SURVEY OF RECENT REPORTED CASES IN REAL PROPERTY LAW

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INTRODUCTION

This Article examines the reported decisions during the survey period of the Indiana Supreme Court ("Supreme Court"), Court of Appeals of Indiana ("Court of Appeals"), and the Indiana Tax Court concerning real property issues.

I. PROPERTY TAXES AND TAX SALES

A. In re Carroll County 2013 Tax Sale

In the case of *In re Carroll County 2013 Tax Sale*,[1] the Supreme Court considered the applicability of the lien foreclosure prohibition clause in Indiana Code section 13-26-14-4 (the "Statute") to tax sales. Two landowners (the "Taxpayers") within the Twin Lakes Regional Sewer District (covering Carroll and White counties) (the "District") were delinquent in the payment of fees and penalties owed to the District. The District, having perfected liens against the properties, certified its liens to the Carroll County Auditor for collection on the next property tax bills.[2] The District's liens were the only liens filed against the properties.[3] The Carroll County Treasurer and Auditor filed an affidavit and joint application for judgment seeking an order allowing the two properties to be sold at tax sale to satisfy the sums owed to the District.[4]

The trial court granted the requested judgment and the properties were listed for tax sale.[5] Prior to the tax sale, the Taxpayers petitioned the trial court to have the properties removed from the 2013 tax sale, arguing the last sentence of the

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1. 21 N.E.3d 832 (Ind. 2014).
2. *Id.* at 832.
3. *Id.*
4. *Id.*
5. *Id.*

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Statute prohibits the foreclosure of sewer liens if such liens are the only liens on the property; therefore, neither property could be sold at tax sale.[6] After a hearing, the trial court ordered the properties removed from the tax sale.[7] The District appealed to the Supreme Court pursuant to Indiana Rule of Appellate Procedure 56(A).[8]

On appeal to the Supreme Court, the District argued Indiana law provides three distinct methods for collecting unpaid sewer charges and penalties: "(1) the filing of a civil lawsuit (Indiana Code section 36–9–23–31); (2) the perfection and foreclosure of a lien on the customer's property (Indiana Code sections 36–9–23–34 and 13–26–14 *et seq.*); and (3) the certification of a lien to the county auditor for collection with property taxes (Indiana Code section 36–9–23–33)."[9] District argued a foreclosure, which terminates the landowner's interest in the real estate, is distinct from a tax sale.[10] A tax sale, in contrast to a foreclosure, constitutes the sale of the tax lien against the property subject to the taxpayer's one-year right of redemption and does not terminate the landowner's property rights.[11] The Taxpayers argued the word "foreclose" in the Statute should be read broadly enough to encompass a traditional real estate foreclosure and a tax sale, which landowners characterize as a "tax foreclosure."[12]

The Supreme Court ruled in favor of the District, observing the Statute provides for the collection and enforcement of regional sewer district liens in substantially the same manner as provided in Indiana Code sections 36-9-23-31 through 36-9-23-34.[13] Sections 31-34 establish three separate methods available to a regional sewer district to collect unpaid charges and penalties and distinguish "tax liens" from the regional sewer district liens contemplated by the Statute.[14] As the Statute distinguishes between a tax lien and a sewer lien, the Supreme Court concluded the prohibition on foreclosure in the Statute does not apply to tax sales.[15]

B. Marineland Gardens Community Ass'n v. Kosciusko County Assessor

In *Marineland Gardens Community Ass'n v. Kosciusko County Assessor*,[16] the Indiana Tax Court interpreted and applied the property tax exemption provided in Indiana Code section 6-1.1-10-16(c)(3) concerning land owned by non-profit entities for the purpose of "retaining and preserving land and water for

6. *Id.* at 833-34.
7. *Id.* at 834.
8. *Id.*
9. *Id.* at 834 n.2.
10. *Id.* at 835.
11. *Id.* (citing IND. CODE § 6-1.1-24-9(b) (2015)).
12. *Id.*
13. *Id.*
14. *Id.* at 836.
15. *Id.*
16. 26 N.E.3d 1087 (Ind. T.C. 2015).

their natural characteristics."[17] Marineland ("Taxpayer") is a homeowners' association representing a subdivision located on a lake,[18] which owns and maintains ten non-contiguous parcels of land within the subdivision, including several that abut the lake.[19] For the 2009 and 2010 tax years, Taxpayer applied for a property tax exemption on each of its ten parcels, claiming the association maintained the parcels for the purpose of retaining and preserving the land and water's natural characteristics.[20] Taxpayer introduced testimony and evidence the association's property was maintained for recreational use (e.g., picnics, fishing, walking) by residents of the subdivision and the public.[21] The Kosciusko County Property Tax Assessment Board of Appeals denied Taxpayer's exemptions and Taxpayer appealed to the Indiana Board of Tax Review (the "Indiana Board").[22] The Indiana Board affirmed the Kosciusko County PTABOA denial of the exemptions and Taxpayer appealed.[23]

The Tax Court affirmed the denial of the exemption.[24] The Tax Court gives great deference to final determinations of the Indiana Board when it acts within the scope of its authority.[25] Taxpayer argued on appeal its evidence of the actual use and maintenance of its land to preserve its natural characteristics was given no weight by the Indiana Board.[26] The Tax Court was unpersuaded.[27] To be eligible for the requested exemption, Taxpayer had the burden of proving the association was established for the purposes of retaining and preserving its property for such property's natural characteristics.[28] The Tax Court concluded Taxpayer did not meet its burden because Taxpayer failed to submit organizational documents or other evidence establishing Taxpayer's purpose.[29] The Tax Court further concluded the only evidence submitted concerned how Taxpayer used its property.[30]

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17. *Id.* at 1088.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* at 1090-91.
25. *Id.* at 1089.
26. *Id.* at 1089-90.
27. *Id.* at 1090-91.
28. *Id.* at 1090.
29. *Id.*
30. *Id.* at 1090-91. The Tax Court's opinion states, in dicta, even if evidence of a property's long-standing use could prove why an organization was established, the evidence Marineland produced was in several cases contradictory. *Id.* at 1090. Citing examples, the Tax Court observed some of Marineland's parcels were improved (one had a gravel lot, one a boat dock and ramp, one a seawall, and several were improved to provide lighting and/or other utilities). *See id.*

C. Johnson County Property Tax Assessment Board of Appeals v. KC Propco LLC

In *Johnson County Property Tax Assessment Board of Appeals v. KC Propco LLC*,[31] the Indiana Tax Court considered the applicability of the educational purposes property tax exemption.[32] KC Propco ("Taxpayer") owned certain real estate in Greenwood, Indiana improved with an almost 7000 square-foot building used to operate a KinderCare Learning Center.[33] In 2009, Taxpayer filed for exemption from property taxes under the educational purposes exemption in Indiana Code section 6-1.1-10.16 on the basis that the property was owned, occupied, and used for an early learning center for children.[34] The Johnson County PTABOA denied the exemption and Taxpayer appealed to the Indiana Board of Tax Review (the "Indiana Board"), where evidence was presented demonstrating the educational activities and programs for which the subject property was used by KinderCare Learning Centers.[35] In response, the Johnson County Assessor argued because Taxpayer's purpose was limited to acquiring and owning real estate, Taxpayer had to demonstrate a use independent of KinderCare Learning Centers.[36] The Assessor also argued KinderCare Learning Centers' educational purposes were incidental to the subject property's primary use as a childcare facility.[37] The Indiana Board granted the exemption, concluding Taxpayer and KinderCare Learning Centers operated as integral parts of a single operation, which provided educational programming sufficient to qualify for the exemption.[38] The Assessor and PTABOA appealed.[39]

The Indiana Tax Court affirmed the granting of the exemption.[40] Indiana Code section 6-1.1-10-16 provides that all or part of a building and the land on which it sits is exempt from property taxes if it is owned, occupied, and used for an educational purpose.[41] "When ownership, occupancy, and use of a property are not unified in one entity, each entity" is required to "demonstrate its own exempt purpose."[42] The purpose of the education exemption "is to encourage non-governmental entities to provide educational services for the public welfare."[43] To qualify for the exemption, an applicant must demonstrate the use of its property serves to provide a public benefit "sufficient to justify the loss in

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31. 28 N.E.3d 370 (Ind. T.C. 2015).
32. *Id.* at 374-78.
33. *Id.* at 371-72.
34. *Id.* at 372.
35. *Id.*
36. *Id.* at 373.
37. *Id.*
38. *Id.* at 373-74.
39. *Id.* at 374.
40. *Id.* at 378.
41. *Id.* at 374.
42. *Id.* at 374-75.
43. *Id.* at 375 (internal quotation omitted).

tax revenue."[44]

> An applicant can meet that burden by showing that it provides the public with either the same educational training that would otherwise be furnished by . . . tax-supported schools or that it provides educational courses that are related to those found in tax-supported schools but not necessarily provided by them.[45]

Finding the record presented sufficient evidence to support the Indiana Board's determination, the Tax Court affirmed the granting of the exemption.[46]

D. 219 Kenwood Holdings, LLC v. Properties 2006, LLC

In *219 Kenwood Holdings, LLC v. Properties 2006, LLC*, the Court of Appeals considered the notice requirements for a petition to apply for a tax deed under Indiana Code section 6-1.1-25-4.6.[47] Kenwood was delinquent in paying property taxes on property it owned in Hammond, Indiana.[48] As a result, the property was sold at a tax sale to a third party ("Tax Sale Purchaser") on April 25, 2013, who assigned its rights to Properties 2006.[49] On June 21, 2013, Tax Sale Purchaser sent Kenwood notice of its purchase and its intent to petition for a tax deed as required by Indiana Code section 6-1.1-25-4.5.[50] The notice declared: "A petition for a tax deed will be filed on or after August 24, 2013."[51] On August 30, 2013, Tax Sale Purchaser notified Kenwood it had petitioned for a tax deed as required by Indiana Code section 6-1.1-25-4.6.[52]

Under Indiana Code section 6-1.1-25-4.6, a party that purchases Indiana real property at a property tax sale initially receives a certificate of sale.[53] A redemption period for the delinquent owner then ensues.[54] If the delinquent owner fails to redeem the property during that period, a tax sale purchaser who complies with the statutory requirements is entitled to a tax deed.[55] The delinquent owner must be given two notices.[56] "The first notice announces the fact of the sale, the date the redemption period will expire, and the date on or after which a tax deed petition will be filed. The second notice announces that

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44. *Id.*
45. *Id.*
46. *Id.* at 376-378.
47. 219 Kenwood Holdings, LLC v. Props. 2006, LLC, 19 N.E.3d 342, 342-43 (Ind. Ct. App. 2014).
48. *Id.* at 342.
49. *Id.* at 342-43.
50. *Id.* at 343.
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*

the tax sale purchaser has petitioned for a tax deed."[57]

The notice must contain the following information: "(1) a statement that a petition for a tax deed will be filed on or after a specified date" and "(2) the date on or after which the petitioner intends to petition for a tax deed to be issued."[58] Kenwood argued the second provision required Tax Sale Purchaser to alert them of when the government would grant the tax deed.[59] The trial and appellate courts disagreed with Kenwood's interpretation, holding subsection (2) does not require a tax sale purchaser to predict when the court will actually issue the tax deed.[60] The court further held subsection (1) and (2) can be satisfied by one statement in a notice.[61]

E. Property Development Co. Four, LLC v. Grant County Assessor

In *Property Development Co. Four, LLC v. Grant County Assessor*, the Indiana Tax Court considered whether a retroactive assessment of former agricultural land was permissible and whether documents mailed to a taxpayer by the county assessor comported with statutory notice requirements for assessments. [62] In 2003, Property Development Company Four, LLC ("Taxpayer") purchased two parcels of land in Marion, Indiana.[63] At the time of Taxpayer's purchase, both parcels were assessed as vacant agricultural land; however, shortly afterwards, in 2004, Taxpayer built a home for the disabled on each parcel.[64] When the two parcels were reassessed in 2006 and 2007, the county assessor ("Assessor") retroactively increased the real property taxes for prior tax years.[65] Following the respective reassessments, the Assessor mailed "Reports of Assessments for Omitted or Undervalued Property Assessment and Assessment Penalties" ("Form 122s") to Taxpayer in 2006 for one parcel, but sent Form 122s for the second parcel to a prior owner ("Prior Owner") in 2007.[66] Taxpayer paid the increased tax liabilities on the two parcels in the years following the reassessments but did not pay for the retroactive assessments.[67]

In 2010, the county treasurer finally attempted to recover the retroactive tax liabilities, fees, and penalties on the two parcels from Taxpayer.[68] Subsequently, Taxpayer appealed the assessments first to the Grant County Property Tax

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57. *Id.*

58. *Id.* at 343-44.

59. *Id.* at 344.

60. *Id.* at 344-45.

61. *Id.*

62. Prop. Dev. Co. Four, LLC v. Grant Cty. Assessor, 31 N.E.3d 1049, 1051-54 (Ind. T.C.), *aff'd on reh'g*, 42 N.E.3d 182 (Ind. T.C. 2015).

63. *Id.* at 1049-50.

64. *Id.* at 1050.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

Assessment Board of Appeals then to the Indiana Board of Tax Review (the "Indiana Board").[69] The Indiana Board conducted a hearing in which Taxpayer argued the retroactive assessments were invalid because they conflicted with Indiana Code section 6-1.1-4-12 and because the Assessor failed to provide Taxpayer with proper notice.[70] In 2013, the Indiana Board held the retroactive property tax assessments were permitted in accordance with Indiana Code chapter 6-1.1-9, except for the 2004 assessment of the second parcel as the Indiana Board concluded it was "untimely."[71]

The Tax Court affirmed the Indiana Board's final determination in part and reversed in part, remanding the matter to the Indiana Board.[72] First, Taxpayer argued the property tax assessments had been misapplied, as the Indiana Board erred in authorizing the assessments under Indiana Code chapter 6-1.1-9 because a more specific statute, Indiana Code section 6-1.1-4-12, applied instead.[73] At the time the parcels were assessed, Indiana Code section 6-1.1-9-4 provided that "property may be assessed, or its assessed value increased, for a prior year under this chapter *only if* the notice required by [Indiana Code section 6-1.1-9-1] is given within three (3) years after the assessment date for that prior year."[74] Indiana Code section 6-1.1-4-12 authorized "the assessment of certain property (e.g., agricultural land) when an objective event signaling the commencement of commercial development occurs."[75] Although the Court acknowledged a more specific statute generally prevails over a more general statute[76] and both statutes authorize the assessment of property,[77] the Court held the application of these statutes were triggered by different factual circumstances and neither statute indicates the application of one precludes an assessment under the other.[78] Here, the Assessor applied assessments to each parcel retroactively "according to Indiana Code section 6-1.1-9-4 because the improvements were omitted from the assessment rolls post-construction."[79] The Court found even though the Assessor could have assessed these parcels when they were subdivided for development under Indiana Code section 6-1.1-4-12, the failure to assess the parcels at that time did not preclude retroactive assessment.[80] Thus, the Tax Court upheld the final determination of the Indiana Board's property tax assessments under

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69. *Id.*

70. *Id.*

71. *Id.* at 1050-51.

72. *Id.* at 1054.

73. *Id.* at 1051.

74. *Id.* at 1051-52.

75. *Id.* at 1052 (citing Hamilton Cty. Assessor v. Allisonville Rd. Dev., LLC, 988 N.E.2d 820, 823-24 (Ind. T.C. 2013)).

76. *Id.* at 1051 (citing State *ex rel*. Hatcher v. Lake Superior Court, Room Three, 500 N.E.2d 737, 739 (Ind. 1986)).

77. *Id.*; IND. CODE §§ 6-1.1-9-1, -4-12 (2015).

78. *Prop. Dev. Co. Four, LLC*, 31 N.E.3d at 1052.

79. *Id.*; IND. CODE § 6-1.1-9-4.

80. *Prop. Dev. Co. Four, LLC*, 31 N.E.3d at 1052.

Indiana Code section 6-1.1-9-4.[81]

Taxpayer, though, additionally argued it did not receive sufficient notice of the respective assessments of the two parcels of land, not only because the Assessor's notice failed to comply with Indiana Code section 6-1.1-9-1, but also because the Assessor mailed the Form 122s for the second parcel to Prior Owner instead of Taxpayer.[82] The Tax Court determined the Assessor failed to meet the required notice provisions for two reasons.[83] First, under a 2007 amendment to Indiana Code section 6-1.1-9-1, the statute requires the notice to contain a statement of "the taxpayer's right to review with the county property tax assessment board of appeals under [Indiana Code section] 6-1.1-15-1."[84] Although the Assessor timely mailed the appropriate Form 122s to the respective parcels, the Assessor failed to include statements regarding Taxpayer's rights to a preliminary conference under Indiana Code section 6-1.1-15-1 in the Form 122s.[85] Secondly, though the mailing of an annual tax bill may itself satisfy the notice requirements of Indiana Code section 6-1.1-9-1,[86] the Tax Court found in this instance that the tax bills—sent in 2010 and thus six years after the 2004 reassessment, five years after the 2005 reassessment, and four years after the 2006 reassessment—were not timely issued within three years of the assessment date.[87]

F. Peters v. Garoffolo

In *Peters v. Garoffolo*, the Indiana Tax Court (the "Tax Court") considered the burden of proof for assessments that increase by more than 5% in any one year and the evidence needed to prove an overvaluation in assessment. [88] Lee and Sally Peters (the "Taxpayers") challenged an assessment of their real property by the Boone County Property Tax Assessment Board of Appeals, which the Indiana Board of Tax Review (the "Indiana Board") upheld.[89] The Taxpayers owned a 0.16 acre lot consisting of a 2582 square-foot office on Main Street in Zionsville, Indiana.[90] In 2009, the Taxpayers' real property was assessed at $306,400; however, for the 2010 tax year the assessment increased to $430,900, but was subsequently reduced to $420,000.[91] The Taxpayers filed a tax appeal to the Tax

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81. *Id.*

82. *Id.* at 1052-53.

83. *Id.* at 1053-54.

84. *Id.* at 1053; IND. CODE §§ 6-1.1-9-1, -15-1.

85. *Prop. Dev. Co. Four, LLC*, 31 N.E.3d at 1054.

86. *Id.*; *see, e.g.*, Williams Indus. v. State Bd. of Tax Comm'rs, 648 N.E.2d 713, 715 (Ind. T.C. 1995).

87. *Prop. Dev. Co. Four, LLC*, 31 N.E.3d at 1054.

88. Peters v. Garoffolo, 32 N.E.3d 847, 849 (Ind. T.C. 2015).

89. *Id.* at 848.

90. *Id.*

91. *Id.*

Court in 2012.[92]

First, the Tax Court considered whether the Indiana Board erred in determining the Taxpayers, rather than the assessor, bore the burden of proof at the administrative hearing.[93] The Tax Court examined "the burden-shifting rule" under Indiana Code section 6-1.1-15-17.2, which provides if an assessment of a property increased by more than 5% from year to year, the burden of proving the assessment is correct shifts to the assessor.[94] Here, the assessment clearly increased more than 5% from 2009 to 2010, so the Tax Court concluded the burden of proof should have shifted to the county assessor.[95]

Even though the Tax Court found the Indiana Board erred in this burden of proof determination, the Tax Court upheld the Indiana Board's assessment of the property value based on the evidence presented by the parties.[96]

In Indiana, real property is assessed on the basis of its market value-in-use, which is usually its fair market value.[97] Three appraisal techniques are generally acceptable for use in determining a property's market-in-value, including the cost approach, the sales comparison approach, and the income approach.[98] The cost approach is the primary technique used in Indiana, where the assessor calculates the market-in-use value by applying previously determined base rates set forth by township or county's land orders and calculates improvements by using cost tables.[99] Property assessments determined by an assessor are presumed accurate, but may be rebutted with other market-based evidence.[100]

In reviewing the administrative record, the Tax Court found the increased assessment was a result of the county assessor failing to assess half of the Taxpayers' property in 2009.[101] Thus, the county assessor simply corrected her mistake by using the base rate to calculate the unassessed portion of the property.[102] The Taxpayers acknowledged half of the property went unassessed in 2009, but presented a number of market comparisons to support their argument the assessment in 2010 was overvalued.[103] In conclusion, the Tax Court held the county assessor's explanation as to the increase in the assessment was sufficient to shift the burden of production back to the Taxpayers and the market evidence presented by the Taxpayers was insufficient to prove the Indiana Board erred in

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92. *Id.*

93. *Id.* at 849.

