

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Gregory L. Ernstberger, as
Trustee of the Ernstberger
Planning Trust Dated February
27, 2016; Mary Ruth
Ernstberger; Paul A. Harrett, Jr.;
and Stevie Joe Lewis,
Appellants-Petitioners,

v.

Floyd County Board of Zoning
Appeals; The Margaret Phan-
Rogers Revocable Living Trust
of July 19, 2005; Full Circle
Automation, LLC; and Jeffrey
Kiper,
Appellees-Respondents.

March 17, 2021

Court of Appeals Case No.
20A-PL-2014

Appeal from the Floyd Circuit
Court

The Honorable Larry R. Blanton,
Special Judge

Trial Court Cause No.
22C01-1909-PL-1304

Bradford, Chief Judge.

Case Summary

- [1] Gregory Ernstberger, as trustee of the Ernstberger Planning Trust Dated February 27, 2016; Mary Ruth Ernstberger; Paul Harrett, Jr.; and Stevie Joe Lewis (collectively, “Appellants”) objected to an application filed by Full Circle Automation, LLC (“Full Circle”) for a variance relating to the zoning

classification of a piece of property located in Floyd County. Following two public hearings on the application, the Floyd County Board of Zoning Appeals (the “BZA”) granted the application. On appeal, Appellants contend that the trial court abused its discretion in finding that sufficient evidence supported the BZA’s decision to grant the requested variance. Concluding otherwise, we affirm.

Facts and Procedural History

- [2] At all times relevant to this appeal, the Margaret Phan-Rogers Revocable Living Trust of July 19, 2005 (the “Phan-Rogers Trust”) has owned approximately one and one-half acres of land (the “Real Estate”), which was located at the corner of State Road 62 (“SR 62”) and Yenowine Lane in Georgetown. In early 2019, the Real Estate was zoned rural residential (“RR”). At some point, the Phan-Rogers Trust granted authorization to Full Circle, which is owned and operated by Jeffery Kiper, to apply for a conditional use for the Real Estate, for the purpose of allowing Full Circle to operate an electrical contracting business.
- [3] On June 28, 2019, Full Circle applied for a special exemption (variance of use) for the Real Estate. Justin Tackett, the Director of Building and Development Services in Floyd County, submitted a report that he completed in connection with Full Circle’s application, in which Tackett indicated that (1) Full Circle was requesting a variance to operate as an industrial machine controls manufacturer; (2) the proposed use specializes in assembling industrial machine

controls; (3) the proposed use will utilize existing structure, as well as an additional 120 by 60 square foot structure to be built; (4) Full Circle has five employees; and (5) although Full Circle initially submitted a conditional use application for a Specialty Trade Office/Workshop, it was directed by staff to submit a request for a variance, as the use is not permitted by the zoning ordinance in the RR zoning district. Tackett's report further indicated as follows:

Planner Viewpoint:

The applicant needs to provide sufficient justification to the board to meet the six items below. My comments are listed below:

1. The special exception will not be injurious to the public health, safety, moral and general welfare of the community:
 - Use is limited to assembly work of mechanical/electrical equipment. As presented by the applicant, with its small size, and limit to indoor assembly of parts, I do not see it being injurious to the public health, safety, moral and general welfare of the community.
2. The use and value of the adjacent to the subject property to the special exception will not be affected in a substantially adverse manner:
 - If use is not limited in scope, screened, and held to a high standard, the use could be detrimental to adjoining property owners due to the close proximity of single family residential uses.
3. The need for the special exception arises from some condition peculiar to the property involved because:
 - Use is permitted in the Office Business/General Industrial Districts. Maplewood Office Business Park is

approximately 0.5 miles straight line distance from subject property.

4. The strict application of the terms of the Floyd County Zoning Ordinance will result in an unnecessary hardship in the use of the property:

- Use is permitted in the Office Business/General Industrial Districts. Maplewood Office Business Park is approximately 0.5 miles straight line distance from subject property.

5. The approval of the special exception will not contradict the goals and objectives of the Floyd County Comprehensive Plan:

- Floyd County should encourage the growth and support locally owned businesses, large or small. However, commercial development should be encouraged in commercial areas.

6. The special exception will not adversely affect neighboring property:

- If use is not limited in scope, use could be detrimental to adjoining property owners due to the close proximity of single family residential uses.

IF the applicant can successfully demonstrate to the board that the above items have been met, staff recommends the following conditions:

1. Material of new structure be of brick/masonry material
2. Commercial Septic Permit from State Department of Health
3. Buffer plantings on northern property line
4. No outside storage of manufacturing materials
5. Resurface of parking lot within 1 year of full operation[.]

