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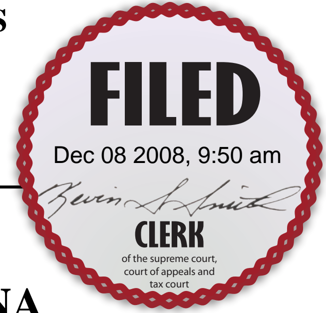

IN THE COURT OF APPEALS OF INDIANA

VIEW OUTDOOR ADVERTISING, LLC,

Appellant-Petitioner,

vs.

PORTER COUNTY BOARD OF ZONING APPEALS,

Appellee-Respondent.

No. 64A03-0804-CV-151

APPEAL FROM THE PORTER SUPERIOR COURT
The Honorable Roger V. Bradford, Judge
Cause No. 64D02-0606-CT-5189

December 8, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

View Outdoor Advertising, LLC ("View Outdoor"), appeals from the trial court's affirmance of a decision of the Porter County Board of Zoning Appeals ("BZA") denying it special exceptions for four billboards. On appeal, View Outdoor contends that the agency's decision was based upon improper considerations and that several of the BZA's findings were not supported by substantial evidence and explanations by the BZA. We conclude that aesthetics, the impact upon adjacent properties' values, and the size of a proposed billboard are all appropriate considerations for the BZA when ruling upon petitions for special exceptions and are supported by sufficient evidence and explanation. We also conclude that the BZA's consideration of the impact of one of the billboards upon public safety was based upon sufficient evidence. We therefore affirm.

Facts and Procedural History

The U.S. 30 Overlay Zone is an area bordering a stretch of U.S. 30 in Porter County. It consists of six hundred feet on both sides of U.S. 30 from Lake-Porter County Road to LaPorte-Porter County Road. Appellant's App. p. 219. The purpose of the U.S. 30 Overlay Zone is to "promote and protect the public health, safety, comfort, convenience and general welfare by providing for consistent and coordinated treatment of the properties" in the Overlay Zone. *Id.* It was "designed to preserve the aesthetic qualities" of the properties bordering U.S. 30. *Id.*

In order to erect a billboard in the U.S. 30 Overlay Zone, a prospective builder must obtain a special exception from the BZA. *Id.* at 220. View Outdoor applied for four special exceptions to permit advertising billboards in the U.S. 30 Overlay Zone.

After the BZA held a public hearing to consider the applications, the BZA denied each of View Outdoor's applications for special exceptions. View Outdoor filed a Verified Petition for Writ of Certiorari to the Porter Superior Court pursuant to Indiana Code § 36-7-4-1003, contending, among other things, that the BZA improperly considered evidence about the aesthetic impact of the proposed billboards and the impact of the billboards on adjacent properties' values and that the BZA's decision was arbitrary and capricious because it was contrary to the evidence. Appellant's App. p. 14, 18. The trial court held a hearing and subsequently issued an order denying relief, concluding that the BZA's findings were sufficient and that its rulings on the special exception applications were not arbitrary and capricious. *Id.* at 61. View Outdoor now appeals.

Discussion and Decision

The issue on appeal is whether the trial court erred in affirming the BZA's denial of View Outdoor's petition for four special exceptions. View Outdoor appeals an agency decision. When reviewing a decision of an administrative agency, appellate courts stand in the same position as the trial court. *John Malone Enters. v. Schaeffer*, 674 N.E.2d 599, 605 (Ind. Ct. App. 1996). A court may only reverse an administrative agency's action pursuant to the limitations provided by the Administrative Orders and Procedures Act

> if it determines that a person seeking judicial relief has been 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. We review the record in the light most favorable to the administrative proceedings and cannot reweigh the evidence. *John Malone Enters.*, 674 N.E.2d at 605. Because of an agency's expertise, judicial review of an agency decision is governed by a presumption that the agency's decision is correct. *Marion Teachers Ass'n v. Bd. of Sch. Tr. of Marion Cmty. Sch. Corp.*, 643 N.E.2d 370, 372 (Ind. Ct. App. 1994), *aff'd*, 672 N.E.2d 1363 (Ind. 1996). The party challenging the agency action bears the burden of establishing its invalidity. *John Malone Enters.*, 674 N.E.2d at 605.

