MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

John William Davis, Jr.
David & Roose
Goshen, Indiana

ATTORNEY FOR APPELLEE

Donald R. Shuler
Barkes, Kolbus, Rife & Shuler, LLP
Goshen, Indiana

IN THE

COURT OF APPEALS OF INDIANA

Ronald E. Davidhizar,
Appellant-Petitioner,

v.

City of Goshen, Indiana,
Appellee-Respondent.

December 6, 2022

Court of Appeals Case No. 22A-PL-1006

Appeal from the Elkhart Superior Court

The Hon. Teresa L. Cataldo, Judge

Trial Court Cause No. 20D03-2107-PL-184

Bradford, Chief Judge.

Case Summary

[1] In 2015, Ronald Davidhizar purchased a house ("the House") located on a lot at 221 West Wilden Avenue, Goshen, Indiana ("the Property"). At the time, the House did not have any utilities, and Davidhizar has not opened any utility accounts since then. In December of 2020, the Goshen Building Inspector notified Davidhizar that the House had been determined to be unsafe and provided him with a list of repairs to be completed by March of 2021. In April of 2021, Goshen's Building Commissioner notified Davidhizar that the House was still unsafe and that he was being ordered to demolish it and a garage also on the Property. Pursuant to statute, Goshen's Board of Public Works and Safety ("the BOW") reviewed the demolition order and, following two hearings, affirmed it. Davidhizar challenged the demolition order in Elkhart Superior Court, which also affirmed it. Davidhizar contends, as restated and reordered, that certain evidence presented to the BOW should be struck, Goshen failed to present sufficient evidence to sustain the demolition order, he was deprived the process due to him when two members of the BOW visited the Property before their final hearing, and changes in the composition of the BOW between its two hearings warrant reversal of the demolition order. Because we are unpersuaded by Davidhizar's arguments, we affirm.

Facts and Procedural History

[2] Goshen Building Inspector Travis Eash conducted an inspection of the Property, owned by Davidhizar, on November 18, 2020. On December 30, 2020, Eash sent a letter to Davidhizar advising that the Property, and

specifically the House, had been determined to be unsafe as it was vacant and not maintained in a manner that would permit human habitation. Eash's letter provided a list of violations and requested that repairs be made to the House by March 1, 2021. The letter summarized Eash's observations as follows:

1. The House was filed with broken glass, trash, debris, animal feces, and several deceased animals, requiring cleaning, removal and proper disposal of deceased animals, in order to maintain the premises in a sanitary manner;
2. Most, if not all, the windows and doors in the House had been broken and/or removed;
3. The overhead garage door was broken;
4. There was chipped and peeling paint throughout;
5. The foundation had holes and cracks in need of repair;
6. Several interior walls had been damaged and/or completely removed;
7. Areas throughout the House had damaged, and in some cases, collapsed floors;
8. There were missing ceiling tiles and areas of collapsed ceiling and falling debris;
9. The garage soffit had begun to collapse;
10. The furnace and duct work were not functioning properly;
11. Electrical wiring had been cut throughout the House, requiring replacement of the electrical system; and
12. Plumbing pipes and fixtures had been damaged and, in some cases, removed.

Goshen sent another letter to Davidhizar dated January 23, 2021, requesting that he secure the premises by January 30, 2021. When this was not done,

Goshen obtained a preliminary injunction requiring the premises to be secured, with which Davidhizar complied by February 26, 2021.

[3] On April 22, 2021, Goshen's Building Commissioner issued an order concerning the House, determining it to be unsafe pursuant to Indiana Code section 36-7-9-4 as it was "in an impaired structural condition that makes is unsafe to a person" and "vacant and not maintained in a manner that would allow human habitation, occupancy, or use" pursuant to Goshen City Code. Appellant's App. Vol. II p. 88. Specifically, the Building Commissioner's order identified the following violations of Goshen City Code that rendered the premises unsafe:

1. The House was filled with broken glass, trash, dead animals, and animal feces (violation of Section 6.3.1.6(b)(1)).
2. Windows and exterior doors were missing or broken leaving the House open and not secured (violation of Section 6.3.1(ff)).
3. Paint throughout the House was chipping and peeling (violation of Section 6.3.1.1(g)).
4. Holes and cracks in the foundation were compromising the House's structural strength and weather resistance. (violation of Section 6.3.1.1(b)).
5. The walls within the House were damaged or removed and floors were collapsed, or the flooring was missing. (violation of Section 6.3.1.1(b)).
6. The ceiling tile was missing, and portions of ceiling had collapsed. Debris and insulation from due to missing sections of ceiling were throughout the House (violation of Section 6.3.1.1(b)).

