

## MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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## IN THE COURT OF APPEALS OF INDIANA

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John Patrick Michaels,  
*Appellant / Petitioner,*

*v.*

Huntington County, Indiana,  
Advisory Board of Zoning  
Appeals,  
*Appellee / Respondent.*

October 12, 2021

Court of Appeals Case No.  
21A-PL-565

Appeal from the Huntington  
Circuit Court

The Hon. Davin G. Smith, Judge

Trial Court Cause No.  
35C01-2003-PL-204

**Bradford, Chief Judge.**

## Case Summary

- [1] John Patrick Michaels owns property in Huntington County on which he wished to establish and operate an outdoor shooting range, a use for which it was not zoned. To that end, Michaels petitioned the Huntington County Advisory Board of Zoning Appeals (“the Board”) for a special exception. After a hearing, the Board denied Michaels’s petition for a special exception, and the trial court denied his petition for judicial review. Michaels contends that the Board and trial court erred in failing to evaluate the Board’s denial of his petition in light of the Second Amendment’s right to bear arms and that the Board abused its discretion in denying his petition. Because we conclude that Michaels failed to properly preserve any Second Amendment argument for review and failed to establish an abuse of discretion, we affirm.

## Facts and Procedural History

- [2] Michaels owns property located at 3833 North Rangeline Road in Huntington County which is in a low-density residential (“R-2”) zoning district. The land around Michaels’s property contains single-family dwellings, farmland, woods, a museum, and a church. On November 6, 2019, Michaels petitioned the Board for a special exception to operate his firearms safety instruction business on his property, which was to consist of an indoor classroom and an outdoor shooting range.
- [3] The Huntington County Zoning Ordinance (“the Ordinance”) defines a special exception as “[a] use designated as being permitted within a district provided it complies with all development standards of that district and satisfies the criteria,

which the Board of Zoning Appeals utilizes when reviewing the application for special exception approval.” Section 501(B) details those criteria and provides as follows:

- B. A proposed exception or use can only be granted by the Board of Zoning Appeals upon an affirmative finding on the following criteria:
  - 1. The proposed exception or use will not be injurious to, or alter the normal and orderly development of, permitted uses of property within the general Vicinity;
  - 2. The proposed exception or use is serviced by adequate access roads, ingress and egress points, and traffic flow and control mechanisms;
  - 3. The establishment, maintenance, or operation of the proposed exception or use will not be injurious to the public health, safety, or general welfare; and
  - 4. The proposed exception or use is not inconsistent with the Comprehensive Plan.

Appellant’s App. Vol. III p. 142. The Board separated Michaels’s petition into two portions: his request for a classroom and his request for an outdoor shooting range. At a November 26, 2019, meeting, the Board granted Michaels’s request to build the classroom and tabled the request for the shooting range.

[4] On February 25, 2020, the Board held a meeting at which it addressed the shooting range. Prior to the hearing, the Huntington Countywide Department of Community Development had issued a staff report that was in favor of approving Michaels’s request. However, a petition opposing the special exception was signed by ninety-three persons identified as “citizens of the area

impacted by the application[.]” Appellant’s App. Vol. II pp. 230–35.

Moreover, Reverend Robert Kemp wrote a letter expressing his concerns that his church would likely be located in the direction of the shooting range and that the noise from the range would be disruptive to church events and ministry programs to the point that church members would be deterred from hosting or attending events at the church. Finally, the Board received letters from sixteen nearby landowners opposed to the range who expressed concerns about noise, safety, and property values, while five persons spoke in favor of the range.

[5] The Board voted to deny Michaels’s request and issued the following findings:

1. The proposed exception or use will or will not be injurious to, or alter the normal and orderly development of, permitted uses of property within the general vicinity because:

[Board members] Caley and Sprowl stated will alter the normal and orderly development and could limit future development of existing permitted uses in the area. Voice vote followed. Motion approved for a negative finding 5-0.

2. The proposed exception or use is or is not serviced by adequate access roads, ingress and egress points, and traffic flow and control mechanisms because:

[Board members] Sprowl and Park stated it is, the proposed traffic is not going to be a problem for the roads and egress points in place. Also Development Plan will take a further 100k into ingress and egress to the property. Voice vote followed. Motion approved 5-0.

3. The establishment, maintenance, or operation of the proposed exception or use will or will not be injurious to the public health, safety, or general welfare because:

[Board member] Sprowl stated will not because the applicant has demonstrated an above average competency in the safety of firearm operation and will have conditions. Voice vote followed. Motion denied 2-3.

4. The proposed exception or use is or is not inconsistent with the Comprehensive Plan because:

[Board members] Sprowl and Park stated the proposed use is inconsistent with the Comprehensive Plan because the property is surrounded by R-2 zoned properties that are anticipated to be developed into an even more concentrated residential area in the future. Voice vote followed. Motion approved for a negative finding 5-0.

Appellant's App. Vol. II p. 40.

