

# SURVEY OF RECENT DEVELOPMENTS IN REAL PROPERTY LAW

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## INTRODUCTION

This Article addresses recent developments in Indiana real property law through an analysis of Indiana appellate court cases decided during the October 2011-September 2012 Survey Period. This Article focuses on the most relevant cases for members of the legal profession and should not be considered an exhaustive list.

### I. PROPERTY TRANSFERS

#### A. *Transfers to Trust*

During the Survey Period, the Indiana Court of Appeals was confronted with an issue of first impression. In *Fulp v. Gilliland*,<sup>1</sup> the court was asked to determine “whether an individual who combines the positions of settlor of a revocable trust, trustee, and beneficiary for life should be considered the settlor or trustee for purposes of a property transfer out of the Trust.”<sup>2</sup> The case stems from a dispute between two siblings arising from the sale of the family farm to one of the siblings for less than the fair market value.<sup>3</sup>

The elderly mother established and transferred the family farm to a revocable trust wherein she “designat[ed] herself as the settlor, trustee, and sole lifetime beneficiary.”<sup>4</sup> After moving into an elderly care facility, the mother executed a purchase agreement to transfer the farm to her son for \$450,252.00.<sup>5</sup> Two weeks later, the mother resigned as trustee, allowing her daughter to assume the role.<sup>6</sup> The daughter, acting as the trustee, refused to follow through on the signed purchase agreement, as the sale price was approximately half that of the appraised fair market value.<sup>7</sup>

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1. 972 N.E.2d 955 (Ind. Ct. App. 2012), *trans. granted, opinion vacated*, 988 N.E.2d 797 (Table) (Ind. 2013).

2. *Id.* at 963.

3. *Id.* at 958-59.

4. *Id.* at 958.

5. *Id.*

6. *Id.*

7. *Id.* at 958-59. The appraised value was \$900,000.00. *Id.* at 958.

The son brought an action seeking specific performance of the purchase agreement and damages for tortious interference with a contract.<sup>8</sup> After a bench trial, the trial court found that the son was not entitled to the equitable remedy of specific performance because he had induced his mother to breach her fiduciary duties to the beneficiaries, and he had failed to prove his claim for tortious interference.<sup>9</sup> The son appealed.<sup>10</sup>

On appeal, the court focused on the duties owed by the mother.<sup>11</sup> The trial court had focused primarily on the mother's status as trustee.<sup>12</sup> However, the appellate court disagreed with the trial court's reasoning, stating, "[F]irst and foremost, [the mother] is the settlor of the trust—without her transfer of property, the Trust could not be settled."<sup>13</sup> With this focus in mind, the court turned to the question of what duties are owed by a person who is the settlor, trustee, and beneficiary of a revocable trust.<sup>14</sup>

The court found guidance in a recent Indiana appellate decision—*Kesling v. Kesling*.<sup>15</sup> In *Kesling*, the Indiana Court of Appeals looked to both the language of a revocable trust and the Internal Revenue Code's treatment of a revocable trust to determine "that the placement of the shares in a trust did not eliminate the settlor's shareholder's status."<sup>16</sup> The court found further guidance from the Texas appellate decision *Moon v. Lesikar*.<sup>17</sup> In *Moon*, the Texas intermediary court held that where a "[trust] reserve[s] to the settlor the power to modify or revoke the trust," and the settlor is the trustee, the trustee may transfer assets without breaching his fiduciary duties to the beneficiaries.<sup>18</sup> The reasoning of the Texas court rested largely on the realization that to hold otherwise would mean that "the settlor could revoke the trust only by breaching his duty to every beneficiary, contingent beneficiary, and remainderman who held an interest, however attenuated, in the trust property."<sup>19</sup> Such a result, the *Moon* court held, "is inconsistent with the [Texas] Trust Code and the terms of the [revocable] trust documents."<sup>20</sup>

Adhering to the reasoning of *Kesling* and *Moon*, the Indiana Court of Appeals held that the mother acted pursuant to the terms of the trust when she

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8. *Id.* at 959. The son also sought docketing of the trust and removal of his sister as trustee, though such discussion is not relevant for purposes of this Survey. *Id.*

9. *Id.* at 959-61.

10. *Id.* at 961.

11. *Id.* at 963-64.

12. *Id.* at 963.

13. *Id.*

14. *Id.*

15. *Id.* at 963 (citing *Kesling v. Kesling*, 967 N.E.2d 66 (Ind. Ct. App.), *trans. denied*, 974 N.E.2d 476 (Ind. 2012)).

16. *Id.* (citing *Kesling*, 967 N.E.2d at 85-86).

17. *Id.* (citing *Moon v. Lesikar*, 230 S.W.3d 800 (Tex. Ct. App. 2007)).

18. *Id.* at 963-64 (first alteration in original) (quoting *Moon*, 230 S.W.3d at 809).

19. *Id.* at 964.

20. *Id.*

executed the purchase agreement with her son and “[h]olding otherwise and viewing [her] as trustee would make the Trust in effect irrevocable as she would no longer be free to control her assets but instead would owe a duty to the beneficiaries which would trump her own interest as settlor and owner of the Trust corpus.”<sup>21</sup> Accordingly, the court reversed on this issue.<sup>22</sup> The court affirmed with regards to the tortious interference claim, finding that the sister was justified to seek non-enforcement of the purchase agreement where it “depleted the Trust corpus and sold the farm below fair market value.”<sup>23</sup>

The Indiana Supreme Court has subsequently granted transfer of this decision and will have the final say on this issue of first impression.<sup>24</sup> Look for a discussion of the supreme court’s decision in an upcoming edition of this Survey.

### *B. Right of First Refusal*

Early in the Survey Period, the Indiana Court of Appeals addressed whether a right of first refusal (“ROFR”) set forth in a thirty-seven-year-old purchase agreement survived the death of the transferor.<sup>25</sup> A ROFR “is typically associated with the purchase of property, where the holder has the right to purchase the property on the same terms that the seller is willing to accept from a third party.”<sup>26</sup> In concluding the ROFR did not survive the passing of the transferor, the court was compelled to seek guidance from a wide array of sources.<sup>27</sup>

The court first noted the guidance of the Indiana Supreme Court that restrictions on alienation, like a ROFR, are disfavored and “the terms in the restrictions are not to be expanded beyond their plain and ordinary meaning.”<sup>28</sup> The court also looked to the American Law of Property for the proposition that “[t]here is a strong tendency to construe an option or pre-emption to be limited to the lives of the parties, unless there is clear evidence of a contrary intent.”<sup>29</sup>

After a review of Missouri and Michigan appellate decisions,<sup>30</sup> the court

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21. *Id.*

22. *Id.* at 964, 966.

23. *Id.* at 965-66.

24. *Fulp v. Gilliland*, 988 N.E.2d 797 (Table) (Ind. 2013).

25. *Ryan v. Lawyers Title Ins. Corp.*, 959 N.E.2d 870, 872 (Ind. Ct. App. 2011).

26. *Id.* at 875 (citing *Hyperbaric Oxygen Therapy Sys., Inc. v. St. Joseph Med. Ctr. of Ft. Wayne, Inc.*, 683 N.E.2d 243, 248 (Ind. Ct. App.), *trans. denied*, 690 N.E.2d 1189 (Ind. 1997)).

27. *Id.* at 875-77.

28. *Id.* at 875 (quoting *F.B.I. Farms, Inc. v. Moore*, 798 N.E.2d 440, 445-46 (Ind. 2003)).

29. *Id.* at 876.

30. *Id.* at 876-77. The court looked to *Kershner v. Hurlburt*, 277 S.W.2d 619 (Mo. 1955) (finding that a contract requiring adjoining property owners to first offer to sell land to other for fixed price was a personal/non-transferrable right); and *Brauer v. Hobbs*, 391 N.W.2d 482, 483 (Mich. Ct. App. 1986) (deciding ROFR held by husband and wife to have terminated upon death of last surviving spouse).

examined the specific language of the purchase agreement.<sup>31</sup> The specific language permitted a ROFR if “the sellers offered the land for sale.”<sup>32</sup> It did not, however, “state, expressly or implicitly, that the right was available if the sellers or their heirs, assigns, or personal representatives offered the [land] for sale.”<sup>33</sup> Moreover, the purchase agreement stated that the ROFR was not a “covenant running with the land.”<sup>34</sup> In light of the presumption to construe an option, like a ROFR, as confined to the lives of the parties and the lack of any language granting it to any successor parties, the court concluded that the right terminated upon the death of the seller.<sup>35</sup>

In a concurring opinion, Judge Baker noted that to interpret the ROFR to have extended to the “heirs, executors, administrators, successors, and assigns . . . would violate the common law Rule Against Perpetuities.”<sup>36</sup>

### C. Appeals of Legal Surveys

In *Schrader Trust v. Gilbert*,<sup>37</sup> the Indiana Court of Appeals was charged with determining whether a trial judge was prohibited by Indiana Code sections 36-2-12-14 and 36-2-12-10 from relying upon two prior surveys after rejecting an appealed legal survey at trial.<sup>38</sup> This action arose from a boundary dispute resulting in an appeal of a recorded land survey.<sup>39</sup> Upon appeal to the Starke County Circuit Court, the circuit judge rejected the legal survey and “imposed two previous surveys.”<sup>40</sup> The circuit court judge’s determination was appealed to the Indiana Court of Appeals.<sup>41</sup>

Indiana Code section 36-2-12-14 governs the process by which a person may challenge a legal survey.<sup>42</sup> The process itself is set forth in Section 10 of the same chapter.<sup>43</sup> The court determined that Section 14 provides the trial court with

three options: (1) it may accept the original survey; (2) it may reject the original survey and it is permitted to order that a new survey be performed by a different surveyor from the surveyor who performed the original survey; (3) it may reject the original survey and order the county

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31. *Ryan*, 959 N.E.2d at 877.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 878.

36. *Id.* (Baker, J., concurring).

37. 974 N.E.2d 516 (Ind. Ct. App.), *clarified on reh’g*, 978 N.E.2d 519 (Ind. Ct. App. 2012) (mem.).

38. *Id.* at 522-23.

39. *Id.* at 517-18.

40. *Id.* at 517.

41. *Id.* at 521.

42. *Id.* at 522.

