

VOLUME 49 ISSUE 1

HOOSIER SURVEYOR

October 2022

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President's Message

Eric Meeks, PS, ISPLS President

Another summer nearly in the books, another long Holiday weekend to celebrate, and yet still much more to come.

I had the opportunity to volunteer some time and help at the Inaugural Vincennes University Surveying Camp, as well as many others who work in our great profession...what an incredible program event. About 20 high school students attended the 3 day camp, lived on campus, ate at the dining hall, attended classes, and for a brief minute were on their way to a degree in our great profession. We may have gained a few and we may have lost a few, but not enough can be said to put into perspective the value held in this workforce development approach to building in a new generation. To Jessica Hess and all those who contributed to the success, Thank You.

At our June Board of Director's meeting, the majority of the agenda was spent with a fiscally sound budget in mind. With a little rocking back and forth, the Board emerged with just that, a budget in the black with much consideration given to funding workforce development goals. With the 2020 Annual Convention being driven to a virtual platform with Covid concerns at peak, ISPLS gained a small "windfall" in savings due to the allowance in relief of the venue contract. This sum was separated from the overall budget and earmarked specifically to workforce development. The workforce development committee is taking on some action items to purchase and put in place materials and infrastructure frequently used in outreach events that to this point which have been made available from members, who spend generous amounts of their time and effort to accommodate. As ISPLS moves forward, continually funding the workforce development goals will need much consideration to furnish and preserve funds available to the mission. Also worth mentioning, there is and will be a continual need for volunteers to staff outreach events all over Indiana. If interested in volunteering, please check

out the ISPLS newsletter or contact Rodney Kelly to ask about how you can help.

In a year of firsts, we have also seen the rollout of the inaugural ISPLS Podcast. Listen in and get caught up with updates, news, and general happenings in the Professional Surveying Community. Board of Director's meetings recaps are planned and as other opportunities come up, digests will be added to help relay.

With the year's end and cooler weather approaching, it's hard not to appreciate reports of fun, successful ISPLS Chapter events and social gatherings. Fall brings in it's whole new set of enjoyment with many opportunities. Attend an event, fundraiser, and / or outing and be a part of the lively happenings!



New Prism Pole System Provides Significant Time Savings

Leica Geosystems



New Prism Pole System Provides Significant Time Savings

An innovative prism pole system with tilt compensation, automatic pole height readings and unique target identification takes total station surveying to the next level.

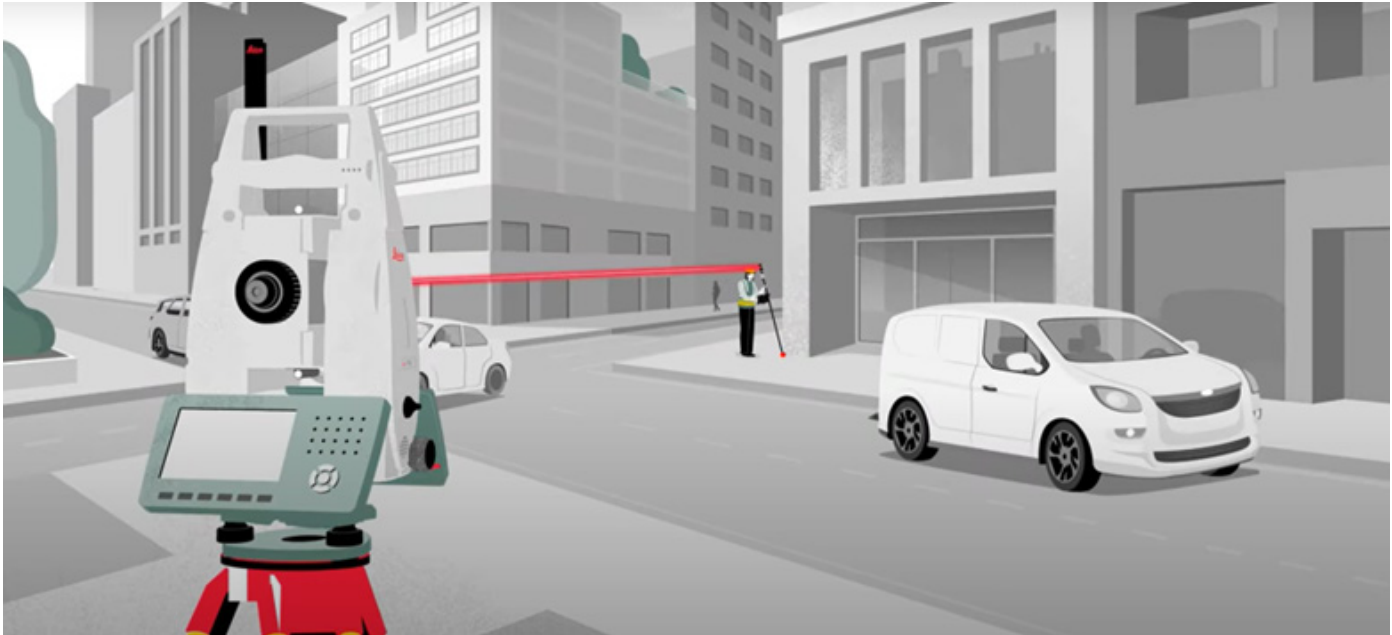
How much time would you save on every surveying project if you didn't have to stop to level your prism pole or measure the pole height after an adjustment?

These are just a couple of the advantages of the new Leica AP20 AutoPole from Leica Geosystems, part of Hexagon. The groundbreaking technology combines an intelligent sensor module with a new reflector pole and operates with Leica Geosystems' existing automated total stations to make surveying workflows fast and autonomous.

