

ADVANCED REAL ESTATE

2005

**A SUPREME
YEAR**



Kelo v. City of New London

- Economic Development
- Right To Use Eminent Domain As A Tool
- Existing Homes Making Way For Marina And Waterfront?
- Homeowners Challenged The Take
- Connecticut Supreme Court Sided With The Government
- Analysis of US Supreme Court Case...

Burd Management, LLC v. State

- INDOT Improving S.R. 36
- INDOT Obtains 2 Appraisals
- INDOT Makes A Uniform Offer
- INDOT Alleges But Does Not Prove Uniform Offer
- Burd Objects

831 N.E. 2d 104 (Ind. 2005)

Burd Management, LLC v. State

- Burd Cites Decker v. State
- Decker Interpreted Two Statutes
- IC 32-24-1-5(a):
 - a condemnor must...make an offer to purchase in the form...
- IC 32-24-1-13(a):
 - INDOT...is not required to prove that an offer of purchase was made...

Burd Management, LLC v. State

- Decker Concluded The Two Were At Odds
- Held That INDOT Must Make an Offer And Prove It Upon Objection
- Justice Sullivan Concludes State Must Make An Offer And Presumably Allege It
- But Need Not Prove It
- Decker Overruled

Borsuk v. Town Of St. John

- Borsuk Owned A Parcel At 109th And US 41
- One Half Zoned Residential And Improved By A House
- Other Half Zoned Commercial And Vacant
- Comp Plan Contemplated Commercial Zoning For The Whole Lot
- All Other Parcels On The Block Zoned Commercial

820 N.E.2d 118 (Ind.005)

Borsuk v. Town Of St. John

- Borsuk Petitioned To Rezone All Of The Parcel As Commercial To Develop A Gas Station
- 52 Neighbors Remonstrated
- Plan Commission Found That Rezoning Would Not Promote Public Health, Safety, Etc

Borsuk v. Town Of St. John

- Town Council Adopted Plan Commission Findings And Denied Rezoning
- Borsuk Sued Alleging
 - Denial Was Arbitrary And Capricious
 - Constituted An Unconstitutional Taking
- Trial Court Ruled For The Town

Borsuk v. Town Of St. John

- Court Of Appeals Reversed
- In Such A Situation
 - Municipality Must—Absent A Compelling Reason-
Comply With Its Own Comp Plan
- Supreme Court Sided With The Trial Court
And The Town

Borsuk v. Town Of St. John

- Chief Justice Shepard Said:
- A Comp Plan Is A General, Long Term Blueprint Used As A Guiding And Predictive Force
- But Implementing The Plan Regarding A Particular Parcel May Not Be The Best Course Of Action On A Given Day

Borsuk v. Town Of St. John

- IC 36-7-4-603 Requires The Plan Commission And Town Council To Pay Reasonable Regard To:
- The Comp Plan
- Current Conditions And The Character Of Current Structures And Uses
- The Most Desirable Use For Which The Land Is Adapted

Borsuk v. Town Of St. John

- Conservation Of Property Values
- Responsible Development And Growth
- Court Said A Municipality Must Consider All Factors And Make A Balanced Decision
- What Did The Court Decide?

Borsuk v. Town Of St. John

- Rezoning Is A Legislative Process
- Standard Of Review Is Limited To:
 - Constitutionality
 - Procedural Soundness
 - Arbitrary And Capricious Acts
- Court Will Not Intervene In A Legislative Process Supported By Some Rational Basis

Borsuk v. Town Of St. John

- Court Found That Town Council And Plan Commission Considered All Of The Factors
- Therefore, A Rational Basis Existed For Upholding The Legislative Decision
- Court Also Found That There Was No Unconstitutional Taking
 - Land Still Economically Viable
 - Borsuk Renting Residence

Borsuk v. Town Of St. John

- Could The Town Admit An Affidavit Of The Plan Commission President?
- General Rule: Boards And Commissions Speak Through Their Minutes And Records Made At Duly Organized Meetings
- Affidavit Allowed Here Because It Supplemented Minutes
 - Did Not Substitute For Silence on Missing Issues

Story Bed & Breakfast LLP v. Brown County Area Plan Commission

- Story Group, Inc Established And Later Modified A PUD For A Bed & Breakfast On 7 Acres
- The PUD Was Subjected To Several Covenants
- The Covenants Filed In The Commission Office, But Not Placed Of Record

Story Bed & Breakfast LLP v. Brown County Area Plan Commission

- Story Later Went Into Receivership And Bank Acquired The Property At A Foreclosure Sale
- The Property Then Changed Hands Twice
- Ultimate Purchaser Was Aware Of PUD, But Not Covenants
- Purchaser Was Denied Permits For An Outdoor Bar And Grill Because It Was Not Specified As A Permitted Use