43. *Id.* at 523.

surveyor to locate and mark the boundary lines with durable markers in the proper places according to the trial court's findings based upon evidence presented to it, including previous surveys.<sup>44</sup>

Because the trial court rejected the legal survey and declined to order a new survey, the court had but one option remaining—to order the county surveyor to mark the boundary lines.<sup>45</sup> The trial court erred in imposing the two previous surveys upon the parties.<sup>46</sup> That is, the judge had every right to accept the surveys and to order the surveyor to mark the boundary in accordance with them, but he lacked the authority to proclaim that the boundaries were in accordance with the two previous surveys.<sup>47</sup> Though this may seem like a meaningless formality, the court noted that adherence to the statute governing surveys must be “to the letter.”<sup>48</sup>

## II. LAND USE

### A. *Servitudes*

1. *Covenants*.—In *Benjamin Crossing Homeowners' Ass'n v. Heide*,<sup>49</sup> the Indiana Court of Appeals reaffirmed the fundamental distinction between private restrictive covenants and zoning ordinances.<sup>50</sup> In 2003 and 2008, respectively, Heide and Wilkerson purchased homes in Benjamin Crossing—“a planned unit development . . . and residential subdivision in Tippecanoe County.”<sup>51</sup> During the development of Benjamin Crossing, the developers “executed the Declaration of Covenants, Conditions, and Restrictions for Benjamin Crossing” (“Declarations”), which included a restriction on the operation of daycare businesses.<sup>52</sup> After execution of the Declarations, the Tippecanoe Area Plan Commission passed a resolution approving the planned unit development and the Declarations.<sup>53</sup> Despite the restrictions, Heide and Wilkerson each operated daycare businesses out of their homes.<sup>54</sup> In 2008, Heide and Wilkerson filed a complaint against the Homeowners' Association and others seeking damages and a declaration that the Association could not enforce its restrictive covenant prohibiting daycare businesses.<sup>55</sup> The trial court ultimately held that the “restrictive covenants of a planned unit development have the status of a zoning

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44. *Id.* at 524.

45. *Id.* at 524-25.

46. *Id.*

47. *Id.*

48. *Id.* at 523-25.

49. 961 N.E.2d 35 (Ind. Ct. App. 2012).

50. *Id.* at 39-40.

51. *Id.* at 37-40.

52. *Id.* at 37.

53. *Id.*

54. *Id.* at 38-39.

55. *Id.* at 39.

ordinance, and a zoning ordinance may not exclude the operation of a licensed child care home in the operator's residence."<sup>56</sup> The Homeowners' Association appealed.<sup>57</sup>

Recognizing that Indiana Code section 36-7-4-1108 prohibits zoning ordinances from excluding child care homes in residential areas solely because the child care home is a business, the court of appeals quickly distinguished between zoning ordinances and private restrictive covenants.<sup>58</sup> The court held that the trial court erred when it determined that the restrictive covenants were transformed into zoning ordinances as a result of being incorporated into a planned unit development ordinance.<sup>59</sup> The court reasoned that

[t]he prohibition against a zoning ordinance barring the operation of a child care home in a residence is directed to the municipality and renders any such ordinance unenforceable by the municipality. On the other hand, the restrictive covenants in the Declaration set out the mutual obligations and rights of property owners to each other. Those restrictive covenants are enforceable by the private parties to the Declaration and were not vitiated by the adoption of the planned unit development ordinance that included them.<sup>60</sup>

From this reasoning, the court concluded that private restrictive covenants, even when incorporated into the approval of a planned unit development, continue to bind the private parties who agreed to the restrictions, including restrictions that are beyond the power of a municipality to enforce through zoning.<sup>61</sup>

*CSL Community Ass'n v. Meador*<sup>62</sup> provides insight into Indiana's standards for invalidating restrictive covenants due to changes in circumstances.<sup>63</sup> The County Squire Lakes Community ("Squire Lakes") was constructed in North Vernon in the 1970s and flourished for decades as a vacation and retirement community, offering such amenities "as an Olympic-sized swimming pool, tennis courts, playgrounds, clubhouses, picnic areas, a marina, lakes, beaches, and a campground."<sup>64</sup> Squire Lakes established a Homeowners' Association to collect dues from property owners to pay for maintaining the community.<sup>65</sup> Clarence Meador purchased two lots in Squire Lakes in times that the community flourished.<sup>66</sup> Meador's deeds, as with the deeds of all lots in Squire Lakes, contained restrictive covenants requiring each lot owner to pay dues to the

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56. *Id.* at 40.

57. *Id.*

58. *Id.* at 42-43.

59. *Id.*

60. *Id.* at 42.

61. *Id.*

62. 973 N.E.2d 597 (Ind. Ct. App. 2012), *trans. denied*, 988 N.E.2d 797 (Ind. 2013).

63. *See generally id.*

64. *Id.* at 598.

65. *Id.*

66. *Id.*

Homeowners' Association.<sup>67</sup>

Unfortunately for Meador, Squire Lakes's demographics eventually shifted from primarily owner-occupants to primarily tenants of investor-landlords.<sup>68</sup> The investors had less incentive to pay Homeowners' Association fees, resulting in large budgetary shortfalls.<sup>69</sup> To make matters worse, the Homeowners' Association had mismanaged its finances, causing greater financial hardship.<sup>70</sup> Squire Lakes's weak economic position led to a lack of amenities: (1) the swimming pool could not hold water; (2) the tennis court was reduced to "rubble" and lacked a net; (3) the "lake became contaminated with raw sewage"; (4) the bathhouse was covered in mildew; (5) the putting green could not be used; (6) the playground consisted of "just one tire swing"; (6) residents could no longer use the clubhouse for playing cards; (7) arsonists torched the pavilion, and it was not replaced; and (8) there were no longer any security guards or a gate.<sup>71</sup> Though Meador had regularly paid his dues for both lots over the years, he eventually stopped paying dues for one of his lots.<sup>72</sup> The Homeowners' Association denied Meador the ability to exercise voting privileges at its meetings for his failure to pay dues on both lots.<sup>73</sup> Meador filed a complaint for declaratory judgment, requesting that the trial court declare that he remained a voting member despite failing to pay dues on one of his lots because the essential purpose of the dues had been defeated.<sup>74</sup> The trial court found that the community's "radical" changes had defeated the original purpose of the restrictive covenants; therefore, the covenants were no longer valid.<sup>75</sup> The Homeowners' Association appealed.<sup>76</sup>

The court of appeals noted that "public policy requires the invalidation of restrictive covenants when there have been changes in the character of the subject land that are 'so radical as practically to destroy the essential objects and purposes of the agreement.'"<sup>77</sup> After reviewing two other cases in which the court had declined a request to invalidate a restrictive covenant, the court reasoned that property owners in Squire Lakes could still benefit from the payment of dues.<sup>78</sup> The court held that the lack of amenities presented in this case is not the sort of radical change that Indiana law requires in order to abrogate restrictive covenants.<sup>79</sup>

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67. *Id.*

68. *Id.* at 598-99.

69. *Id.*

70. *Id.* at 599.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 600.

76. *Id.*

77. *Id.* (quoting *Cunningham v. Hiles*, 395 N.E.2d 851, 855 (Ind. Ct. App. 1979)).

78. *Id.* at 601.

79. *Id.*

Judge Crone dissented, reasoning that the facts of the case were sufficient to establish the sort of radical change that Indiana law requires to invalidate a restrictive covenant, though Meador should not retain voting rights.<sup>80</sup>

2. *Easements.*—In *Cochran v. Hoffman*,<sup>81</sup> the court addressed whether an easement granted for the purpose of travel included the right to park within the easement.<sup>82</sup> The Cochran family owned a landlocked parcel in Dearborn County, Indiana.<sup>83</sup> The Cochrans accessed their property by use of an easement across property owned by Hoffman.<sup>84</sup> The easement granted the Cochrans “[a] right of way of the width of [s]ixteen feet for all purposes of travel over land of said grantors . . . said road to be and remain an open way and to be for the use of the land.”<sup>85</sup> Because the easement was located on a hill, and the Cochrans sometimes had difficulty “surmount[ing] the hill” during poor weather conditions, they sometimes parked within the easement.<sup>86</sup> John Dye, who lived at the Hoffman property, caused one of the Cochrans’ vehicles to be towed in February 2011.<sup>87</sup> In March 2011, Hoffman filed an action in small claims court against the Cochrans, arguing that the easement over his property did not include the right to park on it.<sup>88</sup> The small claims court agreed with Hoffman, ruling that the scope of the easement did not include the right to park within the easement’s boundaries.<sup>89</sup> The Cochrans appealed.<sup>90</sup>

The Indiana Court of Appeals began its analysis by distinguishing between general grants of easement and those that are specifically created for purposes of ingress and egress.<sup>91</sup> In last year’s *Survey of Recent Developments in Real Property Law*, the authors discussed *Kwolek v. Swickard*, a case in which the Indiana Court of Appeals held that an easement for ingress and egress does not include the right to park within the easement.<sup>92</sup> The *Cochran* court distinguished between the Cochrans’ easement and the easement in *Kwolek* on grounds that

the easement in the instant case was written in the general terms of a right of way[, and a] right of way easement created by a conveyance in general terms and without restrictions on its use is to be construed as

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80. *Id.* at 602 (Crone, J., dissenting).

81. 971 N.E.2d 670 (Ind. Ct. App. 2012).

82. *Id.* at 671.

83. *Id.*

84. *Id.*

85. *See id.* at 673.

86. *Id.* at 671.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 672.

91. *Id.* at 672-73.

92. Charles B. Daugherty & Colin E. Flora, *Survey of Recent Developments in Real Property Law*, 45 IND. L. REV. 1305, 1312-13 (2012) (discussing *Kwolek v. Swickard*, 944 N.E.2d 564, 572 (Ind. Ct. App.), *trans. denied*, 962 N.E.2d 644 (Ind. 2011)).



broad enough to permit any use that is reasonably connected with the reasonable use of the land.<sup>93</sup>

Having distinguished *Kwolek*, the *Cochran* court held that an easement granted for the purpose of travel, which does not specifically restrict the easement to ingress and egress, includes the right to park within the easement.<sup>94</sup>

In another easement case, *Kranz v. Meyers Subdivision Property Owners Ass'n*,<sup>95</sup> the Indiana Court of Appeals grappled with the jurisdictional reach of the Natural Resource Commission (“NRC”) and the Department of Natural Resources (“DNR”), ultimately holding that the NRC has jurisdiction to determine the scope of a lake access easement.<sup>96</sup> The Kranzes owned a lot in a subdivision near Bass Lake.<sup>97</sup> The west side of the Kranz’s property was burdened by an easement in favor of the lot owners in the subdivision whose lots were not adjacent to the lake and, therefore, had no access to the lake.<sup>98</sup> The easement holders built and used a group pier at the end of the easement.<sup>99</sup> In the spring of 2007, a DNR officer, after considering the easement’s language, determined that easement holders did not have the right to build the pier.<sup>100</sup>

On October 15, 2007, the easement holders brought an administrative action to review the DNR’s determination, with the Kranzes and their neighbor to the west, Bartoszek, responding to the action.<sup>101</sup> After determining that the easement language was ambiguous and considering extrinsic evidence, the Administrative Law Judge (“ALJ”) found that the easement included the right to build a pier for reasonable access to the lake, but the group pier was a structure that required a permit from the DNR.<sup>102</sup> The easement holders, therefore, were required to successfully complete the permit process.<sup>103</sup>

The subdivision Property Owners Association applied for a permit with the DNR to keep its group pier.<sup>104</sup> The DNR denied the permit on grounds that the group pier would interfere with neighboring landowner’s access to the lake and would create dangerous conditions for boaters and swimmers due to narrow corridors.<sup>105</sup> The Association petitioned for review of the DNR’s decision, which resulted in an evidentiary hearing in which an ALJ heard testimony from

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93. *Cochran*, 971 N.E.2d at 673.

