STATEMENT OF ISSUES

--The trial court abused its discretion in issuing a preliminary injunction.

--Carpenters' remedies at law were adequate.

--At the time the preliminary injunction was issued, there was no evidence that any continued and ongoing injury to Carpenters outweighed the harm the injunction would do City and the general public.

--There was no evidence contradicting City's evidence that the injunction would disserve the public interest.

--The trial court's analysis of Carpenters' likely success on the merits and its findings and conclusions on the merits were erroneous.

--The trial court erred in finding that City had taken from Carpenters a property right they did not possess – the right to place a driveway where a city handrail had been in place at the time they purchased the property.

-- Due process did not require publication or use of detailed standards where City was maintaining recently installed safety features that were present when Carpenters bought their property, rather than depriving them of any right they obtained with or in connection with their property.

--The evidence was insufficient to support the trial court's conclusions that all City's stated traffic and safety related concerns were pretextual, and that City's actions were arbitrary, capricious and unrelated to legitimate governmental interests.

--The evidence was insufficient to support the trial court's conclusion that City denied Carpenters economically viable use of their land, given that the purposes for which they purchased the land are still available.

--The trial court erred in finding City violated Carpenters' right to equal protection, when Carpenters made no showing that any other citizen had ever been similarly situated, let alone treated differently although similarly situated.

--The trial court's order erroneously reached the merits on various liability issues despite a timely demand for jury trial.

STATEMENT OF THE CASE

Plaintiffs David and Kambi Carpenter (Carpenters) filed their Complaint for Damages and Request for Injunctive Relief on August 22, 2000, naming Mayor Jimmie K. Wright of the City of Linton, the City of Linton, and the City Council members as defendants. (App. 1, 23) Defendants (hereafter collectively "City" unless a more specific designation is appropriate) moved for an enlargement of time to respond on September 11, 2000; their motion was granted September 13, 2000. (App. 1, 33) Carpenters filed a request for jury trial on September 14, 2000. (App. 34) After a second enlargement of time to respond, City filed a motion to dismiss on November 1, 2000. (App. 2) Carpenters filed a First Amended Complaint for Damages and Request for Injunctive Relief on January 12, 2001. (App. 35) A hearing was held on City's motion to dismiss on February 12, 2001. (App. 2) On March 6, 2001, City filed a motion to dismiss Count V

of Carpenters' First Amended Complaint. (App. 3) City's motions to dismiss were denied on July 19, 2001. (App. 3)

An evidentiary hearing, stated to concern Carpenters' request for a preliminary injunction, was held on February 15, 2002 and was not concluded. The evidentiary hearing continued on May 8, 2002 and August 16, 2002. (App. 3-4)

On February 14, 2003, the trial court issued its Findings of Fact, Conclusions of Law and Injunction. (App. 4, 22) Except for its final paragraph concerning further hearings, this order was identical to the proposed findings and conclusions Carpenters had submitted. (App. 5-22, 154-172) The order included a preliminary injunction requiring City to remove the "steel barricade" installed in front of Carpenters' property and to allow Carpenters to install a driveway as set forth in their petition to the City Council, upon posting of a $300.00 bond. (App. 20) The order also concluded that City had violated Carpenters' rights to due process and equal protection and had committed a regulatory taking. (App. 14-20) The order ended by stating that the matter was set for "hearing on damages" on June 27, 2002. (App. 21)

City filed a Notice of Appeal on March 10, 2003. (App. 4) On May 20, 2003, City moved for a stay pending resolution of the appeal. The trial court granted the stay on May 28, 2003. (App. 173-175)

STATEMENT OF FACTS

The City of Linton has no planning or zoning ordinances. (App. 36, 151) Citizens desiring City action of some kind generally contact the Mayor or attend a City Council

meeting. (App. 53-55, 56, 61, 63, 87, 88-89, 224, 331-332)[1] Members of the city government say that they apply general common sense and life experience in making their decisions, with special regard for issues of safety. (App. 57-58, 81-82, 116A)

Over the years, various citizens of Linton have installed residential driveways. (App. 178, 181, 185, 192, 200-202) Some did not contact any city official; others contacted the City Streets department or the City Manager. (App. 178, 182, 185, 188, 193-194, 209-210, 216, 317-318) Where there were sidewalks in these residential areas, they were often or usually installed by current or prior residents. (App. 195, 200, but cf. App. 180-182) Often there was no sidewalk at all in these neighborhoods. (App. 179, 189, 211-212) There is no evidence that any Linton resident has ever cut an existing city-installed curb or sidewalk to construct a driveway in a busy traffic area or a non-residential district, though one driveway was cut where a residence was turned into a business. (App. 319; see App. 179, 189)[2] There is no evidence that any Linton resident ever removed a city-installed handrail, or (prior to this case) sought the extension of an unrelated temporary absence of such a handrail, in order to put in a driveway. (App. 329; see App. 183, 207, 321) There are no written guidelines for citizens seeking to cut

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[1] The Appendix includes excerpts from several depositions. The depositions in this matter were made part of the record at the evidentiary hearing. (App. 314)

[2] David Carpenter testified (App. 263) that he gave the City Council numerous photographs of driveways in commercial downtown Linton. However, there is no evidence of when those driveways were constructed, or whether they predated either the former or the current sidewalk and curb. Carpenter specifically mentioned the driveway into the auction barn at the other end of the block, an area never reached by the safety handrail installed on Vincennes Street in 1998. (App. 261) The building and vehicular access shown in Plaintiffs' Exhibit 15 do not appear to be in the area of the two-tier sidewalk and rail. Moreover, they were present before Carpenters bought their building, and therefore almost certainly predated the installation of the current sidewalk, curb and handrail. (App. 262-263)

through city curbs and sidewalks or to remove safety handrails, nor for city officials to use in handling requests from such citizens. (App. 90-91, 98-99, 325, 330)

In 1997 and 1998, the City of Linton used federal and/or state grant money to renovate the sidewalks of Linton's downtown area. (App. 48, 120A, 393, 394) New two-tiered concrete sidewalks were constructed. (App. 117, 395, 402, 433) Where necessary for safety and for compliance with the American Disabilities Act (ADA), new steel handrails were put in place. (App. 116, 401-402) The City Council authorized these improvements. (App. 77, 80) Gobe Associates, the engineering firm that designed and constructed these improvements, made its presentations to, and was hired by, the City Council. (App. 77, 80, 119) Per the terms of the government grants funding the project, the sidewalks and handrails had to meet applicable ADA requirements. (App. 92, 116, 393-394) The two-tier sidewalk was installed because the slope from the buildings to the street was unusually steep. (App. 117, 397) It replaced a previous sidewalk that had been there for decades. (App. 75) There had been some sort of railing at some point along the previous sidewalk as well. (App. 78)

Also on Vincennes Street, past where the handrail ends to the west, an auction barn has a driveway ramp cut at a slope. (App. 261-262)

In early 1998, David and Kambi Carpenter (Carpenters) purchased a lot on Vincennes Street (the Doctronics lot). (App. 219, 270) They purchased this lot after the construction of the new two-tier concrete city sidewalk adjoining the building on the property and the new steel handrail along the upper tier of this sidewalk. (App. 221, 269-270) The new handrail had an opening in front of the door to the building, approximately

the size of the door. (App. 433, 435) Carpenters operated a consumer electronics repair business, Doctronics, in this building until May 1999. (App. 228-229, 268-269, 273)

In April 1999, Carpenters purchased two lots adjacent to the Doctronics lot, on the eastern edge of Vincennes Street extending up to the corner of Vincennes Street and State Highway 59. (App. 219-220, 261, 431-432) The intersection of Vincennes Street and the state highway is very busy and heavily traveled. (App. 60, 371) There has never been a driveway or curb cut in front of either lot. (App. 71, 75, 120) The city's new two-tier sidewalk and steel handrail adjoined these lots as well, and were in place when Carpenters purchased the lots. (App. 221, 272, 296, 433, 434) The rail in front of the lots included one or more gaps approximately the width of a door. (App. 433, 434) Carpenters purchased these two lots with the intention of renovating the building on the corner lot and renting it out, while renovating the building on the other lot and joining it to the Doctronics building. (App. 220-223)