Appellants' App. Vol. II p. 172.

[4] The BZA conducted a public hearing on Full Circle's application on July 8, 2019, during which it heard arguments both against and in favor of the application. At the conclusion of the hearing, the BZA tabled the application until its August 12, 2019 meeting. After considering the application together with Tackett's report and the arguments made during the July 8, 2019 public meeting, the BZA adopted the following findings addressing each of the statutory considerations:

1. The special exception [will not] be injurious to the public health, safety, morals, and general welfare of the community because: the use is limited to assembly work of mechanical/electrical equipment. As presented by the applicant, with its small size, and limited to indoor assembly of parts.
2. The use and value of the area adjacent to the property subject to the special exception [will not] be affected in a substantially adverse manner because: the development will be limited in scope, screened & held to a high standard of construction.
3. The need for the special exception [does] arise from some condition peculiar to the property involved because: the property has been used for commercial activity & is currently vacant. This use is permitted in the Office Business/General Industrial Districts. Maplewood Office Business Park is approximately 0.5 miles straight line distance from subject property. The property is at a corner of a heavily traveled intersection making it more affected by noise & fumes than the surrounding area.
4. The strict application of the terms of the Floyd County Zoning Ordinance [will] result in an unnecessary hardship in the use of the property because: the site is located along [SR 62] which is conducive to commercial activity & its proximity to the Maplewood Office Business Park and this type of activity is

permitted in [the] Office Business/General Industrial District.

5. The approval of the special exception [will not] contradict the goals and objectives of the Floyd County Comprehensive Plan because: Floyd County is encouraging the growth & support of locally owned businesses. The building will face [SR 62] which has commercial business along the road in this area.

6. The special exception [will not] adversely affect neighboring property because: the building will be constructed so it [is] compatible with the surrounding structures.

Appellants' App. Vol. III p. 59. On August 12, 2019, the BZA granted Full Circle's application, subject to the following conditions:

1. The new structure will be constructed using brick, hardy board, or split face concrete blocks or stucco or a blend of these materials to enhance the [building's] appearance.
2. Acquire a Commercial Septic Permit from the State Dept. of Health.
3. Along the northern property line install buffer plantings (2 staggered rows at 20' on center). 6' tall Norway Spruce or [an] alternative approved by staff.
4. The parking lot will be paved within one year of receiving the certificate of occupancy.
5. Submit a landscape plan for staff approval with planting along [the] SR 62 side of the parking lot & the end of the building.
6. Add a minimum of two windows on the Yenowine Lane side of the building.

7. Existing [building] exterior to be refinished similar to [the] new building.

Appellants' App. Vol. III p. 60. The approval was also subject to Full Circle's written commitment that Full Circle would "not store any manufacturing materials outside of the building." Appellants' App. Vol. III p. 60.

[5] On September 4, 2019, Appellants filed a verified petition for judicial review of the BZA's decision. On September 30, 2020, following the submission of briefs by all parties, the trial court issued an order in which it affirmed the BZA's decision.

Discussion and Decision

[6] Appellants contend that the trial court erroneously affirmed the BZA's decision, arguing that the evidence "was so proportionately meager as to lead to the conclusion that the finding and decision of the BZA, and its affirmation by the trial court, were not supported by substantial evidence of probative value." Appellants' Br. p. 16.

When reviewing a decision of a zoning board, this court and the trial court are bound by the same standard. *Scott v. Marshall County Bd. of Zoning Appeals*, 696 N.E.2d 884, 885 (Ind. Ct. App. 1998). We presume the determination of the board, an administrative agency with expertise in zoning matters, is correct. *Id.* Therefore, we will reverse only if the board's decision is arbitrary, capricious, or an abuse of discretion. *Id.* We will not reweigh the evidence or substitute our decision for that of the board. *Id.*

Midwest Minerals Inc. v. Bd. of Zoning Appeals of Area Plan Dep't/Comm'n of Vigo Cnty., 880 N.E.2d 1264, 1268 (Ind. Ct. App. 2008). Thus, Appellants labor under a heavy burden in urging this court to overturn the BZA's decision. *Id.*

I. Appropriate Legal Standard for Review of Full Circle's Application

[7] Indiana Code section 36-7-4-918.2 generally provides as follows:

A board of zoning appeals shall approve or deny all:

- (1) special exceptions;
- (2) special uses;
- (3) contingent uses; and
- (4) conditional uses;

from the terms of the zoning ordinance, but only in the classes of cases or in the particular situations specified in the zoning ordinance. The board may impose reasonable conditions as a part of its approval.