7. The furnace and duct work were not in working order (violation of Section 6.3.1.3(e)).
8. The electrical wiring had been cut throughout the House and the electrical panel was damaged from the cut wires (violation of Section 6.3.1.1(x)).
9. The windows and glass sliding door were broken or the glass was missing and there was broken glass inside the House (violation of Section 6.3.1.1(d)).
10. The garage was open and unsecured, and the soffit was collapsing (violation of Section 6.3.1.1(b)).

The Building Commissioner indicated that "[t]hese violations make the premises at 221 W. Wilden Avenue, Goshen unsafe and the general condition of the house and garage warrants removal" and ordered Davidhizar to demolish the unsafe building. Appellant's App. Vol. II p. 89.

[4] Pursuant to the process outlined by the Indiana Unsafe Building Law ("the UBL"), Indiana Code chapter 36-7-9, the Building Commissioner's order was reviewed by the BOW, Goshen's enforcement authority under the UBL, on May 24, 2021. Eash submitted a memorandum with information and photographs from his inspections of the Property and advised the BOW that he had inspected it that morning and had found that "[o]ther than securing the property and partial cleaning of debris, little progress has been made since the original inspection done on November 18, 2020." Appellant's App. Vol. II p. 153. Eash also advised the BOW that there had been no utilities for the House since 2013, no permits had been obtained to complete any work at the Property, and many of the windows and doors remained broken. The BOW heard that the House had peeling and chipping paint throughout, damaged walls with

holes, electrical wires cut off, plumbing that had been ripped apart, and a furnace of unknown functionality. Eash told the BOW that the furnace, as it had not been used in eight years, would have to be assessed to determine its condition and that, in any event, there were several places where the duct work would need to be reconnected.

[5] Moreover, the BOW heard that the House had a room in which the floor was falling or collapsing. Eash specifically advised the BOW that the sinking floor is symptomatic of a foundation problem, stating "[w]hen the foundation is failing, things tend to crumble and fall" and "that's what occurring at this property … in that corner of the house." Appellant's App. Vol. II p. 158. Eash further stated that from outside the House he could observe that Styrofoam had been placed at the foundation; he surmised that it might have been placed there to keep animals out, but "there's no structural value in that." Appellant's App. Vol. II p. 158. The condition of the foundation was such that one could observe daylight coming in when in the basement or crawl space of the House.

[6] At the hearing, Davidhizar indicated that he had owned the Property for approximately five to six years and, while he intended to rehabilitate the House, he had not yet done so because of an erratic neighbor. Davidhizar acknowledged to the BOW that vandals had smashed doors and windows and cut off copper wiring and that the House had deteriorated as a result. Davidhizar told the BOW that he intended to restore the House and have it rentable by the end of November of 2021. Under further questioning by the BOW, Davidhizar agreed that the House was "[n]ot safe to live in" as it

currently existed, that "[i]t's not appropriate for someone to live in, no, absolutely not." Appellant's App. Vol. II p. 172.

[7] The BOW found the House to be an unsafe building due to all reasons listed in the Building Commissioner's order, excepting the broken glass, trash, dead animals, and animal feces, as those issues had been addressed. Following those findings, the BOW moved that the lawn at the Property should be mowed by June 1, 2021, the exterior of the House and the garage's siding and soffit be put back together, and any windows and doors that are damaged be either repaired to satisfaction, replaced, or that Davidhizar provide a purchase order showing that items had been ordered within four weeks. The BOW continued the hearing as to the imposition of further orders concerning the Property. The BOW's Order dated May 25, 2021, provides, in part, as follows:

> Evidence was presented and arguments heard. The [BOW] being duly advised in the condition of the buildings and premises at 217 W. Wilden Avenue, Goshen, Indiana now finds that the present condition of the buildings and premises are unsafe because the buildings and premises are in an impaired structural condition that makes it unsafe to a person or property. The premises is vacant and not maintained in a manner that would allow human habitation, occupancy, or use under the requirements of a statute or ordinance.

Appellant's App. Vol. II p. 39.

[8] That BOW Order and the state of the Property was reviewed by the BOW at its July 6, 2021, hearing. Eash again presented the BOW with photographs of the House at the Property, this time from his inspection on June 23, 2021. Eash indicated that none of the initial repairs to be completed per the BOW's May

25, 2021, order had been completed and, other than the two small windows, the windows had not been touched. The doors had not been touched. The siding and soffit showed no signs of progress. As there had been little to no progress made to the exterior repairs, let alone the significant repairs needed on the interior, Eash reiterated the request that the unsafe structure be demolished.

