ATTORNEYS FOR APPELLANT

Robert S. Schein
Jonathon B. Snider
Dinsmore & Shohl LLP
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE

Raegan M. Gibson
Mackenzie E. Skalski
Joey K. Wright
Paganelli Law Group
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

Noblesville, Indiana Board of Zoning Appeals,

Appellant-Respondent,

v.

FMG Indianapolis, LLC d/b/a Reagan Outdoor Advertising,

Appellee-Petitioner.

December 27, 2022

Court of Appeals Case No. 21A-PL-2482

Appeal from the Hamilton Superior Court

The Honorable Jonathan M. Brown, Judge

Trial Court Cause No. 29D02-2010-PL-6900

Bailey, Judge.

Case Summary

[1] The City of Noblesville Board of Zoning Appeals ("the NBZA") appeals a trial court order reversing the NBZA's affirmance of a Stop Work Order and Notice of Violation issued by the City of Noblesville ("the City"). The Order and Notice addressed work performed by FMG Indianapolis, LLC d/b/a Reagan Outdoor Advertising ("Reagan") after a storm caused damage to its pole sign ("the Sign"). The NBZA contends that the trial court failed to accord deference to its reasonable interpretation of the relevant zoning ordinance that concluded (1) Reagan performed new construction work without a permit, justifying the Stop Work Order, and (2) work performed by Reagan constituted a relocation of the Sign, which caused the loss of its legal nonconforming status, justifying the Notice of Violation. We reverse.

Issues

[2] The NBZA presents two issues for review:

I. Whether the trial court erred in vacating the NBZA decision; and

II. Whether the trial court erred in granting Reagan declaratory relief and awarding costs.

Facts and Procedural History

[3] The City enacted a Unified Development Ordinance, ("the UDO"), which regulates the display of signs within the City. The UDO prohibits erection of new pole signs, defined as:

> A freestanding street graphic that is permanently supported in a fixed location by a structure of poles, posts, uprights, or braces from the ground and not supported by a building or base structure.

UDO §§ 2(2), 11(A)(2). Pursuant to a grandfathering provision, some existing nonconforming signs are permitted within the City. Such nonconforming signs lose their legal status upon relocation. *See id.* Nonconforming signs also lose their legal status if required maintenance is not performed within six months. UDO § 11.B.3.C.1.

[4] Reagan owns a pole sign erected alongside Allisonville Road before the enactment of the UDO and maintained thereafter as a nonconforming sign.[1] In April of 2020, a storm caused two wooden supports of the Sign to snap and two wooden supports to splinter. Reagan undertook corrective measures, without applying for a construction permit. The graphic face of the Sign was set aside

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[1] A nonconforming use of property is a use that lawfully existed prior to the enactment of a zoning ordinance that continues after the ordinance's effective date, although it does not comply with the ordinance's restrictions. *Metro. Dev. Comm'n v. Pinnacle Media, LLC*, 836 N.E.2d 422, 425 (Ind. 2005). In general, a nonconforming use may not be terminated by the new zoning enactment, because an ordinance prohibiting any continuation of an existing lawful use within a zoned area is unconstitutional as a taking of property without due process of law and as an unreasonable exercise of police power. *Id.*

Here, the UDO defined a nonconforming sign in particular as "a sign legally existing as of the effective date of this ordinance that is not in compliance with this ordinance or any subsequent amendments." UDO §§ 2(2), 11(A)(2).

onto the ground, remaining portions of the wooden supports were cut, and steel supports were installed approximately 18 to 36 inches north of the location of the wooden supports.

[5] On April 25, 2020, a member of the City of Noblesville Planning and Development Department ("the Department") observed that the graphic face of the Sign was leaning against trees, an excavator was on site, and new steel supports had been erected. On the same day, the City Director of Planning and Development issued a generic Stop Work Order to Reagan. In response to an inquiry from Reagan's counsel as to the basis for the Order, the Department issued an email dated April 30, 2020. The Department advised counsel that the Stop Work Order had been issued due to sign installation without a valid permit and because removal or relocation activities caused the loss of legal nonconforming status of the Sign. On May 5, the Department issued a Notice of Violation stating that the Sign no longer had a legal nonconforming status because the failed [wooden] structure had been removed and replaced with steel beams and sign relocation had occurred. The Department demanded that the Sign be removed from the property by June 16, 2020.