Pursuant to Indiana Code § 36-7-4-915, the BZA is required to make written findings of fact when it rules on an application for a special exception. The BZA's findings must have evidentiary support and "be tailored to address the specific facts presented to the [BZA]." *Network Towers, LLC v. Bd. of Zoning Appeals of LaPorte County, Ind.*, 770 N.E.2d 837, 844 (Ind. Ct. App. 2002). We will not reverse an administrative finding of fact "unless it conclusively appears that the evidence upon which the decision was made was devoid of probative value or so proportionately inadequate that the finding could not rest on a rational basis." *Ind. Alcoholic Beverage Comm'n v. River Rd. Lounge, Inc.*, 590 N.E.2d 656, 658 (Ind. Ct. App. 1992), *trans. denied*. In the context of zoning proceedings, "evidence is substantial if it is more than a scintilla and less than a preponderance." *Rice v. Allen County Plan Comm'n*, 852 N.E.2d 591, 597 (Ind. Ct. App. 2006) (quotation omitted), *trans. denied*. Substantial evidence means such evidence "as a reasonable mind might accept as adequate to support a conclusion." *River Rd. Lounge*, 590 N.E.2d at 659. We look at the evidence "as a

whole" to determine whether the BZA's conclusions are clearly erroneous. *City of Indianapolis v. Hargis*, 588 N.E.2d 496, 498 (Ind. 1992).

Pursuant to the Porter County Code, the BZA shall issue a permit for a special exception if it finds that:

> 1. The proposed special exception is to be located in a district wherein such use may be permitted, and
> 2. The requirements set forth in Table 19 (Section 17.60.060) for such special exception will be met, and
> 3. The special exception is consistent with the spirit, purpose and intent of this title, will not substantially and permanently injure the appropriate use of neighboring property, and will serve the public convenience and welfare[.]

Appellant's App. p. 229 (quoting Porter County Code 17.060.030(A)). Likewise,

> upon a finding by the [BZA] that the special exception is not consistent with the spirit, purpose or intent of this title, may substantially or permanently injure the appropriate use of neighboring property, or will not serve the public convenience or welfare, the [BZA] shall disapprove the special exception.

Id. at 230 (quoting Porter County Code 17.060.030(C)). In denying each of View Outdoor's four special exception applications, the BZA relied variously upon the following considerations: "the negative effect the billboard signs would have on the aesthetic qualities of route 30[,]" *id.* at 62, 64, 66, 68; "[t]he effect on property values on the adjacent properties[,]" *id.* at 62, 64, 66, 68;[1] "the location [of one proposed billboard] being at the in[terse]ction of 2 & 30 in Porter County, Indiana is a heavily traveled

[1] In their appellate briefs, both parties treat this consideration as a finding by the BZA that the proposed billboards will have a negative impact upon the property values of adjacent properties. Thus, we do the same. It is also noteworthy that the BZA, in denying all four applications, acknowledged evidence presented by View Outdoor about a Florida study regarding the effect of billboards upon property values and found, "The Board didn't feel the issue of property values was clear as to whether or not the values would be adversely affected." Appellant's App. p. 63, 65, 67, 69. Because the Florida study pertains to the valuation of properties upon which billboards are actually located, this finding does not conflict with the BZA's finding regarding adjacent properties.

