

# RECENT DEVELOPMENTS IN INDIANA REAL PROPERTY LAW

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## I. CONVEYANCES

### A. Foreclosure Property—Marketable Title

With the unstable state of the real estate market and the global economy, an inordinate number of residential and commercial properties are being acquired via foreclosure.<sup>1</sup> A case before the Indiana Court of Appeals in spring 2008 illustrates some of the problems that arise in purchasing distressed real estate and provides practitioners a review of Indiana's rules for conveying marketable title in real property.

The case, *House v. First American Title Co.*,<sup>2</sup> concerned property purchased from a residential real estate developer that had foreclosed its mortgage on a home.<sup>3</sup> House purchased the home from The Centex Home Equity Co., LLC.<sup>4</sup> In connection with the purchase, House hired Security Title Services, LLC, to perform a title search.<sup>5</sup> After Security Title issued a commitment without liens on the property, House purchased title insurance from First American Title Company and closed on the sale.<sup>6</sup>

House improved the property and put it on the market.<sup>7</sup> A sale fell through after the potential buyer's title search revealed two liens on the property: one held by Provident Bank against the original homeowners, Richard and Ginny Wykoff, and the second held by American Acceptance against Ginny.<sup>8</sup>

When Centex, Security Title and First American refused to clear House's title to the property, he sued them,<sup>9</sup> and the trial court granted the defendants-appellees' motion to dismiss.<sup>10</sup>

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1. See Gretchen Morgenson, *So Many Foreclosures, So Little Logic*, N.Y. TIMES, July 4, 2009, at B1.

2. 883 N.E.2d 197 (Ind. Ct. App. 2008).

3. *Id.* at 199.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 200.

After another potential buyer's title search revealed two additional liens on the property, House filed a quiet title action at his expense.<sup>11</sup> After Judge James D. Humphrey held that the judgment liens were still valid against the property, House amended his complaint, alleging each title insurance company breached its contractual duty owed to him.<sup>12</sup> He further alleged that First American's failure to defend his title to the property constituted unfair claim practices, therefore making First American liable for treble damages.<sup>13</sup> The parties' motions to dismiss House's claims were again granted, and House appealed.<sup>14</sup>

House claimed that he was damaged because he lost two sales and incurred the cost of a quiet title action.<sup>15</sup> Centex argued that the special warranty deed it gave House predecided House's claim for damages. The special warranty deed contained a single covenant of warranty,<sup>16</sup> which the court recognized as "a future covenant which is not breached until the grantee is evicted from the property, buys up the paramount claim or is otherwise damaged."<sup>17</sup> The court concluded that this single covenant does not require a grantor to reimburse a grantee for the cost of a quiet title action, nor is the grantor liable to the grantee for lost sales.<sup>18</sup> The court upheld the trial court's decision to grant Centex's motion to dismiss, stating that the covenant did not mean that the title to the property was marketable or guaranteed as such, rather, it acted as a covenant to indemnify the grantee against lawful claims.<sup>19</sup> Allowing House to seek damages for lost sales would re-write the deed to add additional covenants that did not exist in the deed.<sup>20</sup>

Security Title argued that disclosure of the three liens was not required because they were legally deficient.<sup>21</sup> The court noted that Security Title did not offer any authority in support of this argument nor were there any facts before the court indicating whether the property was held by the entireties, thereby addressing whether or not the judgments against the individual Wykoffs would attach to the property.<sup>22</sup> As a result, Security Title's motion to dismiss was

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11. Aurora Elementary School had a lien against Richard Wykoff and the Dearborn County Hospital had a lien against the Wykoffs. *Id.*

12. *Id.* at 199-200.

13. *Id.*

14. *Id.*

15. *Id.* at 201.

16. "The Grantor [Centex], herein and its successors shall warrant and defend the title to the above described real estate to Grantee [House], [his] successors and assigns, against the lawful claims and demands of all persons claiming by, through or under Grantor but against none other." *Id.* at 200-01.

17. *Id.* (quoting *Outcalt v. Wardlaw*, 750 N.E.2d 859, 863 (Ind. Ct. App. 2001)).

18. *Id.* at 201.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* (citing IND. CODE § 32-17-3-1 (2008)).

reversed.<sup>23</sup>

First American's motion to dismiss relied on exclusions in the title insurance policy, including one that states that it had no liability for, "defects, liens, encumbrances, adverse claims or other matters . . . resulting in no loss or damage to the insured claimant."<sup>24</sup> First American further argued that it was not required to pay damages to House unless a lien was enforced against him.<sup>25</sup> The court found that First American ignored the fact that House needed to expend funds to clear his title and concluded that if House's allegations were taken as true, they established the fact that he had unmarketable title.<sup>26</sup> Citing *Humphries v. Ables*,<sup>27</sup> the court noted that marketable title is unlikely to trigger litigation involving issues related to a clouded title.<sup>28</sup> Further, the court noted that "marketable title is title a prudent person would accept and has no defects affecting the possessory title of the owner."<sup>29</sup> The court stated that insurance against unmarketable title would be illusory if an insured had to wait for liens to be enforced or lapse because the insured would be unable to sell the property during that time.<sup>30</sup> The court reasoned that because two potential buyers were unwilling to close on the property, House had to commence a quiet title action in order to sell it and obtain a return on his investment.<sup>31</sup> Thus, without the quiet title action to establish clear title, House did not have marketable title.<sup>32</sup>

House amended his original complaint to delete the allegation of unfair claim settlement practices contrary to Indiana Code section 27-4-1-4.5 and instead alleged that First American's unfair claim practices were, according to *Erie Insurance Co. v. Hickman*,<sup>33</sup> a civil tort.<sup>34</sup> In *Hickman*, the Indiana Supreme Court recognized that "there is a legal duty implied in all insurance contracts that the insurer must deal in good faith with its insured."<sup>35</sup> The court noted that House's complaint alleged four judgment liens on the property, thereby providing sufficient notice that the denial of his claim was tortious for the reasons

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23. *Id.*

24. *Id.* at 202.

25. *Id.*

26. *Id.* at 202-03.

27. 789 N.E.2d 1025, 1033-34 (Ind. Ct. App. 2003).

28. *Id.*

29. *Id.* (citing *Russell v. Waltz*, 458 N.E.2d 1172, 1178 (Ind. Ct. App. 1984)).

30. *Id.* at 202-03.

31. *Id.* at 202.

32. *Id.* at 202-03.

33. 622 N.E.2d 515 (Ind. 1993).

34. *See generally id.*

35. *House*, 883 N.E.2d at 203 (quoting *Hickman*, 622 N.E.2d at 518 (quotation marks omitted)). The duty "includes that obligation to refrain from (1) making an unfounded refusal to pay policy proceeds; (2) causing an unfounded delay in making payments; (3) deceiving the insured; and (4) exercising any unfair advantage to pressure an insured into settlement of his claim." *Id.* at 203-04.

enumerated in his complaint.<sup>36</sup> As a result, the court determined that his allegations were sufficient to survive a motion to dismiss.<sup>37</sup>

### *B. Granting Deed and Adverse Possession*

*Hoose v. Doody*<sup>38</sup> provides an interesting look at conveyance documents affecting lake property and claims of ownership based on adverse possession. Michael and Darlene Hoose purchased lot eight in the Osborne Subdivision in Kosciusko County.<sup>39</sup> The subdivision borders Big Chapman Lake.<sup>40</sup> The granting deed specifically described lot eight and also conveyed to the Hooses,

the proprietorship of land directly between said lot and lake and [grantees] agrees [sic] that no buildings or occupancy will be allowed thereon, subject to the Laws of the State of Indiana governing bodies of water. If said strip of land is ever vacated, owners of lot no. Eight (8) shall have priority of purchase.<sup>41</sup>

Neighbors owning lot nine, adjacent to the Hooses' lot eight, constructed a pier and that led to a dispute as to whether the area immediately north of lot eight (the Disputed Area) was a dedicated park.<sup>42</sup> The recorded subdivision plat contained a faint, "barely visible" numeral seven in the Disputed Area.<sup>43</sup> On July 10, 1953, the owners of the Osborne subdivision recorded and amended the plat.<sup>44</sup> This amended plat identifies the area north of lot eight as a dedicated park, but because not every owner in the Osborn subdivision signed the amended plat, it was vacated in 1953.<sup>45</sup>

The Hooses filed a complaint for declaratory injunctive relief against the Doodys alleging that the warranty deed they received for lot eight conveyed exclusive use of the Disputed Area to them, requiring the Doodys to remove all improvements placed on the area.<sup>46</sup> The Hooses also asked for a permanent injunction prohibiting the Doodys from creating or maintaining any form of encroachment upon the Disputed Area.<sup>47</sup>

The court rejected the Hooses' argument that the warranty deed unambiguously conveyed title to the Disputed Area because it conveyed

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36. *Id.* at 204.

