SURVEY OF RECENTLY REPORTED CASES IN REAL PROPERTY LAW

BRIAN C. CRIST, DEVIN D. BROWN, TYLER J. HARDCASTLE,
KATIE J. MARSCHKE, HALEY L. SOSHNICK,
MICHAEL R. TIRMAN, & ANNIE ROBERTA XIE*

INTRODUCTION

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

I. AUTHORITY OF AN AGENT

A. HLH Consulting v. Bird Automotive

In *HLH Consulting v. Bird Automotive*,[1] the Court of Appeals held that real estate broker contracts that violate the Indiana Broker Licensing Act are not subject to equitable relief claims like unjust enrichment.

In 2009, Harold Hurst, a real estate agent and president of HLH Consulting ("HLH") assisted Christine Burd Tanner ("Christine") in selling her late husband's assets, which included Burd Ford, a car dealership (the "Car Dealership").[2]

> Christine . . . signed two . . . agreements: one agreement in which [she] agreed HLH would "solicit buyers and arrange for the sale of your auto

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* **Brian C. Crist** is a partner in Ice Miller LLP's real estate section. He received his B.A. in History and Economics from the University of Missouri in 1994 and his J.D. from Vanderbilt University in 1997. **Devin D. Brown** is an associate attorney in Ice Miller's real estate section. He received his B.A. in Economics from the University of Indianapolis in 2015 and his J.D. from Indiana University Maurer School of Law in 2019. **Tyler J. Hardcastle** is an associate attorney in Ice Miller's real estate section. He received his B.A. in Political Science from Wabash College in 2015 and his J.D. from Indiana University Robert H. McKinney School of Law in 2019. **Katie J. Marschke** is an associate attorney in Ice Miller's real estate section. She received her B.S. in Hospitality and Tourism Management from Purdue University in 2009 and her J.D. from Pennsylvania State University Dickinson School of Law in 2013. **Haley L. Soshnick** is an associate attorney in Ice Miller's real estate section. She received her B.A. in Political Science and French in 2015 and her J.D. from Northwestern University Pritzker School of Law in 2018. **Michael R. Tirman** is an associate attorney in Ice Miller's real estate section. He received his B.A. in Music with a second major in Finance from Butler University in 2012 and his J.D. from Northwestern University Pritzker School of Law in 2015. **Annie Roberta Xie** is an associate attorney in Ice Miller's real estate section. She received her B.S. in Environmental Science from Brigham Young University in 2014 and her J.D. from Indiana University Maurer School of Law in 2017.

1. HLH Consulting, LLC v. Bird Auto., Inc., 146 N.E.3d 1051 (Ind. Ct. App. 2020).
2. *Id.* at 1053-54.

> related dealerships by an asset or stock sale" ("Asset [Sale] Agreement") and another . . . agreement in which they agreed HLH would "obtain a lease or sale of the real estate owned personally by you or your company and used in the operation of your auto related businesses" ("Real Estate [Sale] Agreement") (collectively, the "[Sale] Agreement(s)").[3]

HLH eventually found a buyer, Jeff Wyler Automotive Family, Inc. ("Wyler"), who offered to purchase the car dealership.[4]

Wyler and Christine entered into an agreement in which Wyler agreed to purchase the dealership's assets, which was contingent upon Wyler's execution of an agreement to lease the real estate upon which the Car Dealership was located.[5] However, before closing, Ford Motor Company exercised its right of first refusal with respect to the proposed sale and entered into a similar asset, lease, and consulting agreement with Christine, which closed in 2012.[6] After closing, Christine initially paid HLH a one-time commission for the asset sale and a monthly commission per the lease agreement, but at some point in 2014 or 2015, she stopped making the payments.[7]

HLH filed a complaint against Christine, alleging breach of contract and unjust enrichment.[8] "Defendants filed their answer asserting affirmative defenses and a counterclaim seeking the return of all commission paid to HLH" because "HLH negotiated [the] transaction for the lease or sale of real estate as a business broker without a real estate broker's license, which violated the Indiana Broker Licensing Act and rendered the [Sale] Agreements void."[9] The trial court held a hearing and granted Christine's motion for summary judgment, stating that relief was not available to HLH because HLH "was not a licensed real estate broker under Indiana Code § 25-34.1-1-1, *et seq.*, (2011) in effect at the time and [therefore could]not recover commissions."[10] The court went on to state that the Sale Agreements at issue were considered to constitute a single agreement, even though one was an agreement for real property and the other personal, and that HLH was not allowed to collect a commission in regards to the Sale Agreement under Indiana Code section 25-34.1-6-2.[11] The court required HLH to return all commission previously received as well.[12] HLH appealed that decision.

The Court of Appeals affirmed the trial court's decision, ruling that the Sale Agreement "violated Indiana law and [wa]s void and unenforceable as against public policy" and that "HLH must forfeit any commission [Christine] already

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3. *Id.*
4. *Id.* at 1054.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* at 1055.
9. *Id.*
10. *Id.*
11. *Id.* at 1055-56.
12. *Id.* at 1056.

paid and is not entitled to equitable relief."[13] The Court of Appeals stated that "[t]he contemporaneous document doctrine provides that '[i]n the absence of anything to indicate a contrary intention, writings executed at the same time and relating to the same transaction will be construed together in determining the contract,'" and the court reasoned that because the Real Estate Sale Agreement and Asset Sale Agreement pertained to the same transaction and were signed at the same time, the contemporaneous document doctrine applied.[14] The Court of Appeals then turned its focus to the Indiana Broker Licensing Act, which it stated made clear in its statutory language that HLH was required to have a real estate broker license to be involved in the sale of the real estate on which the dealership sat.[15] Last, the trial court turned to HLH's argument that it was nonetheless entitled to equitable relief.[16] The Court of Appeals reasoned, however, that the Indiana Broker Licensing Act's statutory language requiring forfeiture of commission makes it clear that "contracts made in violation of the statute are not subject to equitable relief."[17]

II. CONDITIONS PRECEDENT

A. City of Plymouth v. Michael Kinder & Sons, Inc.

In *City of Plymouth v. Michael Kinder & Sons*,[18] the Court of Appeals held that a condition precedent to a Mediation Agreement (defined below) was unsatisfied, and therefore the Mediation Agreement was unenforceable.[19] In 2018, Michael Kinder & Sons, Inc. ("Plaintiff") filed a lawsuit against the City of Plymouth, Indiana (the "City") and the City of Plymouth Redevelopment Commission (the "Commission"), alleging breach of contract and unjust enrichment.[20] After several motions were filed, Plaintiff, the City, and the President of the Commission attended a mediation conference and executed an agreement (the "Mediation Agreement") that provided the following:

> 1) The [City] shall, *subject to the approval* of the . . . Commission keep its offer to settle this litigation for the payment of $130,000.00 to the Plaintiff open.
> 2) *If* the Plaintiff accepts the [City's] offer to pay $130,000 to settle this case *then* the case shall be settled.
> 3) *If* the case is settled *then* the litigation shall be dismissed with

13. *Id.* at 1060.

14. *Id.* at 1057-58 (quoting Lily, Inc. v. Silco, LLC, 997 N.E.2d 1055, 1068 (Ind. Ct. App. 2013)).

15. *Id.* at 1059.

16. *Id.*

17. *Id.* at 1060.

18. City of Plymouth v. Michael Kinder & Sons, Inc., 137 N.E.3d 312 (Ind. Ct. App. 2019).

19. *Id.* at 317.

20. *Id.* at 313.

prejudice and all parties shall execute a mutual release.[21]

After the parties executed the Mediation Agreement, Plaintiff's counsel attempted to accept the City's last mediation offer of $130,000, but the City's counsel responded that the Commission had not approved the offer yet.[22] After this exchange, the Commission deliberated the settlement and ultimately did not approve the settlement.[23] Plaintiff then filed its Motion to Enforce Written Mediation Agreement with the trial court, and following a hearing, the trial court granted Plaintiff's motion.[24] The City appealed the trial court's decision.[25]

The Court of Appeals held that a "condition precedent is either a condition which must be performed before the agreement of the parties shall become a binding contract, or it may be a condition which must be fulfilled before the duty to perform an existing contract arises."[26] The Court of Appeals found that "the plain language of the [Mediation A]greement unambiguously states that the City's promise to 'keep its offer' to settle open was 'subject to' approval by the Commission."[27] Therefore, "any settlement between the parties was subject to a condition precedent," and because the condition precedent was unsatisfied, the City was not obligated to pay the $130,000 to settle the offer.[28] The Court of Appeals found that the trial court erred, and it reversed and remanded for further proceedings.[29]

III. DAMS

A. Miami County v. Indiana Department of Natural Resources

In *Miami County v. Indiana Department of Natural Resources*,[30] the Court of Appeals considered the ownership of dam structures underlying public roads which had been accepted into the county highway system. The court held that although Miami County (the "County") had an obligation to maintain the roads running over the dams, such obligation did not extend to an ownership right or obligation as to the underlying dams.[31] The obligation to maintain the roads stemmed from the County Commissioners accepting certain roads, which had been dedicated by plat as part of a subdivision with seven dams and a system of recreational lakes developed by predecessors to certain owners (the "Owners")

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21. *Id.* at 313-14 (emphasis in original).
22. *Id.* at 314.
23. *Id.*
24. *Id.* at 314-15.
25. *Id.* at 315.
26. *Id.* at 316.
27. *Id.*
28. *Id.* at 316-17.
29. *Id.* at 317.
30. Miami Cty. v. Ind. Dep't of Nat. Res., 146 N.E.3d 1027 (Ind. Ct. App. 2020).
31. *Id.* at 1031.

of the property upon which six of the dams were located.[32] The Owners and the County were cited for violations of the Dam Safety Act and ordered to maintain the dams in a safe condition as owners of the dams.[33] The County disputed its designation as an owner of the dams, and the Indiana Natural Resources Commission ("NRC") held a hearing and found that the County was "an owner of the dams by virtue of its easement interest in the roads on top of the dams" and was liable only for the roadway dams.[34] The parties then petitioned for judicial review, and the trial court reversed the NRC's order and found that the County was responsible for all aspects of the dams as "an owner of the property upon which the structure is located" with joint and several responsibility with the Owners.[35]

The Court of Appeals, in reviewing the decisions by the trial court and NRC, held that agencies are entitled to deference for their "reasonable interpretation of regulations and statutes."[36] However, statutes are to be given their "clear and plain meaning" when reviewed, in order to "avoid unjust or absurd results."[37] The court pointed to the absurd result that, by extension of the NRC's and trial court's reasoning, a nonprofit with an easement for hiking would similarly be considered an owner of a dam underlying the hiking path and thus be held responsible for maintaining the dam.[38] Because the Dam Safety Act defines an owner as having "a right, a title, or an interest in or to the property upon which the structure [i.e., the dam and its appurtenant works] is located,"[39] the court reasoned that the County was not an owner, as it only had an interest in the roads "*on top of* the dams" and not the underlying property, and therefore the maintenance obligation only extended to those roads.[40]

IV. EASEMENTS, COVENANTS, AND TITLE ISSUES

A. Cain v. William J. Huff, II, Revocable Trust Declaration, Dated June 28, 2011

In *Cain v. William J. Huff, II, Revocable Trust Declaration, Dated June 28, 2011*,[41] the Court of Appeals affirmed the trial court's holding, which had

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32. *Id.* at 1028-29.

33. *Id.* at 1029.

34. *Id.*

35. *Id.* at 1029-30.

36. *Id.* at 1030 (quoting Walker v. State Bd. of Dentistry, 5 N.E.3d 445, 448 (Ind. Ct. App. 2014)).

37. *Id.* at 1030-31 (quoting Fight Against Brownsburg Annexation v. Brownsburg, 32 N.E.3d 798, 806 (Ind. Ct. App. 2015)).

38. *Id.* at 1031.

39. *Id.* at 1029 (quoting IND. CODE § 14-27-7.5-4 (2021)).

40. *Id.* at 1031 (emphasis in original) (footnote omitted).

41. Cain v. William J. Huff, II, Revocable Trust Declaration, Dated June 28, 2011, 149 N.E.3d 645 (Ind. Ct. App. 2020).

dismissed a motion to issue a preliminary injunction to prevent the use of an easement.