Carpenters began renovating the buildings on the two latterly purchased lots. Carpenters performed at least part of the renovation work themselves. (App. 224, 436) Carpenters covered the city sidewalks during this process to avoid damaging them. (App. 269) The removal of a support column as part of this would-be renovation caused the buildings to collapse on May 18, 1999, damaging the Doctronics building as well, and showering substantial debris on the city sidewalk. (App. 224-226, 274, 278, 437) When the collapse occurred, Carpenters had already rented the corner building to a tenant who had taken possession. (App. 224, 273) David Carpenter was injured in the building's collapse and spent months in and out of the hospital. (App. 225-226) The remnants of the buildings were removed in August and/or September 1999. (App. 226) City employees

removed fifteen to twenty feet of the steel handrail in front of the collapsed buildings in order to facilitate removal of the wrecked buildings and cleanup of the debris. (App. 147, 228, 295-296, 359-360)

By December 1999, Carpenters decided that instead of rebuilding the collapsed buildings for sale or rent, they would instead move David Carpenter's hobby business of constructing signs into a new building to be erected on that property. (App. 229) David had formerly conducted this business from his home garage and driveway. (App. 299) David approached Linton Mayor Jimmie K. Wright (Mayor) and stated that he was thinking of erecting a masonry building to replace the collapsed building. (App. 121-122, 230-231, 236, 338) He informed Mayor that the building would include an overhead door for moving items and vehicles and in and out, and a driveway leading to that door. (App. 231, 235-236) David testified that he asked Mayor what he needed to do to cut a driveway ramp on his property. (App. 266) David also testified that he mentioned using trucks, which Mayor denies. (App. 137, 231)

It is hotly disputed which of two drawings David showed Mayor. (App. 279, 282, 374-375) David testified he showed Mayor Plaintiffs' Exhibit 11. (App. 231, 449) This undated drawing is the drawing Carpenters later submitted to the City Council. It shows a driveway 18 feet wide, 8 feet from the corner of Vincennes Street and the state highway, leading to an area that could be a parking lot. (App. 449) Mayor testified that the drawing he saw was Defendants' Exhibit 8. (App. 374-375) This two-page drawing is marked "1199." It shows a driveway 9 feet wide, at what appears to be a distance of 20 feet from the corner. (App. 438-439) It is undisputed that at some point, David Carpenter showed Defendants' Exhibit 8 to one or more private contractors in order to obtain

information on the likely cost of constructing the building pictured on the corner lot. (App. 280-281) According to David, the building would have been used for the Doctronics business, which closed in May 1999. (App. 416) Both the drawings are marked "Not to Scale." (App. 438-439, 449)

Mayor told David he would get back to him on whether there would be any utility-related problems. (App. 236) Mayor told David that the City would work with him about his project. (App. 125, 126, 138, 144, 356) Mayor also told David that the City had no permit or approval process for buildings, but that he had better get necessary approvals from the State of Indiana. (App. 123, 338, 375)

According to David, Mayor told him a few days later that he was "good to go" on the building and driveway. (App. 237) Mayor states that he did indicate his approval of some sort of curb cut for a building such as depicted in Defendants' Exhibit 8, or at least City's willingness to work with Carpenters about it. (App. 383) Carpenters then borrowed money for construction of the building and for large and small trucks and machines. (App. 238-239) They also invested $1,000.00 or less of their own money. (App. 240)

At the time David Carpenter approached Mayor and told him he contemplated constructing a masonry building, he was in fact contemplating several alternative buildings, including at least one metal structure. (App. 236, 281) He later decided to build a metal-faced wooden structure rather than a masonry building. (App. 397)

Before and during the construction of the new building, David continued to operate his sign business out of his home garage and driveway, constructing various large and small signs and banners there. (App. 268, 287, 299, 302) After purchasing the

trucks, starting in April and/or May 2000, David parked the trucks on the lots where the new building would be erected. (App. 241) He marked with paint the area of sidewalk where he intended to install the driveway, and drove the trucks in and out over the curb at that point. (App. 2242, 289, 440, 441)[3] Some Linton residents complained to Mayor and/or to City Council members that this location was an inappropriate place to park the trucks. (App. 76, 79A, 96, 103-104, 127-132, 328A-328B, 339-343) At least one resident expressed concern that the trucks would pose a hazard in the downtown area. (App. 128) Fewer than twenty people complained to Mayor about the trucks on the lot. (App. 132, 343) Mayor responded that Carpenters would be erecting a building that would benefit the downtown area. (App. 340, 380) Construction on the building began in June 2000. (App. 287) When the building proved to be a metal shed, Mayor and City Council members received more complaints, more in total than had been made concerning the trucks. (App. 95-96, 133, 135, 343-344)

In early July, 2000, a ribbon-cutting ceremony took place for David Carpenter's sign construction business. At this time, there was no discussion of the construction of a driveway in the adjacent lots. (App. 345)

On July 10, 2000, the City Council held a regularly scheduled meeting. At this meeting, there was discussion of Carpenters' use of the corner property, including his driving of trucks over the curb and over the ramp at the intersection. (App. 347, 442-443) At that meeting or at other times, various Council members expressed concern about the safety hazards of trucks pulling in and out near an intersection much used by pedestrians.

[3] David Carpenter marked this driveway on two separate occasions, months apart, the latter in early July. It is not clear from the record whether the designated width of the

(App. 70) On July 11, 2000, a reporter contacted Kambi Carpenter asking for reactions to the discussion at the City Council meeting. David Carpenter called Mayor to ask for clarification. (App. 243) According to David, Mayor told him that many people objected to the appearance of the new building and its effect on the downtown area. Mayor also objected to David's driving trucks in that area of downtown. Mayor stated he was not inclined to allow Carpenters to cut the sidewalk for a driveway where they wished to cut it. (App. 244-245)

David Carpenter consulted an attorney, who suggested he write a letter to the City stating his intention to proceed with cutting the city curbs for the driveway. (App. 246) David sent a letter dated July 10, 2000, although the sequence of events indicates it must have been composed and sent on or after July 11, 2000. This letter did not refer to his prior conversation with Mayor, nor did it state that Mayor had previously approved a curb cut or driveway. It referred to a discussion "a few months ago regarding your approval to construct an entrance", and stated that he was "now prepared to complete that project". It described his intention to remove a section of the sidewalk and construct a driveway, and stated that this work was important to the continuation of his business. It stated that the work might begin as early as July 17, 2000, and asked that City "[p]lease plan to remove" a certain power line or at least "be available to relocate it." It ended with the following language: "If you have any concerns regarding this action, Please [sic] indicate those to me in writing along with any supporting documentation, no later [sic] Friday July 14, 2000 or this project will proceed as planned." (App. 444)

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driveway was the same both times, or whether the later markings covered a different amount of the curb. (App. 242)

Mayor received this letter on July 13, 2000, and responded with his own letter on the same date. (App. 349) Mayor's letter stated, "I think you had better hold up with taking out any curbs or sidewalks on West Vincennes Street and North Main Street." It noted that the "blueprint" Mayor had seen for the planned building did not include a parking lot for trucks. It recounted the controversy about the site and Mayor's reassurances to townspeople that Carpenters planned to erect a new building that would enhance the downtown area. It opined that the "shed type building" Carpenters had erected, and the parked trucks, made the site unattractive. It also noted that "these trucks . . . create a little bit of a hazard to the pedestrians as well as the traffic flow. These trucks will either be driven in or backed in…." It mentioned David Carpenter's statement, in a recent phone call, that he might move his business out of town, and stated Mayor's preference that David stay in the Linton area. It ended by suggesting a one-on-one meeting "to work out a solution that will be beneficial to all concerned." (App. 445-446)

Mayor and David Carpenter met a few days later and were unable to resolve the dispute. (App. 136A-136C, 249-251) Prior to this time, the handrail that had been removed for easier cleanup of debris had not yet been replaced. David testified that in their meeting, Mayor said the handrail would be replaced if David continued to drive trucks across the sidewalk. (App. 250) Mayor testified that at this time or near to it, a City Council member raised the question of whether the City would be liable if someone fell in that area and the handrail had not been replaced. (App. 146, 358) Mayor said his response was that the rail should have been replaced as soon as the cleanup was completed. (App. 148, 360) Mayor contacted Street Department Superintendent Jack

