BEFORE THE SHELBYVILLE BOARD OF ZONING APPEALS

CASE NO. BZA 2020-12

IN THE MATTER OF THE ADMINISTRATIVE APPEAL BY)
)
BURNSIDE LLC & SUMMERFORD LAND TRUST I)

OBJECTION TO PETITIONER'S REQUEST TO PRESENT ADDITIONAL EVIDENCE

Adam Rude, Director of Planning and Building for the City of Shelbyville ("Director"), by counsel, objects to the admission of additional evidence after the hearing has been closed by the BZA. The Petitioner (a) failed to show good cause why such evidence should be admitted after both parties had an opportunity to present evidence and submit proposed findings of facts and conclusions of law based on such evidence and (b) the proffered evidence is irrelevant, immaterial, or unduly repetitious. For any of those reasons, the proffered evidence should be ignored by the BZA and, in support of his objection, the Director, states the following:

1. This matter originally came for hearing before the BZA on January 12, 2021.

2. The Petitioner appeared remotely in person and by counsel.

3. At the hearing, the Petitioner presented evidence supporting the appeal of the Director's Notice of Violations of the Unified Development Ordinance ("UDO").

4. The BZA closed the hearing and requested proposed findings of fact and conclusions of law within two weeks for the BZA's consideration.

5. Each party submitted its proposed findings of fact and conclusions of law on January 26, 2021.

6. Then, on February 3, 2021, the Petitioner's attorney sent a statement signed by Michele Hansard to the BZA's attorney, which statement is neither sworn nor witnessed by a notary public.

7. The Petitioner's correspondence to the BZA's attorney indicated in pertinent part that the "Petitioner requests that [the statement] be considered in rendering the Board's decision on this matter pursuant to Section 9.04(D) of the [UDO] and added to the record of these proceedings."[1]

[1] The provision of the UDO cited by the Petitioner provides no basis for the admission of evidence after the hearing. The UDO states at 9.04(4) "Review: The Board of Zoning Appeals

8. The Director objects to the consideration of the statement on the following grounds:

a. no good cause exists to show why Ms. Hansard's statement should be accepted after the Petitioner already had an opportunity to present evidence on January 12, 2021, and after the parties submitted their proposed findings of fact and conclusions of law on January 26, 2021; and,

b. the evidence contained in the statement is irrelevant, immaterial, or unduly repetitious.

9. The Director's first objection relates to the fact that the Petitioner wholly failed to present any good cause for the submission of the statement of Michele Hansard after the hearing.

10. The BZA's Rule and Procedures provide for the submission of written statements at the hearing, not after the hearing. See 9.1(E)(1) and (2).

11. The decision to accept additional evidence after a hearing is left to the discretion of the administrative board, and a party offering additional evidence must show good cause why such evidence should be accepted and why it was not introduced before the board at the hearing. See 1 Ind. Law Encyc. Administrative Law and Procedure § 47, citing ***Telligman v. Review Bd. of Indiana Dept. of Workforce Development***, 996 N.E.2d 858 (Ind. Ct. App. 2013). [2]

12. The correspondence from the Petitioner's attorney indicated that the "statement was not available to the Petitioner at the time of the hearing."

13. More enlightening, however, is Ms. Hansard's assertion that "[n]o one contacted me to make this statement."

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shall hear the Administrative Appeal at a regularly scheduled public meeting according to their Rules and Procedures. The Board of Zoning Appeals may consider information conveyed to them in writing and testimony **during the hearing** in making a decision." (Emphasis Added). A correct reading of this provision of the UDO calls for the BZA to disregard Ms. Hansard's statement because nobody presented the information from Ms. Hansard **during** the hearing.

[2] Like other jurisdictions, Indiana appellate court's have considered the rules and principles embodied in the Administrative Orders and Procedures Act ("AOPA") when reviewing zoning decisions. See ***Howard v. Allen Cty. Bd. of Zoning Appeals***, 991 N.E.2d 128, 130 (Ind. Ct. App. 2013) (relying on AOPA case law when considering the propriety of a decision on a use variance). The principles embodied in AOPA have been considered highly pertinent to the review of a zoning board decision. Accord ***Whiteco Outdoor Advertising v. Johnston County Bd. of Adjustment***, 132 N.C. App. 465, 513 S.E.2d 70 (1999) (Because it is not a state agency, a zoning board is not subject to state administrative procedure and rules statutes, but the AOPA provides relevant rules, procedures and precedent when it comes to zoning matters).

