MEMORANDUM DECISION

ATTORNEY FOR APPELLANTS

David B. Schilling
Lee F. Baker
Monroe County Legal Department
Bloomington, Indiana

ATTORNEYS FOR APPELLEE

William J. Beggs
Ryan M. Heeb
Bunger & Robertson
Bloomington, Indiana

IN THE
COURT OF APPEALS OF INDIANA

Monroe County, Indiana, and Monroe County Plan Commission,

Appellant-Plaintiffs,

v.

Boathouse Apartments, LLC,

Appellee-Defendant.

September 15, 2021

Court of Appeals Case No. 21A-PL-55

Appeal from the Monroe Circuit Court

The Honorable Elizabeth A. Cure, Judge

Trial Court Cause No. 53C01-1702-PL-257

Mathias, Judge.

[1] Monroe County and the Monroe County Plan Commission (collectively, the "County") appeal the Monroe Circuit Court's award of summary judgment in

favor of Boathouse Apartments, LLC (the "Developer"), as well as the court's denial of the County's cross motion for summary judgment.

[2] We reverse and remand.

Facts and Procedural History

[3] The undisputed facts show that the Developer owns three lots in the Lakes Neighborhood Planned Unit Development in Bloomington, Indiana (the "Property"). In 2016, after the County issued the Developer an improvement location permit, the Developer began constructing townhome apartments on the Property. The improvement location permit detailed that the townhomes "must be installed correctly before a Land Use certificate will be issued," that a "Land Use Certificate must be obtained from the Planning Department before a Certificate of Occupancy can be issued by the Building Department," and that "[b]oth must be issued before the property can be occupied." Appellant's App. Vol. III, pp. 44, 54.

[4] On August 3, 2016, after several months of construction, the County's building inspector inspected the townhomes to determine whether the construction complied with the use and occupancy requirements noted in the improvement location permit and set forth in County ordinances (the "Monroe County

Code").[1] Upon completing this inspection, the building inspector provided inspection reports listing several construction deficiencies for the Developer to correct or complete. Appellant's App. Vol. II, pp. 105–16. The County informed the Developer that it would not grant final inspection approval until the deficiencies were corrected, and the County reminded the Developer that "a final inspection approval [is] required prior to occupancy of the apartments." Appellant's App., Vol. III, p. 81.

[5] On August 6, just three days later, residential tenants began occupying several of the townhomes. The Developer had not yet obtained a final inspection approval, a land use certificate, or a certificate of occupancy. *Id.* at 53, 55, 68–70. The County did not learn that tenants occupied the townhomes until mid-September, when the County inspected the townhomes for a second time. *Id*. at 71. During that inspection on September 14 and 15, an employee from the County's planning department observed that curtains had been hung in several of the townhomes' windows, that patio furniture had been placed in the yards, and that people entered and exited the townhomes. *Id*.

[6] On September 19, the planning department employee communicated her findings to the assistant planning director, who in turn apprised the county attorney. Upon receiving this information, the county attorney assured the

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[1] We take judicial notice of the ordinances and resolutions in the Monroe County Code. *See* Ind. Evidence Rule 201 ("The court may judicially notice . . . the existence of . . . ordinances of municipalities.").

planning department that he would "look into preparing an action against the developer." Appellant's App. Vol. II, p. 78.

[7] The next day, the County completed a third inspection; this time, for the specific purpose of identifying Monroe County Code violations. The County's building inspector noted that "a number of the apartments were being occupied." Appellant's App. Vol. III, p. 81. Final inspection approval was not granted at that time because "several features required by the Monroe County Building Code still had not been installed or completed." *Id.* The building inspector issued updated inspection reports noting the still-uncompleted construction tasks and identifying more than one dozen occupied townhomes. Appellant's App. Vol. II, pp. 111–16. The updated inspection reports also stated that "Planning Department approval was required." Appellant's App. Vol. III, p. 81.

