

STATE OF INDIANA)
)
COUNTY OF MARION)

MARION SUPERIOR COURT
CIVIL DIVISION ROOM NO. 12
ENVIRONMENTAL DOCKET
CAUSE NO. 49D12-1806-MI-025827

MIAMI COUNTY and MIAMI COUNTY)
BOARD OF COMMISSIONERS,)

Petitioners,)

v.)

INDIANA DEPARTMENT OF NATURAL)
RESOURCES,)

Respondent.)

WALTER B. and DOROTY WOODHAMS,)
ET AL,)

Respondents below (Statutory Parties)

FILED
86 AUG 16 2019
Myra M. Eldredge
CLERK OF THE MARION CIRCUIT COURT

ORDER ON PETITION FOR JUDICIAL REVIEW

Petitioners Miami County, Miami County Board of Commissioners, and certain property owners filed a Petition for Judicial Review of a final order entered by the Indiana Natural Resources Commission (the "Commission") which found Petitioners were owners and responsible for certain costs involved in six dams. The Court heard argument on May 13, 2019, and having taken this matter under advisement and being duly advised, now enters its Order on the County's petition. The Court affirms in part and reverses in part.

FACTS

Russ Bellar, who was in the construction business, began developing some property in Miami County in about 1990. Administrative Record ("R.") (R 1729-1730.) This development became the Hidden Hills subdivision. The Hidden Hills subdivision included the construction of seven dams in Miami County (R at 298-99) six of which are relevant to this case. Bellar created the

dams to make recreational bodies of water for the subdivision's residents. (R. at 304, 331.) The six dams are on two forks of a tributary to Prairie Creek. Three of the dams, referred to as the southeast, east central, and northeast dams, are arranged "one above the other" in a valley on the east fork of the tributary, while the other three dams, referred to as the southwest, west central, and northwest dams, are arranged "one above the other" in a valley on the west fork. (R. 1355). Roads were constructed across the top of each of the dams. (R. 1360:8.)

Bellar prepared a plat for each section of the subdivision. Each plat provided:

THIS SUBDIVISION SHALL BE KNOWN AND DESIGNATED AS: Hidden Hills, an addition to Miami County, Indiana. **All streets shown and not heretofore dedicated, are hereby dedicated to the public.**

All conveyances are subject to the following protective covenants and building restrictions which shall run with the land, and the grantees therein by accepting and recording their deeds, agree to be bound thereby:

...

3. A 60' public right of way shall be provided on or adjacent to these premises as indicated on the plat, unless marked otherwise.

(R. 235, 270) (First Addition); R. 238, 274 (Second Addition); R. 276 (Third Addition); R. 241, 279 (Fourth Addition); R. 242, 280 (Fifth Addition) (emphasis added). Each plat was approved by the Board of the County Commissioners of Miami County. The 60' right of way referenced in the plats was depicted as a series of roads. Some of the roads ran on top of dams that were built to create the recreational bodies of water enjoyed by the Hidden Hills residents. All the six relevant dams have a road running along top of them.

As evidenced by the numerical order of the additions, the roads were built over a period of years. The first two miles of roads within the Hidden Hills

subdivision were accepted into the Miami County road system on December 23, 1996, as shown by the Miami County Commissioners minutes:

Motion by Morris to accept the two (2) miles of road in the Hidden Hills subdivision into the county road system. County will not be responsible for any maintenance, other than snow removal and sanding for a period of two (2) years... Mr. Bellar will resurface the two (2) miles within two (2) years, according to the county road specifications.

(R. 259, Miami County Commissioners, December 23, 1996.)

Additional official county action concerning the roads occurred on December 12, 2005, when, "Ken Einselen brought a copy of a resolution to clean up some road mileage listed with the INDOT. After some discussion (sic) several roads a motion was made by Commissioner Deeds to accept the roads approved by County Engineer Ken Einselen. The motion was 2nd by Commissioner Hawley and passed 3-0." (R. 251, *Miami County Board of Commissioners December 12, 2005*.) The resolution stated,

A RESOLUTION CLARIFYING AND AFFIRMING THE APPROVAL AND ADOPTION OF VARIOUS STREETS AND ROADS IN MIAMI COUNTY, INDIANA.

WHEREAS, these streets or roads have been designed and completed according to the design standards included in the Miami County Zoning Ordinance or the plans approved by the Miami County Board of Commissioners or these roads or streets have been in continuous public use for over ten years; and

WHEREAS, the Miami County Board of Commissioners have considered these streets or roads to be of public use and benefit;

WHEREAS, prior conditions for acceptance of these streets or roads are deemed satisfied;

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF COMMISSIONERS OF MIAMI COUNTY, INDIANA:

That the streets and *road listed in attachment'~" be recorded as accepted into the Miami County Highway System. These streets and roads shall be maintained by the Miami County Highway Department and all right-of-way shall be under the jurisdiction and authority of the Miami County Board of Commissioners.*

Adopted this day, the 12 day of December, 2005.

