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IN THE
COURT OF APPEALS OF INDIANA

David K. and Jane A. Burton, *et al.,*

Appellants-Petitioners,

v.

Board of Zoning Appeals of Madison County, and Lone Oak Solar, LLC,

Appellees-Respondents.

June 21, 2021

Court of Appeals Case No. 20A-MI-2186

Appeal from the Madison Circuit Court

The Honorable Mark Dudley, Judge

Trial Court Cause Nos. 48C06-1910-MI-922 & 48C06-1906-MI-414

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellants-Petitioners, David and Jane Burton, Bob and Jean Mills, Curtis and Rebecca Harrison, Kara and Richard Brown, Ross and Katrina Hunter, Joshua Hiday, John Doe, and Jane Doe (collectively, Neighbors), appeal the trial court's denial of their petition for judicial review in favor of Appellees-Respondents, the Board of Zoning Appeals of Madison County (BZA) and Lone Oak Solar Energy, LLC (Lone Oak) (collectively, Respondents).

[2] We affirm.

ISSUES

[3] Neighbors present the court with four issues, which we restate as:

(1) Whether a BZA member's failure to meet residency requirements invalidated her vote;
(2) Whether a second BZA member had a conflict of interest or bias which invalidated her vote;
(3) Whether the BZA's grant of two special use applications was clearly erroneous; and
(4) Whether the BZA's grant of two setback variances was clearly erroneous.

FACTS AND PROCEDURAL HISTORY

[4] Lone Oak is a wholly-owned subsidiary of Invenergy, which has developed 125 large-scale energy facilities, including twenty-six solar projects. This case stems

from Lone Oak's putative development of a 120-megawatt solar energy farm (the Project) in rural Madison County, Indiana. The Project was originally designed to involve the installation of solar panels over approximately 900 acres of land which Lone Oak had leased in thirty-five parcels from twenty-three landowners. Some of the leased parcels are contiguous. All the land leased by Lone Oak for the Project was zoned as agricultural, as is the great majority of the land adjacent to the Project. The Project's design includes a Decommissioning Plan and a Soil Reclamation Plan to return the land to agricultural viability after approximately thirty-five years. The Project is to include landscaping and buffering from non-participating landowners. The completed solar facility is to be staffed with three solar technicians during regular work hours, and traffic on the site is projected to be light-duty pickups and passenger vehicles.

[5] In March of 2019, in furtherance of the Project, Lone Oak submitted three applications (Original Applications) to the BZA: (1) a Special Use Application (SUA) seeking to allow the Project on land zoned for agriculture; (2) an application seeking to remove, between participating landowners' parcels, mandatory 25-to-30-foot property-line setbacks for structures so that the Project could be built as a seamless solar field (Setback Variance); and (3) an application not at issue in this appeal seeking to extend the three-year maximum starting period for the Project.

[6] Pursuant to Indiana statute and Madison County Ordinance, the BZA is a five-member board which must render decisions by majority. Beth VanSickle

(VanSickle) and Mary Jane Baker (Baker) were both members of the BZA, with Baker serving as Chair. On April 23, 2019, and May 16, 2019, the BZA held public hearings on the Original Applications. Baker did not participate in the hearings, as she had voluntarily recused herself because a friend of hers owned land that was to be used in the Project. Lone Oak and members of the public provided their input at the hearings. On May 28, 2019, the BZA held a third public hearing on the Original Applications, at the conclusion of which it voted 3-1 in favor of the SUA and 4-0 in favor of the variances, including the Setback Variance. VanSickle participated and voted to approve all the Original Applications, but Baker did not participate in the vote. The SUA and the Setback Variance were approved with the conditions that no solar panels could, without the landowner's consent, be located closer than 500 feet from a non-participating landowner's residence or closer than 200 feet from a non-participating landowner's property line. These conditions resulted in a decrease of the number of solar panels which could be installed in the Project. The BZA also required that Lone Oak comply with its Decommissioning Plan, including posting a $5.6 million decommissioning bond, and plant additional trees and vegetation if requested by a non-participating landowner with a sight line to a solar panel. Additionally, Lone Oak was to refrain from physically expanding the Project except as required by the increased setbacks conditions, increasing its production beyond 120 megawatts, producing noise near occupied residences of non-participating landowners above a specified level, and installing any lighting beyond that specified by the BZA. The BZA also

required that the Project be completed and operational before December 31, 2023.

[7] On June 18, 2019, in response to the conditions placed on the grant of the Original Applications, and in order to maintain the number of solar panels Lone Oak planned to install in the Project, Lone Oak submitted a second set of Applications to the BZA (Secondary Applications). The Secondary Applications were identical to the Original Applications except that they applied to approximately 350 acres of additional land which was also all zoned for agriculture. A hearing was set for July 30, 2019, on the Secondary Applications.

