MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Moss Creek Solar, LLC, et al.,
Appellant-Respondent,

v.

Connie L. Ehrlich, et al.,
Appellees-Petitioners.

June 19, 2023

Court of Appeals Case No. 22A-PL-2648

Appeal from the Pulaski Superior Court

The Honorable Greta Stirling Friedman, Special Judge

Trial Court Cause No.
66D01-2110-PL-12

Memorandum Decision by Judge Bailey
Judges Tavitas and Kenworthy concur.

Bailey, Judge.

Case Summary

[1] Moss Creek Solar, LLC ("Moss Creek") filed an application for a special exception ("the Application") from the Pulaski Board of Zoning Appeals ("BZA") to construct a solar farm. After the BZA granted Moss Creek's application, Connie L. Ehrlich, Dean A Cervenka, Donald J. Ehrlich Living Trust Dated January 28, 2002, and Randy Davis (collectively, "the Petitioners") petitioned for judicial review of the BZA's decision. The trial court reversed the decision of the BZA. Moss Creek now appeals and raises two issues for our review, which we revise and restate as whether the court erred when it reversed the BZA's decision. We reverse and remand with instructions.

Facts and Procedural History

[2] On August 2, 2021, Moss Creek filed the Application with the Zoning Administrator seeking a special exception in order to build a solar farm on 1,620 acres in Pulaski County. Appellant's App. Vol. 14 at 72. Moss Creek did not own the land that it intended to use for the solar farm but leased it from seven landowners. The seven landowners are: (1) David W. Busch Living Trust; (2) Steven Cosgray Living Trust and Joy Cosgray Living Trust; (3) Harold R. Johnson Revocable Trust and Carol L. Johnson Revocable Trust; (4) Timothy and Kathleen Kuhn; (5) Meyer Revocable Trust; (6) Timothy and Lisa Reidelbach; and (7) Joseph and Carole Kuhn. *See* Appellant's App. Vol. 2 at 45.

[3] Pursuant to the Pulaski County Unified Development Ordinance ("UDO"), in order for Moss Creek to have the authority to submit an application, all property owners "shall sign the application or a letter or document consenting to the application." UDO § 2.3(B)(1)(a)(3); Appellant's App. Vol. 26 at 76. Based on that requirement, Moss Creek submitted an affidavit of its Vice President, Anthony Pedroni. In his affidavit, Pedroni affirmed that "the Leases entered into by and between [Moss Creek] and [the property owners] each contain a provision which allows [Moss Creek] to submit any and all necessary zoning and permitting applications" to the BZA. Appellant's App. Vol. 14 at 78.

[4] Moss Creek also submitted addendums to the Application that provided: "The undersigned acknowledge [the] Application for Special Exception . . . and agree[] that such Application may be filed on my/our behalf." Appellant's App. Vol. 6 at 36. The documents were signed by: Steven and Joy Cosgray; Harold and Carol Johnson; Carole and Joseph Kuhn; Lisa Reidelbach; Timothy and Kathleen Kuhn; Charles and Bonnie Meyer; and David and Elizabeth Busch. *See* Appellant's App. Vol. 14 at 78-84. In addition, Moss Creek submitted copies of deeds demonstrating land ownership. One deed identified Steven Cosgray and Joy Cosgray as trustees of the Steven L. Cosgray living trust and the Joy E. Cosgray living trust. Appellant's App. Vol. 6 at 55. A second deed identified "Charles W. Meyer and Bonnie S. Meyer as Trustees of the Meyer Revocable Living Trust." *Id*. at 57. And another deed transferred ownership of land to Harold R. Johnson and Carol L. Johnson "as Trustees" of the Harold R. Johnson Revocable Trust. *Id*. at 58.

[5] The Zoning Administrator docketed the Application as #09272021-01, determined that the Application was complete and, on August 5, scheduled a public hearing for September 27. After the hearing had been scheduled but prior to the date of the hearing, Moss Creek supplemented its application. The new application was given docket #39272021-01 but retained the same hearing date. As part of its supplementation, Moss Creek filed a report entitled "Solar Fire Safety Prevention and Protection." Appellant's App. Vol. 18 at 58 (capitalization removed). The report "summariz[ed] fire safety topics around

the development of a solar PV plan as it pertains to the Moss Creek Solar Project in Pulaski County, Indiana." Appellant's App. Vol. 18 at 61.

