

**BEFORE THE
NATURAL RESOURCES COMMISSION
OF THE
STATE OF INDIANA**

IN THE MATTER OF:

MIAMI COUNTY, MIAMI COUNTY BOARD)	
OF COMMISSIONERS, WALTER B. and)	
DOROTHY WOODHAMS, KENNETH T. and)	
REBEKAH J. HANSON, RUSSELL G.)	
BELLAR LIFETIME FAMILY TRUST,)	Administrative Cause
BRYAN B. ECKERLY, KYLE A.)	Number: 14-146W
ROTHERMEL, DONALD EUGENE and)	
SHARON ELAINE WEEKS, RONALD A. and)	
LORRIE L. POTTS, RUSSELL BELLAR,)	
CHRISTOPHER P. ROBINSON, ROBERT W.)	
and LISA R. STANFIELD, JEFFREY A. and)	
LORI A. LAYCOCK, S&S TRUCK REPAIR,)	
LEON and JUDITH HUSKEY, GEOFFERY)	
and WENDY LANGER, ERIC and JODIE)	
MARBURGER, THOMAS and LINDA)	VTS-DM-3939, VTS-DM-3940,
WEBSTER, KENNETH J. and SANDRA E.)	VTS-DM-3941, VTS-DM-3942,
JANOWSKI, LARRY DEAN, SHERYL L.)	VTS-DM-3943 & VTS-DM-3944
WEST, BRIAN A. OLSON, TERRY and)	
LILLIAN DOAN, and HIDDEN HILLS LAKE)	
PRESERVATION, INC.,)	
 Petitioners,)	
)	
vs.)	
)	
DEPARTMENT OF NATURAL RESOURCES,)	
 Respondent.)	

INTERLOCUTORY ORDER ON PETITIONERS, MIAMI COUNTY'S AND MIAMI COUNTY BOARD OF COMMISSIONERS', AND RESPONDENT, DEPARTMENT OF NATURAL RESOURCES', COMPETING MOTIONS FOR SUMMARY JUDGMENT

Procedural Background and Summary of Proceeding

1. The matter in dispute in the instant proceeding relates to six (6) Notices of Violation (*collectively referred to as "NOVs"*) issued by the Department of Natural Resources ("*Department*") relating to six (6) different dams existing within the Hidden Hills First,

- Second, Third, Fourth and Fifth Additions (*collectively referred to herein as "Hidden Hills"*).
2. The NOVs were issued by the Department between October 1, 2014 and October 3, 2014.
 3. The NOVs, which are individually identified as VTS-DM-3939, VTS-DM-3940, VTS-DM-3941, VTS-DM-3942, VTS-DM-3943 and VTS-DM-3944, each identify Miami County and the Miami County Board of Commissioners (*collectively referred to herein as "Miami County"*) as an owner of the dams at issue¹.
 4. Miami County sought administrative review by the Natural Resources Commission ("*Commission*") on October 29, 2014 and from the outset has argued that it is not an owner of the dams at issue.
 5. A prehearing conference was conducted on December 12, 2014 following the grant of motions to continue a previously scheduled date for the prehearing conference. The six (6) individual proceedings originally initiated to address the NOVs were consolidated on the motion of Miami County during the prehearing conference. The parties have conducted extensive discovery and multiple status conferences have been held since December 12, 2014.
 6. On September 29, 2016 and September 30, 2016, the Department and Miami County, respectively, filed their competing motions for summary judgment. Responsive pleadings were filed by all parties and the matter is ripe for a determination of the issue presented on summary judgment.

Issue Presented on Motions for Summary Judgment

7. Miami County and the Department present one sole issue for consideration on summary judgment. The issue is restated as follows:

Is Miami County an "owner", as that term is defined at Indiana Code § 14-27-7.5-4, of any of the six (6) dams at issue in the NOVs issued by the Department?

¹ Each of the individual NOVs also identifies other individuals as owners in addition to Miami County. For purposes of this Order only the status of Miami County will be discussed although it is acknowledged that the other individuals to whom the NOVs were issued have also sought administrative review and have participated in briefing on the issue presented on summary judgment.

