MEMORANDUM DECISION

ATTORNEY FOR APPELLANTS

Steven E. Ripstra
Ripstra Law Office
Jasper, Indiana

ATTORNEY FOR APPELLEE BOARD OF ZONING APPEALS, SPENCER COUNTY, INDIANA

John G. Wetherill
Wetherill Law Office
Rockport, Indiana

ATTORNEY FOR APPELLEES DENNIS LUEBBEHUSEN AND ROSE M. LUEBBEHUSEN

Jonathan M. Young
Law Office of Jonathan M. Young, P.C.
Newburgh, Indiana

IN THE COURT OF APPEALS OF INDIANA

Kenneth L. Dilger and Carol J. Dilger,

Appellants-Petitioners

v.

Board of Zoning Appeals, Spencer County, Indiana, and Dennis Luebbehusen and Rose M. Luebbehusen,

April 13, 2021

Court of Appeals Case No. 20A-MI-1990

Appeal from the Spencer Circuit Court

The Honorable Jon A. Dartt, Judge

Trial Court Cause No. 74C01-2005-MI-191

Appellees-Respondents

Crone, Judge.

Case Summary

[1] Dennis and Rose M. Luebbehusen (Luebbehusen) filed an application for a variance to build a single-family residence on a .89-acre piece of property located in an agricultural zone in which residential structures are permitted only on lots comprising at least one acre. The Spencer County Board of Zoning Appeals (BZA) held a hearing and granted Luebbehusen's variance application over the objection of neighboring landowners Kenneth L. Dilger and Carol J. Dilger (Dilger). Dilger petitioned for judicial review of the BZA's decision, which the trial court affirmed. On appeal, Dilger contends that the BZA's decision is unsupported by the evidence and that the trial court erred in denying his request to supplement the record. We disagree and therefore affirm.

Facts and Procedural History

[2] Dilger owns 5.4 acres of land in Spencer County that adjoins a .89-acre parcel (the Property) purchased by Luebbehusen on July 22, 2019. The Property is located in an agricultural zoning district. "County ordinances 5.3 and 6.3 provide that the minimum square footage for the construction of residential structures in agricultural zones is 43,560 square feet (1 acre)." Appealed Order at 1.

[3] On March 5, 2020, Luebbehusen filed an application for a variance to build a home on the Property. At the BZA hearing on the application, Luebbehusen stated that he was ready to begin construction on the home and that he was unsure whether he would live in the proposed home, give it to one of his children, or sell the home. He stated that he had already received a septic permit from the local health department. In addition to Luebbehusen's statements, the BZA reviewed photographs and a diagram of the Property, heard lengthy statements from Dilger and his attorney, and heard a statement from a representative of the county planning commission. At the conclusion of the hearing, the BZA members voted unanimously to grant Luebbehusen's variance application.

[4] Dilger filed a petition for judicial review of the BZA's decision. The trial court held a hearing on July 15, 2020. At the outset of the hearing, in addition to submitting the BZA record for review, Dilger requested to present evidence outside the BZA record about the BZA's alleged failure to follow proper procedures in making its decision. The trial court asked Dilger for the statutory authority to support his request to supplement the record, and his counsel cited an inapplicable statutory provision. The trial court then informed Dilger regarding the proper procedure for supplementing the record upon petitions for judicial review, and Dilger provided no additional argument or support for his request, essentially conceding that he had none. The trial court then asked, "[C]an you flush[sic] that out for me what your argument is … what procedure you are saying was not followed." Tr. Vol. 2 at 15. Dilger's counsel responded,

"I don't have any specifics with regard to the procedure other than we don't believe that – that there was a finding at the [BZA] hearing that my clients were given proper appropriate notice of the hearing." *Id.*[1] The trial court denied Dilger's request to supplement the record.

[5] Following the hearing, the parties submitted post-hearing briefs, and thereafter the trial court entered its findings of fact, conclusions thereon, and order affirming the BZA's decision. Dilger now appeals. We will provide additional facts when necessary.

Discussion and Decision

Section 1 – The BZA's decision to grant the variance is supported by sufficient evidence.

[6] Dilger first contends that the BZA erred in granting Luebbehusen's variance application. Specifically, he argues that the BZA's decision is not supported by sufficient evidence. "A variance is described as a dispensation granted to permit a property owner to use his property in a manner forbidden by the zoning ordinance. A zoning board has the power within its discretion to approve or deny a variance from the terms of a zoning ordinance." *Schlehuser v. City of Seymour*, 674 N.E.2d 1009, 1012 (Ind. Ct. App. 1996) (citation omitted). Pursuant to Indiana Code Section 36-7-4-918.4, in order to obtain a variance, a petitioner must demonstrate that each of the following elements is present:

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[1] Dilger makes no argument on appeal regarding proper notice or lack thereof.

