MEMORANDUM DECISION

ATTORNEYS FOR APPELLANT

R. John Kuehn
Paul Edgar Harold
Matthew C. Deputy
South Bend, Indiana

ATTORNEYS FOR APPELLEE

Bradley M. Dick
Bryan H. Babb
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Burkhart Advertising, Inc.

Appellant-Defendant,

v.

Howard County Board of Zoning Appeals, City of Kokomo, Indiana, and Greg Sheline

Appellee-Plaintiffs.

October 21, 2021

Court of Appeals Case No. 20A-PL-1899

Appeal from the Howard Superior Court

The Honorable Brant J. Parry, Judge

Trial Court Cause No. 34D02-1902-PL-323

Tavitas, Judge.

Case Summary

[1] Burkhart Advertising Inc. ("Burkhart") appeals the trial court's partial dismissal of its complaint against the Howard County Board of Zoning Appeals,[1] the City of Kokomo ("the City"), and Greg Sheline, individually and as Planning Director of the City of Kokomo's Plan Commission (collectively, "Appellees"). The City cited Burkhart for a series of alleged violations of the City's zoning ordinance with regard to several of Burkhart's billboards. Burkhart appealed the citations and the associated fines to the City of Kokomo Board of Zoning Appeals ("BZA"). The BZA found in favor of the City, and Burkhart sought judicial review of that decision in the Howard Superior Court, in addition to other claims for relief. When Burkhart failed to file a certified copy of the BZA record, the trial court dismissed the petition for judicial review of the BZA decision, as well as the five other counts challenging the BZA decision, finding the failure to file the certified copy of the board record to be fatal to those counts.

[2] Appellees further sought the entry of final judgment with respect to all but one of the dismissed claims, which the trial court granted. Burkhart now appeals. Finding that the trial court did not err in dismissing the challenges to the BZA

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[1] Although Burkhart's complaint identifies the Howard County Board of Zoning Appeals as a defendant, the decision at issue here was issued by the Kokomo Board of Zoning Appeals. Burkhart did not, however, correct its complaint. All parties appear content that an incorrect defendant is named and that the correct defendant is not a party to the case.

decision, including the petition for judicial review, we affirm those dismissals. We further affirm the trial court's entry of final judgments as to those claims.

Issues

[3] Burkhart raises six issues, which we consolidate and restate as:

I. Whether the trial court erred in dismissing Burkhart's petition for judicial review of the BZA decision and the five counts that the trial court deemed incorporated therein for failure to file a certified copy of the BZA record as required by Indiana Code Section 36-7-4-1613.

II. Whether the trial court erred in granting Trial Rule 54(B) relief and entering partial final judgment in favor of Appellees.

Facts

[4] In May 2013, the City banned all "off-premises"[2] signs via an amendment to the zoning ordinance. That ban, however, did not affect signs that predated the ordinance, which were protected as having legal nonconforming status. Nevertheless, the City empowered the planning director of the City of Kokomo's Plan Commission, Greg Sheline, to order the removal of certain legal nonconforming signs. In order to exercise that power, Sheline was required to make a finding that a given sign was "dilapidated, decayed, or in

[2] An off-premises sign is one "which directs attention to a business, commodity, service, or entertainment conducted, sold, or offered elsewhere than upon the premises where such sign is located or to which it is affixed." Appellant's App. Vol. II p. 18 (citing Kokomo, Ind. Zoning Ord. § 11.2 (2013)).

rotten condition," and had "become dangerous to public or private safety or property," or "has been rendered obsolete."[3] Kokomo Zoning Ordinance § 6.34(H).

[5] On November 17, 2013, a tornado damaged eleven of Burkhart's Kokomo-area billboards. Four days later, Sheline notified Burkhart that those billboards had become dilapidated and were, thus, no longer protected by their legal non-conforming status. Shortly thereafter, the City provided Burkhart with a list of signs that they alleged no longer complied with the zoning ordinance. Burkhart and the City then negotiated and reached an agreement memorialized in a "memorandum of understanding" ("MOU"). The City agreed to work toward implementing so-called "cap and replace" legislation, whereby companies like Burkhart would remove some of their signs while upgrading others.[4] In the meantime, the City agreed not to cite Burkhart for any violations of the zoning ordinance.

