

# MEMORANDUM DECISION

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

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Board of Commissioners of  
Delaware County, Indiana,  
*Appellant-Defendant,*

v.

Indiana ABC Apprenticeship  
Trust, Muncie 67-400 Partners  
LLC, and AR Engineering,  
*Appellees-Plaintiffs.*

December 7, 2022

Court of Appeals Case No.  
22A-MI-1533

Appeal from the Blackford Circuit  
Court

The Honorable Brian W. Bade,  
Judge

Trial Court Cause No.  
05C01-2105-MI-117

**Bradford, Chief Judge.**

## Case Summary

[1] Indiana ABC Apprenticeship Trust, Muncie 67-400 Partners LLC, and AR Engineering LLC (collectively, “Dollar General”) are involved in the proposed development of a Dollar General retail store. Dollar General submitted an application for the approval of a plat subdivision to the Plat Committee of the Delaware-Muncie Metropolitan Plan Commission (“the Plat Committee”). The Plat Committee approved the application, subject to acceptance of the necessary right-of-way (“ROW”) dedication by the Board of Commissioners of Delaware County, Indiana (“the Board”). Despite multiple requests from Dollar General, the Board did not accept the ROW dedication. Dollar General initiated a lawsuit and obtained summary judgment and an order from the trial court ordering the Board to accept Dollar General’s ROW dedication. The Board appealed and the matter was remanded for additional proceedings. On remand, Dollar General was again awarded summary judgment and the trial court again ordered the Board to accept Dollar General’s ROW dedication. The Board contends on appeal that the trial court erred in granting Dollar General summary judgment and in ordering it to accept Dollar General’s ROW dedication. We affirm.

## Facts and Procedural History

[2] Our decision in a prior appeal in this case instructs as to the underlying facts: in seeking to develop a Dollar General retail store, Dollar General submitted an application for the approval of a plat subdivision to the Plat Committee. *Bd. of*

*Comm'rs of Delaware Cnty. v. Ind. ABC Apprenticeship Tr.*, 2021 WL 326684 \*1 (Ind. Ct. App. January 29, 2021). After Dollar General agreed to minor modifications to its application, the Plat Committee approved the application, subject to acceptance of the necessary ROW dedication by the Board. At two different meetings, the Board refused to accept the ROW proffered by Dollar General. *Id.* On September 17, 2019, Dollar General filed a complaint for writ of mandate, requesting that the trial court order the Board to accept the offer of dedication. *Id.* The parties filed competing motions for summary judgment. *Id.* at \*2. On August 6, 2020, the trial court issued an order entering summary judgment in favor of Dollar General and ordered the Board to accept the ROW dedication offered by Dollar General. *Id.* The trial court also found that Dollar General was “dedicating a [ROW] solely within the confines of the subdivision approved by the Plat Committee.” *Id.* The Board filed a motion to correct error, which was denied by the trial court. *Id.*

[3] On appeal, a panel of this court concluded that Dollar General had failed to comply with certain statutory bond requirements 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.” *Id.* at \*3. “Because the record of proceedings was not before the trial court,” we concluded that remand was necessary “for the trial court to require [Dollar General] 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.” *Id.*

[4] On remand, Dollar General complied with the requirements of Indiana Code sections 36-2-2-27 and -28. Following a hearing, the trial court again entered summary judgment in favor of Dollar General, concluding as follows:

27. There is no Delaware County ordinance outlining any concrete standards by which the acceptance of a ROW may be judged. It is simply codified that it must be dedicated.

28. The absence of unequivocal language in the ordinance permitting consideration of other ancillary issues means the Commissioners do not have that power, as Indiana law disfavors restrictions on development and alienability and resolves all doubt in favor of the free use of property....

29. After a subdivision ordinance is codified by the legislative body, the power to approve or deny subdivision plats is specifically and exclusively granted to plan commissions.... Therefore, it is inappropriate, and indeed improper, for the County Commissioners to effectively take control over the approval of subdivision plats by utilizing the ROW condition.

30. It is not that the [Board] is without discretion when it comes to subdivision plat approvals. It is that their discretion was already applied when the Subdivision Ordinance was drafted and accepted. Since dedication of right-of-way has been codified as a mandatory precursor to plat approval, [the Board's] action in accepting the dedication ROW is a ministerial act, not a discretionary act.

31. Defendant 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 of Delaware County, Indiana....

34. [Dollar General's] Subdivision plat met all the substantive

requirements in the County’s ordinance, and there is no other ordinance articulating further standards for ROW acceptance, so it is a ministerial act for the ROW to be accepted and the plat to be approved.

35. The Delaware County Commissioners erred when they failed to complete the ministerial act of accepting a proffered right of way as part of a subdivision plat application.

36. The [Board’s] actions were made arbitrarily and are improper based on public policy.

Appellant’s App. Vol. IV pp. 19–22. The trial court further concluded that “[m]andamus is the appropriate remedy to correct this error.” Appellant’s App. Vol. IV p. 22.

## Discussion and Decision

[5] The Board contends that the trial court erred in entering summary judgment in favor of Dollar General and in ordering the Board to accept the proffered ROW.

