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IN THE
COURT OF APPEALS OF INDIANA

THE LAKE COUNTY INDIANA BOARD OF ZONING APPEALS, THE LAKE COUNTY INDIANA PLAN COMMISSION, NED KOVACHEVICH, and THE OFFICE OF THE LAKE COUNTY SURVEYOR,	)	
Appellants-Defendants,	)	
vs.	)	No. 45A05-0509-CV-531
JAMES C. THORN and PAMELA J. THORN,	)	
Appellees-Plaintiffs.	)	

APPEAL FROM THE LAKE CIRCUIT COURT
The Honorable Lorenzo Arredondo, Judge
Cause No. 45C01-0411-PL-256

July 6, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

James and Pamela Thorn sought injunctive relief against the Lake County Board of Zoning Appeals, Lake County Surveyor's Office, Lake County Plan Commission, and Ned Kovachevich as the assistant director of the Plan Commission (collectively referred to as "Lake County"). Lake County appeals the trial court's order granting the requested relief and ordering it to issue the appropriate building permits for lots in their subdivision, contending that the Thorns did not prove their entitlement to a permanent injunction and that the trial court exceeded its authority in granting the injunction. In addition, Lake County appeals the trial court's denial of its motion to withdraw and amend its admissions, contending that the trial court abused its discretion in denying the motion. We conclude that the trial court had authority to issue the permanent injunction and that the Thorns proved the elements necessary to support the injunction. We further conclude that the trial court did not abuse its discretion in denying Lake County's motion to withdraw and amend its admissions. Therefore, we affirm the trial court's orders.

Facts and Procedural History[1]

James and Pamela Thorn own property in Lowell, Indiana, an unincorporated part of Lake County. In March 1996, they began the process of developing a subdivision on that land to be called "Thornmeadow." They intended to subdivide the land into thirty-five single-family residential lots, to be completed in three phases. In July 1996, the Plan Commission gave primary approval to the plans for the entire subdivision, and in November

[1] We heard oral argument in this case on April 19, 2007, in the Hammond City Council Chambers in Hammond, Indiana. We express our appreciation to the City of Hammond Legal Aid Clinic and its director, Kris Costa Sakaleris, and staff for their hospitality, to the audience for its interest, and to the attorneys for

1996, gave secondary approval to plans for Phase I of the subdivision. The Thorns posted appropriate performance bonds for Phase I.[2] In October 1999, the Lake County Board of Commissioners gave final approval to Phase I, the Surveyor's Office released the accompanying performance bonds, and Phase I was recorded in the Lake County Recorder's Office. As of the date of the hearing on the injunction in the trial court, the Thorns had sold seven of twelve lots in Phase I. Homes had been built on some, but not all, of the lots.

In August 1998, the Plan Commission gave secondary approval to plans for Phase II of the subdivision. The Thorns posted the appropriate performance bonds for Phase II. The Lake County Subdivision Ordinance states that performance bonds shall specify that all improvements will be installed within two years, subject to a one-year extension that may be granted by the Plan Commission upon request. The plans for Phase II called for a dry-bottom drainage pond to be installed. In completing the improvements to Phase II, however, the Thorns installed a wet-bottom drainage pond instead of the dry-bottom pond indicated by the approved plans.[3] Because of this discrepancy, final approval was not given to Phase II within two years.[4] The Thorns did not request the one-year extension. The Subdivision Ordinance provides that no building permits will be issued in a subdivision with delinquent bonds.

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their presentations.

[2] Performance bonds (either one bond covering all improvements or three separate bonds) must be posted covering road construction; sidewalks, street signs, landscaping, monuments, etc.; and storm water management systems. Lake County, Ind., Subdivision Control Regulations, Ordinance No. 1670, § 5.1(1)(b)(i).

[3] The Thorns contend that they made the change to the drainage pond at the request of Lake County's engineers and at the additional cost to them of at least $150,000. The change request is not documented in the record.

[4] The Thorns posted three separate bonds for Phase II. The storm water drainage bond is the only bond that has not been released.

Therefore, in August 2002, the Thorns received a letter from Kovachevich, on behalf of the Plan Commission, stating that no further building and zoning permits for any lots in any phase of the subdivision would be issued.