94. *Id.* (citing Orange Cty. Assessor v. Stout, 996 N.E.2d 871, 873 (Ind. T.C. 2013)).

95. *Id.* at 850.

96. *Id.* at 850-53.

97. *Id.* at 848 (citing Millennium Real Estate Inv., LLC v. Benton Cty. Assessor, 979 N.E.2d 192, 196 (Ind. T.C. 2012)).

98. *Id.* at 848-49.

99. *Id.* at 849.

100. *Id.* (citing Indianapolis Racquet Club, Inc. v. Marion Cty. Assessor, 15 N.E.3d 150, 153 (Ind. T.C. 2014)).

101. *Id.* at 850.

102. *Id.*

103. *Id.* at 851.

upholding the assessment.[104]

G. First Bank of Whiting v. 524, LLC

In *First Bank of Whiting v. 524, LLC*, the Court of Appeals considered the adequacy of a tax sale notice and the timeliness of an order granting a tax deed.[105] Purchaser purchased two parcels of real property (the "Parcels") in Lake County, Indiana at a tax sale.[106] At the time of the sale, a trust was the owner of record of both Parcels.[107] The First Bank of Whiting ("Trustee") was the trustee of the trust.[108] After the redemption period expired, Purchaser filed a petition for the trial court to issue a tax deed and Trustee objected.[109] In 2014, the trial court concluded all notices required by law were given and the property owner actually received those notices.[110] The trial court entered an order in favor of Purchaser, directing that the tax deed should be issued to Purchaser with respect to both Parcels.[111] Trustee appealed.[112] Two issues were presented for review: first, whether the tax sale notices substantially complied with the requirements of Indiana Code sections 6-1.1-24-4, 6-1.1-25-4.5, and 6-1.1-25-4.6; and second, whether the trial court's order to issue tax deeds was untimely.[113] In both instances, the Court of Appeals affirmed.[114] With respect to the tax sale notices, Trustee contended because Purchaser did not include "c/o SSAY Corp" in certain mailed notices, the notices were defective.[115] The Court of Appeals noted that to determine whether a notice "substantially complied" with statutory requirements must be "based on the facts and circumstances of the case and is a *question of fact*."[116] In this instance, the Court of Appeals noted it was undisputed (1) at the time of the sale, Trustee was the long-time owner of the Parcels; (2) notwithstanding the failure to include "c/o SSAY Corp," Trustee "actually received presale notices of the tax sale;" and (3) the notices were sufficient to enable Trustee "to timely file an objection to the issuance of tax deeds and appear with counsel at the hearing on the issuance of those deeds."[117] The Court

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104. *Id.* at 852-53.

105. First Bank of Whiting v. 524, LLC, 39 N.E.3d 698, 699 (Ind. Ct. App. 2015).

106. *Id.* at 700.

107. *Id.* at 699-700.

108. *Id.*

109. *Id.* at 700-01.

110. *Id.* at 701.

111. *Id.*

112. *Id.*

113. *Id.* at 699.

114. *Id.*

115. *Id.* at 701.

116. *Id.* at 702 (emphasis in original) (quoting First Am. Title Ins. Co. v. Calhoun, 13 N.E.3d 423, 433 (Ind. Ct. App. 2014) (quoting *In re* Sale of Real Prop. with Delinquent Taxes of Special Assessments, 822 N.E.2d 1063, 1074 (Ind. Ct. App. 2005))).

117. *Id.* at 702-03.

of Appeals also noted that "'SSAY Corp' was merely a conduit by which the required notices were to be delivered to the owner" of record.[118] Thus, under these facts, the Court of Appeals concluded the various notices substantially complied with the applicable rules and Trustee's due process rights were not violated.[119] Second, the Court of Appeals concluded the trial court's order for a tax deed was timely.[120] According to Indiana Code section 6-1.1-25-4.6(b), "the trial court was required to enter an order directing the County auditor to issue tax deeds no later than sixty-one days after the Petition for Issuance of Tax Deed."[121] Specifically, Section 4.6(b) provides:

> Not later than sixty-one (61) days after the petition is filed under subsection (a), the court shall enter an order directing the county auditor (on the production of the certificate of sale and a copy of the order) to issue to the petitioner a tax deed if the court finds that the following conditions exist:
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> (1) The time of redemption has expired.
> (2) The tract or real property has not been redeemed from the sale before the expiration of the period of redemption specified in section 4 of this chapter.
> (3) Except with respect to a petition for the issuance of a tax deed under a sale of the certificate of sale on the property under IC 6–1.1–24–6.1 or IC 6–1.1–24–6.8, or with respect to penalties described in section 4(k) of this chapter, all taxes and special assessments, penalties, and costs have been paid.
> (4) The notices required by this section and section 4.5 of this chapter have been given.
> (5) The petitioner has complied with all the provisions of law entitling the petitioner to a deed.
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> The county auditor shall execute deeds issued under this subsection in the name of the state under the county auditor's name. If a certificate of sale is lost before the execution of a deed, the county auditor shall issue a replacement certificate if the county auditor is satisfied that the original certificate existed.[122]

Trustee contended the trial court's order was filed on July 17, 2014, which was almost a year after Purchaser filed a motion asking the court to order the auditor to issue tax deeds for the Parcels.[123] The Court of Appeals noted if it were to adopt Trustee's interpretation, "the trial court would have been required to

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118. *Id.* at 703.
119. *Id.*
120. *Id.* at 704.
121. *Id.* at 703.
122. *Id.* at 703-04.
123. *Id.* at 703.

enter its order directing the auditor to issue a tax deed for the Parcels almost six months before it conducted the hearing to determine whether . . . [Purchaser's] petition should be granted."[124]

To avoid an absurd result, the Court of Appeals concluded there is an implicit sixth condition in the statute that "the petitioner is *legally* entitled to a tax deed after completing all of the requisite steps."[125] Thus, under the statute, the "trial court has sixty-one days, *after resolving a challenge to a petitioner's request for a tax deed in favor of the petitioner*, to enter an order directing the auditor to issue the deed."[126] Because the trial court simultaneously rejected Trustee's objection and ordered the auditor to issue the tax deed for the Parcels, the lower court complied with the statute.[127]

H. Monroe County Assessor v. Kooshtard Property I, LLC

In *Monroe County Assessor v. Kooshtard Property I, LLC*, the Indiana Tax Court upheld the decision by the Indiana Board of Tax Review (the "Indiana Board") that concluded a taxpayer's appraisal was the best evidence of the value of the taxpayer's land (the "Property").[128]

The taxpayer at issue ("Taxpayer") appealed the assessed value of his land, set at $1.2 million, for the 2008, 2009, and 2011 tax years.[129] At a hearing with the Indiana Board, Taxpayer presented an appraisal that concluded the assessed value of the Property as of March 1, 2006 was $300,000 based on the adjusted sales price of four comparable tracts of real estate.[130] The assessor challenged the appraisal, highlighting the fact the 2006 valuation date was not the appropriate valuation date for any of the applicable years being appealed.[131] Furthermore, the assessor questioned the adjustments the appraiser made in the appraisal to the sales prices of the comparable tracts.[132] The Indiana Board had concerns with the appraiser's methodology but ultimately determined the appraisal, and thus Taxpayer, presented the best evidence of the value of the Property.[133]

On appeal in front of the Indiana Tax Court (the "Tax Court"), the assessor argued (1) the Indiana Board's review was not impartial, and (2) the Indiana Board's determination was arbitrary, capricious, and not supported by substantial and reliable evidence.[134] On both points, the Tax Court sided with Taxpayer.[135]

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124. *Id.* at 704.
125. *Id.*
126. *Id.* (emphasis in original).
127. *Id.*
128. Monroe Cty. Assessor v. Kooshtard Prop. I, LLC, 38 N.E.3d 754, 757 (Ind. T.C. 2015).
129. *Id.* at 755.
130. *Id.* at 755-56.
131. *Id.* at 756.
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.* at 757-58.

Although the Tax Court pointed out the concerns the Indiana Board had with the appraisal, the court also referenced the Indiana Board's reasons for concluding the appraisal provided the best indication of the value of the Property and stated that it would not substitute its judgment for that of the Indiana Board.[136] Specifically, the Tax Court pointed out the Indiana Board's conclusion that though the appraisal's valuation date was not the same as the valuation dates at issue, other evidence, such as the fact that the assessment across all years was the same, linked the valuation dates, and the assessor had failed to present any evidence that the appraisal's adjustments were incorrect.[137]

I. Cooper v. Allen County Assessor

In *Cooper v. Allen County Assessor*, the Indiana Tax Court (the "Tax Court") considered the standard required to use neighborhood property values for purposes of comparison properties.[138] *Cooper* involved a property owner's challenge of his 2012 assessed value and the subsequent denial of that challenge by the county property tax assessment board of appeals and by the Indiana Board of Tax Review (the "Board").[139]

The assessor submitted evidence to the Board indicating the portion of the assessed value attributable to the property owner's land was comparable, on a per acre basis, to the sales price of vacant lots in the same neighborhood.[140] On appeal with the Tax Court, the property owner argued any litigant that uses comparable properties in its analysis must identify how characteristics of the property at issue compare with the characteristics of the comparable property and how any differences between such properties affected their relative market values-in-use.[141] The *Cooper* property owner argued the assessor failed this requirement by using comparisons that were "too conclusory" and "not detailed enough."[142]

The Tax Court rejected the property owner's argument for two reasons.[143] First, the Tax Court concluded that "for purposes of property assessment, the lots within . . . [the neighborhood] were already presumed comparable" and the assessor's evidence in front of the Indiana Board bolstered that presumption by including an explanation of why the lots within the neighborhood were comparable.[144] Second, the Tax Court concluded the owner's appeal basically

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136. *Id.* at 758.

137. *Id.*

138. Cooper v. Allen Cty. Assessor, 42 N.E.3d 596, 598 (Ind. T.C. 2015).

139. *Id.* at 597-98.

140. *Id.* at 597.

141. *Id.* at 598.

142. *Id.* at 598-99.

143. *Id.* at 599.

144. *Id.* The assessor's evidence included a map showing the size, shape, and location of the neighborhood lots and explained the lots appeared to be nearly identical in terms of topography, access to amenities, and primary views. *Id.*

asked the Tax Court to reweigh the evidence provided to the Indiana Board—a request the Tax Court would only entertain if the Indiana Board's conclusion was "against the logic and effect of the facts and circumstances before it."[145] Based upon the "ample evidence" in support of the assessor's proposed assessed value and the owner's appraisal, which carried "no weight,"[146] the court could not conclude the Indiana Board's final determination was against such logic and effect.[147]

J. Pulte Homes of Ind., LLC v. Hendricks County Assessor

In *Pulte Homes of Indiana, LLC v. Hendricks County Assessor*, the Tax Court reviewed a determination of the Indiana Board of Tax Review (the "Indiana Board") regarding the scope of relief available to a taxpayer during the appeal procedure that begins with a Petition for Correction of an Error (a "Form 133").[148]

Pulte arose when the owner of a substantial number of common area parcels of land within several residential neighborhoods ("Petitioner") filed Form 133s with the Hendricks County Property Tax Assessment Board of Appeals (the "PTABOA"), claiming the assessments of its parcels were illegal as a matter of law, or, in the alternative, contained a mathematical error.[149] The PTABOA denied all of Petitioner's appeals, and Petitioner subsequently petitioned the Indiana Board, asserting the same claims it made to the PTABOA.[150] The Indiana Board issued a show cause order (the "Show Cause Order"), which stated that because Form 133s appeared to raise claims that could only be resolved by exercising subjective judgment, the Indiana Board had to determine whether it had the authority to provide Petitioner with the relief it requested.[151] The Indiana Board held a hearing on the Show Cause Order and subsequently issued a final determination dismissing Petitioner's petitions, finding the resolution of Petitioner's claims required subjective judgment and was beyond the scope of relief available through the Form 133 appeal procedure.[152] Soon after, Petitioner initiated a tax appeal.[153]

Petitioner argued the Tax Court should reverse the Indiana Board's final

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145. *Id.*

146. *Id.* The Indiana Board had determined the owner's appraisal, which concluded the assessed value should reflect the purchase price paid for the property by the owner in 2007, was countered by evidence produced at the hearing indicating the 2007 purchase was not performed at arm-length. *Id.* at 597-98.

147. *Id.* at 599.

148. Pulte Homes of Ind., LLC v. Hendricks Cty. Assessor, 42 N.E.3d 590, 591 (Ind. T.C. 2015), *trans. denied*, 43 N.E.3d 244 (Ind. 2016).

149. *Id.* at 592.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

determination for four reasons.[154] First, Petitioner claimed that "the Indiana Board lacked the authority to dismiss its case *sua sponte*."[155] Second, Petitioner claimed the Indiana Board abused its discretion by dismissing its claims "without first conducting an evidentiary hearing."[156] Third, Petitioner claimed the Indiana Board "erred in dismissing its case because it [could] be objectively shown that the taxes on its common area parcels were illegal as a matter of law."[157] Fourth, Petitioner claimed the Indiana Board erred in dismissing its case because the Assessor, not Petitioner, "bore the burden of proving the validity of the assessments under Indiana Code section 6–1.1–15–17.2."[158]

The Tax Court affirmed the Indiana Board's determination in all instances.[159] First, the court held that "the Indiana Board [had] authority to issue an order of dismissal on its own motion."[160] Second, the court found that state law required the Indiana Board to hold a hearing only when the merits are considered for a correction of error, not when determining a preliminary procedural issue.[161] Petitioner argued that "an evidentiary hearing is required on the merits of the appeal even when the Indiana Board is determining a preliminary procedural issue because the Indiana Board cannot limit the scope of an appeal with the parties' consent," citing Indiana Code section 6-1.1-15-4(k).[162] Petitioner further argued the Indiana Board could not dismiss the case because Petitioner would be unable to present evidence of comparable property assessments as permitted by Indiana Code section 6-1.1-15-18.[163] The court ultimately rejected these two arguments, finding the statutes were not applicable.[164]

Third, the court held there is no per se rule that states that "common areas have zero value," and therefore, "any evidence presented would necessarily involve subjective judgment because the value cannot be determined from a simple rendition of objective facts."[165] Finally, the court rejected Petitioner's last argument, finding Petitioner bore the burden of proving to the Indiana Board that the assessment of its common area parcels were not correct.[166] In reviewing Indiana Code section 6-1.1-15-17.2, the court determined the plain language of the statute states the, "burden shifts when an appeal or review is of an assessment."[167] Because this case dealt with a preliminary procedural issue, the

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154. *Id.* at 593.
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.* at 596.
160. *Id.* at 594.
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.* at 595.
166. *Id.* at 596.
167. *Id.* at 595.

statute did not apply.[168]

II. ZONING

A. Caddyshack Looper, LLC v. Long Beach Advisory Board of Zoning Appeals

In *Caddyshack Looper, LLC v. Long Beach Advisory Board of Zoning Appeals*,[169] the Court of Appeals considered a landowner's appeal from the denial of a variance for the construction of a seawall beyond established setbacks. Landowner owned property along Lake Shore Drive in Long Beach, LaPorte County, Indiana.[170] The property is adjacent to Lake Michigan and was improved with an expensive home, a pool, and a patio.[171] In 2010, a severe storm sheared a portion of the property resulting in a five to six foot cliff from the existing grade that left pipes for the pool-deck, guttering, and drainage system exposed.[172] After the storm, the landowner engaged its general contractor to construct a seawall to protect the property.[173] The Contractor submitted a building permit application to the Town of Long Beach, then met with a town official and identified the proposed location of the seawall on a professional survey.[174] The building permit was issued and the contractor commenced work on the seawall.[175] During construction, the town building inspector visited the construction site and discussed his concerns with the seawall's height and the complaints received from neighbors with the contractor, but did not discuss or object to the location of the seawall.[176] The Long Beach Building Commissioner sent a letter to the contractor indicating the seawall being constructed on the property was in violation of the Long Beach View Protection Ordinance (the "Ordinance")—the seawall was located more than 106.6 feet from the zoning lot line abutting Lake Shore Drive—and directing the contractor to stop work immediately.[177] The letter was received after construction was completed.[178]

Landowner filed a petition for a variance to allow the seawall "to extend beyond the 106.6 foot setback."[179] The Long Beach Advisor Board of Zoning Appeals (the "BZA") held a hearing and ultimately declined the petition for

168. *Id.* at 596.
169. 22 N.E.3d 694, 696 (Ind. Ct. App. 2014).
170. *Id.*
171. *Id.* at 704-05.
172. *Id.* at 704.
173. *Id.* at 696.
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.* at 697.
178. *Id.*
179. *Id.* (internal quotation omitted).

variance.[180] Landowner sought judicial review.[181] The trial court reviewed the BZA determination under the provisions of Indiana Code section 36-7-4-918.5(a),[182] which provides a variance petition before a board of zoning appeals may be approved upon a determination that:

> (1) the approval will not be injurious to the public health, safety, morals, and general welfare of the community; (2) the use and value of the area adjacent to the property included in the variance will not be affected in a substantially adverse manner; and (3) the strict application of the terms of the zoning ordinance will result in practical difficulties in the use of the property. However, the zoning ordinance may establish a stricter standard than the "practical difficulties" standard prescribed by this subdivision.[183]

The trial court concluded the BZA determination as to considerations one and two under Indiana Code section 36-7-4-918.5(a) were not supported by the evidence in the record.[184] As to the third consideration, however, the trial court concluded it could not find that the BZA findings were clearly erroneous.[185] Because only one of the three considerations in Indiana Code section 36-7-4-918.5(a) is required to sustain a determination by the BZA, the trial court affirmed the denial of the variance.[186] Landowner appealed.[187]

The Court of Appeals reversed the trial court's decision, concluding strict application of the Ordinance would result in practical difficulties for the use of the property and, as a result, the trial court erred in affirming the BZA's denial of the variance.[188] At issue on appeal was whether the evidence in the record supported the BZA's determination that the strict application of the terms of the Ordinance would not result in practical difficulties in the use of the property.[189] Indiana courts have established three factors for evaluating whether strict application of a zoning ordinance will result in practical difficulties in the use of a property: "(1) whether 'significant economic injury' will result if the ordinance is enforced; (2) whether the injury is self-created; and (3) whether there are feasible alternatives."[190] The Court of Appeals concluded factor one and three weighed in favor of the landowner, while factor two did not weigh heavily for or against the landowner.[191] Accordingly, the Court of Appeals held in favor of the

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180. *Id.* at 697-98.
181. *Id.* at 698.
182. *Id.*
183. *Id.* at 703-04.
184. *Id.* at 698-99.
185. *Id.* at 700.
186. *Id.*
187. *Id.*
188. *Id.* at 706.
189. *Id.* at 704.
190. *Id.* (internal citation omitted).
191. *Id.* at 704-06.

landowner as to issuing the variance for the seawall.[192]

B. Town of Pittsboro Advisory Plan Commission v. Ark Park, LLC

In *Town of Pittsboro Advisory Plan Commission v. Ark Park, LLC*,[193] the Court of Appeals considered the standards applicable to an appeal of the Pittsboro Town Council's (the "Town Council") zoning decision and the constitutionality of a zoning ordinance. Developer filed a complaint seeking judicial review of the Pittsboro Town Advisory Plan Commission's denial of the developer's application for concept plan approval in connection with a planned unit development ("PUD").[194] The developer's complaint sought judicial review and declaratory judgment, and included several documents pertaining to the claims asserted, but the developer failed to either file the board record with the original complaint or request an extension of time to do so pursuant to Indiana Code section 36-7-4-1613.[195] The Town of Pittsboro sought to dismiss the developer's suit on this basis, but the dismissal was rejected by the trial court.[196] The Town Council appealed the trial court's decision.[197]

The Court of Appeals concluded recent decisions by the Supreme Court establish a "bright-line" rule for cases involving judicial review of administrative agency determinations.[198] The statutes codified in Indiana Code section 36-7-4-1600-1616, known as the "1600 Series," establish the exclusive means for obtaining judicial review of zoning decisions.[199] Indiana Code section 36-7-4-1613 requires a party seeking judicial review to either transmit the original or a certified copy of the administrative record, or seek an extension of time to do so within thirty days after filing its complaint.[200] Developer conceded in the record it failed to comply with Indiana Code section 36-7-4-1613.[201] The Court of Appeals concluded the developer's failure to comply with the statute was fatal pursuant to the Supreme Court's bright-line rule that "a 'petitioner for [judicial] review cannot receive consideration of its petition where the statutorily defined agency record has not been filed.'"[202] The Court of Appeals explained this bright-line rule is intended to avoid putting trial courts "in the unenviable position of

192. *Id.* at 706.