[6] On July 16, 2020, Reagan appealed to the NBZA. The NBZA conducted a public hearing on September 1, 2020, and verbally denied Reagan relief at the close of the hearing. On the following day, the NBZA issued a written notice of the denial. The NBZA issued written findings of fact and conclusions on October 5, 2020. The NBZA concluded that the Sign had lost it legal nonconforming status due to relocation, and the NBZA ordered its removal.

The NBZA decision outlined steps that Reagan could have taken to remain in compliance with the UDO, specifically, obtaining a construction permit, replacing damaged posts with new posts in the existing location, and leaving the sign in the existing location.

[7] Reagan filed a Verified Petition for Judicial Review of a Zoning Decision. On April 19, 2021, the trial court conducted a hearing at which argument was heard. On October 11, the trial court entered its order granting Reagan relief:

> [T]he BZA Decision is set aside under Ind. Code § 36-7-4-1615; (2) the Stop Work Order and Notice of Violation are set aside under Ind. Code § 36-7-4-1615; (3) the Application is approved and Reagan may place its Sign on the new, steel Supports without any challenge to its uninterrupted and ongoing legal non-conforming use status pursuant to Ind. Code § 36-7-4-1615(s) and Ind. Code § 34-14-1-2; and (4) Reagan is entitled to an assessment of costs against the BZA under Ind. Code § 34-14-1-10[.]

Appealed Order at 17. The NBZA now appeals.

Discussion and Decision

Standard of Review

[8] A reviewing court may provide relief to a person that has been prejudiced by a zoning decision only if the decision 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 upon the party asserting invalidity. I.C. § 36-7-4-1614(a).

[9] "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). Our review begins with the presumption that a board of zoning appeals, due to its expertise in zoning matters, reached a correct decision. *Id.* We review the BZA's findings of fact only to determine whether they are supported by the evidence in the record. *Id.* at 491-92. We will reverse a zoning board's decision only where a clear error of law has been demonstrated; that is, where grounds set forth in Indiana Code Section 36-7-4-1614(a) have been established. *Burton v. Bd. of Zoning Appeals of Madison Cnty.*, 174 N.E.3d 202, 210 (Ind. Ct. App. 2021), *trans. denied.*

[10] Here, there is no dispute of fact as to the nature or extent of the work performed. Rather, the parties dispute whether, under the UDO, the work performed caused a loss of legal nonconforming status. The construction of a zoning ordinance is a question of law. *Story Bed & Breakfast, LLP v. Brown Cnty Area Plan Comm'n*, 819 N.E.2d 55, 65 (Ind. 2004). "Because zoning laws which limit the use of real property are in derogation of the common law, we will strictly construe such laws to favor the free use of land and we will not extend

restrictions by implication." *Bole v. Kosciusko County*, 565 N.E.2d 1157, 1159 (Ind. Ct. App. 1991).

> In construing the language of a zoning ordinance, this court follows the ordinary rules of statutory construction. *Columbus Bd. of Zoning App. v. Big Blue*, 605 N.E.2d 188, 191 (Ind. Ct. App. 1991). We will interpret the ordinance as a whole and give its words their plain, ordinary, and usual meaning. *Id*. The cardinal rule of statutory construction is to ascertain the intent of the drafter by giving effect to the ordinary and plain meaning of the language used. *Steuben County v. Family Dev., Ltd.*, 753 N.E.2d 693, 701 (Ind. Ct. App. 2001), *trans. denied*.

Lucas Outdoor Advertising, LLC v. City of Crawfordsville, 840 N.E.2d 449, 452 (Ind. Ct. App. 2006), *trans. denied*. When an ordinance is subject to different interpretations, the interpretation chosen by the administrative agency charged with the duty of enforcement is given great weight, unless that interpretation is inconsistent with the ordinance. *Hoosier Outdoor Advert. Corp. v. RBL Mgmt., Inc.*, 844 N.E.2d 157, 163 (Ind. Ct. App. 2006), *trans. denied.*

Stop Work Order

[11] The Stop Work Order did not specify the basis for its issuance. Subsequent inquiry and factual development revealed that the Department took the position that Reagan had engaged in construction activities without obtaining a construction permit. Regan's position was that it had done no more than the repair and maintenance required of a nonconforming sign owner under UDO.

