

STATE OF INDIANA

IN THE LAWRENCE SUPERIOR COURT I

COUNTY OF LAWRENCE

CAUSE NO: 47D01 0805 PL 717

LEE WILDER, ET AL,
PETITIONERS

V.

OFFICE OF ENVIRONMENTAL
ADJUDICATION,
RESPONDENTS

ORDER

Petitioners in this case are Lee Wilder and Ash Lake Homes, d/b/a Rockwood Development. Respondent is the Office of Environmental Adjudication. The case arises from the Office of Environmental Adjudication's Final Order granting summary judgment in favor of the Indiana Department of Environmental Management, holding 1) that, as a matter of law, Petitioners were subject to 327 IAC 15-5 as an entity engaged in a "larger common plan of development or sale"; 2) that Petitioners were in violation of several sections of 327 IAC 15-5; and 3) that Lee Wilder was jointly and severally liable with Ash Lake Homes.

Petitioners have requested Judicial Review of these findings pursuant to IC 4-21.5-5. Having reviewed the petition and found all requirements of IC 4-21.5-5-1 et seq. to be met, this Court now grants judicial review of the OEA's Final Order.

The Court now affirms in part summary judgment for the Respondent on the first two issues and reverses in part the third issue, all pursuant to the following findings of facts and conclusions of law.

Statement of Facts

Lee Wilder is the president of Ash Lake Homes, Inc. *Admin. Record at 69.* Ash Lake Homes, Inc. owned and operated the Rockwood Development residential subdivision site, located on Sand Pit Road in Bedford, Lawrence County, Indiana. *Admin. Record at 69-70.* Advertising for this site listed plots available for sale, ranging in size from 1.4 to 4.7 acres, and amenities including underground utilities and paved roads. *Admin. Record at 81.*

On August 27, 2002, Sharon Hall, employed by the Indiana Department of Natural Resources (INDR), and Missy Shaber, employed by the Lawrence County Soil and Water Conservation District (SWCD), visited the Rockwood Development site and noted land disturbing activity. *Admin. Record 85.* On September 3, 2002, the two met with Mr. Wilder to advise him of the need to submit a plan to comply with the requirements of 327 IAC 15-5 (Rule 5) regarding erosion control from storm-water run-off. *Id.* At that time, they noted that Mr. Wilder stated he would not be disturbing more than five acres of land and that he would file a statement to this effect. *Id.*

INDR sent a Warning of Noncompliance to Petitioners on November 4, 2002, explaining that in order to comply with Rule 5, he must complete a Notice of Intent (NOI) and an Erosion Sediment Control Plan (ESCP) before beginning land disturbing activities. *Admin. Record at 88.* On November 9, 2002, Mr. Wilder answered the Warning, stating that he was unaware of Rule 5, but that he would not disturb more than 5 acres of land and, therefore, would not be subject to the rule. *Admin. Record at 91.* Because Petitioners failed to submit both the NOI and the ESCP, INDR referred the matter to the Indiana Department of Environmental Management (IDEM) and sent notice of this action to Mr. Wilder on January 29, 2003. *Admin. Record at 94.*

IDNR conducted several inspections of the Rockwood Development site, dating from October 28, 2002 to July 19, 2004. The reports generated indicate that compliance with Rule 5 was marginal, at best, and in many instances, unsatisfactory. *Admin. Record at 96-123.* Also mentioned were off-site sedimentation into Sand Pit Road and Leatherwood Creek, as well as a listing of necessary action for compliance with Rule 5. *Id.*

