SURVEY OF RECENTLY REPORTED CASES IN REAL PROPERTY LAW

BRIAN C. CRIST, MARIA M. BAZAKOS, TYLER J. HARDCASTLE, IDA M. HYVARINEN, MATTHEW R. LAND, ASHLEY M. LAUGHLIN, KATIE J. MARSCHKE, AMANDA C. MORTON, ALEX NORLANDER, JONTIA A. PEGUES, MARIE RAGIAS, HALEY L. SOSHNICK, MICHAEL R. TIRMAN, & ANNIE R. XIE*

INTRODUCTION

This Article examines the reported decisions during the Survey Period of the

---

* **Brian C. Crist** is a partner in Ice Miller LLP's real estate section. He received his B.A. in History and Economics from the University of Missouri in 1994 and his J.D. from Vanderbilt University in 1997. **Maria M. Bazakos** is an associate attorney in Ice Miller's real estate section. She received her B.S. in Neuroscience from the University of St. Thomas in 2011 and her J.D. from the University of St. Thomas School of Law in 2014. **Tyler J. Hardcastle** is an associate attorney in Ice Miller's real estate section. He received his B.A. in Political Science from Wabash College in 2015 and his J.D. from Indiana University McKinney School of Law in 2019. **Ida M. Hyvarinen** is an associate attorney in Ice Miller's real estate section. She received her B.S. in Psychology from Florida State University in 2012 and her J.D. from Washington University in St. Louis School of Law in 2020. **Matthew R. Land** is an associate attorney in Ice Miller's real estate section. He received his B.A. in Analytic Philosophy from Indiana University-Purdue University Indianapolis in 2014 and his J.D. from Indiana University Maurer School of Law in 2018. **Ashley M. Laughlin** is an associate attorney in Ice Miller's real estate section. She received her B.A. in Professional Writing and Rhetoric from Miami University, Ohio in 2014 and her J.D. from The Ohio State University Moritz College of Law in 2017. **Katie J. Marschke** is an associate attorney in Ice Miller's real estate section. She received her B.S. in Hospitality and Tourism Management from Purdue University in 2009 and her J.D. from Pennsylvania State University Dickinson School of Law in 2013. **Amanda C. Morton** is an of counsel attorney in Ice Miller's real estate section. She received her B.A. in Political Science from Wake Forest University in 2002 and her J.D. from Mercer University Walter F. George School of Law in 2006. **Alex Norlander** is an of counsel attorney in Ice Miller's real estate section. He received his B.S. in Finance from Miami University, Ohio in 2009 and his J.D. from the University of Illinois Chicago School of Law in 2013. **JonTia A. Pegues** is an associate attorney in Ice Miller's real estate section. She received her B.A. in Political Science from the University of Illinois in 2009 and her J.D. from the University of Illinois Chicago School of Law in 2015. **Marie C. Ragias** is an associate attorney in Ice Miller LLP's real estate section. She received her B.S. in Business Administration from The Ohio State University in 2013 and her J.D. from Capital University Law School in 2017. **Haley L. Soshnick** is an associate attorney in Ice Miller LLP's real estate section. She received her B.A. in Political Science and French from the University of Michigan in 2015 and her J.D. from Northwestern University Pritzker School of Law in 2018. **Michael R. Tirman** is an associate attorney in Ice Miller LLP's real estate section. He received his B.A. in Music with a second major in Finance from Butler University in 2012 and his J.D. from Northwestern University Pritzker School of Law in 2015. **Annie R. Xie** is an associate attorney in Ice Miller LLP's real estate section. She received her B.S. in Environmental Science from Brigham Young University in 2014 and her J.D. from Indiana University Maurer School of Law in 2017.

Indiana Supreme Court (the "Supreme Court"), Court of Appeals of Indiana (the "Court of Appeals"), and the Indiana Tax Court (the "Tax Court") concerning real property issues.

I. ADVERSE POSSESSION

A. Millikan v City of Noblesville

In *Millikan v City of Noblesville*,[1] the Court of Appeals considered a motion for summary judgment relating to a quiet title action brought by Dennis Millikan and Vicki Millikan (together, the "Millikans") against the City of Noblesville ("Noblesville") and KACE, LLC. At issue was a portion of former Conrail railroad right of way adjacent to the property owned by the Millikans.[2] It was undisputed that the Millikans became the fee owners of the portion of the right of way from the centerline to the Millikans' property line; the Millikans claimed title by adverse possession over the remainder of the right of way (the "Disputed Property").[3] The trial court granted summary judgment in favor of Noblesville and KACE, LLC because the Millikans did not satisfy the statutory requirement for adverse possession for payment of taxes and assessments.[4] The Court of Appeals instead held that the Millikans did substantially comply with the statutory requirement because of their reasonable and good faith belief that they were paying the taxes due for the Disputed Property, which were none, for the period of adverse possession.[5]

In addition to the common law elements of adverse possession (control, intent, notice, and duration of ten years),[6] Indiana Code § 32-21-17-1(a) "imposes a requirement that an adverse possessor 'pay all taxes and special assessments that the adverse possessor reasonably believes in good faith to be due on the real property during the period the adverse possessor claims to have adversely possessed the real property,'"[7] and "[s]ubstantial compliance satisfies this statutory tax payment requirement."[8] The Millikans began exercising control over the Disputed Property in 1982, after Conrail abandoned the railway and right of way, by moving the rails and railroad track improvements, cutting down the hedgerow and planting grass and trees, and maintaining and mowing the Disputed Property.[9] Noblesville did not dispute that the Millikans satisfied the common law elements of adverse possession, and so the only question was whether the Millikans substantially complied with the statutory requirements.[10] In 1991, the

---

1. 160 N.E.3d 231 (Ind. Ct. App. 2020).
2. *Id*. at 233.
3. *See id*. at 234.
4. *Id*. at 237-38.
5. *Id*. at 238-39.
6. *Id*. at 236 n.2.
7. *Id*. at 237 (quoting IND. CODE § 32-21-7-1(a)).
8. *Id*. (quoting Celebration Worship Ctr., Inc. v. Tucker, 35 N.E.3d 251, 254 (Ind. 2015)).
9. *Id*. at 233.
10. *See id*. at 235.

Millikans recorded an "Affidavit In Support Of Vesting Interest in Abandoned Railroad Right Of Way" which was stamped by the Hamilton County Recorder's Officer as "duly entered for taxation."[11] Though Noblesville paid drainage assessments on the Disputed Property which were payable in 2010-2016, there were no special assessments payable for the years 2000-2009, no evidence presented as to assessments prior to 2000, and no property taxes ever assessed on the Disputed Property.[12] The court cited the 1991 recorded affidavit as evidence that "[t]he Millikans believed that [the affidavit] put the taxation authorities on notice that [the Millikans] were taking responsibility for taxation of the Disputed Property."[13]

"'[W]here no taxes are assessed none need be paid,'" and adverse claimants are found to have satisfied the statutory requirements.[14] The court concluded that because no taxes or assessments were assessed or due on the Disputed Property for the period of adverse possession, the Millikans had a reasonable and good faith belief that they were paying the taxes for the Disputed Property and therefore substantially complied with the statutory requirement.[15] Title by adverse possession automatically vests "at the conclusion of the ten-year possessory period" and such title "may not be lost, abandoned, or forfeited."[16] Title to the Disputed Property therefore vested with the Millikans upon substantially complying with the taxation requirement and the other elements of adverse possession for at least a ten-year period, and the Millikans were entitled to summary judgment in their favor.[17]

B. Moseley v. Trustees of Larkin Baptist Church

In *Moseley v. Trustees of Larkin Baptist Church*, the Court of Appeals held that the Moseleys' counter claim for adverse possession failed because their "use of the disputed area included no structures, either permanent or temporary, for a ten-year period and consisted only of yard maintenance and the intermittent parking of different vehicles."[18]

In 1991, the Moseleys bought a home on a one-acre parcel next to Larkin Baptist Church.[19] "Between 1991 and 2017, Richard [Moseley] regularly mowed and maintained a grassy area located along their common boundary line, which would later become the subject of a quiet title action by the Church" (the "Disputed Area").[20] "Richard would also park different vehicles at various times

---

11. *Id.* at 234.
12. *Id.*
13. *Id.* at 238.
14. *Id.* (quoting Colley v. Carpenter, 362 N.E.2d 163, 167 (Ind. Ct. App. 1977).
15. *Id.*
16. *Id.* at 237 (quoting Fraley v. Minger, 829 N.E.2d 476, 487 (Ind. 2005)).
17. *Id.* at 239.
18. 155 N.E.3d 1221, 1226 (Ind. Ct. App. 2020), *trans. denied*, 166 N.E.3d 905 (Ind. 2021).
19. *Id.* at 1222.
20. *Id.*

on a small portion of the [D]isputed [A]rea."[21] "In early 2017, the Church commissioned a survey of its property, and the survey indicated that the Church owned the [D]isputed [A]rea."[22] "The Church's pastor and a trustee spoke with Lisa [Moseley] and showed her the location of the property line between the two properties."[23] After receiving this notice, Richard began building a fence and continued to do so after the Church asked him to stop and remove the work he had already done.[24]

"[T]he Church filed a complaint against the Moseleys alleging trespass, conversion, and nuisance and seeking to quiet title to the [D]isputed [A]rea."[25] "[T]he Moseleys filed a complaint to quiet title and for adverse possession."[26] "The two actions were then consolidated and the Moseleys' complaint was converted to a counterclaim."[27] The trial court issued a summary judgment ruling in favor of the Church, denying the Moseleys' adverse possession counterclaim.[28] The Moseleys appealed.[29]

The sole issue on appeal was to determine if the Moseleys had presented enough evidence to create a material issue of fact sufficient to forestall summary judgment.[30] The evidence presented by the Moseleys claimed that:

> in 1991, survey stakes were present indicating that the [D]isputed [A]rea was a part of their property; the Church had mowed up to the location of the stakes outside of the [D]isputed [A]rea; since 1991, Richard had mowed and maintained the [D]isputed [A]rea regularly; since 1991, Richard has, 'at various times,' parked vehicles on the [D]isputed [A]rea; when the Church installed a new septic system, Richard told the installer not to encroach on the [D]isputed [A]rea; when, in 2016, the Church mowed the [D]isputed [A]rea twice, Richard told the person mowing to stop mowing the [D]isputed [A]rea; Richard reasonably believed that his property tax payments included the [D]isputed [A]rea; and a local resident who knew the Moseleys had seen vehicles belonging to Richard parked on the [D]isputed [A]rea 'many times' over fifteen years.[31]

The court noted that Indiana case law is clear that intermittent parking of cars and yard maintenance, without more, is insufficient to establish adverse possession.[32] The Moseleys had anticipated this argument in their brief, claiming

---

21. *Id.*
22. *Id.* at 1223.
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.* at 1223-24.
31. *Id.* at 1225-26 (quoting Appellants App. Vol. 2 at 141, 215).
32. *Id.* at 1226.

that their actions were more akin to the circumstances found in *Celebration Worship Center, Inc. v. Tucker*.[33] In *Celebration Worship Center,* an adverse possessor "had used and maintained a gravel driveway near the [disputed] property line for approximately thirty years."[34] The *Moseley* court was unpersuaded.[35] It drew a distinction between a gravel road and the different "pattern[s] of mowing" that the Moseleys claimed distinguished the Disputed Area from the rest of the Church's parcel and held that "[t]he Moseleys did not maintain any structure or any improvement akin to a gravel driveway within the [D]isputed [A]rea" and therefore presented no evidence sufficient to create an issue of material fact as to their adverse possession claim.[36]

II. DEEDS

A. Fox v. Barker

In *Fox v. Barker*,[37] the Court of Appeals held that a mistake of law does not support the reformation of a deed.[38]