Story Bed & Breakfast LLP v. Brown County Area Plan Commission

- Covenants Prohibited Camping And Amplified Music
- Purchaser Filed A Dec Action To Enjoin Commission's Enforcement Of Requirements Of PUD
- Court Of Appeals Held Restrictions That Were Only In Minutes Did Not Put Purchaser On Notice

Story Bed & Breakfast LLP v. Brown County Area Plan Commission

- Supreme Court Sided With The Commission
- Justice Boehm Said:
- There Is A Murky But Meaningful Distinction Between A Commitment And A Condition In A PUD
- A Condition Is A Restriction Imposed By A Legislative Body

Story Bed & Breakfast LLP v. Brown County Area Plan Commission

- A Commitment Is A Restriction Submitted By A Property Owner To Induce A Zoning Decision
- A Condition Is Part Of The Zoning Ordinance And Need Not Be Recorded
 - As Long As It Is Available In The Public Records
 - Even Though Local Ordinance Was Ambiguous

Story Bed & Breakfast LLP v. Brown County Area Plan Commission

- Purchaser Was On Notice Of The Existence Of The PUD
- Purchasers Are On Actual Notice Of Ordinances Affecting Their Property
- Moral:
 - If You Are Buying A Property Zoned As A PUD, Check The Zoning Files
 - Get A 3.1 Zoning Endorsement?

Bank Of New York v. Nally

- **12/16:** Nally Purchased Property From Owens
 - Nally Gave Amtrust A Mortgage
 - Nally Gave Owens A Mortgage @ 21% Interest
 - Owens Mortgage Expressly Subordinated To Amtrust Mortgage
- **12/26:** Owens Mortgage Recorded
- **1/17:** Deed And Amtrust Mortgage Recorded

Bank Of New York v. Nally

- Amtrust Mortgage Paid Off Via EquiVantage Mortgage 18 Months Later
 - No Proceeds Went To Owens
- EquiVantage Mortgage Later Assigned To Bank
- EquiVantage's Title Search Did Not Reveal Owens Mortgage
- Bank Relied On EquiVantage's Title Work

Bank Of New York v. Nally

- Nally Defaulted On Bank Loan
- Bank Sued To Foreclose
- Owens Joined In Foreclosure
 - Asserted Position Superior To Bank's
- Bank Argued:
 - It Was A BFP For Value or
 - It Was Entitled To Equitable Subrogation

Bank Of New York v. Nally

- BFP Requirements
 - Must Purchase In Good Faith
 - For Value
 - Without Notice Of Outstanding Rights Of Others
- Justice Boehm Said:
- Issue Here Is Notice
- Law Recognizes Constructive And Actual Notice

Bank Of New York v. Nally

- Purchaser Presumed To Have Examined Deeds In Chain Of Title
- Records Outside Of Chain Are Not Notice
- But Statute Requires Grantor-Grantee Index And Mortgagor-Mortgagee Index
- Purchaser Charged With Constructive Notice Of Contents Of Both Indices

Bank Of New York v. Nally

- What Is The Starting Point Of Search?
- Bank: Date Of Recording Of Deed
- Court Of Appeals: Origin Of Title-Sate Grant
- Supreme Court:
 - Once Recorded,
 - Date Of Deed
 - Not Date Of Recording
 - Establishes Notice Date For Grantee's Title
- Bank Held Not To Be A BFP

Bank Of New York v. Nally

- Equitable Subrogation
- Party Paying Off Entire Debt Of A Creditor Steps Into The Shoes Of The Creditor
 - Priority Over Junior Liens
 - Where There Was No Actual Knowledge
 - Not Culpably Negligent In Failing To Learn Of Junior Lien

Bank Of New York v. Nally

- Supreme Court Agreed With Restatement
- Mortgagee Refinancing Existing Mortgage Entitled To Equitable Subrogation
 - Even With Actual Or Constructive Notice
 - But Only To Extent Of Proceeds Used To Pay Off Senior Creditor
 - Must Fully Pay Off Senior Creditor

Bank Of New York v. Nally

- Was Bank Culpably Negligent?
- No Degrees Of Negligence In Indiana
- But Culpably Negligent Means Something More Than Mere
 - Inadvertence, Mistake Or Ignorance
- At Best, Bank Was Negligent—Not A Bar
- Title Insurer A Potted Plant?

Louisville & Indiana Railroad Company v. Indiana Gas Company, Inc.

