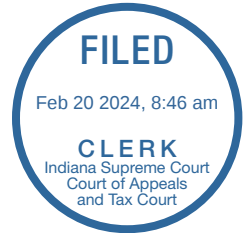


MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision is not binding precedent for any court and may be cited only for persuasive value or to establish res judicata, collateral estoppel, or law of the case.



IN THE Court of Appeals of Indiana

SPM Development, Inc. d/b/a Reinbrecht Homes,
Appellant-Defendant

v.

The Gibson County Board of Commissioners, Warren
Fleetwood, Mary Key and Ken Montgomery,
Appellees-Plaintiffs

February 20, 2024

Court of Appeals Case No.
23A-PL-986

Appeal from the Gibson Superior Court

The Honorable Mary Margaret Lloyd, Special Judge

Trial Court Cause No.
26D01-2203-PL-272

Memorandum Decision by Chief Judge Altice
Judges May and Foley concur.

Altice, Chief Judge.

Case Summary

[1] The Gibson County Board of Commissioners (the Board), comprised of Warren Fleetwood, Mary B. Key, and Ken Montgomery, voted to deny approval of a primary plat of a subdivision proposed by SPM Development, Inc. d/b/a Reinbrecht Homes (Developer), finding that the plat did not comply with Gibson County’s subdivision control ordinance (SCO). Developer thereafter filed in the trial court a Verified Complaint for Writ of Mandamus, Declaratory Judgment, Petition for Judicial Review and Appeal of Decision of County Executive (the Complaint), claiming that the plat met the standards of the SCO and that the trial court should order the Board to approve the plat. The trial court denied Developer’s requested relief, and Developer now appeals, raising two issues that we consolidate and restate as: Was the Board’s decision to deny primary plat approval arbitrary, capricious, an abuse of discretion, or contrary to law?

[2] We affirm.

Legal Backdrop

[3] Ind. Code § 36-7-3-2 governs the platting of real estate in a county without a plan commission, as is the case here, and provides, in relevant part, that when the proposed subdivision is outside corporate municipality boundaries, the developer must “submit the plat for the approval of the county executive.” I.C. § 36-7-3-2(d). The county executive may approve or disapprove a subdivision

plat based upon whether the plat complies with standards for development of subdivisions. I.C. § 36-7-3-2(f). Here, the three-member elected Board is the county executive of Gibson County. Ind. Code § 36-2-2-2.

[4] The SCO was adopted for the purpose of serving as a guideline for the proper planning and development of subdivisions and “to protect the public health, safety, and welfare of the county and ensure that public facilities and services are available to support the subdivision.” *Appendix Vol. II* at 51 (SCO, Article I, Section C). The SCO requires the subdivider to submit a written application for primary plat approval to the county surveyor’s office.¹ *Id.* at 66 (SCO, Article VII). And upon the submission of an application for primary plat approval, the application is transmitted to the Gibson County Subdivision Review Committee (the Review Committee), the purpose of which is “to assist with the technical evaluation of subdivisions and to make recommendations to the [Board].” *Id.* at 59 (SCO, Article III). If the Review Committee finds that the primary plat has been prepared in accordance with the terms of the SCO, it shall forward a report stating such to the Board for consideration and set a date

¹ The SCO also provides that, prior to submission of the plat, the subdivider “shall provide a sketch plan” and consult informally with the county surveyor to “enable the subdivider to become familiar with the general requirements and conditions which might affect the subdivision and thus avoid unnecessary revisions.” *Appendix Vol. II* at 66 (SCO Article VI). The SCO defines sketch plan as

an informal, informational drawing preparatory to the drawing of the preliminary plat to enable the subdivider to *save time and expense in reaching a general agreement with the Commissioners as to the form of the plat and conformance to the objectives of this Ordinance.*

Id. at 56 (SCO, Article II, Section AA) (emphases added).

for a hearing at which the proposed plat will be publicly considered in front of the Board. *Id.* at 70 (SCO, Article VII(B)(1)(a), (2)).

