

To Break or Not to Break

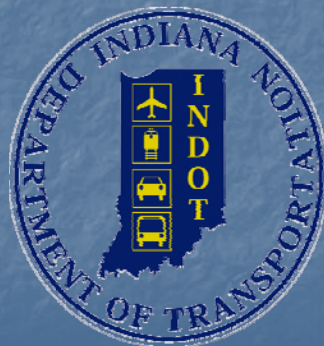
Legal Update: Compensation for Loss of Access

95th Annual Purdue Road School

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Access management is the control and regulation of spacing and design features of transportation systems.



- Median Strips
- One way streets
- Permit denial
- Reduction of # access point
- Change width of access point
- Change location of access point
- Re-route/divert traffic
- Use/install traffic control devices
- Restrict turns
- Install guardrail/curb
- Restrict size, weight, speed on street
- Construction of elevated highway past a property
- Replace access on highway with access on a local road
- Change of grade

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Benefits of Access Management



- Roadway safety.

"This court takes judicial notice of the ever increasing problems of traffic control with which a thriving metropolitan area is confronted. The creation of such facilities such as limited access highways, one-way streets, express thoroughfares, and other methods of construction such as that involved in the present case, is to be encouraged in the interest of traffic control and regulation to the end that the general welfare and safety of the public may best be served." State v. Cherris, 1972.

- Economic
- Environmental
- System preservation
- Traffic operations
- Aesthetic
- Others: minimize project delay (take steps to minimize it) and opportunity to help educate the public--Don't just say "Loss of access is not compensable." Tell them why: "Society has made policy choices—safety/progress/development and minimize monetary burdens on governments."

What Happens If You Don't Manage Access?



Interested in Further Reading?

- More information on access management available at:

<http://www.in.gov/indot/5614.htm>

Indiana Cases

Analysis: Is it a Taking of Property Interest?
Police Power v. Ingress/Egress



- No--Police Power Theory: Agencies win access management cases when the decision is based on police powers. Exercise of police power to regulate traffic flow is not a taking. The theory is that property owners are not entitled to free flow of traffic in front of their property. Rationale: Everyone suffers and DOT's could never build highways.
- Yes--Ingress/Egress: Property owners may be owed compensation if agencies substantially or materially interfere with ingress/egress of their property. Example: Although most vehicles could still reach a business, compensation was due when supply trucks were effectively cut off from delivering goods.



Police Powers

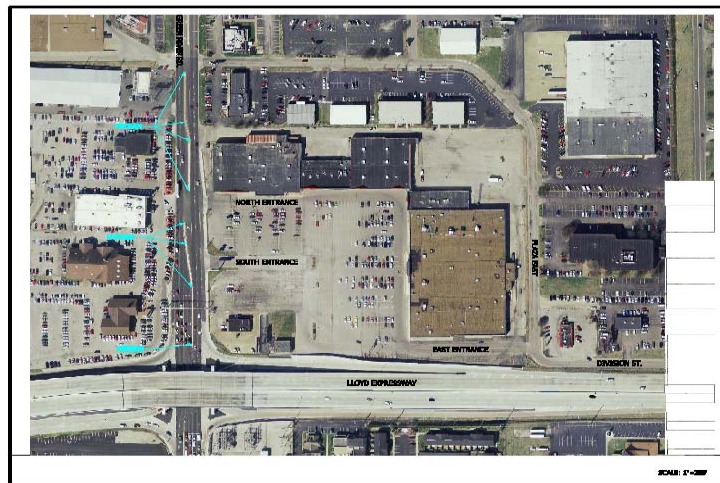
State v. Kimco (You don't want to miss this!)

- 3.2M judgment against the State in 2000. Combination of 3 issues = liability: (1) Median; (2) Reconfigured shopping center entrances; and (3) White line (acceleration lane) on the pavement.
- Indiana Court of Appeals Upholds Trial Court in 2007
- Indiana Supreme Rules in Favor of State Just Last Week

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Kimco Aerial View



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Kimco

North Entrance facing west (Note break in median)



Kimco

North Entrance facing Northeast (Break in median.)



Kimco
North Entrance facing East (Another view)

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Kimco
No Left Turn Into Kimco's South Entrance from Green River Road

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Kimco

South Entrance Facing South (Note White Divider Strip)



Kimco

South Entrance facing North

Police Powers



- State v. Ensley (1960)
- Construction of median strip on Keystone Ave. south of 62nd Street blocked northbound Keystone traffic from turning directly into the recreation center business. Instead, northbound patrons had to continue to 62nd St., make a left turn and drive west approximately ½ block and enter the business through another entrance.

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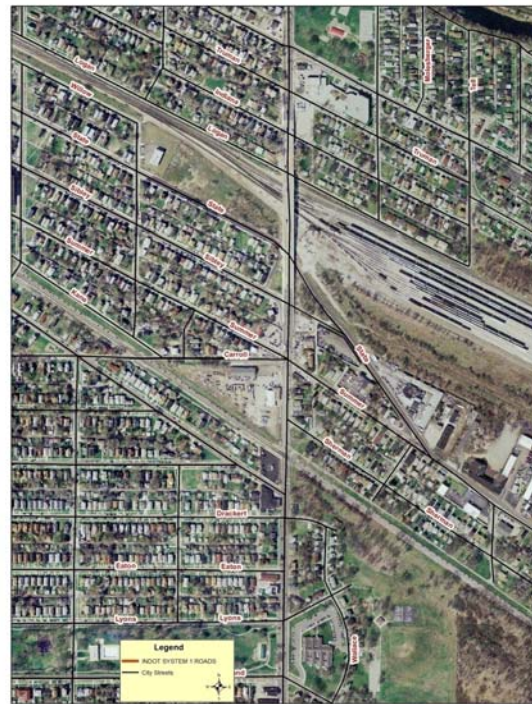
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Police Powers cont.



