

# CAPTIVE GAS AND CONDEMNED TRASH: HIGHS AND LOWS OF INDIANA PROPERTY LAW IN 1996

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## INTRODUCTION

It is hard to believe that another year has gone by and that you may be a year behind on the current changes in Indiana property law. Property was bought and sold, leased and zoned, and devised and developed in ways that inevitably led to controversies and lawsuits. The Indiana courts were faced with the usual array of landlord/tenant disputes, marital property divisions, and abandoned easements. In many of those cases, the courts reaffirmed well-established property-law principles without burdening the dockets of the appellate courts. What follows is a discussion of a number of cases to offer important refinements, qualifications, and exceptions to traditional property rules.

### I. BROKERS

In *Egan v. Burkhart*,<sup>1</sup> two licensed real estate brokers had entered into an exclusive listing contract with sellers for the sale of real estate. Five months later, brokers found a buyer who would purchase the property under an installment contract from sellers for \$35,000. Three days before closing, the buyers notified brokers that they did not have the down payment and requested a loan from brokers. The brokers loaned the buyers the money, and the closing went through. One and a half years later the buyers defaulted and the sellers then learned of the loan. Sellers repossessed the property and sold it, some months later, for \$20,000. Sellers then sued brokers for breach of fiduciary duty to sellers to notify them of the buyers' potential insolvency. At trial, the court found brokers had breached by not disclosing the loan and awarded damages of nearly \$25,000. The court of appeals affirmed the breach of contractual duty of good faith arising under the agency relationship with sellers, finding in particular that sellers would not have entered into the real estate contract with buyers had sellers known of buyers' weak financial condition.<sup>2</sup>

The court of appeals also upheld the \$25,000 damage award for loss on resale, real estate taxes until resale, improvements, and attorney fees associated with repossession and relisting the property for resale.<sup>3</sup> But what damage was occasioned by the brokers' breach? Assuming that sellers would not have entered into the sales contract with buyers had they known of the buyers' weak financial condition, sellers would have had no sale had brokers not breached. Putting the parties back to their original position (which is where they would be had the

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1. 657 N.E.2d 401 (Ind. Ct. App. 1995)

2. *Id.* at 405.

3. *Id.*

brokers not breached) would put sellers in the same position they were in after they repossessed, with their land back (less the expenses expended in repossession and preparing for resale). How the brokers' breach caused the \$15,000 loss on resale is not entirely clear.

In another instance of overzealous brokerage, a real estate broker was held liable for selling the wrong lot and misrepresenting her authority to sell. In *Tri-Professional Realty v. Hillenburg*,<sup>4</sup> Betty Jones Wood spied a homemade "For Sale" sign on a subdivision lot in Putnam County, called the number on the sign and convinced the owner to enter into a professional listing agreement with Tri-Professional Realty. She then sold the lot to Hillenburg on a four-year contract, and Hillenburg began to clear the lot for a building site. Much to Hillenburg's dismay, however, the real owners of her lot discovered her "trespass" and informed her that she was improving the wrong lot. As it turned out, she had actually bought a hilly lot at the back of the subdivision, but the owner of the back lot had placed her sign on a lot up near the road, and Wood had never clarified exactly which lot she had authority to sell. The issues for the court were (1) whether Wood had a professional duty to investigate the seller's title; (2) whether she was liable to the buyer even though Indiana law generally holds that agents of the seller have no legal duty to a buyer; and (3) if so, what damages were sustained when she received a lot worth the same amount as the one she thought she was buying.

The trial court ruled in favor of Hillenburg on a charge of negligence,<sup>5</sup> and the court of appeals affirmed, finding that Tri-Professional Realty did not owe Hillenburg a fiduciary duty as would arise in an agency relationship, but did owe a duty not to misrepresent its authority to sell a piece of property.<sup>6</sup> Hillenburg received nearly \$5000 damages which represented the cost of the lot plus interest.<sup>7</sup> However, the award was not offset by the \$1000 trespass judgment obtained by the actual owners of the front lot. In a strong dissent, Judge Baker argued that, under agency law, an agent should not be held liable for acting on misrepresentations of the principal and, therefore, Wood should not be held liable for the seller's misrepresentations regarding the lot.<sup>8</sup> He also suggested that mutual mistake should have allowed for rescission.<sup>9</sup>

## II. DEEDS

In an interesting twist on the standard rule that a "transferor by means of a warranty deed guarantees that the real estate is free from all encumbrances and that

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4. 669 N.E.2d 1064 (Ind. Ct. App. 1996), *trans. denied*.

5. *Id.* at 1065

6. *Id.* at 1067-68. The majority distinguished between a realtor's duty not to misrepresent her authority and sell a lot of duty to insure good title to the lot, both of which might arise under general negligence doctrine and not under agency law.

7. *Id.* at 1070.

8. *Id.* at 1070-71 (Baker, J., dissenting).

9. *Id.*

he will warrant and defend the title to the same against all lawful claims,”<sup>10</sup> the court of appeals distinguished between successful and unsuccessful defenses of title by grantees. In *Rieddle v. Buckner*,<sup>11</sup> Judge Baker ruled that grantees who were unsuccessful in their suit to quiet title against an adverse possessor were entitled to reasonable attorney fees and costs in addition to compensatory damages for the value of the land lost from the transferor. But in a quiet title and slander of title case, Judge Baker ruled in *Keilbach v. McCullough*<sup>12</sup> that, because McCullough’s suit to quiet title to a seven-acre plot of land claimed by a gun-toting neighbor under adverse possession was successful, Keilbach had not breached his warranty and was therefore not liable for attorney fees incurred in the quiet title action.<sup>13</sup> Judge Baker also questioned the trial court’s award of attorney fees in the slander of title action as being contrary to the American rule that parties to litigation should pay their own attorney fees in the absence of a statute or agreement providing otherwise but upheld them anyway.<sup>14</sup> If a grantee cannot get attorney fees from the wrongful adverse possessor or from the grantor when she is successful in defending her title, but can get attorney fees and damages when she is unsuccessful, what incentive does she have to defend her title zealously?

In a convoluted and confusing case about the effect of a warranty deed conveyed after a tax sale, the court of appeals shed little light on the issue. In *Atkins v. Niermeier*,<sup>15</sup> both parties wished to purchase a tract of real estate in Harrison County at a tax sale. Niermeier, however, attended the tax sale and purchased the property subject to the usual tax sale rule giving the owner one year to redeem the property. Five months after the sale to Niermeier, Atkins, a stranger to the property, paid the delinquent taxes and penalties. This caused the county auditor to inform Niermeier that the “owner” had redeemed the property and that he should relinquish his tax sale certificate—which Niermeier promptly did. When Niermeier learned nine months later that Atkins was not the legal owner, he filed a complaint to extend the tax sale date of redemption and requested return of his tax sale certificate. Before the trial on Niermeier’s complaint, Atkins purchased the property from the original owner who conveyed title to the real estate to Atkins by a corporate warranty deed which Atkins duly recorded. At trial, the court ordered a reissuance of Niermeier’s tax sale certificate and declared the warranty deed to Atkins void on the grounds that the grantor did not have the “capacity” to issue a warranty deed because of Niermeier’s tax sale lien. Atkins appealed.<sup>16</sup>

The court of appeals agreed that Niermeier’s tax sale certificate created a valid lien on the property and that Niermeier’s surrender of the certificate did not void

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10. *Rieddle v. Buckner*, 629 N.E.2d 860 (Ind. Ct. App. 1994) (citing IND. CODE § 32-1-2-12 (1993)).