Michael Cain and Linda Raymond (the "Homeowners") owned property in The Shores subdivision in Monroe County (the "Shores") that was adjacent to 200 acres (the "Benefited Property") owned by William and Nicole Huff (the "Huffs").[42] The Huffs had an easement over a roadway crossing through the Shores, allowing them to access their adjacent property for the limited purposes of the "construction, development, and use by the Huffs and their grantees and assigns of six single-family residential structures" (the "Easement").[43] At issue is the Huffs' use of the Easement to move harvested lumber from their property.[44]

In 2018, the Homeowners filed an initial complaint for declaratory judgment and injunctive relief, asserting that the Huffs' access Easement did not extend to the transportation of harvested commercial lumber.[45] The trial court's ruling in the Homeowners favor prohibited the Huffs from using the Easement for any activity other than development of single-family homes.[46] In 2019, the Court of Appeals vacated the trial court's ruling for being overbroad and found that the Easement did include transporting commercial logging activities to prepare the Huffs' property for development, consistent with the terms of the Easement.[47] This case came from a second motion for preliminary injunction filed by the Homeowners, asserting that the Huffs were crossing the Shores property with lumber collected from different property owned by the Huffs (the "Other Benefited Property") not covered by the Easement, and the Homeowners excluded portions of the original motion to narrow the second motion.[48] The court addressed the Homeowners' arguments surrounding the excluded portions procedurally.[49] The court considered four factors which were the available adequate remedy at law, the likelihood of success at trial, harm to the Homeowners versus harm to the Huffs, and the public interest to determine if it should grant the preliminary injunction related to the Other Benefited Property.[50]

When considering the availability of an adequate remedy at law, the court found no evidence of irreparable harm, which, if present, would prevent an adequate remedy at law.[51] The Huffs offered to issue a bond for damage done and agreed to fix any damage done.[52] As a result, the court found that any damage was compensable.[53] In addition, the Court of Appeals did not accept the Homeowners

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42. *Id.* at 648.
43. *Id.* at 650.
44. *Id.* at 648.
45. *Id.* at 649.
46. *Id.* at 650.
47. *Id.* at 650-51.
48. *Id.* at 651.
49. *Id.*
50. *Id.* at 655.
51. *Id.* at 655-56.
52. *Id.* at 655.
53. *Id.*

argument that the Huffs committed trespass, reiterating "that . . . trespass . . . cannot [occur] for an invasion of a[n] easement."[54]

To determine the likelihood of success at trial, the Court of Appeals considered whether the Huffs had exceeded their authority under the Easement.[55] The Court of Appeals held that under Indiana law, the distinction between the Huffs using the easement from the Benefited Property or the adjoining Other Benefited Property had no bearing, as the properties had unity of title in favor of the Huffs.[56] As a result, the court concluded that the same reasoning that it applied in 2019 also applied in this case, allowing the use of the same analysis of the facts that led the Court of Appeals to its initial conclusion in support of the Huffs.[57]

When considering the harm to the Homeowners vis-à-vis the harm to the Huffs, the Court of Appeals found that the financially calculable damage to the Homeowners that had not yet occurred was outweighed by the revenue loss from the lumber and loss of development revenue for the Huffs.[58] Finally, the public interest factor was also decided in favor of the Huffs.[59] The court relied on the actual text of the easement, that the Huffs' development plans were pursuant to a stewardship plan, and that the Shores and surrounding properties would be benefited by the forest fire prevention trails being created by the logging activity.[60]

B. Duke Energy Indiana, LLC v. J & J Development Co.

In *Duke Energy Indiana, LLC v. J & J Development Co.*,[61] the Court of Appeals considered the scope of a landowner's right to use property encumbered by an electrical line easement. J & J Development Company ("Developer") acquired and developed certain property encumbered by "a 300-foot-wide electric-transmission-line easement" granted to Duke Energy Indiana, LLC ("Duke").[62] Developer then proceeded to construct the following within the easement area: "an entrance from State Road 60 (the only entrance to the planned neighborhood); a road with curbs (Palermo Street) running parallel to and largely within the [e]asement [area]; detention basins (in which water ponds temporarily after rain); a fire hydrant; and buried utility lines."[63]

Though the parties agreed that Developer retained the right to make some use of the land, the issue was whether Developer's improvements unreasonably

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54. *Id.* (quoting Ind. Mich. Power Co. v. Runge, 717 N.E.2d 216, 227 (Ind. Ct. App. 1999)).
55. *Id.* at 656.
56. *Id.*
57. *Id.* at 657.
58. *Id.*
59. *Id.*
60. *Id.*
61. Duke Energy Ind., LLC v. J & J Dev. Co., 142 N.E.3d 916 (Ind. Ct. App. 2020).
62. *Id.* at 917-18.
63. *Id.* at 919.

interfered with Duke's enjoyment of the easement so as to be inconsistent with the grant of easement and prohibited as a matter of law.[64] Duke presented evidence in its brief, not disputed by Developer, that, in its experience, each of the improvements within the easement area would impair or possibly inhibit Duke's ability to access the easement area, or repair, maintain, or replace the electric facilities.[65] Developer gave three primary responses: (1) the specific restrictions raised by Duke were an impermissible expansion of the burden, (2) the improvements did not interfere with the transmission of electricity and posed no issue to maintenance to date and thus were permissible, and (3) the improvements were expressly contemplated by the easement.[66] The Court of Appeals in turn cited the specific language of the easement as dismissing each argument: (1) specific restrictions were not an expansion but an (acceptable) interpretation of the general restriction that "Grantors reserve the use of the . . . land *not inconsistent with* this grant"[67]; (2) the easement rights granted were not just the transmission of electricity but "the perpetual right, privilege, easement and authority to enter upon the real estate hereinafter described and, now or in the future, there *to construct, erect, maintain, operate, inspect, patrol, repair, replace, extend, renew and/or remove*" the various facilities, i.e., the right to freely move within the easement area and maintain the necessary infrastructure "now *or in the future*"[68]; (3) fences are the only new improvements expressly contemplated and the fundamental question remains of whether the improvements are "'not inconsistent' with the grant of the [e]asement, i.e., improvements that do not unreasonably interfere with the use of the [e]asement."[69]

Developer next cited other sources to support a finding that the improvements were permissible including the National Electrical Safety Code, the Clark County Plan Commission's approval of the plat (and purported waiver by Duke), and case law.[70] The Court of Appeals found that Developer's responses were insufficient to rebut the evidence by Duke that the improvements unreasonably interfered with Duke's rights under the easement and remanded for entry of summary judgment in Duke's favor including an injunction that Developer remove the improvements.[71] The Court of Appeals emphasized that though the result may seem harsh, "a landowner who constructs improvements on an easement—especially without consulting the easement holder—does so 'at their

64. *Id.* at 921

65. *See id.* at 921-23 (describing complications arising from a potential need to block the sole entrance to the neighborhood, the potential damage by Duke equipment to utilities running parallel with the easement area, the increased cost and time that may be necessitated by obstructions of such detention basins in inappropriate locations, and the risk of a fire hydrant rupturing and creating "an energized water flow" as a result of work on the transmission line).

66. *Id.* at 923-25.

67. *Id.* at 924 (quoting the easement instrument) (emphasis added by the court).

68. *Id.* (quoting the easement instrument) (emphasis added by the court).

69. *Id.* at 925.

70. *Id.* at 925-27.

71. *Id.* at 927-28.

peril.'"[72]

V. EMINENT DOMAIN

A. Guzzo v. Town of St. John

In *Guzzo v. Town of St. John*,[73] the Supreme Court held that Indiana Code section 32-24-4.5-8(a)(2) applied retroactively to a pending eminent domain proceeding.[74] As of July 1, 2019, the General Assembly amended Indiana Code section 32-24-4.5 to provide a definition for "residential property" and "to clarify that owners of [condemned] residential property . . . are entitled to 150% of the 'fair market value of the parcel as determined under IC 32-24-1.'"[75] The General Assembly intended that Indiana Code section 32-24-4.5-8(a)(2) applies as follows:

> to all residential property, regardless of whether the property is occupied by the owner as a residence, in the case of an eminent domain proceeding initiated: (A) after June 30, 2019; or (B) before July 1, 2019, and with respect to which the fair market value of the parcel has not been determined under IC 32-24-1 before July 1, 2019.[76]

David Guzzo (the "Landowner") and the Town of St. John (the "Town") disagreed on whether the requirements of section 8(b)(2)(B) had been satisfied to permit the enhanced compensation provisions contained in section 8(a)(2) to retroactively apply.[77] The parties agreed "that the eminent domain proceeding[s were] initiated before July 1, 2019[, b]ut . . . disagree[d] on whether the fair market value [of the parcel] was determined according to the eminent domain

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72. *Id.* at 928 (quoting Panhandle E. Pipe Line Co. v. Tishner, 699 N.E.2d 731, 739 (Ind. Ct. App. 1998)).

73. Guzzo v. Town of St. John, 131 N.E.3d 179 (Ind. 2019).

74. This case relates to an ongoing lawsuit between David Guzzo, as the "Landowner" and the Town of St. John, Lake County, Indiana, as the "Town." The prior case, which contains some background information, can be found at 112 N.E.3d 1159 (Ind. Ct. App. 2018).

75. *Id.* at 180; *see also* IND. CODE § 32-24-4.5-8(a)(2) (2021) ("Notwithstanding 32-24-1, a condemnor that acquires a parcel of real property through the exercise of eminent domain under this chapter shall compensate the owner of the [residential property by making a]: (A) payment to the owner equal to one hundred fifty percent (150%) of the fair market value of the parcel as determined under IC 32-24-1; (B) payment of any other damages determined under IC 32-24-1 and any loss incurred in a trade or business that is attributable to the exercise of eminent domain; and (C) payment of the owner's relocation costs, if any.").

76. *Guzzo*, 131 N.E.3d at 180-81; IND. CODE § 32-24-4.5-8(b)(2). Please note that Indiana Code section 32-24-4.5-8(b)(1) does not apply because the Court of Appeals held that the subject property was not residential property occupied by the owner as a residence. *See Guzzo v. Town of St. John*, 112 N.E.3d at 1162.

77. *Guzzo*, 131 N.E.3d at 181.

procedures [under section 32-24-1] before July 1, 2019."[78]

The Supreme Court held that the "fair market value is determined under . . . 32-24-1 either by the agreement of the parties or by the trier of fact."[79] Under Indiana Code section 32-24-1, after the filing of a complaint to determine damages under the eminent domain statute, the trial court appoints three appraisers "to assess damages . . . that the owner or owners severally may sustain, or be entitled to, by reason of the acquisition."[80] The three appraisers determine and report their findings, and any party "aggrieved" by the appraisers' findings may file an "exception" to the report.[81] When an "exception" to the report is filed, the trial court holds a proceeding on the exception before the court or a jury,[82] and the fair market value is a question of fact determined by the court or the jury.[83] The Town argued that the fair market value of the subject property was "'determined under IC 32-24-1' when the [three] appraisers file[d] their report," but the Supreme Court rejected their argument, finding instead that the "fair market value is determined under . . . 32-24-1 either by the agreement of the parties or by the trier of fact."[84] Accordingly, it was appropriate for the trial court to consider whether the Landowner was entitled to enhanced compensation under Indiana Code section 32-24-4.5.

B. VanHawk and the 27 Group, Inc. v. Town of Culver

In *VanHawk v. Town of Culver*,[85] the Court of Appeals held that although the trial court's demolition order was clearly erroneous under Indiana's Unsafe Building Law, it was not clearly erroneous under a common law public nuisance theory.

In 2018, the Town of Culver's ("Culver") Building Commissioner sought to designate a building as an "unsafe building" pursuant to Culver's Unsafe Building Ordinance.[86] The 27 Group, Inc. (the "Group") owned the property.[87] "After Culver received a report that there was a broken door wide open on the [p]roperty, it notified . . . the town's Building Commissioner," Chuck Dewitt, who inspected the property on June 27, 2018.[88] Dewitt captured photos of the condition of the property, before contacting the Group to board up the door.[89]

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78. *Id.*

79. *Id.*

80. *Id.*; IND. CODE § 32-24-1-7(c).