Brewer and told him the handrail needed to be put back in place so City would not incur liability for someone falling. (App. 76B, 148-149, 358, 360) Mayor testified that both the liability issue and Carpenters' threats to do the curb cut without approval motivated him to order the handrail replaced. (App. 149-150, 360-361) Similarly, Mayor's opposition to Carpenters' proposed driveway was based on both the hazard posed by the trucks' backing in and out at that location, and the appearance of Carpenters' building. (App. 388-389)

On August 11, 2000, city employees replaced the missing section of steel handrail in front of Carpenters' property. (App. 251) Carpenters' trucks were still parked on the lot. A news crew interviewed David Carpenter and Mayor at this time. David heard Mayor express concerns during this interview about the safety problems posed by the proposed driveway. (App. 263-264) During the interview, Mayor said he might have told David in the past that he could build a ramp. (App. 254) Mayor told the news crew that Carpenters had been advised to petition the City Counsel for permission to construct the driveway. David Carpenter denied having been told this previously. (App. 252)

On August 14, 2000, at a regularly scheduled City Council meeting, David Carpenter petitioned for permission to cut the City curbs and build a driveway as indicated on Plaintiffs' Exhibit 11. (App. 255, 374, 448, 452) David testified that he would have done so earlier if told it was necessary. (App. 297) David presented pictures of entrances to other properties, allegedly "in eyesight distance" of his property. (App. 255, 450) At least one of those properties was constructed and its driveway in place before the sidewalk renovation. (App. 262-263) There is no evidence indicating that the steel handrail had ever crossed the locations of the entrances in the pictures.

Carpenters' petition stated in general terms that Carpenters would install a ramp in accordance with ADA regulations. It specified that the city would remove the existing sidewalk and relocate an underground wire. (App. 448) The plan did not include any space for trucks to turn around on-site; they would have to continue to back in from or back out onto Vincennes Street, close to the busy intersection with the state highway. (App. 365, 388)

At or prior to the August 14, 2002 meeting, several City Council members expressed doubt or opposition concerning Carpenters' proposal. One or more City Council members raised safety concerns including interference with traffic; the problems posed by trucks crossing a busy sidewalk; the dangers of a driveway along a section of sidewalk that for decades had never had one; the effect on the newly constructed sidewalk; the need for the handrail; the steepness of the slope; the likelihood that the slope would be slippery in winter; and possible city liability if anyone was injured there. (App. 70, 74, 75, 76A, 114-115, 328C) At the meeting, Mayor and one or more Council members also mentioned what they considered the inappropriate appearance of the building and of trucks in that part of downtown. (App. 97, 112-113, 328B-328C) Mayor suggested that a vote be taken at that time. (App. 255) However, Council member Charles Cox suggested that the matter be tabled so they could obtain legal advice about whether the proposed driveway would be unlawful and whether the Council had the authority to approve it. The matter was accordingly tabled. (App. 49-50, 101, 140, 255-256, 353) Carpenters filed suit on August 22, 2002. (App. 1, 23) David Carpenter believed at that time that removal of the rail was necessary to the continuation of his sign

business. (App. 295)[4] He sought an emergency injunction, believing that he could get the handrail removed immediately and cut the driveway. (App. 298)

The next regular Council meeting was in September 2000. David Carpenter attended that meeting. He was asked whether he wanted a vote or some action taken on his request.[5] David replied that he was there merely as a citizen observer. A Council member noted that Carpenters had filed suit and stated that no action was pending concerning Carpenters' request. (App. 51, 79, 84, 93, 104-106, 141-142, 264, 354-355, 455) The Council took no action then or later on Carpenters' petition. (App. 104, 355-356) It does not appear that anyone investigated the legalities affecting Carpenters' petition except in connection with this litigation.

In the latter part of August, 2000, David Carpenter, with several people assisting him, drove his trucks off the lot, using the pedestrian ramp at the intersection. (App. 257) David also removed one or more large signs from the building after the handrails were back in place, using a pickup truck and trailer. He did not consider this procedure worthwhile for continued use. (App. 258)

David Carpenter's sign business was not limited to large signs, but also included license plates, window graphics, and signs of varying sizes. (App. 288) The trucks were used to handle the larger signs. (App. 288)

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[4] As noted *infra*, this proved not to be the case; David Carpenter continued his business briefly in Linton and then moved it to Sullivan, where business improved.

[5] The minutes of the meeting indicate that David Carpenter was asked "if there was anything he wanted to bring to the Council." (App. 445) Mayor and several Council members recall the question as being more specific -- whether he wanted a vote taken. (App. 51, 79, 93, 104, 141-142) David's testimony did not mention the word "vote," but was not inconsistent with that phrasing. (App. 264)

Besides his sign business and renovation projects, David Carpenter was employed as manager of maintenance for an electronic manufacturing company through September, 2000. (App. 241) As part of that work, he has frequently had dealings with local governments in the region. Some of those local governments, like the City of Linton, have no zoning or planning ordinances. In working with the City of Jasonville, which had no planning or zoning ordinances, David always made a point of getting all concerned parties together to make sure no problems arose. He testified that "obviously", it would be inappropriate to, for example, put in a ramp where the city was about to put in a new sewer. He cited “common reasons” for avoiding such actions. (App. 267)

In September 2000, David Carpenter relocated his sign business to Sullivan, Indiana. (App. 298) Carpenters first leased a property to use in the business, and then purchased a property a year later. (App. 259) The property Carpenters purchased for the sign business included a building on a large lot with a large driveway. (App. 456-458) In November 2000, David informed a reporter that his business was doing well and growing. (App. 300-301) His move to Sullivan made it easier for him to do large signs, and led to a surge in business. He was also able to build on leads he had received while still in Linton. (App. 301) David testified that he would not move the sign business back to Linton if the handrail were removed, although he might open some different business in that building. (App. 312)

Since leaving Linton, Carpenters have attempted to sell or rent the Doctronics lot and the two lots adjacent thereto. At the time of the hearing, they had not succeeded, though a discussion was in progress with one or more potential purchasers. (App. 259,

306-308) Carpenters are still servicing the debt incurred for construction of the shed on the corner and adjacent lots. (App. 259-260)

Just prior to the first day of evidentiary hearings, engineer Jerry Williams of Gobe Associates, who had worked on the Linton downtown renovation project, viewed Plaintiffs' Exhibit 11 and Defendants' Exhibit 8 and visited the site for the proposed driveway. (App. 365, 393, 396) Williams was familiar with Vincennes Street and the special elevation problems associated with the street, which had necessitated the two-tiered double curb. (397) Williams testified[6] that he saw serious safety problems with a driveway in that location, within twenty to twenty-five feet from a busy intersection. (App. 401, 404) He stated it was possible for a driveway to be built in that spot that would comply with ADA regulations, but that he would recommend against such a driveway for safety reasons. (App. 404, 404, 408) Williams confirmed that the handrail which had preceded Carpenters' purchase of their property, and which City later reinstalled, was placed there for the safety of pedestrians. (App. 401) Williams also believed that Carpenters had violated applicable state regulations by constructing this type of building and using it for commercial purposes without filing for appropriate permits. (App. 370)

Mayor testified that he does not trust Carpenters, whose initial renovation work ended in disaster, to construct a safe and ADA-compliant driveway ramp at the site in question, and that he believes the city would be liable for any resulting hazardous conditions. (App. 370)

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[6] Williams testified on August 16, 2002. Between his first review of the situation and his testimony, he had time for further inquiries and analysis. (App. 399, 408)

When asked if the harm he suffered from not having the driveway outweighed the harm to the public from the proposed curb cut and driveway, David replied that he thought it did – "certainly financially." (App. 309-310)

SUMMARY OF ARGUMENT

The trial court abused its discretion in granting the preliminary injunction. If Carpenters have any valid claim to relief, they have an adequate remedy at law. By the time of the trial court hearing, David Carpenter had moved his sign construction business to Sullivan, Indiana, where he had successfully followed leads obtained during the business' operation in Linton. Assuming any entitlement to relief, Carpenters' damages would consist of redundant costs due to maintaining property in two different locations. These are easily ascertainable and compensable economic damages. Alternately, under the same assumption, Carpenters could pursue damages for inverse condemnation. Moreover, by ordering removal of the steel safety handrail originally installed in 1997 or 1998, and allowing a driveway to be cut through the specially designed two-tier sidewalk installed at the same time, the injunction would alter, rather than preserve, the long-standing status quo. Finally, there was no showing that any harm to Carpenters from the status quo outweighed the harm to City and the public from granting the injunction. David Carpenter testified that he would not, in any event, reopen the sign construction business at the site in question. Meanwhile, the injunction would remove the safety handrail along the upper tier of the two-tiered sidewalk and allow the cutting of a steeply sloped driveway across that sidewalk where none had ever existed before. If Carpenters opened a business in that location which utilized trucks, the injunction would potentially

lead to trucks being backed in and out near a busy downtown intersection. All the evidence concerning safety indicated that these changes would jeopardize public safety. As City is legally responsible for maintaining the sidewalk in a safe condition, this decreased safety could expose City to liability in the event a passerby is injured.