Summary Judgment Standard

8. Pursuant to Indiana Code § 4-21.5-3-23 the Commission considers summary judgment in the manner prescribed by Trial Rule 56 of the Indiana Rules of Trial Procedure.
9. Trial Rule 56 expressly provides that a party “against whom a claim, counter-claim or cross-claim has been asserted... may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.”
10. Parties moving for summary judgment shall “designate to the court all parts of pleadings, depositions, answers to interrogatories, admissions, matters of judicial notice, and any other matters on which it relies for purposes of the motion.” *Trial Rule 56(C)*.
11. Trial Rule 56(C) provides that “the judgment sought shall be rendered forthwith if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”
12. Summary judgment entered upon less than all the issues in dispute or as to less than all of the parties to the dispute is interlocutory unless expressly designated. *Indiana Trial Rule 56 (C)*.
13. “The purpose of summary judgment is to terminate litigation about which there can be no factual dispute and which may be determined as a matter of law.” *Bragg v. Kittle's Home Furnishings, Inc.*, 52 N.E.3d 908, 919 (Ind. App., 2016).
14. "Summary judgment is appropriate only where the evidence shows there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law." *Id.*
15. “The movant must demonstrate that ‘the designated evidence raises no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.’ Upon this showing, the nonmoving party then has the burden to demonstrate that there is a genuine issue of material fact.” *AM General LLC v. Armour*, 46 N.E.3d 436, 439 (Ind., 2015) citing *Indiana Restorative Dentistry, P.C. v. Laven Ins. Agency, Inc.*, 27 N.E.3d 260, 264 (Ind.2015) (citing *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind.2014)) (internal citations omitted); *State Farm Mut. Auto. Ins. Co. v. Jakubowicz*, 2016 WL 4140829, at *1 (Ind., 2016). However, “summary judgment shall not be granted as of course because the opposing party fails to offer opposing affidavits or evidence, but the court shall make its determination from the evidentiary matter designated to the court.” *Indiana Trial Rule 56(C)*.
16. “A court must construe all designated evidence and reasonable inferences in favor of the non-moving party, and resolve all doubts against the moving party.” *Bragg, supra*.

17. "When any party has moved for summary judgment, the court may grant summary judgment for any other party upon the issues raised by the motion although no motion for summary judgment is filed by such party." *Indiana Rules of Trial Procedure, Trial Rule 56(B)*.
18. "A fact is 'material' if its resolution would affect the outcome of the case, and an issue is 'genuine' if a trier of fact is required to resolve the parties' differing accounts of the truth ..., or if the undisputed facts support conflicting reasonable inferences." *Angel v. Powelson*, 977 NE 2d 434 (Ind. Ct. App. 2012) citing *Williams v. Tharp*, 914 N.E.2d 756, 761 (Ind. 2009).
19. The Commission is obligated to designate the issues or claims presented on summary judgment upon which it concludes there to be no genuine issue as to any material facts. *Indiana Trial Rule 56(C)*.

Findings of Fact Relevant to Issue Presented on Summary Judgment

20. While the parties have not designated as evidence in this proceeding copies of the NOV's it is reasonably determined from the pleadings that the NOV's were issued by the Department under the authority of Indiana Code §§ 14-27-7.5. The parties' motions for summary judgment are considered upon that basis.
21. Certain roads or streets, identified as Harbour Pointe Drive, Kim Road, Grand Avenue (also known as Grandview Lane), El' Burn Drive, and Lakeview Drive, exist within the plats of Hidden Hills. *Department Motion for Summary Judgment, Exhibit A* and *Miami County, Motion for Summary Judgment, Exhibit B*.
22. Harbour Pointe Drive crosses over the top of two dams existing within Hidden Hills. The first dam crossing, identified in VTS-DM-3939, occurs between Raccoon Hill Lane and the terminal end of Harbour Pointe Drive, which is included in the plat of the Fifth Addition of Hidden Hills. The second dam crossing, identified in VTS-DM-3940, occurs between Kim Road and Raccoon Hill Lane, which was platted as a part of the Fourth Addition of Hidden Hills. The Fourth Addition to Hidden Hills was approved by the Miami County Plan Commission on May 13, 1998 and by Miami County on May 26, 1998 while the Fifth Addition was approved by the Miami County Plan Commission on February 8, 1999 and on an unidentified date in February 1999 by Miami County. *Id.*

23. Kim Road crosses over the top of the dam identified in VTS-DM-3941 between Glen Cove Drive and Harbour Pointe Drive. This portion of Kim Road is also identified in the plat of the Fourth Addition to Hidden Hills. *Id.*
24. El' Burn Drive crosses over the top of the dam identified in VTS-DM-3943 between Striker Road and Raccoon Hill Road, which is identified in the plat of the Second Addition to Hidden Hills that was approved by the Miami County Plan Commission on March 9, 1994 and by Miami County on February 14, 1994. *Id.*
25. Lakeview Drive crosses over the top of the dam identified in VTS-DM-3944 at a point between Kim Road and Striker Road, which is identified in the plat to the First Addition to Hidden Hills that was approved by the Miami County Plan Commission on June 10, 1992 and by Miami County on June 15, 1992. *Id.*
26. Each of the plats approved by the Miami County Plan Commission and Miami County contain the following dedication:

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.

