ATTORNEYS FOR APPELLANT

Alex E. Gude
Meaghan K. Haller
Randolph L. Seger
Michael T. Griffiths
Dentons Bingham Greenebaum LLP
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE
DUKE ENERGY INDIANA, LLC

Robert L. Hartley, Jr.
Maggie L. Smith
Frost Brown Todd LLC
Indianapolis, Indiana

Elizabeth A. Heneghan
Ariane Johnson
Duke Energy Indiana
Plainfield, Indiana

ATTORNEYS FOR APPELLEE
INDIANA OFFICE OF
UTILITY CONSUMER COUNSELOR

William I. Fine
Indiana Utility Consumer Counselor

Randall C. Helmen
Chief Deputy Consumer Counselor

Jeffrey M. Reed
Deputy Consumer Counselor
Indiana Office of
Utility Consumer Counselor
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

The City of Carmel, Indiana,
Appellant,

v.

Duke Energy Indiana, LLC, and Indiana Office of Utility Consumer Counselor,
Appellees.

October 28, 2022

Court of Appeals Case No.
22A-EX-88

Appeal from the Indiana Utility Regulatory Commission

The Honorable
James F. Huston, Chairman

The Honorable
Sarah E. Freeman, Commissioner

The Honorable
Stefanie Krevda, Commissioner

The Honorable
David L. Ober, Commissioner

The Honorable
David E. Ziegner, Commissioner

The Honorable
Jennifer L. Schuster,
Senior Administrative Law Judge

Cause No.
45482

Friedlander, Senior Judge.

[1] The City of Carmel appeals the order of the Indiana Utility Regulatory Commission (IURC) determining that two of Carmel's ordinances are

unreasonable and void. Concluding that the Ordinances are not void and unreasonable, we reverse the order of the IURC.[1]

[2] This appeal arises from a proceeding before the IURC upon a complaint filed by Carmel against Duke Energy, a public utility that supplies electric utility service to the public in Indiana, including customers in Carmel. The present dispute centers around two of Carmel's ordinances, pursuant to which Carmel seeks to have Duke relocate certain of its utility facilities and pay the costs of relocation.

[3] In 2019, Carmel adopted Ordinance D-2492-19 (the "Underground Ordinance") and D-2491-19 (the "Relocation Ordinance") (collectively the "Ordinances") pursuant to Indiana Code section 8-1-2-101 (1998), which gives municipalities the power to enact ordinances that determine the manner in which a public utility occupies space within the municipality. The Underground Ordinance prohibits the erection of above-ground public utility poles, lines, or structures in Carmel's right-of-way unless authorized by Carmel.

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[1] By separate order issued today, we grant Carmel's motion to strike the brief of the IURC and its motion for leave to file a reply brief in support of its motion to strike. In addition, we dismiss the IURC as a party to this appeal. Because the IURC acted as a fact-finding administrative tribunal and no statute or administrative provision expressly makes the IURC a party on appeal, it is not a proper party on appeal from its own decision. *See Citizens Action Coal. of Ind., Inc. v. S. Ind. Gas & Elec. Co.*, 70 N.E.3d 429, 432 n.1 (Ind. Ct. App. 2017) (citing *City of Terre Haute v. Terre Haute Water Works Corp.*, 133 Ind. App. 232, 180 N.E.2d 110, 111 (1962) ("When there are two opposing parties before [the Public Service Commission of Indiana], as here, its action in making findings and issuing an order deemed detrimental by one of the parties is similar to that of a court which makes a decision determining a controversy between adverse parties. A court is never a party to an appeal from its decision.")).

See Appellant's App. Vol. 2, p. 40. The Relocation Ordinance sets forth the procedures to be followed when a public utility facility must be relocated due to a road, street, sidewalk, trail, or other project. *Id.* at 44.

[4] At some point after the adoption of the Ordinances, Carmel embarked upon two improvement projects: the Guilford Road project and the 126th Street project. For both projects, several Duke facilities were identified as needing to be relocated, and Carmel and Duke were unable to reach an agreement on which party should bear the costs of the relocation.