Specifically with respect to an application for a variance, Indiana Code section 36-7-4-918.4 provides:

A board of zoning appeals shall approve or deny variances of use from the terms of the zoning ordinance. The board may impose reasonable conditions as a part of its approval. A variance may be approved under this section only upon a determination in writing that:

- (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 [BZA's] comprehensive plan[.]

[8] The relevant Floyd County ordinance, which specifically incorporates the statutory language set forth [in] Indiana Code section 36-7-4-918.4, provides as follows:

Section 15.11 Special Exception (Use Variance)

The following procedure shall apply to all special exception petitions. The following procedure for a variance of use (Special Exception) shall follow the requirements set forth in Indiana Code 36-7-4-918.4. (Amended 1)

A. The petitioner shall submit a special exception application, affidavit and consent of property owner if the owner is someone other than the petitioner, a deed for the property involved, the required filing fee, and supportive information. Supportive information shall include, but not be limited to the following.

1. A site plan drawn to scale, signed, and dated which clearly shows the entire layout of the property and all features relevant to the variance request.
2. The applicant shall describe the details of the special exception use being requested and state how the request is consistent with the required findings of fact described in this Ordinance. The applicant should include any written commitments being made by the petitioner.

3. For proposals using septic systems, a letter from the Floyd County Health Department shall be provided verifying that any proposed development makes appropriate use of the septic system.

4. For proposals using sanitary sewer systems, a letter from the service provider shall be included verifying that any proposed new development will be served and the service provider must provide the following:

- a. Present and to date average daily capacity figures[.]
- b. All required IDEM monitoring reports for last twelve months including any violations noted by IDEM[.]
- c. All proposed developments including estimated amounts of daily usage that the service provider has agreed to service.
- d. Estimated daily use for proposed development[.]

B. Notification for the scheduled public hearing regarding the special exception use request shall be completed consistent with the Rules and Procedures of the Floyd County Board of Zoning Appeals and the Indiana Code[.]

C. The BZA may take action on the petition in accordance to IC 36-7-4-918.2(4) (Amended 1)[.]

1. The petition shall be approved if the findings of fact are made consistent with the requirements of this Ordinance and Indiana State Code. Those requirements are stated

below.

- a. The special exception will not be injurious to the public health, safety, moral, and general welfare of the community.
- b. The use and value of the area adjacent to the property included in the special exception (variance of use) will not be affected in a substantially adverse manner.
- c. The need for the special exception (variance of use) arises from some condition peculiar to the property involved.
- d. The strict application of the terms of the Floyd County Zoning Ordinance would result in an unnecessary hardship in the use of the property.
- e. The approval of the special exception use will not contradict the goals and objectives of the Floyd County Comprehensive Plan.

2. The petition shall be approved with modifications if the BZA determines that the required findings of fact may be made if certain conditions are applied to the petition. The BZA may make reasonable conditions related to the required findings of fact part of its approval or accept written commitments from the petitioner.

3. The petition shall be denied if findings of fact consistent with the requirements of this Ordinance and Indiana State Code are not made. Petitions which are denied shall not be eligible for consideration again by the BZA for a period of 1 year from the date of denial.

4. The petition may be tabled when necessary if consistent with the Rules and Procedures of the Board of Zoning Appeals.

5. Applicants and/or interested parties are encouraged to tender proposed findings of facts for the establishing compliance or non-compliance of the Ordinance.

Appellants' App. Vol. III pp. 82–83. In summary, the ordinance provides that an applicant must present evidence to establish certain facts and allows the BZA to exercise its discretion as to whether it believes that the evidence is sufficient to warrant a variance.

[9] Appellants argue that the trial court applied the wrong legal standard in reviewing the BZA's decision. The Floyd County ordinance appears to treat the terms "special exception" and "variance" interchangeably and applies the standard of proof required for variances to both types of request. Further, while the trial court's order references the general language set forth in Indiana Code section 36-7-4-918.2, its order also refers to the relevant factors set forth in both Indiana Code section 36-7-4-918.4 and the Floyd County ordinance. Based on our review, we do not believe that the trial court applied the wrong standard when reviewing the BZA's decision. However, even if the trial court had applied the wrong legal standard, such error would be harmless given that we stand in the same position as the trial court when reviewing the BZA's decision.

II. Sufficiency of the Evidence to Support the BZA's Decision

[10] The “burden of demonstrating satisfaction of the relevant statutory criteria rests with the applicant for a special exception” and we have “been cautious to avoid imposing upon remonstrators an obligation to come forward with evidence contradicting that submitted by an applicant.” *Midwest Minerals*, 880 N.E.2d at 1269. In this case, the BZA determined that Full Circle had met its burden of satisfying the above-quoted statutory criteria.