intersection and the placement of the sign would be difficult for the passing motorist to see[,] . . . potentially caus[ing] a dangerous situation at the intersection[,]" *id.* at 65; and "the size of [one proposed] billboard in relation to the other signs was much larger" and "[d]ue to the size difference . . . [one proposed billboard] was thought to be out of character for the area and therefore, was thought to not be a benefit for the health, safety, and welfare of the citizens of Porter County[,]" *id.* at 66-67. View Outdoor contends that these were all improper considerations for the purpose of determining whether to permit special exceptions for the proposed billboards. Specifically, View Outdoor argues (1) that the BZA's decision was improperly based upon aesthetics, that the BZA insufficiently explained its findings regarding this factor, and that the BZA's findings pertaining to this factor are not based upon sufficient evidence; (2) that the BZA improperly considered the effect of the proposed billboards upon adjacent properties' values, that the BZA insufficiently explained its findings regarding this factor, and that the BZA's findings pertaining to this factor are not based upon sufficient evidence; (3) that the BZA improperly found that one of the proposed billboards would have a negative impact upon public safety because such a finding is not supported by substantial evidence; and (4) that the BZA improperly considered the size of one of the proposed billboards and that insufficient evidence was presented to support the BZA's finding regarding the proposed billboard's size.

I. Aesthetics

In explaining its rejection of all four special exception applications, the BZA listed the "following specific consideration[]: . . . The language in the US 30 overlay district in

which, it states, that the overlay zone is needed to preserve the aesthetic qualities of the bordering property and the negative effect the billboard signs would have on the aesthetic qualities of route 30[.]" *Id.* at 62, 64, 66, 68. View Outdoor's challenge to this finding has three components.

View Outdoor first contends that the language of the Overlay Zone Ordinance prohibits the BZA from determining that billboards are impermissible in the Overlay Zone due to aesthetic concerns. The Overlay Zone Ordinance provides that "[b]illboards are permitted with a special exception." *Id.* at 220. According to View Outdoor, because the Overlay Zone is "designed to preserve the aesthetic qualities" of its adjacent properties, and because the Ordinance expressly allows for billboards with a special exception, "the legislative body already determined that billboards are in keeping with the aesthetic qualities of bordering property . . . ." Appellant's Br. p. 12.

We disagree. The Overlay Zone Ordinance does not provide that *all* billboards are permissible within the Overlay Zone. Rather, it provides that "[b]illboards are permitted *with a special exception*." Appellant's App. p. 220 (emphasis added). A special exception is only granted in the Overlay Zone when it "is consistent with the spirit, purpose and intent of [Porter County's zoning code], will not substantially and permanently injure the appropriate use of neighboring property, and will serve the public convenience and welfare[.]" *Id.* at 229 (quoting Porter County Code 17.060.030(A)). Certainly, the provision governing special exceptions envisions that billboards *may* fit these criteria, *see id.* at 241 (quoting Porter County Code 17.060.060 Table 19(v)), but a proposed billboard in the Overlay Zone must meet all of the criteria for special

exceptions, *id.* at 229. It is wholly appropriate for the BZA to consider the aesthetic qualities of a proposed billboard for which an applicant seeks a special exception in order to evaluate the effect of the billboard upon the public convenience or welfare. Thus, the BZA properly considered the aesthetic qualities of the four proposed billboards when ruling on the special exception applications.

View Outdoor next contends that, even if the BZA properly considered this factor, it insufficiently articulated its finding that the proposed billboards would have a negative impact upon the aesthetic qualities of U.S. 30. *Id.* at 62, 64, 66, 68. View Outdoor correctly observes that the BZA's findings of fact must provide a factual basis "tailored to address the specific facts presented" to the BZA for the grant or denial of a zoning petition. *Network Towers*, 770 N.E.2d at 844. View Outdoor argues that because the BZA included this finding as a justification for denying each of its four special exception applications, the finding is insufficiently tailored to the facts regarding each application. However, the BZA's findings in this regard are not "merely a general replication of the requirements of the ordinance at issue." *Id.* (quotation omitted). Instead, regarding each application, the BZA found that there would be a negative aesthetic impact of the billboard upon the surrounding portion of U.S. 30. Appellant's App. p. 62, 64, 66, 68. Further, the BZA incorporated the minutes of its meeting regarding the applications into each denial, and it is clear from these minutes that unique evidence was presented regarding each special permit application.

