

“WE JUST SAW IT FROM A DIFFERENT POINT OF VIEW”: RECENT DEVELOPMENTS IN INDIANA REAL PROPERTY LAW

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This Article takes a topical approach to the notable real property cases in this survey period, October 1, 2002 through September 30, 2003, beginning with a discussion of the unresolved tension in Indiana law between legal and equitable remedies for the breach of a contract concerning real estate. The Article then analyzes noteworthy cases in each of the following areas: (1) relationships between private parties; (2) title and recording issues; (3) land use law; (4) eminent domain law; (5) tax sales; and (6) developments in the common law of property.

I. REMEDIES FOR THE BREACH OF A REAL ESTATE PURCHASE CONTRACT

The same panel of the Indiana Court of Appeals addressed a fundamental question twice in as many months this survey period—what remedies are available to a seller after a purchaser’s breach of a contract for the sale of real estate? Beyond their direct application, these cases are important because the contradictory philosophies articulated in *Humphries v. Ables*¹ and *Kesler v. Marshall*² highlight a broad unresolved tension in Indiana common law between legal and equitable remedies, specifically with respect to the availability of the remedy of specific performance for the breach of a real estate contract.

The first case addressed a dispute between Max and Betty Ables (collectively, “Sellers”) and Marc and Kelle Humphries (collectively, “Buyers”), who were parties to a contract for the sale of a liquor store on a site in Frankton, Indiana, that had been previously used as a gas station (the “Property”). The on-site underground storage tanks, unused since the early 1970s, had never been removed.³ Buyers informed Sellers that they would not consummate the transaction, and Sellers filed suit. Buyers counterclaimed, arguing that the Sellers had made fraudulent misrepresentations regarding the environmental condition of the Property, particularly with respect to the underground storage tanks. The trial court found in favor of Sellers and ordered specific performance of the contract and awarded incidental damages.⁴ Buyers appealed, claiming that the presence of the tanks and the possible contamination of the Property rendered the title thereto “unmarketable,” and that, therefore, they had no obligation to fulfill the contract.⁵ In any event, Buyers asserted, Sellers had an adequate

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1. 789 N.E.2d 1025 (Ind. Ct. App. 2003).

2. 792 N.E.2d 893 (Ind. Ct. App. 2003).

3. *Humphries*, 789 N.E.2d at 1028.

4. *Id.* at 1029.

5. *Id.* at 1032. On the marketable title issue, the court of appeals held that potential or

remedy at law and specific performance was not the proper remedy.

Judge Sullivan, writing for the majority, began by setting forth his judicial philosophy about the availability of the equitable remedy. In part, the majority noted that the decision to grant specific performance is within the discretion of the trial court and that such judgments of the trial court are to be given deference because specific performance is a remedy that "sounds in equity."⁶ The court also noted that "[i]t is a matter of course for the trial court to grant specific performance of a valid contract for the sale of real estate."⁷ The court specifically rejected the Buyers' view that, under Indiana law, "specific performance is available [for the non-breaching seller] only when re-sale or foreclosure of the property is made difficult or impossible due to damage or loss."⁸ Instead, the court found that the remedies provision of the contract provided that all remedies, legal and equitable, were available to the non-breaching party and that contracts, when entered into freely and voluntarily, will be enforced by the courts.⁹ "Because the Buyers have made no claim that they did not enter into the contract freely and voluntarily, we will not invalidate a remedy for which the Sellers contracted."¹⁰ Based on this analysis, the court found that the decision to award the equitable remedy of specific performance was within the trial court's discretion.¹¹

Judge Kirsch dissented with regard to the majority's analysis of the specific performance issue, simply noting that:

I believe that specific performance of a real estate contract is proper only where the remedy at law is inadequate. While specific performance may be granted as a matter of course to the purchaser because real estate is unique, in the typical case the seller's remedy at law in the form of an action for money damages will be sufficient to fully compensate the plaintiff. I see nothing in the facts of this case to indicate that the sellers have an inadequate remedy at law to justify the grant of specific performance.¹²

In the opinion and dissent, Judge Sullivan and Judge Kirsch articulate the two major schools of thought regarding the availability of equitable remedies. In Judge Sullivan's view, the choice of remedies between those freely contracted by the parties is within the discretion of the trial court. In Judge Kirsch's view,

certain environmental contamination does not render title to property "unmarketable," citing a New Hampshire Supreme Court decision which noted that "[o]ne can hold perfect title to land that is valueless; one can have marketable title to land while the land itself is unmarketable." *Id.* (quoting *McManus v. Rosewood Realty Trust*, 719 A.2d 600, 601 (N.H. 1998)).

6. *Id.* at 1034.

7. *Id.* (citing *Stoll v. Grimm*, 681 N.E.2d 749, 756 (Ind. Ct. App. 1997)).

8. *Id.* at 1035.

9. *Id.* at 1035-36.

10. *Id.* at 1036.

11. *Id.*

12. *Id.* at 1036-37.

regardless of the bargain between the parties, the trial court may only award equitable remedies, in this case specific performance, if its findings support the conclusion that no adequate remedy at law is available. This philosophical dispute has a long history in Anglo-American law and has quietly remained an unresolved background issue in modern Indiana common law.

The roots of the contemporary conflict between law and equity can be traced to the Magna Carta, which provided that appeals to justice should no longer be the business of the king alone.¹³ Courts of common pleas began to develop what came down to us as the common law, which they applied rigidly. Only monetary damages were available from the courts of common pleas in a civil action. At the same time, the crown retained its inherent authority to decide cases and grant relief to parties in civil matters.¹⁴ The chancellor presided over pleas for royal discretion, which he decided with reference to principles of fairness and morality rather than precedent and inflexible codes. The chancellor employed a number of remedies unavailable in the courts of common pleas, such as specific performance and injunctive relief.¹⁵

Eventually, the courts of chancery developed to perform the chancellor's function, and the common law courts and chancery courts operated separately to enforce different and complementary substantive and procedural rights. During the Tudor and Stuart revolutions of the sixteenth and seventeenth centuries, the crown and the lay judges of the common law courts engaged in a power struggle over the jurisdiction of the two competing systems. Ultimately, "the common law judges won the battle."¹⁶ As a result, individuals could not seek relief from the court of chancery "without first alleging that law was inadequate."¹⁷

As a general rule, it is clear that law continues to dominate over equity in our merged system. The Indiana Supreme Court has recently stated in no uncertain terms that if an adequate remedy at law exists, equitable relief should not be granted.¹⁸ However, for more than fifty years this default rule has not been followed in the context of real estate disputes, particularly when the plaintiff is a non-breaching purchaser seeking specific performance of a real estate purchase contract.

Although Judge Sullivan's holding is consistent with the current prevailing philosophy, Judge Kirsch's dissent in *Humphries* echoes older Indiana cases. Such cases speak of requiring a finding that no adequate remedy at law exists before upholding a trial court's grant of specific performance for the breach of a real estate purchase agreement, even when the non-breaching party was the purchaser.¹⁹ But for Judge Kirsch's apparent fidelity to it, that historically

13. Judy Beckner Sloan, *Quantum Meruit: Residual Equity in Law*, 42 DEPAUL L. REV. 399, 404 (1992).

14. *Id.*

15. *Id.*

16. *Id.* at 406.

17. *Id.*

18. *Ind. Family & Soc. Servs. Admin. v. Walgreen Co.*, 769 N.E.2d 158, 162 (Ind. 2002).

19. *See, e.g., Ind. Union Traction Co. v. Seisler*, 106 N.E. 911, 912 (Ind. App. 1914).

fleeting requirement has been supplanted in the past half century or so by the routine acknowledgment that specific performance is the preferred remedy for the breach of a real estate purchase agreement. Indeed, the Indiana appellate courts have repeatedly characterized specific performance as a “matter of course” in such cases.²⁰ They have explained that “[t]his is so because each piece of real estate is considered unique, without an exact counterpart anywhere else in the world.”²¹

If this historic dichotomy had surfaced in *Humphries* and then slipped off the radar, it would have remained simply an interesting academic debate. Yet things got murkier when, not quite two months after *Humphries* was decided, the same panel of judges: Sullivan, Sharpnack, and Kirsch addressed another case in which a trial court awarded specific performance as a remedy to a seller after it concluded that a purchaser had breached a contract for the sale of real estate. Because the opinion of the majority was written by Judge Kirsch this time, the prevailing philosophy in *Kesler v. Marshall*²² sharply differed from *Humphries*.

In *Kesler*, J. John Marshall (“Seller”) and Kenneth J. Kesler (“Buyer”) entered into a contract for the sale of real property in Elkhart, Indiana (the “Property”). Because of a dispute over the zoning status of the Property, the parties did not consummate the transaction.²³ Six years after the date of the contract, Seller brought an action demanding specific performance and incidental damages.²⁴ The trial court found that Buyer breached the contract and awarded specific performance and incidental damages. Buyer appealed, both on the underlying question of whether he breached the contract and on the trial court’s selection of remedies.²⁵

Judge Kirsch, writing for the majority, concluded that because Seller did not provide Buyer with certain assurances regarding the zoning of the property, Seller failed to substantially perform his obligations under the contract.²⁶ Under Indiana law, “[a] party seeking specific performance of a real estate contract must prove that he has substantially performed his contract obligations or offered to do so.”²⁷ Thus, the court held, “we find the trial court’s conclusion that [Seller]

20. See, e.g., *Ruder v. Ohio Valley Wholesale, Inc.*, 736 N.E.2d 776, 779 (Ind. Ct. App. 2000) (“Specific performance is a matter of course when it involves contracts to purchase real estate.”).

21. *New Life Cmty. Church of God v. Adomatis*, 672 N.E.2d 433, 438 (Ind. Ct. App. 1996).

22. 792 N.E.2d 893 (Ind. Ct. App. 2003).

23. *Id.* at 895. A condition precedent to Buyer’s obligations under the contract was the that Seller “provide, in writing, that the property can be used for any manor [sic] under M-1 zoning regulations, prior to closing.” *Id.* Seller provided Buyer with a letter from the Director of the Planning and Development Department of the City of Elkhart, which was intended to fulfill the requirement. *Id.* However, evidence presented at trial demonstrated that the Property “enjoyed M-1 zoning only by virtue of its ‘grandfathered’ status as a nonconforming use.” *Id.* at 896.

24. *Id.* at 895.

25. *Id.*

26. *Id.* at 896.

27. *Id.*

was entitled to specific performance to be clearly erroneous.”²⁸

After the court held that the Seller was not entitled to any remedy, it analyzed, in dicta, the trial court’s decision to grant specific performance to Seller. The court noted, as it had in *Humphries*, that the decision whether to grant specific performance is a matter within the discretion of the trial court.²⁹ However, it cited recent authority that “[s]uch judicial discretion is not arbitrary, but is governed by and must conform to the well-settled rules of equity.”³⁰ Those “well-settled rules” include the notions that equitable remedies like specific performance are “extraordinary” remedies and that they are “not available as a matter of right.”³¹ Instead, equitable remedies are only available when no adequate remedy at law, i.e., monetary damages, exists. “Where substantial justice can be accomplished by following the law, and the parties’ actions are clearly governed by rules of law, equity follows the law.”³²

In this case, the court found, the trial court’s findings did not support the conclusion that no adequate remedy at law existed.³³ “Under these circumstances, the trial court abused its discretion in ordering [Buyer] to specifically perform the contract.”³⁴ The court did not address what remedy provisions, if any, were present in the contract between Buyer and Seller.