PASSED AND ENACTED by the BOARD OF COMMISSIONERS OF MIAMI COUNTY, INDIANA at a meeting assembled on this 12 day of December, 2005.

(R. 247) (emphasis in original.)

According to the designated evidence, the final county action concerning Hidden Hills roads occurred on January 17, 1906. The meeting minutes state,

RESOLUTION ADOPTION OF ADDITIONAL ROADS.

Ken Einselen brought a resolution to adopt additional roads in order to clear up a mileage discrepancy the County has with the State. A motion to adopt the resolution was made by Commissioner Boyer. The motion was 2nd by Commissioner Deeds and passed 3-0.

(R. 1013, *Miami County Board of Commissioners January 17, 1906.*)

The dams came to the attention of the Indiana Department of Natural Resources ("DNR") in 2011 or 2012 and the DNR issued Notices of Violation ("NOV") for six of the dams claiming they are unsafe. These NOV were sent to certain Hidden Hills property owners whose parcels abutted the dams and to Miami County and the Miami County Commissioners. The dams were: Hidden Hills Southwest Dam, R. 051; Hidden Hills West Central Dam, R. 055; Hidden Hills Northwest Dam, R. 060; Hidden Hills Southeast Dam, R. 065; Hidden Hills East Central Dam, R. 070; and, Hidden Hills Northeast Dam, R. 075. The roads accepted by the County are on top of the dams and, due to deterioration of the dams, will at some point be unsafe for vehicular traffic. (R.130.) Both the County and the Hidden Hills owners sought review of the notices of violation with the Commission.

The DNR concluded it had jurisdiction of the dams pursuant to Ind. Code § 14-27-7.5-1, finding they were all over 20 feet in height. (R. 1380-1381, 1462,1463) The dam's height was the only basis for the DNR's exercise of jurisdiction. (R. 1408.) In relevant part, the Commission affirmed the Department's Notice of Violation and held the parties responsible for repairs as follows:

276. It is determined that the Hidden Hills Petitioners who are the fee title owners of one or more of the dams are jointly and severally liable for the repair, reconstruction, decommissioning and maintenance of the dam for which they hold fee title.

277. Miami County is only liable for the aspects of a roadway dams' repair, reconstruction, decommissioning and maintenance reasonable necessary to fulfill its authority and obligation to reconstruct, repair, and maintain a public road traversing the roadway dam.

(Findings of Fact and Conclusions of Law with Final Order, Ex. A to Verified Petition for Judicial Review filed 7/2/18.) To the extent any matter set forth in the Court's Conclusions of Law below also constitutes a Finding of Fact, the Court hereby incorporates and adopts such matter as part of its Findings of Fact.

Standard of Review

A trial court's review of an administrative decision is intentionally limited, respectful of an agency's expertise in a given area. Under Indiana's Administrative Orders and Procedures Act ("AOPA"), a trial court may provide relief only if an agency action is:

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations,

or short of statutory right; (4) without observance of procedure required by law; or (5) unsupported by substantial evidence.

I.C. § 4-21.5-5-14(d) (2018); *City of Gary v. Indiana Department of Environmental Management*, 967 N.E. 2d 1053, 1057 (Ind. Ct. App. 2012).

A reviewing court must grant deference to the administrative agency's finding of fact if they are supported by substantial evidence, but need not grant deference to the agency's conclusions of law. *LTV Steel Co. v. Griffin*, 730 N.E.2d 1251, 1257 (Ind.2000). "An interpretation of a statute by an agency charged with the duty of enforcing it is entitled to great weight, unless the interpretation would be inconsistent with the statute itself." *Commissioner, Dept. of Revenue v. Fort*, 760 N.E. 2d 1103, 1106 (Ind. Ct. App. 2001). But, an administrative agency does not have the power to make decisions properly committed to another agency. *Pierce v. Ind. Dep't of Correction*, 885 N.E. 2d 77, 89 (Ind. Ct. App. 2008). Lastly, the appealing party has the burden of showing that the agency's action is invalid. I.C. § 4-21.5-5-14(a); *Moriarty v. Ind. Dept. of Nat. Res.*, 113 N.E. 3d 64, 619 (Ind. 2019).

ISSUES

1. Whether the Commission has the authority to regulate dams built before the passage of the Dam Safety Act?
2. Whether Miami County is an owner of dams built under roads, accepted into the County road system?