Tilt Compensation Increases Productivity

When Leica Geosystems in 2017 introduced the first calibration-free tilt-compensating GNSS solution, the Leica GS18 T, it was a true game-changer. The ability to measure without leveling the pole provided productivity gains of 20 percent or more. Now those same productivity gains can be realized in total station surveys with the new Leica AP20 AutoPole.

The system's tilt compensation capability decreases measurement time and increases flexibility and safety onsite by allowing you to easily measure points in inaccessible or hazardous locations. Rather than keeping an eye on the level bubble, you can focus on where you're walking. A quick glance at



your field software provides real-time information on the current pole tip accuracy. You can also flip the pole upside down to take inverted measurements.

"Because you don't have to level up the pole, you can just keep moving," says Burke Asay, US/Canada product marketing manager for Leica Geosystems. "It makes you very efficient in the field."

Automatic Pole Height Measurement Eliminates Errors

If you've ever been on a survey and forgotten to enter a change in your prism pole height on your controller, you're not alone; it happens to everyone. With the AP20 AutoPole, this problem is easily eliminated.

Using a Bluetooth connection, the AP20 software automatically detects the pole height as soon as the upper tube of the pole is snap-locked into predefined lock positions, which are spaced at standard 5-cm intervals. The achieved accuracy in height is $\pm 1.0\text{mm}$. Since you no longer have to read and type height changes in the field, you save time in post-processing corrections and avoid returning to the field to remeasure.

Automatic Target Identification Prevents Work Interruptions

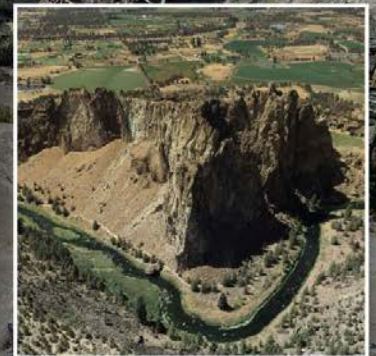
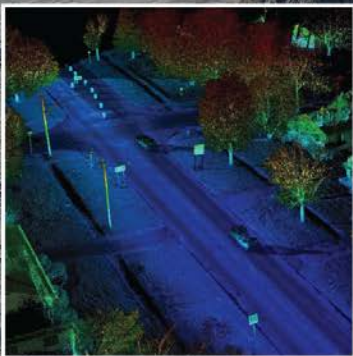
On a busy construction site with multiple sensors and targets, finding and staying locked on to the correct target can be a challenge. The AP20 AutoPole overcomes this issue with the TargetID function, which uniquely identifies the correct target and ensures that your instrument will always lock to it.

Technology Extends Your Surveying Potential

Finding and keeping top talent, solving complex project challenges with confidence, creating accurate, meaningful deliverables quickly with no compromises—these are just some of the requirements to be successful in today's fast-paced surveying and engineering professions. Technology provides an advantage. With innovations like the AP20 that increase your efficiency and confidence, you can complete more work in less time and continue to grow your business.

For more stories on how technology improves surveying efficiency and quality, visit <https://pure-surveying.com/insights>.

To learn more about solutions to maximize your surveying potential, get in touch with a surveying and engineering expert at Leica Geosystems.



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A Very Active Summer For The Northwest Chapter

A look into what the Northwest Chapter was up to this Summer.

Golf Outing



Joint ISPLS Chapter Meeting with St. Joseph Center



Railcats Game



Steam Show



Surveyors Week



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Completed Careers

In memoriam of ISPLS Members whose memory we honor.



Donald "Don" Wayne Wimmer

MARION, IN - Donald "Don" Wayne Wimmer, 62, Marion, passed away at 1:38 pm on Saturday, June 11, 2022, in his home. He was born in Wichita, Kansas, on Saturday, October 24, 1959, to Kenneth and Elaine (Armstrong) Wimmer. He was married to his loving wife, Lisa K. (Fisher) Wimmer, and she survives.

Don graduated from Wichita Heights High School and received his Master's degree in Biology from Pittsburg State University in Kansas. He obtained his surveying license in 2002 and started his business (Wimmer Land Survey, Inc.) in 2004. Don was a member of First Friends Church, Bestor G. Brown Masonic Lodge in Wichita, KS, the Indiana Society of Professional Land Surveyors (Wabash Valley Chapter),

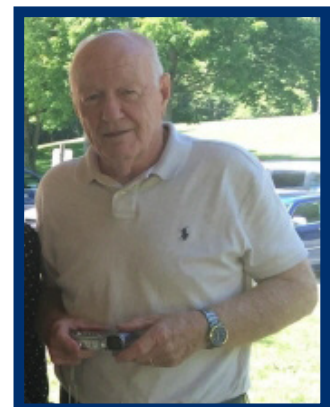
Friends Disaster Service, and the Wichita Kansas Scuba Diving Club. He was also an Eagle Scout and former Scout Master of Troop #450. Don enjoyed scuba diving, fishing, camping, boating, and water skiing. He loved to tend to his yard and garden. More than anything, though, Don cherished his family and the time he spent with them.

In addition to his wife, survivors include his sons, Joshua (Rochelle) Wimmer of Dunkirk and Christopher Wimmer of Sweetser; six grandchildren; sister, Cynthia (Joe) Montgomery of KS; brother, Jonathan Wimmer of KS; several nieces, nephews, cousins, and friends; and his dog, Shiloh.

Larry A. Cramer

Larry A. Cramer, 84, longtime Mooresville resident, passed away peacefully at home July 27, 2022. Larry was born February 13, 1938, in Shelburn, Indiana, to the late Carroll "Calvin" and Doris (Brooks) Cramer. He married his beloved wife, Norma (Trisler) Cramer on October 18, 1958.