Thomas Fox, one half of an unmarried couple, purchased a 99-acre farm after his then girlfriend Judith Barker became concerned about her future if Fox should die.[39] Fox put both his and Barker's names on the deed as tenants-in-common.[40] Within six years, the couple parted ways and eight years post-breakup Barker filed suit for partition of the property.[41] Fox sought to reform the deed claiming that he did not intend to deed the property to both himself and Barker as tenants-in-common, he did not understand the significance of including her name on the deed and that that mistake alone warranted reformation.[42] Fox's affirmative defenses included the claim that the deed was an incomplete gift, that he and Barker had a settlement agreement, and that Barker should be equitably estopped from denying that settlement agreement.[43]

The Court of Appeals affirmed the trial court's partial summary judgment order because there was no genuine issue of material fact.[44] The plain language of the deed contained both Fox and Barker's names.[45] Fox's misunderstanding of the function of the deed was a mistake of law, not a mistake of fact and a mistake

---

33. *Id.*; *see* Celebration Worship Center, Inc. v. Tucker, 35 N.E.3d 251 (Ind. 2015).
34. *Celebration Worship Ctr.*, 35 N.E.3d at 256 (Ind. 2015).
35. *Moseley*, 155 N.E.3d at 1226.
36. *Id.* at 1226-27
37. 170 N.E.3d 662 (Ind. Ct. App. 2021).
38. *Id.* at 666.
39. *Id.* at 665.
40. *Id.*
41. *Id.*
42. *Id.* at 666.
43. *Id.* at 665-68.
44. *Id.* at 669.
45. *Id.* at 666.

of law does not justify deed reformation.[46] Fox never had complete control of the property, so he could not gift it to Barker.[47] The previous owners deeded the property to Fox and Barker and their delivery of the deed to Barker transferred title to *both* listed parties.[48] Fox misplaced the settlement agreement he claimed Barker breached, in which Barker supposedly asked that Fox pay off her credit cards and return the money she invested in the farm, and she would relinquish her claim to the farm.[49] There was no bargained for exchange relative to the settlement agreement, as Barker suffered no detriment and without the physical letter or legitimate part-performance from Fox, the settlement agreement would not satisfy the statute of frauds.[50] Fox did not lack knowledge of the facts, did not rely on Barker's actions, nor did he change his position because of Barker's actions, so the equitable estoppel defense failed as well.[51]

Mistake in the nature of the deed itself does not warrant reformation.[52]

III. EASEMENTS & COVENANTS

A. Blind Hunting Club, LLC v. Martini

In *Blind Hunting Club, LLC v. Martini*,[53] the Court of Appeals determined the scope of an easement agreement entered into among prior owners of adjacent properties. The owners of the servient estate argued that the easement agreement only permitted the dominant estate ingress and egress across the easement area for the purpose of accessing farmland and/or up to two residences.[54] The dominant estate was being used by the Defendant for a hunting facility, and the trial court granted summary judgment in favor of the Plaintiffs, agreeing that the Defendant could not use the easement for ingress to its property while used as a hunting facility.[55] The pertinent language in the easement agreement was as follows:

> Subject only to the conditions stated herein, Grantor[s] hereby convey[] and grant[] to Grantees an unrestricted right of ingress, egress, use and access to, over, across and upon a perpetual easement ("Easement") . . . to provide access for farm equipment, pedestrian and vehicular traffic to and from the Dominant Estate, to and from the physically open and publicly dedicated roadway commonly known as York Ridge Road. Grantor[s'] grant of the Easement herein is subject to the following

46. *Id.*
47. *Id.* at 667.
48. *Id.*
49. *Id.*
50. *Id.* at 667-68.
51. *Id.* at 668-69.
52. *Id.* at 666.
53. 169 N.E.3d 1121 (Ind. Ct. App. 2021).
54. *Id.* at 1123-24.
55. *Id.* at 1124.

> condition, and Grantees do hereby covenant and agree to limit the use of said Easement for the ingress and egress to no more than two (2) residences in total, that may hereafter be constructed and located on the . . . Dominant Estate[.][56]

The Court reasoned that when construing an easement, "'the trial court must ascertain and give effect to the intention of the parties, which is determined by proper construction of the instrument'" as a whole.[57] The Court ruled that the above two provisions, taken together, was patently ambiguous because the term "unrestricted" conflicts with the specified purpose of "access for farm equipment, pedestrian and vehicular traffic."[58]

The Court held that when the operative clause in an agreement is ambiguous, the recitals can aid the court in interpreting the parties' intent.[59] Further, the parties' course of conduct, even that of the prior property owners, should aid the court.[60] The Court held that because the recitals plainly referenced the history and nature of the easement was for farming and the prior owners only used the easement for access to the farm, the easement agreement, taken as a whole, only permitted the grantee to use the easement to access the dominant estate to farm that property and/or access no more than two residences.[61]

B. Castleton Corner Owners Ass'n v. Conroad Associates, L.P.

The Court of Appeals in *Castleton Corner Owners Ass'n v. Conroad Associates., L.P.*, affirmed the trial court's decision that acting reasonably and in accordance with a required standard of care may not defeat a breach of contract claim and that expert reports are excludable when the expert is unqualified or the evidence on which they relied for their opinion is not that which would be reasonably relied on by other experts.[62] The court reversed the trial court's decision on the fact-specific decision of the amount of damages.[63]

Conroad Associates, L.P. ("Conroad") purchased a retail building, thus becoming a member of the Castleton Corner Owners Association, Inc. ("Castleton" or the "Association").[64] Per the Association's declaration and its by-laws, it agreed to "pay 'all Maintenance Costs in connection with' improvements constructed at Castleton Corner," and to "provide for the 'ownership, operation, maintenance, upkeep, repair, replacement, administration, and preservation of the roads, drainage ditches, utility strips and sewers, *including a sanitary lift*

---

56. *Id.* at 1123.
57. *Id.* at 1125 (quoting McCauley v. Harris, 928 N.E.2d 309, 314 (Ind. Ct. App. 2010).
58. *Id,*
59. *Id.*
60. *Id.* at 1126.
61. *Id.* at 1127.
62. 159 N.E.3d 604, 607 (Ind. Ct. App. 2020).
63. *Id.*
64. *Id.*

station.'"[65] The Association paid for weekly maintenance of the lift station, but on February 14, 2015, the lift's control panel stopped receiving power and flooded human sewage into Conroad's property, causing Conroad's tenant to terminate its lease early and forfeit its two additional five-year options.[66] Conroad sued claiming the Association was negligent and had breached its declaration and its fiduciary duty to its members.[67] Both Conroad and the Association appealed; the Association claiming that the trial court could not reconcile its decision that the Association had not been negligent with its decision that it had breached its contract and that Conroad's expert testimony (the appraisal report as to the amount of lost income) was inadmissible hearsay; and that there is no evidentiary support for the amount of damages.[68]

Both the Court of Appeals and the trial court found the Association was not negligent and had not breached its fiduciary duty.[69] The Association argued that the words "reasonably necessary or prudent" limited the Association's contractual maintenance duties, but the Court noted that the phrase "continuous operation" relative to the lift station imposed "strict obligation" on the Association to keep the lift in operation.[70] The Court of Appeals noted that "[i]t is well settled that, when interpreting a contract, specific terms control over general terms."[71] To prove breach of contract, Conroad only needed to show that a contract existed and that the Association breached it.[72] The Association did not keep the lift station in continuous operation, thus breaching its contract with Conroad via the declaration and the by-laws.[73]

The Court of Appeals gave great deference to the trial court's admission of the appraiser's report, "[b]ecause the trial court is best able to weigh the evidence and assess witness credibility," and the Court of Appeals would "review [the trial court's] rulings on admissibility for abuse of discretion."[74] The Court found the Association failed to show that the appraiser's report was inadmissible or that the trial court abused its discretion in admitting the same.[75]

On the issue of damages, the Court affirmed the trial court's decision that Conroad was not entitled to an additional $485,000, finding that Conroad should be compensated for lost rent through the end of the base term, but not for the other expenses, such as the estimated values of property taxes and common area maintenance ("CAM") charges, nor the two additional five-year *options* because "a fact finder 'may not award damages on the mere basis of conjecture and

65. *Id.* at 607-08.
66. *Id.* at 608-09.
67. *Id.* at 609.
68. *Id.* at 607.
69. *Id.* at 609, 613.
70. *Id.* at 612-13.
71. *Id.* at 611.
72. *Id.* at 613.
73. *Id.*
74. *Id.* (quoting Carpenter v. State, 18 N.E.3d 998, 1001 (Ind. 2014)).
75. *Id.* at 614.

speculation."[76]

Castleton breached the contract when it failed to keep the lift station in operation, as lack of negligence does not automatically absolve a party of breach of contract.[77] The trial court did not abuse its discretion in admitting the appraiser's report, as trial courts are well trained in identifying appropriate evidence.[78] The trial court erred in its determination of the amount of damages, as damages cannot be speculative.[79]

C. Hicks & Sons, LLC v. Carewell International, LLC

In *Hicks & Sons, LLC v. Carewell International, LLC*[80] the Court of Appeals upheld the trial court's summary judgment ruling in favor of Carewell International, LLC ("Carewell") allowing Carewell to maintain its sign within an ingress/egress easement on the Hicks & Sons, LLC ("Hicks") property.[81]

Appellant Hicks took issue with Carewell's directional sign for its Holiday Inn being placed within the ingress/egress easement on the Hicks property rather than within the separate sign easement, even though the sign had been in place for several years before Hicks purchased the property.[82] When Carewell refused Hicks' demands to remove the sign, Hicks filed a complaint against Carewell seeking injunctive relief for civil and criminal trespass resulting from the continued maintenance of the sign within the ingress/egress easement.[83] Carewell filed a motion for summary judgment, and following a hearing, Carewell's motion was granted by the trial court.[84]

Hicks appealed the grant of summary judgment, arguing that Carewell did not need the sign within the ingress/egress easement in order to use and enjoy its right of ingress and egress over the Hicks property and that the scope and purpose of the easement was limited and did not include the right to maintain signage.[85] The Appellate Court noted that easements in Indiana are generally "limited to the purpose for which they are granted."[86] The Appellate Court cited prior case law in *Wendy's of Fort Wayne v. Fagan*, which held that in some circumstances, a directional sign is necessary to fulfill an ingress/egress easement's purpose of providing ingress and egress to a particular building.[87]

In this case, Carewell established that without the sign to direct guests, the

---

76. *Id.* at 615-16 (quoting Marathon Oil Co. v. Collins, 744 N.E.2d 474, 482 (Ind. Ct. App. 2001)).

77. *Id.* at 613.

78. *Id.* at 614.

79. *Id.*

80. 173 N.E.3d 270 (Ind. Ct. App. 2021).

81. *Id.* at 272.

82. *Id.* at 273-74.

83. *Id.* at 274.

84. *Id.*

85. *Id.* at 278.

86. *Id.* at 276.

87. 644 N.E.2d 159, 162-63 (Ind. Ct. App. 1994).

