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IN THE
COURT OF APPEALS OF INDIANA

Rebecca Minser and Tina Zion,
Appellants-Defendants,

v.

DeKalb County Plan Commission,
Appellee-Plaintiff.

April 28, 2021

Court of Appeals Case No. 20A-PL-2408

Appeal from the DeKalb Superior Court

The Honorable Monte L. Brown, Judge

Trial Court Cause No. 17D02-1906-PL-29

Tavitas, Judge.

Case Summary

[1] "The first rule of holes, according to an old saying, is to stop digging." *Lightspeed Media Corp. v. Smith*, 761 F.3d 699, 702 (7th Cir. 2014). That is essentially the advice given to Appellants Rebecca Minser and Tina Zion (collectively, "Appellants") by the DeKalb County Plan Commission ("the Commission"), with the expectation that Appellants follow that advice literally.

Appellants paid a contractor to remove dirt from their backyard, but claim that the resulting hole, filled with water, is not legally a pond. They contend the trial court erred when it granted summary judgment in favor of the Commission on its complaint alleging that Appellants constructed a pond in violation of the DeKalb County Unified Development Ordinance ("UDO") and that Appellants be ordered to fill in said pond. In brief, this is a case about what to call a hole in the ground. We are unmoved by Appellants' arguments, and therefore affirm the summary judgment decision of the trial court. We also find, however, that the trial court erred in awarding attorney's fees, and therefore reverse that decision. Accordingly, we affirm in part, reverse in part, and remand with instructions to vacate the attorney's fee award.

Issues

[2] Appellants raise six issues, which we consolidate and restate as two:

I. Whether the trial court erred in granting summary judgment to the Commission.

II. Whether the trial court erred in awarding the Commission attorney's fees.

Facts

[3] Appellants jointly own realty in DeKalb County consisting of approximately ten acres, primarily located in what is known as the AC6 zone under the UDO. The AC6 zone is part of the Airport Compatibility Overlay District ("ACO"), which, as the UDO explains, "is intended to establish a standard of safety and

compatibility for the occupants of land in the immediate vicinity of the DeKalb County Airport by regulating incompatible land uses and setting development standards that supplement or super[s]ede the underlying zoning district." DeKalb Cnty. Unified Dev. Ordinance § 3.05 (2009).

[4] In approximately July of 2018, Appellants, via a contractor, dug a hole on their property. Appellants' alleged intent was to use the displaced dirt to raise the level of their driveway. Appellants did not obtain an improvement location permit prior to digging. The resulting hole[1] filled with water and, thus, became a man-made body of water. The Director/Zoning Administrator of the Department of Development Service received information that the Appellants were shifting the dirt and clay and sent a notice that read:

> On July 26, 2018[,] our building commissioner visually inspected your property because our office received a notice that dirt was being moved or dug from the property. Without knowing what you may be doing, if you are building a new structure, pond, etc. a permit is required. If you are moving dirt, filling in low spots or grading the property, we have no issues. Please contact me as soon as possible and let me know.

Appellants' App. Vol. II p. 75.

[5] After the pond had already been constructed, Appellants applied for, and were denied, a development standards variance to retain the pond. Specifically, the

[1] The record indicates that the hole was approximately twelve feet deep, and approximately .43 acres in size.

Board of Zoning Appeals ("BZA") framed the issue at a hearing for which Appellants were present as: "Rebecca Minser and Tina Zion requesting a Development Standards Variance to allow for *a pond* located within the Airport Compatibility Overlay District in the air traffic pattern zone of AC6." *Id*. at 77 (emphasis added). Members of the airport board appeared at the hearing and opposed the variance. Appellants petitioned for judicial review of the denial in the DeKalb Circuit Court; however, that action was dismissed by the trial court.[2] Appellants were instructed to fill the pond back in, and apparently failed to comply.

