ATTORNEYS FOR APPELLANT

William E. Kelley, Jr.
Sean T. Devenney
Drewry Simmons Vornehm, LLP
Carmel, Indiana

ATTORNEYS FOR APPELLEE

Robert W. Rund
James E. Zoccola
Matthew S. Tarkington
Lewis & Kappes, P.C.
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Performance Services, Inc.,
Appellant-Defendant,

v.

Randolph Eastern School Corporation,
Appellee-Plaintiff.

September 19, 2022

Court of Appeals Case No. 22A-CP-361

Appeal from the Randolph Circuit Court

The Honorable Marianne L. Vorhees, Special Judge

Trial Court Cause No. 68C01-2102-PL-87

Mathias, Judge.

[1] In 2009, the Randolph Eastern School Corporation ("the School Corporation") entered into a contract with Performance Services, Inc. ("Performance") for the construction and operation of a wind turbine. The parties' contract gave the School Corporation physical access to the wind turbine as well as access to

certain data generated by the turbine, which access the School Corporation sought to use in the education of its students. In exchange for that access, the School Corporation agreed to pay $154,000 per year to Performance.

[2] The School Corporation never paid Performance, and, in 2021, the School Corporation instead filed for declaratory judgment and sought to have the contract declared void under a number of legal theories. In response, Performance sued the School Corporation for more than $1.5 million in damages on the unpaid access fees. Following cross-motions for summary judgment and a hearing, the trial court concluded that the contract reflected an illegal investment by a political subdivision and entered summary judgment for the School Corporation.

[3] Performance now appeals the trial court's entry of summary judgment and raises two issues for our review, which we restate as the following five issues:

> I. Whether the parties' contract reflected an illegal investment by a political subdivision.
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> II. Whether the parties' contract was an illegal lease.
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> III. Whether the parties' contract violated Indiana's Public Works Act.
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> IV. Whether the parties' contract is void under Indiana contract law.

V. Whether the trial court erred when it entered summary judgment for the School Corporation and denied Performance's motion for summary judgment.

[4] We reverse the trial court's entry of summary judgment for the School Corporation and remand with instructions to enter summary judgment for Performance.

Facts and Procedural History

[5] In March 2009, Performance and the School Corporation entered into a contract for the construction and operation of a wind turbine ("the Contract"). The Contract provided in relevant part as follows:

> WHEREAS, [Performance] has expressed a desire to acquire an interest in land from the City of Union City, Indiana ("the City") on which to construct and operate a wind turbine to create a renewable source of energy (the "Facility");
>
> WHEREAS, [the School Corporation] has expressed a desire to have access to the Facility for educational and training programs and to receive electricity, directly or indirectly, produced by the Facility; and
>
> WHEREAS, [Performance] and the School Corporation have agreed, subject to completion of various approvals, to enter into this [C]ontract to allow the School Corporation to have access to the Facility for educational and training programs and to have an option to purchase the Facility in the future;

NOW THEREFORE, IT IS HEREBY AGREED BY [PERFORMANCE] AND THE SCHOOL CORPORATION AS FOLLOWS:

Section 1. Land. The parties acknowledge that land described . . . on which the Facility will be constructed is currently owned by [third party] Secor Industries. Secor Industries plans to sell the land to the City. The School Corporation agrees to use its best efforts to work with the City and PSI to obtain for PSI the exclusive right to use that land for a period of not less than twenty-six (26) years. . . .

Section 2. Construction, Operation and Maintenance of the Facility. [Performance] agrees to construct the Facility by purchasing and installing a wind turbine . . . capable of producing 1 MW of electricity per hour at a total estimated project cost of $1,850,000. . . . [Performance] expects to finance the construction of the Facility by obtaining a taxable loan from a financial institution and working with the City to sell tax exempt bonds. . . .

Upon completion of the Facility, [Performance] agrees to operate and maintain the Facility and sell the power generated by the Facility to Indiana Michigan Power ("IM") pursuant to a power purchase agreement (the "PPA") which will provide distribution through IM's substation to . . . a regional transmission organization. [Performance] also intends to produce revenue by selling renewable energy credits on the open market. . . .