On October 21, 2004, IDEM issued a Notice of Violation and Proposed Agreed Order to Mr. Wilder. *Admin. Record at 125.* The complaint cited the Petitioners' failure to complete a NOI, Petitioners' failure to complete an ESCP, as well as Petitioners' failure to minimize runoff and sedimentation leaving the Site and failure to implement and maintain erosion control measures at the site. *Admin. Record at 125-35.* After subsequent inspections by IDEM, the agency issued an Amended Notice of Violation to the Petitioners on March 1, 2006. *Admin. Record at 137.* Petitioners did not respond to the Proposed Order, so the IDEM commissioner issued a Notice and Order on May 18, 2006. *Admin. Record at 146.* The Order required Petitioners to cease and desist any further land disturbing activity until a NOI and an ESCP were submitted. Petitioners were also ordered to implement erosion and sediment prevention measures and to inspect the site weekly and after measurable storm events to ensure that the erosion control measures were working properly. *Admin. Record at 146-161.*

Petitioners filed their Petition for Administrative Review on March 19, 2007. *Admin. Record at 4.* After discovery was completed, IDEM filed for Summary Judgment on September 14, 2007. *Admin. Record at 212.*

The Office of Environmental Adjudication (OEA) issued its Findings of Fact, Conclusions of Law and Non-Final Order on March 14, 2008. *Admin. Record at 273-80.*

On March 24, 2008 IDEM filed a Request for Final Order. *Admin. Record at 281-84.* On April 16, 2008, OEA issued its Final Order, finding that Petitioners had jointly and severally violated environmental rules and that IDEM was entitled to judgment as a matter of law against Lee Wilder and Ash Lake Homes, d/b/a Rockwood Development. The OEA declined to rule on Lee Wilder's personal liability under the responsible corporate officer doctrine. The OEA ordered Petitioners to comply with the terms of the Commissioners Order issued by IDEM. *Admin. Record at 293-94.*

On May 13, 2008, Petitioners filed their request for Judicial Review, stating that 1) OEA erroneously subjected Petitioners to 327 IAC 15-5, since they had not and would not disturb five acres of land; 2) OEA erroneously attributed land disturbing activities to the Petitioners; 3) OEA erroneously relied upon INDR reports as reliable assessments of noncompliance with 327 IAC 15-5; and 4) that OEA's finding that Lee Wilder is jointly and severally liable with Ash Lake Homes, d/b/a Rockwood Development is inconsistent with OEA's decline to rule on Lee Wilder's personal liability under the responsible corporate officer doctrine. *Petition for Judicial Review at 2-3.*

Discussion

Petitioners request relief from three findings presented in the OEA's Final Order. First, Petitioners ask that OEA's grant of summary judgment be reversed, because its finding of no genuine issue of material fact regarding the subjection of Ash Lake Homes to 327 IAC 15-5 as an entity engaged in a "larger common plan of development or sale" is an abuse of discretion. Second, Petitioners request relief from OEA's grant of summary judgment regarding other violations by Ash Lake Homes of 327 IAC 15-5 because such summary judgment was based on reports that contain inconsistencies which present a genuine issue of material fact and the OEA chose not to permit the

impleading of Lawrence County Highway Department and the East Lawrence Water Corporation, parties the Petitioners claim are at least partially responsible for the land disturbing activities in question. Finally, Petitioners ask for a reversal of the OEA's finding of Lee Wilder's personal joint and several liability with Ash Lake Homes because the OEA declined to find that Mr. Wilder was a responsible officer within the meaning of the Responsible Corporate Officer doctrine.

The Court addresses each of these issues separately.

I.

The Court affirms OEA's grant of summary judgment where it found Petitioners were subject to 327 IAC 15-5.

The Indiana Administrative Code section in question, 327 IAC 15-5, was updated in 2003, and again in 2008. Both parties agree, and this Court now finds, that the 2000 version of the code, prior to the 2003 amendments, is the applicable standard for determining Petitioners' subjection to the terms of this section. This version states, in relevant part, that

the requirements of this rule apply to all persons who . . . are involved in construction activity, which includes clearing, grading, excavation, and other land disturbing activities, except operations that result in the disturbance of less than five (5) acres of total land area and which are not part of a larger common plan of development or sale.

