NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION IV

MASONRY CONTRACTORS, INC., an Oklahoma for Profit Business Corporation,

Plaintiff/Appellee,

vs.

THE CITY OF OKLAHOMA CITY BOARD OF ADJUSTMENT, a Municipal Board of Adjustment,

Defendant/Appellant.

Case No. 120,029

APPEAL FROM THE DISTRICT COURT OF
OKLAHOMA COUNTY, OKLAHOMA

HONORABLE CINDY TRUONG, DISTRICT JUDGE

REVERSED

David M. Box
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Oklahoma City, Oklahoma — For Defendant/Appellant

OPINION BY GREGORY C. BLACKWELL, PRESIDING JUDGE:

The City of Oklahoma City Board of Adjustment appeals the district court's reversal of the board's denial of Masonry Contractors, Inc.'s variance requests related to a billboard on Masonry's lot. Because the board could have reasonably found that the requested variances would impair the purpose and intent of the

applicable ordinances, the trial court's reversal of the board's denial must be reversed.

BACKGROUND

The parties stipulated to the relevant facts. *See* R. 380 ("Joint Stipulations). Masonry owns a lot near I-40 in downtown Oklahoma City. The lot sports an existing fifty-foot billboard. Fifty feet is generally the maximum height of a billboard for the lot, as zoned. *See* Oklahoma City Municipal Code, Chapter 3, Article V, § 119(3). Additionally, the lot is within a region of Oklahoma City designated as the "Downtown Scenic Highway Area." Although the ordinance establishing the scenic area allowed preexisting signs such as Masonry's (which were declared to be "nonconforming"), it disallowed both any new billboard (at any height) and existing signs that are "altered in any manner that increases the degree of nonconformity ...." Oklahoma City Municipal Code, Chapter 3, Article V, § 119(8)(c).

Due to the reconstruction of the I-40 and Western Avenue interchange, Masonry's fifty-foot billboard could no longer be seen from the interstate. The company filed an application seeking variances from the ordinances referenced above. They sought variances that would allow them to construct a ninety-foot billboard in place of the existing fifty-footer. While the parties do not so stipulate, we assume for purposes of this opinion that ninety feet is the lowest height from which travelers on I-40 would be able to see a billboard erected on Masonry's lot.

The variance application was forwarded to the Oklahoma City Development Services Department for review. A staff report was created noting that the "[e]levation of the highway may somewhat obscure view of the sign," but that the "proposed

height far exceeds the maximum allowed." The board denied the application in April 2020.

Masonry filed an appeal in Oklahoma County district court pursuant to 11 O.S. § 44-110. The district court found that Masonry satisfied the statutory conditions for variance approval pursuant to § 44-107 and reversed the board's decision to deny the variances. The board appealed.

STANDARD OF REVIEW

> This Court has generally characterized proceedings in district court on appeals from Boards of Adjustment in zoning matters as being equitable in nature, and we have recognized that the question on review is whether the judgment of the district court is clearly contrary to the weight of the evidence. A presumption of correctness attaches to the Board's decision when it has been affirmed by the district court which should be given great weight. The Board's decision should not be overturned unless it is arbitrary or clearly erroneous. The reviewing court may not simply substitute its judgment and discretion. We agree that we must defer to the trial court's factual findings if they are supported by the evidence. However, because the determination of whether a nonconforming use has changed involves the application of the established facts to a legal standard, it is as a question of law which should be reviewed *de novo*.

Triangle Fraternity v. City of Norman, ex rel. Norman Bd. of Adjustment, 2002 OK 80, ¶ 11, 63 P.3d 1, 5 (footnotes removed).

ANALYSIS

Variances "may be granted" by the board of adjustment only upon the finding of each of these four elements:

1. The application of the ordinance to the particular piece of property would create an unnecessary hardship;
2. Such conditions are peculiar to the particular piece of property involved;
3. Relief, if granted, would not cause substantial detriment to the public good, or impair the purposes and intent of the ordinance or the comprehensive plan; and

4. The variance, if granted, would be the minimum necessary to alleviate the unnecessary hardship.

11 O.S. § 44-107. Thus, in order to reverse the denial of the variance below, the district court was required to find (among the other elements) that the variance "would not ... impair the purposes and intent of the ordinance or comprehensive plan ...." *Id.* Even setting aside the board's compelling argument regarding its comprehensive plan,[1] as well as its arguments related to the other three elements, it is clear that Masonry could not show its requested variance satisfied this requirement as to the relevant ordinances.

