"YOU'RE GOING TO NEED A BIGGER BOAT":* NAVIGATING THE UNCERTAIN WATERS OF LAKE LAW

THE HON. CALE J. BRADFORD**
CALE ADDISON BRADFORD***
ALEXANDRA BLACKWELL****

INTRODUCTION

In Indiana, there is only one thing that people talk about more than basketball, the latest fried offering at the Indiana State Fair, and the anarchy that is the Coke Lot at the Indianapolis 500: the weather. A common complaint is Indiana only has summer and winter. Given the last year, it would be difficult to argue otherwise. Although that complaint gets the number of seasons right, it misses the mark on the names of those seasons. For those of us who have grown up around Indiana, the only two seasons in Indiana are lake season and every other month.

There are many things to enjoy about spending time at a lake: teaching one's kids to waterski, taking long pontoon boat rides, playing the Beach Boys' greatest hits on repeat, floating around on a raft, and, of course, cornhole—Indiana's true pastime. Unfortunately, no matter how fast you run to your car at 4 p.m. on Friday afternoon to beat the weekend traffic or how far you travel to "your" lake, legal challenges may follow you. For some, lake season can be complicated by many issues, including, but not limited to, a neighbor extending a pier[1] out to block your use of the lake, the neighbor's seventeen-year-old "kid" driving his parent's $100,000-plus boat inside your buoys, or boaters establishing a "party island" on the sandbar directly in front of your lake cottage.[2] Rather than spend your summer hunting for muskie—the true prize of any Indiana fisherman—you spend your summer fishing for evidence in hopes of restoring the status quo

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* JAWS (Universal Pictures 1975).

** Judge Bradford was appointed to the Court of Appeals of Indiana in 2007. Prior to that, he served as a judge for the Marion Supreme Court, seven years in the criminal division and three in the civil division. Prior to joining the bench, Judge Bradford was a litigator in both federal and state courts. Judge Bradford would like to express his deep appreciation to his co-authors for the energy and intellect that they have given to this Article.

*** Attorney, Hall, Render, Killian, Heath & Lyman, P.C. I would like to thank Will Gooden and Robert Scott, who have been patient and gracious mentors, for lending their lake-law expertise to the drafting of this Article.

**** Attorney, Katz Korin Cunningham, P.C. Former Law Clerk to Judge Cale J. Bradford of the Court of Appeals of Indiana 2016-18.

1. A pier is "a structure (such as a breakwater) extending into navigable water for use as a landing, or promenade or to protect or form a harbor." *Pier*, MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/pier [https://perma.cc/DU2V-MSRN] (last visited Mar. 6, 2018). It is clear from this definition a pier may also be used as a dock for mooring boats.

2. Many, including the Authors, consider all homes on lakes to be cottages, no matter the size.

around your lake.

Therefore, whether you own property on a lake, are interested in buying property, or just want to spend a day on the water, it is important to understand the unique legal issues that accompany lakes—issues no Indiana Law Review article has comprehensively addressed until now. Discussions with neighbors, friends, and fellow lake-lovers have inspired the authors of this Article to dive in and address some of the legal questions that surfaced over the years. Additionally, the authors assembled a "Buyer's Checklist" in Section III, which sets out pertinent considerations for buying property near or on a lake.

I. WHAT ARE RIPARIAN RIGHTS?[3]

Generally, an owner whose property abuts a body of water, such as a lake, has certain riparian rights associated with the ownership of such property.[4] However, these riparian rights are not limited to those who actually own property on a lake. Instead, all members of the public enjoy general rights to these precious state resources. As the Court of Appeals of Indiana explained in *Center Townhouse Corp. v. City of Mishawaka*, "[t]he term 'riparian rights' indicates a bundle of rights that turn on the physical relationship of a body of water to the land abutting it."[5] The extent of one's riparian rights depends on both the location of the land near the water and whether that body of water is public or private.[6] For example, the public enjoys broad rights to use and enjoy Lake George in Steuben County because it is a public freshwater lake.[7] However, unless you are a landowner with property abutting Lake Lamb in Johnson County, you have fewer rights to use that lake because it is a private lake.[8]

Some reading this Article may own property on a reservoir. Unfortunately, these readers' rights are not nearly as broad, as Indiana courts have generally treated reservoirs as private lakes. For example, in *Watson v. Thibodeau*, certain landowners along Morse Reservoir in Noblesville claimed they had riparian rights to use the reservoir because their property abutted the shoreline.[9] The Court of Appeals of Indiana rejected their claim, noting the extent of the landowner's riparian rights depended entirely on conveyance documents from the Indianapolis

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3. Historically, riparian rights have been associated with owners of land abutting a stream or river, while littoral rights were associated with owners of property on a lake or pond. *See* Zapffe v. Srbeny, 587 N.E.2d 177, 178 n.1 (Ind. Ct. App. 1992). However, Indiana courts widely use the term "riparian rights" for both groups of property owners. *Id*.

4. 882 N.E.2d 762, 767 (Ind. Ct. App. 2008).

5. *Id*.

6. 29 IND. LAW ENCYC. WATERS § 13 (2018).

7. Ind. Dep't of Nat. Res. v. Lake George Cottagers Ass'n, 889 N.E.2d 361, 363 (Ind. Ct. App. 2008).

8. *Visitor Center*, LAMBLAKE.NET, http://www.lamblake.net/home/visitor_center [https://perma.cc/RQN5-UF3B] (last visited Feb. 21, 2018).

9. 559 N.E.2d 1205, 1208-09 (Ind. Ct. App. 1990).

Water Company.[10] As it happened, the landowners had no general right to use Morse Reservoir because the Indianapolis Water Company was still the "owner of the water and the land beneath [Morse] Reservoir,"[11] never having conveyed it. Therefore, those owning property on a reservoir, as well as prospective buyers, should be careful to review all conveyance documents to verify what they actually have the right to do, *e.g.*, build a pier on their shoreline.

More broadly, the extent of one's riparian rights requires application of a "reasonableness test"[12] to accommodate the diverse characteristics of each lake in Indiana.[13] The "reasonableness test" requires a court to look at the facts and circumstances of each particular case involving a lake so that riparian owners are treated equitably.[14] However, you do not need to rush to court to determine the precise nature of rights on an Indiana lake, as those rights *typically* include swimming, fishing, bathing, boating, and installing a pier.[15]

II. WHAT RIGHTS DO YOU HAVE?

Even for those who are not "morning people," it is hard to imagine someone who is not a "lake morning person." The water is calm, the air is clean, and the dew is fresh. Unfortunately, there are those lake mornings where your daily paddle-board ride is jolted by "lakers"[16] who are buzzing around the lake on their music-blaring boats and jet skis. Even more unsettling, that peace and quiet is drowned by a bevy of swans walking across your beach, making hissing noises that no amount of coffee can make tolerable.

Naturally, during these mornings, one begins to think about what rights one has to use the lake and if those rights are exclusive. In Indiana, riparian rights to public Indiana lakes generally have three sources:

1. The public trust doctrine;
2. Ownership of property near a lake; and
3. Ownership of property abutting a lake.

The rights attached to each category vary, granting Indiana residents different rights depending on their ownership interests in property near the lake. It should come as no surprise that those owning property on the water generally have more

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10. *Id.*

11. *Id.* at 1207.

12. "The reasonableness determination will additionally depend on factors such as the normal water level of the lake, the number of riparian owners on any one tract, the purpose of the pier, and the statutory consideration of the effect on others who use the waters of [the lake at issue]." Zapffe v. Srbeny, 587 N.E.2d 177, 181 (Ind. Ct. App. 1992).

13. *Id.*

14. *Id*.

15. Daisy Farm Ltd. P'ship v. Morrolf, 886 N.E.2d 604, 607 (Ind. Ct. App. 2008); Bath v. Courts, 459 N.E.2d 72, 76 (Ind. Ct. App. 1984). How far one may extend that pier is addressed later in this Article. *See infra* Part II.B.3.

16. A "laker" is someone who travels to a lake on the weekend or vacations rather than living there full-time.

rights to use the water than those who live down the street. But in all cases, the exact scope of those rights is a little murky.