[8] On June 27, 2019, Neighbors filed for judicial review of the BZA's approval of the Original Applications. It subsequently came to light that VanSickle did not meet the residency requirements to be a member of the BZA. By July 30, 2019, VanSickle was no longer a member of the BZA. At the July 30, 2019, hearing, a BZA staff member stated on the record that VanSickle's votes may not have been valid and that "if that is indeed the case, then the BZA did not take official action on [the Original SUA] as required under Indiana law. This lack of official action necessitates continuing of that hearing." (Appellants' App. Vol. II, p. 88). Although the meeting had been scheduled for consideration of the Secondary Applications, it was noted that no decision would be required on the Secondary Applications if the Original Applications were invalid. In addition, two new members of the BZA desired additional time to review the record

before voting. The BZA, including Baker, voted to continue the hearing to August 29, 2019.

[9] At the August 29, 2019, hearing, Baker announced that, after conferring with its litigation counsel, the BZA had determined that no procedural irregularity had occurred with the May 28, 2019, vote and that its approval of the Original Applications was final. The two new members of the BZA indicated that they wanted more time to prepare for their vote, but the remaining members, including Baker, voted to proceed. Neighbors' counsel objected to Baker's participation and argued that Baker should recuse herself from consideration of the Secondary Applications as she had from the Original Applications proceedings. Lone Oak and members of the public provided input on the Secondary Applications, and evidence regarding the impact of property values of the Project was received. One remonstrator who argued against the Project directly addressed Baker as follows:

> Remonstrator: I've got to say, which our lawyer said, Mary Jane Baker, you recused yourself and you have a friend that's a petitioner in this project. That is a conflict of interest.
>
> Baker: I also have friends –
>
> Remonstrator: Mary Jane.
>
> Baker: – that are on your side.

(Appellants' App. Vol. II, p. 137).

[10] At the conclusion of the August 29, 2019, meeting the BZA voted unanimously to continue the matter to September 24, 2019, when additional evidence for and against the Project was received. At the conclusion of the September 24, 2019, hearing, the BZA voted 3-2 to approve the Secondary Applications, with Baker casting her vote in favor. On October 24, 2019, Neighbors filed a petition for judicial review of the BZA's approval of the Secondary Applications.

[11] In their petitions for judicial review, Neighbors challenged the validity of the votes of VanSickle and Baker, as well as the evidence supporting Lone Oak's showings that the SUAs complied with Madison County's Comprehensive Plan and that sufficient practical difficulties existed with the Project to merit the Setback Variances. On July 9, 2020, the trial court held a hearing on Neighbors' petitions. On November 2, 2020, the trial court entered detailed findings of fact and conclusions thereon in two separate Orders denying Neighbors relief. The trial court concluded that Neighbors had waived their argument regarding the validity of VanSickle's vote by failing to raise it before petitioning for review. The trial court also concluded, that even if the issue had been properly raised, VanSickle was a *de facto* public official at the time she cast her votes on the Original Applications and that her failure to meet the residency requirements for being a member of the BZA did not invalidate her official actions. Pertaining to Neighbors' claim that Baker was biased such that her votes on the Secondary Applications were invalid, the trial court determined that no evidence had been presented that Baker was biased at the time she recused herself from consideration of the Original Applications and that, even if

she had been biased at that time, there was insufficient evidence that any bias had continued until the vote on the Secondary Applications. The trial court found that evidence showed a rational basis for the BZA's grant of both sets of SUAs and Setback Variances and that, more specifically, the Project was consistent with Madison County's Comprehensive Plan and Lone Oak had shown that sufficient practical difficulties existed to merit the grant of the Setback Variances.

[12] Neighbors now appeal both trial court Orders denying them relief, and, pursuant to the consent of all parties, their separate appeals have been consolidated. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Standard of Review*

[13] Neighbors appeal following the denial of their petition for judicial review of the BZA's administrative rulings. Our standard of review in such matters is well-established:

> A trial court and an appellate court both review the decision of a zoning board with the same standard of review. A proceeding before a trial court or an appellate court is not a trial *de novo*; neither court may substitute its own judgment for or reweigh the evidentiary findings of an administrative agency. The appropriate standard of review, whether at the trial court or appellate level, is limited to determining whether the zoning board's decision was based upon substantial evidence.

St. Charles Tower, Inc. v. Bd. of Zoning Appeals of Evansville-Vanderburgh Cnty., 873 N.E.2d 598, 600 (Ind. 2007) (cleaned up). We will presume that a zoning board's decision is correct, and we afford its decision great weight by virtue of its experience in this given area. *Burcham v. Metro. Bd. of Zoning Appeals Div. I of Marion Cnty.*, 883 N.E.2d 204, 216 (Ind. Ct. App. 2008). We will reverse a zoning board's decision only where a clear error of law has been demonstrated. *Id*. Clear error is demonstrated only where the party seeking relief demonstrates that it was prejudiced by a BZA decision 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 § 36-7-4-1614(d). Thus, Neighbors labor "under a heavy burden in urging this court to overturn the BZA's decision." *Midwest Minerals Inc. v. Bd. of Zoning Appeals of Area Plan Dep't/Comm'n of Vigo Cnty.*, 880 N.E.2d 1264, 1268 (Ind. Ct. App. 2008), *trans. denied*.