[6] On June 26, 2019, the Commission filed a complaint in the DeKalb Superior Court, seeking injunctive relief—to have Appellants remove the pond in order to comply with the UDO—as well as requesting "that fines and penalties be assessed against Defendants as provided in the UDO and for attorney fees, court costs and all other just relief." Appellants' App. Vol. II pp. 27-29. During an authorized property inspection on October 15, 2019, the Zoning Administrator took the following photograph depicting the view of the pond, located in Appellant's backyard, from Appellants' patio:

[2] After the BZA filed a motion to dismiss the action, Appellants apparently did not file a response. Appellants' App. Vol. II p. 86.

[7] After the parties completed discovery, the Commission filed a motion for summary judgment and a memorandum in support thereof on January 20, 2020. The Commission also filed an affidavit alleging that $5,182.43 in attorney's fees had accrued as of January 20, 2020. Appellants filed an answer to the motion for summary judgment on March 20, 2020, and argued that Appellants "do not admit that a pond was erected on their property. Rather, [Appellants] maintain that the depression on their land was the result of mining clay from their backyard to be utilized in the preservation of their driveway." Appellants' App. Vol. IV p. 73. The Commission filed a response on April 20,

2020, including an amended affidavit for attorney's fees, now in the amount of $7,573.68.

[8] Without a hearing, on December 3, 2020, the trial court issued findings of fact and conclusions of law thereon and awarded summary judgment to the Commission. The trial court also imposed a $1,000.00 fine on the Appellants and ordered Appellants to pay $7,573.68 in attorney's fees. Appellants now appeal.

Analysis

I. Summary Judgment

[9] Appellants argue that the trial court erred when it granted summary judgment to the Commission. "When this Court reviews a grant or denial of a motion for summary judgment, we 'stand in the shoes of the trial court.'" *Burton v. Benner*, 140 N.E.3d 848, 851 (Ind. 2020) (quoting *Murray v. Indianapolis Public Schools*, 128 N.E.3d 450, 452 (Ind. 2019)). Summary judgment is appropriate "if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Murray*, 128 N.E.3d at 452; *see also* Ind. Trial Rule 56(C). The party moving for summary judgment bears the burden of making a prima facie showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Burton*, 140 N.E.3d at 851. The burden then shifts to the non-moving party to show the existence of a genuine issue of material fact. *Id.* On appellate review, we resolve "[a]ny doubt as to any facts or

inferences to be drawn therefrom . . . in favor of the non-moving party." *Id.* We review the trial court's ruling on a motion for summary judgment de novo, and we take "care to ensure that no party is denied his day in court." *Schoettmer v. Wright*, 992 N.E.2d 702, 706 (Ind. 2013). "We limit our review to the materials designated at the trial level." *Gunderson v. State, Indiana Dep't of Nat. Res.*, 90 N.E.3d 1171, 1175 (Ind. 2018), *cert. denied*. Findings of fact and conclusions of law entered by the trial court aid our review, but they do not bind us. *Supervised Estate of Kent*, 99 N.E.3d 634, 637 (Ind. 2018).

[10] "A party seeking an injunction for a zoning violation must prove: (1) the existence of a valid ordinance and (2) a violation of that ordinance." *Cnty. of Lake v. Pahl*, 28 N.E.3d 1092, 1100 (Ind. Ct. App. 2015) (citing *Dierckman v. Area Plan. Comm'n of Franklin Cnty., Ind.*, 752 N.E.2d 99, 104 (Ind. Ct. App. 2001), *trans. denied*.), *trans. denied*. Appellants contend that neither element has been proven.

[11] The Commission's complaint alleged that Appellants were in violation of the following provisions:

> 5.42 RP-01: Recreational Pond; General
>
> [ ]
>
> The following pond standards apply:

A. Applicability: Any man-made pond or water body not regulated as a retention or detention pond,[3] and greater than 400 square feet in surface area shall conform to the standards in this section.

* * * * *

3.08(G) Traffic Pattern Zone (AC6):

* * * * *

(3) Prohibited Uses, Structures, and Materials. The following uses, structures, and materials are prohibited from the Traffic Pattern Zone.