193. 26 N.E.3d 110, 112 (Ind. Ct. App. 2015).

194. *Id.*

195. *Id.* at 114.

196. *Id.* at 114-16.

197. *Id.* at 116.

198. *Id.* at 118.

199. *Id.* at 117 (quoting IND. CODE § 36-7-4-1601(a) (2015) (internal quotations omitted)).

200. *Id.*

201. *Id.* at 118.

202. *Id.* (quoting Teaching Our Posterity Success, Inc. v. Ind. Dep't of Educ., 20 N.E.3d 149 (Ind. 2014)). This bright-line rule was applied in a companion case to *Teaching Our Posterity Success, Inc.* to require dismissal of a petition for judicial review where the agency record was not timely certified. *See id.* (citing First Am. Title Ins. Co. v. Robertson, 19 N.E.3d 757 (Ind. 2014)).

trying to ascertain blindly whether the documents before it are enough or whether other documents in the official record—to which it does not have access—are relevant to the issues on [judicial] review."[203] Because developer failed to comply with Indiana Code section 36-7-4-1613's requirement to file the agency record timely, the Court of Appeals concluded the complaint should have been dismissed.[204]

C. Dunmoyer v. Wells County

In *Dunmoyer v. Wells County*,[205] the Court of Appeals considered whether landowners opposing a wind farm project (the "Remonstrators") demonstrated the Wells County Planning Commission's (the "Commission") approval of the project was not supported by substantial evidence under Indiana Code section 36-7-4-1614. Developer sought to construct a wind energy conversion system consisting of sixty-eight wind turbines in Wells County, Indiana.[206] Development on private land in Wells County is governed by a county-level zoning ordinance (the "Ordinance").[207] The subject property was zoned A-1 under the Ordinance, which specifically permitted use of such land for large wind energy projects pursuant to specific standards applicable to wind energy conversion systems ("WECS") and communications towers.[208] Developer initially submitted a development plan to the Commission for approval in March 2013.[209] After multiple, well-attended[210] hearings over a six-month period and several intervening revisions to developer's proposed development plan, the Commission approved the developer's plan and Remonstrators sought judicial review.[211] At trial the Remonstrators argued, inter alia, they were aggrieved and prejudiced because the proposed wind energy project would allow wind turbines to be constructed in close proximity to their homes, decreasing Remonstrators' property values, and subjecting their homes to shadow flicker and noise from the turbines.[212] Because the applicable zoning designation permitted the proposed wind energy project and because developer's proposed development plan met or exceeded applicable requirements under the Ordinance, the trial court concluded the Remonstrators had not been aggrieved or prejudiced by the Commission's

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203. *Id.* at 119 (quoting *Teaching Our Posterity Success, Inc.*, 20 N.E.3d at 155).

204. *Id.*

205. 32 N.E.3d 785 (Ind. Ct. App. 2015).

206. *Id.* at 786.

207. *Id.* at 787.

208. *Id.* at 787, 796.

209. *Id.* at 789.

210. *Id.* at 789-90. The June 2013 Commission hearing drew in excess of 300 people and the July 2013 meeting was continued until a larger venue could be found to accommodate the number of attendees. *Id.* at 790.

211. *Id.* at 790-91.

212. *Id.* at 791-92 (summarizing the findings of the trial court).

approval of the development plan.[213] Remonstrators appealed.[214]

The Court of Appeals affirmed, concluding the Remonstrators failed to demonstrate they had been prejudiced under Indiana Code section 36-7-4-1614.[215]

> Section 1614 allows a trial court to grant relief from the zoning decision only if the court determines that the petitioner has been prejudiced by a zoning decision that is: (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; or (5) unsupported by substantial evidence.[216]

The Court of Appeals was not persuaded by the Remonstrators' claim of prejudice because the proposed wind turbines would diminish property values and create shadow flicker.[217] The Court of Appeals noted the Indiana General Assembly delegated to the Commission exclusive authority to approve or disapprove a development plan for real property within its jurisdiction.[218] The legislative body in Wells County created specific requirements for the development of WECS projects and consciously allowed for such projects in the A-1 zoning district under the Ordinance.[219] In doing so, preservation of land values was not a purpose stated within the relevant portions of the Ordinance.[220] Because the Commission acted within the scope of its authority and because the approved development plan satisfied or exceeded the requirements enacted under the Ordinance, the Court of Appeals upheld the trial court's conclusion the Remonstrators were not prejudiced under Indiana Code section 36-7-4-1614.[221]

D. Fifty Six LLC v. Metropolitan Development Commission

In *Fifty Six LLC v. Metropolitan Development Commission*, the Court of Appeals considered whether proper notice requirements were complied with in the adoption of a comprehensive plan.[222] "[L]ocal residents, schools, churches, businesses, and other institutions began a community effort to prevent the divestment of a local retail area in Millersville . . . a neighborhood located on the

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213. *Id.*

214. *Id.*

215. *See id.* at 795-97. The Court of Appeals also addressed arguments regarding the standing of the Remonstrators are beyond the scope of this summary. *Id.* at 795.

216. *Id.* at 792-93.

217. *Id.* at 796-97.

218. *Id.* at 796 (citing IND. CODE § 36-7-4-1401.5(b) (2015)).

219. *Id.*

220. *Id.*

221. *Id.* at 796-97.

222. Fifty Six LLC v. Metro. Dev. Comm'n, 38 N.E.3d 726, 727 (Ind. Ct. App. 2015), *trans. denied*, 43 N.E.3d 1280 (Ind. 2016).

northeast side of Indianapolis . . . ."[223] The efforts of the community members "led to the creation of the Millersville at Fall Creek Valley Community Organization (the 'Organization')."[224] Together with the Indianapolis Division of Planning (the "Division of Planning"), the Organization's efforts resulted in "a new comprehensive plan for the neighborhood" ("Millersville Plan").[225]

The preliminary draft of the Millersville Plan was presented at a public meeting and made available to the public in 2011.[226] The Organization and the Division of Planning made several revisions to the Millersville Plan, which included, in part, the addition of text that described land owned by Fifty Six LLC (the "Landowner").[227] On May 11, 2012, a final draft of the Millersville Plan was completed, in preparation for the May 16, 2012 adoption hearing.[228] The final draft was made available to the public by the Division of Planning and the Office of the City–County Council, as well as on the city's website on May 14, 2012.[229] On May 16, the Metropolitan Development Commission of Marion County (the "MDC") held a public hearing, where it voted on and approved a resolution that amended the Comprehensive Plan for Marion County by adopting the Millersville Plan.[230] The Millersville Plan designated Landowner's parcel as being located in an area designated as "Critical Area #4."[231]

The Landowner brought an action against the MDC seeking a declaratory judgment that the MDC failed to adhere to the public notice requirements for amendments to a comprehensive plan required by Indiana Code section 36-7-4-507 and 36-7-4-511(a) and Marion County Ordinance Section 231-401.[232] The Landowner argued the MDC failed to establish township advisory committees as required by Indiana Code section 36-7-4-504.5 and by Marion County's ordinance, and the MDC did not provide the public with ten days' notice of the entire plan, as required by Indiana Code section 36-7-4-507.[233] In turn, the MDC alleged (1) the Millersville Plan did not affect the rights of the Landowner; (2) the Landowner was not harmed because the final draft of the Millersville Plan was not published within ten days; and (3) the Millersville Plan was not a township plan requiring a township advisory committee.[234] The trial court held a hearing on the cross-motions for summary judgment, and on the same day, the court entered an order granting the MDC's cross-motion for summary

223. *Id.*
224. *Id.*
225. *Id.* at 727-28.
226. *Id.* at 728.
227. *Id.* at 728-29.
228. *Id.* at 729.
229. *Id.*
230. *Id.*
231. *Id.*
232. *Id.*
233. *Id.* at 730.
234. *Id.*

judgment.[235]

> After the hearing, the Landowner filed a motion to correct error, arguing the MDC "admit[ed] that the Millersville Plan revises the township comprehensive plans for Washington and Lawrence Townships in its Answer," that revising the Lawrence and Washington Comprehensive Plans with the required township advisory committees was error, and that the MDC failed to publish the entire Millersville Plan ten days before the meeting, as required by statute.[236]

The trial court entered an order denying the motion to correct error and the Landowner appealed.[237]

The issue on appeal was "whether the trial court abused its discretion when it denied Landowner's motion to correct error or erred when it granted the MDC's cross-motion for summary judgment."[238] The Court of Appeals held the Landowner had standing and the MDC was not required to establish a township advisory committee, but the MDC did not comply with statutorily required notice and hearing provisions.[239]

The Court of Appeals noted Indiana Code section 36-7-4-504.5(a) requires the formation of township advisory committees when "preparing or revising a comprehensive plan for a township," but does not include provisions requiring township advisory committees when a neighborhood or sub-area is the subject of a comprehensive plan.[240] In this instance, "[t]he Millersville Plan was prepared as a village and corridor plan for the Millersville neighborhood" and not as a revision to the comprehensive plans for either Lawrence or Washington Township."[241] Thus, under the facts of the case, the Court of Appeals concluded an advisory committee was not required.[242]

However, the Court of Appeals held the MDC failed to comply with the statutorily required notice and hearing provisions.[243] Indiana Code section 36-7-4-507 requires the schedule must "state where the entire plan is on file and may be examined in its entirety for at least ten (10) days before the hearing."[244] Because a final draft of the Millersville Plan was not available to the public until May 11, 2012 and the public hearing was held on May 16, 2012, the MDC did not comply with the requirement.[245] Thus the Court of Appeals reversed the trial court's denial of the Landowner's motion to correct error and the trial court's

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235. *Id.* at 731.
236. *Id.* (emphasis omitted).
237. *Id.*
238. *Id.*
239. *Id.* at 736.
240. *Id.* at 733.
241. *Id.* at 735.
242. *Id.*
243. *Id.*
244. *Id.* (emphasis omitted).
245. *Id.* at 735–36.

entry of summary judgment in favor of the MDC, and remanded for further proceedings.[246]

E. Councellor v. City of Columbus Plan Commission

In *Councellor v. City of Columbus Plan Commission*, the Court of Appeals, considered whether a city planning commission had illegally delegated its authority to approve plats to private property owners.[247] In *Councellor*, a lot owner within a subdivision located in Columbus ("Applicant") submitted an application to subdivide his lot (the "Lot") into three separate lots.[248] According to the Columbus subdivision control ordinance, a landowner seeking to resubdivide an already approved major subdivision plat must include the signed consent of 75% of the owners of property in the existing subdivision unless the landowner can demonstrate that his proposed changes would not have a significant impact on the existing subdivision.[249] Following notification of the approval by Columbus's plat committee of Applicant's resubdivision, virtually all of the owners of property within the subdivision objected and the city's plan commission ultimately rejected the subdivision.[250]

On appeal, Applicant contended the 75% requirement created a "'neighborhood veto,'" granting "unrestricted power" to his neighbors to approve or disapprove of his resubdivision.[251] For Applicant, this requirement then constituted an impermissible abdication of the commission's authority to his or her neighbors.[252] The Court of Appeals noted, in past instances, certain provisions which delegate uncontrollable power have been held to be unconstitutional.[253] In this case, though, the city's subdivision control ordinance was not such a provision. The court pointed out the ordinance did not give "unrestricted power" to Applicant's neighbors; rather, Applicant could receive a waiver to the 75% requirement by establishing to the commission's satisfaction his or her resubdivision would not have a "significant impact on the subdivision."[254] Because this waiver process placed some restrictions on any power that could be exercised by Applicant's neighbors, the court concluded the 75% requirement was proper.[255]

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246. *Id.* at 736.

247. Councellor v. City of Columbus Plan Comm'n, 42 N.E.3d 146 (Ind. Ct. App. 2015), *trans. denied*, 41 N.E.3d 690 (Ind. 2016).

248. *Id.* at 147.

249. *Id.*

250. *Id.*

251. *Id.* at 150.

252. *Id.*

253. *Id.* (citing Washington *ex rel*. Seattle Title Trust Co. v. Roberge, 49 U.S. 50, 52 (1928)).

254. *Id.* at 151.

255. *Id.*

F. I-465, LLC v. Metropolitan Board of Zoning Appeals Division II

In *I-465, LLC v. Metropolitan Board of Zoning Appeals Division II*,[256] the Court of Appeals decided whether a petitioner successfully met four of the five elements necessary to obtain a zoning variance under Indiana law. *I-465* arose when a hotel owner ("Hotel") challenged a variance granted to an adjacent landowner ("Owner") who proposed building a dog and cat boarding and daycare facility (the "Facility") in a zoning district which did not permit such services.[257] At issue on appeal was whether Owner effectively demonstrated four elements of the variance requirement codified in Indiana Code 36-7-918.4 were present: namely, (1) whether the use and value of the area adjacent to the Facility would not be affected in a substantially adverse manner; (2) whether the need for Owner's variance arose from some condition peculiar to the property involved; (3) whether the strict application of the zoning ordinance would constitute an unnecessary hardship if applied to the property; and (4) whether approval of the variance would not interfere substantially with the area's comprehensive plan.[258]

Hotel contended the noise and sight of the dogs at the Facility would discourage potential patrons from staying at its property, thus negatively affecting the use and value of Hotel's property.[259] The Court of Appeals disagreed, noting Owner's similar facilities were "upscale pet resort[s] with a national reputation for high-quality service" and Owner had produced a study from a noise control expert who concluded the noise generated by the interstate adjacent to the properties at issue was louder than any noise created by barking dogs at the Facility.[260] For the Court of Appeals, the evidence provided by Owner demonstrated the Facility would actually increase, rather than decrease, surrounding property values.[261]

With respect to the element that the need for the variance must arise from a condition peculiar to the property involved, the Court of Appeals noted peculiarity must relate to the specific features of the property at issue.[262] An unusual size or shape may create such a peculiarity, but the Court of Appeals rejected the idea that size and shape were the sole factors that created a peculiarity; other attributes, such as location and adjacent uses, may also be relevant.[263] In this instance, although the size and shape of the property at issue was unusual, the Court of Appeals also noted (1) the Facility's ability to create a buffer between the interstate and nearby residential neighborhoods and (2) the

256. 36 N.E.3d 1094, 1096 (Ind. Ct. App. 2015).

257. *Id.* at 1097.

258. *Id.* at 1098. The fifth element in the variance test—whether the approval would not be injurious to the public health, safety, morals, and general welfare of the community—was not challenged by Hotel. *Id.* at 1099.

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.* at 1100.

263. *Id.* at 1100-01.

location of the lot, as a dead-end site with limited access but also near the interstate and thus convenient for travelers dropping off their pets before a trip, added to the real estate's peculiarity.[264]

In determining whether the strict application of the terms of the applicable zoning ordinance will create a hardship on a petitioner, economic opportunity or loss cannot enter into the equation.[265] Rather, the decision must be based on all of the pertinent factors which, taken together, "indicate that the property cannot reasonably be put to a conforming use because of the limitations imposed upon it by the ordinance."[266] The board of zoning appeals, in this instance, had recognized the current zoning district did not permit the Facility, but did permit more intense uses, such as adult entertainment, gas stations, and bars.[267] Such permitted uses, in the board's view, should not be located near residential districts.[268] Owner's proposed use, though, kept with the theme of the "service uses" permitted in the applicable zoning district and the Court of Appeals found the board was within its discretion to conclude a district which permitted more intense uses than the propose use would create an unnecessary hardship.[269]

Finally, the Court of Appeals reviewed the comprehensive plan for the area, noting the plan recommended "interstate-related, service uses" for the area in question.[270] Owner's proposed Facility did not substantially interfere with this recommendation.[271]

III. LANDLORD TENANT

A. Norris Avenue Professional Building Partnership v. Coordinated Health, LLC

In *Norris Avenue Professional Building Partnership v. Coordinated Health, LLC*,[272] the Court of Appeals considered whether a tenant exercised an option to renew its lease/extend its terms even though the tenant failed to strictly comply with the renewal/extension provisions of its lease. In *Norris Avenue*, Landlord leased certain space to Tenant for a term of two years with two "option terms" of five years each.[273] The lease provided Tenant could exercise each option by giving notice sixty days prior to the end of the initial term or the first option term, as applicable.[274] The lease would remain in effect, but the rent would increase

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264. *Id.* at 1102.
265. *Id.*
266. *See id.* (quoting Lake Cty. v. McFadden, 337 N.E.2d 576, 579-80 (Ind. 1975)).
267. *Id.*
268. *Id.*
269. *Id.*
270. *Id.*
271. *Id.* at 1103.
272. 28 N.E.3d 296 (Ind. Ct. App.), *trans. denied*, 34 N.E.3d 684 (Ind. 2015).
273. *Id.* at 297.
274. *Id.*

based on a calculation tied to the Consumer Price Index.[275] Tenant failed to deliver notice of its intent to exercise the first option, but commenced paying increased rent in accordance with the lease.[276] At the end of the first option, Tenant again failed to deliver notice to Landlord, but again remained in the space and paid the increased rent as required in the lease for the second option term.[277] Prior to the end of the second option term, Tenant notified Landlord of Tenant's intent to surrender the premises; Tenant surrendered the premises to Landlord with all rent paid to the date of surrender.[278] Landlord filed suit claiming Tenant owed the balance of the rent payments due for the remainder of the second option term.[279] The trial court entered judgment in favor of Tenant.[280] Landlord appealed.[281]

The Court of Appeals reversed the trial court, holding Tenant's actions evidenced its intent to exercise both options and therefore was in breach of the lease at the time it surrendered the premises to Landlord.[282] Landlord successfully argued Tenant's actions—i.e., remaining in possession of the premises and paying the increased rent called for under the lease—constituted an affirmative election to exercise both extension options and that Landlord's acceptance of Tenant's rent payments evidenced Landlord's waiver of Tenant's failure to comply with the obligation to give notice.[283] Tenant asserted it had failed to strictly comply with the terms of the lease pertaining to the exercise of the extension options and so its occupancy was a hold-over tenancy.[284] As a threshold matter, the Court of Appeals noted Indiana law distinguishes between rights to extend a term and rights to renew a lease.[285] Under Indiana law, if a tenant has a right to extend its term, merely holding over and paying rent is sufficient to exercise the right.[286] If the tenant is instead given a right to renew its lease, merely holding over and paying rent will not be sufficient to exercise the right.[287] However, where, as here, a lease provides the right of extension/renewal requires notice from the tenant to exercise the right, this distinction disappears.[288] Where a lease provides notice must be given to exercise the right to an additional

