Indiana Farm Bureau®

Landowner Toolkit

Eminent Domain Basics

Created by Alan S. Townsend, Bose McKinny & Evans, LLP

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Indiana Farm Bureau

Eminent Domain Basics

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Alan S. Townsend

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Alan Townsend

- Alan is a partner in the Litigation Group at Bose McKinney & Evans LLP. He has served as counsel for many municipalities to work on eminent domain projects. Alan also represents landowners on eminent domain projects adverse to the State of Indiana.

- Alan graduated from Purdue University in 1987 with a degree in Agricultural Economics. Alan also graduated from the Indiana University School of Law (Bloomington) in 1992. He joined Bose McKinney & Evans in May of 1992 and has practiced there ever since.

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Condemnation = Eminent Domain

Black's Law Dictionary:

Eminent domain is the power to take private property for public use by the state, municipalities, or corporations authorized to exercise functions of public character.



I-69 Indianapolis to Evansville



Indianapolis-Marion County Justice Center

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Topics

- Public Use
- Who has the Power to use Eminent Domain?
- Good Faith Offer
- Condemnation Complaint
- "Take" Hearing
- Court Appointed Appraisers
- Getting to Final Damages
- Project Timing
- Inverse Condemnation

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Public Use

- 5th Amendment
  - *Nor shall private property be taken for public use, without just compensation*
  - *Kelo v. City of New London, Conn.*, 545 U.S. 469 (2005)
    - I.C. § 32-24-4.5 (2006)



Little Pink House Movie

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Public Use

- *Wymberley Sanitary Works v. Batliner*, 904 N.E.2d 326 (Ind. App. 2009)
  - The Court of Appeals held that Wymberley Sanitary Works' sewer-easement takings were lawful, served a public purpose, were not arbitrary or in bad faith, and that the Landowners were not entitled to attorney fees.
- *701 Niles, LLC v. AEP*, 191 N.E.3d 931 (Ind. App. 2022)
  - The Court of Appeals held that AEP's condemnation could not be used to secretly secure a private easement for the University of Notre Dame—because 701 Niles had no notice of the private use, the University's line constituted an unconstitutional taking separate from AEP's public project, and injunctive relief was required.

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Who has the Power to use Eminent Domain?

- Public Utilities and other Corporations, I.C. § 32-24-4-1
- Certain Townships, I.C. § 36-10-7-6
- Gas Distribution, I.C. § 32-24-5-2
- Library Board, I.C. § 32-24-7-2
- County Executive, I.C. § 8-20-3-1
- School Corporations, I.C. § 20-26-5-4(a)(4)
- State Educational Institutions, I.C. § 21-34-3-4
- City Works Board, I.C. § 36-9-6-4
- Public Utilities, I.C. § 8-1-8-1
- Airport Authority, I.C. § 8-22-4-4
- Conservancy Districts, I.C. § 14-33-6-13



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Who has the Power to Use Eminent Domain?

- Ports, I.C. § 8-10-1-11
- Municipal Utilities, I.C. § 8-1.5-2-15
- Reuse Authority, I.C. § 36-7-30-16
- Hospital Governing Board, I.C. § 16-22-3-25
- County Capital Improvement Board, I.C. § 36-10-9-6
- State of Indiana (Buildings), I.C. § 32-24-3-1
- State of Indiana (Roads), I.C. § 8-23-7-2
- Municipalities, I.C. § 36-1-4-5; Park Boards under municipality statutes, I.C. § 36-10-3-11.

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Who has the Power to Use Eminent Domain?

- Pipeline Company for Carbon Dioxide Transmission
  - I.C. § 14-39-1-7
    - gives carbon-dioxide pipeline companies and carbon-sequestration pilot projects the authority to use eminent domain when they cannot reach agreements with landowners. This allows them to obtain the land rights needed to build, operate, access, and monitor CO_2 pipelines or underground storage sites.

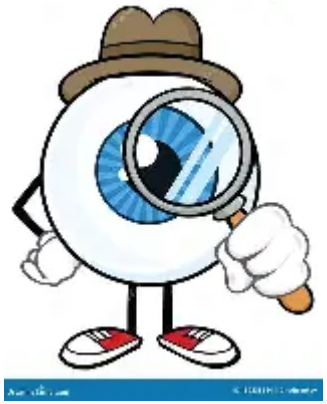
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Good Faith Offer

- Right to Enter Land
  - Examine and Survey the Property to be Acquired
  - I.C. § 32-24-1-3(b)



- Utility – 14 Day Notice or Consent
  - Damages & Potential Attorneys Fees
  - I.C. § 32-24-1-3(g)