[6] On March 26, 2020, Michaels petitioned for judicial review of the Board's decision. On March 4, 2021, the trial court denied Michaels's petition for judicial review, concluding, in part, as follows:

35. The Court also finds that Michaels has failed to meet his burden in this case of showing that the Board's decision was an abuse of discretion or unsupported by substantial evidence. There is substantial evidence in the Record that Michaels's proposed use would be injurious to public safety and welfare, the normal and orderly development of the surrounding area in the R-2 district, and that it is inconsistent with the Comprehensive Plan for the R-2 district.

36. There is evidence in the Record that the Comprehensive Plan calls for increased residential development in a manner that is dictated by growth in housing demand. Michaels has failed to show that the Board abused its discretion when it concluded that the construction of a commercial shooting range on the Michaels Property would be inconsistent with the Comprehensive Plan for the R-2 residential district and that it could hinder future residential growth and development in

the surrounding area. There are several letters in the Record from surrounding landowners and a local real estate professional indicating that construction of the shooting range would likely lead to a substantial decrease in property values and interest in further residential development.

37. There is additional evidence in the Record indicating that Petitioner’s proposed shooting range would be operating in the direction of a neighbor’s home located approximately 600 feet away and in the direction of a local church. There is substantial evidence supporting the Board’s finding that operation of a commercial shooting range in a populated residential area presents legitimate threats to public safety and general welfare.

Appellant’s App. Vol. II pp. 13–14.

## Discussion and Decision

[7] Michaels appeals from the denial of his request for a special exception to operate an outdoor shooting range on his property. While Michaels is correct that a special exception is not quite the same thing as a variance,<sup>1</sup> “the review of board decisions regarding variances and special exceptions is the same: To reverse, there must be an abuse of discretion, or a lack of substantial evidence to

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<sup>1</sup> The Ordinance defines “variance” as “[a] specific approval granted by the Board of Zoning Appeals or Hearing Officer to deviate from a requirement of this Zoning Ordinance.” Appellant’s App. Vol. III p. 133.

support the Board’s decision or an error of law in such decision.”<sup>2</sup> *Merrillville Bd. Zoning Appeals v. Public Storage, Inc.*, 568 N.E.2d 1092, 1094 (Ind. Ct. App. 1991) (citation and quotation marks omitted). “This court and the trial court are bound by the same standards when reviewing the decision of a board of zoning appeals.” *Town of Munster Bd. of Zoning Appeals v. Abrinko*, 905 N.E.2d 488, 491 (Ind. Ct. App. 2009). Indiana Code section 36-7-4-1614(d) provides, in part, that a reviewing court should grant relief “if the court determines that a person seeking judicial relief has been prejudiced by a zoning decision that is [...] arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]” “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).

[8] In reviewing an administrative decision, a trial court may not try the facts *de novo* or substitute its own judgment for that of the agency. [*S&S Enters., Inc. v. Marion Cnty. Bd. of Zoning Appeals*, 788 N.E.2d 485, 490 (Ind. Ct. App. 2003), *trans. denied*]. “Neither the trial court nor the appellate court may reweigh the evidence or reassess the credibility of witnesses.” *Id.* Reviewing courts must accept the facts as found by the zoning board. *Id.*

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<sup>2</sup> Michaels seems to argue that once he produced substantial evidence regarding all of the four components of the Ordinance, the Board lacked discretion to deny his request for a special exception. Michaels, however, fails to distinguish between “regulatory” special exceptions, which require an applicant to show compliance with certain regulatory requirements (*e.g.*, structural specifications), providing the zoning board with no discretion, and “discretionary” exceptions, providing a zoning board with a discernible amount of discretion (*e.g.*, those which require an applicant to show that its proposed use will not injure the public health, welfare, or morals). See *Crooked Creek Conservation and Gun Club, Inc. v. Hamilton Cnty. Bd. of Zoning Appeals*, 677 N.E.2d 544, 547–48 (Ind. Ct. App. 1997) (explaining distinction between regulatory and discretionary special exceptions), *trans. denied*. Because the Ordinance clearly falls into the second category, we review the Board’s decision for an abuse of discretion.

*Hoosier Outdoor Advert. Corp. v. RBL Mgmt., Inc.*, 844 N.E.2d 157, 163 (Ind. Ct. App. 2006), *trans. denied*. “We must determine whether the BZA’s decision ‘is supported by substantial evidence’ and has ‘a reasonably sound evidentiary basis.’” *S & S Enters.*, 788 N.E.2d at 491 (quoting *Crooked Creek*, 677 N.E.2d at 548). Evidence will be considered substantial if it is more than a scintilla and less than a preponderance. *Id.* (citing *Crooked Creek*, 677 N.E.2d at 549). In other words, substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* (citing *Crooked Creek*, 677 N.E.2d at 549).

## I. Second Amendment Argument

[9] Michaels argues that we should review the Board’s denial of his request for a special exception in light of the Second Amendment to the United States Constitution, which provides that “[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” While Michaels does not argue that his Second Amendment rights, or the rights of his potential customers, are being directly violated by the Board’s action, he seemingly contends that the denial of his request for a special exception should nonetheless be subject to some level of heightened scrutiny on review. We need not, however, reach the merits of this argument because Michaels did not make it to the Board.