Holiday Inn's customers and suppliers would not know where to turn to access the hotel, since it had to be accessed from a county road intersecting with the highway.[88] The Appellate Court upheld the summary judgment granted by the trial court because the facts supported the determination that Carewell's sign was necessary to fulfill the purpose of the ingress/egress easement.[89]

D. King v. Dejanovic

In *King v. Dejanovic*,[90] the Court of Appeals held that a homeowner's failure to object to violations of restrictive covenants that do not directly affect the homeowner "does not deprive them of the right to enforce the covenant for a violation right next door that directly interferes with the use and enjoyment of their property."[91]

Defendants, Sandra King and Danielle Benge, (the "Defendants") constructed a pole barn on their property.[92] The pole barn was located twenty feet from the property line of Plaintiffs, Dan and Alice Dejanovic (the "Plaintiffs") and thirty-five feet from the Defendants' house.[93] The pole barn, including its porch overhang, measured a total of 1,600 square feet.[94] Plaintiffs' and Defendants' properties are located in a subdivision subject to certain covenants and restrictions (the "Covenants") which govern land use and building type within the subdivision.[95] One provision of the Covenant in part reads that "[n]o lot shall be used except for one (1) single family residential structure per lot . . . [A]long with one (1) out building no greater than four hundred (400) square feet in size and of construction compatible with the residential use occupying the lot."[96]

The Plaintiffs filed a complaint stating that the Defendants' pole barn was a breach of the covenant.[97] The Defendants acknowledged their pole barn violated the Covenant but raised "an affirmative defense that Plaintiffs waived their right to enforce the covenant by not objecting to other violations in the subdivision."[98]

The Court weighed the following three factors to determine whether the Plaintiffs waived their enforcement rights:

> 1) the location of the objecting landowners relative to both the property upon which the nonconforming use is sought to be enjoined and the property upon which a nonconforming use has been allowed, 2) the similarity of the prior nonconforming use to the [present nonconforming

88. *Hicks*, 173 N.E.3d at 278.
89. *Id.*
90. 170 N.E.3d 268 (Ind. Ct. App. 2021).
91. *Id.* at 269.
92. *Id.*
93. *Id.*
94. *See id.* at 271.
95. *Id.* at 269.
96. *Id.*
97. *Id.*
98. *Id.*

use], and 3) the frequency of prior nonconforming uses.[99]

At the time the Defendants built their pole barn, there were various other nonconforming structures in the subdivision including three pole barns.[100] However, the trial court found that the other violations of the Covenants were (a) out of the Plaintiffs' sight line "on the other . . . side of the subdivision" from the Plaintiffs' property, and (b) "Defendants' pole barn [was] 33% larger than the [other three pole barns]" located in the subdivision. [101]

The Court affirmed the trial court's decision that "[t]he non conforming uses in place prior had a minimal impact on the Plaintiffs['] enjoyment of the character of the neighborhood"[102] and the failure of Plaintiffs "to object to [remote violations] does not deprive them of their right to enforce the covenant for a violation right next door to them."[103] To require homeowners to enforce against violations in all areas of the subdivision would be contrary to the purpose of the Covenants.[104]

E. Steele v. Steuben Lakes Regional Waste District

In *Steele v. Steuben Lakes Regional Waste District*,[105] the Court of Appeals considered: (1) whether the Steuben Lakes Regional Waste District (the "District") could require a property owner, who refused to grant an easement, to arrange and pay for the necessary construction work to install sewer equipment; (2) whether the District could charge the property owner for the necessary equipment for the sewer system; and (3) whether the property owners could be responsible for the District's attorney's fees for litigating how a sewer connection would be obtained.[106] The District asked Kenneth and Janice Steele (the "Steeles"), who owned property within the District (the "Property"), to grant it an easement to connect the two properties to the District's sewer system as a part of their expansion of the Lake Pleasant sewer system.[107] The request stated that if the easement was not granted, the District would proceed with the connection under state law, at the expense of the Steeles.[108] The Steeles refused to grant the easement without just compensation; the District eventually sought and obtained a court order requiring the Steeles to complete the connection at their own expense (costing approximately $15,00-$20,000), to pay for the equipment (costing approximately $7,000), and to pay for the District's attorney's fees.[109] The

---

99. *Id.* at 271.
100. *Id.*
101. *Id.* at 271-72.
102. *Id.* at 272.
103. *Id.*
104. *Id.*
105. 168 N.E.3d 1000 (Ind. Ct. App. 2021).
106. *Id.* at 1001.
107. *Id.* at 1001-02.
108. *Id.* at 1002.
109. *Id.* at 1002-03.

trial court also ordered the Steeles to pay the District's back user fees and penalties, back partial rate and penalties, capacity fees, failure-to-connect penalties, and a contractor reimbursement fee.[110]

The Steeles appealed and argued that the trial court erred, arguing that the District may not punish a property owner, who refused to voluntarily grant an easement, by requiring them to complete and pay for the connection themselves, while property owners who grant an easement have the connection complete at no cost to them.[111] The Court of Appeals held that the District may charge the Steeles for the cost of installation, but may not charge the Steeles for the equipment.[112] The Court of Appeals determined that "it was improper for the District to 'incentivize' [the property owner] 'to voluntarily give up their property by assessing two difference connection charges'" based on the property owners willingness to voluntary convey an easement or not.[113] The Court of Appeals stated that the District could have obtained an easement through eminent-domain, but it did not choose to do so, thus because the District did not have a right to enter the Property, it was logical to require the Steeles to do such work at their own expense.[114] Despite this, it was not appropriate for the District to charge the Steeles for equipment that property owners who granted the easement voluntarily received for free because the District can provide the equipment without entering the Steeles property, and the ability to enter the Property did not change the cost of the equipment.[115] The Court of Appeals emphasized that this was required under *Tucker* and consistent with a recent holding of a similar case.[116] The Court of Appeals affirmed the part of the trial court's order requiring the Steeles to pay for the installation of the system, but reversed the part requiring the Steeles to pay for the equipment.[117]

IV. EMINENT DOMAIN

A. Haggard v. State

In *Haggard v. State*,[118] the Court of Appeals held that a holder of an easement was not entitled to receive a good faith offer to purchase land before the State

---

110. *Id.* at 1003.

111. *Id.* at 1004.

112. *Id.* at 1005-06.

113. *Id.* at 1005 (quoting Steuben Lakes Reg'l Waste District v. Tucker, 904 N.E.2d 718 (Ind. Ct. App. 2009).

114. *Id.*

115. *Id.* at 1005-06.

116. *Id.* (citing Bezingue v. Steuben Lakes Reg'l Waste District, F. Supp. 3d 1021 (N.D. Ind. 2020), in which the landowner received the equipment for a sewer system free of charge regardless of whether the land owner is responsible for the installation, or grants the District an easement to install the sewer system).

117. *Id.* at 1001.

118. 163 N.E.3d 330 (Ind. Ct. App. 2021).

filed its complaint to condemn it.[119] The State, through the Indiana Department of Transportation ("INDOT"), appropriated certain real property as part of the ongoing construction of Interstate 69 through Morgan County, Indiana.[120] The State filed a complaint for appropriation against Jerry Hillenburg, as the fee owner of the property ("Fee Owner"), and named Herbert C. Haggard and Alice M. Haggard (the "Easement Holders") as defendants to any interest they may have because of their easement over the property.[121] The Easement Holders filed an objection "to the State's complaint because they had not received an offer to purchase their easement."[122]

The procedure for the State's exercise of eminent domain is codified in Indiana Code chapter 32-24-1.[123] Before the State can exercise its power of eminent domain, it "must conduct good faith negotiations with the owner of the property and make an effort to purchase the property for the use intended."[124] If the owner of the property and the State disagree on the damages sustained, the State "may file a complaint for the purpose of acquiring the property with the clerk of the circuit court of the county where the property is located."[125] The Indiana Code provides that as a condition precedent to the filing of a condemnation complaint, the State must "'at least thirty (30) days before filing a complaint, make an offer to purchase the property . . . [which] must be served . . . upon . . . the owner of the property sought to be acquired.'"[126] The Court of Appeals further clarified that owner means "'the persons listed on the tax assessment rolls as being responsible for the payment of real estate taxes imposed on the property'"[127] and "'the persons in whose name title to real estate is shown in the records of the recorder of the county in which the real estate is located.'"[128]

The Court of Appeals reasoned that the Easement Holders were not the owners of the property at issue because (a) they are not listed on the tax assessment rolls, and (b) they are not listed as the title holder of the property in the recorder's records.[129] Although their name appears on the deed as the holder of an easement for ingress and egress and to erect and maintain a billboard, the Court of Appeals held that "[t]he State was not required to provide a pre-complaint offer to the [Easement Holders] because they do not have title to the [condemned property]."[130] The State further clarified that the Easement Holders are "appropriate defendants" to the State's condemnation suit, so the parties can

---

119. *Id.* at 336.
120. *Id.* at 332.
121. *Id.*
122. *Id.*
123. IND. CODE §§ 32-24-1-1 to -17 (2021).
124. *Haggard*, 163 N.E.3d at 334; *see also* IND. CODE § 32-24-1-3(b)(2), (c)(3) (2021).
125. *Haggard*, 163 N.E.3d at 334; *see also* IND. CODE § 32-24-1-4(a) (2021).
126. *Haggard*, 163 N.E.3d at 335 (quoting IND. CODE § 32-24-1-5(a)) (2021).
127. *Id.* (quoting IND. CODE § 32-24-1-2 (2021)).
128. *Id.*
129. *Id.* at 335-36.
130. *Id.* at 336.

determine whether any just compensation is due to the Easement Holders for their interest in the easement, but an interest in property alone is not the owner "of the real estate entitled to an offer as a condition precedent to the State's condemnation suit."[131]

B. Krause-Franzen Farms, Inc. v. Tippecanoe School Corp.

In *Krause-Franzen Farms, Inc. v. Tippecanoe School Corp.*,[132] the Court held that the evidence does not point solely to a conclusion that that Tippecanoe School Corporation ("TSC") exceeded its authority to acquire certain property by eminent domain, which property would be used to accomplish TSC's educational purposes.[133]

Krause-Franzen Farms, Inc., David P. Krause, Jane E. Krause, and Philip C. Krause (collectively, "Landowners") and TSC entered into negotiations for TSC to acquire 42.974 acres of land ("Real Estate").[134] When negotiations were not productive any longer, "TSC filed a complaint for condemnation of the [r]eal [e]state alleging that TSC [needed] additional school buildings, facilities and related improvements for public school use . . . ."[135] Landowners subsequently filed an objection to TSC's complaint arguing that TSC's acquisition of the Real Estate was remote and speculative and not presently necessary.[136] The trial court held hearings on the Landowners' objection and TSC personnel testified that TSC needed additional school buildings given the growing surrounding population and deterioration of the current school facilities.[137]

Under Indiana law, necessity for taking for public use under eminent domain statues is not limited to absolute or indispensable needs of a state, but needs which are "reasonably proper and useful for the purpose sought."[138] Further, unless the action of eminent domain is arbitrary, and the use is clearly private, the courts will not interfere.[139] The court noted that TSC is "faced with capacity conditions, security concerns, transportation issues and aging instructional facilities", and must use other facilities for school lunches.[140] As such the Court held that TSC is attempting to appropriate the Real Estate to accomplish its educational purposes, and not because it might someday wish to use the Real Estate.[141] Further, the Court held that, contrary to Landowners' contentions, the evidence does not point solely to TSC exceeding its authority.[142]

---

131. *Id.*
132. 173 N.E.3d 694 (Ind. Ct. App. 2021).
133. *Id.* at 699-700.
134. *Id.* at 694-95.
135. *Id.* at 696.
136. *Id.*
137. *Id.* at 696-97.
138. *Id.* at 699 (quoting Ellis v. Pub. Serv. Co., 342 N.E.2d 921, 923 (Ind. Ct. App. 1976)).
139. *Id.* (citing Guerrettaz v. Pub. Serv. Co., 87 N.E.2d 721, 724 (Ind. 1949)).
140. *Id.* at 699-700.
141. *Id.* at 700.
142. *Id.*

V. HOME IMPROVEMENT CONTRACTS ACT

A. Kluger v. J.J.P. Enterprises, Inc.

In *Kluger v. J.J.P. Enterprises*,[143] the Court of Appeals reversed the trial court's partial summary judgment decision regarding whether the Klugers' claim for Servpro's violation of Indiana's Home Improvement Contracts Act ("HICA") met the statutory requirements to satisfy such a claim.[144]

