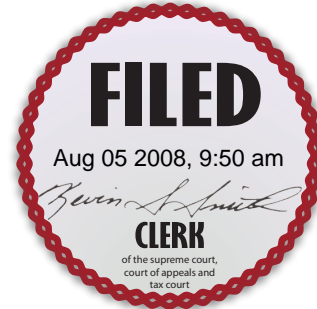


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

ANDY'S TRUCK & EQUIPMENT CO.,)
INC., An Illinois Corporation registered to do)
business in Indiana,)

Appellant-Defendant,)

vs.)

CITY OF GARY, INDIANA by its MAYOR)
RUDOLPH CLAY,)

Appellee-Plaintiff.)

No. 45A03-0711-CV-524

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable William E. Davis, Judge
Cause No. 45D02-0507-PL-00122

AUGUST 5, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

HOFFMAN, Senior Judge

Defendant-Appellant Andy's Truck & Equipment Co., Inc. appeals the trial court's findings of fact and conclusions of law regarding certain activities on its property in Gary, Indiana.

We affirm.

Andy's presents three issues for our review, which we restate as one: whether the trial court's findings of fact and conclusions of law are clearly erroneous.

Andy's Truck & Equipment Co., Inc. ("Andy's") is a business in Gary, Indiana that sells used truck parts and machinery. Andrew Young is the president of Andy's. The City of Gary ("the City") filed a complaint against Andy's alleging that Andy's was using its property in violation of city ordinances. After prolonged litigation, a bench trial was held, and the trial court entered its findings of fact and conclusions of law enjoining Andy's from engaging in certain activities on its property. This appeal ensued.

When the trial court enters findings of fact and conclusions of law, we apply a two-tiered standard of review: first, we determine whether the evidence supports the findings and, second, whether the findings support the judgment. *S.C. Nestel, Inc. v. Future Const., Inc.*, 836 N.E.2d 445, 449 (Ind. Ct. App. 2005). The trial court's findings and conclusions will be set aside only if they are clearly erroneous. *Id.* "Findings of fact are clearly erroneous when the record lacks any evidence or reasonable inferences from the evidence to support them." *St. John Town Bd. v. Lambert*, 725 N.E.2d 507, 518 (Ind. Ct. App. 2000). A judgment is clearly erroneous when it is not supported by the findings of fact. *Id.* Put another way, a judgment is clearly erroneous when a review of the record

leaves us firmly convinced that a mistake has been made. *S.C. Nestel, Inc.*, 836 N.E.2d at 449. In determining whether the findings or judgment are clearly erroneous, we consider only the evidence favorable to the judgment and all reasonable inferences flowing therefrom. *Id.* Moreover, we will not reweigh the evidence or assess witness credibility. *Id.*

Andy's contends that the trial court's findings of fact and conclusions of law are clearly erroneous. Specifically, Andy's challenges the propriety of Finding of Fact #8 and Conclusion of Law #3.

First, Andy's argues that the trial court improperly relies upon certain state statutes that the court enumerated in Finding of Fact #8. Finding of Fact #8 states:

8. Gary City Ordinance[] 163.003, Indiana Code 13-11-2-16.5, I.C. 13-11-2-16.3, I.C. 13-11-2-66.9, I.C. 13-11-2-1[3]0.1, I.C. 13-11-2-130.3, I.C. 13-11-2-250, and I.C. 13-11-2-251 define "Automobile Wrecking Yard," "Junk Yard," "Automobile Scrapyard," "Automotive Salvage Recycler," "End of Life Vehicle," "Motor Vehicle," "Motor Vehicle Recycler," "Waste Tire," and "Waste Tire Storage Site," respectively.

Appellant's Appendix at 20. Although the trial court is correct in asserting that the above-referenced statutes define the respective terms, the evidence in the present case supports only two of the cited definitions. The amended complaint, as well as the evidence presented by the City at trial, refer only to Andy's violations of Gary city ordinances with regard to zoning issues, specifically Gary City Ordinance §163.003 which defines both "automobile wrecking yard" and "junk yard." The state statutes cited by the trial court in its Finding of Fact #8 specifically declare that they are applicable for purposes of Ind. Code §§13-20-13 and -14, or 13-20-17.7, or 13-11-2. These statutes

