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IN THE
COURT OF APPEALS OF INDIANA

TOWN OF CEDAR LAKE, INDIANA,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A03-0906-CV-277
	)	
CEDAR LAKE VENTURES I, LLC,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable John R. Pera, Judge
Cause No. 45D10-0709-PL-154

December 31, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

The Town of Cedar Lake ("Town") and Cedar Lake Ventures I, LLC ("Landowner") disputed the existence of an easement along 133rd Avenue. After each sought summary judgment, the trial court entered judgment in favor of the Landowner.

This dispute concerns whether the Town's action constituted consideration of a subdivision or a planned unit development ("PUD"). Concluding that the Town gave its conditional approval of a PUD, we hold that the Town's conditional approval expired by the terms of its own ordinance. We therefore affirm the trial court's entry of summary judgment in favor of the Landowner.

Issue

The Town raises five issues, which we consolidate and restate as whether the trial court erred in entering summary judgment in favor of the Landowner.

Facts and Procedural History

The relevant facts are not in dispute. Christopher, Helen, and Kenneth McAllister owned land in the Town and ultimately sold it to the Landowner in 2006. Central to this dispute was the McAllisters' effort to develop their land. Their plan was evidenced by a large document that contained both a scaled map of a proposed development on 133rd Avenue, as well as certain written, signed, and notarized assertions (the "Instrument").

The Instrument was titled,

LINCOLN PLAZA WEST

A PLANNED UNIT DEVELOPMENT IN

Appendix at 37. The Instrument contained a "LEGAL DESCRIPTION OF P.U.D." Id. In one corner, the Instrument was labeled, "FINAL DEVELOPMENT PLAT." Id.

The Instrument's map depicted eight lots, only one of which was contiguous to 133rd Avenue – Lot 1. "Lincoln Plaza Way" was designated as a "private road," separating Lots 1, 3, 4, and 5 from Lots 2, 6, 7, and 8. Id. A number of different types of easements were marked on the Instrument, including easements for access, drainage, floodway, and utility.

As owners, Christopher and Kenneth McAllister signed the following statement on the face of the Instrument:

> We . . . hereby certify that we have laid off, platted and subdivided, and do hereby lay off, plat and subdivide said real estate in accordance with the plat herein.
>
> This subdivision shall be known and designated as Lincoln Plaza West, an addition to Cedar Lake, Indiana. All streets, alleys and easements shown and not heretofore dedicated, are hereby dedicated, to the [Town].

Id. (emphasis added). The Instrument also contained the Town Plan Commission's approval:

> Under the authority provided by [Indiana statutes pertaining to subdivisions] and an ordinance adopted by the Town Council . . ., this plat was given approval by the [Town] as follows:
> Approved by Town Plan Commission at a meeting held 4 – 18 – 2001

Id.

On April 18, 2001, the Plan Commission also sent to the Town Council its "Favorable Recommendation," signed by the Plan Commission's president. Id. at 33. The Recommendation identified Kenneth McAllister ("McAllister") as petitioning for a,

> Rezone being sought from Zoning Ordinance No. 496, Title XI Planned Unit Development (P.U.D.) with Neighborhood Business (B-1) Zoning District Use; property is currently zoned Neighborhood Business (B-1).

Id. Under the Plan Commission's Recommendation, McAllister had 180 days from the receipt of a sewer construction permit to record "the approved final development plan." Id. The minutes of the public meeting referred to the Plan Commission's action as "a favorable recommendation for rezone, along with approval for the final development plan." Id. at 36.

The Town Council "accept[ed] the Plan Commission's recommendation and approve[d] Ordinance No. 792" on May 8, 2001. Id. at 120. Town Ordinance Number 792 changed the zoning classification of the property. However, by its plain terms, Ordinance 792 would not be effective until "compliance with all conditions of approval by the Owner and Petitioner." Id. at 122. While Ordinance 792 was drafted to partially amend Ordinance 496, the latter would retain the following provision:

> [The Plan Commission's approval for each phase of the development] shall be valid for a period of eighteen (18) months, at which time, unless the proposed development for that phase has received a building permit, and construction has begun, or the approval extended, the Development Plan approval shall expire.