[8] By September 26, the townhomes still "did not satisfy the Zoning Ordinance requirements for the issuance of Land Use Certificates." *Id.* at 72. The planning department employee emailed the Developer a list of unresolved construction deficiencies, emphasizing again that the specified tasks "must be completed in order to receive a conditional Land Use Certificate," which "is required prior to the [certificate of occupancy] for the townhomes." Appellant's App. Vol. II, pp. 117–121, 124, 126.

[9] Communication between the Developer and the County continued for several weeks. Indeed, on September 30, the Developer met with members of the

County's planning department to discuss the lingering construction deficiencies. *Id*. at 102. On November 22, the County sent the Developer an updated list of outstanding tasks and again reiterated that "[c]omplete installation of all improvements is required before a Land Use Certificate (LUC) can be issued." *Id.* at 121. The County also reemphasized that the issuance of a land use certificate "is required before the property will be considered compliant with Monroe County Zoning Ordinance." *Id*.

[10] Tenants continued occupying the townhomes while the County and the Developer continued to communicate. But the townhomes still had not been approved for occupancy. So, on February 2, 2017, the County filed a two-count complaint against the Developer. *Id.* at 125.

[11] The County's complaint sought a monetary penalty against the Developer and alleged that the Developer violated two parts of the Monroe County Code: the building provisions (the "Building Code") and the zoning provisions (the "Zoning Ordinance"). Appellant's App. Vol. III, p. 36. In its answer to the County's complaint, the Developer twice admitted that "some Units were occupied in August, 2016."[2] *Id.* at 53, 55.

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[2] At this point, the Developer filed a Trial Rule 12(B)(1) motion to dismiss the County's complaint, which the trial court granted. The County then appealed, and a panel of this court reversed, concluding that dismissal of the County's complaint was error. *See Monroe Cnty. v. Boathouse Apartments, LLC*, 150 N.E.3d 1045 (Ind. Ct. App. 2020).

[12] Several months later, the Developer moved for summary judgment. The County responded with a cross motion for summary judgment. Both parties designated evidentiary materials in support of their motions. The designated evidence included a written list—which the Developer had prepared and sent to the County—specifying townhomes that were occupied between August 6, 2016, and March 2, 2017. *Id.* at 68–70.

[13] The trial court held a hearing on the parties' summary judgment motions and, on January 16, 2021, granted summary judgment to the Developer and denied the County's cross motion for summary judgment. Appellant's App. Vol. II, pp. 17–18. In its summary judgment order, the trial court described the County's claims as "not credible" and "not believable," and concluded that the County's behavior "belies any assertion that they thought they were behaving properly from the beginning of this case." *Id*.

[14] The County now appeals.

Standard of Review

[15] We review a summary judgment order using the same standard applied by the trial court. *Alexander v. Linkmeyer Dev. II, LLC*, 119 N.E.3d 603, 612 (Ind. Ct. App. 2019). Summary judgment is appropriate only when "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). When a challenge to summary judgment raises questions of law, we review them de novo. *City of Lawrence Utils. Serv. Bd. v. Curry*, 68 N.E.3d

581, 585 (Ind. 2017). We owe no deference to a trial court's legal conclusions. *HDNet LLC v. N. Am. Boxing Council*, 972 N.E.2d 920, 922 (Ind. Ct. App. 2012).

[16] The moving party bears the initial burden of showing that the material facts—the facts affecting the outcome of the case—are undisputed. *See Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014). If this burden is met, the nonmoving party must come forward with contrary evidence establishing that there is a genuine issue of material fact. *Converse v. Elkhart Gen. Hosp., Inc.*, 120 N.E.3d 621, 625 (Ind. Ct. App. 2019). If the nonmoving party fails to do so, and if the moving party is entitled to judgment as a matter of law, summary judgment should be granted. *Id.* As our supreme court has pointed out, however, summary judgment is a blunt instrument by which the non-prevailing party is prevented from having its day in court. *Hughley*, 15 N.E.3d at 1003. Accordingly, we err on the side of letting marginal cases proceed to trial on the merits to avoid the risk of short-circuiting meritorious claims. *Id.* at 1004.