All revenues from the operation of the Facility, including any payments received from the School Corporation as provided in Section 5, will be maintained in a bank account that is kept separate and apart from all other funds of [Performance]. Revenues shall consist of the payments received under the PPA,

proceeds from the sale of renewable energy credits, and payments from the School Corporation plus any interest earned on any deposits of the foregoing revenues. From the revenues, [Performance] agrees to pay all costs of operating, maintaining and insuring the Facility. If revenues, including payments from the School Corporation, are not sufficient to pay all costs of operating, maintaining and insuring the Facility during the first five (5) years of operation, [Performance] shall contribute the amount of the shortfall, first from the operating reserve discussed in Section 5, and second from its own resources. Major repairs that are not part of normal operating and maintenance activities are not to be included in the operating costs for which [Performance] is liable, but [Performance] agrees to have major repairs completed and to advance the costs of such repairs. Any [Performance] payments required by this Section . . . shall be reimbursable to [Performance] in future years. Such reimbursements . . . shall be paid . . . in the order in which the payments were incurred and shall be made prior to the payment to the School Corporation of payments in lieu of taxes as provided in the last paragraph of Section 5. . . .

Section 3. Tax Credits. The parties agree that [Performance] is entitled to receive the tax credits for which the Facility is eligible.

Section 4. Insurance. [Performance] agrees to purchase property casualty insurance, business interruption insurance and personal liability insurance related to the Facility. . . .

Section 5. Access to Facility and Annual Payments. [Performance] agrees to allow the School Corporation to have access to the Facility and records related [to] the Facility so that the School Corporation may incorporate the Facility and data in offering educational opportunities to its students. Such opportunities will include but not be limited to vocational

training, science and math classes, and environmental educational programs. Such access from 7:00 a.m. to 4:30 p.m., Monday through Friday, will be limited only to the extent that access unreasonably interferes with the operation of the Facility. Access after such hours shall be granted by [Performance] upon request by the School Corporation at least 48 hours in advance, and permission for access shall not be unreasonably withheld or conditioned.

In exchange for such access, the School Corporation agrees to pay [Performance] $77,000 on January 5 and July 5 of each year. The first payment shall be due on July 5, 2010. The construction of the Facility is anticipated to be complete by November 1, 2009. [Performance] shall notify the School Corporation of the expected completion date prior to the end of July, 2009, so that the School Corporation may include the payment in its annual budget. Through the date of the first option to purchase set forth in Section 6 (whether the original initial option to purchase date or the deferred initial option to purchase date), the School Corporation shall receive a credit against each payment in the amount of the net revenues experienced by [Performance] in the operation of the Facility during the six (6) month period ending on the last day of the month prior to the payment date. Thereafter, the School Corporation shall receive a credit in the amount of the following percentage of the net revenue:

Year 6—100% of net revenue

Year 7—75% of net revenue

Years 8-12—50% of net revenue

Years 13-20—25% of net revenue

Years 21-25—50% of net revenue

For purposes of the credit, net revenue shall be defined as the revenues from the operation of the Facility (including any payments by the School Corporation or [Performance]) remaining after payment of all costs of operating, insuring and maintaining the Facility and the payment of debt service on the debt incurred by [Performance] to construct the Facility. Depreciation shall not be included in the costs of operating the Facility for this purposes, and any management fee paid to [Performance] during the first five years of the Facility's operation shall not be included in the costs of operating the Facility without the express written consent of the School Corporation. For federal income tax purposes, credits to the School Corporation shall be treated as costs of operating the Facility. After the fifth year of operation, [Performance] shall be paid a management fee equal to 2% of the annual gross revenue from the PPA, and such management fee shall be included as a cost of operating the Facility.

If the net revenues exceed the amount of the payment due from the School Corporation, [Performance] shall deposit $3500 per year into an operating reserve account until the balance therein equals $10,000. The operating reserve account shall be maintained in a bank account separate and apart from all other funds of [Performance] or the Facility. The operating reserve account may only be used to fund any insufficiency in revenues to pay the costs of operating, maintaining and insuring the Facility and for major repairs to the Facility. Any draws from the operating reserve account shall be replenished from the next available net revenues. *Any net revenues not needed for deposit in the operating reserve account shall be remitted to the School Corporation in the form of a payment in lieu of taxes*.