Ordinance No. 496, Title XI – PUD Zoning District, Section 3(2); App. at 28, 47, 91.

There followed little activity. The Lake County auditor placed the following stamp on the Instrument:

DULY ENTERED FOR TAXATION SUBJECT TO

FINAL ACCEPTANCE FOR TRANSFER

JUN 03 2002

PETER BENJAMIN
LAKE COUNTY AUDITOR

App. at 37.[1] The Instrument was recorded that day in Lake County Book 91, Page 94.

Eighteen months from the Plan Commission's April 18, 2001 approval constituted October 18, 2002. In October 2004, McAllister filed with the Town a "Preliminary Subdivision Plat Approval Application." Id. at 124. He identified the property within the context of the Instrument, stating that he was applying to have Lot 1 of Lincoln Plaza West subdivided into two lots.

In August 2006 – more than five years after the Plan Commission favorably recommended the development plan – the McAllisters sold the property to the Landowner. The transaction involved two documents, a warranty deed from the McAllister Living Trust and a quitclaim deed regarding the life estates of Kenneth and Helen McAllister. Each deed referred to the Instrument in defining the property sold:

> Parcel 1: Lots 2 to 8, both inclusive in Lincoln Plaza West, an Addition to Cedar Lake, as per plat thereof, recorded in Plat Book 91 page 94, in the Office of the Recorder of Lake County, Indiana.
>
> Parcel 2: Lot 1B in One Lincoln Plaza, a Replat of Lot 1, Lincoln Plaza West, a Planned Unit Development to Cedar Lake, as per plat thereof, recorded in Plat Book 96 page 84, in the Office of the Recorder of Lake County, Indiana.
>
> Subject to any and all easements, agreements and restrictions of record.

Id. at 222, 226. The deeds were recorded on September 1, 2006.

[1] The county auditor maintains a tax-identification number for real estate in the county for purposes of administering the property tax. Ind. Code § 36-2-9-18. A recorder may record a deed of partition, a conveyance of land, or an affidavit of real estate transfer only if it has been endorsed by the county auditor as "not taxable," "duly entered for taxation," or "duly entered for taxation subject to final acceptance for transfer." Ind. Code § 36-2-11-14(a).

In August 2007, the Town began performing work within the contested easement. The Landowner's attorney wrote the Town and identified their disagreement regarding the status of the easement. He made plain that the Landowner would consider any unauthorized use of the disputed area as trespass.

The Landowner filed a complaint, alleging that: (1) the recorded development plan was not a plat; (2) it expired by application of the Town's zoning ordinance; (3) it was "improperly submitted and accepted for recording"; and (4) the Town was refusing to leave the property. Id. at 29. It sought a declaration of its entitlement to the disputed easement, as well as damages for inverse condemnation and treble damages for criminal trespass. The Town acknowledged, in its answer, that it refused to leave the property.

Each party moved for summary judgment. The trial court initially granted the Town's motion. However, in response to the Landowner's motion to correct error, the trial court commented that it had,

> failed to consider the conditional nature of the Plan as a whole. . . . Indeed, it is undisputed that the Plan was expired after the McCallisters failed to receive an approved sewer construction permit.

Id. at 10. Concluding that the Town lacked a valid easement, the trial court granted the Landowner's motion to correct error.

The Town then moved to correct error, while the Landowner moved for proceedings to determine damages. Their motions were denied; the trial court entered final judgment for the Landowner.

The Town now appeals the trial court's entry of summary judgment in favor of the

Landowner.

Discussion and Decision

I. Standard of Review

The trial court shall grant summary judgment "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." Ind. Trial Rule 56(C). In reviewing the entry of summary judgment, we apply the same standard as the trial court. Filip v. Block, 879 N.E.2d 1076, 1080 (Ind. 2008), reh'g denied. We construe all facts and reasonable inferences in favor of the nonmoving party. Id.