81. *Guzzo*, 131 N.E.3d at 181; IND. CODE §§ 32-24-1-9(c), 32-24-1-11(b).

82. *Guzzo*, 131 N.E.3d at 181; IND. CODE § 32-24-1-11(c).

83. *Guzzo*, 131 N.E.3d at 181; *see also* State v. Jordan Woods, Inc., 225 N.E.2d 767, 771 (Ind. 1967).

84. *Guzzo*, 131 N.E.3d at 181.

85. VanHawk v. Town of Culver, 137 N.E.3d 258 (Ind. Ct. App. 2019).

86. *Id.* at 261-62.

87. *Id.* at 262.

88. *Id.* at 261.

89. *Id.*

Culver began taking steps "to designate the [p]roperty an unsafe building. On July 24, 2018, the Marshall County Unsafe Building Committee ([the] 'Hearing Authority'), of which Dewitt is a member, convened to determine the status of the [p]roperty[, and] determined that the [p]roperty was unsafe and needed to be demolished."[90] Notice was sent to the Group but the property was not repaired, and on August 15, 2018, Culver filed a Complaint to Public Nuisance and Unsafe Building and Request for Preliminary Relief against the Group.[91] Culver requested that the court order the Group to either repair the property themselves or issue an order allowing Culver to demolish the property.[92] "The same day, Culver also filed an Application for Injunction, in which it requested . . . the trial court hold a hearing and issue an injunction ordering the [Group] to repair the [p]roperty."[93] In that motion, Culver stressed that the property was determined to be unsafe by the Hearing Authority under Indiana Code section 36-7-9-5.[94]

At the hearing, Culver offered the photos it took of the property and Dewitt's testimony describing the condition of the property into evidence, but did not offer the Hearing Authority's determination as evidence.[95] Ultimately, the trial court issued a written order requiring the building be demolished, and specifically stating that if the Group "fails to demolish the building, Culver may demolish the building and recoup expenses from the [Group]."[96] The Group appealed that decision.[97]

The Court of Appeals affirmed the trial court's demolition order under the theory of common law public nuisance, but determined that Indiana's Unsafe Building Law does not permit demolition as a remedy to unsafe buildings.[98] "Indiana's Unsafe Building Law provides that an action by the hearing authority is subject to judicial review upon the request of any person with a substantial property interest in the unsafe premises or any person to whom the order or finding was issued."[99] The Court of Appeals stated, "The statute specifically limits the relief the trial court may grant in an independent civil action under this section to those options described by sections 18 through 22. And contrary to Culver's assertions, none of these sections authorize the trial court to order demolition."[100]

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90. *Id.* at 262.
91. *Id.*
92. *Id.* at 263.
93. *Id.*
94. *Id.*
95. *Id.* at 264.
96. *Id.* at 264-65.
97. *Id.*
98. *Id.* at 266-67.
99. *Id.* at 266.
100. *Id.* at 267 (citing IND. CODE § 36-7-9 (2021)).

VI. HOMEOWNERS' ASSOCIATIONS

A. Feather Trace Homeowners Association v. Luster

In *Feather Trace Homeowners Association v. Luster*,[101] the Court of Appeals held that a homeowner was not entitled to withhold an annual assessment owed to its homeowners' association due to improper neighborhood maintenance by the homeowners' association. In 2002, Donald Luster ("Homeowner") purchased a home in the Feather Trace neighborhood (the "Neighborhood").[102] Homeowner's deed was subject to the Neighborhood's "covenants, conditions, and restrictions, including a requirement that [Homeowner] pay annual fees of $200 [(the 'Fee')] to cover maintenance, repairs, and ordinary operating expenses of the [homeowners association (the 'HOA')]."[103]

Homeowner noticed that the Neighborhood was not being maintained properly.[104] Specifically, there were holes on the street and sidewalks; the pond was not being maintained and emitted an odor, and was filled with dead fish and tested positive for E. coli bacteria; the drainage holes around the pond did not have grates, posing a danger to children; the common areas were not being maintained; there was only one streetlight; and homeowners were allowing weeds to overgrow fences.[105] Homeowner raised these concerns with a member of the HOA board, but it is unclear whether the issues were brought to the board's attention before that board member moved out of the Neighborhood.[106]

In 2018, Homeowner refused to pay the Fee to the HOA, leading the HOA to file a small claims suit against Homeowner, seeking the Fee plus attorneys' fees and costs.[107] "Following [a bench] trial, the trial court ruled in favor of [Homeowner], finding that the HOA's failure[] to maintain the property as it is required to resulted in . . . a radical change in the community [and] that [Homeowner] was not required to pay the . . . [F]ee until his concerns [we]re addressed."[108] The HOA appealed.[109]

The Court of Appeals "found no cases [supporting] that abrogation of [the HOA's Fee] is the appropriate remedy for [Home]owner's dissatisfaction with the way the HOA is performing or the conditions . . . of the [N]eighborhood."[110] While the Court of Appeals sympathized with Homeowner, it found that the trial court's judgment would make matters worse in the Neighborhood by encouraging

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101. Feather Trace Homeowners Ass'n, Inc. v. Luster, 132 N.E.3d 500 (Ind. Ct. App. 2019).
102. *Id.* at 501.
103. *Id.*
104. *Id.*
105. *Id.* at 501-02.
106. *Id.* at 502.
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.* at 503.

other homeowners in the Neighborhood to disregard the Fee.[111] This would make it impossible for the HOA to address the problems Homeowner brought to light.[112] The Court of Appeals noted that Homeowner has other legal remedies, such as campaigning to oust the current HOA board members, participating in HOA meetings, working to become a board member to influence the HOA's decision-making process, seeking injunctive relief against the HOA, or suing the board members for a breach of fiduciary duty.[113] The Court of Appeals "reversed and remanded with instructions to enter judgment in favor of the HOA and to calculate the amount owed by [Homeowner]."[114]

VII. LOCAL GOVERNMENT MATTERS

A. Bergman v. Big Cicero Creek Drainage Board

In *Bergman v. Big Cicero Creek Joint Drainage Board*,[115] the Court of Appeals held that the Indiana drainage law permits a drainage board to fund a reconstruction project through a loan repaid with excess funds from the maintenance fund.

> [Six l]andowners [(the "Landowners")] own[ed] parcels of real property in Tipton and Atlanta, Indiana[,] . . . located within the Big Cicero Creek [W]atershed ("the [W]atershed"). . . . On October 17, 2014, the [Big Cicero Creek Drainage Board (the "Board")] mailed a notice to all landowners in the [W]atershed, including Landowners, stating in relevant part that a maintenance report and schedule of assessments had been filed and were available for public inspection[,] and that a public hearing was scheduled for November 19. . . .
>
> In that 2014 report, surveyors from four counties in the [W]atershed recommended a significant increase in . . . the maintenance fund balance.[116]

"Following the public hearing, the Board issued written findings and an order 'adopting and approving the maintenance report and schedule of assessments as reported by the County surveyors in their report.' . . . Landowners did not seek judicial review of the Board's November 2014 order."[117]

Three years later,

> [i]n 2017, the Board asked the Tipton County surveyor to prepare a report regarding a plan for "partial reconstruction" of the Big Cicero Creek Open Drain System (the "[D]rain [S]ystem"). In [the] report, the

111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. Bergman v. Big Cicero Creek Joint Drainage Bd., 137 N.E.3d 955 (Ind. Ct. App. 2019).
116. *Id.* at 957.
117. *Id.* (citation omitted).

> Tipton County surveyor proposed a partial reconstruction of the [D]rain [S]ystem projected to cost $4.7 million. He recommended that "no additional assessment be sought, that the project should be funded by an outside source, with repayment occurring from a portion of the current revenue stream that is captured under the maintenance assessment for the drain[.]"[118]

The Board properly mailed notices to affected landowners, and following a public hearing, the Board adopted and approved the surveyor's recommendations, which Landowners timely appealed.[119] In particular, the Landowners asserted that the Board's decision was arbitrary and capricious, and an abuse of discretion not in accordance with the law.[120]

The trial court found that the surveyor who submitted the 2014 report requested "the Board increase the maintenance assessments because they had not been raised in twenty-one (21) years and that the solutions for solving issues have outstripped the current maintenance funds and were not adequate to keep up with the maintenance needs of the drain."[121] Moreover, the trial court found that "no evidence" existed to show that a "petition for judicial review was filed following the [Board's] decision adopting and approving the [2014] report."[122] The trial court ruled that

> Section 43 of the Drainage Law does reveal the legislature's intent to allow the Board to create an excess in the maintenance fund [and that] Section 43 grants a drainage board discretion in collecting a maintenance assessment even if the assessment would increase the maintenance fund balance to four (4) times the annual cost of periodic maintenance or up to . . . eight (8) times the annual cost of period maintenance (as long as a public hearing is held).[123]

The trial court concluded that Sections 43 and 45.5 of the drainage statute demonstrate "the legislature's intent to allow a Board to create an excess in the maintenance fund" and that "the Board's transfer of 75% of the maintenance assessments to the reconstruction project was lawful under the Indiana Drainage Law."[124] The Landowners appealed that decision, arguing that the trial court erred when it determined the Board was authorized by the Indiana Drainage Law to "'commit[] future uncertain excess maintenance funds' to repay a loan for the anticipated reconstruction."[125]

After reviewing the Landowners' claims, the Court of Appeals affirmed the

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118. *Id.*
119. *Id.* at 957-58.
120. *Id.* at 958.
121. *Id.* at 958-59 (citation omitted).
122. *Id.* at 959 (alteration omitted) (citation omitted).
123. *Id.* at 960 (citation omitted).
124. *Id.* (citation omitted).
125. *Id.* at 962 (alteration in original) (citation omitted).

trial court's decision.[126] The court reasoned that, because the Indiana Drainage Law "is silent [on] whether a Board . . . may intentionally create a surplus in a maintenance fund for the express purpose of paying for a future reconstruction project," the Board was authorized to finance the reconstruction project and use excess maintenance funds to repay the loan.[127]

B. City of Kokomo v. Estate of Newton

In *City of Kokomo v. Estate of Newton*,[128] the Court of Appeals found that the trial court erred when it denied the City of Kokomo's (the "City") motion for directed verdict, which would have limited the damages the City owed to the Estate of Audra R. Newton (the "Estate") to those directly related to the property owned by the Estate and not the damages incurred by the business that operated there.

The Estate owned two parcels: 226 South Union Street (the "Union Street parcel") and 226 North Main Street (the "Main Street parcel").[129] Prior to the decedent's passing, she owned The Kokomo Glass Shop, Inc. ("Kokomo Glass"), a single-member S-Corporation with the decedent as the sole member.[130] Following the decedent's passing, the decedent's son, and not the Estate, became owner of Kokomo Glass.[131]

In 2016, the City condemned the Main Street parcel for $100,000.[132] Following a jury trial, the trial court awarded damages of $305,600, covering both the Main Street parcel and the resulting damage to the Union Street parcel from Kokomo Glass being required to relocate and essentially lose its use of the property.[133] Kokomo Glass was not added as a party to the condemnation action.[134]

Contrary to the trial court, the Court of Appeals found that the Estate was not permitted to recover damages on behalf of Kokomo Glass, as the Estate and Kokomo Glass are separate entities, even if the beneficiary of the Estate and the owner of Kokomo Glass are one and the same.[135] In order to properly claim damages, Kokomo Glass should have been added to the condemnation action.[136] As a result, the Court of Appeals upheld only those damages asserted by the

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126. *Id.* at 965.

127. *Id.* at 963 (citing City of Lawrence Utils. Serv. Bd. v. Curry, 68 N.E.3d 581, 585 (Ind. 2017)).

128. City of Kokomo v. Estate of Newton, 136 N.E.3d 1172 (Ind. Ct. App. 2019).

129. *Id.* at 1174.

130. *Id.* at 1174, 1176

131. *Id.*

132. *Id.* at 1174.

133. *Id.* at 1175.

134. *Id.* at 1176.

135. *Id.* at 1178.