A. What Rights Do Members of the Public Have?

The Indiana General Assembly passed the Lake Preservation Act in 1947. The Lake Preservation Act specifically states that members of the public may use the public waters for recreational activities including fishing, boating, swimming, the storage of water to maintain water levels, and any other purpose for which lakes are ordinarily used and adapted.[17] Unfortunately, the statute does not provide a thorough explanation that actually clarifies the issue. Although the statute lists the above-mentioned activities, it says nothing about the extent of those rights, including where you can fish and swim. Moreover, the more general right to enjoy the water does not necessarily mean the public has the right to use the land and beaches surrounding the water.

Although Indiana courts have mainly focused on what riparian rights include, on at least one occasion, a court has specifically addressed what riparian rights do not include: the right to an unobstructed view. In *Center Townhouse Corp. v. City of Mishawaka*, the Court of Appeals of Indiana concluded that whether a person's view is needlessly and unlawfully obstructed is instead a "policy decision best left to the legislative branch generally and the local zoning authorities."[18] If such claims were actionable, courts would have to make difficult decisions regarding "the scope of a landowner's view (how high, how far, from what vantage point, etc.), and, if obstructed in some way for some reason, determining how much obstruction is too much."[19] In refusing to recognize this right, Indiana courts broke away from several other states.[20] For Indiana to recognize that right in the future, it would take either (1) the Indiana Supreme Court overruling *Center Townhouse Corp.* or (2) the Legislature passing a statute clarifying riparian rights to include the right to an unobstructed view.

That is perhaps why the Indiana Supreme Court refused to clarify the extent of the public trust doctrine in a 2018 decision *Gunderson v. State*.[21] There, the parties asked the court to decide the scope of the public trust doctrine, but the Indiana Supreme Court reasoned that issue was better left to the Legislature.[22]

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17. IND. CODE § 14-26-2-5 (2018).

18. 882 N.E.2d 762, 772 (Ind. Ct. App. 2008).

19. *Id.*

20. DBL, Inc. v. Carson, 585 S.E.2d 87, 91 (Ga. Ct. App. 2003); City of Ocean City v. Maffucci, 740 A.2d 630, 640-41 (N.J. Super. Ct. App. Div. 1999); Lee Cty. v. Kiesel, 705 So. 2d 1013, 1015-16 (Fla. Dist. Ct. App. 1998); Treuting v. Bridge & Park Comm'n, 199 So. 2d 627, 633 (Miss. 1967).

21. *See generally*, 90 N.E.3d 1171 (Ind. 2018). The Indiana Supreme Court in *Gunderson* applied the public trust doctrine to Lake Michigan, which had previously been an open question under Indiana law. *Id.*

22. *Id.* at 1187-88. However, the court did state *at minimum* the public trust doctrine allows a person to walk along the shore. *Id.*

The *Gunderson* court's reasoning is understandable, as the Indiana General Assembly is in a better position to decide the limits of the public trust doctrine. It may consider testimony from state residents and lakefront property owners regarding the balance between the often competing values of (1) use and preservation natural resources and (2) private property. Rather than forcing individuals to proceed to litigation, the Legislature can be proactive in passing legislation, like the Lake Preservation Act, which could prescribe reasonable boundaries for the public trust doctrine. Even where general guideposts are not enough, it may pass legislation narrowly tailored to specific public trust disputes. In these circumstances, the public does not have to wait for the disposition of a case, which might languish in the state courts system for years. For example, the Gundersons waited over five years after filing their lawsuit before they ultimately received a decision from the Indiana Supreme Court.[23]

Additionally, the Indiana Code sets out limitations on the public trust doctrine. For example, you do not have the right to hold a fishing tournament on a lake without a license.[24] You also cannot park your boat in a way that interferes with the safe travel of other boats on the lake.[25] That means, if you are on Lake Tippecanoe, you cannot make the channel to Little Tippy your own "cocktail cove." Similarly, boat drivers cannot circle other boats or swimmers.[26] While this general lack of clarity may create some anxiety for boaters, the vast majority of activities on a lake are unlikely to create any legal "waves." For example, it would be difficult to imagine the DNR taking issue with a family parking their boat in the middle of a public freshwater lake to swim for an extended period of time.

B. What Do I Need to Know If I Own Lakefront Property?

When you buy a house on a lake, the house generally comes with certain decorations. Typically the lake house will have a sign with a catchy lake saying, perhaps "Relax! You're on Lake Time," or it might say "Education is Important but Fishing is Importanter." There will occasionally be a seashell somewhere in the house, and it is not uncommon that you will find a canoe used decoratively. Of course, the most important thing that comes with the house is its bundle of riparian rights.

Unlike the persons described later in this Article, lakefront property owners do not need an easement or other document giving them access to the lake nor do they need to rely on their general public trust rights. Instead, these property owners generally have a pool of rights that flow directly from the location of their property.[27] Those rights generally include: "(1) the right of access to navigable

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23. LBLHA, LLC v. Town of Long Beach, 28 N.E.3d 1077, 1086 (Ind. Ct. App. 2015).

24. 312 IND. ADMIN. CODE 5-3.5-1(c) (2018).

25. IND. CODE § 14-15-3-27 (2018).

26. *Id.* § 14-15-3-16.

27. Lukis v. Ray, 888 N.E.2d 325, 330 (Ind. Ct. App. 2008) ("Initially, as a general matter, we observe that a riparian owner acquires his rights to the water from his fee title to the

water; (2) the right to build a pier out to the line of navigability; (3) the right to accretions; and (4) the right to a reasonable use of the water for general purposes such as boating, domestic use, etc."[28]

Together, these rights create a "riparian zone"[29] around a lakefront property in which the property owner may exercise those rights.[30] Although these general rights are clear, determining the precise boundaries of a riparian zone is a fact-sensitive analysis, which varies depending on the shape of the lake and angle at which the on-shore property lines intersect with each other and the shoreline.[31] Riparian zones are set by the DNR and often arise in property disputes before the DNR, where the DNR also takes into account the parties, such as whether the dispute is between two neighboring riparian owners, or riparian owners and members of the general public. However, like all lake cottage-related rights addressed thus far, riparian zones and rights, more generally, only go so deep.

1. Personal Piers.—As mentioned previously, in Indiana, the rights associated with riparian ownership generally include the right to place a pier out to the line of navigability.[32] However, ownership of lakefront property does not mean you can just place whatever size pier you desire. State and local laws and regulations strictly govern pier lengths, preventing every pier from becoming too large.[33] These laws exist for good reason: to prevent landowners from limiting the rights of non-abutting landowners and the public. These landowners may own the land around the lake, but they do not own the actual lake or the land underneath it.

Indiana law gives landowners some benefit of the doubt whenever it comes to building piers. These parameters are based on common sense. Generally, you do not need a permit to put a pier on the edge of your property so long as it meets the definition of a "temporary structure."[34] To qualify as a temporary structure, the pier must meet the following specifications:

1. Must be easily removable;
2. Not infringe on the access of an adjacent landowner;
3. Not unduly restrict navigation;
4. Not be unusually wide or long relative to similar structures within the vicinity on the same lake;
5. Not extend more than one hundred and fifty feet from the shoreline or

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shoreland.").

28. *Id.* at 330-31.

29. A riparian zone means "the portion of public waters where a riparian owner has particular rights that are correlative to those of citizens, under the public trust, and exclusive of those of neighboring riparian owners." IND. NAT. RES. COMM'N, INFORMATION BULLETIN #56 (SECOND AMENDMENT) 2, http://www.in.gov/legislative/iac/20100331-IR-312100175NRA.xml.pdf [perma.cc/KH8T-EB7K] (last visited Apr. 9, 2018).

30. *See generally id*.

31. *See* Bath v. Courts, 459 N.E.2d 72 (Ind. Ct. App. 1984).

32. Parkison v. McCue, 831 N.E.2d 118, 128 (Ind. Ct. App. 2005).

33. *See* 312 IND. ADMIN. CODE 11-3-1 (2018).

34. *See id.*

water line;
6. Not be a marina;
7. Not be a group pier; and
8. Must be placed by a riparian owner or with the written approval of the riparian owner.[35]

There is little judicial guidance interpreting these requirements, so it is unclear what terms like "restrict navigation" and "unusually wide" mean in practice. However, the vagueness of these terms suggests these criteria involve fact-sensitive analyses which will vary from case-to-case and lake-to-lake. Given the deference courts generally afford to administrative agencies, including DNR, whatever an agency decides will likely be upheld in court.[36] Therefore, it is advantageous for lakefront property owners to consider all of these requirements before putting their pier in to avoid a litigation headache down the road.

