MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Meeks Cockerill
Winchester, Indiana

ATTORNEYS FOR APPELLEES

Maura J. Hoff
Matthew L. Kelsey
DeFur Voran LLP
Muncie, Indiana

IN THE COURT OF APPEALS OF INDIANA

Board of Commissioners of Delaware County, Indiana,

Appellant,

v.

Indiana ABC Apprenticeship Trust, Muncie 67-400 Partners LLC, and AR Engineering, LLC,

Appellees.

January 29, 2021

Court of Appeals Case No. 20A-MI-1772

Appeal from the Delaware Circuit Court

The Honorable Thomas A. Cannon, Jr., Judge

Trial Court Cause No. 18C05-1909-MI-768

Brown, Judge.

[1] The Board of Commissioners of Delaware County, Indiana (the "Board") appeals the trial court's August 6, 2020 order. We remand.

Facts and Procedural History

[2] Indiana ABC Apprenticeship Trust, Muncie 67-400 Partners LLC, and AR Engineering, LLC ("Appellees") are involved in the proposed development of a Dollar General retail store. Appellees submitted an application for the approval of a plat. The minutes of a meeting of the Plat Committee of the Delaware-Muncie Metropolitan Plan Commission ("DMMPC") held on July 11, 2019, indicate new business for consideration included "a final plat for a 2 lot subdivision known as ABC-DG Subdivision." Appellant's Appendix Volume II at 27. According to the minutes, Marta Moody, the Executive Director of the DMMPC, "stated there were additional revisions needed for the text on the plat, as follows: . . . Since ROW [right of way] for CR 300 W is being dedicated, there needs to be a signature/acceptance for the [Board] which should read . . . the [Board] hereby approves and accepts the dedication of public lands and public improvements with the foregoing plat of ABC-DG subdivision." *Id*. at 28. The minutes state there was a "motion to approve the ABC-DG Subdivision plat with all of the changes discussed and subject to acceptance of the ROW dedication by the [Board]," and the motion was approved. *Id*.

[3] The Board held a meeting on July 15, 2019, and the meeting minutes state Moody and AR Engineering presented information regarding the plat for the ABC-DG Subdivision and the land "is zoned Variety Business." *Id*. at 29. The

Board tabled the discussion of the plat for ABC-DG Subdivision. The Board held a meeting on August 5, 2019, and the minutes state there was a recommendation and motion that the plat for ABC-DG Subdivision be denied and that the motion was granted. The Board met on August 19, 2019, and the minutes indicate counsel for AR Engineering stated the right-of-way "was the only thing that was not accepted as part of the plat" and "[t]he action that came before the [Board] was only acceptance of the additional 18 foot of right of way" and asked the Board to reconsider the denial. *Id*. at 58. The minutes further state: "Petition was not presented to Auditor's office." *Id*. at 59. Executive Director Moody stated "[t]he approval of a plat with the requirement for dedication of right of way is absolutely the norm." *Id*. The minutes indicate there was "a motion to refuse to accept the dedication of the land of right of way" and the motion was granted. *Id*.

[4] On September 17, 2019, Appellees filed a Verified Complaint for Writ of Mandate requesting an order that the Board accept the offer of dedication under a local ordinance (the "Ordinance") which states: "Right-of-way shall be dedicated for existing roadways either in accordance with the Official Thoroughfare Plan or in a width sufficient to encompass all improvements required as a result of the traffic impact study, whichever is greater." *Id*. at 18 (citing Article XXX, Section 5(C)(2)).[1] On October 25, 2019, John and Nicole

[1] The trial court's order refers to this ordinance as the "codified development standards and subdivision control ordinance." Appellant's Appendix Volume III at 58. The court's order also refers to Article XIV,

Stevens filed a motion to intervene alleging that "[t]he existing ROW on County Road 300 W at this location is thirty-three feet (33') in total width, taking equally sixteen and one-half feet (16.5') of each property," Appellees "have demanded that the Commissioners accept an increased ROW of fifty feet (50') at this location which necessarily involves an expanded ROW of twenty-five feet (25') onto both the [Appellees'] and the [Stevenses'] properties," and "after accounting for existing ROW, [Appellees] are attempting to dedicate an additional eight and one-half feet (8.5') for ROW along the west side of [the Stevenses'] property." *Id.* at 88. The court granted the motion to intervene.

[5] The parties filed motions for summary judgment, and the court held a hearing. On August 6, 2020, the court issued an order entering summary judgment in favor of Appellees. The court found that, "[i]n drafting the Subdivision Ordinance the way they did, the [Board] not only imposed a duty on the applicants, but also on themselves" and the Board "has a mandatory statutory duty to accept a proffered right-of-way as part of a subdivision plat approval in order to effectuate the dedication required in the Subdivision Ordinance." Appellant's Appendix Volume III at 59. The court ordered the Board to accept the right-of-way dedication offered by Appellees "in the ABC-DG Subdivision Plat." *Id.* The court also found Appellees are dedicating a right-of-way solely within the confines of the subdivision approved by the Plat Committee and

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Section 2(D)(3) of the Subdivision Ordinance, Delaware County, which contains the same language. The complaint also alleged: "A traffic impact study was not required here; the Official Thoroughfare Plan sets this road as requiring a fifty (50) foot right-of-way." Appellant's Appendix Volume II at 18.

dismissed the Stevenses from the cause of action. The Board filed a motion to correct error arguing Appellees did not comply with the requirements of Ind. Code §§ 36-2-2-27 and 28,[2] and the court denied the motion.

