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IN THE
COURT OF APPEALS OF INDIANA

The Department of Business and Neighborhood Services of The Consolidated City of Indianapolis, Indiana, Consolidated City of Indianapolis and Marion County, Indiana, and Metropolitan Board of Zoning Appeals of Marion County, Division I,

Appellants-Respondents,

v.

H-Indy, LLC, and HH-Indianapolis, LLC,

Appellees-Petitioners

March 19, 2021

Court of Appeals Case No. 20A-PL-1443

Interlocutory Appeal from the Marion Superior Court

The Honorable Patrick J. Dietrick, Judge

Trial Court Cause No. 49D12-1805-PL-20443

Crone, Judge.

Case Summary

[1] H-Indy, LLC, and HH-Indianapolis, LLC (collectively Appellees), are affiliated entities, but they took different paths to this litigation. HH-Indianapolis sought to open a retail store (the Site) in Indianapolis and submitted structural and sign permit applications to the Department of Business and Neighborhood Services of the Consolidated City of Indianapolis, Indiana (BNS). BNS determined that HH-Indianapolis's proposed use of the Site was as an "adult entertainment business," which was not a permitted use in the zoning district and required a variance. HH-Indianapolis appealed the BNS's determination to the Metropolitan Board of Zoning Appeals of Marion County, Division I (the BZA). The BZA affirmed the BNS's determination. HH-Indianapolis then petitioned for judicial review of the BZA's decision, alleging that it was arbitrary, capricious, and unsupported by substantial evidence.

[2] In the meantime, BNS received an email from H-Indy explaining that it had been newly organized to operate the Site in a manner that would not fall within the definition of an adult entertainment business and that it would be filing permit applications. Because the litigation with HH-Indianapolis was ongoing, BNS informed H-Indy that all permit applications related to the Site were on a "litigation hold." Thereafter, H-Indy filed a declaratory judgment action against BNS alleging that BNS violated its constitutional rights by imposing an unauthorized litigation hold on permit applications related to the Site.

[3] The HH-Indianapolis and H-Indy actions were consolidated, and Appellees filed a motion for summary judgment. BNS, the BZA, and the Consolidated

City of Indianapolis and Marion County (collectively the City) also filed a motion for summary judgment. The trial court issued an order (Appealed Order) reversing the BZA's decision, ordering BNS to issue HH-Indianapolis the requested permits, and declaring that H-Indy's constitutional rights had been violated by BNS's imposition of an unauthorized litigation hold.

[4] The City now brings this interlocutory appeal, challenging the trial court's reversal of the BZA's decision and the trial court's conclusion that H-Indy's constitutional rights were violated by BNS's imposition of an unauthorized litigation hold. We affirm the trial court and remand for further proceedings.

Facts and Procedural History[1]

[5] In accordance with our standard of review for summary judgment, the facts most favorable to the non-moving parties follow. HH-Indianapolis is a

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[1] The parties' briefs both present certain deficiencies that have hindered our review. As for the City, it failed to provide citations to the record in its statement of the case as required by Indiana Appellate Rule 46(A)(5). Appellees assert that the City's statement of facts is improper, but we disagree. Appellees incorrectly assert that Indiana Appellate Rule 46(A)(6) "obligates [Appellants] to provide a Statement of Facts 'in a light most favorable to the judgment.'" Appellees' Br. at 14. Appellate Rule 46(A)(6) provides that "the facts shall be stated in accordance with the standard of review appropriate to the judgment or order being appealed."

As for Appellees, their statement of facts contains argumentative assertions that are inappropriate in this section. Further, in their argument section, Appellees inappropriately direct us to argument in their motion to strike. Appellees' Br. at 37 n.3. "[A] party may not present an argument entirely by incorporating by reference from a source outside the appellate briefs." *Bigler v. State*, 732 N.E.2d 191, 197 (Ind. Ct. App. 2000), *trans. denied*. Also, Appellees' brief is replete with pejorative comments regarding the City's position, such as accusing it of an orchestrated carnival game, intentional misdirection, sleight of hand, flirting with frivolity, and others. Appellees' Br. at 14, 33, 35, 37, 41, 45, 46, 47, 50, 53, 55, 57. These comments are not only unnecessary and unpersuasive, but they also distract from Appellees' substantive arguments and are unprofessional. *See Lasater v. Lasater*, 809 N.E.2d 380, 404 (Ind. Ct. App. 2004) (noting that unprofessional and disrespectful remarks do little to advance a party's position and do not promote responsible advocacy).

subsidiary of HH-Entertainment, Inc. Appellees' App. Vol. 2 at 83. "HH" is an acronym for Hustler Hollywood. HH-Entertainment owns numerous entities and engages in several different businesses under the Hustler Hollywood brand, one of which is retail sales. *Id*. Hustler Hollywood conducts its retail sales in brick-and-mortar stores and on its website. *Id*. at 148.