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275. *Id.*
276. *Id.* at 298.
277. *Id.*
278. *Id.*
279. *Id.*
280. *Id.*
281. *Id.*
282. *Id.* at 303.
283. *Id.* at 300.
284. *Id.*
285. *Id.*
286. *Id.*
287. *Id.*
288. *Id.* at 300-01 (noting the purpose of the distinction appears to have evolved to assist courts in determining the intent of the parties where a lessee is given a right to further term, but the lease fails to address what happens if the tenant holds over).

term it is understood to be a condition precedent, and merely holding over and paying rent will not constitute sufficient notice.[289] However, a landlord entitled to notice may waive strict compliance with the notice requirement, as the notice requirement is provided for the landlord's benefit.[290] A landlord's waiver need not be in writing to be effective, but may be evidenced by course of performance.[291]

In the context of the present case, Landlord was entitled to notice.[292] By accepting Tenant's payments of rent, Landlord manifested its waiver of Tenant's strict compliance with the requirement of notice as a condition precedent to exercising Tenant's extension options.[293] Tenant's payment of the increased rent required during each extension option manifested Tenant's intent to exercise its extension options sufficient to put Landlord on notice of Tenant's election (which the court distinguished from a scenario in which a tenant merely pays the rent due under the original term).[294] Accordingly, the Court of Appeals concluded the Tenant exercised its extension options and was therefore bound under the lease.[295]

B. Pearman v. Jackson

In *Pearman v. Jackson*, the Court of Appeals considered whether a landlord waived the requirement for written notice to effect a lease renewal.[296] *Pearman* involved a commercial lease (the "Lease") executed by a landlord ("Landlord") and tenants ("Tenants"), for a three-year term, expiring on December 31, 2010.[297] The Lease granted Tenants the right to renew the Lease for an additional three-year term by providing written notice at least six months prior to the expiration of the then-current term (the "Renewal Option").[298] Further, the Lease provided if the Tenants occupied the premises after the expiration of the current term and rent was accepted by the Landlord, then such occupancy and payment should be construed as a month-to-month extension of the lease, terminable by either party with at least thirty days' written notice.[299]

Near the end of the initial term of the Lease, Tenants considered exercising their right to renew the term of the Lease, but decided against such exercise, instead choosing to search for another location for their business.[300] During

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289. *Id.* at 301.
290. *Id.* at 302.
291. *Id.*
292. *Id.*
293. *Id.*
294. *Id.* at 303.
295. *Id.*
296. Pearman v. Jackson, 25 N.E.3d 772 (Ind. Ct. App. 2015).
297. *Id.* at 773-74.
298. *Id.* at 774.
299. *Id.*
300. *Id.*

Tenants' search, the term of the Lease expired, but Tenants remained in the premises and paid rent on a monthly basis to Landlord.[301] In March 2011, Tenants sent written notice to Landlord, expressing that Tenants no longer wished to occupy the premises on a month-to-month basis, and they wished to terminate the Lease, effective May 31, 2011.[302]

Landlord filed a complaint, claiming Tenants breached the lease by prematurely abandoning the premises.[303] Landlord argued Tenants exercised their right to renew the term of the Lease by remaining in the premises, and thus were responsible for payment of rent during the entire three-year renewal term.[304] Both Landlord and Tenants acknowledged Tenants never sent any type of written notice to renew the term of the Lease, as was required pursuant to the Renewal Option, but Landlord argued he unilaterally waived the written notice requirement.[305] The trial court granted summary judgment in favor of Tenants, concluding Tenants had not breached the Lease.[306]

On appeal, the Court of Appeals affirmed the trial court's judgment in favor of Tenants, as there was no substantive evidence to support Landlord's claim of waiver.[307] In this instance, the Renewal Option included an explicit requirement obligating Tenants to provide written notice in the event Tenants wished to renew the term for an additional three years.[308] For the Court of Appeals, the inclusion of the requirement for written notice in order to effect Tenants' renewal existed precisely to differentiate between a renewal of the term and a holdover from month to month.[309] The fact Tenants continued to pay rent and occupy the premises after the expiration of the current term was insufficient to establish Tenants renewed the term of the Lease, and because Landlord had not designated evidence he waived the written notice requirement, the Court of Appeals upheld the trial court's decision.[310]

C. LBM Realty, LLC v. Mannia

In *LBM Realty, LLC v. Mannia*,[311] the Court of Appeals considered the appropriate standard for addressing subrogation claims of landlords' insurers against negligent tenants. *LBM Realty* arose after a fire occurred at an apartment complex (the "Property") owned by LBM Realty LLC ("Landlord"), resulting in

301. *Id.*
302. *Id.*
303. *Id.*
304. *Id.*
305. *Id.* at 775.
306. *Id.*
307. *Id.* at 780.
308. *Id.*
309. *Id.*
310. *Id.*
311. 19 N.E.3d 379 (Ind. Ct. App. 2014).

$743,402.86 in damages to the Property.[312] Landlord's insurance company ("Insurer"), filed an insurance subrogation action in Landlord's name against Hillary Mannia ("Tenant"), a tenant at the Property, alleging Tenant was in breach of her lease agreement and negligent for causing the fire that damaged the Property.[313]

The threshold issue before the *LBM Realty* Court was deciding which approach to use when addressing subrogation claims of landlords' insurers against negligent tenants.[314] Tenant urged the Court to adopt the "*Sutton* rule,"[315] which provides absent an express agreement to the contrary, a landlord's insurer is precluded from filing a subrogation claim against a negligent tenant because the tenant is presumed to be a co-insured under the landlord's insurance policy.[316] Landlord, instead, argued the Court should adopt the "case-by-case approach," in which courts determine the availability of subrogation based on the reasonable expectations of the parties under the facts of each case.[317]

The *LBM Realty* Court chose to adopt the case-by-case approach, concluding a tenant's liability to the landlord's insurer for negligence depends on the reasonable expectations of the parties to the lease, as ascertained from the lease as a whole and from any other admissible evidence.[318] Although the pro-subrogation approach or the no-subrogation approach (the *Sutton* rule) would each provide more certain outcomes, the Court reasoned the case-by-case approach "best effectuates the intent of the parties by simply enforcing the terms of their lease."[319] The Court of Appeals stated, under the case-by-case approach, a court should look for evidence in the lease indicating which party agreed to bear the risk of loss for a particular type of damage.[320] In a situation involving tenants in a multiunit dwelling, the Court found absent clear notice—ideally in the form of an unambiguous enforceable lease provision that a negligent tenant will be held liable for damages to areas of the building beyond the tenant's leased premises—such liability would not be within the tenant's reasonable expectations and is therefore barred.[321]

Here, the lease between Landlord and Tenant was silent as to Landlord's

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312. *Id.* at 382.

313. *Id.*

314. *Id.* at 385-86.

315. The *Sutton* rule is named as such because of the decision by the Oklahoma Court of Civil Appeals in *Sutton v. Jondahl*. 532 P.2d 478 (1975).

316. *LBM Realty*, 19 N.E.3d at 387-88 (citing *Sutton*, 532 P.2d at 482).

317. *Id.* at 390-91. A third approach to this issue, referred to as the "pro-subrogation approach," holds absent an express term to the contrary, a landlord's insurer is allowed to bring a subrogation claim against a negligent tenant. This approach was not proposed by either party, and thus not discussed by the Court of Appeals in *LBM Realty*.

318. *Id.* at 393-94.

319. *Id.* at 394.

320. *Id.*

321. *Id.*

obligation to carry property insurance.[322] Although Landlord recommended Tenant obtain renter's insurance, there was no lease provision putting Tenant on notice she would be held liable for damage caused by negligence to areas of the Property beyond her leased premises; thus, summary judgment in favor of Tenant was properly granted with respect to any damage to areas beyond the leased premises.[323] On remand, the Court of Appeals instructed the trial court to engage in the analysis of the case-by-case approach to determine Tenant's liability for the damage to the leased premises (1) by considering the lease and any other relevant and admissible evidence, including among other things the insurance maintained by each party as evidence of each party's expectations with respect to liability for damage to the leased premises, and (2) by weighing principles of equity and good conscience since subrogation is an equitable remedy.[324]

D. Meridian North Investments LP v. Sondhi

The Court of Appeals, in *Meridian North Investments LP v. Sondhi*, addressed the issue of whether the president of a professional corporation tenant was bound by an exculpatory clause contained in a lease.[325] In *Meridian North Investments*, Meridian North Investments LP ("Landlord") leased space in an office building to Sondhi-Biggs Orthodontics, P.C. ("Tenant").[326] The lease, which was signed on behalf of Tenant by one of the doctors as "President," required Landlord to be responsible for maintenance of the common areas.[327] The lease also included the following exculpatory clause language:

> Landlord shall not be liable to Tenant, or any other person in the Leased Premises or in the Building by the Tenant's consent, invitation or license, expressed or implied, for any damage either to person or property sustained by reason of the condition of the Leased Premises or the Building . . . or due to any casualty or accident in or about the Building.[328]

The doctor who signed the lease as "President" ("Doctor") slipped and fell on a patch of ice outside of the building, and sued Landlord for negligence, claiming Landlord breached its responsibility to keep the common areas clear of ice.[329] Landlord moved for summary judgment on the basis the exculpatory clause in the lease absolved Landlord of any liability.[330] The trial court denied Landlord's

322. *Id.* at 395.
323. *Id.*
324. *Id.* 395-96.
325. Meridian N. Invs. LP v. Sondhi, 26 N.E.3d 1000 (Ind. Ct. App. 2015).
326. *Id.* at 1002.
327. *Id.*
328. *Id.*
329. *Id.* at 1002-03.
330. *Id.* at 1003.

motion and Landlord appealed.[331]

The Court of Appeals acknowledged Indiana law generally permits sophisticated parties to a commercial lease to allocate risks and burdens freely between the parties and allows the inclusion of exculpatory language freeing the landlord from liability to the tenant for the landlord's negligence.[332] Yet, in this instance, the lease was between Landlord and Tenant—not Landlord and Doctor—and though the exculpatory clause provided Landlord would not be liable to "any other person in the Leased Premises or in the Building by the Tenant's consent,"[333] the Court recalled past precedent provided a person may not limit his or her tort law duty to third parties by contract.[334]

The fact the injured third party was also the individual who signed on behalf of the Tenant added a wrinkle to *Meridian North Investments* that had not been addressed earlier in Indiana.[335] However, the Court found as persuasive reasoning by the New York Supreme Court in *Griffen v. Manice*, a decision which involved a very similar fact pattern.[336] The *Griffen* Court concluded the lease at issue did not purport to apply to the personal rights of the officers or employees of the tenant.[337] The Court of Appeals applied *Griffen* to the *Meridian North Investments* fact pattern, concluding, notwithstanding the fact that Doctor signed the lease in his role as "President" of Tenant, the lease exculpation provision applied to the Tenant only.[338] Since Landlord failed to submit evidence it was misled as to the identity of the Tenant or the corporate veil of Tenant should be pierced to establish the Doctor was one and the same as Tenant, the Doctor's negligence suit was permitted to proceed.[339]

IV. LIENS AND FORECLOSURES

A. U.S. Bank National Ass'n v. Miller

In *U.S. Bank National Ass'n v. Miller*,[340] the Court of Appeals considered the priority of mortgagees' rights to a residential property where the senior mortgagee foreclosed and subsequently sold the subject property, but failed to provide adequate notice of the foreclosure action to the junior mortgagee.[341] Certain debtors ("Debtors") purchased a home in Newburgh, Indiana in 2006

331. *Id.*
332. *Id.*
333. *Id.* at 1002.
334. *Id.* at 1004 (citing Rhodes v. Wright, 805 N.E.2d 382, 385 (Ind. 2004)).
335. *Id.*
336. *Id.* (citing Griffen v. Manice, 59 N.E. 925 (N.Y. 1901)).
337. *Id.* (citing *Griffen*, 59 N.E. at 929).
338. *Id.* at 1004-05.
339. *Id.*
340. 44 N.E.3d 730 (Ind. Ct. App.), *trans. denied*, 43 N.E.3d 1278 (Ind. 2015).
341. *Id.* at 732-33.

using proceeds from a loan from the senior mortgagee.[342] A month later, Debtors opened a home equity line of credit through the junior mortgagee, which line of credit was secured by a second position mortgage on Debtors' residence.[343] Debtors subsequently defaulted on their loan to the senior mortgagee and the senior mortgagee initiated a foreclosure action against Debtors and junior mortgagee.[344] However, the senior mortgagee served notice of its foreclosure to an address unconnected with the junior mortgagee.[345] When neither Debtors nor the junior mortgagee responded to the foreclosure action, on motion from the senior mortgagee the trial court entered default judgments against Debtors and the junior mortgagee in favor of the senior mortgagee and ordered the property sold at sheriff's sale.[346] At the sheriff's sale, the then-holder of the senior mortgagee position purchased the property and, later that month, recorded the sheriff's deed to the property.[347] Three months later, the senior mortgagee sold the property to a third party purchaser ("Purchaser") and conveyed the same via special warranty deed.[348] Purchaser acquired the property with proceeds from a loan from Chase, secured by a mortgage against the property.[349] Approximately eight months after the sale to Purchaser, Debtors stopped making payments to the junior mortgagee, at which time the junior mortgagee learned of the foreclosure and sale of the property to Purchaser and sought to set aside the default judgment against it in the foreclosure action.[350] The default judgment was set aside[351] and the junior mortgagee subsequently was granted summary judgment establishing its interest as senior to all other interests in the property on the basis of the senior mortgagee's rights being eliminated through merger at the time the senior mortgagee acquired the property at sheriff's sale.[352] The senior mortgagee and Purchaser appealed both the trial court's setting aside of the default judgment against the junior mortgagee and the trial court's entry of judgment finding the senior mortgagee's priority interest had merged and the junior mortgagee's interest held first priority.[353]

The Court of Appeals affirmed the setting aside of the default judgment, but

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342. *Id.* at 733. Various financial institutions were involved in the matter addressed in this opinion, but for the sake of simplicity, this summary will simply refer to the original first lien position as "senior mortgagee."

343. *Id.* As with the senior mortgagee, for simplicity sake this summary refers only to "junior mortgagee" to refer to the holder of the home equity line of credit mortgage interest.

344. *Id.*

345. *Id.* at 733-34.

346. *Id.* at 734.

347. *Id.*

348. *Id.*

349. *Id.* at 734-35.

350. *Id.* at 735.

351. *Id.*

352. *Id.* at 737.

353. *Id.* at 737-38. Senior mortgagee, Purchaser, and Purchaser's mortgagee are all parties to this case.

reversed the trial court's judgment in favor of the junior mortgagee on the question of priority and remanded for proceedings consistent with Indiana Code section 32-29-8-4.[354] The Court of Appeals concluded the trial court correctly held the junior mortgagee was never properly given notice of the senior mortgagee's foreclosure action.[355] Under Indiana law, the absence of proper service on the junior mortgagee meant the trial court lacked personal jurisdiction over the junior mortgagee[356] and without personal jurisdiction the trial court's default judgment was void as to the junior mortgagee.[357] The Court of Appeals concluded the disposition of the junior mortgagee's suit to foreclose its lien and be declared first priority was properly governed by Indiana's strict foreclosure statute, Indiana Code section 32-29-8-4.[358] Indiana Code section 32-29-8-4 effectively eliminated the doctrine of merger from Indiana foreclosure law and statutorily established strict foreclosure as the means for resolving claims of omitted parties following mortgage foreclosures.[359] The Indiana General Assembly enacted Indiana Code section 32-29-8-4 in response to the Supreme Court's decision in *Citizens* applying the doctrine of merger in a case with similar facts to the instance matter.[360] The instant case was pending at the time the *Citizens* decision was published and Indiana Code section 32-29-8-4 was enacted shortly thereafter.[361] However, the Court of Appeals rejected the junior mortgagee's argument that Indiana Code section 32-29-8-4 should not, therefore, be applicable in this case for two reasons: (1) the application of Indiana Code section 32-29-8-4 was intended by the Indiana General Assembly to be applicable even in cases pending at the time of the statute's adoption;[362] and (2) the concerns about disrupting settled expectations and impairment of vested rights underlying the judicial rule disfavoring retroactive application of statutes were not implicated by the application of Indiana Code section 32-29-8-4 in the instant case.[363]

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354. *Id.* at 745.

355. *Id.* at 738-39.

356. *Id.* at 738 (quoting Front Row Motors, LLC v. Jones, 5 N.E.3d 753, 759 (Ind. 2014)).

357. *Id.* at 739 (quoting Citimortgage, Inc. v. Barabas, 975 N.E.2d 805, 816 (Ind. 2012)).

358. *Id.* at 745 (citing IND. CODE § 32-29-8-4 (2015)).

359. *Id.* at 742.

360. *Id.* (citing Citizens State Bank v. Countrywide Home Loans, Inc., 949 N.E.2d 1195 (Ind. 2011)).

361. *Id.*

362. *Id.* at 744 (quoting IND. CODE § 32-29-8-4(c)).

363. *Id.* at 745. The Court of Appeals so concluded in part because the doctrine of strict foreclosure was well understood at the time junior mortgagee lent money to debtors in a junior position, and, therefore, junior mortgagee's expectations would not be disrupted by the application of strict foreclosure.

B. 2513-2515 South Holt Road Holdings, LLC v. Holt Road, LLC

In *2513-2515 South Holt Road Holdings, LLC v. Holt Road, LLC*,[364] the Court of Appeals considered whether a Borrower's tax refund attributable to a pre-default period constituted funds secured by the lender's security documents. Borrower owned improved real estate in Marion County, Indiana, and in 2006, executed a limited recourse promissory note (the "Note") in favor of lender's predecessor in interest.[365] The Note was secured by a mortgage (the "Mortgage") and other security documents.[366] Borrower stopped making payments in April 2013 and was in default under the Note for failure to make payments beginning in May 2013.[367] Lender filed its complaint for foreclosure in July 2013, and Borrower acknowledged the default and cooperated in the appointment of a receiver.[368] While the foreclosure was pending, Borrower notified Lender and the trial court it had obtained a property tax refund of more than $300,000 from the Marion County Treasurer, attributable to tax years 2008-2011 (the "Tax Refund").[369] Borrower and Lender disputed who was entitled to the Tax Refund.[370] At trial, Lender argued the language in the Note and Mortgage and other security documents was broad enough to include the Tax Refund under Lender's security interest.[371] Borrower argued the Tax Refund was money that should never have been paid in the first place and therefore constituted personal property outside the Lender's security interest pursuant to the limited recourse nature of the loan transaction.[372] The trial court held the Borrower should retain the Tax Refund.[373]

The Court of Appeals reversed, concluding the Tax Refund fell within Lender's security interest.[374] On appeal, Lender argued the language creating its security interest was drafted broadly enough to capture any money received by Borrower in connection with the subject property.[375] Specifically, Lender argued the Tax Refund constituted "funds" and/or "claims" associated with the subject property "arising from or by virtue of any transactions related to" the subject property.[376] Borrower argued the loan documents failed to identify tax refunds when they spelled out with specificity, over three pages, what property lender

364. 40 N.E.3d 859 (Ind. Ct. App.), *vacated*, 40 N.E.3d 857 (Ind.), *trans. denied*, 43 N.E.3d 1275 (Ind. 2015).

365. *Id.* at 861.

366. *Id.*

367. *Id.*

368. *Id.* at 862-63.

369. *Id.* at 863.

370. *Id.*

371. *Id.* at 863-64.

372. *Id.* at 864.

373. *Id.* at 863.

374. *Id.* at 868.