136. *Id.*

Estate and previously agreed to by the City.[137]

C. City of New Albany v. Board of Commissioners of the County of Floyd

In *City of New Albany v. Board of Commissioners of the County of Floyd*,[138] the Supreme Court considered a disputed conflict between statutes governing authority for governmental agencies and municipal corporations to transfer of property. The dispute arose from a provision in a lease by Floyd County Indiana Building Authority (the "Building Authority") to Floyd County (the "County") which, if enforced, would have resulted in the Building Authority conveying title to the County for the leased premises.[139] The Building Authority and the City of New Albany argued that the provision was invalid because it would conflict with the specific powers granted by Indiana Code section 36-9-13.[140] Although the trial court found for the County, the Court of Appeals held that the lease provision was not valid because of Indiana Code section 36-9-13, but that the conveyance was valid for other reasons.[141]

The Supreme Court reviewed the question of statutory interpretation *de novo* and held that there was no conflict between the lease provision and the statutory authority for transfer of property by a governmental entity.[142] Indiana Code section 36-9-13-22(a)(6) is the only section that addresses power relating to a transfer of property and "provides that a building authority 'may . . . acquire real or personal property by gift, devise, or bequest and hold, use, or dispose of that property for the purposes authorized by this chapter.'"[143] Despite the arguments by the Building Authority and City of New Albany that such language was more specific than the broad authority to "transfer or exchange" property to the government and thus limited such transfers, the Supreme Court found that the plain language of Indiana Code section 36-9-13-22 does not limit a building authority's ability to transfer property.[144] Rather, the two statutes "can operate under their own separate requirements that do not conflict, [and] both can and should be given meaning and effect without overriding one another."[145] The Supreme Court further emphasized that the statutes were adopted in the same legislative session and thus ought to be "interpreted as harmonious, so as to give effect to each," particularly as the Supreme Court found no indication of conflict.[146] Because there was no statutory conflict as to whether the Building Authority could properly convey the leased property to the County, the lease

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137. *Id.*
138. City of New Albany v. Bd. of Comm'rs, 141 N.E.3d 1220 (Ind. 2020).
139. *See id.* at 1222.
140. *See id.*
141. *Id.*
142. *Id.* at 1123.
143. *Id.* (quoting IND. CODE § 36-9-13-22(a)(6) (2021)).
144. *Id.*
145. *Id.* at 1224.
146. *Id.* (quoting Ware v. State, 441 N.E.2d 20, 22 (Ind. Ct. App. 1982)).

provision requiring the conveyance was affirmed as valid.[147]

D. Happy Valley LLC v. Madison County Board of Commissioners

In *Happy Valley LLC v. Madison County Board of Commissioners*,[148] the Court of Appeals held that a lease between a county board of commissioners and private property owners became invalid in the absence of adequate appropriation of funds, and that the economic reality of the lack of appropriation of funds by the county confirmed the county's good faith cancellation of the lease. Happy Valley, LLC ("Landlord") leased property for a minimum security facility for detainees under a four-year lease (the "Agreement") to Madison County ("Tenant").[149] Tenant owned additional property to be remodeled for use as a work release facility, and following a feasibility study conducted after the Agreement was executed, Tenant determined that it would be more cost efficient to expand the work release facility to also house the detainees currently accommodated by the Agreement.[150]

Tenant's attorney provided notice to Landlord that Tenant was terminating the Agreement pursuant to a section of the Agreement that allowed for termination if appropriate funds were not available to support the continued performance of the Agreement.[151] Landlord responded that it did not accept the cancellation of the Agreement.[152] Tenant discontinued payments under the Agreement and filed a declaratory judgment complaint against Landlord, seeking a declaration that the Agreement was cancelled.[153] Tenant passed a resolution confirming that funds had not been appropriated for the Agreement due to Tenant's purchase of the additional property.[154] Landlord counterclaimed for entitlement to unpaid rent.[155] The trial court concluded that a public meeting was not necessary for Tenant to cancel the Agreement.[156] Landlord appealed.[157]

Landlord alleged that Tenant violated the Indiana Public Purchasing Act (the "Purchasing Act") and the Open Door Law.[158] The Indiana Legislature has an "established . . . system for appropriations of county funds by . . . county council[s]."[159] Tenant's "fiscal body is required to hold a regular meeting

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147. *See id.*

148. Happy Valley LLC v. Madison Cty. Bd. of Comm'rs, 133 N.E.3d 193 (Ind. Ct. App. 2019).

149. *Id.* at 195.

150. *Id.* at 196.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* at 197.

157. *Id.*

158. *Id.* at 198.

159. *Id.*

annually 'to adopt the county's annual budget and tax rate,'" through which monies for contracts are appropriated annually while allowing for public comment.[160] "Pursuant to Indiana Code Section 5-22-1-1, the Purchasing Act is . . . applicable to 'every expenditure of public funds by a governmental body' . . . [and] defines a 'purchase' to include [a] 'lease.'"[161] The Purchasing Act "provides protection to taxpayers in that, when the fiscal body determines in writing that funds are unavailable, a contract may be cancelled" so long as the fiscal body acts in good faith.[162] "When the fiscal body . . . makes a written determination that funds are not appropriated . . . to support [the] continuation of [the] performance of a contract, the contract is considered cancelled," and such "determination . . . is final and conclusive."[163] Tenant followed each of these procedures by determining, and notifying Landlord in writing, that it was feasible to construct a minimum security facility on the property Tenant owned and that, as a result, future payments under the Agreement would not be economically feasible.[164]

The good faith requirement under the Purchasing Act is based on "the premise that a governmental entity must operate within the bounds of the law and will be held liable for an abuse," and "[r]elief is available only if a person has been 'substantially prejudiced.'"[165] Landlord "asserted that good faith contract performance by a governmental body should be nothing less than that required of private contracting parties," meaning that "a party to a contract may not rely on a failure of a condition precedent to excuse that party's nonperformance where the party's inaction caused the failure and there exists an implied obligation to make a reasonable and good faith effort to satisfy the condition."[166] While the Court of Appeals found that this doctrine does not fit in with the governmental party circumstances of this case, the Court of Appeals found that the "general proposition that a party to a contract should make a reasonable good faith effort to avoid failure of the contract's purpose, and a party should not sabotage one's own contract," exists nonetheless.[167] While Tenant certainly changed course based upon the feasibility study and determined that it could no longer make payments under the Agreement, the Court of Appeals found that there was no intent to sabotage the Agreement and that all decisions were based on financial reasons.[168]

160. *Id.* (quoting IND. CODE § 36-2-3-7(b)(2) (2021)).
161. *Id.* at 199 (quoting IND. CODE §§ 5-22-1-1, 5-22-2-24(a)).
162. *Id.*
163. *Id.* (quoting IND. CODE § 5-22-17-5).
164. *Id.* at 199-200.
165. *Id.* at 200 (quoting IND. CODE § 5-22-19-2).
166. *Id.* at 200-01 (citing Hamlin v. Steward, 622 N.E.2d 535, 539-40 (Ind. Ct. App. 1993)).
167. *Id.* at 201.
168. *Id.*

E. Hoagland Family Limited Partnership v. Town of Clear Lake

In *Hoagland Family Limited Partnership v. Town of Clear Lake*,[169] the Court of Appeals held that the trial court: (1) erred by ordering a property owner to pay penalties for the property owner's failure to connect its property to the town's sewer lines; (2) applied the wrong penalty ordinance to the sewer connection process; and (3) erred by ordering the property owner to pay the town's attorney fees. Hoagland Family Limited Partnership ("Landowner") owns three parcels of real estate (the "Property") located in the Town of Clear Lake (the "Town").[170] The Property is located within three hundred feet of the Town's sanitary sewer system (the "System"), but the Property is not connected to the System.[171] The Town requested an easement from Landowner to connect the Property to the System, but Landowner declined.[172] The Town then passed an ordinance requiring that the Property be connected to the System.[173]

Landowner "filed an action alleging that the Town had inversely condemned its land by running a sewer main under [Landowner]'s property."[174] The parties settled, but the Town later amended its penalty ordinance, substantially increasing the new penalty for failure to connect to the System, with no express limit.[175] The Town provided notice to Landowner demanding that Landowner connect the Property to the System within ninety days and immediately pay back charges for failing to connect sooner.[176] When Landowner took no action, the Town filed a complaint requesting an order to require connection and payment of back charges pursuant to the new ordinance.[177] The trial court granted summary judgment to Landowner, because the Town stipulated that Landowner cannot complete a connection to the System without the presence of grinder pumps (the "Pumps"), which the Town had neither installed nor commenced eminent domain proceedings to install them.[178] The trial court therefore "ruled that [Landowner]'s compelled connection" to the System "would involve a taking of land" requiring "just compensation to" Landowner.[179]

The Town appealed, and the Court of Appeals found that the Property could not be connected to the System without the Town installing the Pumps.[180] The

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169. Hoagland Family Ltd. P'ship v. Town of Clear Lake, 131 N.E.3d 731 (Ind. Ct. App. 2019).

170. *Id.* at 732.

171. *Id.* at 732-33.

172. *Id.* at 733.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* at 734.

178. *Id.*

179. *Id.* (quoting Town of Clear Lake v. Hoagland Family Ltd. P'ship, 75 N.E.3d 1081, 1084-85 (Ind. Ct. App. 2017)).

180. *Id.*

dispute centered on whether Landowner had to apply for a permit to connect to the System before the Town installed the Pumps, or vice versa.[181] The Court of Appeals ultimately found that Landowner had the obligation to act first, as it had more knowledge of its Property than the Town and could propose the most cost-effective connection method.[182] The Court of Appeals also noted that Landowner was "within its rights to reject the Town's request to voluntarily donate an easement" for the Pumps, and could have "force[d] the Town to initiate eminent domain proceedings."[183] The Court of Appeals reversed, and found that partial summary judgment should have been awarded to the Town.[184]

Forty days following the first appeal, Landowner filed permit applications for the Property's connection to the System and requested eminent domain proceedings.[185] Landowner applied the earlier penalty ordinance, arguing that the "years of litigation regarding its obligations" necessitated that its System connection should not be subject to the newer, costlier ordinance.[186] The Town Council voted to issue connection permits to Landowner provided that Landowner complied with the new ordinance, including the payment of all fees.[187] The Town Council also decided not to initiate eminent domain proceedings for easements over the Property.[188] The trial court initially ordered Landowner to connect in compliance with the new ordinance but ultimately reconsidered and decided that it should not have penalized Landowner for the time spent litigating a justifiable claim before the first appeal was decided.[189] The trial court recalculated and reduced penalties.[190]

> Indiana Code section 36-9-23-30 provides that "a municipality that operates sewage works . . . may require . . . connection to its sewer system of any property producing sewage . . . ," and that the municipality "may establish, enforce, and collect reasonable penalties for failure to make a connection . . . ." The statute requires that the municipality notify [a] property owner of the connection requirement . . . ."[191]

The Court of Appeals noted that, while Landowner declined to donate an easement to the Town to install the Pumps, Landowner asked the Town to install a "Y" in the System for later connection.[192] When "the Town gave Landowner notice that it must connect [the Property] to the [System] . . . . , no 'Y' had been

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181. *Id.*
182. *Id.*
183. *Id.* (quoting *Clear Lake*, 75 N.E.3d at 1087).
184. *Id.*
185. *Id.* at 735.
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.* at 736 (quoting IND. CODE § 36-9-23-30 (2021)).
192. *Id.* at 737.

installed and the Town had not instituted eminent domain proceedings; therefore, there was no way for [Landowner] to connect to the . . . [S]ystem."[193]

The Court of Appeals stated that "whether [Landowner owes] a penalty for failure to connect to the" System depends on "when it became legally required to do so."[194] The Court of Appeals determined that because the Town had "represented [to Landowner] that it would either install a 'Y' in the [System] . . . or initiate eminent domain proceedings," but did neither while Landowner "reasonably relied on th[o]se representations . . . . , it was not obvious that [Landowner] was legally required to act first."[195] The penalty timeline outlined in the ordinance was not triggered until the first appeal.[196] The Court of Appeals found that the old, less costly ordinance was applicable here, as Landowner was initially within its rights to decline an easement to the Town, and the Town subsequently declined to install a "Y" in the System, leaving Landowner with no way to connect.[197] The Court of Appeals reasoned that "[f]orcing [Landowner] to pay the higher connection costs now in place [would] effectively punish[Landowner] for its refusal to gift an easement to the Town, which is bad public policy."[198]

With regard to attorney fees, the Court of Appeals noted that "if a landowner refuses to connect to the public sewer system, thereby requiring the municipality to seek redress in the courts, the municipality is entitled to the cost of the action and . . . reasonable attorney fees."[199] However, the Court of Appeals held that it could not conclude that Landowner had refused to connect simply because it refused to grant the easement.[200] As the Town could have installed a "Y" connector or initiated eminent domain proceedings, the Court of Appeals found that "the attorney fees statute does not apply."[201] The Court of Appeals affirmed in part, reversed in part, and remanded to the trial court with instructions to vacate the orders requiring Landowner to pay penalties and attorney fees.[202]

F. Knob Hill Development LLC v. Town of Georgetown

In *Knob Hill Development LLC v. Town of Georgetown*,[203] the Court of Appeals considered a disputed conflict between statutes governing authority for governmental agencies and municipal corporations to transfer of property. The

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193. *Id.*

194. *Id.*

195. *Id.* at 736-37.