Larry graduated from Ben Davis High School and began a career as a Registered Land Surveyor. Larry was employed with Lewis Engineering for more than forty years as a surveyor and the office manager. He was a member of the Mooresville Lions Club and Mt. Gilead Church. An avid golfer, he was preceded in death by a day by his best golfing buddy, Chuck Berwick. Larry was detail oriented and quite meticulous – traits that allowed him to be very accomplished with building models and replicas. Racecars, boats, birdhouses, lighthouses, and other woodworking projects were all part of his collection. Above all, Larry was a family man. He was a very present and involved dad and



grandpa, attending countless sporting events and even coaching softball through the years. Larry's memory will be forever cherished by a loving family and many friends.

Survivors include his wife of 63 years, Norma Cramer; son, Chris (Debb) Cramer; daughter, Tricia (Larry) Long; grandchildren, Kenzie and Katie Cobb, Levi, T.J., and Miranda Cramer; Cole and Austin Long.

William Arden Jr.

William Arden Jr, age 73 of Portage, IN passed away suddenly on Wednesday, September 21, 2022.

William leaves, to cherish his memory, his wife of 53 years, Caryon, son Shawn (Stephanie) Arden, his loving grandchildren; Charlotte and Chase, Sister; Janet (James) Nolan, his fur baby; "Makers" and many other loved ones.

William was the owner of Arden Land Surveying, LLC. He was a 1967 graduate of East Gary Edison and 1971 graduate of Purdue University. He also served in the National Guard and past President of ISPLS, NW Indiana Chapter.

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Legal Surveys

Bryan Catlin, PS

The goal of this column is to provide brief summaries of recent Indiana Court of Appeals and Supreme Court cases involving topics related to surveying practice, certainly not to provide legal advice. Because of the recent changes to the court's website, I use Google Scholar to search for Indiana cases. Once cases were found, I search for a case by a party's name or case number on the Indiana site to obtain a more conveniently formatted document at www.in.gov/judiciary. Comments or suggestions for future columns are welcome by email to: Bryan.Catlin@indy.gov.

This was an active quarter for cases involving drainage tiles, especially in Montgomery County.

Town of Linden, Indiana, Montgomery County, Indiana, Montgomery County Commissioners, Montgomery County Drainage Board, and Montgomery County Surveyor, v. Darrell Birge and Sandra Birge, Indiana Court of Appeals Case No. 21A-PL-1811, April 18, 2022

The Town of Linden is not served by a storm sewer system. Rather, they relied entirely on an eighteen inch pipe in the James Hose regulated drain originally built in 1898 as an agricultural drain and rebuilt in 1927. The drain runs from south of Linden, through town, then through the Birge's property on the north side of town before emptying into the Stoddard Ditch. Because the drain was in disrepair, there was frequent flooding in town. Mr. Birge is a farm drainage contractor but did not connect any laterals to the drain and will not until the litigation is completed.

The County and the Town jointly worked to solve the flooding issues. Eventually a plan to expand a detention area south of the town, replace the existing drain with a forty-two-inch through town, and construct a structure on the north end of town where the forty-two-inch pipe would empty into two thirty-inch pipes to the ditch was approved. Under this plan, the Birges were assessed benefits of \$7,679.23 and no damages. During engineering, it was determined a forty-eight-inch pipe could be accommodated in town, and that option was chosen for construction. During construction, it was found that the planned enlargement of the detention area south of the town could not be made because of underground utilities, and a berm was constructed along the northern portion of the detention area to protect the Town from a 100-year rain event. Where the forty-eight-inch pipe split into the two thirty-inch-pipes, a grated manhole was being built which the Birges complained about and also sent a formal notice of their disagreement with the design. The Birges demanded no manholes be installed, or if they were installed, they be buried deeply enough to not impact farming of the property. The Drainage Board asked their engineer about this, and they found that grated manhole structures were necessary due to the grade of the property and that the manholes could not be buried. The drainage project was completed in 2012. The drainage problems in Town were solved; not even a heavy rain now causes flooding in Town, but because the two thirty-inch pipes cannot accommodate the water coming from the forty-eight-inch pipe, water overflows the manhole and runs downhill onto the Birge's property.

Since the two thirty-inch pipes are under pressure after every heavy rain, water overflows from multiple manholes onto the Birge's property as well as pressurizing their drainage tiles and laterals, causing flooding and raising the water table outside the easement area for five to seven days making farming difficult. The Birges refused to pay their assessment and on September 22, 2014, filed an action for inverse condemnation in the Montgomery Circuit Court. Various legal proceeding have continued from then until the court concluded the design, and reconstruction of the James Hose Drain uses the Birge's property as the overflow basin for any heavy rain, a "permanent" invasion of their property, and therefore a taking. This interlocutory appeal followed.

The Court of Appeals found that although there is frequent flooding it is not a permanent invasion, but despite the defendants claim, even non-permanent flooding can be a taking. At trial, there had been evidence submitted

of the highest and best use of the property as it had been platted into town lots, and the defendants objected that that was not allowed to determine if a taking had occurred. The Appeals Court agreed but noted the possible future use had not been considered in the determination that there was a taking, only the difficulty in the current farming operations. The Appeals Court will not reweigh the evidence that the project had caused flooding that the trial court accepted, and further noted that the trial court should limit its consideration to the impact of the flooding outside the statutory drain easement. Thus, the trial court finding of a permanent taking was reversed and remanded with instructions to consider factors cited in the appeal as to whether the intermittent flooding caused by the improvements to the drain constituted a taking.

