MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

BP2 Construction, LLC,
Appellant-Petitioner,

v.

Board of Zoning Appeals of the City of Seymour,
Appellee-Respondent.

February 22, 2023

Court of Appeals Case No. 22A-PL-1194

Appeal from the Jackson Superior Court

The Honorable AmyMarie Travis, Judge

Trial Court Cause No. 36D01-2101-PL-2

Memorandum Decision by Judge Weissmann
Judges May and Crone concur.

Weissmann, Judge.

[1] BP2 Construction, LLC desires to use its property as a center for recycling construction materials. That use, however, falls outside the ambits of the property's zoning classification which required BP2 to obtain a use variance. The local Board of Zoning Appeals (BZA) denied BP2's request, finding its proposal met none of the five statutory requirements for a use variance. BP2 sought initial review of the BZA's decision with the trial court, which affirmed the BZA.

[2] In this appeal, BP2 argues that the BZA impermissibly relied on the opinions of the property's nearby residents and that its decision was arbitrary, capricious, an abuse of discretion, and unsupported by substantial evidence. Finding no error, we affirm.

Facts

[3] BP2 owns property zoned for a C-1 neighborhood commercial district in Seymour, Indiana. BP2 wants to use the property to recycle material such as dirt, concrete, and asphalt. This, however, is an I-2 general industrial use. To solve this problem, BP2 petitioned the BZA for a use variance, which would allow BP2 to deviate from the property's zoning classification.

[4] The BZA considered both written and oral testimony in making its decision. The BZA received five letters from the community: four against granting the use variance and one in favor. Six people spoke at a hearing on the matter: four in opposition and two in favor. Those opposing the variance focused on the

increased noise and traffic that a recycling center would produce and argued that such a commercial operation was unsuitable for a residential neighborhood. Nearby residents and businesses complained of activity already occurring on BP2's property consistent with the recycling of construction materials. This activity involved a "giant mountain of broken concrete" and constant noise from dump trucks entering and exiting the property. App. Vol. II, pp. 63, 68. The testimony in favor of the variance focused on the increased business to the community and the environmental benefits of recycling construction materials.

[5] BP2's evidence in support of the use variance consisted of a two-page memo. In it, BP2 made general claims that the recycling center would not impact the health and safety of the community or lower nearby property values. BP2 also committed to eliminating any adverse effects from recycling by limiting the spread of dust and creating a tree line to block the sight of the recycling center and reduce noise. Though BP2 claimed that Indiana's Department of Environmental Management and the Department of Transportation had both approved the property's new use, BP2 failed to provide supporting evidence.

[6] The BZA unanimously voted to deny BP2's variance request. In the written findings accompanying its decision, the BZA noted residents' concerns about the proposed recycling center and found that BP2 failed to provide sufficient evidence to meet the requirements for a use variance.

[7] BP2 sought review of the BZA's decision in the local trial court, arguing that the BZA wrongly denied the use variance. The trial court, however, affirmed the BZA, finding its written findings were "reasonable and outline[d] with sufficient particularity how [BP2] failed to satisfy the necessary elements" for obtaining a use variance. *Id.* at 17. BP2 now seeks further review with this court.

Discussion and Decision

[8] BP2 faces an "extremely difficult" standard of review to overturn the BZA's denial of its use variance. *Boffo v. Boone Cnty. Bd. of Zoning Appeals*, 421 N.E.2d 1119, 1125 (Ind. Ct. App. 1981). As relevant here, we may grant relief only where the zoning decision was arbitrary, capricious, an abuse of discretion, not in accordance with law, or unsupported by substantial evidence. Ind. Code § 36-7-4-1614(d); *see also* Ind. Code § 4-21.5-5-14(a) (listing the same substantive standard of review for "agency actions"). This is the same standard of review employed by the trial court when it reviews the decision of a zoning board. *Caddyshack Looper, LLC v. Long Beach Advisory Bd. of Zoning Appeals*, 22 N.E.3d 694, 701 (Ind. Ct. App. 2014). The party challenging the zoning decision bears the burden of proving the decision's invalidity. Ind. Code § 36-7-4-1614(a).

[9] A use variance petition must establish the existence of the following five requirements before a use variance may be granted:

> (1) the approval will not be injurious to the public health, safety, morals, and general welfare of the community;

> (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.

Ind. Code § 36-7-4-9184; *Maxey v. Bd. of Zoning Appeals*, 480 N.E.2d 589, 595 (Ind. Ct. App. 1985). Yet, even if a petitioner successfully demonstrates all five requirements, the granting of a use variance is not mandatory; the decision is "committed to the discretion" of the zoning board. *Town of Merrillville Bd. of Zoning Appeals v. Public Storage, Inc.*, 568 N.E.2d 1092, 1094 (Ind. Ct. App. 1991).