[5] Carmel filed a complaint with the IURC requesting the IURC to 1) find Carmel's Ordinances reasonable pursuant to Indiana Code section 8-1-2-101; 2) order Duke to relocate the relevant facilities; and 3) order Duke to pay the costs of relocating such facilities. *See id.* at 20 (Verified Complaint). The IURC held an evidentiary hearing on Carmel's complaint at which it admitted the parties' pre-filed witness testimony and attachments. The IURC subsequently issued its order finding Carmel's ordinances unreasonable and void pursuant to Indiana Code section 8-1-2-101. Carmel now appeals that decision.

[6] Carmel presents four issues for our review, which we restate and consolidate as:

> 1. Whether the IURC erred in concluding the Ordinances are unreasonable and void because they conflict with INDOT regulations and contain vague terms.

2. Whether the IURC erred in concluding the Ordinances are unreasonable and void because they impermissibly shift the cost of relocation to Duke's customers statewide.[2]

[7] The General Assembly created the IURC primarily as a fact-finding body with the technical expertise to administer the regulatory scheme devised by the legislature. *Citizens Action Coal. of Ind., Inc. v. S. Ind. Gas & Elec. Co.*, 120 N.E.3d 198 (Ind. Ct. App. 2019). The IURC's goal is to ensure that public utilities provide constant, reliable, and efficient service to the citizens of Indiana. *Id.*

[8] Indiana Code section 8-1-3-1 (1993) authorizes judicial review of IURC orders by this Court. Our review is two-tiered. The first level involves a review of whether there is substantial evidence in light of the whole record to support the IURC's findings of basic fact. *Citizens Action Coal. of Ind., Inc. v. Indianapolis Power & Light Co.*, 74 N.E.3d 554 (Ind. Ct. App. 2017). Under a substantial evidence standard of review, the order will stand unless no substantial evidence supports it. *Id.* We neither reweigh the evidence nor assess witness credibility, and we consider only the evidence favorable to the IURC's findings. *Id.* The

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[2] Carmel also claims the IURC made an unfavorable determination concerning a letter Carmel sent to INDOT about INDOT deferring responsibility for utility relocation to Carmel for these two projects. While the IURC did discuss the letter and its opinion of the meaning of the letter in its order, it merely used the letter as an example in its discussion of another issue and made no determination of its impact on the parties' dispute. *See* Appellant's App. Vo. 2, p. 16 (IURC Order stating "Regardless of the legal effect of this letter . . ."). Moreover, if the IURC had drawn an unfavorable conclusion about the letter, it would not be supported by substantial evidence as the witnesses of both parties acknowledged the fact that INDOT had deferred utility relocation determinations to Carmel without further comment, and there was no evidence to the contrary. *See* Exhibits Vol. 1, p. 94 (Letter from Carmel to INDOT); p. 13 (Testimony of J. Kashman); *see also* Exhibits Vol. 2, pp. 5-7 (Testimony of B. Pease); p. 62 (Testimony of C. Rowland).

IURC's order is conclusive and binding unless it lacks substantial evidence supporting the findings or is unreasonable or arbitrary. *Id.*

[9] The second level entails a review of whether specific findings exist as to all factual determinations material to the ultimate conclusions. *Id.* On this level, we review the conclusions of ultimate facts for reasonableness, with greater deference to matters within the IURC's expertise. *Id.* We may examine the logic of any inferences drawn and any rule of law that may have driven the result. *Id.*

1. The Ordinances are Unreasonable and Void Due to Conflict with INDOT Regulations and Vague Terms

[10] Carmel first contends the IURC erred in its interpretation of the Ordinances by determining they conflict with INDOT regulations and contain vague or undefined terms. When construing ordinances, this Court applies the rules applicable to statutory construction. *Siwinski v. Town of Ogden Dunes*, 949 N.E.2d 825 (Ind. 2011). A question of ordinance interpretation is a matter of law. *Id.* We review questions of law de novo, granting no deference to the IURC. *NIPSCO Indus. Grp. v. N. Ind. Pub. Serv. Co.*, 100 N.E.3d 234 (Ind. 2018), *modified on reh'g*.

[11] The primary rule of ordinance construction is to ascertain and give effect to the intent of the drafters. *Broad Ripple Prop. Grp., LLC v. City of Indianapolis*, 87 N.E.3d 1112 (Ind. Ct. App. 2017). The best evidence of that intent is the language of the ordinance, and all words must be given their plain and ordinary

meaning unless otherwise indicated by the ordinance. *Id.* Clear and unambiguous ordinances leave no room for judicial interpretation; accordingly, the Court will read each word and phrase in its plain, ordinary, and usual sense, without resorting to any rules of construction. *City of Mitchell v. Phelix*, 17 N.E.3d 971 (Ind. Ct. App. 2014), *trans. denied* (2015).