The standard of review of a summary judgment order is well-settled. Summary judgment is appropriate 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 judgment as a matter of law. Summary judgment will be granted where the evidence presented demonstrates that no genuine issue of material fact exists, entitling the moving party to judgment as a matter of law. Summary judgment is intended to end litigation about which there can be no factual dispute. Once the movant for summary judgment has established that no genuine issue of material fact exists, the nonmovant may not rest on her pleadings

but must set forth specific facts which show the existence of a genuine issue for trial.

We are bound by the same standard as the trial court and will consider only those matters which were designated at the summary judgment stage. We will not reweigh the evidence but will liberally construe all designated evidentiary material in the light most favorable to the nonmoving party to determine whether there is a genuine issue of material fact for trial. The party who lost at the trial court has the burden to persuade the appellate court that the trial court erred. A trial court's grant of summary judgment is clothed with a presumption of validity. A grant of summary judgment may be affirmed by any theory supported by the designated materials. However, a trial court's grant of summary judgment may not be reversed on a ground which was not presented to the trial court.

*Perkins v. Fillio*, 119 N.E.3d 1106, 1110–11 (Ind. Ct. App. 2019) (internal citations omitted).

- [6] The crux of the Board's argument is that the trial court erred in interpreting the relevant zoning ordinance to require the Board's acceptance of Dollar General's ROW dedication. "[A] review of the interpretation of a zoning ordinance is a question of law." *Flat Rock Wind, LLC v. Rush Cnty. Area Bd. of Zoning Appeals*, 70 N.E.3d 848, 857 (Ind. Ct. App. 2017), *trans. denied*. Regulations that impair the use of real property are strictly construed because they "are in derogation of the common law." *Essroc Cement Corp. v. Clark Cnty. Bd. of Zoning Appeals*, 122 N.E.3d 881, 891 (Ind. Ct. App. 2019) (internal quotation omitted), *trans. denied*. "We therefore will not extend zoning regulations by implication." *Id.*

[7] “The ordinary rules of statutory construction apply in interpreting the language of a zoning ordinance.” *Flat Rock Wind*, 70 N.E.3d at 857.

Under those rules, the express language of the ordinance controls our interpretation and our goal is to determine, give effect to, and implement the intent of the enacting body. When an ordinance is subject to different interpretations, the interpretation chosen by the administrative agency charged with the duty of enforcing the ordinance is entitled to great weight, unless that interpretation is inconsistent with the ordinance itself. If a court is faced with two reasonable interpretations of an ordinance, one of which is supplied by an administrative agency charged with enforcing the ordinance, the court should defer to the agency. Once a court determines that an administrative agency’s interpretation is reasonable, it should end its analysis and not address the reasonableness of the other party’s interpretation. Terminating the analysis reinforces the policies of acknowledging the expertise of agencies empowered to interpret and enforce ordinances and increasing public reliance on agency interpretations.

*Hoosier Outdoor Advert. Corp. v. RBL Mgmt., Inc.*, 844 N.E.2d 157, 163 (Ind. Ct. App. 2006) (internal citations omitted), *trans. denied*.

[8] Dollar General’s application for plat approval was governed by the “subdivision control” provisions found in Indiana Code section 36-7-4-700 *et seq.*

Pursuant to this statute, the local legislative body must adopt an ordinance which regulates the subdivision of land in its zoning districts and which provides “concrete standards.” I.C. § 36-7-4-702; *Cundiff v. Schmitt Dev. Co.*, 649 N.E.2d 1063, 1066 (Ind. Ct. App. 1995). The purpose of these standards is to provide protection to both developers and landowners and to give “fair warning as to what the local plan commission would consider when reviewing a preliminary plat.” *Burrell v. Lake County Plan*

*Comm'n*, 624 N.E.2d 526, 530 (Ind. Ct. App. 1993), *trans. denied*. In deciding whether to grant an application for primary plat approval under this scheme, the commission is required to “determine if the plat or subdivision qualifies for primary approval under the standards prescribed by the subdivision control ordinance.” I.C. § 36-7-4-702(a). If, after a hearing, the plan commission determines that the application and plat comply with the standards in the subdivision control ordinance, then it shall make written findings and a decision granting primary approval to the plat. I.C. § 36-7-4-707.

Approval of a plat which meets the requirements of the applicable ordinance constitutes a ministerial as opposed to a discretionary act. *Cundiff*, 649 N.E.2d at 1069; *Knutson v. State ex rel. Seberger*, 239 Ind. 656, 659, 157 N.E.2d 469, 471 (1959), *reh'g denied*, 239 Ind. 656, 160 N.E.2d 200. In other words, if the proposed plat meets the “concrete standards” of the subdivision control ordinance, then “the approval or disapproval of the plat on the basis of the controlling standards is a ministerial act.” *Knutson*, 239 Ind. at 659, 157 N.E.2d at 471; *see Cundiff*, 649 N.E.2d at 1069; *Johnson County Plan Comm'n v. RamsHead Corp.*, 463 N.E.2d 295, 304 (Ind. Ct. App. 1984); *Tippecanoe County Area Plan Comm'n v. Sheffield Developers, Inc.*, 181 Ind. App. 586, 601, 394 N.E.2d 176, 186 (1979); *Dosmann v. Area Plan Comm'n*, 160 Ind. App. 605, 611, 312 N.E.2d 880, 884 (1974).

