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IN THE COURT OF APPEALS OF INDIANA

EP MSS LLC,

Appellant-Petitioner,

v.

Merrillville Board of Zoning Appeals, DG Properties Taft LLC, Town of Merrillville, and Town of Merrillville Town Council,

July 21, 2022

Court of Appeals Case No. 21A-MI-2611

Appeal from the Lake Superior Court

The Honorable Bruce Parent, Judge

Trial Court Cause No. 45D11-2104-MI-298

Appellees-Respondents

May, Judge.

[1] EP MSS LLC ("EP MSS"), the owner of Merrillville Self-Storage, appeals the trial court's order finding EP MSS lacked standing to pursue a petition for judicial review. EP MSS sought review of the Town of Merrillville's decision to grant a zoning variance that gave DG Properties Taft LLC ("DG Properties") permission to construct a self-storage facility near EP MSS's Merrillville Self-Storage. EP MSS raises one issue on appeal, which we revise and restate as whether the trial court erred when it determined EP MSS did not have standing to pursue judicial review as an aggrieved[1] party based on EP MSS's claim that it could incur potential loss of business due to the DG Properties self-storage facility. We affirm.

Facts and Procedural History

[2] On November 1, 2019, DG Properties purchased property commonly known as 7189-7245 Taft Street in Merrillville ("the Property"). The Property included several retail establishments and 69,000 square feet of vacant space that formerly housed a grocery store and a parking lot for the grocery store. After

[1] As defined by Indiana Code section 36-7-4-1603(A).

attempts to find a new tenant for the vacant location failed, DG Properties decided it would convert that portion of the Property into a self-storage facility. As a preliminary step in this process, DG Properties was required to obtain a zoning variance because the Town of Merrillville had zoned the Property as a C2 commercial district and operation of a self-storage facility was not a permitted use on property bearing that zoning designation.[2] DG Properties filed its variance application with the Town of Merrillville on February 1, 2021.

[3] EP MSS then filed a written remonstrance in opposition to the variance application. EP MSS owns Merrillville Self Storage, which is located about one mile west of the Property. The remonstrance asserted the supply of self-storage space in Merrillville already exceeds demand, and it advocated to the Merrillville Board of Zoning Appeals ("the Board") that denying the variance application would "actually serve the Petitioners and the surrounding self-storage owner/operators from oversupplying the market and leading to failures." (App. Vol. II at 46.)

[4] The Board considered DG Properties' application for a zoning variance at its meeting on February 24, 2021. DG Properties explained to the Board that while the vacant portion of the Property was built to house a grocery store, a grocery store at that location was no longer an economically viable option.

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[2] *See* Merrillville Municipal Code Chapter 21, Article III, Division 8, Section 21-136 for a schedule of permitted uses for each zoning district and Section 21-137 for the minimal requirements a property must meet to qualify for each zoning district.

Therefore, DG Properties wanted to convert the area into a facility providing indoor and outdoor self-storage units, and DG Properties asserted this proposed use met all the requirements specified in the Indiana Code to qualify for a variance.[3] EP MSS, in turn, voiced its opposition:

> [W]e're here tonight because we are not in favor of this self-storage facility going just down the road from us. Um, and one of the biggest concerns is the current market . . . We're concerned not only for ourselves but the other self-storage in the area that I think um a market study would show that square foot per person is over the saturation level.

(*Id*. at 185). EP MSS also explained it had previously received approval from the Board and Town Council for a plan to expand its existing self-storage operation and noted an additional self-storage business would likely derail those plans. By a unanimous vote, the Board issued a favorable recommendation regarding the application. The Merrillville Town Council entertained the application at its March 9, 2021, meeting.[4] EP MSS appeared at the Town Council meeting and voiced opposition to the variance application. Nonetheless, the Town Council approved the recommendation of the Board by a vote of five to two.

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[3] *See* Ind. Code § 36-7-4-918.4 (providing a zoning variance may be approved only upon a written determination the variance meets certain conditions).

[4] By virtue of its population, Lake County falls within the purview of Indiana Code section 36-7-4-918.6. This statute requires the board of zoning appeals in the requisite counties to consider petitions for use variances and issue recommendations on the petitions to the local legislative body. The local legislative body is then charged with granting or denying the petition.