37. *Id.*

38. 886 N.E.2d 83 (Ind. Ct. App. 2008).

39. *Id.* at 86.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 86-87.

47. *Id.* at 87.

“proprietaryship” to the property.<sup>48</sup> The court held that the “proprietaryship” interest conveyed by the warranty deed was akin to a restrictive covenant limiting the Hooses’ ability to use that property<sup>49</sup> and thus was not fee simple ownership.<sup>50</sup> The court also concluded that the amended plat indicated the clear intention that lot seven would be part of the park in the Osborn Subdivision and that it had been used by the residents as a park for many years.<sup>51</sup>

The court of appeals also rejected Hooses’ argument that they owned fee simple title to the Disputed Area based upon the law of adverse possession.<sup>52</sup> The Indiana Supreme Court recently rephrased elements of adverse possession in *Fraley v. Minger*,<sup>53</sup> holding that the doctrine of adverse possession entitles a person without title to obtain ownership of a parcel of property upon “clear and convincing proof of control, intent, notice, and duration.”<sup>54</sup> In addition, Indiana Code section 32-21-7-1 requires a party claiming property through adverse possession to pay “all taxes and special assessments that the adverse possessor or claimant reasonably believes in good faith to be due on the land or real estate during the period” of adverse possession.<sup>55</sup> The evidence was clear that the Hooses did not pay property taxes on the Disputed Area or lot seven.<sup>56</sup> In fact, lot seven was not included on the county tax rolls.<sup>57</sup> As a result, Hooses’ adverse possession claim failed.<sup>58</sup>

Finally, the Hooses contended that they had acquired a prescriptive easement across the Disputed Area that allowed them continued exclusive use of the Disputed Area’s riparian rights.<sup>59</sup> The court ruled that this argument had been waived at the trial court, but the court also noted that the evidence necessary to support a prescriptive easement claim is different from that of adverse possession.<sup>60</sup> To acquire property through a prescriptive easement, a claimant must use or exercise control of the land for a specific purpose.<sup>61</sup>

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48. *Id.* at 90.

49. *Id.* at 91.

50. *Id.*

51. *Id.*

52. *Id.* at 92-93.

53. 829 N.E.2d 476 (Ind. 2005).

54. *Id.* at 486.

55. *Hoose*, 886 N.E.2d at 91 (emphasis omitted).

56. *Id.* at 92.

57. *Id.*

58. *Id.*

59. *Id.* at 93.

60. *Id.* at 93-94.

61. *Id.* at 94.

## II. RESTRICTIVE COVENANTS

### A. *Fair Housing Act Violation Claim*

The homeowners association of the Villas West II of Willow Ridge Homeowners Association, Inc. brought suit against a homeowner to enforce a covenant prohibiting owners from leasing their residences.<sup>62</sup> The homeowners filed a counterclaim alleging that the “no-lease” covenant violated the U.S. Fair Housing Act.<sup>63</sup> Mrs. McGlothin alleged that the covenant violated two different aspects of the Fair Housing Act: disparate impact and intentional discrimination.<sup>64</sup>

The trial court ruled in Mrs. McGlothin’s favor, seemingly basing its decision largely on a finding of a disparate impact of the covenant on her as a homeowner.<sup>65</sup>

The McGlothins purchased their home in the Villas West II with the common deed restriction that the property would be “subject ‘to any and all easements, agreements and restrictions of record.’”<sup>66</sup> The recorded covenants prohibited owners from leasing their residences as follows:

*Lease of dwelling by owner.* For the purpose of maintaining the congenial and residential character of Villas West II and for the protection of the Owners with regard to financially responsible residents, lease of a Dwelling by an Owner shall not be allowed. Each Dwelling shall be occupied by an Owner and their immediate family.<sup>67</sup>

Mrs. McGlothin lived in the house until she broke her hip, at which time she moved to a nursing home.<sup>68</sup> Mr. McGlothin lived in the residence another five months until he too moved into the nursing home.<sup>69</sup> After Mr. McGlothin died, his daughter leased the house.<sup>70</sup> Approximately three years later, the Villas West II Homeowners’ Association told the daughter that leasing Mrs. McGlothin’s residence violated the no-lease covenant and demanded that the McGlothins comply with the covenant.<sup>71</sup> During negotiations with the Villas West II Homeowners’ Association, counsel for Mrs. McGlothin argued that the lease was financially necessary to keep her in the nursing home and that the no-lease provision might be invalid because it may be construed as having “racially

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62. *Villas West II of Willow Ridge Homeowner’s Assoc., Inc. v. McGlothin*, 885 N.E.2d 1274, 1277 (Ind. 2008).

63. *Id.*

64. *Id.* at 1277-78.

65. *Id.* at 1277.

66. *Id.*

67. *Id.*

68. *Id.* at 1277-78.

69. *Id.* at 1278.

70. *Id.*

71. *Id.*

discriminatory roots.”<sup>72</sup>

The Homeowners’ Association refused to back away from enforcing the covenants and sued, explaining that they were concerned about the economic consequences that a violation could have on the neighborhood and their property values.<sup>73</sup> Mrs. McGlothin counter-claimed that enforcing the covenants violated the Fair Housing Act.<sup>74</sup>

The trial court denied the Homeowners’ Association’s summary judgment motion and concluded that the no-lease covenant violated the Fair Housing Act, because it had greater adverse effects on African Americans and racial minorities.<sup>75</sup> The trial court further held that there was “no legitimate non-discriminatory reason” for the covenant and entered judgment for Mrs. McGlothin.<sup>76</sup> The trial court’s decision was affirmed by the Indiana Court of Appeals, and the Indiana Supreme Court granted transfer.<sup>77</sup>

The court discussed the history of restrictive covenants in real estate and observed that they are often used to maintain or enhance the value of land by regulating the property use.<sup>78</sup> The court recognized that restrictions, such as those found in homeowners’ association declarations and master deeds, are considered by courts to have a strong presumption of validity because each purchaser of a residence purchases it knowing the restrictions and accepting that they will be imposed.<sup>79</sup> The court noted that the *Basso* court held that restrictions in a declaration—similar to covenants running with the land—would not be invalidated unless they were arbitrarily applied, violate public policy, or abrogate fundamental constitutional rights.<sup>80</sup> The court also observed that no lease restrictions are common and that they have been enforced by courts across the country.<sup>81</sup>

Notwithstanding the fact that restrictive covenants are generally enforceable, they still may be contrary to the Fair Housing Act, Title VIII of the Civil Rights Act of 1968 (FHA).<sup>82</sup> The court stated that FHA claims are based on two theories: “disparate treatment or disparate impact.”<sup>83</sup> Disparate treatment claims require a showing of intentional discriminatory treatment of a protected class.<sup>84</sup> Disparate impact claims do not require proving intent and can be successful if a

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72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 1278-79.

79. *Id.* at 1279 (citing *Hidden Harbor Estates, Inc. v. Basso*, 393 So. 2d 637, 639 (Fla. Dist. Ct. App. 1981)).

80. *Id.*

81. *Id.*

82. *Id.* at 1280.

