

STATE OF INDIANA
IN THE RANDOLPH COUNTY CIRCUIT COURT

CHERYL THORNBURG, BILL THORNBURG,
TIM THORNBURG, & WANDA CARTER,

PLAINTIFFS,

V.

RANDOLPH COUNTY BOARD OF ZONING
APPEALS, & RYAN BURK,

DEFENDANTS.

CAUSE NO: 68C01-2207-PL-000457

FILED

JAN 04 2023

RANDOLPH CIRCUIT COURT

ORDER AFFIRMING BZA DECISION

Cheryl Thornburg, Bill Thornburg, Tim Thornburg, and Wanda Carter (the “Petitioners”) filed a verified petition asking for judicial review of the decision by the Randolph County Board of Zoning Appeals (“BZA”) to grant Ryan Burk (“Burk”) a variance to build two proposed turkey barns closer to Carter’s residence than normally allowed by county setback rules. The parties filed briefs and attended oral argument on December 5, 2022. The Court now denies the judicial appeal and affirms the BZA’s decision.

I. Standing.

For purposes of this Verified Petition for Review, the Court will presume that all Plaintiffs have standing to be parties to this action.

II. Merits.

This Court presumes the determination of the BZA, an administrative agency with expertise in zoning matters, is correct. *Midwest Minerals Inc. v. BZA of Vigo County*, 880 N.E.2d 1264, 1268 (Ind. Ct. App. 2008). The Court will reverse only if the BZA’s decision is arbitrary, capricious, or an abuse of discretion. *Id.* The Court will not reweigh the evidence or

substitute its decision for that of the board. *Id.* Petitioners labor under a heavy burden in persuading this Court to overturn the BZA's decision. *Id.*; I.C. § 36-7-4-1614(a). Unless the BZA's decision was illegal, it must be upheld. *McBride v. BZA of Evansville-Vanderburgh Area Plan Com.*, 579 N.E.2d 1312, 1315 (Ind. Ct. App. 1991); *I-465, LLC v. Metro. BZA Div. II of Marion Cnty.*, 36 N.E.3d 1094, 1098 (Ind. Ct. App. 2015) (affirming use variance).

The variance complies with Indiana and Randolph County zoning requirements. A variance may be granted upon a BZA's 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.

I.C. § 36-7-4-918.5. The county's variance requirements are identical. RCZO Art. XVIII(3).

The approval will not be injurious. Based on evidence presented to it, the BZA determined the two proposed barns will be farther away from the subject residence than the existing barns. The Burk parcel and all adjacent properties are zoned "Ag-Intensive." (Findings ¶ 1.) Petitioners contend they noticed flies and odors from the existing barns. There was no evidence the existing barns have caused any problems related to public health, safety, morals, and general welfare of the community. Burk presented evidence of how the state regulates livestock farms to protect the environment. The Randolph County community decided to zone Burk's land and all the adjacent or relevant properties as Ag Intensive—meaning the County has decided that confined feeding is an intended, expected, and encouraged use of these properties. (Rec. 124.) The BZA held the proposed barns would not impact the use or value of the surrounding properties compared to those properties if the proposed barns were not built. (Rec. 112.) This Court must accept the facts as found by the

BZA. *Lockerbie Glove Factory Town Homeowners Ass'n Inc. v. Indianapolis Historic Pres. Comm'n*, 106 N.E.3d 482, 489 (Ind. Ct. App. 2018). This Court will not “try the cause de novo or substitute its judgment for that of the board.” I.C. § 36-7-4-1611. The BZA’s finding that the variance would not be injurious to the community is reasonable and will not be disturbed.

Adjacent property will not be affected in a substantially adverse manner. Burk’s property is zoned “Agricultural-Intensive.” (Rec. 1, 109.) The Petitioners’ properties are also zoned Ag Intensive. (Rec. 99, 112.) Primary uses in the Ag Intensive zone include barns, commercial wind energy, livestock farms—including confinement operations, satellite manure storage structures, greenhouses, fish hatcheries, and other typical agricultural uses. RCZO Art. III Table 3.I-01.1. The areas adjacent to the proposed barns are all used as agricultural or farming properties and therefore their value will not be substantially impacted. (Rec. 100, 104-105.) The Petitioners must take their properties as they exist now—with the existing barns. The Randolph County Zoning Ordinance and Comprehensive Plan support the establishment and development of confined feeding in A-I spaces. Art. III 3.I-01-D. The county has put rural residents on notice that confined feeding may exist, expand, enlarge, or intensify in Ag Intensive areas. Art. III 3.13(a). CFOs are a key economic resource for the county. Comp. Plan pp. 38-39. The Comprehensive Plan ensures agricultural land is used for agricultural purposes and therefore reaches its maximum potential. *Id.*

