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**IN THE
COURT OF APPEALS OF INDIANA**

PORTER COUNTY BOARD)
OF ZONING APPEALS,)
)
Appellant-Respondent,)
)
vs.)
)
LAMAR ADVERTISING NORTHWEST)
INDIANA,)
)
Appellee-Petitioner.)

No. 64A04-1003-PL-186

APPEAL FROM THE PORTER SUPERIOR COURT
The Honorable Roger V. Bradford, Judge
Cause No. 64D01-0807-PL-6752

December 7, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

The Board of Zoning Appeals for Porter County (“BZA”) appeals the trial court’s approval of an improvement location permit sought by Lamar Advertising Northwest Indiana (“Lamar”). For our review, the BZA raises the sole issue of whether the trial court erred when it reversed the BZA’s denial of Lamar’s permit. Concluding the trial court did not err, we affirm.

Facts and Procedural History

Lamar sought an improvement location permit to replace an existing billboard with an electronic sign using light-emitting diodes (LEDs) (the “LED panel”). The LED panel would display a “static, . . . electronically-generated image, but [with] no motion in the billboard itself.” Transcript at 13. The billboard’s electronic memory would have six different advertisements, which would appear one at a time in ten-second intervals. There would be no animation in any of the advertisements or as they transitioned from one to the other; the transition would be instantaneous. The brightness of the light would be controlled to dim in cloudy or nighttime conditions and brighten during daytime conditions. Lamar’s LED panel would differ from a “tri-wave” billboard, which is comprised of slats that simultaneously rotate to change from one advertisement to the next and are programmed to do so every ten or fifteen seconds. Although the slats of tri-wave billboards are programmed to change simultaneously and relatively quickly, they take longer to transition from one advertisement to another than does an LED panel, and are permissible in Porter County. See Appellant’s Appendix at 168.

When Lamar submitted its permit application, the primary issue was whether Lamar’s proposed LED panel complied with a Porter County ordinance limiting billboard displays. The pertinent ordinance states: “Where permitted, an outdoor advertising structure shall . . . [c]ontain not more than one poster panel or the equivalent per facing” Porter County Zoning Ordinance § 17.52.020 (emphasis added).¹

The Executive Director of the Porter County Planning Commission denied the permit, and the BZA affirmed the denial upon Lamar’s appeal. The BZA entered findings of fact, including the following: the permit “would be injurious to the health, safety, morals, and general welfare of the community”; the “ordinance in question” was § 17.052.020(A), interpreted “to determine that only ONE poster panel was allowed on each face of a sign”; “[t]he request of [Lamar] would have posted up to seven poster panel equivalents on the sign”; and “the intent of the ordinance was to prevent the display of multiple messages from one sign.” Appellant’s App. at 169.

Lamar appealed to the trial court, which heard evidence regarding the function of the LED panel, and entered an order that reversed the BZA denial and approved the permit. The BZA now appeals.

Discussion and Decision

I. Standard of Review

When reviewing the decision of a zoning board, we are bound by the same standard of review as the trial court. Hoosier Outdoor Adver. Corp. v. RBL Mgmt., Inc., 844 N.E.2d

¹ This case addresses the ordinance in effect at the time of Lamar’s permit application; the ordinance has since been amended.

157, 163 (Ind. Ct. App. 2006), trans. denied. Accordingly, we may only grant relief to a party “prejudiced by an agency action that 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.

Ind. Code § 4-21.5-5-14(d). The burden of demonstrating the invalidity of agency action is on the party asserting the invalidity. Hoosier Outdoor, 844 N.E.2d at 163.

The trial and appellate courts must accept the facts as found by the zoning board. Id. Neither the trial nor appellate courts may reweigh the evidence or reassess the credibility of witnesses. Id. On questions of law, we generally review agency decisions de novo, however, “an agency’s construction of its own ordinance is entitled to deference.” Id.

As for interpretation of a county ordinance, our standard of review is well-settled:

The ordinary rules of statutory construction apply in interpreting the language of a zoning ordinance. Under those rules, the express language of the ordinance controls our interpretation and our goal is to determine, give effect to, and implement the intent of the enacting body. 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. If a court is faced with two reasonable interpretations of an ordinance, one of which is supplied by an administrative agency charged with enforcing the ordinance, the court should defer to the agency. Once a court determines that an administrative agency’s interpretation is reasonable, it should end its analysis and not address the reasonableness of the other party’s interpretation. 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. at 163 (citations omitted).

II. Zoning Ordinance Interpretation

The Porter County ordinance at issue prohibits a billboard that contains “more than one poster panel or the equivalent per facing” Porter County Zoning Ordinance § 17.52.020 (emphasis added). The Executive Director found the proposed LED panel would violate this ordinance because the entire billboard would change from one advertisement to another several times per minute. The BZA affirmed for, in part, the same reason. Specifically, the BZA interpreted the ordinance such that “only ONE poster panel was allowed on each face of a sign.” Appellant’s App. at 169. “The [BZA] determined that the intent of the ordinance was to prevent the display of multiple messages from one sign,” and that “[t]he request of [Lamar] would have posted up to seven poster panel equivalents on the sign.” Id.