The Thorns appealed that decision to the Board of Zoning Appeals, which held a hearing and denied the Thorns' appeal. The Thorns then filed a petition for writ of certiorari, declaratory relief and complaint for damages in Lake County Circuit Court regarding the refusal to issue permits for Phase I of the subdivision, alleging violations of the federal and state constitutional prohibitions against the taking of property without compensation, violations of the federal and state procedural and substantive due process protections, violations of the federal and state equal protection clauses, and inverse condemnation. In addition, the Thorns sought a writ of certiorari against the Board of Zoning Appeals for "illegal, irregular, arbitrary, and unjust" action in denying the Thorns' appeal. Appendix of the Appellant at 186. On September 6, 2005, the Thorns filed a motion for preliminary and permanent injunction seeking an order that the county authorities "issue building permits for each lot in Thornmeadow Phase I, wherein the legal owner of same, or his designee, applies for said building permit . . . ." Id. at 110. At the outset of the September 13, 2005, hearing on the Thorns' motion for injunction, the Thorns moved, pursuant to Trial Rule 65(A)(2),[5] to have the permanent injunction merged with the preliminary "as there's nothing else left to be proved for the permanent injunction as there is for the preliminary." Tr. at 8. Following the hearing, the trial court granted the permanent injunction requested by the Thorns with the

[5] Trial Rule 65(A)(2) provides that "[b]efore or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing on the application."

following order dated September 13, 2005:

> The Court, having reviewed plaintiffs' Motion for Preliminary and Permanent Injunction, the defendants' response thereto, and having taken under advisement the arguments of the respective parties at hearing, now enters, pursuant to Ind. Rules of Trial Procedure 52 and 65, the following Special Findings of Fact and Conclusions of Law in GRANTING plaintiffs' Motion for Permanent Injunction.
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> I. SPECIAL FINDINGS OF FACT
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> * * *
>
> 2. The Issues: Whether the defendants' failure to issue building permits in Thornmeadow Phase 1 is more likely than not illegal, and whether that denial has caused, and will continue to cause, damages to the plaintiffs of and [sic] irreparable kind or nature necessitating the issuance of a preliminary injunction.
>
> 3. The plaintiffs have been unable to obtain building permits for their properly approved and platted subdivision, Thornmeadow Phase 1, in the Town of Lowell, County of Lake.
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> 4. At a public hearing held on November 12, 1996, the Lake County Plan Commission granted final plat approval to Thornmeadow Phase 1.
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> 5. In October of 1999, the Lake County Board of Commissioners granted final acceptance of the improvements in Thornmeadow Phase 1, and permitted the Lake County Surveyor's Office to release the performance bond associated with Thornmeadow Phase 1.
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> 6. Nonetheless, the Lake County Plan Commission, Lake County Surveyor's Office and Mr. Ned Kovachevich have refused to issue building permits for the lots which have been approved, platted and released from the bonding requirements of the Lake County Subdivision Control Ordinance.
>
> 7. Absolutely no legal justification has been provided for the denial of the requested building permits.
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> 8. The denial of said building permits has destroyed the plaintiffs' ability to develop its subdivision through the marketing and sale of lots, and the marketing and sale of homes built on speculation.
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> 9. In addition, several lots have been purchased by prospective homeowners whom [sic] have been denied building permits by the aforementioned defendants.
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> 10. Certain of the lot owners have demanded a return of their purchase price from the plaintiffs due [to] the aforementioned inability to obtain building permits.
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> 11. The plaintiffs are suffering, and will continue to suffer, substantial expense, damage and injury of a nature so severe as to threaten their ability to carry-on any sort of business related [t]o the Thornmeadow Subdivision, as a result of the actions of the defendants.

12. Said expenses, damages and injuries are virtually impossible to calculate due to changing interest rates, market fluctuations and a multitude of other economic factors effecting the development of the property in question. Put simply, the denial of building permits has had the effect of permanently and irreparably damaging the development in ways that money damages, alone, cannot cure.

II. CONCLUSIONS OF LAW

The Court, having made and entered its Special Findings of Fact herein, now concludes the law thereon to be as follows:

* * *

5. The plaintiffs have proven, by a preponderance of the evidence, that Thornmeadow Phase 1 was legally approved, through the proper and lawful process established by the Lake County Subdivision Control Ordinance and Lake County Zoning Ordinance.

6. The plaintiffs have proven, by a preponderance of the evidence, that Thornmeadow Phase 1 received final approval as to its infrastructure and improvements from Lake County, and that the Lake County Surveyor's Office ordered the bond obtained for guaranteeing that infrastructure released.

7. The plaintiffs have proven, by a preponderance of the evidence, that the effect of the defendants' denial of building permits for Thornmeadow Phase 1 has, and will continue to irreparably damage the plaintiffs.

8. The plaintiffs have proven, by a preponderance of the evidence, that the plaintiffs' remedies at law are inadequate, thus causing irreparable harm pending resolution of the substantive action.

9. The plaintiffs have proven, by a preponderance of the evidence, that the plaintiffs have at least a reasonable likelihood of success at trial by establishing a prima facie case.

10. The plaintiffs have proven, by a preponderance of the evidence, that the threatened injury to the plaintiffs outweighs the potential harm to the defendants resulting from the granting of the injunction. The issuance of said permits will not damage the defendants in any foreseeable way.

11. The plaintiffs have proven, by a preponderance of the evidence, that the public interest is not disserved by the granting of the permanent injunction.

