

Nearby Road Closures Remain Non-Compensable in Indiana Eminent Domain Proceedings

In the Dirt: A Real Estate Legal Update

By Daniel Faust on November 3, 2023

On October 10, 2023, the Indiana Supreme Court denied a landowner's petition to transfer filed in the matter of *State of Indiana v. The Market Place at State Road 37, LLC, et al.*, 22A-PL-2765 (May 17, 2023), and as a result, did not consider certain novel issues presented by the owner's chain of title. The Market Place at State Road 37, which owns property near the intersection of State Road 37, now I-69, and Fairview Road in Greenwood, Indiana, sought to introduce evidence at trial of damages associated with the elimination of that intersection, which was located approximately 350 feet from the owner's Fairview Road access.

In its unpublished decision, the Court of Appeals took up the issue of whether the nearby closure of a public road that does not directly eliminate public access to the landowner's property from the same road is a compensable taking. This issue has been extensively litigated, but the landowner sought to distinguish the instant case by virtue of a transfer document from a 1973 condemnation involving the same parcel purporting to carve out from that appropriation the owner's direct access to S.R. 37, running along the course of Fairview Road. The owner, Market Place, characterized the 1973 transfer document as creating "a covenant running with the land."

On appeal, the Court of Appeals referred to its long-standing precedents regarding so-called "circuitry of travel." First, "the right of an abutting landowner to ingress and egress over the public roads is a cognizable property right, and substantial or material interference with this right by the state is a compensable taking ('the ingress-egress rule')." *Id.* Second, by contrast, "an abutting landowner has no cognizable property right in the free flow of traffic past his property ('the traffic-flow rule')." *Id.*

The court quickly disposed of the owner's argument, concluding that the access from the 1973 condemnation was granted to Fairview Road and access to Fairview Road remained after the most recent condemnation. According to the Court of Appeals, this fact placed the case squarely in the category of "traffic-flow" cases, and thus, the closure of Fairview Road's access to SR 37, even though clearly harmful to the owner, was not compensable in the state's eminent

domain action. The Court of Appeals chose not to consider *Market Place's* characterization of the 1973 document as creating a covenant running with the land.

The instrument at issue was included in the parties' appendices but not in the electronic docket, and the precise language of the 1973 transfer instrument is unclear. If, as the owner contends, it expressly conveyed a right to access SR 37 from the property's access to Fairview Road, the Court of Appeals has implicitly concluded that the circuitry of travel analysis starts at an owner's entrance into public right of way, regardless of whether the owner retains any private property interests located in the right-of-way, itself.

Even if the owner sought to mischaracterize the language of the 1973 transfer instrument, the Court of Appeals' opinion remains instructive. The court explicitly acknowledged harm to the owner as a result of the closure of the Fairview Road's intersection with SR 37, but it did not consider that harm, namely loss of its property interest of access to a major highway 350 feet from the access to property, to be sufficiently "substantial and particular" to warrant the application of the "ingress-egress rule".

While the Supreme Court's denial of transfer leaves some of the questions raised by the Court of Appeals opinion in *Market Place* for another day, the Supreme Court may soon be asked to address a similar situation, again. Oral argument on the matter of *City of Carmel v. Barnham Investments, LLC*, 22A-PL-02399, was held in September, on the issue of whether a Marion County, Indiana, trial court properly admitted into trial evidence of the loss of landowner's non-exclusive easement running along a private road, when the road, itself, was acquired in a separate condemnation. We will follow that case, and its impacts on the *Market Place* opinion and other so-called "circuitry of travel" cases, as it develops.

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