* * * * *

f. **new retention and recreational ponds**,

* * * * *

10.01 Actionable Violations

It shall be an actionable Violation of the Unified Development Ordinance to:

A. Non-permitted Structures: Construct, place, or modify a structure in a manner that

[3] Neither party contends that the pond at issue is either a retention or detention pond.

> is not expressly permitted by the Unified Development Ordinance;
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> * * * * *
>
> D. Non-permitted Uses: Utilize a property for a use that is not expressly permitted by the Unified Development Ordinance in the applicable zoning district; or by a use variance or other approval allowed under the Unified Development Ordinance;
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> * * * * *
>
> F. Non-compliance with Approvals: Fail to fully comply with procedural requirements, payment of fees, conditions, enforceable covenants, or commitments associated with any approval; or
>
> G. Other Violations: Otherwise fail to comply with any component of the Unified Development Ordinance.

DeKalb Cnty. Unified Dev. Ordinance §§ 3.05, 5.42, 10.01 (2009) (bold emphasis added).

[12] We are permitted to reach for the dictionary when striving to ensure that words in a statute or ordinance are afforded their ordinary, plain meanings. *See, e.g., Dierckman,* 752 N.E.2d at 103 (citing *State v. DMZ*, 674 N.E.2d 585, 588 (Ind. Ct. App. 1996), *trans. denied*). Here, however, such depth of research is not

required. This is clearly a pond. *See Walczak v. Lab. Works-Ft. Wayne LLC*, 983 N.E.2d 1146 (2013) ("James Whitcomb Riley (1849-1916), our celebrated 'Hoosier Poet,' is widely credited with the origination of the Duck Test; as he expressed it, '[w]hen I see a bird that walks like a duck and swims like a duck and quacks like a duck, I call that bird a duck.'") (internal citations omitted). The UDO clearly sets out what constitutes a "recreational pond": "any man-made pond or water body not regulated as a retention or detention pond, and greater than 400 square feet in surface area. . . ." DeKalb Cnty. Unified Dev. Ordinance § 5.42 (2009). Appellants cannot reasonably assert that, by digging a large hole, which subsequently filled with water, they did something other than create a man-made body of water. The record reflects that the pond is .43 acres in area, which is equivalent to 18,780.8 square feet, greatly in excess of the 400-square-feet limit. What the Appellants have is an impermissible recreational pond.

[13] Article 9 of the UDO requires a person to obtain a permit or a variance in order to construct a recreational pond in the AC6 zone.[4] Appellants failed to obtain either. In fact, they sought a variance, were denied, and then their petition for judicial review of that denial was dismissed. Thus, they are in violation of the

[4] Appellants' argument to the contrary is plainly at odds with both their own behavior and the plain text of the UDO. We also note that section 9.13 of the UDO provides a list of land improvements that are exempt from the permit requirement, and ponds are not on that list.

UDO. On appeal, they now claim that the body of water is not a "pond," despite the fact that they applied for a variance for a "pond."

[14] Appellants now raise several arguments which we find unavailing.[5] First, they argue that the trial court's reading of the UDO was clearly erroneous. Appellants' Br. pp. 15-16. Appellants suggest that a "pond," which is what the trial court found Appellants' feature to be, is not the same thing as a retention pond, recreational pond, or detention pond, and, therefore, is not regulated by the UDO. We find Appellants' interpretation of the UDO, as well as the implication that the Commission sought to regulate only three specific types of ponds near the airport, but not other types of ponds, implausible. What the trial court found here to be a "pond" is a man-made body of water and, thus, is subject to the requirements of the UDO that attach to any "recreational pond."