14. In other words, notwithstanding several hearing continuances, Petitioner made no effort of any kind to obtain information from Ms. Hansard prior to the January 12, 2021, hearing, let alone the January 26, 2021, deadline to submit proposed findings of fact and conclusions of law.

15. Not surprisingly, the BZA's Rules of Procedures encourage the expedient consideration of matters.

16. For instance, the BZA's Rules of Procedures contemplate testimony with precise time limits at one hearing, not multiple hearings.

17. The BZA, as well as the Planning Department, have finite resources, including but not limited to time.

18. Prior to January 12, 2021, the hearing had been continued twice already.

19. Opening the hearing for the admission of additional evidence after multiple hearing continuances completely defeats the spirit of the BZA's rules of procedure.

20. Moreover, allowing additional evidence after both parties have expended valuable resources in connection with the development of their proposed findings of fact and conclusions of law, simply opens the door for a party to find new evidence to shore up its case after the opposing party may have pointed out how they failed to meet their burden of proof.

21. The Director's second objection relates to the fact that the statement is irrelevant, immaterial, or unduly repetitious and the BZA should disregard it.

22. Upon proper objection, like an administrative law judge who must exclude evidence that is irrelevant, immaterial, or unduly repetitious, a BZA should likewise exclude evidence that is irrelevant, immaterial, or unduly repetitious, especially after the hearing is closed for the presentation of additional evidence. ***1 Ind. Law Encyc. Administrative Law and Procedure § 47, citing IC 4-21.5-3-26(a)***.

23. Ms. Hansard's statement contained information that is irrelevant, immaterial, and unduly repetitious insofar as she claims that she, as a former Deputy Director, as well as the former Director, had knowledge of potential zoning violations and did nothing about it between the years of 2005 and 2015.

24. Her unverified and unnotarized statements, even if true with respect to the state of mind of the former Director, resembled statements contained in Mr. Summerford's affidavit

which implied that prior planning officials knew about the use of the subject properties and never told him that such use constituted a violation.

25. The mere failure to bring enforcement actions against others who may be violating the zoning ordinance does not excuse Petitioner's alleged violations or bar the Director from enforcing the UDO against the Petitioner. See ***Metro. Dev. Comm'n of Marion Cty. v. Schroeder***, 727 N.E.2d 742, 756 (Ind. Ct. App. 2000).

26. As properly noted in ***Hameetman v. City of Chicago***, 776 F.2d 636 (7th Cir.1985), "[t]he Constitution does not require states to enforce their laws (or cities their ordinances) with Prussian thoroughness as the price of being allowed to enforce them at all. Otherwise few speeders would have to pay traffic tickets." 776 F.2d at 641; See also S & S Enterprises, Inc. v. Marion Cty. Bd. of Zoning Appeals, 788 N.E.2d 485, 494 (Ind. Ct. App. 2003)(even though the BZA previously granted the special exception to an applicant, an extension of the special exception is not mandated.)

27. Moreover, this line of evidence, in addition to being irrelevant and unduly repetitious, is immaterial in face of the well-established principle that "[p]roperty owners are charged with knowledge of ordinances that affect their property." ***Terra Nova Dairy, LLC v. Wabash Cty. Bd. of Zoning Appeals***, 890 N.E.2d 98, 105 (Ind. Ct. App. 2008) citing ***Story Bed & Breakfast, LLP v. Brown County Area Plan Comm'n***, 819 N.E.2d 55, 64 (Ind.2004); see also ***Town Council of New Harmony v. Parker***, 726 N.E.2d 1217, 1226 (Ind.2000) (same), amended on reh'g on other grounds, 737 N.E.2d 719; ***Bd. of Zoning App. v. Leisz***, 702 N.E.2d 1026, 1030 (Ind.1998) (same).

Wherefore, for the reasons stated above, the Director asks the BZA to exclude from consideration the statement of Ms. Hansard.

Respectfully submitted,
VAN VALER LAW FIRM, LLP

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