327 Ind. Admin. Code 15-5-2(3) (2000), *Admin. Record at 231*. The OEA found that, as a matter of law, Petitioners were subject to the requirements of 327 IAC 15-5 because the construction activities engaged in were part of "a larger common plan of development or sale."

While the Petitioners present an equally reasonable interpretation of the statute, the OEA's interpretation must be respected unless such an interpretation is contrary to the law itself or constitutes an abuse of discretion. The question becomes, under the OEA's interpretation of the applicable law, is there a genuine issue of material fact that would preempt a finding of summary judgment? This Court finds there is not.

I. A.

The OEA's interpretation of "larger common plan of development or sale" is not inconsistent with the law itself, nor does it pose an abuse of discretion.

Judicial review of an administrative agency is authorized under the Administrative Orders and Procedures Act. Ind. Code 4-21.5-5-1 et seq. While such power is granted, judicial review of the agency is limited. A court may set aside agency action only when such action is: "1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; 2) contrary to constitutional right, power, privilege, or immunity; 3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; 4) without observance of procedure required by law; or 5) unsupported by substantial evidence." *LTV Steel Co. v. Griffin*, 730 N.E.2d 1251, 1257 (Ind. 2000).

Regarding the interpretation of statutes by an agency, the courts of Indiana practice a "general policy of giving 'great weight' to the interpretation of a statute by an administrative agency charged with its enforcement." *Ind. Wholesale Wine and Liquor Co. v. Indiana ex rel Ind. Alcoholic Beverage Comm'n*, 695 N.E.2d 99, 105, n. 16 (Ind. 1998). A reasonable interpretation by such an agency should withstand judicial

review, "unless this interpretation would be inconsistent with the statute itself." *LTV Steel* at 1257.

In the case at hand, OEA has interpreted "larger common plan of development or sale" to include the Rockwood Development, the site owned and operated by Ash Lake Homes. In support of such an interpretation, the OEA pointed to the record, which indicates that the total land area affected by the development encompasses 26.12 acres. In addition to OEA's observation, the record shows advertisements for the site, offering for sale one of 21 different lots, ranging in size from 1.4 to 4.7 acres. The lots are advertised under the common name of Rockwood Development. The OEA was reasonable in concluding that Petitioners were engaged in construction activity that was part of a "larger common plan of development or sale."

Petitioners argue that such an interpretation constitutes an abuse of discretion. They maintain that the only valid interpretation of the statute must include an assessment of the amount of land the construction activity that is part of a common plan of development or sale will ultimately disturb. In support, they offer the illustration of a company that disturbs a half acre of land, but the construction activity was part of a "larger common plan" which would ultimately disturb only three quarters of an acre. According to the Petitioners, if the OEA's interpretation of the statute is permitted to stand, then such a "larger common plan" would be subject to Rule 5. Because of the absurdity of this result, argue the Petitioners, the statute must be read to include only those larger common plans that will ultimately disturb five acres of land.

What Petitioners have lost sight of in this illustration is the phrase "of development or sale." While the company in the illustration may have only disturbed three quarters of an acre, the continued development of properties sold may have been of particular

concern to the drafters of the statute. It is reasonable to assume that the drafters could require the initial developer, if developing a subdivision as the Petitioners are, to complete the NOI and ESCP in order to assess compatibility with the subsequent development of the subdivision site. Such a requirement would be in keeping with the current statutory definition of "larger common plan of development or sale," which states that where the land is "known, designated, purchased or advertised as a common unit or by a common name, such land shall be presumed as being offered for sale or lease as part of a larger common plan." 327 Ind. Admin. Code 15-5-4(21) (2008). Rockwood Development site falls within such a statutory definition. While this language may not be used to illustrate the standard that is applicable in this case, as it was added in the 2003 amendments, it illustrates that such a finding can be neither an abuse of discretion nor contrary to the statute itself, since such a finding is currently presumed as a matter of law.