Although Judge Sullivan agreed with the majority’s decision that Seller was not entitled to a remedy because Seller did not substantially perform his obligations under the contract, he concurred in result with a separate opinion in order to reaffirm the philosophy he expressed in *Humphries*.³⁵ His concurrence simply cited a passage from a 1906 Indiana Supreme Court decision that reads as follows:

“The equitable doctrine is that the enforcement of contracts must be mutual, and, the vendee being entitled to specific performance, his vendor must likewise be permitted in equity to compel the acceptance of his deed and the payment of the stipulated consideration. This remedy is available, although the vendor may have an action at law for the purchase money.”³⁶

Despite their factual similarities, these two cases present acutely contradictory philosophies regarding the discretion of the trial court to award the equitable remedy of specific performance in the context of a breaching purchaser and what findings may be necessary to support such an award. Because neither the majority nor the concurrence in *Kesler* refer to *Humphries* and the issue is

28. *Id.*

29. *Id.*

30. *Id.* (citing *Wagner v. Estate of Fox*, 717 N.E.2d 195, 200 (Ind. Ct. App. 1999)).

31. *Id.*

32. *Id.* at 897.

33. *Id.*

34. *Id.*

35. *Id.* at 898.

36. *Id.* (Sullivan, J., concurring) (quoting *Migatz v. Stieglitz*, 77 N.E. 400, 401 (Ind. 1906)).

merely discussed in dicta, *Kesler* does not overrule the earlier case. In a broader context, however, *Kesler* may be used along with century-old cases having similar holdings which have never been expressly disavowed, for the proposition that no award of equitable remedies is sustainable on appeal unless the trial court finds that no adequate remedy at law exists.

Although the historic unresolved tension between law and equity may seem esoteric, *Humphries* and *Kesler*, combined with last year's decision in *Crossmann Communities, Inc. v. Dean*,³⁷ indicate that the "well-settled rules" regarding law and equity in Indiana common law appear to rest on a shaky foundation. This should be a matter of practical concern. The *Humphries* opinion placed weight upon the contractual remedies provision and the parties' intent to make both legal and equitable remedies available to both parties. However, the *Kesler* opinion failed to discuss the contractual remedies provisions and instead seems to stand for the proposition that regardless of the parties' bargain, the trial court has no discretion to award equitable relief unless it makes a factual determination that no adequate remedy at law exists. The court's approach to the remedies provision in *Humphries* makes no distinction between a provision that is specifically negotiated (i.e., "in the event of breach by the purchaser, the seller shall be entitled to specific performance of the contract") as opposed to boilerplate language that makes all remedies possible. In *Humphries*, the purchase agreement simply gave both parties all remedies at law or equity. It remains to be seen whether another panel of the court of appeals will view these boilerplate provisions so expansively. A jurist of Judge Kirsch's outlook would likely take a different view on how the common law of equity might interact with a boilerplate remedies provision. That is, if the common law does not permit equitable remedies in certain circumstances, may the parties overrule the common law by contract? If so, does the provision need to be specifically negotiated and clear, or does the boilerplate "all remedies at law or equity" suffice?

Most sophisticated commercial real estate purchase agreements include remedies provisions which: (1) limit a non-breaching seller's damages to the earnest money deposit, as liquidated damages; and (2) entitle a non-breaching purchaser to enforce specific performance. Neither *Humphries* nor *Kesler* directly challenge the enforceability of these provisions. Yet, until the historic differences expressed by Judge Sullivan and Judge Kirsch in these two cases are resolved by the Indiana Supreme Court, uncertainty will remain about whether future decisions may place limits on the availability of equitable relief, despite the parties having bargained for it. If specific performance may only be awarded by a trial court after a factual finding on the adequacy of monetary damages, a seller may decide to breach under certain circumstances, rolling the dice that the purchaser will not have the means or the will to pursue monetary damages. On a micro level, this uncertainty causes purchasers and sellers to reallocate their risk in ways that are difficult to predict. On a macro level, it can affect the economics of the commercial real estate market.

37. 767 N.E.2d 1035 (Ind. Ct. App. 2002).

A few weeks after *Kesler* was decided, a court of appeals panel consisting of Judges Darden, Sullivan, and Baker addressed a case in which a trial court awarded specific performance to the purchaser under an oral contract for the purchase of land.³⁸ Although Judge Sullivan did not write the opinion of the court in *Hardin*, the philosophy expressed therein regarding the availability of specific performance is identical to that expressed in *Humphries* and makes no reference to *Kesler*.

At some point between 1995 and 1998, Mike and Annette Hardin, a married couple, had conversations with Mike's father, David, in which the parties evidently agreed that David would sell approximately eleven acres of land to Mike and Annette for \$4000 per acre so that they could build a home. In early 1998, Mike and Annette had the land surveyed, built a bridge across a creek and ravine to access the parcel, paid to extend utility lines to the property, contracted with an architect for blueprints, laid the foundation of the house, and began to construct a septic system.³⁹ David assisted Mike with some of the work on the property. At the end of 1999, Mike informed Annette that he wanted a divorce. Annette contacted David and offered to pay for the land immediately. David refused to accept her payment.⁴⁰ Annette filed a lawsuit against David, seeking damages for his breach of the oral purchase agreement in the form of either specific performance or monetary damages. The trial court concluded that an oral contract existed and that David had breached it. The court ordered David to sell the eleven acres to Annette alone for \$4000 per acre, and David appealed.⁴¹

The court of appeals began by stating, consistent with but without citing *Humphries*, that it reviews grants of specific performance under an abuse of discretion standard.⁴² The court also reiterated that "a party seeking specific performance . . . must prove that he has substantially performed his contractual obligations or offered to do so."⁴³ The court did not separately analyze: (1) whether the oral contract is enforceable; and (2) if so, what remedy is appropriate. Instead, it noted that although contracts for the purchase of real estate are covered by the Statute of Frauds, oral promises to convey land "'may be enforced under the doctrine of promissory estoppel'"⁴⁴ and concluded that "[t]his evidence supports the trial court's conclusion that there was a promise to sell by David, made with the expectation that Mike and Annette would rely on it, which induced their reasonable reliance of a definite and substantial nature."⁴⁵ The court of appeals also found that "[t]here is sufficient evidence to support the trial court's conclusion that here, 'injustice can be avoided only by enforcement

38. *Hardin v. Hardin*, 795 N.E.2d 482 (Ind. Ct. App. 2003).

39. *Id.* at 484.

40. *Id.* at 485.

41. *Id.*

42. *Id.* at 486.

43. *Id.* at 487.

44. *Id.* (quoting *Brown v. Branch*, 758 N.E.2d 48, 50 (Ind. 2001)).

45. *Id.* at 488.

of the promise.”⁴⁶

The *Hardin* opinion does not address whether the trial court made a factual finding that Mike and Annette did not have an adequate remedy at law. *Kesler* appears to stand for the proposition that such a factual finding is necessary for an Indiana appellate court to conclude that a trial court did not abuse its discretion in awarding specific performance. The failure of *Hardin* to discuss, or even acknowledge, the dichotomy revisited by *Humphries* and *Kesler* further underlines the unresolved tension in Indiana common law regarding the availability of specific performance as a remedy for the non-breaching party to a real estate purchase agreement.

II. RELATIONSHIPS BETWEEN PRIVATE PARTIES

A. Security Deposit Statutes

Each survey period brings at least one case dealing with whether, and upon what terms, a residential landlord must return a security deposit to a former tenant. This year, in *Lae v. Householder*,⁴⁷ the Indiana Supreme Court ruled that the forty-five day period in which a landlord must mail an itemized list of damages to a former tenant in order to offset those damages against a security deposit is tolled until the former tenant supplies the landlord with his new address.⁴⁸

Lae (“Landlord”) rented an apartment to Householder (“Tenant”). Forty-seven days after Householder vacated the apartment, his attorney mailed a letter to Lae requesting the return of Householder’s security deposit pursuant to the Security Deposit Statute,⁴⁹ which requires that a landlord, within forty-five days after termination of occupancy under a residential lease, provide tenant with a list of damages claimed to offset a security deposit.⁵⁰ Landlord responded by filing a complaint against Tenant for damages to the apartment. The complaint did not contain an itemized list of damages. Tenant counterclaimed for the return of the security deposit, plus attorney fees. The trial court found in favor of Tenant based on Landlord’s failure to comply with the Security Deposit Statute and Landlord appealed.⁵¹ The court of appeals reversed, reasoning that Tenant’s failure to provide Landlord with a forwarding address within forty-five days after termination of occupancy made it impossible for Landlord to comply and therefore relieved Landlord of his statutory obligation.⁵² Tenant appealed.

The Indiana Supreme Court granted transfer and, after analyzing the Security Deposit Statute using the standard rules of statutory construction, found that a

46. *Id.* (quoting *Brown*, 758 N.E.2d at 52).

47. 789 N.E.2d 481 (Ind. 2003).

48. *Id.* at 485.

49. IND. CODE § 32-31-3-12 (1998).

50. *Lae*, 789 N.E.2d at 482.

51. *Id.* at 482-83.

52. *Id.* at 483.

landlord's obligation to provide an itemized list of damages to tenant does not begin to run until tenant provides landlord with a forwarding address.⁵³ The court concluded, "[i]f the tenant has not supplied an address within the forty-five day period, we think tolling the landlord's obligation until a forwarding address is furnished is more consistent with . . . the purpose of the statute."⁵⁴

B. Guaranties—Limitations and Enforceability

In *Boonville Convalescent Center v. Cloverleaf Healthcare Services, Inc.*,⁵⁵ the court of appeals examined a complicated series of assignments concerning a commercial lease to determine whether the original guarantees were still in effect. Boonville Convalescent Center ("Boonville") leased a nursing home to Cloverleaf Healthcare Services, Inc. ("CHS") for a term of twenty years. The lease was personally guaranteed by a number of officers of CHS and their spouses. Approximately one month later, CHS assigned the lease to a newly created organization, CHB, having the same officers, directors, and shareholders as CHS.⁵⁶ The personal guarantors of CHS reaffirmed the guarantee of the lease agreement. Approximately five years later, CHB subleased the nursing home to Sherwood Healthcare Corp. ("SHC"), a newly created entity owned by CHS's controller, and assigned its interest as lessee and sublessor to BritWill Investments. BritWill Investments subsequently assigned its interest as lessee and sublessor to BritWill Healthcare Company, which later changed its name to Raintree Healthcare Corp. Approximately one year later, a number of the personal guarantors once again reaffirmed their obligations as guarantors of the lease, and approximately two years later, the remaining personal guarantors reaffirmed their obligations under the lease.⁵⁷ Approximately six years later, Raintree notified Boonville of its intention to file bankruptcy and reject the lease. Boonville contacted CHS and its personal guarantors and called on them to honor their obligations under the lease, but neither CHS nor the personal guarantees would take control of the facility. Raintree left the facility in a state of disrepair and forty percent vacant.⁵⁸ In an effort to mitigate damages and maintain its license, Boonville operated the facility as Southwind Healthcare, Inc. on a temporary basis while continuing to look for a permanent tenant or buyer. Southwind and Raintree executed an agreement which purported to be a temporary lease which had been entered into in order to mitigate damages and to maintain operation and management of the facility. The Agreement contained no language which released Raintree from its obligations under the lease.⁵⁹ Subsequently, Boonville sent letters to CHS and the personal guarantors

53. *Id.* at 483-84.

