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IN THE
COURT OF APPEALS OF INDIANA

City of Hammond, Indiana, and Hammond Advisory Board of Zoning Appeals,

Appellants - Respondents,

v.

Phantom Fireworks Showrooms, LLC,

Appellee - Petitioner.

August 24, 2022

Court of Appeals Case No. 22A-PL-507

Appeal from the Lake Superior Court

The Honorable Stephen E. Scheele, Judge

Trial Court Cause No. 45D05-2105-PL-406

Bailey, Judge.

Case Summary

[1] The City of Hammond (the "City") and the Hammond Advisory Board of Zoning Appeals (the "BZA") (collectively, "Hammond") appeal from the trial court's grant of Phantom Fireworks Showrooms, LLC's ("Phantom") petition for judicial review of the BZA's denial of Phantom's application for an improvement location permit. Hammond raises two issues for our review, which we revise and restate as whether the court erred when it granted Phantom's petition. We reverse and remand with instructions.

Facts and Procedural History

[2] Phantom purchased property in Hammond on January 6, 2020, on which it intended to build a consumer fireworks store. The property is designated as a C-4 General Commercial District pursuant to the Hammond Zoning Ordinance (the "Zoning Ordinance"). The "sale, storage, or distribution of consumer fireworks is permitted in the C-4" zoning district. Appellee's Add. at 28. The property is also located within the Woodmar-Gateway Economic Development Area, which has been subject to the Woodmar-Gateway Economic Development Plan (the "Plan") since December 6, 2005.[1] The goal of the Plan is "to provide a tool to convert the former golf course into a commercial/retail development . . . sensitive to the river"

[1] The Hammond Redevelopment Commission adopted the resolution creating the Plan on December 6, 2005. It subsequently filed the resolution with the Lake County Auditor's office and recorded it with the Lake County Recorder's officer on January 5, 2006. *See* Appellants' App. Vol. 2 at 51.

and to "[p]rovide safe, efficient and attractive traffic circulation systems which minimize conflicts between different forms of traffic such as pedestrians, bicycles, automobiles, and/or public transit." Appellants' App. Vol. 2 at 150-51.

[3] Phantom sought a determination from the Hammond Redevelopment Commission ("HRC") as to whether Phantom's building proposal was in compliance with the Plan. On October 6, 2020, the HRC held a meeting at which it heard concerns related to the proximity of the proposed store to a "micro hospital," the "adjacency of the gas station," "higher traffic volumes" during the summer months, and the potential for the increased traffic to discourage pedestrians from using nearby recreational trails. *Id*. at 133. Based on those concerns, the HRC determined that Phantom's proposal was not "in compliance with the goals and objectives of" the Plan. *Id*. at 135.

[4] On December 8, Phantom applied for an improvement location permit from the City's zoning administrator. On January 5, 2021, the zoning administrator denied that application "based on" the HRC's determination "that the project was not in compliance with" the Plan. *Id*. at 49. Phantom appealed that decision to the BZA. The BZA held a hearing on April 27. Phantom did not challenge the basis for the HRC's determination but alleged that the HRC did not have the authority to deny Phantom's proposed use because a consumer fireworks store was a "permitted use" of the property under the Zoning Ordinance. *Id*. at 122. As such, Phantom argued that the City did not have "the authority to deny" Phantom's improvement location permit based on the HRC's determination. *Id*. at 123. The BZA affirmed the decision of the City.

[5] Phantom filed a petition for judicial review of the BZA's decision. Phantom asserted that an "improvement location permit for a structure . . . **must** be issued if the structure and its location conform to the municipal zoning ordinance." *Id.* at 39 (emphasis in original). And Phantom asserted that its business "is expressly permitted by" the Zoning Ordinance. *Id.* Thus, Phantom maintained that the City "was required to issue and/or approve" the improvement location permit and that the HRC had "no authority to approve or deny" Phantom's proposal. *Id.* at 39-40. And Phantom asserted that "permitting the [HRC] to have ultimate approval or denial regardless of what the [Zoning Ordinance] permits[] would produce absurd, arbitrary, and capricious results." *Id.* at 61.