11. *Id.* at 864.

12. 669 N.E.2d 1052 (Ind. Ct. App. 1996).

13. *Id.* at 1054

14. *Id.* at 1053 n.2. The awarding of fees was not an issue on appeal.

15. 671 N.E.2d 155 (Ind. Ct. App. 1996).

16. *Id.* at 157.

the tax sale.<sup>17</sup> The court held Atkins' payment of the delinquent taxes did not constitute redemption because Atkins was not the owner and had no interest in the property and Niermeier's surrender of the certificate was in reliance on erroneous information.<sup>18</sup> The court also held that Niermeier's tax sale lien was enforceable against Atkins.<sup>19</sup> However, the court refused to void Atkins' warranty deed even though the grantor could not convey title free of all encumbrances.<sup>20</sup> What the original owner granted was the grantor's "right to redemption, which is derivative of the right to ownership."<sup>21</sup> Atkins' title to the property was held good under the warranty deed but subject to Niermeier's tax sale lien, thus giving Atkins, as the present owner, the superior right to redeem the property. But should a warranty deed that is clearly defective be upheld or effectively converted into a quitclaim deed despite the existence of a lien by a party who was timely in exerting his interests to the property through the regular channels and when both parties were strangers to the property at the time of the tax sale?

For a sign that property law is moving into the twentieth century, consider the case of *Nelson v. Parker*.<sup>22</sup> In 1994, Russell Nelson executed a warranty deed which conveyed his real property to his son Daniel subject to a life estate for himself and a cohabitant, Irene Parker. Russell died shortly thereafter and Daniel brought an action to quiet title to the property and to eject Irene. Daniel contended that realty cannot be conveyed to a third party by reservation and that, without words of grant or alienation, Irene could not acquire an interest in the property. In support of his claim, Daniel cited *Ogle v. Barker*,<sup>23</sup> which denied a life estate to a wife under roughly the same facts. The *Ogle* court explained that "[a] reservation, as such, must be to the grantor, or, in case of several grantors, to some or one of them; it cannot be made to a stranger to the deed."<sup>24</sup> But fifty years later the traditional rule did not seem quite so apropos. The court found a direct conflict between a formulaic application of the *Ogle* rule and the court's modern goal of construing a deed in a manner consistent with the grantor's intent. Although the language in the deed was as unambiguous as the language in *Ogle*, the *Nelson* court held the grantor's intent superseded the well-established common law rule and Irene could therefore remain in the house.<sup>25</sup> But should the primacy of the grantor's intent rule extend so far as to allow, in clear and unambiguous terms, a conveyance that violates a well-established rule?

Deed construction is always tricky and judges often must reconcile conflicting intentions with medieval and sometimes strict property rules. But is it always the case that, as we move down the road toward discretionary principles of equity and

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17. *Id.* at 158.

18. *Id.*

19. *Id.*

20. *Id.* at 159.

21. *Id.*

22. 670 N.E.2d 962 (Ind. Ct. App. 1996), *trans. granted*, (Ind. Mar. 27, 1997).

23. 68 N.E.2d 550 (Ind. 1946).

24. *Id.* at 554-55.

25. *Id.*

balancing, we will arrive at the best result? Is Irene Parker any more deserving of her life estate than Ms. McCullough is of attorney fees and costs in her battle against the gun-wielding Mr. Martin?

### III. EASEMENTS AND SERVITUDES

In *Contel of Indiana, Inc. v. Coulson*,<sup>26</sup> the court held that public use of a road justified a prescriptive easement in the state for the paved roadway, but emergency public and state maintenance crews' use on the shoulder remained merely a license. In *Coulson*, the Indiana Court of Appeals affirmed a partial summary judgment in favor of the Coulsons and concluded that, as a matter of law, the State of Indiana has no right-of-way or easement in State Road 63 except by prescription over the traveled part of the roadway.<sup>27</sup> The Coulsons own property along State Road 63 in Sullivan County, the boundary of which extends to the center of the road. No fee or easement for right-of-way was ever conveyed to the county or to the state, but the public has traveled freely on the roadway for many years. Recently, the Indiana Department of Transportation issued a permit to Contel to lay long-distance fiber-optic telephone cables in the State Road 63 right-of-way. Contel dug trenches along the road and laid two and a half miles of cable to the side of the paved roadway. The Coulsons filed a complaint against Contel for trespass seeking compensatory and punitive damages for burying the cable after the Coulsons had advised Contel that they owned the property over which the roadway traveled. Contel moved for partial summary judgment and sought a ruling to determine the width of the State Road 63 right-of-way. The trial court entered judgment for the Coulsons, and the court of appeals affirmed.<sup>28</sup>

On the right-of-way issue, the court ruled that, absent purchase or condemnation, the state's easement over the Coulsons' property cannot be greater than the use.<sup>29</sup> It cited a 1981 case holding that the "width of a road established by use is limited to that portion actually traveled and excludes any berm or shoulder."<sup>30</sup> The *Coulson* court determined the right-of-way to be coextensive with the paved roadway.<sup>31</sup> Hence, Contel's permit to lay cable was restricted to the right-of-way owned by the state and would require, presumably, digging under the paved roadway and within the lanes of travel, not in the shoulder area. Moreover, the court held that the state's authority and responsibility to maintain the roads, to mow and maintain ditches and culverts adjacent to the roadway, was based on an implied license and did not rise to an easement.<sup>32</sup>

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26. 659 N.E.2d 224 (Ind. Ct. App. 1995), *trans. denied*.

27. *Id.* at 228-229.

28. *Id.* at 226.

29. *Id.* at 227.

30. Board of Comm'rs of Monroe County v. Hatton, 427 N.E.2d 696, 699 (Ind. Ct. App. 1981).

31. *Id.* at 228.