54. *Id.* at 485.

55. 790 N.E.2d 549 (Ind. Ct. App. 2003)

56. *Id.* at 551-52.

57. *Id.* at 552.

58. *Id.* at 553-56.

59. *Id.* at 553-54.

demanding that they pay the amounts due under the lease and assist in finding a replacement tenant. Boonville filed a claim in Raintree's bankruptcy seeking payment of obligations due under the lease and filed a complaint against CHS and the personal guarantors of the lease for payments of obligations under the lease.⁶⁰ CHS and the personal guarantors filed a motion for summary judgment on grounds that the agreement between Raintree and Southwind constituted an acceptance by Boonville of Raintree's rejection of the lease and that CHS and the personal guarantors were thus relieved of their obligations under the lease. The trial court granted the motion for summary judgment in favor of CHS and the personal guarantors, and Boonville appealed.⁶¹

The court of appeals reversed and remanded the case back to the trial court.⁶² The court noted that in determining whether the surrender of a lease has been accepted, the court must examine the acts of the parties.⁶³ In the absence of a writing supported by consideration to that effect, a surrender will only be deemed accepted by operation of law when the parties do some act that is a decisive and unequivocal manifestation of lessor's acceptance of the surrender.⁶⁴ In this case, the evidence does not show any such manifestation of acceptance of surrender of the lease by Boonville. Rather, Boonville continued to send demand letters to CHS and the personal guarantors of the lease, and the agreement between Southwind and Raintree stressed that it reserved all of its rights and claims under the existing lease agreement against the guarantors of the lease.⁶⁵ Southwind only assumed operation of the facility out of necessity. Under these circumstances, the surrender of the lease was not accepted by Boonville, and CHS and the personal guarantors continued to be obligated under the lease.⁶⁶

In *JSV, Inc. v. Hene Meat Co.*,⁶⁷ the court of appeals clarified that one cannot escape the essential nature of a "personal guaranty," even one which omits the word "personal."⁶⁸ JSV, Inc. ("JSV") signed a lease to rent space from Hene Meat Company ("Hene"). Mark Kennedy ("Kennedy") signed the lease as an officer of JSV and also signed a contemporaneous document labeled "Guaranty." The document stated that it was an unconditional guaranty of JSV's obligations under the lease.⁶⁹ Nothing in the document indicated that Kennedy was executing the guaranty in anything other than his individual capacity. JSV defaulted on the lease, and Hene sued JSV and Kennedy. The trial court granted summary judgment in favor of Hene on its claim that Kennedy was personally

60. *Id.* at 554.

61. *Id.* at 554-55.

62. *Id.* at 557.

63. *Id.* at 556 (citing *Mileusnich v. Novogroder Co.*, 643 N.E.2d 937, 939 (Ind. Ct. App. 1995)).

64. *Id.* at 556-57.

65. *Id.* at 557.

66. *Id.*

67. 794 N.E.2d 555 (Ind. Ct. App. 2003).

68. *Id.* at 560.

69. *Id.* at 557.

liable under the guaranty, and Kennedy appealed.⁷⁰

The court of appeals concluded that the guaranty signed by Kennedy was “unambiguously a personal guaranty, notwithstanding the fact that the word ‘personal’ does not appear in the document.”⁷¹ The court noted that there would have been “no point” for Hene to have Kennedy execute the guaranty in his capacity as an officer of JSV because “[s]uch an action would have been equivalent to JSV guaranteeing JSV’s performance of the lease and to JSV being both obligor under the lease and guarantor under the guaranty.”⁷² Such an outcome, the court stated, would have been “paradoxical and untenable.” Therefore, the reasonable interpretation is that the “Guaranty” was a personal guaranty by Kennedy.⁷³

C. Derivative Actions Against Owners’ Association in Office Park

*Edgeworth-Laskey Properties, L.L.C. v. New Boston Allison Ltd. Partnership*⁷⁴ highlights a few of the problems which can arise when a developer uses a number of related entities in a single development without treating them as completely independent entities and underscores the importance of careful drafting of reciprocal easement and similar agreements.

SMT Realty, Ltd. (“SMT”) acquired raw land that it intended to develop into an office park called Allison Pointe. As part of its pre-development, SMT executed a Declaration of Development Standards, Covenants, and Restrictions for Allison Pointe (“Declaration”). Because SMT was the owner of the real estate, it was the only party to the Declaration.⁷⁵ The Declaration provided for a “Developer,” defined as SMT and its successors and assigns, which had certain powers. These powers included appointment powers for a Development Advisory Board (the “Board”), which Board had the right and responsibility under the Declaration to approve site plans before construction may commence at Allison Pointe. The Declaration also provided for the creation of the Allison Pointe Owners Association, Inc. (“Association”), of which all owners of real estate in Allison Pointe were automatically members.⁷⁶ SMT changed its name to Allison Pointe Realty, L.P. (“APR”), and the Declaration was amended to reflect that change. APR then sold its remaining undeveloped parcels in Allison Pointe to Citimark I. Those parcels were then conveyed to New Boston Allison Limited Partnership (“New Boston”).⁷⁷ Citimark I, the sole remaining partner of APR, then became a limited partner of New Boston. No amendment to the Declaration was recorded which reflected the transaction to New Boston,

70. *Id.* at 558.

71. *Id.* at 560.

72. *Id.*

73. *Id.*

74. 793 N.E.2d 298 (Ind. Ct. App. 2003).

75. *Id.* at 299-300.

76. *Id.* at 300.

77. *Id.*

although Citimark I executed an "Assignment" in favor of New Boston, which purported to assign all of APR's rights, responsibilities, and obligations as Developer to New Boston.⁷⁸

New Boston sold four parcels of land to Edgeworth-Laskey Properties, L.L.C. ("E-L"). In the fourth transaction, the purchase agreement provided that New Boston would "cause" the Board to approve E-L's site plans within five business days after submittal and under a standard of less discretion than provided in the Declaration. E-L submitted its site plans to the Board, and those plans were rejected because E-L did not include a preliminary grading plan.⁷⁹ E-L filed a complaint against New Boston. Count I is styled as a derivative action and sought a declaration that New Boston is not the Developer pursuant to the Declaration.⁸⁰ Count II sought a declaration that the Board is bound by the purchase agreement between New Boston and E-L and that the plans submitted for the fourth parcel are deemed approved. The trial court granted New Boston's cross-motion for summary judgment on both counts.⁸¹

On Count I, the court of appeals did not address the substance of E-L's claim that New Boston was not properly designated as APR's successor because it found that E-L did not have standing to bring a derivative lawsuit.⁸² The court noted that derivative actions must comply with Indiana Trial Rule 23.1 and Indiana Code section 23-1-32-1, which means that shareholders or members must satisfy four requirements to bring such an action:

- (1) the complaint must be verified;
- (2) the plaintiff must have been a shareholder or member at the time of the transaction of which he or she complains;
- (3) the complaint must describe the efforts made by the plaintiff to obtain the requested action from the board; and
- (4) the plaintiff must fairly and adequately represent the interests of the shareholders or members.⁸³

In light of these requirements, the court found that E-L did not have the standing to bring the derivative lawsuit because it was not a member of the Association at the time that the Assignment was executed and recorded.⁸⁴

The court noted that Count II was brought against the Board, rather than New Boston, which E-L claims breached their purchase agreement by failing to compel the Board to approve their site plan.⁸⁵ The court found that E-L has no claim against the Board because the Board was not a party to the purchase agreement and a "trial court cannot require a non-contracting party to adhere to

78. *Id.* at 300-01.

79. *Id.* at 301-02.

80. *Id.* at 302.

81. *Id.*

82. *Id.* at 304.

83. *Id.* at 305.

84. *Id.*

85. *Id.* at 307.

the contractual terms.”⁸⁶ The court noted that:

It is irrelevant to our analysis that New Boston, as Developer, appointed all five members of the Advisory Board because those appointments alone do not suggest that New Boston has the authority to require the Advisory Board to approve or disapprove of certain submissions within a specified period of time. Indeed, if that were the case, there would be no need for the establishment of the Advisory Board.⁸⁷

III. TITLE AND RECORDING ISSUES

A. *Nature of Railroad Interests in Land*

The court of appeals addressed a seemingly archaic but apparently still practical issue twice during the survey period: what is the proper way to interpret historic railroad deeds to determine the nature of railroad interests in land?

The first case was *Louisville & Indiana Railroad v. Indiana Gas Co.*⁸⁸ The Ohio & Indianapolis Railroad Co., the predecessor to the Louisville & Indiana Railroad Co. (the “Railroad”) was chartered by the Indiana General Assembly in 1832, which charter was amended in 1846 and 1849. The 1832 charter gave the Railroad the power to purchase real estate, but did not expressly provide that the Railroad had the authority to hold the real estate in fee simple. In 1849, the General Assembly approved an act which expressly allowed the Railroad to take property in fee simple.⁸⁹

In 1846, a deed from Wales to the Railroad read, in relevant part, as follows:

I, Leonard Wales . . . for and in consideration of the advantages which will or may result to the public in general and myself in particular, by the construction of the . . . Rail Road, . . . do hereby . . . Release and Relinquish, to the [Railroad], the Right of Way, and all my interest in so much of the following described piece or parcel of Land, as the said company are, by charter, entitled to hold, for the purpose of constructing said road.⁹⁰

In 1852, Irwin executed a deed in favor of the Railroad using almost identical language.⁹¹

The question raised in *Louisville & Indiana Railroad* is straightforward—did the Wales and Irwin deeds convey a fee simple in the parcels to the Railroad, or did the Railroad take only an easement? The Indiana Gas Company argued that

86. *Id.*

87. *Id.* at 307 n.6.

88. 792 N.E.2d 885 (Ind. Ct. App. 2003), *trans. granted.*

89. *Id.* at 887-88.

90. *Id.* at 888.