Section 6. Option to Purchase. [Performance] hereby gives the School Corporation the option to purchase the Facility at any time beginning on the December 31 following the five (5) year anniversary of the date the Facility is placed in service. Such option to purchase may be exercised at any time during the two year period following the initial option date. The option price is the price equal to the outstanding balance on the loan incurred by [Performance] to construct the Facility and any capital improvements made by [Performance] upon receipt of approval by the School Corporation . . . ; provide[d], however, that such price is equal to or less than the price that may be determined following any required statutory method for determining the purchase price. If on the initial option date the purchase price is more than the statutorily determined price, the initial option to purchase date shall be deferred until the first December 31 on which the option price is equal to or less than the statutorily determined price. Under no circumstance shall [Performance] be required to sell the Facility to the School Corporation for a price that is less than the outstanding balance of the debt incurred by [Performance] to construct the Facility and to make any capital improvements approved by the School Corporation.

* * *

Section 7. Right of First Refusal. [Performance] agrees that it will not sell the Facility prior to the first Option Date set forth in Section 6. If the School Corporation does not exercise its option to purchase on the first option date, [Performance] may take steps to sell the Facility to an independent, unrelated third party. If [Performance] has received a bona fide, arms length offer to purchase the Facility, [Performance] shall notify the School Corporation of the offer and the price. The School Corporation shall have sixty (60) days to advise [Performance] whether it would like to purchase the Facility at the offer price of the third party's offer. . . .

Appellant's App. Vol. 2, pp. 93-96 (capitalization and underlining in original; italics added). Following the parties' execution of the Contract, they appeared to execute two amendments to the due dates and to the total number of the School Corporation's semiannual payments. *See id.* at 99, 101.

[6] To secure funding for the construction of the Facility, Performance, Union City, and Fifth-Third Bank entered into a Bond Purchase and Loan Agreement (the "Bond Agreement"). The Bond Agreement defined the Contract as a "[l]ease . . . between [the School Corporation] and [Performance]." Appellant's App. Vol. 3, p. 69. It further defined the School Corporation as a "[l]essee[]" under the Contract. *Id.*

[7] Similarly, following the execution of the Contract, the Indiana State Board of Accounts ("the Board of Accounts") issued an Audit Report of the School Corporation's obligations under the Contract. In the Audit Report, the Board of Accounts opined that the Contract was a "lease with an option to purchase." *Id.* at 195. The Board of Accounts further stated that, as an apparent lease, the School Corporation was required to follow certain statutory procedures "to comply with . . . leasing real estate," but there was no evidence that the School Corporation had "complied with these statutes." *Id.*

[8] In a different review, the Board of Accounts separately opined that the Contract reflected an illegal "investment" on the part of a political subdivision. *Id.* at 147. Specifically, the Board of Accounts informed the School Corporation that

Indiana's Home Rule Act "limited schools to investing funds only in accordance with the express language of" Indiana Code Chapter 5-13-9, which describes deposit and investment powers of local administrations, and that that Chapter "does not permit a school to invest in a wind turbine or wind farm, except in the limited circumstances where the wind turbine or wind farm provides power directly for the school buildings and facilities." *Id.* The Board of Accounts circulated this opinion among Indiana's school superintendents.

[9] There is no dispute that the School Corporation never made any of the semiannual $77,000 payments due to Performance under the Contract. There is also no dispute that the School Corporation never sought to exercise its options to purchase the Facility. And there is no dispute that Performance sold the electricity generated by the Facility to the Indiana-Michigan Power Company. In February 2016, Performance submitted an invoice to the School Corporation for an unpaid balance in the amount of $808,435. In January 2021, Performance submitted a second invoice to the School Corporation for an unpaid balance in the amount of $1,578,435.

[10] In February 2021, the School Corporation filed a complaint for declaratory judgment against Performance. In that complaint, the School Corporation sought to have the Contract declared void under at least one of the following theories: that the Contract reflected an illegal investment by a political subdivision; that the Contract was an illegal lease; that the Contract violated Indiana's Public Works Act; that the Contract was void under Indiana contract

law; and that any attempt by Performance to enforce the Contract would be barred by the applicable ten-year statute of limitations. Performance filed an answer and counterclaim against the School Corporation. In its counterclaim, Performance sued the School Corporation for breach of contract, suit on account, and equitable entitlement to the reasonable value of services provided.