375. *Id.* at 865.

376. *Id.* at 865-66.

intended to be subject to its security interest.[377] Borrower also argued the Tax Refund constituted personal property not subject to lender's recovery due to the limited recourse nature of the loan transaction.[378] Borrower further argued refunding overpaid property taxes did not constitute a "transaction" and therefore the Tax Refund was not paid to Borrower in connection with a "transaction" related to the subject property.[379] Citing dictionary definitions, the Court of Appeals concluded the Tax Refund constituted "funds" within the meaning of the Mortgage and such funds—i.e., the Tax Refund—came to Borrower by virtue of a "transaction" relating to the subject property.[380] As a result, the trial court erred and the matter was remanded for entry of judgment in favor of Lender.[381]

C. Merrillville 2548, Inc. v. BMO Harris Bank, N.A.

In *Merrillville 2548, Inc. v. BMO Harris Bank, N.A.*,[382] the Court of Appeals considered, inter alia,[383] whether a leasehold mortgage is governed by mortgage statutes or the Indiana UCC provisions dealing with secured transactions, and whether a leasehold mortgagee is entitled to immediate possession of the mortgaged property.[384] In 2006, Borrower executed a promissory note secured by a mortgage in favor of Lender's predecessor in interest granting Lender a mortgage lien in its leasehold estate of the subject property.[385] Borrower, which operated a Golden Corral, sold its franchise agreement to Claimant in 2007, after which time Claimant operated a Golden Corral restaurant on the subject property, paid rent to the landlord under Borrower's lease, paid property taxes, and made capital improvements.[386] Claimant made no payments to Lender, and in 2013, Lender sought to foreclose its leasehold mortgage.[387] Claimant intervened in the foreclosure action, inter alia, challenging Lender's right to immediate possession of the mortgaged property.[388] The trial court held in favor of Lender, concluding, in relevant part, the leasehold mortgage was "a security interest flowing with the negotiable instrument and attaching to the collateral under [Indiana Code section 26-1-9.1-203] . . . govern[ed] by Article 3 and enforceable under Article 9.1" of the Indiana UCC.[389]

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377. *Id.* at 866.

378. *Id.* at 866-67.

379. *Id.* at 866.

380. *Id.* at 867-68.

381. *Id.* at 868.

382. 39 N.E.3d 382 (Ind. Ct. App.), *trans. denied*, 42 N.E.3d 520 (Ind. 2015).

383. Not addressed in this summary is the Court of Appeals' handling of the issue of the equitable assignment of the lease from Borrower to Claimant.

384. *Merrillville 2548, Inc.*, 39 N.E.3d at 394.

385. *Id.* at 385.

386. *Id.*

387. *Id.*

388. *Id.* at 386.

389. *Id.* at 388.

The Court of Appeals reversed, concluding a leasehold mortgage is governed by the Indiana mortgage statutes and not the Indiana UCC, and as a result, a leasehold mortgagee is not entitled to immediate possession of the mortgaged property.[390] Claimant argued a leasehold estate in real property constitutes a real property interest under Indiana law, and therefore a leasehold mortgage should be governed by the Indiana mortgage statutes, not the Indiana UCC.[391] The Court of Appeals agreed, noting leaseholds on real property are neither personal property nor fixtures, and the express language of Article 9.1 of the Indiana UCC provides the statutes do not apply to leasehold mortgages.[392] Therefore, a leasehold mortgage constitutes a security interest in real property and statutes pertaining to security interests in personal property are inapplicable.[393] Because a leasehold mortgage constitutes a security interest in real property, the Court of Appeals concluded foreclosure of a leasehold mortgage must follow the Indiana mortgage foreclosure statutes.[394] Under the Indiana mortgage foreclosure statutes, Lender had no right to immediate possession of the mortgaged property—"the default situation in Indiana is that a mortgagee has a lien on, but no right to possession of, the mortgaged premises."[395] As such, any rights of Lender to possession of the mortgaged property must be obtained through a foreclosure—i.e., sheriff—sale pursuant to Indiana Code sections 32-30-10-5, 32-30-10-8, and 32-30-10-9.[396]

D. Goodrich Quality Theaters, Inc. v. Fostcorp Heating & Cooling, Inc.

In *Goodrich Quality Theaters, Inc. v. Fostcorp Heating & Cooling, Inc.*,[397] the Supreme Court considered an issue of first impression: whether, under Indiana's mechanic's lien statute, Indiana Code chapter 32-28-3, lienholders can collect attorney's fees incurred in foreclosing upon their liens against a party who posts a surety bond securing the liens.[398] *Goodrich* involved a dispute between a general contractor and three subcontractors for payment for construction labor, services, and materials.[399] The subcontractors did not receive full payment for the services provided and they timely filed mechanic's liens against the subject property pursuant to Indiana Code section 32-28-3-1.[400] While the case was pending, the general contractor posted a surety bond pursuant to Indiana Code

390. *Id.* at 394-95.

391. *Id.* at 393. Lender apparently argued Claimant failed to prove that a leasehold mortgage is an interest in or lien against real property and, therefore, the trial court holding should be upheld.

392. *Id.*

393. *Id.*

394. *Id.*

395. *Id.* at 394.

396. *Id.*

397. 39 N.E.3d 660 (Ind. 2015).

398. *Id.* at 661.

399. *Id.*

400. *Id.*

section 32-28-3-11, providing that the general contractor or its insurer would pay the full amount of any judgment recovered in the lien foreclosure action, including costs and attorney's fees allowed by the court.[401] The court approved the surety bond and released the mechanic's liens on the real property, as the bond served as security in lieu of the real property.[402] After a bench trial, the court ruled in favor of the subcontractors, including an award of attorney's fees.[403]

The general contractor appealed, and with respect to the attorney's fees issue, contended the mechanic's lien statute did not permit an award of the subcontractors' attorney's fees for three reasons: (1) the client paid the general contractor the full amount of the contract, which fulfilled the purpose of the statute and provided the sole recourse for the subcontractors; (2) the purpose of the mechanic's lien statute was to prevent the unjust enrichment of a property owner and did not apply to a dispute between a general contractor and subcontractors; and (3) Indiana Code section 32-28-3-11 did not obligate the party posting the bond to pay attorney's fees.[404] The subcontractors argued the mechanic's lien foreclosure statute, Indiana Code section 32-28-3-14, did indeed permit an award of attorney's fees and the general contractor's interpretation of the statute would result in the ability of general contractors to unfairly escape paying attorney's fees by posting bonds.[405] The Court of Appeals determined the general contractor's argument boiled down to the premise that the mechanic's liens statutes in Indiana Code section 32-28-3 applied only to property owners.[406] The court agreed with the general contractor and reversed the trial court's award of attorney's fees.[407] The subcontractors petitioned for transfer to the Supreme Court.[408]

The Supreme Court reversed the Court of Appeals, finding: (1) a party who posts a surety bond in accordance with Indiana Code section 32-28-3-11 is expressly required by the statute under subsection (b) to pay costs and attorney's fees associated with a judgment in the lien foreclosure action; (2) the plain language of the surety bond obligated the general contractor to pay costs and attorney's fees associated with a judgment in the lien foreclosure action (noting the general contractor was already obligated to do so in accordance with the

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401. *Id.*

402. *Id.*

403. *Id.*

404. *Id.* at 661-62.

405. *Id.* at 662.

406. *Id.*

407. *Id.* (citing Goodrich Quality Theaters, Inc. v. Fostcorp Heating & Cooling, Inc., 16 N.E.3d 426, 441 (Ind. Ct. App. 2014)). The subcontractors subsequently filed for rehearing, at which time the Court of Appeals reaffirmed its reversal of the attorney's fees award. *Id.* (citing Goodrich Quality Theaters, Inc. v. Fostcorp Heating & Cooling, Inc., 23 N.E.3d 28, 29 (Ind. Ct. App. 2014)).

408. *Id.*

statute)[409]; and (3) even if the general contractor had not posted a bond, the mechanic's lien foreclosure statute, Indiana Code section 32-28-3-14(a) is not limited to recovery against a property owner and expressly provides a lienholder is entitled to fees upon the recovery of a judgment.[410]

E. First Federal Bank of the Midwest v. Greenwalt

In *First Federal Bank of the Midwest v. Greenwalt*,[411] the Court of Appeals considered whether the lender for a line of credit materially altered the terms of the loan obligation so as to discharge the landowner's obligation as a surety.[412] In 2000, the landowner and her then-husband executed a promissory note on behalf of the business solely owned by the husband in favor of the lender establishing a revolving line of credit and providing that the business was required to make interest-only payments until the maturity of the note.[413] The landowner and her then-husband contemporaneously executed a mortgage, not to exceed the amount of the principal of the note, granting the lender a security interest in two tracts of land owned by the couple.[414] The mortgage secured the revolving line of credit.[415] Late that year, the couple divorced and each took title to one of the two tracts of land subject to the mortgage; the husband remained the sole owner of the business.[416] Over a ten-year period, the business renewed the note multiple times, the husband sold his tract of land for which the proceeds were applied to the debt, the lender extended an additional "over line" credit facility to the business, and finally, in or around 2009, the revolving line of credit was converted into a closed end line of credit, which eliminated the business' ability to draw on the note for additional funds.[417] In 2011, the husband filed for bankruptcy and a few months later, the lender filed a complaint seeking to foreclose on the tract owned by landowner pursuant to the mortgage.[418] The parties filed cross-motions for summary judgment.[419] The trial court concluded the lender made unapproved modifications to the mortgage by (1) applying

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409. The Supreme Court further noted it would be unfair if a general contractor was able to post a surety bond in order to avoid paying attorney's fees, which would leave the subcontractor in a worse position than if it had foreclosed. *Id.* at 665.

410. *Id.* at 663-65. Rather, the Court explained, Indiana Code section 32-28-3-14(b), which prohibits the recovery of attorney's fees from a property owner who has paid the contract consideration, was intended "to apply sole to property owners who have so paid" and that subsection 14(a) applied "generally in all other circumstances." *Id.* at 665.

411. 42 N.E.3d 89 (Ind. Ct. App. 2015).

412. *Id.*

413. *Id.* at 90.

414. *Id.*

415. *Id.* at 91.

416. *Id.*

417. *Id.* at 91-92.

418. *Id.* at 92.

419. *Id.*

proceeds from the sale of the husband's tract to unapproved obligations in excess of the amount of the original note and (2) applying payments made by the business to other unapproved obligations.[420] Further, had these amounts been applied to the original obligation, the original debt would have been extinguished and, therefore, the landowner should be released from the obligation.[421]

The Court of Appeals agreed with the trial court, finding the landowner was a surety to the debtor, as she furnished collateral—i.e., her tract of land—to secure another's debt—i.e., the business' loan.[422] The court noted Indiana considers a surety to be "a favorite of the law" who "must be dealt with in the utmost good faith."[423] It then considered whether the underlying obligation was materially altered sufficient to release the surety.[424] The Court quoted from a 2007 decision:

> [W]hen the principal and obligee cause a material alteration of the underlying obligation without the consent of the guarantor, the guarantor is discharged from further liability. A material alteration which will effect a discharge of the guarantor must be a change which alters the legal identity of the principal's contract, substantially increases the risk of loss to the guarantor, or places the guarantor in a different position.[425]

The Court of Appeals found the change of the terms from interest to only payments on a revolving line of credit to principal and interest payments on a closed line of credit created a materially different obligation on the part of the business than the one the landowner guaranteed.[426] The Court of Appeals affirmed the trial court's decision, releasing the landowner as a surety and discharging her tract of land.[427]

F. JPMorgan Chase Bank, N.A. v. Claybridge Homeowners Ass'n

In *JPMorgan Chase Bank, N.A. v. Claybridge Homeowners Ass'n*,[428] the Supreme Court held: (1) a valid lis pendens notice was sufficient to provide successor mortgagee with constructive notice of foreclosure action; and (2) a foreclosure action enforced a judgment upon real estate, rather than a personal judgment.[429] In 2004, a homeowner's association obtained a judgment against a

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420. *Id.* at 92-93.

421. *Id.* at 93.

422. *Id.* at 94.

423. *Id.*

424. *Id.*

425. *Id.* at 95 (emphasis omitted) (quoting Keesling v. T.E.K. Partners, LLC, 861 N.E.2d 1246, 1251 (Ind. Ct. App. 2007)).

426. *Id.* at 96.

427. *Id.* at 96-97.

428. 39 N.E.3d 666 (Ind. 2015).

429. *Id.*

homeowner, which was subsequently certified as a final judgment.[430] However, the county clerk mistakenly failed to enter the judgment on the judgment docket.[431] The association filed to foreclose its judgment lien on the real estate and filed its lis pendens notice with the county clerk, providing notice of the judgment lien and pending foreclosure action.[432] The trial court granted summary judgment to the association, foreclosing on the lien, and the order was recorded in 2010.[433] The praecipe for sheriff sale of the real estate was filed in August 2013.[434] In December 2013, the bank, which had assumed a mortgage the homeowner had used to refinance her home, moved to intervene after the filing of the praecipe, arguing it had no notice of the foreclosure action when it assumed the mortgage.[435] The trial court disagreed, denying the bank's motion and finding it had constructive notice by virtue of the lis pendens notice.[436] The Court of Appeals reversed the trial court, and the association petitioned for transfer to the Supreme Court.[437]

The Supreme Court first considered Indiana Trial Rule 24, which governs motions to intervene.[438] Significantly, it requires such motions be timely.[439] The bank argued it lacked notice and therefore its notice was timely under Rule 24.[440] The court then reviewed the history of the lis pendens statute, Indiana Code section 32-30-11-3(a), noting unlike recorded interests for which the public is presumed to have notice, unrecorded interests in real estate require a separate lis pendens filing to enforce any unrecorded lien.[441] This statute applies, unambiguously, to any lien upon real estate, "not founded upon . . . a judgment of record in the county in which the real estate is located."[442] A lis pendens notice "provide[s] machinery whereby a person with an in rem claim to property *which is not otherwise recorded* or perfected may put his claim upon the public records, so that third persons dealing with the defendant . . . will have constructive notice of it."[443] The court concluded the fact the lien was unrecorded is the reason the lis pendens statute applied, as the statute does not require notice for recorded liens.[444] Further, the court found, despite the bank's claim the judgment was

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430. *Id.* at 668.
431. *Id.*
432. *Id.*
433. *Id.*
434. *Id.* at 669.
435. *Id.*
436. *Id.*
437. *Id.*
438. *Id.* at 670.
439. *Id.* (citing IND. R. TR. P. 24(A)).
440. *Id.*
441. *Id.* at 670-72.
442. *Id.* (quoting IND. CODE § 32-30-11-3(a)(3)(B) (2015)).
443. *Id.* at 672 (emphasis in original) (quoting Curry v. Orwig, 429 N.E.2d 268, 272-73 (Ind. Ct. App. 1981)).
444. *Id.*

personal in nature, the foreclosure action enforced a lien upon real estate, separate from the personal judgment.[445] The association's lawsuit, as with all foreclosure actions in Indiana, was an in rem, real estate claim, properly suited to a lis pendens filing.[446] The Supreme Court held once the lis pendens notice was filed, the bank "had all it needed to intervene in the foreclosure in a timely fashion."[447] Therefore, the Supreme Court affirmed the trial court's finding that the motion to intervene was untimely.[448]

V. EASEMENTS, COVENANTS, AND TITLE ISSUES

A. Corn v. Corn

In *Corn v. Corn*,[449] the Court of Appeals considered whether a deed conveying property to brothers created a joint tenancy with rights of survivorship or a tenancy in common. At issue was a dispute between neighboring landowners of real estate within an eighty-acre parcel.[450] Originally, the eighty-acre parcel was subdivided into a fifty-three-acre parcel to the north (the "Northern Parcel"), a nineteen-acre "L"-shaped parcel to the south (the "Southern Parcel"), and an eight-acre parcel to the west (the "Western Parcel").[451] The entire northern boundary of the Southern Parcel stretched across the entire southern boundary of the Northern Parcel; the "L"-shaped Southern Parcel also wrapped around the northeast corner of the Western Parcel, thus splitting the Western Parcel from the Northern Parcel.[452]

In 1896, Mary Bailey owned the Western Parcel, and Priscilla Yeater and Ludlow Sparling owned the Northern Parcel and the Southern Parcel as tenants-in-common.[453] During this time, a lane—partially located in the Southern Parcel and partially serving as the eastern boundary of the Western Parcel—ran in a north-south direction toward the Northern Parcel.[454] Sparling conveyed his interest in the Southern Parcel to Yeater, but reserved "the title in and to a certain lane thirty-feet-wide"; Yeater, simultaneously, conveyed the Northern Parcel to Sparling, but reserved the right to use the lane for ingress and egress.[455] On the same day as the foregoing conveyances, Yeater also conveyed her interest in the Southern Parcel to Bailey, but reserved from the conveyed real estate "the title

445. *Id.*
446. *Id.*
447. *Id.* at 675.
448. *Id.*
449. 24 N.E.3d 987 (Ind. Ct. App.), *trans. denied*, 34 N.E.3d 1233 (Ind. 2015).
450. *Id.* at 990.
451. *Id.*
452. *Id.*
453. *Id.*
454. *Id.*
455. *Id.* at 990-91.

in and to a certain lane and the right of ingress and egress over the same."[456] Two years later, Bailey conveyed to Ovid Conner the Western Parcel and the Southern Parcel, but withheld the lane from the legal description of the property.[457] Approximately two months later, Yeater completed the series of conveyances at issue by quitclaiming her interest in the lane to Sparling.[458]

Eventually, title in the Northern Parcel was conveyed to Randy Corn ("Randy"), while Junior Corn ("Junior") obtained fee simple ownership in the Western and Southern Parcels.[459] A dispute as to the ownership of the lane arose once Junior conveyed portions of his property to his children, who, together with Randy (who used the lane to access his home on the Northern Parcel) and Junior, all used and made various improvements to the lane.[460] Eventually, Junior and his children (together, the "Corns") filed a quiet title action, arguing they held title to the lane in fee simple.[461] Following a bench trial, the trial court concluded Randy and the Corns held title to the lane as tenants in common.[462]

The Court of Appeals revisited the language of the original conveyances of the three parcels at issue in an effort to determine ownership of the lane.[463] The Court of Appeals noted Sparling and Yeater, once owners of the Northern and Southern Parcels as tenants-in-common, agreed to convey their respective interests to the other, so that Sparling owned 100% of the Northern Parcel and Yeater owned 100% of the Southern Parcel.[464] Sparling, in the deed of the Southern Parcel to Yeater, expressly reserved title to the lane.[465] Yeater, when subsequently conveying the Southern Parcel to Bailey, excepted title to the lane from the legal description of the Southern Parcel, and further noted the lane extended entirely across the Southern Parcel.[466] Because Bailey, in her conveyance of the Western and Southern Parcels to Conner, also excluded title to the lane in the deed, the Court of Appeals concluded Sparling retained fee simple ownership of the lane, and Randy, as successor-in-interest to Sparling, was the 100% fee owner of the lane.[467] Consequently, the Court of Appeals concluded Randy owned fee simple title to the lane and remanded the case to determine the question of whether Junior had a prescriptive easement over the lane.[468]

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456. *Id.* at 991.
457. *Id.*
458. *Id.*
459. *Id.*
460. *Id.* at 991-92.
461. *Id.* at 992.
462. *Id.* at 992-93.
463. *Id.* at 993-94.
464. *Id.* at 994.
465. *Id.*
466. *Id.*
467. *Id.* at 994-95.
468. *Id.* at 997.