[15] Appellants also indicate that there is no evidence that they ever intended to create a pond. Notwithstanding the fact that there *is* evidence of their intent to create a pond, we find that their intent is of no moment. *See* Appellant's App. Vol. IV p. 174. Whether they intended to construct a pond or not, a pond is what they created. The definition found in Article 11 of the UDO is perhaps more susceptible to an argument that the intent of the Appellants is relevant. Article 11 defines recreational ponds as follows: "A pond designed to

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[5] Appellants seem to suggest that we should not be confident that the trial court's findings of fact and conclusions of law, which are substantively similar to those proposed by the Commission, are the result of considered judgment. To the contrary, we find that, given the nature of the issues and the ease of their resolution, the trial court's detailed and exhaustive findings are remarkably well-considered.

permanently hold water and be used primarily for recreational and/or scenic purposes." Appellant's App. Vol. II p. 23. This definition seems to require an intent that is absent from UDO section 5.42(A). The intent with which we are primarily concerned, however, as we explain *infra*, is that of the authors of the UDO. Moreover:

> We are mindful that "when a court is called upon to construe words in a single section of a statute, it must construe them with due regard for all other sections of the act and with regard for the legislative intent to carry out the spirit and purpose of the act." *Preferred Prof'l Ins. Co. v. West*, 23 N.E.3d 716, 730 (Ind. Ct. App. 2014), *trans. denied*. "A legislative purpose, shown by the context of a statute, should not be defeated by mere blind adherence to definitions of words found in dictionaries, however reputable." *Chicago & E.I.R. Co. v. Pub. Serv. Comm'n of Ind.*, 185 Ind. 678, 114 N.E. 414, 415 (1916).

Wells Fargo Bank, N.A. v. Rieth-Riley Constr. Co., 38 N.E.3d 666, 673 (Ind. Ct. App. 2015). Lack of evidence as to Appellants' pond being "designed" does not compel the conclusion that their pond is exempt from the UDO.

[16] Appellants argue that the applicability of the definition of "recreational pond" found in section 5.42 of the UDO is limited to that section. Thus, they argue, when section 3.08(G)(3) uses the term "recreational pond" and prohibits such ponds from being constructed on property in the AC6 zone, it is improper for us to understand that use of "recreational pond" as having the same definition as in section 5.42(A). We disagree. We conclude that the UDO is not ambiguous.

Even if it were ambiguous, our basic and well-established canons of statutory construction belie Appellants' arguments:

> Interpretation of an ordinance is subject to the same rules that govern the construction of a state statute. Words are to be given their plain, ordinary, and usual meaning, unless a contrary purpose is shown by the statute or ordinance itself. Where possible, every word must be given effect and meaning, and no part is to be held meaningless if it can be reconciled with the rest of the statute. The goal in statutory construction is to determine and effect legislative intent. Courts must give deference to such intent whenever possible. Thus, courts must consider the goals of the statute and the reasons and policy underlying the statute's enactment. If the legislative intent is clear from the language of the statute, the language prevails and will be given effect.

Rollett Fam. Farms, LLC v. Area Plan Comm'n of Evansville-Vanderburgh Cnty., 994 N.E.2d 734, 738 (Ind. Ct. App. 2013) (quoting *Hall Drive Ins., Inc. v. City of Fort Wayne*, 773 N.E.2d 255, 257 (Ind. 2002)).

[17] We find that the plain text of the UDO, and specifically the purpose set out in section 3.05 are clear. Section 3.05 provides that the purpose of the ACO is "to establish a standard of safety and compatibility for the occupants of land in the immediate vicinity of the DeKalb County Airport by regulating incompatible land uses and setting development standards that supplement or super[s]ede the underlying zoning district," DeKalb Cnty. Unified Dev. Ordinance § 3.05 (2009). Clearly, the "recreational ponds" in section 3.08(G)(3) include the man-made bodies of water referenced in section 5.42(A). We are similarly unpersuaded that the word "designed" in the Article 11 definition of

"recreational pond" was calculated to create an intent requirement, that, if unmet, would permit what would otherwise clearly be recreational ponds to be built in the ACO unfettered.