32. *Coulson*, 659 N.E.2d at 228. Query: If a license is revocable, could the Coulsons revoke the State's license to maintain the adjacent property? If not, doesn't losing the right to

Contel then argued that it had acquired an easement by prescription because it had previously laid local phone lines in the property between the roadway and the Coulsons' current fenceline and that, in addition to laying long-distance lines, it was repairing and replacing some pre-existing lines. The court did not rule on this issue, noting that genuine issues of material fact remained for trial—namely whether Contel's prior use met the twenty-year statute of limitations.<sup>33</sup>

In further judicial action, the court of appeals ruled that a landowner gave permission to a neighbor to cross his land to access a pier with regard to two lots owned by the neighbor, but not with regard to two other lots, thus precluding a finding of adverse possession with regard to any of the lots.<sup>34</sup> In *Fleck v. Hann*, the court of appeals reversed the trial court's finding of a prescriptive easement for the Hanns across land of the Flecks. The Flecks owned lakeside lots on Silver Lake and had given permission to the Ransteads—who owned the neighboring inland lots—to cross an unplatted section of their land to reach the lake. The Ransteads built a pier in 1956 which they used and maintained until the present action. In 1968, they conveyed two of their four lots to the Coles. The Coles then conveyed their lots to the Hanns in 1981. The Ransteads, Coles and Hanns used the pier continuously since 1956, rebuilding it periodically, and allowing renters of theirs to use it as well. In 1992, the Flecks sought an injunction to prohibit the Hanns from using or maintaining the pier. The trial court found that the Hanns had obtained a prescriptive easement by tacking the periods of use from the Ransteads and the Coles to the Hanns' period.<sup>35</sup> The court of appeals, however, reversed the trial court on the grounds that the Ransteads' use of the pier was by permission and personal, thus their use could not be tacked.<sup>36</sup>

An interesting tacking issue arose in this case. The Ransteads initially had purchased two lots. At the time of purchase they negotiated with the Flecks for access to the lake and for permission to use the pier. In 1968 they purchased two additional lots that they rented out, extending to the renters the right to use the pier and boat. The court found that the Ransteads were given explicit permission in 1956 to access the pier over the Fleck's land with regard to their initial two lots and that no further discussions occurred when they purchased the additional two lots. The court then determined that the Ransteads could not use the pier by permission with regard to the first two lots and adversely with regard to the other two lots, even though no permission had been given for access by owners or users of the second two lots.<sup>37</sup> Finding some use adverse and some permissive was thought to amount to "a kind of secretive adverse use which would ultimately circumvent the stringent requirements that an adverse user must prove to acquire a prescriptive easement."<sup>38</sup> Thus, because the Ransteads possessed only a license

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revoke a license convert it into an easement by estoppel?

33. *Id.* at 229.

34. *Fleck v. Hahn*, 658 N.E.2d 125 (Ind. Ct. App. 1995).

35. *Id.* at 127.

36. *Id.* at 128.

37. *Id.*

38. *Id.*

to cross over the Flecks' land, their period of use could not be tacked onto the adverse use of the Coles and the Hanns to meet the twenty-year statute of limitations.

Except to the litigants, *McIntyre v. Baker*<sup>39</sup> is a wonderfully complex and delightful case regarding constructive notice of pre-existing conditions, replatting of developments, implied reciprocal negative servitudes, and the character of pre-manufactured homes. In 1937, the plat of Bonnie Ney's Addition was recorded, containing two parallel strips of lots numbering 1-28 in one strip and 29-60 in the other. In 1960, the owners of all but two lots entered into a restrictive covenant prohibiting a landowner from erecting "any temporary structures, trailers, garage houses, basement houses or any other temporary dwelling quarters. All buildings to be of new construction, no buildings to be moved in."<sup>40</sup> Less than a year later, three of the lots were replatted as Bonnie Ney's Second Addition and all the lots contained the relevant restriction. In 1966 lots 29-60 were replatted as Bonnie Ney's Third Addition, but this third plat did not contain any restrictions or refer to the 1960 covenants. In 1994, Kevin McIntyre purchased lot 18 in the Third Addition and was given a warranty deed that used the standard language and referred to "all easements, restrictions, conditions, and covenants of record affecting either the alienability or the use of the Real Estate."<sup>41</sup> Mr. McIntyre then petitioned the Plan Director for an improvement permit to place a manufactured home, breezeway, and garage on his lot, which was granted. Soon after beginning installation, a kindly neighbor informed him that he was in violation of a restrictive covenant. The case raises the following questions: First, did the restrictive covenants of the original Bonnie Ney's Addition survive the replatting of Bonnie Ney's Third Addition? If so, was Mr. McIntyre on constructive notice of the existence of those restrictions if they were not present in the replatting records? Third, should the doctrine of implied reciprocal negative servitudes be applied to create a servitude if none existed to create uniformity in the subdivision? And fourth, even if he was on notice, did he violate the covenant by installing a manufactured home?

In answer to the first question, the court distinguished between sections of a subdivision that were separately platted as distinct entities, some with and some without restrictions, and those that were replatted over a set of recorded restrictions.<sup>42</sup> Because there never were restrictions of record in the first case, the fact of inconsistent restrictions could not remove or add restrictions to those that differed. But in the latter case, as occurred here, the lot Mr. McIntyre purchased was originally restricted. When it was replatted, the restrictions were omitted. However, the original restrictions were still present in the record and only the consent of all owners of all restricted lots in the plat could remove the original restrictions. Thus, the court held that the restrictions could not be removed by

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39. 660 N.E.2d 348 (Ind. Ct. App. 1996).

40. *Id.* at 350.

41. *Id.*

42. *Id.* at 351.

replatting over the old restrictions.<sup>43</sup>

The court then determined that Mr. McIntyre was on constructive notice of the restrictions because they were properly recorded within the chain of title of his lot.<sup>44</sup> Although this is certainly a correct application of the doctrine of constructive notice, one might ask whether it is reasonable to expect a purchaser of a subdivision lot to look beyond the records and restrictions of the relevant plat.<sup>45</sup>

Third, and the court did not directly address this issue, is whether the doctrine of implied reciprocal negative easements should come into play to create uniformity in the subdivision where the records are inconsistent?<sup>46</sup> McIntyre argued that the original restrictions were invalid because they were placed on Bonnie Ney's Addition after two lots had been sold. However, the rule is that modifications cannot be made after some of the lots have been sold without the approval of all owners.<sup>47</sup> This rule is to prevent removing restrictions after some lots have been sold, not to prevent adding them. It would be patently unfair if some of the lot owners in a restricted subdivision could remove the restrictions after the sale of some lots; it would not be unfair if some of the owners imposed on themselves additional restrictions that were not agreed to by prior owners. Because the *McIntyre* restrictions fell into this second category, the court held that subsequent restrictions would not be invalidated just because some of the lots had been sold unrestricted.<sup>48</sup>

And finally, the court did not address whether or not Mr. McIntyre's manufactured home violated the restrictions.<sup>49</sup> On remand, the question for the trial could be whether the manufactured home is a "building to be moved in." Clearly, the intent of the restriction is to prevent temporary structures, house trailers, and pre-fab buildings. However, the phrase "building to be moved in," probably would not apply if Mr. McIntyre purchased the Benjamin Harrison Home and decided to move it onto his lot. Although it would be a "building to be moved

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43. *Id.* But if conditions had changed between 1960 and 1994 so that the restrictions no longer made sense, would it be necessary to obtain either the consent of all owners or a declaratory judgment that the restrictions were no longer enforceable in order to remove them? *See El Di, Inc. v. Town of Bethany Beach*, 477 A.2d 1066 (Del. 1984).

44. *McIntyre*, 660 N.E.2d at 352.

