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IN THE
COURT OF APPEALS OF INDIANA

David Joseph Guzzo, Robert Glenn Guzzo, and Betty Jo Keller,

Appellants-Defendants

v.

Town of St. John, Lake County, Indiana,

Appellee-Plaintiff.

January 19, 2023

Court of Appeals Case No. 21A-PL-2213

Appeal from the Lake Superior Court

The Honorable Bruce D. Parent, Judge

Trial Court Cause No. 45D11-1403-PL-37

Pyle, Judge.

Statement of the Case

[1] This appeal involves a dispute regarding the amount of compensation owed to property owners in an eminent domain case, and it returns to our Court following a previous appeal and a remand from our Indiana Supreme Court to the trial court. Siblings, David Joseph Guzzo ("David"), Robert Glenn Guzzo ("Robert"), and Betty Jo Keller ("Betty Jo") (collectively, "the Guzzos") appeal from the trial court's final judgment order that involves the interpretation of INDIANA CODE § 32-24-4.5-8, which was amended in 2019, and INDIANA CODE § 32-24-4.5-6.2, which was enacted in 2019. The Guzzos argue that the trial court erred when interpreting these eminent domain statutes and by denying their request to have the Town of St. John ("the Town") compensate them at the statutory rate of 150% of the fair market value of their property ("the Property"). Concluding that the trial court erred when interpreting these statutes, we reverse the trial court's judgment and remand to the trial court with instructions to order the Town to compensate the Guzzos at the statutory rate of 150% of the fair market value of the Property under INDIANA CODE § 32-24-4.5-8(a)(2).

[2] We reverse and remand.[1]

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[1] We held an oral argument in this appeal in our courtroom on November 1, 2022. We thank all counsel for their able advocacy.

Issue

Whether the trial court erred when interpreting the applicable eminent domain statutes and by denying the Guzzos' request for the Town to compensate them at the statutory rate of 150% of the fair market value of the Property.

Facts

[3] This is the second appeal in this eminent domain proceeding between these parties who dispute the statutory rate of compensation that the Town is required to pay the Guzzos for taking the Guzzos' property. To fully appreciate the procedural posture in which we currently find the parties, we first revisit the following relevant facts of this underlying case as set forth by this Court in the parties' first appeal:

> From approximately 1966 until he passed away in 1990, James Robert Guzzo was the owner of the Property, consisting of two parcels of land (the "North Parcel" and the "South Parcel") located in St. John, Indiana, along U.S. 41. Altogether, the Property consisted of approximately 8.65 acres of wooded, untillable land upon which was a house and a barn, among other improvements. The North Parcel was located in a "C-2" highway commercial zoning district while the South Parcel was located in an "I" light industrial zoning district.[2] Due to the age of the Property and the fact that the house predated the current Town zoning ordinance, the Property was treated as a legal non-conforming use. Pursuant to the zoning ordinance, a non-

[2] The Town rezoned the Property in January 2009 while James Guzzo's wife, Rosemary, lived on the Property.

conforming use ceases six months after the Property is abandoned[. . . .]

* * * * *

Upon James's death, the Property was transferred to the Guzzos, subject to a life estate reserved for Rosemary Rokosz-Guzzo. In September of 2009, Rosemary vacated the Property, and on December 18, 2009, she quitclaimed her life-estate interest to the Guzzos. After Rosemary vacated the Property, neither any of the Guzzos nor any other person resided on the Property. Northern Indiana Public Service Company terminated the gas and electric service, also in December of 2009, and removed the utility meters the next year. Gas and electric services to the Property were never restored.

* * * * *

Sometime, apparently in 2013, the Town engaged appraisers to value the Property. At the time the appraisals were completed, it was noted that the residence had been vacant for at least a year. On or about December 30, 2013, the Town entered into an agreement with a developer which involved the proposed development of the Property along with additional public improvements related to U.S. 41. On February 3, 2014, the Town issued a "Uniform Property Acquisition Offer" to each of the Guzzos, in compliance with applicable law, seeking to purchase the Property for a "Roadway Improvement and Economic Development Project." Appellants' App. II pp. 189, 192, 195, 198, 201, 204. On March 18, 2014, the Guzzos rejected the Town's offer.

On March 28, 2014, the Town instituted condemnation proceedings. On July 31, 2014, the trial court approved and entered an agreed order of appropriation of real estate and appointment of appraisers, pursuant to which the Property was appropriated by the Town and was to be appraised by three court-appointed appraisers. The Property was formally

> transferred to the Town on October 24, 2014, when the Town deposited the appraisal amount of $745,000.00 with the trial court.
>
> On September 7, 2016, the Guzzos filed a motion for partial summary judgment, designation of materials in support, and brief in support on the matter of enhanced compensation pursuant to Indiana Code section 32-24-4.5-8. The Guzzos argued that the Town should compensate them 150% of fair market value for their property because it was "a parcel of real property occupied by the owner as a residence." *See* Ind. Code § 32-24-4.5-8(2). . . . On February 23, 2017, the Town filed its response to the Guzzos' motion for partial summary judgment and cross-moved for partial summary judgment, responding to the issue of enhanced compensation and requesting a declaratory judgment on the legality of the Town's taking of the Property.