[18] Next, Appellants argue that the trial court's plain reading of the UDO places the ordinance in conflict with Indiana Code Section 36-7-4-1103, which provides that "[t]his chapter does not authorize an ordinance or action of a plan commission that would prevent, outside of urban areas, the complete use and alienation of any mineral resources or forests by the owner or alienee of them." Appellants thereby challenge the validity of the UDO itself. On this argument, we do reach for the dictionary. Black's Law Dictionary defines "mineral" as follows:

> n. (15c) 1. Any natural inorganic matter that has a definite chemical composition and specific physical properties that give it value <most minerals are crystalline solids>. 2. A subsurface material that is explored for, mined, and exploited for its useful properties and commercial value. 3. Any natural material that is defined as a mineral by statute or caselaw.

Black's Law Dictionary (11th ed. 2019).

[19] On its face, moving dirt from one part of a property to another would not seem to fit the definition of the alienation/movement of mineral resources. The designated evidence does not suggest that the alleged "dirt and clay," Appellants' App. p. 20, that Appellants relocated consisted of a composition that meets the definition of "mineral." Nor have Appellants demonstrated that they were attempting to extract or alienate minerals from that "dirt and clay."

Rather, by their own admission, they were simply trying to move it. Accordingly, we conclude that Appellants have not met their burden to establish the existence of a genuine issue of material fact with respect to whether Indiana Code Section 36-7-4-1103 applies and supersedes a plain reading of the applicable sections of the UDO.[6]

[20] Finally, Appellants point to a series of other properties featuring ponds in the ACO, which were apparently approved by the Commission. Aside from the fact that this argument appears to concede that the pond in question is a pond, it is unclear what import these other instances possess. Our role is not to second-guess a determination by the Commission or a zoning board to allow or disallow a variance for a pond, or whether that determination is in harmony with other decisions of that entity.[7] Our role is simply to determine whether, here, the designated evidence shows that there has been a violation of the UDO. We find that Appellants violated the UDO by constructing a pond

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[6] We also note that section 5.55 of the UDO requires a permit for any "temporary use" of, among others, an AC6 property. Any mining or extraction operation proposed by Appellants would surely be temporary in nature, and thus would require a permit. We find nothing in the record to suggest that Appellants ever sought such a permit.

[7] When that is our role, our standard of review is narrow and deferential. *See, e.g., Terra Nova Dairy, LLC v. Wabash Cnty. Bd. of Zoning Appeals,* 890 N.E.2d 98, 104 (Ind. Ct. App. 2008) ("In reviewing an agency decision, we may provide relief only if the decision is: (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; [(2)] contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; or (5) unsupported by substantial evidence. . . . We presume that the zoning board's decision is correct, and the decision will not be overturned unless it is arbitrary, capricious, or an abuse of discretion.") (quoting *Rice v. Allen County Plan Comm'n*, 852 N.E.2d 591, 597 (Ind. Ct. App. 2006), *trans. denied*).

without the required approval. The trial court did not err in awarding summary judgment to the Commission.

II. Attorney's Fees

[21] Next, Appellants contend that the trial court erred when it awarded attorney's fees to the Commission. "We review a trial court's award of attorney's fees for an abuse of discretion." *River Ridge Dev. Auth. v. Outfront Media, LLC*, 146 N.E.3d 906, 912 (Ind. 2020). "An abuse of discretion occurs when the court's decision either clearly contravenes the logic and effect of the facts and circumstances or misinterprets the law." *Id.* "To make this determination, we review any findings of fact for clear error and any legal conclusions de novo." *Id.*

[22] > Generally, Indiana has consistently followed the American Rule in which both parties generally pay their own fees. In the absence of statutory authority or an agreement between the parties to the contrary—or an equitable exception—a prevailing party has no right to recover attorney fees from the opposition.

BioConvergence, LLC v. Menefee, 103 N.E.3d 1141, 1160 (Ind. Ct. App. 2018) (citing *Loparex, LLC v. MPI Release Techs.*, LLC, 964 N.E.2d 806, 815-816 (Ind. 2012)), *trans. denied*.