> (1) the approval will not be injurious to the public health, safety, morals, and general welfare of the community;
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> (2) the use and value of the area adjacent to the property included in the variance will not be affected in a substantially adverse manner;
>
> (3) the need for the variance arises from some condition peculiar to the property involved;
>
> (4) the strict application of the terms of the zoning ordinance will constitute an unnecessary hardship if applied to the property for which the variance is sought; and
>
> (5) the approval does not interfere substantially with the comprehensive plan adopted under the 500 series of this chapter.

[7] When reviewing a zoning board's decision, we apply the same standard as the trial court. *Stiller Props., LLC v. Floyd Cnty. Bd. of Zoning App.*, 144 N.E.3d 727, 728-29 (Ind. Ct. App. 2020). "We may not substitute our judgment for that of the zoning board, and we may neither reweigh evidence nor reassess witness credibility." *Id*. Judicial relief from a zoning decision may be granted only if the court determines that the petitioner has been prejudiced by a 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." Ind. Code § 36-7-4-1614(d). "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). To reverse the grant of a variance on the basis of insufficient evidence, "an appellant must show that the quantum of legitimate evidence was so proportionately meager as to lead to the conviction that the finding and decision of the board does not rest upon a rational basis." *Burcham v. Metro. Bd. of Zoning App. Div. 1 of Marion Cnty.*, 883 N.E.2d 204, 212-13 (Ind. Ct. App. 2008).

[8] Here, Luebbenhusen appeared at the BZA hearing in support of his application and stated that he was seeking the variance because he wants to build a home on the Property. There was absolutely no evidence presented to the BZA suggesting that such use would be injurious to the public health, safety, morals, and general welfare of the community, or that the use and value of the area adjacent to the property included in the variance will be affected in a substantially adverse manner. Indeed, it is undisputed that "[Dilger's] own residence adjoin[s] the subject property," and there was no evidence presented that construction of another residence would alter the area "in any way whatsoever." Appealed Order at 5. This evidence supports the elements that the approval of the variance will not be injurious to the public health, safety, morals, and general welfare of the community, and that the use and value of the area adjacent to the property included in the variance will not be affected in a substantially adverse manner.

[9] As for the elements that the need for the variance arises from some condition peculiar to the property involved, and that strict application of the terms of the zoning ordinance will result in unnecessary hardship if applied to the Property,

the evidence presented indicates that the Property is small and triangular in shape, and that, due to these peculiar conditions, putting the Property to a profitable or beneficial agricultural use would be quite difficult. Based upon this evidence, the BZA determined that constructing a residence on the Property would be the "most likely best use of the land." Appellants' App. Vol. 2 at 55. We will not substitute our judgment for that of the BZA on this issue.[2]

[10] Moreover, it is evident that Luebbehusen purchased the Property with the sole intention of building a residence on it. Contrary to Dilger's suggestions, the fact that Luebbehusen would have been aware of the use restrictions on the Property at the time of purchase is of no moment. *See Reinking v. Metro. Bd. of Zoning App. of Marion Cnty.*, 671 N.E.2d 137, 142 (Ind. Ct. App. 1996) ("[T]he purchase of property with knowledge of use restrictions does not prohibit a purchaser from claiming a special or unnecessary hardship, regardless of who owned the property at the time it was burdened.").[3] In light of the Property's peculiarities, the BZA was well within its discretion to determine that it would

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[2] Dilger claims that Luebbehusen presented no evidence that the Property could not be used for farming, and that three BZA members who are themselves farmers made this determination based upon their experience, which is not evidence. While we agree with Dilger that the BZA's decision to approve or deny an application should be based on the evidence presented at the hearing, we remind Dilger that BZA members are not held to the same degree of detachment as members of the judicial community, and they cannot be expected to be wholly unaware of the overall circumstances surrounding a variance request. *Ripley Cnty. Bd. of Zoning App. v. Rumpke of Ind., Inc.*, 663 N.E.2d 198, 205 (Ind. Ct. App. 1996)*, trans. denied* (1997). In fact, we fully expect (and fully endorse) that board members rely on their expertise when making their decisions.