Where litigation has been necessary, administrative decisions from DNR show that reasonableness factors heavily into the department's rationale with regard to pier disputes. For example, DNR routinely establishes "buffer zones" between piers, telling each neighbor where they can build them.[37] DNR clarified in *N.G. Hatton Trust v. Young & Pfeiffer*, "[i]n general it is preferred that a buffer zone be no less than five feet in width between a pier and a riparian zone boundary for a total of 10 feet."[38] However, at the same time, those buffer zones cannot work to entirely subvert another riparian right—once again a fact-sensitive analysis.[39] As a result, the administrative law judge in *N.G. Hatton Trust* refused to impose a buffer zone on one of the properties because that property had only approximately 12 feet of shoreline, while the neighboring properties had over 60 and 80 feet of shoreline, respectively.[40] Accordingly, any litigant before DNR should be sure to include both legal *and* practical arguments.

2. Group Piers.—Group piers[41] are treated differently than individual piers.[42]

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35. 312 IND. ADMIN. CODE 11-3-1(b).

36. Ind. Office of Envtl. Adjudication v. Kunz, 714 N.E.2d 1190, 1193 (Ind. Ct. App. 1999).

37. 14 CADDNAR 176, 179 (Ind. Dep't of Nat. Res. 2017).

38. *Id.*

39. *Id*.

40. *Id*.

41. A pier is considered a "group pier" for purposes of 312 I.A.C. 11-2-11.5 if it provides docking space for any of the following:

(1) At least five (5) separate property owners.

(2) At least five (5) rental units.

(3) An association.

(4) A condominium, cooperative, or other form of horizontal property.

(5) A subdivision or an addition.

(6) A conservancy district.

(7) A campground.

(8) A mobile home park.

(9) A club that has, as a purpose, the use of public waters for:

(A) boating;

Group piers on Indiana public lakes require licenses and must be built and placed in accordance with 312 I.A.C. 11-4-8.[43] In order to receive such a license, the applicant must demonstrate the pier would not:

1. Unreasonably impair navigability;
2. Pose an unreasonable hazard to life or property;
3. Violate the public's rights to the water;
4. Interfere with the reasonable exercise of boating operations by the public; or
5. Interfere with the property interests of the applicant's neighbors or their rights to access the lake.[44]

The group pier license is conditional and the pier placement, configuration, and maintenance must comply with the following requirements:

1. The pier must provide a reasonable buffer zone between the pier and the portion of the lake 200 feet from the shoreline or water line.
2. The pier must provide for reasonable navigation by neighbors and the public.
3. Generally, there should be at least five feet of clearance on both sides of a riparian line (for a total of ten feet).[45]
4. In some cases, if additional space is needed for reasonable navigation, a pier may require ten feet of clearance on both sides of a riparian line (for a total of twenty feet).
5. Piers cannot cause unreasonable traffic congestion.
6. Piers can only cause minimal disturbances to vegetation in close proximity to the shoreline or waterline.
7. The pier design should not trap debris under the pier.
8. The pier design should not redirect sediments or currents to cause erosion or sedimentation that is detrimental to navigation or the property rights of others.
9. The pier design should not cause or appear to cause appropriation of public water unnecessary to the reasonable exercise of riparian rights.
10. The pier must not extend more than one-half the width of the applicant's shoreline or waterline.[46]

(B) fishing;
(C) hunting;
(D) trapping; or
(E) similar activities.

312 IND. ADMIN. CODE 11-2-11.5 (2018).

42. *See* 312 IND. ADMIN. CODE 11-3-1(b) (2018).

43. 312 IND. ADMIN. CODE 11-4-8 (2018).

44. 312 IND. ADMIN. CODE 11-4-8(b).

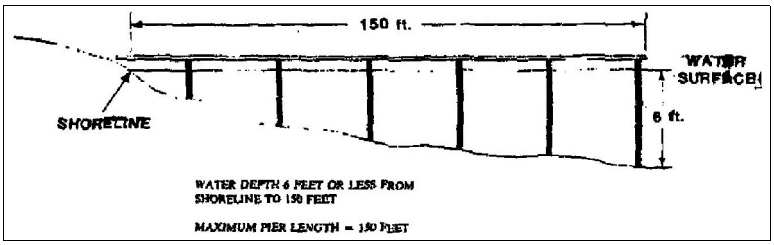
45. DNR may approve an exception to this clause if the pier is on a mutual property line and is shared by neighbors. *See* 312 IND. ADMIN. CODE 11-4-8(c)(1)(B).

46. *See* 312 IND. ADMIN. CODE 11-4-8(c). "As used in this subsection, 'width' is determined by the straight line formed between the points located at intersections of the applicant's property lines with the shoreline or water line." 312 IND. ADMIN. CODE 11-4-8(c)(6).

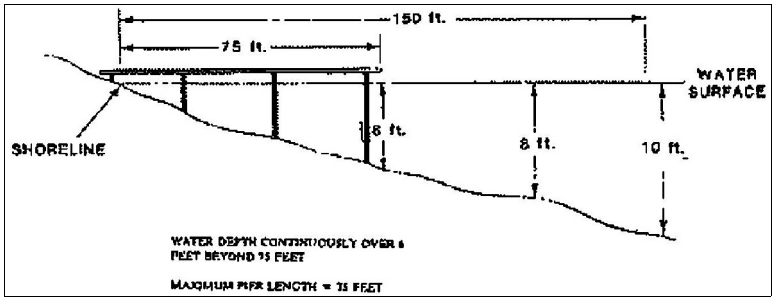
Once again, there is no case precedent interpreting these requirements. However, this lack of case law may be the result of general compliance with these regulatory criteria, indicating so long as a pier meets the "eye" test, it is unlikely to be held non-compliant. That makes sense, as whether a pier restricts travel or causes boat traffic jams is evident to most lake enthusiasts. Therefore, so long as a group pier does not extend out into the middle of the lake with a large gathering platform, the owners and constructors of that pier are unlikely to face a legal challenge.

3. How Long Can A Pier Be?—Even if you own property on a lake, you cannot just throw up any kind or size of pier on your property.[47] There are rules that govern a variety of pier features, including length, which help ensure one person is not exceeding his or her riparian rights. The following illustrations and rules apply to piers that qualify "temporary structure[s]" under 312 IAC 11-3-1:

1. "Where the water depth is six (6) feet or less from the shoreline to one hundred and fifty (150) feet from the shoreline, the maximum pier length is one hundred and fifty (150) feet."[48]

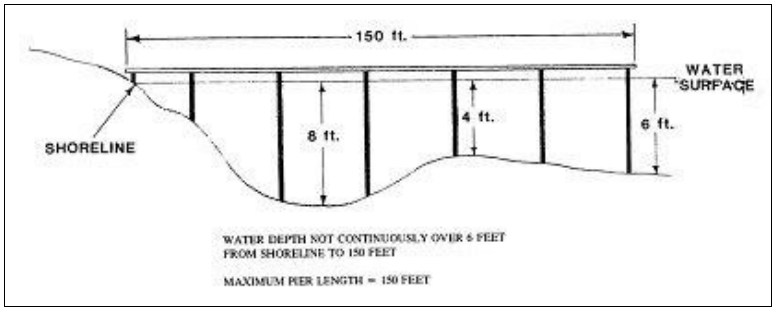


2. "Where the maximum water depth is continuously more than six (6) feet beyond seventy-five (75) feet from the shoreline, the maximum pier length is seventy-five (75) feet."[49]



47. *See generally* 312 IND. ADMIN. CODE 11-3-1.
48. 312 IND. ADMIN. CODE 11-3-1(c).
49. *Id.*

3. "Where the maximum water depth is not continuously over six (6) feet from the shoreline, the maximum pier length is one hundred fifty (150) feet."[50]



4. Does It Matter if a Pier is Built at an Angle?—Generally, you cannot build a pier in a manner that infringes upon the property rights of your neighbors.[51] However, what "infringes" is a question under Indiana law which is resolved on a case-by-case basis.