As noted above, one of the relevant ordinances outlaws any new sign and disallows even existing signs (which are defined as nonconforming) that are "*altered in any manner that increases the degree of nonconformity* ...." Oklahoma City Municipal Code, Chapter 3, Article V, § 119(8)(c) (emphasis supplied). It is beyond dispute that raising the height of an already nonconforming sign from fifty feet to ninety feet will "increase the degree of nonconformity." Indeed, it will do so by a precisely quantifiable measure: 80 percent. The trial court's conclusion that the board could not have found that this very substantial increase in nonconformity would not impair any purpose of the ordinance—which, among others, is "to promote and enhance the beauty, order and attractiveness of the City to residents,

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[1] In 2015, Oklahoma City adopted a comprehensive plan—planOKC—which is "a policy document used by city leaders, developers, business owners, and citizens to make decisions about future growth, development, policy, and capital improvements." *Defendants Exhibit 11*, pg. 4. It provides "long range policy direction for land use ... and serves as a guide for elected and public officials by establishing policies and priorities, and establishing a framework for evaluating developmental proposals." *Id.* The plan specifically addresses billboards and declares a policy, among others, to "restrict new billboards and eliminate or reduce the number of existing billboards ...." *Id.* at 368 (emphasis removed).

tourists and visitors," Oklahoma City Municipal Code, Chapter 3, Article V, § 119(8)(a)—was clearly erroneous and must be reversed.[2]

REVERSED.

WISEMAN, J. (sitting by designation), concurs, and FISCHER, J., dissents.

FISCHER, J., dissenting:

This is not, as the City argues, a case in which Masonry Contractors seeks a variance to install a 90-foot billboard in the City's Downtown Scenic Highway Area where only 50-foot billboards are permitted. What Masonry Contractors seeks is permission to replace the billboard at its location with a billboard that is as visible as the 50-foot billboards installed at the other locations in the Downtown Scenic Highway Area the City has already permitted.

On this issue, Masonry Contractors' evidence is undisputed that location of a 50-foot billboard on this property "would not cause substantial detriment to the public good, or impair the purposes and intent of the ordinance or the comprehensive plan." 11 O.S.2021 § 44-107(3). The City has permitted the location of at least fifteen 50-foot billboards in its Downtown Scenic Highway Area, including one 100-foot billboard. Masonry Contractors' evidence established that a 50-foot billboard at its location is no longer visible due to construction of the Western Avenue overpass exchange which elevated the highway at Masonry

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[2] The dissenting opinion states that "[t]he city has permitted the location of at least fifteen 50-foot billboards in its Downtown Scenic Highway Area, including one 100-foot billboard." It should be noted that nothing in the record suggests that any of these other signs were authorized by variances *after* the implementation of the Downtown Scenic Highway Area. Rather, it appears that these signs, like the sign under review here, are preexisting nonconforming signs that were grandfathered into the scenic overlay.

Contractors' location. The City's own staff agreed in its report to the Board: "Elevation of the highway may somewhat obscure view of the sign." Even before the highway at Masonry Contractors' location was elevated, the City agreed that a 63-foot sign could be erected at this location without causing "substantial detriment to the public good, or impair the purposes and intent of the ordinance or the comprehensive plan." 11 O.S.2021 § 44-107(3). However, Masonry Contractors' unrefuted evidence established that after the highway was elevated, a 90-foot billboard was the minimum height necessary to make Masonry Contractors' billboard as visible as the other 50-foot billboards the City has allowed in its Downtown Scenic Highway Area.

Masonry Contractors' appeal of the Board of Adjustment's denial of its application for a variance was tried to the district court de novo.[1] *See* 11 O.S.2021 § 44-110(D) ("The appeal shall be heard and tried de novo in the district court."). "The trial court must conduct a de novo inquiry and it has the same power as the Board to grant or to deny a variance." *Vinson v. Medley*, 1987 OK 41, ¶ 10, 737 P.2d 932, 938 (footnotes omitted).

At the trial, Masonry Contractors introduced evidence to meet all four statutory requirements for obtaining a reversal of the Board's decision.[2] The evidence

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[1] After the trial before the district court, the parties stipulated to certain matters, primarily the applicable City ordinances and Masonry Contractors' statutory burden to obtain reversal of the Board's decision. R. 380. The stipulation did not address the facts the district court found in reversing the Board's decision.