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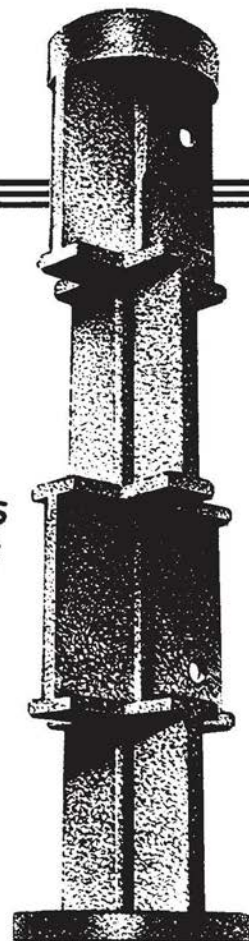
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State of Indiana, v. Brian Koorsen and Kelly Hoffman, Indiana Court of Appeals Case No. 20A-PL-2306, December 1, 2021, Denied transfer to the Indiana Supreme Court May 18, 2022

Koorsen and Hoffman (Landowners) own lots in a Carmel subdivision with covenants reserving all lots for residential purposes. The State of Indiana built a detention pond for US 31 on a separate State-owned lot, and the Landowners filed an inverse condemnation action against the State, seeking compensation for the taking and for litigation expenses. The State lost the inverse condemnation action which was apparently based on the State's view that the pond was a necessary highway drainage pond and the Landowners opinion that it was a weed-infested swamp unsuited to a high-end subdivision. Eventually the Landowners agreed to a State offered compensation of Forty-Five Thousand Dollars exclusive of interest and costs, but believed they were also entitled to an award of reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred per IC 8-23-17-27(c) and asked the Hamilton Superior Court to schedule a hearing to determine interest, costs, and an appropriate award. The State responded by again offering forty-five thousand dollars, treating the Landowners response as a counter-offer since it requested additional monies. The trial court concluded the negotiations resulted in an accepted offer of forty-five thousand dollars for the taking and the Landowners were also entitled to litigation expenses, costs, and interest in addition, a total of two hundred sixteen thousand, six hundred and forty dollars and fifty-six cents. The State appealed this judgment arguing the parties never reached a settlement agreement because the State believed the litigation expenses were included in their offer per their reading of statutes, while the Landowners read the statutes to exclude litigation expenses, so the state's offer could not have included them.

Three eminent domain statutes: IC 8-23-17-27(c), the Relocation Assistance and Real Property Acquisition Act (RARPA) Expense Statute; IC 32-24-1-12, the Settlement Statute; and IC 32-24-1-16, the Eminent Domain Code (EDC) Expense Statute, do not include litigation expenses by default, but also do not agree how those expenses should be handled.

The Appeals Court found the State's argument, that because a settlement offer made under the settlement statute is "exclusive of interests and costs", it must be inclusive of litigation expenses, unpersuasive, and the court cited a 1977 case that stated attorney's fees or litigation expenses are not embraced within just compensation. One reason for this is to encourage the parties to settle and not go to trial. Because the Landowners never accepted the State's renewed original offer, the trial court erred in finding a settlement agreement had been reached, so the case was reversed and remanded back to the trial court. However, the court did not indicate how it might sort out the disagreements between the eminent domain statutes in the future.

There was a petition filed to transfer this to the Indiana Supreme Court which was denied on 5/18/2022.

B&B Farm Enterprises, LLC, v. Curtis K. Hudson and Cindy L. Hudson Revocable Living Trust: Curtis Hudson, Indiana Court of Appeals Case No. 21A-PL-2354, May 23, 2022

Here is another drainage case from Montgomery County. It seems that at least some of the parties here did not have a deep understanding of real estate law. B&B Farms (Farm) bought some property in 2012 where the prior owner had allowed the Hudsons (Neighbor) to connect a six-inch tile to a private drain on the Farm property to drain a small pond on the Neighbor property. Neighbor instead connected 12" and 8" lines

draining the small pond and also bringing in water from another watershed prior to December 5, 2011. In June 2018, Farm filed an action in the Montgomery Superior Court alleging Neighbor trespassed on the farmland, damaged and modified the farm's private drain, and impeded drain flow. Farm alleged it was entitled to the full service of the unmodified drain and sought an order that Neighbor's drain be disconnected and removed at Neighbor's expense and for damages. Neighbor moved for summary judgment arguing both trespass and injury to property other than personal property are subject to a six-year statute of limitations which had expired before the case was filed. Neighbor had also designated evidence that Farm had severed or blocked the drainage from Neighbor's property. Neighbor had a Petition to Remove Obstruction with the Montgomery County Drainage Board, which was waiting on this ruling.

Farm argued the statute of limitations did not apply because this was a question of whether Neighbor had acquired a right-of-way easement for water, and that if the statute of limitation applied, the excess discharge of water was intermittent, creating a new statutory period with each discharge. The trial court granted summary judgment to Neighbor on the grounds of statute of limitations, finding that the issue was one trespass. Farm appealed.

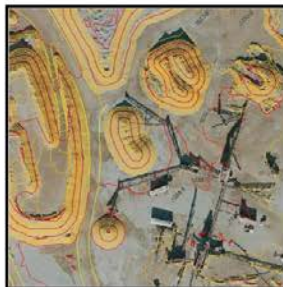
On appeal, Neighbor did not file a brief, and the court noted that the facts of the complaint were a "classic real estate claim", a claim to quiet title in the farmland and its drainage system by determining if Neighbor had an easement to use the drainage system and, if so, whether Neighbor's use exceeds the scope of the easement.



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This is not subject to a six-year statute of limitations, and it was noted that a prescriptive easement is obtained only after uninterrupted use for twenty years, among other things. This may have been a hint to the trial court. Since Farm had established prima facie error in the order granting summary judgment on the grounds all claims were subject to a six year statute of limitations, the trial court ruling was reversed and remanded for further proceedings.