[6] In July 2016, HH-Indianapolis entered into a lease agreement to rent the Site, commercial property at 5505 East 82nd Street, with the intent to operate it as a retail establishment. The Site is in zoning district C-3, which permits some commercial uses, but does not allow adult entertainment businesses, as defined by the Revised Code of the Consolidated City and County (Code). An adult entertainment business includes an "adult bookstore" and an "adult services establishment." Code § 740-202. We will discuss these terms in more detail in the next section, but for purposes of understanding the factual background, we provide the following brief definitions. An adult bookstore is an establishment having at least 25% of its retail floor space, stock in trade, or weekly revenue consisting of "adult products." *Id*. An adult services establishment is any building that provides "a preponderance of services involving specified sexual activities or display of specified anatomical areas." *Id*.

Finally, the City did not provide all the pleadings and documents necessary for the resolution of the issues raised on appeal as required by Indiana Appellate Rule 50(A)(2)(f). We thank Appellees for providing additional relevant documents in their appendix.

[7] In early August 2016, HH-Indianapolis filed applications for structural and sign permits with BNS to obtain authorization to remodel the Site and hang exterior signs. Appellants' App. Vol. 2 at 225, 231. Upon initial review of the sign application, BNS determined that the proposed use of the Site was possibly an adult bookstore, which was not a use permitted in the C-3 district in which the Site was zoned. *Id*. at 145. On August 24, 2016, Christopher Schuck, the project development analyst supervisor for BNS, sent an email to HH-Indianapolis requesting additional information, including a written plan of operation, a floor plan, and a weekly revenue projection, to determine whether the Site's proposed use was a permissible use in its zoning district. *Id*. at 125.

[8] On September 7, 2016, HH-Indianapolis emailed Schuck the requested items, including an "Inventory and Sales Breakdown" (Initial Sales Chart), floor plan, and "Description of Business Attachment." *Id*. at 148-50. The Initial Sales Chart showed weekly revenue of 23.9% for "Total Adult" merchandise and 28.8% for "Toys." *Id*. at 148. There were also categories for "General Merchandise," "Sensual Care," and "Books." *Id*. On September 15, 2016, Schuck sent HH-Indianapolis an email with follow-up questions. *Id*. at 124.

[9] On September 26, 2016, BNS license administrator Ryan Mann sent an email to HH-Indianapolis informing it that he had determined that the proposed use of the Site met the definition of an adult entertainment business. *See id*. at 118 (observing that HH-Indianapolis was in receipt of September 26, 2016 email

from Mann).[2] On September 28, 2016, HH-Indianapolis sent Mann an email explaining that the documents it had initially submitted to Schuck reflected nationwide averages for Hustler Hollywood stores, including Hustler Hollywood's e-commerce web site. *Id*. Therefore, HH-Indianapolis had prepared and was now submitting documents showing projections specific to the Indianapolis location. The new documents included an "Indianapolis Allocation and Projected Revenue Table" (Indianapolis Revenue Table) and floor plan. *Id*. at 122. The Indianapolis Revenue Table showed that adult products, as defined by the Code, were forecast to make up 12.4% of the store's weekly revenue and take up 8.7% of the retail floor space. *Id*. at 119, 122. HH-Indianapolis also informed Mann that the "Games/Party/Toys" category included "non-phallic shaped massagers, bachelorette games, and other bachelorette party accouterments." *Id*. at 119. The Games/Party/Toys category would account for 5.7% of the store's weekly revenue and take up 3.8% of the retail floor space. *Id*. HH-Indianapolis stated that it did not believe that the Games/Party/Toys category met the definition for adult products as defined by the Code, but that even if it did, the projected total weekly revenue for the two categories combined would be only 18.1%, and the merchandise would take up only 12.5% of the retail floor space. HH-Indianapolis requested that, if its current plans somehow met the definition of an adult bookstore, BNS would provide specifications as to how it determined 25% of floor space,

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[2] The email is not in the record on appeal.

revenue, or inventory so that the HH-Indianapolis store could alter its plans. *Id*. at 118.

[10] On October 4, 2016, Mann sent HH-Indianapolis an email informing it that he had determined that the proposed use of the Site met the definition of an adult entertainment business, which was not a permitted use in a C-3 district and would require a variance. *Id*. at 65-66. Mann provided the relevant Code definitions but did not explain how HH-Indianapolis's proposed use of the Site met any of these definitions.

[11] On October 26, 2016, HH-Indianapolis appealed BNS's determination that the Site's proposed use met the definition of an adult entertainment business to the BZA. *Id*. at 115-17. In response, BNS submitted a staff report (BNS Report) recommending that the BZA uphold BNS's determination. Appellees' App. Vol. 2 at 138. BNS's recommendation was based on the Initial Sales Chart and associated documents and made no mention of the new Indianapolis Revenue Table and floor plan.