83. *Id.*

84. *Id.*

covenant has a “discriminatory effect on a protected class, even if the policy or practice is” non-discriminatory on its face.<sup>85</sup> However, the court noted that although federal circuit courts generally have recognized that the FHA allows claims for disparate impact, there is no consensus concerning the analysis of such claims, and the U.S. Supreme Court has yet to address this issue.<sup>86</sup>

The Seventh Circuit Court of Appeals has held recovery is possible for violating the FHA under the disparate impact theory when it is shown that a defendant’s conduct creates a discriminatory effect barred by the FHA.<sup>87</sup> The court in *Metropolitan Housing Development Corp. v. Village of Arlington Heights*<sup>88</sup> established four factors to use as the framework for analyzing such claims:

- (1) the strength of the plaintiff’s showing of discriminatory effect; (2) evidence of discriminatory intent, though not enough to satisfy the constitutional standard of *Washington v. Davis*<sup>89</sup>; (3) the defendant’s interest in the challenged conduct; and (4) whether the plaintiff seeks affirmative relief or merely to restrain the defendant from interfering with individual property owners who wish to provide housing.<sup>90</sup>

In *Villas West II*, the court held that because Title VII of the Civil Rights Act of 1968 and the FHA use the same language to express public policy prohibiting discrimination, courts should use the same framework to analyze both claims, rejecting the *Arlington Heights II* standard as unsound and choosing to employ the burden-shifting test previously adopted by the U.S. Supreme Court.<sup>91</sup> Accordingly, the Indiana Supreme Court held that to establish the right to recover under a disparate impact claim under the FHA, a plaintiff must establish a prima facie case showing a policy or practice has a significant, actual or predictable impact on a protected class.<sup>92</sup> To rebut this, “the defendant must then demonstrate that its policy or practice has a manifest relationship to a legitimate, non-discriminatory interest.”<sup>93</sup> The plaintiff may “overcome the defendant’s showing by demonstrating that a less discriminatory alternative would serve the defendant’s legitimate interest equally well.”<sup>94</sup>

Applying this framework to the McGlothlin facts, the court found that the

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85. *Id.* (emphasis added).

86. *Id.*

87. *Id.* at 1280-81.

88. 517 F.2d 409 (7th Cir. 1975).

89. “A statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race.” 426 U.S. 229 (1976).

90. *Villas West II*, 885 N.E.2d at 1281 (quoting *Metro. Housing Develop. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977)).

91. *Id.* at 1282; see also *Connecticut v. Teal*, 457 U.S. 440, 446-47 (1982); *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977); *Albemarle Paper Co. v. Moody*, 422 U.S. 425 (1975).

92. *Villas West II*, 885 N.E.2d at 1283.

93. *Id.*

94. *Id.* at 1283-84.

homeowners' association had asserted a legitimate non-discriminatory reason for the no-lease covenant.<sup>95</sup> Supported by expert testimony, the finding recognized that tenants do not maintain rental homes as well as homeowners maintain their homes.<sup>96</sup> As a result, the prohibition in the declaration against renting residences benefits the homeowners by helping maintain their property values.<sup>97</sup>

Because the court used the burden shifting test,<sup>98</sup> the burden of proof then shifted back to Mrs. McGlothin to propose an equally effective, but less discriminatory alternative to the non-lease restriction to maintain property values.<sup>99</sup> Mrs. McGlothin directed the court to other covenants in the declaration such as those requiring homeowners to "maintain windows, door hardware, patios, and appliances; water lawns and shrubs; keep the exterior free of trash, signs" and so forth.<sup>100</sup>

The court concluded that those covenants were "not equally effective means of maintaining property values" when contrasted against the no-lease covenant.<sup>101</sup> The court explained that maintaining property values goes beyond maintaining the property itself and includes improving and updating it.<sup>102</sup> The covenants Mrs. McGlothin relied upon did not go this far.<sup>103</sup> The court also observed that, even though the record does not directly address this, ownership versus renting creates different motivation: "[I]t seems obvious that an owner-occupant is both psychologically and financially invested in the property to a greater extent than a renter."<sup>104</sup> The court concluded that because Mrs. McGlothin did not offer "equally effective, less discriminatory alternatives to the [homeowners' association's] legitimate, nondiscriminatory policy," the covenant did not produce a disparate impact, even if it disparately impacted a protected class.<sup>105</sup>

As for Mrs. McGlothin's disparate treatment claim, she alleged that the covenant was designed to prefer, limit, or discriminate among persons who could occupy the homes, "based on race, color, sex, familial status, or national origin."<sup>106</sup> The court remanded the case to the trial court for further evidence and findings on this claim, concluding that the findings on intentional discrimination were contradictory and ambiguous.<sup>107</sup> Justice Rucker's dissent argued in favor of adopting the *Arlington Heights II* methodology, stating that abandoning the four factors of *Arlington Heights II* made it more difficult for housing

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95. *Id.* at 1284.

96. *Id.* at 1283-84.

97. *Id.*

98. *Id.* at 1283.

99. *Id.* at 1284.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 1284-85.

106. *Id.* at 1285.

107. *Id.*

discrimination victims to make claims.<sup>108</sup>

*B. When Home Day Care Is a Business Use of Property*

Another restrictive covenant case involved an issue of first impression for the Indiana Court of Appeals. *Lewis-Levett v. Day*<sup>109</sup> concerned an action brought by a developer seeking a temporary and permanent injunction against a homeowner's operation of a day care in her home.<sup>110</sup> The restrictive covenants in the Golfview Estates declaration stated in pertinent part, "No lot nor any building erected thereon shall at any time be used for the purpose of any trade, business, manufacture or profession."<sup>111</sup> Lewis-Levett began operating a licensed child care facility in her home where she cared for up to twelve children.<sup>112</sup> About six months after the day care opened, the Days filed a complaint requesting a temporary and permanent injunction against Lewis-Levett's operation of the childcare business in her home.<sup>113</sup> The trial court granted summary judgment in the Day's favor, and Lewis-Levett appealed, arguing that the operation of a licensed day care is a "residential use" of her home and, as a result, did not violate the restrictive covenants.<sup>114</sup> She also argued that if operating a licensed day care in her home was held to be a business use, then "the enforcement of the restrictive covenants . . . violates Indiana public policy in favor of home day care."<sup>115</sup> The trial court denied the Days' request for an injunction prohibiting Lewis-Levett from operating *any* day care in her home, thereby paving the way for her to operate an unlicensed, albeit smaller, day care in her home.<sup>116</sup>

The court distinguished this case from its previous consideration of whether an unlicensed home day care in *Stewart v. Jackson*<sup>117</sup> constituted a business use of a residence.<sup>118</sup> The day care in *Stewart* had four children which did not trigger the state's licensure statute.<sup>119</sup> Lewis-Levett was caring for up to twelve children, and up to sixty percent of her home was used for a day care facility, according to her 2005 tax returns.<sup>120</sup> Based on these facts, the court concluded that the day care constituted a business use.<sup>121</sup>

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108. *Id.* at 1286.

109. 875 N.E.2d 293 (Ind. Ct. App. 2008).

110. *Id.* at 295-96.

111. *Id.* at 294.

112. *Id.* at 295.

113. *Id.* at 294-95.

114. *Id.* at 295.

115. *Id.*

116. *Id.* at 295.

117. 635 N.E.2d 186 (Ind. Ct. App. 1994).

118. *Lewis-Levett*, 875 N.E.2d at 295-96.

119. *Id.* at 296; *see also* IND. CODE § 12-7-2-28.6(a) (Supp. 2008).

120. *Lewis-Levett*, 875 N.E.2d at 296.

121. *Id.* at 298.

The court then addressed the issue of whether or not a restrictive covenant prohibiting the use of the home as a day care facility was contrary to Indiana public policy favoring home day care.<sup>122</sup> The court recognized that, although public policy in Indiana favors home day care, the General Assembly created a board to coordinate day care regulation and enacted licensing statutes to govern home day care.<sup>123</sup> Noting that state regulations distinguish between limited activities such as those in *Stewart*, compared to the licensed day care with twelve children in this case, the court concluded that enforcing the covenants did not conflict with Indiana public policy:

In other words, Indiana public policy favoring home day care does not supersede otherwise legitimate restrictive covenants prohibiting the use of lots in Golfview Estates for commercial purposes. Lewis-Levett operates a licensed day care home out of her residence, using sixty percent of her home for that purpose. . . . On the facts presented in this case, we cannot say that the trial court erred when it granted summary judgment enjoining Lewis-Levett from operating a licensed day care home at her residence in Golfview Estates.<sup>124</sup>

### C. *Approval by Developer of Out-Buildings Survives Completion of Subdivision*

Another restrictive covenant case of note was *Drenger v. Duitz*,<sup>125</sup> where property owners erected a shed in violation of a subdivision's restrictive covenants. In this case, the court of appeals concluded that, although the covenants of the neighborhood allowed owners to build out-buildings, the covenants required property owners to obtain written approval from the developer or its assignee before erecting any building.<sup>126</sup> The court further held that the covenant continued to apply even after the initial development of the subdivision was completed.<sup>127</sup> The court also concluded that the covenant did not require owners to receive approval from all owners in the subdivision before constructing an out-building and that the covenants' non-waiver provision was enforceable.<sup>128</sup>

## III. LAND USE

### A. *Solid Waste Transfer Stations*

The Indiana Supreme Court adopted a unique argument advanced in the

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122. *Id.*

123. *Id.* at 296-98.