94. *Id.* at 673-74.

95. 969 N.E.2d 1068, 1070 (Ind. Ct. App.), *clarified on reh’g*, 973 N.E.2d 615 (Ind. Ct. App.), *trans. denied*, 980 N.E.2d 324 (Ind. 2012).

96. *Id.* at 1078.

97. *Id.* at 1070-71.

98. *Id.* at 1071.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 1071-72.

103. *Id.* at 1072.

104. *Id.*

105. *Id.*

interested parties.<sup>106</sup> Ultimately, the ALJ ordered Bartoszek to move his pier to a point seven feet from his property line with the Kranzes.<sup>107</sup> The ALJ ordered that the group pier be placed nine feet east of the easement's western edge and two feet east of the easement's eastern edge.<sup>108</sup> Finally, the ALJ ordered the Kranzes to move their pier fourteen feet to the east of the eastern boundary of the easement.<sup>109</sup> The Kranzes petitioned the Starke Circuit Court for judicial review of the ALJ's decision on grounds, among other things, that the NRC lacked jurisdiction to resolve disputes involving riparian ownership.<sup>110</sup> The circuit court upheld the NRC decision, holding that the NRC "had jurisdiction to determine all issues involved including determination of easements."<sup>111</sup> The Kranzes appealed.<sup>112</sup>

On appeal, the *Kranz* court first noted that the parties incorrectly assumed that jurisdiction must lie in either the NRC or the courts, but not both.<sup>113</sup> The court did not define the exact parameters of the NRC's jurisdiction; however, the court recognized that the NRC and DNR are granted authority to issue permits for piers on public freshwater lakes, "mediat[e] . . . disputes among persons with competing interests,"<sup>114</sup> and resolve such disputes.<sup>115</sup> Thus, the NRC has jurisdiction "to determine the scope of a lake access easement or riparian rights to the extent necessary to carry out the process of issuing permits for the placement of piers on public freshwater lakes."<sup>116</sup> The court could find no reason that the NRC would be incapable of determining the scope of such easements and, as further assurance, noted that the NRC's decisions are reviewable by the courts.<sup>117</sup> The *Kranz* court upheld the NRC's decision as not arbitrary and capricious under the facts and circumstances of the case.<sup>118</sup>

In *Howard v. United States*,<sup>119</sup> the United States Court of Federal Claims called on the Indiana Supreme Court to answer the following certified question:

Under Indiana law, are railbanking and interim trail use pursuant to 16 U.S.C. § 1247(d) uses that are within the scope of the easements acquired by the railroad companies either by prescription, condemnation,

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106. *Id.* at 1072-73.

107. *Id.* at 1074.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 1077-78.

114. *Id.* at 1078 (quoting IND. CODE § 14-26-2-23(e)(3) (2013)).

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 1080-81.

119. 964 N.E.2d 779 (Ind. 2012), *answer to cert. question conformed to* 106 Fed. Cl. 343 (Fed. Cl. 2012).

or the deed at issue; and if either is not within the scope of the easements originally acquired, is railbanking with interim tr[ai]l use a shifting public use?<sup>120</sup>

One hundred and twenty-eight Indiana landowners whose properties were “burdened by railroad easements” brought a federal action to enjoin the railroad from transferring the now-abandoned rail lines to the Indiana Trails Fund for use as public trails pursuant to the National Trails System Act.<sup>121</sup> By a process frequently called “railbanking,” the National Trails Systems Act authorizes the Surface Transportation Board (“STB”) to facilitate such transactions “to ‘preserve established railroad rights-of-way for future reactivation.’”<sup>122</sup> The United States Supreme Court has upheld the constitutionality of the National Trails System Act but noted state law governs the disposition of reversionary interests and, “[b]y deeming interim trail use to be like discontinuance rather than abandonment, Congress prevented property interests from reverting under state law.”<sup>123</sup>

The *Howard* court began its analysis by noting that the Indiana legislature has expressly determined that one means of preserving railroad rights-of-way is under the National Trails System Act.<sup>124</sup> That being said, the court also noted that the ultimate question of whether railroad rights-of-way can be used as recreational trails is a matter of Indiana’s common law on easements.<sup>125</sup> The court declined to adopt a “‘shifting public use’ doctrine” that would allow for a variety of public uses of the railroad easements.<sup>126</sup> Instead, the court reasoned that Indiana law has long held that the purpose for the easement in the minds of the parties at the time the easement was granted determines the scope of easements.<sup>127</sup> The court noted that technology may from time to time change the *means* of achieving the purpose without the means of changing the *purpose* of the easement.<sup>128</sup> For example, a railroad easement may be used by a gas or oil company to install pipelines to transport oil and gas rather than transporting by railway because the purpose of the easement remains the transportation of goods for commerce.<sup>129</sup> Noting that public trails are activities of recreation, not transportation, the court held “that, under Indiana law, railbanking and interim trail use pursuant to the federal Trails Act are not within the scope of railroad easements and that railbanking and interim trail use do not constitute a

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120. *Id.* at 780 (alteration in original).

121. *Id.*

122. *Id.* (quoting 16 U.S.C. § 1247(d) (2006)).

123. *Id.* (alteration in original) (quoting *Preseault v. Interstate Commerce Comm’n*, 494 U.S. 1, 8 (1990)).

124. *Id.* at 781.

125. *Id.*

126. *Id.* at 783.

127. *Id.*

128. *Id.*

129. *Id.*

permissible shifting public use.”<sup>130</sup>

### *B. Annexation*

This Survey Period, in contrast with the last, saw very few cases involving annexation. In *Covered Bridge Homeowners Ass’n v. Town of Sellersburg*,<sup>131</sup> the Town of Sellersburg (“Sellersburg”) and Clark County were embroiled in a jurisdictional controversy in which Sellersburg desired to annex approximately 1800 acres of property in opposition to Clark County, which desired to allow the property owners to incorporate a new town—the Town of Covered Bridge.<sup>132</sup> Sellersburg had introduced the proposed annexation ordinance in June 2008 but failed to follow appropriate notice procedures.<sup>133</sup> Before Sellersburg sent appropriate notice to landowners for a meeting on the ordinance, the landowners petitioned Clark County to incorporate the Town of Covered Bridge.<sup>134</sup> Clark County adopted an ordinance approving the petition six days prior to Sellersburg adopting the proposed annexation after holding a properly noticed meeting.<sup>135</sup>

Sellersburg filed a complaint for a declaratory judgment against Clark County on grounds that its annexation proceeding was “first in time.”<sup>136</sup> An association of landowners and Sellersburg each filed motions for summary judgment regarding Sellersburg’s and Clark County’s “respective ‘jurisdiction’ to annex or incorporate” the property in question.<sup>137</sup> In addition, several of the landowners filed a remonstrance against the annexation.<sup>138</sup> Sellersburg filed a motion to dismiss on grounds that the remonstrance lacked adequate valid signatures; the landowners had waived their right to remonstrate when they purchased property subject to subdivision restrictions and covenants executed and recorded by the subdivision’s developers.<sup>139</sup> The restrictions and covenants contained provisions waiving the right to remonstrate in exchange for connection to Sellersburg’s sewer system.<sup>140</sup> The remonstrators argued that Indiana Code section 36-9-22-2 requires a sewer contract between a developer and a municipality to be recorded in the county recorder’s office in order for a remonstrance waiver to be valid.<sup>141</sup> The trial court held in favor of Sellersburg on both issues and the association of landowners appealed.<sup>142</sup>

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130. *Id.* at 784.

131. 971 N.E.2d 1222 (Ind. Ct. App. 2012), *trans. denied*, 984 N.E.2d 222 (Ind. 2013).

132. *Id.* at 1223.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 1223-24.

139. *Id.*

140. *Id.*

141. *Id.* at 1227 (citing IND. CODE § 36-9-22-2 (2013)).

142. *Id.* at 1224.

The Indiana Court of Appeals first addressed the jurisdictional argument and reformulated the “first in time” rule.<sup>143</sup> The court traced the “first in time” rule to *Taylor v. City of Fort Wayne*, a case in which Fort Wayne desired to annex property that was already in front of Allen County’s board of commissioners for incorporation proceedings.<sup>144</sup> According to the *Taylor* court, “It is a clear principle of jurisprudence, that when there exist two tribunals possessing concurrent and complete jurisdiction of a subject-matter, the jurisdiction becomes exclusive in the one before which proceedings are first instituted, and which thus acquires jurisdiction of the subject.”<sup>145</sup> The *Covered Bridge* court noted that each of the parties, following *Taylor*, characterized the issue as one of jurisdiction, but Indiana courts have redefined the concept of jurisdiction in the past few years.<sup>146</sup> The *Covered Bridge* court reiterated the recent clarification that in the judicial and administrative context, jurisdiction only refers to “the power to hear and determine cases of the general class to which any particular proceeding belongs” and the “require[ment] that appropriate process be effected over the parties.”<sup>147</sup> Reasoning that the use of jurisdiction in the “first in time” rule no longer comports with the recent clarification,<sup>148</sup> the *Covered Bridge* court held that

the first-in-time rule may be restated as follows: when two governmental entities may possess “concurrent and complete” authority over a subject matter, the authority becomes exclusive in the one before which proceedings are first validly instituted, and that entity has a duty to retain its authority and “proceed to a final hearing and disposition.”<sup>149</sup>

The court ultimately upheld the trial court; Sellersburg had “validly instituted . . . proceeding[s]” before Clark County and had retained authority throughout, despite a long delay before holding a properly-noticed meeting of effected landowners.<sup>150</sup>

Having disposed of the first issue, the *Covered Bridge* court turned to the second issue—whether landowners can waive their right to remonstrate in the absence of a recorded contract between a developer and a town for the provision of sewer services.<sup>151</sup> The court noted that Sellersburg conceded that no such contract was ever recorded, despite the statutory requirement to do so.<sup>152</sup> Regardless, the court, looking to the essential purpose of the statute, held that “the [l]andowners had constructive notice of the remonstrance waiver provisions

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143. *Id.* at 1228-32.

144. *Id.* at 1229 (citing *Taylor v. City of Fort Wayne*, 47 Ind. 274 (1874)).

145. *Id.*

146. *Id.* at 1229-31.

147. *Id.* at 1231 (quoting *K.S. v. State*, 849 N.E.2d 538, 540 (Ind. 2006)).

148. *Id.*

149. *Id.* at 1232 (quoting *Taylor*, 47 Ind. at 282).

150. *Id.* at 1232-33.

151. *Id.* at 1233.