Carpenters did not show that they were likely to succeed on the merits. They claim the taking of their right of ingress and egress -- but when they purchased the property, it was fronted by a newly installed steel safety handrail. The replacement of the handrail, after its temporary removal to help Carpenters clean up the debris from their collapsed building, did not take anything Carpenters ever owned. Any easement they possessed was for "ordinary" ingress and egress. Given the situation at the time Carpenters acquired their property rights, there was nothing ordinary about an easement to build a driveway where a steel pedestrian handrail should be. Carpenters did not acquire with that real estate any easement inconsistent with the safety handrail's presence. Nor could the handrail's temporary absence give rise to any prescriptive rights on their part.

Carpenters did not establish that they were likely to show denial of economically viable use of their land. They purchased the corner lot for the purpose of renovating and leasing the building thereon, and the adjoining lot for use in a walk-in video equipment repair business. City had nothing to do with the ill-fated or improper renovation techniques Carpenters used, which thwarted their first attempt to realize their goals. They are still free to pursue those goals. Carpenters are not constitutionally entitled to the highest and best possible use of their land. The physical condition of the sidewalk, curbs and railings, existing when Carpenters formed and acted upon their original intent,

are essentially unaltered. If the lots are not, under those unchanged conditions, as attractive to potential lessees as Carpenters hoped, that is not City's responsibility.

Nor did Carpenters establish likelihood of success on their claim for violation of due process. A city has discretion to control and regulate its streets, and not all circumstances require that this power be exercised by ordinance or regulation. In this case, City acted to restore the status quo. It would be burdensome well past the point of irrationality if local governments were required to promulgate and follow detailed written standards every time they acted to maintain or restore existing safety-related conditions. Moreover, David Carpenter demonstrated familiarity and comfort with, and approval of, similar levels of informality in other local government decisionmaking, and acknowledged that an essentially common-sense, consensus process was appropriate in communities without planning and zoning ordinances for avoiding conflicts between private and municipal improvements.

The trial court erred in finding that Carpenters had shown City's actions to be arbitrary, capricious, and unrelated to legitimate government concerns. All the pertinent evidence indicated that the two-tiered sidewalk and handrail were designed and erected to protect pedestrian safety, and that their removal at that location would jeopardize that safety. Unrebutted evidence also indicated that Carpenters' planned use of trucks backing in and out of his proposed driveway, within eight feet of the busy intersection with State Highway 59, would pose a hazard to pedestrian and/or vehicular traffic. It is undisputed that city officials expressed such concerns on several occasions. The fact that Mayor and City Council members considered the appearance of Carpenters' building and de facto truck parking lot inappropriate for downtown Linton does not render their otherwise

appropriate actions impermissible. Indeed, binding precedent indicates that City was also entitled to take aesthetic impact into consideration.

Carpenters did not establish a denial of equal protection. They did not show that any similarly situated persons existed, let alone that such persons were treated differently without adequate basis for the distinction. There was no evidence that any other Linton landowner was allowed to cut a driveway through a city-installed sidewalk in the business district -- let alone a driveway inconsistent with the continued presence of a pedestrian safety handrail.

The trial court went beyond finding a likelihood that Carpenters would succeed on the merits. It actually ruled on the merits, finding City liable in various respects, and reserving only the issue of damages. This was improper, given the existence of a timely jury demand and the absence of any stipulation withdrawing it. The evidentiary hearing was expressly designated as concerning the preliminary injunction, so City cannot be deemed to have waived a jury trial on any issues beyond that injunction. The issues of whether City violated any of Carpenters' constitutional rights, took Carpenters' property, or committed any intentional torts must be tried by a jury.

ARGUMENT

Standard of Review

The granting or denial of a preliminary injunction is within the equitable discretion of the trial court. *Northern Indiana Public Service v. Dozier*, 674 N.E.2d 977, 989 (Ind.Ct.App. 1996). This Court determines whether the trial court clearly abused that discretion, and will review questions of law and the overall sufficiency of the evidence as

a matter of law. *Fumo v. Medical Group of Michigan City*, 590 N.E.2d 1103, 1107 (Ind.Ct.App. 1992). The trial court's findings will be held clearly erroneous if they are insufficient to disclose a valid basis for the legal result reached or are unsupported by evidence of probative value. *Id*. at 1108; *Steenhoven v. College Life Insurance Co. of America*, 458 N.E.2d 661, 664-665 (Ind.Ct.App. 1984). The evidence must support the court's findings and the findings must support the judgment, or the judgment is clearly erroneous. *Matuga v. Matuga*, 600 N.E.2d 138, 142 (Ind.Ct.App. 1992). Where there are required findings of fact, this Court may not affirm on any ground not supported by the findings. *Foster v. Board of Commissioners of Warrick County, Indiana*, 647 N.E.2d 1147, 1148 (Ind.Ct.App. 1995); *Cockrell v. Hawkins*, 764 N.E.2d 289, 292 (Ind.Ct.App. 2002).

Where a party seeking a preliminary injunction has failed to prove one of the prerequisites for issuance of such an injunction, issuance of the injunction constitutes an abuse of discretion. *Jay County Rural Elec. Membership Corp. v. Wabash Valley Power Ass'n, Inc.*, 692 N.E.2d 905, 909 (Ind.Ct.App. 1998), trans. denied; *Tilley v. Robinson*, 725 N.E.2d 151, 154 (Ind.Ct.App. 2000); *Northern Indiana Public Service v. Dozier*, *supra*, 674 N.E.2d at 989.

I. ISSUANCE OF A PRELIMINARY INJUNCTION WAS NOT SUPPORTED BY THE EVIDENCE AND WAS AN ABUSE OF DISCRETION

A preliminary injunction is an extraordinary remedy to be granted in rare instances, in which the law and facts are clearly in the moving party's favor. *Northern Indiana Public Service v. Dozier*, *supra*, 674 N.E.2d at 989; *Fumo v. Medical Group of*

Michigan City, *supra*, 590 N.E.2d at 1108; *T.H. Landfill v. Miami City Solid Waste*, 628 N.E.2d 1237, 1238 (Ind.Ct.App. 1994). "An injunction may be issued, upon balancing the consequent hardships, only where an irreparable injury cannot be redressed by a final judgment on the merits." *Fumo*, *supra*, 590 N.E.2d at 1108. "The trial court is required to balance the consequent hardships of both parties with the effect of the injunction upon the public interest." *Dozier*, *supra*, 674 N.E.2d at 990, fn. 12. If the trial court's findings of fact do not reflect consideration of all these factors, the preliminary injunction should be dissolved. *Id.* The injunction issued in this case fails these tests.

A. As of the Time of the Hearing, Plaintiffs' Legal Remedies Were Adequate, Rendering Injunctive Relief Unnecessary and Inappropriate

Before any injunction may issue, either preliminary or permanent, the party seeking such relief must demonstrate that his remedies at law are inadequate. *Dible v. City of Lafayette*, 713 N.E.2d 269, 273 (Ind. 1999); *Northern Indiana Public Service v. Dozier*, *supra*, 674 N.E.2d at 989. Carpenters failed to make such a showing, as of the time of the evidentiary hearings.

At the time Carpenters filed their original complaint, they hoped it would lead to immediate removal of the handrail and City acceptance of their planned driveway. When this did not occur, Carpenters promptly pulled up stakes and moved David's sign business to Sullivan, Indiana. In Sullivan, David was able to follow up on prior leads from his time in Linton as well as obtaining new business. Moreover, until his move to Sullivan, David maintained his ability to make signs in his residential garage and driveway, as he had done prior to installing his business in the Vincennes Street location.