Geist Lake Forest Property Owners' Association, Inc., v. Taso's Toys, LLC, Taso's Toys, LLC, v. Geist Lake Forest Property Owners' Association, Inc. and RREF II RB-IN VM, LLC, Indiana Court of Appeals Case No. 21A-PL-2021, June 8, 2022

Here is a case that illustrates that you can't always take subdivision covenants and amendments as really doing what they claim.

Here a developer executed and recorded a Declaration of Covenants, Conditions and Restrictions of Geist Lake Forest Subdivision for six separate parcels of real estate (called Lots 1-6, although apparently, a plat was not filed) in 2006. Then believing the descriptions attached were deficient, recorded a second Declaration in 2007 which was substantially the same but with different documents describing the land. In September of 2009, while still owning all the lots, the developer built a steel outbuilding with a steel roof on Lot 4 (only allowed during the development period per the declarations). The developer mortgaged all of the lots at some point and, after recording a partial release of Lot 4 from the holder of the mortgages, sold Lot 4 and its improvements to Taso's Toys (TT). On February 7, 2013, the holder of the mortgages of the rest of the lots filed a foreclosure action against the developer. On October 14, 2013, while the foreclosure action was pending, the developer and the representative of TT (therefore, all of the landowners affected

by the 2007 declaration) executed the "First Amendment to the Declaration of Covenants, Conditions and Restrictions of Giese (sic) Lake Forest Subdivision: Exemption of Lot 4" which acknowledged Lot 4 had multiple preexisting nonconforming improvements in violation of the declaration and exempted Lot 4 from any constraints in the 2007 declaration. This was recorded on October 21, 2013. The developer never incorporated the homeowners association contemplated in the 2006 and 2007 declarations. On November 17, 2016, as a result of the foreclosure, all of the lots, except Lot 4, were sold at a Sheriff's Auction to RREF's predecessor in interest. On February 5, 2020, RREF formed the Owners Association without participation by TT or the developer, and beginning that month, the Association's legal counsel began sending letters to TT to enforce the 2006 declaration and demanding TT rectify violations. TT did not reply or satisfy those demands.

On September 24, 2020, the Association filed a complaint in the Hamilton Superior Court, alleging TT violated the 2006 Declaration by, among other things, having a free-standing, non-residential building, made of prohibited materials and prohibited roofing on Lot 4. The Association sought a declaratory judgment that Lot 4 is bound by the 2006 Declaration, damages for breach of the Declaration, and permanent injunctive relief enjoining TT's further violation of the 2006 Declaration and requiring TT to remedy its violations. In answer TT generally denied the allegations and said the Association lacked standing to bring suit, claimed the Association was not validly formed under the 2007 Declaration or Indiana law, and asked for a declaratory judgment that TT was exempt from the 2006 and 2007 Declarations and that the Association was not validly formed under Indiana law or the 2006 or 2007 Declarations. On September 8, 2021, the trial court issued an order finding no genuine issues of material fact existed, denied the Association's motion for Partial

summary judgment, and granted partial summary judgment to TT. The court found the 2007 Declaration had superseded the 2006 Declaration, that the First Amendment validly excepted Lot 4 because the only parties whose consent was required, the developer and TT, had both assented, and that since Lot 4 was permanently exempted from the covenants, TT lacked standing to challenge whether the Association was validly incorporated. The Association and RREF appealed.

On appeal, the court found the 2007 Declaration did control, but for different reasoning than the trial court. The 2006 Declaration was not enforceable due to the legal deficiency of the attached descriptions, but neither party challenged the validity of the 2007 Declaration descriptions, so that portion of the ruling was affirmed. The Appeals Court also found that because the privileges and authority of the developer for five lots was transferred by Sheriff's Deed to RREF's predecessor, who then quitclaimed their rights to RREF, they could validly form the Association, and it is not clear that TT has any similar right from the Special Warranty Deed they received from the developer. On the validity of the First Amendment, the appeals court noted the Declarations allowed technical amendments, or to correct clerical or typographical errors, but the association or developer could not make any changes which had a material effect on the rights of any mortgagee or substantially impaired the rights of any owner. The appeals court concluded the First Amendment was not a technical amendment as it materially changed the Declaration and affected the rights of all lots which were subject to mortgages (to very briefly state the reasoning in the opinion). The appeals court further found that any right to have a non-conforming building ended at the end of the development period, as defined in the Declaration, at the latest on April 23, 2014. Therefore, the Association was valid, the Association and RREF were entitled to summary judgment that the Association

was validly formed, the first Amendment did not exempt Lot 4 from the Declaration, and the building violated the Declarations. The trial court was affirmed in part, reversed in part, and summary judgment was entered in favor of the Association and RREF.

Indiana Department of Natural Resources, v. Marvin Houin, Diane Houin, Charles Houin, Houin Grain Farms, LLC, and Marvin Houin as power of attorney for Marilyn J. Ralston, Indiana Court of Appeals Case No. 21A-CC-1178, June 14, 2022

The Houins farm eight fields totaling 407 acres located in the Lake of the Woods watershed. Lake of the Woods is a public freshwater lake in Marshall County surrounded by residential waterfront homes. A higher lake level is advantageous for property owners and the boating public. Because the affected fields and the lake are in a relatively flat plain with little elevation change, a change in water level in the lake impedes the drainage of the fields following rains. A lower lake level is advantageous for farming. The "tolerances for the connectivity between precipitation, infiltration, drainage, and the lake levels are very small." In 1957, a dam was constructed at the sole outlet of the lake to address tensions between residential property owners and the agricultural property owners.