12. This balancing of the equities leads to the ineluctable conclusion that this Honorable Court should grant plaintiffs' Motion for Permanent injunction immediately.

Wherefore, the Court GRANTS plaintiffs' Motion for Permanent Injunction, Orders the defendants, each and all of them vested with authority to do so, to issue building permits for each lot in Thornmeadow Phase 1, wherein the legal owner of same, or his designee, applies for said permit.

App. of the Appellant at 20-24.[6] Lake County filed a notice of appeal that same day.

In addition, on May 6, 2005, prior to the hearing on the injunction, the Thorns served Requests for Admissions on the Surveyor's Office, the Plan Commission, and Kovachevich. Several months later, in August 2005, the Thorns made a motion seeking an order deeming the matters to which the admissions were sought admitted and conclusively established. On September 6, 2005, Lake County filed an opposition to the Thorns' motion, followed on October 3, 2005, by a memorandum in support of their motion for leave to withdraw and amend admissions, and on January 25, 2006, a motion for summary ruling on their motion for leave to withdraw because the Thorns had not filed a response thereto. The Thorns moved to strike Lake County's motion for summary ruling. On March 7, 2006, while briefing in this court on the injunctive relief was proceeding, the trial court issued an "Order on Pending Motions Concerning Plaintiffs' Requests for Admissions":

> Upon careful consideration of the materials submitted, the Court hereby GRANTS Plaintiffs' August 11, 2006 [sic] Motion for Order on Plaintiffs' Requests for Admission, and also GRANTS Plaintiffs' February 15, 2006 Motion to Strike Defendants' Motion for Summary Ruling. The Court also DENIES Defendants' Motion for Leave to Withdraw to Amend Admissions.

Id. at 25. Lake County filed a motion to correct error with respect to this order. The motion to correct error was not ruled upon or set for hearing by the court within the time limits of Trial Rule 53.3, and was therefore deemed denied. Lake County then initiated an appeal of

[6] When the Thorns filed their Motion for Preliminary and Permanent Injunction, they also filed proposed special findings of fact and conclusions of law granting their motion for preliminary injunction. As noted above, at the hearing, the Thorns requested the hearings on the preliminary and permanent injunctions be consolidated. At the conclusion of the hearing, the trial court signed the Thorns' proposed order, but modified it by deleting references to "preliminary" injunction, and handwriting in and initialing the word "permanent" instead. It appears that a few references, specifically in finding number 2 and in conclusion number 9, were inadvertently missed.

this order, as well, and on June 2, 2006, filed a motion with this court to consolidate the two appeals, "as they involve common issues of law and facts and . . . it would be in the interest of efficiency and justice to consolidate these matters." Appellants' Motion to Consolidate Appeals at 1. We granted the motion to consolidate, imposed a series of deadlines on the trial court clerk, court reporter, and counsel, and ordered that the parties submit new briefs raising and/or responding to all issues now raised in this appeal. We thus have before us for review both the trial court's order granting the Thorns' request for injunctive relief and the trial court's order denying Lake County's motion to withdraw its admissions.

Discussion and Decision

I. Injunctive Relief

A. Standard of Review

Pursuant to the requirements of Trial Rule 52(A),[7] the trial court issued special findings of fact and conclusions thereon. When reviewing a judgment based on such findings, we must determine first whether the evidence supports the findings and then whether the findings support the judgment. Gov't Payment Serv., Inc. v. Ace Bail Bonds, 854 N.E.2d 1205, 1208 (Ind. Ct. App. 2006), trans. denied. We will set aside the trial court's findings of fact and judgment only if they are clearly erroneous. Ind. Trial Rule 52(A). Findings of fact are clearly erroneous when the record lacks any reasonable inference from the evidence to support them, and the judgment is clearly erroneous if it is unsupported by the findings and conclusions thereon. Purcell v. S. Hills Invs., LLC, 847 N.E.2d 991, 996 (Ind. Ct. App. 2006).

B. Grant of Permanent Injunction

Although the Thorns moved for both a preliminary and permanent injunction, the matter was initially set for a hearing on the preliminary injunction. At that hearing, the trial court granted the Thorns' request to advance the trial on the merits and considered the Thorns' entitlement to a permanent injunction. The difference between a preliminary and permanent injunction is procedural: "a preliminary injunction is issued while an action is pending, whereas a permanent injunction is issued upon a final determination." City of Gary v. Enterprise Trucking & Waste Hauling, 846 N.E.2d 234, 242 (Ind. Ct. App. 2006) (quoting Ferrell v. Dunescape Beach Club Condominiums Phase I, Inc., 751 N.E.2d 702, 713 (Ind. Ct. App. 2001)).