If in fact David lost any business through City's actions, that loss was almost certainly minimal, and could probably be ascertained or reasonably estimated without undue difficulty. *See Daugherty v. Allen*, 729 N.E.2d 228, 235-236 (Ind.Ct.App. 2000).[7] Nor did Carpenters lose ownership or possession of unique real property – Carpenters still own their property, and could be possessing it if they so chose.

Assuming for the moment that City could be held liable for any loss to Carpenters, that loss would logically consist of the costs Carpenters incurred solely because David established his sign business in two successive locations. Carpenters would have purchased trucks and equipment in any event, and had purchased the property for unrelated purposes before deciding to install the sign business there. If Carpenters incurred duplicative renovation costs, the redundant amounts could be recovered as damages in any appropriate action at law. If, instead, Carpenters pursued inverse condemnation as a remedy, their damages would be any reduction they could prove in the value of the property, though how they could prove such a reduction is hard to conceive when conditions (or those conditions for which City is responsible) are now identical to the conditions present when they purchased the property. In either event, there is no need for, and thus no justification for, equitable relief.

B. Carpenters Did Not Show Ongoing Injury Outweighing Harm to City and/or General Public

[7] The facts of this case distinguish it from *City of Muncie v. Pizza Hut of Muncie, Inc.*, 171 Ind.App. 397, 357 N.E.2d 735 (1976), where the court found money damages inadequate for an obstruction of ingress and egress. That case involved continuing damages, in an amount impossible to ascertain, from loss of business at a restaurant that continued to operate in the same location. Here, the evidence indicates minimal loss of business, and any lost customers should be relatively easy to track down. Moreover, the business has been relocated, so the restricted access is not causing continuing damage.

The object of a preliminary injunction is to maintain the status quo pending adjudication of the underlying claim, so that irreparable injury will not occur between the time the injunction can issue and the time for final judgment. *Jay County Rural Elec. Membership Corp. v. Wabash Valley Power Ass'n, Inc.*, *supra*, 692 N.E.2d at 909; *Wells v. Auberry,* 429 N.E.2d 679, 683 (Ind.Ct.App. 1982). The preliminary injunction issued in this case would disrupt a stable and long-standing status quo. At the time of the hearing, the safety handrail along Vincennes Street near the state highway was in place, and the two-tiered sidewalk remained intact. That was (and, as of this writing, is) the status quo, which the preliminary injunction would (if Carpenters act thereon) significantly disrupt.

As noted above, to obtain a preliminary injunction, a plaintiff must show that the threatened irreparable injury to the plaintiff outweighs the harm the injunction may inflict. *Fumo v. Medical Group of Michigan City*, *supra*, 590 N.E.2d at 1108; *Jay County*, *supra*, 629 N.E.2d at 909; *Reilly v. Daly*, 666 N.E.2d 439, 443 (Ind.Ct.App. 1996). Carpenters made no such showing.

David Carpenter moved his sign construction business to Sullivan, Indiana, years before the trial court hearing. He testified that he would not move it back to Linton, whether or not the injunction were granted. He stated that he might start some other business in Linton in that event – but not that he definitely would do so, let alone that he had any particular plans for such a business, or that such business would require the proposed driveway.

Carpenters' original plan to renovate and either lease or sell the resulting building can still be carried out. Carpenters are attempting to do just that. Some potential

customers were discouraged by the presence of the handrail, but Carpenters did not establish that all the potential customers with whom he was in contact, let alone all potential customers in general, would avoid the building for that reason. If that were the case, Carpenters' original plan, conceived while the handrail was in place, would be at fault. If the presence of the handrail delayed a lease or sale, the damages due to this delay would be quantifiable and not irreparable.

On the other side of the scale is the effect of removing the handrail and constructing a driveway. Carpenters did not in any way rebut or contradict the City's evidence that the handrail was originally installed for safety reasons. Nor did they rebut or contradict the evidence that the proposed driveway in its proposed location would pose a danger to pedestrians and would unfavorably affect traffic flow. Installation of the driveway and removal of the restored handrail could endanger pedestrians and drivers. Moreover, the City faces the risk of liability should the resulting condition of the city sidewalk lead to someone's injury. The City of Linton has the duty to keep public thoroughfares, including sidewalks, in a safe condition for public travel, and may be held liable for failure to correct unsafe conditions. *Frampton v. Hutcherson*, 784 N.E.2d 993, 997 (Ind.Ct.App. 2003); *Town of Highland v. Zerkel*, 659 N.E.2d 1113, 1120 (Ind.Ct.App. 1995); *St. John Town Board. v. Lambert*, 725 N.E.2d 507, 515-516 (Ind.Ct.App. 2000); *Catt v. Board of Comm'rs of Knox County*, 779 N.E.2d 1, 3-4 (Ind. 2002); *Carroll v. Jobe*, 638 N.E.2d 467, 469 (Ind.Ct.App. 1994). This is true even where the unsafe condition was caused by a third party. *Walton v. Ramp*, 407 N.E.2d 1189, 1191-1192 (Ind.Ct.App. 1980); *City of South Bend v. Turner*, 156 Ind. 418, 60 N.E. 271, 273 (1901); *Senhenn v. City of Evansville*, 140 Ind. 675, 40 N.E. 69, 70 (1895); *Town of*

Argos v. Harley, 114 Ind.App. 290, 49 N.E.2d 552, 556 (1943). Whether a street is reasonably safe for travel is to be determined by surrounding circumstances, including the kind and amount of public travel in that location. *Sale v. Aurora & L. Turnpike Co.*, 147 Ind. 324, 46 N.E. 669, 670 (1897). Where railings or barriers are necessary for the safety of travelers, a city's failure to construct and maintain same can lead to liability. *Town of Remington v. Hesler*, 111 Ind.App. 404, 41 N.E.2d 657, 659 (1942). Again, this is true even where a third party caused the dangerous condition, so long as the city has actual or constructive notice. *City of South Bend v. Turner*, *supra*, 60 N.E. 271, 273-274; *see also City of La Porte v. Henry*, 41 Ind.App. 197, 85 N.E. 655, 656 (1908); *Shreve v. City of Fort Wayne*, 176 Ind. 347, 96 N.E. 7, 8 (1911). A city may be held liable for failure to replace a missing railing. *Town of Monticello v. Condo*, 47 Ind.App. 490, 94 N.E. 893, 894 (1911). A city may also be held liable for a pedestrian's injuries where a sidewalk has a barrier along part of its length, but not in the location where the pedestrian fell. *Town of Sellersburg v. Ford*, 39 Ind.App. 94, 79 N.E. 220, 221 (1906).

Given the lack of definite, let alone irreparable, injury to Carpenters from allowing the status quo to persist, the diminution of public safety and convenience threatened by the preliminary injunction, and City's possible liability should the absence of the rail or the presence of the driveway lead to someone's injury, the injunction was improper and an abuse of discretion.

C. The Trial Court Erred in Concluding that Carpenters Were Likely to Succeed on the Merits

The trial court concluded that Carpenters were likely to succeed on the merits. In fact, as discussed in Section III. *infra*, the trial court actually reached the merits on

various issues of liability, despite a timely demand for jury trial, and despite the understanding of all parties that the evidentiary hearing concerned only Carpenters' request for a preliminary injunction.[8]

The following Section II. addresses why Carpenters are not -- or should not be, under applicable law -- likely to succeed on the merits, and why the trial court's conclusions on the merits are erroneous.

II. THE TRIAL COURT'S CONCLUSIONS ON THE MERITS WERE ERRONEOUS

A. Carpenters' Regulatory Takings Claim Is Not Ripe and Substantively Lacks Merit

1. Carpenters' Regulatory Takings and Related Section 1983 Claims are Unripe

The trial court found a regulatory taking in violation of the Fifth Amendment. The trial court's findings were premature, not just because this issue (as discussed *infra*) is reserved for the jury, but because any takings claim Carpenters might have is not yet ripe.

"[Carpenters'] Fifth Amendment claim is not ripe for adjudication because they failed to seek just compensation from the State in an inverse condemnation action." *Impink v. City of Indianapolis, Board of Public Works*, 612 N.E.2d 1125, 1127 (Ind.Ct.App. 1993). Similarly, their failure to pursue inverse condemnation bars them from seeking relief under 42 U.S.C. §1983. *Id.*

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[8] An interlocutory appeal raises every issue presented by the order that is the subject of the appeal. *Tom-Wat, Inc. v. Fink*, 741 N.E.2d 343, 346 (Ind. 2001); *Harbour v. Arelco*, 678 N.E.2d 381, 386 (Ind. 1997). Thus, the trial court's findings and conclusions, including those that appear to go beyond the purpose for which the evidentiary hearing was held, are properly before this Court.