[17] Here, the County responded to the Developer's motion for summary judgment with its own cross motion for summary judgment. Cross motions for summary judgment do not affect our standard of review. *Alexander*, at 612. We simply review each motion independently and construe the facts in favor of the nonmoving party in each instance. *Id.*

[18] We review each party's summary judgment claims in turn.

Developer's Motion for Summary Judgment

[19] As the party moving for summary judgment, the Developer attempted to satisfy its burden by asserting that, regardless of whether it violated the ordinances, the County improperly filed its complaint without first following prerequisite procedures required by the ordinances. Specifically, the Developer argues that "there is no genuine issue of material fact Monroe County filed suit without complying with the applicable ordinances," Appellee's Br. at 20, and that, as a matter of law, the County "exceeded its authority, rendering this action invalid and void," *id*. at 16. We do not agree.

[20] To determine whether the County exceeded the scope of its authority under the Building Code and Zoning Code, we turn first to the Home Rule Act, which implements our state's policy of granting municipalities "all the powers that they need for the effective operation of government as to local affairs." Ind. Code § 36-1-3-2; *City of Charlestown v. Charlestown Pleasant Ridge Neighborhood Ass'n Corp.*, 111 N.E.3d 199, 206–07 (Ind. Ct. App. 2018). A municipality has "all powers granted it by statute," I.C. § 36-1-3-4(1), and the General Assembly has statutorily authorized municipalities to both create and enforce ordinances, I.C. § 36-1-4-11 ("A unit may adopt, codify, and enforce ordinances.").

[21] Various statutes prescribe the ways municipalities must go about enforcing ordinances. In the earlier appeal from this action, a panel of this court outlined three such statutes—Indiana Code section 36-1-6-4, section 36-7-4-1013, and section 36-7-4-1014:

> Indiana Code section 36-1-6-4(a), provides, in relevant part, that a municipal corporation "may bring a civil action" if a person or entity "violates an ordinance regulating or prohibiting a condition or use of property." Further, Indiana Code sections 36-7-4-1013 and 36-7-4-1014 detail remedies for enforcement and allowable actions for violations of ordinances. Specifically, Indiana Code section 36-7-4-1013(a) provides that if, after conducting an investigation into an alleged violation of an ordinance, a municipal attorney or an attorney representing the county comes to the reasonable belief that an entity has violated an ordinance, "the municipal attorney or an attorney representing the county may file a complaint against the person and prosecute the alleged violation under IC 36-1-6." Indiana Code section 36-7-4-1014 provides . . . "[t]he plan commission, board of zoning appeals, or any enforcement official designated in the zoning ordinance may bring an action under IC 36-1-6 to enforce an ordinance adopted or action taken under this chapter."

Boathouse Apartments, 150 N.E.3d at 1049. Notably, nothing in the plain language of the above-quoted statutes requires municipalities to take prerequisite steps before initiating an ordinance enforcement action. *Id.*

[22] Moreover, these statutes do not prohibit a municipality from adopting its own prerequisites. Indeed, in addition to the powers granted it by statute, a municipality has "all other powers necessary or desirable in the conduct of its affairs." I.C. § 36-1-3-4(2). A municipality "may exercise any power it has" so long as the power "is not expressly denied by the Indiana Constitution or by statute." I.C. § 36-1-3-5.

[23] Here, the Developer contends that the County's ordinances set forth non-statutory prerequisites and that the County failed to observe those prerequisites before initiating its enforcement action. The trial court not only agreed with the Developer, the court also expressed incredulity as to "why the County chose to act in violation of the clear mandates of the Monroe County Code §817-3." Appellant's App. Vol. II, p. 18.

