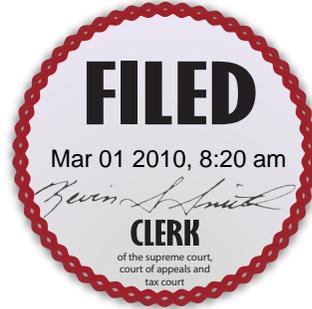


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

CITY OF NEW CASTLE,)
)
Appellant-Defendant,)
)
vs.) No. 33A01-0909-CV-445
)
RANDY NEAL, INTEGRITY LAND)
MANAGEMENT, LLC, R.E. NEAL, LLC,)
and NEAL SCRAP METALS, LLC,)
)
Appellees-Plaintiffs.)

APPEAL FROM THE HENRY SUPERIOR COURT
The Honorable Bob A. Witham, Judge
Cause No. 33D02-0807-MI-5

March 1, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Defendant City of New Castle (“the City”) appeals the denial of its motion for summary judgment and the grant of the cross-motion for summary judgment in favor of Appellees-Plaintiffs Randy Neal, Integrity Land Management, LLC, R.E. Neal, LLC, and Neal Scrap Metals, LLC (collectively, “Neal’s Businesses”) in their declaratory judgment action to determine whether a special exception is required to operate their businesses on real estate zoned as industrial. We reverse the trial court’s ruling on both motions for summary judgment and remand with instructions to enter summary judgment in favor of the City.

Issue

Whether the trial court erred in granting Neal’s Businesses’ cross-motion for summary judgment and denying the City’s motion for summary judgment based on the conclusion that Neal’s Businesses do not need to obtain special exception approval to operate the businesses on real estate in New Castle zoned as I-2.

Facts and Procedural History

On July 31, 2008, Neal’s Businesses filed a complaint for declaratory judgment seeking a determination that they could operate a scrap metal business in the City of New Castle on real estate zoned as I-2 without a special exception being required. The City filed its response, later sought an assessment of fines as well as a preliminary and permanent injunction to prohibit Neal from operating the businesses, and filed a motion for summary judgment. The City contended that, according to the New Castle City Zoning Ordinances (NCZO), Neal’s Businesses constituted a junkyard and required the approval of a special

exception to operate on the I-2 zoned property. On February 23, 2009, Neal's Businesses filed a response to the City's motions and filed a cross-motion for summary judgment. On August 20, 2009, the trial court concluded that, based on the interpretation of the NCZO, a special exception was not required. Accordingly, the trial court denied the City's request for injunctions and fines¹ and its motion for summary judgment and granted Neal's Businesses' cross-motion for summary judgment. This appeal ensued.

Discussion and Decision

I. Standard of Review

A party seeking summary judgment bears the burden of making a prima facie demonstration that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law. Warren v. IOOF Cemetery, 901 N.E.2d 615, 617 (Ind. Ct. App. 2009), trans. denied. Upon the satisfaction of this burden through evidence designated to the trial court pursuant to Indiana Trial Rule 56, the non-movant must designate specific facts demonstrating the existence of a genuine issue for trial. Id.

In reviewing the grant or denial of such motion, we apply the same standard as the trial court: whether there is a genuine issue of material fact that precludes summary judgment and whether the moving party is entitled to judgment as a matter of law. Ind. T.R. 56(C), (H). When there are cross-motions for summary judgment, our standard of review remains unchanged. Liberty Mut. Fire Ins. Co. v. Beatty, 870 N.E.2d 546, 549 (Ind. Ct. App. 2007). "The reviewing court must consider each motion separately to determine whether the moving

¹ The City does not appeal the denial of its request for injunctions and fines.

party is entitled to judgment as a matter of law. Id.

The issue of whether a special exception is required according to a zoning ordinance is a question of law and the review of such a determination is de novo. 600 Land, Inc. v. Metro. Bd. of Zoning Appeals of Marion County, 889 N.E.2d 305, 308 (Ind. 2008). When interpreting an ordinance, we apply the same principles as those employed in construing a statute. Id. Hence, we examine the ordinance sections as a whole and read them together in order that no part is rendered meaningless if it can be harmonized with the remainder sections of the ordinance. See City of Carmel v. Steele, 865 N.E.2d 612, 618 (Ind. 2007). Our primary goal is to give effect to and implement the intent of the legislative body. See id. We do not presume that the legislative body intended the language to bring about an unjust or absurd result. See id.