[11] Thereafter, the parties filed cross-motions for summary judgment.[1] Following a hearing, the trial court concluded that the Contract reflected an illegal investment by a political subdivision under Indiana law. The court thus declared the Contract void and entered summary judgment for the School Corporation. This appeal ensued.

Standard of Review

[12] Performance appeals the trial court's entry of summary judgment for the School Corporation. Our standard of review in summary judgment appeals is well established. As our Supreme Court has made clear, "[w]e review summary judgment de novo, applying the same standard as the trial court." *G&G Oil Co. v. Cont'l W. Ins. Co.*, 165 N.E.3d 82, 86 (Ind. 2021). "Indiana's distinctive summary judgment standard imposes a heavy factual burden on the movant." *Siner v. Kindred Hosp. Ltd. P'ship*, 51 N.E.3d 1184, 1187 (Ind. 2016). We draw all

[1] Performance moved for summary judgment on its claims for breach of contract and suit on account, but not on its claim for equitable entitlement to the reasonable value of services rendered. Accordingly, any issues on Performance's equity claim are not before us. Further, in its order on summary judgment, the trial court found it appropriate to enter its judgment as a final and appealable order.

reasonable inferences in favor of the nonmoving party and affirm summary judgment only "if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Id.* (quoting Ind. Trial Rule 56(C)). And we "give careful scrutiny to assure that the losing party is not improperly prevented from having its day in court." *Id.* (quoting *Tankersley v. Parkview Hosp., Inc.*, 791 N.E.2d 201, 203 (Ind. 2003)). Further, "[p]arties filing cross-motions for summary judgment neither alters" our standard of review "nor changes our analysis—we consider each motion separately to determine whether the moving party is entitled to judgment as a matter of law." *G&G Oil Co.*, 165 N.E.3d at 86 (quoting *Erie Indem. Co. v. Estate of Harris*, 99 N.E.3d 625, 629 (Ind. 2018)).

I. Whether the Contract Reflects an Illegal Investment

[13] We first consider the parties' arguments on the issue deemed dispositive by the trial court: whether the Contract reflects an illegal investment by a political subdivision. On this issue, the School Corporation designated written materials from the Board of Accounts in which the Board opined that the Contract reflected an illegal investment. Performance moved to strike those designations, which the trial court denied. In doing so, however, the trial court made clear that it did not read those designations to "state a binding legal conclusion on the Court" with respect to the meaning of the Contract. Appellant's App. Vol. II, p. 6.

[14] Performance first argues that the trial court abused its discretion when it denied the motion to strike the designated evidence on the Board of Accounts's understanding of the Contract. But Performance's argument here is that those designations contained impermissible legal conclusions on the meaning of the Contract, and further that the Board's assertions were inadmissible parol evidence on the meaning of the Contract. Again, in denying Performance's motion to strike, the trial court expressly stated that it did not rely on those designations for a "binding legal conclusion," i.e., on the Board's opinions on the meaning of the Contract. *Id.* We therefore decline to reverse the trial court's denial of Performance's motion to strike, and, on appeal, we likewise do not read the Board of Accounts's opinions to state binding legal conclusions on the meaning of the Contract, which speaks for itself.[2]

[15] We thus turn to the merits of whether the Contract reflects an illegal investment by a political subdivision under the Indiana Code. In particular, Indiana's Home Rule Act states that a school corporation does not have the power "to invest money, except as expressly granted by statute." Ind. Code §§ 20-26-3-7(1), 36-1-3-8(a)(11) (2021). And Indiana's Public Investment Act does not

[2] The School Corporation asserts on appeal that, while the Board of Accounts's opinions are not binding, we should nonetheless defer to those opinions as agency decisions. We decline to do so because the Board of Accounts is in no better position than this Court to read the Contract and discern its meaning.

grant a school corporation the power to invest public funds in a wind turbine. *See* I.C. §§ 5-13-9-0.3 to -11 (2021).[3]