Because conflicts continued, in 1986, the Marshall Circuit Court issued an order setting the legal average lake level at 803.85 feet from May 15 to September 15, and 802.85 feet from September 15 to May 15. That court order also required DNR to repair or rebuild the dam so it could be operated by third parties but did not require DNR to operate the dam. The dam is manually operated, and the controls are locked with two padlocks which must both be removed to raise or lower the dam. A representative of the agricultural community and a representative of the residential lake property owners each held a key and would

meet to raise or lower the dam to achieve the legal water level. The DNR provided the locks and kept a set of keys also. For many years this system worked, and the affected fields were successfully row cropped through 2009. In 2005, the residential lake property owners decided they no longer wanted responsibility for opening and closing the dam and DNR took over their responsibilities. In 2009, DNR posted a notice at the dam stating: "Effectively immediately it is the intent of the IDNR to leave the gate closed until the mandated opening date of September 15, 2009 unless the lake level elevation exceeds 804.35'. At 804.35' the gate will be opened to draw down the lake level to 803.85." The same notice was posted in 2015. DNR regulates access to the dam by a fence in its easement around the dam and a locked chain link fence around the dam. DNR makes and possesses the keys but also gives keys to selected local residents.

The Houins' fields flooded in multiple years due to the DNR's noncompliant operation of the dam. Due to higher lake levels the Houins' drainage tile system was no longer adequate to drain the fields in one or two days. The Houins told the DNR the higher lake level negatively impacted their ability to farm the affected fields. The DNR responded they would keep the dam closed until the water level rose to 804.35 feet regardless of weather conditions and would instruct the keyholders on how and when to operate the dam. "There was no benefit to this trigger level other than saving DNR staff time."

On April 27, 2016, the Houins filed a Tort Claim Notice with the State claiming damages because the DNR did not operate the dam under the terms of the 1986 court order. The Houins alleged the DNR kept the dam closed until the water level rose to 804.65 feet, approximately 10 inches above the legal level set in 1986 and did not account for local weather in operating the dam. The Houins filed a complaint against the DNR in the Marshall

Circuit Court on February 27, 2017. DNR asserted it was immune from liability under Indiana Code, but the trial court determined the DNR was not entitled to immunity for its decisions about how the dam was operated. After a bench trial, the trial court concluded that DNR had breached their assumed duty to operate the dam pursuant to the 1986 order; that in addition to loss of crop yields, the Houins' drainage tile silted shut because of higher summer lake levels between 2009 and 2016; that the drainage tile was also damaged by pressure when water from the lake ran backward into the affected fields; that the operation of the dam by DNR created a nuisance by causing the fields to flood, resulting in crop yield losses and tile system damage which are recoverable losses; and that the intermittent flooding of the fields caused by DNR's failure to reasonable operate the dam was a taking. The court rejected DNR's defense under the common enemy doctrine because DNR is not a landowner in this case. The trial court awarded the Houins a judgment of \$485,644.00 excluding any damages that might be later assessed for inverse condemnation, plus the costs of the action. DNR appealed.

On appeal, DNR was found to be immune from liability for the operation of the dam under Indiana Code, but DNR's decision to allow the lake level to exceed the legally established level resulted in foreseeable flooding that affected the Houins free use, enjoyment, or interest in the property constituting a taking. So the trial court's judgment was affirmed in part, reversed in part, and remanded for further proceedings.

Darren K. Day and Gabrielle A. Day, v. Deborah Whitaker, Diane Cormican, William R. Hoskins, Garnet Gail Kuntz, Denise Kruthaupt, and Elizabeth Hoskins, Indiana Court of Appeals Case No. 21A-MI-1975, April 18, 2022 - MEMORANDUM DECISION - not regarded as precedent

In 1959, Garnett and Elizabeth Hoskins acquired fifty acres (Hoskins property) just off McGuire Ridge Road. In 1976, Donald and Gabrielle Day acquired property (Day property) that included a driveway both parties used to access their homes as well as a barn on the Hoskins property. Garnett and Donald had an agreement about the mutual use of the driveway. The use of the driveway was not a problem even as the land was transferred to other family members until recently. On November 13, 2020, the Hoskinses filed a complaint seeking a prescriptive easement over the driveway on the Day property for ingress and egress to the Hoskins property. After a bench trial in the Franklin Circuit Court, a judgment was entered for the Hoskinses finding that the Days had not rebutted a presumption that the Hoskinses' open and continuous use of the driveway for over twenty years was adverse and this appeal followed.

On appeal, *Fraley v. Minger* was again cited. Here both parties agreed that all elements of a prescriptive easement were satisfied except for intent. The Hoskinses argued that the driveway had already been used for twenty-one years to access the Hoskins property before the Days purchased the driveway property. The Hoskinses claim this supports a presumption the use was adverse. The court did not agree, noting the Hoskinses' argument assumes the Days had the burden of proving the use was permissive prior to 1976. But under the law, it is actually the Hoskinses' burden to prove the use was "unexplained" for at least twenty years. The judgment of the trial court was reversed.

Here is a case where it would be nice to know what brought this on after so many years. Did someone feel a need to clear title? Were they encouraged to get an easement somehow to increase the marketability of the property? Did someone suggest they had a potential problem and this is the solution they came up

with?