[5] On April 7, 2021, EP MSS filed a petition for judicial review challenging the approval of DG Properties' petition for a use variance, and it filed an amended verified petition for judicial review the next day. EP MSS asserted it was aggrieved by the Town's zoning decision, and it challenged the adequacy of the Board's findings. EP MSS alleged the market for self-storage units in Merrillville was already oversaturated and the variance would render existing self-storage businesses less profitable, possibly leading them all to fail. EP MSS also claimed the zoning variance would hurt existing retail businesses on and around the Property.

[6] DG Properties and the Town of Merrillville filed a joint brief opposing EP MSS's petition for judicial review. They argued EP MSS lacked standing because it cannot show that the zoning decision "infringed upon a legal right" or that the zoning decision resulted in "a pecuniary or special injury." (App. Vol. III at 3.) In addition, the Respondents asserted EP MSS waived its challenge to the adequacy of the Board's findings by failing to object on that basis at the Town Council meeting and, nonetheless, the findings were supported by substantial evidence. In its reply brief in support of its petition for judicial review, EP MSS asserted the additional self-storage facility will hurt the value of its existing self-storage business and "[c]ompetition that would interfere with the value and use of the Petitioner's property is a valid ground to confer standing upon Petitioner here." (*Id.* at 52.)

[7] On November 3, 2021, the trial court held a hearing on EP MSS's petition for judicial review, and the trial court issued its order denying the petition on

November 12, 2021. With respect to whether EP MSS had standing to challenge the zoning decision, the trial court found:

> 25. Here, it was uncontested that the PETITIONER was represented by counsel, who presented both evidence and argument to the zoning board at the hearing of February 24, 2021, and to the Town Council at the hearing of March 9, 2021.
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> 26. To achieve the prerequisite of standing, PETITIONER need only demonstrate that it was an aggrieved party, by demonstrating to the Court that it sustained a special injury not common to the community as a whole and that it sustained a pecuniary damage.
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> 27. The Court found that the PETITIONER failed to carry its burden of demonstrating that it had standing to contest the use variance at issue as it failed to prove that it was particularly harmed.
>
> 28. Each argument presented by the PETITIONER regarding the harm it suffered were harms common to the community as a whole.
>
> 29. PETITIONER failed to demonstrate that the variance at issue caused a special injury to it.

(App. Vol. II at 14.)

Discussion and Decision

[8] EP MSS contends the oversaturation of the market for self-storage space and the specter of decreased profits constitutes a special injury sufficient to render

EP MSS an "aggrieved" party under the statutory definition and bestow standing, and therefore, the trial court erred in finding EP MSS lacked standing to pursue a petition for judicial review. We review a trial court's decision dismissing a case for lack of standing de novo. *Pflugh v. Indianapolis Hist. Pres. Comm'n*, 108 N.E.3d 904, 908 (Ind. Ct. App. 2018), *trans. denied*. "Standing is a judicial doctrine that focuses on whether the complaining party is the proper party to invoke the trial court's jurisdiction." *Liberty Landowners Assoc., Inc. v. Porter Cnty. Comm'rs*, 913 N.E.2d 1245, 1250 (Ind. Ct. App. 2009), *trans. denied*. We must resolve questions of standing at the outset because we do not have jurisdiction over a party that lacks standing. *Pflugh*, 108 N.E.3d at 908.

[9] Indiana Code section 36-7-4-1603(a) lists individuals who have standing to petition for judicial review of a zoning decision, and that definition includes, in relevant part:

> (2) A person aggrieved by the zoning decision who participated in the board hearing that led to the decision, either:
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> > (A) by appearing at the hearing in person, by agent, or by attorney and presenting relevant evidence; or
> >
> > (B) by filing with the board a written statement setting forth any facts or opinions relating to the decision.

In *Bagnall v. Town of Beverly Shores*, our Indiana Supreme Court explained:

> A person must be "aggrieved" by a board of zoning appeals's decision in order to have standing to seek judicial review of that

> decision. [Ind. Code § 36-7-4-1603(a)]; *see also Union* [*Twp.*] *Residents Ass'n v. Whitley* [*Cnty.*] *Redevelopment Comm'n*, 536 N.E.2d 1044 (Ind. Ct. App. 1989). To be aggrieved, the petitioner must experience a "substantial grievance, a denial of some personal or property right or the imposition . . . of a burden or obligation." *Id*. at 1045. The board of zoning appeals's decision must infringe upon a legal right of the petitioner that will be "enlarged or diminished by the result of the appeal" and the petitioner's resulting injury must be pecuniary in nature. *Id*.