[12] When an ordinance is susceptible to more than one interpretation, it is deemed ambiguous and thus open to judicial construction. *Id.* Our primary goal remains to determine and give effect to the intent of the drafters, and we do not presume that the drafters intended the ordinance language to be applied illogically or to bring about an unjust or absurd result. *Hopkins v. Indianapolis Pub. Sch.*, 183 N.E.3d 308 (Ind. Ct. App. 2022), *trans. denied*.

[13] In its brief, Carmel alleges the IURC ignored the presumption that ordinances enacted under Indiana Code section 8-1-2-101(a)(1) are "prima facie reasonable" because the IURC "never referred to, analyzed, or entered any findings" on the presumption. Appellant's Br. p. 27. There is no requirement that the IURC make any special statement or finding as to the presumption; rather, the presumption is applicable and operative regardless. The presumption simply means that Duke has the burden of overcoming by substantial evidence the presumption that Carmel's ordinances are reasonable. *See Pub. Serv. Comm'n v. City of Indianapolis*, 235 Ind. 70, 80, 131 N.E.2d 308, 311-14 (1956) (explaining that, where statute directed that all regulations "shall be prima facie reasonable," opposing party had burden of overcoming prima facie reasonableness by substantial evidence). Like statutes, ordinances are

presumptively valid, and the party challenging an ordinance bears the burden of overcoming the presumption and proving invalidity, with all doubts being resolved against the challenger. *City of Indianapolis v. Clint's Wrecker Serv., Inc.*, 440 N.E.2d 737 (Ind. Ct. App. 1982). Whenever possible, ordinances should be interpreted so as to uphold their validity. *Bd. of Comm'rs of LaPorte Cnty. v. Town & Country Utilities, Inc.*, 791 N.E.2d 249 (Ind. Ct. App. 2003), *trans. denied* (2004).

[14] We pause to note that the Relocation Ordinance is at the heart of this dispute because Carmel is asking Duke to relocate its existing facilities within these two projects and to pay for the relocation, whereas the Underground Ordinance refers to new facilities. Nevertheless, the Ordinances are inter-related, Carmel included both Ordinances in its complaint, and the IURC addressed both Ordinances in its decision.

i. Underground Ordinance

[15] Carmel's Underground Ordinance provides, in pertinent part:

> (b) From and after April 30, 2017, no person, corporation, or utility shall erect or construct within the District, any pole, overhead line, or associated overhead structure used and useful in supplying electric, communication or similar associated services ("Construction"), unless authorized by the City.
>
> (c) The BPW is the City's permit authority for the granting of permits for all Construction in the City's ROW [right-of-way] and in the City's granted utility easements. The BPW shall have the authority to review all requests for Construction and shall have the authority to grant waivers of requirements set out in this Ordinance as set out in an Applicant's permit request as

> submitted by a utility or a communications provider pursuant to this Section 6-245 of the Carmel City Code, Chapter 9, Article 5, Section 9-218 of the Carmel City Code, and other ordinances regarding the placement of utility facilities in the City's right-of-way or in a utility easement granted by the City. *Unless expressly authorized by the BPW, all utility facilities to be located within the District shall be placed underground and/or buried where feasible based upon applicable safety requirements and engineering standards and to the extent allowed by Indiana law.*

Appellant's App. Vol. 2, pp. 40-41 (emphasis added).

[16] The IURC determined:

> **i. <u>The Underground Ordinance</u>.** We find that there are several reasons that the Underground Ordinance is unreasonable and void under Ind. Code § 8-1-2-101.
>
> ….
>
> The Underground Ordinance is essentially a total prohibition on above-ground facilities unless Carmel grants an exemption, which can only occur through an undefined waiver process. As such, *we find that the Underground Ordinance is unreasonable and void because it conflicts with INDOT regulations, including those in 105 IAC 13*, which establish a formal procedure for highway improvement projects that involve the relocation of utility facilities. INDOT's regulations define "highway" as a roadway under the jurisdiction of INDOT or where an improvement project is planned. 105 IAC 13-2-9. An "improvement project" includes, among other things, local projects administered by INDOT, such as the projects at issue in this Cause. 105 IAC 13-2-10. *The Underground Ordinance does not mention INDOT or even contemplate interaction with other government entities, even though many*

> *construction projects involving rights-of-way (i.e., roads) will involve INDOT and possibly other state agencies. This clear conflict renders the Underground Ordinance unreasonable and void in its entirety* under Ind. Code § 8-1-2-101. Both of the projects at issue here are unquestionably INDOT projects and are subject to INDOT regulation.