II. *VanSickle*

[14] Neighbors contend that, because VanSickle did not meet the residency requirements for her position on the BZA, her vote in favor of the Original Applications was invalid. Without VanSickle's vote, Neighbors argue that the BZA did not pass the Original SUA by the required majority vote and that the Secondary Applications are nullified as well, being extensions of the Original Applications. Respondents counter, that, as the trial court concluded,

Neighbors waived this claim by failing to raise it before the BZA's vote on the Original Applications was final and that VanSickle was a *de facto* officer of the BZA whose vote was valid, regardless of her failure to meet the residency requirements.

[15] We agree with Respondents. The *de facto* public officer doctrine is well-established and "confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that person's appointment or election to office is deficient." *Ryder v. United States*, 515 U.S. 177, 180 (1995). The doctrine has been recognized in Indiana for almost as long as it has been a state. *See*, *e.g.*, *Case v. State*, 5 Ind. 1 (1854) (upholding Case's conviction for grand larceny even though the presiding judge had been improperly appointed under a *pro tempore* statute where the appointment, nevertheless appeared "legal in form, and gave to the appointee at least a colorable title to office."). The purpose of the doctrine is to prevent a multiplicity of lawsuits challenging every action taken by an official whose claim to office could be called into question, and it seeks to "protect the public by insuring the orderly functioning of the government despite technical defects in title to office." *Fields v. State*, 91 N.E.3d 597, 600 (Ind. Ct. App. 2017), *trans. denied*. For purposes of the public who deal with an officer and are affected by her actions, the acts of *de facto* officer are valid as those of a *de jure* officer. *Carty v. State*, 421 N.E.2d 1151, 1154 (Ind. Ct. App. 1981). All that is required to make an officer *de facto* is: (1) that she claims the office, (2) that she is in

possession of it, and (3) that she performs its duties under the color of election or appointment. *Id*.

[16] This court has applied the *de facto* officer doctrine to an administrative proceeding where the defect alleged was a failure to meet the residency requirements for office. In *Sullivan v. City of Evansville*, 728 N.E.2d 182, 186 (Ind. Ct. App. 2000), the city's police merit commission upheld the discipline of Sullivan for his treatment of a member of the public during a traffic stop. Sullivan appealed the commission's decision to the trial court and moved for summary judgment when he subsequently determined that none of the three commissioners who had presided over his administrative appeal met the residency requirements for office. *Id*. Sullivan argued that without meeting the state-constitutionally-mandated residency requirement, the commission lacked a legal quorum to hear the matter and, thus, did not have the authority to discipline him. *Id*. at 188. This court rejected that argument, holding that the commissioners had been *de facto* public officers acting under the color of their appointment and that Sullivan had waived his claim by failing to challenge the eligibility of the commission before or during his disciplinary hearing. *Id*. at 191. In reaching this conclusion, the *Sullivan* court relied on cases examining the application of the doctrine in the judicial context holding that challenges to the authority of an improperly-appointed judge *pro tempore* "'must be made at the time *when he assumes to act* or they will be deemed waived on appeal'" and "'the failure of a party to object *at trial* to the authority of a court officer to enter a final appealable order waives the issue for appeal.'" *Id*. at 189-90 (quoting

Survance v. State, 465 N.E.2d 1076, 1081-82 (Ind. 1984), and *Floyd v. State*, 650 N.E.2d 28, 32 (Ind. 1994)) (emphasis added).

[17] We conclude that, following *Sullivan*, Neighbors waived their challenge to the validity of VanSickle's tenure because they did not object to her authority before or at the hearings leading up to the May 28, 2019, vote on the Original Applications. Neighbors argue that the comments of the BZA's representative at the July 30, 2019, hearing that a challenge had been raised to VanSickle's residency which might affect the validity of the May 28, 2019, vote essentially reopened the matter, and, thus, that their claim was not waived. However, we cannot credit this argument because Neighbors did not raise their challenge until after VanSickle had "assumed to act" under the color of her authority as a BZA member by voting on the Original Applications. Once the vote was held, the BZA's decision was final and appealable. *See Town of Darmstadt v. CWK Investments-Hillsdale*, *LLC*, 114 N.E.3d 11, 17 (Ind. Ct. App. 2018) (holding that the time limits for filing for petition for review of a BZA's decision are triggered by the decision made at the end of the meeting, not when findings of facts and conclusions thereon are entered), *trans. denied*. After rendering its decision, the BZA lacked the authority to reconsider it or reopen it after VanSickle's residency status had been brought to its attention. *See Schlehuser v. City of Seymour*, 674 N.E.2d 1009, 1014 (Ind. Ct. App. 1996) (holding that "[t]he function of a board of zoning appeals is quasi-judicial. Thus, it generally has no inherent power to review and vacate, rescind or alter its decision after it has been made."). What is more, the BZA did not, in fact, reconsider the May 28,

2019, vote at its next meeting. Therefore, the matter was final as of the May 28, 2019, vote, and Neighbors had waived any objection to VanSickle's vote as of that day.