[12] On December 6, 2016, the BZA held a hearing on HH-Indianapolis's appeal, at which HH-Indianapolis was represented by counsel, remonstrators were represented by counsel, and BNS was represented by a staff member. Counsel for HH-Indianapolis submitted the new Indianapolis Revenue Table and floor plan. *Id*. at 106. He said that the documents initially submitted to BNS were erroneous because they represented chain-wide information and online sales. *Id*. at 106-07. He noted that the BNS Report included references to workshops

that are sometimes held at Hustler Hollywood stores, but that HH-Indianapolis's submissions to BNS had not referenced any workshops, and it had no plans to have workshops. *Id*. at 107. Counsel noted that the BNS Report stated that "marital aids" are sex toys, but he explained that when HH-Indianapolis used that term it was referring to condoms, which by definition are not sex toys. *Id*. at 105-06. He stated that even if marital aids were considered sex toys, the Site would still fall under the 25% threshold that would make it an adult bookstore as shown by the Indianapolis Revenue Table and floor plan. *Id*. at 106. HH-Indianapolis's counsel also stated that it would like to provide City officials with a walk-through of the Site and that it would be premature to deny HH-Indianapolis's applications before it could provide the full scope of what was proposed for the Site. *Id* at 110.

[13] Counsel for remonstrators argued that the Indianapolis store would be an adult services establishment and in support submitted photographs from other Hustler Hollywood stores. He stated that the Hustler Hollywood website advertised workshops on sexual activities in its stores all across the country and that its Facebook page advertised live demonstrations of its "steamiest couples products." *Id*. at 118. A city councilor, who had visited a Cincinnati, Ohio Hustler Hollywood store, also spoke and submitted photographs from that store showing sex-themed games and novelty items that could be seen through the store window. *Id*. at 120-21.

[14] Finally, a BNS staff member presented BNS's position. He began by explaining that HH-Indianapolis's permits were put on "notice holds" for several reasons,

including to determine that the proposed use was a permitted use. *Id*. at 123. "A 'notice hold' allows the permit record to be amended and updated but prevents the permits from being issued." *Id*. at 138. He stated that the initial documents showed that adult products comprised 23.9% of sales, but that other categories such as toys comprised 28.8% of sales. *Id*. at 124. He added that sensual care products were not included in the adult product total, and that when they were added, total adult products would be 37.7% of sales. *Id*. He then argued that HH-Indianapolis's new documents were not credible. *Id*. He noted that adult products comprised 8.7% of floor space, and Games/Party/Toys took up 3.8% of floor space. He noted that books took up 7.1% floor space and argued that it did not seem credible that no books would fall in the category of adult products. *Id*. Similarly, he argued that it was not credible that none of the products in the general merchandise category were not adult products. *Id*. He noted that the category sensual care included marital aids, which were normally defined as sex toys. *Id*. at 124. He contended that the combined total of all these categories exceeded the 25% threshold. *Id*. at 125.

[15] On February 7, 2017, the BZA issued its Findings affirming the BNS's determination:

> 1. Based on the evidence submitted, [HH-Indianapolis] failed to meet its burden of proof to show that the proposed use would be a permitted use and would not be an adult services establishment, requiring the grant of a variance of use. The evidence presented did not refute the [BNS's] determination

that by partitioning off a specialty sales area that would include a variety of adult products, sensual care products, including marital aids (sex toys), and other activities, including the presentation of films, motion pictures, video cassettes, slides, or similar photographic reproductions that are distinguished or characterized by an emphasis upon the depiction or description of specified sexual activities or specified anatomical areas for observation by patrons; or would include live performances by topless or bottomless dancers, go-go dancers, exotic dancers, strippers, or similar entertainers, where such performances are distinguished or characterized by an emphasis on specified sexual activities or specified anatomical areas; a subpart of the overall facility would be created "which provides a preponderance of services involving specific sexual activities or display of specified anatomical areas," thereby meeting the definition of an adult service[s] establishment in the ordinance.

2. Based on the evidence submitted, [HH-Indianapolis] failed to meet its burden of proof to show that the proposed use would be a permitted use and would not be an [adult bookstore,[3]] requiring the grant of a variance of use. There was credible evidence that some merchandise was mischaracterized as non-adult in order to stay under the 25% threshold for an adult bookstore or to otherwise be deemed an adult services establishment.

3. Based on the evidence submitted, [HH-Indianapolis] failed to meet its burden of proof to show that the proposed use would be a permitted use and would not be an adult services establishment, requiring the grant of a variance of use. Based on contradictory, inconsistent, and recalculated information

[3] The BZA used the term "adult services establishment[,]" but we believe that it meant to use "adult bookstore" here because this finding relies on that definition. Appellees' App. Vol. 2 at 23.

> provided by [HH-Indianapolis], it was proper for the [BNS] to determine that [HH-Indianapolis's] proposed use is not permitted in a C-3 zoning district and a variance of use would be required for [HH-Indianapolis's] proposed use at this location.

Id. at 23 (emphases omitted).