- Railroad Had Right of Way That Crossed Two County Roads
- Indiana Gas Installed Gas Pipelines Along The County Roads And Under The Railroad's Tracks
- Railroad Did Not Consent And Sued For Trespass, Etc

Louisville & Indiana Railroad Company v. Indiana Gas Company, Inc.

- Trial Court Found For Indiana Gas
- Court Of Appeals Reversed
- Questions For Chief Justice Shepard:
- Was Indiana Gas Entitled To Lay Its Pipes Under The Tracks?
- Was Railroad Entitled To Compensation Under The Joint Use Statute?

Louisville & Indiana Railroad Company v. Indiana Gas Company, Inc.

- IC 8-20-1-28 Allows Public And Municipally Owned Utilities To Construct Facilities Under Public Roads
 - So Long As They Do Not Interfere With The Use Of The Roadway
- Railroad's Rights, Whether In Fee Or Via Easement, Already Subservient To County Road

Louisville & Indiana Railroad Company v. Indiana Gas Company, Inc.

- Since Pipeline Does Not Place Additional Burden On Already Subservient Interest
 - No Compensation Is Required
- Joint Use Statute (IC 8-1-2-5)
 - Not Applicable Here
 - Only Applicable To Sharing Equipment
 - E.G. Telephone Poles With Cable TV Lines
 - Not Sharing Of Right Of Way Itself

City Of North Vernon v. Jennings Northwest Regional Utilities

- JNRU Successfully Petitioned IDEM To Establish A Regional Sewer District
- District Overlapped The 10 Mile Extra-territorial Area Of North Vernon To Provide Sewer Service
- North Vernon Was In Fact Providing Extra-territorial Service In Certain Of JNRU's Territory

City Of North Vernon v. Jennings **Northwest Regional Utilities**

- Each Entity Sought To Provide Sewer Service To A New School Within The Overlapping Area
- Each Entity Cited Home Rule Act As Basis For Ultimate Authority

City Of North Vernon v. Jennings Northwest Regional Utilities

- Home Rule Act (IC 36-1-3-1 *et seq*):
- Unit Has All Powers Granted By Statute
- And Has All Other Powers Necessary To Conduct Its Affairs
- Even Though Not Granted By Statute

City Of North Vernon v. Jennings Northwest Regional Utilities

- Limits On Home Rule:
- Unit May Exercise A Power To The Extent The Power
 - Is Not Expressly Denied By Constitution Or Statute
 - Is Not Expressly Granted To Another Entity

City Of North Vernon v. Jennings Northwest Regional Utilities

- Justice Rucker Said:
- Where There Is An Overlap
- Absent A Clear Resolution Of The Overlap During The IDEM Permitting Process
- The District Prevails
- Unless The City Was Already Providing Service In The Area

Lake County Parks And Recreation Board v. Indiana-American Water Company, Inc.

- Public Water Utility Sought To Condemn An Easement On Property Of Parks Board
- Parks Board Resisted Citing:
 - Prior Public Use Doctrine
 - Failure To Use Board's Appraisal
 - An Arbitrary And Capricious Route

Lake County Parks And Recreation Board v. Indiana-American Water Company, Inc.

- Prior Public Use Doctrine
- Where New Use Will Destroy Or Effectively Destroy Use Enjoyed By An Entity With Eminent Domain Power,
- New User Will Not Be Allowed To Use Eminent Domain Power To Destroy Prior Use
- Unless Expressly Authorized By Statute Or By Necessary Implication

Lake County Parks And Recreation Board v. Indiana-American Water Company, Inc.

- Court Found That Installation Of Water Line Would Temporarily Disrupt Park Board's Use
- Found No Permanent Impact
- Therefore, Taking Of Easement Was Authorized

Lake County Parks And Recreation Board v. Indiana-American Water Company, Inc.

- Utility Put On Evidence That
 - It Obtained An Independent Appraisal
 - Made A Uniform Offer
- That Was Sufficient To Demonstrate A Good Faith Offer
- Board's Disagreement On Value Insufficient To Sustain Its Objection
 - Goes To Damages Phase Rather Than Taking

Lake County Parks And Recreation Board v. Indiana-American Water Company, Inc.