152. *Id.* at 1236.

before they purchased their property and consequently are bound by those provisions.”<sup>153</sup> Thus, the *Covered Bridge* court upheld the trial court’s determination that the remonstrators lacked the appropriate number of signatures since the purchase of property subject to recorded restrictions and covenants containing waiver provisions constituted waiver.<sup>154</sup> Accordingly, Indiana courts appear willing to substitute recorded restrictions and covenants for recorded contracts between developers and municipalities because both put landowners on notice that they have waived the right to remonstrate against annexation.<sup>155</sup>

### C. Zoning

In *Mies v. Steuben County Board of Zoning Appeals*,<sup>156</sup> the Indiana Court of Appeals addressed the ability of a Board of Zoning Appeals (“BZA”) to place conditions on the grant of a developmental variance.<sup>157</sup> “James and Janice Mies (collectively, ‘the Mieses’) . . . own[ed] a lot adjacent to Lake Gage in Steuben County.”<sup>158</sup> The Mieses owned a cottage with a wrap-around deck and a set of stairs leading to the lake.<sup>159</sup> The cottage sat on a fairly steep embankment leading to the lake.<sup>160</sup> The deck and stairs were a preexisting nonconforming development under the Steuben County Zoning Ordinance (“SCZO”), which required all structures, including decks and stairs, to be built no closer than twenty feet from the lakeshore.<sup>161</sup> The SCZO allowed for regular maintenance and repairs to nonconforming structures as long as the cost of the work did “*not exceed [fifty percent] of the value of the structure in any given year.*”<sup>162</sup> In 2010, the Mieses noticed a crack in the foundation of their cottage, which was caused by the deck’s movement toward the lake and resulting stress on the cottage’s foundation.<sup>163</sup> The Mieses hired Travis Kyle at T.K. Construction to repair the deck and foundation.<sup>164</sup> Kyle planned to destroy the old deck in its entirety and replace it after fixing the foundation, but he failed to apply for a variance<sup>165</sup> from the setback requirements, as his work would total more than fifty percent of the

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153. *Id.*

154. *Id.*

155. *Id.*

156. 970 N.E.2d 251 (Ind. Ct. App.), *trans. denied*, 976 N.E.2d 40 (Ind. 2012).

157. *Id.* at 253.

158. *Id.*

159. *Id.*

160. *See id.* at 256 (BZA representative describing the problem of a steep hill leading to the lake).

161. *Id.* at 254, 262.

162. *Id.* at 254 (referring to STEUBEN CNTY., IND. ORDINANCES § 22.02 (2012)).

163. *Id.* at 253.

164. *Id.* at 253-54.

165. *Id.* at 254. Kyle did apply for a building permit, but his application indicated that he would be replacing old boards rather than replacing the entire deck. *Id.*

value of the nonconforming deck.<sup>166</sup> Kyle razed the old deck, repaired the foundation, and built a new deck and stairs with the deck encroaching five feet into the setback and the stairs encroaching eighteen feet into the setback.<sup>167</sup>

On May 6, 2010, the Steuben County Plan Commission issued a stop work order to the Mieses for violating the SCZO.<sup>168</sup> Kyle applied for a post-construction building permit and variance on behalf of the Mieses.<sup>169</sup> The BZA held a hearing in which Kyle testified that he knew he should have applied for a variance and the proper building permit, but he had been too busy, and the Mieses were in a hurry to use their deck to host a party.<sup>170</sup> The BZA ultimately voted to allow the stairs on the condition that the Mieses bring the deck into compliance with the setback requirement.<sup>171</sup> The Mieses did not appeal the BZA's decision and did not bring the deck into compliance.<sup>172</sup> The Steuben County "Plan Commission issued a Notice of Violation . . . to the Mieses," noting that they had failed to comply with the condition for the variance.<sup>173</sup> The Mieses, by counsel, responded in a letter arguing that the BZA lacked statutory authority to impose conditions on the variance.<sup>174</sup> The plan director responded by conceding that the enabling act did not explicitly grant the BZA authority to impose conditions on a variance, but argued that "imposition of conditions is a necessary action of local government to carry out its duties, namely granting relief from standards of the SCZO while still protecting the health, safety, and welfare of the applicants, surrounding properties, and the community."<sup>175</sup> After an unsuccessful appeal to the BZA, the Mieses appealed to the trial court, which reversed the BZA's decision and ordered the BZA to conduct another hearing in which it was required to either grant or deny the development standards variance request without conditions.<sup>176</sup> The Mieses then appealed to the Indiana Court of Appeals.<sup>177</sup>

Quoting *Schleuser v. City of Seymour*, the *Mies* court reasoned that "powers of the BZA are strictly limited to those granted by its authorizing statute[,]""<sup>178</sup> and if "the BZA takes action that exceeds those powers, those actions are ultra vires and void."<sup>179</sup> The court distinguished between use

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166. *Id.* at 254-55.

167. *Id.* at 255.

168. *Id.* at 254.

169. *Id.* at 255-56.

170. *Id.* at 255.

171. *Id.* at 256.

172. *Id.* at 253.

173. *Id.* at 256.

174. *Id.*

175. *Id.* at 257.

176. *Id.* at 257-58.

177. *Id.* at 258.

178. *Id.* (quoting *Schleuser v. City of Seymour*, 674 N.E.2d 1009, 1014 (Ind. Ct. App. 1996)).

179. *Id.* (citing *Schleuser*, 674 N.E.2d at 1014).

variances and development standards variances.<sup>180</sup> The legislature authorizes BZAs to impose reasonable conditions for use variances, but Indiana Code section 36-7-4-918.5 expressly requires “that a ‘board of zoning appeals shall approve or deny variances from the development standards (such as height, bulk, or area) of the zoning ordinance.’”<sup>181</sup> The *Mies* court held that variance in this case was one from developmental standards rather than use; therefore, the trial court did not err by requiring the BZA to either grant or deny the variance without conditions.<sup>182</sup>

The Mieses raised an additional point for the court to consider—whether they could separate the void condition from the approved portion of the variance such that the BZA would only need to consider the grant or denial of the variance for the deck.<sup>183</sup> The Mieses relied on *Elkhart County Board of Zoning Appeals v. Earthmovers, Inc.* for the proposition that conditions on variances should be severed from the underlying variance.<sup>184</sup> In *Earthmovers*, the Elkhart County “BZA had granted a special use permit for the operation of a landfill” on the condition that the landfill be privately “operated only by Earthmovers and its affiliates.”<sup>185</sup> Years later, Earthmovers challenged the condition on grounds that it improperly restricted the persons using the land rather than the use of the land.<sup>186</sup> Ultimately, the Indiana Court of Appeals held that the condition was voidable without voiding the underlying special use permit.<sup>187</sup> The *Mies* court distinguished *Earthmovers* on grounds that the condition and variance in the Mieses’ case were interrelated, as “the subjects of both are one structure.”<sup>188</sup> In addition, the court determined that it would be improper to sever the condition from the underlying variance in this case because the court would be substituting its judgment for that of the BZA in determining the scope of the development standards variance.<sup>189</sup>

Another zoning case decided during the Survey Period, *New Albany Historic Preservation Commission v. Bradford Realty, Inc.*,<sup>190</sup> is noteworthy because of an issue brought to light in Judge Friedlander’s dissent. The City of New Albany (“City”) adopted an historic preservation ordinance, which required a downtown property owner to apply for a Certificate of Appropriateness (“COA”) from the New Albany Historic Preservation Commission (“HPC”) prior to undertaking

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180. *Id.*

181. *Id.* (quoting IND. CODE § 36-7-4-918.5 (2013)).

182. *Id.* at 258-59.

183. *Id.* at 260.

184. *Id.* (citing *Elkhart Cnty. Bd. of Zoning Appeals v. Earthmovers, Inc.*, 631 N.E.2d 927 (Ind. Ct. App. 1994)).

185. *Id.* (citing *Earthmovers, Inc.*, 631 N.E.2d at 929).

186. *Id.* (citing *Earthmovers, Inc.*, 631 N.E.2d at 929).

187. *Id.* at 260-61.

188. *Id.* at 261.

189. *Id.*

190. 965 N.E.2d 79 (Ind. Ct. App. 2012).



“most external modifications [to his or her] property.”<sup>191</sup> Bradford owned a house with wood clapboard siding within the historic district.<sup>192</sup> In 2008, Bradford, without obtaining a COA from the HPC, began replacing his wood clapboard siding with vinyl siding “of the same color and the approximate same width.”<sup>193</sup> The HPC sent Bradford a letter indicating that he needed a COA prior to replacing the siding.<sup>194</sup> Bradford finished replacing his siding and, only afterward, applied for a COA.<sup>195</sup> The HPC denied Bradford’s post-replacement request on grounds that his vinyl siding conflicted with HPC design guidelines.<sup>196</sup> Bradford filed a complaint for declaratory judgment, taking issue with the City’s notice procedure and arguing that the City’s actions constituted a taking.<sup>197</sup> The trial court held that the City’s notice procedure in adopting the preservation ordinance failed to comport with due process because the City did not give Bradford actual notice.<sup>198</sup> The trial court also held that the HPC’s actions did not amount to a taking, and that Bradford was not required to obtain a COA because the change to vinyl siding did not trigger the COA requirement as it was not a “conspicuous change” and was “not negative or harmful to the [d]istrict’s purposes, or contrary to the purposes of [the HPC].”<sup>199</sup> The HPC appealed.<sup>200</sup>

The Indiana Court of Appeals overturned the trial court’s determination that Bradford was entitled to actual notice and that Bradford’s vinyl siding did not amount to a conspicuous change.<sup>201</sup> Regarding the notice requirements, the court distinguished between legislative and adjudicative acts, noting that adjudicative acts require notice and a hearing to satisfy the Fourteenth Amendment’s Due Process Clause.<sup>202</sup> The court reasoned that the City’s historic preservation ordinance “was prospective and general in nature” and “regulate[s] only future [behavior rather than past] conduct.”<sup>203</sup> These attributes indicate that the City’s actions were legislative in nature and no actual notice was required in order to afford Bradford due process.<sup>204</sup>

While the court unanimously agreed that Bradford was not entitled to actual notice before adoption of the ordinance, not all judges agreed on whether

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191. *Id.* at 82.

192. *Id.*

193. *Id.*

194. *Id.* at 82-83.

195. *Id.* at 83.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* at 83-84, 87 (alterations in original).

200. *Id.* at 84.

201. *Id.* at 90. The court did uphold the trial court’s determination that the HPC’s actions had not amounted to a taking of Bradford’s property under the Fifth Amendment. *Id.* at 89.

202. *Id.* at 85.

203. *Id.* at 86.

204. *Id.* at 86-87.