[16] In early January 2017, HH-Indianapolis filed in the United States District Court for the Southern District of Indiana an original action against Indianapolis and the BZA (Federal Lawsuit) alleging that the Code violated its rights under the First and Fourteenth Amendments of the United States Constitution. The Federal Lawsuit also included an Indiana administrative law claim that sought reversal of the BZA's decision as arbitrary, capricious, and unsupported by substantial evidence. Appellants' App. Vol. 2 at 90. In September 2017, the district court denied HH-Indianapolis's motion for a preliminary injunction. *HH-Indianapolis LLC v. Consol. City of Indianapolis/Marion Cnty., Indiana*, 265 F. Supp. 3d 873, 891-92 (S.D. Ind. 2017). HH-Indianapolis appealed to the United States Court of Appeals for the Seventh Circuit.

[17] While the Federal Lawsuit was ongoing, HH-Entertainment's Vice President of Retail Operation Philip Del Rio "oversaw the formation of [H-Indy], a subsidiary of HH-Entertainment, Inc., to reorganize ownership of the Site" and "operate the Site for a retail business that would operate far below all of the [Code's] 'adult' standards." Appellees' App. Vol. 2 at 82, 88. On November 3, 2017, H-Indy sent an email to BNS explaining that H-Indy, "a newly organized entity," was launching a new concept store for the City of Indianapolis at the

Site, and adult products as defined by the Code would comprise no more than 10% of its inventory, stock in trade, or weekly revenue. Appellees' App. Vol. 3 at 34-35. It further advised that it would be submitting new building and signage plans for permits to open a retail store at the Site.

[18] On November 6, 2017, BNS informed H-Indy that the Site was "currently subject to pending litigation before the 7th Circuit," and therefore all permit requests related to the Site were on a "litigation hold." *Id*. at 40. H-Indy emailed the City's counsel asking whether any provision in the Code authorized BNS to impose a litigation hold. *Id*. at 42. The City responded that although the Code did not specifically give the City the right to put a litigation hold on the building, it believed it had discretion to do so. *Id*. at 44.

[19] On May 7, 2018, the Seventh Circuit affirmed the district court's denial of HH-Indianapolis's request for a preliminary injunction. *HH-Indianapolis, LLC v. Consol. City of Indianapolis & Cnty. of Marion, Indiana*, 889 F.3d 432, 441 (7th Cir. 2018).

[20] On May 24, 2018, H-Indy filed a petition for action in mandate and declaratory judgment against BNS in Marion Superior Court under cause number 49D12-1805-PL-20443. Appellees' App. Vol. 2 at 48. In Count 1, H-Indy sought an order of mandate to require BNS to review H-Indy's permit applications and to determine that BNS's litigation hold had no basis in law. *Id*. at 54. In Count 2, H-Indy sought declaratory judgment to determine the legitimacy of BNS's litigation hold. *Id*. H-Indy alleged (1) that it was "affiliated" with HH-

Indianapolis, (2) was "a tenant" of the Site, and (3) it intended "to operate as a 'Hustler' branded store [at the Site], that offers Hustler and non-Hustler branded apparel, lingerie, and 'adult products' as defined in the [Code]." *Id*. at 49. On July 23, 2018, the City filed its answer, admitting that "litigation hold" does not appear in the Code. *Id*. at 77. The City's answer did not respond to the portion of H-Indy's complaint dedicated to declaratory judgment.

[21] On October 30, 2018, in the Federal Lawsuit, HH-Indianapolis and the City stipulated to dismissal of the federal questions with prejudice, leaving only the remaining state law claim appealing the BZA's decision to be filed in Marion Superior Court. *Id*. at 88. On November 9, 2018, the district court accepted the parties' stipulation and dismissed the HH-Indianapolis's state law claim without prejudice. On November 13, 2018, HH-Indianapolis transferred its state law claim to Marion Superior Court under cause number 49D02-1811-PL-45374. *Id*. at 9-27. In Count I, HH-Indianapolis sought an order in mandate, alleging that there was no evidence that its business should be designated as an adult bookstore or an adult services establishment, and therefore the "City's determination that a use variance was necessary was a violation of discretion, an abuse of process, and subject to an order in mandate to issue the requested permits to [HH-Indianapolis]." *Id*. at 16-17. In Count 2, HH-Indianapolis sought judicial review of the BZA's decision, asserting that it was arbitrary, capricious, contrary to the evidence, and unsupported by substantial evidence. *Id*. at 18.

[22] On February 4, 2019, the parties filed a joint stipulation to consolidate HH-Indianapolis's action with H-Indy's action under cause number 49D12-1805-PL-20443, which the trial court granted. *Id*. at 43. In June 2019, HH-Indianapolis and H-Indy moved for summary judgment. The City also moved for summary judgment. The trial court held a hearing on the motions, took the matter under advisement, and permitted the parties to file proposed findings of fact and conclusions thereon. On July 24, 2020, the trial court issued the Appealed Order and decreed as follows:

> A. The BZA's Affirmation of BNS's denial of HH-Indianapolis's Structural and Sign Permit Applications is REVERSED;
>
> B. The BZA is ORDERED to issue new Findings of Fact consistent with the Findings and Conclusions of this Court within fourteen (14) days of the date of this Order that HH-Indianapolis was and is entitled to approval of its Structural and Sign Permit Applications pursuant to the requirements of the City Code;
>
> C. The BNS is ORDERED to issue HH-Indianapolis's Structural and Sign Permits within fourteen (14) days of the date of this Order and as it pertains to the Site and these Parties, and BNS is further ORDERED to refrain from applying any further "Litigation Hold" or "Notice Hold" in connection with this matter;
>
> D. BNS violated the constitutional rights and property rights of H-Indy in application of its "Litigation Holds." No such hold exists at law. The Court reserves the issue of whether H-Indy qualifies for damages and in what amount subject to further proceedings before this Court;

> E. BNS violated the constitutional rights and property rights of HH-Indianapolis in application of its "Notice Holds." No such hold is permitted at law. The Court reserves the issue of whether HH-Indianapolis qualifies for damages and in what amount subject to further proceedings before this Court[.]

Appealed Order at 41-42. The trial court expressly determined that there was no just reason for delay and directed the entry of judgment pursuant to Indiana Trial Rules 54(B) and 56(C), making its order a final, appealable judgment. This appeal ensued.

Discussion and Decision

[23] We review the entry of summary judgment using the same standard as the trial court. *JDN Props., LLC v. VanMeter Enters., Inc.*, 17 N.E.3d 357, 359 (Ind. Ct. App. 2014).

> A party moving for summary judgment must make a prima facie showing that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. Summary judgment is improper if the movant fails to carry its burden, but if it succeeds, then the nonmoving party must come forward with evidence establishing the existence of a genuine issue of material fact. We will construe all factual inferences in the non-moving party's favor and resolve any doubts as to the existence of a material issue of fact against the moving party. Our standard of review is not altered when parties file cross-motions for summary judgment. Instead, we must consider each motion separately to determine whether the moving party is entitled to judgment as a matter of law. Also, in the summary judgment context, a trial court's entry of findings of fact and conclusions thereon does not alter our de novo standard of review; such findings and

> conclusions merely aid our review by providing us with a statement of the reasons for the trial court's decision.

Id. at 359-360 (citations and quotation marks omitted). "A trial court's grant of summary judgment is clothed with a presumption of validity, and the appellant bears the burden of demonstrating that the trial court erred." *Carter v. Indianapolis Power & Light Co.*, 837 N.E.2d 509, 514 (Ind. Ct. App. 2005), *trans. denied* (2006). We may affirm the trial court's grant of summary judgment if it can be sustained on any theory or basis in the record. *Schon v. Frantz*, 156 N.E.3d 692, 698 (Ind. Ct. App. 2020). Nevertheless, our task is to carefully review the decision to ensure that a party was not improperly denied its day in court. *Id*.

Section 1 – The BZA's decision against HH-Indianapolis is arbitrary, capricious, and unsupported by substantial evidence.

[24] The City argues that the trial court erred in reversing the BZA's decision against HH-Indianapolis. "When reviewing a zoning board's decision, we are bound by the same standard of review as the trial court." *Essroc Cement Corp. v. Clark Cnty. Bd. of Zoning App.*, 122 N.E.3d 881, 890-91 (Ind. Ct. App. 2019) (citing *Flat Rock Wind, LLC v. Rush Cnty. Area Bd. of Zoning App.*, 70 N.E.3d 848, 857 (Ind. Ct. App. 2017), *trans. denied*), *trans. denied*. Judicial review of zoning board decisions is governed by Indiana Code Chapter 36-7-4. Neither the trial court nor this Court may "try the cause de novo or substitute its judgment for that of the board." Ind. Code § 36-7-4-1611. As such, neither the trial court nor

this Court may reweigh the evidence or reassess the credibility of witnesses. *Essroc Cement*, 122 N.E.3d at 890-91.

[25] A court may grant relief from a zoning board's decision "only" if the person seeking judicial relief has been prejudiced by a zoning 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). A decision is arbitrary and capricious if it is "patently unreasonable" or "made without consideration of the facts and in total disregard of the circumstances and lacks any basis which might lead a reasonable person to the same conclusion." *Lockerbie Glove Factory Town Home Owners Ass'n v. Indianapolis Historic Pres. Comm'n*, 106 N.E.3d 482, 488 (Ind. Ct. App. 2018) (quotation marks omitted), *trans. denied*. A decision is unsupported by substantial evidence if there is no "relevant evidence which a reasonable mind might accept as adequate to support a conclusion." *Id*. "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).

[26] Here, the BZA's decision upheld BNS's determination that HH-Indianapolis's proposed use of the Site was for an adult entertainment business, which was not a permitted use and required the grant of a use variance.[4] As mentioned, an adult entertainment business includes an adult bookstore and an adult services establishment. Code § 740-202. Notably, when BNS informed HH-Indianapolis that BNS had determined that the Site's proposed use was for an adult entertainment business, BNS did not explain how the Site's proposed use satisfied the definition for either an adult bookstore or an adult services establishment. The BZA's decision relies on both definitions, and therefore we consider each.