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Good Faith Offer

- Effort to Purchase
  - I.C. § 32-24-1-3(b)(2)



- Must Include:
  - Establish proposed purchase price
  - Provide owner with appraisal or other evidence used to establish proposed price
  - Conduct good faith negotiations
  - Description of property to be acquired

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Good Faith Offer

Uniform Offer – I.C. § 32-24-1-5

- Hand delivery, certified mail, or publication
- 30 days before lawsuit

Independent Appraisal = Good Faith

- *Wagler v. West Boggs Sewer District*

Agreement Not Required

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Uniform Offer

UNIFORM EASEMENT ACQUISITION OFFER

The Town of Whitestown, Indiana and Whitestown Municipal Utilities (collectively, "Whitestown") is authorized by Indiana law to obtain your property or an easement across your property for certain public purposes. Whitestown needs an easement across your property for a sewer system project that will allow Whitestown to efficiently and effectively provide utility service, and needs to take the easement enclosed with this document.

It is our opinion that the fair market value of and/or any damages for the easement Whitestown wants to acquire from you is $7,175, and, therefore, Whitestown offers you $7,175 for the above described easement. You have thirty (30) days from this date to accept or reject this offer. If you accept this offer, you may expect payment in full within ninety (90) days after signing the documents accepting this offer and executing the easement, and provided there are no difficulties in clearing liens or other problems with title to land. Possession will be required thirty (30) days after you have received your payment in full.

HERE IS A BRIEF SUMMARY OF YOUR OPTIONS AND LEGALLY PROTECTED RIGHTS:

1. By law, Whitestown is required to make a good faith effort to purchase an easement across your property.

2. You do not have to accept this offer and Whitestown is not required to agree to your demands.

3. However, if you do not accept this offer, and we cannot come to an agreement on the acquisition of an easement, Whitestown has the right to file suit to condemn and acquire the easement in the county in which the property is located.

4. You have the right to seek advice of an attorney, real estate appraiser, or any other person of your choice on this matter.

5. You may object to the public purpose and necessity of this project.

6. If Whitestown files a suit to condemn and acquire an easement and the court grants its request to condemn, the court will then appoint three appraisers who will make an independent appraisal of the easement to be acquired.

7. If we both agree with the court appraisers' report, then the matter is settled. However, if either of us disagrees with the appraisers' report to the court, either of us has the right to ask for a trial to decide what should be paid to you for the easement condemned.

8. If the court appraisers' report is not accepted by either of us, then Whitestown has the legal option of depositing the amount of the court appraisers' evaluation with the court. And if such a deposit is made with the court, Whitestown is legally entitled to immediate

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Uniform Offer

possession of the easement. You may, subject to the approval of the court, make withdrawals from the amount deposited with the court. Your withdrawal will in no way affect the proceedings of the case in court, except that, if the final judgment awarded you is less than the withdrawal you have made from the amount deposited, you will be required to pay back to the court the amount of the withdrawal in excess of the amount of the final judgment.

9. The trial will decide the full amount of damages you are to receive. Both of us will be entitled to present legal evidence supporting our opinions of the fair market value of the property or easement. The court's decision may be more or less than this offer. You may employ, at your cost, appraisers and attorneys to represent you at this time or at any time during the course of the proceeding described in this notice.

10. If you have any questions concerning this matter, you may contact us at:

Whitestown Municipal Utilities
6210 Veterans Drive
Whitestown, IN 46075
Attn: Danny Powers, Public Works Director
(317) 732-4328

This offer was made to Hockett Real Estate, LP on the 11th day of October, 2019.

_____
Danny Powers, Public Works Director
Town of Whitestown, Indiana

If you decide to accept the offer of $7,175 made by Whitestown sign your name below and mail this form to the address indicated above. An additional copy of this offer has been provided for your file.

IF THIS OFFER IS OVER FIVE THOUSAND DOLLARS ($5,000), YOU MAY ELECT UNDER IC 32-24-4-4 TO ACCEPT PAYMENT IN A LUMP SUM PAYMENT OR IN ANNUAL PAYMENTS FOR A PERIOD NOT TO EXCEED TWENTY (20) YEARS WITH INTEREST. IF YOU ELECT ANNUAL PAYMENTS, THEN POSSESSION WILL BE REQUIRED THIRTY (30) DAYS AFTER YOU HAVE RECEIVED YOUR FIRST ANNUAL PAYMENT.

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Uniform Offer

ACCEPTANCE OF OFFER

I (We),_____, _____, and _____, landowner(s) of the above-described property or interest in property, hereby accept the offer of $7,175 made by Whitestown on this ____ day of _____, 2019. Please check one of the following if the offer is in excess of Five Thousand Dollars ($5,000):

- ❑ I (We) elect to accept payment in a lump sum.
- ❑ I (We) elect to accept payment in annual payments for a period of _____ years with interest as determined under I.C. § 32-24-4-4.