Guzzo v. Town of St. John, 112 N.E.3d 1159, 1160-61 (Ind. Ct. App. 2018), *trans. granted*, *Guzzo v. Town of St. John*, 131 N.E.3d 179 (Ind. 2019).

[4] At the time that the parties filed their respective summary judgment motions, INDIANA CODE § 32-24-4.5-8 provided, in relevant part, as follows:

> Notwithstanding IC 32-24-1, a condemnor that acquires a parcel of real property through the exercise of eminent domain under this chapter shall compensate the owner of the parcel as follows:
>
> (1) For agricultural land:
>
> * * * * *
>
> (i) payment to the owner equal to one hundred twenty-five percent (125%) of the fair market value of the parcel as determined under IC 32-24-1; or
>
> * * * * *

> (2) For a parcel of real property occupied by the owner as a residence:
>
> > (A) payment to the owner equal to one hundred fifty percent (150%) of the fair market value of the parcel as determined under IC 32-24-1;
> >
> > * * * * *
>
> (3) For a parcel of real property not described in subdivision (1) or (2):
>
> > (A) payment to the owner equal to one hundred percent (100%) of the fair market value of the parcel as determined under IC 32-24-1[.]

I.C. § 32-24-4.5-8 (effective through June 30, 2019).

> On November 8, 2017, the trial court granted the Town's cross-motion for partial summary judgment as to the legality of its taking of the Property. The trial court also concluded that the Property did not qualify as residential property under Indiana Code section 32-24-4.5-8(2) because it was not being occupied by the owner as a residence at the time of the taking. . . . On November 20, 2017, the trial court amended its order to direct the entry of final judgment in favor of the Town.

Guzzo, 112 N.E.3d at 1161.

[5] The Guzzos appealed the trial court's judgment and conclusion that they were entitled to only 100% of the fair market value of the Property. The Guzzos argued, in relevant part, that the Property was a "parcel of real property occupied by the owner as a residence" under subsection (2) of the statute, which would entitle them to 150% of the fair market value. This Court held that the

trial court had correctly concluded that the Property did not qualify as land occupied by an owner as a residence, and we affirmed the trial court's judgment.

[6] The Guzzos filed a petition to transfer, which the Indiana Supreme Court granted. In April 2019, while the case was pending on transfer, the Indiana legislature amended INDIANA CODE § 32-24-4.5-8, with an effective date of July 1, 2019. The legislature amended the name of the category of property that was entitled to 150% of the fair market value compensation, as set forth a newly designated subsection (a)(2), and added subsection (b) as a new subsection. The amended statute provides, in relevant part, as follows:

> (a) Notwithstanding IC 32-24-1, a condemnor that acquires a parcel of real property through the exercise of eminent domain under this chapter shall compensate the owner of the parcel as follows:
>
> (1) For agricultural land:
>
> (A) either:
>
> (i) payment to the owner equal to one hundred twenty-five percent (125%) of the fair market value of the parcel as determined under IC 32-24-1; or
>
> * * * * *
>
> (2) *Subject to subsection (b), for residential property*:
>
> (A) *payment to the owner equal to one hundred fifty percent (150%) of the fair market value of the parcel* as determined under IC 32-24-1;
>
> * * * * *

(3) For a parcel of real property not described in subdivision (1) or (2):

(A) payment to the owner equal to one hundred percent (100%) of the fair market value of the parcel as determined under IC 32-24-1;

* * * * *

(b) *Subsection (a)(2) applies*:

(1) only to residential property occupied by the owner as a residence, in the case of an eminent domain proceeding:

(A) initiated before July 1, 2019; and

(B) with respect to which the fair market value of the parcel has been determined under IC 32-24-1 before July 1, 2019; and

(2) *to all residential property, regardless of whether the property is occupied by the owner as a residence, in the case of an eminent domain proceeding initiated*:

(A) after June 30, 2019; or

(B) *before July 1, 2019, and with respect to which the fair market value of the parcel has not been determined under IC 32-24-1 before July 1, 2019*.