[6] Efforts to reach an agreement on the cap-and-replace language stalled, however, and no such legislation was ever passed. In January 2017, the City informed Burkhart that the planned update to the zoning ordinance was not a priority. Shortly thereafter, the City requested that Burkhart remove one of its billboards

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[3] The Kokomo Zoning Ordinance does not define these terms.

[4] A cap-and-replace ordinance would allow ". . . Burkhart to get credits for removing its signs voluntarily without the City needing to pay to condemn them through eminent domain . . . in other words, cap and replace incentivizes the City and Burkhart to work together to reduce the number of signs in the community." Appellant's App. Vol. II pp. 75-76.

at 408 Washington ("408 Washington") in order to accommodate a developer and threatened to "go after signs" if Burkhart did not remove 408 Washington. Appellant's App. Vol. II p. 77. Burkhart refused. The City offered to allow Burkhart to retain some of the signs on the previously compiled list if Burkhart would agree to voluntarily remove 408 Washington. Once again, Burkhart declined.

[7] Sheline sent a series of letters[5] noticing violations relating to four of Burkhart's billboards. After Burkhart failed to remedy the violations, Sheline sent additional letters informing Burkhart that it would be fined $2,000.00 per day on each sign. Burkhart filed an appeal with the BZA contesting the determination that its billboards violated the zoning ordinance as well as the associated fines. After a hearing on September 4, 2018, the BZA denied the appeal and ruled in favor of the City. The BZA's final vote occurred on January 2, 2019, wherein it adopted the staff findings in favor of the City.

[8] On January 16, 2019, via email, Burkhart requested a certified copy of the BZA record, as required by Indiana Code Section 36-7-4-1613:

> Pursuant to Ind. Code §36-7-4-[16]13 Burkhart Advertising, Inc. requests the BZA prepare a complete certified board record necessary for our judicial appeal. Under §36-7-4-[16]13(c) the board is to include a transcript or prepare one to be included with the record. Unless, the board has already prepared it, Burkhart is

[5] The record includes letters dated April 12, 2017 (the notices of violations) and May 5, 2017 (the warnings of subsequent fines).

> willing to just use the transcript it had prepared by the court reporter. However, it will need to be certified by the board.

Appellant's App. Vol. III p. 53. On January 17, 2019, the City's corporation counsel responded that "the Board shall prepare the record for Burkhart," *id*. at 56, and indicated that a copy of the hearing transcript would be included in the certified BZA record.

[9] On February 1, 2019, Burkhart filed a complaint and verified petition for judicial review of the BZA decision in the Howard Superior Court as follows:

- Count I alleged that the City, by issuing citations on the signs, breached a contractual agreement between the parties in which the City had agreed not to issue citations on those signs while the parties worked in good faith to develop "cap and replace". . . .

- Count II alleged a violation of the U.S. Constitution's Equal Protection Clause: the City, acting "under color of state law," singled out Burkhart for enforcement action and issued citations, not for any rational basis, but solely to gain unlawful leverage against Burkhart and coerce Burkhart into taking down its sign at 408 South Washington to help a private developer.

- Count III included a facial challenge under the First and Fourteenth Amendments of the U.S. Constitution to the ban, in Kokomo's zoning ordinance, of all off-premises signs.

- Count IV alleged a violation of the Fourteenth Amendment to the U.S. Constitution as a result of the

conflicting remedial provisions in Kokomo's zoning ordinance: one section of the ordinance sets forth a "civil zoning violation" punishable by up to $100 after a trial in Howard Superior Court, while the other allows the planning director—without any notice, process, or trial—to fine a person up to $2,500 per day.

- Count V alleged a violation of the Fourteenth Amendment to the U.S. Constitution resulting from the Kokomo zoning ordinance's use of vague, undefined terms like "obsolete," "dilapidated," and "decayed."