James A. Grewe, Mary Jane Grewe, William J. Gardtner, and Patricia A. Gardtner, and Mary Diana Leach, v. Alvin Ray Boggs and Jane B. Boggs, Indiana Court of Appeals Case No. 21A-PL-2296, April 29, 2022 - MEMORANDUM DECISION - not regarded as precedent

Here the Boggses entered into a purchase agreement to buy two adjoining lots in Pine Hills Lake Development from Leach after the other adjoining property owners would not meet Leach's \$22,000 asking price. The Boggses had deposited \$300 and the Boggses had paid for a title search when after some unclear communications, Leach agreed to sell the Lots to the Gardtners and the Grewes for a couple of thousand dollars more. On September 10, 2020, the Boggses filed a complaint with the Washington Circuit Court alleging breach of contract and requesting specific performance. The Boggses also filed a Lis Pendens Notice with the Washington County Recorder that day indicating they had filed a complaint and asked for specific performance. Leach signed a warranty deed to the Gardtners and Grewes on September 16, 2020, which was recorded two days later. At a bench trial on July 27, 2021 information about some rather unusual bylaws and restrictions was presented, including notification of the Board of Directors at least thirty days before placing the property up for sale, all adjoining owners having the first chance to purchase, a possibility that a potential buyer, not already an owner in the development, could be denied after a criminal background check (or their purchase rescinded if completed without the Board of Directors approval), and the Board of Directors having to be provided with any contract for sale of property seven days prior to execution for approval was presented. Leach apparently believed the purchase agreement was not valid because it was not notarized, and the Board of Directors had not given its approval.

Other testimony indicated the Board's approval was only needed for seller financed contracts. On September 21, 2021, the court found the purchase agreement to be valid and ordered that that the September 16, 2020, Warranty Deed be set aside, documents necessary to return title to Leach be executed, and Leach to follow through on the sale to the Boggses. Boggses damages would be determined after a later hearing.

This appeal followed and the judgment of the trial court was affirmed.

Bryan F. Catlin, PS has been registered as a Land Surveyor in Indiana since 1991. He holds B.S. Land Surveying Engineering and M.S. Engineering (Geodesy) degrees from Purdue University.

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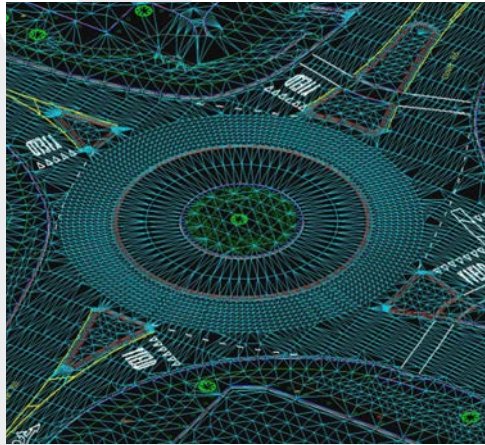
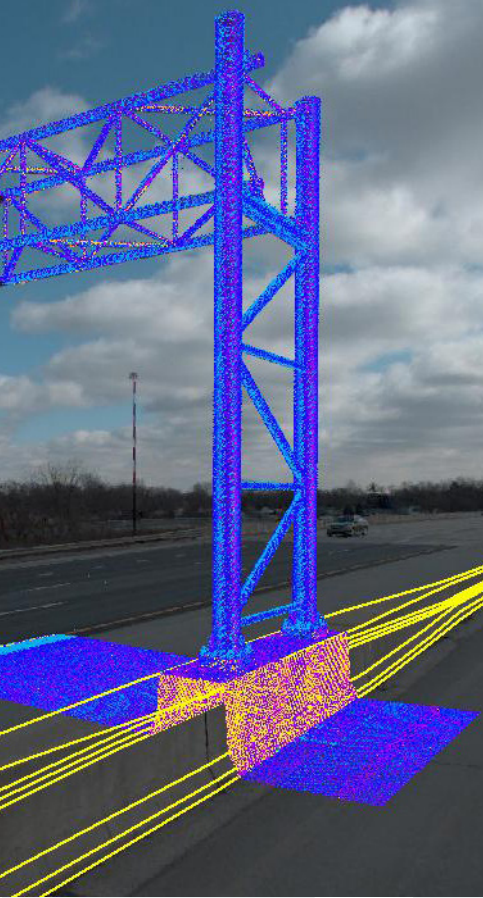
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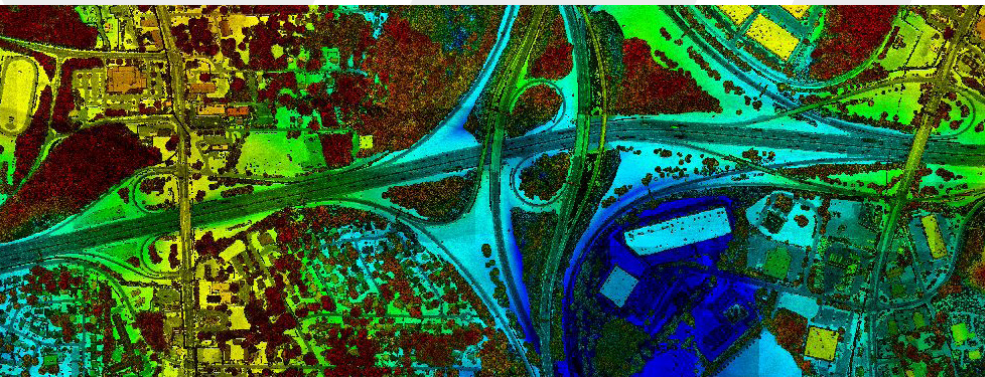
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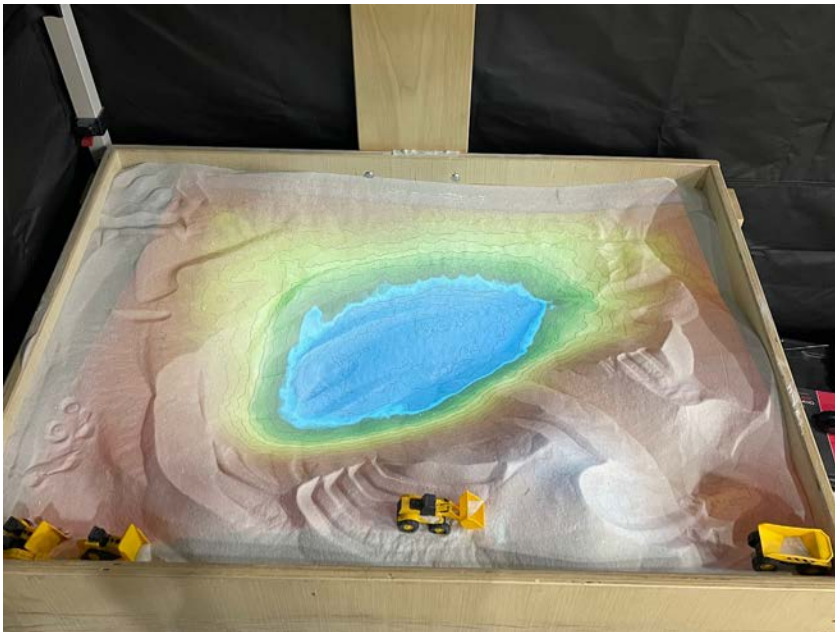
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Workforce Development