According to basic principles of statutory interpretation, we give words their plain, ordinary, and usual meaning. See KPMG, Peat Marwick, LLP v. Carmel Fin. Corp., Inc., 784 N.E.2d 1057, 1060 (Ind. Ct. App. 2003). The plain, ordinary, and usual meaning of the ordinance in question prohibits more than the equivalent of one panel at a time. But the plain, ordinary, and usual meaning of the ordinance also implicitly allows that same one panel (or equivalent) to change from time to time.

Without this additional interpretation, the ordinance would be a limit for time indefinite, which would be impractical, illogical, and likely inconsistent with the practices of the BZA and Porter County billboard owners – especially those who use tri-wave billboards.

Porter County ordinances likely permit billboards to change their one panel (or equivalent) from time to time. A Porter County ordinance addressing the frequency of changing advertisements does not exist. As such, the BZA interpretation is inconsistent with the ordinance itself taken in its plain and ordinary meaning. Conversely, approval of Lamar's application gives the ordinance its full plain, ordinary, and usual meaning. We need not conclude that the ordinance requirement of "one panel" means a panel may only have "one" item of content for time indefinite.

Alternatively, the majority of the BZA's appellate brief frames the issue differently – as a fundamental change of the medium from poster paper to an electronic screen, such that we should defer to the BZA decision. We decline this framing of the issue, however, because the BZA's findings of fact focus on the numerical – seven or one – argument, and not the change of medium. The BZA's findings prohibit Lamar's LED panel because it "would have posted up to seven poster panel equivalents on the sign," Appellant's App. at 169, which, the BZA points out on appeal, "is clearly not equal to one." Appellant's Brief at 8. As stated above, we are unpersuaded by this argument.

Aside from the BZA's interpretation of the "one . . . or the equivalent" phrase of the ordinance, the BZA's findings of fact also concern the change in medium as it might affect the health, safety, morals, and general welfare of the county, and driver safety, in particular. This discussion might reference Indiana Code section 36-7-4-601(c)(3), which states: "When it adopts a zoning ordinance, the legislative body [with jurisdiction over the geographic area described in the zoning ordinance] shall act for the purposes of: . . . promoting the public

health, safety, comfort, morals, convenience, and general welfare” However, this statute is irrelevant here, where the validity of the ordinance is not at issue.

We acknowledge too, that these BZA findings might refer to Indiana Code section 36-7-4-918.5(a)(1), which states that a county BZA may approve a variance from a zoning ordinance upon written determination that it would not be “injurious to the public health, safety, morals, and general welfare of the community.” However, this statute is irrelevant here because Lamar is not applying for a variance, but for an improvement location permit. As to an argument to stretch this statute to apply to the situation before us, we addressed a similar issue in Metropolitan Board of Zoning Appeals of Marion County v. Shell Oil Co., 182 Ind. App. 604, 395 N.E.2d 1283 (1979) (“Metro. BZA”).

In Metro. BZA, a county BZA contended that, “by reason of [its] expertise in land use problems,” it had authority to exercise discretion in granting or denying an improvement location permit for a canopy at a gas station because of the canopy’s size. Id. at 605, 395 N.E.2d at 1284. The BZA argued such even though the size of the canopy did not exceed the limit of the ordinance, and conceded “there is neither specific statutory authority nor specific provision in the Ordinance granting such discretionary power in the case of issuing improvement location permits as opposed to such authority vested in them in reviewing a request for a zoning variance.” Id. at 605-06, 395 N.E.2d at 1284. This concession is notable and similar to this case. Here too, appellants and our independent research reveal no specific authority to grant the BZA the type of discretionary authority that it has when ruling

on variances, which is exactly the type of discretion it exercised in denying Lamar’s permit application.

In Metro. BZA, we disagreed with the argument for a county BZA’s discretion without provision for such by statute or ordinance. We referred to a statute that now provides that “[A]n improvement location permit for a structure . . . may not be issued unless the structure and its location conform to the municipal zoning ordinance.” Ind. Code § 36-7-4-801. We concluded “the only determination to be made by the [BZA in its grant or denial of an improvement location permit] was whether the proposed structures were in conformity with the requirements of the zoning ordinance.” Metro. BZA, 182 Ind. App. at 607, 395 N.E.2d at 1285.

Here, similar to Metro. BZA, we conclude the only determination to be made by the BZA was whether the LED panel that Lamar proposed conformed with the requirements of the zoning ordinance.² Although the BZA’s consideration of safety is prudent, in this case doing so was beyond its authority.

For the reasons stated, the BZA’s interpretation and application of the ordinance is inconsistent with the ordinance itself and with basic principles of statutory interpretation and not in accordance with law. Consequently, we decline to defer to the BZA interpretation and

² We recognize the LED panel did require a size variance, but this issue was not addressed in the BZA findings of fact and therefore is irrelevant to our review, as it was to the BZA’s.

agree with the trial court that Lamar's permit should have been approved.

Conclusion

The trial court correctly concluded Lamar's proposed LED panel is "one panel" under the ordinance. Therefore, we affirm the trial court's judgment approving Lamar's permit.

Affirmed.

MAY, J., and VAIDIK, J., concur.