- Count VI challenged, under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution, the $6,000 daily fines as "wholly disproportional to the alleged violations and obviously unreasonable."

- Count VII alleged that the BZA "violate[d] the Fifth Amendment to the United States Constitution, applicable to Indiana through the Due Process Clause of the Fourteenth Amendment," by "taking . . . Burkhart's private property for public use, without just compensation."

- Count VIII alleged that the City's $6,000-a-day fines were unenforceable based on the equitable theories of estoppel, laches, and waiver.

- [ ] Count IX requested a petition of review of the BZA's decision upholding the fines.

Appellant's Br. pp. 7-9 (internal citations omitted).

[10] Burkhart attached the following to its complaint: (1) the list of signs the City alleged to be out of compliance; (2) the MOU; (3) the letters noticing violations of the zoning ordinance; (4) the original permit application for 408 Washington; (5) a transcript of the BZA September 4, 2019 hearing certified by a court reporter but not by the BZA itself; and (6) what Burkhart describes as "[a] genuine and authentic copy of the BZA decision."[6] Appellant's App. Vol. II p. 28.

[11] On February 21, 2019, the City's corporation counsel provided the certified copy of the BZA record to Burkhart as requested. Delivery was confirmed via certified mail and accepted via signature. Appellant's App Vol. III p. 63. Burkhart never filed that certified copy of the BZA record with the trial court.

[12] Appellees filed a motion to dismiss Burkhart's complaint and petition for judicial review on April 12, 2019. After a hearing, the trial court granted the motion to dismiss in part and denied in part. The trial court denied the motion to dismiss with respect to: (1) Burkhart's breach of contract claim (Count I); and (2) Burkhart's request for injunctive relief to prevent the City from applying the terms "obsolete," "dilapidated," "decayed," or "rotten" as future bases for

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[6] What Burkhart describes as "A genuine and authentic copy of the BZA decision" consists of: (1) a letter from Sheline indicating that the BZA had voted and adopted the 2018 staff findings; (2) a certification that "the attached documents are a true and exact copy of the record of action from which this administrative appeal has been taken. . . ." Appellant's App. Vol. II p. 164. This certification, dating from June 2018, appears to certify to the BZA that the included staff findings reflect the basis for the City's issuance of violations; (3) the 2018 staff findings themselves; and (4) exhibits that were attached to the staff findings. Critically, "a genuine and authentic copy of the BZA decision" *does not* include the transcript of the hearing, or the exhibits introduced at the hearing.

additional citations of Burkhart's other signs (Count V). Appellant's App. Vol. II p. 37.[7] The trial court dismissed: (1) Burkhart's petition for judicial review of the BZA decision (Count IX); (2) Burkhart's facial constitutional challenge to the 2013 amendment to the zoning ordinance that banned all off-premises signs (Count III); and (3) five counts attacking the BZA decision, which the trial court deemed to be incorporated into Count IX (Counts II, IV, VI, VII, and VIII).

[13] On December 16, 2019, Appellees filed a motion requesting the trial court to direct entry of final judgment on less than all claims pursuant to Indiana Trial Rule 54(B), namely those claims dismissed as a matter of Burkhart's failure to file the certified copy of the BZA record. Following a hearing, the trial court granted the motion. On August 5, 2020, Burkhart filed a motion to correct error, which the trial court denied on September 24, 2020. Burkhart now appeals.

[7] Burkhart complains that these terms, which lack definitions in the text of the zoning ordinance, run afoul of the constitutional void-for-vagueness doctrine because the terms do not set forth ascertainable standards that put advertisers on notice of what will constitute compliance with this provision of the zoning ordinance.