I.C. § 32-24-4.5-8 (effective July 1, 2019) (emphases added). Additionally, effective July 1, 2019, the legislature added a statute to define "residential property" as used in the amended version of INDIANA CODE § 32-24-4.5-8. The newly added statute, INDIANA CODE § 32-24-4.5-6.2, provides that "residential property" means "real property that consists of: (1) a single[-]family dwelling that is not owned for the purpose of resale, rental, or leasing in the ordinary

course of the owner's business; and (2) the land on which the dwelling is located." I.C. § 32-24-4.5-6.2 (format altered).

[7] On July 31, 2019, the Guzzos filed with our supreme court a "Notice of Change in Law and Verified Motion to Remand." *Guzzo*, 131 N.E.3d at 180. The Guzzos' motion asserted that the legislature's statutory amendments should be applied retroactively, and our supreme court agreed. *Id.* The parties disagreed about whether the underlying facts of their case fit under subsection 8(b)(1) or subsection 8(b)(2) of the retroactive statue, which would thereby determine whether subsection 8(a)(2), the "residential property" subsection was applicable. Our supreme court, when discussing the determination of the fair market value in an eminent domain case, explained that the "fair market value is determined under Indiana Code chapter 32-24-1 either by the agreement of the parties or by the trier of fact." *Id.* at 181. Our supreme court observed that "[t]he existence of subsection 8(b)(1) clarifie[d] that subsection 8(b)(2) does not apply to cases where there has already been an agreement by the parties or a determination by the trier of fact concerning fair-market value." *Id.* at 182. Additionally, our supreme court determined that "subsection 8(a)(2) on its face applie[d] here because fair market value ha[d] not yet been determined under Indiana Code chapter 32-24-1." *Id.* The Indiana Supreme Court then "dismiss[ed] th[e] appeal without prejudice and remand[ed] to the trial court to determine the fair market value of the Guzzos' property and assess whether they are entitled to enhanced compensation" under subsection 8(a)(2) for residential property. *Id.*

[8] When the case went back to the trial court, the Guzzos filed another partial summary judgment motion, arguing that the Property was "residential property" as defined by INDIANA CODE § 32-24-4.5-6.2 and was, therefore, subject to payment of 150% of the fair market value of the Property pursuant to INDIANA CODE § 32-24-4.5-8(a)(2). Specifically, the Guzzos argued that it was undisputed that, at the time of the Town's condemnation, the Property contained a single-family dwelling and that it was not used for the purpose of resale, rental, or leasing. They also designated, in part, property tax bills showing that the Property had been classified and assessed as a residential property for property tax purposes.

[9] In the Town's summary judgment response, it argued that there were disputed issues of material fact regarding whether the Property was "owned for personal or commercial uses" at the time of the taking and whether the Property "contained a homestead/residential dwelling[.]" (App. Vol. 3 at 14). The Town designated a legislative Fiscal Impact Statement for House Bill 1411 and argued that the Fiscal Impact Statement gave "insight into [the] legislative intent to exclude properties like [the Guzzos] from the definition of "residential property[.]" (App. Vol. 3 at 19) (internal quotation marks omitted). The Financial Impact Statement provided, in part, as follows:

> **Explanation of Local Expenditures:** The provisions of this bill will increase the number of properties entitled to receive 150% of fair market value in the event they are acquired through eminent domain. Because these properties receive only 100% of fair market value under current law, this bill will increase costs to local governments in the actual acquisition of these properties.

> However, because the change would only affect properties that are owned for personal use but not occupied as a residence, this will likely affect a small portion of future eminent domain proceedings.

(App. Vol. 3 at 17). The Town then argued that the Guzzos needed to show that the Property had been used for personal use. The Town also argued that the Property did not fit the definition of "residential property" because the Property's zoning had been changed to commercial-industrial in 2009 and because it had been listed for sale as a commercial-industrial property in October 2013.

[10] In June 2020, following a hearing, the trial court denied the Guzzos' partial summary judgment motion. In its order, the trial court acknowledged the statutory definition of "residential property" under INDIANA CODE § 32-24-4.5-6.2, and it found that the Property included "a single-family home, a storage shed, and unimproved land." (App. Vol. 3 at 42). The trial court then focused on whether any of the Guzzo siblings, who owned the property at the time of the taking, had ever occupied the Property as a resident. The trial court concluded that the Guzzos had "not designate[d] anything to indicate that any of the Defendants [the Guzzo siblings] had ever resided on the property, nor did they designate an intent for any of them to move onto the property[,]" and that the Guzzos "were simply in the process of selling property that they had inherited from their Father." (App. Vol. 3 at 44).