[16] Accordingly, the question on this issue is whether the Contract reflects an "investment" by the School Corporation in a wind turbine. Neither the Home Rule Act nor the Public Investment Act defines "invest." As our Supreme Court has explained, "when a statutory term is undefined, the legislature directs us to interpret the term using its plain, or ordinary and usual, sense." *Rainbow Realty Grp., Inc. v. Carter*, 131 N.E.3d 168, 174 (Ind. 2019) (quotation marks omitted). "We generally avoid legal or other specialized dictionaries for such purposes and turn instead to general-language dictionaries." *Id.* And Merriam-Webster defines "invest" in relevant part as "to commit (money) in order to earn a financial return." *Invest*, Merriam-Webster, https://www.merriam-webster.com/dictionary/invest (last visited Aug. 17, 2022).[4]

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[3] To be sure, some of the statutory provisions of the Public Investment Act post-date the execution of the Contract. *See, e.g.*, I.C. § 5-13-9-0.3 (2021). However, the School Corporation observes that at no relevant time did the Public Investment Act authorize a school corporation to invest in a wind turbine, and Performance does not dispute the School Corporation's understanding of the Public Investment Act on that point.

[4] In its brief on appeal, Performance relies on a more technical definition from the Supreme Court of the United States in *S.E.C. v. W.J. Howey Co.*, 328 U.S. 293, 301 (1946). The *Howey* test has been applied in Indiana in the context of securities law. *See Accelerated Benefits Corp. v. Peaslee*, 818 N.E.2d 73, 76 (Ind. Ct. App. 2004), *trans. denied*. However, we agree with the School Corporation that, as this is not a securities case, *Peaslee* and *Howey* are not applicable, and the better statutory interpretation here lies with a general-language dictionary.

[17] We conclude that the Contract does not reflect an investment by the School Corporation. Rather, the School Corporation agreed to make semiannual payments to Performance of $77,000 each in exchange for certain access to the Facility and data.[5] And the parties agreed that, after five years of such payments, the School Corporation held options to purchase the Facility, which the School Corporation could exercise by paying off Performance's debt in constructing the Facility and any capital improvements made to it. But there is no dispute that the School Corporation never in fact made any of its semiannual payments nor sought to exercise its purchase options.

[18] Thus, on this undisputed, designated evidence, the relationship between the School Corporation and Performance never amounted to more than the School Corporation owing payments for services rendered by Performance. Indeed, the School Corporation's only argument on appeal to the contrary is that *Performance* realized a profit under that relationship, and therefore the Contract reflects that the School Corporation invested in the wind turbine. Appellee's Br. at 29-30. But the plain definition of "invest" applies the hoped-for financial return to the same person or entity that provides the initial commitment of

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[5] The Contract also provided that Performance would provide electricity to the School Corporation "directly or indirectly," and Performance sold the electricity generated by the Facility to the Indiana-Michigan Power Company. Appellant's App. Vol. 2, p. 93. Although the School Corporation states on appeal that Performance did not directly provide electricity to the School Corporation, the School Corporation makes no argument supported by citations to the designated evidence or authority that Performance did not indirectly provide electricity to the School Corporation. *See* Ind. Appellate Rule 46(A)(8)(a).

money, not to the recipient of that money. Therefore, the Contract here does not reflect an illegal investment by a political subdivision, and the trial court erred when it entered summary judgment for the School Corporation on this issue.

II. Whether the Contract is an Illegal Lease

[19] Although the trial court's order on summary judgment was limited to the School Corporation's theory that the Contract reflected an illegal investment, the parties argued and designated evidence on a number of alternative theories proffered by the School Corporation against the validity of the Contract. We may affirm the entry of summary judgment on any theory supported by the record. *See, e.g.*, *Markey v. Estate of Markey*, 38 N.E.3d 1003, 1006-07 (Ind. 2015). We thus consider these alternative theories.

[20] First, we consider the School Corporation's argument for summary judgment on the theory that the Contract is void because it is an illegal lease. There is no dispute that the School Corporation is subject to Indiana's Public Leasing Act, I.C. §§ 36-1-10-1 to -22 (2021).[6] That Act generally requires political subdivisions that "determine to acquire structures, transportation projects, or

[6] As with the School Corporation's references to the Public Investment Act, some provisions of the Public Leasing Act post-date the parties' execution of the contract. *See, e.g.*, I.C. § 36-1-10-22 (2021). Those provisions are not at issue in this appeal.

systems by lease or lease-purchase" to follow certain statutory procedures before executing any such agreement. I.C. § 36-1-10-1(a)(1) (2021).