Analysis

I. Dismissal Under Indiana Code Section 36-7-4-1613(b)[8]

a. Failure to File a Certified Copy of the BZA Record

[14] "'We review de novo a court's ruling on motions to dismiss for failure to timely file necessary agency records where the court ruled on a paper record.'" *Town of Pittsboro Advisory Plan Comm'n v. Ark Park, LLC*, 26 N.E.3d 110, 117 (Ind. Ct. App. 2015) (quoting *Teaching Our Posterity Success, Inc. v. Ind. Dep't of Educ.*, 20 N.E.3d 149, 151 (Ind. 2014)).[9] "The statutes pertaining to judicial review of zoning decisions—Indiana Code §§ 36-7-4-1600 through -1616—are referred to as the "'1600 Series.'" *Id*. (citing Ind. Code § 36-7-4-1600). The 1600 Series sets forth the requirements for a petitioner seeking judicial review of a BZA decision. A petition for judicial review is the exclusive means for court review of a BZA determination. I.C. § 36-7-4-1601.

[15] One of the key requirements is that the petitioner must, within thirty days of filing the petition, file a certified copy of the board record. The procedures and requirements for judicial review are outlined as follows in Indiana Code Section 36-7-4-1613:

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[8] Several of Burkhart's arguments suggest that Appellees apply the wrong standard because, according to Burkhart, the trial court dismissed each count under Trial Rule 12(B)(6). We disagree. Those counts, which were dismissed as being part of the petition for judicial review, were clearly dismissed pursuant to Indiana Code Section 36-7-4-1613(b).

[9] The trial court did not hold an evidentiary hearing in the case at bar.

(a) Within thirty (30) days after the filing of the petition, or within further time allowed by the court, the petitioner shall transmit to the court the original or a certified copy of the board record for judicial review of the zoning decision, consisting of:

(1) any board documents expressing the decision;

(2) other documents identified by the board as having been considered by the board before its decision and used as a basis for its decision; and

(3) any other material described in this chapter or other law as the board record for the type of zoning decision at issue, subject to this section.

(b) An extension of time in which to file the record shall be granted by the court for good cause shown. Inability to obtain the record from the responsible board within the time permitted by this section is good cause. *Failure to file the record within the time permitted by this subsection, including any extension period ordered by the court, is cause for dismissal of the petition for review by the court, on its own motion, or on petition of any party of record to the proceeding.*

(c) Upon a written request by the petitioner, the board making the zoning decision being reviewed shall prepare the board record for the petitioner. If part of the record has been preserved without a transcript, the board shall, if practicable, prepare a transcript for inclusion in the record transmitted to the court, except for parts that the parties to the judicial review proceeding stipulate to omit in accordance with subsection (e).

(d) Notwithstanding IC 5-14-3-8, the board shall charge the petitioner with the reasonable cost of preparing any necessary copies and transcripts for transmittal to the court, unless a person

> files with the court, under oath and in writing, the statement described by IC 33-37-3-2.
>
> (e) By stipulation of all parties to the review proceedings, the record may be shortened, summarized, or organized.

(emphasis added). Accordingly, we have recognized that "a party's '[f]ailure to file the [board] record within the time permitted by this subsection, including any extension period ordered by the court*, is cause for dismissal* of the petition for review by the court[.]' I.C. 36-7-4-1613(b) (emphasis added)." *Ark Park*, 26 N.E.3d at 117.

[16] When a trial court reviews an agency decision, the trial court cannot perform its duty without the proper certified record. In *Ark Park,* we found that "Ark Park did not comply with requirements of Indiana Code § 36-7-4-1613 for timely transmitting the complete board record. It neither transmitted the board record nor sought an extension to file it within thirty days of filing its complaint for judicial review." 26 N.E.3d at 119. Thus, we concluded that Ark Park was not entitled to judicial review of the Town Council's decision. *Id*. (citing *Howard v. Allen Cnty. Bd. of Zoning Appeals*, 991 N.E.2d 128, 129 (Ind. Ct. App. 2013)). A reviewing court cannot review a board decision without confidence that it is in possession of the full certified record.