[6] The BZA held a lengthy hearing as scheduled. At the beginning of the hearing, the BZA unanimously voted to accept the Application with its supplements as complete. It then proceeded to accept written submissions and hear testimony from several people who were both in favor of the solar farm and against it. In particular, counsel for the Petitioners argued that Moss Creek "lacked authority to file the application" because there were no signatures on the consent from a "trustee" or "some representative tasked with acting on behalf of the trust." Appellant's App. Vol. 2 at 146. In addition, counsel for the Petitioners argued that the fire safety plan was "inadequate." *Id*. at 148. And counsel alleged that the solar farm would "hurt" property values. *Id*. at 152.

[7] In regard to the signatures, Moss Creek responded that Pedroni had sworn that Moss Creek had the "authority to file" the application on behalf of "all" landowners. *Id*. at 155. As for the completeness of the Application, Moss Creek asserted that it was "confident" that the Application met all of the necessary requirements. *Id*. at 160. Further, Moss Creek stated that it had contacted local fire departments, would offer training at its expense, and would allow fire departments to visit the site during construction. Following the hearing, the BZA granted Moss Creek's application.

[8] The Petitioners then filed a petition for judicial review and again asserted that Moss Creek "had no authority" to file the Application because, while some of

the subject properties were owned by trusts, none of the consents provided by Moss Creek "were signed in any representative capacity on behalf of any trust." Appellant's App. Vol. 2 at 32. The Petitioners also alleged that Moss Creek's Application lacked "a fire safety plan." *Id.* at 33. And the Petitioners challenged the merits of the Application.

[9] Moss Creek filed a response in opposition to the Petitioners' petition for judicial review. In its motion, Moss Creek asserted it had shown that all property owners consented to its application. In particular, Moss Creek alleged that "the Pedroni Affidavit establishes that all property owners (including the trusts) consented to the Application." Appellant's App. Vol. 29 at 126. And Moss Creek asserted that, in addition to the Pedroni Affidavit, "there is a corresponding Consent Affidavit" for "each trust." *Id.* at 128. Regarding the fire prevention plan, Moss Creek asserted that its report, which it provided before the hearing, "states specific steps advised for design and construction, as well as operations and maintenance, and concludes by stating that communications with first responders and fire officials early on can help minimize or eliminate emergency issues." Appellant's App. Vol. 29 at 142. Thus, Moss Creek asserted that its fire plan was not deficient and that its Application was "materially complete." *Id.*

[10] Following a hearing at which the parties presented oral argument, the trial court entered its findings of fact and conclusions thereon. In particular, the court found that "all of the information included about fire prevention appear[s] to be just that, information only" and that Moss Creek did not submit any "detailed

plans" in support of its application as required by the UDO. Appellant's App. Vol. 2 at 18-19. The court also found that the "lack of an adequate fire prevention safety plan is a fatal flaw, which means the UDO requirements were not met" and that Moss Creek's application "should not have been accepted by the Zoning Administrator. *Id*. at 20.

[11] In addition, the court found that the property is owned in part by four trusts but that "none of the consents is identified as being a trust or being signed by a trustee." *Id*. at 21. The court then found that "it is not possible to tell if the people who signed are the actual trustees" such that "it is not possible to tell if they have the authority to act on behalf of the trust." *Id*. at 21. As a result, the court found that the "consents are inadequate as a matter of law." *Id*. at 23.

[12] Based on its findings, the court concluded that the "consents that were filed by Moss Creek are invalid" and that the decision of the BZA was arbitrary, capricious, and an abuse of discretion. *Id*. at 26. The court then concluded that, "if a Petitioner establishes that a zoning decision was arbitrary and capricious, they are inherently prejudiced" and that "no additional showing of prejudice is required." *Id*. at 28. However, the court also concluded that, even if an actual showing of prejudice were required, "the fact that one or more of the Petitioners lives in close proximity to the project satisfies such a requirement." *Id*. The court then reversed the decision of the BZA without addressing the merits of the Application. This appeal ensued.