[6] The BZA responded and argued that the "HRC correctly exercised its discretion and determined that [Phantom's] proposed development was non-compliant with the Plan[.]" *Id.* at 70. Specifically, the BZA asserted that the Zoning Ordinance "gave the Zoning Administrator the authority to rely on other local governmental agencies for additional support/verification." *Id.* And it maintained that the "verification of non-compliance" from the HRC "squarely falls under the category of 'any other applicable local' authority" such that the City "properly relied on [the] HRC's determination in making its decision to deny" Phantom's permit. *Id.* at 71.

[7] Following a hearing at which the parties presented oral argument, the trial court entered findings of fact and conclusions thereon. In particular, the court concluded: "To allow the [HRC] to exercise zoning authority on a case-by-case basis—as [Hammond has] done here—runs contrary to Indiana law and the

[Zoning Ordinance]." *Id*. at 95. And the Court concluded that there is "nothing" in the Zoning Ordinance or state statutes "that requires the [HRC's] approval prior to obtaining a location permit for a use that is expressly permitted by" the Zoning Ordinance. *Id*. at 96. The court determined that the City and the BZA "had no authority to disregard" the Zoning Ordinance and that, "by doing so, they failed [in] their statutory role and exceeded their authority." *Id*. at 97. Accordingly, the court granted Phantom's petition for judicial review, reversed the decision of the BZA, and remanded the matter back to the BZA with instructions for the BZA to approve Phantom's application for an improvement location permit. This appeal ensued.

Discussion and Decision

[8] Hammond asserts that the BZA properly denied Phantom's application for an improvement location permit and that the trial court erred when it granted Phantom's petition for judicial review. "This [C]ourt and the trial court are bound by the same standards when reviewing the decision of a board of zoning appeals." *Town of Munster Bd. of Zoning Appeals v. Abrinko*, 905 N.E.2d 488, 491 (Ind. Ct. App. 2009). Indiana Code Section 36-7-4-1614(d) (2022) provides that a reviewing court should grant relief "only" if the court determines that a 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 a 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;

(5) unsupported by substantial evidence.

"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).

[9] In reviewing an administrative decision, a trial court may not try the facts *de novo* or substitute its own judgment for that of the agency. *S&S Enters., Inc. v. Marion Cnty. Bd. of Zoning Appeals*, 788 N.E.2d 485, 490 (Ind. Ct. App. 2003), *trans. denied*. "Neither the trial court nor the appellate court may reweigh the evidence or reassess the credibility of witnesses." *Id*. Reviewing courts must accept the facts as found by the zoning board. *Id*. However, "we review questions of law de novo." *Lockerbie Glove Factory Town Home Owner's Ass'n, Inc. v. Indianapolis Hist. Pres. Comm'n*, 106 N.E.3d 482, 488 (Ind. Ct. App. 2018).

[10] Here, the parties do not dispute the underlying facts. There is no dispute that the City had the authority to implement the Zoning Ordinance. Indeed, "[t]he legislative body having jurisdiction over the geographic area described in the zoning ordinance has exclusive authority to adopt a zoning ordinance[.]" I.C. § 36-7-4-601(a). And when it enacts a zoning ordinance, the legislative body may

"regulate how real property is developed, maintained, and used," which includes "restrictions on the kind and intensity of uses." I.C. § 36-7-4-601(d)(2)(G). Pursuant to this authority, the City adopted a Zoning Ordinance. Among other provisions, the Zoning Ordinance specifically provides that the "sale, storage, or distribution of consumer fireworks is permitted in the C-4" zoning district. Appellee's Add. at 28. Phantom's property is located in a C-4 General Commercial District.

[11] The parties also do not dispute that the property is in an economic development area. A redevelopment commission may "approve a plan for and determine that a geographic area in the redevelopment district is an economic development area." I.C. § 36-7-14-41(a). Based on that statute, the HRC created the Woodmar-Gateway Economic Development Area, adopted the Plan, and filed and recorded the Plan with the county. The purpose of the Plan is "to provide a tool to convert the former golf course into a commercial/retail development . . . sensitive to the river" and to provide "safe, efficient and attractive traffic circulation systems which minimize conflicts between different forms of traffic[.]" Appellants' App. Vol. 2 at 150-51.