91. *Id.*

the Railroad took only an easement on two grounds: (1) the 1832 charter did not expressly provide that the Railroad could own property in fee simple, and the 1849 act did not retroactively cure the Wales deed; and (2) the language in the Wales and Irwin deeds was insufficient to convey a fee simple interest in the parcels.⁹² After briefly discussing the nature of curative statutes, the court held that

the 1849 Act was curative legislation that merely acted to clarify the power of the Railroad to hold land in fee simple. Since the curative act retroactively gave the Railroad the power to hold property in fee simple, the Railroad had the authority to take and hold the property in fee simple.⁹³

With respect to the underlying question, the court noted that the Indiana Supreme Court adopted general rules of construction for conveyances of land to railroads in *Hefty v. All Other Members of the Certified Settlement Class*,⁹⁴ including the following general principles: (i) references to the conveyance of a "right-of-way" in a deed "generally leads to its construction as conveying only an easement;" (ii) deeds prepared by railroads will be construed in favor of the grantors; and (iii) if ambiguity exists in the deed, such ambiguity will be generally resolved in favor of the original grantors and their successors.⁹⁵

The court noted that the Wales and Irwin deeds contained two seemingly contradictory phrases: "right-of-way" and "all my interest in so much of the following described piece or parcel of Land."⁹⁶ The court did not interpret these two phrases to create an ambiguity, however, holding that "the conveyance unambiguously reflects a desire to convey the land in fee simple and not simply an easement. Thus, the language of the deeds here is outside the scope of *Hefty*'s general rule."⁹⁷

The court of appeals examined slightly different language in *Poznic v. Porter County Development Corp.*⁹⁸ Poznic obtained property in 1987 that was located directly north of and adjacent to Wabash Avenue, which was directly north of and adjacent to property identified as "Railroad Property."⁹⁹ Poznic sought to quiet title in herself in both the Railroad Property and Wabash Avenue. Poznic argued that: (i) a 1892 deed to the Railroad conveyed an easement rather than fee simple, and thus when the Railroad ceased to use the property for Railroad purposes it reverted back to the grantor; and (ii) Wabash Avenue was never properly dedicated because it was never improved as a street, thus demonstrating that it was never validly accepted by the City. The trial court denied Poznic's

92. *Id.* at 889-91.

93. *Id.* at 890.

94. 680 N.E.2d 843, 854-55 (Ind. 1997).

95. *Louisville & Ind. R.R.*, 792 N.E.2d at 891.

96. *Id.*

97. *Id.*

98. 779 N.E.2d 1185 (Ind. Ct. App. 2002).

99. *Id.* at 1188.

complaint holding that the Railroad received a fee simple and that Wabash Avenue was properly dedicated, and Poznic appealed.¹⁰⁰

The court of appeals affirmed the trial court on both issues, holding that the 1892 deed to Railroad conveyed a fee simple interest in the property.¹⁰¹ The court considered the following factors: (i) the language “grant, bargain, sell, remise, release, alien, and confirm’ forever a strip of land . . . goes above and beyond what was and still is statutorily defined as a fee simple conveyance;” (ii) the word “forever” is more consistent with conveyance of a fee than an easement; (iii) consideration of \$2985.43 was not a nominal amount in 1892 and the “mere benefit of construction of the railroad was not the consideration for the deed;” (iv) the deed conveyed “a strip of land for railroad purposes” without limiting language rather than a mere “right” to the property; (v) there was no language in the deed providing that it could be voided for use other than Railroad purposes or for any other purpose; (vi) there was no language referring to a right-of-way conveyance; and (vii) the habendum clause promised to “warrant and deed’ the grantee ‘against all lawful claims whatever,’” used the word forever, and contained no limiting language.¹⁰²

The court also held that Wabash Avenue was properly dedicated to and accepted by the City because it satisfied the four *Beaman*¹⁰³ requirements for statutory dedication. These include: (i) the street was platted in the First Addition neighborhood; (ii) the plat must have been acknowledged to an authorized officer because it was recorded; (iii) even though there was no evidence of municipal approval, the plat would not have been accepted for recording if a statutorily required certificate of approval had not been attached, so the dedication must have obtained proper municipal approval, and (iv) the plat was recorded.¹⁰⁴

B. Chain of Title

In *Bank of New York v. Nally*,¹⁰⁵ the court of appeals raised new questions about the manner in which chain of title operates in Indiana, and under what circumstances a recorded document may be deemed to impart constructive notice. On a single day, three documents were executed: (1) a deed from Owens to Nally (the “Deed”); (2) a mortgage for a portion of the purchase price from Nally to Owens (the “Owens Mortgage”); and (3) a mortgage for the remainder of the purchase price to Amtrust Financial Services (the “Amtrust Mortgage”).¹⁰⁶ The Owens Mortgage was recorded on December 26, 1996. However, the Deed and the Amtrust Mortgage were not recorded until January 21, 1997. Thus, the

100. *Id.* at 1188-92.

101. *Id.* at 1193.

102. *Id.* at 1190-91.

103. *Beaman v. Smith*, 685 N.E.2d 143 (Ind. Ct. App. 1997).

104. *Poznic*, 779 N.E.2d at 1192-93.

105. 790 N.E.2d 1071 (Ind. Ct. App. 2003).

106. *Id.* at 1073.

Owens Mortgage was recorded before the Deed.¹⁰⁷ Nally later refinanced with Equivantage in order to payoff Amtrust. The mortgage in favor of Equivantage (the "Equivantage Mortgage"), which was later assigned to the Bank of New York (the "Bank") was recorded on June 12, 1998. Nally stopped making payments on the Equivantage Mortgage and the Bank initiated foreclosure proceedings.¹⁰⁸ Owens filed a motion to intervene. The trial court found that Owens had a valid first mortgage on the property, and the Bank appealed.¹⁰⁹

The central question of the Bank's appeal was whether or not it had constructive notice of the Owens Mortgage.¹¹⁰ Indiana Code section 36-2-11-12(b) requires county recorders to maintain separate indexes for (a) deeds and (b) mortgages.¹¹¹ The court held that a purchaser is held to have constructive notice of documents recorded in both the deed book index and the mortgage book index.¹¹²

The court's analysis of this issue, however, somewhat muddies Indiana common law regarding the nature and scope of constructive notice. First, the court notes that the Owens Mortgage was recorded before the Deed, "[t]hus, until the Hamilton County recorder's office received the [Deed], Nally was not the record title owner and there was no place to put the [Owens Mortgage] in the grantor-grantee index."¹¹³ This statement appears to assume that the recorder is required to cross-reference a mortgage to the most recent deed of record. In fact, the recorder is not required to create such cross-references as a matter of course and, in reality, cannot cross-reference mortgages to deeds without an explicit reference in the mortgage to the deed's instrument number, a piece of information which is absent from most mortgages.

The court makes the conclusory statement that because the Owens Mortgage was recorded before the refinancing, the Bank should have been able to find it.¹¹⁴ Missing from the court's analysis is the concept that the Owens Mortgage must be in the chain of title to the property to impart constructive notice to the Bank. The central question unanswered by *Bank of New York* is whether constructive notice vis-a-vis a particular owner of property occurs as of the *effective* date of a deed transferring ownership to that person or the *recording* date. *Bank of New York* appears to assume, without acknowledging the issue, that one has constructive notice of all encumbrances on a person's title after the time that such person takes title, as opposed to the date that the deed transferring title is recorded.

Generally, deeds are recorded soon after a conveyance takes place. But what if a deed is recorded significantly later or not at all? *Bank of New York* appears

107. *Id.*

108. *Id.* at 1073-74.

109. *Id.* at 1074.

110. *Id.*

111. IND. CODE § 36-2-11-12(b) (2003).

112. *Bank of New York*, 790 N.E.2d at 1077.

113. *Id.* at 1076.

114. *Id.* at 1077.

to stand for the proposition that encumbrances on title, whether recorded before the deed or not, are still capable of imparting constructive notice. This seems to be in conflict with the holding in *Keybank National Ass'n v. NBD Bank*,¹¹⁵ which cautions that: "A person charged with the duty of searching the records of a particular tract of property is not on notice of any adverse claims which do not appear in the chain of title; because, otherwise, the recording statute would prove a snare, instead of a protection."¹¹⁶

C. Sufficiency of Legal Description

In *Farm Credit Services ACA v. Estate of Mitchell*,¹¹⁷ the court of appeals clarified that for a UCC financing statement to be enforceable, the affected real estate must be identified "reasonably."¹¹⁸ Mitchell ("Borrower") executed a promissory note with Farm Credit Services ("FCS") and granted FCS a security interest in the following collateral: "Collateral described as follows, including but not limited to collateral located in JOHNSON County, Indiana: All crops growing, grown, or to be grown on real estate and all harvested crops and all processed crops, whether or not produced by Borrowers/Debtors."¹¹⁹

Borrower passed away. Standing crops, but no realty, were identified as an asset of the estate. The crops were harvested and sold for cash.¹²⁰ FCS filed a notice of claim against the estate. The personal representative filed a petition to determine whether FCS had a security interest in the crops "because the documents failed to describe the real estate upon which the crops were grown as specifically required by the Uniform Commercial Code."¹²¹ The probate court ruled that FCS had an unsecured claim for failing to describe the real estate with enough specificity, and FCS appealed.¹²²

The court of appeals found that "the description 'Johnson County,' does not reasonably describe the land upon which the crops were to be grown because it does not reasonably identify the land upon which the crops were grown. No street address or legal description was included in the description to provide reasonable identification."¹²³ The judgment of the trial court was affirmed.¹²⁴

D. Dedication and Adverse Possession

In *AmRhein v. Eden*,¹²⁵ the court of appeals reiterated a few principles

115. 699 N.E.2d 322 (Ind. Ct. App. 1998).

116. *Id.* at 327 (citing *Stead v. Grosfield*, 34 N.W. 871, 874 (Mich. 1887)).

117. 790 N.E.2d 592 (Ind. Ct. App. 2003).

118. *Id.* at 595.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 594.

123. *Id.* at 595.

124. *Id.*

125. 779 N.E.2d 1197 (Ind. Ct. App. 2002).

relating to the status and proper vacation of public ways. The Edens and AmRhein were neighboring landowners. AmRhein's property was located both to the south and the east of the Edens' property with an L-shaped area of land between them.¹²⁶ In 1946, a dispute arose between the then owners of the property, the Johnsons and the Carpenters, regarding the L-shaped property. The resulting judgment from that litigation established a "right of way, alley or street" from which the Johnsons were perpetually enjoined from obstructing or interfering with its free use.¹²⁷

From 1950 to 1956, the Carpenters owned both the property now owned by the Edens and the property now owned by AmRhein. In 1956, when one parcel was conveyed to AmRhein, a fence was located three feet inside the L-shaped parcel. AmRhein considered the fence line to be the boundary and the L-shaped area outside the fence to be a public right of way.¹²⁸ Eden also considered the fence line to be the boundary of his property, with no knowledge of any L-shaped right of way. Eden and AmRhein both cared for the property up to the fence line, and AmRhein and his son used the L-shaped alley on the Edens' side of the fence approximately twelve times per year either walking, or on a tractor or motorcycle.¹²⁹

Upon learning of the Edens' intent to put a modular home on the L-shaped alley, AmRhein informed the Edens of the right of way. The Edens proceeded to put the home, deck, and driveway on the property encroaching on the alley.¹³⁰ The Edens filed a petition to vacate the public way and the County Board granted the petition.¹³¹ AmRhein filed a complaint against the Edens seeking ejectment from one-half of the right of way. The Edens filed a cross-complaint alleging trespass, seeking a declaratory judgment entitling them to the benefits of the injunction in the 1946 judgment, and seeking to quiet title to the Alley under the theories of adverse possession and/or acquiescence.¹³² The trial court ruled in favor of the Edens, determining that (i) AmRhein failed to establish the existence of a public way, (ii) in any case, any such right of way was extinguished by the common ownership of the two surrounding parcels from 1950 to 1956, (iii) the fence had been established as the true boundary between the parcels, and (iv) the parties have acquired title up to the fence by adverse possession.¹³³

The court of appeals reversed and remanded the case to the trial court with instructions to divide the alley in half between the Edens and AmRhein and quiet title in each of them to their respective halves.¹³⁴ The court held that the 1946

126. *Id.* at 1200.

