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IN THE
COURT OF APPEALS OF INDIANA

DMS REAL ESTATE, LLC,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 84A04-1009-PL-617
	)	
BOARD OF ZONING APPEALS OF THE CITY OF TERRE HAUTE, INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE VIGO SUPERIOR COURT
The Honorable Michael H. Eldred, Judge
Cause No. 84D01-0903-PL-2647

September 19, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant-Petitioner DMS Real Estate, LLC ("DMS") appeals the trial court's order granting summary judgment in favor of Appellee-Respondent Board of Zoning Appeals of the City of Terre Haute, Indiana ("BZA") and affirming the BZA's denial of its Special Use Approval Petition ("Petition"), which sought approval of its development plan to construct a waste transfer facility to be integrated with its existing recycling management operation. We affirm.

FACTS AND PROCEDURAL HISTORY[1]

DMS owns and operates a waste recycling management operation located at 4000 Steelton Road, Terre Haute ("the Property"). The Property is zoned M-2 heavy industrial and is located within the Fort Harrison Business Park. Pursuant to the Comprehensive Zoning Ordinance ("Zoning Ordinance"), which can be found in the Terre Haute City Code, the purpose of the M-2 heavy industrial district is to:

> Provide for complete separation of residential and commercial areas from industrial areas for the mutual protection of both industry and residential and commercial uses. It is recognized that to provide for industrial growth, a reasonable excess of quality land must be held in exclusive reserve for industrial expansion. In the granting of special use permits, this goal must be paramount in the consideration and special uses not clearly of a manufacturing and industrial nature must be incidental to an established industrial facility.

Terre Haute City Code § 10-225(d). The Zoning Ordinance provides a list of permitted uses in a M-2 heavy industrial district. Terre Haute City Code § 10-225(e). It also proves a list of uses that require special permission from the BZA, including "[d]umping or disposal of

[1] DMS Real Estate has filed a Motion to Strike Appellee's Appendix and Portions of Appellee's Brief which we deny as moot in a separate order issued simultaneously with this opinion because the challenged documents and arguments were not considered by the court in resolving the instant appeal.

garbage, refuse, or trash, with limitations and qualifications to be established by the Commission." Terre Haute City Code § 10-226(c)(3).

On November 5, 2008, DMS submitted its Petition seeking approval of its development plan to construct a waste transfer facility at the subject Property to be integrated with its existing recycling management operation. On December 3, 2008, January 7, 2009, and February 17, 2009, the BZA conducted hearings on DMS's Petition, at which DMS was allowed to present material it deemed necessary in support of its Petition. Multiple remonstrators spoke against DMS's Petition during each of the three hearings. During the December 3, 2008 hearing, staff from the BZA submitted favorable testimony accompanied by a report documenting its findings ("the Staff Findings") regarding DMS's Petition. At the conclusion of the February 17, 2009 hearing, the BZA voted to deny DMS's Petition.

On April 16, 2009, the BZA issued its findings stating the reasons for its denial of DMS's Petition. Therein, the BZA found as follows:

> 1. The Staff Findings were not consistent with the provisions of Indiana Code, the City's Zoning Code, and the evidence presented to the Board and therefore were rejected by the majority of the Board.
>
> 2. There was evidence that Steelton Road needs to be upgraded to handle the increased traffic and there are right of way and construction problems in upgrading Steelton Road. The Board found that there are safety issues with unimproved portions of Steelton Road for the traveling public since Steelton Road is the major roadway entrance in certain existing and developing residential subdivisions in the Shrine Hill area.
>
> 3. Crestview Farms submitted a copy of the Declaration of Development Standards, Covenants, and Restrictions for the Fort Harrison Business Park which states, among other things, that the developer has exclusive control over the maintenance and administration of the business park and association. It is the intent of the Covenants "…to provide for quality improvements to be

constructed within the Business Park in order to enhance the values of all of the real estate and improvements within the Business Park." Furthermore, Section 17.02 of the Covenants provides that "Any construction of or use and operation of any Site shall be subject to the approval of the Planning Committee and any environmental concerns resulting from such construction or use of any Site may be the basis for the planning committee' decision to reject any plans." The developer states the petitioner's request is not consistent with the standards, covenants, and restrictions.