[9] During the hearing it was discussed that two members of the BOW, Goshen Mayor Jeremy Stutsman and Michael Landis, had looked at the Property following the May 24, 2021, hearing and the May 25, 2021, BOW Order. Specifically, Mayor Stutsman provided that he had taken photographs of the Property on June 23, 2021, and they showed that "very little work had been completed at that time. I drove by earlier this morning and the grass was still pretty high at the [Property.]" Appellant's App. Vol. II p. 181. Mayor Stutsman's photographs, however, were not presented to the BOW. Landis indicated that he had driven by the Property on June 1, 2021, and had observed that no mowing had been done as there was "eight-inch tall grass." Appellant's App. Vol. II p. 182. Though advised that there was not a conflict of interest, Mayor Stutsman and Landis recused themselves to avoid any appearance of one. Following discussion, the BOW affirmed the prior finding that the House was an unsafe building, found that Davidhizar had not complied with the May 25, 2021, BOW Order, and that the House should be demolished.

[10] Following the action of the BOW at its July 6, 2021, hearing, Davidhizar filed his complaint in the trial court on July 15, 2021, challenging the BOW's decision. The parties submitted written arguments to the trial court in

December of 2021, with responses filed in January of 2022. Davidhizar also moved to strike certain portions of the record for judicial review, which had been filed with the trial court on November 2, 2021. Davidhizar contended that as none of the documents in the record had ever been formally admitted as evidence at the BOW hearing, those documents should be stricken. Following the response to the motion to strike by Goshen, the matter was set for hearing on March 23, 2022. On April 5, 2022, the trial court issued its order, in which it rejected Davidhizar's motion-to-strike arguments and affirmed the BOW's Order finding the House to be an unsafe building warranting demolition.

Discussion and Decision

I. Motion to Strike

[11] Davidhizar contends that the trial court abused its discretion in denying his motion to strike portions of the administrative record on the basis that they had not been formally admitted. "A trial court has broad discretion in ruling on a motion to strike." *Sun Life Assur. Co. of Can. v. Ind. Dept. of Ins.*, 868 N.E.2d 50, 57 (Ind. Ct. App. 2007), *trans. denied*. Appellate courts review a trial court's decision on a motion to strike for an abuse of discretion. *Halterman v. Adams Cnty. Bd. of Comm'rs*, 991 N.E.2d 987, 989 (Ind. Ct. App. 2013). A trial court's decision on a motion to strike will be reversed "only if that decision is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom." *Sun Life Assur. Co.*, 868 N.E.2d at 57. In addition, reversal of a trial court's decision requires that "prejudicial error is clearly shown." *Id*.

[12] As Goshen notes, however, Davidhizar did not object at any of the BOW hearings in this case that evidence was not being properly admitted. It is well-settled that one must object to administrative procedures in order to preserve the issue for later review. *See, e.g.*, *Lilley v. City of Carmel*, 527 N.E.2d 224, 227 (Ind. Ct. App. 1988) ("One cannot sit idly by until the Board announces its decision and then object to the procedure utilized."), *cited with approval by Sullivan v. City of Evansville*, 728 N.E.2d 182, 193 n.8 (Ind. Ct. App. 2000); *see also Hoogenboom-Nofziger v. State Bd. of Tax Comm'rs*, 715 N.E.2d 1018, 1022 (Ind. Tax. Ct. 1999) (participant at administrative hearing cannot remain silent and participate in a hearing and then later complain about irregularities). Because Davidhizar did not object to the administrative procedures being used, he has failed to preserve the issue for appellate review, and we need not address it further.

II. Whether Goshen Presented Sufficient Evidence to Sustain the Order that House Is an Unsafe Building that Should be Demolished

[13] Davidhizar contends that Goshen produced insufficient evidence to sustain the BOW's demolition order. The UBL defines an "unsafe building" as follows:

> (a) For purposes of this chapter, a building or structure, or any part of a building or structure, that is:
>
> (1) in an impaired structural condition that makes it unsafe to a person or property;
>
> (2) a fire hazard;
>
> (3) a hazard to public health;

> (4) a public nuisance;
>
> (5) dangerous to a person or property because of a violation of a statute or ordinance concerning building condition or maintenance; or
>
> (6) vacant or blighted and not maintained in a manner that would allow human habitation, occupancy, or use under the requirements of a statute or an ordinance;
>
> is considered an unsafe building.

