

AUSTGEN KUIPER & ASSOCIATES, P.C. REVIEW

PROVIDING BUSINESS, LAND USE, LOCAL GOVERNMENT, AND ESTATE PLANNING SERVICES

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THE BRIEF CASE: A DIGEST OF RECENT NOTEWORTHY CASES*



LAKE COUNTY PLAN COMMISSION

In *Kozlowski v. Dordieski*, 849 N.E.2d 535 (Ind. 2006), the Lake County Plan commission approved Dordieski's application for a subdivision and a waiver of certain subdivision ordinance requirements in 1992. Kozlowski, a neighbor, filed a petition for writ of certiorari to challenge the Plan Commission's decision. Over the next eight years, Dordieski made various improvements to the real estate that complied with the commission's approval and waiver, but not with certain aspects of the subdivision ordinance. In 2001, Kozlowski filed a complaint for injunctive relief in a circuit court, seeking demolition of the improvements and an injunction against further work. The circuit court granted the Plan Commission summary judgment, stating that it did not have subject matter jurisdiction. The Indiana Supreme Court found that pursuant to Ind. Code § 33-28-1-2(a), the circuit court possessed subject matter jurisdiction over the action. However, the court ultimately found that the case was not about subject matter jurisdiction, but rather about who had filed first. Both cases had substantially the same parties, subject matter, and remedies sought. Therefore, the Court found that because the action in the superior court was filed first, the circuit court was right to refrain from exercising authority over the case.

OPEN DOOR LAW

In the recent case of *City of Gary v. McCrady*, 851 N.E.2d 359 (Ind. App. 2006), employee Robert McCrady was the Chief of Operations for the Gary Common Council. At a public meeting of the council, another person was appointed to McCrady's position by vote, and a letter was sent to McCrady to inform him of the decision. Alleging violations of the Open Door Law, McCrady filed suit against the City of Gary and the Gary Common Council. The trial court found that McCrady's termination violated the Open Door Law, because although a replacement was hired, McGrady had not been terminated. The purpose of the Open Door Law is to ensure that the business of the State of Indiana and its political subdivisions is conducted openly, so that the general public may be fully informed. For purposes of the Open Door Law, a final action is defined as "a vote by the governing body on any motion, proposal, resolution, rule, regulation, ordinance, or order." Final action must be taken at a meeting open to the public. In *McCrady*, the action taken by the Council at the meeting was considered a final action because it was a vote by the Council on a council member's motion to appoint a Chief of Operations and was taken at an open meeting. McCrady contended, however, that this vote did not terminate him, and that the action violated the Open Door Law because it was carried out through a letter, and not at the open meeting. The Council, on the other hand, asserted that McCrady had been terminated by the vote at the meeting, and that the subsequent letter simply formalized the termination. The Appellate Court overturned the decision of the Trial court and ruled that the Council did not violate the Open Door Law.

SIDEBAR

SETBACKS

In *Evansville Outdoor Adver., Inc. v. Princeton Plan Comm'n*, 849 N.E.2d 630 (Ind. Ct. App. 2006), Evansville Outdoor Advertising sought to construct a billboard in the city with a setback of 15 feet. After receiving approval from the Indiana Department of Transportation, its application for a conditional use permit was denied by the city based on a city ordinance requiring a setback of 65 feet. The advertising company filed a complaint for a declaratory judgment, and the trial court ordered the issuance of a conditional use permit. During the pendency of an earlier appeal, the advertising company had installed the billboard at a setback of 15 feet, and the court held that the parties had reasonably proceeded under the court's conclusion. The court therefore decided that it could address the advertising company's claims on their merits. The court held that city ordinance § 6.19(A)(5) provided a sufficient standard under which permit applications could be evaluated, and that the protection of visibility of commercial signs was a legitimate public interest under Ind. Code § 36-7-4-601(2) and Evansville Outdoor Advertising must comply with the 65 foot setback provision.

For more information you may contact one of the attorneys at Austgen Kuiper & Associates, P.C.

*Please note that all legal information contained in this newsletter is for information purposes only. It should not and cannot be used for answering specific legal questions. For assistance in answering such questions, please utilize the contact information located on page four (4).



DEMOCRACY IN ACTION NEW AND PENDING LEGISLATION

2006 INDIANA LEGISLATIVE WRAP-UP

As the year comes to an end and the Indiana House gears up for the upcoming 2007 session, here is a summary of some of the 2006 Indiana Legislature's most notable legislation:

MAJOR MOVES INITIATIVE

Lawmakers passed a sweeping compromise bill meant to privatize the Indiana Toll Road and a new extension of I-69, advancing Gov. Mitch Daniels' road-building initiative of the year. The bill authorized the governor to lease the Toll Road to a private firm for 75 years in exchange for a one-time payment of \$3.8 billion, which would be used for road construction.