Despite this uncertainty, at least one common rule has emerged: the straight-line extension method. "[W]here a shoreline approximates a straight line and where the onshore property boundaries are perpendicular to the shore, the boundaries are determined by extending the onshore boundaries into the lake."[52] The Indiana Court of Appeals used this method in *Bath v. Courts*, where a dispute arose between neighbors owning adjacent land on the shore of Nyona Lake.[53] The plaintiffs owned a pier that extended out from their property and decided to add a platform to the end of their pier.[54] They angled their pier towards the defendants' property so as to not interfere with the public pier on the other side of the plaintiffs' property.[55] As a result, part of the pier and platform blocked defendants' shoreline.[56] In apparent retaliation, the defendants then built a pier within two feet of the plaintiffs—clearly interfering with their use.[57] A picture of the properties and the pier is included below:

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50. Id.

51. Ctr. Townhouse Corp. v. City of Mishawaka, 882 N.E.2d 762, 771 (Ind. Ct. App. 2008); Bath v. Courts, 459 N.E.2d 72, 76 (Ind. Ct. App. 1984).

52. *Bath*, 459 N.E.2d at 74 (citing Nosek v. Stryker, 309 N.W.2d. 868, 870 (Wis. Ct. App. 1981).

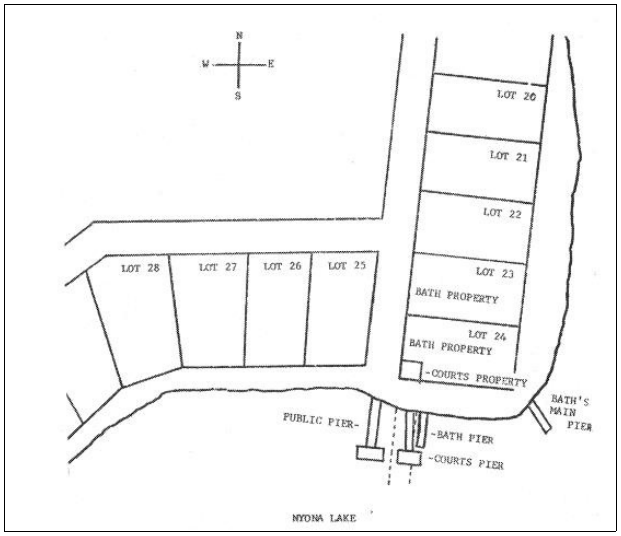
53. *See generally id*. at 72.

54. *Id*. at 73.

55. *Id*.

56. *Id*.

57. *Id*.



The plaintiffs sued and the case eventually went before the Court of Appeals of Indiana.[58] It was undisputed that both parties, as lakefront property owners, had riparian rights to the lake. It appeared both landowners would have been well within their riparian rights in building the pier had the other not existed. The tension the court faced was whether the lawful exercise of one's riparian rights violated the rights of another. Addressing this tension, the court wrote that riparian "rights can co-exist only if the riparian right to build a pier is limited by the rights of the public and of other riparian owners."[59] As a result, lakefront properties owners can build a pier on their shoreline, so long as it is "not to interfere with the use of the lake by others."[60] Because the properties sat on a relatively straight line, the court believed the most "equitable" and "practicable" way of carrying out this principle was permitting the landowners to build out their piers perpendicular to the shoreline.[61]

Despite a seemingly reasonable result in *Bath*—the court did not permit neighbors to maintain a pier clearly intended to aggravate their neighbors—this method obviously may not be helpful for all shorelines. For example, it may not work for a dispute involving two properties sitting in a cove, where usable piers would run into each other. But even without the straight line method, a court would likely adopt the general rationale from *Bath* that lakefront property owners cannot exercise their riparian rights to the detriment of others—especially when it comes to piers.

5. What Do I Need to Know About Buoys?—Just as drivers cannot accelerate

58. *Id*. at 72.
59. *Id*. at 76.
60. *Id*.
61. *Id*.

80 miles per hour down your neighborhood streets, speed limits restrict boaters' travel on a lake. Indiana Code section 14-15-3-17 forbids any boater from driving "at a speed greater than idle speed" within 200 feet of a lake shoreline where the lake is at least 500 feet in width. Because of the practical impossibility of deciding where such boundaries exist, lakefront properties are permitted to place a buoy out as far out as 200 feet from their shore, showing boaters where they cannot tube or jet ski.[62] Generally, no permit is required to place such buoys so long as the buoy otherwise complies with the buoy regulations.[63]

Interestingly, there are no express shape or color restrictions for buoys identifying the 200-foot shoreline.[64] However, for all other buoys—mainly those requiring a license under the administrative code—such restrictions exist. For buoys that require a license, the buoy must be white with two orange stripes—one identifying the water line and other at the top of the buoy.[65] Moreover, the licensed buoy must display certain shapes colored in orange on the white portion of the buoy, which act as navigational signals to boaters:

(1) A vertical, open-faced diamond shape means danger:

(2) A vertical, open-faced diamond shape with a cross centered in the diamond designates a zone which is excluded from usage by a boat or from some other designated purpose:

(3) A circular shape designates a zone where a boat may be operated only if the operation complies with certain restrictions:

(4) A square or rectangular shape means information or directions are provided:

Additionally, it should be noted there are different size and shape requirements

62. 312 IND. ADMIN. CODE 5-4-1(d) (2018).

63. *See* 312 IND. ADMIN. CODE 5-4-1 to -8.

64. *Id.*

65. 312 IND. ADMIN. CODE 5-4-1(c); 312 IND. ADMIN. CODE 5-4-4(a).

for buoys on Lake Michigan.[66]

Although these signals and criteria may be confusing, because these buoys require permits, the DNR would likely cooperate with prospective permitees to verify buoys are marked appropriately. For most, these symbols and colors are irrelevant, given that most likely qualify for the 200-foot shoreline exception.

6. What About Seawalls?—Not only does the State have an interest in lakebeds, it also has an interest in its shorelines. Accordingly, the Indiana General Assembly took major steps to protect that interest by passing the Lake Preservation Act, which, in part, gave DNR authority to regulate lake construction activities on shorelines.

Regulations enabled by the Lake Preservation Act require a lakefront property owner to obtain a permit before he or she may begin building a seawall. Once the property owner submits a permit application, the DNR conducts a review of the proposed project to ensure the public's interest in the lake will not be unnecessarily impacted and there will be no unreasonable detrimental consequences for the lake and surrounding environment.[67]

The viability of one's application may depend on the type of materials used to construct the seawalls. For example, while seawalls made of concrete and steel are effective at preventing erosion in some lakes, these walls may also cause a bathtub effect, creating choppy and irregular waves. These walls, which tend to be tall and vertical, can make it difficult for ingress and egress by animals.

Other materials are more lake-friendly, causing less damage to animal habitats and natural aesthetics. For example, glacial stones and bioengineered seawalls can assuage environmental concerns while achieving much of the same shoreline stability that concrete and steel offer. Glacial stone seawalls involve layering stones along the natural shoreline, while bioengineered walls involve the construction of a "living wall" using plants to control erosion. Both maintain the natural appearance of the shoreline.

Depending on how the DNR classifies the shoreline, property owners' options may be limited. Under Indiana law, a shoreline along a lakefront property will fall into one of four categories.[68] These four categories determine the type of permit needed and the materials which may be used when constructing a seawall along a lakefront property.

Below is a table containing the category number, name, code section, and description of the four types of shorelines:

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66. 312 IND. ADMIN. CODE 5-4-5.

67. However, because this permit process can take several months, one should begin the process as early as possible. Visit www.in.gov/dnr/water/4953.htm [https://perma.cc/P2B2-UDB9] or call 317-232-4160 to obtain a Lake Preservation Act permit application.

68. These categories were developed after the 1990s to assist DNR by providing guidelines for shoreline classification. The guidelines strike a balance between the ecological sensitivity of an area and the amount of impact deemed "reasonable" in each case. The guidelines also help property owners manage their expectations of which projects and materials are permissible prior to submitting their permit applications.