There is, moreover, a requirement that a takings claim cannot be ripe before a final government determination. *Lincoln Utilities, Inc., v. Office of Utility Consumer Counselor*, 661 N.E.2d 562, 566 (Ind.Ct.App. 1996). While Carpenters' petition was in limbo prior to the injunction, David Carpenter's actions had dissuaded City from making any final determination. At the City Council meeting following his submission of the petition, he was asked either specifically whether he wanted a vote on the petition, or more generally whether he wanted some action taken. He replied that he was present simply as a citizen observer. Carpenters had, moreover, filed suit several weeks before that meeting, which could and did lead Council members to conclude that they no longer looked to the Council to pursue a governmental and nonadversarial approach to the matter.

2. Carpenters Did Not Possess, and Thus City Could Not Have Taken, a Right to Cut Through or Displace the Handrail Already in Place When They Purchased the Property

The trial court's analysis of Carpenters' regulatory taking claim completely ignores and omits a crucial, undisputed fact about this case: that when Carpenters purchased the property in question, it was fronted by the steel handrail. That handrail was installed before Carpenters purchased the property, as part of a major, grant-funded renovation of Linton's downtown area. The handrail ran across the upper tier of the new two-tier sidewalk. A section of the handrail was removed for only one reason: because Carpenters' renovation attempts caused the collapse of the building on the two adjacent lots nearest the corner, and removing part of the handrail facilitated cleanup of the debris.

The two cases which at first glance appear comparable, *City of Muncie v. Pizza Hut of Muncie, Inc.*, *supra*, 357 N.E.2d 735, and *City of Richmond v. S.M.O., Inc.*, 165

Ind.App. 641, 333 N.E.2d 797 (1975), involved barricades erected for the first time for the sole purpose of frustrating the property owners' attempts to preserve their existing access to streets or highways. The rights those owners possessed are not comparable to the rights Carpenters acquired when they purchased property fronted by newly installed steel safety handrails.

A property owner's right of ingress and egress is an easement. *State v. Ensley*, 240 Ind. 472, 164 N.E.2d 342, 349 (1960). It is not reasonable to imply an easement across a steel handrail, erected for the safety of pedestrians with grant money made available for that purpose.

Moreover, the property owner's interest is in freedom from obstructions which interfere with "the *ordinary* means of ingress and egress to and from his lot." *City of Muncie*, *supra*, 357 N.E.2d at 736, quoting *Decker v. The Evansville Suburban & Newburgh Railway Company*, 133 Ind. 493, 33 N.E. 349, 350 (1892); emphasis added. The ordinary means of ingress and egress to and from this particular property, as purchased, was on foot, through the gap(s) in the handrail intended for pedestrian access.

The temporary removal of fifteen to twenty feet of the handrail, in order to remove the debris which Carpenters' actions had deposited on the city's right-of-way, cannot be interpreted as granting Carpenters additional property rights they did not originally purchase. A city's temporary tolerance of certain conditions on a sidewalk does not and cannot create a property right to continuation of those conditions. *House-Wives League, Inc. v. City of Indianapolis*, 204 Ind. 685, 185 N.E. 511, 513-514 (1933). No one can acquire prescriptive rights to land dedicated as a public thoroughfare. *House-Wives League*, *supra*, 185 N.E. at 514; *Steele v. Fowler*, 111 Ind.App. 364, 41 N.E.2d

678, 681 (1942). No one has the right to make any permanent use of a street or sidewalk which will impair its safety as a public thoroughfare, as such would constitute a nuisance. *Wickwire v. Town of Angola*, 4 Ind.App. 253, 30 N.E. 917, 919 (1892).

The Indiana Supreme Court has recognized the fundamental distinction between governmental action blocking a landowner's existing ordinary ingress and egress, and governmental action declining to allow ingress and egress for a new business venture where it would interfere with existing plans for use of the highway. *Huff v. Indiana State Highway Comm'n*, 238 Ind. 280, 149 N.E.2d 299, 303 (1958).

Thus, City's failure to approve Carpenters' proposed driveway, and its restoration of the safety handrail, were not a taking of any property rights Carpenters possessed.

3. The Evidence Was Insufficient to Support the Trial Court's Conclusion that City Deprived Carpenters of Economically Viable Use of their Land

The trial court concluded that a regulatory taking occurred because City denied Carpenters economically viable use of their land. This conclusion ignores the fact that Carpenters retain the uses for which they originally purchased the property. Carpenters purchased the corner lot in order to renovate it and then lease or resell it. They purchased the lot next to the Doctronics lot in order to expand a walk-in business operating in the Doctronics building. Nothing City has done has deprived Carpenters of either of these uses.

David Carpenter testified about difficulties he was encountering in selling the property in question. He also testified that negotiations with some potential buyers were ongoing. This hardly suffices to establish that Carpenters will be unable to sell or lease

the property. Moreover, if Carpenters' original plans, for which the property was purchased, prove ill-conceived or impracticable, City's failure to authorize a fundamental change in his property in order to expand its potential uses is not a taking of a preexisting use. A landowner is not entitled to the highest and best use of his land. *Town of Georgetown v. Sewell*, 786 N.E.2d 1132, 1140 (Ind.Ct.App. 2003); *Dep't of Natural Res. v. Ind. Coal Council, Inc*., 542 N.E.2d 1000, 1004 (Ind. 1989), cert. denied. A fortiori, a landowner is not entitled to remove municipal safety features in order to achieve a higher and better use of his land than was feasible when he purchased it.

B. Due Process Did Not Require Promulgation or Use of Detailed Standards for Preserving the Previously Approved Safety Features of the City Sidewalk

"The power to control and regulate a city's streets rests in the sole discretion of the city's officers, and this discretion is not subject to control by the courts absent the clearest abuse thereof." *Town of Syracuse v. Abbs*, 694 N.E.2d 284, 286 (Ind.Ct.App. 1998). Accordingly, this Court does not substitute its judgment for that of a municipality in discretionary matters within its jurisdiction, but will review the proceedings to determine whether procedural requirements were followed, whether there is substantial evidence to support the municipality's actions or whether the decision is fraudulent, unreasonable or arbitrary. *Id*. The procedural requirements do not necessarily include a requirement that all city power, under all circumstances, be exercised by ordinance. *See Town of Syracuse* at 287-288.[9]

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[9] *See also Tri-County Paving, Inc. v. Ashe County*, 281 F.3d 430, 436 (4th Cir. 2002), upholding a county board of commissioners' moratorium on construction of asphalt plants, and noting that "[t]he procedures due in . . . cases . . . involving regulation of land use through general police powers, are not extensive."

City of Richmond v. S.M.O., Inc., *supra*, 333 N.E.2d 797, 799, involved an owner who sought to cut a curb and place a driveway to a state highway jointly controlled by the state and city. After the state had granted permission and the driveway had been constructed, the city denied permission, and eventually erected a barricade. The trial court, and later this Court, held that the city did not have the authority to interfere with the owner's street access unless it was applying an ordinance containing reasonable standards for curb cuts. The opinion cites Illinois precedent for this holding. The only subsequent Indiana opinion citing *City of Richmond* on this or a related point is *Schlehuser v. City of Seymour*, 674 N.E.2d 1009, 1013 (Ind.Ct.App. 1996), concerning zoning variances. *City of Muncie v. Pizza Hut of Muncie, Inc.*, *supra*, 357 N.E.2d 735, decided after *City of Richmond* and involving an owner's attempts to preserve existing access, examined whether the city's action in erecting a barricade had a substantial relation to its police power. *City of Muncie* did not state or suggest that the city had been required to exercise that power only through an ordinance or through detailed standards. City respectfully submits that the language of *City of Richmond* is subject to overgeneralized interpretation. It should not be applied in a case such as the case at bar, where the possibility of vehicular access was literally created by accident and was contrary to the obviously intended use of the property.