A permanent injunction is "an extraordinary equitable remedy" that should be granted with caution.[8] Gov't Payment Serv., Inc., 854 N.E.2d at 1208. The burden is on the plaintiff seeking the injunction to demonstrate its entitlement to a permanent injunction. Lex, Inc. v. Bd. of Trustees of Town of Paragon, 808 N.E.2d 104, 109 (Ind. Ct. App. 2004), trans. denied. The grant or denial of an injunction is within the trial court's discretion and will not be overturned unless the decision is arbitrary or amounts to an abuse of discretion. Id. An abuse of discretion occurs when the trial court's decision is against the logic and effect of the

[7] Trial Rule 52(A) requires the trial court to make special findings of fact without request by either party when granting or refusing a preliminary injunction. T.R. 52(A)(1).

[8] Injunctions that order those to whom they are directed to refrain from doing something are referred to as "prohibitory injunctions." See Field v. Area Plan Comm'n of Grant County, Ind., 421 N.E.2d 1132, 1141 (Ind. Ct. App. 1981) (citing 16 Indiana Law Encyclopedia § 3 (1959)). Injunctions that order a party to take action are referred to as "mandatory injunctions." Ferrell, 751 N.E.2d at 713. We are considering here a mandatory injunction.

facts and circumstances before it. Ins. Co. of N. America v. Home Loan Corp., 862 N.E.2d 1230, 1233 (Ind. Ct. App. 2007).

Generally, the trial court considers four factors when determining whether to grant injunctive relief: 1) whether the plaintiff's remedies at law are adequate; 2) whether the plaintiff has succeeded on the merits;[9] 3) whether the threatened injury to the plaintiff outweighs the threatened harm a grant of relief would cause to the defendant; and 4) whether the public interest would be disserved by granting the relief. Ferrell, 751 N.E.2d at 712. The plaintiff's remedies at law are inadequate where certain and irreparable harm would be caused if the injunction is denied. Id. at 713. Generally, the party seeking the injunction carries the burden of demonstrating an irreparable injury; however, when the acts sought to be enjoined are unlawful, the plaintiff need not make a showing of irreparable harm or a balance of the hardships in his favor. Id.

Finally, a permanent injunction is limited to prohibiting injurious interference with rights. Nance v. Miami Sand & Gravel, LLC, 825 N.E.2d 826, 840 (Ind. Ct. App. 2005), trans. denied. An injunction must be narrowly tailored so that its scope is not more extensive than is reasonably necessary to protect the interests of the party in whose favor it is granted. Id. Further, an injunction should not be so broad as to prevent the enjoined party from exercising his rights. Id.

Lake County contends that the trial court erred in granting a permanent injunction to the Thorns because the Thorns did not prove their remedy at law was inadequate and did not

[9] When determining whether to grant a preliminary injunction, the trial court considers whether the plaintiff has demonstrated a reasonable likelihood of success on the merits by establishing at least a prima

meet their burden to succeed on the merits.[10] Moreover, Lake County contends that the trial court's order was directed to the wrong party and improperly usurped a legislative function, constituting a violation of the separation of powers.

C. Inadequate Remedy at Law

Lake County alleges that the evidence does not support the trial court's finding that the Thorns have no adequate remedy at law because the only injury alleged by the Thorns is an economic one. Mere economic injury is not enough to support injunctive relief because an award of post-trial damages will be sufficient to make the party whole. Barlow v. Sipes, 744 N.E.2d 1, 6 (Ind. Ct. App. 2001), trans. denied. Although mere economic injury generally does not warrant the grant of an injunction, the trial court must determine whether the legal remedy is as full and adequate as the equitable remedy. Crossman Cmtys, Inc. v. Dean, 767 N.E.2d 1035, 1041 (Ind. Ct. App. 2002). "A legal remedy is adequate only where it is as plain and complete and adequate – or, in other words, as practical and efficient to the ends of justice and its prompt administration – as the remedy in equity." Id. (quoting Robert's Hair Designers v. Pearson, 780 N.E.2d 858, 864 (Ind. Ct. App. 2002)). A legal remedy is not adequate merely because it exists as an alternative to an equitable form of relief. Barlow, 744 N.E.2d at 6.

The Thorns have alleged, and the trial court found, that they are not able to further develop their subdivision in the absence of the ability of lot owners to get building permits, that some lot owners who have been unable to obtain building permits are demanding the

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facie case. City of Gary v. Mitchell, 843 N.E.2d 929, 932 (Ind. Ct. App. 2006).

[10] Lake County has not challenged the trial court's findings and conclusions regarding the balancing of the harms and the public interest.

return of their purchase price, and that their ability to continue business related to the subdivision is threatened for those reasons and because the bank is no longer willing to carry their loan for subdivision improvements. The Thorns further allege that because of changing interest rates, market fluctuations, and a multitude of other economic factors including the speculative nature of real estate, the expense, damage and injury they have sustained and continue to sustain is incalculable. Lake County acknowledges that "there may be some variability in the factors that would be used to calculate damages," brief of appellant at 24, but contends that the damages are nonetheless calculable.