Discussion and Decision

[13] Moss Creek asserts that the BZA properly granted its application for a special exception and that the trial court erred when it reversed that decision. "This [C]ourt and the trial court are bound by the same standards when reviewing the decision of a board of zoning appeals." *Town of Munster Bd. of Zoning Appeals v. Abrinko*, 905 N.E.2d 488, 491 (Ind. Ct. App. 2009). Indiana Code Section 36-7-4-1614(d) (2022) provides that a reviewing court should grant relief "only" if the court determines that a person seeking judicial relief has been prejudiced by a zoning decision that is:

> (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (2) contrary to a 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;
>
> (5) unsupported by substantial evidence.

"The burden of demonstrating the invalidity of a zoning decision is on the party to the judicial review proceeding asserting invalidity." Ind. Code § 36-7-4-1614(a).

[14] In reviewing an administrative decision, a trial court may not try the facts *de novo* or substitute its own judgment for that of the agency. *S&S Enterprises, Inc.*

v. Marion Cnty. Bd. of Zoning Appeals, 788 N.E.2d 485, 490 (Ind. Ct. App. 2003), *trans. denied*. "Neither the trial court nor the appellate court may reweigh the evidence or reassess the credibility of witnesses." *Id*. Reviewing courts must accept the facts as found by the zoning board. *Id*. However, "we review questions of law de novo." *Lockerbie Glove Factory Town Home Owner's Ass'n v. Indianapolis Hist. Pres. Comm'n*, 106 N.E.3d 482, 488 (Ind. Ct. App. 2018).

[15] On appeal, Moss Creek asserts that the BZA properly granted its Application and that the court erred on two grounds when it reversed that decision. In particular, Moss Creek contends that the BZA correctly determined that it had provided proper signatures from the landowners such that it had the authority to file its Application and that the BZA correctly determined that it had submitted an adequate fire safety plan. We address each contention in turn.

Authority to File the Application

[16] Moss Creek first asserts that it had the authority to file the Application. There is no dispute that Moss Creek did not own the property that it intends to use for the solar farm. There is also no dispute that Moss Creek leased the solar farm from seven landowners. However, the parties dispute whether Moss Creek submitted valid consents from the landowners as required by the UDO.

[17] Pursuant to the UDO, if there is more than one property at issue, all property owners "shall sign the application or a letter or document consenting to the application." UDO § 2.3(B)(1)(a)(3); Appellant's App. Vol. 26 at 76. At issue here are the four properties owned by the following trusts: (1) David W. Busch

Living Trust; (2) Steven Cosgray Living Trust and Joy Cosgray Living Trust; (3) Harold R. Johnson Revocable Trust and Carol L. Johnson Revocable Trust; and (4) Meyer Revocable Trust.[1] In support of its Application, Moss Creek submitted addendums that provided: "The undersigned acknowledge [the] Application for Special Exception . . . and agree[] that such Application may be filed on my/our behalf." Appellant's App. Vol. 6 at 36. The documents were signed by: David and Elizabeth Busch; Steven and Joy Cosgray; Harold and Carol Johnson; and Charles and Bonnie Meyer. *See* Appellant's App. Vol. 14 at 78-84.

[18] On appeal, the parties dispute whether those signatures are adequate under the UDO. The Petitioners argued, and the trial court agreed, that the consents provided on behalf of the properties owned by trusts were inadequate and that, as a result, Moss Creek lacked the authority to file its Application. Specifically, the Petitioners asserted below, and they again assert on appeal, that "not one consent identified a trust or a trustee, and not one consent was signed in a representative capacity, or otherwise signed on behalf of a trust" but were, instead, signed in an individual capacity. Appellees' Br. at 12. And the Petitioners contend that "[o]ne cannot simply guess or assume that an individual is legally permitted to bind a trust to a legal document[.]" *Id*. at 14. In other words, the Petitioners assert that the consents were inadequate because

[1] The Petitioners have not challenged the consents for the properties owned by individuals.

they do not specifically identify the signatories as trustees or representatives. We cannot agree.