Bradford was required to obtain a COA.<sup>205</sup> Noting that the ordinance requires a COA for “[a] conspicuous change in the exterior appearance of any historic building”<sup>206</sup> and that the word conspicuous is not defined in the ordinance,<sup>207</sup> the majority turned to Black’s Law Dictionary and *Tourkow v. City of Fort Wayne* for guidance.<sup>208</sup> The majority noted that “Black’s Law Dictionary defines conspicuous as ‘clearly visible or obvious[,]’”<sup>209</sup> which led the majority to reason that “the meaning relates to visibility or likelihood of being seen.”<sup>210</sup> The majority further relied on the Indiana Court of Appeals’s holding in *Tourkow* “that ‘[t]he addition of vinyl siding to the exterior of a house is clearly a ‘conspicuous change’ in appearance” to ultimately decide that Bradford’s replacement required a COA.<sup>211</sup>

Judge Friedlander, in dissent, took issue with the majority’s reliance on *Tourkow* for “the sweeping proposition” that any change from an old siding material to vinyl constitutes a conspicuous change.<sup>212</sup> Judge Friedlander distinguished between the facts and circumstances of the *Tourkow* case from the case at hand.<sup>213</sup> In *Tourkow*, the homeowner replaced insulbrick, which generally has a stone-like appearance, to vinyl clapboard style siding.<sup>214</sup> Judge Friedlander reasoned that the changes in *Tourkow* were substantial compared with Bradford’s changes, which resembled more of a fresh coat of paint than a complete change in the nature of the exterior of Bradford’s house.<sup>215</sup> Rather than concluding that a change to vinyl siding is a conspicuous change as a matter of law, Judge Friedlander opined that the changes should be viewed according to whether the structure’s appearance is “markedly different” after the change.<sup>216</sup> Judge Friedlander’s point is well taken. It is unclear to the author, however, how the HPC could use this standard to make a pre-replacement or pre-construction determination, as comparisons cannot be drawn until after the changes are made.

### III. EMINENT DOMAIN

The 2011 Survey Period contained no significant decisions on eminent domain. In 2012, the Indiana Court of Appeals handed down two particularly

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205. *Id.* at 90 (Friedlander, J., dissenting).

206. *Id.* at 87-88 (majority opinion) (quoting NEW ALBANY ORD. § 151.06(A)(1)(c) (2012)).

207. *Id.* at 87.

208. *Id.* at 88.

209. *Id.* (quoting BLACK’S LAW DICTIONARY 323 (8th ed. 2004)).

210. *Id.*

211. *Id.* (alteration in original) (quoting *Tourkow v. City of Fort Wayne*, 563 N.E.2d 151, 153 (Ind. Ct. App. 1990)).

212. *Id.* at 90 (Friedlander, J., dissenting).

213. *Id.* at 91.

214. *Id.*

215. *Id.*

216. *Id.*

noteworthy cases. In *Knott v. State*,<sup>217</sup> the State of Indiana, on behalf of the Indiana Department of Transportation (“INDOT”), filed a complaint for appropriation of real estate to acquire a portion of the Knotts’s property for construction of Interstate 69.<sup>218</sup> The Knotts objected to the State’s appropriation on grounds, among others, that INDOT violated the National Environmental Policy Act (“NEPA”), the Transportation Act, and the Clean Air Act.<sup>219</sup> In essence, the Knotts argued that the State should not be able to condemn their property for public purposes until it had obtained all necessary approvals and permits it would need to use the property for the stated public purpose.<sup>220</sup> The trial court granted the State’s appropriation over the Knotts’s objections.<sup>221</sup> The Knotts appealed.<sup>222</sup>

The Indiana Court of Appeals followed a line of cases from the mid-to-late 1970s, which hold condemnation proceedings are not affected by the government’s failure to obtain necessary permitting or approval prior to the shifting of title.<sup>223</sup> Some of the cases involved environmental issues, and some involved other permitting requirements that had not been fulfilled.<sup>224</sup> In all of the cases, the courts determined that Indiana’s condemnation statutes did not recognize any restriction on the government’s ability to appropriate property despite having failed to meet requirements for the intended use of that property.<sup>225</sup> After reviewing the cases, the *Knott* court upheld the trial court’s determination.<sup>226</sup> While this case does not shift Indiana’s real property law in any new direction, it revisits an interesting question more than thirty years after the line of cases cited by the *Knott* court.<sup>227</sup>

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217. 973 N.E.2d 1259 (Ind. Ct. App. 2012), *trans. denied*, 984 N.E.2d 1253 (Ind. 2013).

218. *Id.* at 1261.

219. *Id.*

220. *Id.* at 1262-63.

221. *Id.* at 1262.

222. *Id.*

223. *See id.* at 1262-64. The cases are *Indianapolis Power & Light Co. v. Barnard*, 371 N.E.2d 408 (Ind. Ct. App. 1978); *Chambers v. Public Service Co. of Indiana, Inc.*, 355 N.E.2d 781 (Ind. 1976); and *J.M. Foster Co. v. Northern Indiana Public Service Co.*, 326 N.E.2d 584 (Ind. Ct. App. 1975).

224. *Id.*

225. *Id.*

226. *Id.* at 1265.

227. The author finds the decision somewhat curious, particularly in light of the seemingly ever-increasing amount of regulatory requirements that must be met in order to use property for one’s intend purposes. At its base, public use is necessary in order for the government to exercise its eminent domain powers. How can the government state that property will be used for a public purpose prior to obtaining approval for such use? If the property is taken for an intended public purpose but never used for such purpose because the government could not obtain necessary permitting, does the original property owner have a mechanism to retake his or her property in exchange for the compensation he or she received? These are questions that appear unresolved in light of the *Knott* decision.

## IV. MORTGAGES AND FORECLOSURES

*A. Deed in Lieu of Foreclosure*

In *GMAC Mortgage, LLC v. Dyer*,<sup>228</sup> a mortgagor who had defaulted on his FHA-insured loan withdrew from a settlement agreement “to proceed with a deed in lieu of foreclosure” because he was not satisfied with the protection extended to him by the resulting agreement.<sup>229</sup> The proposed agreement stated, “Provided all terms and conditions of this Agreement are met and this transaction concluded, [Lender], agrees that neither it nor the U.S. Department of Housing and Urban Development [will] pursue a deficiency judgment from the Mortgagor.”<sup>230</sup> The mortgagor “did not believe that [this language] released him from personal liability nor complied with HUD regulations.”<sup>231</sup> The trial court agreed with the mortgagor.<sup>232</sup> The split court of appeals disagreed.<sup>233</sup> The majority held:

HUD regulations are clear: a deed in lieu of foreclosure releases the borrower from all obligations under the mortgage and the deed in lieu of foreclosure written agreement must contain an acknowledgement that the borrower shall not be pursued for deficiency judgments. [The] proposed agreement contains the precise language required by HUD. Accordingly, [the] proposed agreement releases [Mortgagor] from all obligations under the mortgage.<sup>234</sup>

Though the court was unanimous in its interpretation of HUD regulations, Chief Judge Robb dissented.<sup>235</sup> She based her dissent largely upon the common sense approach that if the deed in lieu of foreclosure acts to release personal liability then there is no harm in adding the additional provision sought by the mortgagor.<sup>236</sup> She also noted the peculiarity of the lender’s litigation of this issue given that it would have been more cost-effective to have simply agreed to the provision.<sup>237</sup>

*B. Post Foreclosure Standing*

The Indiana Court of Appeals was faced with an interesting issue of standing

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228. 965 N.E.2d 762 (Ind. Ct. App. 2012).

229. *Id.* at 764-65.

230. *Id.* at 765 (second alteration in original).

231. *Id.*

232. *Id.* at 766.

233. *Id.* at 769.

234. *Id.*

235. *Id.* at 770 (Robb, C.J., concurring in part and dissenting in part).

236. *Id.*

237. *Id.* at 770 n.8.

during the Survey Period. In *ARC Construction Management, LLC v. Zelenak*,<sup>238</sup> the primary issue was whether the plaintiffs' amended complaint sufficiently stated a claim for breach of the implied warranty of merchantability.<sup>239</sup> However, nestled in the opinion was a brief discussion of whether the plaintiffs lost standing to bring that claim after their home was foreclosed.<sup>240</sup> The court recognized that "[t]he judicial doctrine of standing focuses on whether the complaining party is the proper party to invoke the court's power."<sup>241</sup> Furthermore, "[t]o have standing, a party must demonstrate a personal stake in the outcome of the lawsuit and must show that he or she has sustained, or was in immediate danger of sustaining, some direct injury as a result of the conduct at issue."<sup>242</sup> The court held that plaintiffs had standing because they "alleg[ed] that they sustained damages as a result of [the defendant's] defective construction of their home."<sup>243</sup>

#### V. TAX SALES

The Survey Period included several cases addressing notice prior to tax sale. The most important of these cases is *M & M Investment Group, LLC v. Ahlemeyer Farms, Inc.*,<sup>244</sup> wherein a unanimous court of appeals held that the pre-tax sale notice to mortgagees procedure of Indiana Code section 6-1.1-24-3(b) does not satisfy the Fourteenth Amendment's due process requirements.<sup>245</sup>

The standard for reviewing a finding of unconstitutionality begins with the presumption that the statute is constitutional and upon "any grounds for revers[al,] [the court] will do so."<sup>246</sup> The statute at issue provides:

(b) At least twenty-one (21) days before the application for judgment is made, the county auditor shall mail a copy of the notice required by sections 2 and 2.2 of this chapter by certified mail, return receipt requested, to any mortgagee who annually requests, by certified mail, a

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238. 962 N.E.2d 692 (Ind. Ct. App. 2012).

239. *Id.* at 697-98.

240. *Id.* at 698.

241. *Id.* (citing *Founds. of E. Chi., Inc. v. City of E. Chi.*, 927 N.E.2d 900, 903 (Ind. 2010), *clarified on reh'g*, 933 N.E.2d 874 (Ind. 2010)).

242. *Id.*

243. *Id.*

244. 972 N.E.2d 889 (Ind. Ct. App. 2012), *rev'd*, No. 03S04-1211-CC-645, 2013 WL 5375416 (Ind. Sept. 26, 2013).

245. *Id.* at 898. Also included in the opinion is discussion of whether the trial court committed reversible error for failing to certify the challenge of the constitutionality of the statute to the attorney general. *Id.* at 891-92. Because the attorney general appeared in the appeal as *amicus curiae* and did not seek remand, no such reversible error was found. *Id.* However, the court did issue an admonishment to judges to follow the procedure of Indiana Code section 34-33.1-1-1 when faced with a constitutional challenge. *Id.*

246. *Id.* at 892-93 (quoting *Ind. Dep't of Env'tl. Mgmt., v. Chem. Waste Mgmt.*, 643 N.E.2d 331, 336 n.2 (Ind. 1994)).

copy of the notice. *However, the failure of the county auditor to mail this notice or its nondelivery does not affect the validity of the judgment and order.*<sup>247</sup>

Notably, it provides that failure to comply has no impact upon the judgment and order.

This was not the first time Indiana's pre-tax sale notice to mortgagees was found to fail to provide adequate due process. In 1983, *Mennonite Board of Missions v. Adams* brought the constitutionality of a prior version of Indiana's statute before the Supreme Court of the United States.<sup>248</sup> The prior version "only required notice by publication to mortgagees."<sup>249</sup> Due to the weight of this prior decision, the Indiana Court of Appeals began its analysis with a review of the Court's holding in *Adams*.<sup>250</sup> In *Adams*, the Court recognized that a mortgagee "has a legally protected property interest [that] entitle[s it] to notice reasonably calculated to apprise [it] of a pending tax sale."<sup>251</sup> The Court went on to hold, "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 party . . . if its name and address are reasonably ascertainable."<sup>252</sup>

The appellate court found further guidance from the Indiana Supreme Court in *Elizondo v. Read*.<sup>253</sup> Therein, the court analyzed Indiana's then-existing statute, which

required the county auditor to send notice of sale to any mortgagee of real property subject to sale if the mortgagee annually, on a form provided by the State Board of Accounts, requested such notice and agreed to pay a fee to the county auditor to cover the costs of sending the notice.<sup>254</sup>

The court "held that the language in the pre-tax sale notice statute that required mortgagees to file a request form annually to receive notice was reasonable and did not violate the Due Process Clause."<sup>255</sup>

In 2006, the United States Supreme Court once more spoke on the issue of

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247. *Id.* at 893 (emphasis added) (quoting IND. CODE § 6-1.1-24-3(b) (2013)).