Ind. Code § 36-7-9-4(a). "The statute is written in the disjunctive, meaning that a building may be considered unsafe if it falls into any one of the six categories listed in the statute." *Andrade v. City of Hammond*, 114 N.E.3d 507, 513–14 (Ind. Ct. App. 2018), *trans. denied*. Here, the BOW made findings pursuant to subsections (1) and (6). (Appellant's App. Vol. II p. 39). Pursuant to Indiana Code section 36-7-9-5(a), "[t]he enforcement authority may issue an order requiring action relative to any unsafe premises, including […] demolition and removal of an unsafe building if […] the general condition of the building warrants removal[.]"

[14] Indiana Code section 36-7-9-8 provides a means by which a demolition order may be appealed in superior or circuit court and provides for *de novo* review by that court. *See* Ind. Code § 36-7-9-8(c). We have interpreted this provision as meaning that a reviewing court "may, to a limited extent, weigh the evidence supporting the finding of fact by the enforcement authority." *Kopinski v. Health and Hosp. Corp. of Marion Cnty.*, 766 N.E.2d 454, 455 (Ind. Ct. App. 2002). "The court may negate the finding only if, based upon the evidence as a whole, the finding of fact was arbitrary, capricious, an abuse of discretion, unsupported by

the evidence, or in excess of statutory authority." *Id.*; *see also Vega v. City of Hammond*, 80 N.E.3d 904, 911 (Ind. Ct. App. 2017). Generally, an appellate court applies the same standard of review as a trial court when reviewing the decision of an administrative board or agency. *Burton v. Bd. of Zoning Appeals*, 174 N.E.3d 202, 209 (Ind. Ct. App. 2021), *trans. denied*.

[15] Here, even though, as mentioned, the BOW determined that the House was an unsafe building on two separate and independently sufficient grounds, Davidhizar does not challenge the BOW's finding that the House was an unsafe building because it was in an impaired structural condition that makes it unsafe to person or property pursuant to Indiana Code section 36-7-9-4(a)(1). The closest Davidhizar comes is in the final section of his Appellant's Brief challenging the appropriateness of demolition (not the finding that the House was unsafe) on the basis that the BOW's finding did not indicate what person or property would be "imperiled" by the House's condition. Appellant's Brief p. 48. Because, as mentioned, the relevant statute is written in the disjunctive, Davidhizar's failure to challenge this finding is fatal to his argument.

[16] Davidhizar also argues that the BOW had other alternatives to demolition and that ordering demolition was not supported by sufficient findings of fact. Specifically, Davidhizar contends that the BOW's findings do not indicate why the BOW chose demolition over these other available options and that ultimately, the condition of the House did not warrant demolition. As mentioned, the BOW had the authority pursuant to Indiana Code section 36-7-9-5(a) to order demolition of the House if its general condition warranted it.

The evidence concerning the House's condition amply supports the BOW's conclusion and order for demolition. The BOW had previously found that the House was "in an impaired structural condition." Appellant's App. Vol. II p. 39. The House had failing and damaged walls, with ceilings that had collapsed or were beginning to collapse. Moreover, the House had broken walls and doors throughout, peeling and chipping paint throughout, electrical wires that had been cut, plumbing that had been removed, and duct work for the heating system that had been disconnected. The House also had foundation issues, to the point where a room in the rear of the structure had half its floor "just falling" due to lack of structural support from the foundation. Appellant's App. Vol. II p. 154.

[17] Davidhizar argues that Goshen could have relied on other remedies available pursuant to the UBL as opposed to demolition, maintaining, essentially, that it was improper to order demolition of the House because it could still be repaired. Even if we assume, *arguendo*, that the House could be repaired, "[a]n equally important consideration is whether the building *will* be repaired." *Kollar v. Civ. City of South Bend*, 695 N.E.2d 616, 622 (Ind. Ct. App. 1998) (emphasis in original), *trans. denied*. In *Kollar*, a case in which we affirmed a demolition order, we noted that the property owners had been given "ample opportunity to repair the property and have failed to do so on many occasions over several years." *Id*. This is just as true here. Since Davidhizar took possession and ownership of the Property in 2015, the House has never been rented or occupied and, as Davidhizar admitted, has not had utilities since

2013. Even before commencement of this proceeding, Davidhizar had approximately five years in which to repair the House but did not. Even after being notified in late 2020 of issues with the House, Davidhizar was given ample opportunity to complete minimal repairs to the exterior of the House but could not—or chose not—to comply. Under the circumstances, we cannot say that the BOW clearly erred in ordering that the House be demolished. *See, e.g.*, *Brown v. Anderson Bd. of Pub. Safety*, 777 N.E.2d 1106, 1108-1109 (Ind. Ct. App. 2002) (affirming demolition order for a building that had a foundation in need of repair, missing gutters, chimney pulling apart from the house, and deteriorated flooring, among other issues), *trans. denied*; *Kollar*, 695 N.E.2d at 620–21 (affirming demolition order for a building with deteriorated foundation, rotting joists, and possible electrical problems and stating that "[w]hen the City has little confidence that the repairs will be made, demolition may be a reasonable alternative").