Id. at 15 (internal footnote omitted) (italics added).

[17] Initially, we recognize that a municipality does not have the power to regulate conduct that is regulated by a state agency, except as expressly granted by statute. Ind. Code § 36-1-3-8(a)(7) (2019). Indiana Code section 8-1-2-101 is just such a statute, and it was pursuant to this statute that the Ordinances were adopted. An impermissible conflict with state law will be found if an ordinance seeks to prohibit that which a statute expressly permits. *Hobble by & through Hobble v. Basham*, 575 N.E.2d 693 (Ind. Ct. App. 1991). Otherwise, a municipality may impose additional, reasonable regulations, and may supplement burdens imposed by non-penal state law, provided the additional burdens are logically consistent with the statutory purpose. *Id.*

[18] Here, the IURC's order does not identify the conflicting INDOT regulations or explain in what way they conflict with the Underground Ordinance. The order also does not cite to a requirement that the ordinance refer to INDOT or any other government entity to support its conclusion. Further, we cannot agree with the IURC's overly-narrow interpretation that the ordinance does not contemplate interaction with government entities or state agencies. By its plain language, the ordinance contemplates interaction with, and even deference to,

other entities and their requirements and standards, as well as state law. *See*, *supra*, Underground Ord. ¶ (c). Indeed, the ordinance only allows Carmel to require that utility facilities be placed underground if such action is permitted by Indiana law. And, in doing so, the ordinance in no way divests INDOT of its authority to manage the right-of-way of the state highway system as set forth in 105 Indiana Administrative Code article 13, the stated purpose of which is to provide for the exchange of information and implementation of the responsibilities of the respective parties in a utility facility relocation. *See* 105 Indiana Administrative Code section 13-1-1. Moreover, it would be unduly cumbersome to require Carmel, or any municipality, to specifically identify every entity with which it conceivably might be involved. Thus, the IURC erred in determining that the Underground Ordinance conflicts with INDOT regulations.

[19] As an additional ground for concluding the Underground Ordinance is unreasonable and void, the IURC found that it is

> extremely vague and contains many undefined terms and phrases. For example, the "applicable safety requirements and engineering standards" are not defined in any way, regardless of how Carmel's witnesses interpret this phrase. There is also no information about how Carmel will determine whether underground placement is "feasible." This vagueness would permit Carmel to interpret these words and phrases in a variety of different ways, and this provides another, independent reason that the Underground Ordinance is unreasonable and void under Ind. Code § 8-1-2-101.

Appellant's App. Vol. 2, p. 15.

[20] Our standard of review remains the same: ordinance interpretation is a question of law, *Siwinski*, 949 N.E.2d 825, and we review questions of law de novo with no deference to the decision of the IURC. *NIPSCO Indus. Grp.*, 100 N.E.3d 234. Whenever possible, we interpret an ordinance so as to uphold its presumptive validity. *Bd. of Comm'rs of LaPorte Cnty.*, 791 N.E.2d 249. Additionally, in ordinance interpretation, the plain, common, and customary meaning of a term may be derived from the evidence of the case because the plain and ordinary meaning of a term is that meaning assigned to it by the community and ordinary reader. *Wesner v. Metro. Dev. Comm'n of Marion Cnty.*, 609 N.E.2d 1135 (Ind. Ct. App. 1993).

[21] Jeremy Kashman, Director of Carmel's Engineering Department, testified that "[f]easibility refers to whether it is technologically practical to locate a facility underground and whether it is safe to do so. Carmel's engineers oversee the feasibility analysis, and this analysis considers, among other things, compliance with state and federal electric safety requirements, engineering and architectural standards, and Indiana Department of Transportation ("INDOT") requirements, if applicable." Exhibits Vol. 1, p. 10. Thus, the substantial evidence shows that Carmel provided the meaning of these terms contained in the Underground Ordinance. Further, although arguing against Carmel's Underground Ordinance, Duke witness Cynthia A. Rowland confirmed that Duke is already required to adhere to the National Electrical Safety Code and "utility industry-recognized standards." Exhibits Vol. 2, pp. 41-42.