[18] However, even if Neighbors had not waived their claim, it would not have been meritorious. The parties do not dispute that VanSickle did not meet the residency requirements for the BZA. However, VanSickle was listed on the agendas for the BZA's April 23, May 16, and May 28, 2019, meetings as a BZA member, she appeared at and participated in those meeting as a BZA member, and on May 28, 2019, she cast her vote in favor of the Original Applications. Therefore, we conclude that VanSickle was acting as a *de facto* officer of the BZA because she claimed her office, possessed it by appearing and participating in the BZA's business, and acted under the color of the BZA's authority by casting her vote on the Original Applications. *See Carty*, 421 N.E.2d at 1154.

[19] Neighbors offer two main arguments against their waiver and the application of the *de facto* public officer doctrine to this case. First, they characterize *Sullivan* and other authority cited by Respondents as "outdated cases that had nothing to do with judicial review of zoning decisions," and they contend that "there are no Indiana appellate decisions applying the *de facto* officer doctrine in the zoning context." (Appellants' Br. p. 19). However, this court recently decided *Chapo v. Jefferson County Plan Commission*, 164 N.E.3d 131, 134 (Ind. Ct. App. 2021), *rehearing denied*, and invoked the *de facto* public officer doctrine to uphold a county plan commission's actions implementing a zoning ordinance, even though it had subsequently been revealed that none of the commission's officers

had taken their statutorily-required oath. Although *Chapo* involved a planning commission and not a BZA, we see no principled way to distinguish between the two types of administrative entities for purposes of applying the *de facto* officer doctrine.

[20] Neighbors also make a statutory argument that their failure to challenge VanSickle's authority before her vote was not fatal and that the Indiana zoning statute essentially abrogated the application of the *de facto* public officer doctrine to a BZA. Neighbors first draw our attention to the statutory judicial standard of review of a zoning decision, which provides that a trial court shall grant relief pursuant to a petition only if the court has determined that a zoning decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitation, or short of statutory right[.]" I.C. § 36-7-4-1614(d)(1), (3). Neighbors also rely on Indiana Code section 36-7-4-1612(a) which provides as follows:

> The court may receive evidence, in addition to that contained in the board record for judicial review, only if the evidence relates to the validity of the zoning decision at the time the decision was made and is needed to decide disputed issues regarding one (1) or both of the following:
>
> (1) Improper constitution as a decisionmaking body or grounds for disqualification of those making the zoning decision.
>
> (2) Unlawfulness of procedure or of decisionmaking process.

Neighbors argue that a plain reading of this "statutory scheme expressly allows an inquiry into the propriety of an improperly appointed BZA member's vote as a basis to support a zoning decision" and that the issue may be raised for the first time on judicial review. (Appellants' Br. p. 21).

[21] Addressing Neighbors' argument entails interpreting the statutes cited. We observe that the "primary purpose of statutory interpretation is to ascertain and give effect to the legislature's intent. The best evidence of that intent is the statutory language itself, and we strive to give the words in a statute their plain and ordinary meaning." *City of Greenwood v. Town of Bargersville*, 930 N.E.2d 58, 68 (Ind. Ct. App. 2010). In interpreting a statute, we are mindful of what it does say as well as what it does not say. *Town of Darmstadt*, 114 N.E.3d at 14. "We may not add new words to a statute which are not the expressed intent of the legislature." *Id*. In addition, we will "examine the statute as a whole, reading its sections together so that no part is rendered meaningless if it can be harmonized with the remainder of the statute." *B&S of Fort Wayne, Inc. v. City of Fort Wayne*, 159 N.E.3d 67, 77 (Ind. Ct. App. 2020), *trans. denied*.

[22] These cannons of statutory interpretation militate against crediting Neighbors' argument that their claim was properly brought for the first time on judicial review. Nothing in the express terms of the statutes cited obviates the requirement of making a timely objection before or at a zoning hearing in order to preserve an issue for judicial review. Rather, section -1612 merely provides a procedural mechanism for a trial court to receive evidence on a properly-preserved issue; it does not expressly provide that the listed issues may be raised

for the first time on judicial review. In addition, section 36-7-4-1610 provides that

> A person may obtain judicial review of an issue that was not raised before the board, only to the extent that:
>
> (1) the issue concerns whether a person who was required to be notified by this chapter or other law of a board hearing was notified in substantial compliance with this chapter or other law; or
>
> (2) the interests of justice would be served by judicial resolution of an issue arising from a change in controlling law occurring after the zoning decision.