[23] There are several well-established exceptions to the American Rule. Indiana Code Section 34-52-1-1, commonly known as the "General Recovery Rule" allows prevailing parties to recover attorney's fees if a party "(1) brought the action or defense on a claim or defense that is frivolous, unreasonable, or

groundless; (2) continued to litigate the action or defense after the party's claim or defense clearly became frivolous, unreasonable, or groundless; or (3) litigated the action in bad faith." The common law "obdurate behavior" exception "empowers a court to order a party, under certain circumstances, to pay the opposition's attorney's fees." *River Ridge Dev. Auth.*, 146 N.E.3d at 912 (citing *Kikkert v. Krumm*, 474 N.E.2d 503, 505 (Ind. 1985)).[8] Moreover, trial courts are empowered to assess attorney's fees via their inherent power to sanction. *Id*. at 915-16.

[24] The party seeking fees carries a "hefty" burden to demonstrate that an exception to the American Rule is warranted. *Id*. at 911. Thus, we turn to the question of whether the Commission demonstrated that any statutory authority, inherent authority, or exception to the American Rule justified the trial court's award of attorney's fees.

[25] The only basis cited by the Commission for an award of attorney's fees is UDO section 10.17(C)(4), which states:

> A violator found liable for a violation shall be subject to a court-imposed fine. The fine for a violation shall be reasonably in

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[8] Our Court of Appeals first recognized the common-law "obdurate behavior" exception in 1973. *Saint Joseph's Coll. v. Morrison, Inc.*, 158 Ind. App. 272, 279-81, 302 N.E.2d 865, 870-71 (1973), *trans. denied*. And this Court embraced it twelve years later. *Kikkert*, 474 N.E.2d at 505 (citing *Cox v. Ubik*, 424 N.E.2d 127, 129 (Ind. Ct. App. 1981)). This exception—which reimburses a "prevailing party"—applies when a party knowingly files or fails to dismiss a "baseless claim" and a trial court finds the conduct "vexatious and oppressive in the extreme and a blatant abuse of the judicial process." *Id*.

River Ridge Dev. Auth., 146 N.E.3d at 912-13.

> proportion to the severity of the violation, repetitiveness of similar violations by the same violator, and the costs associated with enforcing, mitigating, administering, researching, inspecting, court fees, legal fees, and the like. Fines imposed by the court of jurisdiction shall be no higher than $2,500 for the first violation, and no higher than $7,500 for the second or subsequent violations according to IC 36-1-3-8.

[26] Further, the only reference in the trial court's order with respect to any authority for awarding attorney's fees is Finding No. 59: "That the DeKalb County Plan Commission is entitled to remedies against Defendants for injunctive relief, fines, penalties *and attorney fees as provide* [sic] *by the UDO*." Appellants' App. Vol. II p. 19 (emphasis added).

[27] Given that the only statutory authority cited by the Commission or the trial court for the award of attorney fees is UDO section 10.17(C)(4), we must determine whether that section confers such authority upon the trial court. We find that it does not. UDO section 10.17(C)(4) confers upon the trial court the authority to impose a *fine* on the offending party. That fine may be proportional to, among other things, legal fees that may be associated with the action. That does not mean, however, that a trial court may *separately* assess attorney's fees as they are ordinarily understood. We therefore find that the trial court misinterpreted the ordinance as conferring authority to award attorney's fees.

[28] Neither the Commission nor the trial court cited the General Recovery Rule,[9] the obdurate behavior exception, or the trial court's powers of sanction. We therefore must conclude that the trial court abused its discretion when it relied upon the UDO for its order to Appellants to pay $7,563.78 in attorney's fees. Accordingly, we vacate the trial court's award of attorney's fees to the Commission.

Conclusion

[29] The trial court did not err when it awarded summary judgment to the Commission, and ordered a fine of $1,000.00, and we therefore affirm that judgment. The trial court did, however, err when it awarded attorney's fees to the Commission, and we remand with instructions to vacate the attorney's fees award in accordance with this opinion.

[30] Affirmed in part, reversed in part, and remanded with instructions.

Najam, J., and Pyle, J., concur.

[9] We note that the Commission may well have had a more than colorable argument for recovery under this rule. Given their failure to raise the argument, however, we do not address the question.