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IN THE COURT OF APPEALS OF INDIANA

LAURA CYRUS,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 45A03-0911-CV-542
	)	
TOWN OF MUNSTER BOARD OF ZONING APPEALS,	)	
	)	
	)	
Appellee.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Diane Kavadias Schneider, Judge
Cause No. 45D05-0905-MI-16

March 8, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Laura K. Cyrus appeals the trial court's decision upholding the Town of Munster Board of Zoning Appeals' (the "BZA") denial of her petition for a developmental standards variance.

We affirm.

ISSUES

1. Whether Munster's zoning ordinance prohibits the construction of a private garage in excess of fourteen feet tall in an R1 residential zoning district.

2. Whether the BZA erred in denying Cyrus' application for a developmental standards variance and whether the trial court erred in upholding the BZA's decision.

FACTS

Cyrus collects antique cars as a hobby. In January of 2009, she purchased residential property located at 1209 Fisher Street in Munster with the intention of demolishing the existing residence, constructing a new residence and replacing the existing attached three-car garage with a detached, two story, 21-foot garage. The height of the proposed garage was to accommodate an electric vehicle lift.

Cyrus had previously constructed two similar 21-foot garages on residential property she owned at 1203 and 1149 Fisher Street. In each instance, she received unanimous BZA approval.[1] The existing garages and the proposed garage are located

[1] The BZA approved the construction of the two-story, three-car garages located at 1203 Fisher Street and 1149 Fisher Street on June 15 and September 21 of 2004, respectively. No remonstrators appeared at either public hearing to oppose Cyrus' petitions.

within the same R-1 dwelling house zoning district on Fisher Street, a dead-end street abutting the east side of Munster High School football stadium and its grounds.

When Cyrus requested a building permit for the proposed garage, she was informed that because the proposed garage exceeded fourteen feet, the Munster Municipal Code required her to obtain a developmental standards variance ("variance") before she could receive a building permit. On March 11, 2009, Cyrus submitted an application for the variance to the BZA. She also submitted the site plan, floor plans, and elevations for the proposed garage.

On April 28, 2009, the BZA held a public hearing on Cyrus' application. Two remonstrators objected to Cyrus' variance request, complaining that the proposed garage would interfere with the sight lines and aesthetics from their respective properties, and, further, that the garage was too big for the neighborhood. Cyrus countered that BZA had previously granted her variances to construct comparable 21-foot garages on Fisher Street. Also, during the hearing, BZA member Mr. Baker asked Cyrus to identify the hardship that the variance was being sought to address; Cyrus responded that her antique cars required a climate-controlled environment.

At the close of the hearing, the BZA voted to deny Cyrus' application for a variance; it subsequently adopted the following findings of fact:

> 1. [Cyrus] requests the variance so that a number of collectible cars can be stored on the premises and a lift can be installed in the proposed garage to facilitate working on the cars on the premises.

2. [Cyrus] has available to her other facilities for storing and working on her collectible automobiles, where she currently stores and works on them.

3. [Cyrus] indicates she can build a garage on the premises without the variance that meets code and will build a garage on the premises whether a variance is granted or not.

4. The need for a higher garage does not come from a hardship or a practica[l] difficulty caused by the nature of the property but rather by [Cyrus'] desire to engage in a hobby activity on the property.

5. Two remonstrators suggested that the proposed garage will be of a height to block sight lines and impair view in the neighborhood and will be detrimental to their properties.

6. There is no substantial hardship or practical difficulty justifying the granting of the variance.

(App. 127).

On May 21, 2009, Cyrus filed a verified petition for writ of certiorari and complaint for damages. On June 10, 2009, BZA filed its record and certified code provisions, as well as its answer to Cyrus' petition and complaint. On August 21, 2009, Cyrus moved for partial summary judgment, alleging that the BZA's denial of her variance petition was "arbitrary and capricious and therefore illegal." (App. 176). On September 21, 2009, the BZA filed its motion for summary judgment.

Also on September 21, 2009, the trial court issued an order containing its findings of fact and conclusions of law, wherein it affirmed the BZA's denial of Cyrus' application for a variance. Its order stated, in pertinent part, the following:

FINDINGS OF FACT

1. On March 11, 2009 Laura K. Cyrus (Plaintiff) at 1209 Fisher Street applied to the Town of Muster [sic] an Application for Developmental Standards Variance (No. 09-003) for a 21 foot garage stating the ordinance height limit was 14 feet tall, and she wished to have storage space above her vehicles, and a heated floor. She applied for a variance in order to receive a building permit from the Town of Munster.