[11] Subsequently, on February 11, 2021, the trial court held an evidentiary hearing on the issue of whether the Property met the definition of "residential property"

under INDIANA CODE § 32-24-4.5-6.2, which would entitle the Guzzos to enhanced compensation of 150% of the fair market value under INDIANA CODE § 32-24-4.5-8(a)(2) for residential property. At the time of this hearing, the issue of fair market value had yet to be determined. The parties stipulated to the admission of thirty-seven joint exhibits, which included exhibits that had been presented during summary judgment, including tax bills and the Financial Impact Statement, as well as other exhibits such as photographs of the Property and the house thereon. The Guzzos also presented testimony from Robert regarding the Property. The parties argued as they had on summary judgment.

[12] Thereafter, on February 19, 2021, the trial court issued an interlocutory order containing findings of fact and conclusions of law ("February 2021 Order"). The trial court made the following relevant conclusions:

> 38. The Structure would have clearly been a "residence" under its present [statutory] definition at the time that the DEFENDANTS [the Guzzo siblings] resided there in the 1960's, 1970's, and for a portion of the 1980's.
>
> 39. The Structure would have continued to be a "residence" under the present definition for James Guzzo and his wife Rosemary.
>
> 40. The Structure would have still been a "residence" under its present definition for Rosemary after James had passed, until she moved from the Property in September of 2009.
>
> 41. The fact that none of the DEFENDANTS resided in the home after it was quit-claimed to them in 2009, had no relevance to this Court, as to whether or not it was a "residential property" under Indiana Code [§] 32-24-4.5-6.2(1) and (2).

42. The question for this Court to determine is whether our Legislature intended for Indiana Code [§] 32-24-4.5-6.2(1) and (2) to apply to a structure that sat vacant and unused by the DEFENDANTS for approximately four years while they first waited out the commercial real estate market and second attempted to sell the Property as "Commercial-Industrial Real Estate."

43. The Court, accordingly, is charged with determining and implementing the intent of our Legislature in enacting House Bill 1411 (2019) which amended the definition of residential property – removing the language that a residence needed to be "occupied by the owner as a residence" – that is to be entitled to enhanced compensation upon the exercise of eminent domain.

44. Th[is] Court f[i]nd[s] that Indiana Code [§] 32-24-4.5-6.2 [i]s ambiguous as it pertain[s] to the present factual and legal situation.

45. Accordingly, this Court looked at [the] Fiscal Impact Statement associated with House Bill 1411 – which later became Section 6.2 of the statute – and determined that the intent of the amendment was to affect "only properties that are owned for personal use but not occupied as a residence."

46. The Structure here was not ever owned for personal use by any of the DEFENDANTS.

47. The Property here was not ever owned for personal use by any of the DEFENDANTS.

48. The last time the Property was owned for personal use, it was owned by Rosemary under her life estate from her husband from roughly 1990 until late 2009.

49. The Court therefore f[i]nd[s] that the proper subdivision of Indiana Code [§] 32-24-4.5-8(a) for these facts is

> subdivision (3), as a parcel of real estate not described in subdivision (1) or (2). As such, payment is due to the DEFENDANTS by the [Town] equal to one hundred percent (100%) of the fair market value of the Property.

(App. Vol. 2 at 51-52).

[13] Thereafter, the Guzzos sought to have the trial court certify its February 2021 Order for interlocutory appeal, and the trial court denied their request. The trial court then scheduled a jury trial for October 2021 to determine the issue of the fair market value of the Property.

[14] In September 2021, the parties filed a "Joint Status Report Regarding Settlement Negotiations and Outstanding Matters in Dispute" and notified the trial court that they had engaged in "substantial negotiations" and had "reached an agreement that they fair market value of the Property is $1,280,000.00[.]" (App. Vol. 3 at 80, 81). The parties also informed the trial court that they "continue[d] to disagree as to the amount of the judgment that should be entered in this case, which hinge[d] on the issue of whether the Guzzos [we]re entitled to enhanced compensation of 150% of the fair market value of the Property pursuant to Indiana Code § 32-24-4.5-8(a)(2)[,]" and they sought to have the trial court review that issue when entering a final judgment. (App. Vol. 3 at 81-82).

[15] On September 17, 2021, the trial court entered its "Final Judgment" order ("September 2021 Order"). (App. Vol. 2 at 43). The trial court determined "$1,280,000.00 to be a reasonable and appropriate fair market value of the

Property." (App. Vol. 2 at 45). However, the trial court again rejected the Guzzos' argument that the Property was a residential property that would entitle the Guzzos to enhanced compensation of 150% of the fair market value of the Property pursuant to INDIANA CODE § 32-24-4.5-8 (a)(2), and it "reaffirm[ed] its previous interlocutory ruling that the Guzzos are only entitled to compensation of 100% of the fair market value of the Property." (App. Vol. 2 at 45). The trial court also determined that the Town was required to pay "interest at the statutory rate pursuant to Indiana Code § 32-24-1-11(d)(6)[.]" [3] (App. Vol. 2 at 45). The trial court entered a final judgment in favor of the Guzzos and against the Town "in the amount of $1,280,000.00, plus pre-judgment interest through September 9, 2021 in the amount of $664,337.53, plus additional interest at the rate of $117.26 per diem from September 10, 2021, until the judgment is paid in full." (App. Vol. 2 at 46).