Finally, View Outdoor argues that, even if this is a permissible consideration and was sufficiently articulated, insufficient evidence was presented to support the BZA's

finding that the signs would negatively impact the local aesthetics. View Outdoor points out that the BZA fails to direct us to the evidence supporting its findings. Appellant's Reply Br. p. 3. This is true. However, we remain mindful of our deferential standard of review of administrative findings of fact: we will not reverse an administrative finding of fact "unless it conclusively appears that the evidence upon which the decision was made was devoid of probative value or so proportionately inadequate that the finding could not rest on a rational basis." *River Rd. Lounge*, 590 N.E.2d at 658. Further, we cannot reweigh the evidence, *John Malone Enters.*, 674 N.E.2d at 605, and we presume that the agency's decision is correct, *Marion Teachers Ass'n*, 643 N.E.2d at 372.

The record in this case reflects that evidence was presented regarding the aesthetic impact of each proposed billboard. In regard to application 06-SE-5, a remonstrator testified,

> [T]hink about the fact that as you come up the hill on Highway 30 coming into Valpo, this is like the gateway, and we're trying to do something nice here and to put up a billboard sign, even on the other side of this building, which I don't think would be appropriate either, you know, I really don't feel it's a good location.

Appellant's App. p. 100. Regarding application 06-SE-6, a remonstrator testified about his concern that erecting a billboard in that location would undermine beautification efforts at the entrance to the city of Valparaiso and recounted previous concerns by the BZA about the placement of billboards in that location. *Id.* at 109.[2] In regard to application 06-SE-7, remonstrators testified about the size of billboards in that area, and one argued that the "visual effect" of this proposed billboard would be detrimental to the

[2] Evidence was presented that two earlier special exception applications for a billboard at this site had been denied by the BZA, one of which was filed by View Outdoor in 2004. Appellant's App. p. 193.

local aesthetics. *Id.* at 114. Finally, regarding application 06-SE-8, View Outdoor's counsel stipulated "that all of [the remonstrators'] objections are the same as the old ones." *Id.* at 115. It was clarified that the parcel involved in application 06-SE-8 is located directly adjacent to the parcel affected by application 06-SE-7. *Id.* at 113-14. It is apparent that the BZA considered each application individually, and, upon reviewing the discussions surrounding each special exception application, we cannot say that the evidence upon which the findings were made was conclusively "devoid of probative value or so proportionately inadequate that the finding[s] could not rest on a rational basis." *River Rd. Lounge*, 590 N.E.2d at 658. The evidence is sufficient to support the BZA's findings that each proposed billboard would negatively impact the local aesthetics.

II. Adjacent Property Values

In explaining its rejection of all four special exception applications, the BZA listed the "following specific consideration[]: "[t]he effect on property values on the adjacent properties." Appellant's App. p. 62, 64, 66, 68. View Outdoor argues that the language of the special exception provision prohibits the BZA from considering whether a proposed billboard will affect adjacent properties' values. View Outdoor also contends that the BZA did not sufficiently articulate its findings that the proposed billboards would negatively impact the values of adjacent properties and that, even if it did, the evidence is insufficient to support these findings.

First, nothing about the language of the special exception provision prohibits the BZA from considering whether a proposed billboard will affect adjacent properties'

values. View Outdoor contends that, because Porter County's special exception provision requires that a special exception "not substantially and permanently injure the appropriate *use* of neighboring property," *id.* at 229 (emphasis added), and says nothing about property values, the BZA cannot consider the effect of a proposed special exception upon adjacent properties' values. We disagree. The special exception provision of the Porter County Code requires the BZA to deny a special exception application if it determines that the proposed special exception "will not serve the public convenience or welfare." *Id.* at 230 (quoting Porter County Code 17.060.030(C)). It is within the BZA's discretion to consider the impact of a proposed special exception upon the value of adjacent properties when evaluating whether a project will serve the public convenience or welfare.

Next, for the same reasons that we determined the BZA sufficiently articulated its findings pertaining to the impact of the proposed billboards upon the local aesthetics, we also conclude that the BZA sufficiently articulated its findings pertaining to the impact of the proposed billboards upon adjacent properties' values.