Additionally, while she did not necessarily agree with Carmel's definition of the term feasibility, Rowland identified Kashman's testimony as providing the definition of the term. *Id.* at 42. Therefore, the rules of ordinance interpretation and the substantial evidence do not support the IURC's determination that the Underground Ordinance contained undefined terms and was vague such that it was unreasonable and void.

ii. Relocation Ordinance

[22] The city's Relocation Ordinance provides, in pertinent part:

> (a) If it is necessary for a public utility facility located along, under, upon, and/or across a City street, highway, or other public property to be relocated because of a City road project, street project, sidewalk project, trail project or other project, or any combination thereof ("Project"), the owner of the public utility facility shall relocate that facility in accordance with the following procedures:
>
> > (1) If a Project is subject to the oversight of the Indiana Department of Transportation ("INDOT") (an "INDOT Project"), *the facility shall be relocated in accordance with INDOT regulations found at 105 IAC 13. Any relocation work plan agreed to by the owner of a public utility facility for an INDOT Project must, to the extent possible, comply with Chapter 6, Article 9, Section 6-245 of the Carmel City Code, which establishes an Underground and Buried Utilities District within the City* in accordance with Indiana Code Sections 8-1-32.3-15 and 8-1-2-101. The City may, in coordination with INDOT and the owner of a public utility facility, recommend a place for the relocation of a public utility facility. To the extent the owner of a public utility facility is not reimbursed by INDOT for the costs of relocating a public utility facility for an INDOT Project, the City shall

not be liable for any relocation costs, unless the City agrees otherwise.

(2) If a Project is not subject to the oversight of INDOT (a "City Project"), the owner of the public utility facility shall relocate that facility at a time, place and manner (including above or underground) as determined by the City ("Relocation Determination"). The City, in making a Relocation Determination, shall consider the following: safety requirements; engineering and construction standards; the legality and feasibility of the new location; less costly alternatives that comply with the City's laws, rules and standards; and factors that may prevent utilities from relocating their facilities such as weather and availability of materials. The cost for relocation of a public utility facility due to a City Project shall be borne by the owner of the public utility facility, unless the City agrees otherwise. An owner of a public utility facility may seek a waiver of a Relocation Determination by providing a written waiver request to the City's Board of Public Works ("BPW") within thirty (30) calendar days of the Relocation Determination. BPW shall respond to a waiver request within thirty (30) calendar days of receipt of the waiver request. To the extent a City Project involves relocation of a public utility facility within the City's Underground and Buried Utilities District pursuant to Chapter 6, Article 9, Section 6-245 ("Section 6-245"), such relocation shall comply with the requirements of Section 6-245.

(b) If a public utility facility owner fails to relocate its facility as directed by the City pursuant to subsection (a)(2) hereinabove, the City shall have the right to relocate that facility. If the City exercises its right to relocate the facility, the owner of the facility shall reimburse the City for the cost of such relocation within thirty (30) calendar days from the date of the owner's receipt of the City's notice of the cost of relocation. If the owner fails to fully and timely reimburse the City for these relocation costs, the

> City shall have the right to collect these costs by exercising any available legal remedy, including, but not limited to, obtaining a money judgment for the costs incurred by the City in relocating the facility.

Appellant's App. Vol. 2, pp. 44-45 (emphasis added).

[23] The IURC determined:

> **ii. <u>Relocation Ordinance</u>.** As with the Underground Ordinance, there are several reasons why the Relocation Ordinance is unreasonable and void under Ind. Code § 8-1-2-101.
>
> **1. <u>Subsection (a)(1)</u>.** *Subsection (a)(1) dictates what will happen in an INDOT project, which is impermissible ("the facility shall be relocated in accordance with INDOT regulations found at 105 IAC 13" and should comply "to the extent possible" with the Underground Ordinance).* As noted above, Carmel cannot dictate what goes in an INDOT project, including what state regulations do and do not apply to any given INDOT projects. *See* Ind. Code § 36-1-3-5. Even if INDOT regulations such as those in 105 IAC 13 do apply to a given road project, this is not a determination for Carmel to make.

Id. at 16 (italics added).