In Indiana Family and Soc. Servs. Admin. v. Walgreen Co., 769 N.E.2d 158 (Ind. 2002), Walgreens sought and obtained an injunction to prevent the State from implementing certain emergency cost-containment measures designed to decrease the Medicaid reimbursement rates to pharmacies for drugs they dispense and pay the pharmacies less for dispensing drugs. Id. at 160-61. The testimony presented at the preliminary injunction hearing revealed that in addition to economic losses, some of the pharmacies might have to close. Id. at 163. The testimony only cited three definite instances in which closings would result, and further revealed that closing stores was part of the ordinary course of business and that customers of closed stores always find alternative providers. Id. In reversing the trial court's grant of the preliminary injunction, our supreme court noted that "imminent business loss or failure is a form of economic injury." Id. at 162 n.4. The court found the following reasoning from the United States Court of Appeals for the D.C. Circuit persuasive:

> The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory

> or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.

Id. (quoting Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958)).[11]

Although it appears that many of the harms the Thorns allege are leading to imminent business failure, we nonetheless conclude that the trial court properly determined that the Thorns have no adequate remedy at law resulting in irreparable injury. It is not just the Thorns who are suffering injury. Certainly, there are elements of calculable economic damages to the Thorns; however, the Thorns and the entire community of Thornmeadow are also suffering incalculable non-economic damages. There are homeowners who have already built homes in Phase I of a failing subdivision, lot-owners who have paid for lots on which they have been unable to build homes, and land in Phase II that has been subdivided and developed for multiple homes, rendering the land useless for most other purposes. Unlike the situation in Walgreen Co., where a "handful" of pharmacies might have to close but the vast majority would continue operation, there is but one business here. Also unlike the situation in Walgreen Co., where customers of closed pharmacies might be inconvenienced but would have other options, it would not be so easy for people who bought lots and built homes in Thornmeadow to just go down the street to the next subdivision to find a home. Money

[11] The court also determined that an injunction in favor of the plaintiffs would disserve the public interest, as the reimbursement rules were enacted to counteract a projected Medicaid deficit of one hundred million dollars. The possibility of a few store closures and the discontinuation of some special services did not outweigh the public interest in allaying a massive budgetary shortfall.

damages paid to the Thorns after the fact cannot fully compensate the Thorns and their failing community.[12]

D. Success on the Merits

Lake County also contends the trial court's findings that the Thorns have succeeded on the merits are not supported by the evidence. It points to the section of the Subdivision Ordinance providing that "[n]o building permits shall be issued in a subdivision with delinquent bonds," Lake County, Ind., Subdivision Control Regulations, Ordinance No. 1670, § 5.1(6), app. of the appellant at 329, and argues that because the Thorns' Phase II storm water improvements bond was delinquent,[13] they were not entitled to building permits by law and the trial court erred in determining otherwise. The Thorns dispute that the Phase II bond was delinquent, but contend that because Phase I had received final approval and all bonds as to Phase I had been released, even if the Phase II bond was delinquent, it should have had no bearing on the issuance of building permits for Phase I lots.

When interpreting an ordinance, we will apply the same rules as those employed for construction of statutes. Green v. Hancock County Bd. of Zoning Appeals, 851 N.E.2d 962,

[12] The Thorns contend that because Lake County's actions are unlawful, they do not have to prove irreparable harm at all. Where the action to be enjoined is clearly unlawful and against the public interest, the unlawful act constitutes *per se* irreparable harm. Dep't of Fin. Inst. v. Mega Net Servs., 833 N.E.2d 477, 485 (Ind. Ct. App. 2005). Because the *per se* injunction standard relieves the plaintiff of several showings otherwise necessary to obtain injunctive relief, it "is only proper when it is clear that [a] statute has been violated." Walgreen Co., 769 N.E.2d at 162 (quoting Union Twp. Sch. Corp. v. State ex rel. Joyce, 706 N.E.2d 183, 192 (Ind. Ct. App. 1998), trans. denied). The Thorns' private assertion of unlawful conduct is not sufficient to invoke the *per se* standard.

[13] We need not decide whether the Phase II storm water bond was in fact delinquent because of our determination regarding the ordinance. We do note, however, that despite Lake County's argument in its brief, counsel for Lake County stated at the oral argument that the Plan Commission did not know until the injunction hearing that the bond was still good. It appears, therefore, that Lake County concedes that as of September 2005, Lake County knew the bond was not delinquent.