The case at bar presents a different situation than the usual exercise of municipal power over driveway construction. Carpenters were, in essence, requesting that City dispense with specially designed sidewalk improvements that had only recently been approved by the City Council, in accordance with government grants meant to enhance citizen safety. It would be questionable public policy to require municipalities to

anticipate such requests to the extent of publishing detailed standards for disposing of them. Our society has, in recent decades, accepted what prior generations would have considered an astonishing level of bureaucracy and red tape, but even now, common sense and efficient governance allow us to draw the line at detailed procedures for maintaining or restoring properly installed street improvements. [10]

David Carpenter's testimony concedes the appropriateness, in many instances, of an informal, consensus-based, common-sense approach to municipal decision-making. He acknowledged that where there are no planning or zoning ordinances, it is still best for all concerned parties to discuss how a proposed improvement would affect municipal facilities and plans for same. He acknowledged that "obviously," a business owner should not expect to put in a ramp where a city is planning to put a new sewer. If no formal, previously promulgated procedures are necessary when an owner's desires conflict with a city's plans for the future, they are even less to be expected when the owner's desires conflict with municipal plans already and recently carried out.

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[10] The trial court's order does not specifically deal with the liability or immunity from liability of Mayor and the City Council members. It should, however, be noted that these individuals have qualified immunity for their performance of discretionary functions unless they "violated constitutional or statutory rights that were clearly established at the time he acted such that a reasonably competent official should have then known the rules of law governing his conduct." *Kellogg v. City of Gary*, 562 N.E.2d 685, 703 (Ind. 1990). "The plaintiff must first show that the law was clear in relation to the specific facts confronting the public official when he or she acted. . . . [The court then] consider[s] whether reasonably competent officials would agree on the application of the clearly established right to a given set of facts." *Earles v. Perkins*, Indiana Court of Appeals Cause No. 49A02-0206-CV-484, issued May 29, 2003. City submits that even if something other than preservation of existing safety features had been at issue, any constitutional defect in the informality by which Linton's government and residents, including David Carpenter, had long conducted local government affairs was not so clearly established that reasonably competent officials would necessarily have realized the need for a sea change in local custom. Given the specific facts involved, any

C. The Evidence Does Not Support the Court's Findings that City's Expressed Concerns, Based on Unrebutted Facts, Were Pretextual, and its Actions Arbitrary, Capricious and Unrelated to Legitimate Governmental Interests

The trial court found that Mayor and the City Council acted solely because of their and a small number of citizens' aesthetic disapproval of Carpenters' use of his property; that any purported concern on City's part related to traffic or pedestrian safety issues was "pretextual"; and that City acted arbitrarily and capriciously, "without any relationship to any valid governmental concerns or interest", and did not "substantially advance legitimate governmental interests." (App. 14-15, 18-19) These findings and conclusions were not supported by the evidence, particularly given the presumptions and principles that must be applied.

City officials are presumed to have acted in good faith and according to law. *Windle v. City of Valparaiso*, 62 Ind.App. 342, 113 N.E. 429, 433 (1916); *Robling v. Bd. of Com.*, 141 Ind. 522, 40 N.E. 1079, 1081 (1895); *Town of Cicero v. Erie, etc. Co.*, 52 Ind.App. 298, 47 N.E. 389, 393 (1912). Where the officials' action secures a public benefit, it is irrelevant if private benefits also accrue. *Windle*, *supra*, 113 N.E. at 433. Similarly, so long as the subject matter of the officials' action was within the scope of their authority, the motives or influences that led them to act are irrelevant. *Coverdale v. Edwards*, 155 Ind. 374, 58 N.E. 495, 498 (1900).

Mayor testified that his opposition to Carpenters' proposed truck driveway, and his order that the handrail be replaced, were based on safety and liability concerns as well as the citizenry's aesthetic objections to the trucks and building. City presented evidence,

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requirement for formal and detailed procedures would not rise to the necessary level of clarity.

unrebutted by Carpenters, that one or more members of the City Council were concerned about the liability the city could face due to the continuing absence of the section of steel handrail. As discussed in section I.B., *supra*, this was a legitimate concern. It is undisputed that the railing was installed for reasons of pedestrian safety, and that it was removed only to facilitate the cleanup of the substantial rubble which Carpenters' failed renovation efforts had left behind. Nor did Carpenters rebut the expert testimony of engineer Jerry Williams, consistent with the expressed concerns of several City Council members, that the proposed driveway would be unsafe, given its location and intended use. A trial court may not ignore competent, unrebutted evidence. *Gossett v. Auburn National Bank of Auburn*, 514 N.E.2d 309, 312 (Ind.Ct.App. 1987), cert. den.; *Dahnke v. Dahnke*, 535 N.E.2d 172, 175 (Ind.Ct.App. 1989); *Steenhoven v. College Life Insurance of America*, *supra*, 458 N.E.2d at 666, fn. 3. Moreover, this Court "consider[s] such evidence as true on appeal when it bears upon a material fact which is necessary to the decision but does not appear in the trial court's findings." *Gossett*, *supra*, 514 N.E.2d at 312. Aside from the conclusory statement that all City's safety concerns were "pretextual," the trial court's findings make no mention of the hazards about which Williams gave his expert opinion and Mayor and various Council members expressed their concern.

Actions which eliminate a liability risk to City, restore a safety feature, and prevent a hazardous situation all bear an obvious relationship to valid governmental concerns, and substantially advance legitimate governmental interests. The fact that Mayor and some Council members also considered Carpenters' building aesthetically inappropriate for the recently renovated downtown area does not change this fact.

Moreover, where municipal action has a real or reasonable relation to safety, health, or general welfare, aesthetic considerations may also be taken into account. *General Outdoor Advertising Co. v. City of Indianapolis*, 202 Ind. 85, 172 N.E. 309, 311 (1930).[11]

The trial court held that City took Carpenters' property for a private purpose. As noted *supra*, Carpenters had no property interest in the possibility of placing a driveway where a steel safety handrail was supposed to be. However, even if some taking had been involved, protecting Linton pedestrians and drivers from hazardous conditions, and protecting the city from liability, are public purposes.

D. Carpenters Did Not Establish a Denial of Equal Protection, as They Failed to Show the Existence of Any Similarly Situated Persons, Let Alone Differing Treatment of Same Without Rational Basis

Where an equal protection claim does not involve fundamental rights or suspect classes, a government action involving classification or differing treatment will be upheld if it bears some rational relationship to a legitimate government interest. *Thomas v. Greencastle Community School Corp.*, 603 N.E.2d 190, 192 (Ind.Ct.App. 1992). The trial court found that City had denied Carpenters equal protection by intentionally treating them differently than others similarly situated, with no rational basis for the difference in treatment. The fundamental flaw in this conclusion is that Carpenters did not show the existence of any similarly situated persons, let alone differing treatment of such persons with no rational basis for the difference.

Carpenters subpoenaed various Linton citizens who had installed driveways in residential neighborhoods without seeking or receiving either Mayor's or the City

[11] See also authorities cited in II.D., *infra*, defining community aesthetic impact as a legitimate government interest for purposes of equal protection analysis.

Council's approval. None of them had installed driveways in the downtown business district, or near heavily traveled areas. There is no evidence that any of them had removed city-installed sidewalks, let alone new specially designed sidewalks.[12] None of them had removed, or sought to extend an unrelated temporary absence of, steel handrails installed with grant money for the safety of Linton's pedestrians. The concerns raised by their actions were vastly different than those raised by Carpenters' proposal. These other property owners and Carpenters were not "similarly situated."

If one uses so broad a definition of "similarly situated" as to include both Carpenters and these other property owners, then the rational basis for City's differing treatment becomes obvious. It is altogether rational to distinguish between, on the one hand, the desire of a landowner in a residential neighborhood to construct or improve his driveway, where there is no sidewalk or only a sidewalk he or his predecessors installed, where there is no handrail installed for pedestrian safety, and there is little pedestrian or vehicular traffic to protect -- and, on the other hand, the desire of a landowner to cut through a specially designed and publicly funded city sidewalk, permanently preventing the reinstallation of a temporarily removed safety handrail, in order to back trucks in or out, close to a heavily traveled intersection in the business district. Distinguishing between these situations bears an obvious, and obviously rational, relationship to the legitimate government interest in protecting public safety and minimizing municipal liability. *See Tri-County Paving, Inc. v. Ashe County*, *supra*, 281 F.3d 430, 439-440,

[12] Debbie Moore removed a portion of a sidewalk whose origin was not specified. (App. 316-321) Fred Chamberlain's testimony about the origin of his sidewalk was ambiguous. (App. 180-182) All the other witnesses called to testify about their driveways removed either no sidewalk or a sidewalk installed by a private citizen. (App. 189, 195,200, 202, 206-207, 212,217-218)

noting that promotion of public safety and well-being are basic and legitimate government functions, and that other entities the plaintiff proposed as similarly situated did not in fact pose similar safety concerns. *See also Bah v. City of Atlanta*, 103 F.3d 964, 967 (11th Cir. 1997); *Costner v. United States*, 720 F.2d 539, 542 (8th Cir. 1983); *Northern Pac. Railway Co. v. Minnesota*, 208 U.S. 583, 597 (1908).