[24] The IURC interpreted the language in the Relocation Ordinance as permitting Carmel to impermissibly "dictate" what happens in an INDOT project. The plain language of the ordinance, however, does not decree how a project will be handled but rather directs the reader to the appropriate section of the administrative code that is applicable when a project is subject to oversight by

INDOT. 105 Indiana Administrative Code article 13 contains the very regulations with which the IURC determined the Ordinances conflict. Not only does the ordinance language demonstrate its subordinance by specifically citing to the applicable state regulations, but also it limits compliance with its own terms by employing the phrase "to the extent allowed by Indiana law." Thus, by its plain language the Relocation Ordinance states that relocation shall occur in accordance with INDOT regulations first and foremost and that, if possible within the confines of those regulations, the relocation should also comply with the Underground Ordinance.

[25] Moreover, additional accuracy in ordinance construction results from taking into consideration the purpose of the ordinance. *Wesner*, 609 N.E.2d 1135. One of the primary reasons the Ordinances here were adopted by Carmel is for the health and safety of the public. Above-ground facilities more frequently contribute to power outages from weather-related events and pose significant safety risks due to their proximity to streets, paths, and trails. Finally, the Ordinances were adopted on the basis of aesthetic and architectural benefits, as well as property value impact. Exhibits Vol. 1, pp. 8-9 (Testimony of J. Kashman). Consequently, the plain language of the Relocation Ordinance does not support the IURC's finding that the ordinance conflicts with INDOT regulations.

[26] In addition, the IURC decided:

> **3. <u>Subsection (b)</u>.** Subsection (b) of the Relocation Ordinance grants Carmel the power to relocate utility facilities "[i]f a public

> utility facility owner fails to relocate its facility as directed by the City pursuant to subsection (a)(2)" and demand payment from the utility for relocation costs within 30 days. *Again, this clearly conflicts with INDOT regulations in 105 IAC 13, which establish a formal procedure for highway improvement projects that involve the relocation of utility facilities.* One could easily envision a circumstance in which a utility and INDOT are still negotiating a work plan under 105 IAC 13-3-3, but Carmel has demanded that the utility relocate its facilities immediately and pay for the relocation within 30 days. This result is clearly unreasonable. *Through subsection (b), Carmel is impermissibly attempting to "regulate conduct that is regulated by a state agency," INDOT.* Ind. Cod § 36-1-3-8(a)(7). Subsection (b) is independently unreasonable and void under Ind. Code § 8-1-2-101 for this reason.

Appellant's App. Vol. 2, p. 17 (emphasis added) .

[27] Subsection (b) of the ordinance does not govern projects subject to INDOT's oversight. Rather, subsection (b) specifically refers to projects that are governed "pursuant to subsection (a)(2)" of the ordinance, which concerns only those projects "not subject to the oversight of INDOT." *See*, *supra*, Relocation Ord. ¶¶ (b), (a)(2). Kashman confirmed and further explained application of these subsections:

> The first methodology, Subpart (a)(1) of the Relocation Ordinance ("Subpart (a)(1)"), applies to projects that are subject to Indiana Department of Transportation ("INDOT") oversight (an "INDOT Project"). If a project is subject to INDOT oversight, utility facility relocation is to be done in accordance with INDOT's requirements, and to the extent possible, should comply with the Underground District Ordinance. . . . The second methodology, Subpart (a)(2) of the Relocation Ordinance ("Subpart (a)(2)"), applies to public utility facility relocations for

> non-INDOT projects, *i.e.*, projects where INDOT does not have oversight or its requirements do not apply.

Exhibits Vol. 1, p. 7 (Testimony of J. Kashman).

[28] The IURC also found that the Relocation Ordinance conflicts with INDOT regulations and related laws because the term "project" is undefined in the ordinance. *See* Appellant's App. Vol. 2, p. 17 (IURC Order). As noted by the IURC, however, the ordinance defines a "Project" as a road project, street project, sidewalk project, trail project, or combination thereof and defines an "INDOT Project" as a project subject to the oversight of INDOT. *See id.* at 16; *see*, *supra*, Relocation Ord. ¶ (a)(1). Moreover, in defining the term "INDOT project," the ordinance cites to the "INDOT regulations found at 105 IAC 13" and mandates that a facility relocation in an INDOT project shall be in accordance with these regulations — the very regulations with which the IURC found the ordinance conflicts. *Id.* at (a)(1). Thus, the ordinance sufficiently delineates its scope in words of common understanding, especially to the municipal, utility, and state parties involved here, and the IURC erred in determining otherwise.