[17] Our Supreme Court has articulated the reasons for the strict requirement of a certified full administrative record in a pair of cases interpreting the identical

language[10] of the Administrative Orders and Procedure Act ("AOPA"), which applies to statewide agencies. *See Teaching Our Posterity Success,* 20 N.E.3d at 149; *First Am. Title Ins. Co. v. Robertson*, 19 N.E.3d 757 (Ind. 2014). As our Supreme Court explained:

> [W]hether the documents before the trial court provide enough information enabling the court to decide an issue in a given case will likely be contested by the parties. *See* [*Ind. Family & Soc. Svcs. Admin.* v.] *Meyer*, 927 N.E.2d [367,] 374 [(Ind. 2010)] (Shepard, C.J., joined by Dickson, J.) ("Whether under some theory a judicial review might proceed with a minimalist record, such a concept is plainly a slippery slope, setting in motion regular satellite litigation . . . in which private citizens and the taxpayers will spend time and money contesting whether a record is

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[10] Indiana Code Section 4-21.5-5-13 provides, in pertinent part:

> (a) Within thirty (30) days after the filing of the petition, or within further time allowed by the court or by other law, the petitioner shall transmit to the court the original or a certified copy of the agency record for judicial review of the agency action, consisting of:
>
> (1) any agency documents expressing the agency action;
>
> (2) other documents identified by the agency as having been considered by it before its action and used as a basis for its action; and
>
> (3) any other material described in this article as the agency record for the type of agency action at issue, subject to this section.
>
> (b) An extension of time in which to file the record shall be granted by the court for good cause shown. Inability to obtain the record from the responsible agency within the time permitted by this section is good cause. Failure to file the record within the time permitted by this subsection, including any extension period ordered by the court, is cause for dismissal of the petition for review by the court, on its own motion, or on petition of any party of record to the proceeding.
>
> (c) Upon a written request by the petitioner, the agency taking the action being reviewed shall prepare the agency record for the petitioner. If part of the record has been preserved without a transcript, the agency shall prepare a transcript for inclusion in the record transmitted to the court, except for portions that the parties to the judicial review proceeding stipulate to omit in accordance with subsection (e).

"Because the judicial review provisions of the 1600 Series are materially identical to their analogs in . . . [AOPA] . . ., we are compelled to conclude that the legislature had the same intent in enacting both. We therefore interpret these respective provisions in the same manner and rely on AOPA case law below." *Howard*, 991 N.E.2d at 130 (citing *Habig v. Bruning*, 613 N.E.2d 61, 64 (Ind. Ct. App. 1993)).

> 'complete enough.'"). The trial court is thus put in the unenviable position of not only deciding the merits of an administrative appeal but also determining just exactly what is relevant to its decision, without having access to the entire record to make that determination. The judicial economy argument thus swings in the other direction. It appears to the Court that submitting the record up front diminishes the potential for time and resource-consuming satellite litigation such as we have in this case. It further obviates the necessity for the trial court to ascertain blindly whether the documents before it are enough or whether other documents in the official record—to which it does not have access—are relevant to the issues on review.

Teaching Our Posterity Success, Inc., 20 N.E.3d at 154-55.

[18] Burkhart argues that the trial court erred in dismissing Count IX (the petition for judicial review of the BZA decision) of its complaint because: "Burkhart filed a certified copy of the administrative record with its Complaint," Appellant's Br. p. 19. In fact, Burkhart has vehemently maintained throughout that it *did* file a certified copy of the board record. Burkhart, however, conceded in open court that it received the certified copy of the BZA record from the City's corporation counsel prior to the expiration of the filing deadline and just did not file it. *See* Tr. Vol. II pp. 35-37. This concession belies Burkhart's argument on appeal. It also obviates the parties' arguments about whether a trial court is permitted to consider extrinsic evidence when determining whether the official record has been filed.

[19] What Burkhart actually filed with its complaint was a series of documents, detailed above, including a letter announcing the BZA decision, and a certified

copy of the staff findings which the BZA adopted as its own, along with a copy of a transcript of the BZA hearing procured by Burkhart but not certified by the BZA. These documents are not synonymous with the "board record" required by statute, even though the board record would certainly have contained these documents. These documents amount to a record that is neither complete nor certified by the BZA.

