notice provision defeats not only the automatic dedication of undedicated roads but also any prescriptive easement. Thus, upon discovering any unauthorized use of their land, whether beneficial, harmful, hostile, or otherwise, the owner would be wise to immediately post such signs, if they are not already posted.

3. [2.108] Statutory Law and Road Widths

Section 6-301 of the Illinois Highway Code, 605 ILCS 5/6-301, provides that “[a]ll township and district roads established under this Division of this Code shall be not less than 40 feet in width, except as provided in Section 6-327.”

Section 6-327 in turn states that “[t]ownship and district roads for private and public use of the widths of 50 feet or less may be laid out from one or more dwellings or plantations to any public road, or from one public road to another, or from one or more lots of land to a public road or from one or more lots of land to a public waterway, on petition to the highway commissioner by any person directly interested.” 605 ILCS 5/6-327.

However, these two statutes apply only to roads that have been formally established pursuant to the Illinois Highway Code. They do not apply to roads created by prescriptive use. *See Semmerling v. Hajek*, 258 Ill.App.3d 180, 630 N.E.2d 496, 500, 196 Ill.Dec. 561 (2d Dist. 1994) (“Therefore, we conclude that section 6-301 [of the Illinois Highway Code] does not govern the width of public highways established by prescriptive easement.”).

4. [2.109] Common Law and Road Widths

Various Illinois court decisions, discussed in §§2.110 – 2.113 below, provide the attorney and the surveyor with some guidance on determining the width of an undedicated right-of-way. Unfortunately, the decisions are not uniform.

Generally, these cases have similar fact patterns. They involve undedicated roads that a local unit of government wanted to widen and improve. In order to widen the road, however, adjoining unpaved or unsurfaced land had to be used. The landowner claimed that the width of the roadway was the paved or gravel surface only and that the use of any additional land for the road was an unwarranted taking without compensation. The unit of government, on the other hand, argued that the right-of-way included this additional land as well as the paved or gravel surface.

a. [2.110] *Width of Road = Surface + Drainage Ditches*

After noting that the ditches on both sides of a road were maintained and used by the public for drainage of the road, the Illinois Supreme Court in *City of Highland Park v. Driscoll*, 24 Ill.2d 281, 181 N.E.2d 93 (1962), determined that the width of the undedicated right-of-way included the gravel surface plus the drainage ditches. In this short and succinct decision, the court commented that in a previous decision “this court pointed out that ‘The easement for a street includes such use of the land at or beneath the surface as will make the easement effective,’ and we think that in determining the width or extent of an easement by prescription a similar concept of use must be employed.” 181 N.E.2d at 94, quoting *City of Dixon v. Sinow & Weinman*, 350 Ill. 634, 183 N.E. 570, 571 (1932).

b. [2.111] *Width of Road = Surface + Fence Lines*

In *Pilgrim v. Chamberlain*, 91 Ill.App.2d 233, 234 N.E.2d 75 (3d Dist. 1968), the road in question was a gravel road bounded on both sides by fences. The court stated: “On the assumption that the most we have before us is a common law dedication in the instant case, under such dedication the width of the road can be determined by the fence-line established by the owners along the road.” 234 N.E.2d at 78. For similar decisions, see *Village of Middletown v. Glenn*, 278 Ill. 149, 115 N.E. 847 (1917); *Town of Harmony v. Clark*, 250 Ill. 57, 95 N.E. 47 (1911); *Tucker v. Bunger*, 108 Ill.App.3d 227, 439 N.E.2d 488, 64 Ill.Dec. 237 (3d Dist. 1982); *Dymeak v. Christjensen*, 279 Ill. 242, 116 N.E. 654 (1917).

c. [2.112] *Width of Road = Surface + Six Feet on Either Side*

In *Semmerling v. Hajek*, 258 Ill.App.3d 180, 630 N.E.2d 496, 196 Ill.Dec. 561 (2d Dist. 1994), the trial court entered an order defining the roadway as the paved portion plus 6 feet on either side of the paved portion. The Lake Villa Township Highway Commissioner appealed this finding, arguing that §6-301 of the Illinois Highway Code, 605 ILCS 5/6-301, required that a roadway be at least 40 feet wide.

The court noted that wooden fences paralleled the road on either side and that between the paved portion of the road and the fences were grassy strips of land. However, the fences were erected in 1991 or some time thereafter. Thus, the fences were in place for no more than three years before this court decision. (As discussed in §2.115 below, this may have been an important factor in this case.) There were also drainage ditches on either side of the road.

During the trial, the plaintiff pointed out that the township paved, maintained, and plowed the road, mowed the grassy areas next to the road, and kept the areas clear for drainage. The commissioner argued that the township snowplows needed room at the end of the road to turn around. He also noted that the public often parked their cars in the area.

In affirming the trial court’s decision, the appellate court noted that §6-301 of the Illinois Highway Code does not govern the width of public highways established by prescriptive easement. The court also acknowledged *City of Highland Park v. Driscoll*, 24 Ill.2d 281, 181 N.E.2d 93 (1962) (see §2.110 above), noting that in *Driscoll*, the prescriptive easement extended beyond the gravel road used by the public and included drainage ditches running along both sides of the road.

However, the *Semmerling* court added that the *Driscoll* court rejected the city’s claim that an 80-foot-wide right-of-way was established. There was no evidence that there was any public use of any land for road purposes beyond the limits of the drainage ditch. Similarly, the *Semmerling* court noted that there was no evidence in the present case that the public used the grassy areas on either side of the road for road purposes. To the contrary, public use was limited to the paved portion of the road. The court said that the trial court was not required to conclude that just because the township mowed the grassy areas, a prescriptive easement encompassed those areas.

The *Semmerling* court concluded that six-foot strips on either side of the road were sufficient to allow for proper drainage, public parking, and the ingress and egress of road maintenance vehicles. “There is no other evidence that the land beyond the six-foot limits was required for proper maintenance of the road or otherwise essential to make the easement effective.” 630 N.E.2d at 501.

d. [2.113] *Width of Road = Surface Only*

In *Klose v. Mende*, 329 Ill.App.3d 543, 771 N.E.2d 960, 265 Ill.Dec. 1 (3d Dist. 2001), the appellate court determined that two 1856 road dedications were not valid, even though the Meriden Township ledger contained an entry indicating that the roads had been dedicated to the township.

The court acknowledged that the township had acquired an easement by prescription over the roads. The court said that the roadbed and shoulders were of varying widths of between 60 and 63 feet. At issue were strips of land alongside the roads that ranged in width from 3 to 6 feet.

The court concluded that Meriden Township could not demand an extra 5 – 6 feet of roadway. The court reasoned:

The common and ordinary use establishing the right to an easement by prescription limits and qualifies it so that it cannot be given to different uses and purposes. Although defendant, as owner of the easement, is allowed to do such things in the way of repairs as to make the easement reasonably useful, he cannot make material alterations in the character of the easement so as to place a greater burden on plaintiffs’ property or to interfere with the use and enjoyment by plaintiffs of their property. . . . We find that increasing the width of the roadway would require five to six feet of plaintiffs’ crop production farmland to be transformed into a public highway. This increase would be an unallowable, material alteration to the original limits of defendant’s easement that would place an unreasonable burden upon plaintiffs’ use and enjoyment of their property. [Citation omitted.] 771 N.E.2d at 965.

5. [2.114] **Summary of Cases**

A summary of the holdings of the cases described in §§2.110 – 2.113 above follows. They appear to be totally inconsistent. Nonetheless, can any sense be made of them? Can any patterns or common threads be discerned? Can any conclusions be made that will aid the surveyor and the attorney in survey preparation, review, and analysis?

- a. *City of Highland Park v. Driscoll*, 24 Ill.2d 281, 181 N.E.2d 93 (1962) — width of road runs to drainage ditches on either side;
- b. *Pilgrim v. Chamberlain*, 91 Ill.App.2d 233, 234 N.E.2d 75 (3d Dist. 1968) — width of road runs to fences on either side;
- c. *Semmerling v. Hajek*, 258 Ill.App.3d 180, 630 N.E.2d 496, 196 Ill.Dec. 561 (2d Dist. 1994) — width of road is the surfaced portion plus six feet on either side; and
- d. *Klose v. Mende*, 329 Ill.App.3d 543, 771 N.E.2d 960, 265 Ill.Dec. 1 (3d Dist. 2001) — width of road is the surfaced portion only.

In any event, it is clear that the court's determination will largely depend on the specific facts of the case on not on any one rule of law.

The facts of *Klose v. Mende*, 329 Ill.App.3d 543, 771 N.E.2d 960, 265 Ill.Dec. 1 (3d Dist. 2001), indicate that there was no evidence of public use beyond the surface of the roadway. For example, it appears that there were no drainage ditches along the side of the roads. Even the court in *Semmerling v. Hajek*, 258 Ill.App.3d 180, 630 N.E.2d 496, 196 Ill.Dec. 561 (2d Dist. 1994), which determined that the right-of-way was the paved portion plus six feet on either side, noted the existence of drainage ditches along both sides of the road and thus evidence of public use.

Also, the *Klose* court stated that “increasing the width of the roadway would require five to six feet of plaintiffs’ crop production farmland to be transformed into a public highway.” 771 N.E.2d at 965. This statement suggests that the plaintiff was farming virtually next to the surface of the roadway; it is another indication that there was no public use beyond the surface of the roads.

The facts in *City of Highland Park v. Driscoll*, 24 Ill.2d 281, 181 N.E.2d 93 (1962), suggest that there were apparently no fences along the road. Could this explain why the *Driscoll* court determined that the roadway went to the drainage ditches?

The “fence rule” set forth in *Pilgrim v. Chamberlain*, 91 Ill.App.2d 233, 234 N.E.2d 75 (3d Dist. 1968), is probably appropriate in some cases, but how can the surveyor know that the fences have been there long enough to establish the limits of the roadway? The *Pilgrim* court mentioned two Supreme Court cases — *Village of Middletown v. Glenn*, 278 Ill. 149, 115 N.E. 847 (1917), and *Town of Harmony v. Clark*, 250 Ill. 57, 95 N.E. 47 (1911). The court in both cases seemed to give great weight to the concept of fences as “ancient monuments.” The *Semmerling* court noted that there were fences along both sides of the road, but they were put up only three years earlier or less, and it appears from the published opinion that the court did not consider these fences in its decision. Did the *Semmerling* court recognize that these fences had hardly achieved “ancient monument” status?

The *Semmerling* court noted that drainage ditches ran along either side of the road, and at first, it appears that the court did not consider this fact in its decision. In fact, *Semmerling* is most valuable for its analysis of both *Driscoll*, *supra*, and the issue of how much additional land is needed for maintaining a prescriptive right-of-way easement.

The *Semmerling* court first cited *Driscoll* with approval, acknowledging that a prescriptive highway easement was not limited to the area that the public actually uses but that it may include additional land “that is essential to make the easement effective.” 630 N.E.2d at 501. The court next noted that the *Driscoll* court upheld the trial court's determination that the prescriptive easement extended beyond the gravel road used by the public and included the drainage ditches that ran along both sides of the road. Finally, the *Semmerling* court concluded that the evidence in the present case indicated that the public used only the paved portion of the road and that six-foot strips on either side of the road were sufficient to allow for public parking, passage of maintenance vehicles, and “proper drainage.” *Id.*

It appears, then, that *Driscoll* and *Semmerling* can be distinguished in the following manner: *Driscoll* indicates that the only additional land needed “to make the easement effective” was the land burdened by the two drainage ditches. The *Driscoll* court considered the ditches to be maintained and used by the public, but they were maintained and used for the drainage of the road. Accordingly, the *Driscoll* court determined that the width of the highway included the drainage ditches.

However, the *Semmerling* court recognized that drainage was not the sole issue, as land was also needed for public parking and for the passage of snowplows; *i.e.*, the public was using the land not only to maintain the road but also for other public purposes. For this reason, the court determined that six feet on each side of the road was required not only to maintain the road but also to meet the needs of the public using the land adjacent to the surface of the road. It seems clear that an additional six feet is not a policy touchstone that is universally applicable in all situations. Rather, it is simply the additional width that the trial court determined was appurtenant to the right-of-way in the given set of circumstances as being necessary “to make the easement effective.”

6. [2.115] General Guidelines

City of Highland Park v. Driscoll, 24 Ill.2d 281, 181 N.E.2d 93 (1962), and *Semmerling v. Hajek*, 258 Ill.App.3d 180, 630 N.E.2d 496, 196 Ill.Dec. 561 (2d Dist. 1994), make it clear that the road width of a prescriptive easement is the paved portion plus whatever additional land is necessary for the maintenance of the road and for making the easement effective. With this in mind, consider the following guidelines.

If the only evidence of public use along the right-of-way is drainage ditches, consider the right-of-way as including the paved portion plus the ditch. How much of the ditch should be included? Again, *Driscoll* indicates that the easement for a street must include enough additional land to make the easement effective. With *Driscoll* in mind, consider the right-of-way as including the paved portion plus the additional land running not merely to the center of the drainage ditch, but running to the top of the back slope of the ditch. See John W. Foltz, *The Highway Commissioner*, 30 Min.L., No. 2 (2003).

If there is no evidence of public use, there is virtually no road shoulder, and the adjoining landowner is clearly using (*e.g.*, farming) right up to the pavement or gravel, then consider following *Klose v. Mende*, 329 Ill.App.3d 543, 771 N.E.2d 960, 265 Ill.Dec. 1 (3d Dist. 2001) (width of road surface is width of right-of-way).

If there are drainage ditches or other evidence of public use, consider *Semmerling, supra*, in any evaluation of how much additional land is needed. In *Semmerling*, an additional six feet were required for drainage, public parking, and snowplow passage. Consider these elements of public use in making a decision.

In attempting to determine the width of the road, some surveyors feel that any overhead utility cross arms and lines belong in the roadway. The thought is consistent with the idea that public utilities are often placed in the right-of-way when there is no recorded grant of easement.

However, many old grants of utility easements allow the utilities to be placed over, under, or *alongside* the right-of-way. Furthermore, one might argue that utility poles and lines do not make a right-of-way easement effective. Although the continued maintenance of the poles and wires may create an easement by prescription for utilities, it may not create an easement by prescription for right-of-way. Therefore, although the utility poles may be an indication of public use, they may not delineate the width of the right-of-way.

If the land on both sides of the road is bounded by ancient fences and there is evidence that the area between the fences and the road surface is being used for drainage purposes or otherwise used by the public, the surveyor may want to consider the distance between the fences as the width of the road. In light of *Klose, supra*, the surveyor should probably not use this “fence rule” if there is no evidence that this land between the fences and the road surface is being used by the public or being used to help maintain the road (*e.g.*, drainage ditches).

7. [2.116] The Center of the Road

Determining the width of a road is, of course, directly related to locating the center of the road. Assume that the property in question was never subdivided. Therefore, the legal description of the land is a metes and bounds description. One of the courses is, *e.g.*, “thence east 100 feet to the center of Jones Road.” A title search discloses that Jones Road was never dedicated. Is there a problem?

Yes, there is. The surveyor cannot simply run an easterly line that is 100 feet long. As further discussed in §2.127 below, there is a hierarchy of legal description elements that comes into play when there is a conflict between two or more of these elements. Illinois law makes it clear that, in the event there is an inconsistency between a known monument and a distance, the monument takes precedence over the distance. The center of Jones Road is a monument. The surveyor must locate the center of the road. Although the course distance is important information for the surveyor, it is not absolute. The surveyor cannot simply measure a line that is 100 feet long because the location of the center of the road takes precedence over a possibly erroneous distance.

Over the years, surveyors have developed some traditional means of locating the center of an undedicated road. By and large, these traditional methods are consistent with the court cases discussed in §§2.109 – 2.115 above. For example:

If there are very old fences alongside the road, surveyors will determine the “split” between these fences. That is, surveyors will divide the distance between the fences by two.

If there are drainage ditches alongside the road, surveyors will determine the “split” of the top of the back slope of the drainage ditches on either side of the fence.

Surveyors will determine the “split” of the paved or graveled surface of the road.

In trying to establish the center of the road, some surveyors feel that any overhead utility lines belong in the roadway. This thought is consistent with the idea that public utilities are often placed in the right-of-way when there is no formal grant of easement.

8. [2.117] Rushing to Judgment

Before the attorney urges the surveyor to go to the site and measure fence lines and drainage ditches, the attorney should consider the effects of *Klose v. Mende*, 329 Ill.App.3d 543, 771 N.E.2d 960, 265 Ill.Dec. 1 (3d Dist. 2001). See §2.113 above. In *Klose*, the court followed a strict interpretation of the law and determined that two 1856 road dedications were not valid, even though the township ledger contained an entry indicating that the roads had been dedicated.

The Illinois legislature apparently objected to this “form over substance” approach to the law. It quickly passed P.A. 93-183 (eff. July 11, 2003), which amended §6-315 of the Illinois Highway Code, 605 ILCS 5/6-315. This amendment counteracts the holding in *Klose* with respect to the dedication issue. (Note that the amendment does not apply to the court’s finding relative to the width of the undedicated road.)

Section 6-315, as amended, reads as follows:

An entry in the records, ledger, or official minute book of the district clerk, stating that there has been a dedication of a public highway according to statutory requirements shall be prima facie evidence in all cases that there was a dedication of a public highway and that the dedication complied with all statutory requirements, regardless of whether supporting records or documentation of the dedication is available. 605 ILCS 5/6-315.

This amendment serves as a reminder to the attorney and the surveyor that the parties should look for records of road openings before assuming that the road is not dedicated. A title search is not always conclusive proof that a road was or was not dedicated. This amendment indicates that an entry in a township road opening minute book can effect a dedication, and such entries are usually not recorded. Township road opening books or other information concerning dedications might be kept at the local recorder’s office, a township or municipal office, a county highway department, or even at a surveyor’s place of business. See, e.g., 35 ILCS 200/9-50; 55 ILCS 5/5-1109.

PRACTICE POINTER

- ✓ How does the attorney find out where township road opening books are? Ask! Ask the title examiner, the local surveyor, the recorder, or an employee at a highway department, township office, or municipality. Ask other real estate attorneys. Eventually, the attorney will find someone who knows whether these records exist.
-

The attorney should also ask at the recorder’s office or assessor’s office whether there are any recorded or unrecorded “ancient maps” filed away. For example, an Act of February 12, 1853, 1853 Ill. Laws 3, provided that, when land had been divided into parcels of less than 1/16 of a section in size or otherwise so divided that the parcels could not be described in a usual manner, the owner was permitted to have the county surveyor prepare a plat for taxation purposes that the owner then

recorded. If the owner did not do this voluntarily, the county assessor could demand that the owner have such a plat prepared; if the owner failed to do so, the assessor had to have the survey made and recorded. These plats were known as “assessor’s plats” or “assessor’s subdivisions” and were the forerunners of today’s “county clerk’s surveys.” One of these plats might include a notation concerning the dedication of the road in question. See *People v. Reat*, 107 Ill. 581 (1883); *Maher v. Brown*, 183 Ill. 575, 56 N.E. 181 (1899); 35 ILCS 200/9-55.

If the attorney and surveyor find no evidence that the road was ever formally dedicated, however, they should consider using the guidelines in §2.116 above to locate the center of the road.

PRACTICE POINTER

- ✓ In working with these guidelines, the attorney and the surveyor should review the legal description of the land on the opposite side of the road. An examination of this description and how the boundary line along the right-of-way is described and how this description meshes with the description of the land in question might be helpful in determining the location of the center of the road.
-

9. [2.118] The Width, the Center, and the Survey

The guidelines developed in this chapter for determining the width of an undedicated road and for locating the center of this road are consistent with Illinois caselaw. Nonetheless, it is clear that these guidelines are somewhat subjective in nature. Therefore, it may be appropriate in some instances for the surveyor to document on the survey the means employed to identify the center of a road. For example:

The title commitment of _____ Title Company, Order No. _____, indicates that there is no recorded dedication of Blackacre Road. This is consistent with my review of county and township records. One cannot locate the center of an undedicated road with exact accuracy. The location of the center of the road on this survey is only an opinion and is based on the following factors and conclusions: _____.

PRACTICE POINTER

- ✓ Sections 2.109 – 2.117 above appear to put an almost crushing burden on the surveyor. With such divergent court cases, how can the surveyor truly determine the width of an undedicated road? How can the surveyor truly locate its center? In reality, these opinions should have little practical effect on the surveyor as long as the surveyor, when appropriate, indicates on the survey the method employed to identify the center of a road. The title insurance company will raise a “rights of the public” exception on any title commitment and policy when insuring land that runs into a right-of-way. The attorneys for the seller and purchaser of the property will realize that a portion of the land falls within the roadway

after reviewing the survey and title commitment. Assuming that the real estate contract calls for a purchase price of so many dollars per “net” square foot or acre (in this regard, see §2.140 below), counsel for both parties will have all the information necessary to make an informed decision concerning the nature of the property and its eventual purchase price.

VI. [2.119] COMMERCIAL SURVEY TITLE POLICY ENDORSEMENTS

There are many different types of survey-related endorsements that can provide additional coverage to owner’s and loan title insurance policies. Some of the more common endorsements are discussed in §§2.120 – 2.125 below.

The wording of some of these endorsements may seem strange. At one time, title insurance companies wrote their endorsements as straightforward statements of fact. For example:

The Company hereby insures the insured against loss or damage that the insured shall sustain by reason of any inaccuracies in the following assurance: The plat of survey made by _____, number _____, dated _____, accurately depicts the location of the exterior boundaries of said land, shows the proper dimensions of said boundaries, and correctly reflects the absence of any encroachments or easements not otherwise expressly set forth in Schedule B.

However, this form of wording is inconsistent with the traditional interpretation of a title insurance policy as a contract of indemnity, *i.e.*, as insurance against loss or damage. In this regard, see *Alliance Mortgage Co. v. Rothwell*, 10 Cal.4th 1226, 44 Cal.Rptr.2d 352 (1995). The facts of this case indicate that a title insurance company issued a location endorsement that stated that there was a multifamily dwelling on the property. However, the land was actually improved with a single-family residence. The court held that this endorsement language might be considered a representation and not merely a contract for indemnity. As a result of the holding of this case, title insurance companies and ALTA have rewritten many of their endorsements.

A. [2.120] Same as Survey Endorsement

A “same as survey” endorsement insures that the land described in Schedule A of the title insurance policy is legally identical to the land shown on the specified survey. See Chicago Title Insurance Company, ENDORSEMENT HANDBOOK, p. 156 (2020), https://media.ctic.com/ncs/il/flipbooks/2020_endo_handbook/files/assets/common/downloads/publication.pdf.

A variation of this endorsement is the “same as portion of survey” endorsement. This endorsement is used when the specified survey includes additional parcels not covered by the title insurance policy. See Chicago Title Insurance Company, ENDORSEMENT HANDBOOK, p. 158 (2020), https://media.ctic.com/ncs/il/flipbooks/2020_endo_handbook/files/assets/common/downloads/publication.pdf.

B. [2.121] Contiguity Endorsement

A contiguity endorsement can come in three forms.

First, a contiguity — multiple parcels endorsement insures that (1) each parcel, in a title insurance policy that insures multiple parcels, is contiguous to at least one other parcel insured by the same policy or (2) if some parcels are not contiguous to at least one other parcel, that certain parcels are contiguous to certain other parcels. See Chicago Title Insurance Company, ENDORSEMENT HANDBOOK, p. 138 (2020), https://media.ctic.com/ncs/il/flipbooks/2020_endo_handbook/files/assets/common/downloads/publication.pdf.

Second, a contiguity — single parcel endorsement insures that the land defined in the title insurance policy is contiguous to some other parcel of land not included within the policy description. See Chicago Title Insurance Company, ENDORSEMENT HANDBOOK, p. 138 (2020), https://media.ctic.com/ncs/il/flipbooks/2020_endo_handbook/files/assets/common/downloads/publication.pdf.

Finally, a contiguity — specified parcels endorsement is used when there are specific groups of parcels within the description of the land that are contiguous when taken as a whole. See Chicago Title Insurance Company, ENDORSEMENT HANDBOOK, p. 140 (2020), https://media.ctic.com/ncs/il/flipbooks/2020_endo_handbook/files/assets/common/downloads/publication.pdf.

C. [2.122] Location Endorsement

A location endorsement or a survey endorsement provides a brief description of the type of improvements located on the subject property and the property's street address. See Chicago Title Insurance Company, ENDORSEMENT HANDBOOK, p. 144 (2020), https://media.ctic.com/ncs/il/flipbooks/2020_endo_handbook/files/assets/common/downloads/publication.pdf.

Closely related and specifically referencing a survey, a location and map endorsement provides a brief description of the type of improvements located on the subject property and the property's street address or, if there is a map attached to the policy, such as a survey or plat of subdivision, that the map correctly shows the location and dimensions of the subject property according to the public records. See Chicago Title Insurance Company, ENDORSEMENT HANDBOOK, p. 146 (2020), https://media.ctic.com/ncs/il/flipbooks/2020_endo_handbook/files/assets/common/downloads/publication.pdf.

PRACTICE POINTER

- ✓ The attorney should review surveys of unsubdivided property carefully. In some instances, the legal description of the land will extend to the center of a road, but the surveyor will darken the outline of the property on the survey so that it appears that the description runs only to the inside edge of the road. In this event, the survey endorsement cannot be issued until the survey is revised. Because these surveys are sometimes incorrectly drawn, title

insurance company personnel will not automatically delete an exception relating to the possibility that part of the insured land falls within a roadway merely because of the manner in which the land is depicted on the survey. The title examiner first will want to review the legal description of the insured property and compare it to the survey. See §2.184 below.

D. [2.123] Access and Entry Endorsement

Subject to the terms of the title insurance policy, the title insurance company typically insures against loss or damage suffered by the insured by reason of “no right of access to and from the land.” However, the title insurance policy insures only access. For example, the policy does not insure that any adjacent road is “physically open” or paved. In other words, the road may be dedicated but may exist only on the plat of subdivision; in reality, there may be no road there at all. Nonetheless, because the road is dedicated, there is legal (and thus insurable) access to the property.

In short, the title insurance policy insures only legal access; the policy does not insure the nature or quality of the access. As the court concluded in *Gates v. Chicago Title Insurance Co.*, 813 S.W.2d 10, 11 – 12 (Mo.App. 1991):

It is true that the western road, the route by which plaintiff Gates had a right of access, was a difficult one and, in its present condition, of only limited usefulness, but if plaintiff had a *right of access*, even though over a rough and nearly impassable route, he makes no case under his title insurance policy. A title insurance company may not be expected to investigate the physical condition of a way of legal access to the insured property to determine if it is passable. [Emphasis in original.]

Title insurance company personnel often refer to *Gates* as “the goat path case” because the access route the insured had to take to get to the land was characterized in the decision as a “goat path” traversable only by foot or horseback. 813 S.W.2d at 11.

Access endorsements, therefore, *broaden* the coverage of the covered risk provision relative to access by insuring, to a degree, the nature of the access, insuring that the road indeed has been opened.

Some title underwriters feel that an access and entry endorsement can be given as long as the street is “physically open” — that is, as long as the street is paved with asphalt or concrete. Other underwriters, however, will first determine that there is a “curb cut” to the property before offering this endorsement. See Chicago Title Insurance Company, ENDORSEMENT HANDBOOK (2020), https://media.ctic.com/ncs/il/flipbooks/2020_endo_handbook/files/assets/common/downloads/publication.pdf

An access and entry endorsement can come in three different forms.

The first and simplest form is an access and entry endorsement that insures the subject property abuts and has actual vehicular and pedestrian access to and from a specific open and publicly maintained street by way of existing curb cuts or entries. See Chicago Title Insurance Company, ENDORSEMENT HANDBOOK, p. 122 (2020), https://media.ctic.com/ncs/il/flipbooks/2020_endo_handbook/files/assets/common/downloads/publication.pdf.

Second, an indirect access and entry endorsement insures that the subject property abuts and has actual vehicular and pedestrian access to and from a specific easement insured in Schedule A of the title insurance policy and that the insured easement gives the subject property access to an open and publicly maintained street. As opposed to the access and entry covered by the endorsement above, the insured access is indirect because it relies on the existence and enforceability of an easement benefiting the subject property, which easement links the subject property to an open and publicly maintained street. See Chicago Title Insurance Company, ENDORSEMENT HANDBOOK, p. 124 (2020), https://media.ctic.com/ncs/il/flipbooks/2020_endo_handbook/files/assets/common/downloads/publication.pdf.

Finally, a utility access endorsement insures against loss if there is a lack of a right of access to specific utilities or services over, under, or upon rights-of-way or easements because of (1) a gap or gore between the boundaries of the subject property and the rights-of-way or easements, (2) a gap between the boundaries of the rights-of-way or easements, or (3) a termination by a grantor of the rights-of-way or easements. Although not directly related to the kind of access described in the two previously described endorsements, access to utilities is an important aspect of owning and using the subject property and can occasionally rely on rights-of-way and/or easements benefiting the subject property. See Chicago Title Insurance Company, ENDORSEMENT HANDBOOK, p. 126 (2020), https://media.ctic.com/ncs/il/flipbooks/2020_endo_handbook/files/assets/common/downloads/publication.pdf.

E. [2.124] Subdivision Endorsement

A subdivision endorsement insures against the failure of the land to constitute a lawfully created parcel according to the subdivision statutes and local subdivision ordinances. The endorsement does not refer specifically to the plat of subdivision governing the subject property but instead refers to the general laws surrounding subdivisions and their creation. See Chicago Title Insurance Company, ENDORSEMENT HANDBOOK, p. 160 (2020), https://media.ctic.com/ncs/il/flipbooks/2020_endo_handbook/files/assets/common/downloads/publication.pdf.

F. [2.125] Zoning Endorsement

Section 1(a) of the Exclusions from Coverage in the 2021 ALTA Owner's Policy specifically excludes from coverage

any law, ordinance, permit, or governmental regulation (including those relating to building and zoning) that restricts, regulates, prohibits, or relates to:

- i. the occupancy, use, or enjoyment of the Land;**
- ii. the character, dimensions, or locations of any improvement on the Land;**
- iii. the subdivision of land; or**
- iv. environmental remediation or protection.**

A zoning endorsement adds this coverage to the policy with respect to the occupancy, use, or enjoyment of the subject property. The endorsement insures the zoning classification in which the subject property is located and the uses permitted in that zone. See also Chicago Title Insurance Company, ENDORSEMENT HANDBOOK, p. 126 (2020), https://media.ctic.com/ncs/il/flipbooks/2020_endo_handbook/files/assets/common/downloads/publication.pdf.

There are three additional variations on the zoning endorsement.

First, a zoning — completed structure endorsement provides the same coverage and is subject to the same limitations as the zoning endorsement above, but the completed structure endorsement also insures against losses arising from a court order that prohibits use of the subject property for specified purposes by the zoning or requires the removal or alteration of a structure located on the subject property because certain physical characteristics of either the subject parcel or a structure located on the subject parcel violate the ordinance. Those physical characteristics are referred to as the “Bulk Requirements” and include (1) the area, width, or depth of the subject parcel as a building site for the structure; (2) the floor space area of the structure; (3) the setback of the structure from the property lines of the subject parcel; (4) the height of the structure; and (5) the number of parking spaces. See Chicago Title Insurance Company, ENDORSEMENT HANDBOOK, p. 8 (2020), https://media.ctic.com/ncs/il/flipbooks/2020_endo_handbook/files/assets/common/downloads/publication.pdf.

The title insurance company will need a survey of the subject property before it can provide the assurances offered in ¶¶3.a and 3.b of this endorsement. If the survey does not provide all the needed information (*e.g.*, height of the structure or number of parking spaces), title insurance companies usually will not require an amended survey. Instead, they normally will accept a letter from the surveyor or owner that includes the needed information.

Items 4 and 7 of Table A of the 2021 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys concern land area and building area. For the purposes of issuing this endorsement, however, most title insurance companies can compute the floor area ratio (*i.e.*, the gross floor area of the building or buildings on the land divided by the area of the land) without requiring these two Table A items from the surveyor. In this regard, the following are some useful mathematical formulas:

Area of rectangle = $b \times h$ (base times height)

Area of triangle = $\frac{1}{2}(b \times h)$ (*i.e.*, one-half of base times height)

Area of circle = $\pi(r^2)$ (*i.e.*, “pi,” or 3.1416, times the radius, squared, of the circle)

To convert acreage into square feet, multiply the number of acres by 43,560 (an acre contains 43,560 square feet).

To reduce square feet to acreage, multiply the number of square feet by 0.000023. In the alternative, multiply the number of square feet by 23 and count off six places (*i.e.*, move the decimal point 6 places to the left). One can also divide the number of square feet by 43,560 (0.000023 is the reciprocal of 43,560).

To find the length of the unknown side of a rectangular parcel when the acreage of the parcel is known and when the length of one side is known, multiply the acreage by 43,560 and then divide this figure by the known length. If the number of square feet is known, divide the square feet by the known length. This results in the length of the unknown side.

EXAMPLE: The title insurance company is insuring a rectangular tract of land that is 5.4 acres in size. The length of the two smaller east and west sides is 459 feet. What is the length of the larger north and south sides?

$$5.4 \text{ acres} \times 43,560 = 235,224 \text{ square feet}$$

$$235,224 \div 459 = 512.47$$

The length of the north and south sides is 512.47 feet.

Second, a zoning — land under development endorsement extends the coverage of a zoning — completed structure endorsement to land on which proposed buildings are to be constructed, but only if the proposed building is constructed according to the site and elevation plans identified in the endorsement. See Chicago Title Insurance Company, ENDORSEMENT HANDBOOK, p. 10 (2020), https://media.ctic.com/ncs/il/flipbooks/2020_endo_handbook/files/assets/common/downloads/publication.pdf.

Finally, a zoning — completed improvement — nonconforming use endorsement is used when there is a known nonconforming use on the subject property under the applicable zoning classification. The endorsement insures against loss or damage if a specified nonconforming use is not allowed because it violates a municipal or county zoning ordinance or regulation. It also insures against a final court order either prohibiting the present nonconforming use or requiring removal or alteration of the existing improvement because the nonconforming use violates a zoning ordinance or regulation as to (1) area, width, or depth of the subject property as a building site for the building; (2) the floor space area of the building; (3) the setback of the building; (4) the height of the building; or (5) the number of parking spaces. See Chicago Title Insurance Company, ENDORSEMENT HANDBOOK, p. 14 (2020), https://media.ctic.com/ncs/il/flipbooks/2020_endo_handbook/files/assets/common/downloads/publication.pdf.

PRACTICE POINTER

- ✓ Some title insurance company underwriters feel that a land title survey is necessary before a zoning endorsement can be issued. Other title underwriters feel that a land title survey is not always needed and that a boundary survey is sufficient for the issuance of this endorsement. Perhaps the former group feels this way because they often receive land title surveys when asked to insure commercial properties. On the other hand, the latter group no doubt argues that, although a land title survey may be necessary in order to issue extended coverage to an owner's title insurance policy, it should not always be needed for the issuance of this zoning endorsement.
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VII. [2.126] LEGAL DESCRIPTIONS IN ILLINOIS

As discussed in §2.2 above, the legal description is used by the surveyor to physically locate the parcel and distinguish it from neighboring parcels. Legal descriptions in many cases have been established through a chain of title from one landowner to the next, but surveyors may also be called on to write a new legal description, such as in the case of a new subdivision or a consolidation of multiple parcels into one. Sections 2.127 – 2.142 below address some common problems with legal descriptions that can impact a survey.

A complete discussion of legal descriptions is beyond the scope of this chapter. For information regarding this subject, see Logan D. Fitch, *REAL ESTATE TITLES IN ILLINOIS*, pp. 2 – 42 (1948); E.D. Grigsby, *Descriptions and Plats*, 39 Ill.B.J. 439 (1951); Lyle W. Maley and William A. Thuma, *The Fundamentals of Legal Descriptions*, 42 Ill.B.J. 672 (1954); and Lyle W. Maley and William A. Thuma, *Practical Observations on Problems in Legal Descriptions*, 43 Ill.B.J. 34 (1954).

A. [2.127] Legal Description Conflicts

Legal descriptions may contain elements that conflict with each other. Illinois caselaw has devised a hierarchy whereby some elements are given more weight than others. This hierarchy is (from highest weight to lowest weight) as follows: natural monuments; artificial monuments; courses; distances; and quantity. *See Cottingham v. Parr*, 93 Ill. 233, 236 (1879) (“It is also a rule that where land is described in a deed by monuments and quantity, and upon a survey they are not harmonious, the quantity must yield to the monuments. . . . Quantity yields to course and distance, course and distance to monuments.”). *See also Hadie v. Erlandson*, 41 Ill.App.2d 328, 190 N.E.2d 848 (2d Dist. 1963) (abst.); *Forest Preserve Dist. of Cook County v. Lehmann Estate, Inc.*, 388 Ill. 416, 58 N.E.2d 538 (1944); *Branstetter v. Dahncke*, 394 Ill. 40, 67 N.E.2d 212 (1946); *Dorsey v. Ryan*, 110 Ill.App.3d 577, 442 N.E.2d 689, 66 Ill.Dec. 263 (4th Dist. 1982); *Texas Co. v. Hawthorne*, 371 Ill. 468, 21 N.E.2d 565 (1939); *Peoria Gas & Electric Co. v. Dunbar*, 234 Ill. 502, 85 N.E. 229 (1908); Logan D. Fitch, *REAL ESTATE TITLES IN ILLINOIS*, pp. 25 – 29 (1948); 5 I.L.P. *Boundaries* §4 (2012); Jeffery N. Lucas, *ILLINOIS BOUNDARY LAW*, pp. 263 – 268 (2012).

EXAMPLE: A metes and bounds legal description reads as follows: “Beginning at the intersection of the east side of Oak Street and the north side of Maple Street; thence north along the east side of Oak Street 55 feet to the southwest corner of lot 1; thence east along the south line of lot 1.” The distance from the point of beginning to the southwest corner of lot 1 is actually 54 feet, not 55 feet. Because monuments control over distances, the corner of the parcel being described is at the southwest corner of lot 1 and not at a point one foot north of this corner. See §2.185 below.

PRACTICE POINTER

- ✓ This hierarchy of description elements is a presumption that can be overcome by contrary evidence of the intent of the parties creating the legal description. *See Branstetter, supra*, 67 N.E.2d at 214 (“In the construction of deeds, it is the rule that the intention of the parties

is the test by which to determine the effect of a deed and that rule applies also to questions involving descriptions and boundaries. . . . That intention must be gathered from the instrument itself and the admissible extraneous facts and circumstances.” [Citation omitted.]

B. [2.128] Statutory Concerns

Attorneys should be aware of §35c of the Conveyances Act, 765 ILCS 5/0.01, *et seq.*, which states, “If references are made to existing monuments or points or lines of previously recorded conveyances, the instant [legal] description shall contain sufficient information so that it may be located without reference to matters outside the instant [legal] description.” The intent of this legislation was to prohibit the recording of deeds whose legal descriptions reference the legal descriptions contained in other documents. For example, “thence east along said section line to the southwest corner of that property described in document R88-11151; thence northerly along the westerly line of said property.”

Many Illinois recorders ignore this legislation. However, in those counties whose recorders strictly enforce §35c, one might not be able to record a deed that contains a legal description that includes a course similar to the one above.

Additionally, §35c refers to deeds or instruments of conveyance. It is unclear if a mortgage falls within the restrictions of §35c. In *Harms v. Sprague*, 105 Ill.2d 215, 473 N.E.2d 930, 85 Ill.Dec. 331 (1984), the Illinois Supreme Court differentiated between the title theory of mortgages, which holds that a mortgage is a conveyance when made, and the lien theory of mortgages, which holds that a mortgage is merely a lien and not a conveyance until a deed is given in foreclosure. However, *Harms* dealt with the effect of a mortgage on a joint tenancy and not whether a mortgage must conform to §35c.

Further confusing the issue, other sections of the Conveyances Act seem to indicate that a mortgage is a conveyance. *See, e.g.*, 765 ILCS 5/1.

Thus, if a mortgage contains a legal description in violation of §35c, should it still be entitled to be placed of record? What happens if the mortgage is foreclosed? It seems possible that a recorder might refuse to record the resulting sheriff’s deed for violating §35c.

To avoid potential problems in counties that enforce this legislation, lender’s counsel should, when necessary and appropriate, hire a surveyor to draft an alternative legal description that does not violate this statute. This description, together with the other nonconforming legal description that has traditionally been used, could be appended to a mortgage in which the traditional legal description violates the criteria set forth in this statute.

This legislation pertains only to metes and bounds legal descriptions. Thus, a simple legal description such as “the Northwest quarter of Section 18, Township 38 North, Range 8, East of the Third Principal Meridian, excepting therefrom that property conveyed in document R88-0708” is perfectly valid. It appears, though, that this legal description is contrary to the intent of this legislation, so it might not be accepted by a recorder who enforces these two amendments.

Finally, §35c concludes by stating, “The neglect to comply with the provisions of this Section shall not invalidate the instrument.” 765 ILCS 5/35c. Thus, a nonconforming deed or mortgage is still a valid and binding instrument as between the parties to the document. However, the refusal of a county recorder to record the document could still deprive it of the benefits granted to recorded documents by Illinois law.

PRACTICE POINTER

- ✓ When faced with a suspect legal description, should lender’s counsel do nothing, concluding that, if a recorder refuses to record a sheriff’s deed, it is the title insurance company’s problem? This may not be the best course of action as the recorder’s recalcitrance probably falls outside the insuring provisions of the lender’s title insurance policy. On the other hand, perhaps counsel could negotiate with the title insurance company for the purchase of a loan policy endorsement that would insure against loss in the event that the legal description does not comply with this statute.

For further information, see Richard F. Bales, *Public Act 85-0373 or To Know Which Road Is Paved with Good Intentions*, 33 Real Prop.Newsl., No. 1, 1, 3 (1987), and Richard F. Bales, *Another Amendment to the Conveyancing Act, or, Retrieving the Baby from the Bath Water*, 34 Real Prop.Newsl. No. 2, pp. 1 – 2 (1988).

C. [2.129] Evaluating Legal Descriptions

Sections 2.91 – 2.104 above on gaps and overlaps illustrate the “hidden risks” of legal descriptions that on their face appear to be perfectly valid, but there are many other types of legal descriptions that are patently ambiguous. When reviewing a survey, the attorney should read through the legal description and question anything that appears to be unclear.

1. [2.130] Irregularly Shaped Lots

It is a simple matter to carve out the “west 15 feet” of a lot when the lot is a square or rectangle, but what if the lot in question is irregular in shape — for example, a parallelogram, with the east and west sides straight up and down, but the north and south sides angling from the northwest to the southeast? See §2.186 below. The general rule of construction is that, unless otherwise qualified, the deed should be construed as if the west 15 feet of the lot were measured by a line drawn at right angles to the west line of the lot, but surveyors, attorneys, and title insurance companies should not have to resort to a rule of construction in order to understand a legal description. The drafter of the legal description should make it clear as to how the west 15 feet is measured. There are two choices:

The west 15 feet of the lot, as measured by a line drawn at right angles to the west line thereof.

or

The west 15 feet, as measured along the northerly line and parallel to the west line.

Section 2.186 below illustrates how the “west 15 feet” of a lot can change in size, depending on how it is measured.

Lot 127 is shown in §2.187 below. A title insurance company was asked to insure this portion of the lot:

Lot 127 (except the east 256.81 feet of the north 8 feet thereof and except the east 8 feet thereof.)

Because the lot is irregularly shaped with lot lines that are either angular (northerly and easterly lines) or curved (westerly and southerly lines), this description contains several ambiguities:

Is the east 256.81 feet measured along the north line of the lot or by a line perpendicular to the east line of the lot?

Is the north 8 feet measured perpendicular to the north line, along the west line, or along the east line of the lot?

Is the east 8 feet measured along the north line of the lot or by a line drawn perpendicular to the east line of the lot?

The lot shown in §2.188 below is commonly called a “stair step parcel.” A title insurance company was asked to insure the east 20 feet of this lot, but what is the east 20 feet of this lot? While one might assume that it is the southern parcel, one might also assume that the drafter of this legal description intended “the east 20 feet” to apply to both parcels of land. The “east 20 feet” is ambiguous; these parcels are better described as follows:

North parcel: **The east 20 feet of the north 50 feet of lot 1.**

South parcel: **The most easterly 20 feet of lot 1.**

2. [2.131] “Exception” Legal Descriptions

“Exception” legal descriptions can be especially confounding. The general rule is to describe the entire tract of land (sometimes called the “caption”) first and then describe any and all exceptions. If the drafter of the description places the exception in the caption, it can be confusing. For example:

The west 400 feet of lot 2, excepting from said tract the west 100 feet.

or

The west 400 feet of lot 2, excepting from said west 400 feet the west 100 feet.

or

The west 400 feet of lot 2 in Blackacre Subdivision, being a subdivision of the southwest quarter of Section 26, Township 38 North, Range 11, east of the Third Principal Meridian, according to the plat of said subdivision recorded October 8, 1971, as document R71-12345, in DuPage County, Illinois, excepting from the above described property the west 100 feet.

In all of these examples, the entire tract of land is described first — in this case, the west 400 feet of lot 2 — and then the exception parcel is described. By writing the legal description in this manner, one can first identify the west 400 feet of lot 2 and then easily eliminate the exception parcel (the west 100 feet of the west 400 feet). See §2.189 below.

Compare these three examples with the following:

The west 400 feet except the west 100 feet of lot 2.

This description is ambiguous. Is the west 400 feet taken out of “lot 2,” or should it be carved out of “lot 2, except the west 100 feet?” It appears that the west 100 feet is to be excepted out of lot 2 first (unlike the previous examples) and then the west 400 feet is to be taken out of the remainder of lot 2. This may not have been the intent of the drafter of the description, however, and it creates a tract of land (see §2.190 below) that is markedly different from the tract in §2.189 below.

Because exception legal descriptions can be confusing, some surveyors might describe “the west 400 feet of lot 2, excepting from said tract the west 100 feet” in this manner:

That portion of the west 400 feet of lot 2 lying east of the following described line: Beginning at a point on the north line of lot 2, a distance of 100 feet east of the northwest corner of said lot, thence south parallel to the west line of lot 2 to the southerly line thereof.

The use of the word “thereof” in exception legal descriptions can sometimes lead to confusion:

Lot 2 in Blackacre Resubdivision, being a Resubdivision of the north half of lot 17 (except the north 33 feet thereof) in Sunnyside Hills Acres Estates, being a Subdivision of the southeast quarter of Section 15, Township 38 North, Range 11, east of the Third Principal Meridian, according to the plat of said Resubdivision recorded on November 18, 1977, as document R77-56789, in DuPage County, Illinois.

What does the phrase “except the north 33 feet thereof” refer to? The north 33 feet of lot 2 or the north 33 feet of the north half of lot 17?

Even very simple legal descriptions can be ambiguous when the word “thereof” is used:

Lot 40 and lot 41, except the south 20 feet thereof.

Does the exception “except the south 20 feet thereof” refer to both lots 40 and 41 or only lot 41? This legal description can be clarified in several ways:

Lot 41 (except the south 20 feet thereof) and lot 40.

or

Lot 40 and lot 41, except the south 20 feet of lot 41.

or

Lot 40 and lot 41, except the south 20 feet of said lots.

The ambiguity in these descriptions was created by the careless use of the word “thereof.” Drafters of legal descriptions should use this word sparingly and instead clearly indicate to what an exception refers.

3. [2.132] Parts of Lots

Consider this legal description:

The east 15 feet of lot 9, lot 10, and the west half of lot 11.

Does this description describe only the east 15 feet of lot 9, or does it describe the east 15 feet of lot 9 and also the east 15 feet of lot 10?

If the drafter intended for “the east 15 feet” to affect only lot 9, the drafter could have clarified the description in at least two ways:

Lot 10, the east 15 feet of lot 9, and the west half of lot 11.

or

The east 15 feet of lot 9, all of lot 10, and the west half of lot 11.

Attorneys, surveyors, and title insurance companies should never worry about keeping numbered lots in numerical order if by rearranging them the legal description is simpler and clearer.

What is wrong with these two legal descriptions?

Beginning at the southwest corner of lot 1; thence north along the west line of said lot 1, 10.50 feet.

Beginning at the southeast corner of section 6, thence west along the south line of said section 6, 50 feet.

Section numbers and lot numbers should never be placed directly adjacent to distances. In these examples, all it would take is the careless deletion of a comma to change the legal descriptions to

. . . thence north along the west line of said lot 110.50 feet. . . .

. . . thence west along the south line of said section 650 feet. . . .

The drafter should insert the words “a distance of” between the lot or section numbers and distances:

... **thence north along the west line of said lot 1 a distance of 10.50 feet. . . .**

... **thence west along the south line of said section 6 a distance of 50 feet. . . .**

4. [2.133] Insuring Parcels by Quantity

Although a conveyance of “the east five acres” of a section of land or a square or rectangular lot is usually acceptable and insurable, the attorney should question a description by quantity if the parcel is irregular in shape.

See, for example, §2.191 below. Where is the dividing line for the “east half” of this lot? One might assume that it is a line running north from the midpoint of the south line of the lot. However, quantity of an irregularly shaped parcel is determined by square footage or acreage. Because this lot is not a square or rectangle, the west line of the east one-half of the total area of this lot would not be in the same location as a line running north from the midpoint of the south line of the lot. This rule of construction for the “east half” of an irregularly shaped lot may not be consistent with the expectations of the attorney or the client. Rules of construction that may later have to be interpreted by a court should be avoided in favor of precisely worded legal descriptions that leave no room for interpretation. See Gurdon H. Wattles, *WRITING LEGAL DESCRIPTIONS IN CONJUNCTION WITH SURVEY BOUNDARY CONTROL*, pp. 7.22 – 7.27 (4th ed. 1979).

5. [2.134] Curves in Metes and Bounds Legal Descriptions

The general rule in Illinois is that a legal description is sufficient if a competent surveyor can locate the land with reasonable certainty. See *Smiley v. Fries*, 104 Ill. 416 (1882); *Village of Auburn v. Goodwin*, 128 Ill. 57, 21 N.E. 212 (1889); *Kane v. McDermott*, 191 Ill.App.3d 212, 547 N.E.2d 708, 138 Ill.Dec. 541 (4th Dist. 1989); *WestPoint Marine, Inc. v. Prange*, 349 Ill.App.3d 1010, 812 N.E.2d 1016, 286 Ill.Dec. 1 (4th Dist. 2004). This rule is particularly applicable when reviewing a survey of a metes and bounds legal description that includes curves. For example, a non-tangent curve should contain sufficient information so that the curve can be reproduced without having to refer to the actual drawing of the land. If, *e.g.*, only the radius and general direction of the non-tangent curve are furnished, another surveyor would not be able to draw out the legal description without first examining the survey or the original surveyor’s field notes.

EXAMPLE: The following description of a non-tangent curve includes only the radius and direction of the curve; this is not enough information to draw the curve:

Beginning at the northwest corner of the northwest quarter of said Section 6; thence north 25 degrees east 210 feet to the beginning of a non-tangent curve; thence northeasterly 150 feet along a curve to the right, having a radius of 150 feet. . . .

EXAMPLE: On the other hand, this description contains enough information to draw the curve:

Beginning at the northwest corner of the northwest quarter of said Section 6; thence north 25 degrees east 210 feet to the beginning of a non-tangent curve, thence northeasterly along a curve to the right, having a radius of 150 feet, the chord of said curve having a bearing of north 78 degrees east and a length of 180 feet. . . .

Although *Smiley, supra*, and other Illinois cases indicate that a surveyor is allowed to use extrinsic evidence to identify the property in question, it is doubtful that a title insurance company would insure a legal description that appeared to be deficient on its face. Furthermore, a recorder might not record a deed that contained an inadequate description, feeling that it did not conform to the requirements of 765 ILCS 5/35c. See, in this regard, §2.128 above.

6. [2.135] Court Cases

The following court cases address insufficient legal descriptions:

In *Hanna v. Palmer*, 194 Ill. 41, 61 N.E. 1051 (1901), the land was described as a certain acre out of a larger tract of land, but the legal description did not specify the part of the larger tract out of which the acre was taken.

In *Pfaff v. Cilsdorf*, 173 Ill. 86, 50 N.E. 670 (1898), a metes and bounds description was void when there was no reference to any government survey and no mention of the county or state in which the land was located.

In *Pry v. Pry*, 109 Ill. 466, 478 (1884), the legal description was void for uncertainty because the point of commencement was “Commencing at the N. W. of the N. W. S. E. of Sec. 19” and also because the description contained a reference to the “S. E. 1/2” of Section 19 — that is, the description referred to the “S. 1/2 of the N.E. 1/4 of the S. E. 1/2” of the section of land.

In *Weber v. Alder*, 311 Ill. 547, 143 N.E. 95, 96 (1924), the legal description was void because it was too ambiguous. The description referred only to “76 ft. east of the 38 ft. facing north on Lawrence Ave. E. of Robey St.” *Id.*

Other cases relating to the adequacy of legal descriptions include *Sickmon v. Wood*, 69 Ill. 329 (1873); *Richey v. Sinclair*, 167 Ill. 184, 47 N.E. 364 (1897); *Evans v. Gerry*, 174 Ill. 595, 51 N.E. 615 (1898); *Smith v. Burt*, 388 Ill. 162, 57 N.E.2d 493 (1944); and *Glen View Club v. Becker*, 113 Ill.App.2d 127, 251 N.E.2d 778 (1st Dist. 1969).

D. [2.136] Legal Descriptions, Plats of Subdivision, and Occupational Evidence

Older plats of subdivision are sometimes ambiguous. Some plats recorded in the early and mid-1900s, for example, have lot lines that appear to run to the center of an adjoining road. Does the lot run to the center of the road, or does the lot line stop at the edge of the road? Is the title insurance company correct in raising a “rights of the public” exception in Schedule B of its title commitment? If not, how does one prove that the lot does not fall within the roadway? Sections 2.137 and 2.138 below provide a road map of analysis in answering questions like these.

1. [2.137] A Will County Case Study

Section 2.192 below depicts lot 19 of Unit No. 1 of Reed's Crest of Hill Estates. This plat of subdivision was recorded in Will County on June 22, 1950, as document 675100.

The figure in §2.192 below indicates that lot 19 is 165 feet wide and 943 feet deep. A 66-foot wide gravel road straddles the section line at the south end. The lot does not run to the center of the road. Or does it? The plat of subdivision indicates that lot 19 contains 3.70 acres and that the depth of 943 feet stops at the edge of the road. Does $943 \text{ feet} \times 165 \text{ feet} = 3.70 \text{ acres}$?

To convert square feet to acres, multiply the number of square feet by 0.000023. (There are 43,560 square feet in an acre, and 0.000023 is the reciprocal of 43,560.)

$$943 \text{ feet} \times 165 \text{ feet} = 155,595 \text{ square feet}$$

$$155,595 \text{ square feet} \times 0.000023 = 3.57 \text{ acres, not } 3.70 \text{ acres}$$

The adjoining road is 66 feet wide. Add one half the width, or 33 feet, to the depth of the lot, compute the square feet, and then convert the square feet to acreage to determine whether this adjusted acreage equals 3.70 acres.

$$943 + 33 = 976 \text{ feet}$$

$$976 \times 165 = 161,040 \text{ square feet}$$

$$161,040 \times 0.000023 = 3.70 \text{ acres}$$

The parcel, including the road, is 3.70 acres; therefore, this plat of subdivision clearly presents an inconsistency between the depiction of the lot's measurements and the lot's acreage. Assume that the client owns lot 19. The surveyor has been asked to survey lot 19. Should the surveyor include the road on their survey? Does lot 19 fall within the road? To answer questions such as these, the attorney, surveyor, and title examiner should closely examine the plat of subdivision. Often the plat will contain information that will aid all parties in making decisions concerning parcel boundaries.

A key factor is evidence of lot corners. If the plat shows that lot corners were set at the edge of the road, then this is a good indication that the original subdivider (and the municipality) intended that the lot run only to the edge of the road. This Will County plat contains the legend "• — indicates iron stakes unless otherwise noted." Further examination of the plat reveals that iron stakes had been set at all four corners of lot 19 and the two southern stakes were set at the edge of the road and not in the center of the road. See §2.192 below.

Finally, when in doubt, examine the plat of subdivision for a certificate that might disclose any additional information. This plat of subdivision includes the statement that "Building line shall be not less than 30.0 feet from front lot line, nor less than 10.0 feet from any side lot line." If the lot

ran 33 feet to the center of the road, this would result in a negative building line of 3 feet. That is, one would be able to build a home that extended three feet into the road! This is obviously not what the developer and the municipality intended. It seems clear that, despite the misleading statement as to the lot's acreage, the lot does not run to the center of the road.

2. [2.138] A Case Study Revision

Now change the facts in §2.137 above slightly. What if the plat of subdivision does not indicate that the lot corners were set? What if the plat contains no building line certificate nor any other helpful legend or statement? If the recorded plat discloses no additional information, then the attorney should turn to the surveyor. If the surveyor can find the original lot corners at the edge of the road, then this suggests that the original surveyor did not intend for the lot to extend into the right-of-way.

What if the surveyor fails to uncover any original lot corners? What if the surveyor finds monuments set at both the edge of the road and the middle of the road? Even worse, what if the client owns just the south half of lot 19? How does the surveyor locate the boundary line between the south half and the north half of the lot if the attorney, the title insurance company, and the surveyor cannot determine where the south line of the lot is? How can the surveyor survey the south half of the lot when the surveyor cannot determine the location of the south line of the lot?

As a last resort, the surveyor should consider occupational evidence between the parcels. Again, the plat of subdivision indicates that the distance from the north line of lot 19 to the edge of the road is 943 feet and that the distance from the edge of the road to the center of the road is 33 feet. If the surveyor measures 488 feet (one half the sum of 943 feet + 33 feet, or 976 feet) from the center of the road and a garage encroaches onto the land to the north, but the surveyor measures 471.5 feet (half of 943 feet) from the edge of the road and all improvements fit within the parcel with no encroachments, then this is a good indication that the lot does not fall within the roadway. See §2.193 below.

If the parcel is vacant with no occupational evidence, the attorney should consult both the client and the owner of the adjoining land. If the parties do not know where the boundary line is between the two parcels, then perhaps the only solution is an exchange of quitclaim deeds between owners or the execution of a boundary agreement. *See Loverkamp v. Loverkamp*, 381 Ill. 467, 45 N.E.2d 871 (1942); *Nitterauer v. Pulley*, 401 Ill. 494, 82 N.E.2d 643 (1948); *Hartzler v. Ufiring*, 114 Ill.App.3d 427, 450 N.E.2d 1208, 71 Ill.Dec. 329 (4th Dist. 1983); *Darter v. Darter*, 91 Ill.App.3d 322, 414 N.E.2d 862, 46 Ill.Dec. 809 (5th Dist. 1980); *Ginther v. Duginger*, 6 Ill.2d 474, 129 N.E.2d 147 (1955); *Skinner v. Francisco*, 404 Ill. 356, 88 N.E.2d 867 (1949). For a more detailed explanation of boundary agreements, see §§2.148 – 2.151 below.

E. [2.139] Surveys of Agricultural Property

It seems that commercial developers are purchasing agricultural property at an ever-increasing rate. Because the sale of a farm has a few unique survey issues, a discussion of surveys of agricultural property is in order and follows in §2.140 – 2.142 below.

1. [2.140] Gross Area vs. Quantity

It is important that attorneys who represent sellers of agricultural property consider the difference between “gross” and “net” area. “Gross area” includes the entire area of the tract, including the area of land, if any, that falls within a road. “Net area” is the area of the tract less the area of that property, if any, that falls within the road.

Therefore, if a survey indicates that the farm is composed of a certain number of acres and if a portion of the property falls within a roadway, the attorney should ask the surveyor to determine the area of the right-of-way. If a farm is sold at so many dollars per acre, the purchaser will certainly be unwilling to pay the asking price for right-of-way land that is essentially worthless for development.

The words “more or less” in a legal description of acreage are terms of precaution, used in deeds to cover slight inaccuracies such as those incident to measurement by different surveyors or inaccuracies stemming from variations in different surveying instruments. They may not necessarily protect an attorney in the event of a major mistake in the determination of the acreage of property. *See Brooks v. Halane*, 116 Ill.App. 383, 388 (3d Dist. 1904) (“In this case the contract does not describe the land to be conveyed, by metes and bounds, nor by any fixed, ascertainable monuments, and in the absence of any such guides, the words ‘more or less’ do not weaken or destroy the statement of quantity.”); *Hagenbuch v. Chapin*, 149 Ill.App.3d 572, 500 N.E.2d 987, 990, 102 Ill.Dec. 886 (3d Dist. 1986) (“The language ‘more or less’ in the description of the land does not transform a sale by the acre into one ‘in gross.’”).

On the other hand, *see Binder v. Hejhal*, 347 Ill. 11, 178 N.E. 901, 904 (1931), in which the court wrote:

The rule in regard to the sale of a tract of land in gross by its proper governmental description, or by any other specific description by which its exact boundaries may be determined, is that these boundaries will control the description in case of a discrepancy as to the quantity or number of acres, and neither the purchaser nor the seller will have any remedy against the other for any excess or deficiency in the quantity stated unless the excess or deficiency is so great as to raise a presumption of fraud; and where a sale of an entire tract of land by metes and bounds for a gross sum has been made and the parties have acted in good faith and no fraudulent representation has been made, neither party will be bound by a statement as to the quantity or number of acres contained in the tract except where such statement is expressly or by necessary implication made the essence of the contract.

2. [2.141] The “Underground Drainage Tile” Title Policy Exception

When asked to insure a farm or other large tract of vacant land, a title insurance company will usually raise an exception for “underground drainage tiles, feeders, and laterals, if any” on its title commitment. Tile, feeders, and laterals are all components of a system used by farmers to drain excess water out of the land in order to avoid oversaturation and to oxygenate the soil. Tiles are the main drainage line, while laterals are smaller drainage lines that drain into the main tiles, and feeders help to divert water into the drainage lines.

The title insurance company usually will not waive this exception when it issues its policy on the vacant land, even when presented with a survey. This is because the survey will show only *observable* evidence of easements, encroachments, and other survey matters. Although the surveyor may show a drainage ditch traversing the land, the surveyor has no way of knowing whether there is drainage tile running under the farmer's fields.

Once the land is platted, improved, and developed, however, the title insurance company should be able to waive this exception from policies issued to purchasers of developed lots. Before waiving the exception, the title insurance company may want to know whether the developer encountered any underground tiles during the course of construction. Developers sometimes furnish this information in what is commonly called a "digger letter." Two variations of this letter are as follows:

Please be advised that the excavation and construction relative to the above-referenced property has been completed. No existing underground drainage tiles, feeders, laterals, pipes, or other conduit were encountered during the course of construction.

or

Please be advised that the excavation and construction relative to the above-referenced property has been completed. During the course of construction, underground drainage tiles and pipes were encountered, but all such tiles and pipes were re-routed into platted drainage easement areas.

PRACTICE POINTER

- ✓ As noted above, title insurance companies will usually not waive the "drainage tiles, feeders, and laterals" exception prior to land development. If the attorney believes that the exception must be waived from the client's title insurance policy, the title insurance company may consider this request, but only if sufficient indemnities are furnished by a financially sound entity.
-

3. [2.142] Farmers and Fences

The statement that "farmers tend to fence their farms" is not only alliterative; it seems to be factual as well, but these fences can also enclose a serious title problem.

Section 2.194 below depicts two adjacent farms. The owner of the west farm has fenced in the farm, but note that the fence is substantially inside the line dividing the two farms. Is the farmer to the east now tilling up to the fence line? If so, could the farmer to the east obtain title by adverse possession to that portion of the neighbor's farmland that lies between the fence and the boundary line? See Chicago Title Insurance Company, ENDORSEMENT HANDBOOK (2020), https://media.ctic.com/ncs/il/flipbooks/2020_endo_handbook/files/assets/common/downloads/publication.pdf.

Both purchaser and lender would take title subject to this exception, but if the fence is not inset too much, perhaps the exception could be endorsed over on the loan policy with an identified risk endorsement. This endorsement would insure the lender against any loss that the lender might sustain as a result of a risk specified in the endorsement, which in this scenario would be a decrease in value of the property in question as a result of any “taking” caused by the possible adverse rights of the neighboring farmer. See Chicago Title Insurance Company, ENDORSEMENT HANDBOOK, p. 196 (2020), https://media.ctic.com/ncs/il/flipbooks/2020_endo_handbook/files/assets/common/downloads/publication.pdf.

When reviewing a survey for possible boundary fence encroachments, the attorney or title examiner, when attempting to determine “whose fence is it,” may look at the survey and at how the horizontal fence boards are depicted in relation to the vertical fence posts. The examiner may feel that if the vertical fence posts are inside the horizontal fence boards, so that the fence boards are enclosing the insured owner’s property, the fence is quite likely the owner’s fence and thus not an encroachment.

Unfortunately, such thinking is erroneous. Many surveyors merely use a “boards and posts” drawing as a universal symbol for the depiction of a boundary fence. The symbol is used regardless of how the boards and posts actually appear. Thus, the title examiner cannot rely on how a fence is depicted on a survey in attempting to determine the ownership of the fence. Furthermore, as noted in §2.51 above, surveyors will usually not determine fence ownership; their job is simply to depict the location of the fence on the survey.

In addition, farmers often put the horizontal fence boards on the *inside* of the fence posts, so that, when their livestock rub up against the fence, the animals will not push the boards off the posts. (Traditionally, though, farmers will place the boards on the outside of the posts when fencing in their front yards in order to give the outer side of the fence a uniform appearance. This is often the case in urban areas as well, with many municipal building codes requiring this same type of front yard fence construction.)

How can the attorney or title examiner determine boundary fence ownership? The best way is to look at the survey and see if the fence follows the perimeter of the property. If it does, the fence is most likely appurtenant to the land in question. See §2.195 below. If the fence veers away from the land and onto adjoining property, it is most likely appurtenant to that property. As a last resort, the attorney or title examiner should talk with the property owner or the neighbor.

PRACTICE POINTER

- ✓ Sometimes the fence encroachment results from the terrain of the land. For example, the farmer or fence installer may bend a boundary fence around a tree, creating a fence encroachment onto the adjoining land.
-

VIII. [2.143] THE ENCROACHMENT OR BOUNDARY DISPUTE

What should the attorney do when the client calls and tells the attorney that the adjoining property owner has just told the client that “your (garage, shed, driveway, etc.) is on my property; I want you to move it.” Sections 2.144 – 2.157 below detail the various means by which an encroachment, boundary dispute, or other survey problem can be addressed.

A. [2.144] The Attorney and the Title Insurance Company

The attorney should obtain a copy of the client’s title insurance policy to see whether the survey problem (*e.g.*, an encroachment) was shown on the policy. If the title insurance policy does not disclose the encroachment, this does not automatically mean that the title insurance company “missed” it. Perhaps the client erected the encroaching structure after the date of the policy. If so, the encroachment would be excluded from policy coverage. See Exclusions from Coverage 3(a) and 3(d) of the 2021 ALTA Owner’s Policy. Also, did the policy contain an “extended coverage” endorsement, waiving the five general exceptions? If not, the client’s policy was subject to these exceptions, including General Exception 2: “Any encroachment, encumbrance, violation, variation, or adverse circumstance affecting the title that would be disclosed by an accurate and complete land survey of the Land.” See §2.4 above.

If the policy reflects both the encroachment and the endorsement, the attorney should contact the title insurance company’s claims department. See Conditions 3 and 17 of the 2021 ALTA Owner’s Policy. Keep in mind, however, that the endorsement probably insures against only court-ordered removal of the encroachment and not money damages, and a court will probably not order the removal of the encroachment. Illinois caselaw indicates that courts usually will not require the encroaching party to remove an encroachment if the encroachment is unintentional, the cost for removing it is great, the corresponding benefit to the encroached-on landowner is small, and damages can be had at law. *See Pradelt v. Lewis*, 297 Ill. 374, 130 N.E. 785, 787 (1921) (ordering removal of 4.5-inch encroachment of building onto neighboring property because “[i]n erecting buildings the owners are bound to take such precautions as to the method of construction and material used that they will not lean over and encroach upon the property of adjoining owners to its damage”); *Stroup v. Codo*, 65 Ill.App.2d 396, 212 N.E.2d 518 (3d Dist. 1965) (finding that 5.5-inch encroachment of building was unintentional when survey was incorrect, surveyor’s incorrect monuments were relied on by general contractor, and no one had notice of survey errors until after construction was complete); *Hill v. Meister*, 133 Ill.App.2d 678, 273 N.E.2d 643 (1st Dist. 1971) (ordering removal of encroaching shed, garden wall, and fence because appellees failed to properly argue unintentional nature of encroachments and instead argued only that no encroachment existed); *Terwelp v. Sass*, 111 Ill.App.3d 133, 443 N.E.2d 804, 66 Ill.Dec. 878 (4th Dist. 1982) (refusing to order removal of encroaching barn when encroachment was unintentional, value of land underlying encroachment was extremely low, and damages were available to defendant); *Mari-Mann Herb Co. v. Borchers*, 216 Ill.App.3d 1014, 576 N.E.2d 496, 159 Ill.Dec. 827 (4th Dist. 1991) (refusing to order removal of encroaching building caused by competing metes and bounds legal descriptions due to small value of subject land and unintentional nature of encroachment); 1 I.L.P. *Adjoining Landowners* §8 (2024).

This does not mean, however, that the endorsement is only a paper tiger. Under Defense of Covered Claims, the 2021 ALTA Owner’s Policy provides: “The Company will also pay the costs, attorneys’ fees, and expenses incurred in defense of any matter insured against by this Policy, but only to the extent provided in the Conditions.” In this regard, see also Condition 5. Also, a court may actually compel the removal of an encroaching structure if the encroachment is deliberate or intentional. See *Turney v. Shriver*, 269 Ill. 164, 109 N.E. 708 (1915); *Fair v. Evergreen Park Shopping Plaza of Delaware, Inc.*, 4 Ill.App.2d 454, 124 N.E.2d 649 (1st Dist. 1954); *Ariola v. Nigro*, 16 Ill.2d 46, 156 N.E.2d 536 (1959); *Whitlock v. Hilander Foods, Inc.*, 308 Ill.App.3d 456, 720 N.E.2d 302, 241 Ill.Dec. 847 (2d Dist. 1999).

PRACTICE POINTER

- ✓ It is possible, however, that a title insurance company would not insure the insured against loss resulting from the insured’s deliberate and intentional encroachment onto adjoining property. Exclusion from Coverage 3 of the 2021 ALTA Owner’s Policy excludes from coverage “[a]ny defect, lien, encumbrance, adverse claim, or other matter . . . created, suffered, assumed, or agreed to by the Insured Claimant.”
-

If (1) the encroachment existed prior to the issuance of the title insurance policy, (2) the title insurance policy does not disclose it, and (3) the title insurance policy includes extended coverage over the general exceptions, the attorney should contact the title insurance company in accordance with Conditions 3 and 17 of the 2021 ALTA Owner’s Policy.

Assume the worst. Assume, *e.g.*, that the title insurance company issued the title insurance policy many years ago before the era of extended coverage. What can the attorney do to help his or her client? Sections 2.145 – 2.157 below attempt to answer this question.

B. [2.145] Minor Encroachments

If the encroachment is truly negligible and de minimis, then consider the facts of *Brownstone Condominium Ass’n v. Geller*, 91 Ill.App.3d 823, 415 N.E.2d 20, 47 Ill.Dec. 295 (1st Dist. 1980). In this case, the plaintiff sued for a mandatory injunction to compel the adjoining landowners to remove nine five-inch bolts from the garage wall of a condominium building. The court denied the requested relief. Quoting the trial court, the appellate court stated:

[T]he mere fact there is a trespass does not warrant any affirmative action by the Court. The close quarters of an urban society demand flexibility when we encounter an intrusion on our personal bubble. In a metropolitan area of seven million people, none can deny that their rights, real or imagined, are infringed upon with regularity. The limitations on the judicial system make it obvious that each of these transgressions cannot be litigated. 415 N.E.2d at 22.

In refusing to issue the injunction, the court also noted that, if actual damage occurs as the result of a minor encroachment, the analysis would be different depending on the facts of such a case.

C. [2.146] Encroachment into Air Space

Perhaps the encroachment is more esoteric than a shed, garage, or building. Perhaps it is an encroachment of an overhead window ledge or sign into the adjacent air space. Unless the adjoining landowner can demonstrate a practical use of the air space, the client may not have to remove the encroachment. See *Geller v. Brownstone Condominium Ass'n*, 82 Ill.App.3d 334, 402 N.E.2d 807, 809, 37 Ill.Dec. 805 (1st Dist. 1980) (holding that defendant's use of temporary scaffolding in air and space above plaintiff's residence was not actionable because "to constitute an actionable trespass, an intrusion has to be such as to subtract from the owner's use of the property"); *United States v. Causby*, 328 U.S. 256, 90 L.Ed. 1206, 66 S.Ct. 1062, 1068 (1946) (finding diminution in value of appellee's property by routine air traffic at heights of 83 feet above appellee's property and stating, "[f]lights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land").

D. [2.147] The Erroneous Survey or the Boundary Dispute

Is it possible that an adjoining owner is relying on an erroneous survey? What if the corners and boundaries of adjacent lands are lost, destroyed, or otherwise in dispute? The Permanent Survey Act, 765 ILCS 215/0.01, *et seq.*, provides for the appointment of a commission of surveyors to survey the properties and to permanently establish the corners and boundaries of the affected parcels. See *Schrader v. Kehr*, 234 Ill. 205, 84 N.E. 880, 883 (1908) ("The object of the [Permanent Survey Act] is merely to restore and re-establish the corners and boundary lines once established by the United States . . . Establishing title is an entirely different matter from re-establishing and restoring lost corners or disputed boundaries."); *Kelch v. Izard*, 227 Ill.App.3d 180, 590 N.E.2d 1050, 169 Ill.Dec. 131 (5th Dist. 1992); *Gvillo v. Stutz*, 306 Ill.App.3d 766, 715 N.E.2d 285, 239 Ill.Dec. 840 (5th Dist.), *appeal denied*, 186 Ill.2d 568 (1999); 5 I.L.P. *Boundaries* §24, *et seq.* (2012).

Boundary problems often come to light when adjoining property owners compare surveys and realize that they are inconsistent with each other. If necessary, the attorney should hire a surveyor to locate the original monuments establishing the boundaries of the property. The boundary lines established by the original surveyor are the true boundaries of the land. If these monuments are obliterated and cannot be found, the surveyor must resort to other known lines and monuments. See *Sawyer v. Cox*, 63 Ill. 130 (1872); *Bauer v. Gottmanhausen*, 65 Ill. 499 (1872); *M'Clintock v. Rogers*, 11 Ill. 279 (1849); *Texas Co. v. Hawthorne*, 371 Ill. 468, 21 N.E.2d 565 (1939); *City of Decatur v. Niedermeyer*, 168 Ill. 68, 48 N.E. 72 (1897); *Dobrinsky v. Waddell*, 233 Ill.App.3d 443, 599 N.E.2d 188, 174 Ill.Dec. 642 (4th Dist. 1992); 5 I.L.P. *Boundaries* §5 (2012).

Unfortunately, no legal rule exists in Illinois that sets forth a procedure for establishing obliterated corners for purposes of resolving boundary disputes. See *Vinyard v. Vaught*, 138 Ill.App.3d 641, 485 N.E.2d 1131, 1134, 92 Ill.Dec. 888 (5th Dist. 1985) ("Although certain language in [*Pliske v. Yuskis*, 83 Ill.App.3d 89, 403 N.E.2d 710, 38 Ill.Dec. 479 (3d Dist. 1980),] seems to suggest that requisite legal procedures have been fixed for the establishment of lost and obliterated corners, we have found no Illinois cases which directly control the instant facts or mandate a specified surveying procedure."); *Dorsey v. Ryan*, 110 Ill.App.3d 577, 442 N.E.2d 689, 692, 66 Ill.Dec. 263 (4th Dist. 1982) ("[T]here appears to be no specific regulation or law applicable

to the reestablishment of lost corners.”); *Pliske, supra*, 403 N.E.2d at 715 (“The statutory provisions and cited case all pertain to the reestablishment of lost corners and boundaries by the use of a commission of surveyors. Such statutory procedure was not followed in the instant case, nor was it mandatory that it be followed.”); Bureau of Land Management, United States Department of Interior, MANUAL OF SURVEYING INSTRUCTIONS (2009); Bureau of Land Management, United States Department of Interior, RESTORATION OF LOST OR OBLITERATED CORNERS AND SUBDIVISION OF SECTIONS (1963); Joe D. Webber, EARLY PUBLIC LAND SURVEYS IN THE NORTHWEST TERRITORY AND PROCEDURES FOR THE RETRACEMENT OF ORIGINAL GOVERNMENT SURVEYS IN ILLINOIS (1981); 5 I.L.P. *Boundaries* §§4, 6, and 29, *et seq.* (2012).

Corners and other monuments that are set by the original surveyor are facts. The surveyor’s field notes and the survey prepared by the surveyor aid in ascertaining these facts. When there is no evidence that this plat is erroneous, the survey serves to confirm the boundaries of the surveyed property. *See City of Decatur, supra; Hill v. Meister*, 133 Ill.App.2d 678, 273 N.E.2d 643 (1st Dist. 1971); *Brothers v. Johnstone*, 340 Ill. 477, 172 N.E. 805 (1930); *Davis v. deVore*, 16 Ill.App.3d 334, 306 N.E.2d 72 (4th Dist. 1974); 5 I.L.P. *Boundaries* §7 (2012).

If the original monuments are destroyed, the parties must rely on the recorded plat of subdivision to determine the dimensions of the land. *See Francois v. Maloney*, 56 Ill. 399 (1870). The true boundary lines of subdivided property are those lines established by the original surveyor. The lines so marked by monuments must prevail even if the surveyor makes a mistake in some of the measurements and in locating some of the lot lines. *See City of Joliet v. Werner*, 166 Ill. 34, 46 N.E. 780 (1897); *Tinnea v. Piel*, 122 Ill.App. 304 (4th Dist. 1905).

E. [2.148] The Boundary Agreement

When a boundary line between two parcels of land is unascertained or in dispute, a boundary can be established by an agreement between the parties. This agreement can be either written or unwritten.

1. [2.149] Unwritten Boundary Agreement

If the agreement is unwritten or parol, there must be possession of the land that is consistent with the unwritten agreement. This possession, though, need not be for the statutory period of 20 years. As the Supreme Court said in *Horn v. Thompson*, 389 Ill. 176, 58 N.E.2d 896, 898 (1945):

The rule relating to establishing boundary lines by agreement, as now settled in Illinois, is that when a boundary line between adjoining tracts of land is unascertained or in dispute, the owners may establish a line by parol agreement and possession in pursuance of that agreement. The effect of such agreement is not to pass title to real estate from one party to another by parol, for such cannot be done, but is to fix the location of an unascertained or disputed boundary.

See also City of Mt. Carmel v. McClintock, 155 Ill. 608, 40 N.E. 829 (1895); *McLeod v. Lambodin*, 22 Ill.2d 232, 174 N.E.2d 869 (1961); *Hellman v. Roe*, 275 Ill. 158, 113 N.E. 989 (1916); *Yates v. Shaw*, 24 Ill. 367 (1860); *Clayton v. Feig*, 179 Ill. 534, 54 N.E. 149 (1899); *Bauer v. Gottmanhausen*, 65 Ill. 499 (1872); 5 I.L.P. *Boundaries* §20 (2012).

2. [2.150] Written Boundary Agreement

A boundary can also be established by a written agreement. With a written agreement, the parties do not have to take possession of the land consistent with the agreement. In other words, the agreement controls, regardless of the actual evidence of possession. *See Purtle v. Bell*, 225 Ill. 523, 80 N.E. 350 (1907); 5 I.L.P. *Boundaries* §21 (2012); 765 ILCS 215/1.

3. [2.151] Appropriateness of a Boundary Agreement

A boundary agreement can be used only if the boundary line is in dispute or if the line is not ascertained. The reason for this is somewhat involved.

The Frauds Act, 740 ILCS 80/0.01, *et seq.*, and Illinois caselaw normally require that a change in boundary lines be in writing and that it be accomplished by the use of deeds. However, in determining where an unascertained or disputed boundary line is, Illinois courts take the position that the boundary agreement merely defines the actual boundary line between the parcels of land. The agreement does not pass the title to these parcels from one person to another. Because there is no transfer of land, the Frauds Act is not violated and deeds are not necessary. *See Nitterauer v. Pulley*, 401 Ill. 494, 82 N.E.2d 643, 646 (1948) (“We have held that where a boundary line between two estates is indefinite or unascertained, the owners may, by parol agreement, establish a division line, and the line thus defined will afterwards control their deeds notwithstanding the Statute of Frauds.”); 765 ILCS 5/1, 215/2; 5 I.L.P. *Boundaries* §21 (2012).

On the other hand, if the parties know the location of the true boundary line or the boundary line is readily ascertainable, they cannot use a boundary agreement to change this location. Instead, they must use deeds to transfer the property. *See Cienki v. Rusnak*, 398 Ill. 77, 75 N.E.2d 372 (1947) (holding that written or parol boundary agreement was not controlling because boundary line was in fact readily ascertainable and not in dispute); *Hartzler v. Uftring*, 114 Ill.App.3d 427, 450 N.E.2d 1208, 71 Ill.Dec. 329 (4th Dist. 1983) (holding that deeds clearly and consistently showed boundary line between two properties and no evidence was presented demonstrating a dispute over location of boundary line); 5 I.L.P. *Boundaries* §19 (2012).

These elements — that a boundary line be in dispute or unascertained — suggest that, in order to use a boundary line agreement to establish the boundary between properties, there must first be a failed effort to locate this boundary line. Thus, one cannot establish a boundary line by agreement when the parties merely do not know where the boundary line is and want to determine its location. In fact, if the parties want to use the agreement to locate the boundary line and in so doing they agree on the wrong line, the agreement is not binding; the boundary line has not been established. The reason is that, in this instance, there is a failure to find a true line due to accident or mistake and not an agreement to adopt an unascertained or disputed line. *See Darter v. Darter*, 91 Ill.App.3d 322, 414 N.E.2d 862, 46 Ill.Dec. 809 (5th Dist. 1980); *Ginther v. Duginger*, 6 Ill.2d 474, 129 N.E.2d 147 (1955); *Skinner v. Francisco*, 404 Ill. 356, 88 N.E.2d 867 (1949); *Loverkamp v. Loverkamp*, 381 Ill. 467, 45 N.E.2d 871 (1942); *Horn v. Thompson*, 389 Ill. 176, 58 N.E.2d 896 (1945); *Purtle v. Bell*, 225 Ill. 523, 80 N.E. 350 (1907); *Schlenz v. Dzierzynski*, 134 Ill.App.3d 937, 481 N.E.2d 287, 89 Ill.Dec. 736 (3d Dist. 1985); 5 I.L.P. *Boundaries* §19 (2012).

PRACTICE POINTER

- ✓ Of course, it is perfectly proper in any instance to use a boundary agreement when it is coupled with the exchange of quitclaim deeds. This arrangement is often used by title insurance companies when settling a boundary dispute between landowners.
-

F. [2.152] Establishment of Boundaries by Operation of Law

One traditionally establishes boundary lines and ownership lines by the execution and delivery of deeds between buyer and seller. As noted in §§2.148 – 2.151 above, boundaries can also be created by an agreement between neighboring landowners. Illinois law also provides for several ways in which boundaries can be established by operation of law. These ways are discussed in §§2.153 – 2.156 below.

1. [2.153] Adverse Possession

How long has the structure been encroaching onto the adjoining property? If it has been 20 years or more, perhaps the client owns the land by virtue of the doctrine of adverse possession.

As discussed in §2.57 above, adverse possession is the open and hostile possession of land under claim of title to the exclusion of the true owner, which, if continued for the period prescribed by statute (20 years), ripens into an actual title. *See Schwartz v. Piper*, 4 Ill.2d 488, 122 N.E.2d 535 (1954); *Canella v. Doran*, 21 Ill.2d 514, 173 N.E.2d 512 (1961); *Tapley v. Peterson*, 141 Ill.App.3d 401, 489 N.E.2d 1170, 95 Ill.Dec. 442 (5th Dist. 1986); *Joiner v. Janssen*, 85 Ill.2d 74, 421 N.E.2d 170, 173, 51 Ill.Dec. 662 (1981); 735 ILCS 5/13-101, *et seq.* For a case that illustrates the great lengths to which a court will go in order to establish adverse possession, *see McNeil v. Ketchens*, 397 Ill.App.3d 375, 931 N.E.2d 224, 341 Ill.Dec. 616 (4th Dist. 2010).

In order to establish ownership of land by adverse possession, a court would first have to determine whether all the elements of adverse possession have been met, but if it appears that all elements have been satisfied, perhaps the attorney can use the doctrine as a bargaining chip to leverage a license agreement, easement agreement, or boundary agreement out of the adjoining owner. *See Boyer v. Noirot*, 97 Ill.App.3d 636, 423 N.E.2d 274, 53 Ill.Dec. 82 (3d Dist. 1981); *Legendre v. Harris*, 125 Ill.App.2d 76, 260 N.E.2d 391 (5th Dist. 1970); 765 ILCS 215/1.

PRACTICE POINTER

- ✓ The attorney should remember that there are significant differences between an easement and a license. One might argue that an easement gives better protection to the encroaching party and a license gives more rights to the non-encroaching party. Generally speaking, a license is a personal privilege that is not transferrable and is binding on only the licensee. A license can be revoked at any time by the licensor. On the other hand, an easement runs with the land and is binding on subsequent grantees. The grantee of an easement (that is,

the owner of the dominant estate, who is the encroaching party), not the grantor, has the right to terminate the easement. See 765 ILCS 5/7a; *Beloit Foundry Co. v. Ryan*, 28 Ill.2d 379, 192 N.E.2d 384 (1963); *Chicago Title & Trust Co. v. Wabash-Randolph Corp.*, 384 Ill. 78, 51 N.E.2d 132 (1943); *South Center Department Store, Inc. v. South Parkway Building Corp.*, 19 Ill.App.2d 61, 153 N.E.2d 241 (1st Dist. 1958); *Keck v. Scharf*, 80 Ill.App.3d 832, 400 N.E.2d 503, 36 Ill.Dec. 83 (5th Dist. 1980); *Davidson v. Dingeldine*, 295 Ill. 367, 129 N.E. 79 (1920); *O'Hara v. Chicago Title & Trust Co.*, 115 Ill.App.3d 309, 450 N.E.2d 1183, 71 Ill.Dec. 304 (1st Dist. 1983); *Entwhistle v. Henke*, 211 Ill. 273, 71 N.E. 990 (1904). *But see Grigoleit, Inc. v. Board of Trustees of Sanitary District of Decatur*, 233 Ill.App.3d 606, 599 N.E.2d 51, 174 Ill.Dec. 505 (4th Dist. 1992).

2. [2.154] Acquiescence

In *McLeod v. Lambodin*, 22 Ill.2d 232, 174 N.E.2d 869, 871 (1961), the Supreme Court laid out the elements of the doctrine of boundary by acquiescence: “Where a boundary between two tracts is unascertained or in dispute, the line may be established . . . by an agreement implied from unequivocal acts and declarations of the parties and acquiescence for a considerable period of time.” This “considerable period of time” can be less than the statutory 20 years for adverse possession. Mere acquiescence in the location of a line is not sufficient to establish it as the boundary line. Rather, the preponderance of the evidence must show that the landowners agreed that the line was the division line and that they and their successors in title, if any, occupied their respective lands in accordance with this line. See *Bauer v. Gottmanhausen*, 65 Ill. 499 (1872); *Quick v. Butler*, 139 Ill. 251, 28 N.E. 926 (1891); *City of Mt. Carmel v. McClintock*, 155 Ill. 608, 40 N.E. 829 (1895); *St. Bede College v. Weber*, 168 Ill. 324, 48 N.E. 165 (1897); *Westgate v. Ohlmacher*, 251 Ill. 538, 96 N.E. 518 (1911); *Hellman v. Roe*, 275 Ill. 158, 113 N.E. 989 (1916); *Nitterauer v. Pulley*, 401 Ill. 494, 82 N.E.2d 643 (1948); *Schlenz v. Dzierzynski*, 134 Ill.App.3d 937, 481 N.E.2d 287, 89 Ill.Dec. 736 (3d Dist. 1985); *Boyer v. Noirot*, 97 Ill.App.3d 636, 423 N.E.2d 274, 53 Ill.Dec. 82 (3d Dist. 1981); *Ginther v. Duginger*, 6 Ill.2d 474, 129 N.E.2d 147 (1955); *Dobrinsky v. Waddell*, 233 Ill.App.3d 443, 599 N.E.2d 188, 174 Ill.Dec. 642 (4th Dist. 1992); 5 I.L.P. *Boundaries* §22 (2012).

So how long is *McLeod's* “considerable period of time”? 174 N.E.2d at 871. The court in *Ginther, supra*, was of little help when it stated that “considerable time means a reasonable period of time.” 129 N.E.2d at 152. On the other hand, the court in *Francois v. Maloney*, 56 Ill. 399 (1870), deemed three years to be too short a time period to establish acquiescence.

3. [2.155] Estoppel

If one party makes representations, either in words or conduct, that induce another party to accept a particular line as the boundary line, then the party making these representations may later be estopped from denying the statements. *Francois v. Maloney*, 56 Ill. 399 (1870); *Mullaney v. Duffy*, 145 Ill. 559, 33 N.E. 750 (1893); *Quick v. Butler*, 139 Ill. 251, 28 N.E. 926 (1891); *Boone v. Graham*, 215 Ill. 511, 74 N.E. 559 (1905); *Chicago, Burlington & Quincy R.R. v. Aman*, 254 Ill.App. 498 (2d Dist. 1929); 5 I.L.P. *Boundaries* §23 (2012).

The party making the statements must have full knowledge of all the facts or must be guilty of gross negligence in failing to learn all the facts. If the person makes the statements without the complete understanding of all the particulars and circumstances, then the statements do not constitute an estoppel against that party. *See Quick, supra*.

The burden of establishing a boundary by estoppel is very great. For example, in *Francois, supra*, the court determined that a man who pointed out a lot line and assisted in taking down a fence, thus inducing a neighbor to build a home to a wrong line, was not estopped from maintaining a cause of action for ejectment when the error was discovered three years later. The court stated:

Under the circumstances, appellee is not estopped from a recovery to the true line, if, through mistake, he induced appellant to build to a wrong line. The testimony is too uncertain and contradictory. To divest a party of title by deed, which clearly defines the boundary, the evidence should be positive and unequivocal. 56 Ill. at 400 – 401.

Consider *Mullaney, supra*, in which the court ruled that one who silently and without objection allows the construction of a building up to an erroneous lot line is not estopped from later asserting the true lot line. In determining that there was no boundary by estoppel, the court said that the silent party must have full knowledge of all the facts and the relying party must not only be ignorant of the truth but also be misled into doing something that he or she would not have done but for the silence. Thus, if someone mistakenly induces another party to construct a building up to a wrong boundary line, that person is not later estopped from asserting the true line.

4. [2.156] Recognition and Practical Location

After adjoining landowners recognize a division line as the boundary for more than the statutory period of limitation of 20 years, the parties are estopped from asserting that it is not the true boundary line. This boundary line can be established even when there is no express or implied agreement between the parties. *See Bauer v. Gottmanhausen*, 65 Ill. 499 (1872); *Hellman v. Roe*, 275 Ill. 158, 113 N.E. 989 (1916); *McLeod v. Lambodin*, 22 Ill.2d 232, 174 N.E.2d 869 (1961); *Nitterauer v. Pulley*, 401 Ill. 494, 82 N.E.2d 643 (1948); 735 ILCS 5/13-101, *et seq.*; 5 I.L.P. *Boundaries* §§18, 22 (2012).

G. [2.157] The Fence Act

The Fence Act, 765 ILCS 130/0.01, *et seq.*, provides that, if two or more people have adjoining lands, each of them must build and maintain their proportionate share of the division fence that separates their lands. If a person does not make or repair the fence, that party is liable for damages. Disputes may be settled by “fence viewers.” *See also Jeffrey A. Mollett, When Bad Fences Make Litigious Neighbors: The Illinois Fence Act*, 89 Ill.B.J. 429 (Aug. 2001).

IX. [2.158] CONCLUSION

As demonstrated in this chapter, a commercial survey — whether a boundary survey, a land title survey, or some other survey affecting commercial property — is very different from a survey

of residential property. While some of the rules governing the interpretation of commercial surveys may also be applicable to residential surveys, commercial surveys are held to much higher standards, as set forth in the 2021 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys. Surveyors of commercial properties are also subject to higher standards and greater liability in performing their work and certifying their results.

The complex array of lines and markings on commercial surveys can mask many pitfalls and problems, matters that can confuse even the most seasoned real estate attorney. It is hoped that this chapter will engender new confidence in the attorney and title examiner when reviewing commercial surveys.

X. APPENDIX

A. [2.159] Additional Resources

Bales, Richard F., *A New Mine Field for the Real Estate Attorney*, 40 Real Prop.Newsl., No. 2, 5 – 6 (1994).

Bales, Richard F., *Survey Nightmare, Part II*, 41 Real Prop.Newsl., No 2, 4 – 5 (1995).

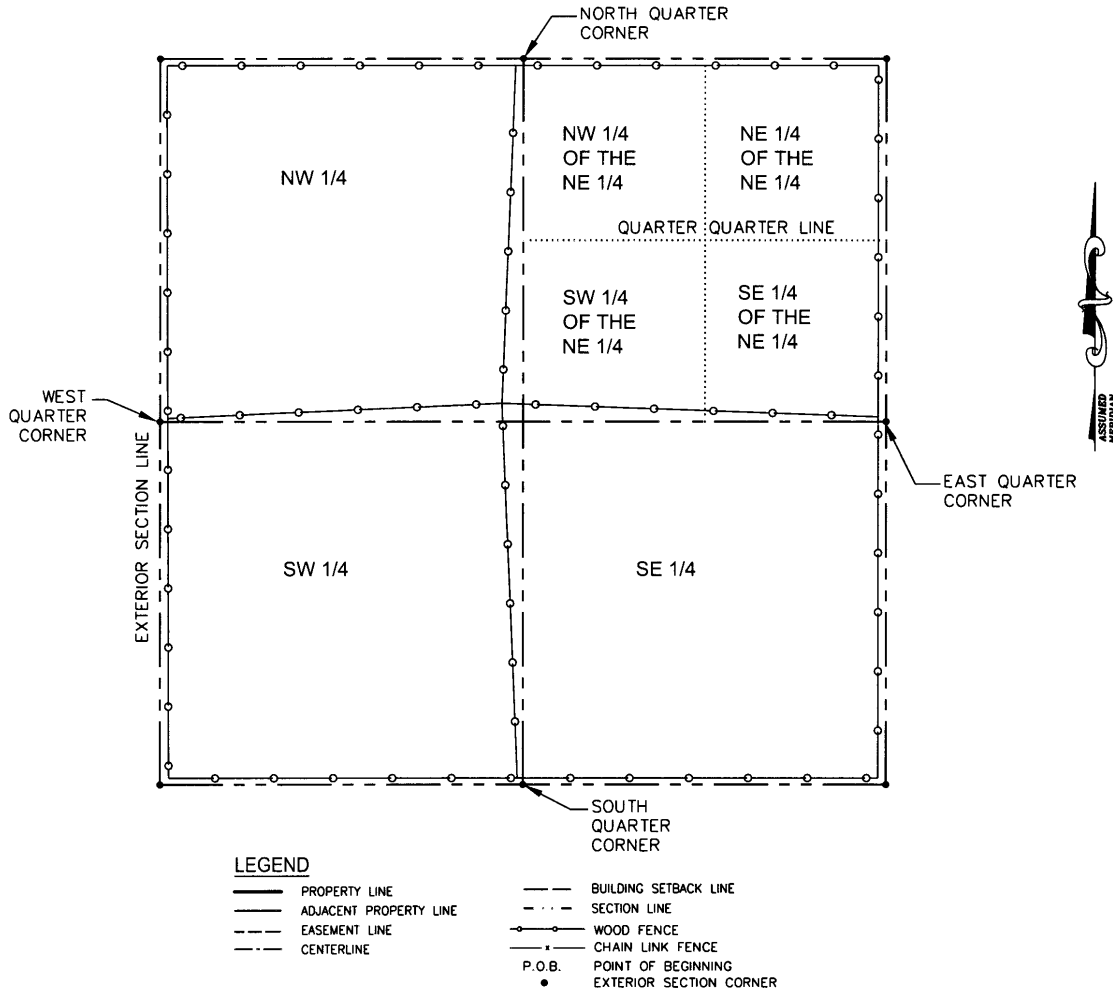
Bales, Richard F., *When an Easement Is Not an Easement*, Title Ins.L.Newsl. (June 2003).

Brinker, Jack J., et al., Ch. 3, *Suits To Quiet Title in Real Estate*, REAL ESTATE LITIGATION (IICLE[®], 2024).

IICLE[®] CLASSICS: WARD ON TITLE EXAMINATIONS 2005 Edition (Including 2009 Supp.), Ch. 10.

B. Illustrations

1. [2.160] Section of Land

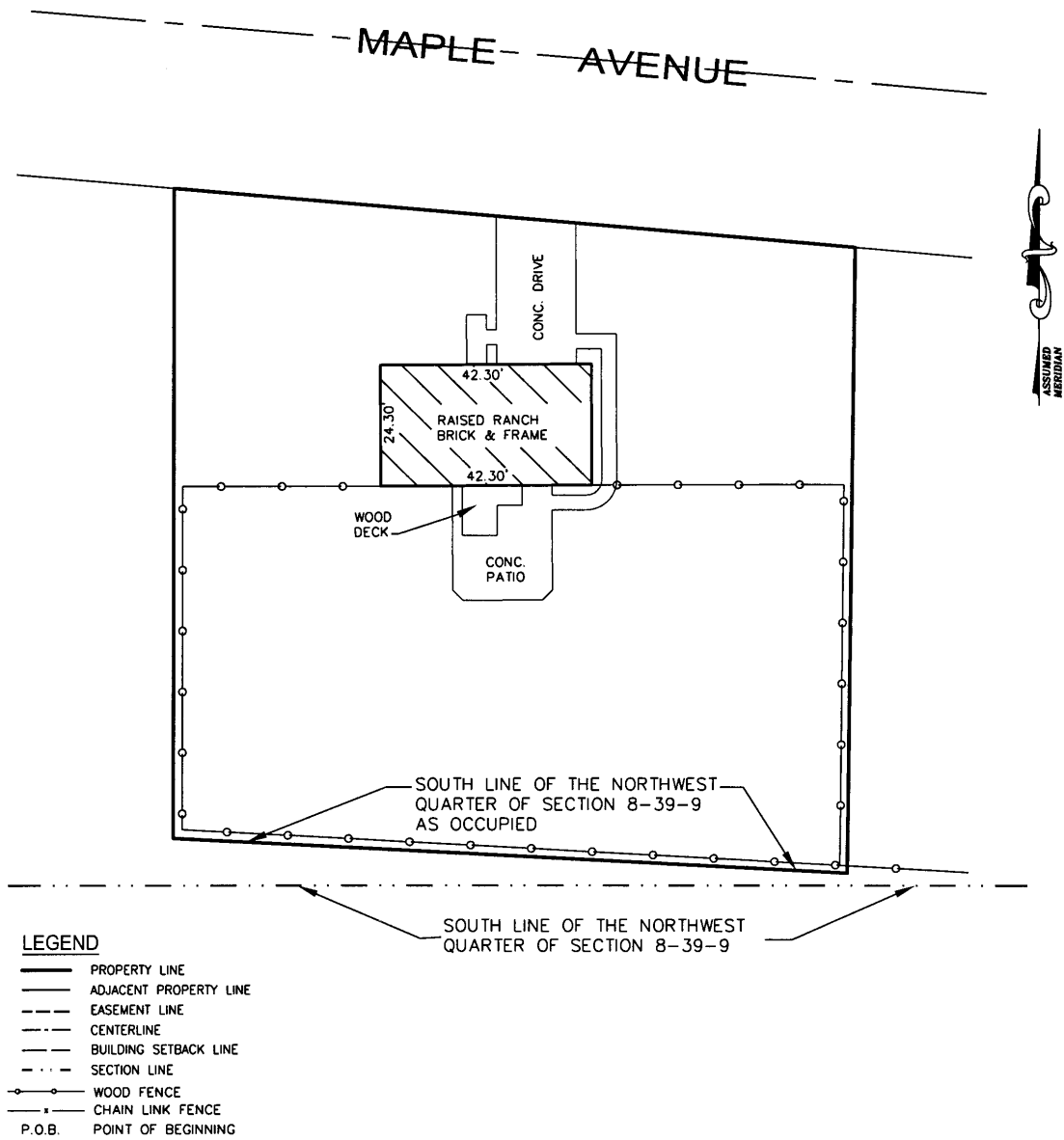


Interior section lines such as quarter section lines and quarter-quarter lines were never surveyed by the original government surveyors. These lines can be determined only by first surveying the original section of land and then establishing these interior lines.

On the other hand, the exterior section lines *were* surveyed and set by the original government surveyors. Many times, fences located along these section lines are the only remaining evidence of these lines.

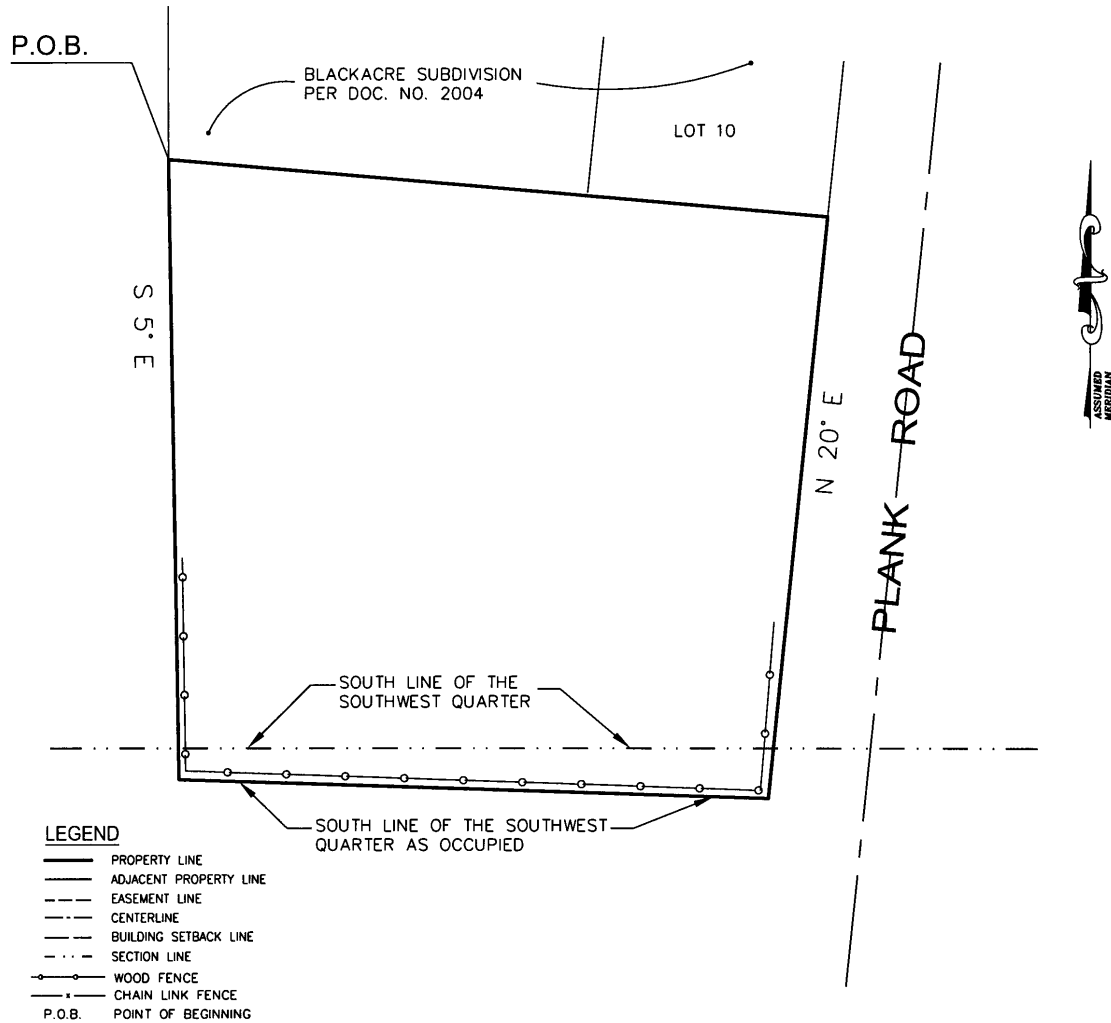
Here, a fence has been constructed along the exterior lines of the section. Although a second fence correctly ties into the north, south, east, and west quarter corners of the section, this fence does not fall along the interior section lines.

2. [2.161] “Actual” and “As Occupied” Boundary Lines



Note the two south lines of the Northwest quarter of Section 8, Township 39 North, Range 9; one of them is the south line “as occupied.”

3. [2.162] “As Occupied” Boundary Line

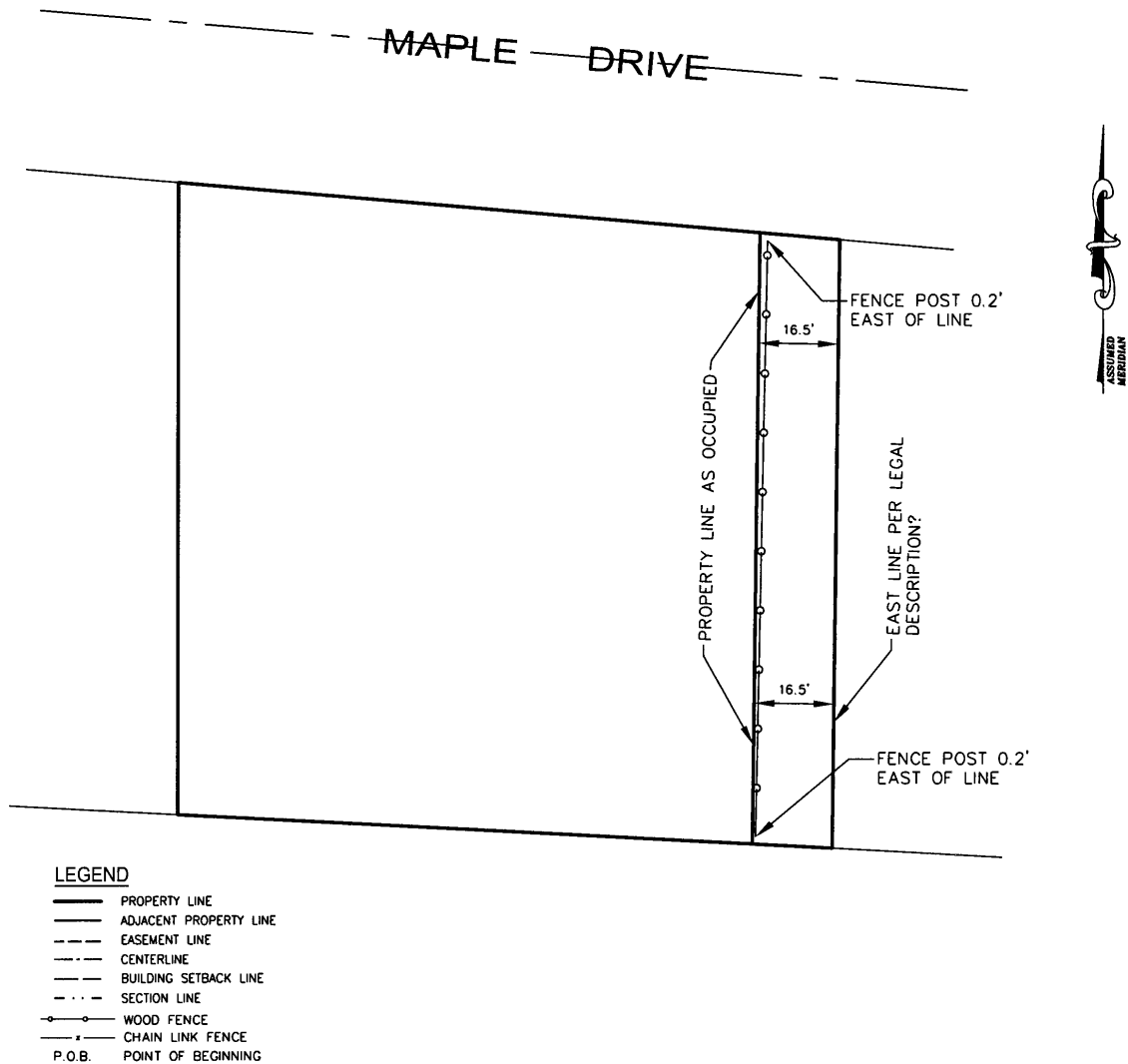


The legal description of this tract is as follows:

“Beginning at the southwest corner of Blackacre Subdivision; thence south 5 degrees east to the south line of the southwest quarter of Section 1 *as occupied*; then east along said south line to the west line of Plank Road; thence north 20 degrees east along said west line to the southeast corner of lot 10 in Blackacre Subdivision; then west along the south line of said Blackacre Subdivision to the point of beginning.”

