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# IN THE
# COURT OF APPEALS OF INDIANA

Town of Linden, Indiana, Montgomery County, Indiana, Montgomery County Commissioners, Montgomery

April 18, 2022

Court of Appeals Case No. 21A-PL-1811

Appeal from the Montgomery Circuit Court

The Honorable Thomas H. Busch, Special Judge

Trial Court Cause No. 54C01-1409-PL-774

County Drainage Board, and Montgomery County Surveyor,[1]
*Appellants-Defendants,*

v.

Darrell Birge and Sandra Birge,
*Appellees-Plaintiffs.*

**Tavitas, Judge.**

## Case Summary

[1] The Town of Linden ("the Town") and Montgomery County ("the County") (collectively "the Defendants") made improvements to an existing regulated drain to alleviate flooding issues in the Town and surrounding areas. Part of the drain runs through a pre-existing drainage easement on property ("the Property") belonging to Darrell and Sandra Birge ("the Birges"). The Birges alleged that the Property is now subject to frequent flooding caused by the improvements to the drain. They, therefore, refused to pay the assessment levied against them for the improvements to the drain and instead brought an action for inverse condemnation against the Defendants,[2] claiming that the

[1] Jeff Healy, Banning Engineering, P.C., and Harvey Construction are nominal Appellants but have not filed appellate briefs. *See* Ind. Appellate Rule 17(A) ("A party of record in the trial court or Administrative Agency shall be a party on appeal.").

[2] The Birges named several County entities as defendants, specifically: Montgomery County; the Montgomery County Commissioners ("the Commissioners"); the Montgomery County Surveyor ("the

flooding of the Property constitutes a governmental taking of their property without compensation. The trial court entered an order finding that there had been a permanent physical invasion of the Property and setting the matter for a determination of damages.

[2] The Defendants bring this interlocutory appeal challenging the trial court's conclusion that there has been a taking and present several arguments, which we consolidate and restate as: (1) whether the trial court erred by admitting and considering evidence regarding the highest and best use of the Property; (2) whether the trial court erred in determining that the flooding issues on the Property were caused by the improvements to the drain; (3) whether the flooding on the Property was sufficient to support a finding of a taking; and (4) whether the trial court failed to consider the applicable drainage right-of-way statute. Concluding that the trial court erred by applying the wrong legal standard to its takings analysis, we reverse and remand. Because the other issues presented by the Defendants are likely to recur on remand, we address them as well.

## Issues

[3] Defendants raise five issues, which we consolidate, reorder, and restate as:

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County Surveyor"); and the Montgomery County Drainage Board ("the Drainage Board"). Unless otherwise specified, we refer to these entities collectively as "the County."

I. Whether the trial court erred in concluding that the effect of the improvements to the drain on the Property was sufficient to constitute a taking.

II. Whether the trial court abused its discretion by admitting and considering evidence regarding the highest and best use of the Property.

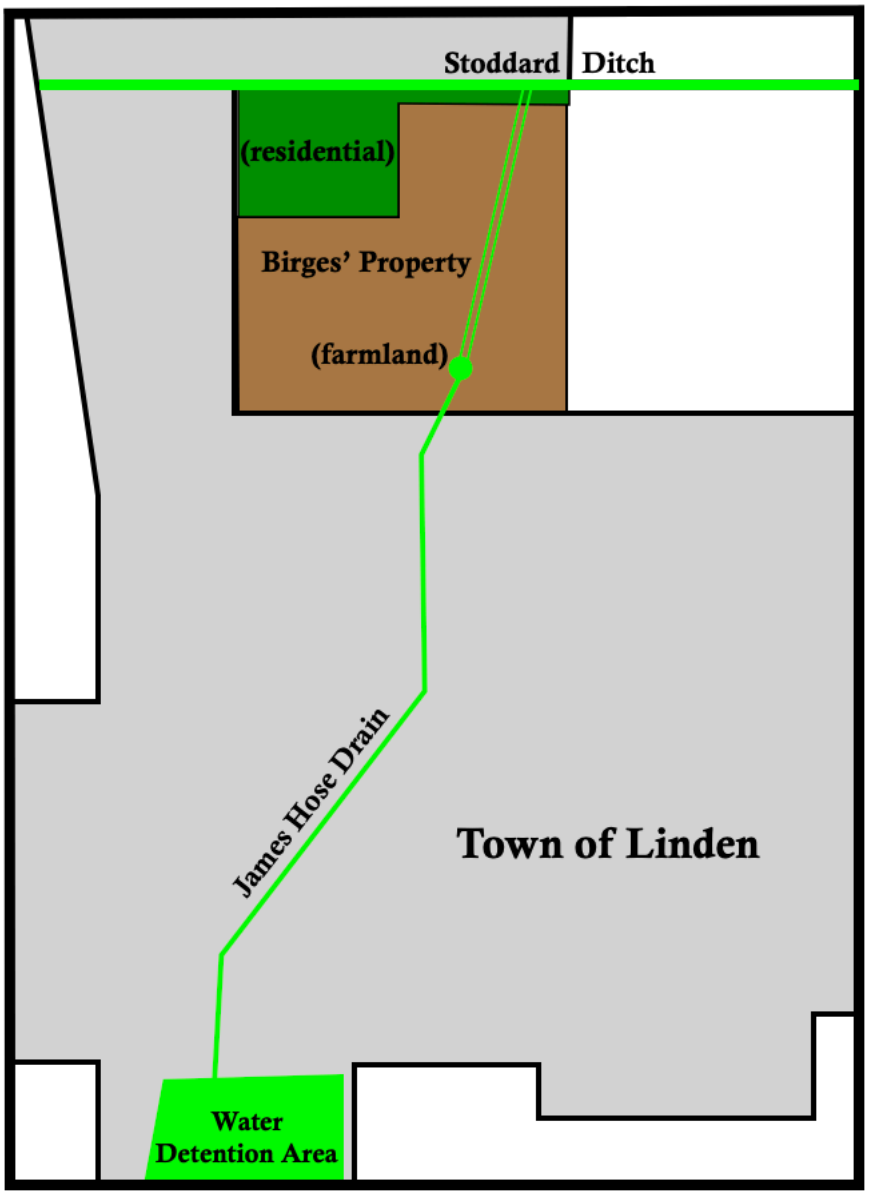
III. Whether the trial court erred in determining that the flooding issues on the Property were caused by the improvements to the drain.