[27] We first address whether the Site's proposed use could properly be classified as an adult bookstore. An adult bookstore is defined as follows:

> [A]n establishment having at least 25% of its

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[4] The parties dispute whether HH-Indianapolis bore the burden of proving that its proposed use would be a permitted use. HH-Indianapolis asserts that the BZA improperly imposed the burden on it to show that the BNS's determination was erroneous. In support, it cites *County of Lake v. Pahl*, 28 N.E.3d 1092, 1100 (Ind. Ct. App. 2015), *trans. denied*, wherein the Court stated, "A party seeking an injunction for a zoning violation must prove: (1) the existence of a valid ordinance and (2) a violation of that ordinance." However, this case involves the denial of a permit application rather than an injunction for a zoning violation. As such, we do not find *County of Lake* applicable. Our review of the Code does not reveal any burden-of-proof provision governing structural or sign permit denials. However, we need not resolve this question because we conclude that the BZA's decision is arbitrary, capricious, and unsupported by substantial evidence based on the burden of proof it did apply.

> (1) Retail floor space used for the display of adult products; or
>
> (2) Stock in trade consisting of adult products; or
>
> (3) Weekly revenue derived from adult products.
>
> For purposes of this definition, the phrase *adult products* means books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, video cassettes, slides, tapes, records or other forms of visual or audio representations which are distinguished or characterized by their emphasis on matter depicting, describing or relating to *specified sexual activities* or *specified anatomical areas*. For purposes of this definition, the phrase *adult products* also means a device designed or marketed as useful primarily for the stimulation of human genital organs, or for sadomasochistic use or abuse. Such devices shall include, but are not limited to bather restraints, body piercing implements (excluding earrings or other decorative jewelry), chains, dildos, muzzles, non-medical enema kits, phallic shaped vibrators, racks, whips, and other tools of sado-masochistic abuse.

Id. (emphases added).

[28] "Specified sexual activities" are any of the following:

> (1) Human genitals in a state of sexual stimulation or arousal;
>
> (2) Acts of human masturbation, sexual intercourse or sodomy;
>
> (3) Fondling or other erotic touching of human genitals, pubic regions, buttocks or female breasts;

(4) Flagellation or torture in the context of a sexual relationship;

(5) Masochism, erotic or sexually oriented torture, beating or the infliction of pain;

(6) Erotic touching, fondling or other such contact with an animal by a human being; or

(7) Human excretion, urination, menstruation, vaginal or anal irrigation as part of or in connection with any of the activities set forth in (1) through (6) above.

Id.

[29] "Specified anatomical areas" are any of the following:

1. Less than completely and opaquely covered human genitals, pubic region, buttocks, anus or female breasts below a point immediately above the top of the areolae; or

2. Human male genitals in a discernibly turgid state, even if completely and opaquely covered.

Id.

[30] Here, the evidence that was before the BZA shows that the Initial Sales Chart represented nationwide company data and the Indianapolis Revenue Table provided specific projected data for the Indianapolis store. There is no evidence to the contrary. Notably, the evidence shows that Mann determined that the Site's proposed use was for an adult entertainment business before HH-Indianapolis had responded to Schuck's request for additional information.

Thus, Mann made a determination without the benefit of data that was specific to the Indianapolis store. Further, the BNS Report was based on the Initial Sales Chart and its associated documents and not on the Indianapolis Revenue Table and its associated documents.

[31] The Indianapolis Revenue Table and floor plan indicate that adult products were forecast to make up 12.4% of the store's expected weekly revenue and their display would comprise 8.7% of the retail floor space. Appellants' App. Vol. 2 at 122. Assuming, without deciding, that the Games/Party/Toys category meets the definition of adult products, this category was forecast to make up 5.7% of the Site's expected weekly revenues and comprise 3.8% of the retail floor space. *Id*. Games/Party/Toys and Adult Products together would make up 18.1% of the Site's expected weekly revenue and take up 12.5% of the retail floor space. *Id*. This evidence shows that the Site's proposed use does not meet the definition of an adult bookstore.

[32] Nevertheless, the BZA found that there was credible evidence that some merchandise was mischaracterized as non-adult to stay under the 25% threshold of adult products. Our review of the record fails to reveal any such evidence. The City argues that the Cincinnati store and the website evidence cast doubt upon the accuracy of HH-Indianapolis's information, but that evidence is irrelevant to the Indianapolis store. Here, the Indianapolis store is in the C-3 zoning district and must operate within its restrictions or face the consequences for any violations. There is no evidence to support the notion that the Site will operate in violation of the Code. To assume as much amounts to pure

speculation. *See Wright v. Northrop*, 621 N.E.2d 1142, 1146 (Ind. Ct. App. 1993) (reversing zoning board's decision where " [t]he findings made by the [b]oard amounted to little more than speculative conclusions by the members"). The City, of course, will have the authority to investigate and enforce alleged Code violations after the store is opened.