45. *See Sanborn v. McLean*, 206 N.W. 496 (Mich. 1925) (holding that a buyer in a subdivision is on inquiry notice that restrictions may exist simply from looking around the development and noticing the uniformity of the construction and use). *See also* CUNNINGHAM ET AL., *THE LAW OF PROPERTY* § 8.28 (2d ed. 1993).

46. Implied reciprocal negative easements doctrine combines the theories of real covenants and equitable restriction doctrine to impose uniformity in subdivisions where inconsistency exists among deeds to similar lots. It is most often used to allow purchasers of the lots to enforce restrictions among themselves when the promises were actually between individual lot owners and the developers. For a full discussion, see CUNNINGHAM ET AL., *supra* note 45, § 8.32.

47. *See McIntyre*, 660 N.E.2d at 352. *See also* *Comer v. Mills*, 650 N.E.2d 712 (Ind. Ct. App. 1995); *Elliot v. Keely*, 98 N.E.2d 374 (Ind. App. 1951).

48. *See McIntyre*, 660 N.E.2d at 352.

49. *Id.* at 353 n.4.

in" it would otherwise more than adequately meet the spirit of the restriction and maintain property values. Also, most manufactured homes arrive in multiple pieces and are attached, permanently, when they are on location. In the strict sense, it would not be a building to be moved in, but a few pieces of a building which happen to be more assembled than the usual assortment of lumber, shingles, and drywall sheets that go into the construction of a new home. Thus, is a home that arrives in four pieces different than a home that arrives in 400 pieces? On the other hand, if the purpose is to prevent temporary structures, manufactured homes would be a more difficult call. This home was to be attached permanently to a cement foundation and would not be removable once installed. In that sense, it is not temporary. But it would most likely not meet the aesthetic and durability requirements of new construction.

#### IV. EMINENT DOMAIN

There were a number of eminent domain cases this past year that met with rather inglorious fates. In *Lincoln Utilities, Inc. v. Office of Utility Consumer Counselor*,<sup>50</sup> Lincoln Utilities wished to raise its rates by 19%, but the Indiana Utility Regulatory Commission permitted it to raise its rates by only 3.51%. The utility appealed, charging a regulatory taking through the operation of section 8-1-2-6 of the Indiana Code which provides that only utility property that is actually used and useful for the convenience of the public shall be used to determine fair market value of the utility, which then provides the basis for determining rate changes. The court rejected the Constitutional issue for lack of ripeness.<sup>51</sup> The court cited *Williamson County Regional Planning Commission v. Hamilton Bank*<sup>52</sup> for the rule that "a claim [of a taking] is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue."<sup>53</sup> In this case, the utility commission's order was merely an interim increase until the commission had sufficient evidence to determine a fair rate of return.<sup>54</sup>

And in another regulatory taking case, *Gorka v. Sullivan*,<sup>55</sup> a group of Medicaid recipients, taxi companies and common carriers challenged a mandatory reduction in the rates paid to transportation providers of Medicaid patients by the Indiana Family and Social Services Administration and the Indiana Office of

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50. 661 N.E.2d 562 (Ind. Ct. App. 1996), *trans. denied*.

51. *Id.* at 566.

52. 473 U.S. 172 (1985).

53. *Lincoln Utilities*, 661 N.E.2d at 566.

54. Even though it was only an interim order, there might still be a temporary taking. If, upon further evidence, the commission determines that a 19% increase in rates is necessary to guarantee a satisfactory return on investments, then a temporary taking might have occurred during the litigation period when the utility was forced to operate at a loss. *Cf. Dennis Long, The Expanding Importance of Temporary Physical Takings: Some Unresolved Issues and an Opportunity for New Directions in Takings Law*, 72 IND. L.J. 1185, 1198-99 (1997).

55. 671 N.E.2d 122 (Ind. Ct. App. 1996), *trans. denied*.

Medicaid Policy and Planning. In an attempt to reduce the costs of transporting Medicaid patients to and from medical service providers, the Medicaid agencies reduced the rates it would pay to transportation providers and created incentives for eliminating unnecessary transportation claims. The transportation carriers claimed a regulatory taking because the state Motor Carrier Act sets the standards for a “fair” rate, which is higher than that paid by the Medicaid agencies, thus implying that the Medicaid rates are “unfair.” After ruling that the state Motor Carrier Act was not preempted by a federal social security statute<sup>56</sup> that sets rates for transportation providers,<sup>57</sup> the court did hold that the providers in this case were exempt from the Motor Carrier Act under the government control exemption.<sup>58</sup> Thus, once the providers accepted a Medicaid contract, the Medicaid agency met the necessary control and supervision requirement to trigger the governmental control exemption.

The providers also contended that the lower rates violated two clauses of the Indiana Constitution by demanding their services without just compensation and by taking their property. However, the court easily dispensed with these arguments on the grounds that the providers had willingly entered into service contracts and could withdraw at any time if the lower rates were not adequate to their needs.<sup>59</sup> As regarded the confiscation claim, the court found that because the contract was not a state mandate, the rates were binding only through operation of a voluntary contract and not through state action.<sup>60</sup>

This case raises a couple of troubling questions. First, if the Motor Carrier Act sets rates at a reasonably fair and efficient level, and those rates are higher than the Medicaid rates, then the regular transportation customer is ultimately subsidizing the Medicaid patient and the state will have to artificially raise the regular rates to compensate for the subsidy. This means that the costs of providing transportation to Medicaid recipients is partly paid by the general public through Medicaid reimbursements and partly by those regular customers who pay higher rates for using transportation services. We should ask ourselves which of these two groups is best able to cover the cost of this service to low-income patients: other bus and taxicab users who also tend to be in the lower income levels or the general taxpayer who can afford his or her own car and is not dependent on public transportation? Second, is it reasonable to label “voluntary” the acceptance of public service contracts in a state with a deplorable lack of public transportation that has resulted in a high incidence of private car ownership and thus a low population of “regular” transportation customers to subsidize the Medicaid customers?

One person’s junk may be another’s treasure, but do city workers who remove

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56. 42 U.S.C.A. § 1396a(a)(30)(A) (1994).

57. *Gorka*, 671 N.E.2d at 126.

58. *Id.* at 127. The government control exemption releases transportation carriers from compliance with the Motor Carrier Act when a governmental agency has control over the carrier. See IND. CODE § 8-2.1-22-2.1(a)(3) (Supp. 1996).

59. *Gorka*, 671 N.E.2d at 131.