pertain to solid waste management, particularly waste tire storage and disposal, mercury switches in end of life vehicles, and definitions for Title 13 relating to the environment. The City neither claimed nor presented evidence of any violation by Andy's of state environmental statutes. Thus, the evidence supports only the portion of the finding that states, "Gary City Ordinance[] 163.003 define[s] "Automobile Wrecking Yard," [and] "Junk Yard." The remainder of Finding of Fact #8 is not supported by the evidence; however this error is harmless. A finding of fact is not prejudicial to a party unless it directly supports a conclusion. *In Re B.J.*, 879 N.E.2d 7, 20 (Ind. Ct. App. 2008), *trans. denied*. In this case, the court did not use the state statutes as a basis for any other findings or for any of its conclusions. Moreover, Andy's does not allege that the court's error prejudiced it in any way. Thus, the erroneous portion of Finding of Fact #8 was merely harmless surplusage that did not prejudice Andy's and, consequently, is not grounds for reversal.

Next, Andy's claims that Conclusion of Law #3 sub-section (2) is erroneous because it precludes open storage of truck trailers. The trial court's Conclusion of Law #3 sub-section (2) states:

3. This Court enters the following permanent injunction against the Defendant: Andy's Truck and Equipment Company is hereby permanently enjoined from engaging in the following activities on the property at 1434 West 11th Avenue, Gary, Indiana:

- (1) *****;
- (2) open storage of used vehicle parts, which have been dismantled or otherwise salvaged from motor vehicles including but not limited to truck cabs, *trailers*, axles, engines, frame cut[]s;

Appellant's App. at 21-22 (emphasis supplied). In support of its contention, Andy's points to the deposition of James Craig, Director of the City of Gary Zoning Department. In his deposition that was admitted as an exhibit at trial, Mr. Craig stated that any use that is permitted in a business district is permitted in an M1-2 zoning district. Counsel then pointed out that a permitted use in a B5 business district is "trailers for motor vehicles, sales and rentals, not including house trailer or mobile homes" and asked Mr. Craig if he interpreted that section to allow truck trailer storage. Mr. Craig answered in the affirmative. Citing this testimony as the basis for its argument, Andy's alleges that Conclusion of Law #3 sub-section (2) is erroneous.

The evidence reveals that Andy's is located in an M1-2 zoning district, which is the zoning district for limited manufacturing. Pursuant to the zoning code of the City of Gary, M1-2 zoning districts are permitted uses that are also permitted in a business district. *See* Joint Exhibit 1, Zoning Code of the City of Gary §163.081(B)(1)(a); *see also* Deposition of James Craig, pp. 16-17 and 56; and Tr. 108. The section referred to in Mr. Craig's deposition is §163.070(B)(2)(q) pertaining to B5 Wholesale and Motor Vehicle Districts and states as follows:

(B) In the B5-1 and B5-2 districts, the following uses are permitted.

(1) ****

(2) Additional retail and service uses, as follows.

(q) Trailers for motor vehicles, sales and rentals, not including house trailer or mobile homes.

Joint Exhibit 1, Zoning Code of the City of Gary. As it states, this section refers to retail and service uses of trailers and does not state anything with regard to storage of truck trailers. Moreover, when questioned further, Mr. Craig acknowledged that his interpretation seemed to contradict a later section of the B5 zoning code. That section sets forth allowable miscellaneous uses of land in the B5 zoning district and states: “Garages and parking lots, other than accessory, for the storage of motor vehicles, *but not truck trailers.*” Joint Exhibit 1, Zoning Code of the City of Gary §163.070(B)(5)(a). Thus, this section of the zoning code specifically excludes the storage of truck trailers. Mr. Craig later clarified in his deposition that §163.070(B)(2)(q) does not necessarily allow trailer storage. *See* Depo. of James Craig, p. 59. Furthermore, at trial Mr. Craig definitively testified that §163.070(B)(5)(a) prohibits truck trailer storage. Tr. 124. Although Mr. Craig’s testimony is equivocal at times about the storage of truck trailers in a business district or a district zoned M1-2 in the city of Gary, the text of the zoning code of the City is not. We cannot accept the invitation to reweigh the evidence or assess once more the credibility of the witnesses.

Andy’s also takes issue with sub-sections (2)-(7) of Conclusion of Law #3.