Because the OEA's interpretation of "larger common plan of development or sale" is not an abuse of discretion, nor is it contrary to the statute itself, such an interpretation may not be set aside upon judicial review. The question then becomes whether there is a genuine issue of material fact surrounding this interpretation.

I. B.

There is no genuine issue of material fact concerning the Petitioners' involvement in a larger common plan of development or sale as it is understood by the OEA.

Indiana Rule of Trial Procedure 56 governs the court regarding summary judgment. Pertinent to the case at hand, such summary judgment "shall be rendered forthwith 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 a judgment as a matter of law." While summary judgment should not be "granted as [a matter] of course because the opposing party fails to offer opposing affidavits or evidence," the court can base its determination only on the evidentiary matter presented to it. Indiana Rules of Trial Procedure 56(c). A fact is material for the purposes of summary judgment if it "helps to prove or disprove an essential element of the plaintiff's cause of action." *Schrum v. Moskaluk*, 655 N.E.2d 561, 564 (Ind. Ct. App. 1995). In other words, material facts are "facts concerning an issue that would dispose of the litigation." *Troxell v. Am. States Ins. Co.*, 596 N.E.2d 921, 923 (Ind. Ct. App. 1992).

Petitioners have offered no evidence that they are not engaged in a larger common plan of development or sale. While summary judgment may not be issued due to a lack of evidence submitted, it is telling the Petitioners' own advertisements state they are selling 21 plots of land, ranging in size from 1.4 to 4.7 acres. The only evidence submitted by the Petitioners regarding their subjection to 327 IAC 15-5 revolved around the size of the land actually disturbed by Ash Lake Homes, d/b/a Rockwood Development, and the amount of land that would ultimately be disturbed by the same. Such evidence may constitute an issue of fact, but the determinative fact is that Petitioners have been found as a matter of law to be engaged in construction activity that is part of a larger common plan of development or sale. The facts still at issue neither help nor hurt the Respondent's claims against the Petitioners, therefore they cannot be characterized as material to the judgment.

Because the size of the land disturbing activity is not a material fact, i.e. one that would dispose of the litigation, summary judgment of the Petitioners' subjection to 327 IAC 15-5 must stand.

II.

This Court affirms OEA's grant of summary judgment regarding other violations by Ash Lake Homes of 327 IAC 15-5 because the minor inconsistencies of the IDNR reports do not constitute a genuine issue of material fact and the OEA's denial of impleader was not an abuse of discretion.

Summary judgment is appropriate where there are no genuine issues of material fact. Minor inconsistencies in the INDR reports do not constitute a genuine issue, such that the burden and expense of requiring further proceedings are necessary for the resolution of the material facts. The impleader of the Lawrence County Highway Department and the East Lawrence Water Corporation are likewise not necessary for the resolution of facts material to the judgment. The permission of impleader is within the discretion of the court, and where it is done with a valid reason, a reviewing court should not set aside a trial court's determination. The OEA made its determination on a valid reason, so its determination must stand.

II. A.

Minor inconsistencies in the IDNR reports do not constitute a genuine issue of material fact.

As previously stated, according to Indiana Rule of Trial Procedure 56, summary judgment should be rendered as a matter of course where there are no genuine issues of material fact and a party is entitled to a determination as a matter of law. To be considered 'genuine' under Rule 56, a material issue must be established by "sufficient evidence supporting the claimed factual dispute . . . to require a jury or judge to

resolve the parties' differing versions of the truth at trial." *Gaboury v. Ir. Rd. Grace Brethren, Inc.*, 446 N.E.2d 1310, 1313 (Ind. 1983).