IV. Whether the trial court erred by failing to consider the applicable drainage right-of-way statute.

## Facts

[4] The drain involved in this case is a regulated drain[3] known as the James Hose Drain ("the Drain"). The Drain was built in 1898 as an agricultural drain. The Drain carries water from the higher-elevated areas south of the Town, through the Town, then through a drainage easement, or right-of-way, located on lower-lying property belonging to the Birges, after which the Drain empties into the Stoddard Ditch. The following map depicts the location of the Drain in relation to the Town and the Property:

[3] A "regulated drain" is defined by statute as "an open drain, a tiled drain, or a combination of the two." Ind. Code § 36-9-27-2.




*See* Exhibits Vol. I p. 168, Vol. IV, p. 67.[4] Mr. Birge is a farm drainage contractor with over forty years' experience. Mr. Birge did not connect any

[4] This map is based on the maps included in the record before us, none of which are reproduced clearly enough to allow us to include them in this opinion. This map is included only as a visual aid to the reader. *See Altevogt v. Brand*, 963 N.E.2d 1146, 1148 (Ind. Ct. App. 2012) (including, as an aid to the reader, a map that was based on materials in the record).

lateral drains to the Drain and admitted that he would not do so until the instant litigation is completed.

[5] Although it was rebuilt in 1927, the Drain was never designed or intended to be an urban drain and had fallen into disrepair. Accordingly, the Drain had long been inadequate to drain the watershed it served. The lack of adequate draining resulted in frequent flooding in the watershed serviced by the Drain, especially in the Town, which had been built without its own storm sewer system and relied solely on the Drain to remove rainwater. This frequent flooding hampered development of the Town.

[6] Due to the drainage issues in the Town and the higher areas south of the Town, the County and the Town undertook a joint effort in 2006 to alleviate the flooding issues. In 2009, the County obtained a grant to hire an engineering firm to prepare a plan to improve the Drain. The County retained Banning Engineering, which prepared a report with three alternatives to address the flooding. The plan that was ultimately chosen, known as Alternative 2, called for the expansion of a water-detention area—also referred to as a ponded area, although it was only ponded during heavy rainfall—south of the Town; this plan would replace the existing Drain with a forty-two-inch pipe[5] through the Town, and the construction of a structure at the north end of the Town to shift

[5] These measurements refer to the diameter of the pipe, not its length.

the Drain from the forty-two-inch pipe to two thirty-inch pipes.[6] *See* Ex. Vol. I p. 35.

[7] A public hearing was held on the proposed reconstruction of the Drain, where a representative of Banning Engineering presented its report and its recommendation to proceed with Alternative 2, as the other two alternatives called for the acquisition of seven and ten acres of additional land. Alternative 2, in contrast, could be built along the existing easements and was, therefore, the least costly of the alternatives at an estimated price of $730,000.