*** * ***

4. [Cyrus] provided a survey from Spiegel Architects of Highland, Indiana for the proposed garage on April 25, 2009. This survey names the garage as an "accessory structure."

*** * ***

6. The Minutes for the [BZA] on April 28, 2009 list the Public hearing on Petition 09-003 for Plaintiff's variance concerning the 21' garage for 1209 Fisher Street. Testimony was taken from two neighboring landowners in Munster opposing the variance. BZA members are noted as having a concern about the lack of hardship surrounding this petition. A vote was held after a motion to deny was approved, and the petition was denied by 3-1, with one member abstaining.

7. The [BZA] issued its Findings of Fact which denied the petition 09-003 on April 28, 2009 and these Findings were approved on May 26, 2009. * * *

*** * ***

CONCLUSIONS IN LAW

1. When a zoning ordinance permits specified uses in specific zoning districts, all other uses in those districts are forbidden absent a special use permit or variance. *T.W. Thom Construction, Inc. v. City of Jeffersonville*, 721 N.E.2d 319 (Ind.App. 1999).

2. Indiana Code § 36-7-4-1003 provides in relevant part, the remedy for review by certiorari of decisions of the board of zoning appeals or the legislative body, stating that, "[e]ach person aggrieved by a decision . . . may present, to the circuit or superior court of the county in which the premises affected are located, a verified petition setting forth that the

decision is illegal in whole or in part and specifying the grounds of the illegality." *Plan Commission of Harrison County v. Aulbach*, 748 N.E.2d 926 (Ind.App. 2001).

3. There is a presumption that determinations of a zoning board, as an administrative agency with expertise in the area of zoning problems, are correct and should not be overturned unless they are arbitrary, capricious, or an abuse of discretion. *Porter County Bd. of Zon. App. v. Bolde*, 530 N.E.2d 1212, 1215 (Ind.App. 1988). Thus, a reviewing court does not conduct a trial *de novo* and may not substitute its decision for that of the board. *Id.*

4. A reviewing court may vacate a board's decision only if the evidence, when viewed as a whole, demonstrates that the conclusions reached by the board are clearly erroneous. *Town of Beverly Shores v. Bagnall*, 590 N.E.2d 1059, 1061 (Ind. 1992). ". . .[T]he standard of review accords great deference to the board when the board's findings of fact are challenged." *Beverly Shores* at 1061.

5. Where the relevant facts are not in dispute and the interpretation of a statute is at issue, such statutory interpretation presents a pure question of law for which summary judgment disposition is particularly appropriate. *Sanders v. Board of Commissioners of Brown County*, 892 N.E.2d 1249 (Ind. App. 2008) *transfer denied.*

6. Munster City Ordinance § 26-513 states: "Dwellings in R1 dwelling house districts which have a total square footage of 5,000 feet or more shall not exceed 39 feet in height. Dwellings in R1 dwelling house districts which have less than 5,000 square feet shall not exceed two and one-half stories or 35 feet in height."

7. Munster City Ordinance § 26-514 states: "In R1 dwelling house districts, a private garage designed for the storage of four noncommercial vehicles may be constructed as an accessory building for a resident containing 5,000 square feet or more. Any four car garage constructed pursuant to this provision shall have its entrance facing the side of the lot rather than the front. The area of an accessory structure shall not exceed 900 square feet . . . . No accessory building shall be erected or used unless the main building to which it is accessory has been previously erected on the same lot where a building

permit for the erection of such main building has been previously issued."

8. The Munster City Ordinance § 26-401 defines an "accessory building" as: "a subordinate building located in and occupying not more than 30 percent of the rear yard of the main building, and designed, intended or used as an accessory use thereto, and which does not exceed 14 feet in height, including, without limitation, detached garages, swimming pools and carports."

9. Munster City Ordinance § 26-456 states in part:
   (a) The board of zoning appeals shall have the following powers:
   (3) Where by reason of [exceptional narrowness, shallowness or shape of a specific piece of property, or by reason of exceptional topographic conditions or by reason of any other extraordinary and exceptional situation or condition of such piece of property], the strict application of any regulations enacted under this article would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owners of such property, [authorize, upon appeal relating to such property and after public notice and hearing, a variance from such strict application so as to relieve such difficulties or hardships; provided, however, that no variance shall be granted under this subsection to allow a structure or use in a district restricted against such structure or use].