[16] The Guzzos now appeal.

Decision

[17] The Guzzos argue that the trial court erred when interpreting the applicable eminent domain statutes—INDIANA CODE § 32-24-4.5-8 and INDIANA CODE § 32-24-4.5-6.2—and by denying their request to have the Town compensate the

[3] INDIANA CODE § 32-24-1-11(d)(6) provides, in part, that "[i]n any trial of exceptions, the court or jury shall compute and allow interest at an annual rate of eight percent (8%) on the amount of a defendant's damages from the date plaintiff takes possession of the property."

Guzzos at the statutory rate of 150% of the fair market value of the Property as residential property.

[18] The trial court entered findings and conclusions in its September 2021 Order, in which it reaffirmed its enhanced compensation determination from its February 2021 Order. Where, as here, the trial court has entered findings and conclusions, we apply the following two-tiered standard of review: (1) whether the evidence supports the findings; and (2) whether the findings support the judgment. *Hazelett v. Hazelett*, 119 N.E.3d 153, 157 (Ind. Ct. App. 2019). The trial court's findings and conclusions will be set aside only if they are clearly erroneous, that is, if the record contains no facts or inferences supporting the judgment. *Id.* A judgment is clearly erroneous when a review of the record leaves us with a firm conviction that a mistake has been made. *Id.*

[19] This appeal involves the Town's condemnation of the Guzzos' property and the resulting required compensation under the eminent domain statutes. "[B]ecause statutes of eminent domain are in derogation of the common law rights to property [they] must be strictly construed, both as to the extent of the power and as to the manner of its exercise." *Util. Ctr., Inc. v. City of Fort Wayne*, 985 N.E.2d 731, 735 (Ind. 2013) (cleaned up). "The state has inherent authority to take private property for public use." *Murray v. City of Lawrenceburg*, 925 N.E.2d 728, 731 (Ind. 2010) (citing *Kelo v. City of New London,* 545 U.S. 469, 477 (2005)). "The Indiana Constitution and the Fifth Amendment require just compensation if this authority is exercised." *Murray*, 925 N.E.2d at 731. "[T]he Fifth Amendment requirement that "just

compensation" be paid when private property is taken for public use is an affirmance of a great doctrine established by the common law for the protection of private property." *Util. Ctr., Inc.*, 985 N.E.2d at 735 (cleaned up).

[20] Resolution of this appeal involves the interpretation of the applicable eminent domain statutes, INDIANA CODE § 32-24-4.5-8 and INDIANA CODE § 32-24-4.5-6.2. "The interpretation of a statute is a question of law, which we review de novo." *Serv. Steel Warehouse Co., L.P. v. United States Steel Corp.*, 182 N.E.3d 840, 842 (Ind. 2022). "When presented with a question of statutory construction, we first determine whether the legislature has spoken clearly and unambiguously on the point in question." *Util. Ctr., Inc.*, 985 N.E.2d at 734 (cleaned up). "If so, our task is relatively simple: we need *not* delve into legislative intent but must give effect to the plain and ordinary meaning of the language." *Id.* (emphasis added) (cleaned up). "As we interpret [a] statute, we are mindful of both what it does say and what it does not say." *City of Lawrence Utilities Serv. Bd. v. Curry*, 68 N.E.3d 581, 585 (Ind. 2017) (cleaned up).

[21] INDIANA CODE § 32-24-4.5-8(a)(2) provides, in relevant part, that "a condemnor that acquires a parcel of real property through the exercise of eminent domain under this chapter shall compensate the owner of the parcel . . . for *residential property*" with "payment to the owner equal to one hundred fifty percent (150%) of the fair market value of the parcel[.]" I.C. § 32-24-4.5-8(a)(2) (emphasis added) (format altered). INDIANA CODE § 32-24-4.5-8(b)(2)(B) provides that INDIANA CODE § 32-24-4.5-8(a)(2) "applies . . . *to all residential property, regardless of whether the property is occupied by the owner as a residence*, in

the case of an eminent domain proceeding initiated . . . before July 1, 2019, and with respect to which the fair market value of the parcel has not been determined under IC 32-24-1 before July 1, 2019." I.C. § 32-24-4.5-8(b)(2)(B) (emphasis added) (format altered). Here, this eminent domain proceeding was initiated before July 1, 2019 and the fair market value had not been determined before July 1, 2019. Therefore, INDIANA CODE § 32-24-4.5-8(a)(2)—the statutory provision relating to 150% compensation for residential property—was applicable to the issue of compensation in this eminent domain case if the Guzzos' property met the definition of a residential property. The legislature defined the term "residential property" as used in INDIANA CODE § 32-24-4.5-8(a)(2) to mean "real property that consists of: (1) a single[-]family dwelling that is not owned for the purpose of resale, rental, or leasing in the ordinary course of the owner's business; and (2) the land on which the dwelling is located." I.C. § 32-24-4.5-6.2 (format altered). Accordingly, this appeal ultimately turns on whether the Guzzos' property was residential property as defined by INDIANA CODE § 32-24-4.5-6.2.