127. *Id.* at 1201.

128. *Id.* at 1201-02.

129. *Id.* at 1202.

130. *Id.*

131. *Id.* at 1202-03.

132. *Id.* at 1203.

133. *Id.* at 1203-04.

134. *Id.* at 1209.

judgment established the alley as a public highway created by user.¹³⁵ Furthermore, the alley was not abandoned merely because the land on both sides was under common ownership from 1950 to 1956. On the contrary, AmRhein continued to use the alley occasionally, and public use is the sole test for determining whether a public way has been abandoned. Since the alley continued to be a public way until it was vacated by the County Board in 1999, it was not susceptible to permanent rightful private possession by adverse possession or acquiescence.¹³⁶ Based on the presumption that abutting landowners own to the center of the street, when the street or public way is vacated, the title to the land reverts to the abutting property owner. Therefore, when the alley was vacated, it reverted one half to the Edens and one half to AmRhein as abutting landowners.¹³⁷

IV. LAND USE LAW

A. *Constitutionality of Zoning Ordinance Defining "Family"*

The zoning dispute between Peter Dvorak and the City of Bloomington was first heard by the court of appeals in 1998.¹³⁸ In 2003, the Indiana Supreme court settled the matter in *Dvorak v. City of Bloomington*¹³⁹ and clarified the manner in which the methodology set forth in *Collins v. Day*¹⁴⁰ should be applied to constitutional challenges under article I, section 23 of the Indiana Constitution.

The City of Bloomington (the "City") has a municipal zoning ordinance (the "Ordinance") that limits the number of unrelated adults who may occupy a "dwelling unit" in areas of the City zoned for single family dwellings. Peter Dvorak ("Dvorak") was the owner of residential property in an area of Bloomington so zoned.¹⁴¹ In 1996, the City filed a complaint against Dvorak, claiming that he and his five tenants were in violation of the Ordinance. Dvorak filed a motion for summary judgment, claiming that the Ordinance was void as an ultra vires act, that it violated the article I, section 23 of the Indiana Constitution, and that it violated Dvorak's right to due process.¹⁴² The trial court denied the motion, and the court of appeals accepted the case on an interlocutory appeal, vacated the decision of the trial court, and remanded for further proceedings, including a determination of the goals the ordinance was designed to promote.¹⁴³ When the trial court found the Ordinance to be constitutional, Dvorak again appealed.

135. *Id.* at 1207.

136. *Id.* at 1207-08.

137. *Id.* at 1209.

138. *Dvorak v. City of Bloomington*, 702 N.E.2d 1121 (Ind. Ct. App. 1998).

139. 796 N.E.2d 236 (Ind. 2003).

140. 644 N.E.2d 72 (Ind. 1994).

141. *Dvorak*, 796 N.E.2d at 237.

142. *Id.*

143. *Id.*

The court of appeals considered whether the Ordinance, which limits the number of unrelated adults who may live together in a single family residence, is constitutional under article I, section 23 of the Indiana Constitution, commonly known as the Privileges and Immunities Clause.¹⁴⁴ The court noted that a 1994 opinion by the Indiana Supreme Court, *Collins v. Day*, sets forth the framework for analyzing challenges to state action under article I, section 23. Under *Collins v. Day*, a state actor may create a legislative classification so long as: (1) the different statutory treatment is reasonably related to the inherent characteristics that distinguish the unequally treated class; and (2) the preferential treatment is uniformly applicable and equally available to all persons similarly situated.¹⁴⁵

Under this framework, the court of appeals defined the "issue" in *Dvorak* as "whether there are inherent distinctions between households consisting of unrelated adults versus those consisting of related adults that are reasonably connected to imposing the burden of exclusion from some neighborhoods."¹⁴⁶ The court examined a number of cases from other states dealing with similar ordinances and found those authorities to be split. Turning back to the *Collins v. Day* test, the court noted that at the trial court level, the City presented evidence, via the testimony of the its planning director, that the goal of the ordinance was the "protection of core neighborhoods through the reduction of . . . external impacts such as traffic, trash generation, noise, and inappropriate parking of vehicles."¹⁴⁷ The planning director had further testified that "the basis for his conclusion that regulating unrelated adults would promote these values was based on 'professional literature' and 'planning premises' that unrelated adults cause greater external impacts than related adults through more independent lifestyles."¹⁴⁸ The court, unpersuaded by this testimony, held that the City failed to show that the legislative classification was "reasonable or substantial" because it was "based on mere planning premises without any documented support in professional literature."¹⁴⁹ It declared the Ordinance unconstitutional and void because it violated article I, section 23 of the Indiana Constitution.¹⁵⁰ The City petitioned for transfer, and the Indiana Supreme Court granted transfer and vacated the decision of the Indiana Court of Appeals, essentially reinstating the Ordinance pending resolution of the appeal.¹⁵¹

In 2003, a unanimous Indiana Supreme Court, in a decision written by Justice Dickson, the author of *Collins v. Day*, held that the Ordinance does not violate article I, section 23 of the Indiana Constitution, nor is it *ultra vires* legislation.¹⁵²

144. *Dvorak v. City of Bloomington*, 768 N.E.2d 490 (Ind. Ct. App. 2002), *trans. granted, opinion vacated*.

145. *Id.* at 495.

146. *Id.*

147. *Id.* at 496-97.

148. *Id.*

149. *Id.* at 497.

150. *Id.* at 498.

151. *Dvorak v. City of Bloomington*, 796 N.E.2d 236 (Ind. 2003).

152. *Id.* at 241.

The court reiterated that because of the strong presumption of the constitutionality of statutes and local ordinances, the party challenging the constitutionality of an enactment bears the burden of proof.¹⁵³ The court found that the appeal presented two issues under the *Collins v. Day* rubric: “whether Dvorak has demonstrated either (1) that the ordinance’s disparate treatment of two classes of persons is not reasonably related to their distinguishing inherent characteristics, or (2) that the preferential treatment accorded one of the classes is not uniformly applicable and equally available to all persons.”¹⁵⁴

On the first issue, the supreme court found that the answer is

self-evident: limiting multiple-adult households in single-family residential zones to families, and excluding non-families, is reasonably related to the difference between families and non-families. To put it another way, considering whether groups are or are not families is obviously related to determining whether to exclude them from districts zoned for family residential use.¹⁵⁵

On the second issue, the court noted that Dvorak argued that the Ordinance accorded preferential treatment to some because some number of homes were “grandfathered” into a higher limit. The court found this alleged deficiency to be “insubstantial and does not render the ordinance contrary to section 23.”¹⁵⁶

Although not argued by the parties in their briefs to the Indiana Supreme Court, the court chose to address the *ultra vires* issue raised to the court of appeals. After discussing the Home Rule Act and the enabling legislation, the court found that “the enactment of zoning ordinances that make distinctions based on familial relations of the users of residential real estate is an integral component of implementing [their] legislative objectives.”¹⁵⁷

B. Denial of Application for Preliminary Plat Approval

In two cases this survey period, the court of appeals addressed the amount of discretion given to local plan commissions with respect to their review of applications for preliminary plat approval. In the first case, *Van Vactor Farms, Inc. v. Marshall County Plan Commission*,¹⁵⁸ Van Vactor Farms (“Van Vactor”) filed an application for preliminary plat approval (the “Application”) to create a residential subdivision on certain farmland that it owned in Marshall County (the “Parcel”). The Parcel is adjacent to two roads, both two-lane rural roadways used frequently by farmers.¹⁵⁹ The Marshall County Plan Commission (“Commission”) conducted public hearings on the Application and heard

153. *Id.* at 238.

154. *Id.* at 239.

155. *Id.* at 239-40.

156. *Id.* at 240.

157. *Id.* at 241.

158. 793 N.E.2d 1136 (Ind. Ct. App. 2003).

159. *Id.* at 1139.

evidence that “the roadways could not safely accommodate additional traffic, that a risk of groundwater contamination existed due to septic tank use, and that there were risks associated with the application of wastewater sludge on the [Parcel] for many years.”¹⁶⁰ Citing these three factors, the Commission denied the application. Van Vactor appealed, and the trial court upheld the decision of the Commission.¹⁶¹ Van Vactor again appealed.

Van Vactor challenged the validity of the Marshall County Subdivision Control Ordinance (the “Ordinance”) provisions cited by the Commission in its denial of the plat, arguing that they did not set forth “concrete and specific standards” to guide the Commission’s discretion. Nonetheless, the court of appeals noted that other provisions of the Ordinance did contain concrete and specific standards.¹⁶²

A plan commission’s only task when reviewing an application for preliminary plat approval is to determine whether the proposed plat complies with the concrete standards set forth in the subdivision control ordinance, and the commission cannot deny an application on the basis of factors outside the ordinance.¹⁶³

After reviewing the Findings of Fact and Conclusions of Law adopted by the Commission, the court of appeals found that the Commission erred in referring to a general preamble-like section as its sole basis for disapproving the plat on the basis of the septic system and wastewater sludge when more specific provisions should have been considered and cited in the Commission’s written findings.¹⁶⁴ However, because the Commission cited to specific and concrete standards with reference to its findings concerning the roadways and traffic, the court found that the Commission gave Van Vactor fair notice of the reasons for its disapproval of the plat.¹⁶⁵ “Accordingly, we conclude that the Commission appropriately denied the preliminary subdivision plat on the basis of the rural character of the roadways and increased traffic.”¹⁶⁶

In the second case, *Fulton County Advisory Plan Commission v. Groninger*,¹⁶⁷ the Groningers applied for preliminary plat approval for a residential subdivision that would enter and exit onto County Road 300 South, a highway. The Fulton County Advisory Plan Commission (the “Commission”) denied the plat because it violated the Vision Clearance Standards articulated in the Fulton County Zoning Ordinance.¹⁶⁸ The Vision Clearance Standards contain three criteria—two of which are concrete and measurable and a third catch-all:

160. *Id.*

161. *Id.* at 1139-42.