> [T]his does not mean that a respondent may "rest upon the mere allegations" of her pleadings once the movant designates evidence to support a prima facie showing that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law. Rather, only those facts alleged by the respondent/nonmovant and supported by affidavit or other evidence "must be taken as true."

McDonald v. Lattire, 844 N.E.2d 206, 212 (Ind. Ct. App. 2006) (citations omitted).

We review de novo summary judgment rulings and other "paper records." Trinity Homes, LLC v. Fang, 848 N.E.2d 1065, 1068 (Ind. 2006). We may affirm a grant of summary judgment upon any theory supported by the evidence. Keaton & Keaton v. Keaton, 842 N.E.2d 816, 821 (Ind. 2006).

The interpretation of a statute is a question of law, to be reviewed de novo. Porter Dev., LLC v. First Nat'l Bank of Valparaiso, 866 N.E.2d 775, 778 (Ind. 2007). Our goal is to give effect to the General Assembly's intent. Id.

> Our primary resource for this determination is the language used by the legislature, and thus our interpretation begins with an examination of the statute's language. We presume that the words of an enactment were selected and employed to express their common and ordinary meanings. Where the statute is unambiguous, the Court will read each word and phrase in this plain, ordinary, and usual sense, without having to resort to rules of construction to decipher meanings.

Id. (citations omitted).

II. Analysis

The Town argues that the trial court erred in entering summary judgment in favor of the Landowner. Specifically, the Town asserts that the events of 2001 and 2002 established a subdivision, with an easement belonging to the Town. In the alternative, the Town argues that the easement was a common law dedication. Finally, the Town claims that the Landowner was estopped from denying the existence of the easement because the Town reasonably relied upon the acknowledgement of the Instrument, including the easement, in the 2006 deeds from the McAllisters to the Landowner.

The Landowner argues that: (1) the Town approved the McAllisters' petition for the creation of a PUD district; (2) the Town's approval was conditioned upon the prior owner's receiving a building permit and beginning construction within eighteen months; (3) the Town's conditional approval expired when neither event occurred within eighteen months; and (4) the Town therefore gained no property rights whatsoever.

A. PUD or Subdivision?

In a practical sense, a PUD is "a device used to permit amendment of an existing zoning ordinance for a designated property." Story Bed & Breakfast, LLP v. Brown County

Area Plan Comm'n, 819 N.E.2d 55, 60 (Ind. 2004).

> "Planned unit development" means development of real property:
> (1) in the manner set forth by the legislative body in the zoning ordinance; and
> (2) that meets the requirements of the 1500 series of IC 36-7-4.

Ind. Code § 36-7-1-15.

> "Subdivision" means the division of a parcel of land into lots, parcels, tracts, units, or interests in the manner defined and prescribed by a subdivision control ordinance adopted by the legislative body under Ind. Code Chapter 36-7-4 [Local Planning and Zoning].

Ind. Code § 36-7-1-19.

Zoning decisions are made by the legislative body,[2] whereas the plan commission has the authority to approve or disapprove proposed subdivision plats. Ind. Code §§ 36-7-3-3(d)(1) and -4-601.[3] "The legislative body shall, in the zoning ordinance adopted under the 600 series of this chapter, determine the zoning districts in which subdivision of land may occur." Ind. Code § 36-7-4-701(a). A PUD district ordinance is a type of zoning ordinance and is controlled by the legislative body. Ind. Code §§ 36-7-4-1503, -1505, and -1507. However, it is the plan commission that may give the primary approval of a subdivision plat, as well as the secondary approval, if the proposed improvements were completed or if a bond was issued. Ind. Code §§ 36-7-4-702 and -709. "As to plats involving land covered by a subdivision control ordinance, the exclusive control over the approval of plats is assigned by statute to plan commissions." Lake County Trust Co. v. Advisory Plan Comm'n of Lake

[2] The legislative body of a town is the town council. Ind. Code § 36-1-2-9(5).