Department Motion for Summary Judgment, Exhibit A and Miami County, Motion for Summary Judgment, Exhibit B.

27. In addition to the approval and acceptance of the Hidden Hills plats by both the Miami County Plan Commission and Miami County as specified in Finding 22 through Finding 26 the following road sections were also accepted into the Miami County Highway System for maintenance as follows:
- a. Kim Road, as associated with VTS-DM-3941, was accepted on December 19, 2005.
 - b. The sections of Harbour Pointe Drive associated with VTS-DM-3939 and VTS-DM-3940 were accepted on December 12, 2005.
 - c. El' Burn Drive, associated with VTS-DM-3943, and Lakeview Drive, associated with VTS-DM-3944, were accepted on December 23, 1996.

Miami County, Motion for Summary Judgment, Exhibit B (Response to Interrogatory #1).

28. Grand Avenue (Grandview Lane) crosses over the top of the dam identified in VTS-DM-3942 at a point west of Betty Lane and very near the terminal end of Grand Avenue as depicted in Google Earth aerial photography ("*Google Earth Photo*") bearing "Imagery Date 9/28/14". *Department Motion for Summary Judgment, Exhibit A.* A comparison of the

Google Earth Photo to other evidence designated by both parties, particularly, the plat to the Third Addition to Hidden Hills indicates that the dam identified in VTS-DM-3942, over which a portion of Grand Avenue was constructed, occurs west of Betty Lane and outside the platted boundaries of Hidden Hills.

29. Miami County accepted sections of Grand Avenue (Grandview Lane) into the county highway system for maintenance on December 12, 2005. However, the accepted portion spans only from its easternmost point, at the intersection with Dart Court, to its intersection with Betty Lane. The portion of Grand Avenue constructed atop the dam associated with VTS-DM-3942 lies further west than Betty Lane. *Id.*
30. Acceptance by Miami County of Kim Road, El' Burn Drive, Harbour Pointe Drive and Lakeview Drive into the county highway system carries with it the requirement and obligation that those roads and streets "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." *Miami County, Motion for Summary Judgment, Exhibit B (Response to Interrogatory #2), Claimants' (other than Miami County) Response to Miami County Motion for Summary Judgment, Exhibits 3 & 4 (Resolution No. 12-12-05).*
31. The width of each of the roads associated with the NOV's is 60 feet. *Department Motion for Summary Judgment, Exhibit A and Miami County, Motion for Summary Judgment, Exhibit B.*

Conclusions of Law Relevant to Issue Presented on Summary Judgment

32. An "owner", as applicable to Indiana Code §§ 14-27-7.5, includes:

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 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.

Indiana Code § 14-27-7.5-4.

33. Miami County is a municipal corporation and a political subdivision, see *Indiana Code §§ 36-1-2-10 & 13*, so the focal point of the issue presented by the Department and Miami County on Summary Judgment is whether Miami County "has a right, a title, or an interest in or to the property upon which the structure is located."

34. The parties designated no evidence and offer no averment that Miami County holds title to real property upon which any of the dams associated with the NOV's are constructed.
35. The designated evidence fails to establish that Miami County has accepted a plat containing the portion of Grand Avenue at the point the roadway crosses the dam at issue in VTS-DM-3942. The designated evidence further fails to prove that Miami County accepted that portion of Grand Avenue west of Betty Lane into the county highway system.
36. For the Hidden Hills plats to be valid they could only be recorded by the Miami County Recorder after being acknowledged by the grantor and being approved by the county plan commission. *Indiana Code § 36-7-3-3(c) & (d)*. The evidence indicates that the Hidden Hills plats are valid.
37. A dedication contained in a plat granting land to public "is considered a general warranty to the donee or grantee named on the plat, for the purposes intended by the donor or grantor." *Indiana Code § 36-7-3-3(b)*.
38. The roads identified in the Hidden Hills plats, as relevant here, Kim Road, El' Burn Drive, Harbour Pointe Drive, and Lakeview Drive were dedicated to public use. *Department Motion for Summary Judgment, Exhibit A* and *Miami County, Motion for Summary Judgment, Exhibit B*.
39. Upon acknowledgement by the grantor, approval by the Miami County Plan Commission and recording by the Miami County Recorder, the roads identified in the Hidden Hills plats "were granted to" Miami County. *Beaman v. Smith*, 685 N.E.2d 143, (Ind. Ct. App. 1997)
40. Kim Road, El' Burn Drive, Harbour Pointe Drive, and Lakeview Drive were accepted into the county highway system by Miami County, thereby requiring Miami County to maintain those roads for the benefit of the public for whom Miami County holds them in trust for the purpose for which they were dedicated in the Hidden Hills plats. *See Interstate Iron & Steel Co. v. East Chicago*, 118 N.E. 958, 959 (1918), as quoted in *Beaman*, "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.'" (emphasis as in *Beaman*)
41. The evidence designated by the parties undisputedly proves that Miami County holds jurisdiction and authority over the 60 foot wide right-of-way associated with Kim Road, El' Burn Drive, Harbour Pointe Drive and Lakeview Drive which traverse the dams associated