Nathan and Laura Kluger (the "Klugers") hired J.J.P. Enterprises, Inc. d/b/a Servpro of North Lexington ("Servpro") to provide cleanup and restoration services after a tornado resulted in water damage to the Klugers' home and personal property.[145] A Servpro representative inspected the damage a few days later and informed the Klugers that their services would include "placement of a temporary roof structure and tarp to cover the home's exposed interior that would prevent further water damage."[146] That same day Nathan Kluger signed the electronic standard form contract presented to him by the Servpro representative.[147] The contract, among other missing provisions, did not provide a detailed description of the services or the contract price for their services.[148] Servpro subsequently failed to place a tarp on the Klugers' home until five days after the representative made a visit and never performed any water extraction services.[149] The Klugers' also never received an invoice for the work performed by Servpro.[150]

The Klugers filed a complaint against Servpro for failure "to perform the cleanup and restoration services in a timely and proper manner" and for violation of HICA for failing to provide a fully executed contract that properly described the work to be performed, the contract price, and start and completion dates of the work.[151] Servpro counterclaimed for the amount owed, plus attorney's fees and costs.[152] The Klugers filed a partial summary judgment motion on the HICA violation to which Servpro countered that "HICA did not apply to 'temporary or emergency services' and that HICA's $150 contract-price threshold was not satisfied because it never billed the Klugers for the work."[153] After the trial court denied the Klugers' initial motion for summary judgment, they filed an amended complaint asserting that the HICA violation "gave rise to a claim under the

143. 159 N.E.3d 82 (Ind. Ct. App. 2020).
144. *Id.* at 84.
145. *Id.*
146. *Id.* at 85.
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*

Indiana Deceptive Consumer Sales Act (DCSA)."[154] The parties then cross-claimed for partial summary judgment and the trial court determined that the $150 threshold contract amount had not been met under HICA because Servpro did not reassert its claim for damages and never actually charged the Klugers for more than $150.[155] Partial summary judgment was granted in favor of Servpro.[156]

HICA was enacted to "protect consumers by placing specific minimum requirements on the contents of home improvement contracts"[157] and such contracts must contain "a) a reasonably detailed description of the proposed improvements . . . and d) the contract price."[158] Based on the plain terms of HICA, it was "readily apparent [to the Court] that a contract price must be provided to the consumer and agreed to by the consumer before work begins on the project," and a "HICA violation occurs upon the presentation and execution of a nonconforming real property improvement contract and commencement of the contracted work, both of which typically occur well before the consumer is invoiced for the work."[159]

The Court concluded that even if not provided in the initial contract, HICA's $150 contract-price threshold was satisfied and "principles of judicial estoppel preclude[d] Servpro" from asserting the Klugers breached by "failing to pay for services and thereafter asserting nothing is owed."[160] The Court reversed the trial court's grant of partial summary judgment in favor of Servpro and remanded to the trial court for entry of partial summary judgment in favor of the Klugers. [161]

VI. LEASING

A. I-65 Plaza, LLC v. Indiana Grocery Group, LLC

In *I-65 Plaza, LLC v. Indiana Grocery Group, LLC,* the Court of Appeals held that the statutory surety requirement in a motion for immediate possession is fatal to a judgment if not followed, and a contradiction within a lease as to the length of an initial term is sufficient ambiguity to allow for examination of parol evidence.[162]

In March 2020, "Indiana Grocery Group, LLC (IGG), filed a complaint for ejectment against its sublessees I-65 Plaza, LLC, and its sole member, Bassam A. Abdulla (collectively, Abdulla)."[163] The suit was "based on Abdulla's alleged failure to exercise his option to extend the sublease."[164] "IGG filed a motion for

154. *Id.* at 86.
155. *Id*.
156. *Id.*
157. *Id.* at 87.
158. *Id.* at 88.
159. *Id.* at 89.
160. *Id*.
161. *Id.* at 90.
162. 167 N.E.3d 1161 (Ind. Ct. App. 2021).
163. *Id.* at 1164.
164. *Id.*

immediate possession and requested a show-cause hearing."[165]

When Abdulla subleased the premises, the parties executed a First Amended and Restated Sublease.[166] In relevant parts it reads, "SECTION 2.01. TERM. The term of this Sublease shall commence on January 1, 2016 (the 'Commencement Date') and shall end on *December 31, 2017* (the 'Term')."[167] However, elsewhere in the Sublease the Term is understood to be twelve months, not the twenty-four months referenced in Section 2.01.[168]

The leading reason for ejectment averred by IGG was that Abdulla was a holdover as he had never given written notice to extend the Sublease when the first Term expired.[169] IGG's position was that the first Term expired on December 31, 2016 not December 31, 2017 as defined in Section 2.01.[170] IGG claimed that the date range in Section 2.01 was a scrivener's error made plain by the other references to a twelve-month initial Term throughout the rest of the Sublease.[171] Abdulla, for his part, showed that he gave notice to extend the lease term, but he gave that notice at the end of the initial Term as defined by Section 2.01, a full twelve months after IGG claimed it was necessary.[172]

An hour before the show cause hearing, IGG filed a reply to Abdulla's answer that contained new evidence.[173] Abdulla requested leave to file a sur-reply in light of the new evidence and arguments contained in the reply.[174] Nevertheless, the trial court continued with the hearing.[175] The following day Abdulla submitted a written motion to file a surreply, but without ruling on that motion, the trial court ruled in favor of IGG's motion for immediate possession.[176]

On appeal the court addressed two issues relevant to property law. First, the court determined that the failure to follow the statutory surety requirement in immediate possession cases is fatal to a judgement.[177] And, second, discrepancies in a lease document such as those contained in this case, create an ambiguity, opening the door to parol evidence.[178]

Before a court can grant an order of possession in favor of plaintiff when the plaintiff has filed a motion for immediate possession, the plaintiff must file:

> with the court a written undertaking in an amount fixed by the court and executed by a surety to be approved by the court binding the plaintiff to

---

165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.* at 1164-65.
169. *Id.* at 1166.
170. *Id.*
171. *Id.*
172. *Id.* at 1167.
173. *Id.* at 1168.
174. *Id.* at 1169.
175. *Id.*
176. *Id.* at 1170.
177. *Id.* at 1171.
178. *Id.* at 1171-72.

> the defendant in an amount sufficient to assure the payment of any damages the defendant may suffer if the court wrongfully ordered possession of the property to the plaintiff.[179]

IGG did not do that.[180] The court held that this was a fatal error in the judgement as issuing the order without the plaintiff having first filed the required written undertaking constituted an *ultra vires* action by the trial court.[181] As such, the court reversed and remanded on this procedural basis.[182]

The court also took the opportunity to address the merits of the trial court's order.[183] Abdulla asserted on appeal "that the one-year overlap between the initial Term and the first Extended Term in the Sublease is an obvious ambiguity that must be resolved by consideration of extrinsic evidence to determine with reasonable probability which party is entitled to possession of the leased premises."[184] The court agreed with Abdulla, holding that the conflict in the lease provisions created an ambiguity, and as such, "[o]n remand the trial court should consider [all relevant evidence] to determine the parties' intent regarding the starting and ending dates of the initial and extended terms of the Sublease."[185]

B. Nuell, Inc. v. Marsillet

In *Nuell Inc. v. Marsillett and Property-Owners Insurance Co.*,[186] the Court of Appeals held that the tenant did not have a valid lease and therefore lacked a financial interest in the property as required for coverage under the tenant's insurance policy.[187]

In 2015, Nuell, Inc. ("Nuell") entered into a written lease agreement, as tenant, with David and Darlene Holsclaw, as landlord, for a commercial property.[188] The property owner of record was a revocable trust, of which David Holsclaw was the trustee.[189] Pursuant to the terms of the lease, "Nuell obtained an insurance policy from Property-Owners Insurance Company ('Property-Owners')."[190] "Coverage under the policy required that Nuell have a financial interest in the property."[191] During the lease term, someone drove their car through a concrete wall and building located on the property.[192] "Nuell filed a

---

179. IND. CODE § 32-30-3-6 (2021).
180. *Id.* at 1171.
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.* at 1172.
186. 164 N.E.3d 768 (Ind. Ct. App. 2021).
187. *Id.* at 777.
188. *Id.* at 770.
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.*

claim with Property-Owners."[193] "Property-Owners ultimately denied the claim on the basis that Nuell did not have a financial interest in the property as required by the policy."[194] Specifically, Property-Owners asserted that Nuell had leased the property from David and Darlene Holsclaw, but the property was owned by their trust.[195] Therefore, Nuell did not have a legal or equitable interest in the property nor a valid lease for the property with the property owner.[196]

Nuell filed a complaint against Property-Owners seeking declaratory judgment in its favor.[197] Property-Owners moved for summary judgment, which the trial court granted.[198] Nuell then appealed to the Court of Appeals to consider whether the trial court erred when it concluded that Nuell's lease was invalid and, thus, that Nuell did not have a financial interest in the property.[199]

The trial court determined that "[a] financial interest might include a leasehold interest pursuant to a written lease if the lease contains an obligation to procure insurance."[200] Here, the lease was between David and Darlene Holsclaw and Nuell; there was no valid lease agreement between the property owner (i.e., the trust) and Nuell.[201] David and Darlene Holsclaw did not have the lawful authority to enter into a lease with respect to the property and David Holsclaw did not enter into the lease in his capacity as trustee; rather, he signed the lease "personally."[202]

In conclusion, the Court of Appeals determined Nuell did not have a valid lease on the property.[203] Because there was no valid lease, Nuell did not have a financial interest in the property.[204] Therefore, the trial court was correct when it entered summary judgment in favor of Property-Owners.[205]

VII. LOCAL GOVERNMENT MATTERS

A. B&S of Fort Wayne, Inc. v. City of Fort Wayne

In *B&S of Fort Wayne, Inc. v. City of Fort Wayne*,[206] the Court of Appeals considered whether an ordinance was preempted as an impermissible attempt to regulate conduct regulated by the State of Indiana ("State").[207] In 2019, the City

193. *Id.*
194. *Id.*
195. *Id.* at 772.
196. *Id.*
197. *Id.* at 771.
198. *Id.* at 772.
199. *Id.* at 773.
200. *Id.*
201. *Id.* at 775.
202. *Id.*
203. *Id.* at 779.
204. *Id.*
205. *Id.*
206. 159 N.E.3d 67 (Ind. Ct. App. 2020).
207. *Id.* at 70.

of Fort Wayne ("City") passed an ordinance that regulates "sexually oriented businesses" and "adult cabarets" ("Ordinance").[208] Fort Wayne, Inc., Showgirl III, Inc., and JCF, Inc. ("Nightclubs") owned adult cabarets within the City.[209]

The Nightclubs filed a complaint for a preliminary injunction alleging that the Ordinance would pose irreparable harm to them if enforced.[210] The trial court found that the Nightclubs were unlikely to succeed on the merits of their claim that the Ordinance is prohibited by Indiana Code section 7.1-3-9-6.[211]

The Court of Appeals held that Indiana Code section § 7.1-3-9-6, which provided that a city shall not enact an ordinance "which in any way, directly or indirectly, regulates, restricts, enlarges, or limits the operation or business of the holder of a liquor retailer's permit," did not invalidate the Ordinance.[212] The Court of Appeals reasoned that the Ordinance did not directly or indirectly regulate, restrict, enlarge, or limit the Nightclubs' business operation pertaining to its permits to sell alcohol.[213] The Court of Appeals upheld the trial court's conclusion "that the Nightclubs did not show a likelihood of success of trial on this issue."[214]