[8] In September 2009, the Commissioners voted to approve Alternative 2. Due to financing concerns, however, the Town applied for a grant to fund the construction of the improvements to the Drain. Ultimately, the Town procured a grant of $600,000, with the remaining costs to be covered by the County's maintenance fund and a special assessment from the landowners within the watershed. In September 2011, the Drainage Board held a final public hearing on the project, including the assessments. The Birges were assessed benefits from the improved Drain in the amount of $7,679.23 and assessed no damages. Thereafter, the Drainage Board issued a reconstruction order and adopted the

[6] The split to the two thirty-inch pipes was necessary because the Property did not have adequate ground cover or the proper grade needed to continue the larger pipe through the Property to the Stoddard Ditch.

reconstruction report of the County Surveyor. The Birges filed no objection under Indiana Code Sections 36-9-27-52(d) to the proposed reconstruction.[7]

[9] The Town, as the receiver of the grant, was required to separately evaluate the reconstruction plan, and it also chose Alternative 2. When engineers began the field work on the project, they determined that, instead of a forty-two-inch pipe, the land could accommodate a larger forty-eight-inch pipe. Accordingly, when the request for bids were sent to contractors, there were two construction options: Option 1, the original plan calling for the forty-two-inch pipe; and Option 2, the newer plan calling for a forty-eight-inch pipe. On January 20, 2012, engineer Joe Miller of Banning Engineering presented the construction bids to the Town. The lowest bid for Option 1 was $574,146, and the lowest bid for Option 2 was $605,821. The Town chose Option 2 and awarded the project to Harvey Construction.

[10] The reconstruction of the Drain began in March 2012. During construction, a few changes were made due to unforeseen issues. One of these involved the enlargement of a water-detention area south of the Town and south of the Property. During construction of this area, existing underground utilities were

[7] This section provides that, not less than five days before the drainage board's hearing on a reconstruction report, an owner of land affected by the report may file written objections alleging: (1) the cost, damages, and expenses of the proposed reconstruction will exceed the benefits; (2) the benefits assessed against the property owner are excessive; or (3) the board failed to find that the objector's land was damaged or that the damages assessed are inadequate. I.C. § 36-9-27-52(d). "The failure of an owner to file objections constitutes a waiver of the owner's right to subsequently object, on the grounds stated in this subsection, to any final action of the board." *Id.* The Defendants also note that the Birges made no objection to the reconstruction of the Drain under Indiana Code section 36-9-27-65(a).

found, which prohibited the planned enlargement of the water-detention area. Banning Engineering determined, based on computer modeling, that if the detention area was not enlarged as planned, the reconstructed Drain would still be adequate to drain the watershed. As part of the plan, a berm—an artificial ridge or embankment—was also constructed along the northern portion of the detention area that would prevent even a 100-year rain event from flooding the Town.

[11] The portion of the Drain where the forty-eight-inch pipe split into two thirty-two-inch pipes was located on the Property at a point referred to as Structure 101. A grated manhole, or inlet, was located at this area to allow water to move in and out of the Drain. When construction of this portion of the Drain was underway, the Birges complained about the grated opening on the inlet. On March 19, 2012, the Birges sent a formal notice of their disagreement with the design of the Drain on their property, especially the grated manhole at Structure 101. The Birges demanded that no manholes be installed or, if they were installed, that the manholes be buried sufficiently deep so that they would not impact farming on the Property.

[12] The Drainage Board asked Miller to determine how the lack of a manhole grate at that location would affect the Drain. On March 23, 2012, Miller presented his findings to the Drainage Board and concluded that the grated manhole structures were necessary due to the grade of the Property and that the

manholes could not be buried as demanded by the Birges.[8] The Drainage Board concluded that it had followed the legal procedures for the Drain improvement project and that the Birges had failed to timely raise any objections. The Drain was ultimately completed by the end of 2012.

[13] The Property is, as mentioned above, located on a lower-elevated area north of the Town. The Birges live in a home located on a portion of the Property and lease the remaining portion as farmland to Brian and Chuck Shelby. There was conflicting evidence regarding the extent of ponding or flooding of the Property prior to the improvements to the Drain. The trial court found, however, that the Birges had no problem with flooding prior to the reconstruction of the Drain.

[14] After the Drain improvement project was completed, however, the Birges noticed water ponding on the lower-lying areas of the Property after any significant rainfall. The affected areas would remain flooded for five-to-seven days before the water would subside. This repeated flooding made farming of the affected areas difficult. The Birges, therefore, refused to pay the $7,679.23 assessment levied against them. Instead, on September 22, 2014, the Birges

[8] By the time of the evidentiary hearing in this case, the manhole at Structure 101 had been capped and did not have a grated opening as designed. It was never established why the cap was placed on Structure 101. The Defendants suggested that Mr. Birge capped the opening but presented no direct evidence to support their claim. More importantly, the trial court did not find that Mr. Birge removed the grated opening and replaced it with a cap.

filed an action for inverse condemnation against the Defendants.[9] After the Defendants filed their answers, the Town, on March 2, 2015, filed a motion to dismiss claiming it was immune from liability under the Indiana Tort Claims Act, and alleged that the claims were based on the performance of a discretionary function. The trial court granted this motion, but a panel of this Court reversed and concluded that the Town failed to demonstrate that it was entitled to discretionary-function immunity. *Birge v. Town of Linden*, 57 N.E.3d 839 (Ind. Ct. App. 2016).

