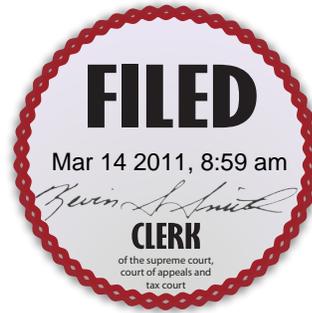


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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IN THE
COURT OF APPEALS OF INDIANA

PEOPLE OF THE STATE OF INDIANA)
ex rel. TERI AND ROBERT STEINBORN,)
)
Appellants-Remonstrators,)
)
vs.)
)
LaPORTE COUNTY BOARD OF ZONING)
APPEALS, HORVATH TOWERS, LLC,)
HILDA FREYER, and KENNETH FREYER, JR.,)
)
Appellees.)

No. 46A04-1010-PL-657

APPEAL FROM THE LaPORTE SUPERIOR COURT
The Honorable Natalie R. Conn, Senior Judge

March 14, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Judge

Appellants-remonstrators Teri and Robert Steinborn appeal the trial court's ruling affirming the decision of the LaPorte County Board of Zoning Appeals (the Board) that granted a special exception to Horvath Towers, LLC (Horvath). The special exception allowed Horvath to construct a monopole cell phone tower on the property of Hilda and Kenneth Freyer.

The Steinborns raise the following arguments on appeal: (1) the notice of hearing failed to adequately advise the remonstrators of the contents of Horvath's proposal; (2) the Board was biased against the remonstrators; (3) the Board erred in finding that the cell tower would not substantially diminish the value or the use and enjoyment of neighboring residential properties; (4) the Board erred in finding that the communications facility was more than 500 feet from neighboring residential structures; and (5) the Board failed to enter sufficiently specific findings of fact. Finding no reversible error, we affirm.

FACTS

Erecting a cell phone tower in an agricultural-zoned area requires that the Board grant a special exception. Horvath wanted to build a 195-foot monopole wireless

communications tower and facility on the Freyers' land, which is zoned agricultural, so in October 2009, Horvath and the Freyers applied for a special exception from the Board.

On November 17, 2009, the Board held a hearing on Horvath's application. The Steinborns and other neighboring landowners appeared at the hearing with counsel and objected to the proposed plan.

At the hearing, Horvath offered a report and testimony from designated expert David Kunkel, a real estate appraiser and consultant with 28 years of experience. Kunkel concluded that "the proposed communications facility will not have any negative impact on the use, enjoyment, or value of surrounding properties." Appellants' App. p. 79. Kunkel also opined that "no substantial or undue adverse effect upon adjacent property, the character of the area, or other matters affecting the public health, safety, and general welfare will occur" as a result of the proposed tower. Id. Additionally, Kunkel testified as follows:

There is no negative impact to the value of surrounding properties created by a tower such as the one that is proposed for this location. It does not have any negative impact on the use[,] enjoyment[,] or value of the properties. In addition, there is no adverse [e]ffect on the adjacent property or surrounding area relevant to public health, safety, or general welfare.

Id. at 106-07. Kunkel's conclusions about the proposed project were based upon a "review of the proposed plans, inspection of the site, as well as our experience with this factor in other locations." Id. at 79.

The Board also heard evidence offered by the remonstrators, including the Steinborns and their counsel, in the form of letters and lay testimony at the hearing. The remonstrators offered no designated expert to counter Kunkel's opinions. The remonstrators generally voiced concerns about the aesthetic impact of the communications facility, opining that the tower is inconsistent with the rural nature of the area and will have a negative effect on the desirability and resale value of the neighboring properties.

Following the hearing, the Board voted 5-0 to grant the special exception to Horvath. The Board made no specific written findings of fact, merely noting that the exception was granted because it "meets all the requirements as provided by the ordinance and such granting is mandatory." Id. at 124.

On December 17, 2009, the Steinborns filed a petition for writ of certiorari with the trial court, seeking judicial review of the Board's decision. On June 8, 2010, the trial court heard argument, and on June 11, 2010, the trial court summarily affirmed the Board's decision. On July 9, 2010, the Steinborns filed a motion to correct error, which the trial court denied on September 24, 2010. The Steinborns now appeal.