[19] Under our standard of review, we are limited "to determining whether the zoning board's decision was based upon substantial evidence." *Crooked Creek Conservation and Gun Club v. Hamilton Cnty. N. Bd. of Zoning Appeals*, 677 N.E.2d 544, 547 (Ind. Ct. App. 1997). And, here, based on the evidence provided by Moss Creek, the BZA properly determined that Moss Creek had submitted substantial evidence to demonstrate that it had obtained the necessary consents of the landowners.

[20] In support of its Application, Moss Creek submitted Pedroni's affidavit, in which Pedroni affirmed that "the Leases entered into by and between [Moss Creek] and [the property owners] each contain a provision which allows [Moss Creek] to submit any and all necessary zoning and permitting applications" to the BZA. Appellant's App. Vol. 14 at 78. In other words, based on Pedroni's affidavit, it was reasonable for the BZA to conclude that all of the landowners, including the relevant trustees, had given Moss Creek permission to submit the Application via the lease agreements. Stated differently, Pedroni's affidavit provided substantial evidence to show that all of the property owners had signed "a document consenting to the Application" as required by the UDO. *See* UDO § 2.3(B)(1)(a)(3); Appellant's App. Vol. 26 at 76.

[21] In addition, while the addendums were signed in their individual capacity, Moss Creek submitted evidence in the form of deeds to establish that the

individuals who had signed on behalf of three of the trusts were indeed trustees. In particular, one deed identified Steven Cosgray and Joy Cosgray as trustees of the Steven L. Cosgray living trust and the Joy E. Cosgray living trust. Appellant's App. Vol. 6 at 55. That deed verifies that Steven and Joy Cosgrave could sign on behalf of the Steven L. Cosgrave Living Trust and Joy E. Cosgrave Living Trust. A second deed identified "Charles W. Meyer and Bonnie S. Meyer as Trustees of the Meyer Revocable Living Trust," which confirms that those individuals could sign on behalf of the Meyer Revocable Living Trust. *Id*. at 57. And another deed transferred ownership of land to Harold R. Johnson and Carol L. Johnson "as Trustees" of the Harold R. Johnson Revocable Trust, which is evidence that they were authorized to sign on behalf of that trust. *Id*. at 58. In other words, the deeds demonstrate that, for those three trusts, the signatories were indeed trustees authorized to sign the consents.

[22] Regarding the Busch Revocable Trust, which was signed by David and Elizabeth Busch individually, David Busch stated at the hearing that he was there representing his "family's farm," which "has been in [his] family going back seven generations now." Appellant's App. Vol. 2 at 234. Because David stated at the hearing that it was his farm and that it had been owned by his family for generations, it was reasonable for the BZA to conclude that David was authorized to sign on behalf of the trust.

[23] Still, the Petitioners seem to assert that the consents were inadequate because they were signed prior to the date Moss Creek submitted its fire safety plan.

The Petitioners maintain that the consents "do not consent to what is argued to be the Application" and that "the 'consents' do not even reference" the "belatedly filed supplementation by Moss Creek." Appellees' Br. at 14. However, we first note that the UDO requires all owners to either sign the application or a "document consenting to the application." UDO § 2.3(B)(1)(a)(3); Appellant's App. Vol. 26 at 76. That ordinance is clear: a property owner must simply consent to the filing of an application. There is nothing in the ordinance that requires a property owner to consent to all aspects of the application. In any event, Pedroni's affidavit demonstrates that the leases entered into between Moss Creek and the property owners contain a clause allowing Moss Creek to submit "any and all" necessary zoning and permitting applications. Appellant's App. Vol. 14 at 78. Thus, the leases provide a general authority for Moss Creek to submit or amend zoning applications as necessary without any further approval by the property owners.