[24] The Developer is incorrect, and the trial court's incredulity is misplaced, for two reasons. First, the County's complaint alleged that the Developer violated both the Zoning Ordinance and the Building Code, but the trial court based its summary judgment decision solely on the provisions of the Zoning Ordinance.[3] In fact, the trial court's summary judgment order is devoid of any reference to the provisions of the Building Code. Secondly, despite describing the provisions of the Zoning Ordinance as "clear," the trial court applied those provisions in a manner that is not supported by their plain language.

[25] Beginning our analysis with the provisions of the Building Code, we address each of these errors in turn.

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[3] The court appears to have disregarded the Building Code in spite of the county attorney's reminder at the summary judgment hearing that "this action consists of two (2) counts." Tr. p. 36. And after explaining that count one is based on Building Code section 430 and that count two is based on Zoning Ordinance section 814, the county attorney repeated that "there are two (2) counts here and not every provision that [the Developer] has talked about applies to each count." *Id*.

a. The Building Code contains no prerequisites.

[26] The County alleged in its complaint that the Developer "allowed fourteen of the [townhomes] to be occupied for residential purposes without first having complied with the Building Code." *Id.* at 90. The County further alleged that, as a result, the Developer "was, and is, in violation of at least Sections 430-16, 430-18, and 430-20 of the Building Code." *Id.*

[27] In relevant part, Building Code section 430-16 provides:

> No certificate of occupancy for any building or structure erected, altered or repaired, after the effective date of this Chapter shall be issued: 1. unless such building or structure is determined, after final inspection, to have been erected, altered or repaired in compliance with the provisions of this Chapter; and 2. unless a valid Land Use Certificate, or waiver, has been issued for the proposed use and occupancy of building or structure by the Monroe County Plan Commission Administrator . . . . It shall be unlawful to occupy any such building or structure prior to the issuance of a full, partial or temporary certificate of occupancy issued by the Building Commissioner.

This provision of the Building Code unambiguously contains no prerequisites to filing suit.

[28] The same is true of section 430-18:

> It shall be unlawful for any person, firm or corporation . . . to erect, construct, enlarge, alter, repair, improve, remove, convert, demolish, equip, use, occupy or maintain any building or structure . . . contrary to, or in violation of the provisions of this Chapter. The Building Department shall, on receipt of information of the violation of this Chapter, make an

> investigation of the alleged violation. If acts elicited by the investigation are sufficient to establish a reasonable belief that a violation has occurred, the County Attorney may prosecute the alleged violation under IC 36-1-6.

[29] Section 430-20 does not impose prerequisites, either.

> The Building Commissioner shall, in the name of Monroe County, Indiana, bring actions in the Circuit Court of Monroe County, Indiana, for mandatory and injunctive relief in the enforcement of, and to secure compliance with, any order or orders of the Building Commissioner. Any such action for mandatory or injunctive relief may be joined with an action to recover the penalties provided for in this Chapter.

[30] These provisions of the Building Code do not require that the County take prerequisite steps before initiating an action to enforce the provisions of the Building Code. As a result, the County did not fail to comply with the applicable provisions of the Building Code, as the Developer maintains. And, for these reasons, the Developer's claim that the County failed to comply with the provisions of the Building Code fails as a matter of law. The trial court erred in granting summary judgment to the Developer on these grounds—or, more specifically, the court erred in granting summary judgment in disregard of the Building Code's provisions.

[31] We turn next to the Developer's claim as to section 817-3.

b. The County complied with the prerequisites contained in the Zoning Ordinance.

[32] The Developer argues there is no genuine issue of material fact that the County initiated its enforcement action without first complying with Zoning Ordinance section 817-3. Specifically, the Developer asserts that the County failed to comply with Zoning Ordinance sections 817-3(B) and (C), which require that the County provide "written notice of a zoning ordinance violation . . . indicating the nature of the violation [and] stating the action necessary to correct the violation" and stating "what action the administrator intends to take" before initiating an enforcement action. Appellee's Br. at 35. The Developer further asserts that the County proceeded in contravention of section 817-3(D) because the County failed to obtain approval from the board of zoning appeals ("BZA") before filing suit. *Id*.