B. Van Meter v. Community Development & Redevelopment

In *Van Meter v. Community Development & Redevelopment*,[215] the Court of Appeals held that the ten-day clock associated with judicial review after an order has been issued by the city does not restart when the order is reaffirmed at a later, separate hearing.[216]

Alan Van Meter ("Appellant") is the owner of a residential property which had fallen into substantial disrepair.[217] The City issued to Appellant an Order of Enforcement (the "Order") whereby twenty-nine ordinance and/or building code violations were discovered upon inspection of the property.[218] The City required Appellant to prepare a timeline regarding his plan to remedy the violations.[219] Appellant had until September 5, 2019, to remedy the violations.[220] On August 19, 2019, a public hearing was held with respect to Appellant's property, and Appellant failed to appear despite receiving notice of the hearing; a continuous enforcement order was subsequently issued.[221] A second hearing was held, and

---

208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.* at 71 (quoting IND. CODE § 7.1-3-9-6 (2021)).
213. *Id.* at 78.
214. *Id.*
215. 152 N.E.3d 22 (Ind. Ct. App. 2020).
216. *Id.* at 26.
217. *Id.* at 23.
218. *Id.*
219. *Id.*
220. *Id.*
221. *Id.*

Appellant failed to demonstrate that he was complying with the Order in order to meet the September 5, 2019, deadline.[222]

Appellant failed to remedy the violations by the September 5, 2019 deadline, and the city proceeded with its plans to demolish the structures on Appellant's property.[223] On appeal, Appellant argued that his appearance on October 7, 2019 re-started the ten-day clock,[224] but the Court of Appeals disagreed, stating that "[t]he law is clear in Indiana that, where a statute sets forth a specific time period for filing an appeal from an administrative decision, one must timely file the appeal in order to invoke the jurisdiction of the court."[225] The Court of Appeals determined that proper notice was given to Appellant, and Appellant did not subsequently exercise his judicial review rights pursuant to Indiana Code section 36-7-9-8.[226]

Further, the Court of Appeals noted that in order to protect the health and safety of their residents, cities and towns have the authority to regulate the use of property; such regulation may include orders requiring actions relative to unsafe premises, such as vacating unsafe buildings, repair or rehabilitation of unsafe buildings, and demolition of unsafe buildings.[227] The city properly issued the Order pursuant to its statutory authority as Appellant's property was deemed unsafe.[228]

Through its statutory authority, the city gave Appellant thirty days to complete its corrective measures, or the property would be demolished.[229] As Appellant did not seek judicial review under Ind. Code § 36-7-9-8 within the ten-day statutory period, the complaint was properly dismissed by the trial court, and the Court of Appeals affirmed the judgment.[230]

VIII. NUISANCE

A. Centennial Park, LLC v. Highland Park Estates, LLC

In *Centennial Park, LLC v. Highland Park Estates, LLC*,[231] the Court of Appeals held that the use of a given lot on a cul-de-sac in a platted residential

---

222. *Id.*

223. *Id.*

224. *Id.* at 24 (describing IND. CODE § 36-7-9-7(c) (2021) (Editor's Note: the court appears to have cited the wrong statute; the following language appears in the same chapter at IND. CODE § 36-7-9-5(c)) whereby "the order must allow a sufficient time, of at least ten (10) days, but not more than sixty (60) days, from the time when notice of the order is given, to accomplish the required action")).

225. *Id.* (quoting Starzenski v. City of Elkhart, 659 N.E.2d 1132, 1136 (Ind. Ct. App. 1996)).

226. *Id.* at 26 (stating that persons requesting judicial review under this section must do so within ten days after the date on which the action was originally taken).

227. *Id.* at 24, 25 (citing IND. CODE § 36-7-9-5(a) (2021)).

228. *Id.* at 25.

229. *Id.*

230. *Id.* at 26, 27.

231. 151 N.E.3d 1230 (Ind. Ct. App. 2020).

subdivision for a construction access road constituted a nuisance.[232]

In 2016, Centennial Park, LLC (the "Lot 15 User") acquired land north of the Highland Park subdivision in Monroe County with the intent of developing a residential subdivision on the acquired property.[233] In furtherance of the planned development, the Lot 15 User acquired Lot 15, property that was part of the adjoining, unrelated, and partially completed Highland Park subdivision ("Lot 15").[234] The Lot 15 User then improved and used Lot 15 as a construction roadway to provide access to their new subdivision.[235] As a result, the developer of the Highland Park subdivision, Highland Park Estates, LLC ("Highland Park"), filed suit to enjoin the Lot 15 User from using Lot 15 as a construction road.[236] In 2018, the trial court issued the injunction to prevent the Lot 15 User from using Lot 15 as a construction roadway.[237] In 2019, the Lot 15 User filed for relief from the injunction and was denied in February of 2020.[238] The court in this case considered the Lot 15 User's appeal and affirmed the trial court's initial denial of relief.[239] Separate from the Court of Appeals' discussion of abuse of discretion, the court considered the findings of fact from the trial court and commented on the question of whether a claim of nuisance was adequately presented to the trial court.[240]

To the trial court, Highland Park argued that the Lot 15 User's use of Lot 15 as a construction road constituted a nuisance by itself.[241] Indiana defines nuisances in Ind. Code § 32-30-6-6, generally as that which is injurious to health, indecent, offensive to the senses, or an obstruction to the use of property to the extent it interferes with the comfortable enjoyment of life or property.[242] A private nuisance may arise when one party uses their property to the detriment of another's property.[243] Cases where, but for the context, the questioned use would otherwise be lawful are considered nuisance *per accidens*.[244] In this case, the

---

232. *Id.* at 1237.

233. *Id.* at 1232.

234. *Id.*

235. *Id.*

236. *Id.* At issue in the case, but not relevant to the direct questions of real estate law, was the fact that Highland Park relied on a specific covenant in the recorded restrictive covenants of Highland Park which prevented use of any lot in a way that may be or become an annoyance or nuisance to the owner of property in Highland Park. The specific covenant of this declaration was ultimately vacated in November of 2017. This summary focuses on the nuisance question only.

237. *Id.*

238. *Id.*

239. *Id.* at 1238.

240. *Id.* at 1234.

241. *Id.*

242. *Id.* (citing IND. CODE § 32-30-6-6).

243. *Id.* (citing Hopper v. Colonial Motel Props., Inc., 762 N.E.2d 181, 186 (Ind. Ct. App. 2002)).

244. *Id.* (citing *Hopper*, 762 N.E.2d at 186).

Court of Appeals accepted the trial court's finding of facts.[245] Key among these facts were: i) placement of the construction road on Lot 15 negatively impacted the cul-de-sac by routing vehicles and heavy equipment through the roadway; ii) an adjoining property owner suffered damage to her mailbox and purchased her adjoining property specifically because it was on a cul-de-sac; iii) after initial construction by the Lot 15 User the addition of the roadway on Lot 15 would be used by residents and owners in both subdivisions and change the cul-de-sac into a thoroughfare; iv) though Lot 15 did not contain covenants restricting use to "residential" the depiction on the plat as a cul-de-sac was sufficient in itself to show intent such that the change to a thoroughfare would constitute a nuisance to owner of property in the former cul-de-sac; and finally, v) that the covenants that originally encumbered Lot 15 (being separate from the plat and not fully addressed herein) indicated an express intent that the cul-de-sac not be converted into a thoroughfare.[246] The Court of Appeals ultimately concluded that the trial court's finding of facts were sufficient to show a private nuisance *per accidens*, independent of any covenants encumbering Lot 15.[247]

IX. PROPERTY TAXES AND TAX SALES

A. Elda Corp. v. Holliday, LLC

In *Elda Corp. v. Holliday, LLC*,[248] the Court of Appeals held that a title holder of improvements located on separately owned land is not subject to claims such as ejection or trespass.[249]

In 1955, Elda Corporation ("Elda") became the record owner of thirty acres of real property in Madison County ("Land").[250] Elda subsequently granted a ground lease to Simon Property Group ("Simon") that contained buildings and paved parking areas ("Improvements Parcel").[251] "The Improvements Parcel was severed and identified" apart from the Land by its own property tax parcel number.[252] Through a series of transactions, Simon's interests in the ground lease and Improvements Parcel were transferred to Anderson Mounds Theater, LLC ("Anderson Mounds").[253] "Anderson Mounds failed to pay property taxes on the Improvement Parcel."[254] The Improvements Parcel was purchased at a tax sale in 2019, which resulted in a tax sale certificate eventually being transferred to Holliday, LLC ("Holliday").[255] Elda failed to challenge the tax sale at any

245. *Id.* at 1236.
246. *Id.* at 1235.
247. *Id.* at 1236.
248. 171 N.E.3d 124 (Ind. Ct. App. 2021).
249. *Id.* at 130, 131.
250. *Id.* at 126.
251. *Id.*
252. *Id.*
253. *Id.*
254. *Id.*
255. *Id.*

point.[256] Holliday was issued a tax deed in fee simple ownership interest to the Improvements Parcel free and clear of all encumbrances created before the tax sale.[257]

Holliday filed an initial complaint for declaratory judgment requesting that "the trial court determine that Elda had no right to collect rent or eject Holliday from the Land."[258] Elda filed a counterclaim to eject Holliday and seeking damages.[259] The parties each filed motions for summary judgement.[260] Elda requested an order of ejectment, while Holliday requested "the trial court determine as a matter of law that it owes no rent to Elda and that Elda lacks standing" for an ejectment claim.[261] The trial court entered a partial summary judgment in Holliday's favor, holding that since Elda failed to challenge the tax sale, Holliday was the fee simple owner of the Improvements Parcel, and Elda had no right to collect rent or eject Holliday.[262]

The Court of Appeals affirmed the trial court's decision, ruling that Elda's interest in the Land and Holliday's interest in the Improvements Parcel can co-exist, without Holliday in wrongful possession of the Land.[263] The Court of Appeals found that after receiving a tax deed free and clear of all encumbrances, the ground lease and all other encumbrances were eliminated from Holliday's title to the Improvements Parcel.[264] As such, Elda was not entitled to ejectment or rent because Holliday was neither a trespasser nor a lessee.[265]

B. Indiana Land Trust Co. v. XL Investment Properties, LLC

In *Indiana Land Trust Co. v. XL Investment Properties, LLC*,[266] the Indiana Supreme Court considered whether the LaPorte County Auditor (the "Auditor") provided "adequate notice reasonably calculated to inform" a real property owner of an impending tax sale of a property.[267] The Court held that the Auditor provided adequate notice and was not required to search its internal records for a better tax sale notice address under the circumstances, affirming the trial court's denial of the landowner's motion to set aside the tax deed.[268]

In 1993, Indiana Land Trust #4340 (the "Landowner") obtained a parcel of undeveloped land in LaPorte County, Indiana (the "Property"), with a vesting deed that directed tax bills be sent to the Landowner's then-current tax notice

---

256. *Id.*
257. *Id.*
258. *Id.*
259. *Id.*
260. *Id.* at 126-27.
261. *Id.* at 127.
262. *Id.*
263. *Id.* at 130.
264. *Id.*
265. *Id.* at 131.
266. 155 N.E.3d 1177 (Ind. 2020).
267. *Id.* at 1179.
268. *Id.*

address.[269] Though the Landowner's tax notice address changed several times in the years following its acquisition of the Property, the Landowner never updated its tax notice address with the Auditor.[270] No property tax payments were made from 2009 through 2015, causing the Property to accrue a tax liability of over $230,000.[271] The Auditor contracted with SRI, Incorporated (the "Company") to mail "two identical notices of tax sale—one via certified mail and one via first-class mail—to" the Landowner at the address included on the vesting deed.[272] "While the first-class mailing was not returned" to the Company or the Auditor, the certified mail was returned as not deliverable.[273] Following the return of the certified mail, the Company performed an unsuccessful skip trace in an attempt to locate the Landowner.[274] The Auditor did not search its internal records for additional Landowner addresses because it believed it had discharged its notice obligation with the first-class mail.[275] The Property was sold to XL Investment Properties, LLC (the "Purchaser"), after which the Landowner filed a motion to set aside the tax deed issued to the Purchaser.[276]