When determining whether an administrative decision is supported by substantial evidence, the receiving court must determine from the entire record whether the agency'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), *trans. denied.*] Thus, we have noted that 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.*

Id. Like the trial court, we conclude that substantial evidence supported the BZA's decision to grant Full Circle's application.

A. Whether the Approval will be Injurious to Public Health, Safety, Morals, and General Welfare of the Community

[11] The BZA found that granting the variance would not be injurious to the public health, safety, morals, and general welfare of the community. In making this finding, the BZA noted evidence that Full Circle's operation is small in size and

is limited to the indoor assembly of mechanical/electrical equipment. Tackett testified during the public hearing that he did “not see it being injurious to the public health, safety, moral and general welfare of the community.”

Appellants’ App. Vol. III p. 3. He included the same opinion in his report submitted to the BZA, in which he opined that “[a]s presented by the applicant, with its small size, and limit to indoor assembly of parts, I do not see it being injurious to the public health, safety, moral and general welfare of the community.” Appellants’ App. Vol. II p. 172.

[12] Again, evidence will be considered substantial if it is more than a scintilla and less than a preponderance, *i.e.*, the evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Midwest Minerals*, 880 N.E.2d at 1269. We conclude that Tackett’s testimony and written opinion is substantial evidence supporting the BZA’s determination in this regard.

B. Whether the Variance will Adversely Impact the Use and Value of Surrounding Properties

[13] In granting the variance, the BZA found that the use and value of the area adjacent to the property subject to the variance would not be affected in a substantially adverse manner. The BZA noted evidence that development of the Real Estate will be limited in scope, screened, and held to a high standard of construction. Its decision was also subject to Full Circle’s commitment that it would “not store any manufacturing materials outside of the building.” Appellants’ App. Vol. III p. 60. In addition, the BZA’s decision required that

new construction on the Real Estate be constructed using materials that are compatible with the surrounding structures and the existing building on the Real Estate be renovated in a manner that is compatible with the surrounding structures.

[14] At the time Full Circle filed its application, the Real Estate was unkempt and was arguably not adding any value to the surrounding properties. In setting conditions for use of the property and requiring the use of certain materials, the BZA seemingly considered Tackett's concern that the variance could potentially be determinantal to adjoining property owners due to the close proximity of single family residential uses if "use is not limited in scope, screened, and held to a high standard." Appellants' App. Vol. II p. 172. However, Tackett also testified that if limited in the manner set forth in the application, "the use and value of the adjacent [properties] to the subject property to the special exception will not be affected in a substantially adverse manner." Appellants' App. Vol. III p. 3.

[15] The evidence established that if the variance was granted, Full Circle planned to construct an "aesthetically pleasing building that is comparable to the homes in our area and to keep the grass and property well maintained." Appellants' App. Vol. II p. 78. The building would be insulated so to limit any noise from disturbing the neighbors, with the loudest noise associated with Full Circle's operations being "drilling small holes in sheet metal." Appellants' App. Vol. II p. 78. Full Circle is not a large operation; it only has five employees. The evidence also demonstrates a plan to plant aesthetically pleasing landscaping to

enhance the visual impact of the planned improvements. In addition, two neighboring property owners, including the neighbor in closest proximity to the Real Estate, spoke in favor of the variance, noting the aesthetic improvements that the proposed use would make to the area and a lack of concern for noise coming from the buildings.

- [16] The record contains substantial evidence indicating that rather than adversely affecting the surrounding properties, granting the variance will result in improvements to the existing unkempt condition of the Real Estate with aesthetically pleasing buildings and landscaping. The proposed use would also not add any additional noise pollution to the area. One could reasonably conclude that such improvements will enhance, not adversely impact, the area. As such, the record supports the BZA's determination in this regard.

C. Whether a Need Arises from a Condition Peculiar to the Property

- [17] In granting the variance, the BZA found that the need for the special exception arose from a condition peculiar to the Real Estate. The BZA noted that the Real Estate, which has previously been used for commercial activity and is currently vacant, is located 0.5 miles from the Maplewood Office Business Park, where the requested use would be permitted. In addition, the Real Estate is located at the corner of a heavily traveled intersection, making it more affected by noise and fumes than the properties located in the surrounding area.