*** * ***

   (b) No relief may be granted or action taken under the terms of this section unless such relief can be granted without substantial detriment to the public good and will not substantially impair the intent and purpose of the master plan and this article. All petitions for variances, all applications for special exceptions or special permits, and all requests for approval and authorization required by the terms of this article shall be conducted in the same manner as [and] the same procedure shall be followed as provided for in the case of appeals under section 26-454 [sic[2]]. In passing upon and determining any appeal, petition for variance, application for special permit, special exception, or

[2] This clause should read "under section 26-455."

request for authorization or approval as provided for in this section, the board of zoning appeals shall be guided by and give consideration to the following:

(6) The effect upon the sound economic development of the community.

(7) The effect upon adjoining or other property in the community, recognizing the right of adjoining or other affected property owners to the peaceful and quiet enjoyment of their property, and including the effect upon the desirability or use of adjoining or nearby residential property, and bearing in mind whether or not such proposed action will be consistent with the development and growth of the town as a restricted residential community.

10. [Cyrus] has alleged the decision of the Town of Munster [BZA] decision was illegal, yet erroneously claims the property in question is zoned R-2 where 50 foot garages are permitted. As the Town of Munster has listed in its answer, the 1209 Fisher Street property is zoned R1, and definitions of accessory structures have been listed above in this Court's Conclusions of Law.

11. A review of the Town of Munster [BZA decision] does not support an allegation of illegality, nor that the decision was made in a manner that was arbitrary, capricious, or an abuse of discretion.

JUDGMENT AND ORDER

The Court holds that [Cyrus'] Motion to vacate the decision of the [BZA] should be DENIED.

Therefore, the Court AFFIRMS the decision of the Town of Munster [BZA].

IT IS FURTHER ORDERED that [Cyrus'] Motion for Partial Summary Judgment is DENIED.

IT IS FURTHER ORDERED that there is no just reason for delay and the Clerk of the Court is ordered to enter judgment for Defendants, Town of Munster [BZA] as to [Cyrus'] complaint.

(App. 15-19).

On September 24, 2009, Cyrus filed a request for hearing on the parties' summary judgment motions; a response to BZA's motion for summary judgment; a reply in support of her motion for partial summary judgment; a motion to correct error; and a motion to set aside the order denying her motion for summary judgment. On October 19, 2009, the trial court entered an order denying Cyrus' motion to correct error and motion to set aside the order of September 21, 2009. The trial court stated it had made its decision based upon reviewing Cyrus' petition for writ of certiorari; the BZA's response and answer; the BZA record; and certified code provisions. The trial court further stated that it was not required by statute to "consider any additional pleadings and arguments of the parties, including the motions for summary judgment, in reaching its determination herein." (App. 14). On November 4, 2009, Cyrus filed a motion for entry of final judgment; on November 17, 2009, the trial court entered an order directing entry of final judgment.

Additional facts will be provided as necessary.

DECISION

1. Standard of Review

> When reviewing a decision of a zoning board, we are bound by the same standard of review as the certiorari court. Indiana Code section 4-21.5-5-14 establishes the scope of judicial review of an administrative decision and provides that a court may grant relief only if the agency action is: (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. The burden of demonstrating the invalidity of the agency action rests with the party asserting the invalidity.

Hoosier Outdoor Advertising Corp. v. RBL Management, Inc., 844 N.E.2d 157, 162 (Ind. Ct. App. 2006) (internal citations omitted). The reviewing court may not try the facts *de novo* or substitute its own judgment for that of the agency. *City of Hobart Common Council v. Behavioral Institute of Indiana, LLC,* 785 N.E.2d 238, 255 (Ind. Ct. App. 2003). 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*. Generally, we review questions of law decided by an agency *de novo*. *Huffman v. Office of Envtl. Adjudication*, 811 N.E.2d 806, 809 (Ind. 2004). However, an agency's construction of its own ordinance is entitled to deference. *Hoosier Outdoor*, 844 N.E.2d at 163.

2. Interpretation of Zoning Ordinances

When Cyrus requested a building permit for the construction of her proposed 21-foot garage, she was informed that she would have to first obtain a variance because the Munster Municipal Code imposed a maximum height of 14-feet on garages.