[21] Although the parties present several arguments under this issue, we find the threshold question of whether the Contract is a lease or a license to be dispositive. "It cannot be disputed that a leasehold is a property interest." *Bowlby v. NBD Bank*, 640 N.E.2d 1095, 1098 (Ind. Ct. App. 1994). In contrast, a "license" is the "permission, usu[ally] revocable, to commit some act that would otherwise be unlawful," such as trespassing on another's land, "esp.[by] an agreement (not amounting to a lease[)] . . . ." *License*, Black's Law Dictionary (11th ed. 2019).

[22] We have little hesitation reading this Contract and concluding that, on these facts, it conveyed only a license from Performance to the School Corporation for the School Corporation to access the Facility and its data while the Facility was in all respects owned, managed, and controlled by Performance. In reaching that conclusion, we emphasize that the School Corporation's options to purchase the Facility under the Contract never vested in the School Corporation. *Cf. Girl Scouts of S. Ill. v. Vincennes Ind. Girls, Inc.*, 988 N.E.2d 250, 255-56 (Ind. 2013) ("a mere possibility[] is not an estate.") (quoting *Gushwa v. Gushwa*, 93 Ind. App. 68, 73-74, 177 N.E. 366, 368 (1931)). Rather, at all times, the School Corporation's relationship to the Facility under the Contract in fact never advanced beyond the School Corporation's payment of the semiannual fees, in exchange for which Performance generally agreed to permit the School

Corporation to enter into the Facility and access its data. That relationship did not create a property right of the School Corporation in the Facility but, rather, a contract right that Performance could have revoked based on the School Corporation's nonperformance.

[23] Further, the School Corporation's arguments to the contrary on this issue are not persuasive. The School Corporation largely relies on the language of the Bond Agreement and a similar assessment by the Board of Accounts to assert that the Contract was a lease. But the Contract is unambiguous, and, therefore, we will not look outside the four corners of the Contract to determine its meaning. *E.g.*, *Care Grp. Heart Hosp., LLC v. Sawyer*, 93 N.E.3d 745, 756 (Ind. 2018). Accordingly, we conclude that the Contract was not a lease, and, thus, the Public Leasing Act was not applicable to the Contract. We cannot affirm the trial court's entry of summary judgment for the School Corporation on this issue.

III. Whether the Contract Violated Indiana's Public Works Act

[24] Another alternative theory asserted on summary judgment by the School Corporation against the validity of the Contract is that the Contract was entered into in violation of Indiana's Public Works Act, I.C. §§ 36-1-12-0.1 to -24

(2021).[7] At the time the parties' executed the Contract, Indiana Code Section 36-1-12-2 (2008) provided as follows:

> As used in this chapter, "public work" means *the construction*, reconstruction, alteration, or renovation of a public building, airport facility, or other structure that *is paid for out of a public fund or out of a special assessment*. The term includes the construction, alteration, or repair of a highway, street, alley, bridge, sewer, drain, or other improvement that is paid for out of a public fund or out of a special assessment. *The term also includes any public work leased by a political subdivision under a lease containing an option to purchase*.

(Emphases added.)

[25] Indiana's Public Works Act does not apply to the Contract. Performance secured the financing for the construction of the Facility through the Bond Agreement with Union City and Fifth-Third Bank. The School Corporation does not suggest that the Bond Agreement was equivalent to "a public fund" or "a special assessment." *See id.* Rather, the School Corporation relies on its theory that the Contract was a lease, which, for the reasons explained above, we have already rejected. Accordingly, we cannot affirm the entry of summary judgment for the School Corporation under the theory that the Contract violated Indiana's Public Works Act.

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[7] As with prior Acts relied on by the School Corporation, some provisions of Indiana's Public Works Act post-date the execution of the Contract, but those provisions are not material to our disposition of this issue.

IV. Whether the Contract is Void Under Indiana Contract Law

[26] The School Corporation's final alternative argument in support of summary judgment on appeal is that the Contract is insufficiently definite under Indiana contract law.[8] Specifically, the School Corporation argues as follows: the original Contract called for an indefinite number of semiannual payments from the School Corporation to Performance; the apparent amendments to the Contract, which changed the payment due dates and set the total number of those semiannual payments at forty, were not approved by a majority of the members of the School Corporation's governing body and thus are void under Indiana Code § 20-26-4-8 (2021);[9] and that, as the amendments fail as a matter of law to set a definite number of the semiannual payments, the remaining indefiniteness in the original Contract renders the Contract void.