[22] Here, in its February 2021 Order, the trial court interpreted INDIANA CODE § 32-24-4.5-6.2 to determine whether the Town was required to compensate the Guzzos at the rate of 150% for residential property under INDIANA CODE § 32-24-4.5-8(a)(2). When addressing the enhanced compensation issue, the trial court first found that the Property contained a structure that had been "the family's home." (App. Vol. 2 at 49). The trial court then determined that that home structure had been a "residence" during the period when the Guzzo

siblings had lived in the house as children (1960's to 1980's), during the period when the Guzzos' father, James, had lived in the house (1967 to 1990), and during the period when James' second wife, Rosemary, had lived in the house (1990 to 2009). The trial court then specifically determined that INDIANA CODE § 32-24-4.5-6.2 was ambiguous "as it pertained to the present factual and legal situation." (App. Vol. 2 at 52). The trial court then relied on the Fiscal Impact Statement to define the term residential property. Specifically, the trial court relied on the statement's language of whether the property was "owned for personal use[.]" (App. Vol. 2 at 52). Thereafter, the trial court concluded that the Guzzos had never owned the Property for personal use and that the "last time the Property [had been] owned for personal use" was when "it was owned by Rosemary under her life estate from her husband from roughly 1990 until late 2009." (App. Vol. 2 at 52). Based on its determination that the Guzzos had not owned Property for personal use, the trial court concluded that the Guzzos were not entitled to the 150% compensation for residential property under INDIANA CODE § 32-24-4.5-8(a)(2) and that, instead, they were entitled to only 100% compensation under INDIANA CODE § 32-24-4.5-8(a)(3).

[23] The Guzzos argue that the eminent domain statutory provisions, INDIANA CODE § 32-24-4.5-8 and INDIANA CODE § 32-24-4.5-6.2, are "simple and straightforward" and that the trial court's interpretation of the statutes was "erroneous in multiple respects" and deviated from principles of statutory construction. (The Guzzos' Br. 19, 20). The Guzzos argue that the trial court erred by determining that INDIANA CODE § 32-24-4.5-6.2 was ambiguous and

that the trial court "failed to give the words" in the statute "their common, ordinary meaning as the principles of statutory construction dictate." (The Guzzos' Br. 20). Additionally, the Guzzos contend that the trial court "compounded this error by using the 'factual and legal situation' between the parties to inject ambiguity into the plain definition of 'residential property' in Ind. Code § 32-24-4.5-6.2, contrary to the rules of statutory interpretation." (The Guzzos' Br. 20). Moreover, the Guzzos argue that the trial court erred when it "impermissibly resorted to the Fiscal Impact Statement, outside the four corners of the [Eminent Domain] Act, to alter the language in Ind. Code § 32-24-4.5-6.2 and add a requirement of ownership for 'personal use.'" (The Guzzos' Br. 20).

[24] On the other hand, the Town contends that the trial court "correctly determined that the statute was ambiguous in that the definition of 'residential property' contained therein is open to multiple interpretations as applied to this case." (The Town's Br. 10). The Town also asserts that the trial court correctly relied upon the Fiscal Impact Statement to determine the legislature's intent of the meaning of the definition of residential property. Additionally, the Town acknowledges that the legislature removed the occupancy requirement from the subsection that pertains to property entitled to enhanced compensation of 150% of the fair market value; however, the Town asserts that "it cannot logically be argued that the Legislature intended that any property which has a structure with four walls and a roof would qualify as residential so long as it is not owned

for resale, rental or leasing within the ordinary course of the owner's business." (The Town's Br. 10).