[15] On remand, the defendants moved for summary judgment, which the trial court subsequently denied. Although the trial court certified its order for interlocutory appeal, we declined to exercise jurisdiction. On May 10-11, 2021, an evidentiary hearing was held on the issue of whether the Defendants' actions resulting in a taking of the Property. Both parties presented evidence, including that of expert witnesses, in favor of their respective positions. The parties, per the trial court's request, submitted proposed findings of fact and conclusions thereon. On June 22, 2021, the trial court issued a judgment and order finding that the improvements to the Drain had caused repeated flooding on the Property. The trial court's order provides in relevant part:

FINDINGS OF FACT

[9] The Birges' complaint also alleged various tort claims against the Town, the County, Banning Engineering, Joseph Miller, Jeff Healey, and Harvey Construction. The Birges later dismissed their claims against Harvey Construction. The current interlocutory appeal concerns only the inverse condemnation claim.

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14. As built, the drainage problem in the Town was solved. Water no longer floods the town, even in a heavy storm. The rebuilt James Hose Drain is designed so that even in a 100-year storm the Town stays dry.

15. However, all the runoff from the entire watershed now flows into Plaintiffs' property. It flows North through the 48" pipe to the point at the South end of Plaintiffs' property where the water is transferred to the two 30" pipes. The 48" pipe is never full, so there is no pressurization in the Town.

16. At structure 102, the transfer point, there is a manhole which overflows because of the inability of the 30" pipes to accept the entire flow. That overflow water flows downhill onto Plaintiffs' property.

17. The two 30" pipes are under pressure in every heavy rainfall. That pressure backs the water up at Structure 101, two manholes at the low point at the North end of Plaintiffs' property, and that water overflows onto Plaintiffs' property.

18. The pressurization of the 30" pipes lead in turn to pressurization of the drainage tiles and laterals on Plaintiffs' property, causing water to flood Plaintiffs' property in those locations.

19. These repeated flooding events increase the surface flooding and raise the water table on Plaintiffs' property outside of the drainage easement.

20 Unlike the Town, where even a 100-year storm will see no flooding, the redesign of the James Hose Drain floods Plaintiffs' property in every heavy rain.

21. No condemnation proceedings were commenced as to Plaintiffs' Property, no damages hearing was held, no compensation was offered.

22. Instead, the Defendants charged Plaintiffs' property with an assessment of $7679, after concluding that Plaintiffs received a benefit from the Project.

23. The benefit to Plaintiffs' property was calculated by the Defendants using a "Before" condition that never existed: a functioning 18" drain through the Town and through Plaintiffs' property.

24. Plaintiffs refused to pay their assessment.

25. The ability to farm Plaintiffs' property has been made more difficult because of the saturation of portions of the property.

26. The agricultural yields of Plaintiffs' property match the County average.

27. The rents received from Plaintiffs' tenant are not contingent on the yield, and have increased since the project.

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CONCLUSIONS OF LAW

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The category of taking that applies to this case is "a permanent physical invasion of . . . property." The design and reconstruction of the James Hose Drain uses Plaintiffs' property as the overflow basin for any heavy rain. This is a "permanent

> physical invasion" of Plaintiffs' property and therefore a taking . . . .

Appellant's App. Vol. V pp. 57-61. At the Defendants' request, the trial court certified its order for interlocutory appeal, and we subsequently accepted jurisdiction.

## Analysis

### *Standard of Review*

[16] In reviewing the findings of fact and conclusions of law thereon made pursuant to Indiana Trial Rule 52, we first determine whether the evidence supports the findings and then whether the findings support the judgment. *Litton v. Baugh*, 122 N.E.3d 1034, 1039 (Ind. Ct. App. 2019) (citing *K.I. ex rel. J.I. v. J.H.*, 903 N.E.2d 453, 457 (Ind. 2009)). On appeal, we will not set aside the findings or the judgment unless they are clearly erroneous. *Id*. (citing Ind. Trial Rule 52(A)). "A finding is clearly erroneous when there are no facts or inferences drawn therefrom which support it." *Perkinson v. Perkinson*, 989 N.E.2d 758, 761 (Ind. 2013). We neither reweigh the evidence nor judge the credibility of the witnesses, and we consider only the evidence and reasonable inferences drawn therefrom that support the findings. *Id*. A judgment is clearly erroneous when there is no evidence supporting the findings or the findings fail to support the judgment. *Litton*, 122 N.E.3d at 1034 (citing *K.I.*, 903 N.E.2d at 457). A judgment is also clearly erroneous when the trial court applies the wrong legal standard to properly found facts. *Id*. In addition, we review the trial court's legal conclusions de novo. *Id*.