*Brant v. Custom Design Constructors Corp.*, 677 N.E.2d 92, 96–97 (Ind. Ct. App. 1997).

- [9] In this case, the relevant governmental entities adopted an ordinance that set forth the standards by which the plan commission would review applications for plat subdivision and appointed the Plat Committee to review the applications. “[T]he plan commission has exclusive control over the approval



of all plats and replats involving land covered by the subdivision control ordinance.” Ind. Code § 36-7-4-701(b). Pursuant to the ordinance, the Plat Committee approved Dollar General’s application, subject to the acceptance of the ROW dedication by the Board.

[10] Dollar General argued below, and the trial court found as a matter of law, that the local ordinance indicated that the Board’s approval was a ministerial act, not subject to the Board’s discretion. The ordinance provides, in relevant part,

#### Dedication of Right-of-Way

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. Where new public roads are proposed, they shall be developed and dedicated in accordance with the rules and procedures set forth in the Delaware County Subdivision Ordinance.

Appellant’s App. Vol. II p. 95. The plain language of the ordinance indicates that the ROW *shall* be dedicated so long as it meets the width requirements of the Official Thoroughfare Plan or traffic impact study, whichever is greater. The Indiana Supreme Court has held that when the word “shall” is used in a statute or ordinance, “it is construed as mandatory rather than directory unless it appears clear from the context or the purpose of the statute that the legislature intended a different meaning.” *State, Ind. C.R. Comm’n v. Indpls. Newspapers, Inc.*, 716 N.E.2d 943, 947 (Ind. 1999); *see also Wilson v. Wilkening*, 175 N.E.3d 1169, 1174 (Ind. Ct. App. 2021) (“Where ... the word ‘shall’ appears in a

statute, it is generally presumed to be used in its imperative sense.”). In this case, there is nothing in the ordinance that indicates that the word “shall” should be given a meaning other than “mandatory.”

[11] The trial court found that the designated evidence established that “[i]n this case, the parties agree that the required right of way under the Official Thoroughfare Plan is fifty (50) feet” and “the issue of the right of way measurement is now moot, yet also resolved by the amended plat submitted by [Dollar General].” Appellant’s App. Vol. IV pp. 15, 18. While the Board argues that it was not required to accept the proffered ROW because the proffered ROW was a forty-one and one-half-foot nonconforming ROW, the Board acknowledges in Footnote 1 on page nine of its appellate brief that the plat submitted for approval includes a fifty-foot-wide public ROW and the designated evidence demonstrates that documents approved by the Platt Committee indicated that the ROW would be the required fifty feet.<sup>1</sup> Thus, despite the Board’s contention to the contrary, the designated evidence indicates that the proffered ROW was, at all times, fifty feet. The trial court, therefore, did not err in finding that the Board lacked the discretion to reject the

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<sup>1</sup> Throughout the litigation, there was some question raised about from which parcels the fifty feet were going to come from and, at some point, Dollar General increased the portion of the ROW coming from land it owned. This change does not appear to have impacted the overall fifty-foot width of the proffered ROW.

proffered ROW and that its acceptance of the proffered ROW was a ministerial act.<sup>2</sup> *Brant*, 677 N.E.2d at 96–97.

[12] The trial court concluded that the Board had “a mandatory 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 of Delaware County, Indiana.” Appellant’s App. Vol. IV p. 21. The trial court further concluded that because Dollar General’s application “met all the substantive requirements in the County’s ordinance, and there is no other ordinance articulating further standards for ROW acceptance,” it is a ministerial act for the ROW to be accepted and mandamus is the appropriate remedy to correct the Board’s error. Appellant’s App. Vol. IV p. 21. Given that the designated evidence demonstrated that Dollar General’s application conformed to the concrete standards set forth in the ordinance, the trial court had the authority to mandate that the Board accept the proffered ROW. *See RamsHead*, 463 N.E.2d at 303–04 (“There is absolutely no question the trial court had the authority to mandate the Commission to approve RamsHead’s preliminary plat so long as it conformed to the concrete standards set forth in the county ordinances.”); *see also Knutson*, 236 Ind. at 663–64, 157 N.E.2d at 473.

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<sup>2</sup> We also agree with the trial court’s determination that the unequivocal language of the ordinance does not permit the Board to consider other ancillary issues in determining whether to accept a ROW dedication. The designated evidence demonstrates that the Board’s stated reasons for rejecting the ROW was not that it did not conform with the Official Thoroughfare Plan, but rather because the Board’s members did not agree with the proposed tenant, *i.e.*, Dollar General, operating in that location. It was improper for the Board to base its decision on such ancillary issues.

[13] The judgment of the trial court is affirmed.

Pyle, J., and Weissmann, J., concur.