124. *Id.* at 298.

125. 883 N.E.2d 1194 (Ind. Ct. App. 2008).

126. *Id.* at 1200-01.

127. *Id.* at 1201.

128. *Id.* at 1202.

appeal of a Board of Zoning Appeals decision denying a petition for special exception to permit a property owner to build a solid waste transfer station. *600 Land, Inc. v. Metropolitan Board of Zoning Appeals* also took an interesting view of statutory interpretation.<sup>129</sup> The property was an eight-acre parcel of land zoned I-4-S, the heaviest industrial zoning classification of the Marion County Industrial Zoning Ordinance (IZO). Historically, the Indianapolis Department of Metropolitan Development (DMD), administrator of the IZO, and its staff required persons seeking to establish a solid waste transfer station to obtain a special exception to the IZO.<sup>130</sup> Based on this administrative requirement, 600 Land filed a special exception petition for the transfer station.<sup>131</sup> Several property owners and business owners in the area remonstrated against the special exception, and the BZA denied the petition after a public hearing.<sup>132</sup>

The property owner appealed the BZA's denial of the special exception and included a request for declaratory judgment that the IZO did not require 600 Land to obtain a special exception because the proposed use of the property as a transfer station qualified as a "motor truck terminal."<sup>133</sup> This is a use specifically permitted in an I-4-S district in Marion County without a special exception.<sup>134</sup>

The trial court affirmed the denial of the special exception holding that the IZO required 600 Land to obtain a special use exception for a solid waste transfer station. The Indiana Court of Appeals affirmed the trial court's holding "that a special exception was required, but . . . reversed the BZA's denial of the special exception on grounds that its findings were not supported by the evidence."<sup>135</sup>

The supreme court analyzed the IZO in great detail reaching the conclusion that the IZO's definition of a "motor truck terminal" included the operation of a transfer station as proposed by 600 Land.<sup>136</sup> The court noted that the IZO contains two elements: first, it is an area where trucks are "parked, stored, or serviced, including the transfer, loading or unloading of goods."<sup>137</sup> Second, a motor truck "terminal may include facilities for the temporary storage of loads prior to transshipment."<sup>138</sup> Because trash collection trucks used in 600 Land's proposed solid waste transfer station would be parked, stored, and serviced at the proposed solid waste transfer station, the court found that 600 Land met the first element of the motor truck terminal definition.<sup>139</sup> Finally, the court concluded that the trash that would be stored at the transfer station met the plain and

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129. *600 Land v. Metro. Bd. of Zoning Appeals*, 889 N.E.2d 305 (Ind. 2008).

130. *Id.* at 307.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at 309.

137. *Id.*

138. *Id.*

139. *Id.* at 310.

ordinary meaning of the word “load” and distinguished the use from the IZO requirement that a scrap metal or salvage storage or operation including automobile or truck wrecking or recycling, construction materials recycling or similar uses requires a special exception.<sup>140</sup>

Also of interest in this case was a lengthy dissent by Justice Boehm, with Justice Dickson concurring.<sup>141</sup> Justice Boehm took issue with the majority’s analysis of the ordinance, arguing that they failed to deal with the central legal issues in the case.<sup>142</sup> First, the dissent argued that the majority failed to follow the rule of law requiring courts construing an ambiguous ordinance to give deference to the interpretation used by the administrative agency charged with enforcing the ordinance.<sup>143</sup> The dissent quoted *St. Charles Tower, Inc. v. Board of Zoning Appeals*,<sup>144</sup> stating that the “interpretation of a statute by an administrative agency charged with the duty of enforcing the statute is entitled to great weight, unless [the] interpretation would be inconsistent with the statute itself.”<sup>145</sup> Based on the rule from *St. Charles Tower*, the dissent concluded that a special exception was required for the transfer station and that interpreting the ordinance without resorting to rules of construction was appropriate.<sup>146</sup>

The dissent also observed that the majority did not analyze the holdings by the court of appeals that “the BZA’s denial of the special exception was supported by sufficient evidence or whether 600 Land’s due process rights were denied at the BZA hearing.”<sup>147</sup> The dissent reviewed the BZA’s three findings and concluded that it would uphold the BZA’s decision because the BZA had determined, based on the evidence before it, that granting the special exception would be contrary to the IZO because it would allow a use that would not be in harmony with the character of the district and land.<sup>148</sup>

600 Land’s due process claim was based on a statement by one of the BZA members during the hearing that she agreed with one of the remonstrators (a city-county councilor) that the “landfill” was not needed in Pike Township.<sup>149</sup> The dissent rejected this claim comparing the statement to commentary by judges during oral arguments, which is not evidence of a bias denying due process.<sup>150</sup>

### *B. Regulation of Sexually Oriented Businesses*

Many communities across the country have tried over the years to regulate

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140. *Id.* at 311-12.

141. *Id.* at 312.

142. *Id.*

143. *Id.*

144. 873 N.E.2d 598, 603 (Ind. 2007).

145. *600 Land*, 889 N.E.2d at 312.

146. *Id.*

147. *Id.*

148. *Id.* at 313.

149. *Id.* at 314.

150. *Id.*

sexually oriented businesses through land use ordinances and business permits with varying degrees of success.<sup>151</sup> In *Plaza Group Properties, LLC v. Spencer County Plan Commission*,<sup>152</sup> the county sought injunctive relief against Plaza Group because it failed to apply for and obtain a building permit before renovating a truck stop for a sexually oriented business.<sup>153</sup>

Plaza Group purchased a truck stop on October 21, 2005, and began remodeling the buildings without a building permit, although a county ordinance requires a building permit when the cost of alterations or modifications to structures or buildings exceeds \$5000.<sup>154</sup> When Spencer County learned about the remodeling, it issued a stop work order and filed a complaint for an injunction, alleging that Plaza Group was violating the county's building permit and zoning ordinances. The trial court issued a temporary restraining order based on Plaza Group's failure to comply with the county's ordinances and enjoined Plaza from operating a sexually oriented business at the site.<sup>155</sup>

Plaza Group was the first company to try to operate a sexually oriented business in Spencer County in twenty years when it purchased the property. Prior to Plaza Group's purchase of the truck stop, Spencer County's zoning ordinance required sexually oriented businesses to obtain a special exception permit, but the zoning ordinances did not contain specific regulations for this type of business, including hours of operation and proximity to other land uses such as residences and schools.<sup>156</sup>

In November 2005, the County Plan Commission held a public hearing and adopted an ordinance eighteen days later which provided that a sexually oriented business could not be located within 1000 feet of a "church, school, daycare center or preschool, or residence" (Ordinance 2005-10).<sup>157</sup> The county adopted a companion ordinance on December 28, 2005, specifically detailing the additional licensing requirements for sexually oriented businesses in the county and also containing the 1000 foot restriction. (Ordinance 2005-11).<sup>158</sup>

After a request by the county for injunctions against Plaza Group, Plaza Group and the county entered into a preliminary injunction order in January 2006 enjoining Plaza Group "from occupying the property's main building before obtaining a building permit."<sup>159</sup> The parties also agreed that Plaza Group would not operate a sexually oriented business as defined by the county ordinance.<sup>160</sup>

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151. Clay Calvert & Robert D. Richards, *Stripping Away First Amendment Rights: The Legislative Assault on Sexually Oriented Businesses*, 7 N.Y.U. J. LEGIS. & PUB. POL'Y 287, 289 (2003-04).

152. 877 N.E.2d 877 (Ind. Ct. App. 2008).