On appeal, she argues that the BZA "had no power to . . . require a variance for the Proposed Garage or . . . to deny the requested variance for construction of the proposed garage," because her proposed [21-foot] garage was a permitted structure in R-1 dwelling districts. Cyrus' Br. at 8. Specifically, she argues that because her proposed building

was to exceed 14-feet in height, it fell into a different classification of structures that is permitted in R-1 districts to a height of 50 feet. The BZA counters, and we agree, that Cyrus asks us to ignore an express provision of the Code that expressly limits the height of accessory buildings to fourteen feet, and "to adopt a strained interpretation of the [Munster Municipal] Code which would allow the construction of garages massive in comparison to the size of the homes they serve." BZA's Br. at 11.

The ordinary rules of statutory construction apply in interpreting the language of a zoning ordinance. *Hoosier Outdoor,* 844 N.E.2d at 163. As such, the express language of the ordinance controls our interpretation and we must "determine, give effect to, and implement the intent of the enacting body." *Id*. "When an ordinance is subject to different interpretations, the interpretation chosen by the administrative agency charged with the duty of enforcing the ordinance is entitled to great weight, unless that interpretation is inconsistent with the ordinance itself." *Id*.

When faced with two reasonable interpretations of an ordinance, one of which is that of an administrative agency charged with enforcing the ordinance, the trial court should defer to the agency. *Id*. Once a court determines that an administrative agency's interpretation is reasonable, it should terminate its analysis and it need not address the reasonableness of the other party's interpretation. *Id*. "Terminating the analysis reinforces the policies of acknowledging the expertise of agencies empowered to interpret and enforce ordinances and increasing public reliance on agency interpretations." *Id*.

3. Analysis

According to paragraph four of the trial court's findings of fact, Cyrus' survey "name[d] the [proposed] garage as an 'accessory structure.'" (App. 15). Section 26-401 of the Munster Municipal Code defines an "accessory building" as "a subordinate building located in and occupying not more than 30 percent of the rear yard of the main building, and designed, intended or used as an accessory use thereto, and which does not exceed 14 feet in height, including, without limitation, detached garages, swimming pools, and carports." Munster Municipal Code § 26-401 (emphasis added).

At the BZA public hearing, Cyrus testified that her proposed garage would be a detached garage. Detached garages are expressly included within the definition of "accessory building" under Municipal Code section 26-401. We can reasonably infer from Cyrus' initial designation of the proposed garage as an "accessory structure" that the proposed garage satisfied the requirements under the definition, namely that it (1) occupied no more than 30 percent of the rear yard of the main residence; and (2) was designed, intended or used as an accessory to the main residence.

Cyrus contends, however, that because the proposed 21-foot garage was going to exceed the 14-foot height limitation expressly imposed therein upon accessory buildings, it (1) was not an accessory building; and (2) it fell into a classification of "[o]ther types of structures" that could be up to fifty feet in height. Munster Municipal Code § 26-513. In support of her contention, she cites the "Height regulations" section of the Munster Municipal Code, which provides that "[d]wellings in R-1 dwelling house districts shall

not exceed 2½ stories or 35 feet in height. Other types of structures which may be permitted by this article shall not exceed four stories or 50 feet in height." Munster Municipal Code § 26-513.

We are not persuaded by Cyrus' attempt to remove her proposed detached garage from the definition of "accessory building." Her interpretation of the ordinance appears to ignore the rationale for granting variances. The BZA, in its discretion, is authorized to grant variances or exceptions from strict application of zoning ordinances to permit construction options that would ordinarily be foreclosed. Here, the fact that Cyrus' proposed 21-foot detached garage exceeds the express 14-foot height limitation imposed on accessory buildings does not automatically remove the structure from the category of accessory buildings and place it into another class of buildings that can be up to fifty feet in height; rather, it simply necessitates Cyrus' having to obtain a variance in order to exceed said height limit. *See Area Plan Comm'n of Evansville and Vanderburgh County v. Wilson,* 701 N.E.2d 856, 862 (Ind. Ct. App. 1998) (When a zoning ordinance permits specified uses in specific zoning districts, all other uses are forbidden absent a special use permit or variance.).[3]

We find BZA's construction of section 26-401 to be a reasonable one; accordingly, we defer thereto. *Hoosier Outdoor,* 844 N.E.2d at 163. Cyrus' proposed detached garage was an accessory building that was subject to the 14-foot height