The BZA Did Not Err in Denying the Use Variance

[10] BP2 makes two related arguments in favor of reversing the BZA. It first argues that the BZA's decision was impermissibly based on the "personal opinions" of nearby residents who opposed granting the use variance. And then more generally, BP2 contends the BZA's decision was arbitrary, capricious, an abuse of discretion, and unsupported by substantial evidence.

"Personal Opinions" of Nearby Residents

[11] In arguing that the BZA impermissibly relied on the opinions of the property's nearby residents, BP2 relies heavily on the general rule that a board of zoning

appeals decision "cannot be determined by a poll of the sentiment of the neighborhood." *Stout v. Mercer*, 312 N.E.2d 515, 520 (Ind. Ct. App. 1974) (quoting *Town of Homecroft v. Macbeth*, 148 N.E.2d 563, 566 (Ind. 1958)).

[12] BP2 directs us to *Network Towers, LLC v. Bd. of Zoning Appeals of LaPorte Cnty.*, in which this Court reversed a board of zoning appeals' denial of a conditional use variance for construction of a cell phone tower over a lack of substantial evidence supporting the decision. 770 N.E.2d 837, 849 (Ind. Ct. App. 2002). The Court found that nearby residents' opinions about their "aesthetic preferences" and a resident's belief about "the potential adverse health effects of microwaves" were insufficient to establish that adjacent property values would be substantially adversely impacted or a realistic concern about the community's health and safety. *Id.* at 844-49.

[13] We note that the standards required to obtain a conditional use variance, like the one at issue in *Network*, are "less stringent than those for a [use] variance." *Id.* at 844. Thus, even if the present case was factually similar to *Network*, BP2 would still have an uphill battle to justify reversing the BZA's decision due to the higher standards required for a use variance. But as a factual matter, none of the testimony the BZA received from nearby residents concerned their aesthetic preferences or wild speculations about potentially harmful health concerns. Residents chiefly complained about readily identifiable and commonly known nuisances from the recycling of construction materials like dust, noise, and increased traffic. The BZA even received video evidence documenting these concerns.

[14] The concerns voiced by nearby residents were particularly compelling consideringBP2 had begun using the property to recycle construction materials before requesting the use variance. Indeed, the trial court had to issue a separate order enjoining BP2 from recycling construction materials on the property. App. Vol. II, p. 8. Thus, residents had already directly experienced the issues they raised as concerns to the potential grant of the variance.

The BZA Did Not Violate the Standard of Review

[15] But the BZA did not rely solely on the testimony of nearby residents. Several times, the BZA noted that BP2 failed to present "sufficient evidence" or "adequate proof" that the use variance would comply with the statutory factors. *Id.* at 58-59. These instances ranged from failing to submit evidence documenting INDEM's and INDOT's approvals for the property's new use, *id.* at 58; a lack of "convincing evidence" showing that the land next to the property would not be adversely affected, *id.*; failing to submit evidence showing the peculiarity of the property that justifies the use variance, *id.*; a lack of evidence on how BP2 would be unnecessarily harmed by the denial of the use variance, *id.* at 59; and finally, a lack of evidence showing that the use variance would comply with the Seymour Township's comprehensive zoning plan, *id.* Even setting aside the concerns of the residents, these findings justified the BZA's denial of BP2's use variance request. *See Midwest Minerals Inc. v. Bd. of Zoning Appeals of Area Plan Dep't/Com'n of Vigo Cnty.*, 880 N.E.2d 1264, 1269-71 (Ind. Ct. App. 2008) (affirming board of zoning appeals' denial of special permit where applicant failed to prove compliance with statutory requirements).

[16] BP2 also complains that it was not their failure to present evidence, but that the BZA "ignored" the evidence before it. Appellant's Br., p. 14. For instance, BP2 alleges that the BZA disregarded its evidence that the sound stemming from the recycling would be fewer than 85 decibels and, therefore, "equivalent [to] a lawnmower or passing traffic." App. Vol. II, p. 66. But nearby residents submitted contrary video evidence to the BZA, directly demonstrating loud noise coming from the property. The BZA did not abuse its discretion or act arbitrarily or capriciously, by crediting this evidence more than BP2's. We do not reweigh the evidence nor "substitute our judgment for that of the BZA." *Riverside Meadows I, LLC v. City of Jeffersonville, Ind. Bd. Of Zoning Appeals*, 72 N.E.3d 534, 538 (Ind. Ct. App. 2017).

[17] Accordingly, we affirm the trial court's refusal to set aside the BZA's denial of BP2's use variance.

May, J., and Crone, J., concur.