MEMORANDUM DECISION

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IN THE
COURT OF APPEALS OF INDIANA

Posey County Board of Zoning Appeals,

Appellant-Respondent,

v.

Derek Collins,

Appellee-Petitioner

August 8, 2022

Court of Appeals Case No. 22A-MI-370

Appeal from the Posey Superior Court

The Honorable Travis Clowers, Judge

Trial Court Cause No. 65D01-2108-MI-269

Vaidik, Judge.

Case Summary

[1] Derek S. Collins applied for a special exception from the Posey County Board of Zoning Appeals (BZA). Following a public hearing, the BZA denied his

application. Collins sought judicial review, and the trial court reversed the BZA's decision, concluding it was not supported by substantial evidence and was arbitrary. The BZA appeals, and we reverse.

Facts and Procedural History

[2] Collins bought a "portable building" and placed it on his empty lot at 100 South Sharp Street in Poseyville. Ex. p. 26. The lot is zoned R-3 Residential Multiple-Family District. Posey County Zoning Ordinance section 153.041(E) states the purpose of R-3 zoning districts is to "provide suitable areas for single-family, two-family, and multiple-family dwelling types in suitable environments in a variety of densities to meet the varying requirements of families." As such, in R-3 zoning districts, "[n]o building or structure, or part thereof, shall be erected, altered or used, or land used, in whole or in part, for other than one (1) or more of the following permitted principle uses": "areawide uses by right," single-family detached dwellings, single-family attached dwellings, multiple family dwellings, and manufactured or modular home dwellings. *Id.* § 153.048. However, structures like Collins's—called "residential storage structures" under the ordinance—"may be suitable for location in any use district but, because of their potential adverse influence on adjacent properties, require site review and are, therefore, permitted in all use districts as a Special Exception requiring Board of Zoning Appeals approval." *Id.* § 153.147. Zoning Ordinance section 153.246(C)(1) provides,

> The Special Exception **may** be granted upon a determination in writing that:
>
> > (a) Will be in harmony with the spirit and intent of this ordinance;
> >
> > (b) Will not be injurious to the neighborhood or otherwise detrimental to the public welfare;
> >
> > (c) The proposed use at that particular location requested is necessary or desirable to provide a service or a facility which is in the interest of public convenience and will contribute to the general welfare or the neighborhood or community; and
> >
> > (d) The proposed use will comply with the regulation and condition specified in this ordinance for such use and with the conditions and safeguards proscribed by the Board in authorization of the use.

[3] Collins did not apply for or obtain a special exception for his storage structure before placing it on his lot because he did not know he needed one. In June 2021, the Posey County Area Plan Commission received a complaint that a "garage" was placed on the lot and notified Collins of the potential ordinance violation. Ex. p. 5. Collins then applied for a special exception for a residential storage structure under Section 153.147.

[4] The BZA held a hearing on Collins's application on July 8. Other than providing pictures of the structure and explaining how he had come to own it and place it on the lot, Collins presented no evidence to support his application.

A neighbor spoke at the hearing and stated he opposed the structure being placed on the lot because it would hurt property values and would prevent any house from being built there. The BZA members then conferred and similarly expressed concern with allowing the structure on the lot. Several members stated that the structure would harm the aesthetics of the neighborhood and "hurt the property values around the area." *Id.* at 34. Members also noted there was a need for more housing in Poseyville and that lots such as Collins's—which had once contained a house and was already equipped with water, gas, electric, and sewage—should be for residential purposes only.

[5] One member of the BZA, Keith Surgeon, who lives in the city of Mount Vernon,[1] noted,

> And I guess in the interest of full disclosure, you all know that I applied for a Special Use for a lot here in town and did the same thing. I put a pole barn on a lot for storage. But this is a little different as in the lot is a lot smaller. No one asked us to, but we did put our pole barn at the rear of the lot. It still would be possible to build small house in front of it. I share the concern that the garage is already there before the process got started. I got my permit before I even purchased the lot. I made sure I had permission to build before I even got the lot. Knowing that Poseyville has a different view about putting a pole barn on lots than Mt. Vernon, that enters into it also.

Id. at 21.

[1] The city of Mount Vernon and the town of Poseyville are both in Posey County.

[6] The BZA found Collins had not shown the evidence required under Section 153.246 and denied his application. In August, Collins petitioned for judicial review asserting the BZA abused its discretion and its denial of his application was "arbitrary and capricious." Appellant's App. Vol. II p. 12. A hearing was held in December. In January 2022, the trial court issued an order granting Collins's petition and ordering the BZA to issue him a special exception. In doing so, the trial court found the BZA's decision to deny Collins a special exception to be "not based on substantial evidence as demonstrated in the record"—noting the BZA failed to present evidence the structure would hurt property values or the aesthetics of the neighborhood—and "arbitrary"—noting that the BZA had previously granted a special exception for a similar structure to Surgeon. *Id.* at 8.

[7] The BZA now appeals.[2]

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[2] Collins has moved to dismiss this appeal, citing a recent opinion by the Indiana Public Access Counselor that found the BZA did not comply with the Open Door Law (ODL) when it held an executive session, rather than a public meeting, to decide to initiate the appeal. Under the ODL, a court may declare void a final action taken in violation of the ODL. Ind. Code § 5-14-1.5-7(a)(3). But despite the executive session occurring on February 10, the BZA's notice of appeal being filed on February 22, and the Public Access Counselor's opinion being issued on May 18, Collins did not move to dismiss until June 29, after the BZA had already filed its opening and reply briefs. As such, his motion is untimely. *See id.* at (b)(2) (providing an action to declare a final action void based on a violation of the ODL be commenced within thirty days of the date of the act complained of or the date the plaintiff knew or should have known that the act occurred, whichever is later). Furthermore, the BZA reaffirmed the initiation of the appeal at a public meeting on March 10. And even if there were an ODL violation, voiding a final action is discretionary, and Collins fails to assert any of the statutory factors for determining whether the action should be voided. *See id.* at (d) ("In determining whether to declare any policy, decision, or final action void, a court shall consider the following factors among other relevant factors . . . ."). As such, we deny his motion to dismiss in a separate order issued today.