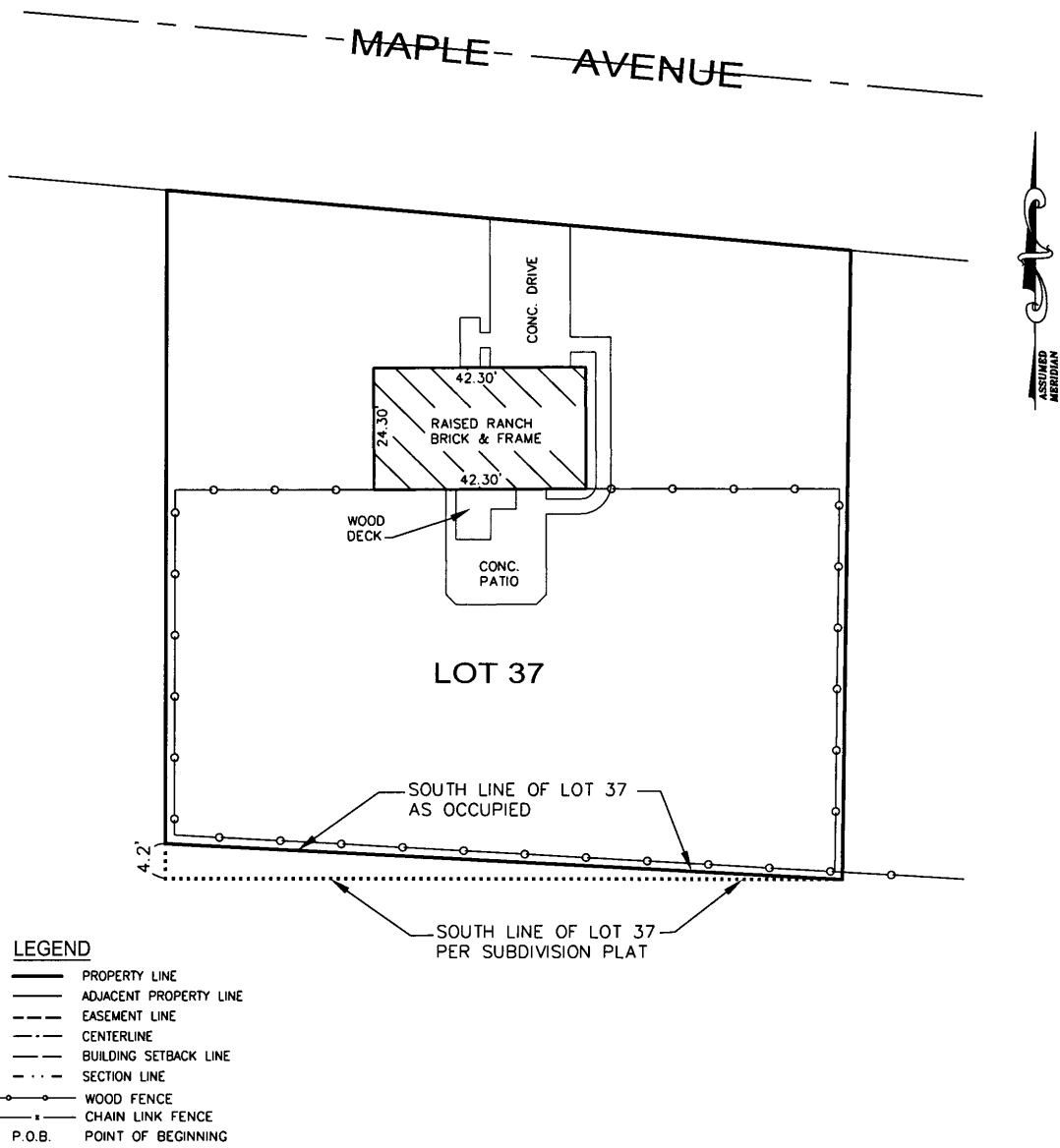
Does the owner of the property actually own the land between the two “south” lines, or is the owner merely adversely occupying this property? This is an issue that the title insurance company and the attorney for the owner must address.

4. [2.163] “As Occupied” Property Line



The surveyor has identified a property line “as occupied.” What is the significance of this term? What is the line that is 16.5 feet east of this property line? Is that the “real” property line? Has the surveyor described the one line as an “occupied” property line because of the fence that is next to this line? Has the surveyor determined that the fence is 0.20 feet east of this line because the surveyor has found lot corner monuments or other monumentation along this line? Were other monuments found along the line that is 16.5 feet east of this time? It seems clear that this survey raises more questions than it answers.

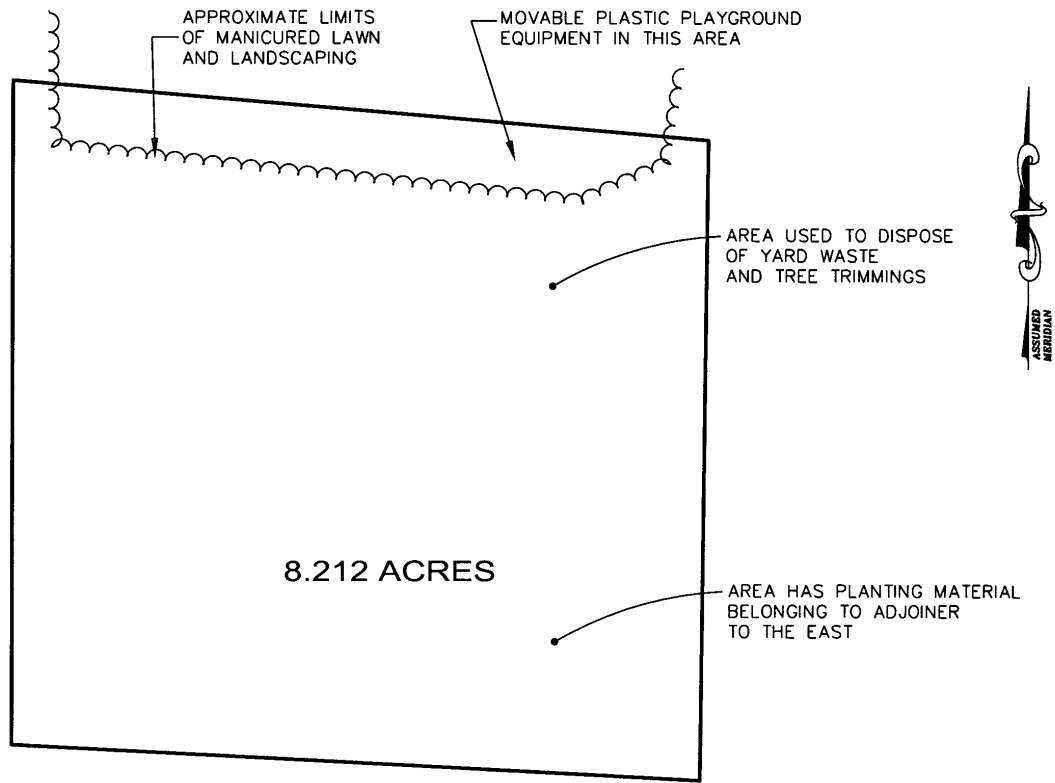
5. [2.164] Lot with Two South Lines



Contrary to this survey, lot 37 can have only one south line.

Note that the fence appurtenant to lot 37 is set inside the south line of the lot as much as 4.20 feet. Is the owner of the land south of lot 37 adversely occupying the area between the fence and the south lot line?

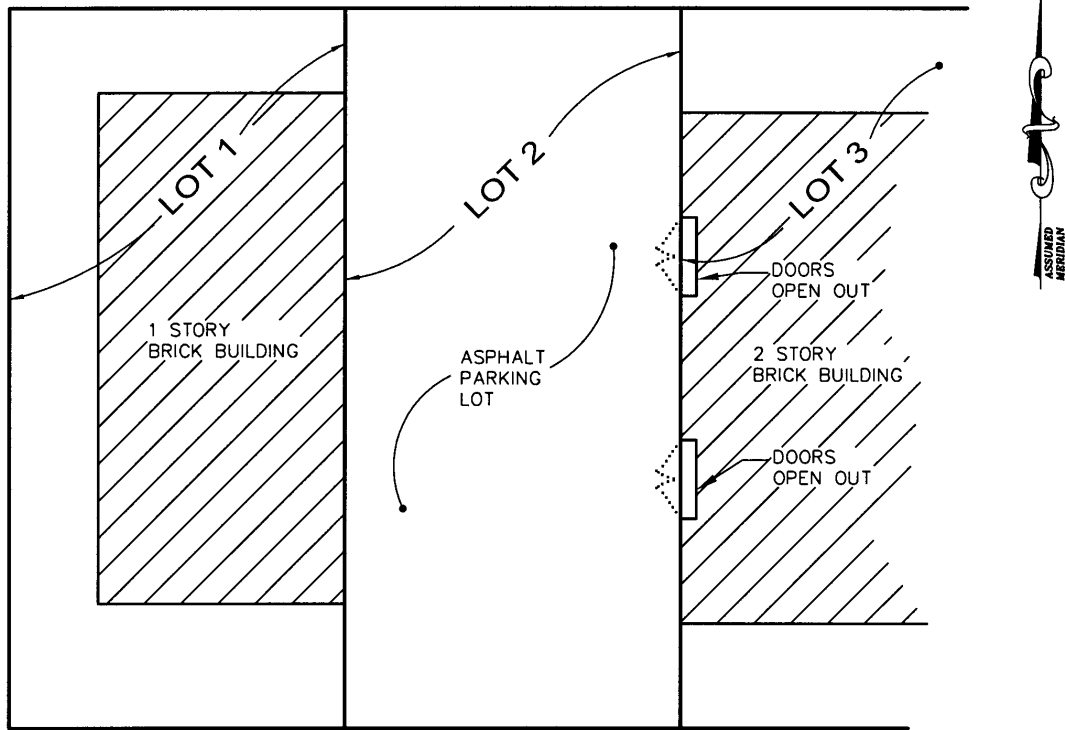
6. [2.165] Adverse Use of Property



- LEGEND**
- PROPERTY LINE
 - ADJACENT PROPERTY LINE
 - - - - EASEMENT LINE
 - - - - CENTERLINE
 - - - - BUILDING SETBACK LINE
 - . . . SECTION LINE
 - WOOD FENCE
 - CHAIN LINK FENCE
 - P.O.B. POINT OF BEGINNING

The surveyor completed a land title survey of this vacant tract of land. Pursuant to Section 5.C of the 2021 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys, the surveyor showed this evidence of adverse use of the property.

7. [2.166] Unrecorded Easements

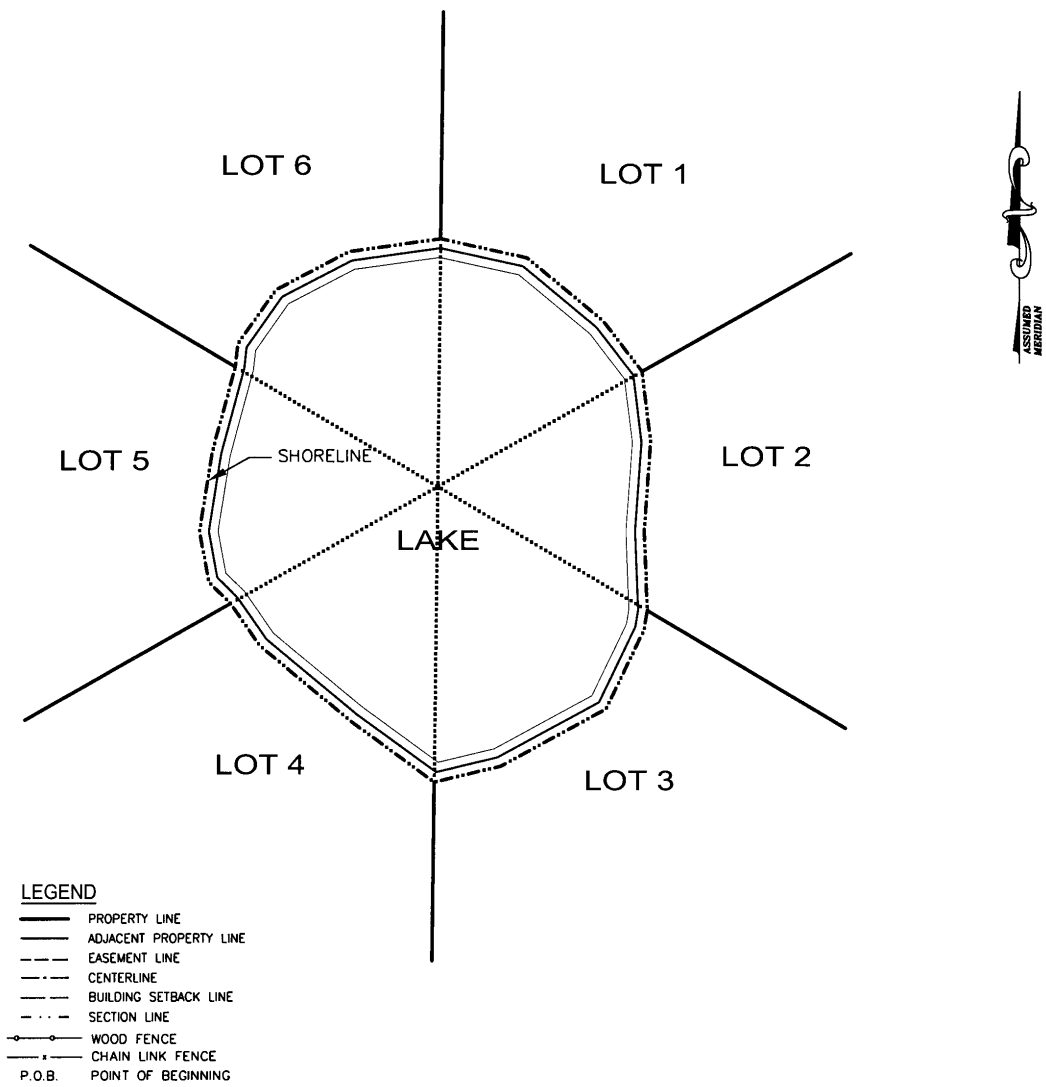


LEGEND

- PROPERTY LINE
- ADJACENT PROPERTY LINE
- - - EASEMENT LINE
- - - CENTERLINE
- - - BUILDING SETBACK LINE
- . . . SECTION LINE
- WOOD FENCE
- x— CHAIN LINK FENCE
- P.O.B. POINT OF BEGINNING

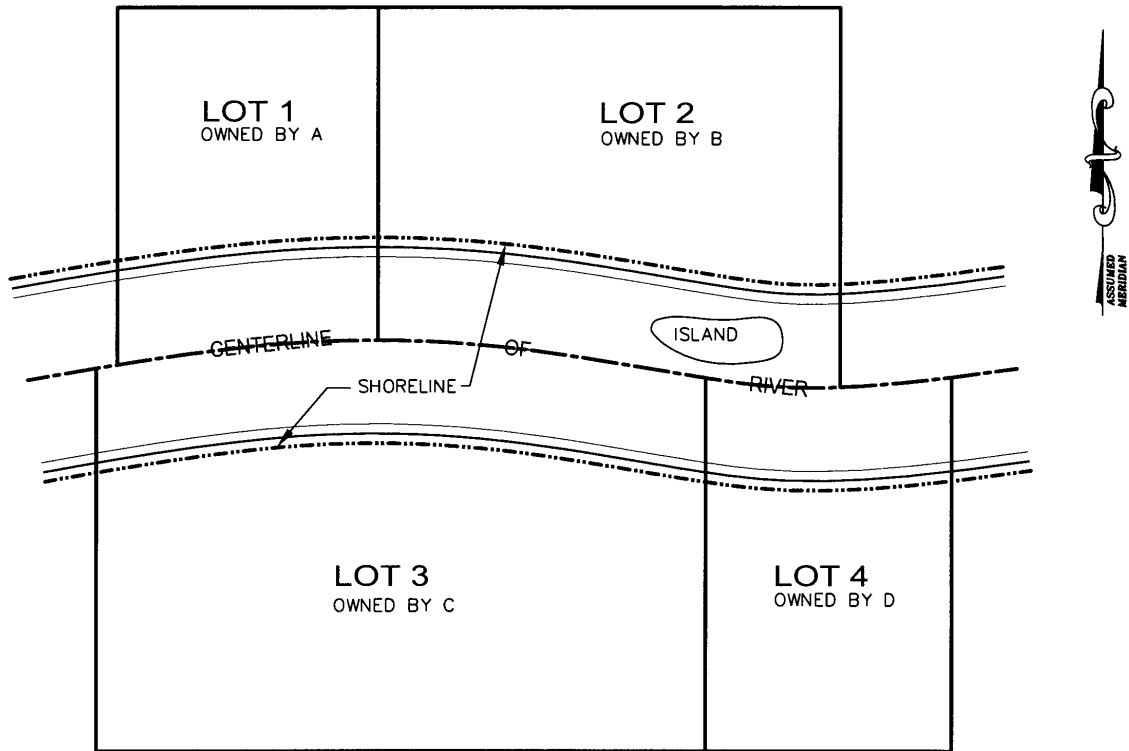
The property in question consists of two lots, lots 1 and 2. A building is built on lot 1; lot 2 is an asphalt parking lot. Another building has been constructed on adjoining lot 3. This building has been built up to the lot line between lots 2 and 3. The two doors of the building swing out and onto the parking lot.

8. [2.167] Title to Bed of Lake



Six lots surround this *non-meandered* lake. The dotted lines illustrate how all of these riparian lot owners presumably share in the ownership of the lake bed.

9. [2.168] Title to Island in One Half of Stream

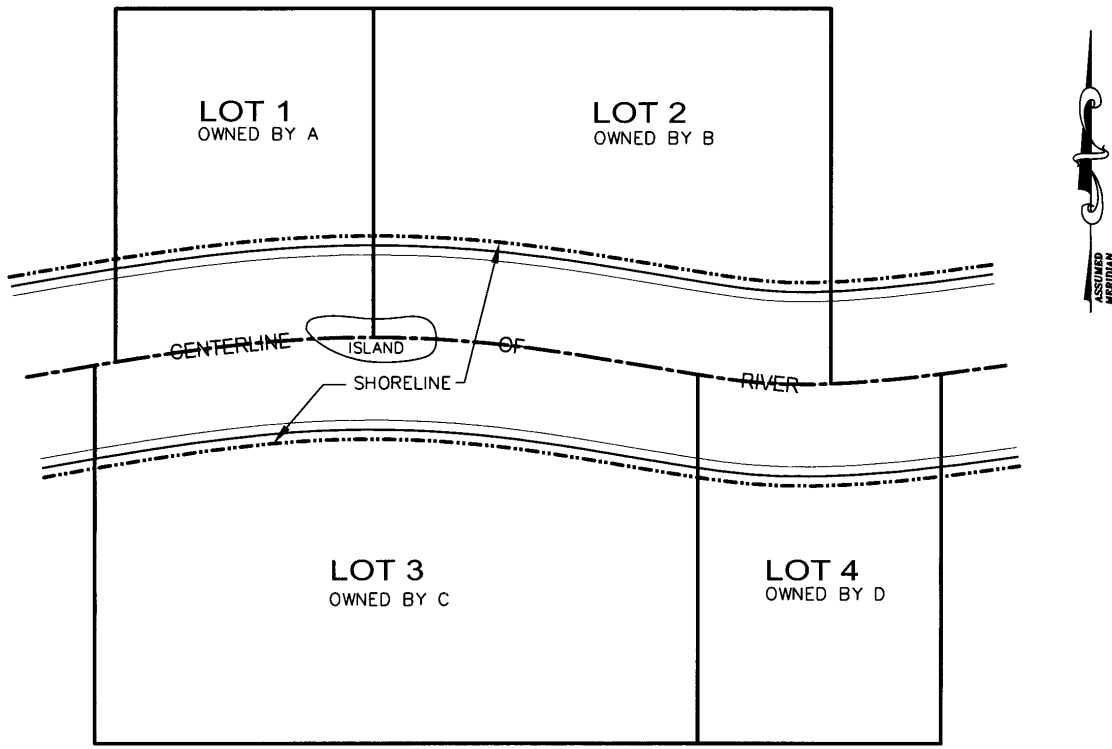


LEGEND

- PROPERTY LINE
- ADJACENT PROPERTY LINE
- - - EASEMENT LINE
- · - CENTERLINE
- · - BUILDING SETBACK LINE
- · - SECTION LINE
- WOOD FENCE
- CHAIN LINK FENCE
- P.O.B. POINT OF BEGINNING

A, B, C, and D all own to the center of this river. An island is located within the boundaries of lot 2. B owns the island.

10. [2.169] Title to Island in Center of Stream

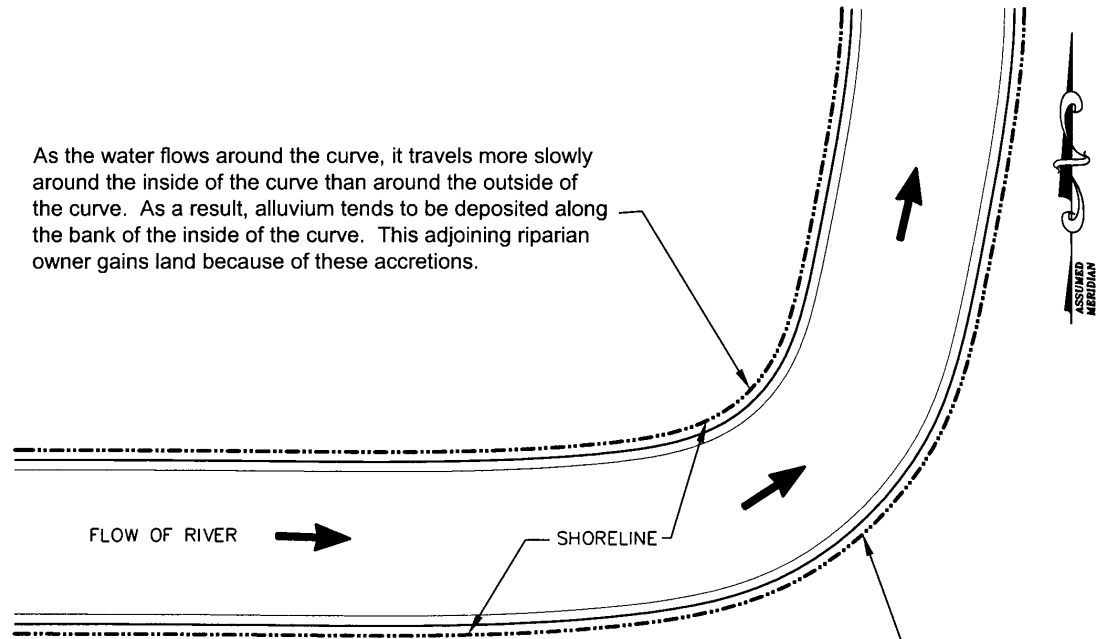


LEGEND

- PROPERTY LINE
- ADJACENT PROPERTY LINE
- - - EASEMENT LINE
- - - CENTERLINE
- - - BUILDING SETBACK LINE
- . . . SECTION LINE
- WOOD FENCE
- x— CHAIN LINK FENCE
- P.O.B. POINT OF BEGINNING

A, B, C, and D all own to the center of this river. An island is located within the boundaries of lots 1, 2, and 3. A, B, and C own the island.

11. [2.170] Accretions and Erosion



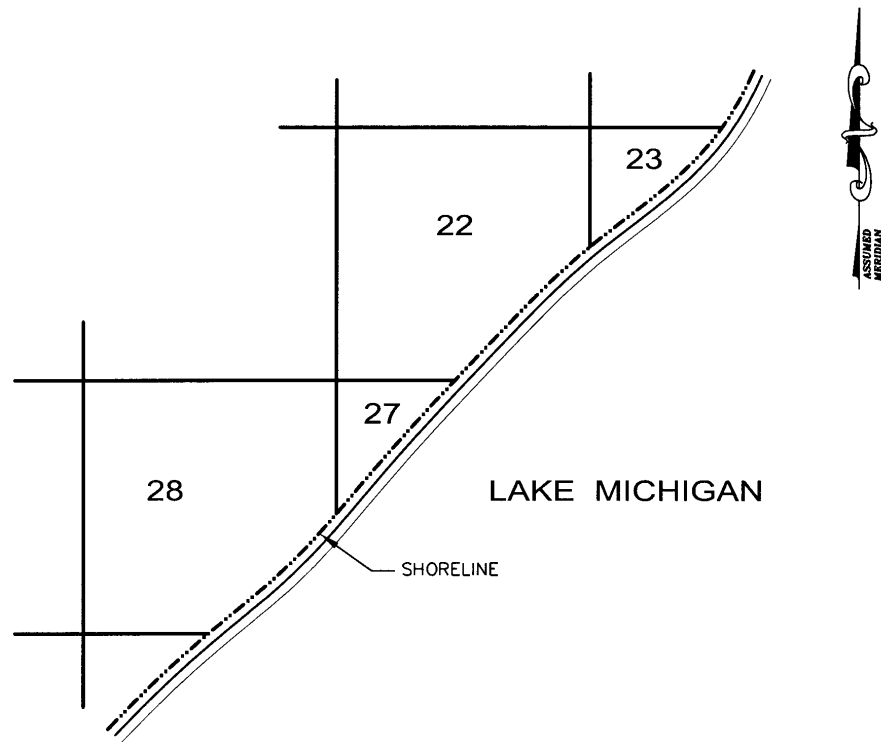
As the water flows around the curve, it travels more slowly around the inside of the curve than around the outside of the curve. As a result, alluvium tends to be deposited along the bank of the inside of the curve. This adjoining riparian owner gains land because of these accretions.

As the water flows around the curve, its travels more quickly around the outside of the curve than around the inside of the curve. As a result, the bank along the outside of the curve tends to be eroded away. This adjoining riparian owner loses land because of this erosion.

LEGEND

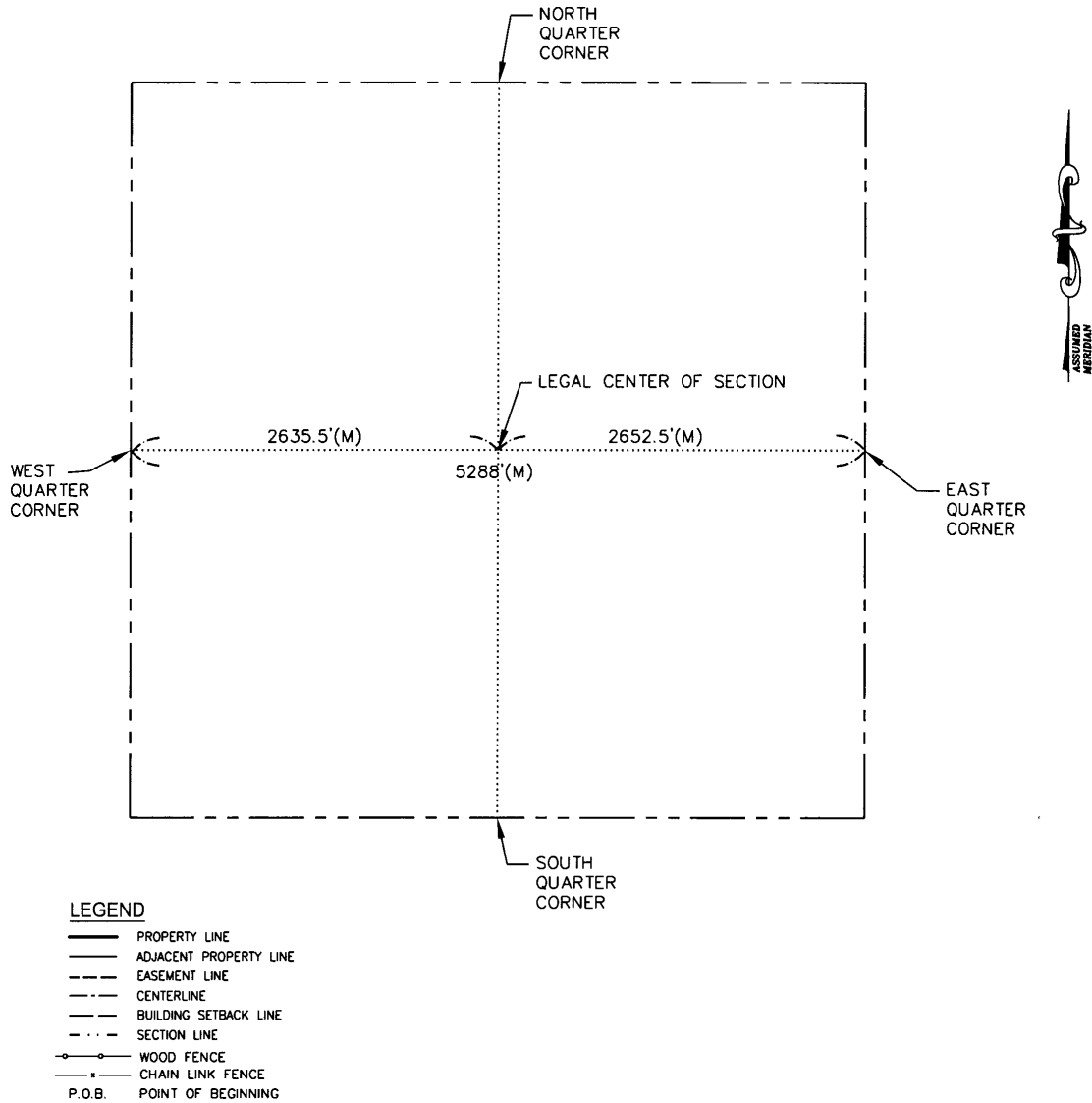
- PROPERTY LINE
- ADJACENT PROPERTY LINE
- - - EASEMENT LINE
- . - . CENTERLINE
- - - BUILDING SETBACK LINE
- . . . SECTION LINE
- — WOOD FENCE
- x — CHAIN LINK FENCE
- P.O.B. POINT OF BEGINNING

12. [2.171] Fractional Section of Land



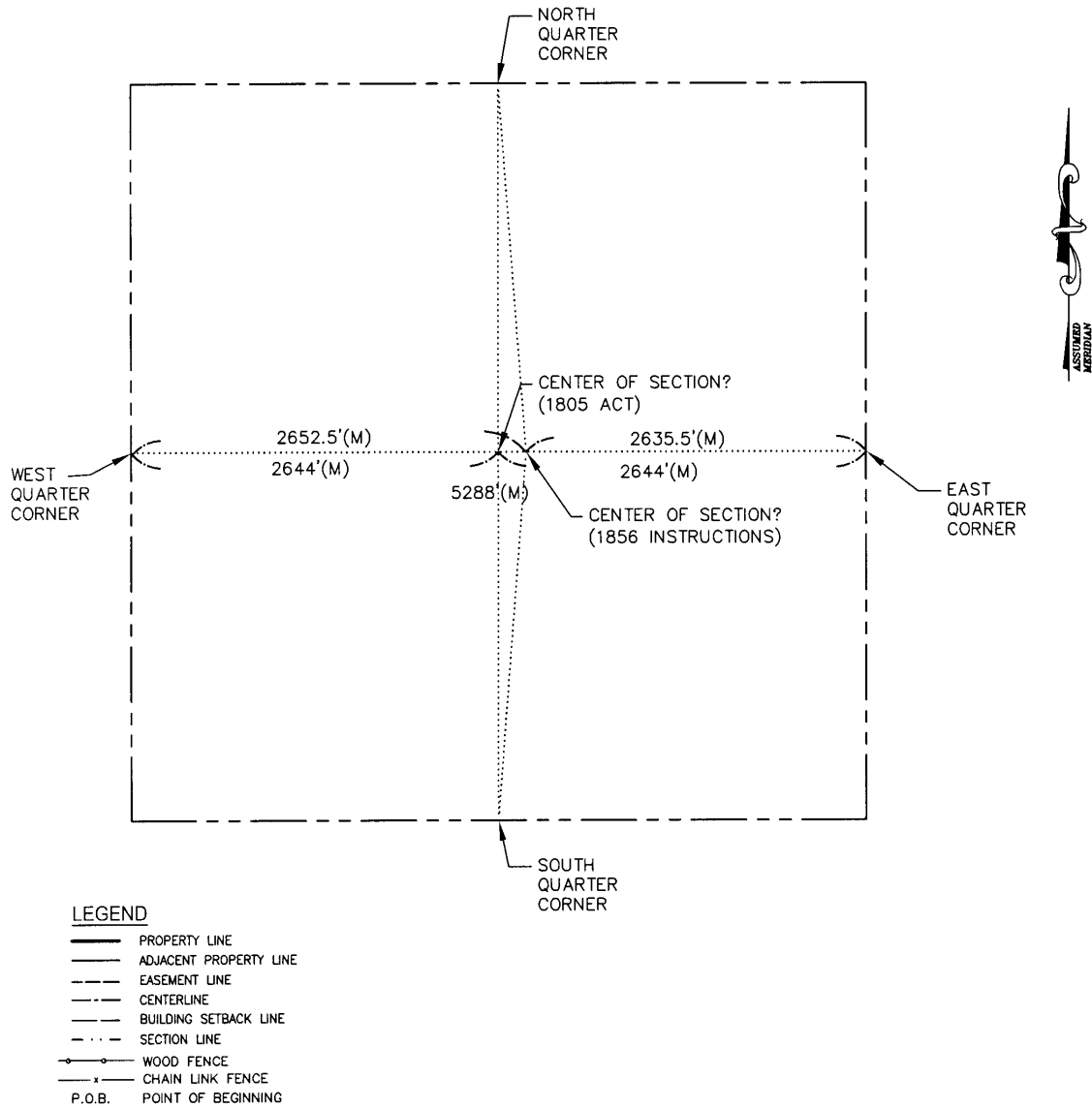
A fractional section of land is any section that contains significantly less than 640 acres. In this example, the sections adjoining Lake Michigan were surveyed only to the water's edge. The lake was a natural boundary that resulted in sections 28, 27, 22, and 23 being fractional sections.

13. [2.172] Legal Center of Section



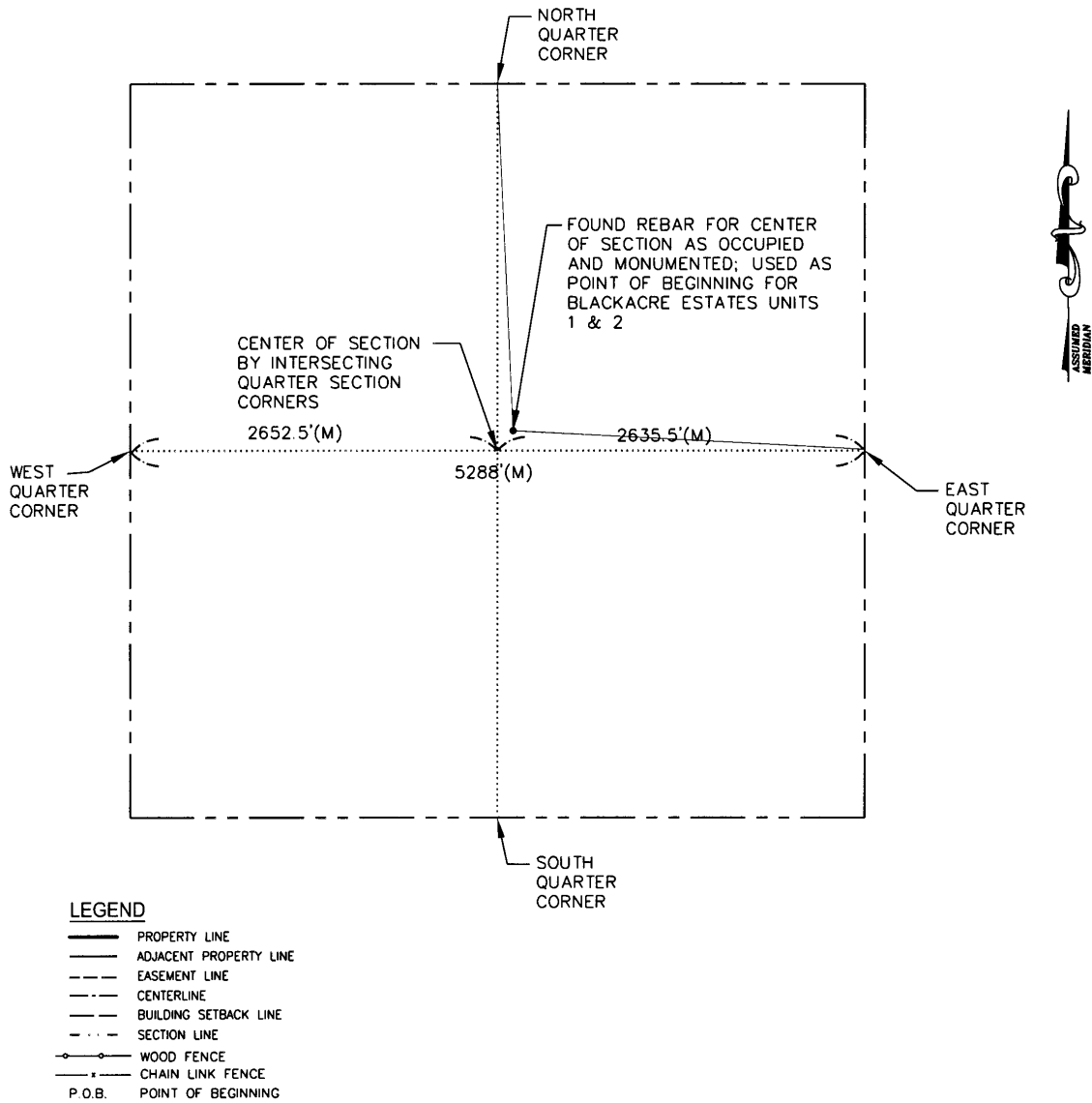
An Act Concerning the mode of surveying the Public Lands of the United States of February 11, 1805, ch. 14, 2 Stat. 313, provided that surveyors locate the center of a section of land at the intersection of the two straight lines connecting the north and south, east and west, quarter section corners.

14. [2.173] Legal Center of Section per Butterfield's Instructions



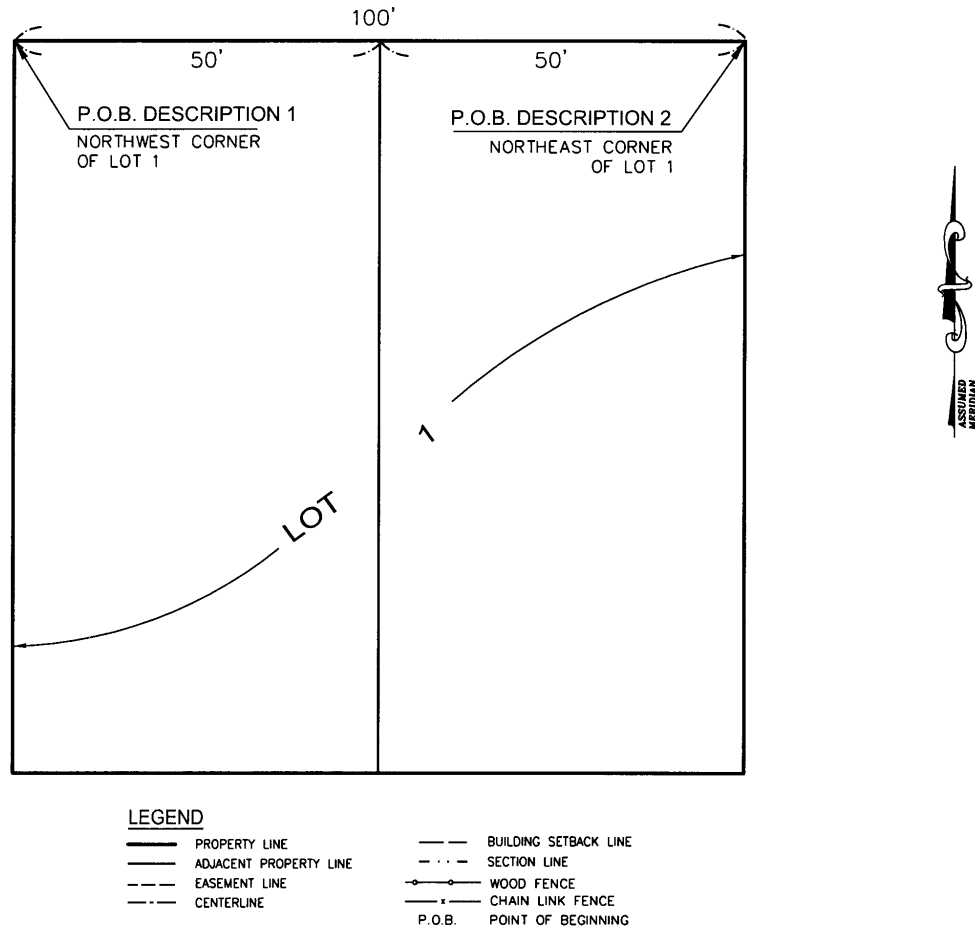
Notwithstanding An Act Concerning the mode of surveying the Public Lands of the United States of February 11, 1805, ch. 14, 2 Stat. 313, Justin Butterfield, Commissioner of the General Land Office, issued special instructions from 1849 to 1851 that directed that the center of a section of land be located at the midpoint of the line connecting the east quarter section corner and the west quarter section corner.

15. [2.174] Conflicting Monumentation at Center of Section



The surveyor's field work indicates that a center of section that was established contrary to An Act Concerning the mode of surveying the Public Lands of the United States of February 11, 1805, ch. 14, 2 Stat. 313, was used as the point of beginning for establishing two subdivisions.

16. [2.175] Creation of Gaps and Overlaps

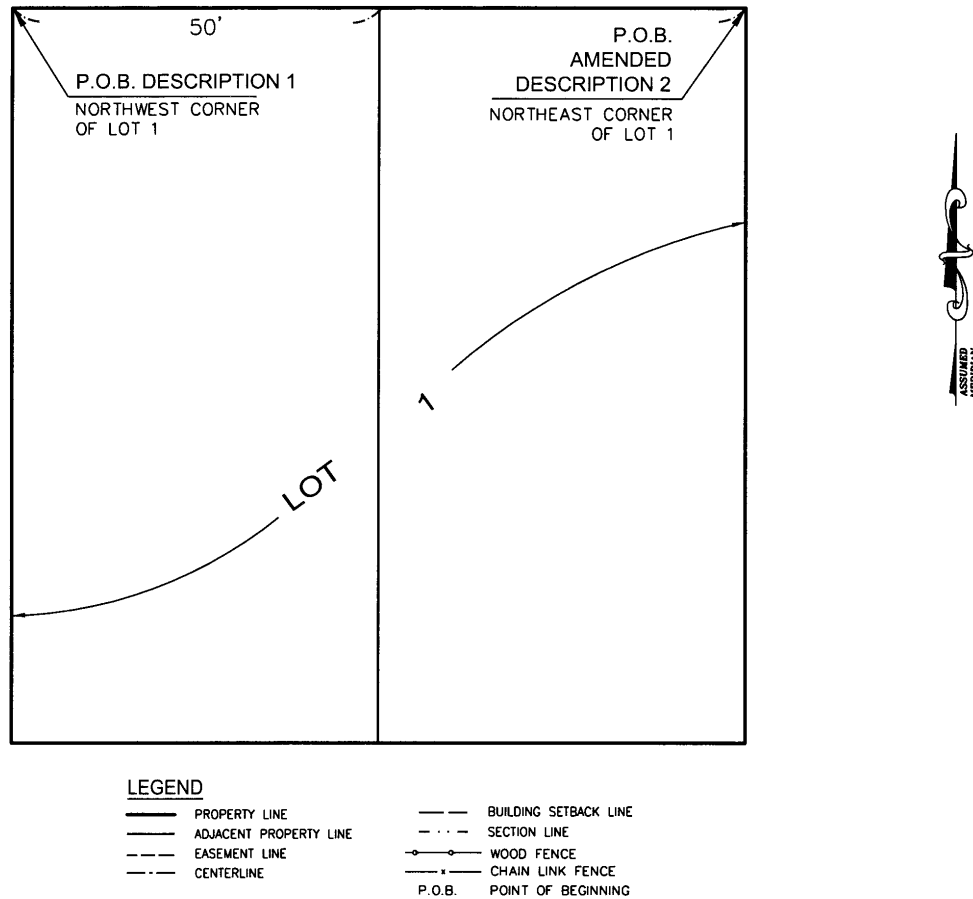


Description One: “Beginning at the northwest corner of lot 1; then east along the north line thereof 50 feet; thence south parallel to the west line of said lot 1 a distance of 100 feet to the south line thereof; thence west along said south line 50 feet to the west line of said lot; thence north along said west line 100 feet to the place of beginning.”

Description Two: “Beginning at the northeast corner of lot 1; then west along the north line thereof 50 feet; thence south parallel to the east line of said lot 1 a distance of 100 feet to the south line thereof; thence east along said south line 50 feet to the east line of said lot; thence north along said east line 100 feet to the place of beginning.”

These two descriptions begin at opposite corners of lot 1. This lot has a platted width of 100 feet. But if lot 1 had an actual width of less than 100 feet, there would be an overlap between the two descriptions. If lot 1 were more than 100 feet in width, there would be a gap between the two descriptions.

17. [2.176] Eliminating Possibility of Gaps and Overlaps

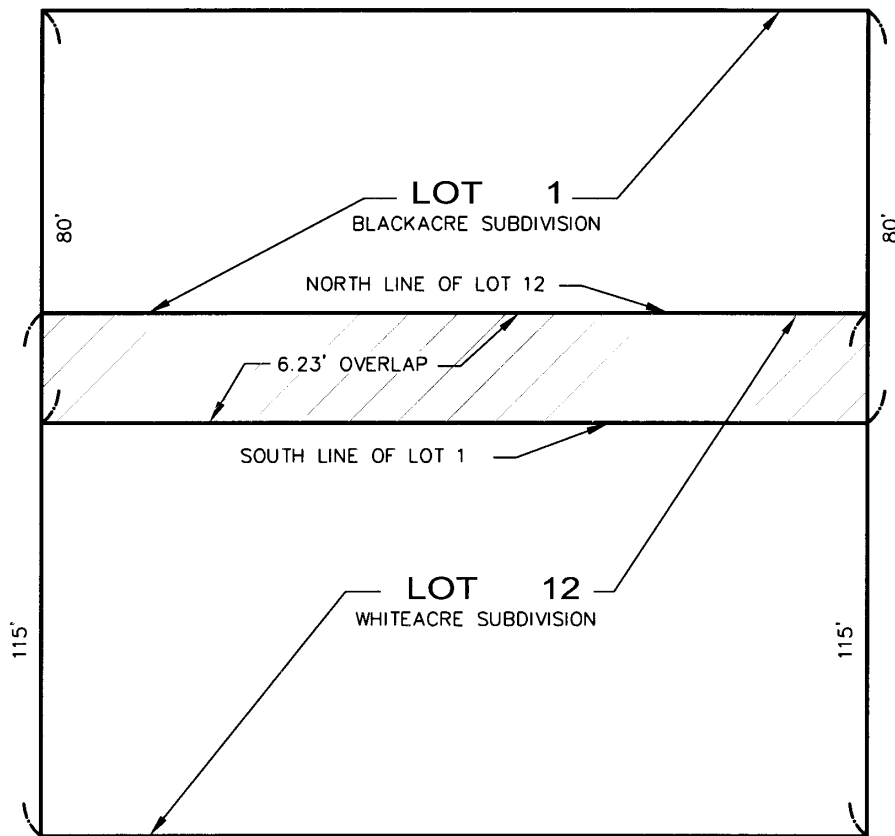


Description One: “Beginning at the northwest corner of lot 1; then east along the north line thereof 50 feet; thence south parallel to the west line of said lot 1 a distance of 100 feet to the south line thereof; thence west along said south line 50 feet to the west line of said lot; thence north along said west line 100 feet to the place of beginning.”

Amended Description Two: “Beginning at the northeast corner of lot 1; then west along the north line thereof to a point 50 feet east of the northwest corner of said lot 1; thence south parallel to the west line of said lot 1 a distance of 100 feet to the south line thereof; thence east along said south line to the east line of said lot; thence north along said east line 100 feet to the place of beginning.”

Note how these two descriptions establish a common line between the two parcels, thereby eliminating the possibility of a gap or overlap between Description One and Amended Description Two.

18. [2.177] **Overlap Created When Larger Tract Was Subdivided: Subdivided Land**

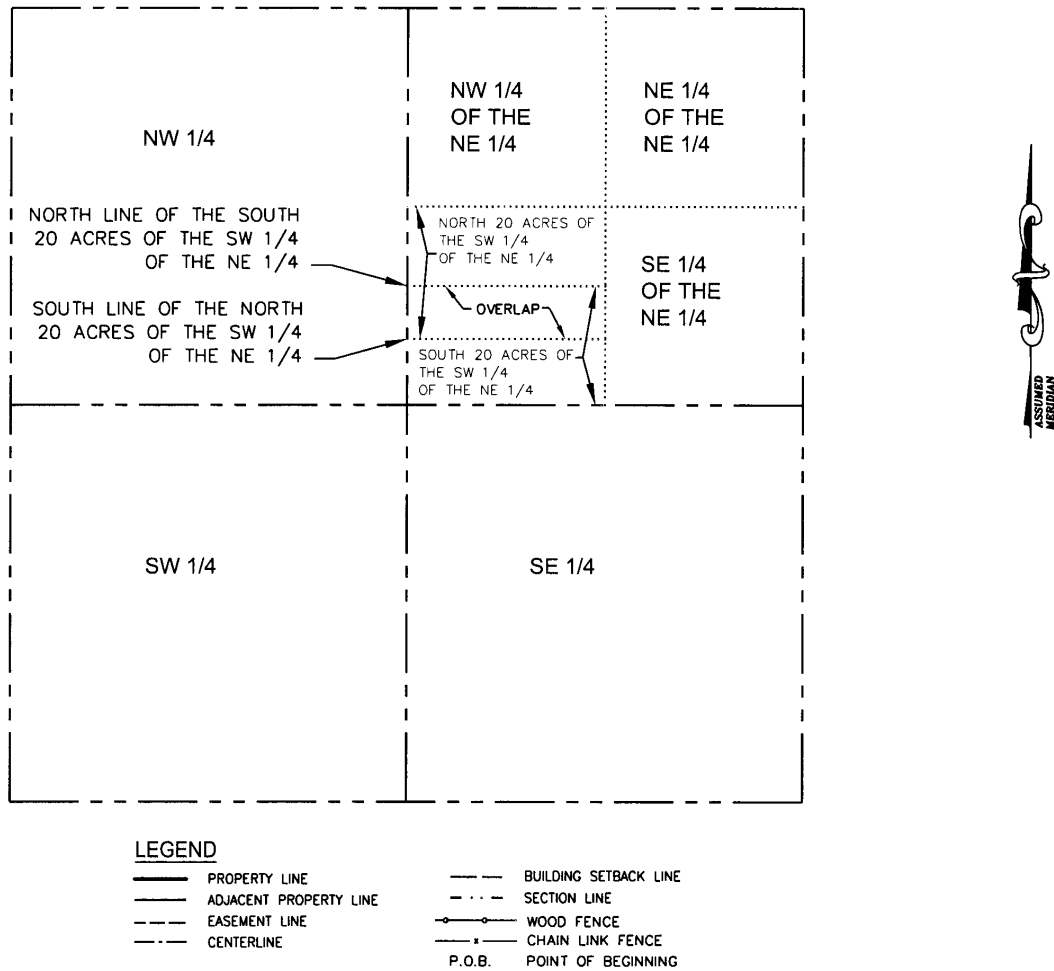


LEGEND

- PROPERTY LINE
- ADJACENT PROPERTY LINE
- - - EASEMENT LINE
- · - · CENTERLINE
- · - · BUILDING SETBACK LINE
- · - · SECTION LINE
- WOOD FENCE
- *— CHAIN LINK FENCE
- P.O.B. POINT OF BEGINNING

Lot 1 in Blackacre Subdivision has a record measurement of 80 feet in width, and lot 12 in Whiteacre Subdivision has a record measurement of 115 feet in width. If one were to look at a county tax map of these two lots, it would appear that the two subdivisions (and the two lots) were contiguous to each other. However, there is actually a 6.23-foot overlap between the two lots. The overlap is a result of the two subdivisions being incorrectly carved out of a larger tract of land.

19. [2.178] Overlap Created When Larger Tract Was Subdivided: Section of Land

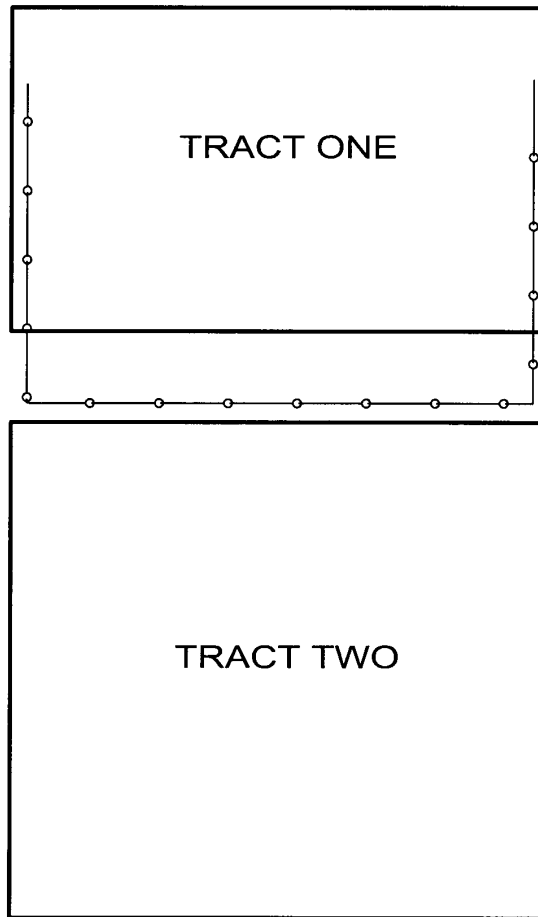


The southwest quarter of the northeast quarter of this section was divided into two tracts of land:

1. the north 20 acres of the southwest quarter of the northeast quarter; and
2. the south 20 acres of the southwest quarter of the northeast quarter.

However, the southwest quarter of the northeast quarter of this section is a quarter-quarter that contains less than 40 acres. Therefore, there is an overlap between the north 20 acres and the south 20 acres of this quarter-quarter.

20. [2.179] Adverse Occupation of Gap

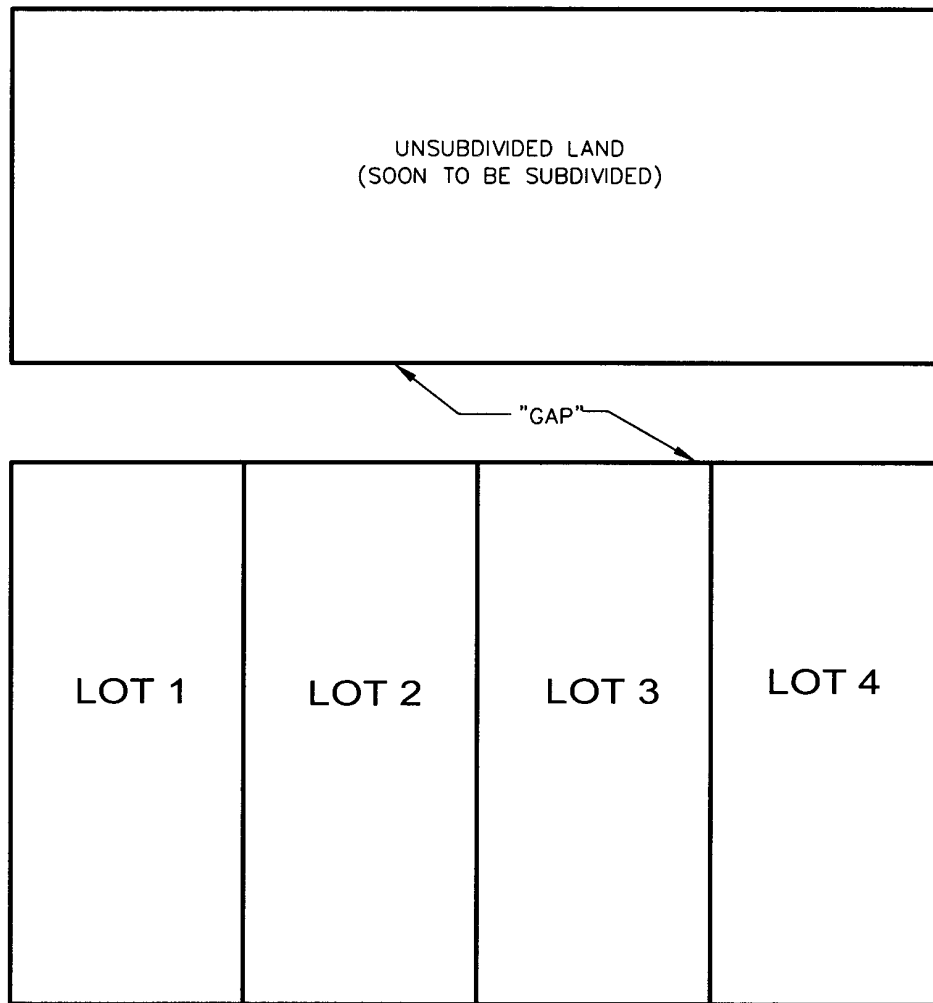


LEGEND

- PROPERTY LINE
- ADJACENT PROPERTY LINE
- - - EASEMENT LINE
- · - CENTERLINE
- - - BUILDING SETBACK LINE
- · - SECTION LINE
- WOOD FENCE
- x— CHAIN LINK FENCE
- P.O.B. POINT OF BEGINNING

The owner of tract one has erected a fence that completely encloses the gap parcel that is between tract one and tract two.

21. [2.180] Gap Between Subdivided and Unsubdivided Land: Example 1

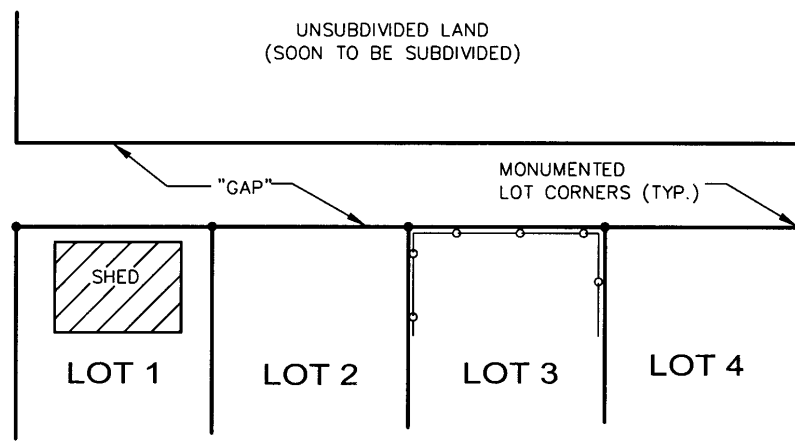


LEGEND

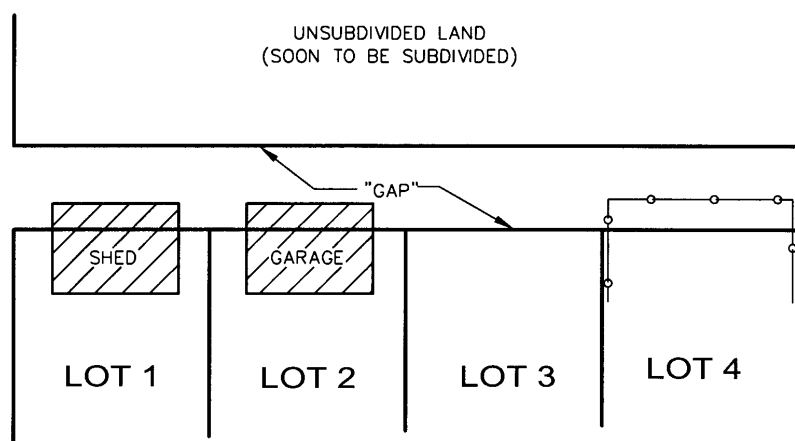
- PROPERTY LINE
- ADJACENT PROPERTY LINE
- - - - EASEMENT LINE
- · - · CENTERLINE
- BUILDING SETBACK LINE
- · · - SECTION LINE
- — ○ WOOD FENCE
- x — CHAIN LINK FENCE
- P.O.B. POINT OF BEGINNING

There is a gap between an existing subdivision and unsubdivided land; this unsubdivided land, however, will soon be subdivided.

22. [2.181] Gap Between Subdivided and Unsubdivided Land: Example 2

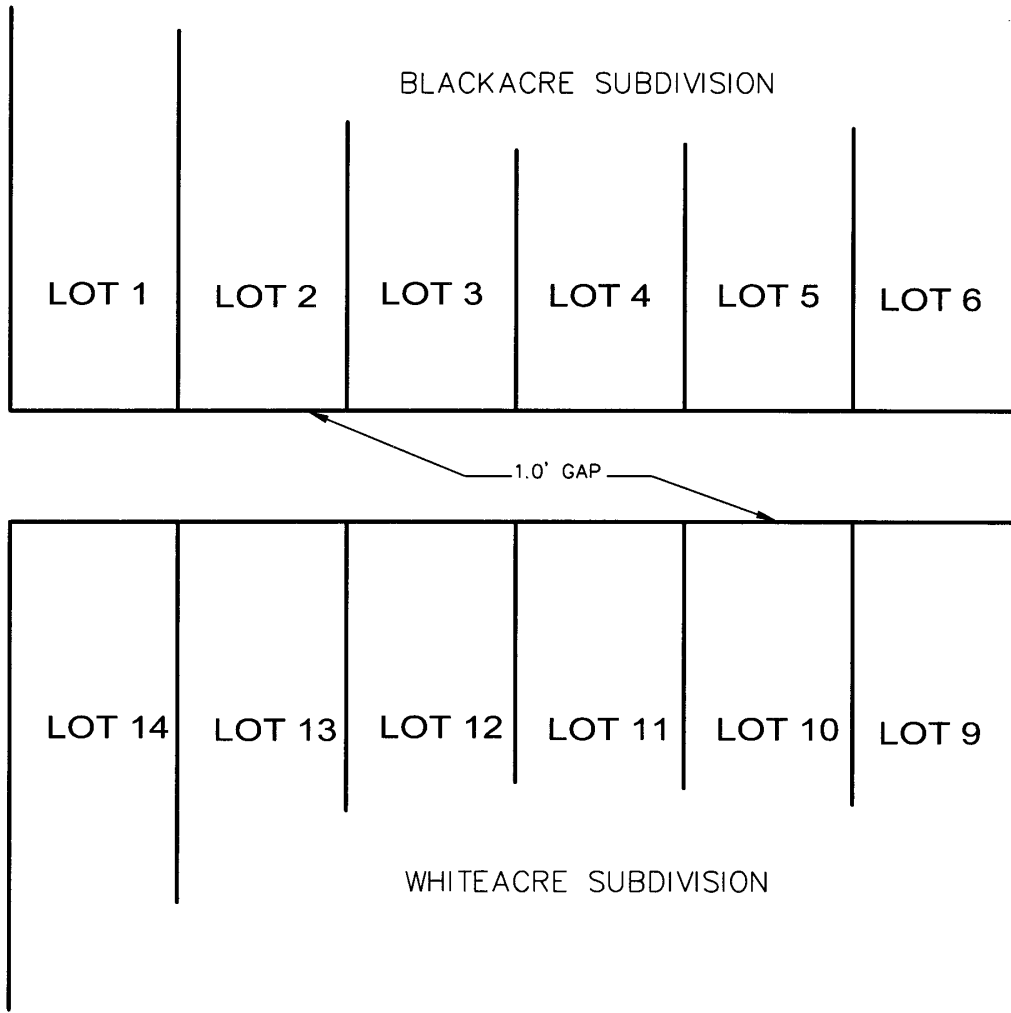


In this example, the iron pipes that monument the lot corners do not fall within the gap parcel. All improvements (a shed on one lot, a fence on another lot) are also set back within the lot lines; there have been no improvements constructed on the gap parcel. It seems clear that the lot owners purchased their lots with no expectation of having any interest in the gap. A title insurance company might be willing to insure that the developer of the unsubdivided land owns the entire gap parcel.



In this example, however, the shed, garage, and fence have all been constructed within the gap parcel. Even if the iron pipes that mark the lot corners are set back away from the gap, it is doubtful that a title insurance company would insure that the developer of the unsubdivided land owns the gap parcel unless the developer acquires deeds from all of the adjoining lot owners.

23. [2.182] Gap Between Subdivisions

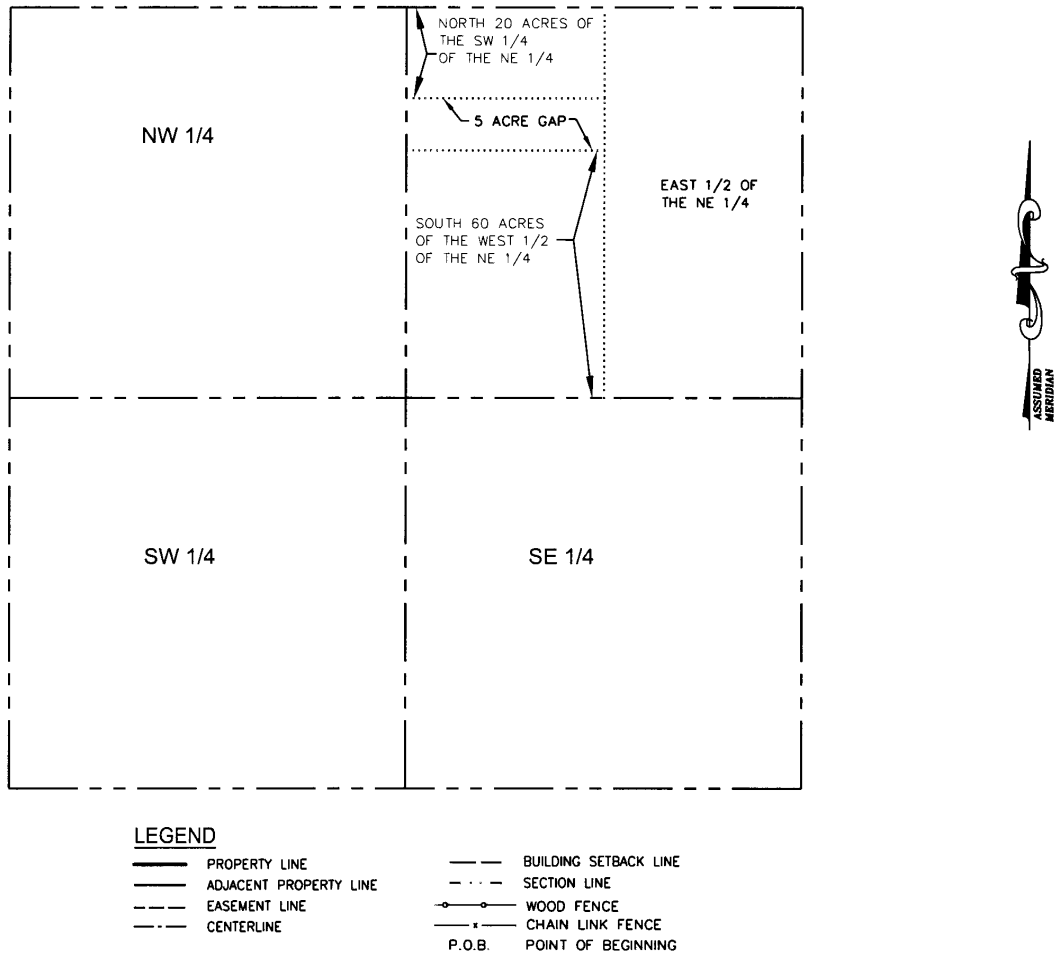


LEGEND

- PROPERTY LINE
- ADJACENT PROPERTY LINE
- - - EASEMENT LINE
- · - · CENTERLINE
- · - · BUILDING SETBACK LINE
- · - · SECTION LINE
- WOOD FENCE
- · - · CHAIN LINK FENCE
- P.O.B. POINT OF BEGINNING

The county tax maps of this property indicate that these two subdivisions are contiguous to each other. Actually, there is a one-foot gap between the two subdivisions.

24. [2.183] Gap Between Unsubdivided Parcels



Land in Illinois was originally surveyed pursuant to both the Rectangular Survey System of land measurement that was devised by Thomas Jefferson and later adopted by the Continental Congress in 1785 and Tiffin’s instructions of 1815.

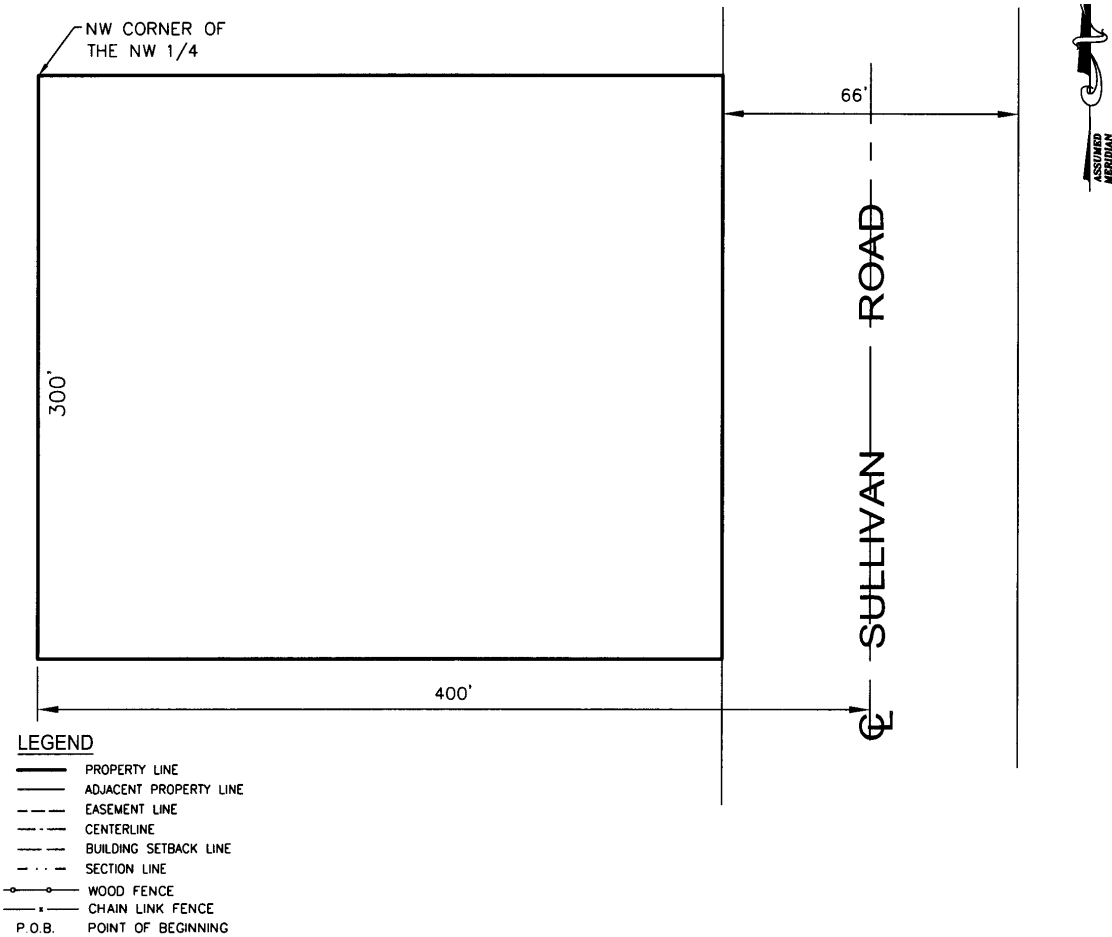
The theoretically perfect quarter section of land contains 160 acres. A half quarter section would therefore consist of 80 acres. In this example, the north 20 acres of the west half of the northeast quarter was first conveyed and then the south 60 acres of the west half of the northeast quarter was conveyed.

This quarter section of land, however, contained more than 80 acres. This incorrect division of the half quarter section (north 20 acres, south 60 acres) resulted in a 5-acre gap between the two tracts of land.

To eliminate the possibility of a gap or overlap, the second tract of land should have been conveyed as “the west half of the northeast quarter (except the north 20 acres thereof).”

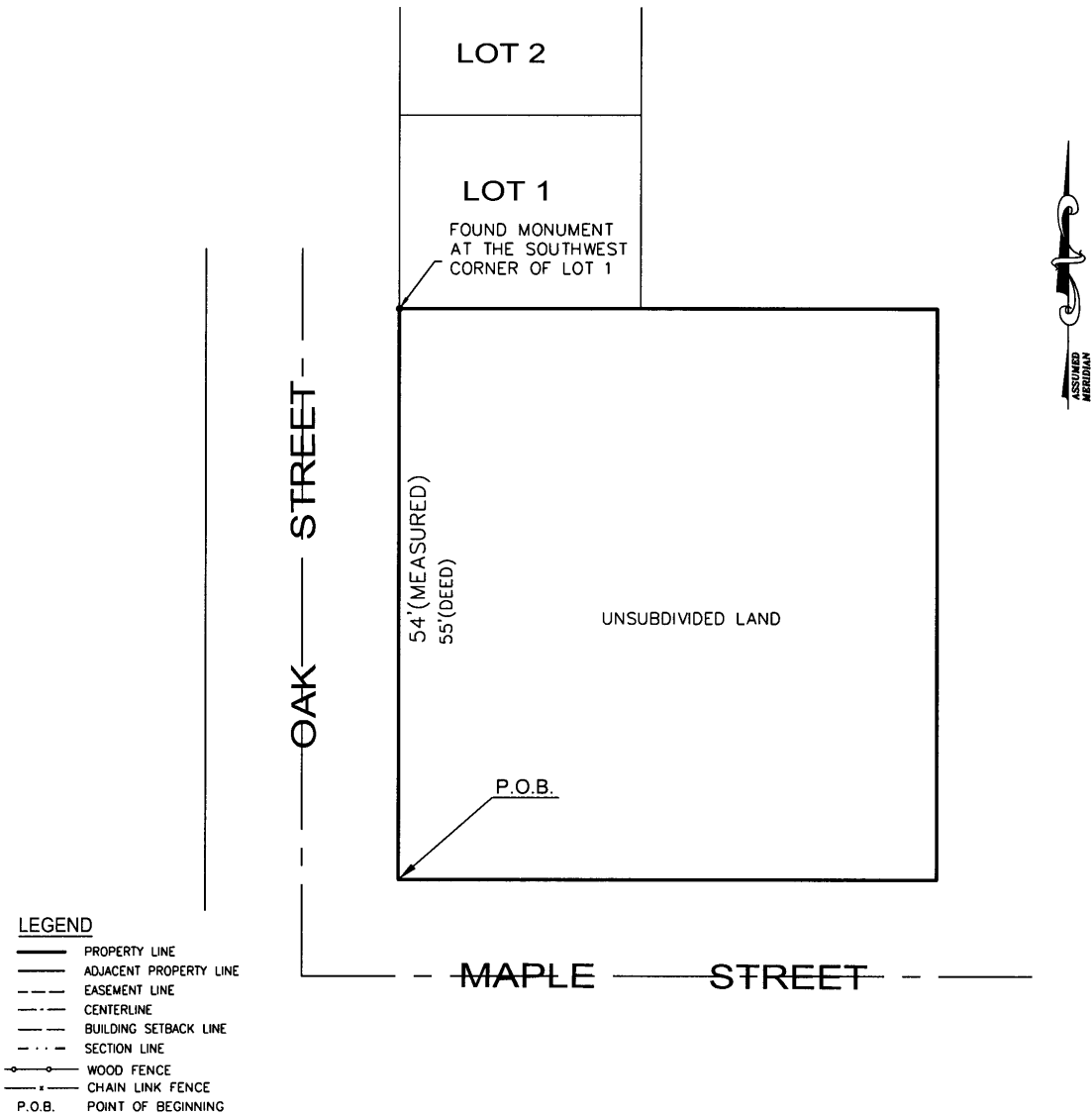
25. [2.184] Boundary Running to Center of Road: Incorrect Survey

“That part of the Northwest quarter of Section 26, Township 38 North, Range 11, East of the Third Principal Meridian, DuPage County, Illinois, described as follows: Beginning at the Northwest corner of said Northwest quarter; thence East along the North line of said Northwest quarter 400 feet to the center of Sullivan Road; thence South along the center of Sullivan Road 300 feet; thence West parallel to the North line of said Northwest quarter 400 feet to the West line of said Northwest quarter; thence North along said West line 300 feet to the point of beginning.”



Note that this legal description clearly indicates that the east boundary of the land falls in Sullivan Road. The surveyor, however, has darkened the perimeter of the property to make it appear as if the legal description runs only to the west edge of the road. Title insurance companies are occasionally asked to give endorsements that insure against loss in the event the survey does not accurately depict the location of the exterior boundaries of the land. This drawing would have to be corrected before such an endorsement could be issued.

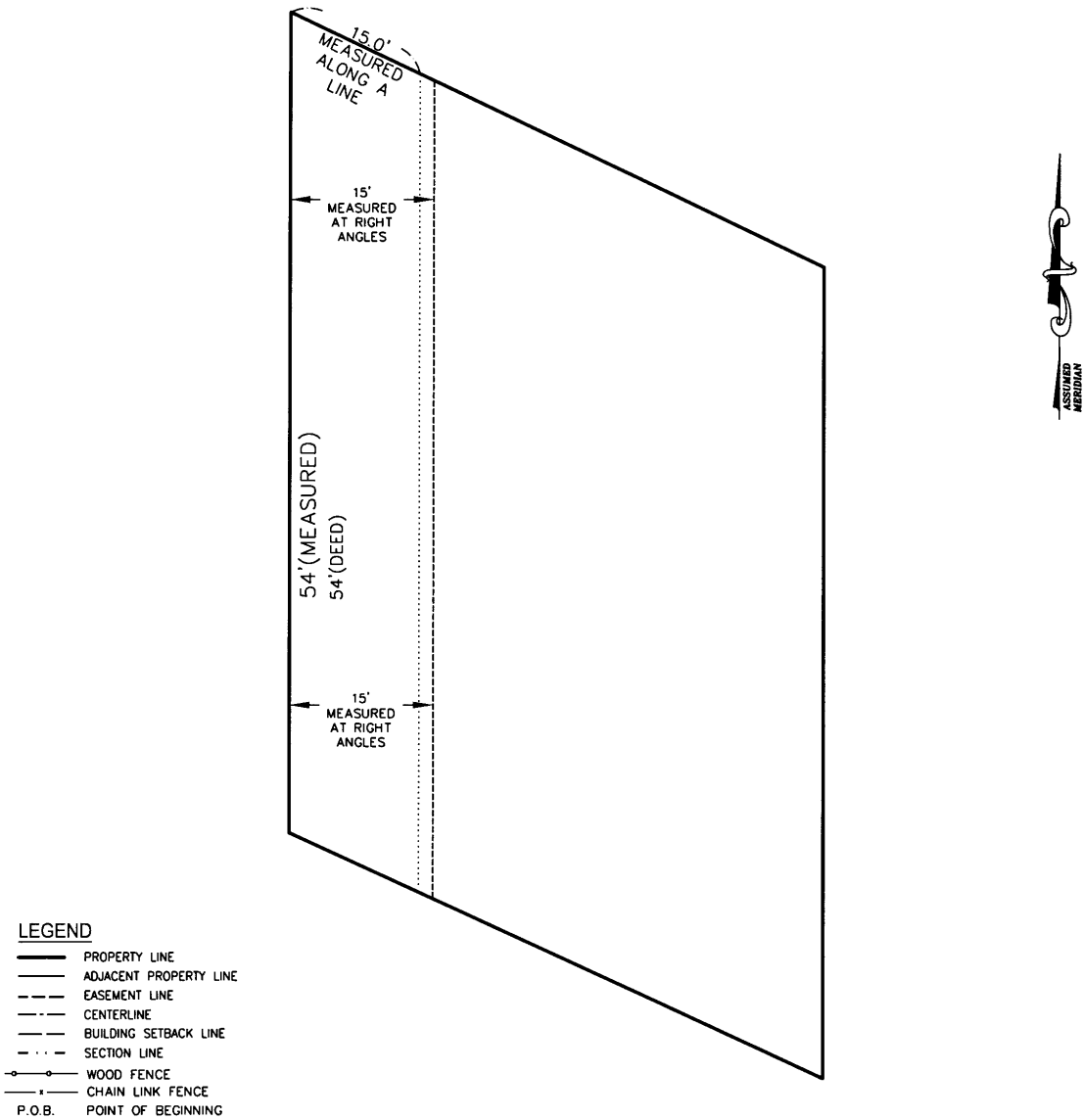
26. [2.185] Hierarchy of Legal Description Elements: Monuments Control over Distance



The legal description for this tract of unsubdivided land has traditionally read as follows: “Beginning at the intersection of the east side of Oak Street and the north side of Maple Street; thence north along the east side of Oak Street 55 feet to the southwest corner of lot 1; thence east along the south line of lot 1.”

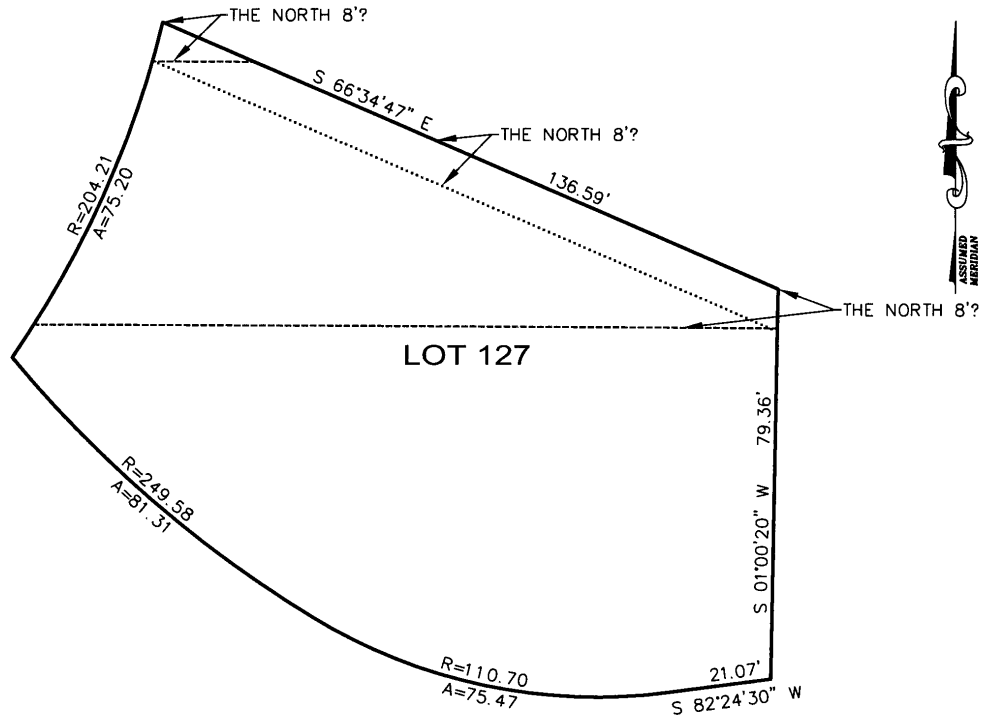
The distance from the point of beginning to the southwest corner of lot 1 is actually 54 feet, not 55 feet. Because monuments control over distance, the northwest corner of this tract of unsubdivided land is at the southwest corner of lot 1 and not at a point one foot north of this southwest corner.

27. [2.186] Measuring a Portion of a Parallelogram-Shaped Lot



How does one measure the “west 15 feet” of an irregularly shaped lot? This example illustrates how the east line of the west 15 feet of a lot shifts to the east by several feet when measured at right angles to the west line of the lot and not measured along the northerly line of the lot.

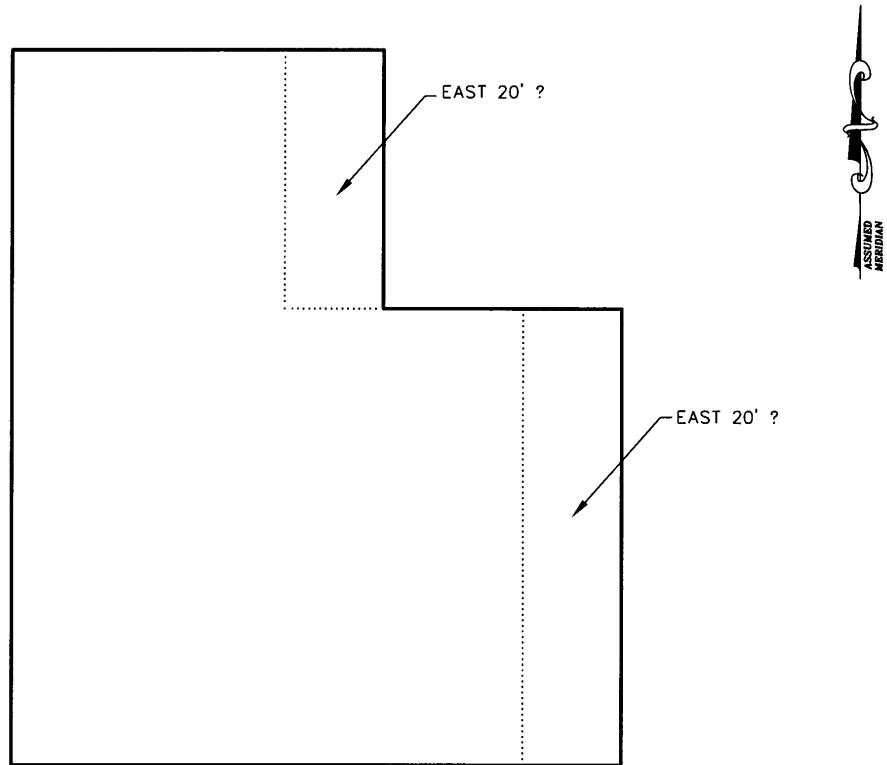
28. [2.187] Measuring a Portion of an Irregularly Shaped Lot



- LEGEND**
- PROPERTY LINE
 - ADJACENT PROPERTY LINE
 - - - EASEMENT LINE
 - · - CENTERLINE
 - - - BUILDING SETBACK LINE
 - · - SECTION LINE
 - WOOD FENCE
 - CHAIN LINK FENCE
 - P.O.B. POINT OF BEGINNING

Even a description as simple as “the north 8 feet” of a lot is ambiguous when the lot in question is as irregularly shaped as this lot is.

29. [2.188] Measuring a Portion of a “Stair Step Parcel”

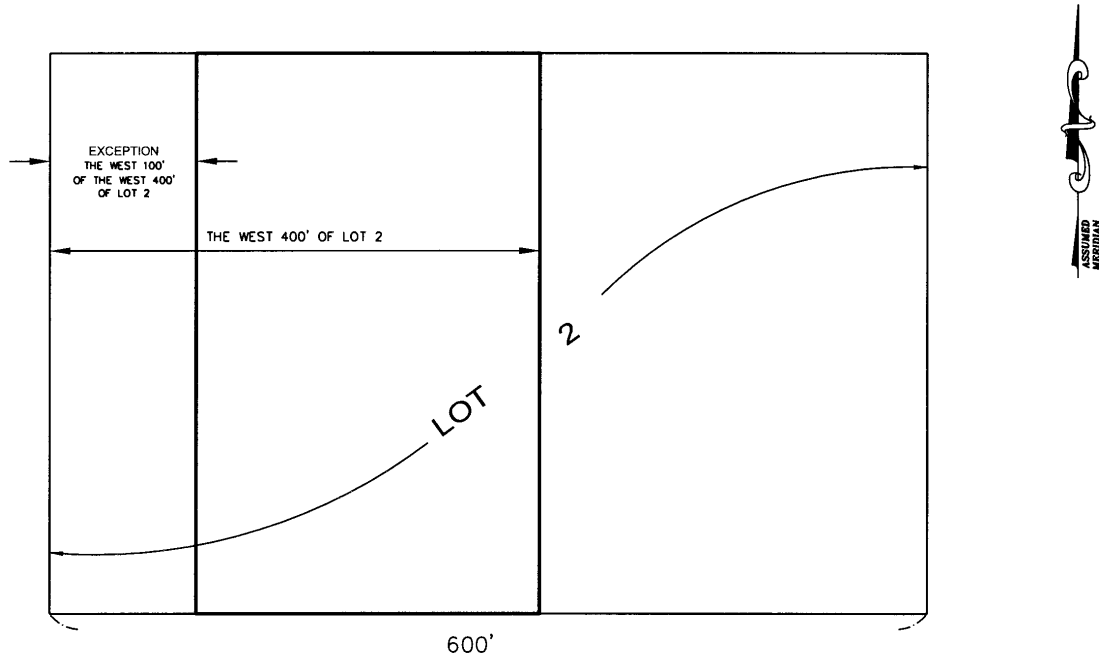


LEGEND

- PROPERTY LINE
- ADJACENT PROPERTY LINE
- - - EASEMENT LINE
- - - CENTERLINE
- - - BUILDING SETBACK LINE
- · - SECTION LINE
- WOOD FENCE
- CHAIN LINK FENCE
- P.O.B. POINT OF BEGINNING

What is the “east 20 feet” of this lot?

30. [2.189] Legal Description of an “Exception”: Example 1



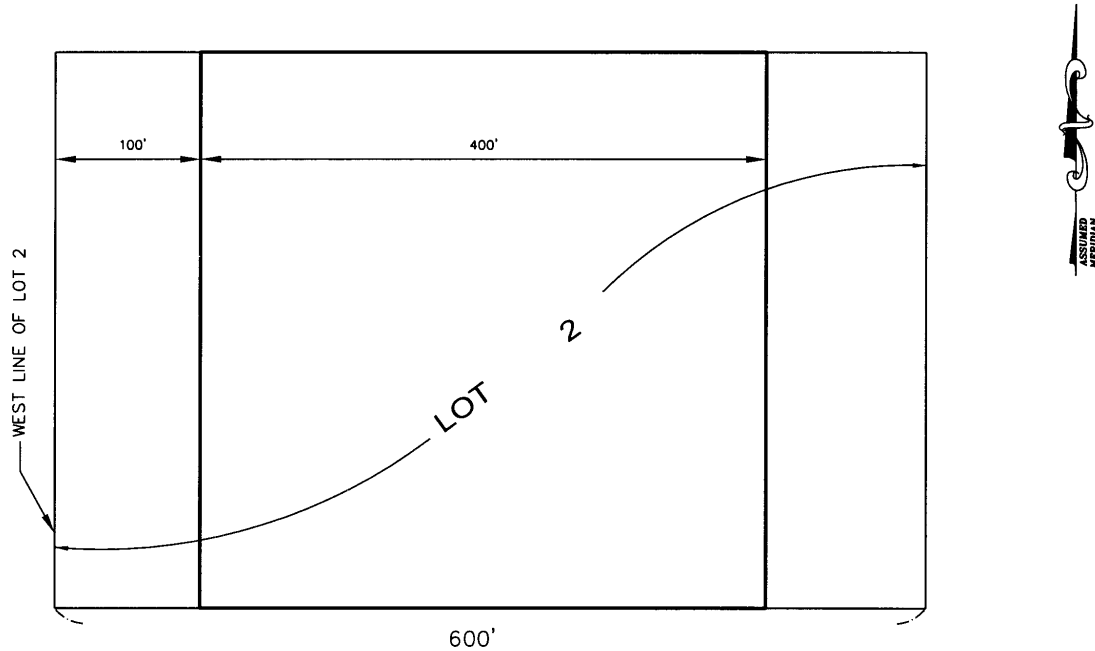
LEGEND

- PROPERTY LINE
- ADJACENT PROPERTY LINE
- - - EASEMENT LINE
- - - CENTERLINE
- - - BUILDING SETBACK LINE
- - - SECTION LINE
- WOOD FENCE
- x— CHAIN LINK FENCE
- P.O.B. POINT OF BEGINNING

“The west 400 feet of lot 2, excepting from said tract the West 100 feet”

In writing an “exception” legal description, the entire tract of land should be described first — in this case, the west 400 feet of lot 2 — and then the exception parcel should be described. By writing the legal description in this manner, one can first identify the west 400 feet of lot 2 and then easily eliminate the exception parcel (the west 100 feet of the west 400 feet of lot 2).

31. [2.190] Legal Description of an “Exception”: Example 2

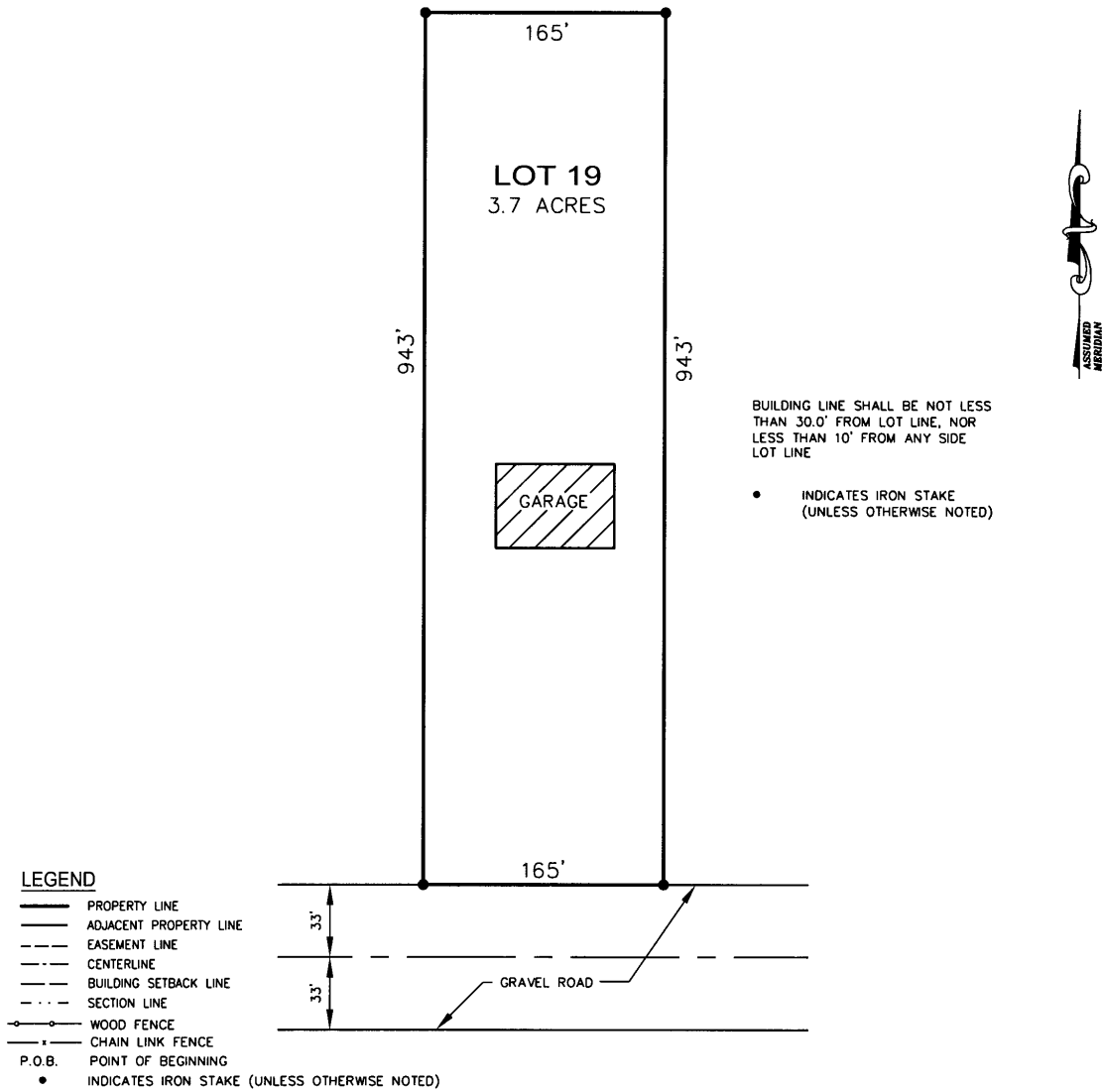


- LEGEND**
- PROPERTY LINE
 - ADJACENT PROPERTY LINE
 - - - EASEMENT LINE
 - · - · CENTERLINE
 - - - BUILDING SETBACK LINE
 - · - · SECTION LINE
 - WOOD FENCE
 - CHAIN LINK FENCE
 - P.O.B. POINT OF BEGINNING

“The West 400 feet except the West 100 feet of lot 2”

This description is ambiguous. Is the west 400 feet to be excepted out of “lot 2,” or should it be carved out of “lot 2, except the West 100 feet”? It appears that the west 100 feet is to be excepted out of lot 2 first (unlike the legal description in §2.189 above) and then the west 400 feet is to be taken out of the remainder of lot 2. This may not have been the intent of the drafter of the description, however, and it creates a tract of land that is very different from the parcel described and depicted in §2.189.

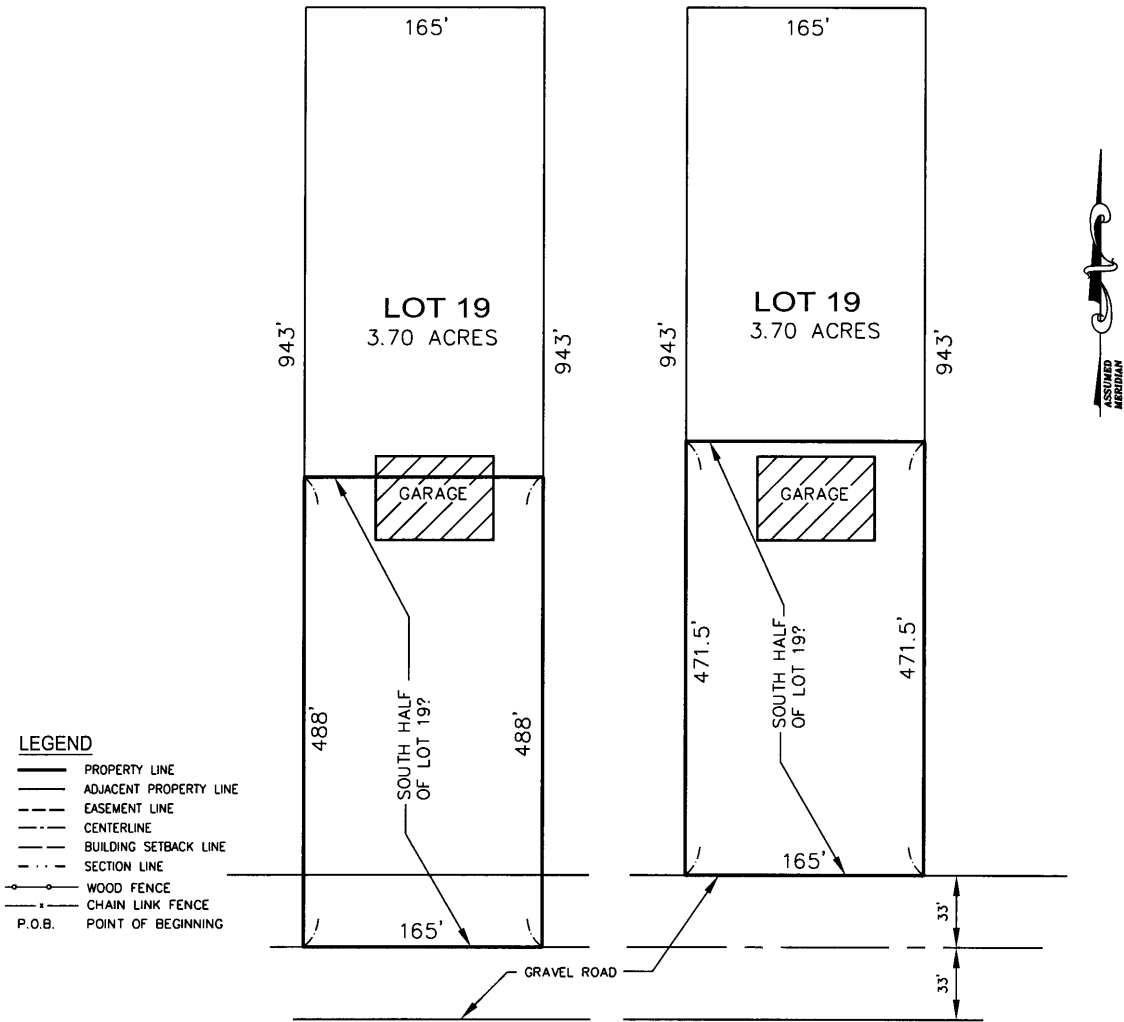
33. [2.192] Using Plat Information To Determine Boundaries



Lot 19 of Unit No. 1 of Reed's Crest of Hill Estates, Will County, Illinois

Does lot 19 extend into the gravel road? The information on this subdivision plat provides the answers.

34. [2.193] Using Occupational Evidence To Determine Boundaries

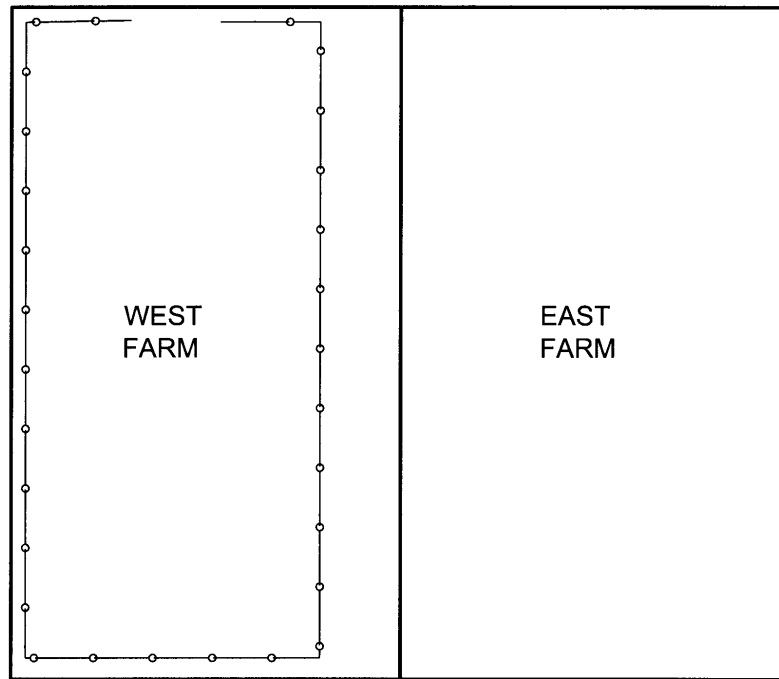


This diagram illustrates how occupational evidence can help determine the location of the lot lines. The surveyor has been asked to survey the south half of lot 19. It is not clear, however, whether the lot runs to the center of the gravel road, which is 66 feet wide. The plat of subdivision indicates that the distance from the north line of the lot to the edge of the road is 943 feet.

Does the lot run to the center of the road? Adding 943 feet + 33 feet (one half of the width of the road) = 976 feet. One half of 976 feet is 488 feet. This parcel is shown in the left drawing. Note how the garage encroaches over the north line.

Does the lot run to the edge of the road? One half of 943 feet is 471.5 feet. This parcel is shown in the right drawing. In both drawings, the garage is located the same distance from the road. In the right drawing, however, the garage does not encroach. Occupational evidence therefore suggests that the lot does not run to the center of the road.

35. [2.194] Fence Inside Boundary Lines

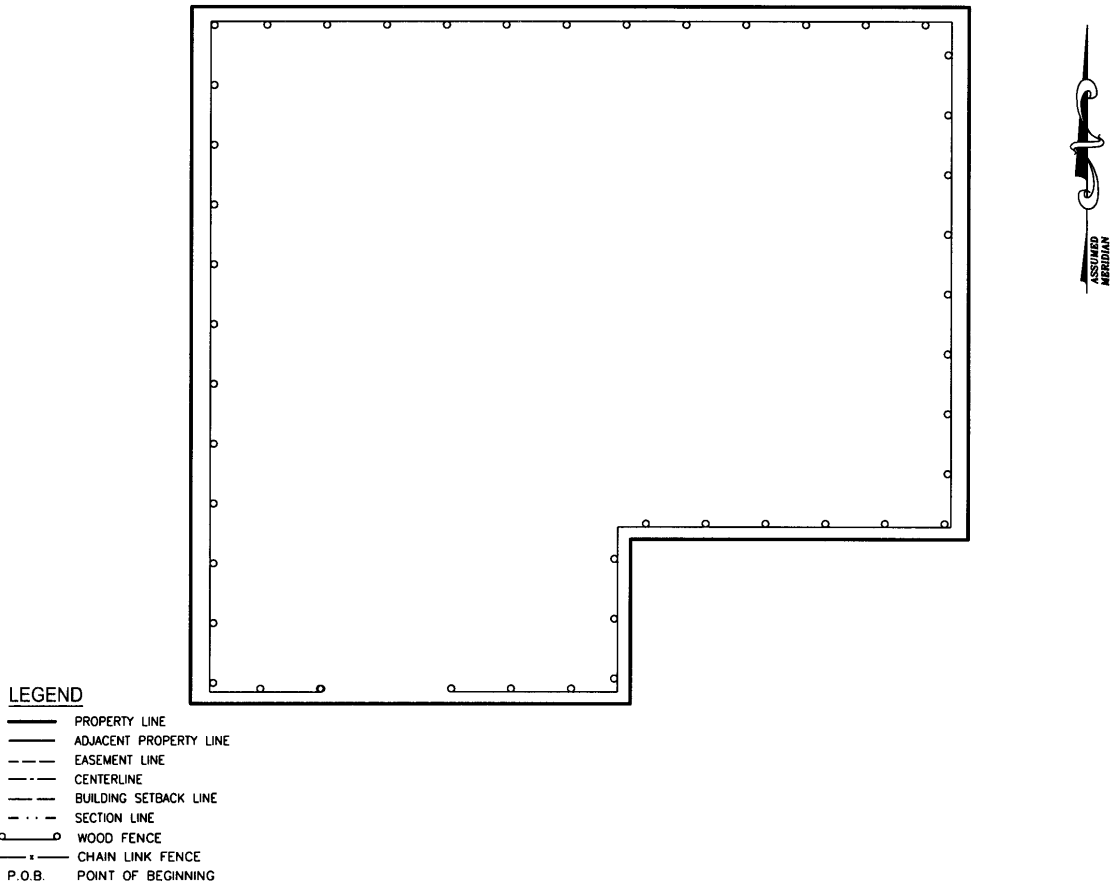


LEGEND

- PROPERTY LINE
- ADJACENT PROPERTY LINE
- - - EASEMENT LINE
- - - CENTERLINE
- - - BUILDING SETBACK LINE
- . . . SECTION LINE
- WOOD FENCE
- +— CHAIN LINK FENCE
- P.O.B. POINT OF BEGINNING

The owner of the west farm has fenced in the farm. But note that the fence is substantially inside the line dividing the west farm from the east farm. Is the farmer to the east tilling the soil up to this fence line? If so, could the farmer to the east obtain title by adverse possession to that portion of the west farmer's farmland that lies between this fence and the boundary line between the two farms?

36. [2.195] Fence Following Perimeter of Property



Whose fence is it? When reviewing a survey, some attorneys and title examiners may look to see how the horizontal fence boards are depicted in relation to the vertical fence posts. They may feel that, if (as shown above) the fence posts are inside the fence boards, so that the horizontal fence boards are enclosing the insured owner’s property, the fence is therefore the landowner’s fence and accordingly not an encroachment.

This thinking is misguided. Surveyors merely use a “board and posts” drawing as a universal symbol for the depiction of a boundary fence. Surveyors will rarely, if ever, attempt to show fence ownership on their plats of survey. In order to determine who owns the fence, the attorney or title examiner should look to see whether the fence follows the perimeter of the property in question. If it does, as shown in this drawing, the fence is most likely appurtenant to the land in question.

3

Zoning Issues: Municipality Perspective

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Chicago

IICLE® gratefully acknowledges Kevin P. McKeown and Dean W. Krone, who provided this chapter for previous editions and on whose material this edition is based.