[27] The School Corporation's argument is not well taken. As the Indiana Supreme Court has made clear: "It is ordinary law that a contract containing no specific

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[8] The School Corporation does not argue on appeal that the trial court's entry of summary judgment can be affirmed under the applicable statute of limitations. As that argument has been abandoned by the School Corporation on appeal, we do not consider it.

[9] This statute, which has not been amended since the parties' execution of the Contract, provides in relevant part as follows:

> Notwithstanding any other law, the president and secretary of the governing body of a school corporation are entitled, on behalf of the school corporation, to sign any contract, including employment contracts and contracts for goods and services. However, each contract must be approved by a majority of all members of the governing body. . . .

termination date is terminable at will and that where the parties fix no time for the performance or discharge of obligations created by the contract they are assumed to have had in mind a reasonable time." *City of E. Chicago v. E. Chicago Second Century, Inc.*, 908 N.E.2d 611, 623 (Ind. 2009). The purported indefiniteness of the number of semiannual payments due from the School Corporation in the original Contract is not a basis for declaring the Contract void. *See id.* Rather, Indiana law presumes that the parties had a reasonable time for those payments in mind, and at no point did the School Corporation seek to terminate the Contract at will. *See id.* And we need not consider whether the validity, or invalidity, of the two amendments as the damages sought by Performance in its countersuit are based on fewer than forty missed payments by the School Corporation. Therefore, we cannot affirm the trial court's entry of summary judgment for the School Corporation under this final alternative theory.

V. Whether the Trial Court Erred When It Entered Summary Judgment for the School Corporation and Denied Performance's Motion for Summary Judgment

[28] We thus turn to the trial court's denial of Performance's motion for summary judgment, in which Performance sought judgment as a matter of law on its claims for breach of contract and suit on account. It is undisputed that the School Corporation never made the semiannual payments due under the Contract. The designated evidence further showed that Performance twice

provided the School Corporation with invoices of the amounts due and owing, which invoices the School Corporation received and never disputed.

[29] The School Corporation's only argument against the entry of summary judgment for Performance is the School Corporation's several theories regarding the alleged invalidity of the Contract. For the reasons explained above, each of those arguments fails. The designated evidence shows that Performance is entitled to judgment as a matter of law on its claims of breach of contract and suit on account. We therefore reverse the trial court's denial of Performance's motion for summary judgment.

Conclusion

[30] For all of the above-stated reasons, we hold that the trial court erred when it granted the School Corporation's motion for summary judgment and denied Performance's motion for summary judgment. We reverse the trial court's judgment and remand with instructions to deny the School Corporation's motion for summary judgment, to grant Performance's motion for summary judgment, and to hold a hearing on Performance's damages in accordance with this opinion.

[31] Reversed and remanded with instructions.

Crone, J., concurs.
Brown, J., dissents with opinion.

Performance Services, Inc.,
Appellant-Defendant,

v.

Randolph Eastern School Corporation,
Appellee-Plaintiff.

September 19, 2022

Court of Appeals Case No. 22A-CP-361

Brown, Judge.

[32] I respectfully dissent and would affirm the trial court. In March 2009, Performance Services, Inc. ("Performance") and Randolph Eastern School Corporation ("School Corporation") entered into a contract for the construction and operation of a wind turbine (the "Contract").

[33] As mentioned by the majority, Indiana's Home Rule Act states that a school corporation does not have the power "to invest money, except as expressly granted by statute," Ind. Code §§ 20-26-3-7(1), 36-1-3-8(a)(11), and Indiana's Public Investment Act does not grant a school corporation the power to invest

public funds in a wind turbine. *See* Ind. Code §§ 5-13-9-0.3 to -11. I part ways with the majority's conclusion that the Contract does not reflect an investment by the School Corporation.