153. *Id.* at 879-81.

154. *Id.* at 885.

155. *Id.* at 880.

156. *Id.*

157. *Id.* at 880-81.

158. *Id.*

159. *Id.* at 881.

160. *Id.*

Plaza Group then filed a counterclaim alleging that the ordinances were unconstitutional on their face as they violated the First Amendments of the U.S. Constitution and “related provisions of the Indiana Constitution.”<sup>161</sup>

Plaza Group’s First Amendment claim was based on the premise that it had an established non-conforming use because it purchased the property and had begun making repairs prior to the adoption of Ordinances 2005-10 and 2005-11.<sup>162</sup> The court rejected Plaza Group’s constitutional claim, holding that the right of a business to maintain a non-conforming use is a question of state law.<sup>163</sup> The court summarized the general rule concerning whether a property owner acquires a “vested right” in its land use that a government cannot stop without triggering the due process or takings clauses of the Fifth Amendment which applies to states through the Fourteenth Amendment.<sup>164</sup> The court then analyzed the trial court record regarding the repairs made to the property and agreed with the finding that Plaza Group omitted many items from its calculation of repair costs and that Plaza Group had spent \$10,490, an amount well over the \$5000 threshold in the ordinance triggering the need for a building permit.<sup>165</sup> As a result, the court concluded that because Plaza Group had spent more than \$5000 to repair, alter and remodel the building, without the building permit as required by ordinance 2005-02, it was not a takings case.<sup>166</sup> The court also rejected Plaza Group’s argument that it was entitled to legally “nonconforming use status because the building permit ordinance” is not a zoning ordinance, noting that it had previously held that where a landowner fails to obtain a required building permit it could not acquire legally non-conforming use status when a subsequent zoning regulation was adopted.<sup>167</sup>

The court concluded that Plaza did not furnish any evidence to dispute the county’s factual findings in support of its sexually oriented business ordinances and otherwise failed to cast direct doubt on the county’s rationale.<sup>168</sup> Therefore, the burden of proof did not shift to the county to provide evidence to renew its support for its substantial government interests in the ordinance.<sup>169</sup> The court rejected this argument noting that the ordinance states that a non-conforming “sexually oriented business must have existing ‘in all respects’ under law prior to the effective date of the ordinance to continue to operate.”<sup>170</sup>

The court concluded that the evidence the county relied upon was reasonably believed to be relevant to the secondary effects of the sexually oriented business

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161. *Id.*

162. *Id.* at 885-86.

163. *Id.* at 884.

164. *Id.*

165. *Id.* at 885-86.

166. *Id.*

167. *Id.* at 886-87 (citing *Bird v. Del. Muncie Metro. Plan Comm’n*, 416 N.E.2d 482, 488 (Ind. Ct. App. 1981)).

168. *Id.*

169. *Id.* at 892.

170. *Id.* at 886-87.

that the ordinance sought to address and that Plaza Group's challenge on these grounds failed.<sup>171</sup>

The court provided a thorough analysis of the constitutional issues in this case and the parameters in which an ordinance allegedly restricting free speech in this matter are to be examined.<sup>172</sup> Plaza Group argued that the county was not entitled to summary judgment because sexually oriented business zoning ordinances are not narrowly tailored.<sup>173</sup> The court noted that the U.S. Supreme Court has addressed this question and has held that a local unit of government is not required to choose the least restrictive means to regulate free speech but rather the restriction may not be "substantially broader" than what is necessary to achieve the government's interest in the regulation.<sup>174</sup> The appellate court also rejected Plaza Group's argument that the 1000 foot restriction in the county's ordinances was an unreasonable restriction because of the rural nature of Spencer County.<sup>175</sup> The court rejected this argument noting that the county provided evidence that at least thirty-four alternative sites existed in Spencer County where Plaza Group could operate a sexually oriented business complying with the ordinance.<sup>176</sup>

In conclusion, the court held that Spencer County's sexually oriented business ordinances "serve a substantial governmental interest while allowing for reasonable alternative avenues of" free speech.<sup>177</sup> Furthermore, the court noted that there was no evidence that the building permit ordinance was enacted or enforced for any reason other than the public safety and welfare of the residents of Spencer County.<sup>178</sup> Because Plaza Group "failed to cast direct doubt on the County's rationale for the ordinances, and the evidence relied upon by the County was held" to be reasonably believed to be "relevant to the secondary effects the County seeks to address with the ordinance, the challenge based on violation of the first amendment failed."<sup>179</sup> As a result, the court upheld the trial court's granting summary judgment in favor of the county.<sup>180</sup>

#### IV. ECONOMIC DEVELOPMENT AREA ANNEXATION

In *Brenwick Associates, LLC v. Boone County Redevelopment Commission*,<sup>181</sup> the Indiana Supreme Court ruled that the state's economic development statutes permit a county to establish an economic development area

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171. *Id.* at 892.

172. *Id.* at 888-95.

173. *Id.* at 892.

174. *Id.* at 894.

175. *Id.* at 895.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. 889 N.E.2d 289, 290 (Ind. 2008).

that included unincorporated land that a town was attempting to annex.<sup>182</sup> Eleven days after Whitestown began annexation of unincorporated Boone County land, the county, through its Redevelopment Commission, initiated the creation of a special taxing district (economic development area) that included the same land, resulting in a power play resolved by the court.<sup>183</sup>

Whitestown began annexation proceedings on July 24, 2006, but had not completed the annexation process by August 4, 2006, when Boone County began the process of establishing its economic development area encompassing the land in Whitestown's annexation petition.<sup>184</sup> On September 25, 2006, Whitestown amended its annexation petition to include additional acreage, much of which overlapped with the county's proposed economic development area.<sup>185</sup> On October 2, 2006, the Board of Commissioners of Boone County approved creating the economic development area.<sup>186</sup> Whitestown still had not completed its annexation at that time.<sup>187</sup>

These moves set the stage for a case delving into the complicated process of municipal annexation and creating economic development areas.<sup>188</sup> Whitestown argued that the county should not be able to jump “in at the last minute and create an economic development area” in a place where municipal annexation was ongoing.<sup>189</sup> Boone County argued almost the opposite point, saying that by “simply filing an annexation [petition],”<sup>190</sup> a municipality could disrupt “orderly efforts to promote economic development in our State”<sup>191</sup> and that such a move should be prohibited by the court.<sup>192</sup>

The issue before that court was whether Whitestown's initiating annexation proceedings could preclude Boone County from creating an economic development area including the same territory.<sup>193</sup> The court determined that Indiana Code sections 36-7-14-3 and 36-7-14-3.5—subsections of Indiana's economic development statutes—governed its decision.<sup>194</sup>

Indiana Code section 36-7-14-3 provides that once a county creates a redevelopment commission, all of the territory in the county, *except* areas within municipalities that have their own redevelopment commissions, constitutes a

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182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.* at 291 (quoting Brief of Amicus Curiae in Support of Appellant at 6).

190. *Id.* (quoting Brief of Amicus Curiae in Support of Appellees at 11-12 n.14). Interestingly, the Indiana Association of Cities and Towns (IACT) submitted an amicus brief supporting the county's position and not that of its member, Whitestown. *See id.* at 291 n.5.

191. *Id.* at 291.

192. *Id.*

193. *Id.* at 290.