60. *Id.* at 132.

trash and debris from a homeowner's yard effect a taking of the homeowner's property? In *Starzenski v. City of Elkhart*,<sup>61</sup> the amount of debris that was removed from the property filled eight dump trucks, though the cleanup was still incomplete when the Starzenski's attorney obtained a temporary restraining order to prevent further removal of the debris. In later seeking a preliminary injunction, the Starzenskis claimed that the City had violated their due process rights by entering their property and had taken their possessions without just compensation. The trial court denied their request and the court of appeals affirmed.<sup>62</sup> Judge Barteau analyzed the Fourth Amendment doctrines prohibiting unreasonable searches and seizures and found that two hearings by the City Building Commissioner and Enforcement Authority, coupled with adequate notice and opportunities to be heard and to appeal to a judicial authority, satisfied the Starzenskis' due process rights with regard to the trespass.<sup>63</sup> There was no trespass onto the property until the city workers arrived to remove the debris, which they did pursuant to a properly obtained warrant which the Starzenskis had the opportunity to challenge on appeal. With regard to the takings issue, Judge Barteau cited *City of Minot v. Freeland*<sup>64</sup> for the well-settled rule that "the government's exercise of its police power to abate a public nuisance hazardous to the public health, safety, or welfare does not entitle the property owner to compensation."<sup>65</sup> In addition, attempts to enforce building and safety codes do not effect a taking.<sup>66</sup> The Starzenskis claimed that the city authorities threw out items of economic and sentimental value without giving them an opportunity to save them. The court quickly rejected this argument, as the city had been battling the Starzenskis since 1985, having told them numerous times to remove the trash and debris or the city would do it for them.<sup>67</sup> There was no question, therefore, that this action was nuisance abatement and not a violation of the Starzenskis' Fourth, Fifth, or Fourteenth Amendment rights.<sup>68</sup>

And in the case of *Reinking v. Metropolitan Board of Zoning Appeals*,<sup>69</sup> the court of appeals held that a property purchaser, who purchased the property with the knowledge that it was burdened by a zoning ordinance, did not have standing to challenge the constitutionality of the ordinance as a taking.<sup>70</sup> Subsequent owners may raise constitutional issues that arise during their proprietorship; they

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61. 659 N.E.2d 1132 (Ind. Ct. App.), *trans. denied, and cert. denied*, 117 S. Ct. 582 (1996).

62. *Id.* at 1136.

63. *Id.* at 1138-39.

64. 426 N.W.2d 556 (N.D. 1988).

65. *Starzenski*, 659 N.E.2d at 1140.

66. *City of Gary v. Ruberto*, 354 N.E.2d 786 (Ind. App. 1976).

67. *Starzenski*, 659 N.E.2d at 1140. Is it necessary to show some economic value in the property allegedly being taken?

68. This case did provide some pedagogic value, if only in demonstrating the difficulties of elevating a common nuisance action into a Constitutional challenge, as oral arguments were heard at the Valparaiso University School of Law.

69. 671 N.E.2d 137 (Ind. Ct. App. 1996).

70. *Id.* at 141.

simply may not challenge ordinance restrictions enacted prior to their ownership and of which they had full knowledge when they purchased the land in question. Such knowledge, however, was not deemed a bar to a petition for a hardship variance, though the property owners still had the burden of proving an undue hardship.<sup>71</sup>

## V. PERSONAL PROPERTY

There were a number of interesting personal property cases, besides the usual bitter divorce disputes over sofas and televisions, that occupied the Indiana courts this year. Remember bailments? In *Kottlowski v. Bridgestone/Firestone, Inc.*,<sup>72</sup> a number of Firestone employees lost their tools in a burglary of their employer's business and subsequently brought suit claiming a bailment existed. The trial court granted summary judgment to Firestone on the grounds that a bailment did not exist because the employer did not have control over the tools.<sup>73</sup> The Court of Appeals reversed and remanded, finding that a bailment for mutual benefit had been created.<sup>74</sup> A bailment requires delivery and acceptance of personal property and the standard of care a bailee owes a bailor is determined by the benefit each receives from the bailment.<sup>75</sup> What made this case difficult, was the common practice that the employees would lock their tools in their own toolboxes each night, but the toolboxes were inaccessible because they were locked in the garage after working hours. Thus, the employer had no direct access to the property when the employee was absent, but the employee could not get to his tools without obtaining a key to the building from the employer. The question for the court was whether delivery and acceptance had been effected, and these are questions about control over the property. Because neither party had clearly assumed a bailment relationship, Judge Najam looked to the practical reality of the situation and concluded that Firestone's "knowledge" that it was impractical for the employees to take their massive toolboxes home each night made it reasonable to conclude that Firestone "intended" to assume control over the employees' property.<sup>76</sup> Although we might question the propriety of collapsing knowledge into intent for such purposes, the alternative was worse. The employees otherwise would be forced to keep their 1000 lb. toolboxes in their possession at all times to guarantee their protection. The court noted that where impracticality did not prevent the employees from removing their tools at night, a bailment might not be created.<sup>77</sup> The court thus remanded for a determination of whether Firestone could prove that it was not negligent under the standard of ordinary care created by a bailment for

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71. *Id.* at 142.

72. 670 N.E.2d 78 (Ind. Ct. App. 1996), *trans. denied*.

73. *Id.* at 81.

74. *Id.* at 83.

75. *Id.* at 82.

76. *Id.* at 83.

77. *Id.* at 84 n.2. Thus, the hairstylist would be well-advised to take home each night his scissors, combs, and hair dryers.

mutual benefit.<sup>78</sup> And in addition to the bailment duties, the court also found that the employee/employer relationship created a common-law duty to exercise ordinary care to protect employees from negligence.<sup>79</sup>

In a strong dissent, Judge Sullivan argued that the court's ruling effectively forces Firestone to make its store absolutely burglar-proof.<sup>80</sup> He would have found that the intervening criminal acts of third parties, who had to take great and destructive measures to break into the store, established that, as a matter of law, Firestone was not negligent. He questioned the majority holding that it was reasonably foreseeable that a break-in might occur.<sup>81</sup> The intervening criminal act raises a clear fact question about the foreseeability of the harm, and thus the exercise of ordinary care.<sup>82</sup>

And for personal property held jointly, the Indiana Supreme Court split 3-2 in *Parke State Bank v. Akers*,<sup>83</sup> involving certificates of deposit placed in a safe deposit box. The parties were married in 1986; one month later the husband had his wife's name placed on four certificates of deposit as joint tenants with rights of survivorship and also authorized her to gain access to the safe deposit box at the bank. In 1990, the husband was diagnosed with cancer and, in 1991, telephoned the bank's president requesting that his daughter have access to the safe deposit box. The bank acquiesced upon condition that he provide written authorization to enter the box, which he did. Then, pursuant to his instructions, the daughter accessed the box, removed four joint CDs, took them to his hospital room for endorsement, and cashed them out for checks written to herself and her two children. The wife then filed suit against the bank alleging breach of the box rental agreement when it permitted the daughter to gain access without the wife's approval. The court of appeals concluded that because the husband did nothing but retrieve and liquidate the CDs, which he owned, the wife suffered no damages.<sup>84</sup> The supreme court reversed and held that the wife had control over the CDs and was thus in constructive possession of them, granting her a present possessory interest in the property.<sup>85</sup> Additionally, the court found that the wife had third-party beneficiary rights in the CDs by virtue of her right of survivorship. The court identified this as a "contingent beneficial interest as a donee-beneficiary."<sup>86</sup> But because the bank breached its box rental agreement, it destroyed the wife's interest that, given the fact that the husband could not leave

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78. *Id.* at 84.