[25] We agree with the Guzzos that the trial court erred by determining that INDIANA CODE § 32-24-4.5-6.2 was ambiguous, by relying on the Fiscal Impact Statement, and by denying the Guzzos' request for the Town to compensate the Guzzos at the statutory rate of 150% of the fair market value of the Property as residential property. When entering its order, the trial court ignored the plain language of INDIANA CODE § 32-24-4.5-6.2, which specifically provides that residential property means "real property that consists" of "a single[-]family dwelling that is not owned for purposes of resale, rental, or leasing" and "the land on which the dwelling is located." When interpreting this statute, we must be "mindful of both what it does say and what it does not say." *City of Lawrence*, 68 N.E.3d at 585. The statute does not define residential property by stating that the property must be owned for personal use or that the owner must occupy the property as a residence. Here, the Property contained a single-family dwelling. Indeed, as the trial court determined, the Property contained a structure that had been "the family's home." (App. Vol. 2 at 49). Moreover, it is undisputed that it was not owned for purposes of resale, rental, or leasing. However, instead of applying the plain language of the statute, the trial court improperly relied on the Fiscal Impact Statement and injected a personal use requirement into the definition of residential property.

[26] The Town argues that the word "dwelling" as used in the statute implies habitability. But the Indiana Supreme Court has already dismissed this notion

in a related case. In *Rainbow Realty Group, Inc. v. Carter*, 131 N.E.3d 168 (Ind. 2019), our supreme court analyzed the term "dwelling units" for purposes of rental property as referenced in INDIANA CODE § 32-31-8-1(a). Because the legislature failed to define the term "dwelling," our supreme court looked to the dictionary definition and found the term means "a shelter (such as a house) in which people live" or "[a] place to live in; an abode." *Id.* at 174 (cleaned up). Though the house in *Rainbow Realty* was uninhabitable, our supreme court found the home was a dwelling "because a single-family house is quintessentially a place to live." As in *Rainbow Realty*, we decline to imply a requirement of habitability to the word "dwelling" as used in INDIANA CODE § 32-24-4.5-6.2.

[27] The legislature spoke clearly and unambiguously on the definition of residential property; therefore, "our task is relatively simple: we need *not* delve into legislative intent but must give effect to the plain and ordinary meaning of the language." *Util. Ctr., Inc.*, 985 N.E.2d at 734 (emphasis added). Because the Guzzos' real property consisted of property containing a single-family dwelling that was not owned for purposes of resale, rental, or leasing, we conclude that the trial court erred by denying the Guzzos' request for the Town to compensate the Guzzos at the statutory rate of 150% of the fair market value of the Property as residential property under INDIANA CODE § 32-24-4.5-8(a)(2). Accordingly, we reverse the trial court's judgment and remand to the trial court with instructions to order the Town to compensate the Guzzos at the statutory

rate of 150% of the fair market value of the Property under INDIANA CODE § 32-24-4.5-8(a)(2) as residential property.

[28] Reversed and remanded. [4]

Robb, J., dissents with opinion.

Weissmann, J., concurs.

[4] In addition to seeking the 150% in enhanced compensation, the Guzzos also request "interest at the statutory rate pursuant to Ind. Code § 32-24-1-11(d)(6)." (The Guzzos' Br. 36). The Town argues that the Guzzos have waived any argument that it is entitled to interest because they did not raise it as a separate issue in their appellate brief. We need not address this argument because, as noted in the facts above, the trial court has already awarded interest to the Guzzos. Specifically, the trial court determined that the Town was required to pay "interest at the statutory rate pursuant to Indiana Code § 32-24-1-11(d)(6)" and ordered the Town to pay "pre-judgment interest through September 9, 2021" and "additional interest . . . from September 10, 2021, until the judgment is paid in full." (App. Vol. 2 at 45, 46).

IN THE
COURT OF APPEALS OF INDIANA

David Joseph Guzzo, Robert Glenn Guzzo, and Betty Jo Keller,

Appellants-Defendants,

v.

Town of St. John, Lake County, Indiana,

Appellee-Plaintiff,

January 19, 2023

Court of Appeals Case No. 21A-PL-2213

Appeal from the Lake Superior Court

Robb, Judge, dissenting.

I respectfully dissent from the majority's conclusion that "[b]ecause the Guzzos' real property consisted of property containing a single-family dwelling that was not owned for purposes of resale, rental, or leasing," they are entitled to be compensated at the statutory rate of 150% of fair market value. Slip op. at ¶ 27.

The Fifth Amendment allows governments to take private property only for "public use" and after payment of "just compensation." In 2005, the United States Supreme Court decided a case involving the proposed taking of fifteen non-blighted parcels of land consisting of ten homes occupied by an owner or family member and five homes held as investment properties for economic

development of the area and held that the taking was for a public purpose even though the properties were to be transferred to another private owner. *Kelo v. City of New London, Conn.*, 545 U.S. 469, 475, 484 (2005). The Court emphasized, however, that states could "confer greater rights to compensation for government action than those afforded by the constitutional takings clauses." *State v. Kimco of Evansville, Inc.*, 902 N.E.2d 206, 212 (Ind. 2009) (citing *Kelo*, 545 U.S. at 489). Indeed, the decision was unpopular, and many states have since passed laws reforming eminent domain. *See* Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 Minn. L. Rev. 2100, 2102 (2009), https://www.minnesotalawreview.org/wp-content/uploads/2012/01/Somin_MLR.pdf (last visited Jan. 9, 2023) [https://perma.cc/2WDT-93ZT] (noting that as of that time, forty-three states had enacted post-*Kelo* legislation to curb eminent domain).

