

STATE OF INDIANA)
)SS:
COUNTY OF LAPORTE)

LAPORTE CIRCUIT COURT
2013 TERM

CAUSE NO. 46C01-1212-PL-1941

LBLHA, LLC, MARGARET L. WEST,)
and DON H. GUNDERSON,)
Plaintiffs,)

v.)

TOWN OF LONG BEACH, INDIANA,)
Defendant.)

*****)

ALLIANCE FOR THE GREAT LAKES)
and SAVE THE DUNES;)
Intervenor Defendants,)

LONG BEACH COMMUNITY)
ALLIANCE, PATRICK)
CANNON, ROGER GANSAUER,)
DAVID OEI, BERNARD RABINOWITZ,)
and JOAN SMITH,)
Intervenor Defendants.)

ORDER AND PARTIAL SUMMARY JUDGMENT

This matter is before the Court on the Motion for Declaratory Summary Judgment filed by Plaintiffs LBLHA, LLC, Margaret L. West, and Don H. Gunderson and the Cross-Motion for Summary Judgment filed by the Town of Long Beach. The Court heard argument on the motions on October 17, 2013. The Court, having taken the matter under advisement, now FINDS and ORDERS as follows:

FACTS

1. The facts surrounding this dispute are largely undisputed, and the parties have focused their memorandums and arguments on their respective interpretations of the relevant case law.
2. Ms. West owns the property rights associated with lots 194 and 196, and Mr. Gunderson has ownership rights in lots 240, 242 and 244. The deeds to these lots are based on and cite to the Long Beach Plat and the Long Beach Elysium Plat. All of the lots involved in this dispute abut Lake Michigan.
3. The Indiana Department of Natural Resources (“IDNR”) posted a discussion concerning navigable waterways and ordinary high watermarks on their website. The discussion claimed the State of Indiana “owned” property abutting Lake Michigan below the ordinary high watermark. On October 10, 2012, the IDNR changed the posted discussion concerning navigable waterways and ordinary high watermarks. The change to the posted discussion stated, “The ordinary high watermark is the line on Lake Michigan and other navigable waterways used to designate where regulatory jurisdiction lies and in certain instances to determine where public use and ownership begins and/or ends.”
4. In July 2010, the Town of Long Beach (“Town”) passed Resolution 10.002. The Town recognized and accepted the position of the IDNR that the dividing line on Lake Michigan between state and non-state ownership was the ordinary high watermark. Further, Resolution 10.002, section 3, stated, “The Long Beach Police Department shall only enforce PRIVATE PROPERTY ORDINANCES between Lake Shore Drive and Lake Michigan in the following locations: A. The entire length and width of all publicly owned beach accesses above the elevation of 581.5 feet. B. The entire length and width of all lots owned by the Town of Long Beach, Indiana, above the elevation of 581.5 feet.” Finally, Resolution 10.002, section 4, stated, “The Long Beach Police Department shall continue to enforce all state and local statutes, ordinances, rules and regulations within its jurisdiction subject to the specific provisions of this policy.”

5. After IDNR changed their position regarding ownership of property below the ordinary high watermark in October 2012, the Town passed Resolution 12-003 to reflect the changes made by IDNR. Resolution 12-003 recognized and accepted the position of the IDNR that the dividing line on Lake Michigan where the state's regulatory jurisdiction lies and, in certain instances, to determine where public ownership or use begins and/or ends was the ordinary high watermark. After section 1, sections 2, 3 and 4 of Resolution 12-003 mirrored sections 2, 3 and 4 of Resolution 10.002.

ANALYSIS

1. Given the preceding facts, the Court finds that the Resolution passed by the Town is not a claim adverse to the Landowners' property rights nor does it constitute a taking. The Resolution is merely a statement of policy and does not speak to ownership of the land under discussion.
2. The Resolution in question is Resolution 12-003. In Indiana, the ordinary rules of statutory construction apply. That is, an ordinance must be interpreted as a whole, giving all words their plain, ordinary and usual meaning. *Weida v. City of West Lafayette*, 896 N.E.2d 1218, 1223 (Ind. Ct. App. 2008). In Resolution 12-003, the Town of Long Beach adopts the State of Indiana Department of Natural Resources (IDNR) position regarding the elevation of the ordinary high water mark and acknowledges the IDNR's authority to regulate with respect to certain beachfront property in Long Beach. Resolution 12-003 states, in pertinent part, "The Town of Long Beach, Indiana, recognizes and accepts the Indiana Department of Natural resources' position as reflected in its publications...the ordinary high watermark is the line on Lake Michigan used to designate where the state's regulatory jurisdiction lies and in certain instances, to determine where public ownership or use begins and/or ends."
3. Within the four corners of the document, nowhere does the Town assert any ownership of any land, nor does the Town take a position relative to the ownership of any specific

parcels. Given what Resolution 12-003 actually says, it is clear that the Resolution is nothing more than an expression of policy, agreeing with the statements made by the IDNR and acknowledging the IDNR's regulatory authority on certain property adjacent to Lake Michigan.