[3] Notably, it is undisputed that on the two prior occasions on which Cyrus built comparable 21-foot detached garages, she was required to and did, in fact, seek and secure variances before she was granted building permits.

limitation imposed thereon. Thus, Munster had the authority to require Cyrus to obtain a variance before she could receive a building permit to construct a detached garage in excess of fourteen feet.[4]

We proceed to a discussion of whether the BZA's denial of Cyrus' variance request was proper. Indiana Code section 36-7-4-918.5, which governs a variance from developmental standards, provides:

> (a) A board of zoning appeals shall approve or deny variances from the development standards (such as height, bulk, or area) of the zoning ordinance. A variance may[5] be approved under this section only upon a determination in writing that:
>
> (1) the approval will not be injurious to the public health, safety, morals, and general welfare of the community;
>
> (2) the use and value of the area adjacent to the property included in the variance will not be affected in a substantially adverse manner; and
>
> (3) the strict application of the terms of the zoning ordinance will result in practical difficulties in the use of the property. However, the zoning ordinance may establish a stricter standard than the "practical difficulties" standard prescribed by this subdivision.

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[4] Cyrus argues that "Munster's interpretation of the ordinance to prohibit all private garages and accessory buildings over 14 feet is not clearly and definitely ascertainable from the face of its ordinance" and was therefore "arbitrary, capricious, unreasonable, and an abuse of its authority under Indiana law." Cyrus' Br. at 15. We are not persuaded. As noted above, the ordinary rules of statutory construction apply herein. *Hoosier Outdoor,* 844 N.E.2d at 163. Thus, where, as here, a statute is clear and unambiguous on its face, we give words their plain, ordinary, and usual meaning, unless a contrary purpose is clearly shown by the statute itself. *Schafer v. Sellersburg Town Council,* 714 N.E.2d 212, 215 (Ind. Ct. App. 1999). Such is not the case here. We decline address this contention further.

[5] *See Williams v. City of Indianapolis Dep't of Pub. Works,* 558 N.E.2d 884, 887 (Ind. Ct. App. 1990) ("Normally, the word "may" in a statute implies a permissive condition and grant of discretion."), *trans. denied.*

I.C. § 36-7-4-918.5 (emphasis added). In the same vein, Munster Municipal Code section 26-456 provides that where "strict application" of a zoning ordinance will "result in peculiar or exceptional practical difficulties to or exceptional or undue hardship upon the owners of [a specific] piece of property," the BZA is authorized to grant a variance from the strict application of the zoning ordinance to relieve the difficulties or hardships, provided that the variance does not permit a structure or use that is prohibited in the zoning district at issue. Thus, under the applicable statute and ordinance, a petitioner for a variance must demonstrate that (1) approval will not harm the community; (2) the use/value of areas adjacent to the affected property will not be affected in a substantially adverse manner; and (3) strict application of the zoning ordinance will result in practical difficulties in the use of the property.

BZA was authorized to grant or deny Cyrus' petition for a variance, and properly acted within its discretion when it denied her petition due to her failure to identify a justifiable basis for the grant of the variance. The record reveals that at the public hearing, the BZA asked Cyrus what practical difficulties or hardship stemming from some condition or situation of the property, she sought the variance to relieve. Cyrus responded merely that her antique cars required a climate-controlled environment. The record further reveals that Cyrus testified that she had existing facilities in which to store and work on her antique car collection. She testified further that she could build a garage on the premises that comported with the Munster Municipal Code, indicating that strict application of the zoning ordinance posed no appreciable practical difficulties or

hardships to Cyrus, given her intentions for the property. The BZA subsequently concluded, and we agree, that Cyrus failed to demonstrate hardship sufficient to necessitate the grant of the variance.

Based upon the foregoing, we cannot say that the BZA's denial of Cyrus' petition was arbitrary, capricious, or an abuse of discretion; in excess of statutory authority; or unsupported by substantial evidence. *See Hoosier Outdoor,* 844 N.E.2d at 162. Nor do we find clear error from the trial court's judgment affirming the BZA's determination because (1) the record contains facts and inferences to support the court's findings and conclusions; and (2) our review of the record does not leave us with a firm conviction that a mistake has been made. *See Weida,* 896 N.E.2d at 1223.

Affirmed.

MAY, J., and KIRSCH, J., concur.