Although the Guzzos do not contend as the *Kelo* plaintiffs did that the Town could not legally take the Property, it is important to consider this background because a large part of what sparked the backlash to the *Kelo* decision and the ensuing legislative action was the fact that in *Kelo*, people's *homes* were subject to eminent domain for economic development purposes. And in the original *Guzzo* opinion, our court stated that "[a]s an initial matter, it seems clear that the legislative intent of Indiana Code section 32-24-4.5-8 is to protect the property rights of certain Hoosiers by erecting an additional obstacle, in the form of enhanced compensation, to the taking of land that falls into certain

categories." *Guzzo v. Town of St. John, Lake Cnty.*, 112 N.E.3d 1159, 1163 (Ind. Ct. App. 2018), *vacated by* 131 N.E.3d 179 (Ind. 2019).

The Guzzos state "[t]he sole issue presented in this appeal is the character of the [Property], and whether it constituted 'residential property' within the meaning of Ind. Code § 32-24-4.5-6.2." Appellants' Brief at 15. Although I agree that at one time the "character" of the Property was residential, I do not believe that necessarily defines its character in perpetuity. What was once a home or a church may be turned into a business, what was once a commercial building may be divided up and made into housing. *See, e.g.,* Stadium Lofts, https://www.coreredevelopment.com/stadium-lofts (last visited Jan. 10, 2023) [https://perma.cc/5X2A-D4GX] (former Bush Stadium in Indianapolis now apartments). Here, the facts lead me to the conclusion that the character of the Property changed after Rosemary vacated the house such that at the time the Town began eminent domain proceedings, it was no longer "residential property."

I do not base this decision on the fact that no one resides on the Property. Given the 2019 amendment to Indiana Code section 32-24-4.5-8, I agree with the majority that the definition of "residential property" for purposes of this case is not dependent on the structure being occupied as a residence. Instead, I base it on the fact that prior to the Town's offer, the Property was rezoned commercial and light industrial and Rosemary continued to reside on the Property as a non-conforming use; the utilities had not just been terminated but the meters removed after Rosemary's departure and the structure was boarded

up; none of the Guzzos lived or intended to live on the Property after Rosemary's departure; and prior to the time the Town made its initial offer, the Guzzos had listed the Property for sale as "Commercial-Industrial Real Estate." Appellants' Appendix, Volume II at 50.

Indiana Code section 32-24-4.5-6.2 defines "residential property" in part as real property that consists of "a single family dwelling that is not owned for the purpose of resale, rental, or leasing in the ordinary course of the owner's business[.]" Besides those listed, what purpose would a single family dwelling be owned for if not personal use, now or in the future? And yet the evidence is clear that the Guzzos did not own the Property for personal use and did not intend to keep it for personal use in the future. They kept it to wait out the housing market downturn and intended to sell it for commercial or industrial use, eventually listing it for nearly two million dollars.

Further, "dwelling" as used in Indiana Code section 32-24-4.5-6.2 is not defined in article 32-24. In *Rainbow Realty Grp., Inc. v. Carter*, 131 N.E.3d 168, 174 (Ind. 2019), our supreme court stated that the undefined statutory term "dwelling unit" for purposes of Indiana Code chapter 32-31-8 should be determined by looking to general-language dictionaries: "Merriam-Webster defines a 'dwelling' as 'a shelter (such as a house) in which people live[.]' Similarly, the American Heritage defines 'dwelling' as '[a] place to live in; an abode[.]'" *Id.* at 174-75 (internal citations omitted). The court held it would therefore "understand a Chapter 8 'dwelling unit' to refer to a place to live[.]" *Id.* at 175.

But again, the Guzzos did not live on the Property, nor did they ever intend to do so.[5]

In sum, I do not believe the Property is the sort of property the legislature intended to protect when it amended Indiana Code section 32-24-4.5-6.2. I agree with the trial court that the Guzzos are not entitled to enhanced compensation because the Property does not meet the definition of "residential property," and I would therefore affirm the trial court.

[5] In this regard, I note that I also do not rely solely on the fact that the utilities had been turned off and the meters removed as evidence of the character of the Property. The utilities could have been reinstalled. But the treatment of the utilities when considered with all the other facts, including the commercial listing and the Guzzos' stated intention to *not* live on the Property, weighs against the continued residential character of the Property.