194. *Id.* at 292.

special county taxing district.<sup>195</sup> A county with a redevelopment commission can then create an economic development area *within* the special taxing district.<sup>196</sup>

On the other hand, Indiana Code section 36-7-14-3.5 provides in part that a municipality with a redevelopment commission may annex an area of the county *after* the county has established a redevelopment district.<sup>197</sup> Upon *completion* of the annexation, the territory then becomes part of the municipality's redevelopment district.<sup>198</sup>

The court noted that there are two instances in which county and municipal authority to establish redevelopment areas intersect and are at odds with one another.<sup>199</sup> In both situations, a municipal redevelopment district would overlap the territory included in a county redevelopment district.<sup>200</sup> The first situation creating a conflict occurs when a municipality that does not have a redevelopment commission decides to establish one after its county has established a redevelopment district<sup>201</sup> (that was not the situation in *Brenwick*). A second conflict occurs when a municipality with a redevelopment commission attempts to annex territory that falls within an existing county redevelopment district.<sup>202</sup> Because Boone County's economic development area was created before Whitestown completed annexation, the court determined that the second conflict scenario applied in this case.<sup>203</sup>

There are, though, rules in these types of annexations to secure continued payment to the county for any outstanding bonds or other obligations.<sup>204</sup> The county redevelopment commission continues to receive tax allocations from the annexed property as long as outstanding obligations exist, even upon annexation and control of the property by the municipality.<sup>205</sup>

The court held that subsections 36-7-14-3 and 36-7-14-3.5 of Indiana's economic development statute provide a comprehensive statement of the law regarding these types of disputes between units of local government.<sup>206</sup> Relying on these subsections, the court concluded that because Whitestown had not completed its annexation proceedings, the county had the authority to create an economic development area including the not yet annexed territory.<sup>207</sup> The court, however, noted that according to Indiana Code section 36-7-14-3.5, "the county's establishment of the [economic development area] does not preclude or interfere

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195. IND. CODE § 36-7-14-3 (2007).

196. *Id.*

197. *Brenwick*, 889 N.E.2d at 292 (citing IND. CODE § 36-7-14-3.5 (2007)).

198. *Id.*

199. *Id.* at 293.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.* (citing IND. CODE § 36-7-14-3.5 (2007)).

205. *Id.*

206. *Id.* at 294.

207. *Id.*

in any way with Whitestown's ability to initiate or complete annexation."<sup>208</sup> As a result, even though Whitestown could continue to pursue annexation, it would not reap the benefit of any additional taxation from the annexed territory until all existing county bonds and other obligations were repaid.<sup>209</sup> Once annexation is completed, however, the disputed area will otherwise be subject to municipal jurisdiction of the town of Whitestown.<sup>210</sup>

#### V. GOVERNMENT ACQUISITION OF LAND THROUGH ADVERSE POSSESSION

The court of appeals encountered an issue of first impression regarding adverse possession in *State v. Serowiecki*,<sup>211</sup> where it addressed whether the legislature, when it enacted the adverse possession tax statute,<sup>212</sup> intended to remove the state's ability to acquire property through adverse possession.<sup>213</sup>

In 1945, the Indiana Department of Natural Resources (the DNR) acquired a piece of land now known as the Beaver Lake Prairie Chicken Refuge (the Refuge).<sup>214</sup> At issue in the case was an 18.6-acre wedge of land between the Refuge and the neighboring property.<sup>215</sup> When both pieces of land were surveyed originally, the boundary line for the area in dispute was not depicted because the area was underwater in Beaver Lake.<sup>216</sup> Later, the lake was drained and a ditch was built at an angle different from the surrounding forty-acre square tracts, thus creating the wedge in dispute.<sup>217</sup> The DNR believed that this ditch and a parallel fence line represented the boundary line, while the neighboring property owner maintained that the boundary line created a square tract like the boundaries between the surrounding plat sections.<sup>218</sup>

The DNR filed an action to quiet title on the disputed tract and later filed a motion for summary judgment.<sup>219</sup> The trial court heard argument on the motion and granted summary judgment against the DNR, finding that the DNR did not obtain legal title to the property, either by inverse condemnation or adverse possession.<sup>220</sup> The court relied on the facts that the neighboring property owner's deed described her property as including the disputed land, and the neighboring property owner paid taxes on the disputed land.<sup>221</sup> In making its decision, the

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208. *Id.* at 295.

209. *See id.* at 293 n.10.

210. *Id.*

211. 892 N.E.2d 194 (Ind. Ct. App. 2008).

212. IND. CODE § 32-21-7-1 (2008).

213. *Serowiecki*, 892 N.E.2d at 202-03.

214. *Id.* at 196.

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.* at 196-97.

219. *Id.* at 198.

220. *Id.* at 198-99.

221. *Id.* at 199.

court also noted that, “[n]o reasonable person could infer anything other than the DNR’s property ended at the straight Section line between [the sections]” meaning that the [DNR] was wrong in assuming that the diagonal ditch and fence line represented the legal boundary line.<sup>222</sup>

The court of appeals looked to Indiana Code section 32-21-7-1, Indiana’s adverse possession tax statute,<sup>223</sup> which outlines that, in addition to common law adverse possession requirements, a party claiming adverse possession must show that he has “paid and discharged all taxes and special assessments” believed to be due on the land.<sup>224</sup> The DNR had not paid any taxes on the property, nor had it discharged the taxes so that no one else was required to pay them.<sup>225</sup> Like the trial court, the court of appeals interpreted the adverse possession tax statute as requiring one or the other of those to be true.<sup>226</sup> The court further held that the statute did not contain an exception for governmental units, so the DNR needed to have met those requirements to have adversely possessed the land.<sup>227</sup>

## VI. RIPARIAN RIGHTS

### A. *Water Views as Riparian Rights*

In *Center Townhouse Corp. v. City of Mishawaka*,<sup>228</sup> the court of appeals addressed an issue of first impression in Indiana when it refused to include the right to an unobstructed water view within a property owner’s bundle of riparian rights.<sup>229</sup>

As part of a riverfront redevelopment project, the city of Mishawaka constructed a pedestrian bridge over a channel between two city-owned properties, Lincoln Park and Kamm Island.<sup>230</sup> Once completed, the bridge was seven feet high and ran parallel to the waterfront side of a series of three-story townhomes.<sup>231</sup> With a length of 140 feet, the bridge obstructed the first-floor views from each of the townhomes.<sup>232</sup>

Individual townhome owners and Center Townhouse Corporation (CTC), the townhome association for the housing development, brought an inverse condemnation action against the city and the city’s parks and recreation board.<sup>233</sup> The homeowners and CTC claimed that their riparian rights included the water

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222. *Id.*

223. *Id.* at 202.

224. *Id.*

225. *Id.* at 202-03.

226. *Id.* at 200, 203.

227. *Id.* at 203.

228. 882 N.E.2d 762, 772 (Ind. Ct. App. 2008).

229. *Id.* at 765.

230. *Id.* at 776.

231. *Id.* at 766.

232. *Id.*

233. *Id.*

view from their properties.<sup>234</sup> They argued further that the bridge blocked their view of the channel and river, and as a result, the loss of view was a compensable taking under Indiana's eminent domain statute.<sup>235</sup>

The trial court agreed with the plaintiffs, determining that the bridge affected a taking,<sup>236</sup> however, in a subsequent trial on damages, the jury did not award damages to the homeowners or CTC.<sup>237</sup> In the court of appeals case, the city argued that there was insufficient evidence to support the taking, while the homeowners and CTC appealed the damages verdict.<sup>238</sup>

In its decision, the court of appeals presumed a taking had occurred because the city failed to include a transcript of the trial court's decision as required by Indiana Appellate Rule 9(F)(4).<sup>239</sup>

Although the court of appeals presumed that the bridge affected a taking, it concluded that an unobstructed water view was not a riparian right compensable under an inverse condemnation action.<sup>240</sup> Instead, the court determined that, "[t]he scope of a landowner's view, whether of the water or otherwise, is a policy decision best left to the legislative branch generally and the local zoning authorities specifically."<sup>241</sup>

The court explained further that if it were to recognize a water view as a compensable riparian right, any taking would be held to the same standard as other property rights takings.<sup>242</sup> That is, the loss of view would have to "result in 'substantial interference with private property which destroys or impairs one's free use and enjoyment of the property or one's interest in the property.'"<sup>243</sup> The court relied upon reasoning in the Indiana Supreme Court's recent *Biddle v. BAA Indianapolis, LLC* decision where the court held that a "mere inconvenience" is insufficient for a takings claim.<sup>244</sup>

### *B. Riparian Right Boundary Lines*

With *Lukis v. Ray*,<sup>245</sup> the Indiana court of appeals reexamined the idea of establishing fixed guidelines for determining riparian right boundary lines. In the end, it maintained the status quo, asserting that "there is no fixed rule governing

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234. *Id.*

235. *Id.* at 770 (citing IND. CODE § 32-24-1-16 (2008)).

236. *Id.* at 769.

237. *Id.* at 765.

238. *Id.* at 767.

239. *Id.* at 769 (citing IND. APP. R. 9(F)(4)).

240. *Id.* at 770-71.