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II. [3.2] Authority To Implement Zoning Restrictions

III. Zoning Restrictions on Property

- A. [3.3] General Purposes of Zoning
- B. [3.4] Zoning Restrictions Generally
- C. [3.5] Types of Zoning Restrictions

IV. [3.6] Seeking Zoning Relief from the Municipality

- A. [3.7] Special Uses
- B. [3.8] Variations
- C. [3.9] Zoning Amendments

V. Challenging Zoning Restrictions in Court

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 - 2. [3.12] Exhaustion of Administrative Remedies
- B. [3.13] Judicial Review
 - 1. [3.14] Administrative Review
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- A. [3.19] Subdivision
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- C. [3.21] Legal Nonconforming Use
- D. [3.22] Exclusionary Zoning of Commercial Uses
- E. [3.23] Inverse Condemnation by Application of Zoning Restrictions
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- B. [3.26] Initial Issues for New Commercial Construction

- C. [3.27] Planning Issues for Commercial Developments
- D. [3.28] Steps To Gain Zoning Approval for Commercial Property
- E. [3.29] Commercial Development Agreement Issues

I. [3.1] INTRODUCTION

The application of zoning to commercial real estate is substantial. Buyers, sellers, and owners of commercial real estate must consider zoning requirements for many issues. All parties are considered to have constructive knowledge of zoning restrictions. See Julie A. Tappendorf and Gregory W. Jones, Ch. 2, *Zoning*, MUNICIPAL LAW: ANNEXATION, ZONING, AND REGULATORY AUTHORITY (IICLE[®], 2024).

In zoning cases, the municipality often seeks to resolve complex competing interests. The municipality would like to increase the value of property without harming the interests of existing property owners. Many commercial developments encounter some opposition within a community. The amount of controversy created by commercial developments can be seen by the increasing number of court cases coming from municipal zoning decisions.

The commercial developer should seek information about a community as early as possible. It is often helpful for the developer to meet with and hear the concerns of opponents. The opposition does not go away, and it is better to seek to alleviate the concerns of the project's opponents and the community.

The major issues often include parking, additional congestion, the compatibility of the development with neighboring properties, etc. The developer often needs to have studies done to answer these concerns.

If the commercial development is in compliance with the zoning ordinances and does not require zoning approvals, the development is often an easy project. However, few developers are so lucky.

Some municipalities have begun using professional employees or contract employees to conduct the zoning hearings. In this case, the decision-maker is not the same party that conducts the hearings, gathers the evidence, and makes findings of fact. This trend is expected to increase as zoning hearings become longer and more complex. The use of hearing officers creates new problems for the developer because the eventual decision-maker may have different concerns from those of the hearing officer.

This chapter summarizes the zoning concepts and terminology that the attorney must know and use to handle zoning issues. The unique issues of commercial zoning are often related to municipal affirmative benefits such as sales tax or property tax rebates.

II. [3.2] AUTHORITY TO IMPLEMENT ZONING RESTRICTIONS

The authority to place zoning restrictions on real estate derives from the police power of the state. “Comprehensive,” or “Euclidian,” zoning is dividing property into districts and placing restrictions on the buildings that may be built in each district and their uses.

Non-home-rule municipalities are authorized to plan for the orderly development of the community (65 ILCS 5/11-12-4 through 5/11-12-7), subdivide land (65 ILCS 5/11-12-8), and create comprehensive zoning plans (65 ILCS 5/11-13-1, *et seq.*). Non-home-rule counties have similar statutory authorizations under the Counties Code, 55 ILCS 5/1-1001, *et seq.* See 55 ILCS 5/5-14001, 5/5-1041, 5/5-1042, 5/5-12001.

Home-rule units of government have the power to zone as an exercise of their power to regulate governmental affairs similar to the State of Illinois' power unless restricted by the state. ILL.CONST. art. VII, §6(a).

III. ZONING RESTRICTIONS ON PROPERTY

A. [3.3] General Purposes of Zoning

As stated in 65 ILCS 5/11-13-1, the purposes of zoning are

1. to secure adequate light, pure air, and safety from fire and other dangers;
2. to conserve the taxable value of land and buildings;
3. to lessen or avoid congestion in the public streets;
4. to lessen or avoid hazards to persons and damage to property resulting from the accumulation or runoff of stormwater or floodwater;
5. to promote public health, safety, comfort, morals, and welfare; and
6. to ensure and facilitate the preservation of sites, areas, and structures of historical, architectural, and aesthetic importance.

B. [3.4] Zoning Restrictions Generally

The zoning power exercises control over land use, density, and development. The zoning power is exercised by

1. cluster zoning;
2. density zoning;
3. floating zoning;
4. special or conditional uses;
5. planned unit development or planned development; and
6. performance zoning.

Cluster zoning produces common open spaces in a subdivision by setting minimum lot sizes and setbacks.

Density zoning sets a maximum number of buildings on a set-size lot. It does not necessarily create open spaces but controls the total number of buildings on a lot.

Floating zoning usually includes density and site development requirements. With floating zoning, it is not the location of the property but the use of the property (e.g., commercial) that determines the zoning rules. The floating zoning technique usually requires a comprehensive municipal plan review prior to its establishment. Whether it is considered spot zoning and is therefore not legal depends on the specifics of the restrictions and the community.

Special and conditional uses of property often limit the types of activities allowed on property in a commercial district and how property owners may operate those activities. What type of and how much commercial activity can be performed on their property is an essential issue for most owners of commercial property. A special-use permit does not always run with the land. *County of Cook v. Monat*, 365 Ill.App.3d 167, 847 N.E.2d 689, 301 Ill.Dec. 679 (1st Dist. 2006) (holding that special-use permit that permitted previous owner of property to continue keeping horses did not run with land).

Planned development (often also referred to as a “planned unit development” or “PUD”), which has set requirements applicable to a single property development and not to other properties in the district, is similar to contract zoning. The planned development usually creates a set of requirements for a unique piece of property, and the ordinance allowing for planned development zoning establishes the minimum rules for the development.

A planned development can be a versatile alternative to other approaches for single-property development plans capable of carving out highly use-specific exceptions to zoning ordinances. In *Hanlon v. Village of Clarendon Hills*, 2016 IL App (2d) 151233-U, a planned development established certain exceptions to existing zoning conditions to permit construction of a residential development project in a district otherwise zoned exclusively for retail business. The PUD survived a suit challenging both the village’s decision to enact the PUD as arbitrary and capricious and its authority to disregard certain applicable self-imposed requirements. *Id.* See also *Shoub Properties, LLC v. Village of Glen Ellyn*, 2021 IL App (2d) 200342-U (holding that deviations from zoning regulations made pursuant to PUD process do not violate substantive-due-process rights). The court’s decision affirmed that as long as a municipality’s decision to grant a PUD is neither arbitrary nor capricious under the *LaSalle* and *Sinclair* tests, it will likely be upheld. See *LaSalle National Bank of Chicago 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).

Performance zoning is a type of planned development that sets standards for open spaces and the size of buildings based on each unique piece of property.

Zoning authorities may limit the application of a zoning approval to a specific person or owner, situation, or time period. *Monat, supra*.

C. [3.5] Types of Zoning Restrictions

The zoning restrictions generally applicable to real estate include

1. minimum lot size for buildings;
2. setback of buildings from property lines;
3. minimum or maximum floor area requirements for buildings;
4. maximum lot coverage for structures and/or impervious surfaces;
5. height limit for buildings;
6. off-street parking requirements;
7. floodplain restrictions;
8. buffer-yard landscaping (a “buffer yard” is an area around the building that has landscaping to separate the building from neighboring property);
9. sign restrictions;
10. density of buildings;
11. use of buildings;
12. accessory buildings or uses; and
13. placement of fences and exterior walls for the property as limited or not limited by setback line restrictions.

The zoning ordinances can address aesthetic, environmental, and historic preservation standards.

Aesthetic restrictions can be significant and differ from district to district. The courts in *LaSalle National Bank v. City of Evanston*, 57 Ill.2d 415, 312 N.E.2d 625 (1974), and *City of Champaign, Illinois v. Kroger Co.*, 88 Ill.App.3d 498, 410 N.E.2d 661, 43 Ill.Dec. 661 (4th Dist. 1980), found that aesthetic restrictions are acceptable for home-rule municipalities. The reasoning of these cases extends to non-home-rule municipalities as well. Aesthetic restrictions are often problematic for developers because one person’s beauty is another person’s ugly.

Aesthetic restrictions are sometimes designed to foster architectural compatibility. Some aesthetic restriction ordinances have sample drawings of acceptable structures. The compatibility can be in terms of colors, bulk, density, style, etc.

Environmental zoning restrictions are proper. *Zeitz v. Village of Glenview*, 304 Ill.App.3d 586, 710 N.E.2d 849, 238 Ill.Dec. 52 (1st Dist. 1999).

Historic preservation restrictions are also proper. *Rebman v. City of Springfield*, 111 Ill.App.2d 430, 250 N.E.2d 282 (4th Dist. 1969); *M & N Enterprises, Inc. v. City of Springfield*, 111 Ill.App.2d 444, 250 N.E.2d 289 (4th Dist. 1969). In addition, the historic preservation restrictions in the zoning ordinance may prevent demolition or certain types of renovation of buildings. *Zaruba v. Village of Oak Park, Illinois*, 296 Ill.App.3d 614, 695 N.E.2d 510, 230 Ill.Dec. 1020 (1st Dist. 1998).

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- ✓ The development plan and survey will show all structures and utilities to be built or existing at the site. Landscaping a development is often the best money spent for the commercial development. More and more, landscaping and aesthetic elements are needed to gain zoning approval.
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IV. [3.6] SEEKING ZONING RELIEF FROM THE MUNICIPALITY

A property owner, tenant, or prospective purchaser of property may have the opportunity to seek relief from the municipality that will allow the owner to use the property as desired. This relief usually comes in one of three forms, as discussed in §§3.7 – 3.9 below.

A. [3.7] Special Uses

While a zoning ordinance will identify those uses within each zoning district that are “permitted” within that district, it is also common for the zoning ordinance to identify other “special uses” that may be allowed but only after an application and hearing process and only if the proposed use meets certain standards identified in the zoning ordinance.

Special uses are specifically authorized by §11-13-1.1 of the Illinois Municipal Code, 65 ILCS 5/1-1-1, *et seq.* A municipality may provide for certain special uses in one or more zoning districts. A property owner can apply for a special-use permit only if the proposed use of the property is listed in the zoning ordinance as a special use.

A special-use permit can be issued only after a public hearing before a commission or committee designated by the corporate authorities, with prior notice given in the manner provided in 65 ILCS 5/11-13-6 and 5/11-13-7. *Musicus v. First Equity Group, LLC*, 2012 IL App (3d) 120068, 980 N.E.2d 1233, 366 Ill.Dec. 874. A notice of a public hearing must be published in a newspaper not more than 30 days nor less than 15 days before the hearing. 65 ILCS 5/11-13-6. The notice must contain a description of the property’s location and the general nature of the requested special use. *Id.* In municipalities with populations of 500,000 or more, similar notice must also be sent to the owners of all properties located within 250 feet of the property for which the special-use permit is sought. 65 ILCS 5/11-13-7. In addition, some municipalities have additional or more

stringent notice requirements. The public hearing procedures must allow all interested parties to present witnesses on their behalf, cross-examine witnesses, and present evidence in written and oral form. *People ex rel. Klaeren v. Village of Lisle*, 202 Ill.2d 164, 781 N.E.2d 223, 269 Ill.Dec. 426 (2002).

A special use shall be permitted only if evidence is presented at the public hearing that the use meets the standards established for special uses in the ordinance. 65 ILCS 5/11-13-1.1; *Pumilia v. City of Rockford*, 2021 IL App (2d) 200681-U. A special use may be made subject to such conditions as are reasonably necessary to meet such standards. 65 ILCS 5/11-13-1.1; *County of Cook v. Monat*, 365 Ill.App.3d 167, 847 N.E.2d 689, 301 Ill.Dec. 679 (1st Dist. 2006).

The commission or committee assigned to preside over the public hearing (usually the zoning board of appeals or plan commission) is required to make findings of fact after the public hearing is concluded with regard to whether the standards for the special use have been satisfied. 65 ILCS 5/11-13-11. In some municipalities, the zoning board of appeals (or plan commission) is authorized to make a final decision with regard to the application. In other municipalities, the board or commission makes a recommendation to the corporate authorities. The corporate authorities must then pass an ordinance if they desire to approve the special use. 65 ILCS 5/11-13-1.1.

If the final decision to approve or deny a special use is made by the zoning board of appeals or some other administrative committee or commission, it is an administrative decision and subject to judicial review pursuant to the provisions of the Administrative Review Law, 735 ILCS 5/3-101, *et seq.* 65 ILCS 5/11-13-13. Under the Administrative Review Law such an action must be commenced within 35 days after the decision is served on the party affected by the decision. 735 ILCS 5/3-103. However, if the final decision is made by the corporate authorities of the municipality, it is a legislative decision and subject to *de novo* judicial review. 65 ILCS 5/11-13-25. “Any action seeking the judicial review of such a decision shall be commenced not later than 90 days after the date of the decision.” *Id.*

B. [3.8] Variations

A zoning ordinance will frequently provide for the possibility of a “variation” (or “variance”) from the strict terms of the zoning ordinance. This device is intended to allow some flexibility when requiring strict compliance would impose an unreasonable hardship on the owner. (Think of an owner who would be prohibited from using a property for any purpose because it is one inch narrower than the required lot width.) A variation may be a “use variation,” which allows a use that is otherwise proscribed by the strict terms of the zoning ordinance, or a variation that relates to the requirements for and limits on construction, such as lot size, density, frontage, setback lines, height limits, etc.

In municipalities of 500,000 or more inhabitants, such as Chicago, only the zoning board of appeals can grant variations and then only when “they are in harmony with the general purpose and intent of the [zoning] regulations and only in cases where there are practical difficulties or particular hardship” in complying with the strict letter of the zoning ordinance. 65 ILCS 5/11-13-4. In Chicago, the zoning board of appeals “shall require evidence that (1) the property in question cannot yield a reasonable return if permitted to be used only under the conditions allowed by the

regulations in that zone; and (2) the plight of the owner is due to unique circumstances; and (3) the variation, if granted, will not alter the essential character of the locality.” *Id.* In municipalities of fewer than 500,000 inhabitants, the Illinois Municipal Code does not mandate the three criteria required in Chicago. 65 ILCS 5/11-13-5. The standards in other municipalities can be written into the zoning ordinance in somewhat different form; however, they tend to reflect the same concepts.

Before a variation can be granted, a public hearing must be held. Hearings on applications for variations are most commonly heard by the zoning board of appeals. 65 ILCS 5/11-13-6. However, in a home-rule municipality, the corporate authorities themselves or another commission, such as a plan commission, may hold the hearing. As with the hearing for special uses, a notice of a public hearing must be published in a newspaper not more than 30 days nor less than 15 days before the hearing; the notice must contain a description of the property’s location and the general nature of the requested variation. *Id.* In municipalities with populations of 500,000 or more, similar notice must also be sent to the owners of all properties located within 250 feet of the property for which the variation is sought. 65 ILCS 5/11-13-7. The public hearing procedures must allow all interested parties to present witnesses on their behalf, cross-examine witnesses, and present evidence in written and oral form. *People ex rel. Klaeren v. Village of Lisle*, 202 Ill.2d 164, 781 N.E.2d 223, 269 Ill.Dec. 426 (2002).

The zoning board of appeals (or the board or commission holding the hearing) is required to make findings of fact after the public hearing is concluded with regard to whether the standards for the variation have been satisfied. 65 ILCS 5/11-13-11. In some municipalities, the zoning board of appeals is authorized to make a final decision with regard to the application. In other municipalities, the board makes a recommendation to the corporate authorities. The corporate authorities must then pass an ordinance if they desire to approve the variation. *Id.*

If the final decision to approve or deny a variation is made by the zoning board of appeals, it is an administrative decision and subject to judicial review pursuant to the provisions of the Administrative Review Law. 65 ILCS 5/11-13-13. Under the Administrative Review Law, such an action must be commenced within 35 days after the decision is served on the party affected by the decision. 735 ILCS 5/3-103. However, if the final decision is made by the corporate authorities of the municipality, it is a legislative decision and subject to de novo judicial review. 65 ILCS 5/11-13-25; *Cahn v. City of Highland Park*, 2021 IL App (2d) 191092-U. Any action seeking the judicial review of such a decision must be commenced not later than 90 days after the date of the decision. 65 ILCS 5/11-13-25.

The zoning variation is granted for the property and not based on the qualities of the owner. A hardship from strictly applying the zoning ordinance normally must not be self-created by the owner. A variation runs with the land.

C. [3.9] Zoning Amendments

When neither a special use nor a variation will provide the necessary relief, the owner can apply for an amendment to the zoning ordinance. An amendment can be either an amendment to the zoning map that rezones the owner’s property from the current zoning district to a different zoning district in which the owner will be able to use the property for the desired use (a “map amendment”) or an amendment to the text of the zoning ordinance that will change the rules that apply to the zoning district in which the property is located (a “text amendment”).

An amendment to the zoning ordinance can be accomplished only by passage of another ordinance and therefore can be accomplished only by action of the corporate authorities of the municipality. However, “no such amendments shall be made without a hearing before some commission or committee designated by the corporate authorities.” 65 ILCS 5/11-13-14. Hearings on applications for zoning amendments are most commonly heard by the plan commission. But in a home-rule municipality, the corporate authorities themselves may hold the hearing. Notice of the public hearing must be published in a newspaper that is published in the municipality or, if no newspaper is published in the municipality, in a newspaper with a general circulation in the municipality; the notice must be published not more than 30 nor less than 15 days before the hearing. *Id.*

Owners of property that will be affected by an amendment, or owners of property adjoining property that will be affected, may file a written protest that requires the corporate authorities to pass an amendment by more than a majority. If the owners of 20 percent of the frontage proposed to be altered, or 20 percent of the frontage immediately adjoining or across an alley from or directly opposite the frontage proposed to be altered, file a written protest, the amendment then requires a two-thirds vote of the alderpersons or trustees then holding office. *Id.*; *Cummings v. City of Waterloo*, 289 Ill.App.3d 474, 683 N.E.2d 1222, 225 Ill.Dec. 559 (5th Dist. 1997).

A simple majority of a county board can pass a text amendment unless a petition objecting to the amendment signed by 5 percent of the landowners in the county is filed, in which case it requires a three-fourths vote of all members of the county board. 55 ILCS 5/5-12014. A county board can pass a map amendment rezoning property by a simple majority unless (1) 20 percent of the landowners of the land to be rezoned sign a petition, (2) 20 percent of the landowners on the perimeter of the property or immediately across a street or alley sign a petition, or (3) a municipality within one-and-one-half miles of the property to be rezoned passes a resolution objecting, in which case a three-fourths vote is required. *Id.*; *1940 LLC v. County of McHenry*, 2012 IL App (2d) 110753, 971 N.E.2d 629, 361 Ill.Dec. 527.

Because a zoning amendment is always made by the corporate authorities of the municipality by passage of an ordinance, it is always a legislative decision, is subject to de novo judicial review, and must be commenced not later than 90 days after the date of the decision. 65 ILCS 5/11-13-25.

V. CHALLENGING ZONING RESTRICTIONS IN COURT

A. [3.10] Preliminary Considerations

A property owner or other interested party who cannot use property as desired because of limitations imposed by a zoning ordinance may be inclined to challenge the validity of the zoning ordinance in court. Doing so requires careful consideration of whether the plaintiff has standing to file such a lawsuit and whether it is necessary to first exhaust any administrative remedies that may be available.

1. [3.11] Standing

An owner of property who is denied the opportunity to use that property as desired because of limitations established by a zoning ordinance has standing to bring an action in court challenging the validity of the zoning ordinance. However, a contract purchaser may not have standing. The Illinois Supreme Court has explained:

While zoning is primarily a legislative function, it is, nevertheless, subject to review by the courts for the purpose of determining whether the power, as exercised, involves an undue invasion of constitutional rights without reasonable relation to the public welfare. . . . The person attacking the validity of an ordinance must be prepared to show, however, that he has sustained, or is immediately in danger of sustaining, some direct injury as the result of its enforcement. [Citations omitted.] *Clark Oil & Refining Corp. v. City of Evanston*, 23 Ill.2d 48, 177 N.E.2d 191, 192 (1961).

In *Clark Oil*, the plaintiff oil company had entered into a contract to purchase certain property contingent on its rezoning to allow it to be used as a gasoline service station. The court held that under those circumstances, the contract purchaser sustained no direct injury from the denial of the application to rezone the property and did not have standing to challenge the decision in court. 177 N.E.2d at 193.

A contract purchaser may acquire standing by partially performing under such a contract. In *Smith v. County Board of Madison County, Illinois*, 86 Ill.App.3d 708, 408 N.E.2d 452, 42 Ill.Dec. 74 (5th Dist. 1980), the contract purchaser made partial payments on the contract, paid taxes and insurance on the property, and developed a portion of the property that was not in dispute. The court explained:

We believe that plaintiff took sufficient steps under the option contract to evidence his agreement to purchase the property in toto. Upon execution of the contract, plaintiff paid the sellers \$200, \$100 of which was credited against the purchase price. When the Piasa Hills property was rezoned R-3 for single-family residences, plaintiff made a payment of \$3,900 against the purchase price. From the year 1966 on, plaintiff paid all of the taxes and insurance on all three of the parcels of land, and he had the right to utilize the land for construction purposes, farming, and storage. He developed Piasa Hills subdivision, and apparently re-sold lots to the individual Piasa Hills homeowners. Furthermore, the \$12,000 or \$13,000 in payments which plaintiff had made against the purchase price was not earmarked toward the purchase of any one of the parcels, but was apparently credited against the undifferentiated whole. It also appeared that the parties to the contract considered it to be bilateral, with each party bound to the entire transaction. Whatever the technicalities between the buyer and seller in this case, we believe that the plaintiff's position is sufficiently distinguishable from that of the plaintiff in *Clark* to support the trial court's conclusion that plaintiff had equitable ownership of, and a possessory interest in, the land; that the sales contract was not contingent upon rezoning; and that the contract was partially executed and subject to specific performance. Accordingly, plaintiff has standing to challenge the zoning ordinance as it applies to this land. 408 N.E.2d at 458.

A lessee may have standing to challenge a zoning ordinance in court. *Metroweb Corp. v. County of Lake*, 130 Ill.App.3d 934, 474 N.E.2d 900, 85 Ill.Dec. 940 (2d Dist. 1985). The key, according to the court, is whether the lessee has a right of possession:

We agree that a lessee, under certain circumstances, may obtain a sufficient possessory interest under a lease agreement and thereby standing to protect its interest in the leased premises. The key to a lessee’s standing, however, is its right of possession and use of the premises under the provisions of the lease. 474 N.E.2d at 903.

2. [3.12] Exhaustion of Administrative Remedies

Before a property owner can challenge the application of a zoning ordinance to the property in court, the owner must attempt to obtain whatever relief may be available from the municipality. Therefore, the owner must apply for a variation, if variations are authorized by the ordinance; apply for a special-use permit, if such a permit is authorized and potentially available; or apply for an amendment to the ordinance. This requirement, which was first established in Illinois in *Bright v. City of Evanston*, 10 Ill.2d 178, 139 N.E.2d 270 (1956), is sometimes referred to as the “*Bright* doctrine.”

In *Bright*, the property owner argued that zoning his property residential, rather than commercial, was bad policy. The court responded that “matters of policy, or the wisdom and desirability of a particular restriction, are not within the domain of judicial competence.” 139 N.E.2d at 272. The court further explained:

A review of applicable authorities would seem to indicate that where it is claimed the effect of an ordinance as a whole is to unconstitutionally impair the value of the property and destroy its marketability, direct judicial relief may be afforded without prior resort to remedies under the ordinance. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303; Dowsey v. Village of Kensington, 257 N.Y. 221, 177 N.E. 427, 86 A.L.R. 642. Under this rule one who seeks relief from an ordinance on the ground that it is void in its entirety is not obliged to pursue the machinery of the ordinance itself for his remedy.

On the other hand, where the claim is merely that the enforcement or application of a particular classification to the plaintiff’s property is unlawful and void, and no attack is made against the ordinance as a whole, judicial relief is appropriate only after available administrative remedies have been exhausted. City of South Bend v. Marckle, 215 Ind. 74, 18 N.E.2d 764. The reason for such a rule is found in the practical difficulty encountered by the city council in foreseeing particular instances of hardship, when general restrictions are initially established for a given area. 139 N.E.2d at 274.

Thus, when a property owner would challenge the application of the zoning ordinance to the owner’s property, the owner must first give the municipality the opportunity to provide relief from its zoning ordinance before going into court. See *Tipton v. Madison County, Illinois*, 2015 IL App (5th) 140186, ¶20, 35 N.E.3d 76, 393 Ill.Dec. 684. Further, “[t]he exhaustion requirement cannot

be avoided simply because relief may be, or even probably will be, denied by the local authorities.” *Northwestern University v. City of Evanston*, 74 Ill.2d 80, 383 N.E.2d 964, 969, 23 Ill.Dec. 93 (1978). This is not true, however, when the entire zoning ordinance is challenged on its face.

It should also be noted that although the term “administrative remedy” is used, and although a zoning amendment is “legislative” in nature and not “administrative,” the rule applies in the case of a zoning amendment. *Reilly v. City of Chicago*, 24 Ill.2d 348, 181 N.E.2d 175 (1962). In *Reilly*, the court observed that this requirement “has the advantage of giving the municipal authorities an opportunity to correct invalid regulations before becoming involved in litigation.” 181 N.E.2d at 175.

B. [3.13] Judicial Review

There are four types of judicial review of zoning disputes. They are (1) administrative review, (2) independent judicial review alleging a violation of procedural due process, (3) independent judicial review alleging a violation of substantive due process as applied to the plaintiff’s property, and (4) independent judicial review alleging that the zoning ordinance is unconstitutional on its face. Which form of judicial review is appropriate depends on (1) what type of body made the complained of final decision, (2) whether an alleged constitutional violation is substantive or procedural in nature, and (3) whether an alleged substantive constitutional violation is made against the zoning ordinance as a whole and on its face or is made as applied to a particular piece of property.

In municipalities with populations of 500,000 or more, an individual who seeks to have a zoning ordinance, rule, or regulation declared invalid by way of a declaratory judgment action must serve written notice to all property owners consistent with §11-13-7 of the Illinois Municipal Code, 65 ILCS 5/11-13-7. 65 ILCS 5/11-13-8; *Figiel v. Chicago Plan Commission*, 408 Ill.App.3d 223, 945 N.E.2d 71, 348 Ill.Dec. 764 (1st Dist. 2011). The point for determining the properties required to be given such notice is the “location” of the subject property to be rezoned, not its common address or addresses. *Scott v. City of Chicago*, 2015 IL App (1st) 140570, ¶17, 29 N.E.3d 592, 390 Ill.Dec. 660. Furthermore, strict compliance, rather than substantial compliance, is required for such statutory pre-suit notice requirements. 2015 IL App (1st) 140570 at ¶30; *Mid-North Ass’n v. City of Chicago*, 2016 IL App (1st) 151104-U, ¶42, *appeal denied*, No. 120760 (Sept. 28, 2016).

Note that federal courts lack jurisdiction to review state court decisions pursuant to the *Rooker-Feldman* doctrine (see *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 68 L.Ed. 362, 44 S.Ct. 149 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 75 L.Ed.2d 206, 103 S.Ct. 1303 (1983)) — that is, one cannot get a second bite at the apple in federal court if dissatisfied with a state court’s decision. *Commonwealth Plaza Condominium Ass’n v. City of Chicago*, 693 F.3d 743 (7th Cir. 2012). In *Commonwealth Plaza*, the plaintiffs’ underlying lawsuit challenged the propriety of a zoning amendment that they claimed deprived them of their right to constitutional due process. The plaintiffs sought review of an Illinois appellate court’s decision by a federal district court, which dismissed the action based on the *Rooker-Feldman* doctrine. The Seventh Circuit found the federal district court did not err in dismissing the plaintiffs’ action. *Id.*

1. [3.14] Administrative Review

When a property owner applies to a municipality for zoning relief in the form of a special-use permit, a variation, or a zoning amendment and a final decision is made denying the application by the zoning board of appeals, the plan commission, or some other administrative agency, then the owner must seek judicial review pursuant to either the Administrative Review Law or pursuant to a writ of certiorari. See 65 ILCS 5/11-13-13. A writ of certiorari is the common-law method for obtaining court review of administrative decisions when the statute or ordinance creating the administrative agency has not adopted the Administrative Review Law.

Under the Administrative Review Law, the court is limited to a review of the record on appeal. Section 3-110 of the Administrative Review Law provides:

Every action to review any final administrative decision shall be heard and determined by the court with all convenient speed. The hearing and determination shall extend to all questions of law and fact presented by the entire record before the court. No new or additional evidence in support of or in opposition to any finding, order, determination or decision of the administrative agency shall be heard by the court. The findings and conclusions of the administrative agency on questions of fact shall be held to be prima facie true and correct. 735 ILCS 5/3-110.

Thus, it is essential to create a complete record at the administrative hearing. The court's responsibility is to determine whether the findings and decision of the administrative agency are against the manifest weight of the evidence. *E.g., Miller v. Hill*, 337 Ill.App.3d 210, 785 N.E.2d 532, 538, 271 Ill.Dec. 600 (3d Dist. 2003). If there is substantial competent evidence to support an agency's decision, the court will not disturb the agency's decision. *Id.* Mistakes regarding the appropriate level of deference for an administrative body's findings of fact are significant and may be cause for reversal. In *South Shore Jewelry & Loan, Inc. v. City of Chicago*, 2016 IL App (1st) 150370-U, the appellate court struck down a lower court's decision to overrule a city zoning board's decision because the lower court failed to give proper weight to the zoning board's findings of fact. The appellate court's decision stressed that the zoning board's findings should have been considered prima facie true. *Id.*

If the issue being reviewed is a mixed question of law and fact, the agency's application of a rule of law to a mixed question of law and fact will not be reversed unless it is clearly erroneous. *Platform I Shore, LLC v. Village of Lincolnwood*, 2014 IL App (1st) 133923, 17 N.E.3d 214, 216, 384 Ill.Dec. 641; *LeCompte v. Zoning Board of Appeals for Village of Barrington Hills*, 2011 IL App (1st) 100423, 958 N.E.2d 1065, 354 Ill.Dec. 869.

2. [3.15] Substantive Due Process — As Applied

If the final decision on an application for a variation, a special-use permit, or a zoning amendment is made by the corporate authorities of the municipality, then the applicant is entitled to seek de novo review in court. Section 11-13-25 of the Illinois Municipal Code provides:

(a) Any decision by the corporate authorities of any municipality, home rule or non-home rule, in regard to any petition or application for a special use, variance,

rezoning, or other amendment to a zoning ordinance shall be subject to de novo judicial review as a legislative decision, regardless of whether the process in relation thereto is considered administrative for other purposes. Any action seeking the judicial review of such a decision shall be commenced not later than 90 days after the date of the decision.

(b) The principles of substantive and procedural due process apply at all stages of the decision-making and review of all zoning decisions. 65 ILCS 5/11-13-25.

If the plaintiff is alleging that the zoning ordinance violates substantive due process as applied to the plaintiff's property, then the standard of review was articulated by the Illinois Supreme Court in *LaSalle National Bank of Chicago v. County of Cook*, 12 Ill.2d 40, 145 N.E.2d 65, 68 – 69 (1957), as follows:

It is well established that it is primarily the province of the municipal body to determine the use and purpose to which property may be devoted, and it is neither the province nor the duty of the courts to interfere with the discretion with which such bodies are vested unless the legislative action of the municipality is shown to be arbitrary, capricious or unrelated to the public health, safety and morals. . . .

By the same token, however, if the restrictions imposed bear no real and substantial relation to the public health, safety, morals, comfort and general welfare, the ordinance is void. . . .

A zoning ordinance is presumptively valid . . . this presumption may be overcome only by clear and convincing evidence . . . and the burden of proof is on the plaintiff. [Citations omitted.]

This “rational basis test,” as it is commonly known, was stated as follows in *Napleton v. Village of Hinsdale*, 229 Ill.2d 296, 891 N.E.2d 839, 853, 322 Ill.Dec. 548 (2008):

[U]nder rational basis scrutiny, a legislative enactment will be upheld if it bears a rational relationship to a legitimate legislative purpose and is neither arbitrary nor unreasonable.

In *LaSalle, supra*, the court identified six factors that are commonly considered when determining the validity of a zoning ordinance:

(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 compared to the hardship imposed upon the individual property owner . . . (5) the suitability of the subject property for the zoned purposes . . . and (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. [Citations omitted.] 145 N.E.2d at 69.

The Illinois Supreme Court added two additional factors in *Sinclair Pipe Line Co. v. Village of Richton Park*, 19 Ill.2d 370, 167 N.E.2d 406, 411 (1960):

- a. the community need for the proposed use; and
- b. the care with which the community has undertaken to plan its land use development.

Even if §11-13-25 does not provide an independent cause of action, a zoning ordinance may be challenged by alleging the vote was arbitrary and capricious and violated the Illinois Constitution, as the court has considered such a claim “as a viable claim for denial of substantive due process under Illinois law.” *American Islamic Center v. City of Des Plaines*, 32 F.Supp.3d 910, 917 (N.D.Ill. 2014).

With regard to the procedure to be employed by the trial court, the Illinois Municipal Code requires that a decision by the corporate authorities of a municipality “be subject to de novo judicial review.” 65 ILCS 5/11-13-25(a). The Illinois appellate court explained what this proceeding would involve in *Our Savior Evangelical Lutheran Church v. Saville*, 397 Ill.App.3d 1003, 922 N.E.2d 1143, 1162, 337 Ill.Dec. 566 (2d Dist. 2009), as follows:

This “de novo judicial review as a legislative decision” is not the familiar *de novo* standard of appellate review generally applicable in appeals of purely legal issues, grants of summary judgment, and so on. [Millineum Maintenance Management, Inc. v. County of Lake, 384 Ill.App.3d 638, 894 N.E.2d 845, 860 – 861, 323 Ill.Dec. 819 (2d Dist. 2008)]. Indeed, it is not a standard of appellate review at all. Rather, it describes a wholly new action under which a plaintiff may challenge a zoning decision in the same manner that a plaintiff may challenge a legislative action. Thus, “the ‘*de novo*’ language indicates that, unlike typical administrative review, evidence outside the already-developed [administrative] record may be presented to the trial court.” *Millineum Maintenance*, 384 Ill.App.3d at 653, 323 Ill.Dec. 819, 894 N.E.2d 845. This additional evidence is allowed because the “de novo judicial review as a legislative decision” does not consider whether the agency decision was correct or incorrect: it considers the entirely new question of whether the zoning decision should be upheld under the same standards applied when legislative decisions are challenged. Although a legislative action may be challenged on several bases, the most common challenge in the context of zoning cases is one based on substantive due process. Under such a challenge, a court considering a zoning decision “de novo . . . as a legislative decision” will examine the zoning action “‘for arbitrariness as a matter of substantive due process under the six-part test set forth in *La Salle National Bank v. County of Cook*, 12 Ill.2d 40, 145 N.E.2d 65 (1957),’ ” and any evidence received by the court must relate solely to those factors. *Millineum Maintenance*, 384 Ill.App.3d at 652-53, 323 Ill.Dec. 819, 894 N.E.2d 845, quoting *City of Chicago Heights v. Living Word Outreach Full Gospel Church & Ministries, Inc.*, 196 Ill.2d 1, 14, 255 Ill.Dec. 434, 749 N.E.2d 916 (2001).

In *Conaghan v. City of Harvard*, 2016 IL App (2d) 151034, 60 N.E.3d 987, 406 Ill.Dec. 436, the court clarified that the decisions in *Our Savior*, *supra*, and *Millineum Maintenance*, *supra*, were not meant to be interpreted as supporting the idea that §11-13-25 creates a private right of action for property owners. The *Conaghan* court firmly reiterated that §11-13-25 merely sets a standard for review, nothing greater.

A novel example of the courts invalidating a special-use permit on the grounds that it violated substantive due process as applied to the particular property is found in *Robrock v. County of Piatt, Illinois*, 2012 IL App (4th) 110590, 967 N.E.2d 822, 359 Ill.Dec. 792. In *Robrock*, Piatt County granted a special-use permit for a restricted landing area on which the property owner could take off and land his “personal gyrocopter,” an “experimental aircraft that is sold as a kit.” 2012 IL App (4th) 110590 at ¶¶4 – 5. The adjacent property owners complained that the operation of the gyrocopter near and over their property adversely impacted them personally and reduced the fair market value of their property. Following a trial, and applying the *LaSalle*, *supra*, and *Sinclair*, *supra*, factors, the trial court found that the special-use permit was arbitrary and bore no real and substantial relation to the public health, safety, morals, comfort, and welfare of the public as applied to the plaintiff’s property, and the appellate court affirmed its decision. 2012 IL App (4th) 110590 at ¶61.

While review on the trial court level is de novo, if the decision is appealed, the appellate court will review the trial court’s decision to determine whether the court’s ruling was against the manifest weight of the evidence. *Mossville Land Investments, LLC v. Peoria County Board*, 2014 IL App (3d) 130222-U.

3. [3.16] Substantive Due Process — Facial Challenge

The owner of property also has the ability to challenge the validity of all or part of a zoning ordinance in court by alleging that it violates substantive due process on its face, rather than as applied to a particular piece of property. This type of “facial challenge” to a zoning ordinance is the subject of the Illinois Supreme Court’s opinion in *Napleton v. Village of Hinsdale*, 229 Ill.2d 296, 891 N.E.2d 839, 322 Ill.Dec. 548 (2008). In *Napleton*, the court observed:

At the outset, we note that plaintiff’s action against Hinsdale is framed solely as a facial challenge to the constitutional validity of the amendments made by Hinsdale to its zoning code as a result of its enactment of Ordinance 2005-02 and does not challenge the validity of the amendments as applied specifically to the subject property. A facial challenge to the constitutionality of a legislative enactment is the most difficult challenge to mount successfully (*In re C.E.*, 161 Ill.2d 200, 210-11, 204 Ill.Dec. 121, 641 N.E.2d 345 (1994), quoting *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697, 707 (1987)), because an enactment is facially invalid only if no set of circumstances exists under which it would be valid. *In re Parentage of John M.*, 212 Ill.2d 253, 269, 288 Ill.Dec. 142, 817 N.E.2d 500 (2004). The fact that the enactment could be found unconstitutional under some set of circumstances does not establish its facial invalidity. See *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 504, 102 S.Ct. 1186, 1196, 71 L.Ed.2d 362, 375 (1982) (“ ‘Although it is possible that specific future applications . . .

may engender concrete problems of constitutional dimension, it will be time enough to consider any such problems when they arise’ ”), quoting *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 52, 86 S.Ct. 1254, 1265, 16 L.Ed.2d 336, 348 (1966); *In re Parentage of John M.*, 212 Ill.2d at 269, 288 Ill.Dec. 142, 817 N.E.2d 500. In contrast, in an “as-applied” challenge a plaintiff protests against how an enactment was applied in the particular context in which the plaintiff acted or proposed to act, and the facts surrounding the plaintiff’s particular circumstances become relevant. See *Lamar Whiteco Outdoor Corp. v. City of West Chicago*, 355 Ill.App.3d 352, 365, 291 Ill.Dec. 318, 823 N.E.2d 610 (2005). If a plaintiff prevails in an as-applied claim, he may enjoin the objectionable enforcement of the enactment only against himself, while a successful facial attack voids the enactment in its entirety and in all applications. *Lamar*, 355 Ill.App.3d at 365, 291 Ill.Dec. 318, 823 N.E.2d 610. 891 N.E.2d at 845 – 846.

Later in the opinion, the court explained further:

The difference between a facial and an as-applied zoning challenge is significant: a zoning ordinance that may be valid in its general aspects may nevertheless be invalid as to a specific parcel of property because the balance of hardships — the gain to the public in general against the detriment to the individual owner — overwhelmingly burdens the individual owner. *Northern Trust Co. v. City of Chicago*, 4 Ill.2d 432, 438, 123 N.E.2d 330 (1954). In light of this possibility, [*LaSalle National Bank of Chicago v. County of Cook*, 12 Ill.2d 40, 145 N.E.2d 65 (1957),] set forth a list of factors that may be relevant in an as-applied challenge to assist in balancing the gain to the public against the specific burdens experienced by an individual property owner. In addition, as a result of the difference in focus of each type of challenge, the evidence needed to sustain a claim of invalidity will be different depending upon whether the challenge is facial — alleging a universal invalidity — or as applied to a particular property. We agree with the appellate court below that if the same evidentiary standard were used in each type of challenge, there would be no difference between these challenges, leading to the absurd result that a zoning ordinance “could never be generally valid but invalid as to a particular piece of property; instead, it would be either valid as to all or invalid as to all.” 374 Ill.App.3d at 1107, 313 Ill.Dec. 263, 872 N.E.2d 23. That the *La Salle* factors do not lend themselves to application to a facial challenge is evident not only from the fact that they focus upon the specific effect of the challenged ordinance upon a particular parcel of property, but also in that plaintiff suggests that this court modify these factors for application to a facial challenge, acknowledging that “some of the *La Salle* factors that deal with the specifics of a parcel of property may not be relevant or applicable in a facial challenge, which . . . maintain[s] that the ordinance at issue is invalid in all applications.” 891 N.E.2d at 852.

So, in a facial challenge, the issue is still whether the challenged ordinance bears a rational relationship to a legitimate legislative purpose, but the analysis is not in terms of the *LaSalle* factors because such factors necessarily relate to a particular piece of property. It should also be noted that seeking an administrative remedy is not required before filing a facial challenge in court. *Northwestern University v. City of Evanston*, 74 Ill.2d 80, 383 N.E.2d 964, 23 Ill.Dec. 93 (1978).

4. [3.17] Procedural Due Process

A property owner who has applied unsuccessfully for a variation, special-use permit, or zoning amendment and believes that the administrative *process* was so flawed as to violate procedural due process can file a lawsuit pursuant to §11-13-25 of the Illinois Municipal Code, 65 ILCS 5/11-13-25, seeking de novo judicial review. The process will be similar to the process followed when the plaintiff is seeking de novo judicial review and alleging a violation of substantive due process. However, the issues and standards will relate to the procedures that were followed during the administrative process.

PRACTICE POINTER

- ✓ The property owner requesting relief usually must exhaust all administrative appeals and/or procedural steps before seeking court review of the decision, but the time deadlines for a challenge of a zoning decision must be carefully followed.
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C. [3.18] Issues, Evidence, and Standards of Review in Zoning Challenges

The issues in zoning challenges often revolve around the following factors:

1. whether the neighboring property is commercial;
2. recent changes to the neighboring property;
3. effect on the market values of the neighboring property;
4. objections of neighboring property owners;
5. suitability for any reasonable use of the property;
6. traffic and environmental effects on the neighboring property of changing the zoning restrictions; and
7. resistance to changes that cannot be shown to be beneficial for the neighboring property.

The use of expert witnesses and studies is becoming more important as all parties to zoning challenges become more sophisticated. Owners or tenants of neighboring property within 1,200 feet may challenge a property owner directly in court for violating a zoning ordinance. 65 ILCS 5/11-13-15.

A large difference in property values as a result of zoning restrictions under zoning classifications is not enough by itself to overcome the presumption that a zoning ordinance is proper. The property must be unable to be used productively, which is usually established by proof that the property cannot be developed because of the zoning classification. *Zeitv v. Village of Glenview*, 304 Ill.App.3d 586, 710 N.E.2d 849, 238 Ill.Dec. 52 (1st Dist. 1999).

The public hearing must meet basic due-process requirements of allowing the interested parties to cross-examine witnesses and present written and oral testimony. Municipalities with a population of fewer than 500,000 persons may utilize a zoning board of appeals or governing board for final decisions on variations and special-use permits. *Bossman v. Village of Riverton*, 291 Ill.App.3d 769, 684 N.E.2d 427, 225 Ill.Dec. 742 (4th Dist. 1997).

In some cases, a zoning ordinance may be enacted that prevents a property owner from using the property for a use that was permitted at the time the land was purchased. In general, property owners have no right in the continuation of a certain zoning classification. As a result, property owners and prospective purchasers must be vigilant to check on such legislative activity before expending funds. See *Ropiy v. Hernandez*, 363 Ill.App.3d 47, 842 N.E.2d 47, 299 Ill.Dec. 710 (1st Dist. 2005); *Strauss v. City of Chicago*, 2021 IL App (1st) 191977, 180 N.E.3d 832, 449 Ill.Dec. 907. There is, however, a “vested right” exception to the general rule that is intended to mitigate unfairness caused to property owners who have made substantial changes in their positions in good-faith reliance on the current zoning restrictions.

For the exception to apply, an owner must prove that the owner has obtained a vested right in the former zoning classification. *Furniture L.L.C. v. City of Chicago*, 353 Ill.App.3d 433, 818 N.E.2d 839, 288 Ill.Dec. 904 (1st Dist. 2004). A vested right exists if (1) the property owner incurred expenditures or obligations as a result of good-faith reliance on obtaining necessary clearance and/or permits to develop the property and (2) those expenditures or obligations were substantial. *Id.* To determine whether an owner acted in good faith, a court will look to when the government took official action to change the property’s zoning classification. See *1350 Lake Shore Associates v. Healey*, 223 Ill.2d 607, 861 N.E.2d 944, 308 Ill.Dec. 379 (2006) (holding that, at minimum, actual introduction of proposal to appropriate zoning authority is required to put landowner on notice of change in existing zoning classification). With respect to what type of expenditures will be considered, the court in *Cribbin v. City of Chicago*, 384 Ill.App.3d 878, 893 N.E.2d 1016, 1028 – 1032, 323 Ill.Dec. 542 (1st Dist. 2008), found that the purchase price of the property may be included in the “substantiality determination” to establish the substantial expenditure prong of the two-part vested rights test. The court noted, however, that no bright-line test exists for what constitutes good-faith reliance on existing zoning classifications. The determination of whether expenditures are substantial is based on the individual facts and circumstances of each case. *Id.*

The Illinois Supreme Court in 2002 and 2003 attempted to change the standard of review for the granting of a special-use permit to administrative review and left the standard of review for zoning variations as de novo review. In *People ex rel. Klaeren v. Village of Lisle*, 202 Ill.2d 164, 781 N.E.2d 223, 269 Ill.Dec. 426 (2002), the Illinois Supreme Court changed the standard of review for a special-use permit to administrative review. The court found that the decision whether to grant or deny a special-use permit is a quasi-judicial decision, and as such any appeal is by administrative review. In *Hawthorne v. Village of Olympia Fields*, 204 Ill.2d 243, 790 N.E.2d 832, 274 Ill.Dec. 59 (2003), the Illinois Supreme Court made a distinction in the standard of review between a zoning variation and a special-use permit. The *Hawthorne* court stated administrative review is not required in a zoning variation appeal and is a quasi-legislative appeal.

The legislature passed laws in 2006 (P.A. 94-1027 (eff. July 14, 2006)) and 2008 (P.A. 95-843 (eff. Jan. 1, 2009)) to essentially overturn *Klaeren* and *Hawthorne* to require any appeal in all municipal and county zoning petitions or applications for a special use, variation, rezoning, or other amendments to a zoning ordinance to be subject to de novo judicial review as a legislative decision regardless of whether the process is considered administrative for other purposes. See *Paul v. County of Ogle*, 2018 IL App (2d) 170696, ¶21, 103 N.E.3d 585, 422 Ill.Dec. 453 (noting that *Klaeren* is superseded by statute). See also *Cahn v. City of Highland Park*, 2021 IL App (2d) 191092-U. Any such review must be commenced not later than 90 days after the date of the decision. 65 ILCS 5/11-13-25; 55 ILCS 5/5-12012.1; 60 ILCS 1/110-50.1.

The 2006 change made zoning judicial reviews de novo and not administrative review cases. The 2008 change clarified that the 2006 law should apply to both the approval and denial of a zoning request. The 2008 law sought to overturn *Millineum Maintenance Management, Inc. v. County of Lake*, 384 Ill.App.3d 638, 894 N.E.2d 845, 323 Ill.Dec. 819 (2d Dist. 2008), which found the 2006 law to not apply to a denial of a municipal zoning decision.

Two important changes were created by these legislative amendments. First, the judicial zoning appeals are now de novo review, so additional evidence that was not presented in the municipal body hearing may be presented in the circuit court. Second, the standard of review is whether the municipal decision was “arbitrary, irrational and capricious,” *i.e.*, the rational basis test. See *Napleton v. Village of Hinsdale*, 229 Ill.2d 296, 891 N.E.2d 839, 322 Ill.Dec. 548 (2008), for a complete discussion of the standard of review.

The burden of proof is on the party challenging the municipal zoning decision under the rational basis test. In *Condominium Association of Commonwealth Plaza v. City of Chicago*, 399 Ill.App.3d 32, 924 N.E.2d 596, 338 Ill.Dec. 390 (1st Dist. 2010), the court applied the rational basis test to find that the City of Chicago successfully enacted a zoning amendment even though the home-rule municipality did not follow its own procedures in adopting the zoning amendment. The court also found the rational basis test applied even if the challenge was brought pursuant to 65 ILCS 5/11-13-15. The fact that the challenge under that section requires a de novo review does not change the standard of review of a zoning amendment under the rational basis test. The court in *Hanlon v. Village of Clarendon Hills*, 2016 IL App (2d) 151233-U, ¶94, citing *Central Transport Inc. v. Village of Hillside*, 210 Ill.App.3d 499, 568 N.E.2d 1359, 1365, 154 Ill.Dec. 910 (1st Dist. 1991), confirmed that courts “will not invalidate a legislative body’s failure to comply with its own self-imposed procedures where the self-imposed procedures are not required under State (or Federal) law.” The court in *Dunlap v. Village of Schaumburg*, 394 Ill.App.3d 629, 915 N.E.2d 890, 333 Ill.Dec. 819 (1st Dist. 2009), found that a trial de novo appealing the granting of zoning variation is considered a new adversary proceeding in which the circuit court requires an examination of testimony and makes independent findings as though the action was originally instituted in that court.

The public hearing should still have sufficient evidence introduced to support any decision of the hearing board. A hearing board must allow for those appearing to present witnesses and for cross-examination of witnesses. Some municipalities will use a court reporter to create a record for review. Others may create a video recording of the hearing or rely on a note taker. Zoning applicants

and objectors may also choose to use expert witnesses to provide evidence at public hearings. The principles of substantive and procedural due process apply to all stages of the decision-making and review processes of all zoning decisions. 65 ILCS 5/11-13-25; 55 ILCS5/5-12012.1; 60 ILCS 1/110-50.1.

Owners of property intended for religious uses may challenge a zoning restriction that prohibits such uses under the federal Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), Pub.L. No. 106-274, 114 Stat. 803. *See Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895 (7th Cir. 2005). *See also Petra Presbyterian Church v. Village of Northbrook*, 489 F.3d 846 (7th Cir. 2007); *River of Life Kingdom Ministries v. Village of Hazel Crest, Illinois*, 611 F.3d 367 (7th Cir. 2010); *Joan Dachs Bais Yaakov Elementary School — Yeshivas Tigeres Tzvi v. City of Evanston*, 2015 IL App (1st) 131809-U, *appeal denied*, No. 119117 (Sept. 30, 2015). RLUIPA forbids a government agency from

impos[ing] or implement[ing] a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution —

(a) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest. 42 U.S.C. §2000cc(a)(1).

Governments may avoid liability for violations of RLUIPA by changing or eliminating the land use regulation causing the substantial burden on religious exercise. 42 U.S.C. §2000cc-3(e). *See Petra Presbyterian Church v. Village of Northbrook*, 409 F.Supp.2d 1001 (N.D.Ill. 2006) (holding that village avoided liability by eliminating discriminatory zoning provisions). A municipality does not violate RLUIPA by enforcing a land use regulation that is facially neutral, applied equally to all landowners, and consistent with a legitimate comprehensive plan or a pattern of land use regulations. *Vision Church, United Methodist v. Village of Long Grove*, 468 F.3d 975 (7th Cir. 2006).

In addition to RLUIPA, owners of property intended for religious uses may also challenge zoning restrictions under Illinois' Religious Freedom Restoration Act, 775 ILCS 35/1, *et seq.* *See Oak Grove Jubilee Center, Inc. v. City of Genoa*, 347 Ill.App.3d 973, 808 N.E.2d 576, 283 Ill.Dec. 610 (2d Dist. 2004). *See also Our Savior Evangelical Lutheran Church v. Saville*, 397 Ill.App.3d 1003, 922 N.E.2d 1143, 337 Ill.Dec. 566 (2d Dist. 2009).

Landowners may not bring a 42 U.S.C. §1983 action to enforce limitations placed by §332(c)(7) of the federal Telecommunications Act of 1996, Pub.L. No. 104-104, 110 Stat. 56, on a regulation made by a local zoning authority on wireless communication facilities. *City of Rancho Palos Verdes, California v. Abrams*, 544 U.S. 113, 161 L.Ed.2d 316, 125 S.Ct. 1453 (2005), citing 47 U.S.C. §332(c)(7).

The preemption provision of the Federal Aviation Act of 1958, Pub.L. No. 85-726, 72 Stat. 731, does not take local land use issues out of the control of local officials. 49 U.S.C. §41713(b)(1). See *Hoagland v. Town of Clear Lake, Indiana*, 415 F.3d 693 (7th Cir. 2005) (holding that Federal Aviation Act did not preempt town's zoning ordinance that regulated landing strips and pads).

In *Passalino v. City of Zion*, 237 Ill.2d 118, 928 N.E.2d 814, 340 Ill.Dec. 567 (2009), the Illinois Supreme Court held that the City of Zion's notice by newspaper publication of a hearing on the city's comprehensive zoning amendment, which was in strict compliance with the statutory notice provision in the Illinois Municipal Code, violated the procedural due-process rights of the affected landowners. In reaching this conclusion, the court found that the city could have easily ascertained the addresses of the 85 property owners whose properties were rezoned to mail out notices instead of relying on notice by publication.

PRACTICE POINTER

- ✓ Parties should develop as complete a record as possible at the municipal public hearings and not rely solely on the de novo review at the circuit court hearings. A court reporter is almost always required to establish a complete record at the municipal public hearings. However, the parties should expect that the circuit court may require further testimony from witnesses introduced at the municipal public hearing.
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The question whether local officials making decisions on zoning matters have immunity from damages is the subject of several federal decisions. In *Chicago Joe's Tea Room LLC v. Village of Broadview*, No. 07 C 2680, 2009 WL 3824723 (N.D.Ill. Nov. 12, 2009), the court held that village trustees who denied an application for a special-use permit to allow the operation of an adult use did not have either legislative immunity or quasi-judicial immunity. In *Irshad Learning Center v. County of DuPage*, 804 F.Supp.2d 697 (N.D.Ill. 2011), the court held that individual members of the zoning board of appeals and the county board who denied a conditional-use permit to use property for religious services and educational purposes had quasi-judicial immunity from damages. In *American Islamic Center v. City of Des Plaines*, 32 F.Supp.3d 910, 915 (N.D.Ill. 2014), the court held that city council members who voted against a particular zoning map amendment were engaging in legislative activity. Because they were engaging in legislative activity, they were provided with absolute legislative immunity. *Id.*

In 2015, the Illinois Supreme Court made clear that public school districts are not exempt from municipal zoning ordinances and following the zoning process. *Gurba v. Community High School District No. 155*, 2015 IL 118332, 40 N.E.3d 1, 396 Ill.Dec. 348. Shortly thereafter, the Illinois General Assembly amended the Illinois Municipal Code and the Counties Code to further clarify that public schools are not exempt from the zoning process, but municipalities and counties must make "reasonable efforts to streamline the zoning application and review process for the school board and minimize the administrative burdens involved in the zoning review process." 65 ILCS 5/11-13-27(b); 55 ILCS 5/5-12021(b). Those amendments also clarified that municipalities and counties could not use the zoning process to frustrate the statutory duties of the public schools. 65 ILCS 5/11-13-27(a); 55 ILCS 5/5-12021(a).

In *Johannesen v. Eddins*, 2011 IL App (2d) 110108, 963 N.E.2d 1061, 357 Ill.Dec. 663, Illinois’ anti-SLAPP (strategic lawsuits against public participation) statute, the Citizen Participation Act, 735 ILCS 110/1, *et seq.*, was invoked by the defendant in a zoning case. The Act protects a citizen’s right to public participation and permits a party to file a dispositive motion on the grounds that the lawsuit is “based on, relates to, or is in response to” the defendant’s actions “in furtherance of [their First Amendment] rights of petition, speech, association, or to otherwise participate in government.” 735 ILCS 110/15.

In *Johannesen*, the plaintiff bought property next to the defendant, on which the plaintiff planned to build a house. The plaintiff and the defendant met and reached an agreement that the plaintiff would seek a corner side yard variation so that the plaintiff could shift the location of the planned house farther to the east, further away from the defendant’s property, if the defendant supported the plaintiff’s application for the variation and forwent any challenge to the building department’s calculation of the front setback requirement. The defendant confirmed the agreement by telephone and signed the plaintiff’s variation application as a “Nominal Applicant.” 2011 IL App (2d) 110108 at ¶5. However, the plaintiff alleged that after that meeting and during the zoning board’s consideration of the plaintiff’s variation application, the defendant had *ex parte* communications with the village manager that resulted in the overturning of the building department’s front setback calculation, thus preventing the plaintiff from building his planned house. The plaintiff sued the defendant, claiming, *inter alia*, that the defendant breached his oral promise to forgo any challenge to the village’s front setback calculation. The defendant filed a motion to dismiss under the Citizen Participation Act. The trial court granted the defendant’s motion. On appeal, the plaintiff argued that the defendant waived his First Amendment rights when he entered into an oral agreement to support the variation and forgo any challenge to the front setback calculation. The Illinois appellate court concluded that the trial court erred because questions of fact remained — specifically, the existence of an oral contract, its terms, the intent of the parties, and the extent, if any, of any waiver of rights under the statute by the defendant.

VI. METHODS TO LIMIT THE RESTRICTIONS OF ZONING ORDINANCES

A. [3.19] Subdivision

Property often must be subdivided into separate zoning lots to have buildings built on it. The subdivision into zoning lots limits what building can be built on the property. The fact that the same person owns two adjoining lots does not necessarily make them one zoning lot. Whether adjoining lots owned by the same owner are treated as a single zoning lot depends on the jurisdiction and the sizes of the lots. The size of a zoning lot often creates restrictions as to the size and type of building to be placed on it.

The subdivision process requires a plat of subdivision to be created, and the process must comply with the Plat Act, 765 ILCS 205/0.01, *et seq.* The plat is approved or disapproved by the municipal authorities by ordinance or resolution. See David S. Silverman et al., Ch. 3, *Subdivisions*, MUNICIPAL LAW: ANNEXATION, ZONING, AND REGULATORY AUTHORITY (IICLE®, 2024). Owners who purchase land in a subdivision with reference to a recorded subdivision plat acquire a private right to have the streets and alleys remain open for use even if the streets or alleys were not in existence at the time the land was purchased. *Ruble v. Sturhahn*, 348 Ill.App.3d 667, 810 N.E.2d 278, 284 Ill.Dec. 625 (4th Dist. 2004).

The subdivision process requires the municipality or county to approve the subdivision plat. The approval must not be unreasonably withheld if the subdivision otherwise meets the requirements of the zoning ordinance.

The subdivision approval by the municipality can impose limitations in addition to the standards of the Illinois Department of Transportation (IDOT) for access to state highways. *State Bank of Waterloo v. City of Waterloo, Illinois*, 339 Ill.App.3d 767, 792 N.E.2d 329, 275 Ill.Dec. 98 (5th Dist. 2003).

B. [3.20] Annexation

The owners of property may seek to have the property annexed to a municipality. See David S. Silverman et al., Ch. 3, *Subdivisions*, MUNICIPAL LAW: ANNEXATION, ZONING, AND REGULATORY AUTHORITY (IICLE®, 2024). The property owners and municipality may enter into an annexation agreement that limits zoning and subdivision controls by the municipality. The property need not be contiguous to the municipality at the date of the annexation agreement, which may be in effect for up to 20 years. *Village of Chatham, Illinois v. County of Sangamon, Illinois*, 216 Ill.2d 402, 837 N.E.2d 29, 297 Ill.Dec. 249 (2005); 65 ILCS 5/11-15.1-1. However, the property must be contiguous to the municipality at the date of the actual annexation. *Village of Chatham, supra*; 65 ILCS 5/11-15.1-1.

A petition for annexation must be filed by a majority of the property owners of record and electors residing on the property to be annexed. Coowners of property are considered as one owner of record. A public hearing is required prior to adoption of an annexation ordinance or resolution. Notice of a public hearing is required to be published in a newspaper not more than 30 days nor less than 15 days prior to the hearing. The vote of two thirds of the trustees or alderpersons then holding office is required to approve an annexation agreement. 65 ILCS 5/11-15.1-3.

Sometimes two municipalities fight over who can annex territory. “The general rule governing conflicting petitions to annex or incorporate the same tract of land is that the first to initiate an annexation petition is entitled to priority over the property against all other parties initiating a proceeding at a later date.” *In re Annex Certain Territory to Village of Lemont, Illinois*, 2017 IL App (1st) 170941, ¶20, 97 N.E.3d 43, 420 Ill.Dec. 469. “Nonetheless, a party loses its right to priority if it is found to have abandoned its petition. . . . This occurs when ‘a party takes no action on an annexation proceeding and frustrates the annexation plans of a neighboring community.’ ” *Id.*, quoting *In re Petition for Submittal of Question of Annexation to Corporate Authorities of City of Joliet*, 282 Ill.App.3d 684, 668 N.E.2d 1073, 1077, 218 Ill.Dec. 241 (3d Dist. 1996).

A quo warranto complaint is the method of challenging the annexation. *People ex rel. Ryan v. City of West Chicago*, 216 Ill.App.3d 683, 575 N.E.2d 1321, 159 Ill.Dec. 261 (2d Dist. 1991).

An annexation ordinance does not constitute government action as covered by the federal Religious Land Use and Institutionalized Persons Act of 2000 because such an ordinance is not itself a “land use regulation” under that statute. *Vision Church, United Methodist v. Village of Long Grove*, 468 F.3d 975, 998 (7th Cir. 2006).

C. [3.21] Legal Nonconforming Use

A nonconforming use may be entitled to continue even though it is not in compliance with the zoning ordinance as long as the use existed when the subsequent zoning restriction was enacted. *City of Peoria v. Danz*, 223 Ill.App.3d 686, 585 N.E.2d 1207, 166 Ill.Dec. 185 (3d Dist. 1992). However, municipalities and counties may restrict expansion of nonconforming uses as long as the ordinance specifically prohibits such expansion. *Fisher v. Burstein*, 333 Ill.App.3d 803, 776 N.E.2d 872, 267 Ill.Dec. 500 (2d Dist. 2002).

Discontinuance or abandonment of the nonconforming use for a period of time stated in the ordinance operates to forfeit the right to nonconformance. However, intent to abandon the nonconforming use must be shown. The property owner of the nonconforming use has the burden of proof.

D. [3.22] Exclusionary Zoning of Commercial Uses

Zoning restrictions may be used to restrict the building of commercial buildings in certain districts intended to be used exclusively for commercial or industrial uses. The zoning restriction may limit development in a zoned district as long as the restriction is reasonable and not arbitrary. If the property is on a business thoroughfare that has only commercial uses, the municipality may not prevent commercial use of similar property. *People ex rel. Chicago Title & Trust Co. v. Reiter*, 25 Ill.2d 41, 182 N.E.2d 680 (1962).

E. [3.23] Inverse Condemnation by Application of Zoning Restrictions

The application of zoning restrictions may result in a public taking of the property, which is referred to as “inverse condemnation” or “regulatory condemnation.” The taking occurs when the government authority intrudes on the property or radically curtails the property owner’s rights to economic or productive use of the property. *Forest Preserve District of DuPage County v. West Suburban Bank*, 161 Ill.2d 448, 641 N.E.2d 493, 204 Ill.Dec. 269 (1994).

F. [3.24] First Amendment Challenges

Zoning restrictions may violate the First Amendment if they restrict speech. Nowhere is this issue more apparent in the context of real estate development than in the area of signage. In a major decision, the Supreme Court has clarified (and some would say changed) what is meant by “content-based” speech. *Reed v. Town of Gilbert, Arizona*, 576 U.S. 155, 192 L.Ed.2d 236, 135 S.Ct. 2218 (2015). In *Reed*, the town of Gilbert, Arizona, adopted a sign code that identified various categories of signs based on the type of information they conveyed and then subjected each category to different restrictions. 135 S.Ct. at 2224. A religious congregation without a church building posted signs each week indicating where church services would be held and left them up longer than was permitted by the code for such “directional signs.” *Id.* The town issued citations to the church for violating the code, and the church and pastor filed suit against the town, claiming that the code violated their right to free speech.

The Court found the code’s provisions were “content-based regulations of speech that cannot survive strict scrutiny.” *Id.* In reaching this conclusion, the Court explained: “Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed.” 135 S.Ct. at 2227. The regulation does not have to target specific viewpoints, but if it “singles out [a] specific subject matter for differential treatment,” then it would be a content-based regulation subject to strict scrutiny. 135 S.Ct. at 2230.

The courts have begun to interpret and apply *Reed*. See, e.g., *Norton v. City of Springfield, Illinois*, 806 F.3d 411 (7th Cir. 2015); *Left Field Media LLC v. City of Chicago, Illinois*, 822 F.3d 988 (7th Cir. 2016). In some cases, the courts have been unwilling to follow *Reed* when it would mean revising established precedent in a particular area. For example, the Seventh Circuit did not extend *Reed* to the regulation of sexually oriented businesses. *BBL, Inc. v. City of Angola*, 809 F.3d 317, 326 n.1 (7th Cir. 2015) (“We don’t think *Reed* upends established doctrine for evaluating regulation of businesses that offer sexually explicit entertainment, a category the Court has said occupies the outer fringes of First Amendment protection.”). The United States District Court for the Northern District of Illinois declined to extend *Reed* to commercial speech and found that restrictions on commercial signage “only need to survive *Central Hudson*’s intermediate scrutiny test.” *Peterson v. Village of Downers Grove*, 150 F.Supp.3d 910, 928 (N.D.Ill. 2015) (“absent an express overruling of [*Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 65 L.Ed.2d 341, 100 S.Ct. 2343 (1980)], which most certainly did not happen in *Reed*, lower courts must consider *Central Hudson* and its progeny . . . binding.”).

In *City of Austin, Texas v. Reagan National Advertising of Austin, LLC*, 596 U.S. 61, 212 L.Ed.2d 418, 142 S.Ct. 1464 (2022), the Supreme Court clarified that its holding in *Reed* did not prohibit municipalities from distinguishing between on-premises and off-premises signs. Citing *Reed*, the Court explained that “[a] regulation of speech is facially content based under the First Amendment if it ‘target[s] speech based on its communicative content’ — that is, if it ‘applies to particular speech because of the topic discussed or the idea or message expressed.’ ” 142 S.Ct. at 1471, quoting *Reed*, 135 S.Ct. at 2226 – 2227. The Court then explained that the city’s regulations governing off-premises signs was content-neutral and not subject to strict scrutiny:

Unlike the regulations at issue in *Reed*, the City’s off-premises distinction requires an examination of speech only in service of drawing neutral, location-based lines. It is agnostic as to content. Thus, absent a content-based purpose or justification, the City’s distinction is content neutral and does not warrant the application of strict scrutiny. 142 S.Ct. at 1471.

See also *Adams Outdoor Advertising Limited Partnership v. City of Madison, Wisconsin*, 56 F.4th 1111 (7th Cir. 2023).

The applicability of the First Amendment and what level scrutiny is to be applied to zoning regulations will continue to evolve.

VII. APPENDIX

A. [3.25] Zoning Issues To Consider

Prior to buying and/or occupying commercial property, it is important to determine

1. the zoned district in which the property is located;
2. the contents of the zoning file for the property at the governmental zoning office;
3. whether the zoning office will issue a certificate of zoning compliance as to area zoning restrictions;
4. the present use of the property by the current owner;
5. what uses for property are allowed in the zoned district;
6. what use the new property owner intends;
7. if the present buildings are not in compliance with the area restrictions, whether a variation was granted and, if so, what the restrictions are with the variation;
8. whether the property is in a historic district or has been granted historic landmark status and, if so, what restrictions apply;
9. whether any aesthetic or environmental restrictions apply to the property;
10. what planned renovations or changes to the building are contemplated by the new property owner and whether the zoning ordinance allows for such changes;
11. the uses and buildings in the neighborhood of the property and whether the intended uses or additions would benefit or harm neighboring property;
12. whether the property's intended building meets the subdivision control aspects of the zoning ordinance;
13. whether the fences and walls at the edge of the property are allowed by the zoning ordinance setback restrictions; and
14. whether the property is in a floodplain, floodway area, or wetland management area and, if so, what restrictions apply.

B. [3.26] Initial Issues for New Commercial Construction

The following initial issues need to be addressed when planning new commercial construction:

1. Does the property need to be subdivided by a plat under the Plat Act or otherwise?

2. Does the local government seek land to be dedicated, impact fees, bonds, or security?
3. Is the property zoned for the use, or does the property need to be rezoned to another zoning district?
4. Does the zoning jurisdiction require the proposed redevelopment to be developed as part of a planned unit development?
5. Does the project meet the zoning setbacks, density, and parking requirements?
6. Does the government have restrictions on landscaping, architectural designs, or signage?
7. Does the project meet water retention requirements and wastewater management restrictions?
8. Is the property in a flood fringe area, floodway area, or wetland management area?
9. Does the project need road access or traffic control development?
10. What public improvements are needed for the development?
11. What are the building permits required and the costs of such permits?
12. What are the utility easements needed for the project, and which utilities need to approve of the easements?
13. Have the environmental studies of the property identified underground storage tanks (USTs) or environmental remediation needed for development?
14. Does the project need approval or permits from
 - a. the Illinois Department of Transportation (streets, waterways, and floodway permits) (<https://idot.illinois.gov>);
 - b. the U.S. Army Corps of Engineers (navigable water and wetlands) (www.usace.army.mil);
 - c. the Illinois Pollution Control Board (<https://pcb.illinois.gov>) and the Illinois Environmental Protection Agency (<https://epa.illinois.gov>) (land pollution and waste disposal);
 - d. the soil and water conservation district (subdivision of vacant or agricultural land in district);
 - e. the Historic Preservation Division of the Illinois Department of Natural Resources (archaeological sites) (<https://dnrhistoric.illinois.gov>);

- f. the Illinois Department of Public Health (wells and other water supplies) (<https://dph.illinois.gov>);
- g. the Illinois Capital Development Board (Americans with Disabilities Act of 1990, Pub.L. No. 101-336, 104 Stat. 327, and accessibility standards) (<https://cdb.illinois.gov>);
- h. the Illinois Office of Mines and Minerals (mining areas) (<https://dnr.illinois.gov/mines.html>);
- i. the Illinois Department of Natural Resources (endangered species in agricultural or open spaces) (<https://dnr.illinois.gov>);
- j. the Federal Aviation Administration (height restrictions) (www.faa.gov); or
- k. the Office of the Illinois State Fire Marshal (underground storage tanks) (<https://sfm.illinois.gov>)?

C. [3.27] Planning Issues for Commercial Developments

The following issues are often raised for commercial developments:

1. The property needs to be subdivided, and a plat of subdivision needs to be prepared. The municipality needs to approve the plat in an open meeting by the governing board. The Plat Act provides that the plat should not be approved unless a registered professional engineer certifies that drainage of surface water will not be substantially changed (with reasonable provisions for collection and diversion thereof); sewage disposal is certified and approved by the local department of health; and the roadway access is approved by the local authority or Illinois Department of Transportation depending on whether the adjoining streets are local or state highways. See 765 ILCS 205/2.

2. The adjoining streets usually need curb cut approval from IDOT or the local highway authority. IDOT does not necessarily allow curb cuts that interfere with traffic flow to state highways. *Id.*

3. The local zoning officer should be consulted if a variation, special-use permit, or planned unit development ordinance is needed to construct the project. Any of these require public notice and a public hearing. The public notice is often to neighboring landowners by mail and publication in the local newspaper. The standards for each of these are usually stated in the zoning ordinance. The burden is on the developer to provide evidence that the standards have been met. The fact that the project will serve the public is not alone sufficient to meet zoning ordinance requirements. Also remember that the standards apply to the property and are not based on the financial or unique characteristics of the owner of the property. The PUD is usually the subject of negotiation with the government but may not violate set standards in the zoning ordinance.

4. The utility companies should be contacted, and they will usually hold a joint meeting to discuss

- a. costs to connect to existing utility lines;
- b. costs to build additional utility facilities;
- c. which utility company is going to do the utility work;
- d. what easements are needed for utility lines; and
- e. whether utility facilities are going to be placed on public or private property.

5. The municipal building permit clerks and inspectors need to review the plan and agree on changes required by codes. Permits are often required for plan review, plumbing, electrical, construction, and fees. The schedule for building inspections should be established early so it is clear who is to call the building inspectors and when inspections will be required. Architectural standards should be reviewed during the permit process.

6. Public property may need to be vacated before construction begins. Vacation of property requires notice by publication, public hearing, payment by the purchasing party of the value of the property being vacated, and a plat of vacation with or without an agreement of restrictions. 65 ILCS 5/11-76-2.

7. The municipality may require that property be dedicated to the municipality (*e.g.*, rights-of-way and parks). The developer should discuss with the municipality whether any land dedications are necessary.

8. A Phase I or Phase II environmental assessment of the property may be required due to environmental issues. Underground storage tanks may be removed only after a permit is granted by the State Fire Marshal. Usually, municipalities must be notified so that fire officials are present at the removal of an UST. 430 ILCS 15/2.

9. Bonds, letters of credit, or deposits are often required to protect the municipal property before building permits are issued. The issue of impact fees or special assessments should be determined. Sometimes a development agreement is negotiated if government property is part of the project. A development agreement often defines future obligations as to the uses of the property. The development agreement is usually recorded on the title of the property.

10. The interplay among elected government officials and government employees who implement the laws is a challenge for all parties involved. Government employees can provide information about procedures and past practices. However, government employees cannot bind or commit government officials to decisions for the project. Most construction projects require approval of some matters by government officials.

11. The attorney for the developer should be aware that the Open Meetings Act, 5 ILCS 120/1.01, *et seq.*, must be followed when the developer meets with certain government officials about pending matters. The Open Meetings Act does not apply to all meetings with government officials. In addition, if a public hearing is being held, developers should avoid *ex parte* communications with the public officials who are conducting the public hearing.

12. Materials provided by the developer to government employees become public records pursuant to the Illinois Freedom of Information Act (FOIA), 5 ILCS 140/1, *et seq.* While public bodies may keep certain information in those records confidential pursuant to applicable FOIA exemptions (*e.g.*, 5 ILCS 140/7(1)(k) (exempting some architects' plans, engineers' technical submissions, and other construction-related technical documents from disclosure)), developers should assume all records provided to a public body for zoning purposes will be open to public disclosure.

D. [3.28] Steps To Gain Zoning Approval for Commercial Property

The following steps to gain zoning approval require work and preparation:

1. Review municipal ordinances for their impact on the commercial property.
2. Meet with the municipal zoning officer. Contact the zoning officer early in the process. The zoning district and the standards that exist for it can be identified by the zoning officer.
3. Order a survey of the property.
4. Prepare a development site plan if it is new construction.
5. Determine what studies are needed. The most common studies are a traffic study of the impact of the commercial use on area traffic and an economic analysis of the effect on economic values of neighboring properties.
6. Apply to the municipality for a rezoning, variation, special-use permit, or planned unit development. Proof of ownership of the property or right to possession of the property must be provided. Proof that the corporate entity is in good standing with the Illinois Secretary of State is required. Obtain a complete description of the use or project.
7. Hold a meeting with the neighbors to explain the plan and answer concerns.
8. Adjust plans to answer specific concerns.
9. Determine who is the hearing officer or board. Review the public record of recent zoning requests before that officer or board for procedure and substance. The hearing officer or board usually has rules of procedure that should be reviewed.

PRACTICE POINTER

- ✓ Request, under the Freedom of Information Act, a copy of the records of recent hearings before the zoning hearing officer or hearing board to determine the procedures and substance of similar zoning hearings. Often, the issues that are important in your case are the same issues from prior zoning requests.
-

10. Prepare expert witnesses on the economics of the property and the neighboring property. Compare the project to other buildings and uses that already exist in the community.

11. Prepare exhibits for the hearing that show the new construction. Exhibits are useful to show the advantages of the commercial use or property. Even an application for a special-use permit can be viewed more favorably when exhibits show how the property is going to be used. A picture is always worth a thousand words at the hearings.

12. Carefully and completely explain the evidence and argument at the hearing. It is important not to become defensive.

13. Provide the hearing panel with written material and specific statistics that show how each element required in the zoning ordinance is satisfied.

14. If the hearing panel is not the final decision-maker, clarify the record at the meeting with the final decision-maker.

15. If necessary, file an appeal. The applicable statute of limitations varies depending on the type of appeal. If the claim is subject to the Administrative Review Law, 735 ILCS 5/3-103, the appeal must be filed within 35 days after the decision is placed in the U.S. mail. If not, the statute of limitations is usually 90 days from the date of the decision by the corporate authorities. 65 ILCS 5/11-13-25.

16. If the decision is appealed pursuant to the Administrative Review Law, issue a summons to the defendants in the case (the final decision-maker, all the named individuals of the board, and the municipality) through the clerk of the court within 35 days of the decision. 735 ILCS 5/3-103. The defendant files the answer consisting of a record of the proceedings had before it if the decision is appealed pursuant to the Administrative Review Law. 735 ILCS 5/3-106. The parties thereafter file the briefs and argue the case. No new evidence is presented if the decision is under the Administrative Review Law. If the decision is otherwise reviewed, the trial court will hear the case de novo. When the decision is a legislative determination, it is not an administrative review case. *Ward v. Village of Skokie*, 26 Ill.2d 415, 186 N.E.2d 529 (1962); *Bossman v. Village of Riverton*, 291 Ill.App.3d 769, 684 N.E.2d 427, 225 Ill.Dec. 742 (4th Dist. 1997). The standard of review under the Administrative Review Law is whether the decision was arbitrary or capricious. *LaSalle National Bank of Chicago v. County of Cook*, 12 Ill.2d 40, 145 N.E.2d 65 (1957).

17. If necessary, file a procedural or substantive due-process claim (42 U.S.C. §§1983 and 1988) or bring a regulatory takings claim directly to federal court. *Knick v. Township of Scott, Pennsylvania*, 588 U.S. 180, 204 L.Ed.2d 558, 139 S.Ct. 2162 (2019). The Supreme Court in *Knick* held that a property owner has an actionable Fifth Amendment takings claim when the government takes the owner's property without paying for it and therefore may bring a claim in federal court under §1983 at that time. The Supreme Court's decision in *Knick* overruled its prior decision in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 87 L.Ed.2d 126, 105 S.Ct. 3108 (1985), which held that property owners must seek just compensation under state law in state court before bringing a federal takings claim under §1983.

E. [3.29] Commercial Development Agreement Issues

As part of a land use evaluation for a potential commercial development, the municipality should consider the costs to the municipality itself. A development agreement for commercial property may be negotiated between the municipality and a commercial developer when the developer seeks municipal improvements or incentives and often is required by the municipality to protect the municipality for large developments or developments that require the developer to make public improvements. The agreement includes all of the obligations of the municipality and the developer, as well as any municipal incentives.

Clauses in a commercial development agreement may include

1. the identity of the parties (*e.g.*, corporation, limited liability company, partnership, land trust, foreign entity, registered agent);
2. the authority of the parties to enter into the agreement;
3. a definition of the specific construction project;
4. title warranties or closing obligations, the right to subdivide, etc.;
5. settlement of pending litigation, if any;
6. municipal incentives (*e.g.*, building permits reduced or waived, sales tax or property tax rebates, land transfers, easements, tax increment financing, special service area financing, governmental bonding authority);
7. municipal infrastructure improvements (*e.g.*, streets, sidewalks, lighting, traffic lights, sewers, signage, green space);
8. municipal impact fees or fees dedicated to schools or other governmental bodies;
9. site plans and legal descriptions (*e.g.*, height, density, location of buildings, traffic flow, landscaping, signage, parking, pedestrian walkways, utilities);
10. the timetable of construction (*e.g.*, timetable for each stage of construction, penalties and incentives to fulfill timetable, escrow of payments, hours and days of construction);

11. procedures for dispute resolution during construction (*e.g.*, construction changes, financing guarantees, progress reports, survey updates);
12. financial guarantees (*e.g.*, minimum financial ability, financing, timetable to obtain financing) and financial assurances that the developer is going to perform its obligations (*e.g.*, provisions requiring the developer to prove the municipality a bond or letter of credit);
13. covenants as to commercial activity to occur, minimum commercial activity in the future, prohibited commercial activity, and tenant selection;
14. reporting (*e.g.*, sales tax, leasehold, financial reporting);
15. insurance (*e.g.*, workers' compensation, general liability, environmental, construction);
16. the liability of each party for its own negligence;
17. events of default (*e.g.*, remedies for failure to perform obligations under the agreement, right to cure and notice requirements, mandatory arbitration);
18. surviving covenants (*e.g.*, obligations not merged with any other legal documents);
19. covenants running with land and terms of obligations;
20. the right to assign obligations and successors' obligations;
21. the obligation of good faith and mutual assistance;
22. that the developer is not a partnership or joint venture;
23. that there are no third-party beneficiaries;
24. the effect of eminent domain, bankruptcy of parties, unsatisfied judgments, appointment of receivers, and dissolution of parties;
25. the obligation of the municipality not to compete by approving other parties' similar commercial activity within a specified time period or geographic area (be careful of any potential antitrust issues);
26. compliance with laws by all parties;
27. that mechanics liens are not to be placed on public funds by the parties;
28. the effect of failure of the municipality to have funds available in the future;
29. brokers' fees and other experts' fees;

30. amendment procedures and limitations;
31. governing law;
32. that the agreement is a voluntary agreement with legal counsel's advice; and
33. the recording of the agreement on real estate records.

The most important issue is what municipal improvements and incentives are being requested by the developer or are required by the municipality. The municipality usually evaluates how long the increased revenue from the commercial development will pay for the cost of the municipal improvements and incentives. This is done by evaluating all of the revenue streams to be paid to the municipality. This can be a difficult calculation. Future real estate tax assessments and appeals can change the real estate revenue stream. Also, future calculations of expected commercial and sales activity can change.

PRACTICE POINTER

- ✓ In most zoning cases, the amount of revenue coming to the municipality and other governmental bodies needs to be calculated. It is best to be conservative in this calculation and to specify in detail what assumptions went into the calculation.
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4

Zoning Issues: A Developer's Perspective

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III. [4.19] Summary

I. [4.1] INTRODUCTION

In a time of growing public awareness of environmental quality-of-life and transparency issues, land use projects are coming under increasing scrutiny. Complex government regulations impact deadlines and budgets in virtually every new development effort. The prudent developer must be aware of myriad issues that he or she will confront during the entitlement process. This chapter is an attempt to provide the developer and the developer's counsel with some general guidance with respect to the zoning approval process.

II. ZONING PROCESS

A. [4.2] Significance of Location

Zoning ordinances typically reflect the philosophical bent of the officials that promulgated them. The focus of an ordinance will be consistent with the policies that drive zoning decisions in the particular jurisdiction, which, of course, will differ depending on the locale. Is a municipality in growth mode, or is it a mature community? In an area that has experienced development over many years, control of development, particularly the design of what is to be built, is often the hallmark of zoning regulation. Alternatively, new communities or communities seeking revitalization may have a more relaxed approach to development. Thus, the first questions one must ask involve where the development is located and what the local zoning ordinance reveals about the municipality's attitude toward development.

B. Analyzing the Development

1. [4.3] Scope of the Building Program

The need to ascertain the nature of the proposed use and the density of the development are threshold issues in any zoning matter. A zoning ordinance typically distinguishes between related yet different types of residential uses (*e.g.*, apartments, group living arrangements, transient hotels), business establishments (*e.g.*, restaurants, taverns, nightclubs), and commercial and manufacturing facilities (*e.g.*, factories, forges). It is therefore necessary to know precisely what uses are to be established at the site. Density — defined both as floor area ratio (FAR), which is the common measure of development potential in most zoning codes, and the number of permitted dwelling units in a residential development — is of paramount importance to both the developer and the regulator. For the developer, it is an essential element of the potential economic success of the development. Indeed, as discussed in §4.12 below, exceeding a certain number of dwelling units within a project is often a trigger for affordable housing requirements, which further complicates achieving economic success. To the regulator, density is not only a measure of intensity of development but also a standard by which to compare the building program with others nearby and a tool to satisfy the affordable housing objectives of the municipality.

Analysis of the development plan must also focus on the size, configuration, and placement of the proposed structure on the property. Setbacks; required front, rear, and side yards; lot coverage; treatment of open spaces; and on-site traffic circulation also must be considered. Most zoning

ordinances also impose height limitations and set standards for parking, loading, and signage. Also, as energy conservation and the use of sustainable materials and practices have come to the forefront, many municipalities have sustainable, or “green,” design and construction requirements that must be followed. Whether these requirements are codified or promulgated as policy, they must be taken into consideration when examining the building program because they typically result in added costs and often require the reservation of space on the building site. These requirements are commonly enforced through the zoning review process.

2. [4.4] Understanding the Limitations of the Zoning District

The zoning district in which a particular site is located can be ascertained by reviewing the relevant zoning map. Standards for development vary by district. A particular land use can be permitted, subject to special- or conditional-use proceedings, or barred. Density, lot area coverage, parking, loading, and signage requirements differ in each district. A determination must be made as to whether the proposed plan conforms to the parameters of the zoning district. Similarly, the zoning of adjacent sites is important. Not only will the person or body that regulates development test the proposed building program against the zoning standards of the larger area, but the ordinance may also place special constraints on neighboring developments under certain conditions.

3. [4.5] Site Constraints

Familiarity with the site of the proposed development is fundamental. The impact of natural or manmade conditions on or adjacent to the property cannot be gauged without an on-site inspection. Similarly, traffic patterns, entrance and exit opportunities, and interrelationships with nearby uses require a familiarity with actual conditions. It is only in the field that the developer can truly grasp the impact that landmarked structures, environmental conditions, or traffic patterns may have on the proposed development and, consequently, on the regulatory process. Once these site constraints, if any, have been analyzed, the development team can determine whether additional studies, such as traffic or shadow, are needed.

C. [4.6] Choice of Remedies or Relief

Having gained an understanding of the development program in a zoning context, it is possible to determine what, if any, relief from the zoning requirements at the site must be sought if the development is to go forward. Some projects may be built at a particular site as a matter of right; although with increasing governmental oversight, these opportunities are becoming far less frequent. In other cases, it may be appropriate to make limited changes to a proposed development to bring it into compliance with all zoning standards — saving money and time when compared to seeking regulatory relief for the desired program.

If possible, some developers choose to avoid the regulatory process for no reason other than an aversion to seeking government approvals. In other cases, the possibility that the request will be denied will cause the developer to forsake an effort to seek relief. In many instances, however, particularly if the proposal is of significant size, a development program does not have the luxury of avoiding the regulatory process. It then becomes necessary to determine the appropriate zoning relief required to meet the needs of the project.

This chapter does not try to discuss all of the possible types of relief that may be sought, but §§4.7 – 4.12 below highlight avenues frequently used to achieve the developer's goals.

1. [4.7] Variations

Depending on the municipality, the zoning board of appeals is the appropriate forum in which to request a variation from a requirement of a zoning ordinance. Typically, a zoning ordinance will delineate a narrow range of variations that may be granted by the ruling body. For example, under the Chicago Zoning Ordinance, a request for parking relief is within the Zoning Board's jurisdiction but only to a stated percentage of the required parking. Similarly, the Board may permit lot coverage to be increased but, again, only within limited parameters.

Typically, a zoning board will not approve a variation unless it finds that, based on the evidence presented to it in each specific case, strict compliance with the regulations and standards of its zoning ordinance would create practical difficulties or particular hardships for the subject property and the requested variation is consistent with the stated purpose and intent of the ordinance.

In Chicago, in order to determine that practical difficulties or particular hardships exist, the Zoning Board of Appeals requires evidence of each of the following:

- a. The property in question cannot yield a reasonable return if permitted to be used only in accordance with the standards of the Zoning Ordinance.
- b. The practical difficulties or particular hardships are due to unique circumstances and are not generally applicable to other similarly situated property.
- c. The variation, if granted, will not alter the essential character of the area.

It should be noted that some municipalities, most notably Chicago, have adopted a procedure whereby relief of a more minor nature may be requested and approved administratively, without extensive notice or a public hearing. Known in Chicago as an administrative adjustment, the procedure allows the zoning administrator to approve requests such as a reduction of up to 50 percent in the depth of a required setback or a 10-percent increase in allowable building height, upon submittal of an application and notice to the local alderman and the property owners adjoining the subject property on either side. Procedures of this nature have the potential to be more cost-effective and expeditious than the traditional variation approach and can be used as specified in cases in which the required relief is less extensive in nature.

2. [4.8] Special Uses

Certain land uses may not be permitted in a particular zoning district as a matter of right but may be allowed upon examination of the proposal by a zoning board under its power to grant special or conditional uses. Land uses that may be sanctioned after these reviews usually are specifically identified for each zoning district. Special or conditional uses require case-by-case review in order to determine whether they will be compatible with surrounding uses and development patterns. This review is intended to ensure consideration of the special use's anticipated land use, site design,

and operational impacts. The special-use process is often a complex proceeding that reflects the sensitivity of many of the issues presented in these hearings. For example, shall a transitional residence be established in a residential zone, a church in a business district, or a sanitary landfill in a manufacturing area?

The ruling authority typically considers a range of criteria when evaluating a special or conditional use:

- a. Is the use in the interest of the public convenience?
- b. Will the use have a significant adverse impact on the general welfare of the neighborhood or community?
- c. Is the use compatible with the character of the surrounding area in terms of site planning, building scale, operating characteristics such as hours of operation and traffic generation, and project design?

There are often other specific standards for certain uses such as waste-related facilities and adult uses, and the zoning regulations for each municipality should be consulted accordingly. These matters can become quite adversarial, with neighbors and community organizations often appearing in opposition and represented by counsel. Cross-examination of witnesses is permitted. Opposing experts are called on to support each side of the arguments presented. The discretion of the zoning board in these matters is quite broad.

3. [4.9] Amendments to the Zoning Ordinance

Frequently, a development plan necessitates more fundamental changes in zoning than may be achieved through variation or special-use procedures. In these situations, rezoning of the property is necessary. This type of proceeding takes the petitioner into the legislative arena, with all of its vagaries and potential pitfalls.

a. [4.10] Map Amendment

A simple rezoning, or map amendment, is an amendment to the comprehensive zoning ordinance that changes the zoning classification of the site in question. The change may be necessary to permit a use that is prohibited in the district applicable to the site or to accommodate greater density. Which new district is appropriate will, of course, be dependent on an analysis of the requirements of the new district relative to the use proposed for the site. For example, if a mid-rise residential development is proposed within a district currently zoned for manufacturing, a map amendment will be required to rezone the site from its current manufacturing designation to a residential district that accommodates multifamily development. The government approval process will vary depending on the locale. In Chicago, for example, the alderperson of the ward in which the proposed development is located has, in reality, the power to permit or deny a map amendment — the tradition being that the other 49 alderpersons will defer to the will of the local alderperson.

b. [4.11] Text Amendment

While map amendments, or alterations to the part of the zoning ordinance that delineates zoning districts, are relatively commonplace, gaining zoning relief through an amendment of the zoning ordinance text is a remedy often ignored by developers and their lawyers. Even as properties may be removed from one zoning classification and placed into another, the text of the zoning ordinance may be amended to permit uses to be established in districts that had previously barred such activities.

The ramifications of a text amendment are potentially greater than that of a map amendment. Whereas a map amendment focuses only on the specific property at issue, the very nature of a text amendment is to affect all property in the zoning district or districts whose regulations have been modified. The concern of the government regulator is that, although it may be reasonable to include a given use in a zoning district at one location, the same use may be inappropriate in another area of the city that is similarly zoned. Although it should be considered, this relief is therefore more difficult to obtain.

4. [4.12] Planned Developments

The most versatile remedy available to the developer seeking to build a particular project is the planned development. Planned developments are rezonings, but they are so individualized as to enable a specific project to be constructed without regard to the constraints of a traditional zoning district. This customized zoning is in reality a negotiated zoning envelope for the site — a series of tradeoffs, the product of which is a development plan that meets the needs of the developer and satisfies the government's concerns for the particular location. The nature of these negotiations is discussed in §4.17 below.

Planned development regulations are designed to ensure adequate public review of major development proposals. These regulations also encourage unified planning and development that promotes economic and efficient land use and development patterns, improved levels of amenities, appropriate and harmonious variety in physical development, creative design, and a beneficial environment.

The theory behind the planned development technique is to provide flexibility for projects of significant size and for which traditional zoning standards are inappropriate. Some municipalities make the planned development process mandatory for large developments that exceed established thresholds concerning parameters such as building height, number of dwelling units, and site area, thereby ensuring that the municipality will have a significant amount of control. The opportunity for the developer to use the planned development remedy is usually limited, however, by the parameters for planned developments set by the municipality's zoning ordinance. Moreover, even if a development meets the standards that will permit it to be processed as a planned development, the underlying zoning classification of the district as well as neighboring zoning districts cannot be disregarded. A rational relationship between what is being requested and what is nearby must ordinarily be shown. In addition, a zoning ordinance typically will mandate that the planned development be in substantial compliance with the underlying zoning and will sometimes require strict compliance with a particular parameter of the underlying zoning district, such as floor area ratio.

Use of the planned development process often is efficient if a project otherwise cannot comply with the requirements of a particular zoning district or if multiple zoning entitlements are required from a number of government agencies. For instance, a development that requires additional density achievable only through a map amendment and a variation from traditional setbacks and that includes uses that would be the subject of a special-use hearing might best be processed as a planned development, thus permitting all elements of the program to be reviewed in a single, comprehensive proceeding.

The developer should expect greater scrutiny of the corporate structure and any relations with government officials as part of the application process. Requirements designed to increase the transparency of the development entity or applicant (and the property owner, if different from the applicant) have become commonplace. These rules can be burdensome and may infringe on the privacy desires of the developer and its officers, directors, and investors. Failure to comply with these requirements, however, can result in delays in the entitlement process.

D. The Application for Relief or Approval

1. [4.13] Necessity of Asking for All Relief

Although there is a great deal of emphasis placed on the public hearing aspect of the zoning approval process, all too often the underlying application for relief is given insufficient attention. Yet, after the opposition of neighbors is forgotten, the renderings are archived, and the concerns of the public regulators are met, the details and parameters of the application, which are the basis for the relief granted, are the standard against which the proposed development is measured.

The need for flexibility also must be considered. Reasonably remote yet potential needs should be addressed. Failure to do so may mean reopening the approval process at a later date. This is because regulatory officials have limited jurisdiction to alter by the exercise of administrative discretion the orders or ordinances that are the product of the zoning process. Unwitting failure to include all the elements necessary to the development program in the initial petition to municipal authorities, therefore, not only is embarrassing but also can cause long and expensive delays in the commencement of construction.

2. [4.14] Notice Letter

The initial documentation that accompanies a request for relief or approval of a development invariably includes a letter notifying neighboring property owners of the government approvals being sought. Some jurisdictions take on the responsibility of notifying surrounding property owners. If the developer is required to send the notice, it should not be treated casually. If written well, the notice letter can be a useful tool in explaining the program to be undertaken. If poorly written, it can do great harm, as it may give rise to false impressions among the nearby property owners who receive it that will be difficult or even impossible to ameliorate during the pendency of the approval process.

Zoning regulations typically require that a notice letter advise the recipient of the nature of the relief requested, by whom the relief is being sought, and that the relief is being sought by an

application filed with the appropriate city agency. To limit this letter to the minimum required by law predictably will cause its recipients to believe that their worst fears will come to fruition if the relief is granted. A careful explanation of what is contemplated for the site and the limited nature of the government action being requested is mandatory if an immediate negative reaction is to be avoided. The notice letter, when used in this manner, can become a positive element in the developer's effort to gain support from neighboring property owners.

E. [4.15] Strategies for Gaining Support

Once the basic development plan is established and a decision is reached concerning the remedy to be sought, the development team must decide on a systematic approach to regulatory officials and others who will have an impact on the ultimate disposition of the developer's petition for municipal action.

To the extent possible, early identification of the interested parties to any zoning proceeding is of critical importance. In addition to the municipal officials charged with responsibility for the regulatory process as it relates to development, neighboring landowners, local political and community leaders, special-interest groups, and, at times, the media must be considered to have a potential role in the decision process. There is no simple, textbook approach to these groups that can be used in all cases. Each matter will require its own individual strategy. In complex situations, early and informal meetings with the political leaders and executive branch decision-makers and their staffs can be a valuable first step, if only to avoid wasting the time of others with a proposal or approach to a problem that, for reasons heretofore known only to municipal officials, will be unacceptable to them. Taking the development program to all interested parties as contemporaneously and as early as possible is typically the wisest course.

The purposes served by approaching these parties vary as greatly as do the targets of this attention. An early presentation to the staffs of the ultimate decision-makers will lead to a prompt appraisal of the project's chances for success, elicit comments about specific concerns, and determine quickly what, if any, tradeoffs will be necessary. Indeed, many jurisdictions require what is commonly referred to as "pre-application meetings."

Because a project's neighbors are most directly affected by any zoning change, their sentiments are given great consideration by those charged with granting or denying relief. Early exposure of nearby property owners to that which is being requested will avoid reactions prompted by fear of the unknown and give the developer the opportunity to assuage fears or respond to legitimate concerns. If these advance glimpses of the program are thoughtfully presented, the development's future neighbors can be important allies. The failure to do so can create difficult opponents.

Although political leaders may not become immediate supporters as a result of an early effort to apprise them of a development program, it is far more likely that they will become opponents as a result of the failure to advise them promptly of a new development proposal in their jurisdiction. It should be remembered that politicians react unkindly to being surprised or, worse yet, to being — in their own estimation — slighted. It is most advantageous to brief local government officials before engaging in any activity (particularly sending out the notice letter) that will cause

their constituents to find them unaware of a plan to build in the area they represent. Working with the relevant political leader toward an amicable agreement on all aspects of a development is highly recommended. Indeed, in Chicago, it is mandatory, given the degree of control the alderpersons have over land use decisions in their respective wards.

These outreach efforts within the community should not be seen as merely defensive tactics. Early disclosure of plans will do more than allay fears. In most circumstances, a thoughtful development plan will be accepted and supported by the local political leader and open-minded community groups or neighbors. True, not all groups or individuals react in a reasoned manner even as all plans are not sensitive to their environs. Developers make a mistake, however, if they presume opposition and fail to seek out support from neighboring property owners and community leaders.

The more local the interest group, the more effective it will be in any zoning proceeding that involves the legislative process. This is because of the importance of the local political leader in the zoning process. Typically, the developer is an outsider or is viewed as one; the community spokesperson is the politician's constituent.

Certain special-interest groups, especially those that focus on a single issue, present a different set of problems. These groups have no property interests in an area as do neighborhood community groups, so their positions are taken without consideration of local conditions or, indeed, concern about the future of the area in which the development is proposed. These groups may have preconceived goals that allow for little or no compromise. Often citywide in their self-delineated scope of activities, they may have no knowledge of, or interest in, local considerations. Their agendas may also be set without regard to broader civic interests. If their principal goal is "no growth," "low density," or "anti-high-rise," it will be difficult to persuade their leaders that a development that challenges these basic premises has any virtues, yet these groups cannot be overlooked. Mitigation of their opposition may reduce the level of acrimony about a project, allowing more rational voices to be heard. If slighted, their mild disagreement may harden into formal, organized opposition.

Other interest groups indeed may present opportunities for a developer. These groups may have as their concern a particular aspect of municipal life. They may be protectors of parks, waterways, landmarks, or the geographic area in which a construction program is proposed. Seeking to come to a meeting of minds with these groups serves two purposes. If agreement can be reached between the proponents of a development and groups that otherwise might be critical of it, the government agency vested with authority over the approval process will find it easier to grant the relief sought. Further, the developer may find that he or she can improve the desired program by accepting limited changes proposed by these groups or at least offering modifications to the original plans in response to certain of the reasonable suggestions made. These groups often include among their membership people of significant expertise and skill. Their review may yield ideas that were not previously considered but that are constructive and an improvement to the proffered plan.

It is possible to cause interest groups to become allies and therefore advocates of a development program. An effort at accommodation, even if it does not win converts, may ameliorate the intensity of opposition or win a measure of goodwill by virtue of the developer's initiation of discussions.

An unwillingness to exchange ideas with these groups will be seen by government officials as intransigence and disdain for the public process. At the very least, a developer who can stand before a city board, commission, or legislative body and state that the proposal has been reviewed with concerned civic groups, regardless of whether any organization's suggestions have been adopted, will likely receive a more sympathetic hearing than a developer who refuses to meet with or consider the comments of these groups.

1. [4.16] The Media

An analysis of interaction with the community would not be complete without mention of the role of the media in the development process. In most cases, citywide newspapers and television stations play no role. Neighborhood periodicals, however, almost universally report and comment on any development programs within their coverage areas. As is the case with community groups, local newspaper support can be advantageous. Effective communication with reporters for these periodicals (and, at times, their editorial boards) can be of great assistance in positioning what is to be built in its best light and correcting misunderstandings or misconceptions that might arise during the pendency of the approval process. If neighboring property owners or interested civic groups are in support of a project, that too can be brought to the attention of both other citizens and government officials through local media.

Certain development plans are of such a scope or proposed at locations so visible as to become a focus of interest for an entire municipality. These situations are predictable and call for a media program to be designed to announce and explain the development. Press contacts should not be limited to those who write about urban affairs. Architectural writers often are interested in these projects, and political reporters cannot be overlooked as the ultimate decision in many zoning matters rests with both the legislative and executive branches of government, each of which is sensitive to public attitudes. Finally, in those few instances in which a development becomes the subject of significant policy debate, soliciting and obtaining editorial board support can be of substantial import in gaining favorable government action.

It should be noted that if and when a development program becomes of interest to the media, both sides of the debate will have an opportunity to take their cases to the public. The developer must be not only ready to tell its story but also able to defend against the criticisms leveled by opponents. A skillful marshaling of facts and expert opinion as well as an ability to focus on the issues the media will deem important are critical. The assistance of public relations counsel in these situations, both to structure media programs and to execute them, is often warranted.

The pervasive influence of social media and the Internet must also be factored into a developer's approach to the presentation of a development plan and the effort to gain support for that plan. At minimum, someone on the development team should monitor the various social media outlets to determine if anyone is writing about the project and, if so, what is being said. In the case of larger or more controversial developments, a developer may also wish to establish a website for the project containing descriptive materials such as a project narrative and drawings depicting the proposed improvements. A means of asking questions or registering support for the project may also be included. As public discourse concerning the project develops, postings may be made to provide facts that debunk false rumors or respond to criticism leveled against the project. In some

cases, elected officials will provide information about a proposed development on their own websites such as details of upcoming meetings at which the project will be presented and links to descriptive materials including project drawings and renderings submitted by the developer. These websites should be monitored from time to time to determine what is being said and to ensure that, if posted, out-of-date descriptive materials are replaced by current versions.

2. [4.17] Negotiations

As noted in §4.15 above, negotiations are often a part of the regulatory process. The parties to any negotiation are several. A planning department is usually the city's negotiating arm. Neighboring property owners, community and special-interest groups, and local political leaders also become part of the process. Numerous issues may be the subject of the interplay between the developer seeking to build the project and the government body seeking to establish limits, implement certain public policy goals, and mediate conflicts between the proponents and opponents of the development plan.

Use and density (including the number of residential units and the parking necessary to accommodate them) are the elements of the development plan most likely to create controversy and therefore most commonly the subject of negotiation. Also critical are traffic-related issues, such as traffic circulation, ingress and egress patterns as they relate to on-site parking, and the number and placement of loading docks; landscaping issues; environmental conditions; signage issues; issues surrounding hours of operation; and height issues (often camouflaged as a density issue in circumstances in which no height limitation is imposed by the ordinance). Design is an overriding concern and often the focal point of these deliberations. Indeed, design review by regulatory authorities has become more formal over time, and design-related comments and requests for revisions have become much more detailed.

A concern in any negotiation is that the accommodation with the public be one that does not jeopardize the economic viability of the building program. It is not an overstatement to say that in most cases the developer's economic plight will generate little sympathy from either the project's critics or government regulators. In these instances, the developer's reputation becomes as critical as its ability to marshal credible arguments on behalf of the proposed development program. Negotiation sessions may resemble mini-hearings. The developer often will wish to include experts, previously retained as hearing witnesses, to express opinions on technical elements of the proposed development program and to support the suitability of the plan proposed.

The negotiation process has increasingly become a vehicle for the attainment of current public policy goals by government regulators. These goals often involve the provision of sustainable building and project features, which enhance stormwater management or energy efficiency, or elements affecting the character of the proposed development, such as the provision of affordable housing units in a residential development. In both examples, satisfaction of the public policy goals has a financial impact on a project that can be quite significant. In some cases, such as the affordable housing example, additional density in the form of floor area or dwelling units may be granted in exchange for the satisfaction of the public policy goal, thereby providing some financial return to offset the cost of satisfying the goal. In others, however, such as energy efficient features, no additional development rights are forthcoming, and satisfaction of the public policy goal simply

results in additional project costs with no corresponding financial benefit to the developer. It is therefore of critical importance that a developer become familiar with the current public policy goals in a particular jurisdiction in order to gauge the potential impact that satisfaction of any or all such goals will have on the proposed development.

At present, many municipalities have gone beyond the articulation of a policy goal and have adopted specific inclusionary housing ordinances requiring developers of certain residential projects to provide affordable housing. Some of these provisions allow developers to pay an in-lieu fee and not actually provide the affordable units in their buildings, whereas many require that a certain percentage of the required affordable units must be provided on site and only allow the remaining percentage to be satisfied by a payment. Finally, Chicago's floor area bonus provisions allow bonuses exclusively in exchange for a cash payment. The revenue generated by these provisions is used to promote development in parts of the city where economic opportunity is lacking. As noted above, developers will have to become familiar with all such provisions in a particular jurisdiction in order to determine the financial impact they will have on the development plan.

Whatever the subject matter of the negotiations, the developer must determine how much flexibility he or she has and what aspects of the proposal may be modified. Should the negotiations become too burdensome, the developer may choose to limit the development to that which may be built as a matter of right under the existing zoning at the site. Unfortunately for developers and property owners, these opportunities are becoming increasingly rare as government regulation increases. If the program the developer has contemplated for the site cannot be adjusted so as to be built as a matter of right and community opposition or proposed government limitations become too burdensome, there may be no alternative but to abandon the development plan.

3. [4.18] Presentation

Successful negotiation of the parameters of a development program with the community and local leaders in most cases will mean success before the decision-making agency. However, the decision-making body cannot be taken for granted. Moreover, even if most objectors have been mollified, there is always the possibility that there will still be objectors who are willing and able to bring suit to overturn the government body's decision. For all of these reasons, it is imperative that the formal record made at the public hearing before the regulatory authorities be complete and persuasive. Any presentation that does not contemplate the possibility that the relief sought will subsequently be challenged in a court of law risks judicial reversal.

A well-crafted presentation should outline the relief being sought clearly and definitively. The development must be placed before the hearing panel in sufficient detail to permit the decision-makers to have a complete understanding of what is proposed for the site. Any unique elements of the plan should be set forth, and the program should be defined in the context of neighboring developments. Hearing officials should be made aware of all the essential elements of the site, the development plan, and its environs. The nature of the approvals sought should be delineated clearly. It is equally important to advise the decision-making panel of those aspects of the development that meet the standards of the zoning district and, therefore, are not the subject of the proceeding.

The presentation must address the elements of the plan that are at issue. These disputed points are often technical in nature and require expert testimony. It is important to determine what these issues will be in the early stages of preparation and to retain the appropriate witnesses to address them. At the hearing, these witnesses should be called on to testify, thereby using their technical expertise as the basis for gaining the relief sought.

The subject of expert witness testimony relevant to any individual case varies with each project. Some expert testimony is mandated by the standards imposed by the municipality's zoning ordinance. For instance, special-use standards frequently require a showing that the establishment of the use at a certain site will not have a significant adverse impact on the welfare of the neighborhood. Often, this standard will involve analysis of property values in the area. Although Chicago recently changed its rules and no longer requires an expert such as an appraisal witness to address this standard, it is often prudent to retain such an expert, particularly if there is any type of challenge to the project. Other typical standards require a showing that the development proposal is compatible with the character of the surrounding area in terms of site planning, building scale, project design, and operating characteristics. As these factors are within the expertise of urban planners and architects, such experts are used frequently to analyze the development proposal and offer testimony tending to show that these standards are met in the particular case. In many municipalities, failure to prove these elements of the case without an expert witness will cause the application to be denied.