Category 1: Developed Area (312 IAC 11-2-7)	Shorelines that fall in this category have little wetland vegetation. These shorelines typically lie between or in close proximity to other bulkhead seawalls. This is the only category where bulkhead seawalls are allowed due to the low likelihood of shoreline recovery and the highly impacted nature of these areas.
Category 2: Area of Special Concern (312 IAC 11-2-2)	Must contain at least one of the following characteristics: more than 625 square feet of contiguous emergent vegetation or rooted vegetation with floating leaves, unaltered shoreline where bulkhead seawalls are at least 250 feet apart, or bogs, fens, muck flats, sand flats, or marl beaches.
Category 3: Significant Wetland (312 IAC 11-2-24)	This is the most sensitive of the shoreline classifications. It is often found in areas that remain largely unperturbed by development. It typically includes one or more of the following characteristics: at least 2500 square feet of wetland vegetation, shoreline adjacent to wetlands designated by a state or federal agency, or plant or animal species that are rare, threatened, or endangered in the state.
Category 4: Natural Shoreline (312 IAC 11-2-14.5	A natural shoreline is considered a continuous stretch of unaltered shoreline where there is at least 250 feet between lawful permanent structures like a seawall. Natural shorelines, along with significant wetlands, are the most sensitive shorelines and are, therefore, the most restricted in terms of options for seawalls.

The permit application must include a narrative statement outlining the project scope. The statement must include the following:

1. An introductory statement on the overall project scope;
2. The reason or necessity for the project;
3. A description of each major component, including but not limited to the:
   a. Type;
   b. Location;
   c. Dimensions;
   d. Whether or not the component is new construction or an existing element; and
   e. Elevations (if applicable);
4. Information relative to any additional material submitted.[69]

Below is example of a narrative statement for a new glacial stone seawall:

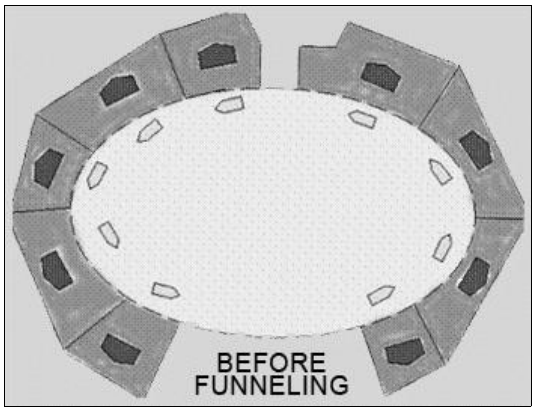
> A new seawall will be constructed along the frontage of Lot 22, Harbor Cove addition at Simonton Lake to deter further shoreline erosion. The

69. *Permit Application Assistance Manual: Project Description*, IND. DEP'T NAT. RES., https://www.in.gov/dnr/water/4972.htm [https://perma.cc/NZ2H-A3T6] (last visited Mar. 8, 2018) (specifically section 2-5-1).

> wall will be composed of 2" to 12" diameter glacial stone and will be approximately 120' long. Its lakeward face will be at the lake's legal shoreline. Plans and color photographs are enclosed in the application package.[70]

In sum, Indiana law treats seawalls like all other lakefront property: the public retains certain rights to the shoreline despite private ownership of the land. Although property rights of private landowners are valued in the United States, so is preserving the country's natural aesthetics. As such, seawall construction is guided by extensive regulations that guide the size and materials of any seawall built along the shoreline of inland freshwater lakes.

7. What If I Buy Property and Share Access with Neighbors?—Funneling—also known as a "keyhole development," "portal," or "corridor-development"—is the use of a single piece of lakefront property to provide lake access to numerous individuals, including non-waterfront properties, campers, or boaters. Funneling increases shoreline and water activity beyond what would be used by a single family. For example, consider the picture below:



It depicts a lake with single-family residences.[71] Assuming each family has only one or two boats, the boats on the lake are proportional to the number of families with homes on the lake. The gap at the top of the lake is a vacant lot, which, if filled by a single-family residence, would generally not change the other families' use of the lake.

However, consider the picture below where, instead of building a single-family residence, the owner of the property uses it to allow non-abutting landowners to access the lake.

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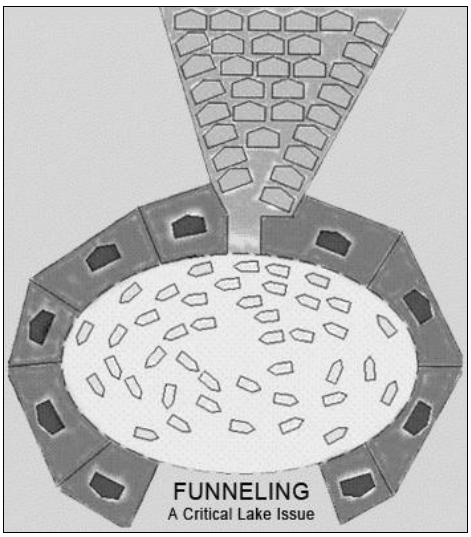
70. *Id.* (specifically section 2-5-2(F)(10)).

71. *Development*, IND. LAKES MGMT. SOC'Y, http://www.indianalakes.org/?page_id=202 [https://perma.cc/LXP6-XJX6] (last visited Feb. 21, 2018).



[72]

Overcapacity on a lake, like the one pictured above, may cause increased boat traffic on the water, increased pollution, ecological damage, increase in noise, decrease in natural beauty, and lower property values for adjacent lakefront lots. The more watercraft on the water, the greater the risk for accidental injury. Although a keyhole or funnel development may appear no different than a public access site, there are several differences, including that keyhole lots

- Allow for long-term docking of boats;
- Seldom have restroom facilities;
- Are generally smaller than public access sites; and
- Require those sharing use of the lot to incur all maintenance costs.[73]

Some lake communities have addressed this issue by enacting ordinances and regulations.

C. What If I Own Property Near, but Not on a Lake?

If you have ever seen a house hunter show, you should know lakefront property is generally more expensive than other properties near a lake—even with lake access—and there is nothing in the real estate market to suggest this will change. For example, the authors of this Article compared the list prices of two houses for sale on or near Lake Wawasee as of January 5, 2018. The first house has three bedrooms and three bathrooms with a total square footage of 2,375.[74]

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72. *Id.*

73. *See Keyhole Development Explained*, KEYHOLE FUNNEL BLOG, http://keyholefunnel.blogspot.com/ [https://perma.cc/BHY3-78NC] (last visited Feb. 21, 2018).

74. *12166 N. Chickasaw Dr, Syracuse, IN 46567*, ZILLOW, https://www.zillow.com/homes/for_sale/Syracuse-IN/85499454_zpid/34221_rid/globalrelevanceex_sort/41.416454,-

The house features fairly modern appliances and has multiple fireplaces.[75] However, the house is channel-front rather than lakefront.[76] The second house is fairly dated and is only 800 square feet, with two bedrooms and one bathroom.[77] Unlike the first house, the second house features 100 feet of lake frontage.[78] The list price for the first house is $399,000 while the second house is listed for $999,000.[79] As any realtor would tell you, it's all about location.

Given most Indiana residents are not in a position to spend close to seven figures on an 800-square-foot home, buying property near a lake is often the more economical route. Just because you are not on the lake does not mean you only have general public rights. Instead, you may have additional rights as a landowner of property near a lake if you have an easement.

Importantly, this group of landowners also includes those whose property is separated from a lake by an intervening public road or trail which could prevent a landowner from acquiring riparian rights.[80] No matter how small the public road is or how infrequently it is used, these landowners do not have the same riparian rights as those who directly abut a lake. In fact, without an easement, they simply have the same rights to use the water as any other member of the general public.

1. Easements.—A challenge facing landowners near, but not on the lake, is lake access. Of course, these landowners may access the lake using a public access site.[81] But another way property owners can gain lake access is with an easement, which is "the right to use the land of another."[82] Landowners generally create easements with legal documents that set out the nature, extent, and duration of the easement.[83]

These legal documents can take different forms. Landowners may grant easements by deed,[84] plat,[85] or contract.[86] "In construing an alleged creation of an

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85.676751,41.403644,-85.694604_rect/15_zm/?view=public [https://perma.cc/3FPG-6ZR3] (listing as of Jan. 5, 2018) [hereinafter Chickasaw Drive Listing].

75. *Id.*

76. *Id.*

77. *11537 N. Crowdale Dr, Syracuse IN 46567*, ZILLOW, https://www.zillow.com/homedetails/11537-N-Crowdale-Dr-Syracuse-IN-46567/85500183_zpid/ [https://perma.cc/563D-3UVQ] (listing as of Jan. 5, 2018) [hereinafter Crowdale Drive Listing].