248. *Id.* (citing *Mennonite Bd. v. Adams*, 462 U.S. 791 (1983)). The statute had been amended prior to the Supreme Court's review; however, "the amended version was not before the Court." *Id.* at 893-94 (citing *Adams*, 462 U.S. at 793 n.2).

249. *Id.* at 893.

250. *Id.*

251. *Id.* at 894.

252. *Id.*

253. *Id.* (citing *Elizondo v. Read*, 588 N.E.2d 501 (Ind. 1992), *abrogated by Jones v. Flowers*, 547 U.S. 220 (2006)).

254. *Id.* at 894-95 (quoting *Elizondo*, 588 N.E.2d at 502).

255. *Id.* at 895 (citing *Elizondo*, 588 N.E.2d at 503-04).

pre-tax sale notice and thereby abrogated *Elizondo*.<sup>256</sup> In *Jones v. Flowers*, the Court held that the government “violated due process when it failed to take further steps after notice to the property owners was returned unclaimed.”<sup>257</sup> The Court held that the government was required to “take[] additional reasonable steps to notify the property owner of the tax sale if practicable.”<sup>258</sup> Furthermore, an individual does not lose his due process rights as a result of following statutory requirements that a person with a publicly recorded interest in the property take affirmative steps to secure that interest.<sup>259</sup> Applying the *Jones* decision, the appellate court held,

When a mortgagee has a publicly recorded mortgage, as in the present case, we conclude, under the holdings of both *Mennonite* and *Jones*, that due process requires that the government must supplement notice by publication with pre-tax sale notice mailed to the mortgagee’s last known available address or by personal service, regardless of whether the mortgagee has requested such notice.<sup>260</sup>

Additionally, the court held that the government must “take additional steps when it knows that notice has failed.”<sup>261</sup> Accordingly, the court held the statute’s provision that failure to mail notice or its nondelivery has no impact upon the judgment or order.<sup>262</sup>

In recognizing the decision’s importance and potential impact, the Indiana Supreme Court granted M & M Investment Group, LLC’s petition for transfer, and numerous *amici curiae* were permitted to tender briefs.<sup>263</sup> Mere days before this Article went to print, the court handed down its unanimous decision reversing the trial court<sup>264</sup> and holding that Indiana Code section 6-1.1-24-3(b) passed constitutional muster.<sup>265</sup> Due to the proximity between the decision and publication of this Article, the window for Ahlemeyer Farms, Inc. to petition the court for rehearing or to seek certiorari to the Supreme Court of the United States remains open.<sup>266</sup> It appears to the authors of this Survey Article that a petition for certiorari is an inevitability in this case. Regardless of whether rehearing or

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256. *Id.* (citing *Jones*, 547 U.S. at 220).

257. *Id.* (citing *Jones*, 547 U.S. at 239).

258. *Id.* (citing *Jones*, 547 U.S. at 232, 234).

259. *Id.*

260. *Id.* at 896.

261. *Id.*

262. *Id.* at 896-97.

263. *M & M Inv. Grp., LLC v. Ahlemeyer Farms, Inc.*, 978 N.E.2d 752 (Ind. 2012) (Table).

264. Though the opinion also had the effect of overruling the court of appeals, Indiana Appellate Rule 58(A) provides that opinions of the intermediary court are vacated upon the grant of transfer and therefore the dispositions of cases before the Indiana Supreme Court that overrule the court of appeals are made in light of the trial court opinion only.

265. *M & M Inv. Grp., LLC v. Ahlemeyer Farms, Inc.*, No. 03S04-1211-CC-645, 2013 WL 5375416, \*14 (Ind. Sept. 26, 2013).

266. IND. APP. R. 56(B); U.S. SUP. CT. R. 13.

Supreme Court review is granted, this case shall certainly find its way into next year's Survey.

The Indiana Supreme Court (4-1) decided *Marion County Auditor v. Sawmill Creek, LLC*,<sup>267</sup> holding that an auditor had satisfied due process in his attempts to provide notice to the property owner.<sup>268</sup> The issue in *Sawmill Creek* arises from a “miscommunication during the negotiations” to purchase a piece of real property “which resulted in the closing statement, the general warranty deed, and the title insurance policy” bearing the incorrect name of the purchaser.<sup>269</sup> The real purchaser was Sawmill Creek, LLC.<sup>270</sup> However, due to the error, “[t]he [p]roperty was recorded under the name Saw Creek.”<sup>271</sup> This did not pose an issue until Sawmill Creek moved its corporate offices, whereupon it sent notice to the county clerk of the change of address.<sup>272</sup> Due to the land having been erroneously recorded under Saw Creek instead of Sawmill Creek, the mailing address was never changed for the property.<sup>273</sup> As a result, Sawmill Creek did not receive tax bills and failed to recognize that it had not received them.<sup>274</sup> After a couple years of delinquency, the county auditor “set the [p]roperty for tax sale.”<sup>275</sup>

In accordance with Indiana's pre-tax sale notice requirement then in place, the auditor sent notice to the listed mailing address, which was returned as undeliverable.<sup>276</sup> The auditor also published the property among the list of properties set for sale in the newspaper, on his website, and posted outside of the clerk's office.<sup>277</sup> After the sale of the property, the auditor retained “a title company to research the [p]roperty.”<sup>278</sup> The title company, unsurprisingly, failed to locate the nonexistent Saw Creek.<sup>279</sup> However, it also failed to identify “Sawmill [Creek] as the true owner.”<sup>280</sup> The auditor sent the post-sale notice to

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267. *Marion Cnty. Auditor v. Sawmill Creek, LLC*, 964 N.E.2d 213 (Ind. 2012).

268. *See id.* at 220 (“Under the ‘practicalities and peculiarities of the case,’ we think the Auditor satisfied the due process requirement.” (citation omitted) (quoting *Mullane v. Cent. Bank & Trust Co.*, 339 U.S. 306, 314 (1950))). The majority opinion was authored by then Associate Justice Dickson and joined in concurrence by former Chief Justice Shepard and Justices Sullivan and David. *Id.* at 214, 232. The lone dissenting voice was Justice Rucker's. *Id.* at 222. An interesting dynamic in this case is that, since its decision, Chief Justice Shepard and Justice Sullivan have retired, which may give rise to a very different outcome.

269. *Id.* at 214.

270. *Id.*

271. *Id.* at 215.

272. *Id.*

273. *Id.* at 214-15.

274. *Id.* at 215.

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*



the same address as the pre-sale notice as well as to two known addresses for the former owner of the property.<sup>281</sup> Again, the notice to the same address was returned undeliverable, as was one of the two notices sent to the prior owner.<sup>282</sup> Sawmill Creek finally learned of the sale when the purchaser placed a new realtor sign on the property.<sup>283</sup>

Sawmill Creek filed a motion with the trial court to set aside the tax deed.<sup>284</sup> The trial judge, after consulting the *Jones* decision, granted the motion finding that the notice was “constitutionally deficient.”<sup>285</sup> On appeal, a unanimous court of appeals affirmed the trial court.<sup>286</sup> The Indiana Supreme Court granted transfer and reversed.<sup>287</sup>

In reaching its conclusion—that the auditor’s notice satisfied due process—the court examined the *Jones* decision and reached a different interpretation than either the trial court or the court of appeals.<sup>288</sup> The court distinguished *Jones* by looking to precisely what notice was found to be insufficient. In *Jones*, pre-tax sale notice was sent to the address of the property and returned as “unclaimed” with notice subsequently published in the newspaper.<sup>289</sup> After reception of a bid, notice was again sent to the property’s address and no further steps to provide notice were taken.<sup>290</sup> The Indiana Supreme Court characterized the *Jones* holding to mean “that, ‘when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so.’”<sup>291</sup>

Distilling *Jones*, the court found that the violation of due process stemmed from the State’s failure to take further reasonable steps.<sup>292</sup> Thus, “the ‘notice required will vary with circumstances and conditions.’”<sup>293</sup> Additionally, the court asserted that, though *Jones* provides several potential options to satisfy due process, it also recognizes that “[a]n open-ended search for a new address’ in the phonebook and other government records would exceed the requirements of due

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281. *Id.*

282. *Id.* at 215-16.

283. *Id.* at 216.

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.* at 217-21. Although the Indiana Supreme Court chooses to refer to *Jones v. Flowers* in short citation form as *Flowers*, the authors of this Survey Article have chosen to utilize the same form as the majority of other courts. *See, e.g.,* Peralta-Cabrera v. Gonzales, 501 F.3d 837, 845 (7th Cir. 2007); Maples v. Thomas, 132 S. Ct. 912, 933 (2012).

289. *Id.* at 217 (quoting *Jones v. Flowers*, 547 U.S. 220, 223-24 (2006)).

290. *Id.*

291. *Id.* (quoting *Jones*, 547 U.S. at 225).

292. *Id.* at 219.

293. *Id.* (quoting *Jones*, 547 U.S. at 227).

process.”<sup>294</sup> The primary thrust in *Jones* is that “additional reasonable steps were available [to the State], and ‘the State did—nothing.’”<sup>295</sup> Therefore, “the review of whether notice efforts satisfied this standard is a fact-intensive process that requires consideration of every relevant fact.”<sup>296</sup>

Under the specific facts of this case, the court held that the auditor satisfied the due process requirements.<sup>297</sup>

When the Auditor mailed the pre-sale notice of tax delinquency and pending tax sale to Sawmill at the address that Sawmill had provided, it was returned, stamped [undeliverable]. The new information thus presented to the Auditor made re-mailing the notice by first class mail unreasonable. In compliance with the statute in effect at that time, the Auditor also published the notice in multiple ways and mailed the post-sale and issuance-of-a-tax-deed notices. But this was not the extent of the Auditor’s efforts.

The Auditor engaged Valley Title to conduct a search that included the chain of title, the records of the Indiana Secretary of State, and the phonebook. Such a search exceeded the constitutional requirements.<sup>298</sup>

The court countered Sawmill Creek’s position—that “there is a difference between ‘trying to *find* Sawmill’ and ‘efforts to actually *notify* Sawmill’”—by noting that the Auditor took affirmative steps to contact the prior owner after receiving the title company’s search results.<sup>299</sup> Therefore, the court held, “Under the unique circumstances of this case, we find the Auditor’s actions were reasonably calculated to provide notice to Sawmill.”<sup>300</sup>

Justice Rucker provided the lone dissenting voice.<sup>301</sup> His dissent was extremely brief and, therefore, somewhat difficult from which to draw many conclusions.<sup>302</sup> In summation, Justice Rucker agreed with both the trial court and court of appeals that the notice was deficient in light of *Jones*.<sup>303</sup> However, little, if anything else, can be garnered from Justice Rucker’s dissent.