On balance, it is useful to retain expert witnesses to opine, on the basis of their professional experiences and educational backgrounds, regarding the elements of the development plan that are in dispute. Unlike self-serving evidence presented by the developer, the developer's architect, or the developer's lawyer, a well-credentialed expert witness not only will supplement and buttress a developer's view of matters in dispute but also can provide an independent analysis on which the regulators can base their decision. In fact, in many instances, a regulatory body will recognize only the testimony of experts and not the statements of the developer's counsel. If the zoning decision is challenged in court, expert testimony will be given appropriate weight by a court and will require opponents to provide similar testimony rather than rely on the objector's often subjective and narrow view of the circumstances at issue.

Finally, the presentation must be complete, but not so lengthy or burdensome as to provoke a negative reaction from those hearing the petition. The developer and the developer's agents and experts must focus on the matters at issue and communicate in a positive way the elements of the development plan on which a favorable decision is required. They also must be able to respond to the questions and criticisms from those making the decision as well as from opponents of the program.

III. [4.19] SUMMARY

In approaching the approval process, the developer must negotiate with government authorities to accommodate its needs as well as those of the public. A balance must be struck between economic requirements and the requirements of the municipality. The process is public, has many audiences, and is marked with a give-and-take that is sometimes rational but often intertwined with

parochial and extraneous circumstances. Whatever the desired remedies, full disclosure, an understanding of the relevant procedures, knowledge of one's rights, and sensitivity to the public process must be combined if the required rights, licenses, privileges, and approvals are to be obtained.

5

Eminent Domain

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I. [5.1] GOVERNMENT POWERS TO CONDEMN PROPERTY

The right of a public body's eminent domain power arises from public necessity. The public body has the power to take and use private property that is necessary for a public purpose. The power of the public body to use its eminent domain powers to take or authorize the taking of any property within its jurisdiction for the public use without the owner's consent is an inherent power of the state and is limited only by the constitutional requirement that the public must pay just compensation for the taking and that property owners have a right to a jury determination of value as provided by law. U.S.CONST. amend. V; ILL.CONST. art. I, §15; *South Park Com'rs v. Montgomery Ward & Co.*, 248 Ill. 299, 93 N.E. 910 (1910). The procedure is set forth in 735 ILCS 30/10-5-5, *et seq.*

The purpose of the just compensation requirement is to ensure that the landowner is made whole, not to place the landowner in a better position than he or she was in before the taking. *Illinois Department of Natural Resources v. Pedigo*, 348 Ill.App.3d 1044, 811 N.E.2d 761, 765, 285 Ill.Dec. 274 (4th Dist. 2004), citing *Department of Transportation v. White*, 264 Ill.App.3d 145, 636 N.E.2d 1204, 1208, 210 Ill.Dec. 772 (5th Dist. 1994). "Just compensation" is the fair market value of the property at its highest and best use on the date of the filing of the complaint to condemn. See 735 ILCS 30/10-5-60. "Market value" is defined as "[w]hat the owner, if desirous of selling, would sell the property for; and what reasonable persons, desirous of purchasing, would have paid for it." *White, supra*, 636 N.E.2d at 1208 (quoting *Ligare v. Chicago, M. & N. R. Co.*, 166 Ill. 249, 46 N.E. 803, 808 (1897), which is now codified in 735 ILCS 30/1-1-15).

Every private owner of property holds title to the property subject to the lawful exercise of the state's power of eminent domain. ILL.CONST. art I, §15. As great as the state's powers of eminent domain may be, they are still subject to constitutional limitations, and the courts may interpose their authority to prevent a clear abuse of the exercise of this right. See *Southwestern Illinois Development Authority v. National City Environmental, L.L.C.*, 199 Ill.2d 225, 768 N.E.2d 1, 263 Ill.Dec. 241 (2002). Whether a specific grant of the power to condemn has been granted by the legislature is strictly construed. *Village of Arlington Heights v. Gatzke*, 101 Ill.App.3d 885, 428 N.E.2d 947, 949, 57 Ill.Dec. 267 (1st Dist. 1981).

The determination of what is a public use or necessity is a question decided by the legislature, which is vested with broad discretion in its determination. See *Cremer v. Peoria Housing Authority*, 399 Ill. 579, 78 N.E.2d 276 (1948). The final determination of whether a public use or necessity is within the discretionary limits of the legislature is for the courts to decide. See *Deerfield Park District v. Progress Development Corp.*, 22 Ill.2d 132, 174 N.E.2d 850 (1961).

Since the 2007 update of this chapter, the Supreme Court's decision in *Kelo v. City of New London, Connecticut*, 545 U.S. 469, 162 L.Ed.2d 439, 125 S.Ct. 2655 (2005), has generated a massive political backlash. *Kelo* endorsed the condemnation of private property for transfer to other private owners in order to promote "economic development." Polls showed that 80 to 90 percent of the public opposed such takings. Oddly, however, almost nothing of this unpopular issue was heard from the Obama administration. Government officials continued to take property and transfer it to politically influential businesses despite the public opposition. The State of Missouri responded to *Kelo* by allowing further eminent domain abuse through failing to adopt meaningful reforms

despite the opportunity to improve. Institute for Justice, Missouri Eminent Domain Laws, <https://ij.org/issues/private-property/ eminent-domain/missouri-eminent-domain-laws>. In addition, federal courts applied *Kelo* to uphold the condemnation of dozens of homes and businesses in New York City in order to make way for a new NBA basketball arena and luxury housing projects.

Some may assume that government action is unnecessary because the problem has already been solved by the legislative backlash against *Kelo*. Indeed, 42 states have passed legislation seeking to curb eminent domain authority. However, the majority of the new laws are likely to be ineffective. California, New York, New Jersey, and Texas are among the major states that enacted purely cosmetic reforms or none at all. Legislators have found ways to produce bills that appear to protect property rights without actually doing so. The most common tactic is that of allowing economic development condemnations to continue under the guise of alleviating “blight.” Many states, like Illinois, define “blight” so broadly that almost any neighborhood qualifies.

Widespread ignorance probably plays the key role in stymieing legislative reform of the kind voters want. Much specialized knowledge is required to tell the difference between an effective “anti-*Kelo*” bill and one that is just for show. Most voters lack the ability and the incentive to scrutinize such details closely. A recent Saint Counseling Group survey showed that (a) only 21 percent of Americans know whether their state has enacted eminent domain reform legislation since *Kelo* and (b) only 13 percent know whether their state’s legislation is likely to be effective. Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 Minn.L.Rev. 2100, 2106 (2009). Such ignorance makes it easy for the state officially to pass off cosmetic legislation as genuine “reform.” The protection of property rights should be at the top of the Governor’s agenda. The cases cited in this chapter underscore the need for additional action.

II. ILLINOIS EMINENT DOMAIN ACT

A. [5.2] Background

Effective January 1, 2007, P.A. 94-1055 created the Eminent Domain Act (EDA), 735 ILCS 30/1-1-1, *et seq.*, which replaced the previous statute located in Article VII of the Code of Civil Procedure, 735 ILCS 5/7-101, *et seq.* The EDA attempts to consolidate in one place all statutory provisions relating to the exercise of the eminent domain power. Should a conflict arise between the provisions of the EDA and other statutory provisions, the EDA controls. 735 ILCS 30/15-1-5. The EDA states that it is a denial and limitation of home-rule powers and functions pursuant to Article VII, §6(h), of the Illinois Constitution. 735 ILCS 30/90-5-20. While the EDA restates most of former Article VII of the Code of Civil Procedure and other eminent domain statutes, it does make several important changes to some statutory and caselaw statements of the law of eminent domain.

The primary push for P.A. 94-1055 was the debate from *Kelo v. City of New London, Connecticut*, 545 U.S. 469, 162 L.Ed.2d 439, 125 S.Ct. 2655 (2005). The issue was whether the proposed condemnation of private property by a public entity met the constitutional requirement that the taking be for a “public use” when the property was conveyed to a private entity for economic development purposes. In *Kelo*, the United States Supreme Court ruled that economic

redevelopment is a legitimate “public purpose” that can satisfy the “public use” standard of the Fifth Amendment. The decision upheld the condemnation of private property by the City of New London as part of a comprehensive redevelopment plan for New London even though the redevelopment plan called for the immediate transfer of condemned property to private developers under 99-year leases for nominal rent. The *Kelo* majority based its decision on a long line of precedent that held that as long as the taking sought to accomplish a legitimate “public purpose,” the government could utilize its eminent domain power as a means to accomplish that purpose, and this use of eminent domain would meet the constitutional “public use” requirement.

Three years before *Kelo*, *Southwestern Illinois Development Authority v. National City Environment, L.L.C.*, 199 Ill.2d 225, 768 N.E.2d 1, 263 Ill.Dec. 241 (2002), barred the taking of private property. While *Kelo* later authorized the taking, the rationale supporting both decisions is, however, the same: While economic development is an important public purpose, to meet the constitutional “public use” test for eminent domain power, taking for the economic development must be within the context of a statutorily approved public planning process.

Finally, the Supreme Court in *Kelo* recognized that legislatures can impose restrictions on the eminent domain power in addition to the constitutional restrictions. Writing for the majority in the five-four decision, Justice Stevens stated:

We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose “public use” requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law . . . while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised. . . . As the submissions of the parties and their amici make clear, the necessity and wisdom of using eminent domain to promote economic development are certainly matters of legitimate public debate. See *Kelo*, *supra*, 125 S.Ct. at 2668.

P.A. 94-1055 was created by the Illinois legislature in response to Justice Stevens’ invitation. A few amendments to Illinois eminent domain law made by the EDA are highlighted in §§5.3 – 5.8 below.

B. Overview of the Eminent Domain Act

1. [5.3] Effective Date

The effective date of the Eminent Domain Act, which was signed by the Governor on July 28, 2006, is January 1, 2007. It does not apply to condemnation proceedings filed before January 1, 2007. 735 ILCS 30/90-5-5. The rationale supporting the January 1, 2007, effective date was to give governmental agencies adequate forewarning of the change in the law so that projects could be planned accordingly.

2. [5.4] Section 5-5-5 of the Eminent Domain Act

The Eminent Domain Act classifies takings into five separate categories that are determined by the ultimate purpose for the taking. 735 ILCS 30/5-5-5. Different standards are placed on eminent domain actions undertaken within each separate category. *Id.*

3. [5.5] Just Compensation

Previous Illinois statutory law defined “fair cash market value” as

the amount of money which a purchaser, willing but not obligated to buy the property, would pay to an owner willing but not obligated to sell in a voluntary sale. 735 ILCS 5/7-121 (repealed in 2007).

The provision remains relatively unchanged in the Eminent Domain Act, which defines “fair cash market value” as

the amount of money that a purchaser, willing, but not obligated, to buy the property, would pay to an owner willing, but not obliged, to sell in a voluntary sale. 735 ILCS 30/10-5-60.

4. [5.6] Relocation Assistance

The Eminent Domain Act requires all condemning authorities, regardless of whether federal funds are involved, to pay to displaced persons relocation costs determined in accordance with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Pub.L. No. 91-646, 84 Stat. 1894, and 735 ILCS 30/10-5-62. This removes the prior discrepancies in the treatment of owners and tenants.

5. [5.7] Attorneys’ Fees and Litigation

The Eminent Domain Act opens up the possibility for owners or tenants to recover their attorneys’ fees and certain litigation expenses in condemnation proceedings. 735 ILCS 30/10-5-110. Prior Illinois law, following the “American rule” required each side to pay its own attorneys’ fees in condemnation litigation regardless of the outcome.

Section 10-5-110 takes a middle road and is based on the fee and cost-shifting provisions of Federal Rule of Civil Procedure 68, Offer of Judgment. This section of the EDA applies only to takings in which the acquired property will be owned or controlled by a private entity. See 735 ILCS 30/5-5-5(c) through 30/5-5-5(f). Section 10-5-110 does not apply to takings in which the acquired property will be owned and controlled by a public entity as described in 735 ILCS 30/5-5-5(b).

6. [5.8] Change in the Valuation Date

The Eminent Domain Act grants the trial court discretion to use a valuation date later than the date of the filing of the complaint if the trial begins more than two years after the complaint is filed.

735 ILCS 30/10-5-60. In a non-quick-take situation, the court can reset the valuation date to a date between the filing of the complaint and the start of the trial. In a quick-take situation, the court can reset the valuation date to a date between the filing of the complaint and the date the condemnor acquired title in the quick-take proceedings. These changes were in response to concerns that an owner becomes disadvantaged if condemnation proceedings drag on if the date of valuing the property remains the date of filing the complaint to condemn, regardless of when the compensation is actually paid to the owner.

C. [5.9] Conversion Table

Code of Civil Procedure, Article VII; 735 ILCS 5/7-101, <i>et seq.</i> (repealed in 2007).	Eminent Domain Act, 735 ILCS 30/1-1-1, <i>et seq.</i>
§7-101	§10-5-5
§7-102	§10-5-10
§7-102.1	§10-5-15
§§7-103.1 to 7-103.149	§§25-7-103.1 to 103.149
§7-113	§10-5-20
§7-114	§10-5-25
§7-115	§10-5-30
§7-116	§10-5-35
§7-117	§10-5-40
§7-118	§10-5-45
§7-119	§10-5-50
§7-120	§10-5-55
§7-121	§10-5-60
§7-122	§10-5-65
§7-123	§10-5-70
§7-124	§10-5-75
§7-125	§10-5-80
§7-126	§10-5-85
§7-127	§10-5-90
§7-128	§10-5-95
§7-129	§10-5-100

III. PREFILING LITIGATION ISSUES IN EMINENT DOMAIN

A. [5.10] Practitioner's Point

When a public body has determined that there is a public use and that it is necessary and desirable to acquire private property for this public use, the public body starts to obtain information regarding the subject property. Most public bodies obtain data on all transactions associated with the subject property in order to obtain a fair market value that they believe is accurate to justify their offer to the landowner. This includes an accurate legal description and information about the

property index number (see 35 ILCS 200/1-120, *et seq.*, of the Property Tax Code), the size of the parcel, surveys, the location, access, zoning, trends in development, and physical characteristics of the subject property, including floodplain and wetlands issues. See *Forest Preserve District of DuPage County v. West Suburban Bank*, 161 Ill.2d 448, 641 N.E.2d 493, 204 Ill.Dec. 269 (1994).

In *Davis v. Brown*, 221 Ill.2d 435, 851 N.E.2d 1198, 303 Ill.Dec. 773 (2006), property owners sued after the enactment of a state statute (605 ILCS 5/4-510) reserving rights in regard to future highways and requiring owners of land within the affected areas to refrain from making improvements without first giving the state notice. Failure to give notice by a landowner would deny the landowner any compensation for any improvements made after the filing of a map that the statute required the Illinois Department of Transportation (IDOT) to prepare. The Illinois Supreme Court held there was no taking. It recognized that nonphysical takings can occur and that this statute placed economic restrictions on the use of an owner's land, but held that such temporary economic restrictions were not takings.

B. [5.11] Offer to the Landowner

Once all the pertinent information regarding the subject property to be acquired is obtained by the public body, the public body sends to the landowner a letter offer. 735 ILCS 30/10-5-15(d). This letter offer is required for state agencies and a prerequisite to filing an action for eminent domain. *Id.* After the public body sends the landowner its offer to acquire the property, there must be a reasonable attempt to agree on the terms of compensation. *Department of Transportation of State of Illinois v. Walker*, 80 Ill.App.3d 1039, 400 N.E.2d 956, 957, 36 Ill.Dec. 376 (3d Dist. 1980). See also *Lake County Forest Preserve District v. First National Bank of Waukegan*, 200 Ill.App.3d 354, 558 N.E.2d 721, 146 Ill.Dec. 758 (2d Dist. 1990). This duty includes an obligation to respond to any counteroffer made by the property owner. *Walker, supra*, 400 N.E.2d at 959.

In *City of Naperville v. Old Second National Bank of Aurora*, 327 Ill.App.3d 734, 763 N.E.2d 951, 957, 261 Ill.Dec. 702 (2d Dist. 2002), the appellate court held that the City of Naperville should offer the full amount of its appraisal valuation in order for its offer to qualify as a bona fide attempt to agree. Due to defects in the city's appraisal, the court found that it failed in its attempt at a bona fide attempt to agree.

In *Department of Transportation ex rel. People v. 151 Interstate Road Corp.*, 209 Ill.2d 471, 810 N.E.2d 1, 284 Ill.Dec. 348 (2004), the Illinois Supreme Court decided to resolve a conflict over the issue of a condemner's compliance with statutory pre-litigation notice requirements and the duty to negotiate before filing a condemnation action. The Illinois Department of Transportation had sent letters to prospective condemnees making offers but later revised the offers by reducing the amounts by 4.45 percent and provided the owners with no additional time to evaluate the new offers. 810 N.E.2d at 17.

The court determined that Illinois law requires a condemnor to negotiate with the landowner in good faith before filing suit. Thus, the new offers by IDOT started the statutory 60-day period for response running again, particularly because IDOT offered no factual reasons for its change in position aside from its lawyer's assertion that the change was due to unspecified "appraisal reasons." 810 N.E.2d at 10. The court said that was insufficient: "Reasons do not change results." 810 N.E.2d at 22.

C. [5.12] Landowner's Response to the Offer

Most often landowners hear of plans to acquire their property for public purposes before receiving notification. Since the property's valuation is based on its condition at the time of the filing of the complaint for condemnation, the property owner may wish to take certain steps prior to receiving formal contact from the condemning authority.

Because the government must follow certain public procedures before filing suit, the landowner would be prudent to better his or her position. See 735 ILCS 30/10-5-10. A good case with which to start in discussions with a client regarding just compensation for a taking of land from a landowner is *Department of Transportation v. Newmark*, 34 Ill.App.3d 811, 341 N.E.2d 133 (5th Dist. 1975). *Newmark* has been interpreted as holding that a property owner has a right to do whatever he or she wishes to improve the property and its value prior to the filing of condemnation even though the property owner has been put on notice of the government's intent to condemn the property. *Id.* However, *Newmark* should be contrasted with *Forest Preserve District of DuPage County v. West Suburban Bank*, 161 Ill.2d 448, 641 N.E.2d 493, 204 Ill.Dec. 269 (1994), in which the court indicated that there are some limits on what property owners can do with their own property if their conduct can be considered wasteful or destructive in relation to the proposed future governmental use.

Property owners should make sure they have copies of all documents for their property (*i.e.*, survey, title policy, engineering plans, and other purchase closing documents). Obviously, if the property has been recently purchased, this fact may be a factor in negotiations. Additionally, with the boom in refinancing, many property owners may have a recent appraisal that may be beneficial or harmful to their valuation. This appraisal should be reviewed carefully before being produced on any condemning authority as it may not consider the highest and best use of the property and may provide accurate comparable sales that may be introduced into evidence.

IV. [5.13] AFTER COMPLAINT TO CONDEMN HAS BEEN FILED

When an attempt to agree has been made and has failed, the public body seeking to acquire the land is ready to institute eminent domain proceedings by filing a complaint to condemn. The complaint must meet the requirements of the Eminent Domain Act, which specifies that it shall contain (a) the public body's authority set forth by reference in the premises, (b) the purpose for which the property is sought to be taken or damaged, (c) a description of the property, and (d) the names of all interested persons (*i.e.*, owners or persons otherwise appearing of record) if known or if not known stating this fact. 735 ILCS 30/10-5-10(a) through 30/10-5-10(d). The complaint also shall pray that the court cause compensation to be paid to the owner to be assessed. 735 ILCS 30/10-5-10(a).

A. [5.14] Quick-Take

The Illinois Department of Transportation, the Illinois Toll Highway Authority, the City of Chicago, and other public agencies may have the power of quick-take. See 735 ILCS 30/20-5-5(b). When public bodies exercise their power of quick-take, it is usually to obtain title so that construction can proceed and the subject property can be utilized for the proposed governmental purpose.

The quick-take process begins with the public body filing a motion for hearing. *Id.* The court fixes a date five days or more after the date of filing. 735 ILCS 30/20-5-10(a). Due notice of the order of hearing must be given to “each party to the proceeding whose interests would be affected by the taking requested, except that any party who has been or is being served by publication and who has not entered his or her appearance in the proceeding need not be given notice unless the court so requires, in its discretion and in the interests of justice.” *Id.*

PRACTICE POINTER

- ✓ The best opportunity to negotiate with the public body arises when there is a contract-letting date looming and there is a risk that the public body will miss the opportunity for state and/or federal funding associated with the public works improvement.
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If a traverse or motion to dismiss has been filed prior to the hearing on the quick-take motion, this traverse or motion to dismiss shall be disposed of prior to any hearing on the quick-take. *See Department of Public Works & Buildings of State of Illinois v. Neace*, 13 Ill.App.3d 982, 301 N.E.2d 509 (2d Dist. 1973). At the traverse hearing, the court first must determine that (1) the public body has the authority to condemn, (2) the property sought is subject to this right, and (3) the right is not being improperly exercised by the petitioner unless the court has made this determination already in the same proceedings. 735 ILCS 30/20-5-10(b). *See also Department of Public Works & Buildings v. Farina*, 29 Ill.2d 474, 194 N.E.2d 209 (1963). The court’s order on these determinations is a final order. *Neace, supra.*

An appeal may be taken within 30 days after entry of the order but not thereafter unless the court on good cause shown extends the time for taking an appeal. 735 ILCS 30/20-5-10(b). *See also Department of Public Works & Buildings of State of Illinois ex rel. People v. Exchange National Bank of Chicago*, 40 Ill.App.3d 623, 356 N.E.2d 376, 1 Ill.Dec. 250 (2d Dist. 1976). An appeal does not stay further proceedings under quick-take unless the appeal is by the plaintiff or the proceedings are stayed by order of the trial court or the court hearing the appeal. 735 ILCS 30/20-5-10(b).

If there is a preliminary determination in favor of the plaintiff and proceedings are not stayed or, being stayed, if the appeal is determined in favor of the plaintiff, the court determines whether the quick-take is necessary. 735 ILCS 30/20-5-10(c). If the court determines it is necessary, it proceeds to hear evidence that it considers necessary or proper to a preliminary finding of just compensation. *Id.* When the court makes a preliminary finding of just compensation, this finding cannot be used in evidence or indicated to the jury in the actual trial as to just compensation. 735 ILCS 30/20-5-10(d).

After the quick-take hearing, the public body makes a deposit with the county treasurer of the amount preliminarily found by the court as just compensation, and the court enters an order vesting the plaintiff with title on a particular date. 735 ILCS 30/20-5-15(a). However, the quick-take statute also provides for the repayment by the property owner to the condemnor of the amount by which the jury verdict is less than the amount deposited in the quick-take proceedings. 735 ILCS 30/20-5-20. The only appealable issues in a quick-take proceeding are the court’s findings that the

plaintiff has the authority to exercise the right of eminent domain, that the property taken is subject to the exercise of this right, and that the right is not being improperly exercised. 735 ILCS 30/20-5-10(b). Issues of the necessity of the quick-take and the amount of the preliminary award of just compensation are interlocutory orders and are not appealable. See §5.23 below discussing appeals.

B. [5.15] Contesting the Power To Take Property

No answer is required in a condemnation proceeding in Illinois, but if one is filed, it may be stricken on motion. *Chicago, T.H. & S.E. Ry. v. Greenfield*, 268 Ill. 94, 108 N.E. 750, 750 (1915). The proper pleading to challenge the right of the condemnation is a traverse and motion to dismiss. *Village of Skokie v. Gianoulis*, 260 Ill.App.3d 287, 632 N.E.2d 106, 113, 198 Ill.Dec. 47 (1st Dist. 1994).

Village of Cary v. Trout Valley Ass'n, 282 Ill.App.3d 165, 667 N.E.2d 1082, 1085, 217 Ill.Dec. 689 (2d Dist. 1996). The pleading challenging the condemnation of property by eminent domain must be filed before the jury is empaneled to determine the award of just compensation. *Chicago Housing Authority v. Berkson*, 415 Ill. 159, 112 N.E.2d 620, 621 (1953). Once a traverse and motion to dismiss is filed, the court must conduct an evidentiary hearing, and the condemning authority has the burden of establishing a prima facie case of the disputed allegations. See *Cary*, *supra*, 667 N.E.2d at 1085. A traverse denies the allegations of the complaint to condemn and places on the plaintiff the burden of sustaining them. *Id.* The traverse generally challenges a plaintiff's right to condemn the landowner's property. *Illinois State Toll Highway Authority v. South Barrington Office Center*, 2016 IL App (1st) 150960, ¶18, 58 N.E.3d 703, 405 Ill.Dec. 442.

The hearing of a traverse motion is no different than any other trial. Often the parties make the tactical mistake of believing that the hearing is similar to that of a motion hearing and save information on some disputed facts for the jury. However, the traverse hearing is the proper time and opportunity to raise all disputed questions of necessity, public purpose, bona fide attempt to agree, authority, and legal description. See generally *Southwestern Illinois Development Authority v. National City Environmental, L.L.C.*, 304 Ill.App.3d 542, 710 N.E.2d 896, 238 Ill.Dec. 99 (5th Dist. 1999) (*Southwestern I*), *aff'd*, *Southwestern Illinois Development Authority v. National City Environmental, L.L.C.*, 199 Ill.2d 225, 768 N.E.2d 1, 263 Ill.Dec. 241 (2002) (*Southwestern II*). Questions as to the necessity of the taking, public purpose, bona fide attempt to agree, legal description, and the scope of the project are arguments that should always be considered carefully and analyzed in any condemnation traverse motion. See 735 ILCS 30/10-5-10.

Any of the allegations contained in the complaint to condemn can provide opportunities to challenge the complaint. The complaint must be analyzed carefully to determine whether the condemning authority has the jurisdictional and statutory authority to proceed with the eminent domain proceedings and whether it has satisfied all the pre-filing requirements. See *Department of Transportation ex rel. People v. Hunziker*, 342 Ill.App.3d 588, 796 N.E.2d 122, 277 Ill.Dec. 407 (3d Dist. 2003). "Necessity" has been held by the Illinois Supreme Court to mean that which is useful to the public, and it is not limited to absolute physical necessity. *Department of Public Works & Buildings v. Lewis*, 411 Ill. 242, 103 N.E.2d 595, 597 (1952). However, necessity is not a judicial question and is not to be interfered with unless to prevent a clear abuse of eminent domain power. *Id.*

The Eminent Domain Act establishes the requirement that eminent domain powers be used for a public purpose (*i.e.*, a “public use”). 735 ILCS 30/10-5-10(a)(i). The Illinois Supreme Court set forth the standards in *Southwestern II, supra*. All persons must have an equal right to the use of the property. *GridLiance Heartland LLC v. Illinois Commerce Commission*, 2023 IL App (5th) 230073, ¶46, 240 N.E.3d 45, 476 Ill.Dec. 137. Often, with local municipalities, there is an ulterior motive that should be analyzed in discovery. Thus, the benefits from the taking cannot be confined to a privileged few and must be for all people or classes of people. *Chicago Steel Rule Die & Fabricators Co. v. Malan Construction Co.*, 200 Ill.App.3d 701, 558 N.E.2d 341, 146 Ill.Dec. 378 (1st Dist. 1990).

The Eminent Domain Act requires that before an action in eminent domain can be filed, an effort must be made to agree on compensation unless the owner of the property is incapable of consenting, the owner’s name or residence is unknown, or the owner is a nonresident of the state. 735 ILCS 30/10-5-10(a). Generally, the condemning authority specifies a time during which its offer may be accepted. The Illinois Department of Transportation and state agencies are required to give advance warning of 60 days within which to start preparation. 735 ILCS 30/10-5-15(d). However, the public body is not required to tender a formal contract-type offer, and the offer may be contingent on final approval by the public body. *See Lake County Forest Preserve District v. First National Bank of Waukegan*, 213 Ill.App.3d 309, 571 N.E.2d 1115, 157 Ill.Dec. 96 (2d Dist. 1991).

The condemnor must provide an accurate legal description of the property to be acquired. 735 ILCS 30/10-5-10. The enabling ordinance and the complaint to condemn must both include a precise legal description, and failure to specifically identify the property being condemned in the enabling ordinance is fatal to the condemnation action. *Illinois State Toll Highway Authority v. DiBenedetto*, 275 Ill.App.3d 400, 655 N.E.2d 1085, 1089, 211 Ill.Dec. 702 (1st Dist. 1995). The legal description is often the Achilles’ heel of the condemning authority. *Forest Preserve District of DuPage County v. Miller*, 339 Ill.App.3d 244, 789 N.E.2d 916, 273 Ill.Dec. 742 (2d Dist. 2003). To allege that the condemning authority failed to make a bona fide attempt to agree in good faith with the property owner on compensation is another ground for dismissal of the complaint to condemn. *See Forest Preserve District of Will County v. Marquette National Bank*, 208 Ill.App.3d 823, 567 N.E.2d 635, 153 Ill.Dec. 677 (3d Dist. 1991). A condemnor must establish a prima facie case and offer some proof on the disputed facts. *Southwestern II, supra*, 768 N.E.2d at 23.

In *People ex rel. Department of Transportation v. Kotara, L.L.C.*, 379 Ill.App.3d 276, 884 N.E.2d 1235, 318 Ill.Dec. 964 (3d Dist. 2008), the core issue concerned whether a court may forbid a property owner from challenging the good-faith basis of IDOT’s negotiations by attacking the methodology used to determine the whole value and other calculations based on the value of the parcel. During the cross examination of IDOT’s appraiser, the defendant sought to establish that the values of the property were established without following industry standards published in The Appraisal Foundation, UNIFORM STANDARDS OF PROFESSIONAL APPRAISAL PRACTICE (USPAP) and IDOT’s LAND ACQUISITION POLICIES AND PROCEDURES MANUAL.

PRACTICE POINTER

- ✓ The current version of USPAP is available for purchase at www.appraisal.foundation.org/imis/taf/standards/appraisal_standards/uniform_standards_of_professional_appraisal_practice/taf/uspap.aspx. The current version of IDOT's LAND ACQUISITION POLICIES AND PROCEDURES MANUAL is available at <https://public.powerdms.com/idot/documents/1994188>, as are manual updates and forms.
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The trial court subsequently refused to allow the defense to call an expert witness on the issue of good faith and would not allow counsel to make an offer of proof in order to perfect the record for purposes of appeal. *Kotara, supra*, 884 N.E.2d at 1243. The court concluded noncompliance with USPAP and the LAND ACQUISITION POLICIES AND PROCEDURES MANUAL constituted a relevant basis for challenging whether the negotiations in the case satisfied the “good-faith” requirements. 884 N.E.2d at 1244. The court’s ruling to the contrary was erroneous, and the matter was remanded for the parties to fully develop the issue of good-faith negotiations without unreasonable restrictions. *Id.* NOTE: This is a fact-bound opinion that discusses the history of this case and the details of the parties’ negotiations, as well as the events at the hearing on the quick-take request, in considerable detail. Counsel should read this opinion in its entirety.

PRACTICE POINTER

- ✓ With mass appraisal techniques by the condemning authority and old engineering plans, one should carefully analyze both the appraisals and the engineering thoroughly. IDOT appraisals always are done on a standard, limited, summary fashion and do not consider all the factors of the take. Additionally, one should never accept either the appraiser or the engineer with *voir dire* before agreeing to the fact they are an expert.
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Speaking in a 29-page opinion, the First District held that when the city brought a condemnation action that was dismissed as an attempted excess taking and the city thereafter brought a second action seeking to take one half of the land that it sought to take in the first action, the dismissal of the first action had no *res judicata* effect and did not constitute a defense to the second taking. See *City of Chicago v. Midland Smelting Co.*, 385 Ill.App.3d 945, 896 N.E.2d 364, 324 Ill.Dec. 578 (1st Dist. 2008) (discussing rules pertaining to substitute condemnation). See §5.26 below for a sample form of a traverse and motion to dismiss.

C. [5.16] Discovery

The fundamental issue in eminent domain cases is the fair market value of the property being taken. The eminent domain attorney should not rely solely on expert testimony. Therefore, it is recommended that both sides to the eminent domain case serve interrogatories and production requests on each other (when filing an appearance) to discover facts or documents that may be

relevant to the condition of the property, including comparable sales, construction plans, and other facts that may be relevant at trial. To achieve a good starting point for understanding the condemning party's case, the owner's attorney should serve a notice to produce on the other side. Some of the items that may be requested, depending on the circumstances, are as follows:

1. all written appraisals (*Department of Transportation v. Western National Bank of Cicero*, 63 Ill.2d 179, 347 N.E.2d 161, 165 (1976));
2. project sales books (*see Department of Business & Economic Development of State of Illinois ex rel. People v. Pioneer Trust & Savings Bank*, 39 Ill.App.3d 8, 349 N.E.2d 467 (2d Dist. 1976));
3. all surveys of the whole property or part taken, parcel plats, and plans of the construction of the improvements (*see Sanitary Dist. of Rockford v. Johnson*, 343 Ill. 11, 174 N.E. 862 (1931));
4. all engineering studies on the property, including but not limited to floodplain studies, reconstruction estimates, soil reports, soil borings, cost estimates for proposed improvements, and environmental studies;
5. all land use studies or plans;
6. all drawings depicting a possible use of the subject property or the remainder;
7. all maps, photographs, or aerial photographs depicting the subject property or the immediate area;
8. all ordinances, resolutions, or minutes of meetings generated by various public bodies regarding acquisition of the subject property by the condemnor;
9. all contracts, deeds, closing statements, and transfer tax declaration sheets regarding comparable sales or the purchase of the subject property;
10. all leases involving the subject property;
11. all traffic studies and parking studies; and
12. the title report involving the subject property.

In *Department of Transportation of State of Illinois v. Tucker*, 366 Ill.App.3d 739, 853 N.E.2d 749, 304 Ill.Dec. 672 (3d Dist. 2006), the court considered written appraisals. *See also Western National Bank of Cicero, supra*, 347 N.E.2d at 165. In *Tucker*, IDOT filed a condemnation action to take three quarters of an acre of the owner's 160-acre property. 853 N.E.2d at 750. IDOT first made a statutory offer of \$11,800 of preliminary just compensation (as against the owner's opinion of \$56,753). *Id.* The owner demanded a copy of IDOT's appraisal report, relying on the statutory language that he was entitled to IDOT's basis for computing the offered just compensation. *Id.* See 735 ILCS 30/10-5-15. The trial court denied the request.

The owner relied on an earlier case, *Department of Transportation ex rel. People v. Hunziker*, 342 Ill.App.3d 588, 796 N.E.2d 122, 134, 277 Ill.Dec. 407 (3d Dist. 2003), which the Third District stated should be applied only prospectively, but the owner in *Tucker* argued *Hunziker* should be applied retroactively. The court concluded that the statutory language — “the basis for computing [the offer]” — did not encompass a formal appraisal report and could be satisfied by listing factors such as the date of valuation, the amount to be paid for damage to the owner’s remaining property, and the highest and best use. *Tucker, supra*, 853 N.E.2d at 752 – 753. Had the legislature intended to require a full appraisal report, it would have so provided in the statute. *Id.* See also 735 ILCS 30/10-5-15.

Illinois Supreme Court Rule 213(f) requires a party to disclose three types of witnesses: (1) lay witnesses; (2) independent expert witnesses; and (3) controlled expert witnesses. S.Ct. Rule 213(f). A “lay witness” is an individual who will give only fact and lay opinion testimony. S.Ct. Rule 213(f)(1). An “independent expert witness” is an individual who will give expert testimony and is not a party, a party’s current employee, or an expert retained by a party. S.Ct. Rule 213(f)(1). A “controlled expert witness” is an individual who will give expert testimony and is a party, a party’s current employee, or an expert retained by a party. S.Ct. Rule 213(f)(3). There is a duty under Rule 213(f) to disclose all trial witnesses and their testimony upon written interrogatory. S.Ct. Rule 213(f).

In *The Dos and Don’ts of Rule 213 Opinion Witness Discovery*, Daniel P. Wurl offers the following advice, which is modified here to reflect the changes made by the July 1, 2002, revision of Rule 213 but which remains sound advice:

1. Serve Rule 213(f) interrogatories in every case.
2. Provide detailed answers to Rule 213(f) interrogatories.
3. Disclose your witnesses before the court-imposed deadline or risk summary judgment.
4. If appropriate, disclose the parties as witnesses.
5. Disclose independent experts and the subject on which they will testify and the opinions you expect to elicit from them.
6. Disclose another party’s witnesses as your own if you expect to call them at trial.
7. Disclose your rebuttal witnesses and their opinions.
8. Disclose the identity of your witnesses and their opinions in a timely manner.
9. Seasonably supplement disclosure.
10. Supplement even the “bases” of your witnesses’ opinions.
11. Do not elicit previously undisclosed opinions at trial lest you risk reversal of a favorable verdict. Daniel P. Wurt, *The Dos and Don’ts of Rule 213 Opinion Witness Discovery*, 89 Ill.B.J. 22 (2001).

In addition, if the deponent's discovery is not completed at the deposition, reserve time to depose the opponent's expert on the eve of trial. And, when providing for discovery, the Supreme Court Rules also provide for case management conferences. S.Ct. Rule 218(a). All rules for discovery apply in eminent domain as in other civil proceedings. *See City of Bloomington v. Quinn*, 114 Ill.App.2d 145, 252 N.E.2d 10 (4th Dist. 1969).

V. [5.17] TRIAL AND EVIDENCE

An eminent domain trial can be a very satisfying experience for the trial lawyer. If the case proceeds to a jury trial, the primary issue is that of just compensation for the landowner. If representing the landowner, counsel should remember that this is the landowner's way of getting his or her day in court. However, if representing the condemner, counsel must understand that it is a way to make sure that the government is limiting its spending. Generally, counsel should analyze thoroughly all aspects of the case before going to trial and always go through the entire file one last time prior to the trial.

A. [5.18] Preliminary Motions

Evidentiary issues often arise concerning valuation of the real estate. Motions in limine or similar types of motion should be filed well in advance of trial. *See Village of Round Lake v. Amann*, 311 Ill.App.3d 705, 725 N.E.2d 35, 244 Ill.Dec. 240 (2d Dist. 2000). Motions in limine are recognized as part of court procedure in Illinois because correct use of these motions promotes a jury verdict that does not result from prejudicial evidence being introduced at trial. *Department of Public Works & Buildings of State of Illinois v. Roehrig*, 45 Ill.App.3d 189, 359 N.E.2d 752, 759, 3 Ill.Dec. 893 (5th Dist. 1976).

PRACTICE POINTER

- ✓ Well in advance of trial, depose any witness that your opponent intends to use to present appraisal, engineering, or planning evidence as support for your motion in limine. Deposition testimony should be attached as exhibits to your pleadings.
-

B. [5.19] Voir Dire

S.Ct. Rule 234 governs the conduct of the voir dire examination of the jurors. Rule 234 provides that the court conducts the voir dire examination of prospective jurors with questions it thinks appropriate, touching on the prospective jurors' competency to serve in the case on trial. S.Ct. Rule 234. In *St. Clair Housing Authority v. Quirin*, 379 Ill. 52, 39 N.E.2d 363 (1942), the Illinois Supreme Court reversed judgment on the verdict in the lower court because of improper voir dire examination of jurors. The court pointed out that the jury in a condemnation case is called only for the purpose of finding values and fixing damages; the narrow issue thus to be submitted to the jury cannot be broadened, nor can the jury's verdict be influenced by the interjection of immaterial matters, especially matters calculated to be prejudicial. Improper voir dire examination is grounds for reversal. *City of Quincy v. V.E. Best Plumbing & Heating Supply Co.*, 17 Ill.2d 570, 162 N.E.2d 373, 377 (1959).

During voir dire of the pool of potential jurors, if the trial court permits counsel to question the jurors, counsel's strategy or theme of the case should be followed or woven into the questioning of potential jurors. The Illinois Code of Civil Procedure provides that each side is entitled to five peremptory challenges. 735 ILCS 5/2-1106(a). Counsel should use these peremptory challenges if he or she feels that certain jurors may not serve the best interests of the client.

PRACTICE POINTER

- ✓ During voir dire of the pool of potential witnesses in an eminent domain proceeding, if there is going to be a major issue (*i.e.*, witness, purchase price, damages, or expertise), counsel should raise these points to the potential jurors to observe their reactions and responses before determining whether a peremptory challenge should be used.
-

C. [5.20] Questions of Law

The opening and closing arguments in an eminent domain case provide counsel with the opportunity to present a road map of the case to the jury that has been impaneled. After the opening statements, the jury may view the property by request of either party. 735 ILCS 30/10-5-45. The eminent domain lawyer should have determined previously the route to and from the property that seems most favorable. When a jury is hearing the question of compensation, either party is entitled to have the jury view the property being condemned, and the jury's view of the property is evidence. *Sanitary Dist. of Rockford v. Johnson*, 343 Ill. 11, 174 N.E. 862, 864 (1931). The jury can go out to the land and examine the property in person. *Id.* However, a verdict cannot be based on the jury view alone. *City of Benton, Illinois v. Odom*, 123 Ill.App.3d 991, 463 N.E.2d 785, 789, 79 Ill.Dec. 231 (5th Dist. 1984).

In an eminent domain trial, the only question for the jury to decide is the just compensation to be paid to the owner of the property sought to be condemned. *Sanitary Dist. of Rockford, supra*, 174 N.E.2d at 864. "Just compensation" is the fair market value of the subject property at its highest and best use on the date of the filing of the complaint to condemn. *Department of Public Works & Buildings v. Association of Franciscan Fathers of State of Illinois*, 69 Ill.2d 308, 371 N.E.2d 616, 618, 13 Ill.Dec. 681 (1977). The Eminent Domain Act provides:

[T]he fair cash market value of property in a proceeding in eminent domain shall be the amount of money that a purchaser, willing, but not obligated, to buy the property, would pay to an owner willing, but not obliged, to sell in a voluntary sale. 735 ILCS 30/10-5-60.

All other matters are questions of law for the determination of the judge either before or after the jury trial. The condemnor has the burden of proving fair market value of the property to be taken. *County of Cook v. Holland*, 3 Ill.2d 36, 119 N.E.2d 760, 762 (1954). The burden is on the property owner to prove any particular element that the owner feels materially increases the value of the property. *Department of Public Works & Buildings v. Finks*, 10 Ill.2d 15, 139 N.E.2d 267, 269 (1956).

PRACTICE POINTER

- ✓ Always find a local broker or developer who is intimately familiar with the area surrounding the subject property and who has sold or built in the area to testify to the situation in the area and current trends.
-

When market value of the property is the criterion of compensation (as it is in the majority of eminent domain trials), the principal means of establishing this value are (1) by testimony of appraisers or experts or opinion testimony and (2) by sales of the property being condemned or of similar properties in the area of the subject property. However,

the question of the market value of land is not a question of art or science, but . . . a question of fact to be proved like any other fact, and . . . any person who is acquainted with the land and has knowledge of real estate values in the vicinity is competent to testify as to its value. *Trustees of Schools of Township No. 42 ex rel. Board of Education of School District No. 57, Cook County v. Schroeder*, 23 Ill.2d 74, 177 N.E.2d 178, 180 (1961).

The property owner is entitled to have its property valued for its highest and best use, which may be its current use, the use to which the property is actually put, or

any capacity for future use which may be anticipated with reasonable certainty, though dependent upon circumstances which may possibly never occur . . . if it in fact enhanced the market value of the land in its present condition and state of improvement. The future prospective use affecting value must be a present capacity for a use which may be anticipated with reasonable certainty and made the basis of an intelligent estimate of value. *Crystal Lake Park Dist. v. Consumers' Co.*, 313 Ill. 395, 145 N.E. 215, 219 (1924).

The most effective evidence in an eminent domain proceeding is comparable sales of the property being condemned or sales of similar property in the immediate area in which the subject property is located. Valuation opinions by appraisers can vary widely; comparable sales evidence provides a measure to test the appraiser's valuation opinion. Comparable sales evidence of property in the neighborhood is admissible if the sales transaction is bona fide, is voluntary, involves land similar to the subject property, and was made at or about the same time as the valuation date. *City of Chicago v. Blanton*, 15 Ill.2d 198, 154 N.E.2d 242, 244 (1958). Whether the sale meets the requirements is largely within the discretion of the trial court, but this discretion is not unlimited. *City of Evanston v. Piotrowicz*, 20 Ill.2d 512, 170 N.E.2d 569, 575 (1960). In *Department of Transportation of State of Illinois ex rel. People v. Prairie Travler, Inc.*, 368 N.E.2d 144, 148 (4th Dist. 1977), the appellate court pointed out that the following factors were to be considered in deciding whether a former sale was admissible:

1. whether the sale was bona fide;
2. whether the sale was voluntary;

3. whether the sale was not too remote in time; and
4. whether the sale was substantially the same in character.

“Similar” does not mean “identical”; rather, “similar” means that there are enough points of likeness to allow the jury to make a comparison even if there are several dissimilarities. *Morton Grove Park District v. American National Bank & Trust Company of Chicago*, 39 Ill.App.3d 426, 350 N.E.2d 149, 158 (1st Dist. 1976), citing *Piotrowicz, supra*, 170 N.E.2d at 766. A copy of the transferee declaration and a certified copy of the deed should be offered into evidence at trial through the valuation witness or the owner of the property. Additionally, the reasonable probability of rezoning is a proper factor to consider in establishing the market value of the real property being condemned. *Department of Public Works & Buildings v. Rogers*, 39 Ill.2d 109, 233 N.E.2d 409, 412 (1968).

D. [5.21] Jury Instructions

Instructions in eminent domain trials are covered by the Illinois Pattern Jury Instructions — Civil (I.P.I. — Civil). The same principles apply to instructions in condemnation cases as in other cases. The court should not attempt to interfere with the province of the jury by instructing them as to the comparative weights of different kinds of evidence. It is error to call attention to the evidence of one side only on a particular fact or item. *Department of Public Works & Buildings v. Maddox*, 21 Ill.2d 489, 173 N.E.2d 448, 451 (1961). The instructions in an eminent domain case include the following:

1. cautionary instructions:
 - a. I.P.I. — Civil No. 1.01 (as modified by I.P.I. — Civil No. 300.01);
 - b. I.P.I. — Civil No. 1.02; and,
 - c. I.P.I. — Civil No. 2.01;
2. issue instructions (I.P.I. — Civil Nos. 300.10 through 300.24);
3. measure of damages instructions (I.P.I. — Civil Nos. 300.42 through 300.60);
4. range of verdict instruction (I.P.I. — Civil No. 300.61);
5. verdict form instructions (I.P.I. — Civil Nos. 300.70 through 300.76.1);
6. definitional instructions:
 - a. I.P.I. — Civil No. 300.80 (just compensation);
 - b. I.P.I. — Civil No. 300.81 (fair cash market value);

- c. I.P.I. — Civil No. 300.84 (highest and best use); and
 - d. I.P.I. — Civil No. 300.87 (easement)
7. Instructions regarding the reasonable probability of rezoning and stipulations;
- a. I.P.I. — Civil No. 300.85 (reasonable probability of rezoning (presented to the judge prior to the trial to see if it is applicable for the trial)); and
 - b. I.P.I. — Civil No. 300.53 (effect of agreement with respect to damages (stipulations used primarily by the condemnor to limit the taking on the owner's property that can be significant in reducing damages to the remainder)).

PRACTICE POINTER

- ✓ There are few novel issues in eminent domain trials. Revising an I.P.I. instruction when you feel that the evidence on your side has been persuasive risks reversal of a favorable result, retrying the entire case, and giving your opponent another bite of the apple. However, if you feel prejudiced by a certain issue during trial, by all means you should attempt to revise the I.P.I. instruction.
-

E. [5.22] Closing Arguments

Closing arguments have become both summation and argument and much more important under the Illinois Supreme Court's ruling in *City of Chicago v. Anthony*, 136 Ill.2d 169, 554 N.E.2d 1381, 144 Ill.Dec. 93 (1990). Typically, closing arguments interweave various aspects of the case in that not only is the evidence reviewed but also inferences are drawn, strengths and weaknesses are explained, and conclusions are argued. All of the efforts to undermine the credibility of the opponent's expert witness at each phase — discovery pretrial, jury voir dire, opening statements, expert voir dire, cross and direct examination, and rebuttal — should be presented to the jury. In an eminent domain case, the credibility of an expert witness is often dispositive of the case. Every effort should be made at each stage of the trial to undermine the testimony, opinions, and supporting data of the opponent's expert witness.

F. [5.23] Appeals

As noted in §5.14 above, the only appealable interlocutory findings in quick-take proceedings are the court's findings that (1) the plaintiff has the authority to exercise the right of eminent domain, (2) the property sought to be taken is subject to the exercise of this right, and (3) this right is not being improperly exercised. 735 ILCS 30/20-5-10(b). See §5.14 above discussing agency quick-take power.

The Illinois Supreme Court's decision in *Department of Transportation ex rel. People v. 151 Interstate Road Corp.*, 209 Ill.2d 471, 810 N.E.2d 1, 284 Ill.Dec. 348 (2004), resolved the split in

the appellate courts as to whether the condemning authority's duty to negotiate in good faith before filing an eminent domain action was susceptible to interlocutory appeal. The court held that the question whether a condemnor has negotiated in good faith bears directly on whether the condemnor was exercising its right of eminent domain improperly and is therefore a proper subject for interlocutory review under §20-5-10(b).

The procedure for prosecuting an eminent domain appeal is governed by the Illinois Supreme Court Rules and is common to all appeals. See generally CIVIL APPEALS: STATE AND FEDERAL (IICLE®, 2022). Pursuant to S.Ct. Rule 301, every final judgment is appealable as of right and is initiated by filing a notice of appeal. S.Ct. Rule 301. No other step is jurisdictional. *Id.* Failure to appeal from an order entered within 30 days, or upon good cause shown, constitutes a waiver of the right to appeal on the issue after the determination of preliminary just compensation. *Department of Public Works & Buildings of State of Illinois ex rel. People v. Exchange National Bank of Chicago*, 40 Ill.App.3d 623, 356 N.E.2d 376, 380, 1 Ill.Dec. 250 (2d Dist. 1976). See also 735 ILCS 30/20-5-10(b).

Questions of law and decisions to deny a motion for judgment n.o.v. are reviewed de novo. See *Department of Transportation v. Chicago Title & Trust Co.*, 303 Ill.App.3d 484, 707 N.E.2d 637, 645, 236 Ill.Dec. 510 (1st Dist. 1999); *Department of Transportation v. Drury Displays, Inc.*, 327 Ill.App.3d 881, 764 N.E.2d 166, 171, 261 Ill.Dec. 875 (5th Dist. 2002).

Decisions on the admissibility of evidence, including valuation evidence, are not to be disturbed unless the trial court committed a clear abuse of discretion. *City of Quincy, Illinois v. Diamond Construction Co.*, 327 Ill.App.3d 338, 762 N.E.2d 710, 714, 261 Ill.Dec. 141 (4th Dist. 2002). Jury instructions are also reviewed according to the abuse of discretion standard. See *Department of Transportation v. Bolis*, 313 Ill.App.3d 982, 730 N.E.2d 1152, 246 Ill.Dec. 687 (3d Dist. 2000).

PRACTICE POINTER

- ✓ During the tempest of trial and evidence, if you believe that an appealable issue is involved, be sure to make the proper objection to preserve it for your record on appeal.
-

Just compensation awards are affirmed if within the range of permissible evidence and not attributable to passion, prejudice, or clear mistake. Even if the trial court adopts an improper method of valuation, the determination on appeal is whether the award is adequate to make the owner whole. See *Village of Round Lake v. Amann*, 311 Ill.App.3d 705, 725 N.E.2d 35, 244 Ill.Dec. 240 (2d Dist. 2000).

A jury verdict that is within the range of the evidence, when the jury views the property, is not disturbed on appeal unless there has been a clear and palpable mistake, a showing that the verdict resulted from passion or prejudice, or an erroneous ruling by the trial court that misled the jury and amounted to prejudicial error. *Bolis, supra*, 730 N.E.2d at 1155, citing *Chicago Title & Trust, supra*, 707 N.E.2d at 648.

V. APPENDIX — SAMPLE FORMS

A. [5.24] Interrogatories to Plaintiff

IN THE CIRCUIT COURT OF _____ COUNTY, ILLINOIS
_____ DEPARTMENT, LAW DIVISION

_____ ,)	
)	
Plaintiff,)	
)	
v.)	Case No.: _____
)	
_____ ,)	
)	Condemnation
Defendants.)	
)	

INTERROGATORIES TO PLAINTIFF

To: [name] [address]
[city, state, zip]

NOW COME the Defendants, _____ (Defendants), by and through their attorneys, _____, and pursuant to Illinois Supreme Court Rules 201 and 213 hereby request that Plaintiff, _____ (Plaintiff), answer the following interrogatories under oath and forward the answers to the offices of _____ at [address] within 28 days from service hereof.

DEFINITIONS

1. As used herein, "Plaintiff" shall mean _____ and all agents, expert and lay witnesses, consultants, and employees of the Plaintiff.

2. As used herein, "Subject Property" shall mean the property that is the subject of Plaintiff's Complaint for Condemnation and any remainder thereof.

3. As used herein, "documents" means any writing, graphic matter, and/or other object and/or tangible thing whether handwritten, printed, recorded, or produced by photographic or other process, including but not limited to letters, reports, other written communications, correspondence, telegrams, memoranda, summaries, records of oral conversations, original or preliminary notes, diaries, calendars, travel records or itineraries, forecasts, analyses, projections, work papers, photographs, slides, motion pictures, tape recordings, models, statistical statements, graphs, laboratory and engineering reports and notebooks, charts, plans, drawings, minutes or records of meetings, minutes or records of conferences,

expressions or statements of policy, lists of persons attending meetings or conferences, reports and/or summaries of investigations, opinions or reports of consultants, appraisals, evaluations, records, summaries of negotiations, contracts, agreements, leases, loan agreements, checks, bank statements, income tax withholding statements, income tax returns, brochures, pamphlets, advertisements, circulars, trade letters, press releases, invoices, and receipts, including preliminary drafts or revisions or copies of any of the foregoing if the copy is in any way different from the original.

4. As used herein, “day” or “date” shall mean the exact day, month, and year if ascertainable or, if not, the best available approximation (including relationship to other events).

5. As used herein, “person” shall mean an individual, firm, partnership, corporation, proprietorship, joint venture, association, or any other organization or entity.

6. As used herein, “and” and “or” shall be construed conjunctively and disjunctively so as to acquire the broadest meaning possible.

7. As used herein, “relating” or “related” to any given subject shall mean, without limitation, anything that constitutes, contains, embodies, reflects, identifies, states, refers directly or indirectly to, or is in any way relevant to the particular subject matter identified.

8. As used herein, “identify” when used in reference to

- (a) an individual shall mean to state his or her full name, present or last known residential and business addresses, present or last known position and/or business affiliation, and occupation;
- (b) a firm, partnership, corporation, proprietorship, joint venture, association, or other organization or entity shall mean to state its full name, present or last known address, and place of incorporation or formation and to specify each agent that acted for it with respect to the matters relating to the interrogatory or answer;
- (c) a document or thing shall mean to state the date, title (if any), each author, each recipient, type of document or thing (*i.e.*, publication, letter, memorandum, book, telegram, chart, etc.) or some other means of identifying it, and its present location or custodian;
- (d) a communication shall mean to state its date and place and the persons who participated in it or who were present during any parts of it or who have knowledge about it.

9. As used herein, “including” shall be construed to mean “including but not limited to.”

10. The singular form of any noun or pronoun includes, when appropriate, the plural thereof; the use of the masculine gender includes, when appropriate, the feminine gender; and the use of any neutral gender noun or pronoun includes, when appropriate, the masculine and feminine genders.

INSTRUCTIONS

1. Pursuant to Illinois Supreme Court Rule 201(n), if you decline to fully produce or identify a document requested hereunder on the ground of privilege or protection, you are requested to state with respect to each such document:

- (a) the date thereof;
- (b) the author or originator thereof;
- (c) the identities of the attorney and client involved;
- (d) the identities of those receiving copies thereof;
- (e) the type of document (*e.g.*, memorandum, letter, contract, etc.);
- (f) the subject matter thereof; and
- (g) the specific ground on which each such document is considered privileged or protected.

2. These interrogatories are to be regarded as continuing in nature. At such time as you receive information that a prior answer is incomplete, inaccurate, or misleading, a supplementary answer is requested.

INTERROGATORIES

INTERROGATORY #1: Identify and provide a copy of the ordinance(s) or other legal authority under which Plaintiff is claiming it is authorized to acquire Defendants' property by condemnation.

INTERROGATORY #2: Explain the specific purpose(s) for which Defendants' property is being sought by Plaintiff.

INTERROGATORY #3: Explain the basis for Plaintiff's offer to purchase the Subject Property, including any and all comparable sales considered by Plaintiff or its appraisers.

INTERROGATORY #4: What does Plaintiff contend is the exact land area of the Subject Property?

- INTERROGATORY #5:** What does Plaintiff contend are the improvements, if any, on or under the Subject Property?
- INTERROGATORY #6:** Describe specifically the interest(s) being sought by Plaintiff, including the nature of each interest sought, the extent of the interests sought, the duration of the interests sought, and the specific purpose for which each interest is being sought.
- INTERROGATORY #7:** Describe what, if any, rights or interests Defendants will retain in the Subject Property being sought by Plaintiff.
- INTERROGATORY #8:** Is Plaintiff taking only surface rights to the Subject Property sought, or is Plaintiff taking more than just surface rights? If Plaintiff is taking more than just surface rights, explain whether Plaintiff is taking subsurface, air, and/or other rights in connection with the Subject Property.
- INTERROGATORY #9:** State any and all covenants, easements, or restrictions of record that are applicable to the Subject Property.
- INTERROGATORY #10:** Other than the interest(s) of [interested parties], explain what Plaintiff believes to be the interests of each of Defendants in the Subject Property.
- INTERROGATORY #11:** Pursuant to Illinois Supreme Court Rule 213(f),
- (a) identify all lay witnesses who will offer opinion testimony at trial; and
 - (b) identify the subject on which each witness will testify.
- INTERROGATORY #12:** Pursuant to Illinois Supreme Court Rule 213(f),
- (a) identify all independent expert witnesses who will offer opinion testimony at trial; and
 - (b) state the subject matters on which each independent expert witness is expected to testify.
- INTERROGATORY #13:** Pursuant to Illinois Supreme Court Rule 213(f),
- (a) identify all controlled expert witnesses who will offer opinion testimony at trial;
 - (b) state the subject matters on which each controlled expert witness is expected to testify;

- (c) state the conclusions and opinions of each controlled expert witness and the bases therefore, including any facts relied on, the background or training of each such witness, and any research performed and used as a basis of any opinion to be offered at trial;
- (d) state the qualifications of each controlled expert witness; and
- (e) provide all reports prepared by or relied on by each controlled expert witness.

INTERROGATORY #14: Identify all other offers and/or agreements made by Plaintiff within the last three years for the acquisition of other properties within a ten-mile radius of the Subject Property.

INTERROGATORY #15: Identify all sales of real estate that Plaintiff and/or its appraisers or other witnesses believe to be comparable to the Subject Property.

INTERROGATORY #16: Have any appraisers or valuation experts for Plaintiff appraised any property located within five miles of the Subject Property within ten years prior to the filing of the Complaint for Condemnation herein? If so, state for whom the appraisal was made, the reason for the appraisal, the location, size, zoning, and appraised value of the property, the date of the appraisal, and the names and addresses of the persons who possess the appraisals.

Defendants

By: _____
Attorney for Defendants

B. [5.25] Request for Production of Documents

[Caption]

REQUEST FOR PRODUCTION OF DOCUMENTS

To: [name] [address]
[city, state, zip]

NOW COME the Defendants, _____ (Defendants), by and through their attorneys, _____, and pursuant to Illinois Supreme Court Rules 201 and 214, hereby request that Plaintiff, _____ (Plaintiff), produce within 28 days from service hereof, each document set forth below for inspection and copying at the offices of _____ at [address].

DEFINITIONS AND INSTRUCTIONS

1. The term “communications” means any oral or written exchange of words, thoughts, or ideas, whether person-to-person, in a group, by telephone, by letter, by telex, or by another process. When in writing, such communications shall include, without limitation, printed, typed, handwritten, or other readable documents, correspondence, memoranda, reports, contracts, drafts, both initial and subsequent, diaries, logbooks, minutes, notes, studies, surveys, and forecasts.

2. The word “document(s)” means, without limitation, the following items, whether printed, typed, handwritten, recorded, stored or reproduced by any process, or otherwise prepared, including originals, copies, and copies not identical to the original (*e.g.*, because handwritten notes appear thereon or are attached thereto) that are in your possession, custody, or control or in the possession of your attorneys or agents or anyone acting on your behalf: correspondence, including telegrams and letters; communications, including interoffice and intra-corporate communications; instructions; memoranda including memoranda of telephonic and personal conversations; contracts; offers; notations; reports; newspaper articles; advertisements; newsletters; brochures; posters; pamphlets; studies; price lists; surveys; accounts receivable; ledgers; estimates; records, including sales records; schedules; sales projections; summaries, including summaries of records, meetings, and conversations; diaries; appraisals; valuations; comparable sales lists; invoices; minutes of meetings; data sheets; shipping tickets; bills of lading; samples; prototypes; graphic materials, including motion pictures, videos, drawings, photographs, sketches, graphs, and charts; tape and sound recordings; computer tapes and printouts; and other data compilations from which information can be obtained.

3. In the event that any document requested herein is not presently in your possession or subject to your control, identify each such document by its date, author, addressee, and title and identify each person who was or is in possession of the original or a copy.

4. With respect to any document that Plaintiff withholds on a claim of privilege, provide a statement signed by an attorney representing Plaintiff claiming the privilege, setting forth as to each such document:

- (a) the name and address of the sender(s) of the document;
- (b) the name and address of the author(s) of the document;
- (c) the name and address of person(s) to whom copies were sent or who are or are believed to be in possession of a copy or copies;
- (d) the job title of every person named in (a), (b), and (c) above;
- (e) the date of the document;
- (f) the date on which the document was received by each person to whom the document was sent;
- (g) a brief description of the nature and subject matter of the document; and
- (h) the statute, rule, or decision that is claimed to give rise to the privilege.

5. Each document request listed herein shall be construed to include any documents that are later discovered by Plaintiff.

6. The terms “with respect to,” “referring to,” “concerning,” “relating to,” “refer to,” or “relate to” mean pertaining to, reporting on, regarding, showing or indicating knowledge of, or mentioning, in any manner, either directly or indirectly, or tending to establish or negate a particular fact.

7. “You” or “Plaintiff” means the Plaintiff, _____, and all agents, experts, witnesses, consultants, and employees of the Plaintiff.

8. The term “Subject Property” means the property that is legally described in the Complaint To Condemn and any remainder thereto.

9. The singular form of any noun or pronoun includes, when appropriate, the plural thereof; the use of the masculine gender includes, when appropriate, the feminine gender; and the use of any neutral gender noun or pronoun includes, when appropriate, the masculine and feminine genders.

10. These requests are to be regarded as continuing in nature. At such time as you receive information that a prior response is incomplete, inaccurate, or misleading, a supplementary response is requested.

DOCUMENTS REQUESTED

1. A full-size (24" × 36") plat of survey, engineering and construction plans, diagrams, sketches, proposals, or specifications relating to the Subject Property and the proposed taking.
2. All plats, diagrams, plans, sketches, proposals, or specifications indicating the exact acreage or square feet of the whole Subject Property.
3. All aerial or ground photographs, topographical maps, and/or soil maps and soil tests of the Subject Property.
4. All title commitments relating to the Subject Property, including the most recent.
5. All appraisals of the Subject Property at any time, including but not limited to all appraisals prepared prior to the filing date, all updated appraisals, memoranda, notes, appraisal review certificates or reports, comparable sales sheets, information booklets, or correspondence concerning the value of the Subject Property.
6. All appraisals of properties within a ten-mile radius of the Subject Property prepared within the last five years, including but not limited to all appraisals prepared in connection with other condemnation cases by Plaintiff, all updated appraisals, memoranda, notes, appraisal review certificates or reports, comparable sales sheets, information booklets, or correspondence concerning the value of any other properties within a ten-mile radius of the Subject Property within the last five years.
7. All documentation concerning any purchase or acquisition of, or transfer of beneficial interest in, the Subject Property, including but not limited to surveys, title policies, closing statements, deeds, mortgages, transfer tax declarations, contracts of sale, and/or option agreements.
8. All documents that relate to any ordinances or regulations that affect the Subject Property and any and all ordinances and regulations that Plaintiff may introduce at the trial hereof.
9. All documents relating to sales of property that Plaintiff or its attorneys, agents, appraisers, or witnesses may consider comparable or similar to the Subject Property, including but not limited to all contracts, deeds, transfer declarations, or listing sheets for such sales.
10. All documents, including any and all studies, tests, and analyses, relating to any environmental issue, ground contamination, problem, or fact that concerns or relates to the Subject Property.
11. Any and all disclaimers of interest, waivers, correspondence, or other documents from any other defendant joined in this matter given to Plaintiff or its attorneys or agents, in which any other defendant disclaims or waives its interest in this matter or in the proceeds from any condemnation award.

12. Other than those that pertain to [interested parties], any and all documents that indicate the interests of any defendants in the Subject Property.

13. Any and all other documents that Plaintiff intends to introduce at the trial hereof.

Plaintiff is requested to furnish an affidavit under oath stating whether production is complete in accordance with this request.

 Defendants

By: _____
 Attorney for Defendants

C. [5.26] Traverse and Motion To Dismiss

[Caption]

TRAVERSE AND MOTION TO DISMISS

NOW COME the Defendants, _____ (Defendants), by and through their attorneys, _____, and hereby respectfully move this Honorable Court for an order granting this Traverse and Motion To Dismiss against Plaintiff, _____ (Plaintiff). As grounds for their motion, Defendants state as follows:

1. On or about _____, 20____, Plaintiff instituted this eminent domain proceeding by filing its Complaint To Condemn for a partial taking of the property identified as having the common address of _____ (Subject Property).
2. Defendants are the record owner in fee of the Subject Property.
3. On or about _____, 20____, Plaintiff filed its First Amended Complaint To Condemn, citing an incorrect legal description of the property to be acquired by Plaintiff.
4. On or about _____, 20____, Plaintiff filed its Motion for Leave To File Second Amended Complaint, to be heard by this Court on _____, 20____, at _____ [a.m.] [p.m.], upon learning that the legal description in the prior complaints for the area to be acquired was incorrect.
5. Section 10-5-10 of the Eminent Domain Act requires that a correct and accurate description of the property to be acquired be included as part of any Complaint To Condemn.
6. Plaintiff now seeks to amend its First Amended Complaint to acquire a perpetual easement over the Subject Property rather than an interest in fee simple in a portion thereof. In addition, there will be significant changes to the area of Plaintiff's taking of the Subject Property.

7. Plaintiff failed to make a bona fide, good-faith attempt to agree on just compensation and damages prior to filing the Complaint for Condemnation, as is required under 735 ILCS 30/10-5-10.

8. Plaintiff failed to make an offer that represented the true fair cash market value of the Subject Property as of the date of filing.

9. Plaintiff failed to issue the 60-day letter required by 735 ILCS 30/10-5-15, which should have offered the fair cash market value of the Subject Property as of the date of filing.

10. Plaintiff based its offer on an outdated appraisal and failed to update this appraisal and offer prior to filing suit.

11. Plaintiff based its offer and attempt to agree on an appraiser who is not truly independent and who utilized an improper method of valuation.

12. Plaintiff failed to respond to a counteroffer submitted by Defendants.

13. Pursuant to 735 ILCS 30/10-5-70, Defendants are entitled to recover from Plaintiff all costs, expenses, and reasonable attorneys' fees incurred by Defendants in defense of Plaintiff's Complaint To Condemn and First Amended Complaint To Condemn.

WHEREFORE, Defendants, _____, respectfully pray that this Honorable Court enter an order granting this Traverse and Motion To Dismiss in their favor and against Plaintiff, dismiss this case with prejudice, award Defendants costs, expenses, and reasonable attorneys' fees, and grant any other and further relief as is deemed just and proper.

Respectfully submitted,

Defendants

By: _____
Attorney for Defendants

6

Mechanics Liens

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I. [6.1] INTRODUCTION

This chapter is a primer for the attorney representing commercial real estate owners on the affirmative actions that should be taken during the course of construction to protect against mechanics liens as well as the common defenses to mechanics liens once they are asserted. Due to the scope of the handbook, this chapter addresses only mechanics liens against privately owned commercial real property and does not address real property owned by governmental entities, construction projects supported with public funds, or mechanics liens against owner-occupied single-family residences.

Mechanics liens in Illinois are governed by the Mechanics Lien Act, 770 ILCS 60/0.01, *et seq.* The original statute was enacted in 1903 and was subject to piecemeal revisions throughout the years, resulting in a statute that was unclear and confusing. The statute's convoluted nature prompted a comprehensive amendment of the Act through P.A. 94-627, enacted August 18, 2005, and effective January 1, 2006. The overall purpose of the amendment was to "clarify the language [of the Act] without making significant substantive changes other than changes necessary to codify existing case law." 94th General Assembly, House of Representatives, Transcription Debate, 63d Legislative Day, p. 17 (May 31, 2005) (statement of Rep. George Scully). Since then, there have been fewer extensive amendments. For example, §24 of the Act, discussed in §6.12 below, was amended effective January 1, 2025, to expand the means by which subcontractors may serve a notice of claim for lien.

The purpose of the Mechanics Lien Act is "to protect those who in good faith furnish material or labor for the construction of a building." *Norman A. Koglin Associates v. Valenz Oro, Inc.*, 277 Ill.App.3d 142, 659 N.E.2d 971, 975, 213 Ill.Dec. 625 (1st Dist. 1995). While the Act is construed liberally as a remedial statute, mechanics liens are a purely statutory creation, so the requirements of the Act must be strictly complied with in order for a lien to be valid. *Midwest Environmental Consulting & Remediation Services, Inc. v. Peoples Bank of Bloomington*, 251 Ill.App.3d 256, 620 N.E.2d 469, 189 Ill.Dec. 501 (4th Dist. 1993). *See also Portage Park Capital, LLC v. A.L.L. Masonry Construction Co.*, 2024 IL App (1st) 240344. This is good news for property owners as even a minor deviation from the statute's requirements may mean that the lien is unenforceable. *See, e.g., Hill Behan Lumber Co. v. Marchese*, 1 Ill.App.3d 789, 275 N.E.2d 451, 453 (2d Dist. 1971) (material supplier's lien was invalid because material supplier failed to serve its notice of lien within deadline required in §24 of Act); *Tefco Construction Co. v. Continental Community Bank & Trust Co.*, 357 Ill.App.3d 714, 829 N.E.2d 860, 293 Ill.Dec. 935 (1st Dist. 2005) (failure to verify mechanics lien claim by affidavit rendered lien claim unenforceable); *Cordeck Sales, Inc. v. Construction Systems, Inc.*, 382 Ill.App.3d 334, 887 N.E.2d 474, 320 Ill.Dec. 330 (1st Dist. 2008).

II. PROTECTING COMMERCIAL REAL PROPERTY FROM MECHANICS LIENS

A. [6.2] General Contractor's Sworn Statement

The most significant risk to property owners is posed by the potential liens of subcontractors, sub-subcontractors, and material suppliers because payments to such parties are usually made by

the general contractor and its subcontractors after the owner has paid the general contractor. A provider of labor or materials has an inchoate lien against the real property as of the date of the general contractor's contract with the owner, and the lien is enforceable as long as it is perfected by the lien claimant in accordance with the Mechanics Lien Act. *W.W. Brown Const. Co. v. Central Illinois Const. Co.*, 234 Ill. 397, 84 N.E. 1038 (1908); *Decatur Bridge Co. v. Standart*, 208 Ill.App. 592 (2d Dist. 1917). See also *American Steel Fabricators, Inc. v. K&K Iron Works, LLC*, 2022 IL App (1st) 220181, 213 N.E.3d 961, 464 Ill.Dec. 589 (noting mechanics lien is creature of statute bestowed on contractor or subcontractor by virtue of its status as same). Under this relation-back doctrine, a subcontractor's lien that complies with the provisions of the Act is considered to have attached as of the date of the contract between the contractor and the owner regardless of when the subcontractor performs its portion of the work. *Petroline Co. v. Advanced Environmental Contractors, Inc.*, 305 Ill.App.3d 234, 711 N.E.2d 1146, 238 Ill.Dec. 485 (1st Dist. 1999). The deadlines set forth in the Act for serving notices with the property owner (discussed in detail in §§6.11 and 6.12 below) could result in a situation in which the owner may not know of the subcontractor's claim, or even the existence of the subcontractor, until after the owner has paid the general contractor for the work. If the general contractor does not then pay the subcontractor and the subcontractor subsequently perfects its lien, in some situations the owner may be forced to pay for the work twice.

In order to protect itself from such inchoate liens of subcontractors and material suppliers, the owner should obtain from its general contractor a contractor's sworn statement pursuant to §5 of the Mechanics Lien Act prior to each payment to the general contractor. (American Institute of Architects Document G702-1992, *Application and Certificate for Payment*, is a commonly used form and complies with the Act's requirements.) The Act provides in pertinent part:

It shall be the duty of the contractor to give the owner, and the duty of the owner to require of the contractor, before the owner or his agent, architect, or superintendent shall pay or cause to be paid to the contractor or to the contractor's order any moneys or other consideration due or to become due to the contractor, or make or cause to be made to the contractor any advancement of any moneys or any other consideration, a statement in writing, under oath or verified by affidavit, of the names and addresses of all parties furnishing labor, services, material, fixtures, apparatus or machinery, forms or form work and of the amounts due or to become due to each. Merchants and dealers in materials only shall not be required to make statements required in this Section. 770 ILCS 60/5(a).

Section 5 provides protection to the owner when read together with §§21 and 32 of the Mechanics Lien Act. Section 21 provides, in pertinent part, that the owner shall not be required to pay more than the price set forth in its contract with the general contractor (plus change orders) unless the owner has made payment to the general contractor in violation of the interests and rights of the subcontractors. 770 ILCS 60/21. Section 32 provides:

No payments to the contractor or to his order of any money or other considerations due or to become due to the contractor shall be regarded as rightfully made, as against the sub-contractor, laborer, or party furnishing labor, services, material, fixtures, apparatus or machinery, forms or form work if made by the owner without exercising and enforcing the rights and powers conferred upon him in Sections 5, 21 and 22 of this Act. 770 ILCS 60/32.

If the owner complies with its obligations under §5 by requiring a sworn statement and withholding sufficient funds to pay the amounts shown thereon as remaining due to subcontractors, the owner will be protected from (1) subcontractor liens for amounts in excess of the amounts shown and (2) liens of subcontractors that are not listed on the sworn statement, as long as the owner reasonably relied on the sworn statement. *Bricks, Inc. v. C & F Developers, Inc.*, 361 Ill.App.3d 157, 836 N.E.2d 743, 297 Ill.Dec. 12 (1st Dist. 2005); *Contractors' Ready-Mix, Inc. v. Earl Given Construction Co.*, 242 Ill.App.3d 448, 611 N.E.2d 529, 183 Ill.Dec. 266 (4th Dist. 1993); *Doors Acquisition, LLC v. Rockford Structures Construction Co.*, 2013 IL App (2d) 120052, 39 N.E.3d 8, 395 Ill.Dec. 541. *Accord GX Chicago, LLC v. Galaxy Environmental, Inc.*, 2015 IL App (1st) 133624, 38 N.E.3d 60, 395 Ill.Dec. 183. If the owner, on the other hand, fails to request the sworn statement and/or withhold sufficient funds to pay the amounts shown thereon as remaining due to subcontractors, the owner may be compelled to pay lien claimants even if the owner has already paid the general contractor in full. *Malesa v. Royal Harbour Management Corp.*, 187 Ill.App.3d 655, 543 N.E.2d 591, 135 Ill.Dec. 208 (2d Dist. 1989); *Weather-Tite, Inc. v. University of St. Francis*, 233 Ill.2d 385, 909 N.E.2d 830, 330 Ill.Dec. 808 (2009).

Obtaining a §5 sworn statement from the general contractor will also ensure that the owner has the full benefit of what is commonly referred to as the “contract price defense.” *Hudson v. Caterpillar Tractor Co.*, 117 Ill.App.3d 720, 453 N.E.2d 880, 73 Ill.Dec. 55 (4th Dist. 1983). The contract price defense protects the owner from subcontractor liens that would cause the owner to pay an amount greater than the owner’s contract price with the general contractor. *GX Chicago, supra*. It is incumbent on the owner, however, to request the §5 sworn statement, as the general contractor is not required to supply one unless requested by the owner. It is recommended that the contract between the parties require a §5 sworn statement as part of each application for payment.

It is important to note that in order to be protected under §5, the owner must reasonably rely on the sworn statement in making its payment. If the owner knew or had reason to know that the sworn statement was false, the owner is not protected from liability for subcontractors’ liens. *Berkshire Warehouse Co. v. Hilger & Co.*, 268 Ill. 463, 109 N.E. 287 (1915) (owner is protected by contractor’s sworn statement only as long as he or she had no knowledge or notice of falsity of sworn statement). *See also Lazar Brothers Trucking, Inc. v. A & B Excavating, Inc.*, 365 Ill.App.3d 559, 850 N.E.2d 215, 302 Ill.Dec. 778 (1st Dist. 2006) (sworn statement is prima facie defense to lien unless lien claimant presents evidence of owner’s bad faith).

Similarly, if it was clear from the face of the sworn statement that the statement was erroneous, the owner is not protected. *See Fred C. Kramer Co. v. LaSalle National Bank*, 36 Ill.App.2d 406, 184 N.E.2d 739, 740 (1st Dist. 1962) (sworn statement containing blank spaces instead of information required under §5 was invalid, and sworn statement containing statement “all material taken from stock and paid for” was invalid because it did not state where material was purchased and whether particular purchase had been paid for); *Ceco Steel Products Corp. v. Couri*, 311 Ill.App. 297, 35 N.E.2d 810, 811 (2d Dist. 1941) (sworn statement indicating that “materials used for said [property] belonged to [the general contractor] and were [its] exclusive property, no one having any interest or claim therein” was defective because it did not state from whom general contractor purchased materials and whether they had been paid for); *Krack Corp. v. Sky Valley Foods, Inc.*, 133 Ill.App.2d 469, 273 N.E.2d 202 (1st Dist. 1971).

Finally, if the owner receives a notice of lien from a subcontractor before making payment to the general contractor, the owner cannot rely on the general contractor's sworn statement. *See Struebing Construction Co. v. Golub-Lake Shore Place Corp.*, 281 Ill.App.3d 689, 666 N.E.2d 846, 217 Ill.Dec. 177 (1st Dist. 1996) (contractor's sworn statement that did not list lien claimant did not protect owner from lien claimant's lien when owner received lien claimant's statutory notice of lien prior to making payments). *See also Bricks, supra* (limiting material supplier's lien to amount outstanding to its subcontractor when owner made payments in compliance with §5 prior to receipt of material supplier's statutory notice of lien). Upon receiving a notice of claim for lien from a subcontractor, the owner is required to withhold payment of the claimed amount from the general contractor.

B. [6.3] Waivers of Lien

In addition to the contractor's sworn statement under §5 of the Mechanics Lien Act, 770 ILCS 60/5, the owner should require from its general contractor, at the time of payment, waivers of lien executed by the general contractor and all of its subcontractors and material suppliers to the extent of payments made or through the date of the payment (the latter being a better option for the owner).

As a general rule, "a clear, unambiguous waiver of lien rights bars an action under the Mechanics' Lien Act." *Luczak Bros. v. Generes*, 116 Ill.App.3d 286, 451 N.E.2d 1267, 1277, 71 Ill.Dec. 900 (1st Dist. 1983). This rule, however, applies only when an innocent party relies on the waiver in making payments. *Id.*; *Cordeck Sales, Inc. v. Construction Systems, Inc.*, 382 Ill.App.3d 334, 887 N.E.2d 474, 506, 320 Ill.Dec. 330 (1st Dist. 2008). Whether an innocent party has relied on a lien waiver is a question of fact. *Luczak Bros., supra*. *See also Merchants Environmental Industries, Inc. v. SLT Realty Limited Partnership*, 314 Ill.App.3d 848, 731 N.E.2d 394, 404 – 405, 246 Ill.Dec. 866 (1st Dist. 2000); *Premier Electrical Construction Co. v. LaSalle National Bank*, 132 Ill.App.3d 485, 477 N.E.2d 1249, 87 Ill.Dec. 721 (1st Dist. 1984) (lien waiver tendered in advance of payment will be upheld when terms of waiver are both clear and unambiguous if party against whose property lien is sought relied on waiver in good faith); *Edward Hines Lumber Co. v. Dell Corp.*, 49 Ill.App.3d 873, 364 N.E.2d 368, 7 Ill.Dec. 207 (1st Dist. 1977) (upholding lower court's ruling that use of final waiver form was mutual mistake in light of evidence that lien claimant never intended to issue final waiver and that parties never treated waiver as final).

It is the burden of the party seeking to assert a lien waiver as an affirmative defense to a mechanics lien to produce the lien waiver and raise that defense. The lien waiver then constitutes a prima facie defense to a mechanics lien claim. *Lazar Brothers Trucking, Inc. v. A & B Excavating, Inc.*, 365 Ill.App.3d 559, 850 N.E.2d 215, 302 Ill.Dec. 778 (1st Dist. 2006). *See also Cordeck Sales, supra*, 887 N.E.2d at 509 (discussing timing of asserting waiver as affirmative defense in litigation). Accordingly, once the lien waiver is produced, the burden of showing a lack of reliance or bad faith rests on the party against whom the waiver is asserted. *Id.* The *Cordeck Sales* court, in denying a summary judgment motion requesting invalidation of the lien based on the lien waiver, reviewed extrinsic evidence offered by the nonmovant showing lack of reliance — despite the clear and unambiguous language of the waiver.

The categories of lien waivers used in Illinois are

1. partial waivers of lien rights to the extent of payment received (*i.e.*, payment waivers);
2. partial waivers of lien rights as to the labor or material furnished to a specific date (*i.e.*, waivers of lien to date); and
3. final waivers of lien rights as to all money for labor or material furnished or to be furnished on the project.

Therefore, if the owner is making its final payment for the project, it must receive final waivers. If, on the other hand, the owner is simply making a progress payment on the project, it must receive a partial waiver. Although used in many states, conditional waivers of lien are not commonly used in Illinois.

The partial waivers of lien used by title insurance companies are typically waivers of lien to date. These waivers waive all lien rights for work performed through the date of the waiver, even if the payment does not exactly match the work performed. Payment waivers are generally not used or accepted by title insurance companies. For waivers of lien to date, the date on the waiver should be the last day of work for which the requested payment applies and should not be the date payment is received, the date that the waiver is tendered, or the date of the payment request. The importance of making sure that the date on a partial waiver coincides with the last day of work to which the requested payment applies is illustrated by *Country Service & Supply Co. v. Harris Trust & Savings Bank*, 103 Ill.App.3d 161, 430 N.E.2d 631, 58 Ill.Dec. 599 (2d Dist. 1981). In *Country Service*, the court construed the waiver language as a clear and unambiguous waiver by the plaintiff for all mechanics lien claims for services or materials when the waiver stated that the plaintiff “does ‘hereby waive and release any and all lien or claim [for] labor or services, material, fixtures or apparatus heretofore *furnished to this date.*’ ” [Emphasis in original.] 430 N.E.2d at 634. The court held that an innocent party, like a lending agency, has a right to rely on the signed and written waiver as long as there is no evidence of fraud. 430 N.E.2d at 635. *But see Cordeck Sales, supra*, 887 N.E.2d at 511 (holding waiver to be partial waiver despite statement indicating that claimant waived all rights for work performed at any time when waiver was accompanied by §5 statement showing large balance remaining due to lien claimant, was entitled “Partial Waiver,” and other extrinsic evidence demonstrated reliance on waiver as partial not final).

Owners should note that the Mechanics Lien Act expressly provides that agreements that waive lien rights (or to subordinate a lien) when such agreements are entered into “in anticipation of and in consideration for the awarding of a contract or subcontract” are “against public policy and unenforceable.” 770 ILCS 60/1(d).

A contractor may subordinate its lien rights to a mortgage lien that secures a construction loan, but it can agree to do so only after more than 50 percent of the loan proceeds have been disbursed to fund improvements to the property. *Id.* This statutory restriction was included in the 2014 amendments to the Mechanics Lien Act that were enacted in response to the Illinois Supreme Court’s decision in *LaSalle Bank National Ass’n v. Cypress Creek I, LP*, 242 Ill.2d 231, 950 N.E.2d 1109, 351 Ill.Dec. 281 (2011).

III. COMMON DEFENSES TO MECHANICS LIENS

A. Has the Lien Claimant Complied with All Statutory Requirements?

1. [6.4] Have the Prerequisites to a Lien Been Satisfied?

While the requirements for the perfection and enforcement of a mechanics lien by a general contractor versus a subcontractor vary, the basic prerequisites for the existence of the liens are the same. Mechanics Lien Act §1 (with respect to the general contractor), 770 ILCS 60/1, and §21 (with respect to the subcontractor), 770 ILCS 60/21, set forth the prerequisites for a lien and are described in §§6.5 – 6.9 below.

a. [6.5] Is the Lien Claimant a “Contractor” or “Subcontractor”?

In order to maintain a mechanics lien claim, the claimant must fit under the definition of “contractor” or “subcontractor” specified in the Mechanics Lien Act. Section 1(a) defines “contractor” as follows:

Any person who shall by any contract or contracts, express or implied, or partly expressed or implied, with the owner of a lot or tract of land, or with one whom the owner has authorized or knowingly permitted to contract, to improve the lot or tract of land or for the purpose of improving the tract of land, or to manage a structure under construction thereon. 770 ILCS 60/1(a).

The Act defines a “subcontractor” as

every mechanic, worker, or other person who shall furnish any labor, services, material, fixtures, apparatus or machinery, or forms or form work for the contractor, or shall furnish any material to be employed in the process of construction as a means for assisting in the erection of the building or improvement in what is commonly termed form or form work where concrete, cement, or like material is used in whole or in part. 770 ILCS 60/21(a).

Generally, a subcontractor is one who contracts with the general contractor to do a portion of the work and is not in privity of contract with the owner. Unlike the general contractor, the subcontractor has a lien not only on the land but also on the money that is due or that will become due to the general contractor, as well as the fixtures incorporated into the land by the subcontractor. *Brady Brick & Supply Co. v. Lotito*, 43 Ill.App.3d 69, 356 N.E.2d 1126, 1 Ill.Dec. 844 (2d Dist. 1976).

The determination of whether a lien claimant is a contractor or a subcontractor is made based on the relevant facts, notwithstanding any statements or presumptions made by the lien claimant. Section 7(c) of the Mechanics Lien Act provides that a lien claimant’s statement that it is a subcontractor does not prejudice the claimant if it is later established that the claimant has a direct contract with the owner or an authorized agent of the owner. 770 ILCS 60/7(c). Similarly, §§24 and 25 of the Act provide that the giving of notices pursuant to these sections does not constitute an admission that the lien claimant is a subcontractor rather than a general contractor. 770 ILCS 60/24(b), 60/25(c).

b. [6.6] *Does the Lien Claimant Have a Valid Contract?*

The lien claimant must show that it has a contract to support its claim of lien. *Candice Co. v. Ricketts*, 281 Ill.App.3d 359, 666 N.E.2d 722, 217 Ill.Dec. 53 (1st Dist. 1996); *B & C Electric, Inc. v. Pullman Bank & Trust Co.*, 96 Ill.App.3d 321, 421 N.E.2d 206, 51 Ill.Dec. 698 (1st Dist. 1981); *Excellent Builders, Inc. v. Pioneer Trust & Savings Bank*, 15 Ill.App.3d 832, 305 N.E.2d 273 (1st Dist. 1973). Indeed, failure to correctly describe the contract in the mechanics lien claim will invalidate the lien. *Candice, supra*, 666 N.E.2d at 725.

The contract may be express (in whole or in part) or implied (in whole or in part). Also, although §1 of the Mechanics Lien Act, 770 ILCS 60/1, does not specifically state it, the contract may be written or oral. *Stepina v. Conklin Lumber Co.*, 134 Ill.App. 173 (1st. Dist. 1907); *Apollo Heating & Air Conditioning Corp. v. American National Bank & Trust Co.*, 135 Ill.App.3d 976, 482 N.E.2d 690, 90 Ill.Dec. 711 (1st Dist. 1985).

The contract must be enforceable in order to support a mechanics lien. If the contract in question is void as a result of a violation of law or public policy, the mechanics lien is unenforceable. *See G.M. Fedorchak & Associates, Inc. v. Chicago Title Land Trust Co.*, 355 Ill.App.3d 428, 822 N.E.2d 905, 291 Ill.Dec. 30 (3d Dist. 2005) (because contract with unlicensed architect is unenforceable, architect's mechanics lien is unenforceable). *But see Mani Electrical Contractors v. Kioutas*, 243 Ill.App.3d 662, 611 N.E.2d 1167, 183 Ill.Dec. 519 (1st Dist. 1993) (distinguishing between illegal contracts and legal contracts involving performance thereunder that violates law).

c. [6.7] *Is the Contract with the Owner, an Authorized Agent of the Owner, or a Party Knowingly Permitted by the Owner To Contract?*

The contract must have been entered into with the owner, the owner's authorized agent, or one knowingly permitted by the owner to improve the real estate. 770 ILCS 60/1. In the case of a subcontractor's lien, the subcontractor must have a contract with the general contractor and the general contractor must have a contract with the owner, the owner's authorized agent, or one knowingly permitted by the owner to improve the property. 770 ILCS 60/21(a).

Regarding who is an "owner," *see M. Ecker & Co. v. LaSalle National Bank*, 268 Ill.App.3d 874, 645 N.E.2d 335, 206 Ill.Dec. 330 (1st Dist. 1994) (land trust is "owner"); *Dunlop v. McAtee*, 31 Ill.App.3d 56, 333 N.E.2d 76 (2d Dist. 1975) (holder of equitable interest in land, including beneficiary under land trust, is "owner"); *Argonne Construction Co. v. LaSalle National Bank (In re Argonne Construction Co.)*, 10 B.R. 570 (Bankr. N.D.Ill. 1981) (defendant-bank was "owner" because legal title to all property at issue in lien claim was held by it prior to sale of condominium units); *Fischer v. McHenry State Bank*, 74 Ill.App.3d 509, 392 N.E.2d 995, 30 Ill.Dec. 230 (2d Dist. 1979) (as matter of law, beneficiary of land trust is "owner" of property whose acts or omissions allow Mechanics Lien Act to apply to real estate).

Regarding who is an "authorized agent," *see Fettes, Love & Sieben, Inc. v. Simon*, 46 Ill.App.2d 232, 196 N.E.2d 700 (1st Dist. 1964) (proof of existence of marital relation does not establish husband's agency for his wife); *Martinez v. Knochel*, 123 Ill.App.3d 555, 462 N.E.2d 1281, 78

Ill.Dec. 927 (4th Dist. 1984) (owners of undivided one-half interest in land were bound by acts of their uncle, who owned other undivided one-half interest); *Stratemeyer v. West*, 125 Ill.App.3d 597, 466 N.E.2d 306, 309, 80 Ill.Dec. 854 (5th Dist. 1984) (“[A]n act [e.g., entering into construction contract] of a partner in apparently carrying on in the usual way the business of the partnership binds the partnership *unless* he has no authority *and* the third party has knowledge that he has no authority.” [Emphasis in original.]).

Regarding one who is “knowingly permitted,” see *Wanzer v. Smorgas-Brickan Developers, Inc.*, 130 Ill.App.2d 378, 264 N.E.2d 435 (2d Dist. 1970) (agent’s knowledge of contemplated improvements is imputable to vendor-owner); *Miller v. Reed*, 13 Ill.App.3d 1074, 302 N.E.2d 131 (5th Dist. 1973) (lien allowed because owner knowingly permitted tenant to contract for improvements); *Christopher B. Burke Engineering, Ltd. v. Heritage Bank of Central Illinois*, 2015 IL 118955, 43 N.E.3d 963, 398 Ill.Dec. 53 (engineering firm must demonstrate that property owner knowingly permitted third party to contract regarding owner’s property). *Accord California Steel Co. v. Dodds (In re California Steel Co.)*, 21 B.R. 383 (Bankr. N.D.Ill. 1982) (sublessee has authority to contract). *But cf. Hacken v. Isenberg*, 288 Ill. 589, 124 N.E. 306 (1919) (lessor, owner of fee, did not knowingly permit lessee to contract with lien claimants merely because clause in lease provided that lessees would keep premises in question in good repair). The owner is presumed “to have ‘knowingly permitted’ the improvements where he knew and failed to protest or accepted the benefits of the improvements.” *Miller, supra*, 302 N.E.2d at 133.

d. [6.8] Has the Lien Claimant Provided Lienable Labor or Materials?

In order to assert a valid lien, the claimant must have “improved” the property. 770 ILCS 60/1(a) (general contractor), 60/21 (subcontractor). The Mechanics Lien Act defines “improve” as

to furnish labor, services, material, fixtures, apparatus or machinery, forms or form work in the process of construction where cement, concrete or like material is used for the purpose of or in the building, altering, repairing or ornamenting any house or other building, walk or sidewalk, whether the walk or sidewalk is on the land or bordering thereon, driveway, fence or improvement or appurtenances to the lot or tract of land or connected therewith, and upon, over or under a sidewalk, street or alley adjoining; or fill, sod or excavate such lot or tract of land, or do landscape work thereon or therefor; or raise or lower any house thereon or remove any house thereto, or remove any house or other structure therefrom, or perform any services or incur any expense as an architect, structural engineer, professional engineer, land surveyor, registered interior designer, or property manager in, for, or on a lot or tract of land for any such purpose; or drill any water well thereon; or furnish or perform labor or services as superintendent, time keeper, mechanic, laborer or otherwise, in the building, altering, repairing or ornamenting of the same; or furnish material, fixtures, apparatus, machinery, labor or services, forms or form work used in the process of construction where concrete, cement or like material is used, or drill any water well on the order of his agent, architect, structural engineer, registered interior designer, or superintendent having charge of the improvements, building, altering, repairing or ornamenting the same. 770 ILCS 60/1(b).

See also *Inter-Rail Systems, Inc. v. Ravi Corp.*, 387 Ill.App.3d 510, 900 N.E.2d 407, 326 Ill.Dec. 771 (1st Dist. 2008) (holding that removal of drums containing hazardous materials from property was not lienable when there was no evidence of such work being part of overall plan to improve property); *Leveyfilm, Inc. v. Cosmopolitan Bank & Trust*, 274 Ill.App.3d 348, 653 N.E.2d 875, 210 Ill.Dec. 680 (1st Dist. 1995); *Verplank Concrete & Supply, Inc. v. Marsh*, 40 Ill.App.3d 742, 353 N.E.2d 27 (4th Dist. 1976); *Atlee Electric Co. v. Johnson Construction Co.*, 14 Ill.App.3d 716, 303 N.E.2d 192 (1st Dist. 1973); *Johns-Manville Corporation of Delaware v. La Tour D'Argent Corp.*, 277 Ill.App. 503 (1st Dist. 1934). The proper focus in determining the validity of a mechanics lien is whether the work actually enhanced the value of the land. *Mostardi-Platt Associates, Inc. v. Czerniejewski*, 399 Ill.App.3d 1205, 929 N.E.2d 94, 340 Ill.Dec. 790 (5th Dist. 2010).

Furnishing “fixtures,” “apparatus,” or “machinery” refers to the furnishing of those fixtures, apparatus, or machinery that are so attached to the real estate that they become integral parts of the real estate. *Norman A. Koglin Associates v. Valenz Oro, Inc.*, 277 Ill.App.3d 142, 659 N.E.2d 971, 213 Ill.Dec. 625 (1st Dist. 1995); *Airtite, Division of Airtex Corp. v. DPR Limited Partnership*, 265 Ill.App.3d 214, 638 N.E.2d 241, 202 Ill.Dec. 595 (4th Dist. 1994); *Owings v. Estes*, 256 Ill. 553, 100 N.E. 205 (1912); *Crane Erectors & Riggers, Inc. v. LaSalle National Bank*, 125 Ill.App.3d 658, 466 N.E.2d 397, 80 Ill.Dec. 945 (2d Dist. 1984) (intention of parties as to whether they considered equipment to be part of realty is key factor in determining whether equipment is fixture and thus lienable); *AUI Construction Group, LLC v. Vaessen*, 2016 IL App (2d) 160009, 67 N.E.3d 500, 409 Ill.Dec. 288 (holding tower built for wind energy system was non-lienable trade fixture as opposed to lienable land improvement).

However, §7 of the Mechanics Lien Act expressly provides that a lien for material shall not be defeated because there is no proof that the material was actually incorporated into a building or improvement or evidence shows that the material was in fact not incorporated into the building or improvement,

provided, that it is shown that such material was delivered either to the owner or his or her agent for that building or improvement, to be used in that building or improvement, or at the place where said building or improvement was being constructed, for the purpose of being used in construction or for the purpose of being employed in the process of construction as a means for assisting in the erection of the building or improvement in what is commonly termed forms or form work where concrete, cement or like material is used, in whole or in part. 770 ILCS 60/7(a).

As stated in §1(b) of the Mechanics Lien Act, furnishing “services” generally refers to the services of the architect, structural engineer, professional engineer, land surveyor, mechanic, laborer, and construction manager. 770 ILCS 60/1(b). See also *Cordeck Sales, Inc. v. Construction Systems, Inc.*, 382 Ill.App.3d 334, 887 N.E.2d 474, 320 Ill.Dec. 330 (1st Dist. 2008) (construction management services held to be lienable); *First Bank of Roscoe v. Rinaldi*, 262 Ill.App.3d 179, 634 N.E.2d 1204, 199 Ill.Dec. 850 (2d Dist. 1994); *BRL Carpenters, Ltd. v. American National Bank & Trust Co.*, 126 Ill.App.3d 137, 466 N.E.2d 1166, 81 Ill.Dec. 364 (1st Dist. 1984) (services of construction superintendent qualified as lienable); *Stepuncik v. Michalek*, 67 Ill.App.3d 440, 384 N.E.2d 526, 23 Ill.Dec. 732 (2d Dist. 1978) (employee of general contractor who performed labor

in construction of building entitled to enforce lien as “subcontractor”). *But see D.M. Foley Co. v. North West Federal Savings & Loan Ass’n*, 122 Ill.App.3d 411, 461 N.E.2d 500, 77 Ill.Dec. 877 (1st Dist. 1984) (maintenance landscaping services not lienable because work performed did not enhance value of land).

Additionally, pursuant to §1.2 of the Mechanics Lien Act, the rental value of leased construction equipment used “in the process of constructing a specific improvement to real estate [is lienable] only if, and to the extent that, the equipment is used on or about the site of the improvement.” 770 ILCS 60/1.2. However, such amounts are not lienable when the improvement is to a single-family residence or multifamily residence containing fewer than 12 units in a single building. *Id.*

If a contractor performs both lienable and non-lienable work, the lienable work must be separable from non-lienable work and the total amount due must be apportioned or the entire lien is defeated. *Verplank Concrete, supra*, 353 N.E.2d at 29; *BRL Carpenters, supra*, 466 N.E.2d at 1170.

It is unclear whether delay damages for disruption and loss of productivity (*e.g.*, increased labor costs due to congestion of trades, winter conditions, or extensive overtime; greater site or home office overhead) are lienable. *See Antonic Rigging & Erecting of Minnesota, Inc. v. MDCON, Inc.*, No. 90 C 4800, 1991 WL 169374 (N.D.Ill. Aug. 28, 1991) (delay damages not lienable). *But see Cleveland Wrecking Co. v. Central National Bank in Chicago*, 216 Ill.App.3d 279, 576 N.E.2d 1055, 160 Ill.Dec. 101 (1st Dist. 1991) (damages for delay caused by defendant against whom lien was enforced were lienable). *Compare Bulley & Andrews, Inc. v. Symons Corp.*, 25 Ill.App.3d 696, 323 N.E.2d 806 (1st Dist. 1975) (allowing recovery of delay damages in claim based on breach of contract).

e. [6.9] Has the Lien Claimant Completed Performance, or Is There a Valid Excuse for Nonperformance?

The contractor must complete performance of the contract or have a valid excuse for nonperformance. *See Young v. Wilkinson*, 2022 IL App (4th) 220302, 213 N.E.3d 486, 464 Ill.Dec. 449, citing *Folk v. Central National Bank & Trust Company of Rockford*, 210 Ill.App.3d 43, 567 N.E.2d 1, 153 Ill.Dec. 286 (2d Dist. 1990) (as general rule, although claimant must show performance of contract as prerequisite to enforcement of lien, substantial performance of contract made in good faith generally entitles contractor to maintain its suit to enforce its lien); *Harmon v. Dawson*, 175 Ill.App.3d 846, 530 N.E.2d 564, 125 Ill.Dec. 406 (4th Dist. 1988) (contractor’s failure to perform in reasonably workmanlike manner constitutes breach of contract); *Whalen v. K-Mart Corp.*, 166 Ill.App.3d 339, 519 N.E.2d 991, 116 Ill.Dec. 776 (1st Dist. 1988) (general contractor’s failure to demand compliance with insurance requirement specified in contract constituted waiver of that contract requirement and, therefore, contractor’s failure to abide by requirement not breach of contract). *See also Matschke v. Uropartners, LLC*, 2023 IL App (1st) 221112, 227 N.E.3d 842, 470 Ill.Dec. 941 (noting implied waiver of legal right when conduct of person against whom waiver is asserted is consistent with intention to waive).

Valid excuses for nonperformance include the owner's breach of contract, abandonment of the project, prevention of performance, or failure to pay when payment is due. *Stanley J. Gottschalk Construction Co. v. Carlson*, 253 Ill.App. 520 (1st Dist. 1929); *Wilmette Partners v. Hamel*, 230 Ill.App.3d 248, 594 N.E.2d 1177, 171 Ill.Dec. 657 (1st Dist. 1992) (contractor excused from performance of demolition contract and allowed to seek damages against developer because developer prevented contractor from performing by ejecting contractor from property); *J.E. Milligan Steel Erectors, Inc. v. Garbe Iron Works, Inc.*, 139 Ill.App.3d 303, 486 N.E.2d 945, 93 Ill.Dec. 412 (3d Dist. 1985) (subcontractor's abandoning worksite after good-faith effort to cooperate with general contractor who refused to pay did not constitute breach of contract).

2. [6.10] Has the Lien Claimant Timely Perfected Its Lien?

Once all the prerequisites set forth in §1 of the Mechanics Lien Act, 770 ILCS 60/1, are met, the contractor must strictly comply with the statutory notice requirements of the Act in order to perfect its lien rights. As noted in §§6.4 and 6.5 above, the requirements for the perfection of a mechanics lien by a general contractor versus a subcontractor vary.

a. [6.11] Requirements for the General Contractor

Section 7 of the Mechanics Lien Act, 770 ILCS 60/7, requires that the general contractor record a lien claim within four months (not 120 days) after completion of the work, in the office of the recorder for the county in which the real estate is located, in order for its lien to be enforceable against the owner as well as subsequent purchasers and third-party encumbrancers. *Stafford-Smith, Inc. v. Intercontinental River East, LLC*, 378 Ill.App.3d 236, 881 N.E.2d 534, 317 Ill.Dec. 366 (1st Dist. 2007); *Apollo Heating & Air Conditioning Corp. v. American National Bank & Trust Co.*, 135 Ill.App.3d 976, 482 N.E.2d 690, 90 Ill.Dec. 711 (1st Dist. 1985). See also *Cordeck Sales, Inc. v. Construction Systems, Inc.*, 382 Ill.App.3d 334, 887 N.E.2d 474, 320 Ill.Dec. 330 (1st Dist. 2008), explaining *Federal Savings & Loan Insurance Corp. v. American National Bank & Trust Company of Chicago*, 115 Ill.App.3d 426, 450 N.E.2d 820, 71 Ill.Dec. 132 (1st Dist. 1983) (holding that language in §7 allowing amendment of liens as against owners implicitly prohibits assertion of amended liens against third parties even when such amended liens are recorded within four-month period).

However, as long as the lien is filed within two years after the last date of work, it is enforceable against the original owner. 770 ILCS 60/7(a); *M. Ecker & Co. v. LaSalle National Bank*, 268 Ill.App.3d 874, 645 N.E.2d 335, 206 Ill.Dec. 330 (1st Dist. 1994).

See also §§6.13 – 6.22 below.

b. [6.12] Requirements for Subcontractors and Material Suppliers

Under §24(a) of the Mechanics Lien Act, 770 ILCS 60/24(a), the subcontractor must serve, within 90 days (not three months) after the completion of the work, a written notice of the claim via personal delivery, a nationally recognized delivery company with tracking service (e.g., UPS or FedEx), or by certified or registered mail, return receipt requested, with delivery limited to addressee only, on the owner or the owner's agent, architect, or superintendent and the mortgagee,

if known. *Matteo Construction Co. v. Teckler Blvd Development Site, LLC*, 2020 IL App (2d) 190766, 177 N.E.3d 747, 448 Ill.Dec 691; *Cyclonaire Corp. v. ISG Riverdale, Inc.*, 378 Ill.App.3d 554, 882 N.E.2d 684, 317 Ill.Dec. 804 (1st Dist. 2007); *Caruso v. Kafka*, 265 Ill.App.3d 310, 638 N.E.2d 663, 202 Ill.Dec. 795 (1st Dist. 1994); *Hill Behan Lumber Co. v. Irving Federal Savings & Loan Ass'n*, 121 Ill.App.3d 511, 459 N.E.2d 1066, 76 Ill.Dec. 931 (1st Dist. 1984); *Lundy v. Boyle Industries, Inc.*, 46 Ill.App.3d 809, 361 N.E.2d 321, 5 Ill.Dec. 182 (3d Dist. 1977). *But cf. Cordeck Sales, Inc. v. Construction Systems, Inc.*, 382 Ill.App.3d 334, 887 N.E.2d 474, 529, 320 Ill.Dec. 330 (1st Dist. 2008) (holding notice under §24 of Act valid although it was not sent “restricted delivery” because there was no dispute that notice was actually received by all parties).

Generally, a subcontractor that failed to properly serve its 90-day notice pursuant to §24 of the Mechanics Lien Act loses its lien rights. However, if the subcontractor was listed on the §5 general contractor’s sworn statement (770 ILCS 60/5), the subcontractor’s lien shall be enforceable to the extent of the amount listed on the sworn statement as being due the subcontractor. *Hill Behan Lumber, supra*.

If a subcontractor is not paid within 10 days after serving its 90-day notice, it may file a claim for lien or file a complaint to enforce its lien under §§7 and 9 – 20 of the Mechanics Lien Act. 770 ILCS 60/28; *Matteo Construction, supra* (holding that subcontractor is not required to wait until 10 days after giving owner notice of its claim for lien before recording it to perfect its lien). Additionally, the subcontractor must record a claim for lien with the recorder for the county where the property is located within four months (not 120 days) of its last date of work in substantially the same manner as the general contractor’s lien. See §6.11 above and §§6.13 – 6.22 below.

c. [6.13] Calculating Time Periods

The time deadlines under the Mechanics Lien Act must be complied with strictly. For example, a subcontractor’s 90-day notice must be given by the 90th day after the date of completion (not three months). A notice given on the 91st day after the date of completion is ineffective. Similarly, the four-month deadline with respect to recording of lien claims by both subcontractors and contractors is four calendar months, not 120 days.

The relevant statutory deadlines are calculated from the completion date of the lien claimant’s work. Therefore, the identification of the completion date is crucial to determining whether the lien was timely perfected. For purposes of the Mechanics Lien Act, the “completion date” means the date the claimant completed the work (or completed the delivery of materials) for which the lien is claimed. *Mutual Services, Inc. v. Ballantrae Development Co.*, 159 Ill.App.3d 549, 510 N.E.2d 1219, 110 Ill.Dec. 188 (1st Dist. 1987); *D.M. Foley Co. v. North West Federal Savings & Loan Ass'n*, 122 Ill.App.3d 411, 461 N.E.2d 500, 77 Ill.Dec. 877 (1st Dist. 1984); *Components, Inc. v. Walter Kassuba Realty Corp.*, 64 Ill.App.3d 140, 381 N.E.2d 42, 21 Ill.Dec. 107 (2d Dist. 1978) (“completion” means completion of work for which contractor seeks to enforce lien rather than completion of contract). *But see Pepper Construction Co. v. Palmolive Tower Condominiums, LLC*, 2021 IL App (1st) 200753, 194 N.E.3d 991, 457 Ill.Dec. 206 (holding lien claimant is not bound by incorrect completion dates when lien appears valid and third parties are not misled).