Moreover, the aesthetic impact of driveways in residential neighborhoods, or driveways leading simply to buildings, does not compare with the aesthetic impact of a driveway eighteen feet wide leading to a parking lot for large trucks, in a newly renovated yet old-fashioned downtown business district. "It is well settled that the state may legitimately exercise its police powers to advance esthetic values." *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 805 (1984); s*ee also Honolulu Weekly, Inc. v. Harris*, 298 F.3d 1037, 1045, 1048 (9th Cir. 2002) (both public safety and aesthetics constituted substantial government interests).

The trial court erred in holding that Carpenters had been denied equal protection as guaranteed under the Fifth and Fourteenth Amendments.

III. THE TRIAL COURT ERRED IN REACHING THE MERITS AS TO VARIOUS ISSUES BEYOND THE SCOPE OF THE PRELIMINARY INJUNCTION DESPITE TIMELY JURY DEMAND

A. Carpenters' Timely Jury Demand Required Jury Trial on Merits

Ind. Trial Rule 38(B) allows any party to demand a trial by jury, for any issue triable of right by a jury, by filing and serving a demand therefor no later than ten days after the first responsive pleading. Carpenters filed and served their Request for Jury Trial on or before September 14, 2000, less than ten days after the defendants filed their

first responsive pleading (a request for more time to answer or otherwise respond). Carpenters requested a jury trial "in the above cause of action", without specification of issues. Therefore, per T.R. 38(C), they are deemed to have demanded a jury trial for all issues where such a trial is available. Per T.R. 38(D), such a demand may not be withdrawn without the consent of the other party or parties. Ind. Trial Rule 39 requires that all issues as to which a jury trial is properly demanded be tried by a jury unless all parties stipulate otherwise, either in writing or in open court. No such stipulation occurred in this case.

The evidentiary hearings in this cause were conducted as hearings on Carpenters' request for a preliminary injunction. (App. 176) However, the findings and conclusions proposed by Carpenters, and adopted wholesale by the trial court, state that City violated Carpenters' due process rights (par. 11), committed a regulatory taking for a private purpose (par. 14), confiscated Carpenters' constitutionally protected property in violation of the Fifth Amendment (par. 14), and denied Carpenters equal protection guaranteed under the Fifth and Fourteenth Amendments (par. 16). (App. 17-20) These were conclusions as to the ultimate merits of Carpenters' cause of action. Moreover, the one change the court made in Carpenters' proposed findings and conclusions was to state that the matter was set "for hearing on damages" several months hence. (App. 21) The court thereby indicated that it had already found City liable on the merits, and reserved only the issue of damages. While Ind. Trial Rule 54(B) leaves open the possibility that the court could change its mind prior to final resolution of the damages issues, the court nonetheless had adjudicated numerous issues beyond the question of a preliminary injunction, without a jury and without even a clear opportunity for either party to protest

the absence of a jury trial for such adjudication. As noted *supra* in Argument section I.C., these portions of the trial court's order, and the court's implicit failure to grant a jury trial on the merits, are before this Court on this appeal.

Once one party has properly demanded a jury trial, if the parties do not stipulate to a bench trial, it is error for the court to hold a bench trial, and the party who did not initially demand a jury trial is free to assert that error on appeal. *Whisler v. Bank of Henry County*, 554 N.E.2d 17, 19 (Ind.Ct.App. 1990); *Corrigan v. Al-Trim Corp.*, 700 N.E.2d 481, 483-484 (Ind.Ct.App. 1998); *see also Guess v. Weiss*, 493 N.E.2d 812, 813-814 (Ind.Ct.App. 1986). Only if the record quite clearly shows a party's intentional relinquishment of the right to jury trial can that party be estopped from asserting the error on appeal. *Corrigan*, *supra*, 700 N.E.2d at 484; *Hamlin v. Sourwine***,** 666 N.E.2d 404, 408-409 (Ind. Ct. App. 1996). Given the trial court's statement that the hearing concerned the preliminary injunction, City cannot reasonably be deemed to have intentionally relinquished a jury trial on the ultimate liability issues.

B. Many Issues Covered in Carpenters' Complaint and the Trial Court's Order are Properly Triable by Jury

Whether a cause can be tried by jury depends on whether the claim involved is legal or equitable in character. The character of the action is determined by its substance, not its caption or formal designation. In making this determination, "[c]ourts must look to the substance and central character of the complaint, the rights and interests involved, and the relief demanded." *Songer v. Civitas Bank*, 771 N.E.2d 61, 68 (Ind. 2002). The underlying substance of Carpenters' claim is that City deprived them of property for inappropriate reasons, without following appropriate procedures, and without proper

compensation. They allege several intentional torts and seek substantial compensatory and punitive damages. These claims are essentially legal, rather than equitable, in character. *City of Terre Haute v. Deckard*, 243 Ind. 289, 183 N.E.2d 815, 817 (1962); *Valadez v. Capital Enterprise Ins. Group*, 519 N.E.2d 1257, 1258 (Ind.Ct.App. 1988); *South Eastern Indiana Natural Gas Co., Inc.*, 617 N.E.2d 943, 948, n. 2 (Ind.Ct.App. 1993).

Jury trials on claims for deprivation of constitutional rights, directly and pursuant to 42 U.S.C. § 1983, are not uncommon. *See, e.g.*, *City of Indianapolis v. Taylor*, 707 N.E.2d 1047, 1050 (Ind.Ct.App. 1999); *Kellogg v. City of Gary*, *supra*, 562 N.E.2d 685, 688; *Drake v. Lawrence*, 524 N.E.2d 337, 338 (Ind.Ct.App. 1988); *Young v. Indiana Dept. of Natural Resources*, Indiana Court of Appeals Cause No. 20A03-0205-CV-161, issued June 9, 2003; *see also State of Indiana v. Hall*, 411 N.E.2d 366, 369 (Ind.Ct.App. 1980). Where a citizen seeks penalties from a government for unlawful official action, the cause may be tried by jury. *Sweigart v. State*, 213 Ind. 157, 12 N.E.2d 134, 137 (1938), cited in *Songer v. Civitas Bank*, *supra*, 771 N.E.2d at 68. The fact that the plaintiffs seek injunctive as well as monetary relief does not prevent a jury trial. *See Kellogg*, *supra*, 562 N.E.2d at 689. If a cause includes substantial separate legal and equitable claims, the two should be severed and the former tried by jury. Ind. Trial Rule 38(A); *Songer v. Civitas Bank*, *supra*, 771 N.E.2d at 68.

Carpenters claimed substantial interference with their use and enjoyment of their property. This is a claim triable by jury. *See Indiana & Michigan Elec. Co. v. Stevenson*, 173 Ind.App. 329, 363 N.E.2d 1254, 1257 (1977), trans. den. Juries decide whether and to what extent a taking is compensable in inverse condemnation. *Jenkins v. Board of*

County Comm'rs, 698 N.E.2d 1268, 1271 (Ind.Ct.App. 1998). A jury may even try an action to recover possession of land. *Hamon v. Pohle*, 46 Ind.App. 369, 92 N.E. 119, 121 (1910); *Martin v. Martin*, 118 Ind. 227, 20 N.E. 763, 768 (1889).

Whether or not Carpenters asserted a substantial equitable claim, the trial court's order went beyond it, deciding essentially legal issues. The findings and conclusions entered on those issues should be vacated, and all issues triable by jury remanded for that purpose.

CONCLUSION

WHEREFORE, City asks that this Court order the preliminary injunction dissolved; reverse the trial court's order to the extent that it reaches liability issues properly triable by a jury; and remand for a jury trial on such issues.

Respectfully submitted,

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