"[T]he trial court determined that [the Company] and the Auditor substantially complied with the tax sale notice statute" and "that the Auditor's mailings satisfied constitutional due process."[277] The Court of Appeals reversed the trial court's ruling on the grounds that "the Auditor was required to search its records for a better [Landowner] address" in order to satisfy due process.[278]

The Supreme Court considered whether the specific circumstances of the case necessitated that the Auditor search its own records for a better Landowner tax sale notice.[279] The Due Process Clause of the Fourteenth Amendment requires that, "before it institutes an action to sell a delinquent property, 'a state must provide "notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."'"[280] "The Supreme Court of the United States has held that, while actual notice is not required, notice must be given in a manner desirous of actually informing the landowner."[281] The Supreme Court has also held that personal service or mailed notice is required: "Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of any

269. *Id.* at 1180.
270. *Id.* at 1179.
271. *Id.* at 1180.
272. *Id.*
273. *Id.*
274. *Id.* at 1181.
275. *Id.*
276. *Id.*
277. *Id.*
278. *Id.* (quoting Indiana Land Trust Co. v. XL LLC, 130 N.E.3d 630, 638 (Ind. Ct. App. 2019)).
279. *Id.* at 1183.
280. *Id.* (quoting Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 795 (1983)).
281. *Id.* at 1185.

party."[282] In a case in which the government sent a certified notice letter that was returned unclaimed, making no additional attempts to notify the landowner, the Supreme Court found that if the government truly wanted to alert the landowner, it "would do more when the attempted notice letter was returned unclaimed, and there was more that reasonably could be done."[283]

"The *Jones* Court made several foundational observations": (1) "the Due Process Clause of the Fourteenth Amendment requires the government to provide 'notice and opportunity for hearing'"; (2) notice reasonably calculated to notify interested parties is required; and (3) "a Court must balance the interest of the state against the individual interest."[284] "Additional reasonable steps to notify"[285] a landowner may be required if a return of mail reveals that notice has not been delivered and "if practicable to do so":[286] "Observing 'every fact relevant to whether [an auditor] acted or failed to act "as one desirous of actually informing" [an owner] of the pending tax sale must be considered.'"[287]

The Supreme Court found that "the notice given by the Auditor met minimal due process requirements."[288] The Indiana Code provides that the county auditor must send notice of the sale by certified and first-class mail to the owner of record of real property "at the last address of the [owner] as indicated in the transfer book records of the county auditor."[289] "If both notices are returned, the county auditor shall take an additional reasonable step to notify the landowner if practical."[290] The Supreme Court focused on the fact-specific nature of whether additional steps are required: "analysis of the sufficiency of notice in a property deprivation matter . . . turns on the 'practicalities and peculiarities of the case,' and 'will vary with circumstances and conditions.'"[291] In this case, "the Auditor, through [the Company], sent contemporaneous notice via certified and first-class mail," and "while the certified mail was returned to [the Company], . . the first-class mail was [not] returned to its sender."[292] "Given actual notice is not required," the Supreme Court found that the Auditor should not have been "left to speculate whether the first-class mail was truly delivered."[293]

---

282. *Id.* at 1183 (quoting Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 800 (1983) (emphasis omitted).

283. *Id.* at 1184 (citing Jones v. Flowers, 547 U.S. 220, 238 (2006)).

284. *Id.* (citing Jones v. Flowers, 547 U.S. 220, 223, 225, 229 (2006)).

285. *Id.* at 1179

286. *Id.* at 1184.

287. *Id.* at 1185 (quoting Marion Cty. Auditor v. Sawmill Creek, LLC, 964 N.E.2d 213, 219 (Ind. 2012)).

288. *Id.* at 1187.

289. IND. CODE § 6-1.1-24-4(b) (2021).

290. *Id.* § 6-1.1-24-4(b).

291. *Ind. Land Tr. Co.*, 155 N.E.3d at 1187 (quoting M & M Inv. Group, LLC v. Ahlmeyer Farms, Inc., 994 N.E.2d 1108, 1118 (Ind. 2013)).

292. *Id.* at 1189.

293. *Id.*

C. S&C Financial Group LLC v. Insider's Cash LLC

In *S&C Financial Group LLC v. Insider's Cash LLC*,[294] the Court of Appeals held that neither the current holder of a mortgage on a property who failed to timely record its interest in the property nor the former holder of a mortgage on a property who did not have an interest in the property at the relevant time have substantial interest of public record that entitles each to notice of a tax sale.[295]

In 2014, Isle Slide Properties, LLC deeded its property to Belinda Luk IRA.[296] Belinda Luk IRA obtained a mortgage, financed by Insider's Cash LLC ("Insider's").[297] Insider's recorded the mortgage in 2015.[298] Insider's subsequently assigned the mortgage to Patricia McCabe IRA ("McCabe IRA").[299] McCabe IRA did not record the assignment.[300] Taxes on the property went unpaid and the property was offered at the 2016 Marion County tax sale.[301] The Marion County Auditor ("Auditor") searched title of the property, which revealed Isle Slide Properties, LLC as the record owner with no encumbrances or other interested parties.[302] Notice of the tax sale was sent only to Isle Slide Properties, LLC.[303]

S&C Financial Group LLC ("S&C") successfully bid on the property and was issued a tax sale certificate.[304] The one-year statutory redemption period expired, and the Auditor filed a petition for a tax deed, which was granted. S&C recorded the deed in 2018.[305]

Fourteen months later, Horizon Trust Company, as custodian for the benefit of McCabe IRA account, finally recorded its mortgage assignment with the Marion County Recorder's Office.[306] McCabe IRA then filed a motion to intervene and set aside the tax sale.[307] S&C filed a motion to intervene and opposed the motion to set aside the tax sale.[308] Four months later, Insider's filed a second motion to intervene and set aside the tax sale.[309] The trial court permitted the interventions.[310] McCabe IRA and Insider's filed summary judgment arguing that they were entitled to notice of the tax sale, which they did not receive.[311]

---

294. 173 N.E.3d 295 (Ind. Ct. App. 2021).
295. *Id*. at 297, 302.
296. *Id*. at 297.
297. *Id*.
298. *Id*.
299. *Id*.
300. *Id*.
301. *Id*. at 298.
302. *Id*.
303. *Id*.
304. *Id*. at 297.
305. *Id*. at 297-98.
306. *Id*. at 298.
307. *Id*. at 297.
308. *Id*.
309. *Id*.
310. *Id*.
311. *Id*. at 298.

S&C countered with its own motion for summary judgment stating that notice was not required and that the challenges to the tax sale were untimely.[312] The trial court granted summary judgment to McCabe IRA and Insider's and denied summary judgment to S&C, finding that Insider's was entitled to notice of the tax sale and the tax deed was set aside.[313]

The Court of Appeals reviewed the plain text of the statutory provisions related to tax sales, which require that the property owner of record be provided with the Auditor's notice of tax sale.[314] Here, Insider's did not have an interest in the property at the relevant time because Insider's had assigned its mortgage to McCabe IRA prior to the time the notices of tax sale were sent.[315] Therefore, Insider's ceased to maintain the required interest in the property and was not entitled to notice.[316] McCabe IRA failed to timely record its interest in the property by failing to record the assignment of the mortgage it held until after the tax sale and statutory redemption period.[317] Therefore, McCabe IRA's interest was not in the public record at the time notice of the tax sale was issued and McCabe IRA was not entitled to notice of the tax sale.[318]

In conclusion, the Court of Appeals determined neither Insider's nor McCabe IRA was entitled to notice of the tax sale and neither party can prevail in a challenge seeking to set aside S&C's tax deed.[319] Therefore, the trial court erred in setting aside the tax deed; the judgment of the trial court was reversed.[320]

D. Windy City Acquisitions, LLC v. Estate of Leland Simms

In *Windy City Acquisitions, LLC v. Estate of Leland Simms*,[321] the Court of Appeals found that Windy City Acquisitions, LLC ("Windy City") substantially complied with the following notice Statutes in connection with its petition for tax deed: Indiana Code Section 6-1.1-25-4.5 and Indiana Code Section 6-1.1-25-4.6.[322]

Leland Simms ("Leland") owned a Vacant Lot ("Vacant Lot") when he died in January 2013.[323] Due to outstanding taxes owed on the property, the Lake County Commissioners obtained a tax sale certificate on the Vacant Lot on September 11, 2018.[324] The Lake County Commissioners assigned the tax sale certificate to Alexander Petrovski ("Petrovski"), who subsequently assigned the

312. *Id.*
313. *Id.* at 298-99.
314. *Id.* at 301.
315. *Id.*
316. *Id.*
317. *Id.*
318. *Id.*
319. *Id.* at 302.
320. *Id.*
321. 173 N.E.3d 675, 678 (Ind. App. 2021).
322. *Id.*
323. *Id.* at 679.
324. *Id.*

tax sale certificate to Windy City.[325] When Petrovski held the tax sale certificate, his attorney sent the notice of redemption required by Indiana Code Section 6-1.1-25-4.5 ("4.5 Notice") to Leland at 2865 Dalla Street in Gary ("Dallas Street Property") and another address associated with Leland at Burr Street in Gary ("Burr Street Property").[326] According to Petrovski's attorney, both notices were sent by first-class and certified mail. [327] Petrovski also posted notice in front of a chain link fence along the Dallas Street Property.[328]

Petrovski then assigned the tax sale certificate to Windy city, who filed a verified petition for a tax deed.[329] Windy City learned of Leland's passing and then filed a petition for the tax deed and sent the required notice pursuant to Indiana Code Section 6-1.1-25-4.6 ("4.6 Notice") to the Vacant Lot address, Dallas Street Property address, and the Burr Street Property address by first-class and certified mail.[330] Brentwood Equitable Trust No. 1003-0613837 ("Brentwood"), successor to Lloyd Simms ("*Simms*") and potential heir to Lloyd, filed an objection providing that notice to Simms was not proper.[331]

1. 4.5 Notice.—The court found the 4.5 Notice was proper.[332] "Petrovski was required to give notice to: (1) the owner of record at the time of the sale; and (2) any person with a substantial property interest of public record in the tract or item of real property."[333] Though Leland died, Leland was the record owner of the Vacant Lot with an address of the Dallas Street Property and notice was sent to said address by certified mail.[334] The notice delivered by certified mail was returned as "attempted not known unable to forward," and Petrovski took an additional step in sending notice via first-class mail, which was not returned.[335] As such the court concludes that Petrovski substantially complied with the 4.5 Notice requirements.[336]

Brentwood also argued that Simms was entitled to proper notice; however, Simms (and Lloyd's siblings) did not obtain title to the Vacant Lot or an interest in the Vacant Lot that was evident in the chain of title.[337] As such, Simms was not entitled to receive 4.5 Notice.[338]

2. 4.6 Notice.—The Court found that 4.6 Notice was proper.[339] In relevant

---

325. *Id*. at 679-80.
326. *Id*.
327. *Id*.
328. *Id*. at 680.
329. *Id*.
330. *Id*.
331. *Id*.
332. *Id*. at 686.
333. *Id*. at 684-85.
334. *Id*. at 685.
335. *Id*. at 686.
336. *Id*.
337. *Id*. at 685.
338. *Id*.
339. *Id*. at 689.