### *Inverse Condemnation*

[17] The Birges brought a claim for inverse condemnation against the Defendants. In *Murray v. City of Lawrenceburg*, our Supreme Court summarized the law of inverse condemnation as follows:

> The State has inherent authority to take private property for public use. The Indiana Constitution and the Fifth Amendment require just compensation if this authority is exercised.[10] Indiana Code Chapter 32-24-1 (2004) outlines the process by which the state is to initiate eminent domain proceedings. If the government takes property but fails to initiate proceedings, Section 32-24-1-16 explicitly allows an owner of property acquired for public use to bring a suit for inverse condemnation to recover money damages:
>
> *****
>
> An action for inverse condemnation requires: (1) a taking or damaging; (2) of private property; (3) for public use; (4) without just compensation being paid; and (5) by a governmental entity that has not instituted formal proceedings.

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[10] Article 1, Section 21 of the Indiana Constitution provides that: "No person's property shall be taken by law, without just compensation; nor, except in case of the State, without such compensation first assessed and tendered." The Fifth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, includes the same proscription against the taking of property without just compensation. "We construe and analyze the 'textually indistinguishable' takings clauses identically." *Himsel v. Himsel*, 122 N.E.3d 935, 946 (Ind. Ct. App. 2019) (citing *Redington v. State*, 992 N.E.2d 823, 835 (Ind. Ct. App. 2013)); *see also State v. Kimco of Evansville, Inc.*, 902 N.E.2d 206, 211-12 (Ind. 2009) (noting that "our state constitutional takings analysis is the same as federal constitutional eminent domain law"), *cert. denied*.

925 N.E.2d 728, 731 (Ind. 2010) (citations and internal quotations omitted). At issue in the present case is the first of these requirements: whether the Defendants took the Property.

### *Governmental Takings*

[18] The United States Supreme Court has recognized two broad categories of takings: (1) actual appropriation of or ouster from private property, and (2) regulatory takings.

#### *1. Actual Appropriation of Private Property*

[19] The first of these, "'[t]he paradigmatic taking . . . is a direct government appropriation or physical invasion of private property' effecting 'practical ouster' . . . ." *AAA Fed. Credit Union v. Indiana Dep't of Transp.*, 79 N.E.3d 401, 404 (Ind. Ct. App. 2017) (quoting *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537, 125 S. Ct. 2074, 2076 (2005)). The typical example of a direct governmental appropriation takings is acquiring property by eminent domain. *See Town of Ponce Inlet v. Pacetta*, LLC, 226 So. 3d 303, 311-12 (Fla. Ct. App. 2017) ("The typical taking is accomplished through an eminent domain action[.]"). Other types of direct government appropriation of property have also been held to constitute takings. *See United States v. Pewee Coal Co.*, 341 U.S. 114, 71 S. Ct. 670 (1951) (holding that government's seizure and operation of a coal mine to prevent a national strike of coal miners effected a taking); *United States v. General Motors Corp.*, 323 U.S. 373, 65 S. Ct. 357 (1945) (holding that government's occupation of private warehouse effected a taking). For a long

time, "it was generally thought that the Takings Clause reached only a direct appropriation of property, or the functional equivalent of a practical ouster of [the owner's] possession." *Lingle*, 544 U.S. at 537 (2005) (citations and internal quotations omitted).

*2. Regulatory Takings*

[20] The United States Supreme Court later recognized that, even if the government does not directly appropriate private property, government regulation of private property can be so "so onerous that its effect is tantamount to a direct appropriation or ouster . . . ." *Lingle*, 544 U.S. at 528 (citing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S. Ct. 158 (1922)). The Court in *Mahon* cryptically held that "while property may be regulated to a certain extent, if regulation goes *too far* it will be recognized as a taking." 260 U.S. at 415; *see also Lingle*, 544 U.S. at 537-38 (referring to the *Mahon* test as "cryptic").

[21] Decades later, in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 125 S. Ct. 2646 (1978), the Court acknowledged that it had been "unable to develop any 'set formula' for evaluating regulatory takings claims." The *Penn Central* Court, however, did identify "several factors that have particular significance." *Id*. As the *Lingle* Court summarized:

> Primary among [the *Penn Central*] factors are [t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations. In addition, the character of the governmental action—for instance whether it amounts to a physical invasion or instead merely affects property interests

> through some public program adjusting the benefits and burdens of economic life to promote the common good—may be relevant in discerning whether a taking has occurred.

*Lingle*, 544 U.S. at 538-39 (citations and internal quotations omitted). These factors—"though each has given rise to vexing subsidiary questions—have served as the principal guidelines" for resolving most regulatory takings claims. *Id*.

[22] Further complicating matters, there are three broad categories of regulatory takings: (a) permanent physical invasions, however minor; (b) a regulation that completely deprives an owner of all economically beneficial use of the property; and (c) all other regulatory takings that do not fall within these first two categories. *AAA Fed. Credit Union,* 79 N.E.3d at 405.

### *A. Permanent Physical Invasions*

[23] "Requiring a landowner to suffer 'permanent physical invasion of her property—however minor' is a per se regulatory taking." *Id*. (quoting *Lingle*, 544 U.S. at 537). Thus, in *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 102 S. Ct. 3164 (1982), the Court held that a state law requiring landlords to permit cable companies to install cable facilities in apartment buildings effected a compensable taking.