78. *Id.*

79. *Compare* Chickasaw Drive Listing, *supra* note 74, *with* Crowdale Drive Listing, *supra* note 77.

80. *See* Irvin v. Crammond, 108 N.E. 539 (Ind. Ct. App. 1915).

81. *Public Access Program*, IND. DEP'T NAT. RES., https://www.in.gov/dnr/fishwild/5498.htm [https://perma.cc/32FB-YVTW] (last visited Apr. 14, 2018). DNR maintains over 400 different public access sites around the state for boaters to access public freshwater lakes in the state. *Id.*

82. Borovilos Rest. Corp. II v. Lutheran Univ. Ass'n, Inc., 920 N.E.2d 759, 764 (Ind. Ct. App. 2010).

83. *Id.*

84. *See, e.g.*, Brown v. Heidersbach, 360 N.E.2d 614, 618 (Ind. Ct. App. 1977).

85. *See* Altevogt v. Brand, 963 N.E.2d 1146 (Ind. Ct. App. 2012).

86. *See* Drees Co. v. Thompson, 868 N.E.2d 32 (Ind. Ct. App. 2007); Tanton v. Grochow,

easement, no particular words are necessary; any words which clearly show the intention to give an easement are sufficient."[87] In all cases, the actual rights associated with these easements, regardless of the manner in which they were granted, depend on the specific language of the granting instrument. That is because easements do not give the easement holder riparian rights.[88] They merely give the easement holder the right to exercise *another's* riparian rights.[89] Therefore, the lakefront property owner can decide how generous he or she wants to be in sharing those rights.

When easement disputes arise, the intent of the grantor is dispositive. Where the easement language is unambiguous, courts will only look to the plain language of the easement as evidence of that intent.[90] However, if the easement is ambiguous—often where an easement grants "ingress" and "egress"—courts will allow the parties to submit parol evidence to show the original intent of the grantor of easement.[91] That means no matter what the weight and credibility of the parol evidence, a litigant must first establish the granting language is unclear.

The plaintiffs in *Brown v. Heidersbach* were unable to make this prima facie showing.[92] In *Brown*, the Smiths and Heidersbachs both held title to lots on Lake George and had an easement to the lake, which the Browns had granted to them.[93] The Heidersbachs' easement was created by a 1949 deed by the phrase, "Also, an easement to the shore of Lake George."[94] The Smith's easement was created by a 1950 deed with the words, "Right of way to the lake is hereby given."[95] Believing they were within their easement rights, the Smiths and Heidersbachs built and maintained a pier at the end of that easement.[96] Later, the Browns sold more of their property, gave the new titleholders the right to use the same easement, and removed the Smith's and Heidersbachs' pier.[97] The Smiths and Heidersbachs subsequently sued the Browns, in part, for the exclusive right to use the easement and maintain a pier at the edge of the easement.[98]

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707 N.E.2d 1010 (Ind. Ct. App. 1999).

87. *Borovilos*, 920 N.E.2d at 764 (internal cite and quotations omitted).

88. Klotz v. Horn, 558 N.E.2d 1096, 1099 (Ind. 1990).

89. *Id.*

90. Metcalf v. Houk, 644 N.E.2d 597, 600 (Ind. Ct. App. 1994).

91. *Id.*

92. 360 N.E.2d 614 (Ind. Ct. App. 1977).

93. *Id.* at 619.

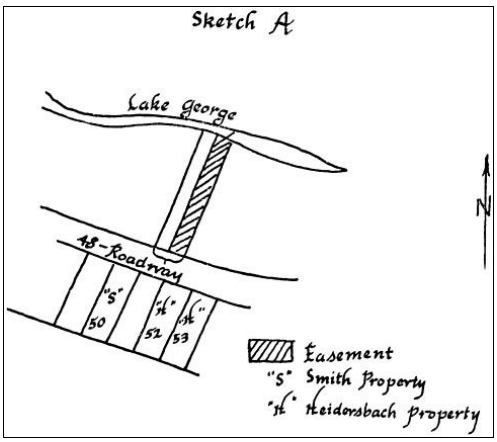
94. *Id.*

95. *Id.*

96. *Id*.

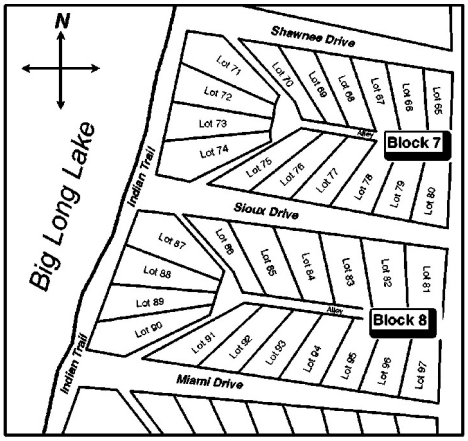
97. *Id.* at 617.

98. *Id.*



On appeal, the Court of Appeals held the easement was unambiguous.[99] The easement language did not explicitly or implicitly convey any riparian rights—meaning it did not give the Smiths and Heidersbachs, as easement holders, the right to dock their boats at a pier attached to the access easement.[100]

Sometimes litigants, like the plaintiffs in *Altevogt v. Brand*, have had to be creative in arguing the easement language was ambiguous.[101] In *Altevogt*, all of the parties owned lots in the same subdivision adjacent to Big Long Lake.[102] Owners of the lots closest to the lake sought to quiet title to the portion of land situated between the front lots and the lake shore.[103] A map of the relevant portion of Long Lake Park is set forth below.[104]



99. *Id.* at 619.
100. *Id.*
101. 963 N.E.2d 1146 (Ind. Ct. App. 2012).
102. *Id.* at 1148.
103. *Id.*
104. *Id.* at 1149.

The plat at issue referred to that property as "the Indian Trail" and provided that "all drives, alleys, and walks are for the use of the owners of the lots and their guests."[105] The plaintiffs, who were the front lot owners, sought to exclude the other members of the subdivisions from using the property at issue, or at the very least, to limit their access to a "walking easement."[106] The court rejected the plaintiffs' various arguments, finding the plain language of the plat was unambiguous.[107] According to that language, each owner, not only the landowners closest to the lake, had a six-foot easement in front of their respective neighborhood blocks (for example, blocks seven and eight above).[108]

It is not uncommon that the language of the easement is vague, requiring courts to consider evidence beyond the plain language of the easement. The Court of Appeals found the terms "ingress" and "egress" to be ambiguous in *Metcalf v. Houk*.[109] That dispute arose when the easement holders wanted to park their cars on the paved roadway leading to Lake James, as well as build, maintain, and use a pier at the lake end of the easement.[110] The instrument creating that easement provided in relevant part:

> Hermon Phillips and Louise E. Phillips . . . hereby grant a *non-exclusive easement for ingress and egress over the following described real estate* in Steuben County, Indiana, to wit: [legal description]. Said non-exclusive easement shall run with the following described real estate in Steuben County, Indiana, to wit: [legal description]. The above real estate includes the area between the east line and the shore of Lake James bounded by the north and south sidelines *extended to the water's edge*.[111]

Like in the previous cases, the parties agreed the easement granted the holders *some* right to access the lake, but disagreed about the exact nature of those rights.[112]

The Court of Appeals explained, "an easement for ingress and egress confers *only* the right to pass over the land and *not* to control the real estate or install improvements."[113] Consequently, where an easement grants access to a lake, the easement holder "*may* gain the right to erect and maintain piers, moor boats and the like," but not in *all* cases.[114] Those rights exist only "where express language in the instrument creating the easement so provides."[115]

The court concluded the easement language was unclear as to whether the

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105. *Id.* at 1148.
106. *Id.* at 1149, 1151.
107. *Id.* at 1155.
108. *Id.* at 1149.
109. Metcalf v. Houk, 644 N.E.2d 597, 600 (Ind. Ct. App. 1994).
110. *Id.* at 599.
111. *Id.* at 600 (emphases in original).
112. *See, e.g.,* Brown v. Heidersbach, 360 N.E.2d 614, 618 (Ind. Ct. App. 1977).
113. *Metcalf*, 644 N.E.2d at 600 (emphases added).
114. *Id.* (emphases added).
115. *Id.*

parties intended those rights to be included here, as it used only the general "ingress" and "egress" language.[116] Because "the instrument [was] silent concerning the specific rights of the easement holder," the trial court allowed "extrinsic or parol evidence to ascertain the intent of the parties who created the easement."[117] Here, the defendants submitted testimony from the original developers of the subdivision clarifying the easement was intended to give the easement holders "essentially the same rights as they would have if they had lakefront property," which included using the easement for "vehicular traffic" and "installing and maintaining a pier."[118] Given this clear evidence of intent, the court held the easement gave the easement holders the right to "drive motor vehicles over and across that portion of the property," as well as "install and maintain a pier or dock of appropriate size and capacity in the water of Lake James."[119]