part, 4.6 Notice provides: "Notice of the filing [of a petition for a tax deed] shall be given to the same parties as provided in section 4.5 of this chapter, except that, if notice is given by publication, only one (1) publication is required. The notice required by this section is considered sufficient if the notice is sent to the address required by section 4.5(d) of this chapter."[340] The Court found that Windy City complied with the 4.6 Notice by providing notice to the same parties as required in the 4.5 Notice.[341] Further, at the time of the 4.6 Notice, Windy City became aware of Simms and properly provided Simms notice by certified mail and first-class mail, which provided Simms actual notice.[342]

X. PURCHASE AGREEMENTS AND LEASES

A. Stephens v. Tabscott

In *Stephens v. Tabscott*,[343] the Court of Appeals considered whether the trial court erred by refusing to apply the statute of frauds when two parties entered into an oral agreement to transfer real property, and the transferee refused to pay the promised consideration.[344] The Court of Appeals affirmed the trial court's decision, finding that the transferee was required to pay the consideration for the property.[345] In 2017, Kenneth Stephens ("Purchaser") began working at Tabscott's ("Seller") place of employment and indicated that he was looking for a place to live.[346] Seller allowed Purchaser to reside in Seller's Morgan County property ("Property").[347] Purchaser and Seller eventually entered into an oral agreement for Purchaser to purchase the Property for $16,000.[348] In 2018, Seller executed a warranty deed expressly stating that Seller was granting the Property to Purchaser for valuable consideration in the sum of $16,000.[349] However, Purchaser never paid any money to Seller for the Property.[350] In 2019, Seller filed suit against Purchaser, alleging breach of contract, fraud, theft, and conversion., and Purchaser pled the affirmative defense of the Statute of Frauds.[351]

At a bench trial, Seller's coworkers testified that they had overheard exchanges between Purchaser and Seller in which Purchaser indicated he was going to pay the consideration promised for the Property.[352] Purchaser acknowledged the oral agreement and that he never paid any money to Seller, but

340. *Id*. at 687.
341. *Id*. at 688-89.
342. *Id*. at 688.
343. 159 N.E.3d 634 (Ind. App. 2020).
344. *Id*. at 636.
345. *Id*. at 641-42.
346. *Id*. at 637.
347. *Id*.
348. *Id*.
349. *Id.*
350. *Id*.
351. *Id*.
352. *Id*.

claimed that the consideration for the Property was his act sifting through a volume of legal paperwork on the Property.[353] The trial court found that there was an oral agreement between the parties for Purchaser to purchase the Property for $16,000, and that pursuant to this promise, Seller conveyed the Property to Purchaser.[354] The trial court found that in failing to pay the purchase price, Purchaser had committed breach of contract, theft, and conversion, and fraudulently induced Seller to transfer the Property with no intention to pay the agreed price.[355]

Pursuant to Indiana's Statute of Frauds: "A person may not bring . . . [an action involving any contract for the sale of land] . . . unless the promise . . . on which the action is based . . . is in writing . . . ."[356] However, oral contracts for the conveyance of land are not void, but voidable, and the statute affects only the enforceability of contracts that have not yet been performed:[357] "Where one party to an oral contract in reliance on that contract has performed his part of the agreement to such an extent that repudiation of the contract would lead to an unjust or fraudulent result, equity will disregard the requirement of a writing and enforce the oral agreement."[358]

Seller performed his part of the agreement by transferring the Property by warranty deed to Purchaser, with Purchaser accepting and possessing the Property.[359] "It has long been understood", under these circumstances, "that an action by the seller of land to recover the purchase price is not foreclosed by the Statute of Frauds."[360] A purchaser "cannot escape liability for the purchase price on the ground that the Statute of Frauds prohibits the enforcement of verbal contracts for the sale of an interest in land."[361] The Court of Appeals held that, as Seller "was not seeking to enforce a contract for the sale of land, but to collect the purchase money on account of such sale, the trial court" properly permitted him to do so, notwithstanding the Statute of Frauds.[362]

XI. TITLE INSURANCE

A. Hughes v. First American Title Insurance Co.

In *Hughes v. First American Title Insurance Co.*,[363] the court held that reimbursement is appropriate for "actual loss" suffered in reliance on an owner's

353. *Id*. at 637-38.
354. *Id*. at 638.
355. *Id.*
356. *Id*. at 639 (citing IND. CODE § 32-21-1-1(b)).
357. *Id*. (citing Jernas v. Gumz, 53 N.E.2d 434, 445 (Ind. Ct. App. 2016)).
358. *Id*. (citing Summerlot v. Summerlot, 408 N.E.2d 820, 828 (Ind. Ct. App. 1980)).
359. *Id*.
360. *Id*. (citing Powell v. Nusbaum, 192 Ind. 358, 136 N.E. 571, 572 (1922)).
361. *Id*. at 640 (citing Arnold v. Stephenson, 79 Ind. 126, 128 (1881)).
362. *Id*.
363. 167 N.E.3d 765 (Ind. Ct. App. 2021).

title insurance policy.[364]

In 2012, Anthony and Jennifer Hughes ("Appellants") purchased real property, and as part of the transaction, obtained a title policy from First American Title Insurance Company ("First American").[365] "Unbeknownst to Appellants," the prior owners of the property granted an easement across a portion of the property, but title examination did not reveal the easement.[366] In 2016, Appellants submitted a claim under their title policy after becoming aware of the easement; First American subsequently notified Appellants that it was assessing options for resolution.[367] Appellants attempted to thwart the easement holder's use of the easement by using "tire poppers."[368] Appellants also filed a suit against the easement holder seeking declaratory and injunctive relief (the "Injunction Suit").[369] Appellants were ultimately "ordered… to pay over $61,000 in attorney's fees and costs" to the easement holder.[370] Appellants commenced the suit at hand to seek damages for their loss caused by the easement and the Injunction Suit.[371] Shortly thereafter, First American found a $3,000 diminution in value of Appellants' parcel "caused by the existence of the easement" and such payment was tendered to Appellants' counsel.[372] In 2019, First American moved for summary judgement, and the court subsequently granted the motion in 2020.[373]

The court of appeals affirmed the trial court's decision, ruling that "[a]ppellants should be reimbursed for the actual loss they suffered in reliance on their policy of title insurance, and such loss is the diminution in value of the property caused by the existence of the easement."[374]

The term "actual loss" was at issue in this case. Appellants argued that the term "actual loss" included the $61,000 they paid as a result of the judgement in the Injunction Suit.[375] The court of appeals stated that their goal is to "ascertain and enforce the parties' intent as manifested in the [title] insurance contract" and applied standard contract interpretation practices to this case.[376]

Appellants' title insurance policy covered "'actual loss, including any costs, attorneys' fees and expenses provided under this Policy'" and one of the

---

364. *Id*. at 770.
365. *Id*. at 767.
366. *Id*.
367. *Id*.
368. *Id*.
369. *Id*. at 765.
370. *Id*.
371. *Id*.
372. *Id*.
373. *Id*.
374. *Id*. at 770.
375. *Id*. at 767.
376. *Id*. at 768 (describing that if a contract term is ambiguous, the court will give its "plain and ordinary meaning"; that contracts should be read "as a whole"; and "ambiguity does not exist simply because [the parties] disagree about the meaning of a provision").

enumerated covered risks is if "[s]omeone else has an easement on the Land."[377] The court of appeals described the purpose of title insurance,[378] and then cited a case where "actual loss" damages were properly measured, and subsequently awarded, based on "the diminution in value of [a] property caused by the [existence of an] easement."[379] Several other states have also determined that, under an owner's policy of title insurance, "actual loss" of the insured is the "difference in value of the property with the encumbrance and its value without the encumbrance."[380]

Further, the Court of Appeals clarified that title insurance only insures the conduct of the insured, not personal dealings between individuals.[381] Only Appellants' title to their property was insured under the First American Policy—not the actions that Appellants took to prevent the easement holder from using the easement.[382] The court goes further to say that Appellants are not actually seeking reimbursement for their "actual loss" under the title policy, but rather, "the damage and actual loss which they incurred in defending against the exercise of the easement."[383]

Because the Appellants' "actual loss" under the title policy was with respect to the existence of the easement, the trial court was correct in awarding Appellants $3,000 for "the diminution in value of the property caused by the existence of the easement."[384]

XII. ZONING

A. Burton v. Board of Zoning Appeals of Madison County

In *Burton v. Board of Zoning Appeals of Madison County*,[385] the court of appeals was asked to review zoning decisions relating to a proposed solar energy farm. In particular, the Burtons and various individuals (the "Neighbors") disputed whether certain votes by members of the Board of Zoning Appeals of

---

377. *Id*.

378. *Id*. (describing that title insurance is to make sure that a property's title is vested in the name of the insured, subject to named exceptions and exclusions as stated in the policy (House v. First Am. Title Co., 858 N.E.2d 640, 643 (Ind. Ct. App. 2006)).

379. *Id*. at 769 (quoting Linder v. Ticor Title Ins. Co. of Cal., Inc., 647 N.E.2d 37, 39 (Ind. Ct. App. 1995)).

380. *Id*.; *see also* 44 AM. JUR. 2D *Insurance* § 1543 (2021) (explaining that "in cases where the title encumbrance is not or cannot be removed, the insured's loss, for title insurance purposes, is the difference between the fair market value of the property if no impairment existed and the fair market value with the impairment").

381. *Hughes*, 167 N.E.3d at 769.

382. *Id*. at 767 (describing that Appellants used tire poppers to attempt to thwart the easement holder's use of the easement, and the subsequent $61,000 judgement that Appellants were required to pay to the easement holder).

383. *Id*. at 769-70.

384. *Id*. at 770.

385. 174 N.E.3d 202 (Ind. Ct. App. 2021).

Madison County (the "BZA") were valid and whether the approvals granted were clearly erroneous.[386] The court held that the two disputed votes were valid. The first vote was valid because the *de facto* public officer doctrine saves an action "performed by a person acting under the color of official title"[387] against claims that such office was defective.[388] The second because there was no evidence of "direct or indirect financial interest in the outcome of the proceedings"[389] or actual bias as the underlying proceedings were not uncontested and the court did not find that the BZA member had expressed an opinion on the merits of the proposed project.[390]

The Neighbors further argued that the BZA approvals were not supported by sufficient evidence because they did not comply with local ordinances.[391] The standard of review for administrative decisions is that the court must determine whether the decision had a reasonably sound evidentiary basis.[392] The plaintiffs carry the burden of proof and the reviewing court will only reverse a zoning board's decision where there is a clear error of law.[393] The Neighbors cited the comprehensive plan as binding the BZA to prioritize agricultural interest over non-agricultural uses, but the court cited the following as substantial evidence supporting the BZA's decision: that the comprehensive plan allows for several general principles including industry and future growth decisions[394]; that the BZA entered findings of fact based on a planning commission staff report that the project enhanced and preserved agricultural activities and also prevented the permanent reduction of agricultural land[395]; and, that the BZA imposed conditions to "reduc[e] [the] long-term impact on the agricultural viability of the land."[396] The Neighbors also contested the project variances as not meeting the required finding for practical difficulties in the use of the property.[397] The court cited the BZA's findings that enforcing the setback would make it impossible for the variance petitioner "to develop a seamless development resulting in additional cost, lost space, and overall construction difficulty resulting in . . . massive reduction of efficiencies."[398] The petitioner need not provide evidence that the development would be impossible without the variance, and in fact the local ordinance defined a practical difficulty as arising where an owner could comply

386. *Id.* at 207.
387. *Id.* at 210 (quoting Ryder v. United States, 515 U.S. 177, 180 (1995)).
388. *Id.*
389. *Id.* at 214.
390. *See id.*
391. *Id.* at 214-15.
392. *Id.* at 215.
393. *Id.* at 210.
394. *See id.* at 216.
395. *See id.*
396. *Id.* at 217.
397. *See id.* at 218.
398. *Id.* (quoting Appellants' App. Vol. II at 70; Appellants' App. Vol. III, p. 55).

but wants a variance regardless.[399] The court therefore held that the Neighbors failed to demonstrate clear error in the BZA's actions and that the approvals were indeed supported by substantial evidence.[400]

B. Department of Business and Neighborhood Services v. H-Indy, LLC

In *Department of Business and Neighborhood v. H-Indy, LLC*,[401] the Court of Appeals held that a Board of Zoning Appeals' ("BZA") decision affirming a Department of Business and Neighborhood Services of the Consolidated City of Indianapolis, Indiana ("BNS") determination on a site was arbitrary, capricious, and unsupported by substantial evidence. The court based its decision on the fact that (1) the BNS, BZA, Marion County, and the City of Indianapolis (collectively, the "City") had made their determination before receiving all the evidence; (2) the City based their decision on other stores and operations not referenced or incorporated into in the application itself; and (3) the application did not contain any "contradictions, inconsistencies, or recalculated information."[402] The court also held that BNS is not permitted to issue so called "litigation holds" when a distinct but affiliated entity submits a permit application during ongoing litigation for the other affiliated entity.[403] The opinion includes other holdings on substantive matters that fall outside the scope of this review and so are excluded.