241. *Id.* at 772.

242. *Id.*

243. *Id.* (quoting *Bd. of Comm'rs of Vanderburgh County v. Joeckel*, 407 N.E.2d 274, 278 (Ind. Ct. App. 1980)).

244. *Id.* (citing *Biddle v. BAA Indianapolis, LLC*, 860 N.E.2d 570, 580 (Ind. 2007)).

245. 888 N.E.2d 325 (Ind. Ct. App. 2008).

such [riparian boundary] disputes."<sup>246</sup>

Lukis (appellant), Ray and the Blackburns (the appellees) each owned abutting lakefront properties situated on a cove.<sup>247</sup> Lukis installed a pier that was longer, wider, and ten feet closer to the Blackburns' western property line than his previous pier had been. In a chain reaction, appellees each moved his pier further east to maintain lake access.<sup>248</sup> In doing so, Ray positioned his pier along his easternmost property line in such a way that his docked pontoon encroached on his eastern neighbor's property.<sup>249</sup> Ray filed an action with the Natural Resources Commission (NRC) against Lukis for infringing on his riparian rights to access the lake.<sup>250</sup>

In that action, the NRC's Administrative Law Judge (ALJ) determined that riparian rights extended into the lake from the onshore property lines.<sup>251</sup> The ALJ concluded that using this calculation resulted in "a just apportionment between the respective parties based upon the amount of shoreline of each owner."<sup>252</sup> Lukis, whose property included the longest lake frontage, benefitted from this definition and was found not to have infringed on appellees' riparian rights.<sup>253</sup>

On an appeal to the trial court, the court held that the ALJ's decision was contrary to law.<sup>254</sup> It found that the ALJ incorrectly apportioned the riparian zones associated with the properties because it did not follow the apportionment method laid out in *Nosek v. Stryker*,<sup>255</sup> a Wisconsin appellate court decision, whose reasoning the ALJ effectively adopted in its decision.<sup>256</sup> In *Nosek*, properties with irregularly-shaped property lines were granted navigable waterfronts proportionate to each property's shore length.<sup>257</sup>

The court of appeals revisited the apportionment question and deferred to the NRC ALJ's decision.<sup>258</sup> Instead of adopting *Nosek's* apportionment methods, the appellate court allowed a previous Indiana Court of Appeals' principle to stand: "there is no set rule for establishing the extension of boundaries into a lake between contiguous shoreline properties."<sup>259</sup>

Interestingly, after the court's decision, the NRC published a non-rule policy document outlining detailed guidelines for determining riparian boundaries

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246. *Id.* at 332.

247. *Id.* at 326-27.

248. *Id.* at 326.

249. *Id.* at 327.

250. *Id.*

251. *Id.*

252. *Id.* (internal quotation omitted).

253. *Id.* at 328.

254. *Id.* at 330.

255. 309 N.W.2d 868 (Wis. Ct. App. 1981).

256. *Lukis*, 888 N.E.2d at 329-30.

257. *Id.* at 329-30 (citing *Nosek*, 309 N.W.2d 868).

258. *Id.* at 332.

259. *Id.*

within navigable waters and public freshwater lakes.<sup>260</sup> The document's guidelines do not have the effect of law, but were created to assist with "interpreting, supplementing, and implementing the [NRC's] responsibilities."<sup>261</sup> The guidance document reflects many of the comments made by the various courts in this case.<sup>262</sup> First, it adopts apportionment methods similar to those found in *Nosek*.<sup>263</sup> Second, it addresses a related concern regarding restrictive covenants, giving precedent to any apportionment method found within them over the detailed apportionment methods found in the non-rule policy document.<sup>264</sup>

## VII. MECHANIC'S LIENS

The court of appeals directly addressed Indiana Code section 32-28-3-5(d), Indiana's recently amended Mechanic's Lien statute, for the first time in *Harold McComb & Son, Inc. v. JPMorgan Chase Bank, NA*,<sup>265</sup> when it determined that, where funds from a loan secured by the mortgage on commercial property are for "the specific project that gave rise to the mechanic's lien, the mortgage lien has priority over the mechanic's lien recorded after the mortgage."<sup>266</sup>

Indian Village, the property owner, executed a mortgage on each of two properties with Bank One, JPMorgan Chase Bank's (Chase) predecessor.<sup>267</sup> McComb & Sons, Inc. (McComb) and American Renovations of Indiana, Inc. (API) served as general contractors for a senior housing complex rehabilitation project on the Indian Village property.<sup>268</sup> Both McComb and API substantially completed all work on the project by November 2004.<sup>269</sup> Months later, neither had received payment in full for its services.<sup>270</sup> As a result, both general contractors filed mechanic's liens against Indian Village.<sup>271</sup> Because Indian Village had not paid off its mortgages by the date specified in its loan agreements with Chase, the bank sought payment as well.<sup>272</sup>

McComb, API, and Chase filed complaints to foreclose on the mechanic's

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260. Natural Resource Commission, Information Bulletin #56, First Amendment, *Riparian Zones Within Public Freshwater Lakes and Navigable Waters*, posted Dec. 10, 2008, IND. REG., 20081210-IR-312080891NRA.

261. *Id.* at 1.

262. *Id.*

263. *See id.* at 3-9.

264. *See id.* at 3.

265. 892 N.E.2d 1255 (Ind. Ct. App. 2008).

266. *Id.* at 1262.

267. *Id.* at 1256.

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.* at 1256-57.

liens and mortgages, respectively.<sup>273</sup> After the trial court consolidated the actions, Chase filed a motion for summary judgment.<sup>274</sup> The trial court granted the motion and ordered foreclosure of Chase's mortgages, determining that mortgage liens "are superior to the interests of all of the other [lien holders]."<sup>275</sup>

At issue in the appellate court's case was whether the trial court erred in how it prioritized the parties' liens.<sup>276</sup> McComb and API argued that, through an exception granted in Indiana Code section 32-28-3-2, Indiana law favored its mechanic's liens over Chase's mortgages.<sup>277</sup> In contrast, Chase argued that Indiana Code section 32-28-3-5(d) applied and "[gave] absolute priority to earlier-recorded mortgages over later-recorded mechanic's liens on commercial property."<sup>278</sup>

The court of appeals determined that Indiana Code section 32-28-3-2 provides the general rule with regard to priority over improvements, but Chase appropriately argued that Indiana Code section 32-28-3-5(d) applied in this case.<sup>279</sup> The court, however, did not adopt Chase's reasoning.<sup>280</sup> Instead, it emphasized that the legislature created the subsection in order to fill a gap created by Indiana Code section 32-28-3-2 and another relevant provision, Indiana Code section 32-21-4-1(b).<sup>281</sup> In its decision, the court of appeals held what had been stated previously only in dicta in a dissenting opinion in *Provident Bank v. Tri-County Southside Asphalt, Inc.*<sup>282</sup> by Judge Sharpnack.<sup>283</sup> Where the "funds from the loan secured by the mortgage are for the project which gave rise to the mechanic's lien . . . the mortgage lien has priority over the mechanic's lien recorded after the mortgage."<sup>284</sup>

#### VIII. REMEDIES FOR BREACH OF LEASE IN LIGHT OF WRONGFUL EVICTION

The court of appeals ruled in *Village Commons v. Marion County Prosecutor's Office*<sup>285</sup> that the language of a lease looked at by itself would have limited a tenant's access to certain remedies, but because the lessor wrongfully

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273. *Id.* at 1257.

274. *Id.*

275. *Id.* (quoting Appellants' app. 50).

276. *Id.* at 1256.

277. *Id.* at 1259.

278. *Id.* at 1260.

279. *Id.*

280. *Id.*

281. *Id.* Indiana Code sections 32-21-4-1(b) and 32-28-3-2 address the prioritization of liens, but they do not address prioritizing mechanic's liens on improvements to commercial property and mortgage liens. See IND. CODE §§ 32-21-4-1(b), 32-28-3-2 (2008).

282. 804 N.E.2d 161 (Ind. Ct. App. 2004).

283. *Harold McComb & Son*, 892 N.E.2d at 1262.

284. *Provident Bank*, 804 N.E.2d at 169 (Sharpnack, J., dissenting).