162. *Id.* at 1143.

163. *Id.* at 1144.

164. *Id.* at 1144-46.

165. *Id.* at 1146.

166. *Id.* at 1147.

167. 790 N.E.2d 541 (Ind. Ct. App. 2003), *trans. granted, opinion vacated.*

168. *Id.* at 543.

“The visibility to or from the desired location is determined to be impaired by the Zoning Administrator.”¹⁶⁹ The Groningers filed an action asking that the trial court mandate the Commission to grant plat approval. The trial court granted the Groningers’ motion for summary judgment and the Commission appealed.¹⁷⁰

The court of appeals noted that a “mandate” is an “extraordinary” equitable remedy that may only be used when the requesting party has a “clear and unquestioned legal right to the relief sought and [shows] that the respondent has an absolute duty to perform the act demanded.”¹⁷¹ The court also noted that “in order to be valid, an ordinance must be definite, precise, and certain in expression” and “standard[s] must be written with sufficient precision to give fair warning as to what the Commission will consider in making its decision.”¹⁷² The Groningers argued that the catch-all provision is not sufficiently definite and gives the Commission great discretion without any basis. The court of appeals agreed with the Groningers:

The third criterion states only that the application may be denied if the Zoning Administrator deems the visibility to be impaired. No further standards or instructions are provided concerning how the Zoning Administrator is to determine if visibility is impaired or how an applicant can avoid or correct such an impairment. Thus, a member of the public is not given sufficient notice of what the Plan Commission will consider when reviewing a plat application to determine if highway visibility is impaired.¹⁷³

The mandate ordered by the trial court was upheld.¹⁷⁴

C. Enforceability of Fees for Permits

At issue in *Area Plan Commission v. Evansville Outdoor Advertising, Inc.*,¹⁷⁵ are four ordinances which empower the Area Plan Commission of Evansville (the “APC”) to “establish and collect a schedule of reasonable fees associated with processing and hearing administrative appeals, petitions for rezoning, special uses, variances, subdivisions, reviewing permit applications, issuing permits, and other official actions taken under IC Title 36.”¹⁷⁶ Particularly at issue is the fee schedule established by the APC with regard to permits for off-premises signs, more commonly known as billboards. The previous fee for billboard permits had been \$100. Pursuant to the above-described ordinance, the APC established a fee

169. *Id.*

170. *Id.* at 543-44.

171. *Id.* at 544.

172. *Id.* at 545.

173. *Id.* at 546-48.

174. *Id.* at 549.

175. 789 N.E.2d 96 (Ind. Ct. App. 2003).

176. *Id.* at 98.

of \$1 per square foot with a minimum charge of \$100.¹⁷⁷ This resulted in an approximately 600% increase in the permit fee for a new billboard. Eighteen months after the new fee schedule became effective, Evansville and Vanderburgh County established new ordinances which more strictly regulated the placement of billboards. These new ordinances decreed that permit fees for billboards should be based on the "total display area" of the billboards.¹⁷⁸

Evansville Outdoor Advertising ("Evansville Outdoor") filed a declaratory judgment action against the Area Plan Commission of Evansville (the "Commission"), the City of Evansville, and the Board of Commissioners of Vanderburgh County, seeking to have the four ordinances declared void. The trial court ruled in favor of Evansville Outdoor, finding that the APC's fee schedule is "not reasonably related to the administrative cost of exercising regulatory power," being used for the purpose of discouraging billboards, and therefore "impermissible."¹⁷⁹ The trial court also found that the Evansville and Vanderburgh County ordinances which state that permit fees should be based on "total display area" were also invalid, even though they did not establish the amount of said fees.¹⁸⁰

The court of appeals reversed the trial court's decision with respect to the Evansville and Vanderburgh County sign ordinances, holding that:

The local legislative bodies clearly had a rational basis for requiring billboard permit fees to be based on total display area, as one could reasonably infer a correlation between sign size and administrative cost incurred by the APC. Therefore, the trial court erred in declaring Vanderburgh County, Ind., Code § 17.27.50(D) and Evansville, Ind., Code § 15.153.07.124(D) void.¹⁸¹

The court of appeals noted that the trial court's inquiry should have been limited to whether the APC's fee schedule violated Indiana Code section 36-1-3-8(a)(5), which provides that a local legislative body does not have "[t]he power to impose a license fee greater than that reasonably related to the administrative cost of exercising a regulatory power."¹⁸² The court noted that the trial court did not make a finding as to whether Evansville Outdoor had shown that the APC's fee schedule was "obviously and largely beyond what is needed for the regulatory services rendered."¹⁸³ The case was remanded to the trial court for a determination of whether the APC fee schedule violates the Home Rule Act.¹⁸⁴

177. *Id.*

178. *Id.* at 98-99.

179. *Id.* at 99-100.

180. *Id.* at 102.

181. *Id.* at 103.

182. *Id.* at 104 (quoting IND. CODE § 36-1-3-8(a)(5) (2003)).

183. *Id.*

184. *Id.*

D. Equitable Estoppel and Zoning

The court of appeals addressed a complicated set of facts in *Brown County v. Booe*,¹⁸⁵ and held that, at least in the zoning enforcement context, a private citizen may assert the principle of equitable estoppel against a governmental entity under limited circumstances.¹⁸⁶ The Brown County zoning ordinance establishes a number of zoning districts in unincorporated areas of the county, including forest reserve ("FR"), industrial, and residential 2 ("R-2"). Pursuant to the ordinance, any property located within 300 feet of a county road is designated R-2. No industrial uses are permitted as special exceptions in R-2 districts, however, some industrial uses are permissible as special exceptions in the FR districts.¹⁸⁷

In 1974, Booe purchased a tract of land and began operating a sawmill. He applied for a special exception, noting that his land was in the FR district. That petition was denied by the Board of Zoning Appeals of Brown County ("BZA") because of "road condition & residential area."¹⁸⁸ The next year, Booe again applied for a special exception permit and provided the BZA with a hand drawn map that depicted his sawmill as more than 400 feet from a county road. Again, the BZA denied the special exception.¹⁸⁹ Finally, in 1976, Booe's third application was approved after he admitted that he had been operating the sawmill illegally for two years and gave the BZA evidence that his sawmill was located 418 feet from Brown Hill Road.¹⁹⁰

In 1994, Booe decided to subdivide his property and submitted a plat to the Plan Commission, which was subsequently approved. The plat included a three-acre Tract I-1, which the plat noted was "an industrial zoned tract." Booe's sawmill is located on Tract I-1.¹⁹¹ In 1998, Booe vacated the 1994 plat and submitted a second plat for approval. Booe received comments from the Plan Commission on his second plat, including a note that he should "dedicate County Road 169." The second plat, which included three tracts (Tracts I-1, I-1A, and I-1B) which were noted as being zoned industrial, was also approved by the Plan Commission.¹⁹²

In 1999, Booe sold Tract I-1A to Beckemeyer, who intended to use it for a commercial woodworking operation. Beckemeyer engaged in due diligence before purchasing the tract, including checking the assessors' records, which refer to the tract as "industrial" and obtaining a letter from the Plan Commission, which read in part: "The special exception granted for sawmill in FR zoning, is granted for the property not the owners as per B.C. zoning ordinance and state

185. 789 N.E.2d 1 (Ind. Ct. App. 2003).

186. *Id.* at 12.

187. *Id.* at 3.

188. *Id.*

189. *Id.*

190. *Id.* at 4.

191. *Id.*

192. *Id.*

statutes. This also allows woodworking in this and any zoning district. This property was given 'FR' zoning in error, the zoning is R-2."¹⁹³ Beckemeyer understood this letter to indicate that he would be able to operate pursuant to the special exception granted to Booe in 1976 and that woodworking would be allowed on Tract I-1A. He purchased the tract.¹⁹⁴

After residential neighbors expressed concern to the Plan Commission, Brown County filed a complaint against Booe and Beckemeyer requesting injunctions to prevent them from operating their sawmill and woodworking operations. Brown County alleged a number of alternative theories which all alleged that the 1976 special exception was no longer valid and that Booe and Beckemeyer were using their respective properties in violation of the Brown County zoning ordinances.¹⁹⁵ Booe and Beckemeyer raised a number of defenses to this complaint, including equitable estoppel. Particularly, they argued that Brown County is estopped from challenging Booe and Beckemeyer's respective industrial uses of their property. The trial court honored this estoppel argument. Brown County appealed.¹⁹⁶

The court of appeals noted that "government entities are not subject to equitable estoppel" except in special circumstances, namely "estoppel may be appropriate where the party asserting estoppel has detrimentally relied on the government entity's affirmative assertion or on its silence where there was a duty to speak."¹⁹⁷ Apparently in 1976 both Booe and Brown County mistakenly understood Booe's tract to be zoned FR based on its distance from Brown Hill Road when it was actually bordering County Road 169. In 1976, due to inadequate county maps, neither Booe nor Brown County knew that what both thought was a private road running through Booe's property was actually County Road 169.¹⁹⁸ Brown County discovered this fact after it approved Booe's first plat, but before it approved his second plat. Nonetheless, it did not correct Booe's mistaken belief that his property was zoned FR and that his special exception was valid. (Recall that no industrial uses are permissible in a R-2 district, even by special exception.)¹⁹⁹ Under these circumstances, the court found that Booe's defense of equitable estoppel was appropriate:

[G]iven Booe's understandable confusion over the location and existence of County Road 169, and Brown County's affirmative acts and nearly thirty-year silence concerning any possible zoning violation with regard to the location and operation of the sawmill, we agree with Booe that Brown County is estopped from challenging Booe's industrial use of his

193. *Id.*

194. *Id.*

195. *Id.* at 5.

196. *Id.* at 5-6.

197. *Id.* at 7.

198. *Id.* at 8-9.

199. *Id.* at 9.

property.²⁰⁰

With regard to Beckemeyer's defense, the court noted that he attempted to discover whether his use would be permissible on Tract I-1A and that the Plan Commission's actions did not discourage him from that belief. In particular, the court referred to the Plan Commission's confusing letter to Beckemeyer which the court held "could be interpreted by a reasonable person to mean that regardless of whether Tract I-1A is zoned 'FR' or 'R-2,' the special exception applies to that piece of property."²⁰¹ Under these circumstances, the court held that Brown County is estopped from challenging Beckemeyer's industrial use of his property.

Finally, the court addressed Beckemeyer's argument that the Plan Commission's approval of Booe's second plat, which designated certain tracts as "zoned industrial," constituted a "de facto rezoning of Tract I-1A to 'industrial.'"²⁰² The court noted that the Plan Commission does not have statutory authority to rezone land, but has the limited authority to "render decisions concerning and approve plats, replats, and amendments to plats of subdivisions."²⁰³ Therefore, the Plan Commission's approval of the second plat could not constitute a de facto rezoning of the tract. Instead, under the facts and circumstances of this case, the court concluded that Booe and Beckemeyer's current uses are non-conforming uses which Brown County is equitably estopped from preventing.²⁰⁴

E. Nature and Enforceability of Zoning Commitments

In a second Brown County zoning case during this survey period, *Story Bed & Breakfast, L.L.P. v. Brown County Area Plan Commission*,²⁰⁵ the court of appeals addressed the nature and enforceability of zoning commitments and whether they are or should be treated similarly to standard title exceptions for purposes of "bona fide purchaser" protections.