Substantial completion of the lien claimant's work is the key to determining the time period. "Work that is trivial and insubstantial, and not 'essential to the completion of the contract' does not extend the time to file a lien under the Mechanics Lien Act." *Braun-Skiba, Ltd. v. LaSalle National Bank*, 279 Ill.App.3d 912, 665 N.E.2d 485, 491, 216 Ill.Dec. 425 (1st Dist. 1996), quoting *Miller Bros. Industrial Sheet Metal Corp. v. LaSalle National Bank*, 119 Ill.App.2d 23, 255 N.E.2d 755, 758 (2d Dist. 1969). While it has been universally established that warranty work, cosmetic or touch-up work, and punch list work do not constitute work for purposes of determining the completion date of work, there is no hard-and-fast rule to determine whether work is essential to completion of the contract or whether it is trivial. The inquiry requires an analysis of the specific facts of the particular case. See *Merchants Environmental Industries, Inc. v. SLT Realty Limited Partnership*, 314 Ill.App.3d 848, 731 N.E.2d 394, 246 Ill.Dec. 866 (1st Dist. 2000) (listing some factors considered in determining whether work is essential to completion of contract). See, e.g., *Daily v. Mid-America Bank & Trust Company of Carbondale*, 130 Ill.App.3d 639, 474 N.E.2d 788, 85 Ill.Dec. 828 (5th Dist. 1985) (date on which contractor spent four hours fixing two doors that had been vandalized constituted completion date for purposes of §7 of Mechanics Lien Act, 770 ILCS 60/7, because such work was specifically required in change order); *J.E. Milligan Steel Erectors, Inc. v. Garbe Iron Works, Inc.*, 139 Ill.App.3d 303, 486 N.E.2d 945, 93 Ill.Dec. 412 (3d Dist. 1985) (date contractor removed crane from jobsite was not valid completion date).

d. [6.14] Amendment of the Lien

Section 7 of the Mechanics Lien Act expressly permits the amendment of a mechanics lien claim against an owner. 770 ILCS 60/7. It has been held, however, that §7 implicitly prohibits the amendment of a mechanics lien against third parties such as mortgagees, even if the amendment is within the four-month period for recording a lien claim against mortgagees. Thus, once a contractor records its lien claim, even if it is still performing work and additional sums are continuing to accrue as owed, the contractor's amendment of its lien claim to increase the amount of the lien, although enforceable against the owner, will not increase the lien amount in any dispute over priority with the lender. *Cordeck Sales, Inc. v. Construction Systems, Inc.*, 382 Ill.App.3d 334, 887 N.E.2d 474, 320 Ill.Dec. 330 (1st Dist. 2008).

3. [6.15] Does the Recorded Lien Contain All Required Information?

As to the form and contents of the claim for lien, the general contractor must comply with 770 ILCS 60/7 and the subcontractor must comply with 770 ILCS 60/24.

Pursuant to §7(a) of the Mechanics Lien Act, the general contractor's claim for lien must be in the form of a verified affidavit setting forth "a brief statement of the [lien] claimant's contract, the balance due after allowing all credits, and a sufficiently correct description of the [real estate] to identify the same." 770 ILCS 60/7(a).

Section 24 of the Mechanics Lien Act requires the same information for a subcontractor's claim with the addition of a statement regarding the existence of a contract between the general contractor and the subcontractor.

It should be noted that there is conflicting caselaw regarding the necessity of stating in the lien claim the date of completion of the work for which a lien is being claimed. The court in *Merchants Environmental Industries, Inc. v. SLT Realty Limited Partnership*, 314 Ill.App.3d 848, 731 N.E.2d 394, 246 Ill.Dec. 866 (1st Dist. 2000), held that the recorded lien claim must state the completion date in order to be enforceable. However, in *National City Mortgage v. Bergman*, 405 Ill.App.3d 102, 939 N.E.2d 1, 345 Ill.Dec. 272 (2d Dist. 2010), the Second District expressly declined to follow *Merchant's Environmental*. Based on an in-depth analysis of the doctrine of strict construction and the rules of statutory construction, the Second District held that the inclusion of the completion date in the recorded lien is not required. 939 N.E.2d at 9.

More recently, the First District, in *North Shore Community Bank & Trust Co. v. Sheffield Wellington LLC*, 2014 IL App (1st) 123784, 20 N.E.3d 104, 386 Ill.Dec. 243, held (a) that including the wrong completion date in the notice of claim for lien was insufficient to invalidate the lien when both the correct completion date and the incorrect date were within the required notice period and (b) that the completion dates in the lien claims were not judicial admissions. *See also Pepper Construction Co. v. Palmolive Tower Condominiums, LLC*, 2021 IL App (1st) 200753, 194 N.E.3d 991, 457 Ill.Dec. 206 (citing *North Shore* holding that statements were not judicial admissions when claimant had to rely on documents to remember date of completion and completion date had to be estimated).

a. [6.16] *Verification*

“Verification” is a statement under oath. *McDonald v. Rosengarten*, 134 Ill. 126, 25 N.E. 429 (1890) (statement of claim itself must be verified as true; therefore, affidavit that claimant has performed labor and furnished materials is insufficient).

The lien claim must be verified by the affidavit of the claimant or an agent or employee. *Pepper Construction Co. v. Palmolive Tower Condominiums, LLC*, 2021 IL App (1st) 200753, 194 N.E.3d 991, 457 Ill.Dec. 206. The failure to verify the claim for lien under penalty of perjury is a basis to invalidate a lien claim as not strictly complying with the requirements of the Mechanics Lien Act. *Tefco Construction Co. v. Continental Community Bank & Trust Co.*, 357 Ill.App.3d 714, 829 N.E.2d 860, 293 Ill.Dec. 935 (1st Dist. 2005); *Vancil Contracting, Inc. v. Tres Amigos Properties, LLC (In re Vancil Contracting, Inc.)*, 381 B.R. 243 (Bankr. C.D.Ill. 2008).

b. [6.17] *Brief Statement of Contract*

The brief statement of the contract should be sufficient to inform third persons of the value, character, and extent of the lien. *Pepper Construction Co. v. Palmolive Tower Condominiums, LLC*, 2021 IL App (1st) 200753, 194 N.E.3d 991, 457 Ill.Dec. 206; *Tefco Construction Co. v. Continental Community Bank & Trust Co.*, 357 Ill.App.3d 714, 829 N.E.2d 860, 293 Ill.Dec. 935 (1st Dist. 2005); *Candice Co. v. Ricketts*, 281 Ill.App.3d 359, 666 N.E.2d 722, 217 Ill.Dec. 53 (1st Dist. 1996) (holding that description of contract was incorrect because contracting parties were misidentified and, therefore, lien was invalid); *Ronning Engineering Co. v. Adams Pride Alfalfa Corp.*, 181 Ill.App.3d 753, 537 N.E.2d 1032, 130 Ill.Dec. 703 (4th Dist. 1989) (holding lien invalid when claim stated that work was performed pursuant to 1985 oral contract but work was in fact performed pursuant to 1986 written contract). *See also Cordeck Sales, Inc. v. Construction Systems, Inc.*, 382

Ill.App.3d 334, 887 N.E.2d 474, 320 Ill.Dec. 330 (1st Dist. 2008) (ruling description of contract for construction management to be sufficient when no incorrect information was provided but when portion of liened work was for general contracting services and not construction management services).

c. [6.18] Balance Due

The lien must state the balance due to the lien claimant. 770 ILCS 60/7. Most disputes in connection with this requirement involve the accuracy of the stated amount. Section 7(a) of the Mechanics Lien Act expressly states that “an error or overcharging” by the lien claimant shall not invalidate the lien absent a showing that such error or overcharge was made “with intent to defraud.” 770 ILCS 60/7(a). Intent to defraud may be inferred from documents containing the overstated lien amounts combined with additional evidence. *Peter J. Hartmann Co. v. Capitol Bank & Trust Co.*, 353 Ill.App.3d 700, 817 N.E.2d 913, 288 Ill.Dec. 263 (1st Dist. 2004). When a lien claimant knowingly records a mechanics lien that contains a “substantial” overcharge, the lien may be defeated on the basis of constructive fraud. 817 N.E.2d at 919. *See Pepper Construction Co. v. Palmolive Tower Condominiums, LLC*, 2021 IL App (1st) 200753, 194 N.E.3d 991, 457 Ill.Dec. 206; *Father & Sons Home Improvements II, Inc. v. Stuart*, 2016 IL App (1st) 143666, 52 N.E.3d 581, 402 Ill.Dec. 660; *Fedco Electric Co. v. Stunkel*, 77 Ill.App.3d 48, 395 N.E.2d 1116, 1118, 32 Ill.Dec. 735 (4th Dist. 1979); *Plepel v. Nied*, 106 Ill.App.3d 282, 435 N.E.2d 1169, 62 Ill.Dec. 197 (1st Dist. 1982); *Hemenover v. DePatis*, 86 Ill.App.3d 586, 408 N.E.2d 387, 42 Ill.Dec. 9 (3d Dist. 1980); *Cordeck Sales, Inc. v. Construction Systems, Inc.*, 394 Ill.App.3d 870, 917 N.E.2d 536, 334 Ill.Dec. 710 (1st Dist. 2009); *Roy Zenere Trucking & Excavating, Inc. v. Build Tech, Inc.*, 2016 IL App (3d) 140946, 65 N.E.3d 340, 408 Ill.Dec. 118.

A claimant may recover for the extra work it performed provided it proves that

1. the extra work was outside the scope of the contract;
2. the extra items were ordered by the owner;
3. the owner agreed to pay, either expressly or by his or her conduct;
4. the extra work was not furnished by the contractor as his or her voluntary act; and
5. the extra work was not rendered necessary by any fault of the claimant. *Kern v. Rafferty*, 131 Ill.App.3d 728, 476 N.E.2d 52, 54, 86 Ill.Dec. 876 (5th Dist. 1985).

d. [6.19] Description of Property

A sufficient description of the real estate is generally the property’s legal description. *Springer v. Kroeschell*, 161 Ill. 358, 43 N.E. 1084 (1896); *Steinberg v. Chicago Title & Trust Co.*, 142 Ill.App.3d 601, 491 N.E.2d 1294, 96 Ill.Dec. 834 (1st Dist. 1986) (perimeter metes and bounds descriptions of land were not proper descriptions to be used in mechanics lien claim when, at time lien was filed, land to which lien sought to attach had changed from raw tract of land identified by perimeter metes and bounds descriptions to subdivided land recorded by plat and sold to, or encumbered by, third parties).

4. [6.20] Has the Lien Claimant Timely Filed Suit To Foreclose Its Lien and Included All Required Allegations?

A suit to enforce a general contractor's lien or a subcontractor's lien must be instituted within two years of the completion date of the lien claimant's work. 770 ILCS 60/7. The suit may be instituted by

- a. filing an original complaint to foreclose the lien in the circuit court of the county where the improvement is located;
- b. filing an answer and counterclaim in the mechanics lien suit of another claimant who has made the claimant a party;
- c. filing a petition to intervene and filing a counterclaim in the mechanics lien suit of another claimant (the counterclaim, not merely the petition to intervene, must be filed within two years); or
- d. filing an answer and counterclaim in a mortgage foreclosure suit.

The pleadings for a lien claim must contain the information required in the Mechanics Lien Act:

(i) a brief statement of the contract or contracts to which the [lien claimant] is a party and by the terms of which the claimant is employed to furnish lienable services or material for the real property (herein called the "premises"), (ii) the date when the contract or contracts were dated or entered into, (iii) the date on which the claimant's work, labor or material labor, services, material, fixtures, apparatus or machinery, forms or form work was last performed or furnished, whether the claimant completed furnishing or performing its work . . . and if not why, (iv) the amount due and unpaid to the claimant, (v) a description of the premises, and (vi) such other facts as may be necessary for a full understanding of the rights of the parties. 770 ILCS 60/11(a).

The pleadings need not include a statement of any contract to which the lien claimant is not a contracting party or any plans and specifications referenced in the lien claimant's contract. *Id.*

The following must be joined as necessary parties to any lien claim suit: the owner of the property, the general contractor, all persons in the chain of contracts between the lien claimant and the owner, all persons who have asserted or may assert liens against the premises under the Mechanics Lien Act, and any other person against whose interest in the property the claim is asserted. 770 ILCS 60/11(b). *See Edward M. Cohon & Associates, Ltd. v. First National Bank of Highland Park*, 249 Ill.App.3d 929, 618 N.E.2d 676, 188 Ill.Dec. 106 (1st Dist. 1993) (trust and mortgage lenders that acquired interests in property during pendency of lien claimant's foreclosure suit were not necessary parties); *Joseph T. Ryerson & Son, Inc. v. Manulife Real Estate Co.*, 207 Ill.App.3d 622, 566 N.E.2d 297, 152 Ill.Dec. 610 (1st Dist. 1990) (subcontractor may be deemed necessary party even if bankrupt or judgment-proof status is in dispute); *Interstate Electric Supply Co. v. Contractors & Engineers, Inc.*, 149 Ill.App.3d 1080, 501 N.E.2d 866, 103 Ill.Dec. 549 (1st Dist. 1986) (foreclosure and sale decree in proceedings that excluded party in interest did not affect interest of excluded party).

Merely filing a motion for leave to file a counterclaim to foreclose a mechanics lien claim or petition to intervene within the two-year period is insufficient to meet the requirement that the action to foreclose be filed within two years of completion of the claimant's work. The counterclaim to foreclose must be filed within that two-year period. *Bank of New York v. Jurado*, 2012 IL App (1st) 112116, 977 N.E.2d 1202, 365 Ill.Dec. 103. In the event a motion for leave to file a counterclaim is necessary and cannot be heard before the two-year period expires, a separate action to foreclose should be filed.

B. [6.21] Is the Owner Protected by a §5 Contractor's Sworn Statement or Waiver of Lien?

An effective contractor's sworn statement under §5 of the Mechanics Lien Act or a lien waiver issued by the lien claimant may protect the owner from liability for lien claims. See §6.2 above for a detailed discussion of sworn statements under 770 ILCS 60/5 and §6.3 above for a detailed discussion of lien waivers.

C. [6.22] Has the Lien Claimant Timely Responded to a Demand To File Suit Pursuant to §34 of the Mechanics Lien Act?

If there is a lien recorded against a client's real property, the client does not have to wait for the two-year period within which the lien claimant can file suit to foreclose the lien. Under §34 of the Mechanics Lien Act, the property owner may demand in writing that the lien claimant file suit to foreclose the lien within 30 days after the demand or forfeit its lien rights. 770 ILCS 60/34. See *Gateway Concrete Forming Systems, Inc. v. Dynaprop XVIII: State Street LLC*, 356 Ill.App.3d 806, 826 N.E.2d 1051, 292 Ill.Dec. 615 (1st Dist. 2005) (when §34 demand was sent to multiple representatives of lien claimant, suit had to be filed within 30 days after first demand was served). The §34 demand must be sent via registered or certified mail, return receipt requested, or made via personal service and only after the lien has actually been recorded. 770 ILCS 60/34; *Krzyminski v. Dziadkowiec*, 296 Ill.App.3d 710, 695 N.E.2d 1275, 231 Ill.Dec. 156 (1st Dist. 1998) (§34 demand must be sent after lien is recorded in order for notice to be effective); *Lake County Grading Co. v. Forever Construction Co.*, 2017 IL App (2d) 160359, 79 N.E.3d 743, 414 Ill.Dec. 108. Note that while an owner maintains the right to demand foreclosure under §34, the appellate court in *American Steel Fabricators, Inc. v. K&K Iron Works, LLC*, 2022 IL App (1st) 220181, 213 N.E.3d 961, 464 Ill.Dec 589, held that a subcontractor also has a right to issue a §34 demand notice to commence suit on a mechanics lien recorded by that subcontractor's sub-subcontractor on that same project.

If the lien claimant fails to file suit within the 30-day period, its lien rights are forfeited, and the client may send a written demand under §35 of the Mechanics Lien Act requiring the lien claimant to provide a written release of lien within 10 days after such §35 demand. If the lien claimant fails to timely provide the written release of lien, it shall be liable to the owner for a penalty of \$2,500 plus the client's costs and attorneys' fees incurred in connection with bringing an action to enforce its rights under §§34 and 35. 770 ILCS 60/35.

Section 34 requires that the notice include specific language advising the contractor of the consequences of failing to respond to the §34 notice:

A written demand under this Section must contain the following language in at least 10 point bold face type: “Failure to respond to this notice within 30 days after receipt, as required by Section 34 of the Mechanics Lien Act, shall result in the forfeiture of the referenced lien.” 770 ILCS 60/34(b).

An owner should be careful in making a §34 demand if its contract with the contractor requires that disputes be arbitrated. In *Illinois Concrete-I.C.I., Inc. v. Storefitters, Inc.*, 397 Ill.App.3d 798, 922 N.E.2d 542, 337 Ill.Dec. 419 (2d Dist. 2010), the court held that by sending a §34 demand to the contractor that had recorded a mechanics lien claim against the owner’s property, the owner waived the arbitration requirement in its contract with the contractor. The court reasoned that the §34 demand is an action that is inconsistent with the right to arbitrate. Yet if a contractor files a lawsuit to foreclose its mechanics lien claim in response to a §34 demand, it will not be deemed to have waived its right to seek arbitration. *LaHood v. Central Illinois Construction, Inc.*, 335 Ill.App.3d 363, 781 N.E.2d 585, 269 Ill.Dec. 788 (3d Dist. 2002). A contractor is permitted to preserve its mechanics lien rights by filing a lawsuit to foreclose. If there is an enforceable arbitration requirement, in most cases the mechanics lien foreclosure lawsuit will be stayed pending the arbitration.

D. [6.23] What if There Are Insufficient Proceeds from the Foreclosure Sale?

In the event there are insufficient proceeds from a foreclosure sale to satisfy the mechanics lien claimants and the mortgage debt, the court must engage in a priority analysis to determine how the foreclosure sale proceeds are split between the mortgagee and the lien claimants. In *LaSalle Bank National Ass’n v. Cypress Creek I, LP*, 242 Ill.2d 231, 950 N.E.2d 1109, 351 Ill.Dec. 281 (2011), the Illinois Supreme Court held that lenders would have the same priority as mechanics lien claimants for amounts that the lenders paid for improvements on a project, in addition to the priority that a lender had for the value of the land at the time that the construction contract was entered into. Under *Cypress Creek*, in structuring the formula necessary to divide the proceeds from a foreclosure sale, the lender would receive a priority to the extent of the value of the land at the time the construction contract is signed and for the improvements paid for by the lender, thus increasing the lender’s recovery and reducing the mechanics lien claimants’ recovery.

In response to *Cypress Creek*, §16 of the Mechanics Lien Act was amended effective February 11, 2013, to reverse the effect of *Cypress Creek* by eliminating the second component of the lender’s recovery. Pursuant to amended §16, in determining how the foreclosure sale proceeds are distributed when the foreclosure sale proceeds are insufficient to satisfy the amounts due the lender and mechanics lien claimants, the lender is entitled to a priority only “in the portion of the proceeds attributable to the value of the land at the time of making of the contract for improvements” and the mechanics lien claimants are entitled to a priority “in the portion of the proceeds attributable to the value of all subsequent improvements made to the property.” 770 ILCS 60/16. *See AP Siding & Roofing Co. v. Bank of New York Mellon*, 548 B.R. 473 (N.D.Ill. 2016). Pursuant to amended §16, the lender does not receive the benefit of the improvements paid for with the lender’s loan proceeds as *Cypress Creek* held but instead receives only the value of the land at the time the construction contract is signed.

E. [6.24] What About Bonding Over Mechanics Liens?

As of January 1, 2016, an amendment to §38.1 of the Mechanics Lien Act allows parties with an interest in real estate to substitute an eligible surety bond as security for payment of a claim for mechanics lien. 770 ILCS 60/38.1. Prior to this amendment, Illinois was one of only a few states that did not allow for some type of bonding process to remove a mechanics lien from title.

Section 38.1(a)(2) identifies the criteria for an eligible bond and the surety's qualifications. 770 ILCS 60/38.1(a)(2). Under this process, an owner, lender, or other party having an interest in the land may obtain an eligible surety bond, which is filed with a petition for substitution with the clerk of the circuit court in the county in which the property is located.

If there already is a pending action to enforce a lien claim, an applicant may file its petition to substitute the bond in that action within five months of the filing of the complaint or counterclaim to foreclose the mechanics lien claim. 770 ILCS 60/38.1(c). The amount of the bond is statutorily set at 175 percent of the mechanics lien claim. 770 ILCS 60/38.1(a)(2)(c). Assuming there is no objection to the substitution within 30 days of filing the petition, the court will allow for substitution. 770 ILCS 60/38.1(e). Once substituted, the parties will look to the bond, instead of the real property, for payment of any mechanics lien claim and the bond is substituted for the real property securing the lien claim. 770 ILCS 60/38.1(l). Once a surety bond is approved, if a foreclosure action is pending, the bond principals and sureties become parties to the foreclosure action. 770 ILCS 60/38.1(h). The principal and surety may assert only those defenses that could have been asserted against the lien claim by the principal of the bond or the owner at the time the contract was let. 770 ILCS 60/38.1(j). Section 38.1 provides that, upon approval of the bond, all other parties to the lien claim count or counts *may* be dismissed. 770 ILCS 60/38.1(h). Thus, dismissal of the owner and lender once the bond is substituted as security for the lien claim may not be compulsory even though there remain no claims against the lender and owner. Because there remain no claims against the owner and lender and no right to recover from them, the better course is to dismiss the owner and lender after the bond is approved.

7

The Sale of Agricultural Property for Commercial Use

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I. [7.1] INTRODUCTION

Starting approximately at the turn of the century, the value of farmland began what appears to be a rapid uptick in value. Based on information from the Illinois Society of Professional Farm Managers and Rural Appraisers, the value of “average” farmland is up more than 500 percent or more and “excellent” soil some 600 percent or more. Illinois Society of Professional Farm Managers and Rural Appraisers, 2024 LAND VALUES REPORT, www.ispfmra.org/download/2024-land-values-report. Although there are many causes driving this increase in value, the old “they are not making any more of it” theory is certainly a contributing factor. As farms grow larger and farmland is lost to nondevelopment or government programs requiring non-production, the battle for land to farm increases, and the price of farmland tags along.

In the early part of this century, much of the increase in farmland value was attributed to commercial development and related §1031 exchange transactions (see 26 U.S.C. §1031). Business owners were “cashing out” during the run up in the value of their business or commercial property and were looking for a safe harbor for their funds. In many of these instances, the purchase of farmland through a §1031 exchange was the preferred option, and if the price paid was over the average at the time, then so be it because the business owners were avoiding the capital gains tax completely. Thus, paying 25 percent more than fair market value was essentially just paying fair market value. Such transactions were commonplace in the early phase of the run-up in farmland value.

But these buyers were strategic business people, and farmland, especially in areas near population centers, became the target of buyers who were looking for developers to build subdivisions, shopping centers, or convenience stores. In many instances, such farmland, having often been in families for multiple generations, had a low basis. The result was that numerous farm owners, as sellers, now also had to either pay capital gains taxes or attempt to avoid such taxes with a §1031 exchange. This tax avoidance was generally accomplished by purchasing more farmland, usually for production agriculture, not for commercial development. Coupled with the “city” commercial sellers and the rise of large or mega-farms, the rapid increase in the value of farmland was well under way.

In the last decade, however, perhaps as a result of both the fear of missing out and the preservation of the family farm, farmers have become more active and aggressive in the purchasing of farmland, with the net result being that the price of agricultural real estate for production purposes is now a factor in the commercial development world. This push by buyers to find more land is causing an uptick in the value of farmland being purchased for commercial development as both farmers and developers vie for the same parcels. Those areas where rural living meets big city development are enticing to a larger pool of investors but are also ripe for the growth of legal disputes. The end result sometimes is bad neighbors and, more and more often, a litigator’s dream case involving the seller of the property, a governmental entity, the developer (sometimes more than one), the brokers, and the buyer, and even the tenant farmer.

This chapter is intended to assist the practitioner in spotting issues or potential problems prior to the negotiation of a final land sales contract. It attempts to look at these issues from the perspective of the party (seller or buyer) likely to be concerned or surprised by previously unseen or undisclosed facts and information. Thus, the chapter is not necessarily heavy on the law but hopefully overly broad on common sense.

II. [7.2] NUISANCE LITIGATION AVOIDANCE

As the line between rural and urban blurs in the wake of urban and suburban sprawl, a house “in the country” has often become part of the American dream. Houses can pop up like mushrooms in suburbia, quickly followed by convenience stores, shops, restaurants, and all forms of related and necessary service industries. Life is good, and the overflow of the city seems to continue at a fast and easy pace. Add to the mix a new Charger and Harley Davidson, a 3,500-square-foot dream home with a pool, great room, and walk-out basement, quaint brick, contemporary shops with open air cafés, and . . . the sweet smell of the dairy down the road? One can almost hear the Charger’s tires squealing as the homeowner races to his or her lawyer to complain and file a lawsuit.

Sadly, this is becoming a more common occurrence as those fulfilling the dream of living in the country find that they may have failed to adequately investigate or understand all that living in the country entails. Well water, septic systems, slow-moving vehicles, and large and loud dust-creating farm equipment usually come as a rude awakening, as none of them are likely to be viewed as one of the expected joys of country living.

To guard against this likelihood, there are certain things to look for and be aware of before the decision is made to undertake the development of agricultural land. Proper planning, investigation, and research at the early stages can prevent later confrontations, and this chapter seeks to explore a few of those areas.

A. [7.3] Farm Nuisance Suit Act

The smell of the dairy or, more often recently, of the potential dairy (or other agricultural development) down the road has generated many nuisance lawsuits. These have met with varying degrees of success. Illinois has passed “right to farm” legislation known as the Farm Nuisance Suit Act, 740 ILCS 70/0.01, *et seq.* Section 1 of the Act makes a clear statement of the intent of the legislation:

It is the declared policy of the state to conserve and protect and encourage the development and improvement of its agricultural land for the production of food and other agricultural products. When nonagricultural land uses extend into agricultural areas, farms often become the subject of nuisance suits. As a result, farms are sometimes forced to cease operations. Many others are discouraged from making investments in farm improvements. It is the purpose of this Act to reduce the loss to the State of its agricultural resources by limiting the circumstances under which farming operations may be deemed to be a nuisance. 740 ILCS 70/1.

As a general rule, the old “first come, first served” rule applies to nuisance actions involving farms:

No farm or any of its appurtenances shall be or become a private or public nuisance because of any changed conditions in the surrounding area occurring after the farm has been in operation for more than one year, when such farm was not a nuisance at the time it began operation, provided, that the provisions of this Section shall not apply whenever a nuisance results from the negligent or improper operation of any farm or its appurtenances. 740 ILCS 70/3.

The bellwether case was heard by the Illinois Supreme Court in 2012 when the Justices took a look at the Farm Nuisance Suit Act. In *Toftoy v. Rosenwinkel*, 2012 IL 113569, 983 N.E.2d 463, 368 Ill.Dec. 50, the issue before the court was whether neighboring homeowners could require a farm to take action to reduce the number of flies that were attracted by the farmer's cattle operation. In noting that the homeowners had built their home some six years after the cattle operation began, the court found that this was a classic "coming to the nuisance" case that the Farm Nuisance Suit Act was intended to address. 2012 IL 113569 at ¶21. The homeowners argued that the prior use of their land as a residence by the former owner (a relative of theirs and albeit in a different residence and in years past) was sufficient to predate the use by the farmer of his land for his cattle operation. The court rejected what could be viewed as a "tacking" argument and found that because the homeowners' home was constructed more than one year after the farmer began his cattle operation, their action was barred by the Farm Nuisance Suit Act. 2012 IL 113569 at ¶¶21 – 22.

This decision concluded five years of litigation and serves as notice that any developer or prospective property owner must fully investigate and inventory the surrounding agricultural area and determine what legal farm uses already exist. *Toftoy* also reveals that, by nature, nuisance litigation is extremely fact intensive, and as drafted and interpreted, the Farm Nuisance Suit Act generally places the burden on those would-be owners to make such factual determinations. 2012 IL 113569 at ¶21; 740 ILCS 70/3.

Potential problems such as the conflict between farm and nonfarm traffic, noise, dust, and odor are but a few of the facts that must be investigated and determined as early as possible in the life of a commercial development. In addition, the size, basic nature, and quality of any nearby agricultural operations, and perhaps more importantly what agricultural (and even other) uses could legally exist thereafter, should be taken into account by a prospective purchaser or developer.

In recent times, attorneys have begun to use contract and deed provisions in an attempt to address some of these use, notice, and potential nuisance concerns. In all circumstances, care should be taken to review the chain of title and all vesting deeds or easements for the existence of any of these liability avoidance provisions — especially as to farmland being purchased for commercial or residential development. One example of such a provision is as follows:

[Buyers] [Grantees] knowingly acknowledge that the property hereby conveyed lies partially or wholly within an agricultural part of _____ County and that said geographic area is involved with the production of food and related agricultural products. Such agricultural activities include but are not limited to activities that cause traffic congestion, noise, dust, and/or odors. [Buyers] [Grantees] further acknowledge they have been provided sufficient opportunity to meet and speak with the owner of all adjacent agricultural lands and are familiar with such owners' use of such adjacent property. [Buyers] [Grantees] acknowledge that such uses, now and in the future, whether increasing or decreasing in nature, are acceptable to [Buyers] [Grantees], and [Buyers] [Grantees] knowingly release Grantor(s) from any liability therefor and assume all liability related thereto.

To the authors' knowledge, whether such a deed provision is fully enforceable has not been the subject of a court ruling in Illinois yet. However, the existence of such a provision provides, at a minimum, constructive and/or actual notice to a subsequent purchaser that some nuisances may exist nearby and that additional investigation may be warranted.

Other areas that could be fodder for such a provision would be a broad and encompassing waiver of any right to sue, a disclaimer of any duties on the behalf of the landowner/seller, or language that would in some manner further absolve the seller and/or adjoining owners from any future liability. As usual, expanding the language of such provisions in an effort to protect the seller or adjoining owners would likely bring about more heightened duties of disclosure, third-party beneficiary questions, and the like — a proverbial plethora of legal theories requiring a cost-benefit analysis on the value of using such language.

B. [7.4] Importance of Disclosure and Due Diligence

As the law presently stands, the general rule of caveat emptor typically applies to the sale of undeveloped farmland. Real estate practitioners have long seen the use of residential disclosures (Residential Real Property Disclosure Act, 765 ILCS 77/1, *et seq.*) and radon disclosures (Illinois Radon Awareness Act, 420 ILCS 46/1, *et seq.* (§10)), as well as various mold, plumbing, septic, water, and other general disclosures in residential real estate transactions. For our purposes, the use of such statements would be intended to disclose that the property is in a rural area and outline the present (and perhaps future) agricultural uses so that the parties are forced to at least think about the potential nuisance, environmental, boundary, or other issues that may cause legal disputes in the future.

As transactions and real estate deals in general become more complex and more highly regulated, the movement toward more disclosure has been gathering momentum, and mandatory use of disclosure statements is gaining support. The deed provision mentioned in §7.3 above is an example of such a disclosure, and in fact some states have codified various disclosure provisions. For example, Alaska Stat. §34.70.050 provides:

[A] disclosure statement must [be provided that will] include a provision that notifies transferees

* * *

(3) that they are responsible for determining whether, in the vicinity of the property that is the subject of the transferee’s potential real estate transaction, there is an agricultural facility or agricultural operation that might produce odor, fumes, dust, blowing snow, smoke, burning, vibrations, noise, insects, rodents, the operation of machinery including aircraft, and other inconveniences or discomforts as a result of lawful agricultural operations.

The use of such disclosures is by no means a new idea, and even local governments are aware of the issue, as is evidenced by Ordinance 546 adopted in 1996 in Kings County, California (California being ever the progressive state). This ordinance led to the creation of a “Notice, Disclosure and Acknowledgment of Agricultural Land Use Protection and Right To Farm Policies of the County of Kings,” www.countyofkingsca.gov/home/showdocument?id=4012, which specifically recites that

the County of Kings has adopted policies which establish agriculture and agricultural facilities and operations as priority uses on productive agricultural lands within the

County, and residents and other occupants of property in the agricultural zone districts should be prepared to accept inconveniences or discomfort from normal, usual, and customary agricultural operations, facilities, and practices.

The Kings County notice goes on to require the legal description of the property be inserted immediately before the following statement:

[The property] is recognized to be in the vicinity of, or adjacent to, land designated and utilized for agricultural uses, facilities, and operations, and may be subject to inconveniences or discomforts arising from the pursuit of those agricultural operations, including but not limited to land preparation, cultivation, growing and harvesting of crops, raising of livestock, dairy production, processing of agricultural commodities, viticulture, apiculture, horticulture, aquaculture, poultry and other agricultural operations. Said inconvenience or discomforts may include, but shall not be limited to: equipment and animal noises; farming activities conducted on a 24-hour, 7-day a week basis; odors from manure, fertilizers, pesticides, chemicals, or other sources; the aerial and ground application of chemicals and seeds; dust; flies and other insects; and smoke from such agricultural operations.

Absent, or perhaps in addition to, such governmentally adopted requirements, the use of contractual disclosure requirements should also be considered. Such contractual provisions could give a potential developer or buyer a leg up on the investigative process, and perhaps support a cause of action at a later date if the disclosures provided by the seller are found to be erroneous, incomplete, or misleading. However, the goal of disclosure should remain basic fact-finding so as to provide a prudent buyer or developer the opportunity to speed up the investigation of the farmland and either avoid a future problem or move forward with the comfort of knowing that any concerns have been dealt with appropriately. Certainly, reliance on the disclosure without independent investigation or verification is not recommended.

III. [7.5] REPAYMENT OF CONSERVATION RESERVE PROGRAM MONEYS

The federal government has a long history of agricultural program payments designed to encourage (or discourage, as the case may be) certain actions by the farm community. One of the more popular offerings has been the Conservation Reserve Program (CRP). Enrollment of land in CRP is voluntary and generally open only to owners or tenants of agricultural land. Participation entitles the landowner or tenant to receive annual payments and/or assistance when establishing a long-term conservation plan for eligible farmland. Those participating in CRP must enter into a contract with the federal government, generally for 10 to 15 years, significantly limiting or restricting the use of the land in some manner. The various government programs are administered through the various local Farm Service Agency locations of the U.S. Department of Agriculture. See U.S. Department of Agriculture, *Find Your Local Service Center*, www.farmers.gov/working-with-us/service-center-locator.

Problematic for the development process is that once a parcel of land is placed in CRP, its removal may cause a repayment penalty, and such amounts can be significant. 7 C.F.R. §1410.51 provides:

(d) If a participant transfers all or part of the right and interest in, or right to occupancy of, land subject to a CRP contract and the new owner or operator does not become a successor to such CRP contract within 60 days, or such other time period as [the Commodity Credit Corporation] determines to be appropriate, then such CRP contract will be terminated with respect to the affected portion of such land and the original participant:

(1) Forfeits all rights to any future payments for that acreage; and

(2) Will refund all previous payments received under the CRP contract by the participant(s) or prior participants, plus interest.

This is quite often a surprise to the seller because it is the seller who gets the notice that thousands, perhaps tens of thousands, of dollars must be repaid. In order to avoid such a surprise, the buyer and the seller should make each other aware of their intentions. It is the authors' opinion that when seeking to assist a buyer in the purchase of *any* undeveloped land, it is good practice to contact the Farm Service Agency or appropriate federal office for the county in which the land is located to determine if all or any portion of the land in question is enrolled in any state or federal programs as such information *typically will not be disclosed* on a title commitment or in an abstract. This interaction with the local governmental agency will most likely require a release from the seller to allow the buyer or the buyer's agents to obtain the necessary information (or proof of no program participation). Sellers should be cautious and require that all information gathered or given to a potential buyer or the buyer's agents be held in confidence, and, when possible, the release should be drafted so as to limit access to only the specific information needed by the potential buyer.

Likewise, when representing a seller, disclosure of the buyer's intended use is key because the seller needs to make sure that the buyer does not take any action that would cause the repayment requirements to be triggered. Contract language clearly outlining the requirement that the buyer become a successor to all CRP contracts of the seller is a must for a seller to avoid any potential repayment issues. The following is a sample sales contract provision (among the many that are being used) that could be used to address the repayment issue:

Purchaser acknowledges that a portion of the Premises is currently subject to certain government farm programs, including but not limited to the following (the "Contract(s)"):

a. _____ Contract # _____, which will expire _____, 20__.

b. _____ Contract # _____, which will expire _____, 20__.

Purchaser covenants and agrees to assume, participate, and continue the Contract(s) until such Contract(s) expire by their own terms. All government contract payments shall be

payable to Seller for the payment year 20___. All Contract payments shall thereafter be made to Purchaser. Should Purchaser terminate, or take any action to cause the termination or default of any such Contract(s) prior to the end of the Contract(s) term, Purchaser shall pay all costs and expenses of Seller incurred due to such termination or default, including but not limited to any repayment obligations Seller may then have or that may thereafter accrue, and shall indemnify Seller therefor, including any reasonable attorneys' fees, costs, or expenses incurred by Seller as a result thereof. This provision shall survive closing and shall further be provided for in any deed of conveyance from Seller to Purchaser.

Perhaps alternate language could be included requiring the buyer to “refund” a portion of the purchase price equal to the repayment (plus an additional amount as a penalty) if the buyer's actions cause the seller to incur a repayment penalty, or the parties may want to consider a penalty provision that provides for repayment to seller of 125 percent of the repayment amount. One might also consider the need for contractual language providing the seller with indemnification from the buyer for any costs, expenses, and attorneys' fees incurred as a result of the buyer's failure to prevent the seller from being required to repay moneys previously received — a tricky situation to be addressed based on the needs of the parties, the amount of the possible repayment, and the facts particular to the transaction. As with the sample language above, it is recommended that the sales contract provision indicates that these types of provisions survive closing.

IV. [7.6] SECTION 1031 PROPERTY EXCHANGES

As mentioned in §7.1 above, earlier this century “like-kind” exchanges were a major factor and seen by some as the driving force behind the initial increase in the value of farmland. There are literally thousands of articles and publications outlining the merits and technical aspects of the tax-free (actually tax-deferred) exchange of business or investment property under §1031 of the Internal Revenue Code, 26 U.S.C. §1031, and hundreds of companies at the ready to assist in this endeavor.

In the case of agricultural land, the need for a tax-free exchange is often critical. Many agricultural landowners have inherited their land and have a basis that is strikingly low (\$400 – \$600 per acre, or less in some instances) in comparison to today's agricultural value (perhaps \$12,000 – \$20,000 per acre), let alone its commercial value (upwards of \$35,000 per acre or more). Thus, the seller is left with the option of either paying a potentially staggering capital gains tax (federal and state) or transferring the gain from the sale of farmland to like-kind property. Given this choice, most farmers choose the tax-avoidance route.

A seller should consider providing contractual language, such as the following, in any sale agreement, thus clearly indicating that a §1031 exchange is being contemplated:

Tax-Deferred Exchange. The parties acknowledge that Seller may structure the sale of this Property so as to qualify for like-kind exchange treatment pursuant to 26 U.S.C. §1031 of the Internal Revenue Code or other provisions providing favorable tax treatment. Accordingly, prior to Closing, Seller reserves the right to assign this Agreement to a qualified exchange intermediary or other third party to the extent necessary to facilitate the exchange and shall give written notice of such assignment identifying the assignee at or prior to Closing. As an

accommodation to Seller, Buyer agrees to accept performance pursuant to this Agreement from Seller's assignee to the extent of such permitted assignment and to perform pursuant to this Agreement for the benefit of Seller's assignee, provided that Buyer shall not be required to acquire replacement property for Seller or to incur any additional expense therefor and title to the Property shall be conveyed directly from Seller to Buyer by the deed as required by this Agreement. Notwithstanding the foregoing, Seller shall remain primarily liable for the performance of the terms of this Agreement.

Given the short 45-day window for a seller to identify replacement property after closing on the sale of farmland, a seller who has not already located "exchange" or "target" property ("replacement property" in §1031 parlance) may want to add a provision providing the seller some form of delay mechanism for closing until suitable exchange property can be identified. A buyer may want a contractual right to take advantage of the seller's need for exchange property by offering to assist in locating exchange property or actually buying it and then "trading deeds" in what would be an actual exchange and tax-deferral all rolled into one transaction. Depending on the contact terms and needs of the parties, it may again be necessary to include language providing that such terms survive closing.

Finally, the statutory notice and timing requirements are critical for a successful §1031 exchange. Sellers and their agents should be or immediately become knowledgeable of these requirements, both technical and chronological, of §1031, or seek the advice of a professional to assist in such decisions.

V. [7.7] COAL, MINERAL, OIL, GAS, WIND, SOLAR AND OTHER SEVERED INTERESTS

The general and long-standing rule in Illinois is that all coal and minerals owned, including oil and gas, are transferred upon sale unless specifically reserved. *Updike v. Smith*, 378 Ill. 600, 39 N.E.2d 325 (1942). However, it is not uncommon for the coal, mineral, oil, or gas rights, and in today's world, wind or solar rights, related to agricultural land to be owned, leased, or even optioned by some person or company other than the surface owner, especially in Central and Southern Illinois. Such severances of one of the "sticks in the bundle of property rights" does not in itself create a substantial problem in most instances, but possible real-world issues are abundant.

The owner of the severed interest may, by virtue of the severance transaction and documents, have an express or implied easement, right, or license of access to the property for a veritable shopping list of activities, often including but not limited to inspection, testing, or removal of the coal, minerals, oil, or gas — or in today's world, possibly the ability to subside the surface as with longwall coal mining, cutting and removing vegetation blocking the sun, or installing roads for access. Additionally, the owner of the mineral estate typically has an implied right to use as much of the surface as may be reasonably necessary to recover the mineral estate. *Jilek v. Chicago, Wilmington & Franklin Coal Co.*, 382 Ill. 241, 47 N.E.2d 96 (1943). Obviously, what is "reasonable" differs based on what a party desires to accomplish and may ultimately be a question for a court, so any effort at the outset to limit, control, or explain such uses could be beneficial.

As a first step, it will be necessary to determine the state of title and identify any such rights of access, inspection, and the like. Certainly, a full understanding of such matters prior to the time of the purchase is preferable to finding out such rights exist after the development is partially or fully completed. This is especially true when the use of the property will be substantially altered (*e.g.*, converted from a cornfield to a grocery store and parking lot or a residential development). A standard abstract or title commitment may not be sufficient for the purpose of determining what rights have been severed or granted, and what encumbrances may exist, when coal, mineral, oil or gas pipeline, wind, solar, or other severance issues are involved. Typical title commitments generally track only the surface ownership and related matters, such as utility easements, rights-of-way, drainage rights, and the like, and may only refer to the earlier severance or granting of mineral or other interests and not follow ownership of that severance, right, or interest any further. Additionally, many title record researchers (who are generally not attorneys) for title agents do not always read the terms of all documents in the chain of title, and thus an important severance, right, or reservation may be missed by the parties if they are relying only on the researcher's review and the title commitment.

When in doubt, a prospective buyer is well advised to seek a title commitment specifically directed at determining ownership of any of these severed estates. This is a time-consuming and costly effort, but it is only then that a full understanding of the effect the owner of those severed estates can have on the subject property can be ascertained, and only then that the risk to the new owner or developer can be adequately evaluated by buyer's counsel.

A. [7.8] Oil and Gas

The leasing of rights for oil and gas development is often easy to deal with when no evidence of development exists. The seller, or a prior owner in the chain of title, can typically sign an affidavit of non-production, which can then be recorded to remove an inactive or expired lease from the list of exceptions in the title commitment. See §7.27 below. (Note that the form in §7.27 below is an affidavit of general applicability and should be tailored to the specific needs of the client's particular situation.) Still, it is recommended that an on-site inspection and investigation be performed to obtain first-hand knowledge of the condition of the land in question.

Where oil and gas rights exist, they are quite often the subject of numerous assignments to operators who are managing, maintaining, and operating the well sites. Locating these companies can be difficult, and, even if they are located, gathering information can be problematic. Most of the operators appear to be in the Central Plains or Texas. They tend to be highly confidential and wary and understand real estate law only with respect to their specific local or state laws. Be prepared to earn your keep when dealing with these companies.

A letter of representation, a release, or even a confidentiality agreement may be required before you can even get your foot in the door. As with many situations, the practitioner is more likely to find success by simply agreeing to generally follow their rules and procedures at the outset and saving the "fight" for any material issues or negotiations that may ensue.

B. [7.9] Coal

Coal, on the other hand, may be a different story for the would-be buyer or developer. While it is not possible to address in this chapter the myriad angles and issues that coal severances can raise, there are some general issues to consider. A review of the maps and data available from the Illinois Geological Survey may help determine whether coal is even present under the land in question and, if so, in what quantity and quality. Maps of the entire state, the various layers of coal, and county-specific coal information are available on the ILMines Coal Mine Viewer at <https://ilmineswiki.web.illinois.edu/wiki/ILMINES> (case sensitive). This should not be used as conclusive proof of the existence or absence of coal, but these maps will provide the practitioner with a general idea of the “lay of the coal” in the area of the property in question, and therefore allow a reasonable determination as to whether additional investigation may be warranted or necessary.

Much of the coal, oil, and gas underlying rural Central and Southern Illinois has been sold or leased in years past, often for a century or more. Many of these severances of coal were actual sale transactions. Over the intervening years, much of the coal in Illinois has found its way to common ownership in large blocks and, in many instances, is now actually owned by the county in which it is located. For example, in Montgomery County, Illinois, the county owns some 120,000 acres of coal (Montgomery County has a total of 453,000 surface acres; thus, over 26 percent of the entire coal reserves are county-owned), and Bond County owns 90,000 acres (Bond County has a total of 244,000 surface acres; thus, it owns some 37 percent of the coal in the entire county). Many of the county boards, for better or worse, have leased or sold these coal rights to developers, to speculators, or directly to coal companies. The chain of deeds for the coal severance should be examined to determine what rights, duties, and/or obligations may have been sold or leased with the coal, when the severance or any later actions as to the severed estate may have occurred, and what effect or interference such rights may have now or in the future on the use of the surface.

Further, problems, or more appropriately potential problems, can be hidden and difficult to find — hence the need for a full and complete review of all documents in or affecting the chain of title. For example, the following language was discovered by the authors’ firm’s researcher in a handwritten deed from 1910 in relation to a transaction one of the authors was working on:

Said grantor hereby agrees for himself, his heirs, executors, administrators, legal representatives or assigns, in consideration of the premises, at any time hereafter, upon demand by grantee, its successors, legal representatives or assigns, to sell and convey to said grantee, its successors, legal representatives or assigns, such portion or portions, or tract or tracts, parcel or parcels of the surface of the above described premises, as may be desired by it, its successors, legal representatives or assigns, for the erection of tipplers, buildings, power houses, sinking of shafts, drifts or slopes, railroad tracks, switches and wagon roads, and hauling ways, places for accumulation of water, slate, gob and refuse of all kind and improvements or equipment necessary for the mining and removing of said coal; such portion to be sold, however, being limited to forty acres and [the] same to not include any of the improved parts of said land, at the price of seventy-five dollars per acre. See Deed Record 55, p. 112, filed June 16, 1910, in the Office of the Recorder of Deeds, Bond County, Illinois.

This is certainly broad language and, in light of what we now know about the mining process, quite progressive for 1910. Per counsel for the title underwriter itself, this was a valid deed provision. Complicating the entire deal was the fact that the latest assignee of the coal (Exxon) had ultimately sold/gifted its right to the county, and the county had in turn leased the coal to a coal company, presumably including this right to purchase 40 acres of land (in 2024, likely valued at \$7,000 to \$8,000 per acre for \$75 per acre. Clearly, this is a potential roadblock for a commercial developer. Thus, the authors would caution all practitioners serving as buyer's counsel to review each document in the chain of title to ensure such provisions are not lying in wait for your client.

Also problematic for today's developers is that the inquiry cannot stop at the status of title when coal is involved. With the technological advances in mining, "longwall mining" techniques can (and are, in fact, intended to) cause nearly immediate subsidence of the surface. ScienceDirect, *Longwall Mining*, www.sciencedirect.com/topics/engineering/longwall-mining. A buyer, when dealing with land where the coal has been severed, must therefore determine whether any mining might later take place under the land. If so, the next inquiry would require a separate search of the recorder's records to obtain an abstract of the coal conveyances. This abstract should provide the buyer and counsel with the vesting deeds and chain of title for the severance of the coal, and documents revealing all of the terms and conditions, if any, by which the coal was sold or leased since being severed from the surface estate. Fair warning that such research will not be easy or cheap, and it may in fact be difficult to find a researcher willing to undertake the task.

As an example of a potential issue, many deeds from the early to mid-1900s provide for the sale of "all coal below the depth of 125', including the rights to mine and remove the same, and to use any and all underground passages related thereto or connected to any adjacent coal or lands owned and mined." This provision was meant to curb the development of strip mines by applying a minimum depth limitation. However, this provision does not mention what rights, if any, the owner of the coal estate may have to subside on the surface of the land above the coal (and sadly the law in Illinois may not clarify this in many instances). Thus, it is imperative in such situations to obtain, review, and research the coal severance deed in order to have any opportunity to determine whether the severance of coal will cause problems for a development.

Finally, many of the deeds severing the coal, or the leases granting rights in oil and gas, contain broad language allowing for access to the surface for a vast array of purposes, such as inspection, surveying, the drilling of test holes, etc. These old deeds generally do not limit such access to any particular part of the surface or require the grantee to provide any notice or compensation to the surface owner. While there are some statutes that require the owner of the mineral estate, or its agent, to provide compensation for damages (see, *e.g.*, §6 of the Drilling Operations Act, 765 ILCS 530/1, *et seq.*), the bigger issue may be the potentially unfettered access to the entire surface that such mineral estate owners may possess. Again, such access could be a significant problem for a developer post-closing.

C. [7.10] Wind and Solar

The newest "use" of farmland for non-agricultural purposes relates to the installation, operation, and maintenance of wind towers and solar panels to generate electricity. As of 2022, wind and solar projects combined to account for almost 14 percent of the electricity produced in

Illinois. WINDEXchange, *Wind Energy in Illinois*, <https://windexchange.energy.gov/states/il>. In fact, per the Illinois Power Agency, in April 2023, wind energy output briefly exceeded energy output from coal plants in the United States. Illinois Power Agency, *IPA Power Hour 10: The State of Wind Energy* (Dec. 15, 2023), <https://ipa.illinois.gov/events/ipa-power-hour-10--the-state-of-wind-energy-.html>. These new resources appear to be here to stay, and thus an understanding of them is necessary to adequately address any legal issues relating to the potential use of the same land for a commercial development, *i.e.*, can the two peacefully and legally coexist?

Having read more than 100 wind or solar agreements, one thing is certain: they are highly complex and favorable to the wind or solar company. Most are couched as options that give the company a few years to investigate and explore the property and make a decision on whether the project will move forward. The long-term effects of a solar project would likely to a large extent prevent the use of that same property for commercial purposes. However, wind turbines have a relatively small footprint for each 40-acre parcel, and thus such use may be compatible with a commercial use.

The option agreements, easements, options, and other documents containing the landowner's grants to the company for land use are generally fully skewed toward the company. They contain many provisions that would assuredly be detrimental to the commercial developer. Such agreements that have not been the subject of proper negotiation may allow the company to access much more than the "project area" itself and provide for generally unilateral action on all sorts of decisions (vegetation, roads, fences, gates, the construction of buildings, material storage areas, etc.). Such open-ended and unilateral control could certainly alter the possible uses of farmland for a long period of time.

VI. TENANTS' RIGHTS

A. [7.11] Lease Duration

Illinois, being a state of agricultural background, has developed many statutes that address issues unique to the agricultural industry. One such statute deals, albeit somewhat confusingly, with the termination of a tenant farmer's right to continue to farm certain parcels of property. 735 ILCS 5/9-206 provides:

Notice to terminate tenancy of farm land. . . . [I]n order to terminate tenancies from year to year of farm lands, occupied on a crop share, livestock share, cash rent or other rental basis, the notice to quit shall be given in writing not less than 4 months prior to the end of the year of letting. Such notice may not be waived in a verbal lease.

The critical determination therefore becomes "what is the last day of the year of letting?" When the notice period is set forth in a written lease, such period will apply in lieu of the statute. However, oral agreements as to a different period are not effective, and the four-month period of the statute will be applicable. *Id.* See also *Rhodes v. Sigler*, 27 Ill.App.3d 1, 325 N.E.2d 381 (3d Dist. 1975). So depending on the timing of the notice and the meaning of the somewhat ambiguous statutory language, a tenant farmer may have a right to possession superior to a purchaser if the notice required by §9-206 is not given in a timely fashion. This could create a long delay or a costly buyout for the developer.

Problematic for the practitioner is that (1) written leases, although on the increase, are still not widely used and (2) there appears to be no “industry standard” as to the typical ending date for farmland leases for the various regions in Illinois. In some areas, the calendar year is followed, while in others “a year to year lease of farm land is presumed to begin on March 1 and end on the last day of February.” Donald L. Uchtmann, *October 31 is “Notice” Deadline for Many Farm Leases*, Agric.L. & Tax’n Briefs, Issue 04-11 (Sept. 2002, updated June 2006), <https://farmdoc.illinois.edu/publications/october-31-is-notice-deadline-for-many-farm-leases>.

In those areas of the state where winter wheat is not planted, the October 31 date may work successfully. In areas where winter wheat is more common, abiding by the October 31 date could cause significant problems as the wheat crop is generally planted and growing before that date. Thus, a landowner expecting to serve a notice to terminate by October 31 may be too late as the tenant has already planted the wheat, leaving the landowner with the option to (1) delay the sale until the next year, (2) “pay off” the tenant and buy the crop, or (3) sell the land at what may be a reduced price because it is subject to the tenancy. As one might suspect, there are many tenants who, knowing the rule, will intentionally plant an early wheat crop in an effort to ensure they get one more crop before the land is sold, in some instances intending to drive the price down so they might have a better chance of purchasing the land at a lower price.

Thus, whether timely notice has been given becomes a critical question that should be resolved and addressed in any sales contract, whether by way of affirmative representations of the seller, a written release from all tenants, or a contractual obligation on the seller that notice be timely provided to all tenants (with copies to the buyer). A buyer certainly does not want to find that the tenant must be “paid off” to give up tenancy rights or that the development could be delayed for many months until the tenancy expires (assuming the buyer gives timely notice after purchase).

B. [7.12] Form of Notice

735 ILCS 5/9-206 also sets forth the recommended general format for a notice to quit for farm tenancies:

The notice to quit may be substantially in the following form:

To A.B.: You are hereby notified that I have elected to terminate your lease of the farm premises now occupied by you, being (here describe the premises) and you are hereby further notified to quit and deliver up possession of the same to me at the end of the lease year, the last day of such year being (here insert the last day of the lease year).

The buyer’s counsel should include a contractual provision requiring that the seller give any tenant proper and timely notice as a condition to closing, and, perhaps as an additional safeguard, the buyer should reserve the right to buy out the tenant in the event the termination is not validly accomplished, obtaining an equal offset against or refund of an equivalent portion of the purchase price from the seller. If the refund route is used, it is recommended that the sales contract provision indicate that the right to seek the refund survives closing.

VII. [7.13] SURVEY

By and large, it appears that much of rural Illinois has not been surveyed for many, many years. Certainly, there have been no comprehensive surveys of large portions of most rural counties since the advent of computerized and global positioning technology. Even when surveys have been performed, many have not been recorded with the county so that others may take advantage of them. Because most title insurance does not provide coverage for boundary line disputes or other issues that would be disclosed by a proper survey, reliance on a title policy is not possible. Thus, a survey is nearly a necessity when agricultural land is to be purchased for development, and today many lenders will require one before any loan will be funded or approved.

This is especially true as the shift from raising livestock on small farms to raising it on mega-farms continues. In the past, farmers would fence nearly all of the alleged boundaries of their property to provide a means of allowing livestock to roam and graze. This dividing line became the assumed property boundary based on the agreement or acquiescence of the neighboring farmers rather than a fancy survey. Today, fewer farmers raise livestock, and the move to larger farm equipment has led to the removal of many fences and tree lines, leaving the boundary lines without any physical surface markers — and leaving prospective buyers without any ability to rely on surface markers even for general guidance.

As a result, today's buyer should contractually require a seller to provide a survey (or perhaps an American Land Title Association (ALTA) survey) of the property to be purchased. Any purchase contract should include contractual language that will ensure that the survey is recorded or that it becomes the buyer's property at closing so the buyer can record it. This is especially important when the sale is "in gross" rather than by the acre (sales in gross are those sales made "of a farm or tract, by name or general description" rather than of a specific number of acres) as a survey may be necessary to determine both the boundaries and the total acreage (and thus total purchase price) of the property being purchased. *Dillenberger v. Ziebold*, 70 Ill.App.3d 585, 388 N.E.2d 936, 939, 26 Ill.Dec. 935 (5th Dist. 1979), quoting *May v. Nyman*, 3 Ill.App.3d 580, 278 N.E.2d 97, 100 (3d Dist. 1972). The reporters are replete with cases in which, for example, an agreement was to sell the "Smith Farm," which was believed for the past 50 years to be 80 acres, only to have a party find out post-closing via survey that it contained only 75 acres.

All surveys should be prepared by a licensed Illinois surveyor. It is also recommended that the parties ask for and check the surveyor's references and that counsel review the legal descriptions on the survey to make sure they are correct. A surveyor's certificate (see §7.28 below) may also be required and recorded. A buyer may thereafter want to contact the surveyor to seek an ALTA survey or contractually require an ALTA survey if circumstances dictate such a need. ALTA surveys are far more detailed than a typical boundary line survey and will reveal the location of easements, utilities, buildings and structures, and other improvements.

A word of caution is also in order as to the advent of geographic information systems (commonly known as "GISs" for short). Most counties now have available an interactive online GIS mapping system. These systems typically show information as to specific parcels and may include zoning, township, and other property characteristics. The main use for this type of system by the general public appears to be to simply search for the "boundaries" of their property. When

they see the GIS boundary does not agree with what they believe to be correct, and having filled in the disclaimer that they agreed to use the system, they quickly run to their local title company, the county offices, or perhaps their lawyer to complain. Attorneys are cautioned to avoid reliance on the GIS maps or the information in the website or any links therein. The disclaimer is there for a reason, and the GIS information is often misleading, incomplete, or simply incorrect.

See Chapter 2 of this handbook for a detailed discussion of surveys.

VIII. [7.14] ZONING

Zoning is an obvious issue but one worth mentioning as the intricacies of local zoning law and politics can quickly derail a project. Municipal subdivision ordinances and controls generally apply to lands located within the one-and-one-half-mile zoning jurisdictional limit for municipalities that have adopted subdivision ordinances and/or comprehensive plans. 65 ILCS 5/11-13-1. Many counties have also adopted zoning ordinances. Zoning ordinances may have a large impact on the time and expense associated with development on the outskirts of such areas. The Plat Act, 765 ILCS 205/0.01, *et seq.*, may also need to be reviewed prior to the purchase of any land as it controls the division of land. Any purchase contract should make clear the current zoning classification of the property being sold and establish the classification required for its intended use thereafter. The contract must then establish who has the burden to complete any zoning reclassification and establish a reasonable time frame for completion of the reclassification process. This process can be a lengthy one in lesser populated or rural areas where local boards may meet only once or twice per month.

It is recommended that contact be made with the local zoning officials early in the process of drafting any contract. This should enable the attorney to have sufficient time to obtain more information on both the process and the timing to be expected. Making this inquiry as to a hypothetical parcel is also recommended to avoid inadvertent disclosure or other possible political ramifications. In addition to supplying the information needed to create a solid contract, this early contact provides an opportunity to introduce oneself to the local authorities and begin to establish communications. A thorough review of the local zoning ordinances and/or regulations is also recommended to ensure a working knowledge of the local procedural requirements (surprisingly, some zoning officials do not follow their own rules) and, foremost, to ensure that the intended zoning classification is attainable.

The likely outcome of this due diligence is a sales contract that includes language making the buyer's obligation to close contingent upon the change in classification (or perhaps the issuance of a variance or special-use permit), *i.e.*, "Prior to the conveyance of the property to Buyer, Seller shall, at Seller's expense, ensure such property is zoned _____." Another possibility is for the seller to grant the buyer an option to purchase. During the option period, the buyer will have the authority to proceed with a change in the zoning classification in the seller's name or otherwise satisfy itself that reclassification can be completed and that closing on the sale should take place. Language such as the following places the burden on the buyer, both financially and legally, and creates little risk for the seller:

Buyer shall obtain from the applicable governmental authorities all permits and approvals, or reasonable assurances of the issuance thereof, so as to permit, to the reasonable satisfaction of Buyer, the contemplated use [describe if necessary] by Buyer of the property.

It should be noted that some zoning ordinances do not allow prospective buyer to seek a change in zoning classification or a variance or special-use permit as a mere prospective buyer is not in title to the property.

Even doing your homework as to zoning may not avoid future problems in the buyer's ability to use and develop the land. In a 2012 case, the authority of a municipality's zoning authority was confirmed, in essence preventing certain commercial uses under a mineral lease. In *Tri-Power Resources, Inc. v. City of Carlyle*, 2012 IL App (5th) 110075, 967 N.E.2d 811, 359 Ill.Dec. 781, Tri-Power filed a declaratory judgment action alleging that the city's zoning ordinance constituted an unconstitutional taking of Tri-Power's leasehold rights in certain property. Tri-Power had leased mineral interests in a 67-acre parcel and, pursuant to a permit from the Illinois Department of Natural Resources, intended to drill thereon for oil. After the leasing of the property and the issuance of the permit, the property was annexed to the city. Per the city's zoning ordinance, the classification of the property upon annexation was "residential," and, per the ordinance, oil drilling was not allowed in residential districts. 2012 IL App (5th) 110075 at ¶3.

The appellate court found that the city's zoning code did not allow oil drilling activities as a "special" or "permitted" use and thus such activities were "precluded by exclusion." 2012 IL App (5th) 110075 at ¶8. The appellate court (without addressing many other interesting questions) therefor affirmed the trial court's opinion that a governmental unit (not a home-rule city, by the way) may prohibit the drilling of oil wells through the use of proper zoning ordinances.

Tri-Power clearly makes it difficult for developers to feel comfortable when the property in question is within the jurisdiction of a municipality or county having a duly adopted zoning ordinance. In a perfect world, all of the likely or potential uses a developer would make of a potential property would need to be vetted and reviewed in light of any applicable zoning — a tall and perhaps impossible task, but still a risk any buyer needs to understand.

IX. [7.15] ENVIRONMENTAL ISSUES

Perhaps no area of regulation strikes fear into a buyer (and counsel) more than those involving environmental concerns. A buyer could be staring at a costly (and perhaps mandatory) remediation program if the property being purchased is determined to be contaminated by a hazardous substance. A comprehensive analysis of the multitude of environmental issues is not possible here, but there are a few topics that warrant consideration. See §§7.16 – 7.18 below.

A. [7.16] Disclosure

Diligent and knowledgeable buyers will demand that a seller complete an environmental disclosure statement, and many lenders require, at a minimum, a Phase I environmental audit to allow the buyer (and the lender) to identify and evaluate any environmental risks associated with the property. ASTM International describes the Phase I as follows:

This practice is intended for use on a voluntary basis by parties who wish to assess the environmental condition of *commercial real estate* taking into account commonly known and *reasonably ascertainable* information. . . . This practice is intended primarily as an approach to conducting an inquiry designed to identify *recognized environmental conditions* in connection with a *subject property*. No implication is intended that a person shall use this practice in order to be deemed to have conducted inquiry in a commercially prudent or reasonable manner in any particular transaction. Nevertheless, this practice is intended to reflect good commercial and customary practice. *Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process*, E1527-21, www.astm.org/e1527-21.html.

Typical environmental disclosure forms contain little in the way of questions directed at possible environmental concerns that could result from prior agricultural use. A prospective buyer may want to request specific information as to the application, use, storage, and disposal of fertilizers, chemicals, herbicides, pesticides, and livestock or other waste and the use or existence (current or prior) of aboveground or underground fuel or oil storage tanks. Again, an on-site inspection of the property is warranted and may result in findings that are not necessarily apparent to everyone.

For example, the authors had a client seeking to purchase a farm who, at the authors' behest, went to walk at the land in person instead of just driving by. Between two old barns the client had ignored because he was just going to raze them, he found an oil dump site. It turned out the land owner had, for decades, used the rock area between the barns as a place to simply drain engine and hydraulic oil on the ground as part of his equipment maintenance. Further testing revealed seepage to about an acre of land and potential environmental issues related to drainage.

B. [7.17] Underground Storage Tanks

Many farms have old or abandoned underground storage tanks (USTs) that once held gasoline, oil, or diesel fuel. There are more than 73,000 registered USTs in Illinois, and estimates are that an equal number of unregistered USTs also exist, some of which are obviously located on agricultural lands. David A. Kelm, *Out of Sight, Out of Mind: Ownership and Liability of Underground Storage Tank*, Illinois Manufacturers Association (Jan. 16, 2013).

As with gas station USTs, many of these tanks rusted through and began to leak at some time in the past. However, unlike gas station USTs, no real public concerns were raised by these farm USTs, and many of these tanks remain in place today (although no longer in use). Nevertheless, any spill from an UST must be reported to the state and federal Environmental Protection Agencies. If inspection or disclosure identifies the possible existence of an UST, the buyer and practitioner should contact an attorney versed in environmental law before entering into any purchase agreement or taking any additional action. As indicated in §7.16 above, buyers should require a Phase I environmental assessment of any parcel that will be purchased, and most lenders will require such an assessment as a contingency to closing on any loan.

Liability for environmental conditions is generally based on the current interpretation of the rules and regulations of the United States Environmental Protection Agency (USEPA). "The date

to remember in determining ownership is November 8, 1984. If a UST was last used prior to November 8, 1984, the last known owner is responsible for the UST. If the UST was last used on or after November 8, 1984, state regulators, with US EPA guidance, assign ownership to the current owner of the property, even if the current owner *never* used the UST or knew of its existence.” *Id.* Information as to registered USTs can be found at Office of the Illinois State Fire Marshal, *Petroleum & Chemical Safety: Underground Storage Tanks (UST)*, <https://sfm.illinois.gov/about/divisions/petroleum-chemical-safety.html>.

C. [7.18] Clean Water Act

The provisions of the Federal Water Pollution Control Act were adopted in 1848 and in 1977 became the Clean Water Act of 1977, Pub.L. No. 95-217, 91 Stat. 1566. The Clean Water Act is broad and encompassing and, in addition to the standard water pollution and dumping issues, also regulates the changing of the hydrology of any “wetlands,” which, according to the United States Environmental Protection Agency, are “areas where water covers the soil, or is present either at or near the surface of the soil all year or for varying periods of time during the year, including during the growing season.” See USEPA, *What is a Wetland?*, www.epa.gov/wetlands/what-wetland.

While many farm-related activities may be exempt, any development work (earthmoving, etc.) is a possible violation if the land being developed is or could be considered a wetland. The “dredging and filling” of any navigable waters of the United States must be permitted prior to the beginning of any work. 33 U.S.C. §1344. “The term ‘navigable waters’ means the waters of the United States, including the territorial seas” (33 U.S.C. §1362(7)) — a broad definition by any standard. The federal government has been increasingly active as to such matters, and regulatory compliance has been at the forefront of its activities.

The U.S. Supreme Court opined on the scope of the Clean Water Act, providing some clarity in *Sackett v. Environmental Protection Agency*, 598 U.S. 651, 215 L.Ed.2d 579, 143 S.Ct. 1322 (2023). As a result, the Clean Water Act’s use of “waters” now refers only to geographical features that are described in ordinary parlance, such as streams, oceans, rivers, and lakes, and to adjacent wetlands that are “indistinguishable” from those bodies of water due to a continuous surface connection making it difficult to determine where the water ends and the wetland begins. 143 S.Ct. at 1341, quoting *Rapanos v. United States*, 547 U.S. 715, 165 L.Ed.2d 159, 126 S.Ct. 2208, 2234 (2006)

In any event, as with any unknowns in drafting a real estate contract, caution and the use of contingency provisions are recommended so as to provide the buyer and its agents a reasonable opportunity to investigate these issues prior to closing. Again, these issues may warrant association with a professional or environmental attorney versed in such matters.

X. [7.19] ADVERSE POSSESSION AND EASEMENTS

Historically, it has been the authors’ experience that farmers are generally helpful, giving neighbors. They will let certain people have access to their land for fishing, hunting, picking wild blackberries, or mushrooming. Over the years, some of these individuals tend to think of the right

of access as an open invitation and quit notifying the landowner prior to their use of the property. Such people, and the rights that they may have acquired from the landowner or by operation of law, could present problems for a buyer of that property. Likewise, absentee or even unwitting landowners may be allowing the use of their property by others without being aware of such use and the legal ramification thereof.

It is the creation of outright ownership through adverse possession or easements by operation of law that are of most concern to buyers and developers because the existence, or the right thereto, may not even be known or understood by the selling landowner. A review of the title policy and records for adjoining parcels may be necessary to alleviate any of the concerns noted in §§7.20 – 7.23 below, and it may also be necessary to demand an affidavit from the seller as to the absence of certain facts or conditions relating to a possible adverse possession or prescriptive easement matter.

A. [7.20] Adverse Possession

Adverse possession is a favorite of law professors and farmers turned coffee shop lawyers. To establish title by adverse possession under the Illinois 20-year limitations statute, a party must prove that its possession was (1) continuous; (2) hostile or adverse; (3) actual; (4) open, notorious, and exclusive; and (5) under a claim of title inconsistent with that of the true owner. *Stankewitz v. Boho*, 287 Ill.App.3d 515, 678 N.E.2d 1247, 1249, 223 Ill.Dec. 116 (2d Dist. 1997). The elements of such a claim may appear to a buyer at first glance to require such monumental proof as to be a small risk. However, the reporters are again replete with litigation over such issues, and experience shows that common boundary line disputes (a favorite as to agricultural real estate; see §7.13 above) often involve adverse possession characteristics.

Because of the factual nature of adverse possession claims, it is recommended that any sales contract require the seller to affirmatively state, via representations and warranties, that no facts exist that would support an adverse possession claim. Still, a buyer would be wise to inspect the property after survey flags are set to visually determine if it appears any boundaries are “off” or if any other land is being accessed through or use made of the subject property.

B. [7.21] Implied Easements

Implied easements can arise when the landowner conveys part of the property after having used the land in such a manner that one of the parcels derives from another a benefit that is apparent, continuous, and permanent. *Granite Properties Limited Partnership v. Manns*, 117 Ill.2d 425, 512 N.E.2d 1230, 1236, 111 Ill.Dec. 593 (1987); *Sheehan v. Sagona*, 13 Ill.2d 341, 148 N.E.2d 795, 797 (1958). Note that the situation must indicate an intent by the parties to create an easement. See John F. Denissen, *Private Ways: Title and Title Evidence*, 45 Ill.B.J. 686, 689 (1957). Again, a formal, in-person inspection of the property coupled with a contractual provision requiring affirmative representations or warranties should address these issues. The existence of roads, driveways, access points, fences, or similar evidence of use should be noted and compared to the written evidence and representations available. Any possible discrepancy can then be dealt with before becoming the subject of post-closing litigation.

C. [7.22] Easements by Necessity

Unlike an implied easement, an easement by necessity does not require the element of intent. An easement by necessity may surface when the landowner conveys (or perhaps retains) a portion of land that is entirely surrounded by the rest of the property or by the property of others such that it becomes landlocked. *Granite Properties Limited Partnership v. Manns*, 117 Ill.2d 425, 512 N.E.2d 1230, 1236, 111 Ill.Dec. 593 (1987); *Finn v. Williams*, 376 Ill. 95, 33 N.E.2d 226, 228 (1941). If access to the landlocked parcel would be reasonably obtained from the parcel a client desires to develop, the sale or pending sale may press the landlocked owner to finally take action to address the situation that, due to only an informal agreement between the parties, has not been an issue until now. Note that no prior use of any easement or right-of-way is necessary as the need may arise only upon the sale or transfer. In addition, Illinois courts require only that no reasonable alternative access exist. See *Rexroat v. Thorell*, 89 Ill.2d 221, 433 N.E.2d 235, 60 Ill.Dec. 438, *cert. denied*, 103 S.Ct. 83 (1982). Once again, visual inspection of the subject property and a survey can save the buyer future problems and perhaps months or years of costly litigation.

D. [7.23] Prescriptive Easements

Prescriptive easements are established in much the same manner as adverse possession. The use of the easement must be “adverse, uninterrupted for a period of twenty years, exclusive, continuous and under a claim of right.” *Ruck v. Midwest Hunting & Fishing Club*, 104 Ill.App.2d 185, 243 N.E.2d 834, 836 (2d Dist. 1968). Again, many factors to consider and an area fraught with the potential for abuse by the party claiming an easement by prescription. Access to other land, especially by foot traffic, is hard if not impossible to ascertain, and sometimes initial and limited access becomes less clear and more broad with the passage of time. Sales contracts should roll prescriptive easement representations and warranties into language similar to that discussed in §7.20 above as to adverse possession.

XI. [7.24] FENCES

Disputes between adjoining landowners relating to fencing issues have been greatly reduced due to the aforementioned reduction in small-scale livestock production in Illinois. However, to those farmers still involved with livestock, or policing the boundaries of their property, the maintenance of fences is an important issue. Thankfully, Illinois has a long-standing statutory guideline just for such occasions — namely, the Fence Act, 765 ILCS 130/0.01, *et seq.*

As always, prospective buyers are cautioned to visually inspect the boundary lines of the property to be purchased to determine what, if any, fences are in existence because the Fence Act provides, in relevant part, that “[w]hen 2 or more persons have lands adjoining, each of them shall make and maintain a *just proportion* of the division fence between them.” [Emphasis added.] 765 ILCS 130/3. Most buyers are hardly desirous of undertaking responsibility for maintaining a fence in such a manner.

As of time of writing, the Fence Act provides a possible solution:

If any person is disposed to remove a division fence, or part thereof, owned by [that person, that person may give] the adjoining owner one year’s notice, in writing, of his or her intention so to do and having received such adjoining owner’s permission, he or she may, at any time thereafter, remove the same, unless such adjoining owner shall previously cause the value of the fence to be ascertained by fence viewers, selected as hereinbefore provided. 765 ILCS 130/14.

For more on the Fence Act and its application, see Jeffrey A. Mollet, *When Bad Fences Make Litigious Neighbors: The Illinois Fence Act*, 89 Ill.B.J. 429 (Aug. 2001); A. Bryan Endres and Lisa R. Schlessinger, *A Move Towards a More Fair Division: Envisioning a New Illinois Fence Act*, *farmdoc Daily* (Dec. 13, 2012), <https://farmdocdaily.illinois.edu/wp-content/uploads/2018/05/fdd131212.pdf> (making the case for a reform of the current Fence Act).

XII. [7.25] DRAINAGE RIGHTS

The laws dealing with the use of agricultural land in Illinois are generally very well settled because of the state’s agrarian history and the development of such laws very early in the state’s existence. The topography of the land to be developed, and that of the surrounding land, must be fully understood in relation to the proposed development and local zoning requirements (for detention ponds, runoff, etc.) because the effect on the drainage rights of those adjoining parcels may be problematic. Most drainage disputes arise because some change in the surface was made (e.g., commercial development and improvements, such as large roofs, ditches, or paved areas) increasing, decreasing, or even relocating the natural flow of runoff.

The general rule has evolved “that it is the right of each proprietor of land upon a natural water course to insist that the water shall continue to run as it has been accustomed to do, and to insist that no one shall obstruct or change its course, injuriously to him, without being liable in damages.” *Ohio & M. Ry. v. Thillman*, 143 Ill. 127, 32 N.E. 529, 530 (1892). So “[w]here water from one tract of land falls naturally upon the land of another, the owner of the lower land must suffer the water to be discharged upon his land and has no right to stop or impede the natural flow of the surface water.” *Gough v. Goble*, 2 Ill.2d 577, 119 N.E.2d 252, 254 (1954), citing *Town of Nameoki v. Buenger*, 275 Ill. 423, 114 N.E. 129 (1916), and *Pinkstaff v. Steffy*, 216 Ill. 406, 75 N.E. 163 (1905). Thus, when a party undertakes “to divert and change the usual and customary flow of the water, it [is] bound to provide sufficient means to carry it away from the farm . . . upon which it [is then caused] to accumulate.” *Ohio & M. Ry.*, *supra*, 32 N.E. at 530 – 531.

It would therefore appear that the land being developed must be of sufficient size and topography (perhaps providing for natural or human-made retention, detention, redirection, etc.) to allow the requirements of the development to be met without causing water to “back up” on any higher parcel or causing any additional discharge on any lower, downstream parcel. Again, knowledge of the topography, intended use, resulting burdens, and local land use requirements as to stormwater retention and detention is crucial. Lack of investigation at this phase could cause significant increases in the development costs if water management is not fully understood and addressed. A review of the title commitment may also reveal drainage easements or conveyances

3. That the undersigned knows through the undersigned’s own personal knowledge that production of oil or gas pursuant to the afore-described lease was obtained on or about [production start date], and that such production continued until on or about [production cessation date], when such production ceased; that upon the cessation of production, all wells located on the lands covered by the aforesaid oil and gas lease were plugged and all equipment previously utilized to produce oil or gas from such wells was removed from the land; and that such plugging and equipment removal was completed on or before [date of completion of removal].

4. That the lease [does] [does not] contain a “Mother Hubbard” clause, but the undersigned knows of the undersigned’s own personal knowledge that there has been no production of oil or gas from, or production equipment located on, any portion of the lands contiguous to or appurtenant to the above-described land and owned or claimed by Lessor.

5. That the lease [has] [has not] been pooled or unitized with another land lease or leases or parts thereof, but the undersigned knows of [his] [her] own personal knowledge that there has been no production of oil or gas from, or production equipment located on, any portions of the lands contained within the other lease, leases, or parts thereof denoted in the pooling or unitization agreement(s).

6. That the lease [does] [does not] contain a “shut-in” clause and/or delayed rental clause(s); that on the [date of required payment], under the terms of said lease, there should have been paid to the Lessor or deposited to [his] [her] credit in [bank] the sum of \$[amount of payment or credit], the payment of which was necessary in order to keep the above lease in force and effect; but that the undersigned knows of the undersigned’s own personal knowledge and hereby swears that the above payment has never been made to the Lessor or [his] [her] representatives, in money or otherwise, nor has the same been deposited to the Lessor’s credit in the above bank or any other bank or account.

7. That the undersigned knows of the undersigned’s own personal knowledge that there has been no production of oil or gas from, or production equipment located on, any portion of the lands described in the aforesaid oil and gas lease during the period from [beginning date], to the date of this affidavit.

Further saith affiant not.

STATE OF ILLINOIS)
) ss.
COUNTY OF _____)

Subscribed and sworn to before me, a notary public in and for the County and State aforesaid, on this [date of swearing], by [signer], who is personally known to me to be the same person who executed the foregoing instrument and acknowledges the execution of same.

Notary Public

My Commission expires: [expiration date]

B. [7.28] Surveyor Certification**SURVEYOR CERTIFICATION**

The undersigned, a professional land surveyor licensed by the State of Illinois, has surveyed the following Real Property:

[insert legal description]

and hereby certifies the following: (a) the Survey was made on the ground, and the map/plat attached hereto is based on the field notes of the Surveyor; (b) the map/plat attached hereto correctly shows the location of all observable improvements, the dimensions of all buildings, and the distance thereof from the nearest facing property line; (c) the map/plat attached hereto shows all recorded easements and rights-of-way affecting the Real Property and all observable evidence of easements on the ground; (d) all utility services respecting the Real Property either enter it through adjoining public streets or the map/plat attached hereto show(s) the point of entry and location of any utilities that pass through or are located on adjoining private land; (e) there are no observable cemeteries or family burial grounds in the Real Property; (f) there are no observable material violations of any applicable zoning, subdivision, and land use laws; (g) all improvements on the Real Property comply with any recorded restrictive covenants; and (h) all boundary line and easement encroachments are listed and shown on the map/plat attached hereto.

Date: _____

_____, Surveyor
PLS No. _____

8

Commercial Development vs. Agricultural Interests

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Decatur

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I. [8.1] SCOPE OF CHAPTER

This chapter discusses the common issues specific to agriculture that landowners and developers will likely encounter in the conversion of open and agricultural land to more intensive, nonagricultural uses. Many of the issues and principles encountered are not unique to agriculture and are discussed in other chapters of this handbook.

II. [8.2] JURISDICTIONAL AUTHORITIES

An owner's or a prospective owner's desired use of agricultural property may be limited, restrained, or even prohibited. As explained in §§8.3 – 8.14 below, there may be a number of statutory restrictions limiting the use of agricultural land. The limitations most often arise from various restrictive zoning ordinances, especially those designating a parcel of real estate as being zoned for agricultural purposes. Any restrictions on the use of agricultural land should be reviewed to determine the validity of that restriction.

A. [8.3] Fifth Amendment Takings

Perhaps the best place to begin an examination on the limitations that government may place on the private use of property is the United States Constitution. The Fifth Amendment contains the prohibition that has given rise to a body of law known as the “Takings Clause”: “nor shall private property be taken for public use, without just compensation.” Although not as readily considered in cases pertaining to real property, the Fourteenth Amendment, §1, states: “nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” Due-process issues and state restrictions should not be overlooked in questioning the validity of a governmentally imposed restriction on the use of property.

There is no question that when a governmental entity has physically taken possession of the land, there must be compensation. The issue is broader in scope, however, and the question is now whether the restriction of an economic activity can be a compensable “taking” under the Fifth Amendment.

The impact of the Fifth Amendment on the private use of property is well illustrated in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 57 L.Ed.2d 631, 98 S.Ct. 2646 (1978). The railroad that owned Grand Central Station in New York City desired to erect an office tower near the terminal. The city, pursuant to its landmark preservation law, had designated Grand Central Terminal a “landmark.” This gave the city's preservation commission the power to approve or disapprove any changes to the building. Even though the railroad's proposed office tower met applicable zoning requirements, it was rejected for the aesthetic reason that it would be detrimental to the landmark. The Supreme Court upheld the city's decision. The Court, although it did acknowledge there was no bright-line test, set forth three major factors as to when a governmental restriction on the use of property can amount to a taking that must be compensated: the character of the action; its economic impact; and the degree of interference with investment-backed expectations.

There have been a number of noteworthy Supreme Court decisions since *Penn Central*. Of particular significance to owners of open agricultural land is *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 120 L.Ed.2d 798, 112 S.Ct. 2886 (1992). The plaintiff had acquired two lots of coastal real estate with the intention of developing those lots into residences consistent with neighboring parcels. The defendant then imposed new coastal preservation laws that essentially prevented any development of the plaintiff's property. The Court held that the defendant's regulations left the plaintiff with no economic viability of his property and thus were a prohibited taking. Even if restrictions are not as broad as they were in *Lucas* (which restricted all economic viability), courts will continue to examine the economic impact and interference with investment-backed expectations. In other words, courts look first at the *Lucas* framework (total/categorical regulatory taking) and, if it is not met, then proceed to the *Penn Central* analysis (partial regulatory taking).

Palazzolo v. Rhode Island, 533 U.S. 606, 150 L.Ed.2d 592, 121 S.Ct. 2448 (2001), comes even closer to identifying the level of restrictions that may be placed on agricultural land, although still again in the context of coastal property. The plaintiff bought undeveloped acreage that was both coastal and, for the most part, wetlands. Palazzolo asserted that the regulations designating salt marshes such as those on the property to be protected coastal wetlands constituted a denial of economic viability and were, therefore, a taking. The case had been decided by the state court against the plaintiff on the theory that, because the plaintiff acquired the property with notice that it was already subject to the restrictions, no loss had occurred. The U.S. Supreme Court reversed Rhode Island's Supreme Court, holding that notice of an existing restriction does not automatically preclude a takings claim. The Court noted that a small portion of the plaintiff's land could be developed with a home; therefore, the plaintiff was not denied all economic viability. Thus, the case was remanded to the trial court for further determination under the *Penn Central* analysis.

Arguably, notice of the existence of an agricultural zoning classification at the time of purchase would not automatically stop a purchaser from successfully challenging the zoning. However, if the land is even partially suitable for agricultural production and, therefore, presents at least some minimal economic viability, the zoning classification would probably survive a takings-based challenge.

B. State Authority

1. [8.4] State of Illinois

Illinois has its own set of provisions regarding the taking of private lands, which are applicable to any discussion concerning agricultural development. See §§8.5 – 8.7 below.

a. [8.5] Constitution

Article I, §15, of the Illinois Constitution, entitled "Right of Eminent Domain," provides:

Private property shall not be taken or damaged for public use without just compensation as provided by law. Such compensation shall be determined by a jury as provided by law.

The protections granted by the Illinois Constitution are greater than those granted by the U.S. Constitution because of the reference to “damaged” property. *Citizens Utilities Co. v. Metropolitan Sanitary District of Greater Chicago*, 25 Ill.App.3d 252, 322 N.E.2d 857, 860 n.4 (1st Dist. 1974).

b. [8.6] Police Powers

The other power of the state lies in its inherent police power relating to the public health, safety, morals, and general welfare. However, governments below the level of the state do not have inherent powers and can exercise only those powers expressly given to them.

c. [8.7] Plat Act

Statutorily, the Plat Act, 765 ILCS 205/0.01, *et seq.*, applies “whenever the owner of land subdivides it into 2 or more parts, any of which is less than 5 acres.” 765 ILCS 205/1(a). The Plat Act sets forth a detailed series of procedural steps that must be complied with, including receiving the approval of the county board or of municipal authorities if part of the subject land falls within the jurisdiction of a municipality. The regulatory embrace of the Plat Act is broad and includes obtaining approval by highway authorities and the local health department. Also significant to the Illinois user of agricultural lands is the Plat Act’s requirements as to the drainage of surface waters. See 765 ILCS 205/2. Anyone wishing to subdivide lot property should consult the Plat Act in detail.

2. Counties

a. [8.8] Counties Code

The basic authority for counties to adopt zoning ordinances and controls is found in §§5-12001 through 5-12022 of the Counties Code, 55 ILCS 5/5-1001, *et seq.* Section 5-12001 states:

For the purpose of promoting the public health, safety, morals, comfort and general welfare, conserving the values of property throughout the county, lessening or avoiding congestion in the public streets and highways, and lessening or avoiding the hazards to persons and damage to property resulting from the accumulation or runoff of storm or flood waters, the county board or board of county commissioners, as the case may be, of each county, shall have the power to regulate and restrict the location and use of buildings, structures and land. 55 ILCS 5/5-12001.

However, other than for such items as building setback requirements, counties do not have the power to zone or regulate agriculture. Within the same initial paragraph of §5-12001 comes the following restriction:

Provided, that permits with respect to the erection, maintenance, repair, alteration, remodeling or extension of buildings or structures used or to be used for agricultural purposes shall be issued free of any charge. *Id.*

Additionally, this section further states:

[The powers shall not] be exercised so as to impose regulations, eliminate uses, buildings, or structures, or require permits with respect to land used for agricultural purposes, which includes the growing of farm crops, truck garden crops, animal and poultry husbandry, apiculture, aquaculture, dairying, floriculture, horticulture, nurseries, tree farms, sod farms, pasturage, viticulture, and wholesale greenhouses when such agricultural purposes constitute the principal activity on the land, other than parcels of land consisting of less than 5 acres from which \$1,000 or less of agricultural products were sold in any calendar year in counties with a population between 300,000 and 400,000 or in counties contiguous to a county with a population between 300,000 and 400,000, and other than parcels of land consisting of less than 5 acres in counties with a population in excess of 400,000, or with respect to the erection, maintenance, repair, alteration, remodeling or extension of buildings or structures used or to be used for agricultural purposes upon such land except that such buildings or structures for agricultural purposes may be required to conform to building or set back lines and counties may establish a minimum lot size for residences on land used for agricultural purposes. *Id.*

While no recent cases have specifically addressed this provision as it relates to agriculture, past caselaw does provide some insight into what is required in order to be considered an agricultural use and thus exempt from zoning regulation. In 1999, the Illinois Supreme Court held that the operation of a large-scale hog confinement facility did constitute a use of land for agricultural purposes and was thereby exempt under the Counties Code from zoning regulations, except for conforming to building or setback lines. *See County of Knox ex rel. Masterson v. Highlands, L.L.C.*, 188 Ill.2d 546, 723 N.E.2d 256, 243 Ill.Dec. 224 (1999), for an overview of the meaning of “agriculture.”

b. [8.9] Local Land Resource Management Planning Act

The Local Land Resource Management Planning Act (Planning Act), 50 ILCS 805/1, *et seq.*, authorizes municipalities and counties to develop land use plans. Those municipalities or counties that adopted a resource management plan are also authorized to implement “zoning and subdivision ordinances as authorized by law and by this Act.” 50 ILCS 805/5(1).

As stated in §2(a) of the Planning Act, its purpose is “to encourage municipalities and counties to protect the land, air, water, natural resources and environment.” 50 ILCS 805/2(a). The Planning Act specifically identifies that it applies to any city, village, incorporated town, township, municipality, special district, or county. 50 ILCS 805/3(D), 805/3(E). The Planning Act identifies 18 specific objectives, the first of which is “to preserve and maintain the productivity of agricultural lands.” 50 ILCS 805/4(1). Other objectives specifically enumerated include the conservation of forest lands, natural resources, and open spaces. 50 ILCS 805/4(7), 805/4(10), 805/4(11).

Despite its grant of authority and power to municipalities and counties to enact zoning ordinances in furtherance of their resource management plans, the Planning Act does not give them the power to regulate agriculture, other than such general items as building setback requirements.

To date, no cases have cited provisions of the Planning Act in relation to agricultural use or development.

c. [8.10] Counties' Ability To Regulate Subdivisions

An additional source of statutory power for counties to regulate and control the use of land can be found at 55 ILCS 5/5-1041 through 5/5-1043, which gives the county board the power by resolution or ordinance to regulate the use of land.

See County of Montgomery v. Deer Creek, Inc., 294 Ill.App.3d 851, 691 N.E.2d 185, 229 Ill.Dec. 249 (5th Dist. 1998), in which the court upheld the county's regulation of a condominium development pursuant to its subdivision ordinance.

3. [8.11] Home-Rule Cities

A home-rule city derives its authority from the Illinois Constitution. Article VII, §6(a), states, in part:

[A] home rule unit may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare; to license; to tax; and to incur debt. ILL.CONST. art. VII, §6(a).

The ability of home-rule cities to enact zoning ordinances arises from this language. Further, the “[p]owers and functions of home rule units shall be construed liberally.” ILL.CONST. art. VII, §6(m). Article VII, however, also contains language that allows the General Assembly to restrict some of the home-rule powers. When questioning the power of a home-rule city's restriction on land use, care should be taken to distinguish caselaw history interpreting a non-home-rule city's zoning authority from that of a home-rule municipality, as differences may exist. Most notably, as further explained in §8.12 below, non-home-rule cities' zoning authority arises by statute only.

4. [8.12] Non-Home-Rule Cities

The zoning powers of non-home-rule municipalities arise from specific statutory grants. The primary source of their zoning power is found in §11-13-1, *et seq.*, of the Illinois Municipal Code, 65 ILCS 5/1-1-1, *et seq.*, and the Local Land Resource Management Planning Act, discussed in §8.9 above. Typically, the user of agricultural land is affected by a municipal zoning ordinance through the municipality's ability to control land within one and one-half contiguous miles of its corporate limits. This extraterritorial power of up to one and one-half miles is again granted to municipalities in Municipal Code §11-12-5(1), which authorizes municipalities to create planning commissions and departments to develop land use plans and regulations to enforce the plans. The power to establish setback limits is specifically granted to municipalities in Municipal Code §11-14-1.

In addition to the above powers, municipalities are given the power to approve maps and plats, thus giving municipalities the power to approve proposed subdivisions. 65 ILCS 5/11-15-1. Actual annexations of adjoining rural tracts into the city corporate limits are subject to the provisions of Municipal Code §7-1-1.

Despite these several statutory grants of power, a municipality's ability to control the use of land is finite. An examination should always be made in situations in which control is being contested as to whether the subject use regulation has been specifically granted. Local governments have only those powers specifically granted to them and nothing more.

5. [8.13] Townships

The specific statutory grant of power to townships to engage in zoning control is found at §110-5 of the Township Code, 60 ILCS 1/1-1, *et seq.* However, this same section expressly limits the township's zoning power to only those township territories not governed by a municipal zoning ordinance or a county's zoning ordinance. 60 ILCS 1/110-5(b), 1/110-5(c). Adoption of a county's zoning ordinance subsequent to a township's zoning ordinance supersedes the township's zoning ordinance. 60 ILCS 1/110-5(b). *See Town of Northville v. Village of Sheridan*, 274 Ill.App.3d 784, 655 N.E.2d 22, 211 Ill.Dec. 362 (3d Dist. 1995), for a brief discussion of this provision as well as a discussion of the standing required to contest the zoning classification between townships and municipalities.

C. [8.14] Private Restrictions

Although limitations on the use of agricultural land are typically found through statutory restrictions, such as zoning ordinances, this is not always the case. A title examination should always be made to determine whether there is a deed restriction or some other restrictive covenant that runs with the land. Such a deeded restriction can limit proposed development use of agricultural land. One such restriction is a conservation easement, discussed in §8.26 below.

III. OTHER STATUTES AFFECTING THE USE OF AGRICULTURAL LAND

A. [8.15] Farm Nuisance Suit Act

Sometimes known as the "Freedom To Farm Act," the Farm Nuisance Suit Act, 740 ILCS 70/0.01, *et seq.*, furthers the "declared policy of the state to conserve and protect and encourage the development and improvement of its agricultural land for the production of food and other agricultural products . . . by limiting the circumstances under which farming operations may be deemed to be a nuisance." 740 ILCS 70/1. The Act has an expansive definition of what is a "farm." 740 ILCS 70/2. The major substantive portion of this Act is at §3:

No farm or any of its appurtenances shall be or become a private or public nuisance because of any changed conditions in the surrounding area occurring after the farm has been in operation for more than one year, when such farm was not a nuisance at the time it began operation, provided, that the provisions of this Section shall not apply whenever a nuisance results from the negligent or improper operation of any farm or its appurtenances. 740 ILCS 70/3.

To further protect farmers, the legislature also enacted another powerful provision:

In any nuisance action in which a farming operation is alleged to be a nuisance, a prevailing defendant shall recover the aggregate amount of costs and expenses determined by the court to have been reasonably incurred in the defense of the nuisance action, together with a reasonable amount for attorney fees. 740 ILCS 70/4.5.

In order for a defendant farmer to recover attorneys' fees, it is necessary to obtain a favorable final court order or judgment. *Id.* The Act specifically excludes from recovery any negotiated settlement agreement and any action in which the defendant farmer took some corrective actions so that a final court order was not necessary. *See March v. Sandstone North, LLC*, 2020 IL App (4th) 190314, 179 N.E.2d 402, 449 Ill.Dec. 483, for a thorough discussion of the Act's fee-shifting provision.

In *Toftoy v. Rosenwinkel*, 2012 IL 113569, 983 N.E.2d 463, 368 Ill.Dec. 50, neighboring property owners brought a declaratory judgment action against a neighbor's cattle farm claiming that the cattle farm created a nuisance due to the presence of an excessive number of flies emanating from the defendants' property. At trial, the court ruled for the neighbors and found that the cattle farm was in fact a nuisance, and the appellate court affirmed the trial court's decision. The Illinois Supreme Court, however, reversed, citing the Farm Nuisance Suit Act as the basis for holding that a nuisance suit against the farm owner was barred. This case provides a thorough review of the Farm Nuisance Suit Act and would be a good resource for anyone seeking to invoke this statute. *See also Village of Lafayette v. Brown*, 2015 IL App (3d) 130445, 27 N.E.3d 687, 389 Ill.Dec. 845 (finding that village's ordinance declaring commercial farming nuisance (without exception) was preempted by Act); *Village of Chadwick v. Nelson*, 2017 IL App (2d) 170064, 95 N.E.3d 1230, 420 Ill.Dec. 134 (finding baling of hay on subject property to be continuous agricultural use by defendant predating village's ordinance by more than one year and thus exempting defendant from prosecution for violation of ordinance).

The Seventh Circuit noted in a 42 U.S.C. §1983 action that the Illinois Farm Nuisance Act has amended the common-law prohibition against the "coming to the nuisance" defense by protecting farmers against nuisance suits after the farm has been in operation for a year with the noted exceptions set forth in the statute. *Guth v. Tazewell County*, 698 F.3d 580 (7th Cir. 2012). The case was originally filed as a §1983 suit based on the county's alleged refusal to rule on the zoning application to rezone the property from agricultural to rural residential.

B. [8.16] Illinois Natural Areas Preservation Act

Section 2 of the Illinois Natural Areas Preservation Act, 525 ILCS 30/1, *et seq.*, allows for the permanent dedication of certain lands that are valued for their natural condition, thus protecting them for future generations. A "natural area" is defined as an area of land that "in the opinion of the [Illinois Nature Preserves] Commission, either retains or has recovered to a substantial degree its original natural or primeval character, though it need not be completely undisturbed, or has floral, faunal, ecological, geological or archaeological features of scientific, educational, scenic or esthetic interest." 525 ILCS 30/3.10.

The Act creates the Illinois Nature Preserve Commission and outlines its duties and authorities in the establishment of dedicated nature preserves. 525 ILCS 30/4. Tracts receiving the designation may remain in private ownership as long as the owner maintains the land consistent with the public dedication. 525 ILCS 30/3.06, 30/3.10, 30/13, 30/16.

In general, nature preserves are not subject to eminent domain. Section 14 of the Act declares:

Areas dedicated as nature preserves are hereby declared to be put to their highest, best and most important use for the public benefit. . . . They may not be taken under power of eminent domain or by other means for any other use except another public use and except upon approval of the Commission, the Governor and any public owner of a dedicated interest therein after a finding by the Commission of the existence of an imperative and unavoidable public necessity for such other public use. 525 ILCS 30/14.

For all practical purposes, land that has received the status of an Illinois nature preserve cannot be developed. This statute is rarely cited in caselaw or administrative law materials but should be reviewed when a client may be seeking to declare or prevent a tract of land from being declared “a natural area.”

C. [8.17] Agricultural Foreign Investment Disclosure Act

Both the State of Illinois and the federal government have requirements for the registration and identification of any person who has an ownership interest in agricultural land who is not a United States citizen or admitted to permanent residency. The Illinois Agricultural Foreign Investment Disclosure Act, 765 ILCS 50/1, *et seq.*, is nearly identical to the federal Agricultural Foreign Investment Disclosure Act of 1978, Pub.L. No. 95-460, 92 Stat. 1263. Both Acts prescribe the information that must be reported. Compliance with the federal guidelines also constitutes compliance with the state Act. Specific disclosure requirements are found at 765 ILCS 50/3 and 7 U.S.C. §3501(a). Anyone representing a foreign individual seeking to invest in agricultural land should consult both statutes to ensure compliance.

D. [8.18] Real Property Conservation Rights Act

The Real Property Conservation Rights Act, 765 ILCS 120/0.01, *et seq.*, provides an expansive definition of a “conservation right.” See 765 ILCS 120/1. A “conservation right” must be in written form and recorded in the county where the land lies such that the restrictions will be shown on an examination of the title. 765 ILCS 120/5. It can be broad in scope and accomplished in different manners, including “restriction, easement, covenant or condition, or, without limitation, in any other form in any deed, will, plat, or without limitation any other instrument.” 765 ILCS 120/1(a). These restrictions may be to preserve the natural state of the land; structures of architectural, historical, or cultural significance; or sites of archaeological significance. *Id.* These rights may be conveyed to an agency of the federal or state government, to units of local government, or to a not-for-profit corporation or trust whose primary purposes include the preservation of the interest conveyed. 765 ILCS 120/2.

A significant aspect of this Act is its conveyance of legal standing to protect the subject property and to enforce the written restriction. Section 4 specifies remedies, including injunctive relief, specific performance, and damages. 765 ILCS 120/4. These may be brought by the entity that holds the restrictive right, including any agency, unit of government, or not-for-profit that owns the conservation rights. *Id.* However, §4(c) also gives legal standing to enforce to the owner of any real property abutting or within 500 feet of the real property subject to a conservation right. 765 ILCS 120/4(c). Therefore, if there is a question whether a proposed use or action would contravene terms of a conservation right, it is advisable to obtain written consent from not only the owner of the property and the holder of the conservation rights but also any person who may own property within 500 feet of the land that is subject to the conservation right. This section is also severe in its penalty, allowing at the court's discretion that the owner of the property who willfully violated a term of a conservation right be held liable for punitive damages in an amount equal to the value of the subject land. *Id.*

But see Bjork v. Draper, 404 Ill.App.3d 493, 936 N.E.2d 763, 344 Ill.Dec. 234 (2d Dist. 2010). There, the neighbors filed a complaint against the property owners and the Lake Forest Open Lands Association, challenging the property owners' additions and alterations to the property, which the neighbors alleged were in violation of the conservation easement. The neighbors sought a declaratory judgment that the easement could not be amended to allow the addition to remain on the property. On appeal, the court held that balancing the equities did not favor requiring the property owners to reduce the 1,900-square-foot addition to the property owner's home to the allowable 1,500 square feet.

E. [8.19] Agricultural Areas Conservation and Protection Act

Section 2 of the Agricultural Areas Conservation and Protection Act, 505 ILCS 5/1, *et seq.*, puts forth the state's policy to conserve, protect, and encourage development of agricultural lands for the production of food and other agricultural products. The Act goes into specific details as to the creation, modification, or termination of and withdrawal from an agricultural area. Agricultural areas are to be created, to the extent possible, in contact and in nearly contiguous parts of at least 350 acres in all counties with a population under 600,000 and at least 100 acres in all counties with a population of 600,000 or more. 505 ILCS 5/5.

An area created under this Act shall be established for a period of ten years. No land shall be included in an agricultural area without the consent of the owner, and no land within an agricultural area shall be used for other than the agricultural production as described in §§3.01 and 3.02 of the Act. *Id.* The Act does have a provision that would allow a municipality to object to the creation of an agricultural area within a one and one-half mile radius of its corporate limits (505 ILCS 5/9), but once an agricultural area is created, the local government does not have any power to enact laws or ordinances within the agricultural area that would unreasonably restrict or regulate farm structures or practices (505 ILCS 5/18). The Act also prevents any special assessments from being made against agricultural area lands for the provision of services, such as sewer, water, or electricity, when assessments were not imposed prior to the creation of the district. 505 ILCS 5/20.

F. [8.20] Farmland Preservation Act

Consistent with the state goal of trying to preserve agricultural lands is the Farmland Preservation Act, 505 ILCS 75/1, *et seq.* This Act created an Inter-Agency Committee on Farmland Preservation among the various state departments. 505 ILCS 75/3. Although most of this Act is policy, it may affect the use of agricultural land in one specific instance. There are restrictions in §5 on a state agency that is participating in a state-funded capital project linked to the conversion of farmland to nonagricultural purposes. 505 ILCS 75/5. The proposed developing agency must deliver a written notification of the project to the Director of the Illinois Department of Agriculture (IDOA). A procedure is then set forth by which the Director is to study and analyze whether the proposed capital project is in compliance with the developing agency's farmland preservation policy. The developing agency's ability to commit funds is subject to the Director's study and compliance with its own farmland preservation policy. *Id.*

The only case interpreting this Act has taken a narrow interpretation. In *Department of Transportation v. Sunnyside Partnership, L.P.*, 337 Ill.App.3d 322, 785 N.E.2d 1018, 271 Ill.Dec. 824 (5th Dist. 2003), the defendant sought to stop the Illinois Department of Transportation's use of eminent domain quick-take powers to prevent a road being routed through the defendant's property. The defendant had evidence showing that its land had been farmed for over 200 years, but for the immediately preceding 60 years, it had been in the defendant's family and operated as a tree nursery. The court noted that the particular area, next to a major arterial highway, was the site of incredible expansion and was now extensively developed as commercial property. The court found that no violation of the Act occurred because, although there was no question that the land was farmland, the Act did not apply because the defendant's "farm" grew trees. The court interpreted the statute to address state policy concerns about farms that produce food products. The court also noted that it was the IDOA that had the responsibility for enforcing the Farmland Preservation Act. The Act made no reference to involvement by the court system; therefore, the courts were not to be involved with issues arising out of the Farmland Preservation Act.

G. [8.21] Illinois Rivers-Friendly Farmer Program Act

For those owners and users of agricultural land who are interested, the state has provided, through the Illinois Rivers-Friendly Farmer Program Act, 505 ILCS 106/1, *et seq.*, enacted January 1, 2020, the ability to be designated a "rivers-friendly farmer." Section 20 sets forth the conservation practices suggested to be used in order to obtain such a qualification. To date, there have been no reported cases citing the Act.

H. [8.22] Watershed Improvement Act

For owners and users of agricultural land who are interested in improving soil and water management practices, some benefit may be available under the Watershed Improvement Act, 505 ILCS 140/0.01, *et seq.* This Act simply empowers the Illinois Department of Agriculture to participate with any other agency of the United States or local watershed organizations in constructing watershed improvements for the retention of surplus rainfall. However, caselaw provides no guidance into the usage of the Act.

IV. LASALLE TEST — JUDGING A ZONING ORDINANCE ON AN INDIVIDUAL BASIS

A. [8.23] In General

In addition to determining whether the authority exists to support the subject land use restriction, an examination must be made as to the application of the restriction to the subject property. Zoning contest cases are often extremely fact-specific. A full discussion of the factual challenges to the validity of zoning ordinances is beyond the scope of this chapter. More complete discussions can be found in *LAND USE LAW: PRACTICE AND PROCEDURE* (IICLE®, 2021) (2025 edition coming soon) and *MUNICIPAL LAW: ANNEXATION, ZONING, AND REGULATORY AUTHORITY* (IICLE®, 2024).

Illinois caselaw is rather uniform in identifying specific factors to be examined in determining the validity of a challenged regulation or ordinance as it applies to a specific tract of land, whether rural or developed. The landmark decision is *LaSalle National Bank of Chicago v. County of Cook*, 12 Ill.2d 40, 145 N.E.2d 65 (1957), in which the Illinois Supreme Court set forth the six factors to be examined for the validity of the zoning ordinance. Soon thereafter, two additional factors were set forth by the Illinois Supreme Court in *Sinclair Pipe Line Co. v. Village of Richton Park*, 19 Ill.2d 370, 167 N.E.2d 406 (1960). These eight factors reveal that the guiding standard is that the subject zoning regulation must bear some substantial relationship to the public health, safety, morals, comfort, and general welfare.

The first factor cited by the *LaSalle* court, and the factor to be given the greatest amount of consideration, is “[t]he existing uses and zoning of nearby property.” 145 N.E.2d at 69. Presenting to the court the specific, accurate data about the uses of the surrounding neighborhood is important. The court will also consider the historical use pattern and future projection trends.

The second of the *LaSalle* factors is “the extent to which property values are diminished by the particular zoning restrictions.” *Id.* Caselaw is uniform that the measuring standard is not a case of “lost profit” that an owner would have realized if the land was zoned as desired. It is a common factor in these types of zoning litigation cases that the subject parcel was bought while zoned for one purpose and sought to be rezoned to allow a higher, more intense usage. The issue the courts are more interested in examining is whether there is still some economic value to be derived from the same classification under which the petitioner acquired the property.

These first two factors are given the greatest consideration by the courts.

Evidence should also be presented to the court regarding “the extent to which the destruction of property values of plaintiff promotes the health, safety, morals or general welfare of the public.” *Id.* Next, the courts examine “the relative gain to the public as compared to the hardship imposed upon the individual property owner.” *Id.* For example, courts will examine whether the current zoning classification is supported by a well-reasoned and comprehensive zoning and growth plan by examining the amount of effort and thoroughness put into development of the plan.

Of particular interest as applied to agricultural lands is the fifth *LaSalle* factor: “the suitability of the subject property for the zoned purposes.” *Id.* If the land is zoned agricultural, suggested facts to bring to the court’s attention would be the nature and quality of the soil for agricultural production and the past productivity of the property in its current agricultural use.