### *B. Complete Deprivation of Economically Beneficial Use*

[24] Also considered a compensable taking is a "regulation 'that completely deprive[s] an owner of all economically beneficial use of her property.'" *AAA*

*Fed. Credit Union,* 79 N.E.3d at 405 (quoting *Lingle*, 544 U.S. at 538). In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886 (1992), the property owner, Lucas, purchased two residential lots on which he intended to build single-family homes. Two years later, South Carolina enacted a law barring Lucas from "erecting any permanent habitable structures on his two parcels." *Id*. at 1007. Based on this legislation, a state court found Lucas's property to be "valueless." *Id.* Describing the taking suffered by Lucas as "categorical," the Supreme Court held:

> We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.

*Id*. at 1019. Thus, the Court in *Lucas* held that the government must pay just compensation for such "total regulatory takings," except to the extent that "background principles of nuisance and property law" independently restrict the owner's intended use of the property. *Id*. at 1026-1032.

### *C. Other Regulatory Takings*

[25] "Outside these two relatively narrow categories . . . regulatory takings challenges are governed by the standards set forth in *Penn Central*[.]" *Lingle*, 544

U.S. at 538.[11] With these differing categories and legal tests in mind, we address the question of whether the temporary flooding of the Property constituted a compensable taking.

## *I. Compensable Taking*

[26] The Defendants argue that the trial court erred in concluding that the effects of the Drain on the Property constituted a compensable taking. The trial court determined that the improvements to the Drain led to a taking of the Property and fit within the category of taking of a "permanent physical invasion of . . . property." Appellant's App. Vol. V p. 58. The Defendants argue that this is improper because the evidence did not indicate that there had been a permanent physical invasion of the Property. We agree with the Defendants.

[27] The trial court found that the two thirty-inch pipes are under pressure after every heavy rainfall, causing water to overflow onto the Property. The trial court also found that this, in turn, caused pressurization of the drainage tiles and laterals on the Property, causing water to flood portions of the property. This, the trial court found, "floods Plaintiffs' property in every heavy rain,"

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[11] *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S. Ct. 3141 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309 (1994), both involved takings challenges to "adjudicative land-use exactions," i.e., "government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit." *Lingle*, 544 U.S. at 547. *See Dolan*, 512 U.S. at 379-80 (where the government conditioned the issuance of a permit to expand a store and parking lot on the dedication of a portion of the relevant property for a greenway); *Nollan*, 483 U.S. at 828 (where the government conditioned the issuance of a permit to build a larger residence on beachfront property on dedication of an easement allowing the public to traverse a strip of the property between the owner's seawall and the mean high-tide line). This line of cases, while under the umbrella of categories of takings, is inapposite here, as no conditional permit is at issue.

making farming the Property more difficult. *Id*. at 57. Although the Plaintiffs presented evidence to support these findings, we conclude that the trial court erred as a matter of law in concluding that this flooding constituted a *permanent physical invasion*. The evidence established instead frequent, periodic flooding of the land.

[28] The Defendants claim that such non-permanent flooding cannot constitute a taking. With this, we disagree. We acknowledge that, in *Sanguinetti v. United States*, 264 U.S. 146, 149, 44 S. Ct. 264 (1924), the Court summarized prior flooding cases as standing for the proposition that "in order to create an enforceable liability against the Government, it is, at least, necessary that the overflow be the direct result of the structure, and constitute an actual, *permanent* invasion of the land." (emphasis added). This would, at first blush, appear to support the Defendants' argument that the periodic flooding of the Property cannot constitute a taking.

[29] Much more recently, however, in *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 34, 133 S. Ct. 511 (2012), the Court clarified that there was no "blanket temporary-flooding exception to our Takings Clause jurisprudence[.]" The Court instead clarified that "government-induced flooding can constitute a taking of property, and because a taking *need not be permanent* to be compensable, our precedent indicates that government-induced flooding of limited duration may be compensable." *Id*. (emphasis added). The Court noted that, in *Loretto*, it had "distinguished permanent physical occupations from temporary invasions of property, *expressly including flooding* cases, and said

that 'temporary limitations are subject to a more complex balancing process to determine whether they are a taking.'" *Id*. (quoting Loretto, 458 U.S. at 435 n.12). Accordingly, the Court held that "[f]looding cases, like other takings cases, should be assessed with reference to the 'particular circumstances of each case,' and not by resorting to blanket exclusionary rules." *Id*. at 37 (quoting United States v. Central Eureka Mining Co., 357 U.S. 155, 168, 78 S. Ct. 1097 (1958), and citing Penn Central, 438 U.S. at 124).