79. *Id.* at 85.

80. *Id.* at 86 (Sullivan, J., dissenting).

81. *Id.*

82. But as with any tort question, we should always ask which party was best able to insure: the employer who had control over the premises and earns a profit from the labor and use of the employee's property, or the employees who have knowledge of the true value of the property and who effectively receive rent on the produce of that property?

83. 659 N.E.2d 1031 (Ind. 1995).

84. *Id.* at 1033.

85. *Id.* at 1034.

86. *Id.*

the hospital, made it pretty likely that her contingent beneficial interest would ripen into ownership. Justice Selby noted that because the husband was too ill to ever return to the bank, the wife's contingent beneficial interest somehow became less contingent so that she suffered a more concrete harm by the bank's breach of contract than if the husband had been able to walk to the bank and cash out the CDs.<sup>87</sup>

This decision poses an interesting dilemma. The husband was fully entitled to remove the CDs at any time and cash them in, thus changing his mind about who he believed should be the beneficiary. Had he done so before he went into the hospital, the wife would have had no cause of action. But because he waited until he was physically incapable of gaining access to the box himself, the wife's interest suddenly ripened into a kind of "soon-to-be-vested" ownership that now precluded his changing his mind about his beneficiaries. Under this reasoning, anyone physically prevented from personally carrying out the actions corresponding to a changed mind would be unable to appoint a surrogate or execute a power of attorney to carry out his wishes because the beneficiary's interests had somehow become riper upon the donor's physical incapacity. It is as though the circling of the vultures triggered the change in property rights, not actual death, as the survivorship right implies.<sup>88</sup>

In a difficult case on fixtures and will interpretation, the court declined the opportunity to engage in a detailed analysis of how much weight should be given to factors tending to show the intent of the testator. In *Estate of Meyer v. Meyer*,<sup>89</sup> the decedent had left a will devising "the entire farm, including Land, Buildings and Equipment" to his nephew, who he also appointed executor. The nephew claimed that he was entitled to thirty-seven head of cattle and the crops as incident to "the entire farm." The court held that the crops were fixtures attached to the land and were therefore included in the term "the land."<sup>90</sup> As regards the cattle, Judge Darden explained that the term "including" must have been meant as a limitation and not as an enlargement because otherwise the testator would have modified the term with the legal phrase: "but not in limitation of the foregoing."<sup>91</sup> Thus, because the ordinary use of the term is as a limitation, and it was possible to invoke the alternative meaning by elaborating on the term, the "entire farm" was construed to mean only the "land, buildings, and equipment." This meant the cows were not intended to be part of the "entire farm." If so they too would have been listed with the land, buildings, and equipment.

Query: Would the result have been any different if Mr. Post had raised the fox

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87. *Id.* at 1034-35.

88. Of course, had the wife suddenly been hit by a bus prior to her husband's succumbing to the cancer, he would be able to send a surrogate to carry out his changed wishes regarding the beneficiaries of his property. Thus, his power to control the property would be restored, despite no change in his physical or mental condition.

89. 668 N.E.2d 263 (Ind. Ct. App. 1996), *trans. denied*.

90. *Id.* at 266.

91. *Id.* at 265. The court explicitly declined to consider the fact that the will was drafted by a layperson who might not have understood the two meanings of "including."

before releasing it for the chase where it was unceremoniously swiped out from under his nose by the ungentlemanly Mr. Pierson?<sup>92</sup> That was the issue in *Indiana Farm Gas Products Co. v. Southern Indiana Gas & Electric Co.*<sup>93</sup> In that case SIGECO purchased natural gas and pumped it into an underground storage field for later distribution to customers in southwest Indiana. Subsequently, IFG leased the tract of land adjacent to SIGECO's field and began drilling for natural gas. Amazingly, it struck gas and hence began negotiations to sell to customers. IFG then filed a petition with the Indiana Utility Regulatory Commission for an order requiring SIGECO to transport the gas from IFG's well through SIGECO's pipeline. The commission initially determined that the IFG gas was produced in Indiana and was "owned" by IFG under the rule of capture.<sup>94</sup> On a petition for reconsideration the commission determined that SIGECO would only have to transport IFG's gas in its pipeline if it was "native gas" and not "storage gas."<sup>95</sup> On appeal, the court of appeals held that the commission did not have jurisdiction to determine the property issue of whether the gas was SIGECO's personal property or was gas subject to capture by IFG.<sup>96</sup> On remand, the commission dismissed IFG's petition.<sup>97</sup> On appeal the second time, the court did not address whether or not IFG had captured the gas or whether it was SIGECO's property all along; instead, it addressed the "law of the case" issue raised by its earlier determination that the commission did not have the jurisdiction to decide the property law issue. The court affirmed the dismissal of IFG's petition while noting that "ownership is still in dispute."<sup>98</sup> As a result, we are left dangling as to whether Mr. Post could have owned the fox, then released it to the wild in such a manner as would allow him to recapture it at will, and yet been able to prevent Mr. Pierson from snatching it out from under his nose.<sup>99</sup>

## VI. REAL ESTATE CONTRACTS

I always suspected that having a law degree gave rise to a per se charge of unclean hands. The Indiana Supreme Court decided a relatively straightforward case regarding a claim for specific performance of a real estate option agreement but with an interesting twist.<sup>100</sup> In *Wolvos v. Meyer*, Gloria Wolvos entered into an exclusive option to sell a lot in South Bend to Steven Meyer. The option was

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92. *Pierson v. Post*, 2 Am. Dec. 264 (N.Y. 1805).

93. 662 N.E.2d 977 (Ind. Ct. App. 1996), *trans. denied*.

94. *Id.* at 979.

95. *Id.*

96. *Id.* at 980.

97. *Id.*

98. *Id.* at 982.

99. This raises two sets of questions: 1) whether the gas, like the fox, could be domesticated, in which case ownership continues regardless of whether the property walked off or was misplaced, and 2) if the property was not domesticated, could one retain a pre-existing property right in the object upon its return to the wild?