The sixth factor the courts are to examine is “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.” *Id.*

After providing this list of factors, the court noted:

No one factor is controlling. It is not the mere loss in value alone that is significant, but the fact that the public welfare does not require the restriction and resulting loss. When it is shown that no reasonable basis of public welfare requires the limitation or restriction and resulting loss, the ordinance fails and the presumption of validity is dissipated. . . . The law does not require that the subject property be totally unsuitable for the purpose classified but it is sufficient that a substantial decrease in value results from a classification bearing no substantial relation to the public welfare. [Citation omitted.] 145 N.E.2d at 69 – 70.

Three years later, the same court reaffirmed the *LaSalle* factors in *Sinclair, supra*, and provided that a court should examine “the care with which the community has undertaken to plan its land use development” and consider “the evidence or lack of evidence of community need for the use proposed by the plaintiff.” 167 N.E.2d at 411.

Both *LaSalle* and *Sinclair* are still regularly cited by courts across the state and should be studied carefully whenever the validity of a zoning ordinance is at issue.

B. [8.24] Use in Court

A challenge to the agricultural zoning classification of open, undeveloped land needs to address the factors discussed in §8.23 above. Aerial maps can show the physical location and nature of the land and distances to other use types and development trends, both current and historical. Maps of soil classification and types, soil productivity values, elevations and slope, drainage patterns and flows, and floodplain information should also be presented to the court. Depending on the nature of the proposed use, some soils may be better suited for development as compared to field crop production, or the soil type may lend itself well to the installation of various septic systems that may be proposed for rural housing.

The economic value of the land, and thus its suitability for continued agricultural production, can be revealed through crop production records. An owner’s return from agricultural production then can be compared based on historic crop revenues versus the return that can be expected from the proposed development use.

Historical records can be used to illustrate the declining viability of local agriculture. Viable farming operations cannot exist in a vacuum. Evidence should be presented to the court regarding

the existence of markets for the land's produce. How far away is the nearest point of sale for the grain? Have any grain elevators closed in the past years? How much investment is taking place in the remaining facilities? Similarly, information can be provided to the court as to the remaining sources of supplies available to service the subject parcel, such as petroleum delivery and the location and number of vendors of fertilizer and agrichemicals. Have the numbers of these been declining?

In addition to the availability of supplies and markets, the availability of the actual farmer should not be overlooked. The age of active farmers is rapidly advancing. What information can be presented to the court regarding the availability of someone to farm the land in the foreseeable future? Can demographic data be provided to the court illustrating the average age of likely farm operators? Is another younger generation present? How far must a likely farmer travel to reach the subject parcel? Is it accessible to a farmer driving a tractor with attached implements, or are distances and road/traffic conditions such that a likely farmer would have to truck equipment to the site? Have farmers been reinvesting capital to upgrade their equipment and facilities? Viable farm operations today require hundreds of acres. Current and projected use trends can illustrate the likelihood of sufficient acreage being left to sustain a farming operation.

Opponents of a proposed reclassification of agricultural land to a more intensive use may want to focus on the care and preparation that went into devising the present zoning classification. In instances of proposed conversion to residential uses, relevant issues include the impact the proposed use would have on the community. What are the existing daily traffic counts and the nature of the roads? How will water and sewage be provided to the proposed subdivision? What will be the probable effect of the increase in population on the local schools or healthcare system? Depending on the area, another factor to bring to the court's attention may be the proposed development's impact on drainage and flood control issues.

A simple search of the cases citing *LaSalle National Bank of Chicago v. County of Cook*, 12 Ill.2d 40, 145 N.E.2d 65 (1957), and *Sinclair Pipe Line Co. v. Village of Richton Park*, 19 Ill.2d 370, 167 N.E.2d 406 (1960), should provide a multitude of supporting cases either for or against a particular zoning ordinance.

C. Responsive Strategies to Proposed Change in Use of Land

1. [8.25] Annexation Issues and Agreements

The owner of agricultural land is not powerless in seeking to develop the parcel. The Illinois Municipal Code grants municipalities the authority to enter into annexation agreements with the owners of land in unincorporated territory. See 65 ILCS 5/11-15.1-1, *et seq.* Such an agreement would allow for the annexation of the property to the municipality at the time the land is or becomes contiguous to the municipality, assuming compliance with the statutory annexation requirements set forth at 65 ILCS 5/7-1-1, *et seq.* Lack of contiguity to the municipality does not affect the validity of the agreement. The terms of the agreement remain applicable on the subject property and binding on the parties for a term of up to 20 years. 65 ILCS 5/11-15.1-1. An annexation agreement is binding on successor owners of annexed property, even if the successor owns only a portion of the original configuration described in the annexation agreement. 65 ILCS 5/11-15.1-4;

Village of Kirkland v. Kirkland Properties Holdings Co., 2023 IL 128612, 221 N.E.3d 300, 468 Ill.Dec 472. Advantages to a municipality include the ability to assure the annexation of the particular tract, especially if the location of the tract makes it possible that other municipalities could annex it.

The developer may be able to secure a desired zoning classification. Municipal Code §11-15.1-2 sets forth a nonexclusive list of items that may be included in an annexation agreement. These include (a) the annexation of the territory to the municipality, (b) continuation of ordinance restrictions, (c) a limitation on increases in permit fees acquired by the municipality, (d) contribution of either land or money, or both, to the municipality or other units of local government having jurisdiction over the land, (e) the granting of utility franchises, (f) the abatement of property taxes, and (g) any other matter not inconsistent or forbidden. Also, it is possible through the use of pre-annexation agreements for the owner of agricultural land to secure a desired zoning classification (subject to compliance with the statutory process) and also to potentially secure economic terms that would enhance the success of the development, such as terms securing the provision of water and sewer services.

Property subject to an annexation agreement is subject to the ordinances, control, and jurisdiction of the annexing municipality the same as property that lies within the annexing municipality's corporate limits. 65 ILCS 5/11-15.1-2.1(a). See *Village of Chatham, Illinois v. County of Sangamon, Illinois*, 351 Ill.App.3d 889, 814 N.E.2d 216, 286 Ill.Dec. 566 (4th Dist. 2004), in which the court found the village did have zoning and building code jurisdiction over noncontiguous parcels of land pursuant to an annexation agreement. Further, the Municipal Code provision allowing the village's annexation agreement was a valid use of the legislature's police power.

2. [8.26] Conservation Easements To Stop Development

One suggested tool for owners of open land who desire that the land not be developed is the placement of a conservation easement on their property. The conservation easement is one of the few permanent property-use controls, as the zoning process is always subject to change. An owner can privately place a restriction on the use of property in the chain of title, but this leads to the question whether owners in future generations will voluntarily comply with this restriction, particularly if the current owner of the fee interest of the property is the only affected party.

A conservation easement is a legal agreement between the landowner and a land trust or between the landowner and a government agency. The conservation easement permanently limits the uses of the land in order to protect its conservation values. Depending on the negotiated terms of the conservation easement, the owner may be allowed to continue owning and using the land in its now restricted condition or have complete freedom to sell the land or pass it on to heirs, subject to the restrictions. An outside party will monitor and enforce the restrictions that assure that the open nature of the land remains.

There are no statutory requirements that specify the elements of a conservation easement. Landowners and the holders of the easement have the freedom and flexibility to negotiate the terms. Given that no two parcels of land are identical, no two conservation easements will be identical.

Although there are no statutory requirements, the donor of the conservation easement may receive significant tax benefits by complying with specifications set forth by the IRS. Therefore, most conservation easements will comply with the provisions of Internal Revenue Code §170(h), titled “Qualified conservation contribution.” 26 U.S.C. §170(h).

The benefits obtained by complying with Code §170(h) can be significant depending on the specific parcel. The land is valued and taxed only for its worth as open or agricultural land. Often, this is considerably less than the value it would have as developed land. The owner at the time of donation obtains an appraisal of the subject land for its fair market value but also an appraisal of its value in its restricted state. The difference in values is a charitable contribution if the conservation easement is donated to a Code §501(c)(3) nonprofit organization or a government entity. At the time of the owner’s death, for estate tax valuation purposes, the land is still valued in its lower, restricted, open-space value regardless of its fair market value if developed. See the definition of “gross estate” in Code §2031(c). This provision of the Internal Revenue Code offers an additional incentive by providing a formula by which the value of the property is further lowered from its already lowered restricted value. There is a limitation on the amount of the deduction available for qualified conservation contributions by pass-through entities imposed by Code §170(h)(7), although there are exceptions to the limitation for contributions outside a three-year holding period (Code §170(h)(7)(C)), for family partnerships (Code §170(h)(7)(D)), and for contributions to preserve certified historic structures (Code §170(h)(7)(E)).

To qualify for reduced taxation, the following essential elements of a conservation easement must be adhered to. It must first be a voluntary undertaking by both sides. The conservation easement may not be “forced” on a landowner. The easement must be legally binding through the use of a deed and filed of record so as to provide public notice of the restrictions both to the current parties and to all parties in perpetuity. This perpetual feature is essential to qualify for IRS tax benefits. Conservation easements that are for a term of years do not qualify for IRS tax deductions. The organization that accepts the conservation easement must meet the test of being a “qualified easement holder.” See 26 U.S.C. §170(h)(3). This is usually met if the donee is a governmental agency or a not-for-profit land trust. The not-for-profit must possess the ability to enforce the restrictions. The subject of the conservation easement must be some type of restriction on future development. Usually, this is a prohibition on all residential and commercial development on the property. Compliance with the Internal Revenue Code does not prevent all future improvements or modification of the property as long as those improvements and modifications are consistent with the agricultural use of the property.

The conservation easement must have a valid conservation purpose as defined by Code §170(h)(4)(A). This section defines a “conservation purpose” as being the preservation of land for outdoor recreation by or education of the general public, the protection of natural habitat, the preservation of open space (including farmland and forestland) when such preservation is for the scenic enjoyment of the public or pursuant to a clearly delineated governmental conservation policy, or the preservation of a historically important land area of historic structure. On a practical basis, the requirement that the preservation of agricultural space must be pursuant to a clearly delineated governmental policy will be easily met in most parts of Illinois. Most county plans will call for the preservation of open and agricultural lands. The conservation easement need not be donated, but funding is extremely limited for grants to purchase the development rights.

The not-for-profit organization or a property owner within 500 feet of the restricted parcel (see §8.18 above) possesses the necessary standing to bring suit to enjoin any action that is in violation of the conservation easement restrictions.

V. CASES DEALING WITH ZONING AND AGRICULTURAL LANDS

A. [8.27] Agricultural Zoning Upheld

As discussed in this chapter, zoning of agricultural lands is upheld in only very specific circumstances. The following cases provide an overview of the types of arguments one may encounter whenever seeking to uphold or attack the zoning of agricultural lands.

In *Tuftee v. County of Kane*, 76 Ill.App.3d 128, 394 N.E.2d 896, 31 Ill.Dec. 694 (2d Dist. 1979), the county attempted to stop the plaintiff's efforts to develop a commercial horse boarding business on 7 acres. The county argued that anything less than its 15 acres zoning requirement was not agricultural. The appellate court ruled that the county lacked authority to regulate an agricultural activity and again provided a discussion of what is an agricultural purpose. The court stated that the county had no authority to establish acreage minimums to which it would grant exemptions from zoning regulations. Likewise, the county had no zoning authority to require the plaintiff to obtain building and special use permits or to restrain her agricultural use of the property.

In *LeCompte v. Zoning Board of Appeals for Village of Barrington Hills*, 2011 IL App (1st) 100423, 958 N.E.2d 1065, 354 Ill.Dec. 869, the property owners sought judicial review of the zoning board's administrative decision finding that the commercial boarding of horses was not a permitted agricultural use of their property and was contrary to the village's zoning ordinances. On appeal, the court held that the boarding of horses was not "agricultural" and distinguished *Tuftee* based on the difference in the zoning ordinances at issue in each case; specifically, the zoning ordinance in *Tuftee* did not define "agriculture" while the zoning ordinance in *LeCompte* did define "agriculture." *LeCompte* would be good to review when confronted with a zoning issue to see if the zoning ordinance is more like *Tuftee* or *LeCompte*.

In *Matloob v. Village of Cahokia*, 84 Ill.App.3d 319, 405 N.E.2d 396, 39 Ill.Dec. 643 (5th Dist. 1980), the developer lost his efforts to develop a large mobile home complex on a small agricultural tract of land. Despite the fact the court freely acknowledged that the area was rapidly changing away from agriculture, it reserved to the community the right to delay rezoning until the community could determine what trends the future would bring. The court held as insufficient the plaintiff's argument of diminished lost profits.

In *Meyer Material Co. v. County of Will*, 51 Ill.App.3d 821, 366 N.E.2d 1149, 9 Ill.Dec. 638 (3d Dist. 1977), the plaintiff was a sand and gravel mining operation that sought to rezone 356 acres to allow mining operations. The zoning board of appeals recommended rezoning, but the Will County Board of Supervisors denied the reclassification. The trial court held the zoning ordinance invalid. Factors showed that the land was well suited for agricultural production but that there were several other sand and gravel mining operations nearby. With competing factors, the appellate court ruled that "the legislative judgment of the Will County Board should be conclusive" and overturned the trial court. 366 N.E.2d at 1154.

In *County of DeKalb v. Vidmar*, 251 Ill.App.3d 419, 622 N.E.2d 77, 190 Ill.Dec. 667 (2d Dist. 1993), the defendants erected two mobile homes on the property in contravention of the county's zoning ordinances. It was held that because the mobile homes were used to house employees tending livestock, the mobile homes, therefore, served an agricultural purpose and the county had no statutory power to regulate them. The court noted prior cases and that its decision might have been different if the mobile homes did not sufficiently serve an agriculturally related purpose.

In *County of Kendall v. Aurora National Bank Trust No. 1107*, 170 Ill.App.3d 212, 524 N.E.2d 262, 120 Ill.Dec. 497 (2d Dist. 1988), the landowner maintained a sand and gravel mining operation elsewhere in the county to which he later added a sod farm. He then converted another parcel of property he owned, which was zoned agricultural, to a second sod farm. The petitioner sought to create a pond for irrigation purposes on the second parcel. In the process of creating the pond, the petitioner would remove sand and gravel, which he planned to sell. The county opposed this effort, arguing that this was merely a disguised mining attempt, which it, therefore, could regulate. The appellate court overturned this, stating that the creation of the pond was in pursuit of an agricultural purpose and, therefore, the county had no power to regulate the agricultural activity. Whether an activity involving use of the land has an agricultural purpose is to be determined from the activity itself and not from external considerations such as the property owner's intent or other business activities.

In *County of Lake v. Cushman*, 40 Ill.App.3d 1045, 353 N.E.2d 399 (2d Dist. 1976), the county tried to stop the defendants from building a poultry hatchery on 3.09 acres. The defendant won because Lake County lacked the statutory authority to regulate "agriculture." The county attempted to argue that the amount of land was inadequate to constitute agriculture. This is a leading case in the definition of "agriculture."

In *Harvard State Bank v. County of McHenry*, 251 Ill.App.3d 84, 620 N.E.2d 1360, 190 Ill.Dec. 99 (2d Dist. 1993), the plaintiff sought to rezone 64.5 acres in an unincorporated area from agricultural to residential. Denial of the rezoning request was upheld. This case provides a good review of the factors for and against residential development in an agricultural area. The court discussed and contrasted prior similar cases that found either way.

In *Wilson v. County of McHenry, Illinois*, 92 Ill.App.3d 997, 416 N.E.2d 426, 48 Ill.Dec. 395 (2d Dist. 1981), the plaintiffs sought to rezone agricultural tracts to a rural residential category and were denied. The case includes a discussion of the *LaSalle* factors (*LaSalle National Bank of Chicago v. County of Cook*, 12 Ill.2d 40, 145 N.E.2d 65 (1957); see §8.23 above) and the importance of the first factor, pertaining to the existing uses and zoning of the surrounding area. Particular emphasis was given to whether the county had a comprehensive plan.

In *City National Bank of Kankakee v. County of Kendall*, 140 Ill.App.3d 933, 489 N.E.2d 486, 95 Ill.Dec. 265 (2d Dist. 1986), the plaintiff sought to have a six-acre parcel of land rezoned from agricultural to residential. The county denied the permit and was upheld by the court because the plaintiffs failed to overcome the presumptive validity of the zoning ordinances. This case also includes a discussion of the *LaSalle* factors (*LaSalle, supra*; see §8.23 above).

In *Racich v. County of Boone*, 254 Ill.App.3d 311, 625 N.E.2d 1095, 192 Ill.Dec. 940 (2d Dist. 1993), 87 acres of farmland were sought to be rezoned into a subdivision. The county's agricultural zoning plan and purpose were upheld. The developers attempted to rezone the land immediately upon purchasing it for a lower agricultural value. The county employed its land evaluation site assessment system in support of its argument that this was prime agricultural farmland to be preserved. This case contains a good discussion and illustration of the issues.

In *Stanek v. County of Lake*, 60 Ill.App.3d 357, 376 N.E.2d 743, 17 Ill.Dec. 597 (2d Dist. 1978), the plaintiffs were successful in having their land zoned from residential to agricultural so they could establish a dog kennel. An appeal was sought by the adjoining landowners. A five-acre tract was in issue, and the court held that the proposed use as a commercial dog kennel was compatible with the current existing surrounding uses and that the facts did not support the current zoning of residential.

In *County of Knox ex rel. Masterson v. Highlands, L.L.C.*, 188 Ill.2d 546, 723 N.E.2d 256, 243 Ill.Dec. 224 (1999), Highlands sought to erect a "factory" hog facility, which the local county opposed and denied the permits for. The landowner sought declaratory and injunctive relief. The case provides a good discussion of the powers granted to a county to zone and, in particular, the inability to regulate through zoning agricultural land because of a lack of a statutory grant of power. The case also contains a discussion of the principle of the exhaustion of administrative remedies.

B. [8.28] Rezoning from Agriculture Granted

The following cases should be consulted when facing the issue of rezoning agricultural land (for or against). The cases below provide a broad overview of issues specifically related to the rezoning of agricultural lands.

In *Hoffarth v. County of St. Clair*, 51 Ill.App.3d 763, 366 N.E.2d 365, 9 Ill.Dec. 108 (5th Dist. 1977), the plaintiffs had a tract of land on which they operated an archery shop and outdoor archery range. The area was later zoned agricultural, with the plaintiffs having a prior existing nonconforming use. The plaintiffs later sought to expand their business by the erection of an indoor archery range. The county denied their request. On appeal, the appellate court ruled that the expansion of the existing nonconforming use would have no negative impact on surrounding agriculture and that there was no offsetting general benefit to the public to be gained by enforcement of the zoning restriction.

In *Pierson v. Henry County of State of Illinois*, 93 Ill.App.3d 320, 417 N.E.2d 234, 48 Ill.Dec. 832 (3d Dist. 1981), the petitioner sought to rezone 20 acres of agricultural land to residential. The county and the trial court denied the rezoning, but the appellate court overturned the ruling. The court analyzed the factors set forth in *LaSalle National Bank of Chicago v. County of Cook*, 12 Ill.2d 40, 145 N.E.2d 65 (1957) (see §8.23 above), and ruled that the loss of value to the property owner was not offset by any gain or benefit to the public by maintaining the agricultural zoning. The land was not well suited for agriculture, the surrounding property — although zoned agricultural — was being used as residential, and the county's long-range growth plan called for this parcel, which was within a mile of the county's largest community, to be residential eventually.

In *County of Lake v. First National Bank of Lake Forest*, 79 Ill.2d 221, 402 N.E.2d 591, 37 Ill.Dec. 589 (1980), the plaintiff was allowed to continue operating a private airstrip and “air museum” in an agricultural area. Lake County’s zoning ordinances were held to be ambiguous and, therefore, could not be enforced against a restricted landing area. It was also held that the proscription against the air museum did not have any real or substantial relationship to the public safety, morals, comfort, or general welfare and, therefore, was void.

In *Goffinet v. County of Christian*, 65 Ill.2d 40, 357 N.E.2d 442, 2 Ill.Dec. 275 (1976), a large tract of prime agricultural land surrounded by prime agricultural land in an agricultural zone was approved to be rezoned as a synthetic gasification plant. The court discussed issues such as conditional zoning and spot zoning. Here, given the oil embargo and gas crisis, a gasification plant very much served the public need and, therefore, justified the rezoning.

In *Twigg v. County of Will*, 255 Ill.App.3d 490, 627 N.E.2d 742, 194 Ill.Dec. 405 (3d Dist. 1994), the plaintiff sought to subdivide 35 agricultural acres to allow for homes for himself and his adult children and horse barns. The county sought to enjoin the construction to enforce its agricultural zoning. The appellate court affirmed the trial court’s holding that the zoning was unconstitutional in this instance. There was an insufficient showing of a benefit to the public to be gained by enforcing the agricultural restriction.

In *Robrock v. County of Piatt, Illinois*, 2012 IL App (4th) 110590, 967 N.E.2d 822, 359 Ill.Dec. 792, the court held that there was sufficient evidence to hold that the granting of the special-use permit to build a restricted landing area for a personal gyrocopter was arbitrary and unreasonable. However, the court noted that the permanent injunction barring a restrictive landing on all of the property was too broad. The court here cited *Twigg* and discussed the *LaSalle* factors as well. This case would be a good resource for application of those factors and the *Twigg* holding.

In *LaSalle National Bank v. County of Will*, 38 Ill.App.3d 622, 347 N.E.2d 854 (3d Dist. 1976), the county denied the plaintiff’s efforts to rezone 33 agricultural acres into a trailer court, and the trial court’s decision holding the ordinance unconstitutional was upheld. This case is a straightforward application of the zoning factors to the case at hand. The county lacked a comprehensive plan, and surrounding development trends contradicted the agricultural zoning. The court found that no public benefit was derived by upholding the continued agricultural zoning.

Smeja v. County of Boone, 34 Ill.App.3d 628, 339 N.E.2d 452 (2d Dist. 1975), is an often-cited case in which the county’s refusal to grant rezoning from agricultural to residential was overturned. However, it was a narrow decision in which the appellate court noted that the majority of the county board did support the plaintiff’s application but lacked the necessary three-fourths majority at issue. The land was marginal farmland and mostly woods, and many adjacent parcels were rezoned into residential in that area.

Pettee v. County of DeKalb, 60 Ill.App.3d 304, 376 N.E.2d 720, 17 Ill.Dec. 574 (2d Dist. 1978), is another case frequently cited to argue that residential land should be rezoned. The petitioner sought to develop 80 acres into a rural residential development featuring a private airstrip and lots for the adjoining homes featuring private hangars. The trial court upheld the county’s denial, but the appellate court overturned it in part, granting the proposed hangar/residential permit. The county’s insistence on retaining its agricultural zoning was deemed unreasonable.

9

Environmental Considerations in Commercial Real Estate Transactions

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I. INTRODUCTION

A. [9.1] In General

The scope of environmental considerations in commercial real estate is daunting even when the analysis is intentionally limited to transactions only — selling, buying, and securing loans with commercial real estate. This chapter considers liability for cleanup costs and damages (*i.e.*, liabilities that “run with the land”) and regulatory and compliance responsibilities associated with owning and operating regulated activities on commercial real estate.

Virtually every commercial real estate transaction has an environmental component. However, be forewarned: In commercial real estate transactions, as in engineering, form follows function. Accordingly, there is no form commercial real estate contract, and there is no standard form for transferring or allocating environmental risk. Rather, the parties negotiate environmental risk associated with both liability concerns (tort and contract damages and statutory cleanup costs) and regulatory responsibilities (permit status and regulatory compliance) and provide for it according to their own terms. Again, there is no form, but rather a general checklist. With regard to environmental considerations, lawyers add precision; we attorneys add form to function and, if needed, cocounsel with experience in environmental law, versed also in real estate law.

B. [9.2] Initial Considerations

It may come as a surprise to some, but environmental law is better understood and analyzed using real estate law principles. While environmental law principles are statutory, and while we find tort principles intentionally and sometimes confusingly within the statutes and in the cases (*e.g.*, joint and several liability and contribution), it is a mistake to analyze any environmental law, statute, code, or regulation using tort analysis. Lenders’ counsel, for example, in the halcyon days of the mid-1980s, learned that lesson to their detriment.

Each environmental principle is a creature of a legislative body or a regulatory agency. Each has its own statutory or regulatory definition. Never assume a common usage or a tort usage for any statutory term. Even the concepts of “real property” and “owner” have their own definitions, with exclusions and exceptions and exemptions within the exclusions. Also, keep in mind that each environmental liability statute and program was designed in response to a catastrophe. The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), Pub.L. No. 96-510, 94 Stat. 2767, was a response to Love Canal; the Oil Pollution Act of 1990, Pub.L. No. 101-380, 104 Stat. 484, was passed following the catastrophic events associated with the Exxon Valdez in Prince William Sound; and the Emergency Planning and Community Right-To-Know Act of 1986 (EPCRA), Pub.L. No. 99-499, Title III, 100 Stat. 1728, was a response to the catastrophic events in Bhopal, India. Even the early media statutes (the Clean Air Act (CAA), ch. 360, 69 Stat. 322 (1955), and the Clean Water Act (CWA), ch. 758, 62 Stat. 1155 (1948)) were designed or significantly modified to combat spontaneous combustion in Lake Erie or acid rain in the Northeast and the presence of ozone in our major cities.

II. [9.3] SOURCES OF ENVIRONMENTAL LAW

The sources of environmental law are many and varied, and some environmental principles appear to be at odds with other environmental principles. The confusion comes when the parties in a transaction, or the legislators designing new statutory responses, inadvertently mix principles from within the various sources of environmental law.

In any event, there are (at least) six sources of environmental law:

- a. regulatory statutes and programs with fines and penalties for “violations” (Note that “violations” may be an indication of statutory environmental cleanup liability, but “violations” are not the predicate to cleanup liability; the predicate is a “release” of a “hazardous substance” that “may be an imminent and substantial endangerment to public health . . . or the environment.” (*e.g.*, 42 U.S.C. §9606(a)));
- b. environmental cleanup liability statutes with statutory cleanup costs that are not damages;
- c. criminal liability provisions with fines and penalties (including jail time) for knowing violations;
- d. notification and disclosure statutes with mandated disclosure above and beyond tort and contract considerations;
- e. response laws, including community right-to-know laws and disclosures to “first responders”; and
- f. torts with damages.

The contract for the sale or purchase of commercial real estate should address each of these sources in some form, or at least the lawyers should consider and distinguish each in negotiating the terms of the contract. Of course, the parties are free to contract and establish their own standards of sharing liability through releases, indemnities, covenants, and “as-is” clauses. However, careful and precise terms must be prepared as courts strictly construe such language. Generally speaking, if the parties intend to modify statutory or common-law liability in any way associated with environmental responsibility or liability, the contract must be clear and mention environmental responsibility and liability specifically, and it is very good practice to identify the statutes and common-law considerations (tort: negligent/intentional misrepresentation, nuisance, trespass, negligence, strict liability, etc.) in the terms of the contract. General indemnities and general releases are strictly construed, and unless the contract specifically refers to environmental liability and environmental statutes or torts, courts will not construe them broadly.

Note, however, while parties are free to negotiate their own terms and standards, the government is not similarly bound. For example, under state statute (Environmental Protection Act (Illinois Act), 415 ILCS 5/1, *et seq.*):

[n]o indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any . . . facility or from any person

who may be liable for a release or substantial threat of a release under this Section, to any other person the liability imposed under this Section. Nothing in this Section shall bar any agreement to insure, hold harmless or indemnify a party to such agreements for any liability under this Section. 415 ILCS 5/22.2(g)(1).

See also 42 U.S.C. §9607(e)(1) (Comprehensive Environmental Response, Compensation, and Liability Act of 1980).

A. [9.4] Regulatory Statutes

The classic example of a regulatory environmental statute is the federal Clean Air Act. Under the CAA program, “emissions” from “sources” (stationary, mobile, and area) are regulated under a command and control structure administered by the United States Environmental Protection Agency (USEPA) through state agencies in most cases. CAA national ambient air quality standards are set by the USEPA and are generally implemented by local agencies under a state implementation plan. As part of the state implementation plan, various processes and operations at these “sources” are regulated — by permit — with the goal of achieving national ambient air quality standards for criteria pollutants. Permits are used to regulate activity under the CAA, the Clean Water Act, and the hazardous waste provisions of the Resource Conservation and Recovery Act of 1976 (RCRA), Pub.L. No. 94-580, 90 Stat. 2795, to name a few. Permit presence and compliance are often overlooked as concerns by purchasers and lenders who have focused their attention on statutory environmental cleanup liability and potential tort damages associated with commercial real estate. Especially for acquisitions of operating facilities or businesses, environmental compliance with regulatory concerns (permit status, terms and conditions, and violations) is critical. The regulatory responsibility shifts to the purchaser upon the acquisition of a regulated process, and with that responsibility come the terms and conditions articulated in the law and the regulations, as well as those terms, conditions, obligations, and limitations specifically described in the permit. In addition, the responsibility for unresolved permit violations shifts to the new owner of the permit despite the new owner’s lack of knowledge or culpability.

Regulatory compliance due diligence is a critical component of the sale and purchase of commercial property that has a functioning and operating regulated process as part of the sale/purchase/loan. Regulatory compliance due diligence is not considered as part of the traditional Phase I environmental site assessment. Transactions with operating processes should consider the following as part of the regulatory compliance due diligence (sometimes referred to as a “compliance audit”):

1. a description of each process at the facility (“Process” includes all commercial and industrial processes associated with cleaning (including industrial parts washers, dry cleaners, and equipment cleaning), treating, pretreating, manufacturing, printing, incinerating, cooling, emitting, discharging, producing, manufacturing, storing, handling, transporting, or disposing of raw materials, finished products, or waste (in any form — solid, liquid, gaseous, or semi-liquid).);
2. a description of all of the Standard Industrial Codes used to describe the operations at the facility;

3. an inventory of all general, nationwide, and regional permits as well as a description of all operating, construction, and pre-construction permits, permit applications, permit modifications, and violation notices from any agency or individual to the seller or the seller's predecessors associated with current and historic operations at the facility as well as permits documenting the installation, presence, or removal of underground storage tanks (USTs);
4. an inventory of all underground and above-ground storage tanks and other vessels used to store any hazardous or regulated substances or petroleum in any form and a representation that all such underground and above-ground vessels are compliant with inventory control, overfill, and spill regulations, as well as the guidelines associated with site inspections, operator training, public record disclosure, secondary containment, and financial responsibility (This inquiry may be slightly redundant given the scope of the standard review provided in a Phase I environmental site assessment, but some of this information, as well as the various definitions of "underground storage tanks," are beyond the scope of the standard form Phase I environmental site assessment.);
5. a description of current and historic chemical storage practices, including a description of compliance with state and federal right-to-know legislation and an inventory of all safety data sheets currently kept on site;
6. a description of all state and federal occupational safety and health compliance investigations, complaints, inspections, and violations or alleged violations;
7. a description of all current and historic insurance adjustments, investigations, applications, and endorsements relating to employee health, workers' compensation, safety instructions, endorsements, and claims associated with production processes;
8. a description of current and historic on-site and off-site waste disposal operations and practices (It is important to recognize that an entity may be responsible for the costs of a cleanup at another site if the owner/operator had arranged for the disposal of hazardous substances off site, and the buyer may inherit that "secret" (or at least, undisclosed) liability, the analysis of which is not within the scope of the standard Phase I environmental site assessment. Some analysis of current and historic on-site disposal practices is warranted to the extent that others may have transported or arranged for the disposal of hazardous substances to the site under consideration (e.g., farm sites, ravines, quarries, ponds, pits, lagoons, and uncontrolled city lots in blighted areas such as those disclosed in the infamous "Operation Silver Shovel").);
9. a description of all right-to-know notices prepared by or received from the Illinois Environmental Protection Agency (IEPA) pursuant to 415 ILCS 5/25d-1, *et seq.*, whether those notices describe contamination migrating from or onto the property under consideration; and
10. a description of all unilateral administrative orders and administrative orders on consent or consent agreements and final orders issued by the USEPA or the IEPA, whether directed to conditions at the site under consideration or not.

This list is not exhaustive. Indeed, each category should lead to further inquiry as part of an iterative investigation. Skilled legal counsel should lead the regulatory compliance due diligence, perhaps blending it with the information learned in the standard form Phase I environmental site assessment process described in §§9.60 – 9.62 below. Often an appropriate consultant may be helpful, and not all consultants are created equal.

Finally, lenders should pay attention to these issues to the extent that regulatory compliance issues may adversely impact the borrower's ability to repay the note out of current operations. Indeed, these concerns are more important than some of the esoteric and immaterial issues raised by lenders in examining environmental conditions at the secured property.

B. [9.5] Environmental Cleanup Liability Statutes

Owners and operators of commercial real estate have become familiar with federal and state environmental cleanup liability statutes. Generally speaking, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 provides the most recognized statutory model for cleanup liability. Under the CERCLA regulatory program, a potentially responsible party is liable for removal and remedial costs incurred by any person following a release of a hazardous substance at a facility. See 42 U.S.C. §9607(a).

The Illinois General Assembly provided a similar environmental cleanup liability regimen at 415 ILCS 5/22.2(f), albeit limited to costs incurred by the State of Illinois. In Illinois, the same class of potentially responsible parties is responsible for cleanup costs incurred by the State of Illinois. *Id.*

Under both state and federal statutes, potentially responsible parties include the current owner, the owner at the time the material was disposed of at the property, the person who arranged for the disposal of the material at a property (on or off the property), and the person who chose the disposal site and transported the material to that site. *Id.* Because the first two classes of potentially responsible parties are traditional owners and operators of the property that is the subject of the sale, most of the standard-form due diligence focuses on current and historic operations and conditions at the property. The third class of potentially responsible parties (“arranger” liability, sometimes confusingly referred to as “generator” liability) generally does not involve the property that is the subject of the acquisition but may create undisclosed environmental liability for the entity or person that acquires the property. The final class of potentially responsible parties (“transporters” who chose the disposal site) is limited to those entities involved in transporting materials to disposal sites and is similar in analysis to those who “arranged” for the disposal at an off-site location; that is, the property under consideration may not be the location of the past disposal activity, but the transporter and/or the entity that “arranged” for the disposal may have undisclosed liability to clean up that site, and the purchaser of that entity may be responsible as the successor regardless of environmental liability assignments or indemnities or characterization of the sale as a mere stock purchase.

As discussed in §9.11 below, CERCLA provides federal and state governments and even individuals with a significant tool to seek reimbursement for appropriate costs related to hazardous substances.

Interestingly, “hazardous substances” do not include petroleum under the CERCLA regimen; that is, the single largest contaminant of concern at most commercial sites — petroleum — is specifically excluded unless the petroleum products come within one of the exceptions to the exclusion or can be characterized as a “hazardous substance.” See 42 U.S.C. §9601(14). On April 19, 2024, the United State Environmental Protection Agency designated perfluorooctanoic acid and perfluorooctanesulfonic acid as “hazardous substances” under the Act, marking the first per- and polyfluoroalkyl substances chemicals to be regulated under CERCLA. 89 Fed.Reg. 39,124 (May 8, 2024).

Nonetheless, Congress also provided for cleanup liability associated with petroleum and regulated substances under the Resource Conservation and Recovery Act of 1976. See 42 U.S.C. §§6972, 6973. Under this program, an individual or the government can seek injunctive relief (not cleanup costs per se or damages) against the person who contributed to a hazardous situation involving hazardous waste, regulated substances, or petroleum. The RCRA citizens’ suits provisions allow owners of real property involved with releases associated with operations at gas stations to obtain a court order mandating corrective action (cleanup) from major oil companies when the primary contaminant of concern involved petroleum. See 42 U.S.C. §§6971, 6972.

In Illinois, the state has authority under the Environmental Protection Act to recover statutory environmental cleanup costs against a similar group of potentially responsible parties. See 415 ILCS 5/22.2(f). The State of Illinois has other powers and authorities under the Illinois Act (*e.g.*, 415 ILCS 5/21 (prohibitions), 5/4(q) (notices)). There is, however, no private right of action under §22.2(f) of the Illinois Act, although a party subject to a unilateral administrative order issued by the Illinois Environmental Protection Agency pursuant to §22.2d(f) may seek contribution “from any other person who is liable for the costs of response actions under this Section.” 415 ILCS 5/22.2d(f). Such actions may be brought before the Illinois Pollution Control Board (IPCB) or in circuit court. *Id.* The IEPA also has authority under the Illinois Act to cite persons for violations under the Act (*e.g.*, §21 prohibitions/violations) and seek fines and penalties accordingly. In addition, the IEPA may send §4(q) notices of potential liability to persons the Agency considers liable for statutory cleanup costs, and the Illinois General Assembly provided the IEPA with authority to issue unilateral administrative cleanup orders against persons the Agency considers responsible for statutory cleanup costs. See 415 ILCS 5/22.2d.

C. [9.6] Criminal Liability Provisions

Each of the federal and state statutes and programs includes criminal liability associated with knowing or intentional violations of various prohibitions and regulatory standards. The fines and penalties (civil fines, treble damages, and imprisonment) are significant but are beyond the scope of this chapter. See ENVIRONMENTAL LAW IN CORPORATE AND REAL ESTATE TRANSACTIONS (IICLE[®], 2023).

D. [9.7] Notification and Disclosure Statutes

Issues concerning notification and disclosure arise in statutes and in contractual provisions negotiated by the parties. With regard to mandated statutory disclosure, the model statute often cited is New Jersey’s former Environmental Cleanup Responsibility Act (ECRA), now the

Industrial Site Recovery Act. See N.J.Stat.Ann. §13:1K-6, *et seq.* New Jersey is and has been a very industrialized state. As a response to environmental contamination, the New Jersey legislature provided that owners, operators, and sellers of commercial property were required to notify prospective purchasers and lenders as well as the state agency in charge of environmental activities and disclose certain environmental conditions. As part of the process, the state reviewed the environmental conditions and mandated certain activities prior to a conveyance. After this super-inspection process was successfully completed, the state agency then provided something in the nature of a comfort letter indicating that the property was no longer a threat to human health or the environment.

Illinois nearly adopted a similar statute in the mid-1980s. However, due in large part to the efforts of the Illinois Chamber of Commerce, that model was replaced with the Illinois Responsible Property Transfer Act (IRPTA). On August 9, 2001, the Illinois General Assembly repealed the IRPTA, leaving only contractual provisions, equitable contract principles, and tort law as remedies for purchasers. The IRPTA was largely ineffective for any purpose; it was a classic example of mixing liability principles with response principles and creating a nearly meaningless disclosure. With the repeal of the IRPTA, there is no mandated statutory disclosure for commercial real estate transactions outside of those contractual provisions negotiated between the parties.

E. [9.8] Response Laws

Following the catastrophic events in Bhopal, India, where several thousand individuals lost their lives as a result of a toxic gas leak from a chemical factory, Congress amended the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (see 42 U.S.C. §9601) to provide for state, federal, and local governmental response mechanisms to deal directly with such a problem if it occurred in the United States. Specifically, the Emergency Planning and Community Right-To-Know Act of 1986 (see 42 U.S.C. §11001) established a more cohesive local, state, and federal government response action team with authority specifically designed to respond to a catastrophic release of materials from an industrial facility. The response model was built on the historic “Civil Defense” structure.

In addition, Congress provided that owners and operators of industrial facilities are required to report “reportable” quantities of hazardous substances that are stored on site and to describe the precise location of those materials within the facility so that response teams (local fire departments, police departments, state and federal emergency management agencies) would know not only of their existence but also their location in the event of a fire or other natural or unnatural disaster. Under EPCRA, commercial and industrial facilities with reportable quantities of hazardous substances are required to disclose the volume present and the location of the hazardous substances to the authorities and to the public. 42 U.S.C. §§11021, 11022. In addition, workers’ safety is coordinated under the Occupational Safety and Health Administration (OSHA) and its regulations involving workers’ safety. Generally speaking, workers’ safety and community right-to-know legislation has mandated the preparation and use of safety data sheets as part of this “response” function of environmental law.

In analyzing environmental response statutes and programs, the issues are more focused on compliance with regulatory statutes than on liability for cleanup. In other words, if a proposed

transaction involves the purchase of a facility that is required to report under EPCRA, the prospective purchaser may learn about the compliance status of the facility and the fact that covered materials are present, but response principles do not imply regulatory responsibility for the purchaser unless the purchaser later operates that facility in a similar manner.

Illinois added its version of right-to-know legislation at 415 ILCS 5/25d-1, *et seq.* If the Illinois Environmental Protection Agency determines that (1) contamination from a site has migrated off site through the soil or groundwater and (2) the contamination poses a threat of exposure to the public, then the Agency has various obligations to report the contamination and notify the owner of the contaminated property. 415 ILCS 5/25d-3, *et seq.* The Illinois right-to-know legislation is significantly different from the federal legislation, and the Illinois statute does not create any regulatory obligation on any property owner to provide the notice, although the fact that a notice was provided will likely be significant.

F. [9.9] Torts

Liability for environmental contamination is not a modern concept. Indeed, environmental issues in the form of tort cases have been before the courts — even the U.S. Supreme Court — since at least the beginning of the 20th century. In one of the earliest cases involving public nuisance, Justice Holmes, in *State of Missouri v. State of Illinois*, 200 U.S. 496, 50 L.Ed. 572, 26 S.Ct. 268 (1906), analyzed the facts and environmental impact associated with the reversal of the Chicago River. In that case, Missouri complained that by reversing the flow of the Chicago River, the City of Chicago was sending its waste to the Mississippi River and adversely affecting Missouri's drinking water supply. Missouri was seeking a permanent injunction prohibiting the continued practice. As part of its response, the State of Illinois argued that its waste was significantly diluted with Lake Michigan water as well as waters from the Illinois and Mississippi Rivers. Moreover, according to the State of Illinois, by the time the waste actually found its way to the Missouri border, not only had the waste material been significantly diluted, but the velocity of the Mississippi River had also significantly reduced any risk to the inhabitants of the State of Missouri. (This is the first known instance in which an alleged polluter attempted to establish the well-worn technical defense to environmental liability — “the solution to pollution is dilution.”)

In any event, Justice Holmes acknowledged the statistics and various scientific explanations and, while recognizing that the evidence of increased typhoid illness was strong, held that the source of the bacteria had not been conclusively proved. In the final analysis, the Supreme Court refused to order the State of Illinois to return the Chicago River to its original and natural flow into Lake Michigan.

In addition, each of the states has developed general tort law principles that apply to environmental liability situations — nuisance (public and private), trespass, negligence, and strict liability.

Generally speaking, a “nuisance” is defined as

[a] condition, activity, or situation (such as a loud noise or foul odor) that interferes with the use or enjoyment of property; esp., a nontransitory condition or persistent activity that either injures the physical condition of adjacent land or interferes with its use or with the enjoyment of easements on the land or of public highways. *Nuisance*, BLACK’S LAW DICTIONARY (12th ed. 2024).

Nuisance takes various forms. In *O’Neill v. Carolina Freight Carriers Corp.*, 156 Conn. 613, 244 A.2d 372 (1968), noise was found to be a nuisance, and the court held that an injunction and damages were proper.

In those cases that analyze the distinction between a public and a private nuisance, the essence of a private nuisance has been held to be

an unreasonable interference with the use and enjoyment of land. . . . The utility of the defendant’s conduct must be weighed against the *quantum* of harm to the plaintiff. The question is not simply whether a person is annoyed or disturbed, but whether the annoyance or disturbance arises from an unreasonable use of the neighbor’s land. . . .

Unreasonableness is judged

“ . . . ‘not according to exceptionally refined, uncommon or luxurious habits of living, but according to the simple tastes and unaffected notions generally prevailing among plain people.’ ” [Emphasis in original.] *Rose v. Chaikin*, 187 N.J.Super. 210, 453 A.2d 1378, 1381 (1982), quoting *Sans v. Ramsey Golf & Country Club, Inc.*, 29 N.J. 438, 149 A.2d 599, 605 (1959), and *Sans v. Ramsey Golf & Country Club, Inc.*, 50 N.J.Super. 127, 141 A.2d 335, 339 (1958).

Odor has also been determined to be a nuisance. See *Washington Suburban Sanitary Commission v. CAE-Link Corp.*, 330 Md. 115, 622 A.2d 745, 750 – 751 (App. 1993) (“in Maryland, nuisance is a matter of strict liability and . . . ‘liability for nuisance may arise even where there is compliance with applicable laws and regulations or where the offending instrumentality is authorized or permitted . . . by state statute’ ”).

In another case analyzing public nuisance, South Carolina courts held that anything that causes inconvenience or damage or interference with the enjoyment of life or property is a nuisance. “More to the point, it is a nuisance to use property in such a way that annoying or injurious odors are emitted.” *Lever v. Wilder Mobile Homes, Inc.*, 283 S.C. 452, 322 S.E.2d 692, 693 – 694 (App. 1984).

Some courts distinguish a private nuisance and provide a remedy for activities that do not necessarily affect the public at large but rather affect individuals. In *Fletcher v. Tenneco, Inc.*, 816 F.Supp. 1186 (E.D.Ky. 1993), compounds from the defendant’s pipeline migrated onto the plaintiff’s property. The defendant defended by claiming that the materials were safe. The court held that the compounds were toxic and that the defendant’s use of the land was unreasonable and created harm to the plaintiff.

Air pollution is also a nuisance. However, the nuisance must exceed “normal” air conditions in that specific locality. As is apparent to anyone who travels through major metropolitan or industrial areas and into rural areas, the quality of air varies. In *City of Chicago v. Commonwealth Edison Co.*, 24 Ill.App.3d 624, 321 N.E.2d 412 (1st Dist. 1974), the court would not order injunctive relief because the City of Chicago had failed to prove substantial harm — that is, that Commonwealth Edison’s activities actually made the “normal” air in Chicago worse. *See also Harrison v. Indiana Auto Shredders Co.*, 528 F.2d 1107 (7th Cir. 1975) (court would not order business to shut down without showing of substantial harm).

From the foregoing cases, we generally recognize that damages may be available for “ordinary harm” (to individuals of ordinary sensibilities), but “substantial harm” is required for injunctive relief.

“Trespass” is generally defined as “[a]n unlawful act committed against the person or property of another; esp., wrongful entry on another’s real property . . . At common law, a lawsuit for injuries resulting from an unlawful act of this kind.” *Trespass*, BLACK’S LAW DICTIONARY (12th ed. 2024). Trespass is, therefore, interference with the possession of property, whereas nuisance is interference with the use and enjoyment of property.

Negligence and negligence per se are also common-law torts used to collect damages associated with environmental hazards to the extent that one party is alleged to have breached a duty of care owed to another and that breach proximately causes damages (in the form of cleanup costs).

In addition, strict liability principles for ultrahazardous activities often create a theory of liability resulting for damages in the form of cleanup costs. Specifically, strict liability for ultrahazardous activities involves the analysis of six factors:

1. the existence of a high degree of risk;
2. the likelihood that the result and harm would be great;
3. the inability to eliminate the risk by exercising reasonable care;
4. the extent to which the activity is not common in the community;
5. the inappropriateness of the activity to the place where it is carried on; and
6. the activity’s value to the community. *See Crawford v. National Lead Co.*, 784 F.Supp. 439, 442 (S.D. Ohio 1989).

Tort theories often supplement statutory liability cleanup causes of action under federal and state statutory programs. At this point, it is important to recognize that none of the statutory cleanup programs under any state or federal law provide for tort damages. However, private parties are generally free to supplement their statutory claims with the various tort theories discussed in this section. Owners, lenders, and prospective owners of real property should be cognizant that tort theories of environmental liability are available in addition to the statutory liability under state and federal law.

III. [9.10] ENVIRONMENTAL CLEANUP LIABILITY IN ILLINOIS

Background aside, environmental cleanup liability in Illinois stems from various federal statutes and the Environmental Protection Act.

A. [9.11] Federal Statutes

The primary federal statute cited as authority for environmental cleanup liability is, of course, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980. CERCLA is really a four-in-one statute. Congress provided an information-gathering and analysis system so that various agencies could develop a database of sites and characterize and prioritize those sites for attention. Next, CERCLA establishes a federal “response” authority and authorizes the President to take “removal” and “remedial” action pursuant to the “National Contingency Plan.” Third, CERCLA creates the so-called “Superfund,” ostensibly designed to collect excise taxes and pay for the removal and remedial actions initiated by the government. Finally, CERCLA provides that persons who are responsible for “releases” of “hazardous substances” will be required to perform reasonable and necessary “removal” and/or “remedial” activities (see 42 U.S.C. §9606) or reimburse a person (*i.e.*, governmental agency, individual, or entity) who incurred “removal” or “remedial” costs at a “facility” (see 42 U.S.C. §9607). While all four aspects of the statute are important, this chapter focuses primarily on the liability aspects associated with owning or financing commercial real estate. Remember, however, that purchasing an entity with an operating facility may involve off-site liability in some cases. See §§9.5 and 9.6 above.

Environmental litigators will note that there is another prominent federal statute that is often used by governmental agencies as well as individuals and other persons to impose cleanup responsibility on owners and operators of various facilities. The Resource Conservation and Recovery Act of 1976 provides a method and a means to force “any . . . past or present owner or operator of a treatment, storage, or disposal facility” to perform an environmental cleanup to the extent that such person “is contributing to the past or present handling . . . of any solid or hazardous waste which may present an imminent and substantial endangerment.” See generally 42 U.S.C. §§6972, 6973.

There are other statutes that provide specific cleanup liability within each statute’s purview. See, *e.g.*, the Clean Water Act, 33 U.S.C. §1251, *et seq.*, and the Oil Pollution Act of 1990, 33 U.S.C. §2701, *et seq.* CERCLA is distinguishable, however, because only CERCLA is specifically designed to address and impose environmental cleanup liability based on the nature of a hazardous situation (current, abandoned, regulated, or unregulated) and is not focused on a regulated act or media. Also, 42 U.S.C. §9607 is a liability statute under which liability can be reduced to a money judgment and may be a lien affecting and attaching to real estate and that does not simply provide grounds for injunctive relief. Nonetheless, the CWA does provide for cleanup liability associated with discharges of pollutants into waters of the United States.

The CERCLA liability regime is well known, and its principles are well recognized. Specifically, two groups of owners may face environmental cleanup liability, and two specific groups of nonowners may face environmental cleanup liability to the extent that any such nonowner either “arranged” for the “disposal or treatment” of a hazardous substance or “transport[ed]” a hazardous substance to a facility of that transporter’s choosing. See generally 42 U.S.C. §§9607(a)(1) – 9607(a)(4).

B. [9.12] Scope of Cleanup Costs Potentially at Issue

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 provides that a responsible person is liable for (1) payment and/or reimbursement of “removal” or “remedial” costs incurred by the federal or state government “not inconsistent with” the national contingency plan (NCP) promulgated at 40 C.F.R. pt. 300; (2) any other “necessary” response costs incurred by any other person “consistent with” the NCP; and (3) damages to “natural resources.” 42 U.S.C. §9607(a)(4).

These “response costs” are costs incurred for the performance of “removal” or “remedial” activities as those terms are specifically defined in the statute, interpreted by the courts, and referred to in the regulations. Remember, these “response costs” are not “damages.” Tort analysis is of little use in analyzing liability under CERCLA.

Congress made it clear that only certain costs were available under the statute and that only certain activities would be deemed appropriate and reasonable for a CERCLA-quality cleanup. The national standard available to review activities and costs is described in 40 C.F.R. pt. 300.

C. [9.13] Potentially Responsible Parties — Environmental Cleanup Liability

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 provides that four classes of persons may face environmental cleanup liability under the statute. The two groups of owners at risk are (1) the current owner of a “facility” and (2) “any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of.” 42 U.S.C. §§9607(a)(1), 9607(a)(2). The two nonowner groups potentially at risk for CERCLA cleanup liability are (1) those who “arranged for disposal or treatment . . . of hazardous substances . . . at any facility” and (2) those who accept hazardous substances for transport “to disposal or treatment facilities.” 42 U.S.C. §§9607(a)(3), 9607(a)(4). The two owner categories are discussed in this section; the nonowner categories are not analyzed, except to say that current or prospective owners do not actually have to have performed the acts that create CERCLA cleanup liability at any particular site. That is, other nonowner liability participants may have created liability at the site. Indeed, as part of any reasonable due diligence, it is incumbent on the parties to recognize that the owner’s customers and suppliers actually could have created environmental cleanup liability at the site to the extent that a customer or supplier “arranged for” the disposal of or “transported” a hazardous substance to a site as part of its reasonable business practice without any intention of “disposing” of any hazardous substance or waste. *See United States v. Aceto Agricultural Chemicals Corp.*, 872 F.2d 1373 (8th Cir. 1989) (agricultural chemicals “formulated” on site, but waste created in process created environmental liability for both owner of site and company’s customers who purchased formulated finished product.) *See also United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988) (any person who shipped hazardous substances to site “like” those present at site could be liable).

In the two classes of owners’ potential liability, CERCLA has been successfully applied retroactively — that is, to activities that occurred long before the statute was enacted and that were legal at the time — by the government. *See United States v. Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726 (8th Cir. 1986). Even waste disposal activity that occurred prior to the

enactment of the statute and arguably did not affect interstate commerce because the party disposed of its own waste on its own site created retroactive CERCLA liability. See *United States v. Olin Corp.*, 107 F.3d 1506 (11th Cir. 1997). The all-too-familiar litany of owner's liability cases also includes *State of New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985) (developer held liable as current owner, even though developer did not participate in generation or transportation of nearly 700,000 gallons of hazardous waste found on site).

In addition, because the statute does not refer to "strict liability" but does provide for various defenses at 42 U.S.C. §9607(b), it is not entirely accurate to describe CERCLA as a strict liability statute. Yet courts continue to characterize CERCLA liability as providing "strict" as well as "joint and several liability" even though the statute and its legislative history eschewed these descriptions. Indeed, all references to "strict, joint and several liability" were intentionally deleted from the Senate bill that became law.

Nonetheless, the early cases found strict as well as joint and several liability unless the harm could be apportioned, that is, made "divisible." See *United States v. Chem-Dyne Corp.*, 572 F.Supp. 802 (S.D. Ohio 1983); *United States v. Bliss*, 667 F.Supp. 1298 (E.D.Mo. 1987); *O'Neil v. Picillo*, 883 F.2d 176 (1st Cir. 1989). The rationale employed by the courts helps explain their thinking; that is, because contamination at a Superfund site is generally part of a "contaminant soup," it is virtually impossible to segregate contaminants or to identify one party's contaminant as distinguished from another party's material. Borrowing from the RESTATEMENT (SECOND) OF TORTS, courts switched the burden to the defendant to "apportion" liability in the same manner that the law would require two or more tortfeasors to prove the divisibility of the harm in order to avoid tort liability. Suffice to say, if a party could not distinguish its benzene from another's, the court would not divide the harm for them, at least not during the initial trial of the government's case. (The parties may avail themselves of an ancillary action, the purpose of which is to allocate the joint and several liability between them, following the government's case-in-chief finding indivisible contamination.)

In that sense, the effect may be the same as strict liability, but because a party may have a defense to liability based on "divisibility" of harm, and because the statute provides for post-liability contribution and other defenses, it is not entirely accurate to describe it as a strict joint and several liability statute either. CERCLA provides a remedy for two or more liable parties to apportion their liability afterwards using equitable factors such as volume and toxicity, among other things. See 42 U.S.C. §9613(f) (providing remedy in contribution "from any other person . . . liable under" statute); *United States v. Alcan Aluminum Corp.*, 964 F.2d 252 (3d Cir. 1992) (may reduce liability to zero if defendant can prove its contaminant did not contribute to release or remedial costs).

In *Burlington Northern & Santa Fe Ry. v. United States*, 556 U.S. 599, 173 L.Ed.2d 812, 129 S.Ct. 1870 (2009), the Supreme Court gave hope to practitioners that CERCLA liability may more often be resolved without lengthy and burdensome equitable allocations. Continuing to look to the RESTATEMENT (SECOND) OF TORTS, the Supreme Court noted that "apportionment is proper when 'there is a reasonable basis for determining the contribution of each cause to a single harm.'" 129 S.Ct. at 1881, quoting RESTATEMENT (SECOND) OF TORTS §433A (1965). The Supreme Court accepted the detailed findings of a district court and allowed the apportionment of liability.

Despite this Supreme Court opinion, lower courts remain reluctant to apportion liability without a clear, unambiguous, and obvious factual basis for doing so, knowing that equitable allocation of jointly and severally liable parties is always available. In *United States v. NCR Corp.*, 688 F.3d 833 (7th Cir. 2012), the Seventh Circuit Court of Appeals refused to apportion liability without overwhelming evidentiary support.

D. [9.14] Statutory Defenses

As mentioned in §9.13 above, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 does provide for various defenses, most of which are remote at best. Specifically, the statute provides a defense for acts of God or acts of war, neither of which has yet been accepted. 42 U.S.C. §9607(b). The remaining defense has been characterized as the so-called “third-party” defense (*id.*) and has created a cottage industry associated with environmental due diligence investigations even though the defense as it was originally available proved to be largely illusory.

As originally drafted, the third-party defense excused an owner from liability under CERCLA for releases of hazardous substances that occurred solely as a result of the acts or omissions of a “third party other than an employee or agent of the defendant, or . . . one whose act or omission occurs in connection with a contractual relationship . . . with the defendant.” 42 U.S.C. §9607(b)(3). Inasmuch as a significant number of real estate transactions involve contracts by and between previous owners, current owners, and subsequent owners, the third-party defense thus proved illusory. In 1986, Congress added 42 U.S.C. §9601(35) to provide that innocent purchasers may avoid CERCLA liability if they can establish that they did not have actual or constructive knowledge of the presence of hazardous substances at the time the real property was acquired. Government entities that acquired property in involuntary transactions and persons acquiring property by inheritance or bequest are also excused. *Id.*

In order to establish a lack of knowledge of contamination, Congress provided that the owner must have (1) undertaken, at the time of acquisition, all appropriate inquiries (AAI) into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability and (2) taken reasonable steps to stop or prevent a release and to prevent exposure of humans over the environment. See 42 U.S.C. §9601(35)(B). Congress instructed the courts to consider the purchaser’s sophistication and experience and the relationship of the purchase price to the value of the property without contamination. Courts are also directed to analyze the obviousness of contamination and the ease of detecting contamination in an “appropriate inspection.” *Id.*

Until a national standard was applied by the American Society for Testing and Materials (ASTM), the custom and practice referred to by Congress varied significantly from area to area (often within a state). More importantly, the so-called “innocent purchaser” defense was narrowly interpreted. See *United States v. A & N Cleaners & Launderers, Inc.*, 854 F.Supp. 229 (S.D.N.Y. 1994) (actual knowledge that landlord discharged waste on site amounted to no defense); *Kerr-McGee Chemical Corp. v. Lefton Iron & Metal Co.*, 14 F.3d 321 (7th Cir. 1994) (failure to take precautions from known contamination meant no defense).

E. [9.15] Passive Owner's Liability/Defense

One of the least understood concepts among transactional lawyers is the potential exposure of a predecessor in title who may have known that the site was contaminated at the time he or she purchased it (or learned of the contamination later) but committed no act that caused the reported release at the property. Indeed, this intervening, nonculpable owner was truly “passive” in relation to the contamination at the site. Clearly, during the time that this passive owner was the current owner, that passive owner was potentially liable pursuant to 42 U.S.C. §9607(a)(1). After the passive owner sells the site, is that person still liable as the owner “at the time of disposal” pursuant to 42 U.S.C. §9607(a)(2)?

It is important to distinguish the two owner liability provisions and recognize the not-so-subtle difference between the current owner described at 42 U.S.C. §9607(a)(1) and the owner who owned the property “at the time of disposal” in 42 U.S.C. §9607(a)(2). Former owners’ liability focuses on the term “disposal.” That is, not all former owners face liability under 42 U.S.C. §9607(a)(2) even if the site was contaminated during a previous owner’s tenure.

Congress defined “disposal” very broadly. “Disposal” includes “the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water.” See 42 U.S.C. §§9601(29), 6903(3). The courts are split as to whether passive intervening owners face any liability under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980. Historic owners are passive to the extent that they did not dispose of the material themselves but (1) otherwise owned the land at the time that hazardous substances were disposed of there or (2) the hazardous substances were deposited prior to that owner’s tenure but continued to leak or spill throughout the tenure of ownership of that owner.

In *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837 (4th Cir. 1992), the court found the passive owner liable. Otherwise, according to the court, “an owner could avoid liability simply by standing idle.” 966 F.2d at 845. However, in *United States v. CDMG Realty Co.*, 96 F.3d 706 (3d Cir. 1996), the court rejected *Nurad*, using the canon of statutory construction *noscitur a sociis* (one term derives meaning from the context of others with which it is associated). According to the Third Circuit, finding passive owner liability would wholly negate the so-called “innocent purchaser” defense, which, by its nature, applies only after a disposal. 96 F.3d at 715 – 716. Moreover, the Sixth Circuit has held that “passive” migration was not a “disposal” as that activity requires human intervention. See *United States v. 150 Acres of Land*, 204 F.3d 698 (6th Cir. 2000).

F. [9.16] Lender Liability

In the early days of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, it came as a significant surprise to many that lenders had any exposure under CERCLA. After all, CERCLA specifically excludes from the definition of “owner or operator” any person “who, without participating in the management of a . . . facility, holds indicia of ownership primarily to protect his security interest in the . . . facility.” 42 U.S.C. §9601(20)(A). Obviously, lenders failed to recognize that the so-called “lender’s exception” was conditional and, more importantly, was found within the definition of “owners and operators.”

Moreover, lenders who did participate in the management of the facility and lenders who held indicia of ownership for other reasons in addition to protecting their security interest faced the same environmental liability as owners, arrangers, and transporters. It took the seminal case *United States v. Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir. 1990), to catch their attention.

In *Fleet Factors*, the court dispelled the myth that lenders, just because they are lenders, are exempt from CERCLA liability in all contexts. In that case, the lender (Fleet) took a fairly active role in disposing of hazardous substances, albeit reasonably and acting in its role as a secured party protecting its security interest. The fact that the lender was acting reasonably and prudently as a lender did not inoculate it from CERCLA liability, however. Fleet held a trust deed (the requisite “indicia of ownership”), but rather than foreclose the trust deed upon the default, the lender took over a large part of the borrower’s business and liquidated accounts receivable and much of the borrower’s equipment.

The government sued, alleging that Fleet was an owner of the site. Fleet protested, arguing that the statute did not provide liability under such circumstances. The court disagreed and, in the most unfortunate dicta, announced its interpretation that the statute implied liability not only for the acts of the lender in this case but also that lender liability should be expanded to include liability for a secured creditor who participates in the financial management of a facility to a degree indicating a “capacity to influence” the borrower’s waste management operations. 901 F.2d at 1557.

Fleet reportedly had participated in winding up the affairs of the borrower: filling orders; laying off employees; supervising management; reviewing and filing tax forms; controlling access to and from the operations; and hiring contractors to dispose of wastes (including drums of waste chemicals). Even absent foreclosure, these activities amounted to operating the borrower’s business. Said differently, even though every activity that Fleet was alleged to have performed was reasonable and prudent, Fleet was doing more than acting as a mere lender. In short, the court refused to interpret the secured creditor’s exemption language in CERCLA to excuse lenders just because they were lenders. Congress had not provided so broad a defense to CERCLA liability, and to be able to sidestep liability exposure so easily would not further the remedial purposes of the statute.

Fleet Factors has been superseded by statute (*see Monarch Tile, Inc. v. City of Florence*, 212 F.3d 1219 (11th Cir. 2000)), but the hue and cry following *Fleet Factors* was remarkable primarily for the pandering from commentators and the confusion that was generated generally as the scope of CERCLA liability was becoming clearer.

Shortly after *Fleet Factors*, the Ninth Circuit addressed the scope of CERCLA liability and the lender’s exemption in *Bergsoe Metal Corp. v. East Asiatic Co.*, 910 F.2d 668 (9th Cir. 1990). In that case, the municipality took title to property as part of a triangulated transaction also involving a borrower and a lender. The municipality held fee-simple title to the real estate to secure the borrower’s performance of a government-sponsored loan program. Real property lawyers will recognize the technique as holding title in “strict foreclosure.” However, to most of the environmental litigation bar, the subtlety of strict foreclosure and the court’s decision added even more confusion to the situation.

After analyzing the facts and the law, the court in *Bergsoe* excused the municipality from CERCLA liability because the court found that the municipality held indicia of title primarily to protect its security interest; the court did not find that the municipality was also involved in managing the site. The municipality held fee-simple title and not a mortgage interest but held it only to protect its security interest. The court approvingly cited *Fleet Factors* but announced that “[m]erely having the power to get involved in management, but failing to exercise it, is not enough.” 910 F.2d at 673 n.3. That is, *Fleet* was not in title but was held liable. In *Bergsoe*, the secured party was in title and was held not liable, and the *Bergsoe* court approved and reconciled its decision with *Fleet Factors*. The point was that indicia of title (no matter what it is) and participating in the management of a borrower’s operation are required to void the secured creditor exemption.

As a matter of precedent, the *Fleet Factors* court did not hold that the mere capacity to influence waste disposal activities was sufficient to impose CERCLA liability. That statement was only dicta, and strictly speaking, the *Bergsoe* court did not hold to the contrary. However, many environmental lawyers screamed for a reconciliation of these “contrary” decisions within the circuits. Inasmuch as the United States Supreme Court never took up the cudgel, public pressure turned political, and the United States Environmental Protection Agency eventually become involved.

In 1992, the USEPA responded by promulgating its “Lender Liability Rule” as part of the National Oil and Hazardous Substances Pollution Contingency Plan. See *Lender Liability Under CERCLA*, 57 Fed.Reg. 18,344 (Apr. 29, 1992); 40 C.F.R. pt. 300. In the Lender Liability Rule, the USEPA specifically rejected liability based on the mere “capacity to influence” and liability based solely on the lender’s participation in purely financial or administrative aspects of a borrower’s activities. In the Lender Liability Rule, the USEPA provided a general test to determine when a lender would void the secured creditor exemption. According to the USEPA, if the borrower was still in possession of the property, the lender would face liability only if the lender (1) exercised actual decision-making control over a borrower’s environmental compliance or (2) actually exercised managerial control over day-to-day operations with respect to environmental compliance or over all aspects of the enterprise other than environmental compliance.

The Lender Liability Rule was almost immediately tested in *Kelley v. Environmental Protection Agency*, 15 F.3d 1100, *reh’g denied*, 25 F.3d 1088 (D.C.Cir. 1994), *cert. denied*, 115 S.Ct. 900 (1995). In *Kelley*, the court held that Congress had not delegated authority to the USEPA to determine liability. Rather, the court insisted that the USEPA had authority only to bring the question to a federal court as a “prosecutor,” and then only an Article III judge could determine liability. 25 F.3d at 1108. In short, the court ruled that the USEPA’s attempt to define liability under CERCLA was unconstitutional.

Thereafter, the political pressure increased, and Congress eventually acted. In 1996, Congress enacted amendments to CERCLA that substantially mirrored the USEPA’s Lender Liability Rule. Specifically, Congress enacted the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996 (Asset Conservation Act), Pub.L. No. 104-208, Div. A, Title II, Subtitle E, 110 Stat. 3009-462. Therein, Congress amended CERCLA by providing a detailed definition of the key terms in the so-called secured creditor’s exemption, but more importantly, Congress provided “safe harbors” for actions undertaken by the lender. Equally importantly, the Asset Conservation Act also added similar protections for fiduciaries. See 42 U.S.C. §9607(n).

This amendment clarifies the status of lenders' liability for environmental cleanup costs associated with commercial real estate. A lender is, and remains, an "owner," but a lender may be an exempt "owner" as long as the lender does not participate in the management of the borrower's operation. "Operator" liability is not affected by this exemption. It is important to recognize and characterize lenders' status as an exemption from liability and not as a defense to liability under CERCLA. The distinction may be subtle, but the exemption is designed to be self-executing and provides counsel with an opportunity to negotiate more reasonable terms with the lender in commercial real estate transactions. In other words, lenders no longer need be concerned with their potential individual liability simply because they are lenders, and their only legitimate concerns involve the value of the security and the borrower's ability to repay the loan in the event of environmental cleanup liability.

Accordingly, a lender participates in management (and loses the protection of the secured creditor's exemption) only if, while the borrower is still in possession of the property, the lender (1) exercises actual decision-making control over environmental compliance to the extent that the lender assumes responsibility for hazardous substance disposal or handling practices or (2) exercises control over the day-to-day decision-making for environmental compliance activities or over "all or substantially all" of the borrower's operational activities. 42 U.S.C. §9601(20)(G)(ii). The point is that the changes provided by the statute are not much different from a correct interpretation of the court's decision in *Fleet Factors, supra*.

In addition, the Asset Conservation Act created nine "safe harbors" for lenders involved in pre-foreclosure activities. These safe harbors assume that the borrower continues to retain control over the operations, in which case, a lender may

1. hold, abandon, or release a security interest;
2. require the borrower to maintain environmental compliance through terms and conditions;
3. monitor or enforce the terms and conditions;
4. monitor or inspect the borrower's operation;
5. require the borrower to participate in a response action to address a release of a hazardous substance before, during, or after the expiration of the loan;
6. provide financial or other advice to mitigate or prevent a default or the diminution in the value of the security;
7. restructure or renegotiate the terms of the loan (including forbearance);
8. exercise any other remedy available for breach of the security agreement; and
9. conduct the response action itself. 42 U.S.C. §9601(20)(G)(iv).

If the lender actually forecloses the security interest, the lender will not be held to be an “owner or operator” under CERCLA as long as the lender does not participate in the management after foreclosure and as long as, after foreclosure, the lender sells, releases, liquidates, or otherwise conveys ownership in the property “at the earliest practicable, commercially reasonable time, on commercially reasonable terms, taking into account market conditions and legal and regulatory requirements.” 42 U.S.C. §9601(20)(F)(ii)(II). According to the statute, the lender may continue to operate the borrower’s business, wind up the borrower’s business, undertake response actions under CERCLA, or take any other measure to protect or prepare the property for sale or disposition. *Id.*

As indicated above, the statute has specific definitions of terms such as “foreclosure” and “security interest,” as well as a description of who qualifies as a lender. Also, the lender liability exemption applies to environmental liability under the Resource Conservation and Recovery Act of 1976 to the extent that the exemption shields lenders with a security interest in property containing petroleum underground storage tanks. See 42 U.S.C. §6991b(h)(9). Notably, the RCRA lender liability exemption extends to all persons and is not limited only to lenders as described in the Asset Conservation Act.

The Asset Conservation Act seems to have settled the waters and provided lenders with some needed guidance concerning the scope of environmental liability under CERCLA. Coincidentally, enforcement activities against lenders slowed significantly in the 1990s. For either or both reasons, there have been fewer reported cases involving lender liability since the enactment of the Asset Conservation Act. In any event, it seems clear that once lenders fully understood and properly analyzed environmental liability under CERCLA, they avoided litigation alternatives in lieu of performing adequate investigations, often referred to as “due diligence.”

G. [9.17] Exemption from Liability for Fiduciaries

Congress also provided other, self-executing, exemptions (not defenses, per se) from liability under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 for fiduciaries in the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996. See 42 U.S.C. §9607(n). “The liability of a fiduciary under any provision [of CERCLA] for the release or threatened release of a hazardous substance at, from, or in connection with a . . . facility held in a fiduciary capacity shall not exceed the assets held in the fiduciary capacity.” 42 U.S.C. §9607(n)(1). The exemption does not apply “if negligence of a fiduciary causes or contributes to the release or threatened release” or if the fiduciary is liable under the statute in any other capacity. 42 U.S.C. §9607(n)(3). In those instances, the fiduciary would have independent liability, and the accretion in exposure likely would not be attributable to the estate.

Congress defined a “fiduciary” as a trustee, executor, administrator, custodian, guardian of the estate or guardian ad litem, receiver, conservator, committee of estates of incapacitated persons, or personal representative (but not trusts that were created as business trusts). 42 U.S.C. §9607(n)(5).

H. [9.18] Exemptions from Liability for Prospective Purchasers and Adjacent Property Owners

Probably the most significant changes in the law involve amendments to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980's environmental liability regimen providing for exemptions from liability for "prospective purchasers" and "adjacent property owners."

Throughout the 1990s, the United States Department of Justice and the United States Environmental Protection Agency tried to establish standards that would recognize the reality of environmental liability associated with so-called "brownfields" (contaminated sites that could have commercial viability if prospective ownership did not carry with it the risk of environmental cleanup liability). The USEPA sought to establish standards that would eliminate the disincentive to prospective purchasers considering investing in brownfields based on the rational fear of environmental liability as the "current owner." After meeting with little success in trying to negotiate terms in individual transactions, in January 2002 Congress enacted, and the President signed, the Small Business Liability Relief and Brownfields Revitalization Act, Pub.L. No. 107-118, 115 Stat. 2356 (2002), which provides exemptions from liability to prospective purchasers and adjacent property owners who are "bona fide prospective purchasers" (as that term is defined under the statute). See 42 U.S.C. §§9607(r), 9601(40).

Briefly, to the extent that a prospective purchaser performs "all appropriate inquiries" as that term and process are now described at 40 C.F.R. pt. 312, a new purchaser/owner may escape environmental cleanup liability for known and discovered contamination if that prospective purchaser/owner can show, by a preponderance of the evidence, that the contaminated material was present and released at the site before the purchaser took title to the site.

In addition to the performance of pre-acquisition AAI, the new owner must exercise post-acquisition "appropriate care" by taking "reasonable steps" to stop continuing releases and to prevent future releases. 70 Fed.Reg. 66,070, 66,073 (Nov. 1, 2005). In addition, in the event of a cleanup or any other remedial activity at the property that takes place after the property is transferred to the purchaser, the new owner must cooperate with the USEPA and other parties or agencies that require access to perform cleanup work, if any. *Id.* Also, the new owner must comply with all land use restrictions imposed in connection with the cleanup at the property. *Id.* Finally, if the new owner gains a windfall measured by the value added following a government-sponsored cleanup completed after the exempt purchaser bought the property at a depressed value due to the presence of the identified contamination, the exempt owner's interest in the property will be subject to a windfall lien for the cleanup costs incurred by the USEPA or the state in performing the cleanup at the property. See 42 U.S.C. §9607(r)(2).

Note that the prospective purchaser's exemption is different from both the third-party and innocent purchaser's defenses otherwise described in CERCLA. See 42 U.S.C. §§9607(b)(3), 9601(35). Remember that both the third-party and the innocent purchaser defenses are designed as defenses to liability for unknown and undiscovered contamination that was not discovered even after performing AAI under the circumstances but is later discovered at the site with potential liability to the nonculpable new owner.

In order to qualify as an “innocent”/third-party purchaser, the new owner also must have performed AAI before a court can conclude that the new owner had no reasonable evidence that the site was contaminated (did not know and had no reason to know) at the time the purchaser took title. Not only must the “innocent”/third party show by a preponderance of the evidence that he or she did not know and had no reason to know that the site was contaminated at the time of the purchase, but the new owner must also cooperate with the agency performing the cleanup (if any) and is subject to, and must comply with, any agency-imposed land use restrictions, take reasonable steps to stop continuing releases, prevent any threatened releases, and prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substances. It is no bargain to qualify as an “innocent purchaser.”

Indeed, except in rare circumstances, it is not likely that the “innocent purchaser” will receive the expected benefit of a contractual bargain, especially if, after taking possession, the new owner finds that the site is burdened with previously undisclosed contamination, unanticipated land use restrictions, and affirmative obligations to manage undisclosed contamination — all after a trial showing by a preponderance of proof that the new owner did not know and had no reason to know that the site was contaminated. Because it is not likely that the significant burdens associated with qualifying as an “innocent”/third-party purchaser were anticipated in the purchase agreement, transactional lawyers should never simply conclude that the purchaser’s interests are protected as an innocent purchaser without providing post-closing relief in the contract if it turns out that the property is contaminated and the new owner must experience the ordeal to qualify as an innocent purchaser in order to avoid cleanup liability and then finds that the new site comes with unanticipated contamination, land use restrictions, and affirmative obligations.

Again, it is not enough to advise a client that he or she qualifies as an innocent purchaser and need not worry. Litigators, without the assistance of an experienced transactional lawyer, likely created the innocent purchaser defense because it still punishes the so-called “innocent” purchaser. The “innocent”/third-party defense still exists, but it was never, and is not now, a definitive planning technique for commercial real estate transactions by itself.

Next, distinguish that the “prospective purchaser” and “adjoining property owners” exemptions acknowledge that the site under consideration contains known contamination, and the AAI are designed to provide evidence that the *known contamination was released at the property prior to the prospective purchaser’s acquisition of the property*. The distinction bears repeating: In the case of known contamination, we analyze the new bona fide purchaser exemptions for prospective purchasers and adjoining landowners. In the case of unknown and undiscovered contamination, we analyze the so-called and burdensome “innocent”/third-party purchaser’s defenses referred to above.

Almost certainly, every commercial real estate transaction will require discreet analysis of known contamination and the application of the bona fide purchaser exemptions (either prospective purchaser or adjoining owner or both) and some critical analysis of the specter of unknown and undiscovered contamination associated with the innocent and third-party purchasers’ defenses. Many consultants do not recognize the significance of the rules. Be forewarned: The rules are no panacea to avoid potential cleanup liability. Like their cousins, the “innocent”/third-party purchaser defenses, the exemptions have intended and unintended, but largely more appropriate, consequences.

The USEPA claims that the prospective purchaser's and adjoining owner's exemptions are "self-executing" — that is, without having to litigate the matter (as would be the case, obviously, in proving either the "third-party" or "innocent purchaser" defenses). It is not really very clear how the USEPA will give effect to the reportedly self-executing nature of the exemptions. The USEPA has not established any administrative procedure for a party to definitively establish its status as a bona fide prospective purchaser or adjoining landowner, and the statute provides that the party seeking coverage as an exempt owner must be prepared to do so "by a preponderance of the evidence" — an obvious reference to a litigation standard of proof. See 42 U.S.C. §9607. Thus, the USEPA's reference to the self-executing nature of the exemptions appears to mean that counsel representing the parties (and most importantly, counsel for the purchaser) will opine accordingly — and that opinion of counsel is not for the uninitiated or the faint of heart.

In certain instances, the statute does provide that the USEPA may "issue an assurance that no enforcement action under this [Act] will be initiated against [an adjacent property owner]," and the USEPA may "grant [an adjacent property owner] protection against a cost recovery or contribution action" initiated pursuant to CERCLA. See 42 U.S.C. §9607(q)(3). No such assurances, however, are specifically mentioned relating to prospective property owners at 42 U.S.C. §9607(r). Again, there is no administrative process for a prospective purchaser to gain a "comfort letter" or a release, and if past history is any guide, gaining any reasonable response from the USEPA within any reasonable time to satisfy the time constraints in most commercial real estate transactions will be unlikely. Except in the case of very large commercial sites with a Superfund profile, it is not likely that the USEPA or the Department of Justice is equipped to provide any assurance that a prospective purchaser qualifies as an exempt party under the statute.

Hence, the choice of the consultant, the development of competent evidence by the consultant (in support of the conclusion that the contamination predates the purchase), and counsel's analysis and guidance in interpreting the consultant's evidence for competency and relevancy in light of the statutory standard are overwhelmingly critical in qualifying a prospective purchaser/adjoining landowner as an exempt bona fide purchaser under the statute.

I. [9.19] All Appropriate Inquiry

The reference to an "all appropriate inquiry" has been a part of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980's environmental lexicon since 1986, initially spawning a national debate on what should constitute "all appropriate inquiry" but eventually being reported as a set of investigative protocols in a national standard established by the American Society for Testing and Materials and known as *Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process*, E1527-21.

Congress charged the United States Environmental Protection Agency with the task of preparing new standards describing "all appropriate inquiries" for use in implementing the Small Business Liability Relief and Brownfields Revitalization Act, Pub.L. No. 107-118, 115 Stat. 2356 (2002). Those new standards were necessary, not only to provide for implementation of the added exemptions from liability for bona fide purchasers (*i.e.*, prospective purchasers and adjoining property owners with known contamination), but also because the statute provides federal brownfields grants to citizens who perform site characterizations and assessments pursuant to 42

U.S.C. §9604(k)(2)(B). Brownfields grants and similar programs are beyond the scope of this chapter, but suffice to say, Congress and the USEPA considered that more stringent standards should apply to protect the public's interest. New standards also were promulgated to address a method and means to determine the value of a cleanup lien in favor of the government in those instances in which the government performs a cleanup with government funds on a site where the owner qualifies as a bona fide purchaser under the statute.

In response to its mandate, on November 1, 2005, the USEPA promulgated a set of standards that the Agency uses to analyze what is considered “all appropriate inquiries.” See *Standards and Practices for All Appropriate Inquiries*, 70 Fed.Reg. 66,070 (Nov. 1, 2005), amending 40 C.F.R. pt. 312. These rules are used in determining the data necessary to support the “prospective purchaser’s” and “adjoining property owner’s” exemptions. According to the rule, ASTM Standard E1527-97 is appropriate for transactions that closed before November 1, 2006, and the revised standards articulated in the rule apply to transactions that close on and after November 1, 2006. 70 Fed.Reg. 66,070, 66,072. Thereafter, the ASTM published subsequent standards, with ASTM Standard E1527-21 as the current standard. The USEPA’s approval of ASTM Standard E1527-21 became effective February 13, 2023, and the previous standard, ASTM Standard E1527-13, was withdrawn on February 13, 2024. 87 Fed.Reg. 76,578 (Dec. 15, 2022).

According to the AAI rule, in order to identify “conditions indicative of releases and threatened releases of hazardous substances on, at, in, or to the subject property” (40 C.F.R. §312.20(e)), the inquiry must consider the following ten factors:

1. The inquiry must be performed by an environmental professional (a defined and specifically qualified professional under the rule). 40 C.F.R. §312.21.
2. The inquiry must include interviews with past and present owners, operators, and occupants of the facility for the purpose of gathering information regarding the potential for contamination at the site. 40 C.F.R. §312.23.
3. The inquiry must include reviews of historical sources, such as chain of title documents, aerial photographs, building department records, and land use records, to determine previous uses and occupancies of the real property since the property was first developed. 40 C.F.R. §312.24.
4. The inquiry must include searches for recorded environmental cleanup liens against the site that are filed under federal (district court clerks’ offices), state, or local (recorders’ offices) law. 40 C.F.R. §312.25.
5. The inquiry must include reviews of federal, state, and local government records, waste disposal records, underground storage tank records, and hazardous waste handling, generation, treatment, disposal, and spill records concerning contamination at or near the facility. 40 C.F.R. §312.26.
6. The inquiry must include visual inspections of the site and of adjoining properties. 40 C.F.R. §312.27.

7. The inquiry must contain some analysis of the specialized knowledge or experience on the part of the prospective purchaser. 40 C.F.R. §312.28.

8. The inquiry must contain some analysis of the relationship of the purchase price to the value of the property if the property was not contaminated. 40 C.F.R. §312.29.

9. The inquiry must analyze commonly known or reasonably ascertainable information about the property. 40 C.F.R. §312.30.

10. The inquiry must include analysis of the degree of obviousness of the presence or likely presence of contamination at the property and the ability to detect the contamination by appropriate investigation. 40 C.F.R. §312.31.

Key points of the current rule are as follows:

1. The AAI rule has a definition of “environmental professional” that requires greater oversight and report certifications by senior engineers of Phase I investigations and, arguably, limits the universe of consultants that may be authorized to perform these assessments. See 40 C.F.R. §312.10.

2. The AAI rule highlights the reporters’ obligations to interview current and past owners and occupants of a site.

3. The AAI rule imposes affirmative requirements on the consultant to interview neighboring property owners in the case of abandoned properties.

4. The AAI rule imposes a duty on the consultant to review historical sources of information dating back to the first use of the property for residential, agricultural, or commercial/industrial purposes.

5. The AAI rule requires the consultant to search for environmental cleanup liens recorded under any federal, state, or local laws.

6. The AAI rule imposed the obligation to document the extent of the review, to identify “data gaps,” and to provide opinions regarding the significance of data gaps to the identification of potential releases of hazardous substances. See 40 C.F.R. §312.20(g).

7. The AAI rule requires analysis of the value of the property in relation to potential cleanup costs and the propriety of the sale price in relation to value with and without a cleanup and an analysis of the sophistication of the prospective purchaser.

Conforming to the AAI rule is important, but it is not a substitute for adequate due diligence. For example, the standard Phase I environmental assessment report prepared pursuant to the AAI rule does not include an examination for asbestos, permit compliance, or off site-liabilities or any guidance on the “continuing obligations” required to maintain the exempt status of a bona fide prospective purchaser. Adequate due diligence may require a supplemental investigation related to one or more of those items.

In order to address the continuing obligations associated with maintaining land use restrictions and engineering controls for residual contamination on properties that have already been investigated and remediated, the ASTM standard characterizes certain risks as “Historic Recognized Environmental Conditions” and “Controlled Recognized Environmental Conditions,” conditions that do not imply a current release of hazardous substances but suggest that there is historic evidence of such a release or that a historic release is now controlled. The current ASTM standard also recognizes the risk of vapor intrusion (*i.e.*, the phenomenon in which volatile organic compounds beneath the surface vaporize and turn to gas with the potential of migrating to occupied spaces at a property), which is discussed in more detail in §9.35 below. While the ASTM standard has always required assessment of potential “migration of contaminations,” the definition of “migration” was amended to include “vapor in the subsurface” to ensure that vapor migration is evaluated.

As with the “innocent”/third-party purchaser’s defense, an exempt owner is not free of post-closing obligations. This is a critical point missed by the purchaser discussed in *PCS Nitrogen Inc. v. Ashley II of Charleston LLC*, 714 F.3d 161 (4th Cir. 2013). The point is, even if a purchaser is exempt from cleanup liability for preexisting contamination, the purchaser loses that exemption if the owner fails to manage the contamination appropriately. Specifically, after completing AAI, the new owner must also (1) exercise post-acquisition “appropriate care” by taking “reasonable steps” to stop continuing releases and to prevent future releases, (2) cooperate with the USEPA or other parties that might desire future access to perform cleanup work, (3) agree to comply with any land use restrictions imposed in connection with any cleanups, and (4) recognize that the property might be subject to a “windfall lien” to the extent that a government-sponsored cleanup enhances the value of the property. 70 Fed.Reg. 66,070, 66,073 (Nov. 1, 2005). However, the windfall lien will attach only to the value enhanced by the cleanup. See 42 U.S.C. §9607(r).

J. [9.20] Prospective Purchaser Exemption in Illinois

Illinois has its version of a prospective purchaser exemption at 415 ILCS 5/22.2b(a). According to that statute, the State of Illinois may grant a “release” from liability imposed by the state pursuant to 415 ILCS 5/22.2(f) if (1) the person performs a response action to remove all of the hazardous substances pursuant to an Illinois Environmental Protection Agency-approved plan; (2) “the person did not cause, allow, or contribute to the release or threatened release of a hazardous substance or pesticide through any act or omission”; (3) the person requests, in writing, that the IEPA provide review and evaluation services and the Agency agrees to provide the review and evaluation services; and (4) the person is not otherwise liable under §22.2(f) and complies with the regulations related to the preparation of an Agency-approved “response action plan” and performed all appropriate inquiries. 415 ILCS 5/22.2b(a)(2).

As with the federal exemption, Illinois has various post-closing obligations associated with cooperation with the agency performing the cleanup (if any), but as with the federal program, those post-closing obligations do not involve statutory cleanup liability under the Environmental Protection Act. Moreover, the §22.2b release is independent of, and does not involve, an application for a no further remediation (NFR) letter from the IEPA under the Site Remediation Program (SRP) described at Title XVII of the Illinois Environmental Protection Act. See §§9.33 – 9.39 below.

Prospective purchasers and sellers should note that the IEPA may approve a response action plan that may or may not require the removal of all hazardous substances or pesticides if the person proves that (1) the proposed response action will prevent or mitigate immediate and significant risk of harm to human life and health and the environment; (2) the activities at the property will not cause, allow, contribute to, or aggravate the release or threatened release of a hazardous substance or pesticide; (3) due consideration has been given to the effect that the proposed activities at the property will have on the health of those persons likely to be present at the property; (4) irrevocable access to the property is given to the State of Illinois and its authorized representatives; (5) the person is financially capable of performing the proposed response action; and (6) the person complies with regulations adopted by the Agency. 415 ILCS 5/22.2b(b).

In addition, the release provided by the State of Illinois under this section does not apply to any person (1) who is potentially liable under §22.2(f) for any costs of removal or remedial action incurred by the State of Illinois or any unit of local government as a result of the release or substantial threat of a release of a hazardous substance or pesticide that was the subject of the response action plan approved by the IEPA; (2) who agrees to perform the response action described in an approved response action plan and fails to perform in accordance with the approved response action plan; (3) whose willful and wanton conduct contributes to a release or threatened release of a hazardous substance or pesticide; (4) whose negligent conduct contributes to a release or threatened release of a hazardous substance or pesticide; or (5) who is seeking a construction or development permit for a new municipal waste incinerator or other new waste-to-energy facility. 415 ILCS 5/22.2b(c).

K. [9.21] Sample Opinion of Counsel

The following is a sample draft opinion of counsel that a client qualifies as a bona fide prospective purchaser. As stated in §9.1 above, however, the opinion must be tailored to meet the specifics of a client's situation.

[Date]

ABC Bank

_____ Street
_____, Illinois _____

**RE: SELLER TO PURCHASERS
Purchase of 1100 – 1114 West Washington
Our File No:**

Dear [loan officer]:

We represent [purchasers] (our clients) as the principals seeking to purchase commercial real estate commonly known as _____ in _____, Illinois (Property). We have reviewed [bank's] loan commitment letter dated _____, 20__, as well as copies of the following documents and reports:

- **Phase I Environmental Site Assessment Summary Report dated _____, 20__, prepared by _____ Environmental Consulting, Inc.;**

- **Section 9 — Environmental Matters in agreement by and between the Seller and our clients as purchasers;**
- **Phase I Environmental Site Assessment Summary Report dated _____, 20__, prepared by _____ Environmental Consulting, Inc.;**
- **Phase II Subsurface Environmental Site Assessment Summary Report dated _____, 20__, prepared by _____ Environmental Consulting, Inc.;**
- **Remedial Objectives Report and Remedial Action Plan (ROR/RAP) dated _____, 20__, prepared by _____, on behalf of Sellers.**

Please consider the following analysis:

Phase I Site Assessment Summary Report dated _____, 20__

It is our understanding that you have reviewed the Phase I Site Assessment Summary Report dated _____, 20__ (Current Phase I Report), prepared by _____ Environmental Consulting, Inc. (Consultant). Therein, Consultant expressed the following recognized environmental concerns:

1. During the site investigation, nine 55-gallon drums were discovered by Consultant at the Property. Consultant concluded that each drum contained soil/groundwater generated during the previous subsurface investigation prepared for the current owner by _____. Consultant concluded that each drum was the responsibility of the Seller as the reported current owner of the site.

2. Consultant also concluded, albeit without any data, that the structure on the site may contain asbestos as part of the building materials at the Property.

3. Consultant also reported that the soil and groundwater at the Property contain a presence of a recognized dry-cleaning solvent commonly known as perchloroethylene (PERC), a/k/a tetrachloroethylene. According to Consultant, despite the reported presence of PERC at the Property, the Illinois Environmental Protection Agency (IEPA) has not issued a no further remediation letter (NFR Letter) pursuant to Title XVII of the Illinois Environmental Protection Act, 415 ILCS 5/58, *et seq.* Consultant also mentioned potential maintenance issues related to likely engineered barriers at the Property and the fact that “impacted” soil and groundwater likely will be considered as hazardous waste if that “impacted” soil and groundwater are ever removed from the Property.

Finally, we note that Consultant represented that the Current Phase I Report was prepared pursuant to ASTM E1527-21: Standard Practice for Environmental Site Assessment Process and the Small Business Liability Relief and Brownfields Revitalization Act (ASTM 2005 AAI Standard).

Analysis of the Current Phase I Report

As described in the Current Phase I Report, Consultant supplemented its earlier 20__ report at our client's direction. In order to qualify for the defenses and exemptions from environmental cleanup liability under state and federal cleanup statutes for real estate transactions that close on or after _____, 20__, we advised our client that a current Phase I must be prepared in accordance with the latest standards articulated by the United States Environmental Protection Agency (USEPA).

Specifically, the USEPA's revised all appropriate inquiries standard provides a method and means for a prospective purchaser to qualify either as an "innocent purchaser" or as a "bona fide prospective purchaser" or as a "contiguous property owner" under state and federal law. See Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. §§9607(a)(1), 9607(q), 9607(r), 9607(b)(3), 9601(35)(A). See also Illinois Environmental Protection Act, 415 ILCS 5/22.2(f), 5/22.2b, 5/22.2(j)(1)(C). See also 40 C.F.R. pt. 312.

In order to take advantage of the exemptions/defenses to statutory environmental cleanup liability for transactions that close on or after _____, 20__, a prospective purchaser must perform "all appropriate inquiries" pursuant to the USEPA's regulation promulgated at 40 C.F.R. pt. 312 — Innocent Landowners, Standards for Conducting All Appropriate Inquiries, 70 Fed.Reg. 66,070, *et seq.* (Nov. 1, 2005).

Initially, we note that the ASTM 2021 AAI Standard protocol employed by Consultant is acceptable and consistent with the USEPA's Part 312 Standard. We also note that Consultant qualifies as an "environmental professional" as that term is used and defined at 40 C.F.R. §§312.10(b), 312.20(a)(1). We are also satisfied that Consultant's Phase I Report dated _____, 20__, contains the required scope of inquiry mandated at 40 C.F.R. §312.20(b).

We do note, however, the following:

No Interview with Past and Present Owner/Occupant of the Property. The property owner interview reported at §__ on page __ of the Current Phase I Report indicates that there were no interviews with "past and present owners and occupants" of the Property. We note that Consultant does not report the lack of those interviews as a Recognized Environmental Concern. We also note that Seller is the current owner of the Property but has never been identified as an occupant or operator at the Property. Thus, there would likely be no relevant or probative evidence from the current owner as to historic operations at the Property. To the extent that Seller has enrolled the Property in the Site Remediation Program (SRP) administered by the IEPA and is applying for an NFR Letter and has generated a significant amount of subsurface data indicative of on-site and off-site environmental conditions at and near the Property, we are satisfied that having information from a current owner/occupant and operator at the Property would not likely reveal additional information beyond the currently reported conditions and the failure to have such information is not a Recognized Environmental Concern under the circumstances.

Specialized Knowledge of the Prospective Purchaser. In addition, we note that Consultant's Report did not indicate any "specialized knowledge" of our client. We concur that our client has no "specialized knowledge or experience" that would be relevant to the scope of all appropriate inquiries, and this factor was properly not raised as a Recognized Environmental Concern.

No Analysis of Relationship of Purchase Price to Value of Property. We note that the USEPA's Part 312 Standard requires an analysis of the "relationship of the purchase price to the value of the property, if the property was not contaminated." 40 C.F.R. §312.29. If the purchase price is less than the perceived fair market value of the property, then the Rule provides that the "person" who concluded that the purchase price of the subject property does not reasonably reflect the fair market value of the property if the property were not contaminated must consider whether the differential in purchase price and fair market value is due to the presence of hazardous substances or threatened releases of hazardous substances. *Id.* We found no such analysis in Consultant's Phase I Report.

However, because of the known presence of PERC and the data currently reported to the IEPA pursuant to the SRP referred to above, it seems clear that the purchase price has been negatively affected by the presence of the reported release of hazardous substances, although we have no opinion, and no data has been presented to us, as to the diminution in value of the Property due to the release of PERC at the Property. Indeed, the diminution in value may be de minimis given the desirability and location of the Property commercial enterprises. In any event, if an appropriate appraiser has prepared an appraisal of the Property, we would expect some analysis of the current purchase price in relation to the presence of PERC in the soil and groundwater at the Property and would conclude that such analysis is acceptable under the USEPA's Part 312 Standard.

The Reported Recognized Environmental Concerns. Again, Consultant raised Recognized Environmental Concerns related to (1) nine 55-gallon drums; (2) potential asbestos-containing building material; and (3) PERC in the soil and groundwater at the Property and reportedly migrating off the Property onto adjacent properties.

The Nine 55-Gallon Drums. Inasmuch as Seller has agreed to remove the drums and properly dispose of the contents, we are satisfied that this issue has been, or will be, properly addressed prior to closing. Indeed, our clients have insisted on the removal of those drums as a condition to closing. While it is clear that our clients have no liability for the contents of those drums, if the drums are abandoned by the current owner, then our clients will have a practical problem in disposing of them as waste. Again, to the extent that Seller has agreed to remove and properly dispose of the contents of the drums, we are satisfied that our clients will experience no claim of environmental cleanup liability or regulatory responsibility for the proper disposal of the contents as solid or hazardous waste.

The Potential Asbestos-Containing Building Material. To the extent that Consultant reported only what can be reasonably described as suspected asbestos in the building material at the Property, there is virtually no liability concern related to asbestos for our clients or the Bank associated with the proposed purchase and mortgage. In the event that our clients intend to demolish or renovate the interior of any structure at the Property, then we would

recommend an asbestos survey and compliance with the City of _____ Environmental Ordinance and the Clean Air Act NESHAP regulations concerning removal and disposal of asbestos-containing building material. In any event, there is currently no evidence of improper or regulated activity involving asbestos at the Property.

The Reported PERC in and Around the Property. As you will note, Consultant reports the presence of PERC in the soil and groundwater in and around the Property, likely migrating off the Property onto adjacent properties owned by third parties. Consultant reports that the suspected source of the PERC is likely the historic operation of a commercial dry cleaner at the Property. There is no current dry cleaner operating at the Property, and our client will not be involved in the operation of a dry-cleaning business at the Property. According to Consultant, the current owner of the Property acknowledged the presence of PERC at the Property and initiated an investigation to determine the source and lateral and vertical extent of the presence of the PERC, on and off the Property.

Eventually, the current owner, Seller, enrolled the Property in the Site Remediation Program administered by the IEPA with the goal of obtaining an NFR Letter as described above. As you may know, an NFR Letter is a release of cleanup liability from the IEPA based on a determination by the IEPA that the site does not pose an imminent and substantial endangerment to human health or the environment. An NFR Letter operates as a release of liability related to the contaminants of concern (in this case, potentially the PERC) in favor of the Remedial Applicant (in this case, the current owner) and transferees from the Remedial Applicant (potentially, our clients) and lenders (potentially, the Bank). Moreover, an NFR Letter is prima facie evidence that the site poses no danger to third-party claimants — that is, the NFR Letter presents a rebuttable presumption that the site presents no cleanup obligation under the Illinois Environmental Protection Act. In addition, the USEPA and the IEPA have a memorandum of understanding wherein the USEPA has agreed to be bound by the NFR Letter in the absence of fraud.

As Consultant reported, the IEPA has yet to issue an NFR Letter for any portion of the Property. Unless the prospective purchaser qualifies for an exemption from liability, the current owner (proposed to be our clients) may be considered a potentially responsible party under CERCLA and the Illinois Environmental Protection Act as a “current owner.” See 42 U.S.C. §9607(a)(1); 415 ILCS 5/22.2(f)(1). As we discuss below, neither our clients nor the Bank has any reasonable exposure for either statutory (state or federal) environmental cleanup costs or potential damages in tort under state common law associated with the proposed purchase and loan involving the Property.

Defenses and Exemptions to Cleanup Liability Analysis

Innocent Purchaser Defense. See 42 U.S.C. §§9607(b)(3), 9601(35)(A) — a defense to statutory cleanup liability for one who purchased contaminated property without knowledge of contamination after completing “all appropriate inquiries.” See also 415 ILCS 5/22.2(j)(1)(C), 5/22.2(j)(6).

Inasmuch as a hazardous substance in the form of PERC has been identified at the Property, it is not likely that our clients qualify as an innocent purchaser under either the state or federal statute, at least as to the reported presence of PERC. The innocent purchaser defense contemplates unknown and later-discovered contamination after performing “all appropriate inquiries.” Nonetheless, the Current Phase I Report discloses no evidence of any other contaminants that may pose environmental cleanup liability under either the federal or state statutes referred to above. Thus, we may reasonably conclude that our clients will not be considered an innocent purchaser under the state and federal statutes for the PERC but will qualify as an innocent purchaser in the event that any other contaminant creating statutory cleanup liability is currently undisclosed at the Property but discovered at the Property in the future as long as the presence of that contaminant is not otherwise the responsibility of our clients. Because our clients have had no relationship with the Property historically, the latter caveat is remarkably unlikely.

Contiguous Property Owner Exemption. See 42 U.S.C. §9607(q) — a statutory exemption to statutory cleanup liability for one who purchased contaminated property with knowledge of contamination from an off-site source that is known to be migrating onto the property under consideration. There is no similar provision in Illinois.

Inasmuch as no known hazardous substances have been disclosed as migrating onto the Property, the Contiguous Property Owner Exemption is irrelevant in this instance. As we understand it, the presence of the PERC is from a historic, on-site dry-cleaning operation that has since ceased operating, and the PERC is not migrating onto the Property but is at the Property and migrating off the Property. Therefore, the Contiguous Property Owner Exemption is unavailable to our clients.

Bona Fide Prospective Purchaser Exemption. See 42 U.S.C. §9607(r) — a statutory exemption to statutory cleanup liability for one who purchased contaminated property with knowledge of contamination from an on-site source. See also 415 ILCS 5/22.2b.

According to the USEPA, the federal Bona Fide Prospective Purchaser exemption is designed to be “self-executing.” That is, there is no administrative process to present the evidence to the Agency and receive a “comfort” letter or release of liability from the Agency indicating that the prospective owner is exempt from statutory cleanup liability. In certain large industrial sites, the USEPA is prepared (in isolated instances, likely not appropriate here) to provide assurances that no enforcement action will be initiated against the prospective owner and provide contribution protection otherwise available in proper circumstances. See 42 U.S.C. §§9607(r), 9601(40). Congress provided:

Notwithstanding subsection (a)(1) [of this section], a bona fide prospective purchaser whose potential liability for a release or threatened release is based solely on the bona fide prospective purchaser being considered to be an owner or operator of a facility shall not be liable as long as the bona fide prospective purchaser does not impede the performance of a response action or natural resource restoration. See 42 U.S.C. §9607(r).

As defined at 42 U.S.C. §9601(40), the term “bona fide prospective purchaser” means a “person (or a tenant of a person) that acquires ownership of a facility after the date of the enactment of this paragraph and that establishes each of the following by a preponderance of the evidence”:

1. the disposal of hazardous substances occurred prior to the acquisition; and
2. the acquiring person made “all appropriate inquiries” of the previous ownership and uses in accordance with the USEPA’s All Appropriate Inquiries Rule found at 40 C.F.R. pt. 312.

[NOTE: The language of 42 U.S.C. §9601(40) has changed significantly due to the Consolidated Appropriations Act, 2018, Pub.L. No. 115-141, 132 Stat. 348.]

A bona fide prospective purchaser has various post-closing obligations to assist any party who may eventually clean up the reported hazardous substances, but those obligations do not include cleanup liability in any event. If a governmental agency does clean the site, the property may be subject to a windfall lien in favor of the governmental agency — but only to the extent that the government-sponsored cleanup enhanced the value of the property — and the lien attaches only to the accretion in value attributable to the cleanup, not to the pre-cleanup fair market value of the property (hence the analysis of the fair market value in the Agency’s All Appropriate Inquiries Rule referred to above). That is, in the unlikely event that the government cleans the Property, if that cleanup increases the fair market value of the property, the government will have a lien that attaches to the increase in value that is the result of the cleanup only but that will not affect the lien of a purchase money mortgage recorded prior thereto.

Illinois has its version of a prospective purchaser exemption at 415 ILCS 5/22.2b(a). According to that statute, the State of Illinois may grant a “release” from liability to a prospective purchaser as long as that prospective purchaser “did not cause, allow, or contribute to the release or threatened release of a hazardous substance or pesticide through any act or omission.” 415 ILCS 5/22.2b(a)(2). As with the federal exemption, the prospective purchaser has various post-closing obligations to cooperate with the cleanup (if any) performed by the government, but as with the federal program, those post-closing obligations do not involve statutory cleanup liability under the Illinois Environmental Protection Act.

Moreover, the §22.2b release is not dependent on, and does not involve, an NFR Letter. In this case, it is clear that our clients qualify and are entitled to the release from liability as a bona fide prospective purchaser, at least as to the reported presence of PERC referred to in the various environmental reports referred to above. We have forwarded Consultant’s reports to the IEPA with a request for a §22.2b release, and in our opinion, the Illinois Environmental Protection Agency is mandated to issue the release of all cleanup liability to our clients (again, limited to the presence of the reported PERC).

In addition, our clients qualify as a bona fide prospective purchaser under the federal statute and will face no potential federal cleanup liability under the federal statute at the property in any way related to the presence of the reported PERC.

The Current Activities Associated with the Application for an NFR Letter

As you may know, Seller has enrolled the Property in the Site Remediation Program administered by the Illinois Environmental Protection Agency under Title XVII of the Illinois Environmental Protection Act and has applied for an NFR Letter from the IEPA. As you may also be aware, an NFR Letter issued by the IEPA pursuant to the SRP is prima facie evidence that the site no longer poses an imminent and substantial endangerment to human health and the environment and is a release from the state from further cleanup liability for the reported contaminants of concern. That is, an NFR Letter has a release feature that is provided to and for the benefit of the Remedial Applicant, as well as subsequent transferees (including lenders), successors, and assigns. An NFR Letter presents a rebuttable presumption that the site no longer presents any danger (or creates any liability) to third-party claimants.

As we understand it, the IEPA is satisfied that the Property qualifies for an NFR Letter, but Seller and our clients recently modified the plan to obtain the NFR Letter from the IEPA. Following negotiations with Seller and Seller's apparent reluctance to incur any further costs in procuring the NFR Letter, our clients have agreed to pursue the NFR Letter with the IEPA. According to Consultant and the IEPA, institutional controls and engineered barriers will need to be in place and notices must be sent to adjacent property owners advising those owners of the presence of PERC beneath their property adjacent to the Property that is the subject of this sale.

The engineered barriers involve the installation of an impermeable cover (asphalt/concrete) over the affected area, and the institutional controls involve a deed restriction. The impermeable barrier is currently in place with the parking lot and structure, although Consultant has some concerns that certain repairs and maintenance will be required.

The deed restriction will be in the form of a condition articulated in the NFR Letter. In general terms, the NFR Letter will require the owner of the property to maintain the impermeable cover at the site for as long as residual PERC remains at the Property and will restrict subsurface access to the property for any purpose unless the IEPA approves. Neither the deed restriction nor the engineered barriers present a concern to our clients, and both are compatible with their intended use of the Property. Our clients are prepared to procure the NFR Letter as soon as possible after the closing for the benefit of our clients and the Bank.

Potential Third-Party Claims

There has been some discussion about our clients' potential liability to adjacent property owners for the PERC that has migrated off the Property and onto the adjacent properties. Because our clients qualify as a bona fide prospective purchaser under both the federal and state environmental cleanup statutes, no individual third party could successfully impose statutory environmental cleanup liability against our clients or our clients' lender.

Also, our clients would not properly be subject to a claim for damages in tort under the common law for the reported migration. Our clients were not responsible for any intentional

act or omission that created the situation and, therefore, will not properly be held responsible for tort damages in negligence, trespass, or nuisance. Without liability as the “current owner” under the state and federal statutes, there are no grounds to properly impose cleanup liability or tort damages against our clients for the PERC. Obviously, if our clients do any act that causes, contributes to, or exacerbates the migration of PERC, our clients could face potential liability exposure, and such would be the case even if the NFR Letter and the §22.2b release had been issued to our clients prior to closing.

Nonetheless, based on the foregoing reports and the foregoing analysis and assumptions that our clients have performed no act or omission regarding the reported release of PERC at the Property, our clients face no liability exposure under state and federal environmental cleanup statutes or under state common law related to the reported presence of PERC at the property and the fact that that PERC is migrating off-site from the Property.

Potential Environmental Lender Liability

In addition, while we do not represent the Bank, it is our understanding that the Bank will not face any statutory environmental liability exposure under either the state or the federal statute unless the Bank participates in the management of an entity at the Property that is involved in managing the PERC or actually manages some aspect of the PERC at the property. Because our clients are not involved in generating, treating, or disposing of PERC as part of their business model, the former description of potential environmental cleanup liability is nonexistent. As far as the latter description of potential lender liability is concerned, we leave that analysis to the Bank, which is ultimately responsible for its own acts or omissions. Suffice to say that the Bank can assess the risks associated with its own independent actions in any such circumstance.

Conclusion

Based on the foregoing facts and analysis of state and federal law, it is our opinion that the reported presence of PERC currently poses no reasonable environmental statutory cleanup exposure to our clients or to the Bank now or at closing. Moreover, it is our opinion that the reported presence of PERC at the Property currently poses no reasonable exposure to a claim for tort damages to our clients or to our clients’ lender.