II. Analysis

The dispute in this case centers on the interpretation of the New Castle City Zoning Ordinances (“NCZO”), particularly those governing the use of property zoned as I-2, to determine whether the operation of a junkyard on such property requires a special exception. The trial court concluded, based on its interpretation of the NCZO, that a junkyard did not constitute a special exception. “[A] special exception is a use permitted under the zoning ordinance upon the showing of certain statutory criteria,” while “a variance is a deviation from the legislated zoning classification applicable to a given parcel of land.” S & S Enters., Inc. v. Marion County Bd. of Zoning Appeals, 788 N.E.2d 485, 490 (Ind. Ct. App. 2003) (quoting Town of Merrillville Bd. of Zoning Appeals v. Pub. Storage, Inc., 568 N.E.2d 1092,

1094 (Ind. Ct. App. 1991), trans. denied), trans. denied. Generally, the granting of “a special exception is mandatory once the petitioner shows compliance with the relevant statutory criteria.” Id.

This appears to be the manner in which the NCZO are written. The beginning ordinances establish the types of districts, the general purpose of each district and reference the appendices that contain requirements for property within a particular district as well as the special exceptions. The special exceptions for all of the districts are listed in Appendix G, along with the districts in which they are permitted, and Appendix H details the addition building/layout restrictions that must be met for that special exception.² In Appendix G, junkyard is listed as a special exception permitted in I-2 districts subject to a list of particular requirements, such as the type of fence surrounding the property and the minimum distance from a residential area. These requirements go beyond what is required for a regular parcel of property zoned as I-2.

The section defining special exception provides in part:

The special exceptions defined below, including accessory buildings and uses, are permitted in the districts indicated in Appendices G and H following this chapter, subject to the provisions herein.

(A) A “SPECIAL EXCEPTION” is one contemplated by this chapter, which is likely or liable but not certain to occur, and is compatible with the essential design of a particular zone, although the use is contrary to the restrictions imposed thereon. A “SPECIAL EXCEPTION” is not at variance with the various elements or objectives of this chapter and the

²“Residential districts. . . . Certain non-residential special exceptions may be permitted in these districts, as described more fully in Appendix G and Appendix H following this chapter.” “Commercial districts. . . . For special exceptions permitted in the commercial districts see Appendices G and H following this chapter.” “Industrial districts. . . . For special exceptions in the industrial districts see Appendices G and H, which follow this chapter.” NCZO § 152.17 (A), (B) and (C), Appendix at 41-43.

comprehensive plan; therefore, a “SPECIAL EXCEPTION” shall not be construed to be a zone change and shall be granted by the Plan Commission in those cases in which such an exception is suitable and appropriate.

NCZO § 152.35, Appendix at 58. Despite junkyard being listed in Appendix G, the trial court apparently adopted the reasoning of Neal’s Businesses and concluded that a junkyard is not a special exception. The explanation posited by Neal’s Businesses is that because its businesses operate within the general restrictions listed for I-2 property the use of the land is not a use “contrary to the restrictions imposed” for I-2 zoned real estate. Thus, the operation of the businesses, whether they constitute a junkyard or not, does not require special exception approval. Furthermore, Neal’s Businesses would not be bound by additional building/layout restrictions required for the grant of a special exception. We disagree with such an interpretation as it fails to incorporate the basic definition of the industrial districts and the clear intent of the legislative body.

The parcel of real estate at issue is in an I-2 district. According to Section 152.15 of the NCZO, the district designation of I-2 is primarily for general industry purposes. The industrial districts are further defined in Section 152.17(C):

Industrial districts. Three districts, I1, I2 and IR, are established to meet the present and future needs of the jurisdictional area for industrial development. Residential uses will be excluded from the I1 and I2 Districts. Where permitted, residential and business uses will conform to the requirements set forth for them in Appendices A through D respectively, which follow this chapter, respectively. The specific requirements for industrial uses in these Districts are given in Appendices E and F, which follow this chapter. For special exceptions in the industrial districts see Appendices G and H, which follow this chapter. A brief description of the industrial districts follows:

- (1) I1. This district incorporates a substantial part of the existing industrial developments and is provided for industrial operations utilizing enclosed space for storage, fabricating, and manufacturing. It includes the lands in the jurisdictional area which are best suited to this type of industrial use.
- (2) I2. This district provides for general industrial operations utilizing both enclosed and unenclosed space for storage, fabricating, and manufacturing.
.....