[2] As the parties stipulated, 11 O.S.2021 § 44-107 provides that a party must meet four criteria to obtain reversal of the Board's decision in the district court: (1) unnecessary hardship; (2) conditions peculiar to the property; (3) relief would not impair the purposes and intent of

was centered on the visibility of the current sign and Masonry Contractors' contention that a 90-foot billboard was the minimum necessary variance to resolve the hardship. The district court heard this evidence and had the opportunity to observe the demeanor of the witnesses at the hearing on Masonry Contractors' appeal of the Board's denial of its request for a variance. This Court has not. "[T]he trial judge, who sees and hears the witnesses . . . and observes their demeanor on the witness stand, is in a much better position than this court to determine the facts." *Taylor v. Taylor*, 1963 OK 263, ¶ 15, 387 P.2d 648, 651.

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the ordinance; and (4) the variance would be the minimum necessary to alleviate the unnecessary hardship.

§ 44-107(1): It is undisputed that without the variance, the hardship imposed on Masonry Contractors is its inability to use a portion of its property for a purpose previously approved by the City, depriving it of a previous source of revenue. Masonry also introduced testimony that limited visibility or physical obstruction of a sign has been considered a hardship by the Board in other variance cases.

§ 44-107(2): Masonry Contractors presented evidence that this particular property is "almost inverted" and that the recent improvements to the overpass interchange rendered the existing sign unreadable to highway traffic. The grade elevation at the base of the existing sign is approximately 32 feet below the grade elevation on the Western Avenue overpass. Masonry presented evidence that "the vast majority" of nearby billboards fifty feet or higher along I-40 were fully visible from the bottom of the sign pole to the top of the sign face.

§ 44-107(3): The Board claims that Masonry created the peculiarity at issue in this case by placing the billboard on the property in the first place. This argument is without merit. The existing sign at issue was erected in 2004. It is undisputed that the existing sign was already in place before the Downtown Scenic Highway Area overlay was adopted and long before the Western Avenue overpass exchange elevated the highway to a point where it obscured the billboard. In addition, Masonry Contractors introduced evidence that the variance would not cause substantial detriment to the public good or frustrate the purpose and intent of the ordinance or comprehensive plan for two reasons. First, in terms of visibility, the 90-foot billboard is consistent with the height of the fifteen other billboards the City has permitted in the area. Second, the billboard would not increase "sign clutter" because the number of billboards would stay the same and the display area of the billboard would not increase.

§ 44-107(4): The City did not dispute Masonry Contractors' evidence from the crane study that a 90-foot sign was the minimum height necessary for its billboard to be as visible as the billboards approved by the City in the Downtown Scenic Highway Area.

The district court reversed the Board's denial of Masonry Contractors' application for a variance. The issue in this appeal is not whether the Board "could have reasonably found that the requested variances would impair the purpose and intent of the applicable ordinances," as described by the Majority. The issue in this equitable proceeding is whether the district court's judgment was "clearly contrary to the weight of the evidence." *Triangle Fraternity v. City of Norman, ex rel. Norman Bd. of Adjustment*, 2002 OK 80, ¶ 11, 63 P.3d 1, 5 (footnote omitted). "[T]he judgment of the district court will not be reversed unless clearly against the weight of the evidence." *Banks v. City of Bethany*, 1975 OK 128, ¶ 6, 541 P.2d 178, 180 (citation omitted). Because the Majority has not shown that the judgment of the district court was "clearly against the weight of the evidence," I respectfully dissent.[3]

December 6, 2023

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[3] I also reject the City's argument, and the Majority's implicit determination, that the district court was required to find that the Board acted arbitrarily before reversing the Board's decision. There is no such requirement in this case. "[W]here the Board's decision was reversed, the presumption that originally attached to its validity is to be considered as having been overcome by the adverse ruling of the trial court. . . . [U]nless clearly contrary to the weight of the evidence, the district court's ruling will not be overturned." *Bankoff v. Bd. of Adjustment of Wagoner Cnty.*, 1994 OK 58, ¶ 19, 875 P.2d 1138, 1143 (footnotes omitted). "The reviewing court may not simply substitute its judgment and discretion." *Triangle Fraternity*, 2002 OK 80, ¶ 11, 63 P.3d 1, 5 (footnote omitted). The City's position, as well as its reliance on *Barnes v. Board of Adjustment*, 1999 OK CIV APP 76, 987 P.2d 430, is clearly contrary to the equitable power of the district court in this case "to grant or to deny a variance" based on its de novo review of the evidence presented during the appeal. *Vinson v. Medley*, 1987 OK 41, ¶ 10, 737 P.2d 932, 938.