Petitioners rely on inconsistencies in the IDNR reports to show a genuine issue of the facts concerning the Petitioners' violations of 327 IAC 15-5. However, review of the reports in question reveal that these reports are largely consistent, showing that Mr. Wilder and Ash Lake's management of the Rockwood site has been only marginally acceptable, at best, and in some instances, wholly unsatisfactory. Likewise the reports show that Petitioners' have consistently ignored recommendations by IDNR, the Lawrence County SWCD, and IDEM for achieving compliance with 327 IAC 15-5. Minor inconsistencies are to be expected when reports are conducted by several persons employed by multiple agencies. The difference between marginally acceptable and unsatisfactory is not one that requires a judge or jury to resolve a "differing version of the truth," especially since there seems to be a consensus among the later reports of unsatisfactory conditions. Both terms indicate poor management of the site. For this reason, there is no genuine issue that needs to be resolved by a trier of fact. Because the minor inconsistencies among the various reports do not constitute a genuine issue of fact, OEA was correct in relying on them in granting summary judgment for the Respondent.

II. B.

Impleader of the Lawrence County Highway Department and the East Lawrence Water Corporation is not necessary for proper adjudication of the relevant facts and OEA's denial was not an abuse of discretion.

Indiana Rule of Trial Procedure 14(a) permits impleader by a defending party in litigation when there is a third person, not already a party to the litigation, who is or may be liable to the defending party for all or part of the plaintiff's claim against him. The defending party must file the third-party complaint with his original answer or by leave of court thereafter with good cause shown.

The use of impleader under Trial Rule 14 "is a matter within the trial court's sound discretion." *City of Elkhart v. Middleton*, 356 N.E.2d 207, 210 (Ind. 1976). The trial court must provide a valid basis for making its grant or denial of impleader, and the reviewing court may only look to the reasons asserted by the trial court in affirming or reversing the trial court's decision. See *id.* A decision made within the trial court's discretion may be overturned only if there is a "clear error," constituting an abuse of discretion. See *id.* at 210-11. This is a strenuous guidepost, and the court's judgment may only be set aside where the reviewer is "definitely and firmly convinced the trial court committed error." *Ind. Family and Soc. Serv. Admin. v. Amhealth, Inc.*, 790 N.E.2d 162, 165 (Ind. Ct. App. 2003).

In this case, Petitioners argue that the construction activity of the Lawrence County Highway Department and the East Lawrence Water Corporation was wrongly attributed to the Petitioners, making any civil penalty assessed against the Petitioners not reflective of their true liability. Petitioners claim that, at the very least, there is a genuine issue of material fact regarding the extent of their liability due to the activities of these two potential third-party defendants. The denial of impleader was an abuse of discretion, in that it precludes a fair adjudication for the Petitioners. As a result, Petitioners have asked that the amount of the judgment be set aside and the issue remanded for further findings with the third-party defendants joined.

The OEA denied the Petitioners' request for impleader, holding that the construction activities performed by the Lawrence County Highway Department and the East Lawrence Water Corporation were in service to the development of the Rockwood subdivision site. For this reason, the OEA held that liability for these activities was fairly attributed to the Petitioners. This reason is valid. Current statutory definitions of construction activity specifically include construction associated with the construction of infrastructure and structures in service of a subdivision site. 327 Ind. Admin. Code 15-5-4(4). As previously stated, these codes are not binding law for this case, as they were enacted after the alleged activities occurred. However, it cannot be said that the actions of the court are clearly erroneous, and that a reviewing court may be definitely and firmly convince of their error, if these same actions would be a matter of course under current law. Therefore, the denial of impleader is not a clear error that constitutes an abuse of discretion and this Court upholds the judgment of the OEA.

Petitioners also argue that because the construction activities of these would-be third-party defendants were not solely for the benefit of the subdivision, they cannot be attributed to the Petitioners' construction activities. The fact remains, however, that these infrastructural construction activities are vital to the Petitioners' subdivision. Without them, there would be no subdivision. The Petitioners have also advertised the construction of roads and utilities to draw in potential buyers. It is clear Petitioners have relied on these construction activities as part of the continued development of the site. The construction activities do not lose this necessary character simply because they will ultimately be used by more than just the Petitioners. At the very least, it cannot be said that a court has made a clear error in making such a determination.