This case is extremely interesting when juxtaposed with *Ahlemeyer Farms*. First, though *Ahlemeyer Farms* was a later decision, it shockingly made no reference to *Sawmill Creek*. Second, the holding of *Ahlemeyer Farms* calls into question the broad statement in Indiana Code section 6-1.1-24-3(b) that notice does not impact the judgment/order.<sup>304</sup> Based upon the fact-specific analysis

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294. *Id.* at 217-18 (alteration in original) (quoting *Jones*, 547 U.S. at 235-36).

295. *Id.* at 218 (citation omitted) (quoting *Jones*, 547 U.S. at 234, 238).

296. *Id.* at 219.

297. *Id.*

298. *Id.* at 220 (footnote omitted) (citations omitted).

299. *Id.* (noting the “Auditor mailed three notices to the previous owner of record”).

300. *Id.* at 221.

301. *Id.* at 222 (Rucker, J., dissenting).

302. *Id.*

303. *Id.*

304. *See* discussion *supra* notes 244-66 and accompanying text.

conducted by the Indiana Supreme Court in *Sawmill Creek* to satisfy due process, it is hard to imagine that such a blanket assertion as made by Indiana Code section 6-1.1-24-3(b) can be found to satisfy due process. Regardless of the final outcome on this point, the Indiana Supreme Court's decision in *Ahlemeyer Farms* should make for an interesting discussion in next year's Survey.

In a less contentious vein, the Indiana Court of Appeals held that pre-tax sale notice requirements are not subject to Indiana Rule of Trial Procedure 4.6.<sup>305</sup> Rule 4.6 requires that "service [of a summons] upon an organization must be made upon an executive officer or appointed agent."<sup>306</sup> As referenced above, the court held that tax sale notice is entirely governed by statute, and because the statutes only require that notice be given to "any person with a substantial property interest of public record at the address for the person included in the public record that indicates the interest[.]" Trial Rule 4.6 is thus not applicable.<sup>307</sup>

## VI. LIENS

The Survey Period saw numerous decisions from the court of appeals dealing with issues related to liens. *Hair v. Schellenberger*<sup>308</sup> provided the court with an occasion to address the enforceability of a money judgment as a lien against real property where the judgment had not been indexed in the county records prior to foreclosure sale.<sup>309</sup> The case arose after the foreclosure and sale of a piece of real property.<sup>310</sup> After the sale, the purchaser conducted a title search and discovered no judgment lien.<sup>311</sup> A year later, the purchaser received a letter whose author claimed to hold a judgment lien against the property.<sup>312</sup> The purchaser "filed an action to remove the cloud on the title to the [property]."<sup>313</sup> Almost ten months after the letter claiming a judgment lien was sent, the judgment was finally indexed in the county records against the former owner.<sup>314</sup> After cross-motions for summary judgment, the trial court held as a matter of law that the purchaser was a bona fide purchaser for value ("BFP"), and, therefore, the judgment "lien was nullified."<sup>315</sup>

On appeal, the court recognized that "[t]o qualify as a BFP, one must

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305. See *Badawi v. Orth*, 955 N.E.2d 849, 852-53 (Ind. Ct. App. 2011) ("[T]ax sale notices are controlled by statute.").

306. *Id.* at 852.

307. *Id.* at 853 (quoting IND. CODE §§ 6-1.1-25-4.5(d) & -4.6(a)(2) (2013)).

308. 966 N.E.2d 693 (Ind. Ct. App. 2012), *trans. denied*, 975 N.E.2d 360 (Table) (Ind. 2012).

309. *Id.* at 695-96. The opinion also includes a discussion of Indiana's Uniform Fraudulent Transfers Act, though the fraudulent transfer claim was found to be time-barred. *Id.* at 697-98.

310. *Id.* at 696.

311. *Id.* at 695-96.

312. *Id.* at 696.

313. *Id.*

314. *Id.*

315. *Id.* at 695-96.

purchase in good faith, for valuable consideration, and without notice of the outstanding rights of others.”<sup>316</sup> The judgment holder challenged the purchaser’s status as a BFP on notice grounds.<sup>317</sup> As the judgment lien was not within the chain of title and “[a] record outside the chain of title does not provide notice to [a BFP,]” the mere assertion of an unrecorded judgment lien could not defeat the purchaser’s status as BFP.<sup>318</sup> The court further noted that courts cannot create judgment liens, but “[i]nstead, they are purely statutory, and the lien’s very existence is dependent upon compliance with the statutory requirements.”<sup>319</sup>

Indiana Code section 34-55-9-2, in relevant part, provides,

All final judgments for the recovery of money . . . constitute a lien upon real estate . . . in the county where the judgment has *been duly entered and indexed* in the judgment docket as provided by law . . . *after* the time the judgment was *entered and indexed*.<sup>320</sup>

Because the judgment holder failed to record his judgment, “the equities favor[ed]” the purchaser.<sup>321</sup> Thus, the court affirmed the trial court’s findings.<sup>322</sup>

In another decision, *Homestead Financial Corp. v. Southwood Manor L.P.*,<sup>323</sup> the court sought to provide guidance in applying the Indiana Park Owner’s Lien Statute.<sup>324</sup> The case pitted the operator of a mobile home park against a financier for tenants to purchase mobile homes.<sup>325</sup> The case resulted after three of the mobile homes financed through the financier were vacated.<sup>326</sup> “[The operator] notified [the financier] that the owners had vacated their properties and that their rents were delinquent.”<sup>327</sup> As a result, the financier mailed certificates of title and notice of release of its liens to the operator.<sup>328</sup> Shortly thereafter, the operator purchased two of the three homes at auction.<sup>329</sup> A half-year later, the operator sued the financier under the Park Owner’s Lien Statute, Indiana Code section 16-41-27-29, for “back lot rent . . . as well as any future rent that might accrue until [the financier] removed the mobile homes.”<sup>330</sup> The trial court

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316. *Id.* at 699 (citing *Bank of New York v. Nally*, 820 N.E.2d 644, 648 (Ind. 2005)).

317. *Id.*

318. *Id.* (quoting *Szakaly v. Smith*, 544 N.E.2d 490, 492 (Ind.1989)).

319. *Id.* (citing *Sullivan State Bank v. First Nat’l Bank*, 146 N.E. 403, 405-06 (Ind. Ct. App. 1925)).

320. *Id.* (alterations in original) (quoting IND. CODE § 34-55-9-2 (2013)).

321. *Id.* at 700.

322. *Id.*

323. 956 N.E.2d 183 (Ind. Ct. App. 2011).

324. *Id.* at 184-86.

325. *Id.* at 183.

326. *Id.*

327. *Id.*

328. *Id.* at 183-84.

329. *Id.* at 184.

330. *Id.*

granted summary judgment in favor of the operator, and the financier appealed.<sup>331</sup>

Both the financier and the operator contended that the Park Owner's Lien Statute favored its respective position. The statute provides the following:

(a) Subject to subsection (b), the owner, operator, or caretaker of a mobile home community has a lien upon the property of a guest in the same manner, for the same purposes, and subject to the same restrictions as an innkeeper's lien or a hotel keeper's lien.

(b) With regard to a lienholder:

(1) if the property has a properly perfected secured interest under IC 9-17-6-7; and

(2) the lienholder has notified the owner, operator, or caretaker of the mobile home community of the lienholder's lien by certified mail; the maximum amount of the innkeeper's lien may not exceed the actual late rent owed for not more than a maximum of sixty (60) days immediately preceding notification by certified mail to the lienholder that the owner of the property has vacated the property or is delinquent in the owner's rent.

(c) If the notification to the lienholder under subsection (b) informs the lienholder that the lienholder will be responsible to the owner, operator, or caretaker of the mobile home community for payment of rent from the time the notice is received until the mobile home or manufactured home is removed from the mobile home community, the lienholder is liable for the payment of rent that accrues after the notification.<sup>332</sup>

The financier did not dispute its status as lienholder prior to providing its releases to the operator.<sup>333</sup> The operator, to the contrary, argued that "a strict reading of the . . . Statute suggests that one is a 'lienholder' from the time one receives notice under subsection (b) and that 'lienholder' status can only be terminated by removal of the mobile home from its lot."<sup>334</sup> The court found such a holding would "lead to absurd and unjust results."<sup>335</sup> Thus, the court "conclude[d] that [the financier] was no longer subject to the Park Owner's Lien [S]tatute once it released its liens on the mobile homes."<sup>336</sup>

The Indiana Court of Appeals also had the chance to provide further insight into Indiana's Personal Liability Notice Statute ("PLN Statute") in *R.T. Moore*

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331. *Id.* at 183-84.

332. *Id.* at 185 (quoting IND. CODE § 16-41-27-29 (2013)).

333. *Id.*

334. *Id.*

335. *Id.*

336. *Id.* at 186.

*Co. v. Slant/Fin Corp.*<sup>337</sup> The issue presented was whether an entity that supplied materials to another who supplied materials for construction projects could avail itself of the protections of the PLN Statute.<sup>338</sup> The PLN Statute is found in the chapter of the Indiana Code governing mechanics' liens.<sup>339</sup> The PLN Statute, codified at Indiana Code section 32-28-3-9, provides in pertinent part:

(a) This section applies to a:

(1) subcontractor;

(2) lessor leasing construction and other equipment and tools, regardless of whether an operator is also provided by the lessor;

(3) journeyman; or

(4) laborer;

employed or leasing any equipment or tools used by the lessee in erecting, altering, repairing, or removing any house, mill, manufactory or other building, or bridge, reservoir, system of waterworks, or other structure or earth moving, or in furnishing any material or machinery for these activities.<sup>340</sup>

The PLN Statute allows a subcontractor, or other enumerated party, to "impose[] personal liability on project owners."<sup>341</sup> Even though the PLN Statute shares the same chapter as mechanics' liens, it "is a separate mechanism at the disposal of a subcontractor who has not been paid by its general contractor."<sup>342</sup> "A subcontractor's rights under the PLN Statute are viewed as an additional or alternative remedy to the subcontractor's rights under the Mechanics' Lien Statute . . . ."<sup>343</sup>

In turning to application of the PLN Statute, the court observed that it had previously "held that the class of individuals protected by the PLN Statute is the same as under the Mechanics' Lien Statute."<sup>344</sup> The court further recognized that

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337. 966 N.E.2d 636 (Ind. Ct. App.), *trans. denied*, 975 N.E.2d 360 (Ind. 2012).

338. *See id.* at 638, 642 ("[W]e have found that 'materialmen supplying others who must themselves be considered materialmen have traditionally been considered outside the ambit of the statute.'" (quoting *City of Evansville v. Verplank Concrete & Supply, Inc.*, 400 N.E.2d 812, 819 (Ind. Ct. App. 1980))).

339. *Id.* at 640.

340. *Id.* (quoting IND. CODE § 32-28-3-9 (2013)).