196. *Id.* at 737.

197. *Id.* at 738.

198. *Id.* (citing Steuben Lakes Reg'l Waste Dist. v. Tucker, 904 N.E.2d 718, 722 (Ind. Ct. App. 2009)).

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* at 739.

203. Knob Hill Dev. LLC v. Town of Georgetown, 133 N.E.3d 729 (Ind. Ct. App. 2019).

plaintiff builders (the "Builders") brought suit objecting to the rates and charges set by the Town of Georgetown (the "Town") for customers of the Georgetown Municipal Sewage Works.[204] Although a witness for the Town testified that the rates were calculated with a combination of the value of the utility among the existing equivalent dwelling units ("EDUs") and with the net cost per EDU for new development,[205] the Builders claimed that the rates lacked a rational basis and that the automatic annual increases violated due process.[206]

Because judicial review of rulemaking authority and legislative actions are highly deferential, the courts can only set aside "a rate-making ordinance [that] is arbitrary, capricious, or contrary to law."[207] The factors upon which a municipality may set rates for sewage services are detailed in Indiana Code section 36-9-23-25 and include "[a]ny other factors the legislative body considers necessary."[208] The Court of Appeals first deferred to the expert testimony presented by the Town regarding the validity of calculating the value of the system by including the certain grants used to keep rates down, and therefore rejected the Builders' arguments that such calculations were arbitrary and capricious.[209] The Court of Appeals next found that the Builders cited to inapplicable case law regarding whether previously paid fees ought to be considered as "contributions in aid of construction" rather than revenues to the Town, and that the Town's reliance on an accepted manual for setting charges for wastewater systems in determining the fees as revenues was valid and warranted deference.[210] The Builders' last argument that the rates lacked a rational basis was that they were contrary to Indiana law, but the Court of Appeals found that the Town acted within the broader authority that was granted subsequently to the applicable case law raised.[211] Rather, the Town's decision to allocate additional costs of the sewer system on new users disproportionate to existing users fits within "[a]ny other factor[] the legislative body considers necessary" and was supported by the Home Rule Act whereby municipalities are presumed to have a power that is not expressly denied.[212]

The Court of Appeals upheld the Builders' contention that the automatic increase violated Indiana law, specifically the requirement that "a municipal legislative body must hold a public hearing before revising sewer rates."[213] In establishing an automatic annual increase, the Town revised the fee each year without doing so in the same manner by which the initial rate was established,

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204. *Id.* at 732.

205. *Id.* at 733.

206. *Id.* at 735.

207. *Id.* at 736 (citation omitted).

208. *Id.* at 737 (quoting IND. CODE § 36-9-23-25(d)(10) (2021)).

209. *Id.* at 737-38.

210. *Id.* at 738-39.

211. *Id.* at 740.

212. *Id.* (alterations in original) (quoting IND. CODE § 36-9-23-25(d)(10)).

213. *Id.* at 741 (quoting Farley Neighborhood Ass'n v. Town Speedway, 765 N.E.2d 1226, 1231 (Ind. 2002)).

that is, by a public hearing.[214] The Town's arguments that it had the authority to enact a new ordinance in the future for the higher rate, as supported by a rational basis and proper rulemaking, were inconsequential to its lack of authority to annually revise the rate without a public hearing.[215]

VIII. PROPERTY TAXES AND TAX SALES

A. McClain Museum, Inc. v. Madison County Assessor

In *McClain Museum, Inc. v. Madison County Assessor*,[216] the Tax Court determined that the word "charity," as would support a charitable purpose tax exemption, is to be broadly construed and that Indiana Code section 6-1.1-10-36.3 instructs how the charitable purpose exemption should be applied when a property is used for both exempt and non-exempt purposes.

Joseph McClain founded the McClain Museum (the "Museum") in 1989, which "exhibits military equipment that was used by the United States' armed forces in various conflicts . . . . [T]he Museum was established as an Indiana no[n]profit corporation and [was] granted an exemption from federal income taxation pursuant to IRC § 501(c)(3)."[217] It is also "recognized by the United States Army as a historical preservation site for military equipment."[218] The Museum "is divided into several discrete sections," including an exhibition area and library consisting of retired military vehicles and equipment; a restoration area where military vehicles are repaired and maintained; a storage area where exhibit items and excess items are stored when not in use; and "a reception/meeting hall known as the 'Officer's Club.'"[219] During the year at issue, the Museum accepted donations, but it did not charge admission fees.[220] "To defray some of its operating costs, the Museum [also] rented out a portion of its storage area . . . to individuals to store their boats. . . . [Additionally], the Museum rented out the Officer's Club for social events like wedding receptions and parties . . . ."[221] The Museum "employed and paid" two staff members: a facilities manager, and a bookkeeper.[222] Everyone else that worked for the Museum was a volunteer.[223]

> In May of 2014, the Museum applied for the educational purposes exemption provided for in Indiana Code § 6-1.1-10-16[, and t]he Madison County Property Tax Assessment Board . . . denied the . . .

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214. *Id.*
215. *Id.*
216. McClain Museum, Inc. v, Madison Cty. Assessor, 134 N.E.3d 1096 (Ind. T.C. 2019).
217. *Id.* at 1098-99.
218. *Id.* at 1099.
219. *Id.*
220. *Id.* at 1100.
221. *Id.* (footnote omitted)
222. *Id.*
223. *Id.*

> application. The Museum . . . appealed to the Indiana Board, claiming entitlement to both the educational purposes exemption and the charitable purposes exemption.
> . . . . On November 21, 2017, the Indiana Board issued its final determination[, finding] that the Museum's real property did not qualify for either exemption.
> On January 5, 2018, the Museum initiated an original tax appeal.[224]

The Tax Court "[a]ffirmed in part, reversed in part, and remanded" the Indiana Board's ruling.[225]

> On appeal, the Museum argue[d] that the Indiana Board's determination to deny the educational purposes exemption or the charitable purposes exemption must be reversed because it constitute[d] "an abuse of discretion and was otherwise not in accordance with the law." The Madison County Assessor, however, contend[ed] that the Indiana Board's final determination must be affirmed because the Museum ha[d] "failed to show that its contribution to the Madison County community justifie[d] the loss of tax revenue" sufficient to award either exemption.[226]

The Tax Court affirmed the Indiana Board's ruling that the Museum could not qualify for the educational purposes exemption because "the Museum made no showing – as required by . . . case law – that it conduct[ed] educational services, training, or coursework related to that topic."[227]

In regards to the charitable purposes exemption, the Tax Court reversed and remanded back to the Indiana Board, ruling that 75% of the Museum property was qualified to be exempted under the charitable purposes exemption.[228] The Indiana Board had reasoned that "charity" is defined as "an attempt to advance mankind in general, or those in need of advancement and benefit in particular."[229] The Indiana Board further reasoned that the "Museum [was] focused on Mr. McClain's hobby" and that "[t]he totality of the evidence shows that whatever public benefits might result are merely incidental to that main focus."[230] "[O]n appeal, the Museum argue[d] that the Indiana Board's stated rationale fails 'to properly interpret and ultimately apply' the terms 'charity' and 'human want.'[231] The Tax Court agreed with the Museum and stated that "it is clear that through the Museum's ownership, occupation, and use of its property, it conveys a gift for

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224. *Id.* at 1100-01 (footnote omitted) (citations omitted).

225. *Id.* at 1097.

226. *Id.* at 1101-02 (alterations omitted).

227. *Id.* at 1102-03; *see* Dep't of Local Gov't Fin. v. Roller Skating Rink Operators Ass'n, 853 N.E.2d 1262, 1265 (Ind. 2006).

228. *McClain Museum*, 134 N.E.3d at 1105-06.

229. *Id.* at 1103 (alteration in original) (citation omitted).

230. *Id.* (citation omitted).

231. *Id.* (citation omitted).

the benefit of the general public that is charitable in nature."[232] The Tax Court then went on to state that not all of the Museum property would be exempt, because some of the property, like the Officer's Club, is used for non-charitable purposes.[233] The Tax Court used Indiana Code section 6-1.1-10-36.3 to discern how the charitable purposes exemption was to be applied.[234] The Tax Court stated that the Museum offered sufficient evidence to show that the "exhibition area, restoration area, and the majority of its storage area are all exclusively used for [the Museum']s charitable purpose," and were therefore "entitled to a 100% exemption."[235] The Tax Court also stated that the Museum failed to offer sufficient evidence to show that the Officer's Club was used predominantly "for any charitable purpose," and therefore would not be entitled to an exemption on that space.[236] It determined that 75% of the Museum property was utilized for a charitable purpose, and therefore the Museum would be allowed a 75% charitable purposes exemption.[237]

B. Southlake Indiana LLC v. Lake County Assessor

In *Southlake Indiana LLC v. Lake County Assessor*,[238] the Tax Court held that a county assessor's appraisal of a store's value based on a build-to-suit lease was contrary to "market value-in-use" law, and that the Indiana Board of Tax Review's repudiation of an independent appraiser's methodology was not supported by substantial and reliable evidence. Southlake Indiana LLC ("Taxpayer") owns an outlot building parcel located in Merrillville, Indiana (the "Property").[239] Taxpayer entered into a build-to-suit lease with a discount department store on the Property.[240] Taxpayer believed the Lake County Assessor (the "Assessor") over-assessed the Property.[241] After appealing, the Lake County Property Tax Assessment Board of Appeals reduced the assessments, but Taxpayer still believed the Property was over-assessed and appealed to the Indiana Board of Tax Review (the "Tax Board").[242]

Taxpayer presented an appraiser ("Taxpayer Appraiser") to the Tax Board who used an income approach to estimate the Property's rent by: "1) averaging extracted market rents of other Indiana properties, 2) calculating rent as a percentage of gross sales, and 3) calculating a cost-based rent."[243] Taxpayer

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232. *Id.* at 1104.
233. *Id.* at 1105.
234. *Id.*
235. *Id.* (footnote omitted).
236. *Id.*
237. *Id.* at 1106.
238. Southlake Ind. LLC v. Lake Cty. Assessor,135 N.E.3d 692 (Ind. T.C. 2019).
239. *Id.* at 693.
240. *Id.*
241. *Id.* at 694.
242. *Id.*
243. *Id.*

Appraiser determined that the Property's market value-in-use was lower than that found by the Assessor.[244] The Assessor presented an appraiser ("Assessor Appraiser") who, using an income approach that averaged market rents extracted from sale-leaseback and build-to-suit leases of similarly-situated discount department stores, found that the Property's market value-in-use was comparable to that found by the Assessor.[245] The Tax Board noted that Assessor Appraiser's approach provided a more detailed market rent analysis than that of Taxpayer Appraiser by offering more relevant comparable properties, but ultimately conducted its own evaluation and adopted Assessor Appraiser's values.[246] Taxpayer appealed.[247]

Taxpayer bore the burden of demonstrating the invalidity of the Tax Board's final determination.[248] In Indiana, real property is assessed on the basis of its "market value-in-use," defined as "the value 'of a property for its current use, as reflected by the utility received by the owner or a similar user, from the property.'"[249]

> Indiana's property tax system taxes the value of real property [rather than] business value, investment value, or the value of contractual rights . . . .[250]
>
> Accordingly, when valuing a property under the income approach, the fee simple interest in property must be valued based on an estimate of market rent, not contract rent.[251] . . . [More specifically, m]arket rent is defined as the "most probable rent that a property should bring in a competitive and open market reflecting all conditions and restrictions of the lease agreement."[252]

The Tax Court held that the Tax Board's market rent conclusions were contrary to law, which provides that market rent estimates cannot be based off of contract rents.[253] In *Grant County Assessor v. Kerasotes Showplace Theatres, LLC*, the court "rejected the use of unadjusted sale-leaseback transactions [as a sound method for] determin[ing] market rent[, . . . as] sale-leaseback transactions often value more than just real property" alone.[254] The Tax Court found that the

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244. *Id.*

245. *Id.* at 694-95.