[20] In *Ark Park*, we addressed this issue. We noted ". . . Ark Park contends that it is still entitled to judicial review because the copies of the documents that it attached to its complaint were 'sufficient to permit review of the case on the merits[.]' (Ark Park's Br. 29). We disagree." *Ark Park*, 26 N.E.3d at 118. Given our bright-line precedent requiring certified copies of board records, we cannot find that a partial record, absent a stipulation, will suffice.

[21] Notwithstanding *Ark Park*, there are four reasons, specific to the facts of this case, that cause Burkhart's argument regarding the attachments to its complaint to fail. First, the certification from Sheline was dated prior to the BZA hearing, and, therefore, clearly cannot be a certification of the full BZA record.[11] Second, according to the unofficial transcript filed by Burkhart, there were exhibits and "other documents" submitted to the BZA during the hearing that

[11] Certifying *some* of the contents of what *would* be contained in the full BZA record, and then arguing that this is enough is precisely the sort of "slippery slope, setting in motion regular satellite litigation . . ." that our jurisprudence in this area seeks to circumvent. *Ind. Family & Soc. Svcs. Admin. v. Meyer*, 927 N.E.2d 367, 374 (Ind. 2010) (Shepard, C.J., concurring in part and dissenting in part). The trial court can only be sure that it is faced with a full record if that record has been certified as such by the BZA.

are not attached to the complaint. Tr. Vol. II p. 37. Third, the attached transcript was produced by a court reporter at Burkhart's behest—the BZA did not prepare the transcript. Indiana Code Section 36-7-4-1613 requires *the BZA*, upon request, to prepare and certify the record, including any transcripts it might contain. And fourth, Burkhart's own actions show that Burkhart knew of the requirement to submit a certified copy of the BZA record. Burkhart's email requesting the requisite BZA record indicates Burkhart's knowledge that the complaint and the attachments thereto would not meet the statutory requirement. *See* Appellant's App. Vol. III p. 53. Moreover, Burkhart's request, included in the complaint itself, for the trial court to "[o]rder the BZA to certify to the Court the entire BZA record for judicial review . . . so that Burkhart may file timely the zoning record with the Court in accordance with Ind. Code § 36-7-4-1613(a)[,]" Appellant's App. Vol. II pp. 43-44, demonstrates that Burkhart was well aware that the documents attached to its complaint were not sufficient to meet the statutory requirements.

[22] We conclude that Burkhart failed to meet the requirements set forth in Indiana Code Section 36-7-4-1613. Burkhart received a certified copy of the BZA record, but failed to file the certified record. Because Burkhart failed to comply with the statutory requirement, the trial court's dismissal of Count IX was proper.

b. Dismissal of the Claims Incorporated into the Petition for Judicial Review

[23] The trial court found that Counts II, IV, VI, VII, and VIII were included within the petition for judicial review and, therefore, also dismissed them as a result of

Burkhart's failure to file the board record. Those claims resemble the potential defects listed in Indiana Code Section 36-7-4-1614, which explains that a court will provide relief on a petition for judicial review of a BZA decision:

> only if the court determines that a person seeking judicial relief has been prejudiced by a zoning decision that is:
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> > (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.

[24] Indiana Code Section 36-7-4-1601 provides that a petition for judicial review of a BZA decision comprises the *exclusive* means of seeking relief from zoning decisions "made by a board of zoning appeals, legislative body, plan commission, preservation commission, or zoning administrator." Freestanding claims asserting that a BZA decision is unconstitutional, for example, are improper. Those claims *must* be brought as a part of the petition for judicial review. In *Ark Park*, we found that:

> the claim for declaratory judgment was not the proper method for bringing its specific challenge to the constitutionality of Section 13 of the 2004 Zoning Ordinance. We note that the 1600 Series "establishes the exclusive means for judicial review of zoning decisions[.]" I.C. § 36-7-4-1601(a). Additionally, Indiana Code § 36-7-4-1614(d)(2) provides that one way a petitioner may challenge a zoning decision is to show that it is "contrary to constitutional right[.]"

Ark Park, 26 N.E.3d at 121.