[34] The record reveals that the Contract provided that the School Corporation would assist Performance in the acquisition of the necessary land, pay $77,000 twice per year, receive access to the facility and its data for educational purposes, and receive a credit with net revenue remitted "in the form of a payment in lieu of taxes." Appellant's Appendix Volume II at 95. The Contract included an option to purchase the wind turbine "at any time beginning on the December 31 following the five (5) year anniversary of the date the Facility is placed in service." *Id.* at 95-96.

[35] In March 2009, Cathy Stephen, the Superintendent of the School Corporation, sent an email with an attached description of the wind turbine project, which stated:

> Performance Services will own the turbines until the tax credits run out (after 5 years). With the new stimulus package, Performance Services can get an excellent rate on financing (4% variable rate or 4.5 ~ 5.0% fixed rate) − better than the model they showed us last week. This makes the cash flow from year one positive for us. A conservative estimate on our profit is now $25,967 the first year. . . .
>
> Performance Services agrees to send us all of the money generated from the sale of energy and the sale of renewable energy credits. They will not take a management fee out of that

> amount during this first five years. We will need to decide if there is more revenue, which we certainly hope there is, where we want to put the excess. I would recommend only putting the reimbursement for the payment we make back in General Fund. I would recommend setting the profit aside in the Rainy Day Fund and then after the first few years appropriating money from Rainy Day to pay for our own electricity. In that way, the wind energy really does become our way of powering our buildings.
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> * * * * *
>
> We pay them the "fee for using the turbine for educational purposes" in the amount of the loan and the maintenance amount and possibly a management fee. The energy produced is sold on the market, as are the renewable energy credits. We will get the income from both of those.
>
> * * * * *
>
> If it is as expected, we will have a surplus each year, and at the end of 25 years will have taken in $3.1 million over and above the payments. We can use the surplus to pay our utility bills or anything else we want it to go toward. I would assume that when we sign a final agreement, we will set up how to recei[ve] the money.

Appellant's Appendix Volume III at 116-117 (capitalization omitted).

[36] On March 21, 2011, Performance entered into a Renewable Energy Credits Purchase and Sale Agreement between NativeEnergy, Inc., the School Corporation, and the City of Union, Indiana. The agreement included an attached exhibit, which stated:

> The turbine is owned and operated by [the School Corporation] and [Performance] of Indianapolis, Indiana. . . . Revenues generated from the sale of energy to a regional utility company will benefit the school budget by offsetting their current utility costs. The project will afford education opportunities to the regional schools by demonstrating the operation of a renewable energy resource and the benefits to the community.

Appellant's Appendix Volume II at 140.

[37] On January 31, 2022, the trial court granted the School Corporation's motion for summary judgment. The court found that "[t]he Contract and Amendments are void because they are an investment in a Wind Turbine, intended for 'offsetting their current utility costs.'" Appellant's Appendix Volume V at 75. The court cited the Project Description and a School Corporation website announcement, which stated that the School Corporation was "either the first or one of the few school districts in the country to have their own wind turbine. The generated power is sold . . . with revenue going to offset energy costs within our schools. We also offer courses in alternative energy as part of our curriculum." *Id.* The court further found:

> If the Contract and Amendments had provided for the power generated by the Wind Turbine to provide power to the schools, Indiana law would permit this. But the Contract and Amendments in my opinion are the type of investment schools are not allowed to make pursuant to the Indiana Public Investment Act. This is a speculative venture into the renewable energy market.

Id. at 76.

[38] The record reveals that the School Corporation would receive access to the wind turbine and its data in return for payments of $77,000 twice a year, the School Corporation would "use its best efforts to work with the City and [Performance] to obtain for [Performance] the exclusive right to use that land" on which the turbine would be built, it retained an option to purchase the facility after five years of operation, it received a credit for net revenue "remaining after payment of all costs of operating, insuring and maintaining the Facility and the payment of debt service on the debt incurred by [Performance] to construct the Facility," and after exceeding "$3500 per year [placed] into an operating reserve account until the balance therein equals $10,000," "any net revenues not needed for deposit in the operating reserve account [would] be remitted to the School Corporation in the form of a payment in lieu of taxes." Appellant's Appendix Volume II at 93-95. The Contract between the School Corporation and Performance reflects an illegal investment by a school corporation in which the School Corporation sought a financial return.

[39] Based upon the record, and for the reasons stated in the trial court's order, I would affirm the trial court's grant of summary judgment to the School Corporation.