_____

_____

_____

NOTARY'S CERTIFICATE

STATE OF _____)
) SS:
COUNTY OF _____)

Subscribed and sworn to before me this _____ day of _____, 2019.

My Commission Expires:

_____

_____
(Signature)

County of Residence:

_____
(Printed) NOTARY PUBLIC

_____

3729515

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Liens

PARTIAL RELEASE OF MORTGAGE

FOR VALUE RECEIVED, the undersigned, for and on behalf of _____, hereby agrees and declares that the mortgage (the "Mortgage") from _____ to _____ **recorded in the Office of the Recorder of** _____ **County, Indiana on** **as Instrument No.** is hereby released and satisfied solely as to the real estate described in the attached Exhibit A, incorporated herein by reference (the "Released Real Estate").

_____ expressly acknowledges and agrees that (i) this Partial Release of Mortgage shall in no manner discharge the lien of the Mortgage and such other listed documents from any of the real estate described therein except the Released Real Estate; and (ii) the real estate, other than the Released Real Estate, described in the Mortgage shall remain pursuant to the terms of the Mortgage and such other documents as security for the payment of the indebtedness secured thereby and for the full performance of all covenants and obligations provided therein.

IN WITNESS WHEREOF, _____, has caused this Partial Release of Mortgage to be executed this _____ day of _____, 2013.

_____

By:_____
Printed:
Title: _____

STATE OF _____)
) SS:
COUNTY OF _____)

Before me, a Notary Public in and for said County and State, personally appeared _____, by me known and by me known to be a _____ of _____, who acknowledged the execution of the foregoing "Partial Release of Mortgage" for and on behalf of .

WITNESS my hand and Notarial Seal this ____ day of _____, 20___.

_____
Notary Public

Printed:_____

My Commission Expires:
_____

My County of Residence:
_____

This instrument was prepared by, and after recording return to: _____

_____

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Don't Accept Offer

- Starts 6 Year Clock for Utility to File Suit
  - Non-utility – 2-year clock, I.C. § 32-24-1-3
  - After – 3-year moratorium, I.C. § 32-24-1-5.5



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Don’t Accept Offer



Who to Sue?

The known owners, claimants, and holders of liens on the property shall be named as defendants

I.C. § 32-24-1-4



Title Search

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Title Search

MTC
MERIDIAN
TITLE CORPORATION
YOUR PEACE OF MIND

SEARCH REPORT

Search Report Prepared For:
Department of Planning and Development
16 S 10th St, Suite 150
Noblesville, IN 46060

Property Address:	**161 Wellington Parkway, Noblesville, IN 46060**
County:	Hamilton
File Number:	20-31871
Customer Reference No.:	

SEARCH PARAMETERS

A Search of the records of the Office of the Recorder of Hamilton County, Indiana was performed between the dates of August 4, 1970 and August 4, 2020 at 8:00 am.

A Judgment and Bankruptcy Search was made against the following:

James M. Rogers
James M. Rogers Revocable Trust dated September 21, 1992

TITLE VESTING

The Estate or Interest in the Land described or referred to in this Report is Fee Simple

James M. Rogers, as Trustee under the James M. Rogers Revocable Trust dated September 21, 1992

LEGAL DESCRIPTION

The land referred to in this Search Report is located in the County of Hamilton, State of Indiana described as follows:

Lot 19 in Wellington Northeast, Section One, an Addition to the City of Noblesville, in Hamilton County, Indiana as per plat thereof, recorded in Plat Book 8, pages 88-90, in the Office of the Recorder of Hamilton County, Indiana.

TAXES AND SEARCH RESULTS

1. Taxes for the year 2020 payable in 2021 are a lien not yet due and payable.

   Taxes for the year 2019 payable in 2020 are as follows:

   Key No. 11-11-07-03-03-023.000
   State Id No. 29-11-07-303-023.000-013

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Title Search

1st installment due May 11, 2020 $3,391.31 - Paid
2nd installment due Nov. 10, 2020 $3,391.31 - Unpaid

Assessed Valuations: 2019/2020

Land $49,200.00
Improvements $225,400.00
Exemption (None) $0.00

Net Valuations $274,600.00

NOTE FOR INFORMATION: Tax information supra is limited to the LAST BILLED information reflected in the computer input in the Treasurer's office and does not necessarily reflect the most current information as to applicable penalties, deductions, exemptions, assessments and payments. Also, it does not reflect possible additional taxes and civil penalties as a result of a determination by County officials that a deduction was improperly granted. A check with the Treasurer's or Auditor's Office should be made to determine the exact status and amount of taxes due, if any.