[25] On appeal, Burkhart argues that Counts II, IV, VI, VII, and VIII can survive the motion to dismiss because "the trial court was wrong to conclude that Burkhart's federal constitutional claims were 'included within the Petition for Review." Appellant's Br. p. 27. Specifically, Burkhart argues that: (1) "Burkhart's federal takings claim in Count VII does not require administrative exhaustion," *id*.; (2) Counts II and VI, though not explicitly styled as such below, are freestanding claims under 42 U.S.C. § 1983 and, thus, can be brought without exhaustion of state remedies, *id*. at 29; (3) Count IV is an independent freestanding facial constitutional challenge, *id*. at 30-32; and (4) Count VIII, which contained equitable challenges to the BZA's decision, "can be raised independently from its petition for review." *Id*. at 33. We need not, however, address Burkhart's specific contentions for independent grounds of the five dismissed counts.

[26] The trial court found that the five counts were included within the petition for judicial review. Although Burkhart now seeks to save them by asserting that each has separate, independent justifications that allow them to survive a

motion to dismiss, Burkhart, by the "plain language" of its own complaint, has "incorporate[d] those claims into the petition for review." Appellant's App. Vol. III p. 15. This concession, made in Burkhart's brief below, is now fatal to its arguments on appeal that these dismissed counts can survive on independent grounds.

[27] We have described the doctrine of judicial estoppel as follows:

> Judicial estoppel is a judicially created doctrine that seeks to prevent a litigant from asserting a position that is inconsistent with one asserted in the same or a previous proceeding. Judicial estoppel is not intended to eliminate all inconsistencies; rather, it is designed to prevent litigants from playing "fast and loose" with the courts. The primary purpose of judicial estoppel is not to protect litigants but to protect the integrity of the judiciary. The basic principle of judicial estoppel is that, absent a good explanation, a party should not be permitted to gain an advantage by litigating on one theory and then pursue an incompatible theory in subsequent litigation. Judicial estoppel only applies to intentional misrepresentation, so the dispositive issue supporting the application of judicial estoppel is the bad-faith intent of the litigant subject to estoppel.

Harr v. Hayes, 106 N.E.3d 515, 521 (Ind. Ct. App. 2018), *opinion corrected on reh'g*, 108 N.E.3d 405 (Ind. Ct. App. 2018) (quoting *Price v. Kuchaes*, 950 N.E.2d 1218, 1227-28 (Ind. Ct. App. 2011) (citation omitted), *trans. denied*.). Burkhart is judicially estopped from making its arguments that the claims are independent of the petition for judicial review, having argued below that the five counts were incorporated into the petition for judicial review and having

prevailed upon that argument.[12] *See* Appellant's App. Vol. III pp. 15-17 ("But even were Defendants correct, the straightforward words of the Complaint demonstrate that the petition for review incorporates these counts and they are part and parcel of it."); *see generally Ellis v. Keystone Constr. Corp.*, 82 N.E.3d 920 (Ind. Ct. App. 2017), *trans. denied*.

[28] Given Burkhart's arguments below, the trial court properly concluded that those five counts were part of the petition for judicial review and properly dismissed them in accordance with Burkhart's failure to file the BZA record in violation of Indiana Code Section 36-7-4-1613(a).

II. Trial Rule 54(B)

[29] Finally, Burkhart contends that the trial court abused its discretion when it directed entry of a partial final judgment with respect to the claims incorporated into the petition for judicial review,[13] as well as the petition for judicial review itself, pursuant to Indiana Trial Rule 54(B). We review a trial court's determination on a Rule 54(B) decision for an abuse of discretion. *See, e.g., Troyer v. Troyer*, 686 N.E.2d 421, 424-25 (Ind. Ct. App. 1997) (quoting *Legg v. O'Connor*, 557 N.E.2d 675, 676 (Ind. Ct. App. 1990)). Burkhart argues that the

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[12] We recognize that Burkhart argued for independent grounds in the alternative below. This is not, however, a matter of whether the arguments have been preserved for appeal. Rather, Burkhart prevailed upon its primary argument. It cannot now argue that the trial court was in error for accepting that argument.