There was no genuine evidence the addition of the proposed barns would substantially negatively impact the use or value of the adjacent agricultural parcels compared to the situation today with the two existing barns. (Rec. 118-120.) The BZA considered Carter’s statement that she had “heard” her property value would decrease and

weighed it against the studies presented by Burk analyzing the impact of confined feeding operations on non-town property values. See Indiana Business Research Center, Kelley School of Business, Indiana University, *The Effect of Regulated Livestock Operations on Property Values in Selected Indiana Counties*, (2008). (Rec. 22, 100, 118-119.) The study concluded that, on average, each livestock operation within one mile of a non-town residence increased sale price by \$12,700. (Rec. 24.) The BZA heard evidence that the Proposed Barns will bring additional jobs and increased tax revenues to Randolph County. (Rec. 22, 100, 118-119.) Livestock farms are businesses with large inputs (labor, feed, construction, etc.). (*Id.*) Sourcing these inputs can have a multiplier effect on local employment. (*Id.*)

Petitioners contend the BZA ignored the reasons the county amended its ordinance to create confined feeding setbacks. But nothing in the 900 series allows a legislative body to limit or prevent the BZA from exercising its ability to grant a variance under § 918.4 or 918.5. Further, in *Strange v. Board of Zoning Appeals*, 428 N.E.2d 1328 (Ind. Ct. App. 1981), the Court of Appeals voided an ordinance that limited the BZA's ability to grant variances. The limitation of authority by the BZA was not allowed by statute. *Id.* The BZA here was aware of the setback ordinance—it is the very reason Burk requested a variance. Nothing in the setback ordinance restricts the BZA's ability to grant variances (nor could it).

The BZA considered all this evidence and concluded that the addition of the proposed barns would not substantially impact the use or value of the adjacent agricultural parcels as compared to the current situation. (Rec. 112 ¶¶ 32-35.) The Petitioners have not identified any reason for this Court to substitute its judgment for that of the BZA.

Strict application would result in practical difficulties. Randolph County has provided guidance for considering whether a “practical difficulty” exists. The BZA must take into consideration the extent to which the following conditions have been established:

- (a) That the particular physical surroundings, shape or topographical conditions of the specific property involved would result in a particular difficulty upon the owner, as distinguished from a mere inconvenience, if the strict letter of the regulations were carried out;
- (b) That the conditions upon which the requested variation is based would not be applicable, generally, to other property within the same zoning classification; and,
- (c) That the alleged difficulty has not been created by any person presently having an interest in the property.

RCZO Art. XVIII(4). The conditions are not exclusive or exhaustive. *Caddyshack Looper, LLC v. Long Beach Advisory BZA*, 2 N.E.3d 694, 704 (Ind. Ct. App. 2014).

Burk presented evidence that if he did not obtain the variance, he could not build the two proposed barns. (Rec. 112, 117-19, 122-23.) This is a practical difficulty. Being unable to use his property to build the proposed barns because of the particular physical surroundings would cause economic hardships for Burk and family and would undermine his ability to continue farming in Randolph County. (Rec. 100, 117-19.) The water infrastructure for the proposed barns is already constructed at Burk’s property. (Rec. 117.) Burk chose this location because at the time he started construction of the existing barns in the summer of 2015, his property met all setbacks and all zoning requirements. (Rec. 100, 117, 119.) Burk did not create his own difficulty. No one presented any evidence that there is any other site in the county where barns were built under the old ordinance, then the setbacks changed, then the farmer wanted to build additional barns farther away from the nearest residence and was required to obtain a variance to do so. As required, the BZA took

these conditions into consideration, deliberated on the evidence, and concluded a practical difficulty existed.

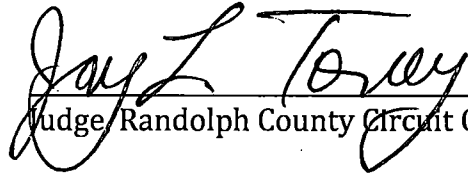
If the Court were permitted to weigh all of the evidence in this matter, and then make an independent decision as to whether the variance should have been granted, the Court may very well have made a different decision in this matter than the Board of Zoning Appeals made. However, the Court is not permitted to reweigh the evidence or substitute its discretion for that of the BZA.

III. Conclusion.

Petitioners have not established a “clear error of law.” The Court affirms the BZA’s determination.

SO ORDERED.

Date: January 4, 2023


Judge, Randolph County Circuit Court

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