PROPERTY TAX RELIEF

House Enrolled Act 1001 provides a two-year property tax break by giving owners of the State's 1.5 million homes \$100 million in additional homestead credits in 2006. In 2007, the bill increases the deduction off of a home's assessed valuation from \$35,000 to \$45,000, which will save homeowners about six percent (6%) off of their 2007 property tax bills.

FIREWORKS

Lengthy House Bill 1099 included a provision legalizing fireworks for those 18 and older, setting the time fireworks can be set off from 9 a.m. to 11 p.m., and putting a five percent (5%) tax on sales to pay for firefighter training and disaster relief. No longer will those who buy fireworks have to sign a form saying they'll set them off out of state.

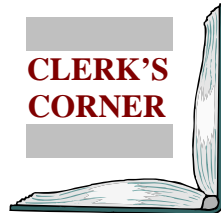
TELECOMMUNICATIONS

House Bill 1279 deregulates local telephone service and lets phone companies set their own rates for basic phone service. The bill shifts control of cable television from local governments to the state.

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CLERK'S CORNER

INDIANA SUPREME COURT & 7th CIRCUIT ON INSURANCE



The Indiana Supreme Court and the Seventh Circuit Court of Appeals have both recently held that, in Indiana, when the policy holder ("insured") of an insurance contract files a claim, s/he must comply with contract provision(s) giving the insurance company ("insurer") the right to take a sworn, signed statement, or an "examination under oath" ("EUO"). In *Morris v. Economy Fire and Cas. Co.*, 848 N.E.2d 663 (Ind. 2006) and *Employers Mut. Cas. Co. v. Skoutaris*, 453 F.3d 915 (7th Cir. 2006), both courts held that when an insured fails to submit to an EUO, the insurer is relieved of all liability, and can deny the claim in full. *Morris, Skoutaris*. The failure to submit to an EUO is a material breach of the insurance contract. *Skoutaris* at 924. Unlike other breaches in an insurance contract that might require the insurer to prove that the insured's actions somehow put the insurer at a disadvantage, if an insured fails to submit to an EUO, the insurer can deny the claim on that breach alone. *Id.*

Both courts found that there was a difference between an insurer's right to take the insured's EUO and the general contract provision(s) that requires an insured to cooperate with the insurer during the investigation of the claim. *Morris* at 666; *Skoutaris* at 924. Indiana law is settled that, if an insured breaches such a "cooperation clause," the insurer must show that it was put at a disadvantage by the breach. *Morris* at 666, citing *Miller v. Dilts*, 463 N.E.2d 257, 265 (Ind. 1984). The insurer's disadvantage is called "prejudice," and prior Indiana decisions have found that prejudice is necessary before an insurer can deny a claim because of a breach of a cooperation clause. *Miller* at 265. However, the insurer's right to take an EUO has been found to be separate and distinct from a cooperation clause. *Skoutaris* at 924. Thus, in the event that an insured breaches the EUO clause of an insurance contract, a showing of prejudice to the insurer is not required by Indiana courts. *Id.*

For more information you may contact one of the attorneys at Austgen Kuiper & Associates, P.C.

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TELECOMMUNICATIONS cont.

Thus, state regulators will no longer have direct supervision over the prices and quality of local phone service. While consumer groups fear phone bills will rise while customer service goes down, phone companies say competition from other communications providers will keep prices in check.

For more information on these regulations or to determine how your business might be affected, contact one of the attorneys at Austgen Kuiper & Associates, P.C.



DIRECT EXAMINATION: AUSTGEN KUIPER & ASSOCIATES, P.C. EMPLOYEE SPOTLIGHT

As a firm, we constantly strive to enhance the relationships with current clients and to develop new relationships. To that end, we would like to provide you with some background and personal information regarding individuals in our Law Firm who work to provide you with excellent legal services. This edition will feature Cassandra “Cassie” Jurgersen. Cassie was born in Clinton, Iowa, but has lived all over the country as her father is in the military. Cassie now resides in Valparaiso while she attends law school. Cassie received her Bachelor’s Degree in Social Justice and Social Science from Ashford University.

Cassie began working for the Firm in March of 2006. Cassie is one of the Firm’s Law Clerks, and she performs various research and drafting tasks for all of the attorneys. Cassie also helps in the filing of court documents and the delivery of client correspondence. When asked what she likes most about her job, Cassie says “I love that I get to apply what I am learning through my studies. It is one thing to learn about the law in a lecture hall, it is a whole different experience to apply my education everyday here in the office.”