Reading sections -1610 and -1612 together leads us to conclude that challenging the authority of a BZA member to render decisions is not an issue that may be brought for the first time in a petition for judicial review. If we were to conclude otherwise, we would be rendering section -1610's "only to the extent" language meaningless.

[23] What is more, the statutes cited by Neighbors were adopted in 2011. As noted above, the *de facto* public official doctrine has been recognized by our state courts for over 150 years. Our supreme court has recently reiterated the long-standing principle of statutory construction that "we presume that the legislature is aware of the common law and does not intend to make any change therein beyond what it declares either in express terms or by unmistakable implication." *River Ridge Dev. Auth. v. Outfront Media, LLC*, 146

N.E.3d 906, 915 (Ind. 2020) (citing *State Farm Fire & Cas. Co. v. Structo Div., King Seeley Thermos Co.*, 540 N.E.2d 597, 598 (Ind. 1989), and *Grusin v. Stutz Motor Car Co. of Am.*, 187 N.E. 382, 385 (Ind. 1933)). We find nothing in the words of the statutes cited by Neighbors abrogating the common law *de facto* public official doctrine, either expressly or by "unmistakable implication." *Id*. In sum, Neighbors waived their challenge to VanSickle's authority and, even if they had not waived their claim, the *de facto* public official doctrine applied to VanSickle's BZA actions. Therefore, we conclude that her vote on the Original Applications was valid.

III. *Baker*

[24] Neighbors next contend that Baker's consideration of, and vote on, the Secondary Applications was invalidated by her conflict of interest. If, as Neighbors' argument goes, her vote is discounted, the Secondary Applications were not passed by the majority of the BZA as required and are not valid. Respondents argue that the trial court correctly concluded that there was no evidence in the record that Baker was biased, either at the time the Original Applications were passed or when she voted on the Secondary Applications.

[25] A member of a BZA is disqualified and may not participate in a hearing or decision if the member is "(1) biased or prejudiced or otherwise unable to be impartial; or (2) has a direct or indirect financial interest in the outcome of the hearing or decision." I.C. § 36-7-4-909(a). However, even if a member of an administrative board or panel is biased, we presume that the board or panel will act properly and without bias or prejudice, with or without the recusal of the

allegedly biased member. *Lockerbie Glove Factory Town Home Owners Ass'n, Inc. v. Indianapolis Historic Preservation Comm'n*, 106 N.E.3d 482, 490 (Ind. Ct. App. 2018), *trans. denied*. "We will not interfere with the administrative process in the absence of a demonstration of actual bias." *Id*. In the context of judicial recusal, actual bias exists "only where there is an undisputed claim or where the judge has expressed an opinion on the merits of the pending controversy." *Harvey v. State*, 751 N.E.2d 254, 259 (Ind. Ct. App. 2001). As the party seeking to invalidate the BZA's decision, Neighbors bore the burden of demonstrating that Baker should have been disqualified. *See* I.C. § 36-7-4-1614(a).

[26] Neighbors assert that the trial court incorrectly found that Baker had no disqualifying condition because she had previously recused herself from consideration of the Original Proceedings based on her friendship with one of the participating property owners. Neighbors also draw our attention to Baker's comment at the August 29, 2019, meeting that she was "very reluctant to say one way or the other on property values because we haven't had the situation. We don't know what's going to happen" and argue that "[v]oting that there will be no adverse effect on values while openly professing she did not know what would happen to property values is a display of her bias as a result of her friendship." (Appellants' App. Vol. III, p. 117; Appellants' Br. p. 25).

[27] There is a dearth of Indiana authority interpreting section 36-7-4-909(a), and neither party has cited authority with similar facts to the present case to support its position. However, we conclude, as did the trial court, that there was insufficient evidence of a disqualifying bias on Baker's part. Without more, the

circumstances surrounding Baker's previous, voluntary recusal and her statements at the hearings did not show that Baker had direct or indirect financial interest in the outcome of the proceedings. *See* I.C. § 36-7-4-909(a)(2). Neither did these circumstances demonstrate actual bias. This was not an uncontested matter in which Baker ruled against Neighbors, nor was Neighbors' proffered evidence consistent with Baker expressing an opinion on the merits of the Project or on the Secondary Applications specifically. This court has observed that, for purposes of conflict-of-interest analysis, we hold judges to a higher standard than members of an administrative body. *Jandura v. Town of Schereville*, 937 N.E.2d 814, 820 (Ind. Ct. App. 2010), *trans. denied*. If a judge would not have been required to recuse herself under these circumstances, we conclude that Baker, as a member of an administrative board, was not required to do so either. Neighbors' argument is essentially a request that we reweigh the evidence before the trial court and ascribe inferences to it that do not support the trial court's determination, which is contrary to our standard of review. *See St. Charles Tower*, 873 N.E.2d at 600. Accordingly, we do not disturb the trial court's conclusion that Baker did not have a disqualifying bias or conflict of interest.