[33] The City also asserts that the BZA's finding is supported by the contradictory nature of the Initial Sales Chart and the Indianapolis Revenue Table. However, as discussed, the uncontradicted evidence clearly establishes the reason that they are different: the first chart represented nationwide data, and the second was specific to the Indianapolis store. We conclude that there is no relevant evidence that a reasonable mind might accept as adequate to support a finding that HH-Indianapolis mischaracterized merchandise. *See Lockerbie Glove*, 106 N.E.3d at 488.

[34] Next, we address whether the Site's proposed use could properly be classified as an adult services establishment. An adult services establishment is "any building, premises, structure or other facility, or any part thereof, under common ownership or control which provides a preponderance of services involving specified sexual activities or display of specified anatomical areas." Code § 740-202.

[35] "Services involving specified sexual activity" or "display of specified anatomical areas" are "any combination of *two* or more" of five listed categories, three of which are relevant here:

> 1. The sale or display of books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, video cassettes, slides, tapes, records or other forms of visual or audio representation that are characterized by an emphasis upon the depiction or description of specified sexual activities or specified anatomical areas;
>
> 2. The presentation of films, motion pictures, video cassettes, slides, or similar photographic reproductions that are distinguished or characterized by an emphasis upon the depiction or description of specified sexual activities or specified anatomical areas for observation by patrons;
>
> [3]. Live performances by topless or bottomless dancers, go-go dancers, exotic dancers, strippers, or similar entertainers, where such performances are distinguished or characterized by an emphasis on specified sexual activities or specified anatomical areas;

Id.[5] (emphasis added).

[36] The BZA found that the evidence did not refute the BNS's determination that "a subpart of the overall facility would be created which provides a preponderance of services involving specific sexual activities or display of specified anatomical areas" and referred to services in all three of the above categories. Appellees' App. Vol. 2 at 23. The BZA also found that it was proper for the BNS to determine that the Site's proposed use was an adult

[5] Broadly speaking, the other two categories involve motion picture machines and unlicensed massage schools.

services establishment based on "contradictory, inconsistent, and recalculated information" provided by HH-Indianapolis. *Id*.

[37] We note that there is no dispute that the Site's business activities include the first category. We also note that BNS did not make a determination that HH-Indianapolis would engage in services that fall within the third category. The BNS Report claimed that "this operation typically includes at least two of the five listed categories" that comprise an adult services establishment: (1) the sale of books or other printed materials and photographs or other visual or audio representations characterized by an emphasis upon specified sexual activities or specified anatomical areas; and (2) the presentation of films or similar photographic reproductions characterized by an emphasis upon specified sexual activities or specified anatomical areas for observation by patrons. *Id*. at 142. The BNS Report maintained that the Indianapolis store would engage in services in the second category because "this operation" includes workshops and courses with live demonstrations and video with titles such as "Gym Class: Sexual Gymnastics" and "Sex Toys 201: Couple's Toys." *Id*. The City argues that the business activity of other Hustler Hollywood stores and its website demonstrate that the Indianapolis store will provide the same services, but we have already concluded that evidence of other stores and the website is irrelevant to the Indianapolis store. Moreover, none of HH-Indianapolis's permit applications or submissions to the BZA mention the Site providing any services in the second or third categories. Thus, there is no evidence that the Site will provide services in the second or third categories. There are no

"contradictions, inconsistencies, or recalculated information" regarding services in the second or third categories. There is simply no evidence relevant to the Indianapolis store that shows that its proposed use is to provide services involving specified sexual activity or display of specified anatomical areas in any category other than the first. Accordingly, BZA's findings related to the definition of an adult services establishment are arbitrary, capricious, and unsupported by substantial evidence.

[38] In sum, we conclude that the BZA's decision affirming BNS's determination that the Site's proposed use is for an adult entertainment business is arbitrary, capricious, and unsupported by substantial evidence.[6] We therefore affirm the trial court's order reversing the BZA's decision, ordering it to issue new Findings, and ordering BNS to issue HH-Indianapolis's structural and sign permit applications.

Section 2 – H-Indy is entitled to judgment as a matter of law on its claim that its constitutional rights and property rights were violated.

[39] As an initial matter, we must resolve the parties' dispute as to whether the trial court granted H-Indy's request for mandamus relief. In Count 1 of its complaint, H-Indy sought an order of mandate to require BNS to review H-

[6] Because we are affirming the grant of summary judgment on this ground, we need not address the City's argument that the trial court erred in determining that BNS and the BZA were prohibited from inquiring into the nature of HH-Indianapolis's business.