In other cases, the party may not be so lucky as to have such substantial and compelling evidence like in *Metcalf*. Even where the language is ambiguous, there may be no evidence to allow the court to discern the grantor's intent. In these cases, courts sometimes look to historical inferences of intent. That was the case in *Abbs v. Town of Syracuse,* where the owners of shoreline property sued the Town of Syracuse and various residents for erecting piers and docking boats at the end of certain streets and alleys leading to the water's edge.[120] The original plat did not contain any language explaining the purpose of the streets and alleys, which were dedicated as public rights-of-way.[121] A later plat evidencing those same rights-of-way contained a simple explanatory phrase which reserved "the right to open streets and alleys as lots are sold."[122] However, other than the plats, "virtually no evidence" existed regarding the original grantor's intent on how the right-of-way should be used.[123]

Consequently, the trial court looked at the historical circumstances surrounding the dedication of the rights-of-way and the fact the public rights-of-way were platted to the water's edge.[124] Specifically, the trial court found:

> Using historical perspective, the grantors lived in a time when the area was undeveloped. A right-of-way is unlike the probable perception then. Certainly automobiles didn't exist and we know that waterways were a far more important means of transportation than they are now; electrical, telephone, cable TV and other wires weren't around and underground use of rights-of-way for water and sewage wouldn't have been a

116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.* at 601.
120. 686 N.E.2d 928, 929 (Ind. Ct. App. 1997).
121. *Id.* at 930.
122. *Id.*
123. *Id.*
124. *Id.* at 931.

> consideration. To them the essence of the right-of-way dedicated to public purpose would have been transportation across land to water. Access to the water would imply the right to use the water—the classic riparian right. These observations conform with the evidence of custom and usage of these locations.[125]

The Court of Appeals of Indiana believed the historical inference was reasonable, and therefore affirmed the trial court's ruling.[126]

2. Are Your Easement Rights Permanent?—Indiana law provides a specific process for vacating the precise property that allows for access to a lake.[127] As mentioned previously, some of those access rights are conveyed through language in plats, more specifically, public rights-of-way outlined in the plats.[128] The purpose of those "roads" or "public ways," common names used by plats, was to permit access to the lake for non-abutting landowners and the plats would often include language expressly stating such intent.[129] The problem with these "roads" and "public ways" is many of them remained underdeveloped over the coming century, even if nearby landowners used the property to access the lake.[130] Instead, many landowners abutting these public ways treat them as if they were private property.[131] That was the case in early 2018, when the Steuben County Board of Commissioners approved a vacation request for a platted public way, which had almost exclusively been treated as property of the abutting landowners.[132] Pictures of both the plat and an aerial shot of the land are included below:

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125. *Id.*

126. *Id.* at 931-32.

127. IND. CODE § 36-7-3-12 (2018).

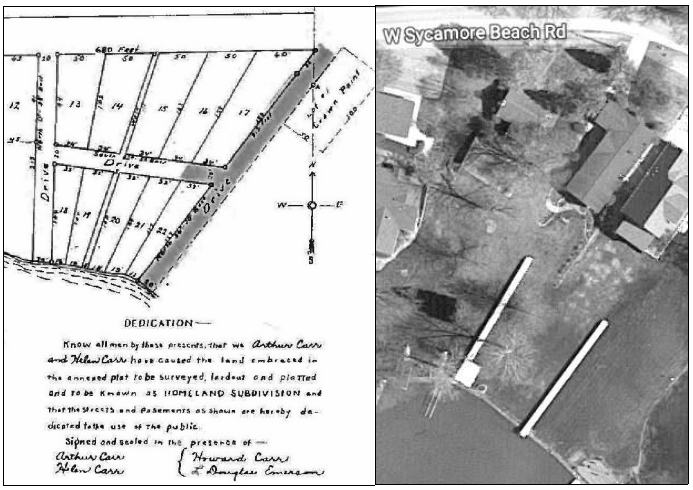
128. *See generally* Metcalf v. Houk, 644 N.E.2d 597 (Ind. Ct. App. 1994); *Abbs*, 686 N.E.2d 928.

129. *See generally Abbs*, 686 N.E.2d 928.

130. *See generally id*.

131. *Id.* In some cases, the plat may contain multiple right-of-ways, but the landowners use the plat as one right-of-way.

132. Meeting Minutes, STEUBEN COUNTY BD. OF COMM'RS, Jan. 2, 2018, www.co.steuben.in.us/1-2-18.pdf [perma.cc/5N4M-38U3].



As shown above, although the property is technically a public right-of-way, it appears as if it is a part of the adjacent lots.

Indiana provides a specific process for vacating plats in part and as a whole.[133] The landowner must begin that process by filing a petition with the appropriate legislative body of the county or municipality under the statute, stating the circumstances of the case, specifically describing the property proposed to be vacated, and giving the names and addresses of all owners of land that abuts the property proposed to be vacated.[134] Often times, a county will require a petitioner to notify other landowners in the area, more specifically, those within the same plat or subdivision. The petitioner then has the burden of showing, by a preponderance of the evidence, that justice requires the vacation.[135] Some counties may require petitioners to go through the county planning commission first, who will review the request and make a recommendation to the legislative body considering the vacation request, generally the county board of commissioners.[136]

Even where you have followed all the steps set out in the statute, you are not necessarily entitled to the vacation. The vacation process for these platted properties is wholly discretionary. Indiana Code section 36-7-3-12 ("Section 12") states, "[a]fter the hearing on the petition, the legislative body *may*, by ordinance, vacate the public way or public place."[137] Indiana courts affirmed this plain reading of the statute in *Smith v. City of Shelbyville*, holding "the statute, by use of the word 'may' . . . confers discretionary authority on the legislative body."[138]

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133. IND. CODE § 36-7-3-12 (2018).

134. *Id.*

135. *See* Booth v. Town of Newburgh, 147 N.E.2d 538, 539-40 (Ind. 1958).

136. IND. CODE § 36-7-4-711 (2018).

137. IND. CODE § 36-7-3-12 (emphasis added).

138. 462 N.E.2d 1052, 1056 (Ind. Ct. App. 1984).

There is no remedy in the statute for an applicant whose request is denied.[139] Under present case law, even where the public has never used the land at issue to access a lake, the applicable entity may still deny the vacation for almost any reason. Perhaps the entity wants to use it for public access in the future, or it believes development on the vacated property would hinder the view of the lake for some nearby owners. Even if the entity cannot articulate a reason, there is still no process for the applicant to challenge that decision.[140]

However, that discretion cuts both ways, as the applicable entity could approve the vacation request. That is why it is imperative for nearby landowners to remonstrate at the hearings regarding these applications to preserve their interests in the land to be vacated.[141] Nevertheless, not every person may remonstrate, as the person must show he or she would be directly injured by the vacation.[142] Indiana Code section 36-7-3-13 ("Section 13") lays out the injuries, which include a showing the "vacation would hinder the public's access to a church, school, or other public building or place."[143]

3. What Do I Have To Prove To Get an Easement Vacated?—It is an open question under Indiana law whether an entity considering a vacation request must deny it where a remonstrator makes a sufficient showing of an injury under Section 13. Moreover, although it is true that these remonstrators may appeal the decision to vacate a plat,[144] constitutional separation of powers problems prevent a court from reviewing a legislative body's discretionary decision truly de novo.[145]

Accordingly, Indiana courts appropriately treat Section 12(f) appeals the same as challenges to other legislative decisions—reviewing only to determine

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139. Harris v. Town of Ogden Dunes, 551 N.E.2d 1147, 1149 (Ind. Ct. App. 1990).

140. *Id.*; IND. CODE § 36-7-3-12.

141. IND. CODE § 36-7-3-13 (2018).

142. *Id*.