[12] On appeal, the parties only dispute whether the City, relying on the HRC's determination that Phantom's proposed use did not comply with the Plan, had the authority to deny Phantom's improvement location permit even though the proposed use complied with the Zoning Ordinance. In order to resolve this issue, we must interpret several statutes. As this Court has stated, "[t]he primary purpose of statutory interpretation is to ascertain and give effect to the intent of our

legislature. The best evidence of legislative intent is the statutory language itself, and we strive to give the words in a statute their plain and ordinary meaning." *21st Amendment, Inc. v. Ind. Alcohol & Tobacco Comm'n*, 84 N.E.3d 691, 696 (Ind. Ct. App. 2017) (citations and quotation marks omitted). Further, we endeavor to read different provisions of the Indiana Code harmoniously. *See Old Republic Ins. Co. v. RLI Ins. Co.*, 887 N.E.2d 1003, at 1011 (Ind. Ct. App. 2008).

[13] Again, there is no dispute that the Zoning Ordinance applied or that Phantom's proposed use complied with the Zoning Ordinance. The question is whether a duly adopted economic development plan can impose greater restrictions than that of a general zoning ordinance. We hold that it can.

[14] "A municipality or a county with a redevelopment district may establish an 'economic development area' within the district . . . thereby acquiring additional power to take certain actions with respect to real property[.]" *Brenwick Assocs., LLC v Boone Cnty. Redev. Comm'n*, 889 N.E.2d 289, 292 (Ind. 2008). Among those powers is the ability to "[a]ppear before any other department or agency of the unit, or before any other governmental agency in respect to any matter affecting . . . any area needing redevelopment within the jurisdiction of the commissioners." I.C. § 36-7-14-12.2(a)(10). In addition, a redevelopment commission may "make plans for the enforcement of laws and regulations relating to the use of land and the use and occupancy of buildings and improvements[.]"

I.C. § 36-7-14-32(b).[2] And the "content and manner of [the] discharge of duties . . . shall be determined by the purposes and nature of an economic development area." I.C. § 36-7-14-43(b).

[15] It is clear that, once a municipality establishes a redevelopment commission, that commission can go before another department of the municipality, such as a city zoning administrator, and provide its determination regarding a property in the redevelopment area. Further, the commission can establish and approve a plan for an economic development area and can establish and enforce laws and regulations relating to the use of land in that area. Here, the HRC adopted regulations relating to the use of the land when it adopted the Plan.[3] Those regulations include imposing restrictions on the types of buildings or uses that are permitted in order to ensure a safe area with effective traffic plans that do not interfere with recreational trails. The HRC was well within its authority to adopt the Plan. And the HRC had the authority to enforce that plan, which it did when it determined that Phantom's business proposal did not comply with the Plan. Accordingly, the City was free to rely on that determination and deny Phantom's application.

[16] Still, Phantom contends that, even though its property is subject to the Plan, the HRC did not have the authority to deny a particular use on the property because,

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[2] While this statute specifically applies to urban renewal projects, "[a]ll of the rights, powers, privileges, and immunities that may be exercised by the commission in a redevelopment project area or urban renewal area may be exercised by the commission in an economic development area[.]" I.C. § 36-7-14-43(a).

[3] There is no dispute that the Plan was properly adopted.

"[o]nce created, the zoning ordinance controls the uses that can be developed and operated on property located in the district." Appellee's Br. at 17 (citing I.C. § 36-7-4-601). In other words, Phantom contends that, any time there is a zoning ordinance in place, nothing can supersede that ordinance or otherwise control what can happen on a property. And Phantom asserts that the HRC's denial of its application is nothing more than an improper attempt to rezone the property.

[17] To support its assertion that the BZA was required to grant the application, Phantom relies, as the trial court did, on Indiana Code Section 36-7-4-801. That statute provides that "[a] structure may not be located and an improvement location permit for a structure . . . may not be issued unless the structure and its location conform to the municipal zoning ordinance." I.C. § 36-7-4-801(a). Further, if an improvement location permit is required, "a structure may not be located and a permit may not be issued unless the use, character, and location of the structure is in conformity with the applicable ordinance." I.C. § 36-7-4-801(b). Based on that statute, Phantom argues that the City was required to issue the improvement location permit because the proposed building complied with the zoning ordinance. We cannot agree.

[18] Indiana Code Section 36-7-4-801(a) simply provides that a building permit cannot be issued unless the structure and its location comply with the zoning ordinance. The statute does not mandate that a permit be issued simply because the proposed structure complies with the structural aspects of the zoning ordinance. Rather, the statute creates a threshold question for the issuance of a building permit. First, the building must comply with the applicable structural provisions of the zoning

ordinance, and, second, the location of the proposed structure must comply with a permitted use for that location. In that regard, subsection (b) goes on to require that the proposed structure also conform to the use and character of the zoning in a given location. I.C. § 36-7-4-801(b). Thus, there is no requirement that an improvement location permit be issued solely on the basis that the proposed structure complies with the structural provisions within a designated location. Instead, the proposed use and character of the building can also be considered in determining whether to issue an improvement location permit.