[24] Based on Pedroni's affidavit, the addendums with the consents, the deeds, and the statements at the hearing on Moss Creek's application, Moss Creek presented substantial evidence from which the BZA could determine that the signatures on the consent forms were those of the appropriate landowners. Accordingly, there was substantial evidence from which the BZA could conclude that Moss Creek had the authority to file the Application. The Petitioners' arguments on appeal are simply requests for this Court to reweigh the evidence, which we cannot do.

Fire Protection and Safety Plan

[25] Moss Creek next contends that the BZA properly concluded that Moss Creek had submitted an adequate fire protection and safety plan with its application.[2] Under the UDO, Moss Creek was required to include as part of its Application a "fire-protection and safety plan for the construction and operation of the" solar farm. UDO § 2.3(R)(3)(e); Appellant's App. Vol. 27 at 5. Here, there is no dispute that Moss Creek provided a fire safety plan after it had submitted its Application but before the BZA held a hearing.[3] However, the parties disagree as to whether the fire safety plan adequately complied with the UDO. Thus, this issue requires us to interpret a zoning ordinance.

[26] The construction of a zoning ordinance is a question of law. *Story Bed & Breakfast, LLP v. Brown Cnty Area Plan Comm'n*, 819 N.E.2d 55, 65 (Ind. 2004). "Because zoning laws which limit the use of real property are in derogation of the common law, we will strictly construe such laws to favor the free use of

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[2] We note that the trial court did not explicitly reverse the decision of the BZA on this ground. Rather, in its conclusions, the trial court relied exclusively on its determination that Moss Creek had failed to provide the necessary consents of the landowners. However, the court found that Moss Creek's failure to provide an adequate fire safety plan was a "fatal flaw" and that the Application was incomplete such that the BZA should not have taken action on it. Appellant's App. Vol. 2 at 20. Thus, the trial court implicitly reversed the BZA's decision on this ground as well.

[3] To the extent the Petitioners appear to assert that the fire safety plan was "untimely," the Petitioners have not provided any cogent argument or authority to support that argument. Appellees' Br. at 16. Rather, the UDO explicitly allows an application to "revise an application prior to the preparation of a staff report, or on receiving permission from review authority after it has reviewed, but not yet taken action on the application." UDO § 2.3(B)(7)(a); Appellant's App. Vol. 26 at 77. The Petitioners have not made any argument that a staff report had already been completed at the time Moss Creek filed its revisions or that Moss Creek needed but did not obtain permission from the Administrator.

land and we will not extend restrictions by implication." *Boyle v. Kosciusko County*, 565 N.E.2d 1157, 1159 (Ind. Ct. App. 1991).

> In construing the language of a zoning ordinance, this court follows the ordinary rules of statutory construction. We will interpret the ordinance as a whole and give its words their plain, ordinary, and usual meaning. The cardinal rule of statutory construction is to ascertain the intent of the drafter by giving effect to the ordinary and plain meaning of the language used.

Lucas Outdoor Advertising, LLC v. City of Crawfordsville, 840 N.E.2d 449, 452 (Ind. Ct. App. 2006), *trans. denied* (citations omitted).

[27] Here, under the UDO, an application for special exceptions requires

> A fire-protection and safety plan for the construction and operation of the CSES facility, which includes emergency access to the site. The developer will meet, as required, with township representatives such as trustees, Pulaski County EMS and/or its successor, and any and all fire departments providing services and/or mutual aid to address concerns about fire safety and emergency response and to coordinate safety planning and potential need for specialized equipment for extinguishing solar-panel/-equipment fires. Financial obligations incurred by departments providing coverage in Pulaski County for solar-energy fire-suppression training purposes shall be negotiated as part of the development of this plan, and any such costs incurred by the developer may be considered during development of the Economic Development Agreement.

UDO § 2.3(R)(3)(e); Appellant's App. Vol. 27 at 5.