4. The Terre Haute City Code, Sec. 10-264, Variations in the Nature of Special Uses, states that requests for Special Uses must take into consideration "…the impact of those uses on neighboring land and of the public need for the particular use at the particular location." Petitioner has not shown that neighboring land would be immune from noise and odor, that there is a public need at that particular location, and that their proposal would not affect the health, safety, and general welfare of the neighboring property owners. Specifically, the petitioner has not shown how the construction of the proposed building would alleviate issues related to dust, odor, and noise; how there is a public need at this site not available at other sites within the City; how the additional traffic would be handled to mitigate the impact on the roadway which is an access route to neighboring areas.

5. The Board finds that a Special Exception would not be in harmony with the characteristic of the district and the authorized land uses around the district. The adjoining industrial property owners in the Fort Harrison Business Park, although requested by the Petitioner, have not consented to a Special Exception for this real estate. It was recognized that there are residential properties on three sides of the Fort Harrison Business Park.

6. The Board received a letter from the Terre Haute Economic Development Corporation dated February 12, 2009 stating that the Fort Harrison Development Park was one of the very few readily available industrial properties located within the City's corporate limits that also have rail service available on-site. Also, approximately two-thirds of the Fort Harrison Business Park remains undeveloped and ready to accommodate new facilities. The concern expressed by the Economic Development Corporation with regard to the proposed project "…is the possible negative impact such a facility could have on future efforts to market the remaining undeveloped portions of the Fort Harrison Business Park for industrial purposes."

7. The Petitioner's Terzo & Bologna Report[("the Terzo Report")], dated October 28, 2008, does not appear to be an appraisal report that establishes fair

market value. No attempt was made to estimate the market value of the subject property or any other property in Terre Haute, Indiana nor does the report estimate market value or changes in market value. Therefore, the Petitioner has failed to prove that the use and value of the area adjacent to the Petitioner's property will not be affected in a substantially adverse manner.

8. The Board received Resolution 3, 2009 from the Terre Haute Redevelopment Commission which raised objections to the project based upon legal questions of ownership. Redevelopment contends that the waste transfer facility interferes and obstructs the right-of-way owned by the Commission.

A. DMS proposed to construct a fence across the right-of-way impairing the use of said right-of-way contrary to the legal rights of the Commission.

B. DMS proposed to utilize a part of the right-of-way as a green space contrary to the legal rights of the Commission.

C. DMS' proposed layout would result in DMS utilizing the right-of-way to back vehicles into the transfer station creating a safety issue for traffic across the right-of-way.

D. The proposed facility would encroach upon the easement designated for drainage purposes which is detrimental to the development of the Fort Harrison Business Park and the health, safety, and general welfare.

9. A citizen petition executed by approximately 184 people to deny DMS Real Estate LLC Special Exception Request states as follows:

A. The processing nature of a waste transfer station would create undo [sic] odor, dust, and noise that will be injurious to the public health and safety.

B. The delivery of Waste will create debris and litter along Fruitridge Avenue and Steelton Avenue, which will have an adverse effect on the value of the residential dwelling in the Shrine Hill area.

C. Steelton Avenue is not designed to carry the excess traffic that would result from the proposed waste transfer station.

D. There is not a public need for a waste transfer station at this particular location and the project is a possible negative impact upon the future development of the Fort Harrison Business Park.

Appellant's App. pp. 305-07.

On March 18, 2009, DMS filed its Verified Petition for Writ of Certiorari with the trial court. On March 23, 2010, DMS filed a motion for summary judgment, and on June 7, 2010, the BZA filed its cross-motion for summary judgment. The trial court held a hearing on DMS's and the BZA's respective motions for summary judgment on August 24, 2010. Thereafter, on September 16, 2010, the trial court issued an order stating that the BZA's findings were sufficient to support its denial of DMS's Petition, granting the BZA's motion for summary judgment, and denying DMS's motion for summary judgment. This appeal follows.