246. *Id.* at 695.

247. *Id.* at 696.

248. *Id.*

249. *Id.* (quoting DEP'T OF LOCAL GOV'T FIN., REAL PROPERTY ASSESSMENT MANUAL 2 (2011)).

250. *Id.* (citing Stinson v. Trimas Fasteners, Inc., 923 N.E.2d 496, 501 (Ind. T.C. 2010)).

251. *Id.* (citing Grant Cty. Assessor v. Kerasotes Showplace Theatres, LLC, 955 N.E.2d 876, 881 (Ind. T.C. 2011)).

252. *Id.* (quoting APPRAISAL INSTITUTE, THE APPRAISAL OF REAL ESTATE 447 (14th ed. 2013)).

253. *Id.* at 699, 697.

254. *Id.* at 697 (citing *Kerasotes*, 955 N.E.2d at 882).

testimony of a discount department store's real estate expense manager confirmed that, like with the use of sale-leaseback transactions, the discount department store's "build-to-suit rents are often above market [rents] because they . . . reflect non-property interests" as well as property interests.[255] The Tax Court also found that Taxpayer Appraiser treated the build-to-suit leases in her analysis in accordance with accepted measures accurately reflecting market value-in-use law.[256]

The Tax Court also held that no reasonable person reviewing the administrative record would find enough substantial and reliable evidence to support the Tax Board's reconstruction of Taxpayer Appraiser's percentage of gross sales analysis or its conclusions.[257] The Tax Board determined that Taxpayer Appraiser's analysis was flawed because it was unable to duplicate her calculations.[258] The Tax Board claimed to "correct" and "reconstruct" Taxpayer Appraiser's gross percentage of sales analysis, but provided little basis why Taxpayer Appraiser's analysis was erroneous, and instead performed a new analysis unsupported by evidence.[259] As a result, the Tax Court "remand[ed] the matter to the [Tax] Board with instructions to assign the . . . [P]roperty a market value-in-use under the income approach that: 1) calculates the Property's [net operating income] each year . . . by replacing [the] market rents [derived by Assessor Appraiser] with the market rents derived by [Taxpayer Appraiser] . . . ; and 2) applies [Taxpayer Appraiser]'s capitalization rates for" certain years at issue and those of Assessor Appraiser for other years at issue.[260]

C. St. Mary's Building Corp. v. Redman

In *St. Mary's Building Corporation v. Redman*,[261] the Tax Court affirmed the Indiana Board of Tax Review's (the "Board") denial of a requested property tax exemption for charitable purposes, finding that the Saint Mary's Building Corporation, an Indiana nonprofit corporation (the "Building Corporation"), failed to produce evidence that demonstrates how its use relieves human want through charitable acts different from the everyday purposes and activities of man in general or relieves the government of a cost that it would otherwise bear.

At issue is the Building Corporation's applications for charitable use exemption for portions of property known as Epworth Crossing leased to St. Mary's Breast Center, LLC; St. Mary's Medical Group, LLC; and St. Mary's Medical Center of Evansville, Inc.[262] On appeal, the Building Corporation stated that the services offered on its property furthered the charitable, religious, and

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255. *Id.* at 697-98.
256. *Id.* at 698.
257. *Id.* at 700.
258. *Id.* at 699.
259. *Id.* at 700.
260. *Id.* at 701.
261. St. Mary's Bldg. Corp. v. Redman, 135 N.E.3d 681 (Ind. T.C. 2019).
262. *Id.* at 683.

educational mission of each of its tenants because the services offered are at a "reduced cost or free of charge depending upon the patient's ability to pay for the services."[263] The Building Corporation also stated that it was a wholly-owned affiliate of St. Mary's Health, Inc. (the "Hospital").[264]

The Board denied the exemption under Indiana Code section 6-1.1-10-16(h) for failure to specifically show that providing charity care was the "predominant use" of the property, and under Indiana Code section 6-1.1-10-16(a) for failure to show a particular community need that was met or "would otherwise be unmet or fall to the government."[265]

The Tax Court distinguished, but did not reverse, the Board's holding that the Building Corporation and the Hospital could be treated as "one in the same" by indicating that this was contrary to law.[266] The Building Corporation and the Hospital should be treated as separate because of their individual corporate identities and the fact that no evidence was introduced to contradict this.[267]

The Tax Court affirmed the Board's ruling, disagreeing with the Building Corporation's assertion that providing healthcare regardless of ability to pay is a charitable purpose.[268] Instead, this only creates a general presumption.[269] Rather than being a bright line test, this general presumption must be met by the taxpayer providing evidence sufficient to show "1) relief of human want manifested by obviously charitable acts different from the everyday purposes and activities of man in general and 2) a benefit sufficient to justify the loss of tax revenue inures to the public through its acts."[270] The Tax Court stated that for this purpose, 501(c)(3) status of the lessor or lessee is not enough; instead, separate evidence for the character of use is required.[271]

The evidence offered by the Building Corporation was found to be insufficient because it was "conclusory in nature."[272] The Building Corporation relied on the 501(c)(3) status and mission of the related Hospital, rather than setting out to independently support the charitable character of the actual use.[273] The Tax Court goes on to state that it would have been sufficient if the Building Corporation "provided not only evidence that meets every element of that exemption, but also walked both the Indiana Board and this Court through every

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263. *Id.* (citation omitted).

264. *Id.* at 684.

265. *Id.* (citation omitted).

266. *Id.* at 688.

267. *Id.*

268. *Id.* at 692.

269. *See* Indianapolis Osteopathic Hosp., Inc. v. Dep't of Local Gov't Fin., 818 N.E.2d 1009, 1015 (Ind. T.C. 2004).

270. *St. Mary's Bldg. Corp.*, 135 N.E.3d at 689 (citing Hamilton Cty. Assessor v. SPD Realty, LLC, 9 N.E.3d 773, 775 (Ind. T.C. 2014)).

271. *Id.*

272. *Id.* at 690, 692.

273. *Id.* at 690.

element of its analysis."[274]

Finally, the Building Corporation's straightforward statement that: "[Epworth Crossing] is used for a single purpose, 100% of the time: providing healthcare to anyone that needs it – rather than for a profit," was insufficient.[275] Specifically, operating at a loss, without a concrete explanation of why that meets the standard of a charitable purpose to the Board, was insufficient. In addition, reflecting unreimbursed Medicare/Medicaid costs and bad debt on the financial statements was insufficient because it lacked a specific explanation to clarify why it related more to charitable purpose than the mere collection of debts.[276] Finally, the Building Corporation failed to clearly show that its predominate use was charitable or by showing that over 50% of the use was charitable, by its own definition, not paying.[277]

D. Shields v. Town of Perrysville

In *Shields v. Town of Perrysville*,[278] the Court of Appeals affirmed the trial court's holding that there was sufficient evidence to show a platted alley was not located within a given landowner's lot and that the town's actions did not constitute abandoning the platted alley.

In this case, Scott Shields (the "Landowner") obtained a survey and built a fence based on the results of that survey.[279] The Town of Perrysville (the "Town") filed an action to quiet title, asserting the fence was built across an alley owned by the Town.[280] The trial court found in favor of the Town, disregarded the survey, and accepted the Town's assertion that it "has title to the area by acquiescence."[281]

The Court of Appeals considered this case under a general-judgment standard and so did not reweigh evidence.[282] Instead of reweighing evidence, the court was obligated to "affirm . . . upon any theory consistent with the evidence."[283] The trial court's ruling came down primarily to weighing the testimony of the surveyor against the testimony of Mike Bowman, President of the Town Council, regarding the location of the alley. When held up against the relevant statute, Indiana Code section 32-30-2-15, which states that, in an action to quiet title, "the plaintiff must recover on the strength of the plaintiff's own title," the trial court's fact-finding role in balancing Bowman and the surveyor was valid.[284]

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274. *Id.*
275. *Id.*
276. *Id.* at 691.
277. *Id.*
278. Shields v. Town of Perrysville, 136 N.E.3d 309 (Ind. Ct. App. 2019).
279. *Id.* at 310.
280. *Id.*
281. *Id.* (citation omitted).
282. *Id.* at 311.
283. *Id.* (citation and quotation marks omitted).
284. *Id.* at 311-12 (quoting IND. CODE § 32-30-2-15 (2021)).

The Court of Appeals did fully consider the Landowner's claim that the Town had abandoned the platted alley. The court found that there was no evidence provided that the Town had abandoned the alley as required under Indiana law.[285] In Indiana, a public right-of-way cannot be abandoned by the common-law concept of non-use; instead, the right-of-way "can only be divested by proceedings authorized by law."[286] This was first stated by the Indiana Supreme Court in *Kyle v. Board of Commissioners of Kosciusko County*,[287] and was reiterated in *McHenry v. Foutty*.[288] For good measure, the Court of Appeals included a more recent case, *Cook v. Rosebank Development Corporation*, that stated that a road can only be closed by "official action of the . . . government[] authority."[289] Finally, Indiana Code section 36-9-2-5 does grant a governmental unit the right to both establish and vacate a public right-of-way, but there was no evidence presented by the Landowner that such had occurred.[290]

E. Square 74 Associates LLC v. Marion County Assessor

In *Square 74 Associates LLC v. Marion County Assessor*,[291] the Tax Court considered the Indiana Board of Tax Review's grant of the county assessor's motion to dismiss a tenant's petitions for correction of errors in tax assessments, finding that land underlying the property could not be excluded from taxation.

Square 74 Associates LLC ("Tenant") leased five distinct commercial spaces (the "Leased Property").[292] Tenant argued that, from 2008 through 2011, the assessor made mathematical errors in the assessment of the Leased Property.[293] In response, the Marion County Property Tax Assessment Board of Appeals reduced the assessed value of some improvements while, among other adjustments, increasing the assessed value of land.[294] Following this, Tenant made additional filings asserting both mathematical errors and that the tax related to the assessed value of land was the responsibility of the property owner, not Tenant.[295] The Indiana Board of Tax Review issued a final determination, supporting a motion to dismiss under the theory that the underlying land was a part of the leasehold interest because no part of the lease excluded it.[296]

The Tax Court reached this same conclusion through two primary holdings.

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285. *Id.* at 312.

286. *Id.* (citation omitted).

287. Kyle v. Bd. Comm'rs, 94 Ind. 115 (1884).

288. McHenry v. Foutty, 60 N.E.2d 781, 782 (Ind. 1945).

289. *Shields*, 136 N.E.3d at 312; Cook v. Rosebank Dev. Corp., 376 N.E.2d 1196, 1201 (Ind. Ct. App. 1978).

290. *Shields*, 135 N.E.3d at 312.

291. Square 74 Assocs. LLC v. Marion Cty. Assessor, 138 N.E.3d 336 (Ind. T.C. 2019).

292. *Id.* at 338-39.

293. *Id.*

294. *Id.*

295. *Id.* at 339.