4. Statements made outside of a Town Council meeting are ineffective in interpreting Resolution 12-003. Indiana courts have made it clear that a municipal entity speaks only through its duly adopted resolution and ordinances and that "the only competent evidence of any act or proceeding of a municipal body, upon which the members of a corporate board are required to vote, is the record of proceedings." Thus, any statements made outside the context of the minutes of a meeting or an ordinance are not relevant. Plaintiffs cite to e-mails made by a Town Council member, however, the case law indicates that these are not relevant to demonstrating the intent of the Town in passing Resolution 12-003 or to interpret the meaning of the Resolution. In *Scott v. City of Seymour*, the court states, "It is well-settled in Indiana that boards and commissions speak or act officially only through the minutes and records made at duly organized meetings... The actions of individual members of a board or commission outside a meeting cannot be substituted for the actions at a duly constituted meeting or for the minutes thereof." *Scott v. City of Seymour*, 659 N.E.2d 585, 590 (Ind. Ct. App. 1995).

6. Likewise irrelevant are the statements attributed to the Clerk-Treasurer and the Town Attorney. The Clerk-Treasurer is not even a member of the Town Council and any statements he made do not indicate the Town's position regarding Resolution 12-003. The Town Attorney's letter refers to the enforcement of Public Property Ordinances, which are defined by the Town Code as those ordinances "designed to regulate or prohibit activity on public and/or Town property". The Town Attorney does not refer to any Private Property Ordinances and the letter is not relevant to demonstrate the intent of the Town Council concerning Resolution 12-003.

7. Finally, the surveys of Town lots performed in 1984 by Charles Hendricks do not delineate the northern boundary of the lots. The only monuments depicted on the surveys

are the eastern and western boundaries of the road easements. The surveys appear to be limited to defining the road easements and to seeing if there are any encroachments thereon. They do not demonstrate any taking by the Town, nor are they relevant to demonstrate the intent of the Town Council concerning Resolution 12-003.

8. Historically, there has been some discussion of the ownership of the land between the ordinary high water mark and the shore in Indiana state and federal case law. However, most of the discussion has been in dicta or has dealt with issues tangential but that were not dispositive. In *Lake Sand Co. v. State*, the Court ruled that the bed of the lake, that is, the land covered by the water of Lake Michigan is held in trust by the state for the citizens of the state. *Lake Sand Co. v. State* 68 Ind. App. 439, 446 (1918). *Lake Sand* stated, "The state in its sovereign capacity is without power to convey or curtail the right of its people in the bed of Lake Michigan". *Id.* The United States District Court for the Northern District of Indiana continued this line of reasoning in *Garner v. Michigan City*. The *Garner* Court stated that "Congress, in 1953, enacted the Submerged Lands Act whereby the federal government quit-claimed title to all lands beneath navigable waters within state boundaries to the various states, reserving in the federal government authority over such lands and waters for the purposes of navigation...By virtue of 43 U.S.C., Section 1301(a) the State of Indiana acquired title up to the ordinary high water mark." *Garner v. Michigan City*, 453 F. Supp. 33, 35 (N.D. Ind. 1978). Now, a much more recent case has come to light; namely, *United States v. Carstens*. *Carstens* states, "According to the Indiana "public trust doctrine", the beach area between the ordinary high water mark, and the edge of the water of Lake Michigan is public land not owned by any person, entity, or municipality." *United States v. Carstens* 2013 U.S. Dist. LEXIS 169079 (2013). *Carstens* goes on to state that "The land between the edge of the water of Lake Michigan and the ordinary high water mark is held in public trust by the State of Indiana." *Id.*
9. This Court does not reach the question of ownership over the land between the ordinary high water mark and the shore, since the Court finds that there has been no taking. In this instance, the Court feels that the matter of ownership is a pure question of law. As such, it

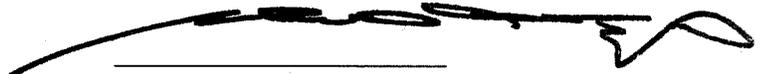
is more properly dealt with by the Indiana Legislature and/or an appellate court in a matter where the State of Indiana is a party.

CONCLUSION

In conclusion, this Court finds that there was no taking by the Town of Long Beach. The Resolution passed by the town was a statement of policy and was not a claim adverse to any property right that the plaintiffs may or may not have in the land between the shore and the ordinary high water mark.

IT IS THEREFORE ORDERED, ADJUDICATED AND DECREED by the Court that Plaintiff's Motion for Summary Judgment with respect to Count 1 is **DENIED**. Defendant's Motion for Summary Judgment with respect to Count 1-4 is **GRANTED**. There being no further cause for delay, the Court enters judgment for Defendant Town Of Long Beach in Counts 1-4 of Plaintiff's Complaint.

SO ORDERED this 26th day of December, 2013.



Judge Thomas Alevizos
LaPorte Circuit Court

Cc: Michael V. Knight, attorney for the plaintiff, 100 North Michigan Street, South Bend, IN 46601
Lester Lukman, attorney for the defendants, 107 Broadway Ave, Chesterton, IN 46304
W. William Weeks, Counsel for Intervenor-Defendants, 116 S. Indiana Ave., Bloomington, IN 47408
James Olson, Counsel for Intervenor-Defendants, 420 E. Front Street, Traverse City, MI 49686
Kurt Earnst, Counsel for Intervenor-Defendants, P.O. Box 1006, Michigan City, IN 46361
File clerk/
/njl