[5] Following the public hearing, the Board may (i) approve the primary plat (grant plat approval), (ii) approve subject to conditions, (iii) refer the plat back to the Review Committee for review or study on a specific technical matter, or (iv) disapprove it. *Id.* at 71 (SCO, Article VII(B)(3)). Ultimate approval or disapproval of any subdivision plat rests with the Board following at least one public hearing on the application for primary plat approval. *Id.*

[6] Relevant to this appeal, the SCO contains the following:

Sanitary Sewage Disposal

Sanitary sewage system shall be designed and constructed by the subdivider to provide adequate sewage service for all lots in the proposed subdivision. A subdivision plat shall not be considered for final approval until improvement plans for a sewage system by one of the following methods have been submitted:

1. A permanent sanitary sewer collection system including all pipes and manholes shall be provided, and said collection system shall be connected to a new or existing public or private sewage system in accordance with satisfactory plans and specifications therefore.

2. A private sewage disposal system for each lot shall be designed in accordance with the minimum requirements of the County Health Department and the Indiana Department of Environmental Management (IDEM). In no case will any part of the private system, including seepage field or leaching field, be

located closer than 10 feet to a property line or within 50 feet of a private well.

Id. at 90 (SCO, Article XI, Section D). In a different section, the SCO addresses “community” sewer systems:

Community System. If connection to an existing sewage or water system is not feasible, the feasibility of constructing a *community* sewerage and water system shall be studied. The study shall give consideration to treatment works, receiving stream, lagoon, etc. and community water supplies.

Id. at 69 (SCO, Article VII, Section A(3)(b)) (emphasis added).

- [7] Under the SCO, Commissioners are authorized to grant modifications and exceptions to the terms of the SCO in certain circumstances. *Id.* at 91-92 (SCO, Article XII, Section A). The subdivider is required to submit a written application, after which it is docketed for a public hearing.

Facts & Procedural History

- [8] Developer owns a 30.92 acre parcel of unimproved farm ground in Gibson County, Indiana. In or about 2020, Developer began the process of platting the real estate for a residential subdivision known as Southern Hills Crossing. Connecting to an existing sewer system, namely a neighboring municipal sewer system, would require crossing over surrounding properties, so Developer approached neighboring landowners to discuss the possibility of obtaining easements to run sewer lines across their properties. Because the neighboring property owners objected, it was not feasible for Southern Hills Crossing to

connect to an existing public sanitary sewer system. After seeking input and guidance from the Gibson County Health Department (GCHD) about other options, Developer proposed a community type of sewer system for Southern Hills Crossing.

[9] On March 19, 2021, Developer filed an application for primary plat approval of Southern Hills Crossing (the Primary Plat), which contained forty single-family residential lots.² The Primary Plat utilized a community septic system, sometimes referred to as a residential cluster system, whereby each home would have its own septic tank, and each septic tank would have a pipe running from it into one of three larger septic field beds in the subdivision. Pursuant to the SCO, the Primary Plat was forwarded to the Review Committee, which issued a report on April 5, 2021, stating, among other things, that GCHD Inspector Ben Dye was waiting for state approval of the Primary Plat's community septic plans before he would give his final approval.

[10] In September 2021, the Indiana Department of Health (IDOH) approved the design and plans for Southern Hills Crossing's community sewage system subject to certain conditions, including maximum bedrooms per lot and a specified cap on wastewater flow per day. *Appendix Vol. IV* at 180-82. On December 7, 2021, Dye emailed the Review Committee, and copied

² Previously, in August 2020, a sketch plan meeting was conducted between Developer, the Review Committee, the county engineer, and Developer's engineer, Cash Waggoner & Associates. At that time, the proposed subdivision contained twenty-five lots on the 30.92 acres.

Commissioner Fleetwood, stating that the GCHD was “ok with” the community septic plan “as long as they follow all written rules and the plan is implemented.” *Appendix Vol. II* at 123. That same date, the Review Committee issued a report to the Board finding that “the primary plat has been prepared in accordance with the terms of the [SCO].” *Appendix Vol. V* at 17-18.

[11] On January 18, 2022, the Board conducted the first of three public hearings at which it considered Developer’s application for approval of the Primary Plat. Commissioners Fleetwood and Montgomery expressed concern over the proposed cluster/community septic system, asking “why wouldn’t you want to connect to city sewer?” *Id.* at 32. Developer’s engineer, Scott Buedel, indicated that connection to a public sewer system was the initial desired route “but the ability to get to a manhole to dump into with the lift station was not available” because obtaining the necessary easements across adjacent properties “was not an option.” *Id.* Buedel explained the proposed sewage system:

So basically [] *it’s a community septic system* that’s being proposed for this site. There’s going to be three different locations for these field beds, and they’re large field beds that are going to be over all of the development. . . .