- with the NOVs, except VTS-DM-3942. *Miami County, Motion for Summary Judgment, Exhibit B (Response to Interrogatory #2), Claimants' (other than Miami County) Response to Miami County Motion for Summary Judgment, Exhibits 3 & 4 (Resolution No. 12-12-05).*
42. Within the context of county governance, a "highway" includes "highways, roads, streets, bridges, tunnels, and approaches." *Indiana Code § 8-17-1-1.2.*
 43. Kim Road, El' Burn Drive, Harbour Pointe Drive and Lakeview Drive are determined to be highways within the Miami County highway system, and as such "shall be kept in repair in the same manner as other roads are kept in repair..." by Miami County. *Indiana Code § 8-17-1-16.*
 44. It is Miami County, as the county executive, that may "construct, reconstruct, improve and maintain all public highways...in the county..." (*Indiana Code § 8-17-1-1*) and that may "reconstruct and improve any existing public highways or parts of those highways with road paving materials" and that may "lay out, alter, widen, vacate, straighten, or change a public highway...and may build all necessary bridges, culverts or approaches in the improvement of highways." *Indiana Code § 8-17-1-2.* It is further concluded that the 60 foot wide rights-of-way dedicated to the public in the Hidden Hills plats are under the authority and jurisdiction of Miami County. *Indiana Code § 8-17-1-3.*
 45. The authority granted to and obligation imposed upon Miami County through Indiana Code §§ 8-17-1-1, 2, 3, and 16 clearly establish Miami County's interest in and authority over the property upon which the dams are constructed for the reason that it must maintain roads on that property, whether atop the dams or by means of bridges over the valleys and ravines remaining after a breach and removal of the dams.
 46. Furthermore, by virtue of its adoption of Resolution # 12-12-05, Miami County expressly obtained a right and jurisdiction to the 60 foot wide rights-of-way as identified in the Hidden Hills plats. That Miami County may exercise those rights and that jurisdiction utilizing the top of the dams or by using the land in the valleys remaining subsequent to a breach a removal of the dams is not consequential to the determination that Miami County possesses a right to the property upon which the dams associated with NOVs, except VTS-DM-3942, are constructed.
 47. Furthermore, because Miami County possesses all jurisdiction and authority within the 60 foot wide right-of-ways identified within the Hidden Hills plats, any other identified owner

of the dams would arguably be prohibited from or potentially face liability for damaging or destroying existing roadways or impeding traffic as necessary to address the violations identified by the Department in the NOV's, except VTS-SM-3942. Such result would be incongruous.

Interlocutory Order on Competing Motions for Summary Judgment

48. It is concluded that Miami County possesses no right to and no interest in the property upon which Grand Avenue west of its intersection with Betty Lane is constructed and for this reason it is concluded that Miami County is not an owner of the dam associated with VTS-DM-3942 under Indiana Code § 14-27-7.5-4.
49. It is determined that Miami County is an "owner", as that term is defined at Indiana Code § 14-27-7.5-4, of the dams associated with VTS-DM-3939, VTS-DM-3940, VTS-DM-3941, VTS-DM-3943 and VTS-DM-3944.

Dated: December 14, 2016



Sandra L. Jensen
Administrative Law Judge
Natural Resources Commission
Indiana Government Center North
100 North Senate Avenue, Room N501
Indianapolis, Indiana 46204-2200
(317) 232-4229

A copy of the foregoing was sent to the following:

Patrick J. Roberts
Sharon L. Breitenbach
Roberts Law Firm
11 South Broadway
P.O. Box 1035
Peru, Indiana 46970-1035

Sean R. Wooding
Legal Counsel
Department of Natural Resources
Indiana Government Center South, Room W-295
402 West Washington Street
Indianapolis, Indiana 46204

Anthony R. Spahr
Attorney at Law
55 South Broadway
P.O. Box 145
Peru, Indiana 46970

cc: Department of Natural Resources, Division of Water: Lori Schnaith