967 (Ind. Ct. App. 2006). The interpretation of an ordinance is a question of law to which we owe the trial court no deference. 600 Land, Inc. v. Metropolitan Bd. of Zoning Appeals, 863 N.E.2d 339, 345 (Ind. Ct. App. 2007). We will give deference to the interpretation of a statute by the administrative agency charged with its enforcement in light of its expertise in the given area. Bowles v. Griffin Indus., 855 N.E.2d 315, 320 (Ind. Ct. App. 2006), trans. denied. However, where the agency's interpretation is unreasonable or inconsistent with the ordinance itself, we will accord it no deference. Higgins v. State, 855 N.E.2d 338, 342 (Ind. Ct. App. 2006).

Foremost among the rules of statutory construction is the directive to ascertain and give effect to the intent of the legislature. Green, 851 N.E.2d at 967. We therefore must consider the goals sought to be achieved and the reasons and policies underlying the statute, requiring us to view the statute within the context of the entire act, rather than in isolation. Id. We presume that the legislature intended the language used in a statute to be applied logically and not to bring about an unjust or absurd result. Doe v. Donahue, 829 N.E.2d 99, 107 (Ind. Ct. App. 2005), trans. denied, cert. denied, 126 S.Ct. 2320 (2006).

Lake County contends that because the Plan Commission is the body in charge of enforcing the Subdivision Ordinance, its interpretation that section 5.1(6) applies to the entire subdivision is entitled to significant weight. As noted above, we will give deference to the agency interpretation only if that interpretation is reasonable. Lake County acknowledges that the Subdivision Ordinance allows for subdivisions to be built in phases and that the Thorns elected to proceed in three phases. One of the purposes of allowing developers to proceed in phases is to ease the financial burden of development. Although installing

improvements for an entire subdivision at one time might be cost-prohibitive, developing the project in phases allows for funds to be expended to install improvements for only a portion of the subdivision in which lots can then be sold, helping to fund improvements in further portions of the subdivision. For this reason, we agree with the Thorns and hold that Lake County's interpretation of section 5.1 of the ordinance is unreasonable.[14] Lake County gave final approval to Phase I, released the bonds thereon, and began issuing building permits for lots in Phase I. The Thorns, as well as those who bought land in Phase I, had a right to rely on Lake County's final approval as just that – final. There would be no purpose in proceeding in phases and the intermediate steps for phase approval would be meaningless if the entire subdivision remained at financial risk from the beginning to the end of the project. The subsequent issue arising with respect to Phase II should affect only Phase II and future development that has not yet received final approval. Accordingly, the Thorns have succeeded on the merits of their claim and the trial court properly granted the permanent injunction ordering the appropriate Lake County authorities to issue building permits in Phase I of Thornmeadow.[15]

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[14] Moreover, we note that in its brief, Lake County states: "The Thorns had the right within the Subdivision Ordinance to sectionalize its subdivision, but it did not choose to do so, so all of the bonding requirements applied to the whole subdivision until completion." Brief of Appellant at 25. First, as Lake County later states in its brief, the Thorns did choose to sectionalize their subdivision. See id. at 36 ("The Thorns had the power to decide how to develop this subdivision and chose to sectionalize this subdivision plat into three phases, as allowed by the [Subdivision Ordinance's] requirements as it related to improvements, bonding and the extensions of time needed for the different phases."). Second, and more importantly, Lake County's statement seems to be an implicit acknowledgement that the bonding requirements apply to the whole subdivision only if a subdivision is not developed in phases; otherwise, they apply only to the phase to which they are attached.

[15] At oral argument, Lake County asserted that the injunction was entered against the Board of Zoning Appeals and yet was ordering the Plan Commission to issue building permits. The Thorns named the Board of Zoning Appeals, the Plan Commission, and the Surveyor's Office as defendants in their complaint. App. of the Appellant at 163. The trial court's order directs "the defendants, each and all of them vested with

E. Separation of Powers

Finally, Lake County contends that the trial court, in entering the injunction, has usurped the legislative function of the Plan Commission and has acted outside its jurisdictional power. Basically, Lake County's argument amounts to an assertion that the Plan Commission is the legislative body with sole authority and absolute discretion when it comes to subdivision decisions, and the trial court improperly substituted its discretion for that of the Plan Commission's in granting the injunction. See State ex rel. Town of Cedar Lake v. Lake Superior Court, 431 N.E.2d 81, 83 (Ind. 1982) (holding that the trial court could not issue an injunction restraining the town board of trustees' exercise of a discretionary power; in that case, the enactment of an ordinance).

The Thorns respond that this issue is waived for failure to raise it in the trial court. See, e.g., Mid-States Gen. & Mech. Contracting Corp. v. Town of Goodland, 811 N.E.2d 425, 438 (Ind. Ct. App. 2004) ("An appellant who presents an issue for the first time on appeal waives the issue for purposes of appellate review."). Notwithstanding waiver, the Thorns contend that the Plan Commission, in denying building permits, was not exercising a discretionary power because the subdivision plat at issue has already received final approval. Therefore, the power was ministerial and issuance was mandatory if there was compliance with the statutory requirements.