[3] The BZA acknowledged that the Property was reduced to .89 acres many years before Luebbehusen's purchase when the State of Indiana took .86 acres through eminent domain for the construction of a highway. Appellants' App. Vol. 2 at 55.

constitute an unnecessary hardship to not permit Luebbehusen's proposed use for the Property.

[11] Finally, as to the fifth element, that the approval does not interfere substantially with the comprehensive plan for the area, during his testimony, Luebbehusen again affirmed to the BZA that he simply wanted to build a home on the Property. While Dilger responded that he believes that Luebbehusen intends to use the Property for commercial purposes, for example as an "Airbnb" rental, and that commercial use would allegedly go against the comprehensive plan for the area, Luebbehusen denied any such intent. Appellants' App. Vol. 2 at 113. [4] Rather, Luebbehusen's proposed residential use for the Property is entirely consistent with the plan for the area, as "residences are routinely constructed in this county in Agricultural Zones." Appealed Order at 5. The record supports a finding that the approval of Luebbehusen's variance would not interfere substantially with the comprehensive plan for the area.

[12] Based upon the foregoing, Dilger has failed to show that the quantum of legitimate evidence was so proportionately meager as to lead to the conviction that the finding and decision of the BZA does not rest upon a rational basis. *Burcham*, 883 N.E.2d at 213. We agree with the trial court that Dilger's "only claim of prejudice appears to be [his] dislike of neighboring residential growth." Appealed Order at 6. In sum, Dilger has not met his burden to establish the

[4] BZA members emphasized that the grant of the current variance would simply allow Luebbehusen to construct a residence on the Property and that he would be required to apply for an additional permit or variance at a later date if he was indeed seeking commercial use.

invalidity of the BZA's decision to grant the variance, and we consequently affirm it.

Section 2 – Dilger has waived our review of the trial court's denial of his request to supplement the record.

[13] Dilger also claims that the trial court erred in denying his request to supplement the BZA record with evidence of alleged board-member bias and improper procedures followed by the BZA. Indiana Code Section 36-7-4-1612 provides:

> (a) The court may receive evidence, in addition to that contained in the board record for judicial review, only if the evidence relates to the validity of the zoning decision at the time the decision was made and is needed to decide disputed issues regarding one (1) or both of the following:
>
> > (1) Improper constitution as a decisionmaking body or grounds for disqualification of those making the zoning decision.
> >
> > (2) Unlawfulness of procedure or of decisionmaking process.
>
> This subsection applies only if the additional evidence could not, by due diligence, have been discovered and raised in the board proceeding giving rise to a proceeding for judicial review.

[14] Dilger insists that evidence of board-member bias and improper decisionmaking process "came to light during and after the April 23 BZA Hearing," Appellants' Br. at 10, and that the trial court should have granted his request to present additional evidence or to compel additional discovery on these issues.

However, Dilger's current assertions do not even come close to resembling those that he presented to the trial court in support of his request to supplement the record with additional evidence.[5] Accordingly, he has waived our review of this issue. *Benton Cnty. Remonstrators v. Bd. of Zoning App. of Benton Cnty.*, 905 N.E.2d 1090, 1096 (Ind. Ct. App. 2009) ("A party generally waives appellate review of an issue or argument unless the party raised that issue or argument before the trial court."). The trial court's decision is affirmed.

[15] Affirmed.

Riley, J., and Mathias, J., concur.

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[5] Dilger claims that his current assertions "were raised in the trial court in [his] Petition for Judicial Review." Appellants' Br. at 22. We have reviewed his petition and find no mention of these assertions. Rather, allegations of board-member bias and improper ex parte procedures were first made in Dilger's post-hearing brief. However, these allegations were not made in the context of his request to supplement the record. As noted above, the only claim Dilger presented to the trial court in support of his oral request to supplement the record was that he was not given proper notice of the BZA hearing. That claim has since been abandoned. *See* Appellants' App. Vol. 2 at 115. Only now does Dilger claim that record supplementation was necessary so that he could present evidence that board members were obviously biased against him. He also urges us to infer that three board members must have met privately to make their decision prior to the BZA hearing and, in doing so, would have violated Indiana's Open-Door Law, Indiana Code Section 5-14-1.5-3. These assertions are based upon nothing more than speculation and inuendo. Neither the trial court nor this Court will indulge these types of bald allegations. Accordingly, waiver notwithstanding, we conclude that the trial court did not err in denying Dilger's request to supplement the record.