726 N.E.2d 782, 786 (Ind. 2000).

[10] This standard requires the petitioner to "'show some special injury other than that sustained by the community as a whole.'" *Id*. (quoting *Robertson v. Bd. of Zoning Appeals, Town of Chesterton*, 699 N.E.2d 310, 315 (Ind. Ct. App. 1998)). Petitioners must "allege injuries that are somehow unique to them as a result of the rezoning." *Reed v. Plan Comm'n of Town of Munster*, 810 N.E.2d 1126, 1128 (Ind. Ct. App. 2004) (internal quotation marks omitted), *reh'g denied*, *trans. denied*. For instance, increased traffic and environmental concerns are insufficient to show special injury because they are born by the community as a whole. *Id*. However, in *Sexton v. Jackson County Board of Zoning Appeals*, we held nearby landowners were considered "aggrieved" within the meaning of the statute when the township assessor testified in front of the zoning board that if the board approved a variance to allow a confined animal feeding operation near their property, their property values would fall by thirty percent. 884 N.E.2d 889, 894 (Ind. Ct. App. 2008). We explained that "[u]nlike in *Bagnall*, where the allegedly aggrieved party presented no evidence of harm, the

Appellants have presented evidence showing that the value of their property will decrease if the CAFO is constructed." *Id*. at 893.

[11] While EP MSS brought its objections before both the Board and the Town Council, DG Properties contends EP MSS was not "aggrieved" as required by Indiana Code section 36-7-4-1603(a) because the zoning decision did not result in infringement of a legal right or pecuniary injury. EP MSS argues it is "aggrieved" as required by Indiana Code section 36-7-4-1603(a) because "the new self-storage facility would harm its nearby business, i.e. the value of its property[.]" (Appellant's Br. at 8.) In the written remonstrance that EP MSS filed with the Board, EP MSS listed the net rentable square feet of self-storage space available in Merrillville and compared that number with its estimate of demand to conclude "the market is already oversupplied by 83,337 [square feet] (not including the square footage at [one self-storage facility in Merrillville] and the 140,000 of square feet approved at Merrillville Self Storage)." (App. Vol. II at 45) (emphases removed). Thus, EP MSS asserts that because the market for self-storage space in Merrillville is already oversaturated according to its own calculations, the addition of another self-storage facility will make its existing self-storage business less profitable and derail its expansion plans.

[12] EP MSS relies on *Department of Financial Institutions v. Wayne Bank & Trust Company*, 381 N.E.2d 1100 (Ind. Ct. App. 1978), *reh'g denied with opinion*, 385 N.E.2d 482 (1979), to argue "[c]ompetition that has the possibility of 'severely damaging' an existing business has been held to affect an existing business's 'legal right,' the term used in *Bagnall*[.]" (Appellant's Br. at 12.) Yet, *Wayne*

Bank extolls the virtues of free competition. In *Wayne Bank*, the Wayne Bank and Trust Company applied to the Department of Financial Institutions ("DFI") to establish a branch bank in Spring Grove, Indiana, but the First National Bank of Richmond opposed the application on the basis that an additional branch bank was not needed in the area. 381 N.E.2d at 1102. DFI denied Wayne Bank's application, and Wayne Bank sought judicial review. *Id*. The trial court reversed the decision of the DFI, and we affirmed. *Id*. at 1107. We explained:

> In the case at bar all the evidence points to the fact that the public convenience and advantage would be served by the establishment of a branch of Wayne Bank in Spring Grove. . . . The only interest which would be served in excluding a bank which offers higher interest on deposits, lower interest on certain loans, and longer banking hours is that of the Richmond banks, not that of the people in the proposed service area. It is not the purpose of the Department of Financial Institutions to foster monopolistic banking practices but rather to protect the public from imprudent banking practices.
>
> The effect of competition from a proposed bank upon an existing bank should be considered controlling only where the possibility exists that the existing bank would collapse, or its business would be severely damaged by such competition, because such collapse or severe damage would detrimentally affect the public convenience and advantage. Slight losses of business which result from healthy competition are not controlling factors in deciding whether a proposed branch bank should be permitted to be established in an area being serviced by an existing bank.