We agree with the Thorns. Having given final approval to Phase I of the subdivision, issuance of building permits was a ministerial act. Public officials, boards, and commissions may be mandated to perform ministerial acts where there is a clear legal duty to perform

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authority to do so, to issue building permits . . . ." Id. at 24 (emphasis added). All parties are therefore

those acts. Boone County Area Planning Comm'n v. Shelburne, 754 N.E.2d 576, 582 (Ind. Ct. App. 2001). The trial court acted within its power in ordering Lake County officials to issue Phase I building permits.

II. Motion to Withdraw Admissions

Lake County also appeals the trial court's denial of its motion to correct error, which challenged the trial court's denial of Lake County's motion to withdraw and amend its admissions.[16]

Trial Rule 36 provides:

> (A) Request for Admission. A party may serve upon any other party a written request for the admission, for the purposes of the pending action only, of the truth of matters within the scope of Rule 26(B) set forth in the request . . . .
>
> Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within a period designated in the request, not less than thirty (30) days after service thereof or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney. . . .
>
> The party who has requested the admissions may move for an order with respect to the answers or objections. . . .
>
> (B) Effect of admission. Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. . . . [T]he court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that

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subject to the trial court's order.

[16] The Thorns contend that this issue is not properly before this court because contrary to the assertions in Lake County's motion to consolidate, the two appeals (the injunction and the motion to withdraw admissions) do not have any common issues of law or fact because Lake County has not attempted to tie the issues concerning the requests for admissions to the grant of the injunction. See Br. of Appellant at 14 (stating that the trial court's order in granting an injunction does not address or rely on any of the admissions). The Thorns allege that because the injunction appeal was fully briefed prior to this court's order consolidating the actions, Lake County's only purpose in seeking consolidation and re-briefing is delay to further injure the Thorns. We are not inclined, after considering Lake County's motion to consolidate and ordering re-briefing, to revisit that earlier decision and will consider this issue on its merits.

> withdrawal or amendment will prejudice him in maintaining his action or defense on the merits.

The rule itself limits the discretion of the trial court in ruling on a motion to withdraw admissions pursuant to Trial Rule 36(B): the court can only grant such relief if it determines both 1) that withdrawal or amendment will subserve the presentation of the merits and 2) that the party obtaining the admission will not be prejudiced in maintaining the action. Gen. Motors Corp., Chevrolet Motor Div. v. Aetna Cas. & Sur. Co., 573 N.E.2d 885, 889 (Ind. 1991). Even if both conditions are satisfied, the rule does not compel the trial court to grant the motion to withdraw or amend. Id. The portion of the rule authorizing limited withdrawal or amendment is intended to avoid the binding effect of inadvertent admissions. Id. at 888.

In Gen. Motors Corp., our supreme court considered the trial court's denial of G.M.'s motion to withdraw its admissions to certain requests. As here, G.M.'s admissions were by operation of rule because G.M. failed to timely respond to Aetna's requests for admissions. The court noted that the Indiana rule permits a request for admission regarding an opinion, contention, or legal conclusion. Id. at 888. Requests for admission, in conjunction with other discovery mechanisms, are intended to help the parties develop, simplify, and otherwise formulate the issues for trial. Id. Requests for admissions, when properly used, "simplify pre-trial investigation and discovery, facilitate elimination of unnecessary evidence at trial, and reduce the time and expense demands upon the parties, their counsel and the courts." Id. When G.M.'s admissions occurred, trial was already set, and G.M. took no action to claim inadvertence and seek prompt amendment or withdrawal of its admissions, despite receiving notice of its co-defendant being granted an extension of time to respond and despite the filing

of Aetna's motion for summary judgment specifically based upon G.M.'s admissions. It was not until the date of the summary judgment hearing, three months after the requests were served and two months before trial, that G.M. first sought withdrawal of its admissions. Holding that G.M.'s delay deprived Aetna of three months' time for the development of its proof upon the admitted issues and that G.M.'s motion and supporting memorandum failed to present any claim or indication that its failure to timely respond was inadvertent, the court affirmed the trial court's decision denying the motion to withdraw admissions. Id. at 889.