III. Due Process

[18] Davidhizar argues that the actions of Mayor Stutsman and Landis in driving by the property on their own rendered the BOW incapable of serving as a neutral adjudicative body. "Due process requires a neutral, or unbiased, adjudicatory decision maker." *Rynerson v. City of Franklin*, 669 N.E.2d 964, 967 (Ind. 1996). "Scholars and judges consistently characterize provision of a neutral decision maker as one of the three or four core requirements of a system of fair adjudicatory decision making." *Id*.

[19] At the outset, it is worth noting that Mayor Stutsman and Landis recused themselves and did not participate in the BOW's final vote regarding the House. Moreover, to the extent that Mayor Stutsman's and/or Landis's actions prior to recusal may have been improper, any error that may have occurred in this regard can only be considered harmless. "An error is harmless when it results in no prejudice to the 'substantial rights' of a party." *Durden v. State*, 99 N.E.3d 645, 652 (Ind. 2018) (citations omitted). First, the photographs Mayor Stutsman had taken of the Property were not shown to the BOW on July 6, 2021, and so did not play a part in its decision. Second, while it is true that, prior to Mayor Stutsman's and Landis's recusals, Mayor Stutsman indicated that very little progress had been made as of June 23, 2021, and Landis indicated that the Property had eight-inch grass as of June 1, 2021, there was more than enough other evidence regarding the state of the Property to support the BOW's decision. As mentioned, at the July 6, 2021, hearing, Eash presented the BOW with photographs of the House and the Property, which he had taken on June 23, 2021. These photographs clearly indicate the dilapidated state of the House, garage, and the Property in general, showing the overgrown state of the Property; soffit, gutter, and garage door damage on the garage; boarded-up doors and windows on the House and garage; foundation damage on the House; and numerous broken windows on the House. Moreover, Eash told the BOW that none of the initial repairs outlined in the BOW's May 25, 2021, order had been completed, and, other than the two small windows, the windows had not been touched. In light of this overwhelming evidence regarding the dilapidated state of the Property, we conclude that any error that

may have occurred in Mayor Stutsman and Landis speaking before recusing themselves can only be considered harmless. *See id*.

IV. Change in Composition of BOW

[20] Davidhizar argues that the BOW's July 12, 2021, order should not have been affirmed because the composition of the BOW changed such that two of the members at the July 6 hearing had not been on the BOW at the May 24 hearing. Davidhizar cites to no authority for the proposition that a change in the composition of an adjudicative body requires such a result, and we are aware of none. Moreover, while Davidhizar attempts to analogize this case to one in which the judge dies following a bench trial and the successor finds the defendant guilty despite not having heard the evidence, this is not an apt analogy.

[21] It is true that

> "[a] party to an action is entitled to a determination of the issues by the jury or judge that heard the evidence, and where a case is tried by the judge, and the issues remain undetermined at the death, resignation, or expiration of the term of such judge, his successor cannot decide, or make findings in, the case, without a trial *de novo*."[1]

[1] This citation, both as quoted in *A.S.* and in the original *Wainwright*, appears on Westlaw.com and in the North Eastern Reporter, Second Series, without a comma in the phrase "or make findings, in the case" and without *de novo* being italicized, while the comma and italicization *are* in the version of *Wainwright* that appears in the official Indiana Reports. While these alterations do not seem to have changed the meaning of the passage in any significant way, we will use the version of it that appeared in the official Indiana Reports.

In re Adoption of A.S., 912 N.E.2d 840, 845 (Ind. Ct. App. 2009) (quoting *Wainwright v. P.H. & F.M. Roots Co.*, 176 Ind. 682, 698–99, 97 N.E. 8, 14 (1912)), *trans. denied*. That, however, is not what occurred in this case. Put simply, this case does not involve a situation in which a group of persons made factual determinations based on evidence heard by other persons. The BOW of May 24, 2021, heard evidence on that date and made its own findings, while the BOW of July 6, 2021, was merely determining an appropriate disposition based, in part, on the previous finding that the house was uninhabitable and, in part, on its own finding that Davidhizar had not brought it into compliance with previous orders. In each case, the findings in question were made by the persons who heard the evidence, rendering *A.S.* inapposite. Because *A.S.* does not stand for the proposition that any change in composition of an administrative body during a case renders any action it takes after the change void, it does not help Davidhizar.

[22] We affirm the judgment of the trial court.

Vaidik, J., and Pyle, J., concur.