[19] Phantom's argument to the contrary considers the zoning statutes in isolation and accepting Phantom's argument would render meaningless the statutes governing redevelopment commissions and their power to establish and enforce laws related to properties in economic development areas. Reading the different provisions in harmony, as we must, we hold that both a zoning ordinance and an economic development plan can apply and regulate property in an economic development area. Therefore, in order to obtain an improvement location permit, the proposed structure and use must comply with the generally applicable zoning ordinances and any additional regulations applicable to the specifically zoned location.[4]

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[4] Phantom also relies on *Metropolitan Board of Zoning Appeals of Marion County v. Shell Oil Company* to support its assertion. 395 N.E.2d 1283 (Ind. Ct. App. 1979). In that case, this Court held that, "[w]here the applicant meets all the requirements of the [zoning] ordinance he is entitled to the issuance of a permit as a matter of right and it may not lawfully be withheld." *Shell Oil Co.*, 395 N.E.2d at 1285. To support that statement, the Court relied on Indiana Code Section 18-7-2-57, which provided that, if the county council required the procurement of an improvement location permit, "a structure shall not be located and a permit shall not be issued [u]nless the use, character, and location of the structure is in conformity with the provisions of the applicable ordinances. All such . . . permits *shall be issued* by the metropolitan planning department." *Id*. (emphasis added). However, that statute

[20] Indeed, we find support for this proposition elsewhere in the Indiana Code. Indiana Code Section 36-7-11-3 provides that "[z]oning districts lying within the boundaries of the historic district are subject to the regulations for both the zoning district and the historic district. If there is conflict between the requirements of the zoning district and the requirements of the historic district, the more restrictive requirements apply." In historic districts, a building must meet not only the requirements of a zoning ordinance but also those of the historic district. It is therefore not always dispositive that a building complies with a zoning ordinance. There are situations where other requirements apply above and beyond that of the zoning ordinance.

[21] Here, Phantom's property was subject to both the Zoning Ordinance and the Plan. We agree with Hammond that the Plan and the Zoning Ordinance "are to be read in conjunction with each other" and that, while the Zoning Ordinance "governs the use of the property in general," the Plan "acts as an overlay to property located within it." Appellants' Br. at 11. It was not enough for Phantom's building to comply with the Zoning Ordinance. It was also required to comply with the Plan.[5]

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has since been repealed. Phantom cites no case law, and we find none, to demonstrate that the statute as currently written mandates the issuance of a permit based only on the fact that the proposed use complies with the zoning ordinance when there are other regulations in place beyond that of the general zoning ordinance.

[5] To the extent Phantom argues that allowing the HRC to make determinations would produce arbitrary and capricious results because Phantom would not have fair warning as to what the HRC would consider, we note that the Plan was filed with the county in 2006, almost fifteen years before Phantom acquired the property. And Phantom does not dispute that it was aware of the Plan's existence. Further, the Plan provided Phantom with the general guidance that anything that was unsafe, that had the potential to disrupt traffic, or that interfered with the use of recreational trails would not comply with the Plan.

Conclusion

[22] Phantom's property is subject to both the Zoning Ordinance and the Plan and, therefore, was required to comply with both. The HRC had the authority to determine whether Phantom's proposed business complied with the Plan, and the City was free to rely on that determination.[6] Accordingly, we cannot conclude that the BZA's decision to affirm the City was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Consequently, we reverse the judgment of the trial court and remand with instructions for the court to reinstate the decision of the BZA.

[23] Reversed and remanded with instructions.

Bradford, C.J, and Weissmann, J., concur.

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[6] Contrary to Phantom's assertions, the HRC did not make its determination based on the fact that Phantom would sell fireworks. Rather, the HRC specifically cited concerns that the building was too close to a hospital and a gas station, that it would create too much traffic, and that the traffic had the potential to deter pedestrians from using nearby recreational trails. Phantom did not challenge the HRC's reasons for its determination. The HRC's and, ultimately, the City's decisions to deny Phantom's permit were based on rational concerns and were reasonable.