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ATTORNEYS FOR APPELLANT:

**MARK A. MCCANN**

McCann Legal  
Kokomo, Indiana

**DERICK W. STEELE**

Raquet & Vandenbosch  
Kokomo, Indiana

ATTORNEY FOR APPELLEE:

**BRIAN L. OAKS**

Kokomo, Indiana



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**IN THE  
COURT OF APPEALS OF INDIANA**

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STATE OF INDIANA Ex Rel. )

EDNA TAYLOR LIVING TRUST, )

Appellant, )

vs. )

KOKOMO/HOWARD COUNTY )

PLAN COMMISSION, )

Appellee. )

No. 80A05-1004-PL-289

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APPEAL FROM THE TIPTON CIRCUIT COURT

The Honorable Thomas R. Lett, Judge

Cause No. 80C01-0812-PL-606

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September 10, 2010

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**NAJAM, Judge**

## **STATEMENT OF THE CASE**

The State of Indiana ex rel. Edna Taylor Trust, by its Trustee, Henry Taylor, (“Taylor Trust”) appeals the trial court’s grant of summary judgment in favor of the Kokomo/Howard County Plan Commission (“the Commission”) on the Taylor Trust’s complaint for mandate. The Taylor Trust presents a single issue for our review, namely, whether the trial court erred when it entered summary judgment in favor of the Commission.

We affirm.

## **FACTS AND PROCEDURAL HISTORY**

Before her death, Edna Taylor brought an unsuccessful suit against Brian Miller, and she appealed that decision to this court. We set out the facts and procedural history of that related case as follows:

Taylor owns Lots 32 and 33 in an addition in the town of Tampico in Howard County, Indiana. Miller owns Lot 34, which is located adjacent to and west of Lot 33. There is a 12-foot wide undeveloped alley located between Lots 33 and 34. In August 2005, Miller filed a petition to vacate the alley, which the Howard County Board of Commissioners denied. Also in 2005, Miller demolished an existing residence on Lot 34, and built a new one. The new residence is set one-half foot farther to the west of Lot 33 than the demolished one.

In September 2006, Taylor filed a complaint against Miller wherein she apparently alleged that Miller trespassed on Lot 33 during the construction of his new home and deposited dirt, gravel, and other substances on Taylor’s property, and that Miller’s new house encroached upon the alley. Taylor apparently asked the court to award her treble damages and attorney fees for the trespass and to issue a permanent injunction ordering Miller to remove the improvements on his property that encroach on the alley and violate the Howard County Zoning Ordinance regarding setback requirements.

At trial, Taylor presented the testimony of eight witnesses. Surveyor Jon Pyke testified that the town of Tampico has an historic reputation for being difficult to survey. Pyke further testified that he surveyed Taylor's property at Taylor's request, and could not determine whether Miller's new residence encroached on the alley. Pyke also testified that there was a potential error in his survey of up to three feet to the east or west. Glen Boise, Executive Director of the Howard County Plan Commission, testified that Jim Hunter, the Commission's former assistant director, measured the lots and house, and found no encroachment.

Also at trial, Jerry Hatfield, Miller's contractor, testified that he entered Taylor's property one time with Taylor's consent during the construction of Miller's home to remove paper debris and trash that had blown over to Taylor's property. Russell Adair, President of the Taylor Regional Sewer District, testified that in the fall of 2005, he installed a sewer system grinder pump in the alley along Taylor's property line. The installation of the pump was part of an overall sewer system plan along the entire street and was unrelated to the construction of Miller's new home. Adair later moved the pump at Taylor's request, and Taylor complained to Adair about the dirt and gravel left on her property.

At trial, Roy Taylor acknowledged that he had no proof of any damages caused by the encroachment. At the conclusion of the bench trial, the trial court entered findings of fact and conclusions of law at the request of both parties wherein the court concluded that Taylor failed to prove the allegations in her complaint. Specifically, the trial court concluded as follows:

6. The weight of the evidence fails to prove that the defendant removed any dirt from the Taylor property.
7. The weight of the evidence fails to prove that the defendant, his agents or representatives placed dirt or rocks on the Taylor property.
8. The plaintiff has failed in its burden to prove that a trespass, as defined in IC 35-43-2-2, has occurred. Thus its request for treble damages, attorney fees and reasonable costs of collection must fail.
9. The plaintiff has failed to prove any loss arising during or from the construction of the residence by the defendant.
10. To obtain an injunction the plaintiff must prove that its remedies at law are inadequate. The plaintiff has not made this showing.
11. The plaintiff has failed to prove the allegations of its complaint.

Taylor v. Miller, No. 34A02-0803-CV-190, slip op. at 2-4 (Ind. Ct. App. July 29, 2008) (footnote omitted). We affirmed the trial court on appeal.