B. Pike v. Conestoga Title Insurance Co.

In *Pike v. Conestoga Title Insurance Co.*, the Court of Appeals considered when a property owner is required to notify its title insurance company of an adverse title claim.[469] In *Pike*, the homeowners ("Homeowners") purchased a home on December 31, 2003, and was issued a title policy shortly thereafter by a title insurance company (the "Title Company").[470] In June 2006, Homeowners received a legal notice that a third party purchased the home at a tax sale as a result of the nonpayment of real estate taxes.[471] Homeowners contacted their lender, which informed Homeowners the taxes were paid and they could ignore the notice, but Homeowners did not contact the Title Company.[472] In November 2006, following the tax sale redemption period, Homeowners received a second notice of the tax sale.[473] Again, Homeowners contacted their lender, which informed Homeowners once more the taxes were paid and they could ignore the notice, and Homeowners did not notify the Title Company.[474]

On November 29, 2006, a tax deed was executed on Homeowners' home.[475] Homeowners subsequently discovered a May 23, 2003 special assessment had never been paid and caused the tax delinquency.[476] Homeowners notified the Title Company and made a claim against its title insurance policy, but the Title Company denied the claim, explaining Homeowners violated the notice requirement of the policy, which provided if the insured did not promptly notify the Title Company of an adverse claim, then "as to the insured all liability of the [Title] Company shall terminate."[477]

Following the trial court's grant of summary judgment in favor of the Title Company, Homeowners appealed.[478] Because the notice requirement is considered material in insurance contracts, the duty of an insured to notify its insurance company of potential liability is "a condition precedent to the company's liability to the insured."[479] In this instance, there was no genuine issue of material fact, as the Court of Appeals noted Homeowners received two notices advising them a tax sale occurred and in neither instance did Homeowners comply with the notice provision of its title insurance policy.[480]

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469. Pike v Conestoga Title Ins. Co., 44 N.E.3d 787 (Ind. Ct. App. 2015).
470. *Id.* at 787-88.
471. *Id.* at 788.
472. *Id.*
473. *Id.*
474. *Id.*
475. *Id.*
476. *Id.*
477. *Id.* at 788-89.
478. *Id.* at 789.
479. *Id.* at 790.
480. *Id.* at 790-91.

C. Bonnell v. Cotner

In *Bonnell v. Cotner*, the Court of Appeals considered when a property owner who holds title through adverse possession may be divested of title in a subsequent property tax sale.[481] The landowners ("Owners") owned two adjacent parcels (the "Property") that were part of a subdivision consisting of several parcels sharing a state highway as its western border.[482] An approximate 0.75-acre strip of land (the "Strip") served as the eastern border of each parcel in the subdivision.[483] Notwithstanding the fact that the Strip was the actual eastern border, all owners in the subdivision, including Owners, believed the eastern boundary lines of their parcels extended across the Strip to a farm fence that ran in a north-south direction along the eastern boundary of the Strip.[484] In 1968, Owners' predecessor-in-interest constructed an outbuilding within the portion of the Strip directly east of the Property, and in 2010, Owners built an extension to the outbuilding, such that the outbuilding extended as much as twenty-two feet past the eastern boundary of the Property.[485]

In 1993, the county auditor issued a tax sale deed to the Strip, and in 2011, the auditor again put the Strip up for tax sale.[486] A purchaser ("Purchaser") bought the Strip at the tax sale, believing he purchased 0.75 acres *east* of the farm fence, but realized after surveying the Strip, his newly acquired property was west of the farm fence.[487] Purchaser contacted all landowners of the parcels in the subdivision and offered to divide the Strip to permit each owner to extend his or her eastern boundary to the farm fence.[488] Owners declined and filed suit, claiming they held title to the portion of the Strip directly east of the Property via adverse possession.[489]

The only element of adverse possession which was disputed in *Cotner* was whether Owners complied with Indiana Code 32-21-7-1, which requires an adverse possessor "pay[] and discharge[] all taxes and special assessments that the adverse possessor or claimant reasonably believes in good faith to be due on land or real estate during the period the adverse possessor or claimant claims to have possessed the land or real estate adversely."[490] The trial court concluded Owners did not comply with this statute, stating because the Strip was put up for tax sale by the county on two separate occasions, Owners could not have had a

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481. Bonnell v. Cotner, 35 N.E.3d 275, 276 (Ind. Ct. App. 2015), *vacated*, No. 66503-37 N.E.3d 493 (Ind. 2016), *aff'd in part, rev'd in part*, No. 66503-1509-PL-530, 2016 WL 614107 (Ind. Feb. 16, 2016).

482. *Id.* at 277.

483. *Id.*

484. *Id.*

485. *Id.*

486. *Id.*

487. *Id.*

488. *Id.*

489. *Id.*

490. IND. CODE § 32-21-7-1 (2006); *Cotner*, 35 N.E.3d at 278.

reasonable, good faith belief they were paying a portion of the taxes on the Strip.[491] The trial court further concluded, since the county took possession of the Strip when taxes were not paid, Owners' post-tax sale attempt to establish adverse possession violated state law that prohibited the taking of title from a political subdivision by adverse possession.[492]

On appeal, the Court of Appeals reviewed the Supreme Court's holdings in *Echterling v. Kalvaitis*[493] and *Fraley v. Minger*,[494] which, taken together, provide that Indiana law "permits substantial compliance to satisfy the requirement of the adverse possession tax statute in boundary disputes where the adverse claimant has a reasonable and good faith belief that the claimant is paying the taxes during the period of adverse possession."[495] In this instance, the *Cotner* court concluded substantial compliance with the tax statute had been met, as Owners and their predecessor-in-interest paid the taxes assessed on the Property, as well as the outbuilding, and had a reasonable, good faith belief those taxes also included the portion of the Strip immediately east of the Property.[496] Consequently, title to this area was vested in Owners' predecessor-in-interest in 1978, once the ten-year statutory period for adverse possession had been completed.[497]

Although the trial court earlier concluded any title vesting in the disputed area was subsequently severed by the two tax sales, the Court of Appeals disagreed.[498] The *Cotner* court noted *Echterling* recognized the tax duplicate generated by the county often provides an incomplete legal description of a taxpayer's property, and thus a taxpayer is rarely put on clear notice of the boundaries of his property based on the tax duplicate.[499] Accordingly, since Owners reasonably believed they were paying the proper taxes, the tax duplicate did not provide him with notice to the contrary that a tax sale had occurred.[500] As a result, the tax sales did not divest Owners of the disputed area and they retained title to the disputed area, even after Purchaser's tax sale purchaser of the Strip.[501]

D. Celebration Worship Center, Inc. v. Tucker

In *Celebration Worship Center, Inc. v. Tucker*, the Supreme Court (the "Supreme Court") considered claims of adverse possession and prescriptive easement.[502] *Celebration Worship* involved homeowners ("Homeowners") who

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491. *Cotner*, 35 N.E.3d at 278.
492. *Id.* at 278-79.
493. 126 N.E.2d 573 (Ind. 1955).
494. 829 N.E.2d 476 (Ind. 2005).
495. *Cotner*, 35 N.E.3d at 282 (citing *Fraley*, 829 N.E.2d at 493).
496. *Id.* at 283.
497. *Id.*
498. *Id.*
499. *Id.*
500. *Id.*
501. *Id.* at 283-84.
502. Celebration Worship Ctr., Inc. v. Tucker, 35 N.E.3d 251, 252 (Ind. 2015).

owned a lot ("Lot 4") which was directly east of a lot ("Lot 3") owned by a neighboring church (the "Church").[503] On the east side of Lot 3 was a gravel driveway (the "Driveway") and a grassy area (the "Grassy Area") which separated the Driveway from Lot 4.[504] The Church sued Homeowners with respect to ownership of the Driveway and the Grassy Area, and Homeowners counterclaimed, contending they owned the Grassy Area as a result of adverse possession and held a prescriptive easement over the Driveway.[505] The trial court granted summary judgment in favor of Homeowners on both claims, the Court of Appeals reversed both claims and the Supreme Court granted transfer.[506]

To succeed on an adverse possession claim, the *Celebration Worship* court concluded a claimant must prove by clear and convincing evidence the elements of control, intent, notice, and duration (for ten years), as well as demonstrate a reasonable and good-faith belief the claimant was paying taxes on the disputed property.[507] In *Celebration Worship*, the Supreme Court placed great weight on sworn affidavits signed by Homeowners and by one of the Homeowners' mother, who owned Lot 4 from 1972 to 2003, when she conveyed it to Homeowner.[508] In the mother's affidavit, the mother stated that she believed in good faith that the taxes she had paid on Lot 4 included the Grassy Area.[509] In addition, the elements of intent, notice, and control were evidenced, respectively, by: (1) the mother's affidavit, which provided at no time was there any question as to her continuous use of the Grassy Area; (2) a statement from a 2004 survey, which depicted the Grassy Area and stated it "has been used and recognized as part of the property of the owner of Lot 4" and photographs from the 1980s which showed evidence of constructive notice, namely, a location of an old garage and photos of family events taking place on the Grassy Area; and (3) a statement in the mother's affidavit providing at no time did the owner of Lot 3 maintain the Grassy Area.[510]

Because the elements of adverse possession generally apply to prescriptive easements, the evidence designated by Homeowners in the claim of adverse possession with respect to the Grassy Area aided Homeowners with respect to

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503. *Id.*

504. *Id.* at 253.

505. *Id.* at 252-53.

506. *Id.* at 253.

507. *Id.* at 254.

508. *Id.* at 255.

509. *Id.* The Court distinguished this case from prior decisions such as *Hoose v. Doody*, 886 N.E.2d 83 (Ind. Ct. App. 2008), and *Flick v. Reuter*, 5 N.E.3d 372 (Ind. Ct. App. 2014), in which instances the claimant failed to demonstrate a reasonable belief as to the payment of taxes. The Court's reasoning in distinguishing the cases was based on the fact that the Homeowners and the mother reasonably believed the Grassy Area was part of the side yard of Lot 4. In *Hoose*, the disputed property involved an entire lot separate from the lot on which the claimant paid taxes, and in *Flick*, the disputed property involved real estate underlying a mobile home which was assessed separately from the mobile home.

510. *Celebration Worship Center, Inc.*, 35 N.E.3d at 256. The element of duration was not disputed.

their prescriptive easement claim over the Driveway.[511] Relevant to the prescriptive easement discussion, though, was a dispute between the parties over whether Homeowners abandoned the prescriptive easement.[512] To demonstrate the element of control, Homeowners designated the mother's affidavit, which provided the mother had used the Driveway to access a garage on Lot 4, which was only accessible via the Driveway, but had since been torn down.[513] The Church argued any prescriptive easement was abandoned upon demolition of the garage.[514] The Supreme Court disagreed on the basis the Homeowners and the mother continued to use the Driveway for ingress and egress to their current garage, even after demolition of the previous garage.[515]

VI. RECEIVERSHIPS

In *Memory Gardens Management Corp. v. Liberty Equity Partners, LLC*, the Court of Appeals considered the impact of the omission of a demand note from a receiver's report.[516] In this case, a company (the "Company") owned several subsidiary companies that owned and operated funeral homes, cemeteries, and other businesses in the funeral home and cemetery industry.[517] One such wholly-owned subsidiary was Memory Gardens Management Corporation, Inc. (the "Subsidiary").[518] In 2008, certain mortgage holders and other creditors of the Company filed an action requesting the appointment of a receiver (the "Receivership Action") over the Company and its subsidiaries (including the Subsidiary), which was subsequently granted.[519]

On June 2, 2008, the Subsidiary's controller filed an affidavit with the receivership court which purported to itemize the assets of the Company and each of its wholly-owned subsidiaries.[520] The affidavit did not identify any loans made by the Subsidiary to Liberty Equity Partners, LLC and Old Bridge Funeral Home, LLC (collectively, the "Old Bridge Parties").[521] In a separate affidavit submitted to the receiver, the funeral director of Old Bridge Funeral Home stated that "during the construction of the Old Bridge Funeral Home, approximately $450,000.00 was lent by [the Subsidiary] to Old Bridge Funeral Home, LLC to complete the construction."[522]

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511. *Id.* at 257-58.

512. *Id.* at 258.

513. *Id.*

514. *Id.*

515. *Id.*

516. Memory Gardens Mgmt. Corp. v. Liberty Equity Partners, LLC, 43 N.E.3d 609 (Ind. Ct. App.), *trans. denied*, 42 N.E.3d 520 (Ind. 2015).

517. *Id.* at 611.

518. *Id.*

519. *Id.* at 611-12.

520. *Id.* at 613.

521. *Id.* at 611, 613.

522. *Id.* at 613.

Over the course of several years, the receiver filed several reports concerning the receivership.[523] These reports contained the itemized list of the assets of the Company and its subsidiaries.[524] Notably missing from all of these reports was any reference to the $450,000 the Subsidiary's loan.[525] Neither the Company, the Subsidiary, nor Robert Nelms ("Nelms"), the Managing Member and CEO of the Old Bridge Parties, objected to these reports.[526] The Subsidiary was eventually dissolved.[527]

Approximately two years and eight months after the Subsidiary's dissolution, Nelms, purporting to act as the President of the Subsidiary, filed a Verified Complaint (the "Complaint") for Damages on Commercial Note, Security Agreement, and for Replevin against the Old Bridge Parties.[528] The Complaint alleged the Old Bridge Parties entered into a security agreement with the Subsidiary on March 3, 2006 to secure repayment of note.[529] It also alleged the Old Bridge Parties breached the terms of the note and security agreement and were indebted to the Subsidiary in the amount of $450,000 plus interest.[530] In turn, the Old Bridge Parties contended the Subsidiary's claims under the note were forever barred by operation of law and because the Subsidiary was dissolved, it did not have standing to bring the claims.[531] The parties filed cross-motions for summary judgment.[532]

The trial court entered an order granting the Old Bridge Parties' motion for summary judgment and denying the Subsidiary's cross-motion for summary judgment.[533] The trial court stated:

> The $450,000 Demand Note was an asset subject to the Receivership. As such, the Receiver was able to consider collecting the $450,000 [Demand Note]. By omitting any mention of the $450,000 Demand Note at issue in her Inventory or failing to collect the $450,000, the Receiver effectively abandoned this claim. Indiana Code § 32-30-5-18(b) placed an affirmative duty upon [the Company], [the Subsidiary], and/or Nelms to file their objections or exceptions to the Receiver's Inventory and Final Report/Accounting within the 30 day period. Since neither [the Company], [the Subsidiary], nor Nelms filed an objection, [the Subsidiary] is forever barred from its claim as to the $450,000 Demand

523. *Id.* at 613-15.
524. *Id.* at 613.
525. *Id.* at 613-15.
526. *Id.* at 611, 615.
527. *Id.* at 614-15.
528. *Id.* at 615.
529. *Id.*
530. *Id.*
531. *Id.*
532. *Id.*
533. *Id.*

Note.[534]

On appeal, the central issue was whether the trial court erred in granting the Old Bridge Parties' motion for summary judgment.[535] The Subsidiary first argued it had no obligation to object to the receiver's treatment of the note, but the court disagreed, holding the Indiana Non-Claim Statute, Indiana Code section 32-30-5-18, extended not only to the "'matters and things contained in an account or report' but also to the matters and things omitted from an account or report that should have been included in the report."[536] Next, the Subsidiary argued the trial court erred in finding the receiver abandoned the Subsidiary's claims under the note.[537] Again, the court disagreed, finding the Company was required to file with the receivership court an affidavit "setting forth in detail all the assets and all the liabilities of [the Company], including those assets and liabilities of the wholly owned subsidiaries."[538] By omitting any mention of the note in her final report, the receiver effectively abandoned Subsidiary's claims under the note.[539]

VII. MECHANIC'S LIENS

In *Wells Fargo Bank, N.A. v. Rieth-Riley Construction Co.*,[540] the Court of Appeals considered the remedy available to a mechanic's lienholder when the property subject to the lien is also subject to a mortgage foreclosure action. Debtor, the owner of certain commercial real estate, refinanced its property through Lender in 2007.[541] In April 2011, Debtor defaulted under its loan.[542] In November 2011, Debtor hired Contractor to pave its parking lot, which Contractor did in November and December 2011.[543] Contractor was never paid and, in February 2012, Contractor recorded a mechanic's lien against Debtor's property.[544] In February 2013, Contractor brought suit to foreclose its lien, naming Debtor and Lender in the complaint.[545] At trial Lender argued its lien, being recorded first in time, had priority over Contractor's mechanic's lien.[546] The trial court concluded Lender's lien in fact had priority, but Contractor's lien held priority with respect to the improvements it made and, therefore, Contractor was entitled to priority as to any proceeds from the sale of the improvements it

534. *Id.*
535. *Id.* at 616.
536. *Id.* at 616-17 (quoting IND. CODE § 32-30-5-18 (2015)).
537. *Id.* at 618.
538. *Id.*
539. *Id.* at 619.
540. 38 N.E.3d 666, 668 (Ind. Ct. App. 2015).
541. *Id.*
542. *Id.*
543. *Id.*
544. *Id.*
545. *Id.*
546. *Id.*

made.[547] The trial court also held Lender was permitted to credit-bid its judgment, but required Lender escrow funds sufficient to ensure Contractor a recovery in the event the trial court subsequently determined that Contractor was entitled to a share of the sales proceeds.[548] Lender appealed.[549]

The Court of Appeals reversed and remanded to the trial court to determine whether Contractor would be entitled to remove its improvements—i.e., the parking lot—pursuant to Indiana's mechanic's lien statutes, or whether Contractor would receive proceeds from the sale of the property after Lender's lien was fully satisfied.[550] Indiana law provides a "mortgage, memorandum of lease, or lease takes priority according to the time of its filing."[551] Indiana's mechanic's lien statute states a recorded mechanic's lien relates back to the date the work was commenced or the materials or machinery furnished.[552] Consistent with long-standing Indiana law, the Court of Appeals concluded Lender's mortgage lien, dating to 2008, had priority over Contractor's mechanic's lien, relating to November 2011, with respect to the Debtor's property.[553] Contractor's lien would not, under Indiana statute, be impaired by the foreclosure of the mortgage, though it was entitled only to the remedies provided under the relevant statute.[554] Contractor's remedies include the right to remove the improvements it constructed to satisfy its mechanic's lien to the extent removal is practical—i.e., the removal would not substantially impair the value of the land beyond that which it would have been had the parking lot never been paved.[555]

VIII. RESIDENTIAL REAL ESTATE DISCLOSURE FORM

In *Hays v. Wise*, the Court of Appeals considered whether a seller may be

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547. *Id.* at 669.

548. *Id.* at 669-70. The Court of Appeals concluded the trial court erred in requiring Lender to escrow funds where Lender was entitled to credit-bid its judgment. This issue is not further discussed in this summary.

549. *Id.* at 670.

550. *Id.* at 675.

551. *Id.* at 671 (quoting IND. CODE § 32-21-4-1(b) (2015)).

552. *Id.* (citing IND. CODE § 32-28-3-5 (2010)).

553. *Id.* at 670-71.

554. *Id.* at 671 (quoting IND. CODE § 32-28-3-2).