Finally, the evidence is sufficient to support the BZA's findings for each application that the proposed billboards would negatively impact adjacent properties' values. Regarding application 06-SE-5, a remonstrator explained that, because of space constraints, the billboard would either violate the setback requirements of the special exception provision or would encroach upon a neighboring property. *Id.* at 100. Further, the Inspection Committee of the Porter County Plan Commission (the "Inspection Committee") submitted a report to the BZA on application 06-SE-5, which substantiates

this observation of limited space and expresses concern about the effect of the proposed billboard upon a neighboring commercial building: "The proposed billboard's location will be very close to the commercial building and if this sign should fall to the West it will fall on the building." *Id.* at 180. Regarding application 06-SE-6, an Inspection Committee Report reveals that the proposed billboard on that site would be placed in a used car parking lot and that it was unclear how this would affect the use of the car lot. *Id.* at 193. During the portion of the BZA hearing pertaining to application 06-SE-7, remonstrators testified about the relative sizes of the signs in the proposed location, and one remonstrator, a business owner in the area, testified that the size of this proposed billboard would be detrimental to neighboring businesses because it would decrease their "line of sight." *Id.* at 112. While another individual testified that the proposed billboard would not negatively impact drivers' views of nearby businesses, the BZA was free to believe the remonstrator, and we cannot reweigh the evidence. Finally, in regard to application 06-SE-8, View Outdoor's counsel stipulated "that all of [the remonstrators'] objections are the same as the old ones." *Id.* at 115. This apparent lack of unique evidence regarding application 06-SE-8 does not, however, lead us to conclude that the evidence is insufficient that this proposed billboard would negatively impact adjacent properties' values because the parcel of land affected by application 06-SE-8 is adjacent to the parcel affected by application 06-SE-7. The testimony presented in opposition to application 06-SE-7 supports the BZA's finding in this regard pertaining to application 06-SE-8. The BZA's findings that the four proposed billboards would negatively impact adjacent property values are supported by sufficient evidence.

III. Public Safety

In addition to its challenges to the BZA's other factual findings regarding application 06-SE-6, which we have already discussed, View Outdoor challenges the following finding, unique to application 06-SE-6:

> [T]he location being at the in[terse]ction of 2 & 30 in Porter County, Indiana is a heavily traveled intersection and the placement of the sign would be difficult for the passing motorist to see. If the passing motorist did attempt to view the sign, it could potentially cause a dangerous situation at the intersection.

Id. at 65. View Outdoor contends that there is no evidence in the record to support this finding. To the contrary, during the BZA's discussion of this application, one BZA member noted the traffic congestion at the site of this proposed billboard, commenting, "[W]e've been through this particular site before and we've always come to the conclusion that it's a bad one, a lot of congestion." *Id.* at 110. The BZA member further observed, "I think this could be considered a dangerous location because of all the activity in the immediate area." *Id.* at 111. View Outdoor makes much of the fact that the remonstrators themselves did not present evidence of this traffic congestion.

View Outdoor is correct that "the BZA's decision to approve or deny an application should be based on the evidence presented at the hearing." *Ripley County Bd. of Zoning Appeals v. Rumpke of Ind., Inc.*, 663 N.E.2d 198, 205 (Ind. Ct. App. 1996), *reh'g denied*, *trans. denied*. However, as we have observed in the past, "we do not require BZA members . . . to attend [zoning application] meetings completely ignorant of the facts surrounding a particular petition." *City of Hobart Common Council v. Behavioral Inst. of Ind., LLC*, 785 N.E.2d 238, 253 n.14 (Ind. Ct. App. 2003). Further,

the BZA, when reviewing an application for a special exception, "has the authority to deny a special exception because the criteria are not met, even in the absence of evidence presented in opposition." *Rumpke*, 663 N.E.2d at 207 n.7. Here, the BZA members were aware of the traffic conditions of the proposed billboard's location. We cannot say that the BZA erred in finding that the proposed billboard's location is a danger to the public.