DECISION

I

"The Dam Safety Act gives the Indiana Department of Natural Resources (the "DNR") jurisdiction over certain dams in, on, or along streams in Indiana to protect Hoosiers' lives and property. *Moriarty v. Indiana Dep't of Nat. Res.*, 113 N.E.3d 614, 617 (Ind. 2019). The Dam Safety Act is codified at Indiana

Code § 14-27-7.5 *et seq.* DNR is mandated to implement the requirements of the Dam Safety Act under 312 IAC 10.5-1-2.

Applying the Dam Safety Act to the instant case does not require the Court to reach back into the past and examine the Parties pre-enactment behavior. Instead, the instant case causes the Court to ask whether the NOV's resulted from the DNR's conclusions concerning the status and safety of the Hidden Hills dams, after enactment of the Act. The statute provides:

The owner of a structure shall maintain and keep the structure in the state of repair and operating condition required by the following:

- (1) The exercise of prudence.
- (2) Due regard for life and property.
- (3) The application of sound and accepted technical principles.
- (b) The owner of a structure shall notify the department in writing of the sale or other transfer of ownership of the structure. The notice must include the name and address of the new owner of the structure.

Ind. Code § 14-27-7.5-7 (West).

The DNR was given the authority to supervise the maintenance and repair of qualifying structures, I.C. 14-27-7.5-8(1), to “see that the structures are maintained in a good and sufficient state of repair and operating condition to fully perform the intended purpose. I.C. 14-27-7.5-8(2). If the DNR inspects a dam and finds the structure is:

- (1) not sufficiently strong;
- (2) not maintained in a good and sufficient state of repair or operating condition;
- (3) not designed to remain safe during infrequent loading events; or
- (4) unsafe and dangerous to life and property;

the DNR can issue a notice of violation or take emergency action to protect life and property. Ind. Code § 14-27-7.5-11, 14-27-7.5-12 (West).

Petitioners argue the heights of the dams should be measured to the top of their spillways rather than to the top of the structure, as in a former version of the statute and the 2002 version of the Dam Safety Act should not have retroactive effect.

Presently, the law requires the height of a dam be measured to “the top of the structure.” I.C. § 14-27-7-5.3. This code provision was enacted in 2002. See Natural Resources—Violations—Dams and Reservoirs, Pub. L. No. 148-2002 (S.E.A. 508). The previous version of the statute, which was in effect when most of the Hidden Hills dams were constructed in the 1990s, provided that: “all dams built for the sole purpose of erosion control, watering livestock, recreation, or providing a haven or refuge for fish or wildlife . . . not exceeding twenty feet in height from the natural stream bed *to spillway level* . . . shall be exempt from the provisions of this chapter.” Ind. Code § 13-2-20-4 (1992) (emphasis added).

The “general rule” in Indiana is that “unless there are strong and compelling reasons, statutes will not be applied retroactively.” *Bourbon Mini-Mart, Inc. v. Gast Fuel & Servs., Inc.*, 783 N.E.2d 253, 260 (Ind. 2003). An exception to this general rule exists for remedial statutes, *i.e.* statutes intended to cure a defect or mischief that existed in a prior statute. *Id.* Whether a statute applies retroactively depends on the Legislature’s intent. *Id.* When a remedial statute is involved, a court must construe it to “effect the evident purpose for which it was enacted[.]” *Id.* (quoting *Martin v. State*, 774 N.E.2d 43, 44 (Ind. 2002)). Remedial statutes will be applied retroactively to carry out their legislative purpose unless to do so violates a vested right or constitutional guaranty. *Id.*

The Court finds the 2002 amendment in the definition of dam height was remedial, because it clarified how DNR would measure the height of a dam. For example, the southwest dam, does not have a spillway and the prior

version of the statute would cause measurement confusion. Every dam has a “top of the structure” and can be measured accurately. Further, the Court FINDS there was substantial evidence within the record to support the conclusion the six Hidden Hills dams were more than 20 feet in height, measured from the natural streambed or watercourse¹ and fall within the jurisdiction of the Department.²

The Court finds the Department can assess the status of dams falling within its jurisdiction to determine whether the dams are safe, including dams constructed before enactment of the statute, and take appropriate action. The Court affirms the final order of the Natural Resources Commission as to the Commission’s authority to regulate dams constructed after passage of the Dam Safety Act.

II

The Court affirms the Commission’s finding that the County was an owner of the dams.

The Act defines an owner.

“owner” means an individual, a firm, a partnership, a copartnership, a lessee, an association, a corporation, an executor, an administrator, a trustee, the state, an agency of the state, a municipal corporation, a political subdivision of the state, a legal

¹ “As used in this chapter, “height” means the vertical dimension of a structure as measured from the lowest point in the natural streambed or watercourse under the centerline of the structure to the top of the structure.” Ind. Code §14-27-7.5-3

² This chapter does not apply to the following:

(1) A structure that meets the following conditions:

(A) Is built for the sole purpose of erosion control, watering livestock, recreation, or providing a haven or refuge for fish or wildlife.