[13] These are Counts II, IV, VI, VII, and VIII, though Burkhart's briefing on appeal erroneously includes Count III in the list at several junctures. Burkhart notes that final judgment was not entered on Count III, and, therefore, we do not address that count further.

dismissed claims substantially overlap with the claims that were not dismissed. Trial Rule 54(B) provides, in pertinent part:

> When more than one [1] claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

Ind. Trial Rule 54(B). Our Supreme Court has explained: "We adopted Rules 54(B) and 56(C), based on the federal model, in an effort to provide greater certainty to litigating parties and to strike an appropriate balance between the interests in allowing for speedy review of certain judgments and in avoiding the inefficiencies of piecemeal appeals." *Martin v. Amoco Oil Co.*, 696 N.E.2d 383, 385 (Ind. 1998) (citing *Berry v. Huffman*, 643 N.E.2d 327, 329 (Ind. 1994)), *cert. denied*. Thus, we find federal authority interpreting Rule 54(B) to be persuasive.

[30] > When a [trial] court invokes Rule 54(b), we have an independent obligation to ensure that its decision on a given claim is indeed a final one. We must also decide whether the [trial] court abused its discretion in determining that there was no just reason for delay. Both questions involve consideration of the factual relation between the issues that have been resolved and those that remain.

Marseilles Hydro Power, LLC v. Marseilles Land & Water Co., 518 F.3d 459, 464 (7th Cir. 2008) (internal citations omitted).

[31] According to *Marseilles*: "The scope of Rule 54(b) must, therefore, be confined to situations where one of multiple claims is fully adjudicated—to spare the court of appeals from having to keep relearning the facts of a case on successive appeals." 518 F.3d at 464 (cleaned up). Thus, if the claims share "a significant factual overlap" with those claims that remain pending, it makes little sense to certify the judgments thereon as final. *Id*. "'[I]f there are different facts (and of course different issues) consideration of the appeals piecemeal rather than all at once will not involve a duplication in the efforts required of the judges to prepare for argument in, and to decide, each appeal.'" *Id*. (quoting *Jack Walters & Sons Corp. v. Morton Bldg., Inc.*, 737 F.2d 698, 702 (7th Cir. 1984), *cert. denied*). "Even if two claims arise from the same event or occurrence, they may be separable for Rule 54(b) purposes if they rely on entirely different legal entitlements yielding separate recoveries, rather than different legal theories aimed at the same recovery." *Id*.

[32] The question before us, therefore, is whether the trial court abused its discretion in determining that no such significant overlap existed between: (1) the dismissed judicial review claims; and (2) Burkhart's surviving breach of contract claim and request for a declaration that the 2013 zoning ordinance amendments were unconstitutional. With respect to the request for declaratory relief, that claim centered on the 2013 amendments to the zoning ordinance, not the 2017 BZA decision. Accordingly, we agree with the trial court that the Count V claims do not substantially overlap with the judicial review counts that were dismissed.

[33] Regarding the breach of contract claim, we also find that this claim is substantially different from the dismissed claims. Considerations of whether an enforceable agreement existed, the scope of that agreement, and whether one or more parties violated the terms of that agreement have little to do with the constitutional and equitable challenges to the BZA decision. Moreover, the breach of contract claim seeks money "damages." Appellant's App. Vol. II p. 31. The dismissed petition for judicial review and incorporated claims seek reversal of the BZA decision to ban certain billboards and impose fines. Thus, the breach of contract claim and the challenges to the BZA decision are not alternate legal theories seeking the same remedy, but rather distinct legal theories seeking different remedies. We cannot find that the trial court abused its discretion in entering partial final judgment on the dismissed judicial review claims pursuant to Trial Rule 54(B).

Conclusion

[34] We find that the trial court properly dismissed, under statutory authority, Counts II, IV, VI, VII, VIII, and IX. We affirm those dismissals. We further affirm the trial court's entry of final judgment on the dismissed judicial review claims pursuant to Indiana Trial Rule 54(B).

[35] Affirmed.

Mathias, J., and Weissmann, J., concur.