Id. at 1006-07. We then quoted with approval the trial court's conclusion that:

> Competition is the life blood of a free enterprise economic system, and competition serves both the convenience and needs of the public. Banks have no right to be free of competition except as otherwise provided by statute.

Id. at 1007. *Wayne Bank* stands for the proposition that promoting economic competition is generally in the public interest and should be encouraged. As DG Properties states in its brief, EP MSS "does **not** have a legal right to be free from increased competition." (Appellee's Br. at 12 (emphasis in original).)

[13] Zoning boards are not charged with protecting private business interests from competition. Indiana Code section 36-7-4-601 lists the powers and duties of legislative bodies charged with adopting zoning ordinances. Subsection (c) of the statute states:

> When it adopts a zoning ordinance, the legislative body shall act for the purpose of:
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> > (1) securing adequate light, air, convenience of access, and safety from fire, flood, and other danger;
> >
> > (2) lessening or avoiding congestion in public ways;
> >
> > (3) promoting the public health, safety, comfort, morals, convenience, and general welfare; and
> >
> > (4) otherwise accomplishing the purposes of this chapter.

Restricting competition among private businesses does not serve any of the specifically enumerated purposes in the statute, and EP MSS does not argue

that it serves any other purpose this chapter of the Indiana Code is meant to protect.

[14] In addition, EP MSS has failed to show pecuniary harm from the granting of the use variance. EP MSS conflates the possibility of future lost profits with a decrease in its property's value. (*See* Reply Br. at 4 ("The 'legal right' that Appellants attempt to preserve here is not to be 'free of competition,' but rather that '[t]he use and value of area adjacent to the property included in the variance of use will not be affected in a substantially adverse manner[.]").[5]) However, EP MSS's assertion that it will suffer pecuniary harm in the form of lower profits if DG Properties is allowed to build an additional self-storage facility is inherently speculative because it assumes the new storage facility will entice customers away from EP MSS.

[15] Moreover, while EP MSS bemoans the current state of the self-storage market in Merrillville and contends the addition of another self-storage business will lead to a market collapse, it also plans to expand its own self-storage offerings. Likewise, the danger that EP MSS will lose business to DG Properties is a risk common to all existing self-storage businesses in Merrillville. Therefore, it does not represent a special injury. *See Pflugh*, 108 N.E.3d at 910 (holding property owner did not have standing as an "aggrieved" party because he did not

[5] We have reproduced the quote as it appears in Appellant's Reply Brief. While not directly cited, it appears Appellant is quoting Indiana Code section 36-7-4-918.4, which lists considerations the board of zoning appeals is to contemplate before approving a variance.

establish the necessary pecuniary or special injury to grant standing). Thus, the trial court did not err when it decided EP MSS lacks standing to pursue a petition for judicial review of the Town of Merrillville's decision to grant a use variance to DG Properties because EP MSS has failed to show the use variance infringes upon its legal rights or causes it to suffer financial harm. *See Nat'l Wine & Spirits Corp. v. Ind. Alcohol & Tobacco Comm'n*, 945 N.E.2d 182, 187 (Ind. Ct. App. 2011) (holding liquor wholesaler lacked standing to pursue petition for judicial review of agency's decision to issue wine and liquor permit to a competitor), *trans. dismissed*.

Conclusion

[16] The trial court did not abuse its discretion when it determined EP MSS lacks standing to pursue a petition for judicial review because it is not an "aggrieved" person for purposes of Indiana Code section 36-7-4-1603(a). EP MSS does not have a right to be free from competition, and therefore, Merrillville's grant of a use variance to DG Properties does not infringe upon the rights of EP MSS. EP MSS's claim of pecuniary harm also fails as it is premised on speculation regarding future profits and runs counter to public policy promoting free enterprise. Moreover, EP MSS has not shown a special injury because all self-storage businesses in Merrillville will be required to compete with DG Properties. As a result, we affirm the trial court.

[17] Affirmed.

Riley, J., and Tavitas, J., concur.