Because the OEA acted within its discretion in denying impleader, and the denial was based on a valid reason that did not constitute an abuse of discretion, this Court affirms the OEA's judgment.

III.

This Court reverses the OEA's finding of Mr. Wilder's joint and several liability with Ash Lake Homes, d/b/a Rockwood Development, since the OEA declined to decide the personal liability of Mr. Wilder under the Responsible Corporate Officer Doctrine in its Final Order.

Personal liability of an officer of a corporation could traditionally only be found after a finding that the corporation was merely a guise for the individual to protect himself from such liability. In essence, a court had to find that the corporation was a "puppet," controlled by the officer for his own protection. Such a finding would permit a plaintiff to "pierce the corporate veil" and hold the officer personally responsible, as the plaintiff would be able to do had the "corporation" not existed. *Comm'r, Dep't of Env'tl. Mgmt. v. RLG, Inc.*, 755 N.E.2d 556, 563 (Ind. 2001).

Courts have extended the personal liability of highly placed officials through the use of the Responsible Corporate Officer Doctrine. Through this doctrine, "an individual, though acting in a corporate capacity as an officer, director, or employee, may be individually liable as a responsible corporate officer." *Id.* at 559. Initially, such a finding could only be made regarding the criminal liability of an officer. However, many courts have found that "the fact that a corporate officer could be subjected to criminal punishment upon a showing of a responsible relationship to the acts of a corporation

that violate health and safety statutes renders civil liability appropriate as well." *United States v. Conservation Chem. Co.*, 660 F.Supp. 1236, 1245-46 (N.D.Ind.1987). The Supreme Court set the standard for an officer who should be found personally liable. "Sufficient evidence must be introduced to show that defendant had, by reason of his position in corporation, responsibility and authority to prevent in the first place, or promptly correct, the violation complained of." *United States v. Park*, 421 U.S. 658, 673-74 (1975).

As the OEA points out, there is substantial evidence that Mr. Wilder is such a responsible corporate officer, within the meaning of the doctrine. However, because genuine issues remained regarding this material fact, the OEA declined to find Mr. Wilder's liability under this doctrine. In this respect, the OEA acted within the bounds of applicable law. It stepped outside the bounds when it named Mr. Wilder as being jointly and severally liable with Ash Lake Homes, d/b/a Rockwood development. It is only with a finding that he is a responsible corporate officer that he may be found personally jointly and severally with the corporation.

The OEA points to Mr. Wilder's separate capacities as a corporate officer and as an individual. However, such a distinction may not be made to find the liability of a person under this doctrine. It is only within the capacity of a person as the corporate officer that personal liability may be assessed. For this reason, only a finding of Mr. Wilder as a responsible corporate officer would permit his personal joint and several liability with the corporation.

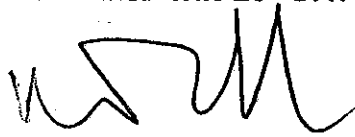
Because the OEA declined to find Mr. Wilder a responsible corporate officer, it erred in finding that he was jointly and severally liable with Ash Lake Homes, d/b/a

Rockwood Development. For this reason, this Court reverses summary judgment and remands for further findings not inconsistent with this ruling.

Conclusion

For the above reasons, the OEA's finding of summary judgment is affirmed regarding both the Petitioners' subjection to the terms and requirements of 327 IAC 15-5 and their liability regarding further violations of the administrative code section. The court erred when it held Mr. Wilder personally jointly and severally liable with Ash Lake Homes, d/b/a Rockwood Development without finding that he was a Responsible Corporate Officer. This issue is remanded for further findings not inconsistent with this ruling.

SO ORDERED THIS 26th DAY OF JANUARY, 2009



THE HONORABLE MICHAEL A. ROBBINS
JUDGE, LAWRENCE SUPERIOR COURT I