100. *Wolvos v. Meyer*, 668 N.E.2d 671 (Ind. 1996).

to remain in effect for 120 days. For some reason, Wolvos did not disclose to Meyer that she had a real estate license and Meyer did not disclose to Wolvos that he was a law school graduate, though he was not licensed to practice in any state. The option agreement provided that Wolvos would undertake an environmental study of the real estate, remedy any violations found thereon, and provide a statement from EPA confirming that the lot was within EPA-accepted levels of all contaminants. Within the 120 days, Meyer notified Wolvos that he wanted to exercise his option to purchase; Wolvos then obtained an environmental analysis and learned that clean-up would cost \$19,000. Wolvos' attorney wrote to Meyer claiming that the option agreement was an unenforceable agreement to agree, and extended to him a different offer of sale in which Wolvos would agree to pay only \$10,000 of the environmental remediation and would not be obligated to provide a statement from EPA confirming any aspect of the environmental condition of the real estate. Meyer rejected the new agreement and brought action for specific performance, which was ordered by the trial court in summary judgment proceedings.<sup>101</sup> Wolvos appealed the ruling asserting that Meyer acted with unclean hands, that had she known of his legal training she would not have agreed to forego legal counsel in drafting the original agreement. The court of appeals reversed the grant of summary judgment for Meyer and remanded with instructions to enter summary judgment for Wolvos.<sup>102</sup> Meyer petitioned the Indiana Supreme Court, which reversed the court of appeals and reinstated the trial court's ruling for Meyer.<sup>103</sup>

The Indiana Supreme Court did not hesitate to find that the option agreement was unambiguous and binding, that enough essential terms were present to render it enforceable and that it was not an agreement to agree but an agreement to enter into a standard purchase agreement.<sup>104</sup> The interesting twist comes in considering whether fraud or misrepresentation was present in Meyer's failure to disclose his law degree. Wolvos claimed that she would have sought legal counsel had she known that Meyer had legal training, and additionally that he had a responsibility under the ethical rules<sup>105</sup> to advise Wolvos to seek legal counsel. The court held that because Meyer was not a practicing attorney, he was not subject to the Professional Conduct Rule.<sup>106</sup> It also ruled that because Wolvos discovered "Meyer's legal education only after executing the option contract, she did not rely

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101. *Id.* at 674.

102. *See id.*

103. *Id.*

104. *Id.* at 678.

105.

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

IND. R. PROF. COND. 4.3.

106. *Id.* at 679.

upon his statements based upon his status as a lawyer.”<sup>107</sup> But isn’t that her point? Because she didn’t know he was a lawyer she was under a false impression that she didn’t need legal advice to review the contract.

*Strodtman v. Integrity Builders*<sup>108</sup> highlights the limitations of both legal and equitable remedies. In 1993, the Strodtmans filed a petition questioning the zoning of a subdivision that Integrity planned to develop adjacent to the Strodtmans’ real estate. Shortly thereafter, the Strodtmans and Integrity entered into an agreement in which the Strodtmans agreed not to oppose the development if Integrity made some changes to its development plan and would provide landscaping on the property adjacent to the Strodtmans’ property.<sup>109</sup> The petition was dismissed with prejudice but Integrity did not provide the landscaping. In 1994, Integrity conveyed the real estate to another developer, but Jeffrey Turner, Integrity’s president, assured the Strodtmans that the landscaping would be done. In September, 1994, the Strodtmans brought suit seeking specific performance against Turner and Integrity. Turner and Integrity filed a motion for summary judgment which was granted by the trial court on the grounds that neither Turner nor Integrity owned the real estate when the Strodtmans filed their complaint.<sup>110</sup> On appeal, the court gave the Strodtmans some relief when it found that Integrity had breached the contract as a matter of law by putting itself in a position where it would be unable to perform the contract.<sup>111</sup> However, the court denied the Strodtmans’ petition for specific performance because Integrity no longer controlled the contract’s subject matter.<sup>112</sup>

## VII. RULE AGAINST PERPETUITIES

In *Buck v. Banks*,<sup>113</sup> the court of appeals held steady to the traditional Rule Against Perpetuities. The case arose out of a 1958 contract by the Bucks to purchase a parcel of land from Lillian Allen which included a right of first refusal to purchase an additional lot should Allen decide to sell the property. Also, the contract contained a clause making the contract’s provisions binding on each

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107. *Id.*

108. 668 N.E.2d 279 (Ind. Ct. App. 1996), *trans. denied*. See also *Alexander v. Dowell*, 669 N.E.2d 436 (Ind. Ct. App. 1996) (Another instance of sales interfering in the court’s ability to order specific performance for breach of a contract concerning real estate.).

109. At trial, the Strodtmans contended that Integrity failed to provide specified landscaping, did not provide a finished site status consistent with the plat, relocated the drainage easement for lot 48, did not provide the earth berm along lots 34 and 35, and built a fifteen-foot hill.

110. *Strodtman*, 668 N.E.2d at 281.

111. *Id.* at 282.

112. *Id.* at 283. In real estate contracts in which each parcel of land is considered per se unique, should a party be permitted to sell when he has a continuing obligation to perform specific things on the land? Should a sale under such circumstances render the seller liable for punitive damages if the sale was conducted to avoid specific performance? Should a covenant that is necessary for permission to develop land be considered appurtenant or personal?

113. 668 N.E.2d 1259 (Ind. Ct. App. 1996).

party's heirs, executors, administrators, and assigns. In 1964, the Bucks made the final payment on the original lot, thus fully performing the contract. In 1993, Mrs. Allen decided to sell the second lot to the Banks who entered into a purchase agreement with her. Before closing, she died, and her estate proceeded with the negotiations. At this time, the Bucks learned of the impending sale and brought suit for specific performance of the option contract. Allen's estate countered that the right of first refusal violated the Rule against Perpetuities, thus voiding the provision in its creation. The trial court ruled for the estate.<sup>114</sup>

The court found that the clause did not invoke the Uniform Statutory Rule Against Perpetuities,<sup>115</sup> which specifically does not apply to nonvested property interests arising out of a nondonative transfer.<sup>116</sup> It was, however, subject to the common law Rule Against Perpetuities, codified in 1945,<sup>117</sup> which restates the traditional language of lives in being plus twenty-one years. The Bucks argued that the provision purportedly extending the contract to all heirs, executors, and assigns did not apply to the refusal right and thus vested within a life in being. The court rejected this argument finding instead that the phrase "all of the covenants and agreements" included the right of first refusal and was obligatory upon the heirs and assigns.<sup>118</sup> Thus, it violated the Rule Against Perpetuities. It clearly was the intent of the parties that the Bucks would have a right of first refusal that would be binding on heirs and assigns; it was unfortunate that the person who drafted the contract did not recognize the Rule Against Perpetuities trap that would undermine the parties' intentions.

The Bucks also asked for reformation pursuant to section 32-1-4.5-1(b) of the Indiana Code to bring it within the Rule. The court denied reformation because, as stated previously, the Uniform Statutory Rule Against Perpetuities was inapplicable to this property interest and there was nothing left to reform because the contract had been fully performed.<sup>119</sup> The court was unwilling to explore the intent of the parties as to whether the preemptive right was intended to survive fulfillment and merger of the contract of the first lot.<sup>120</sup> Nor would the court address reformation doctrine under Indiana's common law "wait and see" rule,<sup>121</sup> which, presumably, would have allowed the interest because it had in fact vested within the perpetuities period.

### VIII. TENANCY BY THE ENTIRETY

There were scores of dissolution cases this past year, and hence scores of property settlements. But there were a couple that raised particularly tough issues

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114. *Id.* at 1260.

115. IND. CODE §§ 32-1-4.5-1 to -6 (1993).

116. *Buck*, 668 N.E.2d at 1261.

117. IND. CODE §§ 32-1-4-1 to -6 (1993).

118. *Buck*, 668 N.E.2d at 1261.