HH-Indianapolis, LLC (the "Initial Applicant") and H-Indy, LLC, (the "Subsequent Applicant") are affiliated entities that are subsidiaries operating under the Hustler Hollywood brand.[404] Hustler Hollywood operates different retail concepts in stores and online.[405] BNS rejected the Initial Applicant's submitted structural and sign permit because BNS determined that the proposed use was for an "adult entertainment business" not permitted in the given zoning district without a variance.[406] While the Initial Applicant was under litigation before the Seventh Circuit, the Subsequent Applicant submitted a separate application that was specifically intended to fall outside of the prohibited use for the site. Shortly after receipt, BNS issued a "litigation hold"[407] for this application indicating that they would take no further action until the federal litigation was resolved.[408] This case reached the Court of Appeals when the separate actions consolidated, and the

---

399. *Id*. at 219.

400. *Id*.

401. 166 N.E.3d 347 (Ind. Ct. App. 2021).

402. *Id*. at 360.

403. *Id*. at 361.

404. *Id*. at 350.

405. *Id*.

406. This rejection was appealed by the Initial Applicant on October 26, 2016 to the BZA. The BZA affirmed BNS's determination on February 7, 2017, the Initial Applicant filed in the United States District Court for the Southern District of Indiana an original action against the City, which was ultimately transferred to the Marion Superior Court for the state law questions only. *Id*. at 349-54.

407. *Id*. at 354.

408. The Subsequent Applicant then filed a petition in the Marion Superior Court. *Id*.

trial court issued an order that was appealed by the City.[409]

The Court of Appeals found that the City's determination on the Initial Applicant's site was arbitrary, capricious, and unsupported by substantial evidence for several factors.[410] First, the BZA made its determination at the staff level that the site was an adult entertainment business before the Initial Applicant had supplied even the second round of information requested by the City.[411] In addition, the BZA asserted that there was credible evidence that merchandise was mischaracterized in a way to present the Initial Applicant's use in a more favorable light.[412] The only support offered by the City for this was the Hustler Hollywood website and stores in other jurisdictions, this was not sufficient and further, inapplicable.[413] Instead, the City has the authority to enforce and investigate violations but is not permitted to preemptively deny applications based on outside information and presumptions like this that falls outside of the plain text of the application.[414] Finally, there were no "contradictions, inconsistencies, or recalculated information" on the dispositive sections of the application.[415]

Separate from the substance of the application, the Court of Appeals held that the Subsequent Applicant was harmed when BNS indicated that it would not process any applications submitted as part of a "litigation hold" while the Initial Applicant's case was still pending.[416] The Court of Appeals then failed to support its burden to show that it had adequate authority to impose such a "litigation hold" by not overcoming the lack of statutory or common law authority.[417]

C. Midwest Entertainment Ventures, Inc. v. Town of Clarksville

In *Midwest Entertainment Ventures, Inc. v. Town of Clarksville*,[418] the Town of Clarksville obtained a preliminary injunction against both a landlord and tenant after the Town had revoked the tenant's license to operate an adult business because it failed to have a manager station that had direct line of sight to the entire premises, in violation of the zoning code and an ordinance.[419] The applicable ordinance required "[a] person who operates *or causes to be operated* an adult" venue to comply with the requirements of the ordinance.[420] The landlord argued the trial court erred in granting the injunction against it because the landlord was not the operator and did not have "the power to correct and prevent"

---

409. *Id.* at 355.
410. *Id.* at 360.
411. *Id.* at 358.
412. *Id.*
413. *Id.*
414. *Id.*
415. *Id.* at 360.
416. *Id.* at 362.
417. *Id.*
418. 158 N.E.3d 787 (Ind. Ct. App. 2020).
419. *Id.* at 789.
420. *Id.* at 794.

zoning violations.[421] The court of appeals upheld the trial court's ruling, turning to the lease for support.[422] The lease prohibited the tenant from making any alterations to the premises without landlord's consent, all alterations for which the tenant obtained consent were required to "be made in compliance with all . . . codes[] and . . . ordinances," and any alterations made by tenant immediately became the property of landlord.[423] The lease also only permitted the tenant to operate as an adult business.[424] Despite the lease provision requiring the tenant comply with all codes and ordinances, the Court reasoned that the landlord "retains the ultimate authority to control any changes to the building, including those necessary to comply with applicable ordinances."[425] The landlord therefore fell within the purview of the ordinance because it "caused" an adult entertainment venue to be operated on the premises.[426]

D. Minser v. DeKalb County Plan Commission

In *Minser v. Dekalb County Plan Commission*,[427] the Court of Appeals upheld the trial court's summary judgment ruling in favor of the Dekalb County Plan Commission (the "Commission") granting an injunction for a zoning violation.[428]

Appellants Rebecca Minser and Tina Zion (collectively, "Appellants") were the joint owners of real estate located in DeKalb County in the AC6 zone under the DeKalb County Unified Development Ordinance (the "UDO"), which is part of the Airport Compatibility Overlay District "intended to establish a standard of safety and compatibility for the occupants of land in the immediate vicinity of the DeKalb County Airport . . . ."[429] In July 2018, Appellants hired a contractor to dig a hole on their property, the purpose of which was to use the displaced dirt to raise the level of their driveway.[430] The resulting hole filled with water and became a man-made pond, but Appellants failed to obtain an improvement location permit prior to digging the hole and allowing it to fill with water.[431] Appellants requested a zoning variance after the pond had already been created, but the variance was denied by the Board of Zoning Appeals after objections of members of the airport board at the variance hearing.[432] Appellants were instructed to fill in the pond, but ignored the instructions of the Board of Zoning Appeals.[433]

---

421. *Id*.
422. *Id*. at 794-95.
423. *Id*. at 793.
424. *Id*. at 794.
425. *Id*. at 795.
426. *Id*. at 794-95.
427. 170 N.E.3d 1093 (Ind. Ct. App. 2021).
428. *Id*. at 1102.
429. *Id*. at 1095.
430. *Id*.
431. *Id*. at 1095-96
432. *Id*. at 1096.
433. *Id*.

On June 26, 2019, the Commission filed a complaint seeking injunctive relief as well as requesting that penalties for attorneys' fees and court costs be assessed against Appellants.[434] The Commission filed for summary judgment, which the trial court granted without a hearing.[435] The Court of Appeals upheld the trial court's grant of summary judgment.[436]

Appellants argued that there was no evidence presented that they intended to create a pond.[437] The appellate court, however, ruled that an intent element was absent from the UDO provision regarding recreational ponds, and that the word "design" was not calculated to create an intent requirement.[438] Appellants also argued that the trial court's reading of the UDO put the UDO in conflict with Indiana Code section 36-7-4-1103, which provides that "this chapter does not authorize an ordinance or action of a plan commission that would prevent, outside of urban areas, the complete use and alienation of any mineral resources or forests by the owner or alienee of them."[439] The Court of Appeals also rejected this argument, holding that dirt and clay, in the absence of evidence to the contrary, ordinarily do not consist of a composition that meets the definition of "mineral".[440] On the other hand, however, the appellate court vacated the trial court's award of attorneys' fees to the Commission because neither the Commission nor the trial court cited an exception (such as the "General Recovery Rule," the "Obdurate Behavior Exception" or the trial court's powers of sanction) to the general rule in Indiana requiring both parties to pay their own attorneys' fees.[441]

E. Monster Trash Inc. v. Owen County Council

In *Monster Trash, Inc. v. Owen County Council*,[442] the Court of Appeals considered: (1) whether the Owen County Zoning and Subdivision Control Ordinance (the "Ordinance") absolutely prohibits "the operation of a solid waste transfer station" at 2243 State Highway 43 in Owen County (the "Property"), which is zoned "Heavy Industrial," (2) whether Monster Trash Inc. ("Monster Trash") "could obtain a variance to operate a solid waste transfer station," and (3) whether the Owen County Council's (the "Council") "refusal to issue a document indicating that no official rezoning or variance would be necessary" for operation of the proposed waste transfer station qualifies as an "arbitrary, capricious and an abuse of discretion."[443] Monster Trash sought a license to operate a solid waste transfer station at the Property from the Indiana Department of Environmental

434. *Id*.
435. *Id*. at 1097.
436. *Id*. at 1102.
437. *Id*. at 1100.
438. *Id*.
439. *Id*. at 1101; IND. CODE § 36-7-4-1103(b) (2021).
440. *Minser*, 170 N.E. 3d at 1101.
441. *Id*. at 1103.
442. 152 N.E.3d 630 (Ind. Ct. App. 2020).
443. *Id*. at 632.

Management ("IDEM"); IDEM required Monster Trash to obtain the document prior to granting the license.[444] The Owen County Board of Zoning Appeals (the "BZA"), the Owen County Council, and the Owen County Commissioners (collectively, the "County") refused to issue the document stating that the operating of a solid waste transfer facility in a Heavy Industrial district was absolutely prohibited by the Ordinance.[445] Monster Trash and the County both petitioned for declaratory judgement, and the trial court agreed with the County.[446] Monster Trash appealed the trial court's decision contending the trial court erred in their decision.[447]

The Court of Appeals reversed, finding that the Ordinance did not prohibit the operation of a solid waste transfer station on the Property because Subsection 3.5 of the Ordinance allows waste stations if they are licenses and approved by the State of Indiana based on the explicit language stating "[a]ll . . . waste transfer stations (not licenses and approved by the State of Indiana) are non-permitted uses."[448] Additionally, the Court determined that the County's argument that Monster Trash could obtain a variance to operate a waste transfer station was incorrect.[449] The Court determined that the language of the Ordinance plainly prohibited variances for non-permitted uses based on the Ordinance stating "prohibition [of non-permitted uses] cannot be removed by an appeal for a use variance."[450] Finally, the Court determined that the only way for Monster Trash to legally operate the waste transfer station was to obtain a State-issued license.[451] Thus, the Court concluded that IDEM's refusal to provide the document, which is the only way for Monster Trash to obtain their State-issued license, qualified as an "arbitrary, capricious, and an abuse of discretion."[452] The Court based this conclusion on the fact that the refusal to issue the document is not in accordance with the clear language in the ordinance, but also a request regarding zoning requirements is irrelevant, because they are not required for the operation of a waste transfer station.[453]

---

444. *Id*.
445. *Id*.
446. *Id*.
447. *Id*. at 631.
448. *Id*. at 633.
449. *Id.*
450. *Id.*
451. *Id.*
452. *Id.*
453. *Id.*