In this case, on May 6, 2005, the Thorns served requests for admissions on the Surveyor's Office, the Plan Commission, and Ned Kovachevich.[17] The Thorns' motion for an order on the admissions, filed August 8, 2005, states that as of the date of filing, their requests for admissions had not been answered by any of the aforementioned parties. The trial court on August 19, 2005, ordered any objections to the Thorns' motion to be filed within fourteen days or relief would be granted as requested. Lake County filed a motion in opposition on September 6, 2005, moving that the matters to which admissions had been sought not be deemed admitted or conclusively established. The objection does not claim that the failure to reply was inadvertent, but does claim that the Thorns have not been

[17] Lake County contends that the Surveyor's Office timely filed responses to the Thorns' Requests for Admissions, citing pages 237A-243 of its appendix. We can find no responses on those pages, or any other pages in the appendix. The cited pages contain the Thorns' Motion for Order on Plaintiffs' Request for Admissions, in which they aver that as of the date of filing, the requests have not been answered by any of the defendants, app. of the appellant at 237A, the Thorns' Motion for a Hearing on the matter, id. at 238, the trial court's order to file objections to the Thorns' motion, id. at 240, and the defendants' Motion in Opposition, in which the defendants state that "[t]he Request for Admissions served upon the Lake County IN Surveyor are [sic] the same as the Request for Admissions served upon Ned Kovachevich and the Lake County Plan Commission. The Response of the Lake County Surveyor is identical to the Response of Ned Kovachevich and the Lake County Plan Commission," id. at 241-242. Nowhere, however, does the record state that the Surveyor's Office has in fact filed a response, nor does it indicate the date that any such response was made.

prejudiced. On October 3, 2005, a memorandum in support of the motion for leave to withdraw and amend was filed claiming inadvertence. The trial court denied Lake County's motion to withdraw and amend its admissions. After its motion to correct error with regard to this ruling was deemed denied, Lake County appealed this decision.

Lake County contends that the withdrawal would subserve the presentation of the merits. The party seeking withdrawal of the admissions bears the burden of showing how the withdrawal would subserve the presentation of the case's merits. Corby v. Swank, 670 N.E.2d 1322, 1326 (Ind. Ct. App. 1996). In making this showing, Lake County asserts its failure to reply was inadvertent. However, the filings by Lake County in the trial court, although invoking the word "inadvertent," do not allege any facts supporting the alleged inadvertence. Lake County's brief to this court also alleges inadvertence without supporting facts. As stated by the supreme court in Gen. Motors Corp., "an admission should ordinarily be binding on the party who made it, [but] there must be room in rare cases for a different result, as when an admission no longer is true because of changed circumstances or through honest error a party has made an improvident admission." 573 N.E.2d at 889. Lake County has alleged but not proven an "honest error." Lake County also contends that it has met its burden because the admissions relate to the core issues in dispute in the case – whether the Thorns were provided due process and whether the building permits were denied for legitimate and permissible reasons. Bryant v. County Council of Lake County, 720 N.E.2d 1, 6 (Ind. Ct. App. 1999), trans. denied, however, states that a motion to withdraw requests for admission is insufficient if it is based on a mere showing that the admissions go to the core issues to be litigated.

Lake County also contends that the Thorns have failed to prove they will be prejudiced in the presentation of their action on the merits if the motion to withdraw is granted. The party who has obtained the admissions bears the burden of demonstrating that it would be prejudiced in maintaining its action on the merits if withdrawal was permitted. Corby, 670 N.E.2d at 1326. However, the prejudice contemplated by Trial Rule 36 is not merely that the party will be required at trial to prove the truth of the matters formerly admitted. Id. Rather, "it means that the party has suffered a detriment in the preparation of his case. For example, prejudice . . . may be shown where the party obtaining the admission is unable to produce key witnesses or present important evidence." Id. In Gen. Motors Corp., prejudice was shown by the deprivation of three months of preparation time. 573 N.E.2d at 889. Lake County contends that neither the Thorns nor the trial court have relied on the admissions, and that the fact the trial court reopened discovery during the pendency of this appeal demonstrates that the underlying case is still at an early stage of the proceedings. Moreover, Lake County points out that only roughly seventy-five days passed between the date the admissions were due and the date it moved to withdraw the admissions, and because the proceedings are stayed, trial is not imminent. The Thorns contend that withdrawal of the admissions would prejudice them by requiring them to conduct additional "voluminous discovery." Brief of Appellee at 28. Also, they note that allowing withdrawal at this point is pointless because they have already succeeded on the merits of their claim, and therefore, the admissions in question have been proven by evidence adduced at the injunction hearing.

Even assuming Lake County proved that the withdrawal of its admissions would subserve the presentation of the merits and that the Thorns would not be prejudiced thereby,

the trial court still has substantial discretion to deny the motion to withdraw. See Gen. Motors Corp., 573 N.E.2d at 889. Lake County has offered no explanation for its failure to respond, and has offered no reason compelling us to hold the trial court abused its considerable discretion.

Conclusion

The trial court properly granted a permanent injunction to the Thorns ordering Lake County to issue building permits in Phase I of Thornmeadow. The trial court did not abuse its discretion in denying Lake County's motion to withdraw and amend its admissions. The orders of the trial court are therefore affirmed.

Affirmed.

RILEY, J., and MAY, J., concur.