[10] In order to preserve a zoning issue for judicial review, a petitioner must first raise that issue before the Board.<sup>3</sup> “Objections or questions which have not been raised in the proceedings before the administrative agency will not be considered by this court on review of the agency’s order.” *McBride v. Bd. of Zoning Appeals of Evansville–Vanderburgh Area Plan Comm’n*, 579 N.E.2d 1312, 1315 (Ind. Ct. App. 1991) (citation omitted). The proper procedure where there is an objection to the legality of a zoning requirement is to raise it before the zoning board. *Lockerbie Glove Factory Town Home Owners Ass’n v. Indpls. Hist. Pres. Comm’n*, 106 N.E.3d 482, 489 (Ind. Ct. App. 2018), *trans. denied*. “This procedure gives the [zoning] board the opportunity to correct or prevent an error [...] and allows the objector the opportunity to preserve error in anticipation of judicial review.” *Id.* Because Michaels did not raise his Second Amendment argument before the Board, we need not address it further.

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<sup>3</sup> Indiana Code section 36-7-4-1610 provides that

[a] person may obtain judicial review of an issue that was not raised before the board, only to the extent that:

- (1) the issue concerns whether a person who was required to be notified by this chapter or other law of a board hearing was notified in substantial compliance with this chapter or other law; or
- (2) the interests of justice would be served by judicial resolution of an issue arising from a change in controlling law occurring after the zoning decision.

Michaels does not argue that either of the conditions listed above applies in this case.

## II. Whether the Board Abused its Discretion in Denying Michaels's Request for a Special Exception

[11] As mentioned, the granting of a special exception pursuant to the Ordinance is dependent upon affirmative findings regarding *all* of the following:

1. The proposed exception or use will not be injurious to, or alter the normal and orderly development of, permitted uses of property within the general vicinity;
2. The proposed exception or use is serviced by adequate access roads, ingress and egress points, and traffic flow and control mechanisms;
3. The establishment, maintenance, or operation of the proposed exception or use will not be injurious to the public health, safety, or general welfare; and
4. The proposed exception or use is not inconsistent with the Comprehensive Plan.

Appellant's App. Vol. III p. 142. Of the four criteria, the Board made an affirmative finding only that the proposed exception would have been serviced by adequate roads, ingress and egress points, and traffic flow and control mechanisms, making negative findings regarding the other three. Therefore, Michaels has to establish that the Board abused its discretion in making all three of its negative findings in order to secure a reversal.

[12] At the very least, we conclude that the Board did not abuse its discretion in determining that he had failed to prove that the proposed exception or use would not be injurious to, or alter the normal and orderly development of, permitted uses of property within the general vicinity. The parties stipulated to, *inter alia*, the following for purposes of judicial appeal:

10. Several neighbors submitted written statements for and against Michaels's request.
  11. Reverend Bobby Kemp expressed his concern that the church would likely be located in the direction of the shooting range on Michaels's property, and that the noise from the range would be disruptive to church events and ministry programs to the point that church members would be deterred from hosting or attending events at the church.
  12. Several parties also spoke or indicated an intent to speak at the hearing for and against Michaels's request.
- [....]
29. The Board heard statements from members of the public who were opposed to Michaels's request, and generally voiced concerns about property values, noise, and safety.
  30. One of the parties who objected to Michaels's petition stated that he "heard the shooting over the summer and it was very loud and went on for hours."

Appellant's App. Vol. IV. pp. 39, 43. This evidence is more than the scintilla required to qualify as substantial evidence and is therefore sufficient to support the Board's finding that Michaels's proposed shooting range would negatively affect properties in the vicinity. *See, e.g., S & S Enters.*, 788 N.E.2d at 491.

Moreover, contrary to Michaels's suggestion that we discount the testimony and submissions of neighbors as allegedly being based on generalized objections or concerns that do not constitute evidence, "[i]t is generally held that the owner of real estate is assumed to possess sufficient acquaintance with it to estimate the value of the property although his knowledge on the subject might not be such as would qualify him to testify if he were not the owner.'" *Benton Cnty. Remonstrators v. Bd. of Zoning Appeals of Benton Cnty.*, 905 N.E.2d 1090,

1098 (Ind. Ct. App. 2009) (quoting *State v. Hamer*, 199 N.E. 589, 595, 211 Ind. 570, 585 (1936)). The opinions of nearby landowners regarding the devaluation of their own property are sufficient to support a finding that the shooting range would be injurious to property in the vicinity. Michaels points to favorable evidence in the record to support his arguments, but the Board was under no obligation to credit this evidence and apparently did not. Michael's argument amounts to an invitation to reweight the evidence, which we will not do. *See, e.g., Hoosier Outdoor Advert.*, 844 N.E.2d at 163.

We affirm the judgment of the trial court.

Robb, J., and Altice, J., concur.