NCZO §152.17(C), App. at 43 (emphasis added). The uses for the I-2 district are “general industrial operations.” The relevant definitions of industry here are the “systematic labor especially for the creation of value” and “a division of productive or profit-making labor, especially one that employs a large personnel and capital especially in manufacturing.” WEBSTER’S THIRD NEW INT’L DICTIONARY 1155-56 (2002). The words “fabricating”³ and “manufacturing”⁴ within the description of the I-2 district further support the interpretation of “general industrial operations” to require that the business in the district make wares or useful, valuable products from raw or prefabricated materials. While the term storage is also included, it is listed in the conjunctive with the terms “fabricating” and “manufacturing.” Thus, a business that is solely based on storage does not fit within the definition of a general industrial operation. The expanded description of general industrial use in Section 152.28(A)(2)⁵ does not change this conclusion. This section simply uses additional

³ Fabricate is defined as “to form by art and labor: MANUFACTURE, PRODUCE”; “to form into a whole by uniting parts”; and “to cause (raw material or stock) to be manufactured.” WEBSTER’S THIRD NEW INT’L DICTIONARY 811 (2002).

⁴ Manufacture is defined as “to make (as raw material) into a product suitable for use.” WEBSTER’S THIRD NEW INT’L DICTIONARY 1378 (2002).

⁵ “GENERAL INDUSTRIAL USE. One which requires both buildings and open area for manufacturing, fabricating, processing, extraction, heavy repairing, dismantling, storage or disposal of equipment, raw materials, manufactured products, or wastes[.]” NCZO § 152.28(A)(2).

synonyms for the three original words of manufacturing, fabricating and storage.

A junkyard is not a business of general industrial operation. Rather than having a purpose of producing some valuable product, the purpose of a junkyard is to collect or salvage personal property usually to extract certain useful components for possible reuse by others:

“JUNK YARD.” Any place at which personal property is or may be salvaged for re-use, resale or reduction or similar disposition, and is owned, possessed, collected, accumulated, dismantled, or assorted; including but not limited to used or salvaged base metal or metals, their components or combinations, used or salvaged rope, bags, paper, rags, glass, rubber, lumber, millwork, brick and similar property except animal matter; and used motor vehicles, machinery, or equipment which are used, owned or possessed for the purposes of wrecking or salvaging parts therefrom.

NCZO § 152.04, App. at 36. Thus, a junkyard is a use that is contrary to the permitted uses within an I-2 district and requires a special exception. Furthermore, it is clear by the construction of the list of special exceptions in Appendices G and H that the New Castle Plan Commission intended the NCZO to require a junkyard operator to obtain special exception approval before operating such a business on an I-2 zoned property.

The trial court’s ruling was based on interpretation of the NCZO.⁶ As our conclusion is that the operation of a junkyard in New Castle requires special exception approval, we reverse the trial court’s grant of Neal’s Businesses’ cross-motion for summary judgment. The City also asks that we review and reverse the trial court’s denial of its motion for summary judgment. For a grant of summary judgment in favor of the City to be proper, a

⁶ “[T]he question in front of the Court involves statutory interpretation and therefore is a question of law.” App. at 6.

secondary question must be answered. As we conclude that a junkyard requires special exception approval, we must now determine whether the operations of Neal's Businesses constitute a junkyard pursuant to the NCZO.

The material facts to answer this question are undisputed. In fact, all of the details are derived from the Complaint for Declaratory Judgment. The businesses of R.E. Neal and Neal Scrap Metals have the same principal office and operation locations. "R.E. Neal is in the business of operating, leasing, maintaining, dismantling, storing, and servicing heavy equipment and light equipment for use both on-road and off-road." Appendix at 8. Neal Scrap Metals processes, stores and disposes of raw materials; dismantles, stores and disposes of equipment; stores and disposes of manufactured products; and stores and disposes of waste. Neal Scrap Metals is required to obtain a license under Chapter 12⁷ of the New Castle City Code, which regulates the operation of junkyards. This chapter requires that for a junkyard license to issue, the applicant must comply with the zoning ordinance requirements. New Castle City Code § 112.04, App. at 22. The description of the operations of the businesses clearly falls within the definition of Junkyard for the purposes of the NCZO. ("Any place at which personal property is or may be salvaged for re-use, resale or reduction or similar disposition, and is owned, possessed, collected, accumulated, dismantled, or