When she does have free time from the office and her law school studies, Cassie enjoys spending time with her fiancé, Jay, and their dog, Ollie, as well as coaching youth softball.

THE FIRM

AUSTGEN KUIPER & ASSOCIATES, P.C. is a progressive and growing Law Firm currently comprised of five (5) attorneys and is located in Crown Point, Indiana. Austgen Kuiper & Associates, P.C. was formed in 1993, but attorneys in the Law Firm have been practicing in this area for more than 25 years. The Firm represents private and municipal clients in Indiana and Illinois. The Firm is a Business law firm which provides legal representation in the areas of Municipal and Government Law, Real Estate/Land Use, Estate Planning/Elder Law, Probate, Corporate/Business Law, Family Law, Criminal Law, Bankruptcy, and Collections. The following is a listing of representative clients: Town of Cedar Lake, Indiana (Civil Town, Board of Zoning Appeals, Plan Commission, Police Commission, Redevelopment and Sewer Utility); Hanover Township, Lake County, Indiana; Town of Schererville, Indiana (Civil Town, Redevelopment, Sanitary & Water Utilities); Town of St. John, Indiana (Civil Town, Plan Commission, Board of Zoning Appeals, Parks and Recreation Board and Police Commission); Meijer, Inc.; Calumet Breweries, Inc.; McDonald’s Corporation; Village of Beecher, Illinois; Vulcan Materials Company; Saco Industries, Inc.; Hallmark Construction; Superior Environmental Remediation, Inc.; Van Prooyen Builders, Inc.; Superior Petroleum Products, Inc.; Standard Bank; Centier Bank; Discount Tire, Inc.; Hallmark Properties, LLC; Tri-Creek Lumber, LLC; Apple Valley Utilities, Inc.; Crown Rentals, Inc.; and Lamar Advertising Company.

NEWS & EVENTS

Attorney **Joseph Svetanoff** attended the Appellate Skills Institute seminar in Indianapolis, on November 2, 2006. The seminar focused on appellate advocacy and practice methods, and was led by several prominent appellate attorneys and judges from around the country. Attorney Svetanoff also attended an Evidence Workshop on November 9, 2006. The workshop focused on evidentiary applications and techniques. The Firm would also like to congratulate Attorney Svetanoff for his recent nomination and placement onto the Board of Managers for the Cedar Lake Boys & Girls Club, in October 2006.

Law Clerk **Eric Stoegbauer** competed in the 18th annual Luther M. Swygert Memorial Moot Court Competition, at the Valparaiso University School of Law. The competition began on October 16, 2006, with the final round on November 1, 2006. Presiding over the final were Judges Bauer and Kanne from the 7th Circuit, Judge Wilson from the 11th Circuit, and Judge Ericksen from the Minnesota District Court in Minneapolis. Eric and his teammate won the competition. Eric will next compete in the Luke C. Moore Invitational at Howard University School of Law in Washington, D.C., in March 2007.

CLOSING STATEMENT: FISCAL PLAN MUST BE CLEAR AND EXPLAIN FUNDING

On October 30, 2006, the Lake County Superior Court, sitting in Gary, denied an annexation of land to Liberty Park in Crown Point, Indiana. The annexation had been proposed by ordinance No. 2004-11-38. The remonstrators opposed to the annexation claimed that the city’s fiscal plan for the annexation failed to meet the statutory requirements of Ind. Code §36-4-3-13(d)(2). At trial, the remonstrator’s claimed that the fiscal plan showed a deficit, but did not provide a plan or explain how the deficit would be funded. The Indiana Supreme Court stated that Ind. Code §36-4-3-13(d)(2) has three (3) important purposes: 1) to permit landowners to make an intelligent decision about annexation; 2) to ensure that judicial review and remonstrance to the annexation is realistic; and 3) to protect landowners’ rights to force the annexing city to provide the services they have promised. *City of Hobart, IN v. Chidester*, 596 NE2d 1374, 1377-78 (Ind. 1992). The Court specified that “more than vague promises [would be] needed for a court to test a city’s ability to provide...services....” In response, Crown Point argued that the city’s fiscal plan proposed that the five (5) year cumulative deficit would be financed from the General Fund, supported by the city’s tax levy. In response, the remonstrator’s noted that the city’s funding proposal would increase Liberty Park property owners’ tax by an average of about \$374.22 per landowner. The Superior Court found that Crown Point’s fiscal plan was too vague according to the statutory test in *Chidester*, because it did not explain how specific and detailed expenses regarding the five (5) year cumulative deficit would be funded. At the time of this publication, press publications report the intentions of the City of Crown Point to appeal this decision.

(RETURN ADDRESS LOGO FROM ENVELOPE)

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*licensed in Indiana and Illinois.