IV. *Comprehensive Plan*

[28] Neighbors next argue that the BZA's approval of the Original and Secondary SUAs were not supported by sufficient evidence because the approvals did not

comply with Madison County's local ordinances for the grant of a special use.[1] When we are tasked with determining whether an administrative decision is supported by substantial evidence, we must determine from the record whether the decision lacks a reasonably sound evidentiary basis. *See Midwest Minerals*, 880 N.E.2d at 1269. Evidence is considered to be substantial if it is more than a scintilla and less than a preponderance. *Id*. Put another way, substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id*. Inasmuch as addressing Neighbors' argument requires us to interpret local zoning ordinances, we apply the ordinary rules of statutory construction but accord deference to an agency's construction of its own ordinance. *Monster Trash, Inc. v. Owen Cnty. Council*, 152 N.E.3d 630, 632 (Ind. Ct. App. 2020). The express language of the ordinance controls our interpretation, and our goal is to determine, give effect to, and implement the intent of the body that enacted the ordinance. *Id*.

[29] The BZA has exclusive subject matter jurisdiction over the grant of special uses. *See* Madison County, Indiana Land Use & Development Code § 11.3 Powers and Duties. The BZA "may grant" a special use approval if, after a public hearing, it makes findings of facts in writing that, among other factors, "the proposed use will be consistent with the character of the zoning district in

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[1] A "special use" is a "use that is designated by the Zoning Ordinance as being permitted in the district concerned if it meets special conditions, is found to be appropriate and upon application, is specifically authorized by the [BZA]. Also know[n] as a special exception." Madison County, Indiana Land Use & Development Code § 1.5 Basic Provisions: Special Use.

which it is located and the Madison County Comprehensive Plan." Land Use & Development Code § 11.8(d) Special Uses. The Madison County Comprehensive Plan (Comprehensive Plan) states the following as its Community Development Goal:

> The Comprehensive Plan encourages growth in and around urban areas, while retaining the balance of Madison County for agricultural use, open space, and high-quality planned developments. To accomplish this task in a desirable manner, the goal for future community development in the unincorporated areas of Madison County is:
>
> **To promote and protect the rural character and quality of life in Madison County by ensuring the viability and integrity of agriculture and the natural environment, and encouraging responsible land use development**.

Comprehensive Plan, Section B, B-1-1 (bold in the original). The Comprehensive Plan's Policy Implementation and Action Plan further provides that

> [a]griculture plays a significant role in defining the physical and functional character of Madison County. Accordingly, the preservation of agricultural industries and rural character has been identified as the highest priority throughout all phases of the planning process.
>
> * * *
>
> The following tools should be considered [to implement these goals]:

* * *

> • enforcing a highly restrictive growth management program to remove development pressures from prime agricultural land.

Comprehensive Plan, Section C, C-1-7. Drawing on these and other similar provisions, Neighbors argue that the Comprehensive Plan prioritizes agriculture over any other type of land use and that a large-scale solar farm such as the Project is fundamentally inconsistent with the stated goals of the Comprehensive Plan. Therefore, Neighbors contend that the BZA's approvals of the SUAs were in violation of the local ordinance requiring any special use to be consistent with the Comprehensive Plan.

[30] Our supreme court has observed that a "comprehensive plan is a community's long-range vision for physical development, but implementing the plan as regards a given piece of real estate may not be the best course of action for the community on a given day. A comprehensive plan is 'a guide to community development rather than an instrument of land-use control.'" *Borsuk v. Town of St. John*, 820 N.E.2d 118, 121 (Ind. 2005) (quoting 4 Kenneth H. Young, *Anderson's American Law of Zoning*, § 23.15 (4th ed. 1996)). In upholding the Town's denial of Borsuk's request to rezone his parcel as commercial even though the Town's comprehensive plan called for the parcel to be rezoned commercial sometime in the future, the *Borsuk* court also cited with approval this court's decision in *Ogden v. Premier Properties, USA, Inc.*, 755 N.E.2d 661, 671 (Ind. Ct. App. 2001), in which we held that a city council's deviation from

its comprehensive plan in making a rezoning decision, standing alone, does not establish that its action was arbitrary. *Id*. at 121-22. In addition, this court has recognized that a local ordinance's requirement that a requested special use be consistent with the comprehensive plan is a criterion which has no objective standards against which it can be measured and involves discretionary decision making on the part of a BZA. *See Midwest Minerals*, 880 N.E.2d at 1269 (holding that the BZA was entitled to determine whether Midwest satisfied the requirements for the grant of a special exception where local ordinance dictated that the use must be "consistent with the general character of the zoning district, land uses authorized therein and the Vigo County Comprehensive Plan."). We conclude from this authority and our standard of review that a BZA's decision that a special use is consistent with a comprehensive plan is discretionary and that we will uphold its exercise of that discretion if it is supported by substantial evidence in the record.