Also, before her death, Edna Taylor and her son Roy Taylor “made repeated demands of the [Commission] to enforce its regulations regarding [Miller’s] violations[.]” Appellant’s App. at 86. In particular, the Taylors believed that the Commission should have exercised “its sanctions and other powers” against Miller for encroaching on the right of way. Id. at 87. When the Commission did not respond to the Taylors’ demands, the Taylor Trust filed a verified complaint for mandate and, on April 15, 2009, an amended verified complaint for mandate against the Commission.

Both the Taylor Trust and the Commission filed motions for summary judgment. Following a hearing, the trial court denied Taylor Trust’s summary judgment motion and granted the Commission’s summary judgment motion. This appeal ensued.

### **DISCUSSION AND DECISION**

We review a summary judgment order de novo. Bules v. Marshall County, 920 N.E.2d 247, 250 (Ind. 2010). The purpose of summary judgment is to end litigation about which there can be no factual dispute and which may be determined as a matter of law. Shelter Ins. Co. v. Woolems, 759 N.E.2d 1151, 1153 (Ind. Ct. App. 2001), trans. denied. We must determine whether the evidence that the parties designated to the trial court presents a genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law. Ind. Trial Rule 56(C); Bules, 920 N.E.2d at 250. We construe all factual inferences in the nonmoving party’s favor and resolve all doubts as to the existence of a material issue against the moving party. Bules, 920 N.E.2d at 250.

Here, the Taylor Trust contends that the building Miller allegedly erected on the right of way violates Chapter 8, Section 8.8 of the Howard County Zoning Ordinance and that the Commission had a duty to enforce that violation. Thus, the Taylor Trust maintains that the trial court should have granted summary judgment in its favor on its complaint for mandate. We cannot agree.

An action for mandate, an extraordinary remedy of an equitable nature, is generally viewed with disfavor. State ex rel. Steinke v. Coriden, 831 N.E.2d 751, 757 (Ind. Ct. App. 2005), trans. denied. Mandamus is not proper unless a party has a clear and unquestioned right to relief and the respondent has failed to perform a clear, absolute, and imperative duty imposed by law. Harmony Health Plan of Indiana v. Indiana Dep't of Admin., 864 N.E.2d 1083, 1089 (Ind. Ct. App. 2007). Mandate orders will not be granted to control the discretionary action of a public officer, board, or commission. Id.

Chapter 8, Section 8.8 of the Howard County Zoning Ordinance provides in relevant part as follows:

The erection, construction, enlargement, conversion, moving or maintenance of any building or structure and the use of any land or building which is continued, operated or maintained contrary to any of the provisions of this Ordinance, is hereby declared to be a violation of this Ordinance and unlawful. The Commission may institute a suit for injunction in the Circuit or Superior Court of the County to restrain any person, firm or corporation to remove any structure erected or located in violation of the provisions of this Ordinance. If the Commission is successful in its suit, the respondent shall bear the cost of action including reasonable attorney's fees to be allowed by the court. Such action may also be instituted by any property owner who may be especially damaged by any violation of this Ordinance.

(Emphasis added). The term “may” in a statute ordinarily implies a permissive condition and a grant of discretion. Romine v. Gagle, 782 N.E.2d 369, 380 (Ind. Ct. App. 2003),

trans. denied. When asked to interpret an ordinance, this court will apply the same principles as those employed for the construction of statutes. See 600 Land, Inc. v. Metropolitan Bd. of Zoning Appeals of Marion County, 889 N.E.2d 305, 309 (Ind. 2008). Thus, here, the ordinance clearly gives the Commission discretion but does not require it to enforce a violation. And the Taylor Trust has not otherwise demonstrated that it has a “clear and unquestioned right to relief.”<sup>1</sup> See Harmony Health Plan, 864 N.E.2d at 1089. The Taylor Trust is not entitled to mandate on this issue as a matter of law, and the trial court did not err when it entered summary judgment in favor of the Commission.<sup>2</sup>

Affirmed.

BAKER, C.J., and MATHIAS, J., concur.

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<sup>1</sup> Collateral estoppel applies where a particular issue is adjudicated and then put in issue in a subsequent suit on a different cause of action between the same parties or their privies. Jaskolski v. Daniels, 905 N.E.2d 1, 13 (Ind. Ct. App. 2009), trans. denied, cert. denied, 130 S.Ct. 2098 (2010). That equitable principle would bar relief in this case, but for the lack of identical parties. All the same, to the extent that a claimant must show a “clear and unquestioned right to relief” to obtain a mandate, we note that Taylor was unable to meet her burden of proof in her suit against Miller.

<sup>2</sup> The Taylor Trust makes a passing reference to an alleged violation of “equal protection under both the State and Federal Constitutions.” Brief of Appellant at 7. But the issue is waived for failure to make any cogent argument in support thereof.