Discussion

[6] Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Mangold ex rel. Mangold v. Ind. Dep't of Natural Res.,* 756 N.E.2d 970, 973 (Ind. 2001). All facts and reasonable inferences drawn from those facts are construed in favor of the non-moving party. *Id*. The fact that the parties make cross-motions for summary judgment does not alter our standard of review. *Huntington v. Riggs,* 862 N.E.2d 1263, 1266 (Ind. Ct. App. 2007), *trans. denied.* We generally review rulings on motions to correct error for an abuse of discretion. *Miller v. Rosehill Hotels, LLC*, 45 N.E.3d 15, 18 (Ind. Ct. App. 2015).

[7] The Board argues Appellees failed to file an affidavit under Ind. Code § 36-2-2-27(b) or a bond as required by Ind. Code § 36-2-2-28(a), as a result the County Auditor did not prepare a transcript of the proceedings, and the trial court erred in not requiring Appellees to follow the statutes. It further argues the Ordinance does not require it to accept all right- of-way dedications and the court's order is ambiguous as to the dimensions of the right-of-way it ordered

[2] Ind. Code §§ 36-2-2-27 and 28 relate to the appeal from a decision of an executive and contain certain filing and bond requirements.

the Board to accept. Appellees respond that, even if the procedural requirements of Ind. Code §§ 36-2-2-27 and 28 were required, "failure to meet those requirements did not affect the outcome of the case and would be harmless error at best." Appellees' Brief at 8. They argue the court correctly interpreted the Ordinance and appropriately entered summary judgment.

[8] In interpreting a statute, the first step is to determine whether the legislature has spoken clearly and unambiguously on the point in question. *Anderson v. Gaudin*, 42 N.E.3d 82, 85 (Ind. 2015). When a statute is clear and unambiguous, we apply words and phrases in their plain, ordinary, and usual sense. *Id.* When a statute is susceptible to more than one interpretation, the primary goal is to determine and implement the intent of the legislature, examining the statute as a whole and reading its sections together so that no part is rendered meaningless. *Id.*

[9] Ind. Code § 36-2-2-27 provides:

> (a) A party to a proceeding before the executive who is aggrieved by a decision of the executive may appeal that decision to the circuit court, superior court, or probate court for the county.
>
> (b) A person who is not a party to a proceeding before the executive may appeal a decision of the executive only if the person files with the county auditor an affidavit:
>
> > (1) specifically setting forth the person's interest in the matter decided; and
> >
> > (2) alleging that the person is aggrieved by the decision of the executive.

> (c) An appeal under this section must be taken within thirty (30) days after the executive makes the decision by which the appellant is aggrieved.

[10] Ind. Code § 36-2-2-28 provides:

> (a) An appellant under section 27 of this chapter must file with the county auditor a bond conditioned on due prosecution of the appeal. The bond is subject to approval by the auditor, and it must be in an amount sufficient to provide security for court costs.
>
> (b) Within twenty (20) days after the auditor receives the appeal bond, the auditor shall prepare a complete transcript of the proceedings of the executive related to the decision appealed from and shall deliver the transcript, all documents filed during the proceedings, and the appeal bond to the clerk of the circuit court.

[11] Appellees have not demonstrated that they made the necessary filings with the County Auditor, and as a result the Auditor did not prepare a transcript of the proceedings of the Board or deliver the transcript and documents filed during the proceedings. We do not read the statutory requirements to be noncompulsory. Because the record of proceedings was not before the trial court, we conclude that remand is necessary for the trial court to require Appellees to comply with Ind. Code §§ 36-2-2-27 and 28, and for the court, upon receipt and review of the record, to issue an amended order. *See Binninger v. Hendricks Cty. Bd. of Zoning Commr's*, 668 N.E.2d 269, 271 (Ind. Ct. App. 1996) (observing the requirements of Ind. Code §§ 36-2-2-27 and 28 and noting that in general the failure to adhere to the statutory prerequisites for judicial review of administrative action is fatal), *trans. denied*.

[12] We also observe the Board's argument that "[t]he plat offered to the [Board] shows that 300 West was to increase from a 33-foot right-of-way to a 50-foot right-of-way" and that Executive Director Moody indicated "half of the 50-foot-right-of-way [] would be taken off the entire east side of the property being proposed for the subdivision." Appellant's Brief at 13 (citations omitted). In response, Appellees state: "Right of Way is measured from the centerline of the road, but where the applicant does not own both sides of the road, only one side of that right of way (essentially 25 feet) is in actuality being dedicated." Appellees' Brief at 15 n.4. To the extent there are questions as to the dimensions and location of the offered right-of-way, the trial court shall, in its amended order, address the issue and if appropriate require the submission of an amended plat.

[13] For the foregoing reasons, we remand for proceedings consistent with this decision.

[14] Remanded.

Vaidik, J., and Pyle, J., concur.