285. 882 N.E.2d 210 (Ind. Ct. App. 2008).

evicted the tenant, the tenant had access to those remedies.<sup>286</sup>

The Marion County Prosecutor's Office (Prosecutor's Office) leased space from Village Commons and Rynalco, Inc. (collectively, landlord).<sup>287</sup> The Prosecutor's Office used the space for its Grand Jury Division offices and evidence storage.<sup>288</sup> The lease began on August 1, 1999 and was to run for a period of seven years and five months.<sup>289</sup>

From March 2001 to January 2003, several external water leaks, leaks from building equipment, and a sewage leak damaged both building and Prosecutor's Office property.<sup>290</sup> The leaks led to mold and other microbial contamination throughout the leased space.<sup>291</sup> Two days after one particularly severe leak, where water poured from the ceiling, the Prosecutor's Office vacated the premises on January 30, 2003.<sup>292</sup> After it vacated, the Prosecutor's Office stopped paying rent, leaving a total of \$380,477.37 unpaid under the lease agreement.<sup>293</sup>

The Landlord filed a complaint against the Prosecutor's Office for breach of lease in order to collect damages as provided by the lease.<sup>294</sup> The Prosecutor's Office counterclaimed, alleging constructive eviction.<sup>295</sup> The landlord argued that the exclusive-remedy provision in the lease prohibited the Prosecutor's Office from seeking remedies outside of those provided in the lease.<sup>296</sup> Key provisions of the lease required the landlord to maintain plumbing, heating and similar equipment and to maintain the premises in good repair.<sup>297</sup> If the landlord breached the lease, the Prosecutor's Office could "'sue for injunctive relief or to recover damages for any loss resulting from the breach, but [it would] not be entitled to terminate this Lease or withhold, setoff or abate any rent due thereunder.'"<sup>298</sup>

At a bench trial, the trial court held that the Prosecutor's Office was not barred by the exclusive-remedy provision in the lease from asserting a wrongful eviction defense and that the Prosecutor's Office was actually and constructively evicted from the property.<sup>299</sup> As a result, the trial court awarded the Prosecutor's

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286. *Id.* at 217.

287. *Id.* at 212.

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.* at 213.

292. *Id.* at 214.

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.* at 215.

297. *Id.* at 212.

298. *Id.* (citing Appellant's add. to Brief, tab 1).

299. *Id.* at 214. The court provided the following definitions of actual and constructive eviction: "'[A]ctual eviction occurs when a tenant is deprived of a material part of the leased premises, and constructive eviction occurs when an interference with possession so serious that it

Office \$7664 in damages.<sup>300</sup>

The court of appeals ruled that the language of the lease was unambiguous, and as a result, the Prosecutor's Office "did not have the right to terminate the Lease or withhold, setoff, or abate any rent due."<sup>301</sup> The court, however, did not find that particular conclusion dispositive in the case.<sup>302</sup> Instead, the court relied on an earlier court of appeals holding in *Sigsbee v. Swathwood*,<sup>303</sup> providing that a lessor's act or omission, not a lessee's, ended the lessee's obligation to pay rent given an actual or constructive eviction.<sup>304</sup>

#### IX. NEW STATUTES EFFECTIVE JULY 1, 2008

Indiana Code section 36-1-11-5.9 allows a county to transfer real property that it acquired through property tax default to an abutting property owner for nominal or no consideration.<sup>305</sup> The new law requires that the county notify all abutting landowners before initiating negotiations for a sale or transfer of the property through a sheriff's sale.<sup>306</sup> The law formerly required the county to hire an appraiser and an auctioneer or sales broker to complete the sale.<sup>307</sup> One goal of the new law is to reduce the time required to get the property back on the tax rolls.<sup>308</sup>

Indiana Code section 32-29-7-3 eliminates the requirement that a county sheriff post notice of a foreclosure sale in at least three public places in each township where the property is located.<sup>309</sup> The law maintains the requirement that the sheriff post notice of the sale at the county courthouse where the property is located.<sup>310</sup>

New legislation regarding smoke detectors in rental properties is scattered throughout a number of Indiana Code sections, including Indiana Code sections 22-11-18-5.5, 32-31-5-7, 32-31-7-5, and 36-8-17-8.<sup>311</sup> Landlords must provide operative smoke detectors in rental properties at the time a tenant moves into the

deprives the lessee of the beneficial enjoyment of the leased premises." *Id.* at 217 (quoting *Talbott v. English*, 59 N.E. 857, 860 (Ind. 1901)).

300. *Id.* at 214.

301. *Id.* at 216.

302. *Id.*

303. 419 N.E.2d 789, 795 (Ind. Ct. App. 1981).

304. *Village Commons*, 882 N.E.2d at 217.

305. IND. CODE § 36-1-11-5.9 (Supp. 2008).

306. *Id.*

307. Indiana Department of Local Government Finance, *Additional Bills of Interest*, <http://www.in.gov/dlgf/5136.htm> (last visited July 12, 2009).

308. The Common Council of the City of Michigan City, Indiana, *Regular Meeting—February 19, 2008*, [www.emichigancity.com/cityhall/council/pdf/minutes021908.pdf](http://www.emichigancity.com/cityhall/council/pdf/minutes021908.pdf).

309. IND. CODE § 32-29-7-3 (2008).

310. *Id.*

311. *Id.* §§ 22-11-18-5.5, 32-31-5-7.

unit.<sup>312</sup> A landlord commits a Class B infraction by failing to properly install a smoke detector or by failing to repair an inoperative hard-wired detector within seven days of notice of the problem.<sup>313</sup> The new law provides that neither landlord nor tenant can waive the smoke detector requirement.<sup>314</sup> It requires further that tenants maintain functioning smoke detectors in the unit.<sup>315</sup> Tenants must ensure that detectors in the unit are not disabled, that battery-powered devices operate (i.e., tenants must install batteries), and if a hard-wired detector malfunctions, tenants must provide written notice to landlords.<sup>316</sup> The new law does not impose penalties if a tenant fails to comply with the statute.<sup>317</sup> Another component of the new law allows an owner or primary lessee who resides in a private dwelling to request that the fire department inspect the interior of the dwelling to determine compliance with the smoke detector requirements.<sup>318</sup>

Indiana Code section 32-31-3-7 was amended to apply residential landlord-tenant statutes to rental agreements that give the tenant an option to purchase the rented property.<sup>319</sup> The statute applies to agreements entered into after June 30, 2008 on all types of dwelling units, including multi- and single-family units.<sup>320</sup>

Indiana Code sections 14-26-2-1.2 and 14-26-2-14.5 update Indiana's Lake Preservation Law regarding riparian rights to establish a definition of acquiescence<sup>321</sup> and evidentiary standards for determining when a riparian property owner acquiesces to allowing public use of a lake.<sup>322</sup> Indiana Code section 14-26-2-1.2 defines acquiescence as "consent without conditions, tacit or passive compliance, or acceptance."<sup>323</sup> Factors indicating acquiescence of a riparian owner to allow public use of a lake include:

- (1) Evidence that the general public has used the lake for recreational purposes.
- (2) Evidence that the riparian owner did not object to the operation by another person of a privately owned boat rental business, campground, or commercial enterprise that allowed nonriparian owners to gain access throughout the lake.
- (3) A record of regulation of previous construction activities on the lake by the department or the department of conservation (before its

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312. IND. CODE §§ 32-31-7-5 (2008), 36-8-17-8 (Supp. 2008).

313. IND. CODE § 22-11-18-5.5 (Supp. 2008).

314. IND. CODE § 32-31-5-7 (2008).

315. *Id.* § 32-31-7-5.

316. *Id.* § 32-31-7-5(6).

317. *See* IND. CODE § 22-11-18-5.5 (Supp. 2008).

318. *Id.* § 36-8-17-8.

319. IND. CODE § 32-31-3-7 (2008).

320. *Id.*

321. *Id.* § 14-26-2-1.2.

322. *Id.* § 14-26-2-14.5.

323. *Id.* § 14-26-2-1.2.

repeal).<sup>324</sup>

The amendments also provide that when the Indiana Department of Natural Resources is a party to an adjudication finding a lake to be private, the law does not apply.<sup>325</sup>

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324. *Id.* § 14-26-2-14.5.

325. *Id.* § 14-26-2-14.5(b).