DISCUSSION AND DECISION

I. Standard of Review

When reviewing the decision of a zoning board, a trial court and appellate court apply the same standard of review, considering whether the board's decision was based upon substantial evidence. St. Charles Tower, Inc. v. Bd. of Zoning Appeals of

Evansville-Vanderburgh Cty., 873 N.E.2d 598, 600 (Ind. 2007). “Substantial evidence” is “such relevant evidence as a reasonable mind might accept as adequate to support the decision of the board of zoning appeals.” Id. at 601. In other words, if the record as a whole contains such relevant evidence as a reasonable mind would find adequate to support the board’s decision, that decision stands. Id.

In conducting our review, we will neither assess witness credibility nor reweigh the evidence. Midwest Minerals, Inc. v. Bd. of Zoning Appeals, 880 N.E.2d 1264, 1268 (Ind. Ct. App. 2008). To the extent that our review turns on an issue of statutory interpretation, we note that “[t]he interpretation of a statute by an administrative agency charged with the duty of enforcing the statute is entitled to great weight, unless [the] interpretation would be inconsistent with the statute itself.” St. Charles Tower, Inc., 873 N.E.2d at 603 (quoting LTV Steel Co. v. Griffin, 730 N.E.2d 1251, 1257 (Ind. 2000)).

II. Notice

The Steinborns argue, without elaboration or citation to supporting authority, that the notice of the zoning hearing sent to the remonstrators was somehow inadequate. But the Steinborns neglected to raise this issue with either the Board or the trial court. Consequently, they have waived it and we will not address it. Cavens v. Zaberdac, 849 N.E.2d 526, 532 (Ind. 2006) (holding that issues not raised with the trial court are waived on appeal); McBride v. Bd. of Zoning Appeals of Evansville-Vanderburgh Area Plan Comm’n, 579 N.E.2d 1312, 1315 (Ind. Ct. App. 1991) (holding that issues that were not

raised in administrative proceedings will not be considered when this court reviews the agency's order).

III. Bias

Next, the Steinborns argue that the Board was impermissibly biased against the remonstrators. Again, they neglected to raise this objection to the Board. Additionally, they failed to raise substantial portions of this argument to the trial court. Consequently, they have waived this issue.

Waiver notwithstanding, we note briefly that we presume that “administrative agencies will act properly with or without recusal of allegedly biased members” and in the absence of “a demonstration of actual bias,” we will not interfere with the administrative process. Ripley Cty. Bd. of Zoning Appeals v. Rumpke of Ind., Inc., 663 N.E.2d 198, 209 (Ind. Ct. App. 1996). In support of their argument that the Board was somehow biased against them, the Steinborns focus on a number of interactions between a Board member and the remonstrators at the hearing.

We have reviewed the record, and at most, these exchanges involved sharp and pointed questions asked by the Board member of the remonstrators. Asking tough questions does not establish that a Board member was biased against the people expected to answer those questions. Thus, we simply cannot find that the Steinborns have demonstrated any actual bias on the part of any Board members, and decline to reverse on this basis.

IV. Ordinance Criteria

Next, the Steinborns contend that the Board erroneously concluded that the cell phone tower proposal fulfilled all of the criteria set forth in the relevant ordinance. Specifically, they argue that the Board erred by concluding that (1) the tower would not substantially diminish the value or the use and enjoyment of neighboring residential properties; and (2) the communications facility was more than 500 feet from neighboring residential structures.

The relevant zoning ordinance provides that to obtain a special exception, an applicant must show that its proposed use “will not be detrimental to or endanger the public health, safety, or general welfare,” and “will not be injurious to the use and enjoyment of other property in the immediate vicinity for the purposes already permitted, nor substantially diminish and impair property values within the neighborhood.” Appellants’ App. p. 150-51. Proposed cell phone towers must also meet a number of technical criteria, including the following: “Wireless Communications Facilities or Towers shall not be located within 500 feet of a residential structure not owned by the applicant.” Id. at 142.

A. Value, Use, and Enjoyment of Neighboring Properties

As noted above, Horvath’s designated expert opined that the proposed cell phone tower “will not have any negative impact on the use, enjoyment, or value of surrounding properties.” Id. at 106-07. His opinion was based on a review of the proposed plans, an inspection of the site, and twenty-eight years of experience in real estate appraisal.

The Steinborns argue that Kunkel's opinion has no value because he failed to provide the Board with, among other things, the methodological data underlying his conclusions. We cannot agree, inasmuch as there is no requirement in zoning decisions that an expert provide the Board with the reams of information being requested by the Steinborns. They did not object to Kunkel's expertise at the hearing, nor do they do so on appeal.