[31] We turn to Neighbors' argument and observe, as an initial matter, that the Comprehensive Plan expressly provides that it is "to serve as policy to guide decisions about the development of the community" and that its policy, goals, and objectives were designed with several general principles in mind, including that the "needs of agriculture and industry must be recognized in future growth decisions." Comprehensive Plan, Sec. A, A-2-1. In addition, even the Community Development Goal cited by Neighbors provides for "encouraging responsible land use development." Comprehensive Plan, Section B, B-1-1. These portions of the Comprehensive Plan indicate that, even though the

preservation of Madison County's rural character and agricultural industry has been deemed the "highest priority," the Comprehensive Plan itself contemplates that industry and development are to be considered in conjunction with that priority. Comprehensive Plan, Section C, C-1-7. Therefore, we reject Neighbors' argument that the BZA was required by the Comprehensive Plan itself to always prioritize the interests of agriculture over a proposed special, non-agricultural use.

[32] Moreover, the BZA entered findings of fact that the SUAs were consistent with the Comprehensive Plan because (i) the Project directly enhanced and preserved agricultural activities, as it would not result in the permanent loss of agricultural land due to the Decommissioning Plan and Soil Reclamation Plan, (ii) the property involved would continue to be zoned for agricultural use and would not need to be rezoned at the conclusion of the Project, (iii) the soil of the property would be preserved, resulting in fertile soil at the conclusion of the Project, and (iv) the special use would insure that the property involved would not be subdivided for the construction of new homes and, thus, prevented the permanent reduction of agricultural land. These findings were based upon a report submitted by the staff of the planning commission which was viable evidence that formed a basis for the findings. *See Allen v. Bd. of Zoning Appeals for City of Noblesville*, 594 N.E.2d 480, 484 (Ind. Ct. App. 1992) ("The Board is entitled to consider the staff report as evidence.").

[33] Neighbors do not address this evidence that supports the BZA's decision. Rather, they contend that the BZA's conclusion that the SUAs were consistent

with the Comprehensive Plan was unsupported by the evidence because the BZA found that the "scale of the [P]roject does require modification in order to be completely consistent with the Comprehensive Plan" but that the conditions it imposed were not related to addressing the scale of the Project. (Appellants' App. Vol. II, p. 61). However, "scale" may be defined as "a distinctive relative size, extent, or degree." *See* Merriam-Webster Online Dictionary, available at www.merriam-webster.com/dictionary/scale. The conditions the BZA imposed upon Lone Oak for the grant of the SUAs included greater setback requirements for solar panels, compliance with the Decommissioning Plan, the planting of additional trees and vegetation if requested by a non-participating landowner with a sight line to a solar panel, restrictions on expansion of the Project in terms of physical layout and megawatt production, and limitations on the permissible noise and lighting emitted by the Project. Thus, these measures sought to reduce the visibility, audibility, and growth of the Project, and they were aimed at reducing long-term impact on the agricultural viability of the land. Therefore, we conclude that the conditions did address the "size, extent, and degree" of the impact of the Project on its surroundings and its neighbors and, thus, addressed the scale of the Project.

[34] Although we affirm the BZA's decision to grant the SUAs, we note that the unique character of Indiana's rural landscape has been celebrated in literature and song, and its subtle beauty is affirmed by our everyday experience. As the trial court observed in its Orders, the "issue of the propriety of a large-scale solar farm in Madison County has engendered strong emotions." (Appellants'

App. Vol. II, p. 16; Appellants' App. Vol. III, p. 16). In reaching our decision today, we express no opinion on the propriety of the Project. We reiterate that our standard of review does not permit us to substitute our judgment for that of the BZA, and it compels us to affirm because we have determined, based upon the record and the arguments before us, that substantial evidence supported the BZA's decision. *See St. Charles Tower, Inc.*, 873 N.E.2d at 600.

V. *Practical Difficulty*

[35] Neighbors lastly challenge the sufficiency of the evidence supporting the BZA's grant of the Setback Variances,[2] which Lone Oak sought in order to develop internally seamless solar fields between the adjacent parcels of participating landowners. Pursuant to state statute, an applicant for a variance must show, among other factors, that "the strict application of the terms of the zoning ordinance will result in practical difficulties in the use of the property. However, the zoning ordinance may establish a stricter standard than the 'practical difficulties' standard prescribed by this subdivision." I.C. § 36-7-4-918.5(a). When determining whether compliance with a zoning ordinance will result in practical difficulties, a reviewing court may consider: "(1) whether 'significant economic injury' will result if the ordinance is enforced; (2) whether the injury is self-created; and (3) whether there are feasible alternatives."