[29] Finally, the IURC found the Relocation Ordinance to be "unreasonably vague" because

> it gives Carmel virtually unlimited discretion to choose "safety requirements; engineering and construction standards; the legality and feasibility of the new location; less costly alternatives that comply with the City's laws, rules[,] and standards; and

> factors that may prevent utilities from relocating the facilities, such as weather and availability of materials." Regardless of what Carmel's witnesses claim that such standards are, the fact remains that they are not identified in the ordinance.

Appellant's App. Vol. 2, p. 17 (IURC Order).

[30] The IURC dismissed the evidence before it of the plain and ordinary meaning of these terms as assigned to them by the community and ordinary reader. *See Wesner*, 609 N.E.2d 1135. Here, Kashman explained the requirements and standards that would be adhered to under the Ordinance:

> Carmel's analysis includes the factors and standards identified in the Ordinances. A location's feasibility is the primary factor that Carmel considers in every utility relocation situation. Feasibility refers to whether it is technologically practical to locate a facility underground and whether it is safe to do so. Carmel's engineers oversee the feasibility analysis, and this analysis considers, among other things, compliance with state and federal electric safety requirements, engineering and architectural standards, and Indiana Department of Transportation ("INDOT") requirements, if applicable. Once the City's engineers determine an underground location to be feasible, the engineers must then balance the benefits of an underground location such as safety and aesthetic with the costs of underground location and potential reliability impacts. The City's engineers will also consider input from the utility's engineers.

Exhibits Vol. 1, pp. 9-10 (Testimony of J. Kashman).

[31] Further, the IURC's characterization of Carmel's discretion under the ordinance as "unlimited" is borne out neither by the clear language of the

ordinance nor by the evidence. The language of the ordinance mandates that Carmel, in making a relocation determination, shall consider the requirements and standards that apply to the project; the ordinance does not provide that Carmel can, at its discretion and whim, choose *which* requirements and standards apply. Indeed, Kashman testified that for a utility relocation, Carmel's analysis includes the safety of relocating as well as *compliance with* state and federal requirements, standards, and any applicable regulations; this compliance eliminates "unlimited discretion" if any existed. Thus, the IURC erred in determining that the Relocation Ordinance was unreasonably vague.

2. The Ordinances are Unreasonable and Void Because They Impermissibly Shift the Relocation Costs to Duke's Customers Statewide

[32] Next, Carmel asserts that substantial evidence does not support the IURC's findings that the Ordinances unfairly burden Duke customers throughout the state. The relevant part of the Underground Ordinance, provides: "Unless expressly authorized by the BPW, all utility facilities to be located within the District shall be placed underground and/or buried where feasible based upon applicable safety requirements and engineering standards and to the extent allowed by Indiana law." Appellant's App. Vol. 2, p. 41. (Underground Ord. ¶ (c)). Similarly, the Relocation Ordinance provides: "To the extent the owner of a public utility facility is not reimbursed by INDOT for the costs of relocating a public utility facility for an INDOT Project, the City shall not be liable for any relocation costs, unless the City agrees otherwise." *Id.* at 44 (Relocation Ord. ¶

(a)(1)). And: "The cost for relocation of a public utility facility due to a City Project shall be borne by the owner of the public utility facility, unless the City agrees otherwise." *Id.* (Relocation Ord. ¶ (a)(2)).

[33] The IURC found:

> Finally, by demanding that utilities comply with costly undergrounding requirements, the Underground Ordinance, in conjunction with the Relocation Ordinance, impermissibly shifts these costs to Duke's customers statewide, most of whom will never benefit from these municipal projects, which is also unreasonable.
>
> The Relocation Ordinance also unfairly burdens Duke's customers, just like the Underground Ordinance [ ], as it shifts onto public utilities all of the costs to relocate utility facilities in Carmel without considering the broader public interests of their customers. Duke serves over 800,000 customers in 69 counties in Indiana, and it is unlikely that very many of Duke's customers outside of the Carmel area will benefit from Carmel's road improvements. To force Duke's customers statewide to pay for utility relocations in Carmel is unfair and unreasonable. Cost-shifting ordinances such as Carmel's Ordinances [ ] would ultimately force utility customers all over the state to bear the cost for numerous municipal construction projects that are located far from their homes, which is inequitable and unreasonable.

Id. at 15, 17.