- Papp v. City of Hammond (1967). Elements of an ingress/egress claim, but
- General public interest in road improvement outweighs temporary inconvenience to gas station (intermittent impassibility of road for over 1-year.)

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Police Powers cont.



- State v. Chervis (1972)
- Construction of median strip required landowner to travel a circuitous route of 1 and ½ miles to reach property.



Police Powers cont.



- Jenkins v. Madison Co. (1998)
- Loss of 17% of total road frontage was not a substantial and material interference with ingress/egress.

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Police Powers cont.



- Bussing v. INDOT (2002)
- Median eliminates left hand turns into apartment complex. Apartments could be accessed by alternate routes, including through a nearby protected U turn and through circuitious route through city streets.

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Police Powers cont.



- Old Romney Development v. INDOT and Tippecanoe Co. (2004)
- 231/300 South Intersection Closed. Landowner never had direct access to 231. Access became more circuitous via 3.2 mile path.

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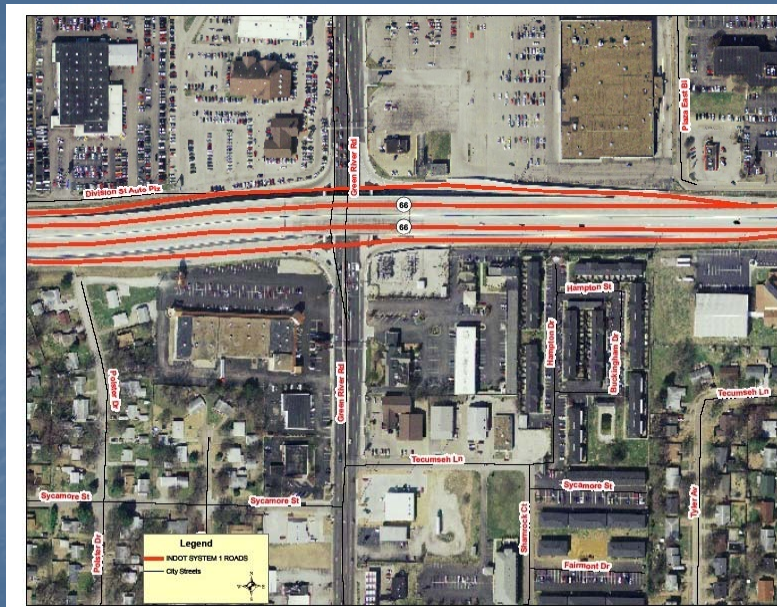
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Police Powers cont.



- State v. Dunn (2008)
- Installation of median strip eliminated right-hand turns onto a service road leading to a hotel was not compensable.

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Police Powers?



- Biddle v. BAA Indianapolis (2007)
- Airplane noise
- Loss of All Productive Use?
- May not apply to road cases, generally.
But, what about construction at night?

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Ingress/Egress State May Owe \$\$



- State v. Geiger (1964)
- Compensation due where construction of an expressway cut off ingress/egress to and from a highway abutting one side of the landowner's property.

Ingress/Egress cont.



- State v. Toliver (1965)
- Bridge load (Completely cut off steel-related business.)

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Ingress/Egress cont.



- State v. Hastings (1965)
- Landowner's rights to ingress/egress completely severed where State bulldozed entrances which had been constructed by landowners and erected a fence thereby forcing landowner's to construct a new access route to a business.

Ingress/Egress cont.



- State v. Diamond Lanes (1968)
- Primary access point for customers of bowling alley completely eliminated and customers compelled to travel circuitous route to other entrances along limited access route.

Other Situations State May Owe \$\$



Watch the farm implements!

Other States



- Cases are generally not useful because decisions are based on state law.
- But, our courts may look to other states for guidance, especially if Indiana has never addressed a legal issue.

Practical Tips



- Think critically and creatively e.g., give a hard look at alternative designs (Kimco)
- Put Yourself in Their Shoes
- Ask questions e.g., If the plans call for taking a relatively small amount of property, carefully review designs for modifications to eliminate the taking.
- Keenly observe surroundings. (When walking the job site or affected area always be on your best game like a surgeon in the operating room, a batter waiting to receive the pitch etc.) (Farm implements)
- Never assume
- Always be professional
- Develop a sense of curiosity
- Be extra careful with public announcements. (Don't announce something unless you mean it!)
- Anticipate issues and do your homework. If you think a local road provides reasonable access, have you completely analyzed the situation?
- Are there any local, state restrictions?
- Can the suppliers/customers reach the property e.g. will the road support truck loads? (Toliver)
- Meetings—think/watch invite list. Someone who shouldn't attend? How do you throw them out?
- Email—don't want it to be Exhibit A in the lawsuit. Not privileged. Never put in email (or any other writing something you wouldn't want to appear on the front page of paper. Also, no forwarding attorney emails.

If Problems



- Immediately contact your management
- Work with the legal department, land acquisition and others
- Present solutions, not create more problems
- Consider building a model to support your case (mainly used in litigation)

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Questions?



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