In 1986, a ten acre parcel of land in unincorporated Brown County (the "Story Property") was zoned as a Planned Unit Development "PUD." The owners at that time entered into a number of land use restrictions designated as "covenants," concerning use of audio equipment, outside lighting, and camping.²⁰⁶ In 1992, the same owners sought approval for a second PUD for a twelve-acre addition to the Story Property. A similar list of "covenants" were adopted as part of the second PUD. Neither the first PUD, the second PUD, nor the attendant "covenants" were recorded.²⁰⁷

200. *Id.* at 10.

201. *Id.* at 11.

202. *Id.* at 11-12.

203. *Id.* at 12 (quoting IND. CODE § 36-2-4-405 (1997)).

204. *Id.*

205. 789 N.E.2d 13 (Ind. Ct. App. 2003), *petition to trans. pending*.

206. *Id.* at 14-15.

207. *Id.* at 15.

In 1999, Story Bed & Breakfast, L.L.P. ("Story") investigated the Story Property with the intent of purchasing it. Story had a title search conducted, which did not reveal the PUDs or the covenants. However, three months before Story purchased the Story Property, an architect informed Story that the Story Property was zoned pursuant to the 1986 PUD. The architect did not know about the covenants and did not suggest to Story that the property was subject to any land use restrictions.²⁰⁸ Story invested a significant sum of money in the Story Property and began to use it in a number of ways which violated the 1986 and 1992 PUDs. After purchasing the property, the Plan Commission informed Story about the PUDs and land use restrictions and filed a lawsuit to enforce them. Story claimed that it was a bona fide purchaser for value without notice of the PUDs and therefore the Story Property was not encumbered by the covenants.²⁰⁹

The court of appeals began by noting the Indiana statutes which permit local zoning authorities to create PUDs with written "commitments" concerning the use of the land. "Importantly," the court noted, "the terms of such an unrecorded commitment may only be asserted against a subsequent purchaser of real property if the purchaser had actual knowledge of the commitment."²¹⁰ The court of appeals discussed in depth whether the land use restrictions attached to the PUDs should be considered "commitments," as they are described by the statute, or "covenants," as they are described by the 1986 and 1992 PUDs. It concluded that such labels are "singularly unhelpful" and that courts should instead "focus on whether a subsequent BFP was given sufficient notice to negate the common law right to the unrestricted use of his or her land."²¹¹

The court was "troubled that a property owner's common law right to the unrestricted use of his or her property might be encumbered by a condition only discoverable through a search of the minutes of a plan commission meeting."²¹² The court continued:

We find it inconsistent that Indiana law requires the terms of conditions to be stated with sufficient clarity as to inform the property owner of the nature of the restrictions inhibiting the use of his or her property and yet would require property owners to search through years of plan commission records for unrecorded land use restrictions outside the recorded chain of title.²¹³

Therefore:

[W]e hold that land use restrictions, however denominated, and which result from the PUD negotiation process, should be recorded or otherwise memorialized in a manner reasonably calculated to provide

208. *Id.*

209. *Id.* at 15-16.

210. *Id.* at 17.

211. *Id.* at 18.

212. *Id.* at 19.

213. *Id.* at 20.

notice to a subsequent purchaser of land. We further hold that the location of such land use restrictions in the minutes of Plan Commission meetings was insufficient to adequately put Story, as a subsequent BFP, on notice of the restrictions contained therein.²¹⁴

Finally, the court addressed whether the fact that Story had been informed about the Story Property's PUD status by the architect prior to purchasing the land put it on notice. The court dismissed that idea:

Having knowledge of a PUD designation is not the same thing as having knowledge of the land use restrictions attached to it. . . . Consequently, causing a property owner's knowledge of a PUD designation to constitute constructive notice of unrecorded or otherwise inadequately memorialized land use restrictions, would require such an owner to review years of plan commission records for information that may or may not exist. We believe this is an unreasonable undertaking that is not adequately ameliorated by vague expectations of accurate and timely advice from associated government land use employees on a county-by-county basis.²¹⁵

It is important to note that the court of appeals opinion suggests that Story made no inquiry with the Plan Commission regarding the zoning of the property before it purchased it. *Story* therefore implies that a potential purchaser will be considered innocent even if does not make any attempt, beyond a title search, to discover if any zoning commitments apply to the property. Because the same reasoning presumably applies, *Story* may be used to argue that any commitments entered into with respect to zoning, not just with respect to PUDs, must be recorded or "otherwise memorialized" in order to be binding on subsequent purchasers.

V. EMINENT DOMAIN LAW

A. *Constructive Notice of Eminent Domain Action*

Lake Central School Corporation ("Lake Central") wished to acquire thirty acres (the "Parcel") owned by Hawk Development ("Hawk") in order to build a new elementary school.²¹⁶ When Hawk refused to sell the Parcel, Lake Central filed a complaint for condemnation in October 1999. In early 2000, while the condemnation action was pending, Hawk Development sought approval for a subdivision of the Parcel which was approved by the Lake County Plan Commission over Lake Central's objections.²¹⁷ In October 2000, while the action was still pending, Hawk Development obtained a loan from Bank Calumet

214. *Id.*

215. *Id.* at 21-22.

216. *Lake Cent. Sch. Corp. v. Hawk Dev. Corp.*, 793 N.E.2d 1080, 1082 (Ind. Ct. App. 2003), *petition for reh'g pending.*

217. *Id.*

secured by a mortgage on the Parcel and sold several lots to Fetsch Townhomes for development. Hawk Development did not disclose the condemnation action to either Bank Calumet or Fetsch Townshomes and both entities obtained title policies which did not reveal the action.²¹⁸ After Bank Calumet, Fetsch Townhomes, and Fifth Third Bank (lender to Fetsch) (collectively, the "Interested Parties") learned of the condemnation proceeding, they sought and were granted permission to intervene, arguing that the current action could not condemn their interests in the Parcel because they had no notice of the action.²¹⁹

Indiana Code section 32-24-1-4(c) provides that the filing of a condemnation complaint constitutes notice of the proceedings to all subsequent purchasers. In this case, the Interested Parties argued that Indiana Code section 32-24-1-4 must be read in concert with the Lis Pendens Act (Indiana Code sections 32-30-11-1 to -10), which requires that a person seeking to place others on constructive notice of a lawsuit concerning real property must file a lis pendens notice with the county recorder.²²⁰ In other words, the Interested Parties argued that despite the clear language of the eminent domain statute, the complaint was not enough to provide constructive notice – a lis pendens notice must also be filed.²²¹ The Indiana Court of Appeals disagreed and held that no lis pendens notice is required by current law. The court also noted that the eminent domain statute is harsh, and strongly suggested that the General Assembly amend the statute in order to require that lis pendens notices be recorded.²²²

B. The Law of Partial Regulatory Takings

In the late 1960s and the early 1970s, the Property was a landfill for the Town of Georgetown (the "Town").²²³ In 1985, the Town sold the Property to Teeter. The Town placed no zoning or other development restrictions on the Property. Teeter applied for and received a building permit and a septic permit from the Town and placed a mobile home on the property, where he lived for several years.²²⁴ In 1996, Teeter sold the Property to the Hertels. The Hertels were aware that the Property had been a landfill, but were unaware of any restrictions on the use of the Property and intended to subdivide it for the construction of homes.²²⁵ In 1996, the Hertels received a construction permit for a private sewage disposal system for the Property. In 1998, Randy and Denise Sewell (the "Sewells") purchased a one acre parcel of the Property for the purpose of building a home for their son Timothy Sewell ("Timothy"), and the

218. *Id.* at 1083.

219. *Id.*

220. *Id.* at 1084-86.

221. *Id.*

222. *Id.* at 1089.

223. *Town of Georgetown v. Sewell*, 786 N.E.2d 1132, 1135 (Ind. Ct. App. 2003).

224. *Id.*

225. *Id.*

deed transferred ownership directly from the Hertels to Timothy.²²⁶ There was a factual dispute regarding whether the Sewells or Timothy knew that the Property had been used for a landfill. After the purchase, the Sewells applied for and received a permit for a private sewage disposal system from the Floyd County Health Department and a building permit from the Town. After some neighbors called the Town questioning the construction of a home on a former landfill, the Town issued a stop work order.²²⁷ The Sewells and Timothy appealed the stop work order to the Georgetown Board of Zoning Appeals (“BZA”). At the BZA meeting, a former member of the Town Board testified that the Town did not have the Indiana Department of Environmental Management (IDEM) inspect the Property or impose restrictions on the Property at the time of the sale of the Property to Teeter because “everyone on the board at that time, and ninety nine percent of the population knew that was the Town dump.”²²⁸ The BZA also heard testimony that it would be unsafe to construct a septic system or residence on the Property because such construction would breach the cover of the landfill. There was testimony that the Property could be used for recreational purposes or grazing purposes and possibly for a slab construction, if fill were brought in so that the cover would not be compromised. The BZA upheld the stop work order and the Sewells filed suit for inverse condemnation.²²⁹ The trial court found that the Sewells had established that a regulatory taking had occurred. The Town appealed.²³⁰

The Indiana Court of Appeals, relying on *BZA of Bloomington v. Leisz*,²³¹ stated that there are two types of regulatory takings under the Fifth Amendment to the U.S. Constitution: (1) those that require the owner to suffer a physical “invasion” of his or her property; and (2) those that “deny all economically beneficial or productive use of the land.”²³² Because the stop work order fell into the latter category, and because it fell short of eliminating all economically beneficial use, the court applied the test articulated in *Ragucci v. Metropolitan Development Commission*,²³³ to determine if a partial regulatory taking had occurred: “Three factors are of ‘particular significance’ to this ad hoc inquiry: (1) ‘[t]he economic impact of the regulation on the claimant,’ (2) ‘the extent to which the regulation has interfered with distinct investment-backed expectations,’ and (3) ‘the character of the governmental action.’”²³⁴

Timothy charged that because of the stop work order, his tract diminished in

226. *Id.*

227. *Id.* at 1136.

228. *Id.*

229. *Id.*

230. *Id.* at 1137.

231. 702 N.E.2d 1026, 1028 (Ind. 1998).

232. *Id.* (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992)).

233. 702 N.E.2d 677, 683 (Ind. 1998) (recognizing a test that originated in *Penn Central Co. v. City of New York*, 438 U.S. 104 (1978)).