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[2] For our purposes, a variance is a "specific approval granted by a Board of Zoning Appeals in the manner prescribed by the Zoning Ordinance, to deviate from the development standards (such as height, bulk, area) that the Ordinance otherwise prescribes." Madison County, Indiana Land Use & Development Code § 1.5 Basic Provisions: Variance, Development Standards.

Caddyshack Looper, LLC v. Long Beach Advisory Bd. of Zoning Appeals, 22 N.E.3d 694, 704 (Ind. Ct. App. 2014). These factors are not exhaustive or exclusive. *Id*.

[36] The Madison County zoning ordinance echoes the statutory requirement but further provides that a practical difficulty "shall not be self-imposed, nor be based on a perceived reduction of, or restriction on, economic gain." Land Use & Development Code § 11.9(A)(c). In addition, the zoning code provides the following definition of "practical difficulty":

> A difficulty with regard to one's ability to improve land stemming from regulations of the Zoning Ordinance. A practical difficulty is not a "hardship," rather it is a situation where the owner could comply with the regulations within the Zoning Ordinance, but would like a variance from the Development Standards to improve his site in a practical manner. For instance, a person may request a variance from a side yard setback due to a large tree which is blocking the only location that would meet the Development Standards for a new garage location.

Land Use & Development Code § 1.5 Basic Provisions: Practical Difficulty.

[37] The BZA entered the following findings regarding the practical difficulties it found which merited the Setback Variances requested by Lone Oak in the Original and Secondary Applications:

> Enforcing the required building setback will result in a practical difficulty of the [P]roject as it would be impossible to develop a seamless development resulting in additional cost, lost space, and

> overall construction difficulty resulting in a negative effect on the [P]roject's economics and massive reduction of efficiencies.

(Appellants' App. Vol. II, p. 70; Appellants' App. Vol. III, p. 55). Neighbors contend that the BZA's findings on this issue were inadequate, and that the trial court erred when it denied relief, because, contrary to the requirements of section 11.9(A)(c), the BZA's findings were only based on economic concerns and not real practical difficulties. However, Neighbors mischaracterize the BZA's findings. Although the BZA found that enforcing the setback ordinance would result in "additional cost" and would result in construction difficulty which would result "in a negative effect on the project's economics," it also found that application of the setback ordinance would result in "lost space" and construction difficulties which would result in a "massive reduction of efficiencies," impacts which are design and efficiency-related and are not strictly economic in nature. (Appellants' App. Vol. II, p. 70; Appellants' App. Vol. III, p. 55).

[38] Neighbors further argue that the BZA merely found that it would be impossible for Lone Oak to build a seamless solar development, which Neighbors contend is insufficient to be a practical difficulty because, they argue, Lone Star could have purchased contiguous parcels, combined them into one parcel, and eliminated the need for the internal setbacks altogether. Neighbors contend that, because Lone Oak did not follow this alternative, "any claimed injury is self-imposed." (Appellants' Br. p. 31). Neighbors also assert that "Lone Oak provided no evidence that the development could not proceed without the

Setback Variances." (Appellants' Br. p. 31). However, Neighbors essentially argue that in order to procure a variance, Lone Oak was required to show that it was impossible to build a solar field without the Setback Variances. This argument is at odds with the plain wording of the statute, which requires a showing of practical difficulties, not practical impossibilities. *See* I.C. § 36-7-4-918.5(a). It is also at odds with the local ordinance's definition of the term which specifies that a practical difficulty is a situation "where the owner could comply with the regulations" but wants a variance regardless of his ability to comply. Land Use & Development Code § 1.5 Basic Provisions: Practical Difficulty. In addition, Neighbors provide no authority for their apparent proposition that a complete re-conception of the land procurement for a project is a 'feasible alternative' for practical difficulty analysis and that failure of the applicant to do so renders any difficulty 'self-imposed.'

[39] We also find Neighbors' reliance on *Metropolitan Board of Zoning Appeals of Marion County, Division II v. McDonald's Corporation*, 481 N.E.2d 141 (Ind. Ct. App. 1985), to be misplaced. In *McDonald's*, we upheld the denial of a variance in part due to lack of proof of significant economic injury. *Id*. at 147. As Neighbors have acknowledged on appeal, pursuant to local ordinance, the BZA was not permitted to base its practical difficulty determination on purely economic factors. *See* Land Use & Development Code § 11.9(A)(c) (providing that a practical difficulty "shall not be self-imposed, not be based on a perceived reduction of, or restriction on, economic gain."). Therefore, we will not reverse for failure of that proof. In short, Neighbors have failed to demonstrate that the

BZA clearly erred in granting the Setback Variances. *See Burcham*, 883 N.E.2d at 216.

CONCLUSION

[40] Based on the foregoing, we hold that the votes of VanSickle and Baker were valid and that the BZA's approval of the SUAs and Setback Variances were supported by substantial evidence.

[41] Affirmed.

[42] Mathias, J. and Crone, J. concur