Junior Achievement's JobSpark Event

ISPLS Members attended the Junior Achievement's JobSpark event, where they represented our profession and ISPLS to the next generation of land surveyors. Rodney Kelly, Etica Group, Todd Jamieson, Seiler, Ryan Perry, RQAW, Brian Haggard, V3, Matt Healy, VS Engineering, and Chris Mabus, Etica Group, were all in attendance.

Special thanks to Lynn Busby and industry partners with bringing ISPLS into the conversation and all the firms who support our profession and volunteers who donate their time.



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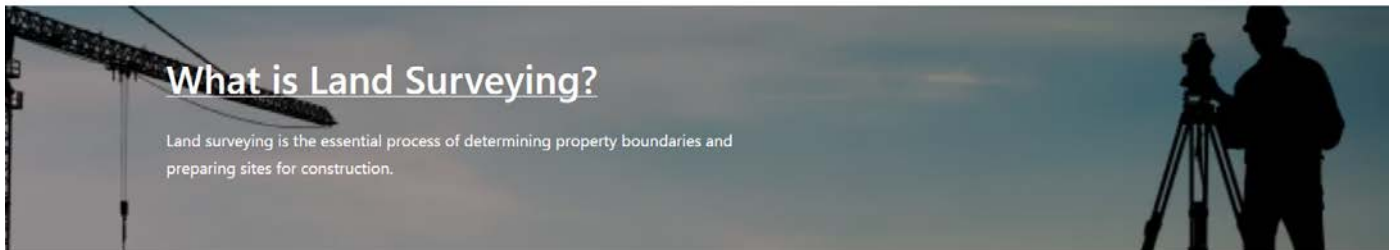
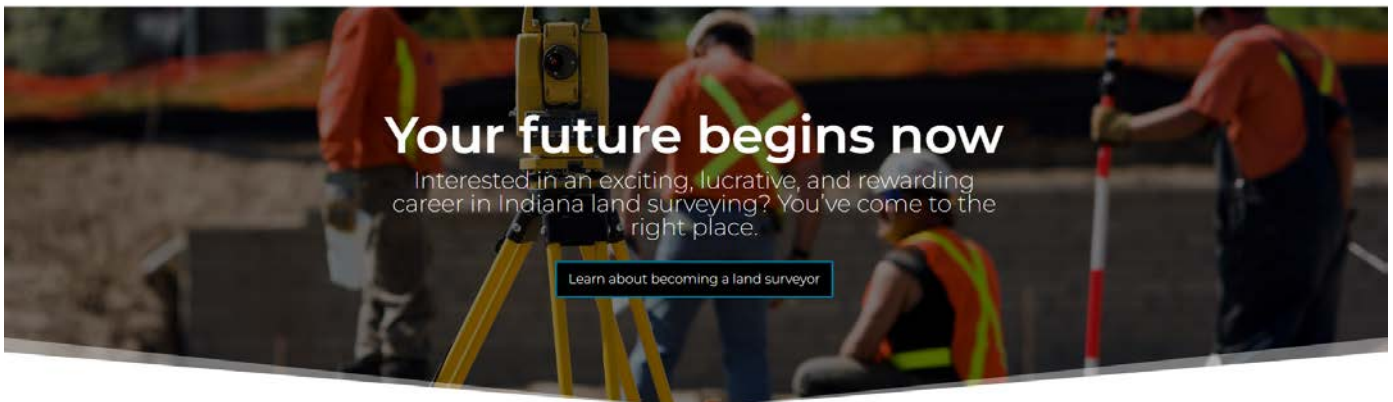
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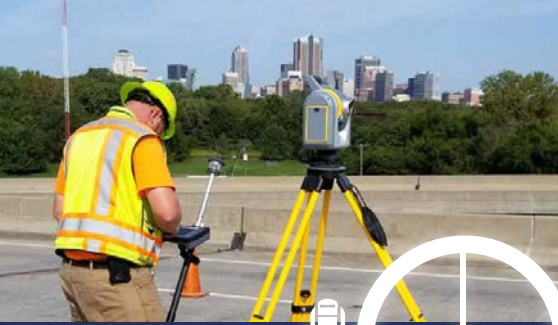
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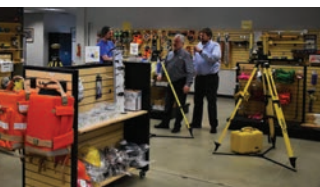
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