234. *Id.*

value from \$14,000 to being “virtually, if not completely, worthless.”²³⁵ The court noted that “a landowner is not entitled to the highest and best use of his land; and a taking only occurs when the land use regulation prevents all reasonable use of the land.”²³⁶ The Town pointed out that economically viable uses for the tract do exist, namely that Sewell could build a slab type structure like a tool shed, or that he could use the property for recreational or grazing activities.²³⁷ Sewell argued, in response that he could receive “no economic benefit from [the property] being used as a pasture or as a park.”²³⁸ The court stated that “We disagree with the notion that tract one has no economically viable use. Timothy can use tract one for grazing or recreational purposes. . . . As such, like the plaintiffs in *Leisz*, Timothy’s ‘property continues to have an economically viable use, even if it is somewhat diminished.’”²³⁹

The court next examined whether the stop work order interfered with Timothy’s reasonable investment-backed expectations.²⁴⁰ The court explained that landowners are charged with knowledge of existing ordinances and regulations affecting their property.²⁴¹ The court noted that landfills are “heavily regulated for the protection of human health and the environment.”²⁴² Because there is a dispute regarding whether the Sewells knew that the Property had been a landfill, the court implies that the landowner is charged with constructive notice of these regulations even if he had no actual notice that his Property had been a landfill.²⁴³ The court did not raise issues regarding the extent of a landowners’ constructive notice of unrecorded restrictions on the use of his property.²⁴⁴

Based on the *Penn Central* test, the court found that the stop work order did not constitute a compensable regulatory partial taking of Sewell’s property and reversed the trial court’s decision.²⁴⁵

Timothy apparently did not raise, and the court therefore did not address, the question of whether the Town is equitably estopped from issuing the stop work order because it never imposed any development restrictions on the Property via zoning or recorded restrictions, or whether the Town’s failure to place any restrictions on the Property undermined its defense on the takings issue.²⁴⁶

235. *Sewell*, 786 N.E.2d at 1140.

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.* (citing *Leisz*, 702 N.E.2d at 1030).

240. *Id.* at 1141.

241. *Id.*

242. *Id.*

243. *Id.* at 1141-42.

244. See *Story Bed & Breakfast, L.L.P. v. Brown County Area Plan Comm’n*, 789 N.E.2d 13 (Ind. Ct. App. 2003).

245. *Sewell*, 786 N.E.2d at 1142.

246. See generally *Brown County v. Booe*, 789 N.E.2d 1 (Ind. Ct. App. 2003).

VI. TAX SALES

The Indiana Court of Appeals addressed tax sales in two opinions during the survey period, clarifying a single issue in each.

In *Lake County Auditor v. Bank Calumet*,²⁴⁷ Bank Calumet, as trustee of a land trust, purchased an improved parcel of land at the 2000 tax sale in Lake County. Prior to the tax sale, Bank Calumet inspected the property and found the building to be satisfactory.²⁴⁸ A few months after the sale and before the redemption period had ended, Bank Calumet again visited the property and found that the improvements had been demolished, presumably by the City of Gary. Bank Calumet filed a verified petition for rescission of the tax sale certificate and for a refund, asking the circuit court to cancel the tax sale for equitable reasons.²⁴⁹ The circuit court granted relief to Bank Calumet and ordered the Lake County Auditor to refund Bank Calumet's money. The Auditor appealed.²⁵⁰

The court of appeals noted that "Indiana appellate courts have recognized that the doctrine of *caveat emptor* applies to tax sales in its fullest force, that is, a purchaser at a tax sale buys at his own risk."²⁵¹ Noting that Bank Calumet did not allege that the Auditor misled the buyer about the status of the property and that no statute provides Bank Calumet with the remedy of obtaining a rescission of the sale under such circumstances, the court of appeals reversed the trial court and held that Bank Calumet had assumed the risk that the "nature or extent of the property he purchased [would be] altered by a third party between the time of the tax sale and expiration of the redemption period."²⁵²

In *Board of Commissioners v. Mundy*,²⁵³ Mundy purchased an improved parcel of real estate at the 2002 tax sale. He sent the required notice to all persons with a substantial property interest in compliance with Indiana Code section 6-1.1-25-4.5.²⁵⁴ A few weeks after the tax sale, Mundy received notice from the City of Evansville Department of Code Enforcement stating that it had issued an order that Mundy must raze the improvements on the real estate by July 10, 2002.²⁵⁵ Mundy filed a complaint in superior court, arguing that he was entitled to a refund of his purchase price, minus a twenty-five percent penalty under Indiana Code section 6-1.1-25-4.6(d). The trial court held that Mundy was entitled to such a refund. The Board appealed.²⁵⁶

Mundy did not contest the fact that he did not petition the court to issue a tax deed at the end of the redemption period or send out the notices of that petition

247. 785 N.E.2d 279 (Ind. Ct. App. 2003).

248. *Id.* at 280.

249. *Id.*

250. *Id.*

251. *Id.* at 281.

252. *Id.* at 284 n.5.

253. 783 N.E.2d 742 (Ind. Ct. App. 2003), *trans. denied*.

254. *Id.* at 743.

255. *Id.*

256. *Id.*

as required by Indiana Code section 6-1.1-25-4.6.²⁵⁷ Nonetheless, he argued, and the court of appeals agreed, that the following provision applied to his case: “[i]f the court refuses to enter an order directing the county auditor to execute and deliver the tax deed because of the failure of the purchaser or purchaser’s assignee to fulfill the requirements of this section, the court shall order the return of the purchase price minus a penalty of twenty-five percent (25%) of the amount of the purchase price.”²⁵⁸ The Board argued that the word “failure” implied that the purchaser was required to make a bona fide effort to comply with the requirements of the statute before it could be entitled to a refund.²⁵⁹ The court disagreed, noting that “[i]t is not unreasonable to say that someone fails to meet these requirements when he chooses not to do them.”²⁶⁰ The decision of the trial court was affirmed.²⁶¹

VII. DEVELOPMENTS IN THE COMMON LAW OF PROPERTY

A. Adverse Possession

The Kings purchased a landlocked tract of land in 1982 and, in the original deed, received a twenty-foot wide access easement purportedly over land retained by the sellers.²⁶² In 1996, the Kings decided to build a driveway in the easement and contracted with a surveyor to perform a “legal survey” under Indiana Code section 36-2-12-10(b).²⁶³ Notice was given to the Wileys and to Harden, whose property abutted the easement parcel. The surveyor found, and indicated on the recorded legal survey, that the easement parcel overlapped with real estate to which the Wileys and Harden purportedly had title.²⁶⁴ The Wileys initiated an appeal of the legal survey along with a complaint seeking a declaration of the boundaries of the easement parcel. The Kings filed a counterclaim to quiet title as to their easement rights.²⁶⁵ The trial court ruled that the legal survey was void because the Kings were not the landowners of property adjacent to the easement parcel and, therefore, the surveyor had no jurisdiction to perform the survey under the statute.²⁶⁶ The trial court further determined that the Wileys and Harden had adversely possessed any interest that the Kings had in the easement parcel. The Kings appealed.²⁶⁷

The court of appeals reversed and remanded, holding that: (1) the Kings were

257. *Id.* at 744.

258. *Id.* (citing IND. CODE ANN. § 6-1.1-25-4.6(d) (West 2000 & Supp. 2003)).

259. *Id.*

260. *Id.*

261. *Id.* at 745.

262. *King v. Wiley*, 785 N.E.2d 1102 (Ind. Ct. App. 2003), *trans. denied*.

263. *Id.* at 1106.

264. *Id.*

265. *Id.*

266. *Id.* at 1107.

267. *Id.*

“landowners” as that term is used in section 36-2-12-10(b) and therefore had the authority to order the legal survey;²⁶⁸ and (2) the Wileys and Harden did not adversely possess the easement parcel.²⁶⁹ Using the standard analysis, the court noted that the encroachment of the Wileys and Harden into the easement parcel was not so open, notorious, or hostile as to give the Kings (or the underlying fee owner) notice of their adverse possession.²⁷⁰ Finally, the court of appeals ruled that the Kings did not provide all adjacent landowners with the notice required by the legal survey statute and declined to use the survey to determine the easement boundaries as a matter of law. The case was remanded to determine the boundaries of the easement parcel.²⁷¹

B. Prescriptive Easement

The Corporation for General Trade (“CGT”) owns Lots 1, 2 and 4 in Krumbhaar’s Subdivision in Terre Haute.²⁷² Sears owns Lots 3, 5, 6, 11 and 12.²⁷³ In 1977, the Sanitary District of the City of Terre Haute (the “District”) condemned a portion of Lots 1, 2, 3, and 4 for the purpose of constructing a drainage ditch and dam across Lots 2, 3, and 4, which flooded a portion of the aforementioned lots, including the private road by which Lot 4 accessed the public road.²⁷⁴ CGT’s predecessor in interest began using the dam road in 1977 to access Lot 4. A locked gate was installed on the road and only the District and CGT’s predecessor had keys.²⁷⁵

In the late 1990s, issues arose between CGT and Sears regarding access to and control of the dam road. Sears requested a key to the gate and was denied by CGT.²⁷⁶ Sears then constructed a cable barrier across Lot 3 to prevent access between Lot 4 and the public road.²⁷⁷ CGT filed suit, claiming that it had obtained a prescriptive easement over the dam road. Sears counterclaimed, arguing that he too had a prescriptive easement over the dam road. Both parties sought injunctions to prevent the other party from blocking its access to the dam road.²⁷⁸

The trial court found that both Sears and CGT had established prescriptive easements over the dam road.²⁷⁹ CGT appealed. Sears did not appeal the trial

268. *Id.* at 1108.

269. *Id.*

270. *Id.* at 1110.

271. *Id.*

272. *Corp. for Gen. Trade v. Sears*, 780 N.E.2d 405, 406-07 (Ind. Ct. App. 2002).

273. *Id.* at 408.

274. *Id.* at 407.

275. *Id.*

276. *Id.* at 409.

277. *Id.*

278. *Id.*

279. *Id.*

court's finding of a prescriptive easement in favor of CGT.²⁸⁰ The Indiana Court of Appeals laid out the common law test for prescriptive easements and stressed that the test is strictly applied.²⁸¹ It found that the evidence presented by Sears at trial was insufficient to establish several of the required facts, including a twenty-year period of continuous use.²⁸² Particularly, the court noted that the trial court inferred actual use for a period of four years based on the circumstantial evidence presented by Sears. This, the trial court was not permitted to do: "Such an inference does not comport with the stringent requirements mandated for establishing a prescriptive easement."²⁸³

The court also addressed a "Flowage Easement" granted by the District to Sears in 1998 for the purpose of granting Sears access to his Lots 2 and 4 through the dam road.²⁸⁴ The court found that the easement condemned by the District was not broad enough to give it the right to grant access rights through its easement to "non-governmental third parties who had nothing to do with constructing or maintaining the dam but simply sought to use the right-of-way for access to adjacent land."²⁸⁵ As a result, the District lacked the legal right to grant the Flowage Easement to Sears and the court dismissed it as "null and void."²⁸⁶

280. *Id.*

281. *Id.* at 410.

282. *Id.* at 411.

283. *Id.* at 412.

284. *Id.*

285. *Id.* at 413.

286. *Id.*