[12] In granting Reagan relief, the trial court observed that the UDO requires Reagan to perform maintenance and repair work and further, "the UDO does not contain a permit requirement for required maintenance on an existing, legally nonconforming sign. Nor does it contemplate such a permit requirement." Appealed Order at 11. More specifically, the trial court order addressed three provisions of the UDO as follows.

> The Sign Permit Section – The sign permit section imposes the requirement of a permit to "erect or display" a sign and requires the disclosure of a [sic] numerous pieces of information that are plainly relevant to erecting or displaying a new sign, not maintenance on an existing sign (i.e. location, height, size, date of erection, elevations, and construction of sign and illumination). (UDO 11.B.1.B).
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> The Sign Maintenance Section – The sign maintenance section, which outlines the mandatory maintenance for signs, requires both large tasks (like the replacement of damaged supports), and a litany of smaller tasks (like cleaning, painting, weeding, and trimming grass), which makes a permit requirement for such maintenance impractical. (UDO 11.B.3.C.1).
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> The Permit Section – The sign permit section forbids the issuance of permits for prohibited signs and a pole sign is a prohibited sign under the UDO. Thus, if a pole sign was not eligible for a permit under the UDO, how could the owner of a nonconforming Sign obtain a permit under the UDO. (UDO 11.A.2; UDO 11.B.1.C.1; UDO 11.B.3.C.1; UDO 11.C.5.L; UDO 11.C.6.A).
>
> As evidenced by these provisions, a permit requirement for maintenance on legally nonconforming signs is not set forth in the UDO, is not contemplated by the UDO, and creates a conflict within the provisions of the UDO[.]

(*Id.* at 11-12.) (emphasis in original.)

[13] In sum, the trial court concluded that the NBZA had attempted to create and enforce an untenable construction permit requirement for maintenance tasks. The trial court's vacation of the Stop Work Order presupposes that the entirety of Reagan's activities in response to the storm damage were maintenance tasks, absent a factual finding to that effect. However, the basic premise for the issuance of the Stop Work Order, which order was affirmed by the NBZA, was that new construction took place. Indeed, the post-storm response was not limited to work in the same location or use of the same type of materials. The objective of installing steel supports may have gone beyond repair to that of increasing life expectancy of the signage and ultimately, its grandfathered status.

[14] Reagan observes that the Stop Work Order did not include specific language to provide Reagan with notice of an alleged UDO violation. "[B]asic constitutional due process considerations about fair notice require that a stop work order issued by a Zoning Administrator be reasonably specific and concrete so as to fairly apprise the wrongdoer of the specific violation." *City of New Haven v. Chemical Waste Mgmt. of Indiana,* LLC, 701 N.E.2d 912, 918-19 (Ind. Ct. App. 1998), *trans. denied.* But here, vacating the Stop Work Order is of no independent practical effect. The crux of this zoning dispute is whether, prior to the issuance of the Stop Work Order, Reagan engaged in activities that caused the loss of the legal nonconforming status of the Sign. We turn to that matter.

Sign Relocation

[15] The Notice of Violation was premised upon alleged "relocation" under the UDO. Although the parties agreed that it was incumbent upon Reagan to do something in response to the storm damage, they disagreed as to what could be done without forfeiture of legal nonconforming status. It is factually undisputed that Reagan installed new steel supports 18 to 36 inches north of the wooden supports.

[16] Pursuant to UDO § 11(A)(2), legal nonconforming signs "shall immediately lose" their legal status if the sign is "relocated." In argument before the trial court, the parties were candid as to the lack of explicit guidance on what constitutes "relocation" under the UDO. "Relocation" is not defined in the UDO, with temporal restrictions. And the parties had not discovered appellate decisions involving like movement under a zoning ordinance substantially similar to the UDO here.