[30] The Court in *Arkansas Game* also clarified or expanded the list of factors set forth in *Penn Central*. These expanded factors include:

> (1) the duration of the interference; (2) "the degree to which the invasion is intended or is the foreseeable result of authorized government action," (3) "the character of the land at issue," (4) "the owner's reasonable investment-backed expectations regarding the land's use," and (5) the "[s]everity of the interference . . . ."

*Memmer v. United States*, 150 Fed. Cl. 706 (2020), *reconsideration denied*, 153 Fed. Cl. 707, 728 (2021) (quoting *Arkansas Game*, 568 U.S. at 38-39); *see also Caquelin v. United States*, 140 Fed. Cl. 564, 581-82 (2018), *aff'd*, 959 F.3d at 1360 (observing that two of the *Arkansas Game & Fish* factors are similar to or derived from the *Penn Central* factors).

[31] Applying this precedent to the present case, we can only conclude that the trial court erred as a matter of law when it found that the frequent but non-permanent flooding of the Property constituted a *permanent* physical invasion of

the property and a per se taking. Instead, such temporary but frequent flooding must be analyzed under the *Penn Central* factors as expanded in *Arkansas Game*.

[32] Since "[d]eciding whether a taking occurred is an *ad hoc*, factual inquiry," *Parker*, 726 N.E.2d at 1226, we reverse the trial court's order to the extent it concluded that a permanent physical invasion of the Property occurred, and we remand with instructions that the trial court consider the *Penn Central*/*Arkansas Game* factors in determining whether the intermittent flooding of the Property caused by the improvements to the Drain constitute a taking of the Property.

[33] Although we reverse the trial court's takings finding, we nevertheless address the other issues presented by the Defendants, as they are likely to recur on remand.

## *II. Evidence of Highest and Best Use*

[34] The Defendants argue that the trial court erred in admitting and considering evidence regarding the highest and best use of the Property. We afford a trial court broad discretion in ruling on the admissibility of evidence. *Sims v. Pappas*, 73 N.E.3d 700, 705 (Ind. 2017). We will disturb the trial court's ruling only where the trial court has abused its discretion. *Id*. Even if an evidentiary decision was erroneous, we will not reverse if the ruling constituted harmless error. *Downs v. Radentz*, 132 N.E.3d 58, 65 (Ind. Ct. App. 2019). An error is considered harmless when the probable impact of the erroneously admitted evidence on the factfinder, in light of all the evidence presented, is sufficiently

minor so as not to affect a party's substantial rights. *Id*. at 65-66; Ind. Appellate Rule 66(A).

[35] The Defendants claim that the trial court erred by admitting and considering evidence regarding the highest and best use of the property when it determined that a taking had occurred. The Defendants are correct that, in determining whether a taking has occurred, a trial court should not consider the highest and best use of the property. In *Tornatta Investments, LLC v. Indiana Department of Transportation*, we explained:

> [A] taking within the meaning of eminent domain includes the diminution in value of a landowner's property. However, highest and best use represents a component of damages to be considered once the issue of taking is resolved in favor of the landowner. Stated differently, once a taking has been established, then damages may be based upon the highest and best use of the property at the time of the taking. Where the landowner has not established a taking, the question is whether the action of the governmental entity diminished the value of the property in its present use.

879 N.E.2d 660, 664 (Ind. Ct. App. 2008) (internal quotations omitted) (citing *Jenkins v. Bd. of Cnty. Comm'rs of Madison Cnty.*, 698 N.E.2d 1268, 1271 (Ind. Ct. App. 1998)). Thus, only after it has been established that a taking has occurred may the trial court consider evidence of the highest and best use of the taken property.

[36] Here, the trial court allowed Mr. Birge to testify that he intended at some point in the future to subdivide his property. The Defendants argue that such

evidence was irrelevant to the issue of whether a taking had occurred and that the trial court erred in admitting and considering this evidence. Per *Tornatta Investments* and *Jenkins*, the evidence regarding the Birges' potential future uses of their property was not relevant to the issue of whether a taking had occurred.

[37] Here, however, there is no indication that the trial court considered the highest and best use of the property when it determined that a taking had occurred. It is true that the trial court made a factual finding that:

> Plaintiffs' property was zoned Agricultural and Plaintiff rented it for farming purposes to a tenant farmer. However, Plaintiffs' property was platted into Town lots. Plaintiffs successfully obtained an injunction in 2010 against the Town's plans to close Bard Street, which would be needed to provide access to Plaintiffs' property if developed residentially.

Appellant's App. Vol. p. 56. In determining that a taking had occurred, however, the trial court focused on the fact that "[t]he ability to farm Plaintiffs' property has been made more difficult because of the saturation of portions of the property." *Id*. at 58. The trial court made no reference to the highest and best use of the property when it concluded that there had been a taking. On remand, the trial court should similarly not consider the highest and best use of the Property in making its takings determination.