The Steinborns also direct our attention to the evidence offered by multiple remonstrators who offered their lay opinions that the proposed tower would have a detrimental effect on their property values as well as their use and enjoyment of their properties. Cf. Porter Cty. Bd. of Zoning Appeals v. SBA Towers, II, LLC, 927 N.E.2d 915, 923 (Ind. Ct. App. 2010) (holding that "[g]eneralized aesthetic concerns" regarding the compatibility of a tower with the area are insufficient to deny a special exception). It was for the Board to weigh the evidence, and we cannot and will not second-guess its decision to credit the opinion of an expert with decades of experience over the lay opinions of the property owners.

The Steinborns argue that the Board's refusal to consider moving the tower to another area on the Freyers' property behind a grove of trees was unreasonable. They offer no citation to authority, however, suggesting that the Board was required to select another site when the original site, as proposed, met the relevant criteria of the ordinance. The Board considered all of the relevant evidence, including official survey plans, maps,

and the request to move the tower behind the trees. We cannot conclude that the Board erred by approving the originally-proposed location for the cell phone tower.

In sum, we find that Kunkel's report and testimony constitutes substantial evidence supporting the Board's conclusion in this regard, and decline the Steinborns' invitation to assess witness credibility and reweigh the evidence. In other words, we will not reverse on this basis.

B. Facilities Not Within 500 Feet of a Residential Structure

Next, the Steinborns argue that the wireless communication facility is within 500 feet of a residential structure, in violation of the terms of the ordinance set forth above. Initially, we note that they failed to raise this argument to the Board; consequently, they have waived it on appeal.

Waiver notwithstanding, we note that "wireless communication facility" is defined as follow by the relevant ordinance:

Any facility used by a licensed commercial wireless telecommunications provider to provide service, including but not limited to cellular, personal communication services, specialized mobilized radio, enhanced specialized mobilized radio, paging, high speed internet and other similar services that are marketed to the general public.

Appellants' App. p. 139-40. The Steinborns do not dispute that the tower itself or the 100-by-100-foot fenced-in facility around it will be more than 500 feet from a residential structure. Instead, they emphasize that the access drive leading up to the tower is less

than 500 feet from a residential structure, and contend that the access drive is, or should be, included within the phrase “wireless communication facility.”

The Board declined to interpret “wireless communication facility” to include the access drive leading thereto, and if we find that the Board’s interpretation is reasonable, we “should end [our] analysis and not address the reasonableness of the other party’s interpretation.” Hoosier Outdoor Advertising Corp. v. RBL Mgmt. Inc., 844 N.E.2d 157, 163-64 (Ind. Ct. App. 2006).

Initially, we note that the definition of the phrase does not include the access drive. Furthermore, the ordinance states that “[f]acility compounds shall be serviced by an access drive” and “[w]ithin the facility compound, parking areas and drives shall be surfaced with stone, asphalt, or concrete.” Appellants’ App. p. 145-46 (emphases added). If the facility included the access drive, it would not make sense for the ordinance to discuss them as separate entities. Likewise, there would be no reason to refer to access drives “within” the facility.

Consequently, we find the Board’s interpretation of the ordinance to be reasonable and end our analysis there. Inasmuch as it is undisputed that the facility—not including the access drive—is more than 500 feet from a residential structure, we decline to reverse on this basis.

V. Findings

Finally, the Steinborns argue that we should reverse because the Board failed to enter written findings of fact supporting its decision to grant the special exception.

Although the better practice would have been for the Board to have made written findings of fact supporting its decision, we find that any error was harmless. The Steinborns have failed to show that they were prejudiced as a result of the absence of written findings. The trial court reviewed “the record as a whole,” including the meeting minutes and the video recording of the hearing, and found that the Board’s decision and conclusions were supported by substantial evidence. St. Charles Tower, 873 N.E.2d at 601; see also Hawley v. S. Bend, Ind. Dep’t of Redevelopment, 270 Ind. 109, 112-13, 383 N.E.2d 333, 336 (Ind. 1978) (noting that “[t]he failure to find such underlying facts and grounds does not require us to reverse the Commission’s decision” because “the trial court had no problem in reviewing the action of the Commission since the hearing was fully transcribed”).

Additionally, we note that there are no disputed facts in this case. Instead, the dispute turns upon whether the undisputed facts constituted substantial evidence supporting the Board’s decision. In such a circumstance, the Board’s findings of fact are less important than in cases where the facts are in dispute. In this case, therefore, we find that the Board’s failure to enter written, specific findings of fact is harmless error.

The judgment of the trial court is affirmed.

VAIDIK, J., and BARNES, J., concur.