[17] In their trial court briefs and argument, the parties addressed the decision of *Cracker Barrel Old Country Store, Inc. v. Town of Plainfield*, 848 N.E.2d 285 (Ind. Ct. App. 2006), *trans. denied*. Within the Town of Plainfield, Cracker Barrel owned and maintained a nonconforming pole sign which needed refacing in 2002. Cracker Barrel, having been instructed that removing the sign cabinet from the sign structure would cause loss of nonconforming status, nevertheless "detached the sign cabinet from the top of the sign and temporarily lowered it to the ground, apparently for safety reasons." *Id.* at 288. The Town of Plainfield served Cracker Barrel with a Notice of Violation and later initiated an

action of enforcement in the trial court. *See id.* The Town of Plainfield was granted summary judgment, and Cracker Barrel was ordered to remove the sign. On appeal, Cracker Barrel contended that the sign was not "moved" within the meaning of the relevant ordinance. *Id.* at 290. A panel of this Court affirmed the grant of summary judgment. *Id.* at 293.

[18] Ultimately, however, *Cracker Barrel* was conceded to be of limited guidance because the ordinance involved there provided that: "should such Building or [sign] Structure be moved for any reason for any distance whatsoever, such Building or Structure shall thereafter conform to the provisions of this Ordinance." *Id.* at 292. Here, in its section specific to signs, the UDO does not likewise prohibit all movement.

[19] With the background of the absence of a specific definition of "relocation" in the UDO, the lack of a specific temporal movement prohibition, and the lack of controlling case law, the parties did not oppose the trial court's application of dictionary definitions of "move" and "relocate." Incorporating such definitions, the trial court agreed with Reagan that the movement was necessary and temporary, not constituting "relocation" under the UDO:

> Reagan temporarily took its Sign down to conduct required maintenance and replace the damaged supports for the Sign. … The temporary removal of a sign does not constitute a relocation, which is defined [by Merriam Webster's Dictionary] as "to locate again, establish/lay out in a new place, or move to a new location." … As a result of an act of nature, [Reagan] actively and timely took steps to maintain and repair its nonconforming sign; the maintenance of the sign was necessitated, not only for

safety reasons, but because the UDO requires an owner to maintain a sign in order to preserve its grandfathered status and not expire[.] The BZA's contrary interpretation of the UDO is arbitrary and unreasonable as that interpretation creates an unnecessary conflict in the provisions of the UDO and absurd and illogical results for sign owners. Sign owners, like Reagan, sometimes must replace damaged sign supports in order to keep their legal nonconforming use status under the UDO. Signs cannot levitate in mid-air during required maintenance. *See Boyle v. Kosciusko Cty.*, 565 N.E.2d 1157, 1159 (Ind. Ct. App. 1991). Reagan's act of erecting the new, steel supports, inches away from the old, wood supports, without ever affixing the sign on the new steel supports, did not constitute a relocation of the sign, and nor was it a "new" sign.

The BZA's contrary interpretation contravenes the language of the UDO. A "sign" (an identification, description, display, or illustration) is defined as something separate and apart from the support to which it is affixed (building, outdoor structure, or parcel of land) under the UDO. (UDO 2.2, Definition of Sign and Pole Sign). Thus, the erection of a new sign support, in and of itself, does not and cannot constitute the relocation of a sign that has never been affixed to that new sign support[.] . . .

The BZA's interpretation is contrary to the language of the UDO. The UDO does not prohibit the "movement" of a sign, it prohibits the "relocation" of a sign. (UDO 11.C.6.B). These words are not defined terms in the UDO, and these words do have different meanings. For example:

Move: To change position or posture; dislodge or displace from a fixed position. (https://www.merriam-webster.com/dictionary/move)

> Relocate: to locate again, establish/lay out in a new place, or move to a new location. (https://www.merriam-webster.com/dictionary/relocate). (BZA Record 000481; UDO 2.1.DF; Merriam Webster's Dictionary);
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> The BZA was required to give each word in the UDO effect and its plain, ordinary, and usual meaning. … If the drafters of the UDO wanted to prohibit any movement and require signs to stay in their identical footprint, they could have done so as they did in the general nonconforming use section of the UDO, which restricts any "movement" of a nonconforming structure "for any reason for any distance." (BZA Record 000647/UDO 14.E.4).
> …
>
> Guided by the limited case law provided by the parties, this Court concludes that moving a sign mere inches away from its prior footprint in order to accommodate the mandatory replacement of damaged supports does not constitute a "relocation."