Our opinions are based on the foregoing facts, assumptions, and analysis and are based only on the facts we have learned through the date of the Current Phase I Report and that are referred to in this letter. Any acts or omissions of any party, entity, or individual after the date of the Current Phase I Report are specifically excluded from this analysis, and all subsequent facts, acts, or omissions inconsistent with those herein stated shall void our opinions. This letter speaks for itself as of the date hereof, and all other representations, analysis, and opinions by our firm are merged herein.

Finally, we recognize that our analysis of the recent changes in the law may require further explanation. If so, we will make ourselves available at your convenience. At this point,

our clients have satisfied all conditions relating to potential statutory and common-law environmental liability raised by the Bank, and the Bank should release those conditions and prepare to assist our clients in purchasing the Property.

Very truly yours,

L. [9.22] Contract Considerations and Contract Terms Associated with Environmental Liability

As noted in §9.13 above, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 and the Illinois Environmental Protection Act have restrictions on the allocation of statutory environmental liability. CERCLA provides:

(1) No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any . . . facility or from any person who may be liable for a release or threat of release under this section, to any other person the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.

(2) Nothing in this subchapter, including the provisions of paragraph (1) of this subsection, shall bar a cause of action that an owner or operator or any other person subject to liability under this section, or a guarantor, has or would have, by reason of subrogation or otherwise against any person. 42 U.S.C. §9607(e).

The Illinois Act has an almost identical provision at 415 ILCS 5/22.2(g). In other words, it is not unlawful for the parties to allocate environmental cleanup liability among themselves, but the government is not bound by any such allocation. See *Hatco Corp. v. W.R. Grace & Co.-Conn.*, 59 F.3d 400, 404 (3d Cir. 1995); *Olin Corp. v. Consolidated Aluminum Corp.*, 5 F.3d 10, 16 (2d Cir. 1993). See also *Harley-Davidson, Inc. v. Minstar, Inc.*, 41 F.3d 341 (7th Cir. 1994).

Next, the seller should decide just how much pre-listing investigation it will perform. Generally speaking, it makes more sense for the parties to structure the transaction following the age-old doctrine of caveat emptor, with the seller providing no warranties and only selected representations, a reasonable environmental “due diligence” period, and the opportunity for the purchaser to terminate the contract for any reason during the environmental due diligence period. In addition, the seller will convey the property pursuant to a special warranty deed, limiting the seller’s warranty exposure to only those warranties of title that occurred during the seller’s tenure as owner of the property. See 765 ILCS 5/8.

Initially, a contract should define the contaminants of concern. If there are specific contaminants of concern (e.g., contaminants associated with a gasoline service station, such as BTEX (benzene, toluene, ethyl-benzene, and xylene) compounds and Pb (lead)), those compounds should be identified. Similarly, compounds associated with dry-cleaning operations or industrial

operations should be described. In addition, or in lieu of specific compounds of concern, consider describing “hazardous materials.” What is included in “hazardous materials”? The CERCLA definition of “hazardous substance” is found at 42 U.S.C. §9601(14). While that description is fairly comprehensive, note that a CERCLA hazardous substance “does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed” and “does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel.” 42 U.S.C. §9601(14).

The Illinois Act defines a “hazardous substance” identically (see 415 ILCS 5/3.215) but provides liability for the releases of “a hazardous substance or pesticide” and defines “pesticide” as “any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest or any substance or mixture of substances intended for use as a plant regulator, defoliant or desiccant.” 415 ILCS 5/3.320. Also, note that nuclear waste is not included in either definition.

Therefore, a working definition of “hazardous materials” could be as follows:

The term “Hazardous Materials” shall mean (1) “hazardous substance” as that term is defined in the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended from time to time, and as interpreted by courts of competent jurisdiction; (2) “hazardous substance” as that term is defined in the Illinois Environmental Protection Act, as amended from time to time, and as interpreted by courts of competent jurisdiction; (3) petroleum, including fractions thereof; and (4) radioactive nuclear materials. By way of description and not of limitation, the term includes [specific containments of concern].

Representations and warranties are generally part of every contract, but remember that the model commercial contract provisions below specifically exclude warranties. As discussed below, the model commercial contract provisions contain “as-is” language, meaning that the seller is making no implied or express warranties. See §9.25 below. Thus, the following seller’s representations are provided for consideration:

(i) There are no known violations of environmental laws or local health and safety laws, statutes, or regulations, including but not limited to failure to possess necessary and required permits, approvals, and governmental authorizations.

[COMMENT: Generally speaking, the issues under consideration involve concerns with statutory cleanup liability and not necessarily “violations” of environmental law. The term “violation” implies a regulatory responsibility and not really any indicia of liability (such as the release or presence of hazardous materials). Needless to say, if the purchaser is purchasing an existing operation, it is important to know, and seek an affirmative representation, that the seller has not “violated” any permit condition, order, or regulatory protocol, but that inquiry is not the same as seeking an affirmative representation that the seller has not participated in any activity that could lead to statutory or common-law liability for cleanup costs and tort damages.]

(ii) Seller did not generate, store, treat, handle, process, or dispose of Hazardous Materials on site.

[COMMENT: This representation is closer to the liability concern and actually provides some indication whether the seller was involved in regulated activity.]

(iii) There is no known presence of any Hazardous Materials or petroleum products on site.

[COMMENT: This representation speaks for itself. It is important to consider whose “knowledge” is being relied on and whether the designated person is one on whom the parties can reasonably rely.]

(iv) There are no [known] Underground Storage Tanks, underground pipelines, dry wells, or other underground storage structures, whether active or inactive, on the site.

[COMMENT: Like virtually every term used in environmental law, most of the items listed in this representation are terms of art. No one should rely on a commonly held notion of what an “underground storage tank” is. Just as important as the definition, the exclusions are critical to understanding the term — and the exceptions to the exclusions imply intended coverage under the statute. Care should be given to defining terms such as “underground storage tank,” likely the most significant source of contamination in commercial real estate. A good place to begin is with a review of the definition of an “underground storage tank” provided by the federal Resource Conservation and Recovery Act of 1976:

The term “underground storage tank” means any one or combination of tanks (including underground pipes connected thereto) which is used to contain an accumulation of regulated substances, and the volume of which (including the volume of the underground pipes connected thereto) is 10 per centum or more beneath the surface of the ground. Such term does not include any —

(A) farm or residential tank of 1,100 gallons or less capacity used for storing motor fuel for noncommercial purposes,

(B) tank used for storing heating oil for consumptive use on the premises where stored,

(C) septic tank,

(D) pipeline facility (including gathering lines) . . .

* * *

(E) surface impoundment, pit, pond, or lagoon,

(F) storm water or waste water collection system,

(G) flow-through process tank,

(H) liquid trap or associated gathering lines directly related to oil or gas production and gathering operations, or

(I) storage tank situated in an underground area (such as a basement, cellar, mineworking, drift, shaft, or tunnel) if the storage tank is situated upon or above the surface of the floor.

The term “underground storage tank” shall not include any pipes connected to any tank which is described in subparagraphs (A) through (I). 42 U.S.C. §6991(10).

The Illinois Act defines “underground storage tank” similarly, “provided however that the term ‘underground storage tank’ shall also mean an underground storage tank used exclusively to store heating oil for consumptive use on the premises where stored and which serves other than a farm or residential unit.” See 415 ILCS 5/57.2.

Note that the term “regulated substance” means the following under RCRA and the Illinois Act:

(A) any substance defined in section 9601(14) of this title (but not including any substance regulated as a hazardous waste under subchapter III), and

(B) petroleum. 42 U.S.C. §6991(7); 415 ILCS 5/57.2.

Therefore, a good working definition of an “underground storage tank” is as follows:

The term “underground storage tank” shall mean “underground storage tank” as that term is defined in the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §6991(10), plus all farm and residential tanks of any volume used or formerly used for any purpose, heating oil tanks used for any purpose, septic tanks, pipeline facilities, surface water impoundments, pits, ponds, lagoons, stormwater and wastewater collection systems, flow-through process tanks, liquefied traps and associated gathering lines used for any purpose, storage tanks in an underground area at or above the surface of the ground, and those tanks used to contain listed or characteristic hazardous waste or solid waste (as those terms are defined in RCRA).

Next, the seller’s representations should include a description of off-site conditions for analysis of migratory potential onto the property and for analysis of qualifying as a bona fide contiguous property owner.]

(v) There has been no known release of Hazardous Materials or petroleum products at, near, adjacent to, or in the vicinity of the Property.

[COMMENT: The representations above consider only statutory environmental liability as the current and prospective owner and the owner of the property at the time of disposal. See 42 U.S.C. §§9607(a)(1), 9607(a)(2); 415 ILCS 5/22.2(f)(1), 5/22.2(f)(2). Both CERCLA and the Illinois Act provide for statutory cleanup liability for a person who “arranged for” the disposal of a hazardous substance at an off-site facility. See 42 U.S.C. §9607(a)(3); 415 ILCS 5/22.2(f)(3). The following

representation solicits information concerning the seller's off-site disposal practices as an indication of potential environmental liability for the purchaser as a successor and, of course, whether the seller was involved in generating, handling, treating, storing, or disposing of hazardous materials:]

(vi) There has been no known storage, treatment, and disposal of Hazardous Materials off site and to a location that is or could be a Superfund Site.

[COMMENT: Similarly, the purchaser may be subject to administrative or judicial orders, and the following is designed to solicit relevant information concerning cleanup or other environmental compliance orders affecting the property:]

(vii) Seller is aware of no consent decrees, compliance orders, or administrative orders involving or related to the Property (and any current or historic operations located at the Property).

[COMMENT: In addition to government-sponsored or government-initiated cleanup liability, individuals have rights to step into the shoes of the government as private attorneys general. The following is designed to solicit information from the seller concerning notices not only from governmental agencies, but also from individuals seeking to file citizen suits. See 42 U.S.C. §6972.]

(viii) Seller has received no notices from any individual entity or governmental agency referring to citizen suits, or the potential therefore, under the Environmental Laws.

[COMMENT: Inasmuch as there are various sources of environmental cleanup liability — statutory and common law — the following is a proposed definition of the term “environmental laws”:

The term “Environmental Laws” shall mean (1) the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. §9601, *et seq.*; (2) the Illinois Environmental Protection Act, 415 ILCS 5/1, *et seq.*; (3) the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §6991, *et seq.*; (4) the Clean Water Act (CWA), 33 U.S.C. §1251, *et seq.*; (5) the Clean Air Act (CAA), 42 U.S.C. §7401, *et seq.*, and the state and federal common law interpreting them, as well as state tort law associated with public and private nuisance, local ordinances, and all regulations, codes, ordinances, and administrative programs promulgated or provided pursuant thereto.

Next is a simple request for the seller to identify notices and special notices that were generated by federal, state, and local authorities concerning potential environmental liability. Local authorities also have the authority to enforce public nuisance statutes or ordinances under the Illinois Municipal Code or local ordinance.]

(ix) Seller has received no requests for information or notices from local, state, or federal governmental agencies or representatives involving or in any way associated with environmental cleanup liability or regulatory activity under the Environmental Laws or health and safety statutes, codes, or ordinances.

[COMMENT: Again, because the model commercial real estate agreement provisions contemplate caveat emptor in its purest form, relevant information may come from many sources, some of which are described in the following representation.]

(x) Seller has received no reports, notices, insurance claims, adjusters' reports, or other documents indicating or reporting on the presence or removal of lead paint, mold, asbestos, or sick building syndrome or indicating or reporting on operation and maintenance systems, closure, or maintenance plans associated with the presence or removal of lead paint, mold, asbestos, or sick building syndrome.

[COMMENT: Next is another generic request for an affirmative representation involving health and safety codes (e.g., Occupational Safety and Health Act of 1970, Pub.L. 91-596, 84 Stat. 1590) and relating to lead paint, mold, asbestos, and sick building syndrome.]

(xi) Seller is aware of no complaints, claims, or threats of enforcement actions seeking reimbursement or damages involving tort claims, any of which may be associated with personal injury, property damage, and/or environmental cleanup liability claims under the Environmental Laws or similar notices under any health and safety statute, code, or ordinance associated with lead paint, mold, asbestos, or sick building syndrome.

[COMMENT: The following solicits information concerning verbal communications and information concerning supplemental potential liability for on-site and off-site activities.]

(xii) Seller has received no notices, claims, or demands (written or verbal) from any individual, entity, or governmental agency or representative concerning alleged or potential responsibility or liability for environmental cleanup expenses or supplemental liability for on-site or off-site activities.

[COMMENT: It is likely important to know whether the seller has experienced any adverse changes in circumstances that would impair the seller's ability to comply with the environmental laws between the time the contract is executed and closing.]

(xiii) Seller has disclosed all changes in circumstances or imminent changes in circumstances that may or could adversely impact the company's ability to comply with or fund environmental cleanup activities associated with cleanup liability under the Environmental Laws and regulatory responsibilities, existing permits, and permits required or necessary for Seller's operations at the property.

[COMMENT: Some sellers disclose nothing; some disclose some things; others disclose all they have. Which is your seller?]

(xiv) Seller has disclosed all documents, writings, and relevant information within Seller's knowledge, possession, and control involving the surface and subsurface conditions at the Property and at adjacent property that may involve environmental cleanup liability and/or environmental compliance under the Environmental Laws.

[COMMENT: If the seller is making representations, the seller should be able to represent that it diligently looked for the information that is the subject of these representations.]

(xv) Seller has made due diligent inquiry in collecting the information provided above.

[COMMENT: The seller should be able to recertify these representations at closing so that the purchaser can rely on the fact that the circumstances have not changed since the contract was executed and the seller has not learned additional relevant facts.]

(xvi) Seller shall certify to Purchaser at Closing that the foregoing representations apply as made again as of the Date of Closing.

[COMMENT: To the extent that the purchaser is relying on the seller's representations, it is of critical importance that the individuals whose knowledge is being relied on are specifically identified. The purchaser should examine those persons' credentials carefully. An employee with three weeks' on-site experience is less valuable than the current or retired VP with thirty years on-site experience, who has knowledge of on-site and off-site activities.]

(xvii) "Seller's knowledge," as used herein, shall involve only the specific knowledge of the following individuals: [names].

[COMMENT: Finally, if certain provisions (e.g., indemnities or certain covenants) are to survive the closing and the transfer of title, say so.]

(xviii) The terms and conditions of this Section shall survive the Closing.

As to remedies for breaches of sellers' representations, sellers look to apply a "material breach" standard or an "aggregate materiality" standard. The following are seller's covenants that the seller is obligated to perform before closing:

A. Seller shall ensure that all operations, permits, and activities are fully in compliance with all regulatory and liability requirements of the Environmental Laws. By way of description, and not of limitation, Seller shall pay all fees and ensure that no condition will exist on or after the Closing Date that will cause or create the revocation of any permit or the imposition of any cleanup liability or lien under the Environmental Laws.

B. Seller shall provide to Purchaser on or before the Closing Date such other and additional documentation or information as required by subsection A above not previously disclosed or provided to Purchaser, whether that documentation or information was generated subsequently or otherwise.

C. Seller shall provide timely notice to Purchaser of any development relating to potential environmental liability or regulatory compliance under the Environmental Laws associated in any way with the Property or the operations at the Property.

D. Seller shall apply for and provide a comprehensive, unconditional No Further Remediation (NFR) Letter prior to the Closing Date issued by the Illinois Environmental Protection Agency pursuant to the Site Remediation Program described at Title XVII of the Illinois Environmental Protection Act, identifying the contaminants of concern at the Property and providing that the Property may be used for residential purposes without institutional controls or engineered barriers.

Indemnities (not releases and not “as-is” clauses) might include the seller’s indemnification of the purchaser for pre-closing environmental cleanup liability and regulatory obligations and responsibilities and the purchaser’s indemnification of the seller for post-closing subsequent acts creating environmental liability, all pursuant to the environmental laws. Additionally, the seller might indemnify the purchaser for breach of any representations. In such a case, do the seller’s representations look more like warranties?

The following is a proposed seller’s environmental indemnification clause:

(a) Seller shall indemnify, defend, and hold harmless Purchaser from and against any and all claims of third parties (including, without limitation, those of governmental authorities or agencies) (Third-Party Claims) seeking compensation or reimbursement for damages for statutory cleanup costs or other losses, costs, injuries, damages, and expenses threatened, suffered, or incurred by Purchaser as a result of (1) bodily injury to any person or entity and environmental liability and cleanup expenses imposed pursuant to the Environmental Laws (excluding any damage to the Property itself) caused by any preexisting surface or subsurface contamination associated with the contaminants of concern associated with the _____ Superfund Site and the activities of Seller and [predecessors in title] at the Property; (2) any final court order or final administrative order that (A) is entered upon the application of any person or entity other than Purchaser or any Affiliate of Purchaser (as defined below) and (B) requires Purchaser to investigate or remediate any historic environmental condition at the Property pursuant to and in accordance with CERCLA or any other applicable Environmental Laws (as defined below); or (3) any lien filed after the Closing by the USEPA against the Property pursuant to 42 U.S.C. §9607(r), on account of any CERCLA response costs incurred by the USEPA (and not recovered by the USEPA from any other party) for any CERCLA response action performed by the USEPA with respect to preexisting surface or subsurface contamination associated with the contaminants of concern associated with the _____ Superfund Site and the activities of Seller and [predecessors in title] at the Property, which response action causes the fair market value of the Property to exceed the fair market value of the Property as of the Closing, provided that the foregoing obligations of Seller under this Section shall not extend or apply to any of the following:

(i) any diminution in value of the Property caused by preexisting surface or subsurface contamination associated with the contaminants of concern associated with the _____ Superfund Site and the activities of Seller and [predecessors in title] at the Property;

(ii) any Volatile Organic Compounds that are introduced to the Property at any time after the Closing under this Agreement that are not preexisting surface or subsurface contamination associated with the contaminants of concern associated with the _____ Superfund Site and the activities of Seller and [predecessors in title] at the Property;

(iii) any exacerbation of preexisting surface or subsurface contamination associated with the contaminants of concern associated with the _____ Superfund Site and the activities of Seller and [predecessors in title] at the Property that is caused at any time after the Closing by the act or omission of Purchaser or any other person or entity other than Seller; or

(iv) any requirement by any bank or other lending institution that makes a loan or extension of credit to Purchaser with respect to the Property regarding any preexisting surface or subsurface contamination associated with the contaminants of concern associated with the _____ Superfund Site and the activities of Seller and [predecessors in title] at the Property requiring additional investigation or remediation to a greater extent or in accordance with more stringent standards than are required under CERCLA or any other of the Environmental Laws.

For purposes of the foregoing clause (a)(3) of this Section, it is agreed that the fair market value of the Property as of the Closing is not less than the Purchase Price under this Agreement. Purchaser agrees to mitigate its damages with respect to any matter for which Seller is responsible under this Section.

(b) As used herein, the term “Third-Party Claim” shall also include all claims by any third party that is not an Affiliate of Purchaser (as defined below) against Purchaser with respect to any of the liabilities for which Seller is required to indemnify Purchaser pursuant to this Section.

(c) In the event that any Third-Party Claim shall be made against Purchaser, Purchaser shall promptly, but in any event within 30 days of Purchaser’s receiving knowledge of such Third-Party Claim, provide written notice to Seller of such Third-Party Claim. Seller shall have the right, but not the obligation, to assume the defense of such Third-Party Claim with counsel reasonably satisfactory to Purchaser, notice of which election by Seller to assume the defense of such Third-Party Claim shall be given, if at all, within 30 days after Purchaser’s delivery of notice to Seller of the Third-Party Claim under the first sentence of this subsection. If Purchaser gives notice to Seller of such Third-Party Claim and Seller does not, within such 30-day period after the effective date of Purchaser’s notice, give notice of Seller’s unconditional election to assume the defense of such Third-Party Claim, Purchaser shall assume the defense of such Third-Party Claim (and Seller shall have the right to participate in such defense, at Seller’s sole cost, expense, and risk), and, if such Third-Party Claim is ultimately determined to be within the scope of Seller’s indemnification obligations under §___ hereof, Seller shall promptly pay or reimburse Purchaser for Purchaser’s reasonable attorneys’ fees, costs, and expenses incurred in connection with such defense and all other damages and cleanup costs referred to as part of Seller’s indemnification obligation hereunder. After notice from Seller to Purchaser of Seller’s election to accept the defense of such Third-Party Claim on behalf of Purchaser, Seller shall not, as long as Seller diligently conducts such defense unconditionally and in Purchaser’s interests, be liable to Purchaser under this Section for any fees of other counsel or any other expenses with respect to the defense of such Third-Party Claim, in each case incurred by Purchaser in connection with the defense of such Third-Party Claim. If Seller unconditionally accepts the defense of such Third-Party Claim on behalf of Purchaser and in Purchaser’s interests, Purchaser agrees that Purchaser will reasonably cooperate with Seller in the defense of such Third-Party Claim. If Purchaser gives notice to Seller of the assertion of any Third-Party Claim within the time period required hereunder and Seller does not, within 30 days after the effective date of Purchaser’s notice, give notice to Purchaser of Seller’s election to accept the unconditional defense of such Third-Party Claim, Seller will be bound by any judicial determination of such Third-Party Claim or any compromise or settlement effected, accepted, or imposed on or by Purchaser.

(d) With respect to any Third-Party Claim subject to indemnification under this Section, both Purchaser and Seller, as the case may be, shall keep, to the extent not inconsistent with §____ below, the other party fully informed of the status of such Third-Party Claim and any related proceedings at all stages thereof when such party is not represented by its own counsel, and the parties agree (each at its own expense) to render to each other such assistance as they reasonably may require of each other and to cooperate in good faith with each other in order to ensure the proper and adequate defense of any Third-Party Claim.

(e) With respect to any Third-Party Claim subject to indemnification under this Section, the parties agree to cooperate in such manner as to preserve in full (to the extent possible) the confidentiality of all confidential and proprietary information and the attorney-client and work-product privileges. In connection therewith, each party agrees that (1) it will use commercially reasonable efforts, in respect of any Third-Party Claim in which it has assumed or participated in the defense, to avoid production of confidential or proprietary information (consistent with applicable law and rules of procedure) and (2) all communications between any party hereto and counsel responsible for or participating in the defense of any Third-Party Claim shall be made, to the extent possible, so as to preserve any applicable attorney-client or work-product privilege.

(f) The rights of Purchaser under this Section are not assignable by Purchaser to any other person or entity, and there are no third-party beneficiary rights under this Section without the expressed written acceptance of assignment signed by the party to be bound thereunder.

(g) In addition to terms that are defined in other provisions of this Agreement, the following terms have the meanings set forth below:

(1) The term “Affiliate of Purchaser” means and includes (i) any officer, director, member, manager, shareholder, employee, agent, or representative of Purchaser; (ii) any person or entity that succeeds to the interest of Purchaser with respect to the Property; (iii) any corporation, partnership, limited liability company, trust, or other entity that is controlled by, or under common control with, Purchaser or any person or entity that controls Purchaser; (iv) any corporation, partnership, limited liability company, trust, or other entity in which five percent or more of the capital stock, partnership interests, membership interests, beneficial interests, or other equity interests are owned or controlled by Purchaser or any of the persons or entities described in the foregoing clauses (i), (ii), or (iii); or (v) Purchaser’s lender.

(2) The term “Environmental Laws” shall mean (i) the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. §9601, *et seq.*; (ii) the Illinois Environmental Protection Act, 415 ILCS 5/1, *et seq.*; (iii) the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. §6991, *et seq.*; (iv) the Clean Water Act (CWA), 33 U.S.C. §1251, *et seq.*; (v) the Clean Air Act (CAA), 42 U.S.C. §7401, *et seq.*, and the state and federal common law interpreting them, as well as state tort law associated with public and private nuisance, local ordinances, and all regulations, codes, ordinances, and administrative

programs promulgated or provided pursuant thereto as well as judicial or administrative orders and judgments issued by tribunals or agencies of competent jurisdiction pertaining to, touching, or concerning hazardous substances (as that term is defined and interpreted under CERCLA), health, pollution, public health or safety, or environmental or ecological conditions.

(3) “Preexisting surface or subsurface contamination associated with the contaminants of concern associated with the _____ Superfund Site and the activities of Seller and [predecessors in title]” include such compounds that are located at the surface or in the subsurface at the Property (*i.e.*, in soil or groundwater on the Property) on the date of execution of this Agreement.

Environmental indemnities are strictly interpreted. The parties must specifically mention environmental liability and statutes. In those instances in which the parties did not specifically identify environmental liability or a specific environmental cleanup statute, courts have concluded that environmental liability was not considered at the time of the contract and would not enforce the terms of the indemnity beyond its specific terms. The same rationale is applied to releases, general indemnities, and general releases. *See AM International, Inc. v. International Forging Equipment Corp.*, 982 F.2d 989, 997 (6th Cir. 1993); *Commander Oil Corp. v. Barlo Equipment Corp.*, 215 F.3d 321, 328 (2d Cir.), *cert. denied*, 121 S.Ct. 427 (2000); *Commander Oil Corp. v. Advance Food Service Equipment*, 991 F.2d 49 (2d Cir. 1993); *Servco Pacific Inc. v. Dods*, 193 F.Supp.2d 1183 (D.Haw. 2002).

1. [9.23] Indemnity Considerations

The following are some of the indemnity considerations in a commercial real estate sales transaction:

- a. the scope of the indemnity, *i.e.*, indemnity against liability or payment or, preferably, both;
- b. the duty to defend and bear defense costs;
- c. the indemnitee’s right to conduct its own defense with counsel of its choice at the expense of the indemnitor;
- d. the indemnitee’s right to approve the indemnitor’s choice of counsel;
- e. the allocation of costs for investigation prior to assuming the defense of a claim;
- f. whether the indemnitee or the indemnitor will have the right to compromise or settle any claims and the approval rights of the other party;
- g. the indemnitee’s right to attorneys’ fees and other costs incurred in enforcing the indemnity;
- h. whether the indemnity includes or excludes protection against the indemnitee’s negligence, active or passive;

- i. whether notice to the indemnitor is required for recovery; and
- j. the indemnitee's duty to mitigate or act reasonably.

2. [9.24] Environmental Releases

The seller's environmental liability exposure to the government, to third parties, and to the purchaser remains post-closing. Purchasers should never routinely release sellers from environmental liability and regulatory responsibility and should take care to carve out from general release language the seller's environmental exposure to the purchaser. Nonetheless, if the seller insists on a release from the purchaser, the following is a proposed release clause:

_____, as Releasor, individually and irrevocably, and on behalf of Releasor's heirs, executors, administrators, personal representatives, fiduciaries, successors, and assigns, hereby irrevocably releases _____, as Releasee, from all environmental cleanup and regulatory liability and responsibility due or owing to Releasor for [all Contaminants of Concern within the soil and groundwater within the Property] [all surface or subsurface environmental conditions at the Property in the soil or in the groundwater at the Property], and for such conditions at adjacent property, which environmental cleanup or regulatory liability and responsibility are described or attributed to the parties under the Environmental Laws.

Generally speaking, a release should cover only cleanup liability and related expenses and not fines, penalties, and fees. Tort damages should be distinguished between property damage (arguably properly subject to the release) and personal injury (an open question). The release should distinguish claims of the purchaser (properly subject to the limited release) from third-party claims (Why would anyone agree to release the seller from liability for the claims of third parties asserted against the purchaser?).

3. [9.25] "As-Is" Clause

The "as-is" clause is the essence of caveat emptor and due diligence. However, an "as-is" clause is only an indication that the property is sold with no expressed or implied warranties. It is not a transfer of environmental liability from the seller to the purchaser, and it is not a release. Sellers cannot hide behind the "as-is" language to shift the risk of nondisclosure of latent defects to purchasers. See *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 90 (3d Cir. 1988), *cert. denied*, 109 S.Ct. 837 (1989); *M & M Realty Co. v. Eberton Terminal Corp.*, 977 F.Supp. 683 (M.D.Pa. 1997); *International Clinical Laboratories, Inc. v. Stevens*, 710 F.Supp. 466, 469 – 470 (E.D.N.Y. 1989); *Mardan Corp. v. C.G.C. Music, Ltd.*, 600 F.Supp. 1049, 1055 (D.Ariz. 1984), *aff'd*, 804 F.2d 1454 (9th Cir. 1986); *Haney v. Castle Meadows, Inc.*, 839 F.Supp. 753, 757 (D.Colo. 1993).

The following is a proposed "as-is" clause:

As Is. Except as expressly set forth in this Agreement, the parties acknowledge and agree that Seller has not made, and does not make and hereby disclaims, any express or implied representations and warranties regarding or relating to the surface or subsurface

environmental conditions, the surface or subsurface geo-technical conditions, suitability for any particular purpose, susceptibility to flooding, value, marketability, layout, square footage, income, expenses, zoning, use and occupancy restrictions, operation, regulatory compliance with and environmental compliance liability described in the Environmental Laws and laws and regulations relating to Hazardous Materials or underground storage tanks, and legal requirements or any other matter or thing affecting or relating to the Property. Purchaser acknowledges that, except as expressly set forth in this Agreement, no such representations or warranties, expressed or implied, have been made, and Purchaser is not relying on any such expressed, implied, or considered warranty or representation. In accordance with the foregoing, Purchaser agrees to take the Property “as is,” and in so agreeing, Purchaser acknowledges and represents that it has inspected or will inspect the Property and has made or will make such investigation as it deems appropriate into the conditions affecting the Property, including without limitation the conditions described above. In so doing, Purchaser represents that it has retained or will retain such experts and consultants to assist in such inspection and investigation as it has deemed or will deem appropriate. In agreeing to purchase the Property “as is” and without representation or warranty express or implied, Purchaser acknowledges and represents that it has factored the “as-is” condition of the Property into the price that it has hereby agreed to pay for the Property. Furthermore, Purchaser acknowledges and represents that it has had adequate time to perform its due diligence investigation of the foregoing items and is satisfied with the remedy provided by the Due Diligence Paragraph herein contained. The terms, representations, and covenants of this section shall survive the Closing.

4. [9.26] Environmental Due Diligence Clause

The concept of environmental due diligence is to provide the purchaser with a reasonable opportunity to inspect the property and accept it, if at all, as is. The following is a proposed due diligence clause:

Due Diligence; Purchaser’s Right To Terminate. Anything in this Agreement to the contrary notwithstanding, Purchaser shall have until _____, 20__ (the Due Diligence Period), to conduct such reasonable tests, studies, and examinations as Purchaser, in its sole discretion, may deem advisable, necessary, or appropriate to determine the acceptability of the Property for purchase by Purchaser (the Due Diligence). During reasonable business hours and subject to such reasonable limits as Seller deems appropriate so as not to interfere with the day-to-day operation of the Property, Purchaser and its agents shall have the right to enter upon the Property for the purpose of inspecting the Property; reviewing all leases and rental agreements, management contracts, and other agreements that may continue to be in existence after the Closing, and the compliance of the Property with all governmental regulations, zoning ordinances, building and housing ordinances, and regulations; determining regulatory compliance with and environmental cleanup liability described in the Environmental Laws and any other consideration relating to Hazardous Materials and underground storage tanks at or adjacent to the Property and other regulations relating to the Property; and reviewing financial statements relating to the operation of the Property for the last _____ years, if available to Seller.

Purchaser understands and agrees that all such inspections and reviews shall be conducted in a manner so as to provide a minimum of disturbance to the tenants and operation of the Property.

If, after undertaking such efforts, Purchaser, in its sole discretion, determines that for any reason Purchaser shall not proceed with the acquisition of the Property, Purchaser may notify, by written notice to Seller given not later than the expiration of the Due Diligence Period, Seller of Purchaser's inability to satisfy itself with respect to the Property and its election to declare this Agreement cancelled and null and void. In such event, Purchaser shall be entitled to a refund of its Earnest Money, together with any interest or earnings thereon, if any.

In the event that Purchaser does not notify Seller that Purchaser has elected to declare this Agreement cancelled and null and void in the manner and within the time period set forth in this Section, this Agreement shall remain in full force and effect, except that Purchaser's option to satisfy itself as to the above matters or to declare this Agreement cancelled and null and void shall be terminated and be of no force and effect.

Purchaser's satisfaction of itself of the matters set forth in this Section shall be done for Purchaser's own account and not as a representative or agent of Seller. Further, Purchaser shall forever fully protect, defend, and hold Seller harmless from all reasonable losses, costs, damages, attorneys' fees, and expenses of every kind and nature whatsoever that Seller may suffer, expend, or incur and that arise out of, relate to, or are in any way connected with Purchaser's Due Diligence or other activities at, or with respect to, the Property. Further, Purchaser shall, within seven days of recordation, pay and discharge of record all mechanics and material suppliers' liens that arise out of, relate to, or are in any way connected with Purchaser's Due Diligence (the Liens). If, and to the extent that, Purchaser does not pay and discharge of record the Liens, Seller shall have the right at any time thereafter, when Seller shall deem it necessary, expedient, desirable, or to its interest to do so, in its sole discretion, to use or apply the Earnest Money or any portions thereof, or any other funds, including Seller's own funds, in such manner and in such amounts as Seller may deem necessary and advisable to the payment, discharge, or satisfaction of the Liens. In the event that Seller uses the Earnest Money in this manner, Purchaser shall, within seven days after notice and demand made by Seller, reimburse Seller for any amount so used. The failure of Purchaser to so reimburse Seller shall be a default hereunder, allowing Seller to enforce all of its rights and remedies under this Agreement.

Purchaser shall not disclose any information acquired during its due diligence activities to any third party or use that information for itself, except in connection with its inspection, approval, purchase, and ownership of the Property and to the extent that Purchaser may be required to disclose such information in connection with any litigation or administrative proceeding to which Purchaser is a party or pursuant to a subpoena or other discovery request served on Purchaser. Upon demand by Seller, Purchaser will destroy any and all documents and information acquired during its due diligence activities and certify to the fact of such destruction in writing to Seller.

IV. UNDERGROUND STORAGE TANKS

A. [9.27] In General

The term “underground storage tank” (UST) is a term of art and is defined differently in every statute in every jurisdiction. That is, an “underground storage tank” is defined differently under state and federal laws and regulatory programs. Also, it is important to recognize that USTs, in and of themselves, do not create any environmental cleanup liability under any of the environmental cleanup statutes. Rather, USTs pose more regulatory responsibility by their existence (as defined) than cleanup liability per se. On the other hand, USTs often contain regulated or hazardous substances, and when they leak (or when there is an overfill or spill associated with the operation of an UST), there may be cleanup liability under state and federal law.

Under the Resource Conservation and Recovery Act of 1976, an UST is defined as any one or a combination of tanks (including underground pipes connected thereto) that is used to contain an accumulation of regulated substances and the volume of which (including the volume of underground pipes connected thereto) is ten percent or more beneath the ground. See 42 U.S.C. §6991(10). Just as the definition of what constitutes an UST is important, so are the exclusions. The following are not USTs under RCRA, even if they otherwise meet the definition:

1. farm or residential tanks with the capacity of 1,100 gallons or less used to store motor fuel for noncommercial uses;
2. tanks used to store heating oil for use on the premises;
3. septic tanks;
4. pipelines regulated under 49 U.S.C. §60101, *et seq.*, or pipelines that are intrastate facilities regulated under a comparable state law;
5. surface impoundments, pits, ponds, or lagoons;
6. stormwater or wastewater collection systems;
7. flow-through process tanks;
8. liquid traps and gathering lines used in oil or gas production; and
9. tanks that are located in an underground room, shaft, or tunnel but that are above or on the bottom surface of the room, shaft, or tunnel in which they are located. 42 U.S.C. §6991(10).

In Illinois, an UST is defined using the same criteria as in the federal statute, except the term “underground storage tank” also means an UST that is used exclusively to store heating oil for consumptive use on the premises and that serves something other than a farm or residential unit. See 415 ILCS 5/57.2.

Under the federal program, even some underground storage vessels that otherwise would qualify as USTs under the federal definition are specifically excluded to the extent that they are used in a process that is otherwise regulated. For example, hazardous waste storage tanks are regulated under Subtitle C of RCRA but are excluded from the regulatory definition of RCRA Subtitle I. See 40 C.F.R. §280.10(b). In addition, wastewater treatment tank systems that are part of a facility subject to regulation under the Clean Water Act and hydraulic lift tanks and electrical equipment tanks are not regulated under RCRA. USTs with a capacity of 110 gallons or less as well as USTs containing a de minimis concentration of regulated substances are not regulated under RCRA. Finally, USTs that are used for emergency spills and overflow containment and that are emptied quickly after use are not regulated. *Id.*

RCRA also defers regulation of wastewater treatment tank systems as well as UST systems containing radioactive materials regulated under the Atomic Energy Act of 1954, ch. 724, 60 Stat. 755 (1946). In addition, USTs that are used with emergency generator systems at nuclear power generation facilities, airport hydrant fuel systems and distribution systems, and field constructed tanks are not regulated. More accurately, these processes are subject to deferred regulation under other programs.

As indicated above, USTs are primarily regulated, although they may leak and create environmental cleanup liability under the RCRA liability program as well as CERCLA and state programs. Nonetheless, RCRA does regulate new and existing UST systems. Specifically, new tank systems must be constructed of fiberglass-reinforced plastic or cathodically protected steel or steel and fiberglass-reinforced plastic or otherwise contain a noncorrosive metal. 40 C.F.R. §280.20(a). In addition, UST systems installed after December 22, 1988, must have spill and overflow protection and a method and means to investigate spills and overflows. Older UST systems must have met the new tank standards or have been upgraded, replaced, or closed by December 22, 1998. 40 C.F.R. §280.21(a). NOTE: As of October 13, 2015, the explicit reference to December 22, 1998, is no longer included.

Under the federal program, an UST is an UST only if it meets the technical specifications referred to above and contains a “regulated substance.” The term “regulated substance” is defined as any hazardous substance defined under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. §9601(14)) and petroleum. See 42 U.S.C. §6991(7). That is, a RCRA-regulated substance contains the entire range of hazardous substances otherwise defined under CERCLA plus petroleum.

Illinois has a category for “special waste” defined at 415 ILCS 5/3.475. Specifically, a “special waste” is a potentially infectious medical waste, a hazardous waste as defined under RCRA, and a waste generated as part of an industrial process or pollution control waste except for various specifically defined process wastes.

In addition, RCRA also regulates UST closure procedures. According to the statute, in the event of a temporary closure (less than three months), the owner or operator must continue to operate and maintain corrosion protection and leak detection systems. 40 C.F.R. §280.70.

In addition, RCRA requires that the owners and operators of USTs procure or maintain the financial resources to properly close an UST. 40 C.F.R. §280.93(a). In some cases, the owners and operators of UST systems provide the financial responsibility for closure by being self-insured. In other cases, insurance is available for a regulated person to own and operate an UST system. However, by and large, most owners and operators who have UST systems take advantage of the state programs designed to provide a fund for leaking USTs. In Illinois, that leaking UST fund (LUST Fund) is provided by Title XVI of the Environmental Protection Act. See 415 ILCS 5/57, *et seq.* In other words, the LUST Fund is not a cleanup statute as some have interpreted it. Rather, the LUST Fund is there to provide owners and operators with the means to satisfy RCRA's financial responsibility requirements.

B. [9.28] Title XVI of the Illinois Environmental Protection Act

Title XVI of the Environmental Protection Act is specifically designed to provide assistance to owners and operators of underground storage tanks “in accordance with the requirements of the Hazardous and Solid Waste Amendments of 1984 of the Resource Conservation and Recovery Act of 1976.” 415 ILCS 5/57. The Leaking Underground Storage Tank Fund applies to the owners and operators of USTs who are otherwise required to “conduct tank removal, abandonment and repair, site investigation, and corrective action in accordance with the requirements of the Leaking Underground Storage Tank Program.” 415 ILCS 5/57.1(a). In addition, the owner and operator of a heating oil tank “may elect to perform tank removal, abandonment or repair, site investigation, or corrective action” under the statute. 415 ILCS 5/57.1(b). In any event, according to the terms of the statute, any owner or operator of an UST who elects to perform any tank removal, repair, or abandonment as well as site investigation or corrective action may be eligible under this statute for assistance from the state's LUST Fund.

The LUST Fund is a reimbursement program authorized by Title XVI of the statute. In order to be reimbursed, the owner or operator must comply with the provisions of the Illinois Act in accordance with the regulations of the Office of the State Fire Marshal (OSFM). 415 ILCS 5/57.5(b).

In order to take advantage of the LUST Fund, the owner or operator of a leaking UST must perform a site investigation. 415 ILCS 5/57.7. The site investigation must be designed to “determine the nature, concentration, direction of movement, rate of movement, and extent of the contamination as well as the significant physical features of the site and surrounding area that may affect contaminant transport and risk to human health and safety and the environment.” *Id.*

According to the statute, within 30 days after the completion of the corrective action plan, the owner or operator is required to submit a final report demonstrating that the corrective action was completed in accordance with the approved plan and remediation objectives. 415 ILCS 5/57.7(b)(5). If the Illinois Environmental Protection Agency determines and approves the final report, then the budgeted amounts that were approved by the Agency are reimbursable from the LUST Fund. In the event that the IEPA fails to approve/disapprove or modify any plan or report submitted pursuant to the Illinois Act, the plan or final report is construed to be rejected for purposes of seeking reimbursement from the LUST Fund. 415 ILCS 5/57.7(c).

The statute also provides, as part of the investigation process, for a soil classification analysis and a groundwater investigation. Based on those two criteria, the site is determined to be high priority, low priority, or a no further action site. See 415 ILCS 5/57.7. The prescribed terms of the corrective action depend largely on how the site is characterized.

Note the distinction between a no further action site and a no further remediation determination by the IEPA. The terms “no further action” (NFA) and “no further remediation” (NFR) are really two different terms. The NFA is clearly an indication that the IEPA will not support an application for any further action in order to qualify for closure. That is, further action will not be reimbursed. The NFR letter is specifically described in 415 ILCS 5/57.10 and is discussed below. The technical requirements for an NFA determination by the IEPA are specifically promulgated at 35 Ill.Admin. Code pt. 734.

As indicated above, the process for seeking reimbursement for approved costs from the LUST Fund starts with a review and eligibility determination by the OSFM. The LUST Fund shall be accessible by owners and operators “who have a confirmed release from an underground storage tank or related tank system.” 415 ILCS 5/57.9(a). The owner or operator is eligible to access the LUST Fund as long as

1. neither the owner nor the operator is the United States government;
2. the tank does not contain fuel that is exempt from the Motor Fuel Tax Law, 35 ILCS 505/1, *et seq.*;
3. the costs were incurred as a result of the confirmed release of any of the following substances — (a) “fuel” as defined in §1.19 of the Motor Fuel Tax Law; (b) aviation fuel; (c) heating oil; (d) kerosene; (e) used oil that has been refined from crude oil used in a motor vehicle as defined in §1.3 of the Motor Fuel Tax Law;
4. the owner or operator registered the tank and paid all of the fees in accordance with the requirements of the Gasoline Storage Act, 430 ILCS 15/0.01, *et seq.*;
5. the owner or operator notified the Illinois Emergency Management Agency of a confirmed release, the costs were incurred after notification, and the costs were incurred as a result of a release of a substance listed in the statute;
6. the costs have not already been paid to the owner or operator under a private insurance policy; and
7. the costs were associated with corrective action as defined in the Illinois Act. 415 ILCS 5/57.9(a)(1) – 5/57.9(a)(7).

The LUST Fund provisions of the Illinois Act provide certain deductible amounts applicable to owners and operators of USTs. Specifically, an owner or operator may access the fund after a \$10,000 deductible except that

1. a \$100,000 deductible shall apply when none of the USTs at the site were registered prior to July 28, 1989, except that in the case of USTs used exclusively to store heating oil for consumptive use on the premises where stored and that serve other than farms or residential units, a deductible of \$100,000 shall apply when none of the tanks were registered prior to July 1, 1992;
2. a deductible of \$50,000 shall apply if any of the USTs were registered prior to July 28, 1989, and the state received notice of the confirmed release prior to July 28, 1989; and
3. a deductible of \$15,000 shall apply when one or more but not all of the USTs were registered prior to July 28, 1989, and the state received notice of the confirmed release on or before July 28, 1989. 415 ILCS 5/57.9(b).

The deductibles apply annually for each site at which costs were incurred under a claim submitted pursuant to the Illinois Act, except that if corrective action is in response to an occurrence that takes place over a period of more than one year, in subsequent years no deductible shall apply for costs incurred in response to that occurrence.

The eligibility and deductibility determinations are made by the OSFM in a specific form that is to be provided within a prescribed period of time. See 415 ILCS 5/57.9(c).

After a professional engineer certifies the completion of the activities associated with the approved corrective action, the IEPA is authorized to issue its letter indicating NFA. In addition, the IEPA may issue an NFR letter “unless the Agency has requested a modification, issued a rejection . . . or the report has been rejected by operation of law.” 415 ILCS 5/57.10(a).

In the event the IEPA issues its NFR letter pursuant to an action taken under Title XVI, the letter shall specifically state that all statutory and regulatory corrective action requirements have been complied with, all corrective action concerning the remediation of the occurrence has been completed, and no further corrective action concerning health, safety, or the environment is required. 415 ILCS 5/57.10(c).

An NFR letter issued pursuant to Title XVI shall apply in favor of

1. the owner or operator to whom the letter was issued;
2. any parent corporation or subsidiary of the owner or operator;
3. any coowner or co-operator, by either joint tenancy, right of survivorship, or any other party sharing a legal relationship with the owner or operator to whom the letter is issued;
4. any holder of the beneficial interest in a land trust or inter vivos trust whether revocable or irrevocable;
5. any mortgagee or trustee of a deed in trust of the owner or operator;

6. any successor in interest of the owner or operator;
7. any transferee of the owner or operator and any heir or devisee of the owner or operator. 415 ILCS 5/57.10(d).

Notwithstanding the foregoing, the statute does provide that the owner or operator of an UST “shall be liable for all costs of investigation, preventive action, corrective action and enforcement action incurred by the State of Illinois resulting from an underground storage tank.” 415 ILCS 5/57.12(a).

Finally, similar to the discussion of secured creditors in §9.16 above, the Illinois General Assembly provided the same safe harbors and definitions as under the Lender Liability Rule of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 and the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996. See 415 ILCS 5/57.12A.

V. [9.29] ASBESTOS

Generally speaking, outside of school buildings, there is no requirement to remove asbestos-containing building material (ACBM). That is not to say that owners of buildings containing ACBM can turn a blind eye to asbestos. To the contrary, there are significant state, federal, and local regulations and ordinances that regulate renovation activities and demolition activities in structures containing ACBM.

By way of background, asbestos is a natural mineral that because of its mineral qualities was an excellent added ingredient to fireproofing building materials. Since 1973, the federal government has banned the spray-on application of ACBM. Since 1975, the wet application of ACBM has been banned, and in 1978, asbestos in ceilings, tiles, and walls was banned. In order to qualify as ACBM, the material must contain more than one percent asbestos.

In addition, asbestos is a “hazardous air pollutant” under the Federal Clean Air Act. 42 U.S.C. §7412(b). The United States Environmental Protection Agency has promulgated the National Emissions Standards for Hazardous Air Pollutants (the so-called “NESHAP” regulations, 40 C.F.R. pt. 61) regulating asbestos when it becomes airborne or friable. If an owner or operator of a building or structure containing ACBM is involved in demolition or renovation activity, then the NESHAP regulations apply because the asbestos will become airborne. In that case, notification is required to the appropriate agency (in Illinois, the Illinois Environmental Protection Agency and any local agency such as the Cook County Department of Environment and Sustainability). Thereafter, the renovation, demolition, and disposal of asbestos are highly regulated, requiring permits and certificates of disposal or destruction.

The Occupational Safety and Health Administration also regulates asbestos. Under the regulations, OSHA has determined a “permissible exposure limit” of 0.1 fiber per cubic centimeter of air over eight hours. 29 C.F.R. §1910.1001(c). Anything that exceeds that limit requires immediate action. In an OSHA situation, the employees must be trained properly, potential ACBM must be quantified, all exceedances of the action level must be reported, and building tenants and employees must be notified. 29 C.F.R. §1910.1001(d).

With regard to school buildings, Congress enacted the Asbestos School Hazard Abatement Reauthorization Act of 1990, Pub.L. No. 101-637, 104 Stat. 4589, requiring building inspection and accreditation standards for asbestos workers. Any building owner involved with asbestos must be cognizant of the standards described in this Act to the extent that the standards for removal of asbestos apply to all contractors involved in any removal, renovation, or demolition project.

In Cook County, the County Board enacted an environmental control ordinance, which provides performance standards for the abatement, demolition, alteration, or repair of asbestos-containing structures. These include but are not limited to preventing asbestos fibers or debris being dispersed beyond the immediate work area, preventing the release of visible quantities of asbestos fibers into the atmosphere, and maintaining a valid license to engage in commercial activity of asbestos abatement. Cook County Code of Ordinances §30-549(a).

In other words, any construction, abatement, alteration, repair, or demolition of a structure, or the processing or manufacturing of asbestos-containing products, is regulated to the extent that there is a potential discharge of visible asbestos dust. This chapter is less concerned about manufacturing activities and focuses on construction, alteration, and repair of a structure containing ACBM.

Section 30-561 of the Cook County Code of Ordinances regulates the demolition of any structure. Sections 30-561(e)(1) through 30-561(e)(5) describe the approval procedures involved in performing that activity. Demolition permits are described in §30-561 of the Code of Ordinances.

The Cook County Code of Ordinances also provides that a removal permit from the county is required for all activities including but not limited to the cutting, trimming, fitting, stripping, demolition, or alteration of a structure that has been determined to contain ACBM. See Cook County Code of Ordinances §30-548. The permit must be obtained prior to the start of a project. The filing fee starts at \$200, with a subsequent inspection fee based on the volume (linear feet or area) of asbestos-containing material at risk. Cook County Code of Ordinances §32-1.

In short, the Cook County ordinance broadly applies to activities such as the demolition or removal of ACBM in any quantity. See Cook County Code of Ordinances §30-545. According to the methods employed in the asbestos abatement industry (and referred to and included by reference in the ordinance), any visible dust that has not been determined not to contain asbestos is assumed to contain asbestos when ACBM is known to exist within that structure.

In other words, if the owner of a structure knows or suspects that the structure contains ACBM, then the ordinance provides that all renovation work within the building must be performed only with an asbestos removal permit issued by Cook County in order to safeguard the public against potential exposure to asbestos. In the broadest sense, this ordinance arguably applies to any work for which a construction permit is required by the local municipality, even if that work does not involve contact with ACBM within the structure. Under such a broad interpretation of the ordinance, formerly simple tasks (replacing ceiling tiles, making simple plumbing repairs, removing wall coverings, re-carpeting, and moving office walls as part of a “build-out” for a new tenant) can be interpreted as triggering the ordinance.

While ignorance of the law is no excuse, continuing to be ignorant is imprudent. Rather, prudence dictates that owners of commercial structures should specifically identify and inventory suspected or potential ACBM in order to avoid compliance problems or enforcement actions by state, federal, or local authorities. Again, there is no requirement to remove asbestos from a nonschool building, but it is wise to have prepared an inventory of suspected and potential ACBM, to design and implement an operation and maintenance program for the asbestos, and to communicate the existence of the ACBM to managers, tenants, contractors, and subcontractors hired to perform maintenance activities within the structure.

The State of Illinois aggressively enforces the NESHAP regulations under §9.1 of the Environmental Protection Act. See 415 ILCS 5/9.1; 35 Ill.Admin. Code §201.141; 40 C.F.R. §§61.145, 61.150. In addition, the Illinois Department of Public Health purports to assert jurisdiction over asbestos removal activities that involve the removal of asbestos in any form greater than three square feet, which encompasses simple removal of asbestos-containing ceiling tile, for example.

It is important to recognize that the standards established by the American Society for Testing and Materials in its Phase I environmental assessment do not include an asbestos survey. In performing due diligence and using the ASTM Phase I standard approach, it is important to recognize that an asbestos survey must be specifically requested.

Finally, while asbestos is a hazardous substance under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, the sale of buildings that contain asbestos has been determined to be not a disposal and, therefore, not a release subjecting the seller to environmental liabilities. See *Prudential Insurance Company of America v. United States Gypsum*, 711 F.Supp. 1244, 1255 (D.N.J. 1989).

VI. [9.30] LEAD-BASED PAINT

Lead has received a great deal of regulatory and liability attention. Lead is found in paints, solders, plumbing fixtures, ammunition, gasoline, and vinyl mini blinds. There has been no established safe level of lead in the human body. Accordingly, in October 1992, Congress passed the Residential Lead-Based Paint Hazard Reduction Act of 1992 (RLPHRA), Pub.L. No. 102-550, Title X, 106 Stat. 3897 (sometimes referred to as “Title X”). The RLPHRA requires a lead warning to tenants and purchasers of real property constructed before 1978. Failure to provide the warning may create liability for property owners, managers, real estate agents, and sellers who knowingly fail to comply with the notification requirement. This requirement has been in effect since September 6, 1996, for owners of four units or more and since December 6, 1996, for one to four units. There are some limited exceptions to the notification requirement, including foreclosure sales, certified “lead-based paint free properties,” short-term leases, zero-bedroom dwellings, and housing for the elderly. 24 C.F.R. §35.86; 40 C.F.R. §745.101.

The regulations can be complied with by providing the purchaser or lessee with the United States Environmental Protection Agency’s pamphlet entitled *Protect Your Family From Lead In Your Home*, www.epa.gov/lead/protect-your-family-lead-your-home-real-estate-disclosure, and by disclosing to the purchaser or lessee the known presence of lead-based paint. Regulations require that an acknowledgment form signed by the recipient of the notice be retained for at least three years. 24 C.F.R. §35.92(c); 40 C.F.R. §745.113(c)(1).

Also, according to the regulations, the purchaser of target housing has a ten-day period to conduct its own risk assessment designed to discover the presence or absence of lead-based paint. 40 C.F.R. §745.110(a). Similar to asbestos, contractors must be specifically accredited to remove lead-based paint.

VII. [9.31] RADON

As is so often stated, radon is a naturally occurring radioactive gas. It is colorless, odorless, and tasteless and is the byproduct of the decay of uranium naturally occurring within the earth. Because of its radioactive nature, radon is considered to be the second leading cause of lung cancer. It is primarily a residential problem associated with basements and people who live in basements. The United States Environmental Protection Agency and the Occupational Safety and Health Administration have proposed an action level of four picocuries per liter of air. For some time now, the USEPA has been recommending that the action level should be reduced to two picocuries per liter in residential structures.

Radon tests may include modest or sophisticated technology. Radon abatement generally consists of filling in cracks and covering sump pump holes in basements or simply removing the gas with the use of a fan or, in commercial settings, with a sub-slab suction technique.

VIII. [9.32] POLYCHLORINATED BIPHENYLS

Polychlorinated biphenyls (PCBs) are compounds with molecules consisting of carbon rings with one to ten chlorine atoms attached. They are colorless to yellow viscous liquids or resins and sometimes come in waxy solid form. They were manufactured and used because of their resistance to heat and are very stable at high temperatures with low flammability. PCBs are found in dielectric fluids associated with transformers, capacitors, hydraulic fluids, and heat transfer systems as well as carbonless paper. They can often be identified by their trade names (Askarel[®], Therminol[®]). PCBs are hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, and the release of PCBs may create CERCLA environmental cleanup liability.

In commercial real estate settings, PCBs can be found in transformers (pad or pole-mounted) as well as in oil-filled capacitors, circuit breakers, and switches. In addition, some fluorescent light fixtures may contain PCBs in small volumes.

Aside from CERCLA liability for releases of hazardous substances, PCBs are also regulated under the Toxic Substances Control Act (TSCA), Pub.L. No. 94-469, 90 Stat. 2003 (1976). TSCA is designed to prevent “unreasonable risk of injury to health or the environment” involving manufacturing, processing, distributing, using, or disposing of chemical substances (other than drugs and pesticides). 15 U.S.C. §2605. At §6 of TSCA, Congress provided for a special provision to phase out PCBs. See 15 U.S.C. §2605(e) requiring the United States Environmental Protection Agency to promulgate rules prescribing the method for the disposal of PCBs and requiring PCBs to be marked with clear and adequate warnings and instructions concerning their processing, distribution in commerce, use, or disposal.

The relevant jurisprudence interpreting TSCA has been rendered by administrative law judges interpreting enforcement activities associated with PCBs. From the cases, it is clear that “owners and operators” of PCB-containing equipment and PCB storage containers are responsible for compliance with the regulations, but the term “owner and operator” has not been interpreted as broadly as under CERCLA. Obviously, TSCA is a regulatory statute and not a liability statute; therefore, liability principles have little influence in interpreting it. That is not to say, again, that CERCLA does not apply to a release of a hazardous substance that includes PCBs. Rather, the point is that, under TSCA, the regulated activities associated with TSCA apply to fewer people with no strict liability. A regulated person under TSCA is generally determined by state property law. *See In re Jackson Brewery Development Corp. New Orleans, Louisiana*, No. TSCA-VI-83C, 1985 WL 57170 (E.P.A. Dec. 16, 1985), *rev'd on other grounds sub nom. United States Environmental Protection Agency v. New Orleans Public Service, Inc.*, 826 F.2d 361 (5th Cir. 1987). *See also In re Santacroce*, TSCA Appeal No. 92-6, 4 E.A.D. 586 (Mar. 25, 1993).

The regulated activities involved with TSCA-regulated substances are the testing of chemical substances and mixtures (15 U.S.C. §2603); the manufacturing and processing notification requirements (15 U.S.C. §2604); the regulation of hazardous chemical substances and mixtures (15 U.S.C. §2605); public notification, administrative reporting, and retention of information (15 U.S.C. §2607); and research, development, and utilization of data (15 U.S.C. §2609). One court has held that a current owner of property was a regulated person and incurred the responsibility to comply with the TSCA regulatory requirements to the extent that the owner acquiesced in the improper disposal of PCB-contaminated soil by a prior owner. *See In re Oklahoma Metal Processing Co.*, TSCA Appeal No. 97-5 (June 11, 1997). A district court interpreted TSCA and held that the term “owner and operator” includes joint venturers. *United States v. Burns*, 512 F.Supp. 916 (W.D.Pa. 1981). However, merely paying for the cost to remove oil from a PCB transformer does not give rise to regulatory liability. *In re Employers Insurance of Wausau*, TSCA Appeal No. 95-6, 6 E.A.D. 735 (Feb. 11, 1997).

Generally speaking, spills and leaks of PCBs are deemed an improper disposal under TSCA, and such activity may also create CERCLA liability to the extent that a hazardous substance is released. See 40 C.F.R. pt. 761. PCBs are regulated in terms of the concentrations of PCBs within the media (fluid, soil, water, etc.). According to the USEPA, an item is “non PCB containing” to the extent that the concentration of PCBs within the media is less than 50 ppm. An item is considered “PCB contaminated” to the extent that the concentration of the PCB is greater than 50 ppm but less than 500 ppm. Finally, an item is considered PCB to the extent that it contains concentrations of PCBs at greater than 500 ppm. 40 C.F.R. §761.3. See 40 C.F.R. §§761.120 – 761.135; 52 Fed.Reg. 10,688, 10,692 (Apr. 2, 1987).

Proper PCB disposal involves incineration and destruction using a disposal incinerator, the disposal of the material in a TSCA-compliant landfill, or incineration in a commercial boiler. 40 C.F.R. §761.60.

IX. [9.33] ILLINOIS ENVIRONMENTAL PROTECTION ACT

The Environmental Protection Act is composed of several titles, each addressing specific media or incidents of environmental liability or regulatory concern. Title I deals with general provisions

and is the enabling statute for the creation of the Illinois Environmental Protection Agency as well as the Illinois Pollution Control Board. Title II contains the air pollution rules, Title III is concerned with water pollution, Title IV deals with public water supplies, and Title IV-A deals with water pollution control. Land pollution and refuse disposal are described in Title V, and Title V, §22.2(f), is the state's analog to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 Superfund statute. However, under the federal program, "any person" may seek an award of response cost incurred following a release of a hazardous substance from a facility by a potentially responsible party. 42 U.S.C. §9607. Under the state program, only the State of Illinois can seek reimbursement for the cost the state incurred and paid from the state's Hazardous Waste Fund. 415 ILCS 5/22.2(f). The Illinois Act also provides statutory direction at Title VI for noise, Title VI-A for atomic radiation, and Title VI-B for toxic chemical reporting. Title VII provides the IEPA with authority to promulgate regulations, and Title VIII describes the enforcement process. Title IX provides for variances, Title X for permits, and Title XI for judicial review, and Title XII deals with civil and criminal penalties. Title XIII contains miscellaneous provisions including, of course, the audit privilege discussed in §9.62 below. More recent enactments cover used tires (Title XIV) and potentially infectious medical waste (Title XV). Title XVI relates to the petroleum underground storage tank fund discussed in §9.28 above. Title XVII, the Site Remediation Program, is discussed in §9.34 below.

Generally speaking, CERCLA jurisprudence is appropriate and applicable to 415 ILCS 5/22.2(f) analysis, except in those rare instances in which Illinois' program is slightly different due to exemptions from or accretions to liability described therein. Those distinctions are apparent, and it is generally a useful technique to compare the state program with the federal program for purposes of describing and interpreting the state statute.

In addition, the state's liability program identified at 415 ILCS 5/22.2(f) reportedly has no statute of limitations, whereas an action under CERCLA has two specific statutes of limitation. See 42 U.S.C. §§9613(g)(1), 9613(g)(2). See also 42 U.S.C. §9613(g)(3) (contribution actions). In addition, contribution is not specifically described within the Illinois program as it is under the federal program. However, lender liability is treated very similarly under both statutes. In seeking reimbursement under 415 ILCS 5/22.2(f), the state may seek relief in an action filed before the IPCB or with the circuit court. The IPCB is the source of the vast majority of jurisprudence interpreting the Illinois Act.

Whether, and how, there may be a private cause of action under the Illinois Act is a question of some remarkable debate in the circuit courts of Illinois, the federal district courts, and the IPCB. Each forum has specific jurisdiction to hear an environmental claim. Generally speaking, the circuit courts of Illinois are courts of general jurisdiction, limited only by the subject-matter jurisdiction provided by the Illinois General Assembly in the Illinois Act. The federal districts courts are, of course, courts of limited jurisdiction requiring a federal question or diversity jurisdiction to hear a claim. Finally, the IPCB is a forum with very specific jurisdiction to hear claims as provided by the Illinois General Assembly in the Board's enabling act and as limited by the subject-matter jurisdiction provided in the Illinois Act.

There is no private cause of action under 415 ILCS 5/22.2(f). Only the State of Illinois (and not a private party) may sue under the authority provided by §22.2(f) for the recovery of

environmental cleanup costs. See *Chrysler Realty Corp. v. Thomas Industries, Inc.*, 97 F.Supp.2d 877 (N.D.Ill. 2000); *Norfolk Southern Ry. v. Gee Co.*, No. 98 C 1619, 2001 WL 710116 (N.D.Ill. June 25, 2001). However, a private citizen may bring an enforcement action against another person who violates the Illinois Act (*i.e.*, 415 ILCS 5/21 but not pursuant to §22.2(f)) before the IPCB. “Under the Illinois Environmental Protection Act . . . any person may bring an action before the Board to enforce Illinois’ environmental requirements.” *Theodore Kosloff Trust v. A&B Wireform Corp.*, PCB 06-163, 2006 WL 1665249, *1 (June 1, 2006). See also *Lake County Forest Preserve District v. Ostro*, PCB 92-80, 1992 WL 196684 (July 30, 1992); *Chrysler Realty Corp. v. Thomas Industries, Inc.*, PCB 01-25, 2000 WL 1860128 (Dec. 7, 2000); *Grand Pier Center LLC v. River East LLC*, PCB 05-157, 2005 WL 1255254 (May 19, 2005); *Matteson WHP Partnership v. Martin*, PCB 97-121, 2000 WL 994951 (June 22, 2000); *2222 Elston LLC v. Purex Industries, Inc.*, PCB 03-55, 2003 WL 21512768 (June 19, 2003); *Mather Investment Properties, L.L.C. v. Illinois State Trapshooters, Ass’n*, PCB 05-29, 2005 WL 1943585 (July 21, 2005). Section 31(d)(1) of the Illinois Act, which has been interpreted to allow such actions, provides:

Any person may file with the Board a complaint . . . against any person allegedly violating this Act, any rule or regulation adopted under this Act, any permit or term or condition of a permit, or any Board order. . . . Unless the Board determines that such complaint is duplicative or frivolous, it shall schedule a hearing and serve written notice thereof upon the person or persons named. 415 ILCS 5/31(d)(1).

In those cases in which a citizen plaintiff, acting as a private Attorney General, alleges and proves a violation of the Illinois Act, the IPCB has held repeatedly that the Board has jurisdiction and authority under its enabling statute to order a person judged to have violated the Act to clean the site and to reimburse the party for the cleanup expenses incurred by the private party. *Lake County Forest Preserve District, supra*; *Chrysler Realty Corp., supra*.

While the IPCB continues to hear and decide such private actions, one Illinois appellate court and several federal court decisions have treated such actions with disfavor. See *NBD Bank v. Krueger Ringier, Inc.*, 292 Ill.App.3d 691, 686 N.E.2d 704, 226 Ill.Dec. 921 (1st Dist. 1997); *Neumann v. Carlson Environmental, Inc.*, 429 F.Supp.2d 946 (N.D.Ill. 2006); *Great Oak, L.L.C. v. Begley Co.*, No. 02 C 6496, 2003 WL 880994 (N.D.Ill. Mar. 5, 2003); *Chrysler Realty Corp., supra*; *Norfolk Southern, supra*; *Singer v. Bulk Petroleum Corp.*, 9 F.Supp.2d 916 (N.D.Ill. 1998). The IPCB distinguished *NBD Bank* as essentially being an action associated with evaluating the right of recovery in tort and not so much related to enforcement of the Illinois Act. See *Village of Park Forest v. Sears, Roebuck & Co.*, PCB 01-77 (June 6, 2002). The IPCB is also not bound by the decisions of the federal courts. The Illinois Supreme Court has not yet decided a case on the availability of private causes of action under the Illinois Act.

Any private actions brought before the IPCB must meet the threshold requirements of not being duplicative or frivolous, as required by 415 ILCS 5/31(d)(1). “Duplicative” means “‘the matter is identical or substantially similar to one brought before the Board or another forum.’ . . . ‘A complaint would be duplicitous if another action was pending between the same parties, alleging substantially the same violations, before another tribunal with power to grant the same relief as the Board.’” *Mather Investment Properties, supra*, 2005 WL 1943585 at *4, quoting 35 Ill.Admin.

Code §101.202 and *Lake County Forest Preserve District, supra*, 1992 WL 196684 at *1. A complaint is frivolous if it requests “relief that the Board does not have the authority to grant” or “fails to state a cause of action upon which the Board can grant relief.” 2005 WL 1943585 at *4, quoting 35 Ill.Admin. Code §101.202.

In addition, the Illinois Supreme Court has held that a private party may seek relief in the circuit court when the State of Illinois sues the private party in circuit court under the Illinois Act. In that case, the defendant may institute a third-party derivative action against another party seeking indemnity, contribution, or some recognized relief under the same provision of the Illinois Act at issue in the original action filed by the State of Illinois. *See People v. Brockman*, 143 Ill.2d 351, 574 N.E.2d 626, 158 Ill.Dec. 513 (1991); *People v. Brockman*, 148 Ill.2d 260, 592 N.E.2d 1026, 170 Ill.Dec. 346 (1992); *People v. Fiorini*, 143 Ill.2d 318, 574 N.E.2d 612, 158 Ill.Dec. 499 (1991); *People v. NL Industries*, 152 Ill.2d 82, 604 N.E.2d 349, 178 Ill.Dec. 93 (1992). However, note that the Illinois appellate court revisited the derivative action exception and held that a defendant’s tort claim against a third party was not an approved derivative action following an initial claim made under the Illinois Act. *See NBD Bank, supra*.

A. [9.34] Site Remediation Program

After many years of experience in environmental cleanup liability, legislators throughout the country began to rethink statutory liability regimens in light of various practical considerations. Specifically, environmental protection had become a remarkable disincentive to investment in historical industrial areas, leading investors to invest in pristine “greenfields” while abandoning historic “brownfields.” This phenomenon has created the disparity now known under the rubric of “Environmental Justice.” In addition, cleanup standards based on carcinogenic risk were reevaluated, especially based on the prospective use of the property (*e.g.*, a factory or a commercial enterprise was similar to the historical enterprise of a gasoline service station, for example, but not to a residential condominium project). In other words, if a site had been used as a gas station before, then it did not seem to make much sense to reduce the cancer risk to virtually nonexistent when the site would be used again for a similar purpose. In the 1990s, these considerations led legislatures to reconsider their liability statutes and, more importantly, the cleanup standards applicable to real estate that historically had been used for industrial or commercial purposes. Illinois’ response to that national movement is found at Title XVII of the Environmental Protection Act, which provides for the Site Remediation Program administered by Illinois Environmental Protection Agency.

In the SRP, the Illinois General Assembly revised its cleanup objectives and enabled the Illinois Pollution Control Board to promulgate regulations designed to provide a Tiered Approach to Corrective Action Objectives (TACO). These so-called “TACO” rules were generally aligned with the national movement to switch from health-based corrective action objectives applicable across the board to any real estate transaction to specific risk-based corrective action objectives that take into consideration the prospective or intended use of the property. In addition, Illinois took a rather remarkable step in revising its liability standards to provide for “proportionate share” liability. Illinois also established a Brownfields Redevelopment Fund designed to assist parties in performing site investigation and remedial activities for selected sites.

B. [9.35] Tiered Approach to Corrective Action Objectives

Under the Environmental Protection Act, the Illinois Pollution Control Board was given the responsibility for creating corrective action objectives to reflect

1. Tier I remediation objectives expressed as a table of numeric values for soil and groundwater (415 ILCS 5/58.5(d)(1));
2. Tier II remediation objectives designed to include formulae and equations with variables that, when applied to certain conditions at a site, demonstrate lower reduced risks (415 ILCS 5/58.5(d)(2)); and
3. Tier III remediation objectives to include methodologies to allow for the development of site-specific, risk-based remediation objectives for soil and groundwater, or both, and for regulated substances (415 ILCS 5/58.5(d)(3)).

In determining Tier III remediation objectives, the General Assembly asked the Illinois Pollution Control Board to consider

1. the use of site-specific characteristic data (415 ILCS 5/58.5(d)(3)(A));
2. the use of appropriate exposure factors for the current and currently planned future land use of the site and adjacent property and the effectiveness of engineering, institutional, or legal controls placed on the current or future use of the site (415 ILCS 5/58.5(d)(3)(B));
3. the use of appropriate statistical methodologies to establish valid remediation objectives (415 ILCS 5/58.5(d)(3)(C)); and
4. a determination of the potential and actual impact of regulated substances on human receptors (415 ILCS 5/58.5(d)(3)(D)).

The final rule promulgated by the Illinois Pollution Control Board can be found at 35 Ill.Admin. Code pt. 742.

The Tiered Approach to Corrective Action Objectives remediation standards focus on four exposure scenarios for residential or industrial/commercial property uses: incidental ingestion of contaminated soil; outdoor inhalation of chemical vapors and contaminated soil particulate matter; ingestion of contaminated groundwater, with a groundwater quality standard and a soil component of groundwater standard; and the indoor inhalation exposure route. See 35 Ill.Admin. Code pt. 742. Under this fourth exposure scenario, commonly referred to as vapor intrusion, chemical vapors originating within contaminated soil and groundwater beneath building foundations and surrounding basement walls permeate the structures and enter the airspace inside. Vapor intrusion is an issue that has received considerable attention recently and is now commonly evaluated by the United States Environmental Protection Agency at Superfund sites in which organic solvents are chemicals of concern. Vapor intrusion has also been the subject of “imminent and substantial endangerment” lawsuits, including one notable decision related to contamination caused by a dry cleaner operation in Illinois. See *Forest Park National Bank & Trust v. Ditchfield*, 881 F.Supp.2d 949 (N.D.Ill. 2012).

The TACO rules continue to be amended from time to time, and it is necessary to ensure that all environmental investigation and remediation work is performed in conformance with the latest requirements.

C. [9.36] No Further Remediation Letters

The Site Remediation Program described at Title XVII of the Environmental Protection Act provides a fairly detailed process involving licensed professional scientists, site investigation, and reporting obligations. To the extent that cleanup is pursued pursuant to the authorities described in the statute and regulations, and as long as the person performing the remedial activities applies to the Illinois Environmental Protection Agency, then, upon successful completion of the program, the Agency will issue its no further remediation letter.

According to the statute, an NFR letter from the IEPA

signifies a release from further responsibilities under this Act in performing the approved remedial action and shall be considered prima facie evidence that the site does not constitute a threat to human health and the environment and does not require further remediation under this Act, so long as the site is utilized in accordance with the terms of the No Further Remediation Letter. 415 ILCS 5/58.10(a).

It is important to recognize that an NFR letter binds only the State of Illinois, but the federal government has shown a tendency to respect the IEPA's determination.

The IEPA is required to issue an NFR letter within 30 days after it approves of the remedial action completion report from the property owner. In the event that the IEPA fails to issue the letter within 30 days after that approval, then the NFR letter shall issue by operation of law. 415 ILCS 5/58.10(b).

As indicated above, an NFR letter will contain various conditions and descriptions. To the extent that a purchaser is reviewing and relying on an NFR letter, it is important to read the letter in its entirety, together with the remedial action completion report prepared by the property owner. According to the statute, the NFR letter must include

1. an acknowledgment that the requirements of the remedial action plan and the remedial action completion report were satisfied;
2. a description of the location of the affected property by adequate legal description or by reference to a plat showing its boundaries;
3. the level of remediation objectives, specifying, as appropriate, any land use limitation imposed as a result of such remediation efforts;
4. a statement that the IEPA's issuance of the NFR letter signifies a release from further responsibility under the Illinois Act in performing the approved action and shall be considered prima facie evidence that the site does not constitute a threat to human health and the environment and does not require further remediation under the Act, as long as the site is utilized in accordance with the terms of the letter;

5. a prohibition against any use of the site in a manner inconsistent with any land use limitation imposed as a result of such remediation efforts without additional appropriate remedial activities;
6. a description of any preventative, engineering, and institutional controls required in the approved plan together with a notification that failure to manage the controls in full compliance with the terms of the plan may result in voiding the NFR letter;
7. an obligation to record the NFR letter with the office of the recorder in the county in which the site is located within 45 days of receipt of the letter;
8. the opportunity to request a change in the recorded land use;
9. notification that further information regarding the site can be obtained through a request under the Freedom of Information Act, 5 ILCS 140/1, *et seq.*; and
10. if only a portion of the site is selected or if only selected regulated substances at the site were the subject of corrective action, any other provision agreed to by the IEPA and the owner of the property performing the remedial activity. 415 ILCS 5/58.10(b).

Note that the IEPA may select only a portion of the site as the “site” subject to the NFR letter, and the Agency and the property owner performing the remedial activity may limit the contaminants of concern to only a select few. That is, when seeking representations and when reviewing an NFR letter from the IEPA, it is incumbent on the parties to recognize that NFR letters may be “focused” on specific contaminants of concern to the exclusion of others and may affect only portions of the site in lieu of the entire site.

According to the statute, the NFR letter applies in favor of a broad group of people, including

1. the person to whom the letter was issued;
2. the owner or operator of the site;
3. any parent corporation or subsidiary of the owner of the site;
4. any coowner, either by joint tenancy or right of survivorship, or any other party sharing a legal relationship with the owner of the site;
5. any holder of a beneficial interest in a land trust or inter vivos trust, whether revocable or irrevocable, involving the site;
6. any mortgagee or trustee of a deed in trust of the owner of the site or any assignee, transferee, or successor in interest thereto;

7. any successor in interest of the owner of the site;
8. any transferee of the owner of the site whether the transfer was by sale, bankruptcy proceeding, partition, dissolution of marriage, settlement or adjudication of any civil action, charitable gift, or bequest;
9. any heir or devisee of the owner;
10. any financial institution as that term is defined in §2 of the Illinois Banking Act, 205 ILCS 5/1, *et seq.*; and
11. in the case of a fiduciary (other than a land trustee), the estate, trust estate, or other interest in property held in a fiduciary capacity, as well as the trustee, executor, administrator, guardian, receiver, conservator, or other person who holds the remediated site in a fiduciary capacity or a transferee of such party. 415 ILCS 5/58.10(d).

Thus, for purposes of analyzing liability under the Illinois Act, the NFR letter is valuable because it is marketable at least to the extent of the broad scope of parties who may take advantage of it, including purchasers and lenders in commercial real estate transactions. At least for purposes of liability under the Illinois Act, an NFR letter is actually an affirmative statement that the IEPA will no longer seek to impose any further liability on any potentially responsible party otherwise described under the statute. This is not to say that the SRP/NFR process is the only way to achieve compliance with the law. In certain circumstances, there is nothing wrong with doing the right thing and not telling anyone about it.

PRACTICE POINTER

- ✓ Distinguish the NFR letter from the no further action letter otherwise available under Title XVI and other regulated programs such as hazardous waste regulatory programs. In an NFA letter, all the IEPA is saying is that no further action will be paid for or mandated. In the NFR letter, the state is saying that the site is clean pursuant to the terms and conditions described in the letter.
-

Not unexpectedly, the NFR letter may be voidable if the site activities are not managed in full compliance with the provisions of the Illinois Act, any rules adopted pursuant to the Act, the approved remedial action plan, or the terms of the NFR letter.

D. [9.37] Proportionate Share Liability

As indicated in §9.34 above, the Illinois General Assembly not only implemented risk-based corrective action objectives and regulatory programs designed to implement the legislation, but it also took one additional step and revised its liability program to incorporate “proportionate share” liability for the cost of the remedial action incurred by the State of Illinois. See 415 ILCS 5/58.9(a). That is, pursuant to Title XVII, the Environmental Protection Act provides for an individual’s

environmental liability for acts “that may be attributed to being proximately caused by such person’s act or omission” but only to the extent of “such person’s proportionate degree of responsibility for costs of the remedial action of releases of regulated substances that were proximately caused or contributed to by 2 or more persons.” *Id.*

In addition, the General Assembly provided that neither the State of Illinois nor any person may require the performance of remedial action pursuant to the Illinois Act against any of the following:

(A) A person who neither caused nor contributed to in any material respect a release of regulated substances on, in, or under the site that was identified and addressed by the remedial action taken pursuant to this Title.

(B) Notwithstanding a landlord’s rights against a tenant, a landlord, if the landlord did not know, and could not have reasonably known, of the acts or omissions of a tenant that caused or contributed to, or were likely to have caused or contributed to, a release of regulated substances that resulted in the performance of remedial action at the site.

(C) The State of Illinois or any unit of local government if it involuntarily acquires ownership or control of the site by virtue of its function as a sovereign through such means as escheat, bankruptcy, tax delinquency, or abandonment, unless the State of Illinois or unit of local government takes possession of the site and exercises actual, direct, and continual or recurrent managerial control in the operation of the site that causes a release or substantial threat of a release of a regulated substance resulting in removal or remedial activity.

(D) The State of Illinois or any unit of local government if it voluntarily acquires ownership or control of the site through purchase, appropriation, or other means, unless the State of Illinois or the unit of local government takes possession of the site and exercises actual, direct, and continual or recurrent managerial control in the operation of the site that causes a release or substantial threat of a release of a regulated substance resulting in removal or remedial activity.

(E) A financial institution, as that term is defined in Section 2 of the Illinois Banking Act and to include the Illinois Housing Development Authority, that has acquired the ownership, operation, management, or control of a site through foreclosure, a deed in lieu of foreclosure, receivership, by exercising of an assignment of rents, as mortgagee in possession or otherwise under the terms of a security interest held by the financial institution, or under the terms of an extension of credit made by the financial institution, unless the financial institution takes actual physical possession of the site and, in so doing, directly causes a release of a regulated substance that results in removal or remedial activity.

(F) A corporate fiduciary that has acquired ownership, operation, management, or control of a site through acceptance of a fiduciary appointment unless the corporate fiduciary directly causes a release of a regulated substance resulting in a removal or remedial activity. 415 ILCS 5/58.9.

Finally, Title XVII applies to any person, including persons required to perform investigations and remediations under the Illinois Act, unless the site is on the federal Superfund list; the site is a treatment, storage, or disposal site for which a permit has been issued or which is otherwise subject to closure requirements under federal or state solid or hazardous waste laws; the site is subject to federal or state underground storage tank laws; or investigation or remedial action at the site has been required by a federal court or an order issued by the United States Environmental Protection Agency. 415 ILCS 5/58.1.

E. [9.38] Environmental Land Use Controls

The Illinois General Assembly also gave the Illinois Pollution Control Board the task of creating rules to establish land use limitations or obligations on the use of real property when it was determined necessary to manage risk to human health or the environment arising from contamination left in place pursuant to the procedures set forth in the Environmental Protection Act. See 415 ILCS 5/58.5; 35 Ill.Admin. Code pt. 742. That is, Title XVII contemplated that “contamination” may be left on site as part of the new performance standards. In that case, institutional controls would need to be implemented to safeguard the environment.

In making a determination to close a site or approve a proposed corrective action plan under Title XVII, the Illinois Environmental Protection Agency has the option of applying the Tiered Approach to Corrective Action Objectives, leaving some contamination in place and imposing “institutional controls” and “engineered barriers.” Institutional controls are described by the IPCB at 35 Ill.Admin. Code §742.1000, *et seq.* Engineered barriers are also part of the IPCB’s regulations and can be found at 35 Ill.Admin. Code §742.1100, *et seq.*

According to the IPCB’s regulations, institutional controls must be part of the corrective action plan when the remediation objectives are based on any of the following assumptions: continued use of the property for industrial or commercial purposes; cancer risks greater than one in one million; a target hazard quotient greater than one; engineered barriers as part of the design; the point of human exposure is at a place other than at the source; exclusion of exposure routes; or a combination of the above. 35 Ill.Admin. Code §742.1000(a).

Generally speaking, no further remediation letters, environmental land use controls, ordinances, and memorandums of understanding or agreement between municipalities can be institutional controls designed to place various limitations on the use of the subject property.

The IPCB provides a special land use control for environmental purposes, specifically described as an “Environmental Land Use Control” (ELUC). See 35 Ill.Admin. Code §742.1010. As the term implies, an ELUC is a site-specific land use restriction designed to run with the land. In order to become effective, an ELUC must be approved by the IEPA and generally include restrictions on the use of groundwater, a restriction on use confined to industrial/commercial uses, and the continued maintenance and operation of engineered barriers and workers’ safety plans. ELUCs may be used when an NFR letter is otherwise not available (*e.g.*, when contamination has migrated off site or outside of the property boundaries) or when an NFR letter is not available under the specific program for which the owner or operator is seeking closure. 35 Ill.Admin. Code §742.1010(a).

As a site-specific land use control, the ELUC document must be recorded in the chain of title. 35 Ill.Admin. Code §742.1010(b).

By design, the ELUC remains in effect in perpetuity:

At no time shall any site for which an ELUC has been imposed as a result of remediation activities under this Part be used in a manner inconsistent with the land use limitation unless attainment of objectives appropriate for the new land use is achieved and a new no further remediation determination has been obtained and recorded in accordance with the program under which the ELUC was first imposed or the Site Remediation Program. [Emphasis in original.] 35 Ill.Admin Code §742.1010(c)(2).

That is, the ELUC stays in place until corrective action objectives are attained and until an NFR letter is issued with a release from the IEPA.

The IPCB provided very specific information to be identified with the ELUC. Those elements include the name of the property owner, an identification of the property, a reference to the IEPA ten-digit identification number, a statement of the reason for the land use limitation, language instituting the land use limitation, and a statement that the limitation applies to the current owners and occupants and their heirs, successors, assigns, and lessees. In addition, an ELUC must contain a statement describing the duration of the land use control, scaled maps specifically identifying the property, a statement concerning the public's right to review the information pursuant to the Freedom of Information Act, and signatures of the parties bound to the limitations. 35 Ill.Admin. Code §742.1010(d). The IEPA has prepared a Model Form ELUC, which is available at <https://epa.illinois.gov/content/dam/soi/en/web/epa/topics/cleanup-programs/institutional-control/documents/model-environmental-land-use-control.pdf>.

The IPCB has also adopted rules providing that municipalities may adopt ordinances as institutional controls applicable to closure or the issuance of an NFR letter. The method and means for seeking approval for such a local ordinance as an institutional control are provided at 35 Ill.Admin. Code §742.1015(b). A municipality's authority to order homeowners to abandon private drinking water wells and to connect to the municipal water supply, even though the wells were safe and there had been no catastrophe creating a danger to the private drinking water well, was held constitutional by the Second District Appellate Court. *Village of Algonquin v. Tiedel*, 345 Ill.App.3d 229, 802 N.E.2d 418, 280 Ill.Dec. 493 (2d Dist. 2003).

The IPCB also provided that "Highway Authority Agreements" may be executed and implemented as an institutional control when contamination has migrated off site and into a highway right-of-way. See 35 Ill.Admin. Code §742.1020. In that agreement, the highway authority must agree to prohibit the use of groundwater under the highway right-of-way and agree to limit access to soil contamination under the highway right-of-way. *Id.*

F. [9.39] Engineered Barriers and Controls

Inasmuch as the purpose of the Tiered Approach to Corrective Action Objectives (see §9.35 above) takes into account various factors that can lead to a reasonable conclusion that the

contamination will not reach an exposure path to human health or the environment, the Illinois Pollution Control Board provided that engineered barriers may be designed and installed to effect that same purpose. According to the IPCB, caps or walls constructed of compacted clay, asphalt, concrete, or other material approved by the Illinois Environmental Protection Agency and any other permanent structure such as buildings and highways may act as engineered barriers for the soil ingestion exposure route. See 35 Ill.Admin. Code §742.1105(c). In certain circumstances, slurry walls and hydraulic control of groundwater may be used. *Id.* Moreover, subsurface piping and vapor extraction, using the same technology commonly used to address radon, can be installed to address vapor intrusion concerns.

X. [9.40] ENVIRONMENTAL LIABILITIES AND BANKRUPTCY

Environmental liabilities and bankruptcy considerations bring together two major national policy considerations — the objective of a clean start following bankruptcy and the policy of providing the method and means for a clean environment. In bankruptcy liquidation cases, the debtor's nonexempt assets are liquidated to pay prepetition creditors. The debtor receives a discharge from all prepetition debts subject only to exceptions under §§523(a) and 727 of the Bankruptcy Code, 11 U.S.C. §101, *et seq.* In a reorganization, the debtor will seek to obtain creditor and bankruptcy court approval for a reorganization plan that will vest the debtor or the debtor's successor with the assets and discharge all debts, subject only to compliance with the payments otherwise described in the plan of reorganization.

A. [9.41] Abandonment of Contaminated Property

Pursuant to §554 of the Bankruptcy Code, 11 U.S.C. §554, the bankruptcy trustee is allowed to abandon property of the estate to the extent that the property is burdensome to the estate or is of inconsequential value to the estate. However, in *Ohio v. Kovacs*, 469 U.S. 274, 83 L.Ed.2d 649, 105 S.Ct. 705 (1985), the U.S. Supreme Court held that no party in possession of a contaminated site may avoid environmental law. According to the Court, environmental liability attaches to the current ownership of the land and survives bankruptcy. In *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 474 U.S. 494, 88 L.Ed.2d 859, 106 S.Ct. 755, *reh'g denied*, 106 S.Ct. 1482 (1986), the Court also held that the Bankruptcy Code does not authorize the abandonment of burdensome property to the extent that the estate's cleanup costs would exceed the bankruptcy estate's equity in the property. Following these decisions, various courts have interpreted the law to require strict compliance with environmental laws before the bankruptcy trustee is allowed to abandon contaminated real estate. Other courts have made exceptions when the bankruptcy estate is closing the operations at the property or when abandonment would not create an imminent and substantial harm. *In re Peerless Plating Co.*, 70 B.R. 943 (Bankr. W.D.Mich. 1987); *In re Smith-Douglass, Inc.*, 856 F.2d 12 (4th Cir. 1988). Abandoned property assumes a prebankruptcy status on an environmental claim. Response costs that are incurred after abandonment may lose administrative priority because such costs are not necessary to preserve the property of the estate. In the final analysis, the question becomes whether there are unencumbered assets otherwise available to pay for the cleanup.

B. [9.42] Automatic Stay

Upon the filing of a petition for bankruptcy, §362 of the Bankruptcy Code, 11 U.S.C. §362, provides for an automatic stay. However, the stay does not affect an action by a government to enforce its police or regulatory powers under environmental laws. Also, the automatic stay does not stay the enforcement of a judgment, other than a monetary judgment, obtained in an action by a government seeking to enforce its police or regulatory power.

In addition, money judgments have been defined narrowly, and courts often refuse to extend the protection of the automatic stay to government cleanup orders even if the compliance would force the debtor to spend substantial sums to the prejudice of the other conditions in the bankruptcy estate. On the other hand, private party actions against the debtor or against the estate are generally stayed by the bankruptcy until such time as the court lifts or modifies the automatic stay.

C. [9.43] Dischargeability of Environmental Obligations

Following confirmation of the debtor's plan of reorganization, the debts of the debtor are discharged only to the extent that the claims arose before the confirmation date (as long as the claimants received adequate notice and an opportunity to participate in the case). In liquidation cases, discharges are available only for claims that arose prepetition. The critical question often involves whether the environmental liability at issue is a claim.

In determining whether an environmental liability is a claim, an important distinction is between a creditor's right to recover cleanup costs (its right to money) and a claimant's right to injunctive relief compelling the debtor to abate an environmental problem. That is, courts generally hold that the debtor's obligations under a government-issued cleanup order or injunction to abate pollution is not a right to payment because it is not a "claim" within the meaning of the Bankruptcy Code and, accordingly, is nondischargeable. Even though the U.S. Supreme Court held in *Ohio v. Kovacs*, 469 U.S. 274, 83 L.Ed.2d 649, 105 S.Ct. 705 (1985), that the debt in that case was dischargeable, the liability in that case had been reduced to a demand for money. Clearly, other provisions of a potential cleanup order, such as the affirmative obligation to refrain from polluting, are nondischargeable. This very issue was addressed in *United States v. Apex Oil Co.*, 579 F.3d 734 (7th Cir. 2009), in which the Seventh Circuit Court of Appeals held that a government claim to an injunction granted under the Resource Conservation and Recovery Act of 1976 was not dischargeable because RCRA does not allow the government any form of monetary relief, only the performance of cleanup work. The discharge of a bankruptcy claim is not allowed when the injunction merely imposes a cost on the defendant. A claim is dischargeable only if there is a right of payment.

On the other hand, the Second Circuit Court of Appeals held that cleanup costs may be dischargeable as long as the government has the option to perform the remediation or to recover the costs from the debtor. See *In re Chateaugay Corp.*, 944 F.2d 997 (2d Cir. 1991). Inasmuch as the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 gives government agencies the option to perform the activities themselves and seek a money judgment, or seek injunctive relief, an order under CERCLA would likely be considered a claim and thus

dischargeable. In Illinois, pursuant to §22.2(f) of the Environmental Protection Act, 415 ILCS 5/22.2(f), the state may seek reimbursement only for the costs it incurred in cleaning up a site, and it has no apparent administrative authority to order a cleanup under §4(q) or §58.9(b) of the Act. However, the Illinois statute also provides:

If any person who is liable for a release or substantial threat of release of a hazardous substance or pesticide fails without sufficient cause to provide removal or remedial action upon or in accordance with a notice and request by the Agency or upon or in accordance with any order of the Board or any court, such person may be liable to the State for punitive damages in an amount at least equal to, and not more than 3 times, the amount of any costs incurred by the State of Illinois as a result of such failure to take such removal or remedial action. 415 ILCS 5/22.2(k).

When read in concert, the provisions of the Illinois Act seem to imply that the Illinois Environmental Protection Agency has some authority to issue something in the nature of an administrative order requiring or mandating cleanup at a site. See 415 ILCS 5/22.2(f), 5/22.2(k). However, the purported scope of these sections is inconsistent with the authority provided by the General Assembly to the IEPA pursuant to §§4(q) and 58.9 of the Act. In any event, §22.2(f) does not clearly provide the IEPA with anything more than an opportunity to seek reimbursement under the statute and to seek a money judgment. Such a money judgment would likely be considered a claim and thus dischargeable under the Bankruptcy Code.

A claim arises in environmental situations at the time the release or threatened release occurs regardless of the time of discovery and regardless of the time the costs were incurred. Indeed, the claim may be a contingent claim, but it is a claim nonetheless. See *Chateaugay, supra*. In other cases, courts have rejected the *Chateaugay* analysis and adopted the “fair contemplation” standard. See *In re National Gypsum Co.*, 139 B.R. 397, 408 (N.D.Tex. 1992).

D. [9.44] Priority Administrative Claims

Money claims for cleanups that were incurred prepetition are generally unsecured and dischargeable claims to the extent they are allowed. The holders of such claims are entitled to pro rata distributions with other general unsecured creditors after satisfaction of all secured and priority claims. Such claims for prospective environmental cleanup costs arising from a prepetitioned release, if allowed, are also unsecured dischargeable claims. However, priority administrative expense status is generally granted to monetary claims for reimbursement of Comprehensive Environmental Response, Compensation, and Liability Act of 1980 response costs that were actually incurred postpetition in order to remedy the contamination at the debtor’s site or to bring the debtor’s operations into environmental compliance. See 28 U.S.C. §959; *In re Chateaugay Corp.*, 944 F.2d 997 (2d Cir. 1991).

XI. ENVIRONMENTAL DISCLOSURES UNDER SECURITIES AND EXCHANGE COMMISSION LAWS

A. [9.45] In General

Entities that acquire and hold interests in real property and have issued equity or debt instruments offered or traded in the public financial markets must disclose material consequences of actual or potential environmental liability under the Securities Act of 1933 (1933 Act), ch. 38, Title I, 48 Stat. 74, and the Securities Exchange Act of 1934 (1934 Act), ch. 404, 48 Stat. 881. The Securities and Exchange Commission (SEC) Staff Accounting Bulletin No. 92 makes it clear that the SEC will press for early and detailed disclosure of material environmental risks and early booking of reserves for these and other contingent liabilities.

Section 5 of the 1933 Act governs registration statements and prospectuses. Registration statements must be filed with the SEC, and a prospectus must be provided to prospective purchasers. 15 U.S.C. §77e. The 1934 Act requires the reporting of information necessary for registration statements, annual reports, and quarterly reports through annual filings of Forms 10-K and 10-Q. Independent filings are required for critical events such as bankruptcy, a change in control, the acquisition and disposition of assets, the change of auditors, and the resignation of directors following a policy dispute.

The 1933 Act regulates tender offers and solicitations of proxies. Liability under the Act applies to issuers, officers, and directors as well as to underwriters, accountants, and others. Section 17 of the 1933 Act contains antifraud provisions that apply to distributions of public offerings and private placements. 15 U.S.C. §77q. Section 24 imposes criminal sanctions for violations and for willful misstatements. 15 U.S.C. §77x. The SEC has authority to suspend or withdraw registration of securities and to impose civil and criminal liability. Both Acts provide for private rights of action against those who fail to disclose information as required.

B. Regulation S-K in Regard to Environmental Concerns

1. [9.46] Item 101 — Disclosure of Capital Expenditures

Under Item 101 of Regulation S-K, 17 C.F.R. §229.101, the registrant must disclose any material cost of environmental compliance. 17 C.F.R. §229.101(c)(2)(i). The Securities and Exchange Commission also requires disclosure of costs of environmental compliance for two years in comparison to competitors (for example, emissions control expenditures under the Clean Air Act and Clean Water Act or Comprehensive Environmental Response, Compensation, and Liability Act of 1980 liability). Other potential areas include asbestos abatement measures under the Occupational Safety and Health Act of 1970 and underground storage tank upgrades required under the Resource Conservation and Recovery Act of 1976. Other such liabilities may include lead paint litigation expenses.

2. [9.47] Item 103 — Disclosure of Legal Proceedings

The Securities and Exchange Commission mandates disclosure of administrative or judicial proceedings under environmental laws if (a) the proceeding is material, (b) the proceeding includes

a claim for damages or costs in excess of ten percent of current consolidated assets, or (c) governmental authorities are parties to the proceeding unless the expected liability is less than \$300,000. 17 C.F.R. §229.103.

The SEC has also indicated that the designation of a company as a potentially responsible party under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 does not, by itself, trigger disclosure under Item 103 of Regulation S-K unless the issuer's individual circumstances provide sufficient information to conclude that the government is contemplating an enforcement action against the issuer.

C. [9.48] Management Discussion and Analysis

The Securities and Exchange Commission considers management discussions and analysis (MD&A) disclosures as an opportunity to give investors a “look at the company through the eyes of management.” SEC Release No. 33-8056, 67 Fed.Reg. 3,746, 3,747 (Jan. 25, 2002), quoting SEC Release No. 33-6711, 52 Fed.Reg. 13,715 (Apr. 17, 1987). Management must determine whether an uncertainty is reasonable and likely to occur. If management cannot conclude that it is not likely to occur, management must assume that it will occur. The event must be described unless management determines that it is not reasonably likely to have a material effect on the company. On the other hand, disclosure of the MD&A is optional if management is anticipating “a future trend or event or anticipating a less predictable impact of a known event, trend or uncertainty.” SEC Release No. 33-8056, 67 Fed.Reg. 3,746, 3,747 n.8 (Jan. 25, 2002), quoting SEC Release No. 33-6835, 54 Fed.Reg. 22,427, 22,429 (May 18, 1989).

The SEC assumes that when a company has been identified as a potentially responsible party under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, the company has potential exposure with no defenses. In that case, the issuer must make the disclosure unless the issuer can reasonably conclude that a material effect is not likely to occur due to insurance, contribution from others, or joint and several liability. There is a significant problem when a potentially responsible party is innocent of liability. According to the SEC, management has an affirmative duty to assemble the information that is required for disclosure. Moreover, environmental disclosures are necessary in proxy solicitations to avoid being a target. In addition to Regulation S-K principles (see 17 C.F.R. §229.101, *et seq.*), the Securities Act of 1933 creates a private right of action against any person who

offers or sells a security . . . by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading. 15 U.S.C. §77l(a)(2).

The Securities Exchange Act of 1934 provides a similar private right of action for those injured by false or misleading statements. Rule 10b-5, 17 C.F.R. §240.10b-5, makes it unlawful for any person in connection with the purchase or sale of any security to employ any device, scheme, or artifice to defraud; to make any untrue statement of material fact, or to omit a material fact necessary in order to make the statement made, in light of the circumstances under which it was made, not misleading; or to engage in any act, practice, or course of business that operates or would operate as a fraud or deceit on any person.

XII. ACCOUNTING REQUIREMENTS

A. [9.49] Disclosure of Environmental Costs

Generally accepted accounting principles require accrual and disclosure of environmental costs in financial statements. The Financial Accounting Standards Board's (FASB) Statement of Financial Accounting Standards Codification (ASC) 450 mandates that a loss contingency shall be accrued by a charge to income, and the nature of the contingency is to be described if it is probable that a loss has been incurred and the amount of the loss can reasonably be estimated. "Probable" is defined in ASC 450 to mean "[t]he future event or events are likely to occur." ASC 450-10-20. If the contingency is only reasonably possible or the loss is likely but not reasonably estimated, the contingency need not be accrued but must be disclosed.

ASC 450 provides accounting guidance on the recognition, measurement, and disclosure of environmental cleanup liabilities to be reported on the company's financial statement. In addition, identification and verification as a potentially responsible party, the receipt of a Unilateral Administrative Order under §106 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §106, or participation in a remedial investigation and feasibility study, as well as the issuance of a record of decision, remedial design, and implementation of a remedy, are the benchmarks used to determine whether CERCLA liability is required to be disclosed. ASC 410-30-25-15.

B. [9.50] Sarbanes-Oxley Act

The Sarbanes-Oxley Act of 2002, Pub.L. No. 107-204, 116 Stat. 745, provides three categories of mandated action: certification; auditability; and disclosure.

Certification. The Act requires the chief executive officer and chief financial officer to certify financial statements. 18 U.S.C. §1350. The Act provides civil and criminal penalties for knowingly falsifying statements. *Id.*

Auditability. Companies must develop policies and procedures that are readily understandable, and third parties are required to attest to financial accounting controls. *Id.*

Disclosure. Companies must report financial results and material changes and corporate financial reports on material changes on a rapid basis. *See In re Caremark International Inc. Derivative Litigation*, 698 A.2d 959 (Del.Ch. 1996). This case was obviously decided before Sarbanes-Oxley, but the requirements of this case apply with added emphasis following the passage of the statute. The court held in a shareholder derivative suit that the company had a duty to establish a system to ensure a reliable and timely flow of information to senior management and to the board of directors concerning possible liabilities (including environmental liabilities) so as to facilitate informed and responsible decision-making.

C. [9.51] FIN 47

In March 2005, the Financial Accounting Standards Board adopted an interpretation of FASB Statement No. 143 that forces public companies to recognize and report contingent costs of

environmental compliance and cleanup of brownfield facilities and related equipment whether or not the company continues to own or use the brownfield site. FASB Interpretation No. 47 (FIN 47) and the Sarbanes-Oxley Act of 2002 are part of a clear trend to require more disclosure of environmental compliance and liability. According to FIN 47, companies are required to identify all conditional asset-retirement obligations (including environmental cleanup liability) on an asset-by-asset basis. Moreover, FIN 47 requires that companies must quantify and report that financial exposure as soon as the obligations arise, often requiring analysis at the time the company acquires, develops, or operates the asset under consideration. This reporting obligation not only involves large power plants and chemical facilities but also clearly applies to any asset (building or lot) with conditional environmental liability. Examples include costs of required asbestos remediation, mandated removal of underground storage tanks, removal or remedial actions pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 or the Illinois Environmental Protection Act, and mandated lead paint removal.

Failure to comply may result in Securities and Exchange Commission investigations or shareholders' suits. See *In re U.S. Liquids Securities Litigation*, No. H-99-2785, 2002 U.S. Dist. LEXIS 26713 (S.D. Tex. June 12, 2002). Directors and officers should be concerned for any number of reasons. Notably, the United States Fifth Circuit Court of Appeals enforced the environmental exclusion in a company's directors and officers liability insurance policy, leaving the directors and officers uninsured as to penalties and damages. See *National Union Fire Insurance Co. of Pittsburgh, PA v. U.S. Liquids, Inc.*, 88 Fed.Appx. 725 (5th Cir. 2004).

XIII. STORMWATER REGULATIONS

A. [9.52] In General

Stormwater, because it eventually finds its way into "waters of the United States," is regulated by the United States Environmental Protection Agency pursuant to the authorities provided in the Clean Water Act. Stormwater is defined in the regulations as "storm water runoff, snow melt runoff, and surface runoff and drainage." 40 C.F.R. §122.26(b)(13).

In the early 1990s, the USEPA promulgated its final rule applying its authority under the CWA to require stormwater discharges only in permitted situations. See 55 Fed.Reg. 47,990 (Nov. 16, 1990); 40 C.F.R. pts. 122 – 124. According to the rule, construction operations that disturb more than five acres and smaller construction operations that are part of a larger common plan of development both require a stormwater discharge permit. 40 C.F.R. §122.26(b)(14)(x). Permits under the CWA are described as "individual permits" (which are applicable to specific situations and the unique needs of the permittee) and "general permits" (which are prescribed for a large number of facilities with similar operations and discharges).

In addition, permit applications come in three different varieties: individual; group; and general. 40 C.F.R. §122.26(c). The individual application obviously is tailored to a specific situation and is often the costliest in terms of both time and money because the permit application requires a specific description of the individual activity for which there will be a discharge of stormwater. Multiple facilities under similar conditions may apply for a permit using a group application. However, construction applicants have not been authorized to make use of group applications because each site is unique. Finally, in those situations that are fairly generic, a general permit application process is available for specific activities.

In 1992, the USEPA issued what it termed as “base line construction general permits” for Phase I construction sites. The construction general permits (CGPs) require permittees to provide a notice of intent to the USEPA and to develop stormwater pollution prevention plans for their sites. 57 Fed.Reg. 41,176 (Sept. 9, 1992); 57 Fed.Reg. 44,412 (Sept. 25, 1992).

In 1995, the USEPA issued new rules that brought so-called Phase II stormwater sources (*i.e.*, construction sites that disturb less than five acres) into the stormwater permit program. 60 Fed.Reg. 40,230 (Aug. 7, 1995). See 40 C.F.R. §122.26(g). See also 60 Fed.Reg. 17,950 (Apr. 7, 1995). Those that disturb less than five acres as part of a construction program are now required to apply for a permit within 180 days after receiving notice of their status from the Illinois Environmental Protection Agency. In 1998, the USEPA published its proposal to require stormwater permits at construction sites that disturb between one and five acres of land. In order to avoid being inundated by permit applications, the USEPA provided that the owners and operators of those smaller construction sites are allowed to certify

1. that the construction activities will occur during a period when the predicted rainfall is expected to be low;
2. that annual soil loss is less than two acres per year at the site in question; and
3. that construction activities will occur in an area otherwise monitored by the USEPA to ensure water quality (as part of the total maximum daily load program). See 63 Fed.Reg. 1536, 1635 – 1636 (Jan. 9, 1998).

According to the USEPA, operators are required to obtain stormwater discharge permits for small construction activities (those that will result in the disturbance of between one and five acres of land or are part of a “common plan” of development that will have the same cumulative effect) and large construction activities (those that will result in the disturbance of five or more acres of land or are part of a “common plan” of development that will have the same cumulative effect). For more information, see www.epa.gov/greeningepa/epa-facility-stormwater-management.

In general, permits are organized into five components:

1. notice of intent requirements;
2. prohibition against discharging non-stormwater;
3. requirements for handling hazardous substances and releases that exceed reporting quantities;
4. the stormwater pollution prevention plan; and
5. site inspection requirements.

B. [9.53] General Permits

Construction general permits are the easiest and least intrusive means available to permit stormwater discharges. They involve providing a notice of intent to the United States Environmental Protection Agency or the Illinois Environmental Protection Agency to the extent that the IEPA has assumed responsibility for the National Pollutant Discharge Elimination System (NPDES) permitting in this state and filling out a fairly simple permit application to provide

1. the location of the construction site;
2. the names, addresses, and telephone numbers of the site owners/operators;
3. a description of the receiving waters;
4. an estimate of the area to be disturbed;
5. the expected frequency of stormwater discharges; and
6. an estimate of the beginning and ending dates of the project.

In addition, a CGP application must indicate whether there are any endangered or threatened species at the project. Applicants for a CGP must also develop stormwater pollution prevention plans otherwise approved by the Agency.

If an applicant qualifies for a CGP, the permit becomes operational two days after the postmarked date on a properly executed notice of intent to the Agency. Unless otherwise notified by the Agency, the permit continues through the course of the construction project up to a maximum of five years. Construction activities after five years require a new permit. See 63 Fed.Reg. 7,858 (Feb. 17, 1998).

C. [9.54] Individual Permits

A construction project requires an individual stormwater permit when the United States Environmental Protection Agency or the Illinois Environmental Protection Agency specifically determines that a discharge is contributing to the deterioration of water quality or is anticipated to be a significant contributor of pollutants to waters of the United States or when the discharge previously has been regulated under an individual permit. Individual permits require a great deal of information about the specifics of a site and project and are negotiated with the Agency. The application requires detailed information concerning the general characteristics, drainage patterns, and proposed pollution controls at any particular site. The Agency requires a map of the site, a specific description of the construction activity, and a description of the total area of the site that will be disturbed. In addition, the Agency looks for the applicant's proposed measures to control discharges during construction and proposed measures to control pollution from the stormwater discharges during construction. Also, the Agency requires a description of the expected volume of stormwater discharge, a description of the fill material and soil quality of the discharge, and a description of the receiving water.

XIV. WETLANDS

A. [9.55] In General

Wetlands are also regulated pursuant to the authority provided by Congress in the Clean Water Act, and accordingly, federal jurisdiction to regulate wetlands is also tied to the CWA's jurisdiction identified in the statute as "waters of the United States." The U.S. Army Corps of Engineers (Corps) and the United States Environmental Protection Agency each have a role in enforcing wetlands regulations pursuant to §404 of the CWA, 33 U.S.C. §1344.

Section 404 regulates the discharge of fill material into all "waters of the United States." According to the USEPA and the Corps, "wetlands" are described as

areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas. 33 C.F.R. §328.3(c).