These sub-sections are as follows:

3. This Court enters the following permanent injunction against the Defendant: Andy’s Truck and Equipment Company is hereby permanently enjoined from engaging in the following activities on the property at 1434 West 11th Avenue, Gary, Indiana:

- (1) *****;
- (2) open storage of used vehicle parts, which have been dismantled or otherwise salvaged from motor vehicles including but not limited to truck cabs, trailers, axles, engines, frame cut[]s;

- (3) open storage [of] vehicles or automobiles or trailers without a valid current state registration and license plate issued to the vehicle or automobile or to the occupant, owner, purchaser;
- (4) open storage of used tires;
- (5) open storage of partially dismantled, nonoperating, wrecked, or junked vehicles;
- (6) open storage of scrap metal, rubbish, inoperable heavy equipment, inoperable machinery, scrap metals and other discarded items on the property;
- (7) outside storage of any item within one hundred and fifty feet of the eastern border of the property.

Appellant's App. at 21-22. Andy's claims that, pursuant to §163.081(A)(2) of the Zoning Code of the City of Gary, it is permitted to have open storage on its property as long as the open storage is not within 150 feet of the residential district on its border. §163.081(A)(2) provides, in pertinent part:

- (A) In the M1-1 and M1-2 Districts, **permitted uses** are subject to the following conditions.
 - (1) *****
 - (2) All business, production, servicing, and processing shall take place within completely enclosed buildings unless otherwise specified. *Within 150 feet of a residence district, all storage shall be in completely enclosed buildings or structures, and storage located elsewhere in this district may be open to the sky but shall be enclosed by solid walls or fences, including solid doors or gates thereto, at least eight feet high, but in no case lower in height than the enclosed storage, and suitably landscaped.*

Joint Exhibit 1, Zoning Code of the City of Gary (emphasis supplied). Andy's argues that Conclusion #3 contradicts the italicized portion of this section of the zoning code and thus improperly restricts Andy's use of its property.

In its Finding of Fact #12, the trial court found that Andy's is operating a junk yard on its property, and Andy's does not challenge this finding on appeal.¹ A junk yard or automobile wrecking yard is not listed as a permitted use in M1-2 districts. *See* §163.081(B) of the Zoning Code of the City of Gary. Mr. Craig testified at trial that if a particular use is not specifically listed for a zoning district, that use is not allowed in that district. Tr. 78. More specifically, Mr. Craig testified that a junk yard is allowed only in an M-3 zoning district or by a special use permit in an M-2 district. Tr. 119; *see also* §§ 163.083(B)(2)(a) and 163.082(C)(2) of the Zoning Code of the City of Gary.

Therefore, based upon Andy's non-permissive use of its property, we determine that sub-section (A)(2) of §163.081 does not apply to Andy's. For this sub-section's conditions to apply, Andy's must be carrying on a *permitted use* on the property. *See* §163.081(A), *supra*. Thus, the court's Conclusion of Law #3 sub-sections (2)-(7) are not erroneous.

Based upon the foregoing discussion and authorities, we conclude that the portion of the trial court's Finding of Fact #8 not supported by the evidence is harmless error.

¹ Although not disputed on appeal, Finding of Fact #12 appears, upon review of the materials submitted, to be supported by the evidence. The term "junk yard" is defined in §163.003 of the Zoning Code of the City of Gary as "[a]n open area where waste or scrap metals are kept, discarded, abandoned, bought, sold, exchanged, sorted, baled, packed, disassembled, or handled, including but not limited to scrap iron and other metal, paper, rags, rubber tires, and bottles. A "JUNK YARD" includes an auto wrecking yard but does not include uses established entirely within enclosed buildings." An "automobile wrecking yard" is "[a]ny land, building, or structure used for the open storage, keeping, or abandonment of any worn out, cast off, inoperative, discarded, or abandoned vehicle, automobile, or parts thereof, which is not being restored to operation; or vehicles or automobiles without a valid current state registration and license plate issued to the vehicle or automobile or to the occupant, owner, purchaser, lessor, lessee, or tenant of the place; or used for wrecking of motor vehicles or parts thereof, including the commercial or salvaging of any other goods or articles." § 163.003 of the Zoning Code of the City of Gary.

Further, we conclude that Conclusion of Law #3 sub-sections (2)-(7) are not erroneous and therefore affirm that conclusion.

Affirmed.

RILEY, J., and CRONE, J., concur.