[18] In *I-465, LLC v. Metro. Bd. of Zoning Appeals Div. II of Marion Cnty.*, 36 N.E.3d 1094, 1101 (Ind. Ct. App. 2015), we rejected the notion that the term “peculiar” refers only to the size and shape of a piece of property in context of determining whether there was a condition peculiar to a property that would support granting a variance. In his report, Tackett noted that Full Circle’s proposed use for the Real Estate was permitted approximately 0.5 miles “straight line distance” from the Real Estate in the Maplewood Office Business Park. Appellants’ App. Vol. II p. 172. At the public hearing, Tackett testified that “the need for the special exception arises from some condition peculiar to the property involved because use is permitted in the” nearby Maplewood Office Business Park. Appellants’ App. Vol. III p. 3. The BZA also heard evidence that the Real Estate had previously been granted a similar variance to be used for commercial activity and had “been used for commercial purposes for 20 years.” Appellants’ App. Vol. III p. 12.

[19] Finally, the evidence establishes that although zoned residential, the Real Estate is located on the corner of a heavily-trafficked intersection, making it more adversely affected by the traffic, noise, and fumes than many of the surrounding properties. See *Metro. Dev. Comm’n of Marion Cnty. v. Troy Realty, Inc.*, 150 Ind. App. 213, 218, 275 N.E.2d 845, 848 (1971) (finding that testimony in the record indicating that this property is situated at one corner of a heavily trafficked intersection, thus this property may be somewhat more affected by the “noise and fumes” than the surrounding area, supported the zoning board’s determination that a condition peculiar to the property

warranted granting a variance). We conclude that the record contains substantial evidence supporting the BZA's determination that conditions peculiar to the Real Estate warranted granting the variance.

D. Whether Strict Application of Zoning Code will Constitute an Unnecessary Hardship on Applicant

[20] In granting the variance, the BZA found that the strict application of the terms of the Floyd County Zoning Ordinance would result in an unnecessary hardship on the use of the Real Estate. The BZA again noted its proximity to the Maplewood Office Business Park where the requested type of activity is permitted. It further noted that the Real Estate is located along SR 62 which is conducive to commercial activity. The BZA's finding relating to the Real Estate's close proximity to the Maplewood Office Business Park, where similar uses are permitted, was supported by substantial evidence. Given the Real Estate's close proximity to the Maplewood Office Business Park, Tackett testified at the public hearing that "strict application of the terms of the Floyd County Zoning ordinance will result in an unnecessary hardship in the use of the property." Appellants' App. Vol. III p. 4.

[21] Based on the evidence presented before the BZA, we conclude that the BZA could reasonably infer that given the Real Estate's location on SR 62, combined with the fact that it had long been either vacant or used for commercial purposes and the complete lack of any indication that anyone had shown an interest in building a residential structure on the Real Estate, the Real Estate

could not reasonably be put to a conforming use.¹ *See Fail v. LaPorte Cnty. Bd. of Zoning Appeals*, 171 Ind. App. 192, 200, 355 N.E.2d 455, 460 (1976) (“Whether an unnecessary hardship exists is a question of fact to be determined by the board. The primary question is whether the land in question may reasonably be put to a conforming use.”). We therefore further conclude that the record contains substantial evidence supporting the BZA’s determination that denial of Full Circle’s application would result in an unnecessary hardship on the use of the Real Estate.

E. Whether Approval will Substantially Interfere with the Floyd County’s Comprehensive Plan

[22] Lastly, in granting the variance, the BZA found that the approval of the variance would not contradict the goals and objectives of the Floyd County Comprehensive Plan. The BZA noted that Floyd County is encouraging the growth and support of locally owned businesses. It further noted that granting the variance would be consistent with other properties along SR 62 as there are other commercial businesses along SR 62 in the surrounding area and the main structure will be built facing SR 62.

[23] The evidence supports the BZA’s determination that Floyd County is encouraging the growth of locally owned business as well as its determination

¹ While the BZA heard evidence from a local real estate broker that the Real Estate could be developed for residential use, nothing in the record before the BZA indicated that anyone had ever shown an interest in doing so.

that there were already other commercial businesses located along SR 62 in the surrounding area. Tackett testified that while “commercial development should be encouraged in commercial areas,” granting Full Circle’s application would “not contradict the goals and objectives of Floyd County[’s] comprehensive plan” as “Floyd County should encourage the growth and support locally owned businesses, large or small.” Appellants’ App. Vol. III p. 4. Tackett’s testimony supports the BZA’s determination that granting Full Circle’s application would not substantially interfere with the Floyd County Comprehensive Plan.

Conclusion

[24] In sum, we conclude that the evidence is sufficient to support the BZA’s findings relating to Full Circle’s application for a variance for the Real Estate. Appellants’ arguments to the contrary effectively amount to an invitation to reweigh the evidence, which we will not do. *Midwest Minerals*, 880 N.E.2d at 1268.

[25] The judgment of the trial court is affirmed.

Vaidik, J., and Brown, J., concur.