IV. Billboard Size

Finally, in addition to its challenges to the BZA's other factual findings regarding application 06-SE-7, which we have already discussed, View Outdoor challenges the following finding, which is unique to application 06-SE-7: "Due to the size difference . . . the sign was thought to be out of character for the area and therefore[] was thought to not be a benefit [to] the health, safety, and welfare of the citizens of Porter County." Appellant's App. p. 67. View Outdoor contends that the BZA impermissibly considered the proposed billboard's size and that insufficient evidence supports this finding.

View Outdoor contends that the BZA impermissibly considered the proposed billboard's size. It argues that, since Porter County has an ordinance provision governing the size of outdoor signs, the BZA cannot deny a special exception on the basis of a proposed billboard's size if it complies with the ordinance. We disagree. As we reasoned in response to View Outdoor's earlier argument that the BZA cannot consider the aesthetic impact of a proposed billboard, not *all* billboards are permissible within the Overlay Zone. Rather, "[b]illboards are permitted *with a special exception*," *id.* at 220 (emphasis added), and the BZA cannot grant a special exception in the Overlay Zone if it "will not serve the public convenience or welfare[,]" *id.* at 230 (quoting Porter County

Code 17.060.030(C)). It is entirely appropriate for the BZA to consider a proposed billboard's size when evaluating the effect of the billboard upon the public convenience or welfare.

View Outdoor argues that, even if the BZA properly considered the proposed billboard's size, insufficient evidence was submitted to support the BZA's finding that the proposed billboard, due to its size, would "be out of character for the area and therefore[] . . . [would] not be a benefit [to] the health, safety, and welfare of the citizens of Porter County." *Id.* at 67. During the hearing on application 06-SE-7, the BZA learned that the signs in the area of the proposed billboard were a similar size and that the proposed billboard would be much larger. *Id.* at 112, 114. One remonstrator argued that, because of the relative size of the proposed billboard, it would "stick out . . . like a sore thumb. . . . [I]t doesn't go with the lay of the land." *Id.* at 112. The remonstrator also argued that the proposed billboard would, because of its size, block passing motorists' view of other businesses' signs. *Id.* View Outdoor contends that this remonstrator's remarks constitute nothing more than speculation, which is insufficient to support a factual finding. *Network Towers*, 770 N.E.2d at 845. View Outdoor also contends that it "presented testimony that the sign would not in fact obstruct any other sign" and introduced "unrebutted evidence that the sign would benefit the community by providing local businesses with an additional means to advertise their goods and services." Appellant's Br. p. 19. We disagree with View Outdoor that the remonstrator's observations were mere speculation such that they cannot be used as evidence by the BZA. We recognize that this Court has previously reversed a BZA's factual finding

based upon "statements . . . limited to personal opinions based on aesthetic preferences only," but that was a factual finding "of an adverse impact on property values." *Network Towers*, 770 N.E.2d at 845. Here, the factual finding at issue is that the proposed billboard is a different size than other signs in the area and is "out of character" for the area. Appellant's App. p. 67. Opinion testimony is relevant to this inquiry, and we cannot say that the BZA impermissibly relied upon a remonstrator's testimony that the proposed sign would "stick out . . . like a sore thumb. . . . [and] [would]n't go with the lay of the land" because of its size. *Id.* at 112. To the extent that View Outdoor contends that the BZA should have more heavily weighed the testimony from its witnesses that the proposed billboard would not block motorists' views of other signs and that Porter County would benefit from more outdoor advertising, we will not reweigh the evidence. Sufficient evidence was presented to support the BZA's finding that the size of the proposed sign would be "out of character for the area and therefore[] . . . not . . . a benefit [to] the health, safety, and welfare of the citizens of Porter County." *Id.* at 67.

Conclusion

We conclude that aesthetics, the impact upon adjacent properties' values, and the size of a proposed billboard are all appropriate considerations for the BZA when ruling upon petitions for special exceptions and that the BZA's findings regarding these considerations are supported by sufficient evidence and explanations. We also conclude that the BZA's consideration of the impact of one of the billboards upon public safety was based upon sufficient evidence. The BZA's decision to deny View Outdoor's four

special exception applications was not arbitrary and capricious. We therefore affirm.

KIRSCH, J., and CRONE, J., concur.