DISCUSSION AND DECISION

I. Standard of Review

> When reviewing a decision of a zoning board, this court and the trial court are bound by the same standard. *Scott v. Marshall County Bd. of Zoning Appeals*, 696 N.E.2d 884, 885 (Ind. Ct. App. 1998). We presume the determination of the board, an administrative agency with expertise in zoning matters, is correct. *Id*. Therefore, we will reverse only if the board's decision is arbitrary, capricious, or an abuse of discretion. *Id*. We will not reweigh the evidence or substitute our decision for that of the board. *Id*.

Midwest Minerals, Inc. v. Bd. of Zoning Appeals, 880 N.E.2d 1264, 1268 (Ind. Ct. App. 2008), *trans. denied*. Thus, DMS labors under a heavy burden in urging this court to overturn the BZA's decision. *Id*.

DMS argues that the trial court erred in failing to reverse the BZA's decision to deny its petition seeking a special use exception. DMS first contends that the BZA was required to grant its petition because it presented sufficient evidence to show that the proposed waste transfer facility would meet the requirements and comply with the five criteria set forth in the

Zoning Ordinance to be considered by the BZA upon receiving a petition for a special use exception. DMS also contends that the remonstrators presented insufficient evidence to rebut its evidence and support the BZA's conclusion that the proposed waste transfer facility would not meet the special use exception criteria.

DMS claims that the award of a special use exception is mandatory upon the petitioner's presentation of evidence that its proposed use satisfies the statutory prerequisites set forth in the zoning ordinance.

> It is often true … that if a petitioner for a special exception presents sufficient evidence of compliance with relevant statutory requirements, the exception must be granted. However, … while some special exception ordinances are regulatory in nature and require an applicant to show compliance with certain regulatory requirements (e.g. structural specifications), providing the zoning board with no discretion, some special exception ordinances provide a zoning board with a discernable amount of discretion (e.g. those which require an applicant to show that its proposed use will not injure the public health, welfare, or morals). [Petitioner's] position that a board of zoning appeals must grant a special exception upon the applicant's submission of substantial evidence of compliance with the relevant criteria is true only as to ordinances falling within the former category. In other words, when the zoning ordinance provides the board of zoning appeals with a discernable amount of discretion, the board is entitled, and may even be required by the ordinance, to exercise its discretion. When this is the case, the board is entitled to determine whether [a petitioner] has demonstrated that its proposed use will comply with the relevant statutory requirements.

Id.; *Crooked Creek Cons'n & Gun Club v. Hamilton County N. Bd. of Zoning Appeals*, 677 N.E.2d 544, 547-48 (Ind. Ct. App. 1997) (citations omitted), *trans. denied*.

Here, the zoning ordinance implicated confers upon the BZA a significant amount of discretion. The ordinance establishes that upon receiving a petition seeking a special use exception, the BZA must give reasonable regard to:

(A) The Comprehensive Plan;
(B) Current conditions and the character of current structures and uses in each district;
(C) The most desirable use for which the land in each district is adapted;
(D) Conservation of property values throughout the jurisdiction; and
(E) Responsible development and growth.

Terre Haute City Code § 10-263(c)(4). It is clear that these criteria, having no absolute objective standards against which they can be measured, involve discretionary decision making on the part of the BZA. *See Midwest Minerals*, 880 N.E.2d at 1269; *Crooked Creek*, 677 N.E.2d at 548. Thus, the BZA was entitled to determine whether DMS satisfied the criteria for the grant of a special use exception. *Midwest Minerals*, 880 N.E.2d at 1269; *Crooked Creek*, 677 N.E.2d at 548.

The burden of demonstrating satisfaction of the relevant statutory criteria rests with the petitioner requesting a special use exception. *Crooked Creek*, 677 N.E.2d at 548. This court has accordingly been cautious to avoid imposing upon remonstrators an obligation to come forward with evidence contradicting that submitted by the petitioner. *Id*. Accordingly, DMS bore the burden to show that its proposed waste transfer facility would satisfy the BZA's consideration of the petition together with the aforementioned criteria. *Id*. Further, neither those opposed to DMS's Petition, nor the BZA, were required to negate DMS's case. *Id*. Because remonstrators need not affirmatively disprove a petitioner's case, a board of zoning appeals may deny a petition for a special use exception on the grounds that the petitioner has failed to carry its burden of proving compliance with the relevant statutory criteria regardless of whether the remonstrators present evidence to negate the sufficiency of the petitioner's evidence to satisfy the enumerated criteria. *Id*.