(B) Has a drainage area above the dam of not more than one (1) square mile.

(C) Does not exceed twenty (20) feet in height.

(D) Does not impound a volume of more than one hundred (100) acre-feet of water.

Ind. Code § 14-27-7.5-1 (West)

entity, a drainage district, a levee district, a conservancy district, any other district established by law, or any other person who has a right, a title, or an interest in or to the property upon which the structure is located.

I.C. §14-27-7.5-4. The County argues its interest in the dams is insufficient to mean it is an owner.

It is undisputed that separate certified plats of the Hidden Hills subdivision were submitted for approval to the Board of County Commissioners of County of Miami, Indiana and all were approved by the Miami County Plan Commission and the Board of County Commissioners then recorded by the Miami County Recorder. *Supra*. This procedure is consistent with the requirements of Ind. Code 36-7-3-3.³ “The long-standing statutory dedication

³ (a) A person who lays out:

- (1) a town;
- (2) an addition to a municipality; or
- (3) a subdivision of lots or lands within the corporate boundaries of a municipality;

shall record a correct plat of the town, addition, or subdivision in the office of the recorder of the county before selling any lots in the town, addition, or subdivision. The plat must show public grounds, public ways, and the length, width, and size of each lot. Lots shown on the plat must be regularly numbered.

(b) Every donation or grant to the public, or to any person, that is noted as such on the plat, is considered a general warranty to the donee or grantee named on the plat, for the purposes intended by the donor or grantor.

(c) Before offering a plat for record under this section, a person must acknowledge it before an officer authorized by law to take and certify acknowledgments of deeds. The plat may be recorded only if it is made and acknowledged in the manner prescribed by this section.

(d) Before a person offers a plat for recording under this section, the person must submit it for the approval of:

- (1) the advisory plan commission that has jurisdiction over the platted area under IC 36-7-4; or
- (2) the municipal works board, if no advisory plan commission has jurisdiction over the platted area under IC 36-7-4.

The advisory plan commission or works board shall approve or disapprove the plat, and may require the public ways shown in the plat to be as wide as, and coterminous with, the public ways in contiguous parts of the municipality. The county recorder may record the plat only if a certificate showing the approval of the plan commission or works board is attached to it. If the record of a plat is not executed and approved as required by this subsection, it is void.

Ind. Code § 36-7-3-3 (West)

scheme in Indiana has been that the owner “who plats a street and acknowledges the plat and has it approved and recorded grants to the municipality, in trust for the public, title to an easement for a street, and no further assent or acceptance by the public is required so far as the grant is concerned.” *Poznic v. Porter Cty. Dev. Corp.*, 779 N.E.2d 1185, 1192 (Ind. Ct. App. 2002). Thus, when the Miami Board of Commissioners approved the plat and the plat was recorded, there was a statutory dedication of the Hidden Hills streets. And when the streets were dedicated, the county acquired title to an easement over the streets in trust for the public. *Bass v. Salyer*, 923 N.E.2d 961, 966 (Ind. Ct. App. 2010).

The Hidden Hills streets, however, were also specifically adopted into the Miami county road system by resolution at the December 12, 2005 County Board of Commissioner’s meeting. Then, the roads were again “*recorded as accepted into the Miami County Highway System*. These streets and roads shall be maintained by the Miami County Highway Department and all right-of-way shall be under the jurisdiction and authority of the Miami County Board of Commissioners.” (R. 247) (emphasis in original.)

The Hidden Hills streets, twice accepted into the Miami County highway system, bestowed upon the County title to an easement in the streets which is sufficient to constitute ownership in the dams. I.C. §14-27-7.5-4. The County became an owner when it accepted the roads into the county highway system. That the now-crumbling dams upon which the accepted roads were built are a burden, should have been contemplated by the parties when the easement was acquired. The county cannot reject their ownership interest in the roads, accepted over twenty years ago, simply because the underlying dams are now in a state of disrepair.

The County accepted the duty to maintain the roads when it accepted the roads into the county highway system. This maintenance also includes the responsibility to maintain the structure upon which the roads were built.

III

The Court reverses the Final Order of the Natural Resources Commission as to *VII Apportionment of Responsibility* finding that Miami County, as owner of title to an easement for the streets which traverse the Hidden Hills dams, is an owner of the property upon which the structure is located and responsible for all aspects of the repair and reconstruction of the six roadway dams under consideration.

ORDER

Based on the above Findings of Fact and Conclusions of Law, the Court Orders that Petitioner's Petition for Judicial Review is denied, and the Order of the Natural Resources Commission is affirmed in part and reversed in part as set forth above.

Date: August 16, 2019



Judge, Marion County Superior Court



Commissioner, Therese Hannah

Distribution:

All counsel of record