We do have state approval for the septic system that was designed. So basically there’s 40 lots in the development. Every lot would have its own septic tank, but then the greywater that comes off of that tank would go into a trunk line and be distributed into these field beds that -- that were approved by the State.

Id. at 31 (emphasis added).

[12] In addition to its dialogue with Buedel, the Board received input from various concerned community members, including individual neighbors and professionals, and one or more members of the Review Committee. The Board expressed reluctance to approve the proposed septic system, with particular concerns over flooding and potential issues with drainage, which would affect not only the subdivision's septic system but also the roads and water tables. The Board also noted concern over the amount and cost of anticipated maintenance associated with the system. Ultimately, the Board tabled the matter to allow for further study of the community septic system, including determining if and where such systems had been used in other counties in southern Indiana.

[13] The Board next considered the application for approval of the Primary Plat at its public hearing on February 15, 2022. Again, the Board received input from, among others, neighboring property owners and professionals. At the conclusion of the meeting, Commissioner Fleetwood motioned to send the matter back to the Review Committee for further review on the sewage treatment system. He stated, "I really feel like we have some concrete standards [of the SCO] that have not been met here" and "it is very pertinent that we follow the guidelines given to us and that we make sure that all the concrete standards have been analyzed, thoroughly met." *Appendix Vol. V* at 80. On a vote of 2-1, the Board sent the matter back to the Review Committee.

[14] Thereafter, on February 25, 2022, the Review Committee issued a report:

We have re-reviewed the . . . [P]rimary [P]lat submittal documents and feel they conform to the County's [SCO]. Specifically, as it relates to the sewage treatment system, a feasibility study was submitted as required, and those plans have been verified by the [GCHD]. . . . [O]ur committee does not believe it is qualified to provide additional technical analysis of septic/sanitary system plans. *Whether it be connecting to an existing sanitary sewer source, a community system, or an on-lot system, any sewage removal plan containing the necessary plans and approved by the [GCHD] would be deemed, by us, to have been submitted in accordance with the terms of the [SCO].*

Id. at 24 (emphases added).

[15] The Board considered the application for approval of the Primary Plat a third time at its meeting and public hearing on March 15, 2022, ultimately voting 2-1 to deny approval of the Primary Plat. The Commissioners stated two bases for the denial: (1) Developer's plans did not conform to the SCO "because [the SCO] says *each lot* will require a private septic disposal system" and the proposed community septic system did not do so, and (2) "because of the flood area." *Id.* at 106 (emphasis added). Pursuant to the SCO, the Developer thereafter asked the Board to modify its decision and approve the Primary Plat, which request the Board denied in April.

[16] On July 5, 2022, the Board (by Commissioners Fleetwood and Montgomery) issued Findings of Fact Supporting Denial of Primary Plat. *Id.* at 26. Summarized, the Board found:

- The Primary Plat did not “propose connection to a public sanitary sewer system” and “rather [] proposed a community wide private septic system to be built on portions of the property located within the Plat.”
- Article XI Section D2 “allows for a private sewage disposal system for each lot, to be designed in accordance with minimum requirement of the [GCHD] and the [IDEM] and no part of the private system, including seepage field or leaching field, may be located closer than ten feet to a property line or within fifty feet of a private well.”
- Although both the IDOH and GCHD approved of Developer’s community septic system, the authority to approve plats for major subdivisions is vested exclusively with the Board pursuant to both the SCO and state statute.
- Although the Review Committee found that the proposed community septic system complied with the SCO, its conclusion was based on its understanding that “any sewage removal plan cont[aining] the necessary plans and approved by the [GCHD] would be deemed . . . to have been submitted in accordance with the terms of the [SCO].”
- The community septic system proposed by Developer “does not meet the requirements of Art.XI.D.2 because it does not provide for an on-lot system, and therefore does not satisfy a concrete standard of the [SCO].”
- Developer never submitted an application for waiver for the community-wide private septic system pursuant to Article XII, Section A of the SCO.

- The community septic system was studied and considered but is not appropriate for this proposed subdivision development.

Id. at 26-28 (underlining in original).³

[17] On April 23, 2022, Developer filed its Complaint, as amended, alleging that the Primary Plat meets the standards of the SCO, that the Board’s disapproval was unsupported by substantial evidence, and that the Board acted arbitrarily and capriciously in refusing to approve it. Developer also asserted that the Board failed and refused to perform its ministerial duty to approve the Primary Plat and, therefore, was entitled to a writ of mandamus from the court compelling the Board to approve the Primary Plat. Developer also asked the trial court to vacate the Board’s decision and enter a declaratory judgment stating that the Primary Plat complies with the SCO. *Appendix Vol. II* at 40.