[33] The trial court agreed with the Developer and expressed disbelief as to "why the County chose to act in violation of the clear mandates" of section 817-3. Appellant's App. Vol. II, p. 18. But, as mentioned above, the trial court's misplaced disbelief likely resulted from its imprecise reading of the provision's plain language.

[34] In full, section 817-3 provides:

> (A) It shall be the duty of the Administrator to enforce the provisions of this ordinance in the manner and form and with the powers provided by this ordinance.

(B) If the Administrator finds that any provision of this ordinance is being, or has been, violated, he shall send a written notice to the person responsible for such violation, indicating the nature of the violation and ordering the action necessary to correct it. Additional written notices may be sent at the administrator's discretion.

(C) The final written notice (and the initial written notice may be the final notice) shall state what action the administrator intends to take if the violation is not corrected.

(D) If the violation is not corrected, the Administrator shall seek Board authority to pursue the remedies authorized by this ordinance.

(E) The above notwithstanding, in cases where delay would seriously threaten the effective enforcement of the ordinance or pose danger to the public health, safety or welfare, the administrator may seek enforcement without prior written notice or Board authority by invoking any of the remedies authorized by this ordinance.

[35] In response to the Developer's claim that the County violated sections 817(B), (C), and (D), the County maintains that section 817-3(E) authorizes it to seek enforcement without prior written notice or BZA authorization. Appellant's Br. at 29–30. Although the parties disagree both as to whether the manner in which the County sought enforcement comports with these provisions and as to which of these provisions apply, the facts demonstrating the County's course of conduct are undisputed.

[36] The County informed the Developer before construction began that the townhomes must pass final inspection approval before a land use certificate will

be issued, that a land use certificate must be obtained before a certificate of occupancy can be issued, and that both must be issued before the townhomes can be occupied. Appellant's App. Vol. III, pp. 44, 54. The County then inspected the townhomes on three separate occasions, each time notifying the Developer that specified construction deficiencies prevented the County from issuing final inspection approval. The County communicated this to the Developer several times; first, in August 2016, then in mid-September, and once again in November. Nonetheless, despite having not received a final inspection approval, a land use certificate, or a certificate of occupancy, the Developer permitted residential tenants to occupy at least one dozen townhomes as early as August 6, 2016. And the Developer concedes that between August 2016 and March 2017, it permitted tenants to occupy several additional townhomes.

[37] In short, the Developer admits both that construction deficiencies persisted and that it nonetheless permitted tenants to occupy the townhomes before obtaining approval to do so. Additionally, the Developer acknowledges that it remained in communication with the County and that it met with members of the County's planning department to discuss the outstanding construction deficiencies preventing it from obtaining the required approvals. When the County observed in mid-September 2016 that the townhomes may be occupied, it promptly investigated to determine whether and to what extent that observation held true. The County communicated its findings to the Developer. Then, over a handful of weeks—several of which coincided with major holidays—the County drafted a complaint against the County.

[38] Given the absence of any genuine dispute over these material facts, the issue of whether the County complied with Zoning Ordinance 817-3 before filing suit turns on a question of law. The trial court concluded that although section 817-3(E) "allows the County to seek enforcement without any prior written notice, 'where delay would seriously threaten the effective enforcement of the ordinance or pose a danger to the public health, safety or welfare,' . . . the six months that elapsed between the first alleged violations and the filing of the suit belies any claim of emergency or danger." Appellant's App. Vol. II, p. 18. Yet, contrary to the court's conclusion, nothing in the plain language of section 817-3(E) requires that an "emergency" exist before the County is entitled to forego the requirements of sections 817-3(B), (C), and (D). Indeed, the word "emergency" does not appear anywhere in section 817-3, and the trial court erred in drawing its conclusion based on the perceived requirement that the County assert a "claim of emergency." *Id*.