555. *Id.* at 671-75. The Court of Appeals cited *Provident Bank v. Tri-County Southside Asphalt, Inc.*, 804 N.E.2d 161 (Ind. Ct. App. 2004), in which the Court concluded a contractor holding a lien relating to the installation of a driveway held priority as to the improvements for which the lienholder provided labor and materials. *See id.* at 671-72. Relying in part upon the decision in *Provident Bank*, in part on the ambiguity in Indiana Code section 32-28-3-2 regarding the meaning to be given to the term "building," and in part on the Court's interpretation of legislative intent, the Court of Appeals concluded a parking lot, like the driveway at issue in *Provident Bank*, was an improvement within the meaning of the term "building" for the purposes of Indiana Code section § 32-28-3-2 and established Contractor's remedies thereunder. *See id.* at 672-74.

liable for fraudulent misrepresentations made on a "Residential Real Estate Disclosure Form" when he or she had actual knowledge the representation was false at the time he or she completed the form.[556] In 2007, Buyer purchased a residence from Seller.[557] The property consisted of sixteen and a half acres and a house that had been personally built by Seller.[558] Seller completed a "Seller's Residential Real Estate Sales Disclosure Form" ("Form").[559] On the Form, Seller answered no to the following questions: (1) "Are there any structural problems with the building?"; (2) "Have you received any notices by any governmental or quasi-governmental agencies affecting this property?"; (3) "Have any substantial additions or alterations been made without a required building permit?"; and (4) "Is the property in a flood plain?"[560] After the purchase, Buyer hired a professional engineer to inspect the residence.[561] The engineer revealed a number of code violations and structural problems, ultimately concluding the house was completely unsafe and repairs would cost more than the value of the home.[562]

Buyer brought suit against the Seller for fraud.[563] The trial court granted Seller's motion that Buyer failed to state a claim upon which relief can be granted, concluding Buyer had no right to rely on the Seller's representations because Buyer had a reasonable opportunity to inspect the property.[564] On appeal, the Court of Appeals held the Indiana General Assembly had codified the rights of a buyer to rely on the disclosures of the seller by requiring a seller to complete, sign, and submit the Form before an offer is accepted.[565] The Court of Appeals thus remanded to the trial court, where a bench trial subsequently ensued.[566] The trial court found for Buyer in the amount of $281,062.77.[567] Seller then appealed arguing (1) the court's judgment was clearly erroneous due to a lack of evidence Seller had actual knowledge of the defects and (2) the judgment ordered damages in excess of the amount that would have been required to repair known structural defects.[568]

On appeal again, the Court noted the residential disclosure form is not a warranty by the Seller; however, "just because the statements made on the [] form are not warranties does not mean that they are not actionable

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556. Hays v. Wise, 19 N.E.3d 358 (Ind. Ct. App. 2014).

557. *Id.* at 360.

558. *Id.* at 360, 363.

559. *Id.* at 360.

560. *Id.*

561. *Id.*

562. *Id.* at 360-61, 364-68.

563. *Id.* at 359.

564. *Id.* at 359-60.

565. *Id.* at 361 (citing IND. CODE § 32-21-5-10 (2015); Boehringer v. Weber, 2 N.E.3d 807, 812 (Ind. Ct. App. 2014)).

566. *Id.*

567. *Id.*

568. *Id.* at 362.

representations."[569] Under Indiana law, "a seller may be liable for fraudulent misrepresentations made on the disclosure form when he or she had actual knowledge that the representation was false at the time he or she completed the form."[570] In this case, the trial court entered findings of fact and conclusions determining Seller was liable to Buyer for failing to disclose conditions about the house known to Seller.[571] The issue here was not whether defects existed, but whether Seller had knowledge of them.[572] The Court of Appeals found Seller—who personally built the home in 2000, but had never previously built a home or any other structure—had actual knowledge of some of the defects when he signed the sales disclosure form.[573] Although there was no direct evidence Seller had actual knowledge of the defects, the Court of Appeals found, "based on the facts and circumstances of the case, there was sufficient circumstantial evidence before the trial court from which it could infer that the [Seller] had actual knowledge."[574] As a result, the Court of Appeals affirmed the value of the damages finding based on expert testimony it would have cost more to repair the house than the house was worth.[575]

IX. CONTRACTS

A. Huber v. Hamilton

In *Huber v. Hamilton*,[576] the Court of Appeals considered whether the statute of frauds applied to an oral agreement modifying a written land contract and also whether the oral agreement could be enforceable under the equitable doctrine of promissory estoppel.[577] In 2007, Roger Hamilton ("Seller") sold commercial real estate located in Crawfordsville, Indiana to Terry Huber ("Buyer") for a $150,000 purchase price, with a down payment of $20,000.[578] The remainder of the principal was payable in monthly installments of $1132.44 at 6.5% interest over a thirty-five month period, at which time the remaining unpaid balance would come due as a balloon payment.[579] The land contract also included terms discussing the transfer of title to Buyer upon full performance, as well as terms discussing what happens in the event of default.[580] In late 2010, as the due date

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569. *Id.* at 361-62 (quoting Johnson v. Wysocki, 990 N.E.2d 456, 462 (Ind. 2013) (citing IND. CODE § 32-21-5-9)).

570. *Id.* at 362 (citing *Johnson*, 990 N.E.2d at 466).

571. *Id.*

572. *Id.*

573. *Id.* at 363-66.

574. *Id.* at 366.

575. *Id.* at 368.

576. 33 N.E.3d 1116 (Ind. Ct. App.), *trans. denied*, 41 N.E.3d 690 (Ind. 2015).

577. *Id.* at 1117-18.

578. *Id.* at 1118.

579. *Id.*

580. *Id.*

for the final balloon payment approached, Buyer requested an extension from Seller.[581] Buyer claimed Seller told him to pay an additional $300 per month to extend the contract, whereas Seller claimed he told Buyer he would accept an additional $300 per month from Buyer for up to a year as a penalty to give Buyer time to arrange financing for the balloon payment.[582] Buyer and Seller's agreement was oral only and never put in writing.[583] Buyer made a total of thirty-four additional monthly payments with the $300 penalty included before Seller provided written notice to Buyer that he was in default demanding full payment within thirty days.[584]

In 2013, Buyer filed a complaint for declaratory judgment against Seller in response to this notice alleging Buyer and Seller had renegotiated the contract, and Seller subsequently counterclaimed to foreclose the land contract.[585] In early 2014, the trial court held a bench trial determining the parties had conflicting intentions as to their oral modification agreement and also the oral agreement was unenforceable as the statute of frauds applied.[586]

The Court of Appeals affirmed the decision of the trial court.[587] First, the Court of Appeals stated the long-standing Indiana rule that the statute of frauds[588] applies to contracts for the sale of land requiring them to be in writing.[589] The Court of Appeals reasoned since the original land contract was required to be in writing, so must any modification.[590] Moreover, this decision echoed an underlying rationale of the statute of frauds in avoiding reliance on the memory and story-telling of the parties by requiring a writing, especially in cases as such where the details of an oral agreement were unable to be determined by the trial court.[591] Thus, the Court of Appeals held, under the statute of frauds, the oral agreement between Buyer and Seller was unenforceable.[592]

Furthermore, the Court of Appeals determined the oral agreement between Buyer and Seller was unenforceable under the equitable doctrine of promissory estoppel.[593] The required elements to enforce an agreement under promissory estoppel were absent in this instance.[594] The Court of Appeals held the agreement was not enforceable as there was no actual "promise" to enforce between the

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581. *Id.*

582. *Id.* at 1118-19.

583. *Id.* at 1119.

584. *Id.*

585. *Id.*

586. *Id.* at 1120.

587. *Id.* at 1125.

588. *Id.* at 1122-23; IND. CODE § 32-21-1-1 (2015).

589. *Huber*, 33 N.E.3d at 1123 (quoting Brown v. Branch, 758 N.E.2d 48, 51 (Ind. 2001)).

590. *Id.*

591. *Id.* (citing *Brown*, 758 N.E.2d 48).

592. *Id.*

593. *Id.* at 1124.

594. *Id.* (citing First Nat'l Bank v. Logan Mfg. Co., 577 N.E.2d 949, 954 (Ind. 1991) (discussing list of elements)).

parties since the trial court could not determine the details of the oral agreement.[595]

B. Metro Holdings One, LLC v. Flynn Creek Partner LLC

In *Metro Holdings One, LLC v. Flynn Creek Partner LLC*, the Court of Appeals held specific performance is an available remedy to a seller of real estate in a dispute, when the parties contract for specific performance to be available to the seller.[596] Metro Holdings One LLC ("Metro Holdings") entered into a purchase agreement to buy two contiguous real estate parcels (the "Phase 1 Property" and the "Phase 2 Property") from Flynn Creek Partners, LLC ("Flynn Creek") on two separate closing dates.[597] Metro Holdings closed on the Phase 1 Property, but on the day of the closing for the Phase 2 Property, Metro Holdings sent Flynn Creek a notice alleging Flynn Creek failed to satisfy certain closing conditions and specifically alleged the existence of wetlands on the property.[598] Metro Holdings invoked a "sixty-day period for Flynn Creek to satisfy the disputed closing conditions."[599] Flynn Creek responded by "asserting that Metro [Holdings] had defaulted in its performance under the purchase agreement by failing to purchase the [Phase 2 Property]."[600] Metro Holdings sent a letter to Flynn Creek stating "that it was electing to terminate the purchase agreement due to the presence of wetlands on the [Phase 2 Property]."[601] Flynn Creek filed suit for breach of contract and "sought specific performance of the purchase agreement or an alternative remedy of damages for its breach of contract claim."[602] Metro Holdings "counterclaimed, arguing the Flynn Creek had repudiated or anticipatorily breached the purchase agreement."[603] The trial court granted Flynn Creek's motion for summary judgment finding that Metro Holdings had "breached the purchase agreement by failing to purchase the second [] parcel and that Flynn Creek was entitled to specific performance."[604]

On appeal, the Court of Appeals held it was undisputed that under the purchase agreement, Metro Holdings "had an obligation to purchase and close on the Phase 2 Property," and Metro Holdings did not purchase the Phase 2 Property on the closing date.[605] Based on the plain language of the purchase agreement, the Court of Appeals determined Metro Holdings could not rely on

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595. *Id.*

596. Metro Holdings One, LLC v. Flynn Creek Partner, LLC, 25 N.E.3d 141, 145 (Ind. Ct. App. 2014), *trans. denied*, 29 N.E.3d 1274 (Ind. 2015).

597. *Id.* at 144.

598. *Id.*

599. *Id.*

600. *Id.*

601. *Id.*

602. *Id.*

603. *Id.*

604. *Id.*

605. *Id.* at 158.

its attempt to terminate the purchase agreement on account of alleged wetlands as justification for terminating the contract.[606] The purchase agreement required Metro Holdings to procure a wetlands study and provide written notice to Flynn Creek prior to the end of the due diligence period in April 2007 to terminate the purchase agreement based on wetlands.[607] Metro Holdings did not do so.[608]

"The parties' purchase agreement included specific language providing that Flynn Creek had 'the right' to specific performance."[609] "Indiana courts recognize the freedom of parties to enter into contracts and indeed, presume that contracts represent the freely bargained agreement of the parties."[610] "Here the terms of the parties' purchase agreement allowed for Flynn Creek, upon default by Metro Holdings, to choose a remedy at law or equity, and the parties agreed that Flynn Creek's equitable remedy included 'the right' to specific performance."[611] Therefore, the Court of Appeals held "the trial court did not err by granting summary judgment to Flynn Creek on its claim for specific performance."[612]

X. DRAINAGE LAW

In *Frazee v. Skees*, the Court of Appeals discussed and decided upon a number of drainage issues arising from a dispute between adjacent landowners occurring during a period of increased rainfall.[613] Frazee and the Skeeses were neighboring landowners whose properties sat upon a high water table and they shared a clay tile drain (the "Subsurface Drain") installed approximately eighty years before the dispute.[614] Surface water naturally drained in a westward direction along a natural swale from the property owned by the Skeeses (the "Skees Parcel") towards the property owned by Frazee (the "Frazee Parcel").[615] During the installation of a geothermal system on the Frazee Parcel, Frazee was forced to repair a portion of the Subsurface Drain, which had been damaged by tree roots.[616] Frazee also discovered, while constructing a barn on her property, sewage was present in the Subsurface Drain.[617] A dye test performed by the county health department (the "Department") indicated the sewage was coming from the Skeeses' home.[618] As a result of the test, the Department required the

606. *Id.* at 160.

607. *Id.*

608. *Id.*

609. *Id.* at 164.

610. *Id.* (quoting Haegert v. Univ. of Evansville, 977 N.E.2d 924, 937 (Ind. 2012) (quoting Fresh Cut Inc. v. Fazli, 650 N.E.2d 1126, 1129 (Ind. 1995))).

611. *Id.*

612. *Id.*

613. Frazee v. Skees, 30 N.E.3d 22 (Ind. Ct. App. 2015).

614. *Id.* at 26.

615. *Id.*

616. *Id.* at 27.

617. *Id.*

618. *Id.*

Skeeses to install a new septic system.[619]

As part of the work performed to install the new septic system, the Skeeses' contractor (1) dug a hole at the end of the septic's finger system, severing the Skeeses' connection to the Subsurface Drain, and (2) placed a boulder inside of the hole over the severed connection, but left the hole otherwise open to permit ground water to continue to flow into the hole and leach into the Subsurface Drain.[620] Although the Department concluded the Skeeses' new system complied with all laws, the disconnection of the Skees Parcel from the Subsurface Drain, when coupled with the increased rainfall, made the already high water table rise even higher, which negatively affected the functionality of the new septic system.[621] In an effort to lower the water table, the Skeeses installed multiple sump pumps on the Skees Parcel and also agreed, upon request from the Department, to install a perimeter drain around the septic system's absorption field which would then connect to the Subsurface Drain.[622] Thus, as a result of the installation of the perimeter drain, the connection between the drainage on the Skees Parcel and the Subsurface Drain was reestablished.[623] At the same time, because the perimeter drain collected the same amount of water that the Subsurface Drain collected prior to the Subsurface Drain being disconnected, the perimeter drain would not increase the downstream burden placed on the Subsurface Drain.[624]

Frazee claimed the barns on the Frazee Parcel flooded more often following the connection of the perimeter drain to the Subsurface Drain, and in an effort to ameliorate these effects, she installed a curtain drain near her barns and replaced a portion of the Subsurface Drain on her property with a six-inch plastic drain pipe.[625] In addition, Frazee filed an action against the Skeeses, alleging nuisance and trespass claims, among other items. The Skeeses counterclaimed, alleging negligence, nuisance, and criminal trespass.[626] The trial court held a two-day bench trial and found (1) the Subsurface Drain was a mutual drain under Indiana law, (2) the Skeeses never abandoned the Subsurface Drain during the course of any of the work required by the Department, and (3) Frazee was solely responsible for all costs to repair the portion of the Subsurface Drain located under the Frazee Parcel.[627]

On appeal, Frazee argued, among other items, all three of these findings were incorrect.[628] With respect to the question of whether the Subsurface Drain was

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619. *Id.* at 28.
620. *Id.*
621. *Id.*
622. *Id.* at 29-30.
623. *Id.* at 30.
624. *Id.*
625. *Id.*
626. *Id.* at 30-31.
627. *Id.* at 31-32.
628. *Id.* at 34.

a mutual drain,[629] Frazee challenged the trial court's conclusion the Subsurface Drain diverted water from the Skees Parcel, claiming the swale located on both parcels provided the only method of drainage from the Skees Parcel.[630] Frazee argued the Subsurface Drain was not a mutual drain, but, rather, two separate drains: (1) a drain that illegally directed the sewage from the Skees Parcel into (2) the private drain located on the Frazee Parcel.[631] The Court of Appeals disagreed.[632] Although the swale did serve to drain some surface water from the Skees Parcel, the Court also pointed out once the Skeeses disconnected from the Subsurface Drain, the water table rose, indicating the Subsurface Drain also diverted ground water from the Skees Parcel.[633] Consequently, the trial court could have properly determined the Subsurface Drain directed water (in addition to sewage) away from the Skees Parcel and thus the Subsurface Drain was a mutual drain.[634]

Frazee also contended the trial court erred when it concluded the Skeeses permanently abandoned their right to use the Subsurface Drain when the contractor severed the Skeeses' connection to the Subsurface Drain for a period of six months.[635] The Court of Appeals disagreed with Frazee on this issue for three reasons.[636] First, the Skeeses created a hole near the disconnection to permit water to continue to flow into the hole in part to determine whether the Subsurface Drain still serviced the Skees Parcel.[637] Second, the work performed by the contractor ensured ground water was still able to leach into the Subsurface Drain through the clay tile.[638] Finally, the Skeeses reconnected to the Subsurface Drain when Frazee installed the perimeter drain.[639] Consequently, in the Court's view, no intent to abandon the Subsurface Drain permanently was present.[640]

Finally, Frazee argued the trial court erred with holding her solely

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629. IND. CODE § 36-9-27-2 (2015). Under Indiana law, a mutual drain is a drain "that (1) is located on two (2) or more tracts of land that are under different ownership; (2) was established by the mutual consent of all the owners; and (3) was not established under or made subject to any drainage statute." *Id.*

630. *Frazee,* 30 N.E.3d at 34.

631. *Id.*

632. *Id.* at 35.

633. *Id.* at 34-35.

634. *Id.* Frazee also claimed no evidence existed that the Subsurface Drain was "established by the mutual consent of all the owners." *Id.* Although the Court acknowledged no evidence was presented to establish this mutual consent at the time of the installation of the eighty-year-old drain, the Court concluded the trial court could infer the element of consent in this instance, since it was clear the Subsurface Drain was installed as one contiguous system approximately eighty years ago, which passed through multiple parcels. *Id.*

635. *Id.* at 35-36.

636. *Id.*

637. *Id.*

638. *Id.*

639. *Id.*

640. *Id.*

responsible for the costs of the repairs to the portion of the Subsurface Drain located under her property.[641] In reviewing this claim, the Court of Appeals held that "the tracts of land under which a mutual drain is located benefit from the existence of that drain."[642] At the same time, the Court also held the trial court may exercise its equitable authority to apportion the costs of any necessary repairs among the owners of the land under which the mutual drain lies based on a list of factors set forth in Indiana Code section 36-9-27-112.[643] In this instance, the Court believed the fact that the trial court determined Frazee was responsible for all costs of the repairs was not a determination that, in general, a landowner is always solely responsible for repairs made to the portion of a mutual drain located solely on such landowner's property; rather, the trial court had, in the Court's view, exercised its authority to apportion such costs equitably and had assigned 100% of all such costs to Frazee.[644] For the Court of Appeals, the fact that the Skees Parcel was not affected by the broken part of the Subsurface Drain and Frazee's repairs were required to finish the construction of the geothermal system on the Frazee Parcel supported this apportionment.[645]

XI. ANNEXATION

A. American Cold Storage NA v. City of Boonville

In *American Cold Storage NA v. City of Boonville*,[646] the Court of Appeals considered whether the City of Boonville, Indiana ("Boonville") satisfied the statutory requirements needed to overcome landowners' remonstrance.[647] Boonville sought to annex over 1000 acres of land adjacent to existing city limits (the "Annexation Area").[648] Certain landowners remonstrated and asserted at trial that Boonville failed to demonstrate Boonville had met its statutory requirement of showing either 60% of the Annexation Area was subdivided, or the Annexation Area was needed and can be used in the reasonably near future by Boonville for development.[649] The trial court rejected remonstrators' petition and authorized the annexation, so the remonstrators appealed, arguing the trial court erred in finding Boonville adequately met its statutory burden of proof.[650]

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641. *Id.* at 36-37.

642. *Id.* at 38.

643. *Id.* Although this statute involves regulated drains, rather than mutual drains, the *Frazee* court held the factors set forth in the statute could apply equally to mutual drains. *id.*; *see also* Crowel v. Marshall Cty. Drainage Bd., 971 N.E.2d 638 (Ind. 2012).

644. *Frazee*, 30 N.E.3d at 38-39.

645. *Id.* at 39.

646. 42 N.E.3d 1027 (Ind. Ct. App. 2015), *reh'g denied*, 2015 Ind. App. LEXIS 685 (Ind. Ct. App. Oct. 13, 2015).

647. *Id.* at 1028.