[3] Indiana Code Sections 36-7-3-3 to -16 apply to a town plan commission. Ind. Code §§ 36-7-3-1; 36-7-1-2 (defining "advisory plan commission") and -12 (defining "municipal plan commission").

County, 904 N.E.2d 1274, 1279 (Ind. 2009). These authorities make clear that the plan commission may consider the creation of a particular subdivision, yet zoning decisions, and specifically PUD ordinances, must be made by a town council.

Given this distinction, we note that there is no dispute that the Town Council accepted the Plan Commission's recommendation and approved Ordinance No. 792. The simple fact that this matter reached the Town Council clearly supports the conclusion that the development plan was a PUD, rather than a subdivision, as the Town Council would not have considered a request for a particular subdivision.

The following documents referred to the matter within the context of zoning and/or a PUD:

> March 1999 Plan Commission minutes regarding a PUD concept;
>
> McAllisters' 1999 "Rezone Application";
>
> Town's public hearing notice regarding the request for a "Rezone Change to [PUD]";
>
> April 1999 Plan Commission minutes regarding preliminary approval of a PUD rezone;
>
> March 21, 2001 and April 18, 2001 Plan Commission minutes regarding "Rezone [to PUD] and Final Development Plan."

App. at 101-03, 107, 109-15, 119. The Town's checklist for the meeting dates required for the project referred to it as a "Rezone" and noted that the "Plat of Survey" was required. Id. at 106.

In response to the Landowner's request for admissions, the Town admitted that the development plan was considered as the zoning of a PUD district, but denied that the matter

was not considered as the platting of a subdivision. Thus, the Town appears to argue that its action was equally and simultaneously a zoning and the consideration of a subdivision plat. However, the General Assembly enacted separate statutes with distinct procedures regarding subdivisions and PUDs – the 700 series and the 1500 series of Indiana Code Chapter 36-7-4. "A zoning ordinance that meets the requirements of [the 1500] series is the exclusive means for exercising zoning control over planned unit development." Ind. Code § 36-7-4-1504(c).

Moreover, Indiana Code Section 36-7-4-1513 provides that the "procedure for platting a parcel of real property that is zoned as a planned unit development district under [the 1500] series is the same as the procedure described in the 700 series of this chapter for other platting." In essence, a person plats a subdivision within a PUD district the same way one plats a subdivision outside a PUD district. If, as the Town appears to contend, the zoning of a PUD district also constitutes the platting of a subdivision, then this statute would be nonsensical.

Based upon the applicable statutes, the Town's written descriptions of the matter, and the fact that the Town Council, rather than the Plan Commission, considered the matter, we conclude that the development plan was a PUD.[4]

[4] Even if we were to conclude the opposite – that the development plan was the platting of a subdivision – the designated evidence most favorable to the Town would still support summary judgment for the Landowner. In its discovery responses, the Town admitted that its subdivision control ordinance "prohibit[ed] the submission of a final plat for plan commission approval until all public improvements are installed or a maintenance bond or performance bond has been issued." App. at 79. In its next response, the Town denied that the public improvements had not been installed and that no bond had been issued. However, the Town failed to designate any evidence as to the installation of improvements or the issuance of a bond.

In contrast, the Landowner designated evidence that the improvements had not been installed and that no bond had been issued. These included a letter from the Town's manager to McAllister, the affidavit of McAllister, and the affidavit of the Landowner's manager.

B. Status of PUD

The Town Council signed Ordinance 792, which amended Ordinance 496 by changing the zoning status of the land owned by the McAllisters. Section Three of Ordinance 792 provided, "this Ordinance shall take effect, and be in full force and effect, from and after its passage by the Town Council of the Town of Cedar Lake, and compliance with all conditions of approval by the Owner and Petitioner." App. at 122. In certifying its favorable recommendation to the Town Council, the Plan Commission "allow[ed] the owner one-hundred, eighty (180) days after receipt of an approved sewer construction permit to duly record at the Office of the Recorder of Lake County, Indiana, the approved final development plan." Id. at 33. There was no designated evidence that the McAllisters received a sewer construction permit. To the contrary, the Landowner's manager stated in an affidavit that the Landowner did not receive a sewer construction permit for the property.