In *Rapanos v. United States*, 547 U.S. 715, 165 L.Ed.2d 159, 126 S.Ct. 2208 (2006), the U.S. Supreme Court acknowledged the definition of a "wetland" but raised serious questions about federal jurisdiction under the CWA itself. Specifically at issue was the Corps' interpretation that "wetlands" include those areas (exhibiting soil, vegetative, and inundation criteria) that are also "adjacent" to "waters of the United States." The Court, in a complicated plurality decision, held that adjacency remained sufficient to impose CWA jurisdiction, as long as there was a rational, evidentiary, and scientific basis to conclude adjacency. Analysis of *Rapanos* and its remarkably confusing progeny is beyond the scope of this chapter. Suffice to say that the definition of a "wetland" remains unchanged, but the question of federal jurisdiction is even murkier following *Rapanos*. After years of uncertainty in applying the Court's decision, in 2015, under the Obama administration, the USEPA and the Corps took an expansive view of the meaning of "waters of the United States" with its *Clean Water Rule: Definition of "Waters of the United States,"* 80 Fed.Reg. 37,054 – 37,127 (June 29, 2015). Subsequently, the Trump administration interpreted "waters of the United States" more narrowly and withdrew the Obama-era clean water rule, replacing it with *The Navigable Waters Protection Rule: Definition of "Waters of the United States,"* 85 Fed.Reg. 22,250 – 22,342 (Apr. 21, 2020). Two years later, the Biden administration replaced the Trump administration's clean water rule with one of its own, interpreting "waters of the United States" to mean relatively permanent waters or waters that have significant connection to navigable waters. *Revised Definition of "Waters of the United States,"* 88 Fed.Reg. 3,004 (Jan. 18, 2023).

The U.S. Supreme Court again addressed the issue in *Sackett v. Environmental Protection Agency*, 598 U.S. 651, 215 L.Ed.2d579, 143 S.Ct. 1322 (2023). In a 5-4 majority opinion written by Justice Samuel Alito, the Court held that for wetlands to be considered "waters of the United States" they must be "indistinguishably part of a body of water that itself constitutes 'waters' under the [Clean Water Act]." 143 S.Ct. at 1339. In other words, a wetland must be connected to another water of the United States in order to be federally protected. Consistent with the previous challenges in defining this term, there were three concurring opinions differing in where the Justices would limit the CWA's reach.

In response to *Sackett*, the USEPA and the Corps released an updated final rule revising the definition of “waters of the United States.” 40 C.F.R. §120.2. Under the revised rule, “waters of the United States” includes only those adjacent wetlands that are “[r]elatively permanent, standing or continuously flowing bodies of water” and have a “continuous surface connection” to a separately covered water of the United States. 40 C.F.R. §120.2(a)(4)(ii). “Adjacent” is defined by the rule to mean “having a continuous surface connection,” although this is not further defined. 40 C.F.R. §120.2(c)(2).

After decades of litigation and rule changes resulting from shifts in political power, the only remedy to the constant ebb and flow of politics is for Congress to amend the CWA and clearly define its intended meaning of “waters of the United States,” a prospect that does not seem likely anytime soon.

The U.S. Department of Agriculture also has its own definition of “wetlands” as part of its “swampbuster” program (designed to encourage farmers not to fill wetlands at the risk of losing crop subsidies):

Wetlands are defined as areas that have a predominance of hydric soils and that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and under normal circumstances do support, a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions, except lands in Alaska identified as having high potential for agricultural development and a predominance of permafrost soils. Soil Conservation Service, U.S. Department of Agriculture, NATIONAL FOOD SECURITY ACT MANUAL (3d ed. 1988).

See also 16 U.S.C. §3801(a)(27).

Section 514.2 of the NATIONAL FOOD SECURITY ACT MANUAL (5th ed.) provides:

I. Wetlands. — Lands that have all of the following characteristics:

- (1) A predominance of hydric soils**
- (2) Are inundated or saturated by surface water or groundwater at a frequency and duration sufficient to support a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions**
- (3) Under normal circumstances support a prevalence of hydrophytic vegetation**

Note: Lands in Alaska identified as having a high potential for agricultural development and a predominance of permafrost soils are not considered wetlands for purposes of the Food Security Act (7 CFR Section 12.2).

See also 7 C.F.R. §12.2.

As anyone who has been involved in a wetland project knows, the Corps and the USEPA work in concert with the U.S. Fish and Wildlife Service. To that extent, the U.S. Fish and Wildlife Service also has its definition of a “wetland”:

WETLANDS are lands transitional between terrestrial and aquatic systems where the water table is usually at or near the surface or the land is covered by shallow water. For purposes of this classification wetlands must have one or more of the following: (1) at least periodically, the land supports predominantly hydrophytes . . . (2) the substrate is predominantly undrained hydric soil . . . and (3) the substrate is nonsoil and is saturated with water or covered by shallow water at some time during the growing season of each year. [Emphasis added.] [Footnotes omitted.] Lewis M. Cowardin et al., U.S. Fish and Wildlife Service, CLASSIFICATION OF WETLANDS AND DEEPWATER HABITATS OF THE UNITED STATES, p. 3 (1979), www.epa.gov/sites/default/files/2017-05/documents/cowardin_1979.pdf.

In January 1987, the Corps' Environmental Laboratory published its CORPS OF ENGINEERS WETLANDS DELINEATION MANUAL (MANUAL), also known as Wetlands Research Program Technical Report Y-87-1, <https://usace.contentdm.oclc.org/digital/collection/p266001coll1/id/4532>. The MANUAL is still considered the most authoritative treatment of wetlands and the permit process. The Corps attempted to revise the MANUAL in 1989, but, following political objections, returned to the guidance provided in the 1987 MANUAL. Within the MANUAL, the Corps has broadened the definition of “waters of the United States,” and hence the Corps' jurisdiction to regulate “wetlands,” to include

- a. The territorial seas with respect to the discharge of fill material.**
- b. Coastal and inland waters, lakes, rivers, and streams that are navigable waters of the United States, including their adjacent wetlands.**
- c. Tributaries to navigable waters of the United States, including adjacent wetlands.**
- d. Interstate waters and their tributaries, including adjacent wetlands.**
- e. All other waters of the United States not identified above, such as isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not a part of a tributary system to interstate waters or navigable waters of the United States, the degradation or destruction of which could affect interstate commerce. MANUAL, p. 2.**

The MANUAL also provides that some artificially created wetlands (called “man-induced wetlands”) may be subject to §404 of the CWA, 33 U.S.C. §1344. MANUAL, p. 82.

As with all environmental statutes, it is always critical to understand what is not regulated. In this case, the Corps has not accepted jurisdiction under §404 of the CWA for

1. irrigation and non-tiled drainage ditches excavated on dry land;
2. artificially irrigated areas that would revert to upland if the irrigation ceased;
3. artificial lakes or ponds created by excavation that are used exclusively for stock watering, irrigation, settling ponds, or rice growing;

4. artificial reflecting ponds or swimming pools or other small ornamental bodies of water;
5. water-filled depressions created on dry land incidental to construction activity; and
6. prior converted crop land. 33 U.S.C. §1344(f); 33 C.F.R. §323.4.

In 2001, the U.S. Supreme Court analyzed an Illinois wetland case, *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 148 L.Ed.2d 576, 121 S.Ct. 675 (2001) (*SWANCC*). In *SWANCC*, depressions in the soil had been created by mechanical operations on site. Those depressions filled with water and eventually qualified as isolated wetlands (*i.e.*, they had hydric soils, hydrophytic vegetation, and inundation). When the owner tried to fill those areas without a permit, the Corps objected. On appeal, the Corps argued that it had authority to regulate isolated wetlands under the Commerce Clause (U.S.CONST. art. I, §8, cl. 3) to the extent that migratory birds in interstate commerce occasionally used those sites. The U.S. Supreme Court struck down the Corps' "Migratory Bird Rule" as a justification for its jurisdiction.

Following *SWANCC*, we now know that there are such things as "isolated wetlands," but the Supreme Court did not provide a criterion to define them. The Supreme Court was more interested in its Commerce Clause analysis than in analyzing the substance of the dispute. Thus, the only way to determine whether a wetland is an isolated wetland beyond the Corps' jurisdiction is to ask the Corps for a formal jurisdictional determination.

Moreover, the Corps has not really modified its approach to wetland regulation, probably because the Court in *SWANCC* analyzed the Commerce Clause and did not define an "isolated wetland." See the memorandum of January 19, 2001, issued by USEPA General Counsel Gary S. Guzy and USACE Chief Counsel Robert M. Andersen. In response to *SWANCC*, local governments immediately passed ordinances taking jurisdiction over local isolated wetlands. See, *e.g.*, Lake County Watershed Development Ordinance, Article 10, as amended July 11, 2023.

The premise behind requiring permits for filling wetlands is based on the CWA's proscription against discharges into "waters of the United States." That is, any discharges into waters of the United States are prohibited unless a permit is provided by the agencies involved. Interestingly, there is no proscription against excavating or draining a wetland. See *National Mining Ass'n v. U.S. Army Corps of Engineers*, 145 F.3d 1399 (D.C.Cir. 1998) (discussing "Tulloch Rule," derived from *North Carolina Wildlife Federation v. Tulloch*, No. C90-713-CIV-5-BO (E.D.N.C. 1992)). That is, properly draining a wetland may not be regulated, although filling it is.

B. [9.56] Wetland Delineation

As the definitions noted in §9.55 above indicate, there are three basic criteria for a wetland:

1. hydrophytic vegetation;
2. hydric soils; and
3. wetland hydrology.

“Hydrophytic vegetation” is defined as “[t]he sum total of macrophytic plant life growing in water or on a substrate that is at least periodically deficient in oxygen as a result of excessive water content.” CORPS OF ENGINEERS WETLANDS DELINEATION MANUAL, p. A6. “Hydric soils” are soils that are “saturated, flooded, or ponded long enough during the growing season to develop anaerobic conditions that favor the growth and regeneration of hydrophytic vegetation.” MANUAL, p. A5. “Wetland hydrology” (the area of most serious contention) is defined as “[t]he sum total of wetness characteristics in areas that are inundated or have saturated soils for a sufficient duration to support hydrophytic vegetation.” MANUAL, p. A14. An area has wetland hydrology “if it is inundated or saturated to the surface continuously for at least 5% of the growing season in most years ([with a] 50% probability of recurrence).” MANUAL, p. 30.

C. [9.57] Wetlands Permits

Wetlands permits, like stormwater permits, come in three varieties:

1. individual permits;
2. nationwide permits; and
3. regional general permits. 33 C.F.R. pt. 330.

Individual permits are required for projects considered large in scope and involving potentially conflicting issues in environmentally sensitive areas; they are also often required for projects involving navigable waters.

Nationwide permits are a form of general permit used to authorize specific activities determined to have no more than minimal impact on the aquatic environment. There are 44 existing nationwide permits, the most important of which are for

1. repair or replacement of existing structures (Nationwide Permit No. 3);
2. outfall structures and maintenance (Nationwide Permit No. 7);
3. backfill for utility lines, including intake and outfall structures (Nationwide Permit No. 12);
4. bank stabilization (Nationwide Permit No. 13); and
5. minor road crossings (Nationwide Permit No. 14).

See 67 Fed.Reg. 2,020 (Jan. 15, 2002).

Regional general permits are authorized for activities identified within an individual U.S. Army Corps of Engineers’ district that are similar in nature and have been found to cause only minimal individual and cumulative environmental impact within a geographical area (such as county or a watershed) or within the boundaries of the district. Each of the Corps’ regions has developed its own set of regional permits, which can be obtained from the region in question.

In the event that a wetland permit is obtained, it will not be without some consequence. That is to say, the stated policy is to have “no net loss” associated with the nation’s wetlands inventory, and to the extent that a permittee is allowed to fill a wetland, the developer must compensate for the loss of that wetland by purchasing a wetland credit pursuant to a formula established for that activity by federal, state, or local authorities. The formulas range from replacing 1.5 to 5 acres for each 1 acre of filled in wetland, depending on various factors.

The Corps also permits “wetland mitigation banks” that supply and sell wetlands credits to developers within a watershed. The price for an acre of wetland credit is market driven. For more information, see United States Environmental Protection Agency, *Mitigation Banks under SWA Section 404*, www.epa.gov/cwa-404/mitigation-banks-under-cwa-section-404.

XV. ENVIRONMENTAL CONSULTANTS

A. [9.58] In General

It is difficult to make any broad recommendations on environmental consultants simply because the scope of the consultation and the needs of clients vary in almost every transaction. It is also difficult to make any recommendation concerning consultants because there is no such thing as a full-service environmental consultant, no matter what any such consultant may say. Rather, it is always important to recognize who the clients are and what the purpose of the consultation is. For example, when representing the seller or the owner, the focus may be on proactive compliance with regulatory activities in the current operation, which is an entirely different focus than in a proactive consultation in anticipation of a sale. When representing buyers and lenders, the issues are somewhat more focused in that caveat emptor still governs Illinois real estate transactions, and the proper purpose of an environmental consultation is simply to gather information and assist the clients in quantifying environmental liability risks. Those risks can come in the form of liability issues associated with the ownership of real property as well as a review of the compliance status of the seller’s operations at the site. Again, regulatory issues must be distinguished from environmental cleanup liability issues under the various environmental laws and programs. There are few, if any, consultants or scientists who can analyze compliance with regulatory concerns and also quantify environmental risks associated with environmental cleanup laws.

Also, it is critical to recognize that lawyers practice law and consultants should not. For example, many consultants use the words “liability” or “contamination” gratuitously. Both words have primary legal significance when the focus is quantifying legal risks. To a scientist, “contamination” means merely “presence” at some concentration greater than the expected background concentration for that particular compound. In addition, many consultants analyze “liability” without ever referring to the statutory or regulatory principles that apply to “owners or operators” or the like. Therefore, lesson number one is to recognize that environmental analysis is ultimately a legal question that deserves legal analysis by a lawyer, with the consultant providing verifiable, admissible scientific facts to analyze.

B. [9.59] Selecting a Consultant

As noted in §9.58 above, there is no such thing as a full-service environmental consultant. Consultants specialize in geology, air, water, soil removal, asbestos, etc., and the best way to select

an environmental consultant is to determine the consultant's experience and check the consultant's reputation with other lawyers in the community. It should also be recognized that consultants come from a wide variety of disciplines, including engineering, chemistry, geology, hydrogeology, industrial hygiene, biology, and soil science. It is important to ensure that the consultant's qualifications match the client's project.

Counsel should become extremely familiar with the consultant's insurance program. Deductibles, most of which are remarkably high and may not be available to the client's project in the event of errors or omissions by the consultant, should be noted. In those cases, the attorney should negotiate an appropriate indemnification or move on to another consultant.

Each consultant has his or her own method and manner of accepting work, usually using some form of a standard proposal. Any such standard proposals should be reviewed in detail and marked up. Also, it should be recognized that there is no national licensure for a consultant and that there are many consultants who operate without much in the way of training.

The consultant should be asked for a list of recent work (environmental assessments as part of real estate transactions or environmental compliance audits). In real estate transactions, consultants should be asked for a representative copy of their Phase I or Phase II reports and resumes of all of those who will be working on the project. References are always helpful.

It should be kept in mind that consultants are independent contractors and that the client may wish to have control over the use of the subcontractors. In addition, the following topics need to be considered in negotiating a scope of work on behalf of a client with an independent contractor consultant:

1. preparation and preservation of samples;
2. performance of reporting;
3. the consultant's handling of another party's intention to use the report;
4. the consultant's position with regard to so-called "reliance" letters;
5. ownership and maintenance of the documents and whether the report is work for hire;
6. the terms of confidentiality required by the client in the project (Generally, consultants should keep all of the information confidential, especially information received from the client as well as the substance of any reports, tests, analyses, recommendations, or advice that the consultant gives to the client in connection with the service provided under the agreement. In addition, the consultant needs to recognize that he or she is working for counsel and the client and not "Mother Nature.");
7. the exact scope of services requested;

8. maintenance of access to the property;
9. suspension of the work by the lawyer on behalf of the client;
10. suspension of performance by the client upon verbal or written notice to the consultant;
11. performance of amendments and termination;
12. disposal of the waste that is generated during the investigation;
13. the specific time limitations for the project;
14. no assignment of work by the consultant;
15. the governing law and venue;
16. notices;
17. a representation by the consultant that there is no conflict of interest currently and that the consultant will not use the data generated or the information gathered in any subsequent activity for any other person or client;
18. the fact that time is of the essence;
19. an approved health and safety plan; and
20. use by the consultant of only treatment, storage, or disposal facilities that have been properly permitted, licensed, and approved by the federal and state agencies involved.

The consultant can also be asked to provide a description of his or her expertise, his or her licenses, permits, and certificates, and the standard of care to be employed as well as a representation and indemnity to perform his or her activities in compliance with all federal, state, and local laws and regulations. In the event that an indemnity is negotiated, it should be made clear that the indemnity must survive the performance of the work, and the financial viability of the firm should be checked through a Dunn & Bradstreet report.

With regard to insurance, counsel should verify that the contractor has workers' compensation insurance in the statutory amount and commercial general liability insurance covering bodily injury and property damage. Counsel should also make sure that there is comprehensive business automobile insurance, and if wastes are transported, an MCS-90 endorsement should be sought. Also, professional liability errors and omissions insurance and/or an umbrella liability policy is recommended.

To the extent that insurance is available, any rights of subrogation against the client should be stricken, and the client should be named as an additional insured. Also, to the extent subcontractors are used, the subcontractors should also carry the same insurance. Finally, verification should be sought from the insurance company that the client will receive notice of termination of the insurance.

XVI. PHASE I ENVIRONMENTAL ASSESSMENT

A. [9.60] Attorney-Client Privilege

The purpose of the attorney-client privilege is to protect the confidential relationship between the lawyer and the client. The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made is a member of the bar and acting as a lawyer in connection with the communication; and (3) the communication relates to a fact of which the attorney was informed by the client, not within the presence of strangers, and for the purposes of securing primarily (a) an opinion on the law, (b) legal services, or (c) assistance in some legal proceeding, and not for the purposes of committing a crime or a tort. In addition, the privilege may not have been claimed and then later waived by the client.

To the extent that the lawyer contracts for a consultant's report on behalf of the client, the report may be privileged. The environmental assessment must be conducted for the purposes of obtaining legal advice.

It should be kept in mind that the attorney-client privilege can be waived by the failure to maintain the confidential nature of the communication.

B. [9.61] Other Potential Privileges

The work-product doctrine applies only if an audit or assessment was prepared in anticipation of litigation. Also, while not recognized in Illinois, there is a privilege in some federal jurisdictions identified as the self-critical analysis privilege. That privilege is based on public interest considerations but has been rejected in at least one case involving an environmental assessment. *See United States v. Dexter Corp.*, 132 F.R.D. 8 (D.Conn. 1990).

C. [9.62] Illinois Environmental Audit Privilege

Several states have provided their own statutory environmental audit privilege. In Illinois, the privilege formerly found at 415 ILCS 5/52.2 was repealed as of August 12, 2005.

XVII. [9.63] INCOME TAX CONSIDERATIONS INVOLVING ENVIRONMENTAL CLEANUP COSTS

The Internal Revenue Code, 26 U.S.C. §1, *et seq.*, does not provide the taxpayer with any specific guidance on whether environmental costs can be deducted or capitalized. Therefore, the basic rules otherwise applicable to deductions (26 U.S.C. §162) and capitalization (26 U.S.C. §263) apply. In order to be deductible, §162 requires that the expense be "ordinary and necessary" in the year it is incurred. The IRS has promulgated Treas.Reg. §1.162-4, which provides that incidental repairs that neither materially add to the value of the property nor appreciably prolong its life, but keep it in an ordinarily efficient operating condition, are currently deductible. However, replacement parts, which are designed to stop deterioration and appreciably prolong the life of the property, must be capitalized. *Id.* Treas.Reg. §1.263(a)-1(b) specifically denies a deduction for

expenditures that are designed to increase the value of the property or to restore the property to the extent that the depreciation allowance was previously allowed. In other words, capitalization is required to the extent that the expenditure adds value to or substantially prolongs the useful life of the property or adapts the property to a new and different use.

Previously, the IRS, in Rev.Rul. 94-38, 1994-1 Cum.Bull. 35, permitted taxpayers to deduct the cost of remediating soil and groundwater contamination notwithstanding the type of contamination and whether the remediated land was used in the taxpayer's business, was left idle, or belonged to someone else. Rev.Rul. 98-25, 1998-1 Cum.Bull. 998, held that costs to replace underground storage tanks containing waste byproducts are ordinary and necessary expenses and deductible in the year in which they are incurred. Rev.Ruls. 94-38 and 98-25 provided a safe harbor to protect taxpayers seeking to deduct environmental cleanup costs.

However, the IRS has issued two other Revenue Rulings on the deductibility of cleanup expenses. Under Rev.Ruls. 2004-17, 2004-1 Cum.Bull. 516, and 2004-18, 2004-1 Cum.Bull. 509, taxpayers may no longer deduct the cost of cleaning up hazardous wastes that were generated in a manufacturing operation. Instead, these costs must now be capitalized and included in inventory. According to the IRS, waste removal expenses are indirect costs of production, and pursuant to Code §263A and the regulations thereunder, these expenses must be capitalized as part of inventory costs.

In addition, the cost of replacing USTs also must be included in inventory because these costs are incurred as part of the production process. According to the IRS, the prior rulings failed to address the treatment of cleanup expenses as inventory costs under §263A. According to the IRS, the earlier focus was on whether such costs were capitalized expenditures or necessary repair expenses. Now the IRS states:

As with other types of deductible business costs, such as labor costs, taxes, rent, and supplies, once repair costs are determined to be deductible . . . a taxpayer with inventories must still apply the rules of §263A to determine whether the repair costs must be included in inventory. . . . In addition, if repair costs must be capitalized . . . to a depreciable asset, a taxpayer with inventories must still apply the rules of §263A to determine whether the depreciation expense must be included in inventory. [Citations omitted.] Rev.Rul. 2004-18.

Notwithstanding the later rulings, the IRS continued to allow cleanup costs taken as deductions in all years ending on or before February 6, 2004, to remain deductible. *Id.*

Interestingly, the IRS makes no distinction between land that was contaminated by the taxpayer and land that was already contaminated when acquired.

In the case of asbestos, the IRS recognizes two alternatives involving encapsulation removal. In Tech.Adv.Mems. 9240004 (Oct. 2, 1992) (the equipment ruling) and 9411002 (Mar. 18, 1994) (the building ruling), encapsulation was determined to be deductible and removal capitalized.

The tax treatment of legal fees is based on the judicially created test that focuses on the origin of the claim. *See United States v. Gilmore*, 372 U.S. 39, 9 L.Ed.2d 570, 83 S.Ct. 623 (1963). That is, if the legal expenses arose in connection with a capital transaction, then the legal expenses would be capitalized. On the other hand, if such expenses arose in connection with a deductible expense, then the legal fees would be deductible. Taxpayers should be able to deduct legal fees incurred in connection with remediation when the origin of the claim is determined to be not the remediation itself, but rather a defense of the taxpayer's trade or business.

The Internal Revenue Code does not provide any deductions for any government-ordered fines or penalties resulting from a violation of the law. On the other hand, if the penalty is compensatory or is imposed to encourage prompt compliance, it is not similar to a criminal fine and may be deductible. If the particular statute and the legislative history associated with it describe the penalty in terms of punishment, then the fine is not likely to be deductible. On the other hand, if the penalty is designed not as punishment but as a means to ensure compliance, then the expense may be deductible.

XVIII. [9.64] INSURANCE PRODUCTS RELATED TO ENVIRONMENTAL LIABILITY

All of the commercial general liability (CGL) policies currently being issued contain what has been described as the "absolute pollution exclusion." Earlier policies either had no exclusion for environmental contamination or had coverage for "sudden and accidental" pollution. A detailed analysis of insurance coverage is beyond the scope of this chapter, but suffice to say that policies that contain no exclusion for pollution, or that contain an exception for "sudden and accidental losses," should be analyzed carefully under state law. The absolute pollution exclusion currently being issued has been upheld in Illinois, but it should be recognized that, in some commercial contracts, insurers provide an endorsement (albeit, under limited circumstances) for contamination-related expenses.

Sometimes environmental insurance can be used as a way to make difficult deals happen. It is often the case that a buyer will only be able to buy property "as is" with an indemnification from the seller for historical contamination. If the seller will not provide it, the parties are at loggerheads even if the buyer qualifies as a bona fide prospective purchaser. The buyer may still be concerned about environmental claims associated with preexisting contamination that crop up after acquisition. For example, whether meritorious or not, a buyer of contaminated property could be on the receiving end of a third-party claim under tort theories (trespass, nuisance, negligence) related to preexisting contamination. There could also be newly discovered contamination, not identified during the pre-acquisition Phase I or Phase I investigations, that could give rise to a new governmental claim. Moreover, there could be new releases of contamination after acquisition of the property.

For these types of claims, pollution legal liability (PLL) insurance can add a layer of additional protection. PLL insurance is often sought out in these cases because a buyer cannot rely on its CGL policy. CGL policies exclude environmental claims from coverage. In seeking out PLL coverage, it is important to work with both a broker who has experience in environmental insurance and environmental counsel. Insurance companies will review all Phase I and II reports, and other

relevant environmental information developed during due diligence, when quoting a policy of coverage. The cost of insurance will vary significantly, based on the facts and circumstances. PLL insurance is available for liability claims subsequently made by third parties for off-site bodily injury, property damage, and cleanup costs caused by contamination from the acquired property.

There is also insurance for financial institutions that provides coverage for the risk of holding nonperforming loans secured by contaminated property. In addition, “stop-loss” insurance is available that combines environmental remediation insurance with self-insurance when the policyholder and the insurance company agree on an estimated cost for remediation for known contamination.

Contingent contractors insurance coverage protects buyers from liability arising from errors or omissions on the part of the environmental contractor. Directors and officers pollution insurance provides coverage for pollution-related claims against the directors and officers for the wrongful acts of those individuals that lead to contamination. There are also insurance policies directed specifically at asbestos-related risks that are negotiated and available at fairly significant premiums. Additionally, there is coverage specifically targeted at brownfields redevelopment activities.

Insurance companies also provide endorsements to general liability insurance policies to modify the pollution exclusion found in the standard policies. One such endorsement allows limited third-party pollution liability coverage for sudden (72-hour) incidents occurring above ground and migrating off site. Another endorsement is available to provide coverage for environmental harm to a landlord for the tenant’s operations. Note that most of the current policies provide for what is described as the “divested property exclusion,” which provides that coverage ceases upon the subsequent sale or divestment of the property.

In addition, standard policies of insurance often provide some of the following exclusions:

- a. contamination that occurs before and after the policy’s inception or before an earlier retroactive date;
- b. contamination discovered during the policy period for which no claim is asserted;
- c. claims by third parties for property damage, bodily injury, or personal injury;
- d. remediation of certain property (*e.g.*, adjoining property or groundwater at a specific property);
- e. defense costs incurred in defending against governmental or third-party claims;
- f. consequential or economic damages (lost profits, stigma damages, lost marketability) unless a loss of revenue endorsement is specifically purchased;
- g. fines and penalties;

- h. punitive damages;
- i. natural resource damages under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980;
- j. contamination arising from storage tanks;
- k. contamination arising from certain types of contaminants (*e.g.*, asbestos, petroleum, lead, and radioactive waste) unless specific coverage is purchased for those losses;
- l. liability arising from certain types of activities or operations on or off the property;
- m. liability arising from failure to comply with applicable environmental laws, regulations, ordinances, directives, and orders;
- n. liability arising from post-inception changes in applicable law;
- o. liability assumed by the policyholder under a contract;
- p. claims by one insured against another insured under the policy;
- q. environmental liabilities for which the insured may be liable under workers' compensation, unemployment compensation, or disability benefit laws;
- r. personal injury to employees during the course of their employment;
- s. contamination related to the operation of automobiles, aircraft, or watercraft;
- t. contamination at or emanating from offshore facilities;
- u. contamination at or emanating from an inactive or closed site;
- v. contamination related to an insured's product or completed operations; and
- w. mold and rot.

10

Due Diligence for Leases on Commercial Properties

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I. [10.1] INTRODUCTION

Performing due diligence on leases for the potential acquisition or lease of a commercial property requires some understanding of the various types of leases. The underlying “norm” for each type of lease must be examined in light of the client’s needs and its willingness to accept or ability to negotiate such terms in the current economic climate. Whether representing a purchaser reviewing existing leases for a transaction or a landlord or tenant negotiating a prospective lease, the practitioner must understand that the current economic environment will dictate the “norms” that impact the economic analysis of a property. Difficult economic times will present opportunities for creative lease structures that allow the practitioner to present viable alternatives that reflect a changing environment. From the standpoint of a purchaser of a leased property, difficult economic times may cause tenants to request lease modifications after the change in ownership. In a purchase transaction, leases should therefore be analyzed against current and projected market information so that a purchaser does not expect (and pay for) an income stream that will not materialize in the long term. While this chapter focuses on the representation of clients performing due diligence in connection with the purchase of a leased property, many of the topics contained herein are applicable to tenants and landlords performing due diligence in connection with their negotiation of a prospective lease and can therefore be analyzed accordingly. In any event, the issues that need to be investigated vary depending on the type of lease and property involved.

For example, while the leases in most apartment buildings are relatively straightforward (based on forms that are not heavily negotiated), they still must be reviewed for compliance with local landlord-tenant ordinances (*e.g.*, §5-12-170 of the Chicago Residential Landlord and Tenant Ordinance requires that a copy of a summary of the ordinance be attached to each rental agreement; see generally Chicago Municipal Code, Ch. 5-12) and provisions that would allow early termination or provide for special concessions or options, each of which would impact the income stream of the property. In addition, if tax credits or certain other specialized finance programs designed to assist low-income residents were used, there may be material limitations on what the client can subsequently do with the property and specific clauses required to be in the leases. Certain property tax incentives involving low-income multifamily dwellings require the reporting of rent levels and certain tenant information (among other requirements) in order for such projects to obtain or maintain their incentive status. Properties falling into these categories should be examined carefully to ensure they have met and will continue to meet such requirements.

Hotels typically have leases with retail and service entities that cater to the needs of their traveling clientele — coffee shops, restaurants, sundry/souvenir/convenience shops, laundry facilities, auto rental facilities, and business centers. Because the lack of any of these tenants in a local marketplace (particularly restaurants or car rentals) can be fatal to the hotel operator, the terms of some of these leases may be quite favorable to the tenants. It is not unheard of for the hotel operator, under a separate document, to enter a joint venture arrangement for restaurant operations because the restaurant food service provider is often the same entity that provides room service to the hotel guests.

Multi-tenant facilities work differently than single-tenant properties. In a multi-tenant property, the landlord typically retains some building and common area maintenance, repair, and replacement responsibility, although the degree of the landlord’s obligations can vary. See §10.6 below

regarding triple net leases. This is the most practical way to manage the areas not leased to tenants as few tenants would be interested in assuming these responsibilities in connection with leasing a portion of a building. To compensate the landlord for performing duties with respect to the common areas, many commercial leases will provide that the landlord receives a management fee (although the rate is not usually specified, rates typically range between 3 and 5 percent of gross rents) and/or an administrative fee (between 5 and 15 percent).

Multi-tenant retail, office, or industrial buildings typically present the most challenging due diligence reviews. In most sophisticated projects, the lease forms are lengthy (between 20 and 65 pages) and can be heavily negotiated depending on the size and negotiating strength of the tenants. A line-by-line read-through of each lease is recommended, if not required, due to the complexity and non-form-based nature of these leases, although even a preprinted “form” can be easily modified through the use of a computer, making changes not readily discernable. This process can be an expensive proposition for a client, given that not only must a rent roll be prepared or confirmed but a legal analysis of the leases must be performed as well. For this reason, due diligence on larger projects is often split between client and attorney, with the client assuming all responsibility for confirming economic and rent roll items and the attorney assuming responsibility for the remainder of the review. In this instance, the attorney’s role is limited more to legal issues, such as (a) identifying where the landlord’s obligations to the tenant diverge from the client’s underlying assumptions about its economic obligations in connection with the project based on the type of lease used; (b) determining instances in which the income stream is interrupted, whether by early termination or other rent abatement situations that are not covered by insurance; and (c) identifying controls by the existing tenants or external factors that could limit or prevent the client’s execution of its future plans for the property.

It is, therefore, critical to real estate clients that the attorney learn to “think like a developer” during the review of these leases, as the project in existence at the time of purchase may have little to do with the possibilities the client sees in its acquisition. Issues that need to be explored with the client include whether the property will be modified in any way, either through redevelopment (construction involving additions, deletions, and modifications to the existing property), the addition of more land that might be cross-easemented with the property in question, etc., or re-tenanting or “de-malling” of the property, because it is not uncommon for more sophisticated tenants (or restrictions of record) to put limitations on these types of activities or to otherwise prevent them from changing the existing character, or tenants, of the property. See; Tim Schooley, *The ‘de-mallification’ of America: when a mall simply isn’t enough*, The Business Journal: Pittsburgh Business Times, www.bizjournals.com/pittsburgh/stories/2001/06/18/focus4.html (Jun 18, 2001) (subscription required) (describing the term “de-malling” as a slang verb that came about due to consumers no longer supporting the typical mall concept). The attorney’s goal is to make sure the client understands the risks attendant to its future plans for the property, given the terms of the existing lease provisions. Even then, a landlord can later be faced with the possibility (and current reality) of a tenant renegotiating a lease based on the current economic environment, forcing the landlord to modify current lease terms or risk losing a tenant on the brink of failure. In this case, both landlord and tenant begin to focus more on the short term by negotiating a balance between locking in lease terms more favorable to the tenant to ensure its survival and providing the landlord with an ability to obtain a more “normalized” income stream in the longer term. In addition to reviewing documentation concerning the tenant’s financial health, interviews with current tenants can help a prospective purchaser ascertain the strength of a tenant’s operations and therefore the likelihood of a post-purchase lease modification request.

Industrial tenant leases, particularly single-tenant properties, do not usually present the lease issues found in multi-tenant situations. In single-tenant building situations, the tenant often has assumed the responsibility for structural maintenance and repair (including the roof), and the issue of future development by the landlord often is not applicable, except perhaps in the context of an industrial park or the future needs of the tenant. Occupants of single-tenant properties normally tend to be more concerned about expansion, the ability to make building modifications as necessary to accommodate manufacturing requirements, and operational concerns such as ceiling height, number and type of loading docks, and number, type, and layout of parking spaces. In today's climate, subleasing provisions may be given more attention as tenants struggle to fill their overcapacity in an effort to make timely master lease payments. A tenant faced with this prospect will again need to negotiate a balance between its short-term survival and its ability to expand into its current structure when appropriate — again, an issue for a prospective landlord. The job of the attorney in the above instances is to confirm that the lease is financeable because the client is typically more concerned with the credit quality of the tenant as that is often the major consideration in the underwriting of the loan.

Any reference to a “standard” lease form is inaccurate; there is no such thing, although lease forms in a particular genre tend to have much in common, especially on key economic obligations. The attorney should strive for a general familiarity with the different underlying structures of the various types of leases and keep in mind that most of the value in a commercial piece of property (or potential value to a tenant, and thus to the client) is in the leases. As discussed above, it is important to explore with the client all potential scenarios for the property so the leases can be effectively reviewed with those goals in mind.

For samples of some of the lease forms discussed in this chapter, see *COMMERCIAL LANDLORD-TENANT PRACTICE* (IICLE®, 2023).

II. UNIVERSAL DUE DILIGENCE ISSUES

A. [10.2] Potential Interruptions in the Income Stream

First and foremost, the attorney needs to identify potential interruptions in the income stream of the property that impact the client's economic plans. This includes not only noting free or reduced rent clauses but also spotting variances from what is typical based on the type of lease being reviewed. A critical function of the due diligence process is to determine whether the amount of the income stream to which the cap rate is being applied is supported or whether there are clauses in the leases that will reduce the overall income stream. The foregoing analysis is also crucial to an ad valorem real estate tax valuation of the subject property. Decreased rent and other concessions can impact the income capitalization approach to value and, therefore, the taxes payable.

Typically, fewer abatement clauses or termination rights are found in ground leases and bond-type leases because in both instances the tenant is placed in exclusive control of the property. In a ground lease, usually only the land is being leased to the tenant, so once any landlord's work is complete, the landlord's obligations to the tenant are so limited that the potential for the landlord to interfere with the tenant is greatly reduced. Once the land is tendered to a tenant, it is thereafter

rarely considered untenable under this type of lease. Although the condition of the improvements on the land may prevent occupancy, the responsibility for maintenance, repair, replacement, and restoration lies with the tenant under a ground lease. During this period, the tenant still retains possession and control of the land — hence the lack of rent abatements. A similar line of reasoning is followed in bond-type leases, the intent being to reduce the rental income stream under the lease to the equivalent of a corporate bond, unaffected by the universe of real estate risks typically found in leasing situations. The norm becomes making sure that such real estate risks result in required purchases of the property, including retirement of outstanding debt sufficient to pay yield maintenance and/or prepayment premiums. These types of “puts” of the property to the tenant are the exit strategy used by the landlord and lenders in this deal structure. As an aside, while a discussion of synthetic leases is beyond the scope of this chapter, for due diligence purposes, the attorney generally should expect such leases to look much more like bond-type leases than net or even ground leases because the obligations in synthetic leases parallel those of a borrower under loan documents. As a result, there are few, if any, abatement situations under synthetic leases.

In triple net lease situations, the landlord usually purchases rental interruption insurance. Net leases often allow the landlord to obtain this insurance (and hopefully will be well enough drafted for the landlord to recapture its cost from the tenants). The attorney should look for language that states that the landlord may carry not only the specific coverages described, if any, but also such additional types of coverages, and in such amounts, as the landlord deems appropriate. After the events of September 11, 2001, this became more important than it once was as the number of lenders requiring terrorism coverage has greatly increased. In addition, well-drafted triple net leases require the tenant to obtain business interruption coverage (an adjunct to property damage insurance coverage) to ensure that the tenant has insurance coverage to pay its rent under the specific instances in which the landlord’s policy will not cover an abatement but the tenant cannot operate and has incurred a property damage loss. It is customary in sale-leasebacks, bond-type leases, and synthetic leases (and sometimes ground leases), especially with single-tenant properties, for the tenant to be required to maintain the rental interruption insurance typically purchased by landlords in triple net lease situations. This coverage is required to ensure that there are always funds available for the payment of rent. Lenders usually insist on the owner or borrower (or, if applicable, the tenant) obtaining the coverage. A coverage period of one year is typical, although the attorney should confirm that the client’s lender does not require a longer period (loan document boilerplate may contain an 18- or 24-month requirement). Any shortfall between the requirements of the lease and loan documents generally must come from the owner’s cash flow (its own pocket), another economic decision a client must analyze in determining net cash flow and whether the purchase price of the property is justified.

Triple net leases present the most challenges in determining how much economic risk the landlord is assuming. Through the use of variations on the triple net theme, the income stream to the landlord can be severely restricted. In addition, by means of commonly negotiated limitations to pass-through clauses, tenants often limit what can be passed through under the various expense provisions of the lease. Finally, there are numerous negotiated provisions that operate to truncate the term of the lease or, in specific instances (under if-then scenarios relating to the leasing of multi-tenant properties), can result in the abatement of the minimum rent and/or conversion of the rent paid to some alternate amount. The latter rights are often used in conjunction with termination rights if the conditions triggering the abatement of rent are not remedied.

Finally, the COVID-19 pandemic brought new challenges to both prospective leasing and the interpretation of existing leases. Most lease clauses governing the foregoing topics do not specifically cover these events and the business/rental interruptions resulting from the COVID-19 pandemic. Practitioners have looked to typically broader sections referencing business/rental interruption, force majeure, or other potentially relevant provisions for assistance in dealing with COVID-19 issues. In connection with these clauses, it should be noted that rental interruption and business interruption insurance should be reviewed carefully to ascertain whether coverage is even possible under these circumstances prior to any party relying on such coverage to replace rental or business income. See §10.21 below for a discussion on go dark clauses in terms of whether a COVID-19 shutdown would trigger such provisions.

B. [10.3] Client's Future Plans and Zoning, Parking, Building Code, and Business License Issues

Other global issues that must be addressed at the outset include those relating to the client's future plans for the property, such as parking, zoning, building code, and business license issues. Zoning laws and regulations set forth parking and other development requirements and/or conditions. While zoning issues often require the assistance of local counsel, there are certain general issues that clients and their attorneys can address. The attorney also should review title documents for issues that might interfere with the client's overall plan for the property by imposing restrictions or conditions on development (*e.g.*, size, approvals over architectural appearance, parking, etc.).

Parking deserves special mention because of its importance with respect to due diligence. Parking can be a multimillion-dollar problem to solve and even a non-starter if it cannot be obtained under existing zoning ordinances or through variances. If a use conversion is intended for the property, the client must know whether that change in use can be implemented within the confines of the existing property lines. For instance, if the client intends to convert an industrial facility into a retail property, is the parking sufficient? The same question must be answered if the client's plans include expansion of the property or if the ultimate intended use of the property, while within the same category, nonetheless would require more parking. Restaurants are a prime example of a use that, while considered to be commercial (or a hybrid of retail), may require more parking under zoning regulations. In addition, if the client intends to provide parking, or parking is currently provided, through cross-easement agreements with adjoining parcels under separate ownership, methods of calculating compliance with parking ratios can differ from location to location. Many leases, particularly those of larger, more sophisticated tenants, require that parking ratios not be reduced below a certain level or that increased parking ratios (often higher than those required by code) be maintained if specific types of uses exist at the property. Restaurants and certain other uses (*e.g.*, offices that are not associated with a retail-type use, health clubs, etc.) tend to be of particular concern to these tenants. The number of restaurants is often limited, as is where they can be located.

Other zoning-related inquiries include determining whether the property is zoned under a planned unit development-style plan. This type of zoning can be very restrictive and highly specific as to conditions under which certain types of tenants can lease space and may require extensive variance procedures to allow new uses, initial development, or redevelopment.

As part of due diligence with respect to zoning, the attorney should work with the client to determine its contemplated tenant mix, procedures for obtaining zoning variances, and existing variances already in place, all of which may restrict the ability of the client to obtain future variances or indicate that the lease-up may be slower and more expensive than anticipated. (Note that some zoning codes provide that the penalty for noncompliance with development conditions issued in conjunction with variances is reversion of the zoning to pre-variance ordinances.)

The attorney should consider recommending that the client obtain a zoning compliance letter prior to purchase. These letters typically are issued without charge by the governing authority having jurisdiction over the property. While they may not act to estop the governing authority from enforcing zoning codes, they are excellent mechanisms to flush out unfulfilled development requirements and to get a crash course on local zoning laws. However, not all jurisdictions will issue these letters, and some that will issue them do so only in preapproved forms. Others will consider the form provided by the purchaser subject to approval by corporation counsel. Obtaining a zoning compliance letter should be considered mandatory in jurisdictions where title companies do not issue zoning endorsements and recommended in any jurisdictions that issue them. While they may seem duplicative of the coverage provided by title companies under zoning endorsements, they often reveal information the client cannot discover solely by obtaining an endorsement to its title policy. Also, many securitized lenders require them in addition to the zoning endorsement. It may be necessary for the purchaser to have this information to determine whether it can fulfill future objectives for the property in the confines of lease restrictions. In addition, most purchasers would prefer to detect problems with zoning up front, while purchase price adjustments can still be made, rather than buying a claim against the title company after closing.

Determining these issues at the onset will help reveal potential exposure to the effects of lease clauses regarding responsibility for building/site modifications necessitated by zoning noncompliance. Building code issues present similar problems and should be addressed so that responsibilities for compliance can be ascertained. When negotiating a lease, tenants and landlords face similar zoning and building code issues with respect to remedying current and future noncompliance and noncompliance related to the tenant's use (the latter typically being the tenant's issue to remedy).

In addition to a proper analysis of the site's zoning restrictions, the practitioner representing a prospective landlord or tenant or a prospective purchaser must make sure that business license matters are reviewed and addressed early enough to ensure that necessary business licenses are issued in a timely manner or that existing licenses are properly in place. Many municipalities impose business license restrictions that require approval after a lengthy application process (during which the municipality commonly reviews the use's compliance with its zoning code). Failure to anticipate this requirement in a timely manner, or at all, can delay or prevent occupancy of the site or temporarily mask issues with the current occupancy thereof. Because building code compliance is commonly ascertained at the purchase, build-out, or occupancy stages, addressing this concern with an early application or review can prevent misunderstandings or unanticipated responsibilities (*i.e.*, necessary sprinkler system modifications) and can be utilized during the negotiation process or as part of a contingency.

PRACTICE POINTER

- ✓ Compliance with municipal business license requirements needs to be ascertained as early as possible in lease negotiations and during a purchaser's due diligence. While some municipalities may not require them, others use them not only as a review of a tenant's operations but also as a review of zoning and building code issues. Certain issues related to these matters may be not only time consuming but also expensive to resolve and should be dealt with accordingly.
-

C. [10.4] Credit of Existing Tenants

Another global area of concern is the credit of the existing tenants. If the tenants are experiencing financial trouble or, worse, headed for bankruptcy, the lender may take that fact into account when underwriting the loan and require increased loan security or credit enhancement from the purchaser or reduce the loan amount. Because one of the requirements may include personal guaranties, it is important to make sure the client speaks with its prospective lender regarding, and does its own due diligence on, the credit of the existing tenants of the property. Naturally, a request for such information from a tenant may yield less than desirable (and potentially inaccurate) information; therefore, in addition to a standard request for financial information, a search for lawsuits, liens, Uniform Commercial Code filings, and discussions with prior landlords of the tenant should be a part of any comprehensive due diligence investigation.

D. [10.5] Exculpation Clauses

An exculpation clause limits the landlord's liability to the tenant under the lease to its interest in the property. Given the widespread use of single-purpose entities (whose sole purpose is to own a specific piece of property) and many lenders' insistence that such entities be used due to bankruptcy concerns, the presence of exculpation clauses is probably less of an issue than it used to be. However, if the client is not using a single-purpose entity, the attorney should check the leases carefully for such a clause. If the leases do not contain this limitation, the attorney may consider, if appropriate, recommending that the client form a separate entity to hold the property.

E. [10.6] Repairs, Maintenance, Replacements, and Related Issues

Triple net leases generally provide that the landlord retains some sort of responsibility in connection with the property. See §10.1 above. Under the typical triple net lease, especially in multi-tenant properties, the landlord will have the ongoing responsibility for repair, maintenance, and replacement of structural items. While this is generally understood by commercial developers to include the roof, exterior walls, load-bearing portions of the structure (*e.g.*, columns, footings, foundations), and slab, the attorney is advised to read the lease carefully. Mere use of the word "structure" in a landlord repair and maintenance clause does not automatically translate into a limitation to the foregoing items. Leases that either are not specific as to the listed items or have been negotiated by the tenant to cover "structural" repairs and maintenance may enlarge the landlord's obligation to include interior, non-load-bearing walls, storefronts, windows, entry and

exit doors, sprinkler systems, etc. It is also typical for landlords to have the responsibility to maintain central utility lines (including sprinkler mains) to the point of connection to the premises (assuming, of course, that such maintenance is not the obligation of a public utility company). Note that, particularly in single-use industrial buildings, fire sprinklers present a unique issue with regard to installation, repair, and maintenance due to their components including main lines and periodic “drops.” Responsibilities for the foregoing should be spelled out clearly, especially because the drops are typically specific to a tenant’s use of the property and vary depending on the location of work and storage areas and code requirements. It is important to make sure the client understands the scope of its maintenance and repair responsibility in light of the current physical condition of the property so it can accurately develop the expense side of the cash-flow equation and the possible additional exposure it has under maintenance and repair clauses. It should be kept in mind that, in general, a tenant is not obligated for replacements unless the lease specifically uses this term. When lease provisions are being negotiated by a landlord and tenant, certain impasses with respect to the above obligations can be resolved through building condition reports that can approximate the remaining useful life of certain building components (*i.e.*, the heating, ventilating, and air-conditioning (HVAC) system) so that the parties can become more comfortable with their responsibilities based on the probability of a needed repair or replacement during the lease term (although this can also work to a client’s disadvantage).

Another item to review with the client in terms of cost analysis of a triple net lease involves the extent of the insurance coverage. Because many leases are not explicit about the extent of the landlord’s and tenant’s respective responsibilities regarding restoration of leasehold improvements, the reviewing attorney or client should make it a point to check this issue. Many insurance policies will cover the restoration of the space only up to so-called “white box” condition, but often commercial leases do not explicitly require the tenant to carry leasehold improvements coverage. Some forms provide that the space will be restored only up to the condition in which the landlord originally tendered it to the tenant, which will probably include some sort of obligation for the landlord to restore at least some leaseholds. If the lease is not specific about the tenant’s obligation to carry leasehold improvement coverage, the landlord will need to make sure its coverage is sufficient to accomplish repairs and/or restoration to the extent required by the lease or face the possibility of a shortage in insurance proceeds. If the landlord must insure leaseholds, it may be necessary to request cost information from the tenant.

An issue common to larger retail tenants (and in some cases larger office tenants) is the tenants’ right to repair or maintain if the landlord fails to do so, often coupled with an offset right if the landlord does not promptly reimburse the tenants for expenses incurred (called a “self-help” right). The practitioner should be certain that any specific offset provision adequately negates any generalized “non-offset” provisions in the lease.

Leases for office tenants typically have less detailed repair and maintenance clauses, although pragmatically they end up functioning like triple net leases. In spite of lease forms that place the obligation on the tenant to maintain and repair its premises, the landlord often will perform needed maintenance and repair to the space (changing light bulbs, unclogging sinks and toilets, etc.) and charge the tenant back for services on a per-occurrence basis. However, a major difference between office and retail situations is that in most office leases, the landlord has exclusive responsibility for HVAC systems, recovering the cost of these items through operating expenses. Most office

buildings have central utility systems, and it is not practical for each tenant to maintain or repair them; most office tenants are also ill equipped, and prefer not, to maintain the interior of the space. Most retail spaces (excluding enclosed regional malls and mixed-use projects) have independent HVAC units that service each tenant exclusively, making it a fairly simple task to separately assign responsibility to each tenant. Further complexities may arise as the proliferation of electric vehicles in industrial, retail, residential, and office settings will require parties to clarify responsibilities related to the installation, maintenance, and costs to operate these systems. The same applies to the installation and upkeep of any alternative power sources such as solar and wind power. The attorney's role here is to make sure the client understands the setup contained in each lease and budgets for the cost exposure. Costs for repairs, maintenance, replacements, and improvements are often heavily negotiated.

In a true bond-type lease (and often in sale-leasebacks when the seller or tenant likely has the most knowledge of the building's condition to begin with), all responsibility for the structure and utility systems lies with the tenant. Self-help and offset are not an issue because the tenant is responsible for the entire building as well as the surrounding property, and the tenant is usually the sole occupant. However, depending on the leverage the tenant has, it is possible that the cost of certain major expenditures required in the final years of the term (*e.g.*, a new roof) will be prorated between the landlord and the tenant based on the remaining years of the lease term over the useful life of the item.

In certain leases, the burden of paying the up-front costs of a major expenditure may be placed on the landlord with the tenant reimbursing the landlord the cost of the expenditure over the remaining life of the lease by amortizing such costs. This allows the tenant to divide the expense of replacing a costly element into installment payments and to spread those installments over many years, thereby reducing the tenant's immediate costs (and placing them on the landlord initially). The length of time over which such expense may be reimbursed by the tenant to the landlord often depends on the useful life of the item being replaced. Therefore, if the useful life of the item is longer than the term remaining on the lease, the tenant will be required to pay for only a portion of the item, with no recourse for the landlord as to the remainder. For example, if it costs \$10,000 to replace an HVAC unit that has a useful life of 200 months, the tenant will pay \$50 per month either until the lease term ends, or if the tenant renews its lease, until such renewal term ends or, ultimately, 200 months have passed. The same example could be applied to structural elements such as a roof. A tenant that plans to remain at the property for an extended period of time may end up repaying the full cost of the replacement to the landlord. If such a provision exists in a lease, the landlord should be aware of the possibility it may need to pay the up-front costs of such expenditures. When drafting this type of lease provision, practitioners must be certain to include a numerical example to avoid confusion as to the responsibilities, timing, and costs involved.

In bond-type leases (and some sale-leasebacks, again, when the seller or tenant typically has the most knowledge), the tenant often is required to assume risks commonly associated with the ownership of property (such as title risks) and to waive any common-law termination rights arising out of the physical condition of the space (including damage and eminent domain). The tenant also assumes the responsibility of restoration and/or repair arising out of eminent domain or damage to the premises, agreeing to pick up any shortfall in insurance or eminent-domain proceeds. Typically, if loan payoff provisions are activated by these events, the tenant must also buy out the lender's

position in the property. This is accomplished by requiring the tenant not only to pay the balance of the loan but also to yield maintenance and prepayment fees and costs. A component of the landlord's expected return also may be included. Tenants under leases in sale-leasebacks often assume liability for environmental and title risks for the entire period of time they have occupied the space even though these risks predate the term of the lease on the assumption that they should remain liable for problems they caused in their capacity as fee owners.

Overall, because bond-type leases (and sale-leasebacks) provide for the tenant to assume so much more responsibility than do triple net leases, there are typically fewer controls over the tenant in these situations. Rights to make structural modifications or to expand the improvements are usually largely unfettered, although there may be some restrictions that provide that the tenant's actions may not reduce the value of the property, that structural alterations will require the lender's consent, or that the tenant can expand only within permissible areas. These restrictions are needed to make sure that the lender and owner have some assurances that the improvements received at the end of the term are not unusable. This lack of control makes the bond-type lease or sale and leaseback a poor candidate for use in multi-tenant properties in which the landlord is much more likely to have issues that require it to maintain ultimate control over what the tenants do to the property. Because anchor tenants drive development initially in retail properties, their leases usually provide broad alteration rights subject to similar limitations and include the additional requirement that the improvements may not be architecturally incompatible with the remainder of the center.

Ground leases are similar to bond-type leases in that the tenant typically assumes all of the responsibility for the improvements. They do not include the buyout provisions relating to eminent domain and/or damage benefitting the owner and lender and usually provide instead that the tenant has affirmative responsibilities to restore except when certain threshold triggering events allow termination. In addition, the landlord usually is still required to provide quiet enjoyment to the tenant. Ground leases typically provide for less control over what the tenant does with the improvements than triple net leases because the landlord has only an expectation interest in them at the end of the term. However, in a multi-tenant property (in which ground leases are frequently used), the landlord may retain control over things like building height and exterior appearance so as to avoid violating restrictions in other leases.

An important consideration for tenants under bond-type leases, sale-leasebacks, and ground leases is credit quality as performance of tenant obligations is only as good as the checkbook of the party obligated (which essentially holds true for any type of lease). Owners and lenders must assess the tenant's ability to perform under the lease with that in mind.

III. OTHER FACTORS IMPACTING INCOME STREAM

A. [10.7] Options at a Set Rental

Some limiting factors cut across the type of lease form, such as options at a set rental. A predetermined level of increase may prevent the landlord from capturing increases in the market rental rates. In a declining market, a set option rental rate will not guarantee renewal at the stated

rate. Faced with the opportunity presented by a declining market, a tenant and its broker may negotiate a rental reduction prior to the exercise of an option if the option is above market. In such case, so stated option rates can have a one-way limiting effect on the landlord. A lease provision that bases the exercise of an option on “then prevailing rates” presents similar problems and adds further complexities, depending on the manner in which the clause is structured.

B. [10.8] Tenant’s Remedies for Landlord’s Default

Another “global” issue relates to the tenant’s remedies for a landlord default. Those leases that allow the tenant to terminate the lease for a landlord default in any situation other than when an equitable termination would be permitted may effectively expand the tenant’s ability to walk away for landlord defaults. Any lease that allows termination by reason of a specified occurrence (*e.g.*, inability to obtain or maintain required licenses or permits, reduction in parking, etc.) also must be looked at as an additional risk factor the client must weigh in deciding whether, and for how much, to purchase the property.

C. [10.9] Pass-Through of Costs

Most of the limiting factors on landlords will be found in multi-tenant properties, which by definition require more involvement by the landlord due to ongoing maintenance, repair, replacement, management, and leasing responsibilities. Some of these factors must be analyzed in terms of what costs other leases permit the landlord to pass through. For instance, in most office leases, the landlord charges each tenant separately (on a per-hour basis) for operating the HVAC system during extended hours (later or earlier hours of operation beyond stated parameters). If a landlord expands the standard building hours in an office building for HVAC services for one tenant (thereby letting the tenant in question avoid some of the “after-hours” HVAC charges), it will need to determine whether the cost of doing so can be passed through to the other tenants. If not, this cost will end up being deducted from the landlord’s income stream.

D. [10.10] Reasonableness of Common Area Maintenance Costs and Caps

Clauses that state that all common area maintenance (CAM) costs will be “reasonable” have been used by some tenants as the basis to critique and object to each and every expenditure made by the landlord, many times coupled with a refusal to pay the charge. Caps on CAM costs (or in office leases, operating expenses) or taxes can greatly impact income and expenses, as can extraordinary services provided to tenants, such as extended hours for operation of utilities, payment of utilities, above-standard maintenance and repair services, or restrictions on the types of costs that can be recaptured under the CAM or tax clauses. Caps can be computed on a cumulative or noncumulative basis. Caps computed on a cumulative basis allow for the carryover of any unused portion of the cap amount to following years. For example, if the annual cap on increases in CAM costs is five percent and in the second year of the term the actual increase is three percent, the remaining two percent would be carried over to allow for an increase of seven percent in the third year. A noncumulative computation of the cap would, of course, ignore any shortfall in the permitted increase for purposes of computing the cap in successive years. Many caps exclude any expenses that are beyond the ability of the landlord to control, such as insurance, taxes (when included in CAM), snow removal, and utility costs.

E. [10.11] Exclusions from Common Area Maintenance Costs

Exclusions from common area maintenance costs are numerous, and most experienced practitioners have developed lengthy lists of the most frequently requested limitations. They include some items that would be considered abusive if included in CAM, like debt service under the landlord's mortgage, rent payments under a ground lease, tenant improvements in connection with leasing, brokers' commissions, and lease enforcement fees. These and similar types of expense exclusions are often conceded by landlords.

Some of the other more popular (and self-explanatory) CAM exclusions include costs of initial construction, expansion, or rehabilitation of a property; costs of correcting defects in design; reserves; bad debt losses; interest or penalties for failure to timely pay CAM bills; costs of maintenance of the landlord entity or preparation of landlord tax returns; advertising costs; wages, salaries, or other compensation paid to employees above the grade of building manager; overhead and profit paid to subsidiaries of the landlord in excess of compensation paid to third parties in arm's-length transactions; removal of hazardous substances; duplication of costs under the lease; and the cost of the landlord's repair, maintenance, and replacement obligations for the improvements on the property.

F. [10.12] Exclusions for Capital Expenditures

Some exclusions are more difficult to deal with and tend to be heavily negotiated. One example is capital expenditures. It is a common misconception that generally accepted accounting principles (GAAP) provide a clear definition of what constitutes a "capital expenditure." The GAAP definition of "capital expenditures" provides that these are the costs of items that last beyond the current accounting period and increase the value of the life of an asset. See Marc Betesh, *Capital Expenditures — Includable or Not?*, KBA Lease Services (Oct. 2, 2016), www.kbalease.com/leasetips-blog/2016/10/2/capital-expenditures-includable-or-not, for a detailed discussion of this definition and typical negotiation stances. There are many expenditures that are made over the course of owning and managing an asset that could fit into this definition but that leave the landlord the option to either expense or amortize the item. Whether a party elects to spread out the recapture or amortization of an item in lieu of expensing it in its entirety in the current year is one issue; whether the landlord should recoup the cost of these expenditures from tenants at all is another. Many leases preclude or greatly restrict the landlord's ability to recapture these costs. For leases in which recapture of capital expenditures is permitted, those that are sensitive to the issue may make sure their clause does not rely completely on the GAAP definition and instead provides an alternate definition of "capital expenditure," such as setting a dollar amount to use as a threshold for requiring amortization of an expense or using IRS rules as a guideline for what will be permitted to be expensed versus amortized. These clauses will not kill deals, but the client needs to know about them to budget accordingly and must understand that a limitation in capital expenditures may preclude (or preclude from expensing in the current year) anything from partial roof replacement to replacements of the utility systems. The practitioner may find that the parties have decided to share a particular capital expenditure cost according to the relationship between the useful life of a building component (*e.g.*, the HVAC system) and the time remaining in the tenant's lease term at the time such component is in need of replacement. Such an agreement as to the responsibilities for certain expenditures can affect not only the overall decision of a purchaser of a property but also the value of a property from a real estate tax valuation standpoint. These clauses should therefore be closely examined.

G. [10.13] Exclusions for Cost Arising Due to Negligence

Other more esoteric restrictions include things like costs arising due to the negligence of the landlord or other tenants. While many negligence claims are covered by insurance, deductibles on multi-tenant properties are typically included in common area maintenance costs. This seemingly harmless exclusion could prevent the landlord from including insurance policy deductibles in CAM because the policies will cover ordinary negligence in certain instances. Because it is the norm to include these deductibles in CAM on a commercial building (and deductibles can be sizeable on a larger property), this exclusion can cost the landlord.

H. [10.14] Exclusions for Taxes

There are also exclusions related to taxes that are typically requested by sophisticated tenants. Again, these fall into two categories — those with relatively little effect and those with much more of a bottom-line impact. For the former, it is typical for tenants to request that “taxes” will not include income, inheritance, franchise, or similar taxes. A distinction to make with respect to these types of taxes is that notwithstanding the fact that rent taxes may be based on rent (and thus relate to income from the property), they can be included within the definition of “taxes” when enacted in lieu of real estate taxes. (Because Illinois has faced the prospect of a rent tax more than once over the past few decades, it is important to consider that it is something that might come to pass.) Of more concern is a clause often requested by tenants with sufficient leverage stating that the tenant will not be required to pay any increases in taxes that result from a sale of the property. Such a clause functions like a cap on taxes and will require the excess to be either passed on to other tenants (a subsidy that is often prohibited by the other tenants’ leases) or paid by deducting it from the landlord’s cash flow from the property. A common compromise for this issue is the tenant’s agreement to pay for increases resulting from one sale of the property over a given period of time, such as three or five years. Related clauses concern exclusions for the payment of costs attendant to a property tax appeal (attorneys’ fees, appraisal, and witness fees, etc.) benefiting the property during and/or outside of a tenant’s term. Other clauses set forth the identity of the party having the first right to file a property tax appeal (usually the landlord in multi-tenant buildings and the tenant in single-tenant buildings) and can operate to place the responsibility for payment of related expenses on the appealing party or on the benefitting party if and to the extent an appeal is successful. More sophisticated tenants may also try to include a provision stating that they are not obligated to pay increases in taxes attributable to improvements by other tenants. These types of provisions can have serious impacts on the bottom-line cash flow from the property and should be approved by the client during its due diligence period. See §10.23 below for other property tax-related issues.

IV. [10.15] OTHER ISSUES TO BE CONSIDERED IN REVIEWING LEASES

Although a primary focus on the net charge clauses is warranted when dealing with commercial leases, there are numerous other provisions that impact the bottom line. (Obviously, if a triple net form has been converted into a gross deal or a modified gross deal by the landlord and tenant negotiating away or omitting taxes, common area maintenance, or insurance, it is not truly a triple net deal, and the client must understand that fact prior to the due diligence period expiring.) See §§10.16 – 10.26 below discussing other clauses to be considered when reviewing leases.

A. [10.16] Cotenancy Provisions

Cotenancy provisions are most common in retail leases. They require that one or more “major” tenants (typically tenants in the 20,000 – 25,000 square foot range and up) be open and operating for business at the premises, often along with the tenants of some percentage of small shop space. The penalty for violating the cotenancy provision is frequently to suspend the payment of minimum rent and, in lieu of that, pay a percentage of gross sales, with or without payment of the net charges. Sometimes this occurs only after a cure period of 180 days, but often the penalty is instituted immediately. A right of the tenant to terminate after the landlord has been allowed a certain period of time to replace the missing tenants may be included. Many tenants insist that replacement anchors must be similar to the ones that left in terms of use and/or size as a condition of the replacement being deemed satisfactory. Many landlords negotiate a “stay or go” provision in the clause that forces the tenant to either resume payment of minimum rent or terminate the lease at the end of a reasonable period (frequently, one year), knowing that market conditions may make it easier to find a new tenant for the space rather than to try to replace an anchor or bring the percentage of leased area back up. Tenants with leverage often can insist that the landlord reimburse the tenant for its unamortized leasehold improvements at the time of the tenant’s termination of the lease. All of these provisions are common, but the client must be made aware of, and approve, them. See §10.22 below discussing exclusive-use clauses and restrictive covenants.

B. [10.17] Kickout Rights

Kickout rights are found in both retail and office leases. They are termination rights typically in favor of the tenant only, although in higher-end retail properties a mutual kickout right is not unheard of. In office leases, they typically will occur at the halfway mark and are straightforward termination rights. In retail leases, they are tied to sales performance; if the tenant does not hit its target sales number for the store, usually measured over a specific 12-month period, it can terminate. This 12-month measuring period often is chosen at a point beyond the initial time it takes to establish the store after opening, so it is not unusual for it to occur in month 18, 24, 30, 36, etc. Tenants do not always terminate under these provisions but frequently use them as leverage to negotiate rental rate reductions for the remainder of the term. National chain tenants may request two kickouts, one occurring sometime during the first 36 months of the term and another around the 48th or 60th month of the term. For all practical purposes, buyers and lenders treat leases with these provisions as having terms ending at the effective date of termination for the kickout, so a lease with a 10-year term and a 5-year kickout will effectively be considered a 5-year lease.

C. [10.18] Gross Sales Deductions

Percentage rent leases are used less and less in strip centers but are still used in enclosed mall situations. Lenders and buyers do not give credit for percentage rent as part of the rent to which the capitalization rate is applied because its certainty is doubtful. However, if it is a serious consideration to a client in purchasing a piece of property (*e.g.*, when one of the old discount store leases in which the base rent is still artificially low is involved), the gross sales clause warrants some examination. More sophisticated tenants negotiate exclusions from the definition of what constitutes “gross sales” that can substantially reduce the overall number. Also, many older

percentage rent leases are silent on how sales generated by more modern means (catalogue, the Internet, retailer-branded credit cards, etc.) are to be treated, so the client should consider the possibility that as technology and retailing evolve, percentage rent might be substantially less than it used to be.

D. [10.19] Rights of First Refusal and First Offer and Options To Lease

A right of first refusal requires the landlord to obtain an offer or negotiate a lease and then bring it to the tenant, which can agree to match the terms of the offer of lease and preclude concluding the lease with the third party by taking the space itself. Because the landlord must spend time and energy to negotiate either a letter of intent or a lease with a third party (which may lose interest once it knows the deal can be withdrawn if the existing tenant exercises its rights), rights of first refusal may be harder to work with than rights of first offer. They can have a chilling effect on the leasing efforts for the project.

Rights of first offer usually require the landlord to give the tenant an initial chance to negotiate for a given area at the rate the landlord intends to offer to third parties or, alternatively, at the same rate the tenant is paying for its existing space. In office leases, these rights are common and relate primarily to adjoining space or other space on floors immediately above or below the tenant's location in the building and protect the ability of the tenant to expand without moving. However, larger tenants have been known to require the landlord to give them a right of first refusal or first offer on all vacant space, and rights like these can be cumbersome from a business standpoint.

Options to lease can refer to either the right to extend the term at a given rate or expansion rights. Expansion rights are most likely to be found, if at all, in anchor tenant leases, typically with grocery anchors. If these rights encumber existing small shop leasable area and less than 36 – 60 months remain prior to the effective date of exercise, it can be difficult to lease the small shop space because few tenants are interested in working to establish a location and then having to relocate after a year or two because of an anchor's right to expand. In office leases, a true option to lease might occur upon a trigger date or the occurrence of a triggering event (such as the expiration of another tenant's lease). In addition, if the rental rate for the space has been pre-negotiated under an option to lease or right of first offer, the client must factor that into account in analyzing the cash flow of the building.

E. [10.20] Radius Clauses

Radius clauses originated from retail percentage rent leases and keep tenants from opening a store within a certain distance of the property in question. The assumption behind them is that any store located too closely would siphon off sales from the landlord's property, lowering the percentage rent the landlord would be able to earn from the existing location. The penalty for violating these clauses is directed squarely at this loss of percentage rent, usually requiring adding some percentage of the violating location's sales into the computation of percentage rent in the project's sales. With percentage rent leases becoming less common, often the penalty is omitted in non-percentage rent leases, although the prohibition is still included to keep the tenant from opening stores too close to an existing location and cannibalizing its own sales. This concept is particularly important when the tenant is a franchisor, as the incentive to open competing locations may be

driven more by franchise fees than anything else. It also prevents the tenant from claiming that a location is nonperforming and that it needs rent relief while it simultaneously opens competing locations. In downtown locations, radius clauses may be nonexistent or extremely small because shopping habits differ greatly, a greater concentration of submarkets tends to exist, and population density may support stores as close as two or three blocks apart.

Reverse radius clauses refer to a tenant's ability to prevent a landlord from leasing to its competitors in projects it owns in or near the center, and they are typically drafted broadly enough to encompass affiliated entities the landlord might establish for the purpose of holding a separate piece of land (adjoining the center or within a certain area of the center). If a client holds other property within a given geographic area or is considering additional development in the area, it needs to be made aware of this type of prohibition.

F. [10.21] Go Darks

A "go dark" is the right in a retail lease permitting the tenant to cease operations at the location without permitting the landlord to declare a default. A well-drafted clause makes it clear that the tenant is not relieved of any other obligation under the lease, including the obligation to pay rent and to heat and secure the premises adequately to prevent damage and theft. (Many readers will recall vacant industrial buildings being broken into and stripped of copper wire after their tenants vacated the buildings; however, the issues giving rise to these buildings "going dark" were the same issues that provided no incentive for their prior occupants to fulfill any "go dark" lease obligations.) It is also important that the clause give the landlord a right to terminate the lease because the landlord may need to terminate and relet the space in order to meet cotenancy provisions in other leases. Additionally, lenders and buyers know that a dark location is one that was not productive and that the tenant probably has no further interest in it. Because of this, lenders may refuse to fund a loan or give a borrower credit for a dark tenant, reasoning that the tenant is one step closer to ceasing the payment of rent in order to force the landlord into reletting under statutory mitigation obligations. The office lease version of this clause also will permit the tenant to leave the premises without the landlord being able to declare a default as long as the tenant otherwise complies with the provisions of the lease. Vacating the premises should not be considered abandoning the premises, which involves a higher level of nonperformance under the lease than the mere cessation of business. More sophisticated office tenants may negotiate this provision into a lease in case a competing landlord is willing to take on the tenant's rent obligation under an existing lease as a means to convince the tenant to move into its building.

The COVID-19 pandemic sparked issues relating to whether a go dark provision and its requirements have been triggered. See §10.2 above. It is necessary to review these provisions carefully to ascertain the potential effects and responsibilities of the parties in connection with a dark space.

G. [10.22] Exclusive-Use Clauses/Restrictive Covenants

Exclusive-use clauses are most common in retail leases, but office tenants may require them as well. Because most office leases contain "general office use" type language in the use clause, however, "exclusives" tend to be far less effective and therefore less common in these leases. Hopefully, there will be few true exclusive-use clauses in the leases being reviewed because they are hard to police and can be so restrictive as to make a retail property extremely difficult to lease.

In lieu of true exclusives, many landlords use restrictive covenants, which typically prohibit another tenant from having the same primary use as the tenant in question. These clauses should be checked for exceptions for (1) existing tenants of the center, (2) land that is not owned by the landlord as parts of the property may be owned by outlot occupants or other parties over whom the landlord has limited control, and (3) anchor or major tenants over whom the landlord typically has no control as they are usually the first tenants of a center. Because the definition of “primary” probably will be at issue, the clause also should define this term by permitting other tenants to have a certain percentage of sales (although this is hard to police if the landlord is not getting sales reports) or, alternatively, a certain amount of shelf or floor space that can be devoted to the use in question without the landlord being deemed in violation. Hopefully, the definition of “primary” will be detailed enough to deal with issues like treatment of aisle space.

The client must carefully review exclusive use and restrictive covenant clauses. A tenant with a generic exclusive for “food” or “women’s apparel” can so severely curtail a potential landlord’s ability to lease space in the center that it may impact the decision whether to buy the property at all.

H. [10.23] Method of Applying Escrowed Tax Funds/Property Tax Considerations

The client should understand how the landlord has been applying the funds received from tenants for the payment of taxes. Typically, for multi-tenant properties, tenants make periodic payments of estimated taxes (usually monthly) to the landlord. Because taxes in most jurisdictions are paid in arrears, tax payments may be received from tenants during the current year but applied in the following year upon issuance of the actual tax bill (called “accrual basis”). Alternatively, tax payments may be received from tenants in one year and applied to taxes that accrued during the prior year (called “cash basis”). While the method of collecting taxes from tenants on an accrual or cash basis should be clearly drafted in leases, this crucial language is often missing. Cash basis collections result in putting the tenant in the position in the beginning of the term of paying taxes for a year the tenant was not in occupancy. Most tenants do not complain about this because taxes for the final year of the term are anticipated to be greater than those in the initial year of the term and tenants will not be paying for taxes attributable to the final year of their occupancy. For an incoming landlord with expiring leases, payment of taxes on a cash basis can represent a cash-flow problem. If a tenant does not renew or a new tenant is not found, someone must pay the taxes on the vacant space. If the formula used for computing a net charge under the lease does not permit the landlord to require the other tenants to subsidize taxes on vacant space, this “someone” will be the owner of the building.

In the event of a lease being reviewed for this language as part of due diligence for a sale of a property, note that the real estate purchase and sale agreement typically specifies how the taxes will be apportioned between the buyer and seller. It is common practice to prorate taxes for the year on a typical accrual basis and for each party to pay its proportionate share of taxes attributable to the time it was in possession of the real estate. Therefore, the seller will pay its pro rata share of taxes attributable to the beginning of the year through the time of sale, while the buyer will pay the remaining portion of taxes attributable to the time of the sale through the end of the year. However, when the property being sold is subject to existing leases, the parties must determine (1) the way

the purchase agreement treats tax prorrations related to the sale of the property (cash versus accrual), (2) how the lease language itself treats tax payments made by tenants to the landlord (cash versus accrual), and (3) how the landlord and tenant have been treating tax payments in practice, regardless of whether the lease language itself clearly addresses this subject.

When the above three variables do not coincide, there is an issue that must be resolved or else one party to the sale will encounter an issue. To review, under the accrual basis method, the landlord will collect funds for taxes accruing during the current year but payable the following year. Therefore, in the event of a sale based on the accrual method, the landlord has already collected the portion of taxes the landlord will owe at the time of the sale. In contrast, under the cash-basis method, the landlord collects funds for taxes payable during the current year that accrued in the prior year. When there is a sale on an accrual basis but the landlord's tax reimbursements are cash basis, an issue arises for the seller who has a gap in tax payment collections for the year of the sale. The opposite situation (cash basis closing with an accrual basis for tax collections) would yield a potential seller windfall. When combined with a practice of collecting from tenants that does not coincide with the terms of existing leases and the purchase agreement, the possibility of a dispute increases. Ultimately, the parties are responsible for memorializing their decisions as to these matters. In a lease review with or without a pending property sale, the written instruments and the actual practice of the parties must be carefully examined and set forth in the appropriate estoppel letters. If the estoppels do not match the lease terms as far as whether taxes are collected on a cash basis or accrual basis, the parties should execute an amendment to clarify the proper method of collecting taxes so the rights and obligations of all parties are clear.

In addition to understanding the methods by which payments for taxes are collected and applied pursuant to existing leases and potentially in a pending purchase agreement, the practitioner should carefully examine the composition of the property's current valuation for real estate tax purposes. This valuation should be analyzed against the current (and projected) income and expenses of the property, comparable rental, sales and equity (uniformity of valuation) data, vacancy information, and, in cases of newer buildings, land acquisition costs and costs of construction. (Note that a current valuation may reflect extraordinary relief such as vacancy or a partial assessment, which can dramatically change upon reoccupancy or full valuation.) Also, note that while a current purchase price may not necessarily be reflected in a post-purchase assessment, it may affect an owner's ability to appeal an assessment below such value in the near term depending on the terms of the sale and the status of the property at the time of the sale. Again, the effect of certain matters such as capital expenditures, tenant improvement allowances, rent concessions, extension options, and options to purchase should be examined. It is also important to note that purchase prices recorded as part of a sale-leaseback transaction are generally not admissible in ad valorem real estate tax appeals in the State of Illinois, as they are considered akin to a financing mechanism more than an arm's-length market value transaction. *See Town of Cunningham v. Property Tax Appeal Board*, 225 Ill.App.3d 760, 587 N.E.2d 573, 575, 167 Ill.Dec. 304 (4th Dist. 1992). In a lease negotiation, the foregoing analysis may affect the parties' willingness to agree to certain responsibilities for the payment of taxes (and appeals thereof) and therefore should be examined carefully. In any event, landlords should be aware of the real estate tax burden of their properties even if the tenant is currently responsible for the payment thereof. Because taxes will likely continue to increase over time, unchecked taxes may cause tenants to reach a point of default if the burden is excessive. They can also cause a property to be generally unmarketable.

If the property is subject to the terms of a redevelopment agreement, is part of a tax increment financing district, or is receiving (or could potentially receive) any other special tax treatment or tax incentive, the documents setting forth the same should be examined carefully so that the mechanics and effects of the same on the property's taxes are correctly ascertained. Current compliance with requirements and the ability to comply in the future should be determined carefully at an early stage. Additionally, the application of any current or proposed special assessments should be ascertained and dealt with accordingly.

PRACTICE POINTER

- ✓ Even when a tenant may have the initial right to appeal a property's real estate taxes, a purchaser of the property should provide for a fallback right to appeal (usually triggered by a certain number of days prior to an appeal deadline) if a tenant fails to appeal. Such a clause can help prevent ever-increasing tax burdens from remaining unchecked due to tenants who fail to vigorously contest a property's real estate taxes. See §10.14 above discussing property tax appeal provisions in leases.
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I. [10.24] Build-Out Issues

Tenant build-out clauses present a unique issue that confronts the purchaser of a property at a time when outstanding build-out obligations exist. They also confront landlords and tenants when negotiating the incentives available to the tenant in connection with its planned occupancy. Build-out provisions typically range from the landlord providing a cash allowance to a tenant for work to be performed by the tenant through its own contractors (typically landlord-approved) to the landlord agreeing to perform certain work for the tenant. Certain rent concessions may also be connected to the build-out provisions of a lease. The practitioner should examine carefully the lease or its exhibit detailing the build-out (typically termed a "work letter") with the client so that each of the promised items in the work letter are clear and sufficiently detailed (diagrams may provide additional clarity) in order to avoid conflicts. Caps as to the dollar value of concessions should also be examined along with any square footage-based calculations. See §10.25 below regarding architectural remeasurement. The timing of any proposed build-outs and their effect on the commencement of rent payments and on the commencement of the lease term, if any, should be clarified. Many physical issues related to the completion of the landlord's work are resolved during the "walk-through" or "punch list" phase of the build-out cycle; however, note that work letters, along with other lease provisions, may reference rights to terminate a lease or seek money damages or rent reductions to the extent that agreed-on build-outs are not substantially completed by a certain time. Again, because much of the foregoing build-out work is considered capital in nature, its effect on the real estate tax valuation of the site should be considered. Finally, note that unperformed landlord work may be detected through estoppel certificates at the appropriate time but that inspections of the site in light of the applicable lease clauses should also be performed.

J. [10.25] Architectural Remeasurement

Leases also may contain a clause that provides for adjustments to the square footage of the space based on an architectural remeasurement. The adjustments provided in this clause may not

only raise or lower rents but also do the same to construction allowances to the extent they are calculated on a per-square-foot basis. On new construction projects, square footages used in the leases are more like estimates, which are frequently discovered to be wrong when an architectural remeasurement occurs, so buyers should consider this possibility when reviewing the leases. Another issue relating to square footage is whether the language establishing a tenant's proportionate share of expenses can fluctuate if the size of the building area is increased.

K. [10.26] Eminent Domain

Provisions regarding the occurrence of an eminent domain proceeding during the lease term should be reviewed carefully, whether they are related to permanent fee-simple takings, temporary takings, or permanent or temporary easement takings. Generally, lease provisions will control a landlord's and tenant's respective rights to compensation for a taking, including with regard to damages to the remainder. While most tenants are excluded from such awards, tenants are usually given the right to pursue an award for their relocation expenses, typically through an applicable relocation authority. Eminent domain clauses may also allow for tenant and/or landlord rights to terminate a lease in the event of a "material" taking (the definition of which, if any, must be analyzed; for example, certain clauses are triggered by a percentage loss of parking spaces). They may also provide for rent abatements proportionate to the degree and length of time of a taking (in temporary taking and temporary easement situations). Due diligence should also extend to the probability of a taking of the particular site not only because it may affect the purchaser's or tenant's plans for the site but also, with regard to a purchaser, because a recent purchase price can be used as evidence of fair market value in an eminent domain proceeding.

V. [10.27] LIMITING FACTORS ON DEVELOPMENT

Some limiting factors do not directly impact income stream but do interfere with reworking a project, adding new improvements, or even supplementing cash flow. See §§10.28 – 10.31 below discussing some of the major factors of this type. All of these provisions can interfere with a potential plan for the development and should be pointed out to the client in conjunction with a due diligence review.

A. [10.28] Kiosk Restrictions

Kiosks are the small stands most commonly seen in the aisles of enclosed malls where vendors sell everything from cell phones to jewelry. (They should be distinguished from the even smaller retail units called "pushcarts" or "retail merchandise units.") Kiosks can be tremendous cash cows and may cost little in terms of allowances to secure tenants. Retailers hate them because they block sight lines to storefronts and, at least in theory, reduce sales by reducing foot traffic and distracting customers from the in-line tenants. While customarily found in malls, they have been used in strip centers on occasion. Retailers frequently use kiosk restrictions to completely prohibit or limit kiosks in shopping center common areas, and the client should be made aware of any such restrictions in the lease. While certain restrictive lease clauses are limited to the mall area immediately in front of the premises, keep in mind that broadly drafted clauses can completely preclude a kiosk anywhere within the sight lines of a tenant's space.

B. [10.29] No-Build Clauses

A no-build clause is what it sounds like: a clause prohibiting any improvements in the common areas within a specified area. The no-build area tends to encompass areas beyond the immediate storefront, often including all or substantial portions of the common areas of the property. In addition, no-build clauses may be drafted broadly enough to preclude kiosks, pushcarts, and retail merchandising units. Clients need to be made aware of no-build clauses because they can materially limit any ability to reconfigure the building area or put new improvements in the common area and thereby prevent or materially impair a client's redevelopment plans. General clauses that state there will be no interference (material or otherwise) with access to, or visibility of, a tenant's premises can have the same effect as a no-build clause. The determination of whether changes in access or visibility will constitute an impairment or reduction can be very subjective and site specific. Typically, no-build clauses are tied to specific site plans attached as an exhibit. Well-drafted clauses will permit the developer the flexibility to do outlots if feasible and also state that periodic maintenance, repair, and replacement actions by the landlord will not constitute an interference as it may be necessary for the landlord to erect scaffolding or close off portions of the common areas for these purposes. Because outlots can represent an area of substantial profit to the developer, the attorney needs to advise the client if these clauses are present and if they could preclude the developer or owner from modifying the center.

C. [10.30] Restrictions on Use of Tenant Space

It is typical for multi-tenant properties to have service lines for other tenants, or for the building, running through tenants' spaces. Those leases that do not reserve the right to landlords to use the space above the finished ceiling, below the floor, or behind walls can present an obstacle to, or increase the cost of, a rehab, "de-malling," or other remodeling and/or reconfiguration of improvements.

D. [10.31] Restrictions on Common Areas

Retailers often restrict the times when work can be performed within the common areas to avoid disturbance during their peak seasons. Prohibitions against performing work during the months of November and December are typical. Other restrictions may prevent any reduction in parking ratio below a certain level. More sophisticated (larger) tenants often specify minimum parking space size or that access routes, entryways, and drive aisles may not be changed without their consent. Some may require that the landlord, in connection with a rehab of the center, not remove their signage unless the landlord pays for removal and reinstallation, along with providing acceptable temporary signage, or provide that if new pylon signs are erected, the tenant gets a spot on the pylon.

VI. [10.32] MISCELLANEOUS ISSUES

Laundry equipment leases in apartment buildings should be carefully reviewed as they can have very long terms with very long extension rights and often automatically renew unless the parties take specific steps to terminate them. These leases may include large upfront payments with only nominal monthly rental, which the purchaser may want to treat as prepaid rental to be prorated on the closing statement.

Another issue not specifically dealt with in this chapter relates to tenant options to purchase the property. This issue is typically detected through estoppel certificates. If it arises, the purchaser and seller will need to deal with it prior to closing and/or the expiration of due diligence.

Finally, there are certain instances in which a license agreement, as opposed to or in addition to a lease, may be in place or contemplated. When the size of a space, the duration of time contemplated, and/or the available transaction timeframe is more suited to a license agreement than a traditional lease, a license agreement may be present. This can arise when the existing tenant may operate as the licensor, in which case lease provisions relating to subletting/assignment/licensing must be reviewed carefully to ensure compliance. In other situations, such as when the purchaser of real property desires to gain access to the property, or a portion thereof, for purposes of storing goods, materials, etc., prior to purchasing the property, a license agreement may be utilized. See §10.39 below and accompanying text for a sample license agreement reflecting the forgoing example. While this and any form must be tailored to fit a particular situation, note that, in any event, a license agreement does not contemplate the full scale of issues dealt with in a traditional lease.

VII. CLOSING ISSUES

A. [10.33] Subordination, Non-Disturbance, and Attornment Agreements and Estoppels

A lender will typically insist that any tenant with a memorandum of lease or subordination agreement of record enter into a subordination, non-disturbance, and attornment agreement (SNDA). Such agreements typically take more time to obtain than estoppels, so more time may be needed to close. If the client is purchasing a ground lessee's interest, consent and loan subordination issues also arise. (For any site covered by a ground or master lease, a non-disturbance agreement should be obtained from any master landlord.) In addition to reviewing leases for the requirement to provide SNDAs, leases should also be reviewed for "self-subordination" language, which allows the lease to be automatically subordinated. Title documents should be reviewed for subordination issues so that they may be dealt with accordingly.

In all projects but apartment buildings, lenders usually insist on estoppels from every "large" tenant (the definition of this term fluctuates depending on the size of the project) as well as from tenants having a specified percentage of small tenant space. The latter requirement can be as high as 90 percent, although if the buyer is close to the required percentage, the lender may elect to close with less. Accordingly, the leases should be reviewed to determine whether they contain a requirement that the tenants furnish these estoppels.

A seller may want to substitute its own estoppel, issued on behalf of the tenants, for the required percentage of estoppels under a contract, but in this case, the buyer risks not only that the lender will not accept a seller estoppel but also that the entity selling the property will have little or no post-closing net worth to stand behind its estoppel. While seller estoppels are accepted on occasion for missing estoppels, the buyer should limit any seller estoppel to the percentage of tenants that is above the threshold required by the lender and satisfy itself as to the seller's net worth after the property is sold. While there may be some ability to negotiate these requirements with the lender at the commitment stage, it is likely limited. If any master lease or declaration encumbers the property, the lender may insist on estoppels under these documents as well.

Because, at least with respect to major tenants, SNDAs (or substitute documentation) are often another lender condition to closing, it is prudent to make sure tenants are required to timely deliver them. In addition, if required, original SNDAs, in recordable form, should be delivered to the title company by closing so that the title company has all necessary documentation to insure the mortgage as a first lien on the property.

B. [10.34] Assignment of Leases

Some leases state that a transferring landlord cannot release itself of any further liability under the lease at the time of sale unless the incoming landlord affirmatively assumes the obligations of the seller under the lease as of the closing date. Lease assignment provisions should be carefully reviewed to ensure compliance therewith. Notices to tenants regarding the change in ownership/management and the change in address for future lease payments and notices are typically addressed at this stage as well.

C. [10.35] Security Deposits and Letters of Credit

Cash security deposits under leases are usually handled by credits on the closing statement. Letters of credit posted by tenants in lieu of a cash security deposit are a different story; often they are not assignable or, if transferable, require payment of a fee. The client should be aware of any of these issues that need to be dealt with and preferably provide for any transfer fees to be paid by the seller under the sale contract.

D. [10.36] Certificate of Insurance

The lease should require that (1) the tenant provide a certificate of insurance evidencing coverage required by the lease and (2) the landlord can obtain a copy of the policy upon request. The client should be prepared to notify the tenants of the names of the new landlord entity, its managing agent, and the lenders at closing to be incorporated into tenant certificates of insurance.

E. [10.37] Prorations

Prorations for base rent are usually straightforward. Prorations for percentage rent, however, may have to be estimated in some fashion with an adjustment post-closing because tenants either periodically pay an estimated amount, which is subject to adjustment based on actual, adjusted gross sales at the tenant's fiscal year end, or pay percentage rent annually. In either case, if percentage rent is being paid, the parties will usually provide that a post-closing proration will take place (with or without a per-diem proration based on estimated percentage rent at closing if applicable). Because most retail sales spike at peak times of the year and as much as 75 percent of their sales may be made at Christmas or some other peak time, it is difficult to handle this issue in any other way.

Other proration issues include those pertaining to arrearages. Typical clauses might state that the sums received by the purchaser from the tenants are applied first to current amounts owed to the purchaser, next to any past-due amounts owed to the purchaser, and finally to rent arrearages owed to the seller during its period of ownership. The buyer may permit the seller to pursue tenants with arrearages that pertain to periods prior to the closing date but stop short of giving it the right to evict the tenant or settle any claims of the purchaser in the process of doing so.

Also, another proration may be necessary to the extent the estimated sums paid by tenants to the seller during the period of ownership are greater or less than the amounts due (*i.e.*, with respect to real estate taxes).

VIII. [10.38] CONCLUSION

While environmental audits, cash-flow analyses, and engineering reports are generally included in a purchaser's due diligence activities, the leases are the lifeblood for each commercial project, whether it is a single-tenant building, multi-tenant office complex, residential building, shopping center, or mixed-use development. That being the case, appropriate time should be set aside for an in-depth examination of the leases that will govern the client's purchase or lease of a property. With this chapter as a guide, the real estate practitioner can thoroughly examine each lease in light of the expectations and goals of the client for the short-term and long-term uses of the project and add substantial value to the process by means of effective due diligence.

IX. [10.39] LICENSE AGREEMENT

LICENSE AGREEMENT

THIS LICENSE AGREEMENT (License Agreement) is made and entered into as of [license agreement date] (Agreement Date), and is effective as of [effective date] (Effective Date), by and between _____, a [licensor's state] corporation (Licensor), and _____, a [licensee's state] corporation (Licensee).

RECITALS

A. Licensor is the owner of a certain parcel of real estate which is commonly known as _____, Illinois, and legally described on Exhibit A attached to this License Agreement (Property).

B. Licensor and Licensee have entered into a Real Estate Sale and Purchase Agreement dated [purchase agreement date], for the Property (Purchase Agreement), which Purchase Agreement is attached as Exhibit B to this License Agreement.

C. Licensee seeks to store equipment inside certain buildings located on the Property and to park trucks on certain portions of the Property, beginning on the Effective Date and continuing through the Inspection Period (as defined in the Purchase Agreement), and, if the Purchase Agreement is not terminated pursuant to its terms and provisions, through the Closing Date (as defined in the Purchase Agreement).

D. Licensor is willing to grant Licensee a temporary license for the limited purposes of accessing the Property to store equipment inside certain buildings located on the Property and to park trucks on certain portions of the Property, subject to the terms and conditions contain in this License Agreement.

E. Licensors and Licensee desire to enter into this License Agreement to establish the temporary license described herein.

NOW THEREFORE, in consideration of the foregoing recitals, which are hereby made a part of this License Agreement as if fully set forth herein and the mutual agreements, conditions, and undertakings herein and other valuable consideration, the parties agree as follows:

1. License.

(A) Licensors hereby grants to Licensee a license (License) for the “License Period” (as hereinafter defined) for the exclusive right to use and occupy up to 10,000 square feet of space within the warehouse of the industrial building comprising part of the Property (such area referred to herein as the “License Area” as shown in Exhibit A) for the purposes of warehousing, storing, and having access to certain personal property, equipment, electronics, goods, cargo, shipping containers, and other materials owned and/or in the custody of Licensee, together with the right to use equipment, fixtures, and appurtenant items that are located in the License Area.

(B) Licensee acknowledges and agrees that it has inspected and is familiar with the License Area, and Licensee accepts the same and the contents thereof in their “as is” condition as of the “Commencement Date” (as hereinafter defined). Licensors shall not be required to perform any work or furnish any materials or otherwise prepare the License Area for Licensee’s occupancy.

2. License Period.

(A) Except as otherwise provided in this Section 2 or as otherwise agreed in writing by the Parties, the term of this License Agreement shall commence on [commencement date], (Commencement Date) and shall continue until either party provides written notice of its intent to terminate this Agreement in accordance with section (B) below.

(B) Either Party may terminate this License Agreement upon not less than 30 days’ prior written notice to the other Party, which notice may be given at any time. Licensee shall have 30 days after the effective date of such notice to vacate the License Area.

3. License Fee. The Parties expressly acknowledge and agree that Licensee’s consideration for Licensors’ granting of the License hereto shall be a Monthly Gross Rent of \$ _____. The Monthly Gross Rent shall be payable to Licensors, monthly in advance, without offset or deduction, commencing on the Commencement Date and continuing on the first day of each month thereafter.

4. Proration of License Fee. In the event that Licensee occupies the License Area for a partial month, the Monthly Gross Rent shall be prorated based on the number of days in which Licensee occupies the License Area.

5. Security Deposit.

(A) Security Deposit. Licensee agrees to deposit with Licensor, upon execution of this License Agreement, a Security Deposit of \$_____ as security for the full and faithful performance by Licensee of each and every term, provision, covenant, and condition of this License Agreement.

(B) Transfer of Security Deposit. In the event of a sale of the Property, Licensor shall have the right to transfer the Security Deposit to such vendee or lessee and upon such vendee's or lessee's assumption of such liability, and Licensor shall thereupon be released by Licensee from all liability for the return of such Security Deposit, as the case may be. To the extent that the Security Deposit shall have been actually transferred or delivered by Licensor to a new Licensor, Licensee shall look solely to the new Licensor for the return of the Security Deposit, as the case may be, and the new Licensor shall have assumed the obligation to return the same. The provisions hereof shall apply to every transfer or assignment of the Security Deposit made to a new Licensor.

(C) Application of Security Deposit. If Licensee should breach this License Agreement, Licensor may use, apply, or retain the whole or any part of the Security Deposit for the payment of any sum then due hereunder or which Licensor may expend or be required to expend by reason of Licensee's breach, including, without limitation, any damages or deficiency in the reletting of the Premises, whether such damages or deficiency shall have accrued before or after reentry by Licensor. If any of the Security Deposit shall be so used, applied, or retained by Licensor at any time or from time to time, Licensee shall promptly, in each such instance, within five days of written demand therefore by Licensor, pay to Licensor such additional sums as may be necessary to restore the Security Deposit to the original amount set forth above, and Licensee's failure to timely do so shall be deemed an event of default. Except as otherwise required by Applicable Law, Licensee shall not be entitled to any interest on the Security Deposit.

(D) Return of Security Deposit. If Licensee shall fully and faithfully comply with all the terms, provisions, covenants, and conditions of this License Agreement, the cash Security Deposit, or the balance thereof, shall be returned to Licensee after all of the following have occurred: (1) the expiration of the License Period; (2) Licensee has vacated the License Area; (3) Licensee has surrendered the License Area to Licensor in accordance with this License Agreement; and (4) Licensor has made a final determination of all amounts payable by Licensee hereunder and Licensee has paid the same.

6. Damage and Destruction. Except to the extent caused by the willful misconduct of Licensor, Licensor shall have no responsibility to Licensee in the event of any damage to, loss of, or theft of any personal property of Licensee during the License Period, and Licensee shall look exclusively to its own insurance coverage, if any, for recovery in the event of any such damage, loss, or theft.

7. Insurance/Indemnity.

(A) Licensee shall be required to maintain and provide to Licensor evidence of the following personal property and commercial general liability insurance with respect to the License Area and any personal property owned by, or in the custody of, Licensee at all times during the License Term:

- i. **Workers' Compensation and Employer's Liability Insurance.** Insurance covering all of Licensee's employees for Workers' Compensation, in statutory amounts, and Employer's Liability coverage of \$1 million for each accident, each employee, and per policy and shall include a waiver of subrogation in favor of Licensor and Licensor's property manager.
- ii. **Commercial General Liability Insurance (Primary).** Commercial General Liability covering Licensee against any claims arising out of liability for bodily injury, death, personal injury, advertising injury, and property damage occurring in and about the License Area and the Property and otherwise resulting from any acts and operations of Licensee, its agents, contractors, invitees, and employees, with combined single limit of \$1 million per occurrence and \$2 million annual general aggregate. Coverage shall include premises liability, products/completed operation liability, fire legal liability, host liquor liability, and contractual liability including coverage for insured contracts.
- iii. **Automobile Liability Insurance.** When any motor vehicles are used in connection with this License Agreement, Licensee shall provide Automobile Liability Insurance to include owned, nonowned, or hired automobiles and automobile contractual liability with limits of not less than \$1 million combined single limit and such other coverages as required by Illinois law.
- iv. **Umbrella Liability Insurance.** Umbrella Liability Insurance to be excess and follow-form over the Commercial General Liability, Automobile Liability, and Employer's Liability Insurance. The Umbrella Liability policy shall be written on an "occurrence" form with a limit of liability of \$5 million and a Self-Insured Retention no greater than \$10,000.
- v. **Property Insurance.** Property coverage provided under a Special Form or "All Risks" policy that shall include coverage for flood and earthquake unless approved otherwise in writing by Licensor. The limit shall be in an amount of the full replacement cost value of Licensee's property (which shall include alterations) and include an agreed amount endorsement waiver and coinsurance limitation.
- vi. **Business Interruption Insurance.** Business Income coverage with limits not less than an amount necessary to cover continuing expenses, including rents for at least one year.

- vii. **During Construction.** In addition to the aforementioned insurances, and during any such time as any alterations or work is being performed in the License Area (except that work being performed by Licensor or on behalf of Licensor), Licensee, at its sole cost and expense, shall carry or cause to be carried and shall deliver to Licensor at least ten days prior to commencement of any such alteration or work, evidence of insurance with respect to (a) Workers' Compensation Insurance covering all persons employed in connection with the proposed alteration or work in statutory limits; (b) General/Excess Liability Insurance, in an amount commensurate with the work to be performed but not less than \$2 million per occurrence and in the aggregate, for ongoing and completed operations insuring against bodily injury and property damage and naming all additional insured parties as outlined below and required of Licensee, and shall include a waiver of subrogation in favor of such parties; (c) Builders Risk Insurance, to the extent such alterations or work may require, on a completed value form including permission to occupy, covering all physical loss or damages, in an amount and kind reasonably satisfactory to Licensor; and (d) such other insurance, in such amounts, as Licensor deems reasonably necessary to protect Licensor's interest in the License Area and Property from any act or omission of Licensee's contractors or subcontractors.
- viii. **Other Coverage.** Such other policy or policies as are deemed reasonably necessary by Licensor.

(B) Licensee shall indemnify, defend, and hold harmless Licensor and its partners, members, shareholders, officers, directors, agents, and employees (individually, a "Licensor Indemnitee," or collectively, the "Licensor Indemnites") from and against any and all claims made or judicial or administrative actions filed that allege that a Licensor Indemnitee is liable to the claimant (other than to the extent caused by or arising from a Licensor Indemnitee's adjudicated recklessness or willful misconduct) by reason of (i) any injury to or death of any person, or damage to or loss of property, or any other thing occurring on or about the License Area or the Property, or in any manner growing out of, resulting from or connected in any way with the use, condition, or occupancy of the License Area or the Property that is attributable to Licensee or other Persons for whose conduct Licensee is legally responsible; or (ii) Licensee's use and occupancy of the License Area or the Property, except to the extent that any such claim is caused by or arises from the recklessness or willful misconduct of any Licensor Indemnitee. Except for Licensor or Licensor Indemnitor's adjudicated recklessness and willful misconduct, Licensee waives any and all claims against Indemnitor, and, with respect to any loss or damage to the License Area or the Property arising out of or related to the foregoing (i) or (ii) above, the parties agree that it is the express intent of the parties to shift all risk of loss or damage of the License Area and the Property as aforescribed to Licensee. The scope of Licensee's indemnity obligation to Licensor shall include reimbursement for Licensor's reasonable attorneys' fees and costs incurred in connection with any indemnified claim.

8. **Assignment; Sublicensing.** The License granted hereby is personal to Licensee and shall not be assigned, nor shall Licensee sublicense or otherwise permit or suffer the occupancy of any portion of the License Area by any third party without first obtaining the prior written consent of Licensor, which consent may be withheld by Licensor for any or for no reason.

9. **Alterations; Restoration.** No alterations may be made by Licensee to the License Area without first obtaining the prior written consent of Licensor. Licensee shall bear all costs and expenses associated with performing any such alterations, including, without limitation, costs of construction and any increased operating costs resulting from such alterations. Any alterations shall become the property of Licensor upon the termination or expiration of this License Agreement.

10. **Additional License Issues To Be Resolved in Good Faith.** The Parties acknowledge and agree that the License Area is of such configuration and size, and that the License Period is for such a duration, that, in the opinion of the Parties, it is not practicable to enter into a lease and/or sublease covering the License Area. Rather, the Parties have entered into this short-form License Agreement, which, the Parties recognize, is not dispositive of all matters and issues that may arise with respect to the License Area. As and when matters arise during the course of the License Period that are not definitively addressed by the provisions of this License Agreement, the Parties shall act reasonably and in good faith endeavor to adjust and resolve such matters.

11. **Miscellaneous.**

(A) **Counterparts.** This License Agreement may be executed in separate counterparts, each of which shall be deemed an original and all of which, when taken together, shall constitute one and the same agreement.

(B) **Facsimile Signatures.** The parties hereto agree that the use of facsimile or electronically transmitted signatures for the negotiation and execution of this License Agreement shall be legal and binding and shall have the same full force and effect as if originally signed.

(C) **Governing Law.** This License Agreement shall be governed by and construed in accordance with the laws of the State of Illinois.

(D) **Interpretation.** The headings contained in this License Agreement are for reference purposes only and shall not affect in any way the meaning or interpretation of this License Agreement. When a reference is made in this License Agreement to an Article or a Section, such reference shall be to an Article or Section of this License Agreement unless otherwise indicated.

(E) **Entire Agreement.** This License Agreement and the exhibits and schedules referenced or attached hereto constitute the entire agreement between the Parties with

respect to the subject matter hereof and shall supersede all prior agreements, understandings, and negotiations, both written and oral, between the Parties with respect to the subject matter hereof. This License Agreement is not intended to confer on any Person other than the Parties hereto any rights or remedies hereunder.

(F) **Severability.** If any terms or other provision of this License Agreement or the schedules or exhibits hereto shall be determined by a court, administrative agency, or arbitrator to be invalid, illegal, or unenforceable, such invalidity or unenforceability shall not render the entire License Agreement invalid. Rather, this License Agreement shall be construed as if not containing the particular invalid, illegal, or unenforceable provision, and all other provisions of this License Agreement shall nevertheless remain in full force and effect as long as the economic or legal substance of the transactions contemplated hereby is not affected in any manner materially adverse to either Party.

(G) **Further Agreements.** The Parties shall execute or cause their applicable affiliates to execute such additional agreements between the Parties and/or their respective affiliates as may be reasonably necessary to effectuate the intent of this License Agreement.

(H) **Binding Effect.** This License Agreement shall inure to the benefit of and be binding on the Parties hereto and their respective legal representatives and successors, and nothing in this License Agreement, express or implied, is intended to confer on any other Person any rights or remedies of any nature whatsoever under or by reason of this License Agreement. This License Agreement may be amended at any time by mutual consent of Licensor and Licensee, evidenced by an instrument in writing signed on behalf of each of the Parties.

(I) **Amendment and Modification.** This Agreement may be amended, modified, or supplemented only by a written agreement signed by all Parties hereto.

(J) **Failure or Indulgence Not Waiver; Remedies Cumulative.** No failure or delay on the part of either Party hereto in the exercise of any right hereunder shall impair such right or be construed to be a waiver of, or acquiescence in, any breach of any representation, warranty, or agreement herein, nor shall any single or partial exercise of any such right preclude other or further exercise thereof or of any other right. All rights and remedies existing under this License Agreement are cumulative to, and not exclusive of, any rights or remedies otherwise available.

(K) **Authority.** Each of the Parties represents to the other Party that (i) it has the corporate or other requisite power and authority to execute, deliver, and perform this License Agreement; (ii) the execution, delivery, and performance of this License Agreement by it have been duly authorized by all necessary corporate or other actions; (iii) it has duly and validly executed and delivered this Agreement; and (iv) this Agreement is its legal, valid, and binding obligation, enforceable against it in accordance with its terms, subject to applicable bankruptcy, insolvency, reorganization, moratorium, or other similar laws affecting creditors' rights generally and general equity principles.

(L) **Third-Party Beneficiaries.** None of the provisions of this License Agreement shall be for the benefit of or enforceable by any third party, including any creditor of any Person. No such third party shall obtain any right under any provision of this License Agreement or shall by reason of any such provision make any claim in respect of any Liability (or otherwise) against either Party hereto. Notwithstanding the foregoing, it is understood that Licensee's rights hereunder shall inure to the benefit of Licensee's affiliates and their officers, directors, and employees.

(M) **Capitalized Terms.** All capitalized terms used herein but not defined herein shall be as defined in the Purchase Agreement.

(N) **Defined Terms.** As used in this License Agreement, the following terms shall have the meanings given to them in this Section 9(N), applicable both to the singular and the plural forms of the terms described:

- i. "Liabilities" means all debts, liabilities, guaranties, assurances, commitments, and obligations, whether fixed, contingent, or absolute, asserted or unasserted, matured or unmatured, liquidated or unliquidated, accrued or not accrued, known or unknown, due or to become due, whenever or however arising (including, without limitation, whether arising out of any contract or tort based on negligence or strict liability), and whether or not the same would be required by generally accepted accounting principles and policies to be reflected in financial statements or disclosed in the notes thereto.
- ii. "Person" means an individual, a partnership, a corporation, a limited liability company, an association, a joint stock company, a trust, a joint venture, an unincorporated organization, or a governmental entity or any department, agency, or political subdivision thereof.

(O) **Time.** Time is of the essence with respect to the performance of every provision of this License Agreement in which time of performance is a factor. Except as expressly provided herein to the contrary, when a Party is required to do something by this License Agreement, it shall do so at its sole cost and expense without right of reimbursement from the other Party.

(P) **Consent/Approval.** Whenever one Party's consent or approval is required to be given as a condition to the other Party's right to take any action pursuant to this License Agreement, unless another standard is expressly set forth, such consent or approval shall not be unreasonably withheld, conditioned, or delayed.

(Q) **Notices.** All notices, demands, requests, or other communications required or permitted hereunder shall be in writing and shall be:

- i. personally delivered to the party to whom it is sent, effective on the date of such delivery; or

- ii. sent via facsimile transmission sent on business days during business hours (between 9:00 a.m. and 6:00 p.m. Central Time), effective on the date of such delivery (otherwise, the effective date shall be the next business day), provided that a copy of such notice along with a copy of the confirmation of such delivery is also mailed by first-class mail concurrently with such facsimile transmission; or
- iii. sent via e-mail transmission sent on business days during business hours (between 9:00 a.m. and 6:00 p.m. Central Time), effective on the date of such delivery (otherwise, the effective date shall be the next business day), provided that a copy of such notice along with a copy of the confirmation of such delivery is also mailed by first-class mail concurrently with such e-mail transmission; or
- iv. sent via overnight delivery through a nationally recognized courier service to the party to whom it is sent, effective on the date of the delivery of such notice to said courier for such delivery, all as follows:

To Licensor: **Name:**
 Address:
 Telephone:
 Facsimile:
 E-mail:

With a copy to: **Name:**
 Address:
 Telephone:
 Facsimile:
 E-mail:

To Licensee: **Name**
 Address
 Telephone:
 Facsimile:
 E-mail:

With a copy to: **Name**
 Address
 Telephone:
 Facsimile:
 E-mail:

- v. Any notice, demand, request, or other communication required or permitted hereunder may be made only on a party's attorney, which shall be effective for all purposes.

IN WITNESS WHEREOF, the Parties have executed this License Agreement as of the date herein above first written.

LICENSEE:

[Licensee]

By: _____

Name: _____

Title: _____

Date: _____

LICENSOR:

[Licensor]

By: _____

Name: _____

Title: _____

Date: _____

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