Discussion and Decision

[8] When we review an action of a board of zoning appeals, we apply the same standard as the trial court. *Riverside Meadows I, LLC v. City of Jeffersonville, Ind. Bd. of Zoning Appeals*, 72 N.E.3d 534, 538 (Ind. Ct. App. 2017). We may not try the facts de novo, nor may we reweigh the evidence or reassess the credibility of the witnesses. *Id.* Instead, we must accept the facts as found by the board. *Id.* However, we conduct a de novo review of any questions of law decided by the board. *Id.* "The burden of demonstrating the invalidity of a zoning decision is on the party to the judicial review proceeding asserting invalidity." Ind. Code § 36-7-4-1614(a).

[9] "We will presume that a zoning board's decision is correct, and we afford its decision great weight by virtue of its experience in this given area." *Burton v. Bd. of Zoning Appeals of Madison Cnty.*, 174 N.E.3d 202, 209-210 (Ind. Ct. App. 2021), *trans. denied*. We will reverse the decision only where a clear error of law has been demonstrated. *Id.* at 210. Clear error is demonstrated only when the party seeking relief demonstrates that it was prejudiced by a zoning board's decision that 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. I.C. § 36-7-4-1614(d).

I. Substantial Evidence

[10] The BZA first challenges the trial court's finding that its decision to deny Collins a special exception was not based on substantial evidence. When determining whether a zoning board's decision is supported by substantial evidence, the reviewing court must determine from the entire record whether the board's decision lacks a reasonably sound evidentiary basis. *Crooked Creek Conservation & Gun Club, Inc. v. Hamilton Cnty. N. Bd. of Zoning Appeals*, 677 N.E.2d 544, 548 (Ind. Ct. App. 1997), *reh'g denied, trans. denied*. Evidence will be considered substantial if it is more than a scintilla and less than a preponderance. *Id.* at 549. In other words, substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.*

[11] The BZA contends the trial court, in issuing its findings, "directly shift[ed] the burden of proof from Collins to the BZA . . . contrary to case law." Appellant's Br. p. 19. We agree. The zoning ordinance gives the BZA discretion to grant or deny a special exception. As such, "the burden of demonstrating satisfaction of the relevant statutory criteria rests with the applicant for a special exception." *Crooked Creek Conservation & Gun Club, Inc.*, 677 N.E.2d at 548. A board of zoning appeals "need not affirmatively disprove an applicant's case" and "may deny an application for a special exception on the grounds that an applicant has failed to carry its burden of proving compliance with the relevant statutory criteria . . . ." *Id.*

[12] Here, the BZA found Collins failed to prove the criteria required in Section 153.246. However, the trial court determined the BZA's decision was not based on substantial evidence in the record, citing the BZA's lack of evidence on "the structure's impact on the surrounding neighborhood or property values." But the BZA was not required to present evidence—Collins was. The question before the trial court, and this Court, is not whether the BZA sufficiently refuted Collins's application, but whether the BZA's determination to deny his application was supported by substantial evidence in the record. And given the deference afforded to these types of determinations, we conclude it is. The BZA found Collins had not shown sufficient evidence required under the ordinance. The record shows Collins presented little to no evidence of his structure's effect on the community. In contrast, the BZA noted that the structure could hurt the aesthetics of the neighborhood, lower property values, and prevent housing from developing on the lot. Collins's neighbor also testified at the hearing that the structure would hurt property values and preclude placing a home on the lot. This is sufficient reasoning to deny his application.

[13] The trial court erred in finding the BZA's decision is not supported by substantial evidence.

II. Arbitrary

[14] The BZA also challenges the trial court's determination that its decision was arbitrary because it had approved other special exceptions "under the same or very similar circumstances." A BZA's decision will be found to be arbitrary and

capricious "only where it is willful and unreasonable, without consideration and in disregard of the facts or circumstances in the case, or without some basis which would lead a reasonable and honest person to the same conclusion." *Evansville Outdoor Advert., Inc. v. Bd. of Zoning Appeals of Evansville & Vanderburgh Cnty.*, 757 N.E.2d 151, 161 (Ind. Ct. App. 2001), *trans. denied*.

[15] The BZA argues its decision to deny Collins's special exception was reasonable and based on the facts of his particular case. We agree. The record shows Surgeon voluntarily informed the other members that he was previously granted a special exception for a residential storage structure on his property. The board members then discussed several differences between the situations, including that Surgeon's structure allowed for a home to be built on the lot and that Surgeon lived in Mount Vernon, not Poseyville. Given that the main reason for the BZA's denial of Collins's application was Poseyville's unique preference for houses over other structures, these differences are paramount. And again, we give great deference to the BZA's decisions in these matters. *See Burton*, 174 N.E.3d at 209-210. As such, we cannot say the BZA's decision to deny Collins's application, even given its acceptance of Surgeon's past application, was arbitrary.

[16] Reversed.

Crone, J., and Altice, J., concur.