When determining whether an administrative decision is supported by substantial evidence, the receiving court must determine from the entire record whether the agency's decision lacks a reasonably sound evidentiary basis. *Midwest Minerals*, 880 N.E.2d at 1269; *Crooked Creek*, 677 N.E.2d at 548. Evidence will be considered substantial if it is more than a scintilla and less than a preponderance. *Midwest Minerals*, 880 N.E.2d at 1269; *Crooked Creek*, 677 N.E.2d at 549. In other words, substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Midwest Minerals*, 880 N.E.2d at 1269; *Crooked Creek*, 677 N.E.2d at 549. Upon review, we conclude that the trial court's conclusion that the BZA's determination to deny DMS's petition for a special use exception was supported by substantial evidence, and thus was not error. *See Crooked Creek*, 677 N.E.2d at 549.

In the instant matter, the Zoning Ordinance establishes that a petitioner may be awarded a special use exception if its petition satisfies the BZA's review relating to five considerations. However, it is within the BZA's discretion to deny the petitioner's request for a special use exception if the petitioner fails to satisfy one of the considerations.[2] *See Midwest Minerals*, 880 N.E.2d at 1269. On appeal, the petitioner bears the burden of proving that each of these considerations has been satisfied. *Id*. DMS argues that it presented sufficient evidence to favorably satisfy each of the five considerations set forth in the Zoning

[2] The criteria to be considered by the BZA, as outlined in the Zoning Ordinance, are written in the conjunctive rather than the disjunctive. This construction suggests that a petitioner must satisfy the BZA's consideration of all five requirements in order to prevail upon a request for a special use exception. *See generally, Bourbon Mini Mart Inc. v. Comm'r, Ind. Dep't of Envtl. Mgmt*., 806 N.E.2d 14, 20 (Ind. Ct. App. 2004).

Ordinance. The BZA, however, could "choose to disbelieve [petitioner's] testimony" and exhibits so long as it gives the specific reasons for its disbelief. *See Town of Merrillville Bd. of Zoning Appeals v. Pub. Storage, Inc.*, 568 N.E.2d 1092, 1095 n.4 (Ind. Ct. App. 1991).

The BZA found that DMS had failed to prove that "the use and value of the area adjacent to the Petitioner's property will not be affected in a substantially adverse manner." Appellant's App. p. 306. In making this finding, the BZA explained this finding by noting that the Terzo Report submitted by DMS "does not appear to be an appraisal report that establishes fair market value," that "[n]o attempt was made to estimate the market value of the subject property or any other property in Terre Haute," and that the Terzo Report does not "estimate market value or changes in market value." Appellant's App. p. 306. The Terzo Report does not contain any specific data relating to the effect the proposed waste transfer facility would have on the value surrounding properties, but rather contains DMS's expert's generalized opinion that the proposed waste transfer facility would not negatively impact surrounding property values.

Again, the criteria set forth in the Zoning Ordinance to be considered by the BZA upon receiving a petition seeking a special use exception have no absolute objective standards against which they can be measured, but rather involve discretionary decision making on the part of the BZA. Accordingly, given the special discretion afforded to zoning boards in such determinations, we conclude that the BZA was within its discretion to deny DMS's Petition for a special use exception based upon its finding that DMS failed to meet its burden of proving that the use and value of the area adjacent to the Petitioner's property will

not be affected in a substantially adverse manner. Furthermore, we conclude that the trial court did not err by affirming the BZA's denial of DMS's request for a special exception and granting the BZA's motion for summary judgment on this ground. Because we affirm the trial court's order on this ground, we conclude that it is unnecessary to consider whether the evidence was sufficient to sustain the BZA's remaining findings.

The judgment of the trial court is affirmed.

ROBB, C.J., and BARNES, J., concur.