⁷ Chapter 12 of the New Castle City Code defines a Junkyard as "[a]ny lot, part of a lot, parcel of real estate, or building which is used for storing or keeping old automobiles and storing of wrecked parts on the premises; or which is used for storing and keeping old waste paper, rags, or old rubber; or which is used for the storing of junk iron or other metal in piles or otherwise; or a place where old parts of vehicles are bought and sold and offered for sale; or where old iron or other metals, rags, rubber, or waste materials are burned on the premises; or where old lumber with other waste materials are stored and are offered for sale; or where old iron or other metals are cut and broken in parts by use of shears or by use of sledges, and such metals are piled or stored preparatory to being shipped." App. at 22.

assorted[.]”). Therefore, Neal’s Businesses must obtain special exception approval to operate these businesses within the City of New Castle.

Based on the foregoing analysis, we reverse the trial court’s grant of the cross-motion for summary judgment and the denial of the City’s motion for summary judgment and remand with instructions to enter summary judgment in favor of the City.

Reversed and remanded.

BAKER, C.J., concurs.

ROBB, J., concurs with separate opinion.

**IN THE
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CITY OF NEW CASTLE,)	
)	
Appellant-Defendant,)	
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vs.)	No. 33A01-0909-CV-445
)	
RANDY NEAL, INTEGRITY LAND)	
MANAGEMENT, LLC, R.E. NEAL, LLC,)	
and NEAL SCRAP METALS, LLC,)	
)	
Appellees-Plaintiffs.)	

ROBB, Judge, concurring

I concur with the majority’s decision but write separately to emphasize that not all scrap metal businesses will fit within the definition of junkyard contained in the NCZO. The NCZO definition of junkyard includes a range of activities relating to salvage and storage operations: collecting, accumulating, possessing, dismantling, wrecking, and salvaging materials for re-use or resale. See slip. op. at 8 (quoting NCZO § 152.04). The definition also lists various materials as examples of property found in a junkyard: “used or salvaged base metal or metals . . . rope, bags, paper, rags, glass, rubber, lumber, millwork, brick,” and “used motor vehicles, machinery, or equipment,” although a junkyard is “not limited to”

these specific materials. Id.

In his affidavit, Neal set forth the following activities his businesses are engaged in: “Processing, extraction, heavy repairing, dismantling, storage of equipment, disposal of equipment, storage of raw materials . . . disposal of raw materials, storage or disposal of manufactured products, storage or disposal of wastes.” App. at 232. Neal’s activities of storing and disposing of raw materials and wastes fit within the part of the junkyard definition encompassing the “accumulat[ion]” and “disposition” of items such as “used or salvaged base metal or metals . . . rope, bags, paper, rags, glass, rubber, lumber, millwork, brick, and similar property.” Id. at 36. Further, Neal’s activities of processing, extracting, dismantling, storing, and disposing of equipment fit within the junkyard definition’s provision for “machinery[] or equipment which are used, owned, or possessed for the purpose of wrecking or salvaging parts therefrom.” Id. Neal’s remaining activities of heavy repairing of equipment and storage or disposal of manufactured products are not equivalent to any of the junkyard definition’s specific provisions. However, the context in which they are listed implies a connection to Neal’s other salvage and storage operations clearly fitting within the junkyard definition, and the record does not contain any facts supporting an inference to the contrary. For these reasons, I agree with the majority’s conclusion that the operations of Neal’s businesses constitute a junkyard within the meaning of the NCZO.

A case involving a different factual record may well lead to the conclusion a scrap metal business is not a junkyard within the meaning of the NCZO or other definitions. For example, Indiana Code section 8-23-1-27 states: “‘Junkyard’ means an establishment or place

of business that is maintained, operated, or used for storing, keeping, buying, or selling junk, or for the maintenance or operation of an automobile graveyard. . . . The term does not include a scrap metal processing facility.” “Scrap metal processing facility” in turn is defined as “an establishment having facilities for processing iron, steel, or nonferrous metal and whose principal product is scrap iron, steel, or scrap for sale for remelting purposes only.” Ind. Code § 8-23-1-36. Thus, a junkyard is not interchangeable with a business engaged primarily in scrap metal processing. However, Neal’s affidavit establishes that scrap metal processing is only one of many salvage and storage activities carried on by his businesses, and the designated evidence does not support an inference that his businesses’ principal product is scrap metal sold for remelting purposes only. As a result, there is not a question of fact regarding whether Neal’s businesses fit within the NCZO’s definition of junkyard. Therefore, I concur in the majority opinion.