[34] We are mindful that ordinances enacted under Section 8-1-2-101(a)(1) are prima facie reasonable and that the party challenging such ordinances bears the

burden of overcoming the prima facie reasonableness by substantial evidence. *See Pub. Serv. Comm'n*, 235 Ind. 70, 131 N.E.2d 308. Likewise, ordinances are presumptively valid, and the party challenging an ordinance has the burden of overcoming the presumption and proving invalidity, with all doubts being resolved in favor of the validity of the ordinance. *City of Indianapolis*, 440 N.E.2d 737. Whenever possible, we interpret an ordinance so as to uphold its presumptive validity. *Bd. of Comm'rs of LaPorte Cnty.*, 791 N.E.2d 249.

[35] Brian Pavey, Vice President of Rates and Regulatory Strategy at Duke Energy Indiana, explained that electric rates for Duke customers statewide *could* increase if Duke were to bear the cost of relocation/undergrounding:

> If Duke Energy Indiana were forced to pay for the cost of relocation, and in addition, to relocate as directed by a municipality (*e.g.*, underground), regardless of the expense associated with those directions, Duke Energy Indiana's cost to serve its customers *would potentially* rise as Duke Energy Indiana would seek recovery of those costs.
>
> . . . .
>
> Duke Energy Indiana would seek to include these additional relocation costs in rates as part of its cost of service.
>
> . . . .
>
> If the City of Carmel's Ordinances or similar ordinances stand, customers in other areas of our service territory would be in essence subsidizing the improved aesthetics and other community improvement efforts of certain municipalities.

Exhibits Vol. 2, pp. 77, 78 (Testimony of B. Pavey) (emphasis added).

[36] Given our standard of review, we cannot say there is substantial evidence to overcome the prima facie reasonableness or the presumption of validity of the Ordinances. Pavey's allegation that the Ordinances *could* inflate Duke's electric rates is not so definite as to constitute substantial evidence that would invalidate an otherwise presumptively valid ordinance. This is especially true given that the Ordinances are limited in scope and restricted to particular circumstances.

[37] First and foremost, the Relocation Ordinance comes into play only when the location of a utility interferes with a project. Further, as acknowledged in the Relocation Ordinance, for an INDOT project, relocation is subject to INDOT requirements, and INDOT reimburses the owner of the utility for a certain amount of the costs of relocation. *See* Appellant's App. Vol. 2, p. 44 (Relocation Ord. ¶ (a)(1)). For a non-INDOT project, the Relocation Ordinance contains several factors to be considered in a relocation determination, including less costly alternatives, and provides for a waiver process by which the utility may dispute a relocation determination. *See id.* (Relocation Ord. ¶ (a)(2)). Moreover, not every relocation involves undergrounding.

[38] Likewise, the Underground Ordinance applies only in certain situations. *See id.* at 40, 41(Underground Ord. ¶¶ (b), (c)). The ordinance requires several steps involving state law and applicable standards and requirements. This ordinance provides for a waiver process as well. *See id.* at 41(Underground Ord. ¶ (c)).

Thus, as mandated by our standard of review, we resolve these doubts in favor of the validity of the Ordinances.[3]

[39] Based upon the foregoing, we conclude that the IURC erred in concluding the Ordinances are unreasonable and void because they conflict with INDOT regulations and contain vague terms and because they allegedly shift the cost of relocation to Duke's customers statewide.

[40] Order reversed.

Crone, J., and Tavitas, J., concur.

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[3] In its order, the IURC refers to the Town of Avon ordinance that it previously found to be unreasonable and void. Avon Town Code § 4-122 (E), adopted in 2015, was entitled "Relocation of Public Utilities" and stated, in pertinent part, "the owner of the public utility facilities will relocate the facilities at the owner's expense at a time and place determined by the Town." Appellant's App. Vol. 4, p. 88. In IURC Cause No. 44804, the IURC issued its order in January 2019 finding Avon Town Code § 4-122 (E) to be unreasonable and void, in part because the IURC found it unfairly burdened Duke's customers statewide with the relocation costs in Avon. Having reviewed the 2015 Avon ordinance, as well as Avon's current, approved version which contains the same above-quoted language, we note that the Carmel Relocation Ordinance that we conclude is valid contains similar language. *See* Appellant's App. Vol. 2, p. 44 (Relocation Ord. ¶ (a)(2)).