648. *Id.*

649. *Id.*

650. *Id.* The Court of Appeals provides a brief synopsis of the long history of this proposed

The Court of Appeals affirmed.[651] Annexation under Indiana law is an essentially legislative function in which courts play a limited role and must afford substantial deference to a municipality's legislative determinations.[652] The remonstrators contended on appeal that Boonville failed to satisfy the requirements of Indiana Code section 36-4-3-13, which requires a municipality show the territory to be annexed is 60% subdivided, and the territory to be annexed is needed and can be developed by the municipality in the reasonably near future.[653] The Court of Appeals rejected remonstrators' arguments regarding the 60% subdivision requirement.[654] At trial, Boonville's expert witness testified 61.5% of the territory of the Annexation Area had been divided in such a way that would have been subject to the Boonville subdivision control ordinance, had it been applicable at the time.[655] In light of the deference given to a municipality's legislative determinations, the definition of "subdivided" proffered by Boonville was sufficient to satisfy the requirements of Indiana Code section 36-4-3-13(b).[656] Similarly, the Court of Appeals confirmed the "needed and can be used" requirement under Indiana Code section 36-4-3-13(c) is to be applied by courts with substantial deference to a municipality's legislative determinations.[657] Accordingly, Boonville was not required to prove the existence of specific development projects for the Annexation Area.[658] Boonville's showing of the need for the annexation, as well as its intended uses of the Annexation Area to promote business and transportation development was sufficient to satisfy the requirements of Indiana Code section 36-4-3-13(c).[659]

B. Town of Whitestown v. Rural Perry Township Landowners

In *Town of Whitestown v. Rural Perry Township Landowners*,[660] the Court of Appeals considered the remonstrators' challenge to a proposed annexation

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annexation and the remonstrators' opposition, which has been ongoing since 2008.

651. *Id.*

652. *Id.* at 1031 (quoting *In re* Annexation of Certain Territory to City of Muncie, 914 N.E.2d 796, 801 (Ind. Ct. App 2009)).

653. *Id.* at 1032 (citing IND. CODE § 36-4-3-13(b)-(c) (2015)). Indiana Code section 36-4-3-13(b) requires a municipality show the territory is contiguous to the municipality, and that one of three conditions exists—one of which is the 60% threshold relied on by Boonville. *See id.* § 36-4-3-13(c) similarly provides more than one means for a municipality to overcome remonstrance—the one stated in this summary is the one apparently relied upon by Boonville.

654. *Am. Cold Storage NA*, 42 N.E.3d at 1033.

655. *Id.*

656. *Id.* Because the statute does not itself define "subdivided," the Court of Appeals considered the definitions for the term proffered by the parties.

657. *Id.* at 1035.

658. *Id.*

659. *Id.*

660. 40 N.E.3d 916 (Ind. Ct. App. 2015).

under Indiana Code sections 36-4-13(c) and 36-4-13(e)(2)(B).[661] The Town of Whitestown, Indiana ("Whitestown") sought to annex twenty-eight parcels of land encompassing approximately 621.87 acres in unincorporated Perry Township adjacent to Whitestown (the "Annexation Area").[662] Prior to adopting the annexation ordinance, Whitestown purchased land at the western end of the Annexation Area, intending the site for development of a new waste water treatment plant.[663] Remonstrators filed a petition challenging Whitestown's annexation ordinance, asserting Whitestown failed to carry its burden of proof with respect to Indiana Code section 36-4-13(c) (need and future use) and Indiana Code section 36-4-13(e).[664] The trial court adopted remonstrators' findings of fact and conclusions verbatim and entered judgment blocking the annexation ordinance, and Whitestown appealed.[665]

The Court of Appeals reversed and remanded for entry of judgment in favor of Whitestown.[666] On appeal, Whitestown argued the trial court erred in interpreting the relevant annexation statutes and failed to give Whitestown proper deference.[667] Indiana Code section 36-4-3-13 prescribes the substantive criteria upon which a trial court must review a proposed annexation of unincorporated land.[668] The statute requires a municipality satisfy the requirements under either subsection 13(b) or subsection 13(c), and under subsection 13(d).[669] Whitestown challenged the trial court's conclusions that the municipality failed to satisfy the requirements of Indiana Code section 36-4-3-13(c) for want of specific, impending plans for development of the Annexation Area, arguing the trial court's interpretation failed to give sufficient deference to the municipality's legislative process.[670] The Court of Appeals agreed, reasoning that in addressing the requirements of Indiana Code section 36-4-3-13(c), the focus should be on the question of the municipality's purpose for annexing the subject area.[671] Indiana courts previously held a purpose of collecting additional tax revenues alone is insufficient reason to support annexation.[672] Thus, the test under Indiana Code section 36-4-3-13(c) is not whether the annexing municipality can make do without the proposed annexation territory, but whether the municipality could use the annexation territory for a purpose other than increased tax collections in the reasonably near future.[673] The Court of Appeals concluded there was sufficient

661. *Id.* at 919.
662. *Id.*
663. *Id.*
664. *Id.* at 920.
665. *Id.* at 920-21.
666. *Id.* at 918.
667. *Id.* at 921.
668. *Id.*
669. *Id.* at 922.
670. *Id.*
671. *Id.* at 926.
672. *Id.*
673. *Id.*

evidence in the record to demonstrate Whitestown satisfied its burden under subsection 13(c), and the trial court's interpretation of Indiana Code section 36-4-3-13(c) was too narrow and failed to grant proper deference to Whitestown.[674]

Indiana Code section 36-4-3-13(e) provides a separate avenue for challenging an otherwise permissible annexation ordinance.[675] Subsection 13(e) allows remonstrators to prevail if certain elements can be established related to: (1) the availability of adequate local governmental services (police, fire protection, street/road maintenance) from a source other than the annexing municipality, (2) the financial impact of the proposed annexation upon residents or landowners, (3) "the best interests of the territory to be annexed," and (4) "the proportion of landowners opposed to the annexation."[676] Remonstrators bear the burden of proof with respect to each element except the "best interests" element, which lies with the annexing municipality to demonstrate annexation is in the best interests of the territory to be annexed.[677] This case focused on the "financial impact" element, which had not previously been adjudicated in Indiana.[678] At trial, remonstrators introduced evidence demonstrating property taxes after the addition of Whitestown's municipal tax would significantly increase property taxes in the Annexation Area, imposing a significant financial impact on landowners in the Annexation Area according to the trial court.[679] Whitestown's annexation ordinance provided, in effect, a thirteen-year period during which property taxes in the Annexation Area would not be subject to the municipal layer, which the trial court discounted as an attempt to "game the system."[680] The Court of Appeals accepted the trial court's reasoning with respect to the impact of the additional taxes, but concluded such findings did not settle the question of what must be satisfied to establish an annexation will have a significant financial impact.[681] The evidence at trial did not speak to what impact there might be after the thirteen-year period in which the Whitestown municipal layer would not be applied, only that for thirteen years following annexation, the municipal layer would not be applied.[682] And absent a legislative provision barring such an accommodation from an annexing municipality, the Court of Appeals disagreed Whitestown's withholding of its municipal property tax layer was "gaming the system."[683] Therefore, the trial court erred when it concluded an uncertain future tax situation at the end of the thirteen-year period constituted a significant financial impact under Indiana Code section 36-4-13(e) and remonstrators had

674. *Id.* at 927.
675. *Id.* at 927-28.
676. *Id.*
677. *Id.* at 928.
678. *Id.*
679. *Id.* at 928-29.
680. *Id.* at 929.
681. *Id.*
682. *Id.* at 929-30.
683. *Id.* at 930.

satisfied their statutory burden.[684]

C. Fight Against Brownsburg Annexation v. Town of Brownsburg

In *Fight Against Brownsburg Annexation v. Town of Brownsburg*,[685] the Court of Appeals considered a remonstrance petition filed against the Town of Brownsburg ("Town Council"), Indiana to protest the annexation of thousands of acres of land. [686] In early 2013, the Town Council introduced an ordinance proposing the annexation of 1193 parcels located on 4461 acres of land north of Brownsburg and a related fiscal plan.[687] Shortly thereafter, several affected landowners formed a group called the Fight Against Brownsburg Annexation ("Remonstrators") and began gathering signatures for an appeal through a remonstrance petition under Indiana Code section 36-4-3-11.[688] The Town Council held public hearings over the next few months regarding the annexation plan as well as related zoning issues, ultimately adopting a final annexation plan.[689] In response, the Remonstrators filed a written remonstrance petition for declaratory judgment to the trial court with signatures of the owners of 808 out of the 1193 parcels to be annexed, or approximately 67%.[690] The Town Council moved to dismiss the remonstrance for lack of subject matter jurisdiction, failure to state a claim upon which relief can be granted, and finally for the Remonstrators' failure to obtain a sufficient number of signatures under Indiana Code section 36-4-3-11(a).[691] The trial court dismissed the remonstrance petition for lack of subject matter jurisdiction.[692] The Remonstrators appealed.[693]

The Court of Appeals first analyzed the subject matter jurisdiction issue and found the trial court erred by dismissing the remonstrance petition.[694] More importantly, in relation to real estate law, the Court of Appeals also analyzed the issues raised by the parties under Indiana Code section 36-4-3-11.[695] Indiana Code section 36-4-3-11 allows for an appeal of an annexation of a territory by a municipality by filing a written remonstrance with the appropriate court within the county in which the territory is located.[696] The written remonstrance required by Indiana Code section 36-4-3-11 must be signed by at least 65% of the land owners in the annexed territory or the owners of more than 75% of the assessed

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684. *Id.*
685. 32 N.E.3d 798 (Ind. Ct. App. 2015).
686. *Id.* at 800.
687. *Id.*
688. *Id.*
689. *Id.*
690. *Id.* at 801.
691. *Id.*
692. *Id.*
693. *Id.*
694. *Id.* at 802-05.
695. *Id.* at 805-06.
696. IND. CODE § 36-4-3-11 (2015).

valuation of the annexed territory.[697] To determine the total number of landowners of the annexed territory, the court should consider the names appearing on the tax duplicate for that county as prima facie evidence.[698] Finally, the written remonstrance petition required by Indiana Code section 36-4-3-11 must be filed within ninety days after the publication of the annexation ordinance with a copy of the ordinance as well as a reason as to why the annexation should not take place.[699]

The Remonstrators appealed the trial court's determination that the petitioners failed to attach a sufficient amount of signatures to their written remonstrance petition under Indiana Code section 36-4-3-11.[700] The Court of Appeals reversed the trial court holding that the Remonstrators' remonstrance petition was sufficient on its face as if the signatures were valid.[701] The Town Council made several arguments under Indiana Code section 36-4-3-11 concerning the signatures on the remonstrance petition.[702] First, the Town Council argued the signatures on the petition should have been gathered following the actual adoption of the annexation ordinance, but the Court of Appeals found no language in Indiana Code section 36-4-3-11 to support this contention.[703] Second, the Town Council argued the Remonstrators' petition was deficient because it did not include the signatures of every owner of the parcels of land owned by more than one person, but the Court of Appeals found Indiana Code section 36-4-3-11 expressly states only one owner needs to sign for each parcel.[704] Finally, the Town Council argued the remonstrance petition was moot, as many of the petition's signatures were collected prior to amendment of the ordinance, but the Court of Appeals held Indiana Code section 36-4-3-11 does not require a timeframe for the signatures to have been collected.[705] Moreover, the Court of Appeals held no substantive change was made to the ordinance from the proposed version to the final amended version.[706] Accordingly, the Court of Appeals concluded the trial court should not have granted the Town Council's Trial Rule 12(6)(b) Motion to Dismiss.[707]

D. Certain Martinsville Annexation Territory Landowners v. City of Martinsville

In *Certain Martinsville Annexation Territory Landowners v. City of*

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697. *Id.*
698. *Id.*
699. *Id.*
700. *Fight Against Brownsburg Annexation*, 32 N.E.3d at 806.
701. *Id.* at 811.
702. *Id.* at 807.
703. *Id.*
704. *Id.* at 809-10.
705. *Id.* at 810.
706. *Id.* at 808.
707. *Id.* at 810.

Martinsville,[708] the Court of Appeals held absent an injunction or stay of the annexation procedure, after an annexation becomes final, any appeal of a proposed annexation will become moot.[709] The City of Martinsville (the "City") adopted an amended resolution in August 2012 to annex 3030 acres of land surrounding the City.[710] In November 2012, the Remonstrators filed a petition against the evidence and arguments, the trial court entered its judgment against the Remonstrators, thus upholding the annexation.[711]

"Under Indiana Code section 36-4-3-15(f), an annexation becomes effective when the clerk of the municipality complies with the filing requirement of section 22(a)."[712] Indiana Code section 36-4-3-22(a) then requires the clerk to file the affirmed annexation ordinance with each of the following: (A) the county auditor of each county in which the annexed territory is located; (B) the circuit court clerk of each county in which the annexed territory is located; (C) if a board of registration exists, the registration board of each county in which the annexed territory is located; (D) the Office of the Secretary of State; (E) the Office of Census Data established by I.C. 2-5-1.1-12.2.

In *City of Martinsville*, the trial court ordered the approval of the annexation ordinance on January 15, 2014.[713] On January 24, 2014, the City filed a copy of the judgment and annexation ordinance with the necessary authorities.[714] "Once these steps had been taken, the annexation became final and effective, and the annexation territory became part of the City."[715] "The Remonstrators did not request a stay of the annexation at any time prior to the appeal."[716] Since the annexation became effective without the Remonstrators requesting an injunction or a stay ordering the municipality to not proceed with the proposed annexation pending appeal, any further challenges to the annexation of land were therefore moot.[717] "An appellate court cannot grant any effective relief without a stay because it has no statutory authority to order disannexation."[718]

Furthermore, the Court of Appeals concluded the public interest exception to the mootness doctrine did not apply.[719] The Court of Appeals noted, "the Supreme Court has long held that landowners have no vested interest in maintaining any particular municipal boundaries because annexation of territory to a city is not a taking of the property and does not deprive any person of any

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708. 18 N.E.3d 1030 (Ind. Ct. App. 2014), *trans. denied*, 26 N.E.3d 981 (Ind. 2015).
709. *Id.* at 1034.
710. *Id.* at 1032.
711. *Id.* at 1034.
712. *Id.*
713. *Id.*
714. *Id.*
715. *Id.*
716. *Id.*
717. *Id.* at 1033-34.
718. *Id.* at 1034.
719. *Id.*

property."[720] Thus, this case, in the Court's view, did not present "a question of great public importance" and the questions presented on appeal in the case were unlikely to recur or "continue to evade review."[721] The Remonstrators' appeal was thus held as moot and dismissed.[722]

E. Town of Fortville v. Certain Fortville Annexation Territory Landowners

In *Town of Fortville v. Certain Fortville Annexation Territory Landowners*,[723] the Court of Appeals contemplated whether courts should consider non-physical uses to determine whether a municipality needs and can use proposed annexation territory.[724] The Town of Fortville sought to annex 644 acres of land (the "Annexation"), which was surrounded on three sides by Fortville's boundaries.[725] 93% of the owners of the parcels in the Annexation filed a petition remonstrating against the annexation.[726] After stipulations by both parties, the issue was narrowed to the question of what factors may be considered, under Indiana Code section 36-4-3-13(c)(2), in determining whether an annexation is needed and can be used by a municipality for its development in the reasonably near future.[727] After a bench trial, the court concluded Fortville failed to demonstrate the Annexation was needed and could be used for the town's development in the reasonably near future.[728]

Fortville appealed, arguing the trial court erred when it did not afford the town's annexation ordinance substantial deference.[729] In agreement with Fortville, the Court of Appeals reversed the lower court's ruling.[730] The Court of Appeals noted the types of evidence cited by the trial court that would support annexation, including plans for construction of schools, plans for opening and closing of roads in the area, and evidence showing expansion from the town surrounding the area on three sides.[731] The Court of Appeals concluded the trial court improperly sought evidence only of physical construction to meet Fortville's burden.[732] Rather, a municipality does not need to provide evidence of "brick and mortar" construction to show its need and use for the annexed land

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720. *Id.* at 1035; *see also* Annexation Ordinance F-2008-15 v. City of Evansville, 955 N.E.2d 769, 777 (Ind. Ct. App. 2011); Bradley v. City of New Castle, 764 N.E.2d 212, 216 (Ind. 2002).

721. *Certain Martinsville Annexation Territory Landowners*, 18 N.E.3d at 1035.

722. *Id.*

723. 36 N.E.3d 1176 (Ind. Ct. App. 2015), *vacated*, No. 30S01–1510–MI–626, 2016 WL 1718831 (Ind. 2016).

724. *Id.* at 1177.

725. *Id.*

726. *Id.*

727. *Id.*

728. *Id.* at 1178.

729. *Id.*

730. *Id.* at 1181.

731. *Id.* at 1179.

732. *Id.* at 1180.

for development in the near future.[733] The Court of Appeals held the facts demonstrated by Fortville were sufficient: (1) the Annexation partakes in the town's water and emergency services; (2) "Fortville intends to expand and continue to develop municipal services . . . provided to the Annexation"; (3) Fortville seeks to protect its sewer and utility services; and (4) development in the areas to the north and west of the Annexation is quickly growing.[734] Ultimately, Indiana courts should consider non-physical factors that pertain to development, including "using annexed territory for 'transportation linkages with other developing areas, to control adjacent development on its borders, and to prevent conflicting land uses.'"[735] The trial court's judgment was reversed and the case was remanded.[736]

XII. ABANDONMENT OF MOBILE HOMES

In *Mobile Home Management Indiana, LLC v. Avon Village MHP, LLC*,[737] the Court of Appeals addressed the issue of the timing requirements of the Indiana Abandoned Mobile Home Statute.[738] The *Mobile Home Management case* arose after a property owner purchased certain property that contained mobile homes from a sheriff's sale.[739] The sale did not include title to the mobile homes.[740] The property owner began the process to auction the mobile homes as "abandoned" under the Abandoned Mobile Home Statute,[741] which grants a property owner the right to auction an abandoned mobile home if it has been on the property owner's property without permission for thirty days.[742] The thirty-day clock of "without permission" begins when the property owner delivers a statutorily required notice to the mobile home's owner of record.[743] If the owner of record of the mobile home does not request additional time or remove the mobile home within thirty days of the first notice, the property owner is required to send a second notice by certified mail to the owner of record of the mobile home.[744] "The auction may be held no sooner than thirty days after the second notice's return receipt is received by the property owner."[745] In *Mobile Home Management*, the property owner mailed the two notices, but did not comply with the statutorily required time frames, by conducting the auction only forty-two

733. *Id.*
734. *Id.*
735. *Id.* at 1181 (quoting Chidester v. City of Hobart, 631 N.E.2d 908, 913 n.6 (Ind. 1994)).
736. *Id.*
737. 17 N.E.3d 275 (Ind. Ct. App. 2014), *trans. denied*, 26 N.E.3d 614 (Ind. 2015).
738. *Id.* at 278; IND. CODE §§ 9-22-1.5-1 to -7 (2016).
739. *Mobile Home Mgmt. Ind., LLC*, 17 N.E.3d at 277.
740. *Id.*
741. *Id.*
742. *Id.* at 279.
743. *Id.* at 280.
744. *Id.*
745. *Id.*

days after the first notice, rather than sixty days as required by the statute.[746] At the sheriff's sale, the property owner purchased all the mobile homes at issue.[747] Shortly after the auction, the record owner of the mobile homes sold the mobile homes to a third party.[748] The property owner then filed suit for declaratory judgment to declare it the rightful owner of the mobile homes.[749] The trial court denied the third party's motion for summary judgment.[750] The third party appealed.[751]

The Court of Appeals reversed the trial court, holding a property owner is required to strictly comply with the statutory notice requirements under the Abandoned Mobile Home Statute.[752] Accordingly, the third party purchaser was the title holder to the mobile homes since the property owner did not comply with the sixty-day minimum notice provision of the statute.[753]

746. *Id.* at 277.
747. *Id.*
748. *Id.* at 277-78.
749. *Id.* at 278.
750. *Id.*
751. *Id.*
752. *Id.* at 280.
753. *Id.*