[39] The court also erroneously centered its conclusion on the County's "claim of . . . danger," which the court concluded was "not credible." *Id.* While "danger to the public health, safety or welfare" is set forth in section 817-3(E) as one of the grounds permitting the County to forego the required prerequisites, it is not the only ground. Section 817-3(E) also provides that the County may proceed in lieu of the requirements required under sections 817(B), (C), and (D) "where delay would seriously threaten the effective enforcement of the ordinance."

[40] Here, the Developer met with the County to discuss the construction deficiencies preventing it from obtaining approval, and the Developer was told several times that approval was required prior to occupancy. Nonetheless, despite receiving several reminders it had not yet received a final inspection approval, a land use certificate, or a certificate of occupancy, the Developer permitted tenants to occupy the townhomes from August 6 onward.

[41] What we find incredible is the Developer's suggestion that it never received notification that it was violating the ordinances. It received several such notifications and remained in communication with the County for several months about what it must do to come into compliance. The County gave the Developer ample opportunity to do so, and the Developer's insistence on permitting continued occupancy without first resolving the specified construction deficiencies and obtaining the necessary approvals rendered the County's attempt to enforce the Zoning Ordinance in lieu of litigation ineffective.

[42] For all of these reasons, we conclude as a matter of law that the County properly proceeded under Zoning Ordinance section 817-3(E). The trial court's grant of summary judgment to the Developer on its claims under the Zoning Ordinance was error.

[43] We turn next to the County's cross motion for summary judgment.

County's Motion for Summary Judgment

[44] As a result of the trial court's conclusion that the County initiated its enforcement action improperly, the court did not consider the County's cross motion for summary judgment. The County argued in its motion that the Developer violated both the Building Code and the Zoning Code. Because we conclude that the County properly initiated its enforcement action, we address the County's cross motion for summary judgment here.

[45] We repeat for emphasis that the County's complaint alleged the Developer violated two separate ordinances: Building Code section 430-16 and Zoning Ordinance section 814-2. And, as with the Developer's motion for summary judgment, the material facts are undisputed, rendering the County's claim a question of law.

[46] Building Code Section 430-16, which we have quoted above, provides that "[i]t shall be unlawful to occupy any such building or structure prior to the issuance of a full, partial or temporary certificate of occupancy." Zoning Ordinance section 814-2(A) sets forth that "no building or other structure . . . shall be occupied or used, in whole or in part, for any purpose whatsoever, until a land use certificate has been issued stating that the structure and/or use comply with all the provisions of this ordinance."

[47] In its answer to the County's complaint, the Developer admitted that "some Units were occupied in August 2016." Appellant's App. Vol. III, p. 53, 55. Moreover, the Developer provided the County a list specifying townhomes that

were occupied between August 2016 and March 2017, and the Developer admits that it did not receive a land use certificate or certificate of occupancy until March 2, 2017, at the earliest.[4]

[48] In light of the Developer's own admissions, it cannot be disputed that in permitting occupancy of the Townhomes from August 6, 2016, onward, the Developer violated both Building Code section 430-16 and Zoning Ordinance section 814-2. Thus, we conclude that the trial court erred in denying the County's cross motion for summary judgment.

Conclusion

[49] The trial court erred in granting summary judgment to the Developer and in denying the County's cross motion for summary judgment. Accordingly, we reverse and remand for proceedings consistent with this opinion.

Riley, J., and Crone, J., concur.

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[4] While the Developer maintains that it received a Land Use Certificate and Certificate of Occupancy on March 2, 2017, other evidence in the record suggests that it did not receive these approvals until November 8, 2017. *See* Appellant's App. Vol. III, pp. 71, 77, 78. Under Building Code section 430-21, each day a violation of the Building Code is committed or permitted to continue constitutes a separate Class C Ordinance Violation. Additionally, Monroe County Code section 115-3(A)(3) provides that "Five Hundred Dollars ($500.00) may be entered for [a] person's first violation constituting a Class C Ordinance Violation and One Thousand Five Hundred Dollars ($1,500.00) for a second or subsequent violation of the same provision." On remand, the trial court should determine the number of days the Developer committed a Class C violation so as to render an appropriate civil penalty.