- Statute Vests Utility With Discretion On Route
- Condemnee Must Show Clear Abuse Of Discretion
- Need Determination That Taking Was Fraudulent, Capricious Or Illegal
- Trial Court Found A Rational Basis For Route
- Not Required To Take Most Direct Route

Fraley v. Minger

- 2.5 Acres Of Land Between Land Owned By Minger and Land Owned By Fraley
- Minger Purchased His Land In 1955
- Fraley Purchased His Land (Including 2.5 Acre Tract) In 1996
- Minger Had Been Told By Fraley's Predecessor That The Predecessor Did Not Own Disputed Tract

Fraley v. Minger

- Minger Demonstrated Possession Of Tract From 1956
 - Fenced It
 - Pastured It
 - Logged It
 - Drained It
- Minger's Neighbors Believed He Owned It

Fraley v. Minger

- Justice Dickson Said:
- Party Must Establish Adverse Possession
- By Clear And Convincing Evidence
- Trier Of Fact's Discretion Given Deferential View
- Opinion Reviewed Topic From Code Of Hammurabi Forward

Fraley v. Minger

- Ten Year Statute Of Limitation
- Five Classic Essential Elements Of Possession
 - Hostile And Under A Claim Of Right
 - Actual
 - Open And Notorious
 - Exclusive
 - Continuous

Fraley v. Minger

- New Articulation
- Control
 - Normal And Customary Use Considering Characteristics
- Intent
 - Intent To Claim Full Ownership Superior To Rights Of Others, Including Legal Owner

Fraley v. Minger

- Notice
 - Claimant's Actions Must Give Actual Or Constructive Notice To Legal Owner Of Claimant's Control And Intent
- Duration
 - Claimant Must Satisfy Other Elements Continuously For Required Period Of Time

Fraley v. Minger

- Statute Requiring Payment Of Taxes
- Minger Paid Taxes On Property Adjacent To Disputed Tract
 - But Not On Tract Itself
- Echterling (Ind. 1955) Held Statute Was Supplemental To Essential Elements
- Substantial Compliance Sufficed
 - Allowed For Inadvertence

Fraley v. Minger

- Rationale For Statute
- Prevented Squatters From Acquiring Title To Land
- Intent Was To Give Record Title Holder Notice Of Someone Claiming An Adverse Interest
 - Paid Tax Bill
 - Refund

Fraley v. Minger

- Boundary Line Exception To Statute
- Kline (Ind.App. 1979) Found Adverse Possession In A Boundary Dispute Where
 - Possessor Assumed He Was Paying Taxes
- Supreme Court Returned To Stricter Construction Of Statute
- Disapproved Kline

Fraley v. Minger

- Supreme Court Narrowed Echterling
- Substantial Compliance Sufficient Where Claimant Has A Reasonable And Good Faith Belief That Claimant Is Paying Taxes
- No Longer Stands For Proposition That Statute Satisfied Where Legal Owner Has Clear Notice Of Adverse Possession

Fraley v. Minger

- Side Note
- In 1996 Minger Attempted To Purchase The Parcel From Fraley
- Court Held That Was Irrelevant Because
- Minger Acquired Title By Adverse Possession Prior To 1996

Tippecanoe Associates, II, LLC v. Kimco Lafayette 671, Inc.

- 1973: Kroger Negotiated Restrictive Grocery Covenant In Lease For Term (20 +4/5s)
- 1983: Kroger Assigned To Pay Less Super Markets
 - Did Not Operate Grocery Store At The Site
- 1984: Pay Less Subleased To H.H. Gregg
- 2000: Landlord Brought Dec Action To Determine That Covenant Unenforceable

Tippecanoe Associates, II, LLC v. Kimco Lafayette 671, Inc.

- Justice Boehm Said:
- Restrictive Covenants Are Generally Enforceable
- Once Tenant Voluntarily Relinquishes Use, Anti-competitive Covenant Is Severed And No Longer Enforceable
- Change In Character Of Center Not Relevant

Tippecanoe Associates, II, LLC v. Kimco Lafayette 671, Inc.

- Restrictive Covenant Unreasonable In Two Situations:
- Restraint Greater Than Necessary To Protect Beneficiary
- Beneficiary's Need For Protection Outweighed By Hardship To Landlord And Likely Injury To Public
- Can't Trade In Restrictive Covenants

Hill v. Davis

- Residential Tenants “Dissatisfied” And Moved Out
- Landlord Sued For Back Rent
- Tenants Left No Forwarding Address Because They Were Homeless
- Small Claims Court Case Summary Indicated Tenants’ New Address

Hill v. Davis

- Landlord Failed To Send Itemized List Of Damages Within 45 Days After Tenants' New Address Appeared In A Court Document
- Landlord Forfeited Right To Recover Damages And Was Required To Return Security Deposit

New Welton Homes v. Eckman

- New Welton Contracted To Install A Modular Home
- Contract Provided For A One Year Warranty
- Foundation Was Faulty, But Problem Not Discovered For 2+ Years
- Supreme Court Refused To Apply “Discovery” Rule To Contract Warranty Action

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