119. *Id.* at 1261.

120. *Id.* at 1262.

121. *Id.* at 1261 n.1; IND. CODE § 32-1-4.5-3 (1993).

about property held as tenants by the entirety.<sup>122</sup> In *Mid-West Federal Savings Bank v. Kerlin*,<sup>123</sup> the Kerlins obtained a judgment of over \$168,000 against Joe Holland and his company in 1992. At the time of judgment, Joe and his wife owned real property, which was mortgaged, as tenants by the entirety. In 1993, they fell behind in their mortgage payments. In December 1993, the Hollands filed a petition for dissolution of marriage, and in March 1994 the mortgage company began foreclosure proceedings. The mortgage company did not name the Kerlins in the foreclosure action. The dissolution was granted in April 1994 with a property settlement agreement that provided Joe would be the sole owner of the real property, thus making it available for satisfaction of the Kerlins' judgment. Shortly after the dissolution, the property was foreclosed on and sold at a sheriff's sale without notice or reference to the Kerlins and their judgment. The question for the court was whether the duly recorded judgment lien against Joe Holland was a first and prior lien not to be extinguished by the Decree of Foreclosure because the Kerlins were not proper parties to the mortgage foreclosure suit and ought not be bound by the judgment or whether the doctrine of *lis pendens* extinguished their claim. At the time the foreclosure action was filed, the property was held in tenancy by the entirety and was not available for satisfaction of the judgment. Only after the property settlement was finalized was the judgment lien perfected. The court held that the date of filing was the only relevant date for determining who the proper parties were, not the date of foreclosure.<sup>124</sup> Although the Kerlins' judgment was not a perfected lien until the April dissolution, the court held that the Kerlins were bound by the judgment of foreclosure, which occurred some months after their lien ripened.<sup>125</sup>

The court also agreed that because the Kerlins' judgment did not attach until after the foreclosure suit was filed, it was extinguished by the foreclosure sale under the doctrine of *lis pendens*. The court held that the commencement of the foreclosure action provided constructive notice to pendent lite claimants, i.e. claimants who acquired an interest after commencement of the first suit (the foreclosure action).<sup>126</sup> This may seem a little tough to swallow for the Kerlins who would have needed direct knowledge that the mortgage company had foreclosed after they had recorded their judgment lien and that the parties had obtained a dissolution of marriage in order to keep their interest alive. But the decision is made somewhat more palatable, perhaps, by the fact that the Kerlins' judgment was subordinate to the original mortgage.<sup>127</sup>

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122. See *Diss v. Agri-Business Int'l, Inc.*, 670 N.E.2d 97 (Ind. Ct. App. 1996) (Income from rental property held in tenancy by the entirety was held not-exempt from judgment creditors of one spouse in fraudulent conveyancing action.).

123. 672 N.E.2d 82 (Ind. Ct. App. 1996), *trans. denied*.

124. *Id.* at 86.

125. *Id.*

126. *Id.* at 87.

127. What if a later creditor had beaten them to the courthouse the day after the dissolution decree made Joe Holland's property available for satisfaction of the judgments and interposed itself between Kerlin's judgment and the property?

## IX. ZONING

And as usual, there were a number of zoning cases that were appealed this year. One important case, *Hendricks County Board of Zoning Appeals v. Barlow*,<sup>128</sup> addressed the issue of whether local zoning ordinances were preempted by state and federal laws governing the licensing and regulation of raising exotic animals. In that case the Barlows had obtained all necessary state and federal licenses and permits to enable them to raise various lions, tigers, monkeys, bears, and African hedgehogs. But the Hendricks County Planning and Building Department issued a citation for violation of a zoning ordinance that dictates that land shall not be used for any purpose other than that which is permitted and specified in the district in which the land is located. The Barlow's property was zoned suburban residential. After appealing the citation to the Hendricks County BZA, which was upheld, the Barlows applied for a variance, which was denied. The Barlows then appealed the denial, and the trial court ruled that the zoning ordinance was preempted by the state and federal acts regulating exotic animals.<sup>129</sup> On appeal, the trial court was reversed on the grounds that the state and federal permit regulations covered substantially different aspects of exotic animal raising than the zoning ordinance and therefore did not preempt the latter.<sup>130</sup> In particular, the state and federal acts govern transportation, purchase, sale, housing, care, and handling of animals to insure humane treatment of the animals consistent with protecting the health and safety of the community.<sup>131</sup> Preemption occurs only when the superior law attempts a pervasive regulation of the activity or where there is a conflict between the superior and the local law such that compliance with both is impossible.<sup>132</sup> In this case, the zoning restriction did not pose a conflict with the state and federal licensing schemes and the court held that neither the federal nor the state acts constituted pervasive regulation of the activity.<sup>133</sup> In fact, with regard to the state laws, the court implied that where a statute is merely a licensing act, it does not show a clear intent to pervasively regulate the field of activity and local regulation is allowed.

In another zoning case, *Howell v. Indiana-American Water Co.*,<sup>134</sup> the court of appeals determined that local zoning regulations did not apply to the location of an elevated water storage tank, despite the fact that the water company requested a variance to construct its tank in an area zoned for agricultural use. When the BZA denied its request for a variance, Indiana-American sought declaratory injunctive relief asserting that it was not subject to local zoning regulations. Local landowners claimed that Indiana-American had voluntarily

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128. 656 N.E.2d 481 (Ind. Ct. App. 1995).

129. *Id.* at 483.

130. *Id.* at 485.

131. *Id.* at 484.

132. *Id.* (citing *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 98 (1992)).

133. *Id.* at 485.

134. 668 N.E.2d 1272 (Ind. Ct. App. 1996), *trans. denied*.

submitted itself to the local zoning board and could not now disclaim its authority. The Indiana Supreme Court has held that public utility facilities are not subject to local zoning ordinances on the grounds that they serve a wider public interest than the local zoning boards.<sup>135</sup> In *Graham Farms, Inc. v. Indianapolis Power & Light Co.*, the court held:

The 1947 statute [authorizing local zoning ordinances] does not specifically provide, and it cannot be assumed that the legislature would authorize, a municipality or a county to regulate a public utility when the utility is serving the larger interest in the general public. The utility is regulated by the Public Service Commission, and local regulation is inimical to that larger interest.<sup>136</sup>

The court thus held that local zoning ordinances are preempted by public utility regulations which grant to the commission “the power . . . to enforce the provisions of this act, as well as all other laws, relating to utilities.”<sup>137</sup> Hence, when zoning ordinances impose additional burdens on individuals engaged in activities like raising exotic animals, they are not preempted by state and federal regulations, but when they interfere with necessary public services they will be preempted in the name of serving the greater public interest.

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135. *Graham Farms, Inc. v. Indianapolis Power & Light Co.*, 233 N.E.2d 656 (Ind. 1968).

136. *Id.* at 666.

137. *Darlage v. Eastern Batholomew Water Corp.*, 379 N.E.2d 1018, 1020 (Ind. App. 1978).