341. *Id.* (citing *Mercantile Nat'l Bank of Ind. v. First Builders of Ind., Inc.*, 774 N.E.2d 488 (Ind. 2002)).

342. *Id.*

343. *Id.* at 640-41.

344. *Id.* at 641 (citing *Lee & Mayfield, Inc. v. Lykowski House Moving Eng'rs, Inc.*, 489 N.E.2d 603 (Ind. Ct. App. 1986)).

“‘[w]hile materialmen are within the protected class, the phrase ‘all other persons’ has not been construed to permit a lien by those parties whose contribution to the effort is remote.’”<sup>345</sup> Thus, where an entity does nothing more than supply materials to another entity for a construction project, as in this case, that entity is not able to avail itself of the PLN Statute.<sup>346</sup>

## VII. LANDLORD-TENANT

During the Survey Period, the court of appeals addressed numerous landlord-tenant cases. In *Gardner v. Prochno*,<sup>347</sup> the court sought to determine what procedures must be followed before a year-to-year tenancy may be terminated.<sup>348</sup> In answering the question presented, the court looked to the text of Indiana Code section 32-31-1-3—requiring notice be given at least “three (3) months before the expiration of the year”<sup>349</sup>—and section 32-31-1-5:

The following form of notice may be used to terminate a tenancy from year to year:

(insert date here)

To (insert name of tenant here):

You are notified to vacate at the expiration of the current year of tenancy the following property: (insert description of property here).  
(insert name of landlord here).<sup>350</sup>

In order to determine whether the use of “may” in Indiana Code section 32-31-1-5 permitted means of termination other than written notice, the court looked to section 32-31-1-9.<sup>351</sup> After analysis of section 32-31-1-9’s service of notice requirements, and the determination that service of notice strongly suggests a written notice requirement, the court held “that written notice is required to terminate a year-to-year tenancy.”<sup>352</sup>

In *Ellis v. M & I Bank*,<sup>353</sup> the court of appeals held that a tenant was not entitled to relief from her eviction where the eviction action was filed in a separate county than a prior foreclosure action to which the tenant was not a party.<sup>354</sup> The tenant had transferred the property to a third-party corporation so that it could use the property as collateral for a line of credit for five years and

345. *Id.* at 642 (alteration in original) (quoting *City of Evansville v. Verplank Concrete & Supply, Inc.*, 400 N.E.2d 812, 818 (Ind. Ct. App. 1980)).

346. *Id.*

347. 963 N.E.2d 620 (Ind. Ct. App. 2012).

348. *Id.* at 623-25.

349. *Id.* at 624 (quoting IND. CODE § 32-31-1-3 (2013)).

350. IND. CODE § 32-31-1-5 (2013).

351. *Gardner*, 963 N.E.2d at 624 (analyzing IND. CODE 32-31-1-9 (2013)).

352. *Id.* at 624-26.

353. 960 N.E.2d 187 (Ind. Ct. App. 2011).

354. *Id.* at 191-92.

then transfer the property back to the tenants at the end of that time period.<sup>355</sup> The lender foreclosed upon the property in one county and then later sought to evict the tenant by an action in another county.<sup>356</sup> The tenant objected because she was not a party to the mortgage foreclosure.<sup>357</sup> The trial court rejected the tenant's argument, as did the court of appeals, finding no error in the handling of the separate actions.<sup>358</sup>

In *Reynolds v. Capps*<sup>359</sup>—perhaps, the most straightforward decision from the Survey Period—the court of appeals held that a tenant was deprived of her due process rights where a pre-judgment possession hearing on an ejectment action was conducted by the court reporter and not a judge.<sup>360</sup> The use of a court reporter “violated [the tenant]’s right to a neutral decision-maker.”<sup>361</sup> Unsurprisingly, the court expressed concern over the occurrence of such a proceeding despite the relative “informality of the small claims process.”<sup>362</sup>

#### VIII. MISCELLANEOUS

The Indiana Supreme Court had an opportunity to interpret the breadth of Indiana's construction statute of repose (“CSoR”) in connection with an asbestos-related injury claim. The case—*Gill v. Evansville Sheet Metal Works, Inc.*<sup>363</sup>—required the court to examine the language of Indiana Code section 32-30-1-5 (2004):<sup>364</sup>

An action to recover damages, whether based upon contract, tort, nuisance, or another legal remedy, for:

(1) a deficiency or an alleged deficiency in the design, planning, supervision, construction, or observation of construction of an improvement to real property;

(2) an injury to real or personal property arising out of a deficiency; or

355. *Id.* at 189.

356. *Id.*

357. *Id.* at 190.

358. *Id.* at 190-93.

359. 968 N.E.2d 789 (Ind. Ct. App. 2012).

360. *Id.* at 791-92.

361. *Id.* at 792.

362. *Id.*

363. 970 N.E.2d 633 (Ind. 2012).

364. *Id.* at 637-45. The court looked to the language of the statute that was in effect as of 2004, but the section was amended in 2005. *Id.* at 638 n.5. Ironically, though the amendments explicitly applied only to causes of action arising after June 30, 2005, and this claim arose prior to that date, all litigation in this matter prior to reaching the Supreme Court was argued under the amended version. *Id.* However, the court disregarded this error and conducted its analysis under the pre-amended version of the section. *Id.* at 638 n.5.



(3) an injury or wrongful death of a person arising out of a deficiency;

may not be brought against any person who designs, plans, supervises, or observes the construction of or constructs an improvement to the real property unless the action is commenced within the earlier of ten (10) years after the date of substantial completion of the improvement or twelve (12) years after the completion and submission of plans and specifications to the owner if the action is for a deficiency in the design of the improvement.<sup>365</sup>

The court held that this language created four elements that a defendant must establish in order to receive immunity under CSoR:

[1] there must have been construction of an “improvement to real property[;]” [2] the claimant must be seeking damages for a deficiency in the design, planning, supervision, construction, or observation of construction of such improvement or an injury arising therefrom[;] [3] the defendant must have performed a covered activity . . . [;] and [4] the action must have been commenced more than ten years after the date of ‘substantial completion’ of the improvement.<sup>366</sup>

This case hinged upon the first element—that there was an “‘improvement to real property.’”<sup>367</sup> “The meaning of the term ‘improvement to real property’” posed a question of first impression and is not defined by statute.<sup>368</sup> In assessing the meaning of the phrase, the court looked to the history of building statutes of repose.<sup>369</sup> Under English common law, “[t]he liability of building professionals . . . was strictly limited.”<sup>370</sup> Liability ran in accordance with privity of contract and terminated upon completion of the improvements.<sup>371</sup> In the early twentieth century, courts began to abolish the privity requirement.<sup>372</sup> “Faced with this expanded liability, during the 1960s the building industry began lobbying state legislatures to enact special statutes limiting the duration of liability for construction professionals.”<sup>373</sup> The result has led to the adoption of building

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365. *Id.* at 637-38 (footnote omitted) (citation omitted) (quoting IND. CODE § 32-30-1-5 (2004)).

366. *Id.* at 638. “[I]f the claim is for a design deficiency, then the action must be commenced either within ten years after substantial completion of the improvement or within twelve years of ‘the completion and submission of plans and specifications to the owner,’ whichever is earlier.” *Id.* at 638 n.7 (quoting IND. CODE § 32-30-1-5 (2004)).

367. *Id.*

368. *Id.* at 639.

369. *Id.* at 639-40.

370. *Id.* at 639.

371. *Id.*

372. *Id.* at 639-40 (citing *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916) (Cardozo, J.)).

373. *Id.* at 640.

statutes of repose by forty-seven states—including Indiana—and the District of Columbia.<sup>374</sup>

Though most states have adopted a building statute of repose, such as the CSOR, “[m]ost legislatures have not defined the term ‘improvement to real property’ as used in their respective . . . statutes.”<sup>375</sup> This has resulted in a well-developed body of case law seeking to define this crucial phrase.<sup>376</sup> “Broadly speaking, two general approaches have emerged—a common-law fixture analysis and a ‘commonsense’ analysis.”<sup>377</sup>

“A ‘fixture’ is a former chattel or piece of personal property that ‘has become a part of real estate by reason of attachment thereto.’”<sup>378</sup> The determination of whether a chattel has transformed into a fixture poses “a mixed question of law and fact” and must be analyzed in light of the “circumstances of each case.”<sup>379</sup> Due to the vagueness of such an approach, most courts apply “a commonsense approach that looks to the ordinary or plain meaning of the phrase.”<sup>380</sup> In applying the commonsense approach, courts typically begin their analysis “with the dictionary definition of ‘improvement.’”<sup>381</sup> Using the common sense approach, courts typically require that four factors be

established: (1) there is a permanent addition to or betterment of real property; (2) that enhances the real property's capital value; (3) that involves the expenditure of labor or money; and (4) that is designed or intended to make the property more useful or valuable as distinguished from ordinary repairs.<sup>382</sup>

The Indiana Supreme Court adopted the commonsense approach,<sup>383</sup> holding that

an “improvement to real property” is (1) an addition to or betterment of real property; (2) that is permanent; (3) that enhances the real property's capital value; (4) that involves the expenditure of labor or money; (5) that is designed to make the property more useful or valuable; and (6) that is *not* an ordinary repair.<sup>384</sup>

The court also advised, “judges and lawyers should . . . not lose sight of the fact that this is a definition grounded in commonsense.”<sup>385</sup> Simple satisfaction of

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374. *Id.* at 639.

375. *Id.* at 640.

376. *Id.*

377. *Id.*

378. *Id.* at 641 (quoting *Ochs v. Tilton*, 103 N.E. 837, 838 (Ind. 1914)).

379. *Id.*

380. *Id.*

381. *Id.*

382. *Id.*

383. *Id.* at 643-44.

384. *Id.* at 644.

385. *Id.*

these enumerated criteria will not be sufficient where finding an “improvement” “would do violence to the plain and ordinary meaning of the term as used in the construction context.”<sup>386</sup>

Applying these criteria/definitions to the case at bar, the court held that the defendant failed to establish a prima facie showing that the work done was “an improvement to real property.”<sup>387</sup> Nothing in the record established whether the plaintiff installed/removed “asbestos-containing products . . . in the process of making a permanent addition to or betterment of real property.”<sup>388</sup> The court also noted, upon review of cases from other states, “that not everything a contractor does constitutes an improvement to real property.”<sup>389</sup> Consequently, the Indiana Supreme Court reversed the appellate court decision and remanded for further review.<sup>390</sup>

#### CONCLUSION

As each year passes, Indiana’s real property law continues to evolve. This Survey Period was certainly no exception. From cases of first impression to reformulations of previous rules, Indiana’s judiciary decided several important and interesting cases in real property law throughout the Survey Period. Unfortunately, this Article cannot afford more than a snapshot of some of the most significant decisions in Indiana’s real property law during the Survey Period. Interested readers are always encouraged to dive deeper into the cases highlighted throughout this Article and seek out other cases that could not be featured in this Article.

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386. *Id.*

387. *Id.*

388. *Id.*

389. *Id.* at 645.

390. *Id.* at 645-47.