296. *Id.*

The first was that the lease language failed to clearly exclude the land underneath the commercial spaces from the leasehold interest.[297] References to certain "structural components" being excluded was not sufficient, because the defined term lacked specificity.[298] Finally, several exhibits to the master lease that purported to describe certain portions of leasehold interests were neither attached to the master lease nor submitted as evidence.[299] The Tax Court notes only that the exhibits cannot be considered for this reason and does not contemplate their hypothetical sufficiency.[300] Finally, the error the Tenant sought to resolve via Form 133 was not part of the enumerated list of items the form was intended for.[301] The process was designed for objective errors, not subjective, as were asserted in this case.[302]

The second element of the holding was that no statute or regulation required the exclusion of the underlying land from the assessment of the leasehold interest.[303] The Tax Court first reiterated that real property that would be exempt from property tax because of the status of its owner *is* taxable to the lessee.[304] The lessee then carries the tax burden, unless that lessee independently qualifies for exemption.[305] To then determine if Tenant is responsible for the property tax, the court reviewed the statutory definition of real property. Indiana Code section 6-1.1-1-15 both expressly includes land and has also been interpreted to include land.[306] Separately, nothing in the language governing improvements on leased property, indicated that land should be excluded.[307] In short, from the plain reading of the statute and the likely intent, Tenant's status as lessee from an exempt lessor was not intended to exclude or provide a statutory avenue to exclude the value of land from assessment.

IX. PURCHASE AGREEMENTS AND LEASES

A. Mountain Trace Development, LLC v. Charles Spillman

In *Mountain Trace Development, LLC v. Spillman*,[308] the Court of Appeals ruled that as a matter of law, a tenant to a lease agreement was required to return the leased premises to its original state after the lease agreement had been terminated.

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297. *Id.* at 343.
298. *Id.*
299. *Id.*
300. *Id.* at 341.
301. *Id.* at 340.
302. *Id.* at 339.
303. *Id.* at 345.
304. *Id.*
305. *Id.*
306. *Id.* at 344-45.
307. *Id.* at 345.
308. Mountain Trace Dev., LLC v. Spillman, 142 N.E.3d 477 (Ind. Ct. App. 2020).

In January 2016, Charles Spillman and Mountain Trace Development, LLC ("Mountain Trace") entered into a written lease agreement so that Spillman could lease a warehouse.[309] The lease provided that "Tenant shall be held responsible for any damages caused by Tenant or other persons under Tenant's control to the property from the date of ratification until the lease is terminated."[310]

> Spillman failed to make the October 2017 rent payment, [and] Mountain Trace subsequently filed a complaint for eviction and damages . . . . On November 27, 2017, the [trial] court held a hearing, . . . both parties appeared[, and t]he court issued an eviction order, [requiring] Spillman . . . to vacate the leased premises on or before January 22, 2018. The [trial] court [further stated] that "any property not removed at the time of eviction [would be] deemed . . . abandoned property."[311]

Spillman failed to remove his property by January 22, 2018, and Mountain Trace spent $9,000 removing the property from Spillman's warehouse.[312] Because of this large cost, "Mountain Trace re[]filed its complaint [against Spillman] on March 13, 2018[, . . . and] requested damages for unpaid rent, late fees, costs to remove Spillman's property from the premises, and 'all other appropriate relief.'"[313] Both parties filed a motion for summary judgment, and the trial court granted Mountain Trace's motion, but concluded it was not entitled to recover the $9,000 it spent to remove abandoned property because the "lease agreement was drafted by [Mountain Trace] and contained no requirement for [Spillman] to remove all property from the premises."[314] The trial court further stated that the eviction order "simply ordered [Spillman] to vacate the premises," not to remove any property.[315] Mountain Trace appealed the trial court's ruling not to award it the $9,000 for removing the abandoned property.[316]

The Court of Appeals reversed and remanded the trial court's decision.[317] The Court of Appeals reasoned that "[e]ven though the lease did not explicitly state that Spillman had an obligation to surrender the premises to Mountain Trace in as good condition as it was when the parties entered into the lease, Spillman was required to do so as a matter of law."[318] The Court of Appeals went on to state that "[a]fter Spillman failed to remove his property from the leased warehouse, Mountain Trace had to remove [the] property . . . to return [the warehouse] to its

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309. *Id.* at 479.

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.* at 480 (citation omitted).

314. *Id.* (citation omitted).

315. *Id.* (citation omitted).

316. *Id.*

317. *Id.* at 482.

318. *Id.* at 481 (citing Burdick Tire & Rubber Co. v. Heylmann, 138 N.E. 777, 779 (Ind. App. 1923)).

condition at lease inception," for which it is entitled to recover damages.[319]

B. Rainbow Realty Group, Inc. v. Carter

In *Rainbow Realty Group, Inc. v. Carter*,[320] the Supreme Court held that: (1) a claimed rent-to-buy contract was a residential lease, not a land-sale contract, subject to residential landlord-tenant statutes; (2) the tenants were of a "dwelling unit," so landlord was required to deliver the unit to tenants in a "safe, clean, and habitable condition"; (3) "any attempt by [the] landlord[] to waive [its] obligations under the [residential] landlord-tenant statutes was void"; (4) the landlord "breached the statutory warranty of habitability"; and (5) the "landlord['s] representation to tenants that landlord[] had no obligation to warrant [the unit]'s habitability was insufficient to subject landlord[] to liability under the Deceptive Consumer Sales Act" (the "Act").[321]

Rainbow Realty Group, Inc. ("Landlord") "sells, rents, and manages" houses in Marion County.[322] Katrina Carter and Quentin Lintner ("Tenants") and Landlord signed an agreement titled "Purchase Agreement (Rent to Buy Agreement)" (the "Agreement"), under which Landlord and Tenants agreed that a house (the "House") would "be used as a single-family private residence."[323] Tenants agreed to acquire the House "as-is," that the House "was not in livable condition, and that they would need to make it habitable before they could live in it."[324] The Agreement also stated that "the House came with no warranties of . . . habitability, that [Tenants] would have to . . . pay for any repairs[,] . . . that payment was due on the first of the month, and that [Landlord] could 'evict' [Tenants] for not paying on time."[325] The House was in disrepair at the time Tenants signed the Agreement—missing plumbing, electrical wiring, and locks; windows, stairs, and carpets were in disrepair; and the "property was strewn with trash."[326]

The Agreement stated that "the parties' intent was to consummate [the] sale of the House[and] required [Tenants] to make monthly payments . . . for thirty years."[327] However, the Agreement called the first twenty-four payments "rental payments."[328] Only if Tenants "made those payments[would] the parties . . . execute a separate 'Conditional Sales Contract (Land Sale)' for the remaining twenty-eight years."[329] Two years after entering into the Agreement, "the House

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319. *Id.* at 481-82.
320. Rainbow Realty Grp., Inc. v. Carter, 131 N.E.3d 168 (Ind. 2019).
321. *Id.* at 168, 173.
322. *Id.* at 170-71.
323. *Id.* at 171.
324. *Id.*
325. *Id.*
326. *Id.*
327. *Id.*
328. *Id.*
329. *Id.*

remained uninhabitable"; however, Tenants had still used the House as a residence.[330] Landlord tried to evict Tenants several times when Tenants fell behind on payments.[331] A small claims court held that Landlord could retake possession.[332] When Tenants appealed, the trial court entered partial summary judgment for Tenants, finding Landlord liable for breach of the warranty of habitability and for making false or deceptive statements about Landlord's ability to disclaim the warranty.[333] Landlord appealed, and the Court of Appeals reversed, concluding that the Agreement is not a residential lease, and not subject to residential landlord-tenant statutes.[334] The Supreme Court granted transfer and affirmed in part, reversed in part, and remanded.[335]

Under Indiana law, "[t]he residential landlord-tenant statutes do not apply to . . . [o]ccupancy under a contract of sale of a rental unit . . . if the occupant is the purchaser."[336] The Agreement stated that Tenant's intent was to purchase the property.[337] The Court found that, while most of the Agreement's terms suggested that this was a sale, "[f]or at least the first two years, the Agreement was a residential lease with a contingent commitment to sell."[338] The Agreement "required a separate contract [in order] to effectuate a sale[, n]o equity accrued . . . during the first twenty-four months," and Landlord had the right to evict Tenants if Tenants defaulted.[339] Therefore, the Court found that the Agreement was subject to residential landlord-tenant statutes.[340]

The Court next held that, under Indiana Code section 32-31-8-1(a), the House is a "dwelling unit," and the Agreement is a "rental agreement," "subjecting the parties' relationship to the residential landlord-tenant statute[. . .] obligation to deliver the premises in a 'safe, clean, and habitable condition.'"[341] The Court found that the House is a "dwelling unit" based on its dictionary definition as a place to live.[342] Indiana Code section 32-31-8-1 applies only to "dwelling units that are let for rent under a rental agreement."[343] As such, the Court further found that the Agreement is a "rental agreement," defined as "an agreement . . . embodying the terms and conditions concerning the use and occupancy of a *rental unit*."[344] The House is a "*rental unit*" because Indiana Code section 32-31-

330. *Id.* at 171-72.
331. *Id.* at 172.
332. *Id.*
333. *Id.*
334. *Id.*
335. *Id.*
336. *Id.* at 173 (quoting IND. CODE § 32-31-2.9-4(2) (2021)).
337. *Id.*
338. *Id.*
339. *Id.* at 173-74.
340. *Id.* at 174.
341. *Id.* (citing IND. CODE § 32-31-8-5(1)).
342. *Id.* at 175.
343. *Id.*
344. *Id.* (emphasis in original) (citing IND. CODE § 32-31-3-7).

3-8 defines a "rental unit" as any "area *promised* for the use of a residential tenant" and Landlord clearly intended that the House be used as a single–family dwelling.[345] The Court concluded that the Agreement is a "rental agreement" because the parties agreed that the House was *promised* for Tenant's use as a single-family dwelling.[346] Because the House and the Agreement fall under residential landlord-tenant statutes, the Agreement's waiver of Landlord obligations is void and Landlord breached the statutory warranty of habitability.[347]

Finally, the Court held that Landlord was not liable under the Deceptive Consumer Sales Act.[348] First, the Court found that Landlord likely did not know that its allegedly deceptive act about its ability to disclaim the warranty of habitability was false, and a deceptive act requires that "the supplier knows or should reasonably know that the representation is false."[349] Second, even if Landlord knew that its disclaimer of the warranty qualified as a deceptive act that Landlord knew or should have known was false, Tenants still would not be entitled to damages, for the Act requires that the claimant rely on the deception, and Tenants clearly did not in this instance.[350] Lastly, the Deceptive Consumer Sales Act does not contemplate an aggrieved person suing for damages when the alleged deception concerns real property.[351]

X. RESTRICTIVE COVENANTS

A. Kosciusko County Community Fair, Inc. v. Clemens

In *Kosciusko County Community Fair, Inc. v. Clemens*,[352] the Court of Appeals held that the trial court's finding that a restrictive covenant related to motorized racing on a county fair property is enforceable and runs with the land. In 1989, a group of homeowners (the "Original Homeowners") filed a complaint against the Kosciusko County Community Fair, Inc. (the "Fair") related to motor vehicle racing on its property (the "Property").[353] In 1990, as part of a settlement with the Original Homeowners, the Fair executed a restrictive covenant (the "Covenant") limiting use of motorized racing on the Property.[354] In 2018, a group of new homeowners (the "Homeowners") filed a complaint alleging that the Fair breached the Covenant and sought injunctive relief and an order requiring that the

345. *Id.* at 176 (emphasis in original) (citing IND. CODE § 32-31-3-8(2)).
346. *Id.*
347. *Id.*
348. *Id.* at 177 (citing IND. CODE § 24-5-0.5).
349. *Id.* (citing IND. CODE § 24-5-0.5-3(b)(8)).
350. *Id.* at 178.
351. *Id.*
352. Kosciusko Cty. Cmty. Fair, Inc. v. Clemens, 143 N.E.3d 310 (Ind. Ct. App. 2020).
353. *Id.* at 313.
354. *Id.*

Fair comply with the terms of the Covenant.[355] The trial court found that one of the Homeowners was a successor-in-interest to one of the Original Homeowners with respect to the Property at the time the Covenant was executed, providing Homeowner standing to enforce the Covenant; as such, the trial court found that the Covenant runs with the land.[356] The Court of Appeals affirmed the trial court's judgment in 2018, and does so again in this case.[357]

The Court of Appeals noted that

> [t]he "law of the case" doctrine designates that an appellate court's determination of a legal issue is binding on both the trial court and the Court of Appeals in any subsequent appeal given the same case and substantially the same facts[, and the court will] minimize unnecessary repeated litigation of legal issues.[358]

The Court of Appeals observed the law that

> restrictive covenants run with the land if (1) the [original parties who entered into the covenants] intended [them] to run [with the land;] (2) the covenant[s] touch[] and concern the land[;] and (3) there is privity of estate between subsequent grantees of the original covenantor and covenantee, and . . . vertical privity is established where the party seeking to enforce the covenant and the party against whom it is to be enforced are successors in title to the property.[359]

The Court of Appeals held that the Covenant constitutes a covenant running with the Property.[360] First, the court found that the language of the Covenant clearly indicates that the covenantor intended for the Covenant to run with the Property.[361] Second, the Covenant undisputedly touches and concerns the Property.[362]

Finally, the Court of Appeals found that there is privity of estate between the Original Homeowners and the Homeowners.[363] One of the Homeowners purchased property that was owned by one of the Original Homeowners when the Covenant was executed.[364] The Court of Appeals agreed with the trial court in finding that this Homeowner was a successor-in-interest to one of the Original

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355. *Id.*

356. *Id.*

357. *Id.*

358. *Id.* at 314 (citing City of Gary v. Smith & Wesson Corp., 126 N.E.3d 813, 832-33 (Ind. Ct. App. 2019)).