## *III. Causation*

[38] The Defendants also argue that the trial court erred by finding that the flooding of the Property was caused by the improvements made to the Drain. The

Defendants note that they presented evidence and the testimony of multiple expert witnesses indicating that the flooding was not caused by the Drain improvements and were instead caused by increased rainfall, the topology of the Birges' farmland, and the failure of the Birges to connect their private lateral drain(s) to the improved Drain. The Defendants also presented evidence that the Drain was never at capacity and, therefore, could not have caused the flooding issues on the Property.[12]

[39] On appeal, we may not reweigh evidence or judge the credibility of the witnesses. *Perkinson*, 989 N.E.2d at 761. Instead, we can consider only the evidence favorable to the trial court's judgment along with any reasonable inferences that may be drawn from that evidence. *Id*. The Defendants' arguments regarding causation are simply a request that we reweigh the evidence and arrive at a different conclusion than did the trial court, which we cannot do.

[40] The evidence favoring the trial court's judgment revealed that the Birges had little issues with flooding prior to the improvements to the Drain. The Birges' expert witness testified that the Drain, as reconstructed, now causes the flooding issues on the Property. Thus, there was sufficient evidence to support

[12] The Defendants also attack the credibility of Mr. Birge, whom they claim lied about his educational credentials in his pretrial deposition. Those issues were brought to the attention of the trial court, and we will not reconsider its determinations regarding credibility. *Perkinson*, 989 N.E.2d at 761.

the trial court's finding that the flooding on the Property was caused by the Drain improvements.

### *IV. Drainage Right-of-Way Statute*

[41] The Defendants also claim that the trial court failed to take into consideration the statute regarding drainage easements or rights-of-way—Indiana Code Section 36-9-27-33. Subsection (a) of this statute provides that "[t]he county surveyor, the board, or an authorized representative of the surveyor or the board acting under this chapter has the right of entry over and upon land lying within seventy-five (75) feet of any regulated drain." I.C. § 36-9-27-33(a). Subsection (c) provides that "all persons exercising the right [of entry] given by this section shall, to the extent possible, use due care to avoid damage to crops, fences, buildings, and other structures outside of the right-of-way, and to crops and approved structures inside the right-of-way . . . ." Subsection (d) then provides:

> The owners of land over which the right-of-way runs may use the land in any manner consistent with this chapter and the proper operation of the drain. Permanent structures may not be placed on any right-of-way without the written consent of the board. Temporary structures may be placed upon or over the right-of-way without the written consent of the board, but shall be removed immediately by the owner when so ordered by the board or by the county surveyor. *Crops grown on a right-of-way are at the risk of the owner, and, if necessary in the reconstruction or maintenance of the drain, may be damaged without liability on the part of the surveyor, the board, or their representatives.* Trees, shrubs, and woody vegetation may not be planted in the right-of-way without the written consent of the board, and trees and shrubs may be

> removed by the surveyor if necessary to the proper operation or maintenance of the drain.

(emphasis added).

[42] Courts interpreting this statute, and its predecessors, have concluded that it creates both a seventy-five-foot right-of-entry *and* a seventy-five-foot right-of-way, i.e., an easement. *Mattingly v. Warrick Cnty. Drainage Bd.*, 743 N.E.2d 1245, 1249 (Ind. Ct. App. 2001) (citing *Johnson v. Kosciusko Cnty. Drainage Bd.*, 594 N.E.2d 798, 804 (Ind. Ct. App. 1992)). In *Mattingly*, we held that no taking occurred when a drainage board prohibited a landowner from building a storage unit on the drainage easement. 743 N.E.2d at 1251. And in *Johnson*, we held that the designation of a mutual drain as a regulated drain caused no additional taking of property "save that incidentally required by the county to enter upon the land to repair and maintain the drain." 594 N.E.2d at 804. The Birges took their property subject to this pre-existing easement; accordingly, no finding of a taking can be made based upon the impact of the Drain improvements on the land lying within this easement. *See Mattingly*, 743 N.E.2d at 1251.

[43] The trial court here found that the "repeated flooding events increase the surface flooding and raise the water table on Plaintiffs' property *outside* of the drainage easement." Appellant's App. Vol. V p. 57. The trial court, however, did not specify the area or dimensions of the taking. Accordingly, we conclude that the trial court did consider the easement in its takings finding, and we consider the trial court's finding of a taking to be limited to the effect on the

Property that lies outside of the pre-existing drainage easement. On remand, in evaluating the effect of the flooding under the *Penn Central/Arkansas Game* factors, the trial court should similarly limit its consideration to the impact of the flooding on those portions of the Property that lie outside the easement and specify the land affected if a taking is determined.

## Conclusion

[44] The trial court applied the wrong legal standard in determining that a taking had occurred. Temporary flooding does not fall within the category of a permanent physical invasion of property. Accordingly, we reverse the trial court's takings determination and remand with instructions that the trial court consider the *Penn Central/Arkansas Game* factors in determining whether the intermittent flooding of the Property caused by the improvements to the Drain constitute a taking of the Property.

[45] Reversed and remanded.

Bradford, C.J., and Crone, J., concur.