[18] The parties submitted briefs in support of their respective positions and filed with the court the Board’s record of proceedings, including the Board’s written Findings denying the Primary Plat, transcripts of the relevant public hearings, and the Review Committee’s record.

³ In addition to the above findings the community septic system, the Board also addressed certain street design requirements in the SCO. Specifically, the Board found that two proposed intersections between the subdivision and adjoining county road were less than 800 feet from one another and “provide for poor visibility and unsafe ingress/egress and therefore were not in furtherance of the health, safety and welfare of the citizens of Gibson County as required for approval under state statute. *Appendix Vol. V* at 28.

[19] The trial court held argument in March 2023,⁴ and, on April 12, 2023, it issued Findings of Fact, Conclusions of Law and Judgment denying Developer’s complaint and upholding the Board’s decision to deny the Primary Plat. The trial court found and concluded that there was substantial evidence in the record supporting the Board’s finding that the proposed subdivision did not conform with the requirements of the SCO, that the Board’s decision denying approval was not arbitrary, capricious or otherwise contrary to law, and that Developer had no “clear and unquestioned legal right” to approval of its proposed subdivision that utilized a community or cluster septic system. *Id.* at 20, 22-23.

[20] Developer now appeals. Additional facts will be supplied below as necessary.

Discussion & Decision

[21] We have recognized that a planning commission’s decision approving or disapproving a subdivision plat is presumed correct and will not be overturned unless demonstrated to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Van Vactor Farms, Inc. v. Marshall Cnty. Plan Comm’n*, 793 N.E.2d 1136, 1142 (Ind. Ct. App. 2003), *trans. denied*. “[A]n administrative act is arbitrary and capricious only where it is willful and unreasonable, without consideration and in disregard of the facts and circumstances in the case, or without some basis which would lead a reasonable

⁴ The parties did not present evidence at the hearing.

and honest person to the same conclusion.’” See *Equicor Dev., Inc. v. Westfield-Washington Twp. Plan Comm’n*, 758 N.E.2d 34, 36 (Ind. 2001) (quoting *Dep’t of Nat. Res. v. Ind. Coal Council, Inc.*, 542 N.E.2d 1000, 1007 (Ind. 1989)). Stated differently, “the test of arbitrary and capricious action is whether there is no reasonable basis for the action.” *Equicor*, 758 N.E.2d at 38.

[22] As noted, Gibson County does not have a planning commission, and instead utilizes the Board to approve or disapprove primary plat applications for proposed subdivision development. We will afford the Board’s decision disapproving the Primary Plat the same deferential appellate review as a planning commission such that it will not be overturned unless arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

[23] A valid ordinance must be “concrete” and “precise, definite, and certain in expression.” *Fulton Cnty. Advisory Plan Comm’n v. Groninger*, 810 N.E.2d 704, 707 (Ind. 2004). This court has observed the following with regard to interpretation of a county’s subdivision control ordinance:

An ordinance will not be construed so as to defeat its purpose if it is sufficiently definite to be understood with reasonable certainty. We will interpret ordinances so as to uphold their validity whenever possible. The purpose of requiring standards to be written with sufficient precision is to provide fair warning to the subdivider as to the factors the Commission will consider in making its decision. Further, when construing the words and phrases in a particular section, we construe them together with other words and phrases in that section, as well as with the ordinance as a whole.

Van Vactor, 793 N.E.2d at 1143 (citations and quotations omitted); *see also* *Burrell v. Lake Cnty. Plan Comm’n*, 624 N.E.2d 526, 529 (Ind. Ct. App. 1993) (we apply the rules of statutory construction when construing a subdivision ordinance and “when construing the words and phrases in a particular section, we construe them together with the other words and phrases in that section, as well as with the statute as a whole”), *trans. denied*.

[24] Here, the SCO sets forth two possible options for sewage disposal: (1) a permanent sewer collection system, the sort with manholes and pipes that connects to another public or private sewage system (Article XI, Section (D)(1)); or (2) a private sewage disposal system, the type involving seepage or leaching fields and having disposal on each individual lot (Article XI, Section (D)(2)). While the proposed community, or cluster, septic system might be the type of “private” sewage disposal system contemplated by Section (D)(2), it lacks the required disposal system on “each lot” and, rather, involves sewage effluent being collected from septic tanks and disbursed through multiple septic lines to shared leaching fields in the subdivision. Thus, the proposed community system does not comply with Section (D)(2).