359. *Id.* at 315 (citing Kosciusko Cty. Cmty. Fair, Inc. v. Clemens, 116 N.E.3d 1131, 1136 (Ind. Ct. App. 2018)).

360. *Id.*

361. *Id.*

362. *Id.*

363. *Id.*

364. *Id.*

Homeowners, and further concluded that there is vertical privity of estate.[365]

The Court of Appeals rejected the Fair's argument that the Covenant did not run with the Property under the Statute of Frauds, "which requires that certain contracts be in writing," because the Covenant "was in writing and was recorded with the . . . County Recorder's Office."[366] The Court of Appeals "also rejected the Fair's argument that the . . . [C]ovenant could not be enforced because it lacked an essential term," as the Covenant "clearly identified the burdened party and included a legal description of the burdened" Property.[367] Finally, the Court of Appeals observed that the rule against perpetuities "applies only to future estates which are contingent, and has no application to vested estates."[368] Accordingly, "a restrictive covenant limiting the use of a parcel of land does not violate the rule against perpetuities even if it is of indefinite duration."[369] The Court of Appeals affirmed the trial court's ruling and remanded for a determination of damages.[370]

XI. UTILITIES

A. KMC, LLC v. Eastern Heights Utilities, Inc.

In *KMC, LLC v. Eastern Heights Utilities, Inc.*,[371] the Court of Appeals affirmed the trial court's summary judgement in favor of Eastern Heights Utilities, Inc. (the "Utility"), confirming that the Utility did not have a duty to shut off the water supply to the fire suppression system in the building (the "Building") owned by KMC, LLC (the "Property Owner").

The Property Owner owned the Building, which was serviced with water by the Utility.[372] The Building had separate water valves for the fire suppression system and the building's general use.[373] In 2017, the Property Owner requested that the Utility shut off the water to the then vacant Building.[374] Though the exact request is not explicitly clear, the Property Owner did not separately request that the Utility shut off the water valves for the fire suppression system, and the Utility did not do so.[375] Cold weather conditions subsequently caused the fire suppression system pipes to burst and damage the Building.[376] The Property

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365. *Id.*

366. *Id.* at 316 (citing IND. CODE § 32-21-1-1(b) (2002); Kosciusko Cty. Cmty. Fair, Inc. v. Clemens, 116 N.E.3d 1131, 1138 n.2 (Ind. Ct. App. 2018)).

367. *Id.* (quoting *Clemens*, 116 N.E.3d at 1138).

368. *Id.* (quoting *Clemens*, 116 N.E.3d at 1139).

369. *Id.* (quoting *Clemens*, 116 N.E.3d at 1139).

370. *Id.* at 317.

371. KMC, LLC v. Eastern Heights Utils., Inc., 144 N.E.3d 773 (Ind. Ct. App. 2020).

372. *Id.* at 774.

373. *Id.*

374. *Id.*

375. *Id.*

376. *Id.*

Owner filed a motion for partial summary judgment, to hold that the Utility was negligent for failing to shut off the fire suppression system water valves.[377] The Utility filed a cross-motion.[378] The trial court held for the Utility, and the Property Owner appealed.[379]

The Court of Appeals reiterated, to prevail on a theory of negligence, the Property Owner must be able to show duty, breach, and that the "damages were proximately caused by that breach."[380] In this case, the Court of Appeals based its ruling on duty alone, being sufficient to determine the outcome of the ruling.[381] The first reason for a lack of duty was that the Property Owner failed to ask the Utility to shut off water to the fire suppression system.[382] This lack of duty was further bolstered because it would have been against the law to turn off the water supply without authorization from an official of the Indiana Fire Protection and Building Commission.[383] Because the Property Owner failed to explicitly submit a request with proper authorization as required by statute, the Utility had no duty to shut off the water supply to the fire suppression system.[384]

B. SurVance v. Duke Energy Indiana, LLC

In *SurVance v. Duke Energy Indiana, LLC*,[385] the Court of Appeals ruled that public utilities have legislative authorization to condemn easements in order to accomplish essential delivery of a utility to the public or to any town or city.

> SurVance owns several adjoining tracts in Martin County that are subject to an express easement[] . . . for a Duke Energy electric transmission line. In March 2019, Duke Energy filed four condemnation complaints against SurVance to amend and release portions of the easement. . . .
> . . . .
> The trial court consolidated the cases and held a hearing, at which SurVance presented no evidence. The trial court summarily denied SurVance's objections and appointed appraisers "to assess the [property]" . . . . SurVance now appeals.[386]

The Court of Appeals affirmed the trial court's ruling, largely because SurVance offered no evidence to which the appellate court could reference.[387]

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377. *Id.* at 775.
378. *Id.*
379. *Id.*
380. *Id.*
381. *Id.* at 774.
382. *Id.* at 775.
383. *Id.* at 776.
384. *Id.* at 777.
385. SurVance v. Duke Energy Ind., LLC, 146 N.E.3d 362, Nos. 19A-MI-2774, 2783, 2786, 2795, 2020 WL 1933193 (Ind. Ct. App. 2020) (unpublished disposition).
386. *Id.* at *1-2.
387. *Id.* at *3.

SurVance's main argument on appeal was that Duke Energy's "taking is not for a public purpose because the transmission line serves, and is only allowed to serve, one customer."[388] The Court of Appeals dismissed this reasoning however, stating that public utilities have "legislative authorization to condemn easements 'to accomplish essential delivery' of electricity 'to the public or to any town or city.'"[389] The Court further stated that public utilities cannot withdraw a utility from a commercial member of the public who has a legal right to use that utility.[390]

XII. WRONGFUL BURIAL

A. Salyer v. Washington Regular Baptist Church Cemetery

In *Salyer v. Washington Regular Baptist Church Cemetery*,[391] the Supreme Court held that the purchaser of a gravesite ("Purchaser") is entitled to the relief provided by Indiana's wrongful burial statutes, when the Washington Regular Baptist Cemetery (the "Cemetery") resold the same gravesite and allowed someone else to be buried in it. In 1982, Purchaser bought five contiguous gravesites in the Cemetery, and over the years, the remains of Purchaser's family have been buried in some of the gravesites.[392] Subsequently, the Cemetery mistakenly sold one of the gravesites to a third-party, and the third-party was buried in Purchaser's northernmost gravesite.[393] Purchaser demanded that the Cemetery move the third-party's remains, and the Cemetery refused.[394]

The trial court concluded that (1) Purchaser did not show that "the Cemetery committed a wrongful burial," and (2) regardless of who was responsible for the wrongful burial, the trial court awarded Purchaser "a vacant gravesite[,] . . . free of charge, . . . 'to "correct" the error and/or dispute.'"[395] The Court of Appeals affirmed the trial court's decision, and the Supreme Court granted transfer.[396]

The Supreme Court vacated the Court of Appeals' opinion, and concluded that "Indiana's wrongful burial statutes provide, in relevant part, that a cemetery owner or its agent 'is not liable in any action for . . . (1) a burial . . . in the wrong lot, grave, grave space, burial space, crypt, crypt space, or niche.'"[397] But, "[w]hen a wrongful burial . . . referred to in section 1(1) . . . occurs, the cemetery owner shall: (1) at the expense of the cemetery owner, *correct* the wrongful

388. *Id.*
389. *Id.* (quoting IND. CODE §§ 32-24-4-1(a) to -2, 8-1-8-1(a) (2021)).
390. *Id.*
391. Salyer v. Wash. Regular Baptist Church Cemetery, 141 N.E.3d 384 (Ind. 2020).
392. *Id.* at 385.
393. *Id.*
394. *Id.* at 385-86.
395. *Id.* at 386.
396. *Id.*
397. *Id.*; IND. CODE § 23-14-59-1 (2021).

burial . . . as soon as practical after becoming aware of the error."[398] The Supreme Court noted that Indiana law "imposes a specific duty upon a cemetery to correct a wrongful burial" and held that the Indiana Code "requires that a wrongful burial be made right or set right, altered so as to bring it to some required condition [meaning that] . . . the burial is no longer 'in the wrong lot, grave, grave space, burial space,' etc."[399] Accordingly, the Supreme Court ordered the Cemetery to correct the wrongful burial by removing the third-party's remains from Purchaser's gravesite and restoring it for Purchaser's use.[400]

XIII. ZONING

A. City of Hammond v. Rostankovski

In *City of Hammond v. Rostankovski*,[401] the Court of Appeals held that a lower court cannot apply the doctrine of laches to an issue *sua sponte* and that it must be offered as an affirmative defense by a defendant.

John Rostankovski was the owner of a residential rental property in Hammond, Indiana.[402] In October 2017, the City of Hammond (the "City") "filed a complaint . . . alleging . . . a violation of the City's zoning ordinance existed at the property."[403] Specifically, "the City alleged that the deck of the house violated the side yard restrictions set under . . . the City's [z]oning [c]ode, . . . which provides in relevant part that neither side yard on the property shall have a width less than three feet."[404] Rostankovski filed a motion to dismiss, which was granted by the city court, reasoning that although the deck violated the zoning code, "the City was barred from enforcing the setback requirement against Rostankovski due to laches."[405] The City then "filed a motion to correct error with the" trial court, arguing that the trial court "erred in dismissing [its] complaint because no facts were presented [at the hearing] that would support a finding of laches and that laches is not a defense to a municipality's action to enforce its zoning ordinances."[406] After the city court denied this motion, and after multiple failed appeal attempts at the city court and trial court levels, the City's appeal was granted by the Court of Appeals.[407]

The Court of Appeals reversed and remanded the trial court.[408]

> [T]he City assert[ed] that it was Rostankovski, and not the City, that had

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398. *Salyer*, 141 N.E.3d at 386 (emphasis added); IND. CODE § 23-14-59-2.
399. *Salyer*, 141 N.E.3d at 387 (citations omitted).
400. *Id.* at 387-88.
401. City of Hammond v. Rostankovski, 148 N.E.3d 1165 (Ind. Ct. App. 2020).
402. *Id.* at 1167 (citation omitted).
403. *Id.* (citation omitted).
404. *Id.* (citation omitted).
405. *Id.* (citation omitted).
406. *Id.* (citation omitted).
407. *Id.* at 1167-68.
408. *Id.* at 1165.

> the duty to raise laches as an affirmative defense, and he waived the issue of laches because he never specifically pleaded to the defense in his motion to dismiss[, and] that the trial court . . . rais[ing] the issue of laches sua sponte in its order dismissing the City's complaint . . . was error.[409]

The Court of Appeals agreed with the City, stating that "[b]ased on [its] review of the record, . . . the trial court erred when it affirmed the [c]ity [c]ourt's ruling dismissing the City's complaint," because it was not Rostankovski who raised the affirmative defense, but the city court *sua sponte*.[410] Furthermore, the Court of Appeals stated that "[t]he law [makes it] clear that laches cannot be a defense to municipality's action to enforce its zoning ordinances."[411]

409. *Id.* at 1169.
410. *Id.* at 1170.
411. *Id.*