Indy's permit applications. Appellees' App. Vol. 2 at 53. In Count 2, H-Indy sought declaratory judgment to determine the legitimacy of BNS's "litigation hold." *Id*. at 54. The trial court concluded that "BNS violated the constitutional rights and property rights of H-Indy in application of its 'Litigation Holds.' No such hold exists at law." Appealed Order at 41. The City asserts that the trial court does not appear to have granted H-Indy's request for an order of mandate and requests that this Court "reverse any determination that H-Indy is entitled to the performance of any mandated action to the extent that such a determination can be found in the trial court's order." Appellants' Br. at 30 n.2 (citing Appealed Order at 32, Findings 152-54). H-Indy asserts that the trial court did grant its request for order of mandate. Although the trial court set forth some blackletter law regarding mandate orders, the trial court did not grant H-Indy's request that BNS be ordered to review H-Indy's permit request. Accordingly, we conclude that the trial court did not grant H-Indy's request for an order of mandate.[7]

[40] We now consider whether the trial court erred by concluding that BNS violated H-Indy's constitutional rights and property rights by imposing an unauthorized litigation hold on applications relating to the Site.[8] We begin by noting that the

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[7] H-Indy asserts that the trial court ordered BNS to refrain from applying any further litigation hold or notice hold "in connection with this matter." Appealed Order at 41. However, that phrase occurs in the paragraph ordering BNS to issue HH-Indianapolis's structural and sign permits and does not appear to apply to H-Indy because H-Indy had not submitted any permit applications.

[8] The City argues that H-Indy lacks standing to bring its declaratory judgment action. H-Indy contends that the City waived its standing argument because the City failed to answer the portion of H-Indy's complaint

City admitted in its answer that the Code does not mention "litigation holds" and it makes no argument on appeal that BNS was authorized to impose such a hold. Accordingly, the City has failed to carry its burden to persuade us that the trial court erred in concluding that the litigation hold had no basis in law. As for whether H-Indy's constitutional rights were violated, the City claims that "[t]he trial court makes references to the United States Constitution, and due process generally, but does not explicitly hold that BNS violated any provisions other than Article I, Section 23, of the Indiana Constitution." Appellants' Br. at 31 (citations to Appealed Order omitted). The City then confines its argument to Article 1 Section 23, making no challenge to H-Indy's claims that the "litigation hold" violated its federal constitutional rights to due process and equal protection. Contrary to the City's assertion, the trial court made specific findings pertaining to H-Indy's federal constitutional rights:

> 157. The Court concludes that the City acted outside the scope of its legal authority and as a result denied H-Indy's due process. The evidence demonstrates an impermissible ad hoc process was used by the City in permitting which was not legally authorized and did not observe the tenets of "fundamental fairness" involving the opportunity to be heard at a meaningful time and in a meaningful manner. *In re C.G.*, 954 N.E.2d 910, 917 (Ind. 2011); *see also* [*Ayers v. Porter Cnty. Plan Comm'n*, 544 N.E.2d 213, 219 (Ind. Ct. App. 1989)].

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relating to its declaratory judgment action. We agree with H-Indy. Pursuant to Indiana Trial Rule 8(D), the unchallenged averments of H-Indy's complaint are deemed admitted.

> ….
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> 186. The Court concludes that BNS and the City operated contrary to constitutional right and authority in dealing with H-Indy and, in particular, application of a "litigation hold" without due process and in treating H-Indy unequally.

Appealed Order at 33, 41.

[41] The City bears the burden of persuading us that the trial court erred. In its reply brief, the City briefly argues that H-Indy was not denied due process because it failed to show that it had a protectible property interest and did not actually submit permit applications.[9] Appellants' Reply Br. at 13. We are unpersuaded. The materials designated by H-Indy in support of its summary judgment motion, particularly its November 3, 2017 email to BNS and Del Rio's affidavit, constitute prima facie evidence that H-Indy had a property interest in the Site. Appellees' App. Vol. 2 at 88; Appellees' App. Vol. 3 at 34. Further, the harm to H-Indy occurred when BNS indicated that it would not process any permit applications; any attempt by H-Indy to submit permit applications would have been futile. We conclude that the City has failed to carry its burden to demonstrate that the trial court erred by concluding that H-Indy's due

[9] "The Due Process Clause of the U.S. Constitution and the Due Course of Law Clause of the Indiana Constitution prohibit state action that deprives a person of life, liberty, or property without a fair proceeding." *In re C.G.*, 954 N.E.2d 910, 916 (Ind. 2011) (quoting *In re Paternity of M.G.S.*, 756 N.E.2d 990, 1004 (Ind. Ct. App. 2001), *trans. denied*.).

process rights were violated by an unauthorized litigation hold.[10] Accordingly, we affirm the judgment granting H-Indy declaratory relief.

Conclusion

[42] Based on the foregoing, we affirm the trial court's judgment reversing the BZA's decision, ordering it to issue a new Findings, ordering BNS to issue HH-Indianapolis's structural and sign permit applications, and concluding that BNS violated H-Indy's constitutional rights by imposing an unauthorized litigation hold. In addition, we observe that the City does not challenge the judgment concluding that BNS violated HH-Indianapolis's constitutional rights and property rights in imposing its unauthorized notice holds. As such, the judgment in this regard stands. We therefore remand for further proceedings.

[43] Affirmed and remanded.

Najam, J., and Riley, J., concur.

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[10] Because we affirm summary judgment in favor of H-Indy on its due process claim, we need not address its equal protection and privileges and immunities claims.