Furthermore, Ordinance 496 provided that the Plan Commission's approval could expire after eighteen months:

> [The Plan Commission's approval for each phase of the development] shall be valid for a period of eighteen (18) months, at which time, unless the proposed development for that phase has received a building permit, and construction has begun, or the approval extended, the Development Plan approval shall expire.

Ordinance No. 496; App. at 28, 47, 91. The Landowner designated a 2004 letter from the town manager to Ken McAllister, in which the town manager stated, "[a]t this time, there has not been any construction activity on the above-referenced site except some drainage work." App. at 86. McAllister stated in an affidavit that the McAllisters did not apply for a building

permit in the relevant time period,[5] did not request an extension of time for approval of the development plan, no bond was issued, and the public improvements were not completed. For its part, the Town indicated in a discovery response that it was "unknown" whether it had issued a building permit for the development plan. Id. at 78. Therefore, even viewing the designated evidence in the light most favorable to the Town, the Plan Commission's approval, issued on April 18, 2001, expired eighteen months later, on October 18, 2002, by operation of Ordinance 496.

C. Other Arguments Presented by the Town

As to the Town's argument regarding common law dedication, we note that common law dedication requires an intent of the landowners to dedicate and an acceptance of the dedication by the public. Kopetsky v. Crews, 838 N.E.2d 1118, 1124 (Ind. Ct. App. 2005). The owner's intent to dedicate must be clear, convincing, and unequivocal. Jackson v. Bd. of Comm'rs. of Monroe County, 916 N.E.2d 696, 704 (Ind. Ct. App. 2009); and Town of Poseyville v. Gatewood, 65 Ind. App. 50, 114 N.E. 483, 484 (1916).

On the face of the Instrument, Christopher and Kenneth McAllister dedicated easements to the Town. However, because the dedication was part of a development plan for a PUD, the dedication was not unequivocal. To the contrary, the dedication appears to have been conditioned upon completion of the process for establishing a PUD. Town Ordinances 496 and 792 each stated clearly that additional steps were required for the establishment of the PUD. Thus, the PUD Instrument was not a common law dedication.

[5] See above discussion regarding the McAllisters' 2004 application to subdivide Lot 1.

Regarding the Town's estoppel argument, it cannot claim that it reasonably relied upon the Instrument, McCallisters' 2004 application to subdivide Lot 1, or the 2006 deeds because the Town was on notice of its own ordinances and the procedure by which a PUD is established. Among the elements of promissory estoppel is that "the complaining party had no knowledge or convenient means of ascertaining the true facts which would have prompted it to react otherwise." Hall v. Gainer Bank, 670 N.E.2d 891, 896 (Ind. Ct. App. 1996) (quoting Hall v. Cropmate, 887 F.Supp. 1193, 1198 (S.D. Ind. 1995)), trans. denied; see also Burns v. Hatchett, 786 N.E.2d 1178, 1184 n.6 (Ind. Ct. App. 2003), trans. denied.

Finally, the Town argues that "[w]hen a sale of a lot is made as designated on the plat, it operates as a dedication of all the streets and alleys marked on such plat." Wischmeyer v. Finch, 231 Ind. 282, 107 N.E.2d 661, 663 (1952). However, "[t]he general rule is that so long as the owner of land on which building restrictions have been established continues to own the entire tract, he may modify the restrictions in any manner he sees fit." Id. Here, the McAllisters sold Lots 2 through 8 and a portion of Lot 1 to the Landowner. As evidenced in the 2006 deeds, Lot 1 had been subdivided by a different document, not the Instrument at issue in this case. Accordingly, the rule recognized in Wischmeyer is not applicable to the Instrument.

Viewing the designated evidence in the light most favorable to the Town, the trial court did not err in entering summary judgment in favor of the Landowner.

Affirmed.

VAIDIK, J., and BRADFORD, J., concur.