143. IND. CODE § 36-7-3-13 (stating that a remonstrance or objection must be based on one of the following grounds:

> (1) The vacation would hinder the growth or orderly development of the unit or neighborhood in which it is located or to which it is contiguous.
>
> (2) The vacation would make access to the lands of the aggrieved person by means of public way more difficult or inconvenient.
>
> (3)The vacation would hinder the public's access to a church, school, or other public building or place.
>
> (4)The vacation would hinder the use of a public way by the neighborhood in which it is located or to which it is contiguous.)

144. *See* IND. CODE § 36-7-3-12(f).

145. *Id.* ("Within thirty (30) days after the adoption of a vacation ordinance, any aggrieved person may appeal the . . . . The court shall try the matter de novo and may award damages."); Smith v. City of Shelbyville, 462 N.E.2d 1052, 1056-57 (Ind. Ct. App. 1984) (holding the statute's use of the words "de novo" does mean the trial court re-hears and re-decides the vacation application, as "[t]he proceeding is not a trial de novo").

statutory and constitutional compliance.[146] For example, in *Smith v. City of Shelbyville*, the Court of Appeals of Indiana considered whether a member of a city council violated Indiana Code section 36-7-4-223 by voting on a variance application in which he may have had a direct or indirect interest.[147] The court refused to address the substantive merits of the variance approval more generally, recognizing such review was impermissible.[148] Due to the fact that Indiana courts do not interpret Section 12 to give judicial bodies the authority to make legislative decisions, those opposing a vacation should advocate as vigorously as possible at the hearing for the vacation, arguing the injury would create an injury under Section 13.

3. How Should Vacated Easement Property Be Distributed?—Even if the property is vacated, there are even more issues as to how the property must be distributed, specifically for those properties at the edge of one plat but abutting another plat. Indiana courts have only generally stated, "when a street or highway is vacated or abandoned the title to the land reverts to the abutting property owners."[149] However, Indiana courts have not clarified the term "abutting landowner."[150]

Other states have addressed this issue directly and have reached varying conclusions. A Minnesota court held vacated platted streets remit to only those abutting landowners *in the same plat*, whereas the Supreme Court of Montana held the vacated property is split between *all* abutting landowners, no matter the plat.[151] Although these courts reached different conclusions, both courts seemingly applied the traditional analysis for easement cases by focusing on the intent of the initial conveyance of the road for public use.[152]

Applying this traditional approach for easement cases, it is likely Indiana courts would follow the analysis from the Montana case and split the property between all adjacent lots, not just those in the same plat, given this state's statutory vacation scheme. In Indiana, two different statutes guide vacating platted property, Indiana Code sections 36-7-3-10 and 36-7-3-12 ("Section 10" and "Section 12," respectively). As mentioned previously, Section 12 creates a specific process for "public ways" and "public places" distinct from the process in Section 10 for other platted properties.[153] Notably, Section 12 treats platted roadways as if they are no longer owned by the plat owners.[154] Instead, it treats

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146. *Smith*, 462 N.E.2d at 1056-57.

147. *Id.*

148. *Id.*

149. Gorby v. McEndarfer, 191 N.E.2d 786, 791 (Ind. Ct. App. 1963).

150. *See id.*

151. *Compare* Petition of Bldg. D, Inc., 502 N.W.2d 406, 408 (Minn. Ct. App. 1993), *with* Herreid v. Hauck, 839 P.2d 571, 574 (Mont. 1992).

152. *See, e.g.*, Abbs v. Town of Syracuse, 655 N.E.2d 114, 117 (Ind. Ct. App. 1995) (holding when an easement is ambiguous, courts "look to the facts and circumstances to determine the intent of the easement").

153. IND. CODE § 36-7-3-12 (2018).

154. *Id.*

them as if the county or municipality owns them because the municipality or county may vacate them at will.[155]

Compare that process to Section 10, which provides for *no* discretion by the decision-making entity.[156] Under Section 10, the applicant must either obtain written consent by all others in the plat, or make a specific factual showing to the Commission.[157] Whereas Section 12 applications are heard by a municipality or county's legislative body—whose denials of applications are not appealable—[158] Section 10 applications are heard by the local plan commission—an administrative body whose decisions are subject to the standard of review for administrative decisions.[159] Therefore, the Indiana General Assembly seemingly intended for vacated property to go all adjacent landowners, no matter the plat.

III. BUYER CHECKLIST: THINGS TO CONSIDER BEFORE TAKING THE PLUNGE

As readers now know, buying a lake house can be a very complicated process. The Authors compiled a list that prospective owners should consider before buying a lake house.

- What exactly are you buying?
  - Are you buying property on a public lake, private lake, or reservoir?[160]
  - Does the property extend to the water's edge?[161]
  - Does the land extend under the water?[162]
  - Are there any easements granting others access to the water over the property?[163]
  - How important is the view of the lake from the property?
    - Remember that Indiana does not recognize a right to an unobstructed view, so what you see is what you get.[164]
- Other than the lake, what else borders the property?
  - What does the plat tell you?[165]
    - Review the plat, including checking the county's GIS system to find out information about the property, as well as nearby properties.

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155. *Id*.

156. IND. CODE § 36-7-3-10 (2018)

157. *Id*.; *see also* IND. CODE § 36-7-4-711(f) (2018) (providing that the Commission can approve any application only where the applicant shows "(1) conditions in the platted area have changed so as to defeat the original purpose of the plat; (2) it is in the public interest to vacate all or part of the plat; and (3) the value of that part of the land in the plat not owned by the petitioner will not be diminished by the vacation.").

158. *See* IND. CODE § 36-7-3-12.

159. *See* IND. CODE § 36-7-3-10.

160. *See supra* Part I.

161. *See supra* Part II.C.

162. *See supra* Part I.

163. *See supra* Part II.C.1.

164. *See supra* Part II.A.

165. *See supra* Part II.C.1-2.

- Are there any dedicated roads, alleys, or other areas that may not be visible during an inspection?[166]
- If roads and alleys exist, are they for public or private use? Are they a part of your plat or another plat?[167]

♦ Have you done a thorough inspection of the property?
- Does there appear to be any type of path or walkway on or across the property?[168]
- Is someone docking a boat on or very near the property?[169]
- Has someone been using a pier on the property?[170]
- If necessary, follow-up to determine what uses are being made, by whom, and under what claim of right.

♦ Was a survey completed for the property?
- How recent was the survey?
- How, if at all, do the boundaries of the property appear different than the legal description?
- Has one of the neighbors acquired the right to use a portion of the property?[171]
- Does the house, shed, garage, or pier straddle or cross the line?
  - Setback ordinances may prohibit some development near the edge of the property.

♦ Is there a lake or homeowner's association?
- What does this association expect of its members?
  - Talk to members to receive valuable information about past or current disputes regarding lake law issues.

♦ What do you know about the body of water?
- Is the water deep enough to dock a boat?[172]
- Are there any restrictions regarding watercraft on the water?[173]
- Do people use the body for other activities, such as duck hunting?

♦ Are there any local ordinances that restrict or control the use of the water or waterfront?
- Any regulations on docks or piers?[174]
- Any additional regulations on seawalls?[175]

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166. *Id.*
167. *Id.*
168. *See supra* Part II.C.1.
169. *Id.*
170. *Id.*
171. *Id.*
172. *See supra* Part II.B.3.
173. *See supra* Part II.B.5.
174. *See supra* Part II.B.3-4.
175. *See supra* Part II.B.6.

CONCLUSION

When the Orca crew set out to hunt Jaws, those on the boat did not fully grasp what they were getting themselves into.[176] Although they had seen some of the havoc the shark caused on Amity Island, Jaws turned out to be even bigger and more destructive than expected.[177]

Similarly, you may have seen or heard about stories of disputes involving lake law issues. However, although those stories may be accurate, they likely fail to capture the number and extent of issues implicated by lake law. Just as the shark was more perilous than anticipated, a cursory understanding of lake law might not prepare you well for the potential legal issues that accompany owning property on or near a lake. Instead, before wading into unknown waters of such property ownership, you should carefully review the issues outlined in this Article to determine what issues might suddenly pop up out of the water. Otherwise, "[y]ou're going to need a bigger boat."[178]

176. *See* JAWS, *supra* note *.

177. *See id.*

178. *Id.*