[28] The Petitioners contend that the "Fire Safety Plan that Moss Creek did eventually present[] was inadequate and was not a plan at all." Appellees' Br. at 16. In particular, the Petitioners contend that there "is no reference to a single aspect or feature of Moss Creek's proposed project"; there is "not one 'plan' for what to do if there is a fire"; the submission was "simply general information"; and "[n]o plan or detail was provided by Moss Creek whatsoever." *Id*. at 17. And the Petitioners maintain that, because Moss Creek did not submit a proper fire safety plan, the matter should have never been deemed complete or proceeded for further review by the BZA.[4] We cannot agree.

[29] The UDO only contains general requirements; it does not provide any specific information. The UDO simply requires an applicant to submit a plan, the developer to meet with town representatives and fire departments to address any concerns about fire safety and to coordinate safety planning, and outlines provisions regarding the cost of training. And Moss Creek's safety plan meets those general requirements.

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[4] Much of the Petitioners' argument on this issue is premised on this Court's recent decision in *Mammoth Solar v. Erlich*, 196 N.E.3d 221 (Ind. Ct. App. 2022). In that opinion, which interpreted the same UDO, this Court held in relevant part that, because Mammoth Solar had failed to include a fire safety plan with its application, the BZA should not have acted on the application. *Id*. at 242. The Petitioners contend that the holding in *Mammoth Solar* necessitates the same result here. However, *Mammoth Solar* is readily distinguishable. In that case, there is no indication that Mammoth Solar included any fire safety plan at all. *See id*. at 228 (discussing the items that were included with the application). The question here is not whether a fire safety plan was submitted but whether the plan submitted was adequate under the UDO.

[30] Indeed, Moss Creek's "Solar Fire Safety Prevention and Protection Plan" is a seven-page document that specifically references the "Moss Creek Solar Project." Appellant's App. Vol. 18 at 58-65 (capitalization removed). The plan then outlines steps for the design of the solar farm, including the installation of "DC disconnect switches," "appropriate warning labels," "fencing to limit access to the electrical equipment," roads and gates "to provide access for emergency vehicles," and "supervisory data acquisition and control systems (SCADA) to monitor the performance of the project and to allow remote control of all equipment within the project." *Id*. at 61-61.

[31] In addition, the plan provides information on construction, including complying with relevant federal standards and providing "the local fire department with maps and diagrams of the facility showing the location of entrance points, hazardous material storage areas and any safety control points[.]" *Id*. at 63. The plan further contains information on the operation and maintenance of the solar farm, which "are designed to keep the PV plant operating at maximum efficiency and include tasks that also minimize the fire risk at the project." *Id*. at 63. And the plan details "Fire Operations," such as installing "[a]ppropriate signs and labels" at the solar farm to "help firefighters identify the various hazards in and around the solar project." *Id*. at 64.

[32] Furthermore, at the BZA hearing, Moss Creek stated that it had "reached out to six, seven fire departments at this point just letting them know who we are as well as the plans and the continued collaboration and cooperation that we have with those first responders." Appellant's App. Vol. 2 at 239. Moss Creek

further stated that it "will offer on this project . . . training covered by . . . our expense where we will allow departments to come onsite during construction to get to see the project facility . . . and whatever is needed to ensure that they understand the project." *Id*. at 239-40.

[33] Thus, contrary to the Petitioners' contentions on appeal, we hold that Moss Creek's fire safety and prevention plan is adequate and satisfied the requirements of the UDO. We therefore hold that there was substantial evidence from which the BZA could conclude that Moss Creek's Application was complete. The Petitioners' arguments on appeal are again improper requests that we reweigh the evidence.

Conclusion

[34] Moss Creek provided the necessary consents of the property owners for the Application, and it submitted an adequate fire safety and prevention plan as required by the UDO. Accordingly, we cannot conclude that the BZA's decision to grant Moss Creek's application was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. Consequently, we reverse the judgment of the trial court and remand with instructions for the court to address the merits of the Application.[5]

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[5] Because we hold that the BZA's decision was not arbitrary or capricious, we need not address Moss Creek's assertion that the trial court erred when it concluded that the Petitioners were not required to make a separate showing of prejudice to be entitled to relief.

[35] Reversed and remanded with instructions.

Tavitas, J., and Kenworthy, J., concur.