2. Possible Rights of Way for legal drains and ditches, feeders and laterals, if any, and all rights therein.

3. Minerals or mineral rights or any other subsurface substances (including, without limitation, oil, gas and coal), and all rights incident thereto, now or previously leased, granted, excepted or reserved.

4. Subject to parties in possession by virtue of unrecorded leases.

5. Building lines and easements as evidenced in the recorded Plat of Wellington Northeast, Section One recorded May 30, 1980 in Plat Book 8, page 88 in the Office of the Recorder of Hamilton County, Indiana.

6. Restrictions filed with Notes on Plat recorded May 30, 1980 in Book 8, Page 88 and amended by Resolution of Wellington Northeast Neighborhood Association to Amend Wellington Northeast Neighborhood Association Restrictive Covenants recorded July 18, 2001 in Instrument No. 200100044099, all in the Office of the Recorder of Hamilton County, Indiana.

7. Mortgage in the amount of $175,000.00 from Kent W. House and Juanita S. House, Husband and Wife to Rober L. Mitchell dated January 20, 2003 and recorded February 12, 2003 in Instrument No. 200300015036 in the Office of the Recorder of Hamilton County, Indiana.

8. DEFECTS, LIENS, ENCUMBRANCES AND ANY OTHER MATTERS AFFECTING TITLE, WHICH WOULD BE DISCLOSED BY A SEARCH OF THE PUBLIC RECORDS, PRIOR TO THE ONLINE EFFECTIVE DATE.

   NOTE: DUE TO OFFICE CLOSURES RELATED TO COVID-19, WE MAY BE TEMPORARILY UNABLE TO SEARCH THE PUBLIC RECORDS PRIOR TO THE ONLINE EFFECTIVE DATE.

   VIEW YOUR VESTING DEED AND SCHEDULE B DOCUMENTS BY FOLLOWING THIS LINK

LIMITATION OF LIABILITY AND SEARCH

The liability of this Company shall not exceed $1,000.00 for any loss covered hereunder, including attorney's fees and court costs.

This information is not an abstract or opinion of title, nor is it a commitment to insure title. This information is furnished for reference purposes only and should not be relied upon for title purposes when acquiring or conveying an interest in the land. It may not be relied upon as a commitment to insure title to the land identified herein. If title insurance coverage is desired, application should be made for a title insurance commitment in a specified amount and identifying the proposed insured.

MERIDIAN TITLE CORPORATION

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Filing Compalint

- Single Project with Multiple Properties in Same County
  - May file in single case or separately
  - I.C. § 32-24-1-4(c)
- Specific Description of Property to be Acquired
- Temporary Easement Considerations

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Take Hearing

- Notice to Appear
- Objections
  - 30-60 days to file
  - Limited

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Take Hearing

- Example Objections:
  - Not Public Purpose
  - Not “Necessary”
  - Take a Different Route
  - No Good Faith Offer
  - Didn’t Follow Procedures



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Take Hearing

- Summary Proceeding
- Explain Need
- Project Drawings
- Appraisal Report
- Offer Letter & Efforts

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Court Appointed Appraisers

Order of Appropriation

- I.C. § 32-24-1-8(e)

Appoint 3 Appraisers

- Indiana residents
- 1 disinterested freeholder of county
- 2 disinterested licensed appraisers
  - 1 must live within 50 miles of property
- I.C. § 32-24-1-9

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Court Appointed Appraisers

- Appraise Damages
  - Fair Market Value
  - Damage to “Residue”
  - Any other damages
  - I.C. § 32-24-1-9
- File Reports
- Fees

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Appraisers Report

45 Days to File Exceptions

I.C. § 32-24-1-11

No Exceptions = Done

Any Party Files Exceptions = Damages Phase

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Damages Phase

- Longer Process
- Discovery
- Expert Witnesses
- Mediation
- Jury Trial
- Offer to Settle
  - Up to $25,000
  - I.C. § 32-24-1-14

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Project Timing

- After Court Appraiser's Report
- Deposit Assessed Damages with Court
  - May take possession
  - Certification Process with Auditor & Recorder
  - Property owner can withdraw funds

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Project Timing

- Appeal Does not Delay
- Funding Issues

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Inverse Condemnation

- Example: Utility line found to be outside of easement or right of way

- Inverse Condemnation
  - Damages & Attorneys Fees

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Inverse Condemnation

- Limits
  - *Sagarin v. Bloomington* (2010)
    - Property owner at time of intrusion
  - *Murray v. Lawrenceburg* (2010)
    - 6-year statute of limitation

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Questions?

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