Appealed Order at 12-14. (emphasis in original).

[20] The trial court focused upon the "temporary" nature of the movement of the components of the Sign. But the temporary nature of activity leading to a permanent placement is not a permissible basis for maintaining a nonconforming status under the UDO. Too, the trial court was persuaded that Reagan had simply maintained its structure. But it is noteworthy that Reagan used materials of an entirely different type in its post-storm response, steel as opposed to wood. At bottom, the role of the trial court was not to weigh the options available to Reagan in unenviable circumstances, but rather to review the decision of the NBZA, giving due deference. That is,

> When an ordinance is subject to different interpretations, the interpretation chosen by the administrative agency charged with the duty of enforcing the ordinance is entitled to great weight, unless that interpretation is inconsistent with the ordinance itself. If a court is faced with two reasonable interpretations of an ordinance, one of which is supplied by an administrative agency charged with enforcing the ordinance, the court should defer to the agency. Once a court determines that an administrative agency's interpretation is reasonable, it should end its analysis and not address the reasonableness of the other party's interpretation. Terminating the analysis reinforces the policies of acknowledging the expertise of agencies empowered to interpret and enforce ordinances and increasing public reliance on agency interpretations.

Hoosier Outdoor Advertising, 844 N.E.2d at 163. The NBZA reasonably concluded that Regan's activities – consisting of employing an excavator, chopping wooden posts, removing a graphic face, placing the graphic face on the ground, and erecting new steel posts 18 to 36 inches to the north – constituted "relocation" of the Sign under the UDO. This determination was entitled to a presumption of correctness and the trial court erred in vacating the NBZA decision.

Declaratory Relief and Costs

[21] Consistent with the foregoing discussion, Reagan did not establish the invalidity of the NBZA order. Regan did not establish entitlement to declaratory relief or costs.

Conclusion

[22] We conclude that Reagan has failed to meet its burden of demonstrating the invalidity of the NBZA decision. The trial court erred in ordering reversal. We reverse the trial court and direct that the NBZA decision be reinstated.

[23] Reversed.

Pyle, J., concurs.
Bradford, C.J., concurs in part and dissents in part with opinion.

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Bradford, C.J., concur in part and dissent in part with opinion.

[24] I agree with the majority that the trial court erred in reversing the NBZA's decision because Reagan has failed to meet its burden of demonstrating the invalidity of the decision. However, I dissent in part because I believe that the matter should be remanded with instructions for the trial court to direct the NBZA to grant Reagan the opportunity to maintain its non-conforming status by following the procedure set out in the Unified Development Ordinance, as stated by the NBZA.

[25] In its Findings of Fact that was adopted on October 5, 2020, the NBZA found that

> The Director of Planning and Development and Staff made the decision to issue a Stop Work Order and Notice of Violation based upon the existing provisions of the Unified Development Ordinance. As the replacement of the support structure for this sign would have required the Petitioner to obtain permit for the work, it was fully within the Department's rights based upon the provisions of UDO 15.0.6.
>
> The Petitioner could have remained in compliance with the provisions of the Unified Development Ordinance by completing all of the following steps:
> • Obtaining the required permit to complete the repair work.
> • Replacing the damaged posts with new post in the existing sign location.
> • Leaving the sign in the existing sign location.
>
> Additionally, the choice to move the existing structure to point that is 18" – 36" to the north of the existing sign location was relocation of the existing sign that resulted in the loss of the sign's legal nonconforming status.… The Unified Development Ordinance sets out the framework for the property owners and tenants to keep their legal nonconforming status, and the actions of the petitioner resulted in the loss of that status, not any actions of the City. Requiring regular maintenance of structures that are damaged does not necessitate the drastic actions taken by the petitioner without first verifying what the appropriate repair actions were to remain within the regulations of the ordinance.

Appellant's App. Vol. IV pp. 238–39. Given the NBZA's acknowledgement that Reagan could have maintained its non-conforming status by following the procedures set forth in the Unified Development Ordinance, I would instruct the trial court on remand to direct the NBZA to grant Reagan the opportunity

to request the necessary permit and to maintain the sign in its same, previous location using like materials, thus allowing it to retain its non-conforming use status.