[25] As to the “permanent” sewer collection system contemplated by Section (D)(1), Developer suggests that the Board “failed to consider” whether the proposed community system complied with Section (D)(1), and, further, that “[i]t is clear that the proposed Southern Hills Sewer System is permitted under Section D(1).” *Appellant’s Brief* at 26. We reject the initial assertion that the Board simply failed to consider and made “no findings of fact [] to support a

determination that [the proposed system] fails to comply with Section D(1).” *Reply Brief* at 9. The Board made a finding that “Neither the Plat nor Plat Application propose connection to a public sanitary sewer system” and, instead, proposed a community-side private septic system. *Appendix Vol. V* at 26. This finding is clearly directed at addressing Section (D)(1) and, thus, the Board did not fail to consider it.

[26] As to the claim that the system in fact complies with Section (D)(1), Developer reasons that the community septic system (i) “is a permanent sanitary sewer collection system” and (ii) “the septic tank and pipes of the [] system are connected to a new private sewage system,” and therefore the proposed system meets the standards of Section (D)(1). *Appellant’s Brief* at 26-27. We find this to be a strained reading of the plain language of the SCO, at best. It appears to blend (D)(1) and (2) when in fact those sections provide separate and alternate acceptable means of sewage disposal. To the extent that Developer argues that theirs was a “permanent” system as provided for in (D)(1) as opposed to a “private” system as provided for in (D)(2), Developer’s own words belie this, as Developer describes its system as “a *private* sewage disposal system[.]” *Id.* at 29 (emphasis added). The proposed system is not one that meets the specific standards of Section (D)(1).

[27] Moreover, viewed as a whole, the language of the SCO reveals that Section (D)(1) is not intended to govern community systems. Rather, those are addressed in a separate section of the SCO, which states that “the feasibility of constructing a *community sewerage and water system* shall be studied” if

connection to an existing sewer system is not possible. *Appendix Vol. II* at 69 (SCO Article VII, Section A(3)(b)) (emphasis added). Here, the proposed community septic system was studied, and re-studied. Indeed, the Primary Plat was discussed at multiple public hearings and public and professional input was received, and questions were raised, which lead to additional research and consideration of the matter.

[28] Although the Review Committee issued a report finding that the Primary Plat was in compliance with the SCO, it also acknowledged that it was not qualified to “provide additional technical analysis of septic/sanitary system plans” and, accordingly, it would deem “any sewage removal plan containing the necessary plans and approved by the County Health Department” as in compliance with the terms of the SCO. *Appendix Vol. V* at 24. Furthermore, it is the Board – expressly tasked with “protect[ing] the public health, safety, and welfare of the county and ensur[ing] that public facilities and services are available to support the subdivision” – that decides whether a primary plat should be approved or disapproved. *Appendix Vol. II* at 51 (SCO Article I, Section C).

[29] We find that, here, the Board’s decision to deny approval of the Primary Plat because its proposed community septic system did not meet specific and

concrete standards set out in the SCO was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.⁵

[30] Because the Primary Plat did not satisfy the SCO's standards with regard to sewage disposal, and Developer did not otherwise seek or obtain an exception to the terms of the SCO, we cannot say that the Board had an absolute duty – i.e., a ministerial duty – to approve it, as Developer claims. *See Brant v. Custom Design Constructors Corp.*, 677 N.E.2d 92, 95 (Ind. Ct. App. 1997) (party requesting mandate, an extraordinary remedy that may be sought against public officer to compel performance, “must have a clear and unquestioned legal right to the relief sought and must show that the respondent has an absolute duty to perform the act demanded”); *see also Robert Lynn Co. v. Town of Clarksville Bd. of Zoning Appeals*, 867 N.E.2d 660, 673 (Ind. Ct. App. 2007), *trans. denied*. Accordingly, the trial court properly denied Developer's requests both for a writ ordering the Board to approve the Primary Plat and a declaratory judgment in its favor.

[31] Judgment affirmed.

May, J. and Foley, J., concur.

⁵ Finding support for the Board's decision to deny plat approval on the basis of noncompliance with the SCO pertaining to sewage disposal, we need not reach Developer's argument challenging the